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POPE V. ILLINOIS: SUGGESTIONS FOR CIVIL REGULATIONS OF NON-OBSCENE PORNOGRAPHIC MATERIAL AND ADULT BUSINESSES

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Twenty years ago, Justice Harlan bemoaned the "intractable obscenity problem."[1] In the spring of 1987, however, the United States Supreme Court upheld the legal definition of obscenity that has existed for fifteen years. In *Pope v. Illinois*,[2] the Court reaffirmed the tripartite test for obscenity set forth in *Miller v. California*[3] and later clarified in *Smith v. United States*.[4] At first blush, *Pope* reassures state and local legislatures, which adopted a *Miller* type obscenity test, that their statutes are constitutional. The decision also seems encouraging to law enforcement officials who have successfully attained criminal obscenity convictions under such legislation. But a closer analysis of the decision indicates that such reassurances are not warranted.

Ever since the Supreme Court stripped obscenity of its protected speech status in *Roth v. United States*,[5] the Justices have been sharply divided concerning a legal definition of obscenity. They also have been divided on whether penal sanctions should be leveled against those found dealing in this material. The Court in *Pope* was no different. The "intractable obscenity problem" split the Court 5-4 once again, resulting in five different opinions. Proponents of the present obscenity laws should also not rely on the younger and avowedly more conservative members of the Court to join ranks faithfully in combatting obscenity via a criminal prosecutorial route. Justice Scalia wrote: "[I]t is quite impossible to come to an objective assessment of (at least) literary or artistic value [of allegedly

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1. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part).
2. Pope v. Illinois, 107 S.Ct. 1918 (1987).
3. Miller v. California, 413 U.S. 15 (1973).
4. Smith v. United States, 431 U.S. 291 (1977).
5. Roth v. United States, 354 U.S. 476 (1957).

obscene material] . . . . Just as there is no use arguing about taste, there is no use litigating about it."[6] Scalia's argument seems to echo Justice Stevens's opinion in *Pope*, which maintained that the guilt or innocence of a criminal defendant in an obscenity trial should not be "determined primarily by individual jurors' subjective reactions to the materials in question . . . ."[7] The only significant difference between the Scalia and Stevens opinions is that Scalia concurred with the majority and Stevens dissented. Justice Scalia concluded his opinion by candidly suggesting the need to reexamine *Miller*.[8]

Pope, therefore, does not provide much reassurance for communities that have relied on criminal prosecution of obscenity to protect their citizens from the massive proliferation of sexually explicit material. This comment delineates civil restrictions as alternatives to criminal remedies. Civil sanctions have two distinct advantages over criminal sanctions: they can be tailored to fit a particular community's need, and they have consistently passed constitutional scrutiny. Possibly the most important advantage of civil sanctions is that they are highly effective in restricting the availability of both obscene and pornographic material.

Part I of this comment summarizies and analyzes the *Pope* decision. The Court's rationale for its continued disinclination to criminalize production and distribution of obscene material will be emphasized. It then focuses on Justice Stevens's suggestions for civil alternatives restricting the dissemination of pornographic material that may or may not be legally obscene. The difference between pornographic and obscene material is one of degrees. Obscenity is essentially hard-core pornography. A pornographic work will be deemed obscene and consequently not protected by the first amendment, if (1) it appeals to a prurient interest in sex, (2) it is patently offensive, and (3) it lacks social value.[9] Part II presents the constitutional basis for a community's right to impose civil regulations on the distribution of sexually explicit material. This argument will be grounded in three lines of Supreme Court zoning decisions. These opinions have held that a state's interest in protecting property values, privacy and family rights, and the quality of its living environment, even in protecting a community's aesthetic

6. Pope v. Illinois, 107 S.Ct. at 1923 (Scalia, J., concurring).

7. *Id.* at 1928 (Stevens, J., dissenting).

8. *Id.* at 1923 (Scalia, J., concurring).

9. *See infra* text accompanying note 10, for a complete definition of obscenity based on the Supreme Court decision, Miller v. California, 413 U.S. 15 (1973).

beauty, are legitimate values that may outweigh other first amendment rights. Part III examines recent decisions that uphold the constitutionality of statutes actually regulating the commercial dissemination of pornography. Finally, these decisions will be practically analyzed and applied providing an outline for an effective and constitutional ordinance. The focus of this legislation is in two general areas: (1) regulating sexually oriented businesses and (2) restricting the public display of pornographic material found harmful to minors.

I. *POPE V. ILLINOIS*

A. *Legal Analysis of* Pope v. Illinois

In *Pope v. Illinois*, the Court barely reaffirmed the *Miller* definition of obscenity, which provides that a work is legally obscene if (1) the average person applying "contemporary community standards" would find that the work, taken as a whole, appeals to a prurient interest in sex; (2) the work is patently offensive; and, (3) the material, based on a reasonable person standard, lacks any serious literary, artistic, political or scientific (LAPS) value.[10] The central issue in *Pope* was whether a "statewide community standard," the standard used by the trial court, could determine the LAPS value of the allegedly obscene magazines or whether the trial court should have applied the "reasonable person" standard.[11] The issue, however, was somewhat blurred because the Illinois obscenity statute had not incorporated the language of the *Miller* test, namely, that a work must lack any LAPS value. Instead of utilizing the *Miller* LAPS test, Illinois adopted a stricter standard. A work, to be obscene, would have to be "utterly without redeeming social value," a standard first set forth in *Memoirs v. Massachusetts*,[12] and abandoned in *Miller*. On appeal the Supreme Court of Illinois found itself in a difficult position. In a later opinion, *Smith v. United States*,[13] the United States Supreme Court held that the reasonable person standard not community standards, should be used to determine a work's

10. Miller v. California, 413 U.S. 15 (1973). In Smith v. United States, 431 U.S. 291 (1977), the Court clarified *Miller* and ruled that only the first two parts of the test should be judged according to "contemporary community standards." *Id.* at 301. The "serious value" criterion, the Court maintained, should not be determined with reference to community standards, but instead the standard should be whether reasonable persons would find value in the material. *Id.* at 302-03.

11. Pope v. Illinois, 107 S.Ct. 1918 (1987).

12. 383 U.S. 413, 418 (1966).

13. Smith v. United States, 431 U.S. 291 (1977).

social LAPS value.[14] In *Pope*,[15] the trial court applied a community standard test, not as to whether the allegedly obscene work had any serious LAPS value but whether it was "utterly without redeeming social value."[16] Because the Supreme Court abandoned the "utterly without redeeming social value" test in *Miller*, it obviously did not have an occasion or a need to decide whether the objective reasonableness standard should apply to the forsaken *Memoirs* test. Therefore, the appellate court did not have direct Supreme Court precedent to guide its decision. As a result, it held that because Illinois adopted a stricter value standard, it may apply a statewide community standard to determine the value of the allegedly obscene magazines in question.[17] The Illinois Supreme Court refused to review the appellate court's decision and the United States Supreme Court granted certiorari.[18]

Justice White, writing for the five-person majority, disagreed with the appellate court's application of the community standard to the third-part value test of the obscenity determination.[19] White reasoned that states are relatively free to choose the "expression" for the value test. States may adopt either the strict "utterly without redeeming social value" test or a "lacking serious literary, artistic, political or scientific value" test.[20] Regardless of which expression a state enacts, the work's social value must still be decided by an objective standard, namely the reasonable person standard.[21] "There is no suggestion in our cases that the question of the value of an allegedly obscene work is to be determined by reference to community standards."[22] Clearly the Court did not want a work's value to be determined by the subjective values of individual communities. The reasonable person standard is stricter, analogous to a national standard, and provides more protection for the allegedly obscene material. Justice White wrote: "Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to

14. *Id.* at 301-02.
15. The Supreme Court consolidated two Illinois Supreme Court decisions, People v. Pope, 486 N.E.2d (Ill. App. 2 Dist. 1985), and People v. Morrison, 486 N.E.2d 345 (Ill. App. 2 Dist. 1985).
16. 486 N.E.2d at 355.
17. *Id.*
18. Pope v. Illinois, 107 S.Ct. 1918, 1920 (1987).
19. *Id.* at 1920-21.
20. *Id.* at 1920 n. 1.
21. *Id.* at 1920-21.
22. *Id.* at 1920.

community based on the degree of local acceptance it has won."[23]

The statewide standard of Illinois was applied in both the Illinois Supreme Court decisions of *Pope* and *Morrison*.[24] The United States Supreme Court remanded to the lower court to determine whether the application of a statewide community standard test constituted harmless error. The Court stated, however, "We see no reason to require a retrial if it can be said beyond a reasonable doubt that the jury's verdict in this case was not affected by the erroneous instruction."[25]

Justice Stevens, joined[26] by Justices Brennan and Marshall, dissented from the majority in three distinct areas: "(1) the error in the [jury] instruction was not harmless; (2) the Court's attempt to clarify the constitutional definition of obscenity is not faithful to the First Amendment; and (3) . . . Illinois may [not] criminalize the sale of magazines to consenting adults who enjoy the constitutional right to read and possess them."[27] In Part One of his dissent, Stevens maintained that the trial judge's jury instructions regarding the third part of the *Miller* test was reversible error. The trial court instructed the jury to determine the social value of the magazines in question based on whether ordinary adults in the whole state of Illinois would consider the magazines that petitioners sold as having value.[28] Stevens argued that the difference between a "statewide community standard" and an objective standard is simply too great. Because the petitioners "were denied a jury determination on one of the critical elements of an obscenity prosecution"[29] the conviction should be reversed. Justices Blackmun, Marshall, and Brennan agreed with this final contention.[30] While the reversible error issue was certainly important to this case, it is

23. *Id.* at 1921.

24. People v. Pope, 486 N.E.2d 350, 359-60 (Ill. App. 2 Dist 1985), and People v. Morrison, 486 N.E.2d 345, 348-49 (Ill. App. 2 Dist. 1985).

25. Pope v. Illinois, 107 S.Ct. 1918, 1922 (1987).

26. *Id.* at 1924-25 (Stevens, J., dissenting). Although Justice Blackmun joined the slim majority in the seminal cases that defined obscenity, he could not be counted among the majority in *Pope*. Blackmun concurred with White in reaffirming the *Miller* obscenity definition, but he sided with Justice Stevens's lengthy dissent in *Pope*. In his dissent, Blackmun maintained that erroneous jury instructions regarding the third prong of the *Miller* test could not be harmless error in this case.

27. *Id.* at 1924 (Stevens, J., dissenting). Justice Brennan wrote a separate dissenting opinion but agreed with Justice Stevens in this regard.

28. *Id.* at 1925 (Stevens, J., dissenting).

29. *Id.* at 1925 (Stevens, J., dissenting).

30. *Id.* at 1923-25 (Stevens, J., dissenting).

less important to this student comment. For our concerns, Stevens's suggested redefinition of obscenity is somewhat more significant; most central to this discussion is his suggested use of civil sanctions to restrict pornographic speech.[31]

In Part Two of his dissent, Stevens offered an alternative third prong to the obscenity test. He argued that the inquiry should not be whether a reasonable person *would, but could*, find literary, artistic, political or scientific value in the material.[32] Stevens argued that the standard promulgated by the majority might lead jurors to believe that "reasonableness" should be equated with what the majority of the population believe to be reasonable.[33] "A juror . . . might well believe that the majority of the population who find no value in such a book are more reasonable that the minority who do find value. First Amendment protection surely must not be contingent on this type of subjective determination."[34] Justice Scalia, in his concurring opinion, thought Stevens's "modified reasonable person standard" only obfuscated an already difficult legal definition. Scalia maintained that a juror already has difficulty deciding how the "reasonable person" *would* judge the value of an allegedly obscene work; but to ask a juror whether a reasonable person *could* find value in a work is to carry "refinement to the point of meaninglessness."[35]

In Part Three of Stevens's dissent, he pointed out that only a slim majority of the Court has ever agreed that the government may constitutionally criminalize the possession or sale of obscene literature.[36] He observed that in "recent years" six members of the Court have expressed the opinion that the first amendment, at the very least, precludes criminal prosecution for sales such as those involved in this case.[37] The gist of his argument is that to establish a sufficiently clear definition of obscenity is impossible. Consequently, distributors of pornography will never be able to distinguish between constitutionally protected material from illegal obscene material. Potential criminal defendants have no certainty of the legality of their sales; only in a criminal trial will this certainty be revealed.[38] Stevens concluded that any statutory definition of obscenity

31. *Id.* at 1924-30 (Stevens, J., dissenting).
32. *Id.* at 1927 (Stevens, J., dissenting) (emphasis added).
33. *Id.* at 1927 (Stevens, J., dissenting).
34. *Id.* at 1927 (Stevens, J., dissenting) (footnote omitted).
35. *Id.* at 1923 (Scalia, J., concurring).
36. *Id.* at 1927 (Stevens, J., dissenting).
37. *Id.* at 1927 (Stevens, J., dissenting).
38. *Id.* at 1928-30 (Stevens, J., dissenting).

would fail on the grounds of vagueness: "[I]n the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law."[39] He continued: "The Constitution cannot tolerate schemes that criminalize categories of speech that the Court has conceded to be so vague and uncertain that they cannot 'be defined legislatively.' "[40]

Those who favor the criminal prosecution of obscenity can take little security from *Pope*. Although the Court did reaffirm a now fifteen-year-old definition of obscenity, an equal number of Supreme Court Justices presently consider the *Miller* definition inadequate. Justices Stevens, Brennan, and Marshall forthrightly objected to the criminal prosecution of obscenity on the grounds that a legal definition of obscenity inevitably would be vague and have a chilling effect on the dissemination of constitutionally protected material.[41] Justice Scalia, without addressing the issues of criminal prosecution or civil sanctions, agreed. He wrote:

> [I]n my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value. . . . Since ratiocination has little to do with esthetics, the fabled "reasonable man" is of little help in this inquiry . . . . I think we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: *De gustibus non est disputandum*. Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide 'What is Beauty' is a novelty even by today's standards.
>
> . . . .
>
> All of today's opinions, I suggest, display the need for reexamination of Miller.[42]

Justice Scalia's concurrence should be viewed as a harbinger of caution. It may indicate that the next time the Court reviews an obscenity case he may swing with the dissent, which would cause a significant modification or overruling of *Miller*. The next Supreme Court obscenity decision may rudely awaken those communities and states dependent on criminal sanctions to combat the proliferation of obscenity. A reversal

39. *Id.* at 1928 (Stevens, J., dissenting) (citing his dissenting opinion in Smith v. United States, 431 U.S. 291, 316 (1976)).

40. *Id.* at 1929-30 (Stevens, J., dissenting) (citing *Smith*, 431 U.S. at 303).

41. *Id.* at 1924-30 (Stevens, J., dissenting).

42. *Id.* at 1923 (Scalia, J., concurring).

of *Miller* will be even more damaging if they have no alternative legislation that provides civil restrictions on the distribution of sexually explicit material.

B. *The Civil Sanctions Alternative*

The criminal prosecution of obscenity is tenuously dependent on the Supreme Court providing a comprehensible definition of obscenity. Criminal prosecution, however, is only one weapon public officials may use to fight the purveyors of pornography. A variety of civil sanctions are available that are more effective and efficient than their penal counterparts. Justice Stevens, in his dissent in *Pope*, encouraged states to concentrate on civil remedies:

> The insurmountable vagueness problems involved in criminalization are not, in my view, implicated with respect to civil regulation of sexually explicit material, an area in which the States retain substantial leeway. Moreover, as long as it [a state's regulation] does not deny "access to the market," and allows "the viewing public" to "satisfy its appetite for sexually explicit fare;" I believe that the state may regulate the sale and exhibition of even non-obscene material. As for prohibiting sale or exhibition of sexually explicit matter to minors or material containing depictions of minors, it has long been established that the state may go beyond the constitutional definition of obscenity.[43]

Justice Stevens cited a number of recent Court decisions to support his contention that the first amendment is more amenable to the civil restriction of sexually explicit material than to the criminal conviction of its proprietors. Stevens referred to a line of decisions upholding the constitutionality of municipal zoning ordinances that regulate the time, manner, and location in which sexually-oriented businesses may operate.[44] The Court has acknowledged that the deleterious effects these businesses have on communities is a "legitimate state interest" and may justify the direct regulation of speech.[45] The leading cases Stevens cited are *Young v. American Mini Theatres*[46] and *Schad v. Bourough of Mt. Ephraim*.[47] These cases, which recognize a community's right to control the operation of X-rated establish-

43. *Id.* at 1929 n. 11 (Stevens, J., dissenting) (citations omitted).
44. *Id.*
45. *Id.*
46. 427 U.S. 50 (1976).
47. 452 U.S. 61 (1981).

ments via zoning and licensing laws, rely heavily on another line of decisions that affirmed the constitutionality of zoning to protect a state's substantial interest in protecting family and privacy rights and community values.[48]

II. Zoning Law Providing the Constitutional Basis for the Civil Regulation of Pornography

Countless local zoning ordinances exist that impinge on first amendment rights. In *Central Hudson v. Public Service Commission*,[49] the Court held that the government's interest in conserving energy outweighed the gas company's free expression right to promote, via advertising, the purchase of utility services. Again, in *Metromedia, Inc. v. San Diego*[50] the city enacted a zoning ordinance which banned all off-site billboards. Owing to a ban on all noncommercial billboard advertising[51] the ordinance was found unconstitutional. But the Court held that San Diego's interest in furthering the city's traffic safety and aesthetic appearance justified an ordinance banning commercial billboards.[52] The use of zoning regulations, which may infringe on constitutionally protected speech, is not a new concept. One of the seminal cases, on which both *Central Hudson* and *Metromedia* depend, is the 1954 Supreme Court decision of *Berman v. Parker*.[53] In *Berman v. Parker*, the Supreme Court addressed the issue of whether the District of Columbia had legitimate interest in "slum clearance and prevention" to warrant its condemnation of several parcels of private property.[54] The appellants challenged the constitutionality of the act. They argued that it was contrary to two mandates of the fifth amendment: (1) "no person shall . . . be deprived of . . . property, without due process of law," and (2) "nor shall private property be taken for public use, without just compensation."[55]

48. *See* Berman v. Parker, 348 U.S. 26 (1954); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Moore v. City of East Cleveland, 431 U.S. 494 (1979). This line of cases held that family and privacy rights may outweigh the competing constitutional rights of free speech and association. Because these decisions provide substantial precedential value for the later Supreme Court opinions of *Young*, *Schad*, and *Renton*, they will be discussed in Part II in some depth.

49. Central Hudson v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980).

50. Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).

51. For example, banning politically oriented advertising.

52. 453 U.S. 490, 508-09.

53. 348 U.S. 26 (1954).

54. *Id.* at 31.

55. *Id.* at 31.

The district court in this case held that the act was constitutional only if the District of Columbia condemned property strictly for the purpose of ridding the city of slums.[56] The Supreme Court greatly expanded the local community's basis for enacting zoning regulations:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm. . . . It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress . . . [has] made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[57]

Many later Supreme Court opinions frequently cite *Berman*, especially the cases discussed in this comment. The *Berman* Court allowed legislators to consider all reasonable local values in drafting zoning legislation. The extent and nature of these values will be discussed in the next two cases, *Village of Belle Terre v. Boraas*[58] and *Moore v. City of East Cleveland*.[59] In each case, the issue was whether a local community's interest in upholding "family values" violated or outweighed other constitutional considerations.

In *Belle Terre*, a New York village ordinance restricted land use to one-family dwellings.[60] The ordinance defined the word "family" to mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons living together as a single family unit.[61] A number of college students challenged the ordinance. These students, both male and female, rented one-family units. None were related by blood, adoption, or marriage. The owners and tenants

56. *Id.* at 31.
57. *Id.* at 32-33.
58. 416 U.S. 1 (1974).
59. 431 U.S. 494 (1979).
60. 416 U.S. at 2.
61. *Id.*

brought a civil rights action, suing under 42 U.S.C. § 1983 for an injunction and a judgment declaring the ordinance unconstitutional.[62] The district court found the ordinance constitutional; the Supreme Court agreed, reversing the appellate court finding of unconstitutionality.[63] Justice Douglas, writing for a 7-2 majority, relied heavily on *Berman v. Parker*. The Court found that the ordinance did not violate any constitutional rights. Douglas summarized the Court's views:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[64]

The legitimate state interest in promoting family values was considered to be a substantial state interest, just the type the zoning laws were designed to protect. In the next case, *Moore v. City of East Cleveland*, the Court struck down a similar statute that was enacted to protect family values.[65] The Court thought the city ordinance actually "slic[ed] deeply into the family itself."[66]

In *Moore*, the city council of East Cleveland enacted an ordinance which they analogized to the village of Belle Terre's.[67] The dispositive difference was that in the East Cleveland ordinance a section existed that allowed certain related individuals to live together in a "family" unit;[68] the ordinance prohibited certain relatives, including a grandmother and her grandchildren, from dwelling together. This ordinance was supposedly enacted to promote family values. But, in a plurality opinion, Justice Brennan maintained the contrary resulted:[69] "East Cleveland, in contrast [to Belle Terre], has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. . . . [I]t makes it a crime of a grandmother's choice to live with her grandson in circum-

62. *Id.* at 3.
63. *Id.* at 3, 10.
64. *Id.* at 9.
65. 431 U.S. 494, 506 (1977).
66. *Id.* at 498.
67. *Id.*
68. *Id.* at 498-99.
69. *Id.* at 494.

stances like those presented here."[70] The Court affirmed the *Belle Terre* holding that cities may use zoning ordinances to effectuate legitimate local goals, protect locally defined family values, *et cetera*.[71] But this ordinance denigrated family values rather than promote them. It also violated the appellant Moore's fundamental right of liberty, to choose with which family member she wished to live.[72]

These three cases are extremely important in laying the foundation for future zoning ordinances restricting the time, place, and manner in which sexually-oriented businesses may operate. In Part III of this comment, the three crucial Supreme Court decisions of *Young v. American Mini Threatres*, *Schad v. Bourough of Mt. Ephraim*, and *Renton v. Playtime Threatres*, along with one circuit court opinion[73] will be analyzed. These decisions provide the best constitutional analysis for restricting presumptively protected pornographic expression. They also discuss the most effective zoning and time, place, and manner restrictions used in regulating sexually oriented businesses and the public display of pornographic material found harmful to minors.

III. Examination of Decisions Upholding Statutes Regulating the Commercial Dissemination of Pornography

A. *Restricting Adult Businesses*

Young v. American Mini Theaters,[74] is the most significant recent Supreme Court decision upholding the constitutionality of an ordinance that imposed zoning restrictions on a variety of adult establishments. In 1972, two Detroit zoning ordinances were enacted amending an "Anti-Skid Row Ordinance"

70. *Id.* at 498-99.

71. *Id.* at 499-500.

72. *Id.* at 494.

73. In FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir.), *stay granted and petition for cert. filed*, 108 S.Ct. 1605 (1988), *cert. granted in part*, 109 S. Ct. 1309 (1989), the Court of Appeals substantially upheld the constitutionality of the "Sexually-Oriented Businesses" ordinance. This ordinance pervasively regulates the operation of sexually oriented businesses in Dallas. It is appended to the district court opinion, Dumas v. City of Dallas, 648 F.Supp. 1061 (N.D. Tex. 1986), and is included in Appendix A of this comment. This ordinance, if upheld by the Supreme Court, will prove to be a valuable tool for legislators in undermining the onslaught of pornography into their community.

74. 427 U.S. 50 (1976).

adopted ten years earlier.[75] These ordinances provided that adult theaters could not be located either within one thousand feet of any two other "regulated uses" or within five hundred feet of a residential area.[76] "Regulated uses" applies to ten different types of retail and entertainment establishments, including adult book stores, cabarets, bars, taxi dance halls, and hotels.[77] The classification of a theater as "adult" is based on the content of the material shown. If a theater showed films that are characterized by an emphasis on matter relating to "Specified Sexual Activities" or "Specified Anatomical Areas" it is considered an adult establishment.[78] This zoning disperses those types of establishments throughout the city.

The Detroit Common Council found that "some uses of property [that is, sexually oriented businesses] are especially injurious to a neighborhood when they are concentrated in limited areas."[79] Urban planners and real estate agents who supported the ordinance concurred: "[S]everal such [sexually oriented] businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and business to move elsewhere."[80] The Court held that the substantial government interest, that is, the preservation and stabilization of the neighborhoods in the City of Detroit, outweighed the incidental effects this ordinance would have on free expression of ideas.[81] This ordinance did not attempt to ban sexually oriented businesses; it only restricted their location in order not to enlarge or encourage the development of a "red light" skid row district.[82]

The decision also indicated that, like commercial speech, pornographic speech may receive less than full first amendment protection.[83] In fact, the Court analogized these two forms of expression. Justice Stevens, writing for the majority, first stated the basic principle that there may be no restriction whatsoever on expressive activity because of its content;[84] he

75. *Id.* at 54.
76. *Id.* at 52-55.
77. *Id.* at 52 n.3.
78. *Id.* at 50, 55.
79. *Id.* at 54.
80. *Id.* at 55.
81. *Id.* at 57.
82. *Id.* at 54 n.6.
83. *Id.* at 68.
84. *Id.*

then cited *New York Times v. Sullivan*,[85] however, to show that libel determinations are content dependent. Stevens continued:

> We have recently held that the First Amendment affords some protection to commercial speech. We have also made it clear, however, that the content of a particular advertisement may determine its extent of protection. . . . The measure of constitutional protection to be afforded commercial speech will surely be governed by the content of the communication.[86]

Based on this argument, the Court in *Young* concluded that sexually explicit, albeit non-obscene speech, also may be restricted based on its content.[87] Citing *Ginsberg v. New York*,[88] in which the Court upheld a conviction for selling pornographic, but not legally obscene, magazines to a minor, Stevens reasoned that the first amendment did not preclude this type of prohibition: "[Y]et it is equally clear that any such prohibition must rely squarely on an appraisal of the content of material otherwise within a constitutionally protected area."[89]

In a more recent decision, *City of Renton v. Playtime Theatres, Inc.*,[90] the Court relied heavily on *Young* to uphold a similar ordinance. In Renton, Washington, the city council enacted an ordinance prohibiting any " 'adult motion picture theater' from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church or park, and from locating within one mile of any school."[91] The ordinance's intent and effect, as distinguished from Detroit's, was to force all sexually-oriented theaters into close proximity, and away from "family oriented" dwellings.[92]

City of Renton is important for a number of reasons. First, it reaffirmed the Supreme Court's approval of restrictive zoning of sexually oriented businesses. Second, it emphasized that a community may choose the type of zoning best suited to its local situation. Zoning that disperses or clusters "adult" establishments are equally valid. Justice Rehnquist, writing for a 7-2 majority in *Renton*, cited *Young v. American Mini Theaters* and reiterated this point: " '[T]he city must be allowed a reasonable

85. 376 U.S. 254 (1964).
86. 427 U.S. at 68 (footnote omitted).
87. *Id.* at 68-73.
88. 390 U.S. 629 (1968).
89. 427 U.S. 50, 70 (1976).
90. 475 U.S. 41 (1986).
91. *Id.* at 44.
92. *Id.* at 52.

opportunity to experiment with solutions to admittedly serious problems.' "[93] Finally, the decision is important because the Renton legislators, unlike those in Detroit, did not initiate any type of study or finding in their community to determine empirically whether these theaters had a negative impact on their community.[94] The idea of allowing a community to restrict without first showing its detrimental effects may seem incongruous. Nevertheless, Justice Rehnquist reasoned that a community may take reasonable steps to avoid a problem without waiting for that problem to develop.[95] The Renton legislators knew that the proliferation of sexually-oriented businesses caused urban decay:

> We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" [of the harmful effects of adult theaters] summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here.[96]

Some local jurisdictions have taken this opinion to heart. Based on other cities' studies, they have enacted extensive zoning ordinances restricting sexually-oriented establishments as justification. Recently, Dallas, Texas, enacted an ordinance regulating sexually-oriented businesses based on the findings of Austin, Indianapolis, and Los Angeles. The Dallas legislation passed judicial scrutiny[97] in 1986 and was reaffirmed in 1988. This ordinance should be considered a model ordinance that may be employed by other communities confronted with either a "skid row" problem or an "unsightly" red light district.

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93. *Id.*

94. *Id.* at 50-53.

95. *Id.* at 50-55.

96. 475 U.S. 41, 51-52 (1986). The Washington case to which the Court referred is Northend Cinema, Inc. v. Seattle, 90 Wash.2d 709, 585 P.2d 1153 (1978), *cert. denied sub. nom.*, Apple Theatre v. Seattle, 441 U.S. 946 (1979).

97. *See* Dumas v. City of Dallas, 648 F. Supp. 1061 (N.D. Tex. 1986), *aff'd sub nom.*, FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988), *stay granted and petition for cert. filed*, 108 S.Ct. 1605 (1988), *cert. granted in part*, 109 S.Ct. 1309 (1989).

B. *Public Display Legislation*

Even though zoning may force adult establishments out of town or at least out of sight, a number of businesses, such as service stations or grocery stores, profit from selling sexually explicit material. This material is often prominently displayed to sexually incite, although it often disgusts, the unsuspecting passerby. Public display legislation attempts to protect both children and adults from this visual assault. These statutes and ordinances do not prevent adults access to the material; they simply prohibit the prominent display of such material deemed "harmful to minors." Similar to the zoning legislation analyzed in this comment, these public display laws need not address the thorny issue of obscenity. In *Ginsberg v. New York*[98] the Court defined "harmful to minors." As long as the legislation follows the definition or similar language provided in *Ginsberg*, a state or local community may prohibit the display of virtually all sexually explicit fare.

The *Ginsberg* Court affirmed the following definition of "harmful to minors." If the sexually explicit work

> "(i) predominantly appeals to the prurient or shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as to a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors."[99]

Legislation can forbid the sale to minors or the display of any material which falls within the definition. Presently, twelve[100] states prohibit the display of sexually explicit material and follow the *Ginsberg* "harmful to minors" language.

Many states,[101] like New York, simply ban the public display of certain sexual or physical activity and specified nudity whether such public displays are legally obscene. As the commentator of the New York legislation wrote: "[T]hey are not constitutionally protected, because they are thrust indiscriminately upon unwilling audiences of adults and children, and constitute assaults upon individual privacy."[102] These laws intend to protect the unwary and especially the innocent from inappropriate and offensive public indecency. These laws provide needed protection for children and unsuspecting adults

98. 390 U.S. 629 (1968).
99. *Id.* at 633.
100. *See* Appendix B.
101. *See* Appendix C.
102. N.Y. penal 245.10 .11 (McKinney 1971).

without unnecessarily restricting the rights of adults to view or procure such material.

Many local communities have passed similar local ordinances. Wichita and Minneapolis have enacted ordinances to forbid the display of sexually explicit material that is harmful to children. The state of Virginia has done likewise. Both the Wichita and Minneapolis ordinances have passed constitutional scrutiny in federal circuit courts; Virginia's statute very recently was found to be constitutional in the state supreme court after answering certain questions certified by the United States Supreme Court.[103]

Another tool available to local legislation to restrict the proliferation of pornography is requiring a license to operate a sexually-oriented business. The cost of the license can be as high as five hundred dollars annually. It may be denied to those with certain criminal convictions. It may also be revoked for a violation of certain crimes. All of these restrictions are found in the Dallas ordinance and can be used as a standard for the constitutional limits of licensing.[104]

The following specific licensing restrictions passed constitutional scrutiny and provide local law enforcement officials with some control over who may operate an adult establishment: (1) anyone who owns twenty percent or more of the business must sign the licenses;[105] (2) the license may be denied if the spouse of the applicant has been refused a license in the past two years, or the "housemate" of the applicant has been refused a license within the past twelve months;[106] (3) the establishment may be inspected at any time by the police, fire and health departments, the housing and neighborhood

103. The Wichita ordinance was found constitutional in U.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983); and the Minneapolis ordinance, in Upper Midwest Booksellers v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985). The Fourth Circuit Court of Appeals found a similar ordinance unconstitutional. *See* American Booksellers Ass'n v. Virginia, 802 F.2d 691 (4th Cir. 1986). The Supreme Court, however, recently vacated this ruling and certified two procedural questions to be answered by the state's supreme court, Virginia v. American Booksellers Ass'n, 108 S.Ct. 636 (1988). The Court did not attempt to decide the constitutional issues presented in Commonwealth v. American Booksellers Ass'n, 372 S.E. 2d 618 (Va. 1988). The Supreme Court of Virginia answered the United States Supreme Court's certified questions and narrowly construed the statute upholding its constitutionality. For decisions reaching contrary results based on similar ordinances, see Tattered Cover, Inc. v. Tooley, 696 P.2d 790 (Colo. 1985), and American Booksellers Ass'n v. Webb, 643 F. Supp. 1546 (N.D. Ga. 1986).

104. *See* Appendix A, Sexually Oriented Businesses.

105. *See id.* at 41A-f(d).

106. *See id.* at 41A-5(a)(5)-(6).

departments, and the building inspection division;[107] and (4) an applicant may be refused a license if he/she or the spouse has been convicted of any of the enumerated sexually related crimes.[108] Although these regulations have been found constitutional, nothing precludes an innovative legislator from providing even greater restrictions so long as the limitations (restrictions) serve a legitimate and reasonable governmental interest.

CONCLUSION

Ever since *Roth v. United States*[109] first defined obscenity over thirty years ago, the criminal prosecution of this material has waned and wavered according to the current make-up of the Supreme Court. As this comment underscored, the trend is not likely to end soon. Although defining obscenity has proved "intractable" and criminal action only somewhat effective, at least three civil regulations have been effectively used to restrict the location and operation of sexually oriented businesses or at least keeping this material out of sight, if not out of town.

The Supreme Court has provided local governments with great leeway and guidance in this area. Their decisions have indicated a willingness to allow local governments to combat the proliferation of X-rated establishments and material in the manner best suited for that community. The Court also has afforded them the constitutional ammunition to enforce these solutions. Zoning laws, public display ordinances, and licensing have passed intense judicial scrutiny; therefore, legislators can be somewhat assured of their constitutionality. Indeed, they can be assured of these solutions' flexibility and effectiveness in addressing very particularized local problems.

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107. *See id.* at 41A-7.

108. *See id.* at 41A-5(10)(A) prostitution; promotion of prostitution; obscenity; sale, distribution, or display of harmful material to minors, sexual performance by a child; possession of child pornography; public lewdness, sexual assault, et cetera.

109. 354 U.S. 476 (1957).

APPENDIX A

CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

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SEC. 41A-19. Regulations pertaining to exhibition of sexually explicit films or videos.
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SEC. 41A-21. Enforcement.
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SEC. 41A-23. Amendment of this chapter.

CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

SEC. 41A-1. PURPOSE AND INTENT.

(a) It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the first amendment, or to deny access by the dis-

tributors and exhibitors of sexually oriented entertainment to their intended market.

(b) It is the intent of the city council that the locational regulations of Section 41A-13 of this chapter are promulgated pursuant to Article 2372w, Revised Civil Statutes of Texas, as they apply to nude model studios and sexual encounter centers only. It is the intent of the city council that all other provisions of this chapter are promulgated pursuant to the Dallas City Charter and Article 1175, Revised Civil Statutes of Texas. (Ord. 19196)

SEC. 41A-2. DEFINITIONS

In this chapter:

(1) ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."

(2) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

(A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas"; or

(B) instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

(3) ADULT CABARET means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

(A) persons who appear in a state of nudity; or

(B) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities;" or

(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the

depiction or description of "specified sexual activities" or "specified anatomical areas."

(4) ADULT MOTEL means a hotel, motel or similar commercial establishment which:

(A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or

(B) offers a sleeping room for rent for a period of time that is less than 10 hours; or

(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

(5) ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(6) ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

(7) CHIEF OF POLICE means the chief of police of the city of Dallas or his designated agent.

(8) ESCORT means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

(9) ESCORT AGENCY means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes, for a fee, tip, or other consideration.

(10) ESTABLISHMENT means and includes any of the following:

(A) the opening or commencement of any sexually oriented business as a new business;

(B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;

(C) the addition of any sexually oriented business to any other existing sexually oriented business; or

(D) the relocation of any sexually oriented business.

(11) LICENSEE means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license.

(12) NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

(13) NUDITY or a STATE OF NUDITY means the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast.

(14) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(15) SEMI-NUDE means a state of dress in which clothing covers no more than the genitals, public region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

(16) SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

(A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

(B) activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude.

(17) SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

(18) SPECIFIED ANATOMICAL AREAS means human genitals in a state of sexual arousal.

(19) SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:

(A) the fondling or other erotic touching of human genitals, public region, buttocks, anus, or female breasts;

(B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

(C) masturbation, actual or simulated; or

(D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above.

(20) SUBSTANTIAL ENLARGEMENT of a sexually oriented business means the increase in floor area occupied by the business by more than 25 percent, as the floor area exists on June 18, 1986.

(21) TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:

(A) the sale, lease, or sublease of the business;

(B) the transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

(C) the establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control. (Ord. 19196)

SEC. 41A-3. CLASSIFICATION.

Sexually oriented businesses are classified as follows:

(1) adult arcades;

(2) adult bookstores or adult video stores;

(3) adult cabarets;

(4) adult motels;

(5) adult motion picture theaters;

(6) adult theaters;

(7) escort agencies;

(8) nude model studios; and

(9) sexual encounter centers. (Ord. 19196)

SEC. 41A-4. LICENSE REQUIRED.

(a) A person commits an offense if he operates a sexually oriented business without a valid license, issued by the city for the particular type of business.

(b) An application for a license must be made on a form provided by the chief of police. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches. Applicants who must comply with Section 41A-19 of this chapter shall submit a diagram meeting the requirements of Section 41A-19.

(c) The applicant must be qualified according to the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.

(d) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a 20 percent or great interest in the business must sign the application for a license as applicant. Each applicant must be qualified under Section 41A-5 and each applicant shall be considered a licensee if a license is granted.

(e) The fact that a person possesses a valid theater license, dance hall license, or public house of amusement license does not exempt him from the requirement of obtaining a sexually oriented business license. A person who operates a sexually oriented business and possesses a theater license, public house of amusement license or dance hall license shall comply with the requirements and provisions of this chapter as well as the requirements and provisions of Chapter 46 and Chapter 14 of this code when applicable. (Ord. 19196)

SEC. 41A-5. ISSUANCE OF LICENSE.

(a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented busi-

ness within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.

(6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.

(7) The license fee required by this chapter has not been paid.

(8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner.

(9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19, or 41A-20.

(10) An applicant or an applicant's spouse has been convicted of or is under indictment or misdemeanor information for a crime:

(A) involving;

(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

(aa) prostitution;

(bb) promotion of prostitution;

(cc) aggravated promotion of prostitution;

(dd) compelling prostitution;

(ee) obscenity;

(ff) sale, distribution, or display of harmful material to minor;

(gg) sexual performance by a child;

(hh) possession of child pornography;

(ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:

(aa) public lewdness;

(bb) indecent exposure;

(cc) indecency with a child;

(iii) engaging in organized criminal activity as described in Chapter 71 of the Texas Penal Code;

(iv) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;

(v) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;

(vi) kidnapping or aggravated kidnapping as described in Chapter 20 of the Texas Penal Code;

(vii) robbery or aggravated robbery as described in Chapter 29 of the Texas Penal Code;

(viii) bribery or retaliation as described in Chapter 36 of the Texas Penal Code;

(ix) a violation of the Texas Controlled Substances Act or Dangerous Drugs Act punishable as a felony, Class A misdemeanor, or Class B misdemeanor; or

(x) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10), for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction, may qualify for a sexually oriented business license only if the chief of police determines that the applicant or applicant's spouse is present fit to operate a sexually oriented business. In determining present fitness under this section, the chief of police shall consider the following factors concerning the applicant or applicant's spouse, whichever had the criminal conviction:

(1) the extent and nature of his past criminal activity;

(2) his age at the time of the commission of the crime;

(3) the amount of time that has elapsed since his last criminal activity;

(4) his conduct and work activity prior to and following the criminal activity;

(5) evidence of his rehabilitation or rehabilitative effort while incarcerated or following release; and

(6) other evidence of his present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for him; the sheriff and chief of police in the community where he resides; and any other persons in contact with him.

(d) It is the responsibility of the applicant, to the extent possible, to secure and provide to the chief of police the evidence required to determine present fitness under Subsection (c) of this section.

(e) The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time. (Ord. 19196)

SEC. 41A-6. FEES.

(a) The annual fee for a sexually oriented business license is $500.

(b) If an applicant is required by this code to also obtain a dance hall license or public house of amusement license for the business at a single location, payment of the fee for the sexually oriented business license exempts the applicant from payment of the fees for the dance hall or public house of amusement licenses. (Ord. 19196)

SEC. 41A-7. INSPECTION.

(a) An applicant or licensee shall permit representatives of the police department, health department, fire department, housing and neighborhood services department and building inspection division to inspect the premises of a sexually oriented business for the purpose of insuring compliance with the law, at any time it is occupied or open for business.

(b) A person who operates a sexually oriented business or his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises by a representative of the police department at any time it is occupied or open for business. (Ord. 19196)

SEC. 41A-8. EXPIRATION OF LICENSE.

(a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 41A-4. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the license will not be affected.

(b) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final. (Ord. 19196)

SEC. 41A-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if he determines that a licensee or an employee of a licensee has:

(1) violated or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19, or 41A-20 of this chapter;

(2) engaged in excessive use of alcoholic beverages while on the sexually oriented business premises;

(3) refused to allow an inspection of the sexually oriented business premises as authorized by this chapter;

(4) knowingly permitted gambling by any person on the sexually oriented business premises;

(5) demonstrated inability to operate or manage a sexually oriented business in a peaceful and law-abiding manner thus necessitating action by law enforcement officers. (Ord. 19196)

SEC. 41A-10. REVOCATION.

(a) The chief of police shall revoke a license if a cause of suspension in Section 41A-9 occurs and the license has been suspended within the preceding 12 months.

(b) The chief of police shall revoke a license if he determines that:

(1) a licensee gave false or misleading information in the material submitted to the chief of police during the application process;

(2) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(3) a licensee or an employee has knowingly allowed prostitution on the premises;

(4) a licensee or an employee knowingly operated the sexually oriented business during a period of time when the licensee's license was suspended;

(5) a licensee has been convicted of an offense listed in Section 41A-6(a)(10)(A) for which the time period required in Section 41A-5(a)(10)(B) has not elapsed;

(6) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in Section 41A-5(a)(10)(A), for which a conviction has been obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed;

(7) a licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in or on the licensed premises. The term "sexual contact" shall have the same meaning as it is defined in Section 21.01, Texas Penal Code; or

(8) a licensee is delinquent in payment to the city for hotel occupancy taxes, ad valorem taxes, or sales taxes related to the sexually oriented business.

(c) The fact that a conviction is being appealed shall have no effect on the revocation of the license.

(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license.

(e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed since the termination of any sentence, parole, or probation. (Ord. 19196)

SEC. 41A-11. APPEAL.

If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved

party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision. If within a 10 day period the chief of police suspends, revokes, or denies issuance of a dance hall license or public house of amusement license for the same location involved in the chief's actions on the sexually oriented business license, then the chief may consolidate the requests for appeals of those actions into one appeal. (Ord. 19196)

SEC. 41A-12. TRANSFER OF LICENSE.

A licensee shall not transfer his license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the application. (Ord. 19196)

SEC. 41A-13. LOCATION OF SEXUALLY ORIENTED BUSINESSES.

(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:

(1) a church;

(2) a public or private elementary or secondary school;

(3) a boundary of a residential district as defined by the Dallas Development Code;

(4) a public park adjacent to a residential district as defined by the Dallas Development Code; or

(5) the property line of a lot devoted to residential use.

(b) A person commits an offense if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,000 feet of another sexually oriented business.

(c) A person commits an offense if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building, structure or portion thereof containing another sexually oriented business.

(d) For the purposes of Subsection (a), measurement shall be made in a straight line, without regard to intervening structures or objects from the nearest portion of the building or structure used as a part of the premises where a sexually ori-

ented business is conducted, to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or residential lot.

(e) For purposes of Subsection (b) of this section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(f) Any sexually oriented business lawfully operating on June 18, 1986, that is in violation of Subsections (a), (b), or (c) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed three years, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.

(g) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a church, public or private elementary or secondary school, public park, residential district, or residential lot within 1,000 feet of the sexually oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application for a license is submitted after a license has expired or has been revoked. (Ord. 19196)

SEC. 41A-14. EXEMPTION FROM LOCATION RESTRICTIONS.

(a) If the chief of police denies the issuance of a license to an applicant because the location of the sexually oriented business establishment is in violation of Section 41A-13 of this chapter, then the applicant may, not later than 10 calendar days after receiving notice of the denial, file with the city secretary a written request for an exemption from the locational restrictions of Section 41A-13.

(b) If the written request is filed with the city secretary within the 10-day limit, a permit and license appeal board,

selected in accordance with Section 2-95 of this code, shall consider the request. The city secretary shall set a date for the hearing within 60 days from the date the written request is received.

(c) A hearing by the board may proceed if at least two of the board members are present. The board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.

(d) The permit and license appeal board may, in its discretion, grant an exemption from the locational restrictions of Section 41A-13 if it makes the following findings:

(1) that the location of the proposed sexually oriented business will not have a detrimental effect on nearby properties or be contrary to the public safety or welfare.

(2) that the granting of the exemption will not violate the spirit and intent of this chapter of the city code;

(3) that the location of the proposed sexually oriented business will not downgrade the property values or quality of life in the adjacent areas or encourage the development of urban blight;

(4) that the location of an additional sexually oriented business in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any efforts of urban renewal or restoration; and

(5) that all other applicable provisions of this chapter will be observed.

(e) The board shall grant or deny the exemption by a majority vote. Failure to reach a majority vote shall result in denial of the exemption. Disputes of fact shall be decided on the basis of a preponderance of the evidence. The decision of the permit and license appeal board is final.

(f) If the board grants the exemption, the exemption is valid for one year from the date of the board's action. Upon the expiration of an exemption, the sexually oriented business is in violation of the locational restrictions of Section 41A-13 until the applicant applies for and receives another exemption.

(g) If the board denies the exemption, the applicant may not re-apply for an exemption until at least 12 months have elapsed since the date of the board's action.

(h) The grant of an exemption does not exempt the applicant from any other provisions of this chapter other than the locational restrictions of Section 41A-13. (Ord. 19196)

SEC. 41A-15. ADDITIONAL REGULATIONS FOR ESCORT AGENCIES.

(a) An escort agency shall not employ any person under the age of 18 years.

(b) A person commits an offense if he acts as an escort or agrees to act as an escort for any person under the age of 18 years. (Ord. 19196)

SEC. 41A-16. ADDITIONAL REGULATIONS FOR NUDE MODEL STUDIOS.

(a) A nude model studio shall not employ any person under the age of 18 years.

(b) A person under the age of 18 years commits an offense if he appears in a state of nudity in or on the premises of a nude model studio. It is a defense to prosecution under this subsection if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

(c) A person commits an offense if he appears in a state of nudity or knowingly allows another to appear in a state of nudity in an area of a nude model studio premises which can be viewed from the public right of way.

(d) A nude model studio shall not place or permit a bed, sofa, or mattress in any room on the premises, except that a sofa may be placed in a reception room open to the public. (Ord. 19196)

SEC. 41A-17. ADDITIONAL REGULATIONS FOR ADULT THEATERS AND ADULT MOTION PICTURE THEATERS.

(a) The requirements and provisions of Chapter 46 of this code remain applicable to adult theaters and adult motion picture theaters.

(b) A person commits an offense if he knowingly allows a person under the age of 18 years to appear in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(c) A person under the age of 18 years commits an offense if he knowingly appears in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(d) It is a defense to prosecution under Subsections (b) and (c) of this section if the person under 18 years was in a restroom not open to public view or persons of the opposite sex. (Ord. 19196)

SEC. 41A-18. ADDITIONAL REGULATIONS FOR ADULT MOTELS.

(a) Evidence that a sleeping room in a hotel, motel, or similar commercial establishment has been rented and vacated two or more times in a period of time that is less than 10 hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter.

(b) A person commits an offense if, as the person in control of a sleeping room in a hotel, motel, or similar commercial establishment that does not have a sexually oriented business license, he rents or subrents a sleeping room to a person and within 10 hours from the time the room is rented, he rents or subrents the same sleeping room again.

(c) For purposes of Subsection (b) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration. (Ord. 19196)

SEC. 41A-19. REGULATIONS PERTAINING TO EXHIBITION OF SEXUALLY EXPLICIT FILMS OR VIDEOS.

(a) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than 150 square feet of floor space, a film, video cassette, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:

(1) Upon application for a sexually oriented business license, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations and the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed 32 square feet of floor area. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The chief of police may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the con-

figuration of the premises has not been altered since it was prepared.

(2) The application shall be sworn to be true and correct by the applicant.

(3) No alteration in the configuration or location of a manager's station may be made without the prior approval of the chief of police or his designee.

(4) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

(5) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.

(6) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in Subsection (5) remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times that any patron is present in the premises and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the application filed pursuant to Subsection (1) of this section.

(7) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) footcandle as measured at the floor level.

(8) It shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in the premises to ensure that the illumination described above, is maintained at all times that any patron is present in the premises.

(b) A person having a duty under Subsections (1) through (8) of Subsection (a) above commits an offense if he knowingly fails to fulfill that duty. (Ord. 19196)

SEC. 41A-20. DISPLAY OF SEXUALLY EXPLICIT MATERIAL TO MINORS.

(a) A person commits an offense if, in a business establishment open to persons under the age of 17 years, he displays a book, pamphlet, newspaper, magazine, film, or video cassette, the cover of which depicts, in a manner calculated to arouse sexual lust or passion for commercial gain or to exploit sexual lust or perversion for commercial gain, any of the following:

(1) human sexual intercourse, masturbation, or sodomy;

(2) fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts;

(3) less than completely and opaquely covered human genitals, buttocks, or that portion of the female breast below the top of the areola; or

(4) human male genitals in a discernibly turgid state, whether covered or uncovered.

(b) In this section "display" means to locate an item in such a manner that, without obtaining assistance from an employee of the business establishment:

(1) it is available to the general public for handling and inspection; or

(2) the cover or outside packaging on the item is visible to members of the general public. (Ord. 19196)

SEC. 41A-21. ENFORCEMENT.

(a) Except as provided by Subsection (b), any person violating Section 41A-13 of this chapter, upon conviction, is punishable by a fine not to exceed $1,000.

(b) If the sexually oriented business involved is a nude model studio or sexual encounter center, then violation of Section 41A-4(a) or 41A-13 of this chapter is punishable as a Class B misdemeanor.

(c) Except as provided by Subsection (b), any person violating a provision of this chapter other than Section 41A-13, upon conviction, is punishable by a fine not to exceed $200.

(d) It is a defense to prosecution under Section 41A-4(a), 41A-13, or 41A-16(d) that a person appearing in a state of nudity did so in a modeling class operated:

(1) by a proprietary school licensed by the state of Texas; a college, junior college, or university supported entirely or partly by taxation;

(2) by a private college or university which maintains and operates educational programs in which credits are transfer-

rable to a college, junior college, or university supported entirely or partly by taxation; or

(3) in a structure:

(A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and

(B) where in order to participate in a class a student must enroll at least three days in advance of the class; and

(C) where no more than one nude model is on the premises at any one time.

(e) It is a defense to prosecution under Section 41A-4(a) or Section 41A-13 that each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value. (Ord. 19196)

SEC. 41A-22. INJUNCTION.

A person who operates or causes to be operated a sexually oriented business without a valid license or in violation of Section 41A-13 of this chapter is subject to a suit for injunction as well as prosecution for criminal violations. (Ord. 19196)

SEC. 41A-23. AMENDMENT OF THIS CHAPTER.

Sections 41A-13 and 41A-14 of this chapter may be amended only after compliance with the procedure required to amend a zoning ordinance. Other sections of this chapter may be amended by vote of the city council. (Ord. 19196)

APPENDIX B

Ala. Code. Sections 13A-12-170, -171 (includes "display" provision)
Ariz. Rev. Stat. Ann. Sections 13-3501, -3506, -3507 (includes "display")
Col. Rev. Stat. Sections 18-7-501, -502 (includes display)
Fla. Stat. Ann. Sections 847.0125, 847.013 (includes display)
Ga. Code Ann. Sections 16-12-101 to 105 (includes display)
Ind. Code Section 35-49-3-3 (includes display)
N.C. Gen. Stat. Sections 14-190.13 to .15 (includes display)
N.M. Stat. Ann. Sections 30-3701, -2 (includes display)
N.D. Cent. Code Section 12.1-27.1-03.1 (includes display)
R.I. Gen. Laws Section 11-31-10 (includes display)
Va. Code Section 18.2-391 (includes display)
Vt. Stat. Ann. tit. 13, Section 2804b (includes display)

APPENDIX C

Arkansas Stat. Ann. Sections 41-3581 to 3583 (exhibition only)
Cal. Penal Code Sections 313, 313.1 (distribution only)
Conn. Gen. Stat. Sections 53a-193, -196 (distribution only)
Del. Code Ann. tit. 11, Section 1365 (includes display)
Hawaii Rev. Stat. Sections 712-1215 (distribution only)
Idaho Code Sections 18-1515 (distribution only)
Ill. Rev. Stat. Ch. 38, Section 11-21 (distribution only)
Iowa Code sections 728.1, .2, .3 (prohibits exhibition to minors of material obscene as to adults)
Kan. Stat. Ann. Sections 21-4301a (prohibits exhibition to minors of material obscene as to adults)
Ky. Rev. Stat. Sections 531.010, .020, .030 (prohibits exhibition to minors of material obscene as to adults)
La. Rev. Stat. Ann. Section 14:91.11 (includes display)
Me. Rev. Stat. Ann. tit. 17, Sections 2911 (includes display)
Md. Ann. Code Art. 27, Sections 416D, 419 (prohibits display)
Mas. Gen. Laws Ann. Ch. 272, Section 28 (distribution only)
Mich. Comp. Laws Sections 28.337 to .338 (prohibits exhibition to children of material obscene as to adults)
Minn. Stat. Ann. Sections 617.293 (distribution only)
Miss. Code. Ann. Sections 97-5-27, -29 (includes display)
Mo. Ann. Stat. Sections 573.040, -.060 (includes display)
Mont. Code Ann. Sections 45-8-202 (includes display)
Neb. Rev. Stat. Sections 28-808 (includes display)
Nev. Rev. Stat. Sections 201.256 to .265 (includes display)
N.H. Rev. Stat. 571-B:1, -B:2 (distribution only)
N.J. Stat. Ann. Sections 2C:34-3, 34-4 (includes display)
N.Y. Penal Law Sections 245.10, .11 (includes display)
Ohio Rev. Code Sections 2907.31 (distribution only)
Or. Rev. Stat. Sections 167.075, .080 (prohibits the distribution or display to minors of material obscene as to adults)
18 Pa. Cons. Stat. Ann. Section 5903 (distribution only)
S.C. Ann. Sections 15-14-260, -290, -390 (includes display)
S.D. Codified Laws Ann. Sections 22-24-27, -29, -29.1, -30 (includes display)
Tenn. Code. Ann. Section 39-6-1136 (includes display)
Tex. Penal Code Ann. Section 43.24 (includes display)
Utah Code Ann. Sections 76-10-1206 (distribution only)
W. Va. Code Sections 61-8A-1, -2 (prohibits exhibition or display to minors of material obscene as to adults)
Wis. Stat. Ann. Section 944.25 (distribution only)
Wy. Stat. Sections 6-4-301, -302 (prohibits exhibition to minors of material obscene as to adults)