Herald Price Fahringer v. the City of New York

He has had success in representing such notorious figures as Hustler publisher Larry Flynt, and has defended such notable accused criminals as Claus von Bulow and Jean Harris. But when Herald Price Fahringer '56 addressed the 10th annual Buffalo Law Review Dinner, he talked at length about something perhaps more instructive: one of his failures.

The address, to a packed room at The Buffalo Club, concerned the rezoning of New York City's Times Square — an obvious attempt by the city to squeeze out sex-related businesses, such as booksellers and video stores, from one of the city's most high-profile neighborhoods. Fahringer represented the business owners on First Amendment grounds, arguing that the 1995 zoning resolution was "patently unconstitutional." "Twenty-three judges heard the case, on the state and federal levels, and," he said wryly, "not one of them agreed with our position."

As originally written, Fahringer said, the law would eliminate 85 percent of the adult entertainment industry in New York City, and 90 percent of the adult video stores and bookstores in the borough of Manhattan. "We thought that was a rather severe piece of legislation," he said.

Fahringer put the case in context by noting that "sexual expression has always been treated differently through history than any other form of expression. We have a long history in this country, an aversion for any form of public display of sex. We are the only nation in the world to prosecute this aggressively books, films and publications on the subject of sex. It started with the postal laws, and now the most convenient vehicle for controlling this form of sexual expression is the zoning law."

Such efforts continue, he said, even though no study has shown that adult-oriented businesses cause any social harm in the form of increased crime or decreased real property values.

The case took some strange turns. The city, Fahringer said, had used a computer mapping program to indicate where in the five boroughs adult businesses would be allowed under the ordinance — "only little pockets of New York City," he said. So "we went out with a video camera and videotaped every place they said we could move to. It took three months. Mostly they were warehouse districts, remote areas of Staten Island without roads or streetlights, some of the worst places you can imagine."

"This was a media frenzy because it involved sex and sex shops. There were days we had four or five camera crews up to the office. But the media were not our allies. They did not identify much with the bookstores and the video stores. The New York Times, which is right on Times Square, of course, wrote editorial after editorial saying the administration was doing the right thing."

But, Fahringer said, "one of the most cherished rights of we the people is the right to decide what to read and what to look at. These zoning laws are just a form of censorship." And there is ample evidence, he said, that the American people want to decide for themselves: 40 percent of all videotapes rented are adult in nature, and in 1998 adult entertainment was a $10 billion industry. "There is an enormous demand for this type of information," Fahringer said, "and on the other side a government trying to suppress it."

There is a coda to the white-haired lawyer’s crusade on behalf of the adult entertainment industry. A revised law now says New York City stores can sell adult material as long as it does not make up the bulk of their wares — the so-called "60-40 rule," saying that no more than 40 percent of the merchandise can be sex-related.

"Since July of last year," Fahringer said, "much of my time has been spent litigating this 60-40 rule. It involves a lot of architectural drawings with different areas marked off, and the judge saying, 'That looks like 40 percent to me,' and the city attorney would say, 'Yes, your honor, but you see, they are not counting the bathrooms and the stairways. '

His work on behalf of such establishments continues. It is an uphill struggle; a New York Times profile at the end of 1999 noted 29 court cases he had fought when the city went after clients for not complying with the new law. Only once was he able to prevail. In that case, the New York State Court of Appeals ruled that the city had been overzealous in trying to close a video store that had put forth a good-faith effort to operate within the law.
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