

THE DISCRIMINATORY EFFECTS OF PROTECTING AMERICA'S CHILDREN

By Jennifer E. Jones*

The Federal Communications Commission (“FCC”) has the unequivocal power to regulate indecent broadcasting consisting of “any obscene, indecent, or profane language by means of radio communications.”¹ Recently, indecency regulation has inspired much debate between the public, broadcasters, courts, and the FCC. Indecency regulation exists to protect only one distinct group of people - children. Yet, current indecency enforcement is not prosecuted on behalf of the interests of children. FCC indecency investigations are fueled almost exclusively by complaints submitted by watchdog groups with politically conservative agendas. Consequently, instead of protecting children and facilitating diversity in the media, the FCC’s policing of public airwaves has effectuated cultural and political homogeneity of public airwaves.

This Article exposes current inconsistencies in the stated policy aims of indecency regulation and the statutory requirement that the FCC facilitate diverse media broadcasts. First, this Article discusses FCC indecency regulation generally. Second, this Article describes the stated policy aims of indecency regulation and the inconsistencies of indecency enforcement in advancing those aims. Lastly, this Article discusses the discriminatory impact current indecency regulation has on broadcast media.

THE POWER TO REGULATE INDECENCY

Essentially, “[o]ne breast and two seconds after the Janet Jackson incident, America became immersed in a cultural war between two competing interests - the broadcasters’ right to exercise their constitutional right to free speech and the FCC’s power to regulate indecent programming.”² The Supreme Court has long held that broadcasters have limited First Amendment protection given the unique role which broadcasting occupies as a medium of expression.³ More recently, the Court has recognized the need to balance First Amendment free speech rights of broadcasters and indecency regulation interests of the government, while keeping with previous decisions which permitted the government to limit broadcasters’ First Amendment rights.⁴

Both the Court’s recent appeal for caution in free speech restrictions and the FCC’s proffered justifications for limiting free speech have provoked strong broadcaster reactions. The FCC’s sole justification for limiting broadcaster rights is the “need to protect our children.”⁵ The premise in all indecency precedent is that between certain hours of the day children are uniquely susceptible to broadcasts and should be protected from indecent material.⁶

However, heavy critique exists regarding the enforcement of indecency regulations and whether this regulation is even necessary at all.⁷ Interestingly, a source of criticism comes directly from FCC Commissioner Adlestein who stated that the FCC has

failed to “address the many serious concerns”⁸ raised in previous cases and that FCC regulations are “arbitrary, subjective and inconsistent.”⁹ Commissioner Adlestein claims the FCC’s rulings do not adequately consider the “totality” of broadcast programs.¹⁰ Ultimately, the FCC’s failure to completely consider and review broadcast programming is inconsistent with court-mandated analysis in restriction of speech cases.¹¹

For example, the Supreme Court held in *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, that broadcast material is subject to indecency regulations when material is broadcast at times when children are reasonably likely to be in the audience.¹² However, the Court has cautioned the government in *Reno v. American Civil Liberties Union* that indecency regulation cannot restrict the adult population to watching only what is fit for children.¹³

When defending such free speech restrictions, the government bears the burden of demonstrating that the indecency regulations in question are sufficiently tailored to resolve conflicts without unnecessarily broad restrictions on speech.¹⁴ Indecency law stems from nuisance law in that indecency regulation seeks to channel material into acceptable timeframes, and not completely prohibit broadcast material.¹⁵ Therefore, the FCC has the burden of showing that indecency regulations are properly tailored to protect children and promote diversity in the media without being overly broad and restraining speech in general. Nuisance law calls for channeling speech, not banning it altogether. However, if broadcasters are prohibited from airing certain types of diverse material during peak hours and are forced to air material to a significantly smaller audience or not at all, bans on speech may be effectuated.

INCONSISTENT AND MISGUIDED FCC INDECENCY REGULATION

The Telecommunications Act of 1996 mandates that the FCC promote the public interest and diversity in the media.¹⁶ However, the FCC’s incomplete review of broadcaster regulation has created arbitrary censorship of diverse broadcasting material without the heightened scrutiny required by law.¹⁷ Additionally, the FCC’s procedure of investigating and prosecuting broadcasters for broadcasting indecent material has resulted in inconsistent enforcement of poorly reviewed regulation penalties.

More importantly, there is an intrinsic flaw in using the protection of children as the sole justification for indecency regulation. The flaw exists in the FCC’s enforcement policy since children are not the actual individuals reporting potential violations. Rather, the children’s parents, parental advisory councils and watchdog groups submit complaints to the FCC. Parental advisory councils and watchdog groups are problematic because they

often have political affiliations and partnerships with lobbyists. Historically, these groups have pushed for an overall clean up of the airwaves in the interest of the “public good”.¹⁸ Therefore, the original rationale of preventing harm to children has been morphed into campaigns for general community standards of morality - standards which can be arbitrary and discriminatory. Since the FCC conducts indecency regulation only when a viewer complaint is filed,¹⁹ certain groups whose sole function is to “patrol the airwaves” can disproportionately affect indecency enforcement on broadcasters.²⁰ For example, the Parental Television Council (“PTC”) was responsible for 99.9 % of indecency complaints in 2003 and 99.8 % of indecency complaints in 2004 unrelated to the Super Bowl halftime show.²¹ The resulting effect is that PTC, a Republican-driven watchdog group, hyper-monitors the public airwaves, which can effectively lead to overbroad free speech restrictions of broadcast material.²² PTC’s founder and President, L. Brent Bozell, served as the Finance Director and President of the National Conservative Political Action Committee, furthering his political agenda.

Not only is PTC responsible for an “overwhelming majority of FCC complaints,” but the number of complaints is drastically rising each year due to the new ability to electronically file FCC complaints.²³ PTC regularly issues email alerts to its members who can easily register thousands of complaints simply by filling out an online form.²⁴ Former Chairman Powell acknowledged this complication and referred to these email complaints as “spam.”²⁵ Nevertheless, PTC has had an exacting hand in selectively choosing broadcasters for the FCC to target and prosecute for allegedly indecent broadcasts.²⁶

Another wrinkle in the FCC’s enforcement policy is the more subjective second prong of indecency analysis²⁷ which is measured using “contemporary community standards.”²⁸ Theoretically, if the policy aims of indecency regulation were fulfilled, this contemporary community standard should be used to shield children from harmful material. The Supreme Court relied on industry guidelines in *Infinity Radio License, Inc.* and held that the community standard test is “whether the material is patently offensive for the broadcast medium” which is gauged by the “average broadcast viewer or listener.”²⁹ Determining what is “patently offensive” and defining who is an “average broadcast viewer or listener” is not only highly subjective, but also difficult to apply.

A tension exists between the original policy aims of protecting children and the contemporary community standards used to measure the protection of children. The subjective bulk of indecency analysis is guided by standards, which are supposed to be that of the average broadcast viewer or listener.³⁰ But in reality, the aims of indecency regulation are often distorted by watchdog groups with socio-political agendas, capable of filing tens of thousands of complaints per year through their members. FCC Commissioner Adlstein expounded on this inherent inconsistency by stating that the “real party in interest is the Commission, acting on behalf [of] the public, rather than the specific individual or organization that brings allegedly indecent material

to our attention.”³¹

DISCRIMINATORY EFFECTS OF CURRENT FCC INDECENCY REGULATION

Evaluating future broadcast programs for potentially indecent material requires great expenditures of money and time.³² In order for broadcasters to comply with indecency regulation as applied to daily programs and broadcasts, they must employ attorneys or specialists able to shield them from the risk of being fined thousands of dollars by the FCC. Broadcasters not only spend vast amounts of money on attempting to ensure that their programs will not be arbitrarily targeted by watchdog groups, but also forgo broadcasting opportunities out of fear of being deemed non-compliant. Given that socio-political agendas of watchdog groups effectively guide the FCC’s current indecency enforcement policy, such regulation has negatively impacted broadcasters.

The standard effectuated in indecency regulation is a neo-conservative standard that blocks out many different kinds of diverse media. When special interest groups, embodying socio-political agendas, effectively prosecute certain broadcasters or individuals, only material indirectly deemed acceptable by that group of individuals is spared from mass complaint filing and is permitted on the public airwaves.

Additionally, even when individuals attempt to “break the surface of placidity,” the very nature and importance of the expression is often misunderstood and penalized under current indecency regulation.³³ Artistic works that serve a political and social purpose among certain minority groups are habitually misunderstood and written off as indecent. For example, Sarah Jones, a well-known female, African-American playwright, actor, poet, and activist wrote a song as a feminist critique of misogynistic lyrics in ‘gangsta rap’ entitled “Your Revolution.”³⁴ However, based on a single-complaint received by the FCC, her song was deemed to be indecent, and the radio station that aired the song was fined.³⁵ In her brief on appeal filed with the FCC, Jones stated that “Your Revolution” was performed in high schools and colleges around the country and had been praised as a positive self-affirmation for young African-American women.³⁶ Sarah Jones used her lyrics as a “free (and imaginative) use of sexual language...that ma[de] the rap empowering,”³⁷ but the FCC’s indecency regulation left no room for cultural context or analysis in its indecency assessment.

Correspondingly, another example of the FCC’s failure to consider and value cultural context in indecency regulation was in the case of “The Blues” documentary, comprised of interviews of several blues musicians, aired by PBS and directed by Martin Scorsese. Generally, broadcasters feel an artistic and educational integrity to retain certain material in its original form to accurately convey experiences of the film subjects. However, the FCC found “The Blues” contained indecent material in the language used by some of the interviewees. This conservative regulation effectively “paralyzed documentary filmmakers” so that filmmakers with powerful and culturally impor-

tant stories were afraid to make, tell, and air their stories on public broadcast television.³⁸

For many broadcasters, there would be no difference between “Saving Private Ryan” and “The Blues” in the usage of certain types of language. “Saving Private Ryan” embodies one of the only known exceptions to indecency analysis, in which the FCC ruled that the use of several expletives in the war film was not indecent and could exist when material was “essential to the nature of an artistic or educational work.”³⁹ However, “The Blues”, which depicted mainly African-American musicians, was deemed to be indecent, while Saving Private Ryan which depicted mainly White-American male soldiers was not. This decision illustrates the cultural value judgments reflecting a more conservative moral authority that ultimately penalized broadcasters of programming focused on a cultural minority viewpoint.

In both of the cases listed above, Sarah Jones and “The Blues,” the FCC has not issued further explanatory Orders.⁴⁰ Broadcasters and certain special interest groups believe in the right to diverse sources of information as mandated by The Telecommunications Act of 1996⁴¹ and the First Amendment.⁴² In the minds of some, the FCC often acts as a cultural dictator, determining precisely what cultural mediums are appropriate and acceptable at any given time.⁴³ In this way, even social ideas damaging to certain groups, whether they involve male/female relations or racial dynamics, are perpetuated into law.⁴⁴

Perhaps the most famous indecent broadcast was the recent exposure of Janet Jackson’s breast during the Super Bowl XXXVIII Halftime Show on February 1, 2004. Some analysts have argued that the FCC’s indecency finding based solely on Janet Jackson’s breast exposure, without regard to Justin Timberlake’s predatory behavior or Nelly’s crotch grabbing, only served to perpetuate social ideas of men dominating women.⁴⁵ Timberlake was the main actor in the scene, ripping off a por-

tion of Janet Jackson’s blouse, yet he did not receive the social backlash and fury Janet Jackson underwent for several months, even years.

Given the morally conservative broadcast climate today, individuals in society that have been historically marginalized, such as African-American women, may easily be restricted more frequently under current FCC indecency regulation.⁴⁶ The FCC’s discriminatory regulations send negative messages to youth and to the public regarding social ideals of feminist principles and cultural dynamics.⁴⁷ It is of the utmost importance

that the FCC not place unnecessarily broad restrictions on broadcasters documenting socio-cultural dialogs. Current indecency regulation has intimidated broadcasters into only broadcasting material that would not likely cause tension with the conservative agenda of watchdog groups.

But this is contrary to the statutorily mandated aim of the FCC. The FCC’s statutory mandate is to enable public access to a diverse array of media over the public airwaves.⁴⁸ Using the FCC as a puppet, political watchdog groups have enabled FCC commissioners to become ineffective “culture czars.”⁴⁹

The public, as well as broadcasters, have First Amendment rights to free speech guaranteed by the Constitution. Inconsistently and arbitrarily applied, current FCC indecency regulation has fundamentally quashed these rights. The FCC must find a way to balance the public’s mandated right and interest in diverse forms of broadcast media with the government’s interest in protecting children. Children as a group encompass individuals of all cultures and social classes that have the right to many kinds of culturally sensitive information, not just those deemed to be decent by neo-conservative watchdog groups. The FCC has an affirmative duty to find an effective indecency regulation regime that precludes discriminatory consequences to minority groups in society.

Indecency regulation exists to protect only one distinct group of people—children. Yet, currently, indecency enforcement is not prosecuted on behalf of the interests of children.

ENDNOTES

*Jennifer E. Jones earned her B.A. from the University of Florida in socio-cultural anthropology and is currently a third-year law student at American University Washington College of Law. Academic interests in technology, telecommunications, cultural politics, and the law inspired this Article. Many thanks to the new staff of *The Modern American* for keeping the torch burning and to Martha and Malcom who gave me the time and space to develop this article.

¹ F.C.C. v. Pacifica Found., 438 U.S. 726, 726 (1978).

² Sona I. Patel, *An Indecent Proposal*, 231 N.J. LAW. 10, 12 (December 2004) (discussing the FCC’s crackdown on indecent broadcasts after the February 1, 2004 Super Bowl XXXVIII where Janet Jackson’s breast was exposed and efforts to regulate public airwaves for the “public good” as dating back to the Communications Act of 1934 and significant challenges and criticisms of current indecency regulation).

³ *Pacifica*, 438 U.S. at 727.

⁴ See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997) (articulating concerns regarding the vagueness of indecency regulation given “its obvious chilling effect on free speech”).

⁵ Matthew C. Holohan, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341, 359 (2005) (citing *In re Clear Channel Communications, Inc.*, 19 F.C.C.R. 10880, 10887 (2004) quoting Former FCC Chairman Powell).

⁶ See *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8001 ¶¶ 5-6, April 6, 2001 [hereinafter *Indecency Policy Statement*] (stating the hours between the hours of 6:01 a.m. and 10:00 p.m. should be regulated).

⁷ See Marjorie Heins, *Do We Need Censorship to Protect Youth?*, 3 MICH. ST. L. REV. 795, 798-807 (Fall 2005) (noting debate over whether indecent material has any negative affects on children, and therefore, whether children should be shielded from indecent material at all) [hereinafter *Do We Need Censorship*]; see

ENDNOTES CONTINUED

also, *supra* note 5 at 363-64 (articulating that in *Pacifica*, the Court referenced *Ginsberg's* justification for restricting speech as being harmful to "youth," but failed to include that this discussion should be premised on the "legislature rationally determining that the restricted speech is actually harmful to children"); see also Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, 22 COMM. LAW 1, 29 (Spring 2004) (discussing inconsistencies in indecency regulation for cable television, which has at least as many child viewers as broadcast television, if not more, as illustrative that Congress' actions do not demonstrate a belief that indecent material is actually harmful to children).

⁸ Statement of Commissioner Jonathan S. Adlestein, *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005 Order*, 2006 WL 3207085, at 24 [hereinafter *Adlestein Statement*].

⁹ *Id.* at 25.

¹⁰ *Id.* at 25 (stating that the FCC should not limit indecency considerations to an "isolated programming segment").

¹¹ See *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

¹² See 518 U.S. 727, 744 (1996) (quoting *Pacifica*, 438 U.S. at 732).

¹³ See 521 U.S. 844, 875 (1997) (citing *Denver*, 518 U.S. at 759, quoting *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 128).

¹⁴ See *Denver*, 518 U.S. at 741 (citing *Central Hudson Gas & Electric Corp.*, 447 U.S. 557, 566) (stating that "restrictions on commercial speech cannot be 'more extensive than is necessary to serve a substantial government interest'").

¹⁵ *Pacifica*, 438 U.S. at 731, n.4.

¹⁶ Telecommunications Act of 1996, 47 U.S.C.A. §257(b) Section on National Policy (1996) [hereinafter §257(b)].

¹⁷ *Kingsley*, *supra* note 11.

¹⁸ *Do We Need Censorship*, *supra* note 7, at 801.

¹⁹ *Indecency Policy Statement*, *supra* note 6, at ¶ 24.

²⁰ See *Holohan*, *supra* note 5, at 360.

²¹ *Holohan*, *supra* note 5, at 360.

²² *Holohan*, *supra* note 5, at 361.

²³ *Holohan*, *supra* note 5, at 361; see PTC 2005 Annual Report, 10 (boasting over 100,000 online activists and 109,000 complaints filed electronically from PTC members), available at <http://www.parentstv.org/PTC/joinus/AR2005.pdf> (last visited Mar. 15, 2007).

²⁴ *Holohan*, *supra* note 5, at 360.

²⁵ Jeff Johnson, *FCC Indecency Enforcement Called Confusing, Burdensome*, CNSNews.com, January 12, 2005, available at <http://www.cnsnews.com/ViewSpecialReports.asp?Page=%5CSpecialReports%5Carchive%5C200501%5CSPE20050112a.html> (last visited Mar. 15, 2007) (quoting former Chairman Powell's speech to the National Association of Broadcasters on April 20, 2004).

²⁶ *Holohan*, *supra* note 5, at 361, n.115.

²⁷ FCC indecency regulation consists of two requirements in determining material broadcasted is indecent. First, material must fall within the indecency definition by describing or depicting "sexual or excretory organs or activities." Second, the material must be patently offensive as measured by "contemporary community standards" after a thorough exploration of the "full context" of the program when the material was aired. This second prong has the following three considerations: 1) explicitness and graphic nature of the description or depiction, 2) whether the material dwells on or repeats at length these depictions or descriptions, and 3) whether the material panders to, titillates, or shocks the audience. See *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rec. 7999, 8003 ¶ 10, April 6, 2001.

²⁸ *Indecency Policy Statement*, *supra* note 6, at 8002, ¶¶ 7-8.

²⁹ *In the Matter of Infinity Radio License, Inc.* 19 F.C.C.R. 5022, 5026 (2004).

³⁰ *Id.*

³¹ See Adlestein Statement, *supra* note 8, at 26.

³² Michael Botein and Dariusz Adamski, *The FCC's New Indecency Enforcement Policy and Its European Counterparts: A Cautionary Tale*, 15 MEDIA L. & POL'Y 7, 31 (Fall 2005).

³³ See Mira T. Ohm, *Sex 24/7: What's the Harm in Broadcast Indecency?*, 26 WOMEN'S RTS. L. REP. 167, 176 (Spring-Summer 2005) (discussing the split in racist societies between a "puritanical façade" and a constantly threatening "explosively sexual and aggressive underbelly" in using the Super Bowl XXXVIII halftime show example by postulating that the "wardrobe malfunction" may have been a way of acting out sexual desires to "ravage a 'lower' woman who is sexually lascivious"); see also Marjorie Heins, *What Is the Fuss About Janet Jackson's Breast*, Free Expression Policy Project (website), February 3, 2004, available at <http://www.fepproject.org/commentaries/superbowl.html> [hereinafter *What Is the Fuss*] (stating "The first response is that punishments by the FCC are not exactly going to put all of the vulgar words and lusty thoughts that cram our culture back into Pandora's Box").

³⁴ Ohm, *supra* note 33, at 175.

³⁵ Ohm, *supra* note 33, at 169.

³⁶ Ohm, *supra* note 33, at 169, n19.

³⁷ Marjorie Heins, *The Strange Case of Sarah Jones*, The Free Expression Policy Project, available at <http://www.fepproject.org/commentaries/sarahjones.html> (last visited Mar. 15, 2007).

³⁸ Lisa de Moreas, *PBS's Lip-Reading Effort*, THE WASHINGTON POST, July 26, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/26/AR2006072602003.html> (last visited Mar. 15, 2007).

³⁹ See *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005).

⁴⁰ FCC Orders are comparable to court decisions and are written and published by the FCC when an indecency investigation has occurred and programming is deemed indecent or not indecent. In particularly controversial decisions, sometimes due to briefs and complaints filed by broadcasters, the FCC will issue additional orders clarifying previous decisions and establishing further guidance on a specific indecency finding at issue.

⁴¹ §257(b), *supra* note 16.

⁴² See Marjorie Heins, *America's Culture Czars*, The Free Expression Policy Project (website), March 21, 2006, available at <http://www.fepproject.org/commentaries/FCC3-21-06.html> at update section [hereinafter *America's Culture Czars*] (Center for Creative Voices in Media filed a Motion to Intervene in the Second Circuit case, arguing that the FCC's decision violated its member artists' and listeners' "rights to have access to diverse sources of information, as is guaranteed by the Communications Act, and the First Amendment").

⁴³ *Id.*; see also Ohm, *supra* note 33, at 172 (stating that FCC regulation does not address adverse impacts of its rulings on "individual empowerment, cultural meaning, and social heterogeneity").

⁴⁴ See generally Ohm, *supra* note 33, at 176.

⁴⁵ See Ohm, *supra* note 33, at 176; see *What Is the Fuss*, *supra* note 33.

⁴⁶ See Ohm, *supra* note 33, at 175 (citing the Sarah Jones' example as having "tame" lyrics in comparison to other songs rap songs regularly broadcasts performed by men).

⁴⁷ See generally Ohm, *supra* note 33.

⁴⁸ See §257(b) *supra* note 16.

⁴⁹ See *America's Culture Czars*, *supra* note 42.