DOCUMENT RESUME

ED 267 443 CS 209 633

AUTHOR Trauth, Denise M.; Huffman, John L.
TITLE Obscenity and Cable Television: A Regulatory Approach. Journalism Monographs. Number Ninety-Five.
INSTITUTION Association for Education in Journalism and Mass Communication.
PUB DATE Mar 86
NOTE 42p.
AVAILABLE FROM Association for Education in Journalism and Mass Communication, College of Journalism, University of South Carolina, Columbia, SC 29208 ($5.00, single issue).
PUB TYPE Viewpoints (120) -- Collected Works - Serials (022)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Adults; *Cable Television; *Censorship; Court Litigation; Freedom of Speech; Local Legislation; Moral Issues; *Obscenity; *Pornography; Programing (Broadcast); Public Opinion; Standards; *Television Research
IDENTIFIERS Federal Communications Commission

ABSTRACT

Noting that much of the recent preoccupation with pornography has centered on its delivery by the relatively new medium of adult-oriented cable television, this monograph explores the questions surrounding regulation of adult-oriented cable television and develops those elements that must be considered when forming a judicial test in this area. The monograph first cites examples of three common mechanisms for censorship. It then analyzes the ways in which Federal Communications Commission (FCC) regulation of commercial and cable broadcasting differ, and how the courts view these two media differently with regard to pornography and First Amendment freedoms. The monograph then explores the question of whether cable television is legally analogous to film distribution, discusses court cases that have served collectively to develop obscenity law as it applies to film--specifically the "Roth" test involving community standards and redeeming social value, and describes the comparatively few cases in the development of indecency-obscenity regulation of broadcasting. Finally, the monograph presents a rationale for a unique test for obscenity to be employed when dealing with adult cable television. (HTH)

JM journalism monographs

NUMBER NINETY-FIVE

March 1986

DENISE M. TRAUTH
and
JOHN L. HUFFMAN

Obscenity and Cable Television: A Regulatory Approach

An AEJMC Publication

JOURNALISM MONOGRAPHS is one of six official publications of the Association for Education in Journalism and Mass Communication. *Journalism Quarterly* (founded in 1924), *Journalism Educator* (founded in 1946), *Journalism Abstracts* (founded in 1963), *Journalism Monographs* (founded in 1966), *Journalism Directory* (founded in 1983); and *aejmc News*, the organizational newsletter.

JOURNALISM MONOGRAPHS was supported in its first two years by a gift from the University of Texas, and until 1979 by the American Association of Schools and Departments of Journalism.

Most editions of JOURNALISM MONOGRAPHS are still in print and may be ordered from the Association. Microform and photocopies are also available through University Microfilms International, 300 North Zeeb Road, Ann Arbor, Michigan 48106. Please indicate series number, author and title when ordering single copies.

Monographs appearing here are regularly abstracted and indexed in *Historical Abstracts*, *America: History and Life* and *Resources in Education*.

Association for Education in Journalism and Mass Communication

1621 College Street, University of South Carolina
Columbia, SC 29208-0951
(803) 777-2005

Jennifer McGill
Executive Director

Judy Hall
Subscription Manager

Subscription Information

Address changes must reach the Association for Education in Journalism and Mass Communication 30 days prior to the actual change of address to insure proper delivery. Copies undelivered because of address change will not be replaced. Other claims for undelivered copies must be made within four months of publication. You must give old address and Zip code as well as new address on changes. Subscriptions are nonrefundable. Subscription Rates: US individual $15, US institution $20, Foreign individual $20, and Foreign institution $25 (air mail surcharge, $12). Single issues, $5 (air mail surcharge $3).

POSTMASTER: Send address correction form to AEJMC, 1621 College St., University of South Carolina, College of Journalism, Columbia, SC 29208-0251

JOURNALISM MONOGRAPHS is published serially by AEJMC in Columbia, SC 29208-0251.

JM journalism monographs

NUMBER NINETY-FIVE • March 1986

Manuscripts and other editorial correspondence should be addressed to the editor, School of Journalism, Southern Illinois University, Carbondale, Illinois 62901.

TO CONTRIBUTORS

Submissions to *Journalism Monographs* should include an original and two copies, double-spaced throughout (including extracts, references and notes).

For style, consult the AEJMC Publication Manual (available from the Business Office at $2.50 per copy). Footnotes should be assembled at the end, not on the page. If a reference style is preferred, follow the style in the Manual. Tables and figures should be on separate pages, not in the text.

Authors are expected to be candid with the editor in matters pertaining to the origins and previous appearances of manuscripts. It is policy not to publish a long version of a study already published in a shorter version elsewhere.

DENISE M. TRAUTH
and
JOHN L. HUFFMAN

Obscenity and Cable Television: A Regulatory Approach

Accepted for Publication August 1985

DENISE M. TRAUTH is Associate Professor of Radio-Television-Film and Chair of the Department of Radio-Television-Film at Bowling Green State University in Bowling Green, Ohio. She received her Ph.D. from the University of Iowa School of Journalism.

JOHN L. HUFFMAN is Professor of Journalism, Chair of the Journalism Department, and Director of the School of Mass Communication at Bowling Green State University in Bowling Green, Ohio. He received his Ph.D from the University of Iowa School of Journalism.

PORNOGRAPHY HAS BEEN A PREOCCUPATION of western civilization from almost the beginning of its recorded history. From Plato through Thomas Aquinas to modern-day reformers, guardians of society's morals and spiritual well being have raised their voices against that which might "deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall,"[1] materials that are perceived to offer "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," or "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[2]

Much of the recent preoccupation with pornography has centered on its delivery by a relatively new means — adult-oriented cable, i.e., cable television channels devoted partially or exclusively to sexually explicit programming. The reason for the recent attention is clear. Although adult cable services have not yet reached the promise of early programmers who predicted that from 50 to 90 percent of basic cable subscribers were willing to pay an extra monthly charge for access to televised erotica, the services are making an impact. It is the opinion of some experts that cable television will take the lead over movie theaters and videocassettes for sexually oriented programming.[3] And the market itself is growing. A bigger market added to a bigger market share will lead to improved quality, argue the producers. This, in turn, will lead to even wider audiences and more money for production.[4]

Juxtaposed with this growth in the industry is the surge of forces determined to keep adult cable programming out of their communities. Former Playboy Channel President Paul Klein has said that his service

had "trouble with about 85 percent of the city councils it approaches concerning possible carriage on local systems."[5] Getting accepted by the local cable company may just be the beginning of the struggle, as cases in Cincinnati and Gainsville have pointed out.

In May 1983 Warner Amex Cable Communications began distributing the Playboy Channel to homes of subscribers in Cincinnati who paid up to $15.95 per month to receive it. Shortly thereafter, the head of Cincinnati's vice squad gave tapes of two films shown on the channel to the Hamilton County prosecutor, suggesting that the films might violate Ohio obscenity law. After a review of the tapes by a grand jury, Amex was indicted, charged with two counts of possessing obscenity and two counts of pandering.

Rather than face a trial in Hamilton County, Warner Amex reached an out-of-court settlement in which it agreed not to distribute "adult oriented sexually explicit movies. . .which are unrated and if rated would receive an X-rating." In addition, the company agreed not to program X-rated films.[6]

A different approach was used in Gainesville, Florida, to eliminate adult programming in that city. For five months in 1981, 1,200 subscribers of Cox Cable Communications' Gainsville Cable Television had an opportunity to watch R-rated movies (X-rated films were never shown) during the late night and early morning hours via Escapade, the forerunner of the Playboy Channel. Almost immediately after commencement of the service, demands for its withdrawal began to come from various parts of the community, most notably from the chairman of the Evangelical Coalition of Gainesville, Rev. Mike Braun.

Five months after its inception in Gainesville, Escapade was discontinued, ostensibly because the number of subscribers continued to be a minority of cable homes in the city. Privately, however, Cox Cable admitted that the early denunciation of the service by the religious group gave people a misconception of the service that promotional efforts could not overcome.[7]

A city in Utah tried a different approach and was less successful. In 1982 the officials of Roy City, Utah, passed an ordinance prohibiting dissemination over cable of "indecent" programming. The penalty for violation of the ordinance was revocation of the cable company's franchise. The officials were attempting to eliminate the R-rated films frequently available in Roy City via pay services such as Home Box Office and Showtime. A federal district judge hearing an appeal of the ordinance found it to be constitutionally infirm because of overbreadth: the ordinance made no distinction between films that were and were not obscene.[8]

These three attempts to limit the distribution of adult pay cable programming represent three common mechanisms of censorship: out-of-court intimidation by citizens' groups (Gainesville); suits filed against particular materials (Cincinnati); and laws passed to limit dissemination of a class of materials (Roy City). However varied these mechanisms may be, they all point to the same questions: is adult cable programming

susceptible to regulation? Can material that would not be considered obscene were it shown in a movie theater be prohibited from cable distribution? And, if this sort of material can be regulated, what form would that regulation take?

The out-of-court approach used in Cincinnati and Gainesville is not a satisfactory long-term solution for an aspect of American life that touches upon a constitutionally protected right. On the other hand, most ordinances and laws that have been passed by cities and states have been held invalid for the same reasons that Roy City's regulation fell. However, would a more narrowly tailored statute survive judicial review?

This monograph explores the questions surrounding regulation of adult-oriented cable television and develops those elements that must be considered in formulating a judicial test in this area.

Regulation of Broadcast Television and Cable Television

Since its inception in the early part of this century, the American broadcasting industry has been more susceptible to government regulation and less protected by the First Amendment to the Constitution than any of the other media industries. On a number of occasions, the U.S. Supreme Court has explained why this is so. "Although broadcasting is clearly a medium affected by a First Amendment interest," said the Court in *Red Lion*[9] "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[10]

The reasons for this selective approach have also been well articulated by the Court. The most prevalent rationale — that of scarcity — was first advanced in the 1943 case *NBC v. United States:*[11]

> 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.[12]

In subsequent years, however, advancing technology obviated to some degree any rationale for broadcast regulation based solely on "scarcity." The Supreme Court recognized that technological advances such as cable television were harbingers of a new era in which the scarcity rationale would be logically infirm; therefore, it introduced a new line of reasoning to justify regulation of broadcasting. There emerged in 1969 a "preferred position" rationale: broadcasters should continue to be regulated because they had attained positions of prominence by government intervention (e.g. conferral of a license), and thus the government was dutybound to monitor and, if necessary, control their performance.[13] In 1973 the Court mentioned for the first time a rationale based on the concept of the "captive audience."[14] The Supreme Court's most recent commentary on the reason for broadcasting regulation in *FCC v. Pacifica Foundation*[15] indicated that broadcasting war-

ranted regulation for yet another reason: the pervasiveness of the electronic media coupled with their unique accessibility to children.

Thus, it is clear that broadcast television can be regulated in ways that would be wholly inappropriate if applied to media such as newspapers or film. This discussion, however, leaves one important question unanswered: how does cable television compare to broadcast television for purposes of regulation?

The answer to this question requires an analysis of the current permissible scope of cable regulation, as articulated by the courts. Such an analysis must begin with the 1977 case *Home Box Office v. FCC.*[16] In this case, the District of Columbia Circuit Court of Appeals held that the Federal Communications Commission, in issuing regulations limiting the types of programming available to cablecasters, had exceeded its jurisdiction.

The rationale that the FCC advanced when it issued pay cable programming rules in 1975, which restricted sharply the ability of cablecasters to present feature film and sports programming if a separate charge was made for this material, included a two-part argument. First, revenues generated by unregulated cable television would allow cable operators to bid away the best programs from over-the-air broadcasters, thereby reducing the quality of conventional television. Second, the FCC argued that in this scenario, people who did not have access to cable television for economic or technological reasons would have their viewing options severely limited.

In reversing the FCC, the appellate court looked to the 1968 Supreme Court decision in *United States v. Southwestern Cable,*[17] which held that the FCC could regulate cable television, but only in instances in which the commission was pursuing "long-established regulatory goals in the field of television broadcasting."[18]

Expanding upon this point and adding that cablecasters are not to be regulated as common carriers, the D.C. Circuit Court said:

> [It] has been the consistent position of the commission itself that cablecasters, like broadcasters, are not to be regulated as common carriers. . . .We seriously doubt that the Communications Act could be construed to give the commission "regulatory rules" over cablecasting that it did not have over broadcasting.[19]

The court then articulated its holding:

> [We] do require that at a minimum the commission, in developing its cable television regulations, demonstrate that the objectives to be achieved by regulating cable television are also objectives for which the commission could legitimately regulate the broadcast media.[20]

Having established that the pay cable rules imposed programming restrictions on cable television that the FCC would not impose on conventional broadcasting, the court also noted that in cases where the First Amendment was involved, an additonal, more stringent test would have to be imposed.

Quoting *Red Lion* that "differences in the characteristics of the new media" warrant "differences in the First Amendment standards applying to them," the court declared that the conventional justification for FCC regulation of broadcast television — scarcity as defined in the 1943 Supreme Court case *National Broadcasting Company v. United States*[21] — cannot be applied to cable television:

> The First Amendment theory espoused in *National Broadcasting Co.* and reaffirmed in *Red Lion Broadcasting Co.* cannot be directly applied to cable television since an essential precondition of that theory — physical interference with scarcity requiring an umpiring role for government — is absent.[22]

In addition, the court disagreed with the position that scarcity resulting from lack of economic resources is equal to the physical scarcity of *National Broadcasting Co.*; in fact, the court took this opportunity to state that event if such economic scarcity did exist, it would not allow the type of regulation at issue in *Home Box Office:*

> In any case, scarcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press, see *Miami Herald Publishing Co. v. Tornillo*. . . and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point.[23]

The court was quick to point out that the absence in cable television of the physical restraints of the electromagnetic spectrum did not automatically lead to the conclusion that no regulation of cable television would be valid. Instead, the important question to the court was *why* the government was regulating. Media regulations, according to the court, fall into one of two categories. The first includes those intended to curtail expression either *directly* by banning speech because of a harm thought to stem from its effect on its intended audience or *indirectly* by favoring certain classes of speakers over others. The first category includes attempts to regulate content. The second category includes regulations based on a government interest unrelated to the suppression of free expression. This category includes regulations which have no impact or only an incidental impact on content.

In *Home Box Office*, the court found that the regulation at issue had no impact upon content and thus used the three-part test established by the Supreme Court in *United States v. O'Brien*:[24] (1) the regulation must further an important or substantial government interest; (2) the governmental interest must be unrelated to the suppression of free expression; and (3) the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest. The court applied this test and found the pay cable rules invalid.

However, more important to the present analysis was the statement by the court in *Home Box Office* that if a regulation does have an impact upon content, then the *O'Brien* test is not appropriate. Rather, the court says "regulations impacting content can be justified only under

categorization doctrines such as 'obscenity,' 'fighting words,' and 'clear and present danger' " — areas traditionally considered outside the ambit of the First Amendment.[25]

Because of the facts of the case and the issues presented for review, *Home Box Office* did not reach the question of how courts are to deal with regulations that *do* have an impact upon content but do not fall into the category of unprotected speech such as obscenity. For this one must turn to the "strict scrutiny" test, developed in the 1960s by the Warren Supreme Court to deal with rights considered "fundamental" to American citizens — rights directly protected in the Constitution or emanating from one of these rights.[26]

Under this test, whenever a fundamental right, such as that guaranteed by the First Amendment, is involved, a higher standard than the one articulated in *O'Brien* must be used. This stricter standard has three components: first, it requires that in order to survive review, the regulation or law must further a compelling state interest. Second, it must be less restrictive of federally protected rights than any alternative means of promoting that interest, i.e., it must be the best and narrowest method available to the government. Third, in order to survive strict scrutiny review, the government must demonstrate that the relationship between the means used to achieve its goals and the goal of the regulation is precise; in other words, the legislation must be neither overinclusive nor underinclusive.[27]

In summary, this analysis of *Home Box Office* yields several notions important in the present context. The case indicates that the Federal Communications Commission does indeed have the authority to regulate cable television, but only in conformance with goals it would pursue in its regulation of conventional over-the-air television. In its statement that cablecasters are not to be viewed as common carriers, the court is emphasizing the twin facts that the FCC may not censor cablecasters and that First Amendment protection does extend to cable television programming.

Undoubtedly, the boldest statement contained in the case is the court's contention that for First Amendment purposes cablecasting is *not* analogous to broadcasting because the physical scarcity of conventional television does not exist in cable. The court, in fact, prefers to compare cable television to newspapers in this regard.

Finally, in this case, the appellate court indicates two different tests of the validity of a given regulation based on whether or not the regulation has an impact on content. If there is no impact upon content, the *O'Brien* test is to be used. If there is an impact, *O'Brien* is inappropriate and, thus, strict scrutiny applying the "categorization doctrines" must be employed.

The FCC's jurisdiction over cable television was recently addressed by the U.S. Supreme Court in a 1984 case, *Capital Cities Cable v. Crisp*.[28] This case did not deal with First Amendment issues; essentially, it involved a dispute between the state of Oklahoma and the FCC over the jurisdiction of cable television. The Supreme Court upheld the authority

of the FCC to regulate cable television, noting that:

> Over the past 20 years, pursuant to its delegated authority under the Communications Act, the FCC has unambiguously expressed its intent to pre-empt any state or local regulation of this entire array of signals carried by cable television systems.[29]

The Court saw the context of the FCC's authority as being its stated aim of "ensuring widespread availability of diverse cable services throughout the United States."[30] The Court decided the jurisdictional dispute in the FCC's favor, noting that the regulatory scheme developed by the FCC over the years for cable television reflected "an important and substantial federal interest in ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers."[31] Since *Capital Cities Cable* did not address First Amendment issues, the reasoning of the Supreme Court is not available in this area. However, two recent federal courts of appeals opinions do give some guidance on the First Amendment protection afforded cable television. The first involves a case in Los Angeles, the second in Miami.

On March 1, 1985, the Ninth Circuit Court of Appeals handed down a decision that, if sustained by the U.S. Supreme Court, could have ramifications for many aspects of cable television, particularly in the area of content.

Preferred Communications, Inc. v. City of Los Angeles[32] confronted the issue, "Can the City, consistent with the First Amendment, limit access, by means of an auction process to a given region of the city to a single cable television company when public utility facilities in that region. . .are physically capable of accommodating more than one system?"[33]

Preferred Communications, Inc., (PCI) had its request for a franchise in Los Angeles refused because it did not participate in the city's auctioning process. Under this process, companies wishing to vie for a franchise in Los Angeles had to submit to a variety of conditions involving paying fees to the city, leaving certain business decisions to the city, and providing mandatory access and leased channels. Following submission of bids from companies willing to submit to these conditions, the city chose the "best" operator for each area of Los Angeles; it awarded only one franchise in each region.

PCI contended that its right to construct a cable television system and disseminate programming should not be conditioned upon an auction procedure. It maintained that Los Angeles may not choose which cable provider may use the city's facilities and may not condition that use on requirements such as the ones at issue in this case. Based on this position, PCI ignored the Los Angeles franchising process and assigned itself the south-central section of the city. When utilities companies refused to hang PCI cable without a franchise it took the city to court.

Los Angeles argued that although the physical capacity to accomodate more than one cable television system existed in the city, the physical

scarcity of available space on public utility structures, the economic scarcity of the cable medium, and the disruptive effect that installing and maintaining a cable system have on a city justified its efforts to restrict access to its facilities to a single cable television company. The district judge saw no violation of the law or the Constitution and discharged the case without a trial.

The court of appeals did not agree and sent the case back for a trial. In dismissing the contentions of Los Angeles, the court rejected the city's argument that "the standards applicable to government regulation of broadcasting also govern the regulation of cable."[34] Pointing to the significant differences between the two media that have "First Amendment consequences,"[35] the court stressed that physical scarcity, the rationale that underlies government intrusion into the affairs of broadcasters, does not exist in cable television. In this context, the court stated:

> We cannot accept the City's contention that, because the available space on such facilities is to an undetermined extent physically limited, the First Amendment standards applicable to the regulation of broadcasting permit it to restrict access and allow only a single cable provider to install and operate a cable television system.[36]

Preferred Communications, which is being hailed as a landmark decision, is properly read as a First Amendment victory for cable television. The decision has been appealed for rehearing before the entire Ninth Circuit Court. Los Angeles has indicated that it will pursue the appeal all the way to the U.S. Supreme Court, if necessary.[37]

In another case, litigated in March 1985, involving First Amendment protection of cable television, a panel of the Eleventh Circuit Court of Appeals affirmed a lower court decision that a Miami ordinance designed to prohibit cable systems from transmitting "indecent material" was a violation of the Constitution. The Miami ordinance, passed as a reaction to Miami Mayor Maurice Ferre's inadvertent viewing of Midnight Blue, a public access program run on Manhattan (New York) Cable, had attempted to apply the broadcasting standard of indecency to cable television. The court of appeals rejected that approach.[38]

What the Miami case particularly demonstrates, in addition to the fact that yet another city is trying to limit sexually explicit material on cable television, is that there is a clear difference between conventional broadcasting and cable television when it comes to content regulation.

Visual Adult Programming

There are three media that are most often involved in visual adult programming: conventional over-the-air television, cable television, and film theaters.[39] As noted above in regard to cable television, the appellate court in *Home Box Office* relied on the *Red Lion* theory that "differences in characteristics of the new media justify differences in the First Amendment standards applied to them" to argue that the tradi-

tional justification for the regulation of conventional broadcasting — scarcity — does not justify regulation of cable television. Implicit in the court's argument is the notion that although cable can be regulated by the FCC consistent with "long-established regulatory goals," because of the lack of scarcity, it cannot be regulated quite as stringently as broadcast television. On this point, the court explicitly states that the very rules it found invalid in *Home Box Office* are valid when applied to broadcast television.[40] Thus, the rules' infirmity in *Home Box Office* stems wholly from the differences between conventional and cable television.

The fact that the court goes on to link pay cable to newspapers as examples of media that are not scarce and cites *Miami Herald v. Tornillo*[41] underscores this position. Also, the fact that *HBO* requires that the protection against prior restraint that the Supreme Court developed for film exhibition in *Freedman v. Maryland*[42] be applied to pay cable is an additional illustration of the wide chasm that the appellate court saw between coventional and cable television.

This same distinction between conventional and cable television was explored more recently by the federal district court judge in the 1982 Roy City, Utah, case. In *Community Television of Utah, Inc., v. Roy City*,[43] the judge found the Roy City ordinance barring "indecent" programs from cable television distribution constitutionally invalid because of its overbreadth.

In its defense, Roy City principally relied on the rationale found in the Supreme Court's decision in *FCC v. Pacifica Foundation*.[44] However, the judge found the reliance of Roy City on *Pacifica* misplaced because he viewed the characteristics of cable and broadcast television as dissimilar in several important respects. To this end he developed the comparison noted in Table 1.[45]

TABLE 1
Dissimilar Characteristics of Cable and Broadcast Television

Cable	*Broadcast*
1. User needs to subscribe.	1. User need not subscribe.
2. User holds power to cancel subscriptions.	2. User holds no power to cancel. May complain to FCC, station, network or sponsor.
3. Limited advertising.	3. Extensive advertising.
4. Transmittal through wires.	4. Transmittal through public airways.
5. User receives signal on private cable.	5. User appropriates signal from the public airwaves.
6. User pays a fee.	6. User does not pay a fee.
7 User receives preview of coming attractions.	7. 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 or choices.	8. Neither distributor nor distributee may add services or signals or choices.
9. Wires are privately owned.	9. Airwaves are not privately owned but are publicly controlled.

It is apparent from *HBO* and *Roy City* that broadcast television and cable television are viewed quite differently by the courts. A logical ques-

tion, then, is how film is viewed *vis-a-vis* broadcasting and cable television.

In 1948 the U.S. Supreme Court for the first time suggested that film had constitutional protection. In that year, the Court heard a case involving a Justice Department-initiated suit against the major film production companies for violation of the Sherman Antitrust Act, *The Paramount Case*.[46] Almost as an aside in *Paramount*, the Court noted, "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."[47] However, since the issue being litigated involved monopoly in the motion picture industry and not First Amendment protection, the Court's ruling did not extend constitutional protection to film. That had to wait until 1952.

In that year the Supreme Court granted *certiorari* for the first time since 1915 to a case involving film censorhip. In this case, *Burstyn, Inc., v. Wilson*,[48] the Court included film in the constitiutional protection afforded other media. The unanimous Court noted that, "the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment . . . secures to any form of 'speech' or 'the press'"[49]

Although the Court answered this question affirmatively and struck down the New York law that permitted the ban, it went on to note:

> To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. . . .Nor does it follow that motion pictures are necessarily subject to precise rules governing any other particular method of expression.[50]

Based upon the holding of *Burstyn*, during the next nine years in a series of six decisions (five of which were *per curiam*) the Supreme Court struck down six statutes authorizing censhorship.[51] However, the important underlying issue that had been smoldering since *Burstyn* — the constitutionality of prior restraint in the form of film licensing — was not resolved in any of these cases. That had to wait until 1961 when the Supreme Court heard *Times Film Corp. v. Chicago*.[52]

This case gave the Court the opportunity to confront a question "never having been specifically decided by this Court":[53] whether First Amendment protection of motion pictures includes absolute freedom to exhibit a film at least once. The negative answer, coming in a 5 - 4 ruling was based on two themes reminiscent of *Burstyn*: that films may have a "capacity for evil,"[54] and that First Amendment protection of film is not absolute.[55]

Although *Times Film* did present the Court with an issue it had not previously adjudicated, the decision did not set a clear precedent for two reasons. First, the facts of the case were highly abstract, leading the lower courts to disregard the decision for lack of a justiciable controver-

sy. Second, the justices were badly divided. Thus, even though *Times Film* held that film licensing was not a violation of the First Amendment *per se*, it said little about the constitutionality of any particular system of licensing, and signaled even less about directions the Court might take in the future.

The articulation of a set of principles governing licensing systems was accomplished in the 1965 case *Freedman v. Maryland*.[56] Here Justice Brennan delivered the opinion of the Court, which held that the First Amendment was violated by a Maryland motion picture censorship statute. That law required film exhibitors to submit movies to a state board of censors for the board's approval *before* any showing would be allowed. The law also placed the burden of seeking judicial review of any board decision upon the exhibitor.

The appellant challenged the Maryland law by exhibiting a film, *Revenge at Daybreak*, at his Baltimore theater without first getting a clearance from the Maryland board. Maryland conceded that the picture was by no stretch of the imagination pornographic, but Freedman was convicted because he did not apply for the required license.

Essentially, the reasoning of the Court revolved around the concept of prior restraint. The Court repeated the oft-cited principle of *Bantam Books, Inc. v. Sullivan*[57] that "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." However, the Court took cognizance of the legal fact that while prior restraints were normally constitutionally repugnant, *Near v. Minnesota*[58] and subsequent cases had demonstrated that prior restraints and censorship were permissible when dealing with legally defined pornographic material.

The Court noted that any censorhip system presented special dangers for constitutionally protected speech, in that such speech might be suppressed along with unprotected speech. Rather than holding that censorship systems were unconstitutional, the Court decided to shift the burden of proving whether a particular film is protected or unprotected expression (legally obscene, that is) from the exhibitor of the film to the censorhip board. In addition, the Court held that only a judicial determination in adversary proceeding would suffice to prove that a film was legally obscene.

After *Freedman v. Maryland*, a censorship board, in order to be "legal," had to operate under certain set rules. Within a specified "brief period," the censor was required to either issue a license for a particular film or else go to court to restrain showing of the film. The Court also mandated that any censorship law had to provide for a "prompt final judicial decision" as to whether or not the film was obscene. The Court specified in *Freedman* that the emphasis on speed was crucial, since without such an emphasis exhibitor and distributors would not be likely to challenge the censor's decision because of a reluctance to engage in protracted litigation over a single film.

Freedman, with its emphasis on procedural due process, remains the standard against which censorship boards are to be compared. And it

was to this standard that the appellate court in *Home Box Office* called attention when it noted that the FCC's pay cable programming rules and their provisions for a waiver were "fundamentally at odds with the standards in *Freedman v. Maryland.*"[59]

Is Cable Analogous to Film?

Should the conclusion be drawn, then, that cable television is legally analogous to film distribution and that programming distributed via cable should be regulated in the way in which theatrical film is? A recent cable-deregulation bill passed by the U.S. Senate would explicitly subject cable television to the test of obscenity developed by the Supreme Court in *Miller v. California,*[60] and thus apply to cable the same obscenity criteria that now apply to film. However, that procedure may serve as a disservice to both film and cable audiences by leading to a single standard for two media with different consumption patterns and different regulatory histories.

At this juncture it is useful to compare cable services with theatrical film and analyze the differences and similarities. With regard to consumption patterns, the most obvious difference between the media is place of viewing: cable is viewed in the home and traditionally film is not. From this fact flow two other important differences. First, it is possible for a person who is changing the dial or checking available programs to be exposed inadvertently to a portion of a cable program; exposure to film, by contrast, requires an affirmative effort on the part of the viewer. Second, a child can be one of the viewers inadvertently exposed to cable; again, by contrast, if children are in the audience for film, they are not there by chance. Although viewers of cable do subscribe to the service, once they are hooked up, they receive all of the programs in the service. Film consumption, by contrast, is a pay-as-you-go affair with the viewer making an exposure choice on a film-by-film basis.

A perhaps more pertinent difference between these two media lies in their regulatory histories. Cable is distributed via a technology that has been regulated since its inception. And although *Home Box Office* did hold certain rules invalid, it did not remove cable form FCC jurisdiction or form the public interest standard, as was recently emphasized, in *Capitol Cities Cable v. Crisp.* By contrast, film, as demonstrated above, has had First Amendment protection for over thirty years and has never been held to a touchstone such as the public interest standard.[61]

As was noted above, in *Red Lion* the U.S. Supreme Court articulated the notion that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." If one uses this regulatory approach and keeps in mind the differences between cable and theatrical film, then what emerges is the conclusion that the norms applied to each ought to be different.

The conclusion that obscenity standards for theatrical film and cable ought to be different is buttressed by evidence from yet another source: *The 1970 Report of the Presidential Commission on Obscenity and Por-*

nography.[62] This document, more commonly called the "Lockhart Report," contained the Presidential Commission's comprehensive and systematic review of social scientific and legal studies addressing the possible connection between consumption of obscenity and criminal conduct, sexual deviance and emotional disturbance. The commission found no connection and called for the repeal of all local, state and federal legislation aimed at obscenity. A very narrow category of exceptions to this repeal was outlined in the *Report*. Two are of particular interest in the present context. Statutes protecting children were supported on the grounds that insufficient evidence exists on the effects of exposure of young people to obscene material. Statutes protecting adults against unwanted assaults on their personal privacy were also supported.

The Lockhart Report, in the midst of what has to be termed a very liberal approach to regulation of obscenity, does then identify two situations in which obscenity regulation ought to exist: when children are in the audience, and/or when the personal privacy of adults is inadvertently "assaulted" by obscene expression. These two conditions do attach to viewing of cable and do not attach to the consumption of theatrical film.

Cable television emerges as a medium that is strictly analogous neither to conventional television nor to theatrical film, at least for purposes of regulating adult programming. However, since it does have a symbiotic relationship from legal and historical perspectives with both media, it should be viewed as a type of hybrid and regulated as such. What is needed, then, is a new test — one that will regulate cable neither as conventional television nor as theatrical film, but as a new medium.

Such a test can be constructed only after taking into account the development of obscenity law in this country, particularly as it applies to film, to determine what elements have traditionally been associated with control of pornography in film. A decision must then be made regarding which, if any, of these elements are appropriate for a test of obscenity on cable. A similar examination of indecency-obscenity regulation as it applies to broadcasting must be made, again with a determination as to what portions of the regulation are appropriate for a test of obscenity on pay cable.

Development of Obscenity Law

The first obscenity case in the common law occurred in 1727 when the tract "Venus in the Cloister or the Nun in Her Smock" was held by a British court to place the general morality in jeopardy.[63] Continuing that tradition for the next two and a half centuries, judges and lawmakers have found it difficult to refrain from making judgments regarding morality when dealing with material alleged to be obscene.

The first obscenity case involving a book in the U.S. arose in Massachusetts in 1821. The book, popularly known as *Fanny Hill* (also entitled *Memoirs of a Woman of Pleasure*), detailed the life of a prostitute, but did not contain a single coarse word or incident. The publisher of the book, Peter Homes, was convicted of being a "scan-

dalous and evil disposed person" who intended to "debauch and corrupt the morals as well as youth of other good citizens."[64]

The concept underlying the action of the judges in both these cases was that people could be corrupted sexually by words and pictures. Soon various legislatures (Vermont, initially, followed immediately by Connecticut and Massachusetts) began to join the judicial branch in outlawing obscenity. In the first national statute in the area, Congress in 1842 enacted a law forbidding the importation of obscene pictures into the U.S.

In 1857 England passed its first anti-obscenity law when it made criminal the sale and distribution of obscene libel. Ten years later the landmark *Hicklin* case came before the British bench. Here the court announced a test of obscenity that was to prevail on both sides of the Atlantic for over seventy-five years: "Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall."[65]

The development of American obscenity law took a giant step forward in 1865 as the result of the actions of a storekeeper named Anthony Comstock, who began a vigorous campaign against sex in all of its manifestations. Congress had already passed a law declaring that mailing obscene publications was a criminal offense, but Comtock succeeded in getting a law passed that forbade use of the mails for any publication, instrument, drug, medicine, or any other article remotely connected with sex and imposing an initial fine of up to $5,000 and an initial term of imprisonment of up to five years for violators.

Since *Hicklin* was the prevailing test at this time, the Comstock Act was held to be constitutional in a number of challenges.[66] However, the validity of *Hicklin* was gradually brought into question, and in 1934 a new test was upheld in a case involving James Joyce's *Ulysses*.[67] The new test contrasted with the *Hicklin* test in its examination of three elements: (1) dominant effects of the book as a whole (rather than isolated passages, as in *Hicklin*); (2) the impact on the average reader (rather than on those most susceptible to corruption); and (3) the intent of the author (which was not examined under *Hicklin*).

The *Ulysses* test prevailed in this country for twenty years, until when in 1957 the U.S. Supreme Court articulated a revision, known as the *Roth* test, which, although it contained some of the elements of the former test, was considerably more liberal: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[68] *Roth* is important in the context of the present analysis for yet another reason: in this case for the first time the Court held that "obscenity is not within the area of constitutionally protected speech or press."[69]

Although the ambiguities raised by the *Roth* test were legion (How are contemporary community standards assessed? Who is the average person? How is prurient interest operationally defined?), it did trigger the most liberal period of obscenity law in the United States.

Under *Roth*, a Michigan statute fell that had disallowed distribution of material to adults "containing obscene, immoral, lewd or lascivious language tending to incite *minors* to violent or depraved or immoral acts (or) manifestly tending to the corruption of the morals of youth." Wrote Justice Frankfurter, "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."[70] Thus a standard began to evolve — it would reach maturity in a 1968 case — that addressed the fact that differences exist between materials suitable for children and those suitable for adults.

During the 1957 term the Supreme Court also applied the *Roth* test to film and revised a U.S. Court of Appeals decision that had held the French motion picture *The Game of Love* obscene.[71]

Constitutional protection of motion pictures was extended once again in 1959 when the Supreme Court reversed the conviction of the distributor of a film and dealt for the first time with "ideological obscenity."[72] Under provisions of the New York Education Law, which required the denial of an exhibition license to a film when "its subject matter is adultery presented as being right and desirable," a license was denied to *Lady Chatterly's Lover* because it was determined that the film "alluringly portrays adultery as proper behavior."

Reversing the conviction, Justice Stewart noted that what New York had done was to prevent the exhibition of a motion picture because that picture advocates an idea, in this case, that adultery may be proper behavior.

> Yet the First Amendment's guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.
>
> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to moral standards, the relative precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority.[73]

Again in 1964, the Supreme Court extended the constitutional protection for film. *Jacobellis v. State of Ohio*[74] grew out of an Ohio conviction of an art theater manager for screening the French film *The Lovers*, which portrays a young woman bored with her life and her marriage who abandons her husband and family for a man with whom she has suddenly fallen in love. Ohio's objection to the film was based almost entirely upon one explicit love scene in the last reel of the film.[75]

Finding *The Lovers* to be not obscene, the Court articulated yet another expansion of the *Roth* test: a work cannot be proscribed as obscene unless it is "utterly without redeeming social importance." Thus, material that deals with sex in a manner that advocates ideas "or has literary or scientific value or any other form of social importance, may not be branded as obscenity and denied constitutional protection."[76]

The Court went on to clarify another element in the *Roth* test: the definition of "community." Writing for the majority, Justice Brennan noted that the standards to be applied in a test of obscenity should be those of a *national* community and not of a local one. Showing a sensitivity to the exigencies of national distribution and to the "chilling effect" of local censorship, Brennan pointed out that "[it] would be a hardy person who would sell a book or exhibit a film anywhere in the land after this court had sustained the judgment of one 'community' holding it to be outside the constitutional protection."[77]

Justice Brennan then turned to another aspect of the case important in the present context: the potential presence of children in the audience. Here the majority recognized the interest in preventing dissemination of material deemed harmful to children, but argued that this does not justify its total suppression.

> Since the present conviction was based upon exhibition of the film to the public at large and not upon its exhibition to children, the judgment must be reviewed under the strict standard applicable in determining the scope of the expression that is protected by the Constitution.[78]

The liberalization of obscenity law reached a climax in 1966 when the book *Fanny Hill* was back in court. In this case *A Book Named "John Clelland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts*,[79] the Supreme Court revised the *Roth* test once again, this time to stipulate that a work must be found to be "utterly without redeeming social value" in order to be judged obscene.

On the same day that the Court handed down its decision in *Memoirs*, it promulgated another opinion that seemed to add a new but less liberal element to the test of obscenity: the conduct of the producer/distributor of material. In *Ginzburg v. U.S.*,[80] Justice Brennan, writing for the majority, explained that although Ginzburg's publications — *Eros*, a glossy, hardcover magazine of expensive format; *Liaison* a bi-weekly newsletter; and *The Housewife's Handbook on Selective Promiscuity*, a short book — were not obscene under the *Roth-Memoirs* test, Ginzburg promoted them as if they were obscene. Thus they lacked "social value." (Promotional techniques included seeking mailing privileges from Intercourse and Blue Ball, Pennsylvania; and mailing circulars that "boasted that the publishers would take full advantage of what they regarded as an unrestricted license allowed by law in the expression of sex and sexual matters."[81])

The *Ginzburg* decision is important in the present context because at a minimum it suggested that (1) "prurient interest" was a critical component of obscenity, and (2) the act of pandering — judged alone and not in conjunction with the content of the publication — could render material obscene. *Ginzburg*'s pandering doctrine "relies on the defendants characterization of the material: if the defendant calls the material obscene and seeks to sell it on that basis then it is held that the material appeals to the prurient interest and lacks social value."[82]

In a 1967 case, *Redrup v. New York*,[83] the Supreme Court provided a

tidy summary of the test of obscenity it had been evolving since *Roth* in 1957. The *Roth-Memoirs* test required that in order for material to be considered obscene, all three of the following must be present: (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) the material is utterly without redeeming social value.[84] Although severely undermined in *Ginzburg*, this test lasted until 1973 when the Supreme Court, under the leadership of Chief Justice Burger, in *Miller v. California*,[85] rejected the *Roth-Memoirs* "utterly without redeeming social value" notion and articulated a new standard.

Two final cases that were litigated under the *Roth-Memoirs* test should be noted because they deal with aspects of obscenity in the present context.

In the 1969 case *Stanley v. Georgia*,[86] the U.S. Supreme Court reversed the conviction of a man found to possess obscene 8 mm. films in his home. A unanimous Court noted that if the First Amendment means anything, it means that a State has no business telling a man, sitting in his own house, what books he may read or what films he may watch."[87] In 1971 the Supreme Court seemed to abandon this priniciple when in *U.S. v. Reidel* [88] it upheld the constitutionality of a federal obscenity statute that prohibited the knowing use of the mails for the distribution of obscene material to willing recipients.

When *Stanley* and *Reidel* are read in conjunction they seem to contradict each other: *Stanley* protects the right to view materials in the home while *Reidel* prevents delivery of those very materials. However, an important distinction between the cases should be noted. *Stanley* deals not with the First Amendment right to receive information but with privacy in the home; *Reidel* deals not with privacy but rather with distribution of obscene material. Thus, once materials reach the home they are protected not by virtue of the First Amendment but because they are located in a constitutionally protected zone of privacy; the distribution system for those materials, however, receives no such protection.[89]

In 1973, a more conservative U.S. Supreme Court decisively rejected the *Roth-Memoirs* test in the landmark *Miller v. California* case,[90] taking the position that to prove material was utterly without redeeming social value imposed a "burden virtually impossible to discharge under our criminal standards of proof," and that "no Member of the Court today supports the *Memoirs* formulation."[91] The new Burger Court felt that there was a need in U.S. society for regulation of pornography. Further, the Court felt that the *Roth-Memoirs* standard had effectively allowed pornographers virtual free rein to produce and sell their wares, as long as they neither "pandered" their wares as pornographic nor sold their wares to children.

The *Miller* decision changed *Roth-Memoirs* in at least three major ways. First, *Miller* threw out the idea from *Jacobellis* that there could be

such a thing as a "national" standard for pornography. Justice Burger stated his belief that "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation."[92] Instead, after *Miller*, the standard imposed by the hypothetical "average person" examining a suspected pornographic work to see if it appealed to the "prurient interest" was to be a local or state standard. As Justice Burger put it, "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."[93]

Secondly, the *Miller* decision imposed the requirement that state pornography laws specifically define the patently offensive depiction of sexual conduct that the individual states desired to make illegal. The Court suggested the following "few plain examples of what a state statute could define for regulation:"

> (a) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals.[94]

Chief Justice Burger explained that these were examples of what he termed representations of "hard core" sexual conduct, and that states so desiring could prosecute those who engaged in the depiction or description of such conduct.[95]

Thirdly, the *Miller* decision, as was noted above, disgarded the "utterly without redeming social value" test derived from *Memoirs*, and substituted for it the legal precept that "at a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political or scientific value to merit First Amendment protection."[96] Chief Justice Burger gave as an example a "medical book for the education of physicians," which, even though it might be found to appeal to a prurient interest in sex and even though it might contain "graphic illustrations and descriptions of human anatomy," must nonetheless be found non-pornographic under *Miller* because of its serious scientific value.[97]

The *Miller* decision was an obvious backing away by the Burger Court from the permissiveness that had been allowed by the *Roth-Memoirs* test of the Warren Court and a return to what the Burger Court felt were more traditional values in the area of sexual depiction and description. Looking fondly back at America's past, Chief Justice Burger noted in *Miller* that:

> There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex in any way limited or affected expression of serious literary, artistic, political or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an "extraordinarily vigorous period," not just

> in economics and politics, but in *belles lettres* and in "the outlying fields of social and political philosophies."[98]

Thus, the underlying philosophy of *Miller* is that censorship and regulation of "pornographic" sexual materials is not only legally permissible, but also, in the long run, may be socially desirable.

Indecency-Obsenity Regulation

In contrast to the plethora of cases referred to in the above analysis of the development of obscenity law, particularly as it applies to film, there is a dearth of cases in the area of the development of indecency-obscenity regulation of broadcasting.

By law, indecency and obscenity in broadcasting can be punished in two ways. The U.S. Code gives authority under the criminal law to the Department of Justice to prosecute anyone who broadcasts obscene, indecent or profane language by means of radio communication.[99] In addition, the Communications Act gives the FCC the power to apply sanctions to anyone who broadcasts obscene, indecent or profane language.

Although the FCC has dealt with cases triggering this authority for at least twenty years,[100] the current state of broadcast law in this area emerges from three cases litigated during a recent eight-year period.

The first involved WUHY-FM, a non-commercial radio station, licensed to Eastern Educational Radio. On January 4, 1970, the station aired a taped interview with Jerry Garcia, leader of the musical group "The Grateful Dead." During the fifty-minute interview, Garcia expressed his views on ecology, music, philosophy and interpersonal relations. His comments were peppered with the words "fuck" and "shit," used either as adjectives or simply as introductory expletives or as a substitute for "et cetera."

The FCC made it clear at the outset of this case that the issue was not whether WUHY-FM could air discussions of ecology or music or even provocative or unpopular programming that might offend some listeners.

> Rather the narrow issue is whether the licensee may present previously taped interview or talk shows where the persons intersperse or begin their speech with expressions like "shit, man . . . " or " . . . 900 fuckin' times."[101]

Having framed the issue in the case, the FCC went on to point out that it does indeed have the authority to prevent the widespread use of such expressions on broadcast outlets because of the consequence to the public interest.

Beginning from the perspective that there is a "crucial" difference between "radio and other media,"[102] the Commission launched into an analysis of radio listening that focused on the passive nature of the radio audience, the pervasiveness of the medium and the presence of children in the audience.

In its defense, WUHY-FM took the position that the broadcast was not obscene "because it did not have a dominant appeal to prurience or sex-

ual matters."[103] Despite the absence of any precedent for this case, the FCC agreed with this analysis; however, it reasoned that the statutory term "indecent" should be applicable, and that "the standard for its applicability should be that the material broadcast is (a) patently offensive by contemporary community standards, and (b) utterly without redeeming social value."[104] The licensee then argued that the program was not indecent because its basic subject matters were obviously decent and the challenged language was not essential to the meaning of the program as a whole. The Commission retorted:

> We disagree with this approach in the broadcast fields. . . .The licensee itself notes that the language in question "was not essential to the presentation of the subject matter . . . " but rather was " . . . essentially gratuitous." We think that is the precise point here — namely, that the language *is* gratuitous" — i.e., "unwarranted or (having) no reason for its existence." There is no valid basis in these circumstances for permitting its widespread use in the broadcast field. . .[105]

One final point made by the Commission was that the presentation was "willful": the material was taped and edited in advance of its airing and thus its content was know to the licensee. Additionally, the Commission noted that station employees could have cautioned Garcia not to use these "gratuitous" expressions and yet failed to do so.[106]

One area of analysis conspicuous by its absence in this case is the concept of obscenity. Despite the existence of a large body of obscenity law (complete with a complex operational definition and a myriad of precedents), the Commission here chose to ignore "obscenity" and to focus on "indecency," an undefined concept lacking either judicial or administrative precedent.

The second case in this line was litigated in 1973 and dealt with the then popular "topless radio" format. WGLD-FM, owned by the Sonderling Broadcasting Corporation, aired a talk-show from 10 a.m. to 3 p.m. Monday through Friday in which the announcer took calls from the audience and discussed largely sexual topics. The complaint in this instance dealt with a twenty-three-minute segment broadcast on February 23, 1973, that dealt with oral sex.

In deciding that this programming ran afoul of both the indecency and obscenity standards of the U.S. Code, the FCC stressed that it was "*not* saying that sex *per se* is a forbidden subject on the broadcasting medium."[107] The FCC then went on to describe the characteristics of radio consumption in terms of the medium's pervasiveness and free access to the home. The fact that radio has equal availability "without regard to age, background or degree of sophistication"[108] led the Commission to conclude:

> The foregoing does not mean that the only material that can be broadcast is what must be suitable for children or will never offend any significant portion of a polyglot audience. But it does mean that in determining whether broadcast

material meets the statutory test, the special quality of this medium must be taken into account.[109]

In finding the WGLD-FM broadcast obscene, the FCC invoked the *Ginzburg* pandering doctrine and found that the program at issue was designed to garner large audiences through titillating sexual discussions. The Commission then found the material broadcast to be obscene under the *Roth* criteria: "If discussions in this titillating and pandering fashion . . .do not constitute *broadcast obscenity* within the meaning of 18 U.S.C.A. 1464, we do not perceive what does or could."[110] Additionally, the FCC explained that the presence of children in the audience during the daytime hours made the finding of obscenity an *a fortiori* matter. Finally, the Commission noted an alternative ground for action in this case: under the *WUHY* construction of "indecent," the material at issue, even if it were not obscene, would warrant a sanction because it was indecent.

At the conclusion of its decision, the FCC invited judicial review of the case; Sonderling declined and paid the $2,000 fine. However, two citizens' groups asked the FCC to reconsider. The Commission did and affirmed its earlier position, which led to an appeal in the District of Columbia Circuit Court.[111]

Ruling against the citizens' groups, the appellate court held that where a radio call-in show during daytime hours broadcast explicit discussions of ultimate sexual acts in a titillating context, the FCC does not unconstitutionally infringe on the public's right to listening alternatives when it determines the broadcast is obscene. The court held that *Miller*, which had been decided after *Sonderling* was announced, did not rescue the program because the broadcast made no serious literary, artistic, political or scientific contribution. The court did not discuss the FCC's contention that the program was "indecent."

The third and final case in this line, and perhaps the most celebrated, is *FCC v. Pacifica Foundation.*[112] The facts of this case show that satiric humorist George Carlin recorded a twelve-minute monologue entitled "Filthy Words" before a live audience in a California theater. The monologue begins with Carlin's reference to "the words you couldn't say on the public airwaves, the ones you definitely wouldn't say, ever." He proceeded to list those words and to repeat them over and over again in a variety of colloquialisms. The recording included frequent laughter from the audience.

At 2 p.m. on October 30. 1973, radio station WBAI-FM, a noncommercial station in New York City owned by the Pacifica Foundation, played the recording. On December 3, 1973, a man who heard the recording while driving with his son filed a complaint with the FCC; the Commission sent the complaint to WBAI for comment.

Pacifica responded that the monologue had been played during a program about contemporary society's attitude toward language and that immediately before its broadcast listeners had been advised that it included "sensitive language that might be regarded as offensive to some."[113] Pacifica called Carlin "a significant social satirist" who "like

Twain or Sahl before him, examines the language of ordinary people. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes toward those words."[114]

The Commission did not impose formal sanctions, but stated that the order would be "associated with the station's license file and in the event subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress."[115]

In its memorandum opinion, the FCC found that certain words in the monologue depicted sexual and excretory activities in a particularly offensive manner, noted that they were broadcast in the early afternoon "when children are undoubtedly in the audience," and concluded that the language broadcast was indecent and prohibited by the Federal Communications Act.[116]

Pacifica was appealed to a three-judge panel of the Court of Appeals for the D.C. Circuit, which reversed the FCC's decision.[117] In an opinion written by Justice Stevens, the U.S. Supreme Court reversed the appellate court decision and upheld that of the FCC. The Supreme Court faced two issues in *Pacifica*: first, whether the FCC's action constituted forbidden censorship within the meaning of the Federal Communications Act; and second, whether speech that is concededly *not* obscene may be restricted as "indecent" under the statutory authority of the Act.

The first question was answered in the negative: the FCC's action did not constitute censorship. The second question was not as easy for the Court to answer. It raised the problem of a distinction between "obscene" and "indecent" and the corollary of whether indecent speech that is not deemed obscene can be restricted.

The Court began with the position that the words in question were not categorically excluded from use on radio:

> Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. Indeed, we may assume, that this monologue would be protected in other contexts. Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its "social value". . . vary with circumstances. . .
>
> In this case, it us undisputed that the content of Pacifica's broadcast was "vulgar", "offensive" and "shocking."[118]

Thus, the Supreme Court said that because the protection for the words in question was not absolute, the context of the communication would determine if they are constitutionally protected.

To a casual observer, the apparent "context" of the words in question is a satirical "program about contemporary society's attitude toward language." However, the Court did not even discuss this context. In-

stead, it agreed with the FCC determination that the "context" of the Carlin monologue was the medium of expression — radio — and went on to distinguish between the content and the context of communication, relying on *Schenck v. U.S.* as the "classic exposition of the proposition that both the content and context of speech are critical elements of First Amendment analysis."[119] The Court viewed the monologue as "not entirely outside the protection of the First Amendment"[120] and thus moved to "consider its context in order to determine whether the commission's action was constitutionally permissible."[121]

Within this discussion of context, the Court pointed out that the electronic media have long received a more limited form of First Amendment protection than the print media. The Court observed that "the reasons for these distinctions (between the print and broadcast media) are complex, but two have relevance in the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Second, broadcasting is uniquely accessible to children, even those too young to read."[122]

In raising the unique accessibility of the broadcast media to children as a reason for providing less First Amendment protection to broadcasting, the Court relied on *Ginsberg v. State of New York*,[123] which upheld a "variable obscenity" law that made it illegal to sell certain publications to children that adults could legally buy. In using *Ginsberg* to "amply justify special treatment of broadcasting," the Court was applying the variable or contextual obscenity approach to the electronic media. This approach rests on the contention that certain materials are or are not considered obscene based on the context in which they are disseminated and/or by whom they are received. It can be contrasted with the constant or definitional approach in which certain words or actions are obscene *per se*, regardless of context or audience. Attempting to explain the variable approach, the Court borrowed from Justice Sutherland who wrote that a "nuisance may be merely a right thing in the wrong place — like a pig in the parlor instead of the barnyard."[124]

Although the concept of variable obscenity had existed before, the first extensive analysis of the approach was conducted by Dean Lockhart and Professor McClure of the University of Minnesota Law School in 1960.[125] According to Lockhart and McClure and their progeny, [126] under the variable obscenity approach, three elements bear examination. The first is the purpose of the distribution, and in this regard pandering is central to the concept: if material is developed to be or advertised as obscene this fact is taken into account.[127]

The second factor to be considered under this analysis is manner of distribution. Under variable obscenity, open and public display of sexually explicit materials may be disallowed; however, the same material may be allowed to be displayed in a theater. Manner of distribution is considered important because other governmental interests, such as protecting the unwilling recipient, may be implicated.

The third element of variable obscenity is effect on the intended and actual audience:

> If the intended or actual audience consists in part of unwilling viewers, then the state's interest becomes greater, the freedom of choice interest become less, and the material could more easily, under a variable obscenity analysis, be deemed obscene. Similarly, variable obscenity supports a more relaxed definition of what is obscene when the material is distributed to minors. Since minors are likely to be more sexually immature, since the state's general interest in the protection of minors is greater, and since the concept of freedom of choice for minors is far less clear, a much more inclusive concept of obscenity would be acceptable if the material is available to minors.[128]

The final facet of variable obscenity is perhaps the most important, for under it the *Roth* and *Miller* concept of "average person" is discarded and replaced by an examination of the effect of the material on the real audience. Thus, the presence of children in the actual audience of a communication can have an impact on the determination of obscenity.

These three factors, when examined in the context of obscenity litigation, will undoubtedly lead to different conclusions from those reached under the definitional or constant approach. Under variable obscenity, material must be looked at within the context of its actual distribution and an evaluation of the state's interest in preventing distribution must be balanced against the rights protected by the First Amendment. Under the definitional approach neither examination of distribution system nor balancing of interests would be undertaken.

At this juncture, an obvious question surfaces: should the variable obscenity approach be applied to cable? An analysis of recent Supreme Court cases in the area of obscenity leads to a resounding yes: not only should the variable approach be used vis-a-vis cable, but it would appear that the Supreme Court is eliminating the definitional approach and that the variable approach will be used in litigation involving obscenity and other media in the future.

The 1957 landmark *Roth* case clearly stood for the definitional or constant approach to obscenity. *Roth* articulated the concept that material that is legally obscene is entitled to full First Amendment protection. Although *Roth* remained the controlling precedent until 1973, this approach began to be eroded as early as 1966 in the aforementioned *Ginzburg v. U.S.* case when the Court held three publications obscene based on a finding that the publisher engaged in pandering. Not suprisingly, in its opinion the Court cited the 1960 Lockhart and McClure article on variable obscenity in support of its reasoning. As noted above, the 1968 *Ginsberg v. New York* case was another example of the Supreme Court's use of this approach to hold material obscene since it was distributed to minors.

Although the landmark *Miller* case in 1973 does represent a return to the definitional or constant approach to obscenity, the Court began to abandon that approach in 1976. In that year, it decided in *Young v. American Mini Theatres, Inc.*[129] that films and books that were *not*

legally obscene could be subject to zoning restrictions. In *Young*, the Court balanced the state's interest in regulation against the First Amendment protection of adult theaters and bookstores. What seems to emerge from *Young* is a category of the "almost obscene,"[130] which, under a variable obscenity statute, can be zoned or channeled, especially if no crimimal penalty attaches to violation of the statute. Finally, as outlined above, the Supreme Court used a variable obscenity approach in its 1978 *Pacifica* decision.

Summary: A New Test for Cable

Two major reasons seem to mandate that a unique test for obscenity be employed when dealing with cable television. The first relates to the present ad hoc approach employed in cities like Cincinnati and Gainesville. This approach, whether it uses an out-of-court settlement following an indictment or pressure from a vocal minority of citizens *sans* judicial intervention, leads to the same consequence: some material that is constitutionally protected speech, such as some of the R-rated films removed from the Gainesville cable system, is sacrificed for fear of larger reprisals. These cities are in fact regulating the content of cable television. Since the "ad hoc regulation" seems to represent a growing trend, a systematic method of regulation that is properly sensitive to the requirements of the Constitution is needed if cable is to be treated equitably in our system of freedom of expression.

A second argument for a systematic method of regulation for cable comes from a quite different sector. In the 1970 report of the Lockhart Commission, as noted above, a recommendation was made to eliminate all obscenity law, with two exceptions. Within the context of the other recommendations of the Lockhart Commission, these two exceptions emerge as strong arguments. The first involved instances in which children were in the audience and the second instances in which the personal privacy of adults was inadvertently "assaulted." As analysis in this monograph has pointed out, both these conditions adhere to television viewing — cable or conventional — in the home.

As was noted earlier, some forces in Congress would like to regulate the content of cable television under the 1973 *Miller* obscenity standard. However, *Miller* used a definitional approach to obscenity (i.e., material deemed obscene is obscene regardless of contextual factors), an approach quite different from the "variable" standard used in most recent obscenity litigation and used almost exclusively in cases involving the electronic media. In addition, the *Miller* test was developed in a factual context and grew out of a strain of cases that involved theatrical film and books. As will be argued below, except in certain well defined circumstances, *Miller* is inappropriate as a test of obscenity in cable television for two primary reasons: the manner of distribution and the effect it has on the actual audience.

This monograph has focused on the various media that may be implicated in dissemination of potentially obscene material. The conclusion

was drawn early in this study that cable television deserves more constitutional protection than that afforded conventional television. *Home Box Office* and *Preferred Communications*, analyzed above, both clearly stated that scarcity, the rationale for stringent regulation of broadcast television, is not present in cable television. Thus both cases easily draw a line between conventional television and cable television. A logical question remains: what is the reason for treating cable television in a manner different from theatrical film? In order to answer this question, the discussion of variable obscenity needs to be reviewed and focused particularly on the inadvertent viewer.

The variable obscenity approach rests on the contention that certain materials are or are not considered obscene based on the context in which they are disseminated and/or who receives them. Under this analysis, if the audience of a communication consists in part of unwilling or inadvertent viewers then the state's interest becomes greater, the freedom of choice interests become less and the material can more easily be held obscene. Method of dissemination of a communication seems particularly tied to the presence of unwilling viewers in the audience. As was discussed at length earlier, the manner of distribution and attendant consumption patterns of cable television are quite different from those associated with theatrical films. In the present context, the most important differences stem from the fact that cable is distributed in such a manner that it is viewed in the home. Flowing from this fact are two other important differences: first, it is possible for a person to be exposed inadvertently to a portion of a cable program; and second, a child can be one of these inadvertent viewers.

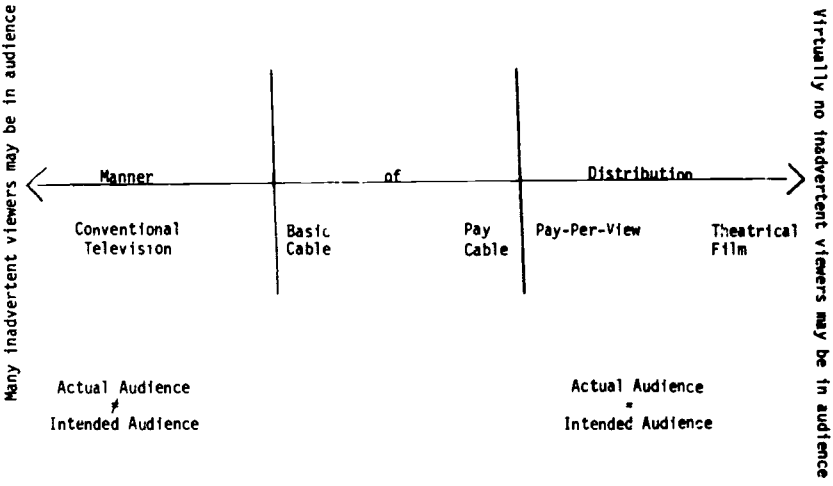
Audiences of theatrical film are provided with a rating service that gives them some insight into the nature of a film. Coupled with this is the fact that film consumption is a pay-as-you-go affair. Only the most naive or untutored film customer will inadvertently view an X-rated theatrical film. Cable, by contrast, requires that a customer subscribe for a minimum period; the customer then has access to all offerings during that period. This distribution system and the potential for inadvertent viewers in the cable audience — some of whom may be children — require a standard of obscenity for cable stricter then that which would be applied to theatrical film but less limiting than that appropriate for conventional television.

A final point to be recalled in this discussion of distribution and audiences is the regulatory history of television. Television has been regulated since its inception in this country, and there exists a popular perception of this regulation, a perception underscored by the Supreme Court case *Capital Cities Cable v. Crisp*, referred to earlier, that upheld FCC jurisdiction over cable television. This perception leads to audience expectations, one of which is that programming decisions relative to television ought to be sensitive to the presence of children in the audience. This does not mean that only programming appropriate for children should be disseminated via television, without regard for the interests and constitutional rights of adult audiences. However, cable

television programers must be sensitive to the fact that they are dealing with two perhaps quite different groups: the intended and the actual audience.

Perhaps a useful way to summarize discussion of the various methods of dissemination involved in the present discussion is to picture them as if they lay along a continuum (See Figure 1), the left end of which represents conventional television and has the possibility of many inadvertent viewers in the audience; the right end represents theatrical film and has the possiblity of virtually no inadvertent viewers. As the discussion of *Pacifica* has revealed, the left end of the continuum is clearly susceptible to more government regulation than is the right.

FIGURE 1
Variable Obscenity Approach
To Manner of Distribution and Inadvertent Viewers



At this point the question is properly asked, how is this continuum sectioned off for purposes of regulation? There is no question but that a line is drawn between conventional television and cable television, but should this be the only distinction that is made? That is, should cable be regulated as theatrical film? The argument has been made above that due to the potential for inadvertent viewers in the cable television audience, it should not receive the full regulatory protection afforded theatrical film. On the other hand, it is a service that is consciously brought into the home, and does not use a scarce resource, as in conventional television. Cable television, then, is something of a hybrid and should be regulated, at least in the area of obscenity, as such.

Pay-per-view is another mechanism for the dissemination of programming via a video receiver. Whether it is distributed via cable television, satellite master antenna television (SMATV), or a multiple distribution system (MDS), pay-per-view allows the viewer access to programming

(primarily theatrical films) on a program-by-program basis. Because the viewer then sees only those programs for which he pays, the possibility of inadvertent viewers in this audience is very slight. This service, although it may be received in conjunction with cable television, is very different from cable. Its dissemination is more akin to theatrical film and thus should be regulated as such.

One final concern remains with regard to developing these categories: do they pass constitutional muster? Since regulation dealing with expression touches on a fundamental right, it is necessary that the categories suggested here are not drawn in a manner that is arbitrary or capricious in violation of the Fourteenth Amendment. Three categories are advanced here. The first contains conventional broadcasting, a dissemination method that allows a great deal of inadvertent viewing. The third contains theatrical film and pay-per-view, dissemination methods that allow virtually no inadvertent viewing. The middle category, cable television, allows some inadvertent viewing for several reasons. In some areas of this country, particularly small towns, people subscribe to cable television not so much because they want cable programming but because that is the only way they can receive conventional television signals. Thus they may become inadvertent viewers of part of the basic cable package. And even in instances in which people consciously subscribe to a service, such as in pay cable, once they are hooked up, they receive all of the programs in the service. Thus there apears to be reason to treat cable differently from both conventional television and from theatrical film and pay-per-view.

The proposed test of obscenity for cable television brings together elements from two sources discussed at length in this monograph. First, two elements identified by Lockhart and McClure as central to a finding of obscenity under the variable approach are employed: (1) manner of the distribution and (2) effect on the intended or actual audience. Second, factors either traditionally associated with obscenity tests or regularly treated in obscenity-indecency cases are utilized. They are (1) unit of analysis, (2) definition of standards, (3) time of day program is disseminated, and (4) appeal to prurient interest.

Under this proposed test, the basic guidelines to be used by the trier of fact in order to determine if a work disseminated via cable television is obscene involve two steps. The first requires a determination of whether the work is disseminated at a time of the day when children are likely to be in the television audience. If this is the case, the proposed test applies; if this is not the case, then the *Miller* test is automatically triggered.

The second step requires a finding of the following: whether the average person in the actual audience for the program (i.e., cable subscribers) using contemporary national standards would find that a dominant motif or recurring theme in the program involves explcit portrayal of ultimate sexual acts in a titillating context. Each of these elements will now be discussed in detail.

Time of Day. If unwilling viewers are in the audience, especially children, then the state's interest in regulation becomes greater and the

freedom of choice interests become less. A type of time "zoning" restriction is employed here. Studies have shown that children are a large part of the television audience throughout prime time and even after 11 p.m.[131] On the other hand, given that regulation of cable impinges upon adults' freedom of expression, the regulation of obscenity for cable needs to be as narrowly tailored as possible with the least possible impact on this constitutionally protected right. A reexamination of *Pacifica* is appropriate here.

In *Pacifica* the Court began with the position that the words in question were not categorically excluded from radio, but neither was the protection for the words absolute. Thus the question of context arises. Using the contextual or variable obscenity approach, the court found that the words were objectionable because of the medium in which they were presented and the time of the day at which they were aired.

Applying this analysis to the present discussion leads to the conclusion that material meeting this proposed test of obscenity for cable should be considered obscene only if it is shown during certain time periods, e.g., between 8 a.m. and midnight; material exhibited via cable from midnight until 8 a.m. should then be scrutinized under the *Miller* test.

Unit of Analysis. The next part of the proposed test for obscenity in cable requiring discussion is the unit of analysis for determining obscenity: examining the work as a whole versus examining an isolated portion of it. As noted earlier, the first announced test of obscenity in this country, the *Hicklin* test, declared a work to be obscene if a part of it had a tendency to deprave or corrupt. This approach prevailed for fifty years until it was replaced in 1934 by the *Ulysses* test, which scrutinized the intent of the author as displayed in the work as a whole. Since *Ulysses* there has been judicial agreement that the work as a whole should constitute the unit of analysis for obscenity purposes in all cases except in those dealing with broadcasting.

The few existing cases that treat indecency and obscenity in the electronic media grew out of conflicts involving radio. There are no cases in which tests of obscenity and indecency for conventional television emerge; therefore, one is left to extrapolate from the way courts have dealt with sexually explicit material on radio if one is to posit the method courts may use to deal with such material on conventional or cable television.

It is clear from the analysis of radio cases treated in this monograph that both the Federal Communications Commission and the courts have examined suspect material using the isolated-passages approach rather than the work-as-a-whole approach. In the *WUHY* case, for example, the Commission found the Garcia interview indecent not because of the speaker's intention developed through the work-as-a-whole, but because of isolated words the FCC found to be "gratutitous" and unnecessary to the essence of the program. Likewise, in the *WGLD* topless radio case, the FCC reached, and the court of appeals upheld, a finding of obscenity based on a twenty-three-minute segment of a five-hour program. And in the *Pacifica* seven-dirty-words case, the Carlin monologue was found to

be indecent despite the intention of the program in which it was contained, and despite warnings to the audience that the monologue might be offensive to some listeners.

What emerges here are clearly different aproaches based on the medium at issue: in the case of books and theatrical film, the work as a whole is examined; in the case of radio, isolated passages are examined. Given the long regulatory history of treating content-related issues on radio and conventional television similarly, it seems apparent that should a case arise involving obscenity or indecency on conventional television, the unit of analysis to be scrutinized would be an isolated passage and not the work as a whole.

Based on this, the proposed test for cable television posits a unit of analysis that is not the work as a whole: due to the manner of distribution and attendant possible effects on the actual audience, a work-as-a-whole analysis is too broad and not sensitive enough to the state's interest in protecting the inadvertent viewer. By contrast, the isolated-passages approach allows for too broad an intrusion into the First Amendment rights of producers, distributors and viewers of cable programming by establishing a situation in which a stray comment or action could disqualify an otherwise acceptable piece from distribution.

The proposed test posits a procedure under which a work is deemed obscene for cable television if a dominant motif or a recurring theme in a work involves explicit portrayal of ultimate sexual acts in a titillating context, thus taking a middle course between the two approaches outlined above.

National Standards. Lest the dominant motif approach lead to an untoward chilling effect upon the freedom of expression of cable producers, distributors and viewers, the principle of contemporary national standards has been used in the proposed test as the basis for a finding of obscenity. Under this principle, the trier of fact would determine what constitutes "explicit portrayal of ultimate sexual acts in a titillating context" to the contemporary national audience, i.e., subscribers, of cable television.

Should the proposed test be codified by the Federal Communications Commission as a regulation, one final question remains regarding this new test of obscenity for cable television: would it survive judicial review? Since this test has an impact on the content of television, a medium protected by the First Amendment, a judicial determination of the constitutionality of this test would proceed along the lines of strict scrutiny, outlined above in the discussion of *Home Box Office v. FCC*

Strict scrutiny has three components. The first requires that the regulation at issue further a compelling state interest. As has been noted several times in this monograph, the government's interest in protecting the inadvertent viewer, particularly if that viewer is a child, is well doucmented, and was articulated by the Supreme Court in *Pacifica.*

The second component of strict scrutiny requires that the regulation be less restrictive of federally protected rights than any other means of promoting that interest. In order to satisfy the requisites of this ele-

ment, the proposed test suggests a national standard instead of a local one; proposes that a dominant motif, not an isolated passage, contain the offending material; and suggests application of the test only during the times of the day when children are likely to be in the audiences.

The third component of strict scrutiny calls for the relationship between the means used to achieve the government's goals and the goal of the regulation to be precise. To satisfy this element, the proposed test is to apply only to "explicit portrayal of ultimate sexual acts in a titillating context," a standard already employed by courts in cases where obscenity in radio is at issue.

The requirements of strict scrutiny appear to be met by the proposed test, and therefore its constitutionality might be safely presumed. The adoption of an obscenity test for cable television similar to the one proposed will hasten the day when the rights of cable producers, cable distributors, cable viewers and the American public are all adequately served.

A postscript to the above analysis of obscenity on cable television comes in the form of a discussion of the lockout box. This device, which can be used to block out certain channels that viewers find objectionable, is required by law in states such as California and New York. In addition, the 1984 Cable Communications Policy Act required that lockout boxes be available to all subscribers during 1985.[132] Some commentators have speculated that perhaps the availability of lockout boxes obviates the need for special cable television obscenity regulation, especially if such regulation is based on the possible presence of children in the audience.

The authors of this study reject this speculation for several reasons, the first of which relates to tangible considerations. There is still some question regarding the technical feasibility of lockout mechanisms: they may interfere with reception of channels adjacent to those blocked out.[133] This being the case, even if they are required by law, they are not likely to be used. Another reason is the charge for the device. In New York City lockout boxes cost the subscriber anywhere from $40 to $150, depending on the cable system. This is more than many subscribers wish to pay. A final concern here is with logistics. A cable subscriber who want to temporarily block a channel removes a key from the device; the channel can be restored only by replacing the key in the lock. The chance of losing or misplacing the key may prevent many people from using the device. In addition, if keeping children away from offensive fare is the goal of the lockout box, installation of the device may be in vain. As one cynic put it "[C]hildren are high tech experts when they're ten years old."[134]

But these tangible concerns are perhaps not as persuasive as some intangible ones. Interestingly, both those for and against more censorship of cable television are opposed to use of this device. Evelyn Dee, executive director of Morality in Media, feels that lockout boxes would be ineffective since "a lock box is a license to keep transmitting anything they (cable operators) want to."[135] On the other side, critics argue that lockout boxes would be used to restrict access to certain opinions and

points of view, thus undermining the unique communicative function of cable television.[136]

The conclusion is reached, then, that although lockout boxes may serve to keep some inadvertent viewers from seeing sexually explicit material on cable television, a judicial test and not an electronic device is ultimately wherein resolution of this issue lies.

NOTES

1. *R.V. Hicklin*, L.R. 3 Q.B. 360 (1868).
2. *Miller v. California*, 413 U.S. 15 (1973), p. 1445.
3. Kenneth Clark, "Turning on Television," *American Film*, March 1982, p. 58.
4. Jean Callahan, "Women and Pornography," *American Film*, March 1982, p. 63.
5. *Broadcasting*, June 27, 1983, p. 72.
6. "X-Rated Films Are Banned From Cincinnati Cable TV," *Christianity Today*, Sept. 2, 1983, p. 47.
7. Edison McIntyre, "Gainesville Fights Back," *American Film*, March 1982, pp. 59-60.
8. 555 F. Supp. 1164 (1982).
9. 395 U.S. 367 (1969).
10. *Ibid.*, p. 386.
11. 319 U.S. 190 (1943).
12. *Ibid.*, p. 226.
13. *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).
14. *CBS v. Democratic National Committee*, 412 U.S. 94 (1973).
15. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).
16. 2 Med. L. Rptr. 1561 (1977).
17. 392 U.S. 157 (1968).
18. 406 U.S. 649, pp. 667-68.
19. 2 Med L. Rptr. 1561, p. 1575.
20. *Ibid*, p. 1577.
21. 319 U.S. 190 (1943).
22. 2 Med. L. Rptr., p. 1582
23. *Ibid.*, p. 1587.
24. 391 U.S. 367 (1968)
25. These areas were first pointed out in *Near v. Minnesota*, 283 U.S. 697 (1931).
26. See Gunther, "In Search of an Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection," 86 *Harvard Law Review* 1 (1972).
27. Denise M. Trauth and John L. Huffman, "Heightened Judicial Scrutiny: A Test for the First Amendment Rights of Children," *Communication and the Law*, 2:39-58 (1980).
28. 10 Med. L. Rptr 1873 (1984).
29. *Ibid.*, p. 1878.
30. *Ibid.*, p. 1874.
31. *Ibid.*, p. 1884.
32. 754 F. 2d 1396 (C A. 9, Mar. 1, 1985).
33. *Ibid.*, p. 1401.
34. *Ibid.*, p. 1403.
35. *Ibid.*
36. *Ibid.*, p. 1404.
37. "L.A. City Council Abandoning Plan to Appeal Preferred Case," *Cablevision*, June 3, 1985, p. 15.
38. "Courts Continue to Grant Wider First Amendment Rights to Cable," *Broadcasting*, April 1, 1985, p. 18.
39. Some experts forecast that home viewing of videocassettes is going to eclipse pay

cable viewing in the future. Indeed, home viewing is now growing twice as fast as pay cable. However, it is difficult to predict how this growth will specifically affect the viewing of sexually explicit material. In addition, since there have been no First Amendment cases dealing with home videocassettes, the present analysis will be confined to conventional television, pay cable and film theaters. For discussion of home video, see "The Video Revolution," *Newsweek*, Aug. 6, 1984, pp. 50-57.

40. *National Association of Theatre Owners (NATO) v. FCC*, 153 U.S. App. D.C. 352 (1969).
41. 418 U.S. 241 (1974).
42. 380 U.S. 51 (1965).
43. 555 F. Supp. 1164 (1982).
44. 438 U.S. 726 (1978).
45. 555 F. Supp 1164 (1982), p. 1167.
46. 334 U.S. 131 (1948).
47. *Ibid.*, p. 166.
48. 343 U.S. 495 (1952).
49. *Ibid.*, p. 501.
50. *Ibid.*, pp. 502-503.
51. *Gelling v. Texas*, 343 U.S. 960 (1952); *Commercial Pictures Corp v. Regents of the University of New York*, 346 U.S. 587 (1954); *Superior Films, Inc. v. Dept. of Education of Ohio*, 346 U.S. 587 (1954); *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955); *Times Film Corp. v. Chicago*, 355 U.S. 35 (1957); *Kingsley International Pictures v. Board of Regents*, 360 U.S. 684 (1959).
52. 365 U.S. 43 (1961).
53. *Ibid.*, pp. 44-45.
54. *Ibid.*, p. 49.
55. *Ibid.*, p. 48.
56. 380 U.S. 51 (1965).
57. 372 U.S. 58 (1963).
58. 283 U.S. 697 (1931).
60. 413 U.S. 15 (1973).
61. The public interest standard has been a touchstone of broadcast regulation since its first appearance in the Radio Act of 1927. It requires that broadcasters use their licenses to serve "the public interest, convenience and necessity."
62. William B. Lockhart, *Report of the Presidential Commission on Obscenity and Pornography* (New York: Bantam Books, 1970).
63. 2 Strange 788, 93 Eng. Rep. 849 (K.B. 1727).
64. Morris L. Ernst and Alan Schwartz, *Censorship* (New York: Macmillan, 1964), p. 16.
65. *R.V. Hicklin*, L.R. 3 Q.B. 360 (1868).
66. See, e.g., *Ex Parte Jackson*, 96 U.S. 727 (1878).
67. *U.S. v. One Book Called "Ulysses,"* 72 F. 2d. 705 (2d Cir., 1934).
68. *Roth v. U.S.*, 354 U.S. 476 (1957).
69. *Ibid.*, p. 485.
70. *Butler v. Michigan*, 352 U.S. 380 (1957).
71. *Times Film Corp. v. Chicago*, 355 U.S. 35 (1957).
72. *Kingsley Pictures v. Regents*, 360 U.S. 684 (1959).
73. *Ibid.*, pp. 688-89.
74. 378 U.S. 184 (1964).
75. See Richard Randall *Censorship of the Movies* (Madison: University of Wisconsin Press, 1968) pp. 163-66 for a discussion of the facts of this case.
76. *Ibid.*, p. 191.
77. *Ibid.*, p. 194.
78. *Ibid.*, p. 195.
79. 383 U.S. 413 (1966).
80. 383 U.S. 463 (1966).
81. *Ibid.*, p. 64.
82. 55 *Southern California Law Review* 693 (March 1982), p. 724.
83. 386 U.S. 767 (1967).

84. *Ibid.*, pp. 770-71.
85. 413 U.S. 15 (1973).
86. 394 U.S. 557 (1969).
87. *Ibid.*, p. 565.
88. 402 U.S. 351 (1971).
89. *Ginsberg v. New York*, 390 U.S. 629 (1968), is a case adjudicated in the area of "variable" obscenity by the Warren Supreme Court in 1969. This case is dealt with in the section headed *Indecency-Obscenity Regulation* of this monograph.
90. 1 Med. L. Rptr. 1441 (1973).
91. *Ibid.*, p. 1444.
92. *Ibid.*, p. 1447.
93. *Ibid.*, p. 1448.
94. *Ibid.*, p. 1445.
95. *Ibid.*, p. 1446.
96. *Ibid.*
97. *Ibid.*
98. *Ibid.*, p. 1449 (citations omitted).
99. 18 U.S.C.A. Sec. 1464.
100. 32 R.R. 2d 1331 (1964).
101. 24 FCC 2d 408 (1970), p. 410.
102. *Ibid.*, p. 411.
103. *Ibid.*, p. 412.
104. *Ibid.*
105. *Ibid.*, p. 413.
106. *Ibid.*, p. 414.
107 27 R.R.2d 285 (1973), p. 287.
108. *Ibid.*, p. 288.
109. *Ibid.*, p. 289.
110. *Ibid.*, p. 290 (emphasis added).
111. *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F. 2d 397 (1975).
112. 438 U.S. 726 (1978).
113. *Ibid.*, p. 730.
114. *Ibid.*
115. *Ibid.*
116. 56 F.C.C.2d 94 (1975).
117. 556 F.2d 9 (1977).
118. 438 U.S. 726 (1978), pp. 746-47.
119. *Ibid.*, p. 744.
120. 438 U.S. 726 (1978), p. 746.
121. *Ibid.*, pp. 747-48.
122. *Ibid.*, pp. 748-49.
123. 390 U.S. 629 (1968).
124. 438 U.S. 726 (1978), p. 750.
125. "Censorship of Obscenity: The Developing Constitutional Standards," 45 *Minnesota Law Review* 5 (1960).
126. See, generally Frederick F. Schauer, "The Return of Variable Obscenity," 28 *The Hastings Law Journal* 1275 (1977).
127. As in *Ginzberg v. U.S.*., 383 U.S. 463 (1966).
128. Schauer, p. 1279.
129. 427 U.S. 50 (1966).
130. Schauer, p. 1287.
131. In *Pacifica Foundation v. FCC*, 556 F.2d 9 (1977), the court of appeals noted that there are over one million children in the television audience at 1 a.m.
132. "Sex and Cable," *Cablevision*, Feb. 11, 1985, p. 32.
133. "Channel J Pornography Is Cause of Lockout Law," *New York Times*, March 5, 1984, p. C-16.
134. "Sex and Cable," p. 32.
135. *Ibid.*
136. *Ibid.*

JOURNALISM MONOGRAPHS

No 1 — Walter B Emery, "Five European Broadcasting Systems." *August 1965*
No 2 — Eugene J Webb and Jerry R. Salancik, "The I rview or the Only Wheel In Town " *November 1966*
No 3 — James E Grunig, "The Role of Information in onomic Decision Making " *December 1966*
No 4 — Linda Weiner Hausman, "Criticism of the Press in U S Periodicals 1900-1939 An Annotated Bibliography " *August 1967*
No 5 — George Gerbner, "The Press and the Dialogue in Education " *Sep ber 1967*
No 6 — Peter R. Knights, "The Press Association War of 1886-1867," *December 1967*
No 7 — Elmer Davis, "Report to the President." edited by Ronald T Farrar *August 1968*
No 8 — Steven H Chaffee and L Scott Ward "Channels of Communication in School-Community Relations " *September 1968*
No 9 — Walter Wilcox, "The Press, the Jury and the Behavioral Sciences " *October 1968*
No 10 — Don R Pember, "The Smith Act as a Restraint on the Press " *May 1969*
No 11 — Joy Schaleben, "Getting the Story Out of Nazi Germany Louis P Lochner " *June 1969*
No 12 — Carter R Bryan, "Negro Journalism in America Before Emancipation " *September 1969*
No 13 — George Gerbner, "The Film Hero. A Cross-Cultural Study " *November 1969*
No 14 — Steven H Chaffee, Keith R. Stamm, Jose L Guerrero and Leonard P Tipton "Experiments on Cognitive Discrepancies and Communication " *December 1969*
No 15 — Darwin Payne, "The Press Corps and the Kennedy Assassination " *February 1970*
No 16 — Elmer A Beck, "Autopsy of a Labor Daily The Milwaukee Leader " *August 1970*
No 17 — Jim A Richstad, "The Press Under Martial Law The Hawaiian Experience " *November 1970*
No 18 — Mary A Gardner, "The Press of Guatemala." *February 1971*
No 19 — Robert L Bishop and LaMar S Mackay "Mysterious Silence, Lyrical Scream Government Information in World War II " *May 1971*
No 20 — Phillip Palmgreen, "A Daydream Model of Communication " *August 1971*
No 21 — William E Francois, "Evaluating Programmed News-Writing Instructions " *November 1971*
No 22 — David Gordon, "The 1896 Maryland Shield Law The American Roots of Evidentiary Privilege for Newsmen " *February 1972*
No 23 — Karlen Mooradian, "The Dawn of Printing " *May 1972*
No 24 — Maxwell E McCombs, "Mass Media in the Marketplace " *August 1972*
No 25 — John W Garberson, "A Limited Number of Advertising Pages " *November 1972*
No 26 — Thomas H Guback and Steven P Hill, "The Beginnings of Soviet Broadcasting and the Role of V I Lenin " *December 1972*
No 27 — John D Stevens "From the Back of the Foxhole Black Correspondents in World War II " *February 1973*
No 28 — Don Dodson and William A Hachten, "Communication and Development African an Afro-American Parallels " *May 1973*
No 29 — Guido H Stempel III, "Effects on Performance of a Cross-Media Monopoly " *June 1973*
No 30 — Beth Heffner, "Communicatory Accuracy Four Experiments " *August 1973*
No 31 — Jerry W Knudson, "The Press and the Bolivian National Revolution " *November 1973*
No 32 — Herbert Strentz, Kenneth Starck, David L Anderson and Loren Ghiglione, "The Critical Factor Criticism of the News Media in Journalism Education " *February 1974*
No 33 — Edmund M Midura, "A J Liebling The Wayward Pressman as Critic " *April 1974*
No 34 — James E Murphy, "The New Journalism A Critical Perspective " *May 1974*
No 35 — Donald S Kreger, "Press Opinion in the Eagleton Affair " *August 1974*
No 36 — Steven H Chaffee, Ed , Godwin C Chu, Jack Lyle and Wayne Danielson "Contributions of Wilbur Schramm to Mass Communication Research " *October 1974*
No 37 — John Dimmich, "The Gate-Keeper An Uncertainty Theory " *November 1974*
No 38 — Mary Ann Yodelis, "Who Paid the Piper? Publishing Economics in Boston, 1763-1775 " *February 1975*
No 39 — Shelton A Gunaratne, "The Taming of the Press in Sri Lanka." *May 1975*
No 40 — Robert N Pierce, "Lork Northcliffe Trans-Atlantic Influences " *August 1975*
No 41 — Mary M Connors, "Prejudicial Publicity An Assessment." *September 1975*
No 42 — Steven H Chaffee and Peter Clarke, "Training and Employment of Ph D in Mass Communication " *November 1975*
No 43 — Donald R Browne, "The Voice of America. Policies and Problems " *February 1976*
No 44 — Donald R Holland, "Volney B Palmer (1799-1864) The Nation's First Advertising Agency Man " *May 1976*
No 45 — Clifford G Christ s, "Jacques Ellul and Democracy's 'Vital Information' Premise ' ugust 1976
No 46 — James E Grunig, Organizations and Public Relations Testing a Communication Theory " *November 1976*
No 47 — Frank L Kaplan, "The Czech and Slovak Press The First 100 Years " *January 1977*
No 48 — Douglas A Boyd, "Egyptian Radio Tool of Political and National Development " *February 1977*
No 49 — Margaret A Blanchard, "The Hutchins Commission, the Press and the Responsibility Concept," *May 1977*
No 50 — David L Paletz and Dennis LaFiura, "The Press and Authority Potray It of a Coach and a Mayor " *August 1977*
No 51 — Manny Lucoff, "Telecommunications Management and Policy Who Governs?" *November 1977*
No 52 — John E Nichols. "The Tinker Case and Its Interpretation." *December 1977*
No 53 — Susan Heilmann Miller, "Reporters and Congressmen Living in Symbiosis " *January 1978*
No 54 — Jerry W Knudson, "Herbert L Matthews and the Cuban Story " *February 1978*
No 55 — Mark R Levy, "The Audience Experience With Television News " *April 1978*
No 56 — Paul W Sullivan, "News Piracy Unfair Competition and the Misappropriation Doctrine " *May 1978*
No 57 — Gail Lund Barwis, "Contract d Newsroom Democracy " *August 1978*
No 58 — C Richard Hofstetter, "News Bias in the 1972 Campaign A Cross-Media Comparison " *November 1978*
No 59 — Eric J Zanot, "The National Advertising Review Board, 1971 1976 " *February 1979*
No 60 — Frank Wm White, "Cameras in the Courtroom A U S Survey " *April 1979*

No 61 – Philip Palmgreen, "Mass Media Use and Political Knowledge" *May 1979*
No 62 – R Gordon Shepherd, "Science News of Controversy The Case of Marijuana" *August 1979*
No 63 – John P Robinson and Leo W Jeffres, "The Changing Role of Newspapers in the Age of Television" *September 1979*
No 64 – P Jean Frazier and Cecilie Gaziano, "Robert Ezra Park's Theory of News, Public Opinion and Social Control" *November 1979*
No 65 – David J Russo, "The Origins of Local News in the U S Country Press, 1840s-1870s" *February 1980*
No 66 – Michael Ryan, "Journalism Education at the Master's Level" *March 1980*
No 67 – David H Weaver and G Cleveland Wilhoit, "News Media Coverage of U S Senators in Four Congresses, 1953-1974" *April 1980*
No 68 – Harold A Fisher, "The EBU Model for Regional Cooperation in Broadcasting" *May 1980*
No 69 – Eugene F Shaw and Daniel Riffe, "NIS and Radio's All News-Predicament." *August 1980*
No 70 – Jerome S Silber, "Broadcast Regulation and the First Amendment" *November 1980*
No 71 – Marlen Cuthbert, "The Carribean News Agency Third World Model" *February 1981*
No 72 – Terry Hynes "Magazine Portrayal of Women, 1911-1930" *May 1981*
No 73 – Wayne M Towers, "World Series Coverage in New York City in the 1920s" *August 1981*
No 74 – M Gilbert Dunn and Douglas W Cooper (with assistance of D. Brock Hornby and David W Leslie), "A Guide to Mass Communication Sources." *November 1981*
No 75 – Lawrence Bowen, "Advertising and the Poor" *February 1982*
No 76 – Bruce M Swain, "The Progressive, the Bomb and the Papers" *May 1982*
No 77 – Daniel W Pfaff, "Joseph Pulitzer II and Advertising Censorship, 1929-1939" *July 1982*
No 78 – John Spicer Nichols "Cuban Mass Media: Organization, Control and Functions" *November 1982*
No 79 – Willard D Rowland Jr, "The Illusion of Fulfillment The Broadcast Reform Movement" *December 1982*
No 80 – Robert J Goldstein "Freedom of the Press in Europe, 1815-1914" *February 1983*
No 81 – James E Guring, "Communication Behaviors and Attitudes of Environmental Publics: Two Studies" *March 1983*
No 82 – Karen K List "The Role of William Cobbett in Philaddlphia's Party Press, 1794-1799" *May 1983*
No 83 – Hugh M Culbertson, "Three Perspectives on American Journalism" *June 1983*
No 84 – Keith R Stamm and Lisa Fortini-Campbell, "The Relationship of Community Ties to Newspaper Use" *August 1983*
No 85 – Dean W O'Brien, "The News as Environment" *September 1983*
No 86 – Fred Fejes, "The U S in Third World Communications Latin America, 1900-1945" *November 1983*
No 87 – Warren K Agee and Nelson Traquina, "A Frustrated Fourth Estate Portugal's Post-Revolutionary Mass Media." *February 1974*
No 88 – David Paul Nord, "The Evangelical Origins of Mass Media in America, 1815-1835" *May 1984*
No 89 – Gerald J Baldasty, "The Pres and Politics in the Age of Jackson" *August 1984*
No 90 – C N Olien, G A Donohue and P J Tichenor, "Media and Stages of Social Conflict," *November 1984*
No 91 – Mary Allienne Hamilton "J W Gitts The Cold War's Voice in the Wilderness" *February 1985*
No 92 – Harry D Marsh, "Hodding Carter's Newspaper on School Desegration, 1954-1955" *May 1985*
No 93 – W Wat Hopkins "Negligence 10 Years After Gertz v Welch" *August 1985*
No 94 – George E Stevens "Discrimination in the Newsroom Title VII and the Journalist" *September 1985*
No 95 – Denise M Trauth and John L Huffman, "Obscenity and Cable Television A Regulatory Approach" *December 1985*

JOURNALISM MONOGRAPHS
1621 COLLEGE ST
UNIVERSITY OF SOUTH CAROLINA
COLLEGE OF JOURNALISM
COLUMBIA, SC 29208-0251
ADDRESS CORRECTION REQUESTED

NON-PROFIT ORGANIZATION
U S POSTAGE
PAID
COLUMBIA, SC
PERMIT NO 196