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Cover Page Footnote

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CENSORING INDECENT CABLE PROGRAMS: THE NEW MORALITY MEETS THE NEW MEDIA

THOMAS G. KRATTENMAKER and*
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INTRODUCTION

CABLE television, originally utilized to retransmit programs to communities unable to receive over-the-air broadcasting from the three commercial networks, is increasingly becoming an important source of information and entertainment for Americans.[1] The form and content of cable programming, however, has recently engendered controversy. The issue is morality; the subject of attack is indecent programming.

Moral activists are seeking to ban "indecent" programming from cable systems. The precise boundaries of what constitutes indecent material are at best unclear. Somewhere between hardcore pornography and the innocuous kiss is probably a good guess. Within those boundaries, however, lies a good deal of nudity, "dirty" words, soft-core sex, and sexual innuendos. The purpose of this Article is to analyze the competing interests at stake and evaluate whether, under current law, indecent material may constitutionally be proscribed on cable television.[2]

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Professor L.A. Powe, Jr., University of Texas School of Law, is the godfather of this Article. *See* Powe, *Cable and Obscenity*, 24 Cath. U.L. Rev. 719 (1975). As is traditional in such cases, he is to be credited for what is good, but held blameless for what is bad, in the offspring. Professor Richard Alan Gordon, Georgetown University Law Center, also provided helpful support to the authors as they worked through these issues.

1. Approximately 29% (23.7 million) of all the homes in this country with television sets receive cable. Broadcasting, May 3, 1982, at 37. For estimates of cable penetration as of May, 1982 by Nielsen and Arbitron, respectively, see *id.*, June 28, 1982, at 32-34.

2. The issue whether the first amendment tolerates punishment for nonobscene, indecent cable television transmissions might arise in a legal proceeding in either of two ways. First, a cable company might challenge a cable indecency statute "as applied," that is, asserting that the nonobscene material it transmits is constitutionally protected. In the course of its argument, the cable company undoubtedly would assert that it necessarily must prevail because no indecent, but not obscene, cable programs may be censored constitutionally. It is that assertion that will be analyzed in this Article.

The answer to that question is likely to produce many different effects, important to quite diverse groups. For example, the nature of cable television's audience appeal may be affected. By its nature, one cable system can simultaneously transmit dozens of non-interfering local signals. Therefore, the cable operator need not gear programs to appeal to the mass populace, and, more importantly, has an economic incentive to provide subscribers with many alternatives. The "indecency" issue raises the question whether cable enjoys constitutional assurance that it can provide the wide diversity offered by other media, such as films, magazines, records, books and nightclubs.

Effects will also be felt in the film industry, which increasingly views cable as an additional revenue source. If indecency can be banned on cable, theatrical film producers seeking to maximize revenue by increasing the number of outlets for their product may find it in their best economic interest to "clean up" their scripts.

Those who view cable television as possessing a unique potential to harm (or help) American youth are yet another group deeply affected by the constitutionality of statutes proscribing indecency on cable. Newly popular media presenting "adult" fare have consistently provoked debate among Americans as to their effects on young people,[3] and this pattern suggests that substantial dispute will soon arise over cable's effects on American youth. No legislative response is more directly targeted at fears that cable corrupts than a ban on indecent cablecasts.

The issue might also arise in an "overbreadth" attack in which the cable firm asks that the statute be declared facially unconstitutional because it regulates indecent, but nonobscene, programs. Although the first amendment principle at issue (whether nonobscene, indecent cable programs can be banned) is identical to that initially raised by an "as applied" attack, the facial challenge is more dubious because it asks that the entire statute be stricken. Since obscenity is likely to be indecent within the meaning of the statute, the overbreadth remedy may be improper.

Even if the state may not punish nonobscene, indecent cable programs, conceivably it may utilize an indecency statute to punish obscenity. The Supreme Court has asserted that, to withstand constitutional scrutiny, obscenity statutes must be narrowly and specifically written. Miller v. California, 413 U.S. 15, 23-24 (1973). But the Court has also refused to find substantially overbroad a state statute regulating sexually provocative pictures of minors on the ground that most such depictions can be regulated without adverting to the possibility that many of these depictions might be covered by obscenity statutes. New York v. Ferber, 102 S. Ct. 3348, 3359-63 (1982). *Ferber* suggests that a state might, notwithstanding *Miller*, successfully avoid an "overbreadth" or "facial" attack on a statute banning indecent cable programs by demonstrating that many statutorily indecent programs are in fact constitutionally unprotected obscenity. The authors would not advocate this result. The proper scope of the overbreadth principle, however, is beyond the scope of this Article.

3. *See* Krattenmaker and Powe, *Televised Violence: First Amendment Principles and Social Science Theory*, 64 Va. L. Rev. 1123, 1288-92 (1978).

Most importantly for purposes of this Article, statutes banning indecency on cable raise significant first amendment doctrinal issues. Determining how far the state may go in regulating cable television content requires, in particular, a careful examination of the Supreme Court's most permissive first amendment ruling in the past three decades—*FCC v. Pacifica Foundation*.[4] For many reasons, detailed below, proponents of cable program regulation are likely to seek expansion of the bounds of *Pacifica's* standard of permissible government regulation. This Article concludes, however, that no acceptable interpretation of *Pacifica* would permit government to exclude from cable even the most indecent nonobscene programming.

I. Indecency Statutes and Initial Judicial Reaction

In its 1981 session, the Utah legislature enacted a statute prohibiting any person from "knowingly distribut[ing] by wire or cable any pornographic or indecent material to its subscribers."[5] Violation of the statute would constitute a class A misdemeanor.[6] The terms "pornographic" and "indecent" were defined by other Utah statutes.[7] Before

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4. 438 U.S. 726 (1978). See *infra* text accompanying notes 74-109.

5. The full text of Utah Code Ann. § 76-10-1229 (Supp. 1981) provides:
   (1) No person, including a franchisee, shall knowingly distribute by wire or cable any pornographic or indecent material to its subscribers.
   (2) For purposes of this section "material" means any visual display shown on a cable television system, whether or not accompanied by sound, or any sound recording played on a cable television system.
   (3) For purposes of this section "pornographic material" is any material defined as pornographic in sections 76-10-1201 and 76-10-1203.
   (4) For purposes of this section "indecent material" means any material described in section 76-10-1227.
   (5) For purposes of this section "distribute" means to send, transmit, retransmit, or otherwise pass through a cable television system.
   (6) Prosecution for violation of this section may be initiated at the instance of the attorney general or any county or city attorney of an interested political subdivision or at the instance of the governing body of any such political subdivision.
   (7) Any person who violates this section is guilty of a class A misdemeanor.

6. A class A misdemeanor is punishable by imprisonment for a term not exceeding one year and a fine not exceeding $1000 for a person, $5000 for a corporation. *Id.* §§ 76-3-204, -301 to -302 (1978).

7. "Pornography" is defined by Utah Code Ann. § 76-10-1203 (1978) as follows:
   (1) Any material or performance is pornographic if:
      (a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to the prurient interest in sex;
      (b) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sado-masochistic abuse, or excretion; and

the statute went into effect, national and local cable distributors and franchisees brought a class action in the Utah federal district court seeking a declaratory judgment that the statute so sweepingly denied first amendment rights that it was unconstitutionally overbroad.[8] The plaintiffs further sought injunctive relief prohibiting the statute's enforcement.[9]

In *Home Box Office, Inc. v. Wilkinson*,[10] the district court struck down the statute as unconstitutionally overbroad.[11] Its opinion relied principally on the Supreme Court's leading obscenity decision, *Miller v. California*,[12] which established a three-part test for permissible state regulation of obscene material. Under *Miller*, material is not obscene unless: 1) it appeals to the prurient interest; 2) it depicts or describes sexual conduct in a patently offensive way; and 3) as a whole it lacks serious literary, artistic, political or scientific value.[13]

Although the *Miller* test requires that the existence of obscenity be determined with respect to the work "taken as a whole,"[14] the Utah statute proscribed "nude or partially denuded figures" and "descriptions or depictions of illicit sex or sexual immorality" without consideration of the context in which the material was presented.[15] The *Wilkinson* court observed that, under *Miller*, the mere portrayal of

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(c) Taken as a whole it does not have serious literary, artistic, political or scientific value.

"Indecent material" is defined by Utah Code Ann. § 76-10-1227 (Supp. 1981) as follows:

(1) "Description or depictions of illicit sex or sexual immorality" means:
  (a) Human genitals in a state of sexual stimulation or arousal;
  (b) Acts of human masturbation, sexual intercourse, or sodomy; or
  (c) Fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.
(2) "Nude or partially denuded figures" means:
  (a) Less than completely and opaquely covered:
    (i) Human genitals;
    (ii) Pubic regions;
    (iii) Buttock; and
    (iv) Female breast below a point immediately above the top of the areola; and
  (b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

8. Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987, 990 (D. Utah 1982). The plaintiff's challenge was to the indecency, and not the pornography, section of the statute. *Id.* at 995 & n.15.

9. *Id.* at 990.

10. 531 F. Supp. 987 (D. Utah 1982).

11. *Id.* at 999.

12. 413 U.S. 15 (1973). See *infra* text accompanying notes 43-49.

13. *Id.* at 24.

14. *Id.*

15. See *supra* notes 5, 7.

nudity and sex, without more, cannot be denied first amendment protection—simply labeling an expression obscene or indecent does not make it so.[16] Further, the state's asserted interest in protecting hypothetical minors did not save the statute, which was overbroad as to minors as well as to adults.[17] To be constitutional, the court concluded, a state content-based programming regulation must, unlike the Utah statute, incorporate the three-part test set out in *Miller*.[18]

The Utah statute was hardly an isolated instance of an attempt to promulgate an indecency statute for cable television. Other legislation, more carefully drafted, is likely to require a more searching review of *Miller* and other precedents. For example, Morality in Media, a New York-based organization, is circulating a model cable indecency statute that would make criminal the distribution of indecent material on cable television.[19] As defined, "[i]ndecent material"

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16. 531 F. Supp. at 996.

17. *Id. at* 997.

18. *Id.* at 998. In holding the statute unconstitutional on overbreadth grounds, the district court did not reach the issue of the specific first amendment right of cable operators to show "indecent" programming. The court did state, however, that *Miller* established the permissible boundary of state regulation, and that by seeking to ban less than hard-core pornography, the statute went beyond *Miller*. *Id.* at 995-96. Further, to extend *Miller* to facilitate society's making correct and moral choices "runs counter to the settled constitutional rule that the States have no power to control the moral content of a person's thoughts." *Id.* at 1001. Moreover, the court noted that the unique advantages of cable derive from the diversity of its programming and the increased ability of subscribers to choose. *Id.* at 1001-02. Thus, *Wilkinson* apparently concludes that any attempt to proscribe indecent material, other than obscenity, on cable television would be unconstitutional.

Wilkinson, however, hardly resolves the question raised in this Article. Eight of the nine Justices that decided *Miller* also participated in the *Pacifica* case, which specifically authorizes the Federal Communications Commission to proscribe nonobscene, indecent radio programming. Thus, to assert only that regulation of indecent cable programs transgresses the bounds of *Miller* is insufficient.

19. The Morality in Media model indecency statute provides:

Section 1

(a) No person (including franchisee) shall by means of a cable television system, knowingly distribute by wire or cable to its subscribers any indecent material or knowingly provide such material for distribution.

(b) "Person" shall include individuals, partnerships, associations and corporations.

(c) "Distribute" shall mean send, transmit or retransmit or otherwise pass through a cable television system.

(d) "Material" means any visual material shown on a cable television system, whether or not accompanied by a soundtrack, or any sound recording played on a cable television system.

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

1. a human sexual or excretory organ or function; or
2. nudity; or

includes representations or verbal descriptions of "1. a human sexual or excretory organ or function; or 2. nudity; or 3. ultimate sexual acts, normal or perverted, actual or simulated; or 4. masturbation."[20] This statute differs most significantly from the Utah law by taking context into account, that is, limiting offenses to those representations that are "patently offensive" under "contemporary community standards for cable television."[21]

Analogous statutes are being introduced throughout the nation. Senator Dennis DeConcini (D. Ariz.) has introduced a bill that would amend the Communications Act of 1934[22] to authorize fines and/or imprisonment for those who utter or distribute obscene, indecent or profane language or material on any television transmission, including cable.[23] The Massachusetts House of Representatives has given initial approval to legislation that would prohibit the showing of X-rated movies on cable television.[24] Last year, Florida state legislators introduced a proposal that would prohibit cable television stations from

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3. ultimate sexual acts, normal or perverted, actual or simulated; or
4. masturbation;

which under contemporary community standards for cable television is patently offensive.

(f) "Community Standards" shall mean the standards of the community encompassed within the territorial area covered by the franchise.
(g) "Provide" means to supply for use.
(h) "A person acts knowingly" if he has knowledge of the character or nature of the material involved. A person is presumed to have knowledge of the character or nature of the material if he has actual notice of the nature of such material whether or not he has precise notice of its contents.

Section 2

Violation of this statute shall constitute a misdemeanor and any person convicted of such violation shall be confined in jail for not more than _____ months or fined not more than _____ Dollars, either or both.

A copy of this model statute can be obtained from Morality in Media, 475 Riverdale Drive, New York, New York.

Indeed, an ordinance somewhat similar to this model was adopted by the City of Roy, Utah after the *Wilkinson* decision. That statute, too, has been declared unconstitutional by the same judge who decided *Wilkinson*. Community Television of Utah, Inc. v. Roy City, Nos. 82-0122J, 82-0171J (D. Utah Jan. 6, 1983) (available Mar. 14, 1983, on LEXIS, Genfed library, Dist file).

20. See *supra* note 19.

21. *Id.*

22. 47 U.S.C. §§ 151-609 (1976 & Supp. IV 1980).

23. S. 2136, 97th Cong., 2d Sess. (1982). For a brief discussion of this bill, see Broadcasting, Mar. 8, 1982, at 142.

24. Mass. H. 3023 (1982). Although the proposed legislation would prohibit the showing of all X-rated movies on cable, J. Michael Ruane, the bill's sponsor, has stated that he is principally concerned with the exhibition of X-rated films during the daytime hours. Letter from J. Michael Ruane to the author (Apr. 14, 1982) (discussing the proposed legislation). A copy of this letter is on file with the *Fordham Law Review*.

showing "R-" or "X-" rated movies, except after 10 p.m.[25] Whether these bills will be enacted is, of course, unpredictable. But collectively they are increasing the extent of debate over the appropriate standards for regulating cable content.

II. Factual Background: Cable Television Programming

Thus, cable television programming is rapidly becoming an issue of national prominence. But what are cable stations showing? Home Box Office (HBO), the nation's oldest and largest national pay television service, provides programming to some seven million subscribers.[26] Feature films, originally shown in movie theatres, comprise approximately 78% of the overall HBO schedule.[27] These films are shown exactly as they were in the theatres; HBO is prohibited by contracts with its major program suppliers from editing the films.[28] Movies shown on HBO have included "Kramer vs. Kramer," "Coming Home," "The Deerhunter," and "One Flew Over the Cuckoo's Nest." Each of these films received an "R" rating and contains one or more scenes of nudity.[29] Each of the above-mentioned films has also won or was nominated for an Academy Award. HBO also shows a number of "PG-" rated films that contain scenes of nudity.[30] In addition to feature films, HBO exhibits special entertainment programming, which, on occasion, may contain isolated scenes of nudity.[31]

Playboy's "Escapade" channel, which has about 200,000 paid subscribers, describes itself as exhibiting a "hard R" type of programming.[32] The network deliberately limits its programming, excluding explicit sex, erections and penetration, to prevent the station from getting an "X-rated" image.[33] The Escapade channel will, however, air implicit sex, nudity and explicit language. The channel's premier package included an interview with John and Bo Derek, video centerfold segments, a Playmate-comedian wrestling match, and a "Ribald Classics" feature in which two lovers are shown caressing in an "R-rated" fashion.[34]

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25. *See* Nat'l L.J., Feb. 15, 1982, at 28, col. 1. The bill died in committee, but is being reintroduced this year in the State Senate. *Id.*

26. *See* Broadcasting, Nov. 30, 1981, at 36.

27. *See* Brief for Plaintiff at 6, Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982).

28. *Id.*

29. *Id.* at 6-7.

30. *Id.* at 7.

31. *Id.* at 7-8.

32. *See* Broadcasting, Feb. 22, 1982, at 56-57. Bob Shanks, who is responsible for development and program production, stated that, "[t]he real raincoat crowd . . . won't be signing up in droves for the Playboy channel." *Id.* at 56.

33. *Id.*

34. *Id.*

Some cable public access channels also present indecent programming. In New York, for example, George Urban is a public access producer on Manhattan Cable. Urban's weekly show, "The Ugly George Hour of Truth, Sex, and Violence," consists of Urban's conversations with women he attempts to convince, often successfully, to disrobe in front of his camera.[35]

Programming on cable that potentially violates statutes proscribing indecency thus runs the gamut from award-winning feature films to moderately graphic sex short of pornography. To some extent, the more specific provisions of various indecency statutes will dictate different results for some films. Whether a film such as "Kramer vs. Kramer" would be proscribed as indecent programming under the Morality in Media statute, for example, is unclear because of the limiting clause.[36] The sex and nudity in that movie might or might not be considered patently offensive under contemporary community standards. The film would be clearly prohibited under the proposed Florida law.[37] At the other extreme, Urban's program surely flunks the Morality in Media statute and could violate the DeConcini bill.[38] All of the above-mentioned programming likely would be banned under the Utah statute for exhibiting "nude or partially denuded figures," as that statute lacks a "patently offensive by community standards" clause.[39]

As the *Wilkinson* case makes clear, however, uncertainty surrounds the question whether *any* regulation of indecency on cable is constitutional.[40] Certainly, the *Wilkinson* court's rationale fully explains why a statute banning indecent, but not obscene, books would be unconstitutional. But the Supreme Court in *FCC v. Pacifica Foundation*[41] has held that the first amendment does not prohibit the proscription of indecent radio broadcasts.[42] Assuming the continued validity of both *Miller* and *Pacifica*, then, analysis of the present question must begin by examining the precise bases of those and related cases.

III. Doctrinal Background: Offensive Speech and the First Amendment

A. *A Pre-*Pacifica *Trilogy:* Miller, Cohen, Erznoznik

Miller v. California,[43] the Supreme Court's controlling obscenity opinion, provides a principal backdrop. *Miller* upheld the application

35. Waters & Gelman, *Cable's Blues in the Night*, Newsweek, Aug. 24, 1981, at 48.
36. See *supra* text accompanying note 21.
37. See *supra* note 25 and accompanying text.
38. See *supra* notes 19-23 and accompanying text.
39. See *supra* text accompanying notes 14-16.
40. See *supra* notes 5-18 and accompanying text.
41. 438 U.S. 726 (1978).
42. *Id.* at 744-50. See *infra* text accompanying notes 74-109.
43. 413 U.S. 15 (1973).

of California's criminal obscenity statute[44] to a mass mailing advertising the sale of "adult" material. The Court concluded that the states have a legitimate interest in prohibiting the dissemination and exhibition of obscenity, and need not demonstrate that such regulation meets traditional first amendment tests because obscenity is not constitutionally protected "speech."[45] State statutes that seek to regulate such material, however, must be carefully limited to proscribe only materials that depict or describe patently offensive "hard core" sexual activities.[46] To this end, the Court set out three factual tests, each of which must be met before expression may be deemed obscene and therefore regulable. States may classify as obscene material that "(a) . . . 'the average person, applying contemporary community standards' would find . . ., taken as a whole, appeals to the prurient interest . . .; (b) . . . depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . taken as a whole, lacks serious literary, artistic, political, or scientific value."[47]

Clearly, *Miller* permits the state to regulate a narrowly defined class of offensive, sexually-related materials that appeal to the prurient interest and as a whole lack redeeming qualities.[48] But that is as far as the opinion goes—only obscenity is regulable.[49] Two other Supreme Court opinions, one pre-*Miller* and the other post-*Miller*, confine the boundaries of permissible state regulation of offensive, nonobscene communication.

In *Cohen v. California*,[50] the Supreme Court reversed a conviction under a California statute that prohibited individuals from "maliciously and willfully disturb[ing] the peace or quiet of any neighbor-

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44. Act of July 19, 1961, ch. 2147, § 5, 1961 Cal. Stat. 4427 (codified as amended at Cal. Penal Code § 311 (West Supp. 1982)).

45. 413 U.S. at 23. The Court had earlier determined that the first amendment does not extend to the protection of obscene material. Roth v. United States, 354 U.S. 476, 485 (1957).

46. 413 U.S. at 27.

47. *Id.* at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957) (citations omitted)).

48. To clarify the type of speech the state could constitutionally regulate, the Court set out two examples: "(a) [p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "(b) [p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S. at 25.

49. *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153 (1974) (reversing conviction for distributing the theatrical film, "Carnal Knowledge"). The Court held the film was protected notwithstanding scenes of nudity, apparently in large measure because the movie did not portray actors' bodies (or genitals) during sexual intercourse. *Id.* at 161.

50. 403 U.S. 15 (1971).

hood or person . . . by . . . offensive conduct."[51] Cohen's offensive conduct consisted of wearing a jacket inscribed with the words "Fuck the Draft" to portray his feelings about the Vietnam War. The Court spoke directly to three issues prominent in the cable-indecency debate.

First, the Court noted that, although potentially offensive, Cohen's words did not constitute obscenity.[52] Although his language contained at least literal sexual overtones, Cohen's expression was not obscene because it was not "erotic," nor would it conjure up similar "psychic stimulation."[53]

Second, the state argued that Cohen's conviction was a permissible exercise of its power to protect unwilling viewers from exposure to objectionable speech.[54] The Court disagreed. In order to ban the public expression of ideas, the state must show "that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."[55] The majority listed several reasons why the interest in protecting unwilling viewers was insufficient in this instance.[56] Prominent among those reasons was that the recipients of Cohen's message were "outside the sanctuary of [their] home[s]"[57] and therefore could avoid further verbal or visual assault "simply by averting their eyes."[58]

Finally, the Court squarely rejected the proposition that nonobscene, offensive language could be proscribed consistently with the first amendment. In addition to asserting that the state may not constitutionally "cleanse public debate to the point where it is grammatically palatable to the most squeamish among us,"[59] the Court noted the inherent danger to the interchange of ideas in a free society that would flow from excising certain words from the public's vocabulary.[60] One's choice of words may not only convey the specific meaning attached to them, but other meanings (including nuances of style, tone, and emotion) as well.[61] *Cohen* clearly represents such a case, in

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51. Cal. Penal Code § 415 (West 1970), *repealed by* Act of Sept. 23, 1974, ch. 1263, 1974 Cal. Stat. 2742.

52. 403 U.S. at 20.

53. *Id.*

54. *Id.* at 21.

55. *Id.*

56. *Id.* at 21-22.

57. *Id.* at 21 (quoting Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970)).

58. 403 U.S. at 21.

59. *Id.* at 25. The Court emphasized this point by the often-quoted statement, "one man's vulgarity is another's lyric." *Id.*

60. *Id.* at 24-26.

61. *Id.* at 26.

which the speaker chose his words especially for the force of the reaction they would engender. To compel Cohen to choose a different expression would likely convey a different idea; in a very real sense, Cohen did not say, or wish to be understood as saying, "I sincerely and vigorously urge abolition of the Selective Service System."

Cohen represents one boundary of impermissible state regulation of offensive speech. The Court addressed a similar issue, albeit concerning a different medium, in *Erznoznik v. City of Jacksonville*.[62] *Erznoznik* involved a challenge to the facial validity of a Jacksonville, Florida municipal ordinance that prohibited drive-in movie theaters from exhibiting films containing nudity when the screen is visible from public places.[63] The Court held the ordinance invalid under the first amendment.[64]

The Court noted that the government's power to censor certain types of speech must be carefully limited.[65] Although the public is often "captive" to offensive speech, absent a showing of a substantial, intolerable invasion of privacy interests, the unwilling viewer is obliged simply to avert his eyes.[66] Thus, the Court dismissed the state's primary argument that it may protect its citizens from exposure to offensive materials.[67]

The state also argued that the ordinance was valid as an exercise of its police power to protect children from offensive material.[68] The Court disagreed and held the statute unconstitutionally overbroad.[69] The ordinance prohibited all nudity, without considering the work as a whole. Therefore, the statute literally barred innocuous or even educational films, such as "a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous."[70] Moreover, children as well as adults

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62. 422 U.S. 205 (1975).

63. Jacksonville, Fla., Mun. Code § 330.313 (1972). The text of the ordinance is reprinted in the *Erznoznik* opinion. 422 U.S. at 206-07.

64. 422 U.S. at 217-18.

65. *Id.* at 209.

66. *Id.* at 210-11; *see* Cohen v. California, 403 U.S. 15, 21 (1971). The Court cited Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) as an example of an intolerable intrusion on privacy interests. In *Rowan*, the Court upheld a federal statute that permitted unwilling recipients of offensive mail (*i.e.*, "erotically arousing or sexually provocative," *id.* at 730) to obtain a post office order requiring the sender to stop all such mailings to the addressee. The Court held that the mailer's right to communicate was subordinate to the individual's right to privacy in the home. *Id.* at 736-38. It is important to note that the statute upheld in *Rowan* did not prohibit the sender from communicating with receptive addressees, but rather allowed unwilling recipients to exercise control over unwanted mail reaching their homes.

67. 422 U.S. at 212.

68. *Id.*

69. *Id.* at 214.

70. *Id.* at 213.

have first amendment rights,[71] and the obscenity doctrine defines the limits of state authority to protect children from offensive speech. For that purpose, the state may only regulate materials that, taken as a whole, are obscene for young people.[72]

Thus, the confines of permissible regulation of speech considered indecent or offensive were fairly well-defined and understood until 1978. The states could proscribe offensive material that rose to the level of obscenity, that is, hard-core pornography. Children could be shielded from material obscene only as to them, but not in a manner that denied adults their rights.[73] *Cohen* and *Erznoznik* represent failed attempts by state and local governments to ban less than obscene material merely because it may offend an unwilling viewer, who could easily avoid sustained injury. Surely, the easiest inference from *Miller*, *Cohen* and *Erznoznik* is that no statute prohibiting mere indecent cable programming could withstand a first amendment challenge.

B. Pacifica

In 1978, however, the Supreme Court clouded the meaning of that trilogy by approving a content ban on an indecent radio broadcast in *FCC v. Pacifica Foundation*.[74] The argument for the constitutionality of statutes banning indecency on cable television must rest principally upon the view that *Pacifica* extends state censorship authority for certain media beyond the limits that *Miller*, *Cohen* and *Erznoznik* apparently established.

The issue before the Court in *Pacifica* was whether the Federal Communications Commission (FCC or Commission) had the power to regulate an indecent, but not obscene, radio broadcast.[75] The Court concluded that it did. At 2 p.m. in New York City, a radio station owned by Pacifica broadcast a George Carlin recording entitled "Filthy Words," a satirical monologue of Carlin's thoughts concerning words that could never be said on the public airwaves.[76] Carlin pro-

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71. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).

72. *See* 422 U.S. at 212-14; Ginsberg v. New York, 390 U.S. 629, 634-43 (1968) (statute defining obscenity in terms of its appeal to the prurient interests of minors held constitutional).

73. *See* Butler v. Michigan, 352 U.S. 380 (1957). In *Butler*, the Court struck down a statute that barred distribution to the general public of material that was obscene only to children, and held that the state could not reduce the adult population "to reading only what is fit for children." *Id.* at 383.

74. 438 U.S. 726 (1978).

75. *Id.* at 729.

76. *Id.* at 729-30.

ceeded to list those words and repeat them over and over.[77] A man, while driving with his young son, heard the broadcast and complained to the Commission.[78] In response to the complaint, the station claimed that the recording was part of a program about society's attitudes toward language and that prior to the broadcast listeners were advised that the recording contained language some might consider offensive.[79] The Commission nevertheless issued a declaratory order holding that Pacifica could be subject to administrative sanctions for the Carlin broadcast.[80]

The Commission was especially concerned with the exposure of children to offensive material. Recognizing that the material in the Carlin monologue was not obscene, and therefore not without first amendment protection, the Commission drew on the law of nuisance to support its decision.[81] Nuisance law attempts to channel, rather than prohibit, offensive behavior.[82] Thus, the FCC determined such programs could and should be channelled. The monologue was indecent because it was broadcast at a time when children were likely to be in the audience.[83] The Commission stated that similar programs, broadcast in the late evening and preceded by warnings, might be permissible.[84]

The United States Court of Appeals for the District of Columbia reversed the FCC's order.[85] Judge Tamm, writing for the court, held that the order violated the Commission's duty to avoid censorship, and further, was overbroad and vague.[86] Judge Bazelon, concurring in the result, determined that under *Miller* the FCC lacked the power

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77. The seven dirty words spoken by Carlin to which the FCC objected were "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit." Pacifica Found., 56 F.C.C.2d 94, 99 (1975), *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978). A verbatim transcript of the Pacifica broadcast appears in the appendix to the Court's decision. 438 U.S. at 751-55 app.

78. 438 U.S. at 730.

79. *Id.*

80. *See* Pacifica Found., 56 F.C.C.2d 94, 99 (1975), *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978). Although the Commission issued no formal sanctions, the complaint became part of the station's license file, to be considered if subsequent complaints made sanctions in order. *Id.* The sanctions the Commission has the authority to impose are: 1) revoke a station's license; 2) issue a cease and desist order; 3) impose a monetary forfeiture; 4) deny license renewal; and 5) grant a short term renewal. 438 U.S. at 730 & n.1.

81. 56 F.C.C.2d at 98.

82. *Id.*

83. *Id.*

84. *Id.* at 98-99. The Commission stated that if the offensive program were aired at a time of day when the number of children in the audience was reduced to a minimum, it would consider whether the broadcast material had redeeming qualities. *Id.*

85. Pacifica Found. v. FCC, 556 F.2d 9, 18 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

86. *Id.*

to regulate indecent, but not obscene, speech.[87] Judge Leventhal dissented, stating that the focus of review should be limited to whether the language, "as broadcast,"[88] was indecent, and determined that it was.[89]

The Supreme Court reversed the circuit court and affirmed the FCC. Taking its cue from Judge Leventhal's dissent, the *Pacifica* majority asked only whether the monologue was indecent "as broadcast."[90] Because the Commission had not engaged in formal rulemaking and had restricted its order to the specific factual context, the Court refrained from issuing an advisory opinion for future cases.[91]

The Court determined that the Carlin monologue was indecent within the meaning of Section 1464 of the federal Criminal Code.[92] In relevant part, this statute makes it a crime to utter "any obscene, indecent, or profane language by means of radio communication."[93] Pacifica argued that, in order to be indecent within the meaning of the statute, the material presented must appeal to the prurient interest, which the Carlin monologue clearly did not.[94] The Court disagreed, holding that the three types of proscribed language in the statute each have a separate meaning.[95] Although prurient appeal is an element of the obscene, to be indecent, material need only fail to conform to the general accepted standards of morality.[96] Therefore, since the Carlin monologue was patently offensive under that definition,[97] it was indecent within the meaning of the statute.[98]

After clearing the statutory hurdles, the Court addressed the constitutionality of the Commission's action. Initially, the Court noted that

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87. *Id.* at 21-30 (Bazelon, J., concurring).
88. *Id.* at 31-32 (Leventhal, J., dissenting).
89. *Id.* at 31 (Leventhal, J., dissenting).
90. 438 U.S. at 734-35.
91. *Id.*
92. *Id.* at 738-41. Initially the Court determined that the Commission's action did not constitute forbidden censorship within the meaning of 47 U.S.C. § 326 (1976). 438 U.S. at 735-38. Although the Commission lacks the power to edit the content of broadcasting in advance, it may review completed broadcasts as part of its regulatory duties. Moreover, because the Commission has authority under 18 U.S.C. § 1464 to regulate obscene, indecent or profane broadcasting, § 326 must be read as inapplicable to such material. *Id.*
93. 18 U.S.C. § 1464 (1976). Section 1464 was originally enacted as § 29 of the Radio Act of 1927, Pub. L. No. 632, § 29, 44 Stat. 1162, 1172, and later re-enacted in the Communications Act of 1934, Pub. L. No. 416, § 326, 48 Stat. 1064, 1091. In 1948, the section was removed from the Communications Act and codified in the Criminal Code as § 1464 of Title 18. *See* 438 U.S. at 735-38.
94. 438 U.S. at 739.
95. *Id.* at 739-40.
96. *Id.* at 740 & n.14.
97. *Id.* at 739.
98. *Id.* at 741.

broadcasting receives the most limited first amendment protection of all forms of communication, asserting that this distinct treatment is warranted because broadcasting is uniquely pervasive and uniquely accessible to children.[99] Thus, the crux of the Court's justification for holding the monologue indecent "as broadcast" rested on an "intrusiveness" rationale.

The *Pacifica* majority asserted that material presented over the airwaves confronts the individual in all aspects of daily life.[100] Radio's pervasiveness is particularly relevant because its effects occur in the home, where the individual's privacy interests outweigh the first amendment rights of the intruder.[101] Moreover, prior warnings about the possible offensiveness of a program's content are ineffective because the listening audience constantly turns the radio on and off.[102] To say simply that the radio may be turned off if one is offended by the language presented "is like saying that the remedy for an assault is to run away after the first blow."[103]

Further, the Court explained, in addition to its legitimate authority to protect adults' sensibilities in the home, the state has an interest in protecting children from offensive material.[104] On this score as well, radio's intrusiveness underlay the Court's analysis. Although Carlin's monologue is protected by the first amendment, and therefore cannot be restricted at its source, it may be withheld from the broadcast media.[105] Because radios in the home are uniquely accessible to children, and because of the state and parental interest in minors' well-being, special treatment for indecent material broadcast in the home is constitutionally justified.[106]

Finally, the Court emphasized the narrowness of its decision, repeating the assertion that only the FCC's authority to punish that specific broadcast was at issue.[107] Referring to the Commission's analogy to nuisance law, which asserted that the question was not whether to prohibit, but only whether to channel, indecent material, the Court noted that the context of the broadcast is most important in resolving that question.[108] Factors to be taken into consideration in

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99. *Id.* at 748-50.
100. *Id.* at 748.
101. *Id.*
102. *Id.*
103. *Id.* at 748-49. The Court noted in a footnote, however, that the situation outside the home may be different. *Id.* at 749 n.27 (citing *Cohen* and *Erznoznik*). There, the remedy of averting ears or eyes may be sufficient; that is, the balance may tip in favor of the speaker.
104. *Id.* at 749-50.
105. *See id.*
106. *Id.*
107. *Id.* at 750.
108. *Id.*

determining whether material is indecent "as broadcast" include the time of day, composition of the audience, content of the program, and differences among radio, television and possibly closed-circuit transmissions.[109]

IV. Indecent Programs and First Amendment Values

Prior to *Pacifica*, the Supreme Court relied on an ill-considered scarcity rationale to justify distinct first amendment treatment of the broadcast media.[110] Because broadcast frequencies constitute a scarce resource,[111] the government, according to this rationale, should be "permitted to put restraints on [broadcast] licensees in favor of others whose views should be expressed on this unique medium."[112] But no scarcity rationale, well- or ill-considered, can logically justify reducing the amount of offbeat or unusual broadcast programming.[113] Spectrum scarcity justifies, if anything, diversity of speech in the broadcast medium, not government censorship. Therefore, the scarcity rationale unsurprisingly provided no support for the *Pacifica* result.

In employing an intrusiveness theory, the Court introduced new criteria for evaluating content regulation—"medium pervasiveness" and "minors' access." Although the Court took pains to assert the narrowness of its holding and to emphasize the peculiar scurrility of Carlin's monologue, the precise rationales employed to justify that holding contain no easily ascertainable limits. Many broadcasts may not conform to "generally accepted standards of morality," the definition of indecency adopted by the *Pacifica* majority.[114] Nor is radio the only medium that may enter the home when unsupervised children are present.[115] Consequently, the substantial tension between *Pacifica*'s holding and its rationale leaves the outer limits of the case obscure. One thing is certain. In allowing regulation of indecent, but nonobscene material, *Pacifica* goes further than *Miller*. How much

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109. *Id.*

110. The scarcity rationale was first set forth in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396-401 (1969). For criticisms of this theory, see B. Owen, Economics and Freedom of Expression 34-37 (1976); Powe, *"Or of the [Broadcast] Press,"* 55 Tex. L. Rev. 39, 55-62 (1976); Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C.L. Rev. 539, 548-60 (1978).

111. 395 U.S. at 376, 399.

112. *Id.* at 390.

113. *See* FCC v. Pacifica Found., 438 U.S. 726, 770 n.4 (1978) (Brennan, J., dissenting).

114. *Id.* at 740 n.14 (quoting Webster's Third New International Dictionary (1966)).

115. *See* Krattenmaker & Powe, *supra* note 3, at 1232-33 (records, books, newspapers, magazines and letters).

further, and to what other media, if any, the intrusiveness rationale may be applicable, is still open to question.

The analysis that follows seeks to determine whether a fair interpretation of *Pacifica* would justify regulation of indecent programming on cable television. Concededly powerful arguments can be advanced that *Pacifica* does indeed authorize such regulation, and would permit even wider restraints. Moreover, it can be argued that *Pacifica* also authorizes the regulatory approaches embodied in the Morality in Media and Utah statutes, which are likely to be prototypical formulations for legislators seeking to do more than enact a law simply barring indecent programs. These arguments are elaborated below. The remainder of the Article nevertheless concludes that no acceptable interpretation of *Pacifica* would permit government to exclude from cable even the most indecent nonobscene fare.

A. *The Argument for Permitting Regulation*

Pacifica altered the outer limits of permissible regulation of offensive material, extending the boundaries previously set by *Miller*. Material need not be obscene under the *Miller* guidelines to be proscribed, but only patently offensive by contemporary moral standards or not in conformance with generally accepted standards of morality. Thus, *Pacifica* has carved out a new class of speech, "indecency," subject to content regulation.

To be sure, *Pacifica* cannot plausibly be read to authorize proscription of indecent expression in all media. *Miller*, *Cohen* and *Erznoznik* were distinguished, not overruled, in *Pacifica*. Rather, for *Pacifica* to govern, the speech must be unduly intrusive as well. But *Pacifica*'s conclusion that radio is especially intrusive rests on reasons equally applicable to cable television. Four distinct arguments suggest that *Pacifica* affects the rights of all broadcasters (including cable systems) to present offensive material, and not simply those that transmit exclusively aural signals.

First, the pervasiveness of a communications medium is unaffected by whether its programming is transmitted over the airwaves or over cable lines. Indeed, the Supreme Court has suggested as much in an otherwise unrelated case, by determining that the FCC may regulate cable systems as broadcasters, but not as common carriers.[116] Moreover, cable is rapidly becoming a part of many American households. By its nature, in those homes in which cable is present, it is used interchangeably with radio and television. The medium used to transmit the programming, from the viewer's perspective, is his television set. This being the case, viewers should receive the same protections

116. *See* FCC v. Midwest Video Corp., 440 U.S. 689, 699-704 (1979).

from cablecasts of indecent programming as they do from television and radio broadcasts.

Second, cable programming, like radio and television, is presented in the home, and is thus subject to more limited first amendment protection than other communication taking place outside the home. When the viewer turns on his cable television system, he is equally captive to what the cable system presents as he is to radio broadcasts when he tunes in to them. Prior warnings about the content of a program are ineffective because the viewer often tunes in during the middle of a show. An unwilling viewer would therefore be unable to avoid assault by an indecent broadcast, and in one's home "the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[117]

Pacifica teaches that cases such as *Cohen* and *Erznoznik* are inapplicable to cable programming. *Cohen* and *Erznoznik* involved indecent speech communicated outside the home. When out in public, the offended individual may have the duty to avert his eyes or ears; that is, the constitutional balance may tip in favor of the speaker.[118] In the home, however, a "captive" audience need not be subject to offensive speech. Because the competing first amendment interests tip in favor of the individual's right to privacy in the home, to tell the viewer to shut off his television set when affronted by indecent programming ignores the issue. As stated by the *Pacifica* Court, it is akin to "saying that the remedy for an assault is to run away after the first blow."[119]

Third, an important element of the pervasiveness theory is that the broadcast media is uniquely accessible to children. Cable television is as easily accessible to unsupervised children in the home as is radio. This characteristic is particularly relevant to children too young to comprehend the written word, but who are quite capable of "learning" from indecent broadcasts. Two distinct state interests justify state regulation of indecent broadcasts when minors are likely to be in the audience. The first is the "parents' claim to authority in their own household to direct the rearing of their children."[120] Second, the state possesses an independent interest in the well-being of children.[121] These interests in promoting the welfare of children and facilitating the development of their moral values justify the regulation of otherwise protected speech. Because cable is no less accessible and is potentially more harmful to children than radio, the permissible state inter-

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117. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); *see* Rowan v. United States Post Office Dep't, 397 U.S. 728, 736-38 (1970).

118. *See* 438 U.S. at 749 n.27.

119. *Id.* at 749.

120. Ginsberg v. New York, 390 U.S. 629, 639 (1968).

121. *Id.* at 640.

ests described in *Pacifica* therefore justify regulation of cable as well.

Fourth, to limit *Pacifica* to radio programming goes against the grain of the Court's opinion; indecent programming portrayed visually is likely to have a stronger impact than the same material broadcast over the radio. Therefore, not only do cable television viewers warrant the same protection from offensive programming as radio listeners, but the pervasiveness argument justifying a content ban on indecent material is heightened when applied to cable.

B. *Applications of the Argument for Permitting Regulation*

In sum, proponents of this viewpoint can argue forcefully that *Pacifica*'s intrusiveness theory, which justifies regulation of radio broadcasting to protect unconsenting adults and untutored children from offensive material, logically extends to regulation of indecency on cable television. If correct, however, such an argument proves only that the Carlin monologue (and offensive language indistinguishably indecent in context) could be banned from cable. The question remains what are the limits of unconventional or offensive programming that may be proscribed.

One approach to this question would be to analyze a series of actual or hypothetical cable programs. *Pacifica*'s repeated insistence that indecency must be judged in context plausibly might be thought to make futile any more general analysis. Yet any program-by-program approach would ultimately degenerate into a string of tedious triviality. More importantly, if resolution of a series of cases yielded no coherent standard for differentiating programs that are constitutionally protected from those legally proscribable, *Pacifica* justifiably could be discarded as an unprincipled doctrine that permits capricious results and, therefore, is an indefensible exercise of judicial power.[122]

Accordingly, to determine whether *Pacifica*, in addition to authorizing regulation of cable programs containing utterances of "obnoxious, gutter language" describing private "bodily functions" repeated solely for their "shock value,"[123] also permits censorship of more widely defined categories of indecent programs, the better approach is to analyze generalized standards. Two specific, generalized standards are readily available and feature prominently in present legislative debates. One is embodied in Morality in Media's model indecency statute.[124] The other is represented by the Utah statute declared un-

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122. *Cf.* Miller v. California, 413 U.S. 15, 22 & n.3 (1973) (summary reversals of convictions for dissemination of protected material after Redrup v. New York, 386 U.S. 767 (1967), places court in position of subjectively judging material without definitive standards).

123. 438 U.S. at 746 n.23 (quoting Pacifica Found., 56 F.C.C.2d 94, 98 (1975)).

124. See *supra* note 19.

constitutional in *Wilkinson*.[125] The arguments for the validity of these statutes are set out, in turn, below.

The Morality in Media statute is easier to defend. The statute's definition of indecent material is well within the bounds of the *Pacifica* definition of indecency, that is, "nonconformance with accepted standards of morality."[126] The Morality in Media statute defines indecent material as that which is "[patently offensive] under contemporary community standards for cable television."[127]

Appeal to the prurient interest, an element of the obscene, is not essential to determining whether particular programming is indecent. *Pacifica*'s extension of the bounds of permissible regulation beyond *Miller* was no accident. Rejecting Pacifica's argument that nonobscene material is protected under the first amendment, the Court stated that "Pacifica's position would . . . deprive the Commission of any power to regulate erotic telecasts unless they were obscene under *Miller v. California*. . . . Anything that could be sold at a newsstand for private examination could be publicly displayed on television."[128] Further, quoting the FCC, the Court stated:

> [W]hile a nudist magazine may be within the protection of the First Amendment . . . the televising of nudes might well raise a serious question . . . . Similarly, regardless of whether the "4-letter words" and sexual description, set forth in *"[L]ady Chatterly's Lover,"* (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activity on radio or TV would raise . . . public interest and [statutory] questions.[129]

The definition of indecency set forth in *Pacifica* encompasses patently offensive references to excretory and sexual organs and activities, in addition to nonobscene "erotic" or sexually provocative broadcasting. That the cable programs may have serious literary, artistic, political or scientific value is not relevant for the same reason it was not relevant in *Pacifica*. The objection is not to the idea but to its manner of expression. The *Pacifica* Court concluded that regulating indecent broadcasting will primarily affect the form, and not the content, of communication, since "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language."[130]

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125. See *supra* notes 5, 7.
126. 438 U.S. at 740 (footnote omitted).
127. See *supra* note 19.
128. 438 U.S. at 744 n.19 (citations omitted).
129. *Id.* at 741 n.16 (quoting En banc Programming Inquiry, 44 F.C.C. 2303, 2307 (1960)).
130. 438 U.S. at 743 n.18.

For these reasons, it may be argued, Morality in Media's definition of indecency appears to fall squarely within the permissible bounds delineated by *Pacifica*, notwithstanding the apparently contrary indications of *Miller*, *Cohen* and *Erznoznik*. Two categories of the definition (representation or verbal descriptions of a human sexual or excretory organ or function, and sexual acts) are expressly subject to regulation by the terms of *Pacifica*.[131] The other two categories (nudity and masturbation) may certainly be proscribed by analogy. The statute, however, does not cover all such depictions or verbal descriptions. Rather, the "context" phrase in the statute permits regulation of only those materials patently offensive by contemporary community standards, incorporating important limiting standards adopted in *Miller*.[132] Therefore, the statute allows the social value of the material as a whole to be considered, that is, the "context" in which the material at issue is printed, in determining whether it is indecent. Thus, for example, nudity represented by an infant, a documentary on tribal cultures or medical treatments probably would not be proscribed under the statute.

The Utah indecency statute proscribes specific categories of communication relating to nudity and sexual activity.[133] Lacking the Morality in Media "context" phrase, the statute prohibits certain types of communication without regard to the work as a whole or even whether the material presented is grossly or patently offensive. Nevertheless, the statute is a good deal more explicit than the federal provision utilized in *Pacifica*, which merely proscribed "indecent or profane language."[134] Because the *Pacifica* majority concluded that indecent programming may constitutionally encompass broadcasts "not conforming to generally accepted standards of morality,"[135] it can be argued that Utah's failure to judge the context in which an offensive depiction takes place is irrelevant. If the FCC may determine what is indecent by such standards, surely the Utah legislature may determine specifically what portrayals of sex acts and sexual organs are offensive to its citizens. Although the statute would proscribe cable programs depicting a nude baby or nonobscene erotic views of a woman's breasts,[136] "[a] requirement that indecent [de-

131. *See id.* at 743.

132. The statute imposes a community, not a national standard, to be measured by the territorial area covered by the franchise. Therefore, where morality standards differ from community to community, that which is determined to be patently offensive may also differ.

133. See *supra* notes 5, 7.

134. See *supra* notes 92-98 and accompanying text.

135. *See* 438 U.S. at 740 n.14 (quoting Webster's Third New International Dictionary (1966)).

136. *See* Utah Code Ann. § 76-10-1227(2) (Supp. 1981); *see also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975).

scriptions or depictions] be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[137]

Thus, proponents of regulation may argue that a fair reading of *Pacifica* would permit a simple, straightforward prohibition of indecent material on cable television. Although the Court specifically decided only whether Carlin's monologue was indecent, and therefore regulable, its definition of indecency may be applied to analogous communications.

C. *The Case Against Permitting Regulation: Reading* Pacifica *in Context*

The preceding description of the case for allowing prohibitions on indecent cable programs demonstrates that at least three different possibilities must be considered. First, could the identical material at issue in *Pacifica*, the Carlin monologue, be prohibited on cable? If so, may government more generally ban, as would Morality in Media, nonobscene depictions of human sexual or excretory organs, nudity, and sexual acts that nevertheless are "patently offensive" under "contemporary community standards for cable television?" Finally, may an even wider censorship be permissible, such as the Utah statute banning nudity on the grounds that it is "indecent," regardless of its pruriency, offensiveness or redeeming social value?

Each of these questions must be answered in the negative, notwithstanding the apparent force of the arguments offered by proponents of such censorship. The key flaw in all those arguments is that they consider *Pacifica* in isolation, rather than placing the opinion in the niche it truly, and deservedly, occupies: a limited exception, for an extreme, virtually non-replicable case, to the general rule established by the *Miller-Cohen-Erznoznik* trilogy. The misreading of *Pacifica* is, unfortunately, facilitated by some of the extraordinarily loose and broad dicta expressed in the Court's opinion which can easily confound the uncritical or untutored reader. Carefully read, and considered against the backdrop of precedent, *Pacifica* truly is what Justice Stevens (the author of *Pacifica*) inartfully, but explicitly, said it was: a case about seven dirty words on radio and no more.[138]

The Court's invitation to read its holding narrowly must be taken seriously. For if *Pacifica* lays down a general rule concerning "intru-

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137. 438 U.S. at 743 n.18.

138. *See id.* at 750. Professor Tribe noted that "*Pacifica* should be confined to its facts, and eventually discarded as a 'derelict in the stream of the law.'" L. Tribe, American Constitutional Law 67-68 (Supp. 1979) (quoting North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 167 (1973)).

sive media" that applies to cable, that rule equally affects all manner of communication that may enter the home when unsupervised children are present, including newspapers, magazines, books and records.[139] And if *Pacifica* establishes a general power to censor speech that is "indecent," "patently offensive" or "not conforming to generally accepted standards of morality," the decision does more than overrule *Miller*, *Cohen* and *Erznoznik*; it obliterates a virtually uninterrupted line of cases, all to the effect that the form of speech does not determine its legality,[140] and returns to the discredited[141] two-tier first amendment theory.[142]

That *Pacifica* is, indeed, a narrow opinion emerges if the rationale employed by the Court is examined more closely in light of these concerns. The Court's opinion is, in fact, narrowly confined to cases concerning both the precise language conveyed and the particular medium of communication employed in that case. *Pacifica* is about dirty words on radio.

1. Dirty Words . . .

That *Pacifica* is a "dirty words" case, not a statement about "indecent," "offensive" or "erotic" language, is expressed in the text of the opinion itself. Although the content of Carlin's monologue was admittedly considered nonobscene, the language of the opinion closely resembles that justifying obscenity regulation. Justice Stevens stated that "[Carlin's monologue] offend[s] for the same reasons that obscenity offends."[143] Further, he quoted the Commission in a footnote: "Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their

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139. *Pacifica*, however, expressly held that the decision did not extend to tapes and records. 438 U.S. at 750 n.28.

140. *E.g.*, Cohen v. California, 403 U.S. 15, 26 (1971); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959); Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

141. *See* Krattenmaker & Powe, *supra* note 3, at 1178-90.

142. This theory had its origin in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *Chaplinsky* established four categories of speech—the obscene, the profane, the libelous and the "fighting word"—each of which was placed outside the protection of the first amendment. *Id.* at 571-72. Thus, the content of speech that fell within one of these categories could be regulated regardless of its effect; all other speech would be accorded first amendment protection unless it presented a clear and present danger of harm. This two-tier analysis has been virtually discarded by the Supreme Court. Krattenmaker & Powe, *supra* note 3, at 1181-83.

Professor Tribe observed that Justice Stevens, in writing the majority opinion in *Pacifica*, sought "to resurrect a new two-level theory of First Amendment rights based on [dictum in *Chaplinsky*]." L. Tribe, *supra* note 138, at 65 n.48. Professor Tribe criticized this attempt, and noted that the majority of the Court has since expressly disclaimed this aspect of Justice Stevens' decision. *Id.*

143. 438 U.S. at 746.

mere bodily functions."[144] To this Justice Stevens added that our society traditionally limits "public exposure or discussion" of privately performed bodily functions.[145]

Moreover, to read *Pacifica* as sanctioning regulation of any potentially offensive or indecent language is at odds with *Cohen* and *Erznoznik*. Cohen's jacket was emblazoned with the ultimate in indecent language, "Fuck," yet the Court held that Cohen's expression was protected under the first amendment. Therefore, unless *Pacifica* is construed to overrule *Cohen*, which it clearly did not, the mere utterance of an indecent word is not subject to regulation. Further, *Erznoznik* is not intelligible if *Pacifica* is not simply a dirty words case. For nudity can be equally "offensive" as dirty words, but *Miller* did not permit government to equate offensive nudity with obscenity.

Thus, although purportedly addressing the issue of indecency, *Pacifica* actually concerns a narrow aspect of obscenity inadvertently overlooked by the Court in *Miller*.[146] Words that graphically convey sexual ideas are not for that reason alone obscene and unprotected, but may be subject to proscription when repeatedly uttered solely for their shock value. Although Carlin's monologue clearly did not appeal to the prurient interest, it may fall under the latter two *Miller* tests for regulable speech. That is, the material may be considered to describe sexual conduct and excretory activities in a patently offensive manner and taken as a whole, lack serious literary, artistic, political or scientific qualities.

That is not to say, however, that *Miller*'s "appeal to the prurient interest" test is to be cast aside, but rather that the *Miller* Court intended to include in the category of unprotected speech certain graphic depictions or descriptions of sexual activities or body organs which, although not appealing to the prurient interest in sex, are sufficiently offensive by contemporary community standards to warrant inclusion in the obscenity category. This is why Justice Stevens pointedly asserted that Carlin's "words offend for the same reasons that obscenity offends."[147] Indeed, the Court in *Miller* overtly recognized a similar point. As an example of regulable obscenity, the Court included patently offensive representations or descriptions of excretory functions.[148] Although such material usually would not appeal to the prurient interest, it is regulable obscenity under *Miller* as long as the latter two tests are met. Therefore, *Pacifica* did not radically depart from *Miller* in holding that repeated utterances of patently offensive

144. *Id.* at 746 n.23.
145. *Id.*
146. *See* Pacifica Found. v. F.C.C., 556 F.2d 9, 32-33 (D.C. Cir. 1977) (Leventhal, J., dissenting), *rev'd*, 438 U.S. 726 (1978).
147. 438 U.S. at 746.
148. *See* Miller v. California, 413 U.S. 15, 25 (1973).

words relating to excretory and sexual organs and activities, purely for their shock value, may be regulated. That, in addition to regulable obscenity as defined in *Miller*, is all that may constitutionally be proscribed. Put another way, had Cohen's jacket or Erznoznik's screen contained all "seven dirty words" and nothing else, *Pacifica* teaches that each would have presented a different case.

2. . . . on radio

Even as reconstituted, however, Cohen's and Erznoznik's cases would not have been easy victories for their prosecutors because *Pacifica* is also limited by the nature of the medium involved. Indeed, the Court specifically invited such a limiting construction, emphasizing that "differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant."[149] Thus, by its terms, *Pacifica* does not extend to content regulation on cable television. To the extent, however, that *Pacifica* may be read to permit the regulation of less-than-obscene material on "uniquely pervasive" and "uniquely accessible" media, those phrases, however accurately they describe radio, cannot sensibly encompass cable programming.[150] The cable medium differs extensively from radio, and therefore should be governed by the standards for permissible content regulation set forth in *Miller*. One need not share the views of a Court, composed entirely of men born during the era of the crystal set, that unsuspecting adults cannot protect themselves from unexpected, offensive radio programming in their homes or that radio broadcasting is uniquely accessible to children to understand that these men believe radio is unique and to realize that cable shares none of radio's assertedly unique attributes.

a. *Pervasiveness*

By its nature, it is highly unlikely that cable programming would be an unwelcome, pervasive intruder in the home. In almost all cases, cable television is a subscription service. An individual desiring to bring cable programming into his home must arrange for it with a cable operator, pay an initial installation fee, and then pay a monthly fee. Thus, cable programming is voluntarily admitted into the home, and that choice is reaffirmed regularly by the payment of monthly fees. To end any "intrusion," the individual need simply cancel his subscription to the cable service. Because a conscious and continuing

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149. 438 U.S. at 750.

150. Even on radio broadcasts, *Pacifica* does not authorize the proscription of all potentially offensive communication. The Court suggested that its decision might have been different had the content been such that it would not command the attention of children or if the broadcast had been aired during the late evening hours when fewer children would be in the audience. *See id.* at 750 n.28.

choice to purchase the programming is required to receive cable television, it is inconceivable that the system could be viewed as an unwelcome intruder without similarly classifying home-delivered newspapers and magazines or subscription services for books or records. Surely, all these media cannot simultaneously be "*uniquely* pervasive."

Further, the success of any cable system depends upon convincing the public to purchase the service, as well as avoiding expensive disconnections. It is therefore in the programmer's best business interest to make the viewing public aware of what is being shown. Misinformed viewers could potentially be dissatisfied viewers who would discontinue their service. This economic incentive on the part of the cable operator to keep the viewing public fully informed increases the probability that cable programming would not be an unwelcome intruder.

In addition to receiving information concerning the types of programming the system offers before purchase, after purchasing the system the viewer typically receives detailed program guides relating to the specific material that will be shown over the monthly period. For example, HBO's guide describes the program offered, and for feature films, lists the ratings assigned by the Motion Picture Association of America.[151] The guide gives further details on the programs, such as whether they contain "violence," "nudity," "profanity," "adult humor," "adult situations," or "strong sexual content," to assist the viewer in deciding whether to watch the program and in monitoring his children's viewing.

Moreover, many systems divide their programming into "pay tiers," with separate charges for each tier. For example, "Super TV," a Washington, D.C. area station, offers both a regular service and a "Night Life" service that shows late night films for "adult" audiences.[152] Although Super TV shows no "X-" rated movies, those shown in its "Night Life" package may be characterized as "hard-R." "Night Life" is an optional, extra service, for which the viewer pays an additional fee.

For all these reasons, the right of those who voluntarily admit cable programming into their homes to be shielded from offensive speech is surely no greater, and is probably less compelling, than the right of those people confronted with Cohen's jacket in a Los Angeles County courtroom or unsuspecting passersby in *Erznoznik*. The same duty to

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151. *See, e.g.*, HBO Guide (Apr. 1982).

152. *See* Super TV Program Guide (Mar. 1982). The station is not a cable system, but a broadcast station that transmits a scrambled signal and leases decoders for a fee. For the reasons stated in the text, these stations also fall outside the media reached by *Pacifica*.

avert one's eyes or turn off the program applies. The obligation to do so is stronger in the case of a cable subscriber who receives the material by choice.

b. *Accessibility*

Pacifica's second basis for justifying content regulation of indecent radio broadcasts is that radio is uniquely accessible to young children, in whose interest the state has wide latitude to censor speech. No such argument could plausibly be advanced in the cable context.

First, parents are entirely free to choose whether to subscribe to cable television. When both parents and child desire that the minor have access to communication, the state has no particularly compelling claim to authority to displace those choices.[153] *Pacifica* simply concludes that receipt of some media requires no more affirmative act than the purchase of a receiver and that, under modern conditions, the "choice" whether to have a radio in the home is scarcely a realistic option.

Moreover, the program guides issued by the cable operator inform parents well in advance of the types of programming that will be shown.[154] Parents who wish to prevent their children from viewing, or be with them during the program, are enabled to do so. In addition, lock boxes and parental keys are widely available as a means of excluding children. These involve either a lock placed on the channel, or a scrambled signal that may be unscrambled by either a key or a code entered into the system.[155] These protections provide additional means for parents effectively to monitor their children's viewing.

As the foregoing indicates, an asserted desire to protect children is not a valid justification for regulating indecency on cable programming. To hold *Pacifica* applicable to cable on that basis would permit similar regulation of magazines and newspapers as well; cable is no more uniquely accessible to children than these forms of speech. All must be affirmatively opened or turned on. If anything, cable affords a greater opportunity to monitor, ahead of time, what will be seen. And lock boxes provide as much protection for children as placing indecent reading material in a locked drawer.

c. *Physical and Economic Characteristics*

As observed earlier,[156] the traditional rationale for content regulation of radio, that such rules are permissible ancillary effects of the

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153. *See* Krattenmaker & Powe, *supra* note 3, at 1241-59.
154. See *supra* text accompanying note 151.
155. *See* Krattenmaker & Powe, *supra* note 3, at 1275-76.
156. See *supra* text accompanying notes 110-13.

need to supervise the allocation by government of a scarce resource, did not and could not justify the result in *Pacifica*. Nevertheless, the preceding analysis reveals that a key to understanding *Pacifica*'s intrusion rationale is the fact that radio broadcasts are simply transmitted into the open air. In this respect, cable television is more akin to the printed media than the "broadcast" media; indeed, the only notable characteristic cable shares with television is the television screen. For these purposes, cable television is essentially an electronic newspaper.[157] Unconstrained by spectrum scarcity, the number of channels available to a cable system is virtually unlimited, and the number of cable systems that can be built in a neighborhood, like the number of newspapers or books that can be delivered there, is limited only by the laws of economics and not those of physics.

Thus, cable regulation geared to the "public interest" by promoting or avoiding programs that appeal to the mass populace is unnecessary. A content ban would prevent the wide dissemination of diverse viewpoints and obstruct the flow of ideas, a result contrary to the first amendment. Content regulation of programs some might find offensive impermissibly encroaches upon the constitutionally protected interests of those who wish to communicate, and those who wish to receive, such material.

D. *Application of a More Prudent Reading of* Pacifica

Thus, because neither the traditional scarcity rationale, nor the new intrusiveness rationale, applies to regulation of cable programming, content regulation of cable should be governed by the *Miller* guidelines. If material shown on cable is obscene under the *Miller* tests, it is unprotected speech under the first amendment. If, however, the material shown is not obscene, it is outside the scope of permissible regulation.

In light of the previous discussion, the Utah statute[158] struck down in *Wilkinson*[159] is patently unconstitutional. That statute proscribes clearly protected communication, such as the mere description or depiction of nude or partially denuded figures, without regard to the work as a whole, prurient appeal or patent offensiveness. Many films afforded first amendment protection when shown in theatres include depictions or descriptions of "illicit sex or sexual immorality," yet such movies are not considered "obscene," and therefore are not regulable under *Miller*. *Pacifica* did not extend *Miller* to encompass blanket

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157. *See* Note, *Cable Television and Content Regulation: The FCC, The First Amendment and The Electronic Newspaper*, 51 N.Y.U. L. Rev. 133 (1976).

158. See *supra* notes 5, 7.

159. See *supra* notes 10-18 and accompanying text.

proscriptions such as those in the Utah statute. Rather, *Pacifica* represents a narrow exception to the general *Miller* tests. Because the Utah statute fails to employ the *Miller* safeguards, it is unconstitutional.

Morality in Media's model indecency statute[160] is unconstitutional to the extent that it proscribes less than obscene material. Facially, the statute appears to come close to the *Miller* suggestions of permissible regulation.[161] The statute, however, lacks the *Miller* three-part test. "Patent offensiveness" is but one element of *Miller*'s three-part test. It is not enough for material merely to be patently offensive to relinquish its first amendment protection—it must be obscene. And to be obscene, the material, taken as a whole, must appeal to the prurient interest and lack serious literary, artistic, political or scientific value. Because the Morality in Media statute does not employ these safeguards, it is unconstitutional under *Miller*.

For example, a single scene of "patently offensive" nudity or a sexual innuendo in a film shown on cable could make its presentation a violation under the statute. Yet these same movies are afforded first amendment protection when shown in a theatre because they are not obscene under the *Miller* test. One cannot plausibly argue that such scenes represent an inadvertent gap in *Miller*'s definition of obscenity. The portrayal of sexual conduct was precisely what *Miller* was all about. Cable television operators and subscribers are entitled to no less first amendment protection than moviegoers, and nothing in *Pacifica* fairly points to a contrary conclusion. Indecent material, which does not rise to the level of obscenity, may not constitutionally be proscribed on cable television.

The regulation of Carlin's monologue, or similar offensive speech, on cable presents a more difficult issue, for it squarely raises the question whether the obscenity-gap-filling rationale of *Pacifica*[162] is limited to "uniquely pervasive" and "uniquely accessible" media.[163] *Pacifica* clearly extended *Miller* to encompass an additional category of regulable speech—repeated utterances over the radio of patently offensive "dirty words" purely for their shock value. The *Pacifica* exception, however, should be confined to "unique media." Indeed, the *Pacifica* majority apparently recognized this point when it concluded that the Carlin monologue was constitutionally protected if delivered via the medium of records.[164]

By any conceivable test of "uniqueness" that does not disregard *Miller*, *Cohen* and *Erznoznik*, cable television must be a "non-

160. See *supra* note 19 and accompanying text.
161. See *supra* text accompanying notes 20-21.
162. See *supra* text accompanying notes 143-48.
163. See *supra* text accompanying notes 149-57.
164. *See* 438 U.S. at 750 n.28.

unique" (like records) rather than a "unique" (like radio) medium. Like a record, a cable subscription is voluntarily and knowingly purchased, easily discarded and easily shielded from children. To be sure, cable, like radio, is received on a broadcast receiver in the home. But this similarity is irrelevant to the first amendment values that led the Court to announce the "unique media" standard in *Pacifica*. Were the Court to conclude otherwise, truly impossible distinctions would be necessary. Imagine a court, having held the Carlin monologue protected on records, but unprotected on radio and cable, confronted with a videodisc of the same program.

This definition of "unique" not only accounts for the *Pacifica* result, but also renders the decision capable of logical explication. Thus, content regulation on cable should be governed by the *Miller* rule, rather than the *Pacifica* exception, and Carlin's monologue should be constitutionally protected if communicated as cable programming.

Conclusion

As the foregoing analysis indicates, *Pacifica* inartfully clouded the boundaries of permissible regulation of cable television programming. Assuredly, many of the above-stated reasons for invalidating statutes banning indecency on cable could conceivably be applied to radio as well. Further, the breadth and looseness of the Court's dicta confessedly make one pause before concluding that the Court believed it confronted only an isolated, overlooked instance of obscenity. Yet reflection suggests that only the very limited reading of *Pacifica* espoused in this Article makes any sense, unless we are to assume that, to be blunt, the majority lied about what it meant in *Pacifica*.

Miller, *Cohen*, and *Erznoznik* were reaffirmed in *Pacifica*. This must be taken to signify that the latter opinion means only what it plainly says: The first amendment does not protect the indiscriminate distribution via open airwaves of exceedingly vulgar language uttered only for its shock value. A principled (in the sense of logical and objectively applicable) rationale explains why that exception can coexist with dominant first amendment jurisprudence, even though the rationale may not satisfactorily justify the exception in terms of enduring first amendment values.[165] Justice Stevens virtually begs the reader to supply a rationale that will confine *Pacifica* to its facts. Having accepted that invitation, one can only assume the rationale will be accepted in return.

Consider the alternative. The danger of extending *Pacifica* to cable is self-evident. Such an extension would not only open the door to limit what is increasingly becoming an important additional means of disseminating diverse ideas and information, but also would threaten

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165. *See* Krattenmaker & Powe, *supra* note 3, at 1280-84.

to destroy the first amendment rights of individuals to say, see and hear what they choose. As the Court has aptly stated elsewhere, "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[166] The state simply may not constitutionally regulate offensive material merely to protect its citizens' moral sensibilities, certainly not when the acquisition of that material requires an affirmative, informed choice by an adult.

Furthermore, to suggest, as would the broader reading of *Pacifica*, that the content of expression often can be divorced from its form is fallacious. As Justice Harlan stated in *Cohen*, "[the form of expression] serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force."[167] A simple illustration is provided by the once controversial line in "Gone With the Wind," in which Rhett Butler tells Scarlett O'Hara, "Frankly, my dear, I don't give a damn!" Any change in the form of that line would alter its expressive content.

Cable programming potentially is available to everyone. It is also, and equally, avoidable by anyone. These conditions are sufficient protection for potentially offensive speech. Adults should not be reduced to seeing what is fit for children,[168] nor should either group be subjected to viewing only that which is "palatable to the most squeamish among us."[169] These principles are deeply imbedded in our jurisprudence. More than loose, over-written dicta in a single opinion will be required to dislodge them.

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166. Stanley v. Georgia, 394 U.S. 557, 566 (1969) (states may not proscribe possession inside the home of obscene material).

167. Cohen v. California, 403 U.S. 15, 26 (1971).

168. *See* Butler v. Michigan, 352 U.S. 380, 383 (1957).

169. Cohen v. California, 403 U.S. 15, 25 (1971).