ERZNOZNIK v. CITY OF JACKSONVILLE

SUPREME COURT OF THE UNITED STATES
422 U.S. 205
June 23, 1975
[6 -3]

OPINION: Justice Powell/Douglas/Brennan/Stewart/Marshall/Blackmun...Richard Erznoznik...was charged with violating §330.313 of the Jacksonville, Florida, municipal code for exhibiting a motion picture [at a **drive-in theater], visible from public streets**, in which "female buttocks and bare breasts were shown." The ordinance...provides: "...It shall be unlawful and it is hereby declared a public nuisance...[for a drive-in theater] to exhibit...any motion picture...in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, **if such motion picture...is visible from any public street...**"

[T]he screen of [the] theater is visible from two adjacent public streets and a nearby **church parking lot** [and]...people had been observed watching films while sitting outside the theater in parked cars and in the grass.

The trial court upheld the ordinance as a legitimate exercise of the municipality's police power, and ruled that it did not infringe upon appellant's First Amendment rights...[W]e...reverse.

Appellee concedes that its ordinance sweeps far beyond the permissible restraints on obscenity and thus applies to films that are protected by the First Amendment. Nevertheless, it maintains that any movie containing nudity which is visible from a public place may be suppressed as a **nuisance**...

Appellee's primary argument is that it may protect its citizens against unwilling exposure to materials that may be offensive. Jacksonville's ordinance, however, does not protect citizens from all movies that might offend; rather it singles out films containing nudity, presumably because the lawmakers considered them especially offensive to passersby.

...A State or municipality may protect individual privacy by enacting reasonable time, place, and

manner regulations applicable to all speech irrespective of content. But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home (*Rowan v. Post Office Dept.*[1]) or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. (*Lehman v. City of Shaker Heights* - a city <u>can</u> deny political advertising on its transit vehicles). As Justice Harlan cautioned: "The ability of government...to shut off discourse solely to protect others from hearing it is...dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California*[2].

...Much that we encounter [in our pluralistic society] offends our esthetic, if not our political and moral, sensibilities...[where] the burden normally falls upon the viewer to "avoid further bombardment of his sensibilities simply by averting his eyes." *Cohen v. California*.

The Jacksonville ordinance discriminates among movies solely on the basis of content. Its effect is to deter drive-in theaters from showing movies containing **<u>any</u> nudity, however innocent or even educational**. **This discrimination cannot be justified as a means of preventing significant intrusions on privacy.** The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes. In short, the screen of a drive-in theater is not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup v. New York.* Thus, we conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content.

If "non-obscene nudity" cannot be prohibited on drive-in theater screens viewable by all, then why can't dance companies put on a "ballet in the nude" in Central Park? I do not assert the right to the ballet, but I question the right to display the same material in public on a 50 foot screen! Is there merely a distinction brought about by 3 dimensions instead of 2?

Appellee also attempts to support the ordinance as an exercise of the city's undoubted **police power to protect children...**It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults. *Ginsberg v. New York*[3]. Nevertheless, minors are entitled to a significant measure of First Amendment protection

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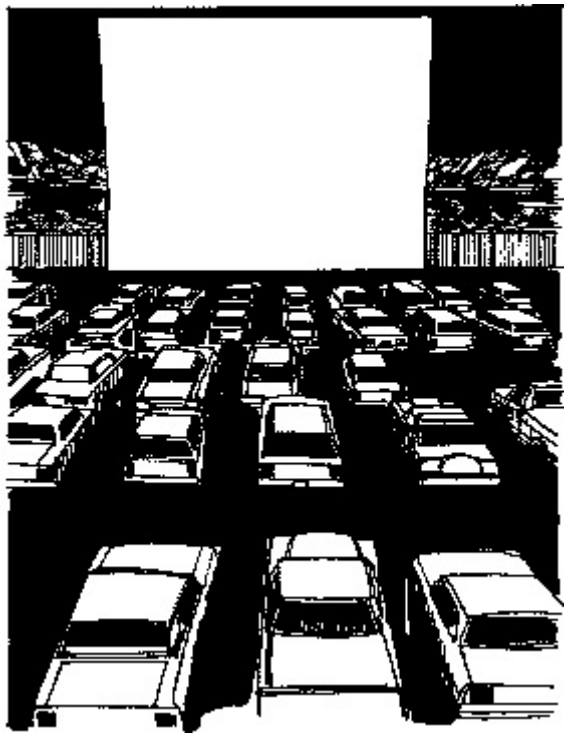
[1]Case 1A-S-19 on this website.

[2]Case 1A-S-20 on this website.

[3]Case 1A-S-14 on this website.

(*Tinker v. Des Moines School Dist.*[4]) and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. *Interstate Circuit, Inc. v. City of Dallas.*

...The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing **any** uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a **baby's buttocks**, the nude body of a **war victim**, or scenes from a **culture** in which nudity is indigenous. The ordinance also might prohibit **newsreel scenes** of the opening of an art exhibit as well as shots of bathers on a beach. **Clearly all nudity cannot be deemed obscene even as to minors...**Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. Thus, if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription...[The City also claims] that nudity on a drive-in movie screen distracts passing motorists, thus slowing the flow of traffic and increasing the likelihood of accidents. Nothing in the record or in the text of the ordinance suggests that it is aimed at traffic regulation. Indeed, the ordinance applies to movie screens visible from public places as well as public streets, thus indicating that it is not a traffic regulation. But even if this were the purpose of the ordinance, it nonetheless would be invalid. By singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is strikingly **underinclusive**. **There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist.**



...Appellee offers no justification, nor are we aware of any, for distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic. Absent such a justification, the ordinance cannot be salvaged by this rationale...In concluding that this ordinance is invalid we do not deprecate the legitimate interests asserted by the city of Jacksonville. We hold only that the present ordinance does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly

[4]Case 1A-S-18 on this website.

emphasized that precision of drafting and clarity of purpose are essential...Reversed...

DISSENT: Justice Burger/Rehnquist...The Court's analysis seems to begin and end with the sweeping proposition that, regardless of the circumstances, government may not regulate any form of "communicative" activity on the basis of its content. Absent certain "special circumstances," we are told, the burden falls upon the public to ignore offensive materials rather than upon their purveyor to take steps to shield them from public view...

Whatever validity the notion that passersby may protect their sensibilities by averting their eyes may have when applied to words printed on an individual's jacket (*Cohen v. California*) or a flag hung from a second-floor apartment window (*Spence v. Washington*[5]), it distorts reality to apply that notion to the outside screen of a drive-in movie theater. Such screens are invariably huge... Moreover, when films are projected on such screens the combination of color and animation against a necessarily dark background is designed to, and results in, attracting and holding the attention of all observers. Similar considerations led Justice Brandeis, writing for the Court in *Packer Corp. v. Utah,* to conclude that there is a public interest in regulating billboard displays which may not apply to other forms of advertising: "Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class."

...[T]he screen of a drive-in movie theater is a unique type of eye-catching display that can be highly intrusive and distracting. Public authorities have a legitimate interest in regulating such displays under the police power; for example, even though traffic safety may not have been the only target of the ordinance in issue here, I think it not unreasonable for lawmakers to believe that public nudity on a giant screen, visible at night to hundreds of drivers of automobiles, may have a tendency to divert attention from their task and cause accidents.

No more defensible is the Court's conclusion that Jacksonville's ordinance is defective because it regulates **only** nudity. The significance of this fact is explained only in a footnote: "Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work... In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws."

Both the analogy and the distinction are flawed. Unlike persons reading books, passersby cannot consider fragments of drive-in movies as a part of the "whole work" for the simple reason that they

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[5]Case 1A-S-27 on this website.

see but do not hear the performance*;* nor do drivers and passengers on nearby highways see the whole of the visual display. The communicative value of such fleeting exposure falls somewhere in the range of slight to nonexistent. Moreover, those persons who legitimately desire to consider the "work as a whole" are not foreclosed from doing so. The record shows that the film from which appellant's prosecution arose was exhibited in several indoor theaters in the Jacksonville area. And **the owner of a drive-in movie theater is not prevented from exhibiting nonobscene films involving nudity so long as he effectively shields the screen from public view.** Thus, regardless of whether the ordinance involved here can be loosely described as regulating the content of a certain type of display, it is not a restriction of any "message." The First Amendment interests involved in this case are trivial at best.

On the other hand, assuming arguendo that there could be a play performed in a theater by nude actors involving genuine communication of ideas, the same conduct in a public park or street could be prosecuted under an ordinance prohibiting indecent exposure. This is so because the police power has long been interpreted to authorize the regulation of nudity in areas to which all members of the public have access, regardless of any incidental effect upon communication. A nudist colony, for example, cannot lawfully set up shop in Central Park or Lafayette Park, places established for the public generally. Whether such regulation is justified as necessary to protect public mores or simply to insure the undistracted enjoyment of open areas by the greatest number of people -- or for traffic safety -- its rationale applies...to giant displays which through technology are capable of revealing and emphasizing the most intimate details of human anatomy.

In sum, the Jacksonville ordinance...is narrowly drawn to regulate only certain unique public exhibitions of nudity; it would be absurd to suggest that it operates to suppress expression of ideas. By conveniently ignoring these facts and deciding the case on the basis of absolutes the Court adds nothing to First Amendment analysis and sacrifices legitimate state interests. I would affirm...

DISSENT: Justice White...The Court asserts that the State may shield the public from selected types of speech and allegedly expressive conduct, such as nudity, only when the speaker or actor invades the privacy of the home or where the degree of captivity of an unwilling listener is such that it is impractical for him to avoid the exposure by averting his eyes...**If this broadside is to be taken literally, the State may not forbid "expressive" nudity on the public streets, in the public parks, or any other public place since other persons in those places at that time have a "limited privacy interest" and may merely look the other way**...I therefore dissent.