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Indecency on Cable Television

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NOTES AND COMMENTS

INDECENCY ON CABLE TELEVISION

As the anti-pornography group, Morality in Media, lobbies across the country to "put a torpedo into the whole sex industry,"¹ pressure mounts upon the entire spectrum of the communications media to limit the dissemination of potentially offensive material. The cable television industry has been affected by this crusade for censorship and new state statutes and municipal ordinances have been enacted to regulate programming on cable television.² When these laws extend to the prohibition of indecent material, they consistently fail and are held unconstitutional, as a violation of the first amendment freedom of speech clause. This note examines the reasons why.

I. THE ELASTICITY OF FIRST AMENDMENT PROTECTION

The first³ and fourteenth⁴ amendments to the United States Constitution protect the freedom of speech and expression from

1. *Reagan Urged to 'Torpedo' Porn*, Miami Herald, Mar. 29, 1983, at 12A, col. 1.

2. See *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 986 (1982); Krattenmaker and Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 FORDHAM L. REV. 606 (1983); Note, *Indecent Programming on Cable Television and the First Amendment*, 51 GEO. WASH. L. REV. 254 (1983); *Courts Say Cable Enjoys First Amendment Rights*, The Independent Professional, Feb. 15, 1983, at 14, col. 1; *MA Citizens Panel Backs Cable Obscenity Bill*, Multi-channel News, Jan. 31, 1983, at 59, col. 1; *Ban Nudity on Cable TV in Orange, Commissioner Urges*, The Orlando Sentinel, Jan. 25, 1983, at B-1, col. 1; *Miami Bans Porn on Cable TV Despite Objections*, Jan. 14, 1983, at 4D, col. 1; *Statewide Ban on Cable-TV Porn is Proposed in Legislature*, The Miami News, Nov. 23, 1982, at 1, col. 1.

3. U. S. CONST. AMEND. I. The first amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

4. U.S. CONST. AMEND. XIV, §1. Section one of the fourteenth amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

infringement by the states. These guarantees apply to the rights of cable operators to disseminate information.⁵ The states may regulate speech or expression only under certain circumstances, and since these limitations apply to all mediums of communication, they apply to cable television as well.⁶ Categories of unprotected speech include "the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."⁷

Even otherwise protected speech may be regulated by reasonable time, place and manner restrictions when required to further significant governmental interests,⁸ such as individual privacy⁹ and the well-being of youth.¹⁰ Thus, expressions ordinarily protected by the first amendment, such as those by means of motion pictures,¹¹ are not free from government regulations at all times and all places.¹² However, the first amendment strictly limits the power of government to censor content,¹³ and permits these time, place and manner restrictions only when the speaker intrudes into the

5. *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1054 n.70 (8th Cir. 1978); *aff'd on other grounds*, 440 U.S. 689 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir. 1977); *Weaver v. Jordon*, 64 Cal. 2d 235, 49 Cal. Rptr. 537, 411 P.2d 289, *cert. denied*, 385 U.S. 844 (1966).

6. *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982).

7. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). *See also* *Cohen v. California*, 403 U.S. 15, 19-20 (1971); *Roth v. United States*, 354 U.S. 476, 485-86 (1957).

8. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 n.18 (1976).

9. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). *See also* *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

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

11. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 496 (1952); *Universal Amusement Co., v. Vance*, 587 F.2d 159, 164 n. 7 (5th Cir. 1978).

12. 343 U.S. at 502. *See also* *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 48 (1961).

For example, an ordinance restricting the showing by outdoor theatres of films depicting sexual conduct may be constitutional as to films viewable from private residences but unconstitutional as to films viewable only from the public street or walkway. *People v. Starview Drive-In Theatre, Inc.*, 100 Ill. App.3d 624, 427 N.E.2d 261 (1981).

13. *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. at 209, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Kovacs v. Cooper*, 336 U.S. at 97 (Jackson, J., concurring). The government must demonstrate that its action is narrowly devised to further a substantial and legitimate state interest unrelated to censorship or the suppression of protected expression. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Genusa v. City of Peoria*, 619 F.2d 1203, 1214 (7th Cir. 1980).

privacy of the home,¹⁴ when the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure¹⁵ or when the communicative materials are accessible to, and obscene as to, minors.¹⁶

The standards for such censorship of content must be clearly drawn. Criteria, such as "sacrilegious,"¹⁷ "prejudicial to the best interests of the people of said City,"¹⁸ "immoral,"¹⁹ "harmful"²⁰ or portraying "sexual immorality"²¹ will not pass constitutional muster because these terms are too vague and indefinite. Neither the exhibition of nudity,²² even as to minors,²³ nor the portrayal of sex²⁴ is by itself sufficient reason to deny first amendment protection. The context in which nudity and sex are presented is crucial.²⁵ For example, material containing a nude baby²⁶ may be innocent or even educational.²⁷

In 1973, the United States Supreme Court in *Miller v. California*²⁸ provided guidelines for permissible and absolute prohibition of obscene works:

- (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary artistic, political, or scientific value.²⁹

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

15. See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

16. See *Erznoznik v. City of Jacksonville*, 422 U.S. at 212; *Ginsberg v. New York*, 390 U.S. at 629. See also *Rabeck v. New York*, 391 U.S. 462 (1968); *Interstate Circuit Inc. v. City of Dallas*, 390 U.S. 676 (1968).

17. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. at 506.

18. *Gelling v. Texas*, 343 U.S. 960 (1952).

19. *Commercial Pictures Corp. v. Regents of University of New York*, 346 U.S. 587 (1954).

20. *Superior Films, Inc. v. Department of Education*, 346 U.S. 587 (1954).

21. *Kingsley Int'l. Pictures Corp. v. Regents of University of New York*, 360 U.S. 684 (1959).

22. *Schad v. Mount Ephraim*, 452 U.S. 61 (1981); *Jenkins v. Georgia*, 418 U.S. 153 (1974).

23. *Erznoznik v. City of Jacksonville*, 422 U.S. at 213 n. 10.

24. *Roth v. United States*, 354 U.S. 476 (1957). Accord, *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974); *Kois v. Wisconsin*, 408 U.S. 229 (1972).

25. *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 986, 996 (1982).

26. *Erznoznik v. City of Jacksonville*, 422 U.S. at 213.

27. *Id.* at 211.

28. 413 U.S. 15 (1973).

29. *Id.* at 24. See also *Kois v. Wisconsin*, 408 U.S. at 230; *Roth v. United States*, 354

The Court furnished two examples of what a state statute could define as prohibited under part (b) of the standard:

- (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of genitals.³⁰

The following year, the Court in *Hamling v. United States*,³¹ rejected a vagueness attack on 18 U.S.C. §1461, which forbids the mailing of "obscene, lewd, lascivious, indecent, filthy or vile" material.³² It stated that the examples given in *Miller*, although not intended to be exhaustive, clearly indicated that there is "a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' " within the meaning of *Miller's* obscenity test.³³ To assure the statute's constitutionality, the Court read *Miller's* limits into it, and constructed §1461 to prohibit the mailing of only obscene material.³⁴

Then, in 1978, the Court in *FCC v. Pacifica Foundation*³⁵ interpreted 18 U.S.C. §1464,³⁶ which prohibits the broadcast of obscene, indecent and profane language, to apply to more than obscene material. The *Pacifica* case involved an afternoon broadcast by a New York radio station of satirist George Carlin's "Filthy Words" monologue. A member of the "Morality in Media" organization complained to the Federal Communications Commission

U.S. at 489.

30. 413 U.S. at 25.

31. 418 U.S. 87 (1974).

32. 18 U.S.C. §1461 (1976); 18 U.S.C. §1461 (1981). 18 U.S.C. §1461 provides in part:

Mailing obscene or crime-inciting matter

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and . . .

Is declared to be nonmailable matter and . . .

Whoever knowingly uses the mails for the mailing, carriage in the mails or delivery of anything declared by this section . . . to be nonmailable, . . . shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense

The term "indecent" as used in this section includes matter of a character tending to incite arson, murder, or assassination.

33. 418 U.S. at 114.

34. *Id.* But the statute defines indecent as matter tending to incite arson, murder or assassination, and is not limited to the meaning of the word "obscene." See *supra* note 32.

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

36. 18 U.S.C. §1464 (1976). 18 U.S.C. §1464 provides:

Broadcasting obscene language

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.

(FCC) that he had heard the broadcast while driving in his car with his young son.³⁷ The Supreme Court upheld the Commission's determination that the monologue, as broadcast, was "indecent" within the meaning of §1464, and that the term "indecent" in §1464 was not restricted to the obscene.³⁸

The Court distinguished *Hamling*, where it interpreted the term "indecent" in 18 U.S.C. §1461 to mean "obscene" to preserve the statute's constitutionality under *Miller*. The Court asserted, "the reasons supporting *Hamling's* construction of §1461 do not apply to §1464. Although history of the former revealed a primary concern with the prurient, the Commission has long interpreted §1464 as encompassing more than the obscene."³⁹ Instead, the Court explained that the FCC's definition of indecency does not necessarily require the component of prurient appeal.⁴⁰ At most, it includes "patently offensive references to excretory and sexual organs and activities,"⁴¹ so that the "constitutional protection accorded to a communication containing such . . . language need not be the same in every context."⁴² Hence, the Court found that an afternoon radio broadcast was one context in which the communication of patently offensive words dealing with sex and excretion may be regulated within the purview of the first amendment.⁴³ However, it did not strike down §1464 as unconstitutional, even though the statute's language calls for the prohibition of the broadcast of indecent language at all times. As the statute stands, it does not distinguish between obscenity and indecency, nor does it require consideration of the context in which the language is presented. On its face, §1464 appears to violate *Miller*, but its con-

37. *Pacifica*, 438 U.S. at 729-30; *Federal Communications Commission Reports*, 56 F.C.C. 2d 94-95 (1975).

38. 438 U.S. at 726.

39. 438 U.S. at 741. *But see Federal Communications Commission Reports*, 26 F.C.C. 2d 408, 412 (1970), where the Commission decided the term "indecent" to have a different meaning from "obscene" in §1464 by finding support in *United States v. Limehouse*, 285 U.S. 424 (1932). In that case, the Court construed the word "filthy" in the postal obscenity law, now §1461, to mean something other than "obscene, lewd, or lascivious," and permitted a prosecution of the sender of a letter which . . . was "course, vulgar, disgusting, *indecent*." (emphasis added). *Id.* As a result, one reason why the Commission viewed the word "indecent" in §1464 to encompass more than the word "obscene" was because the Court originally found the terms to be different in §1461. *See Federal Communications Commission Reports*, 56 F.C.C. 2d 94, 97 (1975). Had the Commission known the Supreme Court would later decide in *Hamling* that the terms in §1461 would have the same meaning, perhaps the Commission would have thought the same for the terms in §1464.

40. 438 U.S. at 741.

41. *Id.* at 743.

42. *Id.* at 747.

43. *Id.* at 745.

stitutionality as applied to situations such as those in *Pacifica* is now firmly established.

The Court emphasized, however, that its holding was based on a nuisance rationale in which "context is all-important."⁴⁴

The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions may also be relevant. As Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place — like a pig in the parlor instead of the barnyard." . . . We simply hold that when the Commission finds that a pig has entered the parlor the exercise of its regulatory power does not depend on proof that the pig is obscene.⁴⁵

Thus, the Court agreed with a determination by the Commission that the principle of channeling should be borrowed from nuisance law and applied to the broadcasting medium. Notwithstanding the language of §1464, the Commission did not intend to place an absolute prohibition on the broadcast of indecent language but instead sought to channel this material to times of day when children most likely would not be exposed to it.⁴⁶ The Court also found that the Commission's power under §1464 to regulate indecent language and to impose sanctions on licensees who broadcast it was not forbidden by the anticensorship provision of the Communications Act of 1934.⁴⁷ This provision merely prohibits the Commission from editing proposed broadcasts in advance; it does not prohibit the Commission from reviewing the content of completed broadcasts.⁴⁸

44. *Id.* at 750.

45. *Id.* at 750-51 (footnote omitted).

46. *Id.*; *Pacifica Foundation v. FCC*, 556 F.2d 9, 12 (D.C. Cir. 1977); 438 U.S. 726 (1968); *Federal Communications Commission Reports*, 59 F.C.C. 2d 892 (1976); *Federal Communications Commission Reports*, 56 F.C.C. 2d 94, 98 (1975).

47. 47 U.S.C. §326 (1976). 47 U.S.C. §326 provides:

Censorship

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

48. 438 U.S. at 735-38. See also *In re McGinley*, 660 F.2d 481, 486 n.12 (C.C.P.A. 1981).

II. BROADCAST MERITS THE LEAST FIRST AMENDMENT PROTECTION

In its analysis of the context of the "Filthy Words" broadcast, the Court stressed that differences in the characteristics of communications media justify differences in the first amendments standards applied to them.⁴⁹ The Court provided two explanations for why broadcasting has received the most limited first amendment protection of all forms of communication. First, is the pervasive presence of broadcast media, particularly in the home, where the individual's right to be left alone outweighs the licensee's first amendment rights to broadcast.⁵⁰ "Unlike a book which requires the deliberate act of purchasing and reading or a motion picture where admission to public exhibition must be actively sought, broadcasting is disseminated generally to the public It comes directly into the home and frequently without any advance warning of its content."⁵¹ Even prior warnings do not necessarily protect viewers from unexpected program content, because people often tune it at times other than at a program's commencement.⁵² Second, the unique accessibility of broadcast media to children, even those too young to read, coupled with the government's interest in the "well-being of its youth" justifies special treatment of the broadcast of indecent language.⁵³ Thus, when the "Filthy Words" broadcast was aired during the afternoon on the radio, it subjected children and "unwilling" adults to unexpected content. Considering the time of day and the pervasiveness and easy accessibility of the medium, a "pig had entered the parlor," and the Commission would have been within its authority to impose sanctions on the broadcaster for it.

In prior cases, another justification given for restricting broadcast's first amendment protection is the inherent physical limitations of the broadcast spectrum.⁵⁴ Broadcast frequencies are a scarce resource; they are not available to all who may wish to use them. There is a fixed natural limitation upon the number of stations that can operate without interfering with each other. As a

49. 438 U.S. at 747. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969); *Joseph Burstyn, Inc. v. Wilson* 343 U.S. 495, 503 (1952).

50. 438 U.S. at 747. Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

51. *Federal Communications Commission Reports*, 24 F.C.C. 2d 408, 411 (1970).

52. 438 U.S. at 747; 24 F.C.C. 2d at 408.

53. 438 U.S. at 749-50. See also *id.* at 731 n. 2.

54. See, e.g., *Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973).

result, government allocation and regulation of broadcast frequencies are recognized as essential, but subject to the public's right to receive suitable access to social, political, aesthetic, moral and other ideas and experiences.⁵⁵ Since broadcast has special inherent problems, FCC regulations, such as common ownership rules⁵⁶ and mandatory access rules,⁵⁷ which would otherwise infringe on the broadcaster's first amendment freedoms, have been upheld.

III. CABLE SYSTEMS DIFFER FROM BROADCASTING COMPANIES AND REQUIRE GREATER FIRST AMENDMENT PROTECTION

The *Pacifica* Court emphasized the narrowness of its "pig in the parlor" rationale and stressed that distinctions must be made between different broadcast media. "This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction."⁵⁸ Thus, one of the questions *Pacifica* leaves unanswered is whether its rule for broadcast must be extended to cable television. If so, the FCC, states and/or municipalities may more freely impose time, place and manner restrictions on indecent material shown on cable television. If not, then the first amendment protection afforded cable television will more closely resemble that of newspapers, books and motion pictures.

Historically, the courts and the FCC have repeatedly asserted that cable systems are not broadcasters. They have contended that cable systems are neither broadcasters nor common carriers within the meaning of the Communications Act, but a hybrid of both, requiring identification and regulation as a separate force in communications.⁵⁹ Although the United States Supreme Court has yet to address the issue of first amendment rights of cable operators, it

55. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 799 (1978); *Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. at 101-02; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388-90; *National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943).

56. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 800.

57. *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).

58. 438 U.S. at 750.

59. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161-64 (1968); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1036, 1036 n.23 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); Order of Dec. 7, 1977, 67 F.C.C. 2d 252 (1977); Report and Order of Apr. 1, 1976, 59 F.C.C. 2d 294, 299 (1976); Cable Television Report and Order of Feb. 2, 1972, 36 F.C.C. 2d 143, 211 (1972); Report and Order of Apr. 13, 1959, 26 F.C.C. 403, 427-29 (1959). See also Geller and Lampert, *Cable, Content Regulation and the First Amendment*, 32 CATH. U.L. REV. 603 (1983).

has noted that the question "is not frivolous."⁶⁰ The Court will probably follow the lower courts which have addressed the issue and prescribe different standards in the first amendment area,⁶¹ because the Court has distinguished broadcasting and cable casting in other areas of the law.⁶²

As early as the 1940's, community antenna television systems (CATV) have been designed to bring better and more distant broadcast signals into the home. Since then, cable systems have developed into a medium with enough channels in each community (over 100 at this time) to accommodate both the retransmission of broadcast television programs and origination and retransmission of special services, such as sports, weather and entertainment program services.⁶³ At first, the FCC avoided regulation of cable television altogether. However, as cable television began to compete with broadcast television, the FCC asserted jurisdiction to prevent fragmentation of audiences and revenues between local broadcasters and competing cable systems which were bringing distant signals into local markets.⁶⁴ Although federal laws and FCC regulations expressly provided that cable television was not broadcasting, the Supreme Court upheld FCC regulation of cable television, but *only* to the extent that it is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."⁶⁵ Any other regulation would be impermissible.

In *FCC v. Midwest Video Corp.*,⁶⁶ The Supreme Court halted the FCC's attempts to encroach into the cable television field. Narrowly limiting the authority of the FCC, the Court found that mandatory access rules, which were valid as to broadcast, were invalid as to cable television because they impermissibly abrogated "the cable operators' control over the composition of their programming."⁶⁷ Several lower courts went further and found that the

60. *Midwest Video*, 440 U.S. at 709 n. 19.

61. See *Cruz v. Ferre*, 571 F. Supp. 125 (S.D. Fla. 1983); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 986 (D. Utah 1982).

62. See, e.g., *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

63. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 21-22 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

64. *Id.* at 22.

65. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

66. 440 U.S. 689 (1979).

67. *Id.* at 701. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and

technological differences between broadcasting and cable television justify differences in their first amendment regulation and protection. The United States Court of Appeals in *Home Box Office, Inc. v. FCC*, distinguished the two media in its discussion of first amendment protection:

The First Amendment theory espoused in *National Broadcasting Co.* and reaffirmed in *Red Lion Broadcasting Co.* cannot be directly applied to cable television since an essential precondition of that theory — physical interference and scarcity requiring an umpiring role for government — is absent. Interference among speakers on a single cable is controlled by electrical equipment which divides the cable into channels and by the owners of the cable system who determine who shall have access to each channel and for how long. Nor is there any apparent physical scarcity of channels relative to the number of persons who may seek access to the cable system Technology is now available that would increase capacity to 80 channels, and in the future channel capacity may become unlimited.⁶⁸

In *Home Box Office*, the court invalidated FCC anti-siphoning rules which regulated and limited the programming fare cable operators could offer to the public for a fee. Although substantially similar rules for broadcast television had previously been upheld in *National Association of Theatre Owners (NATO) v. FCC*,⁶⁹ these rules as applied to pay cable television were violative of the first amendment. The court held that *NATO v. FCC* was not controlling because of the "important differences" between cable and broadcast television.⁷⁰ Thus, even though the rules did not go so far as to constitute content regulations on cable television, the court found them violative of the first amendment.⁷¹

Three recent cases focus on the distinctions between broadcasting and cable that make *Pacifica* inapplicable to cable casting. In *Home Box Office, Inc. v. Wilkinson*⁷² and *Community Television of Utah, Inc. v. Roy City*,⁷³ a federal district court judge invalidated legislation prohibiting the distribution of "indecent" material over cable television. The court in *Roy City* outlined the distinctions between cable and broadcasting that mandated the

compare with *Red Lion Broadcasting*, 395 U.S. 367 (1969).

68. *Home Box Office, Inc. v. FCC*, 567 F.2d at 44-46.

69. 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970).

70. 567 F.2d at 43.

71. *Id.* at 49.

72. 531 F. Supp. 986 (D. Utah 1982).

73. 555 F. Supp. 1164 (D. Utah 1982).

result:

	<u>Cable</u>	<u>Broadcast</u>
1.	User needs to subscribe.	User need not subscribe.
2.	User holds power to cancel subscription.	User holds no power to cancel. May complain to F.C.C., station, network or sponsor.
3.	Limited advertising.	Extensive advertising.
4.	Transmittal through wires.	Transmittal through public airways.
5.	User receives signal on private cable.	User appropriates signal from the public airwaves.
6.	User pays a fee.	User does not pay a fee.
7.	User receives preview of coming attractions.	User receives daily and weekly listing in public press or commercial guides.
8.	Distributor or distributee may add services and expand spectrum of signals or channels and choices.	Neither distributor nor distributee may add services or signals or choices.
9.	Wires are privately owned.	Airways are not privately owned but are publicly controlled. ⁷⁴

In addition, the *Roy City* court noted that cable provides choices that broadcast does not: to choose to subscribe or not to subscribe, resulting in a private contract; to choose among various services, such as HBO or certain sports events; to choose among a large number of channel and subject choices; and to choose to cancel or not to cancel. It also recognized that television by wire does not have the "pervasiveness" of broadcasting over the airwaves. Cable signals travel only upon request and for a fee, so that they are not available everywhere. One must actively contract to subscribe to a cable service, hook-up, and maintain the right to take signals from the wire by periodic payments to the supplier.⁷⁵ As a result, the *Roy City* court held that the *Pacifica* standard is inapplicable to cable television. Instead, the *Miller* standard applies, which "is a national standard with a core of uniformity which allows for a degree of flexibility at a community level. It may be uniformly applied to almost all forms of publicly available communication. Books, magazines, cassettes, periodicals, movies, and cable television are all treated essentially in the same fashion."⁷⁶ Thus, under these two lower court cases, cable television should receive the greater first amendment protection afforded the various other modes of communication outside of broadcasting.⁷⁷

74. *Id.* at 1167.

75. *Id.* at 1168-69.

76. *Id.* at 1169; *see also* 531 F. Supp. at 993-1002.

77. *See, e.g.,* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

Similarly, in the third, more recent case, *Cruz v. Ferre*, the United States District Court for the Southern District of Florida permanently enjoined the City of Miami from enforcing its "indecentcy ordinance."⁷⁸ The court stated that:

The ordinance subject to review by this court prohibits far too broadly the transmission of indecent materials through cable television. The ordinance's prohibition is wholesale, without regard to the time of day or other variables indispensable to the decision in *Pacifica*. The rationale of *Pacifica* applies only to broadcasting. The medium of cable television presents different first amendment concerns; therefore, *Pacifica* is inapposite.⁷⁹

Thus, the court found the ordinance's wholesale prohibition of indecency on cable television to exceed the limits of regulation set forth in *Miller*, rendering it unconstitutional.

Curiously, the legislation involved in each of the three cases strictly prohibited, rather than regulated, the distribution of indecent material by cable television. Each of the district courts noted that *Miller* only permitted the prohibition of obscenity, and not indecency. Although they found that *Pacifica* is inapposite as applied to cable television, it would be interesting to see the results of an attack on indecency legislation with some time, place and manner conditions. It might be more difficult for a court to strike down an ordinance that does not completely ban the transmission of indecent materials through cable television.

Although the Supreme Court in *Pacifica* did not state whether its holding applied to cable television, it indicated that "differences between radio, television, and perhaps closed-circuit transmissions" may be relevant in determining this question.⁸⁰ The current state of the art in cable television technology permits the cable programmer to nearly eliminate the problems of accessibility to children and pervasiveness that troubled the Court about broadcasting in *Pacifica*. Late night scheduling reduces the likelihood of

78. *Cruz v. Ferre*, 571 F. Supp. 125 (S.D. Fla. 1983). Ordinance No. 9538 provided, in pertinent part:

Section 1. No person shall by means of a cable television system knowingly distribute by wire or cable any obscene or indecent material.

Section 2. The following words have the following meanings:

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(g) "indecent material" means material which is a representation or description of a human sexual or excretory organ or function which the average person, applying contemporary community standards, would find to be patently offensive. Miami, Fla., Ordinance 9538 (Jan. 13, 1983).

79. *Cruz v. Ferre*, 571 F. Supp. at 131.

80. 438 U.S. at 750.

children in the audience. Channels dedicated exclusively for adult programming eliminate unexpected program content. The pay-per-view system, activated by a credit card, compels the viewer to consciously select an adult program, thus eliminating any surprises. A feature may be added to allow the viewer to prescreen a program for two minutes. Under an addressable system, a viewer orally requests by telephone that a certain channel carrying adult programs be activated. To prevent unauthorized use, he is required to recite a personal identification code. Alternatively, an adult programming channel may be controlled by a lock box, or the adult programming may be scrambled, and the viewer provided with a lockable decoder.⁸¹ As a result, current systems in the cable industry substantially reduce those problems which justify limited first amendment protection for broadcast. For these reasons alone, *Pacifica* should be inapplicable to cable operators.

Outside of the first amendment area, the courts have historically distinguished cable systems from broadcasters. In 1961, a district court found that a community antenna service neither unfairly competed nor was unjustly enriched when it transmitted through its coaxial cables the programs of television stations, without their consent, to individual subscribers.⁸² The court explained that the companies were not "engaged in the same kind of business."⁸³

Plaintiffs are in the business of selling their broadcasting time and facilities to the sponsors to whom they look for their profits. They do not and cannot charge the public for their broadcasts which are beamed directly, indiscriminately and without charge through the air to any and all reception sets of the public as may be equipped to receive them.

Defendants, on the other hand, have nothing to do with sponsors, program content or arrangement. They sell community antenna service to a segment of the public for which the plaintiff's programs were intended but which is not able, because of location or topographical condition, to receive them without re-broadcast or other relay service by community antenna. Any profit to defendants must come from the public for this service.^{83a}

81. See generally, M. HAMBURG, ALL ABOUT CABLE, §6.05[3] (1981).

82. *Intermountain Broadcasting Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315 (S.D. Idaho 1961). See also *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47, 55 (S.D. Idaho, 1962), *vacated on other grounds*; 335 F.2d 348 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965).

83. 196 F. Supp. at 325.

83a. *Id.*

In 1972, the fourth circuit upheld an allegedly discriminatory nonduplication rule, which denied community antenna television systems, but not broadcast companies, the right to duplicate network fare in some areas.⁸⁴ To support its decision, the court stated, "since broadcasters function as transmitters of signals, they differ from CATV which facilitates the reception of signals."⁸⁵

In two copyright infringement cases, the United States Supreme Court held that the transmission by a cable operator did not constitute a "performance" within the purview of the Copyright Act.⁸⁶ The Court stated:

The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed, CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.⁸⁷

In 1978, the eight circuit held that the FCC has the power to impose mandatory access rules, requiring access channels for free use by public, educational and governmental bodies, upon broadcasters, but not upon cable companies.⁸⁸ The court asserted, "Neither the basic rationale for regulation of common carriers (to insure fair and equal access to the carrier's service) nor that for regulation of broadcast transmissions (to preclude bedlam on broadcast frequencies), is applicable to cable systems *per se*."⁸⁹

In 1981, the West Virginia Supreme Court of Appeals held that the state of West Virginia could impose different taxing policies on cable television systems and broadcasting companies without violating the constitutional guarantees of equal protection and equal and uniform taxation.⁹⁰ It stated that CATV systems and conventional television broadcasters do not offer the same product

84. *Winchester TV Cable Co. v. FCC*, 462 F.2d 115 (4th Cir. 1972), *cert. denied*, 409 U.S. 1007 (1972).

85. *Id.* at 118.

86. See *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

87. 415 U.S. at 403; 392 U.S. at 400.

88. *Midwest Video*, 571 F.2d at 1025.

89. *Id.* at 1036.

90. *Capital Cablevision v. Hardesty*, 285 S.E.2d 412 (W. Va. 1981).

or service: television broadcasters generate and transmit broadcast signals to the general public, while CATV system operators enhance and facilitate reception of those signals.⁹¹

In sum, cable television has been treated differently than broadcast in areas such as siphoning, copyright law and taxation. Careful analysis is required before applying the same law to both media because they are distinguishable. Therefore, applying first amendment broadcast law to cable television is impermissible without some firm justification.⁹²

IV. STATE'S INTEREST IN PROTECTING CHILDREN DOES NOT JUSTIFY STRICTER STANDARDS FOR CABLE TELEVISION

As stated earlier, *Pacifica's* two justifications for providing broadcast with more limited first amendment protection were the "privacy in the home" and the "protection of children" rationales.⁹³ Clearly, the "privacy in the home" justification is inapplicable to cable television. Anyone desiring such privacy from intrusions by this private medium need not subscribe. Thus, unlike broadcast, the "privacy in the home" rationale cannot justify more limited first amendment protection for cable television.

The second rationale was that the unique accessibility of broadcast to children, coupled with the government's interest in the "well-being of its youth," justified special treatment of the broadcast of indecent language. However, the "protection of children" rationale has failed as applied to other media forms, includ-

91. *Id.* at 419-20. *Cf.* *Times Mirror v. Connecticut Public Utility Control*, 9 MEDIA L. REP. 1270, 1273 (Conn. Super. Ct. 1983); *Connecticut Television Service, Inc. v. Public Utilities Comm.*, 159 Conn. 317, 330 (Conn. 1970); (additional cases distinguishing cable television from broadcast television).

92. *Pacifica* has been applied outside of the broadcast area, but the justifications have been limited to the "protection of children" and "privacy in the home" rationales.

See *New York v. Ferber*, 102 S. Ct. 3348 (1982) (prohibition against knowingly promoting a sexual performance by a child under the age of 16 by distributing material depicting such a performance); *Reeves v. McConn*, 631 F.2d 377 (5th Cir. 1980), *reh'g denied*, 638 F.2d 762 (5th Cir. 1981) (prohibition against the amplification of words or sounds that are "obscene" with no further definition of that term); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 n. 20 (D. Mass. 1978) (distinguishing a library setting from the home); *Hinze v. Superior Court of Marin Cty.*, 119 Cal. App. 3d 1005, 174 Cal. Rptr. 403 (1981) (permitting suspension of students for committing obscene acts or engaging in habitual profanity or vulgarity); *Hott v. State*, 400 N.E.2d 206 (Ind. Ct. App. 1980), *cert. denied*, 449 U.S. 1132 (1981) (prohibition against indecent telephone calls).

These rationales should not apply to cable television. See *supra* text accompanying notes 74-79, 105-06.

93. See *supra* text accompanying notes 49-53.

ing cable television.⁹⁴ In *Ginsberg v. New York*,⁹⁵ the United States Supreme Court expressed the view that minors are entitled to a significant measure of first amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.⁹⁶ In that case, the Supreme Court upheld a conviction under a narrowly confined statute which prohibited the sale of obscene material to minors. The Court recognized the primary role of the parents' authority in their own homes to direct the rearing of their children, but stated that the statute did not interfere with that right because parents who so desire could buy such materials (such as magazines) for their children.⁹⁷ In addition, the Court found that the statute rationally protected the state's independent interest in the well-being of its youth to safeguard them from "abuses."⁹⁸

However, the following year in *Stanley v. Georgia*,⁹⁹ the Court held that the first and fourteenth amendments prohibit making the mere private *possession* of obscene material a crime.¹⁰⁰ The Court rejected the contention that such legislation was necessary to keep obscene material from falling into the hands of children.¹⁰¹ Instead, it upheld the individual's right to receive information, entertainment and ideas, regardless of social worth, and found as fundamental the right to be free from unwanted government intrusions into one's privacy.¹⁰² The Court stated, "if 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."¹⁰³ Consequently, the law prohibiting *possession* of such materials failed for overbreadth because unlike the law prohibiting the *sale to children*, it would have a chilling effect on the first amendment rights of adults.

Next in *Miller v. California*, the Court recognized that "the States have a legitimate interest in prohibiting dissemination or exhibition of *obscene* material when the mode of dissemination

94. See *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 986 (D. Utah 1982).

95. 390 U.S. 629 (1968).

96. See *Erznoznik v. City of Jacksonville*, 422 U.S. at 212-13; *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. at 996.

97. 390 U.S. at 639.

98. *Id.* at 640-41.

99. 394 U.S.L.W. 557 (1969).

100. *Id.* at 568.

101. *Id.* at 567.

102. *Id.* at 564.

103. *Id.* at 565.

carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."¹⁰⁴ The court in *Erznoznik v. City of Jacksonville*, however, refused to extend this rule to "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription."¹⁰⁵ Such speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."¹⁰⁶ Consequently, the Court in *Erznoznik* invalidated a city ordinance prohibiting the exhibition of a motion picture containing nudity that is visible from public streets. Likewise, *Miller's* rule should not be extended to indecent material on cable television.

In addition, the *Erznoznik* Court found the ordinance to be overbroad. It prohibited all nudity, and not all nudity is obscene. Thus, the Court struck down the ordinance for prohibiting protected speech, notwithstanding the likely result that some children would view offensive films. The Court also recognized that the burden normally falls upon the viewer to "avert his eyes."¹⁰⁷

As a result, the "protection of children" rationale has generally been limited to those situations in which (1) no parents are present to exercise their discretion regarding their children's viewing or reading material; and (2) parents cannot practically exercise the appropriate degree of control due to the nature of the communication.¹⁰⁸

Dissemination of information over cable television falls into neither category. Unlike radio broadcasting, cable television is designed primarily to go into the home and cannot be received in unsupervised locales, i.e., the playground, the park, an automobile or the beach. Thus, there is a higher degree of parental control over young cable television viewers. Second, the levels of choice exercised by the parents in the decision to receive cable television and premium services gives the parents additional control over its dissemination to their children. Third, the availability to lock-out devices gives the parents an additional control over the availability of the cable programming to their children. Consequently, cable

104. 413 U.S. at 18-19 (footnote and cites omitted; emphasis added).

105. 422 U.S. at 213.

106. *Id.* at 213-14 (footnote and cites omitted; emphasis added).

107. *Id.* at 211-13.

108. See *Pacifica*, 438 U.S. at 726; *Ginsberg*, 390 U.S. at 629.

television is not so easily available to children as to justify content regulation.¹⁰⁹

Even if ordinances and statutes could justifiably regulate the distribution by cable of indecent material, they would have to be carefully drafted to withstand constitutional attacks of overbreadth. Assuming, *arguendo*, that the "protection of children" rationale were acceptable, legislation failing to refer to children will apply equally to all places receiving cable programming, including those without children. Consequently, the programming would be banned in places frequented only by adults, such as bars and homes without children. Neither would references to children without mention of age limits be sufficient because permissible viewing would be the same for teenagers as toddlers. Since such laws would reduce the entire cable television audience to viewing only what is fit for children,¹¹⁰ they have been held as unconstitutionally overbroad.¹¹¹ Even *Pacifica* did not permit a complete ban, only time, place and manner restrictions.¹¹²

V. CONCLUSION

Under *Miller*, state and local governments are permitted to regulate and prohibit "obscene" material on cable television. However, the exhibition of "indecent" material on cable television is protected speech. *Pacifica's* rule that the broadcast of "indecent material" may be regulated in certain contexts should not apply to cable television. Lower court decisions and precedent in other areas of law support the conclusion that due to the peculiar characteristics of cable television, this medium should be distinguished from broadcast television and not subject to broadcast's limited first amendment protection. Legislation prohibiting "indecent" material on cable television under the "protection of children" rationale has failed for overbreadth and for ignoring the existence of devices in cable systems that adequately alleviate the problem of accessibility to children. Finally, even if *Pacifica* were applicable, only *regulation* in certain context would be permissible, and not an

109. See *supra* text accompanying notes 78-79.

110. See *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. at 997; *Olivia N. v. National Broadcasting Co.*, 126 Cal. App. 3d 488, 494-95, 178 Cal. Rptr. 888, 893 (1981).

111. See *Cruz v. Ferre*, 571 F. Supp. 125 (S.D. Fla. 1983); *Community Television of Utah v. Roy City*, 555 F. Supp. at 1164; *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. at 997.

112. See *generally* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-76 (1981); *Pacifica*, 438 U.S. at 750 n. 28; *In re McGinley*, 660 F.2d 481, 486 n.12 (C.C.P.A. 1981).

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absolute ban. Therefore, the only type of legislation which might pass constitutional muster would purport to regulate, and not prohibit, the time, place and manner of indecent material on cable television. However, since the district courts have indicated that *Pacifica* is not applicable to cable television at all, such legislation would probably fail as well.

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