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Andrea L. Bonnicksen

OBSCENITY RECONSIDERED: BRINGING BROADCASTING INTO THE MAINSTREAM COMMENTARY

ANDREA L. BONNICKSEN*

Twice in the past 100 years technology produced a fundamentally new medium for transmitting speech. Motion pictures joined the written word in the late 1890s and broadcasting joined these media in the 1920s. The United States Supreme Court initially excluded each new medium from traditional First Amendment protection. In the 1915 case of *Mutual Film Corp. v. Industrial Commission of Ohio*[1] the Court held that motion pictures did not deserve the benefits of First Amendment press freedom. However, as early as 1943, in *National Broadcasting Corp. v. United States*[2] it held that broadcasting's idiosyncratic nature[3] justified regulating the medium under singular First Amendment principles. The Court then reversed its earlier decision of *Mutual Film* in *Burstyn v. Wilson*[4] and granted motion pictures full First Amendment rights. Only recently in *FCC v. Pacifica Foundation*[5] has the Court reaffirmed that broadcasting is a singular medium warranting separate doctrinal treatment.

The Court's view that broadcasting is qualitatively different from the film and print media influenced decisions involving sexual speech and broadcasting.[6] Court-developed obscenity principles apply with few exceptions jointly to the print and motion picture

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*Assistant Professor of Political Science, Eastern Illinois University.

1. Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915). The Court said, " . . . the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, . . . as part of the press of the country or as organs of public opinion." *Id.* at 244.

2. National Broadcasting Corp. v. United States, 319 U.S. 190, 226 (1943).

3. *See* text accompanying notes 20-31 *infra*.

4. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952). The Court recognized films as "a significant medium for the communication of ideas" and hence part of First Amendment press because by 1952 newsreels and motion pictures containing social and political messages showed that films did more than entertain. *Id.*

5. FCC v. Pacifica Foundation, 438 U.S. 726 (1978). *Compare* Red Lion Broadcasting Corp. v. FCC, 395 U.S. 367 (1969) (approving the fairness doctrine for broadcasting), *with* Miami Herald v. Tornillo, 418 U.S. 241 (1974) (striking down Florida's "right to reply" statute).

6. It has also influenced the law on access. *See* Red Lion Broadcasting Corp. v. FCC, 395 U.S. 367 (1969).

media;[7] but the courts advance a different body of law governing sexual speech in broadcasting. The differences warrant an analytical distinction between "mainstream (or non-broadcasting) law" which governs sexual speech in the print and motion picture media and "broadcasting law" which governs sexuality in radio and television. This bifurcation is echoed in the legal commentary: researchers tend to focus on either mainstream or broadcasting law, or contrast the two when they are discussed jointly.[8] As a result, most conclusions

7. The Court developed standards of obscenity control irrespective of the medium through which the utterances were channeled. Definitive cases involved books: A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); magazines and related publications: Marcus v. Search Warrant, 367 U.S. 717 (1961); films: Heller v. New York, 413 U.S. 483 (1973); Roaden v. Kentucky, 413 U.S. 496 (1973); Lee Art Theatre v. Virginia, 392 U.S. 636 (1968); Freedman v. Maryland, 380 U.S. 51 (1965); and theatrical performances: Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). *See* Powe, *Cable and Obscenity*, 24 CATH. U.L. REV. 719, 723-24 (1975).

However, the Court apparently believes that a message portrayed visually is more forceful than the same message transmitted through the written word. It has said for example that "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression." Interstate Circuit, Inc., v. Dallas, 390 U.S. 676, 690 (1968), *quoting* Burstyn v. Wilson, 343 U.S. 495, 502 (1952). It also tacitly accepted the notion by affirming without comment a lower court decision which said "[b]ecause of the nature of the medium we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word." Fording v. Landau, 54 Cal. Rptr. 177, 181, *aff'd per curiam*, 388 US.. 456 (1967). *See* Powe, 24 CATH. U.L. REV., *supra*, at 725. Finally, in Times Film Corp. v. Chicago, 365 U.S. 43 (1961), the Court upheld a city ordinance requiring all films to be subject to review for obscenity. A similar plan for books would presumably violate the First Amendment. *See* Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 23-24 (1976).

8. This is true of editors of standard casebooks. *See, e.g.*, L. BARKER & T. BARKER, CIVIL LIBERTIES AND THE CONSTITUTION (3d ed. 1978); R. CUSHMAN, CASES IN CIVIL LIBERITES (2d ed. 1976); W. LOCKHART, Y. KAMISAR, & J. CHOPER, CONSTITUTIONAL RIGHTS AND LIBERITES (4th ed. 1975). It is equally true of legal articles. *See, e.g.*, Fahringer & Brown, *The Rise and Fall of Roth—A Critique of Recent Supreme Court Obscenity Decisions*, 62 KY. L. REV. 731 (1974); Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amentment*, 9 GA. L. REV. 533 (1975); Rosenblum, *The Judicial Politics of Obscenity*, 3 PEPPERDINE L. REV. 1 (1975); Note, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations*, 1974 ARIZ. ST. L.J. 457; Note, *Filthy Words, the FCC, and the First Amendment*, 61 VA. L. REV. 579 (1975); Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343 (1970); Comment, *Miller v. California: A Cold Shower for the First Amendment*, 48 ST. JOHN'S L. REV. 568 (1974). With respect to narrative books, *see, e.g.*, H. ABRAHAM, FREEDOM AND THE COURT (3d ed. 1977); H. PRITCHETT, THE AMERICAN CONSTITUTION (1968). Finally it is similarly true for judicial and FCC decisions. *See, e.g.*, Pacifica Foundation, Station WBAI (FM), 56 F.C.C.2d 94, 32 RR2d 1331 (1975), *rev'd*, Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Red Lion Broadcasting Corp. v. FCC, 395 U.S. 367, 390 (1969).

about the status of sexual speech derive exclusively from mainstream principles while broadcasting doctrine is either excluded or merely footnoted as an aberration. The author of one otherwise comprehensive book on obscenity, for example, noted only of broadcasting that "the analysis of what can or cannot be permitted on the airwaves is wholly unlike that for determining obscenity in other contexts."[9]

An accurate analysis of sexual speech requires integration of broadcasting into the mainstream commentary. The incorporation of broadcasting prompts changes in the law relating to sexual speech, changes that indicate a less vigorous system of free expression than that revealed when only mainstream media are considered. The article first suggests that the reasons broadcasting law has traditionally been discussed separately from mainstream law are unpersuasive. It then proposes a restatement of current legal standards governing sexual speech in light of broadcasting law. It includes both substantive and procedural standards of mainstream doctrine and broadcasting doctrine, and the integration of the two in a restated collective standard. It concludes with a discussion of the effect mainstreaming has on the analysis of free expression.

EXPLAINING BROADCASTING NEGLECT IN MAINSTREAM COMMENTARY

Commentary on sexual speech traditionally excludes broadcasting for three apparent reasons. Each has merit but none justifies separating broadcasting from the analysis of sexual speech. First, at least until *FCC v. Pacifica Foundation*,[10] broadcasting principles were largely the result of FCC practices and lower federal court decisions.[11] On the other hand, the Supreme Court produced the bulk of mainstream law.[12] The Court decided dozens of main-

9. F. SCHAUER, THE LAW OF OBSCENITY 190 (1976) [hereinafter cited as SCHAUER].

10. 438 U.S. 726 (1978).

11. *See, e.g.*, Pacifica Foundation, Station WBAI (FM), 56 F.C.C.2d 94, 32 RR2d 1331 (1975), *rev'd* Pacifica Foundation v. FCC, 556 F.2d 9 (1977), *rev'd* FCC v. Pacifica Foundation, 438 U.S. 726 (1978); In re Sonderling Broadcasting Corp., 41 F.C.C.2d 919, 27 RR2d 285 (1973), *aff'd sub. nom.*, Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975); Eastern Educational Radio (WUHY-FM), 24 F.C.C.2d 408, 18 RR2d 860 (1970); Jack Straw Memorial Foundation, 21 F.C.C.2d 833, *aff'd on rehearing* 24 F.C.C.2d 266 (1970); Palmetto Broadcasting Corp., 33 F.C.C. 250 (1962), *rehearing denied*, 34 F.C.C. 101 (1963), *aff'd sub. nom.*, Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 843 (1964).

12. Key decisions in the evolving definition of obscenity include Miller v. California, 413 U.S. 15 (1973) (obscene material appeals to prurient interests, is patently offensive, and lacks *serious* literary, artistic, political or scientific value, as decided

stream obscenity cases after it began to review sexual speech in 1957[13] but its first broadcasting decision came not until 1978.[14] However, the Court's detachment from broadcasting doctrine is not as severe as it first appears considering the 1943 decision of *National Broadcasting Corp. v. United States*.[15] That decision upheld the provisions of the Communications Act of 1934 which allowed the airwaves to be used only in the "public interest" and granted the FCC enforcement powers primarily by means of its control over broadcast licenses.[16] This case gave the FCC enormous discretion in its decisions of what speech was not in the public interest and required only that the FCC could not revoke or deny a license "capriciously."[17] The decision makes the Supreme Court at least partially responsible for FCC treatment of sexual speech.

Second, commentators tend to assume that sexual censorship in broadcasting is not a serious problem. Indeed, very few cases involving censorship appear in FCC and Federal Reporters.[18] Yet the absence of overt censorship does not preclude a constitutional problem. More than one observer has suggested that the FCC exercises subtle pressures that cause licensees to censor themselves.[19] If self-censorship does indeed result from FCC intimidation, then more

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by community standards); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966) (a book which is patently offensive and appeals to prurient interests is not obscene if it has "a modicum of literary and historical value"); Ginzburg v. United States, 383 U.S. 463 (1966) (material may be held obscene if it is crudely and offensively marketed [i.e., "pandered"]); Jacobellis v. Ohio, 378 U.S. 184 (1964) (material must be *utterly* without social importance to be obscene); Manual Enterprises, Inc., v. Day, 370 U.S. 478 (1962) (material must be "patently offensive" as well as appealing to prurient interests to be obscene); Roth v. United States, 354 U.S. 476 (1957) (something is obscene if, "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests").

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

14. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

15. 319 U.S. 190 (1943).

16. 47 U.S.C. § 303(m)(1)(D) and § 308(a) (1976).

17. 319 U.S. at 226-27. This contrasted with other decisions of the 1940s in which the Court suggested that statutory limitations on speech were presumptively unconstitutional. *See, e.g.*, United States v. Congress of Indus. Organizations, 335 U.S. 106, 121 n.20 (1948); Thomas v. Collins, 323 U.S. 516, 529-30 (1943); and Schneider v. New Jersey, 309 U.S. 147, 161 (1939).

18. *See, e.g.*, note 11 *supra*. Part of the reason for infrequent censorship is that licensees shun controversial material in order to avoid antagonizing what they perceive to be a sedate audience. *See* Powe, 24 CATH. U. L. REV., *supra* note 7.

19. *See, e.g.*, Note, 61 VA. L. REV., *supra* note 8, at 606, 611. For a discussion of these pressures, *see* text accompanying notes 175-91 *infra*.

rather than less First Amendment vigilance may be required to guard against the chilling effect.

Third, unique aspects of broadcasting cause many to view it apart from mainstream media.[20] Unlike other media, the argument goes, broadcasting depends upon scarce natural resources and is "uniquely pervasive in the lives of all Americans."[21] Yet arguably these features are shared with other media as well. Consider first broadcasting's resource scarcity: television and radio operate via an electromagnetic spectrum made up of individual frequencies that are limited in number, thus limiting public accessibility.[22] In order to deal with this "scarcity," Congress declared the electromagnetic spectrum a public resource and the FCC the agency for allocating licenses in the Radio Communications Act of 1927 and its successor, the Communications Act of 1934. As the Court said in *National Broadcasting Corp. v. United States:* "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."[23] In contrast, traditional media rely on abundant natural resources. Film, processing equipment, paper, and printing presses exist in abundance, subject only to financial limitations, and thus need not be allocated on a public interest basis.

Yet public accessibility to the traditional media is also limited. Although in theory the materials upon which they rely are freely available and these media can be used by anyone, in practice corporate monopolization limits access to print and other non-broadcast media.[24] Today, only one or two newspapers serve most cities; in fact, only three cities have more than two independently owned competing papers. In approximately 64 cities two independent newspapers operate and 141 cities have two newspapers with the same owner.[25] Causes may differ, but scarcity of opportunity is present to some degree in all media. The newspaper is but one example. Broad-

20. *See, e.g,* SCHAUER *supra* note 8, at 190.

21. FCC v. Pacifica Foundation, 438 U.S. at 748.

22. There are two forms of accessibility. One refers to openness of the marketplace and is measured by the ability of individuals to set up a business within the industry. A second refers to the ability of interested individuals and groups to penetrate the media to publicize their views.

23. 319 U.S. at 226.

24. Barrow, *The Fairness Doctrine: A Double Standard for the Electronic and Print Media,* 26 HASTINGS L.J. 659, 684-85 (1975).

25. *Id.*

casting's relative impenetrability is not unique; rather it arises in different circumstances.[26]

Broadcasting's "uniquely pervasive presence" is another enduring myth. Broadcast material is received in the most private of contexts—the home.[27] It poses the danger of unwittingly exposing the listeners sitting in the sanctity of their homes to unacceptable speech while scanning the dial in search of a program.[28] More importantly, broadcasting is alleged to be "uniquely accessible to children,"[29] especially by parents who have trouble controlling what their children watch on television or hear over the radio. Although television and radio are arguably "intruders"[30] threatening adult and child with involuntary exposure, this does not make them unique. Broadcasting's "dial scanner" has a cohort in the print arena—the "page turner." The dial scanner switches stations in the privacy of the home; the page turner leafs through a magazine, newspaper, or book. In both cases the recipient "opened up" his or her home by an act of free will, on the one hand by purchasing a publication and on the other by turning on the television or radio set. In both cases the "invasion" of privacy could be ended instantly.[31]

In summary, exclusion of broadcast speech from analysis of sexual speech control in other media is unjustified. Contrary to the assertion that broadcasting law is purely that of the FCC and lower courts, *National Broadcasting Corp.*, which gave the FCC broad

26. Ironically, as the traditional media have become less penetrable, cable television makes telecommunications more penetrable. Cable television uses a coaxial cable rather than common airwaves to transmit signals to home television sets. It is not bound by the limited number of airwave frequencies and "can be expanded virtually without bound by adding more lines to the coaxial cable." Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STAN. L. REV. 1527, 1542 n.67 (1975). It has been estimated that for every channel available through the airwaves, 80 are available through a single cable. Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U.L. REV. 133, 135 (1976).

27. For the importance of home privacy *see, e.g.*, FCC v. Pacifica Foundation, 556 F.2d 9, 25 (D.C. Cir. 1977); Rowan v. United States Post Office Dept., 397 U.S. 728 (1970); Stanley v. Georgia, 394 U.S. 557 (1969).

28. *See* In re Sonderling Broadcasting Corp., 27 RR2d 285, 288 (1973); and WUHY-FM, 18 RR2d 860, 864, 24 F.C.C.2d 408, 411 (1970). *But see* Pacifica Foundation, 56 F.C.C.2d 94, 32 RR2d 1331 (1975).

29. FCC v. Pacifica Foundation, 438 U.S. at 749.

30. *Id.*

31. The Court suggested looking away to avoid offensive material in Erznoznick v. Jacksonville, 422 U.S. 205, 211 (1975) (nudity on an outdoor movie screen) and Cohen v. California, 403 U.S. 15, 21 (1971) (a man in a courthouse wearing a jacket on which "Fuck the draft" was written).

power over speech in 1943, indicates a long history of Supreme Court imprimatur. Second, the few cases of broadcast censorship should not cloak the possibility that a deeper, less visible form of censorship is still going on. Third, broadcasting is not as different from other media as might first appear. To be sure, broadcasting is dependent on scarce natural resources and it is inaccessible to aspiring entrepreneurs. It does enter the privacy of the home and it can unexpectedly offend the audience. But traditional media are also effectively closed to many would-be entrepreneurs. Similarly they, as well as broadcasting, can assault the sensibilities of their audiences in the privacy of the home. To isolate broadcasting from mainstream media on the grounds that it is "unique" overstates the argument. A potent word, used to denote one of a kind or something for which there is no equal, "unique" is overused in everday language. It is also misused in broadcasting, erroneously depicting a medium with characteristics unshared by other media. More accurately, the media can be said to fall on a continuum with variations of accessibility, the likelihood of unwanted exposure in the home, and the danger of surreptitious viewing by children. Thus the media are understood better through gradations than typologies. Their similarities suggest that their separate bodies of law may profitably be studied jointly.

SUBSTANTIVE STANDARDS GOVERNING THE CONTROL OF SEXUAL SPEECH

Mainstream Standard

The mainstream standard for controlling sexual speech revolves around obscenity. In *Chaplinsky v. New Hampshire*[32] the Court suggested that obscene utterances were not speech within the meaning of the First Amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and the obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of peace.[33]

Chaplinsky created two classes of utterances: higher level speech within the scope of First Amendment protections and lower level expression technically not First Amendment "speech" at all.

32. 315 U.S. 568 (1942).
33. 315 U.S. at 572.

Chaplinsky's definitional exclusion of certain expressions from the realm of protected speech reflected the Court's assumptions about the nature and meaning of speech. To qualify as speech, utterances must contribute to society's edification. As Mr. Justice Murphy continued in *Chaplinsky*, "it has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[34] The Court's pioneering obscenity decision of *Roth v. United States*[35] recast *Chaplinsky's* "two-level" principle[36] into *ratio decedendi*, at least for that part of *Chaplinsky* dealing with obscenity. *Roth* reiterated that "obscenity is not within the area of constitutionally protected speech or press" because it is devoid of social utility.[37]

Definitions are essential to the *Chaplinsky-Roth* two-level approach. The approach uses obscenity as a signpost to direct protected speech to one avenue and non-protected utterances to another. To be effective the two-level approach needs a clearly displayed waymark or definition. The Court has had trouble clearly defining obscenity and it failed to reach a majority agreement on a definition in the first ten years after *Roth*.[38] Failing this it essentially shelved the question by writing a series of short per curiam opinions when faced with the issue.[39] *Miller v. California*[40] finally broke

34. *Id.*

35. 354 U.S. 476 (1957), decided along with Alberts v. California. The Court granted certiorari in an earlier sexual speech case, Winters v. New York, 333 U.S. 509 (1948), but a tie vote prevented it from contributing to the doctrine developing in lower courts. *See* SCHAUER, *supra* note 5, at 30.

36. The "two-level" appellation was added by Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 9-11.

37. 354 U.S. at 485.

38. In *Roth* it defined material as obscene if, "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." 354 U.S. at 489. The key cases in the next 10 years are listed in note 12, *supra*. In three of these decisions—"Memoirs" v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964); and Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962)—the Justices failed to agree on an opinion for the Court.

39. In Redrup v. New York, 386 U.S. 767 (1967), the Court summarized the different views on obscenity set forth by the Justices and then, in reversing the obscenity convictions of a newsstand dealer and two other persons, said: "[w]hichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand." *Id.* at 771. In *Redrup* and the 35 obscenity convictions summarily reversed on its basis in the next two years, the Justices concluded that the material in question was not obscene but they offered no common definition of obscenity. *See* Fahringer & Brown, 62 KY. L. REV., *supra* note 8, at 734-35.

40. 413 U.S. 15 (1973).

41. *Id.*, at 24.

the impasse in 1973 when the Burger Court sifted through past decisions and arrived at the current working definition of obscenity: material is obscene if, as judged by the average person using contemporary community standards, it (1) appeals as a whole to sexual prurient interests, (2) is patently offensive, and (3) taken as a whole, lacks "serious literary, artistic, political, or scientific value."[41]

As the Court labored from *Roth* to *Miller* it moved between two approaches for defining obscenity. *Roth* approximated what Lockhart and McClure call "constant obscenity," an approach that presumes material diagnosed as obscene in one context will be obscene in every other context.[42] It draws a rigid line between protected and unprotected expression and focuses attention on the material itself. It disregards the context in which the material is read or viewed and does not balance the material with other social interests. For example, the *Roth* Court declined to consider whether the material in question—an assortment of magazines and leaflets sent through the mails—would "create a clear and present danger of antisocial conduct."[43] Using the constant obscenity approach the Court based its decision on facial obscenity and declined to weigh contextual factors.

After *Roth* the Court moved to what Lockhart and McClure call "variable obscenity."[44] Under this approach the Court considers the material's context as well as its content in deciding whether to allow controls. Variable obscenity has taken different forms. One requires the Court to set up a ladder of obscenity definitions and apply one depending on the audience to be reached. In *Mishkin v. New York*[45] the Court held that material directed to a deviant group is obscene if it appeals to the prurient interests of *that* group. *Mishkin* used the average adult homosexual rather than the average adult of the whole community to define obscenity. In *Ginsberg v. New York*[46] the Court concluded that a different standard of obscenity might apply when children compose the target audience. This form of variable obscenity is loyal to *Chaplinsky* and *Roth* because each definition repeats the two-level principle that obscenity is not protected while other material is. The Court brings context into the picture only to decide which definition is appropriate.

42. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 68-88 (1960). *See also* Schauer, *The Return of Variable Obscenity?* 28 HASTINGS L.J. 1275, 1277 n.16 (1977).

43. 354 U.S. at 486.

44. Lockhart & McClure, 45 MINN. L. REV., *supra* note 42, at 68-88.

45. 383 U.S. 502 (1966).

46. 390 U.S. 629 (1968).

A second form of variable obscenity veers further from *Chaplinsky* and *Roth* by using context at the onset to decide whether material is obscene. In *Ginzburg v. United States*,[47] the Court held that the way a publication is advertised and sold may contribute to its obscenity. If material is "pandered," that is crudely and offensively marketed so as to appeal to the salacious interests of the targeted public, this marketing tactic may be enough to tip the scales to obscenity. Similarly, in *Stanley v. Georgia*[48] the Court held that the privacy of the home protected the owner's right to possess material otherwise subject to sanctions for obscenity. Both *Ginzburg* and *Stanley* introduced a flexible line between obscene and nonobscene material.

A third form is suggested by *Young v. American Mini Theatres, Inc.*[49] in which four members of the Court agreed with Mr. Justice Stevens' position that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance."[50] The decision upheld Detroit's zoning ordinances requiring geographical dispersion of "adult theaters" (those emphasizing specified sexual activities and specified anatomical areas) as reasonable time, place and manner restrictions. The decision let stand an ordinance that distinguished theaters on the basis of the content of material they exhibited. In a section in which only three members of the Court joined, Justice Stevens elaborated on his view that speech could be controlled on the basis of its content and that some erotic speech was inherently less deserving of First Amendment protection.[51] The decision opened the possibility that the Court might create a gradation of sexual speech, with obscene utterances not protected, sexually explicit speech somewhat protected, and other speech fully protected. However, the decision contrasts with other Court decisions[52] and it is yet unclear whether *Young* presages a new direction in Court doctrine.

In summary, the mainstream standard casts obscene material outside of First Amendment protection and protects all other sexual

47. 383 U.S. 463 (1966).

48. 394 U.S. 557 (1969).

49. 427 U.S. 50 (1976).

50. 427 U.S. at 61.

51. He said, among other things, that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." 427 U.S. at 70.

52. *See, e.g.*, Erzoznick v. Jacksonville, 422 U.S. 215 (1975). Dissenting in *Young*, Mr. Justice Stewart called the decision an "aberration." 427 U.S. at 87.

speech. However the line the Court erects between obscene and nonobscene speech is no longer as rigid as the one set up in *Chaplinsky* and *Roth*. The Court now recognizes different definitions of obscenity, uses contextual variables to decide whether material is obscene, and has indicated that sexually explicit speech may be subject to more controls than other sexual speech. Yet the line is distinct enough to bar the state from prohibiting such things as "lewd, lascivious, indecent, filthy or vile" material.[53] At heart, the mainstream standard is designed to root out obscenity only.

The Broadcasting Standard

The standard sexual speech must meet in broadcasting differs in three ways from the mainstream standard: it defines obscenity differently, it controls indecent speech, and it regulates speech not thought to be in the public interest.

1. Obscenity

Section 1464 of Title 18 in the Criminal Code makes it illegal to broadcast obscene language.[54] The Justice Department is empowered to bring criminal action against stations for broadcasting obscene language[55] and likewise the Communications Act allows the FCC to revoke a station's license,[56] issue a cease and desist order,[57] or impose a forfeiture[58] on any station broadcasting obscenity. The Justice Department has prosecuted on at least four occasions for obscene broadcasts[59] and the FCC recently imposed a forfeiture on

53. The Court has held that only obscene materials may be proscribed under a federal statute barring the mailing of any "obscene, lewd, lascivious, indecent, filthy or vile" item. Hamling v. United States, 418 U.S. 87 (1974), upholding 18 U.S.C. § 1461 (1976). This left "lewd, lascivious, indecent, filthy or vile" as "mere surplusage." SCHAUER, *supra* note 9, at 173. The Court also held that only obscene materials may be forbidden under a federal statute barring the use of a common carrier for the interstate and foreign transport of any "obscene, lewd, lascivious, or filthy" item. United States v. Orito, 413 U.S 139 (1973), upholding 18 U.S.C. § 1462 (1976). It denied certiorari in a case in which a federal court held that only obscene material may be barred under a provision of the federal code forbidding the interstate shipment of any "obscene, lewd, lascivious, or filthy" material. United States v. Manarite, 448 F.2d 583 (2d Cir. 1971), *cert. denied*, 404 U.S. 947 (1971), interpreting 18 U.S.C. § 1463 (1976).

54. 18 U.S.C. § 1464 (1976): "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

55. *See* Note, 61 VA. L. REV., *supra* note 8, at 591.

56. 47 U.S.C. § 312 (a)(1976).

57. 47 U.S.C. § 312 (b)(2)(1976).

58. 47 U.S.C. § 503 (b)(1)(E)(1976)

59. United States v. Smith, 467 F.2d 1126 (7th Cir. 1972); Tallman v. United States, 465 F.2d 282 (7th Cir. 1972); Gagliardo v. United States, 366 F.2d 720 (9th Cir.

Sonderling Corporation for the obscene broadcasts of one of its stations.[60] The agencies involved in the interpretation of Section 1464 define obscenity differently from the Supreme Court's definition for mainstream media. Inasmuch as the FCC is apparently taking on new responsibility in the enforcement of Section 1464,[61] it is appropriate to focus on its definition of obscenity.

Sonderling Broadcasting Corp.[62] represents the FCC's most complete treatment of obscenity. At issue in the case were "Femme Forum" radio programs aired by a Chicago licensee of the Sonderling Corporation. The programs were broadcast in the daytime, directed at housewives, and dealt explicitly with sex. In response to listener complaints,[63] the FCC singled out as targets two programs containing explicit descriptions of oral sex.[64] The FCC issued a Notice of Apparent Liability[65] to Sonderling Corporation, concluding that the broadcasts were obscene. It proposed a $2000 forfeiture as authorized by the Communications Act.[66]

The FCC issued this Notice just prior to *Miller v. California's* restatement of obscenity standards.[67] The FCC claimed that its obscenity finding followed the then prevailing standards of *Roth v. United States*,[68] *A Book Named "John Cleland's Memoirs of a*

1966); Duncan v. United States, 48 F.2d 128 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931). *See* Note, 61 VA. L. REV., *supra* note 8, at 591 n.97.

60. In re Sonderling Broadcasting Corp., 27 RR2d 285, *recon. denied*, 41 FCC 2d 777 (1973), *aff'd sub. nom.*, Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975).

61. The FCC's recent involvement stems from hearings by the Senate Communications Subcommittee in December, 1969, to the effect that the FCC should play a more active role in sanctioning broadcast obscenity. *See* Note, 1974 ARIZ. ST. L.J., *supra* note 8, at 457-58.

62. In re Sonderling Broadcasting Corp., 27 RR2d 285, *recon. denied*, 41 FCC2d 777 (1973), *aff'd sub. nom.*, Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975).

63. The shows had also been met with listener approval. *See* Illinois Citizens Comm. v. FCC, 515 F.2d 397, 408 (D.C. Cir. 1975).

64. For a description of the questionable procedures carried out by the FCC in this case *see* text accompanying notes 163-74 *infra*.

65. As required by 47 U.S.C. § 503(b)(1)(E) (1976) and 47 U.S.C. § 503(b)(2) (1976).

66. 47 U.S.C. § 503(b)(1)(E) (1976): "Any licensee or permittee of a broadcast station who violates section . . . 1464 of title 18, shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense." The FCC proposed a $2,000 forfeiture because the two programs spanned a period of two days.

67. 413 U.S. 15 (1973) *See* text accompanying note 41, *supra*.

68. 354 U.S. 476 (1957).

Woman of Pleasure" v. Massachusetts,[69] *and Ginzburg v. United States*.[70] Femme Forum, the commissioners concluded, was obscene because it was "patently offensive to community standards for broadcast matter" and was "pandered" by the radio announcer.[71] But FCC claims to the contrary, the definition differed from the mainstream standard.[72]

The FCC's conclusions differed in essentially four ways. First, the FCC based its decision on a 22-minute excerpt extracted from 61 hours of taped programs.[73] Evidence showed the FCC failed to listen to the full radio programs. This differed from *Roth's* requirement that the material be taken as a whole in order to determine its obscenity. Second, the FCC failed to identify the community upon which its decision was based, thereby indicating it used its own standards. This differed from the mainstream use of community standards.[74] Third, the FCC failed to consider any possible redeeming social value of the Femme Forum programs. This diverged from the *Memoirs* stipulation that material must be "utterly without redeeming social value" to be obscene.[75] Fourth, the FCC misapplied *Ginzburg's* admittedly obscure pandering test. *Ginzburg* provided that judges may take the method of sale into account in deciding whether borderline material is obscene. Material commercially foisted upon the audience with the "leer of the sensualist"[76] may tip the material to the sphere of the obscene. However, the FCC used the pandering test on material that was not even borderline obscene. Moreover, it failed to establish factually that the announcer's comments were "pandering" as defined in *Ginzburg*,[77] and it used pandering in reference to two statements in the 22-minute excerpt, contrary to *Ginzburg's* principle that pandering apply to the entire presentation of the material.

The Sonderling Corporation elected to pay the forfeiture rather than assume the anticipated "tremendous financial burden" of an ap-

69. 383 U.S. 413 (1966).

70. 383 U.S. 463 (1966).

71. In re Sonderling Broadcasting Corp., 27 RR2d 285, 289 (1973).

72. This discussion relies upon Chief Judge Bazelon's statement explaining why he voted to grant a rehearing *en banc*, Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 407-25 (D.C. Cir. 1975), and FCC Commissioner Johnson's remarks in News Release of Sonderling, 41 F.C.C.2d 919 (1973).

73. 515 F.2d 397, 409 (D.C. Cir. 1975).

74. *See, e.g.*, SCHAUER, *supra* note 9, at 119 n.19.

75. 383 U.S. at 419-20.

76. 383 U.S. at 468.

77. *See* 515 F.2d at 420 n.51. Chief Judge Bazelon claimed the FCC's conclusion that the anouncer resorted to "leering innuendo" was "gross exaggeration" *Id.*

peal. At that point two citizens' groups representing the listening audience took over the appeal[78] but were met by a district court's affirmation of the FCC's finding.[79] In so ruling the court offered a new definition of obscenity. This definition too veered from the mainstream definition, which by this time was based on *Miller v. California*.[80] First, the court failed to consider the Femme Forum programs as a whole despite *Miller's* reaffirmation of this principle. Basing its decision on the same 22-minute excerpt used by the FCC, the court argued that the "episodic" nature of broadcasting justified using only portions of the material as evidence. The court took "episodic" to mean the programs were "a cluster of individual and typically disconnected commentaries, rather than an integrated presentation," and were commonly heard in "short snatches" by listeners.[81] Second, the court allowed the FCC to substitute its own standards for those of the community despite *Miller's* position that local community standards may guide the determination of obscenity.[82] The court also concluded that the material made "no literary, political, or scientific contribution," thus deviating from *Miller's* position that material must lack "serious" social value to be obscene. In addition, the FCC's faulty application of *Ginzburg's* pandering criterion was accepted by the court which observed that the "pervasive pandering approach makes the broadcast pornographic even though some of its elements may be unoffensive." Finally, the court declined to apply *Miller's* new requirement that sexual speech be controlled only under a state law specifically defining obscenity.[83]

78. The groups, the Illinois Citizens Committee for Broadcasting and the Illinois chapter of the ACLU, filed an Application for Remission of the Forfeiture and a Petition for Reconsideration with the FCC. *See* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d at 401. The FCC refused to reconsider, 41 F.C.C.2d 777 (1973), whereupon the groups took their claims to the United States District Court. In re Sonderling Broadcasting Corp., 27 RR2d 285 (1973), *aff'd sub. nom.*, Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975).

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

80. 413 U.S. 15 (1973). *See* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 407-25 (D.C. Cir. 1975).

81. 515 F.2d at 406.

82. Smith v. United States, 431 U.S. 291 (1977); Jenkins v. Georgia, 418 U.S. 153 (1974); Hamling v. United States, 418 U.S. 87 (1974); Miller v. California, 413 U.S. 15 (1973).

83. Miller v. California, 413 U.S. 15 (1973), specified that obscenity must be specifically defined by state law "as written or authoritatively construed." The *Sonderling* court noted that this provision of *Miller* had not been raised in the present case and that, in any event, "*Miller's* specificity requirement [was] designed to 'provide fair notice to a dealer'" and need not be raised for a group appealing on behalf of a broadcasting corporation. 515 F.2d at 405.

In summary, authoritative bodies in almost all cases regulating broadcast obscenity use a definition, if indeed one is offered, that differs from the mainstream standard. As defined in the recent *Sonderling Corp.* case, broadcast material may be held to be obscene even if it is not taken as a whole, its social value is not appraised, and the local audience is not used to assess its pruriency. Inasmuch as Section 1464, the basis of liability, proscribes simply "obscene" material, not a qualified version such as "obscene as defined for broadcasting," the peculiar definition of obscenity in broadcasing lacks clear statutory authority.

2. Indecent Language

Section 1464 of Title 18 prohibits the broadcast of indecent language.[84] The Justice Department and the FCC enforced this provision for several years in the absence of a clear definition of indecency.[85] The first authoritative definition of indecency came in the case of *FCC v. Pacifica Foundation.*[86] As defined by the appellate court and upheld by the Supreme Court, indecency includes "patently offensive references to excretory and sexual organs and activities."[87] A station broadcasting indecent language is subject to license revocation,[88] a cease and desist order,[89] or a monetary forfeiture.[90]

Pacifica Foundation involved a 22-minute excerpt from a George Carlin recording aired by a New York radio station in connection with a discussion of contemporary language. In the excerpt entitled "Filthy Words," Carlin repeatedly uttered several graphic words. A New York City listener who had heard the broadcast while driving with his son complained to the FCC.[91] In response the Com-

84. *Supra* note 54. The lower courts have long upheld FCC insistence that obscene and indecent expressions are, for regulatory purposes, distinguishable. *See, e.g.*, Gagliardo v. United States, 366 F.2d 720, 725 (9th Cir. 1966); and United States v. Smith, 467 F.2d 1126 (7th Cir. 1972). The Supreme Court upheld this distinction in FCC v. Pacifica Foundation, 438 U.S. 744-48.

85. As late as 1977 a federal court was still able to note that "the term indecent has never been authoritatively construed by the courts in connection with section 1464." Pacifica Foundation v. FCC, 556 F.2d 9, 15 (D.C. Cir. 1977).

86. Pacifica Foundation, Station WBAI-(FM), 56 F.C.C.2d 94, 32 RR2d 1331 (1975), *rev'd* Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977), *rev'd* FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

87. 438 U.S. at 743.

88. 47 U.S.C. § 312 (a)(1976).

89. 47 U.S.C. § 312 (b)(2)(1976).

90. 47 U.S.C. § 503 (b)(1)(E)(1976).

91. The man argued in his complaint that "[a]ny child could have been turning the dial, and tuned in to that garbage." Pacifica Foundation, 56 F.C.C.2d 94, 95 (1975).

mission issued a Declaratory Order barring indecent language, defined as that which "describes, in terms patently offensive as measured by contemporary community standards for the broadcasting medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[92] It mentioned seven "patently offensive" words in particular.[93] The FCC indicated it would use a different test at night when children were less likely to be listening, one which would consider the literary, artistic, political or scientific value of the material.[94] The FCC claimed it was not censoring material but instead was "channeling" offensive speech to times of the day when the fewest children would be listening.[95]

The Order's immediate effect was to bar the station from airing specified indecent language. But it had broader implications for the station, inasmuch as the FCC said it would associate the order with the station's license file and place on record the fact that the station owner could have received administrative sanctions for broadcasting indecent language in violation of Section 1464. This opened the possibility that the FCC would refer to the order at license renewal time. Consequently, the *Pacifica Foundation* ruling directly tied indecency with an administrative sanction.

The Pacifica Foundation, which owned the licensee, appealed the ruling. Shortly thereafter the FCC attempted to narrow its definition by saying that it would not hold the licensee responsible if indecent words were broadcast "as part of a bona fide news or public affairs program" or were aired live.[96] Nevertheless the Circuit Court reversed the FCC's order on the grounds that it was unconstitutionally overbroad and vague and violated the First Amendment.[97] It held that the order "inhibited

92. Pacifica Foundation, 56 F.C.C.2d 94, 98 (1975). The FCC did not impose direct sanctions on the station and instead used the Order as a forum for clarifying the meaning of indecency under 18 U.S.C. § 1464 (1976). The FCC did, however, associate the Order with WBAI's license file, noting that "in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." *Id.* at 99.

93. The words were "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt," and "tit." *Id.* at 99.

94. *Id.* at 97. The Commission denied it was censoring material in violation of 47 U.S.C. § 326 (1976).

95. *Id.* at 99-100. The commission borrowed the channeling principle from nuisance law.

96. In re "Petition for Clarification or Reconsideration" of a Citizen's Complaint against Pacifica Foundation, Station WBAI (FM), 36 RR2d 1008, 1010 (1976). The FCC issued the clarification in response to the Petition for Clarification or Reconsideration.

97. Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977).

the free and robust exchange of ideas" and amounted to censorship in violation of Section 326 of the Communications Act.[98] Because the court disposed of the case on the basis of Section 326 it declined comment on the FCC's definition of indecency although it did hold that the broadcasts were not obscene and were therefore entitled to First Amendment protection.

The FCC appealed the ruling whereupon the Supreme Court reversed,[99] holding first that the FCC order did not amount to censorship in violation of Section 326 of the Communications Act and second that the order was not overbroad in violation of the First Amendment. The Court then specifically upheld Section 1464's indecency provision, thereby rejecting Pacifica Foundation's claim that the state may forbid only obscenity. The Court also affirmed the FCC's definition of indecency as "patently offensive references to excretory and sexual organs and activities."[100] The Court argued that indecency may be controlled in broadcasting because of the medium's unique characteristics.[101] Stating that "we have long recognized that each medium of expression presents special First Amendment problems,"[102] the Court reiterated that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[103]

98. 47 U.S.C. § 326 (1976):

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications.

99. FCC v. Pacifica Foundation, 438 U.S. 726 (1978). The vote was five to four, with Chief Justice Burger and Justices Stevens, Rehnquist, Blackmun, and Powell in the majority and Justices Brennan, White, Marshall, and Stewart dissenting.

100. *Id.* at 1089. With this definition the Court offered the first authoritative definition of indecency under 18 U.S.C. § 1464 (1976). *See supra* note 85. In earlier cases courts had based their rulings on other grounds and had thereby not offered narrowing constructions of Section 1464. *See, e.g.*, Pacifica Foundation v. FCC, 556 F.2d 9 (1977) (*reversing* an FCC determination of indecency but without offering a substantive definition); United States v. Smith, 467 F.2d 1126 (7th Cir. 1972) (overturning a conviction for violating Section 1464 on the grounds that the jury should have been given a definition of indecency but was not); and Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966) (holding that the jury should have been but was not given a definition of indecency in a trial involving language broadcast over a citizen's band radio).

Lacking judicial guidance, the FCC developed its own definition of indecency. In WUHY-FM, 24 F.C.C.2d 408, 413 (1970), for example, it defined indecent language as that which is "(a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value."

101. 438 U.S. at 748. Specifically, the Court mentioned the "uniquely pervasive presence" of broadcasting and its easy accessibility to children.

102. FCC v. Pacifica Foundation, 438 U.S. at 748, *citing* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-503 (1952).

103. 438 U.S. at 748.

The Court's opinion by Mr. Justice Stevens has several implications for the regulation of sexual speech. First, this case represents an extension of thought begun by Mr. Justice Stevens in *Young v. American Mini Theatres*.[104] In *Young* the Court condemned sexually explicit material on its face, indicating that it was qualitatively less desirable than other speech and might be subject to greater regulation on that basis alone. In *Pacifica Foundation* Mr. Justice Stevens took up the same theme in a section in which only two other members concurred.[105] Calling the seven dirty words "vulgar," "offensive," and "shocking," he said that they were "not entitled to absolute constitutional protection under all circumstances."[106] *Young* and *Pacifica Foundation* contrast to the Court's usual position that sexual speech will be controlled for the danger it poses to society[107] and only obscenity may be controlled on its face. Each decision affirms that other forms of sexual speech may also be controlled on their face. Second, the Court set up a variable standard of indecency within broadcasting analogous to the variable standard of obscenity in mainstream media. Rather than offering one definition of indecency and stating that all indecency was forbidden in broadcasting, the Court suggested that indecent words might be permitted if used occasionally rather than repeatedly, in the evening rather than the daytime, or on closed circuit transmissions.[108] Thus, the concept of variable indecency might be added to Lockhart and McClure's concept of variable obscenity. The Court's decision not to set forth a constant standard conforms with its movement from *Roth*'s two-level model and toward a more graduated treatment of sexual speech.

3. Language Not in the Public Interest

The Communications Act of 1934 gives the FCC broad power over licensing. A license is the radio or television station's life force and the FCC has power to grant, suspend, deny it or grant only a short-term license renewal.[109] The FCC may use its licensing power

104. 427 U.S. 50 (1976).

105. Justices Blackmun and Powell. Chief Justice Burger and Justice Rehnquist declined to join Justice Stevens in this section of the opinion.

106. 438 U.S. at 474-78.

107. *See, e.g.* Cohen v. California, 403 U.S. 15, 25 (1973); and Rosenfeld v. New Jersey, 408 U.S. 901 (1972).

108. 438 U.S. at 750.

109. The FCC may suspend the license of any licensee if it is established that the licensee "has transmitted . . . profane or obscene words, language, or meaning. . . ." 47 U.S.C. § 303(m)(1)(D) (1976). The FCC, "if public convenience, interest, or necessity will

to sanction licensees who fail to broadcast in the name of "public convenience, interest, or necessity" providing it does not censor in violation of Section 326 of the Communications Act.[110] Despite the anti-censorship provision of Section 326 the FCC has used the public interest criterion to sanction stations broadcasting material not found to be either indecent or obscene. Two cases illustrate.

In *Palmetto Broadcasting Corp.*[111] the FCC denied a license renewal to a radio station after concluding the station had broadcast "coarse, vulgar, suggestive" language that was capable of "indecent double meaning,"[112] but based its decision on the fact that the licensee misrepresented his knowledge of the broadcasts to the FCC.[113] The FCC emphasized that its decision not to renew could stand on the misrepresentation point alone.[114] The Court of Appeals upheld the ruling on that basis as well.[115] Although the decision was based on technical grounds, the FCC's hostility to the sexual content of the broadcasts in question pervaded its opinion. The district court's decision not to review the FCC's finding of vulgarity left unclear the standards under which the FCC applies the public interest criterion. The FCC's failure to specify what in the programs was offensive magnified the uncertainty. It only referred to one example: the airing of "the suggestive term, 'let it all hang out' three times."[116]

In *Jack Straw Memorial Foundation*[117] the FCC granted only a short-term license renewal to a Seattle radio station after concluding that the station had broadcast language in violation of its *own* policy against airing "obscenity, obscurantism, sensationalism, or simple boorishness."[118] Again claiming that it based its decision on a technical point, the FCC failed to discuss the nature of the material in question. But in order to conclude that the station violated its own policy the FCC had to conclude at least implicitly that the station in fact aired obscene, obscure, sensational or boorish

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be served thereby, . . . shall grant to any applicant therefor a station license. . . ." 47 U.S.C. § 307(a) (1979). The FCC may grant a "renewal of such license . . . from time to time for a term of not to exceed three years . . . if the Commission finds that public interest, convenience, or necessity would be served thereby." 47 U.S.C. § 307(d) (1976).

110. *See* note 98 *supra.*
111. Palmetto Broadcasting Corp., 33 F.C.C. 250 (1962).
112. *Id.*, at 257.
113. *Id.*, at 251.
114. *Id.*, at 258.
115. Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964).
116. Palmetto Broadcasting Corp., 33 F.C.C. 250, 253 n.3 (1962).
117. Jack Straw Memorial Foundation, 21 F.C.C.2d 833 (1970).
118. *See* Note, 61 VA. L. REV., *supra* note 8, at 609.

material. By not specifying standards for reaching this decision the FCC again loosely used the public interest criterion to sanction sexual speech.

In summary, the FCC's power over licensing in the name of the public interest allows it to control speech that is demonstrably not obscene or indecent. Although *Palmetto* and *Jack Straw* penalized stations on technical grounds, the FCC discussed the sexual content of the speech in its opinions. The decisions sent a message to licensees that vulgar or offensive speech might prompt special FCC attention to technical violations. The FCC's licensing power is enhanced by the judiciary's hesitation to intrude upon that power. Traditionally courts require "only a showing that the Commission is rational rather than arbitrary and capricious"[119] and the Supreme Court has approved broad interpretations of the public interest standard, saying that the standard is "a broad one, a power 'not niggardly but expansive,' . . . whose validity we have long upheld."[120] By leaving standards unclear, this judicial deference unquestionably chills broadcast expression.

The Collective Standard

The non-broadcast, mainstream standard definitely puts obscene material outside of the First Amendment and all other sexual speech within it, using *Miller v. California* to identify obscene material. The Court created this two-level, protected/not protected speech model initially in *Chaplinksy v. New Hampshire* but *Ginzburg, Ginsberg,* and *Young* weakened the formerly rigid demarcation. The *broadcasting* standard leaves obscenity, indecency, and material contrary to the public interest open to control. Obscenity is defined by standards peculiar to broadcasting; indecency is defined by the standards of *FCC v. Pacifica Foundation*, and the public interest criterion operates without clear substantive standards.

Combined, the mainstream and broadcasting standards create a collective standard that suggests, first, that the term "obscenity

119. *Id.* at 624.

120. Red Lion Broadcasting Corp. v. FCC, 395 U.S. 367, 380 (1969), *citing* National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943). Heretofore the FCC's power to grant licenses has been used primarily "to promote greater diversity in the broadcasting medium" rather than less. Writer's Guild of America, Inc., West v. FCC, 423 F.Supp. 1064, 1147 (C.D. Cal. 1976). For example, *Red Lion* and *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (1972), *cert. denied*, 412 U.S. 922 (1973), both required stations to air something new (rebuttal to personal attack and anti-cigarette information, respectively) rather than deleting something. The public interest standard was used, however, to proscribe cigarette advertising in Capital Broadcasting Co. v. Acting Attorney General, 405 U.S 1000 (1972).

law" is too narrow to encompass the scope of sexual material open to control. Adding *Pacifica Foundation's* conclusion that the state may sanction indecent language in broadcasting to *Young*'s hint that the state may sanction sexually explicit speech results in increased potential control of sexual expression and warns that the rubric "obscenity law" should be used only with the recognition that other forms of sexual speech are also open to control. Second, the collective standard moots the scholarly debate over whether the Court is pursuing a constant or variable obscenity approach. Commentators regularly chart the Court's movements between constant and variable obscenity.[121] Typically they proceed under the assumption that constant obscenity is the norm and *Ginsberg*, *Ginzburg* and *Young* the "exceptions."[122] But *Pacifica Foundation* adds a fourth essential exception. It effectively tilts the operating presumption to show that variable obscenity, not constant obscenity, is the ruling analysis and constant obscenity the exception. *Pacifica Foundation* is a threshold decision that directs attention from a growing list of "exceptions" to a reformulation of the original operating standard.

Finally, the collective standard advises a restatement of the substantive standards under which sexual speech is controlled. *Miller v. California* binds print and motion picture media while leaving broadcast regulation unfettered. Broadcast material becomes obscene at a lower threshold point than mainstream media and it may be controlled even if it falls short of obscenity. The collective standard shows the short-sightedness of the claim that only "hard-core" pornography may be censored constitutionally.[123] In fact, because airwaves transmit a significant proportion of the total speech heard in the country, much of the total expression conveyed today falls under a singular set of standards. Over 97 percent of American households own at least one television set and few are unaware of the numerous hours spent watching television.[124] The average child watches almost seven hours of television daily and will, by the age of 16, have consumed up to 15,000 hours of television.[125] It is not an exaggeration to say that broadcasting transmits more information, imparts more entertainment, elicits more trust,[126]

121. *See, e.g.*, the sources cited *supra* note 42.

122. *See, e.g.*, Note, 61 VA. L. REV., *supra* note 8, at 589-91.

123. This was the Court's message in Miller v. California, 413 U.S. at 29 and has provided the basis for conclusions of constitutional law scholars. *See, e.g.*, SCHAUER, *supra* note 9, at 47-48.

124. Note, 27 STAN. L. REV., *supra* note 26, at 1548 n.91.

125. *Id.*

126. "[N]early one-half of all adults consider television the most believable news medium among newspapers, magazines, radio and television." *Id.*

and captures more time of Americans than any other single medium. The collective standard recognizes that obscenity standards take a sudden dip when the utterances in question are transmitted via the public airwaves. It advises that a significant portion of the total expression exchanged in this country falls under a regulatory pall largely divorced from the supposedly definitive *Miller* standards of obscenity.

PROCEDURAL STANDARDS GOVERNING THE CONTROL OF SEXUAL SPEECH

The Mainstream Standard

A prior restraint bars expression before it is disseminated to the public; a subsequent punishment controls speech after it has been communicated. A prior restraint prevents speech from occurring at all, a subsequent punishment allows the speech to be voiced but penalizes the perpetrator after the fact.[127] The Supreme Court has long condemned prior restraints. In *Near v. Minnesota* Chief Justice Hughes stated that "it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment] guaranty to prevent previous restraints upon publication."[128] In *Nebraska Press Association v. Stuart*, Chief Justice Burger similarly declared that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights."[129] Because prior restraints are forbidden only for First Amendment speech the state may bar obscenity (unprotected speech) before its distribution. But in order to avoid intruding on protected sexual speech while quashing obscenity, the state must follow proper procedures designed to protect First Amendment speech.

The state controls obscenity by criminally prosecuting people who produce or distribute obscenity, enjoining the distribution of obscene material, and setting up censorship boards to screen obscene material before it ever reaches the public. With the exception of the censorship of print material,[130] the Court upholds these

127. Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROB. 648 (1955).

128. 283 U.S. 697 (1931).

129. 427 U.S. 539 (1976). The Court treats prior restraints as presumptively unconstitutional. Chief Justice Burger said of New York Times v. United States, 403 U.S. 713 (1971): "every member of the Court, tacitly or explicitly, accepted the *Near* [*Near v. Minnesota*, 283 U.S. 697 (1931)] and *Keefe* [*Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971)] condemnations of prior restraint as presumptively unconstitutional." Pittsburgh Press v. Human Relations Comm'n, 413 U.S. 376, 396 (1973).

130. *See* note 140 *infra*.

sanctions as long as the state follows rigorous procedures in executing them.[131] For example, in criminal prosecutions the state must follow proper procedures in seizing material for evidentiary purposes. It must obtain a search warrant issued upon probable cause by a neutral magistrate describing the material to be seized,[132] and one not worded in "conclusionary" terms,[133] and then must hold an adversary hearing promptly after the seizure.[134] If only one copy of the item exists, such as one reel of film, the state must copy the item quickly so that the material can be disseminated and the status quo maintained[135] pending a judicial determination.

The state may enjoin the publication and distribution of obscene material only if a court promptly made the determination of obscenity[136] under a precisely drawn enabling statute.[137] In *Kinsley Books, Inc. v. Brown*[138] the Court upheld a New York statute that authorized a municipal officer to bring action to enjoin the sale or distribution of obscene material. The statute forbade restraint of the material until after a court determined the material was obscene. It mandated that the trial take place within one day after the attempted injunction and the judicial determination take place two days later, thereby keeping to a minimum the action's chilling effect on speech.[139]

Licensing programs which allow a censor to screen material before public exhibition are permissible for films, but not for the print medium.[140] The Court will not tolerate "informal" state pressures on the print medium if their effect is to intimidate distributors into not making publications available. In *Bantam Books, Inc. v. Sullivan*,[141] the Court struck down a commission's plan

131. *See, e.g.*, Chief Justice Warran, dissenting in Jacobellis v. Ohio, 378 U.S. 184, 199 (1964). *See also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

132. Roaden v. Kentucky, 413 U.S. 496 (1973).

133. SCHAUER *supra* note 9, at 218, referring to Lee Art Theatre v. Virginia, 392 U.S. 636, 637 (1968).

134. Heller v. New York, 413 U.S. 483, 490 (1973).

135. *Id.* at 492-93.

136. Freedman v. Maryland, 380 U.S. 51, 58 (1965).

137. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 690 (1973).

138. 354 U.S. 436 (1957).

139. *See also* Freedman v. Maryland, 380 U.S. 51, 60 (1965).

140. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 23-24 (1976). *See* SCHAUER, *supra* note 9, at 232: "any system of censorship for books or magazines would probably be impermissible even if it did comply with *Freedman*." *See* also Freedman v. Maryland, 380 U.S. at 60-61; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 n.10 (1963).

141. 372 U.S. 58 (1963).

to send letters to book distributors notifying them of books it had found objectionable for youth, thanking them for their presumed cooperation, and telling them the list of books would be sent to police departments. Even though the commission had no formal sanctioning powers, its methods threatened to inhibit distributors[142] and amounted to a prior restraint in effect if not name. The Court concluded that the plan was censorship and struck it down because it failed to comply with the rigid procedures necessary when expression is at stake. Among other things, it failed to provide for a notice and a hearing to decide what was objectionable for children and thus allowed the commission to act both as censor and judge. In contrast, the Court has upheld licensing programs for motion pictures. In *Times Film Corp. v. Chicago*[143] the Court upheld a city ordinance requiring a censor to screen films for obscenity before their public showing. The Court later explained that films differed from other forms of expression.[144] Films are scheduled long before they are shown, giving adequate time for a judicial determination so that films found not to be obscene may be advertised and shown as scheduled. In *Freedman v. Maryland*[145] the Court said that film licensing was constitutional if the state maintained the status quo between the initial restraint and the judicial determination, provided for prompt judicial review, and imposed restraints only through the courts. A censorship board may not act doubly as censor and judge and the burden of proof must rest upon the censorship board.

In summary, the Court's distrust of prior restraint led it to develop stringent procedural standards governing the control of obscenity. The Court's position is that erroneous restraint of protected speech in the course of trying to control unprotected utterances irreversibly damages free expression. If the state wishes to suppress obscene expression, it must not do so until a court decides it is obscene. The state may review films before their initial showing to identify possibly obscene material but it must wait until after distribution to bring action against possibly obscene print materials.

The Broadcasting Standard

The FCC controls sexuality in broadcasting through its power

142. *See* Bantam Books v. Sullivan, 372 U.S. at 67 n.8. Wrote the Court, "We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Id.* at 67 (footnote omitted).

143. Times Film Corp. v. Chicago, 365 U.S. 43 (1961).

144. Freedman v. Maryland, 380 U.S. at 60-61.

145. 380 U.S. 51 (1965).

over licensing[146] and its authority to impose monetary fines for the broadcast of obscene or indecent language.[147] There are also indications the FCC informally pressures stations into censoring themselves.[148] The procedures attending the FCC's formal sanctioning power offer less protection to free speech than do those governing sanctions in other media. By its nature, informal FCC pressure occurs in the absence of procedural safeguards.

1. Official Controls

The Communications Act requires stations to be relicensed every three years.[149] The Act empowers the FCC to renew licenses if it decides "public interest, convenience, or necessity would be served thereby."[150] It may deny a renewal or issue only a short-term renewal if it concludes renewal would not benefit the public interest, convenience, or necessity.[151] When the licensee applies for a renewal at the end of the three-year period, the FCC may ask for a written statement of why the renewal should be granted.[152] If the Commission has received complaints about programming content this request may become inquisitorial in tone. For example, in *Palmetto Broadcasting Corp.*[153] the FCC notified the applicant of complaints received about "vulgar and suggestive" programs and requested the licensee to respond within 15 days. This placed the burden on the licensee to show why the FCC should renew the license. This contrasts to the mainstream principle that the state must assume the burden of showing why speech should be controlled. This effect is mitigated only by the fact that if the FCC denies a license renewal the station may then petition for a rehearing,[154] during which time the license must be held in effect.[155]

In cases of license revocation the FCC must launch an inquiry and serve an order to the station stating the reasons for the inquiry, requesting the recipient to show cause why such action should not

146. *See* note 109 *supra.*
147. 47 U.S.C. § 503 (b)(1)(E)(1976).
148. *See* text accompanying notes 175-191, *infra.*
149. 47 U.S.C. § 308 (d)(1976).
150. *Id.*
151. *Id.*
152. *Id.*
153. Palmetto Broadcasting Corp., 33 F.C.C. 250 (1962), *rehearing denied,* 34 F.C.C. 101 (1963), *aff'd sub. nom.*, Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1963), *cert. denied,* 379 U.S. 843 (1964).
154. 47 U.S.C. § 308 (d)(1976), following the provisions of 47 U.S.C. § 405.
155. 47 U.S.C. § 308 (d)(1976).

be taken, and stating the place and time (no less than 30 days later) for the respondent to appear before the Commission.[156] After the respondent appears, the FCC issues an order stating the findings, grounds, and effective date for its decision. This process places the burden of proof on the FCC. However, it does *not* require that the status quo be maintained between the initial order and the final determination.

When the FCC fines a station for broadcasting obscene or indecent language[157] it must first issue a written Notice of Apparent Liability specifying the "date, facts, and nature of the act . . . with which the licensee . . . is charged."[158] This Notice must not be issued more than one year after the utterances were aired.[159] Thirty days after receiving the Notice the licensee may "show in writing . . . why he should not be held liable."[160] The process does not require the status quo to be maintained between the Notice and the determination, nor does it provide for prompt judicial review after the 30 day period.[161] Moreover, in practice the FCC has failed properly to follow even these minimal procedures. Consider, for example, the above-described *Sonderling Corp.*[162] in which the FCC levied a $2000 fine against a radio station for broadcasting obscene language. Acting in response to listener complaints, the FCC taped 60 hours of sex-oriented talk shows aired over eight stations licensed to the Sonderling Corporation in January and February of 1973. It then singled out two shows and ordered a Notice of Apparent Liability to be drawn up. The next day it launched a closed inquiry into the matter and within a week publicly announced its inquiry. Two weeks later it sent a Notice of Apparent Liability to Sonderling Corporation in which it concluded that the broadcasts were obscene or indecent and advised the corporation to pay the $2000 or contest the order in court. The Sonderling Corporation accepted the conclusion and paid the fine.

Two features of this procedure bear noting. First, as its name indicates the Notice of *Apparent* Liability is meant to advise the reci-

156. 47 U.S.C. § 312 (c)(1976). The 30-day rule may be shortened if "safety of life or property" is involved. *Id.*

157. *See* note 54 *supra*. The "fine" is a civil and not a criminal penalty, being a forfeiture.

158. 47 U.S.C. § 503 (2)(1976).

159. *Id.*

160. *Id.*

161. *See* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 414 (D.C. Cir. 1975).

162. In re Sonderling Broadcasting Corp., 27 RR2d 1508, *recon. denied*, 41 F.C.C.2d 777 (1973). *See* text accompanying notes 62-83 *supra*.

pient merely that a charge of statutory violation has been made against it.[163] The notice specifies the "date, facts, and nature of the act . . . with which . . . the licensee is charged."[164] and gives the recipient time to prepare a response.[165] However, the notice sent to Sonderling "concluded" that the broadcasts were obscene or indecent.[166] This tactic not only undercut the Notice's statutory purpose, but also put the FCC into the dual position of being censor and judge inasmuch as the FCC both brought the action and decided the outcome. Moreover, all of this was accomplished without the benefit of a full hearing. These actions recalled those of a state commission reviewed by the Supreme Court in *Bantam Books, Inc. v. Sullivan*.[167] The censorship commission at issue in *Sullivan* sent notices to book distributors listing publications objectionable for minors and warning of sanctions for noncooperation. The Court held that this had the effect of a final judgment and amounted to censorship devoid of proper procedures. One of the fatal defects of the plan was its failure to provide a hearing determining that certain publications were objectionable, thereby allowing the commission to act both as censor and judge.[168]

Second, the initial inquiry into the broadcasts was closed to the public.[169] The FCC said it closed the inquiry to prevent the "chilling" of speech during the course of the review.[170] However at least one court has suggested that the closed inquiry "accentuated" the chill,[171] presumably because it created uncertainty among broadcasters. The closed inquiry would be analogous to grand jury deliberations in a mainstream obscenity trial and would not raise

163. *See* Illinois Citizens Committee for Broadcasting v. FCC, 515 F.2d 397, 403 n.12 (D.C. Cir. 1975).

164. 47 U.S.C. § 503(b)(2) (1976).

165. 47 U.S.C. § 503(b)(2) (1976) states that after a licensee has received a Notice of Apparent Liability it "shall be granted an opportunity to show in writing, within such reasonable period as the Commission shall by regulations prescribe, why he should not be held liable." If the licensee elects not to pay the proposed forfeiture it is entitled to a trial de novo. 47 U.S.C. § 504(a) (1976).

166. Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d at 401. As Chief Judge Bazelon said in his statement why he voted to grant a rehearing en banc, the Notice "reads like a decision and states conclusions." At 414.

167. 372 U.S. 58 (1963). *See* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d at 403.

168. 372 U.S. at 71.

169. Alleged Broadcasts and Cablecasts of Obscene, Indecent or Profane Material, No. 73-331 (FCC March 27, 1973). *See* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d at 408 n.2.

170. Sonderling Broadcasting Corp., 41 FCC2d 777, 783 n.17 (1973).

171. Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d at 408 n.2.

constitutional questions if leading only to a notice to the station that charges were to be brought against it. But, as noted above, the notice amounted to a judgment. In this case the inquiry was analogous to a trial and thus required an open hearing.

Two citizens' groups, acting as representatives of the public, contested the FCC's findings in *Sonderling Corp.* The circuit court accepted the groups' standing to challenge the substantive issues at bar[172] but it denied their standing to challenge the FCC's procedures.[173] This left the FCC's questionable procedures intact. In passing, however, the court pointed out some of the procedure's weaknesses, including its similarity to the scheme struck down by the Supreme Court in *Bantam Books*.[174]

In summary, procedures governing the FCC's sanctioning powers are not imbued with the same concern for the mistaken control of protected speech as are mainstream standards. In renewal cases licensees must take the initiative in showing that their licenses should be renewed. In revocation cases speech is suspended during the appellate process. In at least one forfeiture case the FCC reached a conclusion about a program in the absence of a full hearing. Each case accepts procedures in broadcasting that would be struck down in the mainstream media under *Freedman v. Maryland* standards.

2. "Unofficial" Pressures

The FCC exerts informal as well as formal pressures on stations. In what Chief Judge Bazelon calls the "raised eyebrow" approach,[175] the FCC subtly lets radio and television licensees know its reaction to certain programs. Anxious to avoid encounters with the FCC, the licensees take these cues into account when planning their programs. Until the FCC actions are recognized as formal policy the Commission is free to exert them without procedural safeguards. However, in a sign of new judicial watchfulness, one court has equated informal pressures with formal policy, striking them for procedural deficiencies.[176]

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172. *Id.* at 403.

173. The court concluded that only the licensee could assert procedural errors. *Id.*, at 403.

174. See *id.*

175. *Id.* at 423.

176. Writers Guild of America, West, Inc. v. FCC, 423 F.Supp. 1064 (1976). The case is summarized *infra*, this section.

The FCC's raised eyebrow tactics revolve around its power over licensing. Licensing is the FCC's "ultimate regulatory tool."[177] It gives the FCC "extraordinary bargaining power."[178] The FCC can exert considerable pressure over station programming by merely hinting that it will revoke or deny a license. One way the FCC conveys its views is through channeling audience complaints. When the FCC receives a complaint, it informs the target station and in a cover letter notes that the complaint will be kept on file for use at license renewal time.[179] There are signs that licensees take this threat seriously when making programming decisions.[180] Second, the FCC uses public speeches to convey its disapproval of programming content. For example, FCC Chairman Wiley pointed out in a speech to the Illinois Broadcasters Association that broadcasters were accountable to the public and had "'special' responsibilities as licensees." He warned that "If self regulation [by the industry] does not work, governmental action to protect the public may be required—whether you like it or whether I like it."[181] Similarly, former FCC chairman Dean Burch gave a vitriolic speech before the National Association of Broadcasters (NAB) shortly after the FCC announced its inquiry into the Sonderling case. Burch attacked the "prurient trash that is the stock-in-trade of the sex-oriented radio talk show, complete with the suggestive, coaxing, pear-shaped tones of the smut-hustling host" and brusquely warned that "the price may be high" if broadcasters fail to deal with the "problem"[182] He expressed his hope that the inquiry into the Sonderling broadcasts would "make further government action [to control sex in programming] moot."[183] Soon after, radio stations sharply cut sexual discussion on the air.[184]

Third, the FCC confers directly with broadcasting representatives. It did this in its recent effort to create a family viewing policy for television.[185] Responding to Congressional concern about the harmful effects of television programs on children, the FCC studied ways of resolving the problem.[186] It decided upon a "channel-

177. *Id.* at 1147.

178. Note, 61 VA. L. REV., *supra* note 8, at 611.

179. *Id.* at 606, 611. *See* note 92 *supra.*

180. The FCC's letter policy "probably exceeds the Supreme Court limits more than the reported case law indicates." Note, 61 VA. L. REV., *supra* note 8, at 609, 611.

181. Writers Guild of America, West, Inc. v. FCC, 423 F.Supp. at 1098.

182. *Quoted* in Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d at 408.

183. *Id.*

184. *Id.* at 409.

185. Writers Guild of America, West, Inc. v. FCC, 423 F.Supp. 1064 (1976).

186. *Id.* at 1096-97.

ing" policy which would send violent or sexual programs to late evening hours and restrict them during the early evening when a "family viewing hour" would prevail. Because the FCC could not legally order the family viewing hour, it instead "encouraged" the broadcasting industry to regulate itself[187] through, among other things, threats issued in speeches and meetings with network executives and NAB representatives.[188] Following one series of meetings the NAB Television Code Review Board amended the NAB Television Code to set up a family viewing policy that forbade sex and violence in early evening shows.[189] The Writers Guild of America, West, Inc. and other groups representing writers, actors, directors and producers brought suit against the FCC, NAB, and the CBS, ABC and NBC television networks. They contended, *inter alia*, that the FCC pressured the networks and NAB to censor television in violation of the First Amendment and the Communications Act's anti-censorship guarantee. The U.S. District Court agreed, holding that "the family viewing policy was adopted by the networks and the broadcasting association pursuant to threats from the FCC; [and] that the actions on the part of both the FCC and the broadcasters violated the First Amendment."[190] Reviewing extensive testimonial exhibits, the court concluded that the "Commission exerted improper pressure, that the networks improperly considered that pressure in making programming judgments, and that the defendants combined in an effort to compromise the independent judgments of broadcast licensees through the medium of the NAB."[191]

The Collective Standard

The collective standard shows that courts evince a graduated

187. Said FCC Chairman Wiley, " . . . I feel that self-regulation is to be preferred over the adoption of inflexible governmental rules." Report on Broadcast of Violent, Indecent and Obscene Material, 51 F.C.C.2d 418, 419 n.5 (1975).

188. For example, it was suggested at one meeting that licensees could state their policy on violence and sex when returning licensing renewal forms to the FCC, a move that would pair licensing renewal with the presence of a network policy. Writers Guild of America, West, Inc. v. FCC, 423 F.Supp. 1064, 1100-01. For a summary of these meetings, *see id.* at 1092-1128.

189. As stated in NAB, The Television Code 2-3 (18 ed. June 1975) (from Writers Guild of America, West, Inc. v. FCC, 423 F.Supp. at 1072): "Entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour. In the occasional case when an entertainment is deemed to be inappropriate for such an audience, advisories should be used to alert viewers."

190. Writers Guild of America, West, Inc. v. FCC, 423 F.Supp. at 1154-55.

191. *Id.*, at 1073.

concern for prior restraint despite the Court's reproval of such restraints. Concern is greatest for print materials. There the state must allow suspicious material to be distributed before sanctioning it. Punishment may follow only if a court determines the material was obscene. The judicial review is quick, and the material in question is freely distributed pending the judicial decision. Films engender less concern given the Court's willingness to allow the state to screen films prior to their distribution. However, the determination of obscenity must be made judicially without delay and the status quo must be maintained pending the judicial decision. Screening is permissible for films, the Court holds, because films are booked in advance and may be screened before their scheduled showing.

The Supreme Court has not set down procedures for broadcast censorship, and FCC and lower court case law is undeveloped. The few pertinent decisions on the books show less concern over prior restraint than do Supreme Court decisions involving other forms of expression. The FCC has reached decisions in the absence of full hearings and explicitly drawn statutes. It also informally pressures licensees by, among other things, associating complaints with the station's file and warning that it will review the complaints at license renewal time. This warning threatens to turn audience complaints into final decisions. Informed of complaints on file, the sage licensee will avoid airing similar material. So-called self-censorship is actually a prior restraint if done out of fear of implied punishment. The lax standards governing the control of sexual speech in broadcasting function without a compelling reason. It is one thing to say that the unique *substantive* standards ought to apply to broadcasting because of its nature. It is another thing to say that broadcasting's idiosyncracies justify different *procedural* standards. A strong First Amendment requires procedural controls whenever speech is at issue, regardless of the mode of conveyance. To dilute procedural controls without a compelling reason is to strike a double blow at broadcasting.

Second, the collective standard bids commentators not to conclude that the *Freedman* standards govern the control of sexual speech. In fact a large body of speech—that broadcast over the airwaves—is controlled under procedures less stringent than those in *Freedman*. Even though the Supreme Court has not ruled on the constitutionality of broadcast procedures in sexual speech cases, FCC case law is binding and must be considered in order accurately to assess the status of sexual speech.

CONCLUSION

Broadcasting cannot justifiably be excluded from obscenity analysis. Words and ideas distributed over the airwaves are no less speech than words and ideas transmitted through the print and motion picture media. Broadcasting's idiosyncracies may justify imposing different standards on the medium but they do not justify overlooking the medium when analyzing sexual speech in the country today.

This article outlined substantive standards governing the control of sexual speech in the mainstream media and in broadcasting and then combined the two in a collective standard. It did the same for procedural standards. The collective standard simply states guidelines governing all media taken together. It counterbalances the tendency of commentators to separate the study of the mainstream and broadcast media. The label would be unnecessary were all media studied together as a matter of course.

The incorporation of broadcasting into traditional obscenity analysis compels revisions in the doctrine of sexual speech, as repeatedly described in the article. It also affects the broader doctrine of free expression. First, it points to a system of gradations within the First Amendment based upon media. The substantive standard of sexual speech is two-pronged: it offers one formula for films and the print medium and another for broadcasting. The procedural standard is tripartite: it offers one formula for the print medium, a second for films, and a third for broadcasting. Moreover, the Court distinguishes between types of sexual speech. Whereas it once distinguished merely between obscene and nonobscene speech with the *Chaplinsky-Roth* two-level principle, it now allows that distinction to fluctuate with the variable obscenity approach, it allows the control of indecent speech in broadcasting, and it allows the distinction between indecent and decent speech to fluctuate in the variable indecency approach. In short, the Court has replaced constant obscenity with variable obscenity *and* variable indecency. All of these gradations contrast with the Court's tendency to reduce other First Amendment gradations such as those between commercial and non-commercial speech and between symbolic and verbal speech.

Second, to include broadcasting is to reveal fissures in two supposed pillars of First Amendment doctrine: vigilance against prior restraint[192] and the chilling of speech.[193] Absent a compelling reason,

192. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931).
193. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963).

the FCC and lower courts have diluted controls over prior restraint in broadcasting. Also, by failing to construe the public interest criterion precisely they allow the FCC, in the exercise of its licensing authority, to control the fate of broadcasters amid vague standards that can only chill speech. It is questionable whether broadcasting is so different as to justify encroachments on these cornerstones of First Amendment law.