
WHAT THE #S%& IS HAPPENING ON TELEVISION? INDECENCY IN BROADCASTING

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I. INTRODUCTION

Imagine sitting down with your children to watch an awards show on television aired live during “prime-time” hours.¹ While watching the show, you are shocked when you and your family hear an award recipient use “the F-word” in an acceptance speech.² This is exactly what happened at the January 2003 Golden Globe Awards, when U2 singer Bono accepted an award and exclaimed: “This is really, really, fucking brilliant.”³

You brush it off as a mishap that accidentally sneaked past the censors, but a few months later you hear it again on a different awards show.⁴ This time the word is uttered by one of the presenters during a monologue.⁵ This is exactly what happened at the December 2003 Billboard Music Awards when “The

¹ “Prime-time” hours have been described by the Federal Communications Commission as:

[T]he period from 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10:00 p.m. Monday through Saturday, and 6 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday, or 7 to 10:00 p.m. Monday through Saturday and 6 to 10:00 on Sunday.

In re Implementation of Video Description of Video Programming, *Memorandum Opinion and Order*, 16 FCC Rcd. 1251, 1264 (2001).

² Frank Ahrens, *FCC Chairman Seeks Reversal on Profanity*, WASH. POST, Jan. 14, 2004, at E1.

³ *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globes Award” Program, *Memorandum Opinion and Order*, 18 FCC Rcd. 19859 (2003).

⁴ Ahrens, *supra* note 2.

⁵ *Id.*

Simple Life” star Nicole Richie stated, “Have you ever tried to get cow [expletive deleted] out of a Prada purse? It’s not so [expletive deleted] simple.”⁶ You think that now using the word “fuck” seems more than a mere oversight of censorship - it seems almost commonplace.

To top it off, another slip of censorship occurred during the Super Bowl; this time a visual display of indecency.⁷ In January 2004, during the half-time performance at Super Bowl XXXVIII, singer Janet Jackson’s breast was exposed when fellow performer Justin Timberlake removed a portion of Jackson’s costume at the end of a performance.⁸ Whether the exposure was an accident or a publicity stunt, the result was a two-second airing of Jackson’s breast to ninety million viewers.⁹

Not only confined to awards shows and special events, the use of obscenities and nudity on television has become increasingly popular in recent years.¹⁰ This increase has sparked concern over the way indecency on television should be regulated.¹¹ The rise in the use of profane language has been well documented by the parental watchdog group Parents Television Council (“PTC”).¹² PTC claims that indecency has increased by as much as 94% in the

⁶ Frank Ahrens, *Nasty Language on Live TV Renews Old Debate*, WASH. POST, Dec. 13, 2003, at A1. There is some debate over whether producers encouraged an “edgy” performance, expecting that the time delay would provide censors the opportunity to delete any obscenities. *Id.*

⁷ See generally Joe Flint & Ann Marie Squeo, *Super Bowl Halftime Stunt Angers NFL*, CBS, FCC, WALL ST. J., Feb. 3, 2004, at B1 [hereinafter Flint & Squeo].

⁸ Elizabeth Jensen et. al., *Accusations Fly, Questions Linger After Super Bowl Peekaboo Show; Pressure Heightens on FCC to Require Air-Delay on Live Events, Including This Weekend’s Grammy Awards*, WICHITA EAGLE (Kansas), Feb. 4, 2004, at 5.

⁹ *Id.* Jackson and Timberlake originally claimed that the exposure was an accident resulting from a “wardrobe malfunction” and that part of Jackson’s costume was supposed to remain in place when Timberlake pulled off an outer layer. Later Timberlake backed down from the “wardrobe malfunction” claim, leaving critics to suggest it was a stunt done to increase sales of Jackson’s next album that was set for release three months after the Super Bowl. *Id.*

¹⁰ Maureen Hayden, *A Blue Streak As Our Use of Dirty Words Grows, Is Offensiveness In the Ear of the Beholder?*, EVANSVILLE COURIER (Indiana), Nov. 8, 2003, at B1; see also Larry McShane, *Wrestling’s Ultimate Match It’s Ted Turner’s WCW vs. Vince McMahon’s WWF, Winner Take All*, GREENSBORO NEWS & REC., Jun. 27, 1999, at E1 (documenting the use of foul language in a 100 hour block of time and focusing on the possibility that professional wrestlers are encouraged to use indecent language on television); *Blue Language Red Hot on Movies, Television Shows, New Study Finds*, MEDIA REP. TO WOMEN, Jan. 1, 2000, at 45. (describing the incidence of profane language on network television during the 1998-1999 season as “once every six minutes” and “every two minutes” on cable and that fact that the incidence of profanity in the top money making films of the same year rivaled that of television).

¹¹ PARENT’S TELEVISION COUNCIL, DERELICTION OF DUTY: HOW THE FEDERAL COMMUNICATIONS COMMISSION HAS FAILED THE PUBLIC, at <http://www.parents-tv.org/PTC/publications/reports/fccwhitepaper/main.asp> (last visited Nov. 15, 2004).

¹² PARENT’S TELEVISION COUNCIL, THE BLUE TUBE: FOUL LANGUAGE ON PRIME TIME

last three years.¹³ The increase in the use of profanity is particularly alarming to the PTC, especially during the so-called “family hour,” or the hours between 8 p.m. and 9 p.m. when children normally constitute a portion of the audience.¹⁴

The impetus behind the increase in indecency is difficult to pinpoint. Possible factors include the increase of profanity in societal conversation,¹⁵ a decrease in morality,¹⁶ and financial motivation felt by broadcast television to “keep up” with the racy language permitted on cable television.¹⁷ An even bigger debate lies in the manner in which indecency should be controlled,¹⁸ if at all.¹⁹ As Justice Harlan once wrote, “one man’s vulgarity is another’s lyric.”²⁰ Nevertheless, the recent uproar has called into question whether current regulatory schemes are sufficient to curb the recent trend,²¹ as well as whether any control can be achieved within the bounds of the First Amendment.²²

This comment, in Section II, explores the history and extent of First Amendment protection; which is essential in determining which types of speech receive constitutional protection and which do not. Section III explains why television is regulated and explores the differences between indecency and obscenity on television. This Comment addresses the prominent role of television in the lives of American children and why the state is permitted to regulate television content to protect children. Section IV addresses how the

NETWORK TV; A PTC STATE OF THE TELEVISION INDUSTRY REPORT, at <http://www.parentstv.org/PTC/publications/reports/stateindustrylanguage/main.asp> (Sept. 19, 2003).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Pat Shellenbarger, *#&!@%*\$#! Mania . . . Swearing Has Become So (Bleeping) Common, Some People Hardly Even Notice Anymore, GRAND RAPIDS PRESS, Jan. 28, 1998, at C1.

¹⁶ *But cf. Study on Foul Language on Television Raises False Alarm, Says Swarthmore College Language Expert*, ASCRIBE NEWS, Sept. 24, 2003 (stating that the increase in the use of profanity does not indicate a degeneration in morality, but rather it is a result of changing standards of societal acceptability).

¹⁷ Ann Oldenburg, *Raunchy Behavior Bursts Out All Over; Bono and the F-Word Started FCC Scrutiny*, USA TODAY, Feb. 5, 2004, at D1.

¹⁸ PARENT’S TELEVISION COUNCIL, POWELL DECISION ON F-WORD NOT ENOUGH, at <http://www.parentstv.org/PTC/publications/release/2004/0114.asp> (Jun. 28, 2004) [hereinafter POWELL DECISION].

¹⁹ *See generally* Edward Epstein, *GOP Representative Would Ban Dirty Words From TV / Ose Angry that FCC Failed to Act When Bono, Richie Used F Word*, SAN FRANCISCO CHRON., Jan. 9, 2004, at A4.

²⁰ *Cohen v. California*, 403 U.S. 15, 25 (1973).

²¹ POWELL DECISION, *supra* note 18.

²² Frank Ahrens, *Nasty Language on Live TV Renews Old Debate*, WASH. POST, Dec. 13, 2003, at A1.

regulation process occurs, in order to understand the extent of the FCC's power and the manner in which grievances are settled. Section V investigates current non-regulatory measures available to lessen indecency on television. Section VI introduces new legislation aimed at combating indecency. Section VII addresses the opposition to the new legislation by presenting the views of First Amendment advocates, which is pivotal in order to anticipate constitutional challenges the new legislation may instigate. Section VIII evaluates the effectiveness and constitutionality of the proposed legislation. This Comment asserts that the proposed changes in legislation to combat indecency on television are not sufficient to curb indecency, either because they will not stand up to constitutional challenges, or because they do not address the flawed penalty system currently in place.

II. ISN'T ALL SPEECH FREE?

The regulation of indecency and obscenity came to the forefront of recent societal debate when the Federal Communications Commission ("FCC") ruled that the use of the word "fuck" used as an adjective by Bono did not constitute indecent language.²³ The "Bono decision,"²⁴ combined with the controversial display of nudity at the Super Bowl,²⁵ has elevated indecency on television to a hot political issue.²⁶ In order to evaluate whether the initial "Bono decision"²⁷ was correct or whether Janet Jackson's fleeting moment of nudity at the Super Bowl²⁸ will qualify as indecent, it is necessary to first define indecency and properly place it in its First Amendment context.

A. First Amendment Protection of Speech

Freedom of speech has been regarded as a priority in the United States since the beginning of the country.²⁹ After years of tyrannical restraint of speech under English rule, Colonial activists were leery that the new government of

²³ *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Award" Program, *Memorandum Opinion and Order*, 18 FCC Rcd. 19859 (2003) [hereinafter Complaints].

²⁴ *Id.*

²⁵ Glenn Garvin, *Fallout: After Janet Jackson's Exposure, Networks Cover Their Bases and Brace for Tough New Decency Rules; Television*, MIAMI HERALD, Feb. 6, 2004, at A1.

²⁶ The increase of indecent acts on television has angered the current administration and spawned bipartisan legislation in both houses of Congress. Flint & Squeo, *supra* note 7; see also S. Res. 283, 108th Cong. (2003).

²⁷ Complaints, *supra* note 23.

²⁸ David Bauder, *After Halftime, Freefall of Standards Likely to Stop*, SUN HERALD (Miss.), Feb. 6, 2004, at B2.

²⁹ MARY HULL, CENSORSHIP IN AMERICA 2-5 (1999).

the United States would, like its English antecedents, assert its influence over speech.³⁰ The Colonists particularly feared a reprisal of English law, which forbid any criticism of the government, a crime called “seditious libel”.³¹

Because of the colonists’ earlier experience with Government clampdowns on speech, freedom of speech was codified in American law with the ratification of the First Amendment in 1791.³² The First Amendment is grounded in the notion that candid expression of ideas improves society as a whole.³³ The idea that free speech makes for a better society is embedded in three concepts deeply rooted in American case-law. First, the belief that freedom of speech leads to better informed citizens who are more capable of performing an active role in the political process.³⁴ Justice Harlan’s opinion in *Cohen v. California*³⁵ illustrates this concept:

[The First Amendment] is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.³⁶

The second premise animating the First Amendment is that free exchange of ideas allows the truth or falsehood of an idea to be proven.³⁷ This theory is based on the rationale that the best way to test the validity of a claim is to subject it to public scrutiny.³⁸ This is a theory commonly called the “discovery of truth.”³⁹ The “discovery of truth” model of free speech is best summarized by Justice Holmes’ dissenting opinion in *Abrams v. United States*,⁴⁰ where he stated, “the best test of truth is the power of the *thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which

³⁰ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 748-50 (1997).

³¹ *Id.* at 749.

³² U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

³³ CHEMERINSKY, *supra* note 30, at 752; *see also* N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964) (stating that the First Amendment is based on “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehemence, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

³⁴ CHEMERINSKY, *supra* note 30, at 752 (calling this aspect of free speech “self governance”).

³⁵ *Cohen v. California*, 403 U.S. 15 (1971).

³⁶ *Id.* at 24.

³⁷ CHEMERINSKY, *supra* note 30, at 753.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 250 U.S. 616 (1919).

their wishes safely can be carried out.”⁴¹

Lastly, freedom of speech is grounded in the theory that, as a basic condition of liberty, Americans should choose what speech is acceptable.⁴² This theory has been referred to as “advancing autonomy.”⁴³ The autonomy model of free speech is also evident in *Cohen*,⁴⁴ where the Court stated, “it is nevertheless often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”⁴⁵

Despite the inclusion of freedom of speech in the First Amendment however, there has never been a time in America when speech was completely uninhibited.⁴⁶ Certain types of speech do not receive First Amendment protection at all.⁴⁷ The following are examples of speech types traditionally held to be restrained.

1. Speech that is Not Protected By the First Amendment

The First Amendment’s freedom of speech is not an “absolute” freedom.⁴⁸ There are narrow exceptions for speech that does not effectuate a more informed politic, nor aid in the discovery of truth, nor advance autonomy.⁴⁹ These exceptions are for speech that has little social value and as a result is able to be regulated without violating the First Amendment.⁵⁰ In *Chaplinsky v. New Hampshire*,⁵¹ the Supreme Court listed some of these categories of speech as “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words.”⁵² In addition to the *Chaplinsky* list, speech encouraging illegal conduct is also a category of speech not protected by the First Amendment.⁵³

⁴¹ *Id.* at 630 (emphasis added).

⁴² CHEMERINSKY, *supra* note 30, at 754.

⁴³ *Id.*

⁴⁴ 403 U.S. 15 (1971) (addressing whether a t-shirt bearing the words “Fuck the Draft” deserved First Amendment protection).

⁴⁵ *Id.* at 25.

⁴⁶ HULL, *supra* note 29, at 2-5.

⁴⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

⁴⁸ *Id.*

⁴⁹ *Id.* at 571-572.

⁵⁰ *Id.* In *Chaplinsky*, the Court described these words as “[w]ell-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Id.* at 571-72.

⁵¹ *Id.* at 571.

⁵² *Id.* at 572.

⁵³ *Schenck v. United States*, 249 U.S. 47 (1919).

a. Defamation

Defamation is traditionally not protected by the First Amendment,⁵⁴ but because of the importance of the “marketplace of ideas” and the concept of an informed public, there are limits to the definition of defamation.⁵⁵ Achieving the aims of the First Amendment may at times require protecting speech that “includes[s] vehement, caustic and sometimes unpleasantly sharp attacks.”⁵⁶ Based on this foundation, in *N.Y. Times v. Sullivan*,⁵⁷ the Supreme Court held that in order to successfully recover for defamation or libel there must be more than a mere attack on a person’s character.⁵⁸ The Supreme Court held that there must be evidence that the person launching the attack did so “with knowledge that [the accusations were] false or with reckless disregard of whether it was false or not.”⁵⁹

b. Fighting Words

In *Chaplinsky*, the Supreme Court defined fighting words as those that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁶⁰ *Chaplinsky* involved a man who was distributing literature on a street corner and “denouncing all religion as a ‘racket.’”⁶¹ Mr. Chaplinsky’s language was upsetting to enough people that the police were called for an ensuing riot.⁶² The Court announced that the test for fighting words was “what men of common intelligence would understand would be words likely to cause

⁵⁴ *Chaplinsky*, 315 U.S. at 572.

⁵⁵ *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁵⁶ *Id.* at 271.

⁵⁷ *Id.*

⁵⁸ *Id.* at 279-80.

⁵⁹ *Id.* at 280. *N.Y. Times* involved a 1960 advertisement placed in the *N.Y. Times* soliciting support for the desegregation movement. *Id.* at 256-58. In the ad, the police department of Montgomery, Alabama was criticized for its handling of recent desegregation demonstrations. *Id.* at 257-58. The Commissioner from Alabama in charge of the Montgomery police sued for defamation, alleging that any disparaging remarks against the police were concerning him personally, since his job was one of supervision. *Id.* at 258. The Court held that the speech was protected by the First Amendment. *Id.* at 296-97. The ad did not rise to the level of defamation because there was no evidence to suggest that neither the party that placed the ad, nor the newspaper itself, did so recklessly or with knowledge that ad contained errors. *Id.* at 286. In fact there were small errors contained in the ad pertaining to some of the factual details of particular protests, for example which particular song was sung by protestors. The Court did not place much weight on these inconsequential errors. *Id.* at 258-259.

⁶⁰ *Chaplinsky*, 315 U.S. at 572.

⁶¹ *Id.* at 570.

⁶² *Id.*

an average addressee to fight.”⁶³ The Court held that the words spoken by Mr. Chaplinsky met this test.⁶⁴

The Court, however, reduced the scope of the “fighting words” doctrine in *Cohen v. California*⁶⁵ by stating that the words must be directed at an individual in order to rise to the level of fighting words.⁶⁶ *Cohen* involved a man who walked into the city courthouse wearing a jacket with the words “Fuck the Draft” on the back.⁶⁷ The Court found that this language did not qualify as fighting words because it was neither directed at an individual nor meant to “provoke[e] a given group to hostile reaction.”⁶⁸

“Hostile audience” cases are a subset of “fighting words.”⁶⁹ These cases involve the application of the “clear and present danger test” to factual scenarios where a speaker has incited a violent reaction in an audience.⁷⁰ The Court has approached these cases with mixed treatment. In *Terminiello v. Chicago*,⁷¹ a case involving a politician who called his rivals names resulting in an uprising, the Court held that the insults were protected speech.⁷² The Supreme Court said speech that evokes hostility in an audience should still be protected “unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”⁷³ The Court felt that because the purpose of freedom of speech is to “invite dispute,” the breach of the peace under these circumstances did not rise to the level of a “clear and present danger.”⁷⁴

An additional concern in hostile audience cases is the potential for unfairness in the respect that it is the audience, and not the speaker, that would have control over whether the speech would be protected.⁷⁵ This is because a speaker may be convicted on these grounds when the crowd is out of control as a result of his speech.⁷⁶ The Supreme Court has noted this flaw⁷⁷ and is

⁶³ *Id.* at 573.

⁶⁴ *Id.* at 574.

⁶⁵ 403 U.S. 15 (1973).

⁶⁶ *Id.*

⁶⁷ *Id.* at 16.

⁶⁸ *Id.* at 20. The Court has construed the definition of fighting words rather narrowly. *Id.* After *Chaplinsky*, the Court has never found a conviction on a “fighting words” statute constitutional. *Id.*

⁶⁹ *See id.* at 821.

⁷⁰ *Id.*

⁷¹ 337 U.S. 1 (1949).

⁷² *Id.*

⁷³ *See id.* at 4.

⁷⁴ *Id.*

⁷⁵ CHEMERINSKY, *supra* note 30, at 822.

⁷⁶ *Id.*

⁷⁷ *See Feiner v. New York*, 340 U.S. 315, 325-326 (1951) (Black, J., dissenting).

reluctant to uphold convictions as a result of hostile audiences.⁷⁸

c. Advocacy of Illegal Conduct

“Advocacy of illegal conduct” is when a speaker intends to cause the audience hearing the speech to commit an illegal act.⁷⁹ Like “hostile audience” cases, advocacy of illegal conduct involves the effect of a speaker on the listener.⁸⁰ It is not protected by the First Amendment precisely because of this effect.⁸¹ In *Schenck v. United States*,⁸² the Supreme Court held that speech can be regulated when the intent of the speaker is to evoke illegal action.⁸³ Decided during World War I, *Schenck* involved speech printed on a leaflet encouraging men to resist participation in the draft.⁸⁴ Draft participation was mandatory and “obstruct[ing] the recruiting or enlistment service” was illegal by statute.⁸⁵ The Court noted, “[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 a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”⁸⁶ The Court held that the words printed were intended to “obstruct the carrying . . . out” of the draft law.⁸⁷

⁷⁸ See e.g., *Edwards v. South Carolina*, 372 U.S. 229, 236-38 (1963) (holding that a civil rights protest held by African American protestors at the South Carolina capitol did not meet the “clear and present danger test” because there was sufficient police presence at the demonstration to quell any uprising that may have occurred); *Cox v. Louisiana*, 379 U.S. 536, 550 (1965) (holding that a speaker protesting racial segregation could not be convicted under hostile audience rationale when no on-lookers threatened violence and even if violence would have been threatened police were present to assert control).

⁷⁹ See CHEMERINSKY, *supra* note 30, at 814.

⁸⁰ See generally *Schenck v. United States*, 249 U.S. 47 (1919) (involving a “circular” encouraging illegal conduct from the people who read the material); *Feiner v. New York*, 340 U.S. 315, 317 (1951) (involving a situation where an African American male during a civil rights gathering was “endeavoring to arouse the [African American] people against the whites.”)

⁸¹ CHEMERINSKY, *supra* note 30, at 814.

⁸² 249 U.S. 47 (1919).

⁸³ See *id.* at 52.

⁸⁴ *Id.* at 51.

⁸⁵ *Id.* at 53.

⁸⁶ *Id.* at 52.

⁸⁷ *Id.* at 51. When looking at the facts, the holding in *Schenck* may seem extreme by today’s standards, but it must be viewed in light of the political climate of the time to be fully understood. *Schenck* took place when the United States was involved in a war that was unpopular by a sizeable segment of the population. CHEMERINSKY, *supra* note 30 at 803. As a result, the Espionage Act of 1917, which was the statute at issue in *Schenck*, was enacted to prevent anti-government uprisings in the United States like had happened in other parts of the world. *Id.* Therefore, the “wartime circumstances” found in *Schenck* were unique and speech that otherwise might have fell under the First Amendment was barred. See *id.* For other war-time decisions involving advocacy of illegal conduct, see also

The *Schenck* holding has been called the “clear and present danger test.”⁸⁸ The classic example of speech that meets the “clear and present danger test” is yelling “fire” in a crowded theater.⁸⁹ *Brandenberg v. Ohio*⁹⁰ further defined the clear and present danger test, where the Court held that speech “directed to inciting or producing imminent lawless action” would only be unconstitutional if it was actually “likely to produce such action.”⁹¹ This prong further expanded speech protection.⁹² *Schenck* and *Brandenberg* read together create a three-part test for courts to apply when determining advocacy of illegal conduct. The advocacy must have the: 1) likelihood to produce, 2) imminent, 3) lawless action.⁹³

d. Lewd and Obscene

Lewd and obscene speech was defined by the Court in *Roth v. United States*⁹⁴ as speech “which deals with sex in a manner appealing to prurient interest.”⁹⁵ *Roth*, decided in 1957, was the first time that the Supreme Court addressed obscenity directly.⁹⁶ Supreme Court opinions dating as far back as 1877⁹⁷ however, implied obscenity was not protected by the First Amendment.⁹⁸ This is particularly true because of the threat of exposure to children.⁹⁹

Roth involved challenges to two obscenity statutes banning the mailing of

Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919) and Abrams v. United States, 250 U.S. 616 (1919).

⁸⁸ See CHEMERINSKY, *supra* note 30, at 803.

⁸⁹ See *Schenck*, 249 U.S. at 52.

⁹⁰ 395 U.S. 444 (1969).

⁹¹ *Id.* at 447 (1969). *Brandenberg* involved a film made during a Ku Klux Klan meeting in which there were racial slurs used. *Id.* at 446. The film was made by a member of the media invited to the meeting and aired on television after the fact. *Id.* at 445. The Court in *Brandenberg* did not define “imminent” or “likely to produce,” but conceded that they were not met under these facts. CHEMERINSKY, *supra* note 30, at 813.

⁹² CHEMERINSKY, *supra* note 30, at 813.

⁹³ *Brandenberg v. Ohio*, 395 U.S. 444 (1969), *Schenck v. United States*, 249 U.S. 47, 52 (1919). See *Hess v. Indiana* (holding that the threat, “[w]e’ll take the fucking streets later,” made to a police officer made during an antiwar demonstration did not qualify as advocacy of illegal conduct because the statement “amounted to nothing more than advocacy of illegal action at some indefinite future time;” it failed the “likely to produce” and the “imminent” requirements of the three part test).

⁹⁴ 354 U.S. 476 (1957).

⁹⁵ *Id.* at 487.

⁹⁶ *Id.* at 481.

⁹⁷ See generally *Ex parte Jackson*, 96 U.S. 727 (1877).

⁹⁸ *Roth*, 354 U.S. at 481.

⁹⁹ *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 57-59 (1973).

obscene materials and confirmed this implication.¹⁰⁰ The *Roth* Court made clear that obscenity is not the same as sex.¹⁰¹ *Roth* explained the difference on two levels. First, the Court viewed sex as a topic of great public interest and debate.¹⁰² Therefore, barring or placing prior restraints¹⁰³ on the discussion of sex would violate the liberty foundation of the First Amendment.¹⁰⁴ When *Roth* defined obscenity, the Court set out that there must be more than a “portrayal of sex.”¹⁰⁵ The Court decided on the “prurient interest test,” stating that material would only be obscene if it contained “material having a tendency to excite lustful thoughts.”¹⁰⁶ This sex/obscenity distinction is necessary to prevent the banning of educational and literary materials that approach sex in a refined manner.¹⁰⁷

The *Roth* court’s vague “prurient interest” standard was expanded in *Miller v. California*,¹⁰⁸ where the Court established a three part test to determine if material was obscene. *Miller* concerned facts similar to those of *Roth*. In *Miller*, a man had mailed unsolicited advertisements for books and a video dealing with sex.¹⁰⁹ The advertisement included pictures of individuals “engaging in a variety of sexual activities, with genitals often prominently displayed.”¹¹⁰ The sender of the material had been prosecuted under a California statute banning the distribution of obscene material.¹¹¹

Miller adopted a standard for courts to apply that echoed the California statute,¹¹² consisting of:

- (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the

¹⁰⁰ *Roth*, 354 U.S. at 480-81.

¹⁰¹ *Id.* at 487.

¹⁰² *Id.* at 487-88.

¹⁰³ Prior restraint means a mechanism instituted to prevent speech from happening before it occurs. CHEMERINSKY, *supra* note 30, at 770. There are several forms that prior restraints can take, including court orders and license requirements. *Id.* 776-86.

¹⁰⁴ *Roth*, 354 U.S. at 488.

¹⁰⁵ *Id.* at 487.

¹⁰⁶ *Id.* at 487-88.

¹⁰⁷ *Id.*

¹⁰⁸ 413 U.S. 15 (1973).

¹⁰⁹ *Id.* at 18. The materials advertised included four books named “Intercourse”, “Man-Woman”, “Sex Orgies Illustrated”, “Illustrated History of Pornography” and a video titled “Marital Intercourse”. *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 16. Obscene was defined by the statute as material that: to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance. *Id.*

¹¹² *Id.* at 24.

applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹¹³

The Court in *Miller* gave a few examples of material that would be patently offensive and thereby obscene.¹¹⁴ These included “ultimate sex acts,” “masturbation, excretory functions, and lewd exhibition of genitals.”¹¹⁵ The examples in *Miller* are not intended to be an exclusive list, but are intended to set the “substantive constitutional” scope of the law.¹¹⁶ The Court was clear to establish, however, that the states were responsible for detailing their particular statutory definition of obscenity.¹¹⁷

Beyond *Miller*, subsequent cases have given meaning to all three prongs of the *Miller* test. In *Brockett v. Spokane Arcades, Inc.*,¹¹⁸ concerning the first prong of the *Miller* test, the Court narrowed the definition of “prurient” by holding that a statute outlawing material that does not clearly differentiate between a normal interest in sex¹¹⁹ and a “shameful or morbid interest,”¹²⁰ would be unconstitutional on the grounds that it was overly broad.¹²¹ The “contemporary community standard” of the first prong was defined in *Miller* as the local community, not a national community.¹²² The Court later held, in *Hamling v. United States*,¹²³ that the local community standard is the standard of the community in which the jury is selected.¹²⁴ This standard applies even when the statute is a national one that would span several local communities.¹²⁵

When explaining the second prong of the *Miller* test in *Ward v. Illinois*,¹²⁶ the Supreme Court held that a statute does not have to include an “exhaustive list” of material that is deemed to be patently offensive under the state statute.¹²⁷ The fact that a statute incorporates examples and adequately reflects the language in *Miller* will be enough for a statute to pass constitutional muster.¹²⁸ However, the term “patently offensive” does have boundaries. In

¹¹³ *Miller*, 413 U.S. at 39.

¹¹⁴ *Id.* at 25.

¹¹⁵ *Id.*

¹¹⁶ *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974).

¹¹⁷ *See Miller*, 413 U.S. at 25.

¹¹⁸ 472 U.S. 491 (1985).

¹¹⁹ Here the word “lust” was held to mean a normal interest in sex. *Id.* at 504-05.

¹²⁰ *Id.*

¹²¹ *Id.* at 505. Overly broad means “a statute is so broadly written that it deters free expression.” BLACK’S LAW DICTIONARY 1129 (7th ed.1999)[hereinafter BLACK’S]. If a statute is overbroad it will be found unconstitutional “because of its chilling effect” on speech. *Id.*

¹²² *Miller*, 413 U.S. at 32.

¹²³ 418 U.S. 87 (1974).

¹²⁴ *Id.* at 106.

¹²⁵ *Id.*

¹²⁶ 431 U.S. 767 (1977).

¹²⁷ *See id.* at 776.

¹²⁸ *Id.*

Jenkins v. Georgia,¹²⁹ the film *Carnal Knowledge* was challenged as being “patently offensive” on the grounds that it showed nudity and sexual acts.¹³⁰ The Court held that the film was not patently offensive because, even though it implied ultimate sex acts, “the camera does not focus on the bodies of the actors at such times.”¹³¹ The scenes in question did not show the actors genitals and despite some shots of nudity, the Court held that “nudity alone is not enough” to qualify as “patently offensive.”¹³²

Finally, contrary to the first prong of *Miller*, the Supreme Court has held that the third prong of the *Miller* test must be determined on a standard broader than the local community.¹³³ In *Pope v. Illinois*,¹³⁴ the Court stated that whether material lacks artistic, literary, political or social value does not “vary from community to community.”¹³⁵ The Court held, therefore, that the proper test is whether a reasonable person in any community would find the material lacked such value when taken as a whole.¹³⁶

Because obscene speech receives no First Amendment protection, combined with the danger that it poses to children, obscenity may be regulated to an extent greater than sex alone.¹³⁷ In *Paris Adult Theater v. Slaton*,¹³⁸ the Supreme Court held that to meet these goals, the state may prevent the showing of obscene materials.¹³⁹ The Court qualified this harsh rule of regulation in *Paris* by noting that materials were not “restrained” until there had been a “full adversary proceeding and a final judicial determination . . . that the materials were constitutionally unprotected.”¹⁴⁰

2. Restrictions on the Content of Speech-Content Based Law v. Content Neutral Laws

Regulation of the content of speech is “presumptively invalid,” outside of the narrow exceptions where First Amendment protection does not reach, because restrictions on the content of speech directly contradict the premise of the First Amendment.¹⁴¹ Outside of these narrow exceptions, any content-

¹²⁹ 418 U.S. 153 (1974).

¹³⁰ *Id.* at 158-59.

¹³¹ *Id.* at 161.

¹³² *Id.*

¹³³ *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-59 (1973).

¹³⁸ *See generally id.*

¹³⁹ *Id.* at 57.

¹⁴⁰ *Id.*

¹⁴¹ *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

based regulation on speech will be subject to strict scrutiny.¹⁴² Strict scrutiny is a level of judicial examination whereby a regulation will be upheld only if there is a “compelling state interest”¹⁴³ for the regulation and the regulation is “narrowly tailored”¹⁴⁴ to meet that interest.¹⁴⁵

When there is a regulation that does not regulate the content of speech, yet still impacts speech, the regulation is subjected to a lower form of judicial examination called intermediate scrutiny.¹⁴⁶ These types of regulations are called content-neutral regulations.¹⁴⁷ Therefore, when evaluating a statute for constitutionality it is critical for the Court to determine whether the statute is one that regulates content or one that is content neutral.

In *Turner Broadcasting System, Inc. v. F.C.C.*,¹⁴⁸ the Court acknowledged that determining whether a statute was content-neutral or content-based was not always clear cut.¹⁴⁹ The Court stated, “laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.”¹⁵⁰ Alternatively, statutes that place “benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.”¹⁵¹ Therefore, regulations based on the “viewpoint” or “message” of the speaker are content-based and consequently not permissible, while regulations that do not target particular views and are broadly applied are content-neutral and thus permissible.¹⁵²

3. Permissible Content-Neutral Restrictions

Content-neutral regulations may place “reasonable” standards on the time that the speech may occur, the place where the speech may occur, and the

¹⁴² *Hamilton v. San Bernardino*, 107 F Supp. 2d 1239, 1242 (C.D. Cal. 2000).

¹⁴³ The compelling state interest test is defined as “a method for determining the constitutional validity of a law, whereby the government’s interest in the law is balanced against the individual’s constitutional right to be free of the law, and only if the government’s interest is strong enough will the law be upheld.” BLACK’S, *supra* note 121, at 277.

¹⁴⁴ Narrowly tailored is defined as “being only as broad as is reasonably necessary to promote a substantial government interest that would be achieved less effectively without the restriction; no broader than necessary.” BLACK’S, *supra* note 121, at 1045.

¹⁴⁵ *Hamilton*, 107 F. Supp. 2d at 1247. Strict scrutiny analysis is the most rigorous form of judicial examination, and is applied to laws that restrict the content of speech so as not to allow the government to “target” regulations towards topics of speech of which it does not approve.

¹⁴⁶ *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

¹⁴⁷ CHEMERINSKY, *supra* note 30, at 758.

¹⁴⁸ *Turner*, 512 U.S. at 642.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 643.

¹⁵¹ *Id.*

¹⁵² *See id.* at 641-43.

manner in which the speech may occur.¹⁵³ These restrictions are called “time, place, and manner” restrictions or regulations.¹⁵⁴ In *Ward v. Rock Against Racism*,¹⁵⁵ the Supreme Court made clear that in order to pass the intermediate level of judicial scrutiny, content-neutral restrictions must be made “without reference to the content of the regulated speech.”¹⁵⁶

Ward illustrates the “three part test” needed to satisfy the constitutionality of content-neutral, “time place, and manner restrictions.”¹⁵⁷ In order for the regulation to be constitutional it must be content-neutral,¹⁵⁸ narrowly tailored to meet the specific interest on which the government bases the restriction,¹⁵⁹ and there must be ample alternative means for the speaker to reach the target audience.¹⁶⁰

Time, place, and manner regulations typically involve speech that occurs in the “public forum.”¹⁶¹ Public forum has a rather constricted definition within the judiciary.¹⁶² In *Hague v. Committee for Industrial Organization*,¹⁶³ the Court held that places “held in trust” for citizens would be deemed to be the public forum.¹⁶⁴ Examples of these places include public streets and parks.¹⁶⁵ Citizens are generally allowed to use the public forum to express ideas and debate¹⁶⁶ in conformity with the underpinnings of the First Amendment. The privilege of using the public forum, however, may be regulated with proper time, place, and manner controls in order to maintain peace and good order.¹⁶⁷

¹⁵³ *Ward v. Rock Against Racism*, 491 U.S. 781, 789-91 (1989).

¹⁵⁴ Richard A. Seid, *A Requiem for O'Brien: On the Nature of Symbolic Speech*, 23 CUMB. L. REV. 563, 580 (1993).

¹⁵⁵ 491 U.S. 781 (1989).

¹⁵⁶ *Id.* at 790.

¹⁵⁷ *Id.*

¹⁵⁸ Meaning that a regulation cannot be selective in the groups or type of speech that it prohibits. See *Chicago Police Dept. v. Mosley*, 408 U.S. 92, 99 (1972) (stating that a picketing ordinance was unconstitutional because it “describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter.”). Here, the ordinance allowed picketing about labor issues, but forbid picketing about any other issue. *Id.*

¹⁵⁹ See *supra* note 155 for a discussion of narrowly tailored.

¹⁶⁰ See *Ward*, 491 U.S. at 791.

¹⁶¹ See CHEMERINSKY, *supra* note 30, at 924.

¹⁶² See generally *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (discussing the use of public spaces for speech).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 515.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 515-16.

¹⁶⁷ *Id.*; see also *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941) (upholding convictions of sixty-eight religious demonstrators who walked along the sidewalk carrying signs, etc. The Court stated that the licensing statute under which they were convicted was constitutional because requiring a license for parades and processions was part of the government’s way to provide “proper policing” and “prevent confusion by overlapping parades”).

Thus, so long as they meet the *Ward* test, states have a right to create time, place, and manner statutes under their general police power.¹⁶⁸

Although television is accessed by a large portion of the population, and arguably has characteristics of a “public forum,” it is not treated as public forum for purposes of freedom of speech.¹⁶⁹ Where content of speech cannot be regulated in the traditional public forum, it can be regulated on television.¹⁷⁰ Speech content can be regulated on television when the material approaches, but does not quite meet, the level of obscenity.¹⁷¹ Indecent speech that is constitutionally protected in the traditional “public forum” may be regulated on television.¹⁷²

III. YOU CAN’T SAY THAT ON TELEVISION?! WHERE WE CAME FROM.

A. Why Television Can be Regulated

Television is held to a standard different than free speech in the regular “public forum” because it confronts citizens in their own homes and is readily accessible to children.¹⁷³ Approximately 98% of American homes have a minimum of one television.¹⁷⁴ According to one study, children between the ages of two and seventeen watch almost twenty hours of television per week.¹⁷⁵ Over half of American children ages eight to sixteen have a television set in their bedroom.¹⁷⁶ Thus, many children watch television when there is no supervising adult present to monitor the content.¹⁷⁷ Therefore, speech that would otherwise be protected in the traditional “public forum” may be

¹⁶⁸ *Schneider v. Irvington*, 308 U.S. 147, 150 (1939).

¹⁶⁹ See generally James E. Fleming, et al, *Panel IV: Censorship of Cable Television’s Leased and Public Access Channels*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 801 (1994) (discussing some of the attributes of public access television channels such as availability to a wide portion of the population).

¹⁷⁰ See, e.g., *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978). Although *Pacifica* itself does not specifically speak of radio, the decision in *Pacifica* has been extended to cover television as well. See *In re Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broad. Indecency*, *Policy Statement*, 16 FCC Rcd. 7999, 8000 (2001).

¹⁷¹ See *id.*

¹⁷² *Denver Area Educ. Telecomm. Consortium Inc. v. F.C.C.*, 518 U.S. 727, 750 (1996).

¹⁷³ See *Pacifica*, 438 U.S. 726.

¹⁷⁴ Catherine Edman, *Television is a Bona Fide American Tradition. But Not Everyone is OK With That Fact*, CHI. DAILY HERALD, Apr. 22, 2002.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

regulated when it is on television.¹⁷⁸ When speech is regulated on television, there are limitations in place to make certain that the First Amendment is given the utmost deference.¹⁷⁹

B. Obscene Television

Obscenity, because it is not afforded First Amendment protection, is strictly prohibited on television by statute.¹⁸⁰ 47 U.S.C. §559 allows for a fine and a prison sentence to any person who “transmits” obscene material over “any cable system.”¹⁸¹ The obscenity test as defined by the *Miller* Court is also applied to television.¹⁸² However, the *Miller* obscenity test does not supply a definition for indecency.¹⁸³ This is where the FCC takes over.

C. Indecency Defined

The FCC designates broadcast indecency as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities.”¹⁸⁴ Since indecent material does not quite amount to obscenity, the content is still afforded some protection under the First Amendment.¹⁸⁵ As a result of the protections provided by the First Amendment, any regulation must meet the “compelling interest” and “narrowly tailored” prongs of the strict scrutiny test.¹⁸⁶

The FCC’s compelling reason for indecency regulations is to support “parental supervision of children and more generally its concern for children’s well being.”¹⁸⁷ The FCC’s “compelling interest” and indecency standard has been upheld by the Supreme Court and codified by statute.¹⁸⁸

¹⁷⁸ CHEMERINSKY, *supra* note 30, at 846.

¹⁷⁹ FCC, THE FCC AND FREEDOM OF SPEECH, at <http://www.fcc.gov/cgb/consumerfacts/freespeech.html> (last modified April 01, 2004).

¹⁸⁰ 47 U.S.C. §559 (2000).

¹⁸¹ *Id.*

¹⁸² *See generally* Miller v. California, 413 U.S. 15 (1973); *see also* FCC, OBSCENE AND INDECENT BROADCASTS, at <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last modified April 12, 2004).

¹⁸³ FCC, OBSCENE AND INDECENT BROADCASTS, at <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last modified April 12, 2004).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *In re* Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broad. Indecency, *Policy Statement*, 16 FCC Rcd. 7999, 8000 (2001).

¹⁸⁷ *Id.* at 8001.

¹⁸⁸ FCC, OBSCENE AND INDECENT BROADCASTS, at

In 1978, the FCC's indecency standard was challenged in *F.C.C. v. Pacifica Foundation*.¹⁸⁹ *Pacifica* involved the radio broadcast of comedian George Carlin's monologue entitled "Filthy Words."¹⁹⁰ The monologue was aired at 2 p.m. during a radio program that was evaluating the effect and impact of language on society.¹⁹¹ As part of the monologue, Carlin described "words you couldn't say on the public . . . airwaves."¹⁹²

The Carlin monologue stated that there were seven "original" words that you could not say on the airwaves, and he listed them as "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits."¹⁹³ Carlin listed three "more words" that are not allowed as "fart, turd and twat."¹⁹⁴ The gist of Carlin's monologue was to demonstrate the many ways that these words are used in modern conversation and to point out irony in the fact that most of the words can be used in some context that does not make them "dirty," but when used in a certain manner they become taboo.¹⁹⁵ Carlin explained, for example, that it would be permissible to say the word "ass" in the context of a donkey, but saying "up your *ass*" would not be allowed.¹⁹⁶

The complaint filed regarding the Carlin monologue came from a man who was listening to the broadcast in his car with his young son.¹⁹⁷ Upon initial review, the FCC did not impose any penalty on the station responsible for the broadcast, but did state that they could have been penalized.¹⁹⁸ The FCC went a step further and sought to clarify their definition of indecency because they had been receiving a "growing number of complaints about indecent speech on the airwaves."¹⁹⁹

The statute impacting indecency at the time of *Pacifica* outlawed "any obscene, indecent, or profane language by means of radio communication."²⁰⁰ The FCC found that the Carlin material did not rise to the level of obscenity, but was "patently offensive" and met their indecency standard in light of the Commission's goal to prevent indecency "when there is a reasonable risk that

<http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last modified April 12, 2004).

¹⁸⁹ 438 U.S. 726 (1978).

¹⁹⁰ *Id.* at 729, 751 (appearing as an appendix to the Court decision in *Pacifica* is the entire Carlin monologue); *see also* George Carlin's website, at <http://www.georgecarlin.com/georgecarlin/home/home.html>. (last visited Nov. 15, 2004).

¹⁹¹ *Pacifica*, 438 U.S. at 729-30.

¹⁹² *Id.* at 751.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 755.

¹⁹⁵ *Id.* at 751-55.

¹⁹⁶ *Pacifica*, 438 U.S. at 755 (emphasis in original).

¹⁹⁷ *Id.* at 730.

¹⁹⁸ *Id.* at 730.

¹⁹⁹ *Id.* at 731.

²⁰⁰ 18 U.S.C. §1464 (1976).

children may be in the audience.”²⁰¹ The FCC conceded that their ruling was not meant to be a complete bar on indecent language, but only meant to restrict it or “channel it” to the times of day when children would not be likely to be in the audience and inadvertently hear indecent material.²⁰²

The FCC’s holding was overruled in the Court of Appeals for the District of Columbia Circuit on the grounds that it constituted impermissible censorship.²⁰³ The Supreme Court granted certiorari to decide whether the ruling was an abusive use of censorship and whether the Carlin monologue was in fact indecent.²⁰⁴ On the issue of censorship, the Supreme Court held that censorship was only abusive if the FCC proposed edits or barred material before it was aired.²⁰⁵ Here, the Commission’s decision had clearly been a “subsequent review” of broadcasting and was therefore permissible.²⁰⁶

The Court evaluated the indecency of the broadcast in light of two separate claims made by the Pacifica Foundation, the corporation that aired the Carlin monologue.²⁰⁷ First, Pacifica asserted that the FCC’s definition was overbroad because it would ban “so much constitutionally protected speech.”²⁰⁸ The Court held that the FCC’s ruling was not overbroad because it was limited to a “specific factual context;” therefore, it was narrow enough in scope to be constitutional.²⁰⁹

Second, the Pacifica Foundation argued that *if* the monologue did not rise to the level of obscenity, then *any* ban on content should be forbidden under the First Amendment.²¹⁰ This argument, if successful, would mean that indecency could not be restricted at all.²¹¹ The Court acknowledged that indecent material “offends” under the same rationale as obscenity in that it normally lack, “literary, political or scientific value.”²¹² However, the Court acknowledged that different levels of protection would be afforded for different “medium[s] of expression”²¹³ and making a determination as to whether material was indecent would require that the entire context of the situation be evaluated.²¹⁴ The Court recognized that broadcast speech had been assigned the least

²⁰¹ *Pacifica*, 438 U.S. at 731-32.

²⁰² *Id.* at 733.

²⁰³ *Id.*

²⁰⁴ *Id.* at 735, 742, 744.

²⁰⁵ *Id.* at 735.

²⁰⁶ *Pacifica*, 438 U.S. at 737.

²⁰⁷ *Id.* at 742.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Pacifica*, 438 U.S. at 744 .

²¹² *Id.* at 746.

²¹³ *Id.* at 748.

²¹⁴ *Id.* at 747-48.

protection under the First Amendment.²¹⁵ The reasoning for this is twofold. First, broadcast speech intrudes into people's homes, where the public has a right "to be left alone," so the privacy rights of the listening public "outweighs the First Amendment rights of an intruder."²¹⁶ Second, the "unique" availability of television to children makes this medium different from other forms of media.²¹⁷ When evaluating the Carlin monologue in light of its particular arena and in its entire context, the Court held that the government's interest in protecting children would allow indecency to be regulated in these "narrow" circumstances.²¹⁸

After *Pacifica*, issues arose as to when indecency could be regulated on television. Congress instructed the FCC to enforce the ruling on a "24 hour per day basis," but the Court found this unconstitutional.²¹⁹ The Court found that the least restrictive way to meet the goal of protecting children from unwanted indecency was to limit potentially indecent programming to those times when children would least likely be viewers.²²⁰ The FCC changed their regulatory scheme to reflect this recommendation.²²¹ In 1995, the FCC put into effect 47 C.F.R. §73.3999,²²² which states that no "indecent material" can be broadcast "between 6 a.m. and 10 p.m."²²³ The statute has created a "safe harbor" from indecency in the hours where children should be watching, but leaves the availability open for broadcasters to air indecent material at other hours.²²⁴

IV. REGULATION IN ACTION.

When discussing the regulation of indecent speech on television, one is confined to regulation of broadcast on so-called "public access channels," because cable is held to a different standard.²²⁵ Public access or broadcast channels are free broadcast and are accessible by anyone who owns a television and can receive a signal.²²⁶ Cable, on the other hand, must be paid

²¹⁵ *Id.*

²¹⁶ *Pacifica*, 438 U.S. at 747-48

²¹⁷ *Id.* at 749.

²¹⁸ *Id.* at 749-50.

²¹⁹ *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broad. Indecency, *Policy Statement*, 16 FCC Rcd. 7999, 8001 (2001).

²²⁰ *Id.*

²²¹ *Id.*

²²² 47 C.F.R. §73.3999 (2000).

²²³ *Id.*

²²⁴ *Industry Guidance*, 16 FCC Rcd. at 8001.

²²⁵ Lynn Smith, *FCC Examining Indecency Laws*, L.A. TIMES, Jan. 27, 2004, at 3E.

²²⁶ *Denver Area Educ. Telecomm. Consortium Inc. v. F.C.C.*, 518 U.S. 727, 744-45 (1996).

for and therefore does not pose the same dangers to children.²²⁷ At one point, the FCC had a single standard for both cable and broadcast channels. This changed in the 1980's when cable operators successfully challenged this statutory scheme.²²⁸ Pursuant to 47 U.S.C. §532 however, it is constitutional for a cable operator²²⁹ to regulate indecency if they so choose.²³⁰

A. Role of the FCC In Television Regulation

The responsibility of regulating television falls upon the FCC.²³¹ The FCC was established by the Communications Act of 1934 as the government agency responsible for oversight of all areas of communication.²³² The FCC is an independent agency, meaning that it is responsible to Congress, but not the President.²³³ The FCC has the power to create rules and regulations concerning television under the power granted to them by Congress in the Communications Act of 1934.²³⁴ The rules established by the FCC are the main way that rules regulating speech on television are promulgated.²³⁵

B. How the Regulation Process Occurs

While the FCC promulgates rules, it does not have an omnipotent "Oz"

²²⁷ Oldenburg, *supra* note 17.

²²⁸ James E. Fleming et al., *Panel IV: Censorship of Cable Television's Leased and Public Access Channels*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 801, 810 (1994). It has been argued that indecency has risen in broadcast channels because they have to compete with cable channels for viewers since so many households have cable access. Smith, *supra* note 236. Therefore, they also have to compete for advertising dollars to get to those viewers. *Talk of the Nation: Analysis: Obscenity over the airways and whether Congress or the FCC should tighten restrictions and regulations* (NPR radio broadcast, Jan. 28, 2004). Arguably, this jockeying for viewers and money has caused "HBO envy" on the part of public broadcasters forcing them to "push the envelope." Smith, *supra* note 225.

²²⁹ A cable operator is "any person who provides any wire or communications service." 47 U.S.C. §551(a)(2)(C) (2000).

²³⁰ 47 U.S.C. §532 (2000). *See Denver Area Education Telecommunications Consortium Inc. v. F.C.C.* (holding that a cable operator could prohibit patently offensive material on a cable or leased channel, even though it was unconstitutional to do the same on a public access channel).

²³¹ 47 U.S.C. §303(r) (2000).

²³² FCC, ABOUT THE FCC, at <http://www.fcc.gov/aboutus.html> (last modified Sept. 14, 2004).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ State laws that have a cursory effect on speech are another way that speech on television can be regulated. Some are unconstitutional, such as rate regulations and program access exclusivity. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989). Others may allow a provider to choose which cable channels to include on their service. *See Cmty. Television v. Wilkinson*, 611 F. Supp. 1099 (D.C. Utah 1985).

figure to monitor all T.V. all the time. A public complaint process notifies the FCC about disputes over rules and regulations.²³⁶ Complaints about indecency may be filed by mail or over the Internet.²³⁷ In response to an increase in publicity over broadcast indecency, the FCC has created an Internet link for the public to file complaints regarding indecency directly from their “Obscenity, Indecency & Profanity” page on the Internet.²³⁸ In a dramatic example of the ease of the complaint system, the FCC received 200,000 complaints “in just four days” after the airing of Janet Jackson’s breast.²³⁹

When a complaint is filed, it must provide the FCC with precise information about the alleged indecent event, including the time and date of the event, the broadcast station involved, and a description of the event.²⁴⁰ A recording or tape of the event may also be sent to the FCC.²⁴¹ If this material is not properly included, or if the broadcast occurred during the “safe harbor” hours of 10 p.m. to 6 a.m., the complaint will be dismissed.²⁴²

The FCC applies a two-part test when evaluating complaints for indecency.²⁴³ The FCC first looks at the “subject matter” of the material and decides whether it is sexual or excretory in nature.²⁴⁴ It then decides whether the material is “patently offensive.”²⁴⁵ “Patently offensive” is determined on a case-by-case basis by looking at the entire context of the broadcast.²⁴⁶ Context is a very important factor in the determination of indecency,²⁴⁷ perhaps even the most important factor.²⁴⁸

The FCC has determined that three contextual elements will influence indecency decisions: (1) “graphic description versus indirectness/implication,”

²³⁶ See James E. Fleming et al., *Panel IV: Censorship of Cable Television’s Leased and Public Access Channels*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 801 (1994).

²³⁷ FCC, FIRST AMENDMENT VS. OBSCENITY / INDECENCY, at <http://www.fcc.gov/parents/content.html> (last modified Mar. 31, 2004).

²³⁸ See *id.*

²³⁹ Glenn Garvin, *Fallout; After Janet Jackson’s Exposure, Networks Cover Their Bases and Brace for Tough New Decency Rules*, MIAMI HERALD, Feb. 6, 2004, at A1. This number of complaints nearly matched the 240,000 number of total complaints received in 2003. *Id.*

²⁴⁰ FCC, FIRST AMENDMENT VS. OBSCENITY / INDECENCY, at <http://www.fcc.gov/parents/content.html> (last modified Mar. 31, 2004).

²⁴¹ *Id.*

²⁴² *In re* Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broad. Indecency, *Policy Statement*, 16 FCC Rcd. 7999, 8015 (2001).

²⁴³ *Id.* at 8002.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Industry Guidance*, 16 FCC Rcd. at 8002.

²⁴⁸ FCC, FIRST AMENDMENT VS. OBSCENITY / INDECENCY, at <http://www.fcc.gov/parents/content.html> (last modified Mar. 31, 2004).

(2) “dwelling repetition versus fleeting reference,” and (3) the purpose for which the material was broadcast.²⁴⁹ The material has a greater possibility of being deemed indecent if it is “explicit” in its description of sex or excretory functions.²⁵⁰ Further, material will be found indecent if the underlying, if not explicit, meaning was “unmistakably” indecent.²⁵¹ For example, the following is an excerpt of a broadcast that used only the names of candy but implied sex: “Oh what a piece of juicy fruit she was too. She screamed Oh, Crackerjack. You’re better than the Three Musketeers! As I rammmed my Ding Dong up her Rocky Road and into her Peanut Butter Cup . . . Sure enough nine months later, out popped Baby Ruth.”²⁵² The broadcast was ultimately found indecent by the FCC.²⁵³

The more the potentially indecent material is repeated, the better the chances it will be found indecent by the FCC.²⁵⁴ The FCC may not find the material indecent if the material is a mistake or “isolated.”²⁵⁵ For example, when a newscaster mistakenly said, “Oops, fucked that one up,” the FCC held there was no indecency due to the “accidental nature” of the broadcast.²⁵⁶ Yet, material will be deemed indecent, even when fleeting, if the material is patently offensive because one of the other factors, like graphic nature, is present.²⁵⁷

There is an increased chance the FCC will find material indecent if the purpose of the broadcast was to “titillate” or for “shock value.”²⁵⁸ This rationale was used in *Pacifica* to uphold the FCC’s finding of indecency in the airing of the Carlin monologue.²⁵⁹ However, if the FCC finds that the purpose of the material isn’t to “titillate” but rather was “instructional in nature,” such as a broadcast of a portion of a high school sexual education class in which “realistic” models of anatomy were shown on television, the FCC will not find the material indecent.²⁶⁰

When complaints are filed, and they are not summarily dismissed, there are four potential outcomes:²⁶¹ (1) the FCC may find that the material was not patently offensive and dismiss the complaint; (2) they may request further

²⁴⁹ *Industry Guidance*, 16 FCC Rcd. at 8003, 8008, 8010.

²⁵⁰ *Id.* at 8003.

²⁵¹ *Id.* at 8005.

²⁵² *Id.* at 8006.

²⁵³ *Id.*

²⁵⁴ *Industry Guidance*, 16 FCC Rcd. at 8008.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 8009.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 8010.

²⁵⁹ *Industry Guidance*, 16 FCC Rcd. at 8010.

²⁶⁰ *Id.* at 8011.

²⁶¹ *Id.* at 8015.

material from the broadcaster; (3) they may fine the broadcaster through a letter called a Notice of Apparent Liability (NAL); or (4) they may issue a generate a “formal referral” whereby the entire Commission would review the case.²⁶² Although there have been several monetary fines issued over the years for radio broadcasts, there have only been two fines levied against television broadcasts.²⁶³ The first was a \$21,000 fine against a Puerto Rico television station issued in 2001 for “raw sexual innuendo.”²⁶⁴ The most recent was a \$27,500 fine against a San Francisco television station when an entertainer’s penis was exposed during a performance by the theater group “Puppetry of the Penis.”²⁶⁵

V. HAVEN’T WE ALREADY ADDRESSED INDECENCY?

Due to the fact that the current regulation system occurs “after the fact,” there are several different devices in place that would aid parents in monitoring and detecting indecency on television before their children are exposed to it. One such device is the V-Chip.²⁶⁶ V-Chip technically stands for “Violence Chip,”²⁶⁷ but it works in a manner that also prevents exposure to sex and indecency.²⁶⁸ The V-Chip works in conjunction with another one of the preemptive devices available to parents, the television rating system guidelines.²⁶⁹ There are six different ratings given to television programming, ranging from programming described as able to be viewed by “all children” to material recommended for “mature audience only.”²⁷⁰

The television rating system, started in 1996, is the result of a request made

²⁶² *Id.*

²⁶³ PARENT’S TELEVISION COUNCIL, DERELICTION OF DUTY: HOW THE FEDERAL COMMUNICATIONS COMMISSION HAS FAILED THE PUBLIC, at <http://www.parents-tv.org/PTC/publications/reports/fccwhitepaper/main.asp> (last visited Nov. 15, 2004).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ David V. Scott, *The V-Chip Debate: Blocking Television Sex, Violence, and the First Amendment*, 16 LOY. L.A. ENT. L. REV. 741, 744 (1996).

²⁶⁷ *Id.*

²⁶⁸ Stephen Williams, *Parent’s Ignorance Undermines Effectiveness of V-Chip*, SALT LAKE TRIB. Jul. 24, 2000, at B7.

²⁶⁹ *Id.*

²⁷⁰ FCC, THE V-CHIP: PUTTING RESTRICTIONS ON WHAT YOUR CHILDREN WATCH, EVEN WHEN YOU’RE NOT THERE, at <http://www.fcc.gov/cgb/consumerfacts/vchip.html> (last modified Mar. 25, 2002). The six rating systems are: “TV-Y (All Children) . . . ;TV-7 (Directed to Older Children) . . . appropriate for children age 7 and up . . . TV-G (General Audience) . . . suitable for all ages but is not necessarily a children’s show . . . TV-PG (Parental Guidance Suggested) . . . may also include “V” for violence, “S” for sexual situations, “L” for language, or “D” for suggestive dialog; TV-14 (Parents Strongly Cautioned) . . . unsuitable for children under 14; and TV-MA (Mature Audience Only) . . . unsuitable for children under 17.” *Id.*

by Congress to the broadcasting industry for a voluntary rating system.²⁷¹ The rating system now appears on the screen at the beginning of television shows and is also available in magazines, and other print sources.²⁷² The rating system was promulgated by the National Association of Broadcasters, the National Cable Television Association, and the Motion Picture Association of America.²⁷³ The system is monitored by a twenty-four member group external to the FCC called the TV Parental Guidelines Monitoring Board.²⁷⁴ However, there are also certain programs that do not get rated.²⁷⁵ They are “news, sports, and unedited movies on premium cable channels.”²⁷⁶

The V-Chip, which is placed into television sets when they are manufactured, works by allowing parents to block programming based on this rating system.²⁷⁷ An external box equipped with V-Chip technology is also available if a parent wants the technology, but does not own a television set with the built in V-Chip.²⁷⁸ The cost of the V-Chip is minimal with manufacturing costs of “less than one dollar.”²⁷⁹ Because the V-Chip works off of the rating system, the programs that are not covered by the rating system will not be blocked by the V-Chip.²⁸⁰ Therefore, sports, news and certain cable movies will not be blocked.

Additionally, there is an external box that works off of the closed captioning system and blocks profane language.²⁸¹ This language filter box, called the “TV Guardian,” checks closed caption phrases, which are imbedded into programming for the deaf, and scans for words or phrases that are “offensive.”²⁸² If such material is detected, the TV Guardian mutes the television during that particular material but “displays acceptable words and phrases”²⁸³ in a closed caption type format.²⁸⁴ The TV Guardian costs \$119.95,

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ FCC, THE V-CHIP: PUTTING RESTRICTIONS ON WHAT YOUR CHILDREN WATCH, EVEN WHEN YOU'RE NOT THERE, at <http://www.fcc.gov/cgb/consumerfacts/vhip.html> (last modified Mar. 25, 2002).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ FCC, THE V-CHIP: PUTTING RESTRICTIONS ON WHAT YOUR CHILDREN WATCH, EVEN WHEN YOU'RE NOT THERE, at <http://www.fcc.gov/cgb/consumerfacts/vhip.html> (last modified Mar. 25, 2002).

²⁸¹ Jeannine F. Hunter, *Tired of TV Profanity? Answer May be in This Box*, KNOXVILLE NEWS-SENTINEL, Jul. 14, 1999, at A1.

²⁸² GET READY FOR A REFRESHING CHANGE IN T.V. VIEWING!, at <http://www.dallascoursefreetv.com> (last visited Nov. 15, 2004).

²⁸³ *Id.* In addition to typical obscenities, the TV Guardian also has an option to block

but is limited only to programs with closed captioning.²⁸⁵ Sports, news and other live programs therefore, are not filtered by the TV Guardian.²⁸⁶

VI. WHERE WE ARE GOING

The success rate of the V-Chip, rating system and other devices has been minimal.²⁸⁷ Studies indicate that some parents do not even know about the devices and of those that are aware, most do not know how to properly work the devices.²⁸⁸ Also, since these devices do not apply to all programs, they leave open the possibility for incidents like the Janet Jackson spectacle at the Super Bowl (since it was aired during a sports program which is not rated). The watchdog group PTC additionally claims that programs are often given the wrong rating and that the rating system has led to an increase in indecent material as opposed to a decrease.²⁸⁹ PTC claims that the rating system has given “networks free reign to push the TV envelope as long as they put the right stamp on it.”²⁹⁰

In light of the perceived failure of the current devices,²⁹¹ and the recent well-publicized controversial airings on television, there have been several new proposals geared at curbing indecency.²⁹² Two new congressional Acts directly address indecency. The first is H.R. 3687, a bill dubbed the “Clean Airwaves Act” and introduced in the House of Representatives by Representative Doug Ose in December 2003.²⁹³ Representative Ose, a Republican from California, was inspired to present The Clean Airwaves Act after the FCC ruling finding Bono’s use of the word “fuck” not indecent as an adjective.²⁹⁴ The Clean Airwaves Act would ban completely the use of the following words and phrases: shit, piss, fuck, asshole, cock sucker, mother fucker and ass hole.²⁹⁵ The words would be banned in any form, to include “verb, adjective, gerund,

“offenses to the name of God and Jesus Christ”. *Id.*

²⁸⁴ Hunter, *supra* note 281.

²⁸⁵ GET READY FOR A REFRESHING CHANGE IN T.V. VIEWING!, at <http://www.dallascusefreetv.com> (last visited Nov. 15, 2004).

²⁸⁶ Hunter, *supra* note 281.

²⁸⁷ PARENT’S TELEVISION COUNCIL, STUDIES REPORT V-CHIP FAILINGS, at <http://www.parentstv.org/PTC/publications/ealerts/2000/ealert062800.asp> (June 28, 2000).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Lynn Elber, *TV Too Nasty for Kids, Study Says*, L.A. TIMES, Aug. 3, 2001, at R10.

²⁹¹ See Children’s Protection from Violent Programming Act, S. 161, 108th Cong. (1st Sess. 2003) (stating that indecent programming has an adverse effect on children and admits that current “technology” is unable to protect children in all situations.)

²⁹² See Epstein, *supra* note 19.

²⁹³ Clean Airwaves Act, H.R. 3687, 108th Cong. (1st Sess. 2003).

²⁹⁴ Epstein, *supra* note 19.

²⁹⁵ H.R. 3687.

participle, and infinitive forms” as well as any “compound use” of the words.²⁹⁶ Representative Ose states that his goal is to prevent the FCC from “split[ting] hairs” and basing rulings on grammar.²⁹⁷ The Clean Airwaves Act would amend the language in 18 U.S.C. §1464.²⁹⁸

Another legislative measure, Senate Resolution No. 283, was introduced in the Senate in December, 2003.²⁹⁹ The resolution urges the FCC to “reassert its responsibility as defender of the public interest” by using “all of its available authority.”³⁰⁰ Among the list of requests stated in the resolution, the Senate asks the FCC to reconsider the Bono ruling, start imposing fines for each “separate utterance,” and initiating license revocation hearings.³⁰¹ The House of Representatives introduced a similar resolution in January of 2004.³⁰²

Additionally, in January of 2004, the Children’s Protection from Violent Programming Act was introduced into the House of Representatives.³⁰³ This Act, introduced by Republican Fred Upton from Michigan, would increase the fine levied against indecency from \$27,500 to \$275,000.³⁰⁴ Current FCC Chairman Michael Powell supported the increase.³⁰⁵ A similar bill was introduced to the Senate in February, 2004 by Republican Senator Sam Brownback from Kansas.³⁰⁶

Other theories for improving indecency standards include allowing affiliates choosing which programs to air,³⁰⁷ and then replacing potentially indecent programs with one less racy.³⁰⁸ There is also a push for the FCC to require all “live” shows be tape delayed, which is not currently mandatory.³⁰⁹ Additionally, there has already been some self regulation imposed by the

²⁹⁶ *Id.*

²⁹⁷ Epstein, *supra* note 19; *see also* 149 CONG. REC. E2468-01 (daily ed. Dec. 9, 2003) (statement of Rep. Ose) (stating that he hopes the bill will close a “loophole in the U.S. Code to ensure the public is free from inappropriate communications over public broadcasts and that our airwaves can be clean of obscenity, indecency, and profanity.”)

²⁹⁸ H.R. 3687.

²⁹⁹ S. Res. 283, 108th Cong. (2003).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² H. Res. 500, 108th Cong. (2004).

³⁰³ Broadcast Decency Enforcement Act of 2004, H.R. 3717, (2004).

³⁰⁴ Glenn Garvin, *Fallout: After Janet Jackson’s Exposure, Networks Cover Their Bases and Brace for Tough New Decency Rules*, MIAMI HERALD, Feb. 6, 2004, at A1.

³⁰⁵ *Id.*

³⁰⁶ FCC Indecency Penalties Bill, S.2056, 108th Cong. (2004).

³⁰⁷ *See* Doug Saunders, *CHUM axes Stern’s Radio, Television Talk Shows*, GLOBE & MAIL (Toronto), Aug. 27, 1998, at C1. The FCC does not have a choice in what programs are aired. *See* F.C.C., TELEVISION AND CABLE, at <http://www.fcc.gov/cgb/broadcast.html> (last modified Dec. 6, 2002).

³⁰⁸ Eric Deggans, *Wildly Popular ‘Springer’ Worries Station By Being so Wild Series*, ST. PETERSBURG TIMES (Florida), Feb. 19, 1998, at 2B.

³⁰⁹ Jensen, *supra* note 8.

broadcast industry, such as tape-delaying live programs (as was done for the Grammys in 2004)³¹⁰ and broadcasters choosing to edit out material that may be considered indecent even if it is aired during the safe harbor hours (as NBC did when they edited a bare breast out of a scene about a breast exam on ER).³¹¹

VII. BUT WHAT HAPPENED TO FREEDOM OF SPEECH?

Some free speech advocates disagree with the plans to further restrict indecency on television. These advocates feel that parents, rather than the government, should be the ones placing limits on what children see on television.³¹² Syracuse University professor Robert Thompson has stated his belief that regulations like the Clean Airwaves Act are attempting to bring all broadcasting to the level of a child, which makes television less interesting to adults.³¹³ Professor Thompson calls the bill's tactic of "spelling out" indecent words "juvenile."³¹⁴

Other advocates assert that there is no "harm" in allowing obscenities to be aired and therefore more regulation is not necessary.³¹⁵ Cal State professor Craig Smith, who leads the Center for First Amendment Studies, has said that proving damages from the use of obscenities in broadcasting is "a burden [the government] can't meet."³¹⁶ Mr. Smith is one of the advocates of free speech who feels that many of the words included in the legislation are not offensive.³¹⁷ Others claim that nudity alone, like that of Janet Jackson's breast at the Super Bowl, is not enough to merit indecency and, therefore, should not be punished.³¹⁸

Still other advocates claim that the government's new legislation is attempting to protect not children, but adults, an activity for which there is no government interest.³¹⁹ Advocates like Jeremy Lipschultz from the University of Nebraska, Omaha, say that this is demonstrated because the proposed laws

³¹⁰ *Id.*

³¹¹ Garvin, *supra* note 304.

³¹² Epstein, *supra* note 19.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Doug Saunders, *Wanna Hear the F-word? Fuhgeddaboutit! A Republican Congressman Launches a Bill to Outlaw Seven Vulgarities From U.S. Airwaves*, THE GLOBE & MAIL (Toronto), Jan. 13, 2004, at A3.

³¹⁸ Jensen, *supra* note 8.

³¹⁹ *Talk of the Nation: Analysis: Obscenity Over the Airways and Whether Congress or the FCC Should Tighten Restrictions and Regulations* (NPR Radio Broadcast, Jan. 28, 2004) [hereinafter *Talk of the Nation*].

have no “safe harbors” in them.³²⁰ Professor Lipshultz explains that current laws limit the restriction on indecency only to hours when children are likely to be present, but the newly proposed legislation would be in effect 24 hours a day.³²¹ Therefore, advocates say that the newly proposed bills will not pass constitutional muster if challenged in court because they are overly broad and the indecency standard is difficult to define.³²²

VIII. WILL THE NEW LAWS EVEN WORK?

When upholding the proposed legislation to the level of scrutiny it must pass in order to restrain speech on television, we must consider the test involved. The government must assert a “compelling reason” and they must accomplish their goal in the most “narrow” way possible.³²³ The government’s reason for regulating indecency on television is to protect children from indecency.³²⁴ Against this backdrop, there are potential problems that exist. By not limiting the time that the words included in the Clean Airwaves Act should be restricted, the legislation is not employing the least restrictive means.³²⁵ Therefore, the legislation has the potential to not be seen as “narrowly tailored” to meet the goal of protecting the children.³²⁶ Therefore, the Clean Airwaves Act, as written, would have difficulty withstanding a constitutional challenge. This potential problem could be lessened by the insertion of a “safe harbor” clause that would limit the banned words to certain hours.³²⁷ Creating “safe harbor” hours, which would limit the words only between 6 a.m. and 10 p.m., is most logical because that would conform the Clean Airwaves Act to present indecency regulations.³²⁸

Additionally, the Clean Airwaves Act would limit the definition for indecency by automatically making certain words indecent by their mere utterance.³²⁹ This has the potential for two problems. First, it would remove the contextual aspect of review, which is now afforded by the FCC to indecency complaints. There would be no application of the factors set out by

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Hamilton v. City of San Bernardino*, 107 F. Supp. 2d 1239, 1247 (C.D. Cal. 2000).

³²⁴ *FCC v. Pacifica Found.*, 438 U.S. 726, 731 (1978).

³²⁵ *See generally Talk of the Nation*, *supra* note 319.

³²⁶ *See U.S. v. Playboy Entm’t Group Inc.*, 529 U.S. 803, 813 (2000) (discussing the implications of a statute that is not narrowly tailored).

³²⁷ *See generally Pacifica*, 438 U.S. at 726 (upholding a restriction on indecency to certain times of day).

³²⁸ *See* 18 U.S.C. §1464 (2000).

³²⁹ Clean Airwaves Act, H.R. 3687, 108th Cong. (1st Sess. 2003).

the FCC. This has the potential to make words that were uttered by mistake or not for “shock value” nevertheless deemed indecent and subject to a fine. For example, if there were a legitimate live news cast in which one of the words was inadvertently aired, the broadcaster would be fined without a chance for explanation.³³⁰ The Clean Airwaves Act (“the Act”) functions as a prior restraint on speech and is potentially overly broad in that it does not allow the FCC to view words in context and apply their established factors. As an overly broad regulation, the Act would not withstand a constitutional challenge.³³¹ This defect could be decreased by revising the language in the Act to allow the FCC leeway to evaluate utterances of the banned words by applying their established factors. To maintain the broad sweep of the Act that legislators desired, language could be inserted to mandate that the FCC automatically review all instances in which the words are uttered.

An additional way to curb indecency without resorting to prior restraint would be for broadcasters to have more responsibility in the monitoring for indecency.³³² This could be achieved by mandating that broadcasters employ a delay system for live broadcasts.³³³ The FCC should make the guidelines sufficiently clear so broadcasters would know what programs had to be delayed and how long the delay should be. The FCC should, for example, state whether live sports programs would have to be tape delayed.

Broadcasters could also take it upon themselves to contract with their “on air” talent to prevent exhibitions like that which occurred during Super Bowl XXXVIII. This could be achieved through contracts between the broadcasters and the entertainers. Broadcasters will never be able to be completely responsible for the on air talent.³³⁴ Performers will always be looking for additional publicity, even if it comes at the cost of the broadcasters.³³⁵ Creating contractual agreements would not prevent a fine if indecent utterances occurred, however, it would give more incentive for entertainers not to be indecent if they knew they would be subject to a penalty or cause of action for breach of contract.

The second deficit of the Clean Airwaves Act is that limiting the definition of indecency to designated words “flies in the face” of the current concept of indecency.³³⁶ Indecency is based on the “community standard.”³³⁷ This allows

³³⁰ See generally *Talk of the Nation*, *supra* note 319.

³³¹ BLACK’S, *supra* note 121, at 1129.

³³² *Protecting Children from Violent and Indecent Programming Before the Comm. on Commerce, Science and Transportation of the Senate*, 108th Cong. (statement of Kathleen Abernathy, Commissioner, FCC).

³³³ *Id.*

³³⁴ Oldenburg, *supra* note 17.

³³⁵ *Id.*

³³⁶ *Talk of the Nation*, *supra* note 319.

the definition to be viewed in light of the changing attitudes of what society deems acceptable. One should not forget that at one point in American history using inferences about the word “bathroom” was not allowed to be uttered on television. This illustrates the fact that words do not remain unacceptable forever.³³⁸ The current indecency definition has been upheld by the Court, validating the fluid concept of indecency.³³⁹

Ambiguity is a necessary evil in lawmaking because it is impossible to cover all of the potential words or phrases that a particular person may find offensive. To make the boundaries of indecency clearer without resorting to a list of specific words, the FCC could come up with clearer guidelines on how they will weigh the factors of implication, fleeting reference and purpose. To date, the only guidance the FCC has given broadcasters is to acknowledge that these are factors that they use.³⁴⁰ The application of these factors has resulted in the arbitrary assignment of fines.³⁴¹ There is no bright line rule that says how many of the factors need to be present to prevent a fine or if certain factors are given more weight in the determination of indecency than others. To aid broadcasters, the FCC could prioritize the factors in the order they feel are most important.³⁴²

Likewise, the FCC should disclose to broadcasters how factors relate to one another. For example, if an utterance was used fleetingly by an athlete during sports show where the purpose of the broadcast was innocent, how would the FCC respond? In this scenario, the fact that the utterance was fleeting would tend to favor not fining for indecency, but this is not always the case. The FCC eventually ruled that Bono’s use of the word “fuck” was indecent, despite the fact that it was fleeting.³⁴³ In the past, however, fleeting use of “fuck” had been dismissed.³⁴⁴ More definite guidelines as to how the factors will be applied and how the FCC determines what constitutes the “community

³³⁷ FCC, OBSCENE AND INDECENT BROADCASTS, at <http://www.fcc.gov/cgb/consumer-facts/obscene.html> (last modified Apr. 12, 2004).

³³⁸ See generally Edwin A. Roberts Jr., *Lewd Sitcoms Hardly Define Our Culture*, TAMPA TRIB., Apr. 4, 1999, at 1.

³³⁹ See generally *Denver Area Educ. Telecomm. Consortium Inc. v. F.C.C.*, 518 U.S. 727 (1996).

³⁴⁰ See generally *In re Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broad. Indecency*, *Policy Statement*, 16 FCC Rcd. 7999 (2001).

³⁴¹ *Id.*

³⁴² See generally Ahrens, *supra* note 2.

³⁴³ Complaints Against Various Broadcasting Licensees Regarding Their Airing of the “Golden Globe Awards” Program, *Memorandum Opinion and Order*, File No. EB-03-IH-0110 available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-03-3045A1.pdf (last visited Oct., 2004).

³⁴⁴ *Industry Guidance*, 16 FCC Rcd. 7999.

standard” could alleviate some of the uncertainty about the indecency standard.

The downfall of the Broadcast Decency Enforcement Act of 2004,³⁴⁵ which increases the fines for incidents of indecency, is that it is still not enough of a deterrent for the large corporations who own broadcast stations. The probable effect on deep pocket broadcasters will be minimal.³⁴⁶ A company like Viacom, the owner of CBS, that aired the Super Bowl, has revenues each year in excess of twenty-six billion dollars.³⁴⁷ Fines of as much as \$250,000 would still barely be effective, particularly considering that the cost of a commercial for the Super Bowl is more than the amount of the fine. Viacom earns over seven billion dollars on television alone.³⁴⁸

The increased fines will do little to remedy the flaws in the penalty system employed by the FCC. One problem encompassed in the FCC penalty system is the disparity between the treatment of broadcast television and cable television.³⁴⁹ The fact that so many people in America have access to cable suggests that maintenance of two different standards is outdated.³⁵⁰ The effect is such that broadcast channels have to air racy or cutting edge programming to financially compete with viewers of cable channels.³⁵¹ The fact that more viewers tune into the cable channels and watch programs that push the limit of indecency suggests that the community standard of what is indecent may be less than what the current legislation has proposed.

The Court has made clear that cable cannot be held to the same heightened regulation to which broadcast is subjected,³⁵² so perhaps the FCC should make it clearer how they determine the community standard. This could be accomplished by compiling complaints and releasing data on (1) why complaints were launched, (2) by whom complaints were launched (private citizen versus watchdog group), and (3) what prompted the complaint. Releasing this data and having it evaluated not only by the FCC, but also subject to public scrutiny would validate or invalidate labeling terms or actions as indecent. For example, if there were 100 complaints about the use of the word “asshole” and they all came from the same group, this may not accurately

³⁴⁵ H.R. 3717, 108th Cong. (2004).

³⁴⁶ *Talk of the Nation*, *supra* note 319.

³⁴⁷ *Viacom Reports Full Year and Fourth Quarter 2003 Results; Announces Plans to Divest Ownership Interest in Blockbuster*, at <http://www.viacom.com/pdf/qr4q03.pdf> (last visited Apr. 21, 2004).

³⁴⁸ *Id.* at 6.

³⁴⁹ Frank Ahrens, *Nasty Language on Live TV Renews Old Debate*, WASH. POST, Dec. 13, 2003, at A1.

³⁵⁰ Smith, *supra* note 225.

³⁵¹ *Talk of the Nation*, *supra* note 319.

³⁵² *See generally* Denver Area Educ. Telecomm. Consortium Inc. v. FCC, 518 U.S. 727 (1996).

reflect that the “community” felt “asshole” qualified as indecent. Under the current penalty system, the FCC’s five Commissioners and the Regulatory Board decide what constitutes the “community standard”. To make the definition less ambiguous the community at large has a right to know on what information the FCC bases their decision. The public should also have the opportunity to play a more active role in determining what the “community standard” is. This could be accomplished by having a committee of sorts comprised of non-political, non-FCC citizens who could express their input to the FCC on debated topics of indecency.

If the FCC does not think it possible to more clearly define “community standard,” they could also curb indecent acts more efficiently by making license revocation hearings mandatory after a series of indecent broadcasts.³⁵³ This would force broadcasters to answer to the FCC for repeated acts of indecency. A “three strike” rule or something similar could be employed whereby broadcasters would automatically lose their license for a period of time after being fined for three indecent broadcasts. To avoid overbreadth problems, there could be a time limit in which the “three strikes” would apply, for example three fines in six months.

IX. CONCLUSION

If Congress truly seeks to have an effect on broadcasters’ behavior regarding indecent programming, then fines need to be far greater than the maximum currently proposed and the penalty system employed by the FCC needs to be revamped. If the FCC does not make significant changes to repair its flawed penalty system, the need for competition with cable will just force broadcasters to include the costs of fines into the “price of doing business.” The FCC needs to get a greater appreciation for the community standard and actually apply it to cases where there is clearly indecent behavior. It simply does not stand to reason that in the history of television, there have only been two instances of indecency. However, targeting certain words as indecent, as is done in the Clean Airwaves Act, is not the right answer. A broad sweeping prior restraint is too high a cost for our First Amendment to pay.

³⁵³ See generally S. Res. 283, 108th Cong. (2003).