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Constitutional Law: Utah's Cable Decency Act: an Indecent Act

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CONSTITUTIONAL LAW: UTAH'S CABLE DECENCY ACT: AN INDECENT ACT?

The Utah district court opinion in *Community Television v. Wilkinson*[1] *("Wilkinson")* gives the impression that Utah's statute prohibiting "indecency" on cable television was as indecent as the material it sought to suppress.[2] In finding Utah's attempt to regulate decency unconstitutional, the court ensured that "people can watch in their homes what they can see in their neighborhood movie theatres."[3]

On April 20, 1983, the Utah legislature passed the Cable Television Programming Decency Act ("Decency Act" or "the Act")[4] which empowered state officials to bring civil nuisance actions against anyone distributing "indecent" material on any cable television network.[5] The Utah legislature purposefully stepped beyond the legal definition of "obscenity," most recently set out in the Supreme Court case of *Miller v. California*[6] *("Miller")*, in order to control actions and speech which would not be considered obscene under the *Miller* guidelines. The Act

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1. 611 F. Supp. 1099 (D.C. Utah 1985). The district court decision was subsequently affirmed by the Tenth Circuit Court of Appeals in a per curiam decision. Jones v. Wilkinson *("Jones")*, 800 F.2d 989 (10th Cir. 1986). On March 23, 1987, the United States Supreme Court issued a one sentence order which affirmed the holding of the lower court. Only Chief Justice William Rehnquist and Associate Justice Sandra Day O'Connor voted to hear arguments on the case. Jones v. Wilkinson, No. 86-1125 (March 23, 1987). Arizona, Kansas, Mississippi, Missouri, New Hampshire, New Mexico, Pennsylvania, South Carolina, Washington and West Virginia joined Utah in the appeal to the Supreme Court.

2. Of course, the Utah law is not "indecent" in the strict legal sense which has been given to this term by the courts in recent years, but it is possibly indecent in a more colloquial sense.

3. L.A. Times, March 24, 1987, Pt. I, at 1, col. 4 (quoting a cable television spokesman).

4. UTAH CODE ANN. §§ 76-10-1701 to 76-10-1708 (Supp. 1986).

5. The Utah Decency Act defines indecency as:

> [A] visual or verbal depiction, display, representation, dissemination, or verbal description of:
> (a) A human sexual or excretory organ or function; or,
> (b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or,
> (c) An ultimate sexual act, normal or perverted, actual or simulated; or,
> (d) Masturbation;
> which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented.

Cable Television Programming Decency Act, UTAH CODE ANN. § 76-10-1702(4) (Supp. 1986).

6. 413 U.S. 15 (1972).

defined "indecent" material as "the visual or verbal depiction or description of human sexual or excretory organs or functions [or] exposure of genitals, pubic area, buttocks, or the showing of any portion of the female breast below the top of the nipple."[7]

The day after the Utah legislature passed the Decency Act, several cable networks[8] and other interested parties filed suit in the federal district court against the Attorney General of Utah, David Wilkinson. Amicus briefs from such organizations as Morality in Media,[9] the Federal Communications Commission ("FCC"), and Citizens for Positive Community Values were accepted by the court.[10] Both sides submitted motions for summary judgment. The Utah district court ultimately held for the plaintiffs and granted a permanent injunction against enforcement of the Decency Act on grounds of preemption and because it represented an unconstitutional violation of First Amendment rights.[11]

THE DISTRICT COURT'S ANALYSIS

A. Federal Preemption

The first question the Utah district court dealt with was the relationship between federal power and the state's legitimate police power, re-

7. See supra note 5 for text of the Decency Act.

8. Community Television of Utah, Community Cable of Utah, Inc., Utah Satellite, Inc. and Wasatch Community T.V., Inc. filed a federal suit for injunctive and declaratory relief, alleging infringement of their First Amendment rights. The court allowed Home Box Office to intervene as an additional plaintiff.

9. This organization is dedicated to eliminating what it perceives as obscenity and indecency. It publishes a monthly newsletter entitled THE OBSCENITY LAW BULLETIN which criticizes and approves various trends in the law in this area. A recent issue gave an accurate summary of the Tenth Circuit Court of Appeals opinion in *Jones*. 10 THE OBSCENITY L. BULL. 1 (Oct., 1986). The editors of the *Bulletin* approvingly noted in a comment that "there are those who [believe] that 'indecency' in the broadcast media is of the same nature as obscenity and can be prohibited as unprotected speech." *Id.* at 4.

A view such as this has a potential for substantial curtailment of First Amendment rights. The Supreme Court has said explicitly and repeatedly that "indecency" is not wholly unprotected speech. *See, e.g.*, Young v. American Mini-Theatres, 427 U.S. 50 (1976) (where Justice Stevens first enunciated the court's theory of partially protected speech in the context of "indecency"). In speaking about adult theatres showing explicit, but not necessarily obscene, materials, Justice Stevens said that "[e]ven though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." *Id.* at 52. It is significant that four justices, who joined in a dissent to Justice Stevens' opinion, sought even greater constitutional protection for "indecency" than the majority. The dissent admitted that "the kind of expression at issue here is no doubt objectionable to some [but insisted] that that fact does not diminish its protected [status]." *Id. See infra* note 33.

10. *Wilkinson*, 611 F. Supp. at 1101.

11. *Id.* at 1117.

garding content regulation for cable television. Shortly after the Decency Act was passed, Congress enacted the Cable Communications Policy Act of 1984 ("Policy Act").[12] The Policy Act stated, inter alia, that no federal agency, state or franchising authority could regulate content except as provided by the Policy Act.[13]

The district court first considered section 612(h) of the Policy Act, which asserted that a franchising authority may deny a cable license if the provider of the cable service broadcasts material that is "obscene, or in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States."[14] The district court noted that, while Congress clearly intended to regulate material beyond that which could be considered legally obscene[15] by including material which was merely "lewd" or "indecent," the exclusive remedy set out under section 612(h) was the denial or nonrenewal of a cable license.[16] The *Wilkinson* court then observed that the section gave power to the cable franchising authority,[17] and not to a state legislature, to withhold licensing of cable stations. Thus, the civil nuisance remedy authorized by Utah's Decency Act[18] was impermissible

12. Cable Communications Policy Act, Pub. L. No. 98-549, 98 Stat. 2780 (1984) (codified at 47 U.S.C. §§ 521-559 (Supp. 1986)) [hereinafter Policy Act].

13. Policy Act § 624(f)(1), 47 U.S.C. § 544(f)(1). The Policy Act states that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title." *Id.*

14. The section reads:

> Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority is obscene, or in conflict with community standards in that it is lewd, lascivious, filthy or indecent or is otherwise unprotected by the Constitution of the United States.

Policy Act § 612(h), 47 U.S.C. § 532(h).

Strictly speaking, "lewd" or "indecent" speech is not "unprotected" by the Constitution. *See supra* note 9 and *infra* note 33. Therefore, the constitutionality of § 612(h) is problematic. The language of the *Wilkinson* court suggests awareness of this problem: "Assuming, *arguendo* that § 612(h) is constitutionally valid, it does not authorize the restrictions in the Utah Decency Act." (emphasis in original) *Wilkinson*, 611 F. Supp. at 1103.

15. As defined by the court in *Miller*. *See infra* note 37 and accompanying text.

16. Section 612 also permits a franchiser to confer a license "subject to conditions," but there is no indication of additional civil or criminal penalties for "violations." Policy Act § 612, 47 U.S.C. § 532.

17. The Policy Act indicated that a license could be denied, or given subject to conditions, if the cable station broadcast material that "in the judgment of the franchising authority is obscene . . . ." Policy Act § 612(h), 47 U.S.C. § 532(h). The Policy Act defines a "franchising authority" as an entity empowered by state, federal or local law to confer franchises. Policy Act § 602, 47 U.S.C. § 522(9). Clearly, the Attorney General of Utah did not represent a franchising authority under this definition.

18. See *supra* note 5 and accompanying text.

and pre-empted by the Policy Act.[19]

The court also noted that section 612 of the Policy Act contained a special provision designed to compel cable operators to keep a certain number of channels open to independent operators in order to promote more diverse programming.[20] The cable companies were required to broadcast these independent stations alongside their own programming, without exercising any control over the independent operators.[21] Congress expressly shielded the cable operator from any civil or criminal liability that might result from these transmissions.[22]

Utah's Decency Act permitted civil nuisance proceedings against a cable operator for broadcasting a program that was indecent, even though the material was on a channel provided to an independent station by the cable company over which the cable company had no editorial control.[23] The Policy Act did not sanction this result. To the contrary, section 612 made it clear that the license of the independent operator, and not that of the cable company, could be revoked if the independent operator broadcast "lewd" or "indecent" material. For these reasons, the court found that section 612 preempted the Decency Act rather than supported it.[24]

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19. *Wilkinson,* 611 F. Supp. at 1103.

20. The Policy Act states that "[t]he purpose of this section is to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." Policy Act § 612(a), 47 U.S.C. § 532(a). The section goes on to require that cable operators broadcasting between thirty-six and fifty-four stations set aside ten percent of their channels for use by persons not affiliated with the operator. Policy Act § 612(b)(1)(A), 47 U.S.C. § 532(b)(1)(A). Larger operators are required to set aside as much as fifteen percent of their channels. Policy Act § 612(b)(1)(C), 47 U.S.C. § 532(b)(1)(C).

21. Obviously, the congressional objective of diverse programming would be compromised if cable operators, who were required to provide a certain percentage of their stations to persons with whom they were not affiliated, could nevertheless edit or otherwise control the material of these "independent" broadcasters. For this reason, Congress prohibited the "parent" cable operator from interfering with the "child" cable station:

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

Policy Act § 612(c)(2), 47 U.S.C. § 532(c)(2).

22. Policy Act § 638, 47 U.S.C. § 558. Since cable operators were forced by Congress to provide these channels to independent operators, and since they were prohibited from editing the material of the independent broadcasters, it would be unfair to punish the cable operator for transgressions perpetrated by the independent stations. For this reason, Congress sheltered the cable operator from any civil or criminal liability resulting from the material broadcast by the independent stations. *Id.*

23. *Wilkinson,* 611 F. Supp. at 1103.

24. *Id.* The court said that § 612 "only applies to a limited number of commercial chan-

The *Wilkinson* court then examined section 611 of the Policy Act which, in the public interest, created another special class of channels which cable companies may be required to broadcast alongside their own programming. Franchising authorities were given the power to require cable operators to set aside a certain number of channels for public, educational or governmental use ("PEG" channels).[25] The cable operator was prevented from exercising editorial control over these stations[26] and section 638 of the Policy Act expressly immunized cable operators from civil or criminal liability regarding the content of these stations. The only sanction permitted to state authorities for objectionable program content was the refusal of a franchise or its renewal.[27] The *Wilkinson* court concluded that the "Policy Act [thus] forbids civil [nuisance] actions against cable operators concerning the content of these [PEG] channels."[28]

The final section of the Policy Act the court examined for guidance on the permissible extent of state regulation was section 638.[29] The *Wilkinson* court said that this was the regulation in the Policy Act which applied to all cable stations other than the PEG and independent commercial stations. The court said that "[i]t is therefore the last section of the Policy Act that might arguably authorize the enforcement of the Utah law."[30]

This section provided that nothing in the statute should be understood "to limit the criminal or civil liability of cable operators pursuant to the Federal, State or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising or other similar

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nels which have special editorial restrictions. Utah's Cable Decency Act covers significant areas of cable program distribution outside the scope of § 612. . . . [T]herefore [§ 612] expressly pre-empts, rather than authorizes, the Utah law with regard to these channels." *Id.*

25. Policy Act § 611, 47 U.S.C. § 531.

26. Policy Act § 611(e), 47 U.S.C. § 531(e).

27. *Wilkinson,* 611 F. Supp. at 1103 (citing § 624(d)(1), 47 U.S.C. § 544(d)(1)). The Policy Act gives the cable company some control regarding the PEG channels. The relevant section says that "[s]ubject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any [PEG station]." Policy Act § 611(e), 47 U.S.C. § 531(e). Section 544(d) permits the franchising authority *and a cable company* to issue a license to a PEG station subject to the condition that it shall not broadcast obscene material. Policy Act § 624(d), 47 U.S.C. § 544(d). It is nevertheless true, as the *Wilkinson* court noted, that § 638 expressly precludes a cable operator from civil or criminal liability regarding these stations. The section states, in relevant part, that "cable operators shall not incur any [civil or criminal liability] for any program carried on any channel designated for [PEG] use . . . ." Policy Act § 638, 47 U.S.C. § 558.

28. *Wilkinson,* 611 F. Supp. at 1103.

29. Policy Act § 638, 47 U.S.C. § 558.

30. 611 F. Supp. at 1103.

laws."[31] The court drew attention to the conspicuous absence of "indecency" in this laundry list of areas in which the state was permitted to regulate the content of cable television. This was significant since the legislators were well aware of the distinction between legal obscenity and indecency.[32] Here was a classic list of the areas of unprotected speech in the First Amendment area with a conscious omission of "indecency." The reason for this was that Congress recognized indecency to be an area of speech not wholly unprotected.[33]

The *Wilkinson* court concluded, from this discussion, that the question of federal pre-emption was reducible to the question of whether the Utah law was constitutionally valid since the states retained the power, under the Policy Act, to regulate under the auspices of constitutionally valid civil and criminal laws. Thus, if the Utah law was constitutionally problematic it was, at the same time, pre-empted by the Policy Act.[34] It became necessary, therefore, for the court to determine whether the Decency Act was an unconstitutional infringement upon First Amendment rights.

B. First Amendment Analysis

First the court considered whether the Decency Act was overbroad on its face. The court acknowledged that the Supreme Court has shown

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31. Policy Act § 638, 47 U.S.C. § 558. Judge Baldock, in his Tenth Circuit concurring opinion, argued that the phrase "or other similar laws" was intended by Congress to allow for appropriate state laws regulating indecency on cable television. *See infra* note 57 and accompanying text.

32. *Wilkinson,* 611 F. Supp. at 1104.

33. *Id.* Justice Stevens has been instrumental in the development of a theory of a hierarchy of speech which is deserving of various degrees of protection. *See generally* Young v. American Mini-Theatres, 427 U.S. 50 (1976) (upheld a Detroit ordinance designed to confine "indecent," namely sexually explicit, movies to certain parts of the city). Political speech is at the high end of the spectrum and deserves the full protection of the First Amendment. It can only be curtailed when the state has a compelling state interest and the regulation is narrowly tailored. Obscenity is totally unprotected by the First Amendment, according to the Court. Commercial speech is midway between protected and unprotected speech. *See, e.g.,* Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976) (affirmed reversal of conviction for advertising price of prescription drugs). The Court has determined that "indecency" (speech that is less than obscene) is also quasi-protected. FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (held "indecent" dirty words routine by comedian George Carlin was not protected speech). *See supra* note 9. *See infra* notes 60 and 69 for further discussion of the view that only wholly unprotected speech is included in section 638 of the Policy Act.

34. The *Wilkinson* court said that "[i]n summary, the Policy Act links power with principle. The Policy Act preserves state power to regulate program content that the first amendment does not protect. If state regulations are unconstitutional, they are also pre-empted under the terms of the Policy Act. The final resolution of the pre-emption question necessarily requires a ruling on the First Amendment issue." 611 F. Supp. at 1105. *See infra* note 74 and accompanying text.

reluctance to invalidate legislation on its face and has preferred to strike legislation only as applied to the facts at hand.[35] The more drastic measure is applied only when a law is invalid as written and regardless of how it might be applied to particular factual situations.

In order to determine if the Decency Act violated constitutional standards, the *Wilkinson* court began by citing *Miller*[36] which provided a three part test for obscenity. To find material obscene, the *Miller* test required that (1) an average person using contemporary community standards would find the material as a whole appeals to the "prurient interest"; (2) the material depicts sexual conduct in "a patently offensive way" in relation to applicable state law; and, (3) the work "taken as a whole lacks serious literary, artistic, political or scientific value." All three elements must be present for the material to be obscene.[37]

Utah's Decency Act did not require that the regulated material appeal to the prurient interest or that it lack serious literary, artistic, political or scientific value. Thus, the legislature largely ignored the *Miller* requirements. Furthermore, the Decency Act attempted to restrict material which did not depict sexual conduct in a patently offensive way, since it only required that material be "offensive" for the time, place and manner shown, with no requirement of sexually related material.[38] Since the Decency Act ignored essential requirements set out by the *Miller* test, the federal district court concluded that the Act could not be justified under the constitutional guidelines permitting state regulation of obscenity, as stated in *Miller*.[39]

The defendants argued that the case of *FCC v. Pacifica* ("*Pacifica*")[40] extended state regulatory powers beyond the arena of legal

35. *Id.* at 1106 (referring to facial invalidation as "strong medicine"). *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 613 (1972).

36. 413 U.S. 15 (1972).

37. *Id.* at 24. The *Miller* definition of obscenity cuts back considerably on the liberality of the formulation in the famous *Roth* case. Roth v. United States, 354 U.S. 476 (1957). In *Roth*, Justice Brennan structured the three part test so that the third prong required that the material, to be obscene, must be "utterly without redeeming social importance." 354 U.S. at 484. Now, under *Miller*, the third prong requires that the material possess serious cultural value in order that it may be "redeemed."

38. *Wilkinson*, 611 F. Supp. at 1108 (citing UTAH CODE ANN. § 76-10-1702(4)). Judge Baldock, in his concurring opinion in *Jones*, said that the "district court correctly pointed out that the Cable Decency Act does not conform to the Miller obscenity test." However, Judge Baldock could not "agree that the [Decency Act] fails to satisfy the 'patently offensive sexual conduct' element of the *Miller* test," and he followed Morality in Media's view that the *Miller* test is too liberal and is therefore "inadequate to regulate sexually oriented material on cable television." *Jones*, 800 F.2d at 997.

39. *Wilkinson*, 611 F. Supp at 1109.

40. 438 U.S. 726 (1978).

obscenity to include indecency. *Pacifica* was a fascinating case which involved the comedian George Carlin. Performing in front of a live audience in California, Carlin shocked and amused his listeners by satirizing society's fear of certain "dirty" words by repeatedly using them on stage. Trouble arose when a public radio station broadcasted Carlin's routine and a young child heard it while a passenger in his father's car. The father complained to the FCC who in turn issued a declaratory order against the station. The Supreme Court upheld the FCC decision to reprimand the station even though the material was not obscene under the *Miller* test.[41]

The Supreme Court reasoned that radio broadcasting is a unique medium because children have easy access to it, radios are in the home where special privacy interests exist, unconsenting adults may tune in a station without effective warning of its content, and there is a scarcity of spectrum space, justifying FCC intrusion on behalf of the public interest.[42] The Utah district court emphasized that the cable television medium was distinguishable from public radio and did not warrant the same degree of protection.[43] The court observed that the Supreme Court intended the *Pacifica* holding to be a narrow one which should perhaps be limited to the special circumstances of that case.[44] Finally, the *Wilkinson* court found it significant that the "punishment" sanctioned by the Court in *Pacifica* was extremely mild and fell far short of the remedies envisioned by the Utah legislature.[45]

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41. *Id.*

42. *Id.* at 748-49.

43. The court found the differences significant between the radio medium in which limited intrusion beyond obscenity had been sanctioned by *Pacifica,* and the cable television industry which was presently involved. Cable television is invited into the home by consenting adults who are generally charged a fee for the service. The companies are required to provide lockboxes so that parents can prevent access by their children when this is thought necessary. The programming of cable television is comprehensively displayed in guides with warnings which may be consulted by concerned adults. *Wilkinson,* 611 F. Supp. at 1113.

44. *Wilkinson,* 611 F. Supp. at 1110. The *Wilkinson* court quoted from a House Committee Report, prepared in connection with the Policy Act, which acknowledged that several federal cases had previously held there were substantial constitutional problems in applying an indecency standard to the medium of cable television. *Id.* at 1105 (citing H.R. REP. No. 934, 98th Cong., 2d Sess. 69-70, *reprinted in* 1984 U.S. CODE CONG. AND ADMIN. NEWS 4655, 4732). *See* Community Television of Utah v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982). The district court also noted that *Bolger v. Youngs Products Corp.,* 463 U.S. 60 (1983) had already given some guidance on the question of whether *Pacifica* could be applied to other media of expression. In *Bolger,* the United States Supreme Court declined to uphold a federal statute restricting the mailing of unsolicited contraceptive advertisements. The *Wilkinson* court said that "the *Bolger* case largely limited *Pacifica* to its facts." 611 F. Supp. at 1116.

45. 611 F. Supp. at 1110.

The state of Utah argued that it intended to enforce the Decency Act only during daytime hours despite the absence of such a limitation in the Act itself. The court did not accept the Utah Attorney General's plan of enforcement because the Attorney General could not control the actions of a local government that might insist on full enforcement of the express terms of the Decency Act. Such a promised application of prosecutorial discretion could not cure the constitutional defect where there was a significant departure from constitutional standards.[46]

The Utah district court examined the Eleventh Circuit case of *Cruz v. Ferre* ("*Cruz*")[47] which had considered a similar problem to that presented in *Wilkinson*. In *Cruz*, a Miami city ordinance threatened termination or suspension of the provider's cable license if the provider distributed indecent material. The *Cruz* court held that the Miami ordinance was overbroad since it went beyond the test for obscenity outlined in *Miller*.[48]

C. *Decency at the Right Time and Place?*

Finally, the court considered the Policy Act as a possible "time, place and manner" restriction.[49] The Supreme Court has permitted government to restrict speech where the regulation is not aimed at the content of the speech and the purpose of the regulation is to channel speech to an appropriate time or place.[50]

The *Wilkinson* court noted that the Decency Act contained "time, place and manner" language. The Act required that the average person applying community standards must find the material patently offensive "for the time, place, manner and context in which the material is presented."[51] Despite this language, the court held that the Decency Act was designed to regulate the content of expression to ensure that it was "decent."[52] Furthermore, this general time, place and manner restriction

46. *Id.* at 1109. The court held that rules promulgated by Attorney General Wilkinson purporting to limit "indecency" to "adult viewing hours" were unsatisfactory since the language of the Decency Act was itself too broad and because a subsequent Attorney General could rescind such rules. Furthermore, the Decency Act did not provide for such regulatory control by the Attorney General of Utah. *Id.* at 1115.

47. 755 F.2d 1415 (11th Cir. 1985).

48. *Id.* at 1418. The *Cruz* court also noted that the Miami ordinance disregarded the time of day and the parents' ability to control access to the medium by their children. *Id.*

49. *Wilkinson*, 611 F. Supp. at 1116.

50. Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981).

51. UTAH CODE ANN. § 76-10-1702(4). *See supra* note 5 for text.

52. 611 F. Supp. at 1116. Content-neutral time, place and manner regulations are "acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." City of Renton v. Playtime Theatres,

failed to give cable operators adequate notice of what could or could not be shown. Without clear notice guidelines the Decency Act was not only overbroad on its face but also void for vagueness.[53]

VIEW FROM THE TENTH CIRCUIT

The Tenth Circuit affirmed the Utah district court opinion, noting that "[t]he district court has written a comprehensive opinion with which we agree, and to which we can add little of value. We affirm its judgment on the basis of the reasons stated in the opinion."[54] The opinion contained a special concurrence by Judge Baldock who wrote separately because he believed the Policy Act did not entirely pre-empt state regulation of "sexually oriented content which is not obscene."[55] Judge Baldock believed that the federal Policy Act permitted state regulation of indecency "provided that the regulation is a time, place and manner restriction that is narrowly drawn and exists for the protection of minors."[56] He thought that the decision of the lower court was misguided to the extent that it suggested that such regulation was not permissible under the Policy Act. Judge Baldock voted for affirming the decision of the lower court because he did not believe that the Decency Act represented a narrowly tailored regulation.[57]

Inc., 472 U.S. 1006 (1986). Justice Rehnquist said the Renton statute "treats theatres that specialize in adult films differently from other kinds of theatres [but nevertheless, the] ordinance is aimed not at the content of the films shown [but only] the secondary effects of such theatres on the surrounding community." *Id.* This reasoning comes dangerously close to a suggestion that any speech could be restricted, so long as the justification for doing so was not to inhibit the transmission of ideas but rather to prevent the objectionable behavior that may occur as a result of the transmission of those ideas. In American Booksellers Ass'n. v. Hudnut, Judge Easterbrook described how such a concept can lead to the complete abrogation of the First Amendment. 771 F.2d 323 (7th Cir. 1985).

53. *Wilkinson,* 611 F. Supp. at 1117.

54. *Jones,* 800 F.2d at 991.

55. Judge Baldock voted to affirm the lower court decision with regard to Utah's Decency Act. He agreed the Decency Act was not drafted narrowly enough. However, he thought that it was improper for the court to suggest that states were preempted by the Policy Act from constructing narrowly tailored regulations regarding sexually related non-obscene material. He said that he wrote "separately because [he did] not agree with this court's apparent conclusion that federal law preempts state regulation of sexually oriented content which is not obscene." 800 F.2d at 992. *See infra* note 70 and accompanying text, for a discussion of the extent to which the district court did suggest that states were preempted from regulating on cable television all non-obscene material.

56. 800 F.2d at 992.

57. He wrote that in his "view, *Pacifica* is relevant to the regulation of indecency on cable television, but the Utah Cable Decency Act is not a valid time, place and manner restraint on indecency even under *Pacifica.*" 800 F.2d at 1004. He thought that even if, as he believed, indecency could be regulated on cable television, the Utah law was "not acceptable because it is a complete prohibition rather than regulation." *Id.* at 1007.

Judge Baldock found a basis for his belief that Congress did not intend to pre-empt state regulation of sexually related non-obscene material in the language of the Policy Act which reserved to the states the right to enforce laws relating to defamation, false advertising, obscenity *or other similar laws.*[58] He then provided his own analysis to decide "whether the phrase 'other similar laws' includes laws pertaining to indecency . . . ."[59] He concluded that Congress had intended to include valid cable indecency regulation within the scope of "other similar laws."[60]

ANALYSIS

The Utah district court has provided a thoughtful analysis of the complex issues involved in indecency cases. The distinction between obscenity and indecency was amply illustrated, the Policy Act thoughtfully interpreted and the relevant case law analyzed and applied in a plausible way.

One might ask whether the "strong medicine"[61] of a facial invalidity finding was really called for in this case. As the Supreme Court stated in *Pacifica* "[i]nvalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a last resort.' "[62]

Wilkinson may be distinguished from *Pacifica* in several respects. In *Pacifica* a specific factual situation was presented to the court by Carlin's speech and its subsequent radio broadcast. It was thus possible to rule on the constitutionality of the rule *as applied* in those circumstances.

In contrast, the *Wilkinson* court was not faced with a specific application of the Decency Act, since the suit did not arise as a result of an action against any cable service, but rather, out of a fear of such suits. It was thus not open to the *Wilkinson* court to make a narrower holding and rule on the constitutionality of the statute as applied. The alterna-

58. Policy Act § 638, 47 U.S.C. § 558.

59. *Jones,* 800 F.2d at 994.

60. Judge Baldock considered the same legislative history (*see supra* note 44) that the lower court examined, to arrive at his conclusion. *Jones,* 800 F.2d at 994. The district court's view that "other similar laws" is restricted to laws regulating speech which has been declared by the Court to be wholly unprotected is supported by the fact that the *Pacifica* ruling had come down several years prior to the drafting of the Policy Act. *But see infra* note 69 and accompanying text. If Congress had believed that *Pacifica* had authorized indecency regulation on cable television the Policy Act would have been the place to clearly say so.

61. In *Pacifica,* the Court "decline[d] to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech." 438 U.S. at 743.

62. 438 U.S. at 743 (citing Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

tive would have been to wait until Utah had attempted to enforce the Decency Act.

If Utah had attempted to enforce the Decency Act in an inappropriate way, then perhaps the district court could have adjudicated the validity of the Decency Act. This certainly would have lent added authority to the court's proposition that the law was overbroad and easily capable of misapplication. However, it might have been years before the case reached the courts and in the meantime, there would have been a significant chilling effect created by the statute.[63] Indeed, it was this fear which brought the *Wilkinson* plaintiffs into court for declaratory and injunctive relief.[64]

It is important to note that the FCC, although temperate in its response to the Carlin broadcast, was nevertheless authorized to apply harsher sanctions than it did. When the FCC issued its declaratory order to Pacifica Foundation, it warned that it had the power to revoke a license, to issue a cease and desist order, to impose a monetary fine and deny renewal or subject it to conditions.[65]

The *Wilkinson* court noted that the *Pacifica* Court went out of its way to "emphasize the narrowness of [its] holding."[66] The *Wilkinson* court speculated that if the FCC had imposed a harsher penalty in *Pacifica* this might have brought a different result.[67] *Pacifica* specifically

63. The *Wilkinson* court made the point that in *Pacifica*, the remedy was extremely mild compared to the sanctions permitted by Utah's Decency Act. In *Pacifica*, the FCC simply made a notation in the file of the radio station, to be considered at the time for license renewal. By contrast, the Decency Act provided for a $10,000 fine and legal fees for a second offense. UTAH CODE ANN. § 76-10-1704. Under such circumstances, it is likely that the Decency Act could have a chilling effect on cable operators.

64. Moreover, if the cable companies had waited until the state decided to bring a nuisance suit against them, then the federal district court may have faced the *Younger* abstention doctrine and may have had to decline jurisdiction. *See* Younger v. Harris, 401 U.S. 37 (1971). The Supreme Court has seemed to exercise considerable discretion in deciding ripeness issues. *Compare* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (held that the constitutionality of a provision of the Hatch Act prohibiting a civil servant in the executive branch from taking part in political campaigns could not be adjudicated until a plaintiff could show that he intended specific acts prohibited by the law) *with* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (finding ripeness and constitutionality where federal law limited the liability of private nuclear plants, but prior to any dispute over liability actually arising, since the future harm to plaintiffs was sufficiently certain and an important public question was involved). One commentator has suggested that a review of the cases shows that "no mechanical tests can be applied here." J. NOWAK, CONSTITUTIONAL LAW 72 (1983). In the present case, it is possible to see the chilling effect as an immediate harm of the Decency Act thereby yielding a justiciable "case or controversy." Indeed, the *Wilkinson* court noted that the statute was substantially overbroad and created a significant "chilling effect." 611 F. Supp. at 1106.

65. *Pacifica*, 438 U.S. at 743.

66. *Id.* at 752.

67. 611 F. Supp. at 1110.

recommended that courts consider the composition of the audience and the differences between radio, television and closed circuit transmission when ruling in an indecency case.[68] In following this directive, the *Wilkinson* court pointed out the distinctions between public radio and cable television, which included the voluntary nature of cable TV, which had to be specially installed and usually paid for, and the ability of parents to lock up the programs through a free lock box provided by the cable company.

From one point of view, however, it may seem that the *Wilkinson* court, by virtue of its own reasoning, gave undeserved attention to the *Pacifica* holding. After all, if it is assumed that the Policy Act is constitutional, and if it is held that a provision of the Policy Act permits states to regulate *only* speech on cable television in areas which have been deemed wholly unprotected,[69] then it is not clear how *Pacifica*, which said that indecency is not entirely unprotected, could possibly rescue the Decency Act.[70]

One might have supposed that the purpose of examining the *Pacifica* holding was to conduct an indirect examination of the constitutionality of the Policy Act. If *Pacifica* guaranteed to the states the right to regulate indecency, and if the Policy Act takes that right away, then perhaps the Policy Act is unconstitutional.

Of course, the *Wilkinson* court did not reach this question since it found that *Pacifica* did not justify the regulations of the Decency Act. The *Wilkinson* court distinguished the cable medium from the radio broadcasting medium by the availability of lock-boxes for cable television, the invitation of cable into the home and other factors in order to conclude that the Policy Act regulation of indecency was not justified under the rationale of *Pacifica*.

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68. 438 U.S. at 752.

69. The *Wilkinson* court relied on this rationale for invalidating the Decency Act when it said "[t]he plain purpose of § 638 is to preserve federal, state and local regulation of unprotected expression in the areas [listed]. Upon examination, Utah's Cable Decency Act does not appear to fit within § 638 because 'indecent' expression is not wholly unprotected speech." 611 F. Supp. at 1104.

70. If a Supreme Court decision deemed some new area of speech entirely unprotected, it would, in effect, place that additional area of speech on the list contained in § 638 of the Decency Act. Yet, the *Wilkinson* court analyzed *Pacifica* for more than its decision as to whether indecency is entirely unprotected speech, as if it were possible that, despite the Court's decision that indecency is partly protected, *Pacifica* could somehow rescue the Decency Act. It is noteworthy that the Supreme Court has, in the past, declared new areas of speech to be wholly unprotected. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (holding child pornography not protected under the First Amendment). It seems highly unlikely that the Supreme Court would come to such an extreme conclusion with regard to "indecency."

After concluding that *Pacifica* was inapplicable to the Decency Act, the *Wilkinson* court was unable to use its examination of *Pacifica* as an indirect vehicle for testing the constitutionality of the Policy Act. This is not to suggest that the *Wilkinson* court should have found that *Pacifica* would have permitted the Decency Act, simply to resolve the constitutionality of the Policy Act;[71] rather, having found that the Policy Act did not permit state regulation of indecency on preemption grounds, it was unnecessary to inquire whether *Pacifica* upset this result. Since the Decency Act attempts to regulate speech on cable television that is at least partially protected, the Decency Act is pre-empted.[72]

The reason why the *Wilkinson* court analyzed the holding and reasoning of *Pacifica* so carefully was because it really had a second rationale for invalidating the Decency Act. On this second rationale, the Policy Act embodied the proposition that the states could regulate cable television so long as those regulations were not unconstitutional.[73] In this event, it makes a great deal of sense to gauge the adequacy of the Decency Act in relation to the guidelines provided by *Pacifica*. On this premise, the question of the constitutionality of the Decency Act regulations cannot be answered by noting that indecency is not unprotected speech.

CONCLUSION

The two rationales provided by the *Wilkinson* court for invalidating the Decency Act, to some degree, act as support and reinforcement for one another. They do, however, support implications which are not entirely consistent. The rationale involving invalidation of the Decency Act, because the Policy Act permits states to regulate only areas of wholly unprotected speech, suggests that the appropriate remedy for those in favor of regulating cable indecency is to have Congress amend the Policy Act to clarify that "indecency" is in the list of areas which the state can regulate.[74]

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71. Indeed, the *Wilkinson* court argued that *Pacifica* would not have permitted the Decency Act, even in the absence of the Policy Act.

72. The *Wilkinson* court could have also said that even if the Policy Act did not exist, the regulation contemplated by the Decency Act would not have been justified on the basis of *Pacifica*.

73. Subsequent to the discussion in which the *Wilkinson* court concluded that the Decency Act was invalid because indecency had never been declared unprotected speech, the court said that the Policy Act preempts state regulation if the state regulation violates the First Amendment. 611 F. Supp. at 1105. *See supra* note 34.

74. Congress could either explicitly add "indecency" to the laundry list of § 638 or otherwise indicate that it intended indecency to be an area which the states could regulate. The only other remedy, upon the first rationale, for those favoring state regulation of cable television,

On the other hand, the rationale invalidating the Decency Act on the basis that it was pre-empted because it was an unconstitutional abridgment of the First Amendment, suggests that a narrowly tailored time, place and manner regulation might be acceptable.[75] Since the Supreme Court has merely affirmed[76] the Tenth Circuit which, in turn, affirmed the decision of the district court which contained both rationales,[77] it is impossible to say, at this time, whether a narrowly tailored time, place and manner regulation designed for the protection of children would be constitutional and therefore not preempted.[78]

It is important to keep a proper perspective on this situation. Clearly, many "indecency" regulations are intended to interfere with the First Amendment rights of adults. It is often not an "accident" that they happen to be drawn in an "overbroad" manner so as to limit the rights of adults as well as children. Some governmental bodies and many of the organizations that support such indecency regulations, such as Morality in Media, would like to have indecency regulations that protect children. Unfortunately, they are also groups often prepared to support legislation which would treat adults as if they were children.

Ken Levine

would be for the Supreme Court to declare that indecency is a wholly unprotected area of speech.

75. An acceptable time, place and manner regulation might permit the showing of sexually explicit and other "indecent" material late at night on all stations, and at any time of the day on selected channels, provided parents could lock up these stations to protect their children.

76. *See supra* note 1.

77. *See supra* note 73.

78. It is also quite possible that the *Wilkinson* court thought the Decency Act was pre-empted not only because it attempted to regulate indecency which has been deemed partially protected but also because the differences between public radio and cable television were so significant that the reasoning of *Pacifica* precluded regulation of indecency on the cable medium. This third rationale, like the first rationale, implies that a narrowly tailored time, place and manner regulation would be invalid. At this point, we do not know if the higher courts intended to affirm this rationale or some other.