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Indeceny on Cable Television - A Barren Battleground for Regulation of Programming Content.

Vicky Hallick Robbins

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I. Introduction 417
II. Constitutional Protection for Indecent Material on Cable Television 419
A. First Amendment Rights and Guarantees 420
B. Balancing Freedom of Speech with the Right to Privacy 423
III. *Miller v. California* — the Supreme Court's Definition of Obscenity 424
IV. The History of FCC Regulation of Cable Television 426
V. *FCC v. Pacifica Foundation* — Supreme Court Restriction on "Indecent" Speech 429
VI. Indecent Cable Television Programming 432
A. Legislative Attempts at Regulation 433
B. The Inapplicability of *Pacifica* in the Cable Context 437
C. Implications for Texas 439
VII. Conclusion 441

I. INTRODUCTION

Cable television originated shortly after the birth of broadcast television.[1] Since that time, it has grown in popularity to the point that, today, it is found in over thirty-five percent of American television households and

1. *See* O. DUNLAP, UNDERSTANDING TELEVISION 25 (1948) (television introduced to public as regular service in 1939 in New York City); M. HAMBURG, ALL ABOUT CABLE § 1.02 at 1-6 (rev. ed. 1982) (cable television system first made available to public in 1948 in Mahonoy City, Pennsylvania). The FCC defines a cable television system as "[a] nonbroadcast facility . . . that distributes . . . to subscribers the signals of one or more television broadcast stations. . . ." Cable Television Service, 47 C.F.R. § 76.5(a) (1982). A coaxial cable transmits the signals for cable television in contrast to the over-the-air transmission of traditional broadcast television. *See* W. BAER, CABLE TELEVISION: A HANDBOOK FOR DECISIONMAKING 3 (1974). Antennas placed in favorable reception locations pick up signals from television stations which are then brought into the cable distribution system and eventually fed into subscribers' homes. *See id.* at 4. Coaxial cables are strung on overhead utility poles or buried in underground ducts. *See id.* at 3-4.

is predicted to be in fifty to sixty percent by 1990.[2] Cable transmission began as a service to communities which had inadequate or no reception of conventional over-the-air television broadcasting.[3] Cable system entrepreneurs, however, soon realized that another potentially lucrative market existed in communities without broadcast reception difficulties but in which the citizens wanted expanded viewing alternatives which could be provided by additional cable television channels.[4] In 1966, the Federal Communications Commission (FCC) first exerted its regulatory authority over the cable industry,[5] and in 1972 this commission issued a comprehensive set of rules which greatly expanded the new medium's potential.[6] Today, the cable industry is also subject to the control of state and local bodies which must govern within the boundaries set by the United States Constitution.[7]

Cable has evolved from mere retransmission of television broadcasts into a system of channels which show exclusively such subjects as news, movies, weather, sports, children's programming, educational programming, and Spanish language shows.[8] It has joined broadcast television, radio, books, movies, and newspapers as an "important source of information and entertainment for Americans."[9] Each of these media of commu-

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2. *See* Geller & Lampert, *Cable, Content Regulation and the First Amendment,* 32 CATH. U.L. REV. 603, 603 (1983) (citing *Nielsen Charts Cable Universe at 35% Penetration,* BROADCASTING, Jan. 10, 1983, at 92 (Nielsen November 1982 market-by-market figures)); *Cable: Coming to Terms with Adulthood & A Fifth Estate Glossary,* BROADCASTING, Jan. 3, 1983, at 74-75).

3. *See* W. BAER, CABLE TELEVISION: A HANDBOOK FOR DECISIONMAKING 4 (1974).

4. *See id.* at 4. The person who received public distinction as the father of cable television was John Walson, Sr., of Mahonoy City, Pennsylvania. In 1948, he began a subscription service which today services over 200,000 viewers in Pennsylvania and New Jersey. *See* M. HAMBURG, ALL ABOUT CABLE § 1.02 at 1-6 (rev. ed. 1982).

5. *See* First Report & Order, 38 F.C.C. 683 (1965). Locally, cable systems generally operate under a franchise from the governmental body because they use municipal and county rights-of-way. *See* Irving, Tex., Ordinance 3626 (April 3, 1981) (granting franchise to Teleprompter of Irving, Inc.); *see also* San Antonio, Tex., Ordinance 49433 (Sept. 7, 1978) (granting franchise to UA-Columbia Cablevision of Texas, Inc.).

6. *See* Cable Television Report & Order, 36 F.C.C.2d 143 (1972).

7. *See* U.S. CONST. amend. XIV ("[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."); *see also* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech. . . ."). The free speech provision of the first amendment has been held applicable to the states by incorporation into the fourteenth amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

8. *See* Geller & Lampert, *Cable, Content Regulation and the First Amendment,* 32 CATH. U.L. REV. 603, 603 (1983).

9. Krattenmaker & Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media,* 51 FORDHAM L. REV. 606, 606 (1983).

nication produces its own first amendment issues,[10] and cable television is no exception.[11] The appropriate boundaries of content regulation of cable television have been addressed by the FCC, Congress, state legislatures, and city governments, and a particular concern recently has been "indecent" programming.[12] Cable television has been described in the American Bar Association Journal as "the new obscenity battleground;"[13] however, the issue is not really obscenity but a type of programming which does not rise to the level of constitutionally proscribed hard-core pornography. Against a backdrop of the United States Supreme Court's leading first amendment decision concerning obscenity, *Miller v. California,*[14] and the later *FCC v. Pacifica Foundation*[15] case, in which the Court authorized regulation of indecent language, this comment will explore content control of cable television. The issue in focus is whether indecent programming on cable television may be constitutionally proscribed. The indication from the courts thus far is that it may not. An examination of the reasoning behind this result will conclude this analysis.

II. Constitutional Protection for Indecent Material on Cable Television

The first amendment to the United States Constitution provides, in part: "Congress shall make no law . . . abridging the freedom of speech. . . ."[16] Freedom of speech has long been considered a fundamental right in Western democratic society.[17] Justice Cardozo described it as

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10. *See, e.g.,* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (newspaper publishers protected by first amendment from being required to print rebuttals from victims of criticism); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375 (1969) (allowing person attacked in broadcast time to respond enhances freedom of speech); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (motion pictures, despite being medium of entertainment as well as information, and large scale business, entitled to first amendment protection); *see also* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (discussing uniqueness of first amendment problems of various media of expression).

11. *See* Cruz v. Ferre, 571 F. Supp. 125, 126 (S.D. Fla. 1983) (Miami ordinance prohibiting "indecency" on cable television unconstitutional violation of first amendment rights); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1172-73 (N.D. Utah 1982) (city ordinance proscribing indecent material on cable television unconstitutional violation of right to free speech); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987, 999 (N.D. Utah 1982) (proposed Utah statute banning indecency from cable television unconstitutional).

12. *See* M. Hamburg, All About Cable § 6.05 (rev. ed. 1982).

13. *See* Winter, *Channel X,* 69 A.B.A. J. 886, 886 (1983).

14. 413 U.S. 15 (1973).

15. 438 U.S. 726 (1978).

16. U.S. Const. amend. I.

17. *See* Dunagin v. Oxford, 489 F. Supp. 763, 769 (N.D. Miss. 1980) (quoting J. Nowak, R. Rotunda, & J. Young, Constitutional Law 858 (2d ed. 1983). "The freedom of

"the matrix, the indispensible condition, of nearly every other form of freedom. . . . [A] pervasive recognition of that truth can be traced in our history, political and legal."[18] Freedom of speech along with freedom of the press allows for discussion of the problems of society including the right to criticize government and public officials.[19] The bases of these rights is the assumption that unencumbered interchange of ideas will foster a healthy political and social environment.[20] This right to speak freely and even to encourage exchange of diverse opinions is characteristic of the American way of life.[21]

A. *First Amendment Rights and Guarantees*

While there is some authority for the position that first amendment rights are more important than other constitutional rights or guarantees,[22] the more generally accepted view is that there is no such priority and all are on an equal footing.[23] Therefore, in a situation where rights are in opposition, the necessary balancing of interests presents a difficult, delicate task.[24] The result is that the fundamental constitutional rights and privi-

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speech . . . has been recognized as one of the preeminent rights of Western democratic theory, the touchstone of individual liberty." *Id.* at 769.

18. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

19. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) (suppression of right of press to criticize government violates first amendment); *see also* Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (criticism of government at core of constitutinal right of free discussion).

20. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("The constitutional safeguard [of first amendment rights] . . . was fashioned to assure unfettered interchange of ideas for bringing about of political and social changes desired by the people.") (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

21. *See* Bridges v. California, 314 U.S. 252, 270 (1941) ("For it is a prized American privilege to speak one's mind although not always with perfect good taste, on all public institutions.").

22. *See* Saia v. New York, 334 U.S. 558, 562 (1948) (freedoms of first amendment belong in preferred position when balancing community interests in deciding constitutionality of local regulation); Marsh v. Alabama, 326 U.S. 501, 509 (1946) (rights of freedom of press and speech occupy preferred position to rights of property owners); *see also* Beauharnais v. Illinois, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting) (free speech as contrasted to other civil rights has preferred position because first amendment prohibits abridgment in absolute terms).

23. *See* Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 561 (1976) (authors of Bill of Rights did not assign priorities); *see also* Prince v. Massachusetts, 321 U.S. 158, 164 (1944) (doubtful that any freedoms guaranteed by first amendment are more important than any others since all have preferred position).

24. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 208-09 (1975) (cases pitting first amendment rights of speakers against unwilling viewers demand delicate balancing). In this case, a city ordinance which prohibited a drive-in theatre from showing films with nudity where the screen could be seen from the street and could ostensibly invade privacy interests was declared invalid on its face and unconstitutional. *See id.* at 217-18.

leges of individuals are not absolute and each may only be exercised to the extent that it is consistent with the enjoyment of fundamental rights by all.[25] Thus, even the protection of the right to speak provided by the first amendment is subject to some limitation when it conflicts with a more important civil right.[26] The types of speech which can be regulated include defamation,[27] fighting words,[28] obscenity,[29] and that which incites imminent lawless action,[30] because of their respective intrusions upon other more highly valued rights and their failure to provide anything substantial to our highly valued interchange of ideas.[31]

When a statute or ordinance is attacked as an unconstitutional invasion of a fundamental right or guarantee, the balance becomes one of personal right versus specific societal interests, and a careful analysis of the challenged legislation becomes imperative.[32] To impinge upon a fundamental right, a state must have a compelling interest, and legislation must be drawn narrowly so as to address only the legitimate state interest involved.[33]

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25. *See* Mattox v. United States, 156 U.S. 237, 243 (1895) (many provisions of Bill of Rights subject to exceptions).

26. *See, e.g.,* Konigsberg v. State Bar, 366 U.S. 36, 49 (1961) (freedom of speech and association not absolutes); Augustus v. School Bd., 507 F.2d 152, 156 (5th Cir. 1975) (exception to first amendment rights of students when their exercise causes violence and disrupts educational process); Bullock v. Mumford, 509 F.2d 384, 387 (D.C. Cir. 1974) (no first amendment protection for behavior made unlawful by legitimate legislation or regulation enacted for purpose unrelated to free expression).

27. *See* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (public official may recover damages for defamatory falsehood relating to official conduct only if proves statement made with "actual malice").

28. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (New Jersey statute providing punishment for one who speaks words likely to cause breach of peace in public place does not unconstitutionally infringe on freedom of speech).

29. *See* Roth v. United States, 354 U.S. 476, 484 (1957) (obscenity not protected by first amendment because it lacks any redeeming social importance).

30. *Cf.* Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (Ohio's criminal syndicalism statute unconstitutionally broad for failure to distinguish mere advocacy from incitement to imminent lawless action).

31. *See id.* at 448; New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964); Roth v. United States, 354 U.S. 476, 484 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1949); *see also* Schenck v. United States, 249 U.S. 47, 52 (1918) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

32. *See* Schneider v. State, 308 U.S. 147, 161 (1939) (discussing necessity of astute examination of legislation which will restrict freedom of speech).

33. *See* NAACP v. Button, 371 U.S. 415, 433, 438 (1963). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433. "[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *Id.* at 438.

When freedom of speech is the fundamental right involved, the Supreme Court has traditionally looked very closely at legislation purportedly justified by exercise of the police power; the law enacted to combat a supposed evil must be very narrowly drawn to pass constitutional muster.[34] A law may be attacked for vagueness or overbreadth, upon its face or as applied. Vagueness presents a particular problem because individuals fearing violation of an unclear, imprecise law might forego first amendment rights rather than take a chance on prosecution.[35] Overly broad statutes are a problem because of the possibility that protected speech may be silenced along with the unprotected speech.[36] Generally, in cases involving spoken words, the Court has determined that the possibility of harm to society from letting some unprotected speech go unpunished is outweighed by the danger of protected speech being silenced and has voided such statutes.[37]

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34. *See* Grausam v. Murphey, 448 F.2d 197, 201 (3d Cir. 1971), *cert. dismissed,* 405 U.S. 981 (1972).

35. *See* Scull v. Virginia, 359 U.S. 344, 353 (1959). Scull was subpoenaed to appear before a committee established by the Virginia legislature to promote their resistance to desegregation in the public schools after he and others published a pro-integration newsletter. *See id.* at 347. He refused to answer certain questions because neither the subpoena nor the committee adequately clarified the purpose of the inquiry. *See id.* at 347. His subsequent contempt conviction was overturned by the Supreme Court which held that such vagueness cannot be supported because fear of violating an unclear law might induce individuals to give up rights of speech, press, and association. *See id.* at 353.

36. *See* Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967) ("The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform . . . what is being proscribed."). *See generally* Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844, 882-910 (1970) (overbreadth doctrine discussed as applied to first amendment privileges).

37. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). Legislation may be unconstitutional because of both overbreadth and vagueness. *See, e.g.,* Plummer v. City of Columbus, 414 U.S. 2, 3 (1973) (defendant convicted of violating city code prohibiting use of menacing, insulting, slanderous, or profane language could raise issue of its vagueness or unconstitutional overbreadth as applied to others); Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971) (city ordinance prohibiting gatherings of three or more on street corners from annoying passers-by invalid on face); Keyishian v. Board of Regents, 385 U.S. 589, 602, 604 (1967) (New York statute concerning removal of educators for advocating forcible overthrow of government unconstitutionally vague and broadly stifling). The doctrines have not always been clearly distinguished by the Supreme Court. *See* Cox v. Louisiana, 379 U.S. 536, 551 (1965) (statute "unconstitutionally vague in its overly broad scope"). *But see* Zwickler v. Koota, 389 U.S. 241, 249-50 (1967) (distinguishing doctrines of overbreadth and vagueness). A statute is void for vagueness if it " 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " *See id.* at 249 (quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926)). A statute is void for overbreadth if it "offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly

B. *Balancing Freedom of Speech with the Right to Privacy*

The right to privacy is perhaps, more than any other, the right which most conflicts with the first amendment.[38] The conflict between these two fundamental rights has traditionally been resolved in favor of the one deemed by the Court to be more important in the context of the particular situation.[39] Nonetheless, some general principles have emerged.

To justify eliminating a source of information to protect certain people from exposure to it requires that the government show "substantial privacy interests are being invaded in an essentially intolerable manner."[40] This intolerable invasion is most likely to occur in the privacy of one's home.[41] For this reason, under some circumstances, the government may appropriately prohibit material from entering the home which could not constitutionally be barred from the public forum.[42] Nevertheless, in public, material which is forced upon an unwillingly captive audience that may not practically avoid exposure to it is also subject to regulation.[43] In both situations, the first amendment strictly limits the authority of the local governmental body to select certain speech for prohibition because it is judged to be offensive to some viewers or auditors.[44] On the other hand, a state or municipality may protect the right to privacy by passing legislation containing time, place, and manner restrictions, but such regulations are ap-

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and thereby invade the area of protected freedoms.' " *Id.* at 250 (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)).

38. *See* Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy,* 56 CAL. L. REV. 935, 956-67 (1968) (discusses conflict between rights of free speech and privacy).

39. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (each case decided based on own specific facts when rights of privacy and free speech conflict). "In this sphere of collision between claims of privacy and those of [free speech or] the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

40. Cohen v. California, 403 U.S. 15, 21 (1971) (wearing jacket stating "F___ the Draft" in public place not invasion of substantial privacy interests in essentially intolerable manner because unwilling viewers could easily have averted eyes).

41. *Cf.* Rowan v. United States Post Office Dep't, 397 U.S. 728, 737 (1970) ("ancient concept that 'a man's home is his castle' . . . has lost none of its vitality").

42. *Compare id.* at 737 (person permitted to have postmaster stop mailing of catalogue to home because of objection to contents) *with* Cohen v. California, 403 U.S. 15, 21 (1971) (breach of peace conviction overturned for public display of expletive on jacket).

43. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 302-04 (1974) (sustaining city policy banning political advertisement while permitting other advertisements on city buses). *But see* Erznoznik v. City of Jacksonville, 422 U.S. 205, 217-18 (1975) (declaring unconstitutional city ordinance prohibiting drive-in theatre from showing nudity visible from public street).

44. *See* Cohen v. California, 403 U.S. 15, 21 (1971).

plicable to all speech irrespective of content.[45] This conflict between first amendment rights of speakers and the privacy rights of unwilling viewers or listeners is not one easily resolved, and the medium of cable television has plainly introduced a new constitutional dilemma, particularly when the subject matter at issue is "indecent."

III. *MILLER V. CALIFORNIA* — THE SUPREME COURT'S DEFINITION OF OBSCENITY

In 1957, in *Roth v. United States,*[46] the Supreme Court first held that obscenity was not protected material under the first amendment.[47] The Court announced the following test for determining if material was obscene: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests."[48] Unfortunately, the lower courts had difficulty understanding and applying the test, and the resulting confusion led to many cases reaching the Supreme Court between 1957 and 1973.[49] The justices themselves could not agree on application of the *Roth* guidelines to specific cases, and their individual rationales grew more divergent.[50] Consequently, the Court began the practice of per curiam voting with each jus-

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45. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); *see also* Adderley v. Florida, 385 U.S. 39, 48 (1966) (no constitutional right exists to propagandize protests or views whenever, however, and wherever person desires to do so); Cox v. Louisiana, 379 U.S. 536, 554 (1965) (right of free speech does not mean person may express opinions or beliefs to any group at anytime at any public place).

46. 354 U.S. 476 (1957).

47. *See id.* at 485. The constitutionality of a federal criminal obscenity statute was at issue (18 U.S.C. § 1461), as well as the constitutionality of a similar provision in the California Penal Code (CAL. PENAL CODE § 311 (West 1955)). *See id.* at 479. Both statutes were upheld. *See id.* at 492.

48. *See id.* at 489. The early leading test for obscenity considered only the effect of an isolated excerpt on a particularly susceptible person. *See id.* at 488-89 (citing Regina v. Hicklin, [1868] L.R. 3 Q.B. 360).

49. *See, e.g.,* Redrup v. New York, 386 U.S. 767, 770-71 (1967) (reversed convictions under state laws for selling certain books and magazines); Ginzburg v. United States, 383 U.S. 463, 466 (1966) (three publications held obscene because they represented "commercial exploitation of erotica only for the sake of prurient appeal"); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413, 419-20 (1966) (conviction under state obscenity statute previously used to find *Fanny Hill* obscene overturned).

50. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 1015 (2d ed. 1983). The majority could never agree on the appropriate community for "contemporary community standards" with some justices preferring a national community standard and others favoring a local community or flexibility for state standard. *See id.* at 1015-16. Nor could they agree on whether "prurient interest" referred to dissemination to a clearly defined deviant sexual group or the "average" or "normal" person. *See id.* at 1016.

tice casting a vote based on application of his own test.[51] If five deemed the material not to be obscene, then the conviction for dissemination was reversed.[52] While this approach resolved the dispute between the litigating parties, it provided virtually no guidance for legislators, other courts, and potential litigants.[53] Finally, in 1973, in *Miller v. California,*[54] the Court, while affirming the *Roth* opinion that obscenity is unprotected speech, formulated a three-pronged test which remains the standard today.[55] The Court held that material is obscene and, therefore, not protected by the first amendment if:

> the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, . . . the work depicts or decribes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . the work taken as a whole, lacks serious literary, artistic, political or scientific value.[56]

Miller, therefore, permitted a state or local government to regulate obscenity which, by virtue of the Court's opinion, is a narrowly defined type of material.[57] Portrayal of material which does not satisfy all three of the *Miller* criteria might be offensive, but is nonetheless protected by the first amendment.[58] Despite subsequent Supreme Court cases involving unsuccessful efforts by state and local governments to ban such material,[59] the Court has, on one occasion, supported the FCC in its imposition of restrictions on the broadcasting of indecent material via radio.[60] The FCC, therefore, apparently has been successful, to some extent, in circumventing

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51. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82-83 (1973) (Brennan, J., dissenting).

52. *See id.* at 83 (Brennan, J., dissenting).

53. *See id.* at 83 (Brennan, J., dissenting).

54. 413 U.S. 15 (1973). In violation of a California statute making it a misdemeanor to knowingly distribute obscene matter, defendant had mailed unsolicited advertising brochures containing pictures and drawings explicitly depicting sexual activities. *See id.* at 16.

55. *See id.* at 24.

56. *Id.* at 24.

57. *See id.* at 24. The Court stated that, if the states, in regulating obscene material, follow these guidelines, then the first amendment values applicable to the states through the fourteenth amendment are adequately protected. *See id.* at 25. If there is a question of constitutionality, the appellate courts are available for independent review. *See id.* at 25.

58. *See id.* at 24-25.

59. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975) (invalidating municipal ordinance prohibiting drive-in theatres from exhibiting films containing nudity when screen visible from public place); Jenkins v. Georgia, 418 U.S. 153, 155 (1974) (reversing conviction for distributing movie "Carnal Knowledge").

60. *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

the first amendment in the regulation of broadcast media.[61]

IV. The History of FCC Regulation of Cable Television

The need for regulation of radio broadcasting became apparent in the mid-1920's.[62] Radio had grown in popularity to such an extent that stations, which began broadcasting in response to the demand, crowded the radio wavelength, making listening often impossible.[63] Congress determined that regulation of the industry was needed and passed the Federal Radio Act of 1927,[64] which created the predecessor of the FCC, the Federal Radio Commission, as the responsible regulatory body.[65] Shortly thereafter, Congress enacted the successor to the 1927 Act, the Communications Act of 1934,[66] which, as amended, remains the relevant legislation today.[67] Through the 1934 Act, the FCC was given broad authority to regulate communication by wire and radio,[68] with its powers being distributed into two subject matter subchapters: "Common Carriers"[69] and "Special Provisions Relating to Radio."[70]

Although the FCC was created expressly to regulate the young radio industry, when television emerged in the 1940's, with its reliance on radio waves to broadcast, the FCC exercised regulatory authority over it also.[71]

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61. *Cf. id.* at 750 (FCC permitted to regulate broadcast of radio program because of indecent content).

62. *See* National Broadcasting Co. v. United States, 319 U.S. 190, 211 (1943).

63. *See id.* at 212-13. Justice Frankfurter observed that "With everybody on the air, nobody could be heard." *Id.* at 212. Certain facts about radio communication made the plight the industry found itself in understandable, particularly the fact that the radio spectrum simply could not accommodate everybody because of fixed natural limitations. *See id.* at 213. When limitations were exceeded, the stations began interfering with one another. *See id.* at 213. President Coolidge appealed to Congress in a message, on December 7, 1926, to resolve the chaotic situation with legislation directed at the radio industry. *See* H.R. Doc. No. 483, 69th Cong., 2d Sess. 10 (1926), *cited in* National Broadcasting Co. v. United States, 319 U.S. 190, 212-13 (1943).

64. ch. 169, §§ 1-41, 44 Stat. 1162-74 (1927) (repealed 1934).

65. *See id.*

66. ch. 652, §§ 1-609, 48 Stat. 1064-1105 (1934) (codified as amended at 47 U.S.C. §§ 15-609 (1976 & Supp. V 1981)).

67. *See* 47 U.S.C. §§ 151-609 (1976 & Supp. V 1981). The FCC is comprised of seven members appointed by the President and confirmed by the Senate for seven year terms. *See id.* § 154(a), (c). Three members must be appointed from each of the major political parties with the chairperson belonging to the political party of the President. *See id.* § 154(a), (b).

68. *See id.* § 151.

69. *See id.* §§ 201-223.

70. *See id.* §§ 301-330.

71. *See* Allen v. Dumont Laboratories v. Carroll, 184 F.2d 153, 155 (3d Cir. 1950) (section 153(b) of Communications Act of 1934 includes television as one form of radio transmission); *see also* 47 U.S.C. § 153(b) (1976) (defining "radio communication" or "communication by wire").

Cable television systems, however, presented a new problem because they were neither common carriers nor radio communicators under the terms of the statute.[72] A "common carrier" is defined as "any person engaged as common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."[73] The statute defines "radio communication" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."[74] "Broadcasting" is the dissemination of radio communications.[75]

Initially, therefore, the FCC refused to regulate the cable industry and instead viewed cable television merely as a means to retransmit broadcast signals.[76] But, cable continued to grow, and, apparently in response to television broadcasters' fears about competition from cable television,[77] the FCC issued regulations in 1965.[78] In general, the FCC asserted jurisdiction over the cable industry and imposed by rules certain conditions on cable systems which limited and regulated the manner in which they competed with broadcast television.[79]

In 1968, the Supreme Court upheld the FCC regulatory authority over cable television in *United States v. Southwestern Cable Co.*[80] Specifically, the Court held that cable systems do fall within the language of the Communications Act in that they constitute communication by wire[81] over

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72. *See* 47 U.S.C. §§ 201-223 (1976 & Supp. V 1981); 47 U.S.C. §§ 301-330 (1976 & Supp. V 1981).

73. 47 U.S.C. § 153(h) (1976).

74. *Id.* § 153(b).

75. *See id.* § 153(o).

76. *See* CATV & TV Repeater Servs., 26 F.C.C. 403, 427-31 (1959) (cable does not fall within language of act); *see also* Comment, *Obscenity, Cable Television and the First Amendment: Will FCC Regulation Impair the Marketplace of Ideas?,* 21 DUQ. L. REV. 965, 970 (1983) (FCC decided cable not in need of special regulation).

77. *See* Smith, *Primer on the Regulatory Development of CATV (1950-72),* 18 How. L.J. 729, 736-37 (1975). Cable television was initially called CATV or community antenna television. *See* First Report & Order, 38 F.C.C. 683, 741 (1965).

78. *See* First Report & Order, 38 F.C.C. 683 (1965). For a discussion of the FCC's gradual assertion of authority over the cable industry, see Berman, *CATV Leased-Access Channels and the FCC: The Intractible Jurisdiction Question,* 51 NOTRE DAME LAW. 145, 147-54 (1975).

79. *See* First Report & Order, 38 F.C.C. 683, 697-700, 716-30 (1965). For a discussion of the regulations, see Smith, *Primer on the Regulatory Development of CATV (1950-72),* 18 How. L.J. 729, 736-41 (1975).

80. 392 U.S. 157 (1968).

81. *See* 47 C.F.R. § 153(a) (1976). "Wire communication" or "communication by

which the FCC has jurisdiction.[82] The authority granted the FCC was restricted, however, to that "reasonably ancillary" to effective regulation of the subject of main concern — broadcast television.[83]

In 1972, the FCC issued rules which removed some of the former restrictions and greatly expanded the potential of cable television.[84] The 1972 Cable Television Report and Order[85] set forth a comprehensive scheme of channel usage which required that channels be allocated for carriage of television broadcast signals, origination cablecasting, and access programming for public, educational, local governmental, and leased use.[86] For the most part, these rules remain in effect today, only modified somewhat by two subsequent FCC rulings which, essentially, removed the mandatory origination requirement[87] and changed the four-channel access requirement to a requirement of one composite access channel.[88]

After the Supreme Court established the authority of the FCC to regulate cable television, the FCC turned to content regulation. These regulations distinguish between programming which originates with the local system, subject to its exclusive control ("origination cablecasting")[89] and programming which originates elsewhere ("cablecasting").[90] Despite the standards set forth in *Miller,* one such regulation bars the transmission of indecent as well as obscene material on origination cablecasting channels.[91]

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wire" means "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." *Id.*

82. *See* United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968). The Court, quoting from section 152(a) of the Communications Act, stated that the Commission's authority over "all interstate . . . communication by wire or radio" permitted regulation of cable television systems. *See id.* at 178.

83. *See id.* at 178. The Court's extension of the FCC's authority included no guidelines as to specific areas of regulation such as content. *See id.* at 178. In fact, the Court expressly refrained from stating any view as to regulation in any particular circumstances or for any particular purpose. *See id.* at 178.

84. *See* Cable Television Report & Order, 36 F.C.C.2d 143 (1972).

85. *Id.*

86. *See id.* at 189-98.

87. *See* Report & Order, 49 F.C.C.2d 1090 (1974).

88. *See* Report & Order, 59 F.C.C.2d 294, 314-16 (1976).

89. *See* 47 C.F.R. § 76.5(w) (1982) ("[p]rogramming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator").

90. *See id.* § 76.5(v) ("[p]rogramming (exclusive of broadcast signals) carried on a cable television system").

91. *See id.* § 76.215 (1982) (prohibiting cable system operators from transmitting obscene or indecent material on origination cablecasting channels); *see also id.* § 76.205 (re-

V. *FCC v. Pacifica Foundation* — Supreme Court Restriction on "Indecent" Speech

In 1978, the Supreme Court imposed a content ban on an "indecent" radio broadcast which clearly did not satisfy the *Miller* criteria for obscenity.[92] The Court supported the FCC in their contention that their regulatory authority included being able to regulate the nonobscene content of the broadcast in question, if they did so by resorting to a nuisance rationale.[93] The controversy began in October, 1973, when at approximately 2:00 p.m., a radio station in New York City broadcasted a George Carlin monologue entitled "Filthy Words."[94] The monologue was a satirical look at the words one could not say on the public airways; Carlin not only said the words, but repeated them over and over again.[95] A listener, who had been in his car with his young son when he heard the broadcast, filed a complaint with the FCC.[96] In response, the FCC issued a declaratory order[97] banning the broadcast of the words in question, finding them to be indecent, pursuant to a federal criminal statute[98] which prohibited broadcasting obscene, indecent, or profane language over radio.[99] The FCC defined as indecent: "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience."[100] Rather than

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quiring origination channel to provide equal opportunities to legally qualified candidates in use of station's facilities); *id.* § 76.209 (requiring origination channel to afford reasonable opportunity for discussion of conflicting views on controversial issues of public importance); *id.* § 76.209 (requiring origination channel to notify person or group personally attacked and offer reasonable time to respond); *id.* § 76.213 (prohibiting origination channel from carrying lottery information, except state run lotteries); *id.* § 76.221 (prohibiting origination channels from carrying advertising which lacks sponsorship identification).

92. *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

93. *See id.* at 750.

94. *See id.* at 729-30.

95. *See id.* at 729. A verbatim transcript of "Filthy Words" is included in the opinion. *See id.* at 751-55.

96. *See id.* at 730. This was presumably the only complaint lodged with either the FCC or the radio station. *See* M. Hamburg, All About Cable § 6.05[2] at 6-27 (rev. ed. 1982).

97. *See* Memorandum Opinion & Order, 56 F.C.C.2d 94, 99 (1975). "A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station and to clarify the standards which the commissioner utilizes to judge indecent language." *Id.* at 99.

98. *See* 18 U.S.C. § 1464 (1976). This statute, once contained in the Communications Act, 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." *Id.*

99. *See* Memorandum Opinion & Order, 56 F.C.C.2d 94, 99 (1975).

100. *Id.* at 98.

imposing administrative sanctions on the broadcaster, the FCC placed a letter of violation in the station's file to be considered for possible sanctions in the event other complaints were received against the station.[101]

The FCC expressed concern over the exposure of the children to this offensive material but, at the same time, recognized that the material was not obscene and had first amendment protection.[102] The FCC, therefore, drew upon the law of nuisance to support its decision and spoke of channeling, rather than prohibiting, the offensive behavior.[103] By so doing, the FCC associated the label of "indecent" with the time of day of the broadcast and stated that a similar program, played in the late evening and preceded by a warning, might be permissible.[104] The Carlin monologue was indecent because it was broadcast at a time when children were likely to be in the audience.[105]

The FCC order was reversed by the United States Court of Appeals for the District of Columbia Circuit in a two-to-one vote.[106] Judge Tamm held that the order was overbroad and vague and, specifically, was a form of censorship prohibited by section 326 of the Communications Act.[107] Judge Bazelon, in a concurring opinion, concluded that the FCC did not have the power to regulate speech which was not obscene under *Miller.*[108] The dissent by Judge Leventhal stressed that the language as broadcast in the afternoon was indecent and was subject to regulation under *Miller.*[109]

In a five-to-four vote, the Supreme Court reversed the court of appeals and affirmed the FCC.[110] The Court held that the FCC does have the

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101. *See id.* at 99. The sanctions the FCC has the authority to impose include: (1) revocation of a station's license; (2) issuance of a cease and desist order; (3) imposition of a monetary forfeiture; (4) denial of license renewal; and (5) granting of a short term renewal. *See* FCC v. Pacifica Found., 438 U.S. 726, 730 n.1 (1978).

102. *See In re* Pacifica Found., 56 F.C.C.2d 94, 98 (1975), *rev'd,* 556 F.2d 9 (D.C. Cir. 1977), *rev'd,* 438 U.S. 726 (1978).

103. *See id.* at 98. Offensive programming should be regulated by principles analogous to those found in the law of nuisance where the law generally speaks to channeling behavior more than actually prohibiting it. *See id.* at 98.

104. *See id.* at 98.

105. *See id.* at 98.

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

107. *See id.* at 15-16; *see also* 47 U.S.C. § 326 (1970). "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." *Id.*

108. *See* Pacifica Found. v. FCC, 556 F.2d 9, 21-30 (D.C. Cir. 1977) (Bazelon, J., concurring), *rev'd,* 438 U.S. 726 (1978).

109. *See id.* at 31-32 (Leventhal, J., dissenting).

110. *See* FCC v. Pacifica Found., 438 U.S. 726, 735 (1978).

authority, pursuant to the Communications Act, to sanction licensees who engage in obscene, indecent, or profane broadcasting.[111] Supporting the position taken by Judge Leventhal, the Court reviewed only the FCC's determination that the monologue was indecent "as broadcast."[112] The plurality noted that the FCC had limited its order to the specific factual context; therefore, the Court similarly held in this narrow context and expressly refrained from issuing an advisory opinion for future cases.[113]

The Pacifica Foundation had argued that, in order for the Carlin monologue to be indecent within the meaning of the applicable federal criminal statute,[114] it would have to appeal to the prurient interest, which it clearly did not.[115] The Court disagreed and expressly stated that the three types of proscribed language, obscene, indecent, and profane, each have a separate and distinct meaning.[116] To be indecent, material merely must fail to conform with accepted standards of morality and need not have prurient appeal.[117] The Carlin monologue, being patently offensive, was therefore indecent under the terms of the statute.[118]

The Court then turned to the constitutional implications of the FCC's

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111. *See id.* at 738.

112. *See id.* at 735. Judge Leventhal stressed that the timing of the broadcast was vital to the FCC order. The words were broadcast in the early afternoon when children were undoubtedly in the audience. The FCC order was not read to prohibit absolutely from any television or radio broadcast any one of the seven words. *See* FCC v. Pacifica Found., 556 F.2d 9, 31 (D.C. Cir. 1977) (Leventhal, J., dissenting), *rev'd,* 438 U.S. 726 (1978).

113. *See* FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978).

114. *See* 18 U.S.C. § 1464 (1976).

115. *See* FCC v. Pacifica Found., 438 U.S. 726, 739 (1978).

116. *See id.* at 739-40.

117. *See id.* at 740. In a footnote, the Court cited Webster's definition of indecent: "a: Altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality: . . . ." WEBSTER'S THIRD NEW INT'L DICTIONARY (1966), *cited in* FCC v. Pacifica Found., 438 U.S. 726, 740 n.14 (1978).

118. *See* FCC v. Pacifica Found., 438 U.S. 726, 741 (1978). The FCC's definition of indecency, within the meaning of the statute (18 U.S.C. § 1464 (1976)), at least at times of the day when there is a reasonable risk that children may be in the audience, obviated all of the Supreme Court's requirements for obscenity except one, which was altered. Unlike obscenity, indecency need not appeal to the prurient interest, need not be taken as a whole, and may have, in context, serious literary, artistic, political, or scientific value. *See id.* at 741. Indecency is judged applying contemporary community standards "for the broadcast medium" rather than just applying the standards unqualified as for obscenity. *Compare* Memorandum Opinion & Order, 56 F.C.C.2d 94, 98 (1975) (modifies *Miller* three-pronged test for obscenity with regard to application of contemporary community standards), *rev'd,* 556 F.2d 9 (D.C. Cir. 1977), *rev'd,* 438 U.S. 726 (1978) *with* Miller v. California, 413 U.S. 15, 24 (1973) (three-pronged test for obscenity). *See generally* M. HAMBURG, ALL ABOUT CABLE § 6.05[2] (rev. ed. 1982) ("The Seven Dirty Words" case discussed in chapter entitled "Significant Problems").

action.[119] The Court recognized that, while all forms of communication receive consideration for first amendment protection, the protection provided broadcasting is the most limited.[120] Broadcasting is singled out for two reasons: first, because it is uniquely pervasive in its extension into the privacy of the home; and second, because it is uniquely accessible to children, a group which needs to be protected.[121] The plurality asserted that in this context the individual's privacy interests outweigh the first amendment rights of the intruder.[122] The Court stated that many variables are important in determining whether publicly disseminated material is indecent, including the time of day, composition of the audience, content of the program, and the medium of expression.[123] Thus, the *Pacifica* Court, in stressing that their opinion only applied to the specific factual context at issue,[124] left many questions unanswered regarding content control on other media of communication, particularly cable television.

VI. INDECENT CABLE TELEVISION PROGRAMMING

With the recent boom in the cable television industry much attention has focused on the content of cable programming.[125] As the FCC regulates interstate and foreign communication, it does not preempt regulation by local government; therefore, municipalities and states are free to become involved in regulation of the subject matter on cable television.[126] Any action taken by a state or local government attempting to regulate cable content, however, must not abridge fundamental first amendment rights.[127] There are two general schools of thought: the moral activists use

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119. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

120. *See id.* at 748.

121. *See id.* at 748-50.

122. *See id.* at 748.

123. *See id.* at 750.

124. *See id.* at 750.

125. *See* Geller & Lampert, *Cable, Content Regulation and the First Amendment,* 32 CATH. U.L. REV. 604, 605-06 (1983) (discussion of how growth of cable makes resolving first amendment issues very important).

126. *See* Kroeger v. Stahl, 148 F. Supp. 403, 408 (D. N.J. 1957) (FCC does not preclude states from exercise of police power in applicable situtations), *aff'd,* 248 F.2d 121 (3d Cir. 1957); 47 U.S.C. § 151 (1976) ("[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio"); *see also* M. HAMBURG, ALL ABOUT CABLE § 3.01 at 3-2 (rev. ed. 1982) (discussion of increased state involvement in regulation of cable television as federal involvement decreases).

127. *See* Cruz v. Ferre, 571 F. Supp. 125, 127 (S.D. Fla. 1983) ("No person shall by means of cable television . . . distribute . . . obscene or indecent material.") (quoting Miami, Fla. Ordinance 9583 (Jan. 13, 1983)); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1173-74 (N.D. Utah 1982) (person who knowingly distributes pornographic or indecent material may have franchise agreement revoked or other sanctions imposed) (citing ROY CITY, UTAH, ORDINANCES 17-3-2 (1982)); Home Box Office, Inc. v.

the *Pacifica* opinion as support for the proposition that indecent material may be banned from cable television,[128] while the first amendment advocates cite the holding in *Miller* to support their contention that only material rising to the level of obscenity may be proscribed by local, state, or federal law.[129] Lobbying groups on both sides of the issue have formed all over the country, and a group called Morality in Media has drafted a model cable indecency statute.[130] Two cities and the state of Utah have, thus far, litigated the issue, and in all three instances, the challenged laws proscribing indecency were declared to be unconstitutional by federal district court judges.[131]

A. *Legislative Attempts at Regulation*

In 1981, the legislature of the state of Utah enacted a statute which would punish any person "knowingly distribut[ing] by wire or cable any

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Wilkinson, 531 F. Supp. 987, 989-90 n.1 (N.D. Utah 1982) ("No person . . . shall knowingly distribute by wire or cable any pornographic or indecent material. . . .") (quoting UTAH CODE ANN. § 76-10-1229(1) (Supp. 1981). The Policy Review and Development Division of the FCC's Cable Television Bureau periodically prepares a comprehensive review of state activities with regard to cable regulation. *See* Briley, *Cable Television State Regulation — A Survey of Franchising and other State Law and Regulations (FCC 1977, 1980), cited in* M. HAMBURG, ALL ABOUT CABLE § 3.01 at 3-2 n.8 (rev. ed. 1982).

128. *See* Tell, *Cable TV's Sex Problem,* 4 NAT'L L.J. 1, 28-29 (Feb. 15, 1982).

129. *See id.* at 28-29.

130. *See* Krattenmaker & Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media,* 51 FORDHAM L. REV. 606, 610-11 n.19 (1983). The model indecency statute authored by Morality in Media provides in part:

Section 1

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

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

(1) a human sexual or excretory organ or function; or

(2) nudity; or

(3) ultimate sexual acts, normal or perverted, actual or simulated; or

(4) masturbation;

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

Section 2

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

Id. at 610-11 n.19.

131. *See* Cruz v. Ferre, 571 F. Supp. 125, 126 (S.D. Fla. 1983); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1172-73 (N.D. Utah 1982); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987, 999 (N. D. Utah 1982).

pornographic or indecent material to its subscribers."[132] In *Home Box Office, Inc. v. Wilkinson,*[133] Judge Jenkins permanently enjoined enforcement of the statute, finding it violated the rights of the cable system operators and programmers under the first and fourteenth amendments.[134] The court held that, since *Miller* describes the permissible scope of state regulation of content, any statute seeking to proscribe material must include *Miller's* three-part test, which the statute at issue failed to do.[135] While the *Miller* test requires the work be taken as a whole in determining whether it constitutes obscenity, the Utah statute proscribed "descriptions or depictions of illicit sex or sexual immorality" and "nude or partially denuded figures" without any reference to context; thus, the statute was outside the established boundaries set by *Miller.*[136] Although the court did not reach the specific issue of the first amendment right of cable operators to show indecent material, it did indicate that any attempt to proscribe indecent material on cable television would be unconstitutional.[137]

Shortly after rendering his decision in the *Wilkinson* case, Judge Jenkins was called upon to determine the constitutionality of a city ordinance

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132. *See* UTAH CODE ANN. § 76-10-1229 (Supp. 1981). In part, the statute reads as follows:

(1) No person, including a franchisee, shall knowingly distribute by wire or cable any pornographic or indecent material to its subscribers.

(4) For purposes of this section "indecent material" means any material described in section 76-10-1227.

Id. "Indecent material" is defined by statute as follows:

(1) "Description or depictions of illicit sex or sexual immorality" means:

(a) Human genitals in a state of sexual stimulation or arousal;

(b) Acts of human masturbation, sexual intercourse, or sodomy; or

(c) Fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.

(2) "Nude or partially denuded figures" means:

(a) Less than completely and opaquely covered:

(i) Human genitals;

(ii) Pubic regions;

(iii) Buttock; and

(iv) Female breast below a point immediately above the top of the areola; and

(b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

UTAH CODE ANN. § 76-10-1227 (Supp. 1981).

133. 531 F. Supp. 987 (N.D. Utah 1982).

134. *See id.* at 999.

135. *See id.* at 998.

136. *See id.* at 996.

137. *See id.* at 1002. The challengers' only concern was the indecency portion of the statute, not the section dealing with pornography. *See id.* at 1002.

which, like the Utah statute, prohibited indecency on cable television.[138] As commentators had predicted, the ordinance was declared unconstitutional in *Community Cablevision of Utah, Inc. v. Roy City.*[139] Roy City cited several statutory provisions as providing its authority to impose restrictions on cable content, including the city's power to improve morals,[140] to control streets,[141] and to franchise and license.[142] Additionally, the city cited a need to protect children.[143] The city relied on *Pacifica* for support of its position and analogized its regulatory power to that of the FCC in that case.[144]

The plaintiffs, a cable television distributor and distributees, asserted that, while the city may have stipulated powers, those powers are all subject to first amendment limitations.[145] Additionally, they argued that the permissible limits of first amendment regulations, as set forth in *Miller* and applied in *Wilkinson,* prohibit such an attempt to control wire-transmitted content.[146]

The court expressed its understanding of the city's concern over "trash" on television but held that the sections of the ordinance prohibiting indecency were proscribing protected communication and, in so doing, were unconstitutional.[147] *Pacifica* dealt with broadcasting, and Judge Jenkins asserted that the essential differences between cable and broadcast television made Roy City's reliance on *Pacifica* misplaced.[148] According to the court, the crucial factor distinguishing transmission by cable from broadcasting was choice, and the elements of choice encompassed various levels: (1) one may choose whether or not to subscribe to cable; (2) one may choose to cancel the subscription at any time; and (3) one may choose from

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138. *See* Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1165-66 (N.D. Utah 1982).

139. *See id.* at 1172-73.

140. See id. at 1166 (citing UTAH CODE ANN. §§ 10-8-4,-8,-41,-80 (1973); UTAH CONST. art. XI, § 5).

141. *See id.* at 1166 (citing UTAH CODE ANN. §§ 10-8-8, 10-8-11 (1973)).

142. *See id.* at 1166 (citing UTAH CODE ANN. § 10-8-4 (1973)).

143. *See id.* at 1166.

144. *See id.* at 1166. The defendants drew several other analogies between their case and the *Pacifica* holding, including: (1) the broadcasting of signals through the air to the sending of electronic signals through wires as is done with cable; (2) pervasiveness of the widespread use of cable service within its community; and (3) the protection of the public interest to the charge of Roy City to improve the morals of its residents. *See id.* at 1166-67.

145. *See id.* at 1166.

146. *See id.* at 1166.

147. *See id.* at 1167, 1173.

148. *See id.* at 1167. The opinion listed the following differences:

a variety of services offered.[149] The court rejected as unconstitutional the proposed Roy City ordinance for its prohibition of material not rising to the level of obscenity and reiterated that the three-pronged *Miller* test must be applied to justify a ban on any potentially offensive transmission.[150]

Following the lead of the federal district court in Utah, a federal district judge in Florida drew a clear distinction between broadcast and cable television in *Cruz v. Ferre.*[151] The issue addressed was whether the city of Miami could define certain material as indecent and then regulate its dissemination through cable television.[152] Judge Hoeveler, while sympathetic with the city's attempt to improve the moral climate, nonetheless found the effort to regulate in this manner violative of the first amendment guarantee of free speech.[153] Like the Roy City ordinance, this one was held to be overly broad and facially defective.[154]

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

Id. at 1167. The FCC, acting in response to an opinion by the District of Columbia Circuit Court of Appeals, ceased including transmission by cable in its definition of broadcasting. *See* Order of December 7, 1977, 67 F.C.C.2d 252, 252-53 (1977) (construing Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 829 (1977)). A dictionary definition of broadcasting contains no reference to cable: "broadcast . . . 3. Radio & Television. To send out from a transmitting station (information, lectures, music, messages or pictures) by radio telegraph, radio telephone, or other radio transmission, for an unlimited number of receiving stations." WEBSTER'S NEW INT'L DICTIONARY 339 (2d ed. 1955).

149. *See* Community Television of Utah, Inc. v. Roy City, 555 F. Sup. 1164, 1168 (N.D. Utah 1982).

150. *See id.* at 1169.

151. 571 F. Supp. 125 (S.D. Fla. 1983).

152. *See id.* at 126.

153. *See id.* at 126.

154. *See id.* at 130-31.

B. *The Inapplicability of Pacifica in the Cable Context*

The first amendment does not protect obscenity in any form on any medium of expression, including cable television.[155] Obscenity is unprotected because it provides minimal contribution to the social dialogue and is offensive by contemporary moral standards.[156] But, because of recognized dangers inherent in regulating any form of expression, legislation aimed at obscenity must be carefully and precisely drawn, utilizing the accepted *Miller* standards.[157] Indecent speech, despite its offensiveness to some, is provided with some first amendment protection because it does not rise to the level of obscenity.[158] The three cable cases discussed previously involved legislation which swept too broadly by proscribing speech with first amendment protection.[159]

Pacifica has very limited application, in the cable television context, in that it only states that, through applying a nuisance rationale, broadcasted indecency may be channeled with reasonable time, place, and manner regulation.[160] *Pacifica* does not stand for the proposition that indecency has no first amendment protection.[161] Broadcasted indecency is not a fixed concept as the cable legislation considered seems to imply.[162] Instead, it is a variable factor depending, among other things, on the composition of the audience and the time of broadcast.[163] Absolute proscriptions based on an absolute definition of indecency ignore the narrow fact-specific holding of the *Pacifica* Court.[164] The Utah, Roy City, and Miami legislation all prohibit indecency on a wholesale basis without reference to any of the variables crucial to the decision in *Pacifica.*[165]

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155. *See* Roth v. United States, 354 U.S. 476, 485 (1957).

156. *See id.* at 484-85, 489.

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

158. *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

159. *See* Cruz v. Ferre, 571 F. Supp. 125, 127 (S.D. Fla. 1983) ("No person shall by means of cable television . . . distribute . . . obscene or indecent material.") (quoting Miami, Fla., Ordinance 9583 (Jan. 13, 1983)); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1173-74 (N.D. Utah 1982) ("franchise agreements . . . may be revoked or other sanctions imposed for . . . knowingly distribut[ing] any pornographic or indecent material. . . .") (quoting ROY CITY, UTAH, ORDINANCES 17-3-2 (1982); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987, 989-90 n.1 (N.D. Utah 1982) ("No person . . . shall knowingly distribute by wire or cable any pornographic or indecent material. . . .") (quoting UTAH CODE ANN. § 76-10-1229(1) (Supp. 1981).

160. *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978); *see also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (state or municipality may pass reasonable time, place, manner regulations to protect individual privacy).

161. *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

162. *See id.* at 750.

163. *See id.* at 750.

164. *See id.* at 750.

165. *See* Miami, Fla., Ordinance 9583 (Jan. 13, 1983), *cited in* Cruz v. Ferre, 571 F.

The *Pacifica* Court also noted that different first amendment questions presented by the different media forms merit inconsistent methods of regulation.[166] Broadcasting has historically been afforded more limited first amendment protection than any other medium of expression.[167] This is so because of its pervasiveness,[168] its ability to invade the privacy of the home,[169] its unique accessibility to children,[170] and the limited broadcast space available on the electromagnetic spectrum.[171] Therefore, another medium would not, by implication, be subject to the same restricted first amendment protection.[172] A comparison of broadcast and cable television illustrates the inapplicability of *Pacifica* in the cable context.

Broadcast communication is pervasive in that it is transmitted through the publicly controlled airways from which the user acquires the signal without charge and without a subscription.[173] Cable, on the other hand, is transmitted via privately owned cable wires only to those who pay a fee for subscription to the service.[174] Unlike traditional broadcast television, cable provides greater control to the viewer who may decide whether to subscribe.[175] Therefore, invasion of privacy of the home which is a justification for greater control over the broadcast media is not a factor for cable subscribers who bring cable into the home only by choice.[176] Furthermore, programming which may be unsuitable for children or other immature viewers may be controlled by supervising adults with the use of a "lock-box" operable only with a "parental key."[177] In the *Cruz* opinion, the federal district court in Miami suggested that this ability to avoid harm to children and immature viewers "sounds the death knell of *Pacifica's*

Supp. 125, 127 (S.D. Fla. 1983); ROY CITY, UTAH, ORDINANCES 17-3-2 (1982), *cited in* Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1173-74 (N.D. Utah 1982); UTAH CODE ANN. § 76-10-1229(1) (Supp. 1981), *cited in* Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987, 989-90 n.1 (N.D. Utah 1982).

166. *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978) (mentioning radio, television, and closed-circuit transmissions).

167. *See id.* at 748; *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969) (stating difference in characteristics justify application of different first amendment standards).

168. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

169. *See id.* at 748.

170. *See id.* at 749.

171. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 44 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977).

172. *See id.* at 44.

173. *See* Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1167 (N.D. Utah 1982).

174. *See id.* at 1167.

175. *See id.* at 1167.

176. *See id.* at 1168.

177. *See* Cruz v. Ferre, 571 F. Supp. 125, 132 (S.D. Fla. 1983).

applicability in the cable television context."[178]

The further justification for FCC regulation of broadcast content is the scarcity of channels available.[179] Only a certain number of stations can operate simultaneously without interfering with one another.[180] The Supreme Court determined that this scarcity allows the FCC to consider the type and content of program services to be offered in licensing broadcast channels.[181] This allocation problem does not apply to cable television, however, which has no physical scarcity of channels or problem of interference.[182]

C. *Implications for Texas*

If a person is to be convicted of an obscenity offense in Texas, as in any other state, the material or performance involved must meet the three-pronged *Miller* test, which was incorporated into the statutory definition of obscenity.[183] To be obscene, under the *Miller* test, the work must not only

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178. *Id.* at 132.

179. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 44 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977).

180. *See id.* at 44.

181. *See id.* at 44.

182. *See id.* at 44-45. "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." *Id.* at 44-45; *see also* Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper,* 51 N.Y.U. L. REV. 133, 135 (1976) (cable channel capacity may become unlimited in future).

183. *See* TEX. PENAL CODE § 43.21 (Vernon Supp. 1982-1983).

> (1) "Obscene" means material or a performance that:
>
> (A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;
>
> (B) depicts or describes:
>
> (i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or
>
> (ii) patently offensive representations or descriptions of masturbation, exretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

Id.

> The basic guidelines [for determining if material is obscene] for the trier of fact must be:
>
> (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

appeal to the prurient interest when taken as a whole and lack serious literary, artistic, political, or scientific value, but also must depict or describe "in a patently offensive way, sexual conduct specifically defined by the applicable state law."[184] Under Texas law, the "sexual conduct" incorporated into the *Miller* test includes:

> (i) . . . ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or
> (ii) . . . masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs;[185]

Texas has no statute attempting to define or proscribe indecent material or performances and has no statute specifically addressing cable content. Thus far, no cable cases have been prosecuted under the obsenity portion of the code.

Any city ordinance attempting to impose criminal sanctions on a cable system for showing obscene material would probably be preempted under section 1.08 of the Texas Penal Code which states: "No governmental subdivision or agency may enact or enforce a law that makes any conduct covered by the code an offense subject to a criminal penalty. This section shall apply only as long as the law governing the conduct proscribed by this code is legally enforceable."[186] As the Texas Penal Code does contain provisions making obscenity a crime and this provision has not been declared unconstitutional, prosecution remains the province of the state, and cities seemingly are not free to enforce criminal sanctions for obscene material on cable television.[187] This is not to say that the Penal Code does not allow for prosecution of obscenity on cable television, only that the city may not preempt the state's authority to do so.[188]

Cities with cable systems in Texas have, for the most part, not attempted to regulate the content of cable programming.[189] Those cities are appar-

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(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973); *see also* McMahon v. State, 630 S.W.2d 730, 732 (Tex. App.—Houston [14th Dist.] 1982, no writ) (Texas obscenity statute meets *Miller* standards); West v. State, 514 S.W.2d 433, 439 (Tex. Crim. App. 1974) (*Miller* test met by Texas statutory standards for obscenity).

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

185. TEX. PENAL CODE § 43.21 (Vernon Supp. 1982-1983).

186. *Id.* § 1.08.

187. *See id.* § 1.08.

188. *See id.* § 1.08.

189. *See, e.g.,* Letter from Lloyd Garza, City Attorney, Killeen, Tex., to author (Sept.

ently mindful of the Texas statutory preemption problems with reference to obscenity, as well as constitutional problems involved in attempting to proscribe indecent material not rising to the level of obscenity.[190] From a monetary point of view, cities may not be prepared to mount a challenge against indecent material which would likely involve lengthy, costly litigation.[191]

VII. CONCLUSION

Indecent programming on cable television, while undoubtedly offensive to many viewers, is nonetheless protected by the first amendment guarantee of freedom of speech. Cable television is distinguishable from broadcast television so that the factors which justify limited first amendment protection for broadcasting, as outlined in *Pacifica,* have no application in a cable television context. *Miller* provides the standard for judging whether material is obscene and thereby unconstitutional, and until the Supreme Court decides otherwise, statutes and ordinances drafted without *Miller* in mind will undoubtedly suffer the fate of the Miami, Roy City, and Utah legislation considered herein. Regardless of individual sentiment or governmental concerns, our judicial system has, thus far, determined that the first amendment is alive and well on cable television.

15, 1983) (stating City of Killeen does not have an ordinance regulating cable programming content); Letter from Merril E. Nunn, City Attorney, Amarillo, Tex., to author (Sept. 9, 1983) (stating City of Amarillo does not proscribe any kind of program for local cable television company); Letter from Mindy Ward, City Attorney, San Angelo, Tex., to author (Sept. 9, 1983) (stating City of San Angelo has never attempted to regulate the content of programs shown on cable television).

190. *See, e.g.,* Letter from Randall B. Strong, City Attorney, Baytown, Tex., to author (Sept. 13, 1983) (expressing City's reluctance to enter business of determining what is "indecent" or "obscene"); Letter from R. Clayton Hutchins, City Attorney, Grand Prairie, Tex., to author (Sept. 9, 1983) (expressing belief that "it would be extremely difficult to draft an ordinance . . . which would meet constitutional muster"); Memo from Robert S. Briggs, Asst. City Attorney, to Russell Lancaster, City Councilman, Fort Worth, Tex. (April 29, 1983) (stating any ordinance regulating indecency or obscenity on cable television would probably be preempted by section 1.08 of the Texas Penal Code).

191. Letter from Richard E. Henderson, Asst. City Attorney, to Wade Adkins, City Attorney, Fort Worth, Tex. (April 29, 1983) ("As cities are becoming increasingly aware, the civil rights attorneys' fees that the city could lose in a legal contest if it were to embark on a course of illegal censorship would be staggering.").