Running head: TALK DIRTY TO ME

Talk dirty to me: Broadcast and cable TV push the envelope on indecency

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Abstract

As broadcast and cable programming test the limits of television taboos, the FCC may need to reexamine the need to regulate indecent material aired on broadcast and cable channels. This paper examines the relevant literature about broadcast and cable indecency and the reasons why indecency is regulated in broadcasting. Furthermore, the paper focuses on Federal Communications Commission indecency regulations and court interpretations of those regulations. Finally, the paper discusses the future of indecency regulation as it applies to broadcast and cable television and suggests potential avenues the FCC may follow to resolve the growing desire for talking dirty on television.

Talk dirty to me: Broadcast and cable TV push the envelope on indecency

Talking dirty on broadcast television made the front page of the Sunday edition of *The New York Times* on September 2, 2001. Television producers Steven Bochco and Aaron Sorkin said they planned to push the envelope during television's Fall 2001 season. Bochco proposed to have a character utter "bullshit," usually a TV taboo, on his new show "Philly," starring former "NYPD Blue" regular Kim Delaney. Sorkin planned to violate a similar taboo by having one of the characters on NBC's "The West Wing" take the Lord's name in vain (Rutenberg, 2001).

As broadcast television comes under siege by smaller cable competitors, broadcasters are pitching programming that is more edgy and "real" in an attempt to attract a younger audience, which appeals to advertisers (Rutenberg, 2001). Vulgar or profane language is creeping into broadcast television on a more regular basis. For example, CBS allowed “shit” to be used during a live stage presentation of "On Golden Pond." NBC's "Friends" often refers to masturbation and bodily functions. On the November 15, 2001, episode of "Friends" Phoebe told Rachel that the wine she was drinking tasted like "piss." These examples illustrate that broadcast network censors are becoming more lenient as cable channels continue to garner a larger proportion of the viewing audience (Rutenberg, 2001).

HBO's "The Sopranos" and "Sex and the City" have attracted large audiences due in part to the shows' ability to air whatever they wish (Rutenberg, 2001) on the premium cable station. Words like "fuck" and "cocksucker" are rampant on "The Sopranos," while the women of "Sex and the City" bluntly describe their sexual encounters using graphic language (e.g., “fucking,” “blow job”) that would not make it on broadcast television. James O'Connor, author of Cuss Control, The Complete Book on How to Curb Your Cursing, suggested that "The Sopranos" and "Sex and the City" are setting the standard for television programming by making swearing a key

component of successful shows (Philpot, 2001). Premium cable channels' "anything goes" policy is a threat to broadcasters as they attempt to compete for viewers in a crowded television marketplace (Rutenberg, 2001).

Caught between broadcast channels with their large audiences and premium cable channels with their no-holds-barred attitude are basic and basic-plus cable programming channels, which are chipping away at the broadcast networks' viewership. Non-premium cable channels also are testing the limits of the television taboos by airing indecent and vulgar material as a means of attracting more viewers.

For example, on the June 20, 2001, episode of Trey Parker and Matt Stone's highly successful animated cable television series "South Park," the producers unleashed the s-word on the viewing audience. In the "It Hits the Fan" episode, "shit" was used 162 times during the half-hour program and a counter at the bottom of the screen added to the total each time the vulgarity was uttered. According to the official "South Park" web site, maintained by South Park Studios, the creators came up with the idea in order to make a statement about the Federal Communications Commission's (FCC's) restrictions regarding indecent language on broadcast television.

> Matt and Trey came up with the idea for the season premiere at a writers' meeting. They wanted to use the word "sh*t," but they wanted it to be unbleeped in order to make a point (or so they say). Sure there's the shock value, but … there was a statement behind it all. They expected a big fight from Comedy Central. They even had all of these arguments prepared to sway the powers that be, so they were a bit disappointed when the network readily agreed. In fact, Comedy Central was pretty enthusiastic about it. Since Comedy Central is a basic cable network, FCC

> laws do not apply. They do have an internal standards and practices department that let this particular episode slide. The counter came into play as a joke, but it came in handy when Matt and Trey came up with the idea for a contest during the writers' retreat. (South Park Studios.com, 2001, June 22).

Moreover, the Arts & Entertainment cable television network also aired "shit," one of the seven filthy words considered indecent for broadcast television by the FCC (*Federal Communications Commission v. Pacifica Foundation*, 1978). Not only did the original A&E series "100 Centre Street," which is a "gritty ensemble drama" (Chagollan, 2000, p. 1) about judges, prosecutors and public defenders in New York's night court system (Pennington, 2001, p. 2), air the s-word, it also aired the word "pussy" in the context of sexual activity, a usage many would consider vulgar.

Basic cable programming has largely been ignored in the battles over indecent programming. As this paper discusses, basic cable channels fall into a regulatory gray area that Congress and the FCC have not addressed. Pressure may be building to do so, however. Recently, a conservative television watchdog group, the Parents Television Council (PTC), issued its first report on basic cable programming. The PTC said that cable channels, in developing their own programs, had followed “Hollywood’s push-the-prime-time-envelope mindset” and developed programming that, in some cases, made “the most putrid broadcast show look brilliant” (Parents Television Council, 2002).

As broadcast and cable programming tests the limits of television taboos, the FCC may need to reexamine how it regulates indecent material on television. This paper discusses possible directions the FCC or Congress could take and recommends one possible course. The next section discusses the relevant literature about broadcast and cable indecency and the possible

effects of indecent speech on the audience. The paper also examines the legal background for government regulation of broadcast and cable programming, particularly indecent programming. Finally, the paper discusses the future of indecency regulation as it applies to broadcast and cable television and suggests an avenue the government should follow to resolve the growing desire for talking dirty on television.

Literature Review

Offensive language on television has been the subject of several research studies, books, and newspaper and magazine articles (Bechloss, 1990; Hill & Weingrad, 1986; Kaye & Fishburne, 1997; Kaye & Sapolsky, 2001; MacDonald, 1994; Polskin, 1989). Polskin (1989) noted an increase of crude language on network television since the 1980s. However, Kaye and Sapolsky (2001) found that the use of objectionable words slipped from 1990 to 1997 when a content-based ratings system was implemented. Objectionable words or vulgarities were classified into four groups: the “seven dirty words” (i.e., shit, piss, fuck, cunt, cocksucker, motherfucker, and tits), sexual words (e.g., boobs and balls), excretory words (direct references to human waste products and processes), and “other” offensive words (e.g., hell, son of a bitch, damn, etc.) (Kaye & Sapolsky, 2001). Kaye and Sapolsky (2001) examined one week of prime time programming on ABC, CBS, NBC, and Fox in 1990, 1994, and 1997. Using a content analysis, they found that the per-hour rate of objectionable words was greater in 1994 than 1990, but in 1997 decreased to a level slightly below 1990. Kaye and Sapolsky (2001) reported 20 incidents out of 1,293 instances of offensive language and behavior in which five of the seven filthy words (tits, shit, motherfucker, piss, and fuck) were uttered outside of the safe harbor. The FCC created the safe harbor (10 p.m.-6 a.m.) for indecent material[1] to be aired on broadcast

[1] In *FCC v. Pacifica Foundation* (1978), the FCC defined indecent material as "language that, in

television, which was upheld in *Federal Communications Commission v. Pacifica Foundation* (1978), but network television has since sailed into supposedly forbidden territory on numerous occasions.

Although it is broadcast to most of the country after 10 p.m., which is within the FCC's safe harbor, "NYPD Blue" has been one of the leaders in recent years in presenting programming that parallels language and adult situations often seen in R-rated movies (Coe, 1993).

> The subsequent success of "NYPD Blue" may have signaled a new level of acceptance of "blue" language on prime time television. The program was heavily criticized for its use of offensive words and phrases and it has sparked interest and concern about the blatant use of swear words on television in general. Pressure from some members of the viewing public to curb the use of offensive language as well as depictions of violence and sexual activity has led to implementing age-based and content-based ratings systems for television content. Included in the ratings are warnings for "coarse language" and "suggestive dialogue" (Kaye & Sapolsky, 2001, para. 5).

Before the ratings system was implemented, the television industry was under intense pressure from lawmakers, parents, and social advocacy groups to reduce the amount of violence and offensive language in television programming (Kaye & Sapolsky, 2001). Self-regulation (e.g., parental advisories) was ineffectual and failed to reduce the pressure from advocacy groups and policymakers. Finally, Congress passed the Telecommunications Act of 1996, which included a section titled "Parental Choice in Television Programming." This section called for

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context, depicts or describes, in terms patently offensive by contemporary community standards for broadcast media, sexual or excretory activities or organs."

ratings of sexual, violent, or other indecent programming and required such ratings to be passed along to parents so they could block the display of programming deemed inappropriate for their children (Telecommunications Act of 1996).

Policymakers, parents, and other concerned citizens levied criticism against programming that contained indecent material because of its apparent negative effects on children. Television violence studies have produced evidence that suggests repeated exposure to violent behavior results in desensitization of typical emotional responses (Griffiths & Shuckford, 1989). Desensitization theory states that individuals who watch large amounts of violence become less sensitive to future violent content than individuals who watch less violence (Comstock, 1989). Psychologists have demonstrated that people gradually become less physiologically and emotionally aroused as they view more violence. For example, Cline, Croft, and Courrier (1973) showed a violent television portrayal to children who were heavy television viewers and those who were not heavy viewers. Cline and colleagues found that children who watched a lot of television (arguably a violent medium) became less physiologically aroused when shown the violent clip compared to the children who were not heavy viewers. Condry (1989) and Tan (1985) concur and suggest that repeated exposure to antisocial programming results in desensitization. Desensitized viewers are more likely to engage in antisocial behavior because they become accustomed to violence and are less traumatized by it (Condry, 1989; Griffiths & Shuckford, 1989; Tan, 1985).

Desensitization can be applied to verbal aggression as well (Kaye & Sapolsky, 2001). "The repetition of a word … blunts the original offense caused by inhibition or taboo. This desensitization effect is not particular to dirty words but occurs when any word is used repeatedly" (Jay, 1992, p. 14). This desensitization effect may result in viewers becoming

accustomed to offensive language and subsequently using it more often in everyday conversation (Kaye & Sapolsky, 2001). A potential result of increased television swearing and everyday swearing is that scripts written for television may increase the amount of profanity used by television shows' characters. Thus, "swear words that were once not tolerated on television are now being scripted with increasing frequency" (Kaye & Sapolsky, 2001, para. 14).

Although it seems logical, according to the theory of desensitization, that repeated exposure to indecent material produces indifference and a subsequent increase in the use of offensive language, "there is no scientific evidence to date that supports claims of antisocial or harmful effects from such exposure" (Kaye & Sapolsky, 2001, para. 15). Moreover, there is no evidence to suggest that children under 12 comprehend sexual language and innuendo; therefore, it is unlikely such language produces negative effects (Donnerstein, Wilson, & Linz, 1992; Jay, 1992).

Concerned parents, interest groups, and policymakers continue to support the claim that indecent programming is contributing to the moral breakdown of America, despite the evidence to the contrary (Kaye & Sapolsky, 2001; Lieberman, 1996). These groups' desire to regulate indecent speech is also predicated on protecting parents' rights to rear their children as they see fit (Doctor, 1992).

> It is widely thought that the fuss about dirty language on the airwaves is caused by a small number of viewers. However, these viewers have a strong voice and they have caught the attention of officials who can bring about change. The protestations of those seeking to bridle the use of coarse language on television have led policymakers and governmental agencies to urge the television industry

to limit the use of offensive words to times when children are less likely to be watching (Kaye & Sapolsky, 2001, para. 17).

Some critics of the trend toward more vulgar and profane dialogue and depictions in the popular culture have gone so far as to suggest that the "coarsening" of popular culture may be destroying the nation. Robert H. Bork, for example, has recommended more widespread censorship of books, movies, television, and art. Bork maintains that liberalism and moral relativism, supported by the courts and the "cultural elite," have led to a popular culture that celebrates "degeneracy," creating a society that is "disorderly, hedonistic, and dangerous" (Bork, 1996, p. 153).

While empirical studies and conservative cultural watchdogs warn of the dangers of rampant vulgarity in popular culture, particularly television, there are those who are not convinced. For example, Marjorie Heins (2001) argues that studies of the effects of televised violence, strong language, and sexual situations have oversimplified the complex psychological relationship between what individuals see and what individuals think or do. In particular, Heins argues that regulation of media indecency is based upon vague notions of what many think is bad for children to see. While Heins admits that viewing violent or sexually explicit material may not be good for children, she argues that the regulation of indecency should be based on real rather than symbolic harm. Heins argues that no real harm to children has been proved to an extent that warrants government regulation (Heins, 2001, pp. 10-11).

Whether Heins or Bork is correct, or the true harm to children and the rest of society from televised indecency lies somewhere between their positions, it is a reality that broadcast television, and to a much lesser extent, cable television are regulated as if the harms were real. The next section of the paper examines broadcast and cable indecency regulation.

Regulating Broadcast and Cable Indecency

It has long been settled law that broadcasting, in the form of commercial radio and television in particular, can be regulated by the government in a way that print communication cannot. Congress adopted regulations on broadcasting in the 1920s because it saw the airwaves through which broadcast signals were transmitted as a scarce public resource (Barnouw, 1966). Because the airwaves belong to the public, Congress put first the Federal Radio Commission (Radio Act of 1927) and later the Federal Communications Commission (Communications Act of 1934) in charge of determining who would get licenses and under what conditions. Although the Radio Act of 1927 and the Communications Act of 1934 both barred the federal government from censoring broadcasters, the acts also made it a crime to air obscene, indecent, or profane programming (Radio Act of 1927, § 29; Communications Act of 1934, § 326). The indecency provision was later made part of federal criminal law. However, the prohibitions against obscenity, indecency and profanity left the terms undefined. The laws also directed the FRC and FCC to consider “the public interest, convenience or necessity" in determining who should get and retain broadcast licenses (Radio Act of 1927, § 11; Communications Act of 1934, § 307(a)). Federal courts interpreted the public interest standard as allowing or requiring the FCC to consider a station’s programming, or content, in making licensing decisions (*Great Lakes Broadcasting Co. v. Federal Radio Commission*, 1930; *KFKB v. Federal Radio Commission*, 1931; *National Broadcasting Co. v. United States*, 1943; *Trinity Methodist Church, South v. Federal Radio Commission*, 1932). By contrast, the courts generally have not allowed the government to interfere with what a publisher may print in a book, magazine, or newspaper.

Two cases that the U.S. Supreme Court decided five years apart clearly demonstrate the disparity between the First Amendment rights of publishers and broadcasters. In *Red Lion*

Broadcasting Company v. Federal Communications Commission (1969), the Supreme Court upheld the FCC's right to enforce a "personal-attack" rule, which required broadcasters to air replies from persons criticized on the air. In *Miami Herald Publishing Company v. Tornillo* (1974), however, the Court struck down as unconstitutional a Florida law that required newspapers to publish replies from political candidates criticized in editorials. The Court in *Red Lion* determined that the First Amendment interest that weighed most heavily in regard to broadcasting was the right of viewers or listeners to receive information, not the station owner's right to speak. Scarcity of the airwaves and government control meant that not everyone who might want to could broadcast. No such limitation applied to print, however, so the paramount First Amendment interest in *Tornillo* was the right of the publisher to print what he or she saw fit.

In the area of indecency regulation, government concern about the rights of viewers and listeners have led the Court to allow the FCC to punish broadcast stations for airing material that is not legally obscene, as defined in *Miller v. California* (1973)[2], but is indecent or profane. Because obscenity has no First Amendment value, it can be banned outright in any medium, but indecent speech cannot be banned outright because it is seen as having some First Amendment value (*Federal Communications Commission v. Pacifica Foundation*, 1978).

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[2] Material is considered obscene if 1) an average person, applying contemporary local community standards, finds that the work, taken as a whole, appeals to prurient interest; 2) the work depicts in a patently offensive way sexual conduct specifically defined by applicable state law; and 3) the material lacks serious literary, artistic, political or scientific value (*Miller v. California*, 1973 at 15).

In the *Pacifica* case, the Court upheld the FCC's power to censure a New York radio station that aired comedian George Carlin's "Filthy Words" satirical monologue in the middle of the afternoon. In the monologue, Carlin repeated the seven words that one supposedly was not allowed to use on the air – *cocksucker, cunt, fuck, motherfucker, piss, shit,* and *tits*. The FCC said the language was not obscene but was indecent because it described sexual and excretory activities and organs in a patently offensive manner, but did not appeal to a prurient interest in sex, which could have made the language obscene under the *Miller* definition. The Commission also said that the time of day the monologue was broadcast affected whether it would be considered indecent and suggested that indecency could be broadcast when children were unlikely to be present in the audience, from 10 p.m. to 6 a.m. (In re Pacifica Foundation Inc., 1975). Although the FCC did not punish Pacifica beyond a warning, the station appealed the FCC ruling to the Supreme Court. In its 1978 decision, the Court upheld the FCC indecency policy based on the idea that broadcasting had a "unique pervasiveness" and was able to "invade" the home. The Court also noted broadcasting's accessibility to children. However, the Court said that the decision should be construed narrowly and that a determination that programming was indecent should be based on its context as well as its accessibility to children (*Federal Communications Commission v. Pacifica Foundation*, 1978). Because the Court took pains to emphasize the limited nature of *Pacifica*, the Supreme Court and lower federal courts have read *Pacifica* as applying only to broadcast stations, not other media (*Bolger v. Young Drug Products Corp.,* 1983; *Community Television of Utah, Inc. v. Roy City,* 1983; *Cruz v. Ferre,* 1985; *Home Box Office, Inc. v. Wilkinson,* 1982; *Sable Communications v. Federal Communications Commission,* 1989).

The FCC confined enforcement of the indecency standard to the seven "filthy words" for nearly ten years. However, in 1987, the Commission clarified its indecency standard by adopting a more generic definition concerning patently offensive language. Congress and the Commission also tried over eight years to shorten the “safe harbor” time period but lost in federal court each time (*Action for Children’s Television v. Federal Communications Commission*, 1988; *Action for Children’s Television v. Federal Communications Commission*, 1992; *Action for Children’s Television v. Federal Communications Commission*, 1995).

Since 1987, the FCC has continued to levy fines against broadcast television and radio stations for discussions of sexual and excretory functions and organs between 6 a.m. and 10 p.m. The most notable series of cases involved "shock jock" Howard Stern, whose radio program is syndicated nationwide by Infinity Broadcasting. In 1995, Infinity paid $1.7 million to settle a series of fines dating back to 1987 for Stern broadcasts in which sex and genitalia were discussed outside the safe harbor hours on Infinity-owned stations (Petrozello, 1996).

In 2001, in response to industry calls for clearer guidance, the FCC issued a new report on broadcast indecency. The FCC noted that its indecency regulation was based upon the compelling interest of protecting children’s well-being and providing support for parents to supervise what their children see and hear. The FCC said that it considered three factors in its decisions about whether to punish specific indecent programs: 1) the explicitness or graphic nature of the broadcast; 2) the extent to which the broadcast dwelled upon or repeated at length offensive material; 3) and whether the material seemed designed purely to titillate or pander or was presented solely for shock value. The FCC said that in all decisions it considered the context of the overall broadcast (In re Industry Guidelines on the Commission’s Case Law, 2001).

The FCC generally has found radio stations in violation of the indecency standards far more often than television stations. In the first half of 2001, for example, a LEXIS search found that of nine cases in which the FCC had ruled on complaints about broadcasts, only one involved a television station. A variety of material has been found objectionable enough to warrant fines against broadcasters. From January 1 through June 30, 2001, the FCC issued three final orders of forfeiture or denials of reconsideration. In one, the FCC levied a fine of $7,000 against WLLD-FM of Holmes Beach, Florida, for broadcasting excerpts of "The Last Damn Show," a live rap and hip hop concert, that included some of the seven "filthy words" and other references to oral sex and intercourse (In re Infinity Radio License, Inc., 2001). In another, the FCC fined Los Angeles radio station KROQ-FM $2,000 for playing the song "You Suck" by the group Consolidated, which contained references to oral sex (In re Infinity Broadcasting Corp. of Los Angeles, 2001). In the third, the FCC fined a Puerto Rican radio station, WCOM-FM, $16,800 for repeated, unspecified violations (In re WLDI, Inc., 2001).

In six cases in which the FCC issued Notices of Apparent Liability, which can be appealed, the FCC preliminarily fined Madison, Wisconsin, radio station WZEE-FM for playing an unedited version of "The Real Slim Shady" by rapper Eminem, which contained references to sexual activity and explicit language (In re Capstar TX Limited Partnership, 2001). The same song also generated a notice of a proposed fine of $7,000 to Pueblo, Colorado, radio station KKMG-FM, which allegedly aired the unedited song once (In re Citadel Broadcasting Co., 2001). In the only television case, the FCC levied a preliminary fine of $21,000 against Puerto Rican television station WKAQ-TV for airing three episodes of the show *No te Duermas* that contained suggestive sexual material (In re Telemundo of Puerto Rico License Corp., 2001). In a case involving radio station KEGL-FM of Fort Worth, Texas, the FCC said it intended to fine the

station $14,000 for two broadcasts of the "Kramer and Twitch" show in which the hosts discussed oral sex with callers (In re Citicasters Co., 2001). Another preliminary $14,000 fine was levied against radio station WKQX-FM of Chicago for airing two episodes of the "Mancow Morning Madhouse" show in which sexual techniques were discussed in graphic detail (In re Emmis FM License Corp. of Chicago, 2001). The FCC also announced its intent to fine noncommercial radio station KBOO-FM of Portland, Oregon, $7,000 for airing the song "Your Revolution," which contains descriptions of sexual activity (In re The KBOO Foundation, 2001). In all cases decided in 2001, the allegedly indecent programming was aired between 6 a.m. and 10 p.m., outside of the safe harbor.

Recently, the FCC has indicated that it will take a tougher stance in regard to complaints about indecent shows. The FCC's Enforcement Bureau chief, David Solomon, was quoted as saying that the agency would put a greater burden of proof on broadcasters by assuming that public complaints about indecency are true unless the station can refute them. The FCC also is considering loosening its rules for accepting complaints from consumers, which may mean it will receive and investigate more indecency complaints (McConnell, 2002).

Although the FCC can fine broadcast stations for indecent programming outside of the safe harbor, and may be more inclined to do so, the FCC cannot do the same to cable operators. The Cable Communications Policy Act of 1984 forbids the FCC from regulating the content of cable programming or the provision of cable services (§ 2). However, Congress apparently is free to order the FCC to do so, and the courts have left the First Amendment status of cable operators unclear.

Cable television falls somewhere between the print and broadcast media as far as First Amendment rights are concerned. Exactly where cable falls in that gap is not altogether clear. In

one relatively early cable case, the Supreme Court suggested that cable operators shared characteristics of both print and broadcast media. In *City of Los Angeles v. Preferred Communications, Inc.* (1986), a unanimous Court said that cable operators exercise editorial discretion in choosing what to offer the public, similar to what newspaper publishers do. The Court likened cable to newspaper and book publishers, public speakers, and pamphleteers. However, the Court said the cable operator's First Amendment interests also were similar to those of "wireless broadcasters" such as Red Lion Broadcasting Company, although the Court noted that in the *Red Lion* case, the rights of broadcasters were found to be outweighed by government interests in regulating the airwaves because of scarcity.

In *Leathers v. Medlock* (1991), the Court stated more clearly that cable operators are closer to print media than broadcast media in their use of editorial discretion and are "part of the press" (*Leathers v. Medlock*, 1991 at 444). However, the Court still upheld an Arkansas tax on cable operators that was not levied on other media, finding that the tax was not content-based. The decision was significant for cable operators, however, because it indicated that the Court would apply a high level of scrutiny similar to the one it used on attempted regulations of print if cable regulations were content-based.

Later, the Court in two related cases again indicated that the standard for judging cable content should be closer to its standards for print. Both cases challenged the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992, which required cable operators to include all local broadcast channels in their lineups. In *Turner Broadcasting System, Inc. v. Federal Communications Commission* (1994), a divided Supreme Court said that the factors that worked in favor of lesser scrutiny of broadcast regulation, such as spectrum scarcity and signal interference, did not apply for cable. However, the Court also noted

that cable operators had a "bottleneck" or "gatekeeper" monopoly over what was transmitted over the cable system that warranted some regulation of cable. The bottleneck resulted from the fact that most franchising authorities, such as cities and counties, allowed only one cable company to operate and use public rights of way to string cable on utility poles. The Court determined that the must-carry provisions were not content-based in the 1994 decision and so warranted only "intermediate scrutiny," a lesser standard than that used for content regulations. Later, the Court found the must-carry provisions constitutional (*Turner Broadcasting System, Inc. v. Federal Communications Commission*, 1997).

In the area of indecent programming, the Supreme Court and lower federal courts have determined that state and local governments cannot regulate indecent programming on cable because that would pre-empt federal law (*Community Television of Utah, Inc. v. Roy City,* 1983; *Cruz v. Ferre,* 1985; *Home Box Office, Inc. v. Wilkinson,* 1982; *Jones v. Wilkinson*, 1986). But the Court has not questioned seriously congressional power to regulate indecent programming in the narrowly defined cases it has reviewed.

For example, Congress authorized cable franchising authorities to require that cable operators provide public, educational and government (PEG) channels (Cable Television Consumer Protection and Competition Act of 1992). Congress also required larger cable systems to set aside from 10 percent to 15 percent of their channels for leased access to allow persons not affiliated with the cable systems to provide programming other than that chosen by the cable operators. Although both provisions forbade cable companies from exercising any editorial control over the content of programming on PEG and leased channels, they also allowed cable operators to reject indecent programs on both types of channels. Congress also required cable

operators to segregate any patently offensive programming on leased channels to a single channel and block it from viewer access unless a viewer specifically requested unblocking.

In response to a challenge to the regulations from groups that wanted to provide programming for leased and PEG channels, the Supreme Court upheld the provisions allowing cable operators to reject indecent programming on leased channels while also finding unconstitutional the similar provision tied to PEG channels and the "segregate and block" provision. The sharply divided Court found the provisions too restrictive of the speech rights of those who produced programming for the leased channels (*Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*, 1996).

The plurality opinion further muddied the Court's view of the appropriate First Amendment standard to apply when reviewing regulations on cable. The opinion by Justice Stephen Breyer suggested that given the rapid changes taking place in media technologies, it was premature to pick one standard from the Court's free-speech jurisprudence to apply to cable (*Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*, 1996 at 741-742). But in a partial dissent, Justice Clarence Thomas and two other justices argued that the Court had overlooked a major flaw in the arguments of the consortium. If cable regulation was subject to the same or nearly the same scrutiny as print regulation, as the Court had indicated in *Turner Broadcasting System, Inc. v. Federal Communications Commission* (1994), then the consortium had no First Amendment rights to assert: it was the rights of the cable operators that were paramount. Justice Thomas noted that the requirement that cable operators provide PEG and leased-access channels was close to the Florida law that the Court had struck down in *Tornillo* (1974). Justice Thomas argued that the Court's "dubious" decisions to hold different media to different First Amendment standards had placed cable in a

"doctrinal wasteland" that the *Denver Area* case demonstrated (*Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*, 1996 at 813-814).

More recently, however, the Supreme Court used strict scrutiny, usually reserved for its review of content-based regulations of print or political speech, to review a requirement that cable systems either fully block sexually oriented premium channels or limit the times they could be accessed to protect children. The Court, again sharply divided, determined that the regulation was not the least restrictive means possible to solve the problem of "signal bleed," in which blocked channels can sometimes be seen or heard by non-subscribers. Instead, the Court suggested that a regulation already existing that requires cable operators to scramble unwanted channels (Telecommunications Act of 1996, § 504, codified at 47 U.S.C. 560) was sufficient to protect cable subscribers and their children from offensive programming (*United States v. Playboy Entertainment Group, Inc*., 2000). In response to the Playboy decision, the FCC recently issued a public notice urging cable companies to make consumers more aware of the scrambling option (Advisory to Cable Operators, 2001).

Discussion

The increase in "dirty talk" on broadcast and non-premium cable channels outside of the safe harbor suggests at least three possible directions that Congress and the FCC could take. The government could step in and enforce indecency restrictions on broadcast, non-premium cable, and premium cable channels to create a level playing field for all television program providers. The government also could back off from enforcing indecency standards for broadcast television to allow it to compete more effectively for viewers with cable programming. Or, the government could leave things as they are. Because of advancements in technology and the FCC's trend since

the 1980s toward deregulating television, the more appropriate response for the government to take in regard to the increased "dirty talk" would seem to be the latter.

Shortly after he was appointed FCC chairman in 1982, Mark Fowler suggested that the FCC needed to give broadcasters more freedom from regulation. Fowler suggested that a "marketplace approach" to regulation should replace the "vague" public interest approach. Fowler suggested that broadcasters could best serve the public interest by determining what the public wanted to see and hear and providing it (Fowler & Brenner, 1982).

Later FCC chairs also have said they favored deregulation, at least in regard to the business dealings of broadcast stations. Then-FCC chair Reed Hundt suggested in 1996 that he agreed with Fowler that the public interest standard was vague and indefensible as enforced. However, Hundt suggested that the marketplace approach was not entirely satisfactory either. Instead, he argued that the FCC and Congress should focus on specific actions that would benefit society and on programming that broadcasters would be unlikely to produce if they followed solely the dictates of the market. Hundt suggested that the FCC and Congress should focus on improving children's television, providing free airtime for political candidates, and regulating indecency and violence on television (Hundt, 1996).

Hundt's comments suggested that, with the exception of the concern about airtime for candidates, the FCC should focus on areas affecting children most directly. Likewise, the Supreme Court consistently has found the protection of children from obscene or indecent material to be "an extremely important" and "compelling" justification for regulation of broadcasters (*Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*, 1996 at 743).

However, given the equivocal nature of the findings in studies trying to measure the effect of indecent programming on children, it is not clear that the interest, particularly in regard to profane language, is truly "compelling" (Heins, 2001; Kaye & Sapolsky, 2001). Also, technological advances since 1996, when Hundt wrote about the need to continue regulating programming, may help serve the closely related interest of allowing parents to decide what children should watch. But there are still problems associated with deregulating the content of television shows.

Cable television offers viewers a wide variety of viewing choices, from premium channels such as HBO, ShowTime, Playboy, and others to basic cable channels such as Lifetime, USA Network, ESPN, and Nickelodeon. More than three-fourths of all cable viewers receive more than 30 different channels of programming, while one in two cable subscribers are able to view 54 or more cable channels. Due to digital compression, some cable systems offer more than 100 channels (Dominick, Sherman, & Messere, 2000). However, not all persons can get cable service, and some who can do not choose to do so. Of the 97 million homes in areas served by cable, 67 percent subscribe; some rural and poor inner-city areas report cable penetration rates below 50 percent (Dominick et al., 2000.) Those who do not subscribe to cable may choose a direct broadcast satellite system to provide programming. However, current satellite penetration is only about 22 percent in the United States (RFD Communications, 2002). For those who still rely on broadcast channels for television service, choices are more limited. Any decision that would allow broadcasters to air racier fare outside of the safe harbor hours could limit the choices of those people who get television service through antennas and would prefer to avoid indecent or profane programs.

And while there is obvious pressure on broadcasters to compete for ratings and revenue with basic cable and premium channels, there also are powerful pressures against allowing the broadcast networks to get away with more "dirty talk" outside of the safe harbor. For example, the watchdog group Morality in Media recently urged Congress to force President George W. Bush's nominees to the FCC to discuss their views on indecency. The group also urged Congress to pressure the FCC to "get tough" on broadcasters, noting that the FCC had not fined a television station for indecency for 20 years and calling the 2001 indecency guidelines too lax (McConnell, 2001).

The fact that some people cannot or will not get cable and the pressures that Congress and the FCC are under to "clean up" TV suggest that any attempt to deregulate broadcasting is doomed from the start. But allowing the marketplace to determine content would not necessarily open the floodgates of offensive language or situations. One reason the "South Park" "shit" episode was noteworthy was because it was an exception, even during the safe harbor. Opposition to indecent programming by pressure groups may be one reason that basic cable channels, although free from indecency regulation, rarely push the envelope on racy speech or situations, "South Park" and "100 Centre Street" notwithstanding. Another reason may be that most basic-cable providers share a parent company or are largely controlled by the five largest networks – ABC, CBS, Fox, NBC, and the WB. In fact, once network ownership of basic and premium cable providers is taken into account, the five largest broadcast networks still control about 86 percent of what people watch in prime time, down only a little from the 92 percent the Big Three (ABC, CBS, and NBC) controlled before cable became popular (Jessell, 2000). It seems likely that network values, including those concerning indecency, have influenced cable programming, particularly on "basic" channels for which viewers do not pay extra. In general,

television's need to attract large audiences seems to have influenced producers to be more cautious than libertine.

Of course, another factor that may be keeping basic cable from pushing the envelope on indecency is cable's peculiar regulatory status. While the FCC and state and local governments are barred from regulating the content of cable, Congress is not. The Supreme Court has left cable's future somewhat up in the air. In the *Denver Area* case (1996), in fact, the Court's plurality opinion suggested that cable programming was just as "pervasive" and accessible to children as broadcast television, if not more so (*Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*, 1996 at 744-745). The opinion was sharply divided, however, so it is not clear what the Court would do if faced with a congressional decision to ban indecency from cable as well as broadcast television outside of the safe harbor.

The answer to satisfying television broadcasters' need to take risks to compete with more topical and controversial fare on cable channels while protecting children and other sensitive persons from smut may lie in technology. That may seem like an odd statement, given that technological limitations are in large part to blame for broadcast television's reduced First Amendment status. However, certain new technologies already in place eventually may make it easier for television producers to argue that indecency regulation is outdated. The Supreme Court's decision in *Denver Area* also has left the door open to technological solutions to the problems of indecent programming.

In cases in which Congress and/or the FCC have tried to regulate indecency on other media in the 1980s and 1990s, the Supreme Court has found the regulations unconstitutional in part because technology has made the regulations unnecessary, and therefore, overbroad. After the Supreme Court ruled in *Sable Communications v. Federal Communications Commission*

(1989) that the government could regulate but not ban “dial-a-porn” services, the FCC passed regulations requiring telephone pornography providers to use credit card numbers or access codes to identify customers, or to scramble their signals, to lessen the chance that minors would use the services (In re Regulations Concerning Indecent Communications by Telephone, 1990). Likewise, when the Supreme Court struck down the Communications Decency Act provisions for punishing purveyors of indecent content on the Internet, the Court suggested that filtering software could be useful to block minors’ access to questionable sites (*Reno v. American Civil Liberties Union,* 1997).

The Telecommunications Act of 1996, which contained the Communications Decency Act, also contained provisions requiring television sets to be equipped with the V-chip and urging broadcasters to come up with a rating system for television programs. The V-chip allows parents to program their sets so that shows containing certain ratings are blocked, allowing the parents to control what their children watch even when the parents are not around (Telecommunications Act of 1996, § 551). Although the V-chip was designed to help parents shield their children from violent programming, the ratings already warn parents that some programs contain adult dialogue, sexual situations, or strong language (Smith, Wright, & Ostroff, 1998). The V-chip serves much the same purpose as indecency regulations; it reduces the “pervasiveness” and “invasiveness” of broadcast television and puts control of what children see and hear more firmly in parents’ hands.

However, there are some problems with using the V-chip as an alternative to indecency regulation. First, although all TV sets 13 inches or larger manufactured after January 1, 2000, should be equipped with the V-chip, not everyone has purchased a new set; therefore, not all TV sets in use have the V-chip. Second, even among those households that own a V-chip equipped

television set, studies show that a majority of parents do not use the V-chip appropriately because they do not pay attention to the program ratings (Dominick et al., 2000). Whether the low usage of the V-chip is caused by technical problems or ignorance about how to use it, low use of the technology may work against offering the V-chip as a justification for relaxing or eliminating indecency regulations. Also, no similar technology exists for radio, meaning that indecency regulation likely would have to remain on radio. It would seem unlikely that the FCC or Congress would be willing to treat television and radio differently, although there may be good reasons to do so.

In other words, leaving basic cable as it is – largely unregulated – may be the best approach to the problem of indecency on television, at least for now. Network producers who yearn for more freedom of language can go to premium or basic cable with programming. Broadcasters can continue their perilous balancing act with the changing tastes of viewers and their legal restrictions. The current system, as flawed as it is, may provide the best compromise between those who want more "gritty realism" and those who want to protect their children from expanding their vocabularies four letters at a time. Someday, perhaps soon, technological advancements may make it possible for both sides to get what they want.

Conclusion

The television landscape is changing as programs test the limits of television taboos. On November 11, 2001, an uncut version of Steven Spielberg's "Saving Private Ryan" aired on the ABC television network during prime time. The first 20 minutes of the film offer one of the most graphic depictions of war ever created. In addition, the language used in the film clearly falls into the indecent category as defined by the FCC, although it is probably not repetitive enough to trigger FCC action.

The FCC is clear about when indecent material can be aired, although the definition of what is indecent is left to some interpretation. Nonetheless, broadcasters have a good idea of what they can get away with in terms of airing indecent language. Cable programmers know that they have the opportunity to air whatever they like, but basic cable channels have not pushed the envelope like premium-pay channels. "South Park's" "It Hits the Fan" episode was aired during the safe harbor for broadcast television, but the show could have aired at any other time and would not have violated any indecency standard because cable television lives by a different set of rules than broadcast television. Cable network TNN: The National Network joined the changing television landscape and followed the lead of ABC, which aired "Saving Private Ryan" uncut, with its own uncut versions of the "The Godfather" and "The Godfather, Part II", which aired for the first time December 4-5, 2001, and again recently. Again, although these films are littered with indecent material, cable networks are not restricted by indecency regulation and do not face potential punishment from the FCC. However, it is significant to note that these films were aired on a national cable channel that traditionally has had a mass appeal by offering more conservative programming. TNN, formerly known as The Nashville Network, is currently home to "Kids Say the Darndest Things," “Star Trek: The Next Generation,” and “Real TV.” However, its programming is becoming "racier" with programs like "Baywatch," "Miami Vice," and "MAD TV" being added to its lineup. The cable network's slogan is "The New TNN is America’s Fastest Growing Network." What is making TNN the fastest growing network? Is it the indecent material contained in some of its programming?

As the number of cable television subscribers continues to grow, will Congress feel the need to step in and regulate what basic cable can air? Or will technological changes make the need to regulate indecency on both cable and broadcast obsolete? There are no easy answers to

these questions, and the tendency of the Supreme Court to assume that indecent speech is harmful to children without any real proof complicates the situation. If the purpose of indecency regulation is to give parents more control over what their children hear and see, however, then the introduction of the V-chip offers a glimmer of hope for broadcasters that one day they can allow characters to "talk dirty" without incurring the wrath of the FCC.

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