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Frederick Schauer

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Cable Operators as Editors: Prerogative, Responsibility, and Liability†

by

FREDERICK SCHAUER*

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

I begin this Article on contemporary cable television regulation with these abstract observations on the rhetoric and structure of rights because the subject of cable television is a prime example of the phenomenon I have just described. The phenomenon is perhaps best exemplified in the public and political discourse surrounding the recent legislation, regulations, and litigation regarding so-called "indecent" programming on leased and public access channels. As with anti-rights rhetoric generally, 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 not to relitigate recent court cases, in particular *Turner Broadcasting System, Inc. v. FCC.*1 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, and even after the Supreme Court's decision in *Turner Broadcasting.* That question concerns the legal responsibilities of cable operators generally for the content of their programming. Especially in light of the public concern with 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. In trying to analyze this question, therefore, I hope to say things that will be useful when, as I think it will, the question turns to topics other than that of indecency.

I

I want to begin with a few more observations concerning the logical and rhetorical relationship between rights and responsibilities.

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The rhetorical relationship is well-known, and one sees it these days almost as much in serious commentary as in popular political debate. Yet a recurring feature of that rhetoric 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”—claiming that it is a necessary feature of rights that they bring with them commensurate responsibilities.

This proposition is utter nonsense. Legal rights do not bring legal responsibilities. Rather, they free the right-holder from them. 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, the decision would not increase the responsibilities of those who engage in consensual sexual conduct that some people deem immoral. Rather, the reversal of Bowers would do precisely the opposite by decreasing the responsibilities of the right-holders to conform their consensual sexual activities to the wishes of others or the state. When the Court decided Miranda v. Arizona, neither Ernesto Miranda nor any other criminal defendant took on new responsibilities. Only the police had new responsibilities as a result of the decision. Miranda is thus a good example of the Hohfeldian point that rights and responsibilities are correlative. Individual rights necessarily require that someone else have the responsibility to respect them. In the area of free speech, the same phenomenon can be seen. New York Times Co. v. Sullivan increased the rights of the press just by decreasing its legal responsibilities and potential liability in defamation cases. Shield laws, which


5. 384 U.S. 436 (1966) (establishing obligation of police to advise arrestees of their Fifth Amendment privilege against self-incrimination and their Sixth Amendment right to counsel).


7. 376 U.S. 254 (1964) (holding that First Amendment prohibited imposition of civil liability in public figure defamation cases unless shown with convincing clarity that the defendant published with actual knowledge of falsehood).

8. The various state statutes are collected in In re Roche, 411 N.E.2d 466, 474 n.13 (Mass. 1980). Federal guidelines to the same end are codified at 28 C.F.R. § 50.10 (1993).
allow journalists to protect their sources, accomplish their ends precisely by eliminating what would otherwise be the responsibility of any citizen with knowledge of criminal activity to comply with a subpoena.

Once we recognize that the relationship of legal rights to legal responsibilities is one of disjunction (with respect to the right-holder herself) and not of conjunction, we can understand that those who make the claim that rights entail 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 simply to claim that cable operators should have fewer rights and less editorial freedom than would otherwise be the case. This position is certainly plausible, even though in this context it is not my position. But it is far less plausible and far less acceptable in terms of argumentative honesty to suggest that this conclusion flows logically or quasi-logically from the very nature of the right, or from the fact that cable operators have rights.

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 nonexistence of nonlegal responsibilities in the exercise of that right. Anyone who has been infuriated by reporters who take their First Amendment rights to be an immunity from criticism, or by reporters 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, moral, or social sense of “wrong.” Moreover, widening the scope of legal rights widens the scope of legally protected behavior, and thus necessarily increases the possibility of people engaging in morally wrong conduct. If the scope of free speech rights were narrower, we would likely have fewer Nazi marches,9 fewer cross-burnings,10 fewer racial epithets,11


9. See Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978) (protecting right of neo-Nazi party to march in the public streets, even where march site was selected because of presence of Holocaust survivors).


and fewer denials of the Holocaust. Thus, it may be that the very existence of broad free speech rights increases the number of opportunities to engage in wrongful or harmful conduct just as it increases the number of opportunities to engage in valuable conduct. Moreover, broad free speech rights increase 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. If cable operators had First Amendment editorial freedom akin to the editorial freedom recognized for newspapers in *Miami Herald Publishing Co. v. Tornillo,* it would not and ought not to prevent us from criticizing the operators when they use that freedom to become, for example, the accomplices and instruments of those who would endorse or encourage violence against women. There is no logical error in believing that legal rights and nonlegal responsibilities can operate in tandem. However, there is some reason to believe that increases in rights, even when justified, will increase the opportunities for morally irresponsible behavior and thus increase the need to call for nonlegal responsibility in the exercise of legal rights.

II

Now I want to apply my discussion in Part I to some current controversies regarding the editorial responsibilities of cable operators. As I indicated at the outset, the topic has become salient in part be-
cause of the "indecency" issue, although it is likely to be with us long after that controversy goes away (if it ever does). Moreover, although the Court's decision in *Turner Broadcasting* dampens the prospects of an argument based on *Tornillo* advocating strong First Amendment editorial rights for cable operators, the issues the Court left unresolved will keep this subject on the table for the time being.

So let me provide a brief survey of some other recent legal developments, even though it is likely familiar terrain. Under the Cable Communications Policy Act of 1984, cable operators were required to provide certain services by way of leased access and public access. 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 programming on public access or leased access channels. Because it would be anomalous to hold cable operators legally responsible for content over which they were prohibited from exercising editorial control, Congress immunized cable operators from liability based on the content of leased access or public access channels. The immunity specifically extends to libel, slander, obscenity, incitement, invasions of privacy, and false or misleading advertising.

Although this immunity undoubtedly gave a measure of security to cable operators, its practical importance should not be exaggerated. Even without the statutory immunity, the legal liability of a transmitter of communications based on the content of communications produced by others is simply 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 closely analogous to the position of the cable operator. Recall, after all, that the *New York Times* did nothing other than print a paid advertisement prepared by others. Still, the constitutional standards for the imposition of civil or criminal liability after *Sullivan* and *Garrison v. Louisiana* are themselves so narrow as to make the potential for defamation liability relatively small. Given that in cases involving

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15. See *Tornillo*, 418 U.S. at 256-58.
17. *Id.* §§ 531-532.
18. *Id.* § 531(e).
19. *Id.* § 532(c)(2).
23. 379 U.S. 64, 74 (1964) (holding that standards from *Sullivan* apply with "no less" force to actions for criminal libel).
24. On the actual likelihood of defamation liability, see Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992) and the various articles in THE COST OF
public figures or public officials, the existing First Amendment standards prohibit the imposition of liability on anyone without actual advance knowledge of falsity, it is probable that the prospect of liability for cable operators in such cases would be minuscule. This proposition holds even when we factor in the lower negligence standard applicable to cases brought by those who are neither public officials nor public figures, and even when we take account of the "deep-pockets" phenomenon pursuant to which the cable operator would likely be viewed as having the greatest ability to pay. It is still unlikely that many defamation plaintiffs will be able to show negligence on the part of the cable operator, since mandatory access appears to preclude any possible finding of negligence. Cases may arise in which someone who does as the law orders is found to be negligent, but this is not likely to be one of them.

Similar conclusions apply to other possible bases for cable operator liability. With respect to incitement to unlawful action or with respect to communications indirectly causing physical harm, the stringency of the rule in Brandenburg v. Ohio also eliminates the likelihood of cable operator liability since Brandenburg precludes liability except in cases of intentional and likely effective incitement to imminent lawless action. For example, NBC, in Olivia N. v. NBC, might be analogized to a cable operator, insofar as NBC served as a conduit for programming prepared by others. When one of its programs, the made-for-television movie Born Innocent, became the "but-for" cause of a sexual assault by a group of teenagers who committed a "copycat" crime, 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, should

25. As to the "reckless disregard" component of Sullivan, even that seeming relaxation of the rigor of the intentional falsehood requirement 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, 731 (1968).


make it clear once again that even in the absence of section 558, cable operators should have little to fear from potential incitement liability.

Finally, consider the question of obscenity. Section 588 aside, the substantive legal standards as they now exist again make the likelihood of cable operator liability quite small. This is especially important because Section 10(d) of the Cable Television Consumer Protection and Competition Act of 1992\(^\text{31}\) (1992 Cable Act) explicitly amends 47 U.S.C. section 558 by adding the phrase “unless the program involves obscene material.” As a consequence, we are no longer in the realm of the hypothetical.

Still, 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 more symbolic than anything else. After \textit{Jenkins v. Georgia},\(^\text{32}\) which put to rest the unfounded idea that obscenity was anything a local community said it was, obscenity convictions in the United States have been rare. What few convictions there are have been of large-scale dealers of the kind of material found only in the corners of the most explicit adults-only establishments. This discussion is not intended to be a debate over whether the obscenity laws should be broadened, as some people believe, or narrowed (as I and others\(^\text{33}\) believe), or eliminated entirely. Rather, it is simply a report of the existing state of legal doctrine and prosecutorial practice. As such, the elimination of the obscenity exclusion from section 558 is not likely to affect significantly the possibility of cable operator liability. Accordingly, the elimination is also unlikely significantly to affect cable operator practice.

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\(^\text{32}\) 418 U.S. 153 (1974). In \textit{Jenkins}, then-Associate Justice Rehnquist, writing for a unanimous Supreme Court, made it clear that the movie \textit{Carnal Knowledge} could not be found to appeal to the prurient interest, nor to be patently offensive to contemporary community standards, regardless of the views of the people, courts, or legislature of the State of Georgia. \textit{Id.} Moreover, the third prong of the test for obscenity set out in \textit{Miller v. California}, 413 U.S. 15, 26 (1973), which precludes from the category of the legally obscene any material having “serious literary, artistic, political, or scientific value,” has never been measured against local (as opposed to national) standards. Pope v. Illinois, 481 U.S. 497 (1987); Smith v. United States, 431 U.S. 291 (1977).

Other areas of potential cable operator liability are perhaps not as clear. Liability for false, misleading, or harmful advertisements, for example, is a theoretical possibility. So, too, are actions for invasion of privacy. Still, the existing state of the law with respect to conduits generally, whether broadcasters, cable operators, or print publishers, is such that attempting to address the possibility of cable operator liability based on the content of the materials transmitted on public access or leased access is not likely to be fruitful.

III

The indecency issue, however, is a different kettle of fish. In discussing the issue, I again begin with a brief recapitulation of the existing statutory scheme. In so doing, I will not describe the statutes, regulations, or judicial decisions with the same degree of detail as in Professor Meyerson's contribution to this Symposium. Still, it is worth noting a few high points.

Although Section 10 of the 1992 Cable Act eliminated obscenity immunity from cable operator liability, its primary focus was on "indecency." In contrast to the previous prohibition on cable operator editorial control over public access or leased access programming, Section 10(a) of the 1992 Cable 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." Although Section 10(a) contains permissive rather than mandatory language, Section 10(b) requires the FCC to promulgate 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 10(a)]." More specifically, the regulations must require that all indecent programs be placed on the same channel and must also require that the channel be blocked unless the subscriber specifically requests access in writing. Further, the regulations must require that all programmers notify cable opera-

37. Id. § 10(a).
38. Id. § 10(b).
tors of the presence of any indecent material contained in any of their programs. Finally, the 1992 Cable Act requires the FCC to promulgate, within 180 days, regulations enabling a cable operator to prohibit the use of "any channel capacity or any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."\(^{39}\)

Given the politically charged nature of the "indecency" question, it is not surprising that the Commission promulgated regulations tracking the statutory language. Nonetheless, these regulations were invalidated on First Amendment grounds in *Alliance for Community Media v. FCC*,\(^{40}\) a panel decision that has been accepted by the Court for en banc review but has yet to be decided. The unanimous panel decision, however, written by Judge Wald, concluded that the specific authorization to cable operators to exclude indecent material constituted governmental encouragement of content-based prohibitions rather than mere authorizations.\(^{41}\) As a governmental encouragement, the regulations thus became, according to prevailing state action principles,\(^{42}\) "responsible" for the subsequent actions of the private actors. Since the state action had the effect of restricting sexually oriented material without a finding of legal obscenity (and without falling within the highly uncertain scope of the "broadcasting" exception of *FCC v. Pacifica Foundation*\(^{43}\)), it constituted an infringement of the First Amendment rights of cable operators and cable programmers.\(^{44}\) The Court of Appeals further held that the statutory and regulatory requirements imposed on cable operators who did not choose "voluntarily" to restrict indecent programming were themselves sufficient to constitute coercion. This conclusion rendered the statute and accompanying regulations an unconstitutional restriction on the use or showing of material that was neither obscene nor fell under the arguably

\(^{39}\) *Id.* § 10(c).

\(^{40}\) 10 F.3d 812 (1993).

\(^{41}\) *Id.* at 818.


\(^{44}\) The *Pacifica Foundation* qualification aside, the leading authority for the impermissibility of "indecency" restrictions is Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) (unanimously invalidating congressional efforts to restrict "indecent" fee-based telephone services).
separate *Pacifica Foundation* principles applicable to broadcast, but, under current law, not to cable.\(^\text{45}\)

I want to stick to my earlier promise to avoid both predicting an ultimate outcome of the *Alliance for Community Media*\(^\text{46}\) litigation and suggesting an outcome to the courts. I do think it important to situate the specific issue of cable operators’ liability within a larger history of concerns about legally imposed editorial responsibility for materials distributed but not created by an entity that we might think of as a “conduit.”

Two potentially conflicting strands of First Amendment doctrine and theory are relevant here. One of these takes the “conduit” idea seriously, and the leading case is *Smith v. California*.\(^\text{47}\) *Smith* stands for the principle that excess deterrence of a communications intermediary (in *Smith*, a bookstore) by the threat of civil or criminal liability imposed on the intermediary presents the same kind of chilling effect\(^\text{48}\) that excess deterrence of a primary communicator is thought to present as a result of defamation law.\(^\text{49}\) As a problem of decision theory, primary communicators (perhaps in this context cable programmers, but even more likely the creators and producers 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) and have the chance to benefit from mistaken nonliability (the false negative). Rational primary communicators will seek to minimize the false positives, but not at an excessive cost of minimizing too much the benefits that engaging in risky behavior brings for them. For example, if sexually explicit material bordering on the obscene brought greater returns in the market than did less explicit material, a producer of such material might risk mistaken impositions of liability and operate close to (or over) the line because of the greater returns available from engaging in risky behavior.\(^\text{50}\) Similarly, a speaker com-

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\(^\text{47}\) 361 U.S. 147 (1959).


\(^\text{49}\) It is useful to be reminded once again that the *New York Times* in *New York Times v. Sullivan* was itself a conduit, merely publishing for money an advertisement created by others.

\(^\text{50}\) The nature of the sanctions is of course highly relevant. People are more likely to risk money than jail time, but jail time in obscenity cases is in practice reserved for serious multiple offenders or those whose actual crime is some variant of child pornography.
mitted to an ideology might, because of that commitment (or because certain forms of discourse bring greater attention to the message delivered), find it more valuable to refer to a political opponent as, to take a term now in frequent use in Australian parliamentary discourse, a "scumbag,"51 rather than "the honorable gentleman," even if the former phrase is for some reason riskier. Thus, in the case of primary communicators, running the risk of mistaken imposition of liability or punishment may bring sufficient benefits, financial or otherwise, to explain why primary communicators frequently do not adopt the most risk averse strategy.52

In some domains, there may be little benefit for the communicator who plays it close to the line between liability and nonliability, for some domains engaging in marginally risky activity brings no commensurate marginal benefits. Information communication is one of the best examples of this phenomenon. For any individual provider of information, providing a marginal piece of information is likely to result in negligible benefits.53 If engaging in a communicative activity close to the liability line (such as by publishing one more possibly false statement about a public official in a country without the New York Times Co. v. Sullivan rule) is unlikely to bring the communicator a benefit commensurate with the increased risk of legal liability, communicators will choose risk-averse strategies. If we think the information that might otherwise have been provided by a less risk-averse information provider is a public good in the strict sense (if it is the kind of speech that should be intrinsically protected54), it follows that there may be reasons supporting the manipulation of the incentive

When jail time is hardly ever imposed, and the maximum financial penalties are comparatively small, as under existing criminal obscenity law, the incentives against engaging in legally risky behavior turn out to be much less than a great deal of standard "chilling effect" rhetoric supposes. But when, as in many broadcast or cable situations, the potential penalty is some real possibility of a loss of a license or a franchise, the chilling phenomenon may be substantial.

51. I am not making this up.
54. I say "intrinsically" in order to distinguish the speech we protect because we think it valuable (for example, criticism of governmental policies) from the speech we protect strategically because we want to make sure, by the creation of a buffer zone, that the intrinsically valuable speech remains free. The point is emphasized in Ocala Star-Banner v. Damron, 401 U.S. 295, 301 (1971) (White, J., concurring). See also Schauer, supra note 48, at 705-12.
If calibrated properly, this manipulation could reduce the likelihood of liability, and thus change the marginal risk-return calculation for the publisher of information. This would therefore serve to make information available that might not otherwise see the light of day were we to rely solely on the operation of an incentive system based on the risk-return calculus applicable to other products. Just because the manufacturer of chainsaws has a greater incentive to produce more chainsaws (although chainsaws produce a great possibility of legal liability for the manufacturer) than an information provider has to provide information, the liability rule applicable to chainsaws must be adjusted to produce socially beneficial outcomes when the product is information.

Now let us consider the question of intermediary liability in the context of cable operators. If broadcasting indecent leased access or public access material brings no greater return for the cable operator than does broadcasting nonindecent material, but brings even the smallest increase in the possibility of civil penalties or license nonrenewal, then we can expect cable operators to behave in a risk-averse fashion. Moreover, we can expect a cable operator to behave with far more risk-aversion than, say, a programmer, who often foresees greater benefits in taking greater legal risks. Thus, it should come as no surprise that cable operators eagerly accepted the invitation to restrict in Section 10(a). Careful consideration of the question of cable operator responsibility, therefore, might suggest engaging in a serious and empirically sound incentive analysis. Paradoxically, such an analysis might produce the conclusion that Smith v. California rested on empirically shaky foundations when decided, but nevertheless may apply in different circumstances now. The Smith Court assumed that an increase in the possibility of liability would lead booksellers to remove all legally risky books from their shelves. Were it the case, however, hardly unlikely in 1959, that steamy books like Miller's Tropic of Cancer and Lawrence's Lady Chatterly's Lover would be big sellers and would bring large numbers of customers into the bookstore, then the chilling effect of the absence of a scienter requirement for the intermediary may have been less than the Court supposed. By contrast, however, the benefits for the cable operator of showing "indecent" leased access or public access material may be much less than the benefits of stocking Tropic of Cancer for the 1959 bookstore. As a result, and not without some irony, the lessons of

Smith may be more applicable to 1994 cable operators than they were to 1959 bookstores.

IV

Although the foregoing takes on the question of the implications of liability of cable operators as conduits, a tension exists between the conduit characterization and the rhetoric of the cable operator as editor. This cable operator-as-editor rhetoric, quite apparent in the pre-Turner Broadcasting case law56 persistently compares the cable operator to the newspaper in Miami Herald v. Tornillo.57 The argument that supports the analogy is that the program selection decisions of the cable operator are like the "what goes on the page" decisions of a newspaper editor. Thus, the argument goes, the same policies that protected the Miami Herald ought to protect the right of the cable operator to decide how to fill the available programming hours.58

As noted above, this argument took a beating in Justice Kennedy's opinion for the Court in Turner Broadcasting.59 Nevertheless, that opinion relied heavily on its characterization of the must-carry regulations as not content-based. Thus, the issue remains open whether the Tornillo analogy will remain sound if cases which involve more blatant content-based restrictions on cable operators, such as those discussed here, arrive in the Supreme Court.

Anyone who reads Tornillo will immediately recognize the advantages of characterizing oneself as an editor. People, institutions, and conduct are frequently susceptible to multiple characterizations. Faculty members, for example, are professionals, employees, and independent contractors; deciding which characterization to pick may depend on the consequences of picking one or another among equally plausible and not mutually exclusive characterizations. The same project on the philosophy of law may be characterized as philosophy for purposes of applying for grants from foundations supporting philosophy and as law for purposes of applying for grants from foundations

58. Id.
supporting research about the law. Similarly, if the First Amendment protected sex and not speech, then we might discover that activities characterizable both as sex and speech, like the “loop” at a typical “peep show,” would more commonly be characterized as sex rather than speech. So if we assume that cable operators can characterize themselves with some plausibility both as conduits and as editors, we then want to ask why a cable operator would choose one or the other characterization for purposes of public rhetoric, political argument, and legal strategy.

_Tornillo_ made clear that advantages flow from being an editor because great advantages typically (but not universally) flow from being exempt from government regulation. Institutions want to be editors and not conduits precisely because the First Amendment protects the former but not the latter. Cable companies have traditionally analogized themselves to newspapers and not to broadcasters^60^ not because it is intrinsically better to be like a newspaper than it is to be like a broadcaster. Indeed, for public relations and competitive market purposes it would seem just the opposite, since cable television displaces broadcast television^61^ for far more people than it displaces the print press. Nevertheless, _Tornillo, Red Lion Broadcasting Co. v. FCC,^62^ and _FCC v. Pacifica Foundation_, taken together, make it obvious that one is more immunized from government regulation when treated as a newspaper rather than a broadcaster. So it is no surprise that cable programmers and cable operators have tried so hard to act as if they were newspapers. If the Constitution protects editors but not common carriers, and if freedom from government restriction is the goal, then it is better to be an editor than a common carrier. If the goal is to be able to act without governmental interference, a goal of many individuals and institutions, then there are obvious advantages in defining yourself so as to secure the maximum legal and constitutional immunity from regulation.

Although we can understand the strategic advantages for cable operators in defining themselves as editors, the analogy, as Justice Kennedy noted in _Turner Broadcasting_, often seems strained.^63^ And that is because the editor analogy is itself at least one step removed from the primary First Amendment archetype of a speaker speaking her mind, or of a Zenger-like editor publishing a newspaper of com-

^60^ See cases cited _supra_ note 56.

^61^ More accurately, shows available to cable subscribers only on cable displace shows available to households without cable.


^63^ 114 S. Ct. at 2464-67.
mentary that is soaked with political opinion in every paragraph and on every page. Yet when we consider the cable operator selections from alternatives to fill its channels, we see a pale image of the editorial function at work. Rather, we see many more decisions guided exclusively by business concerns, or, when there is no scarcity, no choices at all. As a result, the analogy between the program "selection" by the typical cable operator and the activity of the speaker deciding what she wants to say is, to put it mildly, tenuous.

I do not intend this line of argument to suggest that cable operators should be controlled. Rather, I want to suggest that the skepticism of Justice Kennedy and the Court majority in *Turner Broadcasting* about the *Tornillo* analogy should come as little surprise. The question whether cable operators should be controlled is not likely to be advanced by treating the cable operator as some sort of Speakers' Corner orator or colonial printing press patriot. Rather, the question is one more likely to be answered, especially after *Turner Broadcasting*, on the basis of administrative, legislative, and judicial decisions about the kind of programming that ought to be available on this increasingly dominant medium. Once that decision is made, cable operators are likely to be put into the legal and conceptual category most suitable to furthering that goal.

In confronting this post-*Turner Broadcasting* environment, cable operators will be tempted to continue to fight the seemingly losing battle to be treated as editors and not as conduits or common carriers. They may believe that there is still a chance of being so treated in cases not involving the must-carry regulations. They may further believe that being seen as editors, both publicly and politically, will help them avoid excess regulation at the earlier administrative and legislative stages.

Yet this approach deserves a second look, and indecency regulation may once again provide a useful way of thinking about this larger issue. Section 10 finds its way into the 1992 Cable Act precisely because there are millions of people who believe, sincerely, that there is too much sex on television, in the movies, in art, in books, in magazines, in newspapers, and elsewhere in modern life. That view is not one I share, although I do believe that there are too many endorsements of violence against women in the mass media and in popular culture, and that many of those endorsements of violence against women are sexualized. Still, given that Section 10 applies only to public access and leased access channels, leaving commercial channels untouched, it may be best to view Section 10 as a symbol, in much the same way that a great deal of the recent controversy about federal
funding of the arts has been symbolic. When the issue becomes symbolic, it becomes especially important that the symbol send out the correct message. That is why even if existing First Amendment doctrine were to be transformed to allow indecency regulation outside of the broadcast media (which I do not think it should be), I would still disagree with the entire point of the indecency enterprise.

I now return to the question of nonlegal responsibility, with which I opened this Article. On the question of nonlegal responsibility, the issue of leased access and public access channels is somewhat beside the point. Normally, we consider questions of editorial responsibility in the context of there being some actual room for editorial choice. When that room is absent, as it is with respect to leased access and public access cable television, it does not make much sense to think about nonlegal responsibility.

When we leave the narrower issue of leased access and public access, however, the question of editorial responsibility for programming decisions is quite different. Were cable operators, even after Turner Broadcasting, to persist with their we-are-editors-and-not-conduits rhetoric, they might find themselves increasingly subject to criticism for the choices they are actually making. And here there may be an intriguing case study in public perception. It is probably fair to assume that many of those same people who object to sexually explicit cable programming also object to sexually explicit pay-per-call telephone services. Yet we rarely hear the telephone companies describing themselves as editors making editorial choices. Furthermore, the telephone companies have in general continued the common carrier rhetoric from earlier years. By contrast, cable operators, who could have but did not continue common carrier rhetoric and pursue common carrier treatment, have in the recent past moved in the direction of “editor” rhetoric. We have seen some of the reasons for this phenomenon, but the question of nonlegal responsibility suggests the issue may be more complex. Editors make choices, and editors are criticized and punished in various nonlegal ways for the choices they make. Boycotts have been and will remain a prime example.

Cable operators might take a good look at the current situation of the television networks as they sit on the hot seat with respect to numerous issues, especially that of television violence. The post-Turner Broadcasting period is a good time for cable operators to reconsider the characterization that best serves their interests—legally, politi-

64. This is clear from Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989).
cally, and economically. As the cable operators watch the network executives squirm in public and worry even more about boycotts when they are not in public, they might therefore want to reconsider before deciding too easily that editors are what they really want to be.