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Wardrobe Malfunction**

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# The Law and Economics of Wardrobe Malfunction

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**ABSTRACT:** This article examines the Federal Communication Commission's indecency regulation for television and radio. In recent years, the FCC has not only pursued high profile enforcements such as Janet Jackson's well-known Super Bowl half time show, but perhaps more important, has issued fines against broadcasters in record amounts totaling millions of dollars. Critics claim that these enforcements are politicized, arbitrary, and chilling of free speech.

This article proposes a new, market-based mechanism for indecency regulation that avoids the pitfalls of the FCC's current approach. The proposal focuses on the viewer--advertiser relationship, in distinction to the FCC's regulations, which concentrate solely on the broadcaster. Drawing on recent economic theory involving "two sided markets," we argue that if the FCC required disclosure of all programming that advertisers sponsor, consumers could then directly pressure advertisers, resulting in programming that better reflects "community standards" of indecency.

## *Introduction*

Michael Powell, Chairman of the Federal Communications from 2001 to 2005 will likely be most remembered for his controversial and attention-grabbing indecency enforcement actions against Howard Stern and, of course, Janet Jackson's Super Bowl "wardrobe malfunction."<sup>1</sup> This legacy is deserved, for in addition to these high-profile enforcement actions, Michael Powell imposed, according to The Center for Public Integrity, a higher total fine amount for 2004 broadcast indecency than for all the previous 10 years combined.<sup>2</sup>

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<sup>1</sup> According to one trade newspaper, "'The top issue [that Powell will be remembered for] will be indecency, much to his chagrin,' one industry insider, who requested his name be withheld, told Satellite News." Editorial, *FCC Chairman Michael Powell Resigns*, SATELLITE NEWS, 2005 WLNR 1335403, Jan. 31, 2005, at 4; see also *Another Powell Departs*, N.Y. TIMES, Jan. 24, 2005, at A16. ("Mr. Powell's disappointing reign will be remembered for the extremes to which he went to punish what he called indecency").

<sup>2</sup> John Dunbar, *Indecency on the Air*, THE CENTER FOR PUBLIC INTEGRITY, Apr. 9, 2004, at <http://www.publicintegrity.org/telecom/report.aspx?aid=239&sid=200>.

Many have alleged that these enforcement actions have been politically motivated stunts made in response to powerful special interests.<sup>3</sup> Some have argued that they have had a chilling effect on free speech over broadcast.<sup>4</sup> Finally, a few have even maintained that the FCC has used its licensure power to discourage licensees, *i.e.*, owners of television and radio stations, from challenging its indecency actions in court<sup>5</sup>—a Byzantine maneuver that permits congressmen and FCC commissioners to continue to use the indecency enforcement publicity that courts might otherwise stop.

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<sup>3</sup> See, e.g., Peter Johnson, *Stern Says He'll Push for Kerry*, USA TODAY, July 1, 2004, at D3; Daisy Whitney, Editorial, *Powell Overreacting to Indecency Issue*, TELEVISION WEEK, Jan. 26, 2004, at 6.

<sup>4</sup> See, e.g., Daniel Rubin, *Bad Words for Bono and Stern*, PHILA. INQ., Mar. 19, 2004, at A5. (“The American Civil Liberties Union said the measure would ‘turn down the thermostat in an already chilly atmosphere, deterring speech that is constitutionally protected.’”); see also Mark Jurkowitz, *Targeting Free Speech As Journalists Face The Courts, The FCC Clamps Down, And Secrecy Grows, Is The First Amendment Under Attack?*, BOSTON GLOBE, Dec. 7, 2004, at A12; Editorial, *Committed to the First Amendment*, BROADCASTING & CABLE, Oct. 24, 2005, at 12.

<sup>5</sup> See Jeff Jarvis, *Can the FCC Shut Howard Up?*, THE NATION, May 17, 2004, at 11 (According to “Robert Corn-Revere—the First Amendment attorney who recently got Lenny Bruce pardoned and who litigated against the Communications Decency Act . . . The FCC has done its best to prolong the longevity of this doctrine by keeping it out of court.”).

Howard Stern has often claimed that the FCC uses its power over licensure to prevent licensees from seeking judicial review of indecency actions. He recently repeated the claim as a caller on a radio show featuring Michael Powell as a guest.

Stern: Fine after fine came and we tried to go to court with you to find out about obscenity and what your line was and whether our show was indecent, which I don't think it is. And you do something really sneaky behind the scenes. You continue to block Viacom from buying new stations until we pay those fines. You are afraid to go court. You are afraid to get a ruling time and time again.

When will you allow this to go to court and stop practicing your form of racketeering that you do by making stations pay up or you hold up their license renewal?

Powell: First of all, that's flatly false. . . .

. . . .

Stern: You're lying.

Ronn Owens' KGO Radio Show (Oct. 26, 2004)

[http://www.buzzmachine.com/archives/2004\\_10\\_26.html#008280](http://www.buzzmachine.com/archives/2004_10_26.html#008280).

In addition, many claim that the FCC “sits” on agency reconsideration orders for the purpose of delaying judicial appeal. Stephen Labaton, *Knowing Indecency Wherever He Sees It*, N.Y. TIMES, Mar. 24, 2005, at C1 (“The networks and affiliates have filed papers with the commission seeking a rehearing on the three major indecency cases: the Janet Jackson incident at the Super Bowl, Bono's use of a profanity at the Golden Globe Awards and a racy episode of “Married by America.” But the agency has sat on those appeals, and may not issue rulings for months or longer. As a practical matter, the inaction by the commission has prevented the networks from taking the matter to court.”).

It is the FCC's current enforcement process, itself, that creates these problems and suspicions. First, because the FCC does not monitor the airwaves but instead relies upon citizen complaints to initiate enforcement,<sup>6</sup> particular groups—or even one particular group—can dominate enforcement even though the indecency standards are supposed to reflect “contemporary community standards.”<sup>7</sup> According to a new FCC estimate obtained by Mediaweek, nearly all indecency complaints in 2003—99.8 percent—were filed by the Parents Television Council, an activist group with links to conservative political and religious organizations.<sup>8</sup> Indeed, as this article demonstrates, modern FCC indecency actions have always been responses to political pressure in a remarkably consistent fashion.

The “game-able” enforcement process inevitably leads to claims of selective and/or arbitrary enforcement. It also leads to “public choice”-type speculation<sup>9</sup> —the indecency enforcement is designed to allow politicians to further their own agendas or, even more darkly, that the complaint process is simply a signaling exercise whereby certain political groups indicate to politicians their political clout in order to influence

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<sup>6</sup> Industry Guidance on the Commission's Case Law. 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd 7999 (2001) (“The Commission does not independently monitor broadcasts for indecent material. Its enforcement actions are based on documented complaints of indecent broadcasting received from the public.”).

<sup>7</sup> Whether speech is indecent depends, in part, on whether it is patently offensive according to contemporary community standards. See Section II.A, *infra*.

<sup>8</sup> Todd Shields, *Activists Dominate Content Complaints*, MEDIaweek.com, Dec. 06, 2004, at 4 (“Through early October, 99.9 percent of indecency complaints—aside from those concerning the Janet Jackson ‘wardrobe malfunction’ during the Super Bowl halftime show broadcast on CBS— were brought by the PTC, according to the FCC analysis dated Oct. 1.”).

<sup>9</sup> Jonathan R. Macey, *Winstar, Bureaucracy and Public Choice*, 6 SUP. CT. ECON. REV. 173, 176 (1998). (“The theory of public choice, also known as the economic theory of legislation, makes the same basic assumptions about self-interest for politicians and bureaucrats that standard economic analysis makes for private sector actors. . . . market forces provide strong incentives for self-interested politicians to enact laws that serve private rather than public interests because . . . these private groups can provide politicians and bureaucrats with the political support they need to serve their objectives of achieving re-election, or of maximizing their bureaucratic turf.”).

issues unrelated to broadcast indecency.<sup>10</sup> Further, the vagueness of the indecency standard lends itself to political manipulation, and the complaint process takes the FCC away from its stated purpose—clarifying and rendering consistent the “community standards” that underlie the indecency determination. Instead, the FCC has confused the standard. After nearly a generation of modern indecency enforcement, the standard is muddier than it was thirty years ago.

In response to these problems, this article sets forth a new, market-based approach to indecency regulation that aims to avoid many of these problems and permits the emergence of standards that more accurately reflect the community’s. This approach relying on market forces would eliminate the FCC’s aforementioned problems and deprive the bureaucratic and political classes of the opportunity to use enforcement for their own gain or for furthering particular private agenda. The proposed regulation would enhance efficiency, providing a new justification for media regulation not before considered by scholars.<sup>11</sup>

The article’s analysis questions a basic legal assumption underlying indecency regulation. As set forth by both the Supreme Court and the FCC over the last 70 years or so, “the People” own the airways, and they, through their elected officials and their delegated agencies, condition the granting of licenses to use the airways.<sup>12</sup> In exchange

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<sup>10</sup> See Eric A. Posner, *Symbols, Singles, and Social Norms in Politics and the Law*, 28 J. LEGAL STUDIES 765 (1998).

<sup>11</sup> See, e.g., Mathew Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1001 (1989) (setting forth the scarcity, public trustee, and industry structure justifications for media regulation).

<sup>12</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 393 (1969) (“Licenses to broadcast do not confer ownership of designated frequencies”); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 157 n. 54 (1994) (“[S]tations operating under Government license are trustees of property, this property to be used for the benefit of the public,” quoting Federal Radio Commission, THIRD ANNUAL REP. 31 (1929)). Or, as Senator Clarence Dill, a sponsor of the epochal 1927 Radio Act

for the right to broadcast, broadcasters must adhere to the obscenity and indecency standards the FCC promulgates.<sup>13</sup> In the language of property law, “the people” trade a limited use right in the airways in exchange for free television and radio broadcasting. While “public ownership” has fallen out of favor as a reason for justifying indecency regulation against First Amendment challenge,<sup>14</sup> it has focused media regulation on the relationship between the public and the broadcasters.

Broadcasters make their money from advertising; the more viewers or listeners (a/k/a “eyeballs”) they deliver to advertisers, the more they can charge. Thus, ABC can charge huge amounts for advertising time during the Super Bowl, but your local UHF channel can charge significantly less for re-runs of Three’s Company. The real economic transaction is *not* between broadcasters and consumers as the traditional regulatory framework assumes but between consumers’ time (the value of which is pegged to their opportunity costs) and advertisers’ provision of programming via broadcasters.

In economic terms, broadcasting markets display “two-sidedness,” a fairly new term to economic research. “Two-sided . . . markets are *roughly* defined as markets in which one or several platforms enable interactions between end-users, and try to get the

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stated, “Of one thing I am absolutely certain. Uncle Sam Should not only police this ‘new beat’; he should see to it that no one uses it who does not promise to be good and well-behaved.” Clarence Dill, *A Traffic Cop for the Air*, 75 REV. OF REV. 181, 181 (1927).

The “public trustee” basis for broadcast regulation is certainly not the only one used by the Supreme Court and the FCC over the years; they have used others, most notably scarcity but also industry structure, access and the protection of children. *See* Spitzer, *supra* note 11, at 1001. Nonetheless, it is one of the earliest justifications, and it has never been abandoned.

<sup>13</sup> For discussion of the development and history of the *quid pro quo*, see Section II.A *infra*.

<sup>14</sup> Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1724 (1997) (“Some broadcast regulation, such as the restrictions on indecent programming, are speech restrictive. These regulations must consequently look elsewhere beyond the public forum doctrine for a First Amendment justification”); *see generally* Denver Area Educ. Telecomm. Consortium Inc. v. F.C.C., 518 U.S. 727, 750 (1996) (Indecent that is constitutionally protected in the traditional “public forum” may be regulated on television.)

two (or multiple) sides ‘on board’ by appropriately charging each side.”<sup>15</sup> Thus, broadcasters try to sell their programming both to viewers and the advertisers at the same time, and success with one group of consumers, *i.e.*, viewers, has positive externalities with the other group, advertisers. Traditional broadcasting regulation only has regulated *one* side of the market. Perhaps as a result, it is the broadcaster who had been able to take sole advantage of the value of the eyeballs, with no advantage to the eyeball owners themselves.

This article maintains that FCC regulation must take into account *both* sides of the transaction—so as to permit the “eyeball owners” to bargain with their advertisers in order to get more than programming in return for listening to their commercials, *i.e.*, to gain a more direct voice in determining programming content. The FCC could easily encourage this mechanism by requiring all programs to state explicitly the entities that advertise and make their addresses/contact information easily accessible, perhaps on the internet. In this way, if enough people were sufficiently outraged by certain programming, they could express their displeasure not simply at the broadcaster but *directly* to all companies that support such broadcasting. The FCC, simply by furnishing and collecting this information, could lower the transactions cost involved for viewers to communicate and organize and thereby use their bargaining power to deal directly with advertisers for programming they find “decent.”

This market-based mechanism could enforce community standards directly without the use of the bureaucracy or legal system. Such a market-based mechanism

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<sup>15</sup> Jean-Charles Rochet & Jean Tirole, *Defining Two-Sided Markets* (Jan. 15, 2004) [http://www.brousseau.info/semnum/pdf/2004-03-01\\_tirole.pdf](http://www.brousseau.info/semnum/pdf/2004-03-01_tirole.pdf).

requires advertisers to weigh complaints, according to their numbers, vociferousness, and source in order to make a decision to revoke or support a given program. This process would arguably better reflect “community standards” than does the FCC’s one-size-fits-all approach which attempts to impose a national indecency standard. A market approach, on the other hand, allows for a localized approach better reflecting the difficult “grayness” inherent in indecency determinations. Finally, by gathering and making public information on advertisers, the FCC’s role would be analogous to that of the Food and Drug Administration in ensuring the accuracy of food labeling—a role with demonstrated efficiency gains, or that of the NEPA’s environmental impact regime which requires disclosure of project’s impact on the environment for the purpose of informing public debate on government activities.

Section I of this Article introduces the current state of the law and regulation on broadcast indecency. Section II examines the modern history of indecency enforcement and argues that the indecency regulation, as currently designed, is an invitation for partisan—and arbitrary—enforcement. The basic structure of indecency enforcement focusing on the viewer-broadcaster relationship with the FCC purporting to act on behalf of the viewer is arguable the cause for this faulty enforcement. Section III examines the history of the legislation and its judicial interpretation in an effort to understand why enforcement has always concentrated on the viewer—broadcaster relationship. This section argues that this focus proceeds from basic legal assumptions about the nature of spectrum licensing. Section IV introduces the theory of the two-sided market and explains its application to broadcasting regulation. Section IV also examines the FCC’s authority for imposing such a regime and argues that, due to the nature of media markets,



the market acting alone may not provide an optimal level of information. Section IV concludes by arguing that this new approach, following from other successfully-“information” based regulatory approaches like those at the FDA and EPA, also has the benefits of building civil society because they provide information and fora appropriate for public discussion about matters of interest to society as a whole.

## I. Current Legal Standards and Complaint Process

The following summarizes the existing legal standards for broadcast decency and the FCC's enforcement process. Section 1464 of Title 18 of United States Criminal Code states: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined or imprisoned or both was not facially unconstitutional because of vagueness of terms "indecent" or "profane."<sup>16</sup> From this criminal statute, the FCC has taken the authority to assess civil forfeitures (fines) pursuant to its own complaint process for indecent material.<sup>17</sup>

As will be discussed further in Section II, the Supreme Court in the famous *F.C.C. v. Pacifica* case<sup>18</sup> ruled that the First Amendment permits the FCC to prohibit "indecent" broadcasting. It described indecency as "nonconformance with accepted standards of morality" and involving "patently offensive reference to excretory and sexual organs and activities," but conceded that the concept of indecency "requires consideration of a host of variables."<sup>19</sup>

Section 73.3999 of the FCC states "No licensee of a radio or television broadcast station shall broadcast . . . any material which is indecent."<sup>20</sup> The FCC currently defines indecency in the following manner: "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards

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<sup>16</sup> 18 U.S.C. § 1464 (2000). Obscene material is prohibited from being broadcast as it has no constitutional protection. The Department of Justice prosecutes transmission of obscene materials. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 15 (1973); *Miller v. California*, 413 U.S. 15 (1971).

<sup>17</sup> *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1335 (D.C. Cir. 1988) (Commission has authority to sanction licensees for broadcast of indecent material).

<sup>18</sup> 438 U.S. 726, 728 (1978).

<sup>19</sup> *Pacifica*, 438 U.S. at 732.

<sup>20</sup> 47 C.F.R. Pt. 73.3999 (2004).

for the broadcast medium, sexual or excretory activities or organs.”<sup>21</sup> The Commission uses a community standard that is not region specific but reflects “an average broadcast viewer or listener” in the United States. The Commission considers the allegedly indecent utterance in context.<sup>22</sup> In making its indecency determinations, the Commission relies on three factors: “(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions or sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.”<sup>23</sup>

The FCC does not monitor broadcasts for indecent material. There are no bureaucrats on the federal payroll watching TV all day looking for “sexual or excretory organs.” Rather, the FCC relies on complaints received from members of the public. These complaints must include a tape of the offending program, the date and time of the broadcast, and the call sign of the station involved. Generally, the Enforcement Bureau of the FCC will make a recommendation and decides on an appropriate disposition, which might include denial of the complaint, issuance of a Letter of Inquiry seeking further information, issuance of a “Notice of Apparent Liability” (NAL) for monetary forfeiture, or a former referral to the commissioners (the five political appointees who lead the FCC).<sup>24</sup> If the Enforcement Bureau issues an NAL, the licensee is allowed to

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<sup>21</sup> Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 (2000) and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 FCC Rcd 7999, 8000 (2001) (*2001 Policy Statement*), citing Enforcement of Prohibitions against Broadcast Indecency in 18 U.S.C. § 1464 (2000), 7 FCC Rcd 703 n.10 (1993).

<sup>22</sup> *2001 Policy Statement*, 16 FCC Rcd 7999, at 8003.

<sup>23</sup> *Id.* at 8003.

<sup>24</sup> *Id.* at 8015. This procedure purports to be driven by the action of the Enforcement Bureau, which is staffed by career bureaucrats, but sometimes the political appointees commandeer the procedure. *See, e.g.*,

respond to the NAL. Based on the response, the FCC then can issue a monetary penalty by issuing a Forfeiture Order.<sup>25</sup> If a forfeiture order is issued, a licensee can seek reconsideration at the FCC or refuse to pay the fine and challenge the order directly in district court.

## **II. Enforcement Action**

The FCC has followed the structure, if not the precise current form, of above-described procedure since its first indecency decisions. This article maintains that that legal-administrative structure is fatally flawed. As described in the introduction, the FCC's approach leads to politicizing enforcement, blurring of legal standards, and even chilling of free expression.

As shown below, the FCC's enforcement displays a consistent pattern of bowing to political pressure. Since the 1960s, FCC action against broadcast indecency has been intermittent, intensifying exclusively during the administrations of Republican presidents in particular Richard Nixon, Ronald Reagan, and George W. Bush, who generally acted due to clear pressure from social conservative groups. This pattern of enforcement has had little to do with defining or clarifying "community standards."

### **A. Early Enforcement under the 1934 Act**

The first notable FCC indecency action followed a pattern that seems remarkably contemporary: famous entertainer gives a performance the pushes the envelope of

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Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe" Program, 19 FCC Rcd 4975 (2004) (Commissioners overriding career staff's decision).

<sup>25</sup> 2001 Policy Statement, 16 FCC Rcd at 8016.

accepted morality, but likely does not truly offend anyone. Politicians fulminate, and the FCC reacts.

In 1937 on the NBC radio network, Mae West gave a slightly salacious radio performance spoofing the Garden of Eden—with the inimitable West playing a particularly self-possessed Eve.<sup>26</sup> Responding to a significant public outcry,

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<sup>26</sup> *The Chase and Sanbourn Hour: Adam & Eve* (NBC radio broadcast, Dec. 12, 1937). The program described West approaching a "palpitatin' python," (played by Edgar Bergman - although some sources credit Ted Osborn with the role) and sends the snake to get an apple for her, leading to this exchange:  
SNAKE: I'll - I'll do it (hissing laugh)  
EVE: Now you're talking. Here - right between those pickets.  
SNAKE: I'm - I'm stuck.  
EVE: Oh, shake your hips. There, there now, you're through.  
SNAKE: I shouldn't be doing this.  
EVE: Yeah, but you're doing all right now. Get me a big one...*I feel like doin' a big apple...* Mmm-oh...nice goin', swivel hips.

Forty million people tuned into the show. According to historical reports, many found the dialogue to be highly amusing, but there were also several thousand complaints.

Oddly, a feature appearing a few minutes later on the program, introduced by Don Ameche as "the romantic battle of the century between Siren Mae West and Casanova Charlie McCarthy," featured West and Charlie McCarty engaged in a steamy dialogue—but did not elicit the same outrage.

*MAE: Nothin' I like better than the smell of burnin' wood!*

*CHARLIE: Wonder if she means me?*

*DON: Better watch out, Charlie!*

*BERGEN: Say, Charlie -- do you smell that perfume? Isn't it ravishing?*

*CHARLIE: Yeah! Yes it is -- it's ravishing! It's weakening! So help me -- I'm swooooooning! Wooo wooo woooo! What is it?*

*MAE: Whyyyyy, it's my favorite perfume: "Ashes Of Men."*

*CHARLIE: Uh-oh! "Ashes Of Men?" Holy smoke! She's not gonna make a ...cinder...outa me!" (Another line where you can pretty well guess where the censor hit.)*

Or:

*MAE: Listen, Charlie -- are these your keys?*

*CHARLIE: Oh, uhhhh, thanks Mae -- did I leave them in the car?*

*MAE: No ---you left 'em in my apartment!*

*Bergen is outraged to learn of Charlie's nocturnal activities -- but Mae rises to his defense.*

*MAE: If you wanna know, he did come up to see me.*

*BERGEN: Oh, he did? And what was he doing up there?*

*MAE: Wellll...Charlie came up, and I showed him my...etchings. And he showed me his...stamp collection.*

*BERGEN: Oh, so that's all there was to it -- etchings and a stamp collection!*

*CHARLIE: Heh, heh, heh -- he's so naive!*

And more:

*MAE: I thought we were going to have a nice long talk Tuesday night at my apartment! Where did you go when the doorbell rang?*

*CHARLIE: I was gonna hide in your clothes closet -- but two guys kicked me out!*

And, of course:

*BERGEN: Tell me, Miss West -- have you ever found the one man you could love?*

*MAE: Sure...lotsa times!*

Representative Lawrence Connery (D-MA) in a letter to then FCC chairman Frank McNich complained of “the ravishing of the American home” by West’s “foul, sensuous, indecent, and blasphemous radio program,” which “reduced the Garden of Eden episode to the very lowest level of bawdy-house stuff.”<sup>27</sup> The FCC responded with a stern warning to NBC—and NBC banned even the mention of West’s name for decades.

Except for the Mae West incident, FCC censorship powers were largely unused between the 1930s to the 1960s, as there were no notable actions for broadcast indecency during this time. Marjorie Heins states that “[t]his power lay largely dormant in the 1950s.”<sup>28</sup> A legal commentator in the 1950s wrote in the Harvard Law Review that “[t]he federal statutes which make it criminal to broadcast obscenity . . . have similarly been almost completely ignored.”<sup>29</sup>

This quiescence stems from social and political, as well as legal causes. Many believe that the 1950s were a time of tremendous conformity and cultural conservatism, and the broadcast media simply responded to these strong cultural conventions. Indeed,

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As the dialogue proceeds, recordings of the program show a certain nervousness in the response of the audience -- there is a marked edginess to the laughter, which only becomes more pronounced as the routine nears its climax:

*MAE: You ain't afraid that I'd do ya wrong? Orrrr..are ya afraid that I'll do ya right?*

*CHARLIE: Well, I'm slightly confused. I need time for that one.*

*MAE: That's all right -- I like a man what takes his...time! Why doncha come up home with me now, honey? I'll let ya play in my.....woodpile. ( A \*very\* nervous laugh from the audience on this line.)*

But Charlie won't give in, and Mae finally gives him the brush-off:

*MAE: I don't need you! I got men for every mood -- men for every day in the week - Monday, Tuesday, Wednesday, Thursday, Friday -- I change my men like I change my clothes!*

*CHARLIE: Mae! Mae! You're not walking out on me, are you?*

*MAE: I got a reputation at stake! No man walks out on me -- they might carry them out, but they never walk out!*

Mae West ended up taking most of the heat, earning a ban from NBC that lasted for nearly twenty years; her name was not even mentioned for over a decade. Standard Brands, the radio program’s sponsor, issued a formal apology on the following week’s program. In a rather sexist result, Edgar Bergen and Charlie McCarthy escaped unscathed and went into the program the most popular act on radio.

<sup>27</sup> 83 CONG. REC. H 560 (daily ed. 3<sup>rd</sup> Sess, Jan. 26, 1938) (statements of Rep. Connery).

<sup>28</sup> MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH 92 (2001).

<sup>29</sup> *State Regulation of Radio and Television*, HARV. L. REV. 386, \*390 (1959).

the few indecency complaints filed and acted upon appear remarkably tame by current standards. For instance, the FCC initiated action against Mile High Radio (KIMN) in Denver. During a 1958 show, the announcer joked about “flushing pajamas down the toilet,” “inflating ‘cheaters’ with helium,” and “the guy who goosed the ghost and got a handful of sheet.”<sup>30</sup> The Broadcast Bureau and FCC chairman sought to revoke KIMN’s license, but the majority of the Commission simply issued a cease and desist order.<sup>31</sup> Importantly, the Commission did not rely on the explicit obscenity and indecency prohibition found in section 1464 but rather the more general public interest standard.<sup>32</sup>

Encouraging conservative approaches in broadcast, the National Association of Broadcasters (NAB), the umbrella trade group of television and radio stations promulgated a private industry censorship code, under pressure implicit and explicit from the FCC as well as Congress. The code prohibited broadcast of “offensive language, vulgarity, illicit sexual relations, sex crimes, and abnormalities during any time period when children comprised a substantial segment of the viewing audience.” Again, the code was periodically changed and altered in reaction to Congressional pressure.

## **B. Changing Times**

Just as the 1960s marked a turning point in so many political and legal arrangements in American society, it marked a shift in broadcast enforcement as well. The FCC’s action against “Uncle Charlie,” host of the *Charlie Walker Show*, a program of WDKD, owned by Palmetto Broadcasting, in Kingstree, South Carolina,<sup>33</sup> was

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<sup>30</sup> HEINS, *supra* note 17, at 92; Revocation of License of Mile High Station, 28 FCC 794, 797-98 (1960).

<sup>31</sup> LUCAS A. POWE JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 167 (1987).

<sup>32</sup> Revocation of License of Mile High Station, 28 FCC at 797.

<sup>33</sup> HEINS, *supra* note 28, at 92.

probably the harbinger of things to come—as his show prompted the FCC’s first modern denial of a license renewal on the basis of immoral broadcasting. In this case, the FCC took action against this announcer for his sexual puns using names of local places, like “Ann’s Drawers” for “Andrews” and “Bloomersville” for “Bloomville” and using such terms as “let it all hang out.”<sup>34</sup> The Commission denied WDKD’s license renewal, ruling that Uncle Charlie had subjected housewives, teenagers, and young children to offensive remarks.<sup>35</sup> As with the Mile High enforcement several years earlier, the Commission did not rely on the explicit obscenity and indecency prohibition found in section 1464 but again the more general public interest standard.<sup>36</sup>

When Richard Nixon’s appointees assumed a dominant position at the FCC in the late 1960s, enforcement accelerated. Republicans wished to “take a strong stand against any programming that offended its white middle-class values.”<sup>37</sup> In January 1970, an interview with Jerry Garcia, member of the Grateful Dead and, perhaps more important, eponymous inspiration for the Ben & Jerry’s ice cream flavor, Cherry Garcia, provided the FCC an opportunity to apply obscenity and indecency prohibitions of section 1464 code directly. In an interview with Eastern Education Radio in Philadelphia, Garcia had used the words “sh—” and “fu—” “mostly either as adjectives or as substitutes for ‘et cetera,’ and occasionally as an introductory expletive.”<sup>38</sup> The Commission fined Eastern Education \$100.<sup>39</sup>

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<sup>34</sup> *Id.* at 92.

<sup>35</sup> *Palmetto Broadcasting( WDKD)*, 33 FCC 250 (1962), *aff’d sub nom. Robinson v. FCC*, 334 F.2d 534 (D.C. Cir. 1964).

<sup>36</sup> *Id.*

<sup>37</sup> POWE, *supra* note 31, at 174.

<sup>38</sup> *Id.* at 175.

<sup>39</sup> *Id.* at 174-78.



Between June 1972 and June 1973, there was a flood of indecency complaints. Many of these were in response to a new format sweeping the country called “topless radio.”<sup>40</sup> Arriving in California, it featured an announcer and a call-in guest, usually a female, discussing sexual matters. The FCC took action against WGLD-FM in Oak Park, Chicago for a discussion of oral sex that included a recommendation for performing it “when you’re driving” to take “the monotony out of things.” The Commission declared the program obscene and fined the station \$2,000.<sup>41</sup> To reach this conclusion, it relied on the then-current *Roth-Memoirs* three-prong Supreme Court rule for obscenity: (i) the dominant theme of the material had to appeal to the prurient interest, (ii) patently offensive by contemporary community standards; and (iii) have no redeeming social value.<sup>42</sup> The D.C. Circuit affirmed the decision in *Sonderling v. FCC*.<sup>43</sup>

While *Sonderling* was on appeal, New York City’s WBAI aired a monologue which was destined to shape broadcast content regulation to this day. On Tuesday, October 30, 1973, WBAI played a twelve-minute sequence from George Carlin’s album “Occupation: Foole,” that was about four-letter words and that mentioned the seven words “you couldn’t say on the public . . . airwaves.”<sup>44</sup>

The Commission received a complaint from a man, who, in the words of the Supreme Court, “stated that he heard the broadcast while driving with his young son, [and] wrote a letter complaining to the Commission. He stated that, although he could

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<sup>40</sup> POWE, *supra* note 31, at 183-84.

<sup>41</sup> 41 F.C.C.2d 919, 924 (1973).

<sup>42</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>43</sup> *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 407 (1975).

<sup>44</sup> POWE, *supra*, at 186.

perhaps understand the ‘record’ being sold for private use, I certainly cannot understand the broadcast of the same over the air that supposedly you control.”<sup>45</sup>

In fact, the complainant was John R. Douglas, a member of the national planning board of Morality in Media, a conservative political group founded in 1961 by a Jesuit priest. As Lucas Powe argues, Douglas was not the typical *Pacifica* listener, and his complaint appears to have been a calculated effort to achieve certain legal and political aims, rather than a spontaneous expression of listener outrage.<sup>46</sup> Powe points to Douglas’s six week delay in submitting his complaint and his description of his fifteen year old as his “young son” as evidence that Douglas probably did not even hear the broadcast.<sup>47</sup>

Regardless of the facts, Douglas’s efforts had their policy effects; the use of the complaint process by special interest groups to achieve political aims has been constant in broadcast content regulation. FCC Chairman Richard “Dick” Wiley prophesied threateningly about further regulation unless the broadcasters did not show “taste discretion and decency.” Congress made noises urging FCC action. This resulted in a 1975 TV agreement for a family viewing hour. It also declared the Carlin monologue banned.<sup>48</sup>

Legally, the complaint had an even greater effect. The FCC’s decision was appealed to the D.C. Circuit, which reversed it, but then the FCC appealed to the Supreme Court. The Court issued the famous *Pacifica* decision that, as discussed below in detail, forms the basis of broadcast regulation to the present day. It articulated the

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<sup>45</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726, 730 (1978).

<sup>46</sup> POWE, *supra* note 31, at 186.

<sup>47</sup> *Id.* at 186.

<sup>48</sup> 56 F.C.C.2d 94, 98 (1975).

difference between indecency and obscenity, stating that the latter had no constitutional protection under *Miller v. California*<sup>49</sup> but the former did, although it could be regulated.

### C. Post-Pacifica and the Brief Reign of the Seven Dirty Words

After *Pacifica*, the FCC did not rush to enunciate a standard of indecency based upon the broad definitions set forth in the Supreme Court opinion. Rather, it simply enforced the rule—never explicitly stated in *Pacifica* but certainly proceeding from a conservative reading of it—that seven dirty words (and a few others) were prohibited from being spoken on the air, at least before 10:00 pm. Indeed, between 1978 and 1987, the FCC failed to find one violation of the indecency standards.<sup>50</sup>

This decade or so of hands-off regulation stems largely from the chairmanship of Reagan-appointee Mark Fowler.<sup>51</sup> He was a deregulation crusader and personally loath to involve the Commission in any sort of broadcast content regulation, at one time stating that that ‘if you don’t like it [questionably indecent programming], just don’t let your kids watch it.’<sup>52</sup> Although in the years preceding 1986, the FCC received over 20,000 complaints involving obscenity and/or indecency, it failed to act on any of them.<sup>53</sup>

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<sup>49</sup> 413 U.S. 15 (1973).

<sup>50</sup> HEINS, *supra* note 28, at 109; *see also* Infinity Broadcasting Corp., 3 FCC Rcd 930, 931 (1987).

<sup>51</sup> Alex S. Jones, *F.C.C. Studies “Indecency” on Radio*, A1 (Nov. 22, 1986). (“The commission has not sent such letters [inquiries about indecency] since 1978 . . . . Under Presidents Carter and Reagan, the commission has strongly advocated a hands-off attitude regarding broadcast programming of all kinds.”); Mark Conrad, *The Constitutionality of FCC’s New Indecency Rules*, 204 N.Y.L.J. (Aug. 17, 1990) (“From 1975 to 1987, peace reigned on the airwaves as a policy of “benign neglect” occurred.”).

<sup>52</sup> HEINS, *supra* note 28, at 109, *quoting* ROBERT LIEBERT & JOYCE SPRAFKIN, *THE EARLY WINDOW: EFFECT OF TELEVISION ON CHILDREN AND YOUTH* 50 (1988).

<sup>53</sup> John Cringler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U.L. REV. 329, 345 (1989).

However, his hands-off strategy did not sit well with numerous conservative groups within his own party, including, the catalyst in the *Pacifica* case, Morality in Media. Shortly after his re-nomination in June 1986, it initiated a picketing campaign at the FCC. In addition, it also, along with other groups, such as the National Decency Forum, wrote hundreds of letters to the Senate Committee on Commerce, Science and Transportation opposing Mr. Fowler's re-nomination. The Reverend Donald Wildmon, Executive Director of the National Federation of Decency, called upon his supporters to oppose Mr. Fowler's re-nomination because he had done 'nothing, zero, zilch' about indecency during his tenure.<sup>54</sup>

These groups brought pressure directly on the FCC as well. In early July 1986, Chairman Fowler met with Brad Curl of the National Decency Forum, who met thereafter with the FCC's General Counsel, Jack Smith.<sup>55</sup> In a letter dated July 9, 1986, Mr. Curl advised the Chairman that, on the basis of their discussion, his organization would discontinue the planned picketing for the following week.<sup>56</sup> The letter stated that the FCC General Counsel would 'cooperate on some indecency actions and some further investigations of our point of view.' He declared that: 'I agree that the citizens have not been bringing you enough complaints and I will take action to publicize the need for more documented citizen complaints.' Mr. Smith said he would be more than willing to cooperate on a few 'send a message' cases.<sup>57</sup> On July 21, 1986, Brad Curl and Paul McGeady of Morality in Media had a further meeting with Chairman Fowler. On July 23,

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<sup>54</sup> *Id.* at 344; *see also* Bob Davis, *FCC Chief Shifts Obscenity View As He Seeks Job Reappointment*, WALL ST. J., Dec. 4, 1986, at 44; HEINS, *supra* note 28, at 112.

<sup>55</sup> Davis, *supra* note 53, at 44.

<sup>56</sup> HEINS, *supra* note 18, at 122, *citing* Letter from Brad Curl, National Director, Morality in Media, to Mark Fowler, Chairman, FCC 1 (July 9, 1986).

<sup>57</sup> *Id.*

1986, in a memo to the FCC, *Morality in Media* outlined the steps the FCC should take to crack down on 'indecent' programming and provided a legal analysis of the basis for proceeding.<sup>58</sup>

#### **D. The End of the Reign of the Seven Dirty Words and the Broadening of the FCC's Indecency Approach**

Under this pressure, FCC responded to three indecency actions. First, *Morality in Media* gave the FCC General Counsel tapes of a Howard Stern show aired on WYSP-FM, recorded by a *Morality in Media* supporter, Mary Keeley, a Philadelphia secretary.<sup>59</sup> Responding to the complaint, on November 14, 1986, the FCC sent an indecency inquiry to Infinity Broadcasting Corporation, licensee of WYSP-FM, Philadelphia, Pennsylvania.<sup>60</sup> The FCC's inquiry focused on Howard Stern's morning show and its inimitable sexual banter.<sup>61</sup>

Second, Nathan Post complained to the FCC about the song 'Makin' Bacon' played over the University of California's station KCSB-FM in Santa Barbara. Later, he wrote to the Parents Music Resource Center, made prominent by Tipper Gore's campaign to label albums on the basis on the explicitness of their rock lyrics.<sup>62</sup> According to Mr. Post, his letter to the Parents' Music Resource Center led to direct White House involvement. He said in a newspaper interview, "it shocked me when, kaboom! they took my letter to the White House and sent Patrick Buchanan to the FCC where he read

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<sup>58</sup> Cringer & Byrnes, *supra* note 52, at 344-45, *citing* Letter from Paul J. McGeedy, General Counsel, *Morality in Media*, to John B. Smith, General Counsel, FCC (July 23, 1986).

<sup>59</sup> Davis, *supra* note 53, at 44.

<sup>60</sup> See Regents of the Univ. of California, 2 FCC Rcd 2703 (1987); Infinity Broadcasting Corp., 2 FCC Rcd 2705 (1987).

<sup>61</sup> Infinity Broadcasting Corp., 2 FCC Rcd 2705 (1987).

<sup>62</sup> Dennis McDougal, *He's Crusader Against Indecency*, L.A. TIMES, Aug. 20, 1987, § 6, at 1.

them the riot act' in August 1986.<sup>63</sup> Responding to Post's and other listeners' complaints, the FCC on September 22, 1986 sent an inquiry to KCSB-FM, Santa Barbara.<sup>64</sup>

Third, on September 1, 1986, Larry Poland lodged a complaint against Pacifica station KPFK,<sup>65</sup> concerning the post- 10 pm broadcast of excerpts from a sexually graphic play, *Jerker*.<sup>66</sup> A couple of weeks after receiving his letter, the FCC's General Counsel called to tell Mr. Poland that the FCC had decided to 'take this one all the way to the Supreme Court' and that he was 'going to be famous.'<sup>67</sup> In the fall of 1986, the FCC advised KPFK-FM radio, Los Angeles, that it had received complaints about 'obscene or indecent programming broadcast during the evening hours on Station KPFK-FM.' The FCC directed the Chairman of Pacifica to comment on the attached complaints within 30 days.

These actions were simply not cosmetic political maneuverings. Particularly after Chairman Fowler's departure from office, they represented a real shift in indecency policy away from the minimalist "seven dirty words" approach to a more general standard of indecency.<sup>68</sup> On April 29, 1988, the Commission promulgated the text of the orders for WYSP-FM, KCSB-FM , KPFK-FM individual licensees, as well as a Public

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<sup>63</sup> *Id.*

<sup>64</sup> See Regents of the Univ. of California, 2 FCC Rcd 2703 (1987); Infinity Broadcasting Corp., 2 FCC Rcd 2705 (1987).

<sup>65</sup> Letter from Larry W. Poland, President, Mastermedia International, Inc., to Mark Fowler, Chairman, FCC (Sept. 1, 1986).

<sup>66</sup> Dennis McDougal, *How 'Jerker' Helped Ignite Obscenity Debate*, L.A. TIMES, at 1 (Aug. 18, 1987).

<sup>67</sup> Mr. Poland also repeated the story in a television interview broadcast nationwide. *McNeil Lehrer News Hour: Expletive Deleted* (PBS television broadcast, Nov. 24, 1987).

<sup>68</sup> The irony of Fowler's departure coinciding with a re-emergence of aggressive broadcast regulation was not lost by contemporary commentators.

When the Federal Communications Commission declared last week that it was going to crack down on sexually explicit language in broadcasting, it was slapping itself on the wrist. Or shooting itself in the foot. . . In an ironic way, the dirty-words decision last week is like the first coat of farewell tar-and-feathers for Fowler, who officially left office on Friday.

Cringer & Byrnes, *supra* note 53, at n. 34, citing Tom Shales, *Fowler's Way: Foul is Fair*, WASH. POST, April 20, 1987, at B1.

Notice announcing that the new indecency policy would henceforth be applicable to all broadcasters.<sup>69</sup> The Public Notice stated that the orders concerning Pacifica, the Board of Regents, Infinity, and the private radio licensee were declaratory rulings with binding precedential effect on all licensing, not simply the three cases.<sup>70</sup> Incoming Chairman Dennis Patrick was quite explicit that these rulings represented a sea change in regulation, saying “What we are doing today is to correct an altogether too narrow interpretation of indecency,”<sup>71</sup>

The Public Notice, as well as the three indecency orders, stated that the FCC would abandon the limited definition of indecency as Carlin's “seven dirty words” and would thereafter apply the 'generic' definition of indecency set forth in Pacifica. The FCC understood this definition as referring to 'language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.’<sup>72</sup>

On June 1, 1987, the National Association of Broadcasters filed a Petition for Clarification and fourteen broadcasters and media representatives jointly filed a Petition for Reconsideration directed toward the April 29, 1987 Public Notice. These groups did not question the constitutional basis for the Public Notice. Instead, they sought numerous revisions which would:

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<sup>69</sup> New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees, 2 FCC Rcd 2726 (1987).

<sup>70</sup> *Id.* at 2727.

<sup>71</sup> Neil Borowski, *FCC Targets 'Indecent' Broadcasts*, PHILADELPHIA INQUIRER, Apr. 17, 1987, A01.

<sup>72</sup> Indecency Public Notice, *supra* note 69, at 2726.

(1) provide more precise guidance as to the elements pertinent to whether material is patently offensive and violates 'contemporary community standards for the broadcast medium'; (2) consider the literary, artistic, political or scientific value of programming in judging whether it is patently offensive and, thus, indecent; (3) exempt news and informational programming from a finding of indecency; (4) defer to reasonable good faith judgments made by licensees applying the requirements set forth by the Commission; (5) apply rulings prospectively, not sanctioning licensees until they have notice that particular material has been judged to be indecent; and (6) adopt a fixed time of day after which non-obscene, adult oriented programming may be aired, or articulate a similar bright Line test.<sup>73</sup>

The Commission's Reconsideration Order did few of these things. It established a definite time, 10 pm, after which the indecency regulations would not apply. It also identified numerous factors that would enter into an indecency judgment, such as the 'vulgar' or 'shocking' nature of the words or picture, the 'manner' in which the language or depictions were presented, whether the offensive material was isolated or fleeting, a the medium's ability to separate adults from children, whether children were present in the audience, and the broadcast's artistic or literary merit.<sup>74</sup> It also stated that "community standards" looked to the national community, not the local broadcaster.<sup>75</sup>

In *Action for Children's Television v. FCC* (ACT I), a group of petitioners including Infinity Broadcasting, as well as the ACLU, which was an intervenor, challenged the regulation as overly broad and unconstitutionally vague. The D.C. Court of Appeals rejected this challenge but found that the "safe-harbor" times were not sufficiently supported and remanded them for further reconsideration.

Congress did not like this result. In 1988, Senator Jesse Helms introduced in Congress an appropriations rider requiring the FCC to set forth regulations enforcing its

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<sup>73</sup> Reconsideration Order, 3 FCC Rcd 930, 931 (1987).

<sup>74</sup> *Id.* at 932

<sup>75</sup> *Id.* at 933.



indecenty rules on a 24-hour basis.<sup>76</sup> The D.C. Court of Appeals, in *Action for Children's Television v. FCC (ACT II)*,<sup>77</sup> rejected the FCC rule written to enforce the rider and remanded the “safe-harbor” issue again to the FCC.

Congress again stepped in and passed the Public Telecommunications Act of 1992 that required the FCC to re-establish a safe-harbor for indecent speech from midnight to 6 a.m. with an exception for public broadcasters, allowing them to broadcast indecent materials after 10 pm.<sup>78</sup> In 1995, the D.C. Circuit in *Action for Children's Television v. FCC (ACT III)*,<sup>79</sup> upheld the 12 midnight to 6 a.m. prohibition, but struck down the preferential treatment for public television stations. As discussed above, this rule is reflected in the Commission's regulations<sup>80</sup> and is essentially the rule adopted in the *Public Notice* in 1987—seven years earlier.

#### E. The FCC in the 90s and the Powell Chairmanship

After ACT III finally clarified the nature of the FCC jurisdiction over broadcast indecency, the FCC assumed a middle course in regulation. Perhaps reflecting the more conservative, “Sister Souljah” tendency of the Clinton administration, the FCC leadership pursued indecency complaints but balanced that pursuit against traditional Democratic protectiveness towards free speech rights. During the 1990s, the FCC issued relatively few decency fines. From 1987 until 1997, there were thirty-six fines issued,<sup>81</sup> and from

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<sup>76</sup> Pub. L. No. 100-459 § 608, 102 Stat. 2186, 2228 (1988).

<sup>77</sup> 932 F.2d 1504 (D.C. 1991).

<sup>78</sup> Pub. L. No. 102-356, 106 Stat. 949 (1992).

<sup>79</sup> 58 F.3d 654 (D.C. Cir. 1995) (en banc).

<sup>80</sup> See 47 C.F.R. § 73.3999.

<sup>81</sup> Milagros Rivera-Sanchez & Michelle Ballard, *A Decade of Indecency Enforcement: A Study of How the Federal Communications Commission Assesses Indecency Fines*, 75 JOURNALISM & MASS COMMUN. Q. 143 (1998). According to the FCC data, there were fewer than 16 NALs between 1998 and 2000. Between 2001 and 2003, there were 17 NALs. In 2004, however, there were twelve.

1997 until the election of George W. Bush in 2001, the FCC issued 16 fines. Interestingly, since 1990 only three fines have been levied against television broadcasters, about 4 percent of the total.<sup>82</sup> Under the Clinton presidency and his FCC chairmen, Reed Hundt and William Kennard, there were some decency fines, most notably those directed at Howard Stern, fining him \$1.7 million in 1995. The total amounts remained relatively constant, however, with total yearly NALs ranging between \$25,500 and \$49,000 during the second Clinton administration.<sup>83</sup>

The election of George W. Bush and his appointment of Michael Powell as FCC commission changed matters. From the beginning of his term, Powell increased the amount in his first year from \$48,000 to \$91,000. In 2004, the last full year of his service, the FCC fined broadcasters an astounding \$7,928,080—more than in the ten prior years together.<sup>84</sup>

This might seem surprising. Michael Powell had served as one of the five FCC commissioners for 4 years before President George W. Bush appointed him chairman. As commissioner, he had expressed a disinclination to vigorously enforce the indecency prohibitions. In 2001, he publicly stated that “It is better to tolerate the abuses on the margins than to invite the government to interfere with the cherished First Amendment.”<sup>85</sup> In 1999, he accepted the Media Institute's Freedom of Speech Award with a stirring defense of the First Amendment: “We should think twice before allowing the government the discretion to filter information to us as they see fit.”<sup>86</sup> As an FCC

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<sup>82</sup> Dunbar, *supra* note 2.

<sup>83</sup> Federal Communications Commission, <http://www.fcc.gov/eb/broadcast/NAL.html> (visited July 30, 2005).

<sup>84</sup> Dunbar, *supra* note 2.

<sup>85</sup> *Powell's Legacy*, KANSAS CITY STAR, at HI (Feb. 12, 2004).

<sup>86</sup> See Jarvis, *supra* note 5, at 11.

commissioner, he said that "government has been engaged for too long in willful denial in order to subvert the Constitution so that it can impose its speech preferences on the public--exactly the sort of infringement of individual freedom the Constitution was masterfully designed to prevent."<sup>87</sup> After he became chairman, he said, "I don't know that I want the government as my nanny."

But later, Chairman, Powell changed his tune.<sup>88</sup> Like Fowler, he was quickly enlisted into the Republican *kulturkampf* as indecency tsar, and like Tsar Boris Godunov of Russian history, he overcame his hesitance and compunction about exercising such power and eventually presided over the largest indecency "crackdown" in FCC history. He justified his position by claiming that he was merely "following orders" so to speak, stating that "I do not have the luxury of ignoring my duty to enforce the statute because owners might react with excessive conservatism."<sup>89</sup>

The infamous 2004 Super Bowl half-time wardrobe malfunction—when Justin Timberlake ripped open Janet Jackson's bustier to reveal her right breast, brought indecency to the center of the national political discussion. Reacting to the public outcry, Congress considered (and is still considering) numerous bills to significantly stiffen indecency penalties. Indeed, there is some talk, particularly from Senator Stevens (R-AK) and Commissioner Kevin Martin to apply indecency rules to cable and satellite as well. The FCC reacted with promises of a thorough investigation—which resulted in a hefty fine—and more promises of being more vigilant.

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<sup>87</sup> *Id.*

<sup>88</sup> *Keeping it Clean*, VIDEO BUS., Feb. 14, 2005 ("Although Powell got with the program, he was always something of a reluctant cultural warrior, having previously expressed uneasiness over the FCC's role as censor.").

<sup>89</sup> See Javis, *supra* note 5, at 11.

Powell, however, was pursuing an aggressive stance towards indecency even before the wardrobe malfunction.<sup>90</sup> One commenter states that the incident merely “provided a well-timed boost to the FCC’s ongoing attempts to enforce indecency regulation more stringently.”<sup>91</sup> A week before the Super Bowl, the FCC issued a notice of apparent liability (NAL) against Clear Channel Communications of \$755,000 against Bubba the Love Sponge, a colorful radio personality.<sup>92</sup> On October 2, 2003, the FCC proposed a \$357,000 fine against Infinity Broadcasting Operations, Inc. for broadcast of an Opie and Anthony radio show that involved a contest for engaging in sex in public places, including St. Patrick’s Cathedral.<sup>93</sup> The Janet Jackson incident, however, led to a tremendous intensification of enforcement.

Once again, the role of social conservative groups proved central. In 2003 and 2004, the number of complaints skyrocketed from 13,992 in 2002, to 202,032 in 2003, to an astounding 1,405,419 in 2004 (largely due to the Janet Jackson incident).<sup>94</sup> Some analysts claim that over 99 percent of the 2004 complaints (barring those involving Jackson) were sent by the Parents Television Council, a conservative political group with connections to the Republican party.<sup>95</sup> This figure is disputed. Some claim the figure is only 20 percent.<sup>96</sup>

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<sup>90</sup> Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, 22 COMM. LAW 1, 25 (2004).

<sup>91</sup> *Id.*

<sup>92</sup> Clear Channel Broad Licenses, Inc., Notice of Apparently Liability for Forfeiture, FCC 04-17 (Jan. 27, 2004).

<sup>93</sup> Infinity Broad. Operations, Inc., Notice of Apparent Liability for Forfeiture, 18 F.C.C. Rcd 19954 (2003).

<sup>94</sup> Federal Communications Commission, <http://www.fcc.gov/eb/broadcast/NAL.html> (visited July 30, 2005).

<sup>95</sup> Shields, *supra* note 8, at 4.

<sup>96</sup> {GET CITE}

Beyond the sheer number and size of Powell's indecency enforcements, his administration saw an unprecedented expansion of the FCC's authority under section 1464. For instance, during the Golden Globe award ceremony which was televised live on January 19, 2003, the singer Bono used the phrase "fu—ing brilliant" when accepting an award for his song "The Hands That Built America" from the movie "Gangs of New York."<sup>97</sup> The FCC's Enforcement Bureau initially rejected the resulting indecency complaints on the ground that one, fleeting word could not be indecent under the FCC's regulations.<sup>98</sup> Recall that FCC regulations require a depiction of sexual or excretory organs and look to whether the challenged material "dwells" on sexual matters.<sup>99</sup> As the FCC's Enforcement Bureau reasoned, a fleeting mention of one word does not fit that standard.<sup>100</sup> Further, it is hardly clear that in context Bono even used the work "fu----g" to refer to anything sexual. Rather, as he used the word, it was probably synonymous with "very" or "extremely."

The FCC commissions rejected its own Bureau's ruling.<sup>101</sup> The Commission ruled that contrary to its own precedent one fleeting use of the word is indecent because "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation."<sup>102</sup> The Commission simply disregarded the factor that the indecent programming must "dwell" on sexual or excretory functions.

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<sup>97</sup> Jim Rutenberg, *Few Viewers Object as Unbleeped Bleep Words Spread on Network TV*, N.Y. TIMES, Jan/25, 2003, at B7.

<sup>98</sup> Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe" Awards" Program, Memorandum Opinion and Order, 18 FCC Rcd 19859 (Oct. 3, 2003).

<sup>99</sup> See note 22 and accompanying text.

<sup>100</sup> Complaint, 18 FCC Rcd at 19863.

<sup>101</sup> Complaints Against Various Broadcast Licenses Regarding the Airing of the "Golden Globe Awards" Program, 19 FCC Rcd 4979 (Mar 18, 2004)

<sup>102</sup> *Id.* at 4987; Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and its New Path on Profanity*, 28 SEATTLE U. L. REV. 61, 64-78 (2004).

Even more remarkable, the Commission determined that the broadcast was “profane.” The word “profane” has a very specific legal meaning: it refers to blasphemous speech.<sup>103</sup> The only FCC precedent on the matter reflects this understanding,<sup>104</sup> and, indeed, the FCC never found anyone liable under this section. To find a successful enforcement for profane speech, one had to go to the FCC’s predecessor, the Federal Radio Commission, and its 1931 action in *Duncan v. United States*.<sup>105</sup>

The FCC attempted to escape this precedent in two ways. First, it muddied the difference between “profane” and “profanity,” stating glibly “the use of the phrase at issue here in the context and at the time of day here constitutes “profane” language under 18 U.S.C. § 1464. The word “profanity” is commonly defined as “vulgar, irreverent, or coarse language”<sup>106</sup>; however, the word does not appear in the statute. The FCC then found a thirty year old opinion addressing a claim that section 1464 is unconstitutionally vague because it uses the terms “indecent and profane.” In dicta (because, as the court noted the indictment at issue was for “obscenity”), the court stated *without citation* that profane is “construable as denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to

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<sup>103</sup> BLACK’S LAW DICTIONARY 389 (8th ed. 2004) (defining profane as “(Of speech or conduct) irreverent to something held sacred”).

<sup>104</sup> Raycom, Inc, 18 FCC Rcd 4186 (2003) (calling God a “sonofabitch” is not profane under section 1464) (citing *Gagliardo v. United States*, 366 F.2d 720, 725 (9th Cir. 1966) (“God damn it” not profane under section 1464) and Warren B. Appleton, 28 FCC 2d 36 (B’cast Bur. 1971) (“damn” not profane under section 1464) (also citing *Gagliardo*)).

<sup>105</sup> 48 F.2d 128, 134 (9th Cir. 1931) (conviction under section 1464 for using profane language upheld where “the defendant ... referred to an individual as ‘damned,’ ... used the expression ‘By God’ irreverently, and ... announced his intention to call down the curse of God upon certain individuals”).

<sup>106</sup> Complaints Against Various Broadcast Licenses Regarding the Airing of the “Golden Globe Awards” Program, 19 FCC Rcd at 4985.

members of the public who actually hear it as to amount to a nuisance.”<sup>107</sup> Relying on this precedent, the Commission concluded that Bono’s phrase was profane “under the Seventh Circuit nuisance rationale. Use of the "F-Word" in the context at issue here is also clearly the kind of vulgar and coarse language that is commonly understood to fall within the definition of ‘profanity.’”<sup>108</sup>

This analysis constitutes aggressive agency statutory interpretation to say the least. The NAL-indecency procedure is probably classified as an informal adjudication and, therefore, strong rules of precedent applying to formal adjudication probably do not exist. As Richard Pierce states, “[t]he dominant law clearly is that an agency must either follow its own precedents or explain why it departs from them.”<sup>109</sup> On the other hand, to the extent that informal adjudication does include justifications for actions, the agency must provide justifications for departures.<sup>110</sup> Further, it is arguably that to the extent the Bono decision constitute a rule change, *i.e.*, a change in the FCC’s understanding of the word “indecent” and “profane” as established in its informal adjudication and its informal rulemaking,<sup>111</sup> such a change most likely requires further notice and comment.<sup>112</sup>

Michael Powell was happy to take credit for this work. As he told the National Press Club in 2004, the last year of his chairmanship, “This Commission, since I took

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<sup>107</sup> Tallman v. U.S., 465 F.2d 282, 292 (7th Cir. 1972).

<sup>108</sup> Complaints Against Various Broadcast Licenses Regarding the Airing of the "Golden Globe Awards" Program, 19 FCC Rcd at 4985.

<sup>109</sup> II RICHARD J. PIERCE, JR. ADMINISTRATIVE LAW TREATISE § 11.5 t 817 (2002); *see also* See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973) (asserting adjudicatory decisions “may serve as precedents” and that there is the agency’s “duty to explain its departure from prior norms” flows from that presumption”); Kelly ex rel. Mich. Dep’t of Natural Res. v. FERC, 96 F.3d 1482, 1489 (D.C. Cir. 1996) (“It is, of course, axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent.”).

<sup>110</sup> *Id.* §11.5 at 820.

<sup>111</sup> *See supra* note 22 and accompanying text.

<sup>112</sup> Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 587 (D.C. Cir. 1997). (“To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements [of informal rulemaking under section 553 of the APA.]”)

over, has worked diligently to increase out enforcement efforts. And I do think the enforcement efforts and fines we have levied have far surpassed those applied by previous commissions combined.”<sup>113</sup> In 2004, the last full year of the Powell chairmanship, the FCC proposed more fines for broadcast indecency than the previous 10 years combined.<sup>114</sup>

### **III. History of the Indecency Prohibitions and Its Underlying Assumptions About Media Markets and Public Ownership**

The FCC’s regulation of indecent broadcast is a record of the failure of legality. As the preceding discussion suggests, the agency has been unable to create a coherent definition of indecency. This failure may stem from the trustee/agent assumption in the enforcement of indecency standards: acting at the behest of the viewer, the FCC attempts to determine what indecency is and then applies these standards against the broadcaster. The FCC’s effort to define indecency is too easily politicized.

The question emerges as to *why* regulation has kept its gaze only on the viewer and broadcaster. As discussed in Section V, there is nothing in the relevant statutes or controlling judicial precedent that would preclude the FCC’s examination of the viewer-advertiser relationship, and as discussed in the next section, such an examination is desirable.

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<sup>113</sup> Dunbar, *supra* note 81.

<sup>114</sup> *Id.*



In recent years, the Supreme Court has not relied on the public ownership concept in its rulings upholding the FCC's indecency standards constitution.<sup>115</sup> This is probably because the proposition that public ownership permits content-based regulation would probably conflict with the Court's rulings that mere public ownership of, for instance, parks, does not confer government the right to regulate the content of speech in public parts.<sup>116</sup> Rather, the Court has relied on the uniquely pervasive nature of broadcast communications and children's access to it to justify regulation. In contexts not directly involving First Amendment issues, however, the Court has continued to recognize public ownership as a basis for broadcast regulation.<sup>117</sup>

This section does not advocate a return to the public ownership justification of broadcast media regulation. Rather, the following recounts the history of indecency regulation to show how and why the assumptions upon which indecency regulation was based naturally focused the regulator on the broadcaster-viewer relationship.

### **A. The Radio Act of 1912**

The Radio Act of 1912<sup>118</sup> represented the first federal foray into federal broadcast regulation. It was passed to satisfy America's obligations under international treaty<sup>119</sup>

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<sup>115</sup> See *FCC v. Pacifica Foundation*, 438 U.S. 726, 733 (1978) (two reasons justify the indecency regulation: "the uniquely pervasive presence in the lives of all Americans" and "broadcasting is uniquely accessible to children").

<sup>116</sup> *POWE, JR., supra* note 31, at 199 (noting that the public ownership rationale cannot justify the disparate treatment of broadcast television).

<sup>117</sup> *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973) (the airwaves are a "valuable and limited public resource"); *NBC v. FCC*, 516 F.2d 1180, 1192 (D.C. Cir. 1975) (separate opinion of Tamm, J.), *vacating as moot* 516 F.2d 1101 (D.C. Cir. 1974) ("broadcasters are temporary permittees-- fiduciaries--of a great public resource and they must meet the highest standards which are embraced in the public interest concept") (quoting *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969)), *cert. denied*, 424 U.S. 910 (1976).

<sup>118</sup> Pub. L. No. 62-267, 37 Stat. 302.

<sup>119</sup> The International Wireless Telegraph Convention required the United States to "to apply the positions of the present Convention to all wireless telegraph stations open to public service between the coast and vessels at sea." Article 1, 27 Stat. 1565, T.S. No. 568.

regarding ship and marine ship-to-shore and ship-to-ship radios,<sup>120</sup> an issue that became particularly pressing due to the role that radio signaling confusion played in the sinking of the *Titanic*.<sup>121</sup> The Act established federal authority to regulate the airways,<sup>122</sup> and although the Act did not declare federal “ownership” of the airways, it established that broadcasting was a privilege requiring federal permission.<sup>123</sup> Anyone with a radio transmitter—from commercial stations to college physics students—could transmit provided she sent a postcard to the Secretary of Commerce.<sup>124</sup> The Secretary had no discretionary authority and had to issue a license to anyone who met the statutory standards.<sup>125</sup> As Thomas Hazlett says, “[t]he federal government was asserting ownership of the electromagnetic resource, but in a rather peculiar way: the secretary took no payment and issued no exclusive frequency rights.”<sup>126</sup>

Strikingly, despite the almost “commons” management of the radio spectrum under the Radio Act of 1914, the government still required that users of spectrum uphold indecency standards. Thus, even at the very infancy of federal ownership of the airwaves, it was demanding its indecency quid pro quo.

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<sup>120</sup> DOCUMENTS OF AMERICAN BROADCASTING 14 (Frank J. Kahn ed., 4<sup>th</sup> ed. 1984) (1969).

<sup>121</sup> See KRATTENMAKER & POWE JR., *supra* note 12, at 5-7. (detailing the *Titanic* disaster and the subsequent genesis of broadcast regulation).

<sup>122</sup> See THOMAS STREETER, *SELLING THE AIR: A CRITIQUE OF THE POLICY OF COMMERCIAL BROADCASTING IN THE UNITED STATES* 78 (1996) (noting that the 1912 Act first asserted the principle of federal limitations on spectrum access and characterized radio transmissions as a privilege sanctioned by the government).

<sup>123</sup> Radio Act of 1912, Pub. L. No. 62-267, 37 Stat. 302.

<sup>124</sup> According to the New York Times, February 25, 1912, there were 733 public entertainment stations and 18,119 amateur radio sending stations.

<sup>125</sup> *Hoover v. Intercity Radio Co.*, 286 F. 1003, 1007 (1925) (“It logically follows that the duty of issuing licenses to persons or corporations coming within the classification designated in the act reposes no discretion whatever in the Secretary of Commerce. The duty is mandatory; hence the courts will not hesitate to require its performance.”).

<sup>126</sup> Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J. L. & ECON. 133, 135 (1990).

In 1914, the Department of Commerce published a pamphlet entitled “Radio Communication Laws of the United States.” Regulation 210 states “[n]o person shall transmit or make a signal containing profane or obscene words or language.” According to historian Rivera-Sanchez, “[i]t is not clear where this regulation came from.”<sup>127</sup> There is no record of either an agency rulemaking or evidence of the pamphlet in the Congressional Record. Rivera-Sanchez notes that editorials in the New York Times suggested that those involved in mischievous radio interference may have used obscene language.<sup>128</sup>

Apparently, this regulation was enforced, although the extent of enforcement is unclear. By the standards of the Howard Stern Show, these complaints were generally tame. For instance, in 1920 amateur licensee, Edgar Ferguson of Lansing, Michigan, received a warning that his license would be suspended for three months if he continued to use the phrase “go to hell,” which contained the profane word “hell” on the air. On the other hand, a transmission between two sailors discussing the comparative advantages of and services available from prostitutes at several ports of call would be racy even by 21<sup>st</sup> Century standards. It should be noted that all recorded examples of enforcement involved point-to-point communications, as opposed to broadcast content intended for a mass audience. “The scarcity of documented complaints about the use of offensive speech in radio broadcasting may have been the result of broadcasters’ respect for their heterogeneous audience.”<sup>129</sup>

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<sup>127</sup> Milagros Rivera-Sanchez, *The origins of the ban on ‘obscene, indecent or profane language of the Radio Act of 1927*, 149 Journalism & Mass Communications Monographs (Columbia, 1995).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

## B. Passage of the 1927 Radio Act and the Federal Radio Commission

### 1. History

Throughout the 1920s, the country experienced a rapid growth of radio broadcasts. By 1922, there were 576 broadcast stations, and the numbers increased throughout the decade.<sup>130</sup> After all, as we learn in introduction microeconomics 101, if the price is zero, demand is infinite. The fear became rampant, at least in industry and Washington policy circles, that the airways had become a tower of Babel.<sup>131</sup> For instance, J.H. Morecraft, in the industry magazine *Radio Broadcast*, “Freedom of the air does not require that everyone who wishes to impress himself on the radio audience need have his private microphone to do so.”<sup>132</sup> He added, “Radio waves cannot be freely used by everyone. Unlimited use will lead to its destruction.”<sup>133</sup>

Herbert Hoover, already an internationally-known figure due to his relief work in Europe after the First World War, was serving as Secretary of Commerce at the time. An engineer by training, he realized the importance, power, and potential of commercial broadcast. He wished to “remol[ded] the Radio Act from its origins and emphasis on wireless point-to-point telegraphy to one that fostered a wider use of the newly emerging technology.”<sup>134</sup> His problem was that the 1912 Act did not give him sufficient power to impose restrictions on broadcast or even reallocate spectrum. Further, a court decision, *Hoover v. Intercity Radio Co.*, made clear that Hoover did not have the authority to

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<sup>130</sup> Hazlett, *supra* note 126, at 139.

<sup>131</sup> See ERIK BARNOUW, A TOWER OF BABEL. A HISTORY OF BROADCASTING IN THE UNITED STATES (1966).

<sup>132</sup> J.H. Morecraft, “March of Radio” *Radio Broadcast* April 1926 at 555. ?

<sup>133</sup> *Id.* at 475. ?

<sup>134</sup> KRATTENMAKER & POWE, JR., *supra* note 12, at 7.

withhold a license but could only select times and wavelengths to minimize interference.<sup>135</sup>

Hoover initiated radio conference, in 1922, 1923, 1924, and 1925, for the purpose of creating consensus on the technical and policy aspects of radio regulation. Each of these conferences set forth plans for a more comprehensive regulation of the airwaves and proposed draft legislation to enact these plans. Of course, these well-thought out plans did not prompt Congress to act.

Hoover, perhaps sensing that mere conferring would not bring congressional action, precipitated events. Despite the ruling in *Hoover v. Intercity Radio Co.*, Hoover continued to refuse certain radio applications. In a 1926 decision, *United States v. Zenith*,<sup>136</sup> a United States district court ruled that not only did the Secretary of Commerce lack authority to refuse to issue licenses, he also lacked the authority to select times when broadcasters could broadcast. In reaction to the decision, Hoover refused to regulate broadcast and essentially closed shop. This, of course, produced a crisis—that forced Congress to act, which is what Hoover and radio industry wanted.<sup>137</sup> As a result, President Calvin Coolidge signing the Radio Act of 1927, establishing the Federal Radio Commission (FRC), which would have the authority to assign and revoke radio licenses.<sup>138</sup>

## **2. Ownership Assumptions Underlying the Act**

Congress made clear that use of spectrum was a quid pro quo. Broadcasters could use their assigned spectrum, but had to give something to the government in exchange—

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<sup>135</sup> *Hoover v. Intercity Radio Co.*, 286 Fed. 1003 (App. D.C. 1923).

<sup>136</sup> *See United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926).

<sup>137</sup> KRATTENMAKER & POWE, *supra* note 12, at 7-16; Hazlett, *supra* note 126, at 159.

<sup>138</sup> Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

and that something was the “public interest” obligation. The meaning of “public interest” was rather vague. As Senator Dill, the Act’s author, said, “It can mean virtually anything—that’s its virtue.”<sup>139</sup> Regardless of the exact parameters of “public interest,” it was clear that Congress expected something in return for the privilege of broadcasting.

The notion that government owned the air and had a right to demand a quid pro quo for usage was well established in the Act itself and in the discussion surrounding it. Fundamentally, the Act “bluntly declared that there could be no private ownership of the airwaves; they were public and use could occur only with the government’s permission.”<sup>140</sup> Maine Congressman Wallace White, a sponsor of the 1927 Act expressed the typical view that “We . . . have reached the definite conclusion that the right of all of our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the rights of the public to service is superior to the right of any individual to use the ether.”<sup>141</sup> Senator Dill states “the one principle regarding radio that must always be adhered to, as basic and fundamental, is that government must always retain complete and absolute control of the right to use the air.”<sup>142</sup> The preamble of one of the bills introduced in Congress, a precursor of the 1927 Act, stated “the ether is the inalienable possession of the people.”<sup>143</sup>

At the November 1925 Radio Conference, Hoover stated

Some of our major decisions of policy have been of far-reaching importance and have justified themselves a thousand-fold. The decision that the public, through

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<sup>139</sup> KRATTENMAKER & POWER, *supra* note 12, at 15.

<sup>140</sup> KRATTENMAKER & POWER, *supra* note 12, at 12, *citing* 44 Stat. 1162 (1927).

<sup>141</sup> XXX Cong. Rec. H5479 (1926).

<sup>142</sup> Dill, *supra* note 12, at 184.

<sup>143</sup> *Interim Report on Radio Legislation* (1926), 12 A.B.A. J. 848.

the Government, must retain the ownership of the channels through the air with just as zealous a care for open competition as we retain public ownership of our navigation channels.<sup>144</sup>

A 1929 law review analysis asserts that “the idea that the ‘government owns the ether’ was an *idée fixe* in the debate of Congress.”<sup>145</sup> According to Powe and Krattenmaker,

Although the 1912 Act had required a license to use the air, it had been silent on the issue of ownership of the airwaves. The 1927 Act was not. It bluntly declared that there could be no private ownership of the airwaves; they were public and use could occur only with the government’s permission.”<sup>146</sup> A 1926 Attorney General opinion states that “There is no doubt whatever that radio communication is a proper subject for Federal regulation under the commerce clause of the Constitution.”

Interestingly, prior to passage of the Act, Congress ensured that no one else owns them. Senate Joint Resolution 125, signed by President Coolidge, required that any applicant for a license or license renewal has to “execute in writing a waiver of any right or any claim to any right, as against the United States, to any wave length or to the use of the ether in radio transmission because of previous license to use the same or because of the use thereof.”<sup>147</sup>

As Powe and Krattenmaker re-iterate point out, broadcasters were involved in a *quid pro quo*. Hoover understood that in exchange for a license government would want something back, stating “it becomes of primary public interest to say who is to do the broadcasting, under what circumstances, and with what type of material.”<sup>148</sup> House sponsor Wallace White of Maine stated that while under the older Radio Act of 1912, and individual could “demand a license whether he will render service to the public there

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<sup>144</sup> C.M. Jansky, Jr., *The Contribution of Herbert Hoover to Broadcasting*, 1 J. BROAD. 241, 248 (1957).

<sup>145</sup> Note, *Federal Control of Radio Broadcasting*, 39 YALE L.J. 244, 250 (1929).

<sup>146</sup> KRATTENMAKER & POWE JR., *supra* note 12, at 12, *citing* 44 Stat. 1162.

<sup>147</sup> S.J. Res. 125 (1926).

<sup>148</sup> KRATTENMAKER & POWE JR., *supra* note 12, at 19, *citing* Daniel E. Garvey, *Secretary Hoover and the Quest for Broadcast Regulation*, 3 JOURNALISM HIST. 66, 67 (1976).

under or not,” the 1927 Act created a requirement of public service.<sup>149</sup> Finally, in 1928, the second year of its existence, the Federal Radio Commission, in its second annual report, concisely characterized the right to broadcast as a quid pro quo. “The Commission must determine from among the applicants before it which of them will, if licensed, best serve the public. . . . Those who give the least, however, must be sacrificed for those who give the most.”<sup>150</sup>

### **C. Obscenity, Indecency, and the Public Interest Standard**

As part of the public interest standard, the 1927 Act included prohibitions against broadcast of obscene, indecent, and profane speech. To be specific, Congress empowered the Federal Radio Commission (“FRC”) in Section 28 of the Act to prosecute “whoever utters any obscene, indecent, or profane language by means of radio communication.”<sup>151</sup> At the same time, the Act, adopting the recommendations of the Fourth National Radio Conference in 1925, stated that “nothing in this act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communication.”<sup>152</sup>

To modern sensibilities, this statutory juxtaposition—prohibitions on certain types of speech next to sections prohibiting censorship—seems jarring. It is arguable, however, that the language simply reflects a different historical mindset. At the time,

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<sup>149</sup> Wallace H. White, *Unscrambling the Ether*, LITERARY DIGEST, Mar. 5, 1927, at 7.

<sup>150</sup> Statement of the Commission, Aug. 23, 1928, reproduced in FEDERAL RADIO COMMISSION, SECOND ANN. REP. 166, 170 (1928) (App. F).

<sup>151</sup> 47 U.S.C. §§ 81-83 (repealed 1934).

<sup>152</sup> Pub. L. No. 69-632, 44 Stat. 1162.



ensorship probably had a more proscribed meaning focused on government review of political speech.<sup>153</sup> That contemporaries did not view restrictions on obscenity, indecency, and profanity as censorship probably reflected an unstated societal consensus that constitutional protections could only be exercised within the confines of public propriety.

To those involved in the Act's passage, the obscenity, indecency, and profanity language no doubt seemed a natural extension of the public interest standard. Senate sponsor, Senator Dill stated, "Of one thing I am absolutely certain. Uncle Sam should not only police this 'new bear'; he should see to it that no one uses it who does not promise to be good and well-behaved."<sup>154</sup> In Herbert Hoover's address to the Third Radio Conference of 1924, he stated

Through the policies we have established the Government and therefore the people, have today the control of the channels through the ether just as we have control of our channels of navigation . . . We will maintain them free . . . but we must also maintain them free of malice and unwholesomeness.<sup>155</sup>

Perhaps due to the unstated societal consensus that free speech over broadcast had to exist within standards of propriety, the indecency sections were mentioned only in passing in the legislative history. Legal authorities, including the *Pacifica* case (the case involving George Carlin's seven dirty words discussed *infra*) make much of the fact that the legislative history is silent on Section 28 of the 1927 Act, stating that the *Pacifica* case states the obscenity and decency provision "was discussed only in generalities when

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<sup>153</sup> David M. Rabban, *The Free Speech League, The ACLU, and Changing Conceptions Of Free Speech In American History*, 45 STAN. L. REV. 47, 55-67 (1992).

<sup>154</sup> Dill, *supra* note 12, at 181.

<sup>155</sup> Jansky, *supra* note 127, at 248.

it was first enacted.”<sup>156</sup> This legislative silence justified, to some degree, the *Pacifica* Court’s willingness to craft its own definition of indecency.

Even though the terms were not discussed, their meaning, however, was probably not as unclear as the dissent in *Pacifica* seems to imply—and, indeed, undercuts the entire *Pacifica* regulatory structure in which “obscenity” and “indecency” refer to different concepts. The Comstock Act of 1872 prohibited mailing of obscene materials. It read “no obscene book, pamphlet, picture, print or other publication of a vulgar or indecent character . . . shall be carried through the mail.”<sup>157</sup> Early court decisions interpreting the Comstock Act did distinguish obscenity from indecency. For instance, an Indiana federal court stated that indecency was a general category encompassing obscene.<sup>158</sup>

Further, as discussed *infra*, there were prosecutions for “obscene and profane” utterances under the 1912 Act and the 1914 Commerce Department regulations. Rivera-Sanchez suggests that the 1927 Radio Act language was largely lifted from the Commerce Department pamphlet of 1914. The First Radio Conference produced a draft radio bill dated April 18, 1922. Section 3(E)(e) of the document states that an operator’s license shall be suspended if he “has transmitted superfluous signals, or signals containing profane or obscene words or language.” This language tracks to the Commerce Department pamphlet perfectly. When Representative Wallace H. White introduced H.R. 11964 on June 9, 1922, Section 3(E)(e) contained the same language as the draft found in the Department of Commerce regulations. According to Rivera-Sanchez, “it is reasonable to suggest that White’s H.R. 11964 was based on the draft from

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<sup>156</sup> *Pacifica*, 438 U.S. at 3034.

<sup>157</sup> 17 Stat. 283, Sec. 148 (Jun. 8, 1872).

<sup>158</sup> *United States v. Males*, 51 F. 41 (1892).

1922. White introduced this bill at least three times between 1922 and 1926.”<sup>159</sup> When Senator Clarence introduced H.R. 9971, however, he reversed the word order of profane and obscene and added the word “indecent.”<sup>160</sup> There is no stated reason why Clarence did this. This version with slight changes was adopted into the 1927 Act.

This interesting historical footnote suggests, however, the *Pacifica* opinion was probably incorrect in claiming that “indecent” and “obscenity” referred to different concepts. Certainly, there is no evidence that the statute’s drafters intended anything different in using the two words. Rather, the evidence, as it is, suggests that the congressmen envisioned prohibitions on an entire category of inappropriate speech.

#### **D. The 1934 Act and the Federal Communications Commission**

Dissatisfied with the FRC, President Roosevelt set up a committee, including congressional leaders such as Senator Dill who had been active in the radio debate in 1920s, to work for the creation of a federal agency with power over both wire and radio companies. The committee issued a report recommending a single body to regulate both phones and radios. After considerable wrangling over whether spectrum would be allocated to non-profit and special interest groups, Congress passed the 1934 Communications Act. It established the Federal Communications Commission (FCC) and transferred authority over spectrum decision to the FCC. The radio provisions in Title III of the new Act were essentially the same as those in the 1927 Act, also affirming the government ownership of all broadcasting rights.

The 1934 Act also adopted the 1927 Act’s obscenity, indecency, and profanity language largely verbatim. There was little legislative history discussing the

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<sup>159</sup> H.R. 13773, 67<sup>th</sup> Cong. (4<sup>th</sup> Sess. 1923); H.R. 7357, 68<sup>th</sup> Cong. (1<sup>st</sup> Sess. 1924), H.R. 5589, 69<sup>th</sup> Cong. (1<sup>st</sup> Sess. 1925); and H.R. 9108, 69<sup>th</sup> Cong. (1<sup>st</sup> Sess. 1926).

<sup>160</sup> S. Rep. No. 772, 69<sup>th</sup> Cong. (1<sup>st</sup> Sess. 1926).

incorporation of such language into the new legislation. The ban on obscene, indecent, or profane language was amended in 1948 and replaced with criminal penalties for using such language over the airwaves. This modified clause was moved from the Communications Act and incorporated into the Criminal Code.<sup>161</sup> Despite the re-codifications, the language remains largely identical.

#### **E. Conclusion**

The obscenity and indecency prohibitions emerge from a legal paradigm that sees the broadcaster and the government involved in an exchange. The broadcasters get from the “People”, through its agency the FCC, a right to use, “license,” and, in exchange, the “People” receives from the broadcaster the promise to act as a trustee in the public interest—with the FCC acting as the enforcer of the agreement. From the very inception of radio, the trustee responsibilities included the obligation to adhere to indecency and obscenity requirements: they were part of the quid pro quo.

Thus, the entire thrust of the regulatory system has focused on the licensee and its obligations towards the listener/viewer with the FCC as enforcer. This analysis ignores the relationship between the viewer and the advertiser. It is to this relationship and how it can be included in a regulatory structure that we now turn.

#### **IV. A Different Look At Media Markets**

As argued in the previous section, the FCC’s regulatory focus stems from almost a century-old set of assumptions concerning the licensee and the viewer. What if these assumptions completely miss the mark? What if they misrepresent or distort the true economic nature of the broadcast market? This section sets forth an economic argument

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<sup>161</sup> See 18 U.S.C. § 1464 (1948).

that the current set of regulatory assumptions *does* miss the mark, failing to account for a key relationship in broadcast markets, that between the viewer and the advertiser. This section then suggests a regulatory regime based upon an improved understanding of media markets.

#### **A. Broadcasting: A Two-Sided Market**

Many markets, such as credit card markets and advertiser-supported media like radio and broadcast television, display what economists term “two-sidedness.” Firms in two-sided markets face two different sets of consumers, and each set of consumers affects the desirability of the product for the other set of consumers. For example, consider retailers. They are, in fact, a two-sided market—on one side, they sell stuff—clothes, TVs, food, etc., to consumers. On the other side, they furnish “business” to credit card companies by providing a place where consumers use credit cards.

These sides are related to one another. The number of stores willing to accept a certain bank’s credit card affects the desirability of that bank’s credit card for shoppers, *i.e.*, everyone prefers “VISA” to the “Discover” card. If more stores accept a bank’s credit card, then more shoppers want to use that bank’s credit card. On the “other” side of the market, the credit card company will seek the greatest number of retailers to honor its card and the larger the retailer, the more the credit card will want such retailer to honor it. A retailer that wishes to maximize its profits will aim to pay a credit card fee (the remission a retailer pays to the credit card company) that maximizes profits by balancing both sides of its market. In other words, firms that face two-sided markets set two

different prices, one for each set of consumers. A decrease in the price to one set of consumers might increase the price to the other set.

This optimization over both sides of the market occurs with radio and broadcast. The number of viewers that watch a television program affects advertisers' demand for commercial time on that program. Clearly, "Friends" at its heyday commanded a higher per minute price for advertising than the mercifully short-lived "Joey" spin-off ever did. If, however, the broadcaster sells too much commercial time, fewer viewers will watch—even if the show is "Friends." In other words, if a television program attracts many viewers, more advertisers will want to buy its commercial time but more commercials may then drive some viewers away.

Consequently, taking into account the relationship of the two sides of the market, a broadcaster generally will optimize over both sides in the following way. The broadcaster charges advertisers an explicit price for commercial time, i.e., a price for a minute of commercial on a given show. A television broadcaster also charges viewers for watching, but this price is implicit. It is the amount of commercial time that viewers endure. This amount can be priced roughly relative each viewer's opportunity costs-- the value of the opportunities the viewer foregoes in order to watch a given commercial is the price he or she pays for a television show.<sup>162</sup>

One simple way to understand the economics of broadcast television is that advertisers pay for programming and bundle commercials with the programming. Viewers pay advertisers for the programming through their willingness to watch the

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<sup>162</sup> See Stephen Coate & Simon Anderson, *Market Provision of Public Goods: The Case of Broadcasting*, forthcoming, *Review of Economic Studies* (2003).

commercials. In this sense, the broadcaster is simply a conduit for the exchange between advertisers and viewers.<sup>163</sup>

Comprehending this relationship between broadcasters, viewers, and advertisers enables us to realize that content regulation must not just focus on the relationship between viewers and programmers, but should also include the relationship between viewers and advertisers. After all, as noted above, broadcasters act as the conduit of exchange between advertisers and viewers. Involving advertisers in content regulation may therefore be just as important as (if not more important than) involving broadcasters. In addition, advertisers want viewers who are receptive to their advertisements. To the extent that advertisers can learn which content makes viewers less receptive to their advertisements, advertisers could obtain value from being involved with content regulation.

## **B. Applying a Two-Sided Market Paradigm to Content Regulation**

As pointed out in Section III, the FCC regulation, largely for historical reasons, has concentrated its efforts on one side of the market: the viewer-broadcaster relationship. What would its regulations look like if they concentrated on the other side of the market as well?

Compare broadcast to other double sided markets like retail and credit cards. Clearly, there is a functioning competitive market for both retail and credit cards, and consumers benefit from competition in both markets. Consumers, to some degree, will make decisions as to what retail firms to patronize on the basis of which credit cards they

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<sup>163</sup> See generally Gary S. Becker & Kevin M. Murphy, *A Simple Theory of Advertising as a Good or Bad*, 108 Q. J. OF ECON. 941 (1993) (demonstrating that this understanding of advertising fits nicely within neoclassical economics).

accept. For instance, one will go to a restaurant *because* it honors a certain credit card—say one for which the consumer has a particularly good frequent flyer mileage program.

Does the same thing occur in the broadcast markets? Do individuals, in fact, make viewing decisions on the basis of which firms advertise on such programming? Do viewers get anything from advertisers for the value of their “eyeballs” as consumers do for using particular credit cards?

In other words, if this advertiser information were cheaply supplied, would consumers change their viewing (and purchasing) behavior so as to “punish” advertisers who support indecent programming in a way analogous to consumers refusing to patronize certain restaurants that fail to accept certain credit cards. On one hand, the mere existence of indecent programming suggests that some segment of the population in fact likes it. Howard Stern does have a loyal listening audience. However, if there are enough people who are so offended by Stern that they will boycott his advertisers, then the “other side” of the market could be said to be working.

There are a few examples of such “punishing” even without a regulatory provision of information. For instance, Terri Rakolta led a public campaign against the TV sitcom, “Married with Children.”<sup>164</sup> Viewing with her family an episode entitled “Her Cups Runneth Over” and finding it particularly objectionable, she brought pressure against the producers of the show and the Fox network, which carried it. She also targeted the advertisers of the show and was successful in having a few particular shows not aired and a few advertisers withdrawing their support.<sup>165</sup>

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<sup>164</sup> *A Mother Is Heard as Sponsors Abandon a TV Hit*, THE N.Y. TIMES, Mar, 2, 1989, at A1.

<sup>165</sup> *Id.*



Rakolta did the research, herself, to discover the firms that advertised on “Married with Children.” What if the FCC performed that informational service and provided in an easy format—either on the internet or even during the show itself on a digital television guide—a list of all firms that provide advertising and perhaps a way of contacting such firms. In this way, the preferences of viewers, whose preferences are not as strong as Rakolta’s, might be registered and advertisers and broadcast programmers could use this information in their programming selection.

### **C. Legality of Disclosure Regime**

The FCC would have the authority to mandate broadcasters to provide information about advertisers who buy commercial time from them under the broad authority of section 303(j)<sup>166</sup> of the Communications Act of 1934. This empowered the Commission to promulgate general rules for broadcasters and require recordkeeping.

The Commission in the past has required broadcasters to keep information about its advertisers pursuant to its program log rules. Indeed, “[s]ome type of program logging requirements have existed virtually since the beginning of broadcast regulation.”<sup>167</sup> These logs have included advertiser information. Broadcasters kept records, available for public inspection as well as inspection by the FCC, that indicated commercials’ “sponsors . . . along with the time devoted to the commercial matter in question.”<sup>168</sup>

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<sup>166</sup> 47 U.S.C. § 303(j) (1997) (the Commission shall “[h]ave authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable”).

<sup>167</sup> The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements of Commercial Television Stations, 94 F.C.C.2d 678, 687 (1983), *citing* General Order No. 106, 5 FRC Ann. Report 96 (1931).

<sup>168</sup> Petition for Rulemaking to Require Broadcast Licensee to Maintain Certain Program Records, 44 F.C.C.2d 845, 864 (1975), ¶ 7. The programming log rules were found at 47 C.F.R. §§ 73.286, 73.586,

While the program log requirements were largely lifted in the early 1980s,<sup>169</sup> the FCC's authority pursuant to the above-mentioned statutory sections, as well as the broad public trustee obligation, remain and continue to give the FCC the authority to require broadcasters to submit advertiser information. This information could be provided to consumers in a variety of low-cost ways. The FCC, itself, could take this information and collate it in a useful form, suitable for easy computer search. The FCC has proven ability to provide the public with large amounts of information in useful formats.<sup>170</sup>

As discussed in the following section, in order for the article's proposed mandated information disclosure to be efficient, the costs of providing the information must be sufficiently low. Posting it on the internet would be low cost to the FCC to provide and would be, in general, low cost to consumers to access. Consumers could visit the FCC website and, with a relatively simple search, discover which advertisers buy time on which programs across the country. Such information would empower consumers to support those programs and advertisers they like—and punish those advertisers who support programs they do not like.

Posting the information during airtime would likely to be too expensive, but with the widespread adoption of digital television, most viewers will have access to digital, real time television guides, known as electronic program guides or “EPGs.” These guides allow viewers, with a few remote control clicks, to access information about the

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73.670, 73.674 (broadcast), 47 C.F.R. §§ 73.112 (Radio AM specific rules), and 47 C.F.R. § 582 (Radio FM specific rules).

<sup>169</sup> In the Matter of Deregulation of Radio, 84 F.C.C.2d 968 (1981) (eliminating program log requirements for radio); The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1075 (1984).

<sup>170</sup> The Taubman Center for Public Policy at Brown University and a team of researchers examined 1,265 state and federal websites and 2002 found the FCC's to be the best. Federal Communications Commission, Press Release, “FCC Website Ranked First in Federal Government” (rel. Sept. 18, 2002).

programs they are watching. The FCC could certainly require carriage of advertiser information on these guides.

#### **D. Efficiency and Mandated Disclosure**

As mentioned in the *Introduction*, legal scholars typically classify the economic rationales of FCC broadcast regulation in three categories.<sup>171</sup> First, courts have looked to the scarcity of broadcast spectrum as a rationale for government regulation. For instance, the Supreme Court states “[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.”<sup>172</sup> Second, academics and the FCC have claimed that broadcast inherently tends towards monopoly or oligopoly.<sup>173</sup> Third, academics and the FCC have argued that broadcast regulation promotes First Amendment values of widespread access of media outlets.<sup>174</sup>

What courts, the FCC, and academics have overlooked is the possibility that regulation could be efficiency *enhancing* by reducing transaction costs. The proposed regulation would cut the costs of individuals in discovering and contacting the firms that advertise on objectionable programs. This general principle is fairly straightforward. Economic efficiency improves with increased information, *i.e.*, people will receive more utility if they have greater knowledge about their purchases and actions.

In this situation, disclosure requirements have the potential to increase efficiency

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<sup>171</sup> MATTHEW L. SPITZER, *SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST* (1986).

<sup>172</sup> *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).

<sup>173</sup> SPITZER, *supra* note 171, at 28.

<sup>174</sup> SPITZER, *supra* note 171, at 43-45, *citing* Lee Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 U. MICH. L. REV. 1 (1976).

by increasing the amount of information consumers have when making viewing decisions. To the degree that individuals would *not* watch a show if it were supported by advertisers that supported objectionable programming, individuals' choices will be better with more information. The more they know about what programs advertisers support, the closer their viewing (and buying) behavior will match their preferences—the standard definition of efficiency. Thus, in the same way that government-mandated labeling improves efficient purchases in salad dressing or, in the same way (perhaps less frivolously), that disclosure under the securities laws encourages efficient investment,<sup>175</sup> labeling/disclosure of the advertisers will encourage efficient media markets. Further, disclosure has distinct efficiency benefits over regulatory oversight in that disclosure allows for greater role of personal preferences, avoiding the difficulty of creating a common standard that inevitably balances and averages personal preferences. The market also has the advantage of more constant monitoring, as consumers have the incentive to evaluate quality on a continuing basis.

Theoretical and empirical studies have demonstrated this fairly obvious insight.<sup>176</sup> For instance, government-mandated labeling has been shown to decrease the fat levels in salad dressing.<sup>177</sup> Arguably, consumers, once they *knew* about what they were buying, used their collective bargaining power to get more of what they wanted, in this case salad dressing that still tastes good, but has less fat.

On the other hand, one may wonder why, if the efficiency gains of disclosure are

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<sup>175</sup> GEORGE G. KAUFMAN, U.S. FINANCIAL SYSTEM: MONEY, MARKETS AND INSTITUTIONS 13 (6<sup>th</sup> ed. 1995).

<sup>176</sup> See THOMAS E. COPELAND & J. FRED WESTON, FINANCIAL THEORY AND CORPORATE POLICY 330-92 (3<sup>rd</sup> ed. 1988).

<sup>177</sup> Alan D. Mathios, *The Impact of Mandatory Disclosure Laws on Product Choices: An Analysis of the Salad Dressing Market*, 43 J.L. & ECON. 651 (2000).

so manifest, the market should provide such information on its own. Economists have pointed out that consumers have strong economic incentives to gather information and, conversely, sellers have a substantial economic incentive to disseminate information to consumers.<sup>178</sup> Given the generally accepted definition of efficiency in the information market as requiring equality between the expected marginal social benefits and the marginal cost of information gathering or information provision—where the marginal social benefit of the information includes the increment to consumer surplus plus the gain in sellers’ net revenues, then mandated disclosure runs the risk of being inefficient on two grounds: (i) Government mandates may provide *more* than the optimal amount of information or (ii) the cost of government mandated information may exceed the efficiency gains the information induces.<sup>179</sup>

Beales, Craswell, and Salop identify features in market that might result in a sub-optimal amount of information. First, they point to the “public good” property of information: while information helps everyone, its benefits are difficult to capture, at least entirely, by the firm that expended the cost to produce it. This suggests that information will be under-produced generally in an otherwise competitive information market.<sup>180</sup>

This public good property of advertiser is an example of this problem. Precisely *how* would a broadcaster provide information about all advertisers. To be effective, it would have to use broadcast air time otherwise devoted to advertising—a clear monetary loss. Whatever gains it would have, however, would go to *all* broadcasters. Thus, any

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<sup>178</sup> Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 25 J. L. & ECON. 492, 502 (1981).

<sup>179</sup> *Id.*

<sup>180</sup> Steven Salop, *Information & Monopolistic Competition*, 66 AM. ECON. REV. 240 (1976).

one broadcaster would have a decreased incentive to provide such information in a competitive environment. Further, even if one did, it would also experience free-rider problems, as others would no longer have the incentive to do so (or less of an incentive)—thus leaving one firm with all the cost and only some of the benefit.

Media markets tend to encourage producer output that caters to the “average taste.” Consider the following. Assume there are three available programs – a baseball game, an opera, and a play, and three types of viewers. Further assume that 1,000 viewers like the baseball game, 200 viewers like the opera, and 100 viewers like the play. Finally, assume there are three channels. As Peter Steiner famously pointed out, three competitors would all duplicate the baseball game, because the baseball game could attract 333 viewers for each of the three channels, which is more than the 200 viewers that would watch an opera or the 100 viewers that would watch a play.<sup>181</sup>

Mandating disclosure of additional information about advertising would create smaller audiences for any given program. For example, it is possible that 1,000 viewers would watch the baseball game, ignorant of its advertisers. 990 viewers, however, would watch it if they knew that an advertising sponsor of the baseball game, say Gillette, advertised also on the Howard Stern Show. A monopolistic firm would have to put on two baseball games—one with Gillette and the other sponsored by advertisers acceptable to the 10 viewers—in order to capture these viewers. Thus, the added information simply adds cost to the firm without necessarily increasing viewership.

Indeed, this same mechanism might also prevent the industry as a whole, through trade associations like the National Association of Broadcasters, from providing such

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<sup>181</sup> Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*. 66 Q. J. ECON. 194 (1952).

information. Advertising information would have the tendency to decrease viewership for any particular program, requiring, to continue the example above, a broadcaster to show two baseball game with acceptable advertisers to two groups of viewers—rather than one baseball game which *would have been acceptable to all without the advertiser information*. Thus, industry-wide advertising would likely simply raise costs without increasing viewership—and thus there would be no incentive for industry groups to engage in such a campaign.

**a. Better Reflection of Community Standards and Preferences**

The Commission uses a community standard that is not region-specific but reflects “an average broadcast viewer or listener” in the United States.<sup>182</sup> It is not clear why the FCC adopts one standard when, in fact, Supreme Court accepts a regional approach for obscenity and indecency.<sup>183</sup> Certainly, the FCC would be constitutionally permitted to adopt a regional approach. Further, the current FCC approach fails to reflect this country’s large geographical and cultural diversity which confounds the notion that there is one national “community.” There are numerous geographic and political communities—each with their own standards of what constitutes indecency.

Of course, a regulatory approach to indecency regulation would be a tremendous administrative burden. While it is fairly uncontroversial that community standards are quite different in the Castro district of San Francisco than in suburban Salt Lake City, defining these differences in a way useful for workable administrative standards would be a massive sociological inquiry and legal effort. Given the vagueness of the indecency

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<sup>182</sup> 2001 Policy Statement, 16 FCC Rcd at 8002.

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standard, itself, such an inquiry may be impossible. It is certainly beyond the resources of the FCC.

On the other hand, a market-based approach to indecency regulation could easily enforce more localized standards. Given that radio and television spectrum is locally licensed, much broadcast advertisements is *locally* bought and sold. (Advertisers contract, therefore, in large part, with the local broadcast stations, or at the very least, on a regional level.) Advertisers, therefore, could withhold support for programs that would be indecent or otherwise objectionable in suburban Salt Lake City, but hardly risqué in San Francisco. Further, nationally purchased advertising could be tailored to locality.

Further, unlike the centralized FCC approach that dictates “community standards” from the hardly representative Beltway culture—which, as discussed above, often simply represents a political compromise and/or signaling game among politicians and special interests, a market-based approach will more likely reflect communities’ tastes and preferences. Unlike bureaucrats and FCC political appointees who have a clear incentive to cater to political and industry interests, advertisers would have a clear economic incentive to avoid sponsoring programs that would offend a significant portion of their community’s viewing audience. Such a result is efficiency-enhancing because advertisers would have the incentive to respond to *real* preferences, not simply bureaucratic approximating guesses—or political compromises purporting to reflect community preferences.

#### **b. Civic Society and Community Standards**

Numerous political scientists and legal scholars, often identified as “civic republicans,” evaluate laws and/or political systems to the extent to which they encourage



or discourage discussion of important issues, and widespread and broad-based involvement in political dialogue.<sup>184</sup> It is thought that such dialogue will help clarify the basic principles of society, producing better principles and, perhaps more important, better citizens. In other words, through continued meaningful involvement in politics, we graduate, so to speak, from the sordid squabbles of high school student government into organic, profound political reflection that elevates both the state and the individual.

Regardless of one's views on civic republicanism, it is clear that the current regulatory approach towards obscenity retards civic society and civic republican virtues. What is particularly striking about the indecency standards is that although they purport to be about community standards, they are more often about Beltway politics and legal definitions and argument; individuals and individual communities have little to say on the matter. Rather, we all tend to sit back and simply wait and see whether the FCC will take action against a particular shock jock or enjoy the spectacle of politicians falling over each other to denounce Janet Jackson in the most vociferous, yet insincere, manner.

While editorials and commenters will often praise or laud a particular FCC action, there is, in fact, little discussion about what the indecency standards *should be*. A review of the 100 editorials written in the aftershock of the Janet Jackson sensation show only 15%, in fact, offering ideas about what the standards *should be*. Rather, most—like bored, *de facto* politically disenfranchised Roman citizens eating their bread at circus, simply give the FCC rules a thumbs up or down.

A market based approach, on the other hand, would encourage and empower discussion about what community standards *should be* for broadcast. It would lower the

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<sup>184</sup> See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988); Frank I. Michelman, *The Supreme Court 1985 Term-Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-18 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

costs for the would-be Terri Rakolta, the woman discussed above who brought pressure on broadcasters regarding the sitcom, *Married with Children*. More people would be able to pressure producers and present arguments to their fellow citizens about the benefits and/or costs of more restrictive broadcast indecency rules—all of which would result in those enjoying, say, *Married with Children*, to present their arguments about why the show is worthy of advertiser support. This is precisely the type of discussion about indecency that our civic discourse lacks.

### **c. Cost of Disclosure**

Finally, any benefits of this regime must be balanced against its costs—regulation that is so costly that it outweighs its benefits generally cannot be defended. Here, the cost is minimal. As discussed above, broadcasters already keep track of the advertisers and their programming.<sup>185</sup> The FCC would merely have to require that such information be posted on the web and perhaps could provide master webpage to assist people in finding particular local broadcasters.

### **E. Beyond Indecency**

The FCC indecency regulation only prohibits indecent material, *i.e.*, that involving sexual or excretory organs. Many believe that other types of programming, particularly violent programming, has a negative effect on children.<sup>186</sup> The FCC has no authority to directly regulate violent content.

Rather, the 1996 Telecommunications Act mandate of the “V-chips” which must be installed in all television sets “shipped in interstate commerce or manufactured in the

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<sup>185</sup> See *supra* notes 166 to 169 and accompanying text.

<sup>186</sup> See KEVIN SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* (2003).

United States” is the closest the FCC comes to regulating violence.<sup>187</sup> These chips can read ratings embedded in programming content and screen out programs with ratings viewers do not want. Thus, for instance, if a program identifies itself as having, more violence than the amount set by the viewer, then that program will be blocked. Due to First Amendment concerns, the Act did not mandate broadcasters to label their programming—rather they “persuaded” them to do so.<sup>188</sup>

The V-chip’s effectiveness has been questionable. As Thomas Hazlett has written, “the joke has always been that mom and dad will be unable to deploy any filtering device that requires programming skills without persuading their 10-year old to show them how.”<sup>189</sup> A recent study by the Annenberg Center suggests that the overwhelming majority of families would not use the V-chip even if given extensive technical support.<sup>190</sup>

This article’s approach provides another mechanism for advocates of violence regulation—a mechanism that allows consumers to put pressure directly on content producers and does not rely on individuals’ abilities to program their VCRs.

## **F. Response to Objection**

An objection immediately arises from this article’s proposal. Civil libertarians might object because it gives *too* much power to specific groups of consumers. Particular groups, say armies of Terri Rakoltas, might be empowered to limit or eliminate types of

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<sup>187</sup> 47 U.S.C. §303(x)

<sup>188</sup> Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1544 n. 294 (2005).

<sup>189</sup> Thomas Hazlett, *Requiem for the V-Chip: A relic of the last battle over indecency on TV*, SLATE. (posted Friday, Feb. 13, 2004).

<sup>190</sup> Amy Jordan & Emory Woodard, *Parents’ Use of the V-Chip to Supervise Children’s Television Use* (The Annenberg Public Policy Center, 2003).

programming enjoyed by minorities of the viewing public. Thus, the proposal would decrease media diversity and arguably “censors” speech.

The response would be that the market *already* “censors” speech. A.J. Liebling’s quip that “freedom of the press is guaranteed only to those who own one” expresses the basic truth that in society with the institution of private property the content of broadcast programming as well as written media is determined by those who own the particular media. Conversely, to the degree that the media properties are valuable assets, their owners will generally select programming that maximizes profits derived from such assets.

As discussed in section II.B, broadcasters that wish to maximize profit often have the incentive to cater to the average taste. Presumably, this does not violate civil libertarian principles. Indeed, the civil libertarian objection goes to far because taken to its logical extension it would prohibit private ownership of media. As discussed above, private ownership tends to cater to average taste, thus if catering to average constitutes censorship, then all private ownership is censorship. Rather, this article’s proposal merely advocates for the more efficient working of the media market—which civil libertarians generally accept, despite its potential to reduce programming diversity.

### ***Conclusion***

The history of recent indecency enforcement is the story of politicization of legal standards. The FCC has not only failed to promulgate clear standards, it has muddied the waters with haphazard interpretations and enforcements. While delegating authority to administrative agencies always risks of politicization and/or slanting of enforcement,

politicization or slanting—when First Amendment values are on the line—is probably undesirable. When the law is unclear, broadcasters will err on the side of caution: self-censoring perfectly legal speech.

This article suggests a new approach to indecency regulation that seeks to enhance the efficiency of a side of the media markets that regulators have ignored—the consumer-advertiser relationship—by lowering information costs for consumers. Such information-based regulation holds the promise of providing indecency standards that are more genuinely reflective of community standards. They could be tailored to community standards that are more nuanced and subtle, better reflecting the context-specific nature of indecency than does the FCC’s national, “yes or no.” Further, the proposed regime could be responsive to material that people find objectionable and damaging to children, such as violent programming, that present FCC regulations largely ignore. The proposed regulation has minimal cost and would simply involve a wider dissemination of information about advertisers and programming, information that broadcasters no doubt already record and track. Dissemination of this information could be made on the web easily and cheaply. Last, this proposal would return the debate about “community standards” to the people, empowering them to carry on the public discussion themselves rather than enabling agency power and, unfortunately, its too often politicized discretion.