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Double Jeopardy

right under the Double Jeopardy Clause. Thus, the court held that to retry the defendant on the second count was violative of her right not to be placed in double jeopardy.[78]

The United States Constitution has a Double Jeopardy Clause which safeguards a defendant's rights as well. This right has "from the very beginning been part of our constitutional tradition"[79] and is "clearly 'fundamental to the American scheme of justice.'"[80] Hence, the Fifth Amendment protects a criminal defendant from multiple punishments and repeated prosecutions for the same offense. Accordingly, the *LaDolce* court dismissed the second count as violative of both the New York and Federal Constitutions.[81]

JUSTICE COURT

SECOND JUDICIAL DEPARTMENT

People v. Hempstead Video, Inc.[82]
(printed December 29, 1994)

Hempstead Video, Inc., retailer of "adult novelties," moved to dismiss summonses and information filed against it pursuant to a Village of Valley Stream permit requirement on the grounds that the ordinance's enactment and enforcement constituted double jeopardy,[83] selective prosecution,[84] and impermissible regulation

78. *Id.*

79. Benton v. Maryland, 395 U.S. 784, 796 (1968).

80. *Id.* (citation omitted).

81. *LaDolce*, 162 Misc. 2d at 351, 616 N.Y.S.2d at 899.

82. N.Y. L.J., Dec. 29, 1994, at 27 (Justice Ct. 2d Jud. Dep't 1994).

83. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Id.*; N.Y. CONST. art. I, § 6. Section six of the New York Constitution provides in pertinent part: "No person shall be subject to be twice put in jeopardy for the same offense . . . ." *Id.*

of freedom of expression[85] in violation of both the New York State and Federal Constitutions.[86] The Village of Valley Stream Justice Court held that double jeopardy was not violated where the legislative intent underlying the challenged ordinance made it clear that each day a business opens its door it commits a separate prosecutable offense; therefore, prosecutions subsequent to a conviction for operating without a permit did not constitute punishment twice for the "same offense."[87] The court also ruled that constitutionally impermissible selective prosecution was not shown where Hempstead Video did not meet its heavy burden of establishing unequal enforcement with an impermissible purpose.[88] Finally, the court held that the regulation of freedom of expression was a reasonable, content-neutral, time, place, and manner restriction.[89]

The defendant, Hempstead Video, Inc., operated an "adult shop," retailing various "novelties and devices."[90] At the time the store opened, between July 16, 1994 and July 19, 1994, it did not possess a certificate of registration as required under a Village of Valley Stream ordinance.[91] On July 18, 1994, the Board of Trustees for the Village enacted a sixty-day moratorium prohibiting issuance of permits to "adult" businesses in order to investigate and conduct hearings as needed to establish a local

84. U.S. CONST. amend. XIV, § 1. The Federal Equal Protection Clause provides in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*; N.Y. CONST. art. I, § 11. Section eleven provides in pertinent part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." *Id.*

85. U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.*; N.Y. CONST. art. I, § 8. Section eight provides in pertinent part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech . . . ." *Id.*

86. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at 27.

87. *Id.*

88. *Id.* at 28.

89. *Id.*

90. *Id.* at 27.

91. *Id.*

law restricting "adult" businesses to certain areas.[92] On July 19, 1994, Hempstead Video was issued summonses for operating a business without a permit.[93] On July 27, 1994, Hempstead Video was convicted for operating without the required permit, the charges involving the first day of the offense, July 19, 1994.[94] Consequently, it was fined $100 and given a conditional discharge on the condition that it would "cease and desist" operation until certification.[95] However, Hempstead Video continued operation and received summonses from July 19, 1994 until the day it filed the motion discussed herein.[96]

Hempstead Video raised three constitutional claims in its motion to dismiss.[97] First, Hempstead Video claimed that issuance of summonses, in addition to the July 19, 1994 summons, constituted double jeopardy or punishment twice for the same crime.[98] Second, Hempstead Video argued that it was the victim of unconstitutional discrimination in the form of "selective prosecution," claiming the permit law was enacted and enforced for the sole purpose of preventing Hempstead Video and "adult" businesses from operating.[99] Third, Hempstead Video contended that the law, on its face, violated its freedom of expression by giving impermissible discretion to officials to deny permits based on what the applicant intends to sell.[100]

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92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* Hempstead Video also moved to dismiss the accusatory instrument on the ground that it was defective. *Id.* It alleged that the People had only filed summonses or appearance tickets that could not be considered accusatory instruments. *Id.* The court noted, however, that the prosecutor had filed an information and a superseding information. *Id.* Examining the superseding information, the court found it to be sufficient. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* Hempstead Video claimed, in the alternative, that the law was being unconstitutionally enforced to deny permits based solely on the content of what the applicant intends to sell. *Id.*

The court first considered Hempstead Video's constitutional claim that it had been subjected to double jeopardy under the New York and Federal Constitutions. Hempstead Video argued that issuance of additional summonses on an almost daily basis, after its July 19, 1994 violation, constituted punishment twice for the same crime.[101] More specifically, the claim was that violation of the ordinance constitutes a "continuing offense" for which only one prosecution is permissible.[102]

Considering this claim, the court reasoned that in order to uphold convictions subsequent to the July 19, 1994 conviction, "either the elements of the charges must be found to be substantially different or the acts constituting the alleged violations must be distinguishable from each other, particularly in terms of time."[103] Whether two offenses are the same "is based upon whether either offense requires proof of a fact which the other does not."[104] This test requires that the court "examine the evidence and determine whether the evidence required to support

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101. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at 27.

102. *Id.* The People responded that each day the business stayed open without a permit constitutes a separate offense under the ordinance. *Id.*

103. *Id. See* N.Y. CRIM. PROC. LAW § 40.20(2)(a) (McKinney 1992). This section provides in pertinent part: "A person may not be separately prosecuted for two offenses based upon the same . . . criminal transaction unless: (a) The offenses as defined have substantially different elements and the acts establishing one offense are . . . clearly distinguishable from those establishing the other." *Id.*; *see also* Auer v. Smith 77 A.D.2d 172, 432 N.Y.S.2d 926 (4th Dep't 1980). The *Auer* court noted a "criminal transaction" is conduct involving at least one offense and at least two or more acts either "'so closely related . . . in point of time and circumstance of commission as to constitute a single criminal incident, or . . . so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture.'" *Id.* at 182, 432 N.Y.S.2d at 933 (citation omitted).

104. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at 27. *See* Blockburger v. United States, 284 U.S. 299 (1932). In *Blockburger*, the United States Supreme Court held that two sales of morphine not from the original package, the second having been initiated after the first was complete, were separate and distinct offenses under a narcotics statute. *Id.* at 301. The Court noted that although the buyer and seller remained the same, time elapsed between the first and second transactions. *Id.* The legislative intent underlying the statute was explored by the Court so that it could determine whether "each provision requires proof of a fact which the other does not." *Id.* at 304.

a conviction for one of the offenses also would suffice to support a conviction for the other."[105]

Citing *People v. Okafore*[106] and *People v. Brown*,[107] the court in *Hempstead Video, Inc.* acknowledged that "the 'continuous offense' doctrine most clearly arises in cases such as this one, where a defendant is charged with repeated violations of a single statute or ordinance."[108] Various factors adduced from *Brown* were deemed relevant in making the determination of whether a crime is "continuous:"

> [W]hether there is unity of victim; whether the acts were motivated by a single intent or scheme; whether the acts were

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105. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at 27. *See* United States v. Dixon, 113 S. Ct. 2849 (1993). "The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment . . . ." *Id.* at 2856.

106. 72 N.Y.2d 81, 527 N.E.2d 245, 531 N.Y.S.2d 762 (1988). In *Okafore*, the defendant was separately charged and convicted of criminal possession of a weapon in the second degree as a result of incidents occurring approximately one hour apart. *Id.* at 83, 527 N.E.2d at 246, 531 N.Y.S.2d at 763. One incident occurred in the Bronx, the other in New York County. *Id.* Finding that second degree possession of a weapon requires the specific intent to use the weapon unlawfully against another, the court reasoned that the defendant's intent abated in the Bronx and subsequently formed again in New York County. *Id.* at 87-88, 527 N.E.2d at 248, 531 N.Y.S.2d at 765. Therefore, the court concluded that while defendant's possession of the weapon was continuous, the intent was separate and distinct and two prosecutable offenses were committed. *Id.*

107. 159 Misc. 2d 11, 603 N.Y.S.2d 256 (Sup. Ct. Kings County 1993). In *Brown*, the defendant moved to dismiss a usury indictment on the grounds that it was duplicitous, as the People had only alleged a single loan, to a single individual, with a single purpose, constituting a single scheme. *Id.* at 15, 603 N.Y.S.2d at 260. The People argued that this scheme, although targeting a single victim, occurred over a sixteen-month period and defendant received separate interest payments at usury rates of 260% annually. *Id.* at 13, 603 N.Y.S.2d at 258. The court looked at the intent of the legislature underlying the criminal usury statute and the nature of the crime, and determined that criminal usury fell into a hybrid of crimes which have an element that sometimes can be committed by a single act or omission, or by several different acts or omissions over a period of time. *Id.* at 18-19, 603 N.Y.S.2d at 262.

108. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at 27.

> caused by a single or separate impulse; whether there was a single purpose or objective in the commission of the acts, and whether the acts were for personal gain.[109]

Citing *Okafore*, the court stated that ultimately, it must look at the intent underlying the ordinance to determine whether its purpose "was to prohibit a course of conduct or specific described acts."[110] Guiding the court's reasoning was the presumption against declaring an ordinance "continuous" and the rule that "any factual conception of an offense as 'continuous' is deemed to be easily rebuttable."[111]

Applying these principles, the court explored the permit law's purpose. First, it determined that the law was regulatory, as opposed to revenue raising.[112] The court then noted that there was no issue of separate intent or impulse in the alleged offenses and that each separate act was deemed controlling.[113] Finally, the court looked at the way the law defines business,[114] finding that it does not refer to "a continuous series of related acts, but occurs every time a merchant opens his or her door to do business."[115] Thus, the court concluded that "business" is conducted every time a business opens its door and, therefore, each day Hempstead Video opened its door to do business, it committed a separate offense.[116] This result was necessary, the court stated,

109. *Id.* (citing *Brown*, 159 Misc. 2d at 18-19, 603 N.Y.S.2d at 262).

110. *Id.* (citing *Okafore*, 72 N.Y.2d at 86, 527 N.E.2d at 248, 531 N.Y.S.2d at 765).

111. *Id.*

112. *Id.* The court determined the law to be mandatory and noted that the law contemplated businesses applying, receiving, and displaying the required permit prior to engaging in business. *Id.* Further, it found that the law served the regulatory purpose of assuring the authorities of business compliance with federal, state, and local codes (e.g., fire and building codes), as well as protecting consumers by providing them with information concerning the business. *Id.* The court stated that it was particularly appropriate for a regulatory law to apply strict liability, which this ordinance did. *Id.*

113. *Id.* at 27.

114. The court deemed it important that the ordinance defined "business" as an "entity through which mercantile activity is engaged in; that is, the thing through which 'business' is done." *Id.*

115. *Id. Cf.* Blockburger v. United States, 284 U.S. 299, 304 (1993).

116. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at 27.

or else defendants would be free to flaunt the permit law after paying the initial $100 fine.[117]

Hempstead Video's second constitutional claim was that it had been the victim of unconstitutional discrimination in the form of "selective prosecution."[118] Hempstead Video claimed that the ordinances were being used for the sole purpose of denying it the right to sell "adult novelties" offensive to various officials.[119] Therefore, Hempstead Video alleged, it had been denied equal protection of the laws under the New York and Federal Constitutions.

The court, citing *Yick Wo v. Hopkins*[120] and *People v. Goodman*,[121] established that intentional discrimination in the

117. *Id.*

118. *Id.*

119. *Id.* In support of its claim, Hempstead Video pointed to a 60-day moratorium enacted at the time it applied for a permit, and also noted various pronouncements made in local newspapers by public officials declaring the moral dilemma of "adult" business. *Id.* Hempstead Video sought a hearing to prove that the law was merely a revenue producing ordinance, that many villagers operate without a permit, and that it had been subjected to a level of enforcement uncommon to similarly situated villagers. *Id.* The People countered that Hempstead Video had not adequately supported its allegations and that the prosecutor's motives were pure. *Id.* Moreover, the People contended that the law was being enforced to the extent possible. *Id.*

120. 118 U.S. 351 (1886). Long ago, in the much hailed *Yick Wo* decision, petitioner was convicted for violating a local ordinance which prohibited the operation of laundries that were not located in brick or stone buildings without consent from a supervising board. *Id.* at 358. Yick Wo alleged that over 200 other Chinese nationals were denied consent by the supervising board, while all but one non-Chinese was given consent. *Id.* at 359. Reversing Yick Wo's conviction, the Court held that:

> The facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial . . . of equal protection. . . . [If] the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an *evil eye* and an *unequal hand*, so as practically to make unjust and illegal discriminations between persons in similar circumstances [then the law will deny equal protection].

administration of a facially valid law violates equal protection.[122] Drawing from this principle, further refined in *303 West 42nd St. Corp. v. Klein*,[123] the court noted that a facially valid law applied by public authorities, with an "evil eye and an unequal

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Id. at 373-74 (emphasis added).

121. 31 N.Y.2d 262, 290 N.E.2d 139, 338 N.Y.S.2d 97 (1972). A village ordinance prohibited commercial signs exceeding four square feet in area. *Id.* at 264, 290 N.E.2d at 140, 338 N.Y.S.2d at 99. The defendant, a registered pharmacist operating a drug store, maintained four signs that exceeded this limit. *Id.* at 265, 290 N.E.2d at 141, 338 N.Y.S.2d at 100. The court found that the ordinance was a valid exercise of the police power designed to promote aesthetics, bearing on economic and cultural community considerations. *Id.* at 267, 290 N.E.2d at 142, 338 N.Y.S.2d at 101. As to the selective enforcement claim, the record was deemed to belie a showing of unequal enforcement as three others were cited under the ordinance on the day of defendant's conviction. *Id.* at 268, 290 N.E.2d at 143, 338 N.Y.S.2d at 103. Thus, defendant had not even shown an "unequal hand," much less the "evil eye" derived from *Yick Wo*. *Id.*

122. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at 27.

123. 46 N.Y.2d 686, 389 N.E.2d 815, 416 N.Y.S.2d 219 (1979). The petitioner corporation leased a part of its building, located in the Times Square area, for use as an adult bookstore and two adult theaters. *Id.* at 690, 389 N.E.2d at 817, 416 N.Y.S.2d at 221. The petitioners initial application for a permit to reconstruct part of the building to accommodate the new tenant was granted. *Id.* Later, however, a "clean up" Times Square campaign occurred which declared intentions to drive out "adult" businesses and, simultaneously, the Commissioner of Buildings took a new look at the reconstruction permit. *Id.* After a hearing, the petitioner was ordered to install sprinklers throughout the entire building. *Id.* at 691, 389 N.E.2d at 817, 416 N.Y.S.2d at 222. The petitioner claimed the fire regulation was being enforced in a discriminatory manner as a result of the clean up campaign. *Id.* at 691, 389 N.E.2d at 818, 416 N.Y.S.2d at 222. The New York Court of Appeals reversed the lower courts' holdings that petitioner had not made a showing of arbitrary and capricious discrimination. *Id.* at 698, 389 N.E.2d at 821, 416 N.Y.S.2d at 226. An evidentiary hearing was required, the court of appeals concluded, since petitioner had demonstrated a reasonable probability of success on the merits of the claim. *Id.* But the court pointed out that petitioner would have to demonstrate both an "evil eye" and an "unequal hand." *Id.* at 693, 389 N.E.2d at 818, 416 N.Y.S.2d at 223. In other words, the court stated that it would be required for petitioner to show that the law was not applied equally to others and that selective enforcement was based on "an impermissible standard such as race, religion or some other arbitrary classification." *Id.*

hand," violates equal protection.[124] Not only would Hempstead Video have to show the law was applied unequally to others similarly situated, but also that the unequal enforcement was carried out with an "evil eye," or that enforcement "was based upon a constitutionally impermissible standard or arbitrary classification."[125] Also, the *Hempstead Video, Inc.* court stressed that a showing of lax enforcement to others similarly situated is not enough[126] and that officials may consider such factors as police resources, available manpower, the nature of the violation, and effective deterrence.[127]

Applying these principles, the court flatly rejected Hempstead Video's selective prosecution claim. First, there was not a sufficient showing of unequal enforcement.[128] For instance, Hempstead Video's assertion that the law was not vigorously enforced was insufficient as well as inconsistent with the record.[129] Moreover, Hempstead Video did not establish that

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124. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at 27.

125. *Id.*

126. *See* People v. Friedman, 302 N.Y. 75, 81, 96 N.E.2d 184, 186 (1950) (finding that the proof was not sufficient to establish a pattern of consciously practiced discrimination where "it merely indicated some nonenforcement [sic] as to certain other businesses many of which were allowed to remain open").

127. Various policy justifications behind the dual requirement of showing the "evil eye" and "unequal hand," referred to in *Klein*, include the fact that effective use of limited police resources often requires uneven enforcement. For example, sometimes prosecutors legitimately pursue a case more vehemently as it has the right fact pattern to challenge an unfavorable ordinance. *Klein*, 46 N.Y.2d at 694, 389 N.E.2d at 819, 416 N.Y.S.2d at 224. The deterrence rational has gone far in upholding uneven prosecutions where the purpose was to select serious violators, or prosecute in high violation areas. *Id.* Also, there is a reluctance to give broad leeway in adjudicating selective enforcement claims, the *Klein* court noted, because every time someone felt singled out they would request a hearing. *Id.* at 695, 389 N.E.2d at 819, 416 N.Y.S.2d at 224.

128. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at 28.

129. *Id.* The court found that uniform enforcement was apparent where six prosecutions were conducted in a period of three years during which at least 135 permits were issued. *Id.* Even if it was true that no business had been subjected to the level of enforcement Hempstead Video had, the court stated, no business had flaunted the law as much. *Id. Cf. Goodman*, 31 N.Y.2d at 268, 290 N.E.2d at 142, 338 N.Y.S.2d at 103 (noting the record was deemed

enforcement was based on an impermissible standard. For instance, the purpose behind prosecution of Hempstead Video could have been deterrence, most particularly where this was a highly publicized case.[130]

Hempstead Video's third constitutional claim was that the permit law facially violated its freedom of expression under the First Amendment of the United States Constitution and article I, section eight of the New York Constitution as it gave officials impermissible discretion to deny a permit based solely on the content of what an applicant intends to sell.[131] Ruling on this contention, the court laid out appropriate regulations of "commercial speech" derived from *Young v. American Mini-Theaters, Inc.*[132] After *Young*, reasonable, content-neutral, time,

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to belie a selective enforcement claim where three others were cited under the same ordinance on the day of defendant's conviction).

130. *Id.*

131. *Id.* Hempstead Video also argued that the law was being enforced unconstitutionally as officials were using it to ban Hempstead Video specifically, and "adult" businesses generally. *Id.* In support of this claim, Hempstead Video pointed to public pronouncements surrounding the 60-day moratorium on adult businesses enacted at the time Hempstead Video opened. *Id.* Rejecting this claim, the court noted that the moratorium was intended to give officials time to consider a new zoning law restricting "adult" businesses to certain areas. *Id.* The court found that "the moratorium constituted a reasonable stop-gap . . . measure designed to temporarily halt development while comprehensive changes were duly considered." *Id. Cf.* 119 Dev. Assocs. v. Village of Irvington, 171 A.D.2d 656, 657, 566 N.Y.S.2d 954, 955 (2d Dep't 1991). Plaintiff's "takings clause" action, brought after a temporary building moratorium, was found to be without merit on the ground that the enactment constituted a legitimate exercise of the police power to temporarily halt development while zoning measures were considered. *Id.*

132. 427 U.S. 50 (1976). The respondents operated "adult" movie theaters. *Id.* at 55. They brought an action against Detroit officials challenging a zoning ordinance amending an "Anti-Skid Row Ordinance" adopted ten years earlier. *Id.* The challenged ordinances prohibited adult theaters from operating within 1000 feet of two "regulated uses" and within 500 feet of a residential area. *Id.* at 52. Rejecting respondent's claim that the ordinance was an invalid prior restraint on free expression, the Court held that reasonable licensing and zoning laws are constitutional. *Id.* at 60. The Court noted that commercial exhibition of "material that is on the borderline between pornography and artistic impression deserves less protection than free dissemination of ideas of social and political significance . . . ." *Id.* at 61. The Court reasoned that

place, and manner restrictions were upheld in *City of Renton v. Playtime Theaters, Inc.*[133] and *Town of Islip v. Caviglia.*[134] In light of the principles enunciated in theses cases, the court rejected Hempstead Video's claim that the ordinance facially violated freedom of expression.[135] The court concluded that "[t]he mere fact that the commercial exploitation of materials protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."[136]

The *Hempstead Video, Inc.*, court merged state and federal law in adjudicating the double jeopardy claim, however, New York has provided greater protection from successive prosecutions under New York's Criminal Procedure Law section 40.20.[137]

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subjecting places where films are exhibited to regulation, does not infringe free expression in light of the countervailing interest of the city in commercial regulation. *Id.* at 63.

133. 475 U.S. 41 (1986). Respondents purchased two theaters intending to exhibit "adult" films and challenged a city ordinance prohibiting "adult" theaters from operating within 1000 feet of any residential zone, single or multiple dwelling, church, park or school. *Id.* at 45. The Court held that because the ordinance did not ban such theaters absolutely, it could properly be deemed a content-neutral time, place, and manner restriction. *Id.* at 46. Such regulations were noted reasonable so long as they served a substantial government interest and do not limit alternative avenues to communication. *Id.* at 47. The Court reasoned that the city had a substantial interest in concerning itself with the effects of "adult" businesses and there were alternative avenues of communication as the ordinance was not an absolute ban. *Id.* at 49. The Court noted that preserving quality of life from urban decline is a substantial government interest. *Id.* at 54.

134. 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989). The petitioner, Town of Islip, sought to enjoin an "adult" bookstore owner from operating in a zone prohibited by ordinance. *Id.* at 548, 540 N.E.2d at 216, 542 N.Y.S.2d at 140. The ordinance provided that non-conforming "adult" uses shall be amortized over a period of years based on a graduated scale of investment in the business. *Id.* The court held that the ordinance was a reasonable, content-neutral, time, place, and manner restriction in light of the fact that petitioner had failed to show a loss sufficient to outweigh the government interest. *Id.* at 561, 540 N.E.2d at 224, 542 N.Y.S.2d at 148.

135. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at 28.

136. *Id.* (citation omitted).

137. *See* N.Y. CRIM. PROC. LAW § 40.20. For example, under federal constitutional doctrine, each state and the federal government are viewed as

Under the Federal Constitution, only separate prosecutions which arise out of the "same offense" are deemed double jeopardy.[138] New York goes further than the Federal Constitution by defining "previous prosecutions" barred as double jeopardy as including prosecutions occurring in a separate sovereign.[139]

Although the New York Legislature has broadened the federal criteria for determining double jeopardy, it enumerated six exemptions to successive prosecutions which receive no protection.[140] In *Hempstead Video, Inc.*, the court focused on Criminal Procedure Law section 40.20(2)(a),[141] noting that double jeopardy does not bar successive prosecutions where either the elements of the charge are substantially different or the acts constituting the offense are distinguishable in terms of time.[142] Having stated this, the *Hempstead Video* court, citing *Blockburger*, noted that determination of whether two offenses are the same is based upon whether either offense requires proof of a fact which the other does not.[143] Thus, while New York purports to provide greater protection from successive prosecution under Criminal Procedure Law section 40.20, the rationale of *Hempstead Video, Inc.* makes the point that

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separate sovereigns and, therefore, each sovereign may prosecute a crime against its own laws regardless of whether there has been a previous prosecution in another sovereign; *see also* Heath v. Alabama, 474 U.S. 82, 88 (1985). In *Health*, the Court held that "[t]he dual sovereignty doctrine . . . compels the conclusion that successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause." However, under New York's Criminal Procedure Laws, a "previous prosecution" barred as double jeopardy includes previous prosecutions by another state or by the federal government. N.Y. CRIM. PROC. LAW § 40.30(1) (McKinney 1992).

138. U.S. CONST. amend. V. *See, e.g.*, *Blockburger*, 284 U.S. at 304. Devising the "same offense" test, the Court concluded the ultimate determination rests on "whether each provision requires proof of an additional fact which the other does not." *Id.*

139. *See* N.Y. CRIM. PROC. LAW § 40.30(1) (McKinney 1992).

140. *See* N.Y. CRIM. PROC. LAW § 40.20(2)(a)-(f) (McKinney 1992).

141. *See* N.Y. CRIM. PROC. LAW § 40.20(a).

142. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at 27.

143. *Id.*

applications of state and federal constitutional doctrine to "continuous offense" claims are, in fact, substantially identical.

The applicable test governing claims of selective enforcement under both the New York and Federal Constitutions are the same. Both New York and federal law require a showing of unequal enforcement with an impermissible purpose. Thus, the New York Constitution is no aid to a defendant who must bear the heavy burden of establishing that the law was applied with the "unequal hand" and "evil eye" faced by the petitioner in *Yick Wo*.

The applicable test governing content-neutral time, place, and manner restrictions of "commercial speech" is the same under both the New York and Federal Constitutions.[144] *Playtime Theaters* and *Caviglia* hold that such regulations are permissible if four factors are satisfied. First, the "predominant purpose" of the ordinance is not to regulate the content of the material purveyed but to control the "secondary effects" of such uses on the community.[145] Second, the ordinance has to serve a substantial government interest.[146] Third, the ordinance must be narrowly tailored to limit only the unwanted effects. Finally, there must be alternative avenues of communication.[147] In *Hempstead Video, Inc.*, the "predominate purpose" of the ordinance was deemed to be controlling the "secondary effects" of "adult" businesses on the quality of community life which was noted to serve a substantial government interest.[148] The ordinance was also narrow enough to survive Hempstead Video's constitutional challenge. Lastly, there were adequate alternative

144. City of Renton v. Playtime Theaters, 475 U.S. 41, 45 (1986). *See* Town of Islip v. Caviglia, 73 N.Y.2d 544, 552, 540 N.E.2d 215, 218, 542 N.Y.S.2d 139, 142.

145. *Playtime Theaters*, 475 U.S. at 54 (finding the "predominant purpose" was to control the "secondary effects" of urban decline linked to "adult" business); *Caviglia*, 73 N.Y.2d at 552, 540 N.E.2d at 218, 542 N.Y.S.2d at 148.

146. *Playtime Theaters*, 475 U.S. at 54 (stating preservation of quality of life and preventing urban decline serves as substantial government interest); *Caviglia*, 73 N.Y.2d at 551, 540 N.E.2d at 218, 542 N.Y.S.2d at 148.

147. *Playtime Theaters*, 475 U.S. at 49 (finding alternative avenues of communication exist as ordinance is not an absolute ban).

148. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994, at 28.

avenues of communication as the ordinance did not purport to be an absolute ban.[149]

It should be noted, however, that New York has traditionally held an expansive view of freedom of expression under its own constitution. As the *Caviglia* court recognized:

> [F]reedom of expression in books, movies and the arts, generally, is one of those areas in which the Supreme Court has displayed great reluctant to expand Federal constitutional protections, holding instead that the subject is governed essentially by community standards[150] and, as we have said before, New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other states would be found offensive to the community.[151]

However, as *Hempstead Video, Inc.* makes clear, a content-neutral, time, place, and manner restriction will be upheld in New York if it is reasonable in scope and bears a rational and relevant relation to a substantial government interest in compliance with the minimum protections provided under federal constitutional doctrine.[152]

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149. *Id.*

150. *See* Miller v. California, 413 U.S. 15, 33 (1973). Stressing that obscenity should be governed by contemporary community values, the Court stated: "people in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.*

151. *Caviglia*, 73 N.Y.2d at 556, 540 N.E.2d at 221, 542 N.Y.S.2d at 145 (citations omitted). *See, e.g.*, People v. P.J. Video, Inc., 68 N.Y.2d 296, 309, 501 N.E.2d 556, 564, 508 N.Y.S.2d 907, 915 (1986) (making the point that New York courts should find community standards, under the *Miller* obscenity test, with deference to the state's traditional liberalism toward freedom of expression and with regard to the state's leadership role in promoting related values).

152. *Hempstead Video, Inc.*, N.Y. L.J., Dec. 29, 1994 at 28.