CELEBRITY WARDROBE MALFUNCTIONS: ECONOMIC EFFICIENCY, PROPERTY RIGHTS ASSIGNMENT, AND LIABILITY IN POPULAR CULTURE

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ABSTRACT

During the halftime show of Super Bowl XXXVIII in February of 2004, popular American entertainers Janet Jackson, P. Diddy, Nelly, Kid Rock and Justin Timberlake put on a show that many television viewers later complained was filled with "inappropriate" and "sexually explicit" content. What most were referring to was the end of the live show, when Timberlake removed of a portion of Jackson's bustier, exposing her breast to a worldwide television audience. Later in her own defense, Jackson coined the term "wardrobe malfunction" to describe what occurred during her live performance with Timberlake. The wardrobe malfunction phenomenon is now so well known in American culture that instructors in law and economics and/or intermediate microeconomics courses could integrate it into their classroom presentations, particularly in sections dealing with economic efficiency, property rights assignments, regulation and liability arrangements.

"The only thing worse than being talked about is not being talked about."

Oscar Wilde

INTRODUCTION AND BACKGROUND

During the nationally televised halftime show of Super Bowl XXXVIII in February of 2004, popular American entertainers Janet Jackson, P. Diddy, Nelly, Kid Rock and Justin Timberlake put on a show that many viewers later complained was filled with "crude," "inappropriate," "lewd," and "sexually explicit" content. That halftime show concluded with what the U.S. Federal Communications Commission (FCC) later described as ". . . Mr. Timberlake's removal of a portion of Ms. Jackson's bustier, exposing her breast to the [Columbia Broadcasting System (CBS)] camera[s] . . ." that were delivering the spectacle to hundreds of millions of viewers worldwide.[1] While the Super Bowl XXXVIII halftime show was in some ways taxing to Viacom, as explained in section 2 below, it represented a boon to popular culture and entertainment media, particularly after Jackson coined the term "wardrobe malfunction" to describe what had occurred during her performance with pop star Justin Timberlake. Although the Jackson-Timberlake episode appeared to be staged, accidental bodily exposures do occur during live entertainment television, and many in the entertainment media began to also use the term "nipple slip," or "nip slip" for short, to describe situations wherein a woman's breast or breasts become exposed accidentally. Tracking these occurrences has been akin to a cottage industry for entertainment/tabloid media such as TMZ.com, PerezHilton.com, and *Us Weekly* magazine, and for some celebrities, thus providing support for the adage often attributed to the late Oscar Wilde – "There is no such thing as bad publicity."

Further support for Wilde's quip comes from the frequency of wardrobe malfunctions. As Table 1 indicates, over a six month period in 2011 (April through September), four episodes involving three different national television networks and four very popular television shows occurred. The first, in April of 2011, involved popular actress, Eva Longoria, and *Late Night with David Letterman*, a nightly talk show airing on CBS, hosted by David Letterman. The most recent episode involves talk show host Nancy Grace and ABC's highly successful *Dancing with the Stars* series. Sandwiched between these two are episodes occurring on Fox News' *Fox and Friends* and ABC's *Good Morning America*, both morning talk shows watched by millions of television viewers.

Table 1: Wardrobe Malfunction Episodes, 2011

Celebrity	Network	Show	Date
Nancy Grace[a] *Talk Show Host*	ABC	*Dancing with the Stars*	September, 2011
Nicki Minaj[a] *Singer/Pop Star*	ABC	*Good Morning America*	August, 2011
Khloe Kardashian[a] *Reality TV Star*	Fox News	*Fox and Friends*	June, 2011
Eva Longoria[b] *Actress*	CBS	*Late Show with David Letterman*	April, 2011

[a]TMZ.com
[b]hollywoodlife.com

The wardrobe malfunction phenomenon is so well known in American culture that instructors in law and economics (or intermediate microeconomics) courses could integrate it into their classroom presentations. This phenomenon encompasses law and economics concepts such as economic efficiency, property rights assignments, regulation, and liability arrangements, which are in large part rooted in the Coasian (1960) theory of social costs – a theory that is familiar to many economics principles students – and has branched into the literature on the economics of product safety, regulation, and tort law that has spanned more than four decades

(Calabresi, 1968 and 1970; Calabresi and Malamed, 1972; Cooter, 1982; Shavell, 1984; Cooter, 1985; Posner, 1986; Landes and Posner, 1987; Kaplow and Shavell, 1996; Brooks, 2002; Polinsky and Shavell, 2010).

Law and economics textbooks, such as Cooter and Ulen (2012), include discussions of the concepts of economic efficiency, property rights assignment, and liability. In an intermediate microeconomics text with a law and economics focus that also references Cooter and Ulen (1998), Ekelund and Ault (1995) provide a number of examples to explain the role of rights assignments in promoting economic efficiency in liability law. For example, Ekelund and Ault consider liability issues related to inappropriate credit card use. If misuse occurs due to theft/loss of the credit card, liability rests with the credit card issuer. If the misuse occurs due to malfeasance on the part of friends and associates of the credit card owner, liability rests with the owner. The central idea is that the credit card issuer is in the low-cost position of preventing any and all use of a stolen or lost card, whereas the credit card's owner is in a low-cost position of preventing a friend's misuse of a borrowed credit card (Ekelund and Ault, 1995; Cooter and Ulen, 1988).

Ekelund and Ault (1995) also explain that differences in liability law between the U.S. and some European countries with regard to good-faith purchase of stolen property results in differences in resource flows, and thus different economic costs. For example, in some European countries, liability laws allow good-faith purchasers of stolen property to retain the property. This provides incentives for property owners, those with a lower cost of preventing transactions involving stolen property, to work to prevent property theft. Again, economic efficiency is promoted (Cooter and Ulen, 2012). Lastly, Ekelund and Ault (1995) also include a question for review/discussion pointing out that in most U.S. states, farmers are liable for damages if their livestock wander onto highways and are struck by vehicles. However, in some western states, motorists are liable in collisions such as these. Again, the idea for students is that in some cases farmers are in the low-cost position of preventing the collision, while in others it is the motorists who are in the low-cost position regarding collision prevention. This particular story is a twist on that in Centner and Griffin (1998), which discusses fence-in and fence-out laws, the former of which requires ranchers to pay for fences that prevent their cattle from wandering onto neighbors' property, while the latter requires ranchers' neighbors to pay for fences that prevent the ranchers' cattle from wandering onto their own property.[2] Many students, particularly those in an undergraduate course in law and economics, are familiar with the applicability of Coasian logic in these situations.[3]

The central topic of this paper can be illuminated using the history of livestock trespass laws or other historical episodes that economists find fascinating (Chadwick, 1862; Ekelund and Ault, 1995; Ekelund and Hébert, 1990; Ekelund and Price, 2012).[4] However, we would argue that the celebrity wardrobe malfunction example presented here is a timely story from American popular culture (i.e., "Americana") that is likely to be more interesting to today's economics students.[5] The next section provides additional details related to the wardrobe malfunction example so that instructors (and, perhaps, textbook authors) can integrate it into a law and economics or intermediate microeconomics course. Discussion of an alternative reality in property rights assignment and liability follows.

GOVERNMENT REGULATION OF INAPPROPRIATE TELEVISION CONTENT

It is currently a violation of federal law in the U.S. to air obscene television programming at any time of the day, or to broadcast on television indecent or profane programming outside of the “safe harbor” hours of 10:00 p.m. and 6:00 a.m. local time (http://transition.fcc.gov). The authority to enforce federal law pertaining to television programming was given by the U.S. Congress to the Federal Communications Commission (FCC), an agency that has the authority to: (1) impose civil money penalties, (2) revoke licensure, and/or (3) deny licensure renewal to violators. Assisting the FCC are the U.S. District Courts, which have the power to impose fines and/or up to two years of imprisonment for violations of federal law related to television broadcasting of inappropriate content (http://transition.fcc.gov). Administration of FCC enforcement of federal law in this area generally falls to the Consumer and Governmental Affairs Bureau (CGAB) or the FCC’s Enforcement Bureau (EB), although investigations and subsequent determinations by the FCC must originate from the general public, through informal and formal complaints submitted to various branches of the FCC.

During the first six months of 2006, the most recent data available from the FCC, there were 327,198 complaints from the general public regarding indecent/profane and/or obscene programming. These complaints involve well over 1,000 programs, with more than 800 (300) of these including television (radio) programs. These complaints resulted in seven pending liability cases, with fines and forfeitures totaling almost $4 million. In one case in December of 2004, CBS was cited for depicting a teenage orgy during an episode of its primetime drama, *Without a Trace*. This case resulted in a $32,500 financial penalty for each affiliate that failed to prevent the scene from airing, ultimately costing CBS more than $3.6 million (http://transition.fcc.gov). In response to the complaints about the aforementioned Super Bowl XXXVIII incident in 2004 involving Janet Jackson and Justin Timberlake, the FCC levied a $27,500 fine on each Viacom affiliate/station that failed to prevent the visual from reaching the airwaves. That per-station fine resulted in a $550,000 penalty for the global entertainment company (http://transition.fcc.gov).[6]

With hundreds of thousands of public complaints reaching the FCC each year, radio and television broadcasting companies always face the risk of fines and forfeitures. This risk results in significant investment in legal and public relations services, either through market contracts or vertical integration, and, possibly, in investments in technology that are capable of preventing indecent programming from ever reaching listeners and viewers. Dotinga (2004) points out that a variety of episodes of inappropriate broadcasts in radio have boosted the demand for a 40-seconds delay technology, which makes it possible for station employees to intercept inappropriate language before it hits the airwaves. Even the industry standard “7-second delay technology isn't cheap for small [radio] stations," as prices from the two main suppliers of the equipment, Symetrix and Eventide, run into the thousands of dollars (Dotinga, 2004). For television, various "blurring" technologies, or technologies that allow for insertion of pre-production video, are also necessary for use with delayed signals.[7] Clearly, the costs associated with acquiring and supporting (e.g., engineer/technician support, maintenance, etc.) these types of technologies in radio and television are substantial to many radio and television broadcasting companies.

PROPERTY RIGHTS ASSIGNMENT AND LIABILITY IN AN ALTERED REALITY

The entertainment industry's expenditures on legal services, public relations services, and technology could perhaps be avoided if the FCC's penalties for inappropriate television content were, instead, imposed on the performers. In this circumstance, celebrities have an incentive to avoid wardrobe malfunctions and similar problems during live performances. Hale (2011) offers five inexpensive solutions that would virtually eliminate wardrobe malfunctions if implemented by celebrities. Three of these solutions are given in Table 2.[8] They include (1) using toupee tape, (2) wearing a bra and (3) using safety pins.

Table 2: The Costs of Avoiding Wardrobe Malfunctions

Suggestions[a]	Cost	Retail Source
Use Toupee Tape	$5.88 (1 pack of 50 strips)	www.amazon.com
	$5.99 (1 roll)	www.sallybeauty.com
Wear a Bra	$15.88 (*Fruit of the Loom* Stretch Cotton Extreme Comfort Underwire Bra)	www.walmart.com
	$27.95 (Nike Women's Pro Compression Sports Bra)	www.amazon.com
	$30.00 (Nike Top Pro Combat Sports Bra)	www1.macys.com
	$34.50 (VSX Sexy Sport *Victoria's Secret* Sports Bra)	www.victoriassecret.com
	$42 to $50 (Body by Victoria Full Coverage Bra)	www.victoriassecret.com
Use Safety Pins	$7.99 (*Singer* Assorted Sizes, 225pk)	www.kmart.com
	$10.00 (Bohin Curved Safety Pins, 65pk)	www.walmart.com

[a]Hale (2011)

Table 2 also includes estimates of the expenditures required to implement these solutions. In every case, a small expenditure would eliminate the possibility of FCC penalties.[9]

Celebrity wardrobe malfunctions like that occurring with Nancy Grace on *Dancing with the Stars* are perhaps the most difficult to avoid. Even so, use of Hale's (2011) second suggestion (see Table 2) – "wear a bra" – could help, particularly if a brand of *sports* bra were selected. The 2011 celebrity wardrobe malfunctions of Eva Longoria and Khloe Kardashian involved the absence of a bra. When appearing on *The Late Show with David Letterman*, Longoria wore a fitted tuxedo top. In this particular case "wearing a bra" would have prevented the "malfunction" that occurred when Longoria leaned forward during her interview with Letterman. Longoria's wardrobe malfunction could have been avoided by wearing a Nike sports bra (two styles are included in Table 2 and either can be acquired through amazon.com and macys.com from $27.95-$30). However, given that Longoria would likely want to maintain her "sex appeal," use of a Nike sports bra may not be practical.[10] In that case, Victoria's Secret offers "sexier" versions of the Nike products at prices ranging from $34.50-$50. These small costs are associated with measures that a celebrity, such as Longoria or Kardashian, could take in order to avoid a wardrobe malfunction.[11] A "toupee tape" or "safety pin" solution would be even more cost effective. For example, an expenditure of $5.88-$5.99 for toupee tape, or $7.99-$10 for safety pins, could have prevented Nicki Minaj's 2011 wardrobe malfunction on ABC's *Good Morning America.*[12] Thus, in an alternate reality wherein FCC penalties for inappropriate television content, such as wardrobe malfunctions, are imposed on the celebrities instead of the broadcasting companies, the costs of avoiding wardrobe mishaps are much lower than in the current reality.

FROM JOURNAL TO CLASSROOM: SOME THOUGHTS ON PEDAGOGY

Discussion of integrating aspects of American pop culture into the economics classroom as a way to capture student's interest in the subject is quite timely, given the recent publication by Hoyt and McGoldrick (2012) of the *International Handbook of Teaching and Learning Economics*. This volume discusses the state of the field of economic education, with a significant emphasis on teaching. Of particular relevance to this essay are entries from Conway (2012), Hansen and Salemi (2012) and Buckles, Hoyt and Imazeki (2012). Conway (2012: 37) discusses the use of cases in economic instruction, noting that, according to Boehrer (1994: 4), "[a] teaching case is essentially a story, a brief account, for example, . . . [that] presents a conflict, typically the tension between alternative courses of action that bring different viewpoints, interests, and values in contention and that must be resolved by a decision." Our essay provides an example of an issue amenable to case-based instruction such as that described by Conway (2012) and made famous by the Harvard Business School.[13] Conway (2012: 42-45) adds that the case method helps student achieve higher-order mastery of economic concepts by (1) enhancing enthusiasm for learning, (2) facilitating discussion, debate and shared learning, and (3) facilitating assessment, including self-assessment.[14]

In what they refer to as "two-way talk," Hansen and Salemi (2012) discuss "how instructors can make discussion an integral part of their instructional approach." Two-way talk offers a variety of ways that students can become more actively involved in the classroom learning process, two of which represent methods that this essay can be integrated into classroom discussion. Hansen and Salemi (2012: 68) note that "two-way talk can be part of the teaching plan . . . [when i]nstructors . . . initiate questions and field responses during their lectures, a technique useful in checking on student understanding and in breaking lectures into smaller chunks." The wardrobe malfunction story offers just such a "smaller chunk" that, after getting some instruction on issues surrounding property rights, regulation and other subjects highlighted above, instructors can offer questions about and field responses to during a portion of that day's class time. A second option involves "instructors and students . . . participat[ing] in a formal discussion of some reading assignment [such as the present essay] for the purpose of gaining a deeper understanding of what the author[s are] saying and exercising their power to think." Given that an upper-level undergraduate course such as law and economics, and perhaps intermediate microeconomics, will often include a brief reading list, adding this essay to the list as a discussion item is a simple matter.

With the widespread use of large lecture halls in economics instruction, or what Buckles, Hoyt and Imazeki (2012) refer to as "the large-enrollment course" engaging to students is a common concern for instructors. As Buckles et al. (2012: 118) state,

> "[a]n increase in class size is a common cost-saving response when state budgets tighten and endowments shrink. Yet when conditions improve, classes do not necessarily return to their previous sizes. This chapter provides advice and guidance for economists who find themselves called upon to teach large introductory, intermediate or elective classes, in which creative course design, effective delivery, and self-assessment of teaching techniques become increasingly important."

Both authors of the present essay have, on many occasions, been "called upon to teach large . . . classes." That experience has led each of us to make use of novel and oftentimes timely topics in the classroom, as well as to focus some of our attention to economic education scholarship that advances this process for others (see Mixon, 2000; Mixon and Green, 2000; Mixon, 2001; Caudill and Hicks, 2005; Mixon, Salter and Withers, 2006; Box and Caudill, 2009; Mixon, 2010; Crisp and Mixon, 2012).[15] Fortunately for "large enrollment [and other] course" students around the globe, this work has, in some cases, been preceded by, and, in other cases, supported (followed) by, other economic education essays (see Boyes and Happel, 1989; Scahill, 1990; McClure and van Cott, 1995; Miller and Felton, 2002; Leahy, 2008; Dilks, Thye and Tayler, 2010; King-Adzima, 2010; Mateer and Stephenson, 2011). Buckles et al. (2012: 121) suggest that instructors in large sections facilitate exploration of diverse and compelling topics such as those listed above by "break[ing] a typical lecture into short segments of between 8- and 15-minute segments, separated by a variety of activities . . . [which] might include simply telling a story, giving an example, or asking a question."

If this approach is implemented, Buckles et al. (2012: 121) add that "an engagement trigger" – which is anything "that captures student attention, helps to engage students in the classroom experience, and initiates an effective interactive lecture segment" – be employed to facilitate segment change. Buckles et al. (2012: 121) state that "[g]ood options for triggers are things that have evocative visual and audio appeal and that might be of unique to students, such as . . . textual passages read aloud or displayed in some way, and clips from the news . . . or television." As pointed out above, altered photographs of the various wardrobe malfunctions are easily located in the internet, as are news clips (see youtube.com) and other video feeds. These, along with portions of this essay, can be visually displayed in large lecture hall classes. Of course, instructors should take care to preview the photos and/or videos before class, as suggested by Mateer and Stephenson (2011: 29), in order to ensure that they have been sufficiently altered to prevent displaying the temporary, partial nudity that these episodes entail.[16]

Each of the pedagogical approaches described above, which are included in the recently-published *International Handbook of Teaching and Learning Economics*, provides economics instructors with a larger toolbox for reaching economics students at all levels in the educational process. Our essay, which builds on the growing tradition in economic education of providing both unique and timely topics for classroom discussion, is amenable, in some way, to employing each of the above approaches, as are the myriad other essays cited in this section. The only additional ingredient needed is the "interest in . . . teaching" that Becker (2004) describes so eloquently.

CONCLUDING COMMENTS

As intermediate microeconomics and law and economics texts point out, different property rights assignments lead to different incentives and different outcomes on the economic efficiency front. This note reviews many such situations, from property rights assignments and liability arrangements involving the use and misuse of credit cards, the good-faith purchase of stolen items, collisions between automobiles and livestock, and even the transportation of British prisoners to Australia during the 1800s. We also provide a more contemporary, steeped-in-Americana, example from popular culture, often referred to as a "wardrobe malfunction," that is arguably more appealing to today's students of economics.

Dating back to Super Bowl XXXVIII in 2004, wardrobe malfunctions have led to an explosion of tabloid chatter along with a spike in viewer complaints of inappropriate behavior to the Federal Communications Commission. Since 2004, a veritable cottage industry has developed around commercializing these episodes, so that most students of economics are familiar with them. As such, they offer a simple, familiar illustration that the economic costs of achieving a desired outcome depend critically on the liability assignment.

AUTHORS' NOTE

The authors thank an anonymous referee of this journal for helpful comments on an earlier version of this article. Any errors are our own.

ENDNOTES

1. The quotes are contained in the FCC's official report on the incident (http://transition.fcc.gov). Appropriately altered photos of Jackson's wardrobe malfunction are easily located on the Internet.
2. Holderness (1989) adds to the traditional cattle trespass story by examining the effects of entry into the industry that is represented by the Coasian party to which the property right has been awarded.
3. Vogel (1987: 161) states that "[t]here is probably no instance in American legal history that better approximates the conditions of the Coase theorem . . . than the example of cattle trespass. There is also probably no example of cattle trespass law more suitable for an analysis of the predictive power of the Coase theorem than the situation that emerged in nineteenth-century California." Vogel (1987) provides a history of cattle trespass legislation during the last half of the nineteenth century in California.
4. Ekelund and Hébert (1990) provide details of the policymaking efforts of Edwin Chadwick, who advised the British government that *ex post* payments to ship captains who transported British prisoners to Australia during the 1800s would result in lower in-voyage mortality rates than would *ex ante* payments. The example of Chadwick's policymaking efforts has also been used to discuss the efficacy of congressional term limitations in the U.S. Congress (Mixon, 1996). A recently-published volume by Ekelund and Price (2012) offers a more in-depth analysis of Chadwick's understanding of economic incentives.
5. As Becker (2004: 5) writes, "[t]hroughout the world, economists have observed student lack of interest in pursuing the study of economics. Characteristically, the trend in the proportion of U.S. bachelor's degrees awarded in economics has been negative since the 1950s, with a steep decline following a relative cyclical high in 1988 . . . Most recently, however, there is evidence of a turn-around in the number of degrees awarded in economics. Intriguingly, along with this recent increase in U.S. degrees awarded in economics, there has been an increase in academic economists' interest in their teaching . . ." It is our contention that a part of instructors' increased interest in their teaching is a keener awareness of the types of subjects that are of most interest to their students.
6. As this study went to press (in June of 2012), the U.S. Supreme Court vacated a lower court's ruling that the FCC's enforcement of its indecency rules was unconstitutional (Flint, 2012). The FCC's indecency rules were challenged by ABC in 2008, in response to the FCC's 2003 decision to fine ABC $1.4 million for airing the exposed buttocks of an actress in an episode of ABC's drama *NYPD Blue*. The Fox Network, which was censured by the FCC for cursing incidents occurring during live awards shows in 2002 and 2003, also brought a case against the FCC (Flint, 2012). In its ruling, the U.S. Supreme Court tied the two cases together. The U.S. Supreme Court sided with ABC and Fox in its ruling that the FCC did not provide adequate due process to the networks in enforcing its indecency standards. However, U.S. Supreme Court Justice Anthony Kennedy noted in his written summation that "because the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission's indecency policy (Flint, 2012)."
7. The aforementioned wardrobe malfunction involving Nancy Grace and ABC's *Dancing with the Stars* provides an example wherein a television broadcaster combined time-delay technology with video capability in order to insert pre-production video of the show's audience over the inappropriate scene involving Grace. The pre-production video that was chosen – one of a docile audience – was, however, broadcast at a time when television viewers expected audience applause, leading many viewers to conclude

that the live audience was not impressed with Grace's performance. This clumsy attempt to prevent an inappropriate visual meant that ABC had to offer additional explanation to its viewing audience during the subsequent episode of the show.

8. The two suggestions by Hale (2011) that are not listed in Table 2 are (1) avoid ill-fitting clothing, and (2) do not "tweet" about one's wardrobe malfunctions after they occur.

9. The possible expenses listed in Table 2 were gathered by the authors.

10. It is also debatable as to whether toupee tape would have prevented Longoria's mishap, given the weight of the tuxedo jacket she was wearing during the interview.

11. Kardashian appeared on *Fox and Friends* wearing a sheer blouse. Thus, toupee tape and/or safety pins would not have been practical. The only wardrobe malfunction prevention method, among those listed by Hale (2011), would have been to wear a bra.

12. Minaj appeared on *Good Morning America* wearing what appeared to be a thin, cotton blouse. Though low-cut, the near-weightless feature of the top would have likely been conducive to using toupee tape to avoid the wardrobe malfunction that occurred.

13. For more on case-based teaching and learning, see Christensen and Hansen (1987).

14. The orders of mastery referred to in Conway (2012) are those described by Bloom, Englehart, Furst, Hill and Krathwohl (1956) and that are commonly referred to as "Bloom's taxonomy."

15. These essays provide economic analyses of (1) the Salem witch trials, (2) the Pope's 1960s decision to relax fasting rules outside of Lent, (3) cartel-like behavior on the popular television show *Survivor*, (4) campus fraternity/sorority organizations as cartels, (5) the buying and selling of jerseys across sports franchises in professional sports, (6) public support for professional sports stadiums, (7) Hollywood films about the Third Reich (and modern bureaucracy theory) and (8) the rise and fall of the Southwest (college football) Conference, respectively.

16. Mateer and Stephenson (2011) provide an excellent checklist for using a video clip during an economics lecture. They also discuss copyright laws surrounding use of videos for educational purposes.

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