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The Bush administration, obscenity and indecency

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Abstract: Despite the hopes and expectations of anti-pornography campaigners, there were relatively few federal obscenity prosecutions during John Ashcroft's tenure as Attorney-General. The reasons for this appear to include the difficulties that prosecutors faced in securing convictions, the exponential growth of the sex industry, political missteps by campaigners who often put forward an untargeted message, the reallocation of resources within the Department of Justice following the September 11th attacks, and the success of zoning regulations in reducing the public visibility of the sex industry and its associations with urban decay. In contrast, opposition to broadcast indecency initially seemed to have been a textbook model of interest group influence. In the wake of incidents such as Janet Jackson's appearance at the 2004 Super Bowl, the Federal Communications Commission, the Bush administration, and members of Congress rallied around proposals to restrict the content of terrestrial broadcasts. The contours of public opinion provide a partial explanation for the contrasting character of the approaches towards obscenity and indecency. The vigour with which indecency has been pursued by many Republicans may also have been a political concession to those disappointed by the administration's apparent lack of diligence in confronting hardcore pornography. However, proposals to curb indecency now also appear stalled.

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The nomination of former Missouri governor and Senator, John Ashcroft, as Attorney-General on December 22nd 2000 led to celebrations among the groups associated with the Christian right. There were few doubts about Ashcroft's faith or his politics. Andrea Lafferty, executive director of the Traditional Values Coalition was among those backing his confirmation in forthright terms:

> 'John Ashcroft is a man of high integrity and respect for the rule of law … I join today with the representatives of millions of women who believe that John Ashcroft will be an excellent and honorable Attorney General. He has our support and our prayers as he faces confirmation next week' [1]

The hostility that Ashcroft's nomination provoked among many Democrats and within the women's and gay movements served only to bolster his standing among those on the right. Ashcroft's views, his critics charged, placed him outside the American mainstream. The Senate Judiciary Committee backed confirmation but the vote (10 to 8) was almost entirely on along party lines. [2] There was even some talk of a filibuster to prevent a vote being taken on the Senate floor although it came to nothing. Then, in the days following his assumption of office, hostility gave way to ridicule as Ashcroft gave instructions to hang blue drapes in front of a topless statue in the lobby of the Justice Department.

Both his supporters and detractors saw Ashcroft as a bulwark of cultural conservatism within the administration. There was a widely-shared expectation that the Department of Justice would, under his direction, confront the seemingly exponential growth of the pornography industry. This required, it was said, the simple enforcement of the laws. Alongside the prohibition of child pornography, federal law includes provisions that make it an offence to mail, sell, or transport obscene matter '.. which has been shipped or transported in interstate or foreign commerce..' or to possess it with intent to mail, sell or transport it. [3] Alongside these direct restrictions, there are often other, albeit more indirect, charges that can be brought. The making and distribution of hardcore pornography has long had ties with organized crime, as the history of *Deep Throat* - the first hardcore film to acquire a quasi-mainstream status – illustrates, thereby facilitating prosecution even when obscenity cannot be established. The application of RICO (Racketeer Influenced and Corrupt Organizations) Act permits seizures of assets. Furthermore, alongside federal statutes, 43 of the states as well as local jurisdictions have laws prohibiting obscenity. Although, for the most part, state laws reproduce federal statutes, while omitting the interstate commerce provisions, some states have gone further. In Alabama, Mississippi and some other states, the obscenity laws extend beyond publications, films and websites. Laws also prohibit the advertising, sale or exhibition of '.. any three-dimensional device designed or marketed as useful primarily for the stimulation of human genital organs ..' [4] In Utah, the legislature created an Obscenity and Pornography Complaints Ombudsman so as '.. to assist citizens and local government with their concerns about obscenity and pornography in their communities.' [5] The application of the law and the pursuit of the pornography industry appear to have widespread backing that extends well beyond the ranks of the Christian right. According to a March 2002 study, 81 per cent of the public believe federal laws against internet obscenity should be vigorously enforced. [6]

Campaigning against porn

What arguments were put forward by those seeking restriction? Firstly, campaigners assert, pornography encourages promiscuity that, in turn, contributes to family breakdown. Although the 1986 Final Report of the Attorney-General Commission on Pornography which was established by the Reagan administration backed away from asserting that there was a causal link between pornography and family breakdown, it concluded:

> '.. it is far from implausible to hypothesize that materials depicting sexual activity without marriage, love, commitment, or affection bear some causal relationship to sexual activity without marriage love, commitment, or affection' [7]

Secondly, pornography is an addiction. As in other forms of addiction, it undermines the individual integrity of users, breaks relationships, and there is a process of progression as users seek ever 'harder' forms of material. Daniel Weiss from Focus on the Family has cited estimates that between three and six per cent of Americans can be regarded as pornography addicts. [8] In November 2004, the Senate Committee on Commerce, Science and Transportation held hearings to study the subject. Witnesses such as Mary Anne Layden of the University of Pennsylvania drew a direct comparison with drug abuse:

> 'Research indicates that even non-sex addicts will show brain reactions on PET scans while viewing pornography similar to cocaine addicts looking at images of people taking cocaine. This material is potent, addictive and permanently implanted in the brain.' [9]

Christian organisations such as Pure Life Ministries in Kentucky and Setting Captives Free seek to work with those who are making efforts to break their addiction.

Thirdly, although the Meese Commission (as the Attorney-General's Commission is often known), couched some of its findings in cautious terms, and divided pornography between different categories, its conclusions included the claim that some forms of 'hardcore' pornography contributed to sexual violence:

> '.. the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials … bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence' [10]

Anti-pornography campaigners often cite the Meese Commission's findings but also set much store by the interview that the convicted mass murderer, Ted Bundy, gave to Dr James Dobson of Focus on the Family, just hours before his execution. Bundy attributed his actions, at least in part, to his early usage of pornographic materials. Fourthly, many of the women who participate in the making of pornographic films are coerced. Years after the film was made, Linda Marchiano testified that she had been held at gunpoint when performing in *Deep Throat.* Anti-pornography campaigners also draw on other surveys. A 1979 study of Phoenix, Arizona, has been widely cited. It:

> ' .. found that neighborhoods with a pornography business experienced 40 percent more property crime and 500 percent more sexual offenses than similar neighborhoods without a pornography outlet. Michigan state police detective Darrell Pope found that of the 38,000 sexual assault cases in Michigan (1956-1979), in 41 percent of the cases pornographic material was viewed just prior to or during the crime.' [11]

Campaigners have also drawn upon a more recent survey. In, 1993 Murray Strauss and Larry Baron reported that rape rates were at their highest in states that had high sales of sex magazines and relatively lax enforcement of pornography laws. [12]

Lastly, campaigners believe that the overall moral character of society is a legitimate consideration in the making of public policy. Neoconservatives and the Christian right come together in arguing that the powers of government can be used to build, in William Bennett's phrase, an 'architecture of the soul.' [13] Others have sometimes joined forces with them. From the 1970s onwards, radical feminists such as Andrea Dworkin, Susan Brownmiller and Catharine MacKinnon attacked pornography's abuse and degradation of women which, they asserted, contributed to rape and other forms of sexual violence. Although the campaign has largely been the prerogative of Republicans, some Democrats have also pursued the issue, particularly when it framed in terms of either an attack upon women or if sex is tied to violence. Senator Joseph Lieberman, the Democrats' vice-presidential nominee in 2000, joined with Bennett to distribute the 'silver sewer awards' to immoral videos.

Prosecutions

Although the prosecutions that had begun during the Reagan / Bush years (1981-93) were continued during Clinton's first term, federal prosecutions had fallen away and were all but abandoned by the beginning of Clinton's second term in office, (see Table 3:1). This was a conscious policy decision. In a later interview, former Attorney General Janet Reno said that she felt that national security and violence were more pressing issues. [14] At the same time, however, there appears to have been a degree of self-censorship by the sex industry. While 'hardcore' pornography became widely available, most producers and distributors kept a distance from particular themes such as simulated rape, implied incest, and even hints of pedophilia that might, despite Reno's approach, have invited prosecution. [15]

Table 3-1: federal obscenity prosecutions, 1992 – 2001

Fiscal year	Prosecutions	Convictions
1992	42	25
1993	32	20
1994	27	26
1995	21	14
1996	19	21
1997	6	6
1998	8	7
1999	7	4
2000	7	4
2001	7	5

Source: adapted from Patrick McGrath (n.d.), *The On-Line Obscenity Problem - An Overview*, obscenitycrimes.org, www.obscenitycrimes.org/pornproblem.cfm

Disappointment

Many activists associated with the Christian right believed that the policy of inaction that had characterized the Department of Justice's approach to obscenity issues during much of Bill Clinton's period of office, would be quickly reversed once John Ashcroft had taken office. The 'adult' industry believed much the same thing and began to look at the need to adopt more restrictive forms of self-regulation. Anticipating this, at the beginning of 2001, Paul Cambria, a long-established lawyer, drew up what became known as

the 'Cambria List.' It detailed sexual activities that should not be included in visual depictions and seemed to preclude most 'hardcore' content. However, the list appeared to have little effect upon the character of subsequent productions. [16]

Some steps were taken during Ashcroft's tenure at the Justice Department. The Department conducted annual 'Investigating and Prosecuting an Obscenity Case' symposiums to guide federal law enforcement agents and federal prosecutors about the handling of cases. In January 2004, the CAN-SPAM Act addressed the problem of unsolicited commercial email, much of which had a pornographic character. In the same month, Bruce Taylor, widely regarded as a very experienced prosecutor and a committed 'porn fighter' who had pursued *Hustler* publisher Larry Flynt during the early 1980s and served as a Department of Justice Special Attorney from 1989 to 1994, was appointed as Senior Counsel to the Assistant Attorney General for the Criminal Division. [17] Before his appointment, Taylor had suggested that it was time to bring prosecutions against consumers as well as producers and distributors: 'Maybe a wife or a girlfriend could find this stuff on a guy's computer and turn it into the cops. [18] Six months later, in June 2004, the Department announced that it was bringing forward revised regulations for the enforcement of Section 2257, the section of the criminal code that came into force in the mid-1990s and imposes record-keeping obligations on the producers of explicit material. The revised regulations establish an inspection regime (which can be carried out from 8 a.m. to 6 p.m., 365 days per year), and require 'secondary producers' who host websites to keep records on participants even if the material that is carried was created by other companies. The revised rules followed a report from Attorney General John Ashcroft to the House Judiciary Committee in June 2004.[19]

Nonetheless, despite these steps, most of the Christian right's hopes and many of the sex industry's fears had been dissipated by the end of President Bush's first term. Despite the personal praise that Ashcroft garnered when he left office, the comments about his record in confronting pornography were either guarded or critical. As *The Washington Times* noted:

> 'But today, as Mr Ashcroft prepares to vacate the highest law enforcement office in the land, anti-porn advocates are deeply disappointed with the Bush administration's record – under Mr Ashcroft's guidance – for pursuing peddlers of smut.' [20]

Patrick A. Trueman, who headed the Justice Department's Child Exploitation and Obscenity Section (CEOS) under both Reagan and George H.W. Bush and joined Family Research Council in 2003 as Senior Legal Counsel was openly critical. In his words, President Bush had '.. a worse record in his first term than Clinton had..' [21] By the end of 2004, the *Washington Times* noted, just thirty seven obscenity convictions had been secured. [22] However, even this statement should be qualified. The first of the convictions was only obtained in December 2002. Furthermore, according to Paul Cambria, the Department of Justice had recorded prosecutions of obscene material together with child pornography and depictions of 'fringe' themes:

> 'When you track down their convictions, most of them are pleas to child porn. Some of them have to do with extreme types of adult entertainment: bestiality, or really hard-core depictions of rape or situations like that … That is not mainstream product. I have not seen any mainstream adult products prosecuted.' [23]

When, some months later, CEOS published its figures covering the period from 2001 to the beginning of February 2005, it reported that it had obtained convictions in eleven obscenity prosecutions involving adult

obscenity, had pending indictments in five cases, and was then handling about fifteen active investigations. [24]

There were other disappointments with Ashcroft's record. Instead of making appointments drawn from the ranks of those most committed to the fight against obscenity, he had promoted Andrew Oosterbaan who had served as deputy in the Justice Department's Child Exploitation and Obscenity Section (CEOS) under Janet Reno to head CEOS. Furthermore, as a June 2004 report from Attorney General John Ashcroft to the House Judiciary Committee revealed, there had been no inspections at all since Section 2257, requiring the keeping of records so as to ensure that participants are not under-age, was enacted in the mid-'90s. [25]
For many anti-pornography campaigners, there seemed to be a marked contrast between the policies adopted in 2001-05 and those pursued during the Reagan and George H.W. Bush administrations. In the years between 1981 and 1993, prosecutions had been intensified. Initiatives such as 'Project Postporn', which was directed towards major mail order distributors and the 'Los Angeles Project', brought together different law enforcement officials and led to the conviction of about twenty companies. The Meese Commission on Pornography reported in July 1986. Although its initial enforcement was delayed by a series of lawsuits, the 1988 Child Protection and Obscenity Enforcement Act established internet child pornography as a federal offence and – through 18 USC Section 2257 - required pornography producers to secure proof of a performer's age and maintain records. It was passed partly because of the momentum established by the Meese Commission and in the wake of the Traci Lords affair. Lords became one of the industry's 'stars' until it was revealed that she had been under-age when many of the films were made.

Lack of zeal

As the administration's seeming lack of zeal became more evident, campaigners adopted increasingly open and visible forms of lobbying. In Autumn 2002, the Reverend Don Wildmon of the American Family Association used blunt terms in a message directed towards the Justice Department:

> 'Yet to date there have been no prosecutions for Internet obscenity or, for that matter, any efforts that we can discern against the major violators of obscenity laws in this nation … We feel we deserve to know why obscenity prosecutions have not begun, when they will, and what we may expect from your efforts.' [26]

In May 2003, Concerned Women for America established a national campaign to contact CEOS and US district attorneys across the country calling for a response to the 22,697 obscenity complaints that were lodged, primarily through a dedicated website established by Morality in Media, between June 2002 and May 2003. [27]

In particular, anti-pornography campaigners called for action against the corporations that had, through partnership arrangements, established ties with the sex industry. They pointed to the cable networks, broadband television companies, and hotels that carried 'adult' programming:

> 'If the Justice Department targeted some of the mainstream companies, the case probably wouldn't even get to the point of going to trial. For example, if a grand jury began to investigate Marriott's supplier of illegal porn and Marriott received a subpoena for all their records on this, Marriott would likely come in and want to know how to get out of a potential prosecution. I believe a settlement could be reached quickly that would result in Marriott removing pornography.' [28]

The anxieties and concerns of the campaigners were shared in Congress, particularly among the most committed social conservatives. In November 2003, the Senate agreed to a resolution:

> 'Whereas it continues to be the desire of the People of the United States of America and their representatives in Congress to recognize and protect the governmental interests recognized as legitimate by the United States Supreme Court … That it is the sense of Congress that the Federal obscenity laws should be vigorously enforced throughout the United States.' [29]

The issue was kept on the Congressional agenda. In March, Senator Jeff Sessions of Alabama added a sentence to the Senate budget bill for fiscal year 2004.

> 'It is the sense of the Senate that of the funds appropriated in Function 750 of the Budget Resolution for the Department of Justice, there will be provided adequate funding in the relevant appropriating committee in Fiscal Year 2004 for the purpose of vigorously enforcing the Federal obscenity laws throughout the United States.' [30]

There were other initiatives. Some Republicans, particularly those who were members of the Values Action Team, joined forces with Concerned Women for America and its allied organizations in observing and promoting Victims of Pornography Month in May of each year. The month of activities customarily incorporated a 'summit' on Capitol Hill with members of Congress and expert witnesses. The 2005 summit's sponsors included Concerned Women for America and the Beverly LaHaye Institute with which it is associated, the American Decency Association, Citizens for Community Values, Center for Reclaiming America, Enough is Enough, Focus on the Family, Kids First Coalition, Morality in Media, National Law Center for Children and Families and the Salvation Army. [31]

Some members of Congress not only sought the enforcement of the law but the broadening of its scope. In 2005, for example, Republican Congressman Mike Pence of Indiana sought to extend the application of Section 2257 which imposes record-keeping obligations on those who produce material that depicts 'actual sexually explicit conduct' by deleting the word 'actual'. All forms of simulated sexual activity (and therefore 'softcore' pornography) would therefore be subject to regulation. Alongside this, in a clause that might also be subject to judicial review were it to reach the statute book, the bill would prohibit the production of obscenity as well as the interstate transportation of it. [32]

Reasons

Why did the administration fail to initiate more prosecutions? Why did it open itself up to criticism from Christian conservatives and the 'pro-family' movement? Self-evidently, the Department of Justice had other priorities after the September 11th attacks although, for their part, Christian right campaigners sought to argue that that the pursuit of obscenity cases would add to, rather than distract from, the fight against terrorism. Investigations of internet chatrooms – a forum used by the hijackers – could, they asserted, yield intelligence about terrorist activity as well as information about pornographers and pedophiles. Furthermore, Concerned Women for America argued, a clampdown on pornography might send a signal to those whose assistance the US was seeking in the war on terror: 'fighting porn would show good will to Muslim nations …They currently see us as pouring moral garbage into their countries.' [33]

The Department of Justice also faced, as some campaigners acknowledged, organizational and administrative difficulties. After the period of 'neglect' during the Reno era, the rebuilding of teams and initiation of investigations required a period of time. Furthermore, resources were limited and the federal government had to concentrate – as it had during the Reno years – on the most extreme forms of pornography. It was a straightforward question of opportunity cost. As Frederick Schauer from the John F. Kennedy School of Government at Harvard University told the Constitution, Civil Rights, and Property Rights subcommittee of the Senate Judiciary Committee in March 2005:

> '.. there remain questions about the appropriate allocation of scarce prosecutorial resources. Because the production of child pornography by definition involves the abuse of real children, and because dealing with such child abuse should remain at the highest level of priority, there is a risk that increasing the quantity of obscenity prosecutions in a world of limited prosecutorial resources - both financial and human - will be at the expense of child pornography prosecutions. … Every dollar spent on an obscenity prosecution is a dollar not spent on child pornography prosecution, and only under circumstances in which it can be said that no more can be done about child pornography would this tradeoff fail to exist..' [34]

Substantial resources were devoted to the pursuit of child pornography. The October 2003 Protection from Pornography Week was structured around child pornography rather than 'adult' forms. [35] The Department of Homeland Security launched Operation Predator so as to locate child predators and identify the children depicted in child pornography, help rescue them, and pursue those responsible for production and distribution. The PROTECT Act, signed by the president in April 2003, facilitated the prosecution of 'sex tourists' and prohibited the use of misleading domain names or 'metatags' so as to lure internet users towards obscene sites or those that included material 'harmful to minors'.

The US Supreme Court and the *Miller* test

However, other considerations apart from these may be more important. Although the administration secured some legal victories, including *United States* v. *American Library Association (2003)*, which upheld the Children's Internet Protection Act requiring schools and libraries to install filtering software on public internet terminals as a condition for receiving federal technology funds there was, nonetheless, legitimate uncertainty about the attitudes that would be taken by the federal courts and a fear that even the most carefully crafted of cases could well be lost. This was because the definition of obscenity around which federal and state law is structured has created significant legal dilemmas.

From 1973 onwards, 'obscenity' rested upon the US Supreme Court's ruling in *Miller v. California*. It established a three-part test so as to determine what was, or was not, obscene. Firstly, a court had to determine whether the 'average person', applying 'contemporary community standards', would feel that a particular work '.. appeals to the prurient interest'. Secondly, it should decide whether the work '.. depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law'. Thirdly, it had to assess whether the work, in its entirety ' .. lacks serious literary, artistic, political or scientific value'. In writing the majority opinion, Chief Justice Warren Burger gave examples of the material that could be subject to regulation under the second part of the *Miller* test: '.. (a) patently offensive representatives or descriptions of ultimate sexual acts, normal or perverted, actual or simulated and (b)

patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of genitals.' [36]

At the time the ruling was made, *Miller* was seen as a setback for the pornography industry. The third form of test – that a work had to lack 'serious … value' – was rather less wide-ranging than that adopted in a 1962 ruling which had based the standard, more loosely, on a work being 'utterly without redeeming social value'. [37] Furthermore, because 'community' upon which the *Miller* ruling rested was defined in local terms, it opened the way for prosecutions in the more traditionalist areas. Producers and distributors could have no clear or precise idea of the limits that they should observe. As Scot Powe from the University of Texas put it: '.. the standards are whatever 12 jurors bring to bear.' [38]

However, with the passage of time, it became clear that the uncertainties associated with the *Miller* test also posed difficulties for prosecutors who were always uncertain about the likelihood of a conviction. By the late 1980s, anti-pornography campaigners increasingly backed the adoption of a 'per se' approach based on specific criteria such as clearly visible penetration. [39] Nonetheless, despite this, the courts were reluctant to embrace a different or more rigorous definition. However, although *Miller* was maintained, the concept of 'community' posed increasing difficulties. In making the ruling, Chief Justice Warren E. Burger had emphasized that the notion of 'national' standards was unacceptable:

> 'Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene … It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City.' [40]

In the era of local distribution and sales, this was straightforward. However, the emergence of mail-order companies supplying a nationwide market comprising many different communities and, to a much greater extent, the development of the internet, raised legal dilemmas. Self-evidently: 'web publishers cannot restrict access to their site based on the geographical locale of the Internet user visiting their site'. [41]
At first, the federal courts seemed reluctant to accept that the changing character of the pornography industry required a revision of the *Miller* test. In *United States v. Thomas* (1996), the 6th Circuit Court of Appeals considered the case of a California couple, who operated a bulletin board allowing members to download pornographic materials. They were indicted in the Western District of Tennessee following the actions of a United States Postal Inspector who downloaded files that included images of bestiality, oral sex, incest and sado-masochism. The materials were judged to be obscene – and the couple convicted - on the basis of 'community standards' in Tennessee rather than California. The Court ruled that they could have limited distribution so as to avoid communities with less tolerant obscenity standards and established that ' .. there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent.'

This did not, however, settle the issue. In 1999 the 3rd Circuit Court of Appeals struck down the Child Online Protection Act (COPA) arguing that the Act – which addressed internet material that was 'harmful to minors' rather than 'obscenity' which has a more 'hardcore' character and went beyond mere nudity - was too broadly worded in using 'community standards' as a basis for judging what should be regarded as 'harmful' by appealing to the 'prurient interest'. Opinion was, however, divided when the Supreme Court considered the case (*Ashcroft v. ACLU*) for the first time in 2002. Although the Court reversed the Court of

Appeals ruling and sent the case back, there were five separate opinions. The most conservative members of the bench - Clarence Thomas, Antonin Scalia and Chief Justice William Rehnquist – were most committed to the maintenance of local standards as the basis for determining what should be regarded as 'harmful to minors' or obscenity. Web providers would have to shape the content of their sites with this in mind and defer to the moral beliefs of more traditionalist communities. If this prevented them from using the internet, so be it. As Clarence Thomas argued: 'if a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.' [42] Others on the bench recognized the logic and coherence of Thomas's argument but could not accept the conclusions that he had drawn. As Stephen Breyer put it, if local standards were applied, websites would be subject to a veto by the most traditionalist communities in the US:

> '.. to read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's veto affecting the rest of the Nation' [43]

Further uncertainties

The uncertainties and complexities stemming from notions of obscenity and the burdens imposed by restrictive measures were compounded by three other issues. Firstly, there were questions about the extent to which proactive steps should be taken to prevent 'adult' images and other materials falling into the hands of children and minors and, if so, should the protection of young people be the responsibility of website operators, adults who use the internet, or individual parents? The 1996 Communications Decency Act (CDA) prohibited the 'knowing' transmission of 'obscene or indecent' messages or anything 'that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs' to a person under 18. In *Reno v. American Civil Liberties Union* (1997), the Supreme Court voted 9-0 to strike down two of its provisions. The CDA was, the Court said, overly vague and would inevitably curb the free speech of adults. According to John Paul Stevens, who wrote the Court opinion, it 'threatens to torch a large segment of the Internet community.' He added:

> 'The Communications Decency Act lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.' [44]

The 1998 Child Online Protection Act (COPA) was an effort to address the Supreme Court's concerns and it was written in narrower terms. As noted above, COPA sought to block access by those aged under 17 to material that was 'harmful'. It imposed penalties on commercial websites that failed to make 'good-faith efforts' to ensure that minors could not visit websites that depicted 'soft' as well as 'hardcore' pornography. The measure was required, Theodore Olson, the Bush administration's solicitor-general said in oral argument before the Supreme Court, to address the 'menace' of ' .. pervasive and essentially unavoidable Internet pornography that inflicts substantial physical and psychological damage on children.' Under the terms of the Act, first-time offenders could spend six months in prison and be subject to a fine of $50,000. Repeat offenders would face additional fines. [45] The enforcement of COPA was blocked by a court injunction which was later upheld by the 3rd Circuit Court of Appeals. In June 2004, (*Ashcroft v. American*

Civil Liberties Union), the Supreme Court upheld the block on enforcement declaring that COPA was likely to be unconstitutional. COPA was not struck down but sent back to US District Court in Philadelphia for further consideration. Although the Court appeared to lean towards the argument that the law was unconstitutional, the federal government was provided with an opportunity to establish that filtering software was ineffective and the burden of protecting the young should therefore be borne by website providers and adult users. [46]

Secondly, those seeking the restriction of obscenity had to contend with the evolution of graphics software and the intermingling of 'virtual' images alongside 'real' forms of pornography? The issue arose because of 'virtual' representations of children but had wider implications. The 1996 Child Pornography Prevention Act – that Congress had passed in response to technological change - incorporated provisions that prohibited the distribution and possession of sexually explicit computer-generated images of children or the use of persons over eighteen who *looked* under eighteen. In *Ashcroft v. The Free Speech Coalition* (2002), by a 6-3 ruling, the Supreme Court noted that the law did not prevent the direct sexual exploitation of children and found it to be unconstitutionally 'overbroad'. It imposed too great a limitation upon free expression. Writing for the Court, Justice Anthony Kennedy suggested that the law might have been enforced against such films as *American Beauty*, *Traffic* and *Romeo and Juliet*. In a dissent, Chief Justice William Rehnquist recorded his strong disagreement with the majority arguing that '.. the computer-generated images are virtually indistinguishable from real children.' [47]

A third issue posed difficulties for prosecutors. From 1965 onwards, the Supreme Court had identified a 'right to privacy' in the Constitution. It rested on 'penumbras of the emanations' and notions of 'due process' in the 14th Amendment and laid the basis for *Griswold v. Connecticut* which established access to contraception as a constitutional right. *Griswold* was built upon in *Roe v. Wade* (1973) and *Lawrence v. Texas* (2003) which extended the right to privacy to abortion and gay sex respectively. However, privacy rights were also built upon by the Supreme Court in *Stanley v Georgia* (1969) which established that they permitted the legal possession of 'adult' (but not child) pornography. In January 2005, a district court in western Pennsylvania considered the case of *Forced Entry*, a 'horror-porn' film that featured Satanic rituals as well as sexual activity. In *United States v. Extreme Associates*, Judge Lancaster reasserted the importance of privacy rights: '.. public morality is not a legitimate state interest sufficient to justify infringing on adult, private, consensual, sexual conduct even if that conduct is deemed offensive to the general public's sense of morality..' On the basis if this, he asserted that if people could not be prohibited from obtaining it through restrictions on distribution. There was, otherwise, a ban on possession. As Thurgood Marshall put it on behalf of the Court, there was a 'fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy,' particularly the 'right to satisfy [one's] intellectual and emotional needs in the privacy of his own home.' [48] Judge Lancaster spoke in similar terms. In his ruling, he asserted that the laws against obscenity '.. burden an individual's fundamental right to possess, read, observe and think about what he chooses in the privacy of his own home by completely banning the distribution of obscene materials..' **[49]** In response to the ruling, the Department of Justice – under Ashcroft's successor, Alberto Gonzales - said that if the ruling – and the interpretation of federal law upon which it was based - were to be upheld, it would undermine not only anti-obscenity prohibitions, but also laws against prostitution, bigamy, bestiality and others '.. based on shared views of public morality.' [50]

Obstacles

Above and beyond the problematic concept of 'obscenity', the federal government as well as state and city prosecutors faced other legal, constitutional and practical uncertainties. [51] At all levels, adult 'porn squad' work has little status within law enforcement agencies and is not seen as a route to career advancement. Furthermore, according to anti-pornography campaigners, state, city and local authorities lack the resources to challenge the sex industry. As a spokesman for the American Family Association put it: '.. local law enforcement and city attorneys get "crushed" by high-powered lawyers hired by adult book stores or video stores when there are efforts to shut those establishments down … "You need the federal government to assist" … ' [52]

Furthermore, the mechanics of pursuing prosecutions became more problematic. High-profile cases have been lost or prosecutors have had to settle for plea bargains in which few penalties were imposed upon the defendant. During the George H. W. Bush administration, the Department of Justice had acted against mail-order distributors by using multi-district prosecutions. A single company would be prosecuted in up to four jurisdictions simultaneously making a legal defence prohibitively expensive. In 1993, the courts asserted that this placed a defendant's rights in jeopardy and the policy was brought to an end. All too often, from the prosecution perspective, cases failed and had to be abandoned on the basis of a plea bargain. These concerns were reinforced when, in March 2002, Los Angeles prosecutors abandoned their high-profile case against Adam Glasser, (who is known in the sex industry as 'Seymour Butts'), and his film *Tampa Tushy Fest*. The case – which had been initiated in the Clinton era - was initially hailed by those bringing the case, including the Deputy L.A. city attorney, as a turning point and the industry prepared for a clampdown. There would be, it was said, far fewer plea bargains. [53] News reports suggested that they had been emboldened by the Bush administration. Criminal defense attorney Jeffrey Douglas was among those warning that the mood had now changed:

> 'I've been at meetings and events where, if you're talking to a 25-year-old porn-maker about federal prosecutions for obscenity, you might as well be talking about the Spanish-Mexican War' [54]

And yet, despite the early rhetoric, a plea bargain allowed Glasser's company to plead 'no contest' to a charge of 'creating a public nuisance' and pay a fine of $1000 into a 'victims' restitution' fund. It also agreed to make customers aware that a less extreme version of the film was available. In return, all other charges were dropped and all tapes and other materials that had been seized in a search were returned. Seemingly, prosecutors were uncertain whether a jury would bring a conviction. [55]

The role of the Christian right

However, alongside the impact of cases such as this, there were other reasons why the Department of Justice was hesitant to pursue obscenity prosecutions. The most visible and consistent campaigners against pornography were tied to the 'outsider' groups within the Christian right rather than those with closer ties with the Republican 'establishment'. The connections between organizations such as Concerned Women for America and the Traditional Values Coalition as well as single-issue campaigns such as the American Family Association (led by the Reverend Donald Wildmon), the American Decency Association (ADA) and Morality in Media, and administration officials were often distant and – in contrast with the defining characteristics of 'insider' organizations – sometimes marked by public fractiousness. At the same time, there was an imprecision and ambiguity about these organisations' goals and an uncertainty about the rationale that should be adopted for pursuing them. Their targets not only included 'hardcore' but also 'soft' porn and publications that simply had a 'glamour' content. Little distinction was made between

‘obscenity’ and ‘indecency’. The ADA targeted the sales of magazines such as *Maxim*, *Stuff*, *Cosmo* and *FHM* and mounted campaigns against the content of advertising by companies such as Abercrombie & Fitch and Victoria’s Secret. [56] The AFA established its credentials as a campaigning organization by forcing 7-Eleven stores to end its sales of *Playboy* and *Penthouse*. [57]

Alongside this imprecision in terms of ‘targeting’, there were more fundamental tensions in the political message that was put forward. The rationale for prohibiting pornography remained imprecisely defined. For many in the movement, pornography was to be restricted because of the dangers that children and minors might gain access to it. In the 1994 *Contract with the American Family*, the Christian Coalition emphasised the importance of child protection and the proper ‘policing’ of the internet and cable television. Legislation, they argued, should be passed so as to ensure that the cable television networks blocked all audio and video access to adult channels to non-subscribers. It should also, the Coalition stressed, become illegal to transmit material ‘harmful to minors’ (softcore) ‘.. with reckless disregard of whether children will come into its possession.’ [58]

However, the movement’s emphasis upon the interests of children was tied together with elliptical suggestions of a further argument. Some campaigners drew on the opinion put forward in *Miller* to suggest that the First Amendment was rooted in heroic notions of liberty rather than smut:

> ‘To equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.’ [59]

Pornography (and perhaps by the same token indecency) was not therefore entitled to First Amendment protection. Others went a stage further by arguing that obscenity should be prohibited because of the damage that pornography inflicted upon the social and cultural fabric. They drew on the Supreme Court’s ruling in *Paris Adult Theatre I v. Slaton* (1973) when it had concluded that ‘.. there are legitimate state interests at stake in stemming the tide of commercialized obscenity’. These included, the Court asserted, the ‘quality of life’, ‘total community environment’, and ‘public safety’. [60] This form of argument had implications. *Miller v. California* had stressed the importance of applying ‘contemporary community standards’ in determining what was or was not legally obscene. Yet, if considerations such as ‘public safety’ or the ‘total community environment’ had primacy, the community could not be left to decide whether obscene materials could, or could not, be distributed. Indeed, majority opinion towards a particular book, magazine, or film was of little relevance. As the opinion in the *Paris* judgement concluded:

> ‘The issue in this context goes beyond whether someone, or even the majority, considers the conduct “wrong” or “sinful”. The States have the power to make a morally neutral judgement that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr Chief Justice Warren’s words, the State’s “right to maintain a decent society”’ [61]

Visibility

Shifts in the character of public attitudes and perceptions of the sex industry may also have played a role in deterring prosecutors. Although the public backed the more rigorous enforcement of the obscenity laws, there was a small but steady liberalizing trend during the 1990s as opinion shifted away from the prohibition

of pornography for all and towards the limitation of restrictions on its availability to those under 18 (see pages 000).

Public disquiet may have been allayed by two developments. Firstly, internet filtering software became more widely available. A March 2005 survey of young people and their parents showed that 54 per cent of families with online access use some sort of filter or monitoring software. [62] Secondly, the sex industry has for the most part been evicted or at least contained in many city centres – where it often seemed associated with street crime - and this may have assuaged concerns. States and, if statutorily empowered, cities and counties have imposed restrictions on sex shops and clubs ('sexually oriented businesses') successfully used zoning regulations, licensing requirements, and other laws to transform the character of some neighbourhoods most closely associated with 'adult' industries. The regulations include display restrictions, zoning laws limiting locations so as to prevent clusters, alcoholic beverage control (ABC) laws preventing nudity in clubs serving alcohol, restrictions on the character of those who are employed, open booth laws regulating peepshows, nuisance laws if lewd conduct occurs on premises, obscene device laws, public indecency laws requiring performers to wear some covering items, and legal limits on the number of 'adult' premises in a building.

Most of these regulations have been upheld by the federal courts. Indeed, in *City of Los Angeles v. Alameda Books* (2002), the Supreme Court confirmed that the authorities have the right to prevent a concentration of adult businesses in a building because such concentrations are associated with a higher rate of crime. New York City Mayor Rudolph Giuliani's transformation of the Times Square and the 42nd Street area is the most well-known and widely-cited example of the process. A 1995 law banned strip clubs and adult book and video shops operating within 500 feet of residential areas, schools, day care centers, houses of worship -- or each other. [63] Although some sex shops evaded the regulations by stocking non-pornographic materials as well as adult supplies, many either closed or moved to neighbourhoods in Queens or Brooklyn. The opening of new retail outlets, restaurants and cafes that served a different market and the rise in property prices ensured that the stores were not reopened. There was also a further tightening of the law in 2001 although its implementation was long delayed by legal challenges. The City amended the zoning ordinance so as to close the loophole by which some shops had survived by stocking other products and established broader guidelines to define adult businesses.

The growth of the sex industry

However, paradoxically, while the sex industry became less visible, and lost its associations with urban decay, the size and scale of production, distribution and the market for its products grew dramatically. It has also become more fragmented. While professional films continued to be produced in areas such as the San Fernando Valley, far lower production costs and nil marginal distribution costs through the internet have allowed the construction and proliferation of amateur or low budget websites. Technological development – which progressed through VHS to DVD and the internet – was significant in another way. It allowed home consumption, ensuring anonymity, and removing the need to public gaze by visiting particular – often uncertain – inner-city neighbourhoods. [64] By 2001, according to Frank Rich of the *New York Times*, the sex industry generated between \$10 billion and \$14 billion in annual sales. Although *Forbes* suggests that this is a gross overestimate and the total is instead between \$2.6 billion to \$3.9 billion, the size and scale of the market is still vast. [65] As a consequence, mainstream companies were increasingly ready to enter into commercial agreements with pornography distributors:

> 'What investors and bigger corporations soon discovered … was a vast audience for pornography – once the privacy barrier was eliminated.' [66]

Anti-pornography campaigners secured some successes in their efforts to reverse this trend. Consumer boycotts and the judicious use of negative publicity have curbed or ended a few of the commercial liaisons between corporations and 'adult' providers. A number of video rental stores have cut back on the forms of material that they hold in stock. In early 2005, Adelphia Communications Corporation, the fifth largest cable company, dropped its plan to offer hard-core programming supplied by Playboy Enterprises after American Family Association supporters publicized Adelphia's intentions and sent over 130,000 emails to the newly-appointed Attorney General, Alberto Gonzales, asking that he begin obscenity investigations. [67] However, these were relatively small steps. Just as the Meese Commission sought to turn the tide of opinion against pornography, video rental chains and retail distributors began to stock pornographic titles. In the 1990s, hotels and resorts started to offer pay-per-view films to guests. [68] All the leading satellite and cable television companies started to carry pornographic channels. Telephone companies increasingly depended upon the market for 'adult' calling services which have been said to generate between $750 million and $1 billion annually. [69] And, most importantly of all, hardcore pornography became ubiquitous on the internet.

Indecency and broadcasting

Obscenity and indecency are separate and distinct categories. Although the 1927 Radio Act blurred them together by prohibiting the transmission of 'obscene, indecent, or profane language' and established the Federal Radio Commission (which – as television began to develop - became the Federal Communications Commission) to regulate the airwaves, the legal and political framework for the contemporary definition and regulation of broadcast indecency on terrestrial radio and television was established by the 1978 Supreme Court ruling, *FCC v. Pacifica Foundation*.

Pacifica became known as 'the seven dirty words case' because it arose from the use in an afternoon show on WBAI, a Pacifica Foundation FM radio station in New York City of familiar sexual expletives. In a 5 to 4 judgement, the Court distinguished between 'obscenity' and 'indecency' by defining indecency as '.. patently offensive sexual and excretory language'. [70] It ruled that the WBAI broadcast was 'indecent but not obscene.' [71] The judgement was subsequently built upon by the FCC. For the Commission, indecency is 'language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities.' [72] It lacks the prurient appeal that was, following the Supreme Court's *Miller* ruling, a defining feature of the 'obscene. As such, although it can be applied to actions as well as language, it is not to be regarded as seriously. Therefore, indecency, and for that matter profanity, is regulated by the FCC's procedures rather than the criminal law. Furthermore, in contrast with obscenity, it is at least partially protected by the First Amendment's guarantee of free speech. There are limits upon the degree to which it can be restricted.

However, in contrast with books or periodicals which have far-reaching protection under the First Amendment, broadcasting had a 'pervasive presence' and, in the Court's words, '.. the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder'. [73] There was also a danger that indecent broadcasting might be heard by unattended children. These considerations – as well as government interests arising from spectrum scarcity and signal interference - permitted the government imposition of limits and regulations on terrestial broadcasters. The FCC had authority to prohibit such broadcasts during hours when children were likely to be among the audience. The seven dirty words could

not therefore be used at such times. The Supreme Court emphasised that such a curtailment of free speech in broadcasting was permissible because indecent language was 'at the periphery of First Amendment concern', there were alternative outlets for those who wished to explore indecent themes or use particular forms of language, and those who transgressed did not face a criminal prosecution. [74]
In the wake of the *Pacifica* ruling, FCC policy rested on the prohibition of the seven dirty words except during the 'safe harbor' hours between 10 pm and 6 am. In 1986, in an effort to curb 'shock jocks', most notably Howard Stern, who had began to talk in explicit terms about sexual activities during his daytime shows without using the seven dirty words, the FCC widened its definition of indecency to incorporate 'patently offensive' language describing sexual or excretory acts or organs. A year later, the 'safe harbor' was narrowed to between midnight and 6 am. Then, in 1988, the Helms Amendment passed into law. The measure – initiated by Senator Jesse Helms of North Carolina - imposed a round-the-clock ban on indecent programming. However, following appeals court rulings and efforts by Congress through the 1992 Public Telecommunications Act to re-establish the midnight threshold, the 10am to 6pm rule was restored.

Limits

However, FCC action against transgressions of the rules has long been limited in scope. In part, the mechanics by which the FCC investigates broadcasts may deter protests. It does not initiate investigations itself, but acts only on the basis of complaints submitted by members of the public. There are often difficulties establishing the context within which particular words are used or pursuing a complaint unless a tape recording or transcript is supplied together with details of the station and the time of the broadcast. If a radio or television station is found to have transgressed, it faces FCC sanctions rather than criminal prosecution:

> 'The Commission may revoke a station license, impose a monetary forfeiture, withhold or place conditions on the renewal of a broadcast license, or issue a warning, for the broadcast of obscene or indecent material.' [75]

However, as Table 3-2 suggests, these monetary forfeitures were often minimal despite the proliferation of 'shock jocks' during the 1990s. Indeed, in 1995, a mere $4,000 was levied. Furthermore, the FCC's enforcement system was often slow, unwieldy, and inconsistent. According to the *Washington Post*, it took the Commission an average of sixteen months to issue an indecency ruling following a broadcast. [76]

Table 3-2: proposed fines for broadcast indecency, 1995 - 2004

	FCC 'fines'
1995	¨$4,000
1996	$25,500
1997	$28,000
1998	$47,500
1999	$49,000
2000	$48,000
2001	$91,000
2002	$99,400
2003	$440,000
2004	$7,928,080 *

Note: the 2004 figure records the fines that the FCC proposed to levy through the 'notices of apparent liability' that were issued. Source: adapted from the John Dunbar (2004), *Indecency on the Air: Shock-radio jock Howard Stern Remains "King of All Fines"*, Center

for Public Integrity, www.publicintegrity.org/telecom/report.aspx?aid=239&sid=200 and Federal Election Commission (2005), *Indecency Complaints and NALs: 1993 – 2004*, Washington DC, Federal Communications Commission, www.fcc.gov/eb/broadcast/ichart.pdf

The clampdown and the Parents Television Council

In 2001, however, the picture changed dramatically. The FCC's abrupt clampdown on indecency and its willingness to use its regulatory powers were a response to both events and concerted lobbying by the organisations such as the American Family Association (AFA), the American Decency Association (ADA), and the Parents Television Council (PTC), an interest group that defines its primary mission as being to '.. promote and restore responsibility and decency to the entertainment industry in answer to America's demand for positive, family-oriented television programming.' [77]

At first sight, the path followed by anti-indecency organizations, most notably the PTC, constitutes a model of applied pressure group success. In 1998, the PTC launched a membership drive that, according to its own figures, recruited half a million supporters. It now claims a membership of a million. [78] The Board of Directors includes the legendary singer, Pat Boone and its founder and president is L. Brent Bozell III, whose father was – alongside William Buckley – a pioneer of the contemporary conservative movement until he began to embrace the more arcane forms of Roman Catholic traditionalism. Although L Brent Bozell III has not consigned himself to the outer edges of the movement as did his father, he has also been distanced from mainstream Republicanism by, for example, serving as National Finance Chairman for Patrick J. Buchanan's 1992 presidential bid.

In its mission statement, the PTC offers a rationale for its commitment to change the character of broadcasting. It stresses that viewing and listening are not simply matters for individual choice or parental discretion. This was partly because parents did not have a proper choice. Although the V-chip, which was installed in newly-manufactured televisions following the passage of the 1996 Telecommunications Act, allowed parents to block access to particular programmes, it was, the PTC argued, ineffective. The television networks did not supply ratings enabling parents to guide and control their children's viewing. More significantly, the PTC claimed, more rigorous regulation was required because the content and character of television programmes have a profound impact on society as a whole:

> 'Television is the most public and powerful means of mass communication … Because of its pervasiveness and persuasiveness, opting out is an entirely inadequate response to the dramatic rise in the amount of televised graphic sex, obscene and profane language, and gratuitous violence found on television today. These depictions affect everyone, including our children's classmates and friends. Vulgar television means a more vulgar society; sex-saturated television means sexualized children stripped of their innocence; violent television results in desensitization to violence.' [79]

The PTC pursued a dual track strategy. Firstly, although it rejects the use of consumer boycotts that some other organizations endorse, it seeks to influence corporations who sponsor offensive forms of programming:

> 'The PTC aims to work with corporations and believes most of them have a sense of social responsibility. They need to advertise to sell their products, and

> we understand that. The PTC instead tries to appeal to that sense of social responsibility and corporations' own standards by making a well-documented case that certain shows are unsuitable at certain times and in venues where children are presumed to have unrestricted access. Our members, however, are free to tell advertisers what their own response to sponsorship of offensive programs will be.' [80]

Secondly, it has encouraged its supporters to lodge complaints and protests with the FCC. Its websites facilitate this through the provision of an on-line form. This has yielded significant political dividends. As Table 3:3 suggests, the number of indecency complaints lodged with the FCC grew dramatically over the course of just four years while the number of programmes subject to a complaint increased threefold.

Table 3-3: indecency complaints, 2000-04

	Number of complaints	Number of programmes involved	Number of radio programmes	Number of TV programmes	Number of cable programmes
2000	111	111	85	25	1
2001	346	152	113	33	6
2002	13,922	389	185	166	38
2003	202,032	375	122	217	36
2004	1,405,419	314	145	140	29

Source: adapted from Federal Communications Commission (2005), *Indecency Complaints and NALs: 1993-2004*, www.fcc.gov/eb/broadcast/ichart.pdf

There are, furthermore, suggestions that these figures are underestimates. The PTC asserts, for example, that 4,073 protests were lodged through their website alone following an episode of *Married By America* broadcast by Fox Television in April 2003. According to FCC records, there were just 159 complaints alleging that the 'episode contained indecent material.' [81] Whatever the figures, both sides accept that the overwhelming majority were submitted through the PTC. Indeed, according to the FCC, 99.9 per cent of the complaints that were lodged between January and October 2004 were submitted to them through the PTC website. [82]

A 'classless, crass and deplorable stunt'

The increasing volume of complaints is, however, only part of the picture. Two television incidents and several radio shows played a pivotal role in establishing an opportunity structure within which the PTC's calls to curb indecency and profanity were not only heard but acted upon. Firstly, there was the use by Bono, the U2 musician, of an expletive during the January 2003 Golden Globe Awards ceremony which was being broadcast live. According the American Family Association, over 1,7500,000 emails protesting about the incident were sent to FCC commissioners and members of Congress. [83] The impact of the expletives was not only intensified by the volume of complaints and the lobbying activities of organizations that offered a channel for complaints such as the Parents Television Council and the American Family Association (as well as allied web-based organizations such as OneMillionMoms.com and OneMillionDads.com), but was also compounded by the FCC's initial reaction. In its first ruling, issued in October 2003, the Commission found that the word was 'fleeting' and part of an 'isolated' incident, It '.. did not describe sexual or excretory organs or activities.' [84] However, following protests, this was reversed in

March 2004 and the FCC concluded that NBC could have prevented the incident. However, no fines were imposed.

Secondly, Janet Jackson bared much of her breast (for – the Commission noted – 19/32 of a second) at the end of a risqué song and dance routine with Justin Timberlake during the intermission at the 2004 Super Bowl. It was, according to Michael Powell, Federal Communications Commission (FCC) Chairman and son of former Secretary of State, Colin Powell, '… a classless, crass and deplorable stunt'. [85] An Associated Press poll found that 54 per cent of the public thought the act was in bad taste. About three-quarters supported more rigorous rules on nudity and sexual content in programmes. [86] Within thirty six hours of the broadcast, the American Family Association website alone had recorded 30,000 protests. Over the next twenty four hours, 250,000 emails were sent to the FCC and members of Congress. [87] According to FCC figures, about 50 percent of the complaints lodged in the period between January and late November 2004 were related to the Super Bowl incident. [88] Alongside these television broadcasts, longstanding - albeit intermittent - disquiet about the Howard Stern radio show came to the fore again. In one his April 2003 show, which considered sex and flatulence, the 'shock jock' had allegedly committed eighteen violations of FCC regulations. [89] Stern was not, however, alone in attracting complaints; protests were also lodged against other radio show hosts such as Bubba the Love Sponge and Opie and Anthony.

Policy shifts

Although there were claims that many of the complaints submitted to the FCC were orchestrated, they had public backing. According to a Pew survey conducted in March 2005, 75 per cent supported the principle of strict government enforcement of indecency regulations. Furthermore, sizeable majorities backed proposals for increased fines on broadcasters (69 per cent) and the extension of the rules governing terrestrial television to the cable networks (60 per cent). [90]

The protests, and the weight of public opinion, were sufficient to prompt a policy shift by Michael Powell and the FCC commissioners. For much of his time as both a commissioner and chairman, Powell's instincts had appeared to have a libertarian edge. He was primarily known for his commitment to deregulation and the removal of restraints on media ownership. He stressed his opposition to government interventionism. [91] However, in the wake of the complaints, he increasingly emphasized the need to curb indecency. The amounts levied in fines grew dramatically. (The FCC initially proposes fines by issuing a notice of apparent liability and then there is an often protracted process of adjudication so as to determine whether it is warranted. Some fines have in the past been cancelled because there is a statute of limitations). CBS stations were fined a total of $550,000 for their coverage of Janet Jackson. By the time Michael Powell stepped down in January 2005, more than $8.5 million had been levied in fines, almost all of it in 2004.

Furthermore, the FCC's commitment to eliminate indecency seems to have been strengthened by the appointment of Kevin Martin, who took over from Powell as the Commission Chairman, and his selection of Penny Nance, a former activist from Concerned Women for America, as his special advisor. These moves have been well-received by campaigners. As Dan Isett of the Parents Television Council noted:

> 'Kevin Martin is now the Chairman of the FCC and, as you know, he is deeply concerned about indecency issues across the board and is committed to a vigorous enforcement of indecency law. In so far as Penny is able to help him know what our concerns are and what we are working on, then all the better'. [92]

The clampdown had four principal consequences. Firstly, at least initially, much of the opposition to the principle of an indecency clampdown appeared to have been subdued. There were some protests but these tended to have a fringe character. David Horowitz Adam D. Thierer, the director of telecommunications studies at the Cato Institute, a libertarian conservative thinktank, stressed parental responsibility in place of regulation. He was fiercely critical of cultural conservatives and the Christian right:

> '.. so many conservatives, who rightly preach the gospel of personal and parental responsibility about most economic issues, seemingly give up on this notion when it comes to cultural issues. Art, music, and speech are fair game for the Ministry of Culture down at the FCC, but don't let them regulate our cable rates! Conservatives and religious groups decry government activism in terms of educating our children, for example, but with their next breath call in Uncle Sam to play the role of surrogate parent when it comes to TV content.' [93]

Some on the left – such as *The Nation*'s bloggers - spoke in similar terms. [94] However, in February 2005, just thirty six Democratic members of the House of Representatives, one Independent, (Bernie Sanders), and one Republican, (Ron Paul), opposed the measure.

Secondly, there were moves within Congress. With the backing of FCC commissioners, both Republicans and Democrats on Capitol Hill argued that the fines levied on broadcasters were too low. The proposed Broadcast Decency Enforcement Act (which had been first introduced a week before the Super Bowl incident) was amended so as to raise the maximum fine to as much as $500,000 per violation. If the bill had been enacted before the Super Bowl incident, this would, according to the Family Research Council, have led to the imposition of fines totaling $5,500,000. [95] A station would face licence revocation if it was found to have carried indecent material three times. Furthermore, individual broadcaster guilty of indecency would be subject to fines of up to $500,000. In the past, performers faced a maximum fine of $11,000 though there are no records of it being imposed. [96] The FCC would be required to respond to complaints within nine months.

The bill was passed in both the House of Representatives (by 391 to 22) and the Senate. However, it stalled in the conference committee that reconciles the House and Senate versions. The White House threw its weight behind the proposal and, in a statement issued in February 2005, the administration asserted that the:

> '.. legislation will make broadcast television and radio more suitable for family viewing by giving the Federal Communications Commission (FCC) the authority to impose stiffer penalties on broadcasters that air obscene or indecent material over the public airwaves ..' [97]

There were renewed efforts during the next Congressional session. In mid-February 2005, the House of Representatives voted for the measure by 389-38 votes.

Against this background, members of Congress also considered other reform proposals. There were calls for the creation of a 'code of conduct' for television that encompassed all forms of television broadcasting. The cable and satellite companies were urged to offer a 'family-friendly' tier of programming so that viewers were not compelled to purchase packages of channels, some of which might be unsuitable for children. For his part, Senator John McCain called upon cable and satellite companies to end programme 'tiers' altogether and offer all channels on an 'a la carte' so that viewers could make channel-by-channel

decisions. McCain's call was supported by the Parents Television Council which initiated the Cable Consumer Choice Campaign. It has won the backing of Consumer's Union, the American Family Association, the American Federation of Labor-Congress of Industrial Organizations, Morality in Media, and seventeen other organizations. [98] However, the call for an 'a la carte' programming faced industry opposition and did not command widespread backing on Capitol Hill. Senator Ted Stevens, Chairman of the Commerce Committee threw his weight instead behind a voluntary scheme by which cable operators would adopt family 'packages', or tiers, as well as simplified TV ratings. [99] In response, Concerned Women for America and thirty five other 'pro-family' groups threw further resources into the 'Cable Choice Campaign'

Thirdly, although several series such as *Sex and the City*, *The L Word*, and *Desperate Housewives* that had attracted the attention of campaigners continued seemingly unabated, both the terrestrial and cable channels began to rein in the content of some programmes. Their concerns about complaints and fines were compounded by an anxiety that transgressions might have an impact when the FCC adjudicated on proposed mergers and other regulatory issues. There was, therefore, growing 'self-censorship'. In 2004, a number of stations withdrew a Veterans' Day showing of *Saving Private Ryan* following complaints about the use of expletives in its opening scenes. As *The Economist* recorded, PBS edited a British docu-drama to remove scenes of a woman in a shower being decontaminated after a nuclear attack and the Fox network decided to pixelate animated nudity in the cartoon series, *Family Guy*. [100] At the same time, Clear Channel – which carried both Howard Stern and Bubba the Love Sponge - adopted a 'Responsible Broadcasting Initiative.' Through this, decency-training initiatives were established and Bubba the Love Sponge was dismissed. Against this background, Howard Stern defected to satellite radio. The PTC claimed credit for these developments and the changing climate:

> 'It appears that the groundswell of opposition to raunchy programming really is starting to have an impact on program content. Although it is clear to even casual observers that on the margins, television has gotten much worse, but it is equally undeniable that there has been a real and perceptible improvement throughout much of the prime time schedule.' [101]

Lastly, the FCC's actions fuelled the self-confidence of anti-indecency campaigners. This, in turn, strengthened the hand of those calling for consumer boycotts. Although the American Family Association called off its boycott of Disney (which it had begun in 1996) following the split between Disney and Miramax, whose film productions included *Priest*, *Kids* (both of which featured sexual activity) and the religious comedy *Dogma*, it called for a boycott of companies advertising on MTV. [102] The firms included Proctor and Gamble, McDonalds, Burger King, Colgate, and Taco Bell. [103] At the same time, there were efforts to broaden the scope of the campaigning. The Family Research Council (FRC) began making efforts to secure the passage of state laws that would impose a tax on sexually explicit businesses. It cited legislation passed in Utah during 2004 that introduced a 10 per cent tax on the admission fees charged by clubs and other sexually explicit businesses and the profits gained from sales of food and beverages during performances. The revenue that was to be raised would be dedicated to domestic violence and sexual abuse programmes for women. [104]

Conclusion: limits and constraints

At first sight, the campaign against indecency appears to have made significantly more headway than the attempts to restrict obscenity. It is tempting to conclude that vigour with which the indecency issue has

been pursued by the administration and many Congressional Republicans and the lack of action against obscenity are tied together. They have perhaps compensated for their inability to curb obscenity in any sustained way by concentrating their efforts upon more limited goals such as television and radio indecency. Certainly, while only limited steps have been taken to address the concerns of those campaigning against hardcore pornography, much more political capital has been spent on the reining in of broadcasters.

However, at the end of 2005, the efforts of anti-indecency campaigners to increase the fines payable by networks – along with other 'family' issues - seemed to have stalled in the Senate. [105] Why did this happen? There were differences in the Senate about the form of regulation that should be adopted. Some sought to extend the FCC's jurisdiction so as to encompass the cable channels. [106] In an age when more than 85 percent of households have access to cable or satellite television services, it was irrational, campaigners asserted, to limit the regulatory process to the terrestrial networks. However, each specific reform option met with opposition from the cable industry. [107] Furthermore, as others noted, there were questions about the constitutionality of such proposals. Echoing earlier legal reasoning, Adam D. Thierer stressed the private and voluntary character of a decision to use cable and satellite services. They do not have the 'pervasive' character of the terrestrial television and radio channels and, therefore, if the logic of the *Pacifica* ruling is pursued, there is no basis for regulation. [108] The Supreme Court seemed to be leaning towards this form of argument in *Turner Broadcasting System v. FCC* (1994) and *US v. Playboy Entertainment Group* (2000) which established that cable channels had full First Amendment protection and restrictions on content would have to be subject, as they are in other forms of expression, to strict scrutiny. [109]

The constitutionality of reform proposals was not, however, the only consideration. More cynical observers emphasized the size and scale of the wider sex industry, the market that it has brought forth, the production and distribution networks, the commercial ties between the industry and other sectors of the economy, and the forms of political influence that these create, may preclude serious or sustained forms of regulation. Large sums are at stake. As Citizens for Responsibility and Ethics in Washington (CREW), a campaigning organization that targets '..government officials who sacrifice the common good to special interests', points out, pornography:

> '.. offers an unusually high profit margin. "The 5 percent or 10 percent of revenue that the hotel chain gets, that's pure profit to them because they have no cost … They didn't put in the wiring system, they didn't supply the programming." Some analysts say these in-room sex movies generate more money for the hotel chains than revenue from the hotels' mini-bars. In fact, adult titles are estimated to be viewed 10 times as often as standard fare by business travelers, and they're often more expensive ..' [110]

In March 2005, CREW published a report listing campaign contributions to some of the Christian right's closest Congressional allies from corporations such as Holiday Inn, Marriott, AT&T, AOL, Time Warner, and Comcast, all of which gain revenue from the provision of 'adult' entertainment, sometimes in its most 'hardcore' form. Their ranks included Tom DeLay of Texas, Values Action Team Chairman Joseph Pitts (Pennsylvania), Senator Sam Brownback (Kansas), and Democratic Senator Joe Lieberman of Connecticut. [111]

However, above and beyond this, popular attitudes also require closer study. Although there was backing for the imposition of more severe penalties on broadcasters, public opinion had a far from straightforward character. A 2005 poll suggested that while there were significant differences between Democrats and Republicans, Christians and those who defined themselves as 'secular', and between the age cohorts, rather greater numbers (48 per cent) believed that 'undue' government regulations posed a 'greater danger these days' than the production of 'material harmful to society' (41 per cent). [112] Furthermore, according to the poll, there were considerably more concerns about television depictions of drug use and violence than sexual activity. [113] Senate Majority Leader Bill Frist, widely regarded as a 2008 presidential aspirant and who some held responsible for the lack of legislative progress, may have recognized the significance of findings such as these, and the potential difficulties posed by a close relationship with organizations such as the Family Research Council (see pages 000). There are suggestions that he soft-pedaled the imposition of restrictions on broadcast indecency and other measures associated with the Christian right during 2005 for this reason. Public opinion again may again be tempering the character of Republican politics.

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[64] Demand for pornography is, however, unevenly distributed. Former Delaware governor, Pete DuPont observed in a *Wall Street Journal* commentary written in the aftermath of the 2000 presidential election that rentals and sales of pornographic videos were much higher in the metropolitan areas around the geographical 'rim' of the US that lean towards the Democrats. They were lower in the more rural 'heartland': 'Mr. Gore carried the areas with the highest percentages (40% on the West Coast and 37% in New England and the Middle Atlantic states); Mr. Bush carried the area with the lowest percentage (14% in the South), and they split the rest of the country that had middling sex movie percentages.' (Pete Du Pont (2000), 'Gore carries the porn belt: this election was about culture above all', *Wall Street Journal*, November 10th, www.opinionjournal.com/columnists/pdupont/?id=65000578)

The Free Speech Coalition – which represents the interests of the industry – has, however, emphasized the extent to which there is demand in conservative regions and states. It cites Utah County in Utah: '..cable subscribers had ordered at least 20,000 explicit movies in the past two years; a local video store was deriving 20 percent of its rental sales from adult movies, even though adult movies only made up 2 percent of the store's inventory; a nearby adult store was racking up on average $111,000 dollars per year selling sex toys and other adult fare; and the Provo Marriott, literally across the street from the courthouse, had sold 3,448 adult pay-per-view movie rentals in 1998 alone.' (Free Speech Coalition (2005), White Paper 2005: A Report on the Adult Entertainment Industry,
www.freespeechcoalition.com/whitepaper05.htm.) For this reason, despite the concerns of campaigners, the delivery of pornography through cell phones may only be limited in character. As Volokh has noted, there are social constraints: 'In practice, almost no one is ever arrested for this sort of thing … People just don't feel comfortable flipping through Playboy on the commuter train.') A 2001 survey suggested that 19 per cent of North American users were regular visitors to adult content sites. (www.freespeechcoalition.com/whitepaper05.htm)

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