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Zoning "Adult" Movies: The Potential Impact of Young v. American Mini Theaters

By JANE M. FRIEDMAN*

It is perhaps inappropriate that this article appears in a symposium covering recent developments in obscenity law. This article is not devoted to a discussion of obscenity law as it is generally defined, but rather to the emergence of a new legal phenomenon: "adult" law. This offshoot of traditional obscenity law came into being in 1976 when the Supreme Court held that "adult" motion pictures, even though not necessarily obscene, are a new genre of erotica which can be subjected to local regulation. In that decision, *Young v. American Mini Theaters, Inc.*,[1] the Court upheld a Detroit zoning ordinance which provides that an adult motion picture theater may not, absent a waiver of the restriction by the Zoning Commission, be located within one thousand feet of any two other "regulated uses."[2] The ordinance defines an "adult motion picture theater" as:

> An enclosed building . . . used for . . . presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified

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1. 427 U.S. 50 (1976).

2. The ordinance provides: "In addition to adult motion picture theaters and 'Mini' theaters, which contain less than 50 seats, the regulated uses include Adult Book Stores; Group "D" Cabaret; Establishment for the sale of beer or intoxicating liquor for consumption on the premises; Hotels or motels; pawnships; Pool or billiard halls; Public lodging houses; Secondhand stores; Shoeshine parlors; and Taxi dance halls." *Id.* at 52 n.3.

> Anatomical Areas' [both terms being explicitly defined in the ordinance[3]] for observation by patrons therein.[4]

Violation of the restrictive provision is punishable by a fine or jail sentence.[5]

The challenge to the ordinance was brought by two theater operators, both of whom "propose[d] to offer adult fare on a regular basis."[6] While not attacking the specificity of the definition of "specified anatomical areas" or "specified sexual activities," plaintiffs argued, *inter alia*, that the ordinance was unconstitutionally vague in that it set forth no standards for determining *how much* of the described activity had to be depicted before a movie would be characterized by an emphasis on such matter. In addition, they claimed that the waiver provisions were both procedurally inadequate and substantially defective. The United States District Court for the Eastern District of Michigan sustained the validity of the ordinance,[7] but the United States Court of Appeals for the Sixth Circuit reversed,[8] holding that the ordinance was an unconstitutional prior restraint and a denial of equal protection. Following a grant of certiorari, the Supreme Court held that the ordinance was neither an invalid prior restraint nor a denial of equal protection. Moreover, the Court found that the provision was not unconstitutionally vague, as applied to the respondents, because they both had admitted that they proposed to exhibit only sexually explicit "adult" fare at their theaters. For this same reason, the respondents were deemed to lack standing to challenge the alleged procedural and substantive defects within the waiver provision.

The Court seemed to concede that there might be theater operators who do not offer "adult fare" on a regular basis and who might

3. The Detroit ordinance defines "specified sexual activities" as:

"1. Human Genitals in a state of sexual stimulation or arousal;

"2. Acts of human masturbation, sexual intercourse or sodomy;

"3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast."

"Specified anatomical areas" are defined as:

"1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and

"2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered." *Id.* at 53 n.4.

4. *Id.* at 53-54 n.5.

5. *See id.* at 90 n.2 (Blackmun, J., dissenting) (Official Zoning Ordinance of Detroit § 69,000).

6. *Id.* at 59.

7. *See* Nortown Theatre, Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974).

8. *See* American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975).

genuinely be in doubt as to the amount of sexually explicit activity that can be depicted before a motion picture can be said to be "characterized by an emphasis" on such matter. However, Justice Stevens concluded for the majority that should these hypothetical litigants ever appear before the state courts, those courts can readily subject the ordinance to a saving construction. He noted:

> Since there is surely a less vital interest in the uninhibited exhibition of material that is on the border line between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and *since the limited amount of uncertainty in the statute is easily susceptible of a narrowing construction,* we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.[9]

Justice Powell concurred with the opinion of the Court on the ground that the zoning ordinance "present[ed] an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent."[10] Justices Stewart and Blackmun each wrote dissenting opinions, joined by each other and by Justices Brennan and Marshall.

It is the thesis of this article that far from "presenting an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent,"[11] the *American Mini Theaters* decision is bound to create a censorial nightmare for the *entire* motion picture industry and, consequently, for the movie-going public. Moreover, that decision will, in all likelihood, impose substantial burdens on the state and local judiciaries which will be compelled to become involved in a new, and additional, genre of litigation over erotic movies. Now the courts will be called upon to decide not only which movies are "obscene" under state and local obscenity laws, but also, on a case-by-case basis, which movies are "adult" within the meaning of a burgeoning number of local zoning ordinances.[12]

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9. 427 U.S. at 61 (emphasis added).

10. *Id.* at 73 (Powell, J., concurring).

11. *Id.*

12. Five months after the *American Mini Theatres* decision was rendered, the New York Times reported that zoning ordinances similar to the one in Detroit had already been enacted in Indianapolis, Indiana and Fairfax County, Virginia. "And many others, including Los Angeles, Des Moines, Iowa, Portland, Ore. and Kansas City, Mo. are now considering passage of such laws." Lindsey, *Drive by Cities on Pornography Spurred by Detroit Zoning Case,* N.Y. Times, Nov. 28, 1976, at 1, col. 1.

Clearly, since the Detroit zoning ordinance purports to restrict only the *location* of adult theaters without attempting to eliminate them altogether, the problem of censorship inherent therein will not arise for those theater owners whose facilities are not located within one thousand feet of another regulated use. However, because regu-

While none of the justices appeared to appreciate fully the potential burden that their decision would place on the state and local courts, Justice Blackmun, in his dissent, clearly foresaw the first tier of the problem: the plight of the general release exhibitor who occasionally wishes to show a sexually explicit film, perhaps one with a high degree of social value. In this regard, he said:

> We should put ourselves for a moment in the shoes of the motion picture exhibitor. Let us suppose that, having previously offered only a more innocuous fare, he decides to vary it by exhibiting on certain days films from a series which occasionally deals explicitly with sex. The exhibitor must determine whether this places his theatre into the "adult" class prescribed [sic] by the challenged ordinance. If the theatre is within that class, it must be licensed, and it may be entirely prohibited, depending on its location.
>
> . . . It will be simple enough, as the operator screens films, to tell when one of these [specified anatomical] areas or [specified sexual] activities is being depicted, but if the depiction represents only a part of the films' subject matter, I am at loss to know how he will tell whether they are "distinguished or characterized by an emphasis" on those areas and activities. The ordinance gives him no guidance. Neither does it instruct him on how to tell whether, assuming the films in question are thus "distinguished or characterized," his theatre is being "used for . . . presenting" such films. That phrase could mean *ever* used, *often* used, or *predominantly* used, to name a few possibilities.[13]

The quandary envisioned by Justice Blackmun was not a hypothetical one. A few months after the Court rendered its opinion in *American Mini Theaters*, the King County Council in the state of Washington passed a zoning ordinance banning the showing of "adult" films in unincorporated areas of the county that were in close proximity to residential neighborhoods. "Adult" films were defined in the ordinance as those which were "characterized by their emphasis on matter explicitly depicting specified sexual activities." An attorney representing several theater owners in the county, none of whom exhibited sexually explicit movies on a regular basis, complained to the council that he was not certain which motion pictures were "adult" within the meaning of the zoning ordinance. A county councilman responded by informing the

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lated uses in the ordinance include such businesses as adult book stores, cabarets, bars, hotels, motels, pawnshops and similar uses, the probability that a theater will be located too close to such an establishment is high. The ordinance may thus apply to the majority of theater owners, at one time or another. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 89-90 (1976).

13. 427 U.S. at 88-89 (Blackmun, J., dissenting) (emphasis in original).

attorney that his clients could "stay out of trouble by simply not showing filthy movies."[14]

Certainly, most King County theater operators and others similarly situated throughout the country, will want to "stay out of trouble," particularly since violation of such a restrictive ordinance might result in the imposition of a jail sentence.[15] But by what standards should an exhibitor gauge his conduct? Prior to *American Mini Theaters*, the exhibitor and his attorney needed to determine only if a movie was "obscene" under the tripartite test set forth by the Supreme Court in *Miller v. California*.[16] There, the Court declared:

> The basic guidelines for the trier of fact must be: (a) whether "the average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value.[17]

While this test of obscenity is believed by many to be unduly vague and subjective, it appears to be a model of clarity and precision when compared to the Detroit and King County definitions of "adult." In addition to its concern with patent offensiveness and lack of social value, the *Miller* test *does* focus on the prurient appeal of the material *taken as a whole.* Thus, a theater owner who exhibits general release movies, some of which include occasional or isolated sexually explicit scenes, can be relatively secure in the belief that showing such films will not subject him to an obscenity conviction. Moreover, if he *is* convicted for showing such a movie, it is likely that ultimately he will be vindicated on appeal.[18]

The Detroit definition of "adult," however, can instill no such sense of security. It is not at all clear that a motion picture with "specified sexual" scenes which are merely occasional or transitory will be excluded from the purview of an "adult" zoning statute. How, then, will the exhibitor's plight be resolved?

The possibilities, it seems, are four-fold. First, if no legislative or judicial clarification is forthcoming, the exhibitor can resort to self-censorship. Second, the exhibitor can apply for a waiver of the zoning restriction. Third, he might risk showing the questionable film and

14. Variety, Dec. 1, 1976, at 39, col. 2.
15. See note 5 & accompanying text *supra.*
16. 413 U.S. 15 (1973).
17. *Id.* at 24.
18. *See* Jenkins v. Georgia, 418 U.S. 153 (1974).

then, upon prosecution or other official action, ask the state courts to subject the ordinance to a narrowing construction. Finally, a city council, when enacting such an ordinance, might attempt to define statutorily how much of a film must be "distinguished or characterized by an emphasis" on specified anatomical areas or sexual activities in order to be classified as "adult."

The remainder of this article will be devoted to a brief discussion of each of these four alternatives.

Self-Censorship

As Justice Blackmun pointed out in his dissent, whenever a general release exhibitor wishes to show a movie with some erotic content, that exhibitor must ascertain not only whether *he* is about to slide into the "regulated use" category, but also whether, at that time, the definition of "regulated use" is applicable to any of his neighbors.

> At any moment he could become a violator of the ordinance because some neighbor has slipped into a "regulated use" classification. . . . Lest he let down his guard, he should remember that if he miscalculates on any of these issues, he may pay a fine or go to jail.
>
> *It would not be surprising if, under the circumstances, the exhibitor chose to forgo showing the film series altogether.*[19]

Assuming that many exhibitors will decide to simply forgo the showing of all films which *might* be classified as "adult," it is likely that some of them will not bother to prescreen each film and attempt to make individual decisions as to their "adult" nature. There already exists in the motion picture industry a program of self-regulation which classifies most motion pictures as "adult," "almost adult," or "nonadult" prior to their release to the exhibitor. Under the Motion Picture Rating System, the vast majority of motion pictures shown commercially in the United States are classified into one of four categories—X, R, PG, or G.[20] The "X" category is the industry's equivalent of "adult." Indeed, when that symbol is attached to a film, no person under 17 years of age may be admitted to the exhibition.[21] Under the "R" rating, the industry's equivalent of "almost adult," persons under 17 years of age must be accompanied by a parent or guardian.[22] In many

19. 427 U.S. at 90 (Blackmun, J., dissenting) (emphasis added).

20. *See generally* Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 COLUM. L. REV. 185 (1973).

21. *Id.* at 192.

22. *Id.*

parts of the country, particularly in small towns, "X" and sometimes even "R" films have long been considered untouchable by exhibitors.[23] Now that *American Mini Theaters* has given judicial sanction to the regulation of "adult" as well as "obscene" films, it seems quite likely that exhibitors who are subject to ordinances such as those in Detroit will simply use "X" and "R" as their indicia of what is "adult," and hence to be avoided. "X" and "R" rated films currently comprise approximately 55 percent of all motion pictures exhibited in this country.[24] But as adult motion picture zoning ordinances begin to proliferate, it is likely that the number of commercial outlets for "X" and "R" films will dwindle drastically, assuming that many exhibitors will equate these symbols with the term "adult." Because the limited market for "X" and "R" rated films will probably render those films economically unsuccessful, film producers will have a strong inducement to produce a higher percentage of material which will be eligible for "G" or "PG" ratings. Thus, while the original purpose of the Detroit zoning ordinance was to prevent urban blight,[25] the ultimate effect of *American Mini Theaters* may be to "reduce the adult population of [the United States] to [viewing] only what is fit for children."[26]

Application for Waiver of Zoning Restrictions

If an exhibitor does not wish to engage in a blanket form of self-censorship, but also does not desire to subject himself to criminal liability, he can, of course, apply for a waiver of the restrictions if the zoning ordinance so provides. The Detroit ordinance authorizes the Zoning Commission to waive the one thousand foot restriction if it finds, *inter alia*, "that the spirit and intent of this Ordinance will be observed" and "that the proposed use will not enlarge or encourage the development of a 'skid row' area."[27] As previously mentioned, respondent theater operators in *American Mini Theaters* had challenged

23. *Id.* at 217 & n.210. *See also* Variety, Oct. 27, 1976, at 34, col. 1, reporting that among Wisconsin exhibitors in towns with under 5,000, most "won't touch [the] X product" and many are reluctant to exhibit "R" rated films.

24. *See* Variety, Nov. 3, 1976, at 3, col. 3.

25. *See* 427 U.S. at 54 n.6.

26. *See* Butler v. Michigan, 352 U.S. 380, 383 (1957). *See also* Interstate Circuit v. Dallas, 390 U.S. 676 (1968).

27. The entire waiver provision reads:

"The ordinance authorizes the Zoning Commission to waive the 1,000-foot restriction if it finds:

"a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.

this provision on the ground of vagueness, arguing that it did not "specify adequate procedures or standards for obtaining a waiver of the 1,000-foot restriction."[28] The Court did not respond to the merits of that challenge but simply stated that the respondents lacked standing to raise that argument since neither of them had "alleged any basis for claiming or anticipating any waiver of the restriction as applied to its theater."[29]

Whatever the merits of the theater owners' substantive "lack of standards" attack,[30] it is clear that the Detroit waiver section is procedurally inadequate in at least two respects. The first of these is that the provision fails to guarantee an applicant the right to a hearing before the Zoning Commission.[31] The second, and even more critical, defect is that the ordinance fails to provide for judicial review of the Commission's denial of a waiver application. Regardless of the fact that the ordinance euphemistically refers to itself as a zoning ordinance, it functions as a prior restraint on the exhibition of constitutionally protected materials.[32] If an "adult" license is denied, or a waiver of the zoning restriction is refused, an exhibitor is foreclosed from showing a movie even though that movie has never been judicially declared either "obscene" or "adult" within the meaning of the ordinance. The absence of a judicial determination violates the requirements of *Freedman v. Maryland*, which held:

> [A] noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. . . . Second . . . only a procedure requiring a judicial determination suffices to impose a valid final restraint. . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. . . . [Third], the pro-

"b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.

"c) That the establishment of an additional regulated use in the area will not be be contrary to any program of neigh[bor]hood conservation nor will it interfere with any program of urban renewal.

"d) That all applicable regulations of this Ordinance will be observed." 427 U.S. 54 n.7.

28. *Id.* at 58.

29. *Id.* at 59.

30. *Compare* Cox v. New Hampshire, 312 U.S. 569 (1941), *with* Interstate Circuit v. Dallas, 390 U.S. 676 (1968).

31. *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1970).

32. *See* American Mini Theatres v. Gribbs, 518 F.2d 1014 (6th Cir. 1975).

> cedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.[33]

Thus, unless and until *Freedman* is overruled, the exhibitor is entitled to know that the censoring agency will, within a brief period of time, either issue a license for the showing of a film or go to court to restrain its exhibition.

Judicial "Narrowing Construction" of the Term "Adult"

It seems inevitable that the judiciary will become involved in this new genre of litigation over erotic movies. Judicial involvement will occur not only because of the mandate of *Freedman*, but also because there is likely to be a plethora of criminal proceedings instituted against theater owners who have allegedly slipped into a "regulated use" without first having obtained a special "adult" license or a waiver of restrictions.

Ultimately, then, the courts must construe the term "adult." Their task will be two-fold. First, they must decide how often a theater must be used for presenting "adult" films before that theater becomes an "adult motion picture theater." The wording of the Detroit ordinance seems to indicate that *any time* an "adult" film is shown, the building in which it is exhibited becomes an "adult" theater. Second, and regardless of the answer to the first question, the courts must decide what quantity of specified sexual activities or specified anatomical areas may be permissible before any given movie is "characterized by an emphasis" on sexually explicit matter.

The American judiciary, however, has always seemed disinclined to engage in erotic quantification.[34] Hence, it is quite probable that some courts will simply attempt to adopt judicially the film industry's standard for "adult"—that is, the "X" and, perhaps, "R" ratings. It is unlikely, however, that the Supreme Court will allow the state and local judiciaries to adopt the industry's classifications because such a system is totally devoid of standards and criteria for determining which movies are "adult" and required to be rated "X" or "R." Thus, many

33. 380 U.S. 51, 58-59 (1965).

34. In none of the post-*Roth* obscenity cases, for example, did the Court attempt to define obscenity in terms of the quantity of the erotic material contained in a movie or publication. On the other hand, a Canadian Court recently attempted to adjudicate the issue of the obscenity of *Last Tango in Paris* by totaling the number of minutes in which the film depicted sexual scenes. Regina v. Odeon Morton Theatres Ltd., 45 D.L.R.3d 224 (1974).

state and lower federal courts have already held, in contexts other than zoning, that the "X" and "R" designations are too vague and impressionistic to serve as a substantive standard for the governmental regulation of time, place, or manner of exhibitions of allegedly "adult" films.

In *Motion Picture Association v. Spector*,[35] for example, the United States District Court for the Eastern District of Pennsylvania invalidated a state statute which prohibited the showing of previews for "X" and "R" movies at exhibitions of "G" or "PG" films. In holding the statute void for vagueness, the court noted:

> The evidence clearly established that the Code and Rating Administration of the [Motion Picture] Association has itself no defined standards or criteria against which to measure its ratings. Twelve persons . . . do the rating, a voluntary Association undertaking. Films viewed are simply graded according to the individual reactions of the viewing members.[36]

The court concluded that the statute was "so patently vague and lacking in any ascertainable standards and so infringe[d] upon the plaintiffs' rights to freedom of expression, as protected by the First and Fourteenth Amendments . . . as to render it unconstitutional."[37]

A similar conclusion has been reached by several other federal and state courts which have considered the constitutional permissibility of the use of the "X" and "R" classifications as a device for ferreting out "adult" films which would be subjected to governmental restrictions not imposed on other films.[38] In each of these cases, the "X" and "R" symbols were held to be impermissibly vague standards for regulation. It is doubtful that this result will be changed merely because the new "adult" restrictions will be imposed under the mandate of a zoning ordinance.

Legislative Clarification of the Term "Adult"

If a city council attempts to incorporate the film industry's "X" and "R" designations as the official indicia of what is "adult," the same consti-

35. 315 F. Supp. 824 (E.D. Pa. 1970).

36. *Id.* at 825.

37. *Id.* at 826.

38. *See, e.g.*, Engdahl v. City of Kenosha, 317 F. Supp. 1133 (E.D. Wis. 1970) (holding that an ordinance prohibiting persons under age 18, unaccompanied by a parent or guardian, from viewing "X" and "R" rated movies was unconstitutional); Hooksett Drive-In Theater, Inc. v. Hooksett, 110 N.H. 287, 266 A.2d 124 (1970) (invalidating an ordinance imposing a $500 fee on each drive-in showing of an "X" rated picture).

tutional infirmity—vagueness—will be present as would be found if a court based its reasoning on the "X" and "R" symbols. Moreover, it seems unlikely that any practicable definition of the term "adult" will or can be formulated. As previously noted, the problem is not one of defining specified sexual activities or anatomical areas, but rather one of determining *how much* of those activities or areas in a film render the film "adult." A legislatively declared percentage seems unthinkable, but without such a clarification, renewed "vagueness" challenges are inevitable. The merits of such a challenge, as indicated by the court in *American Mini Theaters*, ultimately must be judically resolved. All that is necessary to place the matter squarely before the courts is that the plaintiff have standing to raise the vagueness argument—that is, that he not be a theater owner whose predominant business is that of exhibiting sexually explicit films.

Conclusion

The true vice of a standardless "adult" motion picture zoning system can perhaps best be understood by an examination of the Supreme Court's opinion in a nonzoning case, *Interstate Circuit v. Dallas*.[39] In that decision, the Court invalidated a Dallas ordinance which authorized an administrative board to classify films as to their suitability for young persons and to bar young persons from movies found unsuitable. In holding that the statutory definition of "not suitable for young persons" was excessively vague, even though it was accompanied by a three paragraph definition, the Court noted that the true problem with the vagueness of the Dallas "adult" classification system was that it forced *filmmakers*, who were uncertain as to the criteria for an "adult" classification, to choose between producing totally innocuous films and running the risk of foreclosure from a vast portion of the market. Although the Dallas classification system, like the Detroit zoning system, did not impose penal sanctions on filmmakers, the Court found that it was *their* constitutional rights—as well as those of the adult moviegoing public—which were most deeply affected by the ordinance. Filmmakers, unclear as to the standards for an "adult" rating, were likely to err on the side of caution and blandness. The result there, as here, would be to reduce the entire adult population to viewing only those films deemed fit for children. As the Court in *Interstate Circuit* remarked:

> The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing. It may be unlikely

39. 390 U.S. 676 (1968).

that what Dallas does in respect to the licensing of motion pictures would have a significant effect upon film makers in Hollywood or Europe. But what Dallas may constitutionally do, so may other cities and States. Indeed, we are told that this ordinance is being used as a model for legislation in other localities. Thus, one who wishes to convey his ideas through that medium, which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than run the risk, he might choose nothing but the innocuous. . . . *The vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison.*[40]

40. *Id.* at 683-84 (emphasis added).