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Zoning Out Free Expression: An Analysis of New York City's Adult Zoning Resolution

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INTRODUCTION

On October 25, 1995, the City of New York unveiled a most formidable weapon in its relentless war against the adult videostores, bookstores, theaters and cabarets located throughout the five boroughs of New York City. The newly enacted Zoning Resolution, if fully deployed, will virtually wipe out eighty-four percent of New York's adult establishments. By the City's own admission, this law will eliminate approximately ninety percent of the adult establishments located in the heart of Manhattan. Of the adult businesses in the County of Queens, ninety-three percent will be forced to close or relocate. Throughout all five boroughs, the total number of bookstores, videostores and other adult establishments will be cut from 177 to a mere 28. These statistics speak volumes and are harrowing in their implications. Many adult establishments, which have existed without incident in some neighborhoods for over twenty years, will be driven out of business by this new law. Perhaps more importantly, the new law will effectively cut off the public's access to this legitimate form of entertainment.

Over one hundred operators of the embattled businesses have joined forces and sued to have the Zoning Resolution declared unconstitutional.[1] Thus, this massive litigation has called

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1. Amsterdam Video, Inc. v. City of New York, 686 N.E.2d 1365 (N.Y. 1997). The *Amsterdam* plaintiffs formed an alliance called the Coalition for Free Expression. The New York Civil Liberties Union joined forces with the *Amsterdam* plaintiffs in a separate suit brought on behalf of consumers of the entertainment provided by the adult businesses. Hickerson v. City of New York, 932 F. Supp. 550 (S.D.N.Y. 1996). Also, a top-

radically into question our deepest assumptions concerning the manner in which these businesses can be regulated by a municipality. Moreover, the inherent importance of the grave constitutional questions presented by these proceedings, combined with the substantial impact the answers will have on the exercise of free speech for millions of New Yorkers, cannot be underestimated. This article traces the course of the intensely fought litigation and addresses some of the constitutional issues generated by it.

I. THE ZONING RESOLUTION

The Zoning Resolution[2] defines an adult use and bans such uses, including bookstores and theaters, from residential and most commercial zoning districts. It further mandates that all adult establishments be located at least five hundred feet from those residential and commercial districts as well as five hundred feet from a church, school and other adult business.[3] In addition, in many districts only one adult establishment can be located on a zoning lot and may not exceed ten thousand square feet of floor area and cellar space.[4] These forbidding geographical restrictions, in a city as densely populated as New York, will affect free speech in profound ways.

The Resolution defines the term "adult establishment" as a place where "a substantial portion" of the "stock-in-trade" is "characterized by an emphasis" on "specified sexual activities" or "specified anatomical areas,"[5] or a business that "regularly fea-

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less nightclub started a separate suit to have the law declared unconstitutional. Stringfellow's of New York, Ltd. v. City of New York, 653 N.Y.S.2d 801 (N.Y. Sup. Ct. 1996), *aff'd*, 663 N.Y.S.2d 812 (N.Y. App. Div. 1997), *aff'd*, 694 N.E.2d 407 (N.Y. 1998). Although these three allied cases were never consolidated, they have been argued together and decided simultaneously at each level of the litigation.

On July 16, 1996, the Times Square Business Improvement District entered the conflict on the side of the City. On July 24, 1996, the American Alliance for Rights and Responsibilities, now known as the Center for the Community Interest, and 45 predominantly religious and parent-teacher groups, including yeshivas and synagogue congregations, intervened on behalf of the City.

2. NEW YORK, N.Y., ZONING RESOLUTION §§ 12-10, 32-01 (amend. N950384 ZRY, Oct. 25, 1995).

3. *Id.* §§ 32-01(a)-(c), 42-01(b)-(c).

4. *Id.* §§ 32-01(d)-(e), 42-01(d)-(e).

5. *Id.* § 12-10. "Specified sexual activities" are defined as: "(1) human genitals in a state of sexual stimulation or arousal; (2) actual or simulated acts of human masturbation, sexual intercourse or sodomy; or (3) fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast." *Id.* "Specified anatomical areas" are those described as "(1) less than completely and opaquely concealed: (i) human genitals, pubic region, (ii) human buttock, anus, or (iii) female breast below a point immediately

tures" films or live performances depicting an emphasis on the defined form of sexual activity. It then subjugates these adult establishments to certain limited manufacturing and heavy commercial zones within the City and effectively bars their continued operation within the primary commercial districts, which are local and convenient areas most suitable for retail stores. Since the history of this Zoning Resolution helps to place the issues in proper perspective, its extraordinary background should be briefly outlined. From its very inception, the Resolution was stalked by controversy.

A. *The Zoning Resolution's History*

In the past, adult bookstores and theaters have been allowed to exist in each of the commercial districts where other retail businesses, including bars and nightclubs, have been permitted to operate—and where the latter are still allowed to conduct business. Prior to November of 1994, the Zoning Resolution of the City of New York made no distinction between adult entertainment uses and other commercial uses that did not have an "adult character." While the City regulated several general classes of commercial establishments under the Zoning Resolution initially adopted on December 15, 1961, adult-oriented businesses had never been differentiated from other commercial uses. Moreover, for decades, adult establishments have successfully coexisted with other businesses without prejudice or detriment to each other.

On November 23, 1994, the New York City Council adopted a resolution, submitted by the Department of City Planning, which modified the Zoning Resolution by defining the term "adult establishment" as a limited land use.[6] The adopted application imposed a one-year moratorium on new adult uses in all areas of New York City.[7] In the meantime, the New York City Council Land Use Division filed proposed regulations for adult establishments that contained numerous amendments to the Zoning Resolution. Significantly, under the Land Use Proposal, drafted by lawyers sensitive to constitutional necessities, all existing uses were "grandfathered in" and thus allowed to remain in operation in their current locations. In addition, the Land

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above the top of the areola; or (2) human male genitals in a discernibly turgid state, even if completely and opaquely concealed." *Id.*

6. *Id.* § 11-113 (amend. N950113 ZRY, Nov. 23, 1994).

7. *Id.*

Use Proposal did not require adult uses to be distanced from churches or schools.

Nevertheless, despite the Land Use Division's recommendations, on March 21, 1995, the City's Department of Planning drafted its own regulations, which differed drastically from the more constitution-sensitive features submitted by counsel for the Land Use Division. The Department of City Planning's regulations, among other things, eliminated any "grandfather" rights for preexisting uses and required the termination of adult establishments located within 500 feet of a school and/or a church.

B. *Opposition to the Zoning Resolution*

The proposed enactment of the controversial Zoning Resolution incited protests from prominent organizations and officials throughout the City. Notably, the Association of the Bar of the City of New York, the largest bar association in the state, issued a formal report opposing enactment of the amended Zoning Resolution because of its failure to fulfill the constitutional requirements of both the federal and state constitutions.[8] The proposed legislation also prompted complaints among leading political figures. The former Borough President of Manhattan, Ruth Messinger, expressed earnest misgivings about its constitutionality in her testimony against the proposal.[9]

A number of community boards throughout the City also expressed serious concern over the Zoning Resolution's constitutional infirmities. For instance, in Manhattan, Community Boards 2, 3, 4, 5, 6 and 7, which host the majority of the adult establishments in New York City, all opposed the Zoning Resolution on a variety of grounds. A recurring complaint in many of their reports was the City's failure to provide adequate alternative locations for the displaced businesses.

Under the City Charter, a zoning resolution must receive consideration by the City Planning Commission before it can be submitted to the City Council.[10] On July 26 and 27, 1995, public hearings were conducted before the Commission. The borough

8. Land Use Committee Regarding the Proposal to Re-Zone Adult Businesses in New York City (Oct. 19-20, 1995) (written statement of Ass'n of the Bar of the City of N.Y.).

9. Establishment of Permanent Regulations of Adult Uses, City Planning Commission of the City of N.Y., 87-100 (July 26, 1995) (statement of Ruth Messinger, President, Manhattan Borough).

10. If the City Planning Commission fails to approve the proposed legislation, a two-thirds vote of the City Council is required. Whereas, with the Planning Commission's approval, only a majority vote is required. N.Y.C. CHARTER § 197 (1990).

presidents of Manhattan and Brooklyn, in addition to five members of the City Council, voiced their opposition to the proposed text amendment. On September 18, 1995, the City Planning Commission approved a modified version of the text amendment by the narrow margin of seven to six.[11] The members of the Commission who voted against approval of the proposed text amendment wrote vigorous dissents, voicing profound concern that the text amendment seriously infringed upon free expression. Notwithstanding the opposition to the proposed legislation, on October 25, 1995, the City Council adopted the Zoning Resolution by a majority vote and it became effective on that date.[12]

C. *The Action for Declaratory Judgment*

On February 27, 1996, more than one hundred adult-oriented videostores, theaters and cabarets launched an action in New York State Supreme Court to have the Zoning Resolution declared unconstitutional and to enjoin its enforcement.[13] The coalition of owners and operators represents a substantial portion of the adult businesses within all five boroughs of the City of New York. These establishments provide to the public nonobscene, adult-oriented information shown or sold only to willing adults as a form of protected expression.

In March 1996, the City filed petitions to remove both the *Amsterdam* and *Hickerson* actions to the United States District Court for the Southern District of New York.[14] On June 27, 1996, District Judge Miriam Goldberg Cedarbaum held that the district court would abstain under *Railroad Commission v. Pullman Co.*[15] from deciding the claims arising under the New York Constitution. The court remanded all causes of action brought under the New York Constitution, but retained jurisdiction over the separate cause of action brought under the federal constitution, which was held in abeyance pending determination of the state claims.[16] Accordingly, the adult establishments filed a reservation of their federal rights pursuant to *England v. Louisi-*

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11. The modified version eliminated a requirement that established a 500-foot buffer zone between areas where adult establishments are allowed and high-density commercial areas where they would be prohibited.

12. NEW YORK, N.Y., ZONING RESOLUTION §§ 12-10, 32-01 (amend. N950384 ZRY, Oct. 25, 1995).

13. Hickerson v. City of New York, 932 F. Supp. 550 (S.D.N.Y. 1996).

14. The City filed the petitions pursuant to 28 U.S.C. 1446(d). Index Nos. 96 Civ. 2204 and 96 Civ. 2203.

15. 312 U.S. 496 (1941).

16. *Hickerson*, 932 F. Supp. at 557-59.

ana State Board of Medical Examiners.[17] Relying on the district court's decision, the adult establishments did not assert any federal claims in the state proceedings, resting their challenge in the state court solely and exclusively on the state constitution.

On October 23, 1996, a mere two days before the Zoning Resolution was to become effective as to existing businesses, the alliance of bookstores and theaters suffered a bitterly disappointing defeat in its first major engagement with the City. New York County Supreme Court Justice Marylin G. Diamond granted the City's motion for summary judgment and upheld the constitutionality of the Zoning Resolution.[18] The Mayor and other City officials immediately threatened to padlock the bookstores for being in violation of the challenged Zoning Resolution.[19] However, a justice of the Appellate Division, First Department, stayed the enforcement of the Zoning Resolution pending disposition of the appeal taken to that appellate court.

D. *The Appellate Division Decision*

On July 10, 1997, the Appellate Division unanimously affirmed the judgment of the New York State Supreme Court.[20] In the opening line of its short opinion, the court declared that the Zoning Resolution "does not violate plaintiffs' right to freedom of expression under the State Constitution."[21] The court chose to deal with the substantial constitutional questions in a meager six sentences.[22]

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17. 375 U.S. 411, 421 (1964).

18. Stringfellow's of New York, Ltd. v. City of New York, 653 N.Y.S.2d 801 (N.Y. Sup. Ct. 1996), *aff'd*, 663 N.Y.S.2d 812 (N.Y. App. Div. 1997), *aff'd*, 694 N.E.2d 407 (N.Y. 1998). The record supporting the three cases consists of over 10,000 pages of conflicting affidavits and pleadings, as well as numerous exhibits. Sadly, the crucial constitutional questions presented by this litigation were preempted by the trial court's decision granting summary judgment in a case that presented a host of factual issues.

19. Vivian S. Toy, *Sex Shops Greet Law with Wink, Nod and Lawsuit*, N.Y. TIMES, Oct. 16, 1996, at B1.

20. Stringfellow's of New York, Ltd. v. City of New York, 663 N.Y.S.2d 812 (N.Y. App. Div. 1997), *aff'd*, 694 N.E.2d 407 (N.Y. 1998).

21. *Id.*

22. It peremptorily dismissed the host of constitutional claims raised by the plaintiffs by simply stating:

> While a place of adult entertainment is, as a form of free expression, entitled to special protection, it "cannot claim an exemption from statutes of general operation aimed at preventing nuisances or hazards to the public health and safety," and "not every government regulation of general application, having some impact on free expression, implicates constitutional guarantees." (People ex rel. Arcara v. Cloud Books, 68 N.Y.2d 553, 558-559, 510 N.Y.S.2d 844, 503 N.E.2d 492). "A municipality may in the reasonable exercise of its police pow-

E. *The Court of Appeals Decision*

The Court of Appeals heard oral argument on January 14, 1998.[23] Despite compelling arguments in opposition to the Zoning Resolution, on February 24, 1998, the New York Court of Appeals affirmed the order of the Appellate Division and upheld the New York City ordinance.[24]

F. *Return to the District Court*

On February 27, 1998, the plaintiffs returned to federal court for adjudication of their federal constitutional rights.[25] The plaintiffs moved for a temporary restraining order and preliminary injunction.[26] They sought to establish that under federal constitutional standards, there are not sufficient suitable alternative sites for the dislocated businesses. Affidavits established that plaintiffs' businesses do not, in fact, cause adverse secondary effects under federal standards. Nevertheless, the district court denied the preliminary injunction without a hearing.[27] The court concluded that the plaintiffs were collaterally estopped from asserting their federal claims despite the previous *England* reservation since the New York Court of Appeals had relied on federal authorities in rendering its decision.[28] While acknowledging that a violation of the First Amendment of the Constitution is itself irreparable harm, Judge Cedarbaum held that the plain-

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ers change its zoning to control land use and development" (Matter of Khan v. Zoning Bd. of Appeals of Vill. of Irvington, 87 N.Y.2d 344, 350, 639 N.Y.S.2d 302, 662 N.E.2d 782), provided it does so in furtherance of a legitimate governmental purpose and there is a "'reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end'" (McMinn v. Town of Oyster Bay, 66 N.Y.2d 544, 549, 498 N.Y.S.2d 128, 488 N.E.2d 1240, quoting French Investing Co. v. City of New York, 39 N.Y.2d 587, 596, 385 N.Y.S.2d 5, 350 N.E.2d 381.

Stringfellow's, 663 N.Y.S.2d at 812-13. According to the court, an ordinance such as the one at issue meets that test. *Id.* at 813 (citing Town of Islip v. Caviglia, 540 N.E.2d 215 (N.Y. 1989) (citing, *inter alia*, City of Renton v. Playtime Theatres, 475 U.S. 41 (1986))).

23. Amicus curiae briefs were filed in the Court of Appeals on behalf of the adult establishments by the Association of the Bar of the City of New York, the First Amendment Lawyers Association and the Council of Regulated Adult Liquor Licensees.

24. Stringfellow's of New York, Ltd. v. City of New York, 91 N.Y.2d 382 (N.Y. 1998). Chief Judge Kaye, who issued a strong dissent in *Islip*, did not participate in the *Stringfellow's* decision.

25. Hickerson v. City of New York, Nos. 96 CIV. 2203, 2204, 1998 WL 105583 (S.D.N.Y. Mar. 6, 1998), *aff'd*, Nos. 98-7269, 98-7270, 1998 WL 283205 (2d Cir. June 3, 1998).

26. *See id.*

27. *See id.*

28. *See id.*

tiffs did not show a likelihood of success on the merits.[29]

On March 17, 1998, the Second Circuit granted a stay since it was troubled by two issues raised by the appeal. They were: first, whether the general standards applied by the New York courts under New York law carry a different meaning in the federal system; and second, whether the unavailability of Supreme Court review of the New York Court of Appeals' decision affects the appropriateness of collateral estoppel.

On April 29, 1998, a three-member panel of the Court of Appeals for the Second Circuit heard oral arguments on the issues of whether the federal claim was collaterally estopped, and if not, whether the denial of preliminary injunction was improper. The court affirmed the district court's decision denying plaintiff's motion for a preliminary injunction stating that the "same issues that are dispositive of this [federal] claim have already been decided in state court."[30]

II. THE PREEMINENCE OF FREE SPEECH IN NEW YORK CITY

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech or the press."[31] The supremacy of the Free Speech Clause in our hierarchy of constitutional values needs no scholarly vindication. That right guarantees to each of us the ability to satisfy our curiosity and our need for information of every conceivable kind. It also enables us to make countless daily and long-term decisions about virtually every aspect of our lives, ranging from choices in books and motion pictures to political affiliations and sexual preferences. Human sexuality is certainly one of the most dynamic forces in our society and, although controversial, it is a subject of enormous interest to both men and women.[32] Moreover, it matters

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29. *See id.*

30. *Hickerson*, Nos. 98-7269, 98-7270, 1998 WL 283205, at *12 (2d Cir. June 3, 1998).

31. U.S. CONST. amend. I.

32. The constituency for this brand of protected information is considerable. For instance, eight times as many "adult" films are rented or sold per year as there are votes cast in a presidential election. William E. Brigman, *Politics and the Pornography Wars*, Ohio University School of Film, 19 WIDE ANGLE 149 (No. 3, July 1997). In 1996, 665 million adult videos were rented. Eric Schlossel, *Most of the Outsize Profits Being Generated by Pornography Today are Being Earned by Businesses not Traditionally Associated with the Sex Industry*, U.S. NEWS & WORLD REPORT, Feb. 10, 1997, at 44. Moreover, Americans now spend more money at adult cabarets than at Broadway, off-Broadway, regional and nonprofit theaters, at the opera and the ballet and at jazz and classical music performances—combined. *Id.* There are strong social forces that keep pushing out these

not whether the entertainment or information may seem tasteless to others. The basic intuition underlying the notion of free expression is that unlimited access to all information, whether exercised or not, provides us with a true sense of freedom and raises the level of our own self-esteem.

Furthermore, New York City is considered by many to be the greatest city in the world. That greatness is due, in large measure, to its free spirit and high level of tolerance for every imaginable form of expression, whether it be political, religious or sexual; orthodox or unorthodox; popular or unpopular. Much of this free expression manifests itself in the form of entertainment. Because of the premium that we place on free speech, the people of New York have always been allowed to choose freely from a wide variety of competing offerings in the field of entertainment. It is this variety of choice that has made New York the entertainment capital of the world.

It is also important to realize that the appeal of Times Square, where some of the fiercest fighting over the Zoning Resolution is centered, is in large measure due to its complex makeup. An amalgam of many different forms of entertainment and cultures, Times Square is the place where a whole City's energy is put on display. In a way, its very garishness and deviance somehow make it mysteriously magnificent and attractive to people from all over the world. Times Square has historically satisfied the needs of all classes of people with every imaginable taste. Those furnishing adult entertainment have as much right as anyone else to compete for patrons in that diverse market.[33]

III. THE LAW AND ADULT ZONING

Although the entertainment provided by the cabarets, bookstores and theaters involves erotica, there is no contention that it is legally obscene. Thus, this brand of expression is fully protected from unjustified governmental interference by the First and Fourteenth Amendments to the United States Constitution.[34] In addition, popular disapproval of the content of the entertainment provided to the public is not a permissible basis for governmental infringement.

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boundaries of sexual expression. They cannot, nor should they, be contained.

33. Approximately 18 subway and train lines, as well as numerous bus lines, service the Times Square sector of New York City. It may be said that all roads lead to Times Square. No comparable degree of public transportation services other areas of the City.

34. Burstyn v. Wilson, 343 U.S. 495 (1952); Jenkins v. Georgia, 418 U.S. 153 (1974); Kingsley Pictures Corp. v. Board of Regents, 360 U.S. 684 (1959).

Zoning ordinances regulating adult businesses are to be treated quite differently from other zoning laws. For instance, there is no presumption of constitutionality when an ordinance is challenged on the grounds that it infringes on free speech.[35]

Because theaters and bookstores are constitutionally protected, a city seeking to regulate their location must establish that they cause some form of social harm, referred to as "adverse secondary effects."[36] Secondary effects translate into tangible ills such as a rise in crime or decline in property values.[37] Assuming that the city can establish that the adult establishments cause the requisite harm, it must then provide suitable and ample relocation sites for the displaced businesses.[38] These two principles, taken together, provide the central core of the law governing ordinances which impact on free speech.

In regulating adult uses, a critical question concerns the overall impact of the ordinance upon free expression.[39] The City of New York ordinance impermissibly abridges free expression. The ordinance would eliminate eighty-four percent of the existing adult establishments, drastically reducing the number of these establishments and the availability of that information to the public, including potential customers.

It matters not what redeeming features are built into the ordinance.[40] What counts is its overall effect on the public's access to the protected information. The New York City zoning law imposes significant burdens on free speech while providing little assurance of achieving the commensurate protection from the

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35. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 77 (1981) (Blackmun, J., concurring); Young v. American Mini Theatres, Inc., 427 U.S. 50, 75-76 (1976) (Powell, J., concurring); Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring).

36. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-50 (1986).

37. *Id.* at 48.

38. *See id.* at 53.

39. *Young*, 427 U.S. at 71 n.35 (1976); *see also Schad*, 452 U.S. at 71 (1981) (noting that ordinance significantly limiting communicative activity within the Borough must be scrutinized in terms of both the interests of the Borough "and the means chosen to further those interests.").

40. The many ordinances litigated throughout the nation contain dozens of variants concerning the magnitude of separation requirements and the extent of available receptor sites, as well as the existence of "grandfather" rights—to mention only a few of the more prominent statutory components. And, with enough patience and time, one can line up an array of ordinances that have been sustained. But comparisons between ordinances that have been sustained and those that have not been sustained can be extremely misleading because of certain special factors that may not be apparent. For instance, ordinances that have been sustained may affect far fewer businesses and make available for relocation greater percentages of suitable land.

indeterminate harms sought to be eliminated. An ordinance that abolishes eighty-four percent of all adult establishments does, in fact, go *too* far in abridging free expression. In other words, in New York City, where the number of establishments dispensing protected speech will be slashed from 177 to 28, the impact of the Zoning Resolution on free speech will not be just "incidental"—it will be catastrophic. Such a dreadful circumstance could not possibly have been contemplated by the United States Supreme Court in 1986 when it decided *Renton*. No court in the country, either federal or state, has ever approved a zoning ordinance with such radical consequences on the exercise of free speech.

A. *The Requirement that a City "Establish" That the Adult Businesses Cause Tangible Secondary Effects*

Under *Renton*, adult establishments cannot be subjected to regulation unless the City can "establish" that the businesses cause "secondary effects," such as a rise in crime or a decline in property values, rather than a perceived unpleasantness of having adult videostores or topless bars in a given neighborhood.[41] In addition, the City bears the burden of establishing that the ordinance was directed toward controlling "secondary effects" of the businesses on the community.[42]

Absent proof of actual cognitive adverse secondary effects directly attributable to the adult establishments, there is no legal basis for regulating these businesses under the federal constitution.[43] For instance, ordinances have been upheld where empirical evidence established a "dead zone" which affected the traffic of customers and resulted in "loss of business" to adjacent enterprises.[44] Thus, the anticipated harms and the evidence to prove them must be real and tangible.[45]

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41. *City of Renton*, 475 U.S. at 46-51; *Young*, 427 U.S. at 70-72 (1976) (holding that zoning ordinances designed to combat undesirable secondary effects are to be reviewed as content neutral "time, place and manner" restrictions.).

42. *See* Bery v. City of New York, 97 F.3d 689, 697-98 (2d Cir. 1996), *cert. denied*, 117 S.Ct. 2408 (1997); Phillips v. Borough of Keyport, 107 F.3d 164, 173 (3d Cir. 1997), *cert. denied*, 118 S.Ct. 336 (1997).

43. *See* North Street Book Shoppe, Inc. v. Village of Endicott, 582 F. Supp. 1428, 1433-35 (N.D.N.Y. 1984) ("popular disapproval or distaste for the content of plaintiff's expression is not, itself, a permissible basis for governmental infringement of expression"); *Phillips*, 107 F.3d at 173 ("When an ordinance burdening speech is thus challenged, it must be *'justified'* by the state.") (citing *City of Renton*, 475 U.S. at 48).

44. Town of Islip v. Caviglia, 540 N.E.2d 215, 218-21 (N.Y. 1989).

45. Eclipse Enters. v. Gulotta, 134 F.3d 63, 67 (2d Cir. 1997) (holding that speculation and surmise is insufficient where a municipality defends a regulation of speech as a

The reason that the City of New York must meet its burden of establishing adverse secondary effects is clear: Absent proof that an adult establishment causes some harm, zoning resolutions can be used as a pretext for suppressing controversial or unpopular expression. The secondary effects doctrine has been regularly invoked by municipalities in an attempt to justify zoning ordinances that restrict adult uses. The dangers and difficulties posed by such a doctrine are manifest. It can provide endless excuses for limiting protected speech. Plausible arguments can be made that almost any activity involving the distribution of information, which may be unpopular, creates some social consequences that may be labeled harmful. Thus, it creates a host of possible avenues for governmental censorship whenever public officials can invent "secondary" rationalizations for regulating the content of protected speech.

1. *Mr. Giuliani Told Mr. Eisner, "Michael, They'll Be Gone."* There is evidence to show that the New York Zoning Resolution is driven by business and monetary considerations, not by any "legitimate state interest" or concerns over adverse secondary effects. In the spring of 1995, something very important happened. It involved an exchange between Michael Eisner, chairman of the Walt Disney Corporation, and Mayor Rudolph W. Giuliani on the occasion of the opening of the New Amsterdam Theater on 42nd Street:

> In his closing remarks, Mr. Eisner hit upon the real theme of the day: the allies that opportunity makes. He told a story about walking along 42nd Street with the Mayor more than two years ago, when Times Square was still on the rank and steamy side. He said he expressed his reservations about bringing Disney's family-style entertainment to a street dotted with pornography parlors. Mr. Giuliani fixed him with a stolid gaze, Mr. Eisner said, and stated more than once: "Michael, they'll be gone."[46]

This decisive disclosure indicates that the City has turned to the zoning laws to close the adult businesses, not because they cause crime or a decline in property values, but because to some they seem unsightly. They are ostracized because the mes-

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means to prevent anticipated harms); *Phillips*, 107 F.3d at 175 ("[the government] must demonstrate that the recited harms are *real*, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. . . .") (emphasis added).

46. Bruce Weber, *Disney Unveils Restored New Amsterdam Theater*, N.Y. TIMES, Apr. 3, 1997, at B3.

sage conveyed is offensive to some people, perhaps because of a phobia of freer sexual expression that some may find vulgar.

In their brief filed in the Court of Appeals, various intervening community groups argued that the Court's devotion to free speech should not permit New York State to become a *"haven for the pornography industry."*[47] Under this approach to freedom and liberty, perhaps New York should not be a haven for the speech of Louis Farrakan or that of neo-Nazi skinheads. Perhaps it should not be a haven for the speech of gay rights groups or right-to-life organizations either. Perhaps it should be a place where the only speech to be tolerated is that acceptable to the views of this intervenor group who originally marched under the banner of "American Alliance for Rights and Responsibilities." The dangerous undercurrents of this alarming thesis are at once apparent. We ask: Whose rights? And whose responsibilities?

In an effort to sustain the Zoning Resolution, the City of New York relied on three studies: (1) the Department of City Planning Adult Entertainment Study[48], (2) the Times Square Business Improvement District Study of 1994,[49] and (3) the Chelsea Business Survey: An Assessment of the Economic Impact of XXX-Rated Video Stores in Chelsea.[50]

2. *The Department of City Planning Study.* In 1994, the Department of City Planning conducted by far the most exhaustive investigation of adult uses to date in order to determine whether or not such uses cause any cognitive social harms.[51] This study demonstrated that no correlation can be established between adult uses and an increase in crime or a decline in property values;[52] indeed, city investigators could not conclude that adult businesses had any negative impact on the surrounding community.

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47. Brief for the City of New York, Center for the Community Interest, at 7 n.2, Stringfellow's of New York, Ltd. v. City of New York, 694 N.E.2d 407 (N.Y. 1998) (No. 103568-96-NY) (emphasis added).

48. DEPARTMENT OF CITY PLANNING, CITY OF N.Y., ADULT ENTERTAINMENT STUDY (1994) [hereinafter DCP STUDY].

49. TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, REPORT ON THE SECONDARY EFFECTS OF THE CONCENTRATION OF ADULT USE ESTABLISHMENTS IN THE TIMES SQUARE AREA (1994) [hereinafter TSBID REPORT].

50. CHELSEA ACTION COALITION & COMMUNITY BOARD 4, CHELSEA BUSINESS SURVEY: AN ASSESSMENT OF THE ECONOMIC IMPACT OF XXX-RATED VIDEO STORES IN CHELSEA (1993) [hereinafter CHELSEA STUDY].

51. DCP STUDY, *supra* note 48.

52. *Id.* at 54-55.

The investigation concentrated on the five boroughs but omitted the Times Square area since the *TSBID Report* had already been initiated in that region. The *DCP Study* included a survey of street conditions, local organizations and businesses, real estate brokers, police officers and sanitation workers. It also analyzed criminal complaints[53] and property assessment data[54] for six areas throughout New York City. The DCP selected certain survey areas which contained adult uses. They also designated "control" areas which they estimated were similar in character and population. They then conducted a search for any empirical data that might indicate whether there was a higher crime rate or a detectable decline in real estate values in the areas occupied by adult businesses. Regarding an increase in crime, the *DCP Study* stated that:

> [i]n summary, it was not possible to draw definitive conclusions from the analysis of criminal complaints. Land uses other than adult entertainment establishments, e.g., subway station access, appear to have a far stronger relationship to criminal complaints. It was not possible to isolate the impact of adult uses relative to criminal complaints.[55]

In fact, the DCP researchers found that crime statistics are lower in some neighborhoods where adult uses are concentrated.[56] According to the *DCP Study*, it was not possible to draw any definitive conclusions concerning the relationship between the number of criminal complaints and the number of adult uses in the areas investigated.[57]

The DCP also confirmed that the negative impact of adult businesses on assessed property values is inconclusive.[58] In fact, property values in four of the six survey areas where adult businesses are located increased by a greater percentage than in the control areas where no adult businesses are situated.[59] They also concluded that: "[t]he analysis of trends in assessed valuation relative to adult entertainment uses was inconclusive. It would appear that if adult entertainment uses have negative impacts, they are overwhelmed by other forces that increased property values overall, at least as measured by assessed val-

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53. The DCP STUDY analyzed criminal complaint data from a three-month period beginning June 1, 1993. *Id.* at 52.

54. Property valuations were identified for 1986, 1989 and 1992 and percentage changes identified between 1986 and 1992. *Id.* at 54.

55. *Id.*

56. *See id.* at 52.

57. *See id.* at 54.

58. *See id.*

59. *See id.*

ues."[60] The study concluded that:

> [e]ven at the small scale of the survey blockfront, there is a *wide diversity in the assessed value trends* ranging from an increase of more than 18 percent to an increase of more than 200 percent over the period of analysis, *strongly suggesting the importance of other factors.* The influences on assessed value that the city's assessors take into account are numerous and include the sale prices of similar comparable properties adjusted for differences in size, age, and location. While the total assessed values on the survey blockfronts may be influenced to some extent by the presence of adult entertainment uses, demonstrating such effects is very difficult.[61]

The City's failure to produce any evidence of adverse secondary effects is confirmed by James E. Berger, former counsel to the Office of Legislative Affairs, Office of the Mayor, who worked with the New York Department of City Planning and was instrumental in developing the adult-use amendments as well as representing the Office of the Mayor before the New York City Council during the enactment of the Zoning Resolution.[62] Mr. Berger has stated that the "DCP's independent analysis failed, however, to find a statistically significant relationship between adult entertainment establishments and assessed valuations, criminal complaints or sanitation problems."[63]

3. *The Times Square Business Improvement District Study.* The study conducted on behalf of the Times Square Business Improvement District by a private group, Insight Associates, also found no direct evidence that the adult businesses caused a decline in property values.[64] The *TSBID Report* notes that it is hard to distinguish between legitimate and illegitimate concerns on the issue of adult uses, and that secondary effects studies are necessary. Moreover, it seems quite apparent that the report was designed to find legal and effective ways to regulate adult uses. Thus, it presupposes that there is a need to regulate such uses.

However, because the *TSBID Report* does not indicate when the adult uses were present on the various lots, it is impossible to determine, over the eight-year period covered by the analysis,

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60. *Id.*

61. *Id.* (emphasis added).

62. James E. Berger, Essay, *Zoning Adult Establishments in New York: A Defense of the Adult-Use Zoning Text Amendments of 1995*, 24 FORDHAM URB. L.J. 105, 135 n.a. (1996).

63. *Id.* at 112.

64. TSBID REPORT, *supra* note 49.

what effect, if any, the adult uses in the area had on property value.[65] The Report summarizes its property value analysis as follows:

> While it may well be that the concentration of adult use establishments has a generally depressive effect on the adjoining properties, as a statistical matter we do not have sufficient data to prove or disprove this thesis. It may also be that simply the presence of adult use establishments is *subjectively* viewed by assessors as a factor that necessarily reduces the value of an property [sic]. In short, *assumptions may influence assessment*.[66]

Furthermore, the assessments do not reflect lower values because of the presence of adult uses, so even the speculation that their presence affected the assessment process is unfounded. The *TSBID Report*, consistent with other investigations, found no proof that adult uses adversely affect property values.[67] The *TSBID Report* also notes:

> One cannot assert that there is a direct correlation between these statistics [criminal complaints] and the concentration of adult use establishments on 42nd Street between Seventh and Eighth Avenue[s], or along Eighth Avenue between 45th and 48th Streets. But there is very definitely a pointed difference in the number of crime complaints between these study blocks and their controls.[68]

The balance of the Report deals with the results of various interviews undertaken by Insight Associates. In summary, the *TSBID Report* found insufficient data to prove or disprove that adult uses have the adverse secondary effect of lowering property values,[69] and the researchers could not assert that there is a direct correlation between criminal activity and a concentration of adult uses in New York City.[70]

No claim has ever been made that a "dead zone" exists in New York City or that pedestrians will not venture into areas such as Times Square which traditionally have had a concentration of adult uses. The *TSBID Report* showed that more people are flooding into Times Square than ever before, even though

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65. *Id.* at 25.

66. *Id.* at 26 (emphasis added).

67. *Id.*

68. *Id.* at 32. With respect to the overall data from police precincts, the Report suggests that there were more criminal complaints in the areas with adult uses than in the control areas. However, as stated above, the comparisons are generally not valid.

69. *Id.* at 26.

70. *Id.* at 32.

adult businesses remain in the area. *The New York Times* reported that:

> [A]nother finding that the group cheered as a reflection of reduced crime, it said some of the busiest blocks in the center of [Times Square] are now awash in tourists even at night . . . . The study found just over 5,000 people on that sidewalk between 11 P.M. and midnight, and the count dropped by less than 1,000 to 4,300 between midnight and 1 A.M.[71]

As research has shown, the "crowds have spread west from the square's center to the once forlorn stretch of Eighth Avenue between 44th Street and 50th Street."[72]

For example, no fewer than five adult establishments are still concentrated on this "once forlorn stretch" of Eighth Avenue,[73] and other adult establishments are still located throughout the Times Square area.[74] Apparently, the continued existence of adult establishments does not deter people from flocking into Times Square.

4. *The Hazards of Anecdotal Data.* Despite the failure to produce any empirical evidence demonstrating a correlation between adult uses and adverse secondary effects, the Department of City Planning and the Times Square Business Improvement District recommended the enactment of the Zoning Resolution. The City relied upon the assumption that general insights can be derived from subjective and highly idiosyncratic interviews of private business owners in the Times Square area.[75] However, upon close examination, the interviews reveal the prejudices and interests of these powerful economic groups.

Some community leaders in New York City have achieved enormous success in popularizing the notion that all the ills of Times Square somehow can be laid at the doors of the adult businesses. These individuals claim that the adult establish-

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71. Thomas J. Lueck, *Times Square, a Magnet for Tourists, Faces a New Problem: Pedestrian Gridlock*, N.Y. TIMES, Nov. 29, 1997, at B1.

72. *Id.*

73. Each of these establishments are plaintiffs in the *Amsterdam* lawsuit.

74. Some of the adult establishments located on 42nd Street, together with other theaters and business establishments situated on the single block between Seventh and Eighth avenues, were the subject of condemnation proceedings. There are still adult establishments located on 42nd Street just east of Broadway.

75. For example, in its Adult Entertainment Study of 1994, the Department of City Planning of the City of New York selected only six areas where adult uses were located and surveyed a limited number of "representatives," such as real estate brokers, police and sanitation workers and residents. Based on the assertions of those interviewed, the study concluded that adult entertainment establishments have a negative impact.

ments cause everything from serious crime to prostitution to drug trafficking. Such theories and contentions, often delivered with a misplaced air of authority, are unabashedly anecdotal. They have no scientific legitimacy and therefore should not be taken seriously.[76]

Significantly, an earlier version of the *TSBID Report*, relied upon by the City, acknowledges that "anecdotal evidence should not be considered evidence."[77] Additionally, the guidelines established by the American Society of Planning Officials recognize the hazards of such anecdotal evidence and that it cannot be substituted for empirical evidence.[78]

Anecdotal proof consisting of interviews with business people presents specific problems that dramatically affect its value. First and foremost, the explicit treatment of sex is extremely controversial, implicating strong religious and moral concerns. When a business person is asked for an opinion concerning whether an adult establishment might cause a decline in the value of surrounding property, his response may be influenced by his personal views on the material disseminated by the establishment. In other words, the ambient moral fear of open sexual expression that some find offensive accounts for the volatility of comments. Preconceptions that have no scientific basis undermine a reasoned discussion of the issues.

Furthermore, one of our most important freedoms is freedom from authority—not just from the government, but from families, neighbors and clerics. Freedom from their judgments and moral determinations is one good reason for requiring empirical proof to establish adverse secondary effects.

Finally, when drawing on a sufficiently wide range of anecdotal evidence, it is possible to make a case for almost any pro-

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76. For example, anecdotal evidence alleging that adult establishments attract prostitutes was introduced by the Times Square Business Improvement District. However, Dr. Charles Winick, who has written the leading work on prostitution in New York, indicates that there is no evidence to support any correlation between adult uses and prostitution. In his affidavit filed in *Stringfellow's of New York, Ltd. v. City of New York*, Winick supported this determination by citing authoritative studies and findings, in addition to his own research. Winick aff. ¶ 24, Stringfellow's of New York, Ltd. v. City of New York, 694 N.E.2d 407 (N.Y. 1998) (No. 103568-96 NY) (citing REPORT OF THE PRESIDENT'S COMM'N ON OBSCENITY AND PORNOGRAPHY (1970); CITY UNIVERSITY OF NEW YORK, "BRIGHT LIGHTS," STUDY OF TIMES SQUARE (1978); VERNON BOGGS ET AL., THE APPLE SLICED: SOCIOLOGICAL STUDIES OF NEW YORK CITY (1984)).

77. TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, REPORT ON ADULT USE ESTABLISHMENTS IN THE TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT AND THE EFFECT ON THE NEW YORK CITY COUNCIL'S PROPOSED NEIGHBORHOOD PROTECTION ACT 21 (1993).

78. DARWIN G. STUART, NO. 281, AMERICAN SOCIETY OF PLANNING OFFICIALS, PLANNING ADVISORY SERVICE, URBAN INDICATORS: THEIR ROLE IN PLANNING 10 (1972).

position. An acknowledged pitfall underlying an accumulation of anecdotal data is the danger that it may not be representative and therefore is rightly subject to extreme criticism. As a consequence, this questionable data should not form the underlying justification for a zoning ordinance.[79]

5. *Studies Conducted Elsewhere Are Irrelevant to the Circumstances of New York City.* The City of New York also relied upon studies conducted by various small towns and cities which concluded that adult uses caused adverse secondary effects in those particular communities.[80] The errors inherent in those studies render them practically useless as well as irrelevant to the problems of New York City. Under federal law, studies conducted by other communities can only be used to support a zoning regulation if the city "reasonably believes" that the studies are "relevant" to the problems it seeks to address.[81]

No one can reasonably argue that the towns and cities in which the other studies were conducted are comparable to New York City. Nor can any reasonable person conclude that the problems facing those cities are truly relevant to those claimed to be confronting New York City. With regard to the regulation of adult uses, population density and overall population are just two of the critical ways in which New York City differs from all other cities in the United States. New York City has a population density of 23,000 people per square mile. It has 54,000 re-

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79. For example, the CHELSEA STUDY, *supra* note 50, depends exclusively on anecdotal information which is the most unreliable and unstable form of evidence. For that reason it warrants no discussion.

80. DEPARTMENT OF PLANNING & DEV., TOWN OF ISLIP, N.Y., STUDY & RECOMMENDATIONS FOR ADULT ENTERTAINMENT BUSINESSES IN THE TOWN OF ISLIP (1980); DEPARTMENT OF CITY PLANNING, CITY OF LOS ANGELES, STUDY OF THE EFFECTS OF THE CONCENTRATION OF ADULT ENTERTAINMENT ESTABLISHMENTS IN THE CITY OF LOS ANGELES (1977); DEPARTMENT OF METRO. DEV., CITY OF INDIANAPOLIS, A SUMMARY OF A NATIONAL SURVEY OF REAL ESTATE APPRAISERS REGARDING THE EFFECT OF ADULT BOOKSTORES ON PROPERTY VALUES (1984); PLANNING DEP'T, CITY OF WHITTIER, CAL., AMENDMENT TO ZONING REGULATIONS, ADULT BUSINESSES IN C-2 ZONE WITH CONDITIONAL USE PERMIT (1978); CITY OF AUSTIN, OFFICE OF LAND DEVELOPMENT AND SERVICES REPORT ON ADULT ORIENTED BUSINESSES IN AUSTIN (1986); PLANNING DEP'T, CITY OF PHOENIX, ADULT BUSINESS STUDY (1979); MINN., ATTORNEY GENERAL'S WORKING GROUP ON THE REGULATION OF SEXUALLY ORIENTED BUSINESSES (1989); PLANNING & DEV. DEP'T, MANATEE COUNTY, FLA. ADULT ENTERTAINMENT BUSINESSES STUDY FOR MANATEE COUNTY (1987); PLANNING DEP'T, NEW HANOVER COUNTY, N.C., REGULATION OF ADULT ENTERTAINMENT ESTABLISHMENTS IN NEW HANOVER COUNTY (1989).

81. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986). In *Renton*, the Supreme Court concluded that studies from Seattle, relied upon by the town of Renton, could reasonably be believed to be relevant to the problems facing the town.

tail stores with 170 stores per square mile.[82] These startling statistics render the studies conducted in other localities completely irrelevant to the social realities and demographics of New York City.[83] Thus, they cannot be considered in determining whether or not adult establishments in the five boroughs of New York cause adverse secondary effects.

However, even more significantly, common sense dictates that when New York conducts its own investigations of adult uses and those investigations fail to conclude that any correlation exists between adult businesses in New York and adverse secondary effects, then a study in Manatee County, Florida, for example, is not probative or relevant to the facts in New York City. Therefore, studies in other areas cannot be relied upon to close bookstores in New York City. No one could reasonably believe that studies conducted by towns like Islip, New York, or Whittier, California, are relevant to the problems of a city the size of New York.[84]

Finally, many of the studies that purport to show that adult establishments cause some form of tangible social harm are seriously deficient when closely scrutinized.[85] In the early days of litigation over zoning laws that affected free speech, some of these initial studies were not effectively challenged. As a consequence, a misleading aura of certainty or infallibility enveloped these studies that obscured their experimental nature and unsound survey methodology. For instance, we now know that it is imperative to take into account whether studies are founded upon empirical proof or draw only upon anecdotal evidence. Many of those relied upon by New York City are based, to a large extent, on anecdotal evidence, and thus their findings are seriously suspect.[86]

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82. COMPTON'S ENCYCLOPEDIA, NEW YORK CITY ECONOMY (1997). There are approximately 17,000 eating establishments, 6,000 churches, temples and mosques and 400 art galleries in New York City. NEW YORK CONVENTION & VISITORS BUREAU, INC., FACTS ABOUT NEW YORK CITY (1998).

83. In 1977, New York City found significant differences between itself and Detroit. DEPARTMENT OF CITY PLANNING, REPORT TO CITY PLANNING COMMISSION REGARDING "AMENDMENTS OF THE ZONING RESOLUTION PURSUANT TO SECTION 200 OF THE NEW YORK CITY CHARTER" (1977). In light of that finding, it is difficult to understand how New York City can purport to rely on jurisdictions with even greater differences in population, size and population density.

84. Studies relied on by New York City include those conducted for Manatee County, Florida, with 283 persons per square mile; New Hanover, North Carolina, with 730 persons per square mile; Indianapolis, Indiana, with 2,000 persons per square mile; and Phoenix, Arizona, with a density of 2,335 persons per square mile.

85. *See supra* note 80 and accompanying text.

86. *Id.*

B. *An Adult Ordinance Must Be Narrowly Tailored*

An adult zoning ordinance must be narrowly tailored to affect only the category of uses that produce the unwanted effects.[87] This necessarily requires that a municipality investigate each category of adult uses since they can differ quite dramatically from one to another. The ordinance must then be "tailored" to remedy unwanted effects the city is trying to curb.

In New York City, no such investigation of whether a particular category of use causes the unwanted effects was ever considered. As a consequence, the City's Zoning Resolution is concededly not tailored to fit only those adult establishments that are claimed to cause secondary effects.[88] For instance, the City produced no evidence that small neighborhood adult-oriented videostores cause any adverse secondary effects. Yet, businesses such as the Christopher Street Book Shop in Greenwich Village, which is an integral part of that community, is banned by the Zoning Resolution. This is a matter of considerable concern because 64 of the 104 adult establishments in Manhattan are either bookstores or videostores. These small businesses, constituting over sixty percent of the adult uses in Manhattan, will be wiped out.

C. *The Ordinance Must Allow for Reasonable Alternative Avenues of Communication*

A city must provide reasonable alternative sites for those businesses that are required to relocate under the zoning ordinance.[89] A proper reading of the term "suitable" requires that

87. Holmberg v. City of Ramsey, 12 F.3d 140, 143 (8th Cir. 1993) (holding that city has burden of showing substantial governmental interest); Christy v. City of Ann Arbor, 824 F.2d 489, 493 (6th Cir. 1987) (holding that burden is on the city to show that more than a rational relationship exists between the ordinance and the asserted government interest); Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1333 (9th Cir. 1987) (holding that county bears burden of showing narrow tailoring); Adultworld Bookstore v. City of Fresno, 758 F.2d 1348, 1352 (9th Cir. 1985) (holding that government has burden to demonstrate a compelling interest to justify ordinance); Basiardanes v. City of Galveston, 682 F.2d 1203, 1216 (5th Cir. 1982) (holding that city bears burden of showing that ordinance responds to adverse secondary effects of adult theaters and "is narrowly drawn to serve a legitimate interest with only the minimum intrusions upon First Amendment freedoms").

88. The Second Department, relying on *Islip*, recently held that a town did not "demonstrate that its ordinance was reasonably limited to *those establishments* found to have secondary detrimental effects on the community." Town of Huntington v. Pierce Arrow Realty Corp., 216 A.D.2d 287, 288 (N.Y. App. Div. 1995) (emphasis added). As a consequence, it reversed a preliminary injunction granted in favor of the town. *Id.* at 289.

89. *Islip*, 540 N.E.2d at 223.

the public have reasonable access to protected information and that the locations for the displaced adult businesses be commercially viable. Where there is an abundance of suitable alternative sites, an ordinance will only have an "incidental effect" on free speech. Where, as here, nearly all of the existing businesses will be virtually eradicated, constitutional rights of free speech are in jeopardy.[90] Accordingly, courts should approach such an ordinance with greater scrutiny.

The relocation sites proposed by New York City are predominantly situated in destitute, desolate areas occupied by warehouses, oil tank farms, public utilities or other facilities such as the Consulate of the People's Republic of China that render them physically "unsuitable" for any kind of retail establishment. Moreover, it is crucial that the residents of New York, as well as any of the millions of annual visitors to the City, not be required to travel to the outer fringes of other counties to enjoy this form of legitimate entertainment. By any standard imaginable, "suitable" sites must, of constitutional necessity, mean locations that are commercially viable as well as readily accessible to the public. To suggest that bookstores and theaters can be relocated to sites that are patently uninhabitable for any retail or generic commercial use or not readily accessible to the public, is in direct defiance of the federal constitution.

Under federal law, there are not sufficient alternative sites which are a part of the generic commercial market to accommodate all of the displaced businesses.[91] To require them to relocate in remote areas where there are no other retail establishments or infrastructure for such establishments does not provide an equivalent, let alone adequate, forum for this message—a message which has a right to compete with other forms of entertainment.[92] Furthermore, exiling these businesses to the far-

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90. By Mayor Giuliani's own admission, the number of available sites are not only few, but unsuitable. He has stated that after the ordinance is applied, there will be "no more than 20 peep shows, strip clubs and porno shops left within six months" in New York City. Gregg Birnbaum et al., *Apple's Sex Shops Face XXX-ILE! Smut-Free Zones Win Court's OK,* N.Y. POST, Feb. 25, 1998, at 6. This statement belies earlier and continued claims by City officials that the amount of available space will not decrease, but rather accommodate a significant expansion of the adult entertainment industry in New York City.

91. *Cf.* Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1532-33 (9th Cir. 1993) (enjoining the enforcement of a zoning ordinance in Los Angeles because of the inadequacy of alternative sites).

92. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (noting that even if alternative facilities were available, that fact alone does not justify prior restraint); Bery v. City of New York, 97 F.3d 689, 698 (2d Cir. 1996) (informing street vendors that they can sell their artwork in galleries is no remedy for denying them access to side-

thest reaches of the City denies the public and potential patrons access to a constitutionally protected expression.[93]

Color photographs taken of those areas deemed permissible for adult uses convey, with shocking immediacy, the unbearably oppressive nature of the sites. These piercing photographs show what might be labeled "dead ground." The pictures show drums of hazardous waste, oil tank fields, marshes, wetlands, flooded lots, unimproved and closed roads, unpassable sidewalks, walls of concrete boulders and industrial plants. They also show recycling transfer stations, Department of Sanitation buildings, a United States Postal Service facility, a United Parcel complex, New York City Fire Department buildings, United States Customs warehouses and the New York Aquarium parking lot. These pictures graphically demonstrate what an utter sham the City's plan of relocation actually is. No text, however detailed and refined, has the same effect as the photographs of these alien sites that are incompatible with any prospect of commercial success. Stranded and deserted in these afflicted locations, no retail establishment could survive—let alone videostores, cabarets and theaters. Thus, in no way can these marginal relocation areas come within the scope of the Court of Appeal's concept of "suitable" sites where, for example, bookstores can offer expression and people can conveniently patronize them.

While *Renton* set forth the general proposition that a city provide for "reasonable alternative" sites,[94] it neglected to define particular criteria for judging availability. It therefore left to the circuit courts the application of this general principle.

The case that examines most carefully the standards for assessing the viability of alternative sites is *Topanga Press, Inc. v. City of Los Angeles*.[95] There, the enforcement of a zoning ordinance in Los Angeles was enjoined by the Ninth Circuit because of the inadequacy of alternative sites. The facts of *Topanga* are remarkably similar to the circumstances present in New York City, and thus the holding of the Ninth Circuit is compelling.[96]

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walks), *cert. denied*, 117 S.Ct. 2408 (1997); Gold Coast Pub. Inc. v. Corrigan, 798 F. Supp. 1558, 1571-72 (S.D. Fla. 1992) ("When evaluating the availability of alternative channels, courts must consider the alternative channels left open within the public forum, not ones available on private property."), *aff'd in part, rev'd in part on other grounds*, 42 F.3d 1336 (11th Cir. 1994).

93. *See Bery*, 97 F.3d at 693 (indicating that displaying art on the street reaches people "who might not choose to go into a gallery or museum or who might feel excluded or alienated from these forums").

94. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53 (1986).

95. 989 F.2d 1524 (9th Cir. 1993).

96. The *Topanga* court determined that there were 102 existing adult establish-

Topanga sets forth two standards to determine whether an adult establishment has been afforded a reasonable opportunity to relocate. First, the court must assess "whether relocation sites provided to businesses may be considered part of an actual business real estate market."[97] Second, the court must then look to "whether, after excluding those sites that may not properly be considered to be part of the relevant real estate market, there are an adequate number of potential relocation sites for already existing businesses."[98] The *Topanga* standards are highly effective in determining the relevant real estate market.[99]

In *Stringfellow's*, the City failed to meet its burden by offering few, if any, facts concerning the reasonableness or adequacy of the remote areas allotted for approximately one hundred fifty adult establishments required to either close or relocate.[100] Such

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ments within the City of Los Angeles. *Id.* at 1532. Of the more than 100 establishments, the City estimated that only 5 were in compliance with the restrictive provisions of the ordinance. *Id.* at 1532-33. Thus, at least 95 adult establishments had to relocate under the ordinance.

97. *Id.* at 1530.

98. *Id.* Other courts have used the *Topanga* test in evaluating the suitability of alternative sites. A court recently dismissed as absurd a study which included "certain large tracts that could not realistically be treated as available for adult uses" such as "the federal post office and customs house, railroad rights of way and a large tract of about 200 acres adjacent to O'Hare Airport." BBI Enterprises, Inc. v. City of Chicago, 874 F. Supp. 890, 894 (N.D. Ill. 1995). *See also* Adultworld Bookstore v. City of Fresno, 758 F.2d 1348, 1352 (9th Cir. 1985) (finding that preliminary injunction should have been ordered where evidentiary hearing showed that ordinance requires 9 of 10 existing adult businesses to relocate but that relocation sites are virtually nonexistent); North Street Book Shoppe, Inc. v. Village of Endicott, 582 F. Supp. 1428, 1432 (N.D.N.Y. 1984) (finding that no reasonable alternative avenues were provided); Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 96 (6th Cir. 1981) (finding no alternative avenue for expression where there is no location within the confines of the city that is not within 500 feet of another regulated use); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1209 (N.D. Ga. 1981) (finding reduction of public access and no reasonable alternative avenues). Courts have found that land is not, in fact, available if its "physical and legal characteristics make it impossible for any adult business to relocate there." Grand Brittain, Inc. v. City of Amarillo, 27 F.3d 1068, 1069 (5th Cir. 1994). Therefore, the land which New York City labels as "permissible" and "reasonable" for relocation must be both physically and legally suitable for the operation of adult establishments.

99. Thus, the *Topanga* analysis would exclude land that is submerged under the ocean, land currently in use as airstrips at international airports, sports stadiums, areas not "readily accessible to the public," areas that are inadequate or undeveloped for any generic commercial business, areas lacking proper infrastructure, oil tank farms or refineries, horse racing tracks, sewage treatment facilities, warehouses, petroleum gas storage swamps, landfills, junkyards, steel yards, car storage lots or single purpose buildings such as shipping yards. 989 F.2d at 1532. Common sense dictates that this land is impractical for any commercial business.

100. The computers at the Department of City Planning generated maps of each borough indicating the limited areas to which adult uses have been banished. In arriv-

horrendous locations, including uninhabitable and undevelopable land, could not possibly have been contemplated by the *Renton* Court as "suitable." These small, remote islands of space, located in the shadow of oil tanks and sewage disposal plants, are constitutionally unacceptable.

The separation requirements are excessive in a city as densely populated as New York. For example, there are at least 6,000 houses of worship and 1,890 schools in the City.[101] If 500-foot circles were drawn around each of the thousands of "sensitive receptors" in New York City, such as churches and schools, this could potentially exclude adult businesses from at least 142,020 acres of the City.[102] Thus, sixty-eight percent of the City may be excluded merely through the requirement that adult establishments be more than 500 feet from churches and schools.

Moreover, costs can be considered when determining whether a specific site is reasonably suited for operation of a business.[103] That factor is especially critical in assessing whether vast buildings and undeveloped land in New York City are reasonably suitable for the relocation of bookstores and theaters. Requiring an adult theater or cabaret to relocate to a warehouse in a desolate area, or forcing an adult use that currently rents a storefront in Manhattan to relocate to an area on Staten Island, involves a considerable cost.[104] Regardless of whether one categorizes a warehouse or a swamp as physically

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ing at the number of potential relocation sites, the City determined that approximately 514 little circles, representing separate adult businesses, will fit within certain areas of their maps. There are no facts to demonstrate that the sites represented by these areas are "likely to be developed for commercial use" or are otherwise legally acceptable. The City has not surveyed the areas to determine if they are actually suitable for any retail or commercial use. There is no indication as to where these specific sites are located. There is nothing to disclose the physical condition of the locations. Nowhere is it revealed whether a site possesses any infrastructure such as sidewalks, lighting or a sewage system. Without investigating whether any of those areas really include landfills or oil tank farms, the City has arbitrarily concluded that there are approximately 500 potential sites for adult uses.

101. N.Y. CONVENTION & VISITORS BUREAU, INC., FACTS ABOUT NEW YORK CITY (1998); *see also* THE WORLD ALMANAC 618 (1993). This number does not even take into account the day-care programs that the City contends are included within the definition of a "school."

102. Area acres within the City total 205,952. THE 1994-95 GREEN BOOK, OFFICIAL DIRECTORY OF THE CITY OF NEW YORK (1994).

103. *Topanga*, 989 F.2d at 1530.

104. Relocation costs would involve obtaining new licenses and certificates of occupancy, approval from community boards and necessary building permits. In some cases, costs would involve implementing necessary infrastructure and basic utilities. These costs merit consideration in deciding whether a specific relocation site is part of the relevant market.

or economically unsuitable, it is not reasonable to define such a site as part of the real estate market that any business would choose.[105]

D. *In New York City the Availability of Reasonable Alternative Locations Should Be Considered on a Borough-by-Borough Basis*

The Supreme Court has held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[106] Therefore, access to adult expression in one county of New York should not be restricted merely because similar expression may be available in another county. Given the varying scope of zoning authority across communities, the courts must remain particularly attentive to First Amendment protections afforded to minority groups "against the 'standardization of ideas . . . by . . . dominant political or community groups.' "[107]

In a city the size of New York, reasonable alternative locations should be assessed on a borough-by-borough basis, not on a city-wide basis.[108] The City's proposed relocation sites cover the entire five boroughs and are not allocated to each borough. Businesses that are currently located in one borough should not be forced to migrate to another borough because of an insufficient number of alternative sites within the host borough. As a consequence, implementation of the Zoning Resolution would ultimately require establishments in Manhattan to move to outer boroughs such as Staten Island or Brooklyn. This creates two serious constitutional problems: (1) the requirement that a business which may have existed in one location for over twenty years be uprooted and relocated to another county; and (2) the requirement that consumers of the protected entertainment, which may cater to unconventional sexual preferences, now have to travel to another county to enjoy this entertainment.

These are each unduly burdensome infringements on the exercise of free speech. Forty-one of the forty-four adult-oriented businesses in Queens County will be required to close under the

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105. *Topanga*, 989 F.2d at 1531.

106. Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76-77 (1981), *citing* Schneider v. State, 308 U.S. 147, 163 (1939).

107. *Schad*, 452 U.S. at 79 (Blackmun, J., concurring) (quoting Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949)).

108. New York City is unique in that each borough in the City constitutes a distinct county. Because of this characteristic, each borough should be treated as a separate and distinct unit.

Resolution. That is, more than ninety-three percent of adult-oriented businesses in Queens will be required to close. Bookstores, theaters and cabarets should not be forced to move from one county to another because of an insufficient number of alternative sites within their own county.

The proposition that allocation of alternative sites should be made on a borough-by-borough basis is further supported by the demographics of each county.[109] Each county or borough has its own president, who is authorized to review and comment on major land-use decisions and propose sites for facilities, as well as engage in strategic planning for that locality. Each borough has its own seat of government, schools, shopping centers, courthouses, police precincts, museums, historical society and other services that are geographically unique. Moreover, each of the five counties of New York City differs significantly from the others in terms of characteristics such as race, ethnicity, ancestry, national origin, cultural traditions, residential patterns, economic background, household and marital patterns, patterns of leisure use, and other social elements.[110] Therefore, the allocation of alternative sites on a borough-by-borough basis is not only rational but fulfills the constitutional requirement that the public have convenient access to this brand of entertainment.

E. *The Zoning Resolution Is Fatally Vague*

Finally, the language of the Zoning Resolution is vague. Due process requires that statutes be drafted so that " 'individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms.' "[111] The Zoning Resolution is deficient in this regard because it fails to describe with sufficient particularity the type of business covered by the Resolution so that the average person can be guided in his action.

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109. The 1990 Census reports the following population figures for each of the counties that make up greater New York City: New York County (Manhattan), 1,487,536; Kings County (Brooklyn), 2,300,664; Queens County (Queens), 1,951,598; Bronx County (the Bronx), 1,203,789; and Richmond County (Staten Island), 378,977.

110. Some time ago, Staten Island attempted to secede from New York City because of a sense of independence and a recognition of certain demographic and economic differences that alienate it from the other four boroughs. *See, e.g.*, City of New York v. State of New York, 562 N.E.2d 118 (N.Y. 1990); Editorial, *The Case Against Divorce*, N.Y. NEWSDAY, Mar. 21, 1993, at 31. "Secessionist fever" has similarly found roots throughout Brooklyn and Queens. *Id.*

111. Pringle v. Wolfe, 668 N.E.2d 1376, 1382 (N.Y. 1996) (quoting Foss v. City of Rochester, 480 N.E.2d 717, 719-20 (N.Y. 1985)), *cert. denied*, 117 S.Ct. 513 (1996).

The Zoning Resolution defines an adult theater as one which "regularly" features films, motion pictures or videocassettes characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas."[112] The imprecise language of the Zoning Resolution fails to provide a reasonable degree of certainty. Individuals of ordinary intelligence are reduced to guessing the meaning of statutory terms. For example, the Resolution contains nothing to enlighten anyone as to what frequency constitutes "regularly" or what is "characterized by an emphasis." A theater operator has no way of knowing whether or not a film or videocassette that may be exhibited in a theater (which often contains some kind of frontal nudity or simulated sexual activity) *"emphasizes"* the prohibited activity. Furthermore, films showing either "specified sexual activities" or "specified anatomical areas," as defined in Section 12-10(c), are exhibited frequently in theaters all over the City. Moreover, the Resolution fails to indicate whether or not drawings or literary descriptions of specified sexual activities or anatomical areas would fall within the definition.[113]

The Resolution empowers building inspectors with unfettered authority to decide whether a bookstore falls within the definition of an "adult establishment" or whether a "substantial portion" of its stock-in-trade is printed matter "characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas.' "[114] Much will depend on the crude command and control capabilities that will ultimately guide the enforcement of the Resolution.

Unlike other ordinances upheld by courts which clearly identify adult uses by virtue of the fact that they are establishments which exclude minors by reason of age, New York City's Zoning Resolution provides no clear-cut definitions as to what constitutes an adult establishment. The text of the ordinance contains no guidelines for movie exhibitors, dance hall owners, bookstore managers, building inspectors or patrons. Even if the owner of a bookstore wished to comply with the Zoning Resolution, he or she would have absolutely no indication as to whether or not the establishment was in compliance. Moreover, a videostore owner might believe that tapes such as *Body Heat* or *Last Tango in Paris* are permissible whereas a building in-

112. NEW YORK, N.Y., ZONING RESOLUTION § 12-10(c).

113. Thus the poetry of Sapphire, a controversial African-American lesbian poet, whose work frequently contains descriptions of the activities and anatomical areas specified in the Resolution, might fall within the grasp of the ordinance.

114. *Id.* § 12-10(a).

spector, imposing his or her judgment, might conclude that the films are characterized by an emphasis upon the depiction or description of "specified sexual activities" and therefore impermissible. Anything that leaves so much discretion to a government official should be suspect and strictly scrutinized. This is especially the case where controversial expression is at issue.

CONCLUSION

One of the most cherished policies of this nation is that we, the people, are allowed to decide what books we will read and what films we will see for our own amusement. The reality of this new legislation is that this important right of choice is being preempted by the City through the manipulation of its zoning powers. Under this legislation, free speech will be sacrificed to censorship while building inspectors determine whether a bookstore or theater comes within the grasp of the restrictive Zoning Resolution. When we delegate to building inspectors the responsibility of deciding what the rest of us will be allowed to read and see, then we must ask ourselves the question put to the Romans 2,000 years ago by Juvenal: "But who will guard the guards?"