FCC REGULATION: INDECENCY BY INTEREST GROUPS

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ABSTRACT

FCC regulations are among the most controversial administrative law regulations because of their impact on broadcast television. This iBrief analyzes the history of FCC regulation and highlights the problems associated with the current model. Applying theories of economics, this iBrief proposes solutions to the current problems of selective enforcement and vagueness in enforcement. While the Supreme Court recognized that FCC regulation is necessary, it is also necessary for there to be a clearer model for how the agency should be run.

INTRODUCTION

¶1 In a study used by the Parents Television Council ("PTC") in their lobbying practices, researchers found that "20 percent of 2 to 7 year olds, 46 percent of 8 to 12 year olds, and 56 percent of 13 to 17 year olds have televisions in their bedrooms."[2] However, the PTC does not focus their efforts on encouraging parents to spend more time with their children but instead lobbies aggressively to Congress and the Federal Communications Council ("FCC") for increased censorship of indecent programming on broadcast television. This special interest group is among many using the 1978 Supreme Court decision in *FCC v. Pacifica Foundation*[3] as the backbone for their lobbying. The case involved a daytime broadcast of George Carlin's "Seven Dirty Words" sketch in which he repeated a slew of expletives. The Court found that because of the unique, invasive nature of

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[2] MediaWise.org, MediaQuotient: National Survey of Family Media Habits, Knowledge, and Attitudes, http://www.mediafamily.org/research/report_mqexecsum.shtml (last visited Feb. 16, 2008). The study also reported that the average American child watches an average of twenty-five hours of television a week and while 81% of parents of two to seventeen year olds "agree" or "strongly agree" they are "concerned about the amount of violent content their children see in movies or TV," only 34% of parents "always or often use the TV rating system to help choose what programs their children may watch." *Id.*

[3] 438 U.S. 726 (1978).

broadcasting, it is constitutionally sound to limit First Amendment protection of broadcasts.[4]

¶2 The first section of this paper provides an overview of the law relating to the broadcast of obscene language and touches upon recent developments in obscenity regulation. The second section describes various problems associated with FCC regulation. And finally, the last section discusses possible approaches to FCC regulation. This iBrief argues that the FCC can fulfill its goals and objectives in a much more efficient and expedient matter by basing its decisions in sound economic theories rather than the pressure of overzealous interest groups.

I. OBSCENITY LAW AND RECENT DEVELOPMENTS

¶3 This section provides a brief overview of the history and purpose of the FCC. It explores the body of law developed as a result of broadcast indecency regulations. By analyzing the standards of FCC broadcast regulation, it will be easier to highlight the problems associated with enforcement discussed in Section II and the possible solutions to these problems in Section III.

A. History and Purpose

¶4 The FCC was created by Congress to replace the role of the Federal Radio Commission under the Communications Act of 1934.[5] The purpose of the FCC is to "regulat[e] interstate and foreign commerce by wire and radio" with a centralized authority that can effectively govern these entities.[6] Congress wished to regulate indecent programming for two principal reasons: "the unique pervasiveness of broadcasting into the American home and the presence of young children in the viewing and listening audience."[7]

¶5 Initially, the FCC created a slew of regulations and busied itself with ensuring compliance.[8] In *Pacifica*, the Supreme Court upheld the FCC's regulatory authority because of concerns for children and the American home.[9] However, in the years following *Pacifica*, the agency

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[4] *Id.* at 748.
[5] Congress later amended the Communications Act with the Telecommunications Act of 1996, calling it "The New 1934 Act." Communications Act of 1934, Pub.L. No. 416, 48 Stat. 1064 (2003) (codified as amended at 47 U.S.C. §§ 151-615(b)).
[6] 47 U.S.C. § 151 (2006).
[7] *Id.*
[8] Richard E. Wiley & Lawrence W. Secrest, *Recent Developments in Program Content Regulation*, 57 FED. COMM. L.J. 235, 236 (2005).
[9] *Id.*

moved towards a "free market" approach in which it favored general deregulation,[10] focusing on the regulation of "indecent" content.[11]

B. Indecency Analysis

¶6 Just like any other rules regulating speech in America, the FCC broadcast regulations run squarely into the First Amendment. In the seminal decision *Action for Children's Television v. FCC* (*ACT III*),[12] the court upheld regulation of broadcast programming when children were likely to be in the audience.[13] However, the court found that the hours from 10 p.m. to 6 a.m. would be designated safe-harbor hours necessitating no regulation because children were not likely to be in the viewing or listening public at that time.[14] It has been recognized that trying to restrict indecent material on broadcast programming interferes with the exercise of the right to free speech.[15] Thus, the Government needs to have a compelling interest connected with its regulation in order for the regulation to be considered constitutional.[16] Interestingly enough, opinions like *ACT III* bring to light the fact that courts are more than willing to find indecency regulation constitutional in order to protect the well-being of children.[17]

¶7 The FCC proceeds through a three-step analysis in determining what constitutes indecent programming. First, a complaint must be filed by a member of the public.[18] Second, the FCC determines if the alleged offense occurred on broadcast television or on cable or satellite television.[19] The FCC indecency rules do not apply to cable or satellite television.[20] Additionally, the rules do not apply during the safe harbor hours.[21] If these

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[10] *Id.*
[11] *Id.*
[12] 58 F.3d 654, (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 701 (1996).
[13] *Id.* at 662–65.
[14] *Id.* The Court found that the Government has a compelling interest in protecting children from seeing indecent material but the current "safe-harbor" from 10 p.m. to 6 a.m. is sufficient to meet this goal. *Id.* at 656.
[15] *Id.*
[16] *Id.*
[17] *See id.*
[18] FCC Complaint Process, http://www.fcc.gov/eb/oip/process.html (last visited Feb. 16, 2008).
[19] William Davenport, Comment, *FCC, Indecent Exposure? The FCC's Recent Enforcement of Obscenity Laws*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1087, 1090 (construing FCC Enforcement Policy Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8001 (2001)). Mr. Davenport was the Chief of the Investigations and Hearings Division on Enforcement at the FCC.
[20] Davenport, *supra* note 19, at 1090 (construing 16 F.C.C.R. at 8000).
[21] *Id.* at 1090–91.

two conditions are met, the Commission proceeds to the final issue of indecency analysis;[22] whether the broadcast was "patently offensive based on contemporary community standards."[23]

¶8 In order to determine whether a broadcast falls within the community standards for indecency, the FCC makes two fundamental determinations.[24] First, the broadcast must be indecent, which is "describ[ing] or depict[ing] sexual or excretory organs or activities."[25] Additionally, the broadcast must be "patently offensive as measured by contemporary community standards."[26] The analysis in the Supreme Court case of *Hamling v. United States*[27] gives an example of the kind of analysis that the FCC purports to use when evaluating each complaint with regards to "contemporary community standards." The analysis must not focus on the particular standards of a judge or a localized community but rather the larger community as a whole.[28] Therefore, it is necessary for the FCC to be as objective as possible in its interpretation in order to ensure that regulations are being administered in an even-handed way, rather than bending to interest groups or social pressures.

¶9 When dissecting the meaning of "patently offensive," it is essential to consider the "*full context* in which the material appeared."[29] A variety of factors must be taken into account in order to reach a finding of patent offensiveness.[30] In the *Pacifica* opinion, the Court highlighted the necessity of taking into account the literary, political, or scientific value of the speech as well as other factors touching upon whether the speech was meant for shock value or whether there was social value to the speech.[31] The heart of this analysis relies on the First Amendment.[32] Political speech receives strong protection because of the central tenet that "the government must remain neutral in the marketplace of ideas."[33] The opinion makes it clear that speech reflecting on political or social ideals, thereby making commentary on society, is fully protected by the First Amendment because

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[22] *Id.* at 1091.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] 418 U.S. 87 (1974), *construed in* 16 F.C.C.R. at 8002.
[28] 16 F.C.C.R. at 8002.
[29] 16 F.C.C.R. at 8002–03 (construing WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838, 1841 (2000); Infinity Broadcasting Corp., 3 F.C.C.R. 930, 931–32 (1987)) (emphasis in original).
[30] 16 F.C.C.R. at 8002–03.
[31] FCC v. Pacifica Found., 438 U.S. 726, 745–48 (1978).
[32] *Id.*
[33] *Id.* at 746–46.

of its value to society.[34] However, that does not mean there is no First Amendment protection for other types of speech.[35] Rather, the test for patent offensiveness becomes more difficult because of the myriad factors entering into the equation.[36] It is important to think about all of the facts involved and to balance privacy concerns with First Amendment concerns.[37] The appropriate conclusion should take into account both what people would like their children to hear as well as what adults should have access to.[38]

¶10 As guidelines, the three principal factors that the regulations consider are:

> (1) the *explicitness or graphic nature* of the description of depiction of sexual or excretory organs or activities;
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> (2) whether the material *dwells on or repeats at length* description of sexual or excretory organs or activities;
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> (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.[39]

These factors further emphasize the importance of placing the offending speech in context. The regulations continue to give examples of what the FCC has considered indecent and why, most of which depend on how far the speech allegedly violated one of these factors.[40]

¶11 Finally, after all of these factors have been considered, the FCC makes a determination on the merits of the complaint.[41] The complaint can be: (1) dismissed, or (2) a letter can be sent to the licensee (typically the network the broadcast was shown on) asking for more context as to the alleged offense, or (3) there can be a notice of liability sent, and lastly, (4) the case can be referred to the full commission.[42] The licensee is afforded

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[34] *Id.* at 746.
[35] *Id.*
[36] These factors include the medium of expression. The *Pacifica* opinion recognizes that "it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748.
[37] *Id.* at 748–50.
[38] *Id.*
[39] FCC Enforcement Policy Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8003 (2001) (emphasis added).
[40] *Id.* at 8003–15.
[41] *Id.* at 8015.
[42] *Id.* at 8015-16.

an opportunity to respond and after circumstances have been considered, a monetary penalty may be ordered by the issuance of a Forfeiture Order.[43]

II. PROBLEMS WITH THE INDECENCY REGIME

¶12 This section touches on recent events resulting in a surge of enforcement of broadcast indecency regulations and then highlights the first problem of selective enforcement and prosecution. To examine this problem, this paper will look at examples such as the Janet Jackson costume-reveal and Howard Stern's multiple run-ins with the FCC. The second problem that this paper addresses is the vagueness of the indecency standards in enforcement.

A. Recent Events

¶13 In the years following the *Pacifica* decision and leading up to 2004, the FCC did not appear to care much about enforcing indecency standards.[44] In fact, in a 2001 press conference, former FCC Chairman, Michael K. Powell, discussed his plans to focus on deregulation.[45] Powell was interested in increasing competition in the broadband market and had plans in mind that included limiting regulatory costs and interference with the communications industry.[46]

¶14 However, Powell's plans for deregulation were about to be thwarted by the highly publicized "costume reveal" involving Super Bowl Halftime Show performers Janet Jackson and Justin Timberlake.[47] During this

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[43] *Id.* at 8016.

[44] *See* FEDERAL COMMUNICATIONS COMMISSION, INDECENCY COMPLAINTS AND NALS: 1993–2004 (2005), http://www.fcc.gov/eb/broadcast/ichart.pdf (last visited Feb. 16, 2008), *noted in* Matthew C. Holohan, *Politics, Technology & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341, 345-46 (2005).

[45] Press Release, Federal Communications Commission, "Digital Broadband Migration" Part II (Oct. 23, 2001), *available at* http://www.fcc.gov/Speeches/Powell/2001/spmkp109.html.

[46] *Id.*

[47] *See, e.g.*, *Apologetic Jackson Says 'Costume Reveal' Went Awry*, CNN.COM, Feb. 3, 2004, http://www.cnn.com/2004/US/02/02/superbowl.jackson. Powell was also pushed to increase indecency regulation after the singer Bono from U2 said the word "fucking" during the airing of the 2003 Golden Globe Awards but made no substantial effort to do so. In fact, the FCC rejected complaints that came in regarding Bono's use of the f-word, with a representative saying that "fleeting and isolated remarks of this nature do not warrant commission action." *See* Associated Press, *FCC OKs Bono's F-Word Slip*, CBSNEWS.COM, Oct. 7, 2003, http://www.cbsnews.com/stories/2003/09/17/entertainment/main573729.shtml.

infamous halftime show, the duo ended their performance with Timberlake grabbing Jackson's breast and ripping off the material covering it, revealing her nipple.[48] As a result of this performance, the FCC received over 542,000 complaints.[49] Powell immediately expressed outrage as a result of this "classless, crass and deplorable stunt" and ordered a complete investigation.[50] The PTC took this as the last straw and released a report two days after the incident criticizing the FCC for failing the public and subjecting children to far too much indecent material on television.[51]

¶15 Almost immediately after the Super Bowl incident, the FCC jumped into action, in an attempt to avoid the fallout that would result from treating the incident lightly. Even the United States Senate decided to take action, holding hearings on February 11 to discuss broadcast indecency.[52] Additionally, Clear Channel Broadcasting, one of the largest media conglomerates in the country, created an initiative for more responsible broadcasting and suspended shock-jock Howard Stern from the airwaves for vulgar material.[53] As a result of a single incident, broadcast media was turned on its head.

B. Selective Prosecution and Enforcement

¶16 The incident created a media circus resulting in outrage on the one hand and hilarity coupled with pure curiosity on the other.[54] Additionally,

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[48] *Id.*

[49] *See In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show [hereinafter Super Bowl Complaint], 19 F.C.C.R. 19230, 19231 (2004).

[50] Associated Press, *FCC Chief Blasts Jackson Halftime Show*, FOXNEWS.COM, Feb. 2, 2004, http://www.foxnews.com/story/0,2933,110114,00.html.

[51] *See* ParentsTV.org, Dereliction of Duty: How the Federal Communications Commission Has Failed the Public [hereinafter PTC's Dereliction of Duty], http://www.parentstv.org/PTC/publications/reports/fccwhitepaper/main.asp, *construed in* Holohan, *supra* note 44, at 347.

[52] Holohan, *supra* note 44, at 347.

[53] *Id.* at 347–48; *see Howard Stern Suspended for Indecency*, CNN.COM, Feb. 26, 2004, http://www.cnn.com/2004/SHOWBIZ/News/02/25/stern.suspension/index.html.

[54] The media was in a frenzy after this incident with many referring to the halftime show as "Breast Gate." *See, e.g.*, About.com, Breastgate: Janet Jackson Humor or Bust, http://humor.about.com/od/janetjackson/Breastgate_Janet_Jackson_Humor_or_Bust.htm (last visited Feb. 16, 2008). The incident threw TiVo users for a loop, many rewinding and repeating the incident three times more than users typically do for other programs. *See* Ben Charny, *Jackson's Super Bowl Flash Grabs TiVo Users*, CNETNEWS.COM, Feb. 2, 2004, http://news.com.com/2100-1041_3-5152141.html. It was clear though that groups were not taking this

the FCC was not ready to listen to any more appeals from the networks or affiliates that aired the halftime show and was firm on the $550,000 fine that was imposed.[55] In addition to being firm on their fine for the Super Bowl incident, the FCC decided to be more firm on past incidents of "indecency," including an instance when paparazzi star Nicole Richie said the word "fuck" during the 2003 Billboard Music Awards.[56] The effect of this incident highlights the first problem of current FCC regulation: selective enforcement.

¶17 The problem of selective enforcement is not a new one by any stretch of the imagination.[57] In fact, the problem is illustrated by the regulatory treatment of shock jock Howard Stern.[58] For years, Stern was the subject of FCC selective prosecution for his very popular, but very controversial, radio show, "The Howard Stern Show," which was broadcast daily on FM radio from 6:00 a.m. to 10:00 a.m.[59] Following the Janet Jackson Super Bowl incident, Stern, in fact, told reporters that he was waiting for the FCC to come knocking on his door to give him a record-breaking fine.[60] However, in light of the massive backlash following the Super Bowl incident, Clear Channel decided to play it safe and just suspended Stern's show indefinitely in several cities.[61]

¶18 While it might be beneficial for the nation's children to no longer hear Howard Stern or see Janet Jackson's breast on broadcast television, this does not take away from the fact that these prosecutions were fueled by public interest and outrage more than the true viability of the claims filed. The history of FCC's problem of selective prosecution dates back to *Melody*

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incident lightly and many saw it as a way to reignite the debate on indecency on television. *See*, *e.g.*, Ann Oldenburg, *Jackson's Halftime Stunt Fuels Indecency Debate*, USATODAY.COM, Feb. 3, 2004, http://www.usatoday.com/sports/football/super/2004-02-02-jackson-halftime-incident_x.htm.

[55] Associated Press, *FCC Firm on Superbowl Indecency Fine*, CBSNEWS.COM, Feb. 23, 2006, http://www.cbsnews.com/stories/2006/02/23/entertainment/main1340839.shtml.

[56] *Id.*

[57] *See* Seth T. Goldsamt, *Howard Stern, the FCC, and Selective Prosecution*, 28 COLUM. J.L. & SOC. PROBS. 203 (1995).

[58] Emil Guillermo, *Howard Stern and the Burning Bush*, SFGATE.COM, Mar. 9, 2004, http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2004/03/09/eguillermo.DTL.

[59] Goldsamt, *supra* note 57, at 216.

[60] *See* Guillermo, *supra* note 58 (discussing Clear Channel's decision to suspend Stern's program in several cities).

[61] *Id.*

Music v. FCC.[62] In this seminal case, the D.C. circuit made it clear that the FCC must treat "similarly situated parties in a similar manner."[63] The decision made it clear that the FCC could not deny a license to one company when another company with the same allegedly infringing actions is given a license.[64]

¶19 When Infinity (Stern's employer) used the selective prosecution defense in its response to indecency complaints against Stern, the FCC stated that other programs which received indecency complaints, but were later dismissed, were not "substantially similar" to Stern's broadcasts.[65] These other complaints included one against a television broadcast of "Geraldo" and another about the mysteries of sex and the broadcast of a song called "Slip It In."[66] The FCC argued that these programs were not designed to *pander* or *titillate*, in other words saying that these programs were not vulgar in nature.[67] This appears to be a dubious assumption if one were to tune into daytime talk shows like "Geraldo" or "Maury Povich." These programs are designed to attract viewers by pandering to them with vulgar stories of cheating and sexual malfeasance.[68] Consequently, the FCC's response that these shows are not within the scope of indecency that Howard Stern's show embodies is unconvincing and weak. The purpose of having a defense of selective prosecution does not depend on how substantially similar two parties are but rather, whether two parties are in a "similarly situated" position.[69] Clearly, shows like "Geraldo" and "Maury Povich" are within the Stern show's realm of indecency but lack the large audience and publicity that his tends to garner.[70]

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[62] 345 F.2d 730 (D.C. Cir. 1965), *construed in* Goldsamt, *supra* note 57, at 216–18.
[63] *Id.*
[64] *Id.*
[65] Goldsamt, *supra* note 57, at 217–18.
[66] *Id.* at 217–18.
[67] *Id.*
[68] For a sampling of topics on the Maury Povich show, see MauryShow.com, This Week on the Maury Show, http://www.mauryshow.com/this_week.html (last visited Feb. 16, 2008).
[69] Goldsamt, *supra* note 57, at 218–19.
[70] Howard Stern eventually left Clear Channel for the Sirius Satellite Radio Network for a reported deal of $600 million. *See Howard Stern Deal Balloons to $600 Million*, THE WRITE NEWS, http://www.writenews.com/wnews.php?zone=113061 (last visited Feb. 16, 2008).

¶20 The history of selective prosecution rests on the principle of equal protection in the Constitution of the United States.[71] In the case, *Yick Wo v. Hopkins*,[72] the Court said:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[73]

This opinion addresses the need for an even hand in trying to enforce legislation in the United States. In another case, the Court suggested that to succeed on a defense of selective prosecution, defendants must prove that their prosecution was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[74]

¶21 Stern serves as an important "criminal" in the war against indecency. While daytime talk shows like Ricky Lake, Sally Jessy Raphael, and Maury Povich talk about the same illicit topics,[75] they aren't given as much grief as Howard Stern because their following is not as large or reactionary.[76] Additionally, even though singers like Bono or celebrities like Nicole Richie previously said the "F-word" on award shows, the FCC chose not to react to these incidents because the media buzz and public outcry around these events was not as large as the buzz and outcry surrounding the Super Bowl.[77] In Goldsamt's article, the author argues that selective prosecution against Stern is largely based on pressure from the religious right arguing for the "biblical ethic of decency in the media."[78] The article continues to suggest that Stern's political views, which clearly do not align themselves with the religious right, are also to blame for the

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[71] Goldsamt, *supra* note 57, at 220.
[72] 118 U.S. 356 (1886), *construed in* Goldsamt, *supra* note 57, at 220–21.
[73] *Yick Wo*, 118 U.S. at 359, *reprinted in* Goldsamt, *supra* note 57, at 221.
[74] Oyler v. Boyles, 368 U.S. 448 (1962), *reprinted in* Goldsamt, *supra* note 57, at 221.
[75] *See supra* note 68 and accompanying text.
[76] *See, e.g.*, Lycos.com, *Top Talk Radio Personalities of 2006*, Oct. 10, 2006, http://50.lycos.com/101807.asp.
[77] In 2005, Super Bowl commercials cost a staggering $2.4 million per spot, making them the most expensive commercials on television. *See* Krysten Crawford, *Sanitizing the Super Bowl*, CNNMONEY.COM, Feb. 4, 2005, http://money.cnn.com/2005/01/20/news/fortune500/superbowl_ads.
[78] Goldsamt, *supra* note 57, at 241–47.

particularized campaign against him.[79] This kind of motive, however, is impermissible based on the selective prosecution standard set in *Oyler v. Boyles*.[80]

¶22 In another example, returning back to the nipple-reveal during the Super Bowl Halftime Show, the FCC record shows that even though the reveal was probably accidental, the FCC was going to fine CBS and its affiliates because the producers of the halftime show knew of the "sexually provocative nature of the Jackson–Timberlake segment."[81] This seems to diverge from the all-inclusive test that is used in traditional indecency analysis.[82] The analysis requires that the nature of the allegedly indecent broadcast must be so explicit and graphic, that it would be found to be patently offensive by community standards.[83] The test takes into account a lot of factors, such as length of the broadcast, and whether the broadcast was simply for shock value.[84] The Commission, however, seemed to move away from that thorough analysis and branded the show as provocative, regardless of the circumstances behind the seemingly accidental nipple-slip. The record mentions that CBS and MTV advertised that the broadcast would be shocking and titillating.[85] However, this does not answer the question of whether the broadcast was indecent within the boundaries of the traditional indecency analysis. Rather, all this says is that the promoters of this Super Bowl Halftime Show wanted to attract viewership with two sexy but not *per se* indecent performers.

¶23 What the Super Bowl complaint fails to address is the heart of the indecency analysis: a thorough look into whether the exposure was designed to "pander to, titillate and shock the viewing audience." The FCC should have to look at the circumstances surrounding the halftime show to really see if there was a violation of the indecency regulations. Instead, the record focuses on the fact that there were no advance precautions taken.[86] It does not look at the performance as a whole except to say that it was sexy and provocative.[87] In fact, the entire analysis seems to assume that the provocative nature of the performance makes the rest of the analysis almost

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[79] Stern is pro-choice and also a supporter of rights for homosexual couples. *Id.* at 246.
[80] *See supra* note 74 and accompanying text.
[81] Super Bowl Complaint, 19 F.C.C.R. at 19240.
[82] *See* discussion *supra* Sec. I, Part B.
[83] *Id.*
[84] *Id.*
[85] Super Bowl Complaint, 19 F.C.C.R. at 19240.
[86] *See id.* at 19232.
[87] *Id.* at 19234-36.

unnecessary.[88] The rest of the performance, however, was clearly not within the purview of the indecency analysis. While it was sexy, it was not shocking or offensive to community standards of decency. It involved dancing and gyrating, which, although meant to draw in the viewer, arguably does not offend or shock viewers to their core. It was really the one accidental act of a costume-reveal gone awry that sparked the numerous complaints. For the FCC to say that the performance's provocative nature supports its finding of indecency contradicts the proposition that the FCC's review standards are even-handed and objective. This type of analysis clearly goes against the regulatory policy the FCC is supposed to abide by.

¶24 The Super Bowl complaint and the Howard Stern attacks reveal the way that the FCC selectively enforces its broadcast indecency regulations. The more groups like the PTC pressure the FCC, the more likely the FCC will respond. This problem highlights the fact that the FCC might have disingenuous motivations in their "crackdown" on certain programs that broadcast indecent material. And while this might not be *per se* unconstitutional, it certainly illustrates how the FCC might not be serving the American public, but rather, those interest groups or media outlets that launch campaigns against programming that will garner the most publicity for their causes.

C. Vagueness in Enforcement

¶25 The preceding analysis touches upon the next problem associated with FCC regulation, the vagueness and indefiniteness in applying FCC broadcast regulation. This section will cover examples like John Gotti on National Public Radio ("NPR") as well as a program called "Keen Eddie." These examples will show how FCC regulation is applied in a manner that does not enable broadcasters to understand what the parameters of the regulation are.

¶26 On February 8, 1989, NPR broadcast a news program on organized crime featuring a broadcast of a wiretapped conversation between boss John Gotti and his associate.[89] Here is an excerpt from that broadcast:

> JG [John Gotti]: Listen, I called your fucking house five times yesterday. Now if you want (unintelligible) fuck (unintelligible) Now if you want to disregard my fucking phone calls I'll blow you and the fucking house up.
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> OV [Associate]: I never disregarded anything.

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[88] *Id* at 19236-37.

[89] FCC Letter to Mr. Peter Branton, 6 F.C.C.R. 610 (1991), *reprinted in* B. Chad Bungard, *Indecent Exposure: An Economic Approach to Removing the Boob from the Tube*, 13 UCLA ENT. L. REV. 195, 214 (2006).

> JG: Are you, call your fucking wife or will you tell her.
>
> OV: All right.
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> JG: This is not a fucking game I (unintelligible) how to reach me days and nights here, my fucking time is valuable.
>
> OV: I know that.
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> JG: Now you get your fucking ass (unintelligible) and see me tomorrow.
>
> OV: I'm going to be here all day tomorrow.
>
> JG: Never mind all day tomorrow (unintelligible) if I hear anybody else calling you (unintelligible) I'll fucking kill you.[90]

The FCC made a determination that the broadcast was not indecent because it was not "patently offensive" and was simply showing evidence from a widely reported trial.[91] However, the dissenting opinion of Commissioner Ervin S. Duggan points out the flaws in the FCC's analysis of this particular broadcast.[92] While this was a news broadcast that was meant to show Gotti's character to the audience, there was no need for the phone conversation to be played in its entirety for the audience to understand Gotti's vulgarity.[93] The former Commissioner, although recognizing the need for context in making indecency determinations, found that the repeated use of the "F-word" fit precisely within the definition of pandering that the regulations disallow.[94]

¶27 The FCC's decision in this case makes it difficult for indecency regulation to be enforced with any sort of uniformity. By adding journalistic quality to their programs, Howard Stern and Maury Povich could arguably escape FCC regulations and air as much indecent material as they wanted to. While the John Gotti wiretap was aired on NPR with a news-reporting purpose, it also was put on the air to shock viewers and cater to a very lowbrow taste.[95]

¶28 The next example that this paper will examine is a broadcast regarding sexual innuendo of bestiality on the Fox program "Keen

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[90] *Id.*
[91] *Id.* at 613.
[92] *Id.* at 616.
[93] *Id.* at 618.
[94] *Id.* at 618–19.
[95] *Id.* at 619.

Eddie."[96] In this broadcast, the episode's dialogue between men and a prostitute in a stable is reprinted below:

> Prostitute: No, that's not natural.
>
> First Man: Extraction for insemination. If you look at the picture on page 45 you'll see how natural it is.
>
> Prostitute: Forget it!
>
> Second Man: You're a 40-year-old filthy slut, you'll do anything (referring to an advertisement by the prostitute to which the men responded).
>
> Prostitute: With a human.
>
> First Man: Think of it as science.[97]

This material was found not to be indecent by all accounts because the material was not deemed to be explicit or graphic and the woman (prostitute) did not actually do anything with the horse.[98] The scene was found not to pander, shock, or titillate and by all accounts, was rather short (less than a minute).[99]

¶29 In a dissenting statement, Commissioner Kevin J. Martin highlights some of the problems associated with this determination.[100] He points out that the entire purpose of this program, broadcast during the time when children were likely to be in the audience, was to shock the audience into thinking that this prostitute was hired for the sole purpose of servicing a horse.[101] While the prostitute does not approach the horse or actually touch the horse, it is an uncomfortable scene that does seem to shock and pander to the audience.[102]

¶30 It seems unbelievable that the FCC found this *not* to be indecent considering the fact that the entire purpose of this sketch was to shock the audience into thinking that the woman on this show was going to have sexual intercourse with a horse. Comparing this to the Super Bowl Halftime Show, it seems ridiculous that this show falls outside of the FCC's

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[96] In re Complaints Against Fox Television Stations, Inc. Regarding Its Broadcast of "Keen Eddie" Program on June 10, 2003, 19 F.C.C.R. 23063 (2004), *reprinted in* Bungard, *supra* note 89, at 216-18.
[97] *Id.* at 23064.
[98] *Id.* at 23066.
[99] *Id.*
[100] *Id.* at 23069.
[101] *Id.*
[102] *Id.*

reach. In the analysis from the halftime show, the FCC argued that the provocative nature of the performance necessitated FCC involvement.[103] In this case, the sketch was designed precisely to pander to the audience's basest humor and make the audience feel uncomfortable at the thought of a prostitute having sex with a horse.

¶31 These examples illustrate the fact that the FCC does not seem to apply its indecency standards with any sort of rhyme or reason. Rather, it seems that the FCC is much more likely to react to a complaint if it is associated with a high-profile program like the Super Bowl or a high-profile entertainer like Howard Stern. These complaints are precisely within the purview of the FCC's indecency regulations yet no action was taken because arguably, there was no media attention given to these programs.

¶32 Effectively, the problems of selective enforcement and vagueness in the application of regulations are inextricably linked to the fact that the FCC appears to be more interested in pleasing interest groups and the media rather than working towards its actual goals and purposes. Although it could be argued that the FCC accomplished some good for the American people by fining CBS for airing Janet Jackson's costume-reveal or effectively stopping Howard Stern from exposing children to his indecent radio show (at least on AM/FM radio), there are enough programs to fill in where these entertainers left off. As long as the FCC continues to answer to the calls of interest groups, the religious right, and media outlets before thinking about applying its regulations in an even-handed fashion, the Commission will continue to be doubted by many First Amendment advocates and well-informed citizens.

III. TAKING THE LIBERTARIAN APPROACH

¶33 This section will attempt to find a more palpable and economically-sound approach to FCC regulation. While many argue that FCC regulation is not necessary,[104] this iBrief will attempt to take a more pragmatic approach. The way that the law stands, the Supreme Court agrees with the FCC, finding that protecting children from indecent programming is a compelling interest, and therefore, allowing broadcast regulation within the

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[103] *See* discussion *supra* Sec. II, Part A.

[104] *See, e.g.*, Holohan, *supra* note 44, at 368-69. Holohan argues that the "technological underpinnings" of the *Pacifica* decision as well as broadcast indecency regulations are gone as a result of more advanced technology. *Id.* Consequently, he says that because of this incompatibility of technology and regulation, it is time for the Pacifica rationale to be overturned because of its inapplicability to current society and thus, full First Amendment protection should be given back to broadcasters. *Id.*

boundaries of reduced First Amendment protection.[105] Additionally, considering the current strength of the FCC and the reluctance of any politician to say the FCC should be removed, there is a need for a more pragmatic solution to these problems. Therefore, although Holohan and other like scholars present compelling arguments for no regulation at all, this is not the direction that courts nor legislators are likely to take.

¶34 However, in order for FCC regulation to rid itself of the problems that were described in Section II, it is necessary to examine the value of two approaches based on economic theory rather than interest group-fueled enforcement. The first approach attempts to apply the Condorcet Jury Theorem to FCC regulation and the second suggests that indecency regulation should be guided by paying attention to the viewer-advertiser relationship and lowering information costs for viewers.

A. The Condorcet Jury Theorem

¶35 In Bungard's paper, the Chief Counsel/Deputy Staff Director for the House Subcommittee on the Federal Workforce and Agency Organization suggests that the Condorcet Jury Theorem be applied to industry regulation.[106] The Condorcet Jury Theorem was designed by Marquis de Condorcet as a mechanism to "justify the use of majority rule and to assess the optimal size of a deliberative body."[107] The theory is explained by Edelman:

> Suppose that there are *n* voters who must decide between two alternatives, one of which is correct and the other incorrect. Assume that the probability that any given voter will vote for the correct alternative is greater than one-half. Then the probability that a majority vote will select the correct alternative approaches as the number of voters gets large.[108]

Bungard's paper uses examples to illustrate how the Condorcet Jury Theorem works in practice.[109] From a single decision-maker model to majority rule with a five-decision maker model,[110] the examples show how the probability that the correct decision will be reached increases as the number of decision makers increases. However, it is necessary to note that a unanimity rule does not work in a situation with a lot of decision makers

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[105] *See* discussion *supra* Sec. I, Part B.
[106] Bungard, *supra* note 89, at 228.
[107] Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL. STUD. 327, 327 (2002), *interpreted in* Bungard, *supra* note 89, at 228.
[108] *Id.* at 327.
[109] Bungard, *supra* note 89, at 228–31.
[110] *Id.*

because of the high probability of deadlock.[111] Additionally, it is necessary for all of the assumptions behind the Condorcet Jury Theorem to be present, those being "a common probability of being correct across all individuals, each individual's choice is made independent of the others and each individual votes sincerely, taking only his judgment into account."[112]

¶36 In order for each individual to have a common probability of reaching a correct decision, the decision makers must have a clear understanding of the facts in the case they are reviewing and also be well-versed in the broadcast regulations they are applying.[113] Additionally, the decision makers must have a greater than 50% chance of reaching the right answer.[114] Third, decisions must be made *independently* and without reliance on other decision makers.[115] This is extremely important considering the effect of interest groups and bandwagon politics in FCC decisions. Lastly, decisions must be made good faith.[116] It is necessary for decision makers to come to their decision on their own and have belief in the veracity of their vote.

¶37 Assuming that all of these assumptions are in place, Bungard argues that FCC regulations should be able to be implemented with "near-perfect results."[117] What Bungard suggests is the creation of an indecency board within the FCC modeled after this theorem.[118] The paper, like this one, also finds that application of the indecency regulations is central to the FCC's problems.[119] By creating a review board, the paper argues that problems will be alleviated because of the ability of the board to come to conclusions without being plagued by outside influences or advice.[120] The process is regimented as well: (1) the complaint is sent to the board, (2) it is then sent to FCC staff for additional fact inquiry, (3) the board receives additional information, (4) and the members of the board each decide whether the complaint falls within the FCC's definition of "indecent."[121]

¶38 This model attempts to depoliticize the FCC by modeling itself after a theorem that in many ways can be likened to outside directors or counsel in a corporation. However, this model is based on an assumption that a

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[111] *Id.* at 230.
[112] *Id.* at 230–31.
[113] *Id.* at 231–32.
[114] Bungard, *supra* note 89, at 232.
[115] *Id.* at 232-33.
[116] *Id.* at 233.
[117] *Id.*at 233.
[118] *Id.* at 233–34.
[119] *Id.* at 234.
[120] Bungard, *supra* note 89, at 235.
[121] *Id.* at 234-35.

person is more than 50% likely to come to the "correct" answer, if one exists. The trouble with this assumption is that indecency regulations lack the definition necessary to give board members the ability to find the correct answer. The American legal system is based on the common law methodology of looking to past cases to find the answers in the present. This is difficult when board members must look to such divergent examples as the Super Bowl Complaint as opposed to the Keen Eddie or John Gotti Complaints.

¶39 However, this does not mean that the model does not have some benefits. It would be a vast improvement over the old system in which FCC Commissioners themselves are the ones that write the decisions. In this new system, the slate appears to be wiped clean and decision makers are appointed by the President in consultation with Congress.[122] Additionally, the paper suggests that in order to further depoliticize the process, the President should be limited to six members of his own party in appointing the board.[123] And lastly, because this board is in place, the FCC is in a position to review all complaints of indecency and therefore, it cuts interest groups off at the pass by having a systematic and even-handed response to all alleged violations of indecency regulations.[124] Therefore, there is no need for a media blitz to move the FCC to respond to a complaint because each complaint is addressed by a large board that can even-handedly apply indecency regulations by the standards that set in opinions like *Pacifica* and *Action for Children's Television.*

¶40 So, while there are arguable difficulties with the necessary assumptions that the Condorcet Jury Theorem necessitates, the revisions that Bungard suggests are likely to alleviate the problems of selective prosecution and vagueness in enforcement currently plaguing the FCC. The next example takes yet another economic approach to the problem and relies more on the relationship between the advertiser and audience.

B. The Advertiser-Viewer Relationship

¶41 Current indecency regulation is based on the public trustee doctrine.[125] This doctrine states that "'the People' own the airways, and they, through their elected officials and delegated agencies, condition the granting of licenses to use the airways."[126] However, Brown and Candeub suggest that regulation focus on *advertisers* for the precise reason that they

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[122] *Id.* at 236-37.
[123] *Id.*
[124] *Id.* at 237.
[125] Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 B.Y.U.L. Rev. 1463, 1466 (2005).
[126] *Id.* (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 394 (1969)).

are the ones funding the media markets that regulation aims to rid of indecency.[127] The scholars looked at the economic realities of the broadcast industry and use that knowledge to create a system in which information is more freely traded between advertisers and viewers in order for viewers to pressure advertisers that sponsor indecent broadcasting.[128]

¶42 The paper bases its theory on the idea that broadcast television and radio are "two-sided."[129] In a two-sided market, a firm must answer to two different sets of customers and consumers.[130] The example that Brown and Candeub give is retailers, selling to consumers but also doing business with credit card companies.[131] In a similar relationship, broadcasters must think about two different consumer groups that they must attract: viewers and advertisers.[132] However, Brown and Candeub argue that the problem with broadcast regulation is that it focuses on only one part of the relationship that broadcasters have to deal with - the relationship between broadcaster and viewer.[133] By changing the dynamic and making advertisers more involved in the relationship, "to the extent that advertisers learn which content makes viewers less receptive to their advertisements, advertisers obtain value from being involved with indecency regulation."[134]

¶43 This leads to the question of how this relationship becomes the focus of indecency regulation. First, the FCC must mandate that broadcasters provide information about the advertisers that buy commercial time from them.[135] This is within their broad authority under the Communications Act of 1934.[136] Considering that broadcasters already maintain records about their sponsors for typical business records reasons, the transaction costs for companies would be rather low.[137]

¶44 The paper proposes two ways of carrying out the effects of this type of disclosure to the public; either implementing new methods in concordance with current regulation or replacing current regulation

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[127] *Id.* at 1466-67.
[128] *Id.* at 1467.
[129] *Id.* at 1498.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 1499.
[133] *Id.* at 1499–1500.
[134] *Id.* at 1500.
[135] *Id.* at 1501.
[136] *Id.* (construing 47 U.S.C. 303(j) (2000)) (FCC has the authority "to make general rules and regulations requiring stations to keep such records of programs, transmission of energy, communications or signals as it may deem desirable.").
[137] *Id.* at 1502.

altogether.[138] By mandating disclosure to viewers who advertise on a certain program, the viewer can contact the advertiser directly with complaints about the indecent programming that the company is sponsoring.[139] Replacing the current regime completely with this method would put the burden on the viewer to actively send a message to that advertiser. Second, the authors suggest that this system could give viewers another outlet in addition to the way that regulation exists presently.[140] If viewers feel that the FCC is not taking an active role in enforcing indecency regulations against a certain station or program, then viewers can take a more active role and send a message to certain advertisers that their sponsorship of certain programs is not okay.[141]

¶45 This does not mean that advertisers must respond to every complaint that they receive.[142] Rather, advertisers, would now have an active role in determining how indecent programming affects their bottom line and can weigh the costs and benefits of sponsoring an allegedly indecent broadcast.[143] The point is that opening up the lines of communication between viewers and advertisers gives both parties more information and more control over the programs that each party chooses to watch or sponsor.[144]

¶46 The aim of this change proposed by Brown and Candeub seems to address the problem of vagueness in indecency regulation. Rather than have a governmental body try and decide what the public deems to be indecent, the public takes an active role in contacting advertisers and signaling to them that they find their sponsorship of a certain program to be inappropriate. Therefore, advertisers are able to understand what exactly the "community standards" are and what the public considers to be indecent enough to tune out from. By opening up the discourse between advertisers and viewers, there is more efficiency in the market because viewers are able to contact those firms that sponsor and fund the programming that they are watching.

¶47 However, the ills of this program are numerous. In many ways, it is a call to interest groups to be much more aggressive in contacting firms and airing their grievances. While transaction costs might be low for the firms as well as the FCC, the problem with this type of change is that it puts a burden on the everyday viewer to communicate his/her preferences. The

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[138] *Id.* at 1503.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.* at 1504.
[143] *Id.*
[144] *Id.*

likelihood that a viewer will decide to be pro-active and communicate with a company, letting that company know that its sponsorship of a certain program is inappropriate, is very low. In many ways, the change in regulation that Brown and Candeub suggest simply gives interest groups another address to send their numerous and overzealous complaints, rather than encouraging the rest of the American public to help regulate broadcast indecency themselves.

¶48 The problem with Brown and Candeub's paper is that they have little faith in the public trustee doctrine, which is the basis for most regulatory bodies today. Although this is a typical libertarian argument posed by numerous scholars who are more apt to let the free market decide everything rather than bureaucracy, it fails to recognize the realities of the political system that Americans have inherited. The American political system is based precisely on the idea that representation is the best way for the public to get exactly what it needs. Because Americans have a system in which they depend on their Congressperson to fight for their "wants and needs" in Washington, D.C., we have inadvertently sponsored a system in which Congress has created bodies that regulate the different subjects of interstate commerce that our representatives feel need some sort of rule of law.

¶49 So although this method does have a free market basis that encourages communication between different players in the radio and television market, it fails to address the current political realities that exist today. While the FCC's current regulations might be arguably inefficient from an economist's point of view, they cannot be altogether done away with unless we are ready to change the political system that we live with today.

CONCLUSION

¶50 In the wake of events like Janet Jackson's infamous costume reveal, FCC regulation is now once again a topic on many people's minds. While the FCC standards, which are guided by the language from the *Pacifica* decision, necessitate even-handedness and a high degree of attention to community standards of decency, in practice they are more likely to be guided by the pressure of interest groups and media coverage. This paper looked at two theories based on economic principles aimed at remedying FCC problems.

¶51 The first proposed revision used the Condorcet Jury Theorem to create a system that seeks to add some sort of impartiality to FCC enforcement. While the system was based on assumptions that may be difficult to achieve in practice, in many ways, the system seems to be the

most practical way to move the FCC away from being a puppet of interest groups.

¶52 The second proposed revision was based on traditional principles of an efficient capital market. It necessitated that the FCC provide viewers with information on the advertisers that sponsor programming on television. By providing this information to viewers, viewers could then contact advertisers directly and to voice their concerns about the allegedly indecent programming that the sponsor is funding. In response, advertisers could make a business judgment as to whether the viewer's complaint has merit and either continue sponsoring the product and possibly lose some share of the market or discontinue sponsorship as a result of the information that the viewer provided. While this proposed revision was interesting and based on sound theories of efficient capital markets, it failed to address the concern that interest groups will most likely contact advertisers and thus artificially control advertisers' decisions.

¶53 Both of these proposals highlight the inefficiencies of the current system. While neither may be the appropriate choice for the FCC, it is clear that in order for the purpose and goals of the FCC to be met, there needs to be some way to address the problems of selective enforcement and vagueness. Otherwise, it will be difficult for broadcasters to ever determine how to tailor their programming appropriately. This ambiguity in regulation stunts the broadcast market and invariably results in wasted time and effort by companies in the entertainment industry.