Indecent Exposure: An Economic Approach to Removing the Boob from the Tube

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INTRODUCTION

"Oh cursed corset! If I could let it out, without indecent exposure."[1] With the broadcast airing of Super Bowl XXXVIII, over one hundred forty-four million viewers, which included almost seven million children aged 2 to 11, were exposed to a halftime show with idol Justin Timberlake singing in a provocative manner while ripping off a portion of Janet Jackson's *bustier*, exposing her right bare breast.[2] Janet Jackson's exposure at the then most watched television event of all time was indeed "indecent." This surprise stunt spawned a deluge of

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[1] SAMUEL BECKETT, ALL THAT FALL 43 (Krapp's Last Tape ed., Grove Press 1960) (1958).

[2] Bella English, *The Disappearing Teen Years, Bombarded by Sexualized Cultural Forces, Girls Are Growing Up Faster Than Ever,* BOSTON GLOBE, March 12, 2005, at C1 ("Nielsen ratings show that 6.6 million children ages 2 to 11 watched Janet Jackson's 'wardrobe malfunction' during last year's Super Bowl."). The infamous Super Bowl XXXVIII was also, at the time, the most watched television program ever with 144.4 million viewers. *See* Jennifer Jones, *Watch List; To View the Super Bowl Properly, It Takes More Than a TV,* CHICAGO SUN TIMES, February 4, 2005 at 4. For a general description of the facts surrounding the exposure of Janet Jackson's breast during Super Bowl XXXVIII, *see* In the Matter of Complaints Against Various Television Licenses Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show [hereinafter *Halftime Show*], 19 FCC Rcd. 19230 (Aug. 31, 2004).

public complaints to the Federal Communications Commission.[3] Excerpts of some of the complaints capture the disappointment with the prime-time broadcast airing of such "indecent" and inappropriate material:

> Enough is Enough! Stand Up for America's Families!! . . . Why do we as American citizens have to have that sexually explicit garbage rammed down our families [sic] throats during family T.V. hours? The Super Bowl has always been about families, friends and neighbors getting together to watch a family sporting event - - not an X-rated strip act laden with crude and crass dancers with nasty and disgusting lyrics.[4]
>
> The [Super Bowl] Halftime entertainment was sick. This sends a terrible message to the American public and to the world.[5]
>
> I was really enjoying the game until halftime. I was at a Super Bowl Party at a Christian Coffee House. It was packed and they rented a big screen TV for the evenings [sic] enjoyment. When Janet and Justin came on I felt the dancing was much too suggestive for a prime time event. I am tired of seeing sex being crammed down my throat on TV. Then to top it off with exposing Janets [sic] breast on TV. That was disgusting to me and embarrassing as well.[6]
>
> As mothers and grandmothers enrolled in an aerobics class at [an Indiana] YWCA, we are writing to commend you for your prompt and decisive condemnation of the controversial performance by Justin Timberlake and Janet Jackson during the half-time show at the Super Bowl last Sunday. We understand that the FCC has opened up an investigation, and we urge that the resulting fine be large enough to stop future performers from even thinking about such an action. We are not a bunch of prudes. We've been around the block a time or two. But we are appalled at what we are now seeing on televison[.] . . . Is this what we want our teenagers to absorb hour after hour? Equally important, is this the American culture we wish to export to the rest of the world[.][7]

In response to the outpouring of complaints, the FCC found that "in context and on balance, the on-camera exposure of Ms. Jackson's breast [during the Super Bowl XXXVIII halftime show] is patently of-

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[3] Joanne Ostrow, *Tame Beasts Take Burden Off Advertisers,* DENVER POST, February 7, 2005, at D11 ("[T]he Janet Jackson debacle . . . launched 542,000 complaints to the FCC[.]"). Hereinafter the "Federal Communications Commission" shall be referred to as either "FCC" or the "Commission."

[4] *The Smoking Gun* (visited November 2, 2005) http://www.thesmokinggun.com/ archive/ jjfcc7.html.

[5] *The Smoking Gun* (visited November 2, 2005) http://www.thesmokinggun.com/ archive/ jjfcc12.html.

[6] *The Smoking Gun* (visited November 2, 2005) http://www.thesmokinggun.com/ archive/ jjfcc13.html.

[7] *The Smoking Gun* (visited November 2, 2005) http://www.thesmokinggun.com/ archive/ jjfcc11.html.

fensive as measured by contemporary community standards for the broadcast medium."[8] Should such a finding be assuring to the public that the FCC could consistently and properly apply its own "indecency" definition? The short answer is no.

In its decision, the FCC took great effort to explain that factors other than an exposed breast were present: "[T]hroughout the Jackson/Timberlake segment, the performances, song lyrics and choreography discussed or simulated sexual activities and . . . [t]herefore, we find the nudity *here* was designed to pander to, titillate and shock the viewing audience."[9] The emphasis on the other factors leads one to believe that other kinds of Super Bowl nudity could be found acceptable.[10] The FCC also recognized that it "received an unprecedented number of complaints alleging that the CBS network aired indecent material during the program."[11] Would the same decision have been made if only one complaint were made as opposed to over 542,000?[12] Two particular cases shed light on that particular question.

First, on January 19, 2003, numerous broadcast television stations throughout the country aired the Golden Globe Awards.[13] During the broadcast, Bono, lead singer of the rock band U2, received an award for "Best Original Song."[14] In response to winning the award, Bono in apparent utter excitement exclaimed, "this is really, really f[***]ing brilliant."[15] The FCC initially received only 230 complaints alleging that the program airing the utterance was indecent or obscene.[16] The Enforcement Bureau of the FCC on October 3, 2003, denied the complaints and found that Bono's utterance during the Awards was neither obscene nor indecent.[17] The Bureau further added that Bono "used the

[8] *Halftime Show,* 19 FCC Rcd. at 19235.

[9] *Id.*, at 19231 (emphasis added).

[10] Would the FCC, for example, have made an "indecency" finding if Janet Jackson just flashed a bare breast after singing the national anthem, without any concomitant suggestive dancing and sexual lyrics?

[11] *Halftime Show,* 19 FCC Rcd. at 19231.

[12] Ostrow, *supra* note 3, at D11.

[13] *See* In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program (hereinafter "*Golden Globe Awards* 2003"), 18 FCC Rcd. 19859 (2003).

[14] *See* In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, (hereinafter "*Golden Globe Awards* 2004") 19 FCC Rcd. 4975, 4976 (2004).

[15] *Golden Globe Awards* 2003 at 19859.

[16] *See* ANGIE A. WELBORN AND HENRY COHEN, CONGRESSIONAL RESEARCH SERVICE, REGULATION OF BROADCAST INDECENCY: BACKGROUND AND LEGAL ANALYSIS, 1 (March 30, 2005).

[17] *Golden Globe Awards* 2003 at 19862. The Bureau, although acknowledging that the language "may be crude and offensive," stated in its Opinion and Order that the language

word 'f[***]ing' as an adjective or expletive to emphasize an exclamation," as opposed to using it as a verb. [18] The Bureau's decision was short lived.

After the Bureau's decision, the public outcry grew larger as a number of organizations and Members of Congress expressed disappointment with the FCC.[19] At a U.S. House of Representatives Telecommunications Subcommittee hearing held on January 28, 2004, then-House Commerce Committee Chairman Billy Tauzin said, "Regardless of how the word's used, it's offensive. To split hairs whether the word is an adjective or a verb is ridiculous. I strongly urge the FCC to reverse its decision."[20] This outcry led to the March 18, 2004, reversal by the full Commission. [21] In reversing its prior decision, it stated that the "'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language," invoking a "coarse sexual image."[22] The Commission came to this decision notwithstanding the fact that it has held repeatedly prior to this decision that isolated or fleeting use of expletives, including the "F-Word," was not "indecent."[23]

"did not describe sexual or excretory organs or activities, an FCC requirement for a finding of "indecency," as discussed in section III, A, 2 *infra*.." *Id.* at 19861.

[18] *Golden Globe Awards* 2003 at 19861.

[19] *See* WELBORN AND COHEN, *supra* note 16 at 2.

[20] *See* Brooks Boliek, *White House Backs Anti-Smut Bill,* HOLLYWOOD REPORTER, (Jan. 29, 2004); JOHN EGGERTON, POLS PUSH RAW LAW FOR POTTY MOUTHS 134 BROADCASTING AND CABLE, 1 (Feb. 2, 2004).

[21] *Golden Globe Awards* 2004 at 4975 ("We conclude, therefore, that NBC and other licensees that broadcast Bono's use of the 'F-Word' during the live broadcast of the Golden Globe Awards violated 18 U.S.C. Sec. 1464." Section 1464 states:) "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."). The Commission held: "[W]e believe that, given the core meaning of the 'F-Word,' any use of that word or variation, in any context, inherently has a sexual connotation, and therefore falls within the first [of the two] prongs of our indecency definition," which requires that the material "describe or depict sexual oranges or activities." Id. at 4978. In analyzing the second prong of the definition, which requires that the "broadcast must be patently offensive as measured by contemporary standards for the broadcast medium," the Commission next held that the "F-Word" is patently offensive under contemporary community standards for the broadcast medium. *Id.* at 4979.

[22] *Golden Globe Awards* 2004 at 4979.

[23] *Id.* at 4980 ("While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today[,] we conclude that any such interpretation is no longer good law."). Two examples of material not found indecent because it was fleeting and isolated: In "The Morning Show" on WYBB in Folly Beach, South Carolina a live and spontaneous on air statement said, "The hell I did, I drove mother-fu**er, oh. Oh." L.M. Communications of South Carolina, Inc. (WYBB(FM)), 7 FCC Rcd 1595 (MMB 1992). (The "broadcast contained only a fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction."); A news announcer on KPRL (AM)/KDDB (FM) in Paso Robles, California stated, "Oops, fu**ed

In the above *Golden Globe* case, the public outcry seemed to be instrumental in the ultimate outcome. In another decision, the lack thereof with regard to the claim that the broadcast was "indecent," coupled with the fact that a large share of the listening audience claimed that the material in question was not "indecent" seemed to have the same effect but in the opposite direction – reversing an earlier decision. In 1999, a Portland, Oregon FM station, KBOO, aired rap song, "Your Revolution" somewhere between the hours of seven and nine p.m.[24] An excerpt of the broadcasted song is as follows:

> (Various female voices). Your revolution will not happen between these thighs. Your revolution will not happen between these thighs. Your revolution will not happen between these thighs. Will not happen between these thighs. Will not happen between these thighs . . . Maybe your notorious revolution will never allow you to lace no lyrical douche in my bush . . . Your revolution ain't gonna knock me up without no ring and produce little future M.C.'s. Because that revolution will not happen between these thighs. Your revolution will not find me in the back seat of a jeep with L.L. hard as hell, you know - doing it and doing and doing it well, you know - doing it and doing it and doing it well. Your revolution will not be you smacking it up, flipping it or rubbing it down. Nor will it take you downtown, or humping around. Because that revolution will not happen between these thighs . . . Your revolution will not be you sending me for no drip drip V.D. shot. Your revolution will not involve me or feeling your nature rise. Or having you fantasize. Because that revolution will not happen between these thighs. No no not between these thighs. Uh-uh. My Jamaican brother. Your revolution will not make you feel bombastic, and really fantastic and have you groping in the dark for that rubber wrapped in plastic. Uh-uh. You will not be touching your lips to my triple dip of French vanilla, butter pecan, chocolate deluxe or having Akinyele's dream, um hum - a six foot blow job machine, um hum. You wanna subjugate your Queen, uh-huh. Think I'm gonna put it in my mouth just because you made a few bucks. Please brother please. Your revolution will not be me tossing my weave and making me believe I'm some caviar eating ghetto Mafia clown or me giving up my behind . . . but your revolution will not be you flexing your little sex and status. To express what you feel your revolution will not happen between these thighs. Will not happen between these thighs. Will not be you shaking and me,

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that one up." Lincoln Dollar, Renewal of License for Stations KPRL (AM) and KDDB (FM), 8 FCC Rcd 2582, 2585 (ASD, MMB 1993) (The "news announcer's use of single expletive" does not "warrant further Commission consideration in light of the isolated and accidental nature of the broadcast.").

[24] In the Matter of the KBOO Foundation [hereinafter *KBOO* 2001], 16 FCC Rcd. 10731 (2001).

> [sigh] faking between these thighs. Because the real revolution, that's right, I said the real revolution[.][25]

The FCC held that "'Your Revolution' contains unmistakable patently offensive sexual references . . . designed to pander and shock" and therefore found that KBOO-FM "willfully violated our indecency rule."[26]

Upon a challenge by KBOO, the FCC reversed its prior decision and held that the song was "not patently offensive" and therefore "not indecent."[27] The FCC apparently had a change of heart, stating that on review the sexual descriptions in the song were "not sufficiently graphic to warrant sanction."[28] Notwithstanding the fact that the entire song references sex and sexual acts, the FCC seemed satisfied to reverse its decision because the song's "most graphic phrase ("six foot blow job machine") was not repeated.[29] Like before in the Golden Globe decision, the FCC seems to have deviated from its prior decisions.[30] The sole complaint[31] that led to the original decision was simply not enough to withstand the petition signed by many listeners and KBOO's apparent demonstration that the song was consistent with contemporary community standards.[32]

It is apparent that when it comes to applying its own "indecency" definition, public outcry and the amount of complaints matter to the FCC, seemingly more so than the actual standard itself. The standard by which the FCC awards the decision to the side that jeers the loudest should come to an end. This paper will first briefly examine why regulation of "indecent" and "obscene" broadcast material is needed. Second, this paper will review the current law governing both "indecent" and "obscene" material. The paper will then provide an analysis of sev-

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[25] *Id.* at 10736-38.

[26] *Id.* at 10732-33.

[27] *In the Matter of the KBOO Foundation* [hereinafter *KBOO* 2003], 18 FCC Rcd. 2472, 2474 (2003).

[28] *Id.*

[29] *Id.*

[30] In the words of the Enforcement Bureau in the first KBOO decision, "contemporary social commentary in 'Your Revolution' is a relevant contextual consideration, but is not in itself dispositive. [footnote omitted]. The Commission previously has found similar material to be indecent, and we see no basis for finding otherwise in this case. *See* Capstar TX Limited Partnership (WZEE(FM)), 16 FCC Rcd 901 (EB 2001); CBS Radio License, Inc. (WLLD(FM)), 15 FCC Rcd 23881 (EB 2000) (Notice of Apparent Liability for Forfeiture), DA 01-537 (EB Mar. 2, 2001) (Forfeiture Order)" *KBOO* 2001, 16 FCC Rcd. at 10733-35.

[31] Because the song was aired on an educational station in Portland, Oregon, it is safe to assume that the amount of listeners to such station was somewhat limited. One can, therefore, see how an affected audience of loyal listeners could rally behind its beloved station and out duel the sole complainant.

[32] *See KBOO* 2001, 16 FCC Rcd. at 10733.

eral FCC decisions on "indecent" material, which will further establish the FCC's inconsistent and woefully inadequate application of its own definition.

Finally, this paper will propose a much-needed change for the handling of complaints to the FCC regarding the alleged airing of "indecent" material. Contrary to the many proposals to reform the FCC's definition of "indecent" material by providing a clearer and stricter definition, this proposal will work with the existing definition but yet help provide a more consistent and morally sound application of the current definition. This will be accomplished through the establishment of a special board within the FCC based on an economic model known as the Condorcet Jury Theorem ("CJT"). This board should be solely responsible for deciding all cases arising from allegations of "indecent" material. Once in place, this board will supersede the current "applause test" with a straightforward application of the existing standard. The economic model, on which this proposed board is based, will predict that the board will make the correct judgment with a near-one probability, or in other words, near perfect results, assuring both consistency and proper moral application of the existing "indecency" definition developed by the FCC.

WHY REGULATION OF INDECENT AND OBSCENE SPEECH IS NEEDED ON BROADCAST MEDIA.[33]

In the age of cable, satellite television and radio, the Internet, and Podcasting, the ability to obtain, view or listen to "obscene" or "indecent" material is as easy as a click on the remote or mouse. The question then to be answered is why in this new information age should society care if broadcast television, in particular, also aired indecent

[33] When discussing regulation of "indecent" or "obscene" material, this paper only refers to broadcast media and not cable television or radio. Treasa Chidester explains the difference with regard to television:

> 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. Public access or broadcast channels are free broadcast and are accessible by anyone who owns a television and can receive a signal. Cable, on the other hand, must be paid for and therefore does not pose the same dangers to children. 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. Pursuant to 47 U.S.C. § 532 however, it is constitutional for a cable operator to regulate indecency if they so choose.

Treasa Chidester, *What the #$ Is Happening On Television? Indecency in Broadcasting*, 13 CommLaw Conspectus 135, 154-55 (2004).

material?[34] The number one reason for the continued regulation of indecency in the broadcast media as articulated by the FCC is to protect children from being exposed to material that their parents do not want them to see, hear and repeat.[35] This reliance is consistent with the doctrine developed in Federal court jurisprudence.

In *FCC v. Pacifica Foundation,*[36] the case in which the Supreme Court held that the FCC's regulation of broadcast indecency is constitutional, as discussed *infra,* the Court recognized that the "broadcast media have established a uniquely pervasive presence in the lives of all Americans," with a particular emphasis on its "accessib[ility] to children, even those too young to read."[37] The *Pacifica* Court also expressed an interest in the "well-being of its youth" and in promoting the "parents' claim to authority in their own household."[38] This sentiment was shared by the United States Court of Appeals for the District of Columbia, which subsequently held that the government has its own interest in protecting children from indecent material since children are the corner stone of a democratic society.[39] The protection of children and the empowerment of the parent to control what the child takes in are no less important simply because of the ubiquitous presence of indecent material in the information age. Protecting the child, therefore, remains a legitimate and important need for the continued regulation of "indecent" material, particularly in light of the invasive nature of broadcast media.

There are, however, other legitimate concerns and reasons to regulate indecency.[40] Professor Glen Robinson argues that the "protect-

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[34] For the purpose of this section only, the author treats the need to regulate both indecent and obscene speech as the same. *See* Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age,* 47 DUKE L.J. 899, 962 (1998) (With regard to regulation of broadcast material, "I don't see any difference between obscenity and indecency.").

[35] *See, e.g., Halftime Show,* 19 FCC Rcd. at 19242, in which the FCC concluded:

> Viacom betrayed its trust . . . to each parent who reasonably assumed that the national network broadcast of a major sporting event on a Sunday evening would not contain offensive sexual material unsuitable for children, the very class of viewers that the Commission's indecency rule was designed to protect. With its delivery into those homes of the Jackson/Timberlake duet, Viacom wrenched away from the parents the ability to control the exposure of their children to the type of objectionable sexual material in which that performance culminated.

[36] 438 U.S. 726 (1978).

[37] *Id.* at 748-750.

[38] *Id.* at 749-750.

[39] Action for Children's Television v. FCC, 58 F. 3d 654 (D.C. Cir. 1995) [hereinafter *ACT III*].

[40] This paper argues two major reasons for the regulation of "indecent" material on broadcast media, in order of importance: The first being to set the "moral tone" for the nation and the second being the "protection of children," which is arguably subsumed under the first reason. There are, however, other reasons to regulate such material, most of which

the-children" rationale is used as a "convenient cover" to what really amounts to an objection in "cultural coarseness in public images and communications."[41] In other words, "protecting the children" is nothing more than a veiled attempt to protect the morals of society. Robinson's observation may be correct. Although "protecting the children" is extremely important, the author argues that the paramount reason for wanting to regulate the broadcast airing of indecent material should be to set the "moral tone" for the nation.[42] What are we, as a society, really saying if prime-time broadcast television is filled with sexual images, nudity and laced with profanity? Is this really the kind of society that the majority of Americans seek? This section is not meant to argue that there should be regulation of all media, such as cable television or radio, or the regulation of any media outside of broadcast media, but rather to recognize the important role that broadcast media plays in the American society and why such media should be regulated.

The content of prime-time broadcast television, for example, has a seemingly major impact on what the American society as a whole morally accepts and the way it behaves by influencing the social decorum. From *Leave it to Beaver* to *Friends,* the content of prime-time broadcast television has changed dramatically over the decades[43] and yet so has what is considered to be socially acceptable behavior. Adultery and sexual promiscuity outside of marriage, for example, are now seemingly

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are subsumed in some manner in the first two reasons, including, but not limited to prevent the promotion and increase of sexual violence or discrimination, to prevent anti-social and destructive behavior, and to prevent the advocacy of improper sexual values and the promotion of unhealthy lifestyles. *See* Robinson, *supra* note 34, at 959-965; Harry Kalven, *The Metaphysics of the Law of Obscenity,* SUP. CT. REV. 1, 3-4 (1960); 1 U.S. Department of Justice, *Attorney General's Commission on Pornography,* FINAL REPORT 299-306 (1986); CATHERINE A. MACKINNON, ONLY WORDS 67 (1993); Andrew Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality,* 8 HARV. WOMEN'S L.J. 1, 9 (1985).

[41] Robinson, *supra* note 34, at 962.

[42] The "protect the children" rationale, however, would be subsumed under the "moral tone" justification.

[43] *See Parents Television Council, Dereliction of Duty: How the Federal Communications Commission Has Failed the Public* (*available at* http://www.parentstv.org/PTC/publications/reports/stateindustrylanguage/main.asp (visited November 11, 2005)

> Foul language increased overall during every timeslot between 1998 and 2002. Foul language during the Family Hour increased by 94.8% between 1998 and 2002 and by 109.1% during the 9:00 p.m. ET/PT time slot. Ironically, the smallest increase (38.7%) occurred during the last hour of prime time – the hour when young children are least likely to be in the viewing audience.

Id. R.G. Passler, *Regulation of Indecent Radio Broadcasts: George Carlin Revisited—What Does the Future Hold for the Seven "Dirty" Words?,* 65 TUL. L. REV. 131, 159 (1990) ("Indecent language became very pervasive in the 1980s, and it appears that there will be no decrease in the 1990's.").

rampant on broadcast television.[44] Although admittedly without empirical proof, that divorce rates have sky-rocketed during the same period is not likely coincidental.[45] One seventeenth century French writer once poignantly noted, "How utterly futile debauchery seems once it has been accomplished, and what ashes of disgust it leaves in the soul!"[46] Likewise, the stains of broadcast immorality can have the impact of creating a similar social environment. The potential for moral societal decline can simply be exacerbated by an immoral tone set by broadcast media. This "moral tone" argument for regulation of "indecent" material seems to be stronger than the "protect-the child" rationale for regulation, especially in light of the ubiquitous nature of "indecent" material in various media.

The "moral tone" reason for regulation of "indecent" or "obscene" material has even been recognized early on as the true reason for such regulation. Louis Henkin, for example, called "obscenity legislation" really "morals legislation in disguise."[47] The difficulty, however, in justifying regulation based on "morals" is attempting to define what exactly that entails, not to mention the numerous problems, including constitutional, with having the government define "morality."[48] Thus, the "protect-the-children" rationale not only provides "cover," as Robinson characterizes it, but it also provides a justification for the regulation of "indecent" material.[49]

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[44] *See* Joal Ryan, *Sex and the TV Study,* E ONLINE via YAHOO NEWS, (November 11, 2005) (*available at* http://news.yahoo.com/s/eo/20051111/en_tv_eo/17758.html) ("A study released Wednesday by the non-profit Kaiser Family Foundation made headlines for its findings that the number of sex scenes on TV nearly doubled from 1998 to 2005.").

[45] *See* the website for the National Center for Health Care Statistics at http://www.cdc.gov/nchs/fastats/divorce.htm (visited November 11, 2005). The author concedes that there are numerous other potential reasons for the divorce rate to increase in the same period, such as more women in the workplace and the Internet. However, the author argues that the broadcast media sets a tone of what is considered to be socially and somewhat morally acceptable behavior in the society as a whole.

[46] EDMOND DE GONCOURT, THE GONCOURT JOURNALS, Entry for July 30, 1861 (Robert Baldick ed., 1962) (1888 – 1896).

[47] *See* Robinson, *supra* note 34, at 962 (citing Louis Henkin, *Morals and the Constitution: The Sin of Obscenity,* 63 COLUM. L. REV. 391, 391 (1963)).

[48] David Greene, *Not In Front of the Children: "Indecency," Censorship, and the Innocence of Youth,* 10 B.U. PUB. INT. L.J. 360, 361 (2001) (book review) (quoting author Marjorie Heins, "[T]hat government can play any role in establishing a national morality is antithetical to the First Amendment and the whole of our constitutional democracy.").

[49] If the courts and the FCC attempted to justify "indecency" regulation on the "moral tone" rationale as opposed to the "protect the child" rationale, some could effectively argue that because of the influential nature of broadcast media, broadcasters should not be required to advance one moral or social viewpoint. *See* Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards,* 84 HARV. L. REV. 664, 680 (1971) ("If the broadcast media are our most influential forums and if most persons rely on

CURRENT LAW AND THE NEED FOR CHANGE.

A. *Current Law*

The legal standard governing broadcast speech at first glance is straightforward. It is a federal criminal violation to utter "any obscene, indecent or profane language by means of radio communication."[50] Congress has given the FCC the authority to administratively enforce this law by forfeiture or revocation of license.[51] Federal courts, as discussed further below, have upheld Congress's authority to regulate and, therefore, prohibit "obscene" speech, and to a more limited extent have upheld Congress's authority to regulate "indecent" speech.[52]

1. Obscene Material

The U.S. Supreme Court in *Miller v. California,*[53] has determined that "obscene" speech is not entitled to First Amendment protection and, accordingly, Congress can prohibit the broadcast of such material at any time.[54] The *Miller* Court created a three-prong test to determine whether material is "obscene:"

> (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 applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[55]

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them as their principal source of information and entertainment, then broadcasters should not be forced to reinforce one moral, intellectual or social viewpoint.").

[50] 18 U.S.C. § 1464. According to 47 U.S.C. § 153(33) , "The term 'radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

[51] 18 U.S.C. § 503(b).

[52] This section does not discuss "profane" material, primarily because there are not many FCC decisions examining whether material was "profane." Most of the FCC decisions examining potential inappropriate material seem to focus on whether such material was "indecent" as defined by the FCC. If a "profane" complaint came before the FCC, it would look to see if the material included language "so grossly offensive to members of the public who actually hear it as amount to a nuisance." *Golden Globe Awards* 2004, 19 FCC Rcd. at 4981, relying on Tallman v. United States, 465 F.2d 282, 286 (7th Cir. 1972).

[53] 413 U.S. 15 (1973).

[54] "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." *Miller,* 413 U.S at 23. *See also* Kois v. Wisconsin, 408 U.S. 229 (1972).

[55] 413 U.S. at 24.

A federal statute that refers to "obscenity" should be understood to refer to material that meets the *Miller* standard.[56] Federal Communication Commission regulations prohibit any licensee of a radio or television broadcast station from "broadcast[ing] any material which is obscene."[57] Thus, any material that at a minimum, "depict[s] or describe[s], patently offensive 'hard core' sexual conduct"[58] and, thereby, meets the *Miller* test is deemed to be obscene and prohibited at any time by the FCC.

2. Indecent Material

Unlike obscene speech, federal courts have held that the First Amendment protects "indecent" speech.[59] The Supreme Court has held, however, that the government may regulate material that is "indecent," but not "obscene," as long as it is narrowly tailored in the least restrictive means to promote a compelling governmental interest.[60] The FCC's general authority to regulate the broadcast of "indecent"

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[56] *See* HENRY COHEN, CONGRESSIONAL RESEARCH SERVICE, OBSCENITY AND INDECENCY: CONSTITUTIONAL PRINCIPLES AND FEDERAL STATUTES, 3 (Jan. 3, 2005) (Application of material as obscene outside the *Miller* test "would ordinarily be unconstitutional. However, narrowly drawn statutes that serve a compelling interest, such as protecting minors, may be permissible even if they restrict pornography that is not obscene under *Miller.*" *See* FCC v. Pacifica Foundation, 438 U.S. 726, 749-50 (1978) ("The Supreme Court up[held] the power of the FCC to regulate a radio broadcast that was 'indecent' but not obscene.").

[57] 47 C.F.R. § 73.3999.

[58] 413 U.S. at 27.

[59] Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment."); Action for Children's Television v. FCC, 852 F.2d 1332, 1344 (D.C. Cir. 1988) [hereinafter ACT I] ("Broadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people say and hear."). *See also U.S. v. Playboy Entertainment Group,* 529 U.S. 803, 813-15 (2000).

[60] *Sable Communications of California,* 492 U.S. at 126. In finding that indecent speech is constitutionally protected, the Court did recognize that some regulation of indecent speech was appropriate:

> The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. *Ginsberg v. New York,* 390 U.S. 629, 639-40 (1968); *New York v. Ferber,* 458 U.S. 747, 756-57 (1982). The Government may serve this legitimate interest, but to withstand constitutional scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. [citations omitted]. It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.

Id.

material[61] was upheld by the Supreme Court in *FCC v. Pacifica Foundation.*[62] Since that decision, the FCC's regulations governing the prohibition of "indecent" material have evolved in different forms throughout the years, particularly with regard to the time of day in which "indecent" material could be broadcast.[63]

Under current FCC regulations, it is unlawful for a radio or television licensee to broadcast "indecent" material between the times of 6 a.m. through 10 p.m.[64] In enforcing its prohibition, the FCC has defined "indecent" speech as meeting at least the following two criteria: First, "the material must describe or depict sexual organs or activities."[65] Second, "the broadcast must be 'patently offensive as measured by contemporary community standards for the broadcast medium.'"[66] Federal courts have specifically upheld the FCC's definition of "indecent" speech.[67] Once a determination is made that the material in question was aired outside the "safe harbor" hours and meets the subject matter requirements of the Commission's definition, or the first criterion of the definition, the material is then evaluated for "patent offensiveness." In making a determination of whether material is "patently offensive," the FCC has stated that the full context "in which the material appeared is critically important" and "necessarily highly fact specific."[68]

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[61] Unless otherwise stated, any reference in this paper to indecent speech is deemed not to be considered obscene.

[62] 438 U.S. 726 (1978).

[63] For a background of the evolution of the FCC's indecency regulations *see* WELBORN & COHEN, *supra* note 16 at 3-6.

[64] 47 C.F.R.§ 73.3999.

[65] Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement [hereinafter *Industry Guidance on Indecency*], 16 FCC Rcd 7999, 8002 (2001).

[66] In applying the "community standards for the broadcast medium" criterion, the Commission has stated: The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.

Id. According to a press statement by FCC Commissioner Gloria Tristani (*available at* 2001 WL 468423):

> The Supreme Court has provided 'a few plain examples' of patently offensive material: (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

citing *Miller,* 413 U.S. at 25; *see also Memoirs v. Massachusetts,* 383 U.S. 413, 418 (1966).

[67] In *FCC v. Pacifica Foundation*, the Court quoted the Commission's definition of indecency with apparent approval. 438 U.S. at 732. In addition, the D.C. Circuit Court of Appeals upheld the definition against constitutional challenges. *ACT I,* 852 F.2d at 1339; *Action for Children's Television v. FCC* [hereinafter *ACT II*], 932 F.2d 1504, 1508 (D.C. Cir. 1991); *ACT III*, 58 F.3d at 657.

[68] *Industry Guidance on Indecency,* 16 FCC Rcd at 8002, 8003.

Thus, to assist the Commission in determining whether broadcast material is patently offensive, it relies on three additional factors:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have presented for its shock value.[69]

The FCC applies the indecency definition once it receives a complaint that certain broadcast material was "indecent."[70]

THE INDECENCY COMPLAINT PROCESS.

The FCC does not constantly monitor on an independent basis all broadcast media to determine if "indecent" material was broadcast.[71] Rather, the FCC relies on a public complaint process that notifies the FCC of allegations of the broadcast airing of "indecent" material.[72] Indecency complaints may be filed by mail, facsimile, or over the Internet.[73] According to the FCC website, the "FCC's staff reviews each complaint to determine whether the complaint contains sufficient information to suggest that there has been a violation of the obscenity, pro-

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[69] *Id.* With regard to these three factors, the Commission noted in its *Industry Guidance* that "Each indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent. No single factor generally provides the basis for an indecency finding." *Industry Guidance on Indecency,* 16 FCC Rcd at 8002.

The FCC has stated more recently that "one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent, or alternatively, removing the broadcast material from the realm of indecency." In the Matter of Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material [hereinafter *Parents Television Council* 2005], 20 FCC Rcd. 1920, 1922 (2005).

[70] *See* In the Matter of EnterCom Seattle License, 17 FCC Rcd. 1672 (2002) ("The Commission's indecency enforcement is based on complaints from the public. Once a complaint is before the Commission, we evaluate the facts of the particular case and apply the standards developed through Commission case law and upheld by the Courts; *see also* Industry Guidance on Indecency, 16 FCC Rcd at 8002. For a detailed description of filing indecency complaints and the subsequent enforcement procedures that follow see the FCC Consumer Facts Sheet found at www.fcc.gov (Consumer and Governmental Affairs Bureau).

[71] *Industry Guidance on Indecency,* 16 FCC Rcd at 8015.

[72] FCC, OBSCENE, PROFANE & INDECENT BROADCASTS, *at* http://www.fcc.gov/ cgb/consumerfacts/obscene.html (last visited October 30, 2005).

[73] Each complaint must provide as much information as it can, including the details of what was said or depicted, the date and time of the broadcast and the call sign, channel or frequency of the station involved. FCC, OBSCENE, PROFANE & INDECENT BROADCASTS, at http://www.fcc.gov/cgb/consumerfacts/obscene.html (last visited October 30, 2005).

fanity, or indecency laws."[74] The staff will begin an investigation of a complaint if it appears that a violation has occurred. This may include sending a Letter of Inquiry ("LOI")[75] to the broadcast station.[76] If the information and facts of the allegations in the complaint suggest a violation of the "indecency" rules as discussed *supra* did not occur, then either the FCC staff will dismiss the complaint by a letter of denial to the complainant or the FCC will deny the complaint by public order.[77] In either case, the complainant has the option of seeking further review.[78] The FCC may issue a Notice of Apparent Liability ("NAL") for monetary forfeiture, which is a preliminary finding that the improper airing of indecent, profane or obscene material occurred, if it determines that the material at issue was indecent, profane, or obscene.[79] If a NAL is issued, the licensee in question can issue a response.[80] The FCC may then confirm, reduce or rescind this preliminary finding when it issues a Forfeiture Order.[81] A licensee may also appeal a Forfeiture Order through the available procedures under FCC rules.[82]

WHAT PASSES THE DECENCY MUSTER THAT SHOULDN'T?

The "indecency" definition used by the FCC is not without its flaws and some new bright line test could possibly be fathomed that would better assist the fact finder in making the appropriate determination.[83] The definition, however, in its current form, provides sufficient guidance for the fact finder to make an appropriate decision on a consistent basis. The biggest problem lies not with the definition of "inde-

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[74] FCC, OBSCENE, PROFANE & INDECENT BROADCASTS, *at* http://www.fcc.gov/ cgb/consumerfacts/obscene.html (last visited October 30, 2005).

[75] *Industry Guidance on Indecency,* 16 FCC Rcd at 8016 ("Where an LOI is issued, the licensee's comments are generally sought concerning the allegedly indecent broadcast to assist in determining whether the material is actionable and whether a sanction is warranted.").

[76] FCC, OBSCENE, PROFANE & INDECENT BROADCASTS, *at* http://www.fcc.gov/ cgb/consumerfacts/obscene.html (last visited October 30, 2005).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] 47 U.S.C. § 503 (b).

[81] FCC, OBSCENE, PROFANE & INDECENT BROADCASTS, *at* http://www.fcc.gov/cgb/consumerfacts/obscene.html (last visited October 30, 2005); *see also Industry Guidance Indecency,* 16 FCC Rcd at 8016.

[82] *Industry Guidance on Indecency,* 16 FCC Rcd at 8016.

[83] Trying to define a stricter bright line standard would be no easy task and could lead to a potentially ridiculous definition. As James L. Gattuso has stated, "'Indecency' is a notoriously hard term to define." James L. Gattuso, *Broadcast Indecency: More Regulation Not the Answer,* THE HERITAGE FOUNDATION WEB MEMO (February 15, 2005).

cency" but the application of it. As demonstrated briefly in the Introduction and more below, the FCC has difficulty in applying the "indecency" definition in a consistent manner that meets the intent of the regulation. The FCC is seemingly more motivated by outside factors, like the court of public opinion, than trying to apply the definition in a straightforward fashion. This unprincipled approach has led to the schizophrenic application of the "indecency" definition.

A review of FCC decisions on "indecency" reveals a blurred distinction between what the FCC has found to be "indecent" and what it has held not to be "indecent," resulting in both chilled speech[84] and the approval of inappropriate material as acceptable. Consider the following examples of broadcast material that was found "not" to be "indecent" and is apparently deemed appropriate for children of all ages:

John Gotti and National Public Radio

A National Public Radio news program, titled *All Things Considered,* ran a segment on organized crime that featured a wiretap of a telephone conversation between John Gotti (JG) and an associate (AS) at 6:25 p.m. on February 8, 1989.[85] A transcript from the newscast is as follows:

> John Gotti has become a familiar face on television and a feared presence on the streets of New York. NPR's Mike Schuster [MS] has

[84] The chilling effect associated with an inconsistent application of the definition of "indecency" is real. (This paper does not attempt to discuss any possible chilling effect caused by the actual "indecency" definition developed by the FCC but only the chilling effect associated with the application of the definition.). By not applying its definition consistently, the "indecency" standard is essentially boundless. Such a boundless standard permits the FCC to hang the "indecency' regulation "over people's heads like a Sword of Damocles," as demonstrated in subsection 5 of this section. Arnett v. Kennedy, 416 U.S. 134 (1974); *see also* Jay A. Gayoso, *The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality from the Airwaves,* 43 U. MIAMI L. REV. 871, 915 (1989). The results from a boundless application of the standard can be described this way: "A landowner is permitted to enjoy the full fruits of his land up to the boundary, without fear of reprisal. Without a boundary, a landowner would fear encroaching upon his neighbor's land and would not use his land to the fullest." B. Chad Bungard, *You Can't Touch This: A Lesson to Legislators on Political Speech,* 1 N.C. FIRST AMENDMENT L. REV. 13 (2003). Likewise, an inconsistent application of the "indecency" definition can lead to the potential of inhibiting free speech – important speech. As one writer accurately described, "When speech is silenced, not only the speakers, but the potential listeners - - and society as a whole - - lose out. Fewer messages are sent; the diversity of views is lessened; and our communications media . . . are impoverished." Julie Hilden, *How the Janet Jackson "Nipplegate" Scandal Illustrates the Dangers of Chilling Free Speech,* FIND LAW'S LEGAL COMMENTARY (Feb. 17, 2004) (found at: http://writ.findlaw.com/hilden/20040217.html).

[85] *See* Federal Communications Letter Mr. Peter Branton, 6 FCC Rcd. 610 (1991) (page references are unavailable). Although the asterisk is used in this section to omit key letters of the foul language expressed in the broadcast, the broadcast aired the language in all its Anglo Saxon clarity.

> a report and a warning; the following story contains some very rough language.
> MS: Gotti is browbeating the associate for not returning his phone calls. The other man claims his wife didn't pass along Gotti's messages. Gotti's threats are profane.
> JG: (Unintelligible) fu**ing (unintelligible) you understand me?
> AS: (Unintelligible).
> JG: Listen, I called your fu**ing house five times yesterday. Now if you want (unintelligible) fu** (unintelligible) Now if you want to disregard my fu**ing phone calls I'll blow you and the fu**ing house up.
> AS: I never disregard anything.
> JG: Are you, call your fu**ing wife or will you tell her.
> AS: All right.
> JG: This is not a fu**ing game I (unintelligible) how to reach me days and nights here, my fu**ing time is valuable.
> AS: I know that.
> JG: Now you get your fu**ing ass (unintelligible) and see me tomorrow.
> AS: I'm going to be here all day tomorrow.
> JG: Never mind all day tomorrow (unintelligible) if I hear anybody else calling you (unintelligible) I'll fu**ing kill you.[86]

The FCC ruled that the news segment was "not indecent," notwithstanding the fact the some form of fu** was stated ten times. Although the Commission "recognize[d] that the repetitious use of coarse words is objectionable to many persons, and underst[ood] that [the complainant] personally may have been offended by the use of expletives during the Gotti segment, [it] nonetheless f[ou]nd the use of such words in a legitimate news report to [not] have been gratuitous, pandering, titillating or otherwise 'patently offensive,' as that term is used in our indecency definition."[87]

The airing of the wiretap featuring the F-word is patently offensive in and of itself. Its repeated use seems to serve no other purpose than to be shocking and gratuitous and to pander to the audience. The dissenting statement of Commissioner Ervin Duggan recognizes the FCC's departure from its definition of "indecency," possibly due to reasons other than the simple application of the definition, and succinctly describes the "indecent" nature of the broadcast:

> In this case, . . . it appears that the Commission is veering away from its former standard. Bending over backwards, perhaps—because the broadcast in question was by National Public Radio, and because it was a newscast—the Commission suddenly appears willing to ignore the standard that in the past has guided its decision on indecency. One stark fact remains, however: the broadcast featured, in the

[86] Federal Communications Letter Mr. Peter Branton, 6 FCC Rcd. 610 (1991).
[87] *Id.*

> course of a few seconds, ten repetitions of the dirtiest of 'the seven dirty words.' The word in question is the one expletive that has traditionally been considered the most objectionable, the most forbidden, and the most patently offensive to civilized and cultivated people: the famous F-word. That word, in the past—and especially its deliberate, repeated, gratuitous use—has almost always been sufficient to justify a ruling of indecency by the FCC. . . . I consider that the deliberate and repeated use of this word fits precisely the meaning of the word gratuitous: unnecessary and unwarranted. And such deliberate and repeated use, in my judgment, however noble the intent of the broadcaster, seems to me to fit the definition of pandering: catering to low tastes. . . . I am concerned that the Commission's departure here from its usual standard, though well-intentioned, could open the floodgates to the repeated, gratuitous use of language that has historically and legally been considered indecent or obscene.[88]

The Commission's decision seemingly opens the doorway for any "indecent" material to be aired on broadcast media that is covered by the journalistic robe. Such a result, as Commissioner Duggan calls it, would "be a misfortune for our national culture"[89] and would be due to the misapplication of the "indecency" definition.

Will, Grace and Keen Eddie

Explicit sexual innuendo of bestiality, where one can read between the lines, and the depiction of homosexual activity has not escaped the acceptance of the FCC as material being "not indecent." In mid-2003, the FCC received numerous complaints against Fox Television Stations, Inc., for its broadcast of the *Keen Eddie* program during prime time on June 10, 2003.[90] During that particular program, three men hire a prostitute to "extract" a horse's semen for the artificial insemination of another thoroughbred horse.[91] According to the Commission decision, "the episode includes the following dialogue between the men and the prostitute in a stable:

> Prostitute: No, that's not natural.
>
> First Man: Extraction for insemination. If you look at the picture on page 45 you'll see how natural it is.
>
> Prostitute: Forget it!

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[88] Federal Communications Commission Letter, Mr. Peter Branton, 6 FCC Rcd. 610 (1991).

[89] *Id.*

[90] In the Matter of Complaints Against Fox Television Stations, Inc. Regarding its Broadcast of the 'Keen Eddie' Program on June 10, 2003 [hereinafter *Keen Eddie*], 19 FCC Rcd. 23063 (2004).

[91] *Id.* at 23064.

> Second Man: You're a 40-year old filthy slut; you'll do anything (referring to an advertisement by the prostitute to which the men responded).
> Prostitute: With a human.
> First Man: Think of it as science.

The videotape then cuts to another scene in the same stable, with the prostitute standing over a collapsed horse. She explains that she tried to arouse the horse by lifting up her shirt, but she is never shown doing so. She states that when she did so, the horse collapsed and died.[92]

Notwithstanding the exposure of the concept of bestiality and the mental imagery the program elicits "at a time when children were likely to be in the audience," the Commission found that "the specific material is not indecent."[93] The Commission found it significant that the characters do not dwell on or repeat at *any length* any references to specific sexual or excretory organs or activities" and that "the woman is never seen touching or even approaching the horse."[94] The Commission also concluded without much explanation that the scene in question "does not appear to have been intended to pander, shock or titillate."[95] This appears to be a nonsensical conclusion in light of the fact that the scene involved the hiring of a female prostitute to somehow sexually arouse a horse for the sole purpose of extracting the horse's semen, as opposed to seeking the medical advice or assistance of a veterinarian. The explicit sexual mental imagery elicited from the discussions and depictions by the program seem to accomplish everything the Commission says it does not accomplish. It is difficult to imagine how the Commission does not find that the mental image of a woman sexually arousing an animal to the point of ejaculation does not cater to low tastes, shock the average person, and intend to titillate.[96]

In 2004, the Commission also denied a complaint alleging that the NBC television show *Will and Grace* included "a scene in which '[a] woman photographer passionately kissed [a] woman author and then humped her (what she called a 'dry hump')."[97] The FCC, in perfunctory fashion, concluded that the material was "not sufficiently explicit or graphic to be indecent," as both "characters are fully clothed and

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[92] *Keen Eddie,* 19 FCC Rcd. at 23064.
[93] *Id.* at 23066.
[94] *Id.*
[95] *Id.* at 23063.
[96] *See* Dissenting Statement of Commissioner Michael J. Copps and Dissenting Statement of Commissioner Kevin J. Martin. In the Matter of Complaints Against Fox Television Stations, Inc. Regarding its Broadcast of the 'Keen Eddie' Program on June 10, 2003, 19 FCC Rcd. 23068, 23069 (2004).
[97] In the Matter of KSAZ License, Inc., 19 FCC Rcd. 15999 (2004).

there is no evidence that the activity depicted was dwelled upon, or was used to pander, titillate or shock the audience."[98] Before 1991, same-sex kissing never occurred on broadcast television.[99] Any portrayal of same-sex romantic encounters knowingly stirs debate and is intended to titillate and shock as a "one night stunt written in to get ratings."[100] Moreover, such homosexual depictions, as the one contained in this broadcast, are sufficiently explicit and graphic in that they promote a "free-sex ideology" and an alternative sexual lifestyle.[101] With the Commission's acceptance of same-sex kissing, such depictions have increased exponentially in appearance on broadcast television in the past ten years.[102] The opportunity, therefore, for children to view such depictions has increased likewise.

Desperate Housewives and Terrell Owens

At 9:00 p.m. Eastern Standard Time, on November 15, 2004, an introductory segment before Monday Night Football featured Philadelphia Eagles Wide Receiver Terrell Owens, appearing as himself, and actress Nicollette Sheridan, appearing as her character in the ABC program "Desperate Housewives."[103] The FCC order describes the scene:

> Sheridan and Owens, who is fully suited for the game, are alone in the Eagles' locker room. Sheridan, wearing only a towel, seeks to seduce Owens. After he rebuffs her advances, telling her that the game is about to start and that his team needs him, she drops her towel. The camera shows her from the back, nude from the waist up. The viewer cannot see her body below the waist. He responds, 'Aw, hell, the team's going to have to win without me' and she then leaps into his arms.[104]

The Commission held that the scene was "not patently offensive, and thus, not indecent."[105] Notwithstanding the Commission's admission that the segment was "sexually suggestive" and "intended to be titillating, it was "not graphic or explicit enough" for the Commission to find it indecent under "our standard," primarily because "no sexual or excretory organs are shown or described, and no sexual activities are

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[98] *Id.* at 16001.

[99] Ann Oldenburg, *The OC Stirs Latest Lesbian TV Controversy,* USA TODAY, (February 9, 2005).

[100] Oldenburg, *supra* note 99.

[101] *See id.*

[102] *See http://www.afterellen.com/TV/timeline-kisses.html* (last visited October 28, 2005).

[103] In the Matter of Complaints Against Various Television Station Licensees Regarding the ABC Television Network's November 15, 2004, Broadcast of 'Monday Night Football,' [hereinafter *Monday Night Football*] 20 FCC Rcd. 5481 (2005).

[104] *Id.*

[105] *Id.* at 5483.

explicitly depicted or described."[106] Yet, in a separate statement, Commissioner Michael J. Copps acknowledges that as "stewards of the public airwaves, broadcasters can and should do better."[107]

It is difficult to understand how this segment could not be considered "indecent" using a straightforward application of the Commission's definition. First, the scene is undoubtedly sexual in nature, meeting the first prong. The scene features a naked woman trying to seduce a man whom she appears never to have met before and not to know and the man giving in to that seduction in a semi-public place (a locker room) where sex is inappropriate. Second, the explicit seduction, revealing the bare back of a naked woman, implying more than shown, and the implicit sex act that follows, seems quite graphic at a time "when children are likely to be in the audience."[108] Moreover, the scene can hardly be characterized as fleeting since the whole scene encompasses the explicit seduction of a man for sex. Additionally, the scene, as the FCC admits, is "intended to be titillating."[109] This case sets forth another example of how a different outcome would have likely resulted using a straightforward application of the "indecency" definition.

The About Face in Citadel

On June 1, 2001, the Commission's Enforcement Bureau found that Citadel Broadcasting Company ("Citadel"), Licensee of Station KKMG (FM), Pueblo, Colorado, willfully broadcasted "indecent" language by airing the "radio edit" version of the song "The Real Slim Shady" by recording artist "Eminem" and issued a Notice of Apparent Liability.[110] The Commission reversed its decision after "review[ing] Citadel's response and having again reviewed the relevant case law."[111] The original Notice of Apparent Liability found the following two passages in the song to be indecent:

> My bum is on your lips
> My bum is on your lips
> And if I'm lucky you might just give it a little kiss
> And that's the message we deliver to the kids
> And expect them not to know what a woman's BLEEP ["bleep" in original] is

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[106] *Id.* at 5483, 5485.

[107] *Id.* (Statement of Commissioner Michael J. Copps) (2005).

[108] *See Monday Night Football,* 20 FCC Rcd. at 5485 (2005) (Statement of Commissioner Michael J. Copps).

[109] *Id.* at 5484.

[110] *See* In the Matter of Citadel Broadcasting Company, 17 FCC Rcd. 483 (2002).

[111] *Id.*

> Of course, they're gonna know what intercourse is
> ******
> It's funny cause at the rate I'm goin'
> When I'm 30 I'll be the only person in the nursing home flirting
> Pinching nurses asses when I'm BLEEP ["bleep" in original] or jerkin'
> Said I'm jerkin' but this whole bag of Viagra isn't workin.'[112]

Upon further review, the Commission was satisfied that the sexual references were "oblique" and simply not graphic enough.[113] The Commission also agreed with Citadel's contention that "the sexual references in the 'radio edit' version "do not appear to pander to, or to be used to titillate or shock its audience. Thus, the sexual references do not have the effect of a 'verbal shock treatment.'"[114]

The Commission initially applied a straightforward application of the "indecency" definition in deciding that song was "indecent." The Commission's reversal seems quite inconsistent with its own definition. First, as the Commission concedes, the song's passages "refer to sexual activity."[115] Second, in evaluating for patent offensiveness, the song seems to squarely fall within all three factors deemed particularly relevant in making such a determination. The song explicitly and graphically discusses and describes several different sexual acts, including masturbation, intercourse, "pinching nurses asses" and putting his "bum on your lips." The material also dwells on the sexual activity. In fact, eight out of the ten lines in the passage in question discusses sexual acts. Finally, to conclude that the language in the material is not designed to pander, shock or titillate is to ignore the obvious. [116] The plain language of the passage was designed for shock value.

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[112] *Id.* at 485.

[113] *Id.* at 486.

[114] *Id.*

[115] *Id.* at 486.

[116] According to the online magazine Swirling Sphere, *available at* www.thei.aust.com, Eminem "repeats in his interviews that his aim is to shock. At that he has succeeded." http://www.thei.aust.com/tssmusic1/eminem.html (visited October 29, 2005). *See also* Nekesa Mumbi Moody, *Eminem's Sanity a Bit Unnerving,* ASSOCIATED PRESS, (appeared in the CHARLOTTE OBSERVER (NC), Nov. 22, 2004 ("When we first met [Eminem] in 1999 on "*The Slim Shady LP*," he was an unrepentant, smart-aleck punk who spewed vile and *shocking* raps that hinted at darker, unresolved issues.") (emphasis added); David Usborne, *PROFILE: EMINEM: The Show Must Go On for the Man Who Created a Monster,* INDEPENDENT (London, UK) 17, (May 18, 2002) (*available at* 2002 WLNR 8330050):

> Among those to spot Eminem first, when he was just 15, was Marky Bass, a Detroit producer, who would later groom him for years and eventually help produce the Slim Shady LP. In a recent interview with the Sun Herald of Australia, he admitted that Eminem was quite a different performer at the outset, indistinguishable from other aspiring rappers. It was Bass and his brother, Jeff, who hit on cloaking the young man in a shock-rap persona. 'His lyrics were a lot tamer when he first started out. *We came up with*

Saving Private Ryan

On Veterans Day in 2004, numerous ABC affiliates carried a special unedited version of the 1998 World War II motion picture "Saving Private Ryan."[117] Senator McCain introduces the film stating that "'the R-rated language and graphic content of the film is for mature audiences and not appropriate for children.'"[118] Realizing that the content of the film could be interpreted as being "indecent" by the Commission, a number of stations refused to show the film for fear of FCC action.[119] The FCC, however, found that because of the film's "subject matter," the rampant "expletives uttered by [the soldiers] as [the fierce combat] unfold[ed] realistically reflect the soldiers' strong human reactions to, and often, revulsion at, those unspeakable conditions and the peril in which they find themselves."[120] The FCC, therefore, found that the film's dialogue "is neither gratuitous nor in any way intended or used to pander, titillate or shock."[121]

The FCC's decision is remarkable in light of its own findings. The FCC first finds that "the complained-of material contained in the broadcast of the film includes at least one word (i.e., 'fu**' and its variations) which falls within the first prong of our indecency definition."[122] Second, the FCC acknowledges that "this material meets the first and second components to our analysis of whether it is patently offensive, in that at least some of the language is graphic and explicit, and is repeated throughout the course of the three and a half-hour broadcast of the film."[123] That could have been the end of the analysis. The only remaining factor, but not necessary for a finding of indecency, was whether the material in question appears to pander or is used to titillate or whether the material appears to have been presented for its shock value.[124]

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the idea of shock rap. When we went to Interscope (his label still), we worked him as the Marilyn Manson of rap.' *So, let's say that the offend-everybody* antics of Eminem are half real, half fake.

Id. (emphasis added).

[117] In the Matter of 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,'" [hereinafter *Saving Private Ryan*] 20 FCC Rcd. 4507 (2005).

[118] *Saving Private Ryan,* 20 FCC Rcd. at 4508.

[119] *Id.* at 4508-09 ("[A]pproximately 66 of a total of 225 stations affiliated with ABC declined to air the film, citing their uncertainty as to whether it contained indecent material[.]").

[120] *Id.* at 4512.

[121] *Id.*

[122] *Id.* at 4510 (citing *Golden Globe Awards* 2004, 19 FCC Rcd. at 4978).

[123] *Saving Private Ryan,* 20 FCC Rcd. at 4512.

[124] With regard to the three components of the Commission's indecency analysis, the Commission has stated in its *Indecency Policy Statement* that "[n]o single factor generally

The film, as aired, contained numerous expletives and other potentially offensive language, including: 'fu**,' and its variations; 'hell'; 'ass' and 'asshole'; 'crap'; 'son of a bitch'; 'bastard'; 'shit and its variations, including 'bullshit' and 'shitty'; 'prick'; and 'pee.'[125] The Commission found that the "material, in context, is not pandering and is not used to titillate or shock."[126]

The Commission, nonetheless, made a finding of "no indecency" notwithstanding the fact that Senator McCain admitted that the film contained "R-rated language and graphic content [intended] for mature audiences and not appropriate for children."[127] The FCC's own policy statement declares that its compelling interest in regulating indecency is "its concern for children's well being."[128] Thus, despite the FCC's justification that the language used by the soldiers in the film reflected the "soldiers' strong human reactions" to "unspeakable conditions,"[129] the inclusion of the language in the film's sole purpose, consistent with the FCC's justification, was to shock the viewer, which notwithstanding the warnings, could have been a child.

The Commission's own recognition belies its argument that the material is not shocking: "Deleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers."[130] Moreover, prior to the start of the film, a WWII veteran who participated in the war events depicted in the film stated that the film was realistic in its depiction of "'things that no one should ever have to see."[131] Senator McCain even added that it is "important to present this 'intense, emotional film unedited.'"[132] Leaving the explicit language in the film could serve no other purpose but to shock the audience with the realities of war, including offensive language.

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provides the basis for an indecency finding," but it apparently believes that a single factor can provide the basis for a finding of "no indecency." *Saving Private Ryan,* 20 FCC Rcd. at 4512 ("[W]e conclude that such findings with respect to the first two factors are outweighed in this instance by the third component of the analysis.").

[125] *Id.*

[126] *Id.*

[127] *Saving Private Ryan,* 20 FCC Rcd. at 4508 ("Following this introduction, the test of an additional viewer advisory is aired, along with the letters 'TV MA LV,' the voluntary industry code warning parents that the broadcast is for mature audiences only and unsuitable for children due to the presence of violence and unacceptable language.")

[128] *Industry Guidance on Indecency,* 16 FCC Rcd at 8001.

[129] *Saving Private Ryan,* 20 FCC Rcd. at 4512.

[130] *Id.* at 4513.

[131] *Id.* at 4512.

[132] *Id.* at 4508.

The FCC attempted to distinguish this case from its decision in the *Golden Globe Awards*, in which it found the use of the single word fu**ing to be indecent, by stating there was "no claim of 'any political, scientific or other independent value" and it was "during [a time] in which children were expected to be in the audience."[133] These distinctions are insufficient. First, the programs were aired at the same time during the evening. The same amount of children could be expected in either audience. Second, almost any material can be justified as having some kind of political, independent or, even scientific value. The FCC also seemed to find significance with the fact that disclaimers were made prior to and during the broadcast that the material "might be unsuitable for children" and parents "could have exercised their own judgment for their children in the context of this film."[134] If the FCC truly believed that this was significant, than it just created a giant loophole for all "indecent" programming that run disclaimers contemporaneous with the broadcast.

Instead of applying the "indecency" definition in a straightforward fashion, the FCC essentially justified the material as being "not indecent" due to certain public and political pressure. This is evident in the Commission's decision when it stated in its finding that the material was not "patently offensive" and that the "presentation was designed to show the horrors of war [and] to honor American veterans on the national holiday specifically designated for that purpose . . ."[135]

CONCLUSION

As the FCC makes decisions regarding what is "indecent" and what is not, it seems to be persuaded by some kind of public appeal or outside influence, other than contemporary community standards for the broadcast medium.[136] This outside influence is plaguing the ability of the Commission to properly apply its own definition in its "indecency analysis." If the FCC applied the "indecency" definition like a jury applies a jury instruction from the judge, taking context into account, it is arguable that a different result would have transpired in the above cases and many others.[137] Without such a straightforward appli-

[133] *Id.* at 4514.

[134] *Id.* at 4513.

[135] *Saving Private Ryan,* 20 FCC Rcd. at 4513.

[136] "Outside influence" in this context refers to the power affecting a person, particularly one that operates without any direct or apparent effort. This paper does not intend in any way to imply that corrupt practices are taking place regarding Commission decisions.

[137] There are many other cases that were dismissed by the FCC as being "not indecent" that could arguably have been deemed "indecent" if the FCC applied its "indecent" definition in a straightforward fashion. In the decision *Parents Television Council* 2005, 20 FCC

cation, the FCC sets the stage for not only bad precedent, but also a complete collapse of its own definition. The moral decay of what is permitted on broadcast media will continue until the FCC's own definition is applied properly. A continued moral decay will eventually lead

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Rcd. 1920 (2005), the FCC found that three scenes in Stephen King's "The Diary of Ellen Rimbauer" were "not indecent." The three scenes in question were described by the FCC as follows:

> [O]ne scene depicts two female characters and one male character in bed together; all three are under the covers and there are no sexual or excretory organs or activities depicted. Another scene depicts a male character tying a female character to a bed and then applying ice to her abdomen. The female character moans and writhes. A third scene depicts a maid undressing while a male character surreptitiously watches. A portion of the side of the maid's breast is shown, but her nipple is not exposed.

Parents Television Council 2005, 20 FCC Rcd. at 1924. In a dissent, Commissioner Michael J. Copps commented, "I believe ["The Diary of Ellen Rimbauer"] may very well violate the statutory prohibition against indecency." *Parents Television Council* 2005, 20 FCC Rcd. at 1930. Notwithstanding the sexual and titillating nature of the material, the Commission summarily dismissed this complaint along with 35 others without much analysis.

Likewise, the FCC dismissed an indecency complaint that alleged a Chicago, Illinois radio station broadcast discussions of sexual intercourse between a 27 year-old man and a nine-year old child. *See* Press Statement of Commissioner Gloria Tristani, 1 (July 2, 2001) (found at: 2001 WL 740586). Two separate Commissioner statements emerged. First, Commissioner Gloria Tristani stated, "If ever there were a case for a per se violation of the indecency laws, this is it. Discussion of sexual intercourse between an adult and a child is clearly a 'perverted sex act' within the Supreme Court's description of patently offensive material." Press Statement of Commissioner Gloria Tristani, 1, 2 (July 2, 2001) (*available at 2001 WL 740586). Commissioner Michael J. Copps stated:*

> One of the complaints dismissed today involves an allegation that, during a morning radio program, the twenty-seven-year-old host discussed – perhaps even joked about – having had sexual relations with a nine-year old child. This sort of content is at least offensive to the listening public, if not indecent. It is the government's responsibility – and more specifically that of the FCC – to ensure that indecent programming is not broadcast when children are likely to be in the audience.

Press Statement of Commissioner Michael J. Copps, 1, 3 (July 2, 2001) (*available at* 2001 WL 740586).

Commission Gloria Tristani released another press statement expressing her dissatisfaction with the FCC's summary dismissal of two separate complaints alleging broadcast indecency. Press Statement of Commissioner Gloria Tristani, 1 (April 5, 2001) (*available at* 2001 WL 468423). One complaint alleges that a DJ begins discussing the ease with which children can access pornography on the Internet and to prove his point the DJ obtained a phone number from a participant in a chat room. *Id.*An on-the-air conversation continues between the DJ, disguising his voice as a woman, and the unsuspecting participant. *Id.* The conversation culminates in the DJ telling the unsuspecting participant to "whack it against the phone." *Id.* The apparent masturbation sounds are broadcast. *Id.* The second complaint alleges that a radio DJ viewed a video-tape, submitted to the radio station as part of a radio contest, of a man having sexual intercourse with a party piñata and described the scene for fifteen minutes. *Id.* Commissioner Tristani explains in her press statement how both cases appeared to be "prima facie case[s] for patent offensiveness" *Id.* At 2, 3. She concluded that the "Commission appears so averse to indecency cases, and has erected so many barriers to complaints from members of the public, that indecency enforcement has become virtually non-existent. It's time for the commission to begin taking indecency cases seriously again." *Id.* at 3.

to no difference in content between cable and broadcast media. A statement of a Commissioner in conjunction with the dismissal of an "indecency" complaint makes this point:

> The complainants called the Commission's attention to a particular comment made during the program, a comment that I believe pushes the limits of decency on broadcast television . . . Not so many years ago, the Commission thought so too. I have said before. I am beginning to wonder if there even is a bottom.[138]

Moreover, without a consistent application of the "indecency" definition, the broadcaster is left to wonder, what is "indecent" and what is "not indecent." This much was conceded by the same above Commissioner in a separate statement involving the summary dismissal of 36 unrelated complaints against various television licensees:

Some broadcasters contend that the Commission has not been adequately clear about how it determines whether a broadcast is indecent. Today's rather cursory decisions do little to address any of these concerns. . . . We serve neither concerned consumers nor the broadcast industry with the approach adopted in today's item.[139]

The chilling effect caused by an inconsistent standard "is very real, keeping much non-offensive and valuable material off the air."[140]

THE PROPOSAL FOR NEEDED CHANGE

The Condorcet Jury Theorem

Over 200 years ago, the Marquis de Condorcet developed an economic theorem, now known as the Condorcet Jury Theorem ("CJT"). Condorcet developed this idea in an effort to justify the use of the majority rule and to determine the optimal size of a deliberative body.[141] The CJT can be summarized as follows: Allow n voters, where n is an odd number, to choose between two alternatives, one of which is correct and the other incorrect.[142] Assume the voters make their decisions independently and that any given voter will vote for the correct alterna-

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[138] Statement of Commissioner Michael J. Copps on Enforcement Bureau Dismissal of Complaints Regarding Broadcast of "Philly" (June 28, 2002) (*available at* 2002 WL 1396149).

[139] In the Matter of Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material, 20 FCC Rcd. 1931 (2005).

[140] Gattuso, *supra* note 83. *See also supra* note 84.

[141] *See* Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem,* 31 J. LEGAL STUD. 327 (2002).

[142] DENNIS C. MUELLER, PUBLIC CHOICE III 129 (2003); *See* Edelman, *supra* note 141, at 328.

tive with a probability greater than fifty percent.[143] The theorem holds then that the probability that a majority vote will select the correct alternative approaches one (or in other words, perfection) as the number of voters becomes large.[144] Consider the following examples:

1. Single Decision Maker

Assume that a single judge conducts a bench trial. After hearing all of the evidence in the case and applying the rule of law to the facts of the case, the judge will reach the correct verdict regarding the defendant's innocence with a sixty percent probability and the wrong verdict forty percent of the time. Thus, the correct verdict will obviously be reached sixty percent of the time.[145]

2. Unanimity Rule with 3 Decision Makers

Next, assume instead, using the same probabilities of sixty percent for a correct verdict and forty percent for an incorrect verdict, that three judges conduct a bench trial under the unanimity rule, meaning unless all three judges find the defendant guilty, the defendant is found innocent. Under this assumption, a true decision is made only if all individuals make the same decisions, that is, only if all vote for or decide the correct verdict or all vote for the incorrect verdict. Since each judge decides correctly with a 60 percent probability, the judges will reach a correct verdict under the unanimity rule 21.6 percent of the time.[146] In all remaining cases, the judges would either fail to reach any unanimous verdict or would reach the wrong verdict. This would happen 78.4 percent of the time.[147]

3. Majority Rule with 3 Decision Makers

A much different result occurs using the simple majority rule. Using the same assumption and probabilities in the above example, sixty percent for a correct verdict and forty percent for an incorrect verdict, the three judges conduct a bench trial using the simple majority rule. Like before, the judges decide only after hearing all of the evidence and applying the rule of law to the facts of the case. Under this rule, a true

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[143] MUELLER, *supra* note 142, at 129; *see* Edelman, *supra* note 141, at 328; Cass Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets,* 80 N.Y.U. L. REV. 962, 972 (June 2005).

[144] MUELLER, *supra* note 142, at 129; *see* Edelman, *supra* note 141, at 328.

[145] *See* MUELLER, *supra* note 142, at 129; *see* Edelman, *supra* note 141, at 328.

[146] The probability that all three judges vote correctly is (60%) (60%) (60%) = $.6^3$ = 21.6%.

[147] The probability that all three judges vote incorrectly is (40%) (40%) (40%) = $.4^3$ = 6.4%. The probability that the three judges will not reach a verdict is 1 - $.4^3$ - $.6^3$ = 72%.

decision is made if at least two judges make the same decision. Since the number of decision makers is odd and there are only two possible decisions to make, correct and incorrect, at least two judges will always vote the same way, that is, at least two will vote correctly or at least two will vote incorrectly. The judges then have a probability of reaching the correct verdict 64.8 percent of the time.[148] The strength of the theorem is that under the simple majority rule the probability that a panel of judges reaches the correct verdict grows continuously as the panel's size increases, assuming that the other important factors are present.[149] This is shown below, where the probability that a panel of five judges reach the correct verdict increases from when only three judges were on the panel using the simple majority rule.

4. Unanimity Rule with 5 Decision Makers.

As the size of the panel of decision makers increases, the probability that the panel will reach a correct verdict falls under the unanimity rule. For example, if a panel of five judges conducts a bench trial and has the probability of reaching a correct verdict sixty percent of the time and the probability of reaching an incorrect verdict forty percent of the time, there is only a 7.776% chance that the panel will reach a correct verdict.[150] On the other hand, there is a little over 92% chance of reaching no verdict or an incorrect verdict. [151]

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[148] To determine the probability that decision makers will choose the correct result, it is necessary to consider all cases in which they decide correctly. *All of the judges reach the correct verdict:* The probability that this occurs is (60%) (60%) (60%) = $.6^3$ = 21.6% for same reasons explained in Section IV, A, 2 (unanimity rule with 3 decision makers). *Two of the judges reach the correct verdict:* This is where the calculations get a little more complex. First, each judge needs to be separately identified for purposes of calculating the probabilities. The judges will be labeled as follows: Judge A, Judge B, and Judge C. Next, I must calculate the probability that A votes correctly, B votes correctly and C votes incorrectly. This probability is (60%) (60%) (40%) = $.6^2$ (.4) = .144. or 14.4%. It is insufficient to stop there because the judges will reach the correct verdict if any of the two judges reach the correct verdict and not only if Judge A and Judge B vote for the correct verdict. Thus, it is necessary to consider the probability that Judge A and Judge C reach the correct verdict, while Judge B reaches the incorrect verdict and also that Judge B and Judge C reach the correct verdict, while Judge A reaches the incorrect verdict. There are, therefore, three cases in which two judges reach the correct verdict so the probability must be multiplied by 3. Mathematically, this results in the following formulation for the correct and incorrect verdict respectively: $.6^3 + 3\ (.6^2\ (.4)) = 64.8\%$ (probability of correct verdict); $.4^3 + 3(.4^2\ (.6)) = 35.5\%$ (probability of incorrect verdict).

[149] The important assumptions of the theorem are discussed further below.

[150] $.6^5 = 7.776\%$ (correct verdict).

[151] $.4^5 = 1.024\%$ (incorrect verdict). The result of no verdict is $1 - .4^5 - .6^5 = 91.2\%$.

5. Majority Rule with 5 Decision Makers.

On the other hand, as the size of the panel of decision makers increases, the probability that the panel will reach the correct verdict continues to grow and approaches one as the number becomes larger under Condorcet Jury Theorem's simple majority rule.[152] For this to work, all of the assumptions supporting the theory must be present, including, a common probability of being correct across all individuals, each individual's choice is made independent of the others, and each individual votes sincerely, taking only his judgment into account.[153] This will be assumed here, as it was in section 3, and discussed further below.

A simple comparison between the use of the majority rule with 5 judges and 3 judges demonstrates the increase in probabilities of reaching the correct verdict. Using the same assumption and probabilities in the above examples, sixty percent for a correct verdict and forty percent for an incorrect verdict, the five judges conduct a bench trial using the simple majority rule. As before, the judges decide only after hearing all of the evidence and applying the rule of law to the facts of the case. Under this rule, a true decision is made if at least three judges make the same decision. The probability of reaching a correct verdict increases from 64.8% under a panel of three judges to 68.256% under a panel of five judges. [154]

Justified Use of the Condorcet Jury Theorem

With the increased probability of reaching a correct verdict with the expansion of the size of the panel of decision makers, this theory

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[152] *See* MUELLER, *supra* note 142, at 129.

[153] *See id.* at 130.

[154] The calculations are similar to that in note 146 *supra* and are as follows: *All five of the judges vote correctly:* This occurs with the probability of $.6^5$ or 7.776%. *Four of the judges reach the correct verdict and one judge reaches the incorrect verdict:* There are five judges, Judge A, B, C, D and E. The probability that Judges A, B, C and D vote correctly and E votes incorrectly is $.6^4$ (.4). With five decision makers, there are five possible cases in which four of them reach the same decision. Thus, remember 5 ($.6^4$ (.4)) for the correct decision and 5 (.6 ($.4^4$)) for the incorrect decision. *Three of the judges reach the correct verdict and two judges reach the incorrect verdict:* The probability that Judges B, C, and D vote correctly and A and E vote incorrectly is $.6^3$ $(.4)^2$. With five decision makers, there are ten possible cases in which three of them make the same decision, this can be calculated by taking the factorial of the number of judges divided by the factorial of the number of judges who reach the correct verdict multiplied by the factorial of the number of judges who vote incorrectly. (A factorial is the product of a positive integer and all positive integers less than itself. For example, the factorial of a 4, written 4!, is 4 x 3 x 2 x I = 24.). In this case, it is 5!/3! x 2! = 10. Therefore, to calculate the probability that the 5 panel court will reach a correct verdict under the simple majority rule, it must be calculated as follows: $.6^5$ + 5 ($.6^4$ (.4)) + 10 ($.6^3$ $(.4^2)$) = 68.256.

can be used to justify its use in many different applications,[155] including direct democracy in the form of referenda,[156] large juries with the use of the majority rule,[157] and other specific proposals.[158] The CJT does rest on four basic assumptions, two of which were already mentioned. The first assumption is that there is a common probability of reaching a correct decision across all decision makers.[159] This can be achieved if all of the decision makers are starting from the same point and given the same set of instructions before reaching a decision. In the case of a fact-finder or jury, all such decision-making individuals would need to hear the same evidence and facts and receive the same jury instructions, indicating how to apply the evidence and facts of the case to the law. Second, any given voter will vote for the correct alternative with a probability greater than fifty percent.[160] Third, all decision-makers must reach their decision independent of all other decision-makers.[161] This is an important assumption without much room for relaxation simply because in a deliberative process, like that in which a jury acts, individuals could be influenced by the opinions of others and ultimately change their original position.[162] The final assumption is that each individual decision-maker votes sincerely.[163] Thus, the decision-maker must choose the outcome based on his or her own judgment. Some

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[155] *See generally,* MUELLER, *supra* note 142, at 129; *see* Edelman, *supra* note 141, at 328.

[156] *See* MUELLER, *supra* note 142, at 129; *see also* Bernard Groffman and Scott L. Feld, *Rosseau's General Will: A Condorcetian Perspective*, 82 AM. POL. SCI. REV. 567 (1988); Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes,* 36 AM. J. POL. SCI. 617 (1992). For example, Mueller argues that the CJT can be used to justify the use of a state or national referendum. Mueller gives the following example with regard to a referendum on the legalization of drugs:

> Suppose, for example, that all members of society wish to see the crime and suffering associated with the illegal sale and use of drugs eliminated. A proposal is made to legalize and regulate the sale of drugs in the belief that this measure would eliminate the profits and crime associated with drugs, just as the people argue, however, that legalizing drugs would increase their use and lead to even more crime and misery. The Condorcet Jury Theorem states that a national referendum on this issue would make the correct judgment of the facts with a near-one probability, if the probability of any single individual making the correct judgment is greater than .5 and all citizens make their judgments independently of one another.

MUELLER, *supra* note 142, at 129 (emphasis in original).

[157] MUELLER, *supra* note 142, at 129; Steven Penrod and Reid Hastie, *Models of Jury Decision Making: A Critical Review,* 86 PSYCHOL.BULL. 462 (1979); Richard Posner, *An Economic Approach to the Law of Evidence,* 51 STAN. L. REV. 1477, 1498 (1999)

[158] *See* Kevin A. Kordana and Eric A. Posner, *A Positive Theory of Chapter 11,* 74 N.Y.U. L. REV. 161 (1999) (Arguing that the CJT supports a proposal of creditor voting in Chapter 11 proceedings).

[159] *See* MUELLER, *supra* note 142, at 130.

[160] Sunstein, *supra* note 143, at 972.

[161] *See* MUELLER, *supra* note 142, at 130.

[162] *See id.*

[163] *See id.*

experts believe that some of the assumptions can be relaxed from time to time.[164] For example, allowing each individual to have his own probability probably will not alter the CJT as long as the mean of the distribution is greater than one half.[165] This means that a CJT panel could still perform in accordance with the calculations even if not everyone in the group is not more than fifty percent likely to be correct.[166]

The CJT demonstrates the value in modeling decision-making after the Theorem's principles. Decision-making under a CJT model can produce efficient and near-perfect results. These qualities should be exploited when trying to create a decision-making body. There are potentially numerous decision-making bodies in need of reform that could benefit from the adoption of the qualities found in a CJT-style decision-making body. This paper will propose in the following section that one such decision-making body in need of reform is the FCC when deciding cases on "indecent" material.

RECOMMENDATION: CREATE AN INDECENCY REVIEW BOARD WITHIN THE FCC MODELED AFTER THE CONDORCET JURY THEOREM.

The problems with the FCC's interpretation and application of its own definition have been examined throughout the paper. The FCC for different reasons, mostly caused by its decision-making process, has difficulty in applying its definition in a consistent and morally sound manner. Many proposals to reform the system have been recommended in scholarly journals ranging from censorship to more strict regulations governing the "indecency" definition. What most of the proposals fail to acknowledge is the workability of the current "indecency" definition used by the FCC. The problem, as discussed *supra*, does not lie with the definition, but the FCC's application of it.

This can be resolved by removing the function of evaluating "indecency" complaints from the Commission and assigning this responsibility to a newly created board, the Indecency Review Board. Specifically, the author proposes the creation of a new board, the Indecency Review Board, modeled after the Condorcet Jury Theorem. The creation of this new Board will alleviate the problems associated with the FCC itself reviewing and deciding the outcome of "indecency" complaints. This Board will apply the "indecency" definition with near

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[164] *See* Bernard N. Groffman, Guillermo Owen, and Scott L. Feld, *Thirteen Theorems in Search of the Truth,* 15 THEORY AND DECISION 261 (1983).

[165] MUELLER, *supra* note 142, at 130 (citing Groffman, Owen, and Feld, *supra* note 164, at 261.

[166] Sunstein, *supra* note 143, at 973. ("[E]ven if everyone in the group is not more than 50% likely to be right, the Theorem's predictions may well continue to hold.")

perfect results and will, therefore, achieve results in accordance with the purpose of regulating "indecency" on broadcast media.

This new CJT Indecency Review Board can be summarized as follows: The Board should be located within the FCC agency itself and shall consist of at least 11 members. All "indecency" complaints will be sent to the Indecency Review Board for a decision. Like the current process, the Board will rely on a public complaint process that notifies the Board of allegations of the broadcast airing of "indecent" material. Once the Board receives a complaint, it can send it down to the FCC staff for an additional fact inquiry. After the FCC staff has completed gathering the facts in accordance with the Board's direction, the staff will send all relevant information to the Board so that it can make its decision. The Board members shall choose between two alternatives: (1) the material alleged to be "indecent" in the complaint is in fact "indecent" as defined by the FCC; or (2) the material alleged to be "indecent" in the complaint does not fit with the FCC's definition of "indecent," and is therefore deemed to be fit for children. This will not be a deliberative process to ensure that each member is not persuaded to change his or her vote by another member. Each member must make their decision independently and solely make their decision by applying the facts and evidence of each particular case to the FCC's "indecency" definition.[167] Each member will be charged with voting sincerely based on the strict application of the already developed "indecency" definition and is not permitted to expand or decrease the current definition. With the thorough definition of "indecency" developed by the FCC and the guidance it provides, each member should have no greater than a twenty percent chance of applying the definition incorrectly, or, in other words, no greater than a twenty percent probability of getting the decision wrong. Because the current "indecency" provides sufficient guidance for the decision-maker, the probability that a member will choose incorrectly is probably much lower than twenty percent.

Each member will, again, vote secretly, sincerely, and independently, without consulting with any of the other members. Once a member has chosen an alternative, he will submit his vote. When all of the votes have been submitted, the case will be decided using the simple majority rule. Assuming that there is only an eighty percent chance of choosing the correct alternative, an eleven-member panel will still choose the correct alternative with a near-one probability. Under the

[167] The Board shall review all facts and evidence as submitted to it by the complainant, as well as any additional information gathered by the FCC staff, including information from the broadcaster,

majority rule, a true decision is made on the Board if at least six members choose the same alternative. The probability of reaching a correct decision with an eleven-member panel using this model is an astounding 98.8%[168] and that probability will only increase with the size of the Board.[169]

The eleven-member Board should in effect be an apolitical panel appointed by the President in consultation with Congress. Ideally, the panel should be selected in the same manner that a jury is selected, a random selection of the general public.[170] A more thoughtful selection is likely and, therefore, the President should be permitted to select no more than six members from his own party. The probabilities of reaching the correct result will not change based on the term that each member serves, but only on the size of the panel. Thus, terms could run the gamut in range; however, terms for each member of the Board should be equal among all members. An appeal of the Board's decision

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[168] The logic of the calculations to determine probabilities does not change with a larger number of decision-makers. The calculations do, however, become more complex. The calculations for the probability that an eleven member panel under the Condorcet Jury Theorem will reach the correct decision with a 98.8% probability are as follows: A decision is made if at least six of the members make the same decision. To determine the probability that the Board makes the correct decision, all of the possible combinations of the correct decision, must be calculated. *All of the members vote correctly:* The probability that this occurs is $.8^{11}$. *Ten of the members vote correctly and one votes incorrectly:* Take members A, B, C, D, E, F, G, H, I, J, and K. The probability that A, B, C, D, E, F, G, H, I, and J vote correctly and K votes incorrectly is $.8^{10}$ (.2). With eleven individuals, there are eleven cases in which ten of them make the same decision: 11!/10! x 1 = 39916800/3628800 = 11. *Nine of the members vote correctly and two vote incorrectly:* The probability that A, B, C, D, E, F, G, H, and I vote correctly and J and K vote incorrectly is $.8^9$ $(.2)^2$. With eleven individuals, there are 55 cases in which nine of the members make the same decision: 11!/9! x 2! = 39916800/725760 = 55. *Eight of the members vote correctly and three vote incorrectly:* The probability that A, B, C, D, E, F, G, and H vote correctly and I, J and K vote incorrectly is $.8^8$ $(.2)^3$. With eleven individuals, there are 165 cases in which eight of the members make the same decision: 11!/8! x 3! = 39916800/241920 = 55. *Seven of the members vote correctly and four vote incorrectly:* The probability that A, B, C, D, E, F, and G vote correctly and H, I, J and K vote incorrectly is $.8^7$ $(.2)^4$. With eleven individuals, there are 330 cases in which seven of the members make the same decision: 11!/7! x 4! = 39916800/120960 = 330. *Six of the members vote correctly and five vote incorrectly:* The probability that A, B, C, D, E, and F vote correctly and G, H, I, J, and K vote incorrectly is $.8^6$ $(.2)^5$. With eleven individuals, there are 462 cases in which six of the members make the same decision: 11!/6! x 5! = 39916800/86400 = 462. The formula and calculation is as follows: $.8^{11} + 11(.8^{10}(.2)) + 55(.8^9(.2^2)) + 165(.8^8(.2^3)) + 330(.8^7(.2^4)) + 462(.8^6(.2^5)) = .858992 + .2362228 + .2952785 + .2214465 + .110715 + .0387156 = .9882776 = 98.8\%$.

[169] Edelman, *supra* note 139, at 328.

[170] *See* Saul Levmore, *Voting With Intensity,* 53 STAN. L. REV. 111 (Oct. 2000)

> Condorcet's notion is that were each voter has more than an even chance of being right on some matter (with two choices) and voters are a *random sample* of the population, then the more voters we have the closer we get to a probability of one of getting the matter right by voting.

Id. at 143-44 (emphasis added).

should be permitted but only in rare circumstances and with a high standard of review, recognizing deference to the Board's decision. An appeal should in no way be a routine exercise. Otherwise, the appeal could be used to corrupt the near-one probability of reaching the correct decision. The ideal way to treat an appeal is to allow an appeal before the same Board using the simple majority rule.

With the near-one probability in reaching the correct decision that such a Board can bring to the FCC in determining whether certain material was "indecent," it is difficult to justify a reason not to implement this much needed reform. The Commission will no longer be faced with outside pressure in finding material to be "indecent" or "not indecent." The public-at-large and various advocacy organizations, such as the Parents Television Council, will also not feel pressure to send in an enormous amount of complaints so that the Commission will take the issue seriously since the Board will be charged to review each and every complaint.[171] This should not be an unwieldy task, as the Board can meet probably just once a month to resolve all complaints.[172] The general public will also feel relief and security in the fact that "indecency" on television will be dealt with in accordance with the law. For all of the benefits awaiting the American public, lawmakers should not delay in implementing the CJT-modeled Indecency Review Board.

CONCLUSION

In sum, there are two major negative forces in existence due to the FCC's failure to strictly analyze each "indecency" complaint before it under its own definition. First and most importantly, the FCC is increasingly permitting inappropriate and immoral material to be aired on the broadcast medium in contradiction to its own definition. This continued allowance will eventually lead to the elimination of the need for the "indecency" definition and the unfortunate consequences of allowing such "indecent" exposure to the forming minds of children and the culture at large will be revealed in time. Second, while the FCC continues to move back the line of "indecency," it occasionally pulls the line back up. This inconsistent application could lead to chilled speech – a consequence that could lead to valuable material and information from being disseminated.

A new strict "indecency definition" is not needed to produce consistent and morally sound findings. What is needed, however, is a

[171] The Board will undoubtedly rely on the staff to assist it in expediting the case reviews.

[172] The Board members can take turns writing majority opinions. Dissenting and separate concurring statements can be written at any time a Board members wishes to write such a statement.

mechanism that allows for the consistent application of the definition that will at the same time produce morally sound results consistent with intent of the FCC's own definition. This can be accomplished through the adoption of the proposed Indecency Review Board, modeled after the economic based Condorcet Jury Theorem. This proposed Board would, with a remarkable near-perfect probability, apply the FCC's "indecency" definition in its intended manner and alleviate the need to inundate the FCC with complaints since each complaint will be analyzed with a straightforward application of the existing definition free from any outside influences.