COMMENTS

ADVOCACY GROUP BOYCOTTING OF NETWORK TELEVISION ADVERTISERS AND ITS EFFECTS ON PROGRAMMING CONTENT

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INTRODUCTION

The number and variety of media outlets in the United States far exceed those in any other nation. Sixty percent of American homes receive cable television service, enabling the average household to view twenty-seven different channels.¹ Over 10,000 radio stations compete for listeners and over 40,000 journals and magazines are published in the United States every year.² As media outlets have expanded, so have the number of commercial messages reaching the average consumer. Network television³ commercials, for example, have increased greatly. From 1965 to 1990, the number of commercials shown on network television increased threefold, from approximately 1,800 to almost 5,400 per year.⁴ Moreover, this number increases 20% annually.⁵ Networks can broadcast five or six consecutive advertisements during a single commercial break, averaging 10.5 minutes of commercial time per hour of prime-time programming.⁶

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¹ See Peter F. Eder, *Advertising and Mass Marketing: The Threat and the Promise*, FUTURIST, May 1990, at 38.

² See *id.*

³ In this Comment, "network television" refers to the programming of the four largest broadcasting networks: American Broadcasting Company (ABC), Columbia Broadcasting System (CBS), National Broadcasting Company (NBC), and Fox Broadcasting Network (Fox). The Federal Communication Commission (FCC), however, recognizes only ABC, CBS, and NBC as networks; it defines a network "as having weekly programming of 15 hours or more during prime-time." See Brian Donlon, *Network's Great Chase: Big Three in Pursuit of Survival*, USA TODAY, May 21, 1991, at 1D. Fox does not fall under the FCC definition, since it offers only 12 hours a week of prime-time programming. See *id.*

⁴ See Eder, *supra* note 1, at 38.

⁵ See *id.*

⁶ See *id.* "Prime-time" consists of the most highly watched portions of each

Television has become the most influential mass medium in the United States.⁷ Its images permeate public and private spaces.⁸ Television sets are found in virtually every home and they also crowd airports, bus and train stations, hospitals, lobbies, restaurants, nightclubs, and even parks and beaches.⁹ Because news, public affairs, and entertainment programs reflect and shape the dominant values and norms in society, advocacy and special-interest groups have made concerted efforts to control substantive media content.¹⁰

To better understand the types of reforms that advocacy groups seek, it is useful to classify the groups according to their social status, goals, and the extent to which they want to alter the content of the medium.¹¹ Conservative and religious groups view television as an intrusive threat to morals and Christian values and therefore seek to pressure the industry to prevent the degradation of society that results from the projection of alternative values.¹² Similarly, antiviolence groups find fault with television's excessive glorification of violence.¹³ These organizations seek to reduce or eliminate violence from television, arguing that continued exposure to violence will produce a violent society.¹⁴ Social-activist groups, such as environmental organizations, regard television as an "electronic classroom" in which society can most effectively learn about the issues and crises on the organizations' agendas.¹⁵ They want to incorporate educational messages about birth control, AIDS, arms control, and drug and alcohol abuse into television programming.¹⁶ Status-based interest groups, including women, homosexuals, seniors, the disabled, and racial minorities perceive television as a "cultural mirror" that has failed to "reflect their [own] image[s]"

network's schedule: those programs shown between 8:00 p.m. and 11:00 p.m. each evening, and starting at 7:00 p.m. on Sunday. See Robert Lenzner, *Prime-Time Faceoff for Big Money: New York, Hollywood in a Power Struggle*, BOSTON GLOBE, June 10, 1990, at A1.

⁷ See KATHERINE MONTGOMERY, *TARGET: PRIME TIME 6* (1989).

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ For a comprehensive discussion of Professor Montgomery's classification scheme, see *id.* at 8-9.

¹² See *id.*

¹³ See *id.* at 9.

¹⁴ See *id.*

¹⁵ See *id.* at 8.

¹⁶ See *id.*

accurately.”¹⁷ They seek “fuller and more positive representation” in television, because the medium threatens their rights as citizens when it treats them unfairly, excludes them, or only marginally includes them.¹⁸

Advocacy groups have difficulty influencing the substantive content of television programming since their members are often not included in the production and selection process. Instead, advocacy groups express their views by picketing the networks¹⁹ and lobbying governmental authorities for increased regulation.²⁰ More successful is the consumer boycott, which appears to be the weapon-of-choice in the advocacy group arsenal.²¹ By using their economic power to threaten not to purchase products from advertisers or sponsors of programs in which their views are not represented or are unfairly characterized, advocacy groups have made the networks and advertisers more responsive to their concerns.

This Comment examines the effects of consumer boycotts by advocacy groups on the substantive content of network television programming. Section I examines the limits of constitutional and ethical protection afforded boycotts. Section II explores the relationship between advocacy groups and the medium, focusing on the activities and complaints of individuals and organizations who have achieved a degree of prominence and notoriety in the industry. Through a series of comprehensive case studies, Section III examines how boycotts affect the presentation of three issues: abortion, homosexuality, and environmentalism. Finally, Section IV advocates two media policy reforms—content-blind purchasing of commercial air time and advocacy group internal network regulation—and evaluates how these proposals will operate within the current constitutional and regulatory regime.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *infra* text accompanying notes 183-94.

²⁰ See *infra* notes 140-50 and accompanying text.

²¹ See MONTGOMERY, *supra* note 7, at 10; *infra* text accompanying notes 106-11, 122-27.

I. DERIVING A CONSTITUTIONAL PROTECTION FOR CONSUMER BOYCOTTS

Expressive boycotts have long been an effective means of political communication. "From the colonists' protest of the Stamp and Townsend Acts to the . . . National Organization for Women's [(NOW)] campaign to encourage ratification of the Equal Rights Amendment, boycotts have played a central role in our [n]ation's political discourse."²² Their foundation in American history, importance as a mode of expression, and susceptibility to content-based regulations may require that restrictions on boycotts be scrutinized with special care.²³ Although consumer boycotts of television advertisers may appear to be destructive and illegal efforts that infringe upon the rights of the television industry, recent case law affords such boycotts constitutional protection.

A. *Developing a Constitutional Protection for Politically Motivated Boycotts in NAACP v. Claiborne Hardware Co.*

Until the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*,²⁴ the Court indicated that "rational economic policy reasons" could justify the regulation of peaceful consumer boycotts.²⁵ In *Claiborne Hardware*, however, the Court declared a "new consumer right to engage in concerted refusals to patronize even if

²² Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411, 447 (1990) (Brennan, J., dissenting); see also *Missouri v. National Org. for Women*, 620 F.2d 1301, 1319 (8th Cir.) (holding that NOW's Missouri convention boycott of states that had not ratified the proposed Equal Rights Amendment, while causing Missouri to suffer revenue losses, was "privileged on the basis of the First Amendment right to petition"), cert. denied, 449 U.S. 842 (1980).

²³ See *Federal Trade Comm'n*, 493 U.S. at 448 (Brennan, J., dissenting) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.")); see also *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 532 n.10 (1981) (Brennan, J., concurring) (stating that content-based distinctions in defining exceptions to a billboard ordinance "must be scrutinized with special care").

²⁴ 458 U.S. 886 (1982).

²⁵ Michael C. Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and its Implications for American Labor Law*, 93 YALE L.J. 409, 409 (1984); see id. at 409 n.2 (citing *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980) (denying constitutional protection to underwriter unions' picketing of insurance companies, since insurance companies derived over 90% of their income from the sale of underwriter's policies and successful secondary picketing would force the insurance companies to choose between their survival and the severance of their ties with the underwriter)).

such refusals are economically disruptive.”²⁶ This case arose from a black citizens’ consumer boycott of white merchants in Claiborne County, Mississippi, aimed at compelling white elected officials to support demands by civic and business leaders for racial equality and integration.²⁷ On common law tort grounds, the Mississippi court upheld a lower-court judgment for injunctive relief and damages, finding that the protesters had used “illegal force, violence, and threats against the peace” to effectuate the boycott.²⁸ On appeal, the United States Supreme Court unanimously reversed, holding that “[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, *politically motivated* boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.”²⁹ Accordingly, the Court found the nonviolent elements of the NAACP’s activities entitled to First Amendment protection.³⁰

The *Claiborne Hardware* Court drew a critical distinction between (1) pure economic boycott activity and unfair trade practices, which can be restricted by antitrust laws,³¹ and (2) peaceful political boycotts, which should not be regulated, since “expression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’”³² In supporting this differentiation, the Court recognized the importance of collective activity in political areas: “[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the

²⁶ *Id.* at 409. Professor Harper notes that several Fifth Circuit decisions “presaged” the *Claiborne Hardware* decision. *Id.* at 409 n.2 (citing *Henry v. First Nat’l Bank of Clarksdale*, 595 F.2d 291, 302-04 (5th Cir. 1979) (giving First Amendment protection of political speech and association to picketing and boycotting in protest of racial discrimination), *cert. denied*, 444 U.S. 1074 (1980)); *see also* *Machesky v. Brizzell*, 414 F.2d 283, 291 (5th Cir. 1969) (declaring an injunction restricting picketing, congregation, and boycotting in city business areas to be constitutionally overbroad, since it “collides with the paramount institutional interests protected by the First Amendment”).

²⁷ *See Claiborne Hardware*, 458 U.S. at 889.

²⁸ *NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290, 1301 (Miss. 1980), *rev’d*, 458 U.S. 886 (1982).

²⁹ *Claiborne Hardware*, 458 U.S. at 914 (emphasis added). Although a general First Amendment protection was found, the Court “did not squarely rest [its assertion] on any First Amendment . . . precedent.” Harper, *supra* note 25, at 409.

³⁰ *See Claiborne Hardware*, 458 U.S. at 915.

³¹ *See, e.g., NLRB v. Retail Store Employees Union*, 447 U.S. 607, 616 (holding that secondary picketing can be prohibited without violating the First Amendment).

³² *Claiborne Hardware*, 458 U.S. at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

American political process . . . [B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost."³³

B. *Extending the Meaning of Political Activity:*

Environmental Planning Informational Council v. Superior Court

After the *Claiborne Hardware* decision, it was unclear how broadly courts would construe the meaning of political activity.³⁴ Would joining a consumer boycott, for example, be conceived as a "constitutionally protected political act" or would the conception of boycotts as protected political activities be "limited to those aimed at affecting governmental decisionmaking?"³⁵ The Supreme Court of California recently addressed this question in *Environmental Planning and Information Council v. Superior Court*.³⁶ In this case, a newspaper publisher brought an action for injunctive relief and punitive and compensatory damages against a nonprofit environmental organization. Critical of the newspaper's editorial policies on environmental matters, the environmental group had called for a boycott of companies that advertised in the newspaper.³⁷ The California court expressly rejected the publisher's argument that only civil rights boycotts should be afforded constitutional protection, characterizing the organization's activity as a "politically motivated boycott designed to force governmental and economic change."³⁸ "[T]he fact that the change which they seek bears upon environmental quality rather than racial equality, can hardly support a different result."³⁹ The court emphasized that it was "precluded by the First Amendment itself from gauging the degree

³³ *Id.* at 907-08 (quoting *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981)).

³⁴ *See, e.g.*, Harper, *supra* note 25, at 413 (noting that "a right to boycott is difficult to place in any of the lines of First Amendment precedent the Court has developed in this century").

³⁵ *Id.* at 422. Professor Harper argues:

Even boycotts aimed solely at private decisionmaking should share the status of other political acts such as electoral voting, contributing money and time to an election or referendum campaign, and litigating for social purposes. All of these political actions can be viewed broadly as means by which citizens can influence important social decisionmaking.

Id. (footnote omitted).

³⁶ 680 P.2d 1086 (Cal. 1984).

³⁷ *See id.* at 1088.

³⁸ *Id.* at 1091 (quoting *NAACP v. Claiborne Hardware*, 458 U.S. 886, 914 (1982)).

³⁹ *Id.* at 1092.

of constitutional protection by the content or subject matter of the speech: "[T]here is an "equality of status" in the field of ideas."⁴⁰

The *Environmental Planning* court held the boycotters' activity to be constitutionally protected even though it was aimed at changing the editorial policies of the newspaper:

The freedom of a newspaper to formulate editorial policies is obviously of great value in our society, and the spectacle of different groups seeking to influence those policies through the use of economic boycott is troublesome to contemplate. Yet, the newspaper is not in a position to claim infringement of its own constitutional rights by such conduct, since no governmental action is implicated, and the degree of economic coercion which exists may be no greater than that which might lawfully be exerted by an advertiser who, on his own, seeks to influence editorial policy by withdrawing or threatening to withdraw its patronage. The market place of ideas contemplated by the First Amendment cannot be so insulated.⁴¹

Consequently, consumer boycotts aimed at changing the substantive content of a program or the editorial policies of a television network would likely be granted similar protection. If the organization's objective is to influence mass media policy, rather than one of economic gain, courts will hesitate to interfere with the activities of the advocacy group.⁴² For example, a minority group's boycott effected to increase the group's access to and visibility in network programming would invoke interests similar to those of the citizens in *Claiborne Hardware*. Similarly, a religious group's boycott, designed to encourage the depiction of "traditional values," would receive protection under *Environmental Planning*. Therefore, media reform which addresses the effects of advocacy-group boycotting must be consistent with the constitutional right advanced in *Environmental Planning* and in *Claiborne Hardware*.

⁴⁰ *Id.* (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948))).

⁴¹ *Id.* (citation omitted).

⁴² See, e.g., *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (providing no constitutional protection for lawyers who, acting as court-appointed counsel for indigent defendants, boycotted for increased compensation).

C. *The Ethics of Consumer Boycotts: Beyond the
Constitutional Protection*

Claiborne Hardware and *Environmental Planning* appear to define a constitutional right to boycott network television advertisers similar to the right historically afforded expressive boycotts. Some elements of these advertiser boycotts, however, are distinguishable from more traditional politically motivated activities. Professor Alan Dershowitz has questioned the presumption that sponsor boycotts are acceptable, arguing that "although most boycotts are constitutionally protected, some of them are morally wrong."⁴³ At a 1981 broadcast industry gathering, he commented:

"Surely it is more appropriate to boycott an advertiser who plays an active role in determining content than one who plays no role. If, for example, a sponsor were to say, 'I'll advertise on this show only if there are more exposed breasts, or it puts down gays, or if it casts a Klan member as Martin Luther King,' then the propriety of an economic boycott becomes more obvious. But if the sponsor merely declines to remove his ad from an objectionable show, the propriety of a general product boycott becomes more questionable."⁴⁴

Similarly, many consumer boycotts, specifically those engineered by the conservative/religious and antiviolence groups, aim to restrict the public's viewing options and curtail the expressive rights of television producers and networks.⁴⁵ These advocacy groups boycott to reduce network-programming content that does not conform with their agendas, resulting in the elimination of certain

⁴³ MONTGOMERY, *supra* note 7, at 162 (quoting Alan Dershowitz).

⁴⁴ *Id.* Professor Dershowitz has long opposed the tactics of advocacy group boycotts. For example, he was a strong supporter of Bob Guccione, whose *Penthouse* magazine prompted Reverend Jerry Falwell's Liberty Foundation to boycott 7-Eleven stores for selling "adult" magazines. Dershowitz observed that Guccione's magazines were attacked "solely because they do not conform to the single-minded religious, moral and behavioral standards of Jerry Falwell and other fundamentalist zealots." *Penthouse Fights Moral Majority*, FINANCIAL TIMES, Apr. 21, 1986, § 1, at 24. Professor Dershowitz also picketed in support of the Boston Symphony Orchestra, which had cancelled the opera-oratorio *Oedipus Rex*, due to narrator Vanessa Redgrave's ardent support of the Palestine Liberation Organization. Although Dershowitz defended Redgrave's right to perform, he stated that he also supported the orchestra's right to "exercise its freedom of association by refusing to perform with a PLO collaborator." Michael S. Serrill, *Art Silenced or Preserved?: Vanessa Redgrave Charges Blacklisting by the B.S.O.*, TIME, Nov. 12, 1984, at 88.

⁴⁵ For a discussion of Reverend Donald Wildmon's attempts to affect programming content, see *infra* notes 53-111 and accompanying text.

issues from programming.⁴⁶ This purpose, however, directly conflicts with the First Amendment principle of encouraging speech and increasing public debate and contrasts with the goals of social-activist and status-based interest groups, which are typically concerned with the lack of visibility of their views and consequently seek increased access to the medium. This quest for increased access closely parallels the colonists' Stamp and Townsend Acts protests and NOW's Equal Rights campaign; it therefore seems appropriate to pursue this objective through advertiser boycotts.

Finally, an advertiser boycott that is viewed as a restriction or limitation on the speech of the producer and network could be subject to regulation under *United States v. O'Brien*.⁴⁷ The *O'Brien* standard states:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁴⁸

Essentially, the government has the "authority to regulate expressive conduct when the regulation protects countervailing rights and is not directed at the content of the expression."⁴⁹ The government arguably could restrict these organized refusals to patronize because it has a legitimate interest in averting disruption of the economy and protecting the First Amendment expressive rights of those whose programming is attacked.⁵⁰ It is possible that these countervailing interests, in the aggregate, would be sufficient to justify government regulation of advocacy group boycotts in this narrowly-defined situation.

Therefore, although *Claiborne Hardware* and *Environmental Planning* appear to define a constitutional right of consumer boycotting, it is questionable how much protection should be afforded advocacy groups acts directed toward network television sponsors. Since advocacy group boycotts are targeted against

⁴⁶ Wildmon, for example, has threatened boycotts to eliminate both the depiction of homosexuality and abortion. See *infra* notes 53-111 and accompanying text.

⁴⁷ 391 U.S. 367 (1968).

⁴⁸ *Id.* at 377. The *Environmental Planning* court, however, did not incorporate the *O'Brien* test in its analysis.

⁴⁹ Harper, *supra* note 25, at 414.

⁵⁰ See *id.*

advertisers, who arguably have the least creative control over substantive programming content in the broadcast system,⁵¹ the ethical propriety of such boycott efforts is disputable.⁵² Furthermore, boycotts that threaten to interfere with countervailing economic and First Amendment rights of television producers and networks arguably may be regulated under *O'Brien*. Nevertheless, since advocacy group boycotts are currently afforded constitutional protection, any proposed media reform must necessarily be narrowly tailored to address only the effects and not the expressive components of the boycott activity.

II. PROFILES OF PROMINENT INDIVIDUALS AND ORGANIZATIONS IN TELEVISION REFORM

The effectiveness of a consumer boycott depends on the convictions and efforts of the leaders of the advocacy group and the type of reform sought. When advertisers and networks believe that an advocacy group's position represents a majority view, they are more likely to respond to its concerns. However, there is often a disparity between the claimed majority opinion and the actual one. This disparity is evident in the profiles below which analyze the impacts of individual advocates and advocacy groups on network television content and advertising support.

A. Reverend Donald Wildmon's Fight Against "Objectionable" Television

In 1976, Reverend Donald Wildmon experienced a "prime-time epiphany."⁵³ As he sat with his family for a relaxing evening of television viewing, he became enraged when he found only programs filled with violence, profanity, and sexual innuendo.⁵⁴ As he recounted in *Time* magazine:

"I sat down one night to watch television with my family. All I wanted to do was be entertained. Very shortly into the program, somebody was jumping into bed with somebody else's wife, a scene

⁵¹ See *infra* text accompanying notes 274-83.

⁵² Although advertisers arguably exercise indirect control over programming content, by deciding whether or not to sponsor a program, they have no creative input, unlike writers or producers. Therefore, whatever the effectiveness of advertiser boycotts, a boycott of those directly responsible for programming content appears more appropriate.

⁵³ *Righteous Watcher of the Airwaves*, TIME, July 6, 1981, at 20.

⁵⁴ See *id.*

of adultery. Of course it was normal, approved—you know, there was no kind of condemnation or showing it as being wrong. I asked the children to change the channel. I got into another program, which we watched for five minutes or so, and the first thing I know, somebody has called somebody else an s.o.b., but they didn't use the initials. And I asked my children to change the channel again. This was in 1976, and we had three networks plus PBS. I got involved in a pretty good mystery, and all of a sudden the scene changed and one man has another man tied down and is working him over with a hammer. I asked the children to get up and turn the set off. That's all I'd ever been told to do: If you don't like what's on television, turn it off. Then I realized that I'm a part of a whole, larger social group, and what goes on in society, especially in the television industry, is going to affect me and my family and my children—they were small at that point. And I then realized that I should try to do something about this."⁵⁵

Wildmon was so angry that he gave up his position as a Methodist minister in a suburban Memphis congregation and formed the National Federation for Decency (Federation),⁵⁶ an advocacy group for members "disgusted with the cheap, violent and vulgar programming on television" and devoted to effecting change through the use of economic boycotts.⁵⁷ One of the Federation's initial acts was a highly publicized boycott of television in March 1977, which Wildmon claimed was "greatly responsible for a drop of 1 million households daytime and one quarter of a million households prime-time from March to December of 1977."⁵⁸ Industry officials, however, attributed the decline to competition from cable television and motion pictures and the entrance of women into the labor market.⁵⁹

The Coalition for Better Television (Coalition) was formed in February 1981,⁶⁰ with Wildmon as its chairperson.⁶¹ Representing approximately 300 religious and community groups,⁶² includ-

⁵⁵ Don Winbush, *Bringing Satan to Heel*, TIME, June 19, 1989, at 54 (quoting Donald Wildmon).

⁵⁶ See *Righteous Watcher of the Airwaves*, *supra* note 53, at 20.

⁵⁷ *New TV Season: Less Sex, Less Violence*, U.S. NEWS & WORLD REP., Sept. 11, 1978, at 32.

⁵⁸ *Id.* (quoting Donald Wildmon).

⁵⁹ See *id.*

⁶⁰ See N.R. Kleinfeld, *TV Moral Monitors to Press Sponsors*, N.Y. TIMES, May 27, 1981, at D1.

⁶¹ See Curtis Coghlan, UPI, Feb. 12, 1981, available in LEXIS, Nexis Library, UPI file.

⁶² See Kleinfeld, *supra* note 60, at D18.

ing his own Federation and Reverend Jerry Falwell's Moral Majority,⁶³ the organization claimed support from 3.5 million families nationwide.⁶⁴ For the next three months, approximately 4,000 Coalition volunteers noted the television programs they found offensive and the companies that advertised their products during commercial breaks in those programs.⁶⁵ The results were used to determine the advertisers that most commonly supported programs containing "excessive sex, violence and profanity."⁶⁶ Wildmon announced that, once the list was completed, a boycott of the most frequent offenders would be launched.⁶⁷ Surprisingly, after meeting with officials from several consumer products companies, however, the Coalition cancelled the planned boycott.⁶⁸ At a press conference in Washington, D.C., Wildmon explained that "advertisers have listened to us and our concerns, and basically share our concerns."⁶⁹

In the years following the 1981 attack on network television, Wildmon's efforts were infrequently publicized until 1986, when he formed Christian Leaders for Responsible Television (CLear-TV), a coalition of 1,600 Protestant ministers and Roman Catholic priests.⁷⁰ The group, arguably the most vocal and influential advocacy organization today, claims to represent 60 million Americans.⁷¹ Initially, CLear-TV sought television reform by meeting directly with officials from the major networks.⁷² Wildmon, however, was dissatisfied with the responses. "I talked about decency and the concern for society and the children . . . And they used the same words that I used. But we certainly didn't mean the same thing by them."⁷³

⁶³ See *id.*; *Why Sex and Violence Won't Wash With Procter and Gamble*, *ECONOMIST*, June 27, 1981, at 21 [hereinafter *Sex and Violence*].

⁶⁴ See Coghlan, *supra* note 61. This figure was later quoted to be as high as 5 million families nationwide. See Gerald Clarke, *Sanitizing the Small Screen: Procter & Gamble Joins the Networks' Sex-and-Violence Critics*, *TIME*, June 29, 1981, at 83.

⁶⁵ See Clarke, *supra* note 64, at 83; *Sex and Violence*, *supra* note 63, at 21.

⁶⁶ *Sex and Violence*, *supra* note 63, at 21.

⁶⁷ See *Chemical Marketers Feel Anti-TV Pressure*, *CHEMICAL WEEK*, July 8, 1981, at 18.

⁶⁸ See *id.*

⁶⁹ *Id.* (quoting Donald Wildmon).

⁷⁰ See Larry Black, *Burger King Forced to Eat Its Words*, *THE INDEPENDENT*, Nov. 11, 1990, at 8; James Cox, *Rev. Donald Wildmon: Mississippi Minister Takes on TV Networks*, *USA TODAY*, July 17, 1989, at 6B.

⁷¹ See Black, *supra* note 70, at 8.

⁷² See Winbush, *supra* note 55, at 54.

⁷³ *Id.* (quoting Donald Wildmon).

Consequently, Wildmon re-focused his efforts on the advertisers because, unlike the networks, "[a]dvertisers don't give you a cold shoulder. They want to be your friend."⁷⁴ He established a television monitoring system in the west Tupelo offices of the American Family Association (AFA).⁷⁵ As of July 1989, twenty-two employees review television shows, newspapers, and magazines. Their findings are printed monthly in the *AFA Journal*.⁷⁶

One of CLear-TV's most successful efforts was the highly publicized boycott of Pepsi-Cola products, which was announced in the *AFA Journal* in March, 1989.⁷⁷ Wildmon was enraged by Pepsi's "Make a Wish" television ad campaign, featuring rock singer Madonna and the soundtrack of her simultaneously released video "Like a Prayer," which Wildmon found "sacrilegious to the core."⁷⁸ To the astonishment of the advertising community, Pepsi responded to CLear-TV's concerns by canceling the Madonna ad campaign, reportedly costing the company up to \$10 million.⁷⁹ Wildmon explained his objections in *Time* magazine:

"Pepsi said to our young people in this country, 'Here is the role model we think worthy of \$10 million in support.' Here is a pop singer who makes a video that's sacrilegious to the core. Here's a pop star that made a low-budget porn film. Here's a pop star who goes around in her concerts with sex oozing out, wearing a cross. Now Pepsi is saying to all the young people of the new generation, 'Here is the person we want you to emulate and imitate.' They can do that. They've got every right to give Madonna \$10 million, put it on television every night if they want to. All I'm saying is 'Don't ask me to buy Pepsi if you do it. You've got the right to spend your money where you want to; I've got the right to spend my money where I want to . . .' and obviously, evidently, I was somewhat right in that because Pepsi agreed. They canceled their commercial and their [sponsorship of Madonna's] world tour."⁸⁰

⁷⁴ *Id.*

⁷⁵ See Cox, *supra* note 70, at 6B. The AFA is the reincarnated "organization of evangelical Christians" that Wildmon originally founded as the Federation. See *id.*; see also text accompanying notes 56-59.

⁷⁶ See Cox, *supra* note 70, at 6B.

⁷⁷ See Sheila Mullan, *Pepsi Yanks Madonna Ads After Religious Boycotts*, UPI, Apr. 6, 1989, available in LEXIS, Nexis Library, UPI File.

⁷⁸ Winbush, *supra* note 55, at 54 (quoting Donald Wildmon).

⁷⁹ See Estelle Lander, *Viewers Who Have Taken Offense at Risque Shows Go on the Offense*, NEWSDAY, Apr. 17, 1989, § 2 (City Business), at 1.

⁸⁰ Winbush, *supra* note 55, at 54-55 (quoting Donald Wildmon). It is important to note that Wildmon's threatened boycott of Pepsi is conceptually distinguishable

On July 17, 1989, on the heels of its recent success with Pepsi, CLear-TV mounted its largest crusade, a year-long boycott of Mennen Co. and Clorox Corp., companies which CLear-TV denounced as "the leading sponsors of sex, violence and profanity" on television.⁸¹ This determination was based on the work of 3,000 CLear-TV monitors in thirty-three states from April 27, through May 24, 1989.⁸² CLear-TV promoted the boycott by producing a thirty-minute television program explaining the boycott, which the group asked religious broadcasters around the country to air free of charge.⁸³ To further insure the boycott's success, the AFA committed \$2 million out of its \$5.2 million annual budget to a direct-mail and ad campaign which publicized the boycott.⁸⁴

Representatives from both Mennen and Clorox expressed surprise upon hearing CLear-TV's accusations, with Clorox noting that it followed internal standards which "precluded" its commercials from being shown in "programs that make gratuitous, overly graphic use of sex or violence; treat ethnic, religious or political groups in a disparaging manner; present facts inaccurately, or glorify . . . drug or alcohol consumption."⁸⁵ Mennen, on the other hand, issued an aggressive official statement critical of CLear-TV's goals:

"The Mennen Co. has a long-standing policy of pre-screening programs and infrequently declines to sponsor programs that do not meet its standards However, it seems that opinions differ in our great country with regard to what is appropriate viewing.

from most of his other campaigns. In protesting Pepsi's relationship with Madonna, Wildmon was concerned with the content of the song used in the Madonna ad. His other campaigns are usually focused on the content of the television program, not the advertisement. The former campaign seems more ethical than the latter, as the advertiser's role in producing the commercial is substantial, while its influence on program content is minimal. See *supra* text accompanying notes 43-44.

⁸¹ See "New McCarthyism": Year Boycott of Mennen, Clorox Products Announced by CLear-TV, COMM. DAILY, July 18, 1989, at 2 [hereinafter *New McCarthyism*] (quoting statement of CLear-TV).

⁸² See *id.*; *Two Advertisers Targeted for Boycott*, BROADCASTING, July 24, 1989, at 80. The "sweeps" period, of which the boycott period was one, occur four times annually. During this time the networks set the advertising rates for their programs. See Rick DuBraw, KNBC, KCBS Ride War Wave with Early Newscasts, L.A. TIMES, Jan. 29, 1991, at F9.

⁸³ See *Two Advertisers Targeted for Boycott*, *supra* note 82, at 80.

⁸⁴ See Cox, *supra* note 70, at 6B.

⁸⁵ *Two Advertisers Targeted for Boycott*, *supra* note 82, at 80 (quoting Clorox spokesman Fred Reicker).

We do not believe the Mennen Co. should act as a censor for CLear-TV or for any other group. We believe the viewing public will understand the position we are taking and recognize that opinions may differ regarding acceptable programs."⁸⁶

Eight months into the boycott, its impact was unclear. Financial analysts generally agreed that the boycott had not hurt the bottom-line performances of either Clorox or Mennen.⁸⁷ Wildmon disagreed. "Hard figures, independent figures are there to confirm that," he said, noting that Clorox revenues and profits declined in the second half of 1989, compared with the first six months of the year.⁸⁸ Analysts, however, attributed Clorox's second-half figures to a normal decline in the sale of seasonal products, such as barbecue sauces, bleach, charcoal, and salad dressings.⁸⁹ The data indicated that "Clorox actually performed well throughout 1989, showing healthy gains in revenue and profit compared with 1988."⁹⁰

Three months prior to its scheduled conclusion,⁹¹ CLear-TV lifted its boycott against Clorox, contending that the company experienced a decrease in sales and had "implored the group to ease off."⁹² Clorox denied that the boycott affected product sales, but claimed that its "reputation had been unjustly sullied."⁹³ Nevertheless, a Clorox spokesperson conceded that the company (1) ceased to advertise on the shows that CLear-TV found objectionable, (2) agreed to implement standards which would prevent its advertising on "shows depicting gratuitous sex and violence," and (3) received about 350,000 letters supporting the boycott.⁹⁴ At the same time, Wildmon announced that the boycott of Mennen would continue for the remaining three months.⁹⁵

⁸⁶ Judith Graham, *Ad Industry Rears Up at Boycott*, ADVERTISING AGE, July 24, 1989, at 16 (quoting statement of Mennen Co.).

⁸⁷ See James Cox, *Boycott Group Might Have On-Screen Win*, USA TODAY, Mar. 12, 1990, at 1B.

⁸⁸ See *id.* (quoting Donald Wildmon).

⁸⁹ See *id.*

⁹⁰ *Id.*

⁹¹ See Steve Weinstein, *Christian TV-Watchdog Group Ends Boycott on Clorox*, L.A. TIMES, Apr. 28, 1990, at F11.

⁹² Laura Malt, *CLear-TV Lifts Clorox Ban*, ELECTRONIC MEDIA, Apr. 30, 1990, at 3 (quoting CLear-TV chairman Billy Melvin).

⁹³ *Id.* (quoting Clorox spokesman Fred Reicker).

⁹⁴ See *id.*

⁹⁵ See Weinstein, *supra* note 91, at F11.

Several months later, on September 1, 1990, CLear-TV began another national boycott,⁹⁶ this time of Burger King's 5,400 franchises,⁹⁷ which collectively spend \$215 million a year on U.S. advertising.⁹⁸ CLear-TV claimed to have found the fast-food chain to be among the leading sponsors of "gratuitous sex, violence, and anti-Christian stereotyping" on network television.⁹⁹ The offending shows included two television weekly series (CBS's Vietnam drama *Tour of Duty* and ABC's *thirtysomething*)¹⁰⁰ and the films *Platoon*, *Octopussy*, and *Throw Momma from the Train*.¹⁰¹ This boycott was canceled two months later after CLear-TV leaders met with company officials from Burger King.¹⁰²

As part of a settlement of complaints with the group, Burger King ran half-page advertisements in 554 daily newspapers across the country titled "An Open Letter to the American People":

"Burger King wishes to go on record as supporting traditional American values on television, especially the importance of the family. We believe the American people desire television programs that reflect the values they are trying to instill in their children. We pledge to support such programs with our advertising dollars."¹⁰³

Burger King officials firmly denied that the boycott had any impact on sales, stating only that the company "wanted to make the public aware of our position."¹⁰⁴ "We were concerned that there were a lot of misconceptions in the minds of our consumers and that there were hundreds of thousands of them out there who didn't see the news release [from CLear-TV] calling the boycott off."¹⁰⁵

⁹⁶ See Anthony Ramirez, *Burger King Ads Help End Boycott by Religious Group*, N.Y. TIMES, Nov. 7, 1990, at D1.

⁹⁷ See *Boycott of Burger King Called Off*, CHIC. TRIB., Nov. 2, 1990, § 3 (Business), at 2.

⁹⁸ See Black, *supra* note 70, at 8.

⁹⁹ See Ramirez, *supra* note 96, at D1.

¹⁰⁰ See Howard Rosenberg, *Burger King Bows to TV Watchdogs*, L.A. TIMES, Nov. 14, 1990, at F1. *Tour of Duty* was cited for its "profane language and graphic violence," including "explosions and tortured, writhing bodies." *Id.* at F12. *thirtysomething* was criticized for showing the estranged couple Elliot and Nancy together in bed after they separated. *Id.*

¹⁰¹ See Carol U. Ozemhoya, *Burger Kings Ads Responded to Group's Boycott*, S. FLA. BUS. J., Nov. 12, 1990, § 1, at 3; see also Rosenberg, *supra* note 100, at F12.

¹⁰² See Ozemhoya, *supra* note 101, at 3.

¹⁰³ *Id.* at 3 (quoting Burger King advertisement); see Black, *supra* note 70, at 8 (same).

¹⁰⁴ Ozemhoya, *supra* note 101, at 3 (quoting Michael Evans, media relations manager of Burger King).

¹⁰⁵ Rosenberg, *supra* note 100, at F12 (quoting Michael Evans, media relations

More recently, CLear-TV targeted Honda Motor Corp. as the biggest sponsor of "un-Christian sex, violence and profanity on network television."¹⁰⁶ Wildmon also included Duracell, US Sprint, Sony, Anheuser-Busch, Nissan, Heinz, Chrysler and Ralston-Purina as sponsors of objectionable programs.¹⁰⁷ However, CLear-TV has yet to announce a boycott of Honda products,¹⁰⁸ or of any other products from the eight companies listed. Nevertheless, Wildmon maintains that he will continue to apply economic pressure to the advertising and broadcasting industries as long as they "continue to think with their wallets."¹⁰⁹ "I've always tried to work through their conscience," he claimed recently.¹¹⁰ "It just so happens that they sit on their conscience."¹¹¹

B. A Single Viewer's Impact on Network Sponsors

"I'm a perfect example of the First Amendment in its best form," claimed Terry Rakolta,¹¹² a Michigan homemaker and mother of four, who demonstrated how easily advertisers can be influenced when a sole viewer expresses her dissatisfaction with network television. In 1989, Rakolta initiated a campaign urging several major corporations to discontinue advertising their products on the highly popular Fox comedy series *Married . . . with Children*, which she described as "consistently offensive. They exploit women, they stereotype poor people, they're anti-family."¹¹³ Since Rakolta felt that responsibility for offensive programming

manager of Burger King).

¹⁰⁶ Claudia Puig, *Morning Report: TV & Video*, L.A. TIMES, Jan. 7, 1991, at F2.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ Patricia Freeman, *As the "Clean TV" Campaign Heats Up, ABC Chills Two New Shows*, PEOPLE, May 22, 1989, at 155 (quoting Donald Wildmon). Shortly before publication of this Comment, Mazda Motor of America was under attack by Wildmon for advertising on NBC's *Saturday Night Live*. See Kathy Brown & Pat Hinsberg, *Mazda Ads First to Bow to Boycott*, CHI. TRIB., Nov. 3, 1991, Business Section, at 9A. Mazda subsequently removed its ads from the show but denied that the boycott affected its decision. See Martha T. Moore, *Mazda Yanks Ads From "SNL," USA TODAY*, Nov. 5, 1991, at 2B. Mazda, however, acknowledged that Wildmon "brought to [their] attention some of the potential problems with advertisements" on the show. See Brown & Hinsberg, *supra*, at 9A (quoting Mazda spokesman Jack Pitney).

¹¹⁰ See Freeman, *supra* note 109, at 155 (quoting Donald Wildmon).

¹¹¹ *Id.*

¹¹² *What Should Be Done About Different Standards in TV Programming?*, BROADCASTING, Mar. 19, 1990, at 40 (quoting Terry Rakolta).

¹¹³ *Michigan Viewer Urges Ad Boycott of "Married . . . with Children," BROADCASTING*, Mar. 6, 1989, at 34 [hereinafter *Michigan Viewer*] (quoting Terry Rakolta).

should rest "squarely on the shoulders of advertisers," she threatened them with a boycott.¹¹⁴ The sponsors, in turn, pressured the network, which responded by toning down the show and moving it to a later time period.¹¹⁵

Although the fiscal impact of her campaign on the targeted companies was negligible, she did receive a personal written apology from Coca-Cola USA President Ira C. Herbert for his company's advertising on an episode featuring "a back shot of a woman taking off her bra" and references to homosexuality that "appalled" Rakolta.¹¹⁶ However, Coca-Cola did not withdraw its ads from the program and stated that decisions concerning placement of its commercials would continue to be made on an "episode-by-episode basis on all the programs it sponsors."¹¹⁷

According to Fox, only Tambrands Inc. pulled its commercials from that season's *Married . . . with Children* schedule as a result of Rakolta's complaints.¹¹⁸ Sandoz/Dorsey Inc. also announced its intent to withdraw its advertising,¹¹⁹ as did Procter & Gamble, Kimberly-Clark, and McDonald's.¹²⁰ Nonetheless, at the time of Rakolta's complaint, not only was every commercial spot on the *Married . . . with Children* schedule filled, but there was a long sponsor waiting list as well.¹²¹

Since her letter-writing campaign, Rakolta has remained active in the media. She has formed her own advocacy group, Americans for Responsible Television, and she recently spoke on a panel as part of the Center for Population Options' forum on consumer-backed sponsor pull-outs and censorship.¹²² Although she has limited her campaign against sex and violence on television to programming shown during early "family" viewing hours, she does

¹¹⁴ See *id.*

¹¹⁵ See Christine Gorman, *Listen Here, Mr. Big!: Corporate Misbehavior is Sparking a Fevered Outburst of Consumer Protests and Boycotts*, TIME, July 3, 1989, at 41; David Kalish, *Marriage . . . With Problems: Advertising on "Married . . . With Children" Creative Concepts*, MARKETING & MEDIA DECISIONS, May 1990, at 30.

¹¹⁶ See *Michigan Viewer*, *supra* note 113, at 34.

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See Kalish, *supra* note 115, at 30.

¹²⁰ See *Michigan Viewer*, *supra* note 113, at 34.

¹²¹ See *id.* Many of the companies currently advertising on the show are among the top 25 advertisers, including Budweiser, Burger King, Coors, Gillette, LA Gear, Mitsubishi, Nintendo, Nissan, Subaru, and the U.S. Army. See Kalish, *supra* note 115, at 30.

¹²² See Diane Haithman, *Housewife Critic of TV Finds Less to Protest*, L.A. TIMES, July 22, 1989, § 5, at 1.

not believe that her group is encouraging censorship.¹²³ "What we're saying is, self-regulate—you know the boundaries. We're not in the line-drawing business. You draw the line."¹²⁴ Furthermore, Rakolta has begun a formal survey of the nation's 100 leading advertisers to determine what standards they employ in choosing programs on which to advertise.¹²⁵ "If a company without a formal policy on program content rejects her group's advice to formulate one, . . . it will become a candidate for a product boycott."¹²⁶ "Advertisers have a choice to advertise on any show they want, but consumers also have a choice not to buy the products of that advertiser," she recently explained in *Advertising Age*, "[i]t's our only leverage."¹²⁷

C. *People For The American Way and the Battle Against Censorship*

While the efforts of CleaR-TV and Americans for Responsible Television serve to limit television viewing choices, other organizations are devoted to promoting free speech and viewing options. People for the American Way, for example, has taken up the battle against censorship as part of its commitment to protecting First Amendment values.¹²⁸ Formed in 1980 by television producer Norman Lear, creator of such controversial television shows as *All in the Family*, *Maude*, and *Sanford and Son*, People for the American Way has been guided by a number of advisers from the business and religious communities, including Norman Cousins, the former editor of *The Saturday Review*, Reverend M. William Howard, past

¹²³ See *id.*

¹²⁴ *Id.* (quoting Terry Rakolta).

¹²⁵ See Judith Graham & Steven W. Colford, *Execs Fret as Program Jitters Kill ABC Shows*, *ADVERTISING AGE*, May 8, 1989, at 3.

¹²⁶ *Id.*

¹²⁷ *Id.* (quoting Terry Rakolta).

¹²⁸ See Steve Weinstein, *Religious Right May Be in for a Fight*, *L.A. TIMES*, May 20, 1991, at F1. Although much of the organization's energies have been directed recently towards countering various consumer boycotts, People for the American Way has been active on a number of other constitutional fronts. For example, the group recently published its annual study of school censorship, which documented a 33% rise in the number of challenges to school materials. See Jennifer Warren, *Schools Face Censor's Siege, Group Says*, *L.A. TIMES*, Aug. 29, 1991, at A3. In addition, the group has criticized Blockbuster Video's recent decision not to carry videotapes rated NC-17 in its stores, which number 1,600 nationwide. See Beth Kleid, *Morning Report: Movies*, *L.A. TIMES*, Jan. 17, 1991, at F2. Finally, the group, critical of the Supreme Court's recent abortion rulings, lobbied actively to support the Freedom of Choice Act. See Greg Downs, *State Lawmakers Ask Congress: Block Right to Limit Abortion*, *GANNETT NEWS SERVICE*, Aug. 7, 1990, available in *LEXIS*, *Nexis Library*, *GNS File*.

president of the National Council of Churches, and Edgar M. Bronfman, chairman of Joseph E. Seagram and Sons Inc.¹²⁹

The efforts of People for the American Way, for the most part, have been reactive rather than aggressive. For example, when the Coalition for Better Television began its campaign in 1981, People for the American Way allocated \$3 million for television and radio advertisements to "promote freedom of thought and expression"¹³⁰ and sent public service announcements to television stations around the country to denounce the boycotts.¹³¹ These efforts, however, appeared to have little impact on the advertising community, as several major advertisers met with Coalition leaders in an attempt to "avert" the threatened boycott.¹³² Eight years later, when Wildmon's American Family Association initiated a sponsor boycott of the drama *Roe v. Wade*, People for the American Way held a news conference to reiterate their opposition to the attempts of advocacy groups to influence programming.¹³³ Arthur Kropp, the organization's president, charged that Wildmon was "trying to turn network TV into a bully pulpit for his own narrow political and theological viewpoints."¹³⁴ Likewise, in response to CLear-TV's boycott of Clorox and Mennen, Kropp observed:

"My advice is to ignore Don Wildmon. . . . He finds anti[-]family or anti-Christian conspiracies in such programs as *ALF*, *Growing Pains* and *The Magic World of Disney*. Don Wildmon is obviously way out in left field, way out of step with the tastes of the American public. He relies on intimidation tactics that can only win if people take him seriously. Past Wildmon boycotts have failed miserably at the checkout counter and I expect this latest effort will fail as well."¹³⁵

Despite its public stance against groups such as CLear-TV, People for the American Way appears to have been far less influential in affecting network programming than its conservative

¹²⁹ See *These Liberal Groups Are Keeping the Voters on Their Toes*, 13 NAT'L J. 1200 (1981).

¹³⁰ *Id.* (quoting Anthony Podesta, executive director of People for the American Way).

¹³¹ See *Lear TV Ads to Oppose the Moral Majority*, N.Y. TIMES, June 25, 1981, at C14.

¹³² See Joseph B. Treaster, *TV Advertisers Meet Coalition in Effort to Avert Boycott*, N.Y. TIMES, June 26, 1981, at A10; see also *supra* text accompanying notes 68-69.

¹³³ Don Kowet, *The "Righteous Indignation" of Donald Wildmon: How a Mississippi Minister Terrorizes the TV Networks*, WASH. TIMES, July 12, 1989, at E1.

¹³⁴ *Id.* (quoting Arthur Kropp).

¹³⁵ *New McCarthyism*, *supra* note 81, at 2 (quoting Arthur Kropp).

counterparts. This lack of influence may reflect the fact that it is more difficult to criticize a company for not advertising on a show than for sponsoring one. Indeed, organizations like People for the American Way have a hard time simply identifying those advertisers that withdraw from controversial programs, as the networks are reluctant to publish the names of such corporations.¹³⁶ Of all the organizations that attempt to effect change in network television, conservative groups, such as CLeaR-TV, appear to wield the most influence with advertisers.

III. THE EFFECTS OF CONSUMER BOYCOTTS ON THE PRESENTATION OF CONTROVERSIAL PROGRAMMING

The programs and messages conveyed on television are unique; they invade the home, a traditional sanctuary. The challenge in developing acceptable network programming, however, lies in the recognition that the program welcomed into the home of one may offend another. A lighthearted comment from an industry insider illustrates the paradox:

"Dental groups howl when a TV character expresses dread of the dentist's chair Bankers and securities dealers don't like it when one is depicted as a crook or embezzler Librarians' organizations write bitter little notes about the stereotypes of the librarian . . . and the wine industry became upset when it was implied that muscatel was the beverage most favored by broken-down alcoholics Sometimes I think there are too many minorities . . . and I'm not talking about race, creed, or color, or land of origin. I mean doctors, lawyers, plumbers, storekeepers and milliners. And all of them are very easily offended."¹³⁷

Causing the most controversy are issues for which there is no clear moral consensus, such as abortion, homosexuality, and the environment. Advocacy groups are especially concerned when these issues are included in, or excluded from, network programming. This Section examines the treatment of these subjects on network television and the corresponding reactions from various advocacy groups.

¹³⁶ See Diane Mermigas, 'Roe' Loses Ads: NBC Stands Firm, *ELECTRONIC MEDIA*, May 15, 1989, at 3; *infra* notes 156-66, 195-206 and accompanying text.

¹³⁷ MONTGOMERY, *supra* note 7, at 19-20 (quoting Cynthia Lowry, *TV Censor's Job: Listening to All Those Complaints*, Associated Press column, Aug. 22, 1961).

A. *Abortion: When Balanced Viewpoints Aren't "Balanced" Enough*

Controversy surrounding abortion themes in television programs dates back to CBS' *Maude* in 1972, and has resurfaced in recent years on such shows as *China Beach*, and the made-for-television movie *Roe v. Wade*. In an attempt to avoid offending viewers and advertisers, many programs dealing with abortion seek to take a neutral position, by presenting someone in support of abortion rights as well as someone in opposition.¹³⁸ Nevertheless, in a society where abortion rights are constantly debated, there are many who prefer that the subject be removed completely from the television airwaves.

1. *Maude* Enrages Catholic Pro-Life Organizations¹³⁹

In 1972, a two-part *Maude* episode caused an uproar when the title character, a strong-willed, liberated, middle-aged, married woman played by Bea Arthur, became pregnant and, fearing the health risks associated with later-life deliveries, decided to have an abortion.¹⁴⁰ Immediately after the broadcast, 373 angry viewers bombarded the CBS switchboard in New York with calls; only ten viewers registered favorable reactions.¹⁴¹ The network also received hundreds of letters from people upset with the telecast, claiming that the program espoused abortion and that "it was inappropriate to treat such a serious subject as abortion in a comedy series, especially in a show broadcast at 8:00 p.m., when many children would be watching."¹⁴² The producers maintained that the show was balanced, since it included a peripheral character, a mother of four who accidentally became pregnant and was "ecstatic about her condition," sharply contrasting with Maude's "distressed state of mind."¹⁴³ The character, however, did not discuss the issue of abortion, but "was merely added as a kind of sidebar to the

¹³⁸ See *infra* text accompanying notes 167-70.

¹³⁹ For a thorough discussion of the abortion controversy in *Maude*, see MONTGOMERY, *supra* note 7, at 27-50.

¹⁴⁰ See Jay Sharbutt, *NBC Chief Urges Advertisers to Support 'Roe'*, L.A. TIMES, May 11, 1989, § 6, at 1.

¹⁴¹ See Aljean Harmetz, *Maude Didn't Leave 'em All Laughing*, N.Y. TIMES, Dec. 10, 1972, at B3.

¹⁴² MONTGOMERY, *supra* note 7, at 34.

¹⁴³ *Id.* at 32.

central story line, and a very minor one at that. Needless to say, her presence did little to prevent the show from attack."¹⁴⁴

Although the ratings for the two episodes averaged an impressive forty-one percent share of the audience,¹⁴⁵ *Maude's* producers did not expect "the extent of the outcry over *Maude's* abortion."¹⁴⁶ Pro-life organizations, many of them affiliated with the Catholic Church, vehemently protested the show and called for a boycott of its sponsors.¹⁴⁷ In a complaint to the Federal Communications Commission (FCC), the groups alleged a violation of the Fairness Doctrine.¹⁴⁸ In keeping with its decisions concerning

¹⁴⁴ *Id.* at 33.

¹⁴⁵ See Sharbutt, *supra* note 140, at 1.

¹⁴⁶ MONTGOMERY, *supra* note 7, at 34. For example, Lear said that "[m]y fight is to get a funny script on a subject that is adult and meaningful. I enjoy stirring feelings, even negative feelings, because I think that is what theater is about. It's marvelous to know you have engaged the feelings of millions of people." Harnetz, *supra* note 141, at 23 (quoting Norman Lear).

¹⁴⁷ See MONTGOMERY, *supra* note 7, at 35-38.

¹⁴⁸ The Fairness Doctrine was a policy designed to promote the balanced presentation of controversial issues. It required radio and television broadcasters that presented one viewpoint on a controversial issue to present or provide time for the conflicting view. See *FCC Does Not Plan to Eliminate Fairness Doctrine, Fowler Says*, DAILY REPORT FOR EXECUTIVES, Apr. 8, 1987, at A5. Broadcasters claimed that the doctrine infringed upon their First Amendment rights and restricted their "journalistic freedom." *Id.* Some argued that the doctrine stifled freedom of expression because broadcasters feared that examining controversial topics would incite opponents to file FCC complaints. See *id.* In August 1987, the FCC abolished the doctrine, claiming that it "no longer served the public interest." MONTGOMERY, *supra* note 7, at 220; see *In re Complaint of Syracuse Peace Council*, 2 F.C.C.R. 5043, 5057 (1987). In doing so, the FCC found that "dramatic technological advances" had eased concerns about spectrum scarcity. See *PTAR Challenged at FCC*, BROADCASTING, Apr. 23, 1990, at 89. This prompted an unsuccessful attempt by legislators to codify the policy as an amendment to a spending bill in late 1987. See Dennis McDougal & Karen Tumulty, *Fairness Doctrine Loses, But Issue Due to Resurface in 1988*, L.A. TIMES, Dec. 23, 1987, § 6, at 1. An equally unsuccessful lawsuit challenged the FCC's decision. See *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989) (holding that "the FCC's decision that the Fairness Doctrine no longer served the public interest was neither arbitrary nor capricious"). Ironically, several commentators, including Ralph Nader, claim that the doctrine's elimination has actually decreased the amount of public affairs programming on television. See *Public Affairs Shows Decline 51%, Nader Says*, L.A. TIMES, Apr. 5, 1989, at A3 (reporting results of a public interest group founded by Nader); see also Doug Halonen, *The Vanishing Editorialist*, ELECTRONIC MEDIA, Sept. 24, 1990, at front cover (claiming a decline in the number of local television general manager editorials). The Fairness Doctrine, however, continues to apply to cable stations. See *Preemptive Strike: Mooney Says Cable Has More Public Interest Obligations Than Stations*, COMM. DAILY, June 26, 1991, at 2; John Wolfe, *NCTA Blasts Broadcasters 'Duplicitous' Campaign to Use Regulation to Stifle Cable Competition*, U.S. NEWSWIRE, June 25, 1991, available in LEXIS, Nexis Library, USNWR File.

public affairs programming, the FCC denied the complaint, finding that the pro-life groups had not succeeded in showing that CBS had failed to present adequately their position in any of its broadcasts.¹⁴⁹ Although the FCC ruled that a network entertainment program did not have to address both sides of a controversial issue, it did indicate that the FCC would extend the Fairness Doctrine to entertainment programming, in addition to news and public affairs broadcasts.¹⁵⁰

Meanwhile, the Catholic press continued to urge the nation's 48 million Catholics to write letters and boycott the eight corporate sponsors of the episodes.¹⁵¹ To undercut these efforts, pro-choice activists wrote letters expressing their support to these same sponsors.¹⁵² As the intensity of the campaigns declined, the boycott threats soon dissipated.¹⁵³ The boycotts, however, had an effect on advertiser sponsorship of the program. When the network repeated the program for a second showing during the following summer, only thirty seconds (out of three available minutes) of commercial time in the two episodes was purchased.¹⁵⁴ Pepsi-Cola, Co., in fact, directly attributed its withdrawal to consumer displeasure with the show and the boycott threats. A spokesperson explained: "Our policy is essentially hands-off in terms of any sort of prescreening or prejudgment. . . . [B]ut after the protests . . . the company felt it'd be best to bow out of the repeats rather than antagonize all those people all over again."¹⁵⁵

2. Ten Advertisers Withdraw Commercials From *Roe v. Wade*

Almost seventeen years after the *Maude* controversy, and the Supreme Court case *Roe v. Wade*,¹⁵⁶ NBC made a television movie of the same name. Prior to the movie's May 15, 1989, broadcast,

¹⁴⁹ See MONTGOMERY, *supra* note 7, at 42.

¹⁵⁰ See *id.*

¹⁵¹ See *id.* at 37.

¹⁵² See *id.* at 38.

¹⁵³ See *id.* at 39.

¹⁵⁴ See Albin Krebs, "Maude" Sponsorship Decline Laid to Abortion Foes, N.Y. TIMES, Aug. 10, 1973, at 61.

¹⁵⁵ MONTGOMERY, *supra* note 7, at 46 (quoting a Pepsi spokesperson). The reluctance of advertisers, such as Pepsi, to support the rebroadcast may have grown out of a desire to appease people like Bishop James S. Rausch, the former general secretary of the U.S. Catholic Conference, who labelled CBS's decision to rebroadcast the abortion episode "a breach of good faith." Krebs, *supra* note 154, at 61.

¹⁵⁶ 410 U.S. 113 (1973).

Donald Wildmon's American Family Association sent letters to five hundred national television advertisers urging them not to sponsor the program.¹⁵⁷ The AFA also urged viewers to boycott any company's products that were advertised during the movie.¹⁵⁸ In response to Wildmon's efforts, and in fear of losing advertiser support for the show, NBC President Robert C. Wright made an extraordinary move—publicly sending letters to numerous presidents of major corporations.¹⁵⁹ Concerned with the threatened boycotts, Wright stated that the program was “balanced, thoughtful and compelling, and deserving of strong advertiser support NBC firmly believes the decision about where your messages appear rests with you and your marketing people—not with those who have a predisposition to judge a program's merits based on their own agenda and no information.”¹⁶⁰

Despite his efforts, at least ten sponsors, whom NBC declined to identify, withdrew their commercials from the film.¹⁶¹ Each of the twenty-eight thirty-second commercial spots was sold, although many for less than their usual rate of \$180,000 per thirty-second period.¹⁶² Advertising executives estimated that last-minute advertisers received discounts as high as fifty percent.¹⁶³ After the program aired, NBC reported that its switchboard registered 394 telephone calls in favor of the film and seventy-seven calls in protest.¹⁶⁴ The controversy drew sufficient attention to make the movie the highest rated program that evening, attracting a twenty-seven percent share of the audience.¹⁶⁵ The movie also won accolades from the Academy of Television Arts and Sciences; Holly Hunter won an Emmy award for best actress in a mini-series or special and the movie shared the award for best drama-comedy special.¹⁶⁶

¹⁵⁷ See Diane Mermigas, “Roe” Loses Ads: NBC Stands Firm, *ELECTRONIC MEDIA*, May 15, 1989, at 3.

¹⁵⁸ See Wright Defends ‘Roe’ to Advertisers, *BROADCASTING*, May 15, 1989, at 31.

¹⁵⁹ See *id.*

¹⁶⁰ *Id.* (quoting letter of Robert C. Wright).

¹⁶¹ See Sharbutt, *supra* note 140, at 1.

¹⁶² See Jeremy Gerard, *TV Notes*, *N.Y. TIMES*, May 18, 1989, at C30.

¹⁶³ See *id.*

¹⁶⁴ See Jay Sharbutt, “Roe vs. Wade” Courts Smaller Audience But Still Wins Ratings, *L.A. TIMES*, May 17, 1989, § 6, at 1.

¹⁶⁵ See Gerard, *supra* note 162, at C30.

¹⁶⁶ See Emmy Awards for ‘Roe v. Wade’ and ‘Day One,’ *N.Y. TIMES*, Sept. 19, 1989, at C20.

3. *China Beach* Costs ABC \$780,000 in Lost Advertising Revenue

Unlike the cases of *Maude* and *Roe v. Wade*, advocacy groups are often unaware that an abortion issue will be presented in a program before it airs. In such a situation, it is likely that the groups will seek to prevent the network from scheduling a second broadcast. Such was the case with *China Beach*, the Emmy award-winning ABC drama set in Vietnam. In the January 31, 1990, episode entitled "Holly's Choice," the show portrayed the experience of one character who underwent an abortion.¹⁶⁷ Although *China Beach* protagonist Colleen McMurphy expressed her own opposition to abortion, the episode appeared neutral.¹⁶⁸ After airing the episode, ABC announced that the program cost the network \$780,000 because several advertisers, fearful of consumer reaction, decided to withdraw their commercials from the program.¹⁶⁹ Mindful of these lost revenues, and of adverse viewer reaction, the network decided not to rebroadcast the episode during the summer months.¹⁷⁰

Maude, *Roe v. Wade*, and *China Beach* are three examples of network programming addressing abortion issues. They highlight two troubling aspects of consumer boycotts in an advertising-based television industry. First, a tension exists between a network's desire to attract large audiences with topical programming and a simultaneous fear that excessive controversy will reduce advertiser sponsorship. Although the financial impact of a boycott may be negligible, advertisers "wish to avoid subsequent negative publicity and the possibility of offending loyal customers."¹⁷¹ If abortion-related programs continue to be a source of lost advertising revenue for the networks, such shows may be eliminated, thereby diminishing the exchange of ideas on the subject. Second, and more troubling, are advertisers' preemptive decisions to avoid sponsoring programs concerning abortion issues before they are aired. These actions prevent the programs from reaching their intended

¹⁶⁷ See Howard Rosenberg, *Advertisers Cooling Off to Hot Topics*, L.A. TIMES, July 26, 1990, at F1.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ Donald P. Hill & Andrea L. Beaver, *Advocacy Groups and Television Advertisers*, 20 J. ADVERTISING 18, 19 (1991).

audience, denying the viewer the opportunity to form her own opinion.

B. *Homosexuality: Still Controversial Two Decades After the Dawning of the Gay Rights Movement*

"The networks have been openly and unabashedly portraying homosexuals in a positive light. They are blatantly promoting anti-Christian values."¹⁷² This accusation was made by the AFA's associate director, Bill Swindell, in response to the increased visibility of gays in network television programming.¹⁷³ Ever since the 1969 Stonewall riot in Greenwich Village sparked the gay rights movement, the networks have struggled with the depiction of homosexuals on prime-time television.¹⁷⁴ Most often, the networks have ignored the issue. This neglect of homosexuality-related programming prompted a director of the National Gay Task Force (NGTF) to comment: "Homosexuals have been invisible in the media. We are 10 per cent of the U.S. population but to listen to television or radio, you hardly know we exist When we have been part of programs, we are shown as the effeminate stereotypes."¹⁷⁵

Nevertheless, while *Maude* was causing a controversy about abortion,¹⁷⁶ the 1972 ABC made-for-television movie *That Certain Summer* broke ground with its sensitive and serious prime-time portrayal of a homosexual couple.¹⁷⁷ The film depicted the troubled relationship between a gay, upper-middle class, divorced father and his teenage son. The father, played by Hal Holbrook, struggles to tell his son that he is gay and living with a lover, played by Martin Sheen.¹⁷⁸ At the end of the film, the father "cries and apologizes to the son,"¹⁷⁹ who is unable to accept his father's lifestyle.¹⁸⁰

¹⁷² Joseph Hanania, *Gay and Under Pressure*, NEWSDAY, Nov. 8, 1989, § II, at 7 (quoting Bill Swindell, associate director of AFA).

¹⁷³ See *id.*

¹⁷⁴ See MONTGOMERY, *supra* note 7, at 77.

¹⁷⁵ Marsha Dubrow, REUTERS, Mar. 13, 1980, available in LEXIS, Nexis Library, Reuter File (quoting Charles Brydon, co-executive director of the National Gay Task Force).

¹⁷⁶ See John J. O'Connor, *Yesterday's Taboos Are Taken for Granted Now*, N.Y. TIMES, Nov. 7, 1982, § 2, at 27.

¹⁷⁷ See MONTGOMERY, *supra* note 7, at 75-79.

¹⁷⁸ See Lee Margulies, 'Consenting Adult' as Gay Son, L.A. TIMES, Jan. 31, 1985, § 6, at 1.

¹⁷⁹ *Id.*

¹⁸⁰ See MONTGOMERY, *supra* note 7, at 75.

The movie's courageous and unстереotypical portrayal of homosexuality was critically acclaimed for its treatment of the subject matter.¹⁸¹ The film also did well in the ratings, leading the network to believe that television shows exploring homosexuality would attract large television audiences and, in turn, encourage advertiser sponsorship.¹⁸² The case studies below illustrate the often conflicting ways that homosexuality is depicted by the medium and the divergent viewer reactions provoked by these portrayals. The controversies reflect the ongoing conflict between conservative and religious groups seeking to prevent this programming and gay activists seeking greater access.

1. Gay Activists' Outrage Over *Marcus Welby, M.D.*

In 1974, a time when television "almost invariably portrayed [homosexuals] as sick,"¹⁸³ the ABC drama *Marcus Welby, M.D.* angered the gay community.¹⁸⁴ Entitled "The Outrage," the episode featured a male science teacher accused of molesting one of his teenage male students.¹⁸⁵ The gay community saw this connection of homosexuality to child molestation as an example of the inaccurate gay-related images they fought to eliminate from the mass media, for it threatened "not only to reinforce anti-gay sentiment but to create it as well."¹⁸⁶ Upon discovering the program's content during a pre-broadcast screening of the show,¹⁸⁷ gay activists persuaded seventeen ABC affiliates not to broadcast the episode.¹⁸⁸ After determining which advertisers had purchased time in the upcoming episode, the NGTF published

¹⁸¹ See *id.*

¹⁸² The film, though controversial, did not appear to generate the same kind of advertiser resistance seen today. See *The Age of Archie: 1970s*, PEOPLE, Summer 1989, at 116.

¹⁸³ Harry F. Waters, *Sex and TV*, NEWSWEEK, Feb. 20, 1978, at 54.

¹⁸⁴ For a discussion of the controversy surrounding *Marcus Welby, M.D.*, see MONTGOMERY, *supra* note 7, at 79-89.

¹⁸⁵ See *id.* at 80; see also *TV Sex and Violence - Showdown Nears in Washington*, U.S. NEWS & WORLD REP., June 13, 1975, at 31.

¹⁸⁶ MONTGOMERY, *supra* note 7, at 80.

¹⁸⁷ See Dubrow, *supra* note 175.

¹⁸⁸ See *Gays Form Most Effective TV Lobby, Magazine Says*, UPI, May 26, 1981, available in LEXIS, Nexis Library, UPI File [hereinafter *Gays Form Lobby*] (referring to an article published in *TV Guide*); Harry F. Waters, *TV: Do Minorities Rule?*, NEWSWEEK, June 2, 1975, at 78.

those sponsors' names and instructed its members to write protest letters to them, threatening a product boycott.¹⁸⁹

Not content with the progress made through the television and advertising industries, the NGTF convinced the American Psychiatric Association, which had recently removed homosexuality from its list of mental illnesses, to "issue a public statement condemning the . . . episode."¹⁹⁰ As a result of the activists' campaign, seven companies withdrew their commercials from the program, leaving only one minute of commercial time sold.¹⁹¹ The network, however, aired the episode, which resulted in several individual stations becoming the subject of protests. In Washington, D.C., for example, WMAL was picketed by twenty-five members of the Gay Activist Alliance and two women from NOW.¹⁹² The groups demanded an apology from the station for showing a program that "projected a negative view of homosexuals and pandered to the mythology that homosexuals are child molesters."¹⁹³ Having already lost money on the program, ABC decided not to rebroadcast the episode during the summer season.¹⁹⁴

2. ABC Loses Over \$2 Million in Advertising Revenue in Broadcasts of Two *thirtysomething* Episodes

Executive producer Marshall Herskovitz described *thirtysomething* as based on the belief "that human beings must struggle and educate themselves and ask fundamental questions which will lead to the understanding of the world we live in. It is the belief that there is something inherently worthwhile in trying to discover the totality and complexity of the human experience"¹⁹⁵ The series featured two married upscale couples in their thirties, along with their friends and relatives and intermittently included a positive portrayal of a homosexual artist, Russell. In a 1989 episode, Melissa, one of the main characters, introduced Russell to another young homosexual.¹⁹⁶ They became romantically in-

¹⁸⁹ See MONTGOMERY, *supra* note 7, at 82.

¹⁹⁰ *Id.*

¹⁹¹ See *id.* at 83.

¹⁹² See *Protest Picket at WMAL*, WASH. POST, Oct. 10, 1974, at B14.

¹⁹³ *Id.* The station reported approximately 100 telephone complaints after the broadcast. See *id.*

¹⁹⁴ See MONTGOMERY, *supra* note 7, at 85.

¹⁹⁵ Hanania, *supra* note 172, at 9 (quoting Marshall Herskovitz).

¹⁹⁶ See Geraldine Fabrikant, *Ads Reportedly Lost Because of Gay Scene*, N.Y. TIMES, Nov. 14, 1989, at D21.

volved, and were later shown in bed together.¹⁹⁷ Several advertisers withdrew their commercials from the episode, costing the network approximately \$1.5 million dollars in lost revenue.¹⁹⁸ As with *China Beach* and *Roe v. Wade*, the departing advertisers were not identified.¹⁹⁹ It was also reported that the network received approximately four hundred phone calls after the show; roughly ninety percent of these were negative.²⁰⁰ Donald Wildmon claimed that a mass mailing to advertisers by the AFA caused the sponsors to cancel their ads from the *thirtysomething* episode.²⁰¹ "Feedback from advertisers and people inside the network led us to believe our letter had some impact," he claimed.²⁰² ABC acknowledged that economic factors motivated its decision not to rebroadcast the *thirtysomething* episode during summer reruns.²⁰³

Nevertheless, just over a year after the original controversial episode was shown, ABC unexpectedly aired a new episode depicting the two gay men as guests at a New Year's Eve party attended by nearly all of the show's regular characters.²⁰⁴ Although the two gay men were not the episode's central focus, they discussed their previous one-night stand during the course of the party and "reconciled with a midnight kiss on the cheek."²⁰⁵ Once again, due to commercial withdrawals, ABC lost more than \$500,000 by airing this episode.²⁰⁶

3. Conservative Groups Preemptively Respond to Network Interest in *Secret Passions*

Secret Passions, a soap opera providing a candid look at gay life, premiered in January 1990 on community-access cable channels throughout the country, including channels in Chicago, Cincinnati, Denver, Houston, Los Angeles, Nashville, New York, and San

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ See *id.*

²⁰² *Id.* (quoting Donald Wildmon).

²⁰³ See *id.*

²⁰⁴ See Steven Weinstein, *When Gay Means Loss of Revenue*, L.A. TIMES, Dec. 22, 1990, at F1.

²⁰⁵ *Id.*

²⁰⁶ See *id.*

Francisco.²⁰⁷ As of mid-1990, the show could be seen on thirty-nine community access channels.²⁰⁸ By network television standards, the program broke "precedent by showing men kissing, giving each other back massages and lying in bed together after engaging in sexual relations."²⁰⁹ Seventeen of the show's twenty-seven characters are homosexuals.²¹⁰

Upon hearing that the producer of the show had approached network officials to discuss the prospect of airing the show during prime-time, a conservative advocacy group launched a "preemptive strike" at network executives.²¹¹ Concerned Women for America (CWA), which claimed to have 700,000 members, denounced the show.²¹² In May 1990, CWA sent the first 600,000 of what was to become five million mock mailgrams, warning that shows like *Secret Passions* would cram "prime-time perversion . . . down the throats of decent Americans who support traditional family values."²¹³ Recipients of CWA's mailings were asked to sign postcards addressed to officials at ABC, CBS, and NBC that promised a boycott of any products advertised on *Secret Passions*, should it be shown by one of the networks.²¹⁴ CWA's communications director warned that the soap opera "would break down any previous barriers that we've had in America [against] portraying, especially to our children, that this lifestyle, hey, it's normal, it's on TV, they do it, they're fine, they're movie stars."²¹⁵

Donald Wildmon's AFA also threatened a boycott of any sponsors who would advertise on the show.²¹⁶ Randall Murphree, editor of the *AFA Journal*, commented: "It appears to be a series that will promote homosexuality as a normal and viable and acceptable alternative lifestyle."²¹⁷ Although as of July 1990, the show continued to be shown on cable access stations across the

²⁰⁷ See James T. Jones IV, *Daytime Soaps Come Out of the Closet*, GANNETT NEWS SERVICE, Jan. 30, 1990, available in LEXIS, Nexis Library, GNS File.

²⁰⁸ See David Klinghoffer, *Keep Gay Soap Opera in Closet, Conservatives Warn TV Networks*, WASH. TIMES, May 25, 1990, at A1.

²⁰⁹ *Id.*

²¹⁰ See *id.*

²¹¹ See *id.*

²¹² See *id.*

²¹³ *Id.*

²¹⁴ See Leah Garchik, *Personals*, S. F. CHRON., July 2, 1990, at A8.

²¹⁵ Klinghoffer, *supra* note 208, at A1 (quoting Rebecca Hagel, communications director of CWA).

²¹⁶ See *id.*

²¹⁷ See *id.* (quoting Randall Murphree).

country,²¹⁸ there has been no indication that any of the major networks have decided to add the show to their programming schedules.²¹⁹

The controversies concerning *Marcus Welby, M.D.*, *thirtysomething*, and *Secret Passions* illustrate the range of reactions to the broadcast of homosexual themes on network television. Although pleased that *Marcus Welby, M.D.* addressed homosexuality, gay activists were nonetheless angered by the implications of the program's portrayal and the likely misconceptions of the viewing audience. On the other hand, *Secret Passions* and *thirtysomething* demonstrate how conservative groups are able to pressure the industry to avoid any positive presentation of homosexuality altogether. This tension between viewpoints has created an impossible situation for the networks, because it is difficult to present a positive portrayal of homosexuality when so many advocacy organizations are vehemently opposed to the depiction. As one producer commented, "You won't find too many homosexual murderers on television these days. But you don't find too many gay doctors or lawyers, either. A lot of people have said, 'To hell with the whole issue.'"²²⁰ As with the abortion controversy, the result of this tension is the elimination of a topic from television's exchange of ideas and an incomplete representation of the diverse viewpoints which exist in society.

C. *Environmental Causes Do Not Always Gain Universal Support*

Although it appears that most Americans would support measures to protect the environment, when environmental reform poses an economic threat to an industry, such as timber, "green" television programs become controversial. Such was the case when *Ancient Forests: Rage Over Trees*, produced by The National Audubon Society (Audubon), first aired on Turner Broadcasting System (TBS) on September 24, 1989. Narrated by actor Paul Newman, the documentary examined the controversy between conservationists and

²¹⁸ See Garchik, *supra* note 214, at A8.

²¹⁹ This result may be attributable to other factors affecting program selection, although it is likely that protests of *Secret Passions* were a significant factor.

²²⁰ *Gays Form Most Effective TV Lobby, Magazine Says*, *supra* note 188 (quoting David Gerber). But see Peter Johnson, *Alternative Sexual Issues in Prime-Time Storyline*, USA TODAY, July 30, 1991, Life Section, at 30 (noting that two NBC shows, *Dear John* and *L.A. Law*, were planning to address homosexuality and bisexuality in upcoming episodes).

timber interests in the American Northwest over the future of the nation's remaining uncut forests.²²¹ The program was one in a series of World of Audubon specials about environmental issues produced by Audubon and broadcast nationwide on TBS. Covering such topics as endangered species and alternative farming techniques, these shows have had a noticeable impact on the public. A TBS documentary on the threat to dolphins from commercial tuna fishing, for example, prompted a large number of concerned viewers to call the show's hotline.²²² In response to the public outcry, most major tuna producers announced a change in their fishing methods to protect the dolphins.²²³

Unlike many environmental programs, *Ancient Forests: Rage Over Trees* attracted much media attention before its broadcast. The timber industry organized a letter-writing campaign and threatened a boycott of a principal sponsor, Stroh Brewery Co. (Stroh), to prevent TBS from airing the show.²²⁴ Although Stroh provided funding and commercials for previous Audubon specials, it withdrew its corporate sponsorship from *Ancient Forests*.²²⁵ The remaining advertisers followed suit.²²⁶ Surprisingly, TBS remained committed to airing the program and televised it four times.²²⁷ In what appears to be an industry practice, TBS did not disclose either the names of the companies that withdrew their commercials or the amount of lost advertising revenue.²²⁸

Audubon claimed that the campaign by the timber interests began without their having seen the documentary. National Audubon President Peter A. Berle commented:

"The timber industry's cowardly and ignorant attempt to withhold a fair and well-made program from the American people has failed

²²¹ See *Stroh May Pull Financing of Audubon TV Specials*, N.Y. TIMES, Sept. 5, 1989, at C18.

²²² See Carol Matlack, *An Audubon Aide is Taking to the Air*, 22 NAT'L J. 1550 (1990).

²²³ See *id.*

²²⁴ See *Advertisers Drop Program About the Timber Industry*, N.Y. TIMES, Sept. 23, 1989, § 1, at 32.

²²⁵ See Walter Goodman, *More Than Spotted Owls is Endangered*, N.Y. TIMES, Aug. 12, 1990, § 2, at 27.

²²⁶ See *Logging Industry Pressures Audubon Television Specials to Cancel PBS Segment on Ancient Forests Airing Sunday, Aug. 12, 1990*, PR NEWswire, Aug. 9, 1990, available in LEXIS, Nexis Library, Wires File.

²²⁷ See *id.*

²²⁸ See *Ads Pulled From Audubon Documentary Under Timber Pressure*, UPI, Sept. 22, 1989, available in LEXIS, Nexis Library, UPI File.

outright. Nothing about the show will change. Its content remains uncompromised and it will follow the normal schedule for a World of Audubon Special. . . . This failed attempt at issue-specific censorship is especially shocking at a time when a rising tide of environmentalism is sweeping the nation and the television-watching public is demanding wider coverage of crucial conservation issues. The industry campaign against this documentary is the latest manifestation of the industry's multi-million dollar effort to open up as much of the Northwest's public forests as possible to unsustainable logging."²²⁹

Although the show was broadcast, the timber industry's successful boycott sent a clear signal to the television industry that controversial programming may have to be shown without commercial support. Profit-centered networks may be reluctant to produce similar programs in the future, resulting in a medium without controversial environmental programming.

D. Controversies in Other Media Outlets

Although the majority of boycott activity is geared toward objectionable television programming, the print and radio media have also been affected by concerted advocacy protests. The cases below describe the consumer boycotts of two national periodicals, *Sassy* and *Esquire*.

1. The Moral Majority's Campaign Against *Sassy* Magazine

Sassy, a monthly magazine for teenagers, debuted in March 1988, under the direction of then twenty-five year old editor Jane Pratt. In its first year of publication, *Sassy* featured such articles as "So You Think You're Ready For Sex? Read This First," "The Truth About Boys' Bodies," and "How to Kiss."²³⁰ *Sassy* also candidly tackled a broad range of controversial topics, including suicide, homosexuality, and birth control.²³¹ In early 1988, two Indiana women successfully lobbied to remove *Sassy* from local supermarket and convenience store newsstands.²³² Their efforts captured the

²²⁹ *National Audubon Society Special on Ancient Forests to Premiere Sunday, Sept. 24, on Turner Broadcast*, PR NEWswire, Sept. 21, 1989, available in LEXIS, Nexis Library, Wires File (quoting Peter A. Berle).

²³⁰ See *Boycotts: Trying to Silence Sassy*, TIME, Sept. 19, 1988, at 45 [hereinafter *Silence Sassy*]; Marilyn Gardner, *Controversial Magazine for Teen-Age Girls Hits Sensitive Subjects*, CHRISTIAN SCI. MONITOR, Mar. 7, 1988, at 23.

²³¹ See *Silence Sassy*, *supra* note 230, at 45.

²³² See Paul Frichtl, *Sassy Takes on the Moral Majority; Protests Lead to Ad Pullouts*,

attention of the Moral Majority, which, in its "Liberty Report" newsletter, urged readers to write to *Sassy's* advertisers and demand that they boycott the magazine.²³³

The Moral Majority's campaign had a significant impact on the magazine's advertising revenue. Levi Strauss, Noxell, Schering-Plough, and Tambrands suspended their advertising in *Sassy* for the remainder of the year.²³⁴ The companies insisted that they were not responding to pressure from the Moral Majority, though they admitted to receiving some protest letters.²³⁵ To counteract the negative publicity from the cancellations, Sandra Yates, president of Matilda Publications, which published *Sassy* at the time, announced that contracts from ten new advertisers had "virtually replaced" the revenue lost from the dropped accounts.²³⁶ This new business was attributed to *Sassy's* strong readership of 500,000.²³⁷ The Moral Majority's campaign appears to have been influential, however. The November 1988, issue of *Sassy* carried only thirty pages of advertising, six fewer than projected.²³⁸

More important was the Moral Majority's temporary impact on the scheduling of articles in the magazine. After the advertiser cancellations, *Sassy* moved the publication of a sex education piece with a different message, "Why Virgins Are Cool," from the December 1988 issue to the November 1988 issue.²³⁹ Yates asserted, however, that no additional editorial changes accompanied the scheduling change. "We have a responsibility to our readers," she stated, indicating that "virtually all teen magazines run sex education pieces."²⁴⁰ In the December 1991 issue, for example, along with health, beauty, entertainment, and celebrity features, were stories about the violent actions of skinheads, and suggestions for how to fight sexism.²⁴¹ Thus, although the boycott had some

But Sassy Doesn't Flinch, FOLIO, Nov. 1988, at 66.

²³³ See *id.*

²³⁴ See *id.*; *Silence Sassy*, *supra* note 230, at 45.

²³⁵ Tambrands, for instance, received fewer than 20 letters but stopped advertising in *Sassy*. Levi Strauss stopped advertising after receiving 50 letters. See Frichtl, *supra* note 232, at 66.

²³⁶ See *Silence Sassy*, *supra* note 230, at 45.

²³⁷ See *id.*

²³⁸ See Frichtl, *supra* note 232, at 66.

²³⁹ See *id.*

²⁴⁰ *Id.* (quoting Sandra Yates).

²⁴¹ See Jodie Hargus, *How to Fight Sexism*, SASSY, Dec. 1991, at 60; Sarah Wood, *These Skinheads Aren't Raust*, SASSY, Dec. 1991, at 51.

effect on the publication, it is unclear what effect it had on *Sassy's* long-term editorial policies.

2. *Esquire* Magazine and "The Secret Life of the American Wife"

Esquire is a magazine targeted to educated, upscale men. It attracted the attention of thousands of women, however, when the National Organization of Women (NOW) and the Feminist Majority initiated an advertiser and reader boycott of the June 1990 issue, in protest of its theme, "The Secret Life of the American Wife."²⁴² One of the more controversial articles, "Your Wife: An Owner's Manual," discussed "the contents of a typical handbag, the physics of bra design, . . . and the names and relative positions of the various parts of a woman's reproductive system,"²⁴³ complete with a sketch of her "plumbing."²⁴⁴ Also contained in the issue was "a nostalgic paean" to "The Last Housewife in America" which included a picture of the smiling housewife "the endangered species" cleaning a toilet.²⁴⁵

"We find it to be literally an expression of the degradation of women,"²⁴⁶ said Tammy Bruce, president of the Los Angeles chapter of NOW.²⁴⁷ "It puts us into a subhuman level. . . . It places women into a thing mode."²⁴⁸ In a statement issued on June 13, 1990, *Esquire* editor-in-chief Lee Eisenberg discussed the "humor and irreverence"²⁴⁹ that marks the magazine and noted that "[i]t was never the magazine's intention to offend anyone."²⁵⁰

The *Sassy* and *Esquire* incidents demonstrate that advocacy group boycotts are not directed solely at network television. Each magazine dealt differently with the expressed criticisms and boycott threats. *Sassy* editors reacted by slightly altering their editorial

²⁴² See Jon Carrol, *She's Cute! She's Hot! She's Your Wife!*, S.F. CHRON., June 18, 1990, at F12.

²⁴³ *Id.*; see also *Your Wife: An Owner's Manual*, ESQUIRE, June 1990, at 153.

²⁴⁴ *Your Wife: An Owner's Manual*, *supra* note 243, at 159.

²⁴⁵ See Susan H. Anderson, *Chronicle*, N.Y. TIMES, June 14, 1990, at B22; David Finkel, *The Last Housewife in America: A Profile of the Endangered Species*, ESQUIRE, June 1990, at 102.

²⁴⁶ John Elvin, *Inside the Beltway*, WASH. TIMES, June 14, 1990, at A6 (quoting Tammy Bruce).

²⁴⁷ See Anderson, *supra* note 245, at B22.

²⁴⁸ Carrol, *supra* note 242, at F12 (quoting Tammy Bruce).

²⁴⁹ Anderson, *supra* note 245, at B22 (quoting Lee Eisenberg).

²⁵⁰ *Id.*

policies to regain the confidence of the advertising community. *Esquire* editors, apparently seeing and predicting few negative effects from the NOW and Feminist Majority campaigns, simply issued an apology. Both publishers reacted less dramatically than the television industry does. The omnipresent and intrusive nature of television, as compared with demographically targeted periodicals, may explain this difference.²⁵¹

E. *An Analysis of the Effect of Consumer Boycotts on Network Television*

The case studies above illustrate the dynamics of advocacy group boycotts: networks attempt to attract a large viewing audience which, in turn, attracts corporate sponsors. Although controversial and topical programming attracts viewers, too much controversy frightens advertisers, who fear advocacy group boycotts. While advertisers do not appear to be frightened by the marginal economic impact of boycotts,²⁵² they do fear "negative publicity and the possibility of offending loyal customers."²⁵³ Furthermore, because advertisers are normally not involved with the production of a program, they are "likely to withdraw their support at the first sign of trouble."²⁵⁴ When faced with the choice of airing a fully sponsored program, or absorbing the cost of a show avoided by advertisers, the networks will choose the former. This results in an increasingly dull and uncontroversial medium. As one commentator observed:

By international standards American television is unfailingly bland. Feature films are savagely cut. There is no nudity, even within a serious dramatic context. And bad language of the barrack-room sort is studiously avoided. Television sex is mildly titillating rather than explicit, while violence . . . is often too stylized to be offensive. Admittedly, the casualness with which it is shown may inure children to it.²⁵⁵

Indeed, the move away from issue-oriented programming has come at an inopportune time, for broadcasting technology is becoming increasingly sophisticated, providing more opportunity for greater programming variety.²⁵⁶ Stifled creativity at the

²⁵¹ See *supra* text accompanying notes 8-9.

²⁵² See Hill & Beaver, *supra* note 171, at 19.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Sex and Violence*, *supra* note 63, at 21.

²⁵⁶ See Eder, *supra* note 1, at 38

network level is certain to have a ripple effect on cable creativity; the cable industry is also quite dependent on advertiser support, albeit to a lesser degree.²⁵⁷ Therefore, while opportunities exist for greater variety, it is likely that only the quantity, and not the diversity, of programming will increase.

Detrimental sociological effects also result from concerted efforts to influence programming. Corporate advertisers have always been sensitive to consumer concerns about programming, especially if their financial support implies a sponsorship of the program's ideas.²⁵⁸ Most of the organizations that influence the advertisers, however, do not represent the totality of consumer views that the boycott leaders claim for themselves.²⁵⁹ Their actions are not checked by democratic processes, allowing a minority group to demand that the majority adhere to its determination of what programming is acceptable.²⁶⁰ Allowing a single group to impose its standards on the rest of society deprives the majority of its traditional voice in programming choices.²⁶¹

In addition, the effectiveness of advocacy group boycotts appears to be correlated with the nature of the objecting group's complaints. Those seeking to restrict access are somewhat more effective than those attempting to gain access. For example, the cases studied above and in Section II indicate that the dominant advocacy group today, in terms of the quantity and effectiveness of boycott activity, is CLear-TV.²⁶² This group seeks to reduce or eliminate programming that contradicts its conservative positions. In contrast, status-based issue groups such as the National Gay Task Force, which seek to increase their visibility in the medium, appear to have less success in substantially altering programming con-

²⁵⁷ Although some cable stations, like Home Box Office, are supported by funds from subscribers, many stations are not. TBS and Lifetime, for example, both rely on commercial funding for their programs. See John Lippman, *Cable TV Not Achieving Dream of Limitless Choice*, L.A. TIMES, May 10, 1990, at A1. Like the networks, these stations are susceptible to advertiser pressure from advocacy groups.

²⁵⁸ See Hill & Beaver, *supra* note 171, at 24-26.

²⁵⁹ See *Association of Advertisers Condemns Calls for Boycott of Certain TV Sponsors*, 57 Antitrust & Trade Reg. Rep. (BNA) No. 1426, at 124 (July 27, 1989).

²⁶⁰ See *id.*

²⁶¹ See *id.*

²⁶² See *supra* Section II.A.

tent.²⁶³ Many of the perspectives that these groups want presented are those that conservative advocacy groups want excluded.²⁶⁴

Unimpeded by the censoring effects of advocacy groups, television could provide a forum for American's diverse perspectives. Individual citizens would be exposed to a more realistic view of their society and would learn to accept that society and be tolerant of others. Eliminating controversial issues from television impedes this exposure, thereby diminishing citizens' social awareness. Censorship paternalistically protects people from issues on which they should be educated. Ours is a society in which some people utter profanities, some unmarried couples engage in sexual relations, some women have abortions, and some parents accept their homosexual child's choice of lifestyle. By censoring these societal elements from television broadcasts, the viewer's perceptions are needlessly distorted, making it more difficult for one to understand and accept the choices that others make.

The apparent negative effects of advocacy groups boycotts, however, should not blind one to the positive effects. Status-based issue groups, which typically lack a direct, participatory influence over media policy, can use consumer boycotts to correct imperfections in the media's presentation of issues. For example, women have less power over the networks than do men.²⁶⁵ Through boycott pressure, however, they can make their views known. In this sense, advocacy group boycotts are appealing because they resemble a democracy in which members have an economic vote. Similarly, these protest activities provide a powerful check on the television industry when its portrayal of a group is inaccurate or defamatory, as exemplified by the National Gay Task Force's success in pinpointing inaccuracies in *Marcus Welby, M.D.*²⁶⁶ Thus, although advocacy group boycotts produce some negative

²⁶³ It is rare to find a series in which a recurring main character is homosexual, although several successful programs have shown episodes dealing with homosexuality, including *Designing Women*, *The Golden Girls*, and *Northern Exposure*. See Rick Dubrow, *Television: Does it Cross the Line?*, L.A. TIMES, Nov. 3, 1991, Calendar Section, at 7.

²⁶⁴ See Judith Graham, *NBC's 'Roe' May Turn Off Advertisers*, ADVERTISING AGE, May 1, 1989, at 1 (noting a senior advertising agency executive's description the movie *Roe vs. Wade* as a "no-win situation . . . [because t]he subject is just too sensitive"); *Gays Form Lobby*, supra note 188 (indicating that many television producers do not want to explore the issue of homosexuality at all).

²⁶⁵ See Claudia Puig, *Entertainment: A New Women in Film Study Reports Gains for Women in Corporate Boardrooms*, L.A. TIMES, Aug. 13, 1991, at F1.

²⁶⁶ See supra notes 183-94 and accompanying text.

effects, they also occasionally provide a mechanism through which groups express their legitimate concerns.

IV. REDUCING THE NEGATIVE EFFECTS OF CONSUMER BOYCOTTS ON NETWORK TELEVISION

An effective system of media reform must address the tension between the damaging effects of advocacy group boycotting and the viewers' right to express their opinions concerning program content. In an ideal broadcast industry, controversial and topical programming would exist and advocacy groups would address perceived inaccuracies in such programming. The following discussion offers two proposals designed to achieve this ideal. The first proposal, content-blind purchasing of commercial air time, eliminates the corporate advertisers' indirect control over programming content and encourages advocacy groups to address the networks directly with their concerns. The second proposal, increased staffing of network program standards and practices departments with advocacy group members, provides advocacy organizations access to program content decisions and ensures that controversial and issue-oriented programming remains accurate and viable.²⁶⁷

²⁶⁷ This Comment will present each proposal as a voluntary standard to be implemented by each of the networks. It is arguable that voluntary implementation of either of these proposals will be significantly less effective than legal requirements. There are, however, several difficulties in legally requiring the broadcast networks to implement either of these proposals. It is questionable that the broadcast industry, solely on the basis of the scarcity of broadcast airwaves and the service of the public interest, can be subject to greater regulations than other media outlets, such as the print media. Current case law and authorities object to a distinction in regulation guidelines between broadcasting and print media. See *Minneapolis Star Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 588 (1983) (holding that Minnesota's ink and paper tax violated the First Amendment because, in part, the tax singled out the press); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 661-62 (D.C. Cir. 1989) (accepting the FCC's rejection of scarcity as a rationale for differentiating between broadcast and print media), *cert. denied*, 493 U.S. 1019 (1990); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1018-20, 1022-28 (1989) (claiming that the scarcity and impact rationales for treating the two types of media differently should be rejected). Voluntary standards, though not as readily enforced or standardized as legal requirements, will be followed by the networks if it is in their financial interests to do so. If the implementation of either proposal regains more advertising revenue lost from sponsor withdrawals than it costs, it is likely that the networks will adhere to voluntary standards.

A. Content-Blind Purchasing of Commercial Air Time

Many critiques of an advertising-based media system center on the media's reliance on income from commercial sponsors.²⁶⁸ The propaganda model developed by Herman & Chomsky in *Manufacturing Consent* identifies three specific concerns. First, in the print media, papers and magazines offset production costs with advertising revenue. Therefore, the copy price of advertiser-supported publications is substantially lower than those supported with little or no advertising revenue.²⁶⁹ Assuming that the demand for print media decreases as its price increases, "an advertising-based system will tend to drive out of existence or into marginality the media companies and types that depend on revenue from sales alone," usually the working-class and radical papers.²⁷⁰ Second, as advertisers are primarily interested in targeting large, affluent audiences, both broadcast and print media will necessarily select and develop features and programming that attract this type of audience.²⁷¹ Third, advertisers will "choose selectively among programs on the basis of their own principles. With rare exceptions these are culturally and politically conservative."²⁷² Therefore, in order to attract and maintain sponsors, the television networks will often choose programming that mirrors—or, at least, does not contradict—the advertiser's agenda. This choice directly affects the substantive content of the media's publication or broadcast. In short, an advertising-based media system will gradually increase advertising and "marginalize or eliminate" controversial or topical programming.²⁷³

Most authors fail to recognize that, given the number of sponsor withdrawals from controversial broadcasts in response to boycott threats, an advertiser's indirect control over the content of programming on television may be largely fueled by the concerted efforts of advocacy groups. Absent the pressure of concerted activity and the

²⁶⁸ See BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 120-53 (1983) (describing the effect of corporate advertising expenditures on media independence); ERIK BARNOUW, *THE SPONSOR: NOTES ON A MODERN POTENTATE* 79-99 (1978) (noting that commercials sell not only products, but also an "attitude towards life"); EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT* 1-35 (1988) (examining the validity of the "propaganda model" as an explanation of mass media behavior).

²⁶⁹ See HERMAN & CHOMSKY, *supra* note 268, at 14.

²⁷⁰ *Id.*

²⁷¹ See *id.* at 16.

²⁷² *Id.* at 17.

²⁷³ *Id.*

ever-present threat of becoming a boycott target, corporate advertisers would probably base their purchasing decisions on objective factors, such as audience size and demographics, rather than on calculations of minimal offensiveness to potential consumers. Although advertising agencies will always exercise some influence on network programming decisions, by emphasizing programs compatible with corporate values and attractive to consumer-oriented audiences, in the absence of boycotts, the overall effect of their control would be greatly reduced. A system that requires content-blind purchasing of commercial air time would redefine the advocacy groups' perceptions of the relationship between advertisers and the networks.

1. Corporate Sponsorship and the Move Away From It.

In the early days of television, advertisers had complete control over programming content; the networks merely supplied the airwaves over which the advertiser-produced shows were televised.²⁷⁴ In 1948, about fifty corporations regularly advertised on network television; most sponsored shows on NBC.²⁷⁵ Although Bristol-Myers produced *Break the Bank* for ABC, and Ford Motor Company and Liggett & Myers were the "key suppliers" of programs for CBS (producing *Ford Theater* and *Arthur Godfrey*, respectively), nearly thirty advertiser-sponsored shows were televised on NBC, including Chevrolet's *Chevrolet on Broadway*, General Foods' *Meet the Press*, and RCA Victor's *Kukla, Fran & Ollie*.²⁷⁶ One show epitomized the profitability of corporate sponsorship of television programming. This program, *The Texaco Star Theater*, sponsored by Texaco Co. and more commonly known as *The Milton Berle Show*, became the most popular show in the history of television.²⁷⁷ Only three months after Milton Berle was featured, the show drew a 78.9% share of the viewing audience in New York.²⁷⁸ Despite the program's immense popularity, the show reportedly cost Texaco only \$400,000, a "wise" investment by the company's standards.²⁷⁹

²⁷⁴ See Verne Gay, *Television Back to the Future*, ADVERTISING AGE, Nov. 9, 1988, at 30.

²⁷⁵ See *id.*

²⁷⁶ See *id.*

²⁷⁷ See *id.*

²⁷⁸ See *id.*

²⁷⁹ See *id.*

Although advertiser-supported shows still exist, the days of pure corporate sponsorship disappeared in the early 1960s.²⁸⁰ Since advertiser demand for commercial air time greatly exceeds the networks' supply,²⁸¹ it has become more profitable for the networks to sell their advertising time in individual units. ABC was the first major network to depart from the sponsorship tradition by selling randomly placed commercials, in what later became known as single scatter units.²⁸² CBS and NBC followed suit and by 1968 scatter sales were the dominant buys in commercial time, thus forming the commodity sales structure that exists today.²⁸³

2. How Corporate Marketing Strategies Affect the Purchase of Commercial Air Time

The modern method for purchasing advertising time on television is a much more sophisticated and complicated than it was in the days when *The Milton Berle Show* peaked in popularity. As more demographic statistics are gathered, advertisers can selectively purchase commercial time on programs that attract the specific audience to which their product is targeted. In order to maximize the efficiency in their advertising investments, advertisers purchase network commercial television time in three different "waves."²⁸⁴ First, the eight-week-long upfront market, in which advertising time is sold on the basis of long-term future demographic information, begins in mid-May or early June.²⁸⁵ These purchases are made for the following television season, which starts in September and concludes in August of the following year.²⁸⁶ During this time, the major advertisers purchase "critical inventory," which is usually second quarter (pre-summer) and fourth quarter (Christmas) commercial time.²⁸⁷ The networks vary from year to year in how much inventory is sold during this period, but the average is between fifty and seventy percent.²⁸⁸ Most advertisers prefer to

²⁸⁰ See *id.*

²⁸¹ See Allen Banks, *TV Shares Down, Prices Up! How Come?*, MARKETING & MEDIA DECISIONS, Feb. 1983, at 57.

²⁸² See Gay, *supra* note 274, at 142.

²⁸³ See *id.*

²⁸⁴ See Marianne Paskowski, *No Letdown in TV Upfront Buy*, MARKETING & MEDIA DECISIONS, May 1984, at 59, 60.

²⁸⁵ See *id.*

²⁸⁶ See *id.*

²⁸⁷ See *id.*

²⁸⁸ See *id.*; cf. *Television Wrapping Up Year With Good Fourth*, BROADCASTING, Nov.

purchase during this period, "because the rates in [the] scatter [market] are unknown and could be increased greatly if a show succeeds."²⁸⁹

The second wave, the scatter market, are the periods preceding each quarter.²⁹⁰ Here, companies adjust their advertising schedules to insure that they are most efficiently targeting the appropriate demographic mix of consumers. In this wave, seasonal advertisers make their initial purchases.²⁹¹ The prices for time purchased during the scatter periods are typically higher than for time purchased during the upfront period.²⁹²

The last wave, called the opportunistic market, exists throughout the year and involves the sale of air time that has not yet been accounted for in programs that have been previously scheduled and in shows that have been recently added to the programming schedule.²⁹³ Also included in this wave are last minute purchases of air time in programs from which advertisers have withdrawn. When the scatter and upfront markets are strong, there is little for buyers in the opportunistic market to purchase. When those markets are weak, advertisers can get rates that are usually discounted.²⁹⁴

The availability of several purchasing options allows corporate advertisers to target select audiences. Advertisers who sell expensive items, such as luxury automobiles, to a select group of affluent, well-educated consumers, would likely develop an advertising campaign with an emphasis on broadcast frequency, because "it is important to convince this small group of potential buyers through repetition that [the automobile] is the best value for the money."²⁹⁵ This tactic, providing "high levels of fast-build frequency,"

19, 1984, at 35 (noting that in 1984 "ABC sold close to 80% of its inventory [in the] upfront" market).

²⁸⁹ Kevin Goldman, *Advertisers Pay Upfront*, *NEWSDAY*, June 26, 1989, § 2, at 7.

²⁹⁰ See Paskowski, *supra* note 284, at 60.

²⁹¹ See *id.*

²⁹² See *id.* But see Joe Mandese, *Touch Talk Upfront: TV Buyers Ask for New Price Protection, Guarantees*, *ADVERTISING AGE*, June 3, 1991, at 1 (noting that, although prices during the scatter period are normally higher than during the upfront period, "the soft network economy this past season [1990-91] sent scatter rates as much as 50% below upfront deals").

²⁹³ See Paskowski, *supra* note 284, at 60.

²⁹⁴ See *id.*; see also DAVID F. POLTRACK, *TELEVISION MARKETING: NETWORK, LOCAL, AND CABLE* 102-06 (1983) (discussing why the rates the networks charge in the opportunistic market are unstable).

²⁹⁵ See Robert A. Mancini, *Efficiency Versus Effectiveness*, *MARKETING & MEDIA DECISIONS*, Aug. 1988, at 114.

is used by many of the automobile manufacturers in the group of programs, such as *L.A. Law* and *60 Minutes*, that contains the highest concentration of likely purchasers.²⁹⁶ The advertiser can only adopt this marketing strategy with an upfront purchase of network time, as specificity of the target audience could not be achieved as efficiently or reliably with scatter or opportunistic purchases.²⁹⁷

3. The Strengths and Weaknesses of a Content-Blind Commercial Purchase System

A content-blind system for commercial purchases will help to eliminate the influence that advocacy groups and corporate advertisers have on television programming content. Under this system, advertisers would designate the number of people they wish to address in each demographic category and the network would randomly assign to them commercial spots achieving this level, a procedure which is similar to that currently employed in the upfront market. The content-blind system would differ by limiting the advertiser's selection process to statistics concerning audience size and composition. The advertiser would be prohibited from choosing or avoiding any controversial or topical programming under the guise of preserving its corporate image.

This system would send a clear message to advocacy groups that advertisers have no control over or input into the substantive content of programming. In consideration for the reduction of control and flexibility normally accorded its advertising selection process, the corporate sponsor should be unconditionally guaranteed that the program mix selected by the network will produce the required number of viewers in each demographic category, as measured by the usual ratings system.²⁹⁸ This advertising-based reform would accomplish the dual goals of subsidizing the production of network programming while encouraging advocacy groups to approach the networks directly with their criticisms of program content.²⁹⁹

²⁹⁶ See *id.* at 114-15.

²⁹⁷ See *id.*

²⁹⁸ Under the guarantee procedure, the network would refund a portion of the advertiser's purchase price if the program does not deliver its promised share of the audience.

²⁹⁹ It is difficult to determine this proposed reform's effect on the content of programming. The networks may come under increased pressure to sensationalize

A critical factor in the restructuring of the advertiser-network relationship is the recognition that one of the driving forces behind the medium's popularity with the advertising community is the degree of specificity with which the corporation can identify its audience. Corporate advertising decisions are often complex, involving discussions on matters such as the state of the company's "business . . . objectives, future sales projections, competitive environment, and viable strategic approaches" to satisfy these business plans.³⁰⁰ Although a content-blind system will allow the corporation, even absent a choice of programs, to target a specific audience size and demographic mix, it is difficult to determine how many corporations, if any, will refocus their advertising efforts in other media outlets, such as newspapers, magazines, and possibly cable and syndicated programs, where content selection is possible.

In terms of the amount of money spent on each of the advertising mediums, newspapers rank above television and periodicals.³⁰¹ Whereas much of the advertising in newspapers is local or regional,³⁰² the advertising on network television tends to involve national campaigns by large companies, many of whom would probably hesitate to refocus their marketing strategies if a content-blind purchasing system is adopted.³⁰³ Nevertheless, as the newspaper industry faces a weakened economy, and the growth rate of newspaper subscribers continues to decline,³⁰⁴ the newspaper industry is becoming more aggressive in attracting national advertisers.³⁰⁵ It is therefore possible that the combination of the networks' content-blind purchasing system and a weakened

programming in an effort to attract a larger viewing audience. If the advertisers demand that the network supply not only a large, but a reasonably educated, affluent audience, then any move towards "tabloid" programming will be minimal.

³⁰⁰ See Mancini, *supra* note 295, at 114.

³⁰¹ See Alex S. Jones, *Newspaper Advertising Continues to Weaken*, N.Y. TIMES, Apr. 23, 1990, at D9 (noting that the amount of money spent in newspaper advertising increased in 1989, but the rate of growth declined, while advertising in television and magazines "also had slow growth").

³⁰² See *id.*

³⁰³ See, e.g., Brenda Dalgish, *Wanted: New Readers: Newspaper Executives Are Taking Bold Measures to Try to Attract a Younger Audience*, MACLEAN'S, Sept. 16, 1991, at 34, 35 (stating that because newspapers do not attract younger readers, advertisers prefer television and certain periodicals to reach that market).

³⁰⁴ See *id.* at 34.

³⁰⁵ See James Warren, *Newspapers Team Up to Increase Their Allure for National Ads*, CHI. TRIB., Oct. 5, 1989, Business Section, at 5 (describing an attempt by five large-circulation newspapers to jointly "lure" 41 national advertisers to purchase space in their Sunday magazines).

economy will encourage the newspaper industry to develop strategies that attract disenchanted national advertisers away from the networks.³⁰⁶

Despite those strategies by newspapers, the networks may face more competition from magazines, which, unlike newspapers, are able to offer relatively specific demographic information compiled from their circulation lists.³⁰⁷ In addition, special interest magazines provide a forum for a company that may more consistently conform with its corporate agenda. The editorial content of periodicals usually does not change from article to article, or issue to issue. A recent study seems to show that periodicals may be more effective for advertisers than television, which suggests that some advertisers may alter their marketing strategies.³⁰⁸ Nevertheless, no such trend is presently evident. The economic troubles plaguing the newspaper industry are also apparent in the magazine industry, where sixty of the top one hundred consumer magazines have shown declines in the number of pages devoted to advertising.³⁰⁹ Whether this decline would continue after the networks implement content-blind purchasing systems is difficult to predict.

The greatest competition for the networks' advertising revenue will come from the cable industry. As more channels become

³⁰⁶ Determining how effective these strategies will be in changing the advertisers preferences is difficult. Proctor & Gamble, for example, which spends over one billion dollars a year in advertising, adheres to a "traditional" approach and "opt[s] for television, radio and big-time magazines over newspapers." *Id.* Likewise, in response to a five-newspaper joint Sunday magazine venture, an advertising representative for Pillsbury and Tropicana stated that those companies would not be redirecting their advertising budgets to the newspaper industry either. *Id.* It appears likely that companies like these, which already rely so heavily on television advertising, would resist altering their marketing strategies in response to the new network purchasing system.

³⁰⁷ See, e.g., Amy Alson, *Home's New Wings: Home Magazine Publishers Hope to Attract New Advertisers*, *MARKETING & MEDIA DECISIONS*, Apr. 1980, at 4 (describing home-related magazines' attempts to attract new advertisers of nonhome-oriented products); John Klingel, *The Economics of Magazine Publishing*, 17 *FOLIO* 118 (Apr. 1988) (noting that trade magazines care more about the demographics of their readership than do consumer magazines).

³⁰⁸ See Deirde Carmody, *Survey Gives Magazines the Edge vs. TV*, *N.Y. TIMES*, Oct. 11, 1990, at D19. Carmody notes that the respondents "preferred magazine advertising over television advertising as a 'more appealing, informative, believable and helpful' buying guide." *Id.* In addition, the results showed that the preference for periodicals was even higher in the "upper socio-economic group, a group that most interests advertisers." *Id.*

³⁰⁹ See Kim Foltz, *Magazine Industry Bracing for Shakeout as Ads Drop*, *N.Y. TIMES*, Apr. 30, 1990, at D1 (noting statistics for the first quarter of 1990, kept by the Publishers Information Bureau).

available, each geared to a specific audience, advertisers will have the combined benefits of both magazines and the networks. They will be able to select an appropriate substantive forum while maintaining the video imagery "that displays their product[s] better."³¹⁰ Furthermore, the increasing "fragmentation in the audience" will make it much easier for advertisers to target specific viewers.³¹¹ As cable continues to erode the networks' percentage of the viewing audience,³¹² the majority of the viewers switching to cable are the affluent, educated consumers whom advertisers covet.³¹³ As the number of network television viewers decreases and the price of network commercial time increases,³¹⁴ advertisers may find it more efficient to reach their target market through cable television.

Even considering the advantages that other media outlets offer, however, some companies will continue to purchase network television time.³¹⁵ Large, national advertisers are the least likely to abandon network advertising. As one advertising executive noted, "[t]here is still no better way for a wide reach in letting people know about a product . . . than network advertising. It remains the best buy."³¹⁶ Nevertheless, in order to compensate advertisers for the removal of their decisionmaking ability under a content-blind purchasing system, the networks will face increasing

³¹⁰ Warren, *supra* note 305 (explaining some of the claims made by advertisers who have "shunned newspapers").

³¹¹ See Joshua Levine, *The Last Gasp of Mass Media?*, FORBES, Sept. 17, 1990, at 176 (quoting Rupert Murdoch).

³¹² See Goldman, *supra* note 289 (noting that the networks' combined audience shares decreased from 90% in 1979 to approximately 68% in 1989); Judith Reitman, *Costs Up But Cable is Still a Good Buy*, MARKETING & MEDIA DECISIONS, Sept. 22, 1984, at 49 (indicating that the networks' prime-time share of the audience "tumbled" from 89% in 1979 to 77% in 1983).

³¹³ See Reitman, *supra* note 312, at 49.

³¹⁴ See J.L., *supra* note 311, at 176 (noting that the average price of 30 seconds of network commercial time increased by 76% between 1980 and 1990).

³¹⁵ See Goldman, *supra* note 289; Wayne Walley, *TV Buyers Go Gunning for Guarantees: Upfront Placements in Jeopardy if Big 3 Fool with Buyers' Rules*, ADVERTISING AGE, Nov. 26, 1990, at 15 (noting that, although advertisers shifted approximately \$200 million from network television to other media, "most of them . . . will only move a limited amount of ad budgets to [such other outlets as] cable TV and syndication"); see also *Esprit's TV Drive Fields Global View: Esprit de Corp. Launches Its First Ever Television Advertising Campaign*, FOOTWEAR NEWS, Aug. 19, 1991, at 51 (indicating that 70% of Esprit's eight million dollar advertising campaign was directed toward television advertising).

³¹⁶ Goldman, *supra* note 289 (quoting John Sisk, of J. Walter Thompson).

pressure to emphasize their effectiveness in presenting advertisers' messages to the appropriate viewers.

Any intuitive appeal of a content-blind system is somewhat undercut, however, by the resurgent trend toward the 1940s ideas of corporate sponsorship.³¹⁷ Although it is doubtful that network programming will ever again become advertiser-supplied, sponsors may, at the request of the networks, re-establish advertising ties with certain programs. The networks believe that allowing companies to develop "sponsorship identification" with certain programs will help the networks maintain that company's business.³¹⁸ For example, in 1988, CBS instituted a program that, in addition to sponsorship, included corporate "promotional and merchandising support, thereby magnifying [the] sponsor's role" in the presentation of the program.³¹⁹ As part of that agreement, CBS required corporations to underwrite the show over an extended period, possibly by purchasing one commercial spot each week during the year.³²⁰ The success of such sponsorship programs remains uncertain; reports indicate that corporate advertisers do not favor them.³²¹

A content-blind commercial purchasing system could meet the advertiser's economic concern of targeting the appropriate demographic mix of viewers, while maintaining its current efficiency levels and competitive advantages over the alternative media outlets. The level of advertiser resistance to this possible reform is difficult to predict.³²² Although it appears that the networks are considering re-implementing, to some extent, more traditional sponsorship ideals, a content-blind system would effectively reduce the viewer's association of the advertiser with the content of the programming during which its commercials appear. This result would force

³¹⁷ See Gay, *supra* note 274, at 31.

³¹⁸ See *id.*

³¹⁹ See *id.*

³²⁰ See *id.* In addition, a premium could be included to cover promotional expenses. See *id.*

³²¹ See *id.* In certain situations, advertisers want their products advertised on specific programs, because of the audience's demographic mix and the effect the programming has on the consumer's demand for the product. For example, beer manufacturers choose to advertise during football games not only for the large, male audience, but also because the consumption of beer is often associated with watching football games. In such instances, advertisers would resist losing the opportunity to selectively choose the program on which their advertisements appear.

³²² For example, if content-blind purchasing increases the transaction costs associated with television advertising purchasing, some entity will be forced to bear the cost. If advertisers do, they may choose to advertise in an alternative media outlet.

advocacy groups to deal with the networks directly over questions of programming content. If the public refuses to accept this disassociation and continues to hold the advertiser responsible for programming content, the company may be forced to seek other media outlets where it is guaranteed the right to selectively choose the content in which its advertisements appear. For content-blind reform to be successful, it must be assumed that the viewing audience will accept the new advertiser-network relationship and that advertisers will not take their media business elsewhere.

B. Internal Regulation Through Network Standards and Practices Departments Staffed with Advocacy Group Members

From the early days of radio, internal censors have been a part of network broadcasting.³²³ RCA created the "public advisory council" when it formed NBC, the original network, in 1926.³²⁴ The twelve-member council was designed to represent "different shades of public opinion."³²⁵ NBC expressed the following goal:

"In this country we must learn by experiment the best way of handling this important agency. [NBC] is making that experiment. It would like to demonstrate to the American people that this agency can be handled by a private organization effectively, economically and progressively. It would like to demonstrate that it would respond quickly to the public taste and the public needs. It would like to show that it would administer these facilities without unfair discrimination and with maximum service in both quality and quantity."³²⁶

The council, which would later become known as the network's standards and practices department (standards department), had little responsibility during the 1950s, primarily because most shows were produced and controlled by advertisers.³²⁷ Television programming during the 1960s had less corporate sponsorship and control.³²⁸ Consequently, internal regulation increased. The responsibilities of these departments developed during this time and included the application of the Television Code of the National

³²³ See *The First 60 Years of NBC*, BROADCASTING, June 9, 1986, at 49.

³²⁴ See *id.*

³²⁵ *Id.*

³²⁶ *Id.* (quoting a proclamation issued during the first meeting of the council).

³²⁷ See *id.* For a discussion of the nature of advertiser-sponsored programming during this time, see *supra* text accompanying notes 274-79.

³²⁸ See *supra* text accompanying notes 280-83.

Association of Broadcasters (NAB Code)³²⁹ and the monitoring of "the use of hidden commercial advertisements within the program content."³³⁰ Gradually, NBC's standards department, and others like it, exercised greater control over program content, becoming the networks' mechanism for "quality control" from inception through broadcast.³³¹ Their functions included reviewing program scripts for "language, taste and character portrayals" and evaluating commercials to "assure [that] product claims could be substantiated."³³² Recently, economic factors have forced the networks to cut costs by reducing their standards' departments staff.³³³ Concomitantly, massive deregulation of the industry

³²⁹ The NAB Code was enacted in 1952 and functioned to keep "governmental regulations minimal by avoiding program practices that . . . offend[ed] pressure groups and advertisers." MARIEL G. CANTOR, *PRIME-TIME TELEVISION: CONTENT AND CONTROL* 66 (1980). The NAB Code was later declared illegal as violative of antitrust laws. See *United States v. National Ass'n of Broadcasters*, 553 F. Supp. 621, 626 (D.D.C. 1982) (holding portions of NAB Code in violation of Sherman Act).

³³⁰ CANTOR, *supra* note 329, at 69.

³³¹ See Morgan Gendel, *The Battle for the Living Rooms of America: Network Censors: They Decide What's In and What's Out*, L.A. TIMES, Sept. 4, 1985, § 6, at 1.

³³² Kevin Goldman, *Change in TV "Standards": CBS, NBC Phasing Out Offices of Program Review*, NEWSDAY, Aug. 17, 1988, § II, at 15. In addition to monitoring programs specifically made for the networks, the standards departments also scrutinize programs made for other media, such as feature films, that are to be shown on network television. See Cathy Seidner & Kimon P. Timon, *Preserving Intangible Rights in Films Shown on Television*, N.Y. L.J., May 25, 1990, at 5. In this capacity, the department "decides what editing will be necessary for purposes of censorship, time constraints, and adding of advertising matter." *Id.* In addition to auditing program content, the departments also monitor the accuracy and appropriateness of the advertisements themselves. Such decisions are often as controversial as those made concerning the programs. For example, in 1986, CBS's standards department rejected a commercial for Maybelline's Shine Free mascara because there was concern that the "fast-action, quick-cut commercial . . . could trigger seizures in some epileptics." Pat Sloan, *CBS Nixes Maybelline's SFX*, ADVERTISING AGE, Oct. 27, 1986, at 41. Network standards departments, however, seem to be relaxing some restrictions and are approving "franker" commercials. See Stuart Elliott, GANNETT NEWS SERVICE, July 31, 1990, available in LEXIS, Nexis Library, GNS File. For example, the networks allowed bras to be worn on live models in 1987, Playtex commercials being the first, because they were "tastefully executed." See Aliza Laufer, *Grey & Partners' Uplift Playtex, First to Bare Bra*, BACK STAGE, May 1, 1987, at 1, available in LEXIS, Nexis Library, Bckstg File (stating that the ads were designed to move away from sexuality and "position the product on a wholesome, look-good, feel-good attitude"). Also acceptable for use in TV commercials are the words "diarrhea," for Kaopectate, and "period," for feminine hygiene products. See Elliott, *supra*.

³³³ The networks' financial considerations stem, in part, from the increased competition they face from the cable and home video markets. See *supra* notes 310-14 and accompanying text. In addition, the highly publicized takeover challenges and ownership changes at the three largest networks (Capital Cities Communication's purchase of ABC, General Electric's acquisition of NBC's parent company; RCA,

during the Reagan era led networks to televise more controversial and topical programming in an attempt to regain viewership lost to competing cable stations.³³⁴ The result was a proliferation of protests by advocacy groups and the increased use of consumer boycotts.

As advocacy groups gain influence over the substantive conduct of programming by boycotting, networks must develop a method for adequately addressing their concerns. History suggests that this might be accomplished by staffing network standards departments with advocacy group members.³³⁵

1. The Deregulation of the Reagan Era and the Television Program Improvement Act of 1990

During the Reagan administration, the FCC began to deregulate "aggressively" the broadcast industry.³³⁶ Television stations were no longer required to meet with community groups,³³⁷ and their obligation to show public affairs and news programs was removed.³³⁸ Later, the Fairness Doctrine was abolished, since it was believed that "the public interest would be better served if market-

Laurence Tisch's control over CBS after unsuccessful acquisition attempts by Ted Turner and Senator Jesse Helms) have also affected the "bottom line." See MONTGOMERY, *supra* note 7, at 221; Gendel, *supra* note 331 (stating that "[t]elevision has become just another commodity"). As a result of these financial pressures, the standards departments of each of the networks has been either reduced in staff or eliminated completely. See, e.g., John Carmody, WASH. POST, Sept. 21, 1988, at C8 (indicating that ABC began to reduce its standards department during the 1986 acquisition by Capital Cities); Kenneth R. Clark, *Times Mellow, But Censors Are Still Busy as Beavers*, CHI. TRIB., Dec. 16, 1988, Tempo Section, at 1 (indicating that CBS cut its standards staff from 80 to 29); Bill Powell, *What Ever Happened to the "Content Police"?*, NEWSWEEK, Nov. 14, 1988, at 78 (noting that CBS' and NBC's "wrenching corporate reorganizations" eliminated standards groups as separate departments). But see Tom Shales, *Attack of the TV Reformers: The Aftermath of a Season*, WASH. POST, June 25, 1989, at G1 (explaining NBC's announcement to re-staff its department "to better monitor program content").

³³⁴ See Peter Funt, *What's Allowed on TV—Pressures for Change Are Mounting*, N.Y. TIMES, Nov. 2, 1980, § 2, at 1 (noting that network programming decisions are changing because "cable's programming of explicit sex and violence is already affecting what is deemed acceptable for home viewing" (quoting an ABC official)); Shales, *supra* note 333 (describing the networks as being "at the most vulnerable position of their corporate lives [because of] lower ratings, more competition, [and] changing viewer habits").

³³⁵ For a comprehensive discussion of the networks' past attempts to manage advocacy groups, see MONTGOMERY, *supra* note 7, at 51-74.

³³⁶ See MONTGOMERY, *supra* note 7, at 219; Hill & Beaver, *supra* note 171, at 19-20.

³³⁷ See MONTGOMERY, *supra* note 7, at 219.

³³⁸ See *id.*

place forces were allowed to operate, unfettered by government [regulations.]”³³⁹ In effect, the environment for the networks changed from one of government regulation to “self-regulation” within the broadcast industry.³⁴⁰ As Professor Montgomery describes the change in *Target: Prime-Time*, the expectations in the broadcast industry were rather “utopian”:

Any limitations in the present system would be overcome by emerging new communication technologies which would create a more equitable and diverse system; satellite-delivered cable networks would cater to almost every special interest; new low-power broadcast stations would make it possible for virtually anyone to become a broadcaster; and public access cable channels would become the new “electronic soap box,” providing a forum for those shut out by traditional broadcasting.³⁴¹

Such reform has not occurred, and several studies indicate that the networks have seen “little improvement” in community-affairs problems.³⁴² If anything, the decrease in government regulation appears to have been met with a noticeable increase in the number of advocacy group boycotts.³⁴³ The public’s concern for quality network programming has regained the attention of Congress, which recently passed legislation to encourage the curtailment of television violence. The Television Program Improvement Act of 1990 (Television Act),³⁴⁴ signed by President Bush on December 1, 1990, provides a three-year antitrust exemption “for television networks, local stations, producers, and the cable television industry to develop and disseminate voluntary guidelines” to reduce television violence.³⁴⁵ The purpose of the Television Act is to

³³⁹ *Id.* at 220. For a discussion of the Fairness Doctrine and its applicability to television programming, see *supra* note 148.

³⁴⁰ Hill & Beaver, *supra* note 171, at 19.

³⁴¹ MONTGOMERY, *supra* note 7, at 220.

³⁴² See Hill & Beaver, *supra* note 171, at 19 (citing Eric J. Zanot, *Unseen But Effective Advertising Regulation: The Clearance Process*, 14 J. ADVERTISING 26 (1985)); Robert G. Wyckham, *Self-Regulation of Sex-Role Stereotyping in Advertising: The Canadian Experience*, 6 J. PUB. POL’Y & MARKETING, at 76 (1987).

³⁴³ Another contributing factor could be the reduced staff in the networks’ standards departments. See *supra* note 333.

³⁴⁴ The Television Program Improvement Act of 1990, Pub. L. No. 101-650, § 501, 104 Stat. 5089, 5127-28 (1990) (codified at 47 U.S.C.A. § 303c (West 1991)) [hereinafter *Television Act*].

³⁴⁵ *Sponsors of Law Granting Immunity Urge Broadcasters to Move Quickly*, 59 ANTITRUST & TRADE REG. REP. (BNA) No. 1495, at 863 (Dec. 13, 1990) [hereinafter *Sponsors of Law*]; see also 47 U.S.C.A. § 303c(c). Absent this exemption, industry members would be prohibited from any “joint discussions or actions” by the Sherman

encourage representatives from various segments of the industry to develop their own guidelines concerning "when, how and how much violence should be depicted on television,"³⁴⁶ thus eliminating the need to re-establish restrictive governmental or regulatory control.

According to its sponsors, Democratic Representative Dan Glickman of Kansas and Democratic Senator Paul Simon of Illinois, the Television Act responds to various studies which found that television violence had a detrimental effect on audiences, especially children.³⁴⁷ In a December 12, 1990, letter to network executives, the sponsors characterized the law as creating "an opportunity, not an obligation," and urged the executives to use the exemption "to respond to the calls of parents, teachers, and mental health professionals for less violent television for our nation's children."³⁴⁸ The sponsors noted that the "law respects First Amendment freedom and is not coercive: Congress is not telling the television industry how to write the guidelines, and there is no penalty if nothing results from joint discussions."³⁴⁹

Although the networks did not oppose the Television Act,³⁵⁰ CBS expressed its resistance to "any form of government intervention."³⁵¹ ABC deemed the bill unnecessary, thinking its own standards department sufficient.³⁵² NBC expressed a willingness "to engage in dialogues."³⁵³ Whatever the result of the proposed discussions among the networks, the implications of the Television Act are twofold. First, Congress sent a message to the television industry that "voluntary" standards should be enacted to avoid further legislation.³⁵⁴ Second, the antitrust exemption provides

Act. See Kevin Goldman, *A Move to Consider Prime-Time Violence*, NEWSDAY, July 4, 1989, § II, at 7.

³⁴⁶ *TV Industry Urged to Draft Violence Rules*, L.A. TIMES, Dec. 12, 1990, at P10.

³⁴⁷ See *id.*

³⁴⁸ *Sponsors of Law*, *supra* note 345, at 863 (quoting a letter by Dan Glickman and Paul Simon).

³⁴⁹ Robert Shepard, *TV Industry Urged to Curb Violence*, UPI, Dec. 12, 1990, available in LEXIS, Nexis Library, UPI File (quoting Dan Glickman).

³⁵⁰ See Goldman, *supra* note 345, at 7.

³⁵¹ *Id.*

³⁵² See *id.*

³⁵³ Matt Roush, *Congress Tougher About Violence on TV*, USA TODAY, Aug. 2, 1989, at 3D.

³⁵⁴ Congress expressed the goal that the industry develop voluntary standards. As Senator Paul Simon wrote in the *Chicago Tribune*, "I do not want government censorship. Any guidelines would be industry-written and voluntary." *The Need for Restraint on TV Violence*, CHI. TRIB., Aug. 25, 1989, Perspective Section, at 20 (Letter of Senator Paul Simon).

the industry with the unique opportunity to develop guidelines regarding the depiction of violence. Should that effort be successful, it would signal to Congress the need for similar legislation regarding advocacy group boycotts and their effect on substantive programming content.³⁵⁵ During this time, the networks could implement guidelines providing for standards departments staffed with advocacy group members.

2. The Method and Advantages of Staffing Standards Departments with Advocacy Group Members

Most of the contact that the networks have with advocacy groups has been on an informal, ad hoc basis.³⁵⁶ Network representatives readily admit that they "rarely, if ever" receive feedback concerning programming from such groups.³⁵⁷ Instead, they learn of an advocacy groups' concerns indirectly, when a targeted advertiser removes its commercials from a network's program.³⁵⁸ To prevent this, the networks should solicit information from advocacy groups directly through a formal mechanism—their own standards departments.

In his article, *Pressure Groups and Television Entertainment*, Joseph Turow details four general aims for standards departments: (1) limiting the influence that advocacy groups have on the substantive content of programming; (2) keeping conflicts between advocacy groups and the networks from entering into the governmental or advertising arenas; (3) ensuring that whatever programming changes are made do not weaken the "predictability and profitability of the network-producer-advertiser relationships;" and (4) deterring other advocacy groups "from believing that their attacks on the networks will be successful."³⁵⁹ Thus, the standards departments have censorial and public relations functions. In the censorship capacity, the department should insure that program content is less likely to

³⁵⁵ The Act only allows for the development of "guidelines designed to alleviate the negative impact of *violence* in telecast material." Television Act, *supra* note 344, at § 501(c) (emphasis added).

³⁵⁶ See Hill & Beaver, *supra* note 171, at 21-22 (noting that "none of the networks ha[ve] any formal policies regarding interaction with advocacy groups, and most handle advertiser concerns on a 'case-by-case' basis").

³⁵⁷ See *id.* at 21.

³⁵⁸ See *id.*

³⁵⁹ JOSEPH TUROW, *PRESSURE GROUPS AND TELEVISION ENTERTAINMENT*, in *INTERPRETING TELEVISION: CURRENT RESEARCH PERSPECTIVES* 142, 151-52 (Willard D. Rowland & Bruce Watkins eds. 1984).

be subjected to government and public sector criticism,³⁶⁰ thereby eliminating the need for increased government regulation or advertiser withdrawal. In the public relations role, the department should handle viewer complaints as a "buffer" for the network, producer, and advertisers.³⁶¹

These responsibilities can best be handled by people who understand and support the advocacy group's agendas. Professor Montgomery explains that during the 1970s the networks saw the need for hiring people in the standards departments who "could represent advocacy group interests."³⁶² The networks began touting their standards departments as "microcosms of pluralistic American society, staffed not only with blacks, Hispanics, women, and Asians but also with senior citizens, Catholics, and gays."³⁶³ Professor Montgomery also notes that some of the networks "employed members of advocacy organizations such as the NAACP and Nosotros."³⁶⁴ The questions are (1) whether boycotts could be avoided if these efforts were expanded, and (2) what effect such staffing will have on program content.

Professor Montgomery's account of network hiring practices does not explain the extent to which the members of the standards departments actually represented advocacy group interests.³⁶⁵ If these departments are to succeed, members of organizations such as CLear-TV, the National Gay Task Force, and the National Right to Life Organization equally must be part of the departments' composition.³⁶⁶ A gay or Christian employee would not be

³⁶⁰ See MONTGOMERY, *supra* note 7, at 53.

³⁶¹ See *id.*

³⁶² *Id.* at 71.

³⁶³ *Id.*; see also Diane Haithman, *The TV Western Rides Again*, L.A. TIMES, Sept. 20, 1989, § 6, at 1 (noting that ABC had an American Indian in its standards department, and that the networks "no longer tolerate the kind of stereotyping that was rife in the old Westerns").

³⁶⁴ MONTGOMERY, *supra* note 7, at 71.

³⁶⁵ Furthermore, if Hill & Beaver's account of network perceptions is accurate, it is apparent that whatever contact networks did have with advocacy groups in the past has certainly eroded. See *supra* notes 356-58 and accompanying text.

³⁶⁶ The need for the inclusion of a diverse range of interests in these departments is illustrated by the recent controversy over ABC's comedy *Good & Evil*. The National Federation of the Blind (NFB) attacked the portrayal of a blind character on the show as "a bungling fool, an inept idiot." William Mahoney, *ABC Backs "Good & Evil,"* ELECTRONIC MEDIA, Sept. 16, 1991, at 2. ABC refused to alter the show, noting that it had been approved by its standards department, who claimed the program to be an "outrageous parody" in which "not one character is intended to be realistic or believable." *Id.* (quoting an ABC spokesperson). NFB threatened a boycott, and four companies responded by pulling their advertisements from the program. See Verne

sufficient. A network may, for public relations reasons, hire a person of the necessary race, religion, or sexual orientation who they know does not support the corresponding advocacy group. When a member of an advocacy group is hired, it is critical that that person have influence over the actions of their group. Thus, a formalized, expanded version of 1970s hiring practices may succeed in containing conflicts within the networks.

This hiring system will lead to ideological differences within the standards department. Therefore, the staff must be forced to make internal compromises when it disagrees. A particularly effective framework for this mechanism has been discussed by Ronald Hill and Andrea Beaver in their investigation of advocacy group behavior.³⁶⁷ The authors assert that "conflict holds the potential for positive outcomes, including the development of new and creative solutions."³⁶⁸ Nevertheless, they recognize that such conflict "also can produce emotional confrontations in which participants rely on overt power manipulation, threats, coercion, and deception."³⁶⁹

Therefore, efforts must be made to emphasize cooperative, rather than competitive, interaction "characterized by problem-solving approaches that are concerned with identifying mutual interests, goals, and desires."³⁷⁰ When agreement cannot be reached, a "responsible decision-maker" approach could be employed.³⁷¹ This entity would make a decision to which the department must adhere when their own deliberations are not successful.³⁷² The solution is "revealed" to the group during their discussions if they are unable to reach an agreement without it, "but before a final vote regarding alternatives is taken. Thus, disagreement, in effect, becomes agreement on the choice provided by the reasonable decision-maker."³⁷³

Gay, *Four "Good & Evil" Advertisers Yank Ads*, *NEWSDAY*, Oct. 18, 1991, at 99.

³⁶⁷ See Hill & Beaver, *supra* note 171.

³⁶⁸ *Id.* at 20 (citing JOSEPH P. FOLGER & MARSHALL SCOTT POOLE, *WORKING THROUGH CONFLICT* (1984)).

³⁶⁹ *Id.* (quoting Michael J. Papa & Elliott A. Pood, *Coorientational Accuracy and Differentiation in the Management of Conflict*, 15 *COMM. RES.* 400, 400 (1988)).

³⁷⁰ *Id.* (citing Tricia S. Jones, *Phase Structures in Agreement and No-Agreement Mediation*, 15 *COMM. RES.* 470 (1988)).

³⁷¹ *Id.* at 27 (citing Russell L. Ackoff, *A Theory of Practice in the Social Systems Sciences*, *SYS. RES.*, 3, 241-46 (1988)).

³⁷² See *id.*

³⁷³ *Id.*

Use of this decisionmaking process by advocacy-staffed standards departments would allow the networks to maintain control over the substantive content of their programs and formalize their relationships with each advocacy organization.³⁷⁴ Thus, "criticism [of the network] could be channeled into a manageable form."³⁷⁵ It is unlikely that an advocacy group will protest or boycott a programming decision when a member of its organization has played a vital role in the program's development. Furthermore, the advocacy-affiliated member of the standards department will have presumably relayed to his organization accounts of previous victories in changing other programs.

Apart from the procedural efficiencies created when advocacy group members become part of the internal process, this proposal could benefit the networks substantively. Recent successful relationships between the networks and various advocacy groups illustrate this point. The American-Arab Anti-Discrimination Committee (AAADC),³⁷⁶ which monitors Arab stereotyping in the media,³⁷⁷ was able to alter the negative characterization of an Arab in ABC's *Dynasty*, and they convinced the producer of *Cagney and Lacey* to balance the portrayal of an Arab murderer with an Arab female doctor.³⁷⁸ Eventually, ABC began consulting with AAADC and sought its comments on scripts featuring Arab characters.³⁷⁹ Another example of the effectiveness of advocacy-group input is the CBS drama *Tour of Duty*, in which the producers were "unusually solicitous" to Vietnam veterans during production.³⁸⁰ Advice for the show was sought from several veterans, and "special screenings" were also organized.³⁸¹ The president of the Vietnam Veterans of America, who cooperated in the hope that

³⁷⁴ See MONTGOMERY, *supra* note 7, at 54 (characterizing the networks' ability to centralize these elements as "essential").

³⁷⁵ *Id.*

³⁷⁶ AAADC is an organization "devoted to combating the repugnant images of Arabs that . . . pervade American life." David K. Shipler, *The Arab-American Counts His Stereotypes*, N.Y. TIMES, Dec. 31, 1985, at B6.

³⁷⁷ See *id.* Arab-Americans object to being characterized as greedy, dishonest, violent thieves. See *id.* They feel many of these images result from Middle East tensions, the increases in oil prices in the 1970s, and "19th-century images . . . of the Arab as primitive keepers of harems." *Id.*

³⁷⁸ See *id.*

³⁷⁹ See *id.* Shipler writes that a representative from ABC indicated that that network consulted with members of other minority groups as well, "and their objections frequently result[ed] in revisions." *Id.*

³⁸⁰ See *Is It Prime-Time for Vietnam?*, N.Y. TIMES, Aug. 2, 1987, § 2, at 1.

³⁸¹ See *id.*

the program would "bring Vietnam veterans out of solitary introspection," hailed the series' depiction of the war as "accurate."³⁸² The success that the networks have had in working with advocacy groups on an informal basis suggests that a formal mechanism—advocacy-staffed standards departments—could be successful in defusing advocacy groups otherwise driven to boycotting the networks' advertisers.

3. The Weaknesses of Advocacy-Staffed Network Standards Departments

Although advocacy group-staffed network standards departments appear to provide a mechanism that would control advocacy group input, several concerns must be addressed. First, it is possible that organizations such as CLear-TV that already enjoy a certain level of influence in the industry will refuse to participate in any program that requires compromises and concessions. To them, it may be impossible to present a balanced portrayal of an abortion or homosexuality issue. Nevertheless, if the participation of the majority of advocacy groups can be secured, and if the corporate sponsors agree to a moratorium period in which they refrain from withdrawing commercials, then groups such as CLear-TV may be forced to choose between effecting change as an insider or exerting less power as an outsider.

Also unclear are the types of network actions needed to satisfy advocacy group concerns. There are two types of controls that an advocacy group may make in a network standards department: an affirmative action, where the group is provided with the opportunity to introduce an original idea, and a negative action, where the group is able to eliminate an already-existing idea from a program. Advocacy groups may view their compromise responsibilities as only a negative action "veto-power" over existing program content, rather than as an affirmative action opportunity to gain access or visibility for their ideas. For example, CLear-TV may focus its efforts on eliminating "objectionable" content from programming, while the National Gay Task Force will be concerned with increasing homosexual visibility. Rather than include that which is immediately objectionable to another member of the department, the network may choose to restrict the department to censorial, negative actions. But increasing a group's censorship power without increasing its

³⁸² *Id.* (quoting Robert Muller, president of the Vietnam Veterans of America).

access power will favor the conservative/religious and anti-violence agendas and marginalize the concerns of social-action and status-based issue groups.

In addition, the compromises reached by a department of varied viewpoints may adversely effect network programming. Balanced portrayals of characters can sometimes strengthen a program. For example, in the 1970s ABC comedy *Soap*, the standards department emphasized balance, especially concerning the program's depiction of characters affiliated with the Mafia.³⁸³ With each reference to the Mafia, it was "necessary to introduce a principal continuing character of Italian descent who [was] very positive and who . . . , through the dialogue and action, balance[d] and counter[ed] any negative stereotypes."³⁸⁴ Although such compromises could enhance a program, the balanced portrayal of a more controversial issue may be more difficult. Too much compromise may lead to programs in which "controversial issues are consistently and carefully balanced within each program so that one clear argument cannot be discerned."³⁸⁵ When a writer's goal is to present a "strong point of view—not necessarily shrill and tendentious, but passionate and committed,"³⁸⁶ imposing balance upon such a viewpoint may eliminate the "dramatic urgency" from the work.³⁸⁷

The final concern in implementing this reform is the receptiveness of the creative community, some of whom will object to the intrusiveness of the advocacy-staffed standards departments in shaping program content.³⁸⁸ Resistance to standards departments influence already exists. The producer of *thirtysomething* has explained that he was always in "intense battles" with ABC's

³⁸³ See Walter Goodman, *Commercial TV Gets Commercial Threats*, N.Y. TIMES, Apr. 24, 1989, at C13.

³⁸⁴ *Id.* (quoting a rule of ABC's standards department).

³⁸⁵ *Id.* (quoting Kathryn Montgomery).

³⁸⁶ Stephen Farber, *They Watch What We Watch*, N.Y. TIMES, May 7, 1989, § 6, at 42.

³⁸⁷ See *id.* What is more disturbing is the elimination of a program in its entirety. The documentary *AIDS: Changing the Rules* and related 30-second public service announcements were rejected by standards departments because they "were too explicit in presenting their safer-sex message." Clarke Taylor, "*Changing the Rules*" on *Aids Education*, L.A. TIMES, Nov. 6, 1987, § 6, at 32. The program was eventually aired on PBS. A frustrated producer commented, "[w]e're grateful to PBS, but the reality is, we'll reach a much smaller audience than we initially intended." *Id.*

³⁸⁸ See, e.g., Farber, *supra* note 386 (indicating that "most of the writers, producers and directors who contend with the networks' broadcast standards process feel it intrudes painfully on their creative freedom").

standards group.³⁸⁹ In one episode, the standards department objected to a character's comment that "the Government cut safety regulations 'so the car companies can make more money.'" ³⁹⁰ After a struggle, the standards department allowed the government criticism, but deleted the reference to the automobile industry.³⁹¹ Although the standards department agreed that the statement "might be true," they felt that the comment would offend the programs' advertisers.³⁹² Similarly, the producer of *China Beach* described a "constant struggle" with ABC's standards group over the depiction of drugs,³⁹³ stating that "[d]rugs are a difficult territory, but they were very much a part of the picture during the Vietnam War."³⁹⁴ The creative community's resistance to standards department interference was the focus of a University of Southern California seminar entitled the "Future of Television."³⁹⁵ Several producers expressed outrage over the increased interference that standards departments have with their programs. L.A. Law producer Steven Bocho commented, "I've had more fights [with the networks] in the past year than I've had in the last six to eight years put together."³⁹⁶ These battles would presumably continue if standards departments are to become so influential that they would avoid advocacy group boycotts.

Nevertheless, just as network censors have always been a part of the industry, some producers are accustomed to obtaining network approval over their creative decisions.³⁹⁷ Producing a program for network television requires a willingness to work within a system

³⁸⁹ See *id.*

³⁹⁰ *Id.*

³⁹¹ See *id.*

³⁹² See *id.* Farber also describes the problems that the writer/co-producer of *Roe vs. Wade* had in making sure that the lawyer who argued the case before the Supreme Court wasn't portrayed too sympathetically, noting that "[v]irtually every word and image [in the film] was scrutinized and modified." *Id.* Although she believed that the end product "turned out well, . . . there were times when I worried if I had become a good German and given up the heart of the piece." *Id.*

³⁹³ Bill O'Hallaren & Joanna Elm, *Dana Delany's Real-Life War Stories*, PR NEWswire, June 8, 1990, available in LEXIS, Nexis Library, PRNEWS File.

³⁹⁴ *Id.*

³⁹⁵ Diane Haithman, *Panel Finds TV Technologically Daring, Conservative in Content*, L.A. TIMES, Apr. 24, 1989, § 6, at 10.

³⁹⁶ *Id.* (quoting Stephen Bocho).

³⁹⁷ See MONTGOMERY, *supra* note 7, at 200.

less flexible than the motion picture or recording industries.³⁹⁸
As one producer told Professor Montgomery:

"I look at it this way: there are certain rules in writing for television, certain preconditions. It's not any good to complain about them. This is reality [The standards and practices departments] are often right from their point of view. They might not be right objectively in what would be better for the show, but they're right from the amount of trouble—'use this line and this is what is going to happen.'"³⁹⁹

By incorporating advocacy groups into standards departments, all participants in the industry will be forced to make compromises. While some of the demands made by advocacy groups will seem unjustified, there will be occasions when their complaints will have merit. When an advocacy group has a justifiable criticism, the networks will be able to address their concern during the production process. When the complaints are not valid, however, the networks will be able to explain their reasons for remaining committed to the program and the advocacy group member will be able to relay this information to her group's members. The present feedback system, on the other hand, fueled by boycott-driven economic coercion, eliminates the network's opportunity to reasonably address the concerns of a diverse viewing public.

³⁹⁸ The networks, however, are not alone in their use of standards departments. Lifetime Medical Television, a cable station, has a standards department and a medical review department. See Phillips Huston, *Surviving in a Get-Tough-On-Promotion Climate: Pharmaceutical Industry Included Articles on History*, MED. MARKETING & MEDIA, June 1991, at 40. Even MTV, the 24-hour music network, has a standards group that applies "broadcast-network standards about language, violence and nudity" to the music videos it broadcasts. See Jane Hall, *The Channel That Ate the World*, L.A. TIMES, July 28, 1991, Calendar Section, at 6. The application of these standards has led to MTV's ban of a Billy Idol video featuring a "woman being burned on a cross," as well as the controversial Madonna video *Justify My Love*, which included nudity and themes of voyeurism and group sex. See *id.*; David Wharton, *Drop Another Quarter in Your TV Set*, L.A. TIMES, Jan. 25, 1991, Calendar Section, at 21A; cf. Lynne Olson, 9 WORKING WOMAN 90, Feb. 1984 (noting that many producers and writers in the creative community submit their projects to Home Box Office, instead of the networks, because of its "filmmaking flexibility").

³⁹⁹ *Id.* (quoting Interview with Charlie Hauck, in Los Angeles, Cal. (July 11, 1985)).

CONCLUSION

Although advocacy groups have had varied success influencing the programming content of network television, their aggregate impact has been substantial. From Donald Wildmon's CLear-TV to the National Gay Task Force, these organizations have used powerful weapons, including consumer boycotts of advertisers sponsoring "objectionable" programming, in their efforts to shape television programming. As corporate advertisers become more fearful of the groups' tactics, controversial and topical programming will be reduced or eliminated.

Since advertiser boycotts are constitutionally protected under *Claiborne Hardware* and *Environmental Planning*, an advocacy group's activities cannot be regulated without violating their constitutional rights. The two media reforms discussed in this Comment, content-blind commercial purchasing and advocacy-staffed standards and practices departments, if voluntarily adopted, would reduce the influence of advocacy groups over programming content. Content-blind commercial purchasing would redefine the advertiser-network relationship by disassociating the corporate sponsor from the content of the program on which it advertises. Standards departments staffed with advocacy group members can provide a mechanism in which advocacy groups express their concerns and producers incorporate controversial issues into programs that attract viewers, not protesters. Each proposal would reduce the detrimental effects of advocacy group boycotts, while maintaining the economic advantages of an advertising-based broadcasting industry.