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X-RATED MOTION PICTURES: FROM RESTRICTED THEATRES AND DRIVE-INS TO THE TELEVISION SCREEN?

I. INTRODUCTION

Motion pictures were first recognized as a constitutionally protected form of expression in 1952. In that year, the case of Joseph Burstyn, Inc. v. Wilson held that motion pictures were a significant medium for the communication of ideas, the importance of which was not lessened by the fact that they are designed to entertain as well as to inform. The Court, however, was careful to note that while generally extending the protection of the first amendment to motion pictures the Constitution did not require absolute freedom to exhibit every motion picture of every kind at all times and in all places. The Court indicated that if motion pictures possessed a greater capacity for evil than other constitutionally protected modes of expression—particularly among the youth of the community—they would still be subject in some instances to community control short of unbridled censorship.

Despite the guarantee of a right to film censorship through community control given by the Burstyn decision, constitutional protection of freedom of expression in motion pictures gradually led to the emergence of what are commonly known as "X-rated" movies.

1. Prior to 1952, the motion picture industry was considered as only a "business, pure and simple, originated and conducted for a profit like other spectacles, not to be regarded nor intended to be regarded ... as part of the press, or as organs of public opinion." Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230, 244 (1915).

2. 343 U.S. 495 (1952).

3. Id. at 501. This reasoning was primarily based on a statement made earlier in Winters v. New York, 333 U.S. 507 (1948). In that case, the Court stated: "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.

Id. at 510.

4. 343 U.S. at 501.

5. Id. at 502.

6. Almost all general release films today are given ratings by the Code and Rating Administration (C.R.A.) to inform the public of a film's subject matter and its fitness for viewing by children. This is determined by sexual content and the amount of violence portrayed in the movie. The classifications are:

G—General audience, all ages admitted.
PG—all ages admitted, parental guidance suggested.
R—restricted because of theme, content or treatment to persons 17 years of age and
ies in theatres and drive-ins throughout the nation. X-rated motion pictures generally fall into one of three distinct categories: 1) the "exploitation film" which costs little to produce and concentrates on the erotic elements of the picture; 2) the "hybrid film" which combines the sexual explicitness in exploitation films with the distribution patterns of general release films; and 3) the "16 m.m." film which contains exhibitions of sexual intercourse and oral-genital contact. Formerly often held not obscene by judicial standards for adults, these motion pictures have traditionally concentrated upon reaping huge and quick profits from the exploitation of sex and sexual deviations. Indeed, because of their sexual explicitness, judicial decisions have consistently restricted the exhibition of X-rated films to areas—such as theatres and drive-ins—which adopt procedures insuring that children will not be exposed and that the right of the general public to privacy will not be invaded.

over unless accompanied by an adult parent or guardian.
X—no one under 17 admitted because of the sexual content of the picture.

With the exception of the "G" and "X" categories, however, the rating system has become almost meaningless. Because the C.R.A. is owned and controlled by the film industry's own Motion Picture Association of America, it generally is obliged to give a studio the rating it wants. Cf. A. Knight & H. Alpert, PLAYBOY'S SEX IN CINEMA 2, 5-6 (1971).

8. See note 65 infra and accompanying text.
9. In his book, CENSORSHIP OF THE MOVIES, R. Randall states that the "exploitation film" is the common type of X-rated movie released for distribution in America. According to Randall, "exploitation film" is a general trade term referring to several kinds of third-rate movies, the common characteristic of which is shock or salacity. The most sought after themes are prostitution, wayward youth, nymphomania and promiscuity. Lesbianism is believed to have particular commercial appeal, and is preferred to other themes. In terms of profits made on such films, at least two exploitation movies have already become legends in the industry. The Immoral Mr. Teas cost $24,000 to produce and had a gross receipt of over a million dollars in four years. The film, Not Tonight, Henry, had original costs of $40,000 and did almost as well at the box office. As for most of the foreign-made exploitation films flooding the market, American rights can be purchased and the film readied for distribution at a total cost of less than $25,000. This means that the distributor's initial investment can be recovered with only a few bookings. One such film, Daniella by Night, averaged gross receipts of $80,000 from only an eight-week run at a single theatre in New York City. R. RANDALL, CENSORSHIP OF THE MOVIES 216-18 (1968). More recently, a three-dimensional exploitation film entitled The Stewardesses grossed over ten million dollars at the box office. In one theatre in Milwaukee, the picture made $36,000 in one week, the "biggest take at that house since The Swiss Family Robinson in 1954." See Knight & Alpert, supra note 6, at 26-27.

10. The Court has recognized that adults have the right to receive material that would not be fit for children. Butler v. Michigan, 352 U.S. 380, 383-84 (1957). However, the mode of dissemination of this material may be prohibited whenever it carries a significant danger of offending the sensibilities of unwilling adults or of exposure to children. Stanley v. Georgia, 394 U.S. 557, 567 (1969); Ginsberg v. New York, 390 U.S. 629, 637-43 (1968); Interstate
In the latter months of 1972, news reports were released stating that the Columbia Broadcasting System (CBS) planned to extend the reach of X-rated motion pictures by scheduling and airing such films as forthcoming late-night television features over the CBS network. These reports were subsequently denied by CBS department heads who maintained that the network did not own a single X-rated movie and did not plan to acquire any in the future. They contended that the network was simply not interested in exhibiting this kind of material on commercial television and that news reports on the subject were merely unsubstantiated rumors.


11. These reports seem to have originated with a news dispatch by the Los Angeles Times Syndicate on February 6, 1972, which stated that CBS had acquired an X-rated movie entitled The Damned and planned to show an edited version on television. The dispatch went on to state that "[i]t would seem just a matter of a year or two before X- and R-rated movies are as common on TV as aspirin commercials." See Gunther, The Great Sex Movie Scandal That Never Was, T.V. Guide, July 28-Aug. 3, 1973, at 7-8. As the story circulated it was altered, with changes of phrasing in different areas, to basically read as follows:

CBS has announced that they will begin showing X-rated movies on the late show. If there is no protest, they will be shown later at all hours of the day. We will have homosexuality, incest, child molestation and nudity almost daily.

Id. at 7.

12. According to Robert D. Wood, President of the CBS Television Network, the Columbia Broadcasting System did not own any X-rated movies, nor had they ever thought in terms of acquiring such films. The rumor, he stated, that CBS was about to commence scheduling these motion pictures was "inaccurate, without substance, and not contemplated." Letter from Robert D. Wood to J. Henry, Feb. 5, 1973, on file with the Valparaiso University Law Review.

A similar position was also taken by Thomas J. Swafford, Vice-president of Program Practices for CBS, who contended that the network had "no intention of broadcasting X or R rated movies; nor has it ever had any such intention." Mr. Swafford pointed out:

When it was determined that the CBS Television Network would replace Merv Griffin with motion pictures, arrangements were made to purchase 247 features. Of those, one, "The Damned," had originally been given an X rating for theatrical showing. Before we would even consider it, we insisted that the distributors edit the film and have the X rating removed by the Motion Picture Code Office. Both were done; it was edited and the rating was revised to an R. We — CBS — felt that even more editing was necessary and proceeded to take an additional eleven minutes out of the film, after which it was our conviction — and still is — that the motion picture would have come under the category of PG — Parental Guidance. I think that you would agree that any television viewing at such a late hour would involve parental guidance.

Letter from Thoms J. Swafford to J. Henry, Feb. 8, 1973, on file with the Valparaiso University Law Review.

13. See note 12 supra.
Apart from such denials, however, the question is raised whether a network or local station should be permitted to broadcast X-rated films over the commercial television medium. Certainly there has been a current trend in that direction. For example, in Canada, cable television stations recently began to run features ranging from the relatively inoffensive Miss Nude Pacific Northwest beauty contest\(^\text{14}\) to *Casonova*, a six-part series on the great romancer, complete with a multitude of nude scenes,\(^\text{15}\) to *The Baby Blue Movie*, a weekly Friday night feature showing sexually explicit X-rated motion pictures in their unedited versions.\(^\text{16}\) This note will examine whether—in light of current constitutional standards governing the dissemination of sexually explicit materials to a community—the Columbia Broadcasting System, or any American network or local station, could similarly exhibit unedited\(^\text{17}\) X-rated motion pictures over a public medium to which potentially large numbers of children and unwilling adults might unavoidably be exposed. It will be argued that although precious first amendment freedoms are involved, X-rated motion pictures should remain limited to present areas of distribution\(^\text{18}\) rather than be extended to the commercial television medium.\(^\text{19}\)

II. FIRST AMENDMENT PROTECTIONS FOR MOTION PICTURES

It has commonly been said that it is hardest to defend those

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16. *Id.* at 20.
17. This note is not, of course, concerned with X-rated motion pictures "edited for television." Such editing would mean that the more explicit or suggestive parts of the film were deleted to make the movie acceptable for a mass audience. As such the self-censorship exercised in editing the picture would take it out of the X-rated classification.
18. Though almost any assertion which limits a basic freedom is currently met with disdain, the reader should keep in mind the following statement from a book review of "Foolish Figleaves" (by Richard H. Kuh):

> Passion and eloquence has been the purview of the libertarian. It is the pursed lip we associate with the censor. The artist tests limits (or should); the censor draws them. In a freedom adoring society any educated man would instinctively prefer to identify with the former—at least if he aspires to acceptance by the intellectual establishment. So, while in life it is the defense of freedom that requires courage, in letters it is quite the opposite.

19. This note will only consider the exhibition of X-rated movies over the commercial television medium. The educational broadcast systems, of course, are given a much wider latitude to experiment with new ideas and concepts for the sake of cultural enlightenment.
freedoms which we cherish most. Nowhere is this more true than when giving consideration to those basic rights which are included under the elusive concept of first amendment protections. Therefore, before discussing the issue of whether X-rated films should be extended to the television screen, it is necessary to consider the extent of protection which has evolved to safeguard motion pictures under the first amendment. Of course, first amendment doctrine in this area is primarily concerned with distinguishing obscenity from sexually oriented but constitutionally protected materials. Thus, after the Burstyn decision had extended first amendment protection to motion pictures (while, at the same time, allowing censorship within a "permissible scope of community control") the question became one of finding a standard under which the exhibition of obscene materials could be censored.

In the landmark case of Roth v. United States, the Supreme Court emphasized that sex and obscenity could not be held synonymous. Obscene material was said to be material which deals with sex in a manner appealing to prurient interest. The Court held that the standard for judging obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." According to the majority of the Court, history had long shown that the phrasing of the first amendment was neither intended to protect every utterance or to include obscenity within the

20. Separating obscenity from sexually oriented but constitutionally protected materials has proven to be a difficult task for the Court. Since the term "obscenity" is neither mentioned nor defined in the Constitution or Bill of Rights, the Court has no constitutional guidelines for deciding what is and what is not obscene. Therefore, the Court must rely on its own standards to regulate the dissemination of material thought to be obscene.

21. It should be noted that in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), censorship was not imposed because the film was obscene, but on the ground that it was "sacilegious." In overruling such a test, the Court declared that "the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies." Id. at 504-05. However, the Court left open the issue of censorship by other standards, stating that it was unnecessary to decide whether a state could censor a motion picture under a clearly drawn statute designed and applied to prevent the showing of obscene films. Id. at 505-06.

23. Id. at 487.
24. Id.
25. Id. at 489. Prior to Roth, the Court had used the test announced in Regina v. Hicklin, 1868 L.R. 3 Q.B. 360. The Hicklin test judged the obscenity of material by the effect of any excerpt upon particularly susceptible persons.
protections of free speech and press.\textsuperscript{26} Obscenity, it was said, was outside the scope of first amendment protections because it was "utterly without redeeming social importance."

Nine years later, in \textit{A Book Named "John Clelland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts},\textsuperscript{27} the Supreme Court elaborated on the \textit{Roth} standard to form a new test of obscenity. The plurality in \textit{Memoirs} held that "three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards\textsuperscript{28} relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."\textsuperscript{29}

The \textit{Roth} standard, as elaborated by \textit{Memoirs}, was not wholeheartedly accepted by the Court as a satisfactory test of obscenity, yet no better test emerged to replace it.\textsuperscript{30} Thus, the Court in later decisions proceeded to modify, revise and refine \textit{Roth} into a more

\begin{itemize}
\item \textsuperscript{26} 354 U.S. at 484-85. The same view was earlier expressed in Chaplinski v. New Hampshire, 315 U.S. 568 (1942), when the Court stated:
\begin{quote}
There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.
\end{quote}
\textit{Id.} at 571-72.

\item \textsuperscript{27} 383 U.S. 413 (1966).

\item \textsuperscript{28} The Court did not explain what it meant by the phrase "contemporary community standards." However, Jacobellis v. Ohio, 378 U.S. 184 (1964) had earlier established that contemporary community standards referred to the public or society at large, not to any local community. For differing opinions on the meaning of "contemporary community standards," see also Hoyt v. Minnesota, 399 U.S. 524 (1970) (Blackmun, J., joined by Burger C.J., and Harlan, J., dissenting) (flexibility for state standards); Cain v. Kentucky, 397 U.S. 319 (1970) (Burger, C.J., dissenting) (same); Manual Enterprises v. Day, 370 U.S. 478, 488 (1962) (Harlan, J., joined by Stewart, J.) (national standards in relation to federal prosecution).

\item \textsuperscript{29} 383 U.S. at 418.

\item \textsuperscript{30} The \textit{Roth} standard suffered from several shortcomings. Most apparent was the fact that the words meant different things to each court which interpreted them. See Pelper & Schwartz, \textit{Obscenity Revisited}, \textit{Publisher's Weekly}, Aug. 2, 1971, at 37-38. Further, there was no true consensus on the part of the Justices of the Court that \textit{Roth} should be the standard by which to determine obscenity. So confusing was the concept of what materials should be exempted from first amendment protection as being obscene—if, indeed, any should—that the Justices at the time of the \textit{Roth} decision, and thereafter, continued to facilitate between various legal and dictionary definitions of obscenity in a search to find a workable test. See Gaylin, \textit{supra} note 18, at 581.
\end{itemize}
workable standard. For example, in Ginzburg v. United States, the Court held that evidence of "pandering" in the production, sale or publicity of materials would be a relevant factor in the determination of obscenity even though such material, standing alone, would not ordinarily have been considered obscene. The plurality of the Court found that the deliberate representation of materials as erotically arousing tended to force public confrontation with the potentially offensive aspects of the work. Thus, the Court refined the Roth standard by declaring that "[w]here the purveyor's sole emphasis is on the sexually provocative aspects of his publication, that fact may be decisive in the determination of obscenity."

Although not decided on the basis of the Roth standard, Redrup v. New York extended the concept that obscenity may be determined by nuances of presentation and the context of dissemination. In Redrup, the Court indicated that obtrusive exposure to unwilling adults and dissemination to juveniles, as well as evidence of "pandering," bear upon the determination of obscenity. The Court particularly stressed concern for protecting juveniles and unwilling adults from exposure by citing long established cases supporting the use of variable concepts of obscenity to safeguard these interests.

The Roth standard was further refined in Ginsberg v. New York, where the Supreme Court held that a state legislature has

32. Id. at 470.
33. Id.
34. Dissatisfaction with the Roth standard resulted in Redrup, and several succeeding cases, being decided on a per curiam basis. The Court summarily reversed convictions for the dissemination of sexually explicit materials that at least five Justices, applying their separate tests, found to be protected under the first amendment.
35. 386 U.S. 767 (1967) (per curiam).
37. 386 U.S. at 769.
38. The Court has long recognized the privacy rights of adults and their concurrent right to freedom from involuntary exposure to materials which intrude upon the individual's sensibilities. Cf. Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952); Breard v. Alexandria, 341 U.S. 622 (1951). Similarly, the Court has long recognized the need for the protection of children. See Prince v. Massachusetts, 321 U.S. 158 (1944). Later case decisions have consistently upheld these stated interests. See note 10 supra.
the power to find that exposure to material condemned by statutes is harmful to minors.\textsuperscript{40} The Court reaffirmed the multiple standards of obscenity concept enunciated in \textit{Redrup} and noted that parents have the right to direct the upbringing of their children.\textsuperscript{41} Therefore, the state was said to have properly concluded that parents and others having this responsibility were entitled to the support of laws designed to aid them in choosing materials for their children.\textsuperscript{42} The Court also noted that no studies had ever demonstrated whether obscenity is or is not a "basic factor in inspiring the ethical and moral development of * * * youth and a clear and present danger to the people of the state."\textsuperscript{43} Thus, the state's interest in protecting its children was said to justify limitations upon the availability of sexually oriented materials to minors under 17 when the legislature determined that exposure to such material might be harmful.

In \textit{Stanley v. Georgia},\textsuperscript{44} the \textit{Roth} standard was modified to protect the possession of concededly obscene materials in the privacy of the home.\textsuperscript{45} The majority of the Court stated:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of

\textsuperscript{40.} \textit{Id.} at 641.
\textsuperscript{41.} \textit{Id.} at 639.
\textsuperscript{42.} \textit{Id.}
\textsuperscript{43.} \textit{Id.} at 641-42.
\textsuperscript{44.} 394 U.S. 557 (1969).
\textsuperscript{45.} The \textit{Stanley} decision was interpreted by many legal writers and judges at the time to mean that obscene materials were constitutionally protected and that the only permissible purpose that might support regulatory legislation would be the protection of children or safeguarding the privacy of adults who did not wish to be exposed to explicit sexual materials. See \textit{Engdahl, Requiem For Roth: Obscenity Doctrine Is Changing}, 68 Mich. L. Rev. 185 (1969); \textit{Morreale, Obscenity: An Analysis and Statutory Proposal}, 1969 Wis. L. Rev. 421; \textit{Ratner, The Social Importance of Prurient Interest—Obscenity Regulation v. Thought Privacy}, 42 S. Cal. L. Rev. 587 (1969); \textit{Note, Obscenity: A Return To the First Amendment?}, 49 Neb. L. Rev. 660 (1970); \textit{Comment, Stanley v. Georgia: New Directions In Obscenity Regulation?}, 48 Texas L. Rev. 646 (1970). In fact, the \textit{Roth} standard was said to have been dealt a death-blow, for it could no longer ban the distribution of all materials adjudged obscene by the Court. However, as one writer on the subject noted, although \textit{Stanley} seemed to mark the death of the \textit{Roth} standard, "perhaps [it was] not beyond resurrection." \textit{Laughlin, A Requiem for Requiems: The Supreme Court at the Bar of Reality}, 68 Mich. L. Rev. 1389, 1393 (1969). Indeed, \textit{Roth} has been resurrected in recent cases dealing with obscenity. The Court has categorically settled that obscene materials do not fall under first amendment protections. \textit{Kois v. Wisconsin}, 408 U.S. 229 (1972); \textit{United States v. Reidel}, 402 U.S. 351, 354 (1972).
giving government the power to control men's minds.\textsuperscript{48}

The Court asserted that the Roth standard remained unimpaired despite the Stanley decision since Roth had dealt only with the public distribution of obscene materials.\textsuperscript{47} Such distribution, it said, was subject to different objections. These objections concerned the dangers that obscene materials might "fall into the hands of children" or "intrude upon the sensibilities or privacy of the general public."\textsuperscript{48} The Court, however, felt no such dangers would be present when the viewing of obscene materials, intended solely for private possession, was limited to the privacy of an individual's home.

Finally, the recent case of Miller v. California\textsuperscript{48} reaffirmed the basic Roth holding that obscenity is not protected by the first amendment, but adopted a modification of the Roth-Memoirs guidelines. Under the Court's restatement of the Roth-Memoirs definition of obscenity, "[t]he 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{50} The test of "utterly without redeeming social value" articulated in Memoirs was abandoned as an unworkable constitutional standard.\textsuperscript{51} Further, the Court held that issues of "prurient appeal" and "patent offensiveness" would henceforth be measured by ob-

\textsuperscript{46} 394 U.S. at 565. The Stanley Court cited Griswold v. Connecticut, 381 U.S. 479 (1965) to support the proposition that a fundamental right to be free from unwanted governmental intrusions exists in the privacy of one's home. In Griswold, Justice Douglas set forth the concept that "penumbras" surround rights guaranteed to an individual under the Constitution. At the time of the Griswold decision, Douglas was speaking in terms of an absolute right to "marital privacy" as included within these penumbras. Since Griswold, however, penumbral rights have been extended to the point that even the right to possess obscenity for personal enjoyment in the home is protected. See Licker, The Constitutionality of Federal Obscenity Legislation: Roth and Stanley On A Seesaw, 52 B.U.L. Rev. 443, 455-60 (1972). At least one writer was stated that "privacy" could well have been the overriding consideration in the Stanley decision. See Comment, Karalexis v. Byrne and the Regulation of Obscenity: "I Am Curious (Stanley)", 56 Va. L. Rev. 1205 (1970).

\textsuperscript{47} 394 U.S. at 567.

\textsuperscript{48} Id.

\textsuperscript{49} 93 S. Ct. 2607 (1973).

\textsuperscript{50} Id. at 2615.

\textsuperscript{51} Id.
scenity standards in the forum community rather than by national standards.\textsuperscript{52}

From the foregoing examples, then, it can be seen that the Court has labored to find a workable definition of obscenity.\textsuperscript{53} As a result, the regulation of obscenity has moved from the \textit{Roth-Memoirs} focus on only the quality of the material to a position which often incorporates legitimate state concerns for the protection of juveniles and the privacy of non-consenting adults. The conceptual framework of the \textit{Roth} standard, however, has not been altered; the Court has consistently held that obscene materials are outside the scope of first amendment protections.\textsuperscript{54} It is in this light that the exhibition of X-rated motion pictures on television must be considered.

\section*{III. X-Rated Motion Pictures on Television}

The commercial television medium has long been recognized as a form of communication possessing first amendment interests.\textsuperscript{55} Television, and its audio counterpart, radio, are so unique from the printed media in terms of reach and impact, however, that different first amendment standards of regulation are applied to safeguard the public's interest in effective programming.\textsuperscript{56} Pursuant to the goal of safeguarding these interests, the Federal Communications Commission was established by Congressional authorization under the Communications Act of 1934\textsuperscript{57} to ensure that both radio and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{52} Id. at 2618-20. See generally note 28 supra.
\item \textsuperscript{53} See note 30 supra and accompanying text.
\item \textsuperscript{55} See Note, supra note 36, at 664.
\item \textsuperscript{56} It is generally agreed that television is such a different medium for the communication of ideas that different controls are needed. For example, Ben C. Fisher, who served as Chairman of the A.B.A. section on Administrative Law, stated that

\textit{[t]v}elevision is a new and total experience. It is part of a communications revolution. Old rules and old attitudes will not be adequate. New relationships between television and all the other competing electronic media must be established and new concepts must be developed as to the role each will play. I do not think a responsible industry needs to be afraid to strike out on its own. We do not need newspaper precedent to stake a claim to industry freedom and responsibility.


\item \textsuperscript{57} Regulation of the communications field was first governed by the Radio Act of 1927. This was subsequently replaced by the Communications Act of 1934. The purpose of the 1927 Act was to remedy problems resulting from technical limitations inherent in electronic communications, the most evident of these being the narrow spectrum of frequencies available
\end{enumerate}
\end{footnotesize}
television would never function inconsistently with the "public convenience, interest, or necessity." The FCC was not, of course, given the power under the Act to censor constitutionally protected materials. Under 18 U.S.C. § 1464, only the broadcast of any "obscene, indecent, or profane language" could be prohibited. In such cases, the FCC was further provided the administrative authority to impose a fine on a station or to revoke a station's license for a violation of this statutory prohibition.

Thus, under the statutory standards of the Communications Act of 1934, it is clear that motion pictures which have been declared obscene cannot be aired through the commercial television medium. In light of constitutional standards governing obscenity, the Act merely reiterates the Roth position that such materials are

for stations in a given geographic area. By granting licenses to persons for broadcasting, the Federal Radio Commission used the authority given under the Act to insure proper use of the airwaves. The passage of the Communications Act of 1934 gave Congress the opportunity to consolidate the various statutes previously enacted regarding control of the industry. The scope of regulation under this Act, however, remained unchanged. The FCC's basic function was still to insure the efficient use of broadcast facilities by the exercise of its authority to grant and renew licenses to those stations most capable of serving the "public interest, convenience, or necessity." Thus, it is clear that the FCC's function was almost exclusively related to licensing. Further, it has generally used this authority granted by Congress for the regulation of only individual stations rather than the networks to which they are affiliated. See Note, We Pick 'em, You Watch 'em: First Amendment Rights of Television Viewers, 43 S. CAL. L. REV. 826, 844-45 (1970).


59. There has been no lack of charges that the FCC uses its authority to regulate as a means of suppressing constitutionally protected materials and, thereby, effectively side-steps first amendment protections in the name of its own "public interests" standard. However, as Professor Kalven pointed out:

One embarrassment in attacking seriously the topic of free speech in broadcasting is that the admitted benignity of the FCC has made it difficult to amount appropriate indignation. Whatever the posture of the theory, in practice things are not all bad and broadcasting does not live under a shadow of government tyranny.


60. The definition of this section has also been construed by the courts to cover the exhibition of an obscene production on television, rather than being strictly limited to language which is "obscene, indecent, or profane."

61. The FCC is authorized to impose a fine on a station of up to one thousand dollars for a violation of the statutory prohibition. 47 U.S.C. § 503(b)(I)(E) (1964).


63. See note 60 supra and accompanying text.
unprotected by the first amendment. As such, the exhibition of an obscene motion picture on commercial television could be suppressed either on the basis of this Act or Roth obscenity standards.

Past decisions, however, have generally held that X-rated motion pictures possess some "redeeming social value," making them not obscene by judicial standards when restricted to viewing by willing adults. Of course, the modification of Roth-Memoirs in the recent Miller case has left uncertain whether these films will continue to be protected for adults under various community standards. But, assuming that some localities will find X-rated movies not obscene for adults under the Miller guidelines, there would seem to be little justification for the FCC to prohibit the area broadcast of these films on commercial television if suitable controls could be found to avoid exposure to minors and unwilling adults in the community.

As a practical matter, though, establishing controls to regulate commercial television with the thoroughness traditionally required by the courts of restricted theatres and drive-ins is not possible. The exhibition of an X-rated film in a theatre or drive-in can easily be policed to insure that children or unwilling adults are not confronted with this material. In that sense, variable standards of obscenity can be maintained while allowing willing adults sufficient access to view these motion pictures. But commercial television extends into millions of American homes with virtually no effective means of segregating a willing adult population from its unwilling adults and

64. See note 54 supra and accompanying text.
65. Past decisions were based on the Roth-Memoirs standard, under which a film was found not obscene if it possessed "some redeeming social value." See note 29 supra and accompanying text. The vagueness of this standard, plus the Court's permissiveness, led to the protection of many sexually oriented movies and a subsequent boom in showing these films in drive-ins and theatres from coast-to-coast. Cf. Newsweek, Dec. 21, 1970, at 26.
66. See note 52 supra and accompanying text.
67. See notes 49-52 supra and accompanying text.
68. See note 38 supra and accompanying text.
69. Id.
70. At the time of the 1970 census, 96% of all households in America had a television set or sets. U.S. Bureau of the Census, Current Housing Reports, series H-121 (1970); 1970 Census of Housing, Final Report, Housing Characteristics, HC(1)-B1 (1970). By 1971, the average number of American homes having television sets had increased to the point where there were more homes with T.V.s than there were homes with indoor plumbing; and, in these homes, the television set was on for an average of more than six hours a day, 365 days a year. Jones, Eroticism and the Art of the Film, 96 Library Journal, Nov. 15, 1971, at 3809.
The pervasiveness of the commercial television medium creates an effective impasse to a system of controls that would protect many potential recipients.

It is because commercial television is such a pervasive medium, however, that some authorities have concluded that these materials belong on the air. They argue that if the first amendment is intended to protect the wide and free exchange of ideas, the distribution of sexually oriented motion pictures should be extended to large segments of society—the poor, the “shut-ins” and the rural residents—who often have neither the opportunity nor the means to use restricted theatres to supplement the broadcast medium. This reasoning is based primarily on the lack of evidence supporting the contention that sexually explicit materials protected for adults are harmful to the moral and ethical development of children and, thus, should be restricted from their viewing. Without evidence of social harm to children resulting from exposure to these materials, proponents of this position argue that the state can have little interest in protecting an unwilling adult viewer from possible confrontation with an X-rated motion picture.

In light of constitutional standards of obscenity, the reasoning advanced by proponents of X-rated motion pictures on television cannot be supported. Certainly no studies have proven whether these materials are harmful to the development of a child, but it was for this very reason that variable standards of obscenity be-

71. Television is particularly a child’s medium of entertainment. In 1968, it was estimated that by the time a five year old child entered kindergarten he had spent more time in front of the television set than the average college student had spent in class during four years of college. See Broadcasting Magazine, Dec. 23, 1968, at 41. Further, by the time he graduated from high school, he would be expected to have seen at least five hundred films and to have spent more time watching television than in the classroom. See Jones, supra note 70, at 3809.


73. See Note, supra note 36, at 680.

74. Although innumerable studies have been made of the effects of obscenity and pornography on society, no study has proven whether these materials do or do not have a harmful effect on children. In part, this is due to the natural reluctance of researchers to subject a child to possibly harmful exposure to such materials in order to study the effect upon his development. See Lockhart, The Findings and Recommendations of the Commission on Obscenity and Pornography: A Case Study of the Role of Social Science in Formulating Public Policy, 24 Okla. L. Rev. 209, 216 (1971).

75. See Note, supra note 36, at 684-85.

76. See note 74 supra.
tween adults and children were established by the Court.\textsuperscript{77} Until conclusive proof of the effects of sexually explicit adult materials on children can be obtained, the Court has held that the right of the adult population to view this matter must be subordinated to the legitimate state concern for protecting children from possibly harmful exposure.\textsuperscript{78} Moreover, the Court has consistently demonstrated a willingness to protect not only children but also the general public from being involuntarily confronted with sexually explicit materials.\textsuperscript{79} There are those in the adult population who would certainly take offense at the sudden intrusion of scenes depicting sexual intercourse or deviant sexual behavior on their television screen. There are also adults who sincerely wish to avoid this kind of programming but cannot resist the compelling temptation to continue to receive it once they are exposed.\textsuperscript{80} For both these groups of adults, exposure to this material on the television screen can fairly be said to have intruded upon their sensibilities or right to privacy protected by constitutional obscenity standards.\textsuperscript{81} Finally, as a practical matter, there has been no indication that the vast majority of adult viewers, whether they be the poor, "shut-ins," rural dwellers or just average citizens, would even desire to view X-rated films through the commercial television medium. Television is a medium which operates for the primary purpose of making a profit by supplying the public with what it wishes to see.\textsuperscript{82} If the desire to view X-rated motion pictures on television were so strong, it would seem that broadcasters would have acted long before now to supply these materials to the public.

As an alternative to absolute prohibition, proponents of X-rated motion pictures on television have suggested that reasonable regulation of scheduling, promotion and the general context of presentation could be established to segregate willing adult viewers from those not wishing to see such films.\textsuperscript{83} This would include broadcast-

\begin{itemize}
\item \textsuperscript{77} See note 38 supra and accompanying text.
\item \textsuperscript{78} Id. See generally notes 31-48 supra and accompanying text.
\item \textsuperscript{79} See note 38 supra and accompanying text.
\item \textsuperscript{80} Studies have shown that some individuals cannot emotionally resist the temptation to continue to watch sexually oriented materials once they are exposed. See The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 122-23 (1970).
\item \textsuperscript{81} See note 38 supra.
\item \textsuperscript{82} Under FCC regulations, there is no absolute requirement for balanced programming. Consequently, most television shows are scheduled for the profit motive. See Cox, The FCC's Role in Television Programming Regulation, 14 Vt. L. Rev. 590 (1969).
\item \textsuperscript{83} See Note, supra note 36, at 683.
\end{itemize}
ing X-rated motion pictures late at night, giving warnings both preceding and during the program and limiting advance promotions of the movie, on the broadcast media or elsewhere, to information about the picture in order to avoid sensationalist exploitation.\textsuperscript{84} Such an alternative, however, would be just as unsatisfactory by constitutional standards as unrestricted dissemination. These controls would not protect the rights of late-night adult viewers who might turn on the set or switch to a channel only to be confronted with explicit sexual materials.\textsuperscript{85} This elaborate system of controls would similarly be of little help to the unwilling adult viewer who must turn several channels to reach a favorite program. If one or more stations carried X-rated movies, there would be no practical way for the viewer to avoid being subjected to scenes of sex or sexual deviations, short of turning the set off.\textsuperscript{86} Also, in regard to minors, constitutional standards of obscenity have established that one of the primary interests of the state has been to recognize parents' claims of authority in their own household to direct the upbringing of their children.\textsuperscript{87} The system of scheduling and warnings contemplated above would not insure parental control over children's activities. Indeed, it would be impossible for parents to constantly check on the programming content of materials which their children happened to be watching, even if they made a conscious effort to do so. Thus, there can be little doubt that a number of children and adolescents unavoidably would be exposed to the possibly harmful effects of such material despite the use of an elaborate system of controls.\textsuperscript{88} In effect, the purpose behind variable obscenity standards to avoid a child's exposure to the unknown effects of sexually oriented materials would be destroyed by such a system.\textsuperscript{89}

Of course, a better alternative not commonly mentioned by proponents of an elaborate system of controls would seem to be the

\textsuperscript{84} Id.

\textsuperscript{85} Proponents of placing sexually explicit materials on television argue that a momentary offense should have to be endured by unwilling adult viewers as the social cost of assuring the availability of this expression protected by the first amendment. \textit{See Hearings on S.2004 Before the Subcomm. on Communications of the Senate Commerce Committee, 91st Cong., 1st Sess., pt. 2, at 357-58} (1969).

\textsuperscript{86} An intrusion upon the privacy and sensibilities of an unwilling adult which forces him to turn the set off to avoid exposure would clearly violate the intent of obscenity standards designed to protect these rights. \textit{See note 10 supra.}


\textsuperscript{88} \textit{See} note 74 \textit{supra.}

\textsuperscript{89} \textit{See} note 38 \textit{supra} and accompanying text.
use of cable television in areas which find that X-rated motion pictures are not obscene for adults under Roth-Miller guidelines. Cable television would effectively segregate willing adult viewers from those who would not wish to purchase such a service. It would also protect the majority of children in these localities from accidental exposure to explicit sexual material while allowing parents freedom to choose the kinds of programming they wish their children to see. At the present time, however, the financial and legal uncertainties of exhibiting X-rated motion pictures on cable television would seem to have effectively restricted most systems from offering these films as part of their service. Further, the limited number of cable systems in existence suggests that some areas could not receive this service even if desired. Thus, cable television remains only a possible alternative to absolute prohibition that might be explored in the future.

For these reasons, then, it is apparent that the commercial television medium is presently unsuitable for the broadcast of X-rated motion pictures—even to communities which find these films not obscene for adults under Roth-Miller guidelines. As such, the reach of X-rated films should be extended, if at all, through different areas of distribution. For example, one likely area would seem to be the rapidly developing field of video-tape cassettes designed to be played in the home directly through a specially-equipped television set. Unlike the commercial television medium, the distribu-

90. Cable television is currently being used with success in Canada. See generally notes 14-19 supra and accompanying text.

91. See notes 49-52 supra and accompanying text.

92. It might be argued that the protection of even a majority of children would not be adequate under judicial standards. See note 10 supra. Theoretically, however, a service providing X-rated motion pictures through a cable television system could only be purchased by a consenting adult. The Court could thus hold that reasonable precautions had been taken to protect children while insuring the right of willing adults to receive sexually explicit materials. This would, in effect, be similar to standards presently required of a restricted theatre or drive-in to take all reasonable precautions necessary to insure that children will not be accidentally exposed to an X-rated film. Cf. Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969).


94. As of January 1, 1971, there were only 2,550 cable stations in America and they provided service for only five and one half million households. U.S. Bureau of the Census, Statistical Abstract of the United States: 1972, 497 (93d ed. 1972).

95. See notes 49-52 supra and accompanying text.

96. For an excellent discussion of video-tape cassettes see A. Zuckerman, Everything
tion of video-tape cassettes would not require an elaborate system of controls; these cassettes could simply be rented or purchased as desired by adults who would want to view them through their television sets in the privacy of the home. And, because X-rated video-tape cassettes would be intended for private possession in the home, they would be subject to nationwide distribution—whether or not held obscene under Roth-Miller local community standards. Thus, the development of X-rated video-tape cassettes could provide an ideal solution to the problem of allowing willing adults greater access to explicit sexual materials while protecting legitimate state concerns for children and unwilling adults. The possible use of video-tape cassettes has, in fact, already been noted by at least two authorities on X-rated motion pictures who have stated:

One development that this entire field is watching with unconcealed interest is the booming video-cassette market. "Cassettes will be the greatest pornography road-show library going," predicts Joe Solomon, an independent distributor of sex films. Several producers, including such front-runners as Russ Meyer and Radley Metzger, admit that they've already been approached by one or another of the cassette manufacturers—but most add that, to date, the offers have not been accompanied by hard cash. Recalling the early days of television, when pictures sold for a fraction of what they might have earned a few years later, most of the film makers have adopted a wait-and-see policy. No doubt, this attitude is augmented by their awareness that at least half a dozen cassette systems, all totally incompatible, are presently vying for position. There is real

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97. At the present time, a two-hour length movie on a video-tape cassette may cost as much as twenty-five dollars to buy or ten dollars to rent. See Newsweek, May 31, 1971, at 78. Of course, future developments in this field and increased demand may later force prices downward.

98. Roth-Miller community standards of obscenity could not be used to prohibit the viewing of X-rated video-tape cassettes intended for private possession in the home. The Stanley decision has clearly established that even concededly obscene materials are protected when limited to the privacy of an individual's home. See notes 44-48 supra and accompanying text. Problems might exist, however, in obtaining such materials for private possession in the home; the Court has consistently held that although a person has a right to the private enjoyment of materials declared obscene, channels of commerce may not be used for their distribution. See United States v. Thirty-seven Photographs, 402 U.S. 363 (1971); United States v. Reidel, 402 U.S. 351 (1971).
fear that in making a deal with one company or another, they may be backing the wrong horse—and at the wrong time as well. On the other hand, producers freely say that once the cassette market settles down, many of their more pressing problems will be over. Pictures will then be rented or purchased by consenting adults for showing in the privacy of their own homes, thus minimizing the ever-present threat of police and vice-squad raids on X-rated movie-houses. And the makers of sex films, whether of the nudie or hard-core variety, will have access to the wider audiences (and additional income) they could never hope to reach through commercial television.99

IV. CONCLUSION

In conclusion, then, the foregoing sections have made clear that X-rated films should not be exhibited through the commercial television medium at the present time.100 Constitutional standards of obscenity have established that the interests of the state in protecting minors and unwilling adults from exposure outweigh whatever interests various segments of the adult population might have in viewing these motion pictures on the air.101 For individuals who wish to have access to protected adult materials, there remain the restricted theatres and drive-ins. In the near future, of course, X-rated video-tape cassettes may become available for distribution. If the above areas of access to sexually explicit materials are too expensive, paperback novels or various suggestive photographs may be purchased. But whatever the outlet chosen, the commercial television medium should remain outside the reach of X-rated motion pictures as long as its unregulated distribution might be harmful to children or intrude upon the sensibilities or privacy of unwilling adults.

99. A. KNIGHT & H. ALPERT, supra note 6, at 31-32.

100. Although presently unsuitable for television, this does not mean that the possibility of exhibiting X-rated motion pictures on this medium might not exist at some future time. As was suggested by the Commission on Obscenity and Pornography, the potentially harmful effects of such materials on society could be markedly reduced by a massive program on sex education for both adults and children. See note 74 supra, at 212. This program, if initiated, would seem to eliminate the need for strict controls on the exhibition of X-rated motion pictures since natural curiosity about the sexual relationship would be satisfied while exposing as fallacious the present cliches and exaggerations depicted in sexually oriented materials. Cf. Jones, supra note 70, at 3810.

101. See note 10 supra.