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Introduction: The First Amendment, Redeveloped

George Kannar†

In the two articles that follow, counsel responsible for the recent litigation surrounding New York City's 1995 ordinance zoning adult-oriented businesses out of the Times Square area present their differing views, forcefully and subtly. Readers will find themselves agreeing with both sides, as the authors ably score their conflicting, yet convincing points. The judicial view of this controversy has, however, been unwavering: at every level—before every judge and panel, in both federal and state fora—the constitutionality of the City's zoning ordinance has uniformly been sustained. In the view of a particularly in-

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3. See 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) (upholding the constitutionality of a New York City Zoning Resolution which placed specific restrictions on adult entertainment establishments). The plaintiffs brought similar claims in Federal Court. See Hickerson v. City of New York, 932 F. Supp. 550 (S.D.N.Y. 1996). The district court held that, pursuant to Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), it should abstain from deciding any claims arising under the Constitution of New York State and remanded these causes of action accordingly. Hickerson, 932 F. Supp. at 556. However, the court retained jurisdiction over one cause of action which had been brought under the Federal Constitution. Id. at 558-59. This claim was held in abeyance pending determination of the state causes of action. Id. Nevertheless, when the state claims were decided, the district court held that the plaintiffs were collaterally estopped from asserting these claims in federal court because the New York Court of Appeals had relied on federal authorities in its decision. Hickerson v. City
sightful commentator, in fact, the most significant new law made in the course of the Times Square controversy probably concerns the definition and application of collateral estoppel principles in the circumstances of *Pullman* abstention, yet rather than any grand principle of constitutional law or public policy. Yet here, as in so many other celebrated cases, the strictly legal aspects of the immediate dispute may not be the most important ones in the longer run: such cases are notorious for making “bad law.” The controversy’s more enduring significance is almost certainly cultural—the high stakes, high profile deployment of legal doctrine originating from an anti-“adult entertainment” social impulse, applied in and by a polity that is probably not really all that hostile toward erotically-oriented expression.

At the formal level, it has been clear since *City of Renton v. Playtime Theaters* that, in all encounters between zoning-minded localities and adult-oriented businesses, the relevant federal law is almost entirely on the side of the regulating entity. To avoid serious First Amendment challenge, a regulating

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4. Railroad Comm’n v. Pullman Co., 312 U.S. 496 (1941) (counseling federal courts to avoid unnecessary decision of federal constitutional questions when state court determination of potentially dispositive state law issues may be obtainable), cited in Hickerson, 932 F. Supp. 550.


6. See Fahringer, supra note 1, at 406-07 (describing how close the city council votes were and the fact that the Bar Association of the City of New York opposed, and then litigated against, the restrictions).

7. 475 U.S. 41 (1986). *Renton* establishes that zoning ordinances directed toward the suppression of adult-oriented businesses in certain neighborhoods should, in general, be analyzed in accordance with the principles developed relating to “time, place, and manner” limitations upon speech, as though they were content-neutral regulations of behavior directed at the businesses’ “secondary effects” on their vicinity. *Id.* at 46-49. The test became, in effect, whether the regulation in question was “designed to serve a substantial [non-speech-related, or ‘content-neutral’] governmental interest and allow[ed] for reasonable alternative avenues of communication” for whatever expression it constrained. *Id.* at 50.

Of course, Fredericks, supra note 1, and Fahringer, supra note 1, deal more fully with the significance of *Renton* for the Times Square controversy, as well as with all of the other legal issues germane to this controversy, and it is to their much more substantial discussion of such matters that the interested reader is now hereby referred.

8. As Albert Fredericks notes, New York law does not add very much in the way of constraints to these federal requirements. *See Fredericks, supra note 1, at 447.* In the hitherto “leading” case of *Town of Islip v. Caviglia*, 540 N.E.2d 215 (N.Y. 1989), the New York Court of Appeals noted approvingly that the locality had also carried out its own local study of the adult businesses’ “secondary effects,” which was found to have created,
locality need only cite the proper (out-of-town) studies concerning undesirable “secondary effects,” leave available some inhospitable corner of town as a site for the adult businesses’ potential relocation and refrain from denouncing sex-oriented speech per se in its zoning ordinance’s official “purpose” clause, in order to have a post-Renton ordinance upheld. With respect to Times Square, the City of New York had at its disposal not only its own study of New York City’s adult entertainment business outside the immediate Times Square neighborhood, but also a site-specific, block-by-block study, conducted by a private sector business group, regarding the Times Square sex shops’ “secondary effects” on their immediate midtown environment. And there can be little doubt that in at least one particular respect the City’s case was very strong. The suppressed real estate values in the immediate vicinity of the Times Square sex shops were not just statistically demonstrable; the low-rent atmosphere was palpable. The run-down, deserted nature of the area among other things, downtown “dead zones” that caused “public apprehension about entering them” and hampered local trade. Id. at 218-20. The locality took care to insure that the ordinance contested in that case did not constitute a complete ban on all such businesses per se. Id. at 216. The Court of Appeals also made clear that zoning was not an overly broad “means” for dealing with such questions under New York law, notwithstanding prior case law that had seemed to suggest that state law “means” scrutiny might be more rigorous than federal. Id.

9. Indeed, the Court specifically said that site-specific evidence is unnecessary, and left a locality free to rely upon any evidence that it “reasonably believes to be relevant to the problem” at hand. Renton, 475 U.S. at 51-52. The Renton Court also did not take great pains to specify exactly which “secondary effects” might legitimately be considered by a locality, referring broadly to the effects that such businesses may have on the surrounding community, such as increased crime, a reduction in property values, harm to retailing and a diminution in the general quality of urban life. Id. at 47-50. In this respect, as in others, the Renton opinion followed (and in fact largely quoted), the Court’s earlier decision in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

10. See DEPARTMENT OF CITY PLANNING, CITY OF N.Y., ADULT ENTERTAINMENT STUDY (1994) [hereinafter DCP STUDY] (discussed in Fredericks, supra note 1, at 451; Fahringer, supra note 1, at 415).

11. 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] (discussed in Fredericks, supra note 1, at 452; Fahringer, supra note 1, at 417).

12. It bears noting, however, that even the TSBID REPORT with respect to real estate values revealed that such evaluations are inherently relative. What the TSBID REPORT actually showed was that the value of sites at or near the sex shops was appreciating more slowly than the value of sites elsewhere in the Square. In neither the immediate vicinity of the shops, nor in Times Square more generally, was there any indication that real estate values were leveling off, much less that they were declining. See Associated Press, Critics Want Sleaze to Stay in Times Square as Disney Moves In, VARIETY, Jan. 7, 1996, at C1 (pointing out that, during the previous decade, real estate val-
was evident even to the casual passerby.\(^{13}\) Under *Renton*, establishing that much alone would probably have sufficed to insulate the City's zoning action from successful constitutional attack.\(^{14}\)

At the same time, however, considered from just a slightly wider perspective, the fact that real estate prices in the vicinity of the sex shops were unduly *low* hardly establishes that the best—let alone only—way to have dealt with the situation was through the power of the state.\(^{15}\) One could be excused for thinking that these low prices probably represented an unusually attractive business opportunity for private sector investors, who could profitably have acquired the relevant properties without invoking the City's zoning power against the sex shops, with all the attendant First Amendment implications (and foreseeable, taxpayer-financed litigation expenses). This possibility seems all the more plausible when one considers the size and prominence of the economic players standing to profit from the area's redevelopment—huge New York City real estate developers, the Ford Motor Company, Walt Disney Enterprises,\(^{16}\) Condé Nast and the New York Times Company, to name a few.\(^{17}\) The

\(^{13}\) Few first hand observers would probably disagree with the comments of the Disney Vice President who was sent to scout the scene in 1993 that, as of that time, Forty-Second Street was not "so much scary, . . . [as] dead. It was this odd street in the center of the city where there was almost no life." Charles V. Bagli & Randy Kennedy, *Disney Wished Upon Times Sq. and Rescued a Stalled Dream*, N.Y. TIMES, Apr. 5, 1998, at 1 (quoting the responsible Disney Vice President, David L. Malmuth).


\(^{15}\) Indeed, *Renton* itself looked disapprovingly on the notion that the state labored under an obligation to guarantee private parties "bargain" real estate prices—at least when those parties owned adult businesses. *City of Renton*, 475 U.S. at 45.

\(^{16}\) As Mr. Fahringer suggests in his Article, the Disney Company's trumpeted decision to invest $8 million in the Times Square project is generally viewed as the crucial one, due to the company's "wholesome" name, even though, "[b]y Disney standards, it was a small deal. . . . It was the brand risk. . . . We were terrified that we would go forward and there would be some unspeakably horrible act on 42d Street." Bagli & Kennedy, *supra* note 13 (quoting David L. Malmuth). According to a former governor, "The policy was simple. The policy was: get Disney's name." *Id.* (quoting Mario Cuomo).

\(^{17}\) It apparently was Disney, moreover, who "demanded that the state evict the remaining peep shows from 42d Street," just as Mr. Fahringer says. *Id.*

\(^{17}\) *See Rick Lyman, As the Great White Way Turns a Corner*, N.Y. TIMES, May 8, 1998, at B1, B8 (containing a map which shows the owners of properties in the Times Square area, but neglects to label the 43d Street headquarters of the *New York Times*).
mere fact that a “private sector” solution would probably have cost these huge private parties more—the fair market value of the peep shows’ and massage parlors’ leases, for example—is not a very good reason for the government to infringe needlessly upon First Amendment values, even if those values happen not to be judicially insurable ones. When it came to assembling the land for a well-known theme park near Orlando, and for yet another (ultimately unbuilt) “family entertainment” project near Manassas, Virginia, some of these same huge private parties went to considerable, not-so-laudable lengths to drive the most advantageous possible bargain. In the Times Square matter, their motives—the probable source of the ensuing First Amendment controversy—almost certainly were the same.

To be scandalized or outraged hardly seems the point, however, for there surrounds this transaction a wonderful element of spectacle, of posturing and puffery fully in the tradition of Broadway hokum and vaudeville. Consider the irony of the stance assumed by the economic giants involved in the Times Square project when they found themselves confronted with the adult book shops, peep shows and massage parlors whose presence allegedly impeded their plans for the new Times Square against the backdrop of the free-enterprise triumphalism now rampant around the world. “Communism? We can beat the pants off it.” “The Berlin Wall? We’ll reduce the thing to rubble right away.” But a “topless shoeshine parlor” in midtown Manhattan? “Oh my, oh my, oh my—whatever will we do? Let’s run and get the government!” Consider the possibilities: A Funny Thing Happened on the Way to the City Planning Commission, a choral rendition by the CEOs of some tune from Fiorello—which

18. See Mark Andrews, Disney Assembled Cast of Buyers To Amass Land Stage for Kingdom, ORLANDO SENTINEL, May 30, 1993, at K2 (detailing the concealment of identity, secrecy, proclivity for all-cash transactions and the use of purchase options, as opposed to outright purchase, as a means of locking up property without complying with the publicly visible deed-filing requirements attendant to outright purchases); Alvin A. Arnold, Development: How the Site Assembler Operates, MORTGAGE AND REAL ESTATE EXECUTIVES REPORT, Feb. 15, 1995, at 6 (describing the Disney operation in Orlando as a “classic example”).

19. See Tim O'Reiley, Playing Secret Agent for Mickey Mouse; Lawyers Ran Dummy Corporations, Bought Real Estate for Disney, LEGAL TIMES (Washington, D.C.), Jan. 10, 1994, at 2 (concealing its identity, Disney amassed 3,000 acres through the use of dummy corporations to deal with individual property owners, following a formula previously implemented between 1965 and 1967 in preparation of the Walt Disney World complex); David S. Hilzenrath, Disney's Land of Make Believe: Acquisition Agent Used Ruse to Prevent Real Estate Speculation, WASHINGTON POST, Nov. 12, 1993, at A1 (detailing Disney's “stealth approach”).
itself, of course, did not come out of nowhere.\textsuperscript{20}

Can anyone—other than the law, that is—seriously believe that the political background of the Times Square ordinance really revolved around the existence or non-existence of specific “secondary effects” in this commercially-desirable locality? Can the difference in the developers’ approaches to Orlando and Times Square be better explained than by reference to the relative political vulnerability of the particular local landowners affected by each project? It does not take a cynic to suspect that the presence of politically disfavored sexually-oriented expression in Times Square might have tended to make a cheaper “public sector” solution more available to the private investors in the Times Square project than was true in Orlando. Such developers are perhaps fortunate that the law focuses only on the municipalities’ behavior, that there is no beneficiary-focused, trans-jurisdictional doctrine of relative “content-neutrality” or “non-discrimination” principle against which to measure theirs. How pleasant, indeed, to be outside “state action.” And how fortunate, for the politicians, that Renton allows them to denounce adult businesses at election time without sacrificing their ordinance’s “content-neutral” status in the courts.

But if the question of who most immediately profits from the Times Square redevelopment ordinance is easily answered, identifying the long-term losers may be more complex. Naturally, the owners, patrons and employees of the adult establishments are hurt; that was the whole intention. But it may be appropriate to ask whether other residents of the City do not lose as well, whether the tax dollars and associated tourist-industry employment generated by the “new” Times Square are accompanied by real cultural benefits.

The “new” Times Square ethic is not a morally simple one, nor is the “old” Times Square it is replacing just another seedy street corner. One thing that the “new” Times Square project most emphatically does not represent is old-fashioned American Puritanism, a supposed prejudice against “fun.”\textsuperscript{21} On the con-

\textsuperscript{20} Jerome Weidman, et. al, \textit{Fiorello: A New Musical} (1960). \textit{Fiorello} is perhaps best remembered for its account of a low-paid city official’s suspiciously luxurious consumption patterns, which he claimed were based upon his unusually careful conservation of his pocket change, in a “Little Tin Box.” Politically informed real estate “speculation” in New York has, moreover, long been recognized as the premier example of so-called “honest graft,” most notably by that term’s originator—who himself “somehow . . . always guessed about right” when it came to predicting what previously worthless land the City might suddenly seek to acquire. G.W. PLUNKITT, PLUNKITT OF TAMMANY HALL 4 (W. Riordan ed. 1963). “I seen my opportunities and I took ’em.” PLUNKITT, supra, at 3.

\textsuperscript{21} It is commonly asserted that H.L. Mencken denounced “Puritanism” as the
trary, like Disney World and Las Vegas, the "new" Times Square is supposed to be a mecca for it. The "new" Square is designed to be full of ornate signs,\textsuperscript{22} garish and overly-bright lights; full of theaters, video arcades and other gaming parlors; of the pseudo-Baroque and the faux-Rococo, in all of their silly, ostentatious exuberance.\textsuperscript{23} The "new" Times Square is supposed to serve the same social function as the old, to satisfy and profit from humanity's ineradicable desire for cheap thrills and transient pleasures.

The bigger issue here, therefore, is not the sanitizing of the Square; the bigger issue is the sanitizing of our pleasures. For all of the ideological fulmination usually involved in controversies concerning the regulation of "adult" business, one may fairly doubt whether the changes to Times Square have anything very much to do with morality as opposed to marketing; whether they are more about virtue or more about demography—and whether, at a moral level, any real "clean up" was accomplished or intended. What may most distinguish the "new" Times Square from the old may only be the extent to which the new one is based upon the existence of a broad middle class "family" audience, at least momentarily "in the money," now

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\item sneaking suspicion that somebody, somewhere may be "having fun." Jay Ambrose, Envy Politics Freedom to Attain Wealth Should be Cherished, MONTGOMERY ADVERTISER (Alabama), Mar. 14, 1996, at 15A; Alan W. Bock, The Cycle of Priggishness, ORANGE COUNTY REGISTER (California), June 15, 1990, at B13. What he may have actually said is that it consisted of "the haunting fear that someone, somewhere, may be happy." Richard Klein, If It Feels Good, Don't Do It, N.Y. TIMES, July 28, 1996, \$ 7, at 25; Calvin Trillin, Wanted: Bootleggers for Iraqi Liquor Ban, AUSTIN AMERICAN-STATESMAN (Texas), Sept. 10, 1994, at A9; William B. Hunter, Life Restores Mencken to Proper Place, HOUSTON CHRONICLE, May 22, 1994, at 21.

\item According to a recent account, the "new" Times Square is going to include "super signs, mega signs" on parts of the project yet to be built, so as to continue "the theme park, commercialized clutter," characterized by a "neon look," that distinguishes the project so far; among these will be a 10-story "giant light sculpture." Lyman, \textit{supra} note 17. The new "White Way" will also include three news-and-stock-market light "zippers" (up from the present one) and a second gigantic TV screen, similar to that already nationally familiar courtesy of the NBC Evening News. \textit{Id.} Ironically, one of the things \textit{complained of} by respondents to the TSBID \textit{STUDY} was the perceived excessiveness of the adult businesses' pre-redevelopment use of signs. See CITY PLANNING COMMISSION, CITY OF N.Y., \textit{REPORT FOR AN AMENDMENT TO THE ZONING RESOLUTION 13-33} (N950384 ZRY 1995). Under the current plan, "spectacular neon signs" are "required." Bagli & Kennedy, \textit{supra} note 13.

\item As one with primary responsibility for the project put it, "Nobody is trying to change what made the old Times Square famous and so loved for so long, which is what I think of as a sort of aesthetic cacophony." Robert Trussell, Not so Naughty Anymore: Historic and Once Bawdy 42d Street is Swept Clean in Times Square Area Revamp, KANSAS CITY STAR, June 16, 1996, at J1 (quoting Gretchen Dykstra, executive director of Times Square Business Improvement District).
\end{itemize}
more and more persuaded by a rampant consumerist culture to let go "of what it takes to get along"\textsuperscript{24} in return for some ephemeral form of instant gratification. And also exactly who it is who now plays the time-worn part of the profiteering Times Square "Gold Digger,"\textsuperscript{25} in this era in which pleasure is conceptualized, almost exclusively, in terms of experiences and commodities susceptible to mass marketing.

The old Times Square's cultural significance was a little more site-specific. It never did arise from just the Square's "safe" associations—the annual New Year's Eve broadcast, Sinatra's debut at the Paramount or as the famous backdrop for the famous picture of a sailor kissing a woman on the last day of the War. Going back for decades, Times Square was also known—indeed was perhaps primarily known—as the gathering spot for the likes of Nathan ("I've got the horse right here") Detroit,\textsuperscript{26} who long ago knew the Square as Ground Zero for "the oldest established permanent floating crapgame in New York."\textsuperscript{27} It always was, as well, a place famous precisely because it offered "girly shows" of a sort not available elsewhere,\textsuperscript{28} a place celebrated precisely for its association with the seamy and the steamy, the licentious, sinful and corrupt. It was almost a place set aside for such activities, an oasis for them; a quasi-acknowledged demilitarized zone, segregated by history and implicit common agreement from the general culture wars.

Attacking that demilitarized zone now almost seems peculiar. At a time when the average "family" television show, or PG-13 movie, or mass-market magazine advertisement is unspeakably raunchier than any Broadway "girly show" from the 1930s; when the entire "above-ground" culture has become so sleazy and so coarse, so pervasively characterized by sexually-oriented vulgarity and innuendo, can it be any surprise that the always culturally-marginal "adult" business has become raunchier, more

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  \item \textsuperscript{24} Al Dubin & Harry Warren, "The Gold Diggers' Song (We're in the Money)," from \textit{42nd Street} (1933).
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Frank Loesser, "Fugue for Tinhorns," from \textit{Guys and Dolls}, based on a story and characters by Damon Runyon (1950).
  \item \textsuperscript{27} Frank Loesser, "The Oldest Established," from \textit{Guys and Dolls} (1950).
  \item \textsuperscript{28} Al Dubin & Harry Warren, "Dames" from \textit{42nd Street} (1934). Elsewhere the same authors ask, "What do you go for, go to a show for? Tell the truth, you go to see those beautiful dames," \textit{Id.} Indeed, "When a Broadway baby says 'Good Night,' it's early in the morning. Manhattan babies don't sleep tight until the dawn," Al Dubin & Harry Warren, "Lullaby of Broadway," from \textit{42nd Street} (1934). Indeed, it has been recognized, almost folklorically, that to see "a man who danced with his wife" is to see something "they don't do on Broadway." Fred Fisher, "Chicago" (1922) (emphasis added).
\end{itemize}
explicit and more extensive as well? And if the old Times Square’s sex shops’ heightened offensiveness is seen as the result of a flight from the cooption by the “legitimate” economy of what used to be risqué, then can their present displacement in the Square really be seen as anything other than a mere exercise of market power? “Content-neutrality” may indeed be assumed here, finally, and for real. Many of those profiting from the Times Square sex shops’ displacement—consider Condé Nast, to take just one example—almost certainly could not have cared less what those sex shops sold. Indeed, if such “new” Times Square denizens cared at all, it might well have been in terms of the peripheral benefits flowing to their own enterprises as a result of the hard-core “adult” businesses’ renewed public and political stigmatization. Dwelling on what makes hard-core “adult” businesses culturally unacceptable serves to divert critical attention from discussion of what should comprise the “acceptable” soft-core mainstream—while simultaneously enlarging that soft-core’s social sway and market share.

And yet, for all of this, the formal remedies, since Renton, are still few. “Sue me, sue me. What can you do me?,” say redevelopment’s proponents. “Sit down, you’re rockin’ the boat,” chime in the courts. As others have noted, the result is that the public comes to be treated to the same old “naughty, bawdy, gawdy, sporty, Forty-Second Street”—only minus some of the naughty and the bawdy. More orange juice, as one old Manhattanite put it, and less seltzer.

But the truest, and perhaps happiest, lesson may be that the neighborhood’s grand old tradition of schemes and scams and con games is now getting cheerfully continued into a new millennium, and on a scale so great that a small-time operator like Nathan Detroit could not even have imagined it—three-block monte, not three-card.

29. See Fredericks, supra note 1, at 437; Berger, supra note 3, at 105; Simon, supra note 3, at 187.
33. See Trussell, supra note 23 (quoting exact same lyrics, for exact same message and effect).
34. The original Times Square plan, announced in 1980, focused on office usage, as opposed to “family entertainment” venues, for the plainly stated reason that “New York cannot and should not become another Disneyland. . . . We’ve got to make sure we have seltzer instead of orange juice.” Bagli & Kennedy, supra note 13, at 1 (quoting then-Mayor Edward I. Koch).