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## CABLE AND OBSCENITY

L. A. Powe, Jr.\*

Five years ago FCC Commissioner Nicholas Johnson lamented the "absence of any discussion of standards for the control of 'obscenity' or 'indecent' language over the broadcast media."<sup>1</sup> His hypothetical about televising *I Am Curious (Yellow)* as the nine o'clock movie remains a hypothetical, although thanks to "judicious editing," the networks have been willing to run R-rated movies during prime time. Even with this, the networks have retained their traditional lag behind public attitudes and have been unwilling to explore the exact frontiers of what can be broadcast legally. Nor have they approached the lesser frontier which suddenly appeared when the obscenity pendulum made its sharp swing toward a more refined definition of obscenity in the Miller Quintet<sup>2</sup> two years ago.

That we know more about the law in the area of obscenity and broadcasting than we did five years ago is due largely to four FM radio stations<sup>3</sup> and two able student law review articles.<sup>4</sup> But that has not been enough. The basic issues have remained unexplored. The nonadventurous nature of broadcast licensees has meant that difficult cases in this area have not been presented to the FCC and the courts. If there were a solid body of law relating to obscenity and indecency in the broadcast media, it would be easier to extrapolate the probable results of cable television's efforts to redeem its promise of abundance for the viewing public. But lacking a well-developed body of law after almost fifty years of federal regulation, the extrapolation is more difficult, and, of necessity, more tentative.

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1. Johnson, Book Review, 68 MICH. L. REV. 1456, 1464 (1970).

2. Miller v. California, 413 U.S. 15 (1973); Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. 12 200-Foot Reels of Super 8 mm. Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973).

3. WBAI (New York City) in Pacifica Foundation, No. 75-200 (Released Feb. 21, 1975); WGLD (Oak Park, Illinois) in Sonderling Broadcasting Corp., 41 F.C.C.2d 919 (1973); WUHY (Philadelphia) in Eastern Education Radio, 24 F.C.C.2d 408 (1970); KRAB (Seattle) in Jack Straw Memorial Foundation, 21 F.C.C.2d 833 (1970).

4. Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664 (1971); Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343 (1970).

This article will attempt to predict the law relating to obscenity and indecency communicated over cable as the medium develops. First, it will compare the problems of visual and written obscenity, looking briefly at the attempt to impose different standards for obscenity and indecency. Second, the article will explore the rationale for regulation of broadcasting and cable programming and how that rationale is likely to affect decisions relating to obscenity and indecency in the newer medium.

### I. CURRENT OBSCENITY REGULATION

The Sloan Commission aptly noted that "television of abundance is not merely an augmented television of scarcity."<sup>5</sup> On this there appears universal agreement. Market forces will be allowed to bring programming aimed at the tastes of small and select classes of individuals. But whatever may be the untapped potential of cable to provide diverse programming, the market mechanism will probably not be allowed to operate with respect to obscene programming. The FCC, often chastised by congressmen for a less than vigorous attack on obscenity,<sup>6</sup> has promulgated its own rule prohibiting the cablecasting of obscenity and indecency<sup>7</sup> and has indicated that it will ask that the rule be codified in the criminal code.<sup>8</sup> Moreover, despite the fact that the Cabinet Committee on Cable Communications<sup>9</sup> "was aware of the FCC's cable regulation but consciously chose a different policy"<sup>10</sup> with

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5. SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE 43 (1971). The Sloan Commission on Cable Communications was established by the Alfred P. Sloan Foundation in 1970. Its purpose was to assess the technological possibilities of cable television.

6. See, e.g., BROADCASTING, Feb. 26, 1973, at 50. Commissioner Johnson has suggested that the FCC would not have acted as it did with respect to obscenity and indecency "absent severe Congressional pressure to do something in this area." *Sonderling Broadcasting Corp.*, 41 F.C.C.2d 919, 923 (1973) (Johnson, Comm'r, dissenting).

7. No cable television system when engaged in origination cablecasting shall transmit or permit to be transmitted on the origination cablecasting channel or channels material that is obscene or indecent.  
47 C.F.R. § 76.215 (1975).

8. Federal Communications Commission, Report on the Broadcast of Violent, Indecent and Obscene Material 9, FCC No. 75-202, Feb. 19, 1975.

9. The "Whitehead Committee" was formed at the order of President Nixon in 1971 to develop proposals for a comprehensive national policy on cable communications. The Committee was chaired by Clay T. Whitehead, Director of the Office of Telecommunications Policy (OTP). Other members included Peter G. Peterson, Secretary of Commerce; Elliot L. Richardson, Secretary of HEW; George Romney, Secretary of HUD; and Presidential advisors Leonard Garment, Robert H. Finch, and Herbert G. Klein.

10. Memorandum from Henry Goldberg, Office of the General Counsel, Office of Telecommunications Policy, to William V. Skidmore, Jan. 10, 1975. The memorandum discussed the various agency comments submitted to OTP with respect to the draft Cable Communications Act of 1975.

respect to the degree of cable regulation, it did not differ significantly from the FCC on the issue of prohibiting obscenity and indecency on cable television. The Committee not only suggested that an individual have legal sanctions available to block offensive materials from being transmitted to him, but also proposed that all laws affecting obscenity apply fully to cable as well.<sup>11</sup>

Any analysis of cable and potentially obscene or indecent programming must therefore begin with an obvious political fact: to the extent that governmental action can block the cablecasting of such materials, such action will be attempted. Thus a necessary starting point is an analysis of what the government may successfully prohibit. The analysis, if one believes Chief Justice Burger, has an easy ending. The government may prohibit the transmission of "hardcore" pornography.

With the June 1973 decisions on obscenity, the Court finally garnered a five-man majority for a refined test of obscenity. It had been a long time coming. While I have serious doubts that the new test—that the work, taken as a whole, must appeal to the prurient interest in sex, portray sexual conduct in a patently offensive way, and, taken as a whole, lack serious literary, artistic, political, or scientific value<sup>12</sup>—will prove to be a magic genie that will solve the intractable problem of determining which materials may be suppressed in a free and open society, the majority appears to believe this will occur.

At five different places in the *Miller v. California*<sup>13</sup> majority opinion, Chief Justice Burger applied the short-hand test of "hardcore" pornography to the materials that may now be legally suppressed.<sup>14</sup> The apparent assumption was that everyone, like Justice Stewart, knows it when he sees it,<sup>15</sup> and thus there would be few problems applying the test. Realistically, however, one senses that Chief Justice Burger and Justice Stewart know and mean very different things by the phrase "hardcore pornography." Indeed, in the state courts, "hardcore" has been a conclusory phrase invoked in decisions to suppress supposedly obscene materials both before<sup>16</sup> and after<sup>17</sup> *Miller*.

11. CABINET COMMITTEE ON CABLE COMMUNICATIONS, CABLE: REPORT TO THE PRESIDENT 38, 66 (1974).

12. See *Miller v. California*, 413 U.S. 15, 24 (1973).

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

14. *Id.* at 27, 28, 29, 35 & 36.

15. Justice Stewart stated: "I shall not today attempt further to define hardcore pornography . . . . But I know it when I see it . . . ." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

16. See, e.g., *People v. Bloss*, 18 Mich. App. 410, 171 N.W.2d 455 (1969), *rev'd mem. sub nom. Bloss v. Michigan*, 402 U.S. 938 (1971).

17. *Jenkins v. State*, 230 Ga. 726, 199 S.E.2d 183 (1973), *rev'd sub nom. Jenkins*

Despite my doubts that the new test can be easily or sensibly applied, for the purposes of this article I shall assume that it can. I shall also assume that whatever obscenity is, we know it when we see it and thus have no further definitional problems. Yet even with this concession, there still remain two significant and related problems concerning obscenity and cable television. The first problem is whether there is a constitutional standard for determining obscenity in filmed performances different than that for written words. The second is a variant of the first: may a performance be suppressed if it is cablecast, even though it would be protected if shown in a theater or spoken on a street corner? Both of these issues must be explored to determine the legal status of offensive programming carried by cable.

### A. *The Constitutional Standard for Films*

The Supreme Court has never decided whether a film could be suppressed when a similar still picture or a written depiction of the same conduct could not be suppressed. Like most other difficult issues, the available case law provides ample support for any desired conclusion, but falls short of an authoritative suggestion as to the likely result.

Although the Court in an early decision held that films were not to be accorded the same state constitutional protections as speech and press,<sup>18</sup> the Court's initial modern decision on film censorship brought films within first amendment protections.<sup>19</sup> The Court added a caveat, however, designed to deal with the problems of the film medium: "[It does not] follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems."<sup>20</sup> That case merely invalidated censorship which was based on the ground that the film was sacrilegious. The Court expressly noted that it was not dealing with "a clearly drawn statute designed and applied to prevent the showing of obscene films,"<sup>21</sup> but nevertheless added a footnote which clearly implied that such a statute would be valid.<sup>22</sup> The decision was hardly startling; it occurred in 1952, and not for five more

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v. Georgia, 418 U.S. 153 (1974).

18. In a 1915 diversity case, *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915), the Court held films to be beyond the protection of the free speech clause of the Ohio constitution.

19. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

20. *Id.* at 503. This was reaffirmed in *Freedman v. Maryland*, 380 U.S. 51 (1965), in which the Court noted that "films differ from other forms of expression." *Id.* at 60-61.

21. 343 U.S. at 506.

22. *Id.* at 506 n.20.

years, until it decided *Roth v. United States*,<sup>23</sup> would the Court seriously deal with obscenity in any way other than to announce in dicta that obscenity was unprotected.<sup>24</sup> Only in the 1960's did the Court begin facing issues relating to films and obscenity.

In the post-*Roth* era, the Court made no distinctions between films, photographs and writings. *Jacobellis v. Ohio*<sup>25</sup> involved a film, *Manual Enterprises v. Day*<sup>26</sup> and *Redrup v. New York*<sup>27</sup> involved photographs, and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*<sup>28</sup> concerned a writing. As far as anyone could tell, the Court drew no relevant distinctions among them. When the majority in *Stanley v.*

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23. 354 U.S. 476 (1957). In *Roth*, the Court upheld state and federal obscenity statutes by concluding that obscenity was not protected by the first amendment: "[I]m- plicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* at 484. Although the Court by its limited grant of review (nowhere acknowledged in *Roth* itself) had excluded from consideration the issue of whether the materials in question were obscene, it offered an advisory defini- tion of obscenity. Material was obscene if "the average person applying contemporary community standards [would find] the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.* at 489 (footnote omitted).

24. Examples of the Court's former habit of stating in dicta that obscenity was unprotected are contained in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

25. 378 U.S. 184 (1964). The film involved was *Les Amants (The Lovers)*. The Court reversed *Jacobellis'* conviction under an Ohio statute which prohibited the posses- sion and exhibition of obscene films. As with many of the cases dealing with obscenity there was no opinion for the Court, but as with *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413 (1966), Justice Brennan's opinion announcing the judgment of the Court has been treated as the most authoritative. In *Jacobellis*, Justice Brennan emphasized that in applying the *Roth* test the "community" indicated by that test was a national, as opposed to a local, community. Based on such a national community standard, the opinion concluded that the movie was not obscene under *Roth*. *Id.* at 192-95.

26. 370 U.S. 478 (1962). Justice Harlan's opinion announcing the judgment of the Court in *Manual Enterprises* gave added explanation to the *Roth* test. His opinion stated that unless the material in question could be found to be patently offensive, it could not be deemed obscene. *Id.* at 482. Appeal to the prurient interest was not the sole or self- sufficient test. *Id.* at 486.

27. 386 U.S. 767 (1967) (per curiam). *Redrup* indicated the Court's frustration with obscenity cases and its inability to define successfully what constituted obscenity. The per curiam opinion simply reiterated the various tests suggested by the justices in the majority and then stated that whichever of the tests was applied, the material in question was not obscene. Additionally, *Redrup* suggested that valid convictions might be secured (a) under state obscenity statutes which showed a "concern for juveniles"; (b) in cases involving material "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it"; or (c) in cases involving pandering. *Id.* at 769.

28. 383 U.S. 413 (1966). In *Memoirs*, Justice Brennan's opinion announcing the judgment of the Court further refined the *Roth* test. The opinion stated that in order to satisfy the *Roth* test the work must be found to be "utterly without redeeming social value," that is, "unqualifiedly worthless." *Id.* at 419.

*Georgia*<sup>29</sup> waxed eloquent about Stanley's "right to be free from state inquiry into the contents of his library,"<sup>30</sup> it was really talking about three reels of eight millimeter film found in a desk drawer of an upstairs bedroom. And the Burger majority's initial obscenity decision following *Miller* overturned the Georgia Supreme Court's conclusion that, even though it had applied a more stringent definition of obscenity than *Miller* required, the film *Carnal Knowledge* was nevertheless hardcore pornography.<sup>31</sup> These cases offer a potentially impressive display of the fact that the Court treats the obscenity *vel non* of films, photographs, and writings alike.

Still, there is another side. There are troublesome indications that films and writings are subject to different standards in obscenity adjudications. First, it must be noted that a charge of obscenity against the films in some of the cases would be laughable if the depiction were written. In 1964, the Court reversed a conviction for the showing of a love scene "so fragmentary and fleeting that only a censor's alert would make an audience conscious that something 'questionable' is being portrayed."<sup>32</sup> In 1968, the objectionable scene on which a conviction rested contained "two women, at least nude to the waist, going through actions that could lead to no conclusion except that they were behaving like lesbians."<sup>33</sup> And in 1974, it was *Carnal Knowledge*, not *Deep Throat*, that the Justices went to the basement to view. Yet in none of these cases did the Court note that it would be inconceivable that a book could be censored for a similar portrayal.

One of *Miller's* companion cases, *Kaplan v. California*,<sup>34</sup> raised the issue of whether books without photographs could ever be held to be obscene. The Court ruled that they could, but one cannot avoid noting the difference in the content of the book from that of the movie:

It is made up entirely of repetitive descriptions of physical, sexual

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29. 394 U.S. 557 (1969). Stanley had been convicted under a Georgia statute outlawing the possession of obscene material. The material, three rolls of eight millimeter film, had been seized in Stanley's home by federal and state agents seeking information on Stanley's alleged bookmaking activities. The Court overturned the conviction and held that the "mere private possession of obscene matter cannot constitutionally be made a crime." *Id.* at 559.

30. *Id.* at 565.

31. *Jenkins v. State*, 230 Ga. 726, 199 S.E.2d 183 (1973), *rev'd sub nom. Jenkins v. Georgia*, 418 U.S. 153 (1974). After exhibiting the film at an Albany, Georgia movie theater, Jenkins was convicted for the offense of distributing obscene materials. The Georgia statute under which he was convicted employed the "utterly without redeeming social value" test of *Memoirs*. See note 28 *supra*.

32. *Jacobellis v. Ohio*, 378 U.S. 184, 197-98 (1964) (Goldberg, J., concurring).

33. *State v. I. & M. Amusements, Inc.*, 10 Ohio App. 2d 153, 156, 226 N.E.2d 567, 569 (1966), *rev'd per curiam*, 389 U.S. 573 (1968).

34. 413 U.S. 115 (1973).

conduct, 'clinically' explicit and offensive to the point of being nauseous; there is only the most tenuous 'plot.' Almost every conceivable variety of sexual contact, homosexual and heterosexual, is described. Whether one samples every 5th, 10th, or 20th page, beginning at any point or page at random, the content is unvarying.<sup>35</sup>

Moreover, the only case during the four year *Redrup* era in which a finding of obscenity was sustained involved a film. While busily "Redruping" all obscenity cases, the Court granted certiorari and summarily affirmed the judgment in *Landau v. Fording*,<sup>36</sup> a California decision holding the film version of Jean Genet's play, *Un Chant d'Amour*, to be obscene. The exhibitors of the film admitted it was "stunningly frank in its search for the truth" and that "the 'average man', if he chose to see this film, and if he did not have access to the views of the expert witnesses who testified in this case, might believe that its dominant theme is a 'shameful' interest in sex"; indeed he "might" be "struck by the sexual candor of the film and be blind to its deeper meaning."<sup>37</sup> When an exhibitor offers those concessions, it is not surprising that the state court concluded that the film "is nothing more than hard-core pornography and should be banned."<sup>38</sup>

Another aspect of the California court's ruling in *Landau* was that a lesser standard of proof applied to cases involving films. "Because 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."<sup>39</sup> Given the Supreme Court's summary affirmance, the exact basis of the decision is uncertain, but it could be argued that the affirmance of *Landau* suggests the existence of a variable standard for the medium.

This reading of *Landau* finds considerable support in both *Kaplan*, dealing with books, and *Jenkins v. Georgia*,<sup>40</sup> involving a film. Twice in *Kaplan* the majority went out of its way to suggest a special solicitude for books. It first noted that the Court had "always rigorously scrutinized judgments involving books for possible violation of First Amendment rights . . . ."<sup>41</sup> The Court added:

35. *Id.* at 116-17.

36. 388 U.S. 456 (1967), *aff'g per curiam* 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (Ct. App. 1966).

37. Petition for Certiorari at 7-8, *Landau v. Fording*, 388 U.S. 456 (1967).

38. *Fording v. Landau*, 245 Cal. App. 2d 820, 830, 54 Cal. Rptr. 177, 183 (Ct. App. 1966).

39. *Id.* at 827, 54 Cal. Rptr. at 181.

40. 418 U.S. 153 (1974).

41. 413 U.S. at 118 n.3.



Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures of flagrant human conduct. A book seems to have a different and preferred place in our hierarchy of values, and so it should be. But this generalization, like so many, is qualified by the book's context. As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution.<sup>42</sup>

The paragraph quoted comes close to indicating an implicit acceptance of the long rejected ideas-entertainment distinction;<sup>43</sup> the Court seems to have assumed that the printed word is more likely to present ideas than do other media. Leaving aside the questionable validity of this assumption, the conclusion that books enjoy a preferred place in our hierarchy of values adds support to the hypothesis that the printed word receives more preferential treatment than films under the Court's obscenity standard.

When *Jenkins* rejected the finding that *Carnal Knowledge* could meet the patently offensive standard, the Court stated what the film was *not* doing: while "there are scenes in which sexual conduct including 'intimate sexual acts' is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough . . ." <sup>44</sup> One is left to wonder what the result would have been had the film been more sexually explicit. It seems relatively safe to conclude, however, that even with such changes, a book making a narrative depiction of scenes like those viewed in *Carnal Knowledge* would be fully protected.

Thus, within the array of cases from *Jacobellis* through *Jenkins* one can find the *Kaplan-Jenkins* language supporting a distinction between films and written depictions of obscenity. Moreover, the one notable inconsistency with

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42. *Id.* at 119-20 (citation omitted).

43. *See, e.g.,* *Winters v. New York*, 333 U.S. 507 (1948), in which the Court stated: We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

*Id.* at 510. *See also* *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 153 (1946).

44. 418 U.S. at 161.

*Redrup* was a film case. Arrayed on the other side are holdings applying the written word test to reverse lower court findings of film obscenity. Furthermore, on close analysis, *Landau* may not be a strong precedent for the distinction. First, it was a five-to-four decision with Justice Harlan joining the majority. Because *Landau* was heard originally by a state court, Justice Harlan would have voted to sustain the conviction as long as the state applied "criteria rationally related to the accepted notion of obscenity and that it reach[ed] results not wholly out of step with current American standards."<sup>45</sup> The decision below fell well within that standard. Second, from the exhibitor's concessions in his petition for certiorari,<sup>46</sup> it is possible that the remaining four Justices could have agreed more readily than usual with the court below that the film was indeed hardcore pornography. Finally, coming immediately after *Ginzburg v. United States*<sup>47</sup> and *Mishkin v. New York*,<sup>48</sup> the exhibitor's approach to the Court appears to have been aimed at carving out a "willing intellectual" exception to its standard. Whatever the value of such a potential test—and there may well have been something to it, given what *Stanley* held a year later—there was a not insignificant problem of commercialism. Although there was no "pandering" (whatever that is)<sup>49</sup> and the film was "shown to an audience somewhat more limited than the general motion picture audience," the exhibitor "earned substantial amounts from its exhibitions . . . ."<sup>50</sup>

All of these factors serve to undermine any strong reliance on *Landau* as support for the distinction that the lower court employed.<sup>51</sup> There are no

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45. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 458 (1966) (Harlan, J., dissenting). See also *Roth v. United States*, 354 U.S. 476, 496 (1957) (separate opinion of Harlan, J.).

46. See p. 725 & note 37 *supra*.

47. 383 U.S. 463 (1966). *Ginzburg* held that evidence of the circumstances of production, sale and publicity of materials was relevant in determining whether the *Roth* test was satisfied and that evidence of "pandering" might sustain a conviction in cases in which the publications standing alone might not be obscene. Pandering was defined as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of . . . customers." *Id.* at 467 (citation omitted).

48. 383 U.S. 502 (1966). In *Mishkin*, the Court held that when material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. *Id.* at 508.

49. For the Court's definition, see note 47 *supra*.

50. 245 Cal. App. 2d at 830, 54 Cal. Rptr. at 183.

51. Furthermore, it is dangerous to read too much into summary affirmances. As the Chief Justice noted recently:

We might well go beyond [a tension between a summary affirmance and another court holding] and make explicit what is implicit in some prior hold-

very helpful holdings either way. Nevertheless, intuitively, the validity of the distinction seems to make sense.

In his recent book, *The System of Freedom of Expression*, Professor Thomas I. Emerson wrote:

The judgment of whether any particular expression possesses social value or no social value [or possesses or lacks serious literary, artistic, political, or scientific value] is not for the government to make. If freedom of expression is to mean anything that judgment must be made by the individual who speaks or wishes to hear.<sup>52</sup>

Certainly Professor Emerson's words go to the core of the idea of free speech in a democratic society. But one has to stop and think about the problems of freedom of expression before coming to that position. An immediate, natural reaction to various classes of expression is that some are important and some are not. Even the libertarian Alexander Meiklejohn originally seems to have taken such a position by suggesting that the first amendment should protect only ideas necessary for self-government; the remainder of speech problems should be treated as an aspect of due process.<sup>53</sup> In *Miller*, the Court openly embraced such a distinction when it concluded that suppressing materials lacking *serious* literary, artistic, political, or scientific value would not significantly affect the system of freedom of expression.<sup>54</sup> It is wrong, Chief Justice Burger argued, to equate suppressible obscenity with "the free and robust exchange of ideas and political debate."<sup>55</sup> For the *Miller* majority, there is indeed a hierarchy of ideas.

An idea cannot be filmed. "A movie dealing expressly or extensively in rational discussion would probably be judged a poor one by that measure,

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ings. . . . When we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced . . . after full argument.

*Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) (citation & footnote omitted). Although the problem is greater with three judge district courts, in the rare case like *Landau*, in which a state decision is summarily affirmed and the court below relies on more than one theory for decision, the case ought to be read as settling the dispute, but not necessarily as affirming all the reasoning of the lower court.

52. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 489 (1970).

53. At least that was Professor Kalven's interpretation of Alexander Meiklejohn's *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). See Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 16. Meiklejohn replied that "novels and dramas and paintings and poems" would be fully protected under his interpretation of the first amendment. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263.

54. See Comment, *In Quest of a "Decent Society": Obscenity and the Burger Court*, 49 WASH. L. REV. 89 (1973).

55. 413 U.S. at 34.

and its creators blamed for not making greater use of the peculiar gifts of the medium, particularly its power to deal with visible reality."<sup>56</sup> Therein lies the basis for the intuitive notion that films and written depictions may deserve different treatment.

A book can deal with abstractions. A film is much less likely to do so overtly. A film produces some form of reality according to its creator's wishes. To communicate successfully, the film must concentrate on physical objects and motion; dialogue is secondary. As the film communicates with the viewer in a different manner than a book, so too the viewer communicates with the film differently than he would with a book. It takes effort to read and comprehend. One must think about what the author is saying. If the reader's mind wanders, all meaning may be lost, leaving the pages simply a blur. This may not be, and probably is not, the case with viewing a film. Often viewing will be subrational and subcritical. "The viewer can assume a position of relative passivity and receptiveness, with little or nothing required of him intellectually,"<sup>57</sup> and a message will still be received. Thus, for some types of communication, a film may well have an advantage over the written word as a method of communicating: at the barest minimum, films can communicate effectively with a much wider audience than can books.

Other differences between films and books which have been suggested<sup>58</sup> are the darkness of the theater and the fact that one views a film as a part of an audience rather than alone, as is normal with reading. While these are valid differences, they seem less persuasive than the different communicative aspects of films and books and probably cannot justify a distinction between obscenity in the two.

On policy grounds I would prefer holding films and books to the same standard. In effect, this would result in all but destroying obscenity law with respect to films; probably only stag films would still be suppressed. Since I believe that obscenity law is wholly misdirected as applied to consenting adults, I favor doing anything possible to limit it. But once forced to concede that obscenity law exists and can be applied, I have to admit that a distinction between films and books seems proper not only as a matter of common sense, but also as a function of the different ways in which the two media communicate with their audiences.<sup>59</sup>

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56. R. RANDALL, *CENSORSHIP OF THE MOVIES: THE SOCIAL AND POLITICAL CONTROL OF A MASS MEDIUM* 67 (1968).

57. *Id.*

58. *See id.* at 68; Note, *Motion Pictures and the First Amendment*, 60 *YALE L.J.* 696, 707-08 (1951).

59. In *United States v. A Motion Picture Film*, 404 F.2d 196 (2d Cir. 1968), Judges Friendly and Lumbard debated this issue; Friendly saw no distinction between the

There is one significant problem with the distinction: it discriminates against those who do not read. Those who read will be able to obtain materials that are more erotic than those who rely on films. As in other areas, the literate and well-educated have an edge in the Supreme Court's decisionmaking.<sup>60</sup>

As a predictive matter, I would expect the Court to allow the patently offensive standard to be used as the legal vehicle for the distinction between films and books.<sup>61</sup> Thus, to the extent that obscenity laws may be applied to cable television, contemporary community standards for films are likely to authorize the suppression of materials that could not be censored if written.

### B. *The Constitutional Standard for Words*

The next point to consider is whether the government has the power to prevent the use of language over television when it could not censor that language on the street corner. Again the Supreme Court has never ruled on this point. But the activity of the FCC provides an excellent indication of its future regulatory policies. In dealing with offensive language, the FCC has drawn on two dissimilar statutes which establish its sphere of regulatory control. One is section 1464 of the criminal code, which provides penalties for the broadcast of "any obscene, indecent, or profane language."<sup>62</sup> The other is the more generalized public interest standard for the granting and retaining of a broadcast license.<sup>63</sup>

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obscenity standards for books and films, while Lumbard's dissent, *id.* at 202, argued that there existed such a distinction. Friendly's rejoinder asserted that the Second Circuit cannot write on a clean slate when Supreme Court decisions point in one direction. *Id.* at 200. Lumbard has the better argument, however, since the Court's decisions point in all directions.

60. Cf. Tushnet, ". . . And Only Some Wealth Will Buy You Justice"—Some Notes on the Supreme Court 1972 Term, 1974 WIS. L. REV. 177; Powe, *The Supreme Court and Sex Discrimination*, 1 WOMEN L. REP. 1 (1974); see *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974) ("while the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the [topless] dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some 'entertainment' with his beer or shot of rye." *Id.*) The Supreme Court did not deal directly with the issue in affirming in part and reversing in part the judgment of the Second Circuit. *Doran v. Salem Inn, Inc.* 95 S. Ct. 2561 (1975).

61. Some support for this is provided in *Jenkins v. Georgia*, 418 U.S. 153 (1974), in which the Court listed what was not shown in the film during its discussion of "patent offensiveness."

62. 18 U.S.C. § 1464 (1970) provides: "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."

63. 47 U.S.C. §§ 307(a), 307(d) (1970) provide that licenses may be granted and

Despite the criminal code's specific language outlawing broadcast obscenity, the FCC initially eschewed reliance on that language. In *Palmetto Broadcasting Co.*,<sup>64</sup> it applied instead the amorphous public interest standard. In *Palmetto*, the charge was that the station, for a four month period, had permitted the broadcast of material that was "coarse, vulgar, suggestive, and susceptible of indecent double meaning."<sup>65</sup> On finding that the charge was sustained by the facts, the FCC held that this was sufficient reason to conclude that the licensee was not operating in the public interest. An appeal produced no clarification since the District of Columbia Circuit, while noting the FCC charge of broadcasting indecent material, affirmed on the Commission's alternative holding.<sup>66</sup>

The FCC at this time presented itself as an agency of restraint. Faced with complaints concerning avant garde programs aired over the Pacifica stations in California, the Commission, in *Pacifica Foundation*,<sup>67</sup> noted that sanctioning the licensee for the programming in question (which included Edward Albee's *The Zoo Story*) would probably limit programming to bland, wholly inoffensive matters. The Commission emphasized its limited function in this area and acknowledged that the programming was well within the licensee's judgment. On its face the opinion was a solid victory for provocative programming. But less than two years later, the FCC, in actions rather than words, dampened the victory by granting Pacifica's California stations only a short-term renewal rather than the longer three year term.<sup>68</sup> Instead of dealing with the content of the programs, the Commission relied on the licensee's own admission that some programs were aired which did not conform to the station's programming policy.

The potential impact of *Pacifica* was realized in 1970. Using *Palmetto* and *Pacifica* as a perfect pincers movement, the FCC put stations willing to air provocative programming in a vise. On the one hand, programming might fall outside the public interest standard or it might be obscene or indecent. On the other hand, even if it were not, the FCC could sanction a licensee for inadequate supervision under the licensee's own standards. For most licensees who aired unconventional programs, the problem was acute. Whether

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renewed when "public convenience, interest, or necessity" will be served.

64. 33 F.C.C. 250 (1962).

65. *Id.* at 255.

66. *Robinson v. FCC*, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964). The court affirmed the Commission's position that when one owner of a radio station was found to have misrepresented to the Commission his lack of awareness that allegedly improper matter was being aired over the station, such misrepresentation in itself was sufficient to justify denial of the owner's request for license renewal. *Id.* at 536.

67. 36 F.C.C.2d 147 (1964).

68. *Pacifica Foundation*, 2 F.C.C.2d 1066, 6 P & F RADIO REG. 2d 570 (1965).

out of genuine concern or merely the desire to avoid questions about operations in the public interest, a station might deplore certain types of speech. But if such speech is transmitted over its frequency, the licensee can not readily explain it.

Station KRAB-FM in Seattle became the first victim of the pincers movement when, in response to an FCC inquiry about complaints, the licensee admitted that a program it had aired was contrary to the station policy. In *Jack Straw Memorial Foundation*,<sup>69</sup> the FCC granted KRAB a limited renewal, not because the program was indecent, but because of concern over whether the licensee was exercising proper supervision. This sanction was applied to a station which provided "the Seattle area with unusual, stimulating and extraordinary programs. KRAB's programming is meritorious and the station does render an outstanding broadcast service to the area which it serves."<sup>70</sup>

Although the FCC was not applying the statutory prohibition against indecency or obscenity in *Palmetto*, *Pacifica*, and *Jack Straw*, the cases are illustrative of the FCC's concern for these problems. In 1970, the Commission squarely moved from the fringes of the issue to the middle by holding (in a case involving a noncommercial FM station in Philadelphia, licensed to Eastern Education Radio) that the use of indecent language over the air on a single program justified an order of forfeiture.<sup>71</sup> The program in question was aired from 10:00 to 11:00 on a Sunday night. The bulk of the program consisted of a taped interview with Jerry Garcia of the rock group known as the Grateful Dead. In addition to expressing his opinions on ecology, music, philosophy, and interpersonal relations, Garcia frequently interspersed the words "fuck" and "shit" throughout his comments. Since the FCC majority felt Garcia's use of the terms was wholly gratuitous, it held that the licensee had violated the prohibition in section 1464 against broadcasting indecent language.

If the ruling in *Eastern Education Radio*<sup>72</sup> was intended to clear the air of indecency, the Commission was in for a surprise. Between June 1972 and June 1973, complaints to the FCC concerning "obscenity-indecency-profanity" had a 15-fold increase from 2,141 to 32,438, well over 10,000 more than the number of complaints received on all topics during the previous fiscal year.<sup>73</sup> A significant factor in the jump was the advent of "Topless Radio,"

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69. 21 F.C.C.2d 833 (1970).

70. *Jack Straw Memorial Foundation*, 29 F.C.C.2d 334, 351 (1971).

71. *Eastern Education Radio*, 24 F.C.C.2d 408 (1970). The amount of the Order of Forfeiture was \$100.

72. 24 F.C.C.2d 408 (1970).

73. FCC News Release (Aug. 2, 1973).

live programs featuring a telephone conversation with a male host, in which the caller, usually female, would disclose intimate personal and sexual details over the air. The format began in California and soon moved eastward, eventually spreading to such unlikely places as Dallas, despite the protests of outraged listeners, station managers,<sup>74</sup> *Broadcasting* magazine,<sup>75</sup> and United States senators.<sup>76</sup> In the spring of 1973, the FCC, quite responsive to this type of complaint, moved decisively against the format. After having its staff tape programs in different geographical areas, the FCC selected *Sonderling Broadcasting* in a Chicago suburb as the target licensee. The majority found the program "Femme Forum," broadcast on weekdays from 10:00 a.m. until 3:00 p.m., to be obscene.<sup>77</sup> The example used was a day when the topic was oral sex. The majority applied the *Roth-Memoirs* test to the case and found the program to be patently offensive, designed to appeal to the prurient interest, and without redeeming social value. The majority also found the program indecent when tested by the standards of *Eastern Education*. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's holding on the obscenity issue and chose not to discuss the indecency issue.<sup>78</sup>

In *Eastern Education*, the FCC had created its own standard by relying on the *Memoirs* test but eliminating the prurient interest standard. It retained the requirements that the material be patently offensive and utterly without redeeming social value. In holding that Garcia's language was utterly without redeeming social value, the majority found that it was "gratuitous" and that there was "no reason for its existence."<sup>79</sup> It rejected the argument that the language was protected because it reflected the personality and life style of Garcia and came during discussion of important issues.

The affirmance of the *Sonderling* decision, coupled with the realization

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74. See *BROADCASTING*, Oct. 23, 1972, at 35.

75. *BROADCASTING*, March 5, 1973, at 74.

76. See *BROADCASTING*, Feb. 26, 1973, at 50.

77. *Sonderling Broadcasting Corp.*, 41 F.C.C.2d 919 (1973), *affd sub nom. Illinois Citizens' Comm. for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1974).

78. *Illinois Citizens' Comm. for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1974). The Court of Appeals modified the FCC's rationale somewhat. The court emphasized the pandering and titillation aspects of the program as a justification for the finding of obscenity, but it reintroduced the probable presence of children as the primary rationale for suppression. The court noted the scheduling of the program during the daytime hours, the varied reasons why children might be exposed to the program, and the station's knowledge that children were indeed within earshot of "Femme Forum." Some advertising was directed to the 16-20 age group, and the record contained at least one phone call to the station from an irate mother. *Id.* at 404. This made it easier to find that no serious first amendment issue was presented.

79. 24 F.C.C.2d at 413.



that subsequent Supreme Court decisions had made *Eastern Education* somewhat dated, induced the FCC to redefine its standard in a case involving Pacifica's New York City station, WBAI.<sup>80</sup> During an afternoon program discussing contemporary society's attitudes toward language, WBAI played a monologue by comedian George Carlin containing, as he so correctly prophesized, "words you couldn't say on the public . . . airways." The Commission issued a declaratory order holding the language to be indecent in that the words were used in a manner "patently offensive by contemporary community standards for the broadcast medium . . . ."<sup>81</sup>

This trio of cases is interesting both for the FCC's apparent conviction that the results were correct and for its shifting rationale for suppression. In *Eastern Education*, the Commission made clear its reasoning in attempting to ban gratuitous indecency from the air. The majority postulated that not imposing sanctions on this program would lead other stations to allow similarly indecent language over the air. The result would be that "substantial numbers" of the listening population "would either curtail using radio or would restrict their use to but a few channels or frequencies, abandoning the present practice of turning the dial to find some appealing program."<sup>82</sup> This would be inconsistent with the public interest in the "larger and more effective use of radio."<sup>83</sup> The Commission also noted the problem of children's access to such programming.<sup>84</sup>

In *Sonderling*, the majority adhered to a similar theory: fears of thwarting channel changing were buttressed with the fear of an application of Gresham's Law to the spread of this type of programming—a fear, incidentally, that was undoubtedly more substantial than in *Eastern Education*, since "Femme Forum" was the top rated radio show in the Chicago area.<sup>85</sup> But *Sonderling* went beyond *Eastern Education* when the majority noted that it felt its decision justified even in the absence of children's access to the programming. The Commission was disturbed by the "blatantness" of the discussion, which in its view demonstrated that the program was patently offensive. The pandering and titillation by the announcer led to the further conclusion that the program lacked redeeming social value.

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80. See Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 32 P & F RADIO REG. 1331 (1975).

81. *Id.* at 1337. The Carlin monologue came from "Filthy Words," side 2, cut 5 of the phonographic album *George Carlin, Occupation: Foole*. The appendix of the Commission's declaratory order contains a transcript of the monologue.

82. 24 F.C.C.2d at 411.

83. *Id.* at 410, quoting Communications Act of 1934, § 47 U.S.C. § 303(g) (1970).

84. *Id.* at 411.

85. See 41 F.C.C.2d at 924 (Johnson, Comm'r, dissenting).

Although spurred by the rationale of the affirmance of *Sonderling*, the FCC in *WBAI* shifted its attention toward the problem of children in the audience. This at least provided a limiting rationale, and the FCC indeed suggested that the result might be different in the late evenings when there was not a reasonable risk of having children in the listening audience. The FCC announced that

the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offense [*sic*] as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.<sup>86</sup>

Underscoring the difference between indecency and obscenity, the FCC added that the former lacks the element of appeal to the prurient interest, and "when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value."<sup>87</sup> Significantly, despite the explicitness of what they were attempting to suppress, the Commission offered no hint of what times might constitute late evening hours.

Throughout the trio of cases, the FCC's approach to contemporary community standards in the findings of "patently offensive" programming has been the most interesting part of the opinions. Neither Eastern Education Radio nor the Commission received a single complaint about the Philadelphia program,<sup>88</sup> and in *WBAI* there was but a single complaint. Furthermore, the Commission had never specified what regions constituted the relevant community in question. In *Eastern Education* it might have been the nation at large, Pennsylvania, Philadelphia, or college students who were the intended and probable audience of the station. A reading of the opinions leads to the conclusion that the relevant community consists of the seven persons serving as Commissioners of the Federal Communications Commission.

The problem of ascertaining the relevant community cannot be resolved by assuming that the FCC is a perfect microcosm of that community. The United States Court of Appeals for the District of Columbia Circuit in affirming *Sonderling* initially suggested that a jury trial might eventually solve this problem. But given the FCC's belief that airing indecent or obscene

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86. 32 P & F RADIO REG. 2d at 1336.

87. *Id.* at 1337.

88. The program came to the Commission's attention when the staff monitored it. 24 F.C.C.2d at 409 n.2.

material could justify a refusal to renew a license, the court's suggestion was illusory. Apparently the panel recognized this, and in a supplemental opinion issued some months later,<sup>89</sup> the court wrote that "the Commission must adopt, in its deliberations leading to any substantive determination of obscenity, approaches that provide, as nearly as possible, the functional equivalent of a jury determination of a clear community consensus that the material is lewd and offensive."<sup>90</sup> While the court stated that "the Commission does not have the free hand of bureaucratic censorship,"<sup>91</sup> it is interesting to note that the court did not apply the legal standard announced in *Sonderling* to the facts of the case. Yet when the program suppressed is the top rated program in the market, the conclusion that the community approves of it seems much easier to reach than the conclusion that it is patently offensive by community standards.<sup>92</sup>

When dealing with the problem of indecency as opposed to obscenity, it seems that the FCC is off on an unconstitutional (although politically

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89. 515 F.2d 406 (D.C. Cir. 1975). It is surprising that in the supplemental opinion, responding in part to a petition for a rehearing en banc and in part to Chief Judge Bazelon's dissent from the failure to grant the petition, the court chose once again to ignore the Supreme Court's consistent demand that the censoring party seek immediate judicial review of any determination of obscenity. See *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). If the FCC plans to censor programs dealing with obscenity, some requirements as to speed and the burden of seeking judicial review will have to be written into the statute. Cf. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-74 (1971). The *Freedman* test appears to apply to all prior censorship regardless of the medium. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

90. 515 F.2d at 406-07. Although one suspects that the court's use of "lewd and offensive" was not intended as a substitution for "patently offensive," the disturbing quality both of the original and supplemental opinions lies in the court's desire to affirm the FCC without attempting to harmonize the FCC's determination with the applicable case law. This suggests the possibility that the court was introducing a new and lesser standard for suppressing obscenity over the airwaves, while leaving the precise definition of that standard for a later day. It was impossible for the FCC to make a finding concerning the dominant theme of "Femme Forum"; it only had listened to a 22 minute segment with all nonsexual material deleted. The panel's justification for this procedure—that listening is episodic—hardly distinguishes the case from that involving a book because reading too may be episodic. As Chief Judge Bazelon noted, the court offered an exception to the rule that the work must be taken as a whole, an exception large enough to swallow the rule. *Id.* at 417. Nor is the court's use of the pandering rationale, see *Ginzburg v. United States*, 383 U.S. 463 (1966) convincing—the Commission never heard the entire programs involved, and the facts of *Sonderling* were not similar to those in *Ginzburg*. The court's approach thus closely paralleled the Commission's in *Eastern Education*: it realized that the Supreme Court's obscenity cases would not support its decision and therefore studiously avoided discussing those decisions.

91. 515 F.2d at 407.

92. Perhaps the answer to the problem of defining a clear community consensus lies somewhere between total community approval and total community opprobrium.

popular) frolic. In *Eastern Education*, the majority assumed that Garcia would have no right to speak in public places in the manner he spoke on the air. But if a war protestor's donning of a jacket with "Fuck the Draft" printed on it is protected in a courthouse, as it was in *Cohen v. California*,<sup>93</sup> on the rationale that unwilling viewers may avert their eyes—even though some people must be present—then it is difficult to comprehend why Garcia's language is not protected when it is broadcast over the air waves of a station to which no one need listen. This is especially true when the offended person has the opportunity to change the frequency. The FCC, then, appears to be engaging in an attempt to bar the use of several offensive words. Justice Harlan's argument in *Cohen* is no more answerable in *Eastern Education* than it was in *Cohen*, in which he stated: "[h]ow is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."<sup>94</sup> *Eastern Education* was decided prior to *Cohen* on the assumption that a result such as that in *Cohen* was inconceivable. In *WBAI*, the only mention of *Cohen* was as authority to support the proposition that "governmental action to prohibit intrusion into the privacy of the home"<sup>95</sup> is permissible—a point which when applied to radio and television is not supported by the reasoning of *Cohen*.<sup>96</sup>

Just as the *Miller* majority's approach and the distinction between books and films rests on some form of a hierarchy of ideas, so too does the FCC action in this area. At first the Commission refused to believe it was affecting ideas. In *Eastern Education*, its reasoning focused on the gratuitous nature of the language. In *Sonderling*, the Commission found that "this was not a serious discussion of sexual matters."<sup>97</sup> But by the time *WBAI* was decided, it found the question of serious discussion wholly irrelevant. The words were per se indecent, except perhaps late at night. If ideas were affected, that was too bad.

A decade ago FCC Commissioner Robert E. Lee protested against a Pacifica program entitled "Live and Let Live" which aired eight homosexuals discussing their experiences and histories. Lee wrote that "when these subjects [sexual aberrations] are discussed by physicians and sociologists, it is conceivable that the public could benefit."<sup>98</sup> Without such panelists, under this view, the public could not benefit. The continuum between the current

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93. 403 U.S. 15 (1971).

94. *Id.* at 25.

95. 32 P & F RADIO REG. 2d at 1337.

96. See p. 745 *infra*.

97. 41 F.C.C.2d at 920.

98. Pacifica Foundation, 36 F.C.C. 147, 152 (1964) (Lee, Comm'r, concurring).

Commission's position and Lee's is uncomfortably close. What the Commission has overlooked is that speech embodies the emotive aspects and life style of individual personality. Garcia in part "intended to show disrespect" for established standards.<sup>99</sup> Cohen's diatribe, as one of my students once suggested during a discussion of the case, could hardly have been more effective in briefly indicating the intensity of his opposition to the draft and the war. As Justice Harlan warned, one cannot be certain that the "facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas" will hold.<sup>100</sup> The Supreme Court has already stated that a state cannot reduce the adult population intellectually to "only what is fit for children."<sup>101</sup> But, as with Justice Harlan's opinion in *Cohen*, the FCC has again weighed in with its dissent.

It seems unlikely that the Commission's effort to purify the language will succeed. Others will use obscene or indecent language even though, with its position in *Sonderling* affirmed, the FCC's hand was strengthened and the Commission was immediately encouraged to take stronger action. Assuming the Commission attempts to apply its obscenity and indecency standards to cablecasting, it will be necessary to look closely at the potential rationales for that course of action as they apply to cable rather than broadcasting.

## II. OBSCENITY AND CABLE

### A. *The Rationale for Regulation*

There is no doubt that for first amendment purposes broadcast media and other media receive different treatment on the issue of content control by the government. If anyone had doubts, *Miami Herald Publishing Co. v. Tornillo*<sup>102</sup> put them to rest. Naturally it would be advantageous for cable to be treated like a nonbroadcast medium rather than as part of the broadcast media.<sup>103</sup> At a minimum this would mean that there would be no questions

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99. *Eastern Education Radio*, 24 F.C.C.2d 408, 419 (1970) (Cox, Comm'r, concurring in part and dissenting in part).

100. 403 U.S. at 26.

101. *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In the case of material which is violent or sexually oriented but not obscene or indecent (in the minds of the Commissioners), the Commission recognizes the very problem it ignores here. See FCC Report on the Broadcast of Violent, Indecent and Obscene Material, FCC Docket No. 75-202 at 4 (Feb. 19, 1975).

On the special regulatory problems concerning children, see pp. 746-48 *infra*.

102. 418 U.S. 241 (1974) (state statute granting a political candidate a right to equal space to reply to a newspaper's criticism and attacks on his record or character violates the first amendment guarantee of a free press).

103. There is now no judicial opinion suggesting a rationale for treating cable differently under the first amendment from the print media. Given the presumption

raised concerning indecency and, given the experience with movie theaters, substantially more tolerance towards obscenity would be shown. To analyze whether it is likely for cable to receive this treatment, it is useful to look first at the rationale for broadcast content regulation. Although several reasons have been suggested at one time or another, only three have solid legal or analytical underpinnings: scarcity, power, and imposition. In addition, the problem of children's access, moved to the forefront by the affirmance of *Sonderling*, must be considered.

Although some have argued that the scarcity theory lacks an empirical foundation and is based on faulty economics,<sup>104</sup> it has been the favorite rationale for content regulation of broadcasting by both the FCC<sup>105</sup> and the Supreme Court.<sup>106</sup> If scarcity is indeed the reason for content regulation, then cable will be immune from such governmental interference since no one postulates scarcity as a factor in cable. Indeed, the enthusiasm for cable comes from just the opposite view: a belief that abundance will offer as much diversity as could be desired.

Many individuals of diverse backgrounds hold the opinion that television is a medium of unique power.<sup>107</sup> Although Marshall McLuhan probably is the one who provided the most currency for the general idea, the power advocates in the United States have worried about a very different problem—that television might well be shaping public events. The best

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against governmental influence on content decisions in the media, one could expect that prior to treating cable differently from the other media of abundance, some good justifications would have to be forthcoming. As this section will demonstrate, there are no such justifications.

Consideration of whether cable should be treated as a common carrier would not affect the outcome of a restraint on the cablecasting of obscene or indecent materials. This type of content restriction, demanding that certain programs never be brought forward, has no relationship to problems of ownership and programming. The common carrier concept, separating ownership from programming, would be relevant to access doctrines (such as fairness, equal opportunities, and maybe the requirement of diverse program service), see Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659, 692-96 (1975), although it is hardly clear that it would support those doctrines beyond a requirement of nondiscriminatory access to appropriate channels.

104. See, e.g., Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1968); Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719 (1964).

105. See, e.g., FREEDOM AND RESPONSIBILITY IN BROADCASTING 184 (J. Coons ed. 1961) (Comments of FCC Chairman Newton Minow).

106. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

107. For a different analysis of the power theory, see Comment, *Power in the Marketplace of Ideas: The Fairness Doctrine and The First Amendment*, 52 TEX. L. REV. 727 (1974).

known advocate of this viewpoint was former Vice President Spiro Agnew. But others both in the middle and on the opposite side of the political spectrum have taken similar positions. The keystone of the power theory is the amount of television watched by the average viewer. The significance and impact of the medium are apparent when either the six hours and 49 minutes each day the average home has its set on,<sup>108</sup> or the estimated 66 percent of the adult population that sees some television each day,<sup>109</sup> are considered. The significance of the statistics is underscored by the 64 percent of the population that turns to television as the source of most of its news and the 48 percent that finds television as the most believable news medium.<sup>110</sup> Although it is difficult to know precisely what the statistics mean, they may well provide some basis for the conclusion that television is indeed powerful.

The power theory not only has factual support, it has legal support which exactly parallels the scarcity theory. While Justice Frankfurter offered the latter as his rationale for regulation in *National Broadcasting Co. v. United States*,<sup>111</sup> Justice Murphy suggested the former when he stated that

because of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern. Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression.<sup>112</sup>

A quarter century later, when in *Red Lion Broadcasting Co. v. FCC*<sup>113</sup> the Supreme Court turned to content regulation, scarcity and power theories became intertwined in the Court's opinion. Although it was essentially a reaffirmation of the scarcity rationale, running throughout the opinion is the idea of media power. In upholding the constitutionality of the fairness doctrine as applied to a personal attack rule situation, the Court moved its antitrust views as expressed in *Associated Press v. United States*<sup>114</sup> into the forefront. Monopoly power cannot be allowed or trusted in the marketplace of ideas. "There is no sanctuary in the First Amendment," the Court wrote in *Red Lion*, "for unlimited private censorship operating in a medium not

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108. See 1975 BROADCASTING YEARBOOK 2.

109. See 1973 BROADCASTING YEARBOOK 71.

110. See 1975 BROADCASTING YEARBOOK 2.

111. 319 U.S. 190 (1943).

112. *Id.* at 228 (Murphy, J., dissenting).

113. 395 U.S. 367 (1969).

114. 326 U.S. 1 (1945).

open to all."<sup>115</sup> And in some instances there is little hope of dissipating the problem of monopoly even if competition suddenly developed, since confirmed habits of viewers may well provide the existing stations with a competitive advantage over their newer competitors.<sup>116</sup>

The Court's *Red Lion* opinion places the power theory on somewhat firmer ground than the previous speculation that television must be powerful because so many people spend so much time watching it. *Red Lion* infused that power theory with an antitrust conception. This conception has been in the mainstream of concern during the entire history of radio regulation, beginning with the father of the Communications Act, Senator Clarence C. Dill,<sup>117</sup> to the FCC's chain broadcasting regulations, to Justice Frankfurter's affirmance of those regulations in *National Broadcasting*. A monopoly in the marketplace of ideas would be intolerable.

The antitrust idea of power fits nicely with the scarcity idea. No matter how many outlets there are, it seems as if there are only three voices speaking: CBS, NBC, and ABC. Viewed from this perspective not only does the scarcity rationale have some validity, but a genuine oligopoly has captured the medium. And for many people, the historic American distrust of power is fused with a new fear of power influencing ideas and events by shaping opinions. It is this combination of visible oligopoly and suspected influence on behavior that gives the power theory its strong support as the rationale for regulation.

The antitrust underpinnings of the power theory also remove the disquieting aspect of that rationale for content regulation. In its starkest form the power theory is supported by the conclusion that the content of the media can be regulated simply because the media exert a large potential influence on society. No matter how that argument is dealt with, it strikes uncomfortably near the core of the first amendment. The *Washington Post* and the *New York Times* have enormous impact and are powerful voices of communication, yet no one seriously believes they can be regulated.<sup>118</sup> Furthermore, the concept of truth winning out in the marketplace of ideas renders the power of the medium irrelevant. The antitrust concept, however, permits the focus to shift to the fear that truth will not win out because only a few limited ideas will ever be permitted to appear. Like the economic marketplace, the intellectual marketplace might well be flawed.

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115. 395 U.S. at 392.

116. *See id.* at 400.

117. *See Hearings on S.1 and S.1754 Before the Senate Comm. on Interstate Commerce, 69th Cong., 1st Sess. 123 (1926).*

118. *See generally New York Times Co. v. United States, 403 U.S. 713 (1971).*



If the power theory is indeed its real rationale for regulation, then the Court must face, as with the scarcity rationale, the rather tough questions directed at its factual validity.<sup>119</sup> Furthermore, one wonders why the less drastic alternative of enforcing the Sherman Act would not render content regulation unconstitutional. But as to cable these objections will not matter. With cable's abundance of viewing options, the antitrust problems of concentration should vanish and with them the rationale for content regulation.<sup>120</sup>

The imposition theory is a variant of the power theory. There is little doubt that television carries with it a considerable power to offend some viewers. Too much sex or violence accomplishes this with some regularity. When some people complain of the "power" of television they may actually mean its power to be offensive. Here they are on solid ground. Thus, the final plausible theory for content regulation is that the media must be regulated to limit its undoubted capacity to give offense to its quasi-captive audience.

From the time the problems relating to the captive audience first arose, the Court demonstrated a sensitivity to the plight of the individual who desired not to hear. Naturally, a considerable amount of balancing with the first amendment rights of the speaker was necessary. The result has been to defer to the speaker's rights everywhere except in the listener's home.<sup>121</sup> As Chief Justice Burger recently wrote in *Rowan v. Post Office Department*:<sup>122</sup>

We . . . categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient.<sup>123</sup>

The captive audience concept is a strong one carrying its own first amendment and right to privacy overtones. When it can be successfully invoked, it immediately stops communication between the parties and may justify criminal sanctions against the continuation of the speech.<sup>124</sup> To the

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119. See Comment, *supra* note 107 (a devastating attack on a version of the power theory without its antitrust underpinnings). See also Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972).

120. See Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008, 1021 (1971).

121. See *Cohen v. California*, 403 U.S. 15 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970); *Breard v. Alexandria*, 341 U.S. 622 (1951); cf. *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952).

122. 397 U.S. 728 (1970).

123. *Id.* at 738 (1970).

124. For example, in *Breard v. Alexandria*, 341 U.S. 622 (1951), *Breard's* violation of an Alexandria ordinance resulted in a sentence of 30 days or a \$25 fine. *Id.* at 625.

extent it can be applied to the context of television, it would permit one or more disgruntled viewers to suppress any programming of which they disapprove.

On its face the concept has no applicability to the problems of television. In *Rowan*, the Court upheld a statute allowing an addressee to demand that his name be removed from mailing lists, stating that to "hold less would tend to license a form of trespass and would hardly make more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home."<sup>125</sup> The Court's statement recognized the obvious. The disgruntled viewer retains his own self-help remedy against offensive programming.

While there has been no captive audience holding with respect to television programming, the rationale nevertheless has received judicial attention. In *Banzhaf v. FCC*,<sup>126</sup> Chief Judge Bazelon, now a dissenter with respect to the fairness doctrine,<sup>127</sup> authored his court's most extreme extension of that doctrine (albeit under the guise of the public interest standard). Applying the captive audience doctrine to product commercials, he wrote the following passage:

Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.<sup>128</sup>

After its initial presentation, the captive audience idea remained dormant in the years following *Banzhaf*. Used there to justify messages countering what were thought to be the implicit messages in cigarette commercials, it had

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The statute sustained in *Rowan* provides for compliance through a district court's contempt powers. See 39 U.S.C. § 4009(e) (1970). There is no reason why more severe sanctions could not be imposed for the violation of a valid law requiring someone to cease his intrusive speech.

125. 397 U.S. at 737.

126. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

127. See *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 63 (D.C. Cir. 1972) (Bazelon, C.J., dissenting). See also *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 268 (D.C. Cir. 1974) (Bazelon, C.J., concurring).

128. 405 F.2d at 1100-01.

spent its initial usefulness. Regulatory issues turned upon determining which commercials needed to be countered.<sup>129</sup>

When the captive audience rationale next appeared in a case involving television, it was used in its more traditional application to justify a decision not to put certain programming on the air. This time it was Chief Justice Warren Burger, not Chief Judge David Bazelon, speaking. Reversing a decision of the United States Court of Appeals for the District of Columbia Circuit which held that the FCC must require stations to cease barring all editorial advertising, Burger quoted the passage from *Banzhaf* in support of his conclusion. He prefaced the *Banzhaf* quote with the conclusion that the FCC "is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a 'captive audience.'"<sup>130</sup>

As Justice Brennan in a dissenting opinion remarked with respect to the captive audience rationale, the "suggestion that constitutionally protected speech may be banned because some persons may find the ideas expressed offensive is, in itself, offensive to the very meaning of the First Amendment."<sup>131</sup> One might minimize somewhat the jarring quality of the use of the captive audience rationale by noting that it was accepted in the context of refusing to order members of the broadcast media to change their policy of accepting only the advertising they wished to air and only putting forth editorials of their own choosing. The result, if not the reasoning, becomes consistent with first amendment principles.

Despite the justifiable result, the reasoning stood *Banzhaf* on its head by using the captive audience rationale to suppress additional debate rather than attempting to expand it. A similar misreading of the *Rowan* analogy between the mails and television could provide the final link to the full use of the captive audience rationale. The *Rowan* analogy was that to allow an individual to bar the mailing of items to him was the equivalent of the acknowledged right of a television viewer to twist the dial in the face of unacceptable programming. But the analogy does not hold. The television viewer avoids offensive programming either by not turning on his set or by switching channels or turning off the set as quickly as possible when an offensive program appears. In the mail box situation, the analogous actions would be either to throw away unopened all mail from unknown or objectionable correspondents or to open the letters and, as quickly as

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129. See, e.g., *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971); *Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971); *Retail Store Employees Local 880 v. FCC*, 436 F.2d 248 (D.C. Cir. 1970).

130. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127 (1973).

131. *Id.* at 194-95 n.35 (Brennan, J., dissenting).

possible, discard all offensive materials. In the latter situation the addressee is, like the spectators in *Cohen*, initially offended but able to avoid further offense by averting his eyes. The same is true of one watching television who becomes offended. Further offense can be avoided by a quick switch of the dial.

Although the *Rowan* analogy is fallacious, it nevertheless is made. Having stood *Banzhaf* on its head, is it not possible that the Court might attempt to do the same with *Rowan*? The new analogy would proceed from the result in *Rowan*. Since an addressee can stop all offensive literature from entering his mailbox, a viewer must have the analogous right to prohibit all offensive programming from entering his television set. Just as the post office is the intermediary in one, the best mechanism for the other would be some governmental agency properly charged with the realization that viewers are a captive audience. Just as *Rowan* ignored the possibility that the addressee could quickly dispose of unwanted materials, this new analogy would ignore the ability of viewers to turn the dial.

One would hope that the day for this illogical and repressive reasoning will never come. A very recent obscenity case, *Erznoznik v. Jacksonville*,<sup>132</sup> suggests that in the near future it will not. In striking down an ordinance that prohibited the showing of any motion picture in which nudity is portrayed in drive-in theatres in which the screen is visible from any public place, the Court properly noticed that rights of others—the owners as well as patrons who wish to see such films in drive-ins—are affected by such ordinances.<sup>133</sup> Similarly, rights of others besides the offended are affected by the potential use of the captive audience rationale in cable television. The rationale is so startling and dangerous in its reach that a careful guard must be maintained to protect against any of its unwarranted extensions. As long as viewers remain free to switch channels or turn off their sets, the captive audience rationale has no place in regulatory theory. But it is this rationale—and this one alone—which could provide the link between the current regulatory pattern of broadcasting and the future regulation of cable.

Although the captive audience rationale has twice appeared in the context of commercial advertising, it cannot be dismissed as general theory by taking the position that it is an outgrowth of the commercial speech exception to the first amendment.<sup>134</sup> Whatever the contours of that exception, editorial advertisements have no place within the category.<sup>135</sup> Thus, the captive

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132. 95 Sup. Ct. 2268 (1975).

133. *Id.* at 2273-74 n.7.

134. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

135. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

audience exception must be given somewhat more generalized treatment.

One obvious way to limit the imposition on an unwilling viewer is to provide accurate information in advance as to why a given program might prove to be offensive. This would allow the sensitive viewer to avoid all problems before they occur. There always can be quibbles with the adequacy of any warnings, as the Court's remarks concerning the "adults only" warning in one obscenity case demonstrate,<sup>136</sup> but in theory at least this should prove a sufficient means of avoiding most captive audience problems with programming.

Two further problems remain. One relates to potential interruptions of programming with offensive messages. This has been the normal situation for the captive audience theory in the past.<sup>137</sup> With respect to obscenity interruptions in cable, these probably would not be a factor since most likely any problems will flow from the programming itself, not from commercial or other interruptions.

The other problem may be more difficult. The Court has long recognized a societal interest in protecting children from obscenity, and has even gone so far as to sanction a prohibition on its distribution to minors that would be unconstitutional if applied to adults.<sup>138</sup> Books and magazines must be purchased and affirmatively brought into the home, but television is easily accessible to children. Here the potential problems with offensive programs are that children may either accidentally turn on a set or intentionally fail to switch one off. Technologically this problem perhaps could be solved by some form of lock device whereby certain channels that may offer offensive programs cannot be operated without a special key. That key can be placed under parental control to prevent access by children. Any arguments then would be reduced to either the problems of children obtaining the key or the "irresponsible" parent.

In *Ginsberg v. New York*,<sup>139</sup> while upholding the New York prohibition on sales to minors, the Court noted that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."<sup>140</sup> In essence, the Court approved the statute as a legislative aid to parental discretion. If the child obtains the key and thus is able to watch what may be thought of as harmful or offensive programs, then the situation is analogous to that of the child who obtains access to his parents'

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136. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 52 (1973).

137. See Note, *supra* note 120, at 1022.

138. See *Ginsberg v. New York*, 390 U.S. 629 (1968).

139. 390 U.S. 629 (1968).

140. *Id.* at 639.

obscene (or obscene for children) materials. As there is currently no law demanding wholly effective parental supervision, it seems unreasonable to postulate one in the future unless the real concern is with "irresponsible" parents who willingly let their children view obscenity.

In *Ginsberg*, the Court also sustained the statute on the ground that the state has its own independent interest in the well-being of children.<sup>141</sup> How far the state interest in protecting minors from the moral "irresponsibility" of their parents would extend is difficult to know. Yet unless the Court is ready to turn its back substantially on *Butler v. Michigan*,<sup>142</sup> the interest in protecting children from parents who might let them watch morally offensive programs would stop far short of reducing the adult population to viewing only "what is fit for children."<sup>143</sup> Less restrictive alternatives, such as prosecution of the offending adult (assuming the state interest is that great), would still allow the remainder of the population to see adult programs.

This review of the potential rationales for content regulation of cable programming leads to the conclusion that only the captive audience theory might have potential as a possible justification for regulating cable programming. But that justification is so weak and the captive audience theory is so dangerous that it too provides insufficient support for regulation. Thus, those standards that may be applied to broadcasting which are different from the standards applied to other mediums of communication have no place in the consideration of cable. For purposes of obscenity and indecency, cable must be treated under the appropriate standard for either films or literature.<sup>144</sup>

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141. *Id.* at 640.

142. 352 U.S. 380 (1957) (statute making it a misdemeanor to sell or make available books containing language tending to corrupt morality of youth found violative of due process).

143. *Id.* at 383.

144. Advocates of the neoliberal theory of governmental "enhancement" of the marketplace of ideas may well dissent from this proposition. *See, e.g.*, J. BARRON, FREEDOM OF THE PRESS FOR WHOM? (1973); Barrow, *supra* note 103. For those who desire some governmental content control—to increase, of course, the information available to the public—even the diversity of cable could be used as an argument against freeing it from regulation. It has already been suggested that because of the probable audience fragmentation there is too great a risk that the public will be uninformed because members might make the wrong choice in watching the wrong channel. Thus not only is the public interest thought to require the availability of access channels (although making cable a common carrier would accomplish the same thing), but also to require the operator to police the access channels and choose "issues for presentation." Naturally, a well-meaning governmental agency would be available to back up and assist in the choices. *See id.* at 702-05.

If one could point to numerous glowing successes of governmental regulation, especially by the FCC, then there might be a great deal more to say for the proposition that governmental enhancement of the marketplace of ideas would be worth the necessary

Thus, at a minimum, obscenity regulation for cable must be limited to suppression of materials that could be suppressed if shown in a local theater.

### B. *Obscenity in the Home*

In holding that consenting adults had no right to view obscene films in theaters, Chief Justice Burger reminded us that one cannot "compare a theater open to the public for a fee, with the private home."<sup>145</sup> Television, however, is watched in the home and to the extent one may have additional rights in his home these may become relevant in dealing with cable and obscenity.

The origin of additional first amendment rights in the home is *Stanley v. Georgia*,<sup>146</sup> in which the Supreme Court held that mere possession of obscene material in the home cannot constitutionally be made a crime. In *Stanley*, the Court delineated the two rights at issue: the right to receive information regardless of social worth, and the right to be free from unwanted governmental intrusions into privacy. Intertwining these rights, the Court reached the conclusion that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."<sup>147</sup>

But *Stanley* was not only the beginning of the doctrine of additional first amendment rights in the home; it was also its high point. Both the holding and the language used in *Stanley* seemed to encompass a right of willing adults to receive obscene materials, but as soon as the opportunity arose to reaffirm that theory, the Court quashed it. In the process of quashing that prospect the Court, now reconstituted, eagerly limited *Stanley*.<sup>148</sup> The first amendment basis of *Stanley* was virtually ignored as the Court concentrated on the privacy aspect of that case. That decision, the Court said in *Paris*

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first amendment reinterpretation. But when the gains are so speculative—the agency would have to be effective and the audience must either want to be, or be cajoled into being, better informed—it seems clear to this observer that the neoliberal view of the first amendment is not the preferable one. We can control and indeed avoid private monopoly in cable communications and that course is a much wiser one than assuming that governmental content regulation will solve any problems as they arise. *See generally* *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 148 (1973) (Douglas, J., concurring); ROSCOE POUND—AMERICAN TRIAL LAWYERS FOUNDATION, THE FIRST AMENDMENT AND THE NEWS MEDIA—FINAL REPORT 21-29 (1973) (this report was issued by the Annual Chief Justice Earl Warren Conference on Trial Advocacy in the United States).

145. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973).

146. 394 U.S. 557 (1969).

147. *Id.* at 565.

148. *See Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973).

*Adult Theater I v. Slaton*,<sup>149</sup> turned on the old concept that a man's home is his castle. The protection of *Stanley* "is restricted to a place, the home."<sup>150</sup> It depended "not on any First Amendment right to purchase or possess obscene materials, but on the right to privacy in the home."<sup>151</sup> And for anyone who remained ready to argue the first amendment basis for *Stanley* came the rather sharp warning that if the case were not limited as the Court had suggested, then it would no longer be the law.<sup>152</sup>

A right to view obscenity in the home can only be supported, if at all, by *Stanley*. But reliance on *Stanley* is extraordinarily shaky. Reading *Stanley* and the Miller Quintet<sup>153</sup> with the hope that there is room for a right to view obscene materials over cable television without governmental interference leads to the almost inescapable conclusion that the hope is illusory.

With the exception of obscenity, all other state regulations affecting freedom of expression must be supported by ample justification. But with obscenity it took from *Roth* until *Slaton* before even a hint of the justification for the regulation appeared. Against this background it is hazardous to predict whether the justifications in fact have any application to a new medium such as cable television.

Two of the rationales already have been mentioned. One is the shock effect of seeing obscenity; there is little to be said here beyond noting the self-help remedy of switching the dial and requiring advance warnings of the type of programming. The other rationale deals with the problem of children, and here technology offers solutions. In addition, there are the two rationales stated in *Slaton*: the quality of life and the problem of the adverse effects of exposure to obscenity. Both are difficult to evaluate.

The Court in *Slaton* found it irrelevant that there is "no scientific data which conclusively demonstrates that exposure to obscene material adversely affects men and women or their society."<sup>154</sup> The basis for this conclusion was that since obscenity is not speech this is not an area in which the Constitution intrudes. Thus, the legislature has ample leeway for its own judgments. Further,

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149. 413 U.S. 49 (1973).

150. *Id.* at 66 n.13.

151. *United States v. 12 200-Foot Reels of Super 8 mm. Film*, 413 U.S. 123, 126 (1973).

152. *Id.* at 127.

153. See note 2 & accompanying text *supra*.

154. 413 U.S. at 60 (1973). The majority continued: "[I]t is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself." *Id.* The majority should have underscored that comment by adding: "such as the right to an abortion prior to the end of the second trimester of pregnancy." See *Roe v. Wade*, 410 U.S. 113 (1973).



[the] sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.<sup>155</sup>

It is one thing to quarrel with the Court's factual premises, but if it is going to apply the standard of review for due process in economic legislation, as it did,<sup>156</sup> then a fear that viewing obscenity may lead to crime, even if probably wrong, is sufficient to justify legislation. *Stanley* expressly rejected the speculative deterrent theory for the home, however, and to the extent *Stanley* has vitality, the state interest in avoiding criminal sexual behavior cannot override the right to have obscenity in the home.

The conclusion is inescapable that in *Slaton* the Court felt that the most substantial reason for regulating obscenity went to the quality of life. The opinion reflects former Chief Justice Warren's call from *Jacobellis* that the Court allow "States to maintain a decent society."<sup>157</sup> Besides quoting a long passage from Professor Bickel to this effect,<sup>158</sup> the *Slaton* Court offered its own support. The rights and interests involved include "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers . . ." <sup>159</sup> Such justifications in a first amendment case are startling. One perceptive commentator has aptly summed up their potential reach by noting that "[t]he 'decent society' sanctioned by the Chief Justice entails more than cleaning up 42nd Street or Times Square; he envisions a society where men and women act cleanly because they think cleanly."<sup>160</sup>

The semicolon in that commentator's sentence sets apart a restrictive and an expansive reading of *Slaton*. If indeed the Court is searching for a decent society "where men and women act cleanly because they think cleanly," then there is no chance at the present of expecting any liberalization favoring cable viewing. But if the state's interests are limited to what the Court stated in fact, then the case for obscenity and cable is not wholly closed.

"Cleaning up 42nd Street or Times Square" is a good shorthand expression for exactly what the Court was suggesting. The terms "tone of com-

155. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

156. *See id.* at 61-64.

157. 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting).

158. 413 U.S. at 59, quoting Bickel, *On Pornography: Dissenting and Concurring Opinions*, 22 THE PUBLIC INTEREST 25-26 (1971).

159. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973).

160. *See Comment, supra* note 54, at 120.

merce,"<sup>161</sup> "crass commercial exploitation,"<sup>162</sup> and "commerce in obscene books, or public exhibitions focused on obscene conduct"<sup>163</sup> carry with them the suggestion that it is the outward commercialism surrounding obscenity that disturbs the Court. In part it would help explain the Court's continued reliance on business regulation cases for setting the standards for judging legislative determinations. The Court's lengthy quotation from Professor Bickel supports this reading of the case. While he concluded that private reading of obscenity was all right, he went on to state that if the reader

demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, *then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.*<sup>164</sup>

It is altogether possible for a cleanup of the dirty bookshops in the city to exist side by side with private use of obscenity in the home. If it is the aesthetics of the city that concerns the Court, then they are not affected importantly by private persons obtaining obscenity, at least as long as those obtaining obscenity do not misbehave. On the other hand, if a "decent society" includes freedom from concern that someone is enjoying obscenity, then there could be little tolerance for cablecasting obscenity since that would provide a much wider audience than otherwise expected for non-broadcast obscene matter.

This choice is in part quite similar to the one made in the abortion decisions.<sup>165</sup> Since few persons are likely to witness an abortion, what bothers many is the certain knowledge that somewhere someone may be having an abortion. That interest could not block the decision in *Roe* and *Doe* once the privacy interest had been defined. In a similar vein, the Court could allow the cablecasting of obscenity into the home on the ground that the interest of society, in having people secure in the knowledge that no one is enjoying obscenity, is insufficient as long as the interest in eliminating commercial exploitation in the city has been satisfied.

Thus, under one reading of the interests protected by obscenity legislation—commercial exploitation—it might be possible to view obscenity in the privacy of the home by turning on the cable. But not only is this reading premised on a possibly limited reading of the interests asserted in *Slaton*, it also carries the implicit premise of a right to receive.

161. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973).

162. *Id.* at 63.

163. *Id.*

164. *Id.* at 59 (1973), quoting Bickel, *supra* note 158, at 25-26.

165. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

The Court has rejected the idea that *Stanley* granted a consenting adult a right to receive pornography, either by purchase in the market,<sup>166</sup> through the mails,<sup>167</sup> or by private importation.<sup>168</sup> Prohibiting purchase in the marketplace falls precisely within the *Slaton* concern for commercial exploitation. Forbidding a consenting adult from receiving obscenity through the mails begins to have an attenuated relationship with commercial exploitation, although preventing obscenity from entering the stream of commerce is broad enough to make the prohibition plausible and thus keep the commercial exploitation rationale alive.<sup>169</sup> But when private importation by a citizen for his own personal use is considered, talk about commercial exploitation enters the world of 1984 unless we now view our missionary role as cleaning up commercial exploitation the world over. Not surprisingly, in the private importation case the Court did not mention any governmental interests justifying the prohibition.<sup>170</sup>

*Slaton* may have offered the state's justifications, but prohibitions can go beyond them. Thus in the case of a cable viewer, any obscene program would have to be made somewhere, be cablecast from somewhere, and be carried locally. Seemingly, some government would have an interest in prohibiting each part of the necessary transaction except viewing. Any interstate cablecasting would run afoul of the current FCC regulation,<sup>171</sup> and any reasoning that prohibits the interstate transportation of obscene material for personal use is certainly sufficient to sustain the regulation. Moreover, it is hardly an extension of that reasoning to allow local prosecution, applying local standards,<sup>172</sup> of any intrastate transmission.<sup>173</sup>

Just before he died, Justice Black wrote of the beginnings of *Stanley's* emasculation: "perhaps in the future that case will be recognized as good law only when a man writes salacious books in his attic, prints them in his

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166. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

167. See *United States v. Reidel*, 402 U.S. 351 (1971); cf. *United States v. Orito*, 413 U.S. 139 (1973) (common carrier).

168. See *United States v. 12 200-Foot Reels of Super 8 mm. Film*, 413 U.S. 123 (1973).

169. See *United States v. Orito*, 413 U.S. 139, 143 (1973).

170. See *United States v. 12 200-Foot Reels of Super 8 mm. Film*, 413 U.S. 123 (1973).

171. 47 C.F.R. § 76-215 (1975).

172. See *Miller v. California*, 413 U.S. 15, 30-34 (1973). The initial application of "local" standards will come from the local cable system which will have to make some judgments when it receives an out-of-state transmission about whether that program will be acceptable under the prevailing local standards.

173. For example, the Texas Court of Civil Appeals has affirmed an injunction against the furnishing of obscene movies via closed circuit TV to motel patrons in their rooms. *Locke v. Texas*, 516 S.W.2d 949 (Tex. Civ. App. 1974).

basement, and reads them in his living room."<sup>174</sup> Although citations to Justice Black in the obscenity area are notably absent in current majority opinions, this sentence surely deserves favorable treatment. It perfectly states the current status of the right protected by *Stanley*.

### III. A PROGNOSIS FOR THE FUTURE OF CABLE AND OBSCENITY

This survey of the law of obscenity and indecency as it may relate to the future development of cable television offers some bright prospects as well as some constraining ones. On balance, I believe that the former significantly overshadow the latter.

Over-the-air broadcasting has always functioned under significant constraints, whether they be fears that the FCC would strongly oppose certain types of programming or the pressures of reaching the appropriate audience for the purposes of maximizing advertising revenues. Cable may well be free from the latter restraint, and the foregoing analysis leads to the simple conclusion that it is certainly free of the former. Programming that has been deemed offensive—and therefore sanctionable—when offered over the seemingly scarce airways will be immune from such legal impositions when cablecast. No theory of regulation, from the fear of media power to special concern for children to the solicitude for a quasi-captive audience, that treats cable differently from the nonbroadcast media can withstand scrutiny. Thus cable, with its unfulfilled promise of abundance, will receive the legal treatment of a medium of abundance.

As applied to indecent programs—whatever this term may mean—this freedom will mean that the viewer need not watch or listen. The only remedy will be self-help. Even a program like the one involved in *Sonderling* probably would be immune when the problems of children are removed. If there were no pandering, the issue would be free from doubt. Talk shows may be as frank as they wish, given that the visual part of obscenity is what separates films from books.

As applied to filmed obscene programs, this freedom will mean that the determination of obscenity will follow the same substantive and procedural standards as those intended for a theater; nothing less will suffice. A tremendous leap in available viewing material for the home will occur, simply because of the new freedom from legal constraints imposed on the broadcast media.

Even the negative side of the picture is not totally bleak. Cable will be forced to operate under the same general laws as the remainder of the

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174. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 382 (1971) (Black, J., dissenting).

nonbroadcast media. The combination of abundance and home viewing is simply not sufficient to remove cable television from the general purview of the obscenity laws, no matter how attenuated their purposes may seem. Possibly at some future date the Supreme Court will conclude that a consenting adult's desire for obscene materials raises a sufficient interest under the first amendment or under the substantive due process privacy right of sexual gratification to overcome the state's current speculative interest in regulation. At that time cable will indeed be a medium of abundance for all groups of Americans.