Indecency, the First Amendment, and the FCC

Robert M. O'Neil*

For the First Amendment community, recent developments in federal regulation of broadcasting have heightened concerns of several types. Although these concerns have been noted in the current symposium, they merit further scrutiny. Three such topics evoke special attention: proposals to extend regulation of "indecency" in licensed broadcasting beyond its traditional scope, even bolder suggestions that such material might be regulated in other media such as cable and satellite, and the First Amendment implications of FCC complaint procedures. Each will be reviewed briefly here.

First, we might consider the relationship between traditional notions of broadcast indecency and the status of "fleeting expletives," "wardrobe malfunctions" and the like. When the Supreme Court in the *Pacifica* case[1] validated the Commission's authority to impose sanctions on licensed broadcasters, the Justices stressed the limited scope of that ruling. Later cases strongly reinforced those limitations, as the Court consistently refused to authorize regulation of indecent material in any other communications medium.[2] Until quite recently, the Commission itself had confined indecency charges to situations in which the departure from generally accepted language or imagery was substantial. Indeed, the FCC's own Guidelines as late as 2001 identified two distinct prerequisites for such

* Professor of Law Emeritus, University Professor Emeritus, University of Virginia; Director, Thomas Jefferson Center for the Protection of Free Expression.

Suggested citation: Robert M. O'Neil, *Indecency, the First Amendment, and the FCC*, 60 FED. COMM. L. J. F. 12 (2008), http://www.law.indiana.edu/fclj/pubs/v60/no1/O'Neil_Forum_Final.pdf.

1. FCC v. Pacifica Found., 438 U.S. 726 (1978).
2. Sable Comm'ns, Inc. v. FCC, 492 U.S. 115, 130-31 (1989); United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000); Reno v. ACLU, 521 U.S. 844 (1997).

a finding—that the allegedly indecent material must "describe or depict sexual or excretory organs or activities," and that the targeted broadcast must have been "patently offensive as measured by contemporary community standards for the broadcast industry."[3] A finding that offending language was "patently offensive" has, in turn, required close scrutiny of three elements—the explicitness of the description of sexual or excretory activity, the degree to which the material dwells on or repeats such descriptions, and whether the material appears to pander or is presented for shock value.

Notably, the Commission until very recently had stressed the importance of the setting within which the issue arose, insisting that "the full context in which the material appeared is critically important."[4] Such self-imposed scrutiny directly reflected the Supreme Court's insistence in *Pacifica* that "context is all important" and that "indecency is largely a function of context—it cannot be adequately judged in the abstract."[5] Under this interpretation, for example, "fleeting expletives" could not possibly be deemed indecent since they met neither of the two settled criteria and could be deemed to violate the statutory standard only without any appraisal of the context within which they had been uttered. Moreover, although the applicable statute had always covered material that was "profane" as well as "indecent," charges were seldom if ever filed against vulgar or taboo language that was not also arguably indecent. In fact, profanity had never played an independent role in the equation until the Commission's 2004 reversal of field, and even since that time has received only the most cursory of explication, lacking either the detail or the track record that at least qualify indecency as a basis for penalties.

The significance of the Commission's recent and dramatic expansion of its historically limited power to regulate indecent material is constitutional as well as statutory. Judicial validation and acceptance of this authority, uniquely with regard to licensed broadcasting, presupposed the limitations and qualifications that had historically accompanied and circumscribed that power. Even when in the 1980s, the Commission hinted that "indecency" could be found even in broadcast material that did not contain any of the "seven dirty words" (the precise context of *Pacifica*) continuing restraint in the use of such authority reassured both the reviewing courts and the regulated broadcasters. Lili Levy notes perceptively:

---

3. Industry Guidance of the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, *Policy Statement*,16 F.C.C.R. 7999, 8002 (2001).

4. *Id.*

5. *Pacifica*, 438 U.S. at 742.

> Thus, the commission's cases made it a point to reassure broadcasters that fleeting sexual references or depictions would not likely be problematic, that at least some innuendo or double entendre could pass muster, that merit was an important aspect of indecency analysis, and that complaints would have to provide evidentiary support to trigger serious commission review of indecency claims."[6]

The constitutional implications of such a dramatic change in regulatory posture should be clear: The Commission's own, and ultimately the Supreme Court's, response to the substantial vagueness claims that broadcasters had raised could be refuted only by invoking the seemingly settled interpretation of the key statutory term—complete with the attention that, until its radical departure in 2004, the agency had always given to "context." If "fleeting expletives" and merely profane language could now be deemed "indecent" without satisfying any of the restraints and conditions the Commission had historically imposed upon its own authority, no longer would the regulatory process ensure the degree of guidance and particularity that the First Amendment requires where speech is subject to sanctions.

Recent experience amply demonstrates the quandary that licensed broadcasters face in this new environment. The use of vulgar or taboo language may be deemed acceptable where it is "integral to [a] film's objective of conveying the horrors of war through the eyes of . . . soldiers"[7] but apparently not when identical language is used by New York City police officers in the stressful process of post-September 11 law enforcement.[8] If broadcasters now find inadequate or confusing the level of guidance afforded by current Commission interpretations, they may surely be forgiven. Equally serious, the First Amendment vagueness problems the regulatory system has historically avoided through sparing interpretation of the "indecency" power must now be faced anew. In its summer 2007 *Fox Television* ruling, the Court of Appeals for the Second Circuit recognized precisely this problem. Though declining to rule fully on the merits, the appellate panel did express its skepticism that "by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission can adequately respond to the constitutional and statutory challenges raised by the Networks."[9] The majority opinion later

---

6. Lili Levi, *First Report:The FCC's Regulation of Indecency*, University of Miami Legal Studies Research Paper No. 2007-14, at 3, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023822.

7. Complaints Against Various Television Licensees Regarding Their Broadcast of "Saving Private Ryan", *Memorandum Opinion and Order*, 20 F.C.C.R. 4507, 4512-13 (2005).

8. Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-17, ¶ 131 (2006).

9. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 467 (2nd Cir. 2007).

"question[ed] whether the FCC's indecency test can survive First Amendment scrutiny," since the revised definition of indecency "fails to provide the clarity required by the Constitution."[10]

A second and equally troubling prospect is that of extending indecency (and presumably profanity) regulation to other media, notably cable and satellite. In introducing legislation that would have achieved essentially this result, Senator Jay Rockefeller noted that "broadcast, cable and satellite indiscriminately barrage our children and families with indecent and violent images," and later remarked that "for our children, there is little or no meaningful distinction between the broadcasters and the cable producers."[11] A current law review comment reinforces such a prospect, arguing that "if the government is serious about its stated goals of protecting children and the sanctity of the home, then the FCC should expand indecency regulations to cable and DBS [Direct Broadcast Satellite]."[12] The FCC's current chairman has espoused such an extension since assuming his current position, thus elevating this prospect beyond a merely political or conjectural matter.

Although the necessary congressional authorization to extend to other media the FCC's indecency regulation has not yet occurred, or even come close to occurring (Senator Rockefeller's 2005 bill never got out of committee), the merits of such a proposal need to be addressed. Despite the diminishing practical differences between licensed broadcasting and other electronic media, notably cable and satellite, the legal and logical distinctions remain compelling. The *Pacifica* case had invoked several unique qualities of licensed broadcasting as partial rationale for sustaining FCC power to regulate indecency in that medium, at a time when cable was beginning to provide an alternative to over-the-air signals. A decade and a half later, in dealing with "must-carry" rules for cable, the Supreme Court cautioned: "In light of . . . fundamental technological differences between broadcast and cable transmission, application of a more relaxed standard of scrutiny in . . . broadcast cases is inapt when determining the validity of cable regulation."[13] Later the Court would underscore this distinction in striking down a congressional mandate aimed at cable, noting "a key difference between cable television and the broadcasting media . . . . Cable systems have the capacity to block unwanted channels on a household-by-household basis [as Congress had mandated in a valid companion

10. Id. at 463.

11. *See* David Hudson, Indecency Regulation: Beyond Broadcast? (Dec. 5, 2007), http://www.firstamendmentcenter.org/anaysis.aspx?id=19408.

12. Matthew S. Schwartz, A Decent Proposal: The Constitutionality of Indecency Regulation on Cable and Direct Broadcast Satellite Services, 13 RICH. J.L. & TECH. 17, ¶ 4 (Spring 2007).

13. Turner Broad. Sys. v. FCC, 512 U.S. 622, 639 (1994).

provision]."[14] On the basis of these and other relevant rulings, a Congressional Research Service study concluded in 2005 that "it appears likely that a court would find that to apply the FCC's indecency restriction to cable television would be unconstitutional."[15]

There has been substantially less discussion of a possible extension of indecency regulation to satellite communications. Obviously shock-jock Howard Stern and the Sirius Network to which he transferred his salacious language assumed that the new medium would provide complete immunity from FCC sanctions, as Infinity Broadcasting had failed to do. Although it is much too early to know whether or not that premise is sound, the legal case for reaching satellite seems no stronger than the claim for reaching allegedly indecent material on cable. The fact that satellite signals travel through space rather than by cable or wire seems of no constitutional import and does not implicate the special regulatory interests that both the Commission and the Supreme Court invoked in sustaining the unique authority of the Commission with respect to licensees of limited frequencies on the radio and television spectrum.

A less familiar but no less troubling area of First Amendment concern relates to FCC enforcement procedure. The case of poet, playwright, and performer Sarah Jones is strikingly illustrative. One of her recorded songs, "Your Revolution," contained language that not only expressed a politically radical view but also challenged familiar conventions of taste. When the song was broadcast on a noncommercial Oregon radio station (KBOO), the FCC in May 2001 issued a Notice of Apparent Liability against the station for having aired allegedly indecent material. Despite persistent efforts to clarify the situation, the Commission took no action on the matter for many months. Meanwhile, however, other stations not only declined to broadcast this particular song but from fear of potential liability declined to air any of Ms. Jones' other recordings. Seeking resolution, Ms. Jones brought suit in federal court in New York City, seeking a declaration that the Commission through its action (followed by inaction) had abridged her First Amendment freedoms.

The agency urged dismissal for lack of jurisdiction, noting that the proper avenue of appeal was through the D.C. Circuit—though the plaintiff responded that even the broadcaster faced no appealable order, much less a directly affected nonbroadcaster who could never have followed the prescribed appeal path even if a final order had been entered. The district court expressed sympathy for the aggrieved performer and noted that a limited exception did exist for non-D.C. Circuit review of forfeiture orders but felt stymied here by the absence of any reviewable order. The case was

14. United States v. Playboy Entm't Group, 529 U.S. 803, 815 (2000).
15. Hudson, *supra* note 12.

then docketed in the Second Circuit, where Ms. Jones' plight had attracted the interest and support of major First Amendment groups, notably People for the American Way and the Thomas Jefferson Center for the Protection of Free Expression.

This curious saga had a happy ending. The day before the government's brief was due in the Second Circuit, the FCC announced that it had reconsidered "Your Revolution" and concluded that, while unconventional, its content was not legally indecent. Thus at the eleventh hour, the Notice of Apparent Liability was withdrawn, thus mooting the case.[16] Sarah Jones declared victory, at least for the moment, and returned to the airwaves. There is no evidence of any subsequent FCC challenge to broadcasts of any of her challenging material.

Despite the Commission's late recantation, the Sarah Jones case offers a sobering and cautionary tale. But for the resources she was able to marshal to her cause, the issue might have languished indefinitely, either in the FCC or in the federal courts. In the absence of an appealable order—or even with such an order if the broadcaster declines to appeal—the performer who is the real party in interests seems wholly without recourse. While the Commission's internal guidelines call for initial consideration of the merits of such a Notice within sixty days from its issuance, even the broadcaster—much less the affected performer—may lack legal means of compelling such action. Thus the Sarah Jones experience could be replicated many times over in comparably appealing but remediless situations.

An even greater procedural concern emerged from the March, 2006 Omnibus Order. Although some of the allegedly indecent broadcasts were formally cited as such in the Commission's comprehensive review (which covered material that had been aired over a period of slightly more than three years), other salacious language was found to be indecent and/or profane on the basis of the revised 2004 standards but (usually because the broadcast preceded the announcement of those standards) occasioned no forfeiture. Thus a substantial amount of broadcast material was ruled to violate the statute in its current interpretation, although the absence of sanctions effectively foreclosed judicial review of the merits of the Commission's finding. In this way, the agency might conceivably shield a questionable finding of indecency or profanity from judicial review simply by withholding any immediate sanction—even though no such design prompted the absence of formal sanctions in the Omnibus Order of 2006.

16. The Second Circuit Docket noted on March 10, 2003 the receipt by the clerk of the stipulation of the parties to withdraw the appeal with prejudice. The appeal was withdrawn two days later. General Docket for Second Circuit Court of Appeals Docket # 02-6248. The ruling of the District Court was unreported.

Such a prospect further compounds the procedural perils that broadcasters face and which potentially undermine First Amendment freedoms on the airwaves.