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Preventing the Secondary Effects of Adult Entertainment Establishments: Is Zoning the Solution?

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Preventing the Secondary Effects of Adult Entertainment Establishments: Is Zoning the Solution?

Cover Page Footnote

The author would like to give special thanks to J.C. and her family who have supported her throughout the writing and editing of this article. The author also thanks Anthony Davis and Sheldon Graves for their assistance in helping her understand the dynamics and aspects of adult use establishments.

PREVENTING THE SECONDARY EFFECTS OF ADULT ENTERTAINMENT ESTABLISHMENTS: IS ZONING THE SOLUTION?

DANA M. TUCKER*

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Along with the increase of "special cabarets"¹ came the increase in crime which was directly associated with these businesses. In fact there were a total of 463 crimes reported involving robbery, assault, narcotics, prostitution, lewd and lascivious acts, nude dancing, fight disturbances and exhibiting obscene material. With the increase of these businesses and the crime associated with them

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1. This term refers to adult entertainment businesses which offer the public topless to totally nude go-go dancers. See Tampa City Council Workshop Transcript 17 (July 1, 1982) [hereinafter Tampa Transcript].

came the outcry of the families and residents . . . for an end to these "sex oriented" businesses in their neighborhoods.²

The adult entertainment industry has grown rapidly over the past twenty years, especially with the emergence of 1-900 phone lines, pay-per-view adult movies, and pornographic internet websites. Within that time, United States Supreme Court decisions have recognized that First Amendment protection may extend to some types of nonobscene nude dancing and pornography as nonverbal expressive speech.³ With this potential for protection has come an increase in businesses that offer adult entertainment.⁴

Some communities view the proliferation of X-rated movie houses, adult bookstores, and topless bars as a hazard to the morals of their community and a threat to property values.⁵ Where a direct approach to the problem by way of adoption and enforcement of obscenity laws is regarded as impractical, local officials have instead chosen zoning as a method to control the uses and availability of these facilities. Zoning the location of adult businesses has ignited a hotly charged debate. Adult business proprietors and many First Amendment advocates are pitted against those citizens who want adult establishments and their negative secondary effects out of their neighborhoods.⁶

The question remains whether zoning is effectively ridding residential and school areas in close proximity to adult entertainment facilities of resulting adverse effects. This Comment explores this question and proposes possible solutions. Part I outlines the history of zoning and discusses a municipality's authority to zone out entertainment businesses. Part II explores the growth of adult use businesses and their First Amendment protection. Part III defines the secondary effects associated with these establishments, evaluates the growth of the effects, and analyzes the relationship between the adult use businesses and the negative effects seen in residential

2. *Id.* at 17-18.

3. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991) (stating that some nude dancing is expressive conduct within "the outer perimeters" of the First Amendment); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (citing *California v. LaRue*, 409 U.S. 109, 118 (1972) for the proposition that customary barroom types of nude dancing might be entitled to First Amendment protection in some circumstances). "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

4. See *infra* notes 82-89 and accompanying text.

5. See, e.g., Tampa Transcript, *supra* note 1, at 15-19.

6. See *Barnes*, 501 U.S. at 560; Tampa Transcript, *supra* note 1, at 15-19.

neighborhoods. Finally, Part IV assesses possible zoning solutions and alternative methods to decrease negative secondary effects.

I. THE POWER TO ZONE

Zoning may generally be defined as the division of a municipality or other local community into districts, the regulation of buildings and structures according to their construction and the nature and extent of their use, or the regulation of land according to its nature and uses.⁷ To be valid, zoning laws must balance individual property rights with the government's substantial interests in promoting the public welfare.⁸

A. *The Evolution of Zoning in the United States*

Zoning essentially developed as an outgrowth of nuisance law.⁹ By the early twentieth century, the United States Supreme Court upheld at least three municipal land use regulations, basing these decisions on traditional nuisance principles.¹⁰ In 1916, New York City became the first municipality to enact a comprehensive zoning scheme.¹¹ Within ten years, approximately 425 municipalities, representing more than half of the country's urban population, had passed similar measures.¹²

The Supreme Court reached a landmark decision in *Village of Euclid v. Ambler Realty Co.*,¹³ holding that so long as freedom of speech is not threatened, a zoning plan is a valid exercise of local police power if the plan serves a rational interest of the municipality.¹⁴ In *Euclid*, the Court reasoned that the zoning ordinance represented a valid exercise of the police power and rejected the landowner's argument that the ordinance deprived him of his liberty and property in contravention of the dictates of the Fourteenth

7. See 82 AM. JUR. 2D *Zoning and Planning* § 2 (1992).

8. See *Davis v. Sails*, 318 So. 2d 214, 217-18 (Fla. 1st DCA 1975) (citing 101 C.J.S. *Zoning* § 16).

9. See DANIEL R. MANDELKER, *LAND USE LAW* § 1.3 (1982).

10. See *Hadacheck v. Sebastian*, 239 U.S. 394, 410-13 (1915) (upholding an ordinance that excluded brickyards within certain areas of the city); *Reinman v. Little Rock*, 237 U.S. 171, 176-77 (1915) (upholding an ordinance that excluded livery stables from certain areas of the town); *Welch v. Swasey*, 214 U.S. 91, 107-08 (1909) (upholding an ordinance that divided Boston into two building districts with different height limitations applicable to each).

11. See ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION* 8 (1977).

12. See *id.* at 9.

13. 272 U.S. 365 (1926).

14. See *id.* at 389-90.

Amendment.¹⁵ The Court held that so long as the classifications made under a zoning ordinance are "fairly debatable,"¹⁶ and the provisions are not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," the ordinance will be upheld as constitutional.¹⁷

Nearly fifty years later, the Court heard *Village of Belle Terre v. Boraas*.¹⁸ In *Belle Terre*, a landowner challenged a zoning ordinance that restricted the use of his property to single-family dwellings.¹⁹ Only family members or no more than two unrelated persons could reside in a house on his property.²⁰ By alleging that the ordinance infringed his fundamental constitutional rights of privacy, the landowner attempted to have the ordinance reviewed under more exacting constitutional scrutiny than the mere rationality standard adopted in *Euclid*.²¹ The Court did not agree that any fundamental constitutional rights were implicated by the zoning ordinance and applied the mere rationality test, ultimately upholding the ordinance.²²

Three years later, in *Moore v. City of East Cleveland*,²³ the Court was faced with an ordinance similar to the one upheld in *Belle Terre*, but the *Moore* ordinance did not allow related persons to live together under certain circumstances.²⁴ The Court struck down the ordinance as an abridgment of the fundamental right of freedom of choice relating to family matters. The Court applied strict scrutiny, thus requiring the ordinance to be the least restrictive means of achieving a compelling state interest.²⁵ Through these decisions, the Court has reinforced the notion that local governments have wide latitude in protecting society morals and the general quality of life concerns of their communities.²⁶

15. See *id.* at 397. The landowner relied on the provision of the Fourteenth Amendment which states that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1, cl. 3.

16. *Euclid*, 272 U.S. at 388.

17. *Id.* at 395.

18. 416 U.S. 1 (1974).

19. See *id.* at 2.

20. See *id.*

21. See *id.* at 7.

22. See *id.*

23. 431 U.S. 494 (1977).

24. See *id.* at 498-99.

25. See *id.* at 499-500. The Court concluded that although the governmental interests sought to be achieved were "legitimate," the ordinance only has a "tenuous relation" to the achievement of those ends. *Id.* at 500.

26. See, e.g., *Berman v. Parker*, 348 U.S. 26, 32 (1954) (holding that zoning is permissible for the promotion of safety, health, morals, and the general quality of life in the community); *Zahn*

However, when a zoning regulation threatens freedom of speech, the courts cannot apply the deferential *Euclid* standard.²⁷ Therefore, the initial determination for any court reviewing a zoning ordinance that impacts First Amendment expression affects the applicable standard of review. The Supreme Court has consistently held that government regulation of speech on the basis of its content is subject to strict judicial scrutiny.²⁸

B. *The Development of Zoning in Florida*

The power to zone at the county and municipal level may be granted by the state legislature to local authorities by local or special act.²⁹ Zoning is an exercise of legislative power residing in the state and delegated to a municipal corporation.³⁰ The enactment of a zoning ordinance constitutes the exercise of a legislative and governmental function.³¹ In Florida, the zoning power of municipalities is derived from article VIII, section 2(b) of the Florida Constitution³² through the Municipal Home Rule Powers Act.³³ The Florida Legislature grants the governing body of a county the power to establish, coordinate, and enforce zoning and business regulations necessary for the protection of the public.³⁴ However, the doctrine of separation of powers³⁵ prohibits delegation of zoning powers to administrative bodies³⁶ and limits judicial review.³⁷ Since zoning is

v. Board of Public Works, 274 U.S. 325, 328 (1927) (deferring to the legislature where the validity of a zoning ordinance is fairly debatable).

27. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521 (1981) (holding that a zoning ordinance aimed at curbing pollution and eliminating distractions for pedestrians and motorists by prohibiting noncommercial billboards advertising was an unconstitutional violation of the First Amendment).

28. See *Carey v. Brown*, 447 U.S. 455, 458-59 (1980) (holding an Illinois statute unconstitutional because it made the impermissible distinction between labor picketing and peaceful picketing); see also *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (concluding government regulations cannot be based on the content of First Amendment expression); *Street v. New York*, 394 U.S. 576, 594 (1969) (finding it unconstitutional to convict a person for speaking in defamatory terms about the American flag).

29. See *State ex rel. Taylor v. City of Jacksonville*, 133 So. 114, 115 (Fla. 1931).

30. See 7 FLA. JUR. 2D *Building, Zoning, and Land Controls* § 55 (1997).

31. See *id.*

32. FLA. CONST. art. VIII, § 2(b)

33. FLA. STAT. § 166.021(4) (1995).

34. See *id.* § 125.01(1)(h).

35. See FLA. CONST. art. II, § 3. "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." *Id.*

36. See *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978) (holding that the legislature is not free to delegate to an administrative body so much of its lawmaking power as it may deem expedient).

primarily legislative in nature, zoning decisions should be made by zoning authorities responsible to their constituents.³⁸

Zoning laws and regulations are enacted through the exercise of police power. To justify the exercise of police power, the zoning restriction imposed must bear a real and substantial relation to, or be reasonably necessary for the public health, safety, morals, or general welfare.³⁹ A city and the courts must consider the public welfare of the whole community when construing a zoning ordinance; a mere or anticipated benefit to a special group within the city is not enough.⁴⁰

Aesthetics may also be considered in connection with the general welfare of a community.⁴¹ The peculiar characteristics and qualities of a city may justify zoning to perpetuate its aesthetic appeal, and this type of zoning is an exercise of the police power in the protection of public welfare.⁴² However, a zoning ordinance does not become invalid merely because it is based solely or predominately on aesthetic considerations.⁴³ In *Mayflower Property, Inc. v. Watson*,⁴⁴ the Florida Supreme Court recognized the preservation of the general nature of a neighborhood to be a proper purpose on which to base a zoning classification.⁴⁵ Zoning regulations that promote the integrity of a neighborhood and preserve its residential character are related to the general welfare of the community and are valid exercises of legislative power.⁴⁶

37. See *Town of Indialantic v. McNulty*, 400 So. 2d 1227, 1230 (Fla. 5th DCA 1981) (holding that zoning decisions are primarily legislative in nature and should be made by a zoning authority and not by the courts as super zoning review boards).

38. See *id.*

39. See *Burritt v. Harris*, 172 So. 2d 820, 822 (Fla. 1965); see also *City of Miami Beach v. 8701 Collins Ave.*, 775 So. 2d 428, 430 (Fla. 1953).

40. See *Fogg v. City of South Miami*, 183 So. 2d 219, 221 (Fla. 3d DCA 1966) (holding a zoning ordinance prohibiting drive-in operations at a dairy products retail store invalid where the city made exceptions for a gas station, a bank, and a savings and loan business).

41. See *City of Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364, 367 (Fla. 1941); see also *Rotenberg v. City of Ft. Pierce*, 202 So. 2d 782, 785-86 (Fla. 4th DCA 1967) (holding that aesthetics are a valid basis for zoning).

42. See *City of Miami Beach v. First Trust Co.*, 45 So. 2d 681, 684 (1949).

43. See *City of Coral Gables v. Wood*, 305 So. 2d 261, 263 (Fla. 3d DCA 1974) (upholding the validity of a zoning ordinance aimed at maintaining aesthetic characteristics by preventing unsightly appearances and diminution in property values from camper-type vehicles parked in a residential area).

44. 233 So. 2d 390 (Fla. 1970).

45. See *id.* at 392; see also *Blank v. Town of Lake Clarke Shores*, 161 So. 2d 683, 686 (Fla. 2d DCA 1964) (holding that it is not arbitrary and unreasonable for a residential village to pass an ordinance preserving its residential character as long as the inhabitants' business and industrial needs are met by other accessible areas in the community at large).

46. See *City of Miami v. Zorovich*, 195 So. 2d 31, 37 (Fla. 3d DCA 1967).

Florida courts have considered other purposes and objectives for zoning regulations. Zoning regulations may be employed to protect the economic value of existing uses.⁴⁷ The decrease or prevention of traffic congestion⁴⁸ and the prevention of the overcrowding of lands⁴⁹ are proper purposes on which to base zoning classifications. However, the restriction or the control of business competition is not a valid objective or purpose of zoning regulations.⁵⁰

When exercising its zoning powers, a municipality must deal with well-defined classes of uses. Zoning ordinances generally contain comprehensive regulations addressing the construction of buildings and the use of premises in each of the classes of districts which a municipality has been divided.⁵¹ Therefore, zoning regulations must relate to either the nature of the structure or the nature of the use.⁵² Zoning involves more than mere classification; it also involves consideration of the future growth and development, adequacy of drainage and storm sewers, public streets, pedestrian walkways, and density of population.⁵³

II. ZONING AND THE ADULT ENTERTAINMENT INDUSTRY

The regulation of nonobscene nude dancing and adult book and video stores has been addressed in several federal courts.⁵⁴ Since zoning regulations must relate to the nature of the structure or the nature of its use, many municipalities utilize this power to regulate the use of adult entertainment structures to control the activities of these businesses.⁵⁵ Thus, inevitable conflicts arise between local

47. See *Trachsel v. City of Tamarac*, 311 So. 2d 137, 140 (Fla. 4th DCA 1975).

48. See *id.*; see also *Mayflower Prop., Inc. v. Watson*, 233 So. 2d 390, 392 (Fla. 1970).

49. See *Watson*, 223 So. 2d at 374.

50. See *Wyatt v. City of Pensacola*, 196 So. 2d 777, 779 (Fla. 1st DCA 1967).

51. See 7 FLA. JUR. 2D *Building, Zoning, and Land Controls* § 58 (1997).

52. See *id.*

53. See *id.*

54. See, e.g., *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994); *U.S. Partners Fin. Corp. v. Kansas City, Missouri*, 707 F. Supp. 1090 (W.D. Mo. 1989); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 828 F. Supp. 370 (D. Md. 1993); *Janra Enter., Inc. v. City of Reno*, 818 F. Supp. 1361 (D. Nev. 1993).

55. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 563 (1991) (upholding a zoning ordinance requiring performers to wear pasties and G-strings); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 220 (1990) (upholding a zoning ordinance requiring owners and operators of motels that rent rooms for less than 10 hours at a time to comply with licensing requirements of sexually oriented businesses); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding a zoning ordinance prohibiting adult movie theaters from locating within 1,000 feet of a residential zone, church, park, or school); *Hang On, Inc. v. City of Arlington*, 65 F.2d 1248, 1254 (5th Cir. 1996) (upholding a zoning ordinance placing a "no touch" requirement on activities between dancers and customers); *Matney v. County of Kenosha*, 86 F.3d 692 (7th Cir. 1996) (upholding a zoning ordinance requiring that one side of viewing booths in adult establishments remain open or unenclosed).

governments attempting to regulate sexually oriented businesses and owners, operators, and patrons of such businesses seeking protection under the First Amendment.⁵⁶ The resulting case law has wrestled with the problem of defining the lawful scope of local zoning power over businesses that arguably deal with these forms of expression.⁵⁷

A. First Amendment Protection of Expressive Speech

First Amendment litigation generally revolves around two issues: (1) whether the material in question rests under the purview of First Amendment protection; and (2) if so, what is the scope of that protection.⁵⁸ First Amendment analysis and litigation has been the subject of cases involving hate speech,⁵⁹ flag burning,⁶⁰ commercial advertising,⁶¹ defamation,⁶² invasion of privacy⁶³ and matters of national security.⁶⁴

The Supreme Court extended the First Amendment's protection of free speech to cover many types of expressive conduct that are not technically speech. In *Brown v. Louisiana*,⁶⁵ the Court ruled that the First Amendment protected individuals engaged in an orderly demonstration at a segregated public library and stated that First Amendment rights "are not confined to verbal expression."⁶⁶ In *West Virginia State Board of Education v. Barnette*,⁶⁷ the Court held that

56. See Elise M. Whitaker, *Pornographer Liability for Physical Harms Caused by Obscenity and Child Pornography: A Tort Analysis*, 27 GA. L. REV. 849, 855 (1993) (discussing the background of judicial regulation of obscenity on First Amendment grounds).

57. See discussion *infra* Part II.A.

58. See *Spence v. Washington*, 418 U.S. 405, 409-11 (1974).

59. See *Garrison v. Louisiana*, 379 U.S. 64 (1964).

60. See *Texas v. Johnson*, 491 U.S. 397 (1989).

61. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566-73 (1980) (finding that commercial speech or advertising is protected from unwarranted governmental regulations).

62. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Neither factual error nor defamatory content sufficed to remove the constitutional shield from protecting criticism of official conduct. See *id.* at 279-83. However, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) set up an elaborate system of limited protection for publishers of defamatory statements concerning public figures and public matters. See *Gertz*, 418 U.S. at 339-41; *Butts*, 388 U.S. at 148-50.

63. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (finding that a state may not punish for publication of accurate information derived from official court records open for public inspection).

64. See *Snapp v. United States*, 444 U.S. 507, 510 n.3 (1980) (finding that the government had a compelling interest in reviewing a former CIA agent's publication pursuant to a voluntary employment agreement).

65. 383 U.S. 131 (1966).

66. *Id.* at 142.

67. 319 U.S. 624 (1943).

a student could not be forced to salute the flag, stating that "symbolism is a primitive but effective way of communicating ideas."⁶⁸ To determine whether the conduct is expressive or symbolic speech, courts must determine whether it constitutes expressive conduct.⁶⁹ In *Spence v. Washington*,⁷⁰ the Court held that the conduct is expressive if the actor had an "intent to convey a particularized message," and a great likelihood existed that the audience understood the message.⁷¹

Arguably, limitless types of conduct, including appearances in the nude in public, are expressive. People who participate in public nudity may be expressing something about themselves.⁷² The Court, however, expressly rejected this broad definition of expressive speech saying, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."⁷³ The Court went further in *City of Dallas v. Stanglin*,⁷⁴ observing that "it is possible to find some kernel of expression in almost every activity a person undertakes, for example, walking down the street or meeting one's friends at a shopping mall, but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."⁷⁵ The *Stanglin* Court found that the mere activity of the adult entertainment patrons, coming together to engage in recreational activity, is not protected by the First Amendment.⁷⁶

If conduct is found to be nonexpressive, then it does not receive First Amendment protection.⁷⁷ For example, in *South Florida Free Beaches, Inc. v. City of Miami*, the Eleventh Circuit refused to give First Amendment protection to nude sunbathers who challenged a public indecency law on the basis that it infringed on their right to communicate their belief that nudity was not indecent.⁷⁸ In upholding minimum dress requirements at public beaches, the Supreme Court has held that "[t]he appearance of people of all shapes,

68. *Id.* at 632.

69. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968).

70. 418 U.S. 405 (1974).

71. *Id.* at 410-11.

72. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

73. *O'Brien*, 391 U.S. at 376.

74. 490 U.S. 19 (1989).

75. *Id.* at 25.

76. *See id.* (holding that a social dance group does not involve the sort of expressive association that the First Amendment has been held to protect).

77. *See South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608, 609 (11th Cir. 1984).

78. *See id.*

sizes and ages in the nude at a beach . . . would convey little if any erotic message"⁷⁹ The Court further found that whether or not nudity is combined with expressive activity, a state which has indecency or minimum public dress requirements statutes, is attempting to remedy "the evil" of public nudity.⁸⁰

First Amendment rights cases involving adult entertainment businesses have established many of the core principles and standards of the parameters of allowable governmental restrictions on freedom of expression. A long history of governmental attempts to curtail such entertainment ultimately resulted in numerous cases in which the parties sought freedom of speech protection.⁸¹ However, regardless of how one feels about nudity as expressive conduct, the First Amendment standards that have emerged from these battles have undeniably gone to the very core of the right to freedom of expression.

In the last decade those businesses that fall within the definition of "adult entertainment business" have increased tremendously.⁸² The creation of an appropriate definition for adult entertainment has produced significant litigation. No definition exists that will engender a perfect fit for the entire adult entertainment industry. Perhaps all attempts to formulate a definition for adult entertainment will ultimately end with the conclusion reached by United States Supreme Court Justice Potter Stewart. Stewart noted the difficulty of creating an intelligible definition but stated, "I know it when I see it."⁸³ However, for the purposes of this Comment, adult entertainment will be broadly defined as that which focuses on sexuality, where it contains a certain degree of sexual explicitness and/or erotic use of full or partial nudity. Thus, the adult entertainment industry includes: peep shows, adult video stores, pornographic bookstores, special cabarets,⁸⁴ rap parlors,⁸⁵ liquor lounges, internet

79. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571 (1991).

80. *Id.*

81. See *Barnes*, 501 U.S. at 567-71; see also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1987) (citing various cases that extend freedom of speech protection to forms of entertainment which contain nudity).

82. See *infra* notes 83-89 and accompanying text.

83. *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Stewart, J., concurring).

84. A cabaret features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers. See DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.000 (1972).

85. Rap parlors are "establishments at which men may converse with women who are not fully clothed." *Alexander v. City of Minneapolis*, 698 F.2d. 936, 936-37 n.2 (8th Cir. 1983).

web sites,⁸⁶ X-rated pay-per-view channels,⁸⁷ massage parlors,⁸⁸ and 1-900 sex phone lines.⁸⁹

B. Nude Dancing as Expressive Conduct: Eroticism or Obscenity?

Expressive conduct is not limited to communicative speech; it may include symbolic speech that conveys an idea.⁹⁰ Thus, owners of adult entertainment businesses have argued that the dancers are expressing a message and that their conduct is therefore protected as symbolic speech.⁹¹ The respondents in *Barnes v. Glen Theatre, Inc.*,⁹² argued that their go-go dancers were performing nonobscene nude dancing intended to send a message of eroticism and sexuality.⁹³ In addressing the constitutional protection of nude dancing, Chief Justice Rehnquist stated that nude dancing is expression only "marginally" within the "outer perimeters" of the First Amendment.⁹⁴ The *Barnes* Court recognized that public indecency laws have long been justified as part of the state's police powers, reflecting a substantial governmental interest in protecting order and morality.⁹⁵ The Court also found the government interest unrelated to any message expressed by nude dancing, and in doing so, the Court separated eroticism and the message of nude dancing from nude

86. Web sites on the internet that offer material, such as nude pictures and sexually explicit "chat-lines," have been at the center of censorship in recent years. See generally *ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996) (finding that the Communications Decency Act violated the First Amendment by prohibiting certain transmissions on the internet).

87. Some cable companies throughout the United States offer services like the Spice network, where the subscriber may pay for each viewing of a pornographic movie, rather than subscribe to any one particular premium channel. See *Playboy Entertainment Group v. United States*, 945 F. Supp. 772, 776 (D. Del. 1996).

88. An establishment is a massage parlor when it is engaged primarily in providing sexually oriented massages notwithstanding that it calls itself a health club and provides exercise equipment. See *Babin v. City of Lancaster*, 493 A.2d 141, 144 n.3 (1985).

89. Long distance carriers offer services where a caller may dial a phone number with the prefix 1-900 with the agreement to pay per minute to speak with a person, usually a woman, about sexually explicit topics. The caller often requests the woman to use sexually arousing language. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 117-18 (1993).

90. See *Texas v. Johnson*, 491 U.S. 397, 403 (1989) (holding that the burning of the American flag is protected symbolic speech).

91. See *Miller v. City of South Bend*, 904 F.2d 1081, 1086-87 (7th Cir. 1990), *rev'd*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); see also *Walker v. City of Kansas City*, 911 F.2d 82, 85 (W.D. Mo. 1988).

92. 501 U.S. 560 (1991).

93. See *id.* at 569.

94. *Id.* at 566.

95. See *id.* at 569. The plurality cited its decisions in *Paris Adult Theatre I v. Slanton*, 413 U.S. 49 (1973) (upholding a prohibition on the showing of obscene films) and *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a prohibition of sodomy) for the notion that public morality may serve as a basis for law. See *Barnes*, 501 U.S. at 569.

dancing itself.⁹⁶ By requiring dancers to wear pasties and a G-string, Indiana had only made the message slightly less graphic. It did not prohibit the message of eroticism, rather it prohibited the message's transmission through nude dancing.⁹⁷

The argument has been made that nude dancing constitutes obscenity and is without First Amendment protection.⁹⁸ The *Miller* Court announced and applied the standard that American courts continue to use when determining what constitutes obscenity. According to the *Miller* three-part test, material is obscene: (1) if the typical person applying community standards would find the work as a whole appealing to prurient interests; (2) if the work describes or depicts in an obviously offensive manner sexual conduct specifically outlined by the relevant statute; and (3) if the work considered as a whole is devoid of serious artistic, political, literary or scientific value.⁹⁹ Applying the *Miller* test, the Eighth Circuit found, "to the extent that nude barroom dancing contains a message and therefore qualifies as First Amendment 'speech,' it may contain a message that nonetheless is categorically unprotected by the First Amendment—that is, an appeal to the prurient interest."¹⁰⁰

Nevertheless, the Supreme Court's willingness to engage in First Amendment analysis in nude dancing cases indicates that the Court does not view all nude dancing as obscene. Numerous Supreme Court decisions indicate that nude dancing constitutes expressive conduct intended to convey a particularized message, and thus, meets the *Spence* standard.¹⁰¹ In *Doran v. Salem Inn, Inc.*,¹⁰² the Court upheld a preliminary injunction that enjoined enforcement of a city regulation that prohibited topless dancing.¹⁰³ In *Doran*, the Court noted that nude dancing may be protected expression "although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, . . . this form of entertainment might be entitled to First and Fourteenth Amendment

96. See *id.* ("While the dancing to which [the indecency statute] was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.").

97. See *id.* at 573 (Scalia, J., concurring).

98. See *Miller v. California*, 413 U.S. 15, 18-19 (1973).

99. See *id.* at 24; see also *Roth v. United States*, 354 U.S. 476 (1957) (confronting the issue of constitutional protection for obscene material). The defendant, Roth, ran a business that published and sold pornographic magazines, books, and photographs. The Court affirmed Roth's conviction finding that the ideas expressed by lewd and obscene materials are of little "social value" and therefore receive no First Amendment protection. *Id.* at 485.

100. See *Walker v. City of Kansas City*, 911 F.2d 80, 87 (8th Cir. 1990).

101. See *supra* notes 70-71 and accompanying text.

102. 422 U.S. 922 (1975).

103. See *id.* at 932.

protection under some circumstances."¹⁰⁴ Finding the ordinance overbroad as applied to the nude dancing in question, the Court granted the request for injunctive relief without addressing the exact level of protection the First Amendment provides to nude dancing.¹⁰⁵

C. *The Four-Prong Test of Regulating Expressive Speech*

In *United States v. O'Brien*,¹⁰⁶ the Supreme Court formulated a four-prong test for determining whether government regulation aimed at nonexpressive conduct violates the First Amendment.¹⁰⁷ In *O'Brien*, the defendant was convicted under federal law¹⁰⁸ for burning his draft card to protest American involvement in the Vietnam War.¹⁰⁹ The Court stated, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."¹¹⁰ The *O'Brien* Court enunciated a four-prong test, finding that government regulation of conduct is constitutional if: (1) the regulation is a constitutional exercise of the government's power; (2) it furthers an important or substantial government interest; (3) it is unrelated to the suppression of free expression; and (4) any incidental burden upon First Amendment rights is no greater than necessary to promote the compelling state interest.¹¹¹

By applying the four-prong test to the facts in *O'Brien*, the Court found that *O'Brien's* course of conduct was expressive.¹¹² However, the Court found that the government's interest in safeguarding efficient procedures for administering the Selective Service system was a substantial governmental interest that was unrelated to the suppression of speech.¹¹³ The Court also found that the governmental interest could not be advanced by any alternative method and that the regulation did not prevent *O'Brien* from expressing his

104. *Id.*

105. *See id.* at 933-34.

106. 391 U.S. 367 (1968).

107. *See id.* at 376-83.

108. *See* 50 U.S.C. § 462(b) (1965) (stating that any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate . . . may be fined and imprisoned.").

109. *See O'Brien*, 391 U.S. at 376.

110. *Id.*

111. *See id.* at 376-83.

112. *See id.* at 376.

113. *See id.* at 382.

view in other ways.¹¹⁴ Therefore, the conviction was upheld because the Court found the statute to be content-neutral.¹¹⁵

However, in *Texas v. Johnson*,¹¹⁶ the Court found that the *O'Brien* test could not be applied to public burning of the American flag.¹¹⁷ In considering the constitutionality of the statute in *Johnson*, the Supreme Court noted that Johnson's act of burning the flag was expressive, thus meriting analysis under the First Amendment.¹¹⁸ Finding the Texas statute content-based, the Court applied a higher level of scrutiny.¹¹⁹ The Court balanced the governmental interest of preserving the flag as a symbol of national unity against Johnson's right to unburdened freedom of speech.¹²⁰ In making this determination, the Court relied on statements made by Johnson at his trial. According to Johnson, "The American flag was burned as Ronald Reagan was being re-nominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time."¹²¹ Ultimately, the Court held that, under this balancing of interests, Johnson's right to express himself was more important than Texas's asserted state interest.¹²²

1. Issue One: Is the Zoning Ordinance Content-Neutral?

The Supreme Court has applied the *O'Brien* test to cases involving the regulation of adult entertainment businesses when the zoning ordinance is content-neutral, and thus, does not restrict conduct because of its message.¹²³ *Barnes* first applied the *O'Brien* test to adult entertainment. In *Barnes*, owners and dancers in the adult entertainment industry brought suit to enjoin enforcement of Indiana's public indecency statute that required the dancers to wear pasties and G-strings.¹²⁴ After *Barnes*, the Supreme Court approached government regulation of adult entertainment by evoking various legal theories related to First Amendment protection,

114. See *id.* at 378-86.

115. See *id.* at 381-82. Content-neutral regulations are constitutional and do not involve the regulation of speech. Content-based regulations are generally unconstitutional and are enacted to control the expression of speech. See *infra* notes 126-130 and accompanying text.

116. 491 U.S. 397 (1989).

117. See *id.* at 410.

118. See *id.* at 405-06.

119. See *id.* at 412.

120. See *id.* at 414-17.

121. *Id.* at 406.

122. See *id.* at 420.

123. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 563 (1991).

124. See *id.* at 563; see also *supra* notes 92-97 and accompanying text.

including the time, place, and manner test, the overbreadth doctrine, the vagueness doctrine, the prior restraint doctrine, and Twenty-first Amendment principles.¹²⁵

The Supreme Court has consistently held that governmental regulation of speech on the basis of its content is subject to strict judicial scrutiny.¹²⁶ Therefore, only content-neutral ordinances regulating protected expression are constitutional.¹²⁷ The Court's analysis of an ordinance challenge begins with a determination of whether the ordinance focuses merely on the time, place, and manner in which adult uses can be operated (content-neutral regulations) or whether the ordinance is aimed at restricting the content of the expression (content-based regulations).¹²⁸ An ordinance is content-neutral if it meets the following three criteria: (1) the government has a substantial interest in the regulation that is unrelated to the suppression of ideas; (2) the means of regulating the protected expression are narrowly tailored; and (3) reasonable alternative avenues of communication are left open for dissemination of the regulated speech.¹²⁹ For these reasons, local governments attempting to pass zoning ordinances for adult entertainment businesses must ensure that the ordinance provides: (1) sufficient factual basis to support a finding of substantial governmental interest; (2) narrowly tailored definitions of adult uses affecting only those businesses which the ordinance intends to regulate; and (3) reasonable alternative channels of communication for the affected expression.¹³⁰

2. *Issue Two: Whether Time, Place, and Manner Regulations are Proper?*

The time, place, and manner test was originally formulated to apply only to speech or expressive conduct that takes place in public forums.¹³¹ However, some courts and scholars have viewed the

125. See *Young v. American Mini Theatre*, 427 U.S. 50, 58-62 (1976).

126. See, e.g., *Carey v. Brown*, 447 U.S. 455, 458-59 (1980) (striking down a state statute as unconstitutional because it made the impermissible distinction between labor picketing and peaceful picketing); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (holding that government regulations cannot be based on the content of First Amendment expression); *Cohen v. California*, 403 U.S. 15, 24 (1971) (reversing a conviction for wearing jacket bearing the phrase "Fuck the Draft" as a violation of protected expression); *Street v. New York*, 394 U.S. 576, 584-85 (1969) (finding it unconstitutional to convict a person for speaking in defamatory terms about the American flag).

127. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1989).

128. See *Mosley*, 408 U.S. at 95-96.

129. See *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981); *Mosley*, 408 U.S. at 98; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 442 (1957).

130. See *City of Renton*, 475 U.S. at 50.

131. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

time, place, and manner test and the *O'Brien* test as essentially the same.¹³² The Supreme Court has used the time, place, and manner test to evaluate state regulation of nude dancing.¹³³ This application often arises when owners of adult entertainment establishments claim a zoning regulation is a violation of their First Amendment rights.¹³⁴ Government restriction of expressive activities has been permitted in situations where restrictions fall short of a complete ban and constitute time, place, and manner restrictions.¹³⁵ Essentially, courts have found that although expression covered by the First Amendment cannot be banned, it can be restricted in terms of where, when, and how that expression is presented.¹³⁶ For example, nonobscene sexually explicit material on broadcast television and radio can be restricted to times when children are less likely to be in the audience.¹³⁷ The Court has given state and local governments leeway in their attempts to control purported adverse effects of adult entertainment, particularly when related to protecting children or others who do not wish to be exposed to adult material.¹³⁸ This leeway has also extended to controlling alleged adverse secondary effects.¹³⁹ Yet, even with time, place, and manner restrictions, courts have set limits concerning how far a government can go when attempting to ban unpopular expression.¹⁴⁰

The Supreme Court first addressed the time, place, and manner restrictions of adult entertainment regulations in 1976 in *Young v. American Mini Theatres, Inc.*,¹⁴¹ and later in *Schad v. Borough of Mount Ephraim*,¹⁴² and *City of Renton v. Playtime Theatres, Inc.*¹⁴³ Each of these cases supplied an important element for an examination of time, place, and manner regulations. *Young* stressed that the

132. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (finding that the time, place, and manner test embodies the same standards as those set forth in *O'Brien*).

133. See *infra* notes 141-143 and accompanying text.

134. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 562-63 (1991); see also *Walker v. City of Kansas City*, 911 F.2d 80, 82, 85 (W.D. Mo. 1988).

135. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-12 (1975) (invalidating a zoning ordinance that failed to distinguish movies containing nudity from all other movies which were being restricted, thereby constituting a complete ban on speech).

136. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

137. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (finding that because of the use of the public airwaves, broadcasting is subject to somewhat stricter regulation than print media or cable TV).

138. See *id.* at 730 n.1; see also *Erznoznik*, 422 U.S. at 210-12.

139. See *Redner v. Dean*, 29 F.3d 1495, 1505 (11th Cir. 1994); 11126 Baltimore Boulevard, Inc. v. Prince George's County, 886 F.2d 1415, 1420, 1426 (4th Cir. 1989).

140. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-55 (1989).

141. 427 U.S. 50 (1976).

142. 452 U.S. 61 (1981).

143. 475 U.S. 41 (1986).

regulation must not suppress protected expression and that access to that expression must remain available.¹⁴⁴ *Schad* emphasized that the regulation cannot be so broad as to completely prohibit protected expression and that the regulation must further a substantial governmental interest.¹⁴⁵ *Renton* established a deferential standard of review for cases involving time, place, and manner regulations.¹⁴⁶

a. *Young v. American Mini Theatres, Inc.*

According to Justice Powell, *Young* was the first case decided by the Supreme Court "in which the interests of freedom of expression protected by the First and Fourteenth Amendments ha[d] been implicated by a municipality's commercial zoning ordinances."¹⁴⁷ At issue in *Young* was the constitutionality of certain portions of Detroit's Anti-Skid Row ordinance that singled out adult bookstores and theaters for special treatment.¹⁴⁸ The original Anti-Skid Row ordinance, passed in 1962, was based on findings by the Detroit Common Council that certain types of businesses, when concentrated, can have a blighting effect on the surrounding neighborhood.¹⁴⁹

The ordinance forbade adult motion picture theaters, topless cabarets, and other similar establishments from locating within 1,000 feet of each other or within 500 feet of a residential dwelling without first obtaining approval.¹⁵⁰ Although the ordinance was not technically content-neutral because it applied only to adult entertainment, the Court found the ordinance to be a reasonable time, place, and manner restriction of protected speech because the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate.¹⁵¹ The Court held that the ordinance constituted a permissible content-neutral time, place, and manner

144. See, e.g., *Young*, 427 U.S. at 70-71.

145. See *Schad*, 452 U.S. at 68-69.

146. See *City of Renton*, 475 U.S. at 46-48 (deferring to the government's purpose or substantial interest in enacting time, place, and manner regulations).

147. *Young*, 427 U.S. at 76 (Powell, J., concurring).

148. See *id.* at 54-55.

149. See *id.* at 56 (citing DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.000 (1972), which states "[i]n the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood.").

150. See *id.* at 52.

151. See *id.* at 70.

restriction because the purpose of the ordinance was not to eliminate, censor, or suppress the protected speech but rather to preserve the quality of urban life by avoiding the secondary effects of these businesses on the community through regulation of the placement and concentration of such businesses.¹⁵² Justice Stevens' plurality opinion pointed out that the city's goal of avoiding or mitigating these secondary effects is one which must be accorded high respect and is a sufficient governmental interest to justify the resulting incidental restriction on First Amendment speech.¹⁵³

b. *Schad v. Borough of Mount Ephraim*

In contrast to *Young*, the Court in *Schad* struck down a local time, place, and manner zoning ordinance that banned all adult theaters, including live entertainment and nude dancing, from every commercial district in the city.¹⁵⁴ Although the Court recognized the local government's broad zoning power for the purpose of maintaining a satisfactory quality of life, the Court held that this power "must be exercised within constitutional limits."¹⁵⁵ In finding the ordinance unconstitutional, the Court reasoned that the municipality provided no conclusive evidence of a substantial interest in prohibiting all forms of live entertainment, and the municipality failed to prove that there were adequate alternative channels of communication open to businesses subject to the regulation.¹⁵⁶ The Court stated that its decision in *Young* was not controlling because in that case "[t]he restriction did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them."¹⁵⁷

c. *City of Renton v. Playtime Theatres, Inc.*

In *Renton*, a suit was brought challenging the constitutionality of a zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school.¹⁵⁸ The district court granted summary judgment in the city's favor, holding that the ordinance did not violate the First Amendment.¹⁵⁹ The court of

152. *See id.* at 71.

153. *See id.* at 71-73 (Steven, J., concurring).

154. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981).

155. *Id.* at 68 (citing *Moore v. East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring)).

156. *See id.* at 73-74.

157. *Id.* at 71.

158. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43 (1986).

159. *See id.*

appeals reversed, holding that the ordinance constituted a substantial restriction on First Amendment interests and remanded the case for reconsideration of whether the city had substantial governmental interests to support the ordinance.¹⁶⁰ The Supreme Court held that the ordinance was a valid governmental response to the serious problems created by adult theaters and therefore satisfied the dictates of the First Amendment.¹⁶¹ The Court reasoned that the ordinance did not ban adult theaters altogether and was a proper form of time, place, and manner regulation.¹⁶² The Court reaffirmed that content-neutral time, place, and manner regulations are not unconstitutional as long as they are formulated to serve a substantial state interest and not to unreasonably limit alternative avenues of communication.¹⁶³

The district court found that Renton City Council's predominate concerns were with the secondary effects of adult theaters on the surrounding community, not with the content of adult films themselves.¹⁶⁴ This finding was adequate to establish that the city's pursuit of its zoning interests was unrelated to the suppression of free expression, and thus, the ordinance was a content-neutral speech regulation.¹⁶⁵ The Supreme Court concluded that the Renton ordinance was designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication.¹⁶⁶ The Court further held that although the ordinance was enacted without the benefit of studies specifically relating to Renton's particular problems, Renton was entitled to rely on the experiences of and studies produced by other cities.¹⁶⁷ The Court found that no constitutional defect invalidated the method chosen by Renton to further its substantial interests¹⁶⁸ and that cities may regulate adult theaters by dispersing them or by effectively concentrating them as in Renton.¹⁶⁹

Moreover, since no evidence showed that at the time the ordinance was enacted, any other adult business was located in or was contemplating a move into Renton, the Court found that the

160. *See id.* at 44 (citing *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984)).

161. *See id.* at 49 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)).

162. *See id.* at 52-54.

163. *See id.* at 46.

164. *See id.* at 48.

165. *See id.*

166. *See id.* at 53.

167. *See id.*

168. *See id.* at 52.

169. *See id.* at 51.

ordinance was not "underinclusive" for failing to regulate other kinds of adult businesses.¹⁷⁰ The Court determined that although Renton first chose to address the potential problems created by one particular kind of adult business, this choice in no way suggested that the city had "singled out" adult theaters for discriminatory treatment.¹⁷¹ Finally, the Court held that the ordinance allowed for reasonable alternative avenues of communication, as required by the First Amendment.¹⁷² Although the theater owner argued that in general no "commercially viable" adult theater sites were located within the limited area of land left open for such theaters by the ordinance, the Court found that this limitation did not give rise to a violation of the First Amendment since potential adult business owners must fend for themselves in the real estate market on equal footing with other prospective purchasers and lessees. Thus, the Court did not believe that the First Amendment compelled the government to ensure that adult theaters or any other kinds of speech-related businesses would be able to obtain sites at bargain prices.¹⁷³ The Court deferred to the city's desire to preserve "the quality of urban life."¹⁷⁴ In fact, the Court stated that as long as the evidence relied upon by the city is reasonably believed to be relevant to the problem that the city addresses, the evidence will be sufficient to support a finding of substantial governmental interest.¹⁷⁵

In light of *Renton*, municipalities should provide three essential elements in their legislation and accompanying record: (1) a legislative record sufficient to show a nexus between adult uses and particular secondary effects and a legislative finding that the legislation addresses those secondary effects; (2) a definition section which is neither vague nor overbroad; and (3) sufficient available land for the location or relocation of adult businesses.¹⁷⁶

3. *Issue Three: Whether Twenty-first Amendment Principles are Applicable?*

Another approach that has been taken by the Supreme Court to review a governmental regulation of nude dancing utilizes the

170. *Id.* at 52.

171. *Id.*

172. *See id.* at 53.

173. *See id.*

174. *Id.* at 50 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976)).

175. *See id.* at 51-52.

176. *See, e.g., Phillips v. Borough of Keyport*, 107 F.3d 164, 173-74 (3d Cir. 1997); *see also Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 133-34 (3d Cir. 1993).

Twenty-first Amendment of the United States Constitution.¹⁷⁷ In *Ziffrin, Inc. v. Reeves*,¹⁷⁸ the Court recognized that a state has absolute power under the Twenty-first Amendment to prohibit the sale of liquor within its boundaries.¹⁷⁹ The Court recognized that pursuant to the Twenty-first Amendment, states have wide latitude to enact laws that prevent establishments which offer nude dancing from acquiring liquor licenses.¹⁸⁰

In *LaRue*, bar owners challenged a regulation prohibiting nude dancing where alcohol was served.¹⁸¹ The state offered evidence of sordid and illegal acts occurring in and around the establishments.¹⁸² The Court upheld the regulation recognizing the broad powers states have in regulating the use and distribution of alcohol under the Twenty-first Amendment.¹⁸³ The *LaRue* Court held that the regulations were within California's power to control the sale and distribution of alcohol within its borders and that the regulations were a rational response to problems created by mixing alcohol with nude entertainment.¹⁸⁴ The Court stressed the "critical fact" that the state did not prohibit nude performances across the board but only in places serving alcohol.¹⁸⁵

The Supreme Court has further held that a state legislature, pursuant to its power to regulate the sale of liquor within its boundaries, can ban topless dancing in establishments that have a license to serve liquor.¹⁸⁶ A "[s]tate's power to ban the sale of alcoholic

177. U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited."). The Supreme Court has interpreted this language to give the states broad powers to regulate the sale and distribution of alcohol. See *California v. LaRue*, 409 U.S. 109 (1972).

178. 308 U.S. 132 (1939).

179. See *id.* at 138.

180. See *LaRue*, 409 U.S. at 117.

181. See *id.* at 110. The California regulations prohibited certain conduct on licensed premises, such as performance of acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts that are prohibited by law; the actual or simulated displaying of pubic hair, anus, vulva or genitals; and the actual or simulated touching, caressing or fondling on the breast, buttocks, anus, or genitals. See *id.* at 111-12.

182. See *id.* Customers engaged in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer or on the bar so that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers reportedly occurred. See *id.* at 110.

183. See *id.* at 114 (noting that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals").

184. See *id.* at 115-19.

185. *Id.* at 117.

186. See *New York Liquor Auth. v. Bellanca*, 452 U.S. 714, 717 (1981) (per curiam).

beverages entirely include[d] the lesser power to ban the sale of liquor on premises where topless dancing occurs."¹⁸⁷ The Court also held that nudity is the kind of conduct that is a proper subject for legislative action as well as regulation by the State Liquor Authority as a phase of liquor licensing.¹⁸⁸ In addition, "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand."¹⁸⁹

4. *Issue Four: Is the Licensing Requirement a Prior Restraint?*

Governments sometimes adopt licensing or permit systems to regulate certain kinds of activity, such as permits to engage in door-to-door soliciting, permits to parade, and permits to operate sound amplifiers.¹⁹⁰ These licensing or permit systems are constitutional when the regulation is fashioned to benefit public health, safety, welfare, or convenience.¹⁹¹ For example, a parade licensing requirement requiring notification of police for public regulation purposes and ensuring noninterference with other normal uses of the streets is constitutional.¹⁹² However, licensing systems aimed at forbidding speech or regulating the content of speech are unconstitutional.¹⁹³ Since licensing and permit systems can be misused to restrain speech, they are constitutional only if they provide clearly defined relevant standards for issuance and do not accord officials discretion to deny issuance of a license or permit because of the content or viewpoint of the expression or the identity of the speaker.¹⁹⁴ When licensing officials have such broad discretion that they could effectively suppress legitimate speech, the permit scheme is void on its face and speakers need not comply with it.¹⁹⁵ However, when licensing schemes provide clear standards for issuance, speakers must seek a permit, and if refused, must seek judicial or administrative relief rather than speak without permission.¹⁹⁶ Therefore, the

187. *Id.*

188. *See id.* at 717-18.

189. *Id.* (citing NEW YORK STATE LEGISLATIVE ANNUAL 150 (1977)).

190. *See Kovacs v. Cooper*, 336 U.S. 77, 86 (1949).

191. *See Ginsberg v. New York*, 390 U.S. 629, 636 (1968).

192. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151-52 (1969).

193. *See Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 450-52 (1938).

194. *See Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941); *see also Kunz v. New York*, 340 U.S. 290, 294 (1951).

195. *See Staub v. City of Baxley*, 355 U.S. 313, 318 (1958) (citing *Smith v. Cahoon*, 283 U.S. 553, 562 (1931)).

196. *See Poulos v. New Hampshire*, 345 U.S. 395, 409-14 (1953).

doctrine of prior restraint is applicable only to impermissible means of restricting speech.

Some local governments have employed a licensing requirement to prevent a concentration of adult businesses from opening establishments in their community.¹⁹⁷ Adult businesses can be required to obtain an operating license, but no license may be denied merely because the businesses will offer sexually explicit shows or other similar material.¹⁹⁸ The Supreme Court addressed licensing schemes as prior restraints in *FW/PBS*, where the local ordinance required all "sexually oriented businesses" to be licensed in order to operate.¹⁹⁹ The Court found that in order for a licensing system to be constitutional as applied to protected speech, the following three conditions must be satisfied: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.²⁰⁰

Since *FW/PBS*, several decisions have reviewed and addressed various adult business licensing schemes. For instance, a county's adult bookstore ordinance was found to be an unconstitutional prior restraint on protected speech where the ordinance failed to assure prompt judicial review of an administrative denial of a special exception.²⁰¹ Similarly, an ordinance was found to provide inadequate procedural safeguards where an adult bookstore seeking a special exception would face a delay of at least eight months from the date of application.²⁰² The Fifth Circuit reviewed two cases from Texas where the licensing procedures for adult businesses were challenged as prior restraints on protected expression but were upheld under *FW/PBS*.²⁰³ The court was satisfied that the two licensing decisions were required to be made within a specified brief

197. See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 220 (1990) (invalidating a license requirement for adult businesses).

198. See *id.* at 220.

199. *Id.* at 236. The Court recognized that it was reasonable to believe that shorter rental time periods indicate that the motels foster prostitution. See *id.*

200. See *id.* at 227 (citing *Freedman v. Maryland*, 380 U.S. 51 (1965) and finding that a censorship board could not prohibit a movie production and release by way of a prepublication review requirement to determine obscenity prior to publication).

201. See *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 32 F.3d 109, 114 (4th Cir. 1994).

202. See *id.* at 115 (finding that a 150 day period for the completion of judicial review of a decision on an application for an adult bookstore was not an excessive period).

203. See *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068 (5th Cir. 1994).

period, as mandated by *FW/PBS*.²⁰⁴ Because the two adult entertainment businesses at issue in those cases were already in business, the court further held the government could not constitutionally shut them down while their application for a license was pending.²⁰⁵ Another court has held that the requirement for a conditional use permit was presumptively unconstitutional as a prior restraint on protected expression because no sites were available in the county for adult businesses to operate.²⁰⁶ The court also found that the code did not contain safeguards against the possibility that officials would deny a permit on the basis of the content of an applicant's speech.²⁰⁷ These cases indicate the frequency with which local governments use licensing schemes to restrict the operation of adult businesses.

D. Restrictive Zoning Regulations in Florida

Florida, like other states, has attempted to use zoning laws to address concerns regarding the adverse secondary effects attributed to adult businesses.²⁰⁸ Time, place, and manner regulations have been used by several cities in Florida to disperse or concentrate these establishments with the intention of combating the adverse secondary effects. Those Florida cities that have enacted time, place, and manner regulations affecting the location²⁰⁹ and distance patrons must keep from nude dancers,²¹⁰ have also had to satisfy the requirements of *Renton*.²¹¹

Some local governments have attempted to use zoning laws to "zone out" adult entertainment businesses. For example, in

204. See *TK's Video*, 24 F.3d at 708 (60 day period); *Grand Brittain*, 27 F.3d at 1070 (11 day period).

205. See *TK's Video*, 24 F.3d at 708; *Grand Brittain*, 27 F.3d at 1071.

206. See *Mga Susa, Inc. v. County of Benton*, 853 F. Supp. 1147, 1150 (D. Minn. 1994) (invalidating a permit requirement for a "recreational facility," the definition of which included various kinds of adult and nonadult businesses).

207. See *id.* at 1151.

208. See *T-Marc, Inc. v. Pinellas County*, 804 F. Supp. 1500, 1503 (M.D. Fla. 1992) (upholding a zoning ordinance requiring a three foot distance between dancers and patrons to control secondary effects of adult use establishments); *3299 N. Federal Highway, Inc. v. Board of County Comm'rs of Broward County*, 646 So. 2d 215, 221 (Fla. 4th DCA 1994) (upholding a zoning ordinance providing for a three foot distance between the dancers and the patrons to prevent lapdancing and the adverse effects cause by this activity); *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1162 (11th Cir. 1991) (upholding a zoning ordinance that furthered a substantial governmental interest in protecting the quality of urban life from the secondary effects of adult businesses).

209. See, e.g., *International Eateries*, 941 F.2d at 1157.

210. See, e.g., *T-Marc*, 804 F. Supp. at 1503; *3299 N. Federal Highway*, 646 So. 2d at 221.

211. See *International Eateries*, 941 F.2d at 1161; *T-Marc*, 804 F. Supp. at 1502; see also discussion *supra* Part II.C.2.c.

International Food and Beverage Systems, the court noted that the evidence revealed only twenty-five locations around the city that were available for adult entertainment businesses.²¹² The proposed sites were near the city's well-fields on the outskirts of town or located near the airport where much of the land was condemned or undergoing drastic change due to construction of a new expressway.²¹³ The court found that these sites were so patently unsuitable for businesses that the regulations effectively zoned the subject adult entertainment businesses out of the city.²¹⁴ Thus, the regulations were unconstitutional because they were not the least restrictive means to achieve the city's legitimate interests.²¹⁵

Prior to the Florida Supreme Court decision in *City of Daytona Beach v. Del Percio*,²¹⁶ the Florida courts had not answered the critical question of whether Florida had delegated its powers under the Twenty-first Amendment to counties and municipalities. Resolution of this question was crucial because local ordinances regulating the sale or consumption of alcohol would be entitled to a presumption of validity conferred by the Twenty-first Amendment if the state had delegated the authority.²¹⁷ However, if the state had not delegated the authority, the ordinances would be subject to the stricter review applicable to exercises of the general police power.²¹⁸ In 1985, the Florida Supreme Court answered this question by finding that the powers had been delegated.²¹⁹ Since this time, local governments have used these delegated powers to restrict or forbid the sale of liquor at adult businesses.²²⁰

III. THE SECONDARY EFFECTS OF ADULT ENTERTAINMENT ESTABLISHMENTS ON RESIDENTIAL NEIGHBORHOODS

"With the increase of Adult Entertainment Establishments came a public awareness that these type of businesses could have a direct effect on the quality of life in . . . neighborhoods due to the criminal activities associated with these adult businesses and the type of

212. See *International Food and Beverage Systems v. City of Fort Lauderdale*, 614 F. Supp. 1517, 1521 (S.D. Fla. 1985).

213. See *id.*

214. See *id.*

215. See *id.* at 1522.

216. 476 So. 2d 197 (Fla. 1985).

217. See *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (1981).

218. See *Krueger v. City of Pensacola*, 759 F.2d 851, 852 (11th Cir. 1985).

219. See *Del Percio*, 476 So. 2d at 201-04.

220. See *Fillingim v. Boone*, 835 F.2d 1389, 1399-1401 (11th Cir. 1988) (affirming the conviction of adult night club owner for violating an ordinance prohibiting nude or semi-nude entertainment in an establishment where alcoholic beverages were sold for consumption).

patrons that [they] attracted."²²¹ Residents of communities located near some of these businesses have many reasons for disliking these establishments. One concern is with drivers who rush out of the parking lots of the businesses while children are nearby.²²² Public hearings have overflowed with similar concerns about traffic, property devaluation, prostitution and other crimes. However, at the core of this concern is the fear of the kind of people a nude dance club attracts; usually undesirables, transient crowds, and unsavory elements.²²³

A. Adverse Effects and Their Causes

Adult entertainment establishments foster criminal activities such as racketeering, arson, murder, narcotics, bookmaking, pornography, profit skimming, and loan sharking.²²⁴ Along with these activities, opponents of these establishments argue that the spread of HIV, increased prostitution, increased rape, and neighborhood deterioration are also adverse secondary effects attributed to adult businesses.²²⁵ Not only does a community have to deal with the increased crime brought by these businesses but also the impact on moral values. Signs erected on public streets and highway billboards intended to solicit patrons ultimately indicate to the community's youth that the moral standard of the community is to depict women as tools for sexual gratification and fantasy fulfillment, rather than as friends, lovers, mothers, and equals.²²⁶

221. Tampa Transcript, *supra* note 1, at 15.

222. This effect is likely due to the customer's effort to avoid being seen patronizing the business, usually because of the negative image associated with those who frequent adult entertainment establishments. See *It's Showtime*, SEATTLE TIMES/SEATTLE POST-INTELLIGENCER, June 2, 1991, at 22 [hereinafter *It's Showtime*].

223. These terms are generally used to negatively depict patrons and supporters of adult businesses. However, those who patronize adult establishments are often businessmen, married men, or others who would be considered upstanding members of the community. See *It's Showtime*, *supra* note 222, at 22; see also *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 899 (1990).

224. These activities are directly associated with organized crime, which has been argued to be the "money and muscle" behind adult entertainment establishments. Tampa Transcript, *supra* note 1, at 15.

225. See *id.* at 21-22.

226. "What this particular form of entertainment takes away from men, slowly, incrementally over time, probably unconsciously, is their capacity to appreciate the women in their ordinary lives. And perhaps it blunts even their ability to view women as equals." See *It's Showtime*, *supra* note 222, at 23.

1. *The Spread of HIV*

One of the adverse secondary effects attributed to the use and location of adult use businesses is the increased spread of HIV. Many local officials consider the rapid spread of HIV and AIDS in many cities throughout the country, its incurable and fatal nature, and its mode of transmission.²²⁷ During the 1980s, HIV infection emerged as a leading cause of death in the United States among young adults aged 25 to 44 years.²²⁸ By 1989, HIV infection had become the second leading cause of death in men and the sixth leading cause of death in women in this age group, accounting for 14% and 4% of deaths respectively.²²⁹ "[M]ost AIDS cases in men result from HIV transmission by homosexual contact, and high incidence rates of AIDS related to homosexual contact are widespread in many states across the country."²³⁰ Thus, preventing the spread of HIV has been cited as a reason for enacting ordinances to restrict or prohibit closed viewing booths in adult establishments that provide peep shows of nude dancers or coin-operated X-rated video viewing.²³¹

Many local governments have found that viewing booths in adult establishments have been or are being used by patrons as places to engage in sexual acts, particularly between males, including but not limited to intercourse, sodomy, oral copulation and masturbation, resulting in unsafe and unsanitary conditions.²³² The viewing booths at these adult establishments are small closet-sized rooms that are divided from adjoining booths by plywood partitions.

227. See Francisco G. Torres, *Lights, Camera, Actionable Negligence: Transmission of AIDS Virus During Adult Motion Picture Production*, 13 HASTINGS COMM. & ENT. L. J. 89, 92 (1990). HIV causes AIDS by debilitating one's immune system and ultimately causing death. AIDS is a fast-growing public concern due to its rapid spread in recent years. See *id.* at 92-93.

228. See Richard M. Selik et al., *Infection as Leading Cause of Death Among Young Adults in U.S. Cities and States*, 269 JAMA 2991 (1993).

229. See *id.*

230. *Id.*

231. See *Suburban Video, Inc. v. City of Delafield*, 694 F.Supp. 585, 588 (E.D. Wis. 1988).

232. See *id.* at 588 n.1 (citing DELAFIELD, WIS., CODE OF ORDINANCES § 11.14, which lists Milwaukee and Kenosha Counties, Wisconsin; Chattanooga, Tennessee; Newport News, Virginia; and Marion County, Indiana as localities that have found that adult establishments have been used by patrons for sexual acts); The Dayton city commission found that similar activity occurred at local adult establishments in Dayton, Ohio. See *Bamon Corp. v. City of Dayton*, 923 F.2d 470, 473 (6th Cir. 1990). Minneapolis, Minnesota has also passed a similar ordinance based on such findings. See *Doe v. City of Minneapolis*, 693 F.Supp. 774, 777 (Minn. 1988); Broward County, Florida has conducted an extensive sting operation to uncover these activities. See METROPOLITAN BUREAU OF INVESTIGATION, NINTH JUDICIAL CIRCUIT, AFFIDAVIT/PROSECUTIVE SUMMARY (Sept. 1, 1987) [hereinafter PROSECUTIVE SUMMARY] (stating that agents reported witnessing sexual intercourse, oral copulation, sodomy and fellatio) (on file with author).

The plywood petitions have holes cut in them which permit the occupant of one booth to engage in sexual contact with the occupant of the adjoining booth, and consequently, the potential to spread HIV.²³³

Local ordinances that govern the physical layout of these types of adult establishments require that each booth, room, or cubicle be totally accessible to and from aisles and public areas of the establishment and shall be unobstructed by any door, lock, or other control-type devices.²³⁴ These time, place, and manner regulations seek to diminish the spread of contagious diseases caused by high risk sexual conduct by regulating certain commercial facilities where high risk sexual conduct has been found to have taken place.²³⁵ Evidence has shown that high risk sexual activities include multiple, anonymous sexual encounters and casual sexual activity occur in adult establishments that offer such viewing booths.²³⁶ Testimony by patrons of these adult establishments evidence that fellatio, anal intercourse and mutual masturbation take place in the viewing booths.²³⁷ The employees of these establishments have also testified that semen was found on the walls or floors of the viewing booths.²³⁸ Thus, courts have found restrictive ordinances for the viewing booths to be valid based on the local government's substantial interest in ensuring sanitary public places to retard the spread of sexually transmitted diseases, like AIDS.²³⁹

Danny's New Adam & Eve Bookstore discussed the potential spread of HIV and AIDS in adult entertainment establishments that offer closed viewing booths.²⁴⁰ A Pennsylvania state appeals court upheld a lower court decision closing down certain areas of two adult bookstores and video establishments that were found to be public nuisances because they threatened the spread of HIV.²⁴¹ The decision arose on a consolidated appeal by *Danny's New Adam & Eve Bookstore* and *Book Bin East*, which both sold sexually oriented

233. See Memorandum from the Broward County Dep't of Strategic Planning and Growth Management to the Bd. of County Comm'rs (June 4, 1993) [hereinafter *Broward County Memorandum*] (on file with author).

234. See *Suburban Video, Inc. v. City of Delafield*, 694 F. Supp. 585, 588 (E.D. Wis. 1988); *Bamon Corp. v. City of Dayton*, 923 F.2d 470, 471 (6th Cir. 1991); *Doe v. City of Minneapolis*, 693 F. Supp. 774, 777 (D. Minn. 1988).

235. See *Doe*, 693 F. Supp. at 776.

236. See *supra* note 234 and accompanying text.

237. See *Doe*, 693 F. Supp. at 777; *Bamon Corp.*, 923 F.2d at 472; *Pennsylvania v. Danny's New Adam & Eve Bookstore*, 625 A.2d 119, 122 (Pa. Commw. Ct. 1993).

238. See PROSECUTIVE SUMMARY, *supra* note 232.

239. See *Suburban Video*, 694 F. Supp. at 589.

240. See *Danny's New Adam & Eve Bookstore*, 625 A.2d at 121.

241. See *id.* at 122.

video tapes, books, and magazines, as well as offered coin-operated video viewing booths.²⁴² Agents for the state testified that a number of the booths had holes between them that allowed patrons to have oral sex with persons in the adjacent booth.²⁴³ A state agent also testified that in the "Couch Dancing" area of the Book Bin East, dancers offered to have sex with him for money.²⁴⁴ In addition to this testimony, a patron of these establishments testified that he was infected with HIV and that he had engaged in intercourse in the establishments on several occasions.²⁴⁵

The court found that "[c]ompetent evidence exists in the record to support the trial court's conclusion that sexual conduct, occurring on the premises, could lead to the spread of HIV which may result in AIDS."²⁴⁶ The court further held that the "citizens of the Commonwealth of Pennsylvania will suffer irreparable harm if defendants continue to maintain video viewing booths and areas utilized [as] 'California Couch Dancing' where sexual activity has taken place which could lead to the spread of HIV."²⁴⁷ Thus, the court considered the spread of HIV a legitimate state concern to justify regulation.

2. Increased Crime, Prostitution, Rape, and Neighborhood Deterioration

In *LaRue*, the Court relied upon testimony by law enforcement agents and state investigators that prostitution occurring in and around strip clubs involved some of the female dancers employed at the clubs.²⁴⁸ The city also presented testimony that indecent exposure to young girls, attempted rape, rape, and assaults on police officers took place on or immediately adjacent to such premises.²⁴⁹ Numerous studies have been conducted in cities throughout the United States to determine the relationship between increased crime rates and decreasing property values, including Austin, Texas; Orange County, Florida; Dallas, Texas; Los Angeles, California; Tampa, Florida; and Palm Beach County, Florida.²⁵⁰ The reports

242. *See id.*

243. *See id.* at 120-21.

244. *Id.* at 121.

245. *See id.* at 122.

246. *Id.*

247. *Id.* at 121.

248. *See California v. LaRue*, 409 U.S. 109, 110 (1972).

249. *See id.* at 111.

250. *See Broward County Memorandum*, *supra* note 233; *see also T-Marc, Inc. v. Pinellas County*, 804 F. Supp. 1500, 1503 (M.D. Fla. 1992) (listing cities that have conducted studies of secondary effects of adult entertainment).

describe the methodology and results of studies done between 1984 and 1985 in Los Angeles, California and Austin, Texas and are reasonably detailed.²⁵¹ The Austin study compared rates of sex-related crimes and other crimes in four study areas, all of which contained one or two adult businesses, to the corresponding crime rates in control areas, which were said to be near the study areas and similar in land use characteristics, but without adult entertainment establishments.²⁵² Generally the crime rates were found to be higher in areas containing adult establishments than in their corresponding control areas.²⁵³ Crime rates were higher for both sex-related and non-sex-related crimes.²⁵⁴

An independent report found that the number of adult businesses in the Hollywood area of Los Angeles increased from eleven in 1969 to eighty-eight in 1975, a 700% increase.²⁵⁵ During the same time period, reports homicide, rape, and burglary²⁵⁶ increased 7.6% in Hollywood and 4.2% citywide, indicating a low rate in the increase of serious crime in both areas.²⁵⁷ The report notes that arrests for prostitution, drug offenses, gambling violations, and various misdemeanors²⁵⁸ increased dramatically to 45.4% in the Hollywood area compared to a modest increase city-wide of 3.2%. Additionally, a New York City study shows that the most severe crime, prostitution, and urban blight occur when adult businesses concentrate in one particular area of a city.²⁵⁹ Although most of these studies show a correlation between the location of adult businesses and an increase in crime, the studies' reliability and accuracy have been questioned.²⁶⁰ However, surveys of police officers and comments of citizens at public hearings have consistently expressed the view that the presence of adult businesses have had a negative effect.²⁶¹

251. See Randy D. Fisher, Evidence for the Harms of Adult Entertainment: A Critical Evaluation 11 (1993) (unpublished report) (on file with author).

252. See *id.*

253. See *id.*

254. See *id.*; see also *Borrigo v. City of Louisville*, 456 F. Supp. 30, 31 (W.D. Ky. 1978) (upholding an ordinance based on studies on increased crime and undesirable clientele around adult establishments). But see *California v. LaRue*, 409 U.S. 109, 131-33 (1972) (Douglas, J., dissenting) (rejecting the causal connection between sex-related entertainment and criminal activity).

255. See Fisher, *supra* note 251, at 10.

256. See *id.* at 11.

257. See *id.*

258. See *id.*

259. See Rachael Simon, Note, *New York City's Restrictive Zoning of Adult Businesses: A Constitutional Analysis*, 23 FORDHAM L. REV. 187, 205 (1995) (referring to this occurrence as the "combat zone effect").

260. See Fisher, *supra* note 251, at 11.

261. See *id.*; see also Simon, *supra* note 259, at 187, 190.

Two types of studies have been conducted to determine whether the presence of adult entertainment affects property values.²⁶² The most common study approach has been to solicit the opinions of real estate appraisers, lenders, or property owners about the effect of adult businesses on nearby residential or commercial properties.²⁶³ Results of these surveys show that the majority of people surveyed would not buy a house or open a business near an adult business.²⁶⁴ Additionally, real estate professionals and residents generally agree that adult entertainment lowers property values "from moderate to substantial amounts."²⁶⁵

Los Angeles and Indianapolis used a different study approach.²⁶⁶ These studies examined property values through Multiple Listing data or property value assessments and compared data for areas containing adult entertainment with control areas that contained no such establishments.²⁶⁷ Many appraisers and real estate agents surveyed responded that the effects on property values depend upon the type of adult business, how it was run, and how it was marketed.²⁶⁸

B. The Relationship Between Adverse Effects and Location of Adult Businesses

The findings of these studies indicate that when compared to other commercial uses, increased crime rates and lower property values are more likely to be found near adult entertainment businesses.²⁶⁹ Some studies found that illegal and lewd activities often occurred in adult bookstores and theaters.²⁷⁰ Other studies document neighborhood deterioration associated with adult entertainment establishments.²⁷¹

Although local governments have relied on these studies to support the passage of restrictive zoning ordinances, researchers disagree over whether a relationship exists between adult entertainment businesses and adverse secondary effects. The National Coalition Against Pornography, Inc. has distributed leaflets and fact

262. See Fisher, *supra* note 251, at 15; see also Simon, *supra* note 259, at 206.

263. See Fisher, *supra* note 251, at 15.

264. See *id.*

265. *Id.*

266. See *id.* at 16.

267. See *id.*

268. See *id.* at 15.

269. See Broward County Memorandum, *supra* note 233.

270. See PROSECUTIVE SUMMARY, *supra* note 232 (reporting that agents witnessed sexual intercourse, oral copulation, sodomy and fellatio).

271. See Tampa Transcript, *supra* note 1, at 9, 21-22.

sheets that indicate a link between sexually explicit material and crime, child molestation rates, and rape.²⁷² However, following the Final Report of the Attorney General's Commission on Pornography (Meese Commission Report),²⁷³ numerous researchers independently published contrary findings that no statistical data existed to support a relationship between violent or nonviolent sexually explicit material and rape, molestation, prostitution, and other crimes.²⁷⁴

Nevertheless, whether secondary effects are attributable to adult entertainment businesses continues to concern residents of communities located near these businesses.²⁷⁵ These concerns, instead of the abstract statistical data found by researchers, are the focus of zoning boards and local governments.²⁷⁶ Although the passage of restrictive zoning ordinances must be supported by sufficient factual findings, the Supreme Court has held that this evidence may be borrowed from other cities where the secondary effects exist.²⁷⁷ Also, "[a] city need not wait for urban deterioration to occur before acting to remedy it" by way of a zoning ordinance that restricts location of adult entertainment businesses, and a city may rely upon experiences of other cities in enacting such restrictions as long as reliance is reasonable.²⁷⁸

Adult entertainment produces negative secondary effects, as is evidenced by numerous studies. Potential effects include: the spread of HIV, higher crime, higher rates of prostitution and rape, and neighborhood deterioration, including decreased property values. In the next section, this Comment explores methods of reducing these harmful effects.

IV. POSSIBLE SOLUTIONS TO COMBAT SECONDARY EFFECTS

Communities have used different strategies to reduce the harmful effects resulting from the presence of adult entertainment. Many communities use zoning as a tool to rid their residential area of these

272. See NATIONAL COALITION AGAINST PORNOGRAPHY, FACT SHEET (1990).

273. ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 215 (1986) [hereinafter MEESE COMM'N REPORT].

274. See MARCIA PALLY, SENSE AND CENSORSHIP: THE VANITY OF BONFIRES 18-23 (Americans for Constitutional Freedom & Freedom to Read Foundation 1991).

275. See Minutes of the Bd. of County Comm'rs, Broward County, Fla. 2-7 (July 13, 1993) (identifying 20 citizens who voiced opinions concerning adult entertainment establishments in their neighborhoods); see also *It's Showtime*, *supra* note 222, at 22.

276. See *It's Showtime*, *supra* note 222, at 22. See generally Tampa Transcript, *supra* note 1.

277. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986).

278. *15192 Thirteen Mile Rd., Inc. v. City of Warren*, 626 F. Supp 803, 825 (E.D. Mich. 1985); see also *Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980) (finding that "a city need not await deterioration in order to act").

harmful secondary effects.²⁷⁹ When zoning out the adult entertainment establishment is not a viable avenue, other alternatives may be considered, such as expanding the scope of prostitution statutes²⁸⁰ or narrowing the scope of materials protected by the First Amendment.²⁸¹

A. *Is Zoning the Solution?*

In 1986, President Reagan created the Meese Commission specifically to study the impact of pornography on society.²⁸² In reviewing the use of zoning schemes to restrict adult entertainment, the commission expressed concern that "zoning may be a way for those with political power to shunt the establishments they do not want in their own neighborhoods into the neighborhoods of those with less wealth and less political power."²⁸³ Striking a balance between zoning and freedom of speech has proven to be a difficult and imprecise judicial exercise.²⁸⁴ While the courts have not provided definitive guidance on all the legal questions, municipalities desiring to combat the secondary effects of adult uses have received sufficient judicial direction to enable passage of zoning legislation safe from judicial veto.²⁸⁵ Some municipalities have attempted to disperse adult uses by implementing minimum distance requirements between adult establishments and other land uses such as residences, churches, schools, and parks.²⁸⁶ These municipalities concentrate adult establishments in industrial, light industrial, or commercial zones using zoning ordinances.²⁸⁷

279. See discussion *infra* Part IV.A.

280. See discussion *infra* Part IV.B.1.

281. See discussion *infra* Part IV.B.2.

282. See MEESE COMM'N REPORT, *supra* note 273, at 390.

283. *Id.*

284. See David J. Christiansen, *Zoning and the First Amendment Rights of Adult Entertainment*, 22 VAL. U. L. REV. 695, 709 (1988) (discussing the judicial treatment of the practice of zoning out adult businesses).

285. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-50 (1986).

286. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976) (upholding a zoning ordinance that restricted the location of adult use businesses to prohibit the location of adult businesses within 1,000 feet of each other and 500 feet of residential zone); see also *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153, 1156 (Wash. 1978) (upholding a zoning ordinance that restricted the location of adult use businesses to a specified area of the city); see also *City of Renton*, 475 U.S. at 43, 52 (upholding a zoning ordinance that prohibited the location of adult use businesses from within 1,000 feet of a residential zone, church, park, or school); Gianni P. Servodidio, *The Devaluation of Nonobscene Eroticism as a Form of Expression Protected By the First Amendment*, 67 TUL. L. REV. 1231, 1235-37 (1993). Many jurisdictions have found alternatives to get around the *Miller* standard, thus leading to inconsistent results. See *id.*

287. See *City of Renton*, 475 U.S. at 46, 52 (upholding a zoning ordinance that restricted the location of the adult use businesses to industrial and commercial zones).

The first major area of concern in promulgating adult use zoning ordinances involves development of the factual record.²⁸⁸ The factual record must be built by a municipality prior to the passage of any restrictive zoning legislation.²⁸⁹ The record should include two components: (1) studies indicating that a link exists between adult uses and the problems associated with those adult uses; and (2) studies indicating that the method chosen, whether dispersal or concentration, addresses those undesirable secondary effects.²⁹⁰ Municipalities have two alternatives for building a factual record that will support an adult use ordinance, both of which must withstand judicial scrutiny. First, a municipality can hire experts in demography, crime, traffic, housing, real estate valuation, and commercial development to supplement the record.²⁹¹ Unfortunately, this option is very costly. Alternatively, a city can borrow from factual records of other cities that have enacted similar legislation.²⁹²

If a municipality chooses to borrow from other cities' experiences in building its factual record, the statement of purpose for the ordinance should clearly identify that a nexus exists between adult uses and certain secondary effects, the particular secondary effects of adult uses that the ordinance seeks to address, and a legislative finding that the ordinance in question addresses those secondary effects.²⁹³ In addition to a statement of purpose, the factual record should also contain, when feasible, factual findings that support the nexus between the secondary effects,²⁹⁴ and the method chosen to combat those secondary effects.²⁹⁵ This additional information

288. See, e.g., *Northend Cinema, Inc. v. City of Seattle*, 585 P. 2d 1153 (Wash. 1978).

289. See *City of Renton*, 475 U.S. at 51-52.

290. See *id.*

291. See *id.*

292. See *id.* at 50-52. A municipality does not need to conduct new studies and build an independent factual record "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52.

293. See *id.* at 50-52. The language in *Renton* and subsequent decisions indicates that a municipality's failure to address the governmental interest issue can be fatal to the constitutionality of the ordinance. For example, Fort Lauderdale passed a city ordinance that stated as its purpose the desire "to preserve public peace and good order" and maintain property values in areas around residential sections, parks, and schools. The district court held that the city failed to provide evidence of a documented history of concern about the undesirable effect of adult entertainment on the community. *International Food & Beverage Systems v. City of Fort Lauderdale*, 614 F. Supp. 1517, 1520 (S.D. Fla. 1985); see *Krueger v. City of Pensacola*, 759 F.2d 851, 852 (11th Cir. 1985).

294. These findings should include testimony or reports from urban planners, demographers, crime experts, traffic consultants, and experts in housing, real estate valuation, commercial development, and similar evidence. See *City of Renton*, 475 U.S. at 51 (stating that a city may rely on the experiences of other cities and on the evidence summarized in *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153 (Wash. 1978)).

295. See *City of Renton*, 475 U.S. at 52.

allows a court to determine that the legislative body understood the secondary effects and made an intelligent determination that the ordinance was reasonably believed to be an effective method of combating the existing secondary effects.²⁹⁶

Conclusively, restrictive zoning of adult use establishments may help curtail adverse secondary effects that adult businesses bring into communities. However, the requirements of *Renton*²⁹⁷ must be considered to ensure that the constitutional rights of owners and patrons are not violated.

B. Alternative Methods of Solving the Problems of Secondary Effects

1. Expand the scope of prostitution statutes

Prostitution is the criminal act of exchanging sex for money; an offense that is illegal in most states.²⁹⁸ The institution of prostitution allows males unconditional sexual access to females, limited only by their ability to pay.²⁹⁹ Various studies conducted on adult bookstores, peep shows, strip clubs, pornographic modeling studios, and lingerie modeling shops conclude that many of these establishments offer sex for money.³⁰⁰ Increased prostitution and littering in nearby neighborhoods are among the secondary effects attributable

296. See *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153, 1159 (Wash. 1978).

297. The zoning ordinance must provide sufficient evidence of adverse secondary effects, the definitions must be narrowly tailored and a reasonably available alternative means of communication. See *City of Renton*, 475 U.S. at 52-54.

298. Nevada has made an exception for legalized prostitution. "It is unlawful for any person to engage in prostitution or solicitation thereof, except in a house of prostitution." NEV. REV. STAT. § 201.354 (1995).

299. See Evelina Giobbe, *Prostitution: Buying the Right to Rape*, in RAPE AND SEXUAL ASSAULT III: A RESEARCH HANDBOOK 143 (Ann Wolbert Burgess ed., 1991). Prostitution is "[e]ngaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person." BLACK'S LAW DICTIONARY 1222 (6th ed. 1990). Although prostitutes may be either male or female, this Comment refers only to the majority of the situations in which the prostitute is female. This Comment also acknowledges that some pornographic filmmakers are female. However, an examination of these situations is beyond the scope of this Comment.

300. See generally *supra* note 235-245 and accompanying text. A typical work day for pornographic models is 12 to 14 hours long, and models can expect to engage in at least two sex scenes a day. See MEESE COMM'N REPORT, *supra* note 273, at 871. Further, the Meese Commission concluded that "it seems abundantly clear from the facts before us that the bulk of commercial pornographic modeling, that is all performances which include actual sexual intercourse, quite simply is a form of prostitution." *Id.* at 890; see PROSECUTIVE SUMMARY, *supra* note 232 (reporting that agents witnessed sexual intercourse, oral copulation, sodomy and fellatio); see also LINDA LOVELACE & MICHAEL MCGRADY, *ORDEAL* (1980) (the autobiography of a pornographic star who describes the abuse she suffered and the prostitution with which she engaged while filming these types of movies).

to these adult businesses³⁰¹ and are the primary contributors to community complaints about these businesses.³⁰²

One way to assuage the secondary effects of adult businesses would be to include pornographic filmmakers and owners of adult businesses under the scope of prostitution statutes, thus penalizing any activity in which sex is exchanged for money. Any owner, filmmaker, or photographer who does not encourage or assist in the exchange of sex for money would not fall within the scope of these proposed prostitution statutes. As seen in numerous states, many patrons engage in sexual activity or lewd acts in adult establishments.³⁰³ These establishments would be the primary target of expanded prostitution statutes. Decreasing the number of adult establishments that promote and foster sexual activity and lewd acts appears to be the ultimate goal of most local governments which enact restrictive zoning ordinances.³⁰⁴ In contrast, this alternative is not intended to dissolve all adult establishments but aims to decrease physical sexual actions.³⁰⁵ Thus, these improved statutes would merely exist to eliminate the sexual activity and lewd acts that occur at some adult establishments.

If adult establishment owners and pornographic filmmakers were held criminally liable for the activities that occur in the proximity of their establishments then perhaps a heightened level of awareness and prevention of prostitution would develop in this industry and the neighborhoods in which these establishments are located. Thus, under current prostitution statutes, the owner is able ignore illegal money transactions between the patrons and dancers. Broader prostitution statutes would lessen this purposeful ignorance by imposing greater liability upon owners, which in turn would lessen some secondary effects stemming from adult entertainment establishments, most notably prostitution and the spread of HIV and AIDS.

In California, some pornographers have been successfully prosecuted under prostitution statutes.³⁰⁶ However, the case of *People v.*

301. See Tampa Transcript, *supra* note 1, at 21-22. Undercover agents have seen condoms lying on the ground in parking lots of some adult entertainment establishments. See PROSECUTIVE SUMMARY, *supra* note 232, at 235.

302. See Tampa Transcript, *supra* note 1, at 21-22.

303. See discussion *supra* Part III.A.1.

304. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 41, 52-54 (1986).

305. See *id.*

306. See *People ex rel. Van de Kamp v. American Art Enter., Inc.*, 75 Cal. App. 3d 523 (Cal. Ct. App. 1977); *People v. Fixler*, 56 Cal. App. 3d 321 (Cal. Ct. App. 1976); *People v. Zeihm*, 40 Cal. App. 3d 1085 (Cal. Ct. App. 1974).

*Freeman*³⁰⁷ slowed such prosecution by overturning precedent which held to the contrary.³⁰⁸ The court found that paying actors and actresses to engage in "various sexually explicit acts, including sexual intercourse, oral copulation and sodomy" did not come under the statutory definition of prostitution.³⁰⁹ The court further stated that to constitute prostitution, "the money or other consideration must be paid for the purpose of sexual arousal or gratification"³¹⁰ The *Freeman* court found "no evidence that defendant paid the acting fees for the purpose of sexual arousal or gratification"³¹¹

Prior to *Freeman*, the *Fixler* court concluded that the prosecution of owners, filmmakers, and photographers was based on conduct and was not aimed at prohibiting any communication of ideas.³¹² The court in *State v. Kravitz*,³¹³ upheld the conviction of the owner of an adult entertainment theater for soliciting a male and a female to engage in sex acts before an audience.³¹⁴ Likewise, in *People v. Maita*,³¹⁵ the defendant was convicted for pimping and pandering by hiring women to have sex with "members of the audience."³¹⁶ As in these cases, prosecution of adult business owners, pornographic filmmakers, and pornographic photographers under prostitution statutes proves to be a practical approach for lessening some of the secondary effects associated with adult entertainment establishments because the difficult problem of First Amendment line-drawing is avoided.

2. *Modify the application of Miller v. California*

The Supreme Court has held that obscenity does not come under the umbrella of the First Amendment as protected speech or conduct.³¹⁷ Although questions of the soundness of the *Miller* test have produced considerable debate, its practical result has been to nar-

307. 758 P.2d 1128 (Cal. 1988) (overturning conviction of an adult business owner charged with procuring another person for the purpose of prostitution).

308. See *id.* at 1133 n.6 ("To the extent that *People v. Fixler*, *People ex rel. Van de Kamp v. American Art Enterprises, Inc.*, and *People v. Zeilm* hold that the payment of wages to an actor or model who performs a sexual act in filming or photographing for publication constitutes prostitution regardless of the obscenity of the film or publication so as to support a prosecution for pandering . . . they are disapproved.").

309. *Id.* at 1129, 1135.

310. *Id.* at 1131.

311. *Id.*

312. See *People v. Fixler*, 56 Cal. App. 3d 321, 325 (Cal. Ct. App. 1976).

313. 511 P.2d 844 (Or. Ct. App. 1973).

314. See *id.* at 845-46.

315. 157 Cal. App. 3d 309 (Cal. Ct. App. 1984).

316. *Id.* at 313-16.

317. See *supra* note 98 and accompanying text.

rowly define the category of materials subject to prohibition as those depicting "hard-core" sexual conduct.³¹⁸

In *Jenkins*, the Court unanimously reversed an obscenity conviction based on the motion picture *Carnal Knowledge*.³¹⁹ This opinion signaled the Court's willingness to review the content of allegedly obscene material to limit a jury's unbridled discretion in determining what is patently offensive.³²⁰ Thus, the *Jenkins* Court reemphasized that under *Miller*, only the most explicit, thoroughly hard-core materials that lack any redeeming value whatsoever warrant constitutional regulation.³²¹ As a result, only a fraction of the broad range of pornographic materials available to the public could be successfully attacked under obscenity law.

Certain types of pornographic material showing acts of bestiality,³²² flagellation,³²³ sadomasochism and extreme violence³²⁴ do not pose much of a problem for courts when determining whether the material is obscene. However, other types of sexually explicit material have benefited from the protection of the First Amendment, such as dial-a-porn messages,³²⁵ striptease acts,³²⁶ and crudely drawn depictions of women.³²⁷ Perhaps this gap is where the legal system fails to prevent secondary effects caused by adult businesses.

Because obscenity enforcement has never been sufficiently consistent to force pornography syndicates out of business or back underground, video dealers are misled into believing or at least acting as if they believe that hard-core adult business is legal. The Meese Commission criticized both federal and local prosecutors for letting the problem get out of control and urged federal and local enforcement as the solution to the problem of hard-core pornography.³²⁸

If United States attorneys and state and local prosecutors bring strong cases under present laws, perhaps the entire hard-core adult

318. *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974).

319. *See id.* at 155.

320. *See id.* at 160.

321. *See id.* at 161.

322. *See United States v. Guglielmi*, 819 F.2d 451, 453-54 (4th Cir. 1987).

323. *See Ward v. Illinois*, 431 U.S. 767, 771-72 (1977). Flagellation is defined as "a whipping or flogging, especially . . . for sexual stimulation." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 512 (3d ed. 1996).

324. *See United States v. Schultz*, 970 F.2d 960 (5th Cir. 1992).

325. *See Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989).

326. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581 (Souter, J., concurring); *see also Miller v. Civil City of South Bend*, 904 F.2d 1081, 1094 (7th Cir. 1990).

327. *See City of St. George v. Turner*, 813 P.2d 1188, 1192 (Utah Ct. App. 1991), *aff'd*, 826 P.2d 651 (Utah 1991).

328. *See MEESE COMM'N REPORT*, *supra* note 273, at 366-75.

industry will be shown as regularly engaging in the illegal trafficking of obscenity. In a nation-wide survey of law enforcement efforts after *Miller*, the study concluded that obscenity laws have only a minimal effect on the conduct of prosecutors and pornographers.³²⁹ More than half of the prosecutors surveyed said *Miller* has not affected the odds of conviction, 29% said *Miller* has helped the prosecution, and 17% reported it has helped defendants.³³⁰ The study found that the public had become more tolerant of pornographic material and concluded that this "liberalization of attitudes has in turn influenced prosecutors to handle only cases involving particularly hard core materials."³³¹

The Supreme Court consistently and forcefully has recognized that the "crass commercial exploitation of sex" is a matter of grave concern and a legitimate target of state and federal criminal and civil laws and treaties.³³² Following *Miller*, several scholars and state officials have suggested that federal and state legislatures adopt a *per se* definition of obscenity which would address the problems encountered in applying *Miller*.³³³ For example, one legal commentator, Bruce Taylor, suggests the proposed statute or ordinance should state: "Hard-core pornography means any material or performance that explicitly depicts ultimate sexual acts, including vaginal or anal intercourse, fellatio, cunnilingus, analingus, and masturbation, where penetration, manipulation, or ejaculation of the genitals is clearly visible."³³⁴

This definition would limit live performances, films, and photographs that depict such acts. Since *Miller* was intended to limit the production of hard-core pornography, Taylor asserts that this *per se* definition of hard-core pornography will put the adult establishment owners, performers, pornographic filmmakers, pornographic photographers, nude models, and nude actors on notice regarding what constitutes illegal obscene material.³³⁵

329. See Harold Leventhal, Project, *An Empirical Inquiry into the Effects of Miller v. California on the Control of Obscenity*, 52 N.Y.U. L. REV. 810, 928 (1977).

330. See *id.* at 900.

331. *Id.* at 898.

332. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

333. Bruce A. Taylor, *Pornography and the First Amendment*, in CRIMINAL JUSTICE REFORM 156-57 (1983); see also William W. Milligan, *Obscenity: Malum in Se or Only in Context? The Supreme Court's Long Ordeal*, 7 CAP. U. L. REV. 631, 643-45 (1978).

334. Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J. L. REFORM 255, 272 (1987). For a discussion of alternative definitions of pornography, see James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153 (1993).

335. See Taylor, *supra* note 334, at 278-79.

Ultimately, if these persons are aware of the potential criminal and civil sanctions for producing or participating in the production of hard-core pornography, then the amount and substance of this material should decrease.³³⁶ A decrease in the production of hard-core pornography would lessen the supply and the associated secondary effects attributed to this type of material. For example, a live sex show at an adult establishment would fall within the definition of hard-core pornography, thus losing its First Amendment protection.³³⁷ Without First Amendment protection, the state and federal obscenity statutes would apply to the material, its producers, and its performers. This *per se* rule would uniformly define obscene material under *Miller* and ultimately support the conviction of those adult business owners, filmmakers, and photographers that hire women (or men) to depict or perform sexual acts for the entertainment or arousal of patrons.³³⁸ Thus, objectively defining the scope of the *Miller* test would make owners more likely to temper the borderline hard-core sexual practices that they permit in their establishments because legal vagueness in the obscenity standard would be removed, making legal results more consistent.³³⁹ In turn, this result would lessen secondary effects associated with adult entertainment establishments³⁴⁰ in a quite similar way as the alternative advocating the expansion of prostitution statutes.³⁴¹

C. Which Solution is Best?

The above solutions offer unique approaches to combating the secondary effects of adult establishments. Local restrictive zoning ordinances target the location, concentration, and general operations of adult establishments. The expansion of prostitution statutes targets the owners, filmmakers, and photographers who arrange and encourage the exchange of sex for money at their establishments. The modification of *Miller* would target the actual and depicted

336. See *id.* at 281.

337. See William A. Stanmeyer, *Obscene Evils v. Obscure Truths: Some Notes on First Principles*, 7 CAP. U. L. REV. 647, 658-61 (1978).

338. See Taylor, *supra* note 334, at 281.

339. See *id.* at 278; see also P. Heath Brockwell, Note, *Grappling with Miller v. California: The Search for an Alternative Approach to Regulating Obscenity*, 24 CUMB. L. REV. 131, 136-37 (1993-94). The *Miller* test's vague standards are inherent flaws, as *Miller* has had little effect on prosecutions of obscenity. The *Miller* test has been inconsistently applied by law enforcement and jurors, yielding mixed results across the country. See *id.*; see also Servodidio, *supra* note 286, at 1235.

340. See Brockwell, *supra* note 339, at 141.

341. Specifically, both alternatives would aim to lessen prostitution and spread of HIV and AIDS.

sexual acts in photographs and pornographic films. To combat the secondary effects of the adult establishments, one of these solutions should not be chosen over any other. However, if these solutions are utilized together, society will be armed with the proper ammunition to combat the adverse secondary effects of adult establishments. Since each solution offers a different method of attack to combat adverse secondary effects, these solutions should be used in conjunction with one another. Therefore, this Comment advocates that: (1) local governments continue to use zoning ordinances to prevent the effects of secondary effects; (2) state legislatures and local governments enact prostitution statutes that hold all parties involved in the transaction criminally liable; and (3) judiciary entities either modify the application of *Miller* or establish a *per se* definition of obscenity.

V. CONCLUSION

The adult entertainment industry continues to expand and gain support, resulting in the continuing presence of these businesses in our society and communities. Although many legal principles have been asserted to prevent these businesses from visibly operating in cities throughout the United States, most have failed to accomplish this goal. Supreme Court decisions have extended some First Amendment protection to these businesses and have also provided other measures that create difficulty for local governments in combating the adverse secondary effects attributed to these establishments. Zoning is a valid and useful method of ridding residential communities of these businesses and the secondary effects that are associated with them, but governmental authorities, judicial bodies, and concerned citizens need to combine their efforts and resources to successfully win the war against these businesses.

