THIS IS THE PICTURE*—IF YOU DON'T LIKE IT, TURN IT OFF: THE FUTILITY OF SETTING CABLE SPECIFIC OBSCENITY STANDARDS

I. INTRODUCTION

The increasing presence of cable television as a national entertainment medium during the 1970s and 1980s resulted in the development of unique problems. In an effort to address some of these problems, the Cable Communications Policy Act of 1984 (the "Cable Act")[1] set out a regulatory scheme that, in line with the ideological bent of the Reagan years, has relaxed restrictions on the industry. Loosened restrictions have especially occurred in regulation of obscene and indecent programming.[2]

Although courts have set content standards for individual media, there has been no content standard set for cable. Courts setting standards for different media have generally used the notion of indecency, a more restrictive concept than obscenity, as the basis for their decision. Nonetheless, content standards for all media must fall within the three-step legal obscenity standard developed in *Miller v. California*.[3] In addition to the *Miller* obscenity standard, the point at which first amendment protection ceases, there are separate tests used in radio,[4] definitive standards for film in the form of the Motion Picture Association of America ("MPAA") rating system,[5] and an established network

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* *Cf.* L. ANDERSON & P. GABRIEL (words and music), P. GABRIEL, So (Geffen Records, Inc. 1986).

[1] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521-559 (Supp. V 1987)).

[2] The Cable Act merely states that the broadcast of obscene material will be punishable by law. *Id.* at § 639, 47 U.S.C. § 559.

[3] 413 U.S. 15 (1973). Defining obscenity is beyond the scope of this Note, and perhaps beyond anyone's scope. However, the term "legal" obscenity, for the purposes of this Note, means the definition given obscenity by the Court in *Miller*. *See infra* note 52 and accompanying text. Material outside of this definition is not protected by the first amendment. Any use of "obscenity" without the qualifier "legal" does not refer to the *Miller* conception. The *Miller* test is discussed in detail *infra* at notes 50-57 and accompanying text.

[4] FCC v. Pacifica Found., 438 U.S. 726 (1978) (setting a standard specifically for radio based on the pervasiveness of the medium).

[5] The Motion Picture Association of America has a voluntary rating system to notify the public of the subject matter of a film. Films are rated according to their content for general audiences ("G"), parental guidance suggested ("PG") (some material may not be suitable for children), parents strongly cautioned ("PG-13") (some material may be inappropriate for children under 13), restricted ("R") (under 17 requires accompanying parent or adult guardian), and adults only ("X") (no one under 17 admitted). *See* Collins, *Guidance Or Censorship? New Debate On Rating Films*, N.Y. Times, Apr. 9, 1990, at C11,

structure for monitoring program content in the television industry.[6]

Notwithstanding this precedent for other media and congressional intent to establish "a national policy concerning cable communications"[7] and "guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems,"[8] the law of cable program content regulation is vague. Although the Cable Act establishes the punishment for the broadcast of obscene programming,[9] it fails to define or explain the standard for assessing what is "obscene" or "indecent" in the context of the cable medium.[10] Courts, following this lead, have also failed to develop a set of program content standards, instead rejecting local or state regulations on constitutional grounds without defining any parameters.[11]

Content standards used for other media are not applicable to cable because of cable's unique status. Cable contains elements of broadcast television, radio, and film, but is not similar

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cols. 4-6 and C17, cols. 1-4. *See also* Pareles, *Sex, Censors & Rock*, N.Y. Times, Mar. 26, 1989, § 2 (Arts and Leisure), at 24, col. 3.

6 In July 1986, the Attorney General's Commission on Pornography voted against applying to cable television the same standard used to bar "indecent" radio and television programs. ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUST., FINAL REPORT, 105 (1986) (*quoted in* Meyerson, *The Right to Speak, The Right To Hear and The Right Not To Hear. The Technological Resolution to the Cable/Pornography Debate*, 21 U. MICH. J.L. REF. 137, 137 (1988) [hereinafter Meyerson, *The Right*]. Major television networks have offices of standards and practices through which they decide what is acceptable for broadcast. Recently, the major television networks discussed abandoning the offices and allowing the executives of the television networks to determine these issues. This is indicative of a gradual relaxation of television standards.

> In the past two years, all three networks have chipped away at the departments that monitor the content of programs. The reason: corporate downsizing. In other words, it saves each network probably $1 to $2 million a year. NBC axed a dozen people and eliminated the department entirely. Half of CBSs department has been cut in the last two years, leaving 22 executives to patrol what goes on the airwaves. Over at ABC, an undisclosed number of standards personnel were laid off. The staff now numbers between 35 and 40.
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> . . . NBC's programming department, now [is] the only corporate entity overseeing content . . . .

Polskin, *TV's Getting Sexier . . . How Far Will It Go?*, TV GUIDE, Jan. 7-13, 1989, at 19.

7 Cable Act, § 601(1), 47 U.S.C. § 521(1) (Supp. V 1987).

8 *Id.* at § 601(3), 47 U.S.C. § 521(3).

9 *Id.* at § 639, 47 U.S.C. § 559. *See infra* note 45 and accompanying text.

10 Under the Supreme Court test for legal obscenity, stated in Miller v. California, 413 U.S. 15, 24 (1973), the possibility for different interpretations of what constitutes obscenity remains, especially in light of competing local and federal interpretations. People in different states vary in their attitudes toward the issue. *Id.* at 33. *See infra* notes 47-57 and accompanying text.

11 *See infra* notes 68-107 and accompanying text (discussing attempts to regulate cable programming content within the general legal obscenity test as defined in *Miller*).

enough to any one medium to borrow its standard.[12] Until one cable specific content standard is set, litigation concerning obscenity and indecency, as well as first amendment challenges to localities attempting to regulate cable programming content through their own local standards of obscenity, will continue.[13]

Generally, the idea of local or state standards for content is sound. However, there is an inherent conflict between local standards and first amendment concerns. While some courts recognize the first amendment problem of overly restrictive local laws and the resultant pressure created for local operators, they do not clarify what the federal law dictates, aside from the general obscenity test of *Miller*.[14] While local standards are relevant, the prospect of breaking the country into zones with different standards for permissible programming creates a logistical nightmare for a national medium like cable.[15] A media specific standard is needed because, while the parties challenging restrictive stan-

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12 For a discussion of the differences, see *infra* notes 16-25 and accompanying text.

13 *See infra* notes 68-107 and 128-32 and accompanying text. State and local criminal jurisdiction over obscenity is often abused through the arrest of shopkeepers and theater owners for the showing of allegedly obscene material. *See, e.g.*, Pope v. Illinois, 481 U.S. 497 (1987); Jenkins v. Georgia, 418 U.S. 153 (1974). *Accord* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (civil proceeding brought by state against theater owner). *See also* Lewis, *Obscenity Law Used In Alabama Breaks New York Company*, N.Y. Times, May 2, 1990, at 1, col. 1.

The Supreme Court has historically distinguished between the mere possession of obscene matter in one's home and the display of such material. Stanley v. Georgia, 394 U.S. 557, 564 (1969) (stating that the constitution confers the right to be left alone). Further, the *Stanley* court stated that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or films he may watch." *Id.* at 565. The Court's later interpretations of the *Stanley* rule of allowing possession of obscenity in the home, but not its display, have been inconsistent. *See* Paris Adult Theatre I, 413 U.S. at 66 (*Stanley* was "hardly more than a reaffirmation that 'a man's home is his castle.' "). *But see* Bowers v. Hardwick, 478 U.S. 186, 195 (1986)) (*Stanley* was not a case about privacy in the home, but "was firmly grounded in the First Amendment."). This is indicative of the Court's concern with the distinction between the use of "obscene" material in the privacy of the home and its use in the marketplace. *See* Meyerson, *The Right*, *supra* note 6, at 142-43. This distinction is clearly relevant to the cable content regulation question and the pervasiveness of various media in relation to the permissible level of content regulation. *See infra* notes 16-25 and accompanying text.

14 The cases overturning local ordinances did not disallow local standards *per se*, but they did state that the local rules must be within the Supreme Court rulings. *See, e.g.*, HBO v. Wilkinson, 531 F. Supp. 987, 996 (D. Utah 1982) (only in well-defined circumstances may government bar public dissemination of protected materials under the first amendment).

Further, on the local operations element, cable has grown from small, local ownership to national prominence. The result has been the emergence of monopolies, creating questions of how much authority cable operators should have in content regulation. The monopolies created by the cable operators preempt any opposition to their decisions. P. PARSONS, CABLE TELEVISION AND THE FIRST AMENDMENT 1-2 (1987).

15 *See infra* notes 47-57 and accompanying text (discussing the problems of balancing federal rights and community standards to develop an acceptable standard for programming).

dards are usually broadcasting corporations, media watch groups, and government agencies, the outcome of such challenges affects the types of programs viewed by cable subscribers, and therefore, the right to choose one's form of entertainment. The privacy interest of those in their homes to either receive or avoid programming is implicated.

This Note examines past attempts to regulate cable television content through its legislative and judicial history, critiques these efforts, and then analyzes the reasons judicial and legislative attempts to set programming standards are futile and should be scrapped in favor of self-regulation. Part II discusses the differences between cable and other media and the impact these differences have on content restriction. Part III explores the case law and legislation that have attempted to interpret cable content regulations and shows the inability of the government to set moral standards. Part IV critiques these legislative and judicial efforts and offers not only factors for consideration in developing a content test for cable, but also some possible solutions to the medium's problems. Part V proposes solutions to cable content problems and discusses the futility of developing standards for concepts as elusive as obscenity or indecency. In conclusion, this Note suggests a more appropriate solution to the problem than simply attempting to define inherently vague standards.

II. REGULATING CABLE CONTENT: UNIQUE PROBLEMS AS COMPARED TO OTHER MEDIA

Cable is a hybrid medium which combines elements of film, radio, and television and therefore poses unique regulatory problems.[16] The similarities between cable and film are that they both require a substantial financial investment and an affirmative choice by the customer to obtain the entertainment. Cable is also similar to broadcast television and radio in that it comes into the home and is therefore a pervasive medium.[17] The pervasiveness issue may lead to a more restrictive content regulation standard for programming due to the fear of exposing children to objectionable programs.[18] Conversely, film elements of cable may

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16 *See infra* notes 17 and 68-107 and accompanying text.

17 Pervasiveness is the concept of intrusiveness of media. Radio is pervasive because it is, to some degree, unavoidable in our society. Conversely, a movie is not pervasive because one must seek out a theater, pay for a ticket, and enter the theater before being exposed to a film. For a discussion of the relevance of pervasiveness to a determination of what and when programming may be broadcast, see FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978).

18 *Id.*

point toward a more liberal standard because of the subscribers' choice to buy cable and the concern with subjecting subscribers to objectionable programming is then less applicable.

However, cable is unlike radio and television in that a consumer chooses to bring it into her home by paying a subscription fee. Furthermore, unlike radio or broadcast television, acquiring cable requires a positive act of ordering a subscription, thus making cable more like the film medium. Additionally, distinct from radio, cable is a visual medium which generally has limited advertising.[19] Therefore, since cable can be viewed as a luxury which people choose to receive, it is not pervasive, like radio, and the standard for content regulation should be loosened.

Unlike film, cable content regulation involves the issue of "lockboxes," devices which block out particular channels to allow individuals to avoid cable programming they find offensive.[20] Lockboxes allow a cable subscriber to prevent any channel from entering her television at any time of day.[21] A solution to the problem of censorship and cable programming content should involve lockboxes because they minimize government interference, provide individual subscribers with free choice, and are the only available means of self-censorship aside from merely not subscribing.[22]

On the other hand, the lockbox solution raises the issue of whether cable operators should be required to provide the boxes free of charge and, if not, how to deal with the problem of customers being forced to pay to avoid arguably obscene programming.[23] Although section 624(d)(2)(A) of the Cable Act requires

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19 Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1167 (D. Utah 1982).

20 Lockbox devices are machines which block the programming of a certain channel from entering a television and are provided by cable operators at a reasonable cost to subscribers. The lock is controlled by the customer. G. SHAPIRO, P. KURLAND & J. MERCURIO, CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION 45 (1983).

21 *Id.*

22 The purpose of lockboxes is to allow for self-censorship and to avoid having the government engage in value and moral judgments as to what constitutes appropriate programming. H.R. REP. No. 934, 98th Cong. 2d Sess. 23, 69, *reprinted in* 1984 U.S. CONG. CODE & ADMIN. NEWS 4655 [hereinafter H.R. REP. No. 934]. The newly installed FCC Chairman Alfred C. Sikes also favors self-regulating content controls. He said, "[o]ne way Americans have sought to preserve freedom is by initiating voluntary standards." Greppi, *Standards Scrutinized By New FCC Chairman*, N.Y. Post, Sept. 28, 1989, at 85, col. 3. Mr. Sikes further said that "much of the viewing public . . . appears to disagree with this 'I know what's good for you' attitude toward programming by some critics of program content or genre." *Id.*

23 In the Cable Act, section 624(d)(2)(A), operators are permitted to charge for lockboxes. Cable Act, § 624(d)(2)(A), 47 U.S.C § 544 (d)(2)(A). The notion of requiring subscribers to pay to keep obscenity from being broadcast into their homes seems to controvert the idea of obscenity not being protected by the first amendment. *See infra*

operators to provide for the sale or lease of a lockbox device, there is no requirement that cable operators must provide for the box free of charge.[24] Consequently, lockboxes, while a potential solution to the problems of content regulation, are in a regulatory setting that is inhibiting their usefulness.

As cable is a hybrid of elements of various media and must be treated uniquely, the problem is one of categorization. Furthermore, objectionable programming will always exist and the focus shifts to which test to apply to determine whether a program is acceptable. Cable's dissimilarities with broadcast television, film, and radio necessitates creating its own set of standards, a step which the judiciary and legislature have thus far been unwilling or unable to take.[25]

III. ATTEMPTS TO REGULATE CABLE CONTENT: AN EXERCISE IN FUTILITY

A. *Legislative History*

Since radio became a major medium sixty years ago, Congress has been active in attempting to regulate mass media.[26] Virtually every aspect of the broadcast industry has been regulated, from franchising to advertising to programming content. The first major piece of legislation after radio became a widespread medium was the Radio Act of 1927, which repealed the Radio Act of 1912.[27] Seven years later, the Radio Act of 1927 was superseded by the Communications Act of 1934 ("1934 Act"),[28] which was the major media legislation until the Cable Act in 1984. For the purposes of this Note, the important aspects of the 1934 Act are its creation of the Federal Communications Commission ("FCC" or "the Commission") to regulate the

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notes 61-63 and accompanying text (discussing the ability of government to regulate non-obscene programming but not obscene programming).

24 Cable Act, § 624(d)(2)(A), 47 U.S.C. § 544(d)(2)(A) (Supp. V 1987).

25 Under *Pacifica's* discussion of pervasiveness, broadcast television is more accessible than cable because no subscription or fee is needed to obtain it. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978).

26 The Radio Act of 1927, the Communications Act of 1934, and their subsequent revisions show Congress' constant activity in revising media law. *See infra* note 27 and accompanying text.

27 The Radio Act of 1912 set the stage for creation of the FCC by establishing the Secretary of Commerce and Labor as the party responsible for issuing licenses to broadcasters. However, the Secretary had no power to refuse to grant a license and therefore, did not actually regulate broadcasting. *See* Hoover v. Intercity Radio Co., 286 F. 1003, 1006 (D.C. Cir. 1923) (Congress vested itself with power to regulate broadcasting and gave no discretion to the Secretary for the purposes of issuing licenses).

28 15 U.S.C. § 21 (1988) (amended at 46 U.S.C. §§ 484-487, 47 U.S.C. §§ 35, 151-610).

broadcasting industry[29] and the grant of jurisdiction to the FCC to regulate all areas of the broadcasting industry.[30] These particular sections are important because they established both the regulatory framework under which standards could be set and the FCC adjudicative branch as the first forum for dispute resolution on many issues.

Until the advent of cable as an important new medium, the FCC used its regulatory powers to control radio and television.[31] Television did not present the FCC with new problems as to questions of programming content and the Commission's jurisdiction,[32] since stations were generally operated by the same people and in the same fashion as those who ran radio stations.[33] However, when cable became an important medium in the 1970s, new problems were presented. Cable quickly developed into an outlet for programming that was unacceptable to the broadcast television networks.[34] Due to its subscription-only nature, cable became a showcase for those programs that were deemed too

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29 *Id.*

30 FCC v. Pacifica Found., 438 U.S. 726, 735-36 (1978). The FCC was granted authority to govern over the broadcasting industry, except that it was not given authority to censor programming. *Id.*

31 The FCC first considered the parameters of its authority over cable in 1958 in Frontier Broadcasting v. Collier, 24 F.C.C. 251 (1958), *aff'd*, 296 F.2d 443 (D.C. Cir. 1961). In that case, 13 television stations complained to the Commission that 288 cable operations throughout 36 states threatened their business. The television stations asked the Commission to exercise its power over cable as a common carrier under section 3(h) of the 1934 Act. The Commission refused, stating that even if cable were a common carrier, it was unlikely that the FCC would extend its powers to restrict or control the entry of cable operators to protect television broadcast service in individual communities. *Id.* at 255. Following this decision, the Commission began an inquiry into its jurisdiction over cable due to its fear that cable would force broadcast television off the air. Finding that only three of 96 broadcast stations had been affected by cable, the Commission refused to limit cable's growth. Auxiliary Services Inquiry, Report and Order in Docket No. 12443, 26 F.C.C. 403 (1959).

32 The Commission assumed jurisdiction as the cable industry began to grow. Two decisions extended the Commission's jurisdiction throughout all cable systems. First Report and Order in Docket Nos. 14895 and 15233, 38 F.C.C. 683 (1965); Second Report and Order in Docket Nos. 14895, 15233, and 15971, 2 F.C.C.2d 725 (1966).

In United States v. Southwestern Cable Co., 392 U.S. 157 (1968), the Supreme Court upheld the Commission's jurisdiction over cable by holding that the agency's power over cable is only limited by the Commission's responsibilities to the regulation of broadcast television. The 1934 Act is the root, according to Justice White's concurrence, of the FCC's power over cable. Specifically, sections 301 and 303 give the Commission authority over stations to make all regulations it deems necessary to prevent interference between stations and carry out the intent of the 1934 Act. *Id.* at 181-82.

33 The television industry has always been run in much the same way as the radio business, with a system of networks and affiliate stations throughout the country. W. JONES, ELECTRONIC MASS MEDIA 9-10 (2d ed. 1979) [hereinafter JONES].

34 This is especially true of the public access channels that were provided for in the Cable Act and have been a part of cable since the late 1960s. Kaplan, *Is The Klan Entitled To Public Access?*, N.Y. Times, July 31, 1988, § 2 (Arts and Leisure), at 25 [hereinafter Kaplan].

risqué, avant garde, or adult for broadcast television.[35] Gradually, programming changed from merely unusual to arguably obscene or at least objectionable.[36]

In the late 1970s and early 1980s, in response to public concern over the objectionable nature of some programming, various states and localities attempted to set out statutory guidelines to control indecent and obscene programming. These regulations were immediately challenged.[37] Although courts have found several of these regulations unconstitutional,[38] they have failed to establish a content standard for cable, as the Supreme Court has for radio.[39] Rather, courts generally have ruled that the statutes were unconstitutionally vague and did not comply with some element of the obscenity test set forth in *Miller*.[40] Courts have refused to set a cable content standard despite the establishment of the idea that applying the same first amendment standards to all media was inappropriate. In *Community Communications Co. v. City of Boulder*,[41] the Tenth Circuit stated that applying the newspaper standard of regulation to cable television was inappropriate because of the different historical treatment of the two media by the government.[42]

Congress, in 1984, attempted to deal with the state-by-state,

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35 *Id.*

36 This use of "obscene" does not necessarily mean "legally" obscene, due to the varying interpretations of obscenity. *See* Krattenmaker & Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 FORDHAM L. REV. 606, 613-20 (1983) [hereinafter Krattenmaker and Esterow] (discussing the differing views of what constitutes "obscenity" in different communities).

Controversial programming on cable does not necessarily include only that which is sexually oriented. *See supra* notes 34-35. Fringe organizations like the Ku Klux Klan often use cable's public access time requirements to gain a forum that they could not otherwise have gained. For example, a quick perusal of Manhattan Cable Television's programming guide reveals such groups represented as a national association for atheists and various faith healers, astrologers, and fortune tellers. *See* The Cable Guide, Vol. IX, Issue 99, Mar. 1990.

37 *See, e.g.*, Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985) (challenging constitutionality of 1981 Miami, Florida ordinance intended to regulate "indecent" and "obscene" material on cable television); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982) (challenging amendment to Roy City, Utah ordinance enacted to regulate "indecent" material); HBO v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982) (challenging a 1981 Utah statute enacted to criminally punish cable operators who "knowingly distribute by wire or cable any pornographic or indecent material to its subscribers").

38 *See supra* note 37.

39 FCC v. Pacifica Found., 438 U.S. 726 (1978).

40 *See supra* note 37 and accompanying text (cases applying the *Miller* test) and *infra* notes 47-52 and accompanying text (discussing the *Miller* test).

41 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982).

42 *Id.* In *Boulder*, a cable company, in the course of challenging a Boulder city ordinance against expansion, asserted its first amendment right to disseminate ideas. The court held that applying the newspaper standard to cable violated the Supreme Court's admonition that the different characteristics of the news media justify the different first

patchwork approach to regulating cable by enacting the Cable Act, which is the present governing statute.[43] The Cable Act was designed to provide the cable industry with a national policy covering all aspects of cable operation.[44] Although the Cable Act deals with a wide cross-section of issues important to the cable industry, it fails to address the issue of programming content. The Cable Act simply states that (1) it is criminal to transmit obscene material and (2) there is a maximum fine for broadcasting such material.[45]

Despite repeated legislative efforts to regulate programming content on different media, no successful formula has been developed. The nature of the process of developing content regulation standards is such that it requires the legislature to determine the meaning of vague concepts like obscenity and indecency. As a result, statutes have been unclear in their meaning, leaving courts to divine meaning from them.

B. *Case History Relevant to Cable Content Regulation*

Apart from the various legislative efforts to control cable content, there have been judicial attempts to regulate the issue. These cases have done an excellent job of further mucking up the already murky legislative waters. Two seminal cases which generally addressed obscenity, indecency, and the media, suggested elements to consider in developing cable standards.[46] They did

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amendment standards. *Id.* at 1377. The court thus stated that every medium must be considered separately when trying to develop a standard. *Id.* at 1379.

Further, while newspapers have a tradition of freedom from government regulation, the court noted that cable, because of its impact on the public domain, the use of city streets, and the granting of its limited monopoly, has always been regulated. *Id.* at 1378-79.

[43] Cable Act, §§ 601-639, 47 U.S.C. §§ 521-559 (Supp. V 1987).

[44] *Id.* at § 601(1), (3), 47 U.S.C. § 521(1), (3).

[45] *Id.* at § 639, 47 U.S.C. § 559. Further, Cable Act section 612(h), states that no obscene programming is permitted on commercial channels. *Id.* at § 612(h), 47 U.S.C. § 532(h). This is in contrast to Cable Act section 639, which deals with all obscene content. *Id.* at § 639, 47 U.S.C. § 559. The Cable Act does contain a requirement that cable operators provide public access to their facilities so that both a certain amount of public affairs programming and a certain number of channels for community use are provided. However, in the area of programming content, the criminality statement in Cable Act section 638, is all that the Cable Act contains. *Id.* at § 639, 47 U.S.C. § 559. Cable Act sections 611 to 613 discuss the idea of opening channel space to members of the community. *Id.* at §§ 611-613, 47 U.S.C. §§ 531-533. The Cable Act requires operators to provide for community programming, though not specifically "public access" programming. *Id.* at §§ 611-613, 47 U.S.C. §§ 531-533. However, many operators do open space and public access programming is often the source of controversy because of the programming's nature. *See supra* notes 34-36 and accompanying text. Public access programs tend to be non-mainstream in all respects, not just toward obscenity or indecency and, as a result, often the core of controversy. *See* Kaplan, *supra* note 34, at 25.

[46] *See infra* notes 47 and 58 and accompanying text.

not, however, provide answers to the problem of developing program content standards specifically for the cable medium. Four significant cases have specifically involved issues important to cable content regulation. The "cable" cases, in failing to develop standards appropriate for the regulation of cable programs, focused in large part on regulations that were deemed unacceptable for the cable medium.

Miller v. California,[47] a 1973 Supreme Court decision, set the general standard for obscenity. In *Miller*, the defendant, an "adult" book salesman, violated a state statute prohibiting the knowing distribution of obscene matter and was convicted in state court for mailing unsolicited sexually explicit material.[48] The jury was instructed to evaluate the material by the contemporary community standard of California.[49] The United States Supreme Court, in vacating the conviction, attempted to set out a new standard by which to measure obscenity.[50]

For a court to find material obscene under *Miller*, it must meet all of the following criteria:

> (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.[51]

This standard was the most liberal rule under which to consider all obscene material regardless of the medium. Any material deemed obscene under *Miller* was considered to be outside constitutional protection.[52]

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47 413 U.S. 15 (1973).

48 *Id.* at 16-18. "He was convicted of violating California Penal Code § 311.2(a)." *Id.* at 16. The statute incorporated a prior Supreme Court test for obscenity and was thus declared invalid by the Court. *Id.* at 23.

49 *Id.* at 24.

50 *Id.* at 24-25.

51 *Id.* (citations omitted). These are the criteria that the courts in Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); and HBO v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982) held were not met by the local statutes, making them unconstitutional. The courts said that the local statutes had to consider all of these criteria within their standards to be constitutional.

52 Miller v. California, 413 U.S. 15, 36 (1973). "Legal" obscenity is the definition the Supreme Court has given to the concept of obscenity, as opposed to an individual's personal appraisal of what constitutes obscenity. Any material that exceeds the legal obscenity standard is without protection from the Constitution and therefore all standards for individual media must be within the *Miller* test. *See id.* at 36-37. *See also* FCC v. Pacifica Found., 438 U.S. 726, 745-49 (1978) (discussing pervasiveness).

In subsequent litigation, courts interpreted the *Miller* standard to require the application of a local community standard, as opposed to a national or general societal standard. In *Hamling v. United States*,[53] the Court utilized the theory that given the diverse opinions throughout the country as to what constitutes obscenity, it was difficult to determine a national "community standard."[54] However, this "community standard" view was tempered by the Court in *Jenkins v. Georgia*,[55] which stated that local juries do not have blanket discretion to determine what is obscene or patently offensive and therefore, must make such determinations within reasonable parameters.[56] As a result of this line of cases, the Supreme Court made clear what it considered permissible. Under *Miller*, programming is permitted so long as it is not violative of the *Miller*, "legal" obscenity test.[57]

The second general case, *FCC v. Pacifica Foundation*,[58] established obscenity limits specifically for radio within the strictures of *Miller*. The case involved George Carlin's monologue "Filthy Words."[59] The FCC and the Supreme Court both found the broadcast "indecent" and that, more generally, certain material, while not legally obscene,[60] may be deemed patently offensive or indecent.[61] The Court held that the agency's actions did not constitute "forbid-

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[53] 418 U.S. 87, 105-06 (1974) (contemporary community standard shall be determined by the jurors using the standards of the locality).

[54] *Id.* *See supra* note 10 and accompanying text.

[55] 418 U.S. 153 (1974).

[56] *Id.* at 160 (jurors shall not have unbridled discretion in determining the community standard for "patently offensive" because first amendment values applicable to the states through the fourteenth amendment provide appellate courts with authority to review these decisions where necessary).

[57] *See supra* notes 50-51 and accompanying text.

[58] 438 U.S. 726 (1978).

[59] *Id.* at 738.

[60] In the Criminal Code, 18 U.S.C. § 1464 (1988), the original prohibition on obscene broadcasts was codified. It had first been codified in the 1934 Act. Aside from the prohibition, the FCC has been interested in promoting the public interest. *See, e.g.*, Eastern Educ. Radio (WHUY-FM), 24 F.C.C.2d 408, 412-14 (1970) and Mile High Stations, 28 F.C.C. 795, 797 (1960), both of which stated that regardless of whether something is obscene in the context of literature, broadcasting has more of public interest concern due to its accessibility.

Pacifica was the judicial test of the FCC's power to regulate indecent broadcasts. In its *Pacifica* decision, the FCC, in finding that the broadcast was in violation of Section 1464 and not in the public interest, asserted that indecency and obscenity provided different bases for regulation. 56 F.C.C.2d 94, 95 (1975). The order in the case was specifically grounded in indecency, not obscenity.

[61] In the *Pacifica* case, the Commission revised its indecency test. It made the test more specific than the vague references made to "patently offensive" and "social value" in *Eastern Educ. Radio*, 24 F.C.C.2d at 412-13. In *Pacifica*, the Commission found that "the concept of indecent is intimately connected with the exposure of children to language that describes in terms patently offensive . . . by contemporary community standards . . . sexual or excretory activities . . . , at times of day when there is a reasonable risk that children may be in the audience." *Pacifica*, 56 F.C.C.2d at 98. No reference was

den censorship" under the 1934 Act.[62] Furthermore, the Court held that programming deemed "indecent" may be precluded from broadcast,[63] at least during certain times of the day.[64]

Pacifica extended the authority of the FCC to regulate non-ob-

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made to prurient interest, as was done in the legal obscenity decisions. *See, e.g.*, Miller v. California, 413 U.S. 15, 24-25 (1973).

Recently, the Federal Court of Appeals for the District of Columbia ruled on the FCC's definition of indecency. In Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988), the court upheld the FCC's definition of indecency as material describing or depicting, "in terms patently offensive measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *Id.* at 1335. The court was asked to deal with radio programs whose content was deemed by the Commission to be indecent when taking into account the time at which the broadcast occurred. The decision ultimately set up a "safe harbor" period, during which radio stations could broadcast "indecent material" and stated that material which was indecent but not obscene was constitutionally protected. *Id.* at 1343-44.

Action for Children's Television is an example of the *Pacifica* test at work. The *Action for Children's Television* court ruled that the Commission had not shown that a ban during evening hours reached the desired goal of protecting children from such programming. The court, however, implicitly affirmed the FCC's authority to regulate such programming, although it did add that the Commission must stay within first amendment requirements for free speech. *Id.* The court also rejected a contention by the plaintiffs that the Commission's definition was unconstitutionally vague. *Id.*

62 *Pacifica*, 438 U.S. at 736 (finding no "forbidden censorship") and at 750-51 (finding the broadcast indecent).

63 Indecency has not been given a formal definition by the Supreme Court, but it is generally considered to be a more restrictive standard than obscenity, which is the most liberal standard. The *Pacifica* Court, however, did issue a working definition of the term. It defined indecency as being that which fails to conform to generally accepted standards of morality. *Id.* at 740 n.14. Prurient appeal, a necessary element of obscenity, is not included in this definition. Further, with indecency, social value is not relevant and the use of community standards is also ignored. *Id.* Since the *Pacifica* case deals with the pervasiveness issue and the accessibility of radio to children, the average person standard is also not used. *Pacifica*, therefore, is difficult to apply to other media because of the narrowness of its holding to the specific facts in the case.

"Patently offensive," a prominent term in *Pacifica*, is defined in the case as being language that, while not necessarily obscene, may be deemed a nuisance according to the contemporary community standards. *Id.* at 731. A further element of this standard is exposure to children by virtue of broadcast at certain hours. *Id.*

64 *Pacifica*, while important because it shows that different content standards may be imposed for different media, is not applicable to other media besides radio and, in fact, is probably only selectively applicable to radio. Krattenmaker and Esterow, *supra* note 36, at 620-21. The case is limited in its holding because of its special circumstances. The broadcast was in mid-afternoon and the complaint involved a child. *Id.* at 729-30. The Court, in its holding, specifically dealt with the time of day factor. *Id.* at 748-52. *See* Krattenmaker and Esterow, *supra* note 36, at 620-21 (discussing narrowness of *Pacifica* and factors to consider in determining whether an individual broadcast is "indecent" and therefore not permitted for broadcast).

The Utah cable cases involve ordinances which banned programming at all hours of the day. Thus they are distinguishable from *Pacifica's* limitation of programming during particular hours. Further, the Supreme Court has refused opportunities to extend the decision to other media, viewing that the special interest in broadcast media by the government does not necessarily translate to a justification to regulate other media. Finally, as emphasized, there are fundamental differences between cable and broadcast media. *See* Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom.* Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987). *See also infra* notes 100-07 and accompanying text.

scene programming which may still be indecent.[65] It gave broadcasting, specifically radio, the most narrow first amendment protection because of the pervasive and intrusive effect of radio on the privacy of listeners' homes.[66] The *Pacifica* Court maintained that, due to the nature of the medium, it was impossible to prevent patently offensive programming from reaching children.[67]

Beyond *Miller* and *Pacifica*, there have been four significant cases dealing specifically with setting a standard for cable content regulation: *Home Box Office v. Wilkinson*,[68] *Community Television of Utah, Inc. v. Roy City*,[69] *Cruz v. Ferre*,[70] and *ACLU v. FCC*.[71] The first three cases dealt with localities which enacted ordinances deemed unconstitutional by courts. The fourth case involved cable operators' rights and, more importantly for the purposes of this Note, cable operators' duties in relation to lockboxes.

In *HBO*, the district court declared that the state could regulate non-obscene programming.[72] The court considered the constitutionality of a Utah statute which suppressed indecent cable programming.[73] Ignoring the *Pacifica* rationale, the court relied on traditional first amendment analysis to invalidate the statute on vagueness grounds.[74] The court viewed the statute as vague because it prohibited non-obscene programming from households that did not contain minors, as well as those that did.[75] Further, the court analyzed the issues of pervasiveness and accessibility to children, the rationale of *Pacifica*, by holding that the government may

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65 *Pacifica*, 438 U.S. at 737-38. *Pacifica* further affirmed the government's ability to regulate programming which is not legally obscene, but may be indecent. The Supreme Court, in allowing the FCC to determine what material is indecent, showed an inconsistency with its prior approach of community standards as described in *Miller*. The seven "dirty" words to which the FCC objected were: "fuck, shit, piss, motherfucker, cocksucker, cunt, and tit." *Pacifica*, 56 F.C.C.2d 94, 99 (1975), *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

66 438 U.S. at 748-49.

67 *Id.*

68 531 F. Supp. 987 (D. Utah 1982).

69 555 F. Supp. 1164 (D. Utah 1982).

70 755 F.2d 1415 (11th Cir. 1985).

71 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

72 *HBO*, 531 F. Supp. at 994.

73 UTAH CODE ANN. § 76-10-1229(1) (1980 & Supp. 1981).

74 *HBO*, 531 F. Supp. at 999.

75 *Id.* at 997 ("It is unconstitutionally broad to everyone."). Under *Pacifica*, the state is given the right to regulate programming, although the right is not extended to the point where a state may restrict material to a degree where adults are forced to only see, hear, and read matter that is acceptable for children. While states may, therefore, ban programming that it deems objectionable for children, it may not do so to the extent that adults' choices are also restricted. *See* Butler v. Michigan, 352 U.S. 380 (1957) (a state obscenity law held unconstitutional because it would permit adults to only see that which is fit for children).

only censor programming within strictly defined circumstances.[76] Finally, the *HBO* court stated that parents could easily control the viewing habits of their children.[77] The state, the court held, should not replace parental control.[78]

The second cable case, *Roy City*, involved a local ordinance enacted by the municipality of Roy City, Utah which regulated cable licenses by imposing its own definition of what constituted "indecent" programming.[79] The ordinance had the effect of banning non-obscene programming, legally defined under *Miller*.[80] Under the ordinance, the depiction of mere nudity was "indecent," and exposed the cable operator and the cable network that showed such material to revocation of the operator's license and criminal sanctions.[81] The district court found the ordinance unconstitutionally broad and in violation of the first and fourteenth amendments because it potentially banned non-obscene programming,[82] and therefore invalidated it as it overstepped the standards set out by the Supreme Court in *Miller*.[83]

As in *HBO*, *Roy City* established that to regulate programming under a *Pacifica*-style test, the circumstances must be narrowly defined.[84] The *Roy City* court delineated the differences between cable and broadcast television.[85] The court concluded that the *Pacifica* test is inapplicable to cable television, as cable, unlike broadcast television, is not pervasive and affords the viewer a greater level of choice.[86]

In *Cruz*, the district court considered a Miami, Florida ordinance that had the effect of suppressing allegedly indecent cable

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76 *HBO*, 531 F. Supp. at 997.

77 *Id.* at 1001. "And if we're concerned parents and we're not overjoyed by the violence and stupidity of The Dukes of Hazzard, we turn it off and direct our children to something else." *Id.*

78 *Id.*

79 Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1165-66, 1176 (D. Utah 1982).

80 *Id.* at 1172-73. The ordinance seems to be a good example of the fear courts have had of overzealous localities imposing morals. *See, e.g.*, *HBO*, 531 F. Supp. 987.

81 *Roy City*, 555 F. Supp. at 1176-77.

82 *Id.* at 1172-73 ("I emphasize again and again, public tolerance is not public approval."). *Id.* at 1172.

83 *Id.* at 1169 n.23.

84 *Id.* at 1167-69. "[T]he *Miller* standard . . . has . . . great virtues. It is a national standard with some flexibility on a local level based on community standards." *Id.* at 1171.

85 *Id.* at 1167 (comparing characteristics of cable and broadcasting). With cable there is a subscription, limited advertising, transmittal through wires as opposed to over the air, and a fee, all attributes that are the opposite of broadcast television and radio. *Id.*

86 *Id.* at 1169.

programming.[87] The court used an analysis similar to that used in *Roy City*.[88] However, it held that because the ordinance failed to adequately acknowledge the *Miller* test, it was unconstitutional.[89] The court also held that the ordinance violated the due process clause of the fourteenth amendment in that it permitted the local government to initiate complaints, preside over the hearings, and make its own determinations.[90] Thus, the City of Miami violated due process because of the nature of the hearing procedure and because it regulated only cable television and not other forms of media.[91]

The fourth significant cable case, *ACLU v. FCC*,[92] addressed the handling of lockboxes and a cable operator's duty to provide them. In the FCC decision below, the agency upheld requiring cable operators to provide lockboxes by sale or lease at the subscriber's request to block out any channel over which the operator had editorial control.[93] The agency further held that lockboxes may not be used to block out certain channels.[94] The court of appeals reversed, finding that the FCC failed to justify its exclusion of those channels.[95]

The court reiterated the long held position that the FCC had regulatory power over cable[96] and then addressed the Cable Act's lockbox provision, which states that upon a subscriber's request, an operator must provide, by sale or lease, a device to lock out a particular cable service.[97] According to the court, there was no discernible reason in the legislative history which justified a finding that certain channels may not be blocked out.[98] Therefore, the court held that the FCC may not suggest that certain channels cannot be blocked out.[99]

A fifth important cable case, though somewhat less significant

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87 Cruz v. Ferre, 755 F.2d 1415, 1418-22 (11th Cir. 1985), *aff'g* 571 F. Supp. 125 (S.D. Fla. 1983).

88 *Cruz*, 755 F.2d at 1418-20.

89 *Id.* at 1418.

90 *Id.* at 1417, 1422.

91 *Id.* at 1422 & n.10. *See Cruz*, 571 F. Supp. at 134.

92 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

93 *Id.* at 1579. The Cable Act requires cable operators to provide certain types of programming, including public, educational, and governmental channels, and certain channels that must be carried, generally local broadcast stations. *See* Cable Act, § 624(d)(2)(A), 47 U.S.C. § 544 (d)(2)(A) (Supp. V 1987).

94 *ACLU v. FCC*, 823 F.2d at 1579.

95 *Id.*

96 *Id.* at 1558-59.

97 Cable Act, § 624(d)(2)(A), 47 U.S.C. § 544(d)(2)(A).

98 *Id.*

99 *ACLU v. FCC*, 823 F.2d at 1558-59.

than the previous four, was *Wilkinson v. Jones*.[100] *Wilkinson* further elucidated the issues involved with cable indecency. In affirming the lower court decisions, the Supreme Court concluded that the Cable Act preempted state regulations in all areas of the cable industry, including indecency.[101] The Cable Act states, however, that state and local government may regulate "libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws."[102] Because the Cable Act specifically excluded indecency, state and local indecency regulations, according to the *Wilkinson* court, must be considered in light of whether indecency is "similar" to obscenity and thus covered by section 638 of the Cable Act.[103]

The *Wilkinson* court noted that, although Congress did not use the term "indecency" in section 638, the word appeared elsewhere in the Cable Act.[104] Further, the court stated that the explicit references to indecency strongly implied that Congress intended to omit indecency from the issues in section 638.[105] The Cable Act did not preserve state power to regulate cable indecency because, by allowing federal preemption, Congress manifested its intent to provide for the "widest possible diversity" of cable programming.[106] This holding effectively struck down the idea of cable indecency because of Congress' apparent intent to extend cable's content control

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100 480 U.S. 926 (1987), *aff'g* 800 F.2d 989 (10th Cir.), *aff'g sub nom.* Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985).

101 *Id.* at 1103-04. The Cable Act allows states and localities to maintain control over libel, slander, obscenity, and false or misleading advertising, but otherwise prevents state intervention in the programming content. Cable Act, § 638, 47 U.S.C. § 558.

The district court stated that the Cable Act bars both states and localities from imposing any requirements on, among other things, programming content, except as the Cable Act expressly provides. Cable Act § 638, 47 U.S.C. § 558.

102 Cable Act, § 638, 47 U.S.C. § 558.

103 *Wilkinson*, 611 F. Supp. at 1103-04. Since the *Wilkinson* court apparently struck down the idea of cable indecency, for a state or local indecency statute to be valid, it must have a definition of indecency which is similar to obscenity. For a discussion of this and other related issues, see Meyerson, *Cable Television's New Legal Universe: Early Judicial Response To The Cable Act*, 6 CARDOZO ARTS & ENT. L.J. 1, 19 (1987) [hereinafter Meyerson, *Universe*]. *See supra* notes 32, 43-44 and *infra* notes 144-47.

104 *Wilkinson*, 611 F. Supp. at 1104. *See, e.g.*, Cable Act, § 624(d)(2)(A), 47 U.S.C. § 544(d)(2)(A).

105 *Wilkinson*, 611 F. Supp. at 1104. "[E]xplicit indecency provisions [in other sections of the Cable Act] strongly imply that Congress deliberately omitted indecency from . . . § 638." *Id.* at 1105.

Section 612(h) of the Cable Act, permits local regulation of "programming on commercial access channels if the programming is obscene . . . lewd, lascivious or indecent." *Id.* Also, the Cable Act requires the boxes to be provided to restrict obscene or indecent programming. Cable Act, § 624(d)(2)(A), 47 U.S.C. § 544(d)(2)(A). These are two examples of the term "indecent" being used at other sections of the Act, while omitted from section 638. *See* Meyerson, *Universe, supra* note 103, at 19 n.120.

106 Cable Act, § 601(4), 47 U.S.C. § 521(4).

to the extreme position of the *Miller* obscenity standard.[107]

This line of cases has not produced a cable content standard. The cases have failed to elucidate a definite test by which to judge cable content and, as a result, have simply left future courts hearing these issues to their own devices to decide whether a given statute is constitutional or a given program permissible. The difficulties courts have had with elucidating an acceptable content standard bespeak the inherent futility of defining such opaque issues.

IV. WHAT'S WRONG WITH CABLE CONTENT REGULATION LAW?

The obscenity test set forth in *Miller* should not be applied intact to cable because it is too general to deal effectively with a broad range of situations and does not deal with the specific requirements of any individual medium. In fact, the Court in *Pacifica* set the precedent that an individual test may be tailored for a given medium.[108] A test tailored to the cable medium is necessary to regulate not just legally obscene material, but also that which, while not legally obscene, is indecent because of either the time of the broadcast, the pervasiveness of the medium, or another reason.[109]

Pacifica is a seminal case for cable because it further establishes that separate standards may be created under the *Miller* penumbra for specific media. Moreover, *Pacifica* deals with the special problems of an individual medium, rather than simply applying the *Miller* obscenity standard.[110] *Pacifica*'s indecency rea-

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107 In *Wilkinson*, 800 F.2d at 991, the court discussed the distinction between obscenity and indecency. *See supra* notes 47-57 and accompanying text. Indecency, according to the court, is different from obscenity and involves many more factors. *Id.* Obscenity is the more liberal standard. "Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." FCC v. Pacifica Found., 438 U.S. 726, 740 (1978). "It encompasses language that describes (or pictures that depict), in terms patently offensive as measured by contemporary community standards . . . at times of the day when there is a reasonable risk that children may be in the audience." *Wilkinson*, 800 F.2d at 991 (quoting *Pacifica*, 438 U.S. at 732). The Cable Act criminalizes the transmission of programs that are obscene or otherwise unprotected by the Constitution. It is not clear what "otherwise unprotected" means. *See supra* note 52 and accompanying text.

In *Wilkinson*, 800 F.2d at 997, and Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1170-71 (D. Utah 1982), the courts stated that all cable standards must comport with *Miller* requirements. This implies that if there is no specific standard for cable, the *Miller* legal obscenity test will be the standard. However, in a concurrence to the *Wilkinson* opinion, the idea that "indecent" Cable programming could be regulated was endorsed. *Wilkinson*, 800 F.2d at 992 (Baldock, J., concurring).

108 *See Pacifica*, 438 U.S. at 746-50.

109 *See id.* at 748-50 (discussing pervasiveness and time of broadcast).

110 Part of George Carlin's performance was a litany of words which he believed (correctly) to be unacceptable for broadcast under FCC rules. It was broadcast over a small New York public radio station, WBAI-FM, during the mid-afternoon and was heard by a man and his son. The father objected to his son's exposure to such language. He wrote

soning, however, cannot be applied to cable because there are many aspects of cable which distinguish it from the type of pervasive medium the *Pacifica* Court envisioned. Cable is not a free service, but one that individuals choose to bring into the home.[111] Further, it is possible to choose the various types of programming which each subscription will contain.[112] Finally, a lockbox may be acquired to block out certain channels for any amount of time.[113] Therefore, the *Pacifica* Court's concern with protecting children is not directly relevant to the cable obscenity dispute. In an abstract sense, broadcast television and radio, since they are transmitted through the air, are literally forced upon us and are therefore pervasive,[114] while cable is transmitted through wires.

A further issue to consider in cable regulation is the *Miller* requirement of a "contemporary community standard."[115] It is unclear exactly what this standard means and whether it refers to a national or local standard.[116] Therefore, when considering ways in which to approach regulating cable programming content, it is apparent that courts cannot deal with cable by simply applying standards from another medium, as some have found.[117] If localities are permitted to set out individual obscen-

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the FCC to protest and the agency initiated proceedings against the owners of the station, the Pacifica Foundation. Both the FCC and the Supreme Court found against the station and its owner because the broadcast was deemed indecent. *Id.*

111 *See supra* note 25 and accompanying text.

112 *See* Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1167 (D. Utah 1982) (table comparing cable to broadcast television).

113 *See supra* notes 20-24 and accompanying text.

114 Television and radio are over-the-air transmissions which constantly surround us, while cable is sent through wires, thereby never physically proximate to the population. Although it may be argued that for some people the only way to obtain television is by way of cable, this argument is not effective because everyone still has a choice of what programs and channels they will choose for their subscription, as discussed in the *Roy City* case. *See supra* notes 79-86 and accompanying text and *infra* notes 128-32 and accompanying text. Cable programming, through the variety of methods discussed, may be avoided at will, thereby negating the pervasiveness argument of *Pacifica*. *See supra* notes 65-66.

115 *See supra* note 51 and accompanying text.

116 Subsequent cases described the *Miller* test as essentially local. *See supra* notes 53-54 and accompanying text. Despite the Court's later attempts to clarify the local/national question in later cases, the language of *Miller* requires an interpretation of the language as national. "Contemporary community standard" appears to mean that the Court wants the standard to be contemporaneous with the social mores of that time. In fact, in discussing the contemporary "sexual revolution" and layers of "prudery" the Court implies that an element of timeliness and consideration for the current standards of society is needed. *See Miller*, 413 U.S. at 36. A "community" standard must be flexible enough to endure time, yet also concrete enough to allow enforcement. While this is difficult, it is necessary to create an effective standard.

117 Most cases which have overturned local ordinances have, in doing so, at least considered the standards of other media. *See, e.g.*, Cruz v. Ferre, 755 F.2d 1415, 1420 (11th

ity standards, the cable industry faces a dilemma. National networks, like HBO and Cinemax,[118] broadcast the same programming throughout the country. If localities set out extremely strict guidelines for permissible programming, much of the programming shown on these networks may be deemed obscene, thus preventing national cable networks from broadcasting a large percentage of their programs in certain areas of the country.[119] National cable networks could find themselves in a position where their programs will be acceptable in certain areas and not acceptable in others.[120] This would create economic problems for the network and exacerbate the problem of denying programming that is not legally obscene under *Miller*, but merely "obscene" within a locality's standards.

Such an economic quandary crystalizes the problem of regulating cable programming content. Imposing a more restrictive standard than "legal" obscenity, such as indecency, may prevent from broadcast much of what is currently deemed acceptable.[121] Further, if localities set their own content standards through *Miller's* contemporary community standard, national cable networks may be liable to suit or injunction in various parts of the country due to programming that is acceptable elsewhere.[122] Problems would also exist because the Cable Act states that cable operators may not exercise editorial control over public access programming because the Cable Act is a federal statute dealing with programming on local cable systems.[123] This would create a conflict between case law which provides for local standards and a federal statute which purports to regulate public access, the most local of programming.[124]

Cir. 1985); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1168-70 (D. Utah 1982); HBO v. Wilkinson, 531 F. Supp. 987, 996 n.18 (D. Utah 1982).

118 HBO and Cinemax are two of the largest national cable networks. Their programming consists primarily of movies uninterrupted by advertising. Some of the programming could be deemed indecent, at least based upon the statutes enacted in the Utah cases, especially the statute in *Roy City*, which found mere nudity to be obscene. *Roy City*, 555 F. Supp. at 1173-74 (citing Roy City Ordinance, 17-3-6(6)(b)(7)).

119 In the cases involving local ordinances, national networks have been among the plaintiffs because their programming has been adversely affected. *See HBO*, 531 F. Supp. 987 (D. Utah 1982).

120 *Id. See supra* note 15 and accompanying text.

121 *See* FCC v. Pacifica Found., 438 U.S. 726, 740 (1978).

122 *See, e.g.*, ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); *Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *HBO*, 531 F. Supp. 987 (D. Utah 1982).

123 H.R. REP. No. 934, *supra* note 22, at 35.

124 Public access is the service provided by operators to local groups who wish to present community oriented programming. *See supra* notes 34-37. The FCC has no power to control programming that originates from the facilities of the cable operator. *HBO*, 567 F.2d at 61 (Weigel, J., concurring). This ruling creates problems in that much

The importance and applicability of *Miller* therefore lies in two areas in the context of cable program content regulation. First, *Miller* sets out a general rule for obscenity.[125] However, its later explication by the Court acknowledges that the federal judiciary may not impose either its definition of "prurient" or that of the community and it leaves regulation to localities so long as they stay within the parameters of the reasonableness requirement.[126] While *Miller* grants states rights, it also creates new problems related to protecting the rights of those parties, whether they be individuals, cable operators, or cable networks, whose reading of obscenity does not comport with the view of the local authorities. *Miller* also raises the question of whether state's rights will be allowed to trammel the federal free speech rights of individual citizens or groups. Based on the litigation of cable content regulation issues, a recurring problem has been this tension between the "community standard" of *Miller* and the first amendment free speech right.[127]

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of the controversial programming comes from public access channels, which are, by definition, being transmitted from the operators' facilities. *See supra* notes 31-36 and accompanying text.

125 *See supra* notes 47-52 and accompanying text.

126 *See supra* notes 53-56 and accompanying text.

127 Because of this local/national tension, the preemption doctrine must be considered. The preemption doctrine is the use of federal law to trump conflicting or overlapping state law. *See* P. BATOR, D. MELTZER, P. MISHKIN & P. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 895-96 (3d ed. 1988). The Supreme Court has dealt with the question by finding a general FCC intent "to preempt 'any state or local regulation' of the 'entire array of signals carried by cable television systems,' non-broadcast, as well as broadcast." Riggs, *Indecency on the Cable: Can It Be Regulated?*, 26 ARIZ. L. REV. 269, 291 (1984) [hereinafter Riggs] (citations omitted). When the FCC clarified its rules in 1974, it stated that it was currently in favor of preempting pay-cable. Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C.2d 175, 200 (1974). The Supreme Court has taken this and other statements, often made in non-indecency contexts, to mean that state regulation is preempted completely by federal law. Riggs, *supra*, at 292. Section 638 of the Cable Act, however, may be read as recognizing a role for local laws and rules when it states, "Nothing in this title shall be deemed to affect the criminal or civil liability of cable programmers . . . pursuant to federal, state, or local law of libel, slander, obscenity . . . . " Riggs, *supra*, at 293 (quoting Cable Act, § 638, 47 U.S.C § 558).

The *Wilkinson* case also discusses these issues. Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099, 1105 (D. Utah 1985), *aff'd sub nom.* Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987). The court states that it would be unlikely that Congress would accidentally omit indecency from section 638 of the Cable Act. Rather, according to the court, Congress intentionally ignored indecency when compiling its list of areas from which local laws would not be preempted. Therefore, the court reasoned that the section must be read to grant Congress the power to preempt local laws in the area of indecency. *Id.* at 1104-05. However, the court seemed to reverse itself when it said that it still must rule on the constitutionality of indecency laws because the ruling on the preemption issue required a ruling on the first amendment issue. *Id.* at 1105-07. If the indecency issue were preempted, it would be a positive step toward achieving the widest possible diversity in cable programming, the goal of section 601(4) of the Act. Cable Act, § 601(4), 47 U.S.C. § 521(4) (Supp. V 1987). For a discussion of this issue, see Meyerson, *Universe, supra* note 103, at 19-20.

The cable cases have analyzed the local/national tension in the context of the cable medium. In reaching its conclusion, the *Roy City* court compared cable to film, and questioned why something that is acceptable on Main Street should be called obscene on cable.[128] This statement highlighted the fundamental assumption that cable is not a pervasive medium like radio and is indeed more similar to film. Thus, the court implicitly vested cable with a *Miller* legal obscenity standard.[129] Since the Roy City ordinance did not acknowledge the *Miller* test, it was unconstitutional on its face according to the court.[130] The court found that for a standard to be constitutional, it must be within the strictures of *Miller*.[131] Therefore, any given standard need not mirror the *Miller* test, so long as it complies with the *Miller* elements and, if it did not accept the elements, had valid reasons.[132]

ACLU begins to suggest some possible solutions to the problem of establishing standards for cable. While other courts have made clear that any cable standard must comport with the *Miller* rule and that the *Pacifica* Court established a separate standard for the radio medium, *ACLU* deals with lockboxes and the possibility of blocking out certain channels at the request of subscribers. The significance of *ACLU* is that the court extended a more liberal standard for cable content regulation, since a subscriber may now exclude any channel she desires.[133]

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128 *Roy City*, 555 F. Supp. at 1170 (comparing cable television to film).

129 *Id. See supra* note 61 and accompanying text (discussing the court's deference to FCC judgment on defining indecency). The implication of the cable cases is that courts want a content standard developed. Since courts are unwilling to develop a standard they will therefore assume the maximum standard and wait for a legislative body to set the rule. This is not a wise choice because legislators are more susceptible to the vagaries of public opinion than judges and are therefore less likely to establish a lasting standard. *See, e.g.*, Jones v. Wilkinson, 800 F.2d 989, 998-99 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987) (Baldock, J., concurring) (standard to apply to cable depends upon the characterization of cable as a medium of expression); Cruz v. Ferre, 755 F.2d 1415, 1421-22 (11th Cir. 1985); Playboy Enters. v. Pub. Serv. Comm'n of Puerto Rico, 698 F. Supp. 401, 418 (D.P.R. 1988) (upholding Puerto Rican cable ordinance which followed the *Miller* test); *Roy City*, 555 F. Supp. at 1170-71.

130 *Roy City*, 555 F. Supp. at 1170-72.

131 *Id.* at 1169 ("The *Miller* standard is applicable.").

132 *Id. See Cruz*, 755 F.2d at 1418-19; *Wilkinson*, 611 F. Supp. at 1109-10. Examples of this acknowledgement of the *Miller* test are the Supreme Court's upholding the FCC's rulings on radio in FCC v. Pacifica Found., 438 U.S. 726 (1978) and Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988), upholding the Commission's definition of indecency as more restrictive than *Miller* obscenity. *Roy City*, 555 F. Supp. at 1164, like HBO v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982), is instructive as to ways in which to consider these issues. However, these courts refuse to go beyond stating what standard is unacceptable and stating that the *Pacifica* standard does not apply, to the next step of saying what is an acceptable standard.

133 ACLU v. FCC, 823 F.2d 1554, 1579 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

While it can be implied from *ACLU* that cable should be subject to a liberal standard,[134] it is unclear exactly to what length such a standard should go. The availability of lockboxes solves many problems. However, if the devices are only available for a price, subscribers may be required to pay to keep arguably obscene materials off of their screens.[135] If one reads the *Miller* test as allowing local interpretations of obscenity, subscribers could again be forced to pay to keep objectionable programs out,[136] thus creating an inequitable situation.

Furthermore, the allocation of editorial control must also be addressed. Regardless of the no-censorship provision in the 1934 Act,[137] the FCC has decided that, in certain circumstances, it will be acceptable for operators to censor programming.[138] Despite this FCC view, the idea of operators censoring programming is problematic due to the local perspective of a cable system operator and the wide cross-section of attitudes concerning what constitutes indecency or obscenity across the country.[139] Because of the concern for local standards which runs through the cases, it would be unreasonable to develop a national standard to the exclusion of local concerns, despite economic problems this could cause national cable networks. Therefore, these problems could be overcome by limiting, to some extent, the consideration of local concerns when developing a standard because of the tendency of cable content litigation to involve local standards which have violated federal rights. Courts have considered national concerns as preeminent over local mores in the past when they have limited local rules to the strictures of the *Miller* test and drafters of local ordinances and regulations could have similar priorities.

However, as *Roy City* and *HBO* illustrate, overzealous locali-

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134 *See, e.g., id.*; *Roy City*, 555 F. Supp. 1164; *HBO*, 531 F. Supp. 987 (D. Utah 1982).

135 *See supra* note 23 and accompanying text (cable operators may charge for lockboxes).

136 *See, e.g.*, Miller v. California, 413 U.S. 15, 30-33 (1973) (discussing the "contemporary community standard"). The problem of federal versus local regulation also remains unsolved by the courts. *Id. Miller* seems to endorse allowing localities to set their own standards. *Id.* The cases, however, establish that such local standards must be tempered by the *Miller* test. *See also* Hamling v. United States, 418 U.S. 87 (1974); Jenkins v. Georgia, 418 U.S. 153 (1974). Courts have consistently ruled that local standards may be imposed so long as their elements are within the three steps of *Miller*. *See supra* note 51 and accompanying text. The three steps are therefore pivotal. *See Cruz*, 755 F.2d 1415; *Roy City*, 555 F. Supp. 1164; *HBO*, 531 F. Supp. 987.

137 47 C.F.R. § 76.256(b), (d)(1)-(4)(1982).

138 *See supra* notes 61-63 and accompanying text.

139 *See supra* notes 47-57 and the discussion of the "contemporary community standard." For a description of the varying opinions toward these questions, see *supra* note 10 and accompanying text.

ties with extreme views will often abuse first amendment protections if the federal government or judiciary does not have some control.[140] It seems absurd to expect parties to go to court whenever a locality sets out an unconstitutional ordinance, when one standard or rule could be established. There must be a rule set out whereby local and federal concerns are balanced to avoid the persistent litigation relating to local ordinances. As the *Roy City* and *HBO* cases suggest, such litigation will result if the current loose regulatory scheme in which localities have free reign to set out their own rules is continued.[141]

One possible remedy for the local/national problem is to allow, as the FCC has, local regulation of programming originating at the facilities of the operator.[142] The problem with the local origination regulation concept is that there is a tendency on the part of the local legislators to overregulate and attempt to control the programming content on national networks.[143] If this issue is viewed as a first amendment problem and not one of local obscenity law, allowing local regulation could lead to different definitions of what constitutes free speech from state to state and even from town to town. Since this is not a desirable goal, there must be a scheme whereby local and federal interests are balanced to create a rule under which cable content regulation can be achieved on a consistent, national basis.

Without any firm guidance on obscenity from the Cable Act *per se*, operators must look to the FCC ruling which gave cable operators editorial control over programming transmitted through channels under their exclusive control even though this ruling was called into question by the Cable Act.[144] Further, as discussed earlier, the FCC is chartered in the 1934 Act with an anti-censorship provision, thereby limiting the Commission's ability to act as content regulator.[145] While the agency was prohibited from engaging in censorship, it was given the right to ban obscene, indecent, or profane language by means of radio

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140 *See, e.g.*, *HBO*, 531 F. Supp. 987; *Roy City*, 555 F. Supp. 1164.

141 *See, e.g.*, *HBO*, 531 F. Supp. 987; *Roy City*, 555 F. Supp. 1164.

142 *See supra* note 31 and *infra* note 144 and accompanying text.

143 *See supra* notes 68-107 and 128-32 and accompanying text.

144 *See, e.g.*, 47 C.F.R. § 76.215 (1982); In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations Concerning Cable Television Channel Capacity and Access Channel Requirements of Section 76.251, 83 F.C.C.2d 147 (1980) (affirming the right of cable operators to exercise content control over "origination" channels which operate out of the operator's facilities, despite the possible prior restraint problems this idea suggests). *But see* H.R. REP. No. 934, *supra* note 22, at 35 (cable operators as "conduits" without editorial discretion).

145 *See supra* notes 26-32 and 62 and accompanying text.

communication.[146]

Thus, the problem is that while the Cable Act was designed to set out a specific policy for cable operations, cable operators have nothing to use as a guide within its text. A cable operator, left without a standard for programming content and editing programs, must look to case law for some sort of guidance.[147] An operator cannot simply use the *Miller* test to make decisions because, while courts have implicitly applied the *Miller* test to cable, the tone of the cases suggests that if a proper rule comes along, cable will not be vested with such a liberal standard.[148]

On the other hand, courts have not made clear what the content standard will be. Courts hearing these issues have been vague as to what sort of test will be acceptable, merely stating what will not be acceptable as a standard. Therefore, because the Cable Act conflicts with the cases regarding where the responsibility for the regulation lies, there should be a uniform rule on how to handle questions of cable content regulations, and not mere case-by-case adjudication with no definite rule.

V. Proposals and Possible Solutions to the Unique Problems Inherent in Cable Content Regulation

Miller was as good a definition as is possible for obscenity,[149] considering the inherent constraints the Court was under while considering the issue.[150] Local and federal issues had to be balanced and the obscenity definition had to be couched in flexible terminology to stand the test of time and changing morals.[151] Probably the best description of obscenity was that of Justice Stewart, who defined pornography by saying, "I know it when I see it."[152] However, the problems of vagueness and shifting

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146 *See supra* notes 26-30 and accompanying text.

147 As discussed in the text, a cable operator has no clear guidance as to whether a local ordinance is constitutional. *See supra* note 144 and accompanying text.

148 *See, e.g.*, Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); HBO v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982).

149 *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).

150 For example, the Court had to weigh federal versus local interests. *Id.* at 29-32.

151 The Court had to create a rule that was general enough to be able to accommodate the idea that what is considered obscene today, may not be considered obscene in twenty years, so they couched their terms in generalities like "prurient interest" and "community standards." *Id. See supra* notes 47-57 and accompanying text.

152 Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring).

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligently doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Id. at 197. The Court held that a film was not obscene and that therefore, the owner of

morals will probably always exist, thereby hindering any attempt to create a uniform body of legislation or case law on the issue. The best solution is to apply a different standard to individual media,[153] thereby lessening the vagueness and over-breadth problems that have plagued some attempts at drafting obscenity statutes.[154]

Cable does not carry with it the problems outlined in *Pacifica* and other cases of pervasiveness and availability to children because it is brought into the home by choice. Both a subscription and a special hook-up are necessary for installation.[155] Therefore, cable should not be held to a tight standard for content regulation. Additionally, cable is becoming nearly as common, or pervasive, as television itself.[156] However, as the court in *Roy City* discussed,[157] there remain several significant differences, including the subscription factor and the different amount of advertising support.

If lockboxes are required to be distributed free of charge to any subscribers who request them, cable should then be able to claim at least a modified legal obscenity standard, perhaps applicable only during certain times of the day. This is because lockboxes allow for self-censorship and remove the necessity for government to determine what equals obscenity or indecency.[158] Even with these precautions, the *Miller* standard would still be too liberal. Because of the nature of the cable medium, even with the effective use of lockboxes, there is still great potential for exposing children to indecent material. Payment for lockboxes, if it is required of subscribers, should be made by the objecting viewer. If material is legally obscene, it may not be broadcast at all. Conversely, if the program is not legally obscene, the technology is available for those who disapprove of the programming to block it out.

The lockbox solution can also be seen from a market view,

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the theater which showed the film could not be prosecuted under the state obscenity law. *Id.*

153 *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978).

154 *See, e.g.*, Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); HBO v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982).

155 *See supra* notes 16-25 and accompanying text (discussing differences between cable and other media).

156 *See* Gabor, Work, & Cuneo, *Cable TV's Fresh Pitch*, U.S. NEWS & WORLD REPORT, Jan. 30, 1989, at 56 [hereinafter Gabor, Work, & Cuneo].

157 *See Roy City*, 555 F. Supp. at 1167.

158 *See, e.g.*, Action for Children's Television v. FCC, 852 F.2d 1332, 1343-44 (D.C. Cir. 1988) (discussing the idea of tailoring standards according to the time of day of the broadcast).

an approach not yet taken by courts. Bearing in mind the practical issue of the statutory language and the possibility of amending it, Congress could develop a regulatory scheme in which the operator provides a lockbox at market rate. The subscriber could use the box to block whatever programming she finds offensive. In this way, the cable content issue would again disappear, as the viewer would self-regulate.

The pragmatic problem with such a proposal, at least at present, involves payment for the boxes. Any solution including lockboxes would require some change in the Cable Act's lockbox provision, which requires operators to provide lockboxes and allows a charge for them, but does not oblige operators to inform subscribers of the option. One solution may be for the cable operators to increase their basic rate slightly and provide lockboxes at no additional price when a party subscribes to the cable service. However, those who do not want a box would probably object to the price increase.

For any price regulation plan to work, the FCC would probably have to take a limited role in regulating precisely who would pay the market cost, all subscribers, just those who want the box, or the operator. Not all plans would be equally effective. For instance, if the operators were required to pay, they would ultimately pass the cost on to the customers. One possible solution could be to require the subscriber who objects to programming or the producers of programming to pay for the lockbox. The pragmatic problem with implementing such a system would likely be the logistics of determining the price of the lockbox and who receives it. Also, this alternative implicates a constitutional problem of requiring people to pay to keep out objectionable programming. Since the definition of obscenity is vague, requiring people to pay to avoid programs which may in fact be obscene and therefore illegal, is inequitable. The idea of producers paying is more feasible, except for the probability of the production houses merely passing along the cost to the cable networks, who would in turn pass it along to their subscribers.

Pay-per-view,[159] which has become more popular recently,[160] may also solve cable's regulatory problems. Under a pay-per-view plan, viewers pay a fixed rate for an individual program, for example $5 for a movie or $19.95 for a championship

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159 Pay-per-view is controlled by a computer installed at cable networks that allow viewers to order individual programs and be billed à la carte. Conway, *Pay-Per-Peek*, FORBES, Oct. 11, 1982, at 10.

160 Gabor, Work, & Cuneo, *supra* note 156, at 57.

boxing match,[161] in addition to their basic cable fee. Under a pay-per-view system, subscribers engage in a form of self-censorship. However, this would only be workable if pay-per-view schemes grow to the point where they offer full service programming, or at least full-time programming.[162] Currently, such service is only used for special events like championship boxing, rock concerts, or exceptionally big movie premieres.[163] The present state of pay-per-view is such that companies which provide the service are only able to provide limited amounts of programming, generally special events, due to the lack of the requisite technology.[164]

The optimal content standard should then be one, already used to some extent by national cable networks,[165] which, during certain hours, employs the *Miller* test, but not during hours in which children are most likely watching. This approach takes an element of the *Pacifica* test and applies it to cable.[166] Further, lockboxes should be offered free of charge to block out programming viewers deem indecent or obscene, thus allowing for self-censorship and none of the vague formulations of obscenity that courts have developed. Ultimately, the cost will most likely be passed along to the subscribers, but operators will bear the initial cost. If, as in *Roy City*, subscribers object to programming which is not indecent or obscene according to any of the Supreme Court and FCC standards, the objecting subscribers should be required to pay for the lockbox, since the cable operator and the network are offering programming within even a restrictive view of acceptable bounds for programming.

Because public access programming is also a source of much

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161 *See, e.g., id.*; *Cable: Coming to Terms With Adulthood*, BROADCASTING, Jan. 3, 1983, at 75.

162 Gabor, Work, & Cuneo, *supra* note 156, at 57.

163 *See supra* note 160 and accompanying text.

164 Approximately 12 million homes had the required equipment to receive pay-per-view programming. Huber, *Hooray For Pay Television*, FORBES, Dec. 25, 1989, at 136. *See supra* note 162 and accompanying text.

165. Currently, national networks, like HBO and Cinemax, use the MPAA rating system and announce what a film's rating is prior to its broadcast. Krattenmaker and Esterow, *supra* note 36, at 631. The idea of "channelling," in which the objectionable ("obscene" or "indecent") programming is moved to later time periods has been suggested. Meyerson, *The Right, supra* note 6, at 168-69. This is comparable to a city government zoning a given section as the "adult" movie house neighborhood. *Id.* Once again, as has been the theme of this Note, who decides what is obscene, and by whose standards is that decision made?

166 *Pacifica* considered time of broadcast one of the key elements as to whether the program may be broadcast. *See* FCC v. Pacifica Found., 438 U.S. 726, 732 (1978). A modified version of the *Miller* test which balanced the *Miller* standards with the pragmatic concerns of *Pacifica*, including time of broadcast and pervasiveness of the medium, seems to be a possible solution to cable's content problems.

of the controversial programming,[167] another solution to the issue of censoring public access shows would be to create different levels of public access programming. One channel could provide the "obscene" or "indecent" fare while another channel could provide programming which is less likely to offend subscribers. Subscribers would then be given the option of not having both or either channel as part of their subscription package. This solution seems the most viable, as it is a variation on the movie rating system, which has worked effectively.[168] The drawback, however, is that national cable networks tend to have diverse programming, running the gamut from children's films to soft-core adult fare. As a result, this solution is most applicable to public access channels because it is unlikely that the national networks would be willing to stigmatize themselves as the adult or children's channel.

While lockboxes are not the ideal solution to the cable content problem, they offer the best solution to the problems national cable networks face. Lockboxes preclude the government from determining what is acceptable and allow for self-censorship by viewers.[169] If the Cable Act were to require cable operators to distribute lockboxes free of charge to subscribers, the question of what constitutes indecency will largely be rendered moot because of the ability of the viewer to make the decision of what is acceptable.[170] However, the reality of the market is such that the lockbox solution could not be completely adopted largely due to the market problems of spreading the costs. Some degree of large scale usage of lockboxes would go a long way towards curing many of the ills that local legislatures try to cure with poorly drafted statutes.

VI. CONCLUSION

Although case law has dealt extensively with obscenity involving radio, film, and television, courts have neither set out an acceptable obscenity standard for cable television nor stated what restrictions may be constitutionally prohibited. As case law and legislative history surrounding cable television indicate, cable has

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167. *See supra* notes 34-36, 45, and 124 and accompanying text.

168 *See supra* note 5 and accompanying text.

169 In such a scenario, no moral judgments need to be made by the government or any outside body regarding the content of programming because a subscriber decides for herself whether a program is acceptable.

170 Due to the ability of subscribers to engage in self-censorship, the issue of indecency is irrelevant. If a subscriber considers programming objectionable, he or she may simply lock it out.

been a problem child because it is a hybrid of its predecessors. As a result, localities have tended to apply their own, often parochial, content regulation standards to cable. Courts, in response, have failed to develop new standards specific to the cable medium, despite their acknowledgement that standards may be needed.

As cable's popularity in the entertainment market increases, the question of appropriate cable content regulations must be addressed. The legislative history of the Cable Act illustrates Congress' concern about dictating what programming cable systems should provide.[171] Such concern illustrates a tension between protection of free speech and the interest in a community's right to have some measure of control over what is broadcast locally. Because of this conflict, the standard for cable should be more liberal than that of the more pervasive media of television and radio, but more strict than a legal obscenity test.

The solution should be one which provides lockboxes free of charge to any subscriber who wants one, despite the likely protests of the cable operators who would have to provide them. This would provide a pragmatic response to the idea of self-censorship. In essence, the viewer has the best censoring tool: if you don't like it, turn it off. Further, this solution would preclude the government from making value judgments as to what constitutes "obscene" or "indecent" program content.

This Note has not attempted to present a Solomonic solution to cable's content regulation problems. Too many competing interests and too many conceptions of morality are involved for a simple splitting of the baby. As a result, this Note has presented a basic, pragmatic solution. While it may seem overly simplistic to merely say "let the viewer decide," when it comes to free speech, that is the whole point: the free market of ideas should reign supreme. As long as judicial and statutory definitions of obscenity and indecency are largely subjective,[172] there will be no answers to the problems of cable content regulation, only further questions.

Michael Bauman

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171 H.R. REP. No. 934, *supra* note 22, at 26. Congress did not "believe it appropriate for government officials to dictate the specific programming to be provided over . . . cable, and (the Act) reflects this determination." *Id.*

172 *See, e.g.*, Springer, *Smut and the Bottomline*, Media Business News, Oct. 24, 1988, at 1, col. 2 and 18, col. 1 (obscenity must be defined in objective terms, otherwise broadcasters have no way of knowing how to comply with "obscenity" laws).