INDECENCY ON THE CABLE: CAN IT BE REGULATED?

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Is there a right to transmit and to view sexually explicit materials on cable television? This is a question with both political and constitutional overtones. The necessity to confront it has arisen from the rapid expansion of cable viewership[1] and the ensuing resort to varying degrees of explicit sex by companies seeking to exploit the market. System operators have an economic incentive to provide what subscribers are willing to pay for, and the growth of pay cable channels catering specifically to prurient tastes suggests a significant market for such wares.[2]

No issue would arise without opposition, but the sexually oriented programming has predictably provoked a counter reaction. Groups with moral concerns have reacted with alarm and pressed for tighter controls on obscene and indecent programming at all legislative levels.[3] Under pres-

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1. A conservative source estimates the total number of cable subscribers as increasing from under one million in 1963 to 14.1 million in 1979, 21 million by January 1, 1982, and 30 million by January 1, 1984. TELEVISION & CABLE FACTBOOK 1735 (A. Warren ed. 1983-84). Another source put the figure at 32.8 million as of August, 1984, which was 39% of all households with television sets. *Cable Stats*, CABLEVISION, Oct. 1, 1984, at 46. An increase to 50.7 million cable subscribers by 1990 is predicted. *Id.*

2. Among pay cable services which offer sexually oriented material are Escapade/Playboy channel featuring "implicit sex," "frontal nudity," and "explicit talk"; Twin County Trans-Video in Allentown, Pennsylvania, which has been offering X-rated movies since 1978; RCH/Las Vegas Live, featuring risque night club acts from Atlantic City and Las Vegas; and Quality Cable Network, specializing in softcore X-rated films. *See* T. BALDWIN & D. MCVOY, CABLE COMMUNICATIONS 134-36 (1983); N.Y. Times, Sept. 13, 1981, § 6 (Magazine), at 44; BROADCASTING, Feb. 22, 1982, at 56. In June, 1984 the Playboy Channel claimed 700,000 subscribers on 450 cable systems, a 100% increase from the previous year. CABLEVISION, June 11, 1984, at 5, 60. And *see* Smith, *Battle Intensifying Over Explicit Sex on Cable TV*, N.Y. Times, Oct. 3, 1983, § 3 at 22, col. 1.

3. Most notable are the New York-based Morality in Media, Inc., with its National Obscenity Law Center, and Citizens for Decency through Law, Inc., headquartered in Phoenix. Morality in Media has prepared a model cable indecency statute and actively sought its adoption throughout the country. A copy can be obtained from the sponsors at 475 Riverside Drive, New York, New York 10115. Local groups have also been mobilized in support of cable content regulation, *e.g.*, the Utah Association of Women, a multi-issue organization with a conservative political bent. According to one estimate nearly 100 citizen groups have mobilized throughout the country to combat obscene or indecent programming on cable television. Smith, *supra* note 2, at 22, col. 5.

sure from organized constituents, the Utah legislature has twice in the past three years enacted statutes prohibiting the cable transmission of "indecent" material.[4] Local ordinances directed at indecency in cable programming have been adopted in such diverse places as Roy, Utah,[5] Miami, Florida,[6] and Milwaukee, Wisconsin.[7] Attempts to impose stricter decency standards for cable television have also been mounted, thus far without success, in a number of state legislatures[8] and in the United States Congress.[9]

Several of the proposals enacted into law have been challenged in the courts. In three cases that have thus far proceeded to judgment, the state law at issue was held to violate first amendment guarantees of freedom of expression.[10] In each instance the court was probably correct in finding a constitutional defect in the statute, but all three opinions have gone beyond the particular infirmities of the specific enactments to assert broadly that government may not regulate cablecasting of offensive, sexually-oriented (*i.e.*, "indecent") matter unless it is also legally obscene. This surely is an oversimplified analysis of a very complex legal issue. Past precedent does not dictate such a severe limitation upon government regulation of any other medium of communication, including the print media, and no court has attempted to provide a rationale for placing cable in a first amendment position superior to all the rest. The issue is important and bound to recur. The forces that have generated the conflict show no signs of abating. The issue of constitutionality will ultimately be decided in the courts, and the definitive answer ought to represent a more careful analysis of the first amendment issues than the courts have yet brought to bear.[11]

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4. UTAH CODE ANN. § 76-10-1229 (Supp. 1981); *id.*, § 76-10-1701 to -1708 (Supp. 1983). A fourth such measure appeared on the 1984 Utah ballot as a popular initiative proposal but was defeated by the voters. *See* Cable TV Decency Act, filed with Office of the Utah Lieutenant-Governor, December 1982.

5. ROY CITY, UTAH, ORDINANCE 552 (April 6, 1982).

6. MIAMI, FLA., ORDINANCE 9538 (Jan. 13, 1983).

7. MILWAUKEE, WIS., CODE OF ORDINANCES § 99-13(12). Dallas, Texas, has a cable ordinance prohibiting X-rated movies. DALLAS, TEX. CABLE PROGRAMMING ORD. NO. 16741 (Nov. 5, 1981).

8. *E.g.*, Ariz. H.B. 2510, 35th Leg., 2d Sess. (1982); Calif. S. 899, Regular Sess. (1983-84); Fla. S. 16, S. 272, H. 316, H. 1032, Regular Sess. (1983); La. S.B. 192, Regular Sess. (1982); Mass. S. 1994 (1983). For discussion of state and local legislative attempts to control indecency on cable television, see Hofbauer, *"Cableporn" and the First Amendment: Perspectives on Content Regulation of Cable Television*, 35 FED. COM. L.J. 139, 171-90 (1983).

9. S. 2136, 97th Cong., 2d Sess. (1982)(introduced by Dennis DeConcini, D. Ariz.) (providing criminal penalites for uttering or distributing obscene, indecent, or profane language or material on either cable or broadcast television). *But see supra* note 156.

10. Cruz v. Ferre, 571 F. Supp. 125 (D. Fla. 1983); Community Television of Utah, Inc., v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982). See *infra* text accompanying notes 191-237.

11. Challengers understandably have raised numerous constitutional objections besides the first amendment, the specifics depending on the precise nature of the law or ordinance at issue. For example, in Cruz v. Ferre, 571 F. Supp. 125 (S.D. Fla. 1983), although the City of Miami ordinance was attacked primarily as a violation of the first amendment, the complaint also raised constitutional claims relating to vagueness, substantive and procedural due process, the right of privacy, equal protection, preemption, unconstitutional delegation of legislative (and executive and judicial) powers, the contract clause, and the commerce clause, among others. *See id.*, Complaint for Declaratory, Injunctive and Equitable Relief, at 5-9. This Article will address only the freedom of expression questions.

This Article is intended as a contribution to that analysis.

I. REGULATION OF OBSCENE AND INDECENT EXPRESSION

Where obscenity is involved, the issue of regulation is political rather than constitutional. If a jurisdiction has the political will to enact and enforce appropriate laws against obscenity, the first amendment poses no constitutional barrier. Obscene expression is not now, and never has been, protected by the United States Constitution.[12] The serious issue for the courts is not whether obscenity may be banned but whether given material is legally obscene. The current test derives from *Miller v. California.*[13] Under *Miller*, the court must determine

> (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.[14]

To be found obscene, the material must satisfy each part of the test.[15]

Decisions expanding on the *Miller* standard have established that "sadomasochistic" materials may be classified as obscene,[16] that "evidence of pandering to prurient interests" has relevance in determining the existence of obscenity,[17] and that the relevant "community" for deriving contemporary standards of obscenity is "local," not statewide or national.[18] The Court has also made clear that the *Miller* reference to "community standards" does not give juries "unbridled discretion" to decide what is "patently offensive."[19] "[N]udity alone" is "not enough to make material legally obscene under *Miller* standards,"[20] and anything less than "patently offensive 'hard core' sexual conduct" is likely to be protected from a jury determination of obscenity.[21] The class of materials that may be deemed legally obscene is thus quite narrow, but anything falling within

12. "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." Miller v. California, 413 U.S. 15, 23 (1973). "This Court has always assumed that obscenity is not protected by the freedoms of speech and press." Roth v. United States, 354 U.S. 476, 481 (1957).

13. 413 U.S. 15 (1973).

14. *Id.* at 24.

15. *Id.* A rationale for continuing refusal to protect obscene expression was set forth by the Court in a companion case to *Miller*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). The Court in *Paris Adult Theatre* identified a number of "legitimate state interests . . . in stemming the tide of commercialized obscenity," including "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." 413 U.S. at 57-58. The *Miller* Court also emphasized that regulation should be limited to "works which depict or describe sexual conduct," and that conduct must be "specifically defined by the applicable state law, as written or authoritatively construed." 413 U.S. at 24.

16. Ward v. Illinois, 431 U.S. 767 (1977). This decision essentially reaffirmed the continued applicability of Mishkin v. New York, 383 U.S. 502 (1966).

17. Splawn v. California, 431 U.S. 595, 598 (1977). The "pandering" concept stemmed from another pre-*Miller* case, Ginzburg v. United States, 383 U.S. 463 (1966).

18. Hamling v. United States, 418 U.S. 87 (1974).

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

20. *Id.* at 161.

21. *Miller*, 413 U.S. at 24-25.

the class, including broadcasting and cable programming,[22] has no first amendment protection.[23]

A. *Regulation of Indecent Expression: Two-Tier Theories*

Regulation of sexually-oriented expression has by no means been limited to works that are obscene, although the degree of permissible regulation has varied with the circumstances. Frequently government efforts to regulate indecent or otherwise offensive language have been the beneficiary of the Court's two-tier approach to first amendment analysis, which accords some varieties of speech less protection than others.[24] The concept of two-tier analysis is usually identified with *Chaplinsky v. New Hampshire*,[25] where the Court upheld a "fighting words" statute under which Chaplinsky had been convicted for calling a policeman "a God damned racketeer" and a "damned Fascist" during the course of a street altercation.[26] In justifying this outcome, Justice Murphy explained that fighting words and certain other "well-defined and narrowly limited classes of speech" had "such slight social value as a step to truth" that their regulation posed no constitutional problems.[27] The idea that some kinds of utterances are entitled to little or no first amendment protection was not new.[28] Obscenity, profanity, libel, and fighting words had traditionally been punishable under statute or common law, with little hindrance by the first amendment,[29] and commercial advertisements had also been accorded little protection.[30] *Chaplinsky* simply made explicit what had in fact been the accepted law.

In recent decades the broad sweep of the *Chaplinsky* doctrine has un-

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22. The National Cable Television Association has acknowledged this limitation. *See* National Cable Television Association, Inc., *Memorandum to the Industry on Cable System Carriage of Adult Programming* ii, 2 (March, 1982).

23. Nearly every rule has an exception, and this rule is no exception. Under Stanley v. Georgia, 394 U.S. 557 (1969), a constitutional right of privacy shields from government interference the possession of obscene material for personal use in one's own home. This limited right to possess does not, however, confer upon anyone else the correlative right to sell or distribute obscene material. United States v. Reidel, 402 U.S. 351, 355 (1971); United States v. Thirty-seven Photos, 402 U.S. 363, 376 (1971).

24. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-18 (1978); Krattenmaker & Powe, *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1207-1212 (1978); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Note, *Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech*, 4 HASTINGS CONST. L. Q. 321, 344-54 (1977); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 200-05 (1976).

25. 315 U.S. 568 (1942).

26. *Id.* at 569.

27. *Id.* at 571-72.

28. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 149 (1941).

29. For examples of obscenity prosecutions, see MacFadden v. United States, 165 Fed. 51 (3rd Cir. 1908), People v. Pesky, 230 A.D. 200, 243 N.Y.S. 193 (N.Y. App. Div. 1930), *aff'd*, 254 N.Y. 373, 173 N.E. 227 (1930); Commonwealth v. Havens, 6 Pa. C.C.R. 545 (1888). For common law libel cases, *see, e.g.*, Commonwealth v. Clap, 4 Mass. 163 (1809); People v. Stokes, 30 Abb. N.C. Cas. 200, 24 N.Y.S. 727 (1893). For enforcement of profanity laws, *see, e.g.*, Barker v. Commonwealth, 19 Pa. 412 (1852); State v. Pepper, 68 N.C. 259 (1873); Torrington v. Taylor, 59 Wyo. 109, 137 P.2d 621 (1943). Illustrative decisions upholding "fighting words" statutes are Jones v. Commonwealth, 307 Ky. 286, 210 S.W. 2d 956 (1948); Davis v. Burgess, 54 Mich. 514, 20 N.W. 540 (1884); State v. Christie, 97 Vt. 461, 123 A. 849 (1924).

30. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).

dergone significant limitation. *Roth v. United States*[31] substantially enlarged the protection given to sexually oriented materials by narrowing the definition of obscenity.[32] *New York Times Co. v. Sullivan*[33] began the process of granting enlarged protection to utterances formerly regarded as libelous, and *Gooding v. Wilson*[34] signalled a clear intention to limit severely the "fighting words" doctrine. Since 1976 commercial speech has also been brought within the first amendment,[35] although still granted somewhat lesser protection than noncommercial speech.[36] Despite these changes, *Chaplinsky* has never been repudiated.[37] The concept that some kinds of speech are less valuable, and therefore less protected than others, remains firmly imbedded in the law.

If the doctrinal core of *Chaplinsky* is still alive and well, the Court has moved away from simple distinctions between protected and unprotected speech and toward differing degrees of protection for different classes of speech. Speech protected in some contexts may in others be so hurtful, or of so little value, that it can be regulated because the harm to society outweighs the expressive interests. Justice Stevens has been the most persistent advocate of the modern two-level approach. He has repeatedly insisted that first amendment protection "often depends on the content of the speech,"[38] that "the First Amendment affords some forms of speech more protection from governmental regulation than other forms of

31. 354 U.S. 476 (1957).

32. Prior to *Roth*, a number of U.S. jurisdictions had applied the English rule of Regina v. Hicklin, L.R. 3 Q.B. 360 (1868), which tied the definition of obscenity to the susceptibilities of the most vulnerable members of the potential audience and permitted a whole work to be condemned on the basis of isolated passages. *Roth* rejected the *Hicklin* test by requiring that the challenged material, "taken as a whole," be judged by "the average person, not the most susceptible, applying contemporary community standards. . . ." *Roth*, 354 U.S. at 489-90. A few months before *Roth*, the Supreme Court had rejected the "most susceptible persons" element of *Hicklin* by finding unconstitutional a Michigan statute prohibiting sale to adults of materials tending to corrupt minors. Butler v. Michigan, 352 U.S. 380, 383 (1957). In the two or three decades before *Roth* and *Butler*, the *Hicklin* test had already lost considerable ground in the lower courts. *See, e.g.*, Parmelee v. United States, 113 F.2d 729 (D.C. Cir. 1940); United States v. Levine, 83 F.2d 156 (2d Cir. 1936); United States v. One Book Called "Ulysses," 5 F. Supp. 182 (D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); ACLU v. City of Chicago, 3 Ill.2d 334, 121 N.E.2d 585 (1954); Attorney General v. Book Named "Forever Amber," 323 Mass. 302, 81 N.E.2d 663 (1948); People v. Viking Press, Inc., 147 Misc. 813, 264 N.Y.S. 534 (Magis. Ct. 1933); Commonwealth v. Gordon, 66 Pa. D. & C. 101 (1949). *But see* Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945); Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930); L. SOBEL, PORNOGRAPHY, OBSCENITY & THE LAW 8 (1979).

33. 376 U.S. 254 (1964).

34. 405 U.S. 518 (1972). *Gooding* was decided on overbreadth grounds and did not in terms reject the fighting words exception to first amendment protection. *See also* Lewis v. City of New Orleans, 415 U.S. 130 (1974). Though the Supreme Court has not dealt directly with the constitutionality of laws proscribing profanity, its decisions dealing with the utterance of offensive language suggest that such laws are unconstitutional. *See infra* authorities cited note 50.

35. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

36. *See* Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

37. The key paragraph of the *Chaplinsky* two-tier rationale was quoted as recently as the 1981 term. See New York v. Ferber, 458 U.S. 747, 754 (1982).

38. Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976). His authority for this statement is drawn principally from cases dealing with fighting words, libel, commercial speech, obscenity, and incitement to crime and violence. 427 U.S. at 66-69. Obviously content is crucial in such instances.

speech,"[39] and that the *context* of speech may determine whether or not it is protected.[40]

When first enunciated in *Young v. American Mini Theatres*,[41] the Stevens position was endorsed by only four members of the Court. The other five expressly rejected it.[42] In *New York v. Ferber*,[43] however, a Court majority embraced the concept of differential social value when it sustained New York's law prohibiting distribution of child pornography. In words highly reminiscent of the Stevens plurality opinion in *American Mini Theatres*, the Court found "[t]he value of permitting live performances and photographic reproduction of children engaged in lewd sexual conduct" to be "exceedingly modest, if not *de minimis*."[44] The Court also specifically endorsed the *American Mini Theatres* position that speech content may often determine the degree of first amendment protection.[45] The plurality in *American Mini Theatres* apparently had become a majority willing to vary first amendment protection according to the social utility of the expression, at least in some contexts.[46]

Context undoubtedly is crucial in determining the applicable degree of protection. When offensive language is used in discourse on public issues it receives the full benefit of first amendment guarantees. The leading decision in this line of cases is *Cohen v. California*,[47] which overturned a

39. *Ferber*, 458 U.S. 781 (Stevens, J., concurring).

40. FCC v. Pacifica Found., 438 U.S. 726, 747-48 (1978). *See also* Stevens' concurring opinions in Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 544 (1980)(Stevens, J., concurring), and Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 79 (1981)(Stevens, J., concurring). Also notable is the Stevens' comment in *American Mini Theatres*, that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." 427 U.S. at 61.

41. 427 U.S. 50 (1976).

42. 427 U.S. at 73 (Powell, J., concurring); *id.* at 86 (Stewart, J., dissenting). Justices Brennan, Marshall, and Blackmun joined the Stewart dissent. *See also* L. TRIBE, *supra* note 27, at 67-68 (Supp. 1979)(Professor Tribe emphasizes the majority's disagreement with this aspect of the Stevens plurality opinion and urges that it "be rejected because it threatens to 'unstitch the warp and woof of First Amendment law.' ")(quoting *Pacifica*, 438 U.S. at 775) (Brennan, J., dissenting)).

43. 458 U.S. 747.

44. *Id.* at 762. Justice Stevens, in a separate opinion, was pleased to note that the Court had come around to his point of view.

> On a number of occasions I have expressed the view that the First Amendment affords some forms of speech more protection from governmental regulation than other forms of speech. Today the Court accepts this view, putting the category of speech described in the New York statute in its rightful place near the bottom of this hierarchy.

Id. at 781 (Stevens, J., concurring).

45. *Id.* at 763 (quoting *American Mini Theatres*, 427 U.S. 50 at 55, and citing *Pacifica*, 438 U.S. at 742-48).

46. The majority consists of the Chief Justice and Justices White, Rehnquist, and Stevens, the original *American Mini Theatres* plurality, Justice Powell, who either had changed his position or else found the *Ferber* opinion somehow distinguishable, and Justice O'Connor, who had not previously expressed an opinion on the subject. In *Ferber*, O'Connor wrote separately to emphasize that "the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions." *Id.* at 774 (O'Connor, J., concurring). Thus her assent to the Court's opinion would appear to rest on the evil of child exploitation and not upon the minimal social value of the depictions. The whole opinion could be so interpreted, although its language certainly provides ample grounds for Stevens' conclusion that the Court had adopted his point of view.

47. 403 U.S. 15 (1971).

conviction for disturbing the peace predicated upon the public display of a jacket bearing the slogan "Fuck the Draft" as a protest against the Vietnam war. The Court found that Cohen's speech did not fall within any of the unprotected *Chaplinsky* categories,[48] and the government was able to offer no interest compelling enough to override Cohen's right to protest in this fashion.[49] *Cohen* went free; and since that landmark case, the right to use offensive language in public discourse has been regularly vindicated by the courts,[50] except in broadcasting media.[51]

The Court has also given protection to sexually-oriented expression where no hint of public debate on a political or social issue is present. In *Erznoznik v. Jacksonville*,[52] the Court invalidated a local ordinance banning the outdoor exhibition of motion pictures containing nudity if the picture was "visible from any public street or public place."[53] The decision left the door slightly ajar for regulation of indecent expression in a proper case, but only where "precision of drafting and clarity of purpose" are in evidence.[54] In *Erznoznik*, the city advanced no interest to justify the proscription of all nudity. Just a year later, *American Mini Theatres*[55] hinted that the zoning power might be proof against first amendment objections as applied to offensive forms of entertainment, but that notion was subsequently dispelled by *Schad v. Mt. Ephriam*,[56] where the Court refused to allow a live nude dancing establishment to be completely zoned out of the community. *Cohen*, *Erznoznik*, and *Schad* do not negate the two-tier approach as applied to indecent expression, but they emphasize the need for carefully tailoring means to ends and the critical importance of context in the Court's *ad hoc* balancing of interests.

B. *Content Regulation and Viewpoint Neutrality*

Another doctrine bearing on the regulation of indecent expression arises from the Court's treatment of rules that restrict speech because of its

48. *Id.* at 19-20.

49. The possibility of offending others was held not to be a sufficient justification. In the Court's view, the government could not "shut off discourse solely to protect others from hearing it," absent "a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Id.* at 21. Nor could states, "acting as guardians of public morality," *id.* at 22, punish such offensive utterances "in order to maintain what they regard as a suitable level of discourse within the body politic." *Id.* at 23.

50. *E.g.*, Lewis v. New Orleans, 415 U.S. 130 (1974)(abuse addressed to police); Eaton v. City of Tulsa, 415 U.S. 667 (1973) (reference to "chickenshit" while testifying in criminal trial); Hess v. Indiana, 414 U.S. 105 (1973) (foul language on public street during a demonstration); Papish v. University of Mo., 410 U.S. 667 (1973) (foul language in a campus publication); Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (foul language in a school board meeting); Brown v. Oklahoma, 408 U.S. 914 (1972) (four-letter words used to describe police during political meeting held in university chapel); Gooding v. Wilson, 405 U.S. 518 (1972) (threatening and abusive words to police during anti-war demonstration). *See generally* Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C. R.-C.L. L. REV. 1 (1974).

51. *See infra* notes 79-145 and accompanying text.

52. 422 U.S. 205 (1975).

53. *Id.* at 207.

54. *Id.* at 217-18.

55. 427 U.S. 50.

56. 452 U.S. 61 (1981).

content.[57] When laws are aimed at the content of speech, the Court has applied a strict scrutiny test. In order to constitutionally justify the law, the state "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[58] If, however, the regulation is intended to serve a non-speech-related interest, but nevertheless has the incidental effect of abridging freedom of expression, a less strict scrutiny may be applied.[59]

Even when government regulations are directed at the content of speech, the Court has sometimes accorded less than strict scrutiny where subject matter rather than speaker's point of view is the focus of the regulation. Although the line separating the two is often indistinct,[60] the distinction has nevertheless been noted (if not necessarily praised) by commentators,[61] and some authority for it may be found in numerous cases where governmental restrictions based on subject matter but not on viewpoint were allowed to stand.[62] It also seems consistent with a recent plurality decision in *Board of Education v. Pico*,[63] which held that certain books might be removed from a high school library because of their vul-

57. For more detailed discussion of content regulation, see Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978).

58. Widmar v. Vincent, 454 U.S. 263, 269-70 (1981). *Widmar* gives a recent succinct statement of the strict scrutiny standard, but it is only one of various formulations. As Stone has observed, "The Court has not articulated a single all-embracing standard, but rather it has employed several different standards and approaches, including categorization, clear and present danger, and variations of the compelling-interest test." Stone, *supra* note 57, at 82 n.6. For other examples, see Carey v. Brown, 447 U.S. 455, 461, 464-65 (1980); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558-59 (1976); Police Dept't v. Mosley, 408 U.S. 92, 98-99 (1972); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

59. Under the test set forth in United States v. O'Brien, 391 U.S. 367 (1968), such a statute may be upheld "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. In Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977), the District of Columbia Circuit used the *O'Brien* test to invalidate FCC regulations that restricted the showing of feature films and live sports events on pay cable channels.

60. According to one authority, "[T]he Court has in some cases treated the subject-matter restriction as if it were indistinguishable from other sorts of content-based restrictions, while in others it has effectively disregarded the subject-matter restriction entirely and thus analyzed the challenged legislation or regulation as if it were content-neutral." Stone, *supra* note 57, at 115.

61. *E.g.*, TRIBE, *supra* note 24, at 673; Farber, *supra* note 57, at 733; Stone, *supra* note 57, at 83.

62. FCC v. Pacifica Found., 438 U.S. 726 (1978) (prohibiting daytime radio broadcast of indecent programming); Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) (banning in-prison solicitation of membership in a prisoners' union); Young v. American Mini Theatres, 427 U.S. 50 (1976) (placing zoning restrictions on the location of adult theaters); Greer v. Spock, 424 U.S. 828 (1976) (barring political speakers from a military base); Lehman v. Shaker Heights, 418 U.S. 298 (1974) (upholding policy of accepting commercial advertising but refusing political advertisements on city-owned bus line); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (upholding network refusal to accept commercial advertising); Rowan v. Post Office Dep't, 397 U.S. 728 (1970) (banning erotic material from the mails at recipient request). *But see* Bolger v. Youngs Drug Prods. Corp., 103 S.Ct. 2875 (1983), which invalidated a federal statute barring unsolicited contraceptive advertisements from the mail.

63. 457 U.S. 853 (1982).

garity but not because of their objectionable ideas.[64] In *Perry Education Association v. Perry Local Educators' Association*,[65] the Court explicitly held subject matter to be a legitimate, indeed unavoidable, basis for regulating speech in a nonpublic forum.[66] The point could scarcely have been made with less equivocation:

> Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.[67]

Other cases, however, have explicitly refused to recognize the distinction as a valid rule of law. A frequently quoted statement from *Police Department of Chicago v. Mosley*[68] places both viewpoint and subject matter in the same bag for purposes of first amendment protection: both are inviolable. In the Court's words, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[69] This obviously is hyperbole, given the numerous cases previously discussed which have upheld content-based regulation of speech.[70] Nevertheless, the Court in *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*,[71] quoted this declaration from *Mosley*[72] while striking down a state regulation barring utility companies from expressing their views on controversial public issues by means of inserts in billing envelopes. The Court recognized that subject matter regulations had "been approved in narrow circumstances" stemming from "the special interests of a government in overseeing the use of its property,"[73] but the Public Service Commission rule did not fit this narrow category and did not otherwise qualify as "a precisely drawn means of serving a compelling state interest."[74]

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64. *Id.* at 871.

65. 460 U.S. 37 (1983).

66. The term "public forum" is applied to government property generally held open to members of the public for expressive activity. Streets and parks have traditionally been such forums. Government property where communicative activity may occur, but which has not been held open for public expression generally (libraries, courthouses, military bases, etc.), is a "nonpublic forum.") For an in-depth discussion of both concepts, see *id.*

67. *Id.* at 957. The Court indicated, on the other hand, that viewpoint discrimination must be subject to careful scrutiny even in a nonpublic forum. *Id.* at n.9.

68. 408 U.S. 92 (1972).

69. *Id.* at 95.

70. *See* Justice Stevens' discussion of this point in Consolidated Edison Co. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 544 (1980) (Stevens, J., concurring). *See also* Stephan, *supra* note 57, at 251, who concludes:

> A careful examination of the problem of content discrimination in light of traditional first amendment jurisprudence indicates that the Court has said far more than it has meant when it has proclaimed the impermissibility of distinctions based on the content of speech. To the contrary, distinguishing speech according to its content is the only intelligible way to commence any first amendment analysis.

71. 447 U.S. 530 (1980).

72. *Id.* at 537.

73. *Id.* at 538. The Court cited Lehman v. Shaker Heights, 418 U.S. 298 (1974), and Greer v. Spock, 424 U.S. 828 (1976). *See supra* note 62.

74. *Consolidated Edison*, 447 U.S. at 540. A good argument could be made that the rule,

Cases bearing on the viewpoint/subject matter distinction do not lend themselves to easy summarization and sometimes appear contradictory. Yet some threads of consistency appear. *Mosley* and *Consolidated Edison*, which minimized or even denied the distinction, dealt with rules serving to limit public debate on issues of social importance. In that context the difference between subject matter and viewpoint may not be very significant. Squelching debate on public issues may be just as offensive to first amendment values as penalizing a particular viewpoint. On the other hand, the distinction has been accorded significance mainly in cases where the threatened first amendment interests were less compelling, such as when the speech was inappropriate for a particular place;[75] or it jeopardized countervailing first amendment rights of others;[76] or it consisted of sexually-oriented expression.[77]

The last category has been the most common vehicle for judicial enunciation of the subject matter/viewpoint distinction, and this is perhaps no accident. Laws restricting indecent expression are not ordinarily directed at a particular viewpoint. They proscribe only the mode or form of expression, not any ideas that the indecent language or pictures may purport to convey.[78] If the speaker is concerned with ideas, he can escape the penalty by expressing them in some other form. Nor do such laws generally represent government efforts to choose "permissible subjects for public debate," a type of subject matter regulation the Court has specifically condemned. In assessing the constitutionality of any government effort to regulate indecent expression, viewpoint neutrality is only one

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though viewpoint neutral in form, was not neutral in fact since the only voice silenced was that of the utility. The Court, however, did not challenge the Commission's assertion that the regulation was viewpoint neutral. It simply insisted that "[t]he First Amendment's hostility to content-based regulations extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* at 537.

75. Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977); Greer v. Spock, 424 U.S. 828 (1976); Lehman v. Shaker Heights, 418 U.S. 298 (1974).

76. CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

77. FCC v. Pacifica Found. 438 U.S. 726 (1978); Young v. American Mini Theatres, 427 U.S. 50 (1976); Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

78. Stone, *supra* note 57, at 111-12, suggests that restrictions on sexually oriented expression have "a clear viewpoint—differential impact" because such expression "will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores." He continues,

> In a more subtle sense, moreover, the form and content of this sort of expression are inseparable. In our society, the very presence of sexual explicitness in speech seems ideologically significant, without regard to whatever other messages might be intended. To treat such restrictions as viewpoint neutral seems simply to ignore reality.

Id. at 112.

The argument that "form and content . . . are inseparable" would have great force if there were no other way of expressing ideas favorable to "more relaxed sexual mores." But content is separable from form, other modes of expression are available, and restrictions on indecent or obscene material do not preclude advocacy of any ideas the material might otherwise convey. Stone is undoubtedly correct that sexually explicit speech often carries ideological connotations of sexual permissiveness, and banning such speech does not, in the strictest sense, have a viewpoint neutral impact. In that respect, perhaps, it may be compared with a lawyer in open court addressing the judge in opprobrious terms. Rules against that sort of speech, which the judge undoubtedly will enforce, are not viewpoint neutral, and some emotive element may well be lost if the lawyer is not allowed to couch his ideas in language of his own choosing. Since other more acceptable means of objecting to the judge's conduct are available, the lawyer must use them.

element to be placed in the balance. But it has been cited often enough to clearly establish its relevance.

II. REGULATION OF INDECENT BROADCASTING

As noted in the preceding discussion of two-tier approaches and viewpoint neutrality, the Court has occasionally permitted governmental regulation of non-obscene but indecent expression in the print and motion picture media.[79] Broadcasting, however, has a much more extensive history of government regulation in this area. The Comprehensive Radio Act of 1927,[80] which initiated the national system of broadcast licensing and regulation, contained a specific prohibition upon the utterance of "any obscene, indecent, or profane language by means of radio communication."[81] The same prohibition was reenacted as part of the Communications Act of 1934[82] and remained there until 1948, when it was given its present place in the Criminal Code as Section 1464 of Title 18. In addition to the proscription of section 1464, the Federal Communications Commission and its predecessor Radio Commission have consistently interpreted their statutory mandate to promote the "public interest"[83] as authority to take indecent programming into account when deciding licensing and other questions affecting their stewardship of the airwaves.[84]

In applying standards of decency to broadcast programming, the FCC has not limited itself to matter that could be deemed legally obscene under *Roth v. United States*,[85] *Miller v. California*,[86] and the modern obscenity cases. In a number of separate enforcement actions during the 1960's and 1970's, the FCC penalized several radio stations for airing material that probably would have been protected speech under *Roth* and *Miller*. For example, in *Mile High Stations, Inc.*[87], the offense was " 'admittedly poor taste and off-color remarks' "[88] during the course of a telephone call-in show. The Commission made no reference at all to the *Roth* standard; the

79. *See* cases cited *supra* notes 42, 43, 63.

80. Ch. 169, 44 Stat. 1162 (1927). (Repealed 1934).

81. *Id.* at § 29. Significantly, this section includes a prohibition on censorship in the same paragraph with the ban on obscene and indecent expression. Obviously, Congress believed the two were not incompatible.

82. Ch. 652, 48 Stat. 1091 § 326 (1934).

83. For the current mandate, see 47 U.S.C. §§ 303, 309 (1976).

84. *See, e.g.*, Mile High Stations, Inc., 28 F.C.C. 795 (1960); Palmetto Broadcasting Co., 33 F.C.C. 250 (1962); Eastern Educ. Radio (WUHY-FM), 24 F.C.C. 2d 408 (1970); Pacifica Found., 56 F.C.C. 2d 94 (1975), all discussed *infra* at text accompanying notes 87-135. For earlier instances of obscene or indecent language tested by the public interest standard, see cases cited at 28 F.C.C. 795, 797 n.5 (1960).

85. Roth v. United States, 354 U.S. 476 (1957).

86. Miller v. California, 413 U.S. 15 (1973).

87. 28 F.C.C. 795 (1960).

88. *Id.* at 796. The Commission cited a number of examples taken from the broadcast. The following are illustrative:

> A card from a listener stating that she took KIMN radio with her wherever she went occasioned this remark: "I wonder where she puts KIMN radio when she takes a bath—I may peak—watch yourself Charlotte. . . ."
>
> In one instance the announcer remarked: "Say, did you hear about the guy who goosed the ghost and got a handful of sheet. . . ." *Id.* at 798.

Such comments appear patently offensive, particularly in a program involving telephone participation by young people, but probably would not have been considered obscene under *Roth*.

programming was found simply not to "serve the public interest, convenience, and necessity. . . ."[89] Similarly, in *Palmetto Broadcasting Company*,[90] the Commission invoked the public interest standard to deal with a course of broadcasts found to be "coarse, vulgar, suggestive, and of indecent double meaning."[91] The Commission frankly relied on the public interest standard rather than the statutory prohibition of obscenity and indecency because it enabled the Commission to consider material that did not reach "the level of obscenity under 18 U.S.C. 1464. . . ."[92]

In dealing with *Eastern Educational Radio*,[93] its next major encounter with radio indecency, the Commission chose to proceed under the authority of Section 1464. The offending radio station, WUHY-FM, was before the Commission for failure to delete a number of four-letter words from a prerecorded interview with rock musician Jerry Garcia, leader of the Grateful Dead. The words in question, which were part of Garcia's every day vocabulary, were undoubtedly offensive to many but in this context had absolutely no appeal to the prurient interest in sex.[94] If the language were to be reached under section 1464, "indecent" had to mean something different from "obscene."[95] The Commission concluded that it did and defined indecent to mean material that is "(a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value."[96] This test was obviously drawn from the *Memoirs v. Massachusetts*[97] reformulation of the *Roth* obscenity test, including two of

89. *Id.* at 797.

90. 33 F.C.C. 250 (1962).

91. *Id.* at 257. The Hearing Examiner found the broadcasts to be obscene as well. *Id.* at 251.

92. *Id.* at 256. The FCC did not admit that section 1464 applied only to material found legally obscene, but it did recognize uncertainties in the meaning and application of Section 1464. *Id.* at n.7. The Commission also found that Palmetto had made serious misrepresentations during the course of the investigation. On this ground, as well as on the issue of offensive programming, the station's license was not renewed. On appeal, the decision was affirmed without reference to the indecency issue. Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 843 (1964).

93. 24 F.C.C. 2d 408 (1970). In another action earlier in 1970, the Commission had limited to one year the license renewal of Station KRAB-FM because of complaints about the broadcast of offensive language. The Commission cited only a single program in which four-letter words had been used, and that program had been taken off the air when the station manager became aware of it. *In re* Application of Jack Straw Memorial Found., 21 F.C.C. 2d 833 (1970). In 1964 the Commission granted renewal of four radio licenses held by Pacifica Foundation, despite complaints of "filthy" programming. The licenses had been on deferred renewal for several months while the Commission investigated complaints. Of five programs at issue, three were found consistent with the public interest standard, and the Commission accepted Pacifica's explanation that the other two had slipped by inadvertently. *See In re* Application of Pacifica Found., 36 F.C.C. 147 (1964).

94. As the FCC summarized the conversation, "[h]is comments were frequently interspersed with the words "f--k" and "s--t", used as adjectives or simply as an introductory expletive or substitute for the phrase, et cetera. . . ." Examples are:

"S--t man.

"I must answer the phone 900 f----n' times a day, man.

"Right, and it sucks it right f-----g out of ya, man.

"That king of s--t. . . ."

Id. at 409.

95. Of course, the FCC could have found that the Garcia interview did not violate its standards, but that would have been contrary to the Commission's traditional policy of discouraging offensive references to sexual and excretory functions.

96. 24 F.C.C. 2d at 412.

97. 383 U.S. 413 (1966). As stated in *Memoirs*, a finding of obscenity required that

its three prongs but omitting the requirement that the material as a whole appeal to the prurient interest. Stated in this fashion, the rule was broad enough to encompass Garcia's overworked expletives. Or at least the Commission majority thought so.

> Simply stated, our position—limited to the facts of this case—is that such debate does not require that persons being interviewed or station employees on talk programs have the right to begin their speech with "S—t, man . . .", or use "f——g," or "motherf——g" as gratuitous adjectives throughout their speech. This fosters no debate, serves no social purpose, and would drastically curtail the usefulness of radio for millions of people.[98]

The FCC recognized that its interpretation of section 1464 had broken new ground untested in the courts.[99] In light of that consideration and WUHY's overall good record, it assessed a nominal fine of $100.[100]

The *Eastern Educational Radio* decision was not contested, but a subsequent FCC action against Sonderling Broadcasting Corporation[101] was unsuccessfully appealed to the Court of Appeals for the District of Columbia.[102] Neither the FCC action nor the appeals court decision did much to clarify the concept of indecency under Section 1464, however. The FCC relied on its *Eastern Educational Radio* test[103] and the appeals court, finding the broadcasts to be obscene as to children in the audience, did not reach the indecency issue.[104] The action against Sonderling, a Chicago radio station, had come amid a precipitous increase in the number of listener complaints about allegedly obscene, indecent, or profane radio program material.[105] Many of the complaints were directed at a type of call-in radio show known as "topless radio," featuring a master of ceremonies discussing intimate sexual topics with listeners. The FCC selected Sonderling as an example of the genre and ultimately levied a $2000 fine for violating both the obscenity and indecency standards of section 1464. Sonderling chose not to fight the FCC ruling, but the American Civil Liberties Union and the Illinois Citizens Committee for Broadcasting filed an appeal on behalf of listeners' first amendment rights, to no avail as it turned out.[106] The FCC action put an end to the topless radio fad

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three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

383 U.S. at 418. *Roth* had commanded a Court majority, but the *Memoirs* formula did not.

98. 24 F.C.C. 2d at 415. In dissent, Commissioner Nicholas Johnson claimed that the FCC by this decision had "cast itself adrift upon the 'boundless sea' of a search for 'indecency' without compass or polestar for guidance. We have only the obscure charts of the orthodox (presumably represented by a majority of Commissioners) to guide us on our way." *Id.* at 424.

99. *Id.* at 414.

100. *Id.* at 415.

101. *In re* Sonderling Broadcasting Corp., 41 F.C.C. 2d 777 (1973).

102. Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975).

103. 24 F.C.C. 2d 408, 412 (1970).

104. Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d at 404.

105. The FCC had received 1,180 such complaints in fiscal year 1971, 2,141 in fiscal 1972, and 31,084 in the first 11 months of fiscal 1973. 41 F.C.C. 2d 777, 778 n. 5 (1973).

106. *See supra* note 102.

throughout the country,[107] and the appeals court decision affirmed the Commission's right to impose administrative sanctions for violations of section 1464. But the FCC distinction between "obscenity" and "indecency" on the airwaves remained untested in court.

A judicial test of FCC power to regulate indecent broadcasts was finally precipitated by the Commission's censure of Pacifica Foundation's New York radio station WBAI (FM) for broadcasting George Carlin's "Filthy Words" monologue during afternoon hours when children might be in the audience.[108] The complaint which spurred the FCC to action came from a man who claimed that he had heard the broadcast while driving in a car with his young son.[109] Although Pacifica argued that Carlin's commentary on various words associated with sexual and excretory functions was a significant social satire,[110] the Commission nevertheless issued a declaratory order holding that Pacifica "could have been the subject of administrative sanctions."[111] No formal sanctions were in fact imposed, but the order was placed in the station's file where it might be considered should any subsequent complaints arise.[112]

In finding the WBAI broadcast a violation of section 1464, as well as contrary to the public interest,[113] the Commission continued to assert that obscenity and indecency provided separate bases for regulation.[114] Its order in the *Pacifica* case was explicitly based on the indecency standard. Because of the intervening reformulation of obscenity standards in *Miller v. California*,[115] and the D.C. Circuit's conclusion in *Illinois Citizens Committee for Broadcasting v. FCC* that the presence of children in a radio

107. *See* comments in Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 408 (1975) (Bazelon, C.J., voting to grant rehearing *en banc*); Case Note, *Obscenity—Illinois Citizens Committee for Broadcasting v. Fed. Communications Comm'n*, 25 DRAKE L. REV. 257, 259 (1975); Gartner, *Putting a Censorship Lid on Topless Radio*, Wall St. J., May 15, 1973 at 24.

108. FCC Order 75-200, Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C. 2d 94 (1975).

109. *Id.* at 95.

110. *Id.* at 95-96.

111. *Id.* at 99.

112. *Id.*

113. As determined by the FCC under its mandate to "encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g).

114. The Commission admitted that the monologue was not obscene under current judicial standards, 56 F.C.C. 2d at 94-95. The Commission, however, also referred to its definition of indecency as "variable obscenity," *id.* at 98 n.6, which refers to the Court's use of an obscenity standard that varies with the nature of the audience. The term originated with Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standard*, 45 MINN. L. REV. 5 (1960), and was adopted by the Supreme Court in Ginsberg v. New York, 390 U.S. 629 (1968). *See also* Mishkin v. New York, 383 U.S. 502 (1966), which applied the variable standard to a sexually deviant group. As stated in *Ginsberg*, variable obscenity "simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . ' of such minors." *Id.* at 638 (quoting *Mishkin*, 383 U.S. at 509). *See also* comments on variable obscenity in F. SCHAUER, THE LAW OF OBSCENITY (1976) 46, 92-95; Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 938-39 (1963); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834 (1964); Meiklejohn, *The First Amendment and Minors*, 12 SUFFOLK U.L. REV. 1205, 1212-14 (1978); Schauer, *The Return of Variable Obscenity?* 28 HASTINGS L.J. 1275 (1977).

115. 413 U.S. at 15 (1973).

audience was relevant to a finding of obscenity,[116] the FCC saw both a need and an opportunity to revise the test for indecency set forth in *Eastern Educational Radio*. Instead of the terse reference to material that is "patently offensive by contemporary community standards" and "utterly without redeeming social value,"[117] the Commission found that

> the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.[118]

As before, no reference was made to prurient interest, an element of both the *Memoirs* and the *Miller* tests. Instead, the new definition focused on language describing "sexual or excretory activities and organs" as an element of indecency and heavily emphasized one aspect of context—the risk of children being in the audience. The *Miller* requirement that the materials be without "serious literary, artistic, political, or scientific value,"[119] was also treated as a matter of context. If the offensive material had some such value, it might not be indecent when broadcast in the late evening hours but still would be during the day when children were in the audience.[120] In making these distinctions, the Commission deliberately rested its decision on a nuisance rationale, which makes context of crucial importance.[121] The definition made no reference to the *Miller* requirement that a work be judged as a whole.

Unlike the offending broadcasters in *Palmetto* and *Sonderling*, Pacifica Foundation raised a judicial challenge to the FCC order and found a receptive majority on a three-judge panel of the District of Columbia Court of Appeals.[122] Judge Tamm found the FCC order barred by the Communications Act's anti-censorship provision (section 326); he also thought the order vague and overbroad.[123] Concurring, Chief Judge Bazelon addressed the first amendment issue more directly because he believed that section 326 was limited by the section 1464 proscription of "obscene, indecent or profane language . . ."[124] He concluded that indecent speech must be subjected to the same test as obscenity, and that the Commission's definition of indecency was "massively overbroad under *Miller*."[125] Judge Leventhal, in dissent, thought the FCC definition was

116. Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (1975). The FCC explicitly noted the relevance of this decision. 56 F.C.C. 2d 94 (1975).

117. 24 F.C.C. 2d 412 (1970).

118. 56 F.C.C. 2d at 98.

119. 413 U.S. at 24 (1973).

120. 56 F.C.C. 2d at 98.

121. *Id.* As the court of appeals elaborated the concept, "[t]he law of nuisance does not say, for example, that no one shall maintain a cement plant; it simply says that no one shall maintain a cement plant in an inappropriate place such as a residential neighborhood." Pacifica Found. v. FCC, 556 F.2d 9, 12 n.3 (D.C. Cir. 1977).

122. *Id.* at 9.

123. *Id.* at 10-18.

124. *Id.* at 20.

125. *Id.*

sufficiently close to *Miller*, given the special characteristics of radio broadcasting and the presence of children in the audience.[126] Although the words used by Carlin might not at all times and in all contexts be banned, the FCC had properly found this presentation "as broadcast" to be indecent under the statute.[127]

The FCC appealed this adverse decision and a year later was rewarded, in *FCC v. Pacifica*,[128] by a reversal and complete vindication of its position. The Supreme Court flatly rejected Judge Tamm's (and Pacifica's) contention that the Commission's action was forbidden censorship under 47 U.S.C. § 326.[129] That provision was directed against advance editing of broadcast program material and had "never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties."[130] This conclusion was bolstered by the history of the anti-censorship provision which had first appeared in the Radio Act of 1927 in the same section with the prohibition of obscene and indecent language.[131] If Congress intended to give meaning to both provisions, one could not be construed as nullifying the other.[132]

The Supreme Court also upheld the Commission's contention that "indecency" under the statute embodies a different standard from "obscenity." Pacifica had argued that the broadcast was not indecent under the statute because it lacked prurient appeal. The Supreme Court's response was unequivocal:

> The plain language of the statute does not support Pacifica's argument. The words "obscene, indecent, or profane" are written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality.[133]

In making this distinction, Justice Stevens acknowledged that a companion statute forbidding the mailing of "obscene, lewd, lascivious, indecent, filthy or vile" material, 18 U.S.C. § 1461, had been authoritatively construed to equate indecent with obscene.[134] He concluded, however, that

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126. *Id.* at 30-37.
127. *Id.* at 31.
128. 438 U.S. 726 (1978).
129. That section reads as follows:
> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

48 Stat. 1091, 47 U.S.C. § 326 (1976).
130. *Pacifica*, 438 U.S. at 735.
131. Ch. 169, 44 Stat. 1172 § 29 (1927).
132. *Pacifica*, 438 U.S. at 738.
133. *Id.* at 739-40.
134. *Id.* at 740. *See* Hamling v. United States, 418 U.S. 87 at 114 (1974); Manual Enters., Inc. v. Day, 370 U.S. 478 (1962). *See also* United States v. 12 200- ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973)(construing 18 U.S.C. § 1462). Section 1462 forbids the importation or transportation of
> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of indecent character; or

the reasons supporting this construction of section 1461 did not apply to section 1464. Both the history and the disparate nature of the two means of communication negated the argument for giving "indecency" the same meaning in each statute.[135]

The Supreme Court also rejected an overbreadth argument, i.e., that the Commission's construction of section 1464 must be struck down because it embraced so much constitutionally protected expression, even if the Carlin monologue itself was not protected. In the Supreme Court's view, the FCC definition of indecency would at most "deter only the broadcasting of patently offensive references to excretory and sexual organs and activities," a type of expression that surely lies "at the periphery of First Amendment concern."[136] If the overbreadth doctrine was to be invoked only " 'sparingly and as a last resort,' "[137] this clearly was not a proper occasion for it.[138]

The central issue, however, was whether the first amendment permitted governmental restrictions upon the public broadcast of indecent (as contrasted with obscene) language under any circumstances. Pacifica, and the concurring opinion of appeals court Chief Judge Bazelon, contended that it did not: the *Miller* test should govern. Justice Stevens, however, believed that a less demanding first amendment standard might apply. In a portion of the opinion approved only by the plurality (Stevens, Burger, and Rehnquist), Justice Stevens insisted that Carlin's offensive words had such slight social value that they were not entitled to absolute constitutional protection; rather, the degree of protection must vary with the con-

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(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound. . . .

135. As Justice Stevens explained it,

> although the history of the former [section 1461] revealed a primary concern with the prurient, the Commission has long interpreted § 1464 as encompassing more than the obscene. The former statute deals primarily with printed matter enclosed in sealed envelopes mailed from one individual to another; the latter deals with the content of public broadcasts. It is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means.

Pacifica, 438 U.S. at 741.

The Court made no reference to United States v. Simpson, 561 F.2d 53 (7th Cir. 1977), which, a year earlier, had construed "obscene" and "indecent" as synonymous in an appeal from a criminal conviction under section 1464. This apparently was the first court directly to face the issue. It had been previously raised in a criminal context, but in each instance the lower court chose to avoid the issue rather than resolve it. *See* United States v. Smith, 467 F.2d 1126 (7th Cir. 1972); Tallman v. United States, 465 F.2d 282 (7th Cir. 1972); Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966).

136. *Pacifica*, 438 U.S. at 743. Only three members of the Supreme Court concurred in this portion of the opinion. Justices Powell and Blackmun agreed that the overbreadth challenge had no merit, mainly because "the Commission's order was limited to the facts of this case" and " 'did not purport to engage in formal rulemaking or in the promulgation of any regulation.' " *Id.* at 761-62. n.4 (quoting Justice Stevens at 734) (Powell, J., concurring). Justice Powell, however, did not believe that "the application *vel non* of overbreadth analysis should depend on the Court's judgment as to the value of the protected speech that might be deterred." *Id.*

137. *Id.* (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

138. In Justice Stevens' words, "Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort" . . . We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech." *Id.*

text.[139] In this context, a 2:00 p.m. radio broadcast, the words were not protected. The two most important contextual factors contributing to this conclusion were 1) the "uniquely pervasive presence of the broadcast media, with their capacity to invade the privacy of the home and intrude upon "the individual's right to be left alone,"[140] and 2) broadcasting's unique accessibility to children.[141] The Powell concurrence repudiated the Stevens distinction between more and less valuable speech; but it agreed that the "unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and . . . the interest of unwilling adults in not being assaulted by such offensive speech in their homes," were sufficient to justify regulation in this case.[142]

The *Pacifica* decision has been widely criticized as an undesirable abridgement of free speech values,[143] but it remains the law and the latest judicial word governing broadcast indecency. The Supreme Court, in *Pacifica*, was careful to stress the "narrowness" of its holding and the importance of contextual variables in applying the nuisance rationale espoused by the FCC.[144] "We simply hold," said Justice Stevens, "that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."[145] How *Pacifica* may be applied to other instances of offensive broadcasting remains to be seen because, since *Pacifica*, the FCC has approached the matter with great restraint and has taken no formal action against any broadcaster for alleged violations of the indecency standard.

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139. *Id.* at 747-48.

140. *Id.* at 748.

141. *Id.* at 749.

142. *Id.* at 762. All four dissenters—Justice Stewart, joined by Justices Brennan, White, and Marshall—would have affirmed on the ground that the word "indecent" as used in section 1464 should be interpreted consistently with section 1461 as "meaning no more than 'obscene'." *Id.* at 778 (Stewart, J., dissenting). Justice Brennan, joined by Justice Marshall, also addressed the constitutional issues and found the regulation justified neither by the privacy interests of listeners nor the protection of children. Even under a variable obscenity standard, to be regulable the material must still appeal to the prurient interests of minors. The opinion also raised policy objections to the FCC regulation. *Id.* at 762 (Brennan, J., dissenting).

143. *See, e.g.*, L. TRIBE, *supra* note 24, at 61-68 (1979 Supp.); Bonnicksen, *Obscenity Reconsidered: Bringing Broadcasting into the Mainstream Commentary*, 14 VAL. U.L. REV. 261 (1980); Krattenmaker & Powe, *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1228-38, 1280-84 (1978); Quadres, *The Applicability of Content-Based Time, Place, and Manner Regulations to Offensive Language: The Burger Decade*, 21 SANTA CLARA L. REV. 995, 1023-44 (1981); Shinners, *Offensive Personal Product Advertising on the Broadcast Media: Can it be Constitutionally Censored?*, 33 FED. COM. L.J. 39, 47-49 (1982); Comment, *Regulating Indecent Speech: A New Attack on the First Amendment*, 41 U. PITT. L. REV. 321 (1980); Note, *Regulation of Programming Content to Protect Children after Pacifica*, 32 VAND. L.R. 1377 (1979); *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 148-63 (1978); Case Comment, *FCC v. Pacifica Foundation: An Indecent (Speech) Decision?*, 40 OHIO ST. L. J. 155 (1979). *But See:* Thain, *The "Seven Dirty Word" Decision: A Potential Scrubbrush for Commercials on Children's Television?*, 67 KY. L. J. 947, 957-62 (1979) (arguing that *Pacifica* is a very narrow decision and very little freedom is lost as a result of the case).

144. *Pacifica*, 438 U.S. at 750.

145. *Id.* at 750-51.

III. Regulation of Indecency on Cable Television

A. *The FCC Approach*

Case law pertaining to sexually oriented expression in other media undoubtedly has relevance for cable television because underlying first amendment values should not vary with the medium. The broadcasting precedents appear to have special relevance for cable television since cable has much in common with broadcast television. As it is received and viewed by the consumer, it is in fact indistinguishable. Nevertheless, the Court has repeatedly said that regulations must be tailored to fit the peculiar characteristics of each medium, and a rule developed in one context cannot automatically be applied without modification in another.[146]

Despite the obvious similarities in programming, mode of reception, and viewer impact, cable differs from broadcasting in important respects. The FCC initially disclaimed authority to regulate cable television because it was not broadcasting within the meaning of the Communications Act of 1934.[147] Even after the FCC decided to enter the area of cable regulation in response to television broadcaster concerns about cable competition,[148] the FCC continued to reiterate its position that cable was not broadcasting.[149] In sustaining the initial FCC regulations, the Supreme Court emphasized that FCC authority was limited to that "reasonably ancillary" to its broadcast regulation function.[150] A decade later the Court invalidated FCC access requirements because they were not "reasonably ancillary" to the regulation of broadcasting and hence were outside FCC authority.[151] Thus, in law and in fact, cable television is not "broadcasting," and cases dealing with the peculiar characteristics of broadcasting may not necessarily be in point.

The difference between cable and broadcasting is of crucial legal significance in the application of 18 U.S.C. § 1464, which provides criminal penalties for obscene and indecent utterances "by means of radio commu-

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146. *E.g.*, Metromedia, Inc. v. San Diego, 453 U.S. 490, 517 (1981); Heffron v. Society for Krishna Consciousness, 452 U.S. 640, 650-51 (1981); *Pacifica*, 438 U.S. at 726; Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386, 388 (1969); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952).

Geller and Lampert argue that cable is unique because it performs different types of communication functions,some akin to newspapers, some to broadcasting, and some to common carriers. Thus, when engaged in retransmission of broadcast signals, cable should be subject to the broadcast regulatory model; its origination functions should enjoy the freedom from regulation of the newspaper model; and, when serving as a conduit for other people's messages, it should be regulated as a common carrier. *See* Geller and Lampert, *Cable, Content Regulation and the First Amendment*, 32 CATH. U.L. REV. 603, 628-30 (1983).

147. *See* CATV & TV Repeater Servs., 26 F.C.C. 403, 427-31 (1959).

148. *See* Case Note, *FCC Regulation of Cable Television Content*, 31 RUTGERS L. REV. 238, 243 (1978). The first FCC cable regulations, issued in 1965, required cable systems to carry the signals of competing television broadcasting stations and prohibited cable duplication of a local station's programming within fifteen days before or after the local broadcast. First Report & Order, 38 F.C.C. 683 (1965).

149. "We reaffirm our view that cable systems are neither broadcasters nor common carriers within the meaning of the Communications Act. Rather, cable is a hybrid that requires identification and regulation as a separate force in communications." Cable Television Report & Order, 36 F.C.C. 2d 143, 211 (1972).

150. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

151. FCC v. Midwest Video Corp., 440 U.S. 689 at 708 (1979).

nication. . . ."[152] The reference to *radio* communication is significant. The Communications Act of 1934 clearly differentiates "radio communication" from "wire communication" and gives the FCC different regulatory power for each. Thus, 47 U.S.C. § 153 reads

> (1) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission . . .
> (b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures and sounds of all kinds. . . .[153]

By its terms, section 1464 is limited to utterances by means of "radio communication," while cable television falls squarely within the definition of "wire communication." If indecency on cable television is to be regulated, the Commission must look for authority elsewhere than section 1464.

In addition, all of the broadcast indecency cases discussed above have on their facts dealt with radio in the narrow sense rather than with television, whether broadcast or cable, which may further limit their direct applicability. The scarcity of cases dealing with television indecency is undoubtedly the result of greater circumspection on the part of television broadcasters who must appeal to the tastes of a very broad spectrum of the community and take care not to offend commercial sponsors. It also may reflect a more questionable statutory basis for FCC proceedings against indecent television programming. Section 1464 provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication." While television falls within the field of radio communication in its statutory meaning,[154] proscriptions upon the *utterance* of offensive language may not confer authority to proceed against *visual depictions* of sexual material.[155] The Commission may of course take account of program content in pursuance of its "public interest" mandate, but if section 1464 is inapplicable, the Commission has no *specific* statutory authority to move against indecent depictions.[156] Al-

152. 18 U.S.C. § 1464 (1982).

153. 47 U.S.C. § 153 (1982).

154. 47 U.S.C. § 153(b) specifically includes "transmission by radio of . . . pictures" within the purview of the Communications Act. Prior to the enactment of section 153(b), the courts had construed "radio" to include television. *See* DuMont Laboratories v. Carroll, 184 F.2d 153 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951).

155. *See* FCC, REPORT ON THE BROADCAST OF VIOLENT, INDECENT AND OBSCENE MATERIAL, FCC 75-202, 30159, February 19, 1975, at 9, where, in a discussion of section 1464, the Commission states:

> The Commission believes that Title 18, Section 1464, may be inadequate for the purpose of prohibiting explicit visual depictions of sexual material. The precise terms of the statute refer to "utterance of language." It is, therefore, uncertain whether the Commission has statutory authority to proceed against the video depiction of obscene or indecent material.

156. In 1976 an FCC-instigated bill designed to remedy this deficiency by prohibiting the dissemination of "obscene or indecent material by means of radio communication or cable television" was introduced in the Senate (S. 3858) but was not the subject of favorable action. However, such an authority may possibly be found in § 639 of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98th Cong., 2d Sess. (1984), which provides criminal penalties for cable transmission of a "matter which is obscene or otherwise unprotected by the Constitution. . . ."

though the Commission has occasionally expressed concern about adult materials on television,[157] no broadcaster has ever been subjected to formal FCC penalties because of it.[158]

The courts have in two instances dealt with FCC regulation of indecency on cable television, but in neither was the constitutional issue resolved. In *Midwest Video Corp. v. FCC*,[159] the Eighth Circuit held that the Commission had exceeded its statutory authority in requiring cable operators to make available "at least four channels for access users, one channel each for public access, education access, local government access, and leased access."[160] Rules prohibiting the transmission of "obscene or indecent matter" on access channels[161] necessarily were infirm if the Commission had no statutory authority to require access. In dictum, the court suggested that such content controls on speech would also violate first amendment safeguards against prior restraint by making cable operators "involuntary government surrogates" in preventing transmission of the prohibited matter.[162] The Supreme Court affirmed the Eighth Circuit holding that the FCC had exceeded its statutory authority by promulgating the access rules.[163] The Supreme Court observed that the constitutional issues were "not frivolous,"[164] but it did not address the validity of the censorship regulations because they were "not now in controversy before this Court."[165]

The FCC did not press the censorship issue before the Supreme Court because, in a related case, *American Civil Liberties Union v. FCC*,[166] the District of Columbia Circuit had stayed enforcement of obscenity and indecency regulations applicable to access channels pending the conclusion of remand proceedings in the Commission.[167] The Commission had requested the remand in order to reconsider its access channel censorship rules,[168] and that reconsideration was in progress when the Eighth Circuit decision in *Midwest Video* was taken to the Supreme Court for review.[169]

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157. *See* Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976)(describing the FCC campaign to pressure the television industry to take steps to eliminate excessive sex and violence on the airwaves); Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C. 2d 418 (1975); Alleged Broadcasts and Cablecasts of Obscene, Indecent or Profane Material, No. 73-331 (FCC March 27, 1973)(notice stating that a non-public fact-finding proceeding would be held to determine whether certain television, cable, and radio licenses had broadcast obscene material in violation of 18 U.S.C § 1464).

158. At least a search of FCC proceedings reveals none. For an example of the FCC's "hands off" approach to such complaints, see Application of WGBH Educational Foundation, 69 F.C.C.2d 1250 (1978) (Morality in Media complaint about occasional expletives on television dismissed).

159. 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

160. *Id.* at 1034, quoting the Commission's requirements as specified in 47 C.F.R. § 76.254(a) (1976).

161. 47 C.F.R. § 76.256(d)(1-3) (1976).

162. *Midwest Video*, 571 F.2d at 1055-57.

163. FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

164. *Id.* at 709 n.19.

165. *Id.* at 694 n.4.

166. Case No. 76-1695 (D.C. Cir. 1977).

167. *See* discussion in *Midwest Video*, 571 F.2d at 1034 n.19. The stay order was issued August 26, 1977.

168. *Id.* at 1055 n.73.

169. FCC v. Midwest Video Corp., 440 U.S. at 693 n.4.

When the Supreme Court decided that the Commission lacked jurisdiction to publish the access rules, the FCC responded by repealing all of its access rules, including the application of obscenity and indecency restrictions to access channels.[170]

B. *State and Local Alternatives*

1. *Preemption of State and Local Regulation*

With the FCC virtually withdrawn from the field, the current issue is the extent of state and local government authority to restrict indecent material on cable television. That is primarily a first amendment question, but the recent decision in *Capital Cities Cable, Inc. v. Crisp*[171] suggests that preemption may also be an issue.[172] In *Crisp* the Supreme Court struck down an Oklahoma law requiring cable television operators to delete all wine advertisements from out-of-state signals transmitted to their Oklahoma subscribers. Preemption on the facts presented by *Crisp* was not hard to find, as indicated by the 9-0 decision. The Oklahoma law contravened provisions of the *Copyright Revision Act of 1976*[173] which require a cable operator to refrain from deleting or altering commercial advertising on distant broadcast signals it retransmits, as a condition of participating in a program of compulsory copyright licensing.[174] It also directly conflicted with FCC regulations prohibiting deletion or alteration of retransmitted television broadcast signals, some of which the operator is required to carry.[175] To make sure an FCC view was on the record, the Commission issued a statement in November, 1983, declaring the Oklahoma law preempted.[176]

If the Supreme Court had been willing to rest preemption on its finding of direct conflict between federal law and the Oklahoma statute, *Crisp* would have little relevance for local regulation of indecency. Local indecency rules for cable television have been concerned primarily with non-broadcast channels, which are not currently subject to detailed content reg-

170. *In re* Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251, 83 F.C.C.2d 147 (1980). This action mooted the remanded proceeding in American Civil Liberties Union v. FCC. *See* Comment of FCC to this effect. 83 F.C.C.2d at 148 n.1.

171. 104 S.Ct. 2694 (1984).

172. The preemption issue had not been raised in the court below. The parties were ordered by the Supreme Court to brief and argue the question only after it was raised by the Solicitor General appearing as *amicus curiae* for the FCC. *See id.* at 2700.

173. 17 U.S.C. § 111 (1982).

174. Oklahoma cable operators could, of course, avoid the restriction by undertaking the laborious task of concluding separate agreements for all copyrighted material retransmitted, or by abandoning the importation of distant broadcast signals altogether. But either option "would plainly thwart the policy identified by both Congress and the FCC of facilitating and encouraging the importation of distant broadcast signals." *Crisp* at 2707.

175. The "must-carry" rules are found at 47 C.F.R. § 76.59(a)(1), (6)(1983); non-deletion rules are at 47 C.F.R § 76.55(b)(1983).

176. Since the *Crisp* case had never been before the FCC, the Commission could not rule directly on it. Instead the Commission inserted its pronouncement on *Crisp* as dictum in a footnote to a declaratory ruling on an unrelated case dealing with preemption of local rate regulation of non-basic cable television services. *See* Community Cable TV, Inc., 95 F.C.C.2d 1204, 1217 (1983).

ulation by the FCC, rather than with retransmitted television broadcasts. The Court did not draw the line at direct federal-local conflict, however. Instead it found a generalized FCC intent to preempt "any state or local regulation" of the "entire array of signals carried by cable television systems," non-broadcast as well as broadcast.[177] This ruling does not definitively settle the question of cable indecency, since that issue was not directly addressed,[178] but it certainly makes preemption a serious possibility.

The issue turns on whether the FCC has in fact preempted local regulation of obscenity and indecency. In finding preemption of the Oklahoma law as applied to non-broadcast channels, the Court relied on several broad assertions of preemptive intent in FCC decisions dealing with somewhat narrower issues. In a 1974 clarification of its rules, the Commission announced that "for now we are pre-empting the field" of pay cable;[179] but this statement appeared in a discussion of rate regulation and did not in context imply an intent to preempt every other aspect of pay cable as well.[180] The Court also cited a 1975 report in which the FCC identified "signal carriage [a reference to broadcast signals], pay cable, leased channel regulations, technical standards, access, and several areas of franchisee responsibility" as preempted subject areas.[181] The FCC statement was not entirely free from ambiguity, however. After identifying the preempted subjects the FCC continued:

> In each of these areas enforceable proposals or agreements contrary to the federal rules are *ultra vires* and of no force or effect absent a waiver of the rule by this agency. Non-federal officials have responsibility for the non-operational aspects of cable franchising including bonding agreements, maintenance of rights-of-way, franchisee selection and conditions of occupancy and construction. . . .[182]

If local regulations are not proscribed unless "contrary" to federal rules, preemption even of the indicated subject areas is something less than total.

As recently as November, 1983, the FCC reaffirmed that it had "deliberately preempted state regulation of nonbasic program offerings, including both nonbroadcast programs and broadcast programs delivered to

177. *Crisp* at 2701. In identifying areas of preemption the Supreme Court specifically referred to signals "from local and nearby television broadcasting stations, broadcast signals from distant television stations imported by means of communications satellites, and non-broadcast signals . . . transmitted specifically for cable systems by satellite or microwave relay." *Id.* The Supreme Court did not mention locally originated programs, including access channels. Regulation of access channels clearly would not be preempted by the FCC since the Supreme Court has previously held that the FCC lacks statutory authority to regulate access channels. FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

178. Journalistic comment to the contrary notwithstanding. *See, e.g.*, High Court Limits State, Local Power in Cable Television, Washington Post, June 19, 1984, at 1: "The decision would rule out locally imposed bans on sexually explicit films and commercials. . . ."

179. Clarification of Cable Television Rules, 46 F.C.C.2d 175, 200 (1974).

180. The Supreme Court, apparently, assumed that the Commission's "clarification," *id.*, did evidence a very broad preemptive intent. *See Crisp* at 2702.

181. *Crisp* at 2702 n.8, quoting Report and Order in Docket No. 20272, 54 F.C.C.2d 855, 863 (1975).

182. 54 F.C.C.2d at 863.

distant markets by satellite."[183] This statement was also made in the context of a rate regulation ruling, however, and undoubtedly was drafted with an eye to the pending *Crisp* case. Whatever the FCC had in mind, the Supreme Court took these statements as authority that state regulation of non-broadcast cable services "is completely precluded by federal law."[184]

The FCC pronouncements are expansive enough to embrace preemption of local cable indecency laws, but they are not specific enough to be certain. The same is true of the Supreme Court's opinion in *Crisp*. If the FCC should choose to claim preemption, *Crisp* is good authority that the Commission would be sustained. Whether the FCC, in a given case, would choose to include obscenity and indecency rules within its broad preemptive claims is far from certain, however. It has not yet done so in any published report or decision, and recent comments of FCC Chairman Mark S. Fowler clearly espouse the view that local governments have a role in regulating cable indecency.[185] Interviews with FCC staff members following the *Crisp* decision elicited additional opinions that no express preemption in this area has occurred.[186]

The argument against preemption has been further strengthened by congressional enactment in October, 1984[187] of a comprehensive cable reg-

183. Community Cable TV, Inc., 95 F.C.C.2d 1204, 1217 (1983). The FCC continued:

> While the nature of that nonbasic offering was (and still is) developing, the preemptive intent, and the reasons for that preemption, are clear and discernible. Today, the degree of diversity in satellite delivered program services reflects the wisdom of freeing cable systems from burdensome state and local regulation in this area.

Id.

184. *Crisp* at 2704. In a footnote the Court cited Time-Life Broadcast, Inc., 31 F.C.C.2d 747 (1971), and Clarification of CATV First Report as to Scope of Federal Preemption, 20 F.C.C.2d 741 (1969). *Time-Life* simply referred to the earlier opinion at 20 F.C.C.2d 741 (1969) where "this Commission ruled that local authorities are pre-empted from interfering with federally authorized CATV origination and advertising. Accordingly," it continued, "the Commission has pre-empted the field of pay television cablecasting so that local franchise terms are inoperative and no further affirmative authorization is required." 31 F.C.C.2d at 747. The *Time-Life* statement was a one-page letter to an attorney, not a fully considered matter, and presumably should have no greater scope and authority than the 20 F.C.C.2d opinion to which it referred. That opinion had quoted a still earlier report as follows: "State or local regulations or conditions *inconsistent* with these Federal regulatory policies are, we believe, preempted. . . . *States and localities should remain free to impose additional affirmative obligations on CATV systems, so long as they refrain from imposing restrictions which are inconsistent with the Federal regulatory policies.*" 20 F.C.C.2d at 741 (emphasis added) (quoting First Report and Order, 20 F.C.C.2d 201, 223 n.28 (1969)).

185. Letter to the Hon. Jesse Helms, May 14, 1984, reproduced in Cong. Rec., June 14, 1984, at § 7321. Fowler referred to the first amendment infirmities of laws adopted by the State of Utah, Roy City, Utah, and Miami, Florida, but raised no hint of preemption or incompatibility with federal regulation. Under present statutes, he said, "the Commission will impose sanctions where warranted, or will defer to local officials or the Justice Department, as may be appropriate." *Id.*

186. Two FCC officials interviewed by telephone gave almost identical answers to the query whether the FCC had preempted local regulation of obscenity and indecency on cable television. The first responded, without hesitation, "The Commission has gone to great lengths to avoid that question." Interview with FCC attorney C. Grey Pash, June 26, 1984. The second replied, "The Commission has been careful not to make a clear statement on the subject." Interview with William Johnson, Deputy Chief, FCC Mass Media Bureau, June 27, 1984. Mr. Johnson also offered his opinion that as a matter of policy, the Commission ought not to find preemption unless regulations in one state had a significant impact upon other states. Neither official claimed any authority to speak on behalf of the Commission, but their comments further support an argument that *Crisp* does not resolve the issue.

187. An earlier version of the bill was approved by the Senate in 1983 (S. 66, 98th Cong., 1st Sess.), but disagreement between representatives of the cities and the cable industry stalled House action until the end of the 1984 session.

ulation statute.[188] Section 638 of the statute appears explicitly to recognize a continuing role for state and local regulation of cable television content:

> Nothing in this title shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the federal, state, or local law of libel, slander, obscenity, incitement, invasion of privacy, false or misleading advertising, or other similar laws. . . .

Assuming that laws regulating indecency are included within the catch-all phrase "other similar laws,"[189] adoption of this measure would seriously undercut preemption arguments against local regulation of indecency.[190] The first amendment questions, of course, remain, and they must be faced whether the regulation is done by the FCC or by local units of government.

2. *First Amendment Restrictions on State and Local Regulation*

First amendment decisions in other contexts are of course relevant to the question of the extent of state and local government authority to restrict indecent material on cable television. Precedents dealing with FCC regulation of indecent radio broadcasts may be of special relevance. But cable television is not the same as radio broadcasting, and the statutory framework of state or local regulation is likely to differ in important respects from the federal statutes and FCC rules. Moreover, there is no assurance that the courts will view content regulation by a multitude of local jurisdictions in the same light as regulation in the "public interest" by a single federal agency attempting to apply a uniform rule throughout the country. Just three judicial decisions have thus far addressed state and local attempts to limit indecent material on cable television,[191] but others are pending and a Supreme Court test is only a matter of time.

Utah has been the scene of the most persistent attempts to regulate indecent material on cable television, reflecting perhaps the nature of the community standards among important segments of the Utah population as well as the vitality of local morality lobbies. Because Utah has led the way in local regulation, Utah also generated the first two decisions adjudicating its constitutionality: *Home Box Office, Inc. v. Wilkinson*[192] and

188. Pub. L. No. 98-549, 98th Cong., 2d Sess. (1984). The statute was signed into law by the President on October 30, 1984.

189. The section makes no specific reference to indecency, but a colloquy on the Senate Floor, between Sen. Paul S. Trible, Jr., and Sen. Barry Goldwater, Sr., made clear that "other similar laws" included laws regulating indecency. *See* CONG. REC., Oct. 11, 1984, at S. 14289.

190. Should the FCC desire to preempt, it could of course contend that Sec. 638 does nothing to alter the existing balance of federal, state, and local regulation, and that state and local law always remains subject to preemption by the federal government in exercise of its delegated powers. The FCC, however, draws its authority from Congress, and the reference in the act to state and local law strongly suggest the absence of congressional intent to preempt. Moreover in the course of the Senate colloquy, *id.*, Sen. Goldwater expressed the understanding of House-Senate conferees that state and local regulation in this area "would not be preempted by this legislation, other provisions of the Communications Act, or regulations promulgated by the Federal Communications Commission."

191. The cases are discussed *infra* at text accompanying notes 192-237.

192. 531 F. Supp. 987 (D. Utah 1982). The decision is discussed in Note, *Regulation of Indecent Television Programming: HBO v. Wilkinson*, 9 J. CONTEMP. L. 207 (1983).

Community Television of Utah, Inc. v. Roy City.[193] Both were decided adversely to the government at the trial level and no appeals are pending. The 1983 Utah legislature enacted a new regulation which is currently being challenged in federal district court.[194]

Home Box Office arose from a poorly drafted law enacted during the 1981 Session of the Utah Legislature,[195] making it a crime for any person to "knowingly distribute by wire or cable any pornographic or indecent material to its subscribers." "Pornographic material" was defined in terms consistent with the *Miller v. California* test for obscenity,[196] and that portion of the statute was not challenged by the plaintiffs.[197] The focus of the challenge was the prohibition of "indecent" material, defined by statute to include most depictions of nudity, sexual activity, and other specified erotic acts.[198] The court found this portion of the statute facially overbroad,[199] and the state, perhaps recognizing the weakness of its case, did not appeal.

The court's decision to invalidate the statute was undoubtedly correct. The statute embraced a wide range of admittedly not obscene matter. It was not carefully tailored to vindicate the privacy interests of the unwilling viewer or the state's interest in the protection of children. Its proscription of nudity was virtually absolute, despite repeated assertions in case law that nudity alone does not place expression beyond the pale of the first amendment.[200] No reasonable interpretation of first amendment law could have arrived at a conclusion favoring the state.

If the district court was correct in the outcome, its route to that conclusion was somewhat more questionable. The decision was premised on the central proposition that *Miller v. California*, perhaps modified by the variable obscenity standard for children set forth in *Ginsberg v. New*

193. 555 F. Supp. 1164 (D. Utah 1982). This case is discussed in Note, *Indecent Programming on Cable Television and the First Amendment*, 51 GEO. WASH. L. REV. 254 (1983).

194. Community Television of Utah, Inc. v. Wilkinson, Case No. C-83-0551 A (D. Utah 1983).

195. UTAH CODE ANN. § 76-10-1229(1) (Supp. 1981).

196. UTAH CODE ANN. § 76-10-1201, 1203 (1978).

197. 531 F. Supp. at 995.

198. The relevant section of UTAH CODE ANN. § 76-10-1227 (Supp. 1981) reads as follows:

For purposes of this act:

(1) "Descriptions or depictions of illicit sex or sexual immorality" means:
   (a) Human genitals in a state of sexual stimulation or arousal;
   (b) Acts of human masturbation, sexual intercourse, or sodomy; or
   (c) Fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.

(2) "Nude or partially denuded figures" means:
   (a) Less than completely and opaquely covered:
      (i) Human genitals;
      (ii) Pubic regions;
      (iii) Buttock; and
      (iv) Female breast below a point immediately above the top of the areola; and
   (b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

199. 531 F. Supp. at 999.

200. *E.g.*, Erznoznik v. Jacksonville, 422 U.S. 205, 213 (1975). *Cf.* Miller v. California, 413 U.S. 15, 24 (1973); Kois v. Wisconsin, 408 U.S. 229 (1972).

York,[201] was the sole dividing line between protected and unprotected sexually oriented speech.[202] The district court wholly ignored the broadcasting precedents, including *Pacifica*, and argued that indecent but nonobscene expression was simply beyond the reach of the law.[203]

Even if that generalization is limited to the imposition of criminal penalties, leaving room for regulation of indecent expression by civil sanction, the court would still have to account for *New York v. Ferber*[204] and occasional prosecutions under the still viable 18 U.S.C. § 1464.[205] The court acknowledged that a less demanding standard might apply if the statute were addressed specifically to minors, but this alters the *Miller* standard only in the sense that the material need not be obscene as to the community generally if it is " 'obscene' as to minors."[206] Given existing case law, Judge Jenkins was clearly right in striking down the Utah statute; but if he meant to imply that indecent but nonobscene expression could in no circumstance be regulated, he was on less solid ground.

Judge Jenkins also tried the second Utah cable indecency case, *Community Television of Utah, Inc. v. Roy City*,[207] and found the Roy City ordinance suffering from the same constitutional defect as the state law. The Roy City ordinance[208] was not confined to obscene matter under the *Miller* standard and hence was held invalid for overbreadth.[209] Under the ordinance, knowing distribution of "pornographic or indecent material" was grounds for revocation of any license or franchise permit issued to a cable television operation.[210] Since all parties agreed that the programming provided by Community Television was not obscene,[211] the challenge again focused on the definition of indecency, as set forth in sections 17-3-6(6) and (7) of the Roy ordinance:

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201. 390 U.S. 629 (1968). See the district court's comments on *Ginsberg*, 531 F. Supp. at 996. See *supra* note 114, for a definition of variable obscenity. *Ginsberg* is discussed further *infra* at text accompanying notes 357-61.

202. In its reliance on overbreadth, the decision was closely akin to Judge Bazelon's concurring opinion in Pacifica Found. v. FCC, 556 F.2d 9, 22 (D.C. Cir. 1977), which applied the obscenity standard and found the Commission's definition of indecency "massively over-broad." Similarly, District Court Judge Jenkins said of the Utah law: "As I view the statute it is overly broad. It is impermissibly broad. It is incurably broad." 531 F. Supp. at 999. Judge Bazelon and the appeals court were subsequently overruled, FCC v. Pacifica Found., 438 U.S. 726 (1978), but the Supreme Court did not respond directly to Judge Bazelon's argument because the FCC definition of indecency was not at issue—only its "authority to proscribe this particular broadcast." *Id.* at 742.

203. "States may *not* go beyond *Miller* in prescribing criminal penalties for distribution of sexually oriented materials. For better or worse, *Miller* establishes the analytical boundary of permissible state involvement in the decision by HBO and others to offer, and the decision by subscribers to receive, particular cable TV programming." 531 F. Supp. at 994-95.

204. 458 U.S. 757 (1982).

205. *See supra* text accompanying notes 81-82.

206. 531 F. Supp. at 998.

207. 555 F. Supp. 1164 (D. Utah 1982).

208. ROY CITY, UTAH, ORDINANCE, Title 17 Licenses, Chapter 3 Revocation of Licenses. The text of the ordinance appears as an appendix to the opinion, 555 F. Supp. at 1173.

209. *Id.* at 1172.

210. ROY CITY, UTAH, ORDINANCE 17-3-2(5). This ground for license revocation was limited to cable television. *See* ROY CITY, UTAH, ORDINANCE 17-3-6(3), in which "distribute" is defined to mean "send, transmit or retransmit or otherwise pass through a cable television system," and "material" refers to "any visual material shown on a cable television system. . ." *Id.* at 17-3-6(2).

211. 555 F. Supp. at 1166.

(6) "Indecent Material" shall mean material which is a representation or verbal description of:

(a) An erotic human sexual or excretory organ or function; or

(b) Erotic nudity; or

(c) Erotic ultimate sexual acts, normal or perverted, actual or simulated, or

(d) Erotic masturbation;

which under contemporary community standards is patently offensive.

(7) "Erotic" shall mean tending to arouse sexual feelings or desires.[212]

The court did not linger on the details of the ordinance. It admittedly did not satisfy the *Miller* standards,[213] and the only other question of concern to the court was whether a lesser standard might be applicable. The city contended, on the authority of *Pacifica*, that a different standard did apply. Judge Jenkins, however, found *Pacifica* wholly irrelevant because of significant differences between cable and broadcasting.[214] The crucial distinction lay in differing "[l]evels and degrees of choice"[215] which give

212. In 17-3-2(5) the ordinance referred to "violation of the community standards of the community encompassed within the territorial area included within the Roy City boundaries."

213. The court briefly examined the definition in a footnote comparison with *Miller*:

> The *Miller* test requires the application of the average person standard. The ordinance does not. The *Miller* test requires that contemporary community standards be applied. The ordinance requires that Roy standards be applied. The *Miller* standard requires the material to be taken as a whole. The Roy ordinance does not. The *Miller* standard requires an appeal to the prurient interest. The Roy ordinance talks of arousing sexual interest. *Miller* requires that the material, taken as a whole, lacks serious literary, artistic, political or scientific value. The Roy ordinance does not.

555 F. Supp. at 1169 n.23. If Judge Jenkins had found it necessary to construe the ordinance in depth, he might well have found the "average person" standard reasonably implied by the language. The reference in 17-3-2(5) to Roy City as the relevant community does not seem fatal, since the relevant community is indeed the "local" community. On close examination the Roy ordinance definition of "erotic" would probably be found to embody the concept of appeal to prurient interest. Other differences of constitutional dimension remain, however, an effect which Roy City fully intended when it chose to proscribe indecent as well as obscene material.

214. 555 F. Supp. at 1167, 1169. The differences were summarized by the court as follows:

	Cable	Broadcast
1.	User needs to subscribe.	User need not subscribe.
2.	User holds power to cancel subscriptions.	User holds no power to cancel. May complain to F.C.C., station, network, or sponsor.
3.	Limited advertising.	Extensive advertising.
4.	Transmittal through wires.	Transmittal through public airwaves.
5.	User receives signal on private cable.	User appropriates signal from the public airwaves.
6.	User pays a fee.	User does not pay a fee.
7.	User receives preview of coming attractions.	User receives daily and weekly listing in public press or commercial guides.
8.	Distributor or distributee may add services and expanded spectrum of signals or channels and choices.	Neither distributor not distributee may add services or signals or choices.
9.	Wires are privately owned.	Airwaves are not privately owned but are publicly controlled.

215. *Id.* at 1170.

the cable viewer more control over what he receives and thus greatly reduces the capacity of cable television to intrude, unwanted and unexpected, upon the privacy of the home.[216]

Roy City had also sought to justify its ordinance as a means of protecting children from harmful expression, relying again upon the reasoning in *Pacifica*. Presumably, this too should have evoked a reasoned response from the court, but the argument was virtually ignored. The court simply observed in a footnote that "the ordinance as written nowhere speaks of children," and it was "inappropriate to restrict communication content to that which is only fit for the eyes and ears of children."[217]

Besides invoking the *Pacifica* rationale in defense of its ordinance, Roy City had analogized its police power to the FCC's statutory authority to insure that broadcasters act in the "public interest."[218] The court found this analogy inapposite. The burden on broadcasters to serve the public interest was based on "the limited number of broadcasters, their use of the publicly controlled airways and their favored economic opportunity in using a limited public resource. . . ."[219] Since cable uses privately owned wires rather than public airwaves, and there is, "in theory, no physical limitation on the number of wires available to carry electronic signals," cable distributors labor under no public interest charge.[220]

The Roy City ordinance was not as patently unconstitutional as the Utah statute previously struck down by the same court in *Home Box Office, Inc. v. Wilkinson*, and Roy City at first opted to appeal.[221] Roy City had avoided the obvious overbreadth problem of the state statute by banning only material that was "erotic." The definition of indecency in the ordinance was still much less restrictive than the *Miller* test, but the district court's rigid insistence on applying *Miller* undiluted, with no allowance for the tempering rationale of *Pacifica*, or even *Ginsberg*, was certainly subject to challenge. Children are demonstrably a large part of the cable television audience, and both *Ginsberg* and *Pacifica* had relied upon the government's interest in protecting children as a ground for departure from the strict obscenity standard. The district court's cursory footnote reference to the inappropriateness of restricting adults to what is fit for children was certainly not an adequate analysis of the issue.[222] The ordinance still might not have passed constitutional muster because it imposed a flat ban on certain kinds of non-obscene speech without considering the age composition of the potential audience at different times of day or the special

216. *See id.* at 1168-69.

217. *Id.* at 1166 n.8. This was an obvious allusion to the rule of Butler v. Michigan, 352 U.S. 380 (1957), but the note contained no reference to *Butler*. Apparently the court concluded that if the ordinance made no reference to children, the after-the-fact argument of Roy attorneys need not be taken seriously. The failure to address this argument at length seems a serious flaw in the opinion.

218. 555 F. Supp. at 1167.

219. *Id.* at 1169. This undoubtedly referred to the "scarcity" and "public trust" rationales for limiting first amendment protection of broadcasting. *See* discussion *infra* at text accompanying notes 251-320.

220. 555 F. Supp. at 1169.

221. Community Television of Utah, Inc. v. Roy City, No. 83-1217 (10th Cir. 1983).

222. This issue is examined *infra* at text accompanying notes 354-404.

capacity of cable to utilize separate channels to serve different tastes. Nevertheless, the district court's analysis was far from water tight.

The lower court decision ultimately was permitted to stand. The enactment of a new indecency statute by the Utah legislature during its 1983 session,[223] and its subsequent challenge by cable television companies and cable subscribers,[224] induced Roy City to withdraw its appeal and leave the burden of fighting the constitutional battle to the State of Utah. Just as the Roy City ordinance had avoided some of the constitutional pitfalls of the 1981 Utah statute, the 1983 statute was more finely tuned to the case law than was the Roy City ordinance. Taking its cue from *Pacifica*, the statute utilized the terminology of nuisance and made distributors of indecent material liable only for a "continuing course of conduct."[225] Enforcement of the act was limited exclusively to civil penalties.[226] In defining indecency, the statute made specific reference to "the average person applying contemporary community standards"[227] and limited its definition of the relevant community to "the vicinage where a nuisance alleged under

223. UTAH CODE ANN. § 76-10-1701 to 1708. The text of the statute, in relevant part, reads as follows:

76-10-1702. Definitions, as used in this act:

. . . .

(3) "Contemporary community standards" means those current standards in the vicinage where a nuisance alleged under this act has occurred or is occurring.

(4) "Indecent material" means a visual or verbal depiction, display, representation, dissemination, or verbal description of:

(a) A human sexual or excretory organ or function; or

(b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or

(c) An ultimate sexual act, normal or perverted, actual or simulated; or

(d) Masturbation

which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented.

76-10-1703. A person shall be deemed to have maintained a nuisance when, as a continuing course of conduct, he knowingly distributes indecent material within this state over any cable television system or pay-for-viewing television programming.

76-10-1704. (1) Enforcement of this act shall be by civil process only and subject only to the civil sanctions contained herein.

(2) An action under this act may be brought by the Utah state attorney general or by any county or city attorney in any district court where the nuisance alleged has occurred or is occurring and shall be subject to the Utah Rules of Civil Procedure.

(3) A person found to have maintained a nuisance shall be subject to a forfeiture in an amount not greater than $1,000, plus costs and reasonable attorney's fees.

(4) If a person has previously been found to have maintained a nuisance under this act, he shall be subject to a forfeiture in an amount not greater than $10,000, plus costs and reasonable attorney's fees.

. . . .

76-10-1706. (1) It is an affirmative defense to an action under this act that the distribution of indecent material was restricted to institutions or persons having scientific, educational, governmental, or other similar justification for distributing indecent material. . . .

224. Community Television, Inc. v. Wilkinson, No. C38-0551A (D.C. Utah 1983); Jones v. Wilkinson, No. C83-0581C (D.C. Utah 1983). The two cases were subsequently consolidated under a single docket number, C83-0551A.

225. UTAH CODE ANN. § 76-10-1703 (1983 Supp.).

226. *Id.* § 76-10-1704.

227. *Id.* § 76-10-1702(4).

this act has occurred or is occurring."[228] Judge Jenkins had faulted the Roy City ordinance on both of these points.[229]

In one respect, however, the state law was drafted with a broader reach than the city ordinance. The Roy City ordinance would not have banned a cablecast such as George Carlin's monologue because it was not in any reasonable sense "erotic." The state statute made no reference to eroticism or prurient appeal, relying rather on the *Pacifica* holding that nonerotic but patently offensive material might be regulated in an appropriate context. The statute was still limited to specifically defined sexually oriented expression, but erotic appeal was not required if the material was otherwise "presented in a patently offensive way for the time, place, manner and context. . . ."[230] The constitutionality of the Utah statute remains to be adjudicated at the trial level, and, whatever the outcome, the case is sure to be appealed by the losing party.

The reasoning of the federal district court in *Cruz v. Ferre*,[231] the Miami, Florida, indecency case, departed in no essential respect from the Utah cases, although it went a bit farther in distinguishing *Pacifica*. The Miami ordinance totally prohibited all cablecasting of "indecent material," defined as "material which is a representation or description of a human sexual or excretory organ or function which the average person, applying contemporary community standards, would find to be patently offensive."[232] The court's most telling argument went to the scope of the ordinance. In the court's opinion, the wholesale prohibition went far beyond the narrow holding of *Pacifica*, with its focus on a particular program and its concern for time of day and other contextual variables.[233]

Unfortunately, the court failed to carry this sensible comparison to a logical conclusion by holding the Miami ordinance insufficiently tailored to its objective. Instead, the court leaped to the *non sequitur* that *Pacifica* applies only to broadcasting.[234] The court did, however, attempt to justify the latter conclusion by canvassing the differences between cable and broadcasting which render the *Pacifica* rationale inapplicable. Here the court relied heavily upon *Community Television of Utah, Inc. v. Roy City*, quoting verbatim *Roy City*'s nine-point comparison of the two media.[235] The court emphasized differences in the degree of viewer choice and was particularly impressed with the efficacy of a "free" lockbox as a means of

228. *Id.* § 76-10-1702(3).
229. Community Television, Inc. v. Roy City, 555 F.Supp. at 1169 n.23.
230. UTAH CODE ANN. § 76-10-1702(4).
231. 571 F. Supp. 125 (S.D.Fla. 1983).
232. Miami, Fla., Ordinance 9538 Sec. 2(g), (Jan. 13, 1983).
233. Cruz v. Ferre, 571 F. Supp. at 131.
234. The full paragraph reads as follows:

> The ordinance subject to review by this court prohibits far too broadly the transmission of indecent materials through cable television. The ordinance's prohibition is wholesale, without regard to the time of day or other variables indispensable to the decision in *Pacifica*. The rationale of *Pacifica* applies only to broadcasting. The medium of cable television presents different first amendment concerns; therefore, *Pacifica* is inapposite.

Id.
235. *Id.* at 132. *See supra* note 214.

protecting children.[236] With *Pacifica* inapposite, the court found *Miller* to be the controlling precedent, and predictably the ordinance failed that test.[237] *Cruz v. Ferre* thus maintained a perfect score in federal district court for opponents of regulation.

IV. REGULATING CABLE INDECENCY: WILL ANY RATIONALE SUPPORT IT?

In each case discussed in the preceding section, lower federal courts have frustrated local regulation of indecent cable programming on the premise that *Miller* sets the limit on permissible regulation of offensive program content. Yet, in dealing with other communication media, the Supreme Court has in several contexts upheld laws that reached beyond *Miller* to restrict indecent but nonobscene expression. Such contexts have included government regulation of erotic matter sent through the U.S. mail,[238] radio broadcast indecency,[239] the geographic clustering of adult theaters and bookstores in an urban area,[240] child pornography,[241] and the sale of indecent printed matter to children.[242]

At the very least, the case law arising in these contexts attests that nonobscene speech may sometimes be regulated, that content-based restrictions on subject matter are sometimes subject to a relaxed first amendment scrutiny, and that indecent expression sometimes ranks lower on the Supreme Court's calculus of social value than other kinds of speech. If *Miller* is indeed the constitutional limit for cable television, cable must somehow be distinguished from the contexts that have permitted more extensive regulation in other media.

As specific authority for regulation of cable television, a number of the cases are in fact easily distinguished. The regulation upheld in *Rowan v. Post Office Department* provided penalties only for failure to remove a name from a mailing list at the recipient's request,[243] and the cable equivalent surely is to terminate the subscription.[244] Cable regulation also is distinguishable from laws against distribution of child pornography; the issue for cable is not exploitation of children as subjects of erotic program-

236. And to protect children or other immature viewers from unsuitable programming, subscribers need only use a free "lockbox" or "parental key" available from Cablevision. This opportunity to completely avoid the potential harm to minor or immature viewers sounds the death-knell of Pacifica's applicability in the cable television context.

Id. at 132. The lockbox, when attached to the cable converter box, blocks out the cable television signal. It is activated or deactivated by means of a key.

237. *Id.* The court also held that provisions for enforcement of the ordinance violated due process. *Id.* at 133.

238. Rowan v. Post Office Dep't., 397 U.S. 728 (1970).

239. *See supra* text accompanying notes 128-45 for a discussion of *Pacifica*, 438 U.S. 726 (1978), and related cases.

240. Young v. American Mini Theatres, 427 U.S. 50 (1976), discussed *supra*, notes 41-46 and accompanying text.

241. *Ferber*, 458 U.S. 747 (1982), discussed at notes 43-46 and accompanying text.

242. Ginsberg v. New York, 390 U.S. 629 (1968), discussed *supra*, note 201 and accompanying text. *See also infra* text accompanying notes 357-61.

243. Rowan v. Post Office Dep't, 397 U.S. 728, 730 (1970).

244. Furthermore, Bolger v. Youngs Drug Prods. Corp., 103 S.Ct. 2875 (1983), held that the first mailing, at least of contraceptive advertisements, could not constitutionally be prohibited.

ming but rather the harm to children that may result from exposure to indecent television fare. An analogy to the Detroit zoning ordinance in *American Mini Theatres*[245] is also difficult to draw. Zoning is concerned with the physical environment of the community while content regulation of cable television at most speaks to people's moral, cultural, or social environment. The Stevens opinion in *American Mini Theatres* does suggest that dirty books and pictures have minimal social value and thus may be regulated (but not completely prohibited) if the countervailing interests are substantial enough. This gives the case general relevance for cable indecency, but the zoning rationale is too far removed from the facts of cable television to provide a very compelling precedent. Thus we are left with the broadcasting analogy and the protection of children as possible bases for the regulation of cable indecency. Both areas will be examined in detail in the following pages.

A. *The Broadcasting Analogy*

Although cable television is not broadcasting,[246] it is sometimes compared to broadcasting by courts[247] and commentators.[248] Other courts[249] and commentators[250] have found it more analogous to the print media, which traditionally have received greater first amendment protection than broadcasting. Each medium, of course, is technically and constitutionally unique in some respects, and the similarities to be drawn depend heavily on content and the media characteristics being compared. Since the focus here is on the regulation of indecent programming, the following analysis will examine the rationales that have been used to justify regulation of

245. 427 U.S. 50 (1976).

246. *See supra* notes 146-51 and accompanying text.

247. *See* FCC v. Midwest Video Corp. 406 U.S. 649 (1972); United States v. Southwestern Cable Co., 392 U.S. 157 (1968). Both cases upheld FCC regulation of cable television as "ancillary" to the regulation of broadcasting, despite the lack of specific statutory authority to regulate cable. In FCC v. Midwest Video Corp., 440 U.S. 689, 707-09 (1979), the Court treated cable operators as broadcasters, rather than common carriers, under the Communications Act of 1934 as a basis for striking down FCC access regulations. *See also* Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490, 502 (10th Cir. 1983); Omega Satellite Prods. v. City of Indianapolis, 694 F.2d 119, 128 (7th Cir. 1982).

248. *E.g.*, B. SCHMIDT, FREEDOM OF THE PRESS V. PUBLIC ACCESS 199-216 (1976); Barrow, *Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience*, 61 VA. L. REV. 515, 530-31 (1975); Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment*, 54 S. CAL. L. REV. 1001, 1011 (1981); Miller & Beals, *Regulating Cable Television*, 57 WASH. L. REV. 85, 86 (1981); Smith, *Local Taxation of Cable Television Systems: The Constitutional Problems*, 24 CATH. U.L. REV. 755, 757 (1975).

249. *E.g.*, Midwest Video Corp. v. FCC, 571 F.2d 1025, 1056 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979) (cable comparable to newspapers in the performance of editorial functions); Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 (D.C. Cir. 1977) (comparing cable and print media with respect to scarcity which is the result of economic conditions). *See also* Community Communications Co., Inc. v. City of Boulder, 496 F.Supp. 823, 829 (D. Colo. 1980).

250. *E.g.*, G. SHAPIRO, P. KURLAND, & J. MERCURIO, "CABLESPEECH": THE CASE FOR FIRST AMENDMENT PROTECTION 3-4 (1983); Goldberg, Ross & Spector, *Cable Television, Government Regulation, and the First Amendment*, 3 COMM/ENT 577 (1981); Krattenmaker & Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 FORDHAM L. REV. 606 (1983); Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U.L. REV. 133 (1976); Note, *Cable Television: Should Candidates for Federal Elective Office Have an Affirmative Right of Access to Your Cable Television Channels?* 13 SW. L. REV. 287 (1982).

broadcast indecency, the special characteristics of broadcasting that support those rationales, and the extent to which cable television shares the same or similar characteristics.

1. *"Scarcity" as a Rationale for Regulation*

Spectrum scarcity has been a justification for government regulation of broadcasting in the United States at least since the Federal Radio Act of 1927.[251] By that Act, the Congress created a Federal Radio Commission to allot scarce broadcast frequencies among competing applicants and by its regulation to ensure that the broadcast industry served the public interest.[252] Justice Frankfurter gave the scarcity concept its earliest Supreme Court formulation in *National Broadcasting Co. v. United States*,[253] a 1943 decision upholding FCC regulation of network practices affecting the content of local station programming. For him it was a simple cause and effect relationship:

> . . . Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.[254]

Since that time, Frankfurter's "scarcity" rationale, as applied to content regulation of broadcasting, has been much decried by commentators[255] but has never been repudiated by the Court.[256]

Spectrum scarcity is a physical fact—the airwaves will not support an unlimited number of competing broadcasts. Broadcasters operating on the same frequency in a given geographical area will interfere with one another's signals, greatly diminishing the usefulness of radio communication. Conceivably, the courts could resolve conflicting claims on the basis of prior appropriation or some other theory of acquired property rights. But governmental allocation is a reasonable means of dealing with the scarcity problem and by all odds the most efficient. If scarcity does not absolutely require central allocation of frequencies by an agency such as the FCC, it provides a strong justification for it.

As a justification for content regulation, the scarcity rationale is argu-

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251. Federal Radio Act of 1927, ch. 169, 44 Stat. 1162.

252. *Id.* § 4 at 1163, § 11 at 1167. The "public interest" standard was retained in the Communications Act of 1934, ch. 652, 48 Stat. 1064, 1085.

253. 319 U.S. 190 (1943).

254. *Id.* at 226.

255. *See, e.g.*, B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 34-37 (1975); Powe, *"Or of the [Broadcast] Press"*, 55 TEX. L. REV. 39, 55-62 (1976); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 88, 157-61 (1968); Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719, 758-62 (1964); Van Alstyne, *The Mobius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C.L. REV. 539, 548-60 (1978).

256. For recent allusions to scarcity as a justification for regulation, see FCC v. League of Women Voters of Calif., 104 S.Ct. 3106, 3116 (1984): and CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981).

able but much less compelling. In *NBC v. United States*,[257] Justice Frankfurter assumed that the FCC's right to license radio broadcasters carried with it the power to fix licensing conditions that affect program content.[258] This assumption is not an unreasonable extrapolation from the scarcity concept. If available frequencies are scarce and valuable, the free interchange of ideas presupposed by the first amendment is limited to persons holding a license. Should not the licensee then be required to use his privilege in a way that serves the public interest? A "yes" answer to this question is not totally without rational foundation, and it is the answer consistently given by Congress and the courts. But a "no" answer is also possible. The broadcaster competes in a marketplace of ideas extending well beyond the airwaves. In that broad marketplace there is no scarcity, no limit on voices seeking to be heard—at least none not equally applicable to other media. So why a special need to regulate the content of broadcasting? Arguments on both sides of the question could be elaborated further, but one point seems obvious: scarcity does not compel a policy of content regulation in the same sense that it calls for a system of frequency allocation to prevent physical interference with competing broadcast signals.

The scarcity argument is strongest when diversity of viewpoint is the objective. Without governmental encouragement of diversity, broadcasters may engage in private censorship of disfavored viewpoints, thus frustrating the first amendment goal of producing "an informed public capable of conducting its own affairs."[259] This argument was articulated by Justice White in *Red Lion Broadcasting Co. v. FCC*,[260] which upheld the FCC "fairness doctrine" requirement that broadcast time be devoted to issues of public importance and that differing points of view be presented.[261] At issue in *Red Lion* and a companion case[262] were FCC rules mandating reply time for response to personal attacks and political editorials.[263] In sustaining the regulations, the Supreme Court explicitly relied upon the scarcity doctrine as the basis for its decision.[264] In principle, the FCC might use scarcity as a rationale for encouraging diversity in entertainment programming as well as in public affairs broadcasts,[265] but the FCC has

257. 319 U.S. at 227.
258. *Id.*
259. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969).
260. 395 U.S. 367 (1969).
261. The "fairness" doctrine is codified at 47 U.S.C. § 315 (1976).
262. United States v. Radio Television News Directors Ass'n, 395 U.S. 367 (1969).
263. For detailed rules, see 32 Fed. Reg. 10,305 (1967).
264. In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.

Red Lion, 395 U.S. at 400-01.

265. *See, e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978), which relied on *Red Lion* in sustaining FCC regulations barring common ownership of broadcasting stations and daily newspapers located in the same community. The Supreme Court saw "nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media." *Id.* at 799. *See also* WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979), where the District of Columbia Court of Appeals held that the FCC was required by law to consider programming diversity in the

chosen to rely on market forces rather than federal regulation to determine what entertainment fare is broadcast.[266]

In contrast to policies promoting diversity, government *censorship* has a much more tenuous relationship with spectrum scarcity. Rules that promote diversity help offset the limit imposed by spectrum scarcity upon the number and variety of speakers. Censorship, on the contrary, reinforces those limits. In first amendment terms, government encouragement of diversity may abridge the speech rights of broadcasters, but it reinforces the rights of listeners to hear a wide spectrum of political viewpoints and other program material.[267] Censorship, however, abridges the freedoms of both the sender of the message and those who may wish to receive it.[268]

Nevertheless, scarcity is not entirely devoid of logical connection with governmental restrictions on broadcast programming. Because radio frequencies are a scarce resource, they should be used in a way that best serves the public interest. If offensive material may be broadcast at will, the usefulness of radio and television to large segments of the potential listening and viewing audience is substantially reduced. Therefore, some degree of censorship may be necessary if radio is to serve the widest possible clientele. The FCC adopted this line of reasoning in justifying its sanctions against Eastern Educational Radio for broadcasting the expletive-riddled Jerry Garcia interview.[269] The Commission believed that Garcia's four-letter words served "no social purpose, and would drastically curtail the usefulness of radio for millions of people."[270] Although the *Eastern Educational Radio* ruling was never subjected to a court test, it bears a reasonable relationship to a colorable view of the public interest and it has a discernible connection with spectrum scarcity, which the courts have consistently used to justify relaxed first amendment constraints on the regulation of broadcasting.[271]

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licensing process. The appeals court was subsequently overruled in FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

266. *See* discussion of FCC policy in FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

267. This, in fact, was the rationale adopted in *Red Lion*, 395 U.S. at 390, and confirmed by subsequent reiteration in CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981), and CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 123 (1973).

268. This point was made by Judge Bazelon, concurring in Pacifica Found., Inc. v. FCC, 556 F.2d 9, 29 (D.C. Cir. 1977). He observed, "[a]lthough scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship." (emphasis in original). Justice Brennan quoted this statement in his *Pacifica* dissent, FCC v. Pacifica Found., 438 U.S. 726, 770 n.4 (1978) (Brennan, J., dissenting). *See also* comments of Krattenmaker & Esterow, *supra* note 250.

269. *See supra* text accompanying note 98.

270. Eastern Educational Radio, 24 F.C.C. 2d 408, 415 (1970).

271. CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400-01 (1969); National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). Furthermore, attempts to promote diversity have indirect censorship effects. If reply time must be granted in the interest of fairness and diversity, programming that would have been broadcast during that time must be omitted. What is omitted is left to the discretion of the broadcaster, which significantly blunts the sharp edge of censorship; still, he has been obliged to cut out something. And, as frequently noted, the broadcaster may avoid the necessity for reply time by not broadcasting political attacks or political editorials. This is self-censorship induced by regulations designed to promote diversity. In a much quoted opinion authored by Chief Justice Burger, then an appeals court judge, the District of Columbia Circuit held that "claims of racial discrimination, . . . religious discrimination, oppressive overcommercialization by advertising announcements, and violation of

If spectrum scarcity has a modicum of factual and constitutional significance for the regulation of broadcasting,[272] has it any relevance at all for cable television? In *Home Box Office, Inc.* v. *FCC*,[273] the District of Columbia Circuit flatly held that it did not. With over thirty-five channels available on a single cable, and a future prospect of virtually unlimited capacity, the factual predicate for applying the scarcity doctrine to cable was nonexistent.[274] This reasoning was adopted by the Eighth Circuit in *Midwest Video v. FCC*[275] and has generally been espoused by commentators.[276] Indeed, it is impossible to make a sensible argument that spectrum scarcity, in the technical sense, applies to cable television.

The Tenth Circuit, however, has endorsed a concept of "medium scarcity" as a cable analogue to spectrum scarcity.[277] Although the number of cable *channels* is not subject to the technical limitations of the broadcast spectrum, the number of cable *companies* serving a given geographical area is severely limited by economic considerations. In most areas only one company remains economically viable, thus constituting a natural monopoly.[278] The court found such economic-based medium scarcity, coupled with the company's need to run cables along or beneath city rights of way, to be an adequate justification for a local franchising policy that pre-

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the Fairness Doctrine" raised serious questions of broadcaster performance adverse to the public interest and were relevant to a station's request for license renewal. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1006 (1966), *cert. denied*, 385 U.S. 839 (1966). While most of the specific objections could have been satisfied by broadcast of alternative points of view, the "overcommercialization" objection could apparently be satisfied only by cutting back on advertising. Furthermore, the need for presentation of alternative views could have been avoided altogether had the station simply refrained from airing its prosegregationist views and attacks on the Catholic Church.

272. An argument can be made that the effects of spectrum scarcity are currently being mitigated by new technologies, including cable, video cassettes, low power television, multi-point distribution service, direct broadcast satellites, and video discs. *See* Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-26 (1982).

273. 567 F.2d 9 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 829 (1977).

274. *Id.* at 44-45.

275. 571 F.2d 1025, 1048 (1978), *aff'd*, 440 U.S. 689 (1979).

276. *See, e.g.*, Goldberg, Ross & Spector, *supra* note 250, at 605; Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation*, 31 FED. COM. L.J. 215, 228-29 (1979); Rein, Quale, Bayers & Logan, *The Constitutionality of the FCC's Television-Cable Cross-Ownership Restrictions*, 34 FED. COM. L.J. 1, 46 (1982); Stanzler, *Cable Television Monopoly and the First Amendment*, 4 CARDOZO L. REV. 199, 211-17 (1983); Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008, 1018 (1971); Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 146 (1976).

277. Community Communications Co. v. City of Boulder, Colorado, 660 F.2d 1370 (10th Cir. 1981) (*Boulder II*). In *Boulder II* the district court had granted a preliminary injunction against the enforcement of the city's plan to limit plaintiff's cable operations to a defined district of Boulder, 496 F. Supp. 823 (D. Colo. 1980), and the Tenth Circuit reversed, rejecting both antitrust and first amendment claims of the cable company. In a previous antitrust action under the same name (*Boulder I*), the district court had granted an injunction against the city's proposed moratorium on the expansion of plaintiff's services into new areas of the city, 485 F. Supp. 1035 (D. Colo. 1980), and this also was reversed by the Tenth Circuit, 630 F.2d 704 (10th Cir. 1980), on the ground that the city was exempt from antitrust laws under the "state action" doctrine of Parker v. Brown, 317 U.S. 341 (1943). *Boulder I* was subsequently reversed in Community Communications Co., Inc. v. City of Boulder, Colorado, 455 U.S. 40 (1982). The Supreme Court's reversal in *Boulder I* touched only the antitrust question, however, and its dismissal of certiorari in *Boulder II*, 457 U.S. 1105 (1982), left the Tenth Circuit's first amendment analysis untouched.

278. *Boulder II*, 660 F.2d at 1379.

cluded an existing cable company's expansion into new areas of the city.[279]

Not everyone agrees with the Tenth Circuit that cable is a natural monopoly.[280] More than one cable can be strung on a pole or laid in underground rights of way, and the operation of two competing cable systems in at least a few areas of the country[281] attests that economic monopoly does not always and everywhere prevail in the cable business. On the other hand, in a given geographical area monopoly is much more common than competition. This may result in part from franchising practices,[282] but the relative paucity of competing companies in areas where multiple franchising is allowed suggests that economics has something to do with it.[283]

The local cable company in fact conforms rather closely to the economic definition of natural monopoly as "a firm whose long-run average costs decline over the range of output that the industry would produce."[284] The biggest cost of a cable television system is the cable grid that runs along each street, and the grid is necessary no matter how many subscribers the system has. The average cost per subscriber obviously is minimized if all can be connected to a single grid rather than being distributed among several cable companies. If an area is served by competing companies, each with its own grid, the result is economic waste, including higher prices to cable subscribers.[285] Thus a good theoretical argument can be

279. *Id.* at 1378.

280. For an argument that cable is not a natural monopoly, see Stanzler, *supra* note 276, at 200-02, 224-25. *See also* Bolick, *Cable Television: An Unnatural Monopoly, CATO Institute Policy Analysis*, no. 34, March 13, 1984.

281. *See* Stanzler, *supra* note 276, at nn. 2-11 and accompanying text for a discussion of competing systems. *See also* Bolick, *supra* note 280; and G. SHAPIRO, P. KURLAND, & J. MERCURIO, *supra* note 250, at 5-13.

282. *Id.*

283. According to one study of 24 communities that had awarded competing franchises prior to 1978, only four continued to be so served by 1982. *See* A. PEARCE, R. PETERSON, & M. FREDERICKSON, COMPETITIVE CABLE FRANCHISING: AN ANALYSIS OF ECONOMIC THEORY AND EMPIRICAL DATA (unpublished study for the City of Monroe, Georgia), discussed in Stanzler, *supra* note 276, at 201 n.9.

284. R. RUFFIN & P. GREGORY, PRINCIPLES OF ECONOMICS 567 (1983). According to the authors, "[a] *natural monopoly* occurs when economies of scale are so large that there is room for only one firm in the industry. Competition is either unworkable or highly inefficient. Examples of natural monopolies are the local public utilities that deliver telephone services, gas services, water services and electricity." *Id.* at 490 (emphasis in original).

285. This analysis is drawn from Judge Posner's opinion in Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982). The following excerpt from the opinion develops the natural monopoly theme in more detail:

> The cost of the cable grid appears to be the biggest cost of a cable television system and to be largely invariant to the number of subscribers the system has. We said earlier that once the grid is in place—once every major street has a cable running above or below it that can be hooked up to the individual residences along the street—the cost of adding another subscriber probably is small. If so, the average cost of cable television would be minimized by having a single company in any given geographical area; for if there is more than one company and therefore more than one grid, the cost of each grid will be spread over a smaller number of subscribers, and the average cost per subscriber, and hence price, will be higher.
>
> If the foregoing accurately describes conditions in Indianapolis . . . it describes what economists call a "natural monopoly," wherein the benefits, and indeed the very possibility, of competition are limited. You can start with a competitive free-for-all—different cable television systems frantically building out their grids and signing up subscribers in an effort to bring down their average costs faster than their rivals—but even-

made that the scarcity of competing cable systems is attributable to economic forces and not just to local franchising practices.

Demonstrating that cable television has characteristics of a natural monopoly does not necessarily end the argument about medium scarcity. Five years before the Tenth Circuit formulated that concept, the District of Columbia Circuit explicitly rejected "scarcity which is the result solely of economic conditions" as a justification for "even limited government intrusion" upon the first amendment rights of cable television.[286] The court derived this conclusion from *Miami Herald Publishing Co. v. Tornillo*,[287] which had struck down a Florida right-of-reply statute applicable to newspapers. The court of appeals found "nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point."[288]

The Tenth Circuit also took account of *Miami Herald* but concluded that it was not governing.[289] As the Tenth Circuit saw it, *Miami Herald* was addressed specifically to "newspapers, a communication medium protected by a long-standing and powerful tradition" of governmental hands-off, and one which "is not tied to government in the way cable companies necessarily are."[290] The cable industry, on the other hand,

> has always been regulated in many respects. There is no tradition of nearly absolute freedom from government control. Most importantly a cable company must significantly impact the public domain in order to operate; without a license, it cannot engage in cable broadcasting to disseminate information. This is exactly opposite of the situation in *Miami Herald*.[291]

The Tenth Circuit thus offered plausible reasons why *Miami Herald* need not preclude consideration of economic-induced scarcity as the functional equivalent of spectrum scarcity for purposes of regulation.[292]

From the standpoint of any consumer, control over cable lines is more

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> tually there will be only a single company, because until a company serves the whole market it will have an incentive to keep expanding in order to lower its average costs. . . .

Id.

286. Home Box Office v. FCC, 567 F.2d 9, 46 (D.C. Cir. 1977).

287. 481 U.S. 241, 247-56 (1974).

288. *Home Box Office*, 567 F.2d at 46. The court may not have been quite accurate in attributing cable television scarcity "solely" to economic conditions and may perhaps have overlooked significant differences in the distribution system as compared with newspapers. As one writer has observed, " [e]ven if a limited number, that is, in excess of one cable company, is theoretically possible in a town, that is quite different from the physically unlimited number of newspapers, magazines, and pamphlets that theoretically can be distributed in a locality." Meyerson, *The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements*, 4 COMM/ENT 1, 31 (1981-82).

289. Community Communications Co. v. City of Boulder, Colorado (*Boulder II*), 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 457 U.S. 1105 (1982).

290. *Id.* at 1379.

291. *Id.*

292. Meyerson, *supra* note 288, at 22-23, makes a good argument that the Eighth Circuit seriously misinterpreted *Miami Herald* in holding economic scarcity irrelevant to the issue of government regulation. As he points out, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 399-400 (1969), had earlier suggested that the "substantial capital investment" required to engage in broadcasting might reinforce spectrum scarcity as a reason for government regulation.

concentrated than control of broadcasting.[293] Most people in the United States live in areas served by three or more television stations and a much larger number of radio stations. A cable operator has the technological capacity to offer many different programs simultaneously, but in most parts of the country there is still only a single gatekeeper controlling what the cable viewer may see.[294] If the evils spring from concentration of control inherent in the medium, as the scarcity doctrine implies, the consequences of cable medium scarcity ought not to differ significantly from broadcast spectrum scarcity. It follows then, that the scarcity-related arguments for content regulation of broadcasting ought to apply with equal force to cable television.

2. *"Public Trust" as a Rationale for Regulation*

The public trust rationale for government regulation of broadcasting owes its present formulation to *United Church of Christ v. FCC*,[295] an opinion authored by Chief Justice Burger while a member of the District of Columbia Court of Appeals. The relevant passage reads,

> A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.[296]

This concept of a public trust has received periodic reaffirmation in decisions of the United States Supreme Court.[297]

As a basis for regulating broadcast speech, the public trust doctrine

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293. Control is still more dispersed in the print media, where an almost infinite variety of newspapers, magazines, books, and other publications compete for the reader's attention. One may of course focus not on the medium but on the marketplace, where there is no scarcity of competition in the provision of either entertainment or information services. With such a marketplace emphasis, the scarcity rationale could hardly support special government regulation of either broadcasting or cable. For an example of this approach see Hofbauer, *supra* note 8, at 200. *See also* Fowler & Brenner, *supra* note 272.

294. *See* Meyerson, *supra* note 288, at 31. For other discussions of the access question, *see, e.g.*, Kreiss, *supra* note 248; Miller & Beals, *supra* note 248; Note, *Cable Television: Should Candidates for Federal Elective Office Have an Affirmative Right of Access to Your Cable Television Channels, supra* note 250.

295. 359 F.2d 994 (D.C. Cir. 1966). The decision was also notable for its grant of standing to listener groups to challenge a radio broadcast license renewal. 359 F.2d at 1002, 1006.

296. *Id.* at 1003. A similar concept was implicit in Justice Frankfurter's *National Broadcasting Co.* opinion, 319 U.S. a 216-19, but it was not so clearly expressed. Frankfurter quoted with approval an excerpt from an FCC Report on Chain Broadcasting Regulations, the subject of the lawsuit: " 'With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them.' " *Id.* at 218.

297. *See* Columbia Broadcasting Sys., Inc. v. FCC, 453 U.S. 367, 395 (1981), where the Chief Justice quoted from his earlier appeals court pronouncement. *See also* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 383, 387-90, 400 (1969).

has been used primarily in support of fairness and greater diversity in dealing with public issues, but it has been cast in terms broad enough to include restrictions on offensive programming. It rests on two implicit assumptions. The first is the assumption that the airwaves are in some sense public property or domain. The second is the notion that the government's interest in the airwaves permits greater abridgement of speech than does ownership of public parks, streets, and other similar public property. Neither has been carefully probed by the courts.[298]

Robinson has argued with some force that the airwaves cannot be meaningfully "owned" by anyone, since they are not "a thing of nature which can be possessed, occupied, or used in any normal sense of the word."[299] A more colorable claim is raised with respect to public ownership of air rights or air space (though certainly not *all* air space) through which broadcast signals are transmitted.[300] The courts have not generally talked in terms of "air space," but have spoken as though the electromagnetic spectrum, itself an artificial construct, is part of the public domain. At this late date perhaps the best claim is prescriptive. The government has so long exercised the right to engage in broadcast licensing that its interest in and control over this valuable property right can scarcely be doubted.

Even if the airwaves are treated as part of the "public domain," what justifies the greater intrusion upon free speech? Under present first amendment theory, the justification must hinge on the argument that parks and streets are public forums, while radio frequencies and broadcast channels are not.[301] If this distinction is valid, the assumption may be tenable since the government has more leeway to restrict expression in public places that do not constitute public forums.[302] Content-based restrictions have been upheld as applied to such non-public forums as military bases,[303] municipal bus lines,[304] prisons,[305] and public school mail systems;[306] and content-neutral laws have been used to exclude demonstrators from jail grounds[307] and unstamped messages from mailboxes.[308] The contours of a public forum have never been very precisely determined; members of the Supreme Court continue to disagree whether one exists in

298. For critiques of the public trust doctrine, see Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 DEN. L. J. 477, 493 (1976); Robinson, *supra* note 276, at 151; Note, *Cable Television and the First Amendment*, *supra* note 255, at 1018; Note, *Cable Television: Should Candidates for Federal Elective Office Have an Affirmative Right of Access to Your Cable Television Channels*, *supra* note 250, at 329.

299. Robinson, *supra* note 255, at 152.

300. *Id.*

301. For discussion of the public forum concept *see, e.g.*, Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979); Kalven, *The Concept of the Public Forum: Cox v. Louisiana, 1965* SUP. CT. REV. 1; Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233; Comment, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975).

302. *See, e.g.*, Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983).

303. Greer v. Spock, 424 U.S. 828 (1976).

304. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

305. Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977).

306. Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983).

307. Adderley v. Florida, 385 U.S. 39 (1966).

308. U.S. Postal Service v. Greenburgh Civic Ass'n, 453 U.S. 114 (1981).

each given case.[309] There is some agreement, however, that a public forum is a place "to which the first amendment guarantees access to all comers,"[310] subject to reasonable time, place, and manner restrictions.[311] Broadcasting, by reason of spectrum scarcity, is not open to all comers; a tradition of government regulation stemming at least from the Radio Act of 1927 has established the right of the government to decide which applicants for scarce frequencies shall be allowed to speak. Viewed in this light, the airwaves do not constitute a public forum.

Broadcasting obviously is a forum of some kind, since it is devoted solely to communication, but that, apparently, is not sufficient to make it a public forum. In the mailbox case, Justice Brennan argued that "the mails and the letter box are specifically used for the communication of information and ideas, and thus surely constitute a public forum . . ."[312] The Court, however, rejected this argument. "Our cases," it said,

> provide no support for such a sweeping proposition. Certainly, a bulletin board in a cafeteria at Fort Dix is "specifically used for the communication of information and ideas," but such a bulletin board is no more a "public forum" than are the street corners and parking lots found not to be so at the same military base. Likewise, the advertising space made available in public transportation in the City of Shaker Heights is "specifically used for the communication of information and ideas," but that fact alone was not sufficient to transform that space into a "public forum" for First Amendment purposes. . . .[313]

A forum, thus, does not become a public forum simply because it is used for communication.

Even if the public forum concept provides a basis for distinguishing government regulation of broadcasting from regulation of speech in parks and streets, government still does not have unlimited discretion to restrict speech because of its content. In the mailbox case, Justice Rehnquist acknowledged that regulations "based on the content of the speech or the message . . . must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove of the speakers' views.' "[314] While penalties for the broadcast of indecent

309. For example, in U.S. Postal Service v. Greenburgh Civic Ass'n, 453 U.S. 114 (1981), Justice Rehnquist's majority opinion found the mailbox not to be a public forum, *id.* at 128-31; Justice Stevens, in dissent, agreed that it was not, *id.* at 152 (Stevens, J., dissenting); Justice Brennan, *id.* at 137-38 (Brennan, J., concurring in the judgment), and Justice Marshall, *id.* at 148-49 (Marshall, J., dissenting), believed that it was; and Justice White described the whole public forum inquiry as "bootless" in this instance. *Id.* at 142 (White, J., concurring in the judgment). *See also* Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), where Justice White for the Court found a public school mail system not to be a public forum, *id.* at 955-56, while Justice Brennan, joined by Justices Marshall, Powell, and Stevens, suggested that it might be a public forum for some purposes, *id.* at 965 n. 7 (Brennan, J., dissenting).

310. U.S. Postal Service v. Greenburgh Civic Ass'n, 453 U.S. at 128.

311. *Id.* at 132.

312. *Id.* at 137-38 (Brennan, J., concurring).

313. *Id.* at 130 n. 6 (citation omitted).

314. *Id.* at 132 (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-36 (1980), which in turn quoted Niemotko v. Maryland, 340 U.S. 268, 282 (1951)) (Frankfurter, J., concurring in result).

material are not ordinarily directed at the speaker's viewpoint, they are nevertheless concerned with content and must be justified by some substantial government interest.

This brings the argument back to the reasons advanced for regulation of indecent programming under the scarcity rationale, since scarcity is the principal reason for not treating the airwaves as a public forum. It is perhaps no coincidence that Justice Burger, in his *United Church of Christ* opinion,[315] joined both concepts in a single formulation of the public trust doctrine and used scarcity—the broadcaster's "free and exclusive use of a *limited* and valuable part of the public domain"[316]—as a reason for imposing a public trust upon licensees.

Does the "public trust" rationale have any applicability to cable television? The Tenth Circuit thought that it did, at least with respect to governmental allocation of entry into the cable medium.[317] "Medium scarcity" as a functional equivalent of spectrum scarcity has already been discussed and need not be reexamined at this point. The other element of the public trust theory, use of a part of the public domain, also has its cable equivalent. If cables are used, the cables must ordinarily be laid under or along public rights of way.[318] Thus, cable television, like broadcasting, requires the use of a "limited and valuable part of the public domain," and a grant of a street use franchise permits even more exclusive access to the audience of a particular geographical area than does a radio or television broadcasting license.[319] This, coupled with the tradition of governmental regulation of cable television, led the Tenth Circuit to conclude that "government must have some authority . . . to see to it that optimum use is made of the cable medium in the public interest."[320] The Tenth Circuit was not addressing the regulation of indecency, and there is no indication whether its concept of the public interest would justify regulations such as those adopted by the Utah legislature or the Miami City Council. But, to the extent that the public trust doctrine might justify regulation of indecent broadcasting, it should also have relevance for cable television because similar elements of scarcity and dependence upon the public domain are present.

3. *"Pervasiveness" as a Rationale for Regulation*

The pervasiveness rationale stems from *FCC v. Pacifica Founda-*

315. United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

316. *Id.* at 1003 (emphasis added).

317. *Boulder II*, 660 F.2d at 1378.

318. Sometimes cables may pass from private property to private property, as between adjoining tall buildings. *See* Note, *Access for CATV Meets the Taking Clause: The Per Se Takings Rule of Loretto v. Teleprompter Manhattan CATV Corp.*, 25 ARIZ. L. REV. 689, 691 (1983).

319. Dependence upon the "public domain" is rather more obvious with cable than with broadcasting. As observed *supra* note 299 and accompanying text, doubt has been expressed that the airwaves can be "owned" by anyone, but no one doubts that the local community can own streets and rights of way. Newspapers are also distributed over public rights of way, but they require no exclusive use or permanent physical occupation of any portion of the right of way. Moreover, the print media as a whole do not satisfy the requirement of medium scarcity, nor have they historically been subject to extensive government regulation.

320. *Boulder II*, 660 F.2d at 1379.

tion,[321] where Justice Stevens cited broadcasting's "uniquely pervasive presence in the lives of all Americans"[322] as a reason for according it less first amendment protection than newspapers. Without offering a formal definition, he explained the concept in the following terms:

> Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.[323]

As thus elaborated, the essential element of pervasiveness is the capacity of broadcasting to invade the privacy of the home with uninvited, unexpected, and unwanted program material of a patently offensive nature.[324]

But what makes broadcasting's pervasiveness "unique" as compared with print media? Printed matter may also confront the viewer with offensive, unsolicited messages, but the Court has been unwilling to let government suppress such material to protect the potential recipient from exposure to it. The Court in *Cohen v. California* insisted that persons offended by Cohen's crude protest against the draft could "effectively avoid further bombardment of their sensibilities simply by averting their eyes."[325] Cohen's message was exhibited in a public place, but the Court has applied the same reasoning to unsolicited mailings which intrude upon the privacy of the home.[326] These decisions contrast sharply with Justice Stevens' observation that turning off the radio after hearing indecent language is no more a remedy than running away from an assault after the first blow.

The uniqueness, apparently, must rest on an assumption that the spoken word or the graphic video representation are more intrusive, that is,

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321. 438 U.S. 726 (1978).

322. *Id.* at 748.

323. *Id.* at 748-49 (citations omitted).

324. The Court's solicitude for the pivacy of the home in first amendment contexts is well established. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970); Stanley v. Georgia, 394 U.S. 557 (1969). Even Cohen v. California "recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue. . . ." 403 U.S. at 21. *See also* Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975). Privacy is also well established as an important value in other areas of the law. *See, e.g.*, discussion in Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 461 (1983).

325. 403 U.S. 15, 21 (1971).

326. Bolger v. Youngs Drug Prods. Corp., 103 S.Ct. 2875 (1983) (mailed advertisements for contraceptives); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 542 (1980) (bill inserts touting nuclear power). In *Bolger* the Court distinguished *Pacifica* by reasoning that "receipt of mail is far less intrusive and uncontrollable." *Id.* at 2884.

have greater capacity to offend, than the printed word (or picture).[327] We may speculate that it relates to the special impact of voice and animated picture, which reach all in the room simultaneously, while the printed message delivered by mail or left on the doorstep is read—at least initially—by one person at a time. Perhaps, too, the mode of transmission is significant. Someone must retrieve the mail from the box or pick up the flyer from the doorstep, bring it into the house, open the envelope, possibly leaf through pages, and engage in the affirmative act of reading. That person also has some control over who else sees the message, and when. This can take away some edge of surprise and immediacy of impact, as compared with offensive words and representations blurting out from the speaker or depicted in living color on the video tube.[328]

Whatever the unarticulated assumptions underlying the *Pacifica* decision, it identified the "unique pervasiveness" of broadcasting as a reason for restricting the broadcast of indecent material. How far this rationale reaches is by no means clear. Although the Court gave a broad definition to indecency,[329] its holding was narrowly restricted to sustaining noncriminal sanctions against a particular broadcast which, in context, was found to be a nuisance.[330] Two recent commentators have concluded that *Pacifica* is merely "a limited exception, for an extreme, virtually non-replicable case, to the general rule established by the *Miller-Cohen-Erznoznik* trilogy."[331] Probably more accurate is Professor Tribe's observation that

327. Krattenmaker and Esterow, *supra* note 250, at 620, treat "intrusiveness" as "the crux of the Court's justification" for its holding in *Pacifica*. *See also* G. SHAPIRO, P. KURLAND, L. MERCURIO, *supra* note 250, at 34. One significant difference, which has little to do with pervasiveness or intrusiveness, is the historical fact of print media freedom from government regulation. The Supreme Court in *Pacifica* stressed this difference but treated it as a fact to be explained rather than a justification for upholding the FCC, 438 U.S. at 748. Nevertheless, radio's historically less sheltered position predisposes the Supreme Court to view further regulation of radio broadcasting with less suspicion.

328. Of this aspect of the Stevens opinion, Professor Tribe writes: "His words might suggest the very dubious proposition that broadcasting is subject to regulation that is impermissible when applied to other media exactly because it is the most effective form of communication. That proposition turns First Amendment values upside down. . . ." L. TRIBE, *supra* note 27, at 62 n. 33 (Supp. 1979). Upside down or not, this was apparently the position taken by Chief Judge Bazelon in Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), when sustaining the application of the fairness doctrine to cigarette commercials:

> Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.

Id. at 1100-01. Chief Justice Bazelon was, however, justifying diversity (cigarette countercommercials) rather than censorship. The passage was subsequently quoted by Chief Justice Burger in CBS v. Democratic Nat'l Comm., 412 U.S. 94, 128 (1973), as part of a "captive audience" argument for refusing to require broadcasters to accept political advertisements.

329. "[T]he normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." *Pacifica*, 438 U.S. at 740.

330. *Id.* at 750-51.

331. Krattenmaker & Esterow, *supra* note 250, at 627. They interpret *Pacifica* as "holding that repeated utterances of patently offensive words relating to excretory and sexual organs and activities, purely for their shock value, may be regulated." *Id.* at 629-30.

"[t]he Court stressed the narrow scope of its holding, but did little to make the holding's limits apparent."[332] Whatever the Court had in mind, a rule protecting privacy in the home is certainly capable of reaching well beyond the proscription of George Carlin's seven dirty words.

Does the pervasiveness rationale apply to local legislation directed at indecent material on cable television? In *Community Television of Utah, Inc. v. Roy City*[333] and *Cruz v. Ferre*,[334] two federal district courts said that it did not, because cable television is not broadcasting.[335] No one, of course, contends that cable television is broadcasting. The issue is whether cable is sufficiently analogous to radio broadcasting for the *Pacifica* rationale to apply in matters of indecent programming. More specifically, the question arises from the differences in broadcasting and cable transmission of signals rather than from any distinction between radio and television. Neither district court raised the latter issue, and the Court in *Pacifica* was concerned with the "pervasive presence" of the "broadcast media,"[336] not just the radio medium.[337]

If broadcast television falls within the ambit of *Pacifica*, then the inclusion of cable television is in some respects a very modest extension. There is no practical difference in viewer impact (as contrasted with mode of delivery) between cable channels and broadcast television channels, other than the differing programming and in some areas the better quality of the video picture made possible by the cable technology. Its visual and aural impact is precisely the same as broadcast television, and it differs from print media in precisely the same ways. If the special impact of broadcast programming permits the government to do more than advise the offended viewer to avert his eyes, stop his ears, or turn off the set, the same should be true of cable television because its impact upon the viewer differs not at all. Like broadcast media, cable television reaches into the privacy of the home. It need not be retrieved from a mailbox or doorstep like a printed message and passed from hand to hand for perusal; it speaks instantly and simultaneously to all within sight or earshot. In all these respects cable television's impact is indistinguishable from the "uniquely pervasive presence" of the broadcast media. Cable does not yet enter as many homes as radio and broadcast television and thus is not as pervasive in the sense of being widespread. But installations are increasing rapidly,[338] and the numbers are large enough that cable's relatively smaller

332. L. TRIBE, *supra* note 24, at 67 (1979 Supp). The Supreme Court has since cited *Pacifica* in contexts that suggest a wider application. *See, e.g.*, New York v. Ferber, 458 U.S. 764 (1982) (first amendment protection often dependent on content of speech); Carey v. Brown, 447 U.S. 455, 471 (1980) (right to be left alone in the privacy of the home). *See also* Board of Educ. v. Pico, 457 U.S. 853, 883 (1982) (vulgarity not always protected).

333. 555 F. Supp. 1164 (D. Utah 1982).

334. Cruz v. Ferre, 571 F. Supp. 125 (D. Fla. 1983).

335. *Community Television of Utah*, 555 F. Supp. at 1169; Cruz v. Ferre, 571 F. Supp. at 131.

336. *Pacifica*, 438 U.S. at 748.

337. The Supreme Court also spoke of protecting "the listener *or viewer* from unexpected program content." *Id.* (emphasis added). In a disclaimer at the end of the opinion, intended "to emphasize the narrowness of our holding," the Court stated that "differences between radio, television, and perhaps closed-circuit transmissions" might also be relevant to determining whether a particular broadcast constitutes a nuisance. *Id.* at 750.

338. *See supra* note 1.

share of the market should not be a fact of constitutional significance. Without question, many cable programs reach a far larger audience than the select listening group tuned to the FM broadcast of Station WBAI at two o'clock on that late October Tuesday afternoon. In any event, widespread availability cannot be the critical element in broadcasting's "unique pervasiveness" because printed matter is also widely available.[339]

If cable television and broadcast television infringe upon the viewer's consciousness in exactly the same way, their respective modes of delivery have differing implications for intrusiveness that may rise to constitutional proportions. In *Community Television of Utah, Inc. v. Roy City*,[340] the court's most convincing arguments focused on what it called differences in "levels of choice"[341] which give the cable viewer much greater opportunity to decide in advance whether a given cable program will be received in his home. To receive either broadcast or cable television, the potential viewer must first make the decision to purchase a television set. Both obviously require the decision to turn on the set and to tune in a particular channel. If the signals are poor, the viewer of broadcast television may have to erect an aerial. With that, the choices of the broadcast viewer are essentially exhausted. If he has invited television programming into his home by buying a set and dialing a channel, he takes what the networks or the local station choose to send.

With the cable viewer, however, other choices are possible, indeed required. To receive cable service he must subscribe to it and pay a regular fee for continued service, usually on a monthly basis. He may cancel his subscription, or be terminated if he chooses not to pay. If he does not subscribe, he still retains the benefits of broadcast television.[342] Beyond the "basic service," that is, the channels provided in return for the standard subscription fee, the customer in many systems may subscribe to separate pay channels ("pay tiers") upon payment of additional monthly fees. "Adult" programming is frequently marketed as an additional pay tier. Some systems also offer television on a "pay-per-view" basis, which adds further specificity to the range of choice. Other possibilities, not yet in widespread use, are addressable systems in which a channel carrying adult material, for example, might require a telephone call to be activated for a particular program.[343] Typically, also, cable systems provide detailed

339. In Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1169 (D. Utah 1982), the court offered a somewhat different concept of pervasiveness: "Literally it means ever-present. It is in the air, or diffused widely. In that sense broadcasting meets the definition. In that sense, it is pervasive because its medium, the air, is pervasive. Transmission by wire is not." The Court in *Pacifica* appears to have been concerned with broadcasting's intrusive presence rather than with the technical means by which signals are transmitted. For example, the Court indicated that its holding would not apply to "a two-way radio conversation between a cab driver and a dispatcher," 438 U.S. at 750, even though such a conversation would be transmitted through the same medium (the "air") as Carlin's monologue.

340. 555 F. Supp. 1164 (D. Utah 1982).

341. *Id.* at 1168.

342. The district court suggested that the viewer could not choose to "cancel broadcast television." *Id.* As a practical matter, he can "cancel" it by disposing of his television set. A single channel could even be "cancelled" selectively by altering the set to prevent reception on that channel.

343. For a brief catalogue of such alternatives, see National Cable Television Association,

printed program guides to viewers. While television guides are also available for broadcast television, they are not supplied to viewers as part of the general service but must be obtained separately.

At some point in this increased range and specificity of choice, a court could no longer say that cable television programming was an unexpected, uninvited, and unwelcome intruder upon the privacy of unwilling adult viewers. But all points along the spectrum of choice do not have identical implications for privacy. At one extreme, if the viewer is required to pay in order to receive a particular program, or must specifically request to view it, no aspect of privacy can be affronted by what comes over the cable. At the other end of the scale, it is difficult to see how subscription to the "basic service" of a cable company differs substantially from the decision to buy a television set and (if necessary) install an aerial for improved reception. Indeed, cable television, or "community antenna television" (CATV) as it was originally known, was first conceived as a way of getting better broadcast television reception. Through the "community antenna" system, "subscribers received over wire the conventional broadcast signals [that] they could not receive, or could not receive as well, with a home antenna."[344]

As the National Cable Television Association (NCTA) has noted, the nature of cable television programming "has changed dramatically" since those modest beginnings.[345] With news, public affairs, sporting events, movies, and other entertainment programming available from many non-broadcast sources, as well as locally originated cable programming, cable has become a significant source of television fare independent of the major networks and local broadcast stations. With an eye to the first amendment implications, the NCTA has compared the cable system operator's new role to that of "a newspaper or magazine editor or publisher."[346] Thus the operator's "staff develops or directly purchases some of the news and entertainment features, while others are drawn from national services. The operator, like a newspaper editor, must exercise editorial judgment and control, deciding what is shown and what is not, what needs revision and what editorial policies are appropriate."[347]

The new cable programming might more appropriately be compared to broadcasting in these respects, however, since broadcasters exercise precisely the same functions[348] and the nature of the programming, as well as its impact upon the consumer, is much more comparable to broadcasting than to the content of any newspaper or magazine. In a very real sense, the "basic service" of cable television, which by FCC regulation is still

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Inc., *Memorandum to the Industry on Cable System Carriage of Adult Programming* 22-24 (March 1982).

344. Goldberg, Ross & Spector, *supra* note 250, at 578. This article was originally prepared for the National Cable Television Association, under the same title, as a report to Senator Packwood dated April 1981.

345. *Id.* at 578.

346. *Id.* at 579.

347. *Id.*

348. The NCTA noted this fact in a footnote to the above quotation: "Broadcasters have similar discretion, of course." *Id.* n.8.

required to carry the signals of local television broadcasters,[349] is simply "more of the same."[350] The variety may be greater, especially where local access channels are utilized or the company engages in extensive origination cablecasting, but greater variety probably increases the prospect that something offensively indecent will be transmitted.[351]

Arguably, the viewer has asked for whatever he gets when he subscribes to the basic service, but the same argument applies with almost equal force to the purchase of a radio or a television set. This is especially true if the subscriber is motivated primarily by the desire to obtain better broadcast television reception. Even if not, the step from broadcast television to cable is not different in kind from the move to television from radio: the consumer desires enlarged access to information and entertainment. The need to make a continuing monthly payment attests to some strength in his motivation, but subscription to a cable basic service should not be substantially more a waiver of his rights to privacy in the home than the decision to purchase a television set in the first place (probably also on an installment contract with monthly payments). He subscribes to a potpourri of offerings, the exact content of which he cannot know at the time of subscription. His printed program guide will give him advance notice of coming attractions, but certainly no detailed transcripts.[352] Even if the guide in fact provided adequate notice in every instance, he may not read it. Does failure to read constitute a waiver of privacy rights? Does failure to purchase and read a broadcast television guide constitute waiver of privacy rights with respect to broadcast television? The answer to both questions probably is, and ought to be, negative. Nor does the subscriber have any more control over program content on the basic service than he does over programming produced by the broadcast networks and local stations (unless he chooses to utilize one of the access channels for sending his own messages, if such a channel is available). He simply takes what the cable operator sends. He can discontinue his subscription; but he can also get rid of his television set. In either case the remedy is achieved at the sacrifice of a wide range of information and entertainment program material.

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349. 47 C.F.R. §§ 76.57, 76.59, 76.61 (1982).

350. Indeed, this was *Newsweek's* verdict (with one notable exception) on the entire cable television industry as of 1981:

> In theory, cable was supposed to liberate viewers from commercial TV's lowest-common-denominator formulas. So far, the medium's performance has fallen far short of its promise . . . After three decades of existence, cable has produced only one major alternative to the network product. Free of the need to placate sponsors, some cablecasters have turned to soft-core pornography to attract customers. The strategy has paid off—erotica has become pay cable's hottest seller in many areas. . . .

Cable TV: Coming of Age, NEWSWEEK, August 24, 1981, at 44, 46.

351. Note, for example, the use New York City's public access channel to transmit some of the most offensive and indecent material available anywhere. *Public-access TV in New York Tends Toward Sex and Sadism*, Wall St. J., Dec. 20, 1982, at 1.

352. One may ask why lack of notice should be a reason for regulating television when the speech guarantees accorded *Time* or *Newsweek* are in no whit diminished by their subscribers' inability to know in advance the exact content of forthcoming issues. The answer lies in other differences in the media, previously discussed, which have justified greater government regulation of broadcasting than of print media. The issue here is whether cable is sufficiently like broadcasting to justify imposing similar limits on first amendment protection.

The pay tier channels, which may be added to the basic service for additional monthly fees, give the subscriber more control over the type of programming he receives, especially if each such channel transmits homogeneous material. If a subscriber pays extra for a channel devoted to "adult programming," he knows what he is getting and can scarcely claim offense at what he sees. The program material would probably run afoul of the Utah and Miami indecency laws, but neither jurisdiction could reasonably claim that the privacy of the viewer's home was being vindicated by denying him the right to view what he had knowingly chosen to receive. This situation seems close to the program-specific pay-per-view and addressable system, where the pervasiveness or privacy-of-the-home rationale surely has no application.

A closer case is a pay tier channel like Home Box Office (HBO) which devotes the larger part of its service to feature films originally shown in movie theaters.[353] With respect to the "indecency" of their content, the films are not homogeneous; some presumably would be proscribed by an indecency statute and others would not. If we assume that the broadcast of a given film could be restricted by the FCC under its indecency regulations, would the film nevertheless be exempt from local regulation on cable because it is purchased separately as part of a pay tier HBO service? That is, does the viewer waive his privacy rights, or consent to whatever comes on the screen, by virtue of his HBO subscription? The answer to that question may depend on whether the case is analogized to the basic subscription, which probably should not constitute consent to everything short of legal obscenity, or to the pay-per-view situation, which undoubtedly embodies consent. As with pay-per-view cable, a person may avoid HBO's sexually oriented material by not subscribing to HBO; but, as with the decision not to subscribe to basic service (or not to purchase a television set), he thereby loses access to other materials he might very much wish to view.

To civil libertarians, the case is not close: first amendment values should of course prevail. To the morality lobbies and their supporters, the rule is equally clear: indecency should be banned. With broadcast radio and television, no form of regulation can easily reconcile these positions. Legislators and judges must necessarily come down on one side or the other in a zero sum situation. Protecting unwilling viewers from exposure to indecent programming is possible only by denying willing viewers access to the material. But cable technology may well provide a way out of this impasse, allowing protection against intrusive cablecasts to those who wish it and at the same time making available to the willing viewer everything that the obscenity laws will allow. This can be done by segregating the indecent material from the rest on separately purchased, clearly-labeled, homogeneous adult channels. While HBO might, then, have to organize its programming somewhat differently, anything it currently may

353. In its challenge to the first Utah cable indecency law, Home Box Office alleged that such films comprised approximately 78% of its offering. *See* Brief for Plaintiff at 6, Home Box Office, Inc. v. Wilkinson, 531 F.Supp. 987 (D. Utah 1982).

transmit would remain legally available to viewers. Segregating program materials on separate channels may be inconvenient for HBO, but it should not be unconstitutionally burdensome. A law requiring such segregation might well be regarded as narrowly tailored to serve the compelling interest of privacy in the home. Thus, the very versatility of cable television, which distinguishes it from broadcasting, should make possible the enactment of regulations more finely tuned to serve important interests without intruding heavily on first amendment values.

B. *The Protection of Children*

Broadcasting's unique accessibility to children is a second reason given by the Supreme Court for upholding the FCC action in *Pacifica*.[354] Unlike pervasiveness, the protection of children as a rationale for the limitation of first amendment rights has not been confined to the broadcast media. The analysis here will examine arguments raised in nonbroadcast situations as well as broadcast media for their possible application to cable television.

As a general proposition, "society's right to 'adopt more stringent controls on communicative materials available to youths than on those available to adults' " is well established.[355] No member of the present court has dissented from this principle,[356] although the circumstances that may justify the more stringent controls, and the standard to be applied, give rise to differences of opinion. In *Ginsberg v. New York*,[357] the Court sustained a criminal conviction for selling to a minor some "girlie" magazines that admittedly were not obscene as to adults. It was permissible, the Court concluded, for New York to adjust "the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the 'sexual interests' . . .' of minors."[358] The New York law had followed closely the prevailing judicial definition of obscenity,[359] modifying it only to focus on the interests and susceptibilities of minors.[360] In

354. 438 U.S. at 749-50.

355. *Pacifica*, 438 U.S. at 757 (Powell, J., concurring) (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975)). *See also, e.g.*, Miller v. California, 413 U.S. 15, 36 n.17 (1973); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 690 (1968); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964).

356. *But see* dissent of Justice Douglas, joined by Justice Black, in Ginsberg v. New York, 290 U.S. 629, 650-56, contending that obscene matter is protected by the first amendment even when distributed to children.

357. 390 U.S. 629, 634 (1968).

358. *Id.* at 638 (quoting Mishkin v. New York, 383 U.S. 505, 509 (1966)).

359. Roth v. United States, 354 U.S. 476, 485 (1957), as restated in Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

360. NEW YORK PENAL LAW § 484-h, as enacted by L. 1965, c. 327, is included as an appendix to the opinion of the Court in *Ginsberg*, 290 U.S. at 645. Section 2(a) proscribes the sale or rental to minors of "any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or sado-masochistic abuse and which is harmful to minors. . . ."

Section 1(f) defines "harmful to minors" as that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

upholding the statute, the Court was simply applying the *Mishkin*[361] principle that obscenity is determined by reference to the group to whom the material is directed. Nevertheless, the law reached material that would not have been found obscene as to adults, and the decision thus sanctioned more far-reaching controls of erotic materials made available to children.

The *Pacifica* ruling was in some respects less stringent since it upheld an FCC declaratory order that involved no formal sanctions of any kind, other than the possibility that the broadcast might be taken into account later if any subsequent complaints against the radio station were received.[362] In other respects, however, the decision was more far-reaching despite the Court's attempt to emphasize the "narrowness" of the holding and the importance of the particular context.[363] The New York statute in *Ginsberg* conformed closely to the three tests of obscenity—prurient appeal, patent offensiveness, and lack of social value. In *Pacifica*, by contrast, the FCC was willing to make a finding of indecency without reference to prurient appeal or the social value of the broadcast, as long as it described sexual or excretory functions in terms patently offensive to an audience with children in it.[364] The Court's definition of indecency, "nonconformance with accepted standards of morality,"[365] was broader still. The clear purport of *Pacifica* is to permit regulation of indecent but manifestly non-obscene broadcast programming in order to protect children in the potential audience if, in context, the broadcast is offensive enough to constitute a nuisance.[366]

Ranged on the other side, setting limits to the juvenile protection rationale, are cases of a different stripe. *Erznoznik v. Jacksonville*[367] confronted and rejected the protection of children as a valid basis for upholding the city's ban on drive-in movies containing nudity. The Court found the ordinance overbroad because "all nudity cannot be deemed obscene even as to minors."[368] The Court did not deny the importance of protecting children, and it readily agreed that "a state or municipality can

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(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

361. Mishkin v. New York, 383 U.S. 502, 509 (1966).

362. *Pacifica*, 438 U.S. at 730. The order did, of course, ban the radio broadcast of the Carlin monologue at times when children were most likely to be in the audience. *Id.* at 733.

363. *Id.* at 750.

364. The FCC definition is quoted, *supra*, at text accompanying note 118.

365. *Pacifica*, 438 U.S. at 740.

366. Of relevance also is Bd. of Educ. v. Pico, 457 U.S. 853 (1982), which was remanded with instructions for the lower court to determine whether improper motivations had tainted the Board's removal of certain books from a high school library. The first amendment would be offended if the court found the books had been removed with intent "to deny respondents access to ideas with which petitioners disagreed." *Id.* at 871. On the other hand, "an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar." *Id. Pico*, of course, dealt with local school administration, where the Court has long recognized the school board's "broad discretion in the management of school affairs." *Id.* at 863. But it identifies another context in which government may restrict dissemination of indecent communicative materials to children.

367. 422 U.S. 205 (1975).

368. *Id.* at 213.

adopt more stringent controls on communicative materials available to youths than on those available to adults."[369] It insisted, however, that the statute must be narrowly drawn to achieve its objective.[370] In this respect, *Erznoznik* can be readily distinguished from the cases which have allowed the government to regulate distribution of indecent materials to children. The Jacksonville ordinance was totally lacking in deference to judicial tests of obscenity that characterized the New York statute in *Ginsburg*, nor did it condition the unlawfulness of nudity upon patent offensiveness as in *Pacifica*. It also was forced to rely upon the very "limited privacy interest of persons on the public streets,"[371] rather than the more substantial privacy interests arising in the sanctuary of the home which were at issue in *Pacifica*. *Erznoznik*, thus, does not reject the child protection rationale, but it does emphasize the importance of carefully tailoring means to ends.[372]

Probably more formidable as a limitation on government efforts to protect children from sexually oriented materials is *Butler v. Michigan*,[373] with its oft-quoted assertion that the government may not "reduce the adult population . . . to reading only what is fit for children."[374] In a brief opinion authored by Justice Frankfurter, a unanimous Court struck down a criminal conviction under a Michigan statute that forbade the publication, sale or other distribution of any publication, writing, picture "or other thing, including any recordings, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth . . ."[375]Defendant Butler had been fined $100 for selling to a policeman a book found by the trial court to fall within the statute.[376] The sweep of the statute was extremely broad, and the Court was surely correct in finding the law "not reasonably restricted to the evil with which it is said to deal."[377] Michigan, indeed, had another statute specifically proscribing the distribution of erotic materials to minors,[378] but it was not applicable in this case because the purchaser was an adult. By prohibiting distribution to adults as well as children, the effect was, as the Court said, "to burn

369. *Id.* at 212.

370. "[O]nly in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to" children. *Id.* at 213.

371. *Id.* at 212.

372. A comparison of Rowan v. Post Office Dep't, 397 U.S. 728 (1970), with Bolger v. Youngs Drug Prods. Corp., 103 S.Ct. 2875 (1983), is likewise instructive in the need to tailor means carefully to serve desired ends. Protection of children from offensive material was given as one reason for upholding a postal regulation allowing a person to have his name removed from mailing lists of firms advertising erotic matter for sale, *Rowan*, 397 U.S. at 732. In *Bolger*, however, the Court found the same justification insufficient to support a total ban on the mailing of contraceptive advertisements.

373. 352 U.S. 380 (1957).

374. *Id.* at 383.

375. The statute, § 343 of the MICHIGAN PENAL CODE, is quoted at 352 U.S. at 381.

376. The book was a paperback novel, of reasonably serious literary pretensions, published by Pocket Books, Inc. The protagonist ultimately chose life in a monastery, but in the meantime he had a number of sexual encounters which are chronicled with some explicitness. These passages brought the book within the Michigan statute.

377. *Butler*, 352 U.S. at 383.

378. MICHIGAN PENAL CODE § 142, as quoted in *Butler*, 352 U.S. at 383.

the house to roast the pig."[379]

Butler can be readily distinguished from *Ginsberg*, which upheld a statute directed only at distribution of "harmful" materials to minors. But it is less easily distinguished from *Pacifica*, where banning a broadcast during daytime hours prevented adults a well as children from hearing the message, at least during those hours. The *Pacifica* court resolved the *Butler* issue in a footnote, concluding that the FCC order did not "reduce adults to hearing only what is fit for children" because adults "may purchase tapes and records or go to theaters and nightclubs to hear these words" or listen to late evening broadcasts.[380] Justice Powell's concurring opinion adopted the same line of reasoning, though recognizing that the *Butler* argument "is not without force."[381] Justice Brennan, on the other hand, was convinced that the decision "violates in spades the principle of *Butler v. Michigan* . . ." because the dirty words at issue here could "not constitutionally be kept even from children."[382]

The *Butler* principle could conceivably have been applied undiluted to the broadcasting context. But broadcasting presents a problem of distribution different from the publications, writings, and other materials covered by the Michigan statute, and this difference may affect its constitutional treatment. Booksellers and motion picture exhibitors can deny their wares to children without any effect on adult access. But, as Justice Powell observed in his *Pacifica* concurrence, "such a physical separation of the audience cannot be accomplished in the broadcast media"[383] because both adults and children are likely to be in the audience. "This," he noted, ". . . is one of the distinctions between the broadcast and other media to which we often have adverted as justifying a different treatment of the broadcast media for First Amendment purposes."[384]

One response to this distributional dilemma is to subordinate the protection of children to the first amendment freedom of expression. Another is to distinguish the case from *Butler*, as both the Supreme Court and Justice Powell attempted to do. They contended that the FCC action did not deprive adults of access to the Carlin monologue because it might still be made available through other media and even on radio during late night hours. Krattenmaker and Powe have suggested that this argument does not truly distinguish *Pacifica* from *Butler* because the Michigan statute, on its face, did not specifically apply to theaters and nightclubs and therefore did not unequivocally close off all adult access to the offensive material.[385] Justice Brennan argued in his *Pacifica* dissent that "the expenditure of money, time, and effort" required to obtain other access to Carlin's words

379. *Butler*, 352 U.S. at 383.

380. *Pacifica*, 438 U.S. at 750 n.28.

381. *Id.* at 760 (Powell, J., concurring).

382. *Id.* at 768 (Brennan, J., dissenting).

383. *Id.* at 758 (Powell, J., concurring).

384. *Id.* at 759.

385. Krattenmaker & Powe, *supra* note 143, at 1239. The Michigan statute did not apply to broadcasting either, but the broadcast media were subject to FCC regulation in the "public interest," as well as to the indecency proscription of 18 U.S.C. § 1464.

was itself an unconstitutional burden on freedom of expression.[386] He also suggested that radio may be so unique that there is no adequate substitute for it.[387]

But these arguments cannot obscure significant differences in the two cases. *Pacifica* involved a limited form of censorship of a specific program during daytime hours of a single medium whose adult and youth audiences could not be physically separated. *Butler*, on the other hand, applied to all print media, as well as recordings, and embraced a wide-ranging (and vaguely defined) subject matter. Moreover, dissemination of the materials to children could generally be controlled at the point of distribution without denying access to willing adults. One may take a value position that these contextual differences ought to make no constitutional difference (or the contrary position that they should be constitutionally significant), but surely no one can reasonably deny that very substantial distinctions exist.

These distinctions were persuasive to a majority of the Court in *Pacifica* and resulted in a decision permitting limited suppression of indecent material on radio in deference to the youthful portion of its audience. Similar distinctions were also important in *Ginsberg*, which held that a state may forbid distribution to children of printed material that is obscene as to them, although not necessarily obscene as to adults. But cable television is a different medium, with little history of litigation in this area, and the question remains how the child protection rationale ought to apply to the regulation of indecent cable programming.

In *Home Box Office, Inc. v. Wilkinson*,[388] the federal district court concluded, quite properly, that the Utah statutory ban on all nudity was unconstitutionally overbroad, even as to minors.[389] In reaching this conclusion, however, the court ignored *Pacifica*, questioned whether *Ginsberg* had survived *Miller*,[390] and cited precedents upholding the first amendment rights of minors.[391] In the second Utah case, *Community Television of Utah, Inc. v. Roy City*,[392] the same district court cursorily dismissed *Pacifica* as not applicable to cable television. The only direct response to the child protection rationale appears in a footnote comment that "the ordinance as written nowhere speaks of children" and that communication should not be restricted "to that which is only fit for the eyes and ears of children."[393] In *Cruz v. Ferre*, the federal court apparently regarded the lock box as a complete answer to the problem of the juvenile viewer because that was its sole response to the subject.[394] Existing case law thus

386. *Pacifica*, 438 U.S. at 774-75 (Brennan, J., dissenting).

387. "The opinions of my Brethren display . . . a naive innocence of the reality that in many cases the medium may well be the message. . . . The airways are capable not only of carrying a message, but also of transforming it." *Id.* at 774-75.

388. 531 F.Supp. 986 (D. Utah 1982).

389. *Id.* at 997.

390. *Id.* at 996.

391. The court cited Erznoznik v. Jacksonville, 422 U.S. 205 (1975), and Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

392. 555 F. Supp. 1164 (D. Utah 1982).

393. *Id.* at 1166 n.8.

394. 571 F.Supp. 125, 132 (S.D.Fla. 1983).

reveals the opinion of two federal district judges that protection of children does not justify local regulation of indecent cable programming, but it does little to explore the reasons for the applicability or nonapplicability of the rationale.

If a standard of obscenity less stringent than *Miller* can be applied to the print media, traditionally the most protected form of communication, it ought in principle to apply to cable television, which has seen a great deal of government regulation during its short history. But the manner in which the standard is applied may be affected by the special characteristics of the medium. In *Ginsberg*, the distribution of indecent magazines could be controlled at the point of sale, thus obviating the *Butler* objection to protecting children at the cost of depriving adults. The cable television system operator cannot, in the common situation, selectively exclude children from his audience.[395] This directly raises the *Butler* problem of limiting adults to programming deemed fit for children. Broadcasting presents the same problem, however, and the Supreme Court has found the *Ginsberg* rationale relevant there,[396] with some modifications in its application to take account of the *Butler* dilemma.

If the *Ginsberg* rule applies to print media, and in modified form to broadcasting, is cable so different that it should be exempted? As noted in the preceding discussion of adult privacy, cable's impact on the viewing audience is identical with broadcast television. If children need to be protected from words and images emanating from the tube, what difference can it make whether the sound and picture reach the tube by wire or through the airwaves?

But impact, once the image reaches the tube, is not the only relevant characteristic of the two media. Cable, as we have seen, differs from broadcast television in its mode of delivery, and this difference has an important bearing on the interest in protecting children. As interactive systems become more widespread, cable will have a capacity to separate audiences, at least for programs to be ordered separately. With such systems, the cable company can have a degree of assurance that the person ordering the program is an adult. The operator could not be certain that no children would be in the audience; but even under the New York statute upheld in *Ginsberg*, no one could be sure the adult purchaser would not show the forbidden pictures to a child.

Lock boxes may also help provide some separation of audiences, although control shifts from the operator to the household, and the separation must be enforced by the person in charge there—presumably the parents. Quite apart from the parent-child tensions that may be induced by the lock device, attached to the television set as an omnipresent symbol

395. To the extent that interactive systems may become available in the future, allowing communication between the cable system and the potential viewer, cable will have increased capacity to separate audiences—or at least to ascertain that a particular program has been ordered by an adult.

396. Indeed, *Ginsberg* was cited in *Pacifica* in the Stevens opinion, *Pacifica*, 438 U.S. at 749-50; the Powell concurrence, *id.* at 757; and even in the Brennan dissent, *id.* at 767, as authority for the proposition that government has wider discretion to regulate communication to children than to adults.

of tempting but forbidden fruit, the effectiveness of the lock box is likely to be limited. If parental authority and watchfulness were absolute, the children's viewing habits could be adequately controlled without the lock box. The additional increment of control provided by the box is likely to be marginal in many homes.

Pay-per-view systems can provide some separation since children are less likely to have funds to pay for a television movie than are adults. But this too would be far from absolute separation. Late night scheduling and advance notice provide other means of separation of audiences, however imperfect, although cable television is not significantly different from broadcast television in these respects.[397] Published program guides may also be helpful to parents in deciding what programs their children should be permitted to view.

Cable television, unlike broadcast television, has a further capability of confining erotic and other indecent matter to dedicated channels clearly designated as to content. If such channels are pay tiers, the company has reasonable assurance that the service is desired by some adult in the household. Although not program-specific, this is a means of controlling the distribution of whole channels at the point of sale. As discussed above in connection with the issue of privacy in the home and the unwilling adult viewer,[398] no one could claim the material was uninvited if it was supplied only through an explicitly labeled and separately priced channel devoted solely to adult programming. Since the person ordering the pay-tier will in most instances be the responsible parent or guardian in the home, such a restriction should also vindicate any governmental interests in preserving parental authority to protect children against cable indecency. Here, surely, is a constitutionally significant difference between cable and broadcast television.

The state interest in protecting children may not be fully satisfied, however, by laws that assist the parent or guardian to control what enters the home by cable. If a state may properly enact laws "designed to aid discharge of" parental "responsibility for children's well-being,"[399] the "State also has an independent interest in the well-being of its youth."[400] A state, for example, might enforce its child labor laws over the objection of parents[401] and enforce child abuse laws even against parents.[402] Like-

397. Krattenmaker & Esterow, *supra* note 250, at 632, believe that program guides and lock boxes, coupled with the decision to install (or not to install) cable at all, provide "means for parents effectively to monitor their children's viewing" and make cable "no more uniquely accessible to children" than magazines and newspapers. "[L]ock boxes," they suggest, "provide as much protection for children as placing indecent reading material in a locked drawer." *Id.* Such an assessment may be unduly sanguine about the effectiveness of lock boxes and program guides.

398. *Supra* text accompanying notes 321-53.

399. *Ginsberg*, 390 U.S. at 639. *See also, e.g.*, Bellotti v. Baird, 443 U.S. 622, 637-39 (1979); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 290, 401-02 (1923).

400. *Ginsberg*, 390 U.S. at 640. *See also, e.g.*, New York v. Ferber, 102 S.Ct. 3348, 3354-55 (1982); Globe Newspaper Co. v. Superior Court, 102 S.Ct. 2613, 2621 (1982); Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

401. Prince v. Massachusetts, 321 U.S. 158 (1944).

402. *See, e.g.*, People v. Thomas, 65 Cal. App. 3d 854, 135 Cal. Rptr. 644 (1976).

wise, a state might assert an independent interest in keeping harmful material from children even though some parents would be willing to subscribe to an adult channel and run the risk that their children (along with the neighbor's children?) might tune in. Conceivably a few might even encourage their children to watch.[403] In this respect the problem is different from protecting the unwilling adult in the privacy of his home, and the state interest might not be fully satisfied by requiring cable operators to confine their indecent material to plainly identified, separately provided, homogeneous, adult pay-tier program channels. Obviously, such an interest could be served by banning the indecent programming altogether, but this would raise squarely the *Butler* problem.[404] *Pacifica* probably points to the outer limit of state power in vindicating this interest, that is, confining such cablecasts to the late evening and early morning hours when children are least likely to be watching.[405]

C. *Can Indecency on the Cable Be Regulated?*

Can indecency on the cable be regulated by local government? Based on decisions in other media contexts, the answer almost certainly should be "yes," if the rules are carefully drawn to support governmental interests in protecting the welfare of children and the privacy of the home. The case for regulation is strengthened by cable's position as a local monopoly and its dependence upon the grant of a franchise to use a public right-of-way. In some respects the constitutional problems associated with regulating cable seem less intractable than those raised by indecency in the broadcast media. With broadcasting the only manipulable variable (other than the program material, which of course can be varied infinitely) is time of day, and that is relevant primarily to the admixture of adults and children in the audience. It mitigates the plight of the unwilling adult only to the extent that relatively few people watch television at, say 2:00 a.m., and therefore relatively few have the potential to be offended at that hour. Cable, however, has the capacity to segregate its offerings so that potentially offensive materials will be purchased only by a willing adult in each household. If non-obscene but indecent materials are restricted to late

403. Arguably parents have a right to expose their children to material they regard as having educational, artistic, or other merit, even though others would call the material indecent. Such a right may possibly weigh heavier than parents' rights to realize economic gain from the labor of their children, to educate their children through certain kinds of work experience, or to have their children labor for religious reasons—all of which might come into conflict with child labor laws. But the right to expose children to material of the parents' choice does not imply a right to obtain that material from any particular source. The right to view obscene matter in the privacy of one's home, whether for educational or other purposes, does not give anyone else the right to provide that obscene material. United States v. Reidel, 402 U.S. 351, 356 (1971). By the same reasoning, a parent's desire to expose his children to indecent movies should add nothing to the cable operator's claim of a right to exhibit them for the cable audience generally.

404. Perhaps *Butler* could be sidestepped by the Stevens/Powell argument that the material can be made available to adults through theaters, nightclubs, and video tapes. *See supra* text accompanying notes 380-81.

405. Home Box Office already limits its showing of R-rated movies, at least in some areas, to hours after 9:00 p.m. The FCC set a 10:30 p.m. limit on broadcast of the Carlin monologue. HBO might object to a 10:30 or 11:00 p.m. requirement for the exhibition of indecent material, but the protection of children arguably outweighs anyone's first amendment interest in an earlier showing.

night viewing on specially designated adult pay-tier channels, the opportunities for perverting children or offending unwary adults are reduced to a minimum; yet any adult determined to have the material in his home is permitted to do so.

Restrictions on channeling and hours of viewing impose burdens upon first amendment interests but probably not out of proportion to the governmental interests served by the restrictions. If there is no first amendment right to view sexually explicit movies at a theater located conveniently in one's own neighborhood, or within 1000 feet of some other adult theater or bookstore, there probably is no constitutional right to view such movies on one's own television at any and every hour of the day a cable operator is willing to supply them. If the speaker's point of view were the issue, the right to speak and hear in this context might well be absolute. But where the regulation, though content-related, is directed at subject matter rather than point of view, a less exacting standard may obtain. This is particularly true when the regulated subject matter is primarily the portrayal of sexual and excretory functions—a type of expression recognized by at least a plurality of the Court, and probably a majority,[406] as having only modest social value.

If a statute confining indecent programming to designated channels and late evening hours might be constitutionally acceptable, it could still pass muster only if it provided an appropriately narrow and specific definition of "indecency." Something similar to the definition of "harmful to minors" in the New York statute sustained in *Ginsberg*, modified to reflect changes in obscenity law stemming from *Miller*, would almost certainly be acceptable. Such a definition would embrace all three elements of the *Miller* test—the work, taken as a whole, appeals to the prurient interest, is patently offensive, and lacks serious literary, artistic, political, or scientific value. It would reach further than *Miller* by applying local community standards with respect to the interests of minors and what has social importance for them, rather than adults.

Pacifica suggests that a statute might reach even further to include material which contains patently offensive depictions of sex and excretion, regardless of its prurient appeal or the whole work's literary, artistic, or other social value. The Carlin monologue was hardly erotic by most standards, and arguably it had value as social satire. Yet it was subject to FCC regulation.

This seems entirely reasonable, given the Court's concern with privacy and the welfare of children in the context of radio and television communication. Manifestly, material projected into the living room by the miracle of modern electronics can be offensively vulgar to adults and degrading to children without appealing to the prurient interests of either. Moreover, the *Miller* test of artistic, literary, or other value of the work taken as a whole seems peculiarly inappropriate to television. Much television watching is intermittent, with frequent channel changing, so the viewer often sees only portions or excerpts of programs. If the program is

406. *See supra* text accompanying notes 41-46.

the unit to be taken as a whole, the viewer may not feel the impact of its total value because he has not seen it all. Furthermore, with television's special capacity to intrude upon the privacy of the home and the consciousness of impressionable youngsters, the offense stemming from an indecent episode may not be mitigated at all by the literary or artistic value found in other parts of the cablecast.

Such departures from *Miller* and *Ginsberg* might raise more serious questions in the first amendment balancing process if indecent material were to be banned altogether, particularly in view of cable's capacity to segregate programs by channel as well as by time of day. But with a carefully tailored restriction, a definition extending to specified, patently offensive representations of sex and excretion ought to be permissible.

V. CONCLUSION

This Article has drawn together relevant bodies of precedent to determine what kind of regulation of cable television might be constitutionally acceptable. As the Supreme Court has frequently said, each medium is unique, and the rationale for regulating—or not regulating—one medium may not be wholly applicable to another. Cable television is unique in its own right, but its special characteristics support no compelling argument for total immunity from government efforts to restrict the transmission of indecent material. With a precise and narrow definition of indecency, tailored to the protection of children and privacy in the home, a regulation confining such material to homogeneous, separately-purchased channels and to late night hours may well withstand a first amendment challenge.