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# Perspectives

## on current developments

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### Obscenity, Indecency, and the FCC

Is there a difference between “obscene” and “indecent” material? If so, should “indecent” broadcasts be subject to censure like those that are “obscene”?

In July 1978, in *Federal Communications Commission v. Pacifica Foundation*, the Supreme Court voted five to four to uphold the FCC’s censure of a radio station for the intentional daytime broadcast of seven “filthy words.” In doing so, the Court held for the first time that the FCC can restrict radio broadcasts that, like the “filthy words,” are merely “indecent” rather than “obscene.”

The circumstances of the broadcast are important for understanding the Court’s decision. On a weekday afternoon in October 1973, as part of a general discussion on contemporary society’s attitude toward language, New York radio station WBAI broadcast a satiric monologue by comedian George Carlin, who continually repeated seven “filthy words.” Immediately beforehand, WBAI had warned listeners that the monologue contained “sensitive language which might be regarded as offensive to some.” A few weeks later, the FCC received a complaint from a man who stated that he had heard the broadcast while driving with his young son. In February 1975, the FCC issued a declaratory order allowing the complaint to be associated with WBAI’s license file and holding that Pacifica, WBAI’s parent network, “could have been the subject of administrative sanctions.” The commission imposed no formal sanctions on WBAI, but stated that if it received subsequent complaints, it would “then decide whether it should utilize any of the available sanctions it has been granted by Congress.”

In a memorandum opinion accompanying the order, the FCC tried to clarify the general standards it would use in judging whether and in what circumstances language would, like the Carlin monologue, be considered “indecent.”

In the words of the opinion, “the concept of ‘indecent’ is intimately connected with exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, at times of the day when there is a reasonable risk that children may be in the audience.” The commission distinguished “indecent” language—which has at least some constitutional protection—from constitutionally unprotected “obscene” language on the grounds that the former (1) is not directed to the prurient interest and (2) may have literary, artistic, political, or scientific value that varies according to the maturity of the audience—value that *is* redeeming for adult audiences but *is not* redeeming when children are present.

The Supreme Court ruled that the FCC’s action did not constitute “censorship” and that the FCC is justified in penalizing license holders not only for obscene broadcasts but also for certain types of nonobscene broadcasts. The Court determined that the anti-censorship provision in the Communications Act of 1934 touches only on prior restraint: although the FCC cannot forbid license holders from broadcasting whatever they wish, it *can* impose after-the-fact sanctions (such as a fine or nonrenewal of a license) on them. Additionally, the Court broadly interpreted the statutory provision that makes it a criminal offense to broadcast “obscene, indecent, or profane” language. The Court had recently determined that comparable language in laws restricting morally objectionable material in the mails and interstate transportation must be read narrowly, so as to prohibit only patently offensive “hard-core” matter. But in the *Pacifica* decision, the Court upheld the FCC’s authority to censure broadcasts of certain materials that enjoy constitutional protection off the airwaves.

In explaining why the FCC’s action did not violate the First Amendment, the Court stressed

that the commission censured the Carlin monologue for its deliberate and repetitive use of offensive language rather than for the ideas it contained. Furthermore, the Court offered two reasons for giving "indecent" matter less protection on the airwaves than elsewhere. First, individuals may have great difficulty protecting themselves from exposure to offensive broadcasts, insofar as "the broadcast media have a uniquely pervasive presence in the lives of all Americans" and it is easy for unsuspecting listeners to tune in during an offensive broadcast and thereby to miss any warnings that may have been presented. Second, the government has a substantial interest in defending parents' discretion to protect their children from indecent materials, and unsupervised children may often gain access to them if they are broadcast during the day.

In a speech seeking to allay fears of an upcoming "clampdown," FCC Chairman Charles Ferris stated, "I do not want that case to lead to timidity in [broadcasters'] coverage of controversial subjects." He said the circumstances that characterized WBAI's broadcast are "about as likely to occur again as Halley's Comet," and cited the commission's July 1978 decision to renew the license of Boston's WGBH-TV as a demonstration of FCC restraint in handling complaints of "indecentcy." (Condoning WGBH's airing of two "dirty words" after 11:00 P.M., the FCC said that broadcasters may assume an adults-only audience at late hours. It also said that a single "dirty word"—as broadcast by WGBH in a 5:30 P.M. dramatic presentation—would be distinguished from Carlin's "concentrated and repeated assault.")

Despite these assurances, and despite several statements by the Court emphasizing the narrowness of its holding, some observers fear the Court's decision will have a chilling effect on broadcasters, especially since stations must appear before the FCC every three years for renewal of their licenses. In at least one instance (*Palmetto Broadcasting Co.*, 1962) the commission has denied license renewal because of "vulgar, suggestive materials susceptible of double meanings with indecent connotations." The FCC has usually relied on less drastic sanctions (for example, conditional or short-term renewals, fines, and cease-and-desist orders), but even the commission's common practice of forwarding listeners' complaints to stations and re-

questing an explanation can constitute an un-subtle form of pressure—especially when the request is accompanied by a reminder that the complaints will be available for review at the next license-renewal proceeding.

Since the commission's sanctions commonly are minor enough that stations have little incentive to go through the costly process of seeking judicial review, the FCC by default will often have the last word on the "accepted standard of morality." This prospect raises the question whether the seven-member commission is qualified to set such a standard in a nation as heterogeneous as ours. Raising this question in a 1970 dissent, former FCC Commissioner Nicholas Johnson stated that "what the Commission condemns today are not words, but a culture. Indeed, one may wonder whether any panel, regardless of size or composition, can ever be truly qualified to dictate national norms of morality for broadcasting.

The Court's *Pacifica* decision skirted some crucial questions about the way the FCC should exercise its authority to limit "indecent" broadcasting. During what hours is the number of children in the audience sufficiently small to allow the presentation of potentially offensive programs, and do these hours vary by size of community or by type of station? At what age should a child be protected from "indecent" material—need a seventeen-year-old and a seven-year-old be protected to the same extent? In trying to define and apply community standards of morality, should the FCC focus on local norms, regional norms, or national norms?

For its part, the FCC has determined not to pursue formal rulemaking procedures that might help resolve these uncertainties; it will provide further guidance only through case-by-case adjudication.

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### **If You Believe in Peanut Butter, Read This—**

Since the turn of the century, when two physicians first made a paste of roasted peanuts and salt for their constipated patients, peanut butter has been a commercial success—in fact, 24 million pounds were sold by domestic manufacturers last year. Sales have risen impressively over the years, presumably as a result of recipe changes that have improved the con-

sistency, oil suspension, and spreadability of the product.

But some of the recipe changes have aroused controversy about peanut butter's purity. Nearly two decades ago a Food and Drug Administration inspector learned that a popular brand contained less than 75 percent peanuts and included hydrogenated (hardened) vegetable oils, artificial flavors, and sweeteners. Manufacturers of other brands apparently were also adding vitamins, chemical preservatives, and artificial coloring. In 1959, prompted by the conflict between this information and the popular faith in the integrity of "peanut butter made from peanuts," the FDA proposed a "Definition and Standard of Identity for Peanut Butter," which specified acceptable non-peanut additives and limited them to 5 percent of the finished product.

Enacting and enforcing these guidelines proved to be a sticky business. Between 1959 and 1971, the guidelines encountered continual legal challenges from the peanut butter industry and underwent six revisions and five months of bitter hearings. The 1959 proposal, established as a standard in 1961, was stayed in 1962 following objections from peanut butter manufacturers and trade unions. After a survey of manufacturers and after chemical analyses of various peanut butter samples, the FDA's Division of Food Investigation recommended that the allowable proportion of non-peanut additives in the product be increased from 5 to 10 percent—in other words, that the minimum proportion of peanuts be reduced to 90 percent. In 1965, 90 percent became the new standard, only to be stayed later that year after further objections and requests for a public hearing.

That hearing—now preserved in nearly 8,000 pages of transcript—reputedly received more publicity than any previous FDA hearing. Newspaper reports, consumer memos, and a *Federal Register* notice inviting written comments ("preferably in quintuplicate") attracted numerous letters from consumers responding to the proposal. Most of these letters commended the FDA "for trying to safeguard the value of peanut butter," or requested "that standards be maintained and additives clearly labeled." On the other hand, some lambasted the FDA—for example, as "an apparently over-staffed agency full of a bunch of nincompoops."

Unfortunately, few letters directly addressed the questions at issue: Which nonpeanut additives should be approved? What proportion of additives should be allowed in any product labeled "peanut butter"? And should the oil content be limited?

Industry attorneys tried mightily to exclude consumer opinion from the hearing process. Seeking to keep consumer letters out of the evidentiary record, they challenged the authenticity of the letters ("I don't know whether the same person wrote them all"). Attempting to bar consumer witnesses from testifying, they disputed consumers' expertise ("a lot of this will be highly technical"). Their arguments were somewhat deflated when confronted with the logic of a Federation of Homemakers spokeswoman: "We consider peanut butter a product that everyone understands. . . . There may be foods you can make complicated, but peanut butter which is eaten by children should not be made complicated." In response, the attorneys petitioned to exclude the Federation of Homemakers from the rest of the hearings and, failing that, sought to have the hearing examiner disqualified for partiality.

Amidst this tactical maneuvering, the Peanut Butter Manufacturers Association argued that it was not yet time to standardize a product still being perfected. The association contended that flexibility to make future improvements would protect consumer interests by protecting free choice. The Federation of Homemakers responded that peanut butter containing a high proportion of additives and a low proportion of peanuts should, in fairness to the unsuspecting consumer, be labeled "peanut spread" or "imitation peanut butter."

As the manufacturers began to realize that some standard would almost inevitably be enacted, the debate shifted to percentages. Decrying the 90 percent FDA standard as "unreasonable," the attorney for a major manufacturer presented consumer survey and industry data showing that an 87 percent standard would be far more likely to promote honesty and fair dealing in the interest of consumers. (Lest this industry stance appear arbitrary, it is important to note that several of the leading brands of peanut butter then contained 87 percent peanuts.)

From the prehearing conference (when industry counsel argued that their witnesses

would not be able to appear until after election day—"Are you going to deprive my witnesses of their franchise?") until the last minutes of the sixty-second day of hearings (when more time for briefing was demanded), industry attorneys pressed for delays. In questioning government witnesses, they behaved as though the hearings were a criminal proceeding. An organic chemist, brought in "merely to give a background and history" of the subject, briefly mentioned several cookbook recipes as examples of acceptable composition and home use of peanut butter. Cross-examination, lasting a full day, included such queries as: "Who instructed you to examine cookbooks?", and "Can you give us the names and dates of all the cookbooks you looked at?" Later, complaining about vague questioning by the government attorney, an industry lawyer remarked, "I will have to object to the next question unless he ties it to a time." Perhaps a bit exasperated, the hearing examiner asked, "Are we reaching the point where objections are entered to questions that have not been asked yet?"

A tentative standard issued in 1967 lasted less than four months before facing petitions for judicial review. Finally, in 1970 the Supreme Court cleared the way for a final regulation by refusing to reconsider a lower court ruling that had upheld the 1967 standard. The FDA's final standard, issued in 1971, (1) required that all mixtures labeled "peanut butter" contain at least 90 percent peanut product, (2) prohibited artificial flavorings, artificial sweeteners, artificial colorings, and artificially added vitamins, and (3) required "clear and honest" labeling.

Nonetheless, questions about the wholesomeness of peanut butter have by no means been resolved. A 1963 study found that rats who are fed peanut meal develop liver cancer. The cancer was subsequently traced to some common food molds (found on peanuts, corn, and other crops) that produce carcinogenic substances called aflatoxins. Since these substances can be found at any stage in the process of growing, harvesting, and storing peanuts, removing them *entirely* from peanut butter would be prohibitively expensive.

Weighing the hazards of aflatoxins against the cost of removing them, the FDA in 1969 established a legal ceiling for aflatoxins in peanut butter and affected commodities at 20 ppb (parts per billion). In 1974, the FDA proposed

a still lower ceiling of 15 ppb, admitting that "for complete protection aflatoxins should be eliminated from food." After a period of public comment that ended in 1975, the FDA decided to postpone final adoption of the proposed ceiling until it could conduct a study quantifying the risks that aflatoxins in peanuts impose on humans. In January 1978, the agency made its risk analysis available for comment. The Peanut Butter Manufacturers and Nut Salters Association (the trade association's new name) requested additional time for comment, and soon afterward announced its conclusion that the 15 ppb standard is unjustifiably stringent. (Interestingly, 93 percent of the peanut butter sampled in a 1974 FDA survey would have met that standard.)

It does not take the memory of an elephant to detect a pattern developing here—perhaps something akin to a circus?

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## HEW and DOT Confront Discrimination against the Handicapped

Few pieces of recent federal legislation have promised so much, met with so much controversy, or suffered so much delay in being carried out as the Rehabilitation Act of 1973. To a large degree, the controversy and delay have stemmed from the breadth of the act's promises and from questions about the costs of their fulfillment. Section 504 of the act requires that

no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Along with other significant provisions of the act, this section buoyed the hopes and expectations of the nation's 13 million handicapped adults and 8 million handicapped children—not to mention their families and friends. As usual, the difficult task of fulfilling congressional promises fell squarely on the regulatory agencies responsible for carrying them out—in this case primarily the Department of Health, Education, and Welfare and the Department of Transportation.

## In Brief-

### ICC Chairman Gets "Weight Bump."

Since the rate paid for a household move depends on the net weight of the truck, one way for unscrupulous truckers to bilk unsuspecting consumers is to certify that the truck's contents weigh more than they actually do. This is called getting a "weight bump."

To check how easy it is to get a weight bump, last May Interstate Commerce Commission Chairman A. Daniel O'Neal, his director of enforcement, and one of his chief enforcement officers dressed as interstate movers, rented a truck, drove into a weigh station in Alexandria, Virginia, and asked for a weight bump. Not only did they get it—at no cost—but the weightmaster even counted the burly (250 lb.) director of enforcement who had remained in the cab!

**Air Fares Deregulated—CAB To Be Abolished.** On October 24, President Carter signed the Airline Deregulation Act of 1978, after it had been passed by overwhelming majorities of both houses of Congress. Among other things, the act allows domestic airlines to raise fares by 5 per-

cent or lower them by 50 percent without approval by the Civil Aeronautics Board, allows new carriers to enter the business with only a showing that they are "fit, willing and able" to provide service, and allows existing carriers to enter new markets with little regulatory interference. Also, the CAB is slated to be abolished in 1985 and its remaining functions transferred to other agencies.

With respect to fares, the act in a sense "legitimizes" the major thrust of an action taken by the CAB on September 5. In that action, the board granted the airlines virtually unconditional approval to raise fares by as much as 10 percent or reduce them by as much as 70 percent. Thus, the board's new policy is even more liberal than the act requires.

**OSHA Must Do Benefit/Cost Analyses.** In a far-reaching decision, the U.S. Court of Appeals of the Fifth Circuit ruled on October 5 that the Occupational Safety and Health Administration must perform a benefit/cost analysis before issuing substantial health regulations. The ruling was handed down in a suit brought against OSHA's proposed benzene standard (see *Regulation*, November/December 1977). In the past, OSHA has maintained that

benefit/cost analyses of health regulations (1) are impossible to do and (2) are neither required by statute nor relevant to its decisions.

Said the court: "OSHA's failure to provide an estimate of expected benefits for reducing the permissible exposure limit, supported by substantial evidence, makes it impossible to assess the reasonableness of the relationship between expected costs and benefits. This failure means that the required support is lacking to show reasonable necessity for the standard promulgated. Consequently, the reduction of the permissible exposure limit from 10 ppm to 1 ppm and all other parts of the standard geared to the 1 ppm level must be set aside."

### Until Mechanical Pepper Pickers Are Perfected. . .

The price of pre-mashed Mexican hot red peppers may not be a top inflation worry for most Americans, but it has ignited fiery concern at McIlhenny Company, manufacturer of Tabasco sauce. Complaining about shortages of U.S. hot red peppers, McIlhenny requested Congress to suspend the tariff on peppers imported from Mexico. (The company reportedly has been paying about \$20,000 a year in duties on 300,000 pounds of Mexican peppers.) Assuring congressmen that it is not trying to abandon

In 1977, four years after the act was passed, HEW finally translated the act into regulations for educational institutions, public service agencies, and firms that receive HEW funding. In January 1978, it also issued guidelines for other federal agencies to follow when preparing their own regulations under the act. HEW interpreted the act as requiring "access in the least restrictive setting"—an approach commonly called "mainstreaming"—for all handicapped people. For example, each university receiving funds from HEW must provide the necessary equipment, facilities, and staff to overcome every kind of handicap in all university-sponsored degree programs, housing, and activities.

Although alternative policies might in some cases offer greater benefits to the handicapped for the same or less cost, HEW's strict interpretation of the act precludes any approach other

than mainstreaming. Even where neighboring institutions could serve the handicapped better by pooling resources to develop special programs and facilities (for example, cooperating to make one or two of a city's four colleges well-equipped to serve the handicapped) than they could by independently mainstreaming (going it alone so that each can only afford a mediocre job of equipping itself), HEW's guidelines insist on mainstreaming. Various approaches for sharing equipment, operating consortia, or using voucher programs for the purposes of consolidating resources and thereby providing a better range of choices to the handicapped were all dismissed as not satisfying the intent of Congress.

In June 1978, to conform with the act and HEW's guidelines, the Department of Transportation proposed regulations affecting all rapid-transit systems, most buses, railroads,

U.S. peppers, McIlhenny observed that the shortage is largely due to a scarcity of American laborers to do the backbreaking picking, and pointed out that it had begun work on a mechanical pepper picker. In October, in a heroic victory for free trade, Congress rescinded the duty on Mexican peppers—or at least the pre-mashed ones.

**Update on "Border Taxes and Executive Discretion."** In June 1978, the Supreme Court handed down its final decision on *U.S. v. Zenith Radio Corporation* (for background, see *Regulation*, September/October 1977). It unanimously upheld a lower court's decision sustaining the Treasury Department's refusal to levy new tariffs on Japanese electronics equipment. Japan taxes its electronics products if they are sold in Japan but not if they are exported. Since 1970, Zenith had argued before the Treasury Department and then in court that this tax exemption constitutes a "bounty" or "grant" under the U.S. Tariff Act and that the Treasury must therefore levy an import duty of the same magnitude.

**Inflation and Vested Interests.** Waging war against inflation by taking on vested interests is tough for any political leader. For example, in an

August 14 address to the Midcontinent Farmers' Association, President Carter said: "The fight against inflation becomes nearly impossible when the pressures of special economic interest lobbyists are successful. These lobbyists care absolutely nothing about national interest—as long as they get theirs. We will never win the fight against inflation unless we help Congress to resist these pressures."

But he also felt compelled to say: "I will not permit any more expansion in beef imports this year—[applause]—I will not permit unrestricted beef imports next year—[applause]—and I am strongly and permanently opposed to any price controls on meat or other farm products [applause]."

**Seat Belts and Safety in the Air.** The National Highway Traffic Safety Administration's recent decision to require air bags or other passive restraints in all new cars (through a three-year phase-in to begin in 1982) may in some sense have upstaged good old seat belts, but seat belts still have friends at the Federal Aviation Administration. As part of its comprehensive review of safety regulations, the FAA has proposed that airplane passengers be required to remain seated with their safety belts fastened at all times during

a flight. (Unbuckled passengers tend to get tossed about when a plane experiences turbulence or flight-control malfunctions.) Fortunately, there is an important exception: passengers may leave their seats to meet "physiological needs."

**Competitively Speaking.** If you frequently ship household goods, how do you reduce transit time by 5 percent, increase the proportion of "on-time" deliveries from 57 percent to 88 percent, raise small businesses' share of the total business from 23 to 35 percent, and in the process save taxpayers \$34 million? Easy. You introduce competitive bidding. At least that is how the Department of Defense has achieved these results since 1975 for shipments between the United States and a limited number of foreign destinations.

Because the program has been so successful, the department wants to expand it. But freight forwarders and some congressional allies recently attempted to block the expansion. Their reasoning: in competitive bidding situations, large firms undercut small movers, drive them out of business, and later raise prices. In response, Congress decided to leave the department free to expand the program abroad but explicitly made Alaska and Hawaii ineligible.

airlines, and associated facilities such as terminals and stations. In terms of 1977 dollars, DOT estimates that the total capital costs of structural alterations and other changes required by the regulations would be \$1.8 billion. Of that amount, \$1.6 billion would be for the installation of elevators and ramps in existing subway and commuter-rail stations—and three quarters of the \$1.6 million would be needed to equip existing stations in New York, Chicago, Philadelphia, and Boston. Also, DOT predicts that the regulations would raise operating costs by almost \$74 million a year.

DOT estimates that 4.3 million Americans living in urban areas suffer from impaired mobility. Of those, about 1 million people are confined to their homes and would probably benefit very little from DOT's proposed regulations. Another 1 million of the urban handicapped are confined to wheelchairs or need assistance

in traveling and therefore cannot at present use mass-transit facilities; but many of them might if the facilities were made fully accessible. About 2 million urban handicapped already use existing transit services (albeit with some difficulty) and would be very likely to benefit from improved accessibility.

If the proposed regulations benefited 3 million people—the approximate number of urbanites who have impaired mobility but are not confined to their homes—the estimated \$1.8 billion in capital costs would work out to \$600 per person helped. However, as already noted, DOT expects \$1.2 billion to be spent modifying mass-transit stations in four cities (New York, Philadelphia, Chicago, and Boston). Even if as many as one-half of all handicapped Americans live in these four cities, making mass transit fully accessible in those cities would involve capital costs of \$800 per person helped (an

amount that could certainly pay for quite a few taxi rides).

Regardless of whether the cost per person is \$600, \$800, or some other amount, the same basic question needs to be considered: could handicapped people be served more effectively and more humanely by other forms or mixes of transportation services?

DOT recognizes this to be an open question. Although its initial proposal follows HEW's strict interpretation of access and requires that the handicapped be "mainstreamed" into all federally funded transportation systems, DOT has requested suggestions on vouchers (to pay for taxi rides, for example), special buses, and other alternatives that might give the handicapped superior mobility at a lower cost than mainstreaming. In asking for such suggestions, the department appears to be searching for ways to reduce the cost of serving handicapped people without compromising their interests.

An intense and often emotional battle is now raging over DOT's proposal. Many opponents of the proposal have contended that the compliance costs were grossly understated by DOT, would be highly inflationary, and would cause staggering budgetary deficits for transit systems in certain cities; opponents' estimates of the total capital costs range as high as \$8 billion—almost five times as large as DOT's figure. In reply, supporters of the proposal have criticized opponents' cost estimates as much too high. Many supporters have also argued that, regardless of cost, the handicapped have a *right* to use public services with the same ease as able-bodied individuals.

It is difficult to compare the effectiveness of mainstreaming with that of various alternatives because public transportation systems have so far done little to address the needs of the handicapped, and therefore only limited data are available. One of the few cities where mainstreaming has been attempted on even a small scale is Washington, D.C. Following a lawsuit, Washington's Metro installed elevators in the new subway system it has been building. Between July 1976 and June 1977, when the only subway service being provided was on a six-station 4.6-mile route, the elevators were used by fewer than six people a day. Since June 1977, Metro has added another 18 miles of routes to the system—thus making it much more accessible to the handicapped and everyone else—but

has also stopped collecting data on handicapped persons' use of the elevators, so that the degree to which the handicapped have been taking advantage of the system's improved accessibility remains unclear. Baltimore, one of the few cities that has provided the handicapped much of an alternative to mainstreaming, operates a "mobility service" which, by responding to telephone requests made forty-eight hours in advance, gives handicapped persons door-to-door service in specially designed small buses. The service carries about 150 people a day and is reputed by transit officials to cost only a fraction as much to operate as would a "mainstreamed" bus system. However, some proponents of mainstreaming contend that Baltimore's mobility service is extremely inadequate and does not even come close to making in-town travel as easy for the handicapped as it is for able-bodied individuals who can use the regular transit system. They also contend that the cost of operating a genuinely adequate door-to-door van service in major cities across the country would be about as expensive as mainstreaming.

DOT reportedly will not be ready for final adoption of its proposal—or of some alternatives—until spring 1979. Given the thorniness of the issue, DOT may be lucky if it can resolve the issue that soon.

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## Regulators and the Polls

Scholars as yet have little scientific information about the precise effects of the public's opinion of government regulation on the actions of regulators, legislators, and courts. But it seems reasonable to surmise that such opinion at least sets broad limits for both the administration of existing rules and the consideration of new rules.

Reflecting in part what was perceived to be a growing public sentiment that it should "do something" about environmental, health, and safety problems, the federal government has engineered a massive increase in the extent of regulation during the 1970s. Some view the extra measure of regulation as an unnecessary impediment to the free market and a costly burden to the consumer. Others express dissatisfaction with the performance of the agencies and demand more efficient and, in some cases,

more extensive regulation. As the debate over regulatory reform intensifies, the public's sentiments toward regulatory issues will be one of several important factors determining the outcome. The responses of the executive branch, the Congress, and even the courts will probably to some degree reflect the public's assessment of regulation and its perceptions of where change is needed.

**Perceived Need for Regulation.** Recent evidence shows that the public believes strongly in free enterprise but also favors a substantial degree of government regulation. For example, a January 1978 poll by CBS News and the *New York Times* revealed that, when asked about government regulation *in general*, 58 percent of the public agreed that government "has gone too far in regulating business and interfering with the free enterprise system," while only 31 percent disagreed. In the same poll, fewer than half believed the government should regulate the sale of allegedly dangerous food and drugs (46 percent), pornography (42 percent), or saccharin (28 percent). On the other hand, majorities favored governmental controls on workplace safety (67 percent), handguns (57 percent), and marijuana (55 percent). Moreover, the public does not believe that free-market mechanisms can solve the problem of inflation, which a majority now regards as the nation's number one problem. Although many economists insist that wage and price controls will not work, Gallup polls taken since 1968 have consistently shown pluralities in favor of such controls. A poll conducted in April 1978 showed 50 percent favoring such controls, with 39 percent opposed.

Available polling data suggest that fear of size and fear of unrestrained profit motives at least partially explain why there is so much public support for regulation. In a 1974 Harris poll, over 80 percent of those surveyed agreed that "if left alone, big business would be greedy and selfish and would make profits at the expense of the public." In a 1977 *U.S. News* poll, 72 percent of the sample expressed the belief that "monopoly is growing in the United States." These findings, especially given the connotations attached to the term "monopoly," imply that most Americans believe that business institutions are growing larger and perhaps less responsive to the public interest.

But why the seeming inconsistencies in the public's attitude toward the need for regulation? Perhaps the most plausible explanation is that members of the public oppose government regulation when they feel they can handle a problem by themselves—for example, in deciding whether to risk smoking cigarettes or whether to read pornography. But workplace safety, product safety, and environmental quality are another matter, and most people apparently feel that these are conditions over which they have no direct control. For example, they often do not have enough information to judge whether a product is safe, and they do not feel they can trust manufacturers to make things safe at the expense of profits. So they turn to the government for protection—thus using one huge entity to fight another, even though (or perhaps because) they may not have a high opinion of the leaders of either.

**Regulatory Performance.** Notwithstanding this support for governmental regulation, there is widespread unhappiness with the actual performance of regulatory agencies. In a 1977 *U.S. News* poll that cut across political, economic, and occupational lines, only 6 percent of those responding gave regulatory agencies "high" ratings in their "ability to get things done," while 53 percent gave them "average" ratings and 30 percent gave them "low." In the same poll, 42 percent disagreed that the "cost to taxpayers of regulating business is well worth it," while only 36 percent agreed.

Part of the disenchantment with regulatory performance undoubtedly flows from a recognition that, even ignoring taxes collected to run regulatory agencies, government intervention is costly. In the *U.S. News* poll, 62 percent agreed that "the more regulation there is, the less efficiently companies can operate"; only 23 percent disagreed. In an August 1978 Harris poll, a plurality of 44 percent to 32 percent agreed that "on the whole, . . . businessmen's complaints about excessive government regulation of business are . . . justified."

A more stinging criticism of regulatory agencies is that they allegedly favor the businesses they regulate over the consumers they supposedly protect. In the *U.S. News* poll, 81 percent agreed and only 8 percent disagreed that "large companies have a major influence on the government agencies regulating them."



In a 1977 Sentry poll, 46 percent agreed and only 24 percent disagreed that "on the whole, government regulation has done more to help business than to protect the consumer."

**Attitudes toward Reform.** As public disenchantment with existing programs has grown, regulatory reform has become a popular topic. Politicians and scholars alike have advanced many proposals designed to "streamline the bureaucracy" and to make regulatory agencies more responsive to the public interest. These proposals have embodied many different approaches—such as exposing the regulatory decision-making process to closer public scrutiny (through "sunshine" meetings open to the public, "freedom of information" provisions, and the like); providing government funding for consumer representation in agency proceedings; abolishing certain agencies or programs that have "outlived their usefulness" (through "sunset" laws); requiring greater use of benefit/cost analysis by regulatory agencies; and generally intensifying congressional oversight of regulatory agencies. Thus far, polls have elicited only a smattering of public opinion on such proposals, but enough data are available to suggest certain recurring themes.

In the area of social regulation, most people tend to equate "reform" with increased intervention. Although half of the respondents in a 1977 *U.S. News* poll rejected the idea that "government should require the ultimate in product safety standards, regardless of the cost to the consumer," the breakdown was close—50 percent to 40 percent. Majorities of women and of blue-collar workers favored the idea. In the same poll, 50 percent agreed and 41 percent disagreed that "having completely clean air and water is worth paying whatever higher prices and higher taxes are needed." Although many have argued that much public support for regulation of safety and the environment is based on gross underestimates of the costs of such regulation, there is no question that the public is willing to pay a great deal for protection from unsafe products and pollution.

Public support for drug regulation seems more restrained, especially when consumers are warned of possible health risks. In a 1977 *U.S. News* poll, 54 percent agreed that "the gov-

*(Continues on page 54)*

## Bruce Knight

*These verses, originally presented at a dinner honoring economist Frederick Taylor, were published in a slightly different version by the Michigan Business Review back in 1952, the second year of mandatory Korean War wage and price controls. Since that time, they have enjoyed an informal circulation in university economics departments—where, indeed, they have been used as exempla for examinations. Bruce Knight is professor emeritus at Dartmouth.*

Great Whoopla, King of Hoomhomho,  
In Privy Council deeply swore,  
Some nineteen hundred years ago,  
That Profiteering made him sore.  
"Egad, it gets my goat," he said:  
"Two bits is too darn much for bread!"

"Not only that my Kingdom cracks  
Beneath these Robber Barons' tolls:  
The Lord perceives their heartless tax  
And marks for Doom their greedy souls.  
What think ye, Gents of High Renown—  
Shall we revise this tariff down?"

The Council thought: "To buck a king  
At best were misdirected gall:  
Those prone to such a silly thing  
Were never Councilmen at all."  
Their verdict was unanimous:  
"What, ho! that sounds like sense to us."

So East and West and North and South  
The heralds rode throughout the land,  
With simple speech and ample mouth,  
That Profiteers might understand:  
"Hear ye!" they roared, with voice intense:  
"The Price of Bread is Thirteen Cents!"

"His Royal Nibs doth eke proclaim  
That whoso charges more for Bread,  
To brand his economic shame  
Shall lose his ears from off his head:  
Beware the Most Imperial Shears—  
Charge Thirteen Cents, and keep your ears!"