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Constitutional Law-Explicit Sex and the First Amendment

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Mattis v. Schnarr exemplifies judicial activism in a touchy area of public policy. For those who resent such intrusions into the normal legislative processes, it is judicial activism at its worst. For those who believe the courts must play the primary role in safeguarding civil rights, it is judicial activism long overdue.

MICHAEL W. RHODES

CONSTITUTIONAL LAW—EXPLICIT SEX AND THE FIRST AMENDMENT

Young v. American Mini Theaters, Inc.[1]

In 1972, Detroit amended its "Anti-Skid Row Ordinance." The original ordinance contained a finding that certain types of business establishments, when concentrated in particular areas, had deleterious effect on the neighborhoods in which the concentration took place.[2] Accordingly, the ordinance provided a system of inverse zoning for "regulated uses"[3] which, apart from special waiver, could not be located within 1,000 feet of two other regulated uses or within 500 feet of a residential zone. The 1972 amendments[4] included "adult" book stores, and "adult" motion picture theaters in the regulated use category. If the theater was "used to present" materials "distinguished or characterized by an emphasis on matter depicting . . . 'Specified Sexual Activities' or 'Specified Anatomical Areas,' "[5] it was classified as an "adult" establishment. "Adult" book stores were similarly defined. In addition, the types of "depictions" proscribed by the ordinance were explained in detail.[6]

Respondents operated two adult motion picture theaters. One began exhibiting adult films after the effective date of the ordinance and was located within 1,000 feet of two other regulated uses. The other was denied a certificate of occupancy because of the intention to exhibit adult films in a location also violative of the ordinance.

The theatre owners brought an action against Detroit city officials in the United States District Court for injunctive relief and a declaratory

1. 427 U.S. 50 (1976).
2. DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.000 (1962).
3. The businesses regulated were bars, transient hotels and motels, pawnshops, pool halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls.
4. DETROIT, MICH., AMENDMENTS TO OFFICIAL ZONING ORDINANCE, Nos. 742-G, 743-G (Nov. 11, 1972).
5. DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 32.007 (1972).
6. *Id.*

judgment that the amendments to the ordinance were unconstitutional. The theatre owners contended the ordinance was so vague as to violate the Due Process Clause of the fourteenth amendment, that it was an invalid prior restraint on communication protected by the first amendment, and that the classification of theaters on the basis of the content of their films violated the Equal Protection Clause of the fourteenth amendment.

The district court upheld the validity of the ordinance,[7] but the Court of Appeals for the Sixth Circuit reversed.[8] The United States Supreme Court reversed the judgment of the court of appeals. The plurality, per Mr. Justice Stevens, held that respondents were unaffected by the alleged vagueness of the ordinance. Thus, the Court rejected their claim of inadequate notice resulting in a denial of procedural due process.[9] The case was not considered to be one in which important protected expression of persons not before the Court would be sufficiently "chilled" by the alleged vagueness in the ordinance to justify respondents nonetheless raising the vagueness issue.[10] The Court further determined that no impermissible prior restraint was imposed by the ordinance[11] and that the ordinance did not violate the Equal Protection Clause of the fourteenth amendment.[12]

Although the case presents several other notable issues, the refusal of the Court to grant respondents standing to litigate the vagueness and overbreadth issues, and the two differing approaches used to uphold a content-discriminatory "place" restriction on heretofore protected[13] speech are the two issues examined herein.

On several prior occasions, the Court has determined that a defendant whose own speech was unprotected had standing to challenge the constitutionality of a statute which purported to prohibit arguably protected speech.[14] The two prerequisites for litigants wishing to avail themselves of the standing exception recognized in first amendment overbreadth attacks are a showing that the statute is not readily subject to a narrowing construction in the state courts[15] and that a real and substantial deterrent effect on

7. 373 F. Supp. 363 (E.D. Mich. 1974). The court upheld the 1,000 foot provision. It found that it was no greater than essential and imposed only a slight and incidental burden on first amendment rights.

8. 518 F.2d 1014 (6th Cir. 1975). The reversal was based on the invalidity of the ordinances under the Equal Protection Clause of the fourteenth amendment.

9. 427 U.S. at 59.

10. *Id.* at 61.

11. *Id.* at 62-63.

12. *Id.* at 63-73.

13. Because there had been no judicial determination of the movies respondents wished to exhibit declaring them obscene under the standards set forth in Miller v. California, 413 U.S. 15 (1973), the materials must be presumed within the protection of the first amendment. *See also* note 25 *infra*.

14. *See, e.g.*, Lewis v. New Orleans, 415 U.S. 130 (1974); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Gooding v. Wilson, 405 U.S. 518 (1972); Dombrowski v. Pfister, 380 U.S. 479 (1965).

15. Erzonznik v. Jacksonville, 522 U.S. 205 (1975); Dombrowski v. Pfister, 380 U.S. 479 (1965); Cox v. New Hampshire, 312 U.S. 569 (1941).

protected speech is caused by the statute's overbreadth.[16]

As Mr. Justice Blackmun pointed out in his vigorous and well reasoned dissent, the Detroit ordinance presents substantial overbreadth problems because of the vagueness of its operation.[17] Under the ordinance, the exhibitor has the responsibility of monitoring his theater's classification. To do this he must master the ambiguous "characterized by an emphasis" and "used for presenting" language of the ordinance.[18] Should the exhibitor determine that his theater is within the "adult" classification, he must then constantly evaluate the status of all of his neighbors within 1,000 feet who may also be included in any of the various "regulated use" categories. In addition, the ordinance is silent as to which "use" (assuming there appear to be three within a given 1,000 foot radius) is the violator, and which will be prosecuted.

Thus, although the ordinance refers to expression which must be presumed constitutionally protected,[19] it is not difficult to envision how the vagueness of its operation might cause a "chilling effect." Instead of undertaking the task of monitoring his own films, as well as the operation of all neighbors who might at some time fall into the "regulated use" category, the exhibitor might well forego showing any sexually explicit non-obscene films.

Confronted with an arguably overbroad proscription, the plurality had then to determine if the ordinance was readily subject to a narrowing construction. This requirement, characterized as an "effective safeguard against the loss of protected freedoms of expression" in *Dombrowski v. Pfister*,[20] involves a judgment on the part of the Court as to whether the legislation can be rehabilitated in a single adjudication. Although the dissent uncovered no less than five potentially vague areas, the plurality cited only one potential area of vagueness. Thus it found the "limited amount" of uncertainty in the ordinance easily susceptible of a narrowing construction.[21]

Having decided the ordinance could be so narrowly construed, the Court had to consider whether it created a real and substantial deterrent

16. See Broadrick v. Oklahoma, 413 U.S. 601 (1973), where the application of the concept was limited to situations in which the statute was attempting to regulte actions and conduct as well as speech. However, the requirement was reiterated in Erznoznik v. Jacksonville, 422 U.S. 205 (1975), in a situation where the distinction between speech and action was elusive, without mention of the above limitation. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970), and Note, *Overbreadth Review and The Burger Court*, 49 N.Y.U.L. REV. 532 (1974).

17. 427 U.S. at 88-96 (1976). The Court has long recognized that "the threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . . [and that the] government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433 (1963).

18. DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 32.007 (1972).

19. *See* note 13 *supra*.

20. 380 U.S. 479, 492 (1965).

21. 427 U.S. at 61.

effect on protected expression. The plurality acknowledged that some expression containing the above "depictions" might indeed be chilled, but reasoned that "an exhibitor's doubts" as to whether or not a particular film may be shown in his theater did not involve the "kind of threat to the free market in ideas and expression"[22] sufficient to warrant a grant of standing.

The tenor of the opinion unmistakably suggests either an alteration of the deterrent effect requirement or the creation of a new requirement—that the expression upon which the statute exerts a deterrent or "chilling" effect must be "important." The view that the "importance" of speech might have an effect on standing requirements had previously been considered only in the narrow context of situations involving both speech and conduct, and then only with respect to the deterrent effect of the statute being substantial or "important" as to the speech.[23] Because of its use in buttressing both the "narrowing" and "deterrent" elements, the plurality would now apparently impose a third requirement, focusing on the "importance" to society of the content of the expression being deterred, for litigants seeking to vindicate the rights of absent persons in first amendment overbreadth attacks.

As often occurs in constitutional law cases, those things left unsaid may be of greater significance than the doctrines dealt with directly. Putting aside all considerations of whatever overbreadth might be created by the vagueness of the ordinance's operation, there can be no question as to its literal facial overbreadth. Included within the ordinance's proscription are various "anatomical areas" without regard to sexual conduct.[24] Nudity per se is not sexual conduct and without more can *never* be proscribed under the current test for obscenity promulgated in *Miller v. California*.[25] "Anatomical areas," and not "specified sexual activities" comprise a large part of regulated expression in the ordinance; thus it is clearly overbroad. The overbreadth problem is de facto vitiated by the holding in part three of the plurality opinion. However, the implications of the Court's approval of an ordinance proscribing *mere nudity* as an area of permissible regulation are startling in light of the *Miller* requirement of *sexual conduct*.[26]

Closely related to the "importance of the content to society" concept in the above standing discussion is its use by the plurality in substitution for what was indicated would be an analysis of the classification's consistency

22. *Id.*

23. "[O]verbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment. . . ." Broadrick v. Oklahoma, 413 U.S. 601, 614 (1973).

24. DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 32.007 (1972).

25. 413 U.S. 15 (1973). "We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. . . . [W]e now confine the permissible scope of such regulation to works which depict or describe *sexual conduct*." (emphasis added). *Id.* at 23-24.

26. The lack of any facial overbreadth consideration is further confused by Justice Stevens' specific reference to a body of facial overbreadth cases in a discussion ostensibly confined to vagueness. 427 U.S. at 59-60 n. 17.

with the Equal Protection Clause.[27] It was precisely the classification's inconsistency with the Equal Protection Clause, however, that necessitated the extreme departure of the plurality in the "importance" holding.

Because claims of abridgment of freedom of expression are joined with claims of denial of equal protection, this part of the case might be characterized in either first amendment or equal protection terms.[28]

The decision to characterize a particular case in first amendment rather than equal protection terms will depend upon the degree of first amendment infringement perceived. The greater the burden on first amendment rights, the more necessary it becomes to abandon the equal protection test of an incidental infringement in pursuit of a compelling state interest and to consider the infringement solely in light of the first amendment.[29]

Without doubt, content regulation is at the core of the first amendment, thus if first amendment protections are to have any significance apart from the protections afforded by the Equal Protection Clause, the first amendment tests determining the protection of speech by an analysis of content, must be definitive restatements of what limited applicable "compelling state interests" may be found.

That the ordinance imposes a "place" restriction was perhaps the only point upon which all nine justices agreed. Historically, the Court has upheld time, place, and manner restrictions on protected expression if they were necessary to further significant or "compelling" governmental interests, and were *content neutral*.[30] While requiring equality of treatment within the class of protected expression, the Court has not expressly precluded all regulation based upon content.[31] However, the validity of the distinction drawn via content would be contingent upon a finding that the expression discriminated against, given its content and the surrounding circumstances, was unprotected.[32]

Clearly, the ordinance in *Young* imposed a place restriction that was not content neutral. An examination of the traditional first amendment

27. *Id.* at 63.

28. However, analyzing the case in terms of equal protection allows the Court more leeway in that it need not define as thoroughly the substantive right involved.

29. Clearly, the elements of the test enunciated in United States v. O'Brien, 391 U.S. 367 (1968) support this conclusion. In *O'Brien*, the Court utilized equal protection analysis only because the statute in question did not abridge free speech on its face, and the effects on first amendment rights were deemed incidental and unrelated. *Id.* at 377. *See also* text accompanying notes 56-59, *infra*. *See generally* N. CAPALDI, CLEAR AND PRESENT DANGER, THE FREE SPEECH CONTROVERSY (1969); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

30. *See, e.g.*, Police Dep't of Chicago v. Mosely, 408 U.S. 92, 98-99 (1972).

31. *Id.* at 98-100.

32. This would certainly preclude content regulation on the face of the statute. "Predictions about imminent disruption . . . involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter." *Id.* at 100-01. *See also* Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring).

justifications of content regulation yields the conclusion that the only arguably applicable test determining protection via content would be the "fear of imminent peril" test.[33] However, after the Court's previous rejection of this rationale as a basis for denying protection to obscene expression,[34] the plurality could not, without fear of an anomalous result, find the non-obscene "depictions" at issue in *Young* to fall within the purview of this test. In addition, it must be shown that the ordinance restricting protected expression was the least drastic alternative available to the city.[35] Because Detroit's avowed justification revolves around the prevention of crime in the areas of "regulated use" concentration,[36] the traditional deterrent of punishment for violations of the law appear more directly attuned to the realization of such a purpose,[37] without abridging the right of free expression.

An addition impact of *Young* is the plurality's treatment of sexually explicit non-obscene material. The plurality's determination that lower importance of the content to society warrants lower protection for non-obscene sexual expression demonstrates further the willingness of the current Court to retreat from earlier holdings in the area. In *Roth v. United States*,[38] the Court recognized sex as a great motive force in human life, a vital problem of human interest, and warned that "[T]he door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and only opened the slightest crack necessary. . . ."[39] Eventually, in *Miller v. California*,[40] the door which was to remain so tightly closed in *Roth* seemingly fell off its hinges. In *Miller*, the Court announced, "We do not see the harsh hand of censorship of ideas—good or bad . . . and 'repression' of political liberty lurking in every state regulation of

33. Brandenburg v. Ohio, 395 U.S. 444 (1969).

34. The "effects" approach, although mentioned in Paris Adult Theater v. Slaton, 413 U.S. 49, 58 (1973), (arguable correlation between obscene material and crime) historically has not been viewed as the reason obscene material is without the protection of the first amendment. Like libel, the basis for withholding first amendment protection is that it is without social importance. Roth v. United States, 354 U.S. 476, 484 (1957). The "arguable correlation' cited by Mr. Chief Justice Burger in *Paris Adult Theater, supra*, was a three-man minority report of an eighteen-man commission. THE REPORT OF THE COMMISSION ON OBSCENTIY AND PORNOGRAPHY 243 (1970).

35. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See also* United States v. O'Brien, 391 U.S. 367, 377 (1968); United States v. Robel, 389 U.S. 258, 268 (1967).

36. 427 U.S. at 71 n.34.

37. Whitney v. California, 274 U.S. 357, 378 (1928) (Brandeis and Holmes JJ., concurring). *See also*, Wood v. Georgia, 370 U.S. 375, 389 (1962); Schneider v. Irvington, 308 U.S. 147, 162-163 (1939).

38. 354 U.S. 476 (1957).

39. *Id.* at 487-88.

40. 413 U.S. 15 (1973).

commercial exploitation of human interest in sex."[41]

Such reasoning has been glaringly put to life in *Young*, even to the point of reaching expression entirely protected under the test expressed in *Miller*.[42] Indeed, the statement by Mr. Justice Stevens in *Young*, that even in upholding this regulation, the paramount obligation of governmental neutrality has not been violated because the regulation does not discriminate according to "whatever social, political, or philosophical message"[43] the film communicates, demonstrates even more vividly the political cast toward which the protections of freedom of expression may be headed. Dispensing with whatever minimal differences are involved between "discussion" and "expression," it is interesting to note that at least four members of the Court, in effect, do not view erotic but non-obsene material an issue "about which information is needed or appropriate to enable members of society to cope with the exigencies of their period."[44]

Baldly asserting that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude. . . ."[45] and holding that the state may legitimately "classify" such materials differently,[46] the plurality skirted the traditional tests for determining a content-oriented ordinance's constitutionality under the first or fourteenth amendment, while avoiding the anomaly of finding the materials unprotected. By so categorizing the interests involved, the plurality ultimately relegated the ordinance's classification to a status justifiable under the mere "rational relationship" test.[47]

By using the "importance of the content of society" notion to reduce materials dealing explicitly with sex to an area of quasi-protection, the plurality would take what Mr. Justice Harlan called an "intractable"[48] problem and complicate it further. A change from a simpler "protected-unprotected" theory, which itself has been described as a "strained effort to trap a problem,"[49] to an even more elusive theory can only produce continued damage to first amendment freedoms.

The approach used by Mr. Justice Powell in his concurring opinion is significantly different than that employed by the plurality. He professed disagreement with the importance conclusions used in both the standing and equal protection holdings of the plurality,[50] but found that the ordinance might be otherwise upheld.

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41. *Id.* at 35-36.
42. *See* text accompanying notes 25, 26 *supra*.
43. 427 U.S. at 70.
44. Thornhill v. Alabama, 310 U.S. 88, 102 (1939).
45. 427 U.S. at 70.
46. *Id.* at 70-71.
47. Obviously, the requisite relationship was found. The language of the plurality opinion, however, borders on complete judicial deference. *Id.* at 71-73.
48. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (separate opinion); Memoirs v. Massachusetts, 383 U.S. 413, 456 (1966) (Harlan, J., dissenting).
49. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 11.
50. 427 U.S. at 73 n.1.

Mr. Justice Powell viewed the impact of the ordinance as merely "incidental and minimal"[51] on first amendment interests. This was so because the tests he used to determine impact considered only the possible inhibitory effects on creators and audiences,[52] and assumed that the economics involved in forcing the theater owner either to relocate or to stop exhibiting erotic films were unimportant or had no direct carry-over to first amendment inquiry. Crucial to Justice Powell's analysis was the assumption that first amendment rights with respect to the expression involved in *Young* were primarily vested in creator and audience.

So far as protected expression is concerned, first amendment guarantees have always included the exhibitor or middleman;[53] thus, the absence of any equal consideration of the ordinance's effect from the standpoint of the exhibitor draws a very strong parallel to the absence of protection given the exhibtor in obscenity situations. Where the subject is obscenity, the Court has emphasized that it will not accept, as a corollary to its position in *Stanley v. Georgia*,[54] a constitutional right to distribute.[55] This similarity of treatment, though the justices appear at first glance to be five to four against the "importance of the content to society" holdings of the plurality, is why there can be no clear statement of *Young's* implications. The alignment of the "depictions" at issue here with the treatment given obscene material must ultimately rest on a conclusion about their "importance."

After finding only "incidental" effects on freedom of expression, Mr. Justice Powell employed the four-part test of *United States v. O'Brien*,[56] to determine the permissibility of the ordinance. In *O'Brien*, defendant was convicted of knowingly destroying his draft card after he burned it on the steps of the South Boston Courthouse to illustrate his anti-war beliefs. The Court found that the statute in question plainly did not abridge free speech on its face,[57] and noted that when predominately non-speech elements combine with speech elements in a course of conduct, a compelling state interest in regulating the former may sometimes justify incidental limitations on the latter.[58] In affirming the conviction the Court was careful to

51. *Id.* at 78.

52. "This prompts essentially two inquiries: (i) does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them?" *Id.*

53. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (the right of freedom of speech and press includes not only the right to utter or print, but the right to distribute); Bates v. Little Rock, 361 U.S. 516, 523 (1960) (freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental inference); Kingsley Int. Pic. Corp. v. Regents of N.Y.U., 360 U.S. 684, 690 (1959) (motion pictures are within the first and fourteenth amendment's basic protection).

54. 394 U.S. 557 (1969) (mere private possession of obscene material cannot constitutionally be made a crime).

55. United States v. Reidel, 402 U.S. 351, 356 (1970).

56. 391 U.S. 367, 377 (1968).

57. *Id.* at 375.

58. *Id.* at 376.

point out, however, that the governmental interest and operation of the statute were limited to the *non-speech* element of the conduct, and was thus unlike a situation where the government perceived the impact of the *communicative* conduct to be harmful.[59]

Clearly, the facts in *Young* present a situation in which the impact of the communicative conduct is thought to contribute to the harmful results. Not only is the operation of the ordinance triggered by the content of the communication, it is also difficult to perceive what "conduct" is involved absent the communication. Even if one might go so far as to say that the mere location of a theater is "conduct", the burden would then be on the government to show that an unoccupied "adult" theater would equally frustrate the governmental purpose. However, the ordinance itself envinces the governmental belief that it is only because of the communicative impact, *i.e.*, because of the particular types of films shown, that "undesirables" are attracted into the neighborhood. In a word, the application of this test has been stretched beyond the breaking point.

The use of the *O'Brien* test by only one of the justices indicates a general assumption that the Detroit ordinance directly regulates expression similar to pure speech. However, as the foregoing indicates, there is a considerable difference of opinion between the members of the Court regarding the classification to be given such expression.

Certainly, any zoning ordinance which tracks Detroit's Anti-Skid Row Ordinance will presently find five votes on the Court. As to an ordinance which requires concentration rather than inverse zoning, a different situation is presented. While the plurality indicated that such a scheme would likely be permissible,[60] if the result was an overall curtailment of adult movie presentations or substantial audience inconvenience, Mr. Justice Powell's support might be lost.[61]

First amendment freedoms are as precious and fundamental as they are vulnerable. To deny protection to expression the content of which the Court perceives as only minimally important to society is to drastically sterilize the first amendment. Surely the essence of censorship is content control, yet the Court in *Young* has fashioned a test which grants protection on the basis of the importance to society of the content of the expression being regulated.

Sensible enforcement and indeed even the foundation of the first amendment's free speech guarantee presupposes that protection does not turn upon the mere "popularity, or social utility[62] of the content of the expression involved. The fact that "few of us would march our sons and daughters off to war to . . . see 'specified sexual activities' "[63] is precisely

59. *Id.* at 381-82. *See also* Stromberg v. California, 283 U.S. 359 (1931).
60. 427 U.S. at 71-72.
61. *See* note 52 *supra*.
62. NAACP v. Button, 371 U.S. 415, 445 (1963).
63. 427 U.S. at 70.