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The Federal Communications Act and the Broadcast of Aborted Fetus Advertisements

Hille von Rosenvinge Sheppard†

During the 1992 election season, candidates for federal office in seventeen different states ran graphic television advertisements depicting aborted fetuses.1 Indiana Republican congressional candidate Michael Bailey ran an advertisement that showed tweezers picking through a petri dish containing the crushed head, legs, and arms of an aborted fetus while a woman’s voice said, “It’s my body . . . it’s a woman’s choice.” In Georgia, Republican congressional candidates Daniel Becker, Jimmy Fisher, and Mark Myers each ran an advertisement showing “Choice A,” a smiling baby, and “Choice B,” a fully developed fetus purportedly aborted in the last weeks of pregnancy.3

Television stations balked at the prospect of running such graphic advertisements. Nevertheless, the stations ran the advertisements because section 312(a)(7) of the Federal Communications Act (the “Act”)4 guarantees candidates who run for federal elected office an affirmative right of reasonable access to television stations.5 Moreover, these stations were forced to run the advertisements unedited because section 315 of the Act prohibits the censoring of political advertisements.6

The broadcast of aborted-fetus advertisements during the campaign season generated much controversy. Stations that ran


5 47 USC § 312(a)(7).

6 47 USC § 315.
the advertisements received "hundreds of viewer complaints." Additionally, both candidates running the advertisements and their opponents received enormous responses in the form of money donations and complaints.8

Stations that did not wish to run the graphic abortion advertisements sought help from both the Federal Communications Commission ("FCC" or "Commission") and the courts. The FCC, however, rejected the stations' claim, holding in August 1992 that advertisements depicting aborted fetuses are not indecent and, therefore, must be shown uncensored.9 In October 1992, however, Judge Robert Hall of the United States District Court for the Northern District of Georgia ruled that one particularly graphic advertisement depicting a four-minute live abortion was indecent and therefore exempt from the broadcast requirement.10

This Comment uses aborted-fetus advertisements as a case study for examining the limits and requirements of the Federal Communications Act provisions that govern political campaign advertising. Part I explores the statutory language of section 315 and the case law interpreting it. Part II considers whether indecent, violent, violence-inciting, misleading, or sham-candidate advertisements constitute exceptions to the no-censorship rule, and concludes that aborted-fetus advertisements do not fall within any of these possible exceptions. Part III outlines several proposals for reform that would allow broadcast stations to refuse to run aborted-fetus political advertisements.

I. THE FEDERAL COMMUNICATIONS ACT: SEEMINGLY ABSOLUTE

Sections 312(a)(7) and 315 of the Federal Communications Act together require licensed broadcast stations to run, uncensored, the advertisements of political candidates for federal office. Section 312(a)(7) grants legally qualified candidates for federal elective office a guaranteed right of reasonable access to broadcasting stations to run their political advertisements.11 Section 315, moreover,
explicitly provides that stations airing such political advertisements have "no power of censorship over the material broadcast." 12

The courts have construed these provisions strictly. In Farmers Educational and Cooperative Union v WDAY, Inc., 13 the Supreme Court held that stations, if they are to comply with section 315, cannot censor political advertisements. 14 In Farmers Educational, the Court addressed a libel suit brought against a station that did not censor defamatory material from a candidate's advertisement. The station was forced to choose between conflicting legal duties: on the one hand, section 315 required it to broadcast political advertisements uncensored; on the other hand, state law imposed civil liability for broadcasting libelous material. The Farmers Educational Court held that section 315 superseded the station's duty under state law to refrain from broadcasting libelous material:

Because of the time limitation inherent in a political campaign, erroneous decisions by a station could not be corrected by the courts promptly enough to permit the candidate to bring improperly excluded matter before the public. . . . [A]llowing censorship, even of the attenuated type advocated here, would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television, and hence restrict the

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12 ABORTED FETUS ADVERTISEMENTS

Section 315 is not limited to federal candidates, but instead prohibits selective station censorship of the campaign advertisements of legally qualified candidates for public office.

13 47 USC § 315. Additionally, the legislative history of section 315 "shows a deep hostility to censorship either by the Commission or by a licensee." Farmers Educational and Cooperative Union v WDAY, Inc., 360 US 525, 528 (1959), quoting S Rep No 1567, 80th Cong, 2d Sess 13-14 (1948). The Senate Report explicated this anti-censorship position:

The flat prohibition against the licensee of any station exercising any censorship authority over any political or public question discussion is retained and emphasized. This means that the Commission cannot itself or by rule or regulation require the licensee to censor, alter, or in any manner affect or control the subject matter of any such broadcast and the licensee may not in his own discretion exercise any such censorship authority.

14 State v University of Maine, 266 A2d 863, 868 (1970). Section 315 is not limited to federal candidates, but instead prohibits selective station censorship of the campaign advertisements of legally qualified candidates for public office.

15 360 US at 525.

16 Id at 527. "The term censorship, . . . as commonly understood, connotes any examination of thought or expression in order to prevent publication of 'objectionable' material. We find no clear expression of legislative intent, nor any other convincing reason to indicate Congress meant to give 'censorship' a narrower meaning in Section 315." Id (emphasis in original).
The Court further held that because section 315 required the station to broadcast the libelous material, the station could not be held civilly liable for doing so.\textsuperscript{16} In \textit{Red Lion Broadcasting Co., Inc. v FCC},\textsuperscript{17} the Court reaffirmed this strict understanding of section 315: "[Section 315], which has been part of the law since 1927 . . . has been held valid by this Court as an obligation of the licensee \textit{relieving him of any power in any way to prevent or censor the broadcast}."\textsuperscript{18} In so holding, the Supreme Court suggested that section 315, as reflected in its statutory language, absolutely prohibits station censorship of candidate political advertisements.

\section*{II. Possible Exceptions to Section 315}

While section 315 appears to embody an absolute requirement that stations show all candidate political advertisements uncensored, there may nonetheless exist some exceptions to that rule. While neither the FCC nor the courts have definitively ruled on any of these possible exceptions, this Part explores whether obscene, indecent, violent, violence-inciting, misleading, or sham-candidate advertisements might constitute exceptions to section 315.

\subsection*{A. Obscenity and Indecency}

In order for a publication to be legally obscene, an average person applying contemporary community standards must find that, taken as a whole, it appeals to the prurient interest, contains patently offensive depictions or descriptions of specified sexual conduct, and has no serious literary, artistic, political, or scientific value.\textsuperscript{19} The FCC defines an indecent broadcast as one that contains "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community

\begin{thebibliography}{99}
\bibitem{16} Id at 530-31.
\bibitem{17} 360 US at 531.
\bibitem{19} Id at 391 (emphasis added).
\bibitem{17} \textit{Miller v California}, 413 US 15, 24 (1973).
\end{thebibliography}
standards for the broadcast medium, sexual or excretory activities or organs.\textsuperscript{20}

As with libelous political advertisements, stations must choose between conflicting broadcast obligations when presented with obscene or indecent political advertisements. On the one hand, stations must air the political advertisements uncensored in order to comply with section 315. Indeed, stations face losing their licenses if they fail to comply.\textsuperscript{21} On the other hand, stations may not, under section 1464 of the Federal Criminal Code, broadcast obscene or indecent material;\textsuperscript{22} if they broadcast such material, they face not only the threat of losing their licenses, but also possible criminal penalties.\textsuperscript{23}

Although it is difficult to determine which provision controls, this Comment concludes that the criminal indecency statute should supersede the Federal Communications Act’s no-censorship provisions. This Comment posits, however, that aborted-fetus ad-

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\textsuperscript{21} Section 312(a)(7) authorizes the FCC to revoke any station license or construction permit for failing to provide candidates for federal office reasonable access to the broadcast facility. Section 312(a)(4) allows the FCC to revoke any station license or construction permit “for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter, or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.” 47 USC § 312(a)(4). Section 401(b) gives both the United States and private citizens causes of action when any station disobeys FCC orders. 47 USC § 401(b) (1988). Section 501 penalizes violations of Chapter 47 with fines or imprisonment. 47 USC § 501 (1988). See Kennedy for President Committee v FCC, 636 F2d 432 (DC Cir 1980) (approving license-revocation for non-compliance).

\textsuperscript{22} 18 USC § 1464 (1988) (“section 1464”). This provision applies to stations that broadcast via radio waves, namely radio and television stations. It does not apply to cable television.

Based on its finding that children may be in the television viewing audience at any time, Congress outlawed the broadcast of indecent material completely. Helms Adult Radio Amendment, Pub L No 100-459, 102 Stat 2186 (1988). The 24-hour ban was found unconstitutional in Action for Children’s Television v FCC, 852 F2d 1332 (DC Cir 1988) (“ACT I”), vacated by Action for Children’s Television v FCC, 932 F2d 1504 (DC Cir 1991) (“ACT II”) (ACT I’s essential holding was preserved). ACT I held that a complete restriction on the broadcast of indecent material violated the First Amendment, but upheld the FCC’s authority to prohibit the broadcast of indecent material at times when there is a reasonable risk that children are in the audience. See Comment, Regulation of Indecent Radio Broadcasts: George Carlin Revisited—What Does the Future Hold for the Seven ‘Dirty’ Words?, 65 Tul L Rev 131 (1990).

\textsuperscript{23} 18 USC § 1464 (“Whoever utter any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.”). Section 312(a)(6) allows the FCC to revoke a station’s license or construction permit for violating section 1464, and section 312(b) allows the FCC to issue a cease and desist order. See 47 USC § 312(a)(6); 47 USC § 312(b). In addition, violators of section 1464 are liable for a forfeiture penalty under 47 USC § 503(b)(1)(D) (1992).
Advertisements do not fall within the FCC's current understanding of "obscenity" or "indecency."

1. **Section 1464 should trump sections 312(a)(7) and 315.**

   In *FCC v Pacifica Foundation*, the Supreme Court held that the FCC could constitutionally restrict the daytime broadcast of indecent material in accordance with section 1464 without violating the Federal Communications Act's general command in section 326 that the FCC have no censorship power over broadcasted material. In *Pacifica*, the Court addressed the constitutionality of regulating the 2:00 p.m. radio broadcast of a monologue by comedian George Carlin that was aptly entitled "Filthy Words." In the monologue, Carlin identified the "seven dirty words" that one cannot say on the airwaves. The Court held that the words were indecent and that the FCC could sanction their broadcast. The *Pacifica* Court rested its holding on two facts:

   First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Second, broadcasting is uniquely accessible to children, even those too young to read.

   *Pacifica* further held that viewer-discretion warnings do not make indecent material suitable for daytime broadcast. The Court reasoned that

   [b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

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438 US at 726.

Id at 738.

Id at 748-49. The FCC has subsequently recognized that "the linchpin of indecency enforcement is the protection of children from inappropriate broadcast material." *In the Matter of Liability of Sagittarius Broadcasting Corp*, 7 FCC Rec 6873 (1992), citing *ACT I*, 852 F2d at 1340.

438 US at 748-49.
Additionally, while viewer-discretion warnings might help the conscientious parent monitor his child’s viewing, the warnings are helpful only if the parent is present while his child is watching television.

The FCC has not yet definitively indicated whether stations might be justified in refusing to run obscene or indecent political advertisements. The FCC has addressed this question twice, first with respect to a racial epithet and more recently in the context of aborted-fetus advertisements. The full Commission, however, has not made a definitive determination on this issue, nor has either ruling been approved by the courts.

In *In re Complaint by Julian Bond*, the FCC refused to expand its definition of indecency to include the word “nigger.” The FCC said that “even if the Commission were to find the word ‘nigger’ to be ‘obscene’ or ‘indecent,’ in light of Section 315 we may not prevent a candidate from utilizing that word during his ‘use’ of a licensee’s broadcast facilities.”\(^\text{29}\) This case suggests two possible readings. First, it might stand for the proposition that section 315 prohibits any censorship of indecent material contained in political advertisements. Second, it could mean only that the FCC itself cannot prohibit the broadcast of such an advertisement, because doing so would violate section 326’s prohibition of FCC censorship; a station, however, could nonetheless refuse to broadcast an indecent political advertisement without facing sanctions for violating sections 312(a)(7) or 315. The first reading more likely represents the FCC’s view, because the FCC based its determination of its inability to censor indecent political advertisements on section 315 rather than section 326. *Julian Bond* therefore suggests that the FCC views section 315 as absolute.

The FCC may be backing away from this position. In a particularly graphic aborted-fetus case involving an advertisement for Georgia congressional candidate Daniel Becker that depicted a four-minute live abortion, the FCC indicated that section 1464 should override section 315:

> [The] Commission’s staff . . . informally opined that ‘[t]he application of both traditional norms of statutory construction as well as an analysis of the legislative evolution of Section 315 militates in favor of reading

\(^{29}\) *FCC2d 943 (1978).*

\(^{29}\) Id at 944. Of course, because the FCC concluded that the word “nigger” is not indecent, its conclusion that section 315 is absolute is dictum.
Section 1464 [prohibition of the broadcast of indecent or obscene material] as an exception to Section 315.'

The FCC further stated that "'a broadcaster would be justified in refusing access to a candidate who intended to utter obscene or indecent language.'" In so holding, the FCC indicated, albeit without a formal ruling, that section 1464 should override section 315.

The Supreme Court's decision in Farmers Educational does not preclude such an interpretation because obscene or indecent political advertisements are clearly distinguishable from the defamatory advertisements which the Farmers Educational Court considered. Obscene and indecent political advertisements present stations with a choice between following conflicting congressional mandates. Defamatory advertisements, on the other hand, present stations with a choice between following federal law or state law. Farmers Educational held that a station could not be held liable under state law for broadcasting uncensored political advertisements as required by federal law, because doing so "would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee." Because stations cannot comply both with sections 312(a)(7) and 315 and with section 1464 if the political advertisement in question is obscene or indecent, they must be told which to obey; to sanction stations for complying with a congressional mandate would be "unconscionable."

Farmers Educational held that section 315 prohibits stations from censoring defamatory political advertisements principally because the time constraints of political campaigns prevent courts from adequately rectifying stations' erroneous decisions. The problem of rectifying erroneous decisions does not disappear when the underlying material is obscene or indecent rather than libelous. However, because the possibility of error is smaller and the harms sought to be prevented are greater for obscene and indecent ma-
tional than for defamatory material, the time problem is not as compelling.

For obscene or indecent political advertisements, errors will arise from differences in legal interpretation, not bad investigation. Broadcast stations are less likely to make erroneous decisions regarding obscene or indecent material than regarding libelous material because stations can measure advertisements against the relatively straightforward definition of indecency and thereby make correct determinations about what is indecent.36 For libelous advertisements, on the other hand, stations must make factual inquiries into the truth or falsity of a statement; such inquiries are more likely to yield erroneous results.37

Balancing the interests identified in *Pacifica* with a candidate’s right to air uncensored political advertisements seems to militate against requiring the broadcast of obscene or indecent political advertisements. In *Pacifica*, the Supreme Court held that indecent political speech may be restricted despite its political character.38 Thus, inserting prohibited speech into political speech does not save the prohibited speech. This reasoning should extend to political advertisements. The harms that result from the broadcast of obscene or indecent material—invasion of privacy and the exposure of children to harmful material—are not diminished by the fact that the material is included in a political advertisement. As such, obscene or indecent political advertisements should not be

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36 The FCC’s definition of indecency (see text accompanying note 20) requires stations to determine whether broadcast material depicts or describes sexual or excretory material or organs. Because all obscene material would come within the broader definition of what is indecent, stations need only inquire about indecency.

37 Additionally, the harms sought to be prevented by imposing sanctions upon the broadcast of obscene and indecent material are greater than those for libelous material. In the case of libel, the primary harm is to the person libeled; while the individual has a great interest in not having the libel broadcast, society’s interest is not as great. In the case of obscenity or indecency, however, the primary harm is to the viewing audience, especially children; society thus has a strong interest in preventing the broadcast of this material. These distinctions justify giving broadcast stations censorship power over obscene or indecent material but not libelous material and would explain why *Farmers Educational* does not demand that sections 312(a)(7) and 315 be given priority in the case of obscene or indecent political advertisements.

38 The Court held:

The [Carlin] monologue does present a point of view; it attempts to show that the words it uses are ‘harmless’ and that our attitudes toward them are ‘essentially silly.’ . . . The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet.

*Pacifica*, 438 US at 746 n 22.
broadcast uncensored. Thus, section 1464 should trump section 315.

2. Aborted-fetus advertisements are not obscene or indecent.

Even if section 1464 overrides section 315, stations will not be able to refuse to broadcast aborted-fetus advertisements because such advertisements do not fall within the current legal definitions of "obscene" or "indecent." In order for a publication to be obscene, an average person applying contemporary community standards must find that the publication appeals to the prurient interest, contains patently offensive depictions or descriptions of specified sexual conduct, and has no serious literary, artistic, political, or scientific value. Aborted-fetus advertisements do not appeal to the prurient interest, nor do they contain depictions or descriptions of sexual conduct. Additionally, aborted-fetus advertisements arguably have some political value, for they allow political candidates to express a pro-life position and to illustrate their view that abortion is the violent taking of human life. As such, aborted-fetus advertisements are not obscene.

A more difficult question is whether aborted-fetus advertisements are indecent. The FCC's definition of indecency limits indecent material to profanity, sexual acts, sexual organs, and excrement. Advertisements displaying aborted fetuses clearly do not depict profanity, sexual acts, or sexual organs. Moreover, in Letter to Vincent A. Pepper, the FCC, in holding that an aborted-fetus advertisement run by Georgia Republican congressional candidate Daniel Becker was not indecent, found that aborted fetuses

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99 Miller, 413 US at 24.

40 See note 20 and accompanying text. The FCC's definition of indecency requires that the material be used "in terms patently offensive as measured by contemporary community standards for the broadcast medium." Goodrich Broadcasting, 6 FCC Rec at 7484. This requirement allows the broadcast of things that are otherwise within the definition of indecency. For instance, female genitalia have been shown during programs depicting live births, and exposed breasts have been shown during programs on African tribes. While both female genitalia and breasts are technically within the definition of indecency, the two contexts described above constitute exceptions to indecency because they do not offend society; neither situation depicts body parts in a manner "patently offensive as measured by contemporary community standards for the broadcast medium." Id.

41 It is possible that fetuses aborted during the third trimester may have sexual organs and therefore fall technically within the indecency definition, although this argument has not been made in any of the cases about the broadcast of aborted-fetus political advertisements.

42 7 FCC Rec at 5599.
ABORTED FETUS ADVERTISEMENTS

are not excrement." In so holding, the FCC rejected the petition of over 300 broadcasters who argued that programming “containing graphic and shocking depictions of dead, bloodied or aborted fetuses or of any . . . tissue” constitutes excretory activity because dead fetuses are covered with “menstrual gore.”

Another aborted-fetus advertisement aired by Becker, a thirty-minute political program entitled “Abortion in America: The Real Story,” became the subject of two separate lawsuits in October 1992, just two months after Pepper. Becker had requested WAGA-TV in Atlanta, Georgia to air his advertisement on Sunday, November 1, 1992, immediately following a football game between the Atlanta Falcons and the Los Angeles Rams. In the first suit, Gillett Communications, WAGA-TV sued Becker in the United States District Court for the Northern District of Georgia to enjoin Becker from requiring the station to broadcast his advertisement, which the station considered to be indecent. In the second suit, Letter to Daniel Becker, Becker petitioned the FCC to force WAGA-TV to broadcast the advertisement.

In Gillett Communications, Judge Robert Hall agreed with WAGA-TV that Becker’s thirty-minute program was indecent, and therefore enjoined Becker from requiring WAGA-TV to air his advertisement except during the safe-harbor period. Gillett Communications therefore appears to contradict Pepper, in which the FCC held that aborted-fetus advertisements are not indecent. According to Judge Hall, Becker’s program, which contained graphic footage of a four-minute live abortion, fell within the FCC’s indecency definition because it “contain[ed] graphic depictions and descriptions of female genitalia, the uterus, [and] excreted uterine fluid.” Judge Hall also recognized the relevance of “dismembered fetal body parts, and aborted fetuses” in rendering the performance of a live abortion “patently offensive according to contemporary community standards.” The Eleventh Circuit affirmed the District Court’s ruling and, without comment, Su-

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48 Id.
49 Id, citing Petition for Declaratory Ruling filed by Kaye, Scholer, Fierman, Hays & Handler.
50 Whitford, Atlanta J & Const at A1 (cited in note 3).
52 Gillett Communications, 807 F Supp at 764.
53 Pepper, 7 FCC Rec at 5599.
54 Gillett Communications, 807 F Supp at 763.
55 Id.
56 Kate Maddox, TV Stations Sorting Through Court’s Ruling on Fetus Ads, Electronic Media 10 (Nov 9, 1992). The Eleventh Circuit’s decision is unpublished.
preme Court Justice Anthony Kennedy denied Becker's request for an emergency ruling one hour before the start of the game.  

While WAGA-TV petitioned the District Court, Becker requested the FCC to intervene to ensure that he was granted access to air the program.  

The FCC refused to intervene on Becker's behalf, stating that the FCC does not "render indecency rulings in advance of broadcasts." Instead, the FCC deferred to the station's judgment that the advertisement was indecent, and thus did not require the station to broadcast the advertisement. In so ruling, the FCC indicated that it will not require stations to broadcast political advertisements that, in their judgment, fall within the FCC's definition of indecency.

Because of the harms that obscene and indecent material pose to privacy interests and to children, section 1464 should override section 315. This would allow stations to refuse to run candidate political advertisements that are obscene or indecent. However, because the usual aborted-fetus advertisement that does not depict a live abortion is neither obscene nor indecent, and therefore does not meet section 1464's standards, most aborted-fetus advertisements will not be censorable on these grounds. In most cases, therefore, aborted-fetus advertisements will not fall within a possible obscenity or indecency exception to section 315.

B. Violent Advertisements

Television stations voluntarily abide by guidelines promulgated by the National Association of Broadcasters ("NAB") in 1990, which consist of a four-part "Statement of Principles" concerning drug-related programs, children, violence, and indecency. These guidelines prohibit stations from showing violent or sexual programs during family viewing hours, defined as the first hour of prime time and the hour immediately preceding it, and encourage...
stations to use viewer-discretion warnings and place the more violent and sexually explicit shows later in the evening.\textsuperscript{57}

Allowing stations to apply the NAB's violence guidelines to political advertisements, particularly aborted-fetus advertisements, would limit the broadcast of violent political advertisements during times when very young children watch television, and would help parents make viewing decisions for their children. In contrast to television programs, even conscientious parents who monitor their children's viewing habits cannot foresee their children's exposure to a violent advertisement. When assessing what programs to allow their children to watch, parents generally consider the program's subject matter, not advertisements. Allowing a child to watch a game show or sporting event would normally pose little danger of exposing the child to unexpected violence.\textsuperscript{58} However, an unforeseen advertisement could expose children to violence that the parent would consider inappropriate. Thus, violent advertisements pose a greater danger to children than violent television programs shown during daytime hours.

Subjecting graphic advertisements to the violence guidelines would not relegate them to being aired at as late a time period as an indecency determination would. Under the NAB guidelines, stations may broadcast violent programs after the first hour of prime time, but may broadcast indecent material only during the nighttime safe-harbor period.\textsuperscript{59} Thus, even if the NAB guidelines were applied to political advertisements, candidates could show violent advertisements to adult audiences that do not watch late-night television, an audience to which they would not be able to show "indecent" advertisements.

If violent advertisements were an exception to section 315, aborted-fetus advertisements would probably be sufficiently violent to be channelled to later viewing times, although not exclusively to the safe-harbor period. The NAB guidelines instruct broadcasters that "presentation of the details of violence should

\textsuperscript{57} Among other provisions, the NAB urges that depictions of "physical or psychological" violence be used responsibly.

"Presentation of the details of violence should avoid the excessive, the gratuitous and instructional . . . . The use of violence for its own sake and the detailed dwelling upon brutality or physical agony, by sight or by sound, should be avoided."


\textsuperscript{58} \textit{Nightline} (cited in note 1).

\textsuperscript{59} See note 22.
avoid the excessive, the gratuitous and the instructional . . . [T]he detailed dwelling upon brutality or physical agony, by sight or by sound, should be avoided.\(^6\) Aborted-fetus advertisements graphically depict bloody, dismembered, and disfigured fetal body parts. They present the "details of violence" by showing close-up images of mutilated dead fetuses. As such, they would fall within the NAB guidelines' prohibitions and would thus be relegated to later viewing hours.

Excessive violence, however, is probably not a viable exception to section 315. Unlike the prohibitions against the broadcast of obscene or indecent material, there exists no congressional statutory prohibition against violence on television. As such, violence is probably very much like the defamatory material considered by the Supreme Court in *Farmers Educational*.\(^1\) Indeed, the reasons identified in *Farmers Educational* for not censoring political advertisements apply with more force in the violence context than they do in the indecency context. While indecency determinations are fairly unambiguous, requiring stations only to assess whether the advertisement contains sexual acts, organs, profanity, or excrement, a determination of violence calls for more discretionary decisions, thus leaving the process open to abuse. The depiction of violence in political advertisements, therefore, probably does not constitute an exception to section 315.

C. Other Exceptions

There are three other possible exceptions to section 315's requirement that stations broadcast all candidate political advertisements uncensored: (1) political advertisements inciting violent behavior; (2) misleading political advertisements; and (3) advertisements proffered by sham political candidates.

First, advertisements that incite violent behavior may constitute a possible exception to section 315. Under *Brandenburg v Ohio*,\(^8\) a state may prohibit speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."\(^9\) Because of the serious dangers to society that would result from advertisements that are directed to and do incite

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\(^6\) Halonen, Electronic Media at 3 (cited in note 57).

\(^1\) 360 US at 525. See discussion of *Farmers Educational* in notes 13-16 and 32-35 and accompanying text.


\(^9\) Id at 447 (citation omitted).
violence, *Brandenburg’s* dictates should probably constitute an exception to section 315.

In *In re Complaint by Atlanta NAACP Concerning Section 315 Political Broadcast by J.B. Stoner*, the FCC refused to censor a political advertisement using the word “nigger” because “there d[id] not appear to be that clear and present danger of imminent violence which might warrant interfering with speech which does not contain any direct incitement to violence.” In so holding, the FCC indicated that it might take action to censor a political advertisement that calls for violence and presents a clear and present danger of violence. This holding suggests, therefore, that a station might be justified in refusing to run such an advertisement.

Aborted-fetus advertisements, however, do not incite violence, nor does there appear to exist a danger that their broadcast will trigger an eruption of violence. Their damage is limited, instead, to the possibility of causing hysteria in children and causing severe emotional distress, neither of which would be sufficiently harmful under *Brandenburg* to justify limiting their broadcast.

Misleading political advertisements may constitute a second possible exception to section 315. A frequent criticism of aborted-fetus advertisements is that they are misleading. For example, Janet Benshoof, of the Center for Reproductive Law and Policy, has argued that candidates often “take a one-inch fetus and blow it up across a 25-inch television screen and imply that that’s really what is being aborted in America.” Others have criticized candi-

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*44* 36 FCC2d 635 (1972). In this case, the FCC considered the following political advertisement:

I am J.B. Stoner. I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrell’s civil rights law. Gambrell’s law takes jobs from us whites and gives those jobs to the niggers. The main reason why niggers want integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and niggers too. Vote white. This time vote your convictions by voting white racist J.B. Stoner into the run-off election for U.S. Senator.

Id at 636.

*45* Id at 637.

*46* *Nightline* (cited in note 1).

*47* Mark van Louks, a former Vice President of United Cable Television, is suing Colorado senatorial candidate Matt Noah for intentional infliction of emotional distress caused by Noah’s aborted-fetus advertisements: “To me, this issue has very little to do with the abortion issue. It has to do with what should or shouldn’t be shown on television. This stuff has a clear and present danger of inflicting harm on my kids and other children in this community.” Id.

*48* Id.
dates for featuring fetuses aborted during the third trimester, although such abortions are rare. Pro-life candidates counter, however, that such advertisements merely illustrate that aborted fetuses are children.

Political aborted-fetus advertisements, however, should not be censored because of their potentially misleading nature for several reasons. First, most political advertisements are misleading to some extent, and indeed some are clearly untrue. Second, there exists no congressional mandate analogous to section 1464 that prohibits the broadcast of misleading advertisements. Third, identifying misleading advertisements would require stations to conduct a factual inquiry into the claims made by the candidate and to rectify any mistakes, a process made difficult by the time constraints of a political campaign. Finally, in light of the Supreme Court's rejection of station censorship of libelous material in Farmers Educational, it is unlikely that the Court would allow stations to censor merely misleading political advertisements. Such inaccuracies would best be left for opponents to counter.

Sham-candidate advertisements could constitute a third possible exception to section 315. Arguably, aborted-fetus advertisements need not be shown at all when they are produced by sham candidates who have no right to reasonable access under section 312(a)(7). Evidence suggests that sections 312(a)(7) and 315 have been abused by individuals who become candidates solely to force stations to run their advertisements. For example, several of the candidates who ran aborted-fetus advertisements may have entered the political race solely to get images of aborted fetuses on the air. Where the mandatory-access requirement of section 312(a)(7) does not apply, television stations, in order to avoid of-
fending their viewing public, routinely reject aborted-fetus advertisements promoted by pro-life organizations.\textsuperscript{72}

Although some individuals might abuse the system by becoming candidates solely to get their political message on the air,\textsuperscript{73} such misuse of the campaign laws does not provide a sufficient basis for restricting the broadcast of aborted-fetus advertisements. Distinguishing between actual candidates and sham candidates would be extremely difficult. Additionally, even sham candidates would undoubtedly serve if elected. Most importantly, however, section 312(a)(7) provides reasonable access for "legally qualified candidates." In order to be "legally qualified" under the Commission's rules, a candidate must: (a) be eligible under law to hold the office he seeks; (b) announce his candidacy; and (c) qualify for a place on the ballot or be eligible under law for election as a write-in candidate.\textsuperscript{74} Accordingly, under section 312(a)(7), even sham candidates could properly qualify for access to broadcasting time. Thus, sham candidacy is irrelevant under sections 312(a)(7) and 315. Even if some pro-life candidates for federal office enter a campaign solely to get aborted-fetus advertisements broadcast, they could not be censored for that reason.

\textbf{III. PROPOSALS FOR REFORM}

Sections 312(a)(7) and 315, as currently construed, are too absolute because they allow children to be exposed to harmful material during the day simply because the material is contained in political advertisements. When political advertisements contain images or language that is harmful to children, stations should not be required to broadcast them under section 315. Indeed, images of aborted fetuses may affect children more deeply than many things

\textsuperscript{72} Id. Indiana congressional candidate Michael Bailey first conceived of getting pictures of aborted fetuses on the air by means of being a political candidate. Bailey explains: "I was reading the law, the reasonable access law, that said if you are a federal candidate and you run for high office in America, your television ads, by law, cannot be censored, they must be aired during prime time, and they must be aired for the lowest political rate. And I went, 'Eureka, praise God, there's a way to get the truth on television.'" Id. See also Whitford, Atlanta J and Const at A1 (cited in note 3).

\textsuperscript{73} An extreme example would be a "sham" candidate who runs for office not to gain television coverage of his political views, but rather to get inexpensive, prime-time commercial advertising. Section 315 requires that legally qualified candidates be sold air time at the lowest unit charge during prime time. Thus, a company could run a candidate on, for example, the Wonderbread platform, with the candidate merely extolling the virtues of Wonderbread.

that are currently considered indecent. The following proposals for reform recognize that aborted-fetus advertisements should not be broadcast in an entirely unrestricted manner. The proposals could be adopted separately or in conjunction with one another.

A. Amend Section 315

Congress has made clear that it would like to make the broadcast media better for children. It has sought to eliminate inappropriate material from the airwaves. Not only has Congress made the broadcast of obscene or indecent material illegal under section 1464, but it has also enacted the Helms Adult Radio Act, which prohibits the broadcast of indecent material 24-hours a day. Moreover, Congress recently passed the Television Program Improvement Act of 1990, which exempts from the antitrust laws any stations that engage in discussions on curbing excessive violence. Additionally, Congress has directed the FCC to monitor the public interest when making licensing decisions.

Congressional efforts to protect children are undermined by political candidates who choose to air advertisements that are harmful to children. Congress should amend section 315 to allow broadcasters to refuse to broadcast a political advertisement that

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75 For instance, five-year-old Sean Meyer became hysterical when Indiana congressional candidate Michael Bailey's graphic abortion advertisement was aired during an afternoon game show. Sean's father, Kert Meyer, explained: "Part of the trauma was the fact that he had a newborn sister who, I think, he immediately, you know, transferred, 'Well, that's going to happen to my baby sister.' He didn't know what they were talking about." His mother, Shannon Meyer, continued: "That's much too old for him. It's an adult topic, not a child topic. This shouldn't be shown when children should be watching." Nightline (cited in note 1). FCC Commissioner Andrew C. Barrett "particularly ha[s] concern about the impact these graphic images might have on children in the broadcast audience. . . . [T]hese images could cause far more damage to the psychological well-being of the child audience than any of the programming the Commission to date has found to be indecent." Andrew C. Barrett, Commissioner Barrett Issues Statement on Declaratory Ruling Concerning Reasonable Access, 1992 FCC LEXIS 6300, *2 (Nov 6, 1992).

76 Helms Adult Radio Amendment, Pub L No 100-459, 102 Stat 2186 (1988). The Amendment provided: "By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with § 1464, title 18, United States Code, to enforce the provisions of such section on a 24-hour per day basis." The FCC stated that it would enforce 18 USC § 1464 on a 24-hour basis beginning on January 27, 1988. In the Matter of Enforcement of Prohibitions Against Broadcast Obscenity and Indecency In 18 USC § 1464, 4 FCC Rec 457 (1988). The D.C. Circuit, however, held that a 24-hour ban on the broadcast of indecent material would be unconstitutional and that there must be a safe-harbor period during the night during which stations could broadcast indecent material. See note 22.

77 47 USC § 303(c) (1991).

78 The FCC makes its licensing decisions in accordance with 47 USC § 309.
is either indecent or excessively violent. Such a change would not significantly undermine the purposes of section 315; rather, it would merely encourage political candidates to find less harmful ways to express their views. While such a change would impose some restrictions on a candidate’s ability to disseminate his beliefs, this interest is clearly outweighed by the harm to children that this amendment seeks to prevent.

Even if Congress does not amend section 315, the FCC might be able to achieve the same result. Section 315(d) instructs the FCC to “prescribe appropriate rules and regulations to carry out the provisions of this section.” Until now, the FCC’s rules and regulations have not discussed the no-censorship aspect of section 315, and have instead limited dialogue to the equal-time and lowest-unit-charge provisions of section 315. The FCC may be able to amend its rules and regulations to include guidelines for determining when the reasonable-access and no-censorship provisions should be overridden by conflicting considerations. This is a particularly strong argument when conflicting congressional mandates must be enforced by the FCC, as in the case of obscenity and indecency, on the one hand, and no-censorship on the other. This course would curb the broadcast of inappropriate political advertisements and would probably effect change more quickly than congressional action.

B. Expand the Definition of “Indecency”

The FCC’s current “indecency” definition, which encompasses only those materials portraying sexual organs, sexual acts, profanity, and excrement, is too limited because it does not include other materials that are offensive to adults and harmful to children. Pacifica allows the FCC to regulate the broadcast of indecent material in order to protect people from being confronted with offensive material in their homes and to protect children from exposure to harmful material. Neither of these reasons justifies restricting the definition of “indecent” material to only those materials that are sexual or excretory in nature. Rather, under Pacifica’s reasoning, the FCC should adopt a more expansive understanding of “indecency.”

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81 Pacifica, 438 US at 748-49.
One way to expand the "indecency" definition would be to include particularly violent material within those materials that are considered "indecent." Society generally agrees that children should not be exposed to too much violence on television. Because low-level violence is not clearly damaging, such material can be monitored by conscientious parents. Excessive violence, however, should be off-limits to children altogether. This approach has been adopted by the Motion Picture Association of America in its movie-rating system. The ratings, G, PG, PG-13, R, and NC-17, are designed to help parents assess whether their children are sufficiently mature to watch a particular movie. For more violent or sexual movies, however, children are not admitted into the theater without an adult, or are not admitted at all.

The FCC should also expand its definition of indecency to include graphic images of dismembered and disfigured human bodies, including recognizably human fetuses. Close-up images of decapitated, dismembered, and disfigured human bodies may invade privacy interests and be as, or more, harmful to children as the word "shit" or many other things that are currently considered indecent. Indeed, the offensive nature of gory images of aborted fetuses is evidenced by the large number of complaints television stations have received after airing graphic abortion advertisements. The FCC should therefore expand its indecency definition to encompass particularly violent material, including graphic images of dismembered and disfigured human bodies and fetuses.

C. Allow Stations to Channel Political Advertisements

The threat that aborted-fetus advertisements pose to young children may be prevented in part by allowing stations to channel all political advertisements away from certain children's shows, a practice that may be permissible under current law. The FCC should clarify that this is an acceptable way for stations to deal with advertisements that they deem inappropriate for young children and encourage stations to adopt this strategy.

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88 "Shit" is one of George Carlin's "seven dirty words" labeled "indecent" in *Pacifica*. Id at 752.

89 See notes 7-8 and accompanying text. Precisely because the visual images are disgusting and gory, many people, regardless of whether they are pro-life or pro-choice, are offended when they see graphic aborted-fetus advertisements on television. In addition, many people do not want their children to see such images. Children could be both disturbed and scared by seeing disfigured dead fetuses on television.
Stations may refuse to broadcast all political advertisements during certain television programs. For example, stations can bar all political advertisements from news programs because of the danger that viewers could interpret such advertisements as news and thus get a distorted understanding of the news.\textsuperscript{84} Stations may also refuse to run all political advertisements during specials, because they would be unable to provide equal access to all candidates given the unique time constraints.\textsuperscript{85} Stations may not, however, ban all political advertisements from prime time or from whole dayparts.\textsuperscript{86}

Under current law, stations may be able to bar all political advertisements from certain children’s programs.\textsuperscript{87} The FCC has not specifically considered whether stations may adopt this course for children’s programs, but has indicated that stations may not alter the scheduling of political advertisements when they find such advertisements to be unsuitable for children.\textsuperscript{88} This admonition, however, may be understood as holding only that stations cannot deal individually with advertisements that they deem inappropriate for children. The FCC has therefore not foreclosed the possibility that a station could ban all political advertisements from certain shows such as children’s programming.

The Supreme Court’s decision in \textit{CBS, Inc. v FCC,}\textsuperscript{89} likewise, does not preclude the banning of all political advertisements from children’s shows. The Court, in \textit{CBS}, prohibited stations from adopting “blanket rules” to govern the broadcast of political advertisements.\textsuperscript{90} In so holding, \textit{CBS} rejected a requirement that all political advertisements be five minutes long because “[a] broadcaster’s ‘evenhanded’ response of granting only time spots of a fixed duration to candidates may be ‘unreasonable’ where a particular candidate desires less time for an advertisement or a longer format to discuss substantive issues.”\textsuperscript{91} The blanket rules prohi-
bited by CBS, however, may be limited to format restrictions on political advertisements and may not extend to bans on all advertisements from certain shows.

Channelling all political advertisements away from certain children's shows is less troubling than simply channelling some of them. Channelling all political advertisements away from children's shows would have little negative impact on section 312(a)(7)'s reasonable-access requirements, because it would not disproportionately affect a candidate's ability to target the voting public, which does not include children. Moreover, such a measure would not require stations to preview the political advertisements to make an independent determination that they are inappropriate for children, a practice which would violate section 315. Additionally, such a rule would not disadvantage any one candidate more than another, because the rule would apply to all political advertising, not just to those advertisements that a station deems inappropriate for children.

**CONCLUSION**

Graphic aborted-fetus advertisements are not appropriate for young children to see. Section 315, however, requires that stations broadcast uncensored candidate political advertisements depicting aborted fetuses. As such, aborted-fetus advertisements reveal a shortcoming in section 315.

Congress should amend section 315 to create an exception for political advertisements that are offensive and inappropriate for children, and the FCC should issue new guidelines along the same lines. This would, at a minimum, ensure that stations could censor

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82 Irv Gastfreund, the attorney who represented broadcast stations in their attempt to get aborted-fetus advertisements labelled as indecent, questions, "[W]hat legitimate purpose is being served in connection with furthering a candidate's campaign to make sure that these kinds of very graphic depictions of aborted dead fetuses are targeted specifically at children?" *Nightline* (cited in note 1). Such a ban on political advertisements during children's shows, however, could affect a candidate's ability to wean young audiences toward a particular political stand. Indeed, some candidates may have tried to target child audiences in order to convert them to the pro-life position.

83 Professor Cass Sunstein argues that some neutral speech regulations may in fact be viewpoint-based, in effect or in design. Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U Chi Legal F 25. Under this Comment's proposed reforms, candidates who run aborted-fetus advertisements will be affected more than candidates who do not. However, the proposals focus on harm to children, not the views of the candidates. The harm prevented clearly outweighs the limited restriction on speech in the aborted-fetus advertisement context. Of course, any reform enacted to silence pro-life candidates rather than to protect children would be illegitimate.
obscene and indecent political advertisements without facing sanctions for doing so. The FCC should also expand its definition of what is indecent to include graphic images of dismembered and disfigured human bodies. In addition, the FCC should encourage stations to restrict all political advertisements from television shows watched primarily by very young children, because such a regulation would protect children without seriously infringing the right of political candidates to control their own campaigns.