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Freedom of Speech and the Problem of the Lawful Harmful Public Reaction: Adult use Cases of Renton and Mini Theatres

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FREEDOM OF SPEECH AND THE PROBLEM OF THE LAWFUL HARMFUL PUBLIC REACTION: ADULT USE CASES OF *RENTON* AND *MINI THEATRES*

by

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The constitutional right of freedom of speech[1] protects the speech of adult erotic entertainment.[2] The state, consequently, can not suppress such speech unless it is obscene.[3] This constitutional protection helped to turn adult erotic entertainment into one of the nation's growth industries.[4]

The constitutionally protected speech of adult erotic entertainment includes explicit sex films,[5] nude dancing[6] and erotic books.[7] Various adult land uses sprung up to satisfy an apparent large public demand for this entertainment.[8] Adult film theaters, of course, show filmed reproductions of live sex on a big screen. Some taverns offer nude dancing.[9] Some adult bookstores sell more than books and pictures.[10] Adopting a practice of the beverage industry, they also sell films for consumption both on and off the premises.[11] Some bookstores go farther and offer the customer live nude dancing in a booth with a protective, but transparent glass partition between the performer and the viewer.[12] Thus, although the basic form of this expression has probably changed very little since ancient times, it clearly appears adaptable to the improvements

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[1]The first amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

[2]*See,* Schad v. Borough of Mt. Ephraim, 452 U.S. 61,66 (1981); Young v. American Mini Theatres, 427 U.S. 50,70 (1976); Doran v. Salem Inn, Inc., 422 U.S.922 (1975); Miller v. California, 413 U.S.15,24,29 (1973); Paris Adult Theater v. Slaton, 413 U.S.49 (1975); California v. La Rue, 409 U.S.109,118 (1972).

[3]*American Mini Theatres,* 427 U.S. at 70.

[4]Marcus, *Zoning Obscenity: Or, The Moral Politics Of Porn,* 27 BUFFALO L. REV. 1,4,8 (1977). The annual sales volume of sex magazines, books, films and videotapes in the nation in 1985 was between eight and ten billion dollars. In 1984, consumers of erotica in America outnumbered the voters who reelected Ronald Reagan as President. The number of hard core films totalled 1700 titles in 1985. Improved technology has lowered film production costs to $12,000 per film. There were fifty-four million X-rated videocassette rentals in 1984, a six-fold increase in a decade. A New York dial-a-porn telephone service gets 500,000 calls a day, and one-fifth of them are long distance calls. *See* Nesbit, *Pornography Crackdown Finds Support And Opposition,* Detroit Free Press, July 4, 1986, at 5C, col. 1.

[5]Miller v. California, 413 U.S. 15 (1973).

[6]*Schad,* 452 U.S. at 62.

[7]*Id.*

[8]*See, supra* note 4.

[9]Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); California v. La Pue, 409 U.S. 109 (1972).

[10]*Schad,* 452 U.S. at 62.

[11]*Id.*

[12]*Id.*

of modern merchandising.

In effect, however, the recent case of *City of Renton v. Playtime Theaters, Inc.*[13] may allow the nation's towns and small cities to prohibit the future development of adult speech entertainment uses within their territory. *Renton* holds that the constitutional right of freedom of speech does not prevent a city from requiring adult film theaters to keep more than one thousand feet away from any residential zone, single or multiple family dwelling, church, park or school.[14] Upholding this restriction may well give a small city or town the practical power to place a large part of its commercial area off limits to adult uses that are not yet in place. This is so because much of the area in a town or small city is near a residence, church, school or park. *Renton* allows the state to close off this area to adult uses. Prohibitive cost and existing structures, on the other hand may deny access to any remaining areas that are not foreclosed by law.

The severe adverse practical impact of *Renton* upon adult uses is much greater than might have been anticipated from *Young v. American Mini Theatres, Inc.*[15] which was decided nine years earlier. *Mini Theatres* allowed Detroit, Michigan, and the nation's other central cities, to prohibit adult uses from clustering together in large numbers and dominating the character of the area where this concentration occurred.[16] A large city, in other words, can require adult uses to spread out. But in authorizing this power to disperse adult uses, the court observed that its exercise in *Mini Theatres* left consumer access to adult uses virtually unrestricted.[17] *Renton,* on the other hand, allows towns and small cities to virtually deny access altogether.

Detroit's regulation of adult uses in *Mini Theatres* grew out of the city's experience with skid rows.[18] After it had eliminated its downtown skid row with an urban renewal program in 1962, the city enacted an ordinance to prevent the redevelopment of future skid rows.[19] The ordinance enumerated certain uses, and it forbade more than two of these uses from locating within one thousand feet of each other.[20] The enumerated uses were cabarets, taverns, hotels and motels, pawnshops, pool halls, public lodging houses, secondhand stores, shoeshine parlors and taxi dance halls.[21]

In 1972, the city amended the ordinance to reach adult bookstores and

[13] 106 S.Ct. 925 (1986).

[14] *Id.* at 926-27.

[15] 427 U.S. 50.

[16] *Id.* at 52, 71.

[17] *Id.* at 62, 71-72 n.35.

[18] *Id.* at 54-55.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 52 n.3.

adult theaters, including mini theaters,[22] such as converted gasoline stations, for less than fifty patrons.[23] The Supreme Court upheld application of this ordinance to two adult film theaters in *Young v. American Mini Theatres, Inc.*[24]

Detroit's ordinance did more than merely prevent the concentration of adult uses. It also prohibited an adult use from locating within five hundred feet of a residential area.[25] The adult theaters in *Mini Theatres* did not challenge this restriction.[26] Undoubtedly, it continued to operate and contribute to the success of the city's ordinance which checked the growth of adult uses in the city.[27] Nine years later, *Renton* expressly upheld a comparable restriction.[28]

The city of Renton, Washington has a population of 32,000 persons and is located just south of Seattle.[29] Foreseeing the possibility that two theaters in its downtown area might be used to exhibit adult films, the city imposed a moratorium upon the licensing of sexually explicit businesses until it could make an appropriate change in its zoning laws.[30] The city then amended its zoning laws to forbid the operation of adult film theaters within one thousand feet of any residential zone, single or multi-family dwelling, church, school or park.[31]

There were no adult uses in Renton when the ordinance was enacted.[32] The ordinance, however, did leave about five hundred and twenty acres or five per cent of the city's land area open to adult film theaters.[33] The available area included land in all stages of development from "raw land to developed, industrial warehouse, office and shopping space that is criss-crossed by freeways, highways and roads."[34]

The Court upheld the ordinance against the claim "that in general there are no 'commercially viable' adult theater sites within the 520 acres left open by the Renton ordinance."[35] The Court said that Renton's location restrictions upon adult film theaters were valid because they furthered substantial governmental interests unrelated to the suppression of speech and left open other reasonable avenues of communication.[36] It was immaterial that adult uses lacked

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[22] *Id.*
[23] *Id.* at 55.
[24] *Id.* at 72-73.
[25] *Id.* at 52.
[26] *Id.*
[27] *See,* Marcus, *supra* note 4, at 1,4,8.
[28] *Renton,* 106 S.Ct. at 926-27.
[29] *Id.* at 927.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 932.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 929-30.

market power to penetrate open areas in the city.[37] Adult film theaters must simply "fend for themselves in the real estate market."[38]

Renton may even prove decisive when regulation of adult uses is undertaken by a small municipality that consists only of residential areas within a short distance of a commercial strip. Protecting these residential areas from adult uses would require keeping adult uses out of town. The residential areas and commercial strip in *Schad v. Borough of Mt. Ephraim*[39] appeared appropriate for this kind of protection. *Schad* was decided before *Renton,* but after *Mini Theatres.*

The borough of Mt. Ephraim is a small community in New Jersey about seventeen miles from Philadelphia, Pennsylvania and Camden, New Jersey.[40] It is located on the Blackhorse Turnpike.[41] The borough's commercial district, or most of it, consisted of a strip that straddled both sides of the turnpike.[42] Each part of the strip was two hundred and fifty feet in width.[43] The residential areas were next to the strip.[44]

In an attempt to suppress an adult bookstore in the commercial zone that was presenting live nude dancing in a glass-partitioned booth,[45] the borough persuaded the state courts to construe its zoning ordinance to prohibit all live entertainment in the zone.[46] The Supreme Court held that freedom of speech prohibits such a sweeping exclusion of speech uses from a commercial zone, absent a showing that they are incompatible with the zone's other commercial uses.[47]

Thus, the Court in *Schad* did not address regulation that is expressly directed only at adult uses.[48] Further, the Court left open the question of how extensive a bedroom municipality's zoning power over adult uses should be, including the question of whether room out of town would be permissible.[49] Moreover, *Renton* did not address these issues either because the city's zoning ordinance in *Renton* left a large area of the city open to adult uses.[50]

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[37] *Id.* at 932.
[38] *Id.*
[39] 452 U.S. 61 (1981).
[40] *Id.* at 85.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 62.
[46] *Id.* at 65, 67.
[47] *Id.* at 65, 67, 75.
[48] *Id.* at 66, 74.
[49] *Id.* at 74, 76.
[50] *Renton,* 106 S.Ct. at 932.

A borough like Mt. Ephraim, naturally, would ban all future adult uses from the municipality if it forbade adult uses from locating closer than one thousand feet to residential areas. Still, the harm that adult uses cause would justify their total exclusion from a small bedroom community. There is no reason why such a community should be exposed to harm that adult uses cause simply because the community is not part of a large city. A small town, of course, must allow adult uses to operate if it has suitable room for them. It should not have to sacrifice its zoning plan, however, simply to provide room for adult uses.

Without the protective action of local government, property values in many districts in the nation's towns and cities would be at risk to the harm that adult uses can cause.[51] This is true of downtown business districts.[52] Residential neighborhoods seem more vulnerable.[53]

Many residential neighborhoods have at least one commercial strip for a boundary. Numerous commercial strips, themselves, have empty theaters and other structures. These structures are readily adaptable to adult uses that can erode the value of nearby property.

When local government decided to prevent this harm by enacting location restrictions for adult uses, the Supreme Court gave its approval in *Renton* and *Mini Theatres.* These decisions, however, left a considerable amount of confusion in the law of freedom of speech. Perhaps this confusion could be overlooked as a unique response to the vexatious problems of erotic speech, except for the possibility that it may someday affect state power to regulate other constitutionally protected speech, too.

In any event, none of the Court's explanations in *Renton* and *Mini Theatres* really explains.[54] The proposition that, except in rare situations involving a compelling state interest, a state cannot regulate constitutionally protected speech because of its content[55] seemed to present the greatest difficulty.[56] A straightforward application of its seemingly ironclad protection would appear to condemn location restrictions for adult uses.[57]

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[51] *See,* Marcus, *supra* note 4 at 1,8,9. This article contains many references to the harmful effects of adult uses that appear in the Midtown Report, i.e., New York City, New York, Mayor's Office of Midtown Manhattan Planning and Development, Draft Report On Adult Use Zoning; *Id.* at 2-3 n.8; Kirchick, Young v. American Mini Theatres, Inc.: The War On Neighborhood Deterioration Leaves First Amendment Casualty, 6 Envtl. Aff. 101, 107 n.24 (1977); *American Mini Theatres,* 427 U.S. at 55, 71, 81-82 n.4. *Renton,* 106 S.Ct. at 930; Northend Cinema, Inc. v. City of Seattle, 90 Wash. 2d 709, 712-13, 558 P. 2d 1153, 1155-56 (1978).

[52] *See,* Marcus, *supra* note 4, at 8-9.

[53] *Id.* at 9 n.43.

[54] *See, infra* p. 14-19.

[55] *Renton,* 106 S.Ct. at 928, 930; *American Mini Theatres,* 427 U.S. at 65, 81 n.4, 82 n.6 (Powell, J., concurring), 84-85 (Stewart, J., dissenting).

[56] *See, infra* notes 71-91 and accompanying text.

[57] *American Mini Theatres,* 427 U.S. at 65.

The proposition that invalidates content regulation of speech, of course, should receive steadfast application when constitutionally protected speech elicits a harmful, criminal audience reaction.[58] What the proposition cannot do, however, is to provide guidance for the case where constitutionally protected speech elicits a harmful lawful public reaction, a reaction that is not wrong and cannot be the subject of sanctions. An adult use elicits this kind of reaction. It lowers the value of nearby property by driving away persons who would provide financial support for a higher value.

This public avoidance reaction is harmful, but it is also lawful. Further, such a response is not unique to erotic speech.[59] Therefore, the confusion of the adult use precedents of *Renton* and *Mini Theatres* will eventually require clarification.

This task of clarification requires an understanding of the harm that an adult use can do. An adult use can harm nearby property as much as a nonspeech nuisance or a nonspeech incompatible land use. It is the position of this paper that the state's power to prevent this harm should be the same regardless of whether it is caused by constitutionally protected speech.

Recognition of such state power would have supported the decisions in *Renton* and *Mini Theatres* compatibly with freedom of speech and without confusion. All of these matters will be set forth herein.[60] More needs to be said first, however, about the extent of the harm that adult uses can cause and the appropriateness of location restrictions to prevent the harm. This will be done now.

ADULT USES – INCOMPATIBILITY – PROTECTIVE MEASURES

Deciding what grounds justify a regulation of speech requires great care. The reason for regulation must not be so insubstantial that it would serve as an easy pretext for state suppression of speech merely to prevent the speaker from enlarging his constituency. With this in mind, the case for prohibiting adult uses from concentrating in an area seems strong.[61] Further, the case for keeping a single adult use out of a residential neighborhood, while perhaps not strong, seems adequate enough.[62]

Persuasive data do indicate that a concentration of adult uses in an area lowers the value of property there.[63] A concentration of adult uses, for example, helped to turn an area near the central business district in Boston,

[58] *See, infra,* notes 92-121 and accompanying text.

[59] *See, infra,* notes 122-155 and accompanying text.

[60] *See, infra,* notes 166-179 and accompanying text.

[61] *See, infra,* notes 64-68 and accompanying text.

[62] *See, infra,* note 68 and accompanying text.

[63] *See, infra,* note 68 and accompanying text.

Massachusetts and an area near the Times Square theater district in Manhattan, New York City into redlight districts.[64] Detroit, Michigan relied upon these data about New York City in *Young v. American Mini Theatres, Inc.*[65] Few persons, of course, care to be near a redlight district except its customers and the providers of its principal and auxiliary services. Property values on the district's borders, consequently, tend to erode.

Prevention of prostitution, however, would hardly justify excluding solitary adult uses from residential neighborhoods. One adult use would rarely present a serious risk of making a neighborhood a center for prostitution. It might lower property values, nevertheless.

Renton, for example, does refer to a case,[66] *Northend Cinema, Inc. v. Seattle,*[67] where the trial court had made detailed findings of the harmful impact of only one adult film theater in residential neighborhoods.[68] Although the details of these findings did not appear in *Renton* or *Northend Cinema,* they still seem credible. Many persons find adult uses sordid, offensive and a visual affront. They would suppress them outright if they could, and they tolerate them only at long distance if at all. These persons simply do not want their home neighborhoods to provide an establishment for public erotic arousal and vicarious sexual satisfaction.[69]

Consequently, they will not choose such a neighborhood for their homes if they are able to make a choice. They will leave such a neighborhood, circumstances permitting, if they live in one. They will not live in one, circumstances permitting, if they live elsewhere.

These persons will also avoid the neighborhood's commercial strip that has the adult use if they can conveniently shop at retail stores elsewhere.[70] Their avoidance of the neighborhood will lower its property values. Arguably, therefore, the basis for keeping even a single adult use out of residential neighborhoods is firm. Moreover, the basis for exclusion is not mere camouflage behind which a hostile legislative majority can hide the regulatory purpose of preventing the advocates of erotica from finding more followers.

Adult uses, whether concentrated or solitary, turn general consumers and their dollar bills away from the support of a neighborhood's property values. Adult uses do not have to attract prostitutes to cause this harm. Adult uses, in other words, can cause two different harms. They can result in crimes of vice that harm the participants. They can also harm the property of other persons.

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[64] Marcus, *supra* note 4, at 1-4, 8-10. *See, supra,* note 57 and accompanying text.

[65] *American Mini Theatres,* 427 U.S. at 55,81 n.4; *See,* Kirchick, *supra* at 101,107 n.24.

[66] *Renton,* 106 S.Ct. at 930.

[67] 90 Wash.2d 709, 585 P.2d 1153 (1978).

[68] *Id.* at 712-13, 585 P.2d at 1155-56 *supra* note 4, at 18-20.

[69] *cf.* Marcus.

[70] *cf. Id.*

Mixing up these two different harms is likely to mix up any explanation of why the state should have power to regulate adult uses. A failure to keep these two harms separate and apart also helps to account for the Supreme Court's confusing explanations of this power in *Renton* and *Mini Theatres*. These explanations will be considered now.

ADULT USES – CONFUSING EXPLANATIONS OF THE POWER OF REGULATION – *RENTON* AND *MINI THEATRES*

In these two cases, the Court was confronted with the rule that a state cannot ordinarily regulate speech because of its content.[71] One of the court's threefold responses was that if location restrictions for adult uses are a content regulation of speech, they are not the kind of content regulation that is within the reach of the invalidating rule.[72] To buttress this position, however, the Court laid out another proposition alongside it, one with which the Court seemed far more comfortable, namely, that location restrictions for adult uses are not content regulations of speech at all.[73] Then to protect its rear as well as its flanks and front from assault, the Court also said that if location restrictions for adult uses are content regulations to which the general invalidating rule does apply, the state, nevertheless, can enact content regulations of speech when a compelling state interest justifies such regulation.[74] The Court did not apply this last proposition, however, in either *Mini Theatres* or *Renton*.

In *Mini Theatres*, four justices of a five justice majority said that although location restrictions for adult uses are a content regulation of speech,[75] the rule that invalidates content regulations does not apply to such location restrictions.[76] Further, these four justices also said that nonobscene erotic speech does not deserve as much protection from state regulation as other kinds of constitutionally protected speech.[77] The fifth justice of this five justice majority, Justice Powell, disagreed with giving low grade constitutional protection to nonobscene erotic speech.[78] He also said that location restrictions for adult uses are not content regulations of speech.[79] Strange as it may seem, however, the explanation of his position was essentially the same as what the other four majority justices said in explaining why they thought that the location restrictions

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[71] *Renton*, 106 S.Ct. at 928-30; *American Mini Theatres*, 427 U.S. at 65, 81 n.4, 82 n.6, 84-85.

[72] *Renton*, 106 S.Ct. at 929; *American Mini Theatres*, 427 U.S. 65-67, 76.

[73] *Renton*, 106 S.Ct. at 929. In *American Mini Theatres*, however, four justices of the five-justice majority did hold that location restrictions upon adult uses are regulations of speech content: *American Mini Theatres*, 427 U.S. at 70-71. The fifth justice, Justice Powell, on the other hand, said that these restrictions are not content regulations; *Id.* at 81-82 n.4-5.

[74] *Renton*, 106 S.Ct. at 930; *American Mini Theatres*, 427 U.S. at 82 n.6 (Powell, J., concurring).

[75] *American Mini Theatres*, 427 U.S. at 70-71.

[76] *Id.* at 70.

[77] *Id.*

[78] *Id.* at 73 n.1 (Powell, J., concurring).

[79] *Id.* at 81-82 n.4.

were content regulations, but beyond the reach of the invalidating rule.[80]

The reason for this rule, according to the four justices, is that state regulation of constitutionally protected speech must not be either hostile or sympathetic to its content.[81] They said that the location restriction satisfied this condition because the restrictions struck at the secondary effects of adult uses, namely, the deterioration of neighborhoods,[82] rather than at the content of adult entertainment speech which could be freely disseminated at numerous unrestricted locations.[83] Justice Powell, the fifth justice, basically said the same thing.[84] Further, he also correctly observed that the protection of a compelling state interest can justify regulation of speech based upon its content.[85]

The position of all five of these justices coalesced in *Renton*. The majority opinion in *Renton* even repeated the statement from *Mini Theatres* that would assign nonobscene erotic speech a low grade status for the purpose of constitutional protection.[86] More importantly, the Court once more emphasized that location restrictions for adult uses do not take aim at the content of adult entertainment speech because such restrictions are directed at the so-called secondary effects of speech.[87]

It is possible to follow most of what the Court said. It is not possible, however, to understand why the Court thought that a regulation of speech to address its secondary effects can make the regulation content neutral or disqualify the regulation as a content regulation. Location restrictions upon adult uses seem to be content regulations of speech because adult speech content activates these restrictions to prevent harm that adult content can cause. Presumably, a regulation of speech would not be content neutral or would regulate the content of speech if the regulation were aimed at the primary effects of speech rather than its secondary effects. But the court did not explain why these different effects are critical as to whether a regulation of speech regulates its content. Nor did the court explain what the primary effects of speech are.

Besides, if adult uses increase the demand for prostitutes, which seemingly would be a primary effect of adult entertainment speech, and if satisfaction of

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[80] *See, infra,* notes 81-83 and accompanying text.

[81] *American Mini Theatres,* 427 U.S. at 67.

[82] *Id.* at 71 n.34. The four plurality justices, to be sure, also offered another explanation. They said that the location restrictions were content neutral because they applied regardless of the viewpoint of the adult or sexually explicit speech; *Id.* at 70. Even *Renton* approved this explanation. *Renton,* 106 S.Ct. at 930. Because sexually explicit speech is likely to advocate more relaxed sexual morals, however, this explanation seems unsatisfactory; *see, Renton,* 106 S.Ct. at 933 n.1 (Brennan, J., dissenting).

[83] *American Mini Theatres,* 427 U.S. at 62.

[84] *Id.* at 81, 82 n.4,6 (Powell, J., concurring).

[85] *Id.* at 82 n.6 (Powell, J., concurring).

[86] *Renton,* 106 S.Ct. at 929-30 n.2.

[87] *Id.* at 929-32.

this demand has the secondary effect of deteriorating a neighborhood, then the primary effect of the speech causes the secondary effect, and it becomes impossible to distinguish the two effects on the basis of their source.

Four justices dissented in *Mini Theatres* essentially for this reason.[88] They thought that freedom of speech forbade the regulation of constitutionally protected speech merely to prevent its "distasteful effects,"[89] including skid rows and streets in need of a clean up.[90] As they saw it, adult uses should be allowed to operate in commercial areas, and the chips would simply have to fall where they may.[91] For a street clean up, the state obviously would be restricted to use of the traditional criminal law.

It is submitted that the position of the four dissenting justices in *Mini Theatres* is severe. Further, the explanations on both sides seem entirely unsatisfactory. The reason is that they do not even raise the principal difficulty in the cases which is whether different effects of speech should give the state different measures of power to regulate speech.

It is possible, of course, to distinguish different effects of different kinds of speech or different effects of the same kind of speech based upon the public's reaction to speech. There is a difference, for example, between a harmful, criminal nonspeech reaction to constitutionally protected speech and a harmful, lawful nonspeech reaction. The machinery of the state's traditional criminal law can be brought to bear upon one, but not the other. Thus, the state can punish the practice of prostitution instead of suppressing speech that induces the practice. The state, however, cannot punish patrons and others who would provide financial support for a neighborhood when an adult use induces them to spend their consumer dollars elsewhere.

This latter situation presents a clear-cut choice. Either the state must have the power to restrict the location of the adult use or accept serious loss of the benefits of its zoning laws in neighborhood after neighborhood. The freedom of speech precedents permit regulation. They will receive attention now.

HARMFUL AUDIENCES — CRIMINAL REACTIONS

Advocacy Of Force Or Other Law Violation: The Action Rule — The Ideas Rule

The constitutional rules of freedom of speech respond in two ways to speakers who propose force or some other violation of the law to get what they want. Some of this speech presents an unacceptable risk of causing a violation

[88] *American Mini Theatres*, 427 U.S. at 84-85 (Stewart, J., dissenting).

[89] *Id.* at 85.

[90] *Id.* at 87.

[91] *Id.* at 87-88.

of the law.[92] The imminent lawless action rule lets the state suppress such speech.[93]

Much advocacy of the use of force or law violation, however, presents a minimal or acceptable risk of law violation. Such speech is usually critical of government policy or conditions over which the state has some responsibility and control. This speech receives the benefit of the rule that protects advocacy of ideas and similar speech.[94]

A few examples will show the kind of differentiation that the action rule and the ideas rule make. An obvious case for application of the imminent lawless action rule is a well-planned conspiracy to rob banks. Suppression of the conspiracy is clearly commendable. A less obvious case for application of the rule, however, is speech that seeks a genuine, but indefinite commitment to engage in revolutionary action in the uncertain future.[95] But the rule does permit suppression of this kind of speech, too.[96]

The ideas rule, on the other hand, applies to speech that undertakes to inform and educate the public about existing conditions, even speech that proposes violation of the law as a cure.[97] Further, the protection of the ideas rule is nearly absolute.[98] The violence in the proposal, in other words, is immaterial as long as the proposal, itself, is only a principle of belief.[99] Consequently, presentation of the case for the desirability and necessity of violent overthrow of the government is constitutionally protected speech.[100] Freedom of speech, consequently, places this part of the educational program of the Communist Party or similar organization beyond the state's power to suppress speech.[101]

The advocacy of ideas and the criticism of existing conditions did not always receive such generous protection. Thus, in *Schenck v. United States,*[102] the clear and present danger rule[103] let the state jail a communist speaker[104] for

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[92] *See,* Brandenburg v. Ohio, 395 U.S. 444,447-48 (1969); *cf.* Kingsley Int'l. Pictures Corp. v. Regents of New York, 360 U.S. 684, 689 (1959).

[93] *Brandenburg,* 395 U.S. at 447-48.

[94] Scales v. United States, 367 U.S. 203, 251-53 n.27 (1961); Yates v. United States, 354 U.S. 298, 318-20 (1957); *cf. Brandenburg,* 395 U.S. at 447-48 n.2; *Kingsley Int'l Pictures Corp.,* 360 U.S. at 689 n.11.

[95] *Scales,* 367 U.S. at 251-53; *cf. Brandenburg,* 395 U.S. at 456-57 (Douglas, J., concurring).

[96] *Scales,* 367 U.S. at 251-53.

[97] *Id.* at 252-53; *cf., Brandenburg,* 395 U.S. at 447-48 n.2.

[98] ". . . the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg,* 395 U.S. at 447.

[99] *Scales,* 367 U.S. at 252-53 n.27.

[100] *Id.*

[101] *Id.*

[102] 249 U.S. 47 (1919).

[103] *Id.* at 52.

[104] *Id.* at 49.

telling draftees why he thought that World War I was an unjust capitalist war.[105] The basis for suppressing the speech was that it might induce some draftees to immediately refuse military service.[106] It did not matter that the speaker did not propose this form of resistance[107] and that he did request a different way of expressing opposition.[108]

Bond v. Floyd,[109] however, seemed to have deliberately ignored *Schenck v. United States* and the clear and present danger rule. In *Bond v. Floyd,* the Georgia legislature tried to deny Julian Bond a seat in the legislature on the ground that his outspoken opposition to the Viet Nam War precluded him from sincerely taking the required oath of office to support the federal and state constitutions and the laws.[110] Bond's public denouncements of the war[111] seemed every bit as condemnatory and provocative as anything said against the nation's participation in World War I by the defendant in *Schenck v. United States.*[112] The *Bond* court simply said, nevertheless, that Julian Bond could not be punished for speaking out against the Viet Nam War because what he said did not advocate any lawless conduct.[113] The clear and present danger rule was not even mentioned.

Thus, the imminent lawless action rule and the advocacy of ideas rule severely curtail the power of the state to suppress speech on the ground that it may cause its audience or the public to misbehave. The action rule, of course, does let the state suppress speech that the Supreme Court finds incompatible with the purposes of freedom of speech.[114] Using force and violating the law to get what one wants in a democracy are inconsistent with government by the consent of the governed. Speech that seeks a commitment to unlawful action, therefore, does not receive constitutional protection.[115]

But speakers have enormous power, nevertheless, to educate the public about existing conditions, even to the point of getting the public to accept the need for the most drastic change.[116] A speaker is free to propose sexual revolu-

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[105] *Id.* at 51.

[106] *Id.* at 51, 53.

[107] *Id.* at 51.

[108] *Id.*

[109] 385 U.S. 116 (1966).

[110] *Id.* at 118, 123.

[111] "We, the Student Nonviolent Coordinating Committee, have been involved in the black people's struggle for liberation and self-determination in this country for the past five years . . . the United State government has never guaranteed the freedom of oppressed citizens, and is not yet truly determined to end the rule of terror and oppression within its own borders." *Id.* at 119. "We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft . . ." *Id.* at 120.

[112] *See, supra,* note 105 and accompanying text.

[113] *Bond,* 385 U.S. at 134.

[114] *See, supra,* notes 92-101 and accompanying text.

[115] *Id.*

[116] *Id.*

tion[117] as well as civil war.[118] Further, it is immaterial that acceptance of the speaker's ideas will increase the risk of criminal misbehavior or even induce it.[119] Freedom of speech ordinarily confines the state's remedies to prosecution of the criminal rather than suppression of the speaker.[120]

Undoubtedly, the ideas rule protects speech that can cause serious non-speech harm. But neither the speech nor the harm that it causes, although both create problems for law enforcement, is inconsistent with the existence and enjoyment of the interests that they harm. Thus, the ideas rule and the speech that it protects can inflict harm upon the interest of the people in security from bodily harm and loss of property. Yet, the ideas rule and speech that advocates dangerous ideas are not incompatible with security of the person and property. The traditional criminal law and the law abiding sentiments of the people usually provide enough protection. As a result, security of the person and property as well as speech that harms these interests can exist side by side.

Some speech, however, including the speech of adult entertainment uses is not merely harmful. It is destructive of particular interests that the community wants to enjoy. It is incompatible with these interests. Speech of this description, naturally, invites either classification as unprotected speech or curtailment pursuant to rules that permit curtailment of speech.

The defamation cases are instructive. The same defamatory statement can be either protected speech or unprotected speech, depending upon the context in which it is made.[121] Further, like the harm that ensues from adult uses, a lawful public reaction causes the harm that ensues from defamation. The defamation precedents will be discussed now.

HARMFUL AUDIENCES — LAWFUL REACTIONS

Defamation

Like some speech that may induce a criminal audience reaction, some defamatory speech does not receive the protection of any constitutional rule. Deliberate or reckless falsehood that is harmful to reputation is simply unprotected speech.[122] A good name holds together one's economic and social life support system.[123] The Supreme Court has decided that the destruction of one's reputational interests by lies and reckless falsehood is not consistent with the

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[117] *Kingsley*, 360 U.S. at 688-89.

[118] *Scales*, 367 U.S. at 252 n.27.

[119] *Kingsley*, 360 U.S. at 689.

[120] *Id.*

[121] *See, infra*, notes 124-26 and accompanying text.

[122] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 342-43 (1974); *cf.*, New York Times v. Sullivan, 376 U.S. 254,279-80 (1964).

[123] PROSSER & KEETON, THE LAW OF TORTS, § 111, § 116A (5th ed. 1984).

purposes of freedom of speech.[124]

Defamatory speech can cause the loss of customers, clients, employees, associates and friends. The reaction of these groups to defamatory speech is invariably lawful. The relationships between the defamation victim and persons who withdraw from him rest upon consent and could hardly be compelled to exist by the coercive power of the state. Consequently, the only way that the state can protect reputational interests is by curtailing speech. Constitutional rules for defamation, therefore, are an effort to protect the public's right to receive information without destroying the interests that are held together by a good name.

Further, the Supreme Court has decided that adequate protection of reputation is possible even though freedom of speech does not allow the state's formal sanctions for defamation to always give some persons as much protection as others. Thus, public officers and public figures can receive protection only against malicious false statement, namely, statement that is made with deliberate or reckless disregard of the truth.[125] The state, however, can impose sanctions for merely negligent false statement when it defames private persons who are caught up in a media event.[126]

The Supreme Court has explained why different measures of formal protection for public and private persons are permissible. Public officers and public figures deliberately put their reputations on the line.[127] These persons also have greater access to the media to protect their reputations than private persons.[128] Therefore, public officers and figures cannot receive the heightened protection from negligent defamation that the state can provide to private persons.[129]

Moreover, defamatory speech and the speech of adult entertainment uses have some similar characteristics. Both can elicit a lawful harmful audience reaction. Adult uses can drive away the economic support of a neighborhood, just as defamatory speech can dry up the economic and social support of the defamation victim. Further, negligent defamation has constitutional protection when its target is a public person,[130] protection that is lost when the target is a private person.[131] A comparable adjustment between adult uses and zoning districts, therefore, would justify loss of constitutional protection for adult uses

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[124] *See, supra,* note 122 and accompanying text.

[125] *Gertz,* 418 U.S. at 342-43.

[126] *Id.* at 329, 333-34, 347, 350.

[127] *Id.* at 345.

[128] *Id.* at 344.

[129] *Id.* at 342-43.

[130] *Id.*

[131] *Id.* at 347, 350.

when they would deprive districts of the benefits of zoning. They would receive constitutional protection of course when they operate in zones where they would not cause this harm.

Besides, there are times when the state can suppress or curtail constitutionally protected speech. The commercial speech cases authorize this kind of state regulation. They will be discussed now.

Commercial Speech

Some commercial speech is not constitutionally protected speech.[132] Commercial speech is no different in this respect than defamatory speech and advocacy that can induce a criminal audience response. False or misleading advertising seems to be an important concern in the commercial speech cases.[133] Giving this kind of speech the protection of freedom of speech would approach giving the tort of misrepresentation and the crime of obtaining property by false pretenses constitutional status. Therefore, it is hardly surprising that false or misleading commercial speech is unprotected speech.

True and nonmisleading commercial speech receives the protection of freedom of speech, however.[134] State suppression of this kind of commercial speech is unconstitutional unless it is necessary to prevent harm to a substantial state interest.[135] The rule does allow suppression, of course, when it is necessary to protect a substantial state interest, provided state regulation is not overbroad.[136]

Two landmark commercial speech cases have special relevance to the state's power to regulate adult uses because they involve harm to a state interest that was caused by a lawful audience reaction to truthful speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,*[137] the first of these cases, gave constitutional protection to commercial speech.[138] The second case, *Central Hudson Gas & Electric Corp. v. Public Service Commission,*[139] established the constitutional rule that governs permissible state regulation of truthful, nonmisleading commercial speech.[140]

In *Consumer Council,* the state prohibited the truthful advertising of pre-

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[132]Central Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[133]Friedman v. Rogers, 440 U.S.1, 8-9,12-13 (1979); Bates v. State Bar, 433 U.S. 350, 363, 383-84 (1977); *see* NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW p. 935, 939-41 (2d ed. 1983).

[134]*Central Hudson,* 447 U.S. at 566.

[135]*Id.*

[136]*Id.*

[137]425 U.S. 748 (1976).

[138]*Id.* at 758, 771,773.

[139]*Central Hudson,* 447 U.S. 557.

[140]*Id.* at 566.

scription drug prices.[141] The state thought that aggressive price advertising would lower the quality of pharmacists' services, preclude beneficial, but costly services, increase drug prices and diminish the professional image of the pharmacist.[142] The state wanted to prevent these results by protecting the small independent pharmacist from the lawful competition of the large discount druggist.[143] The large discount druggist, in other words, might entice away the customers of the smaller druggist with truthful information about lawful prices.[144] The state suppressed speech to prevent the occurrence of this lawful conduct.[145]

Similarly, *Central Hudson* also involved a state law to stop a lawful consumer audience reaction. The case concerned a state regulatory response to the energy crisis.[146] New York wanted its citizens to keep their thermostats at a low temperature.[147] Consequently, the state imposed a blanket ban upon promotional advertising for energy consumption.[148]

The ban forbade promotion of lawful practices, such as use of the heat pump and consumption of electricity at a lower price during periods of off-peak demand.[149] As in *Consumer Council,* the ban also prevented competition between electric utilities and other utilities by suppressing truthful information about a lawful trade practice.[150] Once more, the state had acted to prevent a seller from lawfully enticing an audience of consumers away from a competitor.

The Supreme Court struck down the ban upon truthful advertising of lawful trade practices in both cases.[151] In both, the state had other ways than the suppression of truthful speech to prevent harm to the interests that the state wanted to protect. Thus, a state can protect the small druggist from competition with a subsidy or in other ways, presumably price control, for example.[152] Similarly, a state can promote energy conservation by prohibiting advertising of wasteful consumption practices.[153] The ban upon truthful speech in both cases was overbroad and, therefore, unnecessary to protect a substantial state interest.[154]

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[141] *Consumer Council,* 425 U.S. at 752, 773.

[142] *Id.* at 767-68.

[143] *Id.* at 769-70; *see,* NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW, 932-33 (2d ed. 1983).

[144] *Consumer Council,* 425 U.S. at 769.

[145] *Id.* at 770.

[146] *Central Hudson,* 447 U.S. at 559 (1980).

[147] *Id.* at 559, 561, 572 n.15.

[148] *Id.* at 558-59.

[149] *Id.* at 570.

[150] *Id.* at 567.

[151] *Id.* at 571-72; *Consumer Council,* 425 U.S. at 773.

[152] *Consumer Council,* 425 U.S. at 770.

[153] *Central Hudson,* 447 U.S. at 570-71.

[154] *Id.* at 571-72.

The situation is different, however, when adult speech entertainment uses seek to enter a residential neighborhood. Keeping these uses out of the neighborhood will prevent them from lowering its property values. Besides, there is no other way to stop adult uses from lowering the value of other property in the neighborhood except by keeping out adult uses.

Preventing the loss of property values throughout residential neighborhoods is a substantial state interest. What is at stake are the benefits of zoning for all persons in residential areas where adult speech entertainment uses can readily set up shop. Just as negligent defamation, which is a form of protected speech when its target is a public person, is required to yield in the interest of protecting reputation when its target is a private person,[155] so should the speech of adult entertainment uses lose its protection and yield in the interest of providing residential areas with the benefits of zoning.

This adjustment of incompatible speech and nonspeech interests should not menace other kinds of protected speech. Similarly, it is not inconsistent with the opposite adjustment that has to be made when a different constitutional right, such as the right of access to housing without racial discrimination, collides with property values. These matters will be addressed now. Then, a brief conclusion will follow.

RESTRICTING LOCATION OF ADULT USES – ITS RISK TO OTHER SPEECH

Undoubtedly, there is a lot of speech activity that a majority of the community dislikes or even detests. Power to exclude adult speech entertainment uses from a residential neighborhood, however, would not permit the state to deny private land sites in the neighborhood to all speech activity that the majority disapproves. Banning X-rated film theaters from the neighborhood, for example, would not carry with it the power to prohibit atheists, communists, Nazis or advocates of the cause of some other minority from using private property there.

Unlike adult uses, other unpopular speech uses have yet to drive consumers away from other property in neighborhoods where they locate and, thereby lower property values. This difference between adult uses and other unpopular speech uses is subjective, of course. But so is the public reaction that causes it.

Besides, the location of an unpopular speech use in a neighborhood, ordinarily, is not an expression of community sentiment about the moral worth of the neighborhood. Location of adult uses in a neighborhood, however, gives it the aura of a redlight district. A concentration of adult uses, naturally, creates a stigma that only one adult use could not project. Still having to live near only one would likely cause more discomfort than living near any other

[155] *See, supra*, notes 124-131 and accompanying text.

commercial use.

Adult uses, in fact, may be unique in their power to repel.[156] Most other unpopular uses are different. The difference would protect them from burdensome location restrictions.

CONSTITUTIONAL RIGHTS AND INCOMPATIBLE COUNTERVAILING INTERESTS: FREEDOM TO ACQUIRE PROPERTY WITHOUT RACIAL DISCRIMINATION – FREEDOM OF SPEECH – A COMPARISON

A white residential neighborhood may lose some or all of its white residents when blacks begin to purchase its homes. The loss may come sooner or later, gradually or suddenly. Whites may stop moving into the neighborhood. Whites who live in the neighborhood may leave. White flight may occur. Property values in the neighborhood may decline if fewer persons want to live there.

The situation is analogous to what can happen when adult uses enter a neighborhood. Changes occur in the neighborhood in both situations. These changes elicit a lawful, but harmful public reaction that can reduce the neighborhood's property values.

The state, nevertheless, cannot deny blacks access to a white residential neighborhood to prevent a drop in its property values that would happen because of the racial attitude of its white residents toward blacks. Equal protection of the laws would forbid it.[157] The equal protection clause assures a black person the right to purchase what he can get from a willing seller.[158] The state cannot impose the additional requirement of the consent of all or some of the neighbors who are non-parties to the contract.[159] This is true whether the consent of the neighbors is required by ordinance[160] or racial covenants in deeds.[161]

It would seem, consequently, that the equal protection clause ought to forbid the state from restricting the access of blacks to a neighborhood to prevent white flight from it. When whites flee black neighbors, they obviously refuse to consent to live with blacks in the same neighborhood. The state, naturally, must watch while whites flee if they refuse consent. The state, however, should not be allowed to support the refusal by restricting the access of blacks to the neighborhood in the first place.

Arguably, then, this proposed right of equal protection should invalidate

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[156] *cf. American Mini Theatres*, 427 U.S. at 76 (Powell, J., concurring).

[157] ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

[158] *See, infra*, notes 160-161 and accompanying text.

[159] *Id.*

[160] Harmon v. Tyler, 273 U.S. 668 (1927) discussed in Shelley v. Kraemer, 334 U.S. 1,12 (1948).

[161] Shelley v. Kraemer, 334 U.S. 1 (1948).

an ordinance that prohibits home-for-sale signs and home-sold signs to prevent white flight from even a racially integrated neighborhood.

From the perspective of equal protection of the laws, the free market rather than a state command in support of whites only or whites and blacks who believe in integration should determine how many blacks are acceptable in a neighborhood. In any event, *Linmark Associates, Inc. v. Township of Willingboro*[162] held such an ordinance invalid on the ground that it violated freedom of speech.[163] In *Linmark,* the Court was unimpressed with the white flight argument.[164] It said that the record did not establish a need for the ordinance on this ground.[165] The court deferred to another day, however, decision of the question of whether such an ordinance might be permissible to prevent panic selling of homes.[166]

Some occasions of panic selling, naturally, might justify a restriction upon use of signs for home sales. An informed answer to this question, of course, would have to await a concrete case. What equal protection of the laws ought to preclude, however, is any attempt by the state to deny or substantially restrict the access of blacks to a neighborhood because whites dislike them as neighbors, regardless of what form their dislike might take.

White flight from a residential neighborhood, of course, is an avoidance reaction to the exercise of the right of blacks to buy homes. A similar avoidance reaction occurs when an adult speech entertainment use settles down in a residential neighborhood and drives away many of the potential buyers of whatever is for sale in the neighborhood. Moreover, the state must allow blacks the right to purchase homes and let the chips fall where they may, even though white flight would drop property values in some neighborhoods.

It does not follow, however, that the state has to ignore the drop in property values that happens when an adult use enters a residential neighborhood. The right to acquire property free from the impediments of racial discrimination obviously disables the state from using racial discrimination and its results as a reason for reducing the right. The constitutional right to speak, on the other hand, does not automatically excuse the speaker for the consequences of what he says.

Adult speech entertainment uses, of course, can deprive large groups of the benefits of a regulatory system. These uses can lower property values in residential neighborhoods and thereby deprive numerous property owners of the benefits of zoning.[167] Further, the incompatibility between adult uses and

[162] 431 U.S. 85 (1977).

[163] *Id.* at 95.

[164] *Id.* at 95-97.

[165] *Id.* at 95.

[166] *Id.* at 95 n.9.

[167] *See, supra,* notes 61-70 and accompanying text.

other uses is not merely the momentary annoyance that comes with brushing aside an unwelcome invitation in the street.[168] Nor can it be resolved by having offended passersby "avoid further bombardment of their sensibilities simply by averting their eyes."[169] Adult uses become a permanent part of the landscape, and they tend to drive away everybody's customers but their own when they locate in a residential neighborhood.

This avoidance reaction causes harm that justifies exclusion of adult uses from a residential neighborhood without violating the principle that the state must allow the public equal access to all constitutionally protected speech. This principle works fine when the state wants to give some speech preferential access to a public forum although the preferred speech presents the same risk of harm as the unpreferred speech. A state, for example, has been forbidden from prohibiting all picketing in front of a school, except labor dispute picketing, when the purpose of the ban is to prevent disruption in the classroom.[170]

The principle of equal public access to all speech, however, does not mean that the state always has to treat all constitutionally protected speech the same. Some speech creates different risks than other speech. The state has always been able to address this difference with different rules.

The clear and present danger rule, for example, is at least adaptable to advocacy that creates a more or less immediate risk of nonspeech audience misbehavior. Thus, it permitted the state to suppress an antiwar speech to draftees because the speech might have induced a nonspeech refusal of military service.[171] But use of the clear and present danger test for defamatory speech would be inappropriate, and it could be devastating on occasion.

Unlike the speech in a proper clear and present danger case, defamatory speech can induce a lawful, but harmful immediate nonspeech audience reaction. Moreover, automatically treating any two different situation the same, including clear and present danger cases and defamation cases, can produce absurd results. Literal application of the clear and present danger rule to defamatory speech, for example, would authorize state sanctions for speech that injures reputation even though it is true and concerns a matter of public interest.

Regardless of what the constitutional rule for the regulation of adult uses might be, it would not eliminate the difficulty of finding a comfortable place for them in a system of zoning regulations. The task would not be completely dissimilar from finding a compatible location for a bordello in a land use plan. The factory section and, perhaps, the open countryside are obvious possibilities, naturally, but they are also harsh locales for constitutionally pro-

[168] *cf.* Cantwell v. Connecticut, 310 U.S.296, 302-03, 308-09 (1940).

[169] Cohen v. California, 403 U.S. 15,21 (1971). (The case involved a jacket upon which was a sentence of three words criticizing the draft. The last two words of the sentence were: the draft.)

[170] Police Dept. v. Mosley, 408 U.S.92, 99-100 (1972).

[171] Schenck v. United States, 249 U.S.47 (1919).

tected speech.

Secure protection for residential districts and their supporting commercial strips, on the other hand, hardly seems drastic. Besides, a commercial area that is not part of a residential neighborhood may also need protection. An adult use in such an area might divert its customers elsewhere and cause it to deteriorate.

It seems that a compatible location for an adult use requires an area that does not depend upon a large presence of the general consumer for its economic viability. The reason is that the general consumer tends to stay away from a locale that has adult entertainment except when he wants adult entertainment.[172]

The site of least incompatibility for an adult use, therefore, is likely to be a place where the workforce stays during working hours. An area where white collar employees are concentrated during their workday may be the most suitable location for an adult use whether the area is a downtown office area or its counterpart across town or even out of town. An appropriate location for an adult use, in other words, is simply a place where it will not substantially lower property values in the vicinity. That is the reason for keeping adult uses out of residential areas and their integral commercial strips.

Adult uses have far more power than other commercial uses to lower the value of property. It is this power rather than their power to seduce and degrade that justifies location restrictions for adult uses.

CONCLUSION

The constitutional right of freedom of speech protects the non-obscene speech of adult erotic entertainment uses.[173] Consequently, this protection makes some reasons unavailable to the state as grounds for regulating this speech. The state, for example, cannot suppress the speech of adult uses because it inflicts psychic harm upon some persons by affronting their senses as well as their moral values.[174] Nor does the state have power to regulate adult uses to deter advocacy of an erotic way of life or to prevent any criminal misbehavior that might ensue from this advocacy.[175] Nor can state regulation of adult uses undertake to stop a minority of persons from trying to change the mind of the majority about sex or from enjoying whatever lawful community of interest that the minority has.[176]

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[172] *cf.* Marcus, *supra* note 4, at 17-20.

[173] *See, supra,* notes 1-12 and accompanying text.

[174] Cohen v. California, 403 U.S. at 21 (1971); *see, infra,* note 169 and accompanying text.

[175] *Kingsley,* 360 U.S. at 689.

[176] *cf.* "Congress certainly cannot forbid all effort to change the mind of the country." Abrams v. United States, 250 U.S. 616,628 (1919) (Holmes, J., dissenting). Like its companion case, Schenck v. United States, 249 U.S.47 (1919), *Abrams* involved criminal prosecution for public opposition to the nation's participation in World War I.

Finally, more is involved than mere majority dislike of what a minority does enjoy. Instead, it is dislike plus the material harm that comes from driving down property values while driving persons away from the property whose value is reduced. The majority simply want adult uses to find a place where this harm will be minimal or will not occur at all.

But the minority may reply that all of the reasons that freedom of speech withdraws from the state as bases for regulation go for naught if the state can severely curtail speech for some other reason. What matters to the speaker is that he cannot speak. The reason for compulsory silence gives no comfort.

The speaker, of course, does not seem to care that what he wants will deprive others of the benefits of zoning.[177] What he wants, therefore, is severe. Allowing it would extend the protection of speech beyond the point where it ought to stop. Instead, speech should lose its constitutional protection when its content has the same power to repel and harm as a nonspeech nuisance or incompatible use.

Protected speech, naturally, cannot demand an exemption from zoning requirements that prescribe permissible density and intensity requirements for land uses. Churches, for example, cannot insist upon locating next to houses in residential areas.[178] Further, density and intensity are not the only harmful characteristics of land uses.

Thus, a brick kiln does not belong in a commercial zone simply because it can satisfy the size and area requirements for structures in the zone. The noxiousness of its smoke would drive away ordinary commercial uses. Consequently, the state can exclude it from the zone.[179]

Similarly, an adult use does not belong in a neighborhood when the content of its speech has comparable power to repel. The loss to the injured landowner will be the same regardless of the cause. Freedom of speech has no special power to console those persons whom it harms.

The constitutional right to speak should not be a license to substantially reduce the value of private property without the permission of the government or the consent of its owner and other persons who would willingly support its value. Freedom of speech and the accomplishment of legitimate governmental objectives must have been meant to travel hand in hand. Tension between them is inevitable, but contradiction could not have been intended. Banning adult uses from a neighborhood when they are incompatible with the neighborhood's other land uses should not violate freedom of speech.

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[177] *See, supra,* notes 61-70 and accompanying text.

[178] Corporation of Presiding Bishop, C.J.C.L.D.S. v. Porterville, 338 U.S.805 (1949); discussed in American Communications Association v. Douds, 339 U.S. 382,397-98 (1950).

[179] *cf.* Hadacheck v. Sebastian, 239 U.S. 394 (1915).