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Freedom of Expression and Adult Entertainment: The Naked Truth

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Freedom of Expression and Adult Entertainment: The Naked Truth

INTRODUCTION

Government officials have traditionally attempted to regulate adult entertainment in a variety of ways. This comment discusses regulations affecting rights guaranteed by the First Amendment and illustrates how these regulations can constitutionally coincide with the First Amendment.[1] It asserts that both lawyers and municipal officers need to be more aware of the First Amendment issues that may arise when adult entertainment regulations are proposed and subsequently enacted.

Part I of this comment distinguishes between obscenity, which is not afforded protection by the First Amendment, and other forms of adult entertainment, which are deemed protected expression. Part II analyzes common methods that state and local governments have used to ban adult entertainment. In doing so, it examines both licensing regulations and zoning ordinances and discusses how these may violate the First Amendment. Finally, Part III identifies potential First Amendment issues and provides advice to both lawyers and municipal officers involved in drafting restrictive legislation. Specifically, it suggests that drafters of adult entertainment licensing regulations impose adequate standards to guide officials in their decision-making capacity. In addition, the licensing regulations should impose procedural safeguards sufficient to ensure a prompt decision. It also recommends that proposed zoning ordinances, enacted to regulate adult entertainment, be aimed at serving a substantial governmental interest, namely the existence of harmful secondary effects.

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the *freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

I. OBSCENITY V. ADULT ENTERTAINMENT

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[2] The rights this amendment embraces are often grouped together under the rubric of "freedom of expression." Although First Amendment rights enjoy a great degree of protection, they are not absolute.

The government may punish an individual for utterances that cause results so undesirable they outweigh the value of freedom of expression. For example, disclosure of U.S. intelligence operations and names of intelligence personnel for the purpose of obstructing intelligence operations is clearly not protected speech.[3] It is often stated that the most stringent protection of free speech would not allow a person to falsely shout "fire!" in a crowded theater.[4] Courts have held some verbal and visual expression to be obscene and outside the protection of the First Amendment.

Obscenity, like fighting words and defamation, has been a form of expression unprotected by the First Amendment.[5] The Supreme Court has determined that obscenity has so little social value that the societal interest in order and morality outweighs any interest in protecting obscene material. Thus, the Court has characterized

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2. U.S. CONST. amend. I.

3. Haig v. Agee, 453 U.S. 280 (1981). The Court upheld the revocation of Agee's passport because he engaged in activities abroad that caused serious damage to the national security. *Haig*, 453 U.S. at 280-81. Specifically, Agee, a former employee of the Central Intelligence Agency ("CIA"), engaged in a campaign to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they were operating. *Id.*

4. *See* Schenck v. United States, 249 U.S. 47 (1919). In *Schenck*, the defendants were convicted of conspiracy to violate § 3 of the Espionage Act of 1917 by circulating, to men who had been called and accepted for military service, a document alleged to be aimed at obstructing the recruiting and enlistment process. *Schenck*, 249 U.S. at 49.

5. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In *Chaplinsky*, Chaplinsky was arrested while distributing Jehovah's Witnesses literature on the street and denouncing all religion as a "racket." *Chaplinsky*, 315 U.S. at 569-70. Justice Murphy, speaking for the Court, upheld the conviction, stating that these words were intended to inflict harm rather than to communicate ideas and, therefore, were not really "speech" at all. *Id.* at 573. The Court further held that the words were not protected by the First Amendment because they were likely to provoke the average person to retaliate and, thereby, to cause a breach of peace. *Id.* In *New York Times*,a decision authored by Justice Brennan, the Supreme Court held that the First Amendment does not protect defamatory expression in actions brought by public officials against critics of their official conduct, absent proof of actual malice. *New York Times*, 376 U.S. at 279-80.

obscene materials as unprotected speech.[6] Pursuant to the United States Constitution, local governments may ban obscenity, including any and all obscene forms of adult entertainment.[7]

The difficulty with adult entertainment, however, is that it often does not rise to the level of obscenity. Non-obscene printed matter, films, and live entertainment—even if erotic—are meant to be sheltered by the First Amendment.[8] In other words, sexual expression that is indecent but not obscene is protected expression under the First Amendment.

In 1973, in the landmark decision of *Miller v. California*,[9] the Supreme Court announced the current standard for distinguishing

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6. Roth v. United States, 354 U.S. 476, 484-85 (1957). Justice Brennan, on behalf of the Supreme Court, held that (1) a federal obscenity statute making punishable the mailing of material that is obscene, lewd, lascivious, or filthy or of other publications of an indecent character and (2) a California obscenity statute making punishable, inter alia, the keeping for sale or advertising of material that is obscene or indecent do not offend constitutional safeguards against convictions based on protected material. *Id.* at 491-92.

7. Miller v. California, 413 U.S. 15, 24 (1973); *See infra* pp. 7-9.

8. Several forms of "adult entertainment" have been found not to rise to the level of obscenity, such as:

> (1) ADULT BOOKSTORE: An establishment having as a substantial or significant portion of its stock in trade books, magazines, other periodicals, or any tangible items and objects, not necessarily of a reading or photographic nature, which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, as defined below, or an establishment with a segment or section devoted to the sale or display of such material. (2) ADULT MOTION PICTURE THEATER: An enclosed building with a capacity of fifty (50) or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical area, as defined below, for observation by patrons within. (3) ADULT MINI MOTION PICTURE THEATER: An enclosed building with a capacity for less than fifty (50) persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, as defined below, for observation by patrons within. (a) For the purpose of these descriptions, "specified sexual activities" can be defined as human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse or sodomy; and fondling or other erotic touching of human genitals, pubic region, buttock or female breast; and "specified anatomical areas" can be defined as less than completely and opaquely covered human genitals, pubic region, buttock or female breast below a point immediately above the top of the areola; and human male genitals in a discernibly turgid state, even if completely and opaquely covered. (4) CABARET: An establishment which features go-go dancers, exotic dancers, strippers, or similar entertainers.

Phillips v. Borough of Keyport, 107 F.3d 164, 170 (3d Cir. 1997) (quoting Ordinance No. 31-92, Borough of Keyport, codified at KEYPORT, N.J., REV. GEN. CODE, ch. XXV, § 25:1-3(a)(1992)).

9. 413 U.S. 15 (1973).

between protected expression and illegal obscenity.[10] The Court held that if (1) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value, then the work constitutes illegal obscenity and does not warrant constitutional protection.[11] The practical result of the *Miller* test has been to narrowly define the category of materials subject to prohibition, such that the definition encompasses only "hard-core" sexual expression.[12]

States encountered difficulties in applying the *Miller* standard to distinguish between soft- and hard-core pornography.[13] This became evident in *Jenkins v. Georgia*,[14] in which the Court unanimously reversed the obscenity conviction of a movie theater owner who had shown the motion picture "Carnal Knowledge."[15] Justice Rehnquist, writing for the Court, reemphasized that, under *Miller*, only the most explicit, hard-core materials, lacking any redeeming value whatsoever, would suffer constitutional proscription.[16] As a result, only a small portion of the broad range of pornographic materials available to the public could successfully be regulated under the obscenity law as set forth in *Jenkins*. However, the courts have had little trouble characterizing certain types of adult entertainment material as obscene, such as those materials depicting flagellation,[17] bestiality,[18] sadomasochism, and ex-

10. *Miller*, 413 U.S. at 24.

11. *Id.*

12. *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153, 160 (1974). In *Jenkins*, the defendant was convicted of distributing obscene materials in violation of Georgia obscenity law. *Jenkins*, 418 U.S. at 154. The material in question was a film that included scenes in which sexual conduct, including "ultimate sexual acts" was to be understood to be taking place, and that included occasional scenes of nudity but in which the camera did not focus on the actors' bodies or on any parts thereof during such scenes. *Id.* at 161. Justice Rehnquist, speaking for the Court, reversed the conviction, finding that the film did not depict sexual conduct in a patently offensive way and was not obscene under "currently operative constitutional standards." *Id.* at 155.

13. *Id.*

14. 418 U.S. 153.

15. Jenkins, 418 U.S. at 155. The Georgia Supreme Court upheld Jenkins' conviction in *Jenkins v. State*, 230 Ga. 726, 199 S.E.2d 183 (1973). *Id.*

16. *Id.* at 153.

17. *See, e.g.*, Ward v. Illinois, 431 U.S. 767, 771-72 (1977). Justice White, writing for the Supreme Court, held that sadomasochistic materials were the kind of materials that may be proscribed by state law, even though they were not expressly included in the

treme violence.[19]

Although obscenity is not protected by the First Amendment, the Supreme Court has held that laws relating to sexually explicit material and other forms of speech must be sensitive to the First Amendment rights otherwise involved.[20] In *Roaden v. Kentucky*,[21] the Court held that the setting of an adult book store or commercial theater is presumptively protected by the First Amendment.[22] Then, in *Schad v. Borough of Mt. Ephraim*,[23] the Court stated that entertainment, as well as political and ideological speech, is constitutionally protected.[24] The Court continued, "motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."[25] The Court also stated, in *Schad*, that an entertainment program could not be prohibited solely because it displays the nude human figure.[26] Moreover, the Court has repeatedly found that "[n]udity alone does not place otherwise protected material outside the mantle of First Amendment protection."[27]

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examples of sexually explicit representations set forth in *Miller* to define obscenity. *Ward*, 431 U.S. at 771-72. The term "flagellation" is defined as "a beating or whipping; a flogging; especially as religious discipline or in abnormal eroticism." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 695 (2d ed. 1983).

18. *See, e.g.*, United States v. Guglielmi, 819 F.2d 451, 453-54 (4th Cir. 1987). The Court of Appeals for the Fourth Circuit held that the "prurient interest" branch of the test for obscenity did not require a finding that the average person would experience sexual arousal in viewing a film to deem obscene films depicting bestiality. *Guglielmi*, 819 F.2d at 453-54. The Court also opined that the finding of obscenity with respect to films depicting bestiality did not necessitate a finding of appeal to the "average zoophiliac." *Id.*

19. *See, e.g.*, Hamling v. United States, 418 U.S. 87, 123 (1974). In *Hamling*, the Court upheld the conviction for mailing and conspiring to mail an obscene brochure advertising an illustrated version of a report from the Presidential Commission on Obscenity and Pornography; *See also* Smith v. California, 361 U.S. 147, 155 (1959). Justice Brennan reversed an obscenity conviction due to the fact that the ordinance under which the defendant was charged dispensed with the element of scienter, thereby imposing strict criminal liability on bookseller possessing obscene material. *Smith*, 361 at 155.

20. *See, e.g.*, Roaden v. Kentucky, 413 U.S. 496 (1973); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

21. 413 U.S. 496 (1973).

22. *Roaden*, 413 U.S. at 504.

23. 452 U.S. 61 (1981). The Court struck down a zoning ordinance that prohibited live entertainment, including nude dancing. *Schad*, 452 U.S. at 65. Because the ordinance effected a total ban on all live entertainment, it impermissibly prohibited a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments. *Id.*

24. *Schad*, 452 U.S. at 65.

25. *Id.*

26. *Id.* at 66.

27. *See, e.g., Jenkins*, 418 U.S. at 161; Southeastern Promotions, Ltd. v. Conrad, 420

The Supreme Court has consistently held that nude dancing is expressive conduct and, as such, is protected by the First Amendment.[28] Although the Supreme Court has indicated that nude dancing may approach the outer perimeter of First Amendment protection, it is nonetheless clear that all regulations regarding nude dancing must be examined using First Amendment criteria.

Over the years, government officials have attempted to regulate adult entertainment uses in a variety of ways. Specifically, state and local officials have frequently mandated that businesses or individuals involved in the adult entertainment industry obtain special permits or licenses.[29] They have also enacted zoning ordinances that disperse the adult uses throughout the municipality or, alternatively, concentrate them in one area.[30] However, because of such officials' careless and/or negligent drafting of licensing regulations and zoning ordinances, courts have struck down many of these laws as unconstitutional. The purpose of the remainder of this comment is to identify typical problems presented by ordinances and laws that seek to regulate adult entertainment and to propose ways for lawyers and municipal officers to enact adult entertainment regulations that do not offend the First Amendment.

U.S. 546 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205, 211-12 (1975).

28. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 982 (1975); *Schad*, 452 U.S. at 61; Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991). In *Doran*, owners of three topless bars sought a temporary injunction from a North Hempstead, New York, town ordinance that prohibited topless dancing in any public place. *Doran*, 422 U.S. at 924. Justice Rehnquist wrote that "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 Amendment protection in some circumstances." *Id.* at 932. In both *Schad* and *Barnes*, the Supreme Court followed the *Doran* Court, concluding that nude dancing is not without First Amendment protections from official regulation. *Schad*, 452 U.S. at 66; *Barnes*, 501 U.S. at 565-66.

29. *See, e.g.*, Dease v. City of Anaheim, 826 F. Supp. 336, 342 (C.D. Cal. 1993), *infra* note 34; Freedman v. Maryland, 380 U.S. 51, 58-60 (1965), *infra* note 39.

30. *See, e.g.*, Grand Brittain, Inc. v. City of Amarillo, 27 F.3d 1068 (5th Cir. 1994) (adult book store brought action challenging city ordinance and Fifth Circuit held that city was required to maintain status quo, during licensing proceedings, for businesses that were operating when the ordinance became effective but that other portions of the ordinances were constitutional); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986), *infra* note 85.

II. REGULATION OF ADULT ENTERTAINMENT

A. Licensing Regulations

Licensing is a method that states regularly employ to regulate adult entertainment. The state may generally impose license requirements on legitimate businesses for purposes of promoting the public health, morals, safety, or welfare.[31] However, when license requirements are imposed only on specific businesses, such as sexually-oriented businesses, which disseminate a certain type of speech, at least some of which may be protected by the First Amendment, serious questions as to the validity of the licensing requirement may arise.[32] To satisfy constitutional requirements, a licensing regulation must meet two tests: it must impose adequate standards; and it must impose procedural safeguards.[33]

1. Adequate Standards

A constitutional licensing regulation must impose adequate standards for officials to apply in rendering a decision as to whether to grant, deny, or revoke an operational license. In particular, any such regulation must contain narrow, well-defined, objective, and definite standards to guide the licensing authority. Municipalities do not always satisfy this requirement. For example, in *Dease v. City of Anaheim*,[34] proprietors of adult businesses challenged the validity of the City of Anaheim's conditional use permit ordinance that applied to adult businesses.[35] Under the challenged ordinance, a permit could be denied if (1) the planning

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31. This is known as the "police power" of a state or municipality. It is defined as:
> An authority conferred by the American constitutional system in the Tenth Amendment, U.S. Const., on the individual states, and, in turn, delegated to local governments, through which they are enabled to establish a special department of police; adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred on him or her by the general laws.

BLACK'S LAW DICTIONARY 1156 (6th ed. 1990).

32. *See, e.g.*, Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976), *infra* note 65; *Renton*, 475 U.S. at 48, *infra* note 85.

33. Dease v. City of Anaheim, 826 F. Supp. 336, 342 (C.D. Cal. 1993); Freedman v. Maryland, 380 U.S. 51, 58-60 (1965).

34. 826 F. Supp. 336 (C.D. Cal. 1993).

35. *Dease*, 826 F. Supp. at 342.

commission found that the adult business would "adversely affect" the use of a church, school, park, or playground; (2) the adult business was "insufficiently buffered" in relation to residential areas; or (3) the exterior appearance of the business was "inconsistent" with the appearance of external structures in the neighborhood.[36]

The district court concluded that the permit scheme was invalid, basing its decision on the fact that the planning commission was vested with unconstitutionally broad discretion to decide whether to grant or deny the permit.[37] The court held that the Anaheim Planning Commission's decision-making process was not guided by definite and objective standards, leaving open the possibility of content-based discrimination.[38] This litigation may have been avoided if the drafters of the ordinance had given more careful consideration to the First Amendment rights of owners of adult businesses.

2. Procedural Safeguards

The second test for determining the constitutionality of a licensing regulation is whether it imposes procedural safeguards sufficient to ensure a prompt decision. The Supreme Court, in *Freedman v. Maryland*,[39] identified the following three procedural safeguards that guarantee a decision is rendered promptly, specifically: (1) any restraint imposed prior to judicial review could 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 made available; and, (3) the government must bear both the burden of going to court to suppress the speech and the burden of proof in court.[40] If the licensing statute in question fails to provide these procedural safeguards, it will be found unconstitutional.[41]

It is well-settled that, in the area of free expression, a licensing statute placing "unbridled discretion" in the hands of a government official or agency constitutes a prior restraint and may result in

36. *Id.* at 340. (*citing* ANAHEIM, FLA., MUN. CODE §18.03.030).
37. *Id.*
38. *Id.* at 345.
39. 380 U.S. 51 (1965).
40. *Freedman*, 380 U.S. at 58-60.
41. *Id.*

unconstitutional censorship.[42] In *FW/PBS, Inc. v. City of Dallas*,[43] the Supreme Court indicated that allowing government officials to exercise unbridled discretion in determining whether to prohibit protected speech, as a matter of policy, presented an unacceptable risk of both indefinitely suppressing and chilling protected speech.[44]

In *FW/PBS*, an ordinance regulating sexually-oriented businesses was intended to "eradicat[e] the secondary effects of crime and urban blight."[45] The Court held that the ordinance lacked the necessary procedural safeguards because it failed to set time limits on the inspections required prior to the issuance of a license to the sexually-oriented businesses.[46] According to the Court, absent the constraint of specific standards to guide decision makers in determining whether a license should be issued, an impermissible danger existed because government officials may either inconsistently suppress speech or have unlimited latitude in determining whether the license should be issued.[47] In addition, applicants may feel compelled to censor their own speech because of the lack of definite limitations on time.[48] The Court noted that a licensing scheme that allowed indefinite postponement of the issuance of a license created the possibility that constitutionally-protected

42. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 225-26 (1990); *Freedman*, 380 U.S. at 51.

43. 493 U.S. 215 (1990).

44. *FW/PBS*, 493 U.S. at 223-24.

45. *Id.* at 220. The United States District Court for the Northern District of Texas held that the ordinance was not violative of the First and Fourth Amendments, in *Dumas v. Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986). The petitioners appealed the District Court's decision to the Court of Appeals for the Fifth Circuit, which affirmed the decision. FW/PBS, Inc. v. Dallas, 837 F.2d 1298 (5th Cir. 1988).

46. *Id.* at 223.

47. *Id.* at 226-27.

48. *Id.* at 226. The licensing scheme contained in a comprehensive city ordinance that regulated sexually-oriented businesses—defined as adult arcades, adult bookstores, adult video stores, adult cabarets, adult motels, adult motion picture theaters, adult theaters, escort agencies, nude model studios, or sexual encounter centers—was found to violate the Constitution. *Id.* at 224. This licensing scheme was unconstitutional because it was enforced against businesses engaged in activity protected by the First Amendment and because the ordinance provides that the chief of police shall approve the issuance of a license to a sexually-oriented business within thirty days after the receipt of an application but does not require a license to be issued if the premises to be used for the business have not been approved by the health department, fire department, and the building official as being in compliance with the applicable laws and ordinances and does not set a time limit within which the inspections must occur. *Id.* at 226-27. Such a scheme is unconstitutional because it allows indefinite postponement of the issuance of a license and fails to provide an avenue for prompt judicial review so as to minimize suppression of protected speech in the event of a license denial. *Id.*

speech would be suppressed.[49] The Court, in *FW/PBS*, concluded that, without procedural safeguards in place to ensure a prompt resolution, such licensing schemes might convince an applicant that seeking a determination was too burdensome to pursue, thereby, impermissibly chilling protected speech as a result of the potential for indefinite postponement.[50]

Adult entertainment licensing regulations can be constitutionally enacted, provided they comply with the above-mentioned guidelines. The regulations must impose adequate standards to guide officials in making licensing decisions. In addition, the regulations must impose procedural safeguards sufficient to ensure a prompt decision. The drafters of the licensing regulation in *FW/PBS* did not comply with the constitutional guidelines set forth in *Freedman*. Rather, they gave the chief of police unbridled discretion to grant or withhold the license.[51] Furthermore, the regulations failed to set forth a time limit for the rendering of the licensing decision.[52] Drafters of regulations, as well as attorneys, must conform to the guidelines set forth by the Supreme Court, so as not to run afoul of the First Amendment.

Licensing regulations are just one method by which state and local municipalities attempt to regulate adult entertainment. Zoning ordinances, aimed at restricting adult entertainment establishments, have also been proposed and enacted. Like many licensing regulations, they have often been struck down when they unconstitutionally infringe on protected expression.

B. Zoning Ordinances

Zoning ordinances that exclude places of entertainment from specified zones have generally been upheld by the courts. The Supreme Court firmly established this broad zoning power in *Village of Euclid v. Ambler Realty Co.*[53] Pursuant to that decision, municipalities were given the power to protect the public health, safety, morals, and welfare of their residents by restricting the permissible uses of land.[54] Since *Euclid*, zoning has developed into a powerful

49. *FW/PBS*, 493 U.S. at 226-27.
50. *Id* at 227.
51. *Id.*
52. *Id.*
53. 272 U.S. 365 (1926).
54. *Euclid*, 272 U.S. at 365. The Supreme Court acknowledged that zoning constitutes a legitimate function of the state police power. *Id.* at 387-88. A court must con-

tool for controlling and shaping urban life and has become a major weapon in communities' attempts to regulate businesses offering sexually explicit materials. Zoning now affects much more than the location of undesirable land uses. It preserves historical landmarks, encourages development, and deters disorderly growth.

However, when the land use in question is a sexually-oriented business, such as an "X-rated" movie theater, adult bookstore, or establishment offering nude entertainment, the municipality's zoning power is limited because the regulation may encroach on the freedom of expression. Similar to the above-discussed licensing regulations, many localities shape zoning schemes to the demise of the commercial potential and strength of the adult entertainment businesses.[55] Both lawyers and municipal officials must understand how these zoning ordinances can impinge on the First Amendment, so that they can propose and enact ordinances that do not violate the United States Constitution.

One of the ways zoning ordinances can violate the Constitution is by restricting expression on the basis of the content of that expression. Such restrictions are classified as "content-based" laws. Presumptively unconstitutional, content-based laws must advance a compelling governmental interest using the least restrictive means if they are to comply with the Constitution.[56] As Justice Marshall, writing for the Court, recognized in *Police Department of Chicago v. Mosley*,[57] "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[58] When the government action is content based, the courts will apply strict scrutiny and invalidate any restriction that is not narrowly tailored

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sider a city's zoning scheme in the context of all of the surrounding circumstances and conditions. *Id.* at 388. The court will defer to the city's judgment in this area, unless the zoning scheme was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395.

55. Gianni P. Servodidio, *The Devaluation of Nonobscene Eroticism as a Form of Expression Protected by the First Amendment*, 67 TUL. L. REV. 1231, 1236 (1993).

56. Kunz v. New York, 340 U.S. 290 (1951). Chief Justice Vinson held that a New York City ordinance, making it unlawful to hold public worship meetings on the streets without first obtaining a permit from the city police commissioner, was invalid because it vested control over the right to speak on religious subjects in an administrative official without providing appropriate standards to guide his actions. *Kunz*, 340 U.S. at 293.

57. 408 U.S. 92 (1972).

58. *Mosley*, 408 U.S. at 95. Justice Marshall held that a city ordinance prohibiting all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute, was unconstitutional because it made an impermissible distinction between peaceful labor picketing and other peaceful picketing. *Id.* at 94-95.

to serve a compelling state interest.[59]

Laws that restrict freedom of expression without regard to the content of the speech are referred to as "content-neutral" laws. Content-neutral laws are typically justified by their prevention of harmful secondary effects and, as such, are required to satisfy a less exacting constitutional standard.[60] They must be narrowly tailored to serve a substantial governmental interest and must leave open ample alternative channels for communication of information.[61]

When presented with content-based zoning regulations, courts have generally applied a strict scrutiny standard of review and found such regulations to violate the First Amendment, unless the localities involved could establish the existence of harmful secondary effects caused by such expression.[62] "Regulations that permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[63] In contrast, when presented with content-neutral zoning ordinances restricting the location of adult businesses under the First Amendment, courts have been required to decide what evidence is sufficient to establish a "substantial" government interest in restricting the location of adult businesses.[64] Proving the existence of a "substantial" governmental interest is a relatively easy burden for

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59. United States v. O'Brien, 391 U.S. 367, 376-77 (1968). Chief Justice Warren held that a sufficient governmental interest was shown to justify the defendant's conviction, despite his claim that his act was protected as "symbolic speech." *Id.* at 367. This speech was not protected because the government had a substantial interest in ensuring the continuing availability of issued selective service certificates, because the statute punishing knowing destruction or mutilation of such certificates was an appropriately narrow means of protecting such interest and condemned only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of defendant's act of burning his registration certificate frustrated the government's interest. *Id.* at 381-82.

60. *See, e.g.*, *Young*, *infra* note 65; *Renton*, *infra* note 85.

61. *See, e.g.*, *Young*, *infra* note 65; *Renton*, *infra* note 85.

62. *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990) (the Flag Burning Act was subject to most exacting scrutiny and could not be upheld under the First Amendment); *See also* Texas v. Johnson, 491 U.S. 397 (1989) (the state could not justify prosecution of a defendant based on its interest in preventing breaches of peace or in preserving the flag as symbol of nationhood and national unity).

63. Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984). In *Regan*, a publisher brought an action challenging the constitutionality of statutes governing the publication or production of illustrations of federal currency. *Id.* at 643. Justice White, on behalf of the Supreme Court, held that the statute's purpose requirement discriminated on the basis of content in violation of the First Amendment but that the statute's size and color requirements were valid as reasonable manner regulations. *Id.* at 648-49, 658-59.

64. *See, e.g.*, *Young*, *infra* note 65; *Renton*, *infra* note 85.

the government to overcome, whereas proving the existence of a "compelling" governmental interest is much more difficult. Therefore, in the realm of adult entertainment, courts have upheld both content-based and content-neutral zoning regulations when such regulations were justified by the adverse secondary effects caused by the "speech." The distinguishing factor between content-based and content-neutral regulations is the degree of governmental interest required by the Constitution. As the remainder of this comment shows, the "secondary effects" doctrine has spawned zealous debate within the judicial system.

1. *Avoidance of Harmful Secondary Effects as a Substantial Governmental Interest*

In *Young v. American Mini Theatres, Inc.*,[65] a plurality of the Court opined that it was constitutionally permissible to distinguish between "adult" or sexually explicit speech and other categories of speech in a zoning ordinance imposing locational restrictions on adult businesses.[66] The plurality opinion conceded that the ordinances treated adult theaters differently, based on the content of the material shown in the respective theaters.[67] The pluarilty opinion of the Court determined that the ordinance in question in *Young* had neither the intent nor the effect of suppressing speech but, instead, was aimed at the secondary effects caused by adult businesses on surrounding uses and, as such, was not an invalid prior restraint on protected expression.[68]

In *Young*, the City of Detroit amended its "Anti-Skid Row Ordinance" to impose zoning limitations on adult businesses.[69] Under the new ordinances, no adult businesses could be located within 1,000 feet of any two existing adult businesses or within 500 feet of any residential area.[70] The Supreme Court found that the zoning requirements were passed, not to silence offensive expression, but to prevent the deterioration of neighborhoods.[71] The city's finding

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65. 427 U.S. 50 (1976).
66. *Young*, 427 U.S. at 58-63.
67. *Id.* at 62-63.
68. *Id.* at 63, 71 n. 34.
69. *Id.* at 52-54.
70. *Id* at 52. This disbursement method is one approach municipalities have used to restrict adult entertainment uses.
71. *Young*, 427 U.S. at 62-63. Justice Stevens stated:
In the opinion of urban planners and real estate experts who supported

that adult uses of property, when concentrated in limited areas, had a "deleterious effect on the adjacent areas" and could "contribute to the blighting or downgrading of the surrounding neighborhood" supported the legislative purpose.[72] In the Court's plurality opinion, Justice Stevens characterized this interest as a harmful secondary effect.[73]

In the words of Justice Stevens, "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."[74] Justice Stevens relied heavily on the fact that the zoning regulation was passed in response to "secondary effects," relating to the decline of property values and increase in crime rate, rather than in response to the content of the films that were shown.[75]

This secondary effect rationale, however, has generated heavy criticism.[76] First Amendment commentators have noted that the "secondary effects" doctrine is applicable for most restrictions on speech.[77] For instance, a blanket ban on speech criticizing the government may be substantiated as an attempt to promote a more efficient and economical government.[78] Such prohibitions would be freed from strict scrutiny via the secondary effects doctrine.[79]

Several years after *Young*, in *Avalon Cinema Corp. v. Thompson*,[80] the United States Court of Appeals for the Eighth Circuit attempted to limit *Young* by requiring some semblance of a fact-

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> the ordinances, the location of several such businesses [adult theaters and other regulated businesses] in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely effects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.

Id. at 55.

72. *Id.* at 54 n.6.

73. *Id.* at 71 n.34. Justice Stevens supported this conclusion, noting as follows:

> The Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which were not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive'" speech.

Id. at 71.

74. *Id.*

75. *Id.*

76. Kimberly K. Smith, *Zoning Adult Entertainment: A Reassessment of Renton*, 79 CALIF. L. REV. 119, 128 (1991).

77. Smith, 79 CALIF. L. REV. at 128.

78. *Id.*

79. *Id.*

80. 667 F.2d 659 (8th Cir. 1981).

finding effort by government officials before the court would use the secondary effects rationale.[81] The ordinance in *Avalon Cinema Corp.* prohibited the location of adult motion picture theaters within 100 yards of a church, public or private elementary school, area restricted to residential use, or park.[82] The court invalidated this city zoning law, finding that it had been passed by the North Little Rock, Arkansas, city council only after an adult business received a permit and license to operate an adult bookstore and an adult movie theater.[83]

Judge Arnold, writing for the Eighth Circuit, distinguished the North Little Rock ordinance from the Detroit zoning ordinance in *Young* on the grounds that the North Little Rock zoning law was based on neither studies conducted by social scientists nor a demonstrated past history of adult theaters causing neighborhood deterioration.[84] In contrast to the empirical evidence in *Young*, the only finding made in *Avalon Cinema Corp.* was that "[t]he City Council . . . found and determined that the prohibition of certain sexually explicit films in specific areas of the city is immediately necessary and desirable to insure and safeguard the proper development of young people and adults alike within the City of North Little Rock. . . ."[85] In response to this purported justification by the city, the circuit court noted that "[t]his 'finding' is little more than a statement that the City Council thinks that a certain kind of protected speech is morally objectionable. Such a purpose, however defensible on moral grounds cannot, under the First Amendment, be the basis for restricting protected speech."[86] The court determined that the lack of proof of any secondary effects demonstrated that the ordinance was a hostile reaction to the form of expression and, therefore, held the content-based ordinance unconstitutional.[87]

In *Renton v. Playtime Theatres, Inc.*,[88] a seven-member majority of the Supreme Court significantly expanded a city's power to single out adult businesses through its zoning laws without violating

81. *Avalon Cinema Corp.*, 667 F.2d at 661-62.
82. *Id.* at 660 n.3.
83. *Id.* at 660-61.
84. *Id.* at 661.
85. *Id.* at 661 n. 6.
86. *Avalon Cinema Corp.*, 667 F.2d at 661.
87. *Id.* at 661-63.
88. 475 U.S. 41 (1986).

the constraints imposed by the First Amendment.[89] There, the plaintiffs, who had purchased two theaters within a proscribed area with the intent to exhibit adult films, sought declaratory[90] and injunctive[91] relief against enforcement of an ordinance that provided that adult theaters could not be located within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school.[92]

The Court held that ordinances that merely restrict the location of adult theaters without banning them altogether are content neutral and should be evaluated as "time, place, and manner" regulations for purposes of determining their validity under the First Amendment.[93] The Court opined that a permissible time, place, and manner restriction is one that is justified by a substantial governmental interest unrelated to free speech and that allows for adequate alternative avenues of communication of sexually explicit material.[94] Following its broad holding in *Young*, the Court held that the ordinance in question did not ban adult theaters altogether and was, therefore, a proper time, place, and manner regulation.[95]

The United States District Court for the Western District of Washington initially determined that the predominant intent of the ordinance was to mitigate the secondary effects of adult theaters, not to regulate their content.[96] On appeal, the Court of Appeals for the Ninth Circuit held that if a "motivating factor" in enacting the ordinance was the restriction of speech, the ordinance will be held invalid.[97] The Supreme Court held that the existence of a valid predominant intent was adequate to establish that the city's zoning

89. *Renton*, 475 U.S. at 51-52 (explaining that the city is not required to perform its own studies regarding secondary harmful effects, as was required by the Eighth Circuit in *Avalon)*.

90. "In a case or actual controversy within its jurisdiction . . . any court of the United States, on the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201 (1994).

91. Injunctive relief is "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." BLACK'S LAW DICTIONARY 784 (6th ed. 1990); FED. R. CIV. P. 65.

92. *Renton*, 475 U.S. at 44-45.

93. *Id.* at 54. Some courts have determined an ordinance is not content neutral if an improper intent or purpose has been established. *Avalon*, 667 F.2d at 661-63.

94. *Id.*

95. *Id.* at 46.

96. *Id. (*citing City of Renton v. Playtime Theaters, Inc., No. 83-3980; No. 83-3805).

97. *Renton v. Playtime Theaters, Inc.*, 748 F.2d 527 (9th Cir. 1984).

efforts were unrelated to the suppression of free expression.[98] The Court relied on the stated purposes of the ordinance, which were the protection of retail trade, the prevention of crime, the maintenance of property values, and the preservation of the quality of neighborhood commercial districts and urban life.[99] The Court held that such a mixed motive was insufficient to invalidate an otherwise valid restriction, so long as the predominant concern of the zoning regulation was legitimate.[100]

Although no adult uses existed in the city at the time the *Renton* ordinance was proposed, the city planning committee held public hearings and reviewed the secondary effects of adult uses in other cities, such as Seattle and Detroit, before enacting the ordinance.[101] The Court held that, in enacting ordinances that restrict the location of adult uses, a city need not conduct its own studies regarding the secondary effects of adult businesses to establish the requisite substantial governmental interest unrelated to the suppression of free speech.[102] The Court, in *Renton*, concluded that the First Amendment does not require that a city conduct new studies or produce evidence independent of that already generated by other cities before enacting an ordinance, so long as whatever evidence the city relies on is reasonably believed to be relevant to the problem that the city addresses.[103]

In addition, the Court determined that the ordinance was narrowly tailored to affect only that category of theaters shown to produce "unwanted secondary effects."[104] The Court found that cities may regulate adult theaters by dispersing them or by concentrating them and must be allowed a reasonable opportunity to ex-

98. *Renton*, 475 U.S. at 48.

99. *Id.*

100. *Id.* at 47-48.

101. *Id.* at 51. The city planning committee relied on the experiences of Detroit, as discussed in *Young*. *Id.*

102. *Id.* at 51-52.

103. *Renton*, 475 U.S. at 51-52 (Brennan, J., dissenting). Justice Brennan wrote a dissenting opinion in which Justice Marshall joined. *Id.* at 55. Justice Brennan argued that the law selectively imposed limitations on the location of a movie theater based exclusively on the content of the films shown there. *Id.* He persuasively pointed out that, although adult theaters may cause harmful secondary effects, this does not make the zoning ordinance content neutral. *Id.* at 56. He noted that the purported secondary effects were mentioned by Renton city leaders after the lawsuit was filed. *Id.* at 59. Justice Brennan stated, "[p]rior to the amendment, there was no indication that the ordinance was designed to address any secondary effects a single adult theater might create. In addition to the suspiciously coincidental timing of the amendment, many of the City Council's findings do not relate to legitimate land-use concerns." *Id.*

104. *Id.* at 52-53.

periment with ways to combat the secondary effects of adult businesses.[105] The Court also noted that the ordinance allowed for reasonable alternative channels for sexually explicit communication.[106] Specifically, the ordinance did not unreasonably limit alternative avenues of communication because 520 acres, or greater than five percent of the city's land, was left open for the establishment of adult theaters.[107] The Court stated that the city need only refrain from, in effect, prohibiting proprietors of adult theaters a reasonable chance to locate and function an adult theater within the city.[108]

Thus, the current status of the law, after *Renton*, is that an adult use zoning regulation will be upheld if it is designed to serve the substantial governmental interest of preventing harmful secondary effects and it allows for reasonable alternative avenues of communication.[109] However, the supporting evidence of harmful secondary effects need not come from the municipality's own studies or experts.[110]

One possible danger of the *Renton* holding is that even the most tranquil of communities could create a barrier against adult entertainment based on empirical evidence gathered in far distant cities. Unfortunately, this may create new First Amendment concerns, such as the necessity of presenting independent evidence of harmful secondary effects and the necessity of presenting pre-enactment evidence of such harmful secondary effects.

III. POTENTIAL FIRST AMENDMENT ISSUES REGARDING EVIDENCE OF HARMFUL SECONDARY EFFECTS

A. The Necessity of Presenting Independent Evidence of Harmful Secondary Effects

Both lawyers and municipal officers need to be aware of First Amendment issues on the horizon that will shape the law in this area. In *Renton*, the most recent statement of the law regarding zoning restrictions on adult entertainment, the Supreme Court

105. *Id.* at 52.
106. *Id.* at 53-54.
107. *Id.* at 53.
108. *Renton*, 475 U.S. at 54.
109. *Id.* at 50.
110. *Id.* at 51-52.

held that a city need not conduct its own studies regarding the secondary effects of adult businesses; a city's mere reliance on the experiences and studies of other cities is deemed sufficient to demonstrate that adult businesses can have harmful effects on the city's own community.[111] It is possible, however, that this portion of the *Renton* holding may be overturned in the near future.

The Supreme Court, in *44 Liquormart, Inc. v. Rhode Island*,[112] recently struck down a Rhode Island statute that prohibited retail pricing information in alcoholic beverage advertisements.[113] In *44 Liquormart*, the Court reconsidered the application of the long-standing test for determining the validity of a government regulation concerning commercial speech, a test virtually identical to the test applicable to time, place, and manner regulations of noncommercial speech, which was approved under *Renton*.[114]

Under *Renton* and its progeny, the Court has long held that courts are to defer to legislative judgment regarding the substantiality of the governmental interest and whether the regulation was narrowly tailored to serve those interests.[115] However, in *44 Liquormart*, the Court suggested that it would "carefully examine" the substantiality of a governmental interest and the evidence relied on by the government to establish that the regulation substantially advances that interest.[116]

Given the holding in *44 Liquormart*, it may be that a locality will have to do more in the future than merely rely on experiences and studies from other cities. Plainly, the enactment of a zoning ordinance supported solely by the concern of residents and public officials pertaining to the location of adult businesses in their com-

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111. *Id.*

112. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

113. *Liquormart*, 517 U.S. at 489. This action arose out of an advertisement placed by 44 Liquormart in a Rhode Island newspaper in 1991. *Id.* at 492. The advertisement did not state the price of any alcoholic beverages because state law prohibited advertising liquor prices. *Id.* "The ad did, however, state the prices at which peanuts, potato chips, and Schwepps mixers were being offered, identify various brands of packaged liquor, and include the word 'WOW' in large letters next to pictures of vodka and rum bottles." *Id.*

114. *Id.* at 494-95.

115. *See, e.g.*, Posadas de Puerto Rico Associates v. Tours and Co. of P.R., 478 U.S. 328 (1986). In a five-to-four decision, the Supreme Court upheld a Puerto Rican law that prohibited the advertising of casino gambling aimed at residents of Puerto Rico but permitted such advertising aimed at tourists. *Id.* The Court accepted, without further inquiry, Puerto Rico's assertions that the regulations furthered the government's interest and were no more extensive than was necessary to serve that interest. *Id.*

116. *Liquormart*, 517 U.S. at 494-95.

munity would fail to withstand this type of searching scrutiny.

It can be argued that *Renton* has been partially overruled by *44 Liquormart*, which requires independent studies and experiences to establish harmful secondary effects. Adult entertainment uses can be damaging in a variety of ways to a municipality. Although there may be several tools that local governments can utilize in their attempt to eliminate the problems associated with the adult entertainment industry, it seems clear that the appropriate use of local zoning and land use powers provides the most effective relief—especially when coupled with detailed studies concerning the secondary effects of such uses. State and local governments may need to produce independent evidence of these harmful secondary effects in an effort to establish the requisite "substantial governmental interest." This independent evidence may consist of expert opinions, such as police officer testimony regarding the effects on criminal activity, and real estate appraisals regarding the deterioration of neighborhoods and/or the decrease in property values.

B. The Necessity of Presenting Pre-Enactment Evidence of Harmful Secondary Effects

In response to First Amendment attacks on adult entertainment ordinances, state and local governments have typically attempted to amend invalid ordinances in response to litigation. Lawyers and municipal officers must be aware that, in light of recent case law, they may need to present pre-enactment evidence of harmful secondary effects.

The United States Court of Appeals for the Third Circuit, in *Phillips v. Borough of Keyport*,[117] recently upheld a government regulation affecting speech, despite the fact that the adopting entity did not have before it, at the time of adoption, evidence of harmful secondary effects of the regulated speech.[118] The court noted that "a significant difference exists between the requirement that there be a factual basis for a legislative judgment presented in court when that judgment was challenged, and a requirement that such a factual basis have been submitted to the legislative body

117. 107 F.3d 164 (3d Cir. 1997).
118. *Phillips*, 107 F.3d at 178-79.

prior to the enactment of the legislative measure."[119]

In effect, the *Phillips* approach allows for a legislative body to enact a zoning ordinance without proof of harmful secondary effects, in direct violation of the principles established in *Young* and *Renton*. The circuit court, in *Phillips*, essentially allowed legislatures to establish evidence of harmful secondary effects after the enactment of the ordinance. This "post-enactment" finding of secondary effects directly contravenes earlier precedent and may ultimately be overruled.

Judge Rosenn, in a persuasive dissenting opinion in *Phillips*, held that "the Borough of Keyport's failure to articulate at the time of enactment any governmental interest justifying its Ordinance No. 31-92, designed to curb protected speech expression, is a fatal constitutional defect."[120] He continued by stating that "[t]he defect cannot be cured by allowing the municipality to structure a post hoc record more than four years later, and then after judicial review by a trial and appellate court."[121]

Judge Rosenn reiterated how courts have sought to reconcile "respect for local land regulation concerns with the protection of speech by requiring that municipalities impose restraints on adult entertainment establishments only where there is evidence that they have deleterious 'secondary effects' on adjacent areas."[122] Although the majority allowed the development of evidence at any time after the zoning regulation was enacted but before it was challenged in court, Judge Rosenn concluded that "this runs counter to the protective purpose of such an evidentiary requirement, which is the view taken by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, and by virtually every other circuit in this country."[123]

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119. *Id.* at 178.

120. *Id.* at 187 (Rosenn, J., dissenting).

121. *Id.* Judge Rosenn continued:

> Although I fully empathize with the efforts of the Borough of Keyport to preserve a wholesome quality of community life, I cannot lend my support to the majority's potentially dangerous disregard of an established safeguard in protection of cherished First Amendment rights, namely, a record at the time of enactment justifying the restrictive regulation of protected speech.

Id. at 188.

122. *Id.* (citing *Young*, 427 U.S. at 50, 70).

123. *Phillips*, 107 F.3d at 188. The *Phillips* Court noted as follows:

> *Renton* stands only for the proposition that a municipality need not conduct its own pre-enactment studies (*i.e.*, that it may rely on studies conducted by other communities). The unavoidable inference from *Renton* is that the municipality must rely on something at the time of enactment jus-

Judge Rosenn noted that no other court of appeals has interpreted *Renton* to require absolutely no pre-enactment evidence.[124] The position adopted by the majority leaves the Third Circuit an outcast among the United States courts of appeals. The *Renton* Court left no doubt that pre-enactment evidence of harmful secondary effects is indeed a constitutional requirement; the Court sustained the ordinance in question because it was satisfied that the enacting body had sufficient pre-enactment evidence before it.[125]

Similar cases have been decided by the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits.[126] "Each of these circuits has interpreted *Renton* to require pre-enactment evidence of harmful secondary effects, and each of these circuits has insisted on such evidence before affirming the constitutionality of a restrictive zoning ordinance."[127] Although the *Phillips* majority, by allowing "post-enactment" findings of secondary effects, directly contravenes earlier precedent, state and local governments continue to rely on *Phillips* in an effort to ban adult entertainment without performing the potentially difficult task of determining whether harmful secondary effects really exist. This, however, is a dangerous approach because it allows legislatures to amend invalid ordinances in response to litigation, without first finding sufficient facts to support such ordinances.

It is noteworthy that the Supreme Court in *United States v. Virginia*,[128] similar to the dissent in *Phillips*, suggested that the state must show that the justification for the legislation is genuine, not

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tifying its action limiting freedom of speech.

Id. The *Renton* Court, itself, specifically stated

> 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 on is reasonably believed to be relevant to the problem that the city addresses.

Renton, 475 U.S. at 51-52.

124. *Id.*

125. *Id.* at 189. (citing *Renton*, 475 U.S. at 51-52).

126. *See* National Amusements, Inc. v. Dedham, 43 F.3d 731, 742 (1st Cir. 1995); 11126 Baltimore Blvd. v. Prince George's County, 886 F.2d 1415, 1421-23 (4th Cir. 1989); SDJ, Inc. v. Houston, 837 F.2d 1268, 1274 (5th Cir. 1988); Christy v. Ann Arbor, 824 F.2d 489, 493 (6th Cir. 1987); Berg v. Health & Hosp. Corp., 865 F.2d 797, 803-04 (7th Cir. 1989); Postscript Enter. v. Bridgeton, 905 F.2d 223, 227 (8th Cir. 1990); Tollis Inc. v. San Bernardino County, 827 F.2d 1329, 1333 (9th Cir. 1987); International Eateries of America, Inc. v. Broward County, 941 F.2d 1157, 1163 (11th Cir. 1991).

127. *Phillips*, 107 F.3d at 190.

128. 518 U.S. 515 (1996).

hypothesized or invented post hoc in response to litigation.[129] Although *Virginia* dealt with gender-based education, the intermediate standard of review applied in that case was identical to that afforded to adult entertainment.[130] It can be argued that the rationale of *Virginia* requires proof of harmful secondary effects to be presented before litigation. Lawyers and municipal officials may not be able to establish a substantial governmental interest in response to litigation post hoc and should be wary of doing so.

CONCLUSION

Many forms of adult entertainment, unlike obscenity, are afforded protection under the First Amendment. Because of this protection, laws that regulate adult entertainment must be prudently drafted so as not to violate rights guaranteed by the First Amendment. Specifically, drafters of adult entertainment licensing regulations must impose adequate standards for officials to apply in rendering a decision. In addition, the licensing regulations should impose procedural safeguards sufficient to ensure a prompt decision. It is also recommended that proposed zoning ordinances that seek to regulate adult entertainment be aimed at serving a substantial governmental interest, namely the existence of harmful secondary effects.

Both lawyers and municipal officials should devote the time necessary to understand how these regulations may impinge on First Amendment rights. In addition, both lawyers and municipal officials should be aware that the courts may, in the future, impose a requirement that state and local governments present independent evidence of harmful secondary effects and a requirement that

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129. *Virginia*, 518 U.S. at 533. The United States sued the Commonwealth of Virginia alleging an equal protection violation in maintaining a military college exclusively for males. *Id.* at 516. The United States District Court for the Western District of Virginia entered judgment for the commonwealth, in United States v. Commonwealth of Virginia, 766 F. Supp. 1407 (W.D. Va. 1991). On appeal, the Fourth Circuit Court of Appeals vacated the district court's judgment and remanded the case back to the district court, United States v. Commonwealth of Virginia, 976 F.2d 890 (4th Cir. 1992). The district court then approved the commonwealth's proposed remedial plan. United States v. Commonwealth of Virginia, 852 F. Supp. 471 (W.D. Va. 1994). Justice Ginsburg, writing for the Court, held that the commonwealth failed to show exceedingly persuasive justification for excluding women from a citizen-soldier program offered at a Virginia military college in violation of equal protection. *Virginia*, 518 U.S. 516.

130. *Id.* at 531.

they present pre-enactment evidence of such harmful secondary effects. The guidelines discussed throughout this comment should be carefully considered by all those involved in the regulation of adult entertainment, so as to avoid potential infringement on First Amendment rights.

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