Obscenity in the Age of Direct Broadcast Satellite: A Final Burial for Stanley v. Georgia(?) , A National Obscenity Standard, and Other Miscellany

John V. Edwards
OBSCENITY IN THE AGE OF DIRECT BROADCAST SATELLITE: A FINAL BURIAL FOR \textit{STANLEY v. GEORGIA(?)}, A NATIONAL OBSCENITY STANDARD, AND OTHER MISCELLANY

[C]ommunications technology is dynamic, capable tomorrow of making today obsolete.\(^1\)

The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.\(^2\)

In February, 1990, a Montgomery County, Alabama, grand jury returned an indictment against four companies on charges of obscenity.\(^3\) In November, 1990, the U.S. Attorney's offices in New York and Utah accepted plea agreements stipulating a guilty plea by one of the four companies for a felony charge of distributing obscene material.\(^4\) These charges, targeting obscenity, are among the first filed on the state and federal levels against companies utilizing direct satellite transmission.

The scrambled\(^5\) and unscrambled direct broadcast satellite signal is distinct from any other form of media. This distinctive nature of the direct broadcast satellite signal requires a fresh look at obscenity regulation. The direct broadcast signal is dis-
similar to the radio, broadcast, or cable television signal in that its distributional area encompasses numerous "communities." The "communities" concept is a primary consideration for a fact finder to apply when determining whether a particular work is obscene. Unlike movies shown in theaters, the movies broadcast unscrambled over direct broadcast satellites cannot be targeted to only carefully selected and narrowly defined areas. The cases this Note discusses highlight the new challenges facing prosecutors and the courts dealing with the age-old problem of obscenity.

Home Dish Only Satellite (HDOS), based in New York, broadcast adult material on the "American Exxxtasy" Channel until March 9, 1990. During the early evening hours of transmission, HDOS broadcast, unscrambled, a "soft-porn" film and previews of "hard-core" films to be broadcast later in the evening. Hard-core films and adult product advertisements followed. HDOS scrambled the hard-core films to prevent unauthorized access. HDOS advertised and sold subscription rights to the scrambled sections of the service during the unscrambled part of the broadcast.

U.S. Satellite Corporation, Inc. (USSC) transmitted both the unscrambled and the scrambled material from an uplink facility in Utah to a GTE Spacenet satellite travelling in a geosynchr-
The satellite's orbit permitted the retransmitted signal to be received throughout the continental United States, part of Mexico, and a portion of Canada.

In coordination with transmission of the scrambled films, USSC transmitted the signature codes of American Exxxtasy subscribers' descramblers. These signature codes actuated descramblers linked to the subscribers' television sets. A small number of Montgomery County, Alabama, residents subscribed to the American Exxxtasy Channel and obtained descrambling devices to receive the broadcasts.

Following the broadcast, children gained access to a number of descrambled movies and soon circulated video cassette tape copies of the movies in neighborhood schools. After local officials received complaints, Alabama convened a grand jury to review the films to determine whether the films were obscene according to Miller v. California, 413 U.S. 15 (1973), for determining whether material is considered "obscene":

"We now confine the permissible scope of [the] regulation of obscene materials to works which depict or describe sexual conduct. That conduct must be specifically defined by applicable state law, as written or authoritatively
to prevailing community standards\textsuperscript{20} in Montgomery County, Alabama. The state grand jury returned indictments\textsuperscript{21} on February 13, 1990, against HDOS, USSC, GTE, and GTE Spacenet Corporation in Montgomery County District Court for violating the Alabama Code\textsuperscript{22} involving the distribution\textsuperscript{23} of obscene material.\textsuperscript{24}

The U.S. Attorney's offices in Utah and the Western District of New York followed suit, and, in accordance with a plea agree-

...The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.\textsuperscript{Id.} at 24 (footnote omitted) (citations omitted). The Court has since fine-tuned the doctrinal test of Miller by holding that the jury must utilize a reasonable person standard to determine the value of a particular work. This value does not vary between communities.\textsuperscript{See Pope v. Illinois, 481 U.S. 497, 500-01 & n.3 (1987).}

20. The fact finder uses local community standards to judge whether a work is obscene. \textsuperscript{See infra notes 122-33 and accompanying text.}

21. The fact that the movies came to the attention of authorities through children may have affected the grand jury's determination. This Note, however, discounts this possibility and evaluates the cases as if the grand jury's determination was based solely on the nature and content of the films and on the prevailing community standards of tolerance in Montgomery County, Alabama.

22. (1) It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material for any thing of pecuniary value. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than $10,000 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year.

(2) It shall be unlawful for any person, being a wholesaler, to knowingly distribute, possess with intent to distribute, or offer or agree to distribute, for the purpose of resale or commercial distribution at retail, any obscene material for any thing of pecuniary value. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than $20,000 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year.

\textsuperscript{ALA. CODE § 13A-12-200.2 (Supp. 1990).}

23. Section 13A-12-200.1(3) defines "distribute" as "[t]o import, export, sell, rent, lend, transfer possession of or title to, display, exhibit, show, present, provide, broadcast, transmit, retransmit, communicate by telephone, play, orally communicate or perform." \textsuperscript{Id. § 13A-12-200.1(3).}

ment, filed a felony information on November 28, 1990, against HDOS\textsuperscript{25} for violating the federal statute\textsuperscript{26} prohibiting the distribution of obscene materials by cable or subscription television.\textsuperscript{27}

Pursuant to Alabama law,\textsuperscript{28} the Governor of Alabama requested extradition of four principals of HDOS from the State of New York.\textsuperscript{29} The Governor of New York refused extradition.\textsuperscript{30} The New York Attorney General's office found no indication that the transmissions in question in fact were obscene in New York, and the Alabama law did not require the transmissions to be legally obscene in New York.\textsuperscript{31}

USSC filed a motion to dismiss the Alabama indictments.\textsuperscript{32} USSC argued that Alabama failed to demonstrate jurisdiction and venue for the case because any action that did take place did not take place within Alabama.\textsuperscript{33} USSC further claimed that its status as a common carrier protected USSC from the content violations of others because the federal regulation in the broadcast area preempted state law and shielded USSC from state prosecution.\textsuperscript{34} USSC raised due process concerns based on federal

\footnotesize{Montgomery County, Ala. filed Feb. 13, 1990); Indictment at 2-8, State v. U.S. Satellite, Inc. No. 90-000971-G (Cir. Ct. Montgomery County, Ala. filed Feb. 13, 1990) (all of the above Indictments are exact duplicates of one another with the exception of defendant name and case number) [hereinafter Indictment].

25. Felony Information, supra note 4. The U.S. Attorney's office has not pursued charges against USSC, GTE, or GTE Spacenet.

26. (a) Whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than 2 years or by a fine in accordance with this title, or both.

(b) As used in this section, the term "distribute" means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire, microwave, or satellite, or to produce or provide material for such distribution.

(c) Nothing in this chapter, or the Cable Communications Policy Act of 1984, or any other provision of Federal law, is intended to interfere with or preempt the power of the States, including political subdivisions thereof, to regulate the uttering of language that is obscene or otherwise unprotected by the Constitution or the distribution of matter that is obscene or otherwise unprotected by the Constitution, of any sort, by means of cable television or subscription services on television.


27. Felony Information, supra note 4.


29. Verhovek, supra note 17.

30. Id.

31. Id.


33. Id. at 1-2.

34. Id. at 1-3. But see 18 U.S.C.A. § 1468(c) (West Supp. 1991), which is reprinted supra note 26.
common carrier mandates and also claimed it lacked the mens rea to commit the crime. Finally, USSC questioned whether any crime in fact had been committed, arguing that a fact finder cannot consider a scrambled signal obscene. State Judge William Gordon, hearing USSC's motion argument, granted the motion to dismiss on October 29, 1990.

35. United States Satellite is a common carrier transmitter that received its authorization from the FCC to commence operation in 1980 conditioned on USSC's agreement "not to be substantially involved in the production, writing or the selection of, or otherwise influence, the content of any information to be transmitted over its facilities." FCC Order and Certificate at 3, No. W-P-C-3580 (adopted Dec. 24, 1980), reprinted in Defendant's Motion to Dismiss Indictment, Exhibit 1, State v. U.S. Satellite, Inc., No. 90-000971 (Cir. Ct. Montgomery County, Ala. filed June 8, 1990) [hereinafter FCC Order].

A "communications common carrier" as defined in 47 U.S.C. § 702(7) (1988) refers to the Communications Act of 1934, which in turn defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, . . . but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h) (1988).


It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Id.; see also infra notes 53-98 and accompanying text.

36. Defendant's Motion to Dismiss Indictment at 4, U.S. Satellite (No. 90-000971) (arguing that USSC performed all activities of an uplink operator "without knowledge that any signal would ever be received in Montgomery County, Alabama"). ALA. CODE § 13A-12-200.2 (Supp. 1990) prohibits "knowingly distribut[ing]."

One can interpret USSC's argument that it lacked the mens rea sufficient for prosecution in two ways. First, USSC possibly was arguing that although it was aware that the signal being uplinked would be rebroadcast, it was not aware that the rebroadcast footprint would include Montgomery County, Alabama. Alternately, USSC's argument could have been that although it was aware that the signal being uplinked would be rebroadcast and that the broadcast footprint would include Montgomery County, Alabama, it was unaware that the signal could be decoded in Montgomery County, Alabama. The latter interpretation of USSC's argument would be based on the allegation that USSC had no control over decoding devices and had no knowledge that a decoding device capable of being activated by the uplink signal was located in Montgomery County, Alabama.

The former interpretation of USSC's argument, however, is bolstered by a later reference to the fact the USSC "possessed no knowledge or control as to where the signal it uplinked was to be distributed and therefore, cannot knowingly distribute obscene materials." Defendant's Motion to Dismiss Indictment at 4, U.S. Satellite (No. 90-000971) (emphasis added).

37. Defendant's Motion to Dismiss Indictment at 5, U.S. Satellite (No. 90-000971).

State prosecutors filed motions for *nolle prosequi* in the GTE cases and the GTE Spacenet case. On October 29, 1990, HDOS pled guilty to two counts of distribution of obscene material and was fined $10,000 for each count.

HDOS and two of its principal operators submitted to a plea agreement concerning the felony informations in New York and Utah. As part of the plea agreement, the principals named in the agreement promised to abstain from "promot[ing], sell[ing] or distribut[ing] materials that depict sexually explicit conduct [and from] knowingly owning [or] having [an] interest in . . . any entity whose principal business promotes, sells, or distributes" the same. Furthermore, the principals agreed to pay a sizable fine. In exchange for use immunity, the principals promised "to be de-briefed . . . concerning their knowledge of and participation in the operations of HDO[S] . . . [and] to testify as witnesses before any federal grand jury investigating possible obscenity violations . . . and at any trials."

This Note discusses federal and state obscenity laws as applied to direct broadcast satellite, particularly in reference to the

---

39. The prosecuting attorney files a *nolle prosequi* motion with the court to declare that the attorney will not prosecute the case. BLACK'S LAW DICTIONARY 1048 (6th ed. 1990).
42. The state judge allowed $75,000 of each fine to be suspended on the condition that HDOS donate $75,000 to each of two specified charities. Sentencing Order, Alabama v. Home Dish Only Satellite Networks, Inc., No. 90-002199-G (Cir. Ct. Montgomery County, Ala. filed Feb. 13, 1990).
44. Sexually explicit conduct is defined in 18 U.S.C.A. §2256(2) (West Supp. 1991) as:
   - factual or simulated—
     - (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
     - (B) bestiality;
     - (C) masturbation;
     - (D) sadistic or masochistic; abuse; or
     - (E) lascivious exhibition of the genitals or pubic area of any person . . .
   *Id.*
45. Plea Agreement, *supra* note 4, at 4-5.
46. *Id.* at 5.
47. *Id.* at 7-8.
HDOS cases. First, it discusses first the liability of the satellite owner and the uplink operator for obscenity as well as the use of the common carrier defense.\(^{48}\) The question of liability revolves around the determination of whether a state can hold a company criminally accountable for actions the federal government requires. The analysis demonstrates that a state cannot hold a company criminally accountable for fulfilling that company's federal common carrier mandate.

Next, this Note addresses the potential criminal liability of the originator and the uplink operator for obscenity in two contexts. The first context addresses whether the legal community must reevaluate the "community standard" criteria for the determination of obscenity outlined in *Miller v. California*\(^ {49}\) to account for the technological peculiarities of direct broadcast satellite. Particularly relevant is a discussion of a national "lowest common denominator" obscenity standard\(^ {50}\) for satellite broadcasts beamed for use in direct broadcast satellite home stations. The analysis under this context demonstrates that the local community standard remains relevant for the originator of the scrambled signal broadcast. The local community standard fails, however, when utilized against the originator of the unscrambled direct broadcast satellite signals.

Following this discussion, the Note explores the question of whether the prosecutions of direct broadcast satellite owners and uplink operators for obscenity would have a chilling effect by placing these companies in the role of private censors to protect themselves from criminal prosecution. Courts have previously thrown out Federal Communications Commission (FCC) rules for cable operators that placed those operators in similar situations.\(^ {51}\) Analysis of the question in this analogous situation indicates that

\(^{48}\) See *infra* notes 53-100 and accompanying text.


\(^{50}\) This Note uses the term "'lowest common denominator' obscenity standard" to describe the aggregate lowest level of tolerance for any particular type of pornographic display. The lowest common denominator obscenity standard thus could consist of a tolerance for broadcasts of live topless but not fully nude dancing from Community A, the tolerance of the broadcast of live nude dancing and certain but not all sexually explicit language from Community B, and the tolerance for the broadcast of so-called adult fare programs including images of live nude dancing from Community C. The combination of all of these standards would apply to each of the communities to prevent the broadcast of live nude dancing in Communities B and C despite the fact that the communities would otherwise tolerate the programming.

\(^{51}\) See *infra* notes 92-100 and accompanying text.
courts will find that current rules may chill some broadcasts. Recent cable decisions indicate that the chilling effect is enough to exempt from liability any satellite owner or uplink operator not acting knowingly or recklessly in facilitating the broadcast of patently obscene materials.

Finally, this Note evaluates the question of whether a scrambled and otherwise unintelligible signal can be the subject of an obscenity prosecution. Typically, the operator scrambles the signal and the receiver cannot unscramble that signal except through a signal authorization that is broadcast simultaneously with the material. The courts could protect the signal primarily because the signal is unintelligible until it reaches the home, but also because Stanley v. Georgia protects the broadcast once it is received in the home and is descrambled. In this context, this Note discusses the American Exxxtasy Channel cases as a final bright-line delineation in the series of cases limiting the freedom announced in Stanley.

COMMON CARRIER LIABILITY

The FCC granted GTE, GTE Spacenet, and USSC common carrier status for the particular satellite transponder involved

---

52. 394 U.S. 557 (1969). In Stanley, the Court found that films discovered in a search of the defendant’s home could not form the basis for obscenity charges when the films were not the subject of the search. The case has been interpreted to stand for the right to possess obscene material in the home if the material is for personal, rather than commercial, purposes. For a discussion of the decision in Stanley, see Michael 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, 142-44 (1988).

53. A common-carrier service in the communications context is one that ‘‘makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing.’’ FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) (quoting Report and Order, Indus. Relocation Serv., 5 F.C.C.2d 197, 202 (1966)) (determining mandatory access rules promulgated by the FCC under the then-present statutory authority were beyond the scope authorized by Congress). A common carrier does not ‘‘make individualized decisions, in particular cases, whether and on what terms to deal.’’ Id.

54. A transponder is an electronic device within the satellite that receives the uplink signal on a particular wavelength and transforms the signal into rebroadcast form. The satellite then strengthens and rebroadcasts the signal. Each satellite transponder can be designated as to its common-carrier status independently of other transponders on the satellite. The independence of each transponder is analogous to the independence of each channel in a cable system in determination of common-carrier status. Id. at 701 n.9 (citing National Ass’n of Regulatory Util. Comm’rs (NARUC) v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976)); see also *Resource Manual*, supra note 14, at 21-25.
in the American Exxxxtasy Channel cases. FCC rules and decisions required common carriers to provide services characterized by two distinctive qualities: (1) the carrier must provide the service to others without discrimination and on a first-come, first-served basis and (2) the carrier must provide communication that is the "transmission of intelligence of the user's own design and choosing." As a condition of this special status, common carriers cannot, within certain bounds, control the content of the transmission:

Common carriers have a general obligation to hold out their services to the public on a first-come, first-served basis without regard to content. Most authorities, however, recognize an exception to this general rule which gives common carriers the right to prohibit the use of their facilities for an illegal purpose.

The common carrier thus has a dual problem: although it has a duty to refrain from any editorial review, the common carrier, under penalty of sanctions, must not allow its customers to use its facilities for an illegal purpose. If the common carrier knowingly transmits communications pursuant to an illegal purpose, then the federal government may hold the common carrier lia-


57. Memorandum Opinion, Declaratory Ruling and Order, In the matter of Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 1987 FCC LEXIS 3907 (1987) (referring to Multipoint Distribution System (MDS) common carriers). For a definition of MDS, see infra note 61; see also Midwest Video Corp. v. FCC, 571 F.2d at 1050-51 (describing one of the characteristics of common carrier status as the transmission of another person's choice of programming).

58. See Dial Info. Serv. Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991) (upholding the so-called Helms Amendment which, in part, prohibits the use of any "telephone facility" for transmitting obscene or "indecent communication for commercial purposes which is available to any person under 18 years of age," 47 U.S.C.A. § 223(b)(2)(A) (West 1991), cert. denied, Dial Info. Serv. Corp. v. Barr, 1992 U.S. LEXIS 609 (Jan. 27, 1992). The statute in question allowed the telephone company to present the affirmative defense to any prosecution under § 223(b), that it acted "in good faith reliance upon the lack of any representation by a provider of communications" that those communications were covered by the prohibition. Id. § 223(c)(2)(B)(ii).
ble. Also, if the operator was intimately involved in the production of the material in question, had an interest in the broadcast, or recklessly avoided knowledge of a patently and openly illegal transmission, the federal government conceivably could also hold the operator liable. The paradox of this dual problem may lead to the common carrier either remaining knowingly ignorant of all broadcasting under its control or, in the alternative, scrutinizing all broadcast materials.

The FCC, however, does not require all common carriers to screen all material that the carrier retransmits. The FCC, for example, was hesitant to place multipoint distribution service (MDS) common carriers "in the uncertain predicament of watching all programming and assessing, in each instance, whether to engage the legal machinery for interpretative rulings" to determine whether a particular message could be adjudicated an illegal transmission.

The FCC has compared the common carrier satellite owner to the telephone company carrying sexually oriented taped or live material: "'There must be a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions before any liability is likely to attach." Liability would depend on the role the company fulfills. When a telephone company acts as a common carrier, liability often will not attach.

59. "[I]n interpreting whether MDS common carriers are 'knowingly involved' in transmitting obscene material, we will focus upon whether the carrier is passive. Unless an MDS common carrier has actual notice that a program has been adjudicated obscene, . . . it will not be subject to adverse agency action." Memorandum Opinion, Declaratory Ruling and Order, 1987 FCC LEXIS at *10-11 (referring to MDS common carriers).

60. See id. ("'We will focus upon whether the carrier is passive" in determining whether "common carriers are 'knowingly involved' in transmitting obscene material.").

61. A multipoint distribution system is a "[p]rivate microwave distribution service . . . used to distribute TV programming as a commercial service." Resource Manual, supra note 14, at 430. An MDS is similar in many aspects to the direct broadcast satellite distribution system.

62. Memorandum Opinion, Declaratory Ruling and Order, 1987 FCC LEXIS at *8-9 (referring to Sable Communications, Inc. v. Pacific Tel. & Tel. Co., 1987 Dist. LEXIS 13421 (C.D. Cal. 1984) (requesting a declaratory order that Pacific Telephone would not be liable for obscene messages sent over the Pacific Telephone system), aff'd in part, rev'd in part, vacated in part, 890 F.2d 184 (9th Cir. 1989)).

63. Id. at *10.

64. See, e.g., 47 U.S.C.A. § 223(c) (West 1991):

(1) A common carrier . . . shall not, to the extent technically feasible, provide access to [an obscene or indecent] communication . . . from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication. . . .

(2) No cause of action may be brought in any court or administrative
When a telephone company knowingly becomes involved in the transmission, however, by producing or advertising the services for its own pecuniary interest, then liability may attach. 65

Because of this FCC determination, a court examining the satellite or uplink operator's actions must go through two distinct levels of analysis. Initially, the court must evaluate the common carrier's adherence to the statutory obligation to avoid editorial control. Second, the court must evaluate the common carrier's interest in the transmitted material for determination of any pecuniary interest, 66 regardless of its inability to exercise this editorial control. Once a common carrier has passed these two evaluations, arguably federal liability would not attach even if the broadcast was otherwise illegal. The indictments against GTE, USSC, and GTE Spacenet, however, indicate that the evaluation precluding federal liability is not enough. The court would have to conduct a final investigation to determine whether the federal common carrier requirements have a preemptive effect over state obscenity law.

State Regulation in Light of the Federal Common Carrier Requirements

The breadth of state regulation depends on whether the federal common carrier requirements take precedence over contrary state law when the state law defines and prohibits obscenity. The Supreme Court has recently considered this question in the case of Capital Cities Cable, Inc. v. Crisp: 67

[C]onsideration of that question is guided by familiar and well-established principles. Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, the enforcement of a state regulation may be pre-empted by federal law in several circumstances: first, when

---

66. Pecuniary interest in the material being transmitted here is distinguished from pecuniary interest in the transmission itself. Liability may arise from a pecuniary interest in the material.
Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law; second, when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby “left no room for the States to supplement” federal law; and, finally, when compliance with both state and federal law is impossible, or when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

And, as we made clear . . . “Federal regulations have no less pre-emptive effect than federal statutes.”

In Capital Cities Cable, the Court dealt with FCC regulations conflicting with a state prohibition on broadcast advertisement of alcoholic beverages. The Court addressed the question of whether Congress intended the federal scheme to preempt totally any state regulation in the area.

Federal common carrier requirements generally take precedence over contrary state law. In Capital Cities Cable, however, a unanimous Supreme Court ruled that a cable company’s federal mandate to carry local broadcasting took precedence not only over Oklahoma state law, but also over an Oklahoma state constitutional provision prohibiting television stations from broadcasting alcoholic beverage commercials. The Oklahoma constitutional provision was otherwise authorized pursuant to a federal constitutional provision, the Twenty-first Amendment.

---

68. Id. at 698-99 (holding that FCC regulations preempt contrary state constitutional provision restricting the ability of television broadcasters to carry alcoholic beverage advertisements) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) and quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); and Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

69. The FCC regulations involved in this case required the cable company, in exchange for the right to rebroadcast distant broadcast signals without negotiating specific royalties with each royalty owner of material rebroadcast, to pay into a royalty fund and to refrain from exercising any editorial control over the signal being rebroadcast. Id.

70. Id. at 713-14 (“In this case . . . we must resolve a clash between an express federal decision to pre-empt all state regulation of cable signal carriage and a state effort to apply its ban on alcoholic beverage advertisements to wine commercials contained in out-of-state signals carried by cable systems.”).

71. The Oklahoma state constitutional provision in question read as follows: “It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words ‘Retail Alcoholic Liquor Store.’” Okla. Const. art. XXVII, § 5.

72. “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. Const. amend. XXI, § 2 (emphasis added).
which normally confers broad regulatory powers on the states in contravention of the Commerce Clause.\textsuperscript{73}

The Oklahoma State Constitution allows the sale but prohibits the advertising of alcoholic beverages except for certain on-premises signs.\textsuperscript{74} Oklahoma implemented this prohibition in part by requiring cable companies to block such advertising when a local cable television station carried a national television broadcast.\textsuperscript{75} The Court noted that

[s]ince the Oklahoma law, by requiring deletion of a portion of . . . out-of-state signals [the F.C.C. clearly encouraged the cable companies to carry], compels conduct that federal law forbids, the State ban clearly “stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of the federal regulatory scheme.\textsuperscript{76}

Courts can draw a distinction, however, in addition to the question of the medium, between \textit{Capital Cities Cable} and the American Exxxtasy Channel cases. The broadcasting of advertising for alcoholic beverages is protected speech,\textsuperscript{77} whereas obscenity is not.\textsuperscript{78} The Court may have been more comfortable finding a preemptive effect in defense of protected speech than it will be in the defense of nonprotected speech.\textsuperscript{79}

\begin{footnotes}
  \item Capital Cities Cable, 467 U.S. at 697. The Commerce Clause states that “[t]he Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8.
  \item The Court found that the regulatory scheme was not a direct consequence of the Twenty-first Amendment, although the regulatory scheme was clearly pursuant to this Amendment. \textit{Capital Cities Cable}, 467 U.S. at 716 (“[T]he State’s central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated.”).
  \item Capital Cities Cable, 467 U.S. at 694. For the text of the relevant constitutional provision, see supra note 71.
  \item The ban did not apply to advertisements in the print media, “principally because of the practical difficulties of enforcement.” \textit{Capital Cities Cable}, 467 U.S. at 695.
  \item Id. at 694-95. The national broadcasters gave the local affiliates ample notification of the upcoming advertisements. \textit{Id.} at 695 n.2.
  \item Id. at 706 (quoting \textit{Hines} v. \textit{Davidowitz}, 312 U.S. 52, 67 (1941)).
  \item \textit{E.g.} \textit{Bolger} v. \textit{Youngs Drug Prods. Corp.}, 463 U.S. 60 (1983) (holding that contraceptive advertisement is lawful commercial speech). The statement that commercial speech is constitutionally protected of course must be conditioned on the speech not being subject to another form of prohibition that would take it outside the confines of constitutional protection. This loss of constitutional protection would occur if the advertisement was also obscene. Such was the case in \textit{United States} v. \textit{Reidel}, 402 U.S. 351 (1971), in which the defendant was convicted upon proof that he had mailed a commercial advertisement later adjudicated to be obscene.
  \item Note that the speech involved in the American Exxxtasy Channel cases may not
\end{footnotes}
Congressional enactments involving cable mandatory-access channels and cases interpreting these statutes provide further evidence of this preemptive rule. A mandatory-access channel is a common-carrier channel on franchised cable systems. Congress requires the mandatory-access channels on any cable system offering more than thirty-six channels and offers immunity from prosecution under state obscenity laws for programming that is aired on the mandatory-access channels. Congress prohibits cable operators, like satellite operators on common carrier transponders, from exercising editorial control over the programming on these mandatory-access channels. Finally, the federal statutes controlling mandatory-access channels explicitly and specifically preempt state obscenity laws.

have been unprotected. The Governor of New York, for example, refused extradition of the principals of HDOS partially on the grounds that the communication was not adjudicated obscene in New York. See Verhovek, supra note 17.

80. The Cable Communications Policy Act of 1984, 47 U.S.C.A. §§ 521-559 (West 1991), requires cable operators that provide 36 or more activated channels to designate a percentage of those channels for commercial use by persons unaffiliated with the operator. Id. § 532.

81. See id. § 558 (declaring cable operators not liable for obscenity broadcast on § 532 cable channels); see also Meyerson, supra note 52, at 172-73 (suggesting a reconciliation of the latter two statutory provisions). Compare 47 U.S.C.A. § 559 (making it a federal offense to transmit obscene material over a cable system) with id. § 544 (allowing a cable franchising authority to specify under what conditions obscene material may be shown over a cable system).

82. (c) Use of channel capacity by unaffiliated persons; editorial control; restriction on service

(1) If a person unaffiliated with the cable operator seeks to use channel capacity designated pursuant to subsection (b) of this section for commercial use, the cable operator shall establish, consistent with the purpose of this section, the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.

(2) A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that an operator may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

47 U.S.C.A. § 532(c).

83. Nothing in [the Cable Act] shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements.

Id. § 558.
Federal courts recently interpreted these provisions in *Playboy Enterprises v. Public Service Commission.* In that case, the United States District Court for the District of Puerto Rico granted a permanent injunction against the Public Service Commission of Puerto Rico (the Commission) preventing the Commission from sanctioning cable operators for the transmission of allegedly obscene materials on mandatory-access channels. The Commission threatened to sanction cable operators for obscenity if they failed to drop the Playboy Channel from their cable service. The court relied on the explicit preemption provisions of the Federal Cable Act of 1984 to preclude the Commission from prosecuting the cable operators for obscenity. The court did not address whether the Commission could prosecute Playboy Enterprises as an originator of programming rather than as a cable operator.

Federal broadcast law does not contain any such preemption. In fact, the law specifically states that no preemptive effect is to take place. Regardless of this provision, preemption results from a conflict between state and federal law. This conflict makes enforcement of one law impossible in light of the enforcement of the other, at least in reference to obscenity transmitted over direct broadcast satellites.

Cable operators held an analogous position before 1978, when FCC rules made cable operators liable for obscene and indecent

---

85. Id. at 419.
86. HDOS also broadcast the Tuxxedo Channel, the companion to the Exxxtasy Channel. The content of the Tuxxedo Channel has been compared to that of the Playboy Channel. See Verhovek, supra note 17. The Tuxxedo Channel was not the subject of any indictment or information.
87. As a result of the threats, at the time of the suit all but one cable operator dropped the Playboy Channel from their cable services.
89. Language in the Act, however, indicated that the cable programmer—the producer of the material being shown on the cable mandatory access channel—was not explicitly excluded from liability. See id.
91. See supra notes 67-68 and accompanying text.
programming on mandatory-access channels. According to the United States Court of Appeals for the Eighth Circuit in Midwest Video Corp. v. FCC, the rules in existence "created a corps of involuntary government surrogates [to carry out otherwise prohibited censoring operations], but without providing the procedural safeguards respecting 'prior restraint' required of the government." Failing to find a preemptive effect for direct broadcast satellite owners would be inconsistent with the analogous position cable operators held.

If the courts allowed the prosecution of a satellite owner for obscene material broadcast over common carrier satellite transponders, the satellite owner would have little choice but to maintain a constant surveillance of the transmissions to ensure that the programs being broadcast did not offend any community standard for obscenity within the satellite's broadcast footprint. A cadre of private, rather than governmental, censors with the obligation to expurgate materials to avoid potential liability conceivably would enforce this minimum level of community tolerance, which this Note refers to as the lowest common denominator national obscenity standard.

Courts have found that the pre-1978 FCC rules presented cable companies with irreconcilable pressure from two sides:

When the cable operator, in policing his access channels, is considering whether an access user is being or has been "obscene" or "indecent," or whether access should be denied for any reason, there are ghosts in the wings. On one side lurks a fear of violating the Commission's rules, and potential loss of his "Certificate of Compliance." On the other stands the

92. Midwest Video Corp. v. FCC, 571 F.2d 1025, 1056-57 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979). The FCC used the existence of a national market as a basis for regulation of the cable television industry. The court in Midwest Video held the FCC regulations unconstitutional: "Broadcast signals are being used as a basic component in the establishment of cable systems, and it is therefore appropriate that the fundamental goals of a national communications structure be furthered by cable . . . ." Id. at 1043 (emphasis added) (quoting Cable Television Report and Order, 36 F.C.C.2d 143, 190, aff'd, 36 F.C.C.2d 326 (1972)). Apparently, for the purposes of an obscenity standard, the FCC did not equate the national market with a national community.

93. Id.

94. Id. at 1056.

95. See supra notes 56-62 and accompanying text.


97. See supra note 50.
potential for violation of the access user's rights. . . . [C]able operators [are exposed] to law suits [brought] by access users claiming prior restraint of their First Amendment rights, . . . by the state for his having transmitted obscene material, by outraged subscribers (whether outraged by obscenity or outraged by having to pay for it) or by persons denied access for any reason. . . .

The FCC rules sanctioning cable operators for indecency or obscenity on mandatory-access channels were, for this reason, irreconcilable with the mandatory nature of those same channels. Courts have found such FCC rules unenforceable in reference to cable operators.99 Similarly, the courts should find the analogous FCC rules as applied to common carrier satellite owners irreconcilable with the mandatory nature of the satellite system.103

LOWEST COMMON DENOMINATOR OBSCENITY STANDARD

The satellite owner may escape criminal liability for dissemination of allegedly obscene material over common carrier transponders, but the producer and the uplink operators of the material may still be at risk for borderline101 obscene materials. Although only a single locality within the satellite's broadcast footprint may consider certain material obscene, liability for broadcasting that material in an unscrambled form may chill the broadcast for the entire area, an area potentially as large as the entire continental United States.102 This scenario illustrates the problem of the lowest common denominator obscenity standard.103

98. Midwest Video Corp., 571 F.2d at 1058 (footnote omitted).
99. Id.
100. Actually, such rules are not essential to the prevention of use of common carrier transponders for illegal purposes. Under present rules, prosecutors may seek indictments against operators who knowingly transmit communications pursuant to an illegal purpose. See supra note 59 and accompanying text. If these operators knowingly advanced illegal actions other than the transmission of obscenity, conceivable they would be liable under the statutes that make those actions illegal.
101. This Note uses the term "borderline obscene" to refer to material that may reasonably be considered obscene in one community although merely sexually oriented or "adult" material in another. The distributor of borderline obscene material must take care to disseminate the material only in those communities in which the material is not considered legally obscene. See supra notes 59-60 and infra notes 137-39 and accompanying text for a discussion of the mens rea required for liability for distribution of borderline obscene materials to communities that would find the materials legally obscene.
102. See infra notes 174-77 and accompanying text.
103. The Supreme Court accepts the existence of a lowest common denominator
The 1982 Supreme Court case *New York v. Ferber*\(^\text{104}\) provides a stark example of the possible problems a nationwide distributor faces under a lowest common denominator obscenity standard.\(^\text{105}\) At the time of *Ferber*, twenty states prohibited the distribution of materials depicting sexually explicit child-content\(^\text{106}\) regardless of whether the material was obscene; fifteen states prohibited distribution only if the material was considered obscene; two states prohibited distribution only if the material was obscene only as to minors; and twelve states prohibited only the use of minors in the production of the materials.\(^\text{107}\) Furthermore, at least fifteen states placed the line dividing children and adults at age eighteen; four states at age seventeen; sixteen states at age sixteen; two states at age sixteen or of one who appeared to be prepubescent; one state defined a child as an individual who was or appeared to be under sixteen; and one state prescribed different penalties for child pornography depending upon the different ages of children involved.\(^\text{108}\) This listing does not even

---

obscenity standard:

The use of "national" standards . . . necessarily implies that materials found tolerable in some places, but not under the "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes.

Miller v. California, 413 U.S. 15, 32 n.13 (1973); see also Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) ("If [the radio station's] audience is comprised of different communities with different local standards, [that radio station] ultimately bears the burden of complying with the prohibition on obscene messages.").


105. The Court, in upholding Ferber's conviction, found the statute prohibiting the distribution of child pornography valid under the First Amendment and not overly broad. *Id.*

106. "Child-content" in this context refers to materials directed to adults that contained portrayals of children regardless of the actual age of the models portraying those children.

107. Arizona, Colorado, Delaware, Florida, Hawaii, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New York, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, and Wisconsin prohibited the distribution of materials depicting sexually explicit child-content regardless of whether the material was obscene. Alabama, Arkansas, California, Illinois, Maine, Minnesota, Nebraska, New Hampshire, North Dakota, Ohio, Oregon, South Dakota, Tennessee, and Washington prohibited distribution of child-content material only if the material was considered obscene. Connecticut and Virginia prohibited distribution of this material only if the material was obscene only as to minors. Alaska, Georgia, Idaho, Iowa, Kansas, Maryland, Missouri, Nevada, New Mexico, North Carolina, and Wyoming prohibited the use of minors in the production of such materials. *Id.* at 749-50 n.2.

108. *Id.* at 764 n.17. The 16 states that defined a child as a person under 18 years old were Arizona, Delaware, Florida, Georgia, Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, North Dakota, Ohio, Rhode Island, Tennessee, Virginia, West Virginia,
begin to address the issue of the materials each state considered obscene.

To protect against personal liability under a lower common denominator obscenity standard, the producer of pornographic material using a young "model" had to comply with the lowest common denominator child obscenity statutes for states in which the producer distributes the material. The producer of borderline obscene sexually explicit materials faces analogous problems. Courts, however, must delineate exactly what actions a state may take constitutionally in proscribing obscenity to determine exactly the dangers that await these producers.

**CONSTITUTIONAL BOUNDARIES ON THE REGULATION OF OBSCENITY**

A state may proscribe obscene materials without offending the United States Constitution. As the Supreme Court proclaimed in *Roth v. Unites States*, "[O]bscen[e] [materials are] not within the area of constitutionally protected speech or press." The range of materials states may proscribe as obscene is not restricted to permanent writings or impressions. A state may forbid the distribution and possession outside of the home of obscene moving pictures, for example, even though the films consist only of celluloid such that light projected through would produce pictures on an otherwise blank screen. Some states have even taken steps to prohibit specific mechanical devices as obscene.

and Wisconsin. The four states that defined a child as a person under 17 years old were Alabama, Louisiana, Missouri, and Texas. The 15 states that defined a child as a person under the age of 16 were Alaska, California, Connecticut, Hawaii, Kansas, Maine, Maryland, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina, and South Dakota. The two states that defined a child as one who is under 16 or who appeared to be prepubescent were Illinois and Nebraska. The one state that defined a child as an individual who was or appeared to be under the age of 16 was Indiana. The one state that prescribed different penalties for child pornography depending upon the different ages of the children involved was Kentucky. *Id.* at 764 n.17 (citing T.C. Donnelly, *Note, Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. Mich. J.L. Ref. 295, 307 n.71 (1979)). In *Ferber*, the Court apparently did not notice that, although the Note claimed 16 states defined a child as one who is under 16, the Note listed only 15 states.

110. *Id.* at 485.
Although "mere private possession of obscene matter [within the home] cannot constitutionally be made a crime," states may constitutionally proscribe distribution of obscene materials, even for use in the home. Assuming that “[s]tates have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles,” a state may regulate most aspects of the dissemination of obscene material. A state may regulate the distribution, importation, acquisition, or transportation of obscene materials. A state may also constitutionally proscribe the viewing of obscene materials shown within an enclosed theater to consenting adults. A state may even prohibit the distribution of obscene materials produced outside the state of prosecution.

---

the Legislative Proscription and Criminalization of the Sale or Promotion of Devices Which are Designed or Manufactured for the Purpose of Stimulating Human Genital Organs, 17 St. Mary's L.J. 1125, 1138-45 (1986).

113. Stanley, 394 U.S. at 559.

114. See Smith v. United States, 431 U.S. 291, 307 (1977) ("[T]he individual's right to possess obscene material in the privacy of his home, however, [does not create a] correlative right to receive, transport, or distribute the material."); United States v. Orito, 413 U.S. 139, 142 (1973) (determining that the prohibition of transporting obscene material in interstate commerce applies to nonpublic as well as to public transportation); United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 128 (1973) (upholding statute prohibiting the importation of obscene materials even if the materials were for private possession and use); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973) ("[C]ommerce in obscene material is unprotected by any constitutional doctrine of privacy."); United States v. Thirty-Seven Photographs, 402 U.S. 363, 375 (1971) (plurality opinion) (upholding statute prohibiting the importation of obscene materials as applied to materials imported for commercial use); United States v. Reidel, 402 U.S. 351, 355-56 (1971) (holding that a statute prohibiting the use of the mails for the delivery of obscene materials is constitutional as applied to individuals delivering materials to willing adult recipients).


117. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. at 128; Thirty-Seven Photographs, 402 U.S. at 376 (White, J.);

118. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. at 126.

119. United States v. Orito, 413 U.S. 139, 141-42 (1973); see also Groskaufmanis, supra note 90, at 1291; cases cited supra note 114.

120. "Nothing, however, in this Court's decisions intimates that there is any 'fundamental' privacy right 'implicit in the concept of ordered liberty' to watch obscene movies in places of public accommodation." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973).

In adjudicating obscenity, a fact finder uses a “community standard” to determine whether particular material is to be designated obscene.\footnote{122. An interesting application of the community standard formula appeared in Smith v. United States, 431 U.S. 291 (1977). At the time of the subject offense, the State of Iowa had no law prohibiting obscenity for adults. The state legislature had not yet passed a new statute to replace a prior law prohibiting obscenity that had been declared unconstitutional. Smith was nonetheless convicted of distribution of obscene materials through the mails—a federal offense—based upon the community standards of a state having no law restricting the material mailed, even though the materials never left the state.} As representatives of the community, the jury need not refer to any expert testimony to make the determination.\footnote{123. Paris Adult Theatre I, 413 U.S. at 56 (declining to require expert testimony to establish the community standard).}

Although the Supreme Court applied community standards to determine obscenity as early as 1957 in Roth v. United States,\footnote{124. 354 U.S. 476 (1957).} it did not begin to define the meaning of the term until its decision in Miller v. California:\footnote{125. 413 U.S. 15 (1973).}

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the “prurient interest” or is “patently offensive.” . . . Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable “national standards” when attempting to determine whether certain materials are obscene as a matter of fact.\footnote{126. Id. at 30-32.}

The Court in Miller did not extensively develop the community concept, but later, in Sable Communications, Inc. v. FCC,\footnote{127. 492 U.S. 115 (1989).} it did state categorically that the relevant “community” is smaller geographically than the nation.\footnote{128. Id. at 124-25. A state may “impose a geographic limit on the determination of community standards by defining the area from which the jury could be selected in an obscenity case.” Smith v. United States, 431 U.S. 291, 303 (1977) (dictum).} Furthermore, the Court stated the standard had nothing to do with an “average” community.\footnote{129. Sable Communications, 492 U.S. at 125-26.}
without its detractors. Far from believing "a national 'community standard' would be an exercise in futility," Justice Stevens has stated:

A federal statute defining a criminal offense should prescribe a uniform standard applicable throughout the country. This proposition is so obvious that it was not even questioned during the first 90 years of the enforcement of the Comstock Act [the early obscenity statute] under which petitioner was prosecuted. When the reach of the statute is limited by a constitutional provision, it is even more certain that national uniformity is appropriate.

In Jacobellis v. Ohio, Justice Brennan stated: "[T]he constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding." Regardless of this criticism, however, the Supreme Court has not deviated from the local community standard.

A national or regional distributor of borderline obscene materials thus may constitutionally be subject to different community standards under federal or state laws. The Supreme Court has said:

The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the States for violations of state obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions.

130. Miller, 413 U.S. at 30 (emphasis omitted).
131. Smith v. United States, 431 U.S. 291, 312 (1977) (Stevens, J., dissenting) (footnote omitted); see also Manual Enters. v. Day, 370 U.S. 478 (1962) (Harlan, J., joined by Stewart, J.), quoted in Jacobellis v. Ohio, 378 U.S. 184, 193 (1964) (Brennan, J., joined by Goldberg, J.) ("[A local standard would have] the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency.").
133. Id. at 195.
134. Hamling v. United States, 418 U.S. 87, 106 (1974). But see Jacobellis, 378 U.S. at 194 (Brennan, J., joined by Goldberg, J.) ("[T]o sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variations between the two places.").
The Court has not prescribed the exact geographical extent of the applicable community, however, and lower courts have determined the applicable community according to the type of media under question.

Present law does not require a prosecutor to prove a distributor knew that any particular community could consider the material legally obscene to prosecute the distributor for violation of obscenity distribution laws. If the distributor knew the "character and nature of the materials," a community that finds the material obscene can hold liable the distributor who knowingly conveys the material.

For many forms of media, this mens rea requirement does not present undue dangers of liability to the distributor. Companies engaged in the production and distribution of borderline obscene materials generally can tailor the distribution network of the medium involved to address any inconsistencies in the varying standards of obscenity in different communities. No distributor can know for certain whether the communities to which it purveys its materials will consider the material obscene. The wide array of sexually explicit material in each market, however, does allow a distributor to gauge the amount of risk the distributor

135. See Smith, 431 U.S. at 303:
If a State wished to adopt a slightly different approach to obscenity regulation, it might impose a geographic limit on the determination of community standards by defining the area from which the jury could be selected in an obscenity case, or by legislating with respect to the instructions that must be given to the jurors in such cases.

Id.; see also Hamling, 418 U.S. at 105 ("Our holding in Miller that California could constitutionally proscribe obscenity in terms of a 'statewide' standard did not mean that any such precise geographic area is required as a matter of constitutional law."). To see how this has been applied, see Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987, 999 n.22 (D. Utah 1982) (referring to the Utah Supreme Court's designation of a "community" as being the county from which the jury is selected for the purposes of a cable obscenity and indecency statute that the court therein ruled unconstitutionally broad).

136. See infra notes 140-69 and accompanying text.
137. See, e.g., Hamling, 418 U.S. 87:
It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.

Id. at 123.

138. Sable Communications, Inc. v. FCC, 492 U.S. 115, 125 (1989) (suggesting that telephone dial-a-porn services can choose not to serve certain communities or to provide different messages to different communities).
would take in sending particular materials to any particular community.

Distributors of borderline obscene materials often skirt the edge of criminal law and, thus, assume the risk that their behavior may be criminal:

> Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.139

Unless the direct broadcast satellite transmission is a distinctive media form, broadcasters of borderline obscene materials should be held to the same risk for violations of community standards for any broadcast received in the satellite footprint as would the distributor of sexually explicit material utilizing another medium type.

The ability to regulate the communication depends partially upon the nature of the medium.140 For example, if the medium is

---


140. "We have long recognized that each medium of expression presents special First Amendment problems." FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (plurality opinion); see also Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952):

Nor does it follow [from the decision that motion picture regulation is subject to the Free Speech Clause] that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

Id. at 503 (holding that motion picture regulation is subject to the terms of the First Amendment and that a finding that the film is sacrilegious is not sufficient to ban that film); FCC v. League of Women Voters, 468 U.S. 364 (1984):

Communication of this kind [public broadcasting] is entitled to the most exacting degree of First Amendment protection. Were a similar ban on editorializing applied to newspapers and magazines, we would not hesitate to strike it down as violative of the First Amendment. But . . . because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve 'compelling' governmental interests.

Id. at 375-76 (citations omitted); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969) (upholding the FCC fairness doctrine: “[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them.”), quoted in
readily accessible to children, that accessibility affects the ability of the government to regulate. Regulation is also different depending upon the reception point of the message and on the availability of the communication.

Even if a particular medium requires "affirmative steps to receive the communication," the transmitter and developer—as well as the receiver—of the communication generally are liable for its content. States regulate both the production and dissemination of potentially obscene material and thus determine obscenity at the source of the communication. States also regulate the transfer of potentially obscene material and thus determine obscenity at the reception point of the communication. It follows, therefore, that either or both the state of broadcast and the state of reception may hold the broadcaster of the movie liable, depending only upon whether either or both states consider the movie obscene.

League of Women Voters, 468 U.S. at 377. According to the En banc Programming Inquiry: [While a nudist magazine may be within the protection of the First Amendment . . . the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464. . . . Similarly, regardless of whether the "4-letter words" and sexual description, set forth in "Lady Chatterly's Lover," (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activity on radio or TV would raise similar public interest and section 1464 questions.

44 F.C.C. 2303, 2307 (1960), quoted in Pacifica, 438 U.S. at 741 n.16. See generally Michael Bauman, Note, This is the Picture—if You Don't Like It, Turn It Off: The Futility of Setting Cable Specific Obscenity Standards, 8 CARDOZO ARTS & ENT. 611 (1990).


142. See Sable Communications, 492 U.S. at 127-28 (comparing the regulation of indecency in dial-a-porn services in the case at bar with the regulation of indecency in radio broadcasts in Pacifica).

143. Id.

144. The limit to this liability, of course, is the extent of knowing participation. Should a receiver fraudulently receive a communication in such a way as to subject that communication to a determination of obscenity, and the broadcaster was not reckless in his actions, courts would probably not hold the broadcaster liable.


147. Although a distributor of pornographic materials may be held liable in any state through which the material travels if the material is in physical form, the same may not be said for broadcast materials as long as the broadcast cannot be received and converted into intelligible form in an intervening state.
The combined effect of these factors is that regulation has taken different forms for different media types. The distinctive nature of each media type accounts for differing methods of regulation for obscenity. Distinctions between different media forms include whether the receiver is active or passive in receiving the communication; whether the communication is in an intelligible or material form; and whether the distributor has the ability to screen the potential audience.

Telephone dial-a-porn services and phone companies can easily channel callers by the originating area code or by the age of the caller. Furthermore, the communication is caller-initiated. Attempts at scrambling the telephone messages so that they may be received by descrambling devices made available only to adults has not proven generally effective at restricting access to minors as have efforts to restrict calls to "900" area code and "976" or "970" prefix telephone numbers.


149. The viewer of a rented video cassette recorder (VCR) tape must actively seek out and procure that tape whereas a radio listener may inadvertently and passively receive a particular radio broadcast. See FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (plurality opinion).

150. "Intelligible" and "material" refer to the characteristics of the signal or communicative medium. A video cassette tape, for example, requires a simple and readily accessible device, a video cassette recorder (VCR), to reproduce the images contained therein which a state could adjudicate obscene. A prospective audience needs no additional or special access, however, to procure the images. Anyone with a VCR would have access to the images contained on the video cassette tape. This scenario is distinguishable from a scrambled cable television "premium channel" signal that requires the additional positive step of subscribing to the cable premium service to make the otherwise unintelligible signal viewable.

151. Sable Communications, 492 U.S. at 125-26 (discussing the ability of the telephone company to provide operators or mechanical screening devices to block access to messages from certain areas); see also Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1296 (9th Cir. 1987) ("976 [telephone] service differs from ordinary broadcasting in that listeners must take deliberate steps to hear the particular kinds of messages they choose."); cert. denied, 485 U.S. 1029 (1988). But see id. at 1297 n.6 ("Depending on whether Carlin's messages are legally obscene, Mountain Bell [Telephone] could still face criminal liability for carrying Carlin's messages. . . . Some self-censorship is an inevitable result of all obscenity laws.").

152. Requiring the caller to provide a credit card or requiring prepayment and screening are two methods that would allow for screening by age. See Sable Communications, 492 U.S. at 121-22, 128.

153. Id. A service whereby a telephone subscriber can have the telephone company block calls from the subscriber's phone to certain prefixes, called voluntary blocking, apparently has also failed in effectively screening children from sexually explicit telephone
A video cassette recorder (VCR) tape exists in intelligible, material form during transportation and delivery.\textsuperscript{154} Communities thus hold responsible anyone knowingly distributing legally obscene material in video cassette form.\textsuperscript{155} The immediate distributors, video cassette rental and sales agents, dealing directly with the consuming public, have the ability to screen customers by age. Once the video cassette is beyond the confines of the store, however, distributors are powerless to confine the viewing public to a particular locality or audience.\textsuperscript{156}

A movie shown in a theater is also in intelligible, material form during transportation and delivery. Communities therefore hold responsible anyone knowingly distributing legally obscene material in this form.\textsuperscript{157} The immediate distributors—theater owners—have the ability to screen customers by age. The theater owner, however, has more control over the age and tolerance of the audience than does the immediate distributor of the video cassette because the video cassette goes directly into the hands of the audience, whereas the theater movie itself is never within the immediate control of the audience.

A computer program located on a disk is also in intelligible, material form during the transportation and delivery stages. Computer network operators have the ability to screen obscene materials from networks accessible by telephone linkages in the same manner as are regular telephone communications.\textsuperscript{158}

Pornographic material in print, either pictorially or textually, is in intelligible, material form requiring no intervening mechan-

\textsuperscript{154} For a discussion of how a VCR is distinguishable from other forms of communication and its impact on the First Amendment, see Groskaufmanis, supra note 90, at 1284-93.

\textsuperscript{155} See, e.g., ALA. CODE § 13A-12-200.2 (Supp. 1990) (reprinted supra note 22).

\textsuperscript{156} Cf. United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 129 (1973) ("[W]e should note that it is extremely difficult to control the uses to which obscene material is put... Even single copies... can be quickly and cheaply duplicated by modern technology thus facilitating wide-scale distribution.").

\textsuperscript{157} See, e.g., ALA. CODE § 13A-12-200.2 (reprinted supra note 22); see also Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

\textsuperscript{158} See supra notes 151-53 and accompanying text.
ical device for interpretation. Communities hold responsible anyone knowingly distributing legally obscene material in this form. A distributor cannot realistically guarantee either that adolescents will not view the material or that an adult purchaser will not transport the sexually explicit printed material to a community not tolerant enough to accept the material. Legal purchasers can readily redistribute the material to minors or transport it to other communities without the immediate distributor's consent or knowledge.  

The radio broadcast is in intelligible but nonmaterial form during its delivery stage. Radio broadcasting is limited in distributional area by the power of the broadcast and by natural obstacles. The broadcast area often encompasses substantially less than one full "community" for the purposes of community standards. Radio broadcasting is pervasive and is not suitable to scrambling. Radio broadcasting stations, further, are subject to licensure.

The television broadcast is in intelligible but nonmaterial form during its delivery stage. Television broadcasting is limited in distributional area, much in the same way radio is limited. It is also pervasive and not suitable for scrambling. Television broadcast stations are similarly subject to licensure.

159. See Paris Adult Theatre I, 413 U.S. at 58 n.7 (contrasting the abilities of adult theaters and adult bookstores to control their audiences). This observation does not intimate that the state can hold liable the immediate distributor who sells material that eventually is found obscene in another locality if the immediate distributor has no knowledge of the subsequent distribution or transportation, nor has any reason to believe that any subsequent distribution or transportation is to take place without the distributor's consent.

160. This Note does not attempt to address in the present context the problems arising from the fact that some wave spillage occurs which allows a broadcast signal to be accessed beyond the immediate boundaries of a single nation. For some of the implications of this predicament, see Taishoff, supra note 13, at 8-9.

161. See FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality opinion) (concerning a broadcast medium not able to specifically target the audience, but able to tailor broadcast standards for the local region).

162. Id. at 748.

163. Although a radio broadcast conceivably could be scrambled, given the limited broadcast range, market forces would probably not allow for scrambling.

164. See infra note 165 (concerning the analogous licensure of television broadcast stations).

165. The Supreme Court found spectrum scarcity to be important to the ability to license television stations, given that the licensees "must serve in a sense as fiduciaries for the public by presenting those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves." FCC v. League of Women Voters, 468 U.S. 364, 377 (1984) (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969)). The concept of spectrum scarcity has been increasingly discredited given the state of modern technology. See Groskaufmanis, supra note 90, at 1276-79.
The cable signal is in intelligible but nonmaterial form during its delivery stage.\textsuperscript{166} The signal is distinguishable from the direct broadcast signal in that the former requires the intervention of a "community receiver,"\textsuperscript{167} whereas the latter is a more "focused" signal, which allows for reception by smaller, individually owned satellite dishes.\textsuperscript{168} Cable operators—comprising a regulated government-sanctioned monopoly serving a particular community—utilize valuable public resources in the transmission of services.\textsuperscript{169} Cable television broadcasters, limited to the area of a community encompassing the cable company franchise, can tailor the general content of their distribution for the particular community served by the cable company's franchise.

The scrambled and unscrambled direct broadcast satellite signal is distinctive when compared to any other media type. This distinctive nature of the direct broadcast satellite signal obligates a fresh look at the regulation of obscenity.

The direct broadcast signal is dissimilar to the radio broadcast or cable television signal in that the distributional area encompasses numerous "communities."\textsuperscript{170} The signal is less intelligible, especially in its scrambled form, because it requires, in addition to the now-pervasive television, the intervention of a satellite dish for reception and a "descrambler" for interpretation.\textsuperscript{171} The scrambled form additionally requires a "password," a decoder

\textsuperscript{166} Cable companies generally send out the entire signal spectrum to all cable subscribers. The cable companies filter, or scramble, the channels for which the customer has not paid.

\textsuperscript{167} Taishoff, supra note 13, at 4.

\textsuperscript{168} Resource Manual, supra note 14, at 6-7.

\textsuperscript{169} See Community Communications Co. v. Boulder, 660 F.2d 1370 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982). Scrambled cable broadcasts differ from scrambled satellite broadcasts in that the former must utilize public by-ways for the dissemination of its message:

A newspaper may reach its audience simply through the public streets or mails, with no more disruption to the public domain than would be caused by the typical pedestrian, motorists, or user of the mails. But a cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys and other public ways. Some form of permission from the government must, by necessity, precede such disruptive use of the public domain.

\textsuperscript{170} Id. at 1377-78.

\textsuperscript{171} Taishoff explains: "[O]ne appropriately equipped geostationary satellite can continuously transmit and receive electronographic signals to and from over 40 per cent of the earth's surface." Taishoff, supra note 13, at 4; see supra notes 160-69 and accompanying text (discussing the limited distribution area of radio and television broadcasts and of cable signals).

\textsuperscript{171} See supra note 166 and accompanying text.
activation signal. Unlike a computer network, this activation signal is broadcast by the distributor, not by the receiver. The direct broadcast signal, finally, is not subject to redistribution without the active, generally illegal, intervention of the cable viewer. This Note next addresses these distinctions and the complications of regulating obscenity.

Unscrambled Direct Broadcast Satellite Transmissions

The size of the relevant community and the intervention of the satellite dish are the major distinguishing features of the direct satellite transmission in an unscrambled form. The technical aspects of the direct broadcast satellite precludes targeting a broadcast to a single locale unlike movies shown in theaters which can be targeted to carefully selected and narrowly defined areas. The transmission is very similar to broadcast television or radio transmissions in that the receiver receives and interprets the communication with the aid of a readily available mechanical device. Any individual who is financially capable of purchasing a satellite dish is able to receive the communication. The distributor cannot "screen" any particular reception of the communication within the broadcast footprint. Much like the radio or television transmission, then, the distributor can be liable for any unscrambled obscene transmission within the broadcast footprint.

The responsibility for transmission via unscrambled direct broadcast satellite transmission is dissimilar to that for radio or broadcast television because the relevant community is larger. Just as courts determine the relevant community for a television or radio broadcast by the location and strength of the transmitter, so should they determine the relevant community for unscrambled direct broadcast satellite transmission by the location and strength of the satellite. The result is potential liability for lower levels of pornographic broadcasts, based on the lowest common denominator obscenity standard in the broadcast footprint.

An individual wishing to receive the direct broadcast satellite transmission must also own a satellite dish, presently not a pervasive home "appliance." The initial scarcity and later pervasiveness of the radio and television set, however, demonstrate

172. See supra text accompanying note 158.
173. Prospectus, supra note 9, at 1.
174. The orbital location of a satellite determines its footprint and thus the relevant community for an unscrambled direct broadcast satellite transmission. Id.
175. See supra notes 90 and 101-03 and accompanying text for a discussion of the lowest common denominator obscenity standard.
the minimal role this consideration should take in the development of a constitutional theory governing direct broadcast satellite.

Given a situation such as the present American Exxxtasy Channel cases\textsuperscript{176} and discounting the need for a satellite dish to receive the broadcasts, if a broadcaster does not scramble a signal, a local community could declare the transmissions obscene and subject the originator and broadcaster to liability.\textsuperscript{177} This single community’s reaction would effectively deter the distributors from broadcasting the material at all. Regardless of the tolerance of different localities in the United States for a film’s content, the lowest common denominator obscenity standard of a local community would set the standard for the nation. Montgomery County, Alabama, as well as any other community within the satellite’s broadcast footprint, would have the power to proscribe the materials from being broadcast on that medium anywhere in the United States.

\textit{Scrambled Direct Broadcast Satellite Transmissions}

Once the broadcast is scrambled, however, the analysis becomes somewhat different. Initially, a court would have to determine the applicable relevant community based on the dissemination range of subscriptions to the broadcast service. Second, a court would have to address the question of whether the scrambled signal itself is outside obscenity regulation altogether because the unintelligible, scrambled signal deserves protection otherwise not given to an intelligible, unscrambled signal.

\textit{Relevant Community Analysis for Scrambled Direct Broadcast Signal Transmissions}

The disseminator of a scrambled direct broadcast signal has the ability to control the reception of the programming by way of the scrambling/descrambling process. The broadcaster of a scrambled signal dictates who is eligible to receive the signal by sending the unique decoder signature of the receiver along with the signal.\textsuperscript{178} If an individual owns a decoding device but has not

\textsuperscript{176} See supra notes 3-47 and accompanying text.

\textsuperscript{177} See supra notes 53-100 and accompanying text for a discussion of why liability would be restricted to the originator of the programming if the program was carried over a common carrier satellite transponder.

\textsuperscript{178} Prospectus, supra note 9, at 1.
subscribed to a particular service, that service will not transmit
the decoding device's signature with the broadcast, and the
individual will not be able to descramble the signal. In contrast,
cable companies receive a scrambled signal via satellite, descram-
ble the signals, and place filters near the reception point to
screen out nonsubscribers. Computer networks give an access
code to subscribers to gain entry to a protected program. Once
made public to one subscriber, that subscriber can easily transfer
the access to nonsubscribers.

Because the broadcaster of the direct broadcast satellite trans-
mission has this control over the distribution of the scrambled
signal, the broadcaster can avoid liability for borderline obscene
material by restricting access to subscribers living in communities
tolerant of the material being programmed. The broadcaster
can further restrict reception to subscribers living in communities
tolerating some, but not all, of the broadcast transmissions. The
distributor can make the decision either to broadcast or to
restrict the reception of certain broadcasts on the same basis as
a decision to distribute a magazine.

The individual purchasing a pornographic magazine in a com-
munity tolerant of the magazine's level of pornography may easily
copy and redistribute the printed material to a different com-
munity that is not as tolerant. Conversely, any redistributor of
satellite programming must take the additional steps of receiving
the signal when broadcasting and taping the programming for
redistribution. Furthermore, the receiver must take the affir-
mative step of purchasing the service to descramble the signal
and to receive the broadcast in intelligible form. The nature of

179. Id.
180. See supra note 166 and accompanying text.
181. See supra text accompanying note 158.
182. The broadcaster could transmit a signal with no decoding signal, thus preventing
everyone from receiving and decoding the signal. See Prospectus, supra note 9, at 4.
183. "Restricted" broadcasts would be accomplished in much the same way as suggested
for dial-a-porn services in Sable: that is, for certain programming only certain signature
codes would be concurrently broadcast; for other programming, the number of signature
codes would be expanded or contracted depending upon the sexually-explicit content of
the programming. See supra note 151 and accompanying text.
184. Modern technology is making this process easier today with innovations such as
television sets equipped with two built-in video cassette recorders. This development
demonstrates that "communications technology is dynamic, capable tomorrow of making
today obsolete." Midwest Video Corp. v. FCC, 571 F.2d 1025, 1052 (8th Cir. 1978), aff'd
185. Unlike the computer network's access code, the descrambling code is peculiar to
the descrambling device. Although a particular user generally can utilize any computer
the medium removes it from any general public availability analysis because a distributor has a greater ability to restrict reception of the signal to certain communities than to restrict distribution of magazines or other similar distribution media.

Signal Scrambling for Protection under Stanley v. Georgia

Any court faced with the issue of pornography on a direct broadcast satellite signal must decide whether to protect the broadcaster on the basis that the signal is unintelligible until it reaches the home. Once the signal reaches inside the home and is descrambled, Stanley v. Georgia protects the materials received.

Again, a state may regulate the distribution, importation, acquisition, and transportation of obscene materials. Once inside the home, however, the material gains the protection outlined in Stanley.

The home is the key to the protection. In almost all cases limiting the application of Stanley, the Supreme Court has restricted the privacy rights extended to an individual viewing obscene material to mere possession in the home:

---

187. Id. In Stanley, the Court held that private possession of obscene material in the home is not a criminal act. Id. at 568. For a discussion of the decision in Stanley, see Meyerson, supra note 52, at 144-46.
190. See 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. at 126.
191. Stanley does not protect the possession of child pornography in the home because a state has a strong interest to protect by punishing possession of pornography using children. The state interest is not as strong in pornography using adults. Osborne v. Ohio, 495 U.S. 103 (1990).
193. E.g., United States v. Orito, 413 U.S. 139 (1973); the essence of appellee's contentions is that Stanley has firmly established the right to possess obscene material in the privacy of the home and that this creates a correlative right to receive it, transport it, or distribute it. We have rejected that reasoning. This case was decided by the District Court before our decisions in United States v. Thirty-seven Photographs, 402 U.S. 363 (1971), and United States v. Reidel, 402 U.S. 351 (1971). Those holdings negate the idea that some zone of constitutionally protected privacy follows
If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide Stanley on the narrow basis of the "privacy of the home," which was hardly more than a reaffirmation that "a man's home is his castle." Moreover, we have declined to equate the privacy of the home relied on in Stanley with a "zone" of "privacy" that follows a distributor or consumer of obscene materials wherever he goes.194

The Supreme Court has rested its limitation of Stanley not on whether commercial exploitation or distribution occurred,195 but on the presence of the obscene material in the "public environment." Once the material has reached the home, the court should no longer address the question of whether "such material[] has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' 'right . . . to maintain a decent society.'" 197

Further, satellite transmissions are similar to the subscription television service analyzed in Chartwell Communications Group v. Westbrook198 and, as such, may not be amenable to normal broadcast regulation. In that case, the United States Court of Appeals for the Sixth Circuit ruled that a subscription television

---

194. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973) (citation omitted) (deciding not to extend the privacy rights for viewing obscene material to individuals viewing such material in movie theaters); see also Carey v. Brown, 447 U.S. 455, 471 (1980) (citing Stanley to support the right to be free from others protesting another's home). But see Osborne, 495 U.S. at 108 n.3 (reiterating that the "decision in Stanley was 'firmly grounded in the First Amendment' ") (quoting Bowers v. Hardwick, 478 U.S. 186, 195 (1986)).

195. See, e.g., 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. at 125 ("The narrow issue directly presented in this case, and not in Thirty-seven Photographs, is whether the United States may constitutionally prohibit importation of obscene material which the importer claims is for private, personal use and possession only.").

196. See, e.g., Paris Adult Theatre I, 413 U.S. at 68-69 ("[C]ommercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment."); see also 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. at 126 ("Stanley depended, not on any First Amendment right to purchase or possess obscene materials, but on the right to privacy in the home.").


198. 637 F.2d 459 (6th Cir. 1980).
program utilizing a scrambled signal was unintelligible until de-scrambled with special equipment and inherently not intended to be received by the general public. The court refused to characterize the signal as a broadcast and therefore found that it did not need to analyze the signal as such for the purposes of regulation.

The scrambled direct broadcast satellite transmission is even further removed from being intelligible than the broadcast analyzed in Chartwell Communications. Possession of a decoding device alone does not allow for translation of the signal into something comprehensible. Unless the signal itself contains the signature code for a particular decoding device, any reception of the signal is unintelligible.

All other forms of media are either intelligible in primary form, such as magazines and newspapers, or intelligible after translation through commonly available subsidiary devices, such as radios, televisions, or motion picture projectors. Even communications requiring translation through a subsidiary device are generally translatable through any subsidiary device of the same type. For example, any VCR can play any particular video tape. On the other hand, a receiver of a direct broadcast signal must utilize a particular decoding device to make each broadcast of scrambled direct broadcast satellite transmission intelligible.

This characteristic of the scrambled direct broadcast satellite transmission is unique. The signal is distinguishable from all other forms of media in that receivers are incapable of translating the signal into intelligible form by any interchangeable, commonly accessible translation device. This distinguishing characteristic provides the groundwork for full protection of the signal under Stanley v. Georgia. As long as the material is not obscene at the location the producer develops and scrambles the material, its transmission in a scrambled, unintelligible form would seem to be constitutionally protected.

A state or the federal government may regulate an electronic, unintelligible signal for obscenity provided that the broadcast or the receipt of that signal, as converted into an intelligible com-

199. Id. at 465.
200. Id.
201. See supra notes 15-16.
203. This conclusion does not imply that similar protection could or should be extended to child pornography in a similar scrambled form. The interests of the state in protection of children would far outweigh the privacy interest Stanley protects.
munication, can similarly be regulated for obscenity. If the government is able to regulate the material in question for obscenity, and if the government does not consider that material in question to be obscene in that location, the location becomes a so-called safety zone from which individuals may freely distribute the materials.

Under *Stanley*, courts will protect obscenity in the home. The scrambled direct broadcast satellite signal is unintelligible while outside the home. A fact finder cannot hold an unintelligible signal beamed from one protected area to another as obscene if one cannot receive and translate the material, because the only material susceptible to that classification is that which an individual can perceive and understand through the senses. Once the receiver secures the scrambled transmission and descrambles it within the home, transforming it into an intelligible form capable of being classified as obscene, the transmission, as well as the receipt of the transmission, gains *Stanley* protection.

Under this analysis, a court would no longer look solely to the disseminator of the "message," the unintelligible and nonobscene signal. The right of the receiver to receive the unintelligible but uniquely translatable signal would determine the right of the transmitter to send the scrambled signal. This analysis is in accord with the Court's analysis in *Lamont v. Postmaster General,* in which the Court found that the post office could not require a written request authorizing delivery to the receiver prior to the dissemination of communist propaganda through the

---

204. The following example exemplifies the concept discussed: An individual in Community A possesses a sexually explicit photograph not considered obscene in Community A. This individual beams a scrambled recreation of the photograph across Community B and into Community C where another individual receives and descrambles the signal to reproduce the photograph. Assume that Community B considers the photograph obscene, but that Community C does not. Community B cannot prosecute either individual for distribution of obscenity in Community B unless some person within Community B could and did receive the signal and convert the signal into an intelligible, obscene communication. Without this receipt and conversion, Community B could not prove the prima facie case of distribution of obscene materials because it would be unable to prove the distribution element. Furthermore, unless the individual in Community A doubted the impossibility of an individual in Community B receiving and converting the signal, Community B could not prove the prima facie case of attempt to distribute obscene materials because it would be unable to prove the intent element. The argument parallels that put forth by USSC in its Motion to Dismiss in the American Exxtasy cases. Defendant's Motion to Dismiss Indictment, State v. U.S. Satellite, Inc., No. 90-000971, at 5 (Cir. Ct. Montgomery County, Ala. filed June 8, 1990).

205. This proposition, of course, would be true only if the community in which the material was produced and scrambled would not itself find the material obscene. See *supra* note 145 and accompanying text.

206. 381 U.S. 301 (1965).
The right of the receiver to receive the communication determines the right of the disseminator. Courts would be incapable of labeling the scrambled and unintelligible signal obscene and would similarly be unable to deny its nature as a message.

**ONE TOO MANY "LOGICAL" EXTENSIONS**

Although the analysis detailed above is sound in theory, it fails to account for and protect the basic framework of most criminal laws affecting communication. Stretched to its extreme, the analysis creates one too many "logical" extensions.

In the American Exxxstasy Channel cases, children gained access to the broadcasts either directly or through video cassette tapes of the broadcasts. The children’s parents took an affirmative step to receive the broadcasts by purchasing the service. Presumably, they knew of the nature of the broadcasts. HDOS initiated the American Exxxstasy Channel broadcasts from a protected safety zone and the parents received the broadcasts in their home, also a protected safety zone.

If the children gained access to the broadcasts first-hand, then the parents should have had the power to lock out the channel and prevent the access. If the children instead gained access to the movies by way of tapes the parents had made of the broadcasts, the parents could have prevented access to these tapes.

One cannot make an analogy to the case of unexpected exposure to indecent materials. Adults had to subscribe to the American Exxxstasy Channel service to gain intelligible access to the

207. *Id.* at 305.
208. *Id.* at 307.
209. See *supra* note 2 and accompanying text.
210. An interesting sidelight to the lockbox question appears in Bauman, *supra* note 140, at 611, in which the writer finds troublesome the practice of charging money for the rental of the cable lockboxes: "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." *Id.* at 615 n.23. Such a problem does not arise in the case of the American Exxxstasy Channel, nor in the case of a premium channel being subscribed to through cable television. Unlike the basic tier service available to cable subscribers, the premium channel and satellite subscribers must take the additional affirmative step to receive a singular service that is otherwise not available and that is received knowing of its particular content.
211. See Meyerson, *supra* note 52, at 164-65 (discussing the distinction between children’s access to radio broadcasts and access to subscription cable television).
broadcasts. In the American Exxxxtasy Channel scrambled signal situation, no unwilling receivers viewed the signal. Thus, the ability of the government to regulate the signal would seem to be at a minimum.

The courts have placed limits on the extent of the freedoms outlined, however, and the courts could extend these limits to create one more, perhaps final, exception to the Stanley rule:

No government—be it federal, state, or local—should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law . . .

If a court allowed this “safety zone” logic to prevail, the wall courts have erected around the Stanley protection would begin to crumble. The Supreme Court has consistently found a legitimate state interest in “stemming the tide of commercialized obscenity” to etch into the Stanley protection. No reason exists to believe that the Court would proceed differently in the present case.

In Paris Adult Theatre I v. Slaton, the Court found the interest in “stemming the tide” to be compelling despite the assumption that the theater could prevent minors and noncon-

---


213. The right of a speaker to communicate through the mails outweighed a recipient's interest in preventing entry into the home of objectionable [but not obscene] material. Although the Court in Lamont v. Postmaster General, 381 U.S. 301 (1965) had held that requiring a recipient to request material unconstitutionally burdened the right to receive information, the Court in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) stated that the “short, though regular, journey from mailbox to trash can . . . is an acceptable burden” on the right to avoid offensive material. This burden is only acceptable, however, when the combined rights of a speaker to send the material and of a willing home dweller to receive it balance against the rights of an unwilling recipient. When the willing recipient does not appear in the equation, the balance shifts in favor of the right to limit the material that enters one's home.

Meyerson, supra note 52, at 147 (footnotes omitted). The author also argues that the postal cases are “as close to an ideal solution as can be achieved in a complex world of competing interests and differing tastes.” Id. at 148.


216. Id.

217. Id.
senting adults from viewing the films in question.\(^{218}\) The theater owners protected the films in *Paris Adult Theatre I* from dissemination to minors in a way that the films shown over the American Exxxxtasy Channel could not be,\(^ {219}\) yet the visible presence of the theater in the community was enough to invoke the interest.\(^ {220}\) Furthermore, the history of new communication media presents a foreshadowing of new communication developments that could possibly stretch the *Stanley* limits to the breaking point.

**The Limitation Argument Based on Obscenity Alone**

The counterargument to the safety zone logic is that the government has a right to regulate the stream of commerce.\(^ {221}\) Obscenity regulation is simply incidental to this right.\(^ {222}\) Indeed, the Supreme Court relied on this governmental right to decide in *United States v. Orito*.\(^ {223}\) Orito was found to have transported eighty-three reels of allegedly obscene films.\(^ {224}\) Somewhat analogous to the American Exxxxtasy Channel cases, Orito had conveyed the films by common carrier airlines.\(^ {225}\) He attacked the relevant statute\(^ {226}\) as being overly broad, claiming that the statute

---

\(^ {218}\) Id. at 57-58.

\(^ {219}\) A child lock-out feature was presumably available for the direct broadcast satellite home stations, although in this case, this feature did not prevent children from gaining access. Children could have gained access despite the lock-out feature for various reasons: because it was not present in the home, because it was not activated, or because the adult user videotaped the films. The distributor of the direct broadcast satellite transmission does not have the control over the distribution of the films to adolescents to the degree present for the theater owner in *Paris Adult Theatre I*. See id.

\(^ {220}\) See id. at 59. One can counter the argument that a sufficiently large section of the community tolerated the movies involved in *Paris Adult Theatre I* to keep the theater open by addressing the possibility that the owner may have been taking a loss on the theater and subsidizing the theater operations with other business concerns. The Court did not comment on the economic strength of the theater.

\(^ {221}\) U.S. Const. art. I, § 8, cl. 3.

\(^ {222}\) Because obscenity is not protected speech, the material is solely a product subject to the regulatory powers of Congress under the Commerce Clause. *Cf.* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68-69 (1973) (resting the decision not to extend privacy rights to individuals viewing obscene material in movie theaters on "a States broad power to regulate commerce").

\(^ {223}\) 413 U.S. 139, 143 (1973).

\(^ {224}\) On the day that the Supreme Court decided *Orito*, it also developed the *Miller* test for judging whether a particular communication is obscene. *See* *Miller v. California*, 413 U.S. 15, 30-32 (1973); *see also supra* notes 125-26 and accompanying text. The Court thus vacated and remanded the *Orito* case to the district court for reconsideration of the obscenity determination. *Orito*, 413 U.S. at 145.

\(^ {225}\) *Orito*, 413 U.S. at 140.

\(^ {226}\) Id.

failed to distinguish cases in which transportation “involved no risk of exposure to children or unwilling adults.”

The Supreme Court was not willing to accept the distinction that the material was inaccessible to any but the transporter:

Given (a) that obscene material is not protected under the First Amendment, (b) that the Government has a legitimate interest in protecting the public commercial environment by preventing such material from entering the stream of commerce, and (c) that no constitutionally protected privacy is involved, we cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because the material is intended for the private use of the transporter. . . . Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area, regardless of a transport’s professed intent.

The Court reiterated the familiar reasoning that Congress has the right to regulate interstate commerce even on the basis of morality as long as a rational relationship justifies that regulation. The Court found irrelevant the fact that Orito utilized a means of transportation that would protect children and non-voluntary adults from exposure.

The Supreme Court has severely curtailed the reach of Stanley. In much the same manner, the courts should not permit Stanley

---

228. Orito, 413 U.S. at 141.
229. The Court did note that the tariffs of common carriers generally included the right to inspect the items being transported. Id. at 142 n.5.
230. Id. at 143 (citations omitted).
231. The Court reinvoked the Lottery Case, 188 U.S. 321 (1903), as well as a series of other cases, in finding the morals legislation valid: Congress could reasonably determine such regulation to be necessary to effect permissible federal control of interstate commerce in obscene material, based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause. . . . "It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature."

Orito, 413 U.S. at 143-44 (quoting North Am. Co. v. SEC, 327 U.S. 686, 705 (1946)); see also id. at 144-45 n.6 (quoting Brooks v. United States, 267 U.S. 432, 436-37 (1925) (stating that Congress can forbid and punish the use of interstate commerce as an agency "to promote immorality, dishonesty or the spread of evil").
232. Orito, 413 U.S. at 143.
to protect the transmission of materials that could reach the home in an otherwise unintelligible manner through scrambled direct broadcast satellite. The Supreme Court has stated: "It is extremely difficult to control the uses to which obscene material is put . . . . Even single copies, represented to be for personal use, can be quickly and cheaply duplicated by modern technology thus facilitating wide-scale distribution."\textsuperscript{233} VCRs are the present "modern technology" that facilitated the wide-scale distribution of the allegedly obscene, though admittedly unintelligible signal in the American Exxxtasy Channel cases.

The distinctive nature of direct satellite broadcasting fails to create a rational exception to the general rule proscribing the distribution of obscene matter in interstate commerce. The courts should find this exception based solely on the technology of the medium designed to prevent reception, not on the traditional grounds of viewpoint scarcity.\textsuperscript{234} The "seductive plausibility of single steps in [the] chain of evolutionary development of [the] legal rule"\textsuperscript{235} has found its "logical extreme."\textsuperscript{236}

The Supreme Court has an alternative solution to this legal rule that has now found its logical extreme. In place of erecting another wall around \textit{Stanley}, it could overrule \textit{Stanley} altogether. Indeed, the Supreme Court has threatened the reversal of \textit{Stanley}, stating, "it is not unreasonable to assume that had [\textit{Stanley}] not been so delineated [as a line of demarcation between what is acceptable and what is not], \textit{Stanley} would not be the law today."\textsuperscript{237}

Building another wall around \textit{Stanley} would be more desirable because the basics of \textit{Stanley} would remain intact without sacrificing any recognized state interest heretofore protected. A proclaimed "bright line" of allowing the regulation of the otherwise unintelligible, scrambled signals would keep all rights in place as they existed prior to the development of the new technology. The advent of avoidance technology developed by broadcasters seeking to avoid legal prohibitions should not so

\textsuperscript{233} United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 129 (1973).
\textsuperscript{235} 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. at 127.
\textsuperscript{236} Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908), quoted in 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. at 127 n.5.
\textsuperscript{237} 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. at 127.
affect the rights of individuals who are not taking advantage of that avoidance technology.\textsuperscript{238} No less-intrusive method of regulating this form of obscenity exists beyond that suggested. Separating media technology regulation designed to further the interests of a robust community dialogue through a multitude of speakers would further the state goal of protecting interstate commerce from the dissemination of pornography. When presented with the question of obscenity in the direct-broadcast satellite context, the Supreme Court could validly utilize the Commerce Clause to restrict the use of scrambled direct broadcast satellite transmission of pornographic material.\textsuperscript{239}

Overruling Stanley is a logically seductive choice. More restrictions on Stanley seemingly leave only the shell of a right, even less so than existed prior to this technology. With the proposed restriction in place, however, a person may still constitutionally possess in the home obscene sexually explicit material depicting adults,\textsuperscript{240} albeit with the total proscription on transporting the same. The one remaining right not proscribed is the right to produce this pornographic material within the home for one's in-home personal use.\textsuperscript{241}

\textsuperscript{238} The prohibition of the radar detector in the marketplace, clearly an item of technology used solely to avoid speeding tickets, has not resulted in a concomitant loss in any constitutional rights except the right to own a certain piece of technology.

\textsuperscript{239} This not very "picturesque" Commerce Clause logic uses the danger to justify the regulation. The Court used the same logic when upholding a ban on the transportation of lottery tickets. Lottery Case, 188 U.S. 321, 356-62 (1903); see also United States v. Orito, 413 U.S. 139, 143 (1973) (acknowledging Congress' right to regulate the interstate transportation of obscene material). Stanley itself seems to discount this argument: [W]e are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because the right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.


\textsuperscript{240} States may constitutionally prohibit the possession of child pornography regardless of whether the possession of the material is in the home or for personal use. Osborne, 495 U.S. at 103.

\textsuperscript{241} Care should be taken not to extend this statement beyond its strict limits. Certainly the home is not a buffer against the otherwise prohibited behaviors of pandering, prostitution, production of child pornographic materials, or commercial production of pornographic materials. Protected behavior includes the self-production of materials, such as the writing of a book, the drawing of pictures, and the taking of self-portraits.
Although the behavior protected may seem unworthy of surrounding it with a monolithic bulwark, the mindset the behavior evinces is worthy. Stanley correctly derided the stated goal of the subject Georgia law to protect the individual's own mind and morality: 242 "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." 243 Overruling Stanley to proscribe all possession, production, and transportation of obscene materials would have the seductive character of simplifying at least one aspect of the convoluted obscenity law. It would also represent the first impermissible inroad into the sacred territory of an individual's thought processes.

Finally, the Court could decide to eliminate the community standard for both scrambled and unscrambled pornographic materials for the determination of obscenity. It would then face the question of how to establish a national obscenity standard. It could decide to apply the lowest common denominator standard, thus forcing the nation to adopt the moral standards of the least tolerant community. Alternately, it could decide to apply a liberalized standard, subjecting the least tolerant community to withstand the onslaught of materials it now is capable of prohibiting. 244 Finally, it could attempt to develop an "average" standard, compromising the interests of both the least tolerant and the most tolerant communities.

At some point, the Supreme Court must adopt one of these alternatives to deal with new communication technologies. Although the present state of the communication arts does not require such a choice, eventually the nation may become so intertwined as to make the choice unavoidable. The Court presently, however, does not need to make such a Hobson's choice.

CONCLUSION

The government, either state or federal, cannot hold the common carrier direct broadcast satellite transmitter liable for carrying programming that any particular community would consider

243. Id. at 566.
244. The marketplace theory, suggesting that the least tolerant communities will not be subjected to materials it otherwise would not tolerate, cannot withstand scrutiny. Radio, television, and cable television, to some extent, utilize national broadcasts. Some material otherwise not welcome would leach into the community.
obscene unless the carrier has a pecuniary interest in the programming or unless the carrier violates its federal mandate to avoid exercising editorial control over broadcast material. If the programming is in an unscrambled form, however, any local community within the satellite's broadcast footprint may proceed against the knowing participants in the broadcast. This local community control over the transmission of direct broadcast satellite signals introduces for the first time a minimum common denominator obscenity standard, a standard that is by its nature less tolerant than the previously rejected national obscenity standard.

Direct broadcast satellite transmission is unique among media forms for obscenity analysis. When the broadcast is scrambled, distinctions between the direct broadcast satellite transmission and other media types appear to permit an exception to the general rule that transportation or broadcast of obscenity is subject to regulation and proscription. A scrambled direct broadcast satellite transmission, in fact, may be completely protected under Stanley as long as the original production and scrambling takes place in a community that would not find the material obscene. The post-Stanley obscenity decisions indicate that this predicted result may not be accurate. The arrival of the direct broadcast satellite and the attendant use of that medium for the transmission of obscenity in scrambled form poses a very real threat to the existence of the Stanley protection.

John V. Edwards