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MEDIA AND THE LAW SYMPOSIUM: WHEN DOES GOVERNMENT REGULATION GO TOO FAR?

ADDRESSES

ESSAYS

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LIBERTY VS. TYRANNY: A CONSTANT STRUGGLE†

*Judge Andrew P. Napolitano**

The creation of the American Republic with its written Constitution and guarantees of personal freedom—a Constitution enacted by those who gave up their power to the central government instead of accepting a Constitution thrust upon them—is the single greatest political achievement in the history of the world. When we were colonists and subjects to a British king and parliament located 3,000 miles away, the king and parliament sought ingenious ways to raise money from us, so they would impose tax after tax after tax.[1] This is tyranny—taxation without representation. The tax that was the last straw was the Stamp Act.[2] In the Stamp Act, the parliament decreed, not for those in Great Britain but only for the colonists in the New World in the Americas, that every piece of paper in their personal possession—every book, document, bank draft, deed, mortgage, lease, and pamphlet to be nailed to a tree—had to have the king's stamp on it.[3] If you think going to the post office is terrible today, imagine being forced to go to a foreign post office operated by the king's people in Virginia in order to buy one of the king's stamps!

How did the king know if every piece of paper in your home had his stamp on it? Parliament enacted an abomination known as the

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1 AMERICAN ERAS: THE REVOLUTIONARY ERA, 1754–1783, at 202 (Robert J. Allison ed., 1998) (suggesting that taxation of the colonies was one of several measures "consistent with the mercantile theory that trade bound the empire together and that the revenue from this trade financed the empire's government and defense").

2 *Id.*

3 Stamp Act, 1765, 5 Geo. 3, c. 12, § 1 (Eng.).

Townshend Revenue Act, a statute that authorized British soldiers to write their own search warrants, show up at your front door, and hand you a piece of paper by which they had authorized themselves to enter your home.[4] And of course, while they look for stamps they might help themselves to rum, on which you could not prove you paid taxes, or to furniture, which you could not prove had been made domestically. They might also help themselves to whatever was in your barn and to a couple of your bedrooms until they decided it was time for them to leave.

Enough was enough. We fought a revolution, we won the revolution, and we wrote a Constitution. In that Constitution we had states that ceded a little bit of their sovereign power to a central government. Think about this: when our cousins in Europe received liberty they did so by threatening a begrudging king or potentate or prince who reluctantly gave them some freedom. That was power—the king granting liberty.

In creating the American Republic, we turned that notion upside down. It was not power granting liberty, but the opposite: liberty granting power. We recognized—as Thomas Jefferson did when he wrote in the Declaration of Independence the words "all men are created equal" and "endowed by their Creator with certain unalienable Rights"[5]—that our rights are natural. When Jefferson wrote those words, he wedded the soul of the American Republic to the natural law. We believed then, and I would like to think we still believe today, that our rights come from our humanity; as we are created in God's image and likeness and as He is perfectly free, we too are perfectly free. Our rights—to think as we wish, to say what we think, to publish what we say, to worship or not to worship, to self-defense, to privacy after the right to life (the greatest right that exists), the right to be left alone, the right not to incriminate ourselves, to use and enjoy our property as we see fit (not as the government tells us to)—these are natural rights that come from our humanity. They do not come from the government, but are gifts from God.[6]

This argument has not always been accepted by the people who write the laws. Indeed, in 1787, when they wrote the Constitution in Philadelphia, James Madison, with support from Jefferson, carried the ball for the natural law argument.[7] Their arguments were met with

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[4] Townshend Revenue Act, 1767, 7 Geo. 3, c. 46, § 10 (Eng.). Writs of assistance were originally prescribed in the fourteenth year of King Charles II's reign and were reauthorized in the Townshend Revenue Act. *Id.*

[5] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[6] *Id.* paras. 2–29 (delineating sundry unalienable, natural rights violated by the tyranny of King George III).

[7] *See* Declaration of Rights para. 1 (1776), *in* 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 21, 21 (Philadelphia, J.B. Lippincott & Co. 1865) (demonstrating Madison's support for natural law); *see also* Letter from Thomas Jefferson to Dr. John Manners (June

great resistance by the big government crowd, which existed even then, in the personalities of John Adams[8] and Alexander Hamilton.[9] Hamilton claimed that rights come from the government and those rights cannot exist without a government protecting them.[10]

They argued back and forth and eventually agreed on a Constitution in which the thirteen colonies would give away discrete, specific, delineated powers written down in the Constitution—powers delegated from the states to the federal government. The original draft of the Constitution, however, did not contain the Bill of Rights, and some, including Hamilton, argued that it was unnecessary.[11] Jefferson, however, was distrustful of power and demanded that certain individual rights, like the freedom of the press, be included in the Constitution.[12] Eventually, the Constitution was adopted, and four years later the Bill of Rights was added.[13]

The Bill of Rights contains guarantees of liberty. These are not aspirations; these are guarantees that speech, religion, and privacy will not suffer interference by the government. But almost from the moment the ink was dry on the document, Congress began wearing away at these guarantees of liberty by enacting the Alien and Sedition Acts, which made it a crime to disparage the government with the intent of harming it, specifically by attacking Congress or the President.[14] Who is missing?

12, 1817), *in* 12 THE WORKS OF THOMAS JEFFERSON 65, 66 (Paul Leicester Ford ed., 1905) (illustrating Jefferson's support for natural law).

8 *See* Letter from John Adams to Benjamin Rush (Aug. 28, 1811), *in* 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 635, 638 (Charles Francis Adams ed., Books for Libraries Press 1969) (1850) (advocating for a national bank); Michael J. Gerhardt, *The Constitutional Significance of Forgotten Pres[i]dents*, 54 CLEV. ST. L. REV. 467, 470 (2006) (describing Adams as having a "nationalist vision of a strong federal government").

9 THE FEDERALIST NO. 1 (Alexander Hamilton).

10 *See id.*

11 THE FEDERALIST NO. 84 (Alexander Hamilton).

12 Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* THOMAS JEFFERSON: WRITINGS 914, 915–16 (Merrill D. Peterson ed., 1984).

13 AMERICAN ERAS: DEVELOPMENT OF A NATION, 1783–1815, at 204, 208 (Robert J. Allison ed., 1997). The Constitution was approved, not ratified, on September 17, 1787. *Id.* at 204. Two years later, in September 1789, the First Congress drafted twelve Amendments, ten of which became our Bill of Rights when the states ratified them on December 15, 1791. *Id.* at 208.

14 Sedition Act, ch. 74, § 2, 1 Stat. 596, 596 (1798). The Sedition Act is commonly grouped with the Alien Act, which allowed the President to deport aliens deemed dangerous to the government. Alien Act, ch. 58, § 1, 1 Stat. 570, 570–71 (1798). Though the Sedition Act made it unlawful for citizens to oppose "measures of the *government*," or to "intimidate" members of the "*government*" from performing their duties, Sedition Act § 1, 1 Stat. at 596 (emphasis added), only the President and members of Congress were singled for additional protection. *Id.* § 2.

The Vice President.[15] The Vice President was Thomas Jefferson. Not only did Jefferson not care if they attacked him, he did not want to have anything to do with the federal government prosecuting people for speech. But it did. For example, the administration of John Adams prosecuted a Vermont congressman named Matthew Lyon because he criticized the President for swallowing up the public welfare "in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."[16] Congressman Lyon was sentenced to four months in prison, during which time he was even re-elected to Congress.[17]

Jefferson then, of course, becomes President. The Alien and Sedition Acts had a sunset clause, so they expired.[18] Jefferson threatened to veto the laws if they were re-enacted, but because the Anti-Federalists who were supportive of small government controlled the Congress, the Alien and Sedition Acts never got to Jefferson's desk.[19] It was a sordid period in American history in which the same generation that said Congress shall make no law abridging the freedom of speech wrote a law abridging the freedom of speech, and then prosecuted people under that law.

We do not again see serious punishment for speech or the exercise of fundamental liberties until the time of the Civil War. In this horrible period of our history, the President of the United States of America, his Justice Department, and his military prosecuted people for speech. I am not talking about people who took up arms against the government. I am talking about journalists and politicians in the North who disagreed with the President's war effort and were therefore dragged before military commissions and prosecuted, instead of being prosecuted in federal court. Congressman Clement Vallandigham of Ohio, for example, was tried by a military commission in his home state.[20] The Civil War was not fought in Ohio, and the federal courts were open and operating, but the government still ordered that he be prosecuted in a military commission in Ohio because he disagreed with the President's war effort.[21] It was not until after Lincoln was dead that the Supreme Court would rule in *Ex parte Milligan* that U.S. military commissions do not have the power to try non-military individuals unless the revolt in the streets is so great that the courts cannot sit.[22] Yet another generation of

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15 *See* Sedition Act § 2, 1 Stat. at 596.

16 Lyon's Case, 15 F. Cas. 1183, 1183 (C.C.D. Vt. 1798) (No. 8,646).

17 *Id.* at 1185, 1189–90.

18 Sedition Act § 4, 1 Stat. at 597; Alien Act § 6, 1 Stat. at 572.

19 *See* SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828, at 274–75 (1999).

20 *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 244 (1863).

21 *Id.*

22 *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123, 127 (1866).

Americans in government leadership positions did not understand the idea that Congress shall make no law abridging the freedom of speech.

Then comes World War I and Congress enacts the Espionage Act.[23] The Espionage Act makes it a crime to speak against the government's war effort with the purpose and intention of deterring people from going to war.[24] If, for example, you stood outside a recruitment office or a draft board and said to young men, "Do not go in there," you could be prosecuted under the Espionage Act. Ask Mr. Abrams—who wrote pamphlets against the war effort and encouraged people not to work in munitions plants or volunteer for service during World War I[25]—if the federal prosecutors who went after him respected the First Amendment. Mr. Abrams's leaflets were in Yiddish and English, which he distributed by throwing from the window of a building in the middle of New York City that housed the employer of one of the defendants.[26] Mr. Abrams was sentenced to decades in prison for violating the Espionage Act because Congress made speech that it hated or feared a crime[27] and because the Supreme Court relied upon the previously unheard-of doctrine it created in an earlier case—that if there is a "clear and present danger" created by the speech, then the speech may be prosecuted.[28]

The Espionage Act is still on the books. If you will recall when the *New York Times*, of which I am not a champion or defender, exposed President Bush's warrantless wire-tapping, the then-Attorney General of the United States, Alberto Gonzales, threatened to prosecute the newspaper under the Espionage Act because its revelation of the truth would harm the war effort.[29] Gonzales was right—that was the law. It is a horrific, horrendous, clearly unconstitutional law, but still the law of the land.

In World War II, we witnessed the spectacle of Franklin Delano Roosevelt ("FDR") incarcerating approximately 120,000 Japanese-Americans in the far west[30]—not because of any proof of guilt, not even

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[23] Espionage Act, ch. 30, tit. I, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. §§ 792–98 (2006)).

[24] *Id.* §§ 2–3, 40 Stat. at 218–19.

[25] Abrams v. United States, 250 U.S. 616, 617–18, 621, 624 (1919).

[26] *Id.* at 617–18.

[27] *See id.* at 629 (Holmes, J., dissenting).

[28] *See id.* at 618–19 (citing Schenck v. United States, 249 U.S. 47, 52 (1919)).

[29] *See Examining DOJ's Investigation of Journalists who Publish Classified Information: Lessons from the Jack Anderson Case: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 3 (2006) (statement of Matthew W. Friedrich, Chief of Staff and Principal Deputy Assistant Att'y Gen., Criminal Division, Department of Justice); *Developments in the Law—The Law of Media*, 120 HARV. L. REV. 990, 1007 (2007).

[30] 131 CONG. REC. S10, 267 (daily ed. May 2, 1985) (statement of Sen. Matsunaga).

because of any allegation against them, but just because of their ethnicity and the fear that they would break the law.[31] And again, in *Korematsu v. United States*, a cowed Supreme Court went along with it.[32] Justice Frank Murphy, who was FDR's closest friend on the Court at the time, wrote a stinging dissent[33]—one which would cause FDR never to speak to Murphy again. Nevertheless, the Court upheld the incarceration of people based on race in this horrendous case.[34]

What is it about wartime that makes the government want to seek and acquire more power? In wartime, people are afraid, and when people are afraid, they look for the following satanic bargain: give me your freedom, and I will keep you safe. And do not worry when you do not have to be kept safe anymore; I will give you your freedom back. Yet we all know that liberty lost does not come back. We all know that when we sacrifice liberty for safety, we usually end up with neither. If the President of the United States of America says that his first job is to keep us safe, he is wrong! His first job is to keep us *free*. If he keeps us safe but not free, he is not doing his job. That is the lesson of the Declaration of Independence and the Bill of Rights.

What is it about members of Congress who take an oath to uphold the Constitution, but look the other way when they encounter constitutional impediments to their agendas? I once interviewed Congressman Jim Clyburn, the number three ranking Democrat in the House. I said to him, "[Congressman Clyburn], where in the Constitution is the federal government charged with maintaining peoples' health?"[35] And he said to me, "[Judge], there's nothing in the Constitution that says the federal government has got anything to do with most of the stuff we do."[36] Then he said, "[Your Honor], how about showing me where in the Constitution it prohibits the federal government from [managing health care]?"[37]

This reveals an incredible ignorance of the concept of the federal government. Congress is not a general legislature. It does not exist in order to right every wrong. It exists only to pursue federal issues, not

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[31] Korematsu v. United States, 323 U.S. 214, 226 (1944) (Roberts, J., dissenting) ("On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.").

[32] *Id.* at 223–24.

[33] *See id.* at 233 (Murphy, J., dissenting).

[34] *Id.* at 223–24.

[35] YouTube, Judge Napolitano v[s.] James Clyburn: Debating [the] Constitutionality of Federal Health Care, http://www.youtube.com/watch?v=00Xcqp46A64 (last visited Apr. 19, 2010) (at beginning of the interview).

[36] *Id.* (at seven seconds into the interview).

[37] *Id.* (at fifty-six seconds into the interview).

national issues, which were specifically delegated to it by the states when they gave away some of their sovereignty. Ronald Reagan reminded us in his First Inaugural Address that the states created the federal government—the federal government did not create the states.[38] The states gave a little bit of their power to the federal government, confined and limited that power to certain areas, and set forth what the federal government was permitted to do.

I have argued that power given by the states can be taken back by the states.[39] If a legislature has enacted a resolution giving some of its power away, it can also enact a resolution taking some of that power back. Tell that to Congressman Clyburn, who does not care what the Constitution says.

Finally, we deal with the judiciary. Who would have thought that black-robed judges would save the Constitution? The whole purpose of an independent judiciary is not to go along with majority opinion, but to resist it. The judicial branch is the anti-democratic branch of the government. Were this not so, no one would be around to prevent a majority from taking your freedom or property by majority vote. On what principle would the judiciary rely for the authority to stop the majority? It would rely on the natural law—one principle of which is that you own your body and the property that your hands and intellect lawfully acquire and produce.[40] And you do not own these things subject to the government; you own them outright.

Hamilton argued that unless men were angels, we could not give them unlimited power, no matter who they are or what they promise.[41] We have a government that thinks it can write any law, tax any event, seize any property, and regulate any behavior, whether authorized by the Constitution or not. It is the charge of those of you in this room who will take the same oath that Congressman Franks and I took, and of the others here who are licensed to practice law, to uphold the Constitution—not the constitution we think should exist, but the Constitution as it is.

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[38] Ronald Reagan, First Inaugural Address (Jan. 20, 1981), *in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 331, 333 (U.S. Gov't Printing Office, Bicentennial ed. 1989). President Reagan stated, in pertinent part,

> It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government.

Id.

[39] ANDREW P. NAPOLITANO, THE CONSTITUTION IN EXILE 240–41 (2006).

[40] *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 123–24 (Thomas P. Peardon ed., Macmillan Publ'g Co. 1952) (1690).

[41] THE FEDERALIST NO. 51 (Alexander Hamilton).

Jefferson's immortal statement that we "are endowed by [our] Creator with certain unalienable Rights"[42] was not just a political remark. It was incorporated by reference into the supreme law of our land.[43] Our rights are natural. The government cannot take them away with a command from the President or an unconstitutional act like the Patriot Act, which lets federal agents write their own search warrants.[44] Did we not fight a revolution to keep British soldiers from writing their own search warrants?

Some of my colleagues are very upset that the Secretary of Homeland Security came out with a report saying we have to worry about people who hold pro-life and pro-gun views, veterans recently returning from overseas wars, people who are disgruntled about the state of the economy, and people who think the federal government is too powerful.[45] And I said, "Well, she knows that I'm pro-life; she knows that I'm pro-gun; she knows that I don't like to pay taxes; she knows that I think that the government is too big, too fat, and regulates too much." But how does she know that about the average person? She knows because she has dispatched her agents to write search warrants to capture the keystrokes on laptops, hear the conversations on telephones, and look at medical and legal records. And if she does not use that information to prosecute you, you will never even know that she has it. Well, how did she get that power? Nobody else had that power. It is in the PATRIOT ACT.[46] You may have trusted George Bush with that kind of power, but now you have a government that disagrees with you on guns, the right to life, and paying taxes, and that government has the same power.

In that same vein, a question that some may be asking now is: Should we be concerned about the recent talks of Congress possibly reinstating the Fairness Doctrine?[47] I would not be surprised at all if the

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[42] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[43] *See* U.S. CONST. art. VII (attributing the beginning of the United States to the time at which the Declaration of Independence was signed).

[44] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, tit. II, § 215, 115 Stat. 272, 287 (codified as amended at 50 U.S.C. §§ 1861–63 (2006)). Though not called a "search warrant," the method of collecting records under section 215 of the Patriot Act is essentially the same thing. *See id.*

[45] OFFICE OF INTELLIGENCE & ANALYSIS, U.S. DEP'T OF HOMELAND SEC., RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT 2–5, 7 (2009).

[46] USA PATRIOT ACT §§ 201, 214–15, 115 Stat. at 278, 286–88 (codified at 18 U.S.C. § 2516 (2006); 50 U.S.C. §§ 1842–43, 1861–63 (2006)).

[47] *See* Fairness and Accountability in Broadcasting Act, H.R. 501, 109th Cong. § 2 (2005); Media Ownership Reform Act of 2005, H.R. 3302, 109th Cong. § 3 (2005). The Fairness Doctrine was a rule promulgated by the Federal Communications Commission

present administration, and its huge majorities in the Congress, attempted to reinstate the Fairness Doctrine, which basically would destroy talk radio and would require that for every Bill O'Reilly there be one Geraldo Rivera[48]—or even worse that they be together in the same studio on the same show. I believe in having a sense of humor, but this is a serious issue about which to be concerned. The flip side is that I really do not believe that the Supreme Court, as presently constituted, would uphold the type of infringement on speech that would come about from the Fairness Doctrine. The Fairness Doctrine was once upheld[49] but it was by a different Supreme Court in a different era with a different attitude about First Amendment rights. Fortunately, given the current Court's jurisprudence, I do not think that such an imposition on free speech could survive today.[50]

Power once given cannot be taken back. And government is not logic; it is fear and force. John Adams said we would not have a government if we did not have fear.[51] George Washington said the whole basis of government is its power to force people to obedience.[52] So which is greater: The individual created in the image and likeness of God with an immortal soul that can glorify Him through eternity, or an artificial creation based on fear and force? The answer is an obvious one. You must possess the courage and the will to make sure that others understand this as well, because in every age, as Jefferson predicted,

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("FCC") in 1949, pursuant to its congressionally-mandated authority. *See* Communications Act of 1934, Pub. L. 73-416, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.); Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1257–58 (1949). The rule stated that a broadcaster must give adequate coverage to public issues, and that coverage must be fair in that it accurately reflects the opposing views. *Id.* A corollary to this rule, applying specifically to the endorsement of political candidates, was enacted in 1967 and still remains on the books to this day. *See* 47 C.F.R. §§ 73.1910, 73.1940, 73.1941 (2009). Although its constitutionality was upheld in later case law, *Red Lion Broadasting Co. v. FCC*, 395 U.S. 367, 375 (1969), the FCC discarded the rule in 1987. Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C.R. 5043, 5052, 5057 (1987), *aff'd*, Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989).

48 *See supra* note 47.

49 *Red Lion*, 395 U.S. at 375.

50 *See, e.g.*, Citizens United v. Fed. Election Comm'n, No. 08-205, slip op. at 55–57 (Jan. 21, 2010) (striking down a statute that limited political speech).

51 Adams's words were as follows: "Fear is the foundation of most governments; but it is so sordid and brutal a passion, and renders men in whose breasts it predominates so stupid and miserable, that Americans will not be likely to approve of any political institution which is founded on it." JOHN ADAMS, *Thoughts on Government*, *in* 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 189, 194 (Charles Francis Adams ed., Books for Libraries Press 1969) (1850).

52 George Washington, Farewell Address, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 213, 217 (James D. Richardson comp., Washington, D.C., Gov't Printing Office 1896).

government gets stronger and individual liberty gets weaker.[53] You must guard against that in everything you do and in every act that you take, especially after you take that solemn oath to uphold the Constitution.

I would suggest using the government's greatest weapon against it: I would suggest using fear against the government. During Antonin Scalia's confirmation hearings for the U.S. Supreme Court, when he was asked if he thought that statements of members of Congress on the floor of the House and in Committee Reports should be examined by justices when attempting to interpret statutes, he said no.[54] When asked why not, he said these statements are unreliable and may not accurately represent the will of Congress as a whole;[55] indeed, there is only one reason that members of Congress vote for anything: to get re-elected. There is, however, one thing that members of Congress do fear: the loss of their power to violate the Constitution. To conclude, let us remember the age-old refrain—when the people fear their government, there is tyranny, but when the government fears the people, there is liberty.

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[53] Letter from Thomas Jefferson to Colonel Carrington (May 27, 1788), *in* 1 HENRY STEPHENS RANDALL,THE LIFE OF THOMAS JEFFERSON 488–89 (Philadelphia, J.B. Lippincott & Co. 1865).

[54] *Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 67 (1986) (statement of Antonin Scalia, J.).

[55] *See id.*

PROTECTING THE INNOCENT WHILE PRESERVING SPEECH: A BALANCING ACT OF MEDIA REGULATION†

*Congressman Trent Franks**

I am intrigued by the title of this Symposium—the intersection of media and the law. When does government regulation go too far? As you might imagine, this is a question we ask every day in Congress. It is always the interpretation of when and how much, and how it fits into the construct of the Constitution. It is always a big discussion for us, and on the Judiciary Committee, it is one we tackle all of the time.

The question is generally one of deciding where certain regulations belong along the private/public spectrum. Which things are properly addressed by government, and which things are properly addressed by the private sector? Focusing in on regulation of the media, we must first realize that television has been commercially available for almost eighty years,[1] and radio has been widely available and utilized for even longer.[2] By now we know that problems arise from an unregulated media. Take, for example, the abuse of children in the creation of child pornography—something made profitable only through pervasive use of mass media channels.[3]

Once we identify those problems—and they usually become readily apparent over time—then those of us in government are given the charge to try to work to provide the most effective solution that we can in the law. If we grant that a regulation could be effective in any given circumstance, then we must begin our problem solving analysis with the question of authority. Is the regulation permissible under the construct of the Constitution? Does the government have the final authority to restrict the activity in question? Any responsible policymaker or regulator should tell you that the first step in answering the question of where the law and the media should intersect is to determine the

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1 15 THE NEW ENCYCLOPEDIA BRITANNICA 213 (15th ed. 2007).

2 *Id.* at 210.

3 *See* RICHARD WORTLEY & STEPHEN SMALLBONE, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., PROBLEM-SPECIFIC GUIDES SER. NO. 41, CHILD PORNOGRAPHY ON THE INTERNET 8 (2006) ("The Internet has escalated the problem of child pornography by increasing the amount of material available, the efficiency of its distribution, and the ease of its accessibility.").

constitutional parameters of the proposed regulation. But some regulators seem loathe to observe *any* restrictions, and even among those who do, it seems that there is an endless number of opinions on the question of what those parameters are or should be.

Now it's interesting to note that most of the prominent issues impacting today's topic involve the Fairness Doctrine[4] and various forms of indecency regulation. Those are pretty disparate concepts. It strikes me that these two issues have at least one core ingredient in common, however, and that is paternalism. Paternalism in the American psyche is an ugly, ugly word. *Paternalism* is defined as the practice of managing or governing individuals, businesses, or nations in the manner of a father dealing benevolently and often intrusively with his children.[5] Paternalism is the burdening of those who are not fully liberated. And the American impulse is to want neither a benevolent dictator nor an intrusive, meddling father.

We Americans in particular have a low tolerance for government interference in our lives. So why do we have these paternalistic laws? And in the case of the Fairness Doctrine, why *did* we have this paternalistic law? Why on earth would we even discuss resurrecting it? Should there be a place for paternalism at all? I think that perhaps *that* should be the focus of today's topic.

The answer varies, of course, by circumstance. Proponents argue that any of the indecency regulations, and obviously the child pornography laws, are drafted to protect children—not to oppress adults. From the perspective of many legislators, legislating with the goal to

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[4] The "Fairness Doctrine" was a policy that originated in a 1949 Federal Communications Commission ("FCC") report requiring broadcast media licensees to "devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations" and to provide the public with "a reasonable opportunity to hear different opposing positions" on such issues. Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1257–58 (1949). A corollary to this rule, applying specifically to the endorsement of political candidates, was enacted in 1967 and still remains on the books to this day. *See* 47 C.F.R. §§ 73.1910, 73.1940, 73.1941 (2009). Despite the fact that the Supreme Court upheld the constitutionality of the Fairness Doctrine in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969), the FCC discarded the rule in 1987 because, contrary to its purpose, it failed to serve the public interest by encouraging "access to diverse opinions on controversial issues." Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C.R. 5043, 5052, 5057 (1987) (expressing concerns that the doctrine violated First Amendment free speech principles), *aff'd*, Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989) (affirming the decision of the FCC without reaching the constitutional issues). Some Democrats in the current Congress have called for the revival of the Fairness Doctrine. Jim Puzzanghera, *Democrats Speak Out for Fairness Doctrine*, L.A. TIMES, July 23, 2007, at C1.

[5] *See* BLACK'S LAW DICTIONARY 1241 (9th ed. 2009) (defining *paternalism* as "[a] government's policy or practice of taking responsibility for the individual affairs of its citizens, esp[ecially] by supplying their needs or regulating their conduct in a heavyhanded manner").

protect children is a completely different enterprise than simply legislating the activity of adults. But almost any single regulation that deals with that will do some of both. When I was still in my twenties, I became the cabinet-level Director of the Arizona Governor's Office for Children, and I oversaw all of the children's programs for Arizona.[6] One thing that should remain clear to all of us, ladies and gentlemen, is that children are almost always dependent entirely upon others for their well-being. The moral impulse that we should have in that regard is profoundly important for the cause of the human race, for it is the harm inflicted upon us when we are children that can have the most lasting and damaging effect upon our lives.

The regulation of online child pornography is one prominent example. In a recent House Judiciary Committee examination of six partisan bills to fight online child exploitation, we learned that a recent study—the first in-depth study of online sexual behavior—found that eighty-five percent of offenders who downloaded child pornography also committed abusive sexual acts against children.[7] *Eighty-five percent.*

The policy implications of that study are so significant because they firmly link pornography and sexual predation. Our job in the Committee is to protect our citizens in their constitutional rights first and foremost, especially those who are defenseless. So when persons claim that they have a First Amendment right to consume child pornography, we have to weigh this against the child's right to live free from harm. For me—and certainly most legislators—it is not a close call.

Oftentimes, discussions of regulation of child pornography and related forms of abuse focus on the rights, or the lack thereof, of the persons seeking to obtain the restricted material. But there is more than one human entity with rights in this picture—that entity being the child. Few legislators tend to craft legislation with the rights of both the exploiter and the exploited equally in mind. Instead, legislators end up favoring the rights of one over the other—either the exploiter's supposed First Amendment rights or the child's right to be free from harm—which causes us to sometimes get out of balance

Those of you in the legal community know our legal system has a long tradition of making special provision in the law for protecting children because often children do not have the ability or the judgment to make wise decisions without guidance. The law accommodates greater intrusion in the area of personal autonomy when children are involved

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[6] House.gov, Biography of Congressman Trent Franks, http://franks.house.gov/pages/biography (last visited Apr. 14, 2010).

[7] *Sex Crimes and the Internet: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) (statement of Rep. J. Randy Forbes, Member, House Comm. on the Judiciary).

because paternalism is justified for the protection of little human beings who are not able to control their environment or to advocate on their own behalf when something in that environment is very harmful to them.

We should also remember that children share many rights with adults and are full citizens under our Constitution.[8] This paternal approach to children's issues explains our car seat laws, compulsory vaccinations, and (sometimes) indecency legislation. If there were ever a place for paternalism, most can agree that it is in the area of protecting children because of the irreversible harm and impact pornography and other forms of child abuse can have on those children.[9]

So, what about cases of paternalism where there is no discernable right or harm for the affected persons—such as in the case of discriminating adults? The most prominent example of such paternalism is the Fairness Doctrine. The Fairness Doctrine, a 1949 creation of the Federal Communications Commission, requires broadcasters to air viewpoints on controversial issues.[10] Simply put, the Fairness Doctrine appoints government as an umpire, or nanny if you will, to decide whether what American adults are hearing is politically desirable. The Fairness Doctrine assumes that an average adult is unable to critically consume information or to discern the appropriate degree of messaging where there are divergent views.[11] Is there such a thing as an appropriate degree or amount of messaging on any given issue? Who gets to decide what that message is going to be? Perhaps other adults who count themselves as capable of discriminating appropriately?

Astute political observers on both sides of the aisle will sometimes state plainly that the Fairness Doctrine is a weapon against conservative hegemony on talk radio. Both sides of the political aisle understand and acknowledge that talk radio is a conservative stronghold. Some have suggested in so many words that wherever there is competition, conservatives have the advantage—such as with radio, books, or blogs. But this is not really a partisan comment on my part; it's just to pose the

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[8] *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511, 513–14 (1969) (holding that children, as "persons" under the Constitution, are afforded the right to freedom of expression).

[9] Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULL. 164, 164–67, 173 (1993) (concluding, based on the results of forty-five studies, that "sexual abuse is serious and can manifest itself in a wide variety of symptomatic and pathological behaviors").

[10] *Supra* note 4.

[11] *See* Thomas G. Krattenmaker & L. A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 159–60 (arguing that the Fairness Doctrine "substitutes monolithic governmental choice for the programs that otherwise would result from broadcasters' competition for viewers' and listeners' time and attention").

question: Could competitiveness of a forum determine how the parties align on issues related to the intersection of media and the law?

So let me just close here. Is the Fairness Doctrine actually a sword to be used against the First Amendment? Would it only be a sword if placed into the hands of unscrupulous regulators? Can regulators ever be trusted to be scrupulous? Maybe competition isn't the linchpin. Maybe, as is argued in the case of children, a true regard for harm to the innocent animates that debate. Surely the First Amendment is not meant to be a safe haven for child pornographers, as was argued unsuccessfully in the 1982 case of *New York v. Ferber*.[12] But there are groups like the North American Man/Boy Love Association ("NAMBLA")[13] who might still argue that it is. It has been my honor to be with you all here today. Coming up, we have a very impressive panel of experts who are some of the most learned it their fields. Perhaps our distinguished panelists will have some thoughts to share regarding these issues that I have addressed. I sincerely look forward to hearing from them.

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[12] New York v. Ferber, 458 U.S. 747, 749–50, 774 (1982).

[13] NAMBLA.org, Who We Are, http://www.nambla.org/welcome.htm (last visited Apr. 14, 2010). NAMBLA is a "liberation movement" that was formed in 1978 with the "goal to end the extreme oppression of men and boys in mutually consensual relationships." *Id.* In support of that goal, NAMBLA condemns "age-of-consent laws and all other restrictions which deny men and boys the full enjoyment of their bodies and control over their own lives." *Id.*

SHALL THOSE WHO LIVE BY FCC INDECENCY COMPLAINTS DIE BY FCC INDECENCY COMPLAINTS?†

*Adam Candeub**

INTRODUCTION

The Supreme Court's recent decision, *FCC v. Fox Television Stations, Inc.*, affirmed the power of the Federal Communications Commission ("FCC") to prohibit indecent content on broadcast television and radio.[1] The Court's opinion in *Fox* concerned administrative law questions; specifically, whether the FCC could regulate "fleeting expletives" that its indecency rules did not specifically prohibit.[2] The Court kept alive the *FCC v. Pacifica Foundation*[3] constitutional justifications for the FCC's regulations,[4] though it remanded the question of their constitutionality to the court of appeals, perhaps to visit the matter at a later time.[5]

The FCC indecency regulations forbid "utter[ing] any obscene, indecent, or profane language by means of radio communication."[6] As the Court in *Fox* stated, "The Commission first invoked the statutory ban on indecent broadcasts in 1975 [in the *Pacifica Radio* case], declaring a daytime broadcast of George Carlin's 'Filthy Words' monologue actionably indecent."[7] In the *Pacifica* case, the FCC announced the

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1 129 S. Ct. 1800, 1819 (2009).

2 *Id.* at 1805, 1810.

3 438 U.S. 726 (1978).

4 *Fox*, 129 S. Ct. at 1805 (citing *Pacifica*, 438 U.S. at 748–49).

5 *Id.* at 1819.

6 18 U.S.C. § 1464 (2006).

7 *Fox*, 129 S. Ct. at 1806 (citing Pacifica Found., 56 F.C.C.2d 94 (1975)). Not to indulge in pedantry, but the FCC certainly relied upon § 1464 at least implicitly decades before *Pacifica*, contrary to Justice Scalia's claim. While radio (and later television) were largely self-policing until the 1970s, this self-restraint proceeded in part from the clearer social standards of the time but also from the implicit threat of FCC action pursuant to § 1464.

The FCC's reaction to the infamous 1937 *Chase & Sanborn Hour* radio show on the NBC network serves as an example of the pre-*Pacifica* "iron fist in velvet glove" regulatory approach to indecency. The show at issue featured Mae West playing a provocative Eve engaged in sexual banter with the snake in the Garden of Eden. *Chase & Sanborn Hour* (NBC radio broadcast Dec. 12, 1937) (Garden of Eden skit). West's radio skit produced a

indecency test that still guides its policy today, prohibiting "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[8] The Supreme Court upheld this regulation against a First Amendment challenge on the grounds of broadcasts' unique ubiquity and effect on children.[9]

These justifications now seem quaint. Most households receive their broadcast television through cable. Most people therefore click from regulated "decent" broadcast programming to unregulated and perhaps "indecent" cable programming without even noticing it. Radio perhaps still has some of the ubiquitous quality the *Pacifica* case relied upon, but it is a quality that is diminishing with the rise of satellite radio and podcasts. Indeed, Internet delivery deluges us with unregulated media and will only continue to do so. The Supreme Court repeatedly has refused to allow Congress to extend indecency regulation beyond broadcast television and radio.[10] In short, the degree that the broadcast indecency regulations in fact protect children from indecent material is marginal to nonexistent in our current media environment.

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public outrage, RADIO CENSORSHIP 27 (Harrison B. Summers ed., Arno Press Inc. 1971) (1939), destroyed her radio career, *id.*, and generated great pressure for a political response. Steve Craig, *Out of Eden: The Legion of Decency, the FCC, and Mae West's 1937 Appearance on* The Chase & Sanborn Hour, 13 J. RADIO STUD. 232, 239–40 (2006). The FCC was unwilling to take legal action. In light of contradictory provisions in the Communications Act of 1934—prohibiting censorship but allowing indecency regulation, § 326 (codified at 47 U.S.C. § 326 (1934))—the FCC probably did not want to risk a trip to the Supreme Court. Instead, the FCC reacted with an admonishing letter to NBC, primarily warning NBC of its "social, civic, and moral responsibility . . . [to provide] a high standard for programs as would insure against features that are suggestive, vulgar, immoral, or of such other character as may be offensive to the great mass of right-thinking, clean-minded American citizens." 83 CONG. REC. app. at 357 (1938).

[8] *Pacifica*, 56 F.C.C.2d at 98. Over a quarter of a century later, the FCC issued guidelines to elucidate the standard's meaning. These guidelines include:

> (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 of 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.*

Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, 8003 (2001) (emphasis added). For a definitive and highly-readable review and analysis of the FCC's indecency regulation, see generally Lili Levi, *The FCC's Regulation of Indecency*, FIRST REP., Apr. 2008, http://www.firstamendmentcenter.org/PDF/FirstReport.Indecency.Levi.final.pdf.

[9] *Pacifica*, 438 U.S. at 748–49.

[10] *E.g.*, United States v. Playboy Entm't Group, 529 U.S. 803, 806, 827 (2000) (refusing to extend indecency regulation to cable television); Reno v. ACLU, 521 U.S. 844, 849 (1997) (refusing to extend indecency regulation to the Internet).

Complaints and filings before the FCC, as well as political posturing over broadcast regulation, portray an alternate reality. By these lights, our civilization hangs upon indecency regulation. Hundreds of thousands of complaints deluge the FCC, and broadcasters pay millions in forfeiture orders.[11] Congressmen and commissioners give endless speeches on the subject.[12] If the effect of indecency regulation is marginal upon children's exposure to indecent materials—and that seems undeniable—why should anyone care? Why is there such a fuss?

The answer is, of course, politics. The complaint process allows political actors to reveal credible information about their political strength and affiliation.[13] It is a type of public exhibition. By filing complaints, cultural conservatives display their powerful muscles.[14] Politicians—by issuing forfeiture notices to broadcasters—demonstrate their commitment to serve that power.[15] There is certainly nothing wrong with this game. Arguably, much, if not most, political activity is susceptible to such interpretation.

When examined in a broader historical and global perspective, risks emerge. Christians, particularly those outside established denominations, have used radio, and later television, to create a vibrant religious following—a point that need hardly be made in the pages of the Regent University Law Review.[16] Yet the history of United States

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[11] According to the latest available statistics, the FCC received 2,132,831 complaints from 2003 through June 2006 and issued forfeiture orders totaling $12,330,580. Fed. Commc'ns Comm'n, Complaint and Enforcement Statistics, http://www.fcc.gov/eb/oip/Stats.html (last visited Apr. 19, 2010) (follow "Indecency Complaints and NALs: 1993–2006" hyperlink). Many point to the Parents Television Council ("PTC") as the source or impetus for the vast majority of these complaints. *See, e.g.*, Michael Strocko, *Just a Concern for Good Manners: The Second Circuit Strikes Down the FCC's Broadcast Indecency Regime*, 17 U. MIAMI BUS. L. REV. 155, 176 (2008) (explaining that the "overwhelming majority" of complaints about an expletive during the Golden Globes were from those associated with the PTC (citing Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19,859, 19,859 n.1 (2003))).

[12] *See* Liza Porteus, *House Passes Broadcast Decency Bill*, FOX NEWS.COM, Mar. 11, 2004, http://www.foxnews.com/story/0,2933,113951,00.html.

[13] *See* Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 BYU L. REV. 1463, 1464–65 (citing Todd Shields, *Activists Dominate Content Complaints*, MEDIAWEEK, Dec. 6, 2004, at 4).

[14] *See id.*

[15] *Id.* at 1465 (citing Jonathan R. Macey, Winstar, *Bureaucracy and Public Choice*, 6 SUP. CT. ECON. REV. 173, 176 (1998)).

[16] Kimberly A. Neuendorf et al., The History and Social Impact of Religious Broadcasting 9–10 (Aug. 1, 1987) (paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication, reproduced by the Educational Resources Information Center ("ERIC")) (citing Michael Doan, *The "Electronic Church" Spreads the Word*, U.S. NEWS & WORLD REP., Apr. 23, 1984, at 68, 68), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/3f/

communications regulation shows considerable hostility to religious broadcasting—with deregulation spurring the greatest growth in religious broadcasting.[17] Countries, like those in Western Europe, with completely regulated (that is, nationalized) media for most of the twentieth century provide access largely only to the established and mainstream religious denominations.[18] Interestingly, Christianity seems a spent force in Western Europe, yet it remains vital in the United States.[19] It seems that deregulatory policies have benefitted religious broadcasting (and religion) far more than government regulation.[20]

This Essay suggests that those interested in fostering media markets that produce the greatest diversity and varieties of religious experiences should not succumb to the temptation of inviting government media regulation, including indecency regulation. This is particularly true because the indecency regulation has such a marginal effect on our media culture—and all that the indecency regulations really enable is a political signaling game.[21]

Then what can those who find the current media environment objectionable do? The media is a mirror of our public selves—a script of permissible fantasies and acceptable moral narratives. If we want better media, tastes must be changed. And that can only be done by continuing to lower barriers to the production of non-mainstream media—programming that offers an alternative to what broadcasters now serve. Lowering these barriers usually involves deregulation, but sometimes, as others in this Symposium point out, it involves regulation as perhaps in the network neutrality debate.[22] In sum, for those wishing the greatest quantity, quality, and diversity of religious programming, more openness may be more valuable than more decency.

I. A FEW ILLUSTRATIVE MOMENTS FROM THE HISTORY OF RELIGIOUS BROADCASTING

Given the proliferation of religious programming today, we tend to think that U.S. radio and television always offered extensive religious

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53/b1.pdf. Regent University was founded by Pat Robertson (founder of the Christian Broadcasting Network). *Id.* (citing Doan, *supra*).

[17] *See infra* Part I.A.

[18] *See infra* Part II.

[19] PBS.org, American Faith Statistics, http://www.pbs.org/now/society/faithstats.html (last visited Apr. 19, 2010).

[20] *See infra* Part II.

[21] *See* Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 766–67 (1998) (explaining the importance of symbols and signals and how they relate to politics); *see also* Brown & Candeub, *supra* note 13, at 1465 (citing Macey, *supra* note 15) (explaining that politicians signal to stay in power).

[22] *See, e.g.*, Marvin Ammori, *Strange Bedfellows: Network Neutrality's Unifying Influence*, 22 REGENT U. L. REV. 335, 341 (2010).

programming. The persistent shadows of such radio pioneers as Aimee Semple McPherson, R.R. Brown, and Robert Schuller reinforce this image.[23] But when examined just a bit more closely, a different picture emerges. Government has, in general, demonstrated a persistent hostility toward religious broadcasting. Religious broadcasting showed its greatest growth—and openness to new comers—in periods of low regulation. While such a claim would require rigorous support, the following simply suggests this claim through an examination of three moments in regulatory history: the original licensing of radio in the late 1920s and early 1930s, the official policy for religious broadcast television that developed in the 1940s and 1950s, and finally, the role of cable deregulation in advancing religious programming.

A. The Original Radio Licenses Allocation

Religious broadcasting played a central role in radio from the medium's inception. The first non-experimental radio station in the country, KDKA, included on January 2, 1921, a church service in its first year's programming.[24] Some claim this inclusion resulted from the station engineer's position as a church choir member.[25] A year later, in 1922, WJBT aired the first regular religious broadcast of *Where Jesus Blesses Thousands* in Chicago.[26]

The 1920s developed into a type of golden age of religious broadcasting; indeed, there was broadcasting of all kinds. One out of ten radio stations licenses were owned by a religious group, totaling over 600 stations nationwide.[27] In general, a tremendous diversity of ownership characterized radio broadcast. There were commercial stations, but there were just as many hobbyists, university and school groups, and other nonprofits taking to the waves in roughly equivalent number as commercial stations.[28]

The regulatory approach to spectrum allocation no doubt led to this diversity. Specifically, there was hardly any regulation. Pursuant to the Radio Act of 1912, anyone could start broadcasting on radio by simply mailing a postcard to the Department of Commerce.[29] This led to supposed "chaos" in which radio stations interfered with one another,

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[23] *See* Neuendorf, et al., *supra* note 16, at 3, 9.

[24] JEFFREY K. HADDEN & CHARLES E. SWANN, PRIME TIME PREACHERS: THE RISING POWER OF TELEVANGELISM 73 (1981).

[25] *Id.*

[26] Carol Flake, *The Electronic Kingdom*, NEW REPUBLIC, May 19, 1982, at 9, 9.

[27] HADDEN & SWANN, *supra* note 24, at 73–74.

[28] *Hoover to Maintain Radio Status Quo*, N.Y. TIMES, Feb. 25, 1927, at 2 (claiming that out of 18,119 total radio stations, only 733 were public entertainment stations).

[29] Pub. L. No. 62-264, ch. 287, 37 Stat. 302, 302–03 (1912) (repealed 1927).

destroying the value of the medium,[30] or so the argument went. As a result of these concerns, then-Secretary of Commerce Herbert Hoover sponsored a series of radio conferences to bring the stakeholders together and produce legislative proposals.[31] While these conferences produced not much but paper, they perhaps contributed to a political momentum "to do something."[32] Hoover attempted to regulate interference matters, but the courts rebuffed him.[33] Hoover eventually refused to regulate radio at all, thereby pressuring Congress to do something.[34]

With Hoover's actions (or inaction) as a prompt, Congress passed the Radio Act of 1927,[35] the legislation that provides the model for broadcast spectrum allocation still used today. Asserting government ownership of the airwaves, the Radio Act of 1927 now distributed this wealth, granting licenses to those entities that would serve the "public interest."[36] This statutory standard, which survives today in the Radio Act's successor, the Communications Act of 1934, still governs spectrum allocation.[37] Its meaning was vague then and continues to be so. In 1930, a leading communication lawyer stated that "'[p]ublic interest, convenience, or necessity' means about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority."[38] The passage of time has not brought legal clarity. Speaking nearly seventy years later, then-FCC Chairman Michael Powell said that the public interest standard "'is

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[30] THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 11–12 (1994) (citing Louis Caldwell, *Clearing the Ether's Traffic Jam*, NATION'S BUS., Nov. 1929, at 33, 34–35).

[31] *Id.* at 8.

[32] Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 171 (1990).

[33] *See, e.g.*, Hoover v. Intercity Radio, 286 F. 1003, 1007 (D.C. Cir. 1923) (ruling that the Secretary of Commerce did not have the authority to withhold a license from a qualified applicant regardless of wavelength interference); United States v. Zenith Radio, 12 F.2d 614, 617 (N.D. Ill. 1926) (ruling that the Secretary of Commerce lacked the authority to select times when broadcasters could broadcast).

[34] *See* Brown & Candeub, *supra* note 12, at 1474 (citing KRATTENMAKER & POWE, *supra* note 30, at 7–16; Hazlett, *supra* note 32, at 159).

[35] Pub. L. No. 69-632, ch. 169, 44 Stat. 1162 (1927) (repealed 1934).

[36] *Id.* § 11, 44 Stat. at 1167.

[37] Pub. L. No. 73-416, ch. 652, tit. III, § 309(a), 48 Stat. 1064, 1085 (codified as amended at 47 U.S.C. § 309(a) (2006)).

[38] Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930).

about as empty a vessel as you can accord a regulatory agency and ask it to make meaningful judgments.'"[39]

Bureaucratic and unofficial political power mushrooms in vague statutes' shady, dank interstices. And, beginning in the 1920s, lobbyists and business groups dominated efforts before the Federal Radio Commission ("FRC") and its successor agency, the FCC, to obtain licenses.[40] In this struggle, religious broadcasters fared badly, with the FCC often concluding that religious broadcasting was not in the public interest under the Radio Act of 1927.[41] According to George Douglas, "[B]etween 1927 and 1932 the total number of broadcast stations was reduced . . . from 681 to 604," with a "drastic cutting back . . . of stations authorized to broadcast at night . . . from 565 to 397."[42] The FRC's actions "wiped out several low-budget, self-serving conservative religious stations."[43]

As a result, religious broadcasting became largely the domain of the dominant radio networks. With independently owned and controlled religious broadcasters largely pushed off the air, the network radio stations (1) provided religious programming pursuant to their obligations to provide public interest broadcasting, and (2) generally had policies forbidding sale of airtime for religious programming.[44] The networks worked with groups of mainline churches, like the Federal Council of Churches, to create programming.[45] The Federal Council represented mainline churches—and had a clear policy of avoiding "special-interest proselytizing" as well as "doctrine and controversy."[46] It also created a cartel by which the Federal Council and other groups recognized by the networks could exclude all but "mainstream" churches.[47]

Interestingly, a handful of religious radio figures who offered more innovative religious programming managed to continue broadcasting,

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[39] Yochi J. Dreazen, *FCC's Powell Quickly Marks Agency as His Own*, WALL ST. J., May 1, 2001, at A28.

[40] *See* ADVISORY COMM. ON PUB. INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCASTING FUTURE: FINAL REPORT 18 (1998), *available at* http://www.benton.org/sites/benton.org/files/recs.pdf.

[41] *See* HAL ERICKSON, RELIGIOUS RADIO AND TELEVISION IN THE UNITED STATES, 1921–1991, at 4 (McFarland Classic ed. 2001).

[42] GEORGE H. DOUGLAS, THE EARLY DAYS OF RADIO BROADCASTING 96 (McFarland Classic ed. 2001).

[43] ERICKSON, *supra* note 41, at 4.

[44] *Id.* at 4–5; HADDEN & SWANN, *supra* note 24, at 78; Laurence R. Iannaccone et al., *Deregulating Religion: The Economics of Church and State*, 35 ECON. INQUIRY 350, 359 (1997).

[45] Iannaccone et al., *supra* note 44, at 359.

[46] ERICKSON, *supra* note 41, at 3.

[47] *Id.*; HADDEN & SWANN, *supra* note 24, at 77–78.

often facing great difficulties. This included Aimee Semple McPherson and Dr. Walter Maier.[48] Many gained national stature and drew great followings.[49] From an economic perspective, these preachers became entrepreneurs, pioneering viewer-supported business models that proved ever more powerful as cable television became a deregulated medium, a point discussed below.[50]

B. Treatment of Religious Programming on Broadcast Television

Unlike radio, television never experienced a period analogous to radio's "wild west" 1920s. Licenses were carefully allocated to leading commercial interests, starting in the 1940s and 1950s.[51] Television adopted an approach to religious programming that, in many ways, mimicked the approach taken by radio: broadcasters relied upon mainstream religious organizations—in particular the National Council of Churches ("NCC"), a successor to the Federal Council—to recommend and create programming, and then broadcasters provided free air time.[52] While the National Religious Broadcasters ("NRB"), a group representing conservative and evangelical Christian groups, gained some power, the NCC received the most free airtime "while the conservative's NRB functioned with paid time both locally and in syndication."[53] According to A. Kenneth Curtis, conservatives "had to purchase time to have a voice and presence in television."[54]

FCC regulations had an interesting provision that encouraged broadcasters to allow mainstream groups to decide which religious programming would air. Under FCC regulations, television stations had to devote a certain percentage of their time for public interest-type programming.[55] Religious programming counted towards this requirement *only if* it were given away at no cost.[56] In general, this resulted, as it did in radio, in conventional types of programming, as broadcasters, eager to avoid controversy, relied upon mainstream religious groups to provide general programming.[57] One scholar concludes that religious television broadcasting could be characterized as

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48 ERICKSON, *supra* note 41, at 120–21, 126–27.

49 *Id.*

50 *See* HADDEN & SWANN, *supra* note 24, at 78.

51 *See* Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547, 1557, 1557 nn.32–34 (2008).

52 ERICKSON, *supra* note 41, at 8–9.

53 *Id.* at 9.

54 A. Kenneth Curtis, *A New Apostasy?*, ETERNITY, Sept. 1978, at 21.

55 Iannaccone et al., *supra* note 44, at 359.

56 *Id.*

57 *See id.* (citing JEFFREY K. HADDEN & ANSON SHUPE, TELEVANGELISM: POWER AND POLITICS ON GOD'S FRONTIER 46–47 (1988)).

falling into only four categories: (1) using the camera and microphone as an extended pulpit (for example, Bishop Fulton Sheen); (2) creating a spectacle (for example, Billy Graham specials); (3) teaching (for example, the National Council of Churches' *Lamp Unto My Feet* and the Lutheran Church-Missouri Synod's *This Is the Life*); and (4) provoking earnest thought in "spot" public service announcements.[58] Further, those with innovative approaches were kept out, even if they were willing to pay for it. As with radio, most television stations had a policy against "commercial religion" and refused to sell those given that label time.[59]

Finally, the threat of FCC applying the Fairness Doctrine[60] to religious programs no doubt homogenized broadcast content. While the FCC generally declined to apply the Fairness Doctrine to religion,[61] the threat was always there.[62] Indeed, the *Red Lion Broadcasting v. FCC* landmark Supreme Court case that affirmed the FCC's Fairness Doctrine involved a broadcast by conservative minister Billy James Hargis.[63] Complaints and license applications were (and still largely are) "carried out on a case-by-case basis";[64] therefore, predicting how the FCC might rule could never be a sure thing.

Things did change as conservative religious broadcasters became better at playing the Washington game. In 1960, conservative religious groups not affiliated with the NCC pressured the FCC to rule that local stations must count airtime sold to religious broadcasters (not donated freely) towards satisfying their "public interest" credit.[65] Before the FCC ruling took effect, only fifty-three percent of all religious broadcasting was paid air-time.[66] But by 1977, paid-time religious broadcasting had risen to ninety-two percent.[67] Peter Horsfield has stated that evangelical

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[58] J. HAROLD ELLENS, MODELS OF RELIGIOUS BROADCASTING 37–38, 90–91, 102, 105, 120–22, 123 (1974).

[59] *See* WILLIAM F. FORE, TELEVISION AND RELIGION: THE SHAPING OF FAITH, VALUES, AND CULTURE 78 (1987).

[60] The Fairness Doctrine was a rule promulgated by the FCC in 1949, pursuant to its congressionally mandated authority. *See* Communications Act of 1934, Pub. L. 73-416, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.); Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257–58 (1949). The rule stated that a broadcaster must give adequate coverage to public issues and that coverage must be fair in that it accurately reflects the opposing views. *Id.*

[61] *See, e.g.*, Johnson v. Station KHEP, 54 F.C.C.2d 923, 923 (1975) (citing Communications Act of 1934 § 326); Madalyn Murray, 40 F.C.C. 647, 647–48 (1965).

[62] Richard H. Gentry, *Broadcast Religion: When Does It Raise Fairness Doctrine Issues?*, 28 J. BROADCASTING 259, 260 (1984).

[63] 395 U.S. 367, 370–71, 375 (1969).

[64] ERICKSON, *supra* note 41, at 12.

[65] Iannaccone et al., *supra* note 44, at 360.

[66] PETER G. HORSFIELD, RELIGIOUS TELEVISION: THE AMERICAN EXPERIENCE 9 (1984).

[67] *Id.*

"paid-time programs have virtually eliminated local religious programming."[68] It is arguable, however, that conservative religious programming did better with deregulation than with lobbyists.

C. Deregulating Cable Television and the Explosion of Religious Networks

Although the 1960s and 1970s showed a liberalization of restrictions on religious broadcasting and a concurrent increase in diversity, this output of religious broadcasting provided by traditional over-the-air broadcast remained relatively small and constant. The emergence of alternate broadcasting channels, specifically the now almost-defunct UHF channels, allowed for a growth of religious broadcasting.[69] Indeed, in 1961, Pat Robertson "took charge of a failed UHF station in Portsmouth, Virginia."[70]

The deregulation of cable television is a long story, ably told elsewhere.[71] It need only be said here that, in an effort to protect local broadcasting, the FCC limited cable television's ability to provide pay-for-view offering or offerings originating outside of the local broadcast area.[72] This protection continued, at least nominally, until the early 1980s.[73] And, not surprisingly, "[t]he 1980s saw an upsurge in electronic religion's audience. . . . Conservative broadcasters had taken advantage of the UHF boom in the 1960s and the 1970s, and they were again in the forefront with the fledgling cable industry."[74] Indeed, the incredible diversity of religious broadcasting today can be traced in large measure to the opening of cable television in the 1980s.[75]

II. THE SUPPLY-SIDE THEORY OF RELIGION AND REGULATION OF BROADCAST

One of the great puzzles of twentieth century western civilization is why religion continues to thrive in the United States but has largely died out in western Europe during the post-war period. One theory maintains that western Europe suffers from a monopoly in religion.[76] State-

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[68] *Id.*

[69] ERICKSON, *supra* note 41, at 12–13.

[70] *Id.* at 13.

[71] *See generally* Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77 (1981) (discussing the history of the cable television industry, including deregulation).

[72] *Id.* at 93 (citing Amendment to Rules & Regulations of Cmty. Antenna Television Systems, 23 F.C.C.2d 825, 828 (1970); Amendment to Rules & Regulations of Subscription Television Serv., 15 F.C.C.2d 466, 468 (1968)).

[73] *See id.* at 106–07.

[74] ERICKSON, *supra* note 41, at 14.

[75] *Id.*

[76] *See* Iannaccone et al., *supra* note 44, at 351.

supported national churches dominate in northern Europe,[77] and the Catholic Church dominates in southern Europe, though drawing more on cultural authority than official government support.[78] According to this theory, monopoly in religion produces a lower output and quality, just as monopoly tends to do in other areas more traditionally understood as markets.[79] Conversely, the United States, which has been a haven for myriad sects and denominations from its inception, provides competition for the provision of religion.[80] This competition leads to a greater supply of religious experiences that better responds to people's spiritual needs.[81] Not surprisingly, European states have media policies that explicitly favor broadcasting of the established church and other mainline denominations.[82]

This Essay only adds to the insight that lowering barriers to entry and the cost of communications (a central input cost for religion) also encourages supply of religious experience. In addition, lowering communications costs also encourages certain dynamic efficiencies, as suppliers of religious experiences learn and master new technologies to develop new ways to respond to people's religious needs. Government restriction of communication seems to reduce the supply of religious broadcasting—to the detriment of religion in our country.

The history, sketched anecdotally above, illustrates this point; as communications media were deregulated, barriers to entry were eliminated. The supply increased, and those individuals who could best respond to people's spiritual needs prospered and flourished. While religious broadcasters were successful in the 1960s and 1970s in using political pressure to obtain paid-for programming and UHF channels, their greatest success followed deregulation of media.[83]

Well, what does this set of insights have to do with the initial topic of this Essay: the FCC's indecency regulation? It is only that those interested in promoting religion through mass media should be wary of government involvement and regulation. To mix metaphors, indecency regulation risks letting the camel nose of government into the tent,

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77 *Id.* at 352.

78 *See, e.g.*, Vatican City State, State Departments, http://www.vaticanstate.va/EN/State_and_Government/StateDepartments/index.htm (last visited Apr. 19, 2010) (noting that the Pope is the Vatican City-State's Head of State, located in Rome, Italy).

79 *See* Iannaccone et al., *supra* note 44, at 351, 353 (citing FRANCIS GRUND, THE AMERICANS IN THEIR MORAL, SOCIAL, AND POLITICAL RELATIONS (1837), *reprinted in* THE VOLUNTARY CHURCH 77, 80 (Milton Powell ed., 1967)).

80 *Id.* at 352–53.

81 *See id.* at 351.

82 *See* BURTON PAULU, BRITISH BROADCASTING: RADIO AND TELEVISION IN THE UNITED KINGDOM 197–98 (1956) (regarding minority religions' exclusion from broadcasting).

83 *See supra* Part I.C.

threatening the religious programming itself—thereby cutting one's nose off to spite one's face. This is particularly true given the marginal effect that indecency regulation has on our general cultural atmosphere.

Then what must we do if we want a less vulgar, more uplifting media? The problem is deeper than any indecency regulation, which, after all, can only regulate a very limited type of speech. Our society is deeply coarsened in ways that go beyond the indecency regulation's prohibition on George Carlin's *Filthy Words*[84] or Janet Jackson's revealed anatomy.[85]

This Symposium offered a wonderful, unplanned illustration of this point. In Professor Corcos's highly elucidating presentation, she used a clip from the television show, *Two and a Half Men*. The scene involved a young boy, Jake Harper, then-aged ten and played by Angus T. Jones, waking up his hungover uncle, Charlie Harper, played by Charlie Sheen.[86] The scene is thematically identical to that found in the classic Broadway play, then-movie starring Rosalind Russell, *Auntie Mame*. Indeed, the similarity was so striking and surprising that I felt compelled to mention it during the panel session. A scene from *Two and a Half Men* is reproduced below.

It's morning. Charlie is asleep. He opens his eyes and a little boy comes into focus in front of him. It is Jake.

Jake: Boy, is your eye red.

Charlie: You should see it from in here. What are you doing here, Jake?

Jake: My mom brought me. Will you take me swimming in the ocean?

Charlie: Can we talk about it after my head stops exploding?

Jake: Why is your head exploding?

Charlie: Well, I drank a little too much wine last night.

Jake: If it makes you feel bad, why do you drink it?

Charlie: Nobody likes a wiseass, Jake.

Jake: You have to put a dollar in the swear jar. You said "ass."

Charlie: Tell you what, here's twenty. (*gives Jake the note.*) That should cover me until lunch.[87]

Now compare it to the scene reproduced below from *Auntie Mame*, in which the young Patrick Dennis, also aged ten, confronts a hungover Auntie Mame.

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[84] FCC v. Pacifica Found., 438 U.S. 726, 729 (1978).

[85] CBS Corp. v. FCC, 535 F.3d 167, 172 (3d Cir. 2008), *vacated*, 129 S. Ct. 2176 (2009).

[86] Christine Alice Corcos, *Some Thoughts on Chuck Lorre: "Bad Words" and the Raging Paranoia of Network Sensors*, 22 REGENT U. L. REV. 369, 375 (2010).

[87] *Two and a Half Men: Pilot* (CBS television broadcast Sept. 22, 2003).

Scene 5

The lights come up—faintly—on Auntie Mame's plush bedroom. She is reclining on a huge bed, with a sleeping mask over her eyes.

Young Pat bursts in the door.

Young Pat: (*Excitedly.*) Auntie Mame! Auntie Mame! (*Auntie Mame is shocked into jangling wakefulness. She sits upright in bed and clutches the mask from her face.*)

Auntie Mame: (*Confused.*) What is it? What happened?

Young Pat: I've got something to show you. (*He opens the Venetian blinds and a shaft of bright afternoon sunlight hits Auntie Mame squarely in the face. She reels back against the pillow.*) Look! (*Young Pat spins the airplane. Auntie Mame watches it with fascinated horror.*)

Auntie Mame: My God! Bats!

Young Pat: (*As the airplane circles in descending spirals.*) It's an actual model of the *Spirit of St. Louis.* (*Auntie Mame recoils from the model airplane, as it crashes into her lap. Young Pat rushes to recover it and explain its mechanism to Auntie Mame.*) See? It's got a rubber-band motor, and I whittled the body out of balsa wood, and—(*Auntie Mame gestures him away, closing her eyes and holding her aching head.*)

Auntie Mame: Please, darling—your Auntie Mame's hung. (*Young Pat is deeply hurt by this. It's Chicago all over again. Quietly he takes the airplane and backs out of the room.*)

Young Pat: (*Softly.*) Oh, sure, Auntie Mame. (*Auntie Mame is left alone with her hangover. She sits for a moment with her hands shielding her eyes from the sunlight. Gradually she realizes what she has done. Peeking through her fingers, she braves the sunlight and calls to the boy who has left her.*)

Auntie Mame: Patrick. Patrick—come back. (*Young Pat reappears in the doorway, uncertainly.*) You know, I really am interested in all your projects. But you've got to admit, it's a bit surprising for Auntie Mame to find Mr. Lindbergh in her bedroom before breakfast. (*She squints at the light.*) Child, how can you see with all that light? (*Obligingly Young Pat crosses to the window and partially closes the Venetian blinds.*) That's better. Now be a perfect angel and ask Ito to bring me a very light breakfast: black coffee and a sidecar. And you might ask him to fix something for your Aunt Vera; I think I hear her coming to in the guest room. (*Young Pat starts out obediently.*) First—

> come and give your Auntie Mame a good-morning kiss. But gently, dear. (*Young Pat approaches timidly and kisses her.*) That was lovely, darling. You'll make some lucky woman very happy someday. (*Gingerly, Auntie Mame takes the airplane model from the boy's hands and winds the propeller tentatively.*) You know, I really am fascinated by aviation. I never knew before they did it all with rubber bands. (*As she hands the airplane back to Patrick, the propeller blows in her face insolently. The telephone rings suddenly. This affects Auntie Mame like a dentist's drill at the nape of her neck. Young Pat picks it up.*)[88]

The unintentional similarities in these two scenes are striking. Both employ, for comic purposes, the spectacle of an authority figure, respectively aunt and uncle, in a morally compromising position—being hungover—and confronted by a ten-year-old boy. (One supposes that for both works, ten years old is the age that best balances understanding with innocence.) The differences, however, are far more telling. In *Auntie Mame*, the compromised authority figure regains her dignity—after some histrionics—and assumes a proper parenting role inquiring about Patrick's model plane. The scene maintains its humor by the amusing dialogue of a sophisticated socialite doing her best to interest herself in model airplanes while nursing a horrible hangover.

In contrast, in *Two and a Half Men*, the authority figure, Uncle Charlie, is unrepentant. Humor is achieved by the spectacle of a young boy using the word "ass." Uncle Charlie never even attempts to assume the proper parental role of interesting himself in the child's world. Indeed, the child has no "world"; his interests appear limited to attempting to embarrass his uncle.

On a deeper level, *Auntie Mame* examines two very different human beings developing a relationship under unusual circumstances—and relies upon human foible to tell its story. While strict moralists might find the portrayal of a hungover parent figure discovered by a child

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[88] JEROME LAWRENCE & ROBERT E. LEE, AUNTIE MAME 23–25 (rev. ed. 1999). This scene is from the play, but the original movie uses the dialogue almost identically. *See* AUNTIE MAME (Warner Bros. Pictures 1958). Though also made into a less-than-memorable musical and movie musical starring Lucille Ball, MAME (ABC 1974), the original *Auntie Mame,* starring Rosalind Russell, remains a classic. Indeed, in some critics' estimation, the novel on which it was based qualifies as one of the best post-War American novels ever written. *E.g.*, CAMILLE PAGLIA, SEXUAL PERSONAE 220 (Yale Univ. Press 2001) (1990) ("The only character in literature whose theatrical personae rival [Shakespeare's] Cleopatra's is Auntie Mame. Patrick Dennis'[s] *Auntie Mame* (1955) is the American *Alice in Wonderland* and in my view more interesting and important than any 'serious' novel after World War II.").

inappropriate, the incident is used to create a vivid, human portrait that explores the limits and possibilities of human affection. Conversely, *Two and a Half Men* seems simply about human foible and relies on portraying embarrassment, shamelessness, and references to human anatomy to create interest.

While literary critics often make the error of seeing the world in a grain of sand, and law review articles rarely offer good literary criticism, comparing these two scenes reveals the state of our culture and limits of the indecency regulation. What seems truly objectionable in *Two and a Half Men* is not the use of the word "ass." Rather, it is the lack of a compelling normative story. The scene seems to trade on humiliation and embarrassment as ends unto themselves (and trade very well, for that matter). *Two and a Half Men* has been on the air for seven years and is one of the most popular television comedies in the United States.[89] What an indictment on the overall coarseness of our culture! No amount of regulation will cure this issue; in fact, such regulations could have the unintended effect of hindering the very religious broadcasts that might help society correct its course. Instead of arguing for further indecency regulation, a concerted effort must be undertaken to regain the same cultural sense of decency that tempered the story of *Auntie Mame*. To argue otherwise is to simply ignore what has become of our country's moral fabric.

CONCLUSION

The FCC indecency regulation exists in an alternate universe, exerting little to no control over most of the media people consume but playing a major role in an elaborate inside-Beltway signaling game. At the same time, the indecency complaint procedure constitutes a dangerous invitation for more government regulation of media. Given government's historic hostility to religious broadcasting and the innovation in religious communication that unregulated media has prompted, this is an invitation that those who support creative religious programming should decline.

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[89] *See* Scott Collins, *CBS Skirts Sheen Scrutiny*, L.A. TIMES, Jan. 9, 2010, at D1.

THE FCC'S AFFIRMATIVE SPEECH OBLIGATIONS PROMOTING CHILD WELFARE†

*Lili Levi**

Child welfare has been the most commonly articulated rationale justifying regulation and legislation regarding electronic media in the past twenty years. The most visible and controversial initiatives that the Federal Communications Commission ("FCC") has taken to promote that goal—such as the prohibition of indecency on broadcast television during the daytime[1]—have entailed suppressing speech to protect children from harm. But prohibiting speech is not the only tack the FCC has taken to promote the welfare of children. It has also adopted regulations designed to use television to educate and improve the young. Specifically, the FCC's children's educational television rules—adopted under the authority of the Children's Television Act of 1990 ("CTA")[2]—have sought to induce broadcasters to air a minimum of three hours per week of core educational programming for children.[3] The remainder of this Essay focuses on that affirmative speech obligation.

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† This speech is adapted for publication and was originally presented at a panel discussion as part of the Regent University Law Review and The Federalist Society for Law & Public Policy Studies Media and Law Symposium at Regent University School of Law, October 9–10, 2009.

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1 FCC Broadcast Radio Services, 47 C.F.R. § 73.3999 (2009); *see also* 18 U.S.C. § 1464 (2006) (making it a federal criminal offense to broadcast obscene, indecent, and profane material). The FCC has defined indecency as "'language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.'" Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, 8000 (2001) (quoting Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464 , 8 F.C.C.R. 704, 705 n.10 (1993)). Since 2003, the FCC has expanded the scope and enforcement of its indecency rules. *See* Lili Levi, *The FCC's Regulation of Indecency*, FIRST REP., Apr. 2008, at 2–3, 14, http://www.firstamendmentcenter.org/PDF/FirstReport.Indecency.Levi.final.pdf; *see also* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009) (upholding, against Administrative Procedure Act challenge, the FCC's expansion of its indecency prohibitions to the broadcast of fleeting expletives); FCC v. Pacifica Found., 438 U.S. 726, 758–61 (1978) (upholding, against First Amendment challenge, the agency's right to channel indecency).

2 Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996–1000 (codified as amended in 47 U.S.C. §§ 303(a), 303(b), 394, 397 (2006)).

3 47 C.F.R. § 73.671(d) (2009); *see also* Policies & Rules Concerning Children's Television Programming, 11 F.C.C.R. 10,660, 10,718 (1996) (authorizing the Mass Media Bureau "to approve the Children's Television Act portions of a broadcaster's renewal application where the broadcaster has aired three hours per week . . . of educational and informational programming").

Children in America watch an average of over three hours of television daily.[4] While many complain about children's entertainment programming on commercial television, social scientists have demonstrated the medium's ability to be an effective teacher.[5] In contrast, public discourse highlights failures—in money, competence, outcomes—in public education systems all around the country.[6] It is understandable, then, that children's advocates, the FCC, and Congress have all expressed interest in affirmatively enlisting commercial broadcasters to enhance public education.

This issue is now very much in the public eye. Over the summer, the Senate Commerce Committee held a hearing entitled *Rethinking the Children's Television Act for a Digital Media Age*.[7] Julius Genachowski, the then-recently appointed FCC Chairman, responded to the Senate inquiry by announcing the commencement of a new FCC investigation into the children's educational television rules and their application in the digital media age.[8] Shortly thereafter, the FCC released a Notice of Inquiry entitled *Empowering Parents and Protecting Children in an Evolving Media Landscape*; therein, it invited comment, *inter alia*, on "what steps the government or industry could take to promote the development and availability [of children's educational content]," and "whether the [FCC's] rules implementing the CTA have been effective in

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[4] Empowering Parents & Protecting Children in an Evolving Media Landscape, 24 F.C.C.R. 13,171, 13,175 (2009) (citing DONALD F. ROBERTS ET AL., KAISER FAMILY FOUND., GENERATION M: MEDIA IN THE LIVES OF 8–18 YEAR-OLDS 23–24 (2005)).

[5] *E.g.*, *id.* at 13,176 (citing Heather L. Kirkorian et al., *Media and Young Children's Learning*, FUTURE OF CHILDREN, Spring 2008, at 39, 47; Barbara J. Wilson, *Media and Children's Aggression, Fear, and Altruism*, FUTURE OF CHILDREN, Spring 2008, at 87, 107–08).

[6] *See, e.g.*, Sam Dillon, *16 Finalists are Named for School Grant Program*, N.Y. TIMES, Mar. 5, 2010, at A15 (describing state contest for federal education funds under Race To The Top initiative); Bob Herbert, Op-Ed., *Stacking the Deck Against Kids*, N.Y. TIMES, Nov. 28, 2009, at A19 (noting that the current recession is curtailing American children's educational opportunities). *See generally Fixing D.C.'s Schools: A Washington Post Investigation*, WASH. POST ONLINE, http://www.washingtonpost.com/wp-srv/metro/interactives/dcschools/#fullseries (detailing the plight of Washington, D.C. schools) (last visited Apr. 19, 2010).

[7] Julius Genachowski, Chairman, Fed. Commc'ns Comm'n, Statement Before the United States Senate Committee on Commerce, Science, & Transportation: Hearing on "Rethinking the Children's Television Act for a Digital Media Age" 3–4 (July 22, 2009) [hereinafter Genachowski Statement], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-292170A1.pdf. For the C-SPAN video of the hearing, see C-SPAN Video Library, Senate Commerce Hearing on Children's Television, http://www.c-spanvideo.org/program/287915-1 (last visited Apr. 19, 2010).

[8] Genachowski Statement, *supra* note 7, at 2; *see also* John Eggerton, *FCC to Revisit Kids TV Rules*, BROADCASTING & CABLE, July 22, 2009, http://www.broadcastingcable.com/article/316123-FCC_To_Revisit_Kids_TV_Rules.php?nid=2228&source=title&rid=6104711 (reporting the FCC inquiry into children's television rules in the current media age).

promoting the availability of educational content for children on broadcast television."[9]

This renewed focus on children's television provides an opportunity to think about whether the FCC's rules are effective or should be fundamentally revised. In my view, the history of children's television regulation is one of limited success. Where you come out on this depends on whether you emphasize the "limited" or the "success," and that is why this issue will likely be controversial.

Although the FCC has encouraged broadcasters to air quality children's educational television for almost fifty years, it rejected mandatory requirements during much of that period.[10] Despite FCC exhortations, broadcasters of the 1970s and later decades did not air much educational programming for children.[11] Even after Congress passed the CTA in 1990, requiring programming service to the child audience, at least some broadcasters continued to claim that shows like *The Jetsons*, *GI Joe*, and *Teenage Mutant Ninja Turtles* satisfied their obligations to program appropriately for the child audience.[12] If you have children and have seen these programs, you're probably amused at the broadcasters' temerity.[13]

Ultimately, in 1996, the FCC decided to incentivize broadcasters to air more educational programming for children. So the agency adopted what it called a "processing guideline" under which a broadcast station airing a minimum of three hours per week of core children's educational

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[9] *Empowering Parents*, 24 F.C.C.R. at 13,179.

[10] *See, e.g.*, Comm'n en banc Programming Inquiry, 44 F.C.C. 2303, 2303, 2314 (1960) (recognizing children as a group whose interests must be met by broadcasters seeking to fulfill their public interest obligations). For the FCC's account of the history of children's television regulation, see, for example, *Children's Television Obligations of Digital Television Broadcasters*, 19 F.C.C.R. 22,943, 22,945–49 (2004). For scholarly histories of the FCC's approach to children's television, see, for example, NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 9, 21 (1995); Angela J. Campbell, *Lessons From Oz: Quantitative Guidelines for Children's Educational Television*, 20 HASTINGS COMM. & ENT. L.J. 119, 137 (1997); James J. Popham, *Passion, Politics and the Public Interest: The Perilous Path to a Quantitative Standard in the Regulation of Children's Television Programming*, 5 COMMLAW CONSPECTUS 1, 2–8 (1997).

[11] *See* MINOW & LAMAY, *supra* note 10, at 47–57.

[12] *Id.* at 10–11; Amy B. Jordan, *The Three-Hour Rule and Educational Television for Children*, 2 POPULAR COMM. 103, 104 (2004); Dale Kunkel, *Policy Battles Over Defining Children's Educational Television*, 557 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 44 (1998); Dale Kunkel & Ursula Goette, *Broadcasters' Response to the Children's Television Act*, 2 COMM. L. & POL'Y 289, 293 (1997); Popham, *supra* note 10, at 9 (citing 142 CONG. REC. 7220 (1996) (statement of Rep. Markey)).

[13] Throughout this period, the FCC also limited the amount of commercial content that could be aired on children's programming. *See* 47 C.F.R. § 73.670 (2009). It is this part of the children's television rules that has been most effective, when the FCC has actively enforced it.

or informational ("E/I") programming as part of its public interest obligations would receive expedited, staff-level review when it came to license renewal.[14] The FCC also defined core children's educational programming as specifically designed to serve the "educational and informational needs of children [sixteen] years of age and under."[15] Finally, the rules had an informational component that required identification of educational programming.[16]

Subsequently, in 2004 and 2006, in order to translate the "three hour rule" to the digital broadcast environment, the FCC explained that digital broadcasters transmitting any free digital content streams in addition to their main channels would be required to air an additional, proportional amount of E/I programming on their additional content streams if they were seeking expedited staff-level license renewal review.[17]

None of these children's educational television rules was subjected to judicial review. Broadcasters voluntarily agreed not to challenge the constitutionality of the rules in a 1996 compromise brokered by the White House in connection with a children's television summit convened by President Clinton.[18] They also dropped their constitutional challenges to the digital extension of the children's educational television rules after reaching a negotiated compromise with children's advocacy groups.[19]

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[14] Policies & Rules Concerning Children's Television Programming, 11 F.C.C.R. 10,660, 10,662–63 (1996).

[15] 47 C.F.R. § 73.671(c) (2009).

[16] *Policies & Rules Concerning Children's Television Programming*, 11 F.C.C.R. at 10,683–84; *see also* 47 C.F.R. §§ 73.3526(e)(11)(iii), 73.673 (2009) (requiring broadcasters to report educational programming efforts).

[17] Children's Television Obligations of Digital Television Broadcasters, 19 F.C.C.R. 22,943, 22,950 (2004). The 2004 order required digital broadcasters to increase the amount of core programming broadcast "roughly proportional" to the amount of additional free video programming (for example, data-casting and subscription video services are not included) offered on multicast channels. *Id.* The increase is tied to increments of twenty-eight hours; therefore, a broadcaster who offered up to twenty-eight hours of free video programming would be required to show an additional thirty minutes of core programming; twenty-nine to fifty-six hours would entail an additional sixty minutes of programming, and so on in increments of twenty-eight hours. *Id.* at 22,950–51; *see also* Children's Television Obligations of Digital Television Broadcasters, 21 F.C.C.R. 11,065, 11,066–68, 11,070, 11,072 (2006) (revising and clarifying some aspects of the rules while retaining the proportionality requirement).

[18] Popham, *supra* note 10, at 15 n.176; Kunkel, *supra* note 12, at 47–49.

[19] Joint Proposal of Industry and Advocates on Reconsideration of Children's Television Rules, Children's Television Obligations of Digital Television Broadcasters, No. 00-167 (F.C.C. Feb. 9, 2006), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=6518324672; Press Release, Fed. Commc'ns Comm'n, FCC Opens Comment Period on Joint Proposal for Changes to Children's Television Rules (Mar. 17, 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264394A1.pdf.

That compromise was subsequently accepted by the FCC.[20] Because of these agreements, few parties are left with the incentive to commence a judicial challenge to the rules.

The welfare of children naturally has nonpartisan appeal. Nevertheless, regulatory experiments should be subject to periodic study, particularly when they are: 1) the result of negotiated agreements where it is not clear that everyone is sitting at the table; 2) promoting government-preferred speech of a particular kind; and 3) leaving few stakeholders with incentives to question the rules.

An assessment of the rules should begin with the constitutional question. Are the children's educational television rules an example of compelled speech that is unconstitutional under the First Amendment? Or are they a minimally-intrusive *quid pro quo* for the benefit broadcasters receive of using the public airwaves? The FCC's approach would be likely to survive First Amendment scrutiny because of the constitutionally special status of children,[21] and because of the constitutionally exceptional jurisprudence of broadcast regulation.[22] The "broadcast First Amendment" leads to more deferential review of the FCC's regulatory decisions,[23] and the welfare of children is a heavy weight on the scale regardless of medium. Moreover, the FCC's rules promoting children's educational television were drafted so as to avoid

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[20] *Children's Television Obligations of Digital Television Broadcasters*, 21 F.C.C.R. at 11,065, 11,070.

[21] *See, e.g.*, Ginsburg v. New York, 390 U.S. 629, 640 (1968) (recognizing that the government has an "interest in the well-being of its youth").

[22] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."); *see also* Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1 (2004) (describing exceptionalism of broadcast regulation); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1008–09 (1993) (identifying dual First Amendment traditions for broadcasting and print); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 263 (2003) (noting the limited First Amendment protection enjoyed by broadcasters (citing *Pacifica*, 438 U.S. at 748–50)). More generally, Justice Scalia's opinion for the majority in *FCC v. Fox Television Stations, Inc.*, provides a tantalizing glimpse of a condition-based rationale for broadcast regulation. *See* 129 S. Ct. 1800, 1805–1819 (2009). Spectrum scarcity, the traditional justification for broadcast regulation, has been widely criticized. *See, e.g.*, Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221–26 (1982)); *see also Fox*, 129 S. Ct. at 1820–21 (Thomas, J., concurring) (describing and criticizing scarcity-based broadcast regulation). But instead of leading to a reversal of the constitutionally exceptional status of broadcasting, Justice Scalia's reasoning suggests an alternative rationale to ground regulation. *See Fox*, 129 S. Ct. at 1819 (asserting that "[t]he [FCC] could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children").

[23] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386–87 (1969).

formal compulsion.[24] They provide incentives—rather than mandating requirements—to air three hours per week of core children's educational programming.[25] Broadcasters still have the option of airing less than three hours of core educational programming and having their CTA compliance assessed by the full FCC.[26] The only consequence of a failure to comply is that rubber-stamp review by the FCC staff will be unavailable.[27] If these rules are seen as little more than a reasonable choice offered the broadcaster, they are likely to pass even more stringent First Amendment scrutiny than that usually accorded to broadcast regulation.

But the constitutional issue should not be the end of the inquiry. In its recent *Empowering Parents* Notice of Inquiry, the FCC asked for comment on the effectiveness of its current children's television rules and specifically inquired whether it should "consider an approach that would permit commercial entities to fund the creation of educational content to be provided by others, such as [Public Broadcasting Service ("PBS")]."[28] In a forthcoming article in the *Federal Communications Law Journal*, I argue that while the agency's current approach has likely led to some broadcasters airing better children's programming than they might otherwise have done, it is still fraught with challenges.[29] I argue that there are structural impediments to commercial broadcasters filling the need for high quality children's educational programming. First, broadcasters' economic incentives will push them toward as minimal compliance as possible. Children's educational programming is still largely unprofitable for broadcasters, and is therefore likely to be under-produced by commercial licensees.[30] This reality is reinforced by the fact that the FCC imposes limits on advertising during children's television

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[24] *See* 47 C.F.R. § 73.671(d) (2009).

[25] *See id.*

[26] *Id.*

[27] *Id.*

[28] Empowering Parents & Protecting Children in an Evolving Media Landscape, 24 F.C.C.R. 13,171, 13,180 (2009).

[29] *See generally* Lili Levi, *A "Pay or Play" Experiment to Improve Children's Educational Television*, 62 FED. COMM. L.J. (forthcoming Apr. 2010) [hereinafter Levi, *A "Pay or Play" Experiment*].

[30] S. REP. NO. 101-227, at 5–9 (1989) (making such findings in connection with the passage of the Children's Television Act); *see also* Adam Candeub, *Creating A More Child-Friendly Broadcast Media*, 2005 MICH. ST. L. REV. 911, 925–28 (explaining the two-sidedness of media markets and arguing for efficiency of disclosure regulations allowing viewers to communicate with advertisers); Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1242 (1996) (detailing the difficulty of producing educational programming (citing Joint Comments of the Association of America's Public Television Stations & the Public Broadcasting Service at 5–10, Policies & Rules Concerning Children's Television Programming, 11 F.C.C.R. 10,660 (1996) (No. 93-48))).

programming.[31] Recent evidence, such as a claim by some stations that *Winx Club* is core educational programming, bolsters this prediction.[32] (The theme song to the series is: "We've got the style! And we've got the flair! Look all you want! Just don't touch the hair!"[33] One might wonder precisely what education is being conveyed.)

While strict enforcement might be a counter-weight to minimalist compliance in theory, in actuality the FCC's concerns about free speech will continue to make the agency hesitate to enforce the rules stringently. The FCC is institutionally ambivalent—simultaneously committed both to protecting children and to broadcaster expressive freedom.[34] It is also sensitive to the political context Professor Candeub described, and the ways in which it will signal its commitments.[35] When we add in the fact that parents say they don't understand the children's television ratings that have been required by the FCC,[36] and that high quality children's educational programming is available on public television, cable, the Internet, and interactive computer programs, we can understandably begin to doubt the current system as a matter of policy.

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[31] *See* 47 C.F.R. § 73.670 (2009) (limiting, *inter alia*, the amount of commercial material broadcasters can air during children's programming). These limits were adopted pursuant to the Children's Television Act. *See* Children's Television Act of 1990, Pub. L. No. 101-437, tits. I–II, §§ 102(a)–(b), 203(a), 104 Stat. 996–98 (codified as amended at 47 U.S.C. §§ 303a(a)–(b), 394 (2006)).

[32] For example, a Washington, D.C. channel, WTTG, filed an FCC Form 398—the FCC's children's programming report form, FED. COMMC'NS COMM'N, INSTRUCTIONS FOR FCC 398: CHILDREN'S TELEVISION PROGRAMMING REPORT 1 (2006), *available at* http://www.fcc.gov/Forms/Form398/398.pdf—for the fourth quarter of 2008, identifying *Winx Club* as core educational programming. WTTG, FCC 398: CHILDREN'S TELEVISION PROGRAMMING REPORT 2 (2008), *available at* http://media.myfoxdc.com/FCC/Childrens TV63008.pdf.

[33] Lyricsmode.com, We Are the Winx! (Winx Club Theme Song) Lyrics, http://www.lyricsmode.com/lyrics/t/television/we_are_the_winx_winx_club_theme_song.html (last visited Apr. 19, 2010).

[34] For example, the FCC has made clear that it "will ordinarily rely on the good faith judgments of broadcasters" with respect to children's educational programming. *Policies & Rules Concerning Children's Television Programming*, 11 F.C.C.R. at 10,662, 10,701.

[35] Adam Candeub, *Shall Those Who Live by FCC Indecency Complaints Die by FCC Indecency Complaints?*, 22 REGENT U. L. REV. 307, 309 (2010).

[36] Comments of Children's Media Policy Coalition at 8, Children's Television Obligations of Digital Television Broadcasters, No. 00-167 (F.C.C. Sept. 4, 2004), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=6519721521 (citing KELLY L. SCHMITT, ANNENBERG PUB. POL'Y CTR. OF THE UNIV. OF PA., REPORT SER. NO. 30, THE THREE-HOUR RULE: IS IT LIVING UP TO EXPECTATIONS? 25 (1999), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Media_and_Developing_Child/Childrens_Programming/19990628_three_hour_expectations/19990628_three_hour_reaction/19990628_three_hour_reactions_report.pdf).

Empirical studies of children's educational programming since the 1996 adoption of the FCC's rules reveal mixed results. As recent studies confirm, most broadcasters appear to be formally complying with the FCC's rules.[37] Yet the advocacy group Children Now released a 2008 study—noted in the FCC's new children's programming docket—showing a noteworthy decline in the amount and quality of children's E/I programming.[38] While the majority of shows were "moderately educational," according to Children Now, high quality children's educational programming was "down dramatically."[39] Of course, people can say that these are very subjective judgments. What is high quality to me may be terrible quality to you, and vice versa. But at a minimum the current studies raise questions about whether commercial broadcasters really can save the day for children's educational television.

I suggest in my article that the FCC should explore an alternative "pay or play" approach to the promotion of high quality children's educational television programming on broadcast stations.[40] While I will refer to that article for the details, I will just mention my bottom-line suggestion here. The proposal would place commercial broadcasters under an obligation to contribute a children's educational programming fee yearly to a fund for public stations to generate high-quality public television educational programming for children. As *Sesame Street* attests, few would quarrel with the ability of public television to do this. But those who wished to reduce or eliminate these fee obligations could air their own children's educational programming instead. What this approach would do, then, would be to give broadcasters the flexibility to decide whether, in the particular markets and economic circumstances in which they find themselves, it would make sense for them to commit to high quality children's programming. Of course, we would like this rule to make us better off than we are today under the "mixed success" story of the current rules. To do so, the programs proposed by broadcasters to offset their E/I fee obligations would have to be highly rated in order to pass muster. Workable "pay or play" systems are tricky to design, but if the FCC opened up this possibility to serious public consideration, two benefits could result. First, the full range of possible "pay or play" structure—with their pros and cons—could be ventilated

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[37] *E.g.*, BARBARA J. WILSON ET AL., CHILDREN NOW, EDUCATIONALLY/INSUFFICIENT?: AN ANALYSIS OF THE AVAILABILITY & EDUCATIONAL QUALITY OF CHILDREN'S E/I PROGRAMMING 22 (2008), *available at* http://www.childrennow.org/uploads/documents/eireport_2008.pdf.

[38] Comments of Children's Media Policy Coalition, *supra* note 36, at 15 (citing WILSON ET AL., *supra* note 37, at 8, 11, 14).

[39] WILSON ET AL., *supra* note 37, at 17.

[40] *See generally* Levi, *A "Pay or Play" Experiment*, *supra* note 29.

through a serious public proceeding. Second, the process might again open the door to negotiated alternatives.

What are the benefits of "pay or play" approaches? If they work, they can provide a win-win alternative to command-and-control regulation. For broadcasters, a "pay or play" approach could promise flexibility while evening the playing field. On the public side, if they are structured properly, they ensure either that high quality programming will be aired commercially or that PBS—which knows how to make excellent children's programming—has lots of additional resources to continue producing and airing such programming. Maybe there would be enough money to create a public children's channel to compete with Nickelodeon. At the same time, a "pay or play" rule with disclosure obligations could enhance broadcaster accountability.

This kind of proposal is not antithetical either to the FCC's approach or to the CTA. The Act itself contains language that permits broadcasters to satisfy their children's television obligations by sponsoring core children's educational programming on other stations in the market.[41] In theory, then, the CTA provides for a novel use of marketplace forces to advance regulatory goals. As such, it is a quiet experiment in the media policy context with a kind of "third way" model much discussed in the past decade in other administrative contexts.[42] That kind of approach is an attempt to create a workable regulatory stance between command-and-control regulation and virtual surrender to the market by adopting market-inclusive regulatory approaches melding some traditional governmental regulation with market-based elements.

The problem is that the FCC has, in the past, interpreted the statutory sponsorship provision in an extremely restrictive way. For example, although the agency has not spoken often to this issue, those few statements it has made have suggested that broadcasters who sponsor children's programming on other stations cannot sponsor away

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[41] The Children's Television Act provides that during review for license renewal, "the [FCC] may consider . . . any special efforts by the licensee to produce or support programming broadcast by another station in the licensee's marketplace which is specifically designed to serve the educational and informational needs of children." Children's Television Act of 1990, Pub. L. No. 101-437, tit. I, § 103(b), 104 Stat. 996, 997 (codified as amended at 47 U.S.C. §§ 303b(b) & (b)(2) (2006)). The FCC's regulation reflects this. *See* 47 C.F.R. § 73.671(b) (2009) (stating that supporting other stations' E/I programming "may also contribute to meeting the licensee's obligation").

[42] Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L. REV. 1321, 1342 n.74 (2007) [hereinafter Levi, *Regulatory Equilibrium*] (citing Reed E. Hundt, Keynote Address, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 539–47 (1996); Reed Hundt & Karen Kornbluh, Commentary, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11, 17, 22–23 (1996)).

their entire obligation, and must air at least three hours of children's educational programming per week.[43] So it is not surprising that, to my knowledge, no broadcaster has availed itself of the sponsorship option allowed under the CTA. In taking this interpretation, I would argue that the FCC has given short shrift to a potential experiment in a media "third way." What this means is not that "pay or play" approaches will not work, but that the FCC has not made its current "third way" approach sufficiently realistic and attractive as an alternative. The FCC's recent request for comment on the desirability of sponsorship models for the provision of children's educational programming suggests that the agency may be open to rethinking its approach.[44]

In the final analysis, the current FCC children's television rules are not bad media policy. After all, such empirical data as we have reflects that most broadcasters are complying with the letter of the FCC's rules. The question is whether a more flexible system might better promote both the goals of the original rules and other social policy goals. Children's television is not the only beneficial programming we should wish to generate. Yet mandatory children's programming rules are likely to reduce broadcaster willingness to air other kinds of socially desirable but equally unprofitable programming. If the audience is wedded to cable and public television, then won't the broadcast requirement have the undesirable result of essentially duplicating programming available elsewhere at the expense of other important programming?

The other important programming I am thinking about is serious journalism. This kind of enterprise—particularly investigative journalism—is expensive and increasingly under-produced in today's media marketplace.[45] We face a daily barrage of obituaries for

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[43] The FCC has interpreted the sponsorship option narrowly, stating that "a licensee's sponsorship of programming aired on another station in the market does not relieve the licensee of the obligation to air educational programming, and [ ] such efforts may be considered only 'in addition to' consideration of the educational programming aired by the licensee itself." Children's Television Obligations of Digital Television Broadcasters, 19 F.C.C.R. 22,943, 22,955 n.67 (2004) (quoting Policies & Rules Concerning Children's Television Programming, 11 F.C.C.R. 10,660, 10,725 (1996)); *see also* 47 C.F.R. § 73.671(d) (2009) ("Licensees that do not meet these processing guidelines will be referred to the [FCC], where they will have full opportunity to demonstrate compliance with the CTA (e.g., by relying *in part* on sponsorship of core educational/informational programs on other stations in the market that increases the amount of core educational and informational programming on the station airing the sponsored program . . .)." (emphasis added)).

[44] *See* Empowering Parents & Protecting Children in an Evolving Media Landscape, 24 F.C.C.R. 13,171, 13,180 (2009) (citing Children's Television Obligations of Digital Television Broadcasters, 15 F.C.C.R. 22,946, 22,954–55 (2000)). Footnote 39 of the *Empowering Parents* Notice of Inquiry cites to the sponsorship provision and 47 C.F.R. § 73.671(e)(1) (2009) without reference to the limiting language noted in footnote 38. Admittedly, however, it is unwise to read too much into what is missing from a footnote.

[45] *See* Levi, *Regulatory Equilibrium*, *supra* note 42, at 1326.

newspapers and searching inquiries into the future of journalism.[46] Maybe at this point in newspaper history, media policy should focus on generating incentives to serious journalism in electronic media. To the extent that we face a scarcity of regulatory attention and political feasibility, I would argue that promoting journalism should take precedence over market-wide children's educational programming obligations for every commercial broadcast television station.

I realize that the first rule of policy proposals should be "do no harm." Perhaps the fact that most broadcasters are at least minimally complying with the FCC's current children's television rules should counsel against fiddling with the status quo. But the reality is that commercial broadcasters, owned by publicly-traded corporations whose shareholders invest to make money, are not in the business of altruism. Their economic incentives will push toward barely minimal compliance so long as the mandated programming isn't profitable for them. A well-designed "pay or play" model leaves the decision of what makes the most economic sense to those closest to the issue. A "pay or play" model might well lead to an improvement in the quality of children's educational programming in each broadcast market overall, so long as the FCC adopts strong rules that do not permit stations to classify programming akin to *Sponge Bob Square Pants* as "play." We should at least engage in a serious exploration of such an option.

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[46] *See generally* Free Press, Welcome to SaveTheNews.org, http://www.savethenews.org/welcome (last visited Apr. 19, 2010) (promoting "a new, broad-based campaign to develop policies that address the journalism crisis; to renew, reshape and re-imagine our nation's newsroom; and to involve the American people in the process").

STRANGE BEDFELLOWS: NETWORK NEUTRALITY'S UNIFYING INFLUENCE†

*Marvin Ammori**

I want to talk about something called network (or "net") neutrality. Let me begin, though, with a story involving short codes. For those unfamiliar with what a short code is, recall the voting process on American Idol and the little code that you can punch into your cell phone to vote for your favorite singer.[1] Short codes are not ten digit numbers; rather, they are more like five or six.[2] In theory, anyone can get a short code. Presidential candidates use short codes in their campaigns to communicate with their followers. For instance, a person could have signed up and Barack Obama would have sent them a message through a short code when he chose Joe Biden as his running mate.[3]

A few years ago, an abortion rights group called NARAL Pro-Choice America wanted a short code to communicate with its own followers.[4] NARAL's goal was not to send "spam"; instead, the short code was directed to people who agreed with their message.[5] Verizon rejected the idea of a short code for this group because, according to Verizon, NARAL was engaged in "controversial" speech. The *New York Times* printed a front page article about this.[6] Many people who read the story wondered if they really needed a permission slip from Verizon, or from anyone else, to communicate about political things that they care about. In response

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1 Monica Alleven, *Decoding Short Codes*, WIRELESS WK., Apr. 15, 2007, http://wirelessweek.com/Archives/2007/04/Decoding-Short-Codes/.

2 Common Short Code Admin., Frequently Asked Questions, http://www.usshortcodes.com/csc_faq_csc.html (last visited Apr. 14, 2010).

3 NIELSEN CO., THE SHORT CODE MARKETING OPPORTUNITY 2–3 (2008), http://yourmarketingarchitect.com/uploads/Short_Code_Mktg_Opportunity.pdf.

4 *See* Adam Liptak, *Verizon Rejects Text Messages from an Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, at A1.

5 *Id.*

6 *Id.*

to the public outrage, Verizon essentially said that its employees just made a mistake.[7] It was all a big misunderstanding. No need to worry.

Soon thereafter, the *Washington Post* featured an op-ed by NARAL in favor of freedom of speech; co-signing on the piece was the Christian Coalition.[8] The underlying message was that both sides care about freedom of speech and communicating with their followers; they cared about this right both for their organizations and for people who don't agree with them.[9] Often you will find strange bedfellows on free speech issues who are on opposing sides of another issue—both care about having a fair chance to convince the public that they're right.[10]

That case did not involve network neutrality, but it involved a very similar idea—whether you need permission from each and every phone and cable company to communicate as you choose, about what you choose, with whomever you choose.

In exploring the idea of net neutrality, we can begin with one of the main cases that we handled when I was a lawyer at Free Press. I am now a law professor at the University of Nebraska, where I teach cyberlaw, cyberwarfare law, and domestic and international telecommunications law. At Nebraska's law school, we have a J.D. and a post-J.D. LL.M. program in space and telecommunications law, which is partly inspired by U.S. Strategic Command being down the street in Omaha. Strategic Command has jurisdiction over space warfare and cyberwarfare, and the Air Force sends their Judge Advocate General lawyers who advise the "cyber" war commands to our program to study the laws applying to cyberwar. Others join the program for the private sector aspects of space or cyber, or media, law. But before I became a professor, I was the head lawyer of an amazingly effective organization called Free Press.

Free Press is an advocacy group with 500,000 activists that works on media reform and open Internet issues. It aims to foster a movement

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[7] *See* Adam Liptak, *In Reversal, Says it Will Allow Group's Texts*, N.Y. TIMES, Sept. 28, 2007, at A20.

[8] Nancy Keenan & Roberta Combs, Op-Ed., *Can You Hear Us Now?*, WASH. POST, Oct. 17, 2007, at A17.

[9] *Id.*

[10] *See, e.g.*, Steve Carney, *Air America Flies Back to Southland*, L.A. TIMES, Jan. 20, 2005, at E5 (reporting that Clear Channel Communications, a renowned conservative radio talk-show distributor, agreed to distribute Air America Radio shows—shows that are patently liberal—to Los Angeles after the Air America shows were "unceremoniously yanked off the air"); Nat Hentoff, *Saving Free Speech and Jesus*, VILLAGE VOICE, Apr. 3, 2007, http://www.villagevoice.com/2007-04-03/news/saving-free-speech-and-jesus/ (stating that conservative legal organizations such as the American Center for Law and Justice and Alliance Defense Fund joined with the American Civil Liberties Union and Feminists for Free Expression in support of a student's fight to unfurl a "Bong Hits 4 Jesus" banner in *Morse v. Frederick*, 551 U.S. 393 (2007)).

around democracy issues by getting the public involved with twenty-first century speech tools like mass media and Internet technologies.[11] The first big case we worked on was in 2002 and 2003 when the Federal Communications Commission ("FCC"), the nation's communications regulator, was considering relaxing ownership rules over broadcast stations.[12] Previously, there was a rule in place that said a company could not own a TV station and a newspaper in the same town,[13] and we thought that this was a good rule because it promoted diverse ownership of news media in local areas. Because we wanted the public involved, we encouraged hearings across the country.[14] We wanted the FCC to travel the country and talk about these rule changes, and we encouraged the public to file comments in the docket at the FCC.[15] While the FCC did not travel the country, some Commissioners did. Around two million people filed,[16] and alliances formed, the likes of which included the Conference of Catholic Bishops, the United Church of Christ, and the National Rifle Association.[17] There were many groups who all agreed on the same thing—a more diverse media—and fought side-by-side for this issue.[18]

To me, network neutrality has always been a free speech issue.[19] It is important to understand the concept of net neutrality and how it is linked with media power and the rights of individuals to speak. Typically, a person is accustomed to the Internet working in this fashion: after paying a monthly fee, a person uses a phone or cable line to connect to the Internet, where that person can then go to whatever website he or she wants. On the Internet, people can comment on Facebook photos, "tweet," read their favorite blogs, comment on their least favorite blogs,

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[11] Originating in 2002, Free Press is currently the "largest media reform organization in the United States" and actively "promote[s] diverse and independent media ownership, strong public media, quality journalism, and universal access to communications." Free Press, Free Press and the Free Press Action Fund, http://www.freepress.net/about_us (last visited Apr. 14, 2010).

[12] Cheryl Leanza & Harold Feld, *More Than "a Toaster with Pictures": Defending Media Ownership Limits*, 21 COMM. LAW., Fall 2003, at 12, 12.

[13] 47 C.F.R. § 73.860 (2009).

[14] CTR. FOR INT'L MEDIA ACTION, THE MEDIA POLICY ACTION DIRECTORY 3–4 (2003), http://mediaactioncenter.org/files/directory_onscreen.pdf.

[15] *See id.* at 1, 3–4.

[16] Press Release, Fed. Commc'ns Comm'n., FCC Commissioner Adelstein Dissents from Media Ownership Decision (July 2, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-236095A1.pdf.

[17] CTR. FOR INT'L MEDIA ACTION, *supra* note 14, at 57–60.

[18] *See generally* Jim Puzzanghera, *Bad Reviews Pile Up for FCC Chief's Plan*, L.A. TIMES, Nov. 19, 2007, at C1 (commenting on the FCC's failure to overcome opposition to proposed rule changes in 2003).

[19] Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 274–83 (2009).

create their own sites, or invent their own technologies and put them on display or out for sale. People do not need permission from Verizon, AT&T, Comcast, or any other Internet service provider ("ISP") to do these things on the Internet. This is the historical understanding of the Internet based on long-recognized standards, its creation by the government and the military, and based on certain regulations in place until about 2005.[20]

In 2005, there were some changes in FCC rules that permitted the phone and cable industry to gain market power and then leverage it.[21] Essentially, most Americans can now choose between a phone company or a cable company for local high-speed Internet. This is because the FCC did not apply the old dial-up rules—permitting consumers to choose any independent ISP from AOL to Earthlink or Juno—to higher-speed DSL and cable service.[22] Without these rules, the cable and phone companies can dominate Internet access, and consumers will have nowhere else to turn. At the end of 2005, the CEO of AT&T, Ed Whitacre, spoke about the desire of his company to assert total control over the Internet experience of its consumers. In response to a question regarding new Internet upstarts such as Google and Vonage, Whitacre stated,

> How do you think they're going to get to customers? Through a broadband pipe. Cable companies have them. We have them. Now what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes?

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[20] *See* Richard S. Whitt & Stephen J. Schultze, *The New "Emergence Economics" of Innovation and Growth, and What It Means for Communications Policy*, 7 J. ON TELECOMM. & HIGH TECH. L. 217, 250–56 (2009). For a more in-depth discussion of the Internet's regulatory history, see, for example, Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 FED. COMM. L.J. 167, 204–05 (2003) (providing a brief outline of significant landmarks in Internet history); Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J. 587, 597–600 (2004) (discussing Internet creation and corresponding FCC regulation).

[21] *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000–03 (2005); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14,853, 14,858, 14,865 (2005).

[22] *See Appropriate Framework for Broadband Access*, 20 F.C.C.R. at 14,872–76; *see also* Susan Crawford, Op-Ed., *An Internet for Everybody*, N.Y. TIMES, Apr. 11, 2010, at WK12 (describing the change and impact of the FCC's 2005 classification of Internet access services as "information services").

> The Internet can't be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! . . . or Vonage or anybody to expect to use these pipes [for] free is nuts![23]

AT&T had already been paid along the way—by consumers and backbone ISPs delivering content—but still wanted to be able to charge extra for Vonage and Google. Why Vonage? Vonage is a phone company online that competes with AT&T's phone company offline.[24] Thus, Whitacre's position seemed anticompetitive. A few weeks later, Verizon General Counsel John Thorne said something very similar: "The network builders are spending a fortune constructing and maintaining the networks that Google intends to ride on with nothing but cheap servers . . . . [Google] is enjoying a free lunch that should . . . be the lunch of the facilities providers."[25]

These ideas bothered a lot of us at Free Press. We did not like the idea of Verizon, Comcast, or AT&T—or anyone else—being able to interfere with certain websites, or charge extra fees for accessing certain websites. Americans should be free to access sites, to speak, and to listen online, without intermediaries asserting control. Our democracy would benefit from having an Internet where, if a person wanted to go to the Barack Obama website or the John McCain website and join any group he or she wanted online, that person would not need to get permission from anyone. The issue went beyond speech to economic innovation. The major cable and phone companies wanted to be able to determine who would be the winners and losers on the Internet. The nation—especially during the great recession—would benefit from free and vibrant competition driving innovation, where any innovator, from Skype to Vonage, could innovate online and reach an audience.

Network neutrality is the idea that the network shall remain neutral among applications and among different types of speech, rather than be biased by the network owner.[26] Major telecommunication companies, like Verizon and AT&T, should be simply gateways to the Internet rather than gatekeepers. Thus, in 2006 there was a big fight—again, with strange bedfellows—in which the Christian Coalition and

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[23] Matt Stoller, *Bad Faith from AT&T, Ed Whitacre and Mike McCurry*, HUFFINGTON POST, May 2, 2006, http://www.huffingtonpost.com/matt-stoller/bad-faith-from-att-ed-whi_b_20237.html (alteration in original).

[24] *See* BusinessWeek, Vonage Holdings Corp. (VG): Company Description, http://investing.businessweek.com/research/stocks/snapshot/snapshot_article.asp?ticker=VG:US (last visited Apr. 14, 2010).

[25] Arshad Mohammed, *Verizon Executive Calls for End to Google's 'Free Lunch'*, WASH. POST, Feb. 7, 2006, at D1.

[26] *See* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 145–46 (2003); Save the Internet, Frequently Asked Questions, http://www.savetheinternet.com/faq (last visited Apr. 14, 2010) [hereinafter Save the Internet, FAQs] (follow "What is Net Neutrality?" hyperlink).

MoveOn.org took out a joint advertisement in the *New York Times* in favor of net neutrality.[27]

At the time, Free Press, along with hundreds of other organizations, created Save the Internet, which aimed to preserve net neutrality in a congressional debate over this issue.[28] The nonlawyers at Free Press created a video to introduce people to the idea:

> The way the Internet works today, everyone is connected to each other through the same level playing field. But a handful of phone and cable companies want to change all that. They want to lock down parts of the Web and make sites pay them more money to use it. Everyone else will get the slow lane. How will they do that? By killing one of the Internet's founding principles—net neutrality. . . .
>
> You connect to the Web through pipes owned by telephone and cable companies. But the deal is they're not allowed to mess with what's inside those pipes— whether it's Google or Yahoo, Lonely Girl or Bill O'Reilly, everyday citizens or business tycoons. Everybody's website gets the same speed and quality. That's called net neutrality. . . . The companies want to set up a restricted fast lane on the Internet—but only for their partners and services, only sites who pay them a huge fee would be allowed to use it—making them gatekeepers.[29]

The Internet is not something that Comcast or AT&T create and deliver to you. It consists of interconnected networks. For example, if a person types in "www.stanford.edu" into a browser window, he or she can access information on Stanford's network because that network interconnects with other networks, using the same standards to communicate. Rather than each network being a local network available only locally, networks agree to connect with other networks and be universally available.[30] Phone and cable companies do not create the Internet and have created little of the things you like on the Internet—from Facebook to Google to Twitter to email. They simply provide access to all these other networks.

In enabling all these networks to interconnect, the Internet has been a general purpose network. That is, it can be used for any purpose.

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[27] When it Comes to Protecting Freedom, the Christian Coalition and MoveOn Respectfully Agree, http://www.moveon.org/r/?r=1868 (last visited Apr. 14, 2010); *see also Keeping a Democratic Web*, Editorial, N.Y. TIMES, May 2, 2006, at A26 (detailing the unity of interest in the net neutrality debate between organizations that are traditionally on opposite sides of issues).

[28] *See* Save the Internet, Join Us, http://www.savetheinternet.com/about (last visited Apr. 14, 2010); Save the Internet, Members, http://www.savetheinternet.com/members (last visited Apr. 14, 2010).

[29] Save the Internet, FAQs, *supra* note 26 (follow "What is Net Neutrality?" hyperlink; then play video).

[30] *See* JOHN R. LEVINE & MARGARET LEVINE YOUNG, THE INTERNET FOR DUMMIES 9–10 (12th ed. 2010).

In that way, it resembles an electricity grid—so long as you can plug in through a common standard. When a person buys a refrigerator, the refrigerator works when you plug it into an electrical outlet. A person does not have to get permission from the electrical company to plug in certain refrigerators, or cut special deals based on the appliance he or she uses. That is a good thing for our economy and our freedom, though it may be a bad thing for a few executives at power companies.

In 2005, the FCC did not adopt a net neutrality principle. As I noted, the FCC reversed some rules for high-speed Internet industry that could have promoted competition.[31] Curiously, the FCC Chairman at the time, Kevin Martin, decided to issue a policy statement stating the goal to protect an open Internet through the preservation of four key principles that affirm the freedom of consumers to (1) access all content, (2) use applications of their choice, (3) attach any device, and (4) obtain useful service plan information.[32] Despite this policy statement, debate broke out immediately—before the end of the year.[33]

Finally, in 2007, the most important net neutrality violation occurred. The largest cable company, Comcast, was caught blocking and degrading BitTorrent, a popular new technology.[34] BitTorrent is used to download movies—sometimes illegally.[35] It is also used by many legal video distributors and start-up businesses; even ABC.com uses this kind of technology.[36] NASA uses BitTorrent for distributing high definition images of the earth, and it has devoted a whole page to describing the technology.[37] Software developers use it to distribute games and open

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[31] Stephen Labaton, *F.C.C. Eases High-Speed Access Rules*, N.Y. TIMES, Aug. 6, 2005, at C1.

[32] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14,986, 14,988 (2005); Press Release, Fed. Commc'ns Comm'n, FCC Adopts Policy Statement: New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet (Aug. 5, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf.

[33] Steve Anderson, *The Battle Over Net Neutrality Continues*, *in* PETER PHILLIPS ET AL., CENSORED 2008: THE TOP 25 CENSORED STORIES OF 2006–2007, at 149, 149–52 (2007).

[34] *See* Nicholas Carr, *The Price of Free*, N.Y. TIMES, Nov. 15, 2009, § M (Magazine), at 26.

[35] *See* Andrew Gioia, Note, *FCC Jurisdiction over ISPs in Protocol-Specific Bandwidth Throttling*, 15 MICH. TELECOMM. & TECH. L. REV. 517, 519–21 (2009). *But cf.* Dawn C. Chmielewski & Meg James, *TV May Be Free but Not* That *Free: As Downloads Increase, Executives Have to Figure Out How to Convince People It's Stealing*, L.A. TIMES, Mar. 1, 2006, at A1 (labeling the download of "free" television shows through BitTorrent as "piracy").

[36] *See* Richard Siklos, *Media Frenzy: Can TV's and PC's Live Together Happily Ever After?*, N.Y. TIMES, May 14, 2006, § 3, at 3; Clive Thompson, *The BitTorrent Effect*, WIRED, Jan. 2005, at 151, 152.

[37] Visible Earth: A Catalog of NASA Images and Animations of Our Home Planet, Frequently Asked Questions, http://visibleearth.nasa.gov/faq.php#bt1 (last visited Apr. 14, 2010). For a catalog of NASA animations and images using BitTorrent technology, see

software like Linux or Mozilla.[38] BitTorrent is also used by software developers who are sharing software remotely and working together. BitTorrent is simply a good technology for transmitting files, so lots of companies, agencies, and individuals use it.

As a result, BitTorrent could, in theory, enable people to watch high-definition television online and cancel their cable subscription or, at least, buy fewer movies on cable on-demand services. Thus, Comcast was secretly blocking this technology. According to the FCC, this blocking was partly because of an anticompetitive incentive.[39]

In a bipartisan order issued in August 2008, after many months of investigating the Free Press complaint against Comcast, the Republican FCC Chairman and two Democrats voted to sanction Comcast and stop them from interfering with the Internet.[40]

So we have evolved. Today, the principle of net neutrality has proceeded from a mere policy statement to something enforced in adjudication against cable giants like Comcast. Net neutrality was included in the stimulus bill. The bill gave $7.2 billion to companies that are going to extend Internet capability to unserved areas;[41] companies receiving grants are required to extend the network with a nondiscriminatory, net neutrality principle.[42] The FCC has proposed a net neutrality rule that takes the four principles articulated by former Chairmen Michael Powell and Kevin Martin,[43] and applying those rules to both wireless and wireline networks.[44] This proposed application clearly encompasses *any* means of accessing the Internet. Yet the fight continues. Free Press and other network neutrality proponents were

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Visible Earth: A Catalog of NASA Images and Animations of Our Home Planet, http://visibleearth.nasa.gov/ (last visited Apr. 14, 2010).

[38] *See, e.g.*, MARK G. SOBELL, A PRACTICAL GUIDE TO LINUX COMMANDS, EDITORS, AND SHELL PROGRAMMING 855–58 (2005) (outlining the use of BitTorrent with Linux).

[39] Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp., 23 F.C.C.R. 13,028, 13,028–33 (2008); *accord* Scott Woolley, *Telecom Knockout*, FORBES, Oct. 13, 2008, at 64, 66.

[40] *Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp.*, 23 F.C.C.R. at 13,059–61; Jim Puzzanghera, *Comcast Rebuked by FCC: Net Neutrality Backers Cheer the Order to Stop Blocking File Sharing*, L.A. TIMES, Aug. 2, 2008, at C2.

[41] American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, div. A, tits. I–II, 123 Stat. 115, 118, 128.

[42] *Id.* div. B, tit. VI, §§ 6000–01, 123 Stat. at 512–16 (to be codified at 47 U.S.C. § 1305); *accord* Brad Reed, *Broadband Stimulus Funding Timeline Set by Government*, NETWORK WORLD, Mar. 10, 2009, http://www.networkworld.com/news/2009/031009-broadband-stimulus-timeline.html; Brad Reed, *Net Neutrality Debate Spills over to Broadband Stimulus*, PC WORLD, Mar. 24, 2009, http://www.pcworld.com/businesscenter/article/161844/net_neutrality_debate_spills_over_tt_broadband_stimulus.html.

[43] *See supra* note 32 and accompanying text.

[44] *F.C.C. Proposes Rules That Support Net-Neutrality*, N.Y. TIMES, Sept. 22, 2009, at B3.

disappointed with the FCC's proposal, which had some potentially major loopholes.[45] In its Comcast decision, the FCC relied on a certain kind of residual jurisdiction,[46] but the D.C. Circuit recently invalidated that reliance and vacated the FCC's order in our case.[47] But the FCC has signaled it will move forward to address those jurisdictional issues.[48] And we hope they will do so carefully, without adopting loopholes.

Net neutrality is good for America. Net neutrality is not, as some opponents have argued, "'the [F]airness [D]octrine for the Internet.'"[49] The Fairness Doctrine is the idea that aims to regulate the speech of a few powerful radio or TV companies in order to make their speech balanced or fair.[50] I oppose the Fairness Doctrine, and I encourage people to oppose it as well.[51] Net neutrality is totally different—it is the idea that anyone can speak and have an open platform. There is no regulation for balance; instead, everyone can speak and let the open market choose the winners and losers.

But network neutrality is a regulation, and how can we defend *any* regulation? Some government regulations are good. For example, someone who wakes up at the Westin Hotel, as I did on the morning of the Symposium, can be reasonably assured that the hotel probably complies with the fire code, and if there had been a fire, I would have been properly warned. If I went downstairs and enjoyed a breakfast of eggs and salmon, I could be reasonably assured that the kitchen in which it was prepared could get inspected and that the food was not left out all night. When a driver picked me up after breakfast, I did not have to ask the nice Regent law student if he had a license to drive. I did not need to inspect the car for seatbelts. I was reasonably sure that the car would not have blown up if we had crashed—thanks to regulations. Many people appreciate regulations preventing toxic waste disposal in a drinking water source. Most people approve of child porn regulation.

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[45] Biggest Net Neutrality Boosters Question FCC Proposal, http://voices.washingtonpost.com/posttech/2009/11/_cisco_a_company_that.html (Nov. 2, 2009, 08:00 EST).

[46] *See* Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp., 23 F.C.C.R. 13,028, 13,033–44 (2008); Posting of Marvin Ammori to Balkinization, http://balkin.blogspot.com/2010/04/how-i-lost-big-one-bigtime.html (Apr. 7, 2010, 11:51 EST).

[47] Comcast Corp. v. FCC, No. 08-1291, slip op. at 36 (D.C. Cir. Apr. 6, 2010).

[48] Posting of Austin Schlick to Blogbland, http://blog.broadband.gov/?entryId=356610 (Apr. 7, 2010).

[49] *Contra* Posting of Kim Hart to Hillicon Valley, Blackburn: Net Neutrality is 'Fairness Doctrine for the Internet', http://thehill.com/blogs/hillicon-valley/605-technology/63875-blackburn-net-neutrality-is-qfairness-doctrine-for-the-internetq (Oct. 20, 2009, 11:07 EST) (quoting Tennessee Congresswoman Marsha Blackburn).

[50] *See* Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1257–58 (1949).

[51] *See* Marvin Ammori, *The Fairness Doctrine: A Flawed Means to Attain a Noble Goal*, 60 ADMIN. L. REV. 881, 882–83, 885–89 (2008).

Thus, there are some regulations that are obviously good and pro-consumer.

There are also other types of regulations that are good because they promote competition. Regardless of one's thoughts about regulation, I tend to think competition is a wonderful thing—it helps allocate resources to their highest use, lowers prices, and leads to innovation. Think of places without competition. There is no choice of Internet connections at places like the Westin, which are then able to charge ten dollars a day for an Internet connection. Competitors, however, can lower the price—they can be competitive.[52]

Why do we need regulation for competition in the telecom space? Essentially, the cost structure means that there will be very few networks that will be laid out to compete with one another. The phone and cable networks were built long ago under the protection of state-sanctioned monopoly and guaranteed rates of return.[53] Phone and cable networks could not be built in a competitive environment because of the cost structure. The electricity grid operates the same way—it is very hard to get more and more competitors in.[54]

Net neutrality does not increase competition among networks—that is a nearly impossible task, considering the cost structures. Network neutrality does increase competition among applications riding on top of the Internet. The Carterfone decision, which was created in the 1960s, helps to illustrate the point.[55] In the 1960s, AT&T was the only phone company, and the phone was actually hard-wired into the wall. People rented a phone from AT&T—the same way a person rents a cable modem from his or her cable provider today. Back at that time, there was a recognition that regulation was necessary. Even though we could not have competition among phone companies—there were not dozens of them—we *could* have competition among devices. As a result, the standard phone jack was created, largely through regulation, and suddenly you had phones that were not just the black or the blue ones

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[52] *See, e.g.*, MARVIN AMMORI, FREE PRESS, TV COMPETITION NOWHERE: HOW THE CABLE INDUSTRY IS COLLUDING TO KILL ONLINE TV 2 (2010), http://www.freepress.net/files/TV-Nowhere.pdf.

[53] *See, e.g.*, AT&T, A Brief History: The Bell System, http://www.corp.att.com/history/history3.html (last visited Apr. 14, 2010) (detailing the history of the AT&T phone company and describing its "function[] as a legally sanctioned, regulated monopoly").

[54] *See* ELEC. ENERGY MKT. COMPETITION TASK FORCE, FED. ENERGY REGULATORY COMM'N, DRAFT REPORT OF ELECTRIC ENERGY MARKET COMPETITION TASK FORCE 2 (2006), *available at* http://www.ftc.gov/os/2006/06/FERCDocketNoAD05-17-000EEMCTFandFERCNoticeRequestingComments.pdf ("Federal and several state policymakers generally introduced competition in the electric power industry to overcome the perceived shortcomings of traditional cost-based regulation.").

[55] Ryan Singel, *Skype, Wireless Companies Fight to Shape Net Neutrality Regs*, WIRED, Jan. 15, 2010, http://www.wired.com/epicenter/2010/01/skype-ctia-net-neutrality/.

from AT&T. There was the Mickey Mouse phone, or the hamburger phone we all saw in the movie *Juno*. People could have fax machines and plug in a modem, giving birth to the Internet.[56] Once we got competition where we could, in devices, there was vibrant competition and lots of choice. One of the reasons why the Department of Justice under President Reagan broke up AT&T was to try to get competition where they could find it—in long distance—even if they couldn't at the network level.[57] This is the same model we should have on the Internet: limited competition in networks, if we face facts, but vibrant competition and free choice in applications and content.

Today there's a debate over net neutrality. Congressmen often don't know much about new media or new technology, but many other people do. You young folks, you future leaders, use technology and understand it better than Ted Stevens, who, when he was chairman of the Senate Committee on Commerce, Finance, and Transportation, called the Internet "not a dump . . . truck" but a "series of tubes."[58] To better educate our representatives, your voice should be heard in D.C. during this debate. Congress and the FCC shouldn't hear only from the most powerful, well-paid lobbyists of powerful media and telecom corporations.

Comments are being accepted right now. If want to preserve what you love about the Internet, you should get involved and make your voice heard. A good way to do that is to use the Internet to communicate with the government and to organize support among your friends and acquaintances. In short, you can use the Internet to save the Internet, before it's too late.

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[56] *Id.*

[57] A. Douglas Melamed, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Network Industries and Antitrust, Address Before The Federalist Society, The Eighteenth Annual Symposium on Law and Public Policy: Competition, Free Markets and the Law 8 (Apr. 10, 1999), *available at* http://www.justice.gov/atr/public/speeches/2428.pdf.

[58] Ken Belson, *Senator's Slip of the Tongue Keeps on Truckin' Over the Web*, N.Y. TIMES, July 17, 2006, at C5; YouTube, Series of Tubes, http://www.youtube.com/watch?v=f99PcP0aFNE (last visited Apr. 14, 2010) (at two minutes and fifteen seconds into recording).

RE-EVALUATING MEDIA REGULATION IN A MEDIA ENVIRONMENT OF NEARLY UNLIMITED ENTERTAINMENT PROGRAMMING AND AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION†

*Patrick M. Garry**

INTRODUCTION

The outline for this Symposium posed several questions. With respect to its focus on regulation of media outlets, the outline asked whether some additional regulation of political speech is desirable. For instance, should lawmakers revive some form of the Fairness Doctrine and apply it to talk radio? Conversely, with respect to indecent media entertainment, the outline suggested that perhaps regulation in this area has become too restrictive or outmoded.

In stepping back and taking a broader view of the questions posed in this Symposium, a certain irony becomes apparent. Even while exploring new ways to regulate political speech, some question the old ways of regulating indecent commercial media entertainment. In effect, it almost seems as if political speech occupies a lower rung on the ladder of constitutional importance than does indecent commercial media entertainment.[1] Consequently, the regulation of political speech—for example, campaign finance regulations—seems to have more legitimacy than the regulation of indecent media entertainment.[2] But of course, such a scenario contrasts sharply with traditional free speech notions.[3]

In addition to prominent constitutional theories relating to the importance of political speech, the Supreme Court on countless occasions has stated that political speech, or speech relating to the conduct of self-government, is the kind of speech with which the First Amendment is

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1 Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model That Focuses on the Existence of Alternative Channels of Communication*, 72 MO. L. REV. 477, 491–502 (2007) [hereinafter Garry, *Exploring a Constitutional Model*].

2 *Id.*

3 *See id.*

most concerned and should most protect.[4] Under current First Amendment jurisprudence, however, not only do some constitutional doctrines fail to favor political speech, but at times political speech actually receives more disadvantageous treatment than does indecent commercial media entertainment.[5] This Essay examines some ways in which this has occurred, along with the reasons for such disadvantageous treatment. Such an examination will involve the legacy of First Amendment doctrines born nearly a century ago and under a much different media environment than what exists today. Using the marketplace metaphor that was first articulated by Justice Holmes nine decades ago in his dissent in *Abrams v. United States*,[6] this Essay argues that the Court has articulated First Amendment doctrines that end up greatly benefiting nonpolitical media entertainment—sometimes at the expense of political speech.

Failing to adopt a First Amendment model specifically singling out and elevating political speech threatens the autonomy and freedom of such speech.[7] First, supposedly content-neutral regulations can have a disproportionate effect on uniquely political speech.[8] Second, the vast increase in sexually explicit and graphically violent speech can have a desensitizing effect on political speech.[9] When the public witnesses increasing levels of outrageous or offensive speech in commercial media entertainment, it often concludes that all speech receives sufficient protection, and sometimes the public will even believe that all speech, including political speech, requires more restraints.[10] Current First Amendment doctrines can give the illusion, by protecting the vilest and most vulgar of speech, that speech in general is overly protected, which in turn results in a backlash that can spill over to political speech.[11] Thus, perhaps all the cultural focus on the need to protect violent and indecent media entertainment speech has somewhat blinded the public, and even the courts, to the status of political speech.[12] In fact, Steven

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[4] Connick v. Myers, 461 U.S. 138, 160–62 (1983) (Brennan, J., dissenting) (quoting Saxbe v. Wash. Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting); Mills v. Alabama, 384 U.S. 214, 218–19 (1966); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Stromberg v. California, 283 U.S. 359, 369 (1931)).

[5] Garry, *Exploring a Constitutional Model*, *supra* note 1.

[6] 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[7] Garry, *Exploring a Constitutional Model*, *supra* note 1, at 524.

[8] *Id.* at 485–87.

[9] *Id.* at 489–90.

[10] *Id.* at 490.

[11] *Id.*

[12] *See id.*

Heyman suggests that the repeated influx of media violence and indecency has made Americans less prone to accept vigorous free speech protections.[13]

In examining the evolution of First Amendment doctrines, this Essay also explores the meaning of free speech and censorship in today's media society. Does censorship mean any burden applied on one type of speech in any one media venue, even if that speech is in plentiful supply in various other media venues? Furthermore, is there a difference between censorship, which seeks to eliminate a certain kind of speech from the social discourse, and legislative measures, which seek to facilitate freedom of choice for those who wish to avoid the offensive, nonpolitical speech that has become almost inescapable in today's media world?

I. HOW CURRENT FIRST AMENDMENT DOCTRINES DISADVANTAGE POLITICAL SPEECH

A. Political Speech as the Primary Concern of the First Amendment

There are several different purposes and values that justify the protection of free speech: the truth value, the self-fulfillment value, the safety-valve value, and the democratic self-governance value.[14] The latter value can often be found in the writings of Alexander Meiklejohn.[15] While Meiklejohn did seem to promote an absolute protection of free speech, the protection he promoted was limited to political speech.[16] Meiklejohn characterized political speech as "speech which bears, directly or indirectly, upon issues with which voters have to deal."[17] Although the Supreme Court has highlighted the importance of political speech numerous times,[18] it has never mandated that the speech at issue

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[13] Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 532–33 (2003). According to Professor Heyman, "In the ongoing culture wars, few battlegrounds are more contested than freedom of expression. In recent decades, the First Amendment has been at the heart of controversies over antiwar demonstrations, pornography, hate speech, flag burning, abortion counseling, anti-abortion protests, and the National Endowment for the Arts." *Id.* (citations omitted).

[14] GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 1017–24 (2d ed. 1991).

[15] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25–26 (Lawbook Exchange, Ltd. 2004) (1948).

[16] For an analysis of Meiklejohn's views, see PATRICK M. GARRY, THE AMERICAN VISION OF A FREE PRESS: AN HISTORICAL AND CONSTITUTIONAL REVISIONIST VIEW OF THE PRESS AS A MARKETPLACE OF IDEAS 74–80 (1990) (citing MEIKLEJOHN, *supra* note 15, at 26–27, 88–89).

[17] MEIKLEJOHN, *supra* note 15, at 94.

[18] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the

relate to self-government in order to qualify for the highest levels of constitutional protection. In *Garrison v. Louisiana*, however, the Court did maintain that "speech concerning public affairs is more than self-expression; it is the essence of self-expression; it is the essence of self-government."[19] As stated by the Court, there exists "'practically universal agreement that a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs.'"[20] The Court in *FCC v. League of Women Voters* noted that "editorial opinion on matters of public importance . . . is entitled to the most exacting degree of First Amendment protection,"[21] and that the speech the "Framers of the Bill of Rights were most anxious to protect" was speech "that is 'indispensable to the discovery and spread of political truth.'"[22] According to the Court, "[E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values."[23]

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people.'" (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) (alteration in original)); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."). Still, constitutional protection, as laid out by the Court, does not rely upon a meaning of public discourse that differentiates "speech about 'matters of public concern' from speech about 'matters of purely private concern.'" Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 667 (1990) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (plurality opinion)).

19 379 U.S. 64, 74–75 (1964).

20 Burson v. Freeman, 504 U.S. 191, 196 (1992) (quoting *Mills*, 384 U.S. at 218).

21 468 U.S. 364, 375–76 (1984).

22 *Id.* at 383 (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

23 *Id.* at 381 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (internal quotation marks omitted)). In general, indecent speech is also part of that category of speech entitled to full protection under the First Amendment. The Code of Federal Regulations identifies indecency as that which focuses on sexual and excretory activities or organs. *See* 47 C.F.R. § 76.701 (2009) (allowing cable operators to prohibit programming that "describes or depicts sexual or excretory activities or organs in a patently offensive manner"). Strict scrutiny applies to any governmental attempt to impose a content-based restriction on indecent speech, requiring both a compelling governmental interest and the absence of any less restrictive means of achieving that interest. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 874 (1997). Under certain circumstances, however, indecency descends in importance to a "low-value" category. As an example, indecent speech in the broadcast medium receives a lower level of constitutional protection. FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) (referring to the "'slight social value'" of indecent speech (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942))). On a similar note, the Supreme Court in *Bethel School District No. 403 v. Fraser* approved a school district's sanctioning of student speech that contained sexual innuendo and profane language, and, in doing so, the Court clearly distinguished between that speech and a more serious message of political protest, which would be protected. *See* 478 U.S. 675, 680 (1986) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)). In discussing the lower court's reliance on *Tinker v. Des Moines Independent Community School District*, the

B. Disadvantages Faced by Political Speech

While the Court has consistently articulated the value of political speech, it has never issued a specific constitutional rule or model focused on political speech.[24] One primary reason for this is that the Court has been unwilling to draw any definitional distinction between political and nonpolitical speech.[25] As a result, however, the Court might actually be treating political speech less favorably than nonpolitical media entertainment.[26]

Political protest is traditionally and uniquely connected to physical space; therefore, it is uniquely susceptible to time, place, and manner regulations regarding that physical space.[27] Since America's beginnings, political protest has frequently focused on certain physical venues, such as government buildings or offices, or the site of particular public events or actions.[28] The following example illustrates this connection.

The War on Terror and heightened national security concerns have brought with them increasingly stringent restrictions upon political protest.[29] Because these restrictions occur under the guise of content-neutral time, place, and manner regulations, they seem innocuous. But these regulations can be content-neutral in appearance only and, in reality, have a particularly repressive effect on political protest.[30] At the 2004 Democratic National Convention, for instance, law enforcers confined protesters to a free speech cage surrounded by chain-link fences and coiled razor wire.[31] And during the 1999 World Trade Organization

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Court in *Bethel* dismissed the lower court's opinion that the political speech at issue in *Tinker* (wearing a black armband to protest the Vietnam War) equated with the sexually suggestive speech in *Bethel*. *Id.* As observed by Cass Sunstein, "[I]t seems clear that all the categories of low-value speech are nonpolitical." Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 302 (1992).

[24] Garry, *Exploring a Constitutional Model*, *supra* note 1, at 524.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 485–86 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[28] *See id.* (citing Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 791–93, 815 (1984); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 645, 647 (1981)).

[29] Garry, *Exploring a Constitutional Model*, *supra* note 1, at 492.

[30] *Id.*

[31] *Id.* (citing Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 66–67 (D. Mass. 2004), *aff'd sub nom.* Bl(A)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004)). At the 2000 Democratic National Convention in Los Angeles just four years earlier, there was a proposed "free speech" zone that would have essentially kept protesters almost 300 yards away from any convention delegate. Serv. Employee Int'l Union v. City of Los Angeles, 114 F. Supp. 2d 966, 972, 975 (C.D. Cal. 2000) (enjoining the use of this zone and ordering the defendants to reconfigure the zone to comply with the

meetings in Seattle, officials banned all protests within a twenty-five square block, designating the area a "restricted zone."[32]

Such limitations on traditional political speech qualify as time, place, and manner restrictions. These restrictions, on their face, focus only on the place and manner of the speech; therefore, they are seen as content-neutral.[33] But herein lies the problem. Most traditional forms of political protest often occur in chosen physical locations, such as outside government buildings and political conventions. Yet indecent and graphically violent speech tends, increasingly, to derive from the electronic or cyber world of the modern media, occurring irrespective of any physical location. As a result, supposedly content-neutral time, manner, and place restrictions often end up affecting exclusively or primarily the speech of political protest.

In *Coalition to Protest the Democratic National Convention v. City of Boston*, the court upheld Boston's use of a designated zone of demonstration to contain protesters at the 2004 Democratic National Convention while simultaneously admitting that this fenced-in zone resembled "an internment camp."[34] The court found that the demonstration zone resulted from content-neutral regulations that simply governed the location of the protesters.[35] On appeal, the First Circuit affirmed this decision on the argument that the protesters, even if confined to the demonstration zone, could still resort to mass media coverage as an alternative to the physical act of protesting at the site of the convention.[36] The problem with using mass media, however, was that it provided no guarantees as to how the media would portray or edit their message. Another problem with using mass media was that it provided no guarantee that the convention delegates—their intended audience—would even see the protesters' message aired across television. Furthermore, there was no guarantee that the opportunity to shout and chant for fifteen seconds to a television camera would be enough to draw in a significant crowd of protesters. In reality, denying

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terms set forth by the court, not because it was designed to restrict protest, but because its size was insufficiently tailored to the government's interest and it "burden[ed] more speech than [was] necessary").

[32] *See* Menotti v. City of Seattle, 409 F.3d 1113, 1124–26, 1167 (9th Cir. 2005).

[33] *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that place restraints on political protests "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information").

[34] 327 F. Supp. 2d at 74–76.

[35] *Id.*

[36] *Bl(A)ck Tea Soc'y*, 378 F.3d at 14.

the most relevant physical venue to political protesters limits the kind of message they can convey, whereas if one television channel denies access due to media violence and indecency, there are numerous similar channels through which that speech can travel.

Time, place, and manner restrictions on speech focus on the physical site of the speech.[37] This approach to time, place, and manner restrictions recognizes the relationship between the speech and the immediate physical surroundings, and it came about during the nearly century and a half preceding adoption of the First Amendment, and during the century following ratification of the First Amendment.[38] At that point in time, a primary location where political protest took place was out in the public square, where the speaker could attract as large an audience as possible and where the speaker could amplify his or her message by coupling it with a relevant physical backdrop.[39]

Constitutional doctrines eventually developed so as to allow the government to control potentially disruptive speech common to the public square, which was the primary venue for such disruptions.[40] But it is mainly political protest that occurs in connection with specific places, such as at the site of political events. Electronic commercial media entertainment, conversely, lacks a connection to a physical site; consequently, it proceeds uninhibited by time, place, and manner restrictions. Such speech has no real physical location and needs no relationship with a particular physical location in order to convey its message.[41]

In another political speech case, *Hill v. Colorado*, the Court upheld a Colorado statute creating a "floating buffer zone" of eight feet that prevented anyone from approaching another person outside of an abortion clinic for the purpose of leafleting or engaging in oral protest or counseling.[42] The Court so ruled despite recognizing that First Amendment protections extended to the speech of the abortion

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[37] For a comprehensive analysis of the Court's "place" focus in its First Amendment jurisprudence, see generally Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006). Professor Zick asserts that, due to the connection between the place of speech and the content of speech, not all place regulations achieve a content-neutral outcome. "The time, place, and manner doctrine applies only where the state is neutral with regard to content, the presumption being that place itself has nothing to do with the substance of speech." *Id.* at 616. To Professor Zick, place is connected to and facilitates the expression of certain kinds of speech. *Id.* at 617.

[38] Garry, *Exploring a Constitutional Model*, *supra* note 1, at 495.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] 530 U.S. 703, 723, 726 (2000).

protesters, and that the public sidewalks covered by the statute were "'quintessential' public forums for free speech."[43] But the dissent in *Hill* argued that the Court had never before extended a governmental interest in protecting people from unwanted communications to speech on public sidewalks.[44] Additionally, the dissent maintained that the Colorado statute imposed considerable burdens on the protesters' "right to speak."[45] Yet the Court still allowed a supposedly content-neutral time, place, and manner restriction to virtually suppress that speech, regardless of its being clearly political speech.

The Court's decision in *Hill*, involving political speech in a traditional public forum, can be contrasted with an earlier decision involving sexually explicit speech on cable television. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the Court addressed the constitutionality of regulations in the Cable Act of 1992, requiring that cable operators place indecent programs "on a separate channel; to block that channel; to unblock the channel within [thirty] days of a subscriber's written request for access; and to reblock the channel within [thirty] days of a subscriber's request for reblocking."[46] In holding these regulations unconstitutional—despite recognizing that they served the compelling purpose of protecting minors—the Court focused on the inconveniences to would-be viewers of such programming.[47] None of these burdens, however, presented insurmountable obstacles. Viewers could still access the desired programming simply by following the established procedures.

Both cases—*Hill* and *Denver Area*—involved segregate-and-block schemes. In *Denver Area*, cable operators segregated indecent television programming to certain channels, with those channels blocked to anyone

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[43] *Id.* at 715.

[44] *See id.* at 741–55 (Scalia, J., dissenting).

[45] *Id.* at 756. The dissent noted that an eight-foot zone of separation made it practically impossible to have a normal conversation, especially when the goal was not to protest but to engage in counseling and educating—activities that "cannot be done at a distance and at a high-decibel level." *Id.* at 757. The use of bullhorns and loudspeakers, which was recommended by the majority, would be of "little help to the woman who hopes to forge, in the last moments before another of her sex is to have an abortion, a bond of concern and intimacy that might enable her to persuade the woman to change her mind and heart." *Id.* As argued by the dissent, "It does not take a veteran labor organizer to recognize . . . that leafletting will be rendered utterly ineffectual by a requirement that the leafletter obtain from each subject permission to approach . . . . That simply is not how it is done, and the Court knows it." *Id.* at 757–58.

[46] 518 U.S. 727, 753–54 (1996) (citing Cable Act of 1992 § 10(b), 47 U.S.C. § 532(j) (2006)).

[47] *Id.* at 755–57.

who did not voluntarily request access.[48] In *Hill*, law enforcement officers segregated abortion protesters off at a distance from clinics and blocked them from having access to all people going in and out of those clinics, except those who voluntarily chose to speak to the protesters.[49] But even though both cases involved segregate-and-block schemes, the Court upheld the political speech restrictions and not the indecent media entertainment restrictions. Moreover, a simple request made to a cable provider easily overcame the burden imposed in *Denver Area*, whereas the burden imposed in, for instance, the Boston Democratic National Convention case, was impossible to overcome.

The irony is that the constitutional protections for sexually explicit and graphically violent media entertainment arose out of the political speech cases. When the Supreme Court developed its current free speech doctrines, largely during the period from the 1930s to the 1970s, most of the controversies involved dissident political speech[50]—for example, socialists and communists trying to convey their political ideas to a largely unreceptive public. Such is not the case, however, with most of the current speech controversies. Most controversial speech now involves offensive entertainment programming packaged and sold by large media corporations. Therefore, perhaps we should reconsider the assumption that a primary reason we protect low-value indecent media entertainment is to ensure the continued protection of high-value political speech.

II. DRAWBACKS OF THE MARKETPLACE MODEL IN FIRST AMENDMENT JURISPRUDENCE

A. The Failure of Courts to Consider Actual Burdens on Speech

Current First Amendment doctrines stem from the marketplace of ideas metaphor, first expressed by Justice Holmes in his dissent in *Abrams v. United States*.[51] Objecting to the Court's decision to uphold Sedition Act convictions of individuals charged with distributing pamphlets attacking the government's expeditionary force to Russia, Holmes articulated his now-famous metaphor: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."[52] Holmes's marketplace metaphor exerted a profound influence

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48 *See supra* note 46 and accompanying text.

49 *See supra* notes 42–45 and accompanying text.

50 *See* Garry, *Exploring a Constitutional Model*, *supra* note 1, at 487 (citing Sunstein, *supra* note 23, at 258).

51 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

52 *Id.*

on First Amendment doctrines throughout the twentieth century.[53] Essentially, the marketplace metaphor seeks to increase the quantity of speech without regard to the content or quality of that speech—it strives to protect as much speech as can be crammed into the media marketplace.[54]

But the role or application of the marketplace model has changed over time, especially as the type of free speech cases coming to the courts have changed. This change occurred around the 1970s. Although political dissidents brought the major First Amendment cases during the mid-twentieth century, many of the later cases involved complaints by commercial entertainment distributors.[55] Thus, the desire to indiscriminately increase the supply of political speech in the early to mid-part of the twentieth century eventually worked to indiscriminately increase the amount of commercial entertainment in the latter part of the twentieth century. Commercial media entertainment speech was able to take advantage of all the constitutional protections that had developed to protect political dissent.[56] But "because most of the recent cases interpreting the Free Speech Clause have involved media entertainment, constitutional doctrines have been influenced by the demands and conditions of that speech, not by the needs [or] demands of more traditional political speech."[57]

The marketplace model makes two assumptions that may very well be erroneous in today's society. First, it assumes that there is a shortage of, or social blockage to, speech. Second, it presumes

> that a public debate is occurring, that the speech in the public domain is even capable of debate, that this speech is more than mere images meant to manipulate emotions rather than contribute to some rational discussion, and that music videos are as communicative in a First

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[53] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 885 (1997) (rejecting the argument that the Internet's unregulated availability of indecent or offensive material drives "countless citizens away from the medium" because the "phenomenal" growth of the Internet reflects a "dramatic expansion of this new marketplace of ideas"); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 769 (1996) (Stevens, J., concurring) ("Congress should not be put to an all or nothing-at-all choice in deciding whether to open certain cable channels to programmers who would otherwise lack the resources to participate in the marketplace of ideas."); Bigelow v. Virginia, 421 U.S. 809, 826 (1975) (noting that the First Amendment extends protection to advertising because "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas").

[54] *See supra* note 53.

[55] Sunstein, *supra* note 23, at 258.

[56] *See* Garry, *Exploring a Constitutional Model*, *supra* note 1, at 487–88 & nn.50–51.

[57] *Id.* at 488.

Amendment sense as newspaper editorials.[58]

The marketplace solution to harmful speech is simply to increase the amount of speech, as if more speech will somehow remedy or nullify the "bad" speech. Still, it seems highly unlikely that there is logical speech capable of somehow rectifying the irrational impressions given by different types of entertainment.

The marketplace model has worked somewhat to overprotect indecent media entertainment relative to political speech. One of the ways it has done so is the content-neutrality rule. This rule focuses almost entirely on indiscriminately increasing the supply of speech. But in doing so, it does not sufficiently look at the actual burdens being imposed, or not imposed, on particular speech.

The Supreme Court's current free speech jurisprudence depends primarily on whether a particular regulation is content-neutral.[59] The Court does not really take into account the actual degree of the burden; furthermore, the Court fails to make a distinction of whether the law imposes a mere burden or a complete ban on the speech.[60] In reality, however, there is a substantial difference between a mere burden placed on speech being expressed in just one of many media channels and a complete ban that effectively silences that speech in all communications venues. The courts are indifferent as to whether a burden or ban is occurring in just one of many media venues through which the speech is available. But the First Amendment does not mandate that speakers incur absolutely no obstacles or burdens in exposing listeners to their speech.

By treating all content-based regulations the same, courts make virtually no effort to determine if a particular law imposes the kind of burden that threatens to drive an idea out of the marketplace of ideas. In other situations, however, a court may determine a law to be content-neutral and will sustain the law notwithstanding the apparent burdens on speech caused by that law. Unlike the approach taken by the Supreme Court in some other situations, such as its abortion-rights jurisprudence, no thought goes to whether the regulation imposes an

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[58] Patrick M. Garry, *The Right to Reject: The First Amendment in a Media-Drenched Society*, 42 SAN DIEGO L. REV. 129, 136 (2005) [hereinafter Garry, *Right to Reject*].

[59] *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (citing Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)); *see also* Patrick M. Garry, *A New First Amendment Model for Evaluating Content-Based Regulation of Internet Pornography*, 2007 BYU L. REV. 1595, 1603.

[60] *See, e.g., Playboy Entm't Group, Inc.*, 529 U.S. at 812 ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

"undue burden" on the particular speech.[61] This disregard of the degree of actual burden has resulted in courts overturning every state regulation that purports to shield young children from exposure to a powerful new media product—graphically violent video games.[62] Courts have overturned laws that require parental consent before minors can obtain graphically violent video games based on the rationale that those laws make content distinctions, even though the only burden imposed is on the ability of commercial vendors to sell those games to children without their parents' knowledge or consent.[63]

The Court's decision in *United States v. Playboy Entertainment Group, Inc.*[64] illustrates the gross imbalance of burdens currently being allocated between commercial vendors of indecent programming and unwilling recipients of such programming. *Playboy Entertainment* involved a challenge to a provision in the Telecommunications Act of 1996 that required cable operators with channels "primarily dedicated to sexually-oriented programming" to either completely block the channels or limit the broadcast of those programs to the hours between 10 p.m. and 6 a.m., when children are not likely to be among the viewing audience.[65] Long before this provision went into effect, cable operators used signal scrambling to ensure that only paying customers had access to certain programming; but, because this scrambling was subject to signal bleed, the time-channeling regulation endeavored to shield children from hearing or seeing images resulting from such signal bleed.[66] Still, the Court refused to uphold the provision because it posed

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[61] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992). In *Stenberg v. Carhart*, the Court held that a Nebraska law outlawing partial birth abortion was unconstitutional because it violated the "undue burden" test. 530 U.S. 914, 945–46 (2000). Freedom of association cases, involving conduct that facilitates expression, also use this type of balancing approach. *Cf.* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 260 (2004). Prior to determining how strict or deferential the standard of review to apply to the law, the courts in these cases take into account the severity of the burdens imposed on the freedom of expressive association. *See, e.g.*, Clingman v. Beaver, 544 U.S. 581, 586–87 (2005); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).

[62] *See generally* Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 139 (2004) [hereinafter Garry, *Defining Speech*] (explaining how current First Amendment application prevents regulation on the distribution of violent video games).

[63] *See* Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 956 (8th Cir. 2003); Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034, 1037 (N.D. Cal. 2005).

[64] 529 U.S. 803 (2000).

[65] *Id.* at 806 (quoting 47 U.S.C. § 561(a) (2006)).

[66] *Id.*

too great a restriction on speech, even though the Court recognized the state interest in shielding young viewers from such programming.[67]

In dissent, Justice Breyer focused particularly on the issue of relative burdens.[68] Justice Breyer noted that the law in question did not prohibit adult programming; instead, it merely placed a burden on the speech.[69] According to Justice Breyer, "Adults may continue to watch adult channels, though less conveniently, by watching at night, recording programs with a VCR, or by subscribing to digital cable with better blocking systems."[70] Additionally, he observed that the law only extends to channels that "broadcast 'virtually 100% sexually explicit' material."[71] Justice Breyer also pointed out that signal bleed exposed approximately twenty-nine million children to sexually explicit programming.[72] Taking into account the fact that tens of millions of children have no parents at home after school and some children may spend afternoons and evenings watching television outside of the home with friends, Justice Breyer asserted that the time-channeling law offered "independent protection for a large number of families."[73] Justice Breyer also cited evidence reflecting all the difficulty people encountered while trying to get their cable operator to block sexually explicit channels—difficulty which comes as no surprise to those who have previously tried to get their cable company to fix something.[74] According to Justice Breyer, the Framers did not intend the First Amendment to leave millions of parents helpless in the face of media technologies that bring unwanted speech into their children's lives.[75]

Under the content-neutral approach of the marketplace model, not only does the Court fail to closely scrutinize the actual degree of burden imposed upon media entertainment speech, but it also does not really consider the burdens on those who wish to avoid such speech. Even though speech and communication is a two-way process, the Court looks only at the rights of those commercial entities seeking to deliver indecent entertainment programming, ignoring the rights of those individuals who wish to prevent exposing their children from such programming.

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67 *See id.* at 825.

68 *Id.* at 838 (Breyer, J., dissenting).

69 *Id.*

70 *Id.* at 845.

71 *Id.* at 839 (quoting Playboy Entm't Group, Inc. v. United States, 30 F. Supp. 2d 702, 707 (D. Del. 1998)).

72 *Id.*

73 *Id.* at 842.

74 *Id.* at 843–44.

75 *See id.* at 846.

III. THE MARKETPLACE MODEL DOES NOT CONSIDER THE BURDENS ON THOSE WISHING TO AVOID INDECENT COMMERCIAL ENTERTAINMENT PROGRAMMING

In *Denver Area*, the Court was concerned only with inconveniences to would-be viewers of indecent programming—for example, a viewer who might want to choose a channel without any advance planning, or the one who worries about any embarrassment he might feel if he makes a written request to subscribe to the channel.[76] The Court ruled in *Playboy Entertainment* that audiences should generally expect to assume the burden of averting their eyes whenever unwanted or offensive media programming confronts them.[77] The Court previously articulated this expectation that unwilling viewers must avert their eyes in *Cohen v. California*, where the Court refused to permit the censorship of an expletive-laced political message printed on the back of a jacket worn in the Los Angeles courthouse, even though passersby may be involuntarily exposed to this message.[78] In *Cohen*, the Court placed the burden of avoiding the speech entirely on the viewer.[79] The Court imposed this same burden in *Erznoznik v. City of Jacksonville* when it struck down an ordinance prohibiting drive-in movie theatres from exhibiting nudity.[80] But a careful reading of Justice Breyer's *Playboy Entertainment* dissent makes clear that one's ability to avert one's eyes differs significantly between the various media. It is one thing to turn one's eyes away from an expletive printed on someone's jacket in a public place or to avoid driving by an outdoor movie theatre, and it is quite another thing to prevent one's children from viewing sexually explicit material on television—a medium that is everywhere and constantly accessible.[81] Thus, with respect to such modern media venues as cable television and the Internet, the "avert one's eyes" expectation stated in *Cohen* becomes a fallacy.

Because current First Amendment analysis is often virtually blind to the actual burdens borne by parents wishing to prevent their children from being exposed to indecent media entertainment, most of the time the courts require that those parents bear the full burden of "averting

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[76] Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 753–54 (1996).

[77] *Playboy Entm't Group, Inc.*, 529 U.S. at 813 (citing Cohen v. California, 403 U.S. 15, 21 (1971)).

[78] *Cohen*, 403 U.S. at 16, 26.

[79] *Id.* at 21.

[80] 422 U.S. 205, 206, 210 (1975).

[81] *See Playboy Entm't Group, Inc.*, 529 U.S. at 842 (Breyer, J., dissenting).

their eyes or ears," regardless of the degree or cost of that burden.[82] In *United States v. American Library Ass'n*, however, the Supreme Court tried to more effectively balance the placement of burdens.[83] The Court upheld a law requiring public libraries to install filtering software on their Internet computers, stating that the law did not require a total ban on a patron's Internet access to certain types of material but did require any adult wishing to view such material to ask a librarian to unblock the desired site.[84] The slight burden on adults who could still access the material with just a request to the librarian gave way to the goal of protecting children from pornography. In considering the relative burdens involved, some viewed this decision as bucking the trend followed in *Playboy Entertainment*, where just about any burden on an adult's access to indecent speech, no matter what the risk to children, was found to be unconstitutional.[85]

The finding that children could easily access sexually explicit material on the Internet was crucial to the Court's holding in *American Library Ass'n*.[86] But if it is as easy as the Court in *American Library Ass'n* says it is to access indecent speech on the Internet, and if there is no way for parents to adequately site or content-block, and if the Internet is indeed an integral part of contemporary life, then is it feasible to expect people to avert their eyes from all the sexually explicit

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[82] *Cf.* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 61 (1983) (holding that the federal government could not ban the unsolicited mailing of contraceptive ads); *Erznoznik*, 422 U.S. at 210–11 (holding that the burden falls upon the unwilling viewer to avoid offensive speech "'simply by averting [his] eyes'" (quoting *Cohen*, 403 U.S. at 21) (alteration in original)); Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965) (holding that the Post Office could not screen out communist mail from foreign sources and require potential recipients to affirmatively request its delivery).

[83] 539 U.S. 194, 208 (2003).

[84] *Id.* at 209.

[85] *See supra* notes 64–75 and accompanying text.

[86] *Am. Library Ass'n*, 539 U.S. at 200 (citing Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 406, 419 (E.D. Pa. 2002)). National surveys illustrated that a quarter of all school children had unintentionally accessed pornography while at a public library. Elizabeth M. Shea, *The Children's Internet Protection Act of 1999: Is Internet Filtering Software the Answer?*, 24 SETON HALL LEGIS. J. 167, 185 & n.92 (1999). Studies show that adolescents between the ages of twelve and seventeen are one of the largest consumers of adult-oriented material on the Internet. *Id.* at 184 (citing *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing on H.R. 3783, H.R. 774, H.R. 1180, H.R. 1964, H.R. 3177, and H.R. 3442 Before the Subcomm. on Telecomm., Trade, & Consumer Prot. of the H. Comm. on Commerce*, 105th Cong. 22 (1998) (statement of Rep. Ernest J. Istook, Jr.) [hereinafter Istook Statement]). Most pornography sites do not require a credit card to access their extensive free previews, thus permitting children to see graphic sexual and violent images without going through any age verification process. *Id.* at 178–79 (citing Istook Statement, *supra*, at 22).

speech that pops up on the Internet?[87]

The courts fail to scrutinize fully the ease or difficulty for an adult to overcome whatever burden is placed on his or her access to sexually explicit speech, compared with the ease or difficulty for parents to safeguard their children from such speech; in other words, the courts put minimal effort into comparing the relative burdens of those who wish to access the speech with those who wish to avoid the speech.[88] An opt-in requirement on specific types of "low value" nonpolitical speech, however, would venture to equalize those burdens. Rather than decreasing the amount of speech in the system, it would simply create an additional step before someone could access the speech. Justice Breyer made this point in his *Playboy Entertainment* dissent: the time-channeling law provided invaluable assistance to those who wished to avoid the sexually explicit programming, while placing a relatively insignificant burden on those who wished to obtain the programming.[89]

When using the content-neutral approach, the Court does not effectively contemplate the freedom to avoid being subjected to offensive and unwanted commercial entertainment—possibly one of the most vulnerable and fragile freedoms in today's media environment.[90] Not

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[87] The Court in *United States v. American Library Ass'n* acknowledged that "there is also an enormous amount of pornography on the Internet, much of which is easily obtained," and that the "accessibility of this material has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography." 539 U.S. at 200 (citing *Am. Library Ass'n*, 201 F. Supp. 2d at 406, 419). As observed by Professor Nachbar, very few parents have the time to supervise their children's access to the Internet, and "unless the parent were, for example, to open each [web]page with the child looking away and only allow the child to view the page after a parental preview, there is no way to keep the child from taking in the content while the parent is evaluating its appropriateness." Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215, 220–21 (2000).

[88] The question raised here is why should First Amendment doctrine favor adults over children, especially when adults can access speech, even with slight burdens, more easily than parents can keep such speech away from their young children, and especially when the consequences are so much different: potential psychological harm to children versus a slight delay in obtaining the speech for adults? For a discussion of the harms to children, see generally Garry, *Exploring a Constitutional Model*, *supra* note 1.

[89] *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 841–42 (2000) (Breyer, J., dissenting).

[90] *See* PATRICK M. GARRY, REDISCOVERING A LOST FREEDOM: THE FIRST AMENDMENT RIGHT TO CENSOR UNWANTED SPEECH 38–39, 42–48 (2006) [hereinafter GARRY, REDISCOVERING A LOST FREEDOM]. The purpose of the new challenge under the First Amendment may be to safeguard the right of recipient control, just as the purpose of the challenge under the marketplace model was to safeguard the right of speaker control. *See id.* at 22–27. Basically, the purpose of the modern First Amendment challenge may be to adjust the one-sided approach of the marketplace model.

only has the Court failed to realistically analyze how feasible it is for parents to "avert" their children's eyes from electronic commercial media entertainment, but the Court has, in some cases, applied the "avert one's eyes" standard more leniently in political speech matters than in indecent media entertainment matters. And if the Court applies that standard more leniently in political speech matters, it allows for more speech regulation, thus serving the interests of the unwilling audience. In *Hill v. Colorado,* for instance, the Court favored the interests of the unwilling listener—the person going in and out of the abortion clinic—by restricting the speech of the protesters. In finding that it was difficult for the patrons or employees of the clinic to "avert their eyes" from the protesters, the Court significantly limited the protest speech.[91] Conversely, in *Denver Area,* a case involving indecent television entertainment programming, the Court gave no consideration to the unwilling audience—namely, those parents who did not wish to expose their children to such programming.[92]

IV. THE COURTS' ISOLATED-MEDIA VIEW

The courts must make certain that regulations of nonpolitical speech do not amount to a total ban on that speech. But as long as that speech remains accessible through other avenues or in other formats, courts can avoid such a ban.

Current free speech doctrines ignore the realities of the modern media world by refusing to recognize the plethora of media channels that exist for any one type of speech.[93] In this respect, First Amendment jurisprudence is stuck in the early twentieth century when, due to the few media venues available, a burden or ban in one venue essentially meant a complete censorship of the subject speech. When First Amendment doctrines were born, there was effectively only one mass media outlet—the print media.[94] But now, in the twenty-first century, there are many different media venues. Thus, in a multiple media world, the question arises as to whether a speech burden in one venue amounts to an unconstitutional censorship, even if the particular speech remains plentiful in other venues—in other words, the speech is still available

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[91] Hill v. Colorado, 530 U.S. 703, 723, 726 (2000).

[92] *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 753–54 (1996) (describing only the statute's restrictive effects upon the willing audience).

[93] Strict scrutiny not only fails to consider whether a content-based regulation imposes only a slight or narrowly confined burden on speech, but it also does not consider whether this burden only exists in just one of many communication channels.

[94] Aside from the fact that there were very few different media venues, there was also, in the early twentieth century, very little sexually explicit or graphically violent media speech due to social customs as well as technological restraints.

and remains not banned.

Violent and sexually explicit speech is in great supply in today's society. Thus, courts should view restrictions on such speech in light of the total supply of that speech in the entire media, rather than through the effects of those restrictions on just one media avenue. Because there is an abundance of so many different communications mediums, courts should view speech regulations in terms of the total media spectrum. Thus, a regulation of speech in one media venue may be permissible if that speech remains available through other media venues. Courts, in analyzing measures to help those wishing to avoid their children's exposure to harmful speech—measures aimed at facilitating freedom of choice on behalf of the avoider—should consider the media as a whole, instead of just considering individual media venues in isolation.[95]

Before the modern growth of new "communications technologies, the censorship of a particular medium (or of a particular way of conveying an idea or information) amounted more or less to a complete censorship of that idea or information."[96] But now, that is not the case. For that reason, courts should look at the media in its entirety to determine

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[95] The problem with courts treating each single media venue as if it constituted the media as a whole is not only that ideas are expressed in all the different media venues, but that each different media venue may have some unique influences on children. For instance, the idea of violence is expressed in all the different media venues; however, the way that violence is depicted in graphically violent video games, for instance, has been shown to have particular and long-ranging negative effects on children's behavior. Garry, *Defining Speech*, *supra* note 62, at 139. Therefore, a restriction that applies only to graphically violent video games—for example, a restriction on very young children buying certain games without parental knowledge—may serve to accomplish a valuable child protection interest, while at the same time not causing a ban on the message or idea of violence. The distinctions between various media venues have been recognized by Professor Frederick Schauer:

> When we are compelled to treat mass distribution of detailed instructions for causing harm in the same way that we treat an individual speaking to a live audience, we face a different kind of problem: too much protection rather than too little. And when First Amendment doctrine insists that the Internet, cable television, telephone, newspapers, magazines, and books are for many purposes indistinguishable, serious questions arise as to whether courts have overlooked important historical, structural, economic, and cultural differences among the various channels and institutions of communication.

Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1271 (2005) (citing Rice v. Paladin Enters., 128 F.3d 233, 239 (4th Cir. 1997)). According to Professor Schauer, the Court's First Amendment jurisprudence rests on the basis of content of the speech or communication; the Court has paid relatively little regard to the institutional environment or media venue in which the speech occurs. *Id.* at 1256. Thus, the Supreme Court has been reluctant to draw any lines around communicative institutions or media venues; it has instead focused almost exclusively on looking at what type of speech is at issue. *Id.* at 1263.

[96] *See* GARRY, REDISCOVERING A LOST FREEDOM, *supra* note 90, at 96–97.

whether restrictions on a particular kind of output or imagery of one communications medium do in fact preclude such speech from altogether entering the social marketplace of ideas through another communications medium.[97] Because our current society is swelling with media content, courts should examine whether a specific regulation of speech in one venue is equivalent to a total censorship of that idea or piece of information in society at large.[98] It appears absurd to only examine one media venue in hopes of discovering whether an unconstitutional censorship has occurred while ignoring the abundance of speech that is still in the media system as a whole.

The accessibility of alternative venues for regulated speech played a significant part in *Action for Children's Television v. FCC*, where the D.C. Circuit Court of Appeals upheld the "safe harbor" provisions of the Public Telecommunications Act of 1992, which restricted indecent programming to the hours between midnight and 6 a.m.[99] The court came to the conclusion that the time-channeling rule for indecent transmissions did not "unnecessarily interfere with the ability of adults to watch or listen to such materials both because [adults] are active after midnight and . . . have so many alternative ways of satisfying their tastes at other times."[100] Likewise, the Second and Ninth Circuits upheld restrictions on access to dial-a-porn services—such as requiring telephone companies to block all access to dial-a-porn services unless telephone subscribers submit written requests to unblock them—finding that such restrictions merely shifted the burdens of accessing the indecent speech, rather than amounting to a total ban of such speech.[101]

A constitutional model that recognizes the reality of the modern

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[97] *See, e.g.*, Cohen v. California, 403 U.S. 15, 19 (1971) (stating that the First Amendment has "never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses").

[98] Courts are able to differentiate between laws that suppress actual ideas and laws that suppress only individual expressions of those ideas. *Id.* For example, do we really need the expression of violence in a video game—and in a way that has a particularly harmful effect on children—when we have lots of books and movies that express the same thing?

[99] 58 F.3d 654, 667 (D.C. Cir. 1995) (citing Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (codified at 47 U.S.C. § 303 (2006))). The court in *Action for Children's Television* recognized the harm of pornography to children, and yet First Amendment doctrines allow for regulation of pornography only on the broadcast medium, which in today's media world is a diminishing medium.

[100] *Id.*

[101] In *Dial Information Services Corp. v. Thornburgh*, 938 F.2d 1535, 1537 (2d Cir. 1991), and *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 879 (9th Cir. 1991), the Second and Ninth Circuits, respectively, ruled that the restrictions in the so-called "Helms Amendment," 47 U.S.C. § 223(b)–(c) (2006), did not infringe on the First Amendment.

mass media would look at the media marketplace in its entirety to determine whether a requirement in one venue equates to a total ban of the speech. The key is to not look at each medium in a vacuum or as if each single medium has to carry a complete supply of speech on its own; rather, the issue is to look at all mediums together when considering the impact on speech.[102]

By upholding statutes that restrict speech in one venue while leaving open other venues for that speech, courts have implicitly approved this approach—and explicitly for so-called content-neutral regulations.[103] Because advertising in other media venues was still available, the court in *Capital Broadcasting Co. v. Mitchell* held that a statute restricting advertising in certain media venues did not infringe upon the First Amendment.[104] In *Hill v. Colorado*, the Court upheld a "buffer zone" regulation that restricted the speech rights of abortion protesters, reasoning that the statute merely restricted face-to-face dialogue while still leaving open other channels of communication.[105] The Court also observed in *Schenck v. Pro-Choice Network of Western New York* that speakers remained "free to espouse their message" in various ways, even though they were required to keep a distance from their intended audience.[106] Through cases like *Hill* and *Schenck*, the Court seems to suggest that it is essential to preserve the potential of communicative interchange between speakers and willing listeners. What is important is that willing listeners still be able to seek out and obtain the speech through an alternative channel.[107]

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[102] This is a derivative of the acknowledgment that the "unique characteristics" and "distinct attributes" of "each mode of expression" should direct First Amendment analysis, *Ashcroft v. ACLU*, 535 U.S. 564, 594–95 (2002) (Kennedy, J., concurring) (citing Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975)), and that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

[103] Frisby v. Schultz, 487 U.S. 474, 484 (1988); *see also* Moser v. FCC, 46 F.3d 970, 975 (9th Cir. 1995) (noting that a ban on auto-dialing machines still left abundant alternatives open to advertisers).

[104] 333 F. Supp. 582, 584 (D.D.C. 1971) (citing Public Health Cigarette Smoking Act of 1969 § 6, Pub. L. No. 91-222, 84 Stat. 87, 89 (1970) (codified at 15 U.S.C. § 1335 (2006)).

[105] 530 U.S. 703, 727 & n.33 (2000) (citing *id.* at 780 (Kennedy, J., dissenting)).

[106] 519 U.S. 357, 385 (1997).

[107] In *Urofsky v. Gilmore*, where a group of university professors challenged the constitutionality of a statute restricting state employees from accessing sexually explicit material on computers owned by the state, the court noted that the statute did not prohibit all access to such materials because an employee could always get permission from his or her agency head to access the material. 167 F.3d 191, 194 (4th Cir. 1999).

CONCLUSION: CHOICE FACILITATION VS. CENSORSHIP

Freedom of speech is, in reality, part of a larger freedom to control certain basic aspects relating to one's role within the communicative process. Indeed, speech is a component of something beyond just the individual; it is a component of the communicative process, and as such is both a social act as well as an individual act.[108] Seen in this light, a free individual should have not only the right to speak what he or she wishes to speak, but also the right to avoid or reject whatever offensive or harmful speech he or she wishes to reject.

Similar to this freedom, parents also have a right to control their children's upbringing. Part of the parental child-raising function relates to the kind of speech or images to which the parent wishes to expose the child. Constructing speech freedoms in such a way as to leave parents with little effective control over what nonpolitical media entertainment programming confronts their children severely erodes the right to control their children's upbringing. In that case, parents must choose between two equally objectionable options: acquiesce in their children's media exposure or remove their children entirely from the modern media society.

So often, opponents of any measures aimed at helping parents prevent their children's exposure to unwanted nonpolitical media entertainment cast those measures in terms of "censorship." And indeed, history has proven that censorship is a futile exercise and almost never accomplishes what its advocates hope to accomplish.[109] But not all speech regulations amount to censorship. Censorship tries to achieve a complete repression of a particular idea. This type of ban—the banishment of an idea from social discourse—is quite different from measures which simply help unwilling recipients avoid exposure to certain kinds of offensive, nonpolitical speech.

There is a middle ground between complete, unrestricted freedom of speech and censorship. That middle ground lies in regulatory measures, which strive to achieve choice facilitation. Choice facilitation is different from censorship. It still allows ideas or images to remain in the social discourse but provides greater power to those wishing to avoid certain offensive or harmful media programming. In a way, choice facilitation enhances freedom by giving more effective choice rights to the unwilling recipient. For instance, poor families need to have Internet access in their home for educational purposes. But why should they then have to

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[108] *See* Garry, *Right to Reject*, *supra* note 58, at 151.

[109] *See generally* PATRICK GARRY, AN AMERICAN PARADOX: CENSORSHIP IN A NATION OF FREE SPEECH (1993) (arguing that censorship in America has historically proven futile).

bear even more economic burdens through installing various filtering devices or software just to keep out all harmful material to which they do not wish to expose their children? Why should poor families have to bear such a burden or why should they be subjected to the difficult choice of either getting the Internet and accepting all the harmful material or rejecting the Internet and denying their children educational opportunities? Through narrowly drawn measures aimed at choice facilitation, poor families may be able both to have the Internet and avoid their children's exposure to certain harmful material.

Choice facilitation measures do not amount to a ban on speech because, given all the different media venues, whatever speech is regulated to provide choice facilitation in one venue should be in ample supply in other venues—otherwise, such measures would be struck down as unconstitutional. Thus, what occurs is not censorship but a balancing of rights between speakers and those wishing to avoid the speech. The goal of the choice facilitation measure is not to censor speech but to allow parents to prevent their children's exposure to certain kinds of nonpolitical media entertainment. One example of a choice facilitation measure that should be allowable under the First Amendment is the one that was at issue in *Denver Area*, where the segregate-and-block scheme strove to give parents the ability to avoid certain speech while also allowing willing adults to obtain that speech.[110] An analogy can be seen in the alcohol-free sections provided at major league ballparks across the country. Owners carve out one small section of a ballpark as alcohol-free while allowing adults to obtain alcohol in every other section of the park.[111] Clearly, such measures do not amount to a ban on alcohol but are merely an attempt to give parents the ability to choose the environment in which their children live.

Censorship has become a discredited endeavor, and arguably the great majority of society now believes in freedom of speech. The nature of that freedom, however, must extend to parents wishing to control the media environment of their children, at least as much as it extends to those media companies that wish to profit off of sexually explicit and graphically violent speech. By striving to effectuate the freedom of those parents wishing to exercise their right to control their children's upbringing, choice facilitation measures such as those at issue in *Denver Area* essentially seek to achieve a greater level of freedom in society.

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[110] *See supra* notes 46–48 and accompanying text.

[111] *See, e.g.*, Fenway Park A-to-Z Guide, http://boston.redsox.mlb.com/bos/ballpark/guide.jsp (follow "Non-Alcohol Sections" hyperlink) (last visited Apr. 14, 2010); Yankee Stadium A-to-Z Guide, http://newyork.yankees.mlb.com/nyy/ballpark/guide.jsp (follow "Alcohol-Free Seating" hyperlink) (last visited Apr. 14, 2010).

SOME THOUGHTS ON CHUCK LORRE: "BAD WORDS" AND "THE RAGING PARANOIA OF OUR NETWORK CENSORS"†

*Christine Alice Corcos**

My remarks today are based on an article that I am writing on the effects of the Federal Communications Commission's ("FCC") regulation of language from the mid-1960s until today. Today I will focus on producer and showrunner[1] Chuck Lorre, and some of his disagreements with the Columbia Broadcasting System ("CBS") censors over the use of language, particularly on his popular television show *Two and a Half Men*.[2] Lorre has encountered a continuing series of problems with the CBS censors.[3] Since the FCC's increased willingness to find violations of its indecency standards through the "fleeting expletives" policy, adopted in 2004,[4] CBS and other networks are understandably wary of allowing creative talent to use words and depict behavior that might trigger FCC scrutiny.

The ruling articulated in *Golden Globes* set forth policy holding for the first time that the agency could regulate unintentional or "fleeting"

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† Chuck Lorre Prods., The Official Vanity Card Archives: Vanity Card 255, http://www.chucklorre.com/index.php?p=255 (last visited Apr. 19, 2010). The phrase "bad words" is a tongue-in-cheek reference to, for example, a litany of "prohibited" words from George Carlin's monologue *Filthy Words*, as noted by the U.S. Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726, 729 (1978). This speech is adapted for publication and was originally presented at a panel discussion as part of the Regent University Law Review and The Federalist Society for Law & Public Policy Studies Media and Law Symposium at Regent University School of Law, October 9–10, 2009.

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1 A "showrunner" is the individual responsible for the day-to-day organization and production of a television show, as well as the "overall creative direction of a series." CATHRINE KELLISON, PRODUCING FOR TV AND VIDEO: A REAL-WORLD APPROACH 12 (2006).

2 *See* Edward Wyatt, *Success Softens the Show Runner*, N.Y. TIMES, Sept. 20, 2009, at MT1; *Two and a Half Men* (CBS television broadcast 2003), *available at* http://www.cbs.com/primetime/two_and_a_half_men/about/. *Two and Half Men* airs Monday nights on CBS and stars Charlie Sheen as Charlie Harper, Jon Cryer as his brother Alan, and Angus T. Jones as Alan's son Jake (the "two and a half men" of the title). Wyatt, *supra*.

3 Wyatt, *supra* note 2.

4 *See* Complaints Regarding Airing of the "Golden Globe Awards" Program (*Golden Globes*), 19 F.C.C.R. 4975, 4980 (2004) ("We now depart from . . . all . . . cases holding that isolated or fleeting use of the 'F-Word' or a variant thereof . . . is not indecent and conclude that such cases are not good law . . . .").

uses of patently offensive or profane language over the airwaves.[5] According to the FCC,

> By our action today, broadcasters are on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the "F-Word" or a variation thereof in situations such as that here. We also take this opportunity to reiterate our recent admonition (which took place after the behavior at issue here) that serious multiple violations of our indecency rule by broadcasters may well lead to the commencement of license revocation proceedings, and that we may issue forfeitures for each indecent utterance in a particular broadcast.[6]

Fox Television Stations and other members of the media challenged the policy in the Second Circuit Court of Appeals, and won;[7] the agency then appealed to the Supreme Court and obtained a reversal on the administrative issue.[8] The Court sent the case back to the Second Circuit on the constitutional question: whether the "fleeting expletives" policy violates the First Amendment.[9]

What concerns many members of the media about the "fleeting expletives" policy is not simply that it implicates uses of profane or indecent language. If that were the extent of the policy, broadcasters might be able to anticipate the application of the policy or could at least put policies in place to address FCC concerns. One of the reasons Fox and other broadcasters have challenged the policy is reflected in an example of a "fleeting expletive" that violated FCC regulations. The original complaints, and a reason for the "fleeting expletives" policy, came about because of entertainer Bono's use of the word the "F-word" at the Golden Globe Awards Broadcast of 2003.[10] According to National Broadcasting Company, Inc. ("NBC"), Bono did not use the word in a "sexual" manner, but as an intensifier.[11] What he said, upon receiving an award for "Best Original Song," was either "'this is really, really f---ing brilliant,' or 'this is f---ing great.'"[12] The FCC's Enforcement Bureau initially determined that Bono's comment did not violate FCC regulations,[13] but the agency overturned that order, determining that any use of the "F-word," even a "fleeting" use, violates FCC regulations.[14]

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5 *Id.*

6 *Id.* at 4982.

7 Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 447 (2d Cir. 2007).

8 FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1812, 1819 (2009).

9 *Id.* at 1819.

10 *See Golden Globes*, 19 F.C.C.R. at 4975–76, 4976 n.4.

11 *Id.* at 4976, 4978 n.23.

12 *Id.* at 4976 n.4. In accordance with their policy, the editors of this Law Review have redacted the expletive at issue. The word appears unredacted in the FCC ruling cited.

13 *Id.* at 4976.

14 *See id.* at 4980.

> Neither Congress nor the courts have ever indicated that broadcasters should be given free rein to air any vulgar language, including isolated and gratuitous instances of vulgar language. The fact that the use of this word may have been unintentional is irrelevant; it still has the same effect of exposing children to indecent language. Our action today furthers our responsibility to safeguard the well-being of the nation's children from the most objectionable, most offensive language.[15]

The FCC's "fleeting expletives" policy is an expansion of the rule established by *FCC v. Pacifica Foundation*, a Supreme Court decision that determined the agency had the power to regulate a radio (and, by extension, a television) broadcast that is indecent, but not obscene, under the powers that Congress gave it under 18 U.S.C. § 1464.[16] The policy is still in place as of today, although the Second Circuit has reheard arguments challenging its constitutional validity.[17]

One reason we know that Lorre has had run-ins with the network over the use of language on *Two and a Half Men* is that he publicizes the disagreements. Unlike creative talent on other shows and other networks who might keep differences with network executives relatively quiet, Lorre has been quite vocal about his disagreements with both CBS executives and CBS censors. He mentions his disagreements in both interviews and on what he calls "vanity cards," which he posts both at the end of television episodes and on the Internet.[18] Particularly because he makes his opinions available through his vanity cards, and because, to some extent, we can track the history of his disagreements through the cards as well as through some of the interviews he grants to the media, Lorre's positions on artistic integrity and First Amendment speech makes an interesting case study.

Lorre does not always devote his vanity cards to rants against the network censors. They may, for example, be musings on his personal life.[19] But he may also talk about the latest argument that he had with the censors. If Leslie Moonves, the current President of CBS, does not like what Lorre has to say on a vanity card, Moonves censors the card so

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[15] *Id.* at 4979.

[16] 438 U.S. 726, 738 (1978).

[17] Mark Hamblett, *Court Questions Policy Penalizing "Fleeting Expletives"*, LEGAL INTELLIGENCER, Jan. 19, 2010, at 4. For a video posting of oral arguments, see Fox Television v. FCC, http://www.c-spanvideo.org/program/291305-1 (last visited Apr. 19, 2010).

[18] Wyatt, *supra* note 2. "Vanity cards" are Lorre's statements, shown for a few seconds at the end of episodes, commenting on the just-completed episode. *See* Katherine Rosman, *Hit TV Writer Has Brief Message for His Viewers*, WALL ST. J., May 14, 2008, at A1. He began showing them with his series *Dharma and Greg*. *Id.*

[19] *E.g.*, Chuck Lorre Prods., The Official Vanity Card Archives: Vanity Card 267, http://www.chucklorre.com/index.php?p=267 (last visited Apr. 19, 2010).

that it does not air.[20] But Moonves cannot censor the card on the web, which means that we can read Lorre's original writings.

What might occasion CBS's censorship of *Two and a Half Men*? In many cases, the words, phrases, or scenes the CBS censors object to seem to be content that does not fall easily on one side of a bright line or the other. Instead, the censors seem to object to the content the network and its standards and practices staff believe might give rise to complaints from viewers and advertisers, and possibly an eventual FCC inquiry. To avoid such a situation, the network prefers to err on the side of less-offensive rather than more-offensive language, avoiding jokes that might cause angry letters to the network, from a particular ethnic group, for example.[21]

Thus, Lorre finds himself at odds with the network over the need for the use of a particular word or phrase in a particular context. Like George Carlin before him, Lorre asks why a word or a phrase is objectionable in one situation but not in another, and suggests through the show that objectionable thoughts might be in the mind of the interpreter.[22]

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[20] *E.g.*, Chuck Lorre Prods., The Official Vanity Card Archives: Vanity Card 236, http://www.chucklorre.com/index.php?p=236 (last visited Apr. 19, 2010). All censored vanity cards have a (c) after them to indicate that they are the censored version. Lorre also provides a link to the uncensored version; one need only type a "c" at the end of a censored card's IP address to gain access. *E.g.*, Chuck Lorre Prods., The Official Vanity Card Archives: Vanity Card 236(c), http://www.chucklorre.com/index.php?p=236c.

[21] *See* Chuck Lorre Prods., The Official Vanity Card Archives: Vanity Card 251(c), http://www.chucklorre.com/index.php?p=251c (last visited Apr. 19, 2010) [hereinafter Koreatown Card]. The censored card explains a joke that was cut from the episode, which involved Charlie Harper's suggestion that his fiancée abandon her cat in Koreatown where someone might eat it. Says Lorre,

> The point is when material like this has aired on CBS in the past, angry Korean Americans, no doubt sensitive about their culinary image, held angry meetings with network executives which made the network executives unhappy. That's it. That's why the joke was cut. No one at CBS wanted to go to another angry meeting that would make them unhappy. Now please understand, I'm not bringing this up because I'm upset about our show being censored. I'm way past that. Waste of time and energy. No, I just wanted my vanity card readers to know that they can influence the content of CBS, or any of the major networks, by simply making the appropriate executives unhappy. It's simple: flood the network with angry form letters and/or emails, demand a meeting, threaten a boycott of their advertisers, then have fun making the creative choices that best suit your tastes. But be careful. You will inevitably make someone angry, and they will damn sure make you unhappy. Which makes me happy.

Id.

[22] *See* Christine A. Corcos, *George Carlin, Constitutional Law Scholar*, 37 STETSON L. REV. 899, 913–14 (2009) (noting that while some words are per se inappropriate, others become inappropriate due to the context in which they are spoken). Edward III is said to have remarked while dancing with the Countess of Salisbury, "Honi soit qui mal y pense."

If *Two and a Half Men* were not one of the most popular television shows currently airing,[23] Lorre's disputes with the censors would be interesting, but perhaps not as important as they are. Lorre, however, currently has two hit shows on the network (*Two and a Half Men* and *The Big Bang Theory*),[24] and has shown his ability to capture viewers (or "eyeballs," in television parlance).[25] In this way, he demonstrates his ability to communicate with a large segment of today's television audience.

Some of the same qualities that make *Two and Half Men* popular—indecent language and edgy or "questionable" situations—also bring it to the network's attention because they attract criticism, and this criticism also serves Lorre's purposes. But Lorre and his writers are particularly interested examining the interaction of particular subjects on the show, and in how they can most effectively express those subjects through the use of language. Among those subjects are the effects of television and the media on children in today's society.[26] *Two and a Half Men* returns to this theme often, either through its consideration of Jake's preference for video games over reading, for example,[27] or the influence of advertising on children.[28] I am not suggesting that *Two and a Half Men* does not address other issues; certainly it does. Among them are Charlie and Alan's inability to find stable relationships, Charlie because of his immature behavior and Alan because of his rigidity and controlling ways.[29] But any suggestion that Lorre's sole interest is in vulgarity and sexual situations for their own sake, I think, overstates the case.

(Evil to him who thinks evil.). THE MACMILLAN BOOK OF PROVERBS, MAXIMS, AND FAMOUS PHRASES 713 (Burton Stevenson comp., 1987).

[23] *See* Scott Collins, *CBS Skirts Sheen Scrutiny*, L.A. TIMES, Jan. 9, 2010, at D1.

[24] Rosman, *supra* note 18.

[25] DICTIONARY OF MEDIA STUDIES 84 (A & C Black Publishers 2006).

[26] Some groups, such as the Parents Television Council, believe that Lorre, who is also a parent, is their opponent on a number of issues. *See* Two and a Half Men—Parents Television Council Family TV Guide Show Page, http://www.parentstv.org/ptc/shows/main.asp?shwid=1771 (last visited Apr. 19, 2010). I would suggest that he has a number of the same interests and the same concerns. But he disagrees about how to approach these issues, and how to resolve them. *See* Chuck Lorre Prods., The Official Vanity Card Archives: Vanity Card 244, http://www.chucklorre.com/index.php?p=244 (last visited Apr. 19, 2010) ("The Parents Television Council has asked Apple Computers to stop advertising on *Two and a Half Men*. Their reasoning is, surprise, surprise, the show's adult humor. I thought I might use my vanity card to send another message to Apple Computers.").

[27] *E.g.*, *Two and a Half Men: Weekend in Bangkok with Two Olympic Gymnasts* (CBS television broadcast Sept. 19, 2005).

[28] *E.g.*, *Two and a Half Men: It Was Mame, Mom* (CBS television broadcast Mar. 7, 2005) [hereinafter *Mame, Mom*].

[29] *E.g.*, *Two and a Half Men: Crude and Uncalled For* (CBS television broadcast Feb. 1, 2010).

Lorre, like Carlin before him, is a satirist and observer of the social scene. One of his interests is the relationship between fathers and sons, and between young men and the other male relatives in their lives. He uses *Two and a Half Men* to focus on this issue:

> At Warner Brothers, Mr. Lorre was asked to expand an idea for a show about two brothers, but he soon became intrigued by the idea of exploring the relationship between an aging bachelor playboy and his divorced brother's young son. With the help of Mr. Aronsohn, "Two and a Half Men" was born.[30]

An issue Lorre is particularly interested in is the hypocrisy that he identifies surrounding the way American society deals with the raising of children. By "society," I am not referring only to parents, but to adults in general, and adults in all professions, including the media.

Two and a Half Men centers on two adult males (the "two" of the title) and a young boy. One of the men, Alan, is divorced and shares custody of his ten-year-old son, Jake, with his ex-wife, Judith. Having lost his home and most of his income in the divorce, Alan moves in with his bachelor brother Charlie, who lives a cheerfully hedonistic life in a beautiful beach house in Malibu. Jake spends weekends with them; the show follows the developing relationship of these men with the boy, as well as the men's relationships with the women in their lives, including Berta, Charlie's housekeeper, and Rose, a neighbor who is infatuated with Charlie.[31]

One recurring theme involves the extremely adult situations and language to which Charlie exposes Jake, and the attempts that Alan and Judith make to dissuade Charlie from this thoughtless behavior. As Charlie often says, he knows what he is doing; he just does not care. But as he slowly discovers, his developing relationship with his nephew actually makes him care. As many adults who are not parents but have close relationships with children (for example, aunts, uncles, cousins, close friends) discover, such relationships can be complicated. How do these adults deal with messages that their parents might not entirely approve of? How do they help children understand and absorb messages and images that might be a little too sophisticated for them? How do they help children develop as they grow, both intellectually and physically? Is the FCC's approach—to censor indecent, though not obscene, language that comes in over the broadcast airwaves—the one to follow? After all, children are likely to hear such language on the playground, even if they do not hear it in the home.

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[30] Wyatt, *supra* note 2.

[31] About Two and a Half Men, http://www.cbs.com/primetime/two_and_a_half_men/about/ (last visited Apr. 19, 2010).

Consider two examples from *Two and a Half Men's* first season, one from the first episode broadcast (the pilot),[32] and the second from the last episode, *Can You Feel My Finger?*.[33] In the first example, Jake, who is visiting his father for the weekend, wakes up his uncle Charlie, who has a hangover. Charlie is not expecting to see Jake.[34] He has not considered that, by inviting Alan to share his home, he is also opening up his life to his young nephew.

Jake: Boy, is your eye red.
Charlie: You should see it from in here. What are you doing here, Jake?
Jake: My mom brought me. Will you take me swimming in the ocean?
Charlie: Can we talk about it after my head stops exploding?
Jake: Why is your head exploding?
Charlie: Well, I drank a little too much wine last night.
Jake: If it makes you feel bad, why do you drink it?
Charlie: Nobody likes a wiseass, Jake.
Jake: You have to put a dollar in the swear jar. You said "ass."
Charlie: Tell you what, here's twenty. (*gives Jake the note*) That should cover me until lunch.[35]

We can expect tension in the household often when Jake comes over for father-son visitation. Alan and his ex-wife Judith have certain rules concerning appropriate language to be used around their son, and Charlie has already violated at least one of them—not only that, but he gives Jake money to avoid the consequences. Will Charlie stop using vocabulary that Alan and Judith find objectionable? This question is unanswered for the couple, for the audience, and for the CBS censors because we suspect that "ass" is not the only non-socially standard word that Charlie uses, regardless of the company in which he finds himself. Thus, Jake is very likely going to hear such language, to wonder about it, and may very well start using it—in spite of his parents' objections.

Another example from the first season demonstrates the frankness that both Charlie and Alan want to employ when discussing "the facts of life" with Jake. Both men underestimate Jake's grasp of the situation. Charlie explains to Jake that he has made the decision to get a vasectomy because he does not want to risk having children out of wedlock, but he does not want to get married, and he does not want to stop having relationships.[36] Whether we agree with Charlie's moral

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[32] *Two and a Half Men: Pilot* (CBS television broadcast Sept. 22, 2003) [hereinafter *Pilot*].

[33] *Two and a Half Men: Can You Feel My Finger?* (CBS television broadcast May 24, 2004) [hereinafter *Feel My Finger*].

[34] *See Pilot*, *supra* note 32.

[35] *Id.*

[36] *Feel My Finger*, *supra* note 33.

position, we must recognize that he does want to take responsibility for the decision not to reproduce.

Charlie: (to Alan) You're lucky I'm still talking to you after tossing my swimmers on the Coast Highway.
Alan: What?
Charlie: It's nothing. Thanks to you I have to reschedule the whole deal for this afternoon.
Jake: What whole deal?
Alan: It's not important, Jake.
Charlie: Why shouldn't he know?
Alan: OK—go ahead. Explain it to him.
Charlie: Well, Jake, your Uncle Charlie is getting a vasectomy.
Jake: Oh. What's wrong with the car you have now?
Alan: Well done.
Charlie: All right, let me try again. A vasectomy is a very simple operation.
Jake: (*with an air of concern*) Are you sick?
Charlie: No, no, no, no, no, I'm perfectly healthy. It's a procedure so that I don't have babies by accident.
Jake: (*with an air of understanding*) Oh, yeah, like we had to do with Scout.
Charlie: (*not understanding*) Scout?
Alan: A dog we had—couldn't keep it in his fur. Keep going. You're doing great.
Charlie: Uh, Jake, it's not exactly the same with people as with dogs.
Jake: I know. Why don't you just use a condom?
Alan: Guess he knows more than he lets on.
Charlie: (*studying Jake intently*) You do, don't you?
Jake: (*concentrating on his breakfast*) I hear things.[37]

In this scene Lorre is suggests that we cannot really control what children learn about the world. What we *can* do is discuss with them what they *do* hear and help them evaluate and assess what they hear. We can guide them through those interpretations.

Also significant is that as Charlie, Alan, and Jake discuss these matters, they do so around the kitchen table. Such a setting is crucial and it sends an important message. That message is clear: adults and children should talk about the important *and* the unimportant things in life; discussing what seems unimportant sets up the paradigm for discussing the important later on. Adults should try to talk to children and teenagers, even when, as happens in the later seasons of *Two and a Half Men*, the teenaged Jake simply does not want to talk to Charlie and Alan because he thinks, as many teenagers do about the adults in their

[37] *Id.*

lives, that Alan and Charlie are complete idiots.[38] Other discussion scenes include clips in which the adults and Jake sit on the couch, watching television and discussing the programs and commercial messages. Jake often asks questions about either the shows or the commercials, allowing the show's writers to comment on the influence that television itself has on families and the importance that advertisers have, both on networks and on the content of television shows.[39] Thus, although the network's censors object to a fair number of Lorre's jokes as anti-religious,[40] anti-ethnic,[41] and even obscene,[42] one might have to balance these objections against Lorre's purpose.

Further, some words that the censors disapprove of are actually completely innocuous and perfectly defensible words. But because they sound like words that are or might be on the FCC's "prohibited" list, the CBS standards and practices office raises objections.[43] Lorre then engages in arguments with the office over whether he can use the words for broadcast.[44] Lorre's position is that these words ought to be permitted even though they might raise thoughts or impressions in viewers' minds.[45] The censors and the network, however, would probably prefer to avoid objections from pressure groups, and a possible subsequent FCC

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[38] *E.g.*, *Two and a Half Men: I Think You Offended Don* (CBS television broadcast Jan. 19, 2009).

[39] *E.g.*, *Mame, Mom*, *supra* note 28.

[40] *See* Chuck Lorre Prods., The Official Vanity Card Archives: Vanity Card 198(c), http://www.chucklorre.com/index.php?p=198c (last visited Apr. 19, 2010) [hereinafter Religion Card]. The censored version of this vanity card actually aired not on *Two and a Half Men*, but on *The Big Bang Theory* episode *The Loobenfeld Decay*. *The Big Bang Theory: The Loobenfeld Decay* (CBS television broadcast Mar. 24, 2008).

[41] Koreatown Card, *supra* note 21.

[42] *See* Chuck Lorre Prods., The Official Vanity Card Archives: Vanity Card 255(c), http://www.chucklorre.com/index.php?p=255c (last visited Apr. 19, 2010). This vanity card "encrypts" a word on the FCC's prohibited list as a phone number, and the network refused to allow it to be broadcast. *Id.*

[43] While no actual "list" exists, *see* Andrew D. Cotlar, *You Said What? The Perils of Content-Based Regulation of Public Broadcast Underwriting Acknowledgments*, 59 FED. COMM. L.J. 47, 58 (2006), the FCC publishes some general guidelines to aid consumers and the general public. *See generally* CONSUMER & GOV'T AFFAIRS BUREAU, FED. COMMC'NS COMM'N, FCC CONSUMER FACTS: OBSCENE, INDECENT, AND PROFANE BROADCASTS (2008), http://www.fcc.gov/cgb/consumerfacts/obscene.pdf (discussing FCC policies on the airing of obscene, indecent, and profane material). CBS's Program Practices Unit has the mission "to insure the acceptability of the content of . . . CBS's program . . . material." *Panel III: An Industry Perspective on Television and Violence*, 22 HOFSTRA L. REV. 855, 855 (1994).

[44] Wyatt, *supra* note 2.

[45] *See generally* Chuck Lorre Prods., The Official Vanity Card Archives: Vanity Card 217(c), http://www.chucklorre.com/index.php?p=217c (last visited Apr. 19, 2010) [hereinafter Words Card] (introducing the card with the phrase "words that confuse the CBS censor," and thereafter listing the words, stating that, "[a]s you can see, context is everything").

inquiry. They wish to protect against the trauma of an inquiry, even though they may suspect that ultimately no sanction would issue.[46] We know about these disagreements because, as I indicate above, Lorre documents them.[47]

To illustrate, consider a scene in *Two and a Half Men* in which Charlie, Alan, and Jake are sitting on the couch watching television. When a commercial for a drug for erectile dysfunction airs, Jake, wondering what the drug is for, asks his father and uncle. Alan is uncomfortable answering the question. He hems and haws, and finally Charlie explains that the product helps men get an erection. Jake still does not understand, and Charlie tells him, "They're boner pills, Jake."[48] Think about the word "boner." Apparently the CBS censors finally approved of that word. On *Two and a Half Men* the audience hears that word, which is slang, but it also hears anatomically correct words such as "gonad," "testicle," and "penis."[49] Indeed, Lorre's writers use those words often throughout episodes. The CBS censors seem to have little or no problem with these words.

Yet they have problems with other words that are just as "correct" or acceptable in terms of standard English. While the exact objections to these questions are unclear, the problem might be that the words, when pronounced, might evoke offensive images in the minds of some—perhaps most—viewers. The censors have told Lorre and his writers that they cannot use these words on *Two and a Half Men*.[50] Lorre states on one censored card, "[t]onight's vanity card is about censorship. It was censored. As always, you know where to look."[51]

The words in question are "fecund," which means fertile or fruitful; "titmouse," which is a small, insectivorous bird; "coccyx," which is the tailbone; "kumquat," which is a small edible orange-like fruit, available in many supermarkets; "gobble," which describes the sound that turkeys make; "guzzle"; "swallow," which is both what humans do to food and drink and a kind of bird; "manhole," a utility hole or maintenance hole to gain access to the sewers or underground; "fallacious," which means mistaken; "lugubrious," which means mournful; "angina," which is a heart condition; "gherkin," which is a type of pickle; "Uranus," the problematic name of the seventh planet of the solar system, which can

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[46] *See* Koreatown Card, *supra* note 21; Religion Card, *supra* note 40.

[47] *See* Wyatt, *supra* note 2.

[48] *Mame, Mom*, *supra* note 28.

[49] *E.g.*, *Two and a Half Men: Rough Night in Hump Junction* (CBS television broadcast Apr. 21, 2008).

[50] *See generally* Words Card, *supra* note 45 (stating that these are "words that confuse the CBS censor").

[51] Chuck Lorre Prods., The Official Vanity Card Archives: Vanity Card 217, http://www.chucklorre.com/index.php?p=217 (last visited Apr. 19, 2010).

raise pronunciation problems; "masticate," which means chew; and the name "Dick Butkus."[52]

As we can see, some of these words might raise red flags because of secondary meanings or because of pronunciation issues. If the FCC were to receive a certain number of complaints, it could initiate an investigation and ask CBS for an explanation of any language possibly categorized as indecent.[53] But as long as an actor does not mispronounce the word, and because the shows are taped, individual viewers determine the meaning. Should Lorre or the network be responsible if the actor pronounces the seventh planet's name with the accent on the first syllable and a member of the audience interprets the name differently (with the accent on the second syllable)? This, of course, is part of Lorre's issue with the network.

Does Chuck Lorre believe that all audience members are as interested as he is in deconstructing language and examining context? Probably not. Does he understand the network's position? Of course he does. He is aware that viewers will take away certain impressions if they hear particular words in a particular context. He, like CBS, knows that words, like acts, can have more than one meaning. Indeed, on the vanity card where he lists the words over which he and CBS have a disagreement, he states, "As you can see, context is everything."[54] But context is one of the issues he is most interested in exploring.

Lorre ultimately won the battle over the word "masticate," and it became the center of an extremely funny and touching scene in the episode *Your Dismissive Attitude Toward Boobs*.[55] Jake is sitting at the kitchen table, chewing energetically, and Alan enters and asks him what he is doing. Jake responds, "I'm masticating." Alan asks for clarification, and Jake responds, "It's not what you think." Alan responds, "What do I think?" The son says, "You *know*," and Alan responds, "What do I know?" At this point Jake is at a loss. He knows another word sounds like "masticate" but he does not know what it is, and Alan does not tell him. He knows, or thinks he knows, that it is a "bad word" he is not supposed to say. Of course, the studio audience laughs at this point, but Alan does not laugh.[56] Why not? Alan would never laugh at Jake's ignorance in these matters. It would undermine Jake's confidence and suggest

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[52] Words Card, *supra* note 45. One of the words listed ("manhole") does have a slang meaning as well, which may have been the origin of the CBS censors' objection. Urban Dictionary, http://www.urbandictionary.com/define.php?term=manhole%20cover (last visited Apr. 19, 2010).

[53] *See* CONSUMER & GOV'T AFFAIRS BUREAU, *supra* note 43, at 2–3.

[54] Words Card, *supra* note 45.

[55] *Two and a Half Men: Your Dismissive Attitude Toward Boobs* (CBS television broadcast Oct. 10, 2005).

[56] *Id.*

disrespect. Alan has many faults, but disrespect for his child is not one of them.

Lorre's point here is quite important. The difference between the two words, "masticate" and "masturbate," is crucial. They are not the same thing, and Alan knows that. Lorre knows that. The CBS censors know that. Adults know the difference. Did Lorre really seek a cheap laugh here? Or was he hoping to point out that building trust between parent and child is more important than a cheap laugh? If his intent was the latter, how can he make such a point if he cannot use the word "masticate" on broadcast television?

Of course Chuck Lorre uses his television shows as a vehicle to critique both CBS for its lack of willingness to take a stand against pressure groups, and the FCC for its lack of clarity in promulgating clearer standards. He sees the critique as his role. The CBS censors are setting up a filter—perhaps more of a filter than necessary—to catch what might cause problems for their network, and to stave off complaints from lobbying groups and advertisers. That is their role. To raise these objections to such words is to make the same objections that George Carlin's detractors made to his famous *Filthy Words* monologue.[57] But, so far, I would point out that the advertising dollars are apparently staying. The show continues to be extremely popular, even in the wake of Charlie Sheen's recent domestic troubles.[58] Lorre continues to try to use analogies, homonyms, double entendres, code words, and other means as described above to get his messages to viewers, because among his goals as an artist is to examine the effects of language on children and families.[59] Because he is interested secondarily in examining the effect of words generally on his viewers, many critics of his work miss this point when they only look at the use of offensive language and circumstances on the show without considering the context.

What does Lorre's approach have to do with the FCC's "fleeting expletives" policy, and legally and administratively why might the policy continue to have such an impact on his work and the work of artists like him? Let us review some of the arguments that Fox and the other plaintiffs originally made to the Second Circuit concerning the reasons

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[57] *See* Corcos, *supra* note 22, at 903 (citing Milagros Rivera-Sanchez & Paul Gates, *Abortion on the Air: Broadcasters and Indecent Political Advertising*, 46 FED. COMM. L.J. 267, 283 n.87 (1994)).

[58] *See* Collins, *supra* note 23.

[59] *See generally* Wyatt, *supra* note 2 (noting how the CBS Standards and Practices department tries to "rein in" Lorre's use of double entendres and "outright vulgarities").

that the policy is problematic—arguments that the broadcasters reiterated in the rehearing in January.[60]

First, the FCC sanctions or permits indecent language, depending on the type of event.[61] Language that is otherwise indecent might be permissible during a news interview.[62] But such language during an awards show is not permissible, even though both events might be "live."[63] Such uneven treatment leads to uncertainty. Second, the agency will apparently permit or sanction indecent language depending on its evaluation of the value of the speech. The FCC indicated that it would not sanction ABC's airing of the film *Saving Private Ryan* because to insist that the network "bleep" the expletives "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers."[64] Such an exception suggests that a film or television broadcast that qualifies as a critics' favorite might safely explore the boundaries of indecency; popular television favorites that can make no such critical claims (or achieve no such acclaim) may have to tread more carefully. Again, differential treatment leads to uncertainty.

Finally, as language and society evolve, policy should evolve with them. More and more American households subscribe to cable, and are able to use filters to regulate the messages that they receive. Such filters allow families more choice and more ability to control messages. TiVo and other time-shifting devices enable them to control when they receive such messages.

Further, words change in meaning. Certain words that once had sexual or excretory meanings now no longer primarily or exclusively carry those meanings. We cannot preserve our language or our messages in amber any more than we can protect our children from words we would prefer they not hear or acts they not see. Through *Two and a Half Men* and his other work, Chuck Lorre wants to explore such words and acts and challenge us to think about the society in which we live and the ideas that permeate it.

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[60] *See On America & the Courts: Fox Television v. FCC* (C-SPAN television broadcast Jan. 16, 2010).

[61] *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 458 (2d Cir. 2007) (citing Complaints Against Various Television Licensees, 21 F.C.C.R. 13,299, 13,327–38 (2006)).

[62] *Id.*

[63] *Compare id.* (noting the FCC's willingness to excuse expletives occurring "during a *bona fide* news interview"), *with Golden Globes*, 19 F.C.C.R. 4975, 4982 (2004) (holding that the live broadcasting of the "F-Word" during the Golden Globe Awards was indecent).

[64] *Fox*, 489 F.3d at 458–59 (quoting Complaints Against Various Television Licensees, 20 F.C.C.R. 4507, 4513 (2005)).

PANEL DISCUSSION AND COMMENTARY†

Congressman Franks: This panel discussion will focus on Internet regulation. Let me begin by offering my legislative perspective and noting that although Congress has passed several acts over the last few years aimed at regulating content on the Internet for the ostensible purpose of protecting children, we have not had a very good record in the courts.[1] How then do we regulate content without offending the Constitution? I also pose this question to you: How much influence or weight should parents' rights be afforded in this analysis, whether we are discussing the Internet, radio, or film? We will begin with you, Professor Candeub.

Professor Candeub: Congressman Franks is quite right. The content regulation of the Internet has had an unsuccessful record before the Supreme Court. It's a real challenge for parents who want to control what their children do on the net. Beyond the legality of the indecency regulation, I tend to look at it in terms of cost. How expensive is it as a parent to control your child's environment? And to produce the sort of environment that you want?

We have neighbors who have taken a different approach: they homeschool; they don't have television (except for DVDs); and they have a more circumscribed social environment that revolves largely around church. That's one solution—or rather possibility—and must factor into the equation. Do we want a society in which the popular culture is so difficult to control and so offensive to so many that you have people

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† This panel discussion was presented as part of the Regent University Law Review and The Federalist Society for Law & Public Policy Studies Media and the Law Symposium at Regent University School of Law, October 9–10, 2009. The panelists discussed issues involving government regulation of media sources. Panelists included: Marvin Ammori, Assistant Professor, University of Nebraska-Lincoln College of Law, and former General Counsel, Free Press; Adam Candeub, Assistant Professor, Michigan State University College of Law; Christine A. Corcos, Associate Professor, Louisiana State University Law Center, and Associate Professor of Women's and Gender Studies, Louisiana State University; Patrick M. Garry, Professor, University of South Dakota School of Law, and Director, Hagemann Center for Legal & Public Policy Research; and Lili Levi, Professor, University of Miami School of Law. The panel was moderated by Congressman Trent Franks, Second Congressional District of Arizona.

1 *E.g.*, Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, div. A, tit. I, § 121(2), 110 Stat. 3009-26, 3009-27 to -28 (codified as amended at 18 U.S.C. § 2256 (2006)), *invalidated in part by* Ashcroft v. Free Speech Coal., 535 U.S. 234, 239, 258 (2002); Communications Decency Act of 1996 § 502, 47 U.S.C. § 223 (Supp. II 1994), *invalidated in part by* Reno v. ACLU, 521 U.S. 844, 849, 874, 885 (1997); *Id.* § 505, 47 U.S.C. § 561 (Supp. III 1994), *invalidated by* United States v. Playboy Entm't Group, 529 U.S. 803, 806, 827 (2000); Child Online Protection Act of 1998, 47 U.S.C. § 231 (2006), *invalidated by* ACLU v. Mukasey, 534 F.3d 181, 207 (3d Cir. 2008).

withdrawing from it? That is an issue requiring serious consideration.

Professor Levi: The FCC justifies some of its content regulations—such as indecency regulation—by reference to two interests: the state's desire to promote parental control and its independent interest in the welfare of children.[2] Not all parents are going to have the same views about what their children should or should not be exposed to. Under those circumstances, what FCC rule could adequately satisfy its goal of supporting parents? Allowing parents who find certain content offensive to make it unavailable to those who do not tilts too far in one direction. Maybe the best approach is to allow parents the possibility to "opt out."

Regardless, governmental regulation may be overshadowed at this point by nongovernmental censorship, as already mentioned by Professor Corcos. Nongovernmental censorship may well be more effective than government efforts, which must satisfy constitutional requirements. When Internet service providers control access and filters,[3] and when television networks engage in private censorship through their standards and practices departments,[4] Congress need not do much more.

Professor Ammori: I feel like there is no ideal solution to the question. Essentially, there are trade-offs and two or three bad solutions, and you have to choose the least "bad" of them. In our imperfect world, that is essentially what we do whenever we make policy. One bad solution is to have government pass a law making certain kinds of online speech illegal. And those laws have been struck down. And when you read those laws and cases you know it's very hard to write a law that doesn't ban *Romeo and Juliet*—an example used by the Court[5]—or

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[2] Action for Children's Television v. FCC, 58 F.3d 654, 660–61 (D.C. Cir. 1995) ("The Commission identifies three compelling Government interests as justifying the regulation of broadcast indecency: support for parental supervision of children, a concern for children's well-being, and the protection of the home against intrusion by offensive broadcasts. Because we find the first two sufficient to support such regulation, we will not address the third."); *see also* FCC v. Pacifica Found., 438 U.S. 726, 757–58 (1978) (Powell, J., concurring) (recognizing validity of dual government interests in assisting parents and protecting children); Ginsberg v. New York, 390 U.S. 629, 639–40 (1968) (same).

[3] *E.g.*, Elizabeth M. Glazer, *Seeing It, Knowing It*, 104 NW. U. L. REV. COLLOQUY 217, 221 (2009) (noting that Google, the Internet search engine, filters certain types of content more strictly).

[4] *See* Michael Botein & Dariusz Adamski, *The FCC's New Indecency Enforcement Policy and Its European Counterparts: A Cautionary Tale*, 15 MEDIA L. & POL'Y 7, 13 (2005)(describing the role of standards and practices departments in limiting indecency on the air).

[5] Ashcroft v. Free Speech Coal., 535 U.S. 234, 247 (2002) (recognizing that Shakespeare's play *Romeo and Juliet* has inspired various modern adaptations, and the fact that they may contain sexually explicit scenes is not enough, in itself, to justify the conclusion that the work was obscene).

advocacy websites addressing AIDS awareness. So when you read the law, it looks like it is overbroad, and you run into discriminatory enforcement by government or state agents who harass some groups but not others. That's the real problem—the state having discretion to regulate Internet speech.

But if we leave it entirely in the parents' hands, it is also difficult—there are few website-blocking technologies that are capable of adequately protecting your children unless you are sitting next to them in front of the computer screen,[6] which would be a hassle, and a full-time job.

I think laws like network neutrality would make it easier for developers to design technology that can block and be easily programmed by parents; if you are asking the government or the Internet service provider to figure out how to block websites, or to determine which websites are bad, you're going to have a lot less innovation in these blocking technologies and a lot less choice for parents. You won't have a free market of technologies amongst which parents as consumers can choose based on their different wants and needs.

Professor Garry: I'll build on what Professor Ammori just said. We want individual choice and freedom, but we must be wary of the inherent dangers of media outlets such as the Internet; indeed, I have written on the idea that because the media has become so monopolistic, the voice of the people has been stifled.[7] The Internet has almost fulfilled the potential of the old eighteenth century pamphleteering, which in times past allowed the people's voice to be heard. But the Internet presents some horrible dangers.

It is an interesting question that Congressman Franks poses in terms of the rights of parents because it is beyond question that parents do have the right to control the upbringing of their children.[8] But they are in a tough position. We don't want them to "opt out," as Professor Levi stated; why would we want them to? We make fun of them if they opt out because such behavior marginalizes those parents.

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[6] *See generally* CHERYL B. PRESTON, CP80 FOUND., WHY FILTERS ARE NOT THE ANSWER (2006), *available at* http://www.cp80.org/resources/0000/0019/Why_Filters_are_Not_the_Answer_-_The_CP80_Foundation.pdf (discussing the inefficacy of Internet filters alone as a mechanism to protect children from online pornographic material). *But see* ACLU v. Gonzales, 478 F. Supp. 2d 775, 795 (E.D. Pa. 2007) (finding that "filters generally block about 95% of sexually explicit material").

[7] *See* Patrick M. Garry, The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?, 65 U. PITT. L. REV. 183, 223–24 (2004).

[8] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

Let's examine, for instance, the plight of poor families. They work to put a computer with Internet access in their home to aid their children's education, but they must then worry about what their children will see and have access to on that computer. So now they're going to have to find a way to block all of that, which is yet another financial burden.

ACLU v. Reno was educational for the Court; it was really the first Internet regulation case before the Court, and the treatment of the Internet was rather naïve.[9] They thought it was a wonderful medium with readily accessible information that made it nearly impossible for children—with their limited knowledge—to access harmful material. Well, by the time *United States v. American Library Association* came around, the Court came to a different conclusion.[10] They began citing surveys and studies in which kids had "accidentally" come across material their parents did not wish them to see.[11] Clearly, the Internet is a very difficult medium for parents to control day-to-day, minute-by-minute.[12]

The danger the Internet presents is a legitimate concern. I think most of what Congress has done up to this point has been ineffective to solve the problem because censoring the entire medium is impossible. I think there is also the concern that we can't treat the Internet as if it were a freely accessible public park and then expect all the users to simply turn away from it when they don't like what they see.

There's really only one scheme I've seen that's been proposed in terms of Internet regulation, and that is one in which people have a choice.[13] But we also have to realize that there's a choice not only to access information, but to avoid information. One proposal I've seen is not to try to regulate the Internet; instead, it involves making use of the

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[9] *See* Reno v. ACLU, 521 U.S. 844, 849–57 (1997) (describing even the most fundamental aspects of Internet composition and navigation, and adhering to the view that sexually explicit material is rarely stumbled upon accidentally).

[10] 539 U.S. 194, 200 (2003). The Court noted:

> [T]here is . . . an enormous amount of pornography on the Internet, much of which is easily obtained. The accessibility of this material has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography. Some patrons also expose others to pornographic images by leaving them displayed on Internet terminals or printed at library printers.

Id. (citations omitted).

[11] *Id.*

[12] Ashcroft v. ACLU, 542 U.S. 656, 685 (2004) (Breyer, J., dissenting) (recognizing that at least five million children are left unsupervised each week while their parents work and thus may have unrestrained access to a computer).

[13] *See, e.g.*, Cheryl B. Preston, *Zoning the Internet: A New Approach to Protecting Children Online*, 2007 BYU L. REV. 1417, 1426–27 [hereinafter Preston, *Zoning the Internet*] (promoting a "Ports Concept" that allows the end-user to select those Internet ports that will be allowed into his or her home).

many ports on the Internet.[14] For instance, you make a certain port—like an HTTP—a type of family-friendly port, and that becomes the default port.[15]

If I want any other port, then I can go ahead and ask for that kind of port. If you separate it by ports, you don't have to worry about filtering problems. It's a good way to be able to keep out what you don't want and then on any other port you can have absolutely anything you want, which gives parents both control and choice.[16]

Professor Corcos: I also think this is a really difficult situation precisely because parents do want to and should monitor what information their children are exposed to when they are young. But children grow up; we were all children once. Children grow, and we expect them to mature. And we expect them to make choices. And as I was discussing with several of you right before this part of the symposium started, we expect them at eighteen to take on the responsibilities of adults. Yet that isn't something that happens overnight. To prepare, they need to start making intelligent choices during that continuum from adolescence to adulthood. Parents need to keep those lines of communication open during that very significant period before children turn eighteen, and part of that is talking to them about the choices that they make about books, television, friends, driving cars responsibly, and about places they go on the Internet.

Advocating regulation of the Internet is not something that I would favor lightly. I like Professor Ammori's suggestion that companies can promote and develop products that parents could choose to help them guide their children.[17] Another choice is for parents to simply turn off the computer. Or, parents could put the computer in a room other than the child's bedroom. You monitor just the way you monitor television viewing. Not all parents can do it; not all parents have time to do it. But I think we have to re-engage with what our children are doing in the time that we have them under our supervision so that when we're not around them, we can be a little more certain of what it is that they're doing when they're with their friends or other adults. And maybe they will make the choices that we want them to make when we're not around. I know it's not a simple question. But that's all the wisdom I have.

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[14] *Id.* at 1426–35.

[15] Cheryl B. Preston, *Making Family-Friendly Internet a Reality: The Internet Community Ports Act*, 2007 BYU L. REV. 1471, 1475–76 (2007).

[16] *See id.*

[17] *Cf.* Shea *ex rel.* Am. Reporter v. Reno, 930 F. Supp. 916, 931–32 (S.D.N.Y. 1996) (recognizing myriad available filtering and blocking systems).

Congressman Franks: Maybe we can shift to access to the Internet. It's already been pretty well demonstrated that Congress has a hard time catching up to and regulating new media. There is even the suggestion now that the $7.2 billion American Recovery and Reinvestment Act[18]—the stimulus package—be used as a vehicle for regulation for broadband in rural areas. This speaks to Professor Ammori's premise of net neutrality.

Many members of Congress—including me—do not completely understand that issue, but it seems to focus on equality of access.[19] Should speed of access by the consumer be based upon the ability of the privately owned site to pay more or less for that speed? Some of us have to go back to the original break-up of Ma Bell as an example.[20] The government controlled Ma Bell—a private company—in a big way until we broke it up, allowing people to have their own networks, which in the long run gave the underserved more access.[21]

The question then comes down to this: Is it better for government to control the access mechanism of the Internet, or is it better for government to allow those who own different parts of the network to let the market control access? Which option will have the most effect on giving additional access to private individuals who may not be able to pay for the faster pipes that major companies can afford?

Professor Candeub: The question is remarkably complex. Professor Ammori and I probably have different ideas on the way networks work right now. It's currently not neutral in many deep ways. Discrimination happens in very technical ways in various parts of the net right now. So it's difficult to create one rule or figure out what that rule would be and then leave it to the Federal Communications Commission ("FCC") to define it, because you'll end up with what you had under the most recent telecommunications regulation—the Telecommunications Act of 1996 ("TCA")—which was a confusing mess

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[18] American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, div. A, tits. I–II, 123 Stat. 115, 118, 128.

[19] *See generally* Shane Lunceford, *Network Neutrality: A Pipe Nightmare*, 17 U. BALT. INTELL. PROP. L.J. 25 (2008) (discussing Internet traffic amongst various "pipes" and the policy reasons to promote legislation on net neutrality that regulates behavior rather than outlawing certain uses of technology).

[20] "Ma Bell" was a colloquial term used to describe the phone-service monopoly held by AT&T until its break-up in 1984. BARBARA J. ETZEL, WEBSTER'S NEW WORLD FINANCE AND INVESTMENT DICTIONARY 203 (2003); 1 THE NEW ENCYCLOPÆDIA (15th ed. 2007); *see also* AT&T, A Brief History: The Bell System, http://www.corp.att.com/history/history3.html (last visited Apr. 19, 2010) [hereinafter The Bell System] (detailing the history of the AT&T corporation).

[21] The Bell System, *supra* note 20.

of rules that never stood up in Court[22] and was unhelpful in promoting a competitive industry.

So I would say I would agree with Professor Ammori and the others on the panel that the political objectives have to remain central. We have to make sure that people aren't cut off because of what they say, and that certain groups aren't favored because they're better connected in D.C. But we should be careful in creating rules for the FCC to administer because the network is very complex. People don't really understand how traffic flows. And it's not clear that any one simple rule would work.

Professor Levi: I agree with the centrality of the political objectives and the difficulty of regulating for them. The Internet is effectively an essential facility—even if not in specific antitrust terms, certainly in terms of its cultural usage and role. Access to broadband will be central to reducing the digital divide. So the question is how best to ensure that access. I don't think that one can be anti-regulation per se in this area because we can't completely avoid regulation. Sensible regulation, when well-administered, can be quite effective.

Let me make one point in response to Congressman Franks's reference to the break-up of AT&T. I'm not a telephone historian, but from what I understand, AT&T essentially made a deal with the government in which the government permitted AT&T to operate as a monopoly in exchange for AT&T's promise to provide universal telephone service even when it would be economically unprofitable to do so.[23] When AT&T was broken up, the government did not give up on the goal of universal service. It merely sought to achieve that goal by direct rather than implicit subsidies.

Professor Ammori: I just want to address two thoughts. In 1984, when the government broke up AT&T[24] and decided to move it into a more private industry model, the government still regulated the local phone company. They broke up the local phone companies into seven "Baby Bell" entities across the country so that there could be long distance companies that could compete.[25] And there were computer-type

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[22] *See, e.g.*, Pub. L. No. 104-104, tit. V, § 505, 110 Stat. 56, 136, *invalidated by* United States v. Playboy Entm't Group, 529 U.S. 803, 806, 827 (2000).

[23] *See* Ted Sabety, *Nanotechnology Innovation and the Patent Thicket: Which IP Policies Promote Growth?*, 15 ALB. L.J. SCI. & TECH. 477, 490 (2005) (citing The Bell System, *supra* note 20).

[24] The Bell System, *supra* note 20.

[25] Bell.com, Regional Bell Operating Companies, http://www.bell.com/rbocs.htm (last visited Apr.19, 2010); *see also* United States v. Am. Tel. & Tel., 552 F. Supp. 131, 141–42 & n.41 (D.D.C. 1982) (issuing a Modification of Final Judgment that details the

companies, and they'd compete. They would all have access to the local phone company—which was still highly regulated at almost the level of a regulated monopoly because the feeling was that you wouldn't get competition in the local market.[26]

And so the government policy was this: where we can have competition, we will take it, and where there is no competition, we will need some regulation to ensure that the computer services companies and the long distance service companies can all compete on equal footing.[27]

At the time we had to figure out a way to make sure that all Americans got access to the phone system, so we came up with this very complicated subsidy system.[28] And subsidizing services is kind of like regulation because the government comes in and interferes in the market by saying, "We don't think the market will produce certain outcomes; it won't lead to everyone in rural areas getting phone service." I think (as do many others) that we made a total mess of that situation,[29] but our hearts were in the right place.

Today we're hopefully going to transition over to subsidizing things like high speed Internet access. Right now, as we've been suggesting, the Internet is sort of a basic infrastructure for everything we do. People do their banking, get their health information, and look for jobs on the Internet. It's a basic infrastructure similar to electricity or even education. We want to make sure it is open and available to all people.

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circumstances surrounding the divestiture of the AT&T organization, including the fact that "AT&T . . . indicated in its reorganization plan [that] it will provide for the amalgamation of the twenty-two Operating Companies into seven regional Operating Companies").

[26] *See* James Gattuso, *Local Telephone Competition: Unbundling the FCC's Rules*, BACKGROUNDER (Heritage Found., Washington, D.C.), Feb. 10, 2003, http://www.heritage.org/Research/Reports/2003/02/Local-Telephone-Competition.

[27] *See* Barbara S. Esbin & Gary S. Lutzker, *Poles, Holes and Cable Open Access: Where the Global Information Superhighway Meets the Local Right-of-Way*, 10 COMMLAW CONSPECTUS 23, 31 (2001) (citing 47 U.S.C. § 230(b)(2) (2000)).

[28] *See* Michael R. Gardner, *December 19, 1984—A Big Day in Telecommunications*, 34 CATH. U. L. REV. 625, 630 (1985) (explaining how "the cost of local telephone service was being subsidized by long distance rates").

[29] *See generally, e.g., Universal Service: Reforming the High-Cost Fund: Hearing Before the Subcomm. on Communications, Technology and the Internet of the H. Comm. on Energy & Commerce*, 111th Cong. (2009) (testimony of S. Derek Turner, Research Director, Free Press), http://energycommerce.house.gov/Press_111/20090312/testimony_turner.pdf (discussing the "convergence" of telephone infrastructure with broadband Internet infrastructure, and identifying an "opportunity to ensure universal affordable broadband access *and* [an] opportunity to significantly reduce the future burden on the Universal Service Fund"); Jonathan Weinberg, *The Internet and "Telecommunications Services," Universal Service Mechanisms, Access Charges, and Other Flotsam of the Regulatory System*, 16 YALE J. ON REG. 211 (1999) (discussing the need for a distinct regulatory scheme for IP transmission).

I'd like to talk for a moment about the potential for competition in the local network. In the local network usually you have just the one phone company to choose from for local phone service, and, for broadband service, you usually have the local phone company or the local cable company.[30] The TCA that Professor Candeub mentioned was an attempt to get some competition in the local market. The theory was that people couldn't build an entire local network from scratch to compete, but maybe they'd be able to lease access to parts of the incumbent's network, notably the last mile to a house. This way, many companies could compete, and the entrants wouldn't have to build a whole new network. We were unable to make that system work, but some countries have succeeded.[31] That is what happens when you have competition; it has to be regulated initially to make sure it can work.

Professor Garry: This is a good question to follow up on the previous question because so often this area presents contradictions. People who like to regulate in one area don't like to regulate in another. And I think you have to expose that. For instance, I am sometimes sympathetic to those who have inclinations to regulate content because certain content on the Internet is a threat to society and culture. But in that respect I do try to focus not on regulation but again on trying to give people a realistic choice.[32] Give people who want it the ability to get it, but give people who don't want it the ability to keep it out. Regarding access to Internet, I tend to be a bit skeptical of government intentions even though sometimes those intentions are genuinely good ones. I've never seen a regulatory scheme that's not well-intentioned.

So on one hand, we don't want to over-regulate the Internet, but then we do want to regulate access to certain content. I don't think that in those regulatory environments, government has done a very good job. I therefore remain skeptical.

Professor Corcos: Again, it would be wonderful to bring broadband access to places in this country that don't have it, but even in

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[30] *See* Kevin Werbach, *Connections: Beyond Universal Service in the Digital Age*, 7 J. ON TELECOMM. & HIGH TECH. L. 67, 69–70 (2009) ("In the U.S., over ninety percent of customers have no more than two broadband choices (DSL and cable modem)." (citing INDUS. ANALYSIS & TECH. DIV., FED. COMMC'NS COMM'N, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF JUNE 30, 2007, at 3–4 (2008))).

[31] *E.g.*, Blaine Harden, *Japan's Warp-Speed Ride to Internet Future*, WASH. POST, Aug. 29, 2007, at A1 (reporting that broadband service in Japan is "eight to [thirty] times" as fast as in the United States); Jennifer L. Schenker, *Vive la High-Speed Internet!*, BUS. WK., July 18, 2007, http://www.businessweek.com/globalbiz/content/jul2007/gb20070718_387052.htm (reporting that France is a "clear leader" in network service provision due to its "fierce" competition).

[32] *See supra* notes 13–16 and accompanying text.

places that do have it—for example, in my own city of Baton Rouge—we don't have a wide choice of providers. Broadband access is slow because the actual access coming into residences or even into the universities comes in via just one conduit. So the fact that you may have a choice of providers doesn't matter that much because you have only one way to bring it into the place that the provider serves (this is what the IT wizards have tried to explain to me, and, while I think I understand what they're saying, I'm not really a technical person).

Thus, I'm a bit concerned about how this will be done and the money that may be put into this initiative. I agree with Professor Ammori that there are, perhaps, problems with the technical portions of the TCA when you compare our problems with broadband access to the situation in Asian countries.[33] Access is also at least as fast and is cheaper in Europe.[34] Why is it that they've been so much more successful than we have? And why do we pay so much more for our access than they do?

Congressman Franks: I would now like to focus on two major dynamics: individuals' right to access the Internet and the regulation of access to certain content in this medium that so effectively integrates the pros and cons of other older forms of media (radio, television, etc.). This is Congress's biggest challenge: What is the access protocol, and what is the content we should or should not regulate? Competition is clearly important for access (twenty-four years ago, few people had cell phones; after de-regulation, millions now have cell phones and can even access the Library of Congress with those phones).

Let's now shift to content, as we've thoroughly probed the access question. In terms of indecency, is there *anything* that is so vile that it should be prohibited on the Internet? Who should decide that, and what should the criteria be for deciding what content can be restricted? Professor Corcos, we'll start with you.

Professor Corcos: Well, one criterion, for example, is the *Miller* test.[35] If something is obscene under the *Miller* test, it could be

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[33] *See* Werbauch, *supra* note 30, at 69 (citing DANIEL K. CORREA, INFO. TECH. & INNOVATION FOUND., ASSESSING BROADBAND IN AMERICA: OECD AND ITIF BROADBAND RANKINGS (2007), *available at* http://www.itif.org/files/BroadbandRankings.pdf).

[34] *Id.* (citing Org. for Economic Co-Operation & Dev., OECD Broadband Portal, http:// www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1,00.html (last visited Apr. 19, 2010)).

[35] Miller v. California, 413 U.S. 15, 24 (1973). The Court articulated the test as follows:

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts

prohibited on the Internet.[36] That's one way to regulate obscenity.

Defamation can also be prohibited (I'm not talking about Internet service providers who can ask for protection under section 230 of the Communications Decency Act,[37] but somebody who does not get the protection of section 230). I'm also assuming that you're not talking about prior restraint here. You're talking about speech that is disseminated and then someone brings either a criminal or civil suit because of that speech. If that is the case then yes, I think there is speech that can be prohibited.

Congressman Franks: And what would be the criteria for determining that?

Professor Corcos: Well, if it's obscenity, for example, the *Miller* test criteria would apply. But, as you know, those kinds of prosecutions are hard to win.

Congressman Franks: They are?

Professor Corcos: Yes, they are.

Professor Garry: Well to some degree, there is an idealistic answer to this question. Are there things we should prohibit? Yes. Should we prohibit obscenity? Yes. Could we prohibit more? I'm answering the question, so I'd say yes. I think that there is some pretty harmful material out there, and I think it is not the kind of material the Framers necessarily intended the First Amendment to protect.

I advocate a political speech model for the First Amendment—anybody who says anything with respect to any political issue in any respect has complete and absolute freedom to do so. But when you're talking about some of the images out there; well, I wouldn't even define those as speech. I see them more as products sold by commercial enterprises, and they are products that cause real harm. On the one hand, we regulate cigarettes because of their harm to individuals. But on the other hand, we're so hesitant to regulate (or at least take a stand against) content that causes real harm.

> or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (internal citations and quotation marks omitted).

[36] *Id.*; *see also* United States v. Thomas, 74 F.3d 701, 706–09 (6th Cir. 1996) (distinguishing intangible, pre-recorded sexually-explicit messages from obscene computer-generated images, thus subjecting such images to 18 U.S.C. § 1465).

[37] Communications Decency Act of 1996 § 509, 47 U.S.C. § 230 (2006).

It's hard for me to come up with my own proposal because, after all, that is what the First Amendment tries to avoid. I can't come up with the rules; none of us individually can come up with the rules. But we must have some kind of rule on this. The courts have already told us that obscenity is something that we can prohibit.[38] But it takes a lot to be able to qualify for obscenity, as Professor Corcos said. I guess I try to get away from this a little bit. I already feel that we ought to prohibit certain content because I think some of it is truly vile with absolutely no redeeming social quality, but I'm probably different than other people in terms of applying the *Miller* test.[39] I would probably apply it more broadly than it has been applied by the courts. I don't think there is any redeeming social value to some content, and I think the only reason we do not prohibit it is because we are simply afraid of taking a stand on where to draw the line.

The good thing about distinguishing political speech from non-political speech is that you never draw an absolute line. As long as you can debate whether you ought to regulate a certain kind of speech, the door is always still open. Maybe I don't think that certain programming depicting certain images that are offensive to me ought to be shown, but as long as I can debate it then that issue is still open. And that still leaves the issue with the people—with the public—so I guess the answer that I'd give is yes—I think we can prohibit certain content. I think it is a matter for the community to decide, and in many respects the community does have that power as long as we absolutely protect political speech because the debate will never be frozen. We will always be able to debate, in fact, whether the speech is of a harmful type. Thank you.

Professor Ammori: This is an area slightly outside of my expertise, but when I think of things that we could block online, child pornography comes to mind. Oddly enough, you cannot—according to the Supreme Court—block *simulated* child pornography; that is, something like computer-generated child pornography.[40] But "regular" child pornography is something we can prohibit. So some sites that contain child pornography and sites that are devoted to pedophiles coming together, collaborating, and generally conspiring to do "weird" things with real children—those *can* be blocked, I believe.

Now the methods for doing so—from what I understand—are fairly

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[38] *See Miller*, 413 U.S. at 24 (holding that an obscene offense that can be regulated is one "which, taken as a whole, appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value").

[39] *See supra* note 35 and accompanying text.

[40] Ashcroft v. Free Speech Coal., 535 U.S. 234, 253–55 (2002).

targeted and essentially involve criminal investigations. If you were investigating, you would do a criminal investigation. You would block specific IP addresses. There is often collaboration with a non-profit independent group called "NCMEC"—the National Center for Missing and Exploited Children.[41] That is a great group that has a lot of law enforcement experts on the board.[42] Some people look at that model and take comfort in knowing that it is not just the government or just the carriers involved in this investigation; there is this sort of "outside" organization that specializes in policing this issue. And as long as you have checks and balances in different sorts of groups that people trust, and if you have open protocols that people understand along with very specific, targeted blocking, then the threat to legitimate speech is fairly low while the benefit of going after this kind of real, vile, dangerous speech is pretty high. So that's one example.

Spam: spam can be regulated to some extent. We have done a bad job of it with the CAN-SPAM Act.[43] The whole idea was to "can spam"—like throwing it into the trash "can." I have a friend who works in Internet advertising, and he refers to it as the "I CAN SPAM Act" because it essentially authorized spam in some ways.[44] But under the commercial speech doctrine, which is a doctrine that gives a little less protection to commercial speech than to other speech, things like spam or unwanted telemarketing phone calls can be regulated in certain ways.[45]

And another thing that can be regulated and blocked within the network—one of the very few things that I think can be blocked within the network—without needing the government to conduct an investigation or needing NCMEC to get involved, is a type of "speech" (if we can call it that) of "worms" or "network attacks."[46] Almost everything on the Internet is some kind of speech, but network attacks are a certain type of content that is obviously worthy of discrimination.

Professor Candeub said earlier that there are some non-neutral

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[41] Nat'l Ctr. for Missing & Exploited Children, http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (last visited Apr. 19, 2010).

[42] Nat'l Ctr. for Missing & Exploited Children, Federal Law-Enforcement Agencies, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2285 (last visited Apr. 19, 2010).

[43] Pub. L. 108-187, 117 Stat. 2699 (2003) (codified at 15 U.S.C. §§ 7701–13, 18 U.S.C. § 1037, and 47 U.S.C. § 227 (2006)).

[44] *See* 15 U.S.C. § 7704 (2006) (delineating consumer email protections that, on their face, do not categorically outlaw spam).

[45] Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 AM. BUS. L.J. 127, 138–48 (2007) (discussing the evolution of the commercial speech doctrine).

[46] *See* 15 U.S.C. § 7703(c) (2006).

things on the Internet. Net neutrality is actually fairly particular; all of you can do things like buy faster servers or faster computers, or pay for caching or better peering arrangements.[47] All of those are available in competitive markets. But the "last mile" access isn't competitive,[48] which is where we would want to have a sort of non-discrimination rule, with the exception of network attacks.

Professor Levi: Congressman Franks has asked whether there is anything so vile that it should be prohibited and who should decide. There is a lot of vile speech out there. One recent example is the dog-fight video case in which oral argument was heard by the Supreme Court last week, I believe.[49] To summarize, although dog-fighting is apparently illegal in most states,[50] a purveyor of dog-fighting videos supposedly produced in places where dog-fighting is legal, claims protection under the First Amendment.[51] These videos, like the related "crush videos" in which women in high heels are depicted stepping on and killing small animals,[52] are apparently designed to appeal to those with sexual fetishes involving cruelty to animals.[53] Congress has recently attempted to pass legislation designed to stop crush videos,[54] but the language of the legislation is quite broad.[55] The oral argument suggests skepticism on the part of the justices that this particular legislation could pass constitutional muster.[56] Ironically, during the latter part of the twentieth century, the contours of the First Amendment have been defined not as

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47 *E.g.*, Press Release, Fed. Commc'ns Comm'n, New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet (Aug. 5, 2005), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf (referencing the ability of consumers to choose Internet content and providers).

48 *See* Posting of Ed Felten to Freedom to Tinker: The Last Mile Bottleneck and Net Neutrality, http://www.freedom-to-tinker.com/blog/felten/last-mile-bottleneck-and-net-neutrality (June 14, 2006, 01:25 EST). "Last mile" access is defined as "the access link that connects the information-rich Internet (and the World Wide Web) to the end user." John Apostolopoulos & Nikil Jayant, *Broadband in the Last Mile: Current and Future Applications*, *in* BROADBAND LAST MILE: ACCESS TECHNOLOGIES FOR MULTIMEDIA COMMUNICATIONS 1, 1 (Nikil Jayant ed., 2005).

49 Transcript of Oral Argument, United States v. Stevens, No. 08-769 (U.S. argued Oct. 6, 2009), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-769.pdf.

50 *See* HUMANE SOC., FACT SHEET—DOGFIGHTING: STATE LAWS (2009), *available at* http://www.humanesociety.org/assets/pdfs/animal_fighting/dogfighting_statelaws.pdf.

51 Transcript of Oral Argument, *supra* note 49, at 25.

52 *Id.* at 27–28.

53 *Id.* at 28.

54 *See* 18 U.S.C. § 48 (2006).

55 United States v. Stevens, 533 F.3d 218, 220 (3d Cir. 2008), *cert. granted*, United States v. Stevens, 129 S. Ct. 1984 (2009).

56 *See* Transcript of Oral Argument, *supra* note 49, at 3–27, 29.

much by politics as by smut. This is yet another example.

Many will doubtless be shocked by the result if the Court strikes down Congress's attempt to create some boundaries to offensive speech in this case. Some will argue that government should not censor even very vile speech. But we don't have to go that far to argue that Congress should be very careful and precise in its attempts to regulate in this area. Even if the desire to regulate the vilest speech is understandable, it must be done within constitutional bounds.

In addition, even those who think that the vilest, most harmful expressive content should be regulable don't necessarily agree that speech short of that extreme should be censored. So, whatever regulatory discretion exists with respect to the vilest speech, we still need to answer the question of where the boundaries lie short of that. Focusing on the vilest speech doesn't address that.

Professor Candeub: I want to reiterate a lot of what Professor Corcos and Professor Levi said. I often have attempted to have a student write a law review note for me distinguishing between obscenity and indecency. For those of you who are not familiar with the statute and the relevant constitutional distinctions, indecency can be regulated by the FCC as lesser protected speech.[57] Obscenity is not protected speech, and it can be prohibited completely.[58]

It's actually very difficult and a rather unpleasant procedure to try to identify what constitutes obscenity as opposed to indecency because you have to look at and analyze, in legalistic terms, very specific and explicit sexual acts.[59] I've never been able to get a student to actually write that, and, I understand my students' disinclination, as I certainly would not enjoy writing such an article. But let me pick up on what Professor Levi said and ask whether this question about line-drawing on the extremes is really distracting us from what is bothering a lot of us about the media. And it can be much broader than is in fact demonstrated in the law.

Professor Corcos's discussion of the television show *Two and a Half Men* and the scene of the boy confronting his uncle (who was very hung-over)[60] resonated with me because that seems exactly the same scene done fifty years ago in an old movie called *Auntie Mame* with Rosalind Russell.[61] This was a great old movie based on a book by Patrick Dennis,

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[57] *See* CONSUMER & GOV'T AFFAIRS BUREAU, FED. COMMC'NS COMM'N, FCC CONSUMER FACTS: OBSCENE, INDECENT, AND PROFANE BROADCASTS 1 (2008), http://www.fcc.gov/cgb/consumerfacts/obscene.pdf.

[58] *Id.*; Miller v. California, 413 U.S. 15, 24, 36–37 (1973).

[59] *Miller*, 413 U.S. at 24, 36–37.

[60] *Two and a Half Men: Pilot* (CBS television broadcast Sept. 22, 2003).

[61] AUNTIE MAME (Warner Brothers Pictures 1958).

which I think is a great novel.[62] This movie depicted the same scene—the nephew confronting his hung-over aunt in the morning after a night of drinking. This scene presented some important moral issues, such as showing the person who should be the role model in less-than-ideal shape. What was amazing about it in *Auntie Mame* is how witty and how clever it was—how in the end Auntie Mame got over her splitting headache and assumed her proper role, taking an interest in her nephew. And I thought how much funnier that older movie's scene was without the use of the word "ass."

It struck me how coarsened our society has become. I think that is a fact; I do not think one has to be a crazy cultural conservative to believe that. My question is: What do we do about it? Do we look to the arcana of communications law, which really can only work around the fringe, and only imperfectly? Or, I think, do we look to ourselves and our freedoms to sort of create more vital cultures that can compete against a society which, in general, is not the society that it was fifty years ago? The solution to that might be more social than legal.

Congressman Franks: All right, this will conclude the main portion of our panel discussion. I thank all of our distinguished panelists for their input. We will now allow the audience to ask questions.

Audience Question 1: Hello. I have a couple of questions as a private citizen, so to speak, which I feel reflect the feelings of many people. First, what are the chances that these issues could be really handled constitutionally at the state or local level, where the people themselves could take responsibility and have a direct voice, rather than leaving it in the hands of the remote and centralized federal government and the executive-based regulatory agencies, which themselves are constitutionally questionable? An example of this, to explain my meaning, is that from the perspective of many people—mine included—it appears that the federal government has actually interfered with efforts to stop Internet pornography.

My second question goes along with the first: Is not the very existence of the seemingly unconstitutional executive-based regulatory agencies itself a threat to our limited government and therefore our freedoms? My questions are addressed to Professor Garry and Congressman Franks. Thank you.

Professor Garry: I was afraid I was going to get that question. I mean, that is a good question; it is just a very broad question. I actually wrote a good share of a book on the notion of rights and federalism which

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[62] PATRICK DENNIS, AUNTIE MAME: AN IRREVERENT ESCAPADE (1955).

asked the following question: Under our current individual rights jurisprudence as articulated by the Supreme Court, has there emerged a more centralized notion of rights and liberties than we might otherwise need?[63] I do not know how to condense an answer in the time we have, but I think that is a very good question to ask: Has our notion of rights perhaps become too centralized along the way? Do we now not allow then for state and local governments to have a bit more freedom in terms of defining how they want to protect rights, or what they want to do about particular rights?

So I do sympathize with that—and this gets way off the point—but when you talk about the notion of limited government, of course I think one of the things that we have really forgotten in terms of constitutional law and constitutional history is that originally under the Constitution, liberty was protected in a very structured manner through the concepts of limited government, separation of powers, and federalism. And that was how liberty was primarily protected according to the Framers; it was not through a listing of individual rights like we have in the Bill of Rights. It was to be structural; it was to create a kind of a government that would not be able to infringe upon liberties, and that way we could protect liberty in a much more overarching manner than to simply specify a certain number of liberties and then leave it up to the Court to define what those liberties are.[64]

Of course, that changed much during the New Deal period when the Court gave up enforcing those structural provisions—the separation of powers and federalism—and I think we lost that protection of liberty.[65] It is no surprise then that you can trace the way the Court subsequently became very much more active in terms of individual rights during the Warren court era because—in effect—it had to. That was the only way we were going to protect liberty—through individual rights—because we had lost that whole structural basis built into the Constitution that was the original mechanism for protecting our liberties. So the Court almost had to focus on that, and we have not seen the Court—even under Rehnquist and Roberts—diminish in any way at all the notion of these newly-centralized individual rights because they cannot do so if we do not have any other protections in the Constitution.[66] So with that probably non-responsive answer, I will push it back to Congressman Franks.

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[63] PATRICK M. GARRY, AN ENTRENCHED LEGACY: HOW THE NEW DEAL CONSTITUTIONAL REVOLUTION CONTINUES TO SHAPE THE ROLE OF THE SUPREME COURT 1–9 (2008).

[64] *Id.* at 3–4.

[65] *Id.* at 2–4.

[66] *See id.* at 4–9.

Congressman Franks: I think it was very responsive. I absolutely agree with the gentleman's fundamental premise. In fact, that was one of the points I was trying to drag out of the panel in regards to how to regulate and who can regulate (and with what criteria those people can regulate) obscenity.

But I think it really does come down to a community standard of some kind; even former Supreme Court Justice Stewart once noted that although he could not define obscenity, he would know it when he saw it.[67] It really does come down to a judgment call, and it speaks to whether we are a society that has become so coarse that nothing does offend us—or that nothing offends us to such a degree that we are willing to say that we are going to make a policy choice to prohibit something categorically. I think that if we did assess the community standard, that would be a much more effective way of defining obscenity.

Yet there is another aspect to this challenge. For one thing, prohibiting certain content would really mess up those who make money on pornography or obscenity, so they go to the courts, and unfortunately many times they find a willing ear.[68] So it is really not Congress that has exacerbated the problem in trying to regulate it. It is, rather, the courts that have made it almost impossible for Congress to postulate any kind of mechanism that they will accept.[69]

This is a tough situation. At the end of the day, if somebody falsely yelled "fire" in this room, and somebody got trampled upon on the way out, he or she would have a cause of action against the person who yelled "fire."[70] There are some types of speech that do harm to other people, and from my perspective, we need to ask this: When people talk about victimless crimes, are those crimes indeed victimless? If it is victimless, then there is no crime, but many times the victim is hidden. I think in the area of obscenity that is a perfect example. I hope that helps a little bit.

Professor Levi: Could we weigh in as well please?

Congressman Franks: Sure.

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[67] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within [hard-core pornography] . . . . But I know it when I see it . . . .").

[68] *See supra* note 1 and accompanying text.

[69] *See id.*

[70] Schenk v. United States, 249 U.S. 47, 52 (1919) (recognizing that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic").

Professor Candeub: I would say one solution is to go after the advertisers to the degree that the show is on broadcast or cable television. I recall a remarkable anecdote about a woman who hated the television show *Married with Children*. She had this huge campaign against that show and targeted neither the television producers nor the television networks, but the advertisers.[71] She was remarkably successful in getting certain changes in the script, thus making the script less offensive to her.[72] I think that is a mechanism that is really under-used. Broadcasters are not necessarily agents of cultural degeneracy; they are profit-maximizers. They get their money from advertising, and advertisers want to make their consumer base happy. That can work both on the national level and the local level because about one-fourth to one-half of all advertising on broadcasts is locally based.[73]

Professor Levi: I want to resist the suggestion in the question that the courts are the problem. First, without suggesting that members of Congress need not take the Constitution into account, it is the courts' duty to make their own interpretations of the Constitution. In case of conflict, our constitutional order requires that the courts' interpretations prevail.[74] So judicial interpretations of the First Amendment in the area of offensive expression cannot simply be written off as misinterpretations. Congress has to legislate as best as it can within constitutional norms, but it is finally the courts' obligation to determine if it has done so.

Second, I am troubled as much by the tone and tenor of political discussion these days as by indecency on television. Professor Garry is saying that political discussion, on both the right and left, can be permitted to be as nasty or as snarky as desired, without threat of regulation. But because of a reading of politics that limits the definition

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[71] Bill Carter, *TV Sponsors Heed Viewers Who Find Shows Too Racy*, N.Y. TIMES, Apr. 23, 1989, at 1.

[72] *A Mother Is Heard as Sponsors Abandon a TV Hit*, N.Y. TIMES, Mar. 2, 1989, at A1.

[73] *See* JACK W. PLUNKETT, PLUNKETT RESEARCH, LTD., PLUNKETT'S ADVERTISING & BRANDING INDUSTRY ALMANAC 32–33 (2009).

[74] *See* City of Boerne v. Flores, 521 U.S. 507, 519, 536 (1997) (holding that RFRA, the Religious Freedom Restoration Act of 1993, exceeded Congress's powers under § 5 of the Fourteenth Amendment and stating that Congress's power "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment," not to determining "what constitutes a constitutional violation," and that "the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution" (alterations in original)); *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (holding that "Congress is the final authority as to desirable public policy," but cannot "rewrite the Fourteenth Amendment law laid down by th[e] Court").

of "politics" to electoral politics, the protected zone for expressive debate is defined rather narrowly. On this approach, the values of the most repressive people in the most repressive communities can serve as regulatory baselines so long as the speech at issue is not political. This means that government can regulate sexual expression that some deem offensive even without having to show harm, while being prevented from legislating the kind of reasonable, restrained speech that many would far prefer over the extreme rhetoric that marks modern political discourse.

Lastly, let me comment to the original question about regulation on the local level. Ordinarily, I might agree that differences in local mores could justify a diversity of indecency regimes. The problem is that because of the economic incentives of content providers as well as the global access to and marketing of expressive content, the preferences of the most puritanical localities may well determine what is available to everyone else around the world.[75]

Congressman Franks: Let me briefly respond. As a member of the Constitution Committee, I believe in Congress working within the confines of the Constitution. The challenge is that every time the Supreme Court sits down, they have a different view of the Constitution. But I do not think the founding fathers had in mind child pornography when they wrote the First Amendment. It is a great challenge for those of us in Congress; I swore to uphold the Constitution, but I did not swear to do what the Supreme Court told me to do. I have to try to do the best I can within those confines. And now, we have time for one more question.

Audience Question 2: I have a slightly more specific question, but it relates to what Professor Levi was speaking about a moment ago. I have been reading about a proposal to reserve a ".xxx" domain,[76] or extension of the bandwidth exclusively for pornography, and I wonder if the panelists, and especially Professor Ammori, have any opinions on whether this would actually serve to quarantine the objectionable content, or is it more likely to serve as a launching pad for more robust invasions of the other domains?

Professor Ammori: There was a controversy and debate at the

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[75] *See* Reno v. ACLU, 521 U.S. 844, 877–78 (1997) ("The 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.").

[76] Ryan Paul, *Proposal to Erect XXX Domain Faces Stiff Opposition*, ARSTECHNICA.COM, Mar. 28, 2007, http://arstechnica.com/tech-policy/news/2007/03/proposal-to-erect-xxx-domain-faces-stiff-opposition.ars.

international level over .com, .net, .xxx, and whether you could put all pornography on .xxx.[77] The proposal's premise was that it would be good for the pornography industry because everyone would know where to find it—anyone who wanted to find it. And it would be good for children because parents could use tools to block the whole .xxx domain.

It didn't happen, largely because the U.S. government opposed the proposal. Some groups in the United States believed the .xxx domain would legitimize pornography.[78] At any rate, my guess is that you cannot put everything dangerous on .xxx. For instance, people will buy URLs with innocuous names but use them as porn sites, and try to fool those surfing the net into going to those sites.[79] You also know that there is dangerous material that children can access all over the Internet—not just on pornographic sites. Consider chat rooms, Facebook, MySpace—those are not going to be on .xxx, and you have to make sure there are some precautions to deal with the kind of content that kids would encounter there as well.

Congressman Franks: As a member of Congress, it has been my privilege to be here, and I thank all of you for your thoughts. Obscenity issues are particularly difficult to discuss, but sooner or later our society must address them because of the profound impact upon future generations. There comes a time in every child's life when the door to childhood quietly closes forever, and after that no mortal power on earth can open it again. So we members of Congress do not have the luxury of ignoring these issues. We must deal with them directly, remembering who we are, and remembering that we protect political free speech while simultaneously protecting children from exploitative and opportunistic behavior.

I also thank Regent University and everyone involved with this Symposium. It has been my honor to be here. Let us charge the gates, for time is running out. Thank you.

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[77] *See* John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 334–37 (2009); Cheryl B. Preston, *All Knowledge is Not Equal: Facilitating Children's Access to Knowledge by Making the Internet Safer*, 13 INT'L J. COMM. L. & POL'Y 114, 114–24 (2009).

[78] *E.g.*, Patrick Trueman, Op-Ed., *.xxx Would Legitimize Porn*, USA TODAY, Sept. 15, 2005, at 12A.

[79] For example, Whitehouse.com is a well-known porn site, while Whitehouse.gov is the official White House site.

MENTAL BLOCK: THE CHALLENGES AWAITING A MENTALLY IMPAIRED CLAIMANT WHEN APPLYING FOR SOCIAL SECURITY DISABILITY BENEFITS

INTRODUCTION

Nora Lewis has not always been this way.[1] There was a time when the only thing on Nora's mind was whether she had spent too much money on her daughter's birthday present. But now things have changed. Today, she wonders why she is alive, and she wishes that she were not. Three months ago, Nora was diagnosed with bipolar disorder with schizoaffective features, a diagnosis which explains her inability to get out of bed and the frequent hallucinations she experiences. Her illness has interfered with her ability to function—so much so that it has forced Nora and her twelve-year-old daughter to move in with Nora's grandparents.

Nora applied for Social Security disability benefits in December 2004 and appeared at a hearing three years later. Two years ago, she was notified by letter that her request for disability benefits had been denied because her medical records indicate that she experiences brief periods of functioning while on medication. Nora is scared and confused, and she does not know what she is going to do. Instead of birthday presents, her thoughts now turn to suicide.

This Note examines the Social Security disability adjudication process for mentally impaired claimants. Part I discusses the history of mental illness and society's opinions of the mentally ill from both three-hundred years ago and today. Part II gives a brief overview of the process of applying for disability insurance benefits and Supplemental Security Income and also addresses the common hurdles that a claimant with mental impairments will face before benefits will be awarded. Part III addresses the documentation that a claimant submits in support of the disability allegations and the effect that each piece of evidence has on a disability determination. Part IV discusses the significance of Global Assessment of Functioning ("GAF") ratings and how these assessments are weighed, specifically focusing on the approaches taken by the Third, Sixth, and Tenth Circuits. Finally, Part V outlines a proposal for an Administrative Law Judge's consideration of GAF evaluations.

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[1] Nora's mental impairments and her experiences with the disability adjudication process are based on those of a real-life claimant; her name, however, has been changed to protect her confidentiality. The Administrative Law Judge's ("ALJ") decision cannot be cited to, as it is unpublished and contains the claimant's Social Security number. Her story is used with the permission of her legal representative, and the ALJ's opinion is on file with the author.

I. THE MISPERCEPTION OF MENTAL ILLNESS

A. Mental Illness in the 1700s

Only a few centuries ago, the local jails were used to confine not only the criminally guilty, but also individuals with mental diseases.[2]

> In 1725 the [New York City] town marshal, Robert Crannell, Jr., was paid two shillings six pence a week by the churchwardens "for to Subsist Robert Bullman a Madman in Prison." Not infrequently the unfortunate person spent decades incarcerated like a common criminal. But when some hope was held out for his recovery, only temporary confinement was ordered. In 1720, for example, the same marshal was given the custody of one Henry Dove, "a Dangerous Madman, untill he shall Recover his senses."[3]

In addition to confinement in a jail cell, the mentally ill were also subjected to inhumane treatment, even when, instead of being imprisoned, the individual was admitted into a psychiatric institution.[4]

Clifford Whittingham Beers experienced this firsthand.[5] Beers, a Yale University graduate and businessman, suffered a mental breakdown after becoming obsessed with the fear that he, like his brother, had epilepsy.[6] After jumping from a four-story window in an attempt to end his life, Beers was admitted to several psychiatric institutions.[7] During his hospital admissions, Beers

> was treated in the harsh and crude way that was all too prevalent at that time. He was beaten mercilessly, choked, spat upon and reviled by attendants, imprisoned for long periods in dark, dank padded cells, and forced to suffer the agony of a strait-jacket for as many as twenty-one consecutive nights. . . .
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> A large measure of this treatment had its source in the prevailing ignorance concerning insanity—ignorance not only of proper therapeutics, but of the very nature of mental disorder. . . . It was still regarded less as an illness than as a family disgrace and as a frightful visitation for some evil or sin committed by the victim.[8]

Indeed, the twenty-first century has brought about positive changes in the treatment of the mentally ill, as few have the opinion that these individuals should be incarcerated and/or treated cruelly. While our care

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[2] ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA 41 (Columbia Univ. Press 1949) (1937).

[3] *Id.* at 42 (citation omitted).

[4] *Id.* at 303.

[5] *Id.* at 302.

[6] *Id.*

[7] *Id.* at 302–03.

[8] *Id.* at 303–04.

of the mentally ill has evolved substantially since the 1700s, our feelings and opinions of them, however, remain the same.[9]

B. Mental Illness Today

A recent study conducted by sociology professor Jason Schnittker of the University of Pennsylvania assessed the extent to which society's view of mental illness had changed during the previous ten years.[10] This study found that "even though more Americans today believe that mental illness has a genetic basis . . . they remain just as intolerant toward some mentally ill patients, especially schizophrenics, as they've ever been."[11] Although Americans now view alcoholism differently, our views toward other mental diseases, such as schizophrenia, have not changed.[12] "[M]ost Americans don't want to work with them, help them, or even associate with them,"[13] and the study concluded that it is unlikely that such bias will ever go away.[14]

A similar study at the University of North Carolina at Chapel Hill came to the same conclusion[15]:

> People with psychiatric disabilities are arguably doubly marginal—unwelcome in both the nondisabled and the disabled communities. They were included only grudgingly under provisions of the Americans with Disabilities Act (Bell 1997). Recent Equal Employment Opportunities Commission rulings requiring workplace accommodation for people with psychiatric conditions have evoked an unsympathetic response, which was epitomized by a *New York Times* story that ran under the headline, "Just What the Government Ordered: Breaks for Mental Illness," with a subhead that declared, "Employers are Terrified."[16]

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[9] *See, e.g.*, Sue E. Estroff et al., *Pathways to Disability Income Among Persons with Severe, Persistent Psychiatric Disorders*, 75 MILBANK Q. 495, 496 (1997); Tim Hyland, *Americans Still Wary of Mentally Ill*, PENN CURRENT (Univ. of Pa., Phila., Pa.), Sept. 18, 2008, at 2, *available at* http://www.upenn.edu/pennnews/current/research/091808.html (discussing Jason Schnittker, *An Uncertain Revolution: Why the Rise of a Genetic Model of Mental Illness Has Not Increased Tolerance*, 67 SOC. SCI. & MED. 1370, 1380 (2008)).

[10] Schnittker, *supra* note 9, at 1370–71.

[11] Hyland, *supra* note 9, at 2.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Estroff et al., *supra* note 9, at 496.

[16] *Id.* at 496 (citing Christopher G. Bell, *The Americans with Disabilities Act, Mental Disability, and Work*, *in* MENTAL DISORDER, WORK DISABILITY, AND THE LAW 203 (Richard J. Bonnie & John Monahan eds., 1997); Sheryl Gay Stolberg, *Breaks for Mental Illness: Just What the Government Ordered*, N.Y. TIMES, May 4, 1997, § 4, at 1).

The existence of such intolerance is surprising, as mental illness is becoming increasingly prevalent in the United States.[17] According to the National Institute of Mental Health, there are numerous Americans suffering with some form of mental disease.[18] A recent study found that 26.2 percent of American adults "suffer from a diagnosable mental disorder."[19] When this figure was applied to the 2004 U.S. Census population, it was determined that approximately 57.7 million people currently living in the United States are mentally ill.[20]

Mental disease does not appear to be a rare or novel condition of which society is completely ignorant. In fact, the University of Pennsylvania study actually suggests that there have been vast improvements in the mindset and treatment of mental disease over the past three centuries.[21] Nonetheless, the mentally impaired continue to be treated as a substandard class in many instances.[22] Few are immune to this bias, and the Social Security Administration has begun to reflect this bias in its disability determinations.[23] As the trends of the disability adjudication process are analyzed herein, it becomes evident that mentally ill claimants face numerous disadvantages when applying for Social Security disability benefits.

II. THE MENTALLY ILL AND THE DISABILITY ADJUDICATION PROCESS

When an individual can no longer sustain full-time employment because of a physical and/or mental impairment, that person may be entitled to Social Security disability benefits provided through the Social Security Administration.[24] Such an individual may be eligible for disability insurance benefits if the claimant worked for a statutory period of time and paid into the Social Security system.[25] For someone who does not meet those requirements, that person may be eligible for

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[17] Nat'l Inst. of Mental Health, Statistics, http://www.nimh.nih.gov/health/topics/statistics/index.shtml (last visited Apr. 15, 2010).

[18] Roughly one in every four adults has a mental condition. *Id.*

[19] *Id.*

[20] *Id.*

[21] Schnittker, *supra* note 9, at 1371.

[22] Estroff et al., *supra* note 9, at 496.

[23] *Id.* at 495–96 (citing Robert A. Rosenblatt, *Social Security Plans New Tests of Disability Pay*, L.A. TIMES, Mar. 17, 1996, at A1).

[24] SOC. SEC. ADMIN., DISABILITY BENEFITS 4 (2009) [hereinafter SOC. SEC. ADMIN., DISABILITY], *available at* http://www.ssa.gov/pubs/10029.pdf. Providing disability benefits for individuals with mental impairments costs approximately $12 billion each year. J. Reich, *DSM-III Diagnoses in Social Security Disability Applicants Referred for Psychiatric Evaluations*, 47 J. CLINICAL PSYCHIATRY 81, 81 (1986).

[25] 20 C.F.R. §§ 404.130, .315(a) (2009); SOC. SEC. ADMIN., DISABILITY, *supra* note 24, at 5.

Supplemental Security Income based on the claimant's limited income and resources.[26]

To begin the long process of obtaining disability benefits,[27] an initial application must first be filed;[28] if denied, the claimant may appeal by filing a Request for Reconsideration of the initial decision.[29] If denied again, the claimant may then request a hearing before an Administrative Law Judge ("ALJ").[30]

When determining whether a claimant is disabled, the ALJ follows a five-step sequential evaluation process.[31] The first step requires the ALJ to consider whether the claimant is currently engaged in "substantial gainful activity."[32] If the claimant is sustaining full-time

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[26] 20 C.F.R. §§ 416.202, .1201 (2009); SOC. SEC. ADMIN., SUPPLEMENTAL SECURITY INCOME 5 (2007), *available at* http://www.ssa.gov/pubs/11000.pdf.

[27] It can often take three years or longer before a claimant will receive a final adjudication to a request for Social Security disability benefits. The national average waiting period for a hearing to be scheduled before an Administrative Law Judge ("ALJ") alone is 500 days. *Eliminating the Social Security Disability Backlog: Hearing Before the H. Comm. on Ways and Means*, 111th Cong. 9, 106 (2009) (statement of Dr. McDermott, chairman of the Subcomm. on Income Security and Family Support, and statement of Peggy Hathaway, Vice President, United Spinal Association).

[28] 20 C.F.R. § 404.603 (2009).

[29] *Id.* § 404.900(a)(2); SOC. SEC. ADMIN., THE APPEALS PROCESS 1 (2008) [hereinafter SOC. SEC. ADMIN., APPEALS], *available at* http://www.socialsecurity.gov/pubs/10041.pdf. About 71% of claimants from years 2005 to 2008 were denied Social Security disability benefits after filing an initial application. Delaware Online, Shut Out of Social Security: A Special Report, http://php.delawareonline.com/federal/alj.php?queryName=byState (last visited Apr. 15, 2010) (determining percentage from combined initial denials of all fifty states and Washington, D.C.). Tennessee has the highest denial rate—about 92.8%. *Id.*

[30] 20 C.F.R. § 404.900(3) (2009); *see also* U.S. Dep't of Labor, Who Are ALJs and How Are They Appointed?, http://www.oalj.dol.gov/FAQ4.HTM (last visited Apr. 15, 2010) ("The position of Administrative Law Judge (ALJ), originally called hearing examiner, was created by the Administrative Procedure Act of 1946, Public Law 79-404. The Act insures fairness and due process in Federal agency rule making and adjudication proceedings. It provides those parties whose affairs are controlled or regulated by agencies of the Federal Government an opportunity for a formal hearing on the record before an impartial hearing officer. . . . [T]he Administrative Procedure Act includes provisions that give administrative law judges protections from improper influences and ensure independence when conducting formal proceedings, interpreting the law, and applying agency regulations in the course of administrative hearings.").

A hearing before an ALJ gives the claimant the opportunity to speak to the ALJ personally and explain why he is disabled and unable to work. This is an advantage over the initial and reconsideration levels, where decisions are based solely on the claimant's medical records. SOC. SEC. ADMIN., APPEALS, *supra* note 29, at 1–2.

[31] 20 C.F.R. § 404.1520 (2009).

[32] *Id.* § 404.1520(a)(4)(i). Substantial gainful activity is "work activity that involves doing significant physical or mental activities" that the claimant does for pay or profit. *Id.* § 404.1572(a)–(b). "A person who is earning more than a certain monthly amount (net of impairment-related work expenses) is ordinarily considered to be engaging in SGA." Soc. Sec. Admin., Substantial Gainful Activity, http://www.socialsecurity.gov/OACT/COLA/

work at the time of the hearing, the ALJ will find the claimant not disabled.[33] If, however, the claimant is not engaged in substantial gainful activity, the ALJ then begins step two by considering the claimant's alleged impairments and the severity of those conditions.[34] In addition, the ALJ also determines the length of time that the impairment is expected to last; unless the impairment is expected to result in death, it must continue or be expected to continue for at least twelve consecutive months.[35] Third, once alleged impairments have been substantiated, the ALJ will then determine whether those impairments meet or equal a Social Security listing.[36] Currently, there are 114 sub-categories of physical[37] and nine sub-categories of mental listings that a claimant can potentially meet.[38] If the listing requirements are satisfied, the claimant

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sga.html (last visited Apr. 15, 2010). In 2010, for a non-blind claimant, up to $1,000 gross could be earned without adversely affecting the claimant's application for disability benefits. *Id.*

[33] 20 C.F.R. § 404.1520(a)(4)(i) (2009).

[34] *See id.* § 404.1520(a)(4), (a)(4)(ii). An impairment "is not severe if it does not significantly limit your physical or mental ability to do basic work activities." *Id.* § 404.1521(a). The ALJ will examine the record to determine whether an impairment is severe. *Id.* § 404.1520(a)(4)(ii). Typically, the record will contain treatment notes, test results, and physician opinions, which the claimant is responsible for submitting to the ALJ. *Id.* § 404.1512(b)–(c). "Basic work activities" include understanding, use of judgment, responding appropriately to supervision and co-workers, and dealing with changes in a routine work setting. *Id.* § 1521(b).

[35] *Id.* § 404.1509.

[36] *Id.* § 404.1520(a)(4)(iii); *see also* Soc. Sec. Admin., Disability Evaluations Under Social Security (Sept. 2008), http:// www.ssa.gov/disability/professionals/bluebook/listing-impairments.htm (last visited Apr. 15, 2010) ("The Listing of Impairments describes, for each major body system, impairments considered severe enough to prevent an individual from doing any gainful activity . . . . Most of the listed impairments are permanent or expected to result in death, or the listing includes a specific statement of duration is made. For all other listings, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months.").

[37] The primary categories for physical impairments include the musculoskeletal system, special senses and speech, respiratory system, cardiovascular system, digestive system, genitourinary impairments, hematological disorders, skin disorders, endocrine system, impairments that affect multiple body systems, neurological, malignant neoplastic diseases, and immune system disorders. 20 C.F.R. pt. 404, subpt. P, app. 1, §§ 1.00–12.00 (2009).

[38] The nine Social Security mental listings are: organic mental disorders; schizophrenic, paranoid, and other psychotic disorders; affective disorders; mental retardation; anxiety-related disorders; somatoform disorders; personality disorders; substance addiction disorders; and autistic disorder and other pervasive developmental disorders. *Id.* § 12.02–12.10.

Each listing consists of requirements which the claimant must meet; the listings are divided into paragraph A criteria (a set of medical findings) and paragraph B and C criteria (a set of impairment-related functional limitations). *Id.* § 12.00(A). To meet the requirements of paragraph A, the claimant must show the presence of a particular mental disorder through specific symptoms, signs, and laboratory findings. These findings,

will be adjudicated disabled.[39] Fourth, the ALJ will consider the claimant's residual functional capacity ("RFC") and his past relevant work.[40] For the fifth and final step, the ALJ reviews the claimant's RFC, age, education, and work experience to determine whether the individual can make an adjustment to other types of work if he no longer can perform his past work.[41]

A. What Is So Special About Mental Cases?

1. The Nature of Mental Disease

As previously noted, before an award of benefits will be made, the claimant must first show that the impairment has lasted or is expected to last at least twelve months.[42] When a claimant has a chronic physical impairment—such as congestive heart failure or degenerative disc disease, which can be confirmed through objective medical testing—it is not significantly difficult to convince an ALJ that the limitations caused by this condition will likely persist for one year or longer. With physical diseases, surgical intervention or pain management may be required, and although limitations may improve after such treatment, the

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however, must substantiate the existence of the disease according to Social Security's definition. *Id.*

Paragraphs B and C require a showing of "impairment-related functional limitations that are incompatible with the ability to do any gainful activity." *Id.* For example, in order to meet the criteria in paragraph B for Anxiety Related Disorders, the claimant must show at least two of the following (unless he can show a complete inability to function independently outside his home): marked restriction of activities of daily living; marked difficulties in maintaining social functioning; marked difficulties in maintaining concentration, persistence, or pace; or repeated episodes of decompensation, each of extended duration. *Id.* § 12.06(B).

[39] *Id.* § 1520(a)(4)(iii).

[40] *Id.* § 404.1520(a)(4)(iv). An RFC assessment is the most a claimant can do despite his limitations; the ALJ bases this assessment on the relevant evidence in the record. *Id.* § 404.1545(a)(1).

> Ordinarily, RFC is the individual's maximum remaining ability to do sustained work activities in an ordinary work setting on a regular and continuing basis, and the RFC assessment must include a discussion of the individual's abilities on that basis. A "regular and continuing basis" means 8 hours a day, for 5 days a week, or an equivalent work schedule.

Titles II and XVI: Assessing Residual Functional Capacity in Initial Claims, 61 Fed. Reg. 34,475 (July 2, 1996). Based on this rule, unless the ALJ can find that the claimant is capable of sustaining a forty-hour work-week, the ALJ must award disability benefits. *See* 20 C.F.R. § 404.1520(a)(4)(iv)–(v) (2009).

The past relevant work that the ALJ considers is the substantial gainful activity that the claimant has done within the previous fifteen years and that was done long enough for the claimant to learn how to do it. *Id.* § 404.1565(a).

[41] *Id.* § 404.1520(a)(4)(v).

[42] *Id.* § 1509.

claimant is unlikely to make a complete return to the physical state that was previously occupied.

With mental illness, however, there is a strong likelihood that the claimant's symptoms will worsen and then improve on a regular basis.[43] Individuals with bipolar disorder, for example, often experience periods of full functioning only to be followed by episodes of decompensation.[44] Bipolar disorder has been described as

> a long-term condition that requires lifelong treatment, even during periods when you feel better. . . . Effective and appropriate treatment is vital for reducing the frequency and severity of manic and depressive episodes and allowing you to live a more balanced and enjoyable life. Maintenance treatment—continued treatment during periods of remission—also is important. People who skip maintenance treatment are at high risk of a relapse of their symptoms or having minor episodes turn into full-blown mania or depression.[45]

As with many mental diseases, the severity of the symptoms may not be continuous for a twelve-month period.[46] Again, it is quite common for an individual suffering with severe mental limitations to regain an ability to function effectively for a period of time.[47] During this time, the

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[43] David Mischoulon, *An Approach to the Patient Seeking Psychiatric Disability Benefits*, 23 ACAD. PSYCHIATRY 128, 131 (1999). It is estimated that approximately 5.7 million American adults, or about 2.6 percent of the U.S. population age 18 and older are personally affected by bipolar disorder in any given year. Nat'l Inst. of Mental Health, The Numbers Count: Mental Disorders in America, http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml#KesslerPrevalence (last visited Apr. 15, 2010) (extrapolating from Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of 12-Month* DSM-IV *Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES OF GEN. PSYCHIATRY 617, 620 (2005)).

[44] Mayo Clinic, Bipolar Disorder, http://www.mayoclinic.com/health/bipolar-disorder/DS00356 (last visited Apr. 15, 2010).

[45] Bipolar Depression Symptoms, Treatments and Drugs, http://bipolardepressionsymptoms.com (last visited Apr. 15, 2010).

[46] *See* Mischoulon, *supra* note 43, at 131 ("[D]etermination of psychiatric disability is not simple, largely because determination involves a prediction of the future. Outpatient clinic assessments may not reflect the true extent of disability. Disability may fluctuate with time, as seen in patients with bipolar disorder who may be very productive during a manic or hypomanic phase, but very unproductive during a depressed phase. Emphasis may be placed on subjective (nonmeasurable) rather than objective (measurable) impairments. Histories presented may not be corroborated, and patients may exaggerate or falsify their symptoms. Sadly, a few cases can cloud the fact that people do become disabled from psychiatric illness." (citing H.A. Pineus et al., *Determining Disability Due to Mental Impairment: APA's Evaluation of Social Security Administration Guidelines*, 148 AM. J. PSYCHIATRY 1037, 1042 (1991); C.R. Brewin et al., *The Assessment of Psychiatric Disability in the Community: A Comparison of Clinical, Staff, and Family Interviews*, 157 BRIT. J. PSYCHIATRY 671 (1990); H. Massel et al., *Evaluating the Capacity to Work of the Mentally Ill*, 53 PSYCHIATRY 31 (1990); Mansel Aylward & John J. Locascio, *Problems in the Assessment of Psychosomatic Conditions in Social Security Benefits and Related Commercial Schemes*, 39 J. PSYCHOSOMATIC RES. 755, 757–58 (1995))).

[47] *Id.*

claimant may feel well enough to return to work only to deteriorate at a later date.[48] This individual, however, cannot be expected to be reliable in sustaining full-time employment. Nonetheless, ALJs frequently deny a mentally impaired claimant because the mental limitations were briefly interrupted with periods of functioning.[49]

2. Ability to Function with Medication but Failure to Maintain Treatment

If psychiatric treatment notes indicate that a claimant's functioning has improved with medication or that the claimant has been noncompliant with treatment, an ALJ will repeatedly deny a claimant on the basis that the claimant can sustain full-time employment when taking medication on a regular basis.[50] When such a situation is present, the ALJ has a legitimate ground to deny benefits[51] because such a claimant is likely to perform successfully in a work environment as long as the medication continues to suppress the symptoms.

Often, however, the ALJ fails to take into consideration that a symptom of mental illness is voluntary noncompliance with medication.[52] This often occurs because those with mental health issues feel the disgrace that comes with their diagnosis.[53] Once medicated, the claimant

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[48] *See id.*

[49] *See, e.g.*, Barnhart v. Walton, 535 U.S. 212 (U.S. 2002) (upholding the SSA's denial of benefits to a mentally ill claimant who managed to work for a brief period after 11 months of disability, since the Court ruled the Agency's twelve month requirement was a permissible statutory interpretation).

[50] *See* 20 C.F.R. § 404.1530(b) (2009).

[51] *Id.*

[52] *See* Mark Olfson et al., *Predicting Medication Noncompliance After Hospital Discharge Among Patients with Schizophrenia*, 51 PSYCHIATRIC SERVS. 216, 221 (2000).

[53] Sarah, a twenty-six year old college graduate with psychosis and multiple personality disorder, explained the stigma of her mental disease and how it affected her life:

> I worry a lot about, you know, asking my mom for so much support, because she does have limited resources. And for that I thought it was acceptable to take some sort of help, because otherwise it was going to come out of her pocket. And you know, it's such an ordeal to get approved for stuff like that. You have to basically say, "I'm incompetent to be a person." You know, I mean, you really have to declare yourself a complete basket case, and that's very upsetting, you know. Nobody likes to say, you know, "I can't cope and I won't be able to cope for a while." I don't like thinking of myself as a disabled person. On the other hand, had my parents not taken me in, I literally would have been homeless. I didn't have a home anymore. I didn't have anybody else to take care of me. . . .
>
> God, you know, if there were any alternative, if there were any way to have handled a job, I definitely would have gone for that instead. I don't think anybody gets on disability because they're too lazy, because it's too much of a job to get the disability. . . . Well, for one thing, they make you feel like you're a, you're trying to cheat somebody out of something when you're applying.

Estroff et al., *supra* note 9, at 501–02.

typically begins to feel better.[54] This euphoric state, however, then causes the claimant to think, "I don't need this medication. I feel fine. There's nothing wrong with me."[55] Shortly thereafter, the claimant stops taking his medication and begins to experience the debilitating symptoms that caused the initial need for the medication.[56] Sadly, it becomes a vicious cycle. In fact, the Mayo Clinic advises its schizophrenic patients of the challenges that await while on the road to recovery.[57]

> [I]t's often difficult for people with schizophrenia to stick to their treatment plans. You may believe that you don't need medications or other treatment. Also, if you're not thinking clearly, you may forget to take your medications or to go to therapy appointments. . . . Even with good treatment, you may have a relapse.[58]

Voluntary noncompliance with medication is a commonly recognized symptom in the mental health arena.[59] Robert Heinssen, Ph.D., of the National Institute of Mental Health, has faced such challenges while treating a patient to whom he refers as "Ms. J."[60] According to Dr. Heinssen, Ms. J. has suffered with schizophrenia for over fifteen years.[61] During this time, she has been admitted to psychiatric facilities on a regular basis and has been prescribed numerous antipsychotic medications. "The reasons Ms. J. gave for stopping her medications included . . . a belief that 'I should be able to make it on my own,' and difficulty remembering dosing times."[62]

Dr. Heinssen also noted that "her lingering reservations about prophylactic pharmacotherapy threatened her commitment to long-term medication compliance."[63] In addition, a study performed by the Institute for Health at Rutgers University found that "one in five patients with schizophrenia reported missing one week or more of oral antipsychotic medications during the first three months after hospital discharge."[64]

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[54] Mayo Clinic, Schizophrenia, http://www.mayoclinic.com/health/schizophrenia/DS00196/DSECTION=treatments-and-drugs (last visited Apr. 15, 2010).

[55] *See id.*

[56] OhioHealth, Schizophrenia, http://www.ohiohealth.com/blank.cfm?print=yes&id=6&action=detail&ref=1081 (last visited Apr. 15, 2010) (citing Mayo Clinic, Schizophrenia, *supra* note 54).

[57] *Id.*

[58] *Id.*

[59] *See* Robert K. Heinssen, *Improving Medication Compliance of a Patient with Schizophrenia Through Collaborative Behavioral Therapy*, 53 PSYCHIATRIC SERVS. 255, 255 (2002).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] Olfson et al., *supra* note 52, at 221. It was also noted that "patients whose families refuse[] to participate in treatment" and those "who have difficulty recognizing their own symptoms" are at high risk for medication noncompliance. *Id.*

Despite documented research that a claimant's failure to comply with recommended treatment is actually a symptom of the disease, ALJs continue to deny benefits on this basis.[65] While an ALJ can legitimately deny a physically impaired claimant who refuses to follow physician treatment plans,[66] a claimant with a mental condition presents a unique situation which should be considered further. A claimant with a mental impairment—as opposed to a physical one—has significant chemical imbalances in the brain that affect the claimant's ability to make rational decisions,[67] such as the need to take medication regularly. This is a facet of mental disease which the ALJ should be required to take into consideration when determining whether the claimant is entitled to disability benefits instead of mechanically denying the claimant because of noncompliance with medication.

3. Noncompliance with Recommended Treatment Due to Financial Inability

Although ALJs typically deny claimants with mental or physical impairments due to noncompliance with medical treatment, many ALJs do not adequately attempt to determine the reasons for the noncompliance;[68] instead, if treatment notes reflect noncompliance, the ALJ now has a regulatory-supported basis for denial.[69] While there are compelling public policy reasons for denying a non-compliant claimant, such as a desire to deter willful disobedience of a treating physician's recommendations, there are also a myriad of justifiable reasons why a claimant may be in noncompliance. These permissible reasons should include a lack of health insurance or an inability to afford the co-pay for medications.[70]

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65 *See* 20 C.F.R. § 404.1530(b) (2009).

66 *Id.*

67 *E.g.*, Mayo Clinic, Bipolar Disorder, http://www.mayoclinic.com/health/bipolar-disorder/DS00356/DSECTION=causes (last visited Apr. 15, 2010); Mayo Clinic, Schizophrenia, *supra* note 54.

68 For example, in *Simons v. Heckler*, a district judge reversed the ALJ's denial of benefits to a mentally ill claimant when the ALJ had based that denial on claimant's refusal, without satisfactory explanation, to seek treatment. The judge explained that excuses that "may seem irrational" can be consistent with the symptoms of the applicant's mental illness, indicating that ALJs should examine whether refusals are caused by the illness itself. 567 F. Supp. 440, 444 (E.D. Pa. 1983); *see also* Benedict v. Heckler, 593 F. Supp. 755, 761 (E.D.N.Y. 1984) (explaining that denial of benefits to mentally ill claimants because their refusal of treatment is unreasonable "mocks the idea of disability based on mental impairments").

69 20 C.F.R. § 404.1530(b) (2009).

70 Many claimants find themselves without health insurance when their disability forces them to quit or when they are fired from their jobs. Without full-time employment, it is extremely difficult for an insurance company to provide adequate health care coverage.

Atypical issues arise when a claimant with mental impairments has not complied with prescribed treatment, and the ALJ should bear the burden of determining the reasons underlying noncompliance before the claimant can be denied. Additional investigation is needed because the reason for noncompliance may not always be evident. For example, even when a claimant is covered by health insurance, it may not provide adequate coverage when the claimant suffers with a mental disorder.[71]

> Health insurance coverage for psychiatric illnesses, when available, may have high deductibles and copayments, limited visits, or other restrictions that are not equal to the benefits for other medical disorders. . . . The newer medications that can be so helpful for most patients are unfortunately more expensive than the older ones.[72]

If a claimant is in noncompliance with recommended treatment due to financial difficulties and has made a good-faith attempt to treat the condition, the claimant should not be penalized due to reasons beyond the claimant's control. Unfortunately, ALJs can continue to fault claimants because of noncompliance, even when reasonable efforts have been made. To prevent an unjust outcome, a burden should be placed on the ALJ to question the claimant regarding any notations of noncompliance in the record while the claimant is testifying at his hearing. If the claimant provides an objectively reasonable explanation, the ALJ should be prohibited from basing a denial on noncompliance.

III. PROVING A MENTAL IMPAIRMENT EXISTS

To convince an ALJ that an award of benefits should be made, the claimant must begin by showing that the mental disorder significantly limits the claimant's ability to perform basic work activities.[73] Again, mental disorders are unique in the disability circuit when compared to physical conditions. The strongest evidence a claimant can offer when applying for disability benefits is objective evidence, such as a MRI report or X-ray findings.[74] Few ALJs will argue with a heart catheterization showing Coronary Artery Disease or a CT scan of the

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Furthermore, as claimants find themselves unemployed, they are forced to rely on family for support, further depleting financial resources. *See* Estroff et al., *supra* note 9, at 502.

[71] Peter J. Weiden et al., *Expert Consensus Treatment Guidelines for Schizophrenia: A Guide for Patients and Families*, 60 J. CLIN. PSYCHIATRY 73, 76 (Supp. 11 1999).

[72] *Id.*

[73] 20 C.F.R. § 404.1520(c) (2009). If significant limitation is established, the ALJ will find the claimant's limitations to be "severe." *See id.* §§ 404.1520(c), 416.920(c) (2009). A "slight abnormality" that has only a "minimal effect" on the claimant's ability to work is considered "not severe." *Id.* §§ 404.1521(a), 416.921(a); Soc. Sec. Rul. 85-28; Titles II and XVI: Considering Allegations of Pain and Other Symptoms in Determining Whether a Medically Determinable Impairment Is Severe, 61 Fed. Reg. 34,468, 34,470 (July 2, 1996).

[74] *See Titles II and XVI: Considering Allegations of Pain and Other Symptoms*, 61 Fed. Reg. at 34,469.

abdomen revealing an inoperable aneurysm. In this regard, physically impaired claimants have an advantage over the mentally impaired, as test results can definitively confirm or deny the existence of a debilitating condition.

With mental impairments, however, medical science has yet to produce a purely objective method that can fully substantiate an allegation of an existing mental illness.[75] Because there is a lack of advanced medical technology for confirming a mental diagnosis, ALJs are forced to rely on psychiatric treatment notes, medical opinions of treating physicians, and GAF assessments.[76]

A. Psychiatric Treatment Notes and Clinician Opinions

To confirm the existence of a mental impairment, the ALJ will often begin by reviewing the record to see whether the claimant is getting ongoing psychiatric treatment.[77] If so, the treatment notes should then reveal the specific treatment undergone by the claimant as well as diagnoses. The ALJ will also look for such information when the claimant is asserting disability based on a physical impairment, but once again, mentally ill claimants present distinctive challenges.

In order to prove disability, the claimant bears the burden of submitting medical evidence which supports the claimant's allegations.[78] When a mental disability is alleged, the claimant will typically submit treatment notes and/or hospital records from admissions to substantiate the disability.[79]

But before an ALJ will even consider such evidence, the ALJ must be persuaded that the treatment has been provided by an "acceptable medical source."[80] If the ALJ believes that the evidence does not

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[75] When considering subjective evidence such as a claimant's symptoms, the ALJ will then make a credibility determination. Titles II and XVI: Symptoms, Medically Determinable Physical and Mental Impairments, and Exertional and Nonexertional Limitations, 61 Fed. Reg. 34,488, 34,489 (July 2, 1996); Titles II and XVI: Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements, 61 Fed. Reg. 34,483, 34,485 (July 2, 1996).

[76] *Id.*

[77] See *infra* Part III.B. for discussion concerning Global Assessment of Functioning ("GAF") ratings. "A GAF score may help an ALJ assess mental RFC, but it is not raw medical data. Rather, it allows a mental health professional to turn medical signs and symptoms into a general assessment, understandable by a lay person, of an individual's mental functioning." Kornecky v. Comm'r of Soc. Sec., 167 Fed. App'x 496, 503 n.7 (6th Cir. 2006) (citing AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., text rev. 2000)).

[78] 20 C.F.R. § 404.1512(a), (c) (2009).

[79] *Id.* § 404.1512(b)(2).

[80] Social Security regulations distinguish between an "acceptable medical source" and "other sources." 20 C.F.R. § 404.1513(a), (d) (2009); Titles II and XVI: Considering

originate from such a source, the evidence does not have to be considered, regardless of how comprehensive it is.[81] In regard to mental health providers, Social Security Rules provide that the only acceptable medical sources that the ALJ may consider are psychiatrists and licensed psychologists.[82] All other providers, such as Licensed Clinical Social Workers and therapists, are considered "other sources,"[83] and evidence from these providers "may be based on special knowledge of the individual and may provide insight into the severity of the impairment(s) and how it affects the individual's ability to function."[84] An ALJ is not required to consider opinions,[85] diagnoses, or prognoses from these sources.[86] This is very important, as medical opinions of an "acceptable medical source" are entitled to substantial deference, and if not contradicted, controlling weight must be given.[87]

A problem arises under these rules because many mental-health specialists keep poor treatment notes, particularly psychiatrists who are one of the few "acceptable medical sources."[88] This is because

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Opinions and Other Evidence from Sources Who Are Not "Acceptable Medical Sources" in Disability Claims, 71 Fed. Reg. 45,593, 45,594 (Aug. 9, 2006).

[81] *Titles II and XVI: Considering Opinions and Other Evidence*, 71 Fed. Reg. at 45,594.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] Medical opinions are "judgments about the nature and severity of . . . impairment(s), including . . . symptoms, diagnosis and prognosis, what [one] can still do despite impairment(s), and [an individual's] physical or mental restrictions." 20 C.F.R. § 404.1527(a)(2) (2009). A treating source will often have more than one medical opinion, including "at least one diagnosis, a prognosis, and an opinion about what the individual can still do." Titles II and XVI: Giving Controlling Weight to Treating Source Medical Opinions, 61 Fed. Reg. 34,490, 34,491 (July 2, 1996). It is important to note that a mental health professional's opinion toward disability may affect the opinions rendered.

> For example, a practitioner with strong beliefs about personal responsibility may be opposed, on principle, to disability seeking, and may view the patient as being rewarded for idleness. Conversely, a practitioner with more liberal beliefs may be inclined to sympathize with a disability-seeking patient. Psychiatrists need to be aware of their personal and political values and not allow them to cloud their clinical judgment.

Mischoulon, *supra* note 43, at 131 (citing Elliott M. Heiman & Stephen B. Shanfield, *Psychiatric Disability Assessment: Clarification of Problems*, 19 COMP. PSYCHIATRY 449 (1978)).

[86] 20 C.F.R. § 404.1513 (2009); Titles II and XVI: Considering Opinions and Other Evidence from Sources Who Are Not "Acceptable Medical Sources" in Disability Claims, 71 Fed. Reg. 45,593, 45,594 (Aug. 9, 2006).

[87] 20 C.F.R. § 404.1527(d)(2) (2009).

[88] E-mail from Dennis Pash, Attorney, Dale L. Buchanan & Assoc., to author (Nov. 24, 2008, 05:59 EST) (on file with author) ("These treatment notes have [two] problems—being scant and being often unreadable (and ALJs often declare the records invalid or not useful in spite of seeking clarification or transcription).").

psychiatrists primarily meet with patients only when a change in medication is needed or for follow-up appointments.[89] This appears to be the trend among mental-health providers, as the Palo Alto Medical Foundation, a multi-specialty health care provider, acknowledges that

> [a]ll of our doctors do see some patients for therapy, but this is a smaller part of their practice since most of their time is used for medication evaluations and follow up. We have a team of highly qualified psychotherapists, including licensed clinical social workers, who do the bulk of psychotherapy . . . .[90]

Because psychiatrists predominantly meet with patients for medication purposes, psychiatric treatment notes seldom note a claimant's ability, or lack thereof, to perform daily activities or function in a potentially stressful environment. Instead, such treatment notes contain general notations, such as "patient functioning well on medication" or "Seroquel made her feel like she was under water. Trazodone was substituted." These statements, although helpful, do not provide adequate insight into the claimant's ability to successfully function in a work environment.[91]

In order to get a complete picture of the claimant's daily struggles, treatment notes from talk therapy sessions are typically more helpful, as those tend to provide a more detailed description of the claimant's symptoms and functioning levels.[92] Having this consistent one-on-one contact with the patient, the mental-health provider often makes preliminary diagnoses based on the symptoms that have been discussed and observed.[93] Talk therapy sessions are, however, predominately conducted by therapists or licensed clinical social workers who are not "acceptable medical sources" under Social Security regulations;[94] thus, the ALJ is not required to consider this potentially comprehensive evidence.[95]

This is a common challenge that many mentally disabled claimants face while seeking disability benefits. These claimants are often treated by a licensed clinical social worker for weekly therapy sessions and meet

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89 *Id.*; Palo Alto Medical Found., Psychiatry & Behavioral Health, http://pamf.org/psychiatry/services/faq.html (last visited Apr. 15, 2010) (follow "Why don't [sic] your psychiatrist see more patients for therapy?" hyperlink).

90 Palo Alto Medical Found., *supra* note 89.

91 *See* 20 C.F.R. § 404.1513(c)(2) (2009).

92 Mayo Clinic, Psychotherapy, http://www.mayoclinic.com/health/psychotherapy/MY00186 (last visited Apr. 15, 2010).

93 *Id.*

94 JEROME D. FRANK & JULIA B. FRANK, PERSUASION & HEALING: A COMPARATIVE STUDY OF PSYCHOTHERAPY 15 (3d ed. 1993).

95 *Cf.* 20 C.F.R. § 404.1513(a) (2009) (distinguishing between an "acceptable medical source" and "other sources"); Titles II and XVI: Considering Opinions and Other Evidence from Sources Who Are Not "Acceptable Medical Sources" in Disability Claims, 71 Fed. Reg. 45,593, 45,594 (Aug. 9, 2006) (same).

with the overseeing psychiatrist only when medication changes are necessary.[96] Upon applying for disability benefits, the claimant will then submit the treatment notes of the therapist with no guarantee that the ALJ will actually consider the diagnoses and opinions found therein.[97]

This Social Security rule[98] should be repealed to ensure that all relevant evidence will be considered, regardless of whether the source is a psychiatrist or therapist. In its place, a rule requiring the ALJ to consider the opinions of all mental health providers should be promulgated, especially when the provider and the claimant have had an ongoing treating relationship as evidenced by the record.

B. GAF Ratings

In 1952, the American Psychiatric Association published the Diagnostic and Statistical Manual of Mental Disorders[99] ("DSM"), "the standard classification of mental disorders used by mental health professionals in the United States."[100] The DSM has been referred to as

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[96] There are, however, few mental health professionals who feel experienced enough to give an opinion regarding a patient's ability to maintain a full-time work schedule.

> Psychiatrists need to learn how to respond appropriately to petitions for psychiatric disability benefits. Unfortunately, most psychiatric residency training programs do not include disability assessment in their didactic curricula, and supervising psychiatrists may be reluctant to address the subject during supervision of residents. This shortcoming may stem from a general unfamiliarity with the mechanics of a disability assessment and the countertransference issues that frequently arise when a patient presents with a disability petition. Consequently, the discomfort with disability assessment may be perpetuated to the next generation of psychiatrists, as the psychiatric resident may feel anxious, frustrated, and inadequately supported when called upon to perform a disability evaluation. This inadequacy may cause the resident to feel resentful or hostile, and present a threat to the doctor-patient alliance.

Mischoulon, *supra* note 43, at 128–29 (citing Allen J. Enelow, *Psychiatric Disorders and Work Function*, 21 PSYCHIATRIC ANNALS 27 (1991)).

[97] *See* 20 C.F.R. § 404.1513(a).

[98] *Id.*

[99] Am. Psychiatric Assoc., Post-World War II, http://www.psych.org/MainMenu/Research/DSMIV/History_1/PostWarClassifications.aspx (last visited Apr. 15, 2010). Since 1952, there have been five revisions to the DSM. *Id.*; Am. Psychiatric Assoc., Development of DSM-III, http://www.psych.org/MainMenu/Research/DSMIV/History_1/DevelopmentofDSMIII.aspx (last visited Apr. 15, 2010). The most recent revision was the DSM-IV, which was published in 1994. AM. PSYCHIATRIC ASSOC., *supra* note 77; Am. Psychiatric Assoc., DSM-III-R and DSM-IV, http://www.psych.org/MainMenu/Research/DSMIV/History_1/DSMIIIRandDSMIV.aspx (last visited Apr. 15, 2010). The DSM-V is due for publication in May 2013. Am. Psychiatric Assoc., DSM-V: The Future Manual, http://www.psych.org/MainMenu/Research/DSMIV/DSMV.aspx (last visited Apr. 15, 2010).

[100] Am. Psychiatric Assoc., Diagnostic and Statistical Manual, http://www.psych.org/MainMenu/Research/DSMIV.aspx (last visited Apr. 15, 2010) [hereinafter Am. Psychiatric Assoc., DSM].

"the psychiatric bible,"[101] and is consulted by practitioners in different psychiatric specialty fields, such as biological, psychodynamic, cognitive, behavioral, interpersonal, and family systems.[102]

As a result of reliance on the DSM, diagnoses and prognoses from psychiatric treating sources fall into one of five axes:

Axis I	Mental Disorders
Axis II	Developmental Disorders and Personalty Disorders
Axis III	Physical Disorders and Conditions
Axis IV	Severity of Psychosocial Stressors
Axis V	Global Assessment of Functioning.[103]

Axis V, GAF, has become an important aspect in the treatment of psychiatric disorders and in the adjudication of disability benefits.[104] A GAF is a number on a scale of 1–100[105] that indicates "the clinician's judgment of the individual's overall level of functioning[, and] is to be rated with respect only to psychological, social, and occupational functioning."[106]

IV. THE IMPACT OF THE GAF IN THE DISABILITY REALM

Although the GAF has been an aspect of the mental health profession for quite some time,[107] courts appear to be at odds as to what to do with it. Since a GAF is a "judgment of the individual's overall level of functioning,"[108] does this mean that it is the equivalent of a medical opinion? If so, the score is entitled to substantial deference at the least.[109] Or is a GAF just another piece of evidence to be considered in combination with the record? The Social Security Administration has not directly answered this question, but has taken the stance that a claimant's GAF score "does not have a direct correlation to the severity requirements."[110] The Social Security Administration does, however,

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[101] *See* HERB KUTCHINS & STUART A. KIRK, MAKING US CRAZY: DSM: THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS (1997).

[102] Am. Psychiatric Assoc., DSM, *supra* note 100.

[103] AM. PSYCHIATRIC ASSOC., *supra* note 77, at 27.

[104] *See id.* at 32.

[105] *See infra* Addendum. The GAF scale ranges from 1 (severe limitations as evidenced by a continuous likelihood of harming self or others) to 100 (no limitations in the ability to function). *Id.*

[106] AM. PSYCHIATRIC ASSOC., *supra* note 77, at 32.

[107] *Id.*

[108] *Id.*

[109] 20 C.F.R. § 404.1527(d)(2). This is only the case if the GAF assessment is provided by an "acceptable medical source." If not, the score does not have to be considered. *Id.* § 404.1513(a), (d); Titles II and XVI: Considering Opinions and Other Evidence from Sources Who Are Not "Acceptable Medical Sources" in Disability Claims, 71 Fed. Reg. 45,593, 45,594 (Aug. 9, 2006).

[110] Revised Medical Criteria for Evaluating Mental Disorders and Traumatic Brain Injury, 65 Fed. Reg. 50,746, 50,764–65 (Aug. 21, 2000).

acknowledge it as the medical tool used by clinicians to "assess current treatment needs and provide a prognosis."[111]

Because there is not a direct and definitive answer to whether a GAF is a medical opinion, different circuits have taken differing—and conflicting—approaches.

A. The Sixth Circuit: A GAF Is Not a Medical Opinion

The Sixth Circuit has consistently held that a GAF is not a medical opinion entitled to substantial deference.[112] In 1996, the Circuit held that a GAF is "a subjective determination" that must be supported by the entire record in order to be considered.[113] The Circuit affirmed its decision seven years later in *Howard v. Commissioner of Social Security*.[114] There, Ms. Howard had filed suit in federal court, requesting that the ALJ's decision be reversed for several reasons, one of which was the ALJ's failure to consider her GAF scores on four different occasions.[115] She claimed that this failure had caused the ALJ's RFC to be inaccurate.[116] The court stated that "[w]hile a GAF score may be of considerable help to the ALJ in formulating the RFC, it is not essential to the RFC's accuracy. Thus, the ALJ's failure to reference the GAF score in the RFC, standing alone, does not make the RFC inaccurate."[117]

More recently, the Circuit has specifically stated that "[a] GAF score may help an ALJ assess mental RFC, but it is not raw medical data. Rather, it allows a mental health professional to turn medical signs and symptoms into a general assessment, understandable by a lay person, of an individual's mental functioning."[118] Again, the Circuit described a GAF as "a clinician's subjective rating."[119]

B. The Third Circuit: A GAF Is a Medical Opinion

In contrast, Third Circuit case law specifically requires an ALJ to "consider all the evidence and give some reason for discounting the

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[111] *Id.* at 50,764.

[112] *See, e.g.*, Kornecky v. Comm'r of Soc. Sec., 167 Fed. App'x 496, 503 n.7 (6th Cir. 2006); Howard v. Comm'r of Soc. Sec., 276 F.3d 235, 241 (6th Cir. 2002) (citing Hardaway v. Sec'y of Health & Human Servs., 823 F.2d 922, 927 (6th Cir. 1987)).

[113] Rutter v. Comm'r of Soc. Sec., No. 95-1581, 1996 U.S. App. LEXIS 19136, at *4–5 (6th Cir. July 15, 1996).

[114] *Howard*, 276 F.3d at 241.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Kornecky*, 167 Fed. App'x at 503 n.7.

[119] *Id.*

evidence she rejects."[120] Within the Third Circuit, the Eastern District of Pennsylvania has taken the approach that a GAF is a medical opinion because it is widely used by mental health professionals.[121]

In *Dougherty v. Barnhart*, Ms. Dougherty applied for disability benefits, alleging disability due to bipolar disorder, anxiety, and other physical impairments.[122] After being denied by the ALJ, and having that decision later affirmed by the Social Security Administration's Appeals Council, Ms. Dougherty filed a complaint against the Commissioner in federal district court.[123] Ms. Dougherty argued that her mental impairments were disabling, which was supported by several GAFs found in the record that the ALJ failed to consider.[124] Conversely, the Commissioner argued that the scores were not supported by the evidence and that Ms. Dougherty was "attempting to rely upon isolated GAF results."[125] The court was unconvinced by the Commissioner's arguments and held that, because a GAF is a piece of medical evidence that has been relied upon by the mental health profession and is reliable, it "must be addressed by an ALJ in making a determination regarding a claimant's disability."[126]

The court's decision was supported by numerous cases in support of its holding that a GAF is a medical opinion. In *Escardille v. Barnhart*, an ALJ's unfavorable decision was reversed because the ALJ failed to mention the claimant's GAF score of 50.[127] In its holding, the district court found that the score "constituted a specific medical finding that [the claimant] was unable to perform competitive work."[128] In *Colon v. Barnhart*, the Eastern District of Pennsylvania once again held that "in light of Plaintiff's total GAF score history, the ALJ was required to discuss his reasons for not even considering the two GAF scores of 50, leading up to the disability determination in this case."[129] The court also reprimanded the ALJ for "cherry-picking" the higher GAF scores while completely disregarding the lower scores.[130] In *Span ex rel. R.C. v.*

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[120] Adorno v. Shalala, 40 F.3d 43, 48 (3d Cir. 1994) (citing Stewart v. Sec'y of Health, Educ., & Welfare, 714 F.2d 287, 290 (3d Cir. 1983)).

[121] Dougherty v. Barnhart, No. 05-5383, 2006 U.S. Dist. LEXIS 58562, at *28 (E.D. Pa. Aug. 21, 2006).

[122] *Id.* at *1–2.

[123] *Id.* at *1–3.

[124] *Id.* at *13. Ms. Dougherty was given a GAF of 40 on three occasions, including a GAF of 55 and 60. *Id.* A score of 50 or lower is considered disabling. *Id.* at *31 n.5; *infra* Addendum.

[125] *Dougherty*, 2006 U.S. Dist. LEXIS 58562, at *28.

[126] *Id.*

[127] No. 02-2930, 2003 WL 21499999, at *7 (E.D. Pa. June 24, 2003).

[128] *Id.*

[129] 424 F. Supp. 2d. 805, 813 (E.D. Pa. 2006).

[130] *Id.* at 813–15.

Barnhart, the ALJ's decision was reversed and remanded because the written opinion did not indicate that the GAFs found in the record were considered; instead, the scores were merely listed in the opinion and the ALJ then adopted a doctor's opinion that the claimant was not disabled.[131]

C. The Tenth Circuit: A GAF Is a Medical Opinion, but on Second Thought, Maybe It Is Not

Some circuits, such as the Tenth Circuit, cannot decide whether a GAF is a medical opinion. This has resulted in conflicting opinions,[132] leaving mentally ill claimants even more confused as to how supportive a GAF actually is to the disability claim.

In 2007, the Tenth Circuit remanded a decision because the ALJ failed to analyze the GAF "as the *opinion* of a treating physician as required by the regulations and our case law,"[133] and then subsequently held that a GAF is merely a piece of evidence to be considered with the rest of the record.[134] The Circuit has also held that "[s]tanding alone, a low GAF score does not necessarily evidence an impairment seriously interfering with a claimant's ability to work. The claimant's impairment, for example, might lie solely within the social, rather than the occupational sphere."[135]

As a general rule, however, the Tenth Circuit has stated that an ALJ's written opinion "must demonstrate that the ALJ [has] considered all of the evidence," but discussion of every piece of evidence is not required; the ALJ is only required to refer to the "uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects."[136]

V. THE THIRD CIRCUIT IS RIGHT: A GAF IS A MEDICAL OPINION ENTITLED TO SUBSTANTIAL DEFERENCE

A GAF is a medical opinion by its very nature. It is a "clinician's *judgment* of the individual's overall level of functioning."[137] According to

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[131] No. 02-CV-7399, 2004 U.S. Dist. LEXIS 12221, at *22, 29 (E.D. Pa. May 21, 2004).

[132] *Compare* Petree v. Astrue, 260 Fed. App'x 33, 42 (10th Cir. 2007) ("[A] low GAF score does not alone determine disability, but is instead a piece of evidence to be considered with the rest of the record."), *with* Lee v. Barnhart, 117 Fed. App'x 674, 678 (10th Cir. 2004) ("[T]he GAF score should not have been ignored.").

[133] Givens v. Astrue, 251 Fed. App'x 561, 567 (10th Cir. 2007) (emphasis added).

[134] *Petree*, 260 Fed. App'x at 42.

[135] *Lee*, 117 Fed. App'x at 678 (citing Eden v. Barnhart, 109 Fed. App'x 311, 314 (10th Cir. 2004)).

[136] Clifton v. Chater, 79 F.3d 1007, 1009–10 (10th Cir. 1996) (citing Vincent *ex rel.* Vincent v. Heckler, 739 F.2d 1393, 1394–95 (9th Cir. 1984)).

[137] AM. PSYCHIATRIC ASSOC., *supra* note 77, at 32 (emphasis added).

Social Security's own rules, a medical opinion is a "*judgment*[] about the nature and severity of [an individual's] impairment(s), including [his] symptoms, diagnosis and prognosis, what [he] can still do despite impairment(s), and [his] physical or mental restrictions."[138] Social Security's definition of a medical opinion describes a GAF perfectly. When determining a patient's GAF, the clinician is opining on the patient's highest and lowest ability to function socially, psychologically, and *occupationally*.[139]

Moreover, mental health professionals "consider the GAF to be a key part of any outcomes assessment program. . . . [T]he information obtained through the GAF 'is useful in planning treatment and measuring its impact and in predicting outcome.'"[140] The GAF scale is not a new invention that has not been tested for reliability.[141] "[T]he GAF probably is the single most widely used rating scale to assess impairment among patients with psychiatric . . . disorders."[142]

This Note urges the Social Security Administration to promulgate a rule specifying that a GAF is a medical opinion. Because a GAF is a medical opinion and is widely relied upon by mental health clinicians and researchers when making determinations of functioning, the Social Security Administration should take its rule one step further by creating an inference of disability upon evidence of consistently poor GAF assessments.

When the record contains a string of GAF scores—the majority of which are disabling—an inference of disability should occur. The ALJ should then look to the remaining evidence and make a determination as to whether the record, in its totality, supports or rebuts the inference. If the treatment notes and opinions do not adequately rebut the inference created by the string of poor GAF scores, the ALJ must award disability benefits.

Such a standard is necessary for several reasons. First, mental disorders present many challenges for an ALJ when trying to make a

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138 20 C.F.R. § 404.1527(a)(2) (2009) (emphasis added).

139 Rudolf Moos et al., *Global Assessment of Functioning (GAF) Ratings: Determinants and Role as Predictors of One-Year Treatment Outcomes*, 56 J. CLINICAL PSYCHOL., 449, 450 (2000) [hereinafter Moos et al., *GAF Outcomes*].

140 Rudolf Moos et al., *Global Assessment of Functioning Ratings and the Allocation and Outcomes of Mental Health Services*, 53 PSYCHIATRIC SERVS. 730, 730 (2002) [hereinafter Moos et al., *Ratings, Allocation, and Outcomes*] (citing Pamela Moriearty et al., *Incorporating Results of a Provider Attitudes Survey in Development of an Outcomes Assessment Program*, 14 AM. J. MED. QUALITY 178 (1999); M. Tracie Shea, *Core Battery Conference: Assessment of Change in Personality Disorders*, *in* MEASURING PATIENT CHANGES IN MOOD, ANXIETY, AND PERSONALITY DISORDERS 389 (Hans H. Strupp et al. eds., 1997); AM. PSYCHIATRIC ASSOC., *supra* note 77).

141 AM. PSYCHIATRIC ASSOC., *supra* note 77, at 32.

142 Moos et al., *GAF Outcomes*, *supra* note 139, at 450.

determination of disability. An inference takes the guess work out of the process and also protects a mentally disabled claimant from being denied erroneously. Second, a GAF assessment is a medical opinion regarding the claimant's ability to function in everyday activities, which the clinician—in his expertise—has based on diagnoses, prior treatment and hospital admissions, and prognoses. Third, a GAF assessment is an extremely useful tool in disability adjudication because an ALJ is not a medical expert and cannot be expected to review treatment notes and make a determination of functioning. Instead, the ALJ must rely on the assessment of a medical expert who has had one-on-one contact with the claimant and has assessed the claimant's limitations and provided a prognosis.

Furthermore, a GAF is the best standard that the medical profession has to offer when providing evidence for a disability determination due to mental disease. Until medical technology can create a specialized test that can definitively confirm a diagnosis of bipolar disorder or manic depression, the ALJ will be forced to rely on treatment notes and medical opinions. The claimant should not be penalized for a lack of advanced medical technology.

Although a GAF rating has proven to be a helpful tool in painting the big picture of an individual's ability to function, there are noted problems with its application when assessing whether a claimant is disabled. One such problem is that GAFs can be misleading because they require a prediction of a claimant's functioning.[143] A high GAF could be noted for several reasons, such as a sheltered work or home environment.[144] If the demands of a full-time job were placed on a claimant, a GAF could rapidly decline. In addition, a single poor GAF does not equal disability, as the majority of Americans have poor GAF days from time-to-time.

Another alleged problem with GAFs has been noted by the Sixth Circuit: a GAF is a "subjective determination" by a clinician and thus should not be entitled to great weight in disability adjudication.[145] A GAF is not subjective, however, because an independent medical expert is assessing the claimant's functioning, not the claimant himself.[146] Such

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[143] *See generally* David A. Patterson & Myung-Shin Lee, *Field Trial of the Global Assessment of Functioning Scale—Modified*, 152 AM. J. PSYCHIATRY 1386 (1995) (finding degree of social support to be one of several factors that accounts for variance in GAF scores).

[144] *See id.*

[145] Kornecky v. Comm'r of Soc. Sec., 167 Fed. App'x 496, 503 n.7 (6th Cir. 2006); Rutter v. Comm'r of Soc. Sec., No. 95-1581, 1996 U.S. App. LEXIS 19136, at *4 (6th Cir. July 15, 1996).

[146] An opinion is subjective when it is "[b]ased on an *individual's* perceptions, feelings, or intentions." BLACK'S LAW DICTIONARY 1561 (9th ed. 2009) (emphasis added).

an assessment is more than merely writing down the claimant's subjective complaints in the treatment notes, although it appears that some courts have made the assumption that a GAF is solely based on the claimant's complaints.[147] This assumption, however, is inaccurate. A study of the reliability of GAF assessments found that the "GAF ratings obtained during treatment were only minimally associated with self-reported symptom outcomes."[148] Furthermore, this argument does not change the fact that a GAF evaluation is a medical *judgment* assessed by a medical professional,[149] and as such is entitled to deference.

The American Psychiatric Association has also observed problems with GAF assessments, resulting in a published clarification as to how a GAF should be used within the mental health profession:

> Lack of detail in the instructions regarding application of the Global Assessment of Functioning (GAF) rating have led to misinterpretations of how to apply the GAF. One source of confusion is how to operationalize the current time frame for the GAF. Does it strictly refer to how that patient appears and functions during the evaluation procedure? This interpretation might result in a misleadingly high GAF, given that some individuals may experience transient improvement in anticipation of receiving help. For clarity, the text now includes a sentence that states in order to account for day-to-day variability in functioning, the GAF rating for the current period is sometimes operationalized as the lowest level of functioning for the past week.
>
> Another source of confusion involves how to integrate the potentially disparate contributions of psychiatric symptomatology and functioning to the final GAF score. For example, for a patient who is a significant danger to self (justifying a GAF below 20) but is otherwise functioning well at work and with his family (reflecting a GAF above 60), what should the final GAF be? Some GAF users mistakenly average the two together, resulting in a GAF around 40. In fact, the final correct GAF score should always reflect the lower of the two (i.e., in this case, the GAF should be below 20, despite the higher social and occupational functioning).[150]

Because a GAF assessment is made by an independent medical expert, it does not satisfy the definition of "subjective." A GAF assessment cannot be classified as objective, however, because while it is made by a clinician, that person may or may not be a disinterested party "[w]ithout bias or prejudice." *See id.*

[147] *Kornecky*, 167 Fed. App'x at 503 n.7; *Rutter*, 1996 U.S. App. LEXIS 19136, at *4–5.

[148] Moos et al., *Ratings, Allocation, and Outcomes*, *supra* note 140, at 731.

[149] *Id.* at 730.

[150] Am. Psychiatric Assoc., Clarification of the Procedure for Making an Axis V Global Assessment of Functioning Rating, http://www.psych.org/MainMenu/Research/DSMIV/DSMIVTR/DSMIVvsDSMIVTR/SummaryofPracticeRelevantChangestotheDSMIVTR/GAFProcedures.aspx (last visited Apr. 15, 2010) (internal quotation marks omitted).

Because of this problem, a low GAF score may have been assessed because of social functioning limitations only and therefore may not be a strong indicator of an inability to function in an occupational setting.[151] The American Psychiatric Association illustrated this problem by noting that a person could be "a significant danger" to himself "but is otherwise functioning well at work."[152] While this seems counterintuitive, as common sense argues that someone who is overtaken with thoughts of suicide would have a difficult time functioning adequately at work, it is possible that a claimant could function for short periods of time under such circumstances. The suicidal ideation, however, would inevitably take over the thought-process, affecting concentration, persistence, and pace. A Boston University study found that people with mental disabilities are predisposed to significant challenges in a work setting when trying to screen out environmental stimuli, sustain concentration, maintain stamina, handle time pressures and multiple tasks, interact with others, and respond to negative feedback or change.[153]

Regardless of whether the GAF is based on limitations in social functioning, a continuous disability in a claimant's ability to perform activities of daily living will unavoidably extend the limitations to his ability to concentrate, to maintain appropriate social interaction, and to perform the duties required of a full-time job. As such, the problems reported with GAFs do not outweigh their benefits. A GAF is a clinician's judgment based completely on a claimant's ability to function; this goes to the heart of whether an individual is capable of sustaining full-time work. It is a reliable, trusted opinion that is entitled to substantial deference and an inference of disability when evidenced by the record.

CONCLUSION

Despite the fact that numerous malingering claimants file false disability claims each year, the majority of disability claims—like Nora's—are filed by claimants who suffer from legitimate mental impairments. These claimants are denied relief, however, because the focus in disability adjudication has shifted from the forest to the trees. Instead of keeping the big picture in mind, ALJs have become cynical and disheartened with the disability process and have allowed this to skew their judgment, particularly when dealing with the mentally impaired. Yet in spite of their flaws, America's Social Security disability programs continue to provide a better way of life for millions of people;

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[151] *Id.*

[152] *Id.*

[153] Boston Univ. Ctr. for Psychiatric Rehabilitation, How Does Mental Illness Interfere with Work Performance?, http://www.bu.edu/cpr/reasaccom/employ-func.html (summarizing L.L. Mancuso, *Reasonable Accommodations for Workers with Psychiatric Disabilities*, 14 PSYCHOSOCIAL REHAB. J. 3 (1990)).

with improvement, Franklin D. Roosevelt's vision of a program that provides economic security for the nation's disabled will become a reality.[154]

Sarah E. Dunn, Esq.

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[154] *See* SOC. SEC. ADMIN., MANAGEMENT'S DISCUSSION AND ANALYSIS 1 (1998), *available at* http://www.socialsecurity.gov/finance/1998/98md&a1.pdf.

ADDENDUM: GLOBAL ASSESSMENT OF FUNCTIONING SCALE*

91–100	Superior functioning in a wide range of activities, life's problems never seem to get out of hand, is sought out by others because of his or her many positive qualities. No symptoms.
81–90	Absent or minimal symptoms (e.g., mild anxiety before an exam), good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more than everyday problems or concerns (e.g., an occasional argument with family members).
71–80	If symptoms are present, they are transient and expectable reactions to psychosocial stressors (e.g., difficulty concentrating after family argument); no more than slight impairment in social, occupational, or school functioning (e.g., temporarily falling behind in schoolwork).
61–70	Some mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social occupational, or school functioning (e.g., occasional truancy or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships.
51–60	Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers).
41–50	Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).
31–40	Some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).
21–30	Behavior is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment (e.g., sometimes incoherent, acts grossly

* AM. PSYCHIATRIC ASSOC., *supra* note 77, at 34.

	inappropriately, suicidal preoccupation) OR inability to function in almost all areas (e.g., stays in bed all day; no job, home, or friends).
11–20	Some danger of hurting self or others (e.g., suicide attempts without clear expectation of death; frequently violent; manic excitement) OR occasionally fails to maintain minimal personal hygiene (e.g., smears feces) OR gross impairment in communication (e.g., largely incoherent or mute).
1–10	Persistent danger of severely hurting self or others (e.g., recurrent violence) OR persistent inability to maintain minimal personal hygiene OR serious suicidal act with clear expectation of death.

MORE FOLLY THAN FAIRNESS: THE FAIRNESS DOCTRINE, THE FIRST AMENDMENT, AND THE INTERNET AGE

Dominic E. Markwordt[*]

Not only the station manager but the newspeople as well were very much aware of this Government presence looking over their shoulders. I can recall newsroom conversations about what the [regulatory] implications of broadcasting a particular report would be. Once a newsperson has to stop and consider what a Government agency will think of something he or she wants to put on the air, an invaluable element of freedom has been lost.[1]

INTRODUCTION

The above quotation is one would expect to hear from a dissident in Alexander Solzhenitsyn's *Gulag Archipelago*[2] or from Winston Smith, the protagonist in George Orwell's classic *Nineteen Eighty-Four*.[3] Yet the above statement was uttered by none other than Dan Rather, then-managing editor and anchor of CBS News.[4] He had submitted the comments on behalf of CBS Inc. to the Federal Communications Commission ("FCC").[5] The FCC was reviewing the Fairness Doctrine, a policy that required all radio and television broadcasters to give adequate coverage to "all responsible positions" on controversial issues of public importance and mandated that coverage be fair and reflect opposing viewpoints.[6] A unanimous U.S. Supreme Court upheld the Fairness Doctrine in the 1969 case of *Red Lion Broadcasting Co. v. FCC*.[7] In breathtakingly broad language, the Court opined that the "mandate to the FCC to assure that broadcasters operate in the public

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* J.D. expected May 2010, University of Baltimore School of Law; M.B.A. 2007, University of Baltimore; B.S. 2005, Towson University. The author would like to thank Professor Eric B. Easton for his thoughtful comments and encouragement during the writing process.

1 Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 142, 171 (1985) (internal quotation marks omitted).

2 ALEKSANDR I. SOLZHENITSYN, THE GULAG ARCHIPELAGO: 1918–1956 (Thomas P. Whitney trans., 1974).

3 GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).

4 *Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d at 171.

5 *Id.*

6 Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1250 (1949). See Rex S. Heinke & Heather L. Wayland, *Lessons from the Demise of the FCC Fairness Doctrine*, 3 NEXUS, Issue 1 1998, at 3, 5–10, for a brief history of the Fairness Doctrine.

7 395 U.S. 367, 400–01 (1969).

interest is a broad one, a power 'not niggardly but expansive.'"[8] Dan Rather and Bill Monroe would beg to differ.[9] The FCC eventually thought so, too. It unanimously voted to abolish the Fairness Doctrine in 1987.[10]

Recently, some members of Congress have renewed attempts to reinstate the Fairness Doctrine.[11] Senator Trent Lott (R-MS), then-Republican Whip in the U.S. Senate, fumed, "'Talk radio is running America. We have to deal with that problem.'"[12] His counterpart, Senator Dick Durbin (D-IL), similarly supports reinstatement of the Fairness Doctrine,[13] as do Senator Diane Feinstein (D-CA),[14] and Senator Jeff

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[8] *Id.* at 380 (quoting Nat'l Broad. Co. v. United States, 319 U.S. 190, 219 (1943)). The vote to uphold the Fairness Doctrine was 8-0 because Justice Douglas did not participate in the decision. *Id.* at 401. He later wrote that he did not support the outcome. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 154 (1973) (Douglas, J., concurring) ("I did not participate in th[e] [*Red Lion*] decision and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime.").

[9] *Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d at 171. Bill Monroe was the moderator and producer of the popular television talk show *Meet the Press*. *Id.* at 171 n.102. Bill Monroe echoed Dan Rather:

> Some years ago as a young man I worked for a newspaper. I was very impressed with the spirit of independence on the part of the editors of the newspaper. They didn't care if something they put in the paper offended a major political figure. Later I went to a television station and slowly I discovered that the managers of the television station were a little afraid of [the] government. They were timid, conscious of [the] government looking over their shoulder in a way that the newspaper publisher and editor for whom I had worked had not been. I began to feel I was a little bit less than free, and it worried me.

Id. (citation omitted).

[10] Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C.R. 5043, 5057 (1987).

[11] *E.g.*, Media Ownership Reform Act of 2005, H.R. 3302, 109th Cong. § 3(2) (2005). Sponsored by Rep. Maurice Hinchey (D-N.Y.), the bill garnered sixteen cosponsors. *Id.* Rep. Hinchey's official government website states: "Please note that Hinchey will be introducing an updated version of MORA in the coming weeks." Congressman Maurice Hinchey, Issues and Legislation, http://www.house.gov/hinchey/issues/mora.shtml (last visited Apr. 19, 2010).

[12] *FOX News Sunday* (FOX News television broadcast June 24, 2007), *available at* http://www.foxnews.com/story/0,2933,286442,00.html (transcript of Senator Lott's and Senator Feinstein's television appearances).

[13] Alexander Bolton, *GOP Preps for Talk Radio Confrontation*, THE HILL, June 27, 2007, http://thehill.com/homenews/news/12407-gop-preps-for-talk-radio-confrontation ("'It's time to reinstitute the Fairness Doctrine' . . . . 'I have this old-fashioned attitude that when Americans hear both sides of the story, they're in a better position to make a decision.'").

[14] *FOX News Sunday*, *supra* note 12 ("Well, I'm looking at [reviving the Fairness Doctrine], as a matter of fact, . . . because I think there ought to be an opportunity to present the other side. . . . But I do believe in fairness. I remember when there was a Fairness Doctrine, and I think there was much more serious correct reporting to people."). It is doubtful whether the media of yesteryear was any more responsible than the media of

Bingaman (D-N.M.).[15] The Democrats' standard-bearer in 2004, Senator John Kerry (D-MA), also concurs.[16] The most recent elected officials to join the chorus of voices advocating for reinstatement of the fairness doctrine are Senators Debbie Stabenow (D-MI)[17] and Tom Harkin (D-

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today. During the early years of the republic, President Thomas Jefferson bitterly complained:

> [T]he man who never looks into a newspaper is better informed than he who reads them[,] inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehoods and errors. He who reads nothing will still learn the great facts, and the details are all false.

Letter from Thomas Jefferson, President, to John Norvell (June 11, 1807), *in* 11 THE WRITINGS OF THOMAS JEFFERSON 222, 225 (Andrew A. Lipscomb & Albert Ellery Bergh eds., Definitive ed. 1905). Jefferson further suggested that "[p]erhaps an editor might begin a reformation in some such way as this[:] Divide his [news]paper into four chapters, heading the 1st, Truths[;] 2[n]d, Probabilities[;] 3[r]d, Possibilities[;] 4th, Lies." *Id.*

[15] Bruce Daniels, *Bingaman Still Getting Heat over 'Fairness'*, ALBUQUERQUE J. ONLINE, Oct. 23, 2008, http://www.abqjournal.com/abqnews/index.php?option=com_content&task=view&id=9123&Itemid=2; Ken Shepard, *Sen. Bingaman (D-N.M.): Fairness Doctrine Would Help Radio Reach 'Higher Calling'*, NEWSBUSTERS, Oct. 23, 2008, http://newsbusters.org/blogs/ken-shepherd/2008/10/23/sen-bingaman-d-n-m-fairness-doctrine-would-help-radio-reach-higher-cal (citing The Radio Equalizer: Brian Maloney, Dem Senator Outlines Vindictive Plan to Eliminate Talk Radio, http://radioequalizer.blogspot.com/2008/10/new-mexico-democrat-will-push-to.html (Oct. 22, 2008, 14:11 EST) ("I would want this [radio] station and all stations to have to present a balanced perspective and different points of view . . . I think the country was well-served [when the Fairness Doctrine was in force]. I think the public discussion was at a higher level and more intelligent in those days tha[n] it has become since."). The NewsBusters website also has the audio of Senator Bingaman being interviewed by talk radio host, Jim Villanucci, of KKOB in which Senator Bingaman makes the comments quoted above. *Id.*

[16] John Eggerton, *Kerry Wants Fairness Doctrine Reimposed*, BROADCASTING & CABLE, June 27, 2007, http://www.broadcastingcable.com/article/CA6456031.html. During Senator Kerry's 2004 presidential campaign, Sinclair Broadcasting was planning to air a documentary, *Stolen Honor: Wounds That Never Heal*, critical of his service during the Vietnam War shortly before the election. Bill McConnell, *Activists Claim Sinclair Victory*, BROADCASTING & CABLE, Oct. 25, 2004, http://www.broadcastingcable.com/article/CA474631.html?q=%22Equal+Time%22. After a firestorm of controversy and threats of legal action from the Democratic National Committee, pressure from shareholders and legislators, and complaints to the FCC, Sinclair instead aired *A POW Story: Politics, Pressure and the Media*, which featured both pro- and anti-Kerry material. *Id.*

[17] Posting of Michael Calderone to POLITICO, Senator Stabenow Wants Hearings on Radio 'Accountability'; Talks Fairness Doctrine, http://www.politico.com/blogs/michaelcalderone/0209/Sen_Stabenow_wants_hearings_on_radio_accountability_talks_fairness_doctrine.html?showall (Feb. 5, 2009, 11:12 EST) ("I think it's absolutely time to pass a standard. Now, whether it's called the Fairness Standard, whether it's called something else—I absolutely think it's time to be bringing accountability to the airwaves."). Michael Calderone's blog also contains audio of Senator Stabenow making the comments in an interview with radio host Bill Press. *Id.* Notably, Senator Stabenow's husband, Tom Athans, is the "co-founder and former CEO of the liberal-progressive Democracy Radio." Jennifer Chambers, *Sex Case Warrant Issued*, DETROIT NEWS, Apr. 23, 2008, at 2B. After leaving Democracy Radio, Athans went on to lead programming at the liberal, now bankrupt, radio network Air America and started TalkUSA Radio in 2006. Korrie Wilkins

IA).[18] Former President Clinton also recently voiced his support for reinstatement of the Fairness Doctrine.[19] President Obama has not personally addressed the question of whether to reinstate the Fairness Doctrine, but he has sent a spokesperson to tell reporters he is opposed to the Doctrine's reinstatement in the wake of uncertainty fueled by comments his senior advisor and press secretary made.[20]

Drawing on scholarship from the Fairness Doctrine's inception to its repeal over twenty years ago,[21] this Article critically examines the rationales for the Fairness Doctrine's reinstatement in light of the massive technological changes that have taken place over the past generation. This Article begins in Part I by discussing the history of the Fairness Doctrine, focusing specifically on the seminal litigation in *Red Lion Broadcasting Co. v. FCC*. Part II discusses the Fairness Doctrine's chilling effects on broadcasters' speech from its inception in 1949 to its repeal in 1987. After a brief discussion in Part III of the Doctrine's abolition in 1987, Part IV examines the persuasiveness of the spectrum and numerical scarcity rationales used to justify lesser First Amendment protections for broadcast radio and television. Part V surveys the post-repeal media landscape and explains how the diversity of voices available today undermines the rationale for the Fairness Doctrine's reinstatement. Instead of reinstating the Fairness Doctrine, Congress should pass legislation to protect the First Amendment rights of

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& Todd Spangler, *Stabenow: Work Is Focus, Not Sex Case: Husband's Action Now a Family Issue*, DETROIT FREE PRESS, Apr. 3, 2008, at A1.

[18] Posting of Michael Calderone to POLITICO, Sen. Harkin: "We Need the Fairness Doctrine Back," http://www.politico.com/blogs/michaelcalderone/0209/Sen_Harkin_We_need_the_Fairness_Doctrine_back_.html (Feb. 11, 2009, 09:08 EST) ("By the way, I read [Bill Press's] Op-Ed in the *Washington Post* the other day. I ripped it out, I took it into my office and said 'there you go, we gotta get the Fairness Doctrine back in law again.'"). Michael Calderone's blog also contains audio of Senator Harkin making the quoted comments in an interview with radio host Bill Press. *Id.*

[19] Posting of Michael Calderone to POLITICO, Clinton Wants "More Balance" on Airwaves, http://www.politico.com/blogs/michaelcalderone/0209/Clinton_wants_more_balance_on_the_airwaves.html (Feb. 12, 2009, 17:34 EST) ("Well, you either ought to have the Fairness Doctrine or we ought to have more balance on the other side . . . ."). Michael Calderone's blog also contains audio of former President Clinton making the quoted comments in an interview with radio host Mario Solis Marich. *Id.*

[20] FOX News.com, White House: Obama Opposes 'Fairness Doctrine' Revival, http://www.foxnews.com/politics/first100days/2009/02/18/white-house-opposes-fairness-doctrine/ (last visited Apr. 19, 2010). A senior advisor to Obama, David Axelrod, had said earlier on *FOX News Sunday*, "'I'm going to leave th[e] [Fairness Doctrine reinstatement] issue to Julius Genachowski, our new head of the FCC[,] and the [P]resident to discuss. So I don't have an answer for you now . . . .'" *Id.*

[21] Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C.R. 5043, 5043 (1987).

broadcasters.[22] This Article ultimately concludes in Part VI that, given the exponential growth in media sources and viewpoints available to the average American, "[t]ruth and fairness have a too uncertain quality to permit the government to define them."[23]

I. THE HISTORY OF THE FAIRNESS DOCTRINE

A. History of the Fairness Doctrine from 1949 to Red Lion

1. An Early History

Congress's first foray into radio came with passage of the Radio Act of 1912, which required broadcasters to be licensed.[24] When the Secretary of Commerce sought to penalize the Zenith Radio Corporation under the Act for operating on an unauthorized frequency, the U.S. Court of Appeals for the District of Columbia held that the Radio Act did not give the Secretary any discretion to withhold a license from a broadcaster.[25] The U.S. Attorney General arrived at the same conclusion.[26] In response to the ineffective Radio Act of 1912, which had done little to control the cacophony of competing radio broadcasters that were making the airwaves virtually unusable, Congress passed the Radio Act of 1927.[27] The 1927 Act established a five-member Federal Radio Commission ("FRC"), and empowered it to allocate or renew broadcast licenses contingent upon broadcasters showing that their radio stations would serve the "public convenience[,] . . . interest[,] or . . . necessity."[28] Section 18 required radio broadcasters to give legally

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[22] The Broadcaster Freedom Act of 2009, which would prohibit the FCC from reinstating (in whole or in part) the Fairness Doctrine, would ensure that broadcasters' First Amendment rights are protected. H.R. 226, 111th Cong. (2009). Introduced on January 7, 2009, H.R. 226 has 183 cosponsors. THOMAS (The Library of Congress), http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR00226:@@@P (last visited Apr. 19, 2010).

[23] David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 236.

[24] Act of Aug. 13, 1912, Pub. L. No. 62-264, ch. 287, 37 Stat. 302 (repealed 1927).

[25] Hoover v. Intercity Radio Co., 286 F. 1003, 1007 (D.C. Cir. 1923).

[26] Fed. Regulation of Radio Broad., 35 Op. Att'y Gen. 126, 131 (1926) (citing *Hoover*, 286 F. at 1007; Radio Commc'n—Issuance of Licenses, 29 Op. Att'y Gen. 579, 580 (1912)).

[27] Radio Act of 1927, Pub. L. No. 69-632, ch. 169, § 39, 44 Stat. 1162, 1174 (repealed 1934). *See generally* W. Jefferson Davis, *The Radio Act of 1927*, 13 VA. L. REV. 611 (1927) (discussing the necessity for additional federal regulation of radio broadcasting).

[28] Radio Act §§ 3, 11, 44 Stat. at 1162–63, 1167. Senator Howell unsuccessfully attempted to require broadcasters to present both sides of public issues if requested to do so. 67 CONG. REC. 12,503 (1926) (statement of Sen. Howell) ("We recognized . . . that if a radio station allowed the discussion of a public question it must afford, if requested, an opportunity to present the other side. I think it was the view of the [C]ommittee [on Interstate Commerce] that if any subject was to be presented to the public by any of the limited number of stations, the other side should have the right to use the same forum; and if such privilege were not to be granted, then there should be no such forum whatever.").

qualified candidates for public office "equal opportunities" to use broadcasting stations, but allowed station owners to refuse all political advertisements.[29] The FRC interpreted these standards to require radio broadcasters to devote "ample play for the free and fair competition of opposing views" on issues of public importance.[30] The public interest standard that the FRC applied is the forerunner to the Fairness Doctrine, and its application led the FRC to decline to grant or renew radio stations' broadcasting licenses.[31]

Congress replaced the FRC with the FCC as part of a comprehensive overhaul of the regulatory scheme contained in the Communications Act of 1934.[32] The public interest standard in section 18 of the Radio Act of 1927 was reenacted verbatim in the 1934 Communications Act,[33] and the FCC continued to enforce it.[34] Commentators disagree on whether the early decisions by the FRC and the FCC constituted the first enunciation of the Fairness Doctrine.[35] In 1941, the FCC forbade broadcast licensees from engaging in *any*

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[29] Radio Act § 18, 44 Stat. at 1170.

[30] Great Lakes Broad. Co., 3 F.R.C. ANN. REP. 32, 33 (1929).

[31] *See, e.g.*, Trinity Methodist Church, S. v. Fed. Radio Comm'n, 62 F.2d 850, 852–53 (D.C. Cir. 1932) (stating that the FRC may refuse to renew a radio station's broadcasting license if that station uses its power to "obstruct the administration of justice, offend the religious susceptibilities of thousands, [and] inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality").

[32] *See* Pub. L. No. 73-416, ch. 652, tits. I & VI, §§ 1, 602–04, 48 Stat. 1064, 1064, 1102–03 (repealed 1947, 1994, and codified as amended in 47 U.S.C. § 604 (2006)).

[33] *Id.* tit. III, § 309(a), 44 Stat. at 1085 (codified as amended at 47 U.S.C. § 309(a) (2006)).

[34] Young People's Ass'n for the Propagation of the Gospel, 6 F.C.C. 178, 185 (1938).

[35] *Compare* Roscoe L. Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447, 462 (1968) ("Notwithstanding the substantial history of the [F]airness [D]octrine, some authorities date the [F]airness [D]octrine from 1941. . . ." (citing Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 132 (1967); John Paul Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719, 728 (1964)), *with* Jerome A. Barron, *The Federal Communication Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1, 2 (1961) ("It was with the *Mayflowe* case of 1941 that the [F]airness [D]octrine received its first tentative formulation by the [Federal Communications] Commission." (citing Mayflower Broad. Corp., 8 F.C.C. 333 (1941))), *and* Jonathan D. Blake, Red Lion Broadcasting Co. v. FCC*: Fairness and the Emperor's New Clothes*, 23 FED. COMM. B.J. 75, 79 (1969) ("The early Federal Radio Commission and FCC cases did not stand for a fairness principle or justify broad Commission regulation."). The Supreme Court seemed to accept that Fairness Doctrine principles had been imposed by the FRC "since the outset." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 377–78 (1969).

editorializing.[36] Nevertheless, the first "definitive and comprehensive statement o[f] the Fairness Doctrine" was the FCC's 1949 report that sought to clarify the obligations of broadcast licensees.[37] The first prong of the Fairness Doctrine imposed upon licensees the affirmative obligation to adequately cover issues of public importance.[38] A licensee was required to broadcast views on public issues of "substantial importance" regardless of the licensee's own beliefs or the possible unpopularity of the required viewpoints among a station's audience.[39] This requirement extended to "all *responsible positions* on matters of sufficient importance to be afforded radio time."[40]

The second prong of the Fairness Doctrine required licensees to ensure that "the various positions taken by *responsible groups*" on controversial issues of public importance were broadcast.[41] This requirement included an obligation to provide free airtime "on demand" to alternative viewpoints on controversial issues of public importance.[42] Thus, the Fairness Doctrine required broadcasters to fulfill their Fairness Doctrine obligations at their own expense if sponsorship was unavailable for an alternative viewpoint.[43] Furthermore, even if no individual or group requested free airtime, licensees had to take the initiative to obtain programming to fairly cover a controversial issue of public importance.[44]

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[36] *Mayflower*, 8 F.C.C. at 339–40; *see also* Note, *The Mayflower Doctrine Scuttled*, 59 YALE L.J. 759, 759 (1950) (discussing the *Mayflower* Doctrine's rationale and its demise in 1949).

[37] STEVEN J. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 41 (1978) (citing Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1246 (1949)).

[38] *Editorializing by Broad. Licensees*, 13 F.C.C. at 1249; *accord* United Broad. Co., 10 F.C.C. 515, 517 (1945).

[39] *Editorializing by Broad. Licensees*, 13 F.C.C. at 1249–50.

[40] *Id.* at 1250 (emphasis added). The FCC never defined what a "responsible position" was. Thus, if the FCC did not deem a person or a group's views to be responsible, the FCC could hold that the Fairness Doctrine did not apply to the particular viewpoint of that person or group. One can easily imagine viewpoints on virtually every controversial issue from abortion to xenophobia not gaining airtime because the FCC could deem them "not responsible."

[41] *Id.* at 1251 (emphasis added). Thus, the FCC not only had the power to determine which viewpoints citizens should hear ("responsible viewpoints"), but also what "responsible groups" would be permitted to air those viewpoints.

[42] *Id.*

[43] Cullman Broad. Co., 40 F.C.C. 576, 577 (1963).

[44] John J. Dempsey, 40 F.C.C. 445, 445–46 (1950); *see also* Metro. Broad. Corp., 40 F.C.C. 94 (1960) (requiring "continuing vigilance of management to see that [the Fairness Doctrine] policies are carried out"). This requirement seems unnecessary as one strains to think of *any* controversial issue of public importance that would not inspire some person or group to demand free airtime to present their viewpoint on the issue. One can make a strong argument that if no person or group demands free airtime, then the issue at stake is not one of *controversial* public importance.

2. The Personal Attack Rule

The FCC's 1949 Report stated that "elementary considerations of fairness" may require a broadcaster to provide airtime to a person or group attacked on the air.[45] As time progressed, the FCC developed the personal attack rule as "a remedy for personal attacks that resulted from broadcaster compliance with the [F]airness [D]octrine."[46] It was not until the early 1960s that the FCC fleshed out the scope of the personal attack rule in a trio of cases.[47] The FCC required any broadcast licensee whose facilities were used to attack a person or group to contact the person or group that had been attacked and give them a reasonable opportunity to reply.[48] In response to what it viewed as "flagrant personal attacks" on the part of broadcasters, the FCC formalized the personal attack rule in 1967.[49]

At first blush, the Fairness Doctrine, despite its serious shortcomings, arguably represented a marginal improvement in the FCC's position, which, under the *Mayflower* Doctrine, had prohibited broadcast licensees from using their facilities for *any* editorializing.[50] Perceived noncompliance with the Fairness Doctrine resulted in FCC investigations, petitions by complainants to deny licensees' requests for license renewals, and even license nonrenewal.[51] But, as over three decades of experience with the Fairness Doctrine would show, the doctrine and its corollaries, like the personal attack rule, proved onerous and entangled politicians, ideologues, interest groups, and a federal

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[45] *Editorializing by Broad. Licensees*, 13 F.C.C. at 1252.

[46] Robert W. Leweke, *Rules Without a Home: FCC Enforcement of the Personal Attack and Political Editorial Rules*, 6 COMM. L. & POL'Y 557, 559 (2001).

[47] Billings Broad. Co., 40 F.C.C. 518, 520 (1962); *In re* Application of Clayton W. Mapoles, 40 F.C.C. 510, 515 (1962); Time Mirror Broad. Co., 40 F.C.C. 538, 539 (1962).

[48] *Billings*, 40 F.C.C. at 520.

[49] Amendment of Part 73 of the Rules to Provide Procedures in Event of a Personal Attack, 8 F.C.C.2d 721, 724 (1967). The personal attack rule was codified at 47 C.F.R. § 73.123. *Id.* at 723. It read as follows:

> When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity[,] or like personal qualities of an identified person or group, the licensee shall, within . . . [one] week after the attack, transmit to the person or group attacked[:] (1) notification of the date, time[,] and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

47 C.F.R. § 73.123 (1968).

[50] *Editorializing by Broad. Licensees*, 13 F.C.C. at 1259 (separate opinion by Comm'r Jones) ("[T]he *Mayflower* . . . decision . . . fully and completely suppressed and prohibited the licensee from speaking in the future over his facilities [o]n behalf of any cause." (citing Mayflower Broad. Corp., 8 F.C.C. 333 (1941))).

[51] *See infra* Part III.

bureaucracy in continual disputes over which viewpoints received airtime.[52]

3. *Red Lion Broadcasting Co. v. FCC*

The *Red Lion* saga began when author and journalist Fred J. Cook encountered difficulty publishing a book tentatively titled *Goldwater: Fanatic of the Right*.[53] Cook's agent approached Grove Press, which in turn wrote to Wayne Phillips, the Democratic National Committee's ("DNC") Director of News and Information, who offered to purchase 50,000 copies for twelve cents each on behalf of the DNC.[54] The DNC eventually purchased 72,000 copies of the highly partisan biography.[55] Cook collected between $1,800 and $2,000 in royalties.[56] Grove Press did not fare so well; it sold only 44,000 copies besides those ordered by the DNC and eventually had to turn to its lawyers when the DNC refused to pay for the copies it had ordered.[57]

Shortly thereafter, Phillips spoke with Cook about writing an article criticizing right-wing broadcasters.[58] According to Cook, Phillips approached the editor of *The Nation*, and suggested that Cook be given an assignment to write about right-wing broadcasters.[59] Cook penned a blistering 4,000 word exposé, *Hate Clubs of the Air*, relying on the DNC's "vast files."[60] A key figure in the "blood brotherhood of fanaticism," according to Cook, was the Reverend Billy James Hargis, an anti-Communist broadcaster, whom Cook attacked for being against "communism, liberalism, the National Council of Churches, federal aid

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52 *Id.*

53 FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT 35 (1976). Friendly's book provides an excellent in-depth discussion of *Red Lion*.

54 *Id.* at 36.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* at 37.

59 *Id.* After Fred W. Friendly wrote about Cook in an article in the *New York Times Magazine*, Fred W. Friendly, *What's Fair on the Air?*, N.Y. TIMES, Mar. 30, 1975, (Magazine), at 11, Carey McWilliams, editor of *The Nation*, wrote a letter to the editor of the *Times* claiming it was his idea to write a story about right-wing broadcasters and that the DNC had no involvement in the publication of "Hate Clubs on the Air," Carey McWilliams, Letter to the Editor, *Assigned, Not Arranged*, N.Y. TIMES, Apr. 27, 1975, at 70. Even if one chooses to believe that the DNC was not the driving force behind Cook's article in *The Nation*, Cook wrote in his article that "[a]ides of the Democratic National Committee . . . have been monitoring the [right-wing] broadcasts, [and] report that the attempts to paint [President] Kennedy with a Red smear . . . are now being transferred with equal virulence to President Johnson." Fred. J. Cook, *Radio Right: Hate Clubs of the Air*, THE NATION, May 25, 1964, at 523, 524–25. This is proof that the DNC was well aware of the right-wing broadcasters Cook excoriates in his article.

60 FRIENDLY, *supra* note 53 at 37; *see also* Cook, *supra* note 59.

to education, Jack Paar [a popular radio and television talk show host], federal medical care for the aged, Ed Sullivan [a popular television talk show host], the Kennedy-Khrushev meeting, Eleanor Roosevelt, disarmament, [and] Steve Allen [a popular television talk show host]."[61]

On November 25, 1964, WGCB, a radio station owned by the Red Lion Broadcasting Corporation, carried a fifteen-minute program in which Hargis spent two minutes accusing Cook, of, among other things working for the "left-wing publication, [*The Nation*]," and seeking to "smear and destroy Barry Goldwater."[62] The FCC's personal attack rules, a corollary to the Fairness Doctrine, required broadcasters that aired an attack on a public figure during a discussion of public issues to give a tape, transcript, or summary of the broadcast to that public figure and offer that person a reasonable opportunity to reply—for free if necessary.[63] Cook asked the DNC for help in defending himself and demanded free airtime from more than 200 radio stations that had carried the broadcasts, including WGCB.[64] The Reverend John M. Norris, the feisty octogenarian who owned WGCB, refused Cook's demand and sent Cook WGCB's rate card, offering to run Cook's reply if he would pay.[65] Cook turned to the FCC, which, eleven months after the broadcast aired, determined that "elemental fairness" required WGCB to provide free airtime to Cook.[66]

Norris decided to sue the FCC and eventually convinced the National Association of Broadcasters ("NAB") to support him.[67] The NAB had strongly urged Norris not to sue and even agreed to reimburse any legal fees Norris had incurred thus far because of the NAB's strong misgivings about what it viewed as his weak case.[68] The U.S. Court of Appeals for the District of Columbia initially ruled that Norris lacked standing to sue because the FCC's letter requiring him to provide airtime to Cook was not an appealable order.[69] The FCC petitioned for an

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[61] Cook, *supra* note 59, at 524–25.

[62] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 371–72 n.2 (1969); *see also* FRIENDLY, *supra* note 53, at 5.

[63] Billings Broad. Co., 40 F.C.C. 518, 520 (1962); FRIENDLY, *supra* note 53, at 35.

[64] FRIENDLY, *supra* note 53, at 10, 42. The help of the DNC also helps explain how Cook was able to identify WGCB as one of the more than 200 radio stations that had aired the offending broadcast given that at the time of the broadcast Cook lived in Interlaken, New Jersey—well outside of WGBC's broadcast range. *Id.* at 10, 42. Cook claimed he simply sought the advice of his local attorney. *Id.* at 42.

[65] FRIENDLY, *supra* note 53, at 4, 44. WGBC was selling fifteen minutes of airtime for $7.50; Cook could have purchased two minutes for $1.00. *Id.* at 5.

[66] Letter from the FCC to John M. Norris (Oct. 6, 1965), *in* 1 F.C.C.2d 934 (1965).

[67] FRIENDLY, *supra* note 53, at 46–47, 49.

[68] *Id.* at 48.

[69] Red Lion Broad. Co. v. FCC, 381 F.2d 908, 910 (D.C. Cir. 1967).

en banc review, which was granted.[70] The full court vacated the three-judge panel's order and delivered the knock-out punch in favor of the FCC by upholding the Fairness Doctrine and the personal attack rule.[71] Undaunted, Norris petitioned for certiorari, which the Supreme Court promptly granted.[72]

Flush from victory, the FCC issued a Notice of Proposed Rulemaking to formalize the personal attack rule.[73] Realizing that their worst nightmare—a far-right broadcaster in the high court challenging the Fairness Doctrine on weak facts—was becoming reality and could lead to a dramatic defeat, the major broadcasters moved quickly.[74] The Radio Television News Directors Association filed suit at approximately noon on July 27, 1967, in the U.S. Court of Appeals for the Seventh Circuit, challenging the Fairness Doctrine.[75] CBS filed a similar lawsuit a few hours later in the U.S. Court of Appeals for the Second Circuit.[76] NBC also filed in the Second Circuit four days later.[77] Caught off guard, the FCC moved with speed not normally associated with the glacial pace of a regulatory agency and amended its proposed rules a mere five days after NBC filed suit to exempt "bona fide newscast[s] or on-the-spot coverage of a bona fide news event" from its proposed personal attack rules.[78]

The U.S. Department of Justice still had concerns with the FCC's proposal,[79] and the Seventh Circuit, where the three suits had been transferred and consolidated, allowed the FCC to amend its regulations a second time to exempt "bona fide news interview[s] and news commentary or analysis in a bona fide newscast."[80] The Seventh Circuit

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[70] *Id.* at 910.

[71] *Id.* at 910, 930.

[72] Red Lion Broad. Co. v. FCC, 389 U.S. 968 (1967).

[73] Notice of Proposed Rulemaking, 3 F.C.C.2d 991 (1966), *adopted in* Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to a Political Candidate, 8 F.C.C.2d 721, 721, 727 (1967).

[74] FRIENDLY, *supra* note 53, at 50.

[75] Radio Television News Dirs. Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968); FRIENDLY, *supra* note 53, at 53.

[76] FRIENDLY, *supra* note 53, at 53.

[77] *Id.*

[78] Amendment of Part 73 of the Rule to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to a Political Candidate, 9 F.C.C.2d 539, 539 (1967). An additional problem proponents of the reinstatement of the Fairness Doctrine face is that it is by no means certain what constitutes a "bona fide newscast or on-the-spot coverage of a bona fide news event" today. Would a blog, a Facebook status update, a tweet, or a student newspaper count? If so, which blogs, status updates, tweets, or students newspapers?

[79] FRIENDLY, *supra* note 53, at 54.

[80] *Radio Television*, 400 F.2d at 1008–09 (citing Amendment of Part 73 of the Rules Relating to the Procedures in the Event of a Personal Attack, 12 F.C.C.2d 250, 250, 252

invalidated the FCC's personal attack regulations as unconstitutional under the First Amendment.[81] The Supreme Court granted certiorari to the Seventh Circuit decision and consolidated the suit with Norris's to decide the constitutionality of the personal attack rule and the Fairness Doctrine in light of the circuit split.[82]

4. *Red Lion*'s Rationale

The broadcasters' worst fears were realized when, in a sweeping opinion, the Court concluded that the Fairness Doctrine and the personal attack rule were not merely constitutional but "enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment."[83] The FCC had defended the Fairness Doctrine on the grounds that it was aimed at ensuring WGCB met its license requirement that obligated it to operate in the public interest.[84] The Supreme Court noted that Congress had given the FCC the statutory authority to make rules and regulations for broadcast radio insofar as "'public convenience, interest, or necessity requires.'"[85] The FCC was explicitly required to take into account the "public interest" when making broadcast licensing decisions, including the renewal of licenses.[86] Given its previous expansive interpretation of public interest, the Court concluded that the Fairness Doctrine was a critical component of the public interest standard.[87] In a footnote, the Court noted that the FCC

(1968)). The definition of "bona fide news interviews" and "commentary or analysis in the course of bona fide newscasts" would likewise be difficult to define in a principled way. Would a popular blogger interviewing a politician be considered a "bona fide news interview?" Should it?

[81] *Id.* at 1021. Shortly after the *Red Lion* litigation began, the FCC issued a Notice of Proposed Rulemaking to formalize the obligations of broadcasters in cases of personal attacks. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 373 (1969) (citing Personal Attacks; Political Editorials: Notice of Proposed Rulemaking, 31 Fed. Reg. 5710 (April 13, 1966)). The FCC adopted the language without substantial changes. 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1968).

[82] United States v. Radio Television News Dirs. Ass'n, 393 U.S. 1014 (1969).

[83] *Red Lion*, 395 U.S. at 375.

[84] *Id.* at 386; *see also* 47 U.S.C. § 309 (a), (h) (2006) (codifying the standard by which station licenses were and are currently issued, the standard with which the FCC argued it complied).

[85] *Red Lion*, 395 U.S. at 379 (quoting 47 U.S.C. § 303, (r) (1964)). The Supreme Court also noted that "Senator Dill expressed the view that the Federal Radio Commission had the power to make regulations requiring a licensee to afford an opportunity for presentation of the other side on 'public questions'" in a colloquy with Commissioner Robinson. *Id.* at 379 n.7 (quoting *Hearings Before the S. Comm. on Interstate Commerce on S. 6*, 71st Cong. 1616 (1930) (statement of Sen. Clarence Dill, Chairman, S. Comm. on Interstate Commerce)).

[86] *Id.* at 379–80 (citing 47 U.S.C. §§ 307, 309(a) (1964)).

[87] *Id.* at 380–81; *accord* FCC v. RCA Commc'ns, Inc., 346 U.S. 86, 90 (1953); Nat'l Broad. Co. v. United States, 319 U.S. 190, 219 (1943); FCC v. Pottsville Broad. Co., 309

was proscribed from censoring radio communications,[88] essentially holding that enforcing the public interest standard did not constitute censorship in violation of the First Amendment, an outcome it had previously endorsed.[89]

The Supreme Court next turned its attention to WGCB's argument for invalidating the fairness doctrine on First Amendment grounds.[90] Due to the reach of "new media" like broadcast radio, the Court held that First Amendment standards that differed from those applicable to traditional print media were justified.[91] It analogized broadcast radio to the user of a sound truck who was not permitted to "snuff out the free speech of others."[92] It also accepted the view that because a limited number of broadcasting frequencies were reserved for public use, the FCC should be permitted to stop a licensee from monopolizing a radio frequency to solely serve its own narrow interest.[93] The Court also countenanced holding licensees as proxies or fiduciaries who are required to present views representative of their communities because certain views would not otherwise be aired.[94] Under this public trust doctrine, "[i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount."[95] Justice Brennan, who joined the Court's opinion, had previously advocated the belief that while a licensee's speech was protected, the manner in which he chose to

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U.S. 134, 138 (1940); Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933).

88 *Red Lion*, 395 U.S. at 382 n.12 (citing 47 U.S.C. § 326 (1964)).

89 *Nat'l Broad.*, 319 U.S. at 227 ("The standard [Congress] provided for the licensing of stations was the 'public interest, convenience, or necessity.' Denial of a station license on that ground, if valid under the [Federal Radio] Act, is not a denial of free speech."); *see also* KFKB Broad. Ass'n v. Fed. Radio Comm'n, 47 F.2d 670, 672 (D.C. Cir. 1931) (holding that the nonrenewal of a radio station's license by the FRC on public interest grounds was not censorship).

90 *Red Lion*, 395 U.S. at 386. The Supreme Court had long held that the First Amendment applied to broadcasters. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

91 *Red Lion*, 395 U.S. at 386 (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

92 *Id.* at 387 (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)).

93 *Id.* at 389; *see also* Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 708–10, 713–14 (1964) (discussing the Fairness Doctrine as an example of the public interest requirement as well as the rationale for holding the Doctrine compatible with the First Amendment).

94 *Red Lion*, 395 U.S. at 389, 394.

95 *Id.* at 390; *accord* FCC v. Allentown Broad. Corp., 349 U.S. 358, 362 (1955) ("Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece."); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940) ("Plainly it is not the purpose of the [Communications] Act [of 1934] to protect a licensee against competition but to protect the public.").

exercise it might fall beyond the scope of the First Amendment's protection.[96]

In *Red Lion*, the Court also raised the specter of a few licensees acting as "private censor[s]" by airing only views on public issues, people, or candidates for public office with which they agreed to the exclusion of every other viewpoint.[97] It agreed with commentators who argued that the Fairness Doctrine is constitutional because it expands public access to information concerning controversial issues, as opposed to government regulation, which deprives the public of information.[98]

The Court rejected the view that the constitutionality of a government policy like the Fairness Doctrine turns on whether the policy has the purpose or effect of leading to the dissemination of diverse viewpoints.[99] Relying on long-standing administrative practice and its deferential prior decisions, the Court approvingly accepted the "congressional desires 'to maintain . . . a grip on the dynamic aspects of radio transmission.'"[100] The Court also brushed aside WGCB's concerns of the Fairness Doctrine's vagueness and accused the broadcaster of "embellish[ing] [its] First Amendment arguments."[101]

The Supreme Court rejected the notion that the scarcity of broadcast spectrum was no longer compelling due to technological advances like ultra high frequency television transmission, declaring that scarcity is "by no means a thing of the past."[102] The Court also dismissed concerns that the Fairness Doctrine would lead to self-censorship by broadcasters in their coverage of controversial public issues to avoid having to air opposing viewpoints for free.[103] At its core, the Court viewed *Red Lion* as concerning "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas

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[96] William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 5 (1965); *accord* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1666–67 (1967) [hereinafter Barron, *Access to the Press*] (arguing for a right of access to the press under the First Amendment to "produce meaningful expression despite the present or potential repressive effects of the mass media."). Justice Brennan presented his paper at Brown University on April 14, 1965, as the Alexander Meiklejohn Lecture. Brennan, *supra*, at 1.

[97] *Red Lion*, 395 U.S. at 392, 394.

[98] Barrow, *supra* note 35, at 509; *accord* Barron, *Access to the Press*, *supra* note 96, at 1669 (arguing that the media should be considered a state actor and, therefore, the government restriction is justified when one restrains expression by not airing alternative views).

[99] *See Red Lion*, 395 U.S. at 395–96.

[100] *Id.* at 394–95 (alteration in original) (quoting FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940)).

[101] *Id.* at 395.

[102] *Id.* at 396, 398.

[103] *Id.* at 392–93. See *infra* Part III for a discussion of why the Court's assertion is questionable.

and experiences."[104] But the Court agreed that if the Fairness Doctrine proved to reduce rather than enhance the quantity and quality of coverage of controversial issues of public importance, it would be a "serious matter" meriting reconsideration of the Fairness Doctrine's constitutionality.[105]

As for Norris, he complied with the Supreme Court's decision and offered Cook free reply time.[106] Cook claimed he never knew his complaint to the FCC had resulted in a Supreme Court case and declined the offer of free time in light of the more than four and a half years that had passed since the date of the original broadcast attacking him.[107] Although *Red Lion* ended with more of a whimper than a roar, it became the definitive Supreme Court decision on the Fairness Doctrine—"a constitutional decision of the first order."[108]

II. 1949–1987: THE FAIRNESS DOCTRINE'S "CHILLING EFFECTS"

A. The 1985 Fairness Report

1. Evidence from Broadcasters

In 1985, the FCC studied the effects of the Fairness Doctrine and issued an extensive report that provided a wealth of data useful in an assessment of whether the "chilling effect" on free expression the Supreme Court had dismissed in *Red Lion* was occurring.[109] Over one hundred individuals, interest groups, broadcasters, corporations, and religious groups submitted formal comments to the FCC.[110] The Tribune Broadcasting Company stated that licensees "are conscious of the probability that coverage of a highly controversial issue will trigger an

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[104] *Id.* at 390.

[105] *Id.* at 393. The Supreme Court's end-justifies-the-means analysis is highly suspect. The Court is obligated to uphold the First Amendment's guarantee of free speech (or, for that matter, any other provision of the Constitution) regardless of *any* discernible benefit. U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."); *accord* 28 U.S.C. § 453 (2006) (prescribing the oath U.S. judges or justices must take); Adamson v. Comm'r, 745 F.2d 541, 546 (9th Cir. 1984) ("Federal courts cannot countenance deliberate violations of basic constitutional rights. To do so would violate our judicial oath to uphold the Constitution of the United States." (citing 28 U.S.C. § 453)).

[106] FRIENDLY, *supra* note 53, at 74.

[107] *Id.* at 74–76.

[108] Syracuse Peace Council v. FCC, 867 F.2d 654, 674 (D.C. Cir. 1989); *accord* Handling of Pub. Issues Under the Fairness Doctrine, 48 F.C.C.2d 1, 4 (1974) (dubbing *Red Lion* a "landmark decision").

[109] *See* Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 145, 145 (1985).

[110] *See id.* at 248–51.

avalanche of protests" and lead to demands for free airtime.[111]

Even when a licensee ultimately prevailed, it seemed like a Pyrrhic victory.[112] A Spokane, Washington television station, KREM-TV, spent over $20,000 defending a single Fairness Doctrine complaint regarding its coverage of a bond issue following a four-day field investigation that dragged into a twenty-month administrative process and ultimately consumed over 480 hours of KREM's time.[113] The $20,000 KREM-TV spent defending a single Fairness Doctrine complaint is considerable given that all three television stations in Spokane reported a combined total profit of only $494,000 in 1972.[114] Unfortunately, KREM-TV's situation was by no means unique.

NBC spent approximately $100,000 over a four-year period in litigation and administrative proceedings to defend itself against a Fairness Doctrine complaint lodged against it because it aired an award-winning investigative documentary, *Pensions: The Broken Promise*.[115] The FCC agreed with Accuracy in the Media Inc., a conservative interest group, that NBC had failed to fulfill its Fairness Doctrine obligations by failing to adequately present the viewpoint that the private pension system was, by and large, adequately funded and thus required no remedial legislation.[116] The U.S. Court of Appeals for the District of Columbia initially reversed the decision and ultimately dismissed the complaint on mootness grounds.[117] Though the broadcasters eventually

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[111] *Id.* at 164 (internal quotation marks omitted).

[112] *Id.* at 164–65; *see also To Provide That the Federal Communications Commission Shall Not Regulate the Content of Certain Communications: Hearing on the Freedom of Expression Act of 1983 Before the S. Comm. on Commerce, Science and Transportation*, 98th Cong. 228 (1984) (testimony of Eugene W. Wilkin) [hereinafter *1983 Hearings*] (lamenting the cost of settling conflicts with the FCC).

[113] *Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d at 165 & nn.81–82 (citing Complaint by Sherwyn M. Heckt, 40 F.C.C.2d 1150, 1150–51, 1153 (1973)). According to the Federal Reserve Bank of Minneapolis's Inflation Calculator, $20,000 spent on goods or services in 1973 is equivalent to $98,018.02 in 2010 dollars. Fed. Reserve Bank of Minneapolis, http://www.minneapolisfed.org/ (last visited Apr. 19, 2010).

[114] *Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d at 165–66.

[115] *Id.* at 166. NBC's documentary won a Peabody Award, a Christopher Award, a National Headliner Award, a Merit Award of the American Bar Association, and was nominated for an Emmy Award. Nat'l Broad. Co. v. FCC, 516 F.2d 1101, 1106 n.1 (D.C. Cir. 1974). Of course, even an award-winning television or radio broadcast can be very one-sided and such an award would not, in and of itself, insulate the broadcast from the Fairness Doctrine's requirements.

[116] Complaint by Accuracy in Media, Inc., 40 F.C.C.2d 958, 958, 967 (1973), *aff'd* Complaint of Accuracy in Media, Inc. Against Nat'l Broad. Co., 44 F.C.C.2d 1027, 1044 (1973).

[117] *Nat'l Broad.*, 516 F.2d at 1106, 1180. The Employee Retirement Income Security Act of 1974 (ERISA) was passed by Congress and addressed the concerns mentioned in *Pensions: The Broken Promise*. *See* Employee Retirement Income Security Act of 1974, Pub.

prevailed, the Supreme Court has recognized that financial considerations "may be markedly more inhibiting than the fear of prosecution under a criminal statute," thus acting as a powerful restraint on the freedom of speech.[118]

After WNBC-TV aired a mini-series, *Holocaust*, a person filed a Fairness Doctrine complaint demanding the station's license not be renewed on the grounds that the station had not provided a reasonable opportunity to present views "opposing the allegation [in *Holocaust*] of a German policy of Jewish extermination during World War II."[119] The complaint was pending for one year before the FCC eventually vindicated WNBC-TV.[120]

KHOM in Houma, Louisiana, experienced a similar ordeal.[121] It aired Ronald Reagan's radio commentary program for eighteen months without receiving a single complaint from hearers in its listening area.[122] One day KHOM received complaints from nine individuals and groups outside its listening area demanding free time.[123] Unsure of how to proceed, KHOM eventually decided to grant free airtime to satisfy the complainants on the advice of a Washington lawyer.[124]

2. Evidence of Corporate Influence

Corporate interests have also used the Fairness Doctrine to stifle discussion of public issues. Florida Power & Light ("FP&L") filed a Fairness Doctrine complaint against WINZ, a radio station in Miami, Florida, for participating in a petition drive with the Dade County Consumer Affairs Office to have the Florida Public Service Commission lower or deny a rate increase proposed by FP&L.[125] The FCC eventually vindicated WINZ, but the experience left the radio station's manager with the impression that FP&L had filed the complaint merely to create negative publicity for WINZ and not to enhance coverage of an important

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L. No. 93-406, §§ 1–2, 88 Stat. 829, 829, 832–33 (codified as amended at 29 U.S.C. § 1001 (2006)).

[118] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) (citing City of Chicago v. Tribune Co., 139 N.E. 86, 90 (Ill. 1923) ("A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions . . . .")).

[119] Application of Nat'l Broad. Co. for Renewal of License of Station WNBC-TV, 71 F.C.C.2d 250, 251 (1979) (internal quotation marks omitted).

[120] *Id.* at 250–52.

[121] *1983 Hearings*, *supra* note 112, at 125–26 (testimony of Raymond Saadi, Vice President & General Manager, KHOM).

[122] *Id.* at 125.

[123] *Id.*

[124] *Id.* at 125–26.

[125] Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 145, 168 (1985).

public issue.[126] Similarly, the manager of the Cornhusker Television Corporation stated that the sole reason he cancelled a series of public service announcements regarding inflation was out of fear of having to run additional announcements presenting an opposing viewpoint.[127] To avoid Fairness Doctrine complaints, the Meredith Corporation stated that one of its television stations had chosen not to editorialize on *any* matter of public importance.[128] This result was not atypical: a NAB survey conducted in 1982 found that fifty-five percent of responding stations had not editorialized at all during the preceding two years.[129]

3. Evidence from the Doctrine's Proponents

Ironically, the strongest evidence of the Fairness Doctrine's chilling effect on broadcasters came from a vocal proponent of the Doctrine, the Public Media Center ("PMC").[130] In comments submitted to the FCC, the PMC noted a response from one coalition to advertisements from the beverage industry opposing a beverage deposit ballot initiative included writing a letter to all five hundred California broadcasters demanding double the amount of free airtime to counter the beverage industry's advertisements.[131] The PMC candidly admitted that "the coalition urged broadcasters to refuse to sell airtime and therefore avoid a fairness situation at all."[132] The tactics succeeded: less than one-third of the stations sold advertising time to the beverage industry coalition.[133] The Glass Packaging Institute confirmed that its members had difficulty purchasing airtime to present their views on ballot initiatives because the stations it approached either refused to sell time or demanded inflated advertising rates to cover the costs of the free airtime requests opponents would likely demand.[134] Similarly, the PMC recounted how an anti-smoking group successfully prevented the tobacco industry from buying airtime on ten Miami radio stations by preemptively mailing letters to every local broadcast station, mentioning a pending vote and

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[126] *Id.* (citing *1983 Hearings*, *supra* note 112, at 129 (testimony of Stan Cohen, General Manager, WINZ-AM)).

[127] *Id.* at 172–73.

[128] *Id.* at 174; *see also* Maier v. FCC, 735 F.2d 220, 234 n.19 (7th Cir. 1984) (upholding the refusal of WTMJ-TV to sell airtime to Public Employees' Union Local No. 61 because the station's policy stated that "[t]ime is not sold for the discussion of controversial issues" (internal quotation marks omitted)).

[129] *Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d at 174.

[130] *Id.* at 176.

[131] *Id.* at 176–77.

[132] *Id.* at 177 (internal quotation marks omitted).

[133] *Id.*

[134] *Id.* at 175–76.

asking to be contacted once the tobacco industry bought airtime.[135]

One of the most disturbing examples of Fairness Doctrine abuse occurred when COND, an anti-nuclear coalition, notified broadcasters it would file a Petition to Deny License Renewal if its Fairness Doctrine concerns were not resolved.[136] COND ultimately prevailed upon the broadcasters to allow it to run specific anti-nuclear advertising spots that it had produced.[137] The PMC candidly admitted that "[t]he implied threat of a license renewal challenge increased the stations' desire for a negotiated settlement."[138]

In the case of WXUR and WXUR-FM, the FCC refused to renew their licenses to broadcast due to Fairness Doctrine and personal attack violations after a four-year process.[139] This result was not surprising given the FCC's assertion that "adherence to the [F]airness [D]octrine is a *sine qua non* of every licensee."[140]

Courts recognized the tremendous potency of the sanction of license nonrenewal that the FCC was increasingly being pressured to employ.[141] Representative Patsy Mink (D-HI) demanded that WHAR, a radio station in Clarksburg, West Virginia, air an eleven-minute broadcast she had produced discussing anti-strip mining legislation she was sponsoring in Congress in order to counter the views of a pro strip-mining U.S. Chamber of Commerce spot she alleged WHAR had aired.[142] The station denied it had played the Chamber's programming,[143] claimed

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[135] *Id.* at 177.

[136] *Id.* at 162–63 n.73.

[137] *Id.* at 163 n.73.

[138] *Id.* (internal quotation marks omitted).

[139] Brandywine-Main Line Radio, Inc., 24 F.C.C.2d 18, 34 (1970); *accord* Comment, *The Fairness Doctrine and Broadcast License Renewals:* Brandywine-Main Line Radio, Inc. 71 COLUM. L. REV. 452, 460 (1971). For example, the FCC found that WXUR had asserted that "the Flushing Branch of the Women's International League for Peace and Freedom was a commie group." *Brandywine-Main Line Radio*, 24 F.C.C.2d at 26 (internal quotation marks omitted).

[140] Office of Commc'n of United Church of Christ v. FCC, 359 F.2d 994, 1009 (D.C. Cir. 1966); *accord* Office of Commc'n of United Church of Christ v. FCC, 425 F.2d 543, 548 (D.C. Cir. 1969). The FCC also adopted this position. Complaints of Committee for the Fair Broad. of Controversial Issues, 25 F.C.C.2d 283, 292 (1970) (citing *United Church of Christ*, 425 F.2d at 548; *Brandywine-Main Line Radio*, 24 F.C.C.2d at 21–22).

[141] Bus. Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 666 (D.C. Cir. 1971) (McGowan, J., dissenting), *rev'd sub nom.* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); *see also* KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 92 (5th ed. 2007) ("The 'death sentence' for broadcasters is license revocation.").

[142] Complaint of Representative Patsy Mink, 59 F.C.C.2d 987, 987 (1976).

[143] *Id.* at 989. The proceedings do not include a finding or otherwise indicate that WHAR aired any of the Chamber's programming. Of course, this does not necessarily mean that WHAR did not air the Chamber's spots. It may simply mean that the complainants

it had met its Fairness Doctrine obligations, and refused to air the complainants' tape, but the FCC still determined that WHAR had failed to adequately cover the issue of strip mining.[144]

B. Bipartisan Political Meddling

1. Democratic Interference

Politicians have not remained immune from the temptation to silence critics and amplify the voices of those who support them.[145] President Kennedy was concerned that opposition from radio broadcasters would hinder Senate ratification of the Nuclear Test Ban Treaty of 1963.[146] At Kennedy's direction, his political allies formed the Citizens' Committee for a Nuclear Test Ban Treaty and sent letters to stations demanding free reply time whenever broadcasters like Hargis denounced the treaty.[147] Assistant Secretary of Commerce Bill Ruder explained, "Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue."[148] Wayne Phillips candidly wrote in a report to the DNC, "Even more important than the free radio time was the effectiveness of this operation in inhibiting the political activity of these right-wing broadcasts . . . ."[149]

Arthur Larson, a prominent liberal Eisenhower Republican recruited by the DNC, headed a bipartisan front group, the National Council for Civic Responsibility ("NCCR"), to attack broadcasters hostile to Democrats.[150] Speaking at a news conference in New York's Overseas Press Club, Larson insisted that NCCR's "formation had nothing to do with the [p]residential campaign or with the right-wing views of the Republican candidate, Senator Barry Goldwater."[151]

2. Republican Machinations

Democratic politicians were not the only ones who succumbed to the siren song of effectively silencing their political foes and attempting to

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were unable to obtain a proof of the radio spots or simply forgot to include them in the administrative proceedings before the FCC.

[144] *Id.* at 987, 989, 997.

[145] FRIENDLY, *supra* note 53, at 32–35, 38–42.

[146] *Id.* at 34.

[147] *Id.*

[148] *Id.* at 39 (internal quotation marks omitted).

[149] *Id.* at 41 (internal quotation marks omitted).

[150] *Id.* at 39.

[151] *Anti-Birch Group Presses an 'Exposé'*, N.Y. TIMES, Oct. 18, 1964, at 78.

amplify allies' voices.[152] In a September 15, 1972, meeting in the Oval Office, President Nixon, his Chief of Staff, H.R. Haldeman, and his White House Counsel, John Dean, discussed how to silence the *Washington Post*:

> PRESIDENT: The main thing is the [*Washington*] *Post* is going to have damnable, damnable problems out of this one. They have a television station . . . and they're going to have to get it[s license] renewed.
> HALDEMAN: They've got a radio station, too.
> PRESIDENT: Does that come up [for renewal], too? The point is, when does it come up?
> DEAN: I don't know. But the practice of non-licensees filing on top of licensees has certainly gotten more . . . active in . . . this area.
> PRESIDENT: And it's going to be God damn active here.
> DEAN: (Laughter) (Silence)
> PRESIDENT: Well, the game has to be played awfully rough.[153]

And play rough Nixon did. Nixon was obsessed with press coverage from the outset of his administration and requested that aides contact newscasters, networks, and magazines to take "specific action relating to what could be considered unfair news coverage."[154] J.S. Magruder, deputy director of White House communications, suggested to Haldeman that when Dean Burch was confirmed as FCC Commissioner, he should "[b]egin an official monitoring system through the FCC" to document cases of unfavorable coverage and then "make official complaints from the FCC."[155] Nixon's allies outside of Washington also harassed broadcasters; the head of the finance chairman for the Florida Nixon Re-election Committee challenged WJXT, a radio station in Jacksonville, and another Nixon confidante challenged WPLG in Miami.[156]

In a memorandum to Haldeman labeled "FYI—Eyes Only, Please," Chuck Colson, special counsel to Nixon, recounted a meeting he had with the network executives of ABC, CBS, and NBC.[157] Colson wrote that

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[152] See WILLIAM EARL PORTER, ASSAULT ON THE MEDIA: THE NIXON YEARS (1976) for an excellent compilation of reprints of most of the significant documents detailing Nixon's assault on the press.

[153] JOSEPH E. SPEAR, THE PRESIDENT AND THE PRESS: THE NIXON LEGACY 133 (1984) (alterations in original) (quoting Thomas Whiteside, *Annals of Television*, NEW YORKER, Mar. 17, 1975, at 62).

[154] Memorandum from J. S. Magruder to H. R. Haldeman (Oct. 17, 1969), *in* PORTER, *supra* note 152, at 244 (listing twenty-one instances in a thirty-two day period that Nixon asked aides to take "specific action").

[155] *Id.* at 244–45.

[156] RODGER STREITMATTER, MIGHTIER THAN THE SWORD: HOW THE NEWS MEDIA HAVE SHAPED AMERICAN HISTORY 220 (2d ed. 2008); Editorial, *A Bill of Complaint*, BOSTON GLOBE, Jan. 21, 1973, at A6.

[157] Memorandum from Charles W. Colson to H. R. Haldeman (Sept. 25, 1970), *in* PORTER, *supra* note 152, at 274.

"[t]he networks are terribly nervous over the uncertain state of the law, i.e., the recent FCC decisions" and were "startled . . . from the way in which we have so thoroughly monitored their coverage."[158] He went on to note that two of the three television network executives (ABC and CBS) agreed that the Fairness Doctrine did not apply to Nixon when he spoke as President and that all three executives were "damned nervous and scared and we should continue to take a very tough line, face to face, and in other ways."[159] Most ominously, Colson wrote that he would "pursue with Dean Burch the possibility of an interpretive ruling by the FCC on the role of the President when he uses TV."[160]

In light of the persuasive evidence of politically-motivated meddling spanning multiple administrations, Justice Douglas remarked that the Fairness Doctrine "puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends."[161]

3. Political Appointees as FCC Commissioners

Even if presidents and national political parties could resist the temptation to directly misuse the FCC for partisan purposes—and history is not encouraging in this regard—the fact remains that the five FCC Commissioners are political appointees.[162] The *Los Angeles Times* compared current FCC Commissioner Michael J. Copps to a revivalist preacher and quoted him as saying that the Republican-led FCC was so feckless that "unless you're a child abuser or a wife beater," getting a television station's license renewed was "a slam-dunk."[163] DSLReports.com, a consumer-oriented broadband online community,[164] blasted former telecommunications lobbyist and current FCC Commissioner Robert McDowell for arguing in a *Washington Post* opinion editorial that "'[t]he Internet might grind to a halt'" if the FCC chose regulation over collaborative, private-sector group decision making.[165]

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[158] *Id.* at 274–75.

[159] *Id.* at 275, 277.

[160] *Id.* at 277.

[161] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 154 (1973) (Douglas, J., concurring).

[162] 47 U.S.C. § 154(a) (2006).

[163] Jim Puzzanghera, *Copps, a Liberal Voice on the FCC, Knows How to Get His Message Out*, L.A. TIMES, Nov. 5, 2007, at C1 (internal quotation marks omitted).

[164] DSLReports.com, About Us, http://www.dslreports.com/about (last visited Apr. 19, 2010).

[165] Karl Bode, *FCC's McDowell: The Internet Will Stop if you Regulate Comcast*, DSLREPORTS.COM, July 28, 2008, http://www.dslreports.com/shownews/96484 (quoting Robert M. McDowell, *Who Should Solve This Internet Crisis?*, WASH. POST, July 28, 2008, at A17).

C. Responses of 1985 Fairness Report Critics

Despite numerous examples of individuals, interest groups, politicians, and corporations of all political persuasions attempting to use the fairness doctrine to suppress otherwise lawful speech, several groups, including the American Civil Liberties Union ("ACLU"), contended that the testimony of broadcasters used in the 1985 Fairness Hearings consisted of "self-serving" statements of personal beliefs and was therefore of little probative value—much less proof of a chilling effect.[166] Far from being self-serving, the broadcasters' statements could be viewed as statements against interest given the Court's warning in *Red Lion* that the FCC had the power to sanction broadcasters for failing to adequately and fairly present issues of public importance, especially those that admit they are afraid to air or editorialize on *any* issue of public importance.[167]

As a practical matter, any statement by a licensee or other stakeholder before the FCC could be viewed as self-serving, including the PMC's or the ACLU's statements, and viewing all stakeholders' comments as lacking probative value would make it virtually impossible for the FCC to decide any issues raised before it.[168] Proponents have no qualms pointing to the FCC's conclusion in the 1974 Fairness Report that it saw "no credible evidence that our policies have in fact had 'the net effect of reducing rather than enhancing the volume and quality of

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[166] Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 142, 180 (1985). The ACLU's position on the Fairness Doctrine seems to have shifted from strongly in favor to taking no official position on the issue. In a 1994 interview, then-ACLU President Nadine Strossen stated,

> We have historically supported the Fairness Doctrine, although I've dissented from that position, as have other prominent people within the ACLU. Our basis for supporting it was so narrow and so historically contingent that I really have my doubts as to whether even the Fairness Doctrine itself would be reaffirmed if the ACLU National Board took another look at it. It was based on the notions of spectrum scarcity and of government having conveyed a public trust, if you will, to the broadcasters. Both facts have changed substantially.

Cathy Young, *Life, Liberty, and the ACLU: An Interview with Nadine Strossen*, REASON, Oct. 1994, at 32, 35. The ACLU's current position remains similarly nuanced:

> There continues to be discussion within [the] ACLU about the relevant circumstances that served as the basis for our support of the Fairness Doctrine in years gone by. . . . We didn't take an active position on the recent efforts to bar reinstatement of the Fairness Doctrine. . . . As a practical matter, the doctrine was abandoned during the Reagan years and the effort to bar its reinstatement seemed truly superfluous, particularly in light of the current [Obama] [A]dministration's stated intention not to revive the doctrine.

E-mail from Michael W. Macleod-Ball, Chief Legislative & Pol'y Counsel, Am. Civil Liberties Union, to Dominic E. Markwordt (Mar. 18, 2009, 13:56 EST) (on file with author).

[167] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 393 (1969).

[168] *Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d at 181.

coverage.'"[169] The FCC's bare, conclusory assertion in its 1974 Fairness Report is devoid of any empirical or even anecdotal data and can likewise be viewed as self-serving.[170]

Advocates of the Fairness Doctrine also claimed broadcasters simply misunderstood their obligations, and that this led to the Doctrine's allegedly inhibiting effects.[171] Determining whether a chilling effect did occur is difficult; one commentator even believes it is "almost impossible to determine."[172] Even if this assertion is correct, the Supreme Court has consistently recognized that when a person is unsure of what is lawful because standards are uncertain, citizens will "'steer far wide[] of the unlawful zone'" to avoid potentially violating the law.[173]

Even the FCC, charged with administering the Fairness Doctrine, admitted that one of the most difficult decisions to make was the initial determination of whether a licensee had raised the specific issue about which someone had complained.[174] Courts also found that the ambiguity inherent in determining when an issue had been raised for purposes of the Fairness Doctrine chilled speech, leading to a lessening of the free flow of information.[175] At least one court was "especially hesitant" in deciding when a public issue became "controversial" and deferred to the FCC, thus making it unlikely licensees would prevail in lawsuits alleging violations of their First Amendment rights.[176]

Proponents of the Fairness Doctrine claimed that the relatively small number of complaints the FCC forwarded to broadcasters was

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[169] Handling of Pub. Issues Under the Fairness Doctrine, 48 F.C.C.2d 1, 8 (1974) (quoting *Red Lion*, 395 U.S. at 393). The 1974 Fairness Report was the FCC's first comprehensive inquiry into the effectiveness of the Fairness Doctrine after the *Red Lion* decision. *Id.* at 1.

[170] *Id.* at 8 ("In evaluating the possible inhibitory effect of the [F]airness [D]octrine, it is appropriate to consider the *specifics of the doctrine* and the *procedures employed* by the Commission in implementing it." (emphasis added)).

[171] *Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d at 167.

[172] Roland F.L. Hall, *The Fairness Doctrine and the First Amendment: Phoenix Rising*, 45 MERCER L. REV. 705, 736 (1994).

[173] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

[174] *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d at 12; *see, e.g.*, *Who Decides Fairness?*, TIME, Feb. 4, 1974, at 59, 59 (reporting that NBC contended its documentary, *Pensions: A Broken Promise*, did not implicate the Fairness Doctrine "because the existence of some inadequate pensions—the program's subject—is a fact, not a controversial issue" (internal quotation marks omitted)); *see also* SIMMONS, *supra* note 37, at 146–88 (devoting an entire chapter to the difficulty of determining when an issue has been raised that implicates the Fairness Doctrine).

[175] Am. Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 458 (D.C. Cir. 1979) (Wright, C.J., concurring); Cmty.-Serv. Broad. of Mid-Am., Inc. v. FCC, 593 F.2d 1102, 1116 (D.C. Cir. 1978).

[176] Meredith Corp. v. FCC, 809 F.2d 863, 871 n.9 (D.C. Cir. 1987).

evidence that the Doctrine did not have a chilling effect on speech.[177] Cataloguing the number of complaints the FCC forwarded to broadcasters is the wrong metric by which to measure any chilling effect because the chilling effect is concerned with what action a licensee reasonably thinks the FCC might take, not with what action the FCC ultimately takes.[178] Thus, even if the FCC only intended to conduct a field investigation in response to a Fairness Doctrine complaint, if the broadcaster believes the FCC will refuse to deny his license and acts accordingly, a chilling effect has taken place. The chilling effect is premised on the notion that powerful sanctions, like license nonrenewal or long administrative proceedings—even if they eventually result in vindication for the broadcaster—are so distasteful to licensees that it is enough to change their overall behavior, even if only a relatively small number of complaints are forwarded to broadcasters.

One proponent of the Fairness Doctrine even claimed that responsible journalists should present opposing viewpoints on controversial issues and, therefore, only irresponsible broadcasters not acting in the public interest would be subject to a chilling effect.[179] The FCC's own admission that it did not "expect a broadcaster to cover each and every important issue which may arise in his community" best encapsulates the uncertainty and chilling effect broadcasters inevitably felt when attempting to decide whether to cover particular issues or risk having to give free airtime to complainants.[180]

Ultimately, the debate over whether the Fairness Doctrine chills broadcasters' speech is largely academic given the Supreme Court's observation that "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'"[181] The quote refers to newspapers, but editors decide on content, the depth and length of coverage, and perform the same function regardless of whether they work for a broadcaster or a newspaper publisher.[182] The Supreme Court concluded that any government regulation of a newspaper's editorial process is incompatible with the First Amendment.[183] Because the Court

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[177] Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 142, 185 (1985).

[178] *Cmty.-Serv. Broad. of Mid-Am.*, 593 F.2d at 1116.

[179] Mark A. Conrad, *The Demise of the Fairness Doctrine: A Blow for Citizen Access*, 41 FED. COMM. L.J. 161, 190 (1989) ("An administrative rule requiring broadcasters to exercise such judgment cannot serve to chill the speech of a broadcaster who is acting responsibly and in the public interest.").

[180] Handling of Pub. Issues Under the Fairness Doctrine, 48 F.C.C.2d 1, 10 (1974).

[181] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)). See *infra* notes 206–210 for a fuller discussion of *Tornillo*.

[182] *Tornillo*, 418 U.S. at 258 (discussing the function of newspaper editors).

[183] *Id.*

held that government-mandated access chills speech,[184] the question is not whether the Fairness Doctrine chills speech, but whether broadcasting is sufficiently different than the newspaper industry to justify the Doctrine's chilling effect. It is not.

III. THE FCC'S REPEAL AND SUBSEQUENT REINSTATEMENT EFFORTS

Despite the strong evidence indicating that the Fairness Doctrine chilled speech, the FCC deferred to Congress and the legislative process, which, in 1985, chose to maintain the status quo instead of abolishing the Doctrine.[185] The FCC continued to enforce the Fairness Doctrine leading to a court challenge in *Meredith Corp. v. FCC* in which a broadcaster contested the FCC's adverse Fairness Doctrine determination on freedom of speech grounds.[186] A panel of the U.S. Court of Appeals for the D.C. Circuit noted that the FCC's 1985 Fairness Report "eviscerate[d] the rationale" for the Doctrine and remanded the case to the FCC for it to consider the broadcaster's First Amendment arguments.[187]

On remand, the FCC, relying heavily on its 1985 Fairness Report, voted 4-0 to abolish the Fairness Doctrine.[188] The FCC decided that the Doctrine no longer served the public interest because it decreased coverage of controversial issues of public importance.[189] As such, the Doctrine was presumptively unconstitutional under *Red Lion's* framework.[190] In *Syracuse Peace Council v. F.C.C.*, a separate panel of the D.C. Circuit upheld the FCC's decision to administratively abolish the Fairness Doctrine, stating it was within the FCC's discretion to do so.[191] The D.C. Circuit declined to reach Meredith's First Amendment challenge to the Fairness Doctrine.[192] Judge Starr merely concurred in the judgment because he believed Meredith's constitutional claim should have been decided.[193] An outraged Congress immediately passed

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[184] *Id.* at 257 (quoting *N.Y. Times*, 376 U.S. at 279).

[185] Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d, 142, 142 (1985).

[186] 809 F.2d 863, 865 (D.C. Cir. 1987).

[187] *Id.* at 873–74.

[188] Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C.R. 5043, 5043 (1987). The FCC had the authority to administratively repeal the Fairness Doctrine if it no longer served the public interest because *Red Lion* did not mandate the Fairness Doctrine, but merely permitted it. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 393 (1969).

[189] *Complaint of Syracuse Peace Council*, 2 F.C.C.R. at 5043.

[190] *Id.*

[191] 867 F.2d 654, 669 (D.C. Cir. 1989).

[192] *Id.* at 657–58.

[193] *Id.* at 674 (Starr, J., concurring).

legislation mandating the Fairness Doctrine.[194] President Reagan vetoed the legislation.[195]

Politicians have periodically called for the Fairness Doctrine's reinstatement despite the 1985 Fairness Report's documentation of its chilling effect on speech. In 1989, reports surfaced that members of Congress supported the Fairness Doctrine because they were upset that radio talk show hosts were channeling opposition to a congressional pay raise.[196] In 1993, Representative Bill Hefner (D-N.C.), sponsor of House Resolution 1985, The Fairness in Broadcasting Act of 1993, issued a flyer stating, "TV and Radio talk shows [] often . . . make inflammatory and derogatory remarks about our public officials. THE FAIRNESS DOCTRINE IS URGENTLY NEEDED."[197] Senator Dianne Feinstein (D-CA) recently echoed this sentiment when she stated that "talk radio tends to be one-sided. It also tends to be dwelling in hyperbole. It's explosive. It pushes people to, I think, extreme views without a lot of information."[198] Rhetoric like this provided ample basis for detractors of the Fairness Doctrine to conclude that proponents merely desired to muzzle them regardless of statistical studies showing that the Doctrine chilled speech.[199] One need not be a cynic to believe that much of the desire for reinstating the Fairness Doctrine comes from what politicians perceive as an effective mechanism to silence critics. In any case, a rigorous statistical study published in 1997 confirmed the 1985 Fairness Report's conclusion and found a significant expansion in news, talk, and public affairs formats that coincided with the Doctrine's repeal in 1987.[200]

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[194] Fairness in Broadcasting Act of 1987, S. 742, 100th Cong. (1987). House Commerce Committee Chairman John Dingell called the FCC "lickspittles" and Ernest Hollings, Senate Commerce Committee Chairman, called the repeal "wrongheaded, misguided and illogical." Nicholas Johnson, *With Due Regard for the Opinion of Others*, CAL. LAW., Aug. 1988, at 53, 53, *available at* http://www.uiowa.edu/~cyberlaw/LRevArt/8CalL52.html.

[195] 133 CONG. REC. 16,989 (1987).

[196] *Hill Steamed over Radio's Tea Time*, BROADCASTING, Feb. 13, 1989, at 29, 30 ("House Telecommunications Subcommittee Chairman Ed Markey (D–Mass.), in a humorous vein, said it would be 'very easy for us to separate our deep bitterness about the media's treatment of the pay raise' when considering the [broadcast] industry's legislative agenda.").

[197] Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279, 301 (1997).

[198] *FOX News Sunday* (FOX News television broadcast June 24, 2007), *available at* http://www.foxnews.com/story/0,2933,286442,00.html (transcript of Senator Lott's and Senator Feinstein's television appearance).

[199] Hazlett & Sosa, *supra* note 197, at 301.

[200] *Id.* at 279. *But see* Project, *The Impact of the Deregulation of the Fairness Doctrine on the Broadcast Industry and on the Public*, 47 ADMIN. L. REV. 625, 633–36,

IV. FLAWED FIRST AMENDMENT JUSTIFICATIONS[201]

A. The Scarcity Rationale

1. Spectrum Scarcity

The Supreme Court in *Red Lion* recognized that the First Amendment applied to broadcasting, but held that broadcast radio and television possessed unique characteristics—spectrum scarcity—that justified a different First Amendment standard than the standard applied to traditional print media.[202] In the words of the Court in *Red Lion*, "Because of the scarcity of radio frequencies, the [g]overnment is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[203] That decision is in conflict with the general rule that content-based restrictions on speech are subject to strict scrutiny.[204] There is no doubt that the Fairness Doctrine is a content-based restriction on speech.[205]

Miami Herald Publishing Co. v. Tornillo, decided just five years after *Red Lion*, involved a Florida "right of reply" statute.[206] The Supreme Court unanimously held that a newspaper could not be forced

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640 (1995) [hereinafter Project] (arguing that the Fairness Doctrine did not greatly hamper broadcasters because the FCC investigated comparatively few broadcasters relative to the number of complaints it received). *See supra* Part II.C. for an explanation of why this reasoning is unpersuasive.

[201] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

[202] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375–76, 386, 388–89 (1969); *accord* FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984) (reiterating the view that different First Amendment standards should be applied to broadcasting because its frequencies are a scarce resource (citing Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973))).

[203] *Red Lion*, 395 U.S. at 390.

[204] *See, e.g.*, Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 655 (1990); Boos v. Barry, 485 U.S. 312, 334 (1988) (plurality opinion); *see also* Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality opinion) (requiring that "a facially content-based restriction on political speech in a public forum . . . be subjected to exacting scrutiny"); Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1987) (same); Cornelius v. NAACP, 473 U.S. 788, 800 (1985) (same); United States v. Grace, 461 U.S. 171, 177 (1983) (same); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (same). Justice Kennedy believes that content-based restrictions are per se invalid. Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("[C]ontent-based speech restrictions that do not fall within any traditional exception [for example, obscenity, defamation, child pornography, etc.] should be invalidated without inquiry into narrow tailoring or compelling government interests.").

[205] *See* Cass R. Sunstein, *Free Speech Now*, 50 U. CHI. L. REV. 255, 280 (1992) ("The restrictions of the [F]airness [D]octrine, or any similar alternative, are content-based.").

[206] 418 U.S. 241, 244 (1974). Commentators find it remarkable that the *Tornillo* opinion does not once reference *Red Lion* despite the fact that the Court essentially decided the same issue. *See, e.g.*, Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 4 (1976).

to run a free reply to an attack on a political candidate because such a content-based burden "intrud[es] into the function of editors."[207] The Court agreed that newspapers were not limited by technological obstacles like spectrum scarcity, but focused on the economic realities that restricted newspapers from simply adding pages to provide room for statutorily-mandated replies to attacks.[208] Theoretically, newsprint is virtually unlimited, but economic considerations do not make it feasible for publishers to profitably increase the size of a newspaper absent additional advertising revenue.[209] Even if newspapers faced no costs in complying with the compulsory access law, the Court held that at its core the First Amendment protects the exercise of editorial control and judgment over the contents of a newspaper.[210]

In *Red Lion*, the Court justified the FCC's regulations of broadcasters' content through the Fairness Doctrine by holding that because more people wanted to broadcast than there were frequencies on which to broadcast, the FCC could allocate licenses in a manner that maximized access to the scarce resource.[211] But it does not automatically follow that spectrum scarcity should give the FCC authority to regulate the content of otherwise lawful broadcast speech.[212] Congress has consistently provided by statute that broadcasters are not common carriers.[213] Subsequent Supreme Court opinions grappling with the underlying meaning of *Red Lion* focused on the desire to "preserve an uninhibited marketplace of ideas,"[214] and rejected the view that

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[207] *Tornillo*, 418 U.S. at 258.

[208] *Id.* at 256–57.

[209] *See* Kenneth A. Weiss, Note, *Constitutional Law—Freedom of the Press—Florida Statute Requiring Equal Space Reply to Be Printed by Any Newspaper Attacking Political Candidate Held Constitutional*, 48 TUL. L. REV. 433, 438 (1974).

[210] *Tornillo*, 418 U.S. at 258.

[211] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 391, 400–01 (1969); *accord* Handling of Pub. Issues Under the Fairness Doctrine, 48 F.C.C.2d 1, 4 n.4 (1974) (adopting the view that the Court in *Red Lion* relied on the "scarcity principle" in reaching its decision); Milda K. Hedblom, *Returning Fairness to the Broadcast Media*, 7 LAW & INEQ. 29, 40 (1988) (contending that only the scarcity viewpoint provided the rationale for the outcome in *Red Lion*). Although there is no doubt that the Fairness Doctrine is a content-based regulation, it should be noted that the FCC's licensing requirements are not per se controversial. Indeed, even critics of the Fairness Doctrine accept the FCC's role if it merely allocates and polices the spectrum but does not interfere with broadcasters' editorial decisions. *See* Charles D. Ferris & Terrence J. Leahy, *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, 38 CATH. U. L. REV. 299, 312 (1989).

[212] Syracuse Peace Council v. FCC, 867 F.2d 654, 683 (1989) (Starr, J., concurring); Ferris & Leahy, *supra* note 211, at 312. Nor does a licensing requirement *ipso facto* allow the government to justify less First Amendment protections for broadcasters. Bruce Fein, *First Class First Amendment Rights for Broadcasters*, 10 HARV. J.L. & PUB. POL'Y 81, 84 (1987).

[213] *See, e.g.*, 47 U.S.C. § 153(10) (2006).

[214] *Red Lion*, 395 U.S. at 390.

broadcasters' speech was state action and, therefore, that it could be regulated as such.[215] Nonetheless, the Court held that the "[FCC] was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the [Communications Act of 1934] nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees."[216]

The flaw in using spectrum scarcity as the determinative analytic factor to justify a lower level of First Amendment protection for broadcasting is that all economic goods, including newsprint, ink, printing presses, and delivery trucks, are scarce.[217] In the American economic system, a pricing mechanism is usually used when the demand for goods exceeds their supply.[218] Newspaper publishers, moreover, depend upon a government-run postal service, government-provided streets maintained by the government, and government-provided traffic and safety regulations to ensure they can deliver their products to customers.[219] During the Second World War and the post-war period, the government rationed newsprint.[220] This made entry into the newspaper business more difficult, thus protecting existing publishers.[221] It did not, however, lead to government content-regulation based on the scarcity rationale.[222]

The federal government even grants newspapers the opportunity to apply for limited antitrust immunity to form "joint operating agreements," allowing cooperative advertising, printing, circulation rates, and distribution schemes.[223] Both federal and state governments

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[215] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 121 (1973); *see also id.* at 140–41 (Stewart, J., concurring) (rejecting the state action rationale for government regulation of broadcasting).

[216] *Red Lion*, 395 U.S. at 395 (citing Nat'l Broad. Co. v. United States, 319 U.S. 190, 215–16 (1943)).

[217] Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986).

[218] R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959).

[219] *Telecomm. Research & Action Ctr.*, 801 F.2d at 509.

[220] *See* SUBCOMM. ON NEWSPRINT OF THE S. SELECT COMM. ON SMALL BUS., 82D CONG., SUPPLIES FOR A FREE PRESS: A PRELIMINARY REPORT ON NEWSPRINT 1–4 (Comm. Print 1951) (discussing newsprint scarcity throughout the history of the United States). Of course, newsprint is not inherently scarce, but this does not explain why even temporary scarcity would not justify content regulation, especially during wartime.

[221] *Id.* at 3.

[222] *See id.* at 17–19 (listing potential legislative remedies for the newsprint shortage problem—none of which include content-regulation).

[223] Newspaper Preservation Act of 1970 §§ 2, 3(2), 4–5, 15 U.S.C. §§ 1801, 1802(2), 1803–04 (2006). *See generally* Mark Fink, *The Newspaper Preservation Act of 1970: Help for the Needy or the Greedy*, 1990 DET. C.L. REV. 93 (discussing the negative effects of the Newspaper Preservation Act of 1970).

have histories of accommodating the printed media with special privileges such as reduced second-class postage rates.[224] Some states even protect newspaper publishers by making it a crime to steal a newspaper with the intent to prevent people from reading it.[225] Despite the many advantages the government grants newspaper publishers, no court has suggested that it is also acceptable for the government to regulate the content of newspapers.[226]

Commentators who argue that content regulation is permissible because broadcast frequencies are scarce and effective broadcasting requires government regulation concede that this principle would logically apply to newspapers as well.[227] The natural outgrowth of this view is that the government may employ "mild regulatory efforts" with respect to newspapers or any other expressive medium if the aim is to "promote quality and diversity."[228] Stated more generally, when the government regulates in a way that "might promote free speech, [that regulation] should not be treated as an abridge[]ment [of free speech] at all."[229]

Yet the Supreme Court took a very protective view of speech, stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[230] It endorsed this view despite recognizing that the primary purpose of the First Amendment is to provide for the dissemination of a wide range of views from "'diverse and antagonistic sources.'"[231] *Red Lion* represents a constitutional anomaly in free speech jurisprudence in that it allows the

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[224] Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 811 n.206 (1999).

[225] *E.g.*, MD. CODE ANN., CRIM. LAW § 7-106(b) (LexisNexis 2002) ("A person may not knowingly or willfully obtain or exert control that is unauthorized over newspapers with the intent to prevent another from reading the newspapers.").

[226] Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501, 509 (D.C. Cir. 1986).

[227] *E.g.*, Sunstein, *supra* note 205, at 267.

[228] *Id.* at 294.

[229] *Id.* at 267; *accord* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16–17 (Lawbook Exchange, Ltd. 2004) (1948) ("Legislation which abridges that freedom [of speech] is forbidden, but not legislation to enlarge and enrich it.").

[230] Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam); *accord* Roth v. U.S., 354 U.S. 476, 484 (1957). In *Buckley*, a campaign finance case, the Supreme Court permitted Congress to limit contributions to candidates for public office. *Buckley*, 424 U.S. at 58. But this was only because the Court viewed Congress's desire to "safeguard[] the integrity of the electoral process" as a "basic governmental interest." *Id.* One reads the *Red Lion* opinion in vain in an attempt to discern any clearly enunciated "basic governmental interest" that would justify a reduction in a broadcaster's First Amendment rights.

[231] *Buckley*, 424 U.S. at 49 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)).

government to indirectly suppress lawful speech by content regulation because the ends (allegedly, more diversity) justify the means (suppression of some otherwise-lawful speech).[232]

The FCC's "command-and-control spectrum allocation process[]" led to an inefficient use of spectrum, making the broadcast spectrum appear even more scarce than it actually is.[233] Even before *Red Lion*, the FCC had, on several occasions, declined to license a broadcaster because the FCC determined the licensee had not met the FCC's programming requirements or because allocating a license would harm the economic interests of existing broadcasting stations.[234] For instance, the FCC refused to grant a license to Suburban Broadcasters even though it was "legally, technically and financially qualified" and the *only* license applicant.[235] The FCC determined Suburban had not researched the community in which it wanted to broadcast.[236] It is difficult to fathom how a town that previously had no radio station could be worse off with a station, even if that station had not completed a demographic study of the town to prove an "earnest interest in serving a local community."[237]

Suboptimal use of a broadcasting spectrum is by no means a thing of the past; the Government Accountability Office ("GAO") recently found that "during a [four]-day period in New York City, only [thirteen] percent of spectrum between 30MHz and 2.9GHz was occupied at one time or another."[238] FCC policy typically has been more concerned with minimizing interference than with the efficient use of spectrum.[239] For decades, observers have been urging the FCC to encourage the more efficient use of spectrums by transitioning to a more market-based system.[240]

From 1934 to 1984, the FCC allocated broadcast licenses principally

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[232] *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 394 (1969).

[233] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-06-212R, RADIOFREQUENCY SPECTRUM MANAGEMENT: BRIEFING FOR CONGRESSIONAL COMMITTEES 18, 21 (2005) [hereinafter 2005 GAO REPORT], *available at* http://www.gao.gov/new.items/d06212r.pdf. Interestingly, at least one commentator in favor of the Fairness Doctrine seems to think that the then-current FCC allocation procedure, comparative hearings, was not a "command-and-control regulation." Sunstein, *supra* note 205, at 279.

[234] Bollinger, *supra* note 206, at 9 (citing Henry v. FCC, 302 F.2d 191, 193 (D.C. Cir. 1962)).

[235] *Henry*, 302 F.2d at 192.

[236] *Id.*

[237] *Id.* at 194.

[238] 2005 GAO REPORT, *supra* note 233, at 32.

[239] U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-04-666, SPECTRUM MANAGEMENT: BETTER KNOWLEDGE NEEDED TO TAKE ADVANTAGE OF TECHNOLOGIES THAT MAY IMPROVE SPECTRUM EFFICIENCY 17 (2004) *available at* http://www.gao.gov/new.items/d04666.pdf.

[240] *See, e.g.*, Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 231 (1982).

through quasi-judicial comparative hearings in which potential licensees argued why they should be given a license.[241] Critics contended that the comparative hearings were resource intensive, time-consuming, led to protracted litigation, lacked transparency, and favored large companies.[242] From 1984 to 1993, the FCC allocated licenses solely by a random lottery from among qualified applicants.[243]

After Congress eliminated the FCC's authority to conduct lotteries in 1997,[244] it gave the FCC the authority to conduct auctions.[245] Despite beginning to auction off licenses in 1994, the FCC auctioned off only two percent of the total licenses it granted.[246] Contrary to critics' fears, the nonpartisan GAO found that the market-based auction mechanism produced "little or no negative impact on end-user prices, investment, and competition."[247] The FCC's authority to conduct competitive auctions was set to expire in 2007, but twenty-one of the twenty-two panelists surveyed by the GAO supported extending the FCC's authority to conduct auctions.[248] Congress subsequently extended the FCC's authority to conduct spectrum auctions until 2011.[249]

2. Numerical Scarcity

While *Red Lion* is premised partly on spectrum scarcity, the Supreme Court also based its decision on the "present state of commercially acceptable technology."[250] This hints at the view that the Court was not only concerned with the number of broadcast frequencies available but also with numerical scarcity—the actual number of

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241 2005 GAO REPORT, *supra* note 233, at 11.

242 *Id.*

243 *Id.* at 12.

244 47 U.S.C. § 309(i)(5) (2006).

245 47 U.S.C. § 309(j)(2) (2006). *See generally* Peter Cramton, *The Efficiency of the FCC Spectrum Auctions*, 41 J.L. & ECON. 727 (1998) (discussing the FCC's spectrum auctions).

246 2005 GAO REPORT, *supra* note 233, at 14.

247 *Id.* at 26. The fifty-nine auctions the FCC conducted in the period covered by the GAO report raised over $14.4 billion for the federal treasury. *Id.* at 14. Of course, any system of allocating licenses, including auctions, can be abused. *See, e.g.*, Star Wireless, LLC v. FCC, 522 F.3d 469, 471 (D.C. Cir. 2008) (denying a petition for review where the FCC had imposed a monetary forfeiture on a wireless company for violating spectrum auction anti-collusion rules).

248 Letter from JayEtta Z. Hecker, Dir., Physical Infrastructure Issues, U.S. Gov't Accountability Office, to Senator Ted Stevens et al. 4 (Nov. 10, 2005), *available at* http://www.gao.gov/new.items/d06212r.pdf. The panelists represented a cross-section of stakeholders including government agencies, academics, and wireless spectrum users. 2005 GAO REPORT, *supra* note 233, at 41–42.

249 47 U.S.C. § 309(j)(11) (2006).

250 Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 388–89, 400–01 (1969).

broadcasters broadcasting.[251] The Court stated that "[s]carcity is not entirely a thing of the past,"[252] but noted that the demand for broadcast frequencies had recently been so high that the FCC had decided to suspend new applications for broadcast licenses to revise the rules governing how it allocated most broadcast radio licenses.[253] The Court knew that the demand for broadcast licenses was still very strong; therefore, the only logical conclusion is that the Court's understatement regarding scarcity must have been a reference to numerical scarcity and not merely spectrum scarcity.[254]

The view that *Red Lion* also addresses the number of broadcasters is buttressed by the Court's assertion that "[i]t is the right of the public to receive suitable *access* to social, political, esthetic, moral, and other ideas and experiences which is crucial here."[255] As early as 1973, Justice Douglas noted, "It has been predicted that it may be possible within [ten] years to provide television viewers 400 channels through the advances of cable television."[256] In a later case, the Supreme Court likewise recognized that the spectrum scarcity rationale relied upon in *Red Lion* might become obsolete due to advances in telecommunications technology—like cable and satellite television—that made diverse viewpoints more easily accessible to the average consumer.[257] The court in *Meredith* also latched onto the Supreme Court's admonition that the state of commercially-available technology is an important factor undergirding the Fairness Doctrine.[258]

If the underlying purpose of *Red Lion* was to ensure that citizens could access diverse viewpoints, the spectrum scarcity rationale is obsolete if citizens can readily access a panoply of different perspectives.[259] Numerous broadcast stations do not guarantee

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[251] *Id.* at 396.

[252] *Id.*

[253] *Id.* at 398; *see also* Kessler v. FCC, 326 F.2d 673, 678 (D.C. Cir. 1963) (discussing the FCC's "freeze" on applications for broadcast licenses pending rule revisions).

[254] *Red Lion*, 395 U.S. at 396; *see also* Sunstein, *supra* note 205, at 278 ("One reason for the [Fairness D]octrine was the scarcity of licenses.").

[255] *Red Lion*, 395 U.S. at 390 (emphasis added).

[256] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 158 n.8 (1973) (Douglas, J., concurring); *see also* Brandywine-Main Line Radio, Inc. v. FCC., 473 F.2d 16, 75 (D.C. Cir. 1972) (Bazelon, J., dissenting) ("But *Red Lion* cannot be read as the final word on scarcity: the cable technology of the future was not even mentioned in the Court's decision.").

[257] FCC v. League of Women Voters of Cal., 468 U.S. 364, 376–77 n.11 (1984).

[258] Meredith Corp. v. FCC, 809 F.2d 863, 866–67 (D.C. Cir. 1987) (citing *Red Lion*, 395 U.S. at 388).

[259] Syracuse Peace Council v. FCC, 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr, J., concurring).

diversity,[260] but they do make it more likely that a listener will hear more than one viewpoint. This reasoning led Justice Douglas to conclude that broadcasters could not constitutionally be treated differently from newspapers for First Amendment purposes.[261]

3. Practical Considerations

There are a number of practical pitfalls that cast doubt on whether even a perfectly-implemented Fairness Doctrine could "produc[e] an informed public capable of conducting its own affairs."[262] The Fairness Doctrine is a broadcast-centric regulation that implicitly assumes that most consumers receive the majority of their news from broadcast television or radio.[263] The fewer broadcasters there are and the more consumers rely on only a few stations, the greater the Fairness Doctrine's appeal and vice versa.[264] Even if there are relatively few broadcasters, the Doctrine's rationale weakens in proportion to the number of non-broadcast sources from which consumers can obtain their news.[265]

As historically implemented, it is not likely that the Fairness Doctrine can fulfill its stated purpose of exposing listeners and viewers to multiple sides of a controversial issue.[266] A licensee is not required to present opposing positions on a controversial issue "on that same program or series of programs," but must only "make a provision for the opposing views in his *overall programming*."[267] As applied in the complaint alleging an unbiased view of the presentation of the mini-series *Holocaust*, the FCC found that WNBC-TV had fulfilled its Fairness Doctrine obligations because its overall programming was balanced.[268]

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[260] Thomas S. McCoy, *Revoking the Fairness Doctrine: The Year of the Contra*, 11 COMM. & L. 67, 82 (1989).

[261] *Columbia Broad. Sys.*, 412 U.S. at 150 (Douglas, J., concurring).

[262] *Red Lion*, 395 U.S. at 392.

[263] *See* Handling of Pub. Issues Under the Fairness Doctrine, 48 F.C.C.2d 1, 11 (1974).

[264] Hall, *supra* note 172, at 746.

[265] *Id.* at 746 & 746 n.252.

[266] *Red Lion*, 395 U.S. at 390; *see also* Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."); Associated Press v. United States, 326 U.S. 1, 20 (1945) ("[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . .").

[267] *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d at 8 (alteration in original); *see also* Thomas G. Krattenmaker & L. A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 157 (declaring the Fairness Doctrine, "[a]t best, . . . a glorious but futile symbol").

[268] Application of Nat'l Broad. Co., Inc. for Renewal of License of Station WNBC-TV, 71 F.C.C.2d 250, 251 (1979).

A broadcaster could run a one-sided series on a controversial issue and still fulfill its Fairness Doctrine obligations of providing balanced programming by airing another program presenting a different viewpoint.[269] The FCC's logic fails to take into account that even regular viewers or listeners of a particular station may not hear or watch enough of that station to be exposed to the different viewpoint.[270] For example, a broadcaster could run a mini-series on Monday nights during primetime for three weeks and then present a program with an opposing viewpoint during the next three Friday evenings. In November 1969, NBC's program, *Huntley Brinkley Report*, aired a show entitled *Air Traffic Congestion and Air Safety* alleging that private pilots and general aviation were the principal cause of midair collisions due to lack of training.[271] The FCC stated that NBC had not violated the Fairness Doctrine because, overall, its coverage of the entire issue of congestion over airports was fair even if its coverage of this sub-issue may not have been fair.[272] Despite its public declaration that only overall fairness is required, James McKinney, Chief of the FCC's Media Bureau, explained that "when it comes down to the final analysis, we take out stopwatches and we start counting seconds and minutes that are devoted to one issue compared to seconds and minutes devoted to the other side of the issue."[273]

Even with its stopwatches, the FCC had difficulty administering the Fairness Doctrine because major controversial issues frequently have more than two sides.[274] The FCC itself admitted that there may be several different opinions on a given topic that warrant coverage but that "[i]n many, or perhaps most, cases it may be possible to find that only two viewpoints are significant enough to warrant broadcast coverage."[275] Many, if not most, of the controversial public issues of our time are multifaceted and cannot appropriately be analyzed in a binary fashion.[276]

The aim of *Red Lion* was to provide a forum to representative

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[269] *See Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d at 19.

[270] Congress or the FCC could, of course, require that every program discussing a controversial issue of public importance be scrupulously fair to account for the fact that even devoted viewers of a particular radio or television station do not listen to all of a station's programming. But this would lead to even more intrusion by the FCC into radio and television programming, further exacerbating the chilling effect the Fairness Doctrine would have on broadcasters. *See supra* Part II.

[271] Nat'l Broad. Co., 25 F.C.C.2d 735, 735 (1970).

[272] *Id.* at 737.

[273] Krattenmaker & Powe, *supra* note 267, at 164 n.60 (internal quotation marks omitted).

[274] *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d at 14.

[275] *Id.* at 15.

[276] Krattenmaker & Powe, *supra* note 267, at 161.

community views "which would otherwise, by necessity, be barred from the airwaves."[277] In practice, the Fairness Doctrine has reinforced the tendency to think of issues as two-sided and has predictably led to views being characterized as either "Republican" or "Democratic."[278] The holders of the two most commonly-held viewpoints on perennially controversial issues like abortion and euthanasia do not need judicial solicitude in the form of the Fairness Doctrine to propagate their agendas.[279]

With the explicit blessing of the FCC, broadcasters could fulfill their Fairness Doctrine obligations by airing the perspectives of the two most common viewpoints on controversial issues, which, incidentally would likely have been heard anyway.[280] Despite the Fairness Doctrine, Dr. Benjamin Spock, the People's Party's candidate for president in 1972, received no coverage from the three major television networks (ABC, CBS, and NBC) during the last three weeks of the 1972 election—despite being on the ballot in ten states.[281] The FCC denied Dr. Spock's Fairness Doctrine complaint, finding that Dr. Spock's lawyers had not provided enough information to prove the "substantiality" of his candidacy.[282] Commissioner Nicholas Johnson pointed out in his lengthy dissenting opinion that it was uncontroverted that Dr. Spock was a presidential candidate who was on the ballot in ten states, and it was unclear what additional information he could have provided the FCC to prove he had been "waging an extensive national campaign."[283] On one of the most important and controversial issues facing the American public—who should be elected President in 1972—the Fairness Doctrine provided little help for a non-mainstream candidate with a significant following.

Perversely, the Fairness Doctrine provided incentives to ignore non-mainstream or even minority establishment viewpoints because airing them would elicit requests from other minority groups for free responses.[284] It was not particularly risky for a broadcaster to ignore a non-mainstream view because the FCC's guidelines stated that a licensee should make a "good faith judgment" as to whether a minority view on a particular issue needed to be aired.[285] Given the practical realities of day-to-day Fairness Doctrine enforcement, it is not clear why Justice Burger's insight that "[a] responsible press is an undoubtedly

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277 Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 389 (1969).

278 Krattenmaker & Powe, *supra* note 267, at 161.

279 *See id.* at 161–62.

280 *Id.*

281 SIMMONS, *supra* note 37, at 191.

282 Complaint by Dr. Benjamin Spock, 38 F.C.C.2d 316, 318 (1972).

283 *Id.* at 320 (Johnson, Comm'r, dissenting).

284 Krattenmaker & Powe, *supra* note 267, at 161–62.

285 Handling of Pub. Issues Under the Fairness Doctrine, 48 F.C.C.2d 1, 13 (1974).

desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated,"[286] appears to be falling on deaf ears.

V. THE POST-REPEAL MEDIA LANDSCAPE

A. Network Television

Even if the Fairness Doctrine's chilling effects can be dismissed as insufficiently weighty to merit declining reinstatement, proponents would be hard-pressed to justify reinstatement based upon the scarcity rationale, the *raison d'être* of *Red Lion*.[287] Less than thirty years ago, a *U.S. News & World Report* article provocatively asked, "Is TV News Growing Too Powerful?"[288] Readers and viewers need not have worried; over the past twenty-five years ABC, CBS, and NBC, the three broadcasters with the most-viewed nightly newscasts, lost viewers at a rate of approximately one million per year.[289] The networks' nightly newscasts lost half their viewers in the period from 1980 to 2009.[290]

More importantly, the network anchors have lost their influence over the American public.[291] After CBS Evening News anchor Walter Cronkite declared the Vietnam War a lost cause, President Lyndon Johnson famously remarked to aides, "If I've lost Cronkite, I've lost middle America," and thus decided not to run for reelection.[292] Katie Couric, CBS's current anchor, is no Walter Cronkite. A 2007 survey by the respected Pew Research Center for the People and the Press found that only five percent of respondents named her as their favorite journalist—and this was the highest percentage among journalists named.[293] As recently as 1987, eleven percent of respondents named CBS

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[286] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974).

[287] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388–389 (1969). The Court even went so far as to include a table listing FCC statistics on various commercial channels allocated to the top one hundred television stations to bolster its scarcity argument. *Id.* at 398.

[288] Alvin P. Sanoff, *TV News Growing Too Powerful?*, U.S. NEWS & WORLD REP., June 9, 1980, at 59, 59–60.

[289] PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2010: NETWORK TV—AUDIENCE (2010), http://www.stateofthemedia.org/2010/network_tv_audience.php [hereinafter PROJECT FOR EXCELLENCE IN JOURNALISM, NETWORK TV]. The rate of decline in the networks' newscast viewership has recently slowed, but it is still prominent. The three nightly network newscasts had about 22.3 million viewers in 2009, a drop of about two and a half percent, or 565,000 viewers, compared to 2008. *Id.*

[290] *Id.*

[291] *Id.*; *see also* Al Neuharth, *What Iraq Needs Is a Walter Cronkite*, USA TODAY, June 30, 2005, at 13A (lamenting that "there is no [Walter] Cronkite to call Bush's bluff").

[292] Neuharth, *supra* note 291.

[293] PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, TODAY'S JOURNALISTS LESS PROMINENT 3 (2007), http://people-press.org/reports/pdf/309.pdf. *But see* PROJECT FOR

Evening News anchor Dan Rather as their favorite journalist.[294]

NBC Universal Chief Executive Officer Jeff Zucker recently raised the possibility of NBC reducing the nights per week it broadcasts.[295] In fact, many media insiders believe that the days of signature evening newscasts are numbered.[296]

B. Cable and Satellite Television

While the networks' primetime audience has been declining for decades, cable news became an important source of news for roughly 3.88 million Americans per night in 2009.[297] More people now report regularly watching cable news programs on CNN, FOX News, or MSNBC, than report regularly watching one of the three broadcast networks.[298] Wired cable penetration was about sixty-one percent of all households with television in February 2010.[299]

In 2006, a survey reported that one-third of Americans thought of cable or satellite television as a necessity they could not live without—more than the percentage of people who thought high-speed Internet was a necessity (twenty-nine percent).[300] The survey also reported that half of the viewers who were older than sixty-five considered cable or satellite television a necessity.[301] Justice Douglas, who envisioned the possibility of consumers receiving 400 channels,[302] would be pleased to learn that consumers living in the same zip code as the FCC in Washington, D.C., can receive over 600 channels from the local cable provider, Comcast

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EXCELLENCE IN JOURNALISM, NETWORK TV, *supra* note 289 (reporting that Couric still lost significant viewership).

294 PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 293.

295 Paul J. Gough, *NBC Might Scale Back Hours*, HOLLYWOOD REP., Dec. 9, 2008, http://www.thrfeed.com/2008/12/nbc-might-scale.html.

296 Brian Stelter & Bill Carter, *Network News at a Crossroads*, N.Y. TIMES, Mar. 1, 2010, at B1.

297 PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2010: CABLE TV—AUDIENCE (2010), http://www.stateofthemedia.org/2010/cable_tv_audience.php. The networks reported on were CNN, FOX News, and MSNBC. *Id.*

298 PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, AUDIENCE SEGMENTS IN A CHANGING NEWS ENVIRONMENT: KEY NEWS AUDIENCES NOW BLEND ONLINE AND TRADITIONAL SOURCES 13 (2008), http://people-press.org/reports/pdf/444.pdf.

299 TELEVISION BUREAU OF ADVER., TV BASICS: ALTERNATE DELIVERY SYSTEMS—NATIONAL (2010), http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/12_ADS-Natl.asp.

300 PEW RESEARCH CTR., LUXURY OR NECESSITY? THINGS WE CAN'T LIVE WITHOUT: THE LIST HAS GROWN IN THE PAST DECADE 1 (2006), http://pewresearch.org/assets/social/pdf/Luxury.pdf.

301 *Id.* at 4.

302 Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 158 n.8 (1973) (Douglas, J., concurring).

Corporation.[303]

Satellite television and video on-demand are rapidly making inroads and challenging cable television's dominant market position.[304] Satellite television alone had a market penetration rate of approximately twenty-six percent in 2007[305] and offers consumers hundreds of channels from which to choose.[306] Consumers now have access to an unprecedented number of information sources. In 2007, consumers spent an average of 19.4 hours per week viewing cable or satellite television compared to just thirteen hours viewing broadcast television.[307]

C. Radio

In recent years AM and FM stalwarts have been joined by satellite, HD Radio,[308] and Internet radio as well as podcasting and even cell phone radio.[309] Currently, approximately ninety-three percent of people over age twelve listen to traditional terrestrial broadcast radio, despite radio having been part of the media landscape for decades.[310] Upstart satellite radio company SIRIUS XM offers its 20 million subscribers[311] over 200 channels[312] ranging from *Blue Collar Radio*, promising "all-

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[303] *See* Comcast, Channel Lineup, http://www.comcast.com/Customers/clu/ChannelLineup.ashx?area=0 (last visited Apr. 19, 2010). Indeed, nationally, the average American household receives 118.6 channels. News Release, The Nielsen Co., Average U.S. Home Now Receives a Record 118.6 Channels, According to Nielsen (June 6, 2008), *available at* http://en-us.nielsen.com/etc/content/nielsen_dotcom/en_us/home/news/news_releases/2008/june/average_u_s__home.mbc.53397.RelatedLinks.62970.MediaPath.pdf.

[304] MOTION PICTURE ASSOC. OF AM., INC., ENTERTAINMENT INDUSTRY MARKET STATISTICS: 2007, at 19 (2008), http://www.mpaa.org/USEntertainmentIndustryMarketStats.pdf.

[305] *Id.*

[306] *See, e.g.*, DISH Network, America's Everything Pak, http://www.dishnetwork.com/packages/detail.aspx?pack=AEP (last visited Apr. 19, 2010); DIRECTV, Great Offers for New Customers, https://www.directv.com/DTVAPP/wizard/buildYourSystem1.jsp?footernavtype=-1 (last visited Apr. 19, 2010).

[307] MOTION PICTURE ASSOC. OF AM., INC., *supra* note 304, at 24.

[308] HD Radio is a registered trademark of iBiquity Digital Corporation. iBiquity Digital Corp., Trademarks, http://www.ibiquity.com/about_us/trademarks (last visited Apr. 19, 2010).

[309] PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2008: RADIO—INTRO (2008), http://www.stateofthemedia.org/2008/narrative_radio_intro.php?media=10.

[310] News Release, Arbitron, Inc., More Than 239 Million Listen to Radio Every Week According to the Arbitron Radar 104 Report (Mar. 15, 2010), http://arbitron.mediaroom.com/index.php?s=43&item=673.

[311] Tim Arango, *Satellite Radio Still Reaches for the Payday*, N.Y. TIMES, Dec. 28, 2008, at BU1.

[312] SIRIUS Satellite Radio, Channel Guide, http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=ChannelLineup&cid=1218563499691&o= (last visited Apr. 19, 2010).

American comedy with universal appeal,"[313] to *Cosmo Radio*, for everything the "fun, fearless, female" needs "to be the most informed girl at the water cooler."[314] Subscribers can also listen to over half of SIRIUS's programming online.[315]

According to a joint 2008 study by ratings companies Arbitron Inc. and Edison Media Research, about thirteen percent of the U.S. population older than twelve listens to Internet radio weekly.[316] Online radio attracts a wide range of ages with no single demographic cohort dominating the audience.[317] Sixteen percent of the listeners are over age fifty-five, disproving the notion that only young people listen online.[318] Contrary to what one might expect, listeners of digital radio platforms do not spend less time listening to traditional terrestrial broadcast radio.[319]

Podcasting is also growing in popularity. In 2008, nearly four out of every ten Americans—and almost three-quarters of teenagers ages twelve to seventeen—owned a portable MP3 player such as Apple's iPod.[320] Again, contrary to popular assumptions, only ten percent of portable MP3 player owners reported listening less to broadcast radio as a result of owning an MP3 player.[321] Given the increasing ubiquity of portable MP3 players, it is no surprise that nearly one out of ten Americans age twelve or older listened to an audio podcast during the last month of the Arbitron-Edison study—an estimated twenty-three million listeners age twelve or older.[322]

D. Internet

Any discussion of the twenty-first century media landscape would be incomplete without delving into the Internet's impact on how

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[313] SIRIUS Satellite Radio, Blue Collar Radio, http://www.sirius.com/bluecollar comedy (last visited Apr. 19, 2010).

[314] SIRIUS Satellite Radio, Cosmo Radio, http://www.sirius.com/cosmoradio (last visited Apr. 19, 2010).

[315] SIRIUS Satellite Radio, SIRIUS Internet Radio, http://www.sirius.com/sirius internetradio (last visited Apr. 19, 2010).

[316] ARBITRON, INC. & EDISON MEDIA RESEARCH, THE INFINITE DIAL 2008: RADIO'S DIGITAL PLATFORMS 5 (2008), *available at* http://www.arbitron.com/downloads/digital_radio_study_2008.pdf.

[317] *Id.* at 6.

[318] *Id.*

[319] *Id.* at 19.

[320] *Id.* at 10; *see also* MARY MADDEN & SYDNEY JONES, PEW INTERNET & AM. LIFE PROJECT, PEW INTERNET PROJECT DATA MEMO (2008), *available at* http://www.pewinternet.org/~/media//Files/Reports/2008/PIP_Podcast_2008_Memo.pdf.pdf (providing an in-depth discussion of recent trends in podcast downloading).

[321] ARBITRON, INC. & EDISON MEDIA RESEARCH, *supra* note 316, at 12.

[322] *Id.* at 14.

Americans consume news and public affairs programming.[323] A 2008 report indicated that eighty percent of people older than seventeen view the Internet as an important source of information—significantly higher than all other information sources, including television (sixty-eight percent), newspapers (sixty-three percent), and radio (sixty-three percent).[324] Sixty percent of internet users go online to seek out news on a weekly basis.[325] Thirty-seven percent of people go online for news at least three days per week—far more than those who watched the nightly network newscasts (twenty-nine percent).[326] Young (eighteen to twenty-four year olds) and middle-aged (fifty to sixty-four year olds) Americans were almost equally as likely to use the Internet as a news source.[327]

Not only are Americans accessing news online, they are also reading and being exposed to more news sources.[328] A full eighty-three percent of online news consumers use search engines to find stories that interest them.[329] Sixty-four percent of online news users younger than twenty-five report more often following links to news websites rather than going directly to news organizations' homepages.[330] No single news website or set of news websites has a large market share.[331]

The news website with the highest market share is Yahoo! News, with a share of just 6.64% for the week ending March 20, 2010, according to the online ratings company Hitwise.[332] The fifth and seventh most-visited news websites for that week were Google News (2.80%) and Drudge Report (1.62%).[333] This is particularly noteworthy because both Google News and the Drudge Report do not produce their own content; they merely link to other online news sources throughout the world.[334]

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[323] *See generally* PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 298 (providing a detailed and comprehensive 127-page report on how Americans consumed news during 2008).

[324] CTR. FOR THE DIGITAL FUTURE, ANNUAL INTERNET SURVEY BY THE CENTER FOR THE DIGITAL FUTURE FINDS SHIFTING TRENDS AMONG ADULTS ABOUT THE BENEFITS AND CONSEQUENCES OF CHILDREN GOING ONLINE 2 (2008), *available at* http://www.digitalcenter.org/pdf/2008-Digital-Future-Report-Final-Release.pdf.

[325] *Id.* at 4.

[326] PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 298, at 4.

[327] *Id.* at 8.

[328] *See id.* at 22–23.

[329] *Id.* at 23.

[330] *Id.* at 24.

[331] HITWISE, HITWISE NEWS AND MEDIA CATEGORY WEEKLY REPORT BASED ON US INTERNET USAGE FOR THE WEEK ENDING MARCH 20, 2010, at 1 (2010) *available at* http://www.drudgereport.com/hit.pdf.

[332] *Id.*

[333] *Id.*

[334] *See* Drudge Report, http://www.drudgereport.com/; Google News Home Page, http://news.google.com/.

E. Numerical Scarcity

The number of broadcast radio and television stations has also increased markedly since 1949,[335] the first time the Fairness Doctrine was officially promulgated.[336] The more than twelvefold increase in broadcast radio and television stations since 1949 likely significantly understates the number of radio stations a person can currently listen to compared to a citizen in 1949 because advances in technology have greatly increased broadcast signal strength. An FCC employee at the FCC's headquarters in Washington, D.C., for example, can hear over ninety-five terrestrial radio stations.[337]

In the face of overwhelming evidence that calls both spectrum and numerical scarcity into question, even vocal proponents of the Fairness Doctrine who provide intellectual fodder for the pro-reinstatement camp appear to have largely abandoned the scarcity rationale.[338] The scarcity rationale is now even more untenable because of the recent government-mandated switch to digital television from analog broadcasting.[339] The digital switchover freed up a large chunk of broadcast spectrum that the

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[335] *Compare* 18 FCC ANN. REP. 121 (1952) (listing 2,353 licensed broadcast radio and television stations) *and* Press Release, Fed. Commc'ns Comm'n, Broadcast Station Totals for January 1969 (Feb. 20, 1969), *available at* http://www.fcc.gov/mb/audio/totals/pdf/1969 0131.pdf (listing 7,411 broadcast radio and television stations the year *Red Lion* was decided), *with* Press Release, Fed. Commc'ns Comm'n, Broadcast Station Totals as of December 31, 2009 (Feb. 26, 2010), *available at* http://www.fcc.gov/Daily_Releases/ Daily_Business/2010/db0226/DOC-296538A1.pdf (listing 30,503 broadcast radio and television stations).

[336] *See* SIMMONS, *supra* note 37, at 41 (citing Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1246 (1949)).

[337] VSoft Commc'ns, Zip Code Signal, http://www.v-soft.com/ZipSignal/ (enter zip code 20554) (last visited Apr. 19, 2010).

[338] *See, e.g.*, Bollinger, *supra* note 206, at 2 ("[T]he Court's attempt [in *Red Lion*] to distinguish broadcasting on the basis of its dependence on scarce resources . . . is unpersuasive; moreover, whatever validity the distinction may once have had is now being undercut by the advance of new technology in the form of cable television."); Sunstein, *supra* note 205, at 278 ("One reason for the [Fairness D]octrine was the scarcity of licenses, but licenses are no longer scarce; indeed, there are far more radio and television stations than major newspapers."); Roy J. Thibodaux III, Comment, *Is It Time to Revisit the Fairness Doctrine in Response to the Federal Communication Commission's Proposed Media Ownership Rules?*, 15 SETON HALL J. SPORTS & ENT. L. 337, 358 (2005) ("Technology has made the scarcity of airwaves no longer an issue since the FCC can now assign more channels to broadcasters than it could in the past."); Irving R. Kaufman, *Reassessing the Fairness Doctrine*, N.Y. TIMES, June 19, 1983, (Magazine), at 17 (arguing technological advances in communications have weakened the Fairness Doctrine's scarcity justification). Of this list, Bollinger's article is especially noteworthy because it was published in 1976, well before new technologies like the Internet and satellite radio became available to the average American.

[339] DTV.gov, The Digital TV Transition: What You Need to Know About DTV, http://www.dtv.gov/ (last visited Apr. 19, 2010).

FCC was required to auction off.[340]

Not surprisingly, commentators against reinstatement of the Fairness Doctrine agree that spectrum scarcity no longer exists.[341] The American public largely agrees: by an overwhelming margin of seventy-four percent to nineteen percent, Americans believe "it is already possible for just about any political view to be heard in today's media."[342] Professor and noted technologist Lawrence Lessig has even gone so far as to advocate scrapping the FCC and replacing it with an "Innovation Environment Protection Agency," which would maintain a policy of "benign neglect."[343]

By listening to the rhetoric from our elected officials in Washington, D.C., one might get the mistaken impression that American consumers are clamoring for reinstatement of the Fairness Doctrine.[344] Fortunately, not all politicians are cheerleaders for reinstatement; radio host and then-Democratic Governor of New York Mario Cuomo penned an opinion editorial in the *New York Times* entitled *The Unfairness Doctrine*, strongly urging his fellow elected officials to refrain from reinstating the Fairness Doctrine.[345] Alan Colmes, a liberal political commentator and former co-host of the now-defunct FOX News show *Hannity & Colmes*, is similarly against reinstatement of the Fairness Doctrine.[346] Even Jon Sinton, the founding President of Air America Radio, a nationwide progressive radio network that went bankrupt in 2006, is against reinstatement of the Fairness Doctrine.[347]

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[340] 47 U.S.C. § 309(j)(15)(C)(v)–(vi) (2006).

[341] *See, e.g.*, BRIAN FITZPATRICK, CULTURE & MEDIA INST., UNMASKING THE MYTHS BEHIND THE FAIRNESS DOCTRINE 3–6 (2008) (debunking the scarcity argument by demonstrating the vast news sources available to Americans), *available at* http://www.cultureandmediainstitute.org/specialreports/2008/Fairness_Doctrine/CMI_FairnessDoctrine_Single.pdf; Heinke & Wayland, *supra* note 6, at 8 ("As an empirical matter today, however, the assumption of broadcast spectrum scarcity has become increasingly unsound.").

[342] *47% Oppose Fairness Doctrine, But 51% Think Congress Likely to Bring It Back*, RASMUSSEN REP., Feb. 15, 2009, http://www.rasmussenreports.com/public_content/politics/general_politics/february_2009/47_oppose_fairness_doctrine_but_51_think_congress_likely_to_bring_it_back.

[343] Lawrence Lessig, *Reboot the FCC*, NEWSWEEK, Dec. 23, 2008, http://www.newsweek.com/id/176809.

[344] *See supra* notes 11–19, *infra* note 349 and accompanying text.

[345] Mario M. Cuomo, Op-Ed., *The Unfairness Doctrine*, N.Y. TIMES, Sept. 20, 1993, at A19 ("[A]s policy, the [Fairness D]octrine is unwise. Precisely because radio and TV have become our principal sources of news and information, we should accord broadcasters the utmost freedom in order to insure a truly free press.").

[346] Youtube, Alan Colmes Is a Punk, http://www.youtube.com/watch?v=kkhrdpuwyQw (last visited Apr. 19, 2010).

[347] John Sinton, Op-Ed., *Limbaugh Is Right on the Fairness Doctrine*, WALL ST. J., Dec. 22, 2008, at A17 ("As the founding president of Air America Radio, I believe that for the last eight years Rush Limbaugh and his ilk have been cheerleaders for everything

Despite this overwhelming evidence, absence clearly makes the heart grow fonder in the case of the Fairness Doctrine, especially with members of Congress.[348] Instead of letting an outdated regulatory concept like the Fairness Doctrine rest in peace in its shallow administrative grave, Representative Anna Eshoo (D-CA) wants to resurrect the Fairness Doctrine and extend it to cable and satellite television programming.[349] Because the FCC repealed the Fairness Doctrine administratively, all that would be necessary is for three of the five FCC Commissioners to vote for reinstatement.[350] Given that the Supreme Court has never overruled *Red Lion*, as long as the FCC's actions do not violate the highly-deferential arbitrary or capricious standard under the Administrative Procedure Act, reinstatement could take place without congressional action.[351]

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wrong with our economic, foreign and domestic policies. But when it comes to the Fairness Doctrine, I couldn't agree with them more. The Fairness Doctrine is an anachronistic policy that, with the abundance of choices on radio today, is entirely unnecessary."). Sinton's editorial is especially noteworthy because reinstatement of the Fairness Doctrine would have given his progressive radio network a guaranteed market because conservative talk radio broadcasters would have been required to present alternative progressive viewpoints.

[348] See *supra* notes 11–19, *infra* note 349 and accompanying text for a list of politicians who have recently publicly pined for the "fairer" days of yore. Senator Charles Schumer (D-N.Y.) complained that the same people who approve of the FCC regulating pornography were against the Fairness Doctrine and that this argument was logically inconsistent. Bob Cusack, *Schumer on Fox: Fairness Doctrine 'Fair and Balanced'*, THE HILL, Nov. 4, 2008, http://thehill.com/homenews/news/16881-schumer-on-fox-fairness-doctrine-fair-and-balanced. Of course, content-based restrictions are not always unconstitutional, but any governmental content-based restriction must serve a compelling government interest and be narrowly tailored to achieve that interest. *See supra* note 204. It is much easier to fulfill the narrow tailoring prong if the government is merely seeking to regulate one small sliver of content (for example, pornography) as opposed to when it is attempting to regulate *all* broadcast content via the Fairness Doctrine. *See* FCC v. Pacifica Found., 438 U.S. 726, 745, 750–51 (1978) (holding the FCC may regulate the broadcast of a patently offensive monologue containing sexual and excretory language).

[349] Rep. Eshoo to Push for Fairness Doctrine, http://sfppc.blogspot.com/2008/12/rep-eshoo-to-push-for-fairness-doctrine.html (Dec. 16, 2008, 00:05 PST) ("I'll work on bringing [the Fairness Doctrine] back. I still believe in it . . . . It should and will affect everyone . . . . [T]here should be equal time for the spoken word."). Think of this as the Fairness Doctrine on steroids.

[350] *See* Syracuse Peace Council v. FCC, 867 F.2d 654, 657 (D.C. Cir. 1989) (holding that the FCC had the authority to reject the Fairness Doctrine if it did so without being arbitrary or capricious and if it concluded that the Doctrine no longer served the public interest). If the FCC has the plenary authority to reject the Fairness Doctrine, it could certainly reenact the Doctrine if it so desired.

[351] Pub. L. No. 79-404, ch. 324, § 10, 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 706(2)(A) (2006)); Conrad, *supra* note 179, at 194 ("[E]ven if Congress is unable to pass legislation codifying the [Fairness] Doctrine, it may be resurrected by a new FCC . . . ."). Of course, as Conrad notes, Congress could always pass a law mandating the Fairness Doctrine as it has attempted to do in the past. *Supra* note 194 and accompanying text.

As the Fairness Doctrine's rationale becomes weaker and weaker due to technological change, proponents are left making internally-contradictory arguments supporting its reinstatement.[352] A 1995 American Bar Association Study concluded that the Fairness Doctrine "came to be a regulation with little practical remedial effect[s]" and "had [a] minimal effect when enforced, causing merely a ripple in an ocean of thousands of broadcast licensees."[353] Professor Leweke undertook an exhaustive study of every single personal attack and political editorial complaint filed with the FCC since their codification in 1967, and concluded that the justification for reinstating the Fairness Doctrine is meager.[354] Even one of the largest progressive media advocacy groups, the Center for American Progress, agrees that "[s]imply reinstating the Fairness Doctrine will do little [to ensure presentation of all viewpoints]."[355]

Paradoxically, proponents of the Fairness Doctrine argue that precisely *because* the FCC took so few enforcement actions, no chilling effect was taking place and therefore the Doctrine is constitutional.[356] This begs the question: If a regulation, like the Fairness Doctrine, is so infrequently enforced, is it even necessary? The stock answer is that the Doctrine's very existence causes broadcasters subject to it to conform; but this is simply another name for the constitutionally-impermissible chilling effect.[357] The Fairness Doctrine's proponents cannot afford to admit that the Doctrine has chilling effects, because the Doctrine's stated purpose is to encourage the discussion of controversial public issues.[358]

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[352] Conrad, *supra* note 179, at 190 ("Broadcasting, especially television, is the most powerful communications force ever devised, a medium that many Americans rely upon *exclusively* for information and analysis of public issues." (emphasis added) (citing Andrew Radolf, *Television News Rates High*, EDITOR & PUBLISHER, Apr. 13, 1985, at 9, 9)). This may have been true in 1985, but it is certainly not true today. *See supra* Part V.A–D.

[353] Project, *supra* note 200, at 629, 641.

[354] Leweke, *supra* note 46, at 576 ("[T]he FCC may reinstate either [the personal attack or the political editorial] rule through a rule-making proceeding if it deems the public interest requires them. The recent case history of the rules does not lend strong support for the need to do so." (footnote omitted)).

[355] CTR. FOR AM. PROGRESS & FREE PRESS, THE STRUCTURAL IMBALANCE OF POLITICAL TALK RADIO 7 (2007), *available at* http://www.americanprogress.org/issues/2007/06/pdf/talk_radio.pdf.

[356] *Supra* note 177 and accompanying text.

[357] *See supra* note 178 and accompanying text.

[358] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392–93 (1969) ("[I]f political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective.

A realization that reinstatement of the Fairness Doctrine would still not satisfy their desire to control the airwaves has led to a call for even more intrusive government regulation of broadcasting.[359] The Center for American Progress recommends reducing broadcasting licenses from eight-year[360] to three-year terms, subjecting broadcasters to comparative hearings, requiring broadcast licensees to periodically prove they are operating in the public interest by providing documentation, and mandating that the FCC run a website to "conduct on-line discussion and facilitate interaction with the public about licensee conduct."[361] The think tank recommends that any broadcaster not meeting the recommended requirements be charged a "spectrum use fee."[362] This fee is expected to raise $100 to $250 million and should go directly to the Corporation for Public Broadcasting to ensure balanced and fair coverage of controversial political issues.[363] The debate over the constitutionality of the Fairness Doctrine seems almost quaint when considering this panoply of proposed broadcast regulations. Amid widespread availability of news sources and viewpoints, calls for reinstatement of the Fairness Doctrine and even tighter government oversight and control of the airwaves border on the absurd.

CONCLUSION

The FCC's Fairness Doctrine is a policy whose time—if it ever was justified—has come and gone. Despite the Supreme Court blessing the Faustian bargain of access to broadcast frequencies in return for partial government content regulation in *Red Lion*, Congress and President Obama should continue to refrain from succumbing to the temptation to reinstate the Fairness Doctrine. Justice Stewart, who joined *Red Lion*, later reconsidered his position and ultimately concluded that "'fairness' [is] far too fragile to be left for a Government bureaucracy to accomplish."[364] Politicians and policymakers would do well to heed his advice and pass legislation protecting the First Amendment rights of broadcasters.

Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the [D]octrine would be stifled.").

[359] *See, e.g.*, CTR. FOR AM. PROGRESS & FREE PRESS, *supra* note 355, at 2, 6, 9–11.

[360] 47 U.S.C. § 307(c)(1) (2006).

[361] CTR. FOR AM. PROGRESS & FREE PRESS, *supra* note 355, at 11.

[362] *Id.*

[363] *Id.*

[364] Columbia Broad. Sys. Inc., v. Democratic Nat'l Comm., 412 U.S. 94, 145–46 (1973) (Stewart, J., concurring).

THE FREE SPEECH PROTECTION ACT OF 2009: PROTECTION AGAINST SUPPRESSION

INTRODUCTION

In 2003, Dr. Rachel Ehrenfeld published a book in the United States titled *Funding Evil: How Terrorism is Financed—and How to Stop It.*[1] In the book, she alleged that a wealthy Saudi Arabian businessman named Khalid Salim Bin Mahfouz was funding al Qaeda and other terrorists.[2] The British publisher cancelled its deal with Ehrenfeld after receiving a threat of a lawsuit by an unnamed Saudi.[3] After the book was published in the United States, Mahfouz's lawyers asked Ehrenfeld to retract what she said, but she refused.[4] Mahfouz filed suit against Ehrenfeld in England for libel, asserting English courts had jurisdiction over her based on twenty-three copies of the book that had been purchased in England over the Internet and a chapter posted on an ABCNews.com website available in England.[5] Ehrenfeld chose not to appear to contest the suit on advice of English counsel, and received a judgment against her for $225,000.[6] Ehrenfeld accepted the default judgment because she believed it was better than dealing with the high cost of litigation and procedural barriers in England, and because of her disagreement in principle with being sued in a libel-friendly jurisdiction where she did not even make the speech at issue.[7]

Ehrenfeld instead filed a suit of her own in the U.S. District Court for the Southern District of New York, seeking a declaratory judgment that Mahfouz could not prevail based on the allegedly libelous statements at issue and that the English judgment was not enforceable in the United States or New York.[8] The district court held that it lacked personal jurisdiction over Mahfouz based on a New York long-arm statute.[9] In response to a certified question to the U.S. Court of Appeals for the Second Circuit, the Court of Appeals of New York ruled that

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1 RACHEL EHRENFELD, FUNDING EVIL: HOW TERRORISM IS FINANCED—AND HOW TO STOP IT (Expanded ed. 2005).

2 *Id.* at 22.

3 Sarah Lyall, *Are Saudis Using British Libel Law to Deter Critics?*, N.Y. TIMES, May 22, 2004, at B7.

4 Jeffrey Toobin, *Let's Go: Libel*, NEW YORKER, Aug. 8, 2005, at 36, *available at* http://www.newyorker.com/archive/2005/08/08/050808ta_talk_toobin.

5 *See* Ehrenfeld v. Mahfouz, 881 N.E.2d 830, 832 (N.Y. 2007).

6 Floyd Abrams, *Foreign Law and the First Amendment*, WALL ST. J., Apr. 30, 2008, at A15.

7 *Ehrenfeld*, 881 N.E.2d at 832–33.

8 *Id.* at 833.

9 *Id.*

Mahfouz had not transacted sufficient business in New York to be subject to jurisdiction under the statute.[10] Although the court limited itself to deciding personal jurisdiction, it described the issue as "libel touris[m]" and said the legislature could address the problem.[11]

The New York state legislature responded by passing the Libel Terrorism Protection Act,[12] which provided that a foreign judgment need not be recognized unless the New York court first determines that the foreign defamation law under which a suit is brought provides as much or more protection for freedom of speech and the press as is provided by the U.S. Constitution and New York Constitution.[13] The Act also modified New York's long-arm statute to allow personal jurisdiction in cases such as Ehrenfeld's.[14]

The U.S. House of Representatives passed a bill similar to the New York law in September 2008, H.R. 6146, providing that "a domestic court shall not recognize or enforce a foreign judgment for defamation that is based upon a publication concerning a *public figure or a matter of public concern* unless . . . the foreign judgment is consistent with the [F]irst [A]mendment."[15] Though this bill only affected cases involving a public figure *or* a matter of public concern, it extends to protect individuals such as Ehrenfeld, who write about matters of public concern like terror financing and public figures like Mahfouz.

In April 2008, another measure, the Free Speech Protection Act of 2008, was introduced in the House[16] and in May 2008 was introduced in the Senate.[17] The Free Speech Protection Act of 2008 would have expanded the protection created in New York's Libel Terrorism Protection Act and H.R. 6146 by providing a non-enforcement provision and a countersuit cause of action for U.S. citizens.[18] It then stated "findings" explaining why the cause of action is necessary.[19] The cause of action, in section 3(a), stated as follows:

> Any United States person against whom a lawsuit is brought in a foreign country for defamation on the basis of the content of any writing, utterance, or other speech by that person that has been

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10 *Id.* at 831, 833 (citing N.Y. C.P.L.R. 302(a)(1) (McKinney Supp. 2010)).

11 *Id.* at 833–34 & n.5.

12 2008 N.Y. Laws 66.

13 *Id.* § 2 (amending N.Y. C.P.L.R. 5304 (McKinney Supp. 2010)).

14 *Id.* § 3 (amending N.Y. C.P.L.R. 302 (McKinney Supp. 2010)).

15 H.R. 6146, 110th Cong. § 2(a) (2008) (emphasis added).

16 H.R. 5814, 110th Cong. (2008).

17 S. 2977, 110th Cong. (2008).

18 S. 2977; H.R. 5814. The stated purpose of the Act is "[t]o create a Federal cause of action to determine whether defamation exists under United States law in cases in which defamation actions have been brought in foreign courts against United States persons on the basis of publications or speech in the United States." S. 2977.

19 *See* S. 2977 § 2.

> published, uttered, or otherwise disseminated in the United States may bring an action in a United States district court specified in subsection (f) against any person who, or entity which, brought the foreign suit if the writing, utterance, or other speech at issue in the foreign lawsuit does not constitute defamation under United States law.[20]

The Free Speech Protection Act of 2008 continued by discussing jurisdiction, remedies, damages, and other items.[21]

The Free Speech Protection Act of 2008 was reintroduced in both the House and the Senate last year as H.R. 1304[22] and S. 449,[23] both titled the Free Speech Protection Act of 2009, ("the Act") and is currently sitting in committee.[24] The current House version of the Act has been changed so that now the speech must be "disseminated *primarily* in the United States."[25] The current Senate version of the Act requires that the speech be "*primarily* disseminated in the United States," and that "the person or entity which brought the foreign lawsuit serves or causes to be served any documents in connection with such foreign lawsuit on a United States person."[26] These additional requirements result in a slightly narrower cause of action in both the current House and Senate versions of the Act, but one that is still a worthwhile attempt at dealing with forum shopping.

This Note recommends passage of the Free Speech Protection Act of 2009 because of the need for its proactive protection of free speech. Part I of this Note compares defamation law in the United States with that of other countries because application of the Act itself hinges on defamation law. Part II defines and examines the cause of action given in the Act. Part III examines types of cases affected by the cause of action and discusses why it is important in light of international

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[20] *Id.* § 3(a).

[21] *See id.* § 3(b)–(g) (2008); H.R. 5814 § 3(b)–(g) (2008). A complete examination of the Act is beyond the scope of this Note, which focuses on the cause of action. But some other parts of the Act, such as those governing personal jurisdiction and remedies, have to be discussed in order to have a complete picture. For example, personal jurisdiction may not exist when the plaintiff's actions are used as the basis to obtain jurisdiction over a defendant. As a commentator on New York's version of the Act noted, "Additionally, the provisos of the Act seem to provide personal jurisdiction based on the plaintiff's own actions rather than the defendant's independent activities, and, thereby, runs afoul of long standing Court of Appeals precedent." Kyle C. Bisceglie, Expert Commentary, Ehrenfeld v. Mahfouz, 9 N.Y.3d 501 (N.Y. 2007), *and the New York Libel Terrorism Protection Act,* 2008 EMERGING ISSUES 2485 (LEXIS). This Note urges passage based only on the merits of the underlying policy of the Act.

[22] H.R. 1304, 111th Cong. (2009).

[23] S. 449, 111th Cong. (2009).

[24] H.R. 1304 § 1; S. 449 § 1.

[25] H.R. 1304 § 3(a) (emphasis added).

[26] S. 449 § 3(a) (emphasis added).

differences in defamation law. Part IV examines non-defamation examples of chilling free speech and suggests modifications to this Act to help it deal with that problem.

I. U.S. DEFAMATION POLICY AND FOREIGN DEFAMATION POLICY

A. Defamation at Common Law

1. England

The common law of defamation existed long before the First Amendment. Throughout history, people have always been interested in protecting their good name and reputation.[27] In one early example, Alfred the Great accomplished this goal with the remedy of cutting out the defamer's tongue.[28] Early English defamation law descended from Roman law for the purpose of addressing wrongs done to a person's character, and the same purpose existed in Canon law applied before the year 1066.[29] But as post-Norman Conquest Canon law took jurisdiction over defamation, its "care over souls" approach caused the focus to move from remedying the harm done to reputation to "curing" the defamer by public penance.[30] During the fourteenth century, the English Star Chamber vigorously prosecuted criticism of the government as libel, and even truth was not a defense.[31] In the sixteenth century, slander was worked into the law but remained a tort very distinct from libel; part of the courts' reluctance to merge the two was due to their desire to continue to consider political libel as a more serious offense.[32]

By the end of the sixteenth century in England, defamation was in the jurisdiction of the common law courts.[33] In the late seventeenth century, a new form of libel law appeared in order to deal with noncriminal libel, and this was the civil libel law that continued to develop in the English common law.[34] The common law in England eventually developed into its current plaintiff-friendly status: the

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[27] *See* 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:1 (2d ed. 2009).

[28] Colin Rhys Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1052–53 (1962) (quoting 1 ENGLISH HISTORICAL DOCUMENTS 378 (Law No. 32) (Whitelock ed. 1955)).

[29] *Id.* at 1052, 1054.

[30] *Id.* at 1054–55, 1058 (citing Van Vechten Veeder, *The History of the Law of Defamation*, *in* 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 468 (Ass'n of Am. Law Sch. ed., Wildy & Sons Ltd. 1968)).

[31] *Id.* at 1060–62.

[32] *Id.* at 1070–71.

[33] 1 SMOLLA, *supra* note 27, § 1:3 (citing Lovell, *supra* note 28, at 1053).

[34] Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 569–70 (citing Frank Carr, *The English Law of Defamation*, 18 LAW Q. REV. 388, 393–94 (1902)). This article also gives an overview of early defamation history in England.

plaintiff must only show that the "defendant voluntarily communicated to someone [else] . . . a defamatory statement referring to the plaintiff."[35] This heavy protection for reputation is an obvious descendant of the goal of earlier defamation law to protect one's "good name."[36]

Today, defamation law in England generally is the same as it was at common law.[37] The policy of protecting individual reputation is still very present in a system in which a strict liability tort holds publishers liable for statements they honestly believed were true and did not publish negligently, even if the plaintiff is a public official or public figure who would be given less protection under U.S. law.[38] In *Telnikoff v. Matusevitch*, the court noted that "American and Maryland history reflects a public policy in favor of a much broader and more protective freedom of the press than ever provided for under English law," and went on to note that the British government has kept a tight rein on printed publications and the government criticism they would contain ever since the invention of the printing press.[39]

More recent British decisions do show a policy moving slightly in the direction of that of the United States.[40] In *Reynolds v. Times Newspapers Ltd.*, in which the plaintiff sued a newspaper for publishing material relating to his alleged dishonesty in his political career, Lord Nicholls considered, but ultimately rejected, a special category of qualified privilege for "political information," because it would not provide sufficient protection of reputation.[41] Even though rejecting a free speech approach, he showed a reluctance to infringe free speech in that,

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[35] Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union*, 36 VA. J. INT'L L. 933, 939 (1996) (citing Pullman v. Walter Hill & Co., [1891] 1 Q.B. 524, 527 (C.A.)).

[36] 1 SMOLLA, *supra* note 27, § 1:1.

[37] 1 SMOLLA, *supra* note 27, § 1:9; *see also* Raymond W. Beauchamp, Note, *England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073, 3087 (2006) (citing ERIC BARENDT ET AL., LIBEL AND THE MEDIA: THE CHILLING EFFECT 1 (1997) ("[D]efamation law in England . . . has not undergone the radical transformation that we have witnessed in the United States.")).

[38] 1 SMOLLA, *supra* note 27, § 1:9.

[39] 702 A.2d 230, 240 (Md. 1997).

[40] 1 SMOLLA, *supra* note 27, § 1:9.50 (citing Amber Melville-Brown, *The Impact of* Reynolds v. Times Newspapers, 18 COMM. LAW., Winter 2001, at 25); *see also* Marin Roger Scordato, *The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law*, 40 CONN. L. REV. 165 (2007) (commenting on a recent British case that essentially changed traditional British libel law, while also analyzing the results of the case holdings and comparing those results to defamation laws in the United States).

[41] [1999] UKHL 45, [2001] 2 A.C. 127 (appeal taken from Eng.) (U.K.).

"[t]o be justified, any curtailment of freedom of expression must be convincingly established by a *compelling* countervailing consideration."[42]

This deference to free speech is also seen in *Turkington v. Times Newspapers Ltd.* when, in dealing with a newspaper being sued by a law firm for publishing a report of a press conference at which comments critical of the law firm were made, the court recognized the need for more press freedom, noting that "the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."[43]

What *Reynolds* had promised, but not delivered, was fulfilled a few years later in the landmark decision of *Jameel v. Wall Street Journal Europe*,[44] which moved English defamation law even closer to that of the United States[45] after ruling on material published in a newspaper about multiple Saudi individuals and business interests with possible ties to terrorism.[46] In *Jameel*, the Lords ruled that when (1) there was a "public interest" in having the statement at issue in the "public domain," (2) the inclusion of the specific statement was justifiable (meaning it was necessary to the story), and (3) the gathering and publishing of the statement met the standards of "responsible journalism," then the statement is entitled to qualified privilege immunity, also called a "*Reynolds* privilege."[47]

Jameel has since opened the doors to a more publisher-friendly world in England. It has been applied in *Charman v. Orion Group Publishing Group Ltd.* to rule for a defendant who authored a book exposing corruption in a police force,[48] and in *Roberts v. Gable* to rule for a defendant magazine.[49] Yet the fact that the *Reynolds*, *McCartan*, and *Jameel* defendants were newspaper companies begs the question of how far the *Jameel* privilege rule will go in protecting other types of defamation defendants. Recently, speaking for the Court of Appeal of Jamaica, Lord Carswell said in *Seaga v. Harper*, that they saw "no valid reason why [the rule] should not extend to publications made by any person who publishes material of public interest in any medium, so long as [the publications meet the requirements laid out in *Jameel*]."[50]

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42 *Id.* (emphasis added).

43 [2000] UKHL 57, [2001] 2 A.C. 277 (appeal taken from N. Ir.) (U.K.).

44 [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.) (U.K.).

45 Scordato, *supra* note 40, at 167.

46 *Jameel*, [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.) (U.K.).

47 *Id.*

48 [2007] EWCA (Civ) 972, [2008] 1 All E.R. 750 (Eng.).

49 [2007] EWCA (Civ) 721, [2008] 2 W.L.R. 129 (Eng.).

50 [2008] UKPC 9, [2009] 1 A.C. 1 (appeal taken from Jam.) (U.K.).

These developments in English defamation law show a clear trend toward more protection for the defendants in libel suits, but the level of protection still does not approach that provided by the First Amendment in the United States. Apart from the few recent developments in *Jameel*, English law still requires the defendant to show that the allegedly defamatory statement was true.

2. Canada

Canada maintains the pro-plaintiff, "truth is a defense" common law approach that it inherited from England.[51] Canadian courts have followed those of England and Australia in remaining firmly on common law ground and have expressed their reluctance to move toward a U.S. approach.[52] One court considered (but rejected) adopting a more pro-free speech law like that of the United States because other jurisdictions like England and Australia had not adopted it, and the current policy of placing the burden of ascertaining the truth before publishing was the proper one.[53] But the court did adequately consider the "chilling effect" of the threat of libel suits, and cursorily dismissed it after a "review of jury verdicts in Canada reveal[ed] that there [was] no danger of numerous large awards threatening the viability of media organizations."[54]

Like England, Canada has moved *slightly* toward more press freedom in its increased qualified privilege protection.[55] One of these is the "fair comment" privilege, protecting "comments based on true facts made honestly without malice with reference to a matter of public interest."[56] But the comments cannot be "mixed up with statements of fact that the reader or listener is unable to distinguish between the reported facts and comment,"[57] a prohibition that clearly places Canadian law in the same pro-plaintiff territory as English law.

3. Australia

Just like Canada, former English colony Australia inherited England's pro-plaintiff common law of defamation.[58] The recently–

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[51] 1 SMOLLA, *supra* note 27, § 1:9.75 (citing 1 RAYMOND E. BROWN, THE LAW OF DEFAMATION IN CANADA § 1.5(1)(c) (2d ed. 1999)).

[52] *See, e.g.*, Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, ¶¶ 125–145 (Can.).

[53] *Id.* ¶ 140.

[54] *Id.* ¶ 143.

[55] 1 SMOLLA, *supra* note 27, § 1:9.75.

[56] Leenen v. Canadian Broad. Corp., [2000] 48 O.R.3d 656¶¶ 121, 123 (Can.).

[57] *Id.* ¶ 123.

[58] Nathan W. Garnett, Dow Jones & Co. v. Gutnick: *Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?*, 13 PAC. RIM L. & POL'Y J. 61, 70

decided case *Dow Jones, Inc. v. Gutnick* reaffirmed this idea when it applied the common law of defamation to suppress a news website originating in the United States.[59] This is especially apparent in one judge's comment during oral argument:

> [The American view of free speech that informs United States defamation law] is a very American viewpoint which is not shared by the rest of the world. The whole rest of the world does not share. [sic] It has to be very clear. The international covenant on civil and political rights does not share the American, as others see it, obsession with free speech.[60]

In spite of certain qualified privileges that have made headway in recent years, the protection for free speech in Australia is in line with the English law and is clearly not at the level of that provided in the United States.

4. United States

The importance of protecting reputation in English law was imported and stressed in early U.S. history, owing to the high deference lawyers in the Colonies gave to the English common law.[61] Even so, a wariness of government intervention in the affairs of the press led to a desire for more free speech and a prevalent attitude that the common law of defamation was "un-American."[62] Those who were worried about the press having runaway power could take comfort in two checks on the power of the press: (1) counterspeech and (2) defamation law.[63] One event that significantly informed early American jurisprudence on protection of freedom of speech was the *Zenger* trial in 1735.[64] John Zenger had published a newspaper in which politician William Cosby was attacked by opponents, and Cosby sued Zenger.[65] Since the reign of the Tudors, English law had held that truth was no defense to seditious libel; to the contrary, the greater the truth, the greater the libel, as truth was considered more of a threat to the king's power.[66] Despite this, Zenger's lawyer successfully convinced the court to allow the criminality

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(2004) (citing Matt Collins, *Defamation and the Internet After* Dow Jones & Co. v. Gutnick, 8 MEDIA & ARTS L. REV. 165, 167 (2003)).

59 (2002) 210 C.L.R. 575, ¶¶ 190–202 (Austl.).

60 Transcript of Oral Argument, *Dow Jones*, (2002) 210 C.L.R. 575, *available at* http://www.austlii.edu.au/au/other/hca/transcripts/2002/M3/2.html.

61 *See* Paul T. Hayden, *Reconsidering the Litigator's Absolute Privilege to Defame*, 54 OHIO ST. L.J. 985, 1009–10 (1993) (quoting Veeder, *supra* note 34, at 546).

62 1 SMOLLA, *supra* note 27, § 1:4 (citing Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 17 (1983)).

63 *Id.* § 1:27.

64 *Id.* § 1:28 (citing THE TRIAL OF PETER ZENGER (Vincent Buranelli ed. 1957)).

65 *Id.*

66 *Id.*

of the publication to be determined by a jury of peers rather than a judge and successfully convinced the jurors that truth should be a defense, because they "should declare what they knew to be the truth" of the suffering under the Cosby government.[67] This reversal of clear precedent was a landmark verdict for the protection of free speech and influenced the adoption of the First Amendment.[68]

The adoption of the First Amendment and the explicit recognition of free speech that went along with it diverged in a small but distinct way from the English common law's protection of reputation[69] even though the First Amendment was not yet applied to defamation law.[70] Many still revered Blackstone's view of a more limited freedom of speech that ensured public and governmental order[71] by punishing "the disseminat[ion], or making public, of bad sentiments, destructive of the ends of society."[72]

After the American Revolution, defamation law developed independently in the states but generally remained a strict liability tort very similar to that which existed in England.[73] To make out a prima facie case, a plaintiff needed only to show that (1) defamatory speech, (2) had been published, (3) about the plaintiff.[74] The defendant then had to prove either (1) that the statement was substantially true, or (2) that it was privileged.[75] The common law's policy for punishing libel more seriously than slander was driven by the idea that libel damaged a person's reputation more seriously than slander, had a wider reach, and showed greater premeditation and deliberation on the part of the defendant.[76] Earlier in the common law, all libel was actionable without proof of actual harm, but eventually the law required special damages to be proved in a slander lawsuit *unless* one of four categories was implicated: "(1) imputation of a serious crime involving moral turpitude, (2) possession of a loathsome disease, (3) an attack on the plaintiff's

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67 *Id.*

68 *Id.*

69 *Id.*

70 *See* Respublica v. Oswald, 1 Dall. 319, 325 (Pa. 1788). In observing the "great crime" of libel, the Court asked, "Can it be presumed that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred, by the authority of the [C]onstitution, when delivered to the public through the more permanent and dissu[a]sive medium of the press?" *Id.*

71 *See id.*

72 WILLIAM BLACKSTONE, 2 COMMENTARIES *152.

73 1 SMOLLA, *supra* note 27, § 1:7.

74 *Id.* § 1:8 (citing RESTATEMENT (FIRST) OF TORTS § 558 (1938)).

75 *Id.* (citing RESTATEMENT (FIRST) OF TORTS §§ 582–98 (1938)).

76 *Id.* § 1:13.

competency in his business, trade, or profession, or (4) unchastity in a woman."[77]

Although certain privileges developed over the years to protect the speaker,[78] the common law of England controlled defamation law in the United States.[79] The First Amendment was not applied to defamation even as recently as 1942,[80] but that changed a few years later when the U.S. Supreme Court decided *New York Times Co. v. Sullivan*.[81]

B. U.S. Supreme Court Interpretations of the First Amendment Led U.S. Defamation Law to Depart Radically from That of Other Countries

In the United States, the First Amendment began playing a role in defamation law in *New York Times v. Sullivan* when a non-party took out an advertisement in the *New York Times* newspaper to draw attention to the plight of blacks in the South.[82] The advertisement included statements, some true and some false, that allegedly libeled Sullivan as one of three commissioners of Montgomery, Alabama, because the activities implicated police under his control.[83] The trial court, affirmed by the Alabama Supreme Court, ruled for Sullivan on the ground that the material was libelous *per se*, because it was published and it concerned him, with injury being implied and malice being presumed, and rejected the newspaper's argument that it was protected by the First Amendment.[84]

The U.S. Supreme Court reversed, holding that "the Constitution delimits a [s]tate's power to award damages for libel in actions brought by public officials against critics of their official conduct," because the First and Fourteenth Amendments require "safeguards for freedom of speech and of the press."[85] The Court stated that it was "compelled by neither precedent nor policy" to measure libel by the same constitutional limitations as other areas of expression, whether it came in the form of a paid or unpaid advertisement, and that now "actual malice" must be

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[77] *Id.* § 1:15 (citations omitted).

[78] *Id.* § 1:8 (citing RESTATEMENT (FIRST) OF TORTS §§ 582–98 (1938)).

[79] *See* Hayden, *supra* note 61, at 1009–10 (citing LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 33–35 (2d ed. 1985)).

[80] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (citing ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 149 (1941)) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

[81] 376 U.S. 254 (1964).

[82] *Id.* at 256–57.

[83] *Id.* at 256–59.

[84] *Id.* at 262–64 (citing N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 52 (Ala. 1962)).

[85] *Id.* at 264, 283.

proved for a public official to recover for libel.[86] The Court found support for this new rule in the same rationale that was behind widespread rejection of the Sedition Act of 1798 (which criminalized libeling members of the federal government); namely, the idea that the United States, unlike England, was governed ultimately by the people and that the people therefore needed to examine and critique the government whose power they would approve.[87]

The Court noted that the free exchange of ideas and latitude for government criticism are essential for a democracy to function properly.[88] The problem with common law defamation was that it did not provide this:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.[89]

Without constitutionally protected defamation, "would-be critics of official conduct may be deterred from voicing their criticism" because, although they know it is true, it is too expensive to defend in court.[90] Moreover, this self-censorship affects not one individual but the entire public.[91] The Court used this policy, embodied in lines of free speech cases, rather than common law defamation cases, to implement a new law for alleged libel involving public officials.[92]

Just three years after *New York Times* the Court decided *Curtis Publishing Co. v. Butts*, in which the Court held that public figures—people who are "involved in issues in which the public has a justified and important interest"—may recover damages for defamation "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[93] The Court noted the "competing considerations" of the *New York Times* and common law defamation standards, but in cautioning against "blind application" of the *New York Times* standard, recognized that the policy of reporting on a public figure should be less favorable to the reporter than the policy of reporting on a public official.[94] Ultimately, the policy here is still on the side of the

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86 *Id.* at 265, 269, 279–80.

87 *See id.* at 273–76 (citing Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798)).

88 *Id.* at 269 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

89 *Id.* at 279.

90 *Id.*

91 *Id.*

92 *See id.* at 269–73.

93 388 U.S. 130, 134, 155 (1967).

94 *Id.* at 147–48 (internal quotation marks omitted).

press—it aims to allow the press freedom to purvey news and ideas about public figures without fear, so long as they do not demonstrate an "extreme departure" from responsibility.[95]

A few years later in *Gertz v. Robert Welch, Inc.*, the Court slowed the movement toward press freedom when it ruled that the *New York Times* test should not be applied to private individuals, but only to public officials and public figures.[96] Though the Court noted the need for "'breathing space'" to avoid self-censorship by the media,[97] it gave greater weight to "the strong and legitimate state interest in compensating private individuals for injury to reputation."[98] The Court set out a new rule that, as long as the states do not impose liability without fault, they may determine for themselves the standard of liability for defamation to a private individual.[99] In an attempt to balance the free speech policy of the First Amendment, the Court said that in regard to "an issue of public or general interest," the states also may "not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."[100] In his dissent, Justice Douglas noted the majority's struggle to find a balance between the common law of defamation and the First Amendment and suggested that the struggle be abandoned for the First Amendment to have the full effect that the Framers wanted.[101] Justice Brennan likewise believed that "free and robust debate" was not given adequate "'breathing space'" by the majority's rule.[102]

Later cases continued to nuance the first three in the *New York Times* line of reasoning. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* moved the law even more than *Gertz* to protect individual reputation by allowing presumed damages without showing actual malice in cases dealing with matters of private concern.[103] But the press received some relief in *Philadelphia Newspapers, Inc. v. Hepps*, in which the Court ruled that a private figure plaintiff must bear the burden of showing the defamatory speech was false when suing a media defendant for speech on a matter of public concern.[104] The Court decided this way even though its decision would "insulate from liability some speech that is false"[105]

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95 *See id.* at 149–55.

96 418 U.S. 323, 346 (1974).

97 *Id.* at 342 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

98 *Id.* at 348–49.

99 *Id.* at 347.

100 *Id.* at 346, 349.

101 *Id.* at 356 (Douglas, J., dissenting).

102 *Id.* at 361 (Brennan, J., dissenting) (quoting *Button*, 371 U.S. at 433).

103 472 U.S. 749, 761, 763 (1985) (plurality opinion).

104 475 U.S. 767, 776–77 (1986).

105 *Id.* at 778.

because of the policy of protecting some false speech just to protect "'speech that matters.'"[106] In *Hustler Magazine, Inc. v. Falwell*, the Court took one more step to protect even deliberately false speech in the form of a satirical cartoon, as the policy of free contribution to the public debate was important enough to justify it.[107] In *Milkovich v. Lorain Journal Co.*, the Court refused to explicitly grant additional protection to "opinion" as a constitutionally protected exception to defamation law because sufficient constitutional protection already existed, and "fact" and "opinion" are too closely intertwined to properly accord different legal status in defamation law.[108] The Court took note of its "recognition of the [First] Amendment's vital guarantee of free and uninhibited discussion of public issues" and sought to balance that with protecting reputation.[109]

Additionally, the Court has promoted rules that reduce the potential for self-censorship from threat of defamation actions.[110] The Court recognizes that some false speech is actually protected but has chosen to leave false speech to be corrected in the marketplace of ideas rather than promulgating rules that chill false speech at the expense of also chilling true speech.[111] The Court has reasoned that "[t]he First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."[112]

Even with this application of the First Amendment, defamation law still allows the restriction of speech when that would otherwise not be permissible.[113] Why is this so? One reason is that protecting relations between individuals prevents harm to the reputation and individual human personality that affects those relations.[114] Society has placed great value in "preventing and redressing attacks upon reputation."[115] The reason the law maintains that protection against defamation even in the face of the power of the First Amendment is due to the importance of

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[106] *Id.* (quoting *Gertz*, 418 U.S. at 341).

[107] 485 U.S. 46, 52–57 (1988).

[108] 497 U.S. 1, 18–21 (1990).

[109] *Id.* at 22–23.

[110] Deeann M. Taylor, Dun & Bradstreet, Hepps *and* Milkovich: *The Lingering Confusion in Defamation Law*, 1992/1993 ANN. SURV. AM. L. 153, 164.

[111] *Id.* at 165 (citing *Gertz*, 418 U.S. at 339–40; N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964)).

[112] Bose Corp. v. Consumers Union, 466 U.S. 485, 503–04 (1984). This idea was poignantly presented by the notion of willingly "'invit[ing] dispute'" as "'a function of free speech.'" Ashton v. Kentucky, 384 U.S. 195, 199 (1966) (quoting Terminiello v. Chicago, 337 U.S. 1, 3–4 (1949)).

[113] 1 SMOLLA, *supra* note 27, § 1:21.

[114] *Id.* § 1:22 (citing Leon Green, *Relational Interests*, 31 ILL. L. REV. 35, 36 (1936)).

[115] Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

minimizing disruption of the esteem that individuals enjoy in the eyes of fellow citizens.[116] One possible way to break down the types of harm to relational interests is (1) existing relations with third persons, (2) interference with future relations, (3) damage to public image, and (4) creating a negative public image when no previous public image existed.[117] Other rationales for redressing harm from defamation include economic harm, emotional injury, promotion of human dignity by preventing "undeserved" attacks, and deterrence of publishing false material.[118] Ultimately, because society has placed great value in "preventing and redressing attacks upon reputation,"[119] defamation law still allows for some restriction of speech even with this application of the First Amendment.[120]

Whether the terms "public official," "public figure," "public concern," and others will be given broader or narrower definitions in the future, the policy of current U.S. defamation law is clearly pro-defendant and pro-free speech.[121] Although some areas show a slight return to common law standards,[122] they are still a distance away from the law in England, Canada, Australia, and other common law countries. The United States stands alone in that its *New York Times* line of cases clearly prefers free speech and allows a law that willingly suffers false material to be published rather than to restrict the free exchange of ideas and free speech the Court has held to be guaranteed by the First Amendment.

II. CAUSE OF ACTION

The above comparison of defamation law exposes the differences between the law in the United States and several common law countries. This demonstration of differences is necessary because this fact is what gives "teeth" to the cause of action provided in section 3(a) of the Act.[123] Basically, the problem this Act addresses arises out of the differences in defamation law between the United States and other nations.

The cause of action is notable in that it creates a way to "retaliate" for being sued for defamation in a foreign jurisdiction. But the cause of action is not for defamation, because the person who is able to file suit under this Act is the one who was *sued for* defamation in a foreign

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[116] *See* 1 SMOLLA, *supra* note 27, § 1:22 (citing Kiesau v. Bantz, 686 N.W.2d, 164, 175 (Iowa 2004)).

[117] David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 765–66 (1984).

[118] 1 SMOLLA, *supra* note 27, § 1:23–:26.

[119] *Rosenblatt*, 383 U.S. at 86.

[120] 1 SMOLLA, *supra* note 27, § 1:21.

[121] *See* Taylor, *supra* note 110, at 164–65.

[122] *Id.* at 165.

[123] *See* H.R. 1304, 111th Cong. § 3(a) (2009); S. 449, 111th Cong. § 3(a) (2009).

country. It is similar to an abuse of process or malicious prosecution counterclaim. Still, this analogy can only stretch so far because the foreign defendant has not "abused" the foreign judicial system; rather, the foreign defendant has "abused" the U.S. judicial system. The U.S. citizen is able to file suit simply for being sued *if* the defamation at issue in the foreign lawsuit "does not constitute defamation under United States law."[124]

Although H.R. 1304 already provides a non-enforcement remedy, the retaliatory measure provided by this Act is also necessary. While this Act does not stop plaintiffs from suing in foreign jurisdictions, it allows for (1) *deterrence*, because foreigners will not want to sue when they know they will be sued in the United States, and (2) *retaliation*, because even if the foreigner wins overseas, the defendant may recover costs, and possibly more, in a suit in the United States.[125]

A. Deterrence

The Act will serve as a deterrent to libel lawsuits like *Ehrenfeld v. Mahfouz*[126] where the plaintiff "forum shops" before bringing a suit. As expressed in Part I, the current problem with defamation law differences is that most other common law countries are significantly more plaintiff friendly than the United States. In addition to "voiding" or "negating" the foreign suit through the nonenforcement provision, the Act provides

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[124] *Id.*

[125] This Note is not an overview of the entire Act, nor does it explore all the legal problems which may arise out of the language of the cause of action. *See supra* note 21.

In light of the *Ehrenfeld* lawsuit behind the origin of the Act, this language is presumably meant to target similar cases in which a publication *intentionally targeted* for distribution only in the United States ends up in a foreign country where a foreign plaintiff sues. But what if the intended distribution is 50% in the United States and 50% in some foreign country? 25% and 75%? 5% and 95%? These cases seem to be covered by the language of the Act, but it is not clear whether they are meant to be if the goal is to only protect individuals in Ehrenfeld's position.

Another problem might be the language "published, uttered, *or* otherwise disseminated." H.R. 1304 § 3(a) (emphasis added); S. 449 § 3(a) (emphasis added). The "or" would allow authors presumably to publish only in the United States and target foreign countries, even up to 100%. This is not what Rachel Ehrenfeld did, and the measure may be (1) a loophole or (2) an intentional overprotection and overreaction to *Ehrenfeld*.

Another issue this Note does not discuss is how the Act is affected by conflict of laws issues. For example, courts may refuse to enforce foreign judgments because they are repugnant to public policy in negating First Amendment protections. Matusevitch v. Telnikoff, 877 F. Supp 1, 2 (D.D.C. 1995). This remedy *was* the only hope for U.S. citizens. Now, the Act gives U.S. citizens a clear cause of action in an area which was before left up to the courts. An examination of the conflict of laws issues presented by the Act might lead to the conclusion that it must not be passed—or at least be modified before being passed—but that is not the point here. The protection that the Act gives to free speech is needed today in spite of the need that other provisions be slightly modified.

[126] 881 N.E.2d 830 (N.Y. 2007).

the threat of a retaliatory countersuit which will dull foreign plaintiffs' enthusiasm for bringing suits against U.S. citizens.

The Act already expressly provides that foreign judgments not meeting defamation under U.S. constitutional standards shall not be enforced.[127] But that is solely a defensive cause of action. In no way does it aid those who are under assault by those who are attempting to suppress their speech. Situations like Ehrenfeld's require a counter-weapon to deter those filing the lawsuits, or people like Ehrenfeld might not publish. Unlike the current situation—people like Ehrenfeld waiting to see if and when the foreign plaintiff will attempt to enforce the suit—there is a greater likelihood, under this Act, that the foreign plaintiff will never bring suit in the first place.[128] Currently, groundless lawsuits may be filed by foreign plaintiffs who are simply hoping for a good settlement offer. Frivolous lawsuits may be filed to intimidate, or for other reasons, because the risk to the filing party is pretty low. This Act would deter those types of suits. Even if H.R. 1304 or S. 449 is enacted, a defendant will still incur litigation costs and may have to deal with psychological trauma. This may be enough to cause them to self-censor. A counteraction cause of action is needed to provide more support for those willing to speak their minds and to do so without unnecessary worry.

The Act is intended to discourage forum shopping litigants and others with motives *besides* compensation for injury to reputation. Still, there might be some "collateral damage" in discouraging valid suits not under that description. Foreign citizens will be subjected to the Supreme Court's reading of the First Amendment by triggering a U.S. lawsuit. Even so, that is necessary collateral damage for the greater good of protecting free speech. A foreigner may have been defamed under the law of his or her own country and have no other motive to bring suit other than to be compensated for his or her injured reputation, but that foreigner may be deterred from bringing suit out of fear of being subjected to a U.S. lawsuit under this Act. But just as the Supreme Court has justified protecting some false speech in order to protect free speech in general, a threat to justifiable libel suits is necessary in order to deal with the unjustifiable ones.

This vigorous promotion of the First Amendment is not entirely novel. The First Amendment has been held to affect international jurisdictions in choice of law cases, as in *Desai v. Hersh* when the court said, "Moreover, so as not to chill speech inside the United States

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[127] H.R. 1304 § 3(c); S. 449 § 3(c).

[128] *See* N.Y. CITY BAR COMM. ON COMMC'NS & MEDIA LAW, REPORT IN SUPPORT OF S.6687/A.9652: THE LIBEL TERRORISM PROTECTION ACT 3, *available at* http://www.nycbar.org/pdf/report/LTPA.pdf. The commentary in this report refers to New York's law, but the Free Speech Protection Act of 2009 is almost identical to the New York law and accomplishes the same goals with the same cause of action.

relating to matters of public concern, it may be necessary that [F]irst [A]mendment protections spill over to more extensive extraterritorial re-publications of that speech, given the ease and likelihood of extraterritorial re-publication."[129]

Although the Act may "meddle" in the law of other countries—and foreign citizens may have to think twice now before filing suit—that concern is worth paying for the protection of free speech. Besides, to "meddle" is only one interpretation of this issue. Another interpretation, just as fair, is that the United States is simply doing its job in protecting its citizens. Even if this Act "meddles" with national sovereignty, any such "meddling" is not that different from the way forum shopping—such as that in *Ehrenfeld*—affects relations in the international community. Moreover, increased globalization and the international community's acceptance of forum shopping leave it with less of an argument that national sovereignty should bar legislation like this Act. Put another way, nations in effect concede any defense of national sovereignty by allowing forum shopping.

Another fact that should alleviate concern over "meddling" is the Act's requirement that the material be disseminated "primarily" in the United States.[130] This will limit lawsuits to only the most egregious attempts of forum shopping for the weapon of a libel judgment. A plaintiff would only be able to sue under this Act when a foreigner is trying to suppress speech primarily meant for the citizens of the United States. An author would not be able to use the current version of the Act as cover and protection to inject their views primarily into a foreign forum.

This Act responds to *Ehrenfeld* and its hot-button issue of terror financing, but it implicates other subject matter as well. Suppose a U.S. author publishes a book denying the Holocaust and attributes the claim to well-known foreign scholars. Although this damage to reputation would likely constitute defamation under the common law, it would probably be a matter of public concern dealing with public figures and, therefore, not qualify as defamation in the United States. If the scholars sued for defamation, they would be subject to suit in the United States. Thereby, the Act "meddles" with the sovereignty of foreign countries that want to make Holocaust denial a crime. Holocaust denial laws are already in place in some European countries and are being considered in others.[131] Though it is currently not illegal in England,[132] this Act will

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[129] 719 F. Supp. 670, 676–77 (N.D. Ill. 1989).

[130] H.R. 1304 § 3(a); S. 449 § 3(a).

[131] *Push for EU Holocaust Denial Ban*, BBC NEWS, Jan. 15, 2007, http://news.bbc.co.uk/2/hi/europe/6263103.stm.

[132] *See id.*

implicate any country with a similar defamation law. Despite the interference, this Act is needed because there is already self-censorship in British schools, regardless of the Holocaust denial laws.[133] Preventing similar self-censorship of U.S. authors is a primary goal of this Act.

B. Retaliation

The cause of action could be analogized to a countersuit in the form of (1) an abuse of process claim, (2) a malicious prosecution claim, (3) an action to recoup attorney's fees, or (4) an action under Federal Rule of Civil Procedure 11.[134] The media may use all of these actions to counter frivolous libel suits.[135] It may also use an action for infringement of constitutionally protected rights, which in these cases would be infringement of the First Amendment.[136]

Although none of these actions would apply here because these are international cases, not domestic ones in which a party may assert a counteraction due to both parties working within the same legal system, the ideas behind them shed light on the cause of action.

1. Abuse of Process

Abuse of process occurs when a party "uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed."[137] Abuse of process

> is not the wrongful *procurement* of legal process or the wrongful *initiation* of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any *purpose other than that which it was designed to accomplish.* Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed . . . .[138]

Abuse of process is a counteraction available to a person who has been sued for a purpose not intended by the judicial system. Such action

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[133] Laura Clark, *Teachers Drop the Holocaust to Avoid Offending Muslims*, DAILY MAIL (London), Apr. 2, 2007, at 33, *available at* http://www.dailymail.co.uk/news/article-445979/Teachers-drop-Holocaust-avoid-offending-Muslims.html.

[134] *See* Seth Goodchild, Note, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L.J. 315, 336–50 (1986).

[135] *See id.* (discussing "[c]ounteractions available to the media").

[136] *See id.* at 350–56 (reviewing the media's ability to fight infringement of its First Amendment rights). This last claim is not analogous here, however, because the foreign defendant's behavior in his own country is not governed by the First Amendment.

[137] RESTATEMENT (SECOND) OF TORTS § 682 (1977).

[138] *Id.* § 682 cmt. a (emphasis added).

allows the defendant in an improper suit to become the plaintiff in an abuse of process suit against the original plaintiff.

A counteraction for abuse of process of defamation law is not entirely unprecedented. Courts have refused to dismiss counterclaims for abuse of process to libel claims.[139] In *Rewald v. Western Sun*, the defendants argued a libel suit was brought to intimidate them from publishing certain material, and the court refused to dismiss the abuse of process claim because it was well-pled.[140] When a plaintiff sued for libel in *Peisner v. Detroit Free Press*, the court found there could be an ulterior motive—in other words, a jury would be able to conclude that the only reason for the suit would be to intimidate the defendant newspaper into hiring someone to write a retraction.[141] The court ultimately dismissed the case on summary judgment because, even though that element was met, the second element of a "misuse" of the process was not met when the plaintiff properly initiated the libel suit.[142]

The "ulterior motive" element is what this Act targets. What the Act is really saying is that it is an abuse of process to sue for defamation when the publication is reporting on current events. Although some foreign defamation suits are brought with the proper motive of redressing harm to reputation, some, like that which confronted Ehrenfeld, are brought with the improper motive of stifling free speech. While an abuse of process claim would apply *within* one legal system, and therefore would not apply in this case, it still illustrates what this Act does. Just like the "ulterior motive" element of abuse of process claims, this Act targets the improper motive of a desire to suppress free speech. If the defamation suit referred to in this Act were brought in the United States, there could be an abuse of process counterclaim if it were shown that the original plaintiff clearly knew the defamation did not meet the standards of the law.

2. Malicious Prosecution

The legal remedy in this Act emulates the principles of a malicious prosecution claim. Malicious prosecution occurs when a plaintiff files a lawsuit with knowledge that it has no foundation and is defined as a suit "that is begun in malice and without probable cause to believe it can succeed, and that finally ends in failure."[143] It is distinguished from abuse of process in that malicious prosecution is the wrongful initiation

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[139] *See, e.g.*, Feder v. Woodward, 12 Media L. Rep. (BNA) 1071, 1071 (C.D. Cal. 1985).

[140] 11 Media L. Rep. (BNA) 2494, 2495 (D. Haw. 1985).

[141] 242 N.W.2d 775, 778 (Mich. Ct. App. 1976).

[142] *Id.*

[143] 52 AM. JUR. 2D, *Malicious Prosecution* § 1 (2000).

of process, while abuse of process, defined in Part II.B.1 above, occurs after the process has been initiated.

This cause of action is not commonly used in retaliation to a libel suit, but courts have upheld a malicious prosecution claim when a libel suit was instituted without sufficient probable cause.[144] Yet the requirement that the libel trial be closed before initiating a suit for malicious prosecution makes this claim much more difficult to use.[145]

Malicious prosecution is the type of claim that this Act gives U.S. citizens against foreigners who bring libel suits without foundation, similar to the quasi-judicial complaint brought against journalist Mark Steyn before the Ontario Human Rights Commission alleging that Steyn's article on Islam and the West violated the Ontario Human Rights Code.[146] Steyn's opponent admitted to filing a complaint with the Ontario Human Rights Commission in order "to demonstrate the gaping hole" in the law, even though "he knew the complaint would probably be dismissed."[147] The Act is necessary to protect against the suppression of speech caused by these claims without foundation.

3. Actions for Attorney's Fees and Rule 11 Actions

A defendant may sue for attorney's fees when the plaintiff has brought a suit in bad faith or wantonness.[148] One court affirmed an award of attorney's fees on the "thinness" of a case and the bad faith in which it was brought.[149] Under Federal Rule of Civil Procedure 11, federal courts may impose sanctions for frivolous litigation.[150]

Rule 11 actions would only work within the United States legal system, but serve as a useful analogy to what this Act does. An award of attorney's fees is actually provided for in section 3(c) of the Act,[151] and will serve the goal of punishing frivolous suits under this Act just like attorney's fees awards do within the United States legal system.

III. THE CAUSE OF ACTION IN LIGHT OF DEFAMATION LAW

The cause of action in section 3(a) of the Act clearly promotes U.S. defamation law by requiring its standards to be met in order to avoid a

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[144] Kirk v. Marcum, 713 S.W.2d 481, 483 (Ky. Ct. App. 1986).

[145] Goodchild, *supra* note 134, at 342.

[146] Joseph Brean, *Rights Body Dismisses Maclean's Case*, NAT'L POST (Ontario), Apr. 9, 2008, *available at* http://www.nationalpost.com/news/story.html?id=433915 (internal quotation marks omitted).

[147] *Id.*

[148] Goodchild, *supra* note 134, at 344 (citing F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129 (1974)).

[149] Nemeroff v. Abelson, 704 F.2d 652, 659–60 (2d Cir. 1983).

[150] Goodchild, *supra* note 134, at 349 (citing FED. R. CIV. P. 11).

[151] H.R. 1304, 111th Cong. § 3(c)(2)(B) (2009); S. 449, 111th Cong. § 3(c)(2)(B) (2009).

countersuit, which, in turn, promotes a pro-free speech policy in defamation law. The common law of England, Canada, and Australia examined in Part I.A. is being subjected to the constitutionalized U.S. defamation law examined in Part I.B.

The contrast between the current state of U.S. defamation law and that of other common law countries[152] cannot be overstated, as the *New York Times* cases have brought the law onto ground that solidly supports the purposes of the Act. Before *New York Times*, people in Mahfouz's situation could sue easily and succeed if the people in Ehrenfeld's situation could not prove the truth of their claims. Proving the complex claims of financial ties to terrorism could turn out to be expensive and time consuming, thus deterring her from publishing. By not publishing, the public would be deprived of potentially valuable and necessary information of public concern. After *New York Times*, Mahfouz, who was likely a public figure,[153] not only would bear the burden of proving the claims were false, but also would have to prove that they were highly unreasonable.[154]

The potential effects that H.R. 1304 or S. 449 would have had on past cases are readily apparent. Cases like *Dow Jones & Co. v. Harrods Ltd.*,[155] *Bachchan v. India Abroad Publications Inc.*,[156] and *Telnikoff v. Matusevitch*,[157] involving U.S. parties seeking to bar foreign judgments from being enforced in the United States, would clearly be affected by H.R. 1304 or S. 449. But these cases involved libel suits in foreign jurisdictions that may never have been brought had the plaintiff been deterred by the threat of a suit under this Act.

This Act would provide deterrence in cases like *Ehrenfeld* by causing Mahfouz to be subject to a U.S. suit by Ehrenfeld and allowing Ehrenfeld to protect her right to free speech by effectively "requiring" foreign lawsuits to meet U.S. standards if the foreign plaintiff does not want to be sued in the United States.[158] But *Ehrenfeld* is an easy case; it was the reason this Act was ultimately introduced. What other cases would be different if the Act was passed?

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[152] *See supra* Part I.

[153] *See supra* note 93 and accompanying text.

[154] *See supra* notes 93–95 and accompanying text.

[155] 237 F. Supp. 2d 394 (S.D.N.Y. 2002).

[156] 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

[157] 702 A.2d 230 (Md. 1997).

[158] Although the foreign plaintiff has no options for avoiding suit in the United States besides not filing at all in the foreign country, that cost is necessary to protect American authors from having to self-censor. Foreign plaintiffs may have legitimate concerns about protecting reputation, and those may be dealt with by modifications to the Act. But that is not the scope of this Note; rather, the point here is that this type of measure is necessary to protect against the gravity of current free speech suppression.

It would depend on whether the speech or publication is about a public or private figure, as well as whether it is public or private speech. Public official cases like *New York Times* and public figure cases like *Butts* would clearly implicate this Act and would thus give a U.S. defendant a cause of action. A case involving a private figure in a matter of public concern where the private figure plaintiff has the burden of proving the speech was false in order to recover[159] would implicate the Act because the plaintiff would not have this burden in the English common law jurisdictions.

But cases involving speech about a private figure affecting matters of only private concern like *Dun & Bradstreet* might not implicate the Act because the Court in that case took an approach more similar to the common law. In these cases, the speech would "constitute defamation under United States law" as required by the Act,[160] and there would be no cause of action.

It is worth passing this Act to ensure that U.S. citizens keep their First Amendment protections in this age of increasing globalization. The Internet and other tools have increased the ease of communication, blurring lines of national sovereignty and causing jurisdictional problems. This Act does not force other nations to adopt First Amendment standards into their laws; it requires such protection only in the United States. The United States should exercise its sovereignty by promoting the policy of free and open speech for its citizens. If the United States, as the world's leading voice for free speech, fails to stand up against international forum shopping now, free speech and thought will take a big step toward extinction.

IV. THE EXPANSION OF PROTECTION OFFERED BY THIS ACT IS NEEDED DUE TO INCREASING WORLD-WIDE SUPPRESSION OF SPEECH

The unique cause of action in this Act is the type of measure necessary to combat (1) the chilling effect of the threat of litigation in many plaintiff friendly jurisdictions, (2) the filing of frivolous lawsuits as a way of "advancing the bar" of the law towards suppression, (3) using the claims of "defamation" and "the need to protect human rights" as ways to suppress speech, and (4) using protests and direct physical violence as a way to suppress speech. The Act already protects against the first two, but it should be modified to protect against the latter two, which may come in the form of a quasi-judicial proceeding or simply a law against criticizing an idea.

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[159] Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69 (1986).

[160] H.R. 1304, 111th Cong. § 3(a) (2009); S. 449, 111th Cong. § 3(a)(1) (2009).

A. Quasi-Judicial Cases

Because the protection of speech is so important to free societies and an open marketplace of ideas, the power held by this Act to deter speech suppression should be extended to protect victims of foreign lawsuits or tribunals that may not be "defamation" actions in the formal sense but still involve restrictions on free speech under the guise of "defamation."

The Act should be expanded to deter situations like the attempted censorship of journalist Mark Steyn's writings in *Maclean's* magazine under the Canadian Human Rights Act.[161] After Steyn wrote about conflict between Islam and the West, several individuals filed charges against him before the Canadian, British Columbia, and Ontario Human Rights Commissions on the grounds that his publications violated their respective human rights codes.[162] Even though this speech was not directed at an individual, the Ontario Human Rights Commission still issued a ruling because the speech could possibly incite hatred of Muslims.[163] The word "defamation" was not used in Steyn's case, but the plaintiff attempted to censor Steyn because his writings were likely to injure the reputation of a particular group. Cases like Steyn's are not normal defamation cases. But because the restriction of press freedom at issue is one thing the Act is designed to protect, the Act should be enlarged to give U.S. citizens a cause of action for foreign quasi-legal prosecutions *similar* to defamation in their restriction of speech.

B. Criticism of Ideas

Defamation law has traditionally protected individual reputation, but it is being hijacked to serve the goal of suppression of ideas. Those seeking to suppress ideas they do not agree with might sometimes cry "defamation" absent any actual remedy, and might sometimes attempt to misuse the legitimate legal remedy of defamation. Although common law countries currently define defamation as protecting the individual and not the idea, the gap between the two is narrowing and is in danger of closing in on free speech. By passing this Act, the United States can at least protect its own citizens from the censorship of unfavorable ideas.

Recent years have seen an increase in the number of instances of human rights "courts" and organizations bowing to groups claiming that speech negative of Islam violates "human rights" and "defames" Islam. For example, the United Nations Resolution Combating Defamation of

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[161] Brean, *supra* note 146.

[162] *Id.*

[163] *See* Press Release, Ontario Human Rights Comm'n, Commission Statement Concerning Issues Raised by Complaints Against Maclean's Magazine (Apr. 9, 2008), http://www.ohrc.on.ca/en/resources/news/statement.

Religions singles out for elimination speech that is critical of Islam.[164] Though the Resolution claims to protect all religions, Islam is the only one mentioned by name.[165] It is also of note that the resolution was introduced—and is still largely supported—by Muslim-majority countries.[166] The Resolution is a perfect example of protection of an idea, rather than individual rights. This Act defines defamation as "any action for defamation, libel, slander, or similar claim alleging that forms of speech are false or have caused damage to reputation."[167] If the U.N. Resolution, or a measure like it, is ever used as legal authority to bring a foreign defamation suit against a U.S. citizen, the U.S. citizen should be able to bring a counteraction in the United States.

The U.N. measure exposes the tactic of using defamation phraseology to repress speech critical of Islam, but this couching of suppression of ideas in acceptable legal terms and using judicial systems to further this insidious end is only part of a much broader wave that is swamping expression of thought critical of Islam. Numerous recent incidents indicate a pattern of repressing free speech in traditionally free, western countries, including the United States. The pattern is widespread, and the following examples are representative.

In 1989, the Iranian government called for the death of author Salman Rushdie after he wrote a book which supposedly committed apostasy against Islam.[168] Numerous riots and protests to the book followed around the world.[169] The fatwa against Rushdie was reaffirmed by Iran as recently as 2005,[170] and even recently demonstrators gathered in anger and Pakistani officials referred to Rushdie as a "big criminal"

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[164] Combating Defamation of Religions, Human Rights Council (HRC) Res. 7/19 (Mar. 27, 2008), *available at* http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_19.pdf.

[165] *See id.*

[166] *See id.* This is important because these countries do not see themselves as groups of people with the goal of simply living together in harmony—as Western countries do—but as entities to bring the authority of Islam to other countries around the world. *See* BERNARD LEWIS, THE CRISIS OF ISLAM 31–32 (Modern Library ed. 2003).

[167] H.R. 1304, 111th Cong. § 6(1) (2009); *see also* S. 449, 111th Cong. § 5(1) (2009). The Senate version of the Act expands this definition, defining defamation as "any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented a person or persons in a negative light, or have resulted in criticism or condemnation of a person or persons." S. 449 § 5(1).

[168] Philip Webster et al., *Ayatollah Revives the Death Fatwa on Salman Rushdie*, TIMES (London), Jan. 20, 2005, at 4, *available at* http://www.timesonline.co.uk/tol/news/uk/article414681.ece.

[169] Chris Hedges, *Rushdie Seeks to Mend His Rift with Islam*, N.Y. TIMES, Dec. 25, 1990, at 9.

[170] Webster et al., *supra* note 168.

after the United Kingdom knighted him.[171] After the more recent Danish Cartoon Controversy, the leader of the resistance group Hezbollah said, "If there had been a Muslim to carry out Imam Khomeini's fatwa against the renegade Salman Rushdie, this rabble who insult[ed] our Prophet Mohammed . . . would not have dared to do so."[172]

Theo van Gogh was a Dutch film maker who was murdered in November 2004 by a Moroccan immigrant acting on "religious conviction."[173] Van Gogh had produced a short film designed to call attention to the treatment of women in Islam, which caused an outcry from Muslim leaders who said it was "blasphemous" and "confrontational."[174] Van Gogh had previously received death threats and was shot two months after the film was released.[175] In trial testimony, his murderer, Mohammed Bouyeri, who appeared in court holding a copy of the Koran, said, "'the law compels me to chop off the head of anyone who insults Allah and the prophet.'"[176] Even though Bouyeri's motive is now public knowledge, the Dutch people are "struggling to understand *how* Bouyeri, who was born and raised in Amsterdam, turned to radical Islam."[177] Regardless, governments must heed these warning signs by not letting death threats roll back free speech. Instead, governments must maintain free speech laws while vigorously prosecuting law-breakers of all types, religious and non-religious, instead of trying to solve intolerance by tolerating it.

Ayaan Hirsi Ali is a Somali woman who immigrated to the Netherlands and later renounced Islam even though she was raised as a Muslim.[178] Ali produced the film *Submission*, which led to the assassination of director van Gogh,[179] after which a death threat note directed at Ali was found pinned to van Gogh's body.[180] Ali speaks

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[171] *Day of Pakistan Rushdie Protests*, BBC NEWS, June 22, 2007, http://news.bbc.co.uk/2/hi/south_asia/6229506.stm (internal quotation marks omitted).

[172] Sakher Abu El Oun, *Mohammed Cartoon Protests Escalate to Threats Against West*, MIDDLE EAST ONLINE, Feb. 2, 2006, http://www.middle-east-online.com/english/?id=15640 (internal quotation marks omitted).

[173] *Life of Slain Dutch Film-Maker*, BBC NEWS, Nov. 2, 2004, http://news.bbc.co.uk/2/hi/entertainment/3975211.stm.

[174] *Id.*

[175] *Id.*

[176] *Van Gogh Killer Jailed for Life*, BBC NEWS, July 26, 2005, http://news.bbc.co.uk/2/hi/europe/4716909.stm (internal quotation marks omitted).

[177] *Id.* (emphasis added).

[178] Gerald Traufetter, *"Everyone is Afraid to Criticize Islam,"* SALON.COM, Feb. 7, 2006, http://www.salon.com/news/feature/2006/02/07/hirsi_ali.

[179] *Id.*

[180] *Van Gogh Killer Jailed for Life*, *supra* note 176.

liberally, and often negatively, about the prophet Mohammed.[181] These statements, among many others such as "all humans are equal but not all cultures are equal,"[182] resulted in numerous death threats against her.[183] When Ali came to deliver a speech recently in Johnstown, Pennsylvania, a local imam unsuccessfully attempted to get the university to prevent her from speaking and said that her ideas warrant the death sentence under Islam.[184] Despite the risks people like Ali choose to undertake to speak freely, the United States must uphold its law from which Ali's free speech right emanates.

In 2005, the Danish newspaper *Jyllands-Posten* published cartoons of the prophet Mohammed that Muslims considered insulting.[185] The controversy spread, and while some newspapers reprinted the cartoons as a way to assert their freedom of expression,[186] crowds rioted at Danish and other embassies around the world.[187] Jordanian newspaper editors also decided to reprint the cartoons, but they were soon arrested after "Jordan's King Abdullah II said the publication of such images is a 'crime that [] cannot be justified under freedom of expression.'"[188] Many newspapers feared confrontation after the outcry, and capitulated to self-censorship by choosing not to publish the cartoons.[189]

Recently, in the United States, Random House decided not to publish the book *The Jewel of Medina* after concerns were raised that Muslims would be upset with it,[190] "saying it had been informed by credible sources that the book could incite violence."[191] Another publisher

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[181] *See* Helle Merete Brix & Lars Hedegaard, *Interview with Ayaan Hirsi Ali*, SAPPHO, Nov. 23, 2005, http://www.sappho.dk/Den%20loebende/hirsi_english.htm.

[182] Boris Kachka, *The Infidel Speaks*, N.Y. MAG., Feb. 4, 2007, *available at* http://nymag.com/arts/books/profiles/27304/.

[183] William Grimes, *No Rest for a Feminist Fighting Radical Islam*, N.Y. TIMES, Feb. 14, 2007, at E1.

[184] Robin Acton, *Johnstown Imam Ousted over "Death" Remarks*, PITTSBURGH TRIB. REV., May 10, 2007, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/print_506958.html.

[185] *Embassies Torched in Cartoon Fury*, CNN.COM, Feb. 4, 2006, http://www.cnn.com/2006/WORLD/meast/02/04/syria.cartoon.

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *See* Flemming Rose, Op-ed., *Why I Published Those Cartoons*, WASH. POST, Feb. 19. 2006, at B1.

[190] Asra Q. Nomani, Op-ed., *You Still Can't Write About Mohammed*, WALL .ST. J., Aug. 6, 2008, at A15.

[191] *British Publisher to Bring Out Controversial Prophet Mohammed Novel*, AFP EUR. EDITION, Sept. 3, 2008, http://www.thefreelibrary.com/British+publisher+to+bring+out+controversial+Prophet+Mohammed+novel-a01611634417.

agreed to take on the book because of the importance of open access to varying books and ideas, even those that are controversial.[192]

In the United States in 2006, several imams were removed from a U.S. Airways flight after passengers and flight attendants suspected their behavior indicated a possible act of terrorism.[193] The imams filed a lawsuit against U.S. Airways and six un-named passengers who reported their behavior, though the passengers were dropped in an amended complaint.[194] Perhaps more telling of the desire to suppress speech is the imam's vehement opposition to the filing of an amicus brief by the Becket Fund,[195] a religious freedom organization that seeks to protect the religious freedom of individuals of *all* religions, including Islam.[196]

In England in June 2008, two individuals seeking to share their Christian beliefs in a Muslim neighborhood were met with hostility, and were told by none other than a police officer that they could not preach in a Muslim area or attempt to convert Muslims to Christianity, because that was a hate crime.[197]

More recently, a Muslim school in Minnesota sued the American Civil Liberties Union ("ACLU") for defamation, claiming that the ACLU's accusations that the school was promoting Islam hurt its ability to hire teachers.[198] The suit was dismissed.[199] Some would argue that this Act is not needed because the system will deal with matters like this—if the suit has no merit, it will be dismissed, and if it has merit, it will continue. But this argument overlooks the plaintiff who is grasping for any straw and abuses the process of defamation as discussed above.[200] This plaintiff knows there is no merit in the claim and is only seeking a public forum in which to shift public sentiment. Eventually, even though many suits will be dismissed, public opinion may shift, and

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[192] *Id.*

[193] Libby Sander, *Six Imams Removed from Flight for Behavior Deemed Suspicious*, N.Y. TIMES, Nov. 22, 2006, at A18.

[194] *See* Shqeirat v. U.S. Airways, Inc., 515 F. Supp. 2d 984, 990–91 (D. Minn. 2007).

[195] Plaintiffs' Memorandum of Law in Opposition to Becket Fund for Religious Freedom's Motion for Leave to File Brief *Amicus Curiae* in Support of Dismissal at 4–6, Shqeirat v. U.S. Airways Group, Inc., 645 F. Supp. 2d 765 (D. Minn. 2007) (No. 07-1513).

[196] The Becket Fund for Religious Liberty, About Us, http://www.becketfund.org/index.php/article/82.html (last visited Apr. 19, 2010).

[197] Steve Doughty & Andy Dolan, *You Can't Preach the Bible Here, This Is a Muslim Area*, DAILY MAIL (London), June 2, 2008, at 9, *available at* http://www.dailymail.co.uk/news/article-1023483/You-preach-Bible-Muslim-area-What-police-told-Christian-preachers.html.

[198] Sarah Lemagie, *Judge Throws Out Claim ACLU Defamed TiZA School*, STAR TRIB. (Minneapolis), Dec. 11, 2009, at B4, *available at* http://www.startribune.com/local/south/79023182.html.

[199] *Id.*

[200] *See supra* Part II.B.1.

the law may change to allow defamation suits to protect ideas, a dangerous end that the law never intended.

These events stand in stark contrast to U.S. history and the policy behind the First Amendment. Free speech in the United States has always been held to be of higher value—for example, prohibiting films that a censor claimed to be "sacrilegious" because they mock a religion has been held to violate the First Amendment,[201] as does requiring a license before sharing religious beliefs in a certain neighborhood.[202]

Unique circumstances of the current times call for certain measures. Terrorist groups' unprecedented complexity, ease of communication, and financial exploits call for suitable countermeasures—the foremost of which must be free and open reporting. Prohibiting "bad sentiments"[203] that cause *individual* harm may have been suitable for Blackstone's time, but changing times often require changes in the law, and certain inflammatory statements are necessary to successfully fight the complex terrorism practices of today.

The examples above, and many more like them, indicate a world-wide trend toward suppression of speech and ideas. Although not implicated by the current version of the Act, this Act is the type of measure needed to send a strong message to those repressing ideas, to protect against the spread of this type of suppression, and to provide legal protection for those victimized by it. These recent events make protection for those who desire to speak the truth even more crucial. The spread of "defamation" law must be carefully watched—and free speech must be protected.

CONCLUSION

The Free Speech Protection Act of 2009 should be passed because it is the type of measure needed to vigilantly guard the First Amendment right of U.S. citizens to speak freely. The Act takes a necessarily strong stance in protecting U.S. defamation law and in promoting its policy of reporting facts of public concern. This is an especially crucial goal during a time when certain elements are using defamation law to suppress speech. In light of this, legislators should broaden the Act to protect quasi-judicial foreign suppression of speech and should pass it, or a measure like it, to protect free speech.

Travis S. Weber[*]

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[201] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952).

[202] Cantwell v. Connecticut, 310 U.S. 296, 300–03, 307 (1940).

[203] BLACKSTONE, *supra* note 72, at *152.

[*] I would like to thank Professor Craig Stern for providing assistance as I wrote this article.