The Lion, the Witch(Hunt) and the Wardrobe Malfunction: Congress's Crackdown on Television Indecency

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I. INTRODUCTION

Justice Potter Stewart once said about obscenity: "I know it when I see it."1

And while that may guide decisions made at the Supreme Court level, it does not provide any clear guidance to broadcasters as to what is "indecent." Each day, television producers and networks struggle to put new, fresh, and innovative material on the air. Competition among stations for viewers' attention and advertising dollars is fierce. Storylines are created in prime time, real-life dramas unfold live on the evening news, and Oscar winning movies are broadcast. Which of these is indecent? Which is acceptable? Broadcasters have long been scratching their heads, filtering their programs through network brass, and hoping for the best. Without meaningful guidance, what is a network to do?

This article examines Congress's proposed solution, the Broadcast Decency Enforcement Act of 2005. In Part II, I will discuss the events leading up to the proposed legislation, outlining the previous law and examining two key Supreme Court cases that have framed the issue of broadcast indecency over the past thirty years. Next, I will outline the differences between the legislation as proposed by both the House and Senate, and highlight the concerns raised by network executives regarding the passage of the Act. In my analysis of the proposed legislation, I will argue that neither version should be passed in their current form. Finally, I will propose some suggestions of how the Federal Communications Commission [hereinafter FCC] can improve its guidelines so the broadcasting industry can better know what is and is not indecent.

1. Jacobellis v. Ohio, 378 U.S. 184 (1964). Obscenity is not protected under the First Amendment, yet I believe the sentiment of Justice Stewart's famous quote can be extended to indecency.
II. BACKGROUND

A. The Social Climate Leading to the Enactment of New Legislation

Years from now, many people will not remember Super Bowl XXXVIII, the score of the game, or even the teams that played. But chances are they will remember the Halftime Show – the Janet Jackson/Justin Timberlake stunt that changed the face of live television and inspired a crackdown on television indecency. Several key moments in American media have recently emerged, galvanizing conservative groups and unleashing a torrent of controversy in broadcasting circles. Some of these events will be discussed in turn.

1. The Janet Jackson and Justin Timberlake Super Bowl Fiasco

On February 1, 2004, CBS aired Super Bowl XXXVIII live, with MTV sponsoring the Halftime Show. The Show featured performances by several popular musical acts, including P. Diddy, Kid Rock, and Nelly. The controversy surrounds the finale, where Justin Timberlake sang “Rock Your Body” to Janet Jackson. At the end of the song, he ripped off a portion of her bustier, which was allegedly supposed to reveal a red bra. However, as a result of a “wardrobe malfunction,” Ms. Jackson’s

3. Id. at 2.
nipple was exposed. In response, the FCC was inundated with calls from concerned viewers, with a total of 542,000 complaints received through the end of August 2004. Michael Powell, the Chairman of the FCC, derided the entire show, saying it amounted to “onstage copulation” and was “more fitting of a burlesque show.” As a result, the FCC fined Viacom and CBS outlets $550,000 - $27,500 for each of the twenty network-owned stations. The FCC based its findings in part on statements made by MTV, promoting a revealing and shocking halftime show. The FCC took this as evidence that “officials of both CBS and MTV were well aware of the overall sexual nature of the Jackson/Timberlake segment, and fully sanctioned it.”

2. Bono’s Acceptance Speech at the 2003 Golden Globe Awards

A month after the Super Bowl incident, the FCC weighed in on whether the “F” word may be uttered on television. NBC had


7. See Super Bowl, supra note, 2 at 2.


10. Id. at 8.

11. Id. For another recent example of the FCC’s crackdown on indecent television, see Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married by America” on April 7, 2003, FCC Notice of Apparent Liability for Forfeiture, 200532080003, (hereinafter “Married by America”) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-242A1.doc. There, the FCC fined Fox $1,183,000.00 for broadcasting bachelor and bachelorette parties that featured strippers and partygoers in an array of sexually charged situations. The FCC received nearly 160 complaints related to the show and in response, levied the largest fine in history.

aired the Golden Globes telecast live the previous winter. In his acceptance speech for “Best Original Song,” Bono, the lead singer of the popular group U2, said, “This is really, really, f***ing brilliant.” The Parents Television Council complained to the FCC, and wanted NBC to be punished for failing to use tape delay technology to “bleep” out the offensive language. Initially, the FCC’s Enforcement Bureau excused the incident, citing Bono’s usage of the word. According to the Bureau, the material was not indecent because it did not “describe, in context, sexual or excretory organs or activities and that the utterance was fleeting and isolated.” However, the FCC overturned the Bureau’s decision, concluding that Bono’s usage was “within the scope of [the] indecency definition,” and that it was “patently offensive.” When the dust settled, NBC received nothing more than a slap on the wrist, as no fines were levied against the network. However, the FCC unequivocally stated that all broadcasters were on notice that the “F-word” is off limits.

(hereinafter “Golden Globes”).

13. Id.
15. See Golden Globes, supra note 12.
16. Id.
17. Id. at 4976.
18. Id at 4978-79.
19. Id. at 4975.
20. Id. at 4982. Another example of Award Show gaffes includes the Paris Hilton and Nicole Richie December 2003 appearance at the Billboard Music Awards. There, Ms. Hilton warned Ms. Richie to watch her language, as it was a live show. Ms. Richie responded by swearing, which the network censors were able to catch due to a five second delay. However, moments later Ms. Richie, reflecting on her experiences on an Arkansas farm on her show The Simple Life, stated: “Have you ever tried to get cow [expletive] out of a Prada purse? It’s not so [expletive] simple.” See Frank Ahrens, Nasty Language on Live TV Renews Old Debate, NEWSBYTES NEWS NETWORK, Dec. 13, 2003, 2003 WL 61570708 (2003).
3. The Howard Stern Radio Show

Television is not the only medium that is heavily regulated by the FCC. Radio has increasingly been under the intense glare of government scrutiny. On April 7, 2004, the FCC leveled $495,000 in fines against Clear Channel Broadcasting. At that time it was the largest penalty ever assessed to a broadcaster. Unlike its handling of the Super Bowl stunt, the FCC took a totality of the circumstances approach in reaching its conclusion that Howard Stern’s radio show was indecent. The FCC was especially bothered by the fact that the broadcast was aired around 7:25 a.m., which violates the FCC’s rules against indecent broadcasting during daytime hours. In response to the fines, Clear Channel pulled Stern’s show from six of its stations. As a result, in October of 2004 Howard Stern announced he was taking his show to unregulated satellite radio.


22. For the largest fine assessed to date, see Married By America, supra note 11.


24. Id. at 7. The FCC also stated that Clear Channel’s history of airing indecent material buttressed its argument that the Howard Stern show had to be dealt with appropriately. Id. at 1.


26. Id. More radio hosts are moving to satellite radio, as the medium is not regulated by the FCC like basic radio stations are. Stern stands to gain $500 million from his new, five-year contract with Sirius Radio. Id. A similar situation occurred earlier this year. In February, Clear Channel Radio personality Todd Clem (aka “Bubba the Love Sponge”) was fired after his sexually explicit morning show garnered a proposed $715,000 in fines by the FCC. Bubba the Love Sponge’s Radio Show a Washout, MIAMI HERALD, Feb. 24, 2004, available at 2004 WL 70704299. See also John Maynard, Near-
4. The Buildup of Public Sentiment Leads to an Overhaul of Previous Legislation

Over the last several years, concern about television indecency has evolved from a blip on the public’s radar to an all-out frenzy. In 2000, the FCC received 111 complaints about programming, 25 of which were for broadcast television programs.27 Fines were assessed against seven radio programs in the amount of $48,000 for the entire year.28 Last year, the number of complaints multiplied exponentially, to a record 1,405,419 complaints and over $7.9 million in fines.29 This increase has merited Powell the distinction of having slapped more fines on broadcasters than all previous FCC chairmen combined.30

The Parents Television Council [hereinafter PTC] is a particularly vocal group. The PTC has crusaded against offensive content in television shows by encouraging grassroots efforts in communities and filing numerous complaints against what it perceives to be indecent programming.31 According to PTC, the majority of parents are “very concerned” about the amount of sex

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28. Id.
29. Id.
31. Material available at http://www.parentstv.org (last visited Sept. 17, 2005). In addition, the group regularly reviews TV shows and movies, and has a Best/Worst of the Week segment. Interestingly, they post graphic content warnings on the website for indecent shows, and site visitors can click on the clip to view the “indecent” material.
and violence on television.\textsuperscript{32} Yet just days after the FCC levied over half a million dollars in fines for the Janet Jackson halftime debacle, the Kaiser Family Foundation released a study showing 67 percent of parents polled were not concerned about the incident.\textsuperscript{33}

Congress has long had what has been referred to as a "safe harbor" provision that no indecent programming be broadcast between the hours of 6:00 a.m. and 10:00 p.m., when children may be watching.\textsuperscript{34} This policy remains in effect under the currently proposed legislation.

\textbf{B. Indecency Defined}

In order to understand the impact of this legislation, it is important to know the definition of indecency within both society and government.

1. \textit{Webster's Dictionary}

The understanding of indecency most people have comes from the traditional dictionary definition we encounter in everyday life. According to \textit{Webster's Dictionary}, indecency means "not decent, grossly unseemly or offensive to manners or morals."\textsuperscript{35}

2. \textit{Black's Law Dictionary}

Legal scholars would define "indecency" according to \textit{Black's Law Dictionary}: "the state or condition of being outrageously

\begin{itemize}
\item \textsuperscript{32} Material available at http://www.parentstv.org/ptc/facts/mediafacts.asp (last visited Sept. 17, 2005), citing study conducted by Kaiser Family Foundation.
\item \textsuperscript{34} 47 U.S.C.S. §303 Note, Section 16 (2005).
\item \textsuperscript{35} Available at http://www.m-w.com/cgi-bin/dictionary (last visited Sept.1, 2005).
\end{itemize}
offensive, especially in a vulgar or sexual way."  

36. BLACK'S LAW DICTIONARY 772 (7th ed. 1999).
37. Id. (citing Rollin M. Perkins & Ronald N. Boyce, Criminal Law 471 (3d ed. 1982)).
40. Id. at ¶7,8.
41. Id. at ¶8.
C. Prior Legislation

Previously, the maximum fine a broadcaster could receive was $27,500.\textsuperscript{42} But according to Chairman Powell, this amount was not enough to deter large companies from airing potentially objectionable material.\textsuperscript{43} Thus, with the FCC’s blessing, Congress introduced the Broadcast Decency Enforcement Act in both the House and Senate in 2004.\textsuperscript{44} Although both bills passed in their respective forums, the House and Senate were unable to resolve debate about potential amendments, and the bills died with the conclusion of the 2004 session.\textsuperscript{45}

Earlier this year, Representative Fred Upton introduced the Broadcast Decency Enforcement Act of 2005, which has received resounding support.\textsuperscript{46} In January, the Senate again introduced companion legislation.\textsuperscript{47} Assuming the Acts pass in both the House and Senate and a suitable compromise is reached, it will be submitted to the President to sign.\textsuperscript{48} The White House has already

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\textsuperscript{42} The current legislation mandates that the maximum fine for a broadcaster is $32,500 and $11,000 for an individual. The proposed changes in the House would increase the maximum fine to $500,000 for stations and $500,000 for individual performers. BROADCASTING & CABLE, Feb. 14, 2005.

\textsuperscript{43} According to an interview with Rep. Upton, Powell approached Congress before the Super Bowl incident requesting an increase in fines for several reasons. Powell stated that the fines had not kept up with inflation, and broadcasters were not paying their fines because they were not significant. The Justice Department would not go after broadcasters because the cost to recoup the fines was less than the cost of enforcing the law in court. National Public Radio, Interview: Representative Fred Upton Talks About His Indecency Bill Before Congress, Feb. 12, 2005 (on file with author).


\textsuperscript{45} Carroll James, Broadcast Indecency Targeted, COURIER-JOURNAL, Feb. 9, 2005.

\textsuperscript{46} H.R. 310, 109th Cong. (2005).

\textsuperscript{47} S. 193, 109th Cong. (2005).

\textsuperscript{48} David Hinckley, New Indecency Act has Industry Feeling Exposed, NEW YORK DAILY NEWS, Feb. 16, 2005, available at 2005 WL 57266369. As of press time, the BDEA passed in the House and was under consideration in the Senate. See supra notes 46 and 47.
\end{flushleft}
expressed support for the legislation.49

D. Key Supreme Court Decisions Regarding Broadcast Indecency

Two cases have shaped the law on broadcast indecency. These cases will be discussed in turn.

1. Federal Communications Commission v. Pacifica Foundation

It was a typical fall afternoon in New York on October 30, 1973, when a local radio station aired a twelve minute taped monologue by famed comedian George Carlin titled “Filthy Words.”50 But not everyone was laughing. A father, driving with his young son, had tuned in, and several weeks later voiced his complaint to the FCC.51 The FCC forwarded the complaint to Pacifica Foundation, the owner of the radio station, who responded that the comedy bit had been part of a show about society’s attitude toward language and that they had warned listeners at the start of the show that some potentially offensive language would be used.52 While no formal action was taken against Pacifica, the FCC placed a declaratory order about the complaint in Pacifica’s file.53 The order held that sanctions could have been issued against Pacifica for such a broadcast, and if more complaints stemming from the situation arise, the FCC would then assess whether further action should be taken.54 Ultimately, the FCC found the language in the

51. Id. at 730.
52. Id.
53. Id.
54. A Citizen’s Complaint Against Pacifica Foundation Station WBAI (FM), New York, N.Y. Declaratory Order, 56 F.C.C.2d 94 (1975). The FCC argued that Congress had given it power to discipline broadcast stations that air indecent material, including the right to (1) revoke station licenses, (2) issue “cease and desist” orders, (3) impose fines, (4) deny license renewals, or (5) grant short-term renewal of licenses. Id. at 96, 99.
monologue to be "patently offensive," but not necessarily obscene.\textsuperscript{55}

What was most troubling to the FCC was the fact that Pacifica knew the content of the taped broadcast was potentially offensive, and that it would air at 2 p.m., a time when many children would be listening.\textsuperscript{56} The Commission asserted that Pacifica knew the content of the pre-taped broadcast, and by allowing the seven "filthy words" to be uttered repeatedly on-air, its actions were deliberate.\textsuperscript{57} The FCC claimed its main goal was to "channel" such language to times of night when children are not a likely audience.\textsuperscript{58} In its opinion, the FCC found the language to be indecent but did not impose any sanctions against the station.\textsuperscript{59}

Pacifica appealed and the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the FCC's order amounted to censorship and was therefore prohibited by the Communications Act.\textsuperscript{60} The FCC then appealed to the Supreme Court, which reversed the Court of Appeals, holding that the Commission was correct in its assessment that the material was indecent, though not obscene, and the order did not violate Pacifica's First Amendment rights.\textsuperscript{61}

The Court quickly dismantled Pacifica's arguments, asserting that the First Amendment does not protect all speech.\textsuperscript{62} Pacifica argued that the First Amendment "prohibits all governmental regulation" pertaining to the content of the speech.\textsuperscript{63} Justice Stevens disagreed, citing an earlier opinion by Justice Holmes, who stated, "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create

\textsuperscript{55} Pacifica Found., 438 U.S. at 732.
\textsuperscript{56} Id.
\textsuperscript{57} Id. The Court suggested that the entire broadcast could have been aired at a later time when children are not likely to be listening. Id. at 733.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 726.
\textsuperscript{60} Pacifica Found., 438 U.S. at 726.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 745.
\textsuperscript{63} Id. at 744.
a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." The Court suggested that had Carlin's satire been an assertion of his views or beliefs, it would have received protection under the First Amendment. In other words, if the FCC had deemed the broadcast to be offensive simply because the Commission disagreed with his views, it would be protected. However, according to the Court, this was not the case. It determined the FCC did not have anything against what Carlin expressed, but rather his mode of expression. As Justice Stevens opined, "there are few, if any, thoughts that cannot be expressed by the use of less offensive language."

The case was close. Ultimately, the Court set forth two arguments for why the Carlin broadcast was indecent. First, television broadcasts, by their very nature, intrude into the homes (and lives) of the American people. The Court has previously held that an individual's right to be left alone outweighs the First Amendment rights of a solicitor. Viewers do not necessarily watch a program in its entirety, from start to finish, and frequently tune in to a show already in progress. Therefore, the Court reasoned, warnings of graphic language or material given at the start of the broadcast do not serve to protect all viewers from the intrusion. Secondly, young children are impressionable and can pick up dirty words from radio broadcasts if such words are permissible on the radio. The Court stated unequivocally that a

64. Schenck v. United States, 249 U.S. 47, 52 (1919).
66. Id.
67. Id. at 746.
68. Id. at 743, n.18.
69. The decision was 5-4. Id. at 729.
70. Pacifica Found., 438 U.S. at 748.
71. Id.
73. Pacifica Found., 438 U.S. at 748.
74. Id.
75. Id. at 749.
program can be deemed indecent without being obscene.\textsuperscript{76}

In his dissent, Justice Brennan vigorously opposed the majority’s position, and was angered that the Court was imposing its notions of what is proper on the American public.\textsuperscript{77} The monologue was not deemed to be “fighting words” or obscene, and the entire Court agreed that the monologue qualified as protected speech.\textsuperscript{78} Yet the majority held that Carlin’s broadcast could not be broadcast on the public airwaves.\textsuperscript{79} Justice Brennan cited two problems with the Court’s analysis – first, the Court misconstrued the privacy interests of individuals in their homes, and second, the constitutional rights of listeners who wanted to hear these broadcasts were being ignored.\textsuperscript{80}

The dissent agreed with the Court that an individual’s right to be left alone should be protected.\textsuperscript{81} However, they argued, by turning the radio on, people are taking part in public discourse, albeit passively.\textsuperscript{82} To illustrate this point, Justice Brennan cited the seminal case of \textit{Cohen v. California}.\textsuperscript{83} There, a man was convicted of disturbing the peace after he wore a jacket with the words “Fuck the Draft,” in protest of the Vietnam War in public.\textsuperscript{84} The Court reversed the conviction, refusing to punish speech in order to protect a “captive audience.”\textsuperscript{85} The Court reasoned that the passersbys could have easily averted their attention from a message they found offensive.\textsuperscript{86} Similarly, Justice Brennan felt unsuspecting listeners who encounter an unpleasant radio show can simply switch stations or turn off the radio.\textsuperscript{87} According to

\begin{itemize}
\item \textsuperscript{76} \textit{Id.} at 750-51.
\item \textsuperscript{77} \textit{Id.} at 762.
\item \textsuperscript{78} \textit{Id.} at 763.
\item \textsuperscript{79} \textit{Pacifica Found.}, 438 U.S. at 751.
\item \textsuperscript{80} \textit{Id.} at 764.
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.} at 764.
\item \textsuperscript{84} \textit{Cohen v. California}, 403 U.S. 15 (1971)
\item \textsuperscript{85} \textit{Edwin Chemerinsky, Constitutional Law Principles & Policies} 999-1000 (2002).
\item \textsuperscript{86} \textit{Cohen}, 403 U.S. at 15.
\item \textsuperscript{87} \textit{Pacifica Found.}, 438 U.S. at 765.
\end{itemize}
Justice Brennan:

whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the ‘off’ button, it is surely worth the candle to preserve the broadcaster’s right to send, and the right of those interested to receive, a message entitled to full First Amendment protection.88

As a result of the Court’s decision, the dissent feared adults would be reduced to listening only to programming suitable for children.89

Justice Brennan also asserted the important principle that parents should be able to raise their children as they see fit.90 Some parents may find the honest treatment of the “seven dirty words” as healthy, and those parents, though they may not be in the majority, should be able to expose their children to such a broadcast.91

The dissent made a slippery slope argument. It feared the FCC may not stop at comedy broadcasts and may extend its censorship to classic literary works, citing works by Shakespeare, Hemingway, Chaucer, even the Bible, as potentially indecent under the Court’s decision.92 Ultimately, the dissent believed that adults should be able to decide for themselves what they want to watch, not the government censors.93

88. Id. at 765-66.
89. Id. at 769.
90. Id. at 770.
91. Id.
92. Id. at 771. Brennan cites passages from the Bible as support for his position. II Kings 18:27 and Isaiah 36:12: “[H]ath he not sent me to the men which sit on the wall, that they may eat their own dung, and drink their own piss with you?” and Ezekiel 23:3: “And they committed whoredoms in Egypt; they committed whoredoms in their youth; there were their breasts pressed, and there they bruised the teats of their virginity.” Pacifica Found., 438 U.S. at 771, n.5
93. Id. at 772.
Like the message on the back of Mr. Cohen's jacket, the dissent argued that some words convey greater emotion and impact than others. Carlin, a social commentator, was using the words to make a point about society's attitudes towards the "seven filthy words."

Finally, the dissent chastened the Court for not representing the varied views of the American people. Words that are deemed "shocking" by the Court and the FCC are not considered to be so by many groups of Americans. Justice Brennan also rejected the majority's proposed solution to the problem that suggested people who want to listen to objectionable recordings can buy tickets to Carlin's shows or purchase a recording of his performances. This is not realistic, the dissent argued, as not all adults who would like to hear the message can afford that luxury.

2. Reno v. ACLU

In Reno v. ACLU, the Supreme Court invalidated several key portions of the Communications Decency Act of 1996 [hereinafter CDA]. Specifically at issue were provisions regarding the indecent transmission and patently offensive display of material to minors on the internet.

94. *Id.* at 773.
95. *Id.* at 777.
96. *Id.* at 775.
97. *Id.* at 776.
99. *Id.*
101. *Id.* at 849. The indecent transmission provision prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. It provides:

   Whoever (B) by means of a telecommunications device knowingly – (i) makes, creates, or solicits, and (ii) initiates the transmission of, "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age. . .shall be fined under Title 18, or imprisoned not
Forty-seven plaintiffs consisting mainly of non-profit educational groups sought to have the legislation overturned on First and Fifth Amendment grounds. They argued that the CDA was both overbroad, in that it did not distinguish between educational materials and pornography, and vague, because it did not define the terms "indecent" and "patently offensive." They feared that people trying to find information about birth control or discuss issues like prison rape would be convicted under the statute.

The government argued that there were two affirmative defenses that could be used to defend against criminal charges. The defenses applied to adults who took "good faith" precautions to restrict access to indecent materials by minors, and age verification more than two years, or both."


The second provision prohibits the knowing sending or displaying of patently offensive messages in a manner a minor can access. It provides:

Whoever (1) in interstate or foreign communications knowingly -(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated communication; or (2) knowingly permits any telecommunications facility under such person’s control to be used for an activity prohibited in paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.


102. ACLU, 521 U.S. at 861-62.

103. Id. at 871. The Court did not consider the Fifth Amendment claim, because the case was able to be decided on First Amendment grounds. Id. at 864.

104. Id. at 878.

105. Id. at 860.
systems such as credit card information or adult passwords. The district court held that the statute violated the First Amendment, finding the affirmative defenses would burden non-commercial sites. Groups like the ACLU refused to charge the public to access their message. Additionally, the court cited evidence that adults do not want to visit sites that require passwords. Further, the government did not supply proof that verification systems could ensure all users were over the age of eighteen.

The government appealed to the Supreme Court, relying on several cases, including *FCC v. Pacifica*, as support for its position. The Court held the government had erroneously relied on *Pacifica* for three reasons. First, it noted that broadcasting is afforded a lower level of protection under the First Amendment. There, a specific radio broadcast was targeted and time restrictions were appropriate because children could be listening in the afternoon. Here, the CDA applies at all times. Second, the FCC's order in *Pacifica* was regulatory in nature, not punitive. Here, violators face criminal penalties of up to two years in prison. Third, the ruling in *Pacifica* applied to a different medium with limited First Amendment protection for broadcasters. The Court did not extend these limitations to the area of cyberspace.

106. *Id.* at 861.
108. *Id.* at 857, n.23.
109. *Id.*
110. *Id.* at 857.
111. *Id.* at 864.
112. *Id.* at 867.
113. See *ACLU*, 521 U.S. at 866-67.
114. *Id.*
115. *Id.* at 867.
116. *Id.* at 866-67.
117. *Id.* at 872 (discussing the potential criminal penalties available under the CDA).
118. See *ACLU*, 521 U.S. at 867.
119. *Id.*
Justice Stevens made another critical distinction and asserted that the internet, unlike broadcast media, was not invading people’s homes. In order to visit a website, the court argued, you must take affirmative steps to reach the information. Usually a warning appears that the material may be offensive, or at the very least, a description of the site’s content is available before you click into the site.

While the Court found that the government had a compelling interest in protecting minors, it held that the government cannot do so by suppressing free speech that adults have the right to hear, especially when less restrictive alternatives exist. The government did not prove why less restrictive measures are not as effective as the CDA. The Court held that the statute was a content-based restriction of speech and was both vague and overbroad. The CDA provisions did not distinguish between educational materials and pornography and therefore was not narrowly tailored to withstand strict scrutiny analysis.

The fact that the legislature did not provide definitions for “indecent” and “patently offensive” greatly troubled the Court. Because the CDA is a content-based regulation of speech, it chills free speech. Speakers are left uncertain as to what constitutes protected speech, and may be unwilling to engage in conversations about birth control and health issues for fear of violating the statute. That the CDA is a criminal statute, with up to two years

120. Id. at 869.
121. Id. at 870.
122. Id. at 869.
123. Id. at 874-75.
124. ACLU, 521 U.S. at 879.
125. Id. at 868, 879.
126. Id. at 878-79.
127. Id. at 871.
128. Id. at 868, 871.
129. Id. at 878. Innocent educational materials would be considered indecent under the CDA. The Court cited as an example of the overbreadth of this statute a parent who emails his 17-year-old daughter away at college information about birth control could be jailed, even if he and his community found the materials educational and not offensive. ACLU, 521 U.S. at 878.
in prison per violation, may further chill innocent speech.\textsuperscript{130} The social stigma of a conviction would deter protected speech.\textsuperscript{131} A more carefully drafted statute, it argued, would avoid such problems.\textsuperscript{132}

Finally, the Court rejected the two affirmative defenses the government asserted would insulate "innocent" violators from prosecution.\textsuperscript{133} The good faith defense was illusory, the Court held, because the technology to ensure the blockage of offensive material was not in existence at the time the case was argued.\textsuperscript{134} Moreover, credit card verification measures were already being used by pay-to-view adult websites.\textsuperscript{135} There are no safeguards to ensure kids are not using credit card information and posing as adults.\textsuperscript{136} The Court reasoned that such a provision would protect porn purveyors who use this technology now, while educational sites will suffer because they want to provide free information to viewers.\textsuperscript{137}

The Court, in a 7-2 decision, affirmed the district court’s ruling that the CDA placed too heavy a burden on protected speech, and threatened to destroy the internet.\textsuperscript{138} At the conclusion of the opinion, Justice Stevens opined: "We presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."\textsuperscript{139}

\textsuperscript{130} Id. at 872.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 874.
\textsuperscript{133} Id. at 881-82.
\textsuperscript{134} Id. at 881. The "good faith" defense stated that a person who "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" had a defense against prosecution. 47 U.S.C. §223(e)(5)(A) (2005).
\textsuperscript{135} ACLU, 521 U.S. at 881.
\textsuperscript{136} Id. at 882.
\textsuperscript{137} Id. at 881-82.
\textsuperscript{138} Id. at 882.
\textsuperscript{139} Id. at 885.
III. LEGISLATIVE HISTORY

This section examines the most recent legislation affecting the broadcast television industry, specifically the Broadcast Decency Enforcement Act of 2004 and the Broadcast Decency Enforcement Act of 2005.

A. The Broadcast Decency Enforcement Act of 2004

In response to the perceived increase in indecent material on television, both the House of Representatives and the Senate took swift action and proposed legislation that would dramatically increase the fines for airing such material. On January 21, 2004, Representative Fred Upton, a Republican from Michigan, introduced what came to be known as The Broadcast Decency Enforcement Act of 2004, or H.R. 3717 [hereinafter BDEA].140 Two weeks later, Senator Sam Brownback introduced companion legislation in the form of S. 2056, also named The Broadcast Decency Enforcement Act of 2004, which set forth aggravating factors the Federal Communications Commission [FCC] should consider when levying such fines.141

1. H.R. 3717: The Broadcast Decency Enforcement Act of 2004

The purpose of the bill was to express Congress’s desire that “broadcast station licensees should re-institute a family viewing policy for broadcasters that is similar to the policy that existed in the United States from 1975 to 1983.”142 To reach this goal, the bill authorized penalties against violators of up to $500,000 for each incident deemed indecent by the FCC, an increase from the maximum allotted fine of $27,500.143

142. H.R. 3717, supra note 140, at §11(a)-(b).
143. Id. at §2.
The Act directed the FCC to consider specific factors to determine the penalties, such as whether the broadcaster used a time delay mechanism to control the show, and if the media had an opportunity to review the material prior to air, or "a reasonable basis to believe live or unscripted programming may contain obscene, indecent, or profane material." In addition, the FCC was to consider whether the decision was made at the network level, or if affiliate stations were given the opportunity to refuse to carry the potentially offensive material.

Finally, the Act set deadlines for action on complaints received by the FCC. Once an allegation of indecent material has been made against a broadcaster, the FCC has 180 days to put the broadcaster on notice, and within 270 days, the FCC must inform the broadcaster of either the amount of the penalty or that no action will be taken against them.

Under the legislation, monetary damages were not the only remedy the FCC could seek against broadcasters. The Commission may require stations to broadcast Public Service Announcements (PSAs) geared toward educating children that reach audiences up to five times the size of the group affected by the indecent material.

Essentially, the Act gave the FCC the ability to revoke or not renew a broadcaster's license on the basis of its violation of decency standards. It required the FCC to monitor companies and individuals who had previously been fined for indecent programming and track any subsequent violations. It set forth a

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144. H.R. 3717, supra note 140. In section three, the Act:
[D]irects the F.C.C., in enforcing penalties for violators, to take into account specified factors with respect to the violator's (1) degree of culpability, including whether the offending material was live or recorded and scripted or unscripted; and (2) ability to pay, including whether the violator is a company or individual and the company's size.

Id.

145. Id.

146. Id. at §12.

147. Id. at §6.

148. Id. at §9.
“three strikes” rule, where a broadcasting facility that received three or more violations within its license term would undergo a license revocation proceeding.

Lastly, the Act put the FCC under a continuing obligation to advise Congress annually as to the status of violations of the Act. The report must include the number of complaints received by the FCC, the number of pending complaints, an accounting of the notices issued by the Commission, a listing of all companies or individuals receiving such notices, the amount of each proposed penalty, the status of the investigation, and the disposition of the case (i.e. whether the company has paid the fine).

2. S. 2056: The Broadcast Decency Enforcement Act of 2004

In response to H.R. 3717’s proposed crackdown on indecency on broadcast airwaves, the U.S. Senate proposed a similar bill to further express its indignation toward incidents like the Janet Jackson Super Bowl Halftime Show “wardrobe malfunction.” Senator Sam Brownback, a Republican from Kansas, introduced Senate bill 2056 on February 9, 2004.

While the bill was similar in force to H.R. 3717, it had a clearer fine structure. As discussed above, the previous maximum fine for a single incident of offensive programming was $27,500. Under S. 2056, a first-time offense would bring a $275,000 fine, a second such offense would cost the offender $375,000, and a third and any subsequent violation would be $500,000, with a 24-hour cap of $3 million. As was expressed in H.R. 3717, the FCC must consider the violator’s ability to pay and follow a similar “three strikes” philosophy when it comes to license revocation and renewal.

S. 2056, in conjunction with its counterpart, set forth aggravating factors that could increase the fine leveled at broadcasting stations or networks. The FCC must consider:

149. H.R. 3717, supra note 140, at §10.
150. Id.
151. S. 2056, supra note 141.
152. Id. at §102.
153. S. 2056, supra note 141.
"whether the material was live or recorded, scripted or unscripted; the violator had reasonable opportunity to review the programming; a time delay blocking mechanism was implemented; and the violation occurred during a children's program or during children's viewing hours." If any of these factors are present, the FCC had discretion to double the fine for such violations. Additionally, if the broadcaster should have known the potentially offensive material would air, the proposed fine would increase to $500,000 for each violation.

3. Reactions to H.R. 3717 and S. 2056

Both the House and Senate versions of the Broadcast Decency Enforcement Act received resounding support from Congress. However, a panel of network executives and broadcast television station owners assembled before Congress last year to express concern about the fairness of such legislation.

One seemingly universal concern was consumer confusion about the difference between broadcast and cable television. It was asserted that most people pick up the remote control and pay little mind as to whether they are watching pay stations or regular television as they surf through the channels. As Alex Wallau, president of ABC Television stated, "It seems that some of the programming that people have in mind when they complain about objectionable programming and television material is actually on cable, not broadcast. Not only does this throw into question the effectiveness of the indecency rules, it also raises troubling issues

154. Id. at §103.
155. Id. The Bill states in pertinent part: "When aggravating factors are present, [allows the F.C.C.] to double the fine amounts for such violations." Id. at §103(G).
156. Id.
157. See Indecency Complaints, supra note 27.
of fairness.”159 The argument is that what viewers are complaining is objectionable material is really on cable television, a medium which is currently unregulated by the FCC.160 Broadcasters argue that they are unfairly held accountable for the actions of cable broadcasters who may air indecent material.161 Wallau’s view, which is shared by other executives, is that these rules should be extended to cable television.162

Harry Pappas, a private station owner, wanted the FCC to expand the list of factors to include whether the indecent action was willful or inadvertent; whether the action was a one-time occurrence or part of a continuing pattern; and whether the companies were acting in good faith.163 Mr. Pappas also spoke on behalf of smaller stations worried that they will have to “take the heat” for decisions made at the network level because it is often difficult for affiliate stations to view the programming before it airs, and, he argued, often hard to receive permission from the networks to not air national programming if the owner has an objection to it.164

Still other executives argued that their primary motivation was not to avoid fines, but rather to protect their reputation as esteemed broadcasters within the community.165 Alan Wurtzel, the President of NBC, felt that an approach focused on the proportionality of the fine was a better test than the implementation of a flat universal fine.166 He urged each situation to be evaluated on a case-by-case basis, as few events are ever clearly black and white.167

Mr. Wallau argued that the universal mandate of a fine of $275,000 for the first incident of indecent material is not the best approach. For a station in a small market, that figure may

159. Id. at 198 (testimony of Alex Wallau).
160. Id.
161. Id.
162. Id.
163. Id. at 217-18 (testimony of Harry Pappas).
165. Id. at 205-07.
166. Id. at 246 (testimony of Alan Wurtzel).
167. Id.
represent their entire operating budget for the year.\textsuperscript{168} He argued that for the larger companies, the stigma of being reprimanded by the FCC carries more of a penalty than any fine the Commission may impose.\textsuperscript{169}

Finally, the majority of the panel of broadcasters expressed confusion over the definition of "indecency." While it was asserted on an earlier occasion by FCC Chairman Michael Powell that the definition is clear and does not need revision, some expressed their need for clarity.\textsuperscript{170} Gail Berman, the President of Entertainment for Fox Broadcasting Company, asked for additional guidelines from the FCC, saying "I know that they have wavered on their guidelines . . . they have determined that certain things were indecent, then they were decent, then they were indecent, and it's a little confusing."\textsuperscript{171}

\textbf{B. The Broadcast Decency Enforcement Act of 2005}

The 108th session of Congress closed without passage of the BDEA of 2004.\textsuperscript{172} Undeterred, both the House and Senate re-issued legislation in early 2005, in essentially the same form as the 2004 versions.

On January 25, 2005, Representative Fred Upton re-launched his effort to pass the BDEA.\textsuperscript{173} The bill had 67 co-sponsors, including 53 Republicans.\textsuperscript{174} The bill passed in the House on February 16, 2005.\textsuperscript{175}

One day after the House introduced its latest bill, Senator Sam Brownback re-introduced his version of the BDEA.\textsuperscript{176} The bill has

\begin{footnotesize}

\textsuperscript{168} Id. (testimony of Alex Wallau).
\textsuperscript{169} Id.
\textsuperscript{170} See Hearing, supra note 158, at 249 (testimony of Gail Berman).
\textsuperscript{171} Id.
\textsuperscript{172} See James, supra note 44.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} S. 193, 109th Cong. (2005).
\end{footnotesize}
26 co-sponsors, 20 of whom are Republicans.\textsuperscript{177} As of this writing, the legislation is still pending.\textsuperscript{178}

IV. ANALYSIS

The BDEA is problematic for three reasons. First, live news, by its very nature, is largely unscripted. It is virtually impossible in such an environment to guarantee that no potentially objectionable material will “make air” in such a situation. Second, legislation that takes into account a broadcaster’s ability to pay is patently unfair. Finally, the rules pertaining to BDEA, as they exist, are too arbitrary. Each of these arguments will be addressed in turn.

A. The Live News Dilemma

1. Broadcasters Do Not Have Control Over Guests and Performers

In response to last year’s infamous Super Bowl Halftime Show, Janet Jackson stated in an FCC Notice of Apparent Liability for Forfeiture that no one knew of the “surprise” reveal both she and Justin Timberlake had planned for the conclusion of the song, as no dress rehearsals had been held. The question now becomes: Should a broadcaster be held liable for something a performer, who is inherently creative, may say or do at the spur of the moment?

This argument obviously would not hold water in a case like the San Francisco morning show that broadcast a segment highlighting a performance by a group who called their show “Puppetry of the Penis.” The station was fined $27,500, the statutory maximum, after a performer’s cape slipped and his genitalia was exposed as

\textsuperscript{177} Id.

\textsuperscript{178} Id.
the performer attempted to demonstrate "genital origami."\textsuperscript{179} There, it would be reasonably foreseeable that something potentially objectionable could happen on air, given the segment's subject matter. However, in most situations, there is not such an obvious risk.

2. Breaking News is Largely Unscripted

As a journalist, every day is different – one never quite knows what to expect.\textsuperscript{180} Frequently an entire news show will be written and ready to go and then five minutes before air, breaking news occurs, rendering the scripts useless. It is the nature of the beast – it is what makes it both very exciting and terribly frustrating. In a breaking news situation, a producer surrenders some of the safety and structure of her show. She works with professionals, and she trusts that her co-workers will do their jobs responsibly. But there is an element of the unknown in that stations have little to no control over what happens as a story unfolds live on the air. What happens when a reporter on the street outside a large apartment fire is filing her report, and an overzealous man jumps into the shot, screaming obscenities? Or if that same reporter is covering a large demonstration, an undoubtedly newsworthy event, and a protester holds up a sign that some viewers may find offensive? The photographer can try to frame the shot to exclude potentially offensive messages, but in a live news situation, that is not always possible. Should a station be held responsible for the actions of private individuals who are not associated with the station?

\textsuperscript{179} Young Broadcasting of San Francisco, Inc., 19 F.C.C.R. 1752, 1757 (Jan. 27, 2004).

\textsuperscript{180} The author is a former journalist who worked for two major networks, and is drawing upon personal experience in making these claims.
B. One Size Does Not Fit All: The Band-Aid Approach is Both Unfair and Unrealistic

1. Legislation that Considers Broadcaster’s Ability to Pay is Patently Unfair

A disturbing portion of the Act takes into account a broadcaster’s ability to pay when determining the amount for fines. This is unfair to both big business and “Ma & Pop” operations. While it can be argued that large companies can more readily absorb the fines and may consider it a “cost of doing business,” that is not a reason to make the law different for two media groups, essentially favoring one over the other. While it is true that fining a small, privately-owned operation could put them off the air, it is highly unfair to single out the big networks and hit them in their wallets, simply because they have deeper pockets.

Driving small stations out of business will also have an adverse effect on the community. Local stations often broadcast meaningful programming, as it relates to that particular community. Viewers in small towns have a valid interest in learning about their community and news that affects them. Local television plays an important role in educating the public about important issues, such as candidate platforms and educational reform. To wipe these small broadcasters off the map will relegate viewers to get their news from somewhere else, presumably from cable news. As Justice Brennan stated in the Pacifica dissent, this is a luxury that most people cannot afford. In addition, cable news is unlikely to report stories affecting small groups of people, as their audience is national.

If this legislation is enacted as written, broadcast stations will be so crippled by these fines that they will no longer be able to compete with their cable and satellite television counterparts. If they are not bankrupted by the sheer magnitude of the proposed fines, they will be stymied in their ability to put forth quality

181. See S. 2056, supra note 141.
programming because of their financial situation. If that occurs, they will undoubtedly lose out on much-needed advertising dollars, which would have been used to fund the station. Thus, it becomes a vicious cycle.

2. The Government Should Not Be a Substitute for Good Parenting

By far, the most outspoken critic of television today is the Parents Television Council (PTC). The group, headed by Brent Bozell, prides itself in crusading to rid the public airwaves of what it considers to be "slime." The group claims support from nearly one million members. PTC members are frequently urged to file complaints with the FCC through their website, and to complain to their representatives about particular programs. According to MediawEEK, a publication dealing with the television industry, the PTC filed 99 percent of the more than 1.1 million indecency complaints made to the FCC last year. Bozell vigorously denies this, stating that only 224,000 of its members used his organization's website to file such complaints.

The FCC claims that it is not imposing its notions of what is proper on the American public, and does not act until it gets complaints from the public. Groups like the PTC galvanize people to file complaints about programs and make it easy to do so by including weblinks to an FCC complaint sheet. In February, PTC members filed 12,000 complaints about the February 17th, 2005

185. Shields, supra note 183.
186. Id.
187. Id. The FCC does not independently investigate indecent programming, rather it acts only when the public has submitted indecency claims against a broadcaster. Id.
episode of CSI. Traditionally, people would file complaints with the FCC about programming they watched first-hand. Now, groups like the PTC encourage people to watch clips it deems “disturbing” out of context, and then email complaints to the FCC through their website.

The PTC’s website contains interesting facts and statistics. On the main page, the group allows “concerned” citizens to view clips the group considers to be indecent. With a simple click of the mouse, people can view “graphic” video clips from television programs like CSI and Surreal Life 4. Each clip contains a vehement warning that people who do not want to view “explicit” video should not click play. Of particular interest in all of this is that the PTC repeatedly denounces cable television shows like Sex and the City as indecent, yet the Broadcast Decency Enforcement Act relates only to broadcast television, not cable. The majority of the shows they are up in arms over are not even affected by this legislation.

One statistic from a University of Kansas study, ironically found on the PTC website, states that 54 percent of children have televisions in their bedrooms. This suggests that concerned parents should be more involved in their children’s lives and know what their kids are watching. It is not the broadcaster’s job to “water down” all programming, even programming aimed at reaching adults, for the lowest common denominator. Essentially,


189. See Shields, supra note 183.

190. See http://www.parentstv.org. The relevant area says “Surreal Life 4 – graphic content. Warning: Graphic Content!!! Do NOT push play if you don’t want to see the explicit video!!!” The clip goes on to show the performers talk about fetishism, as some S&M objects are shown in the background. Id.

we are relegating adults to watching programs sanitized for the youngest members of our society. Parents can use parental controls like the V-Chip or locks on their remote controls to monitor what their kids are watching. Adults should not have to suffer because children may or may not see a breast on television. Parents should not "pawn off" their responsibilities as parents to the broadcasting community.

This argument is bolstered by Justice Brennan's dissent in *Pacifica.* There, he argued, the constitutional rights of people who wanted to hear comedian George Carlin's monologue about the "Seven Dirty Words" were thwarted because children may have been listening to the radio broadcast. Here, the constitutional rights of adults who want to see these shows are being ignored at the expense of "protecting" others who do not want to hear it. If you do not like what you see, you can always avert your eyes or exercise your constitutional right to change the channel.

In Brennan's dissent, he expressed the fundamental right parents have to raise their children as they see fit. By declaring programming to be indecent, we are essentially taking away parents' right to choose what they want their children to see. The PTC underestimates the fact that responsible parents can always watch shows with their children and have a conversation about adult matters afterward. A well-crafted television program dealing with adult themes can often be beneficial in facilitating open communication between parents and their children.

This leads to a slippery slope argument – where will the line be drawn? Is the film *The Passion of the Christ* too graphic? What about war? The Holocaust? Genocide in Rwanda? Our world's history is not always pretty – does that mean we cannot show what really happened because it may upset a sensitive segment of the population? Who makes this determination? Does it not make sense to allow people to make individualized determinations, based on their own preferences, and then choose what they want to watch accordingly? Does not telling a watered down story mute the emotional impact such a powerful message can have on us? If

we just say a million people were killed in Rwanda ten years ago, is the message not lost? If a story about the triumph of the human spirit is capable of reaching out and educating the public so that such atrocities never occur again, is there not some value there?

What is “shocking” to some people is not shocking to everyone. Some people are more sensitive than others. Should we cater all programming to them? It can be argued that people who want to see hard-hitting programs should subscribe to cable television. This argument misses the point. As Justice Brennan stated in *Pacifica*, it may not be a luxury everyone can afford. Broadcast television is owned by the public. As such, it should be representative of the public at large, not just a vocal minority.

**C. The Rules are Too Arbitrary**

Broadcasters have no idea where the line is drawn between acceptable and unacceptable material. As stated above, not all stories reported and pictures aired are going to be pretty, and sometimes more graphic descriptions are required to get the message across to viewers. As a result, many broadcasters will refrain from showing quality material out of fear of being hit with outrageous fines, and art will suffer.

**1. Media Confusion**

Like the majority in *Reno v. ACLU*, the lack of guidance provided by Congress and the FCC in terms of what is indecent is troubling. Broadcast media does not invade peoples' homes. Justice Stevens reasoned that people take affirmative steps to access material by logging on to the internet and then visiting assorted websites. Like a computer, a television must be turned on. Graphic images do not jump out and accost people as they read the morning paper. As stated previously, concerned parents can get a V-chip or parental locks on their television through their

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193. *See id.* at 774.
cable provider.

As Fox Executive Gail Berman stated in a Congressional hearing on the subject: "I know that they [the FCC] have wavered on their guidelines . . . they have determined that certain things were indecent, then they were decent, then they were indecent, and it's a little confusing." 195

Stations have repeatedly asked for guidance from the FCC, specifically when considering airing "Saving Private Ryan" and whether they would be fined for showing such a movie at a time of war. 196 Yet the FCC refuses to give any guidance as to what is acceptable and what is indecent, leaving many broadcasters in the dark. 197

2. The Act Has a "Chilling" Effect on Free Speech

In November 2004, sixty-six television stations shelved their plans to broadcast Saving Private Ryan in honor of Veterans' Day. 198 The Academy Award winning movie was replaced in at least one market by Batman Forever after the station had asked the FCC for guidance and the agency refused to provide it. 199 While Batman may be a fine action movie, many would argue it is not an adequate substitute for a moving account of an historic event. 200

195. See Hearing, supra note 171 (testimony of Gail Berman).
197. The number of indecency complaints and Notices of Apparent Liability ("NAL") made to the FCC over the past five years are interesting. In 2000, 111 complaints were received, and $48,000 worth of fines was assessed. In 2001, 346 complaints were registered, and $91,000 in fines. By 2002, 13,922 complaints were received, as was $99,400 in fines. In 2003, 202,032 complaints were lodged, and $440,000 in fines leveled at broadcasters. Most recently, in 2004, there were 1,405,419 complaints and $7,928,080 in fines assessed. As is plain to see, this is becoming big business for the FCC. Statistics available at http://www.fcc.gov/eb/broadcast/ichart.pdf (last visited Apr. 17, 2005).
198. See Solomon, supra note 196.
199. Id.
200. FCC Rules in Favor of 'Private Ryan,' BOSTON GLOBE, Mar. 1, 2005, at C6. The FCC subsequently ruled that the Oscar-winning film was not
It seems nobody is spared from fear of outrageous fines. Talk show hosts like Oprah Winfrey deal with adult topics like sexual assault, cheating spouses and how infidelity affects the family, and sex. What happens to these shows? Like *Reno*, speakers who want to educate are left uncertain about what constitutes protected speech, and may be unwilling to engage in conversations about birth control or health issues for fear of offending someone and bringing the ire of the FCC upon them.\(^{201}\)

Another particularly upsetting aspect of the BDEA is the ramped-up fines for individual speech. Currently, a person is liable for fines up to $11,000. Under the new legislation by the House, the cap jumps to $500,000. This has the potential to not only bankrupt broadcasters, but newscasters as well. Ultimately, we must ask: how does this help? Can a songwriter be hauled into court to pay outrageous fines for a song he wrote thirty years ago? Where should we draw the line?\(^{202}\)

The international media has taken notice of how outrageous this issue has become. After the 2004 Summer Olympics in Athens, Greece, the FCC received complaints about NBC’s coverage of the games, relating to exterior shots of buildings and Greek statues.\(^{203}\) What most of the world considers an expression of culture and history, some Americans call indecent. According to an article in the *Times of India*, the complaints alleged “male nudity, a woman’s breast, simulated sex, the Satyr, and nude Kourous male statues (both emblems of ancient Greece’s golden age)” were indecent.\(^{204}\) The chief of the Olympic Games, Gianna Angelopoulos, was understandably outraged at the idea that the U.S. was considering an investigation into the complaints: “far from being indecent, the opening ceremony was beautiful,

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201. *See ACLU, supra* note 129.
204. *Id.*
enlightening, uplifting. Greece does not wish to be drawn into an American culture war. Yet that is exactly what is happening.\footnote{Id.}

If someone can lodge a complaint about statues celebrating ancient Greece, what is next? Should warnings be placed at the entrance to America’s museums warning that there are naked statues inside? Should art programs be banished from PBS because a nude painting or sculpture may be shown? Aside from being utterly ridiculous, it arguably sends a message to children that the human body is offensive.

In her article, Katherine Fallow argues that this zero tolerance policy by the FCC will chill protected speech.\footnote{Id.} Over the years, the FCC standards have been vague and inconsistent.\footnote{Id.} The guidelines and decisions made by the agency are so subjective and arbitrary that it makes it virtually impossible for broadcasters to know what behavior will be accepted and what will be deemed to be over the line. The FCC needs to improve the format of its guidelines so the broadcast industry can better know what is and is not indecent.

\textit{D. Where Do We Go From Here?}

So what can be done to assist broadcasters who want to air responsible, non-sanitized programming? One possible solution is to narrow the legislation to apply only to material that exists solely to shock viewers and has no artistic merit, similar to obscenity laws. It appears that the majority of broadcasters want to be in compliance with the regulations, but are unaware of what they are because they are so unclear.\footnote{See Hearing, supra note 158.} Certainly no broadcaster wants viewers to stop watching their programming because the audience finds it offensive. An open dialogue between the FCC and the broadcasters in developing these standards, combined with a clear definition of indecency, would be helpful. This "I know it when I

\begin{itemize}
\item \textit{Id.}
\item Katherine A. Fallow, \textit{The Big Chill? Congress and the FCC Crack Down on Indecency}, 22 SPG COMM. LAW. 1 (2004).
\item \textit{Id.}
\item See Hearing, supra note 158.
\end{itemize}
see it” strategy by the FCC of adjudicating complaints is clearly not helpful. As it stands, there is no clear context of community standards.

V. CONCLUSION

The FCC’s crackdown has a very real chilling effect on free speech, as evidenced by broadcasters amending their program schedules to exclude award winning programming, (i.e. the Saving Private Ryan debacle). While broadcasters should be put on notice that they cannot air material without artistic value, free speech should not be silenced because of widespread fear of unreasonable fines.

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