Cable Operators as Editors: Prerogative, Responsibility, and Liability

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The conjunction of rights with responsibilities has been a staple of anti-rights rhetoric for several generations. Those who think that rights have gone too far, generally or in specific cases, typically seek to "remind" us that rights entail responsibilities, and then equally typically urge changes in the law decreasing the scope or strength of the rights to which they object, and increasing the legal responsibilities of the right-holders. This increase in responsibilities, of course, has the desired effect, even by itself, of making the right both smaller and weaker than had previously been the case.

I begin this paper on contemporary cable television regulation with these abstract observations on the rhetoric and structure of rights because the subject of cable television is as good an example as any of the the phenomenon I have just reported. Perhaps best exemplified in the public and political

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discourse surrounding the recent legislation, regulations, and litigation regarding so-called "indecent" programming on leased and public access channels, the subject of the rights of cable operators has become legally and rhetorically intertwined with the subject of the editorial responsibilities and potential legal liability of those same operators.

My goal here is neither to relitigate recent court cases, nor to tell courts how to decide the ones before them, in particular the case on the "must carry" regulations now before the Supreme Court,[2] and even more particularly the case on the indecency regulations now before the United States Court of Appeals for the District of Columbia.[3] I will leave it to the litigators to litigate, and leave it to the courts to reach their own decisions. My goal, in some sense, is a bit larger. For although I will talk at some length about the current contretemps regarding the indecency regulations, I think it important to see these regulations and the surrounding controversy as examples of a question likely to endure even after this particular dispute is resolved. That question is one of cable operators' legal responsibilities generally for the content of their programming. Especially with the development of a new public concern with

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[2]Turner Broadcasting System, Inc. v. FCC, No. 93-44, argued 1/12/1994, on writ of certiorari from 819 F. Supp. 32 (D.D.C. 1993) (three judge court).

[3]Alliance for Community Media v. Federal Communications Commission, 10 F.3d 812 (D.C. Cir. 1993), reconsideration en banc pending.

violence on television, it would be a mistake to think that the question of cable operators' editorial responsibility is one with a short shelf life, and in trying to analyze this question I hope to say things that will be useful when, as I think it will, the question turns to topics other than the topic of indecency.

I

I want to begin with a few more observations on the general theme with which I commenced this paper - the logical and rhetorical relationship between rights and responsibilities. The rhetorical relationship is well-known, and one sees it these days almost as much in serious commentary as in popular political debate.[4] Yet it is a recurring feature of that rhetoric that it seeks to suggest that the relationship between rights and responsibilities is a logical or necessary one. At times we see the language of formal logic, as with the phrase "rights entail responsibilities," and even more often we see essentially the same claim made in the language of conceptual necessity - "rights carry responsibilities" - language suggesting that it is an intrinsic or necessary feature of rights that they bring with them commensurate responsibilities on the right-holder.

That is utter nonsense. Legal rights do not bring legal

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[4]E.g., Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (New York: Macmillan, 1991).

responsibilities, but in fact free the right-holder from them.[5] Recognition of a constitutional right to privacy does not produce constitutional or legal responsibilities for those who gain the right to privacy. If the Supreme Court were to reverse Bowers v. Hardwick,[6] it would not increase the responsibilities of those who engage in consensual sexual conduct that some deem immoral. Such a decision would do precisely the opposite, decreasing the responsibilities of the right-holders to conform their consensual sexual activities to the wishes of others or the wishes of the state. When the Court decided Miranda v. Arizona[7] neither Ernesto Miranda nor any any other defendant in a criminal case took on new responsibilities. The only ones with new responsibilities were the police. And in the area of free speech, the central topic of this symposium, the same phenomenon can be seen. New York Times Co. v. Sullivan[8] increased the rights of the press just by decreasing its legal responsibilities and potential liability in defamation cases, and legislation allowing journalists to protect their sources accomplishes its ends precisely by eliminating a responsibility - the responsibility of citizens to comply with subpoenas when they have knowledge of criminal activity - that journalists otherwise

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[5]For similar thoughts in this vein, see my "Can Rights Be Abused," Philosophical Quarterly, vol. 31 (1981), pp. 223ff.

[6]478 U.S. 186 (1986).

[7]384 U.S. 436 (1966).

[8]376 U.S. 254 (1964).

would have had.[9]

Once we recognize that the relationship of legal rights to legal responsibilities is one of disjunction and not of conjunction, we can understand that those who make the claim that rights entail or carry responsibilities are commonly seeking not to complete a logical relationship, but rather to restrict the scope or strength of some right. To claim that cable operators have or should have legal responsibilities for the content of their programming is quite simply to claim that cable operators should have fewer rights - less editorial freedom - than would otherwise be the case. That is certainly a plausible position, even though in this context it is not mine. But it is far less plausible and far less acceptable in terms of argumentative honesty to suggest that this conclusion flows in some logical or quasi-logical way from the very nature of the right.

Although it is a mistake to attribute logical status to the conjunction of rights with responsibilities, the claim of conjunction becomes more plausible if we see it as an argument for the lack of a relationship between the existence of a right and the non-existence of non-legal responsibilities in the exercise of that right. Anyone who has been infuriated by reporters (fortunately not all of them) who take their First

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[9]See Vincent Blasi, "The Newsman's Privilege: An Empirical Study," Michigan Law Review, vol. 70 (1971), pp. 229 ff.

Amendment rights to be an immunity from criticism, or by reporters (even fewer, fortunately) who believe that they should do everything the First Amendment gives them a legal and constitutional right to do, recognizes the point I am trying to make here. Rights can be exercised wrongly, in the political or moral or social sense of "wrong," even if the claim becomes confused once we seek to attach legal penalties to those wrongs. Moreover, widening the scope of legal rights increases the possibility of people engaging in morally wrong conduct. Were free speech rights narrower, we would likely have fewer Nazi marches, fewer cross-burnings, fewer racial epithets, and fewer denials of the Holocaust, and thus it may be that the very existence of broad free speech rights increases the opportunities to engage in wrongful or harmful conduct (just as it of course increases the opportunities to engage in valuable conduct), and thus increases the opportunities for people to urge that those rights be exercised with an attention to the moral and political responsibilities of the right-holder, responsibilities that are neither extinguished nor diminished by giving the conduct the legal immunity that we call a right. That cable operators do and should have a First Amendment-based degree of editorial freedom, akin to the editorial freedom recognized for newspapares in Miami Herald Publishing Co. v. Tornillo,[10] does not and ought not to prevent us from criticizing those operators when they use that freedom to become, for example, the accomplices and instruments

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[10]418 U.S. 241 (1974).

of those who would endorse or encourage violence against women. There is no logical error in believing that legal rights and non-legal responsibilities can operate in tandem, and some reason to believe that increases in rights, even when fully justified, will increase the opportunities for morally irresponsible behavior and thus increase the need to call for non-legal responsibility in the exercise of legal rights.

II

Now I want to return to the concrete situation before us and apply much of this to current controversies regarding the editorial responsibilitiues of cable operators. As I indicated at the outset, the topic has become salient because of the "indecency" issue, although it is likely to be with us long after that controversy goes away (if it ever does). So let me begin with a brief survey of some of the recent legal developments, familiar terrain for much of this audience. Under the Cable Communications Policy Act of 1984,[11] cable operators were required to provide certain services by way of leased access and public access.[12] Consistent with the concept of mandatory access, operators were prohibited, by what is now 47 U.S.C. section 532, from exercising editorial control over the

[11]Pub. L. 98-549, 98 Stat. 2779.

[12]47 U.S.C. secs. 531-32.

programming on public access or leased access channels.[13] Because it would be anomalous to hold cable operators legally responsible for content over which they were legally prohibited from exercising editorial control, Congress in 47 U.S.C. section 558 immunized cable operators from legal liability based on the content of leased access or public access channels, that immunity being specifically extended to libel, slander, obscenity, incitement, invasions of privacy, or false or misleading advertising.

Although this immunity undoubtedly gave a measure of security to cable operators, its practical importance should not be exaggerated. When we are talking about the legal liability of a transmitter of communications based on the content of communications produced by others, it is under most circumstances the case that such liability is not an important part of the American jurisprudential terrain. Take libel and slander, for example, an intriguing place to start since New York Times Co. v. Sullivan itself is analogous given that the New York Times did nothing other than print a paid advertisement prepared by others. Still, the existing standards of liability after New York Times v. Sullivan are themselves so narrow as to make the potential for defamation liability a relatively small factor even for those most likely to be encounter the prospects of defamation

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[13]See Playboy Enterprise v. Public Service Commission, 906 F.2d 25 (1st Cir. 1990).

liability.[14] And given that those standards prohibit the imposition of liability, in public official and public figure cases, on anyone without actual knowledge in advance of the falsity,[15] it seems safe to say that the prospects of liability for cable operators in public official or public figure cases would be minuscule. Even when we bring in the lower negligence standard applicable to cases brought by those who are neither public officials nor public figures,[16] and even when we recognize the deep pockets phenomenon pursuant to which it may often be the cable operator perceived by a plaintiff as having the deepest pockets, it still seems remote to think that very many defamation plaintiffs will be able to show negligence on the part of the cable operator, especially since mandatory access, at least, would seem to preclude the possibility of a plausible finding of negligence on the part of the cable operator. Cases may arise in which someone who does as the law orders is for that reason negligent, but this is surely not likely to be one of them.

Similar conclusions apply to other possible bases for cable operator liability. With respect to incitement or other varieties of communication causing physical harm, the stringency

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[14]Footnote on the National Enquirer figures.

[15]As to the "reckless disregard" component of New York Times, even that requires that there "must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727 (1968).

[16]Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

of the rule in Brandenburg v. Ohio,[17] even as applied to negligent intermediaries, again precludes a serious likelihood of cable operator liability. In Olivia N. v. National Broadcasting Co.,[18] for example, the National Broadcasting Company might be analogized to a cable operator, insofar as it served as a (much more willing than the typical cable operator in a public access or leased access situation) conduit for programming actually prepared by others. When one of its programs, the made-for-television movie Born Innocent, turned out to cause (in the tort law sense of a but-for cause) a sexual assault by virtue of "copycat" activity by a group of teenagers, the California courts held that Brandenburg precluded liability except in those cases in which it could be shown that the defendant had actually desired or intended physical harm to occur. This result, consistent with results in other cases,[19] should make it again clear that even in the absence of section 558 cable operators should have little to fear on the incitement score.

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[17]395 U.S. 444 (1969).

[18]178 Cal. Rptr. 888 (Ct. App. 1981), cert. denied sub nom. Niemi v. National Broadcasting Co., 458 U.S. 1108 (1982).

[19]E.g., Herceg v. Hustler Magazine, 814 F.2d 1017 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988); Walt Disney Productions, Inc. v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981). See generally Diamond & Primm, "Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries: From the Mickey Mouse Club to Hustler Magazine," Hastings Comm/Ent Law Journal, vol. 10 (1988), pp. 969ff.; Kopech, "Shouting 'Incitement' in the Courtroom: An Evolving Theory of Civil Liability," St. Mary's Law Journal, vol. 19 (1987), pp. 173ff.; Schauer, "Mrs. Palsgraf and the First Amendment," Washington and Lee Law Review, vol. 47 (1990), pp. 161ff.

Finally, consider the question of obscenity. Once again the substantive legal standards as they now exist are such as to make the likelihood of cable operator liability quite small, section 558 aside. Now of course we are no longer in ther realm of the hypothetical, since Section 10(d) of the Cable Television Consumer Protection and Competititon Act of 1992[20] explicitly amends 47 U.S.C. section 558 by adding the phrase "unless the program involves obscene material."

Still, the likelihood of cable operator liability seems remote. Like the exclusion of obscenity in the reauthorization of funding for the National Endowment for the Arts, the exclusion of obscenity from section 558 immunity seems far more symbolic than anything else. After Jenkins v. Georgia,[21] which at least as a matter of legal doctrine put to rest the unfounded idea that obscenity was anything a local community said it was, obscenity convictions in the United States have been extraordinarily rare, and what few there have been have been convictions of large scale

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[20]Pub. L. 102-385, 106 Stat. 1460 (October 5, 1992).

[21]418 U.S. 153 (1974), in which then Associate Justice Rehnquist, writing for a unanimous Supreme Court, made it clear that the movie Carnal Knowledge could not be found to appeal to the prurient interest, nor to be patentlky offensive to contemporary community standards, regardless of the views of the people, courts, or legislature of the state of Georgia. And the third prong of the standard in Miller v. California, 413 U.S. 15 (1973), that precluding from the category of the legally obscene any material having "serious literary, artistic, political, or scientific value," has never even nominally been measured against local standards. Pope v. Illinois, 481 U.S. 497 (1987); Smith v. United States, 431 U.S. 291 (1977).

dealers of the kind of material found only in the most explicit corners of the most explicit adults-only establishments. This is not the place to debate whether the obscenity laws should be eliminated entirely, as some people believe, or broadened, as others believe, or narrowed, as I and others believe,[22] but simply as a report of the existing state of legal doctrine and prosecutorial practice. And as such, the elimination of the obscenity exclusion from section 558 is unlikely significantly to affect the possibility of cable operator liability, and thus, in a rational world, unlikely significantly to affect cable operator practice.[23]

Other areas of potential cable operator liability are perhaps not as clear. Liability for false, misleading, or harmful advertisements is a theoretical possibility, and as to the last perhaps ever-so-slightly greater after the Soldier of Fortune litigation.[24] Still, the existing state of the law with respect to conduits generally, whether broadcasters, cable operators, or print publishers, is such that spending much time

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[22]See Schauer, "Causation Theory and the Causes of sexual Violence," American Bar Foundation Research Journal, vol. 1987, pp. 737 ff.

[23]In their testimony in 1985 before the Attorney General's Commission on Pornography, representatives of the American Library Association and Playboy magazine both represented that they did not see the obscenity laws, unlike the then-pending anti-pornography ordinances, as constituting a threat to their own practices.

[24]Get reference.

worrying about the possibility of cable operator liability based on the content of the materials transmitted on public access or leased access channels (or on commercial channels, for that matter) is unlikely to be particularly fruitful.

II

The indecency issue is, however, a different kettle of fish.[25] Again, a brief recapitulation may be helpful. Although Section 10 of the 1992 Act did eliminate the obscenity immunity from cable operator liability, its primary focus was on indecency. First, in contrast to, or as an exception to, the previous prohibition on cable operator editorial control over public access or leased access programming, Section 10(a) of the 1992 Act permits "a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." And although section (a) is written in permissive and not mandatory terms, section (b) requires the Federal Communications Commission to promulgate within 120 days regulations "designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under [section (a)]." More specifically,

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[25]See Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S. Ctr. 1281 (1992); Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

the regulations are to require all indecent programs to be placed on the same channel, and are to require that the channel be blocked unless the subscriber specifically requests access in writing. The regulations are also to require all programmers to notify cable operators of the presence of any indecent material contained in any of their programs. And, finally, the FCC is required to promulgate within 180 days regulations enabling a cable operator to prohibit the use of "any channel capacity for any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."

The Commission's regulations in pursuance of the congressional directive largely track the statutory language, and it was these regulations, as well as the pertinent statutory provisions, that were struck down by the Court of Appeals on November 23, 1993, in Alliance for Community Media v. FCC.[26] The panel decision is now pending decision by the court en banc. The unanimous panel decision, written by Judge Wald, concluded that the specific authorization to cable operators to exclude indecent material constituted state encouragement pursuant to prevailing state action principles.[27] And since the state action consequently had the effect of restricting sexually oriented material without a finding of legal obscenity (and without coming

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[26]10 F.3d 812 (D.C. Cir, 1993).

[27]See especially Reitman v. Mulkey, 387 U.S. 369 (1967).

within the highly uncertain scope of the "broadcasting" exception of FCC v. Pacifica Foundation[28]), it constituted, under existing law, a clear infringement of the First Amendment. Moreover, the court held, the statutory and regulatory requirements imposed on cable operators not choosing to "voluntarily" restrict indecent programming were themselves sufficient to constitute coercion, the effect being that once again the statute was seen to restrict the use or showing of material neither obscene nor coming within the arguably separate principles applicable to broadcast, but, under current law, not applicable to cable.

I want to stick to my promise earlier in this paper. That is, I do not want to predict the outcome of the Alliance for Community Media litigation, nor attempt to suggest an outcome to the courts. I do, however, want to situate the issue within a larger range of concerns about legally imposed editorial legal responsibility for materials not created by the what we might think of as the "conduit."

Interestingly, there are two potentially conflicting strands of First Amendment thinking that might be relevant here. One of those strands takes the "conduit" idea seriously, and here the leading case is Smith v. California.[29] Smith, the case that gave us the roots of the scienter requirement in obscenity law, in

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[28]438 U.S. 726 (1978).

[29]361 U.S. 147 (1959).

fact stands for a larger principle. It stands for the principle that excess deterrence of a communication intermediary (in Smith a bookstore) presents the same kinds of problems that excess deterrence (the "chilling effect"[30]) of a primary communicator is thought to present in, for example, defamation law. As a problem of decision theory, primary communicators (perhaps cable programmers in this context, but even more likely creators of individual programs) recognize the possibility that in a world of some exposure to legal liability they run the risk of mistaken liability, the false positive, or mistaken non-liability, the false negative. The rationally-acting primary communicator will seek to minimize the false positives, but not at an excess cost of minimizing the benefits that engaging in risky behavior brings for them. Thus, if it were the case that sexually explicit material close to the obscenity line brought greater returns in the market than less explicit (and thus less close to the obscenity line) material, a producer of such material might risk some number of mistaken impositions of liability, and thus might play it close to (or over) the line just because of the marginally greater returns that are available in this area.[31]

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[30]See Stephen M. Renas, Charles Hartmann, and James L. Walker, "An Empirical Analysis of the Chilling Effect," in Everette E. Dennis and Eli M. Noam, eds., The Cost of Libel (New York: Columbia-University Press, 1989), pp. 41ff.

[31]The nature of the sanctions are of course relevant. People are more likely to risk money than jail time, but jail time in obscenity cases is in practice reserved for seriously multiple offenders or those whose actual crime is some variant of child pornography.

Similarly, an ideologically committed speaker might because of her own ideology (or because certain forms of discourse bring greater attention) find it more valuable to refer to a political opponent as, to take a term now in use in Australian parliamentary discourse, a "scumbag," rather than as "the honorable gentleman."[32] So when we are dealing with primary communicators, running the risk of mistaken liability (in the broadest sense) may bring sufficient benefits, financial or otherwise, to explain why communicators frequently do not adopt the most risk-averse strategy.[33]

In some domains, however, there may be little benefit to the communicator in going close to the liability line, because in some domains that marginal activity brings virtually no marginal benefit. Information, of course, is a prime example of this phenomenon, since for any individual provider of information the expected advantage from providing a marginal piece of information is likely to be negligible.[34] If enagaging in a communicative activity close to the liability line is unlikely to bring the

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[32]In the words of Dave Barry, I am not making this up.

[33]See Ronald A. Cass, "Principle and Interest in Libel Law After New York Times," in The Cost of Libel, op. cit., pp. 69ff.

[34]See Ronald Cass, "Commercial Speech, Constitutionalism, Collective Choice," University of Cincinnati Law Review, vol. 56 (1988), pp. 1317 ff.; Daniel Farber, "Free Speech Without Romance: Public Choice and the First Amendment," Harvard Law Review, vol. 105 (1991), pp. 554 ff.; Richard Posner, "Free Speech in an Economic Perspective," Suffolk University Law Review, vol. 20 (1986), pp. 1 ff.; Frederick Schauer, "Uncoupling Free Speech," Columbia Law Review, vol. 92 (1992), pp. 1321 ff.

communicator a benefit commensurate with the increased risk of legal liability, risk-averse strategies will be employed. And if we think that the information that might otherwise have been provided is a public good in the strict sense (as we do, by stipulation, with all intrinsically constitutionally protected speech[35]), then there may be reasons to manipulate the incentive system, reducing the likelihood of liability to make available information that might not see the light of day were we to rely solely on the operation of a private incentive system.

III

Now let us consider this problem in the context of intermediary liability, in particular intermediary liability for cable operators. If the broadcasting of indecent leased access or public access material brings no greater return for the cable operator than does broadcasting non-indecent material, but brings even the smallest increase in the possibility of liability, then we can expect cable operators to behave in expectedly risk-averse fashion, more risk-averse than, say, the programmer who may in some circumstances foresee greater benefits in exchange for taking greater legal risks. And that is why it is no surprise that cable operators so eagerly took up the invitation in section

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[35]I say "intrinsically" to distinguish speech we may protect because we want to and speech we protect strategically because we want to make sure that other speech remains free. See Ocala Star-Banner v. Damron, 401 U.S. 295 (1971) (White, J., concurring); Frederick Schauer, "Fear, Risk, and the First Amendment: Unraveling the 'Chilling Effect,'" Boston University Law Review, vol. 58 (1978), pp. 685 ff.

10(a), hardly to the surprise of either Congress or the Commission.[36] Careful consideration of the normative question of cable operator responsibility, therefore, might suggest a serious incentive analysis, an analysis that might, perhaps paradoxically, produce the conclusion that Smith v. California was less necessary in the circumstances of its initial application than it might be now in quite different circumstances.[37]

The rhetoric of the cable operator as "conduit," however, is intriguingly in tension with an increasing rhetoric of cable operator as editor.[38] Now I do not want to operate under any illusions here. Anyone who reads Miami Herald Publishing Co. v. Tornillo[39] will immediately recognize the advantages of characterizing themselves as an editor. If the goal is to be able to do want you want to be able to do without governmental interference, a goal that many people and institutions have, then

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[36]See Alliance for Community Media, 10 F.3d at 821-22.

[37]That is, the Court in Smith assumed that an increase in the possibility of bookseller liability would automatically produce bookseller sterilization of the bookshelves. That might be right, but a full analysis would have to take into account that, to use a 1959 example, Tropic of Cancer might have been more profitable (either directly or as a way of bringing customers into the bookstore) than less steamy works.

[38]And case law to that effect. See, e.g., Quincy Cable TV, Inc. v. FCC, 768 F.2d F.2d 1434 (D.C. Cir. 1985); Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330 (D.C. Cir. 1985); Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985).

[39]418 U.S. 241 (1974).

there are obvious advantages in defining yourself in such a way as to secure the maximum legally and constitutionally enforced immunity. If the First Amendment protected sex and not speech, then we might discover that activities characterizable as both sex and speech[40] would become more commonly characterized as the former rather than as the latter. Similarly, if the Constitution protects editors but not common carriers, and if you want to be able to maximize your own freedom of action, then better to be an editor.

Although we might thus understand the strategic advantages for cable operators in defining themselves as editors, the analogy often seems a bit strained. And that is because the editor analogy is itself an analogy from the primary archetype of the speaker speaking as she wants to speak, or the Zengerian editor publishing a newspaper that was unalterably opinionated from beginning to end. When we think about the cable operator selecting among alternatives to fill its channels, we recognize some of the editorial function, but we recognize as well that the connection between this activity and the speaker deciding what she wants to say is, to put it mildly, somewhat remote.

All of this is not to suggest that cable operators should be controlled. It is to suggest that the question whether cable

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[40]Those who don't see the possibility should go to see a "loop" at an "adults only" peep show.

operators should be controlled is not likely to be advanced by starting with a picture of the cable operator as some sort of Speaker's Corner orator or colonial printing press operator. Rather, the question whether cable operators should be controlled is one seemingly made best on the basis of a decision about what kind of programming ought to be available on this increasingly dominent communications medium. Once that decision is made, cable operators can then be put into the constitutional category most likely to achieve that goal.

IV

Which gets us back to indecency. Section 10 finds its way into the 1992 Act precisely because many people sincerely believe that there is too much sex on television, in the movies, in art, and elsewhere. That is not a view I share, although unlike many people who do not share the view that there is too much sex in the mass media I do believe that there are too many endorsements of violence against women in the mass media, some of which are sexualized. Still, given that Section 10 applies only to access channels, and leaves commercial channels untouched, it may be best to view section 10 as a symbol, in the same way that much of the recent controversy about arts funding has been largely symbolic. At that point one's sympathy or hostility with the underlying substantive issue becomes more important, because it is especially important that symbolic acts be tailored to send out the right message. And that is why even if existing First

Amendment doctrine were to be transformed so as to allow indecency regulation outside of the broadcast media (which I do not think it should be), I would still disagree with the point of this entire enterprise.

Nevertheless, it may be worthwhile at this point to return to the non-legal question of responsibility. Here the question of leased access and public access channels is somewhat unusual, because the typical scenario in which we consider questions of editorial responsibility is one in which there is some room for editorial choice. When that is absent, it does not make much sense to think of (non-legal) responsibility in the making of that choice. When we leave the narrower issue of leased access and public access channels, however, the question of editorial responsibility for choices actually made is quite different. As cable operators increasingly adopt a rhetoric in which they describe themselves as editors, a rhetoric accompanying their desire to resist the must-carry regulations, they may find themselves increasingly subject to criticism for the editorial choices they are in fact making. Here me may find ourselves in the middle of an intriguing experiment in public perception. It is probably fair to assume that many of those who object to sexually explicit cable programming object as well to sexually explicit telephone services. Indeed, we do not even have to

assume this.[41] Yet we rarely hear the telephone companies describing themselves as editors making editorial choices, and indeed the telephone companies have in general quite comfortably continued the common carrier rhetoric from earlier days. By contrast, cable operators, which might for some reasons have chosen to continue common carrier rhetoric and pursue common carrier treatment, have for some reasons chosen to abandon that rhetoric and move in the direction of a quite different "editor" rhetoric. Editors, however, like television networks, make choices, and are often criticized (or more) for the choices they make. Cable operators might take a careful look at the current situation of television networks, perhaps especially vis-a-vis the current issue of televised violence, before deciding too quickly that editors are what they really want to be.

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[41]Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).