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Abstract

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KEYWORDS: Adult Entertainment, Game, Municipal

Municipal Regulation of "Adult Entertainment"—The Game Without Rules?

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> "Perhaps I could never succeed in intelligibly [defining obscenity]. But I know it when I see it."
>
> Mr. Justice Stewart, concurring in *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964).

Historically, local governments have been empowered to regulate the health, safety, welfare and, more significantly, the morals of their citizens. The exercise of these powers is subject to a standard of reasonableness, except where there exists some threat to the exercise of "fundamental rights" of those persons who are to be governed by the regulations.

The courts have decided that the sale or distribution of materials previously determined to be obscene is not a right protected by the first amendment to the Constitution of the United States.

While there have been varying opinions regarding the precise definition of obscenity, this article will address the ability of local governments to regulate the distribution of those materials that have been judicially determined to be obscene and the measures which may properly be applied to those individuals who have previously been convicted of some offense relating to obscenity.

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In addition to utilizing the power to revoke occupational licenses for infractions relating to obscenity, local authorities have sought to circumvent the legal difficulties associated with the infringements upon free speech by fashioning zoning regulations which are designed to confine "adult entertainment" activities to specified geographical areas, to disperse these activities throughout a wide geographical area, or to abate these activities as nuisances.

Local governments have often imposed rules and procedures which may be designed to frustrate the "adult entertainment" activities. These procedures include background investigations of operators, officers and employees of adult entertainment businesses; the taking of police photographs and fingerprints of employees; requiring that lists of names and addresses of customers be maintained; and the strict (and sometimes selective) enforcement of building and fire codes.

The judiciary has sought to balance the competing interests of governments, which seek to regulate and proscribe a mode of conduct and those citizens who seek to exercise their right of expression and their freedom to earn a living. The result of the courts' judicious scrutiny has been that cases involving the propriety of certain regulatory measures have been decided, each on its own facts. As a result, there are few precise guideposts for legislative bodies to follow.

In an effort to discover whether there exist consistent patterns of legislation which appear to be a permissible exercise of the police power in a manner designed to regulate the morals of the citizens, this article will explore some of the enactments by local governments and the review processes.

1. HISTORY

"Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind throughout the ages."[1] The interest in sexual matters was first "squarely presented" to the United States Supreme Court in 1957,[2] when it was called upon to determine the permissibility of having local governmental bodies proscribe the extent to which sexually-oriented materials may be sold, ad-

1. Roth v. United States, 354 U.S. 476, 487 (1957).

2. *Id.* The court did note that, in its previous opinions, it had always *assumed* that obscenity was not protected by the "freedoms of speech and press." 354 U.S. at 481. However, this was the first case actually *holding* that obscenity is not a constitutionally protected area. 354 U.S. at 485.

vertised or distributed to the public.

There have been early determinations that municipalities may adopt ordinances which regulate the exhibition of obscene motion pictures[3] and the distribution of obscene literature as a valid exercise of the police power. However, in these earlier cases, the concepts of obscenity were limited to whether a theatre operator should lose his license for exhibiting a film relating to the repeal of a birth control law,[4] a picture which portrayed in harrowing detail the capture and death of a spy,[5] or a certain picture dealing with the American Civil War reconstruction period and having a tendency to stimulate class hatred.[6] Current concern for regulation is motivated by a desire to limit the distribution of materials which explicitly depict sexual intercourse, fellatio, cunnilingus, brutality, sodomy and, more recently, the depiction of the foregoing activities by children, known as "kiddi-porn."

Inasmuch as the intensity of the sexual activity which is depicted has increased over the years, the need for heightened emphasis upon the regulation of morals by governments is apparent. Concurrently, however, the courts are reluctant to countenance a manner of regulation which would infringe upon an individual's "fundamental rights." All ideas having even the slightest social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the constitutional guaranties of free speech and press, unless excludable because they encroach upon the limited area of more important interests.[7] The difficulty, from the view of local governments, is that the "more important interests" have not been precisely defined. The Supreme Court, in *United States v. O'Brien*,[8] held that a government regulation is sufficiently justified if: (1) it is within the constitutional powers of the government; (2) it furthers an important or substantial governmental interest; (3) the govern-

3. *See, e.g.*, Brooks v. Birmingham, 32 F.2d 274 (N.D. Ala. 1929).

4. Universal Film Manufacturing Co. v. Bell, 100 Misc. 281, 167 N.Y.S. 124 (1917), *aff'd*, 179 App. Div. 928, 166 N.Y.S. 344 (1917). The film in question portrayed, as a martyr, the confessed violator of a law forbidding the imparting of information pertaining to birth control. The intent of the film's maker was, unquestionably, to argue in favor of repealing the law. The court upheld the suspension of the theatre operator's license under a city ordinance allowing same where such a film or play is "immoral, indecent or against the public welfare." 167 N.Y.S. at 128.

5. City of Chicago v. Fox Films, 251 F. 883 (7th Cir. 1917).

6. Thayer Amusement Corp. v. Moulton, 21 R.I. 117, 7 A.2d 682 (1939).

7. 354 U.S. at 484.

8. 391 U.S. 367 (1968).

mental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.[9] The Court referred to "an important governmental interest," but failed to define it. In the opinion, Mr. Justice Harlan noted that "[t]wo members of the Court steadfastly maintain that the first and fourteenth amendments render society powerless to protect itself against the dissemination of even the filthiest materials."[10] However, there is also a reluctance to admit that the states are powerless to protect their citizens from exposure to patently offensive materials. "The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential."[11] The Court believes that the "task of restructuring the obscenity laws lies with those who pass, repeal and amend statutes and ordinances."[12]

While the courts have had little difficulty in permitting the regulation of those materials which are determined to be offensive to children and non-consenting adults,[13] the question of whether states and municipalities may regulate distribution to "consenting adults" is not so well settled.

The United States Supreme Court, in *Paris Adult Theatre I v. Slaton,*[14] announced that, even though it had often pointedly recognized the high importance of states' interest in regulating the exposure of obscene materials to juveniles and non-consenting adults, "this Court has never declared these to be the only legitimate state interests permitting regulation of obscene material."[15] The Court held, in particular, "that there are legitimate state interests at stake in stemming the tide

9. *Id.* at 377.

10. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 705 (1968). The "two members" to whom Harlan is referring are Justices Douglas and Black, both of whom set out this idea in their dissenting opinions in Roth v. United States, 354 U.S. 476, 508, and in Ginzburg v. United States, 383 U.S. 463, 476, 482 (1966).

11. United States v. Reidel, 402 U.S. 351, 357 (1971).

12. *Id.*

13. Miller v. California, 413 U.S. 15, 18 (1973). (Unsolicited offering of sexually explicit books sent through the mails).

Stanley v. Georgia, 394 U.S. 557 (1969). (Where the court found that the first and fourteenth amendments recognize a valid governmental interest in dealing with pornography which might fall into the hands of children or offend the general public.)

14. 413 U.S. 49 (1973).

15. *Id.* at 59.

of commercialized obscenity . . . ."[16] "These included the interest of the public in the equality of life and the total community environment, the tone of commerce in the great city centers, and possibly the public safety itself . . . that there is at least an arguable correlation between obscene material and crime."[17]

In distinguishing between an individual's private right to "expose himself to indecency" and his demand for a right to obtain books and pictures in the marketplace, the Court noted that *to grant this right is to affect the world about the rest of us, and to impinge on other privacies.*[18]

By its holding in *Paris,* the Court opened the door for local governments to regulate, pursuant to a recognized state interest and subject to procedural safeguards, the distribution of obscene materials. Such a right does invite the innovative and imaginative exercise of the power. However, again the Court failed to provide standard to be applied. The result has been that state and local governments have adopted certain measures, the operators of "adult entertainment" establishments have attacked these measures and the courts have treated each of the cases separately, with no apparent emerging judicial policy regarding the parameters within which the governments may regulate.

The courts of the state of Florida have already ruled upon such issues as whether the seizure of certain motion pictures by municipal officers and a subsequent court injunction against their showing constitute a prohibited prior restraint[19] and whether a charging information which tracks the language of the Florida obscenity statute[20] while specifically naming the publication involved in a prosecution is "sufficient to put the defendant on notice and prevent double jeopardy."[21] Thus far,

16. *Id.* at 57.

17. Report of the Commission on Obscenity and Pornography, (Hill-Link Minority Report) (1970).

18. Berns, *Pornography vs. Democracy, The Case for Censorship,* 22 THE PUB. INTEREST 3 (Winter 1971) (emphasis added).

19. State ex rel. Little Beaver Theatre v. Tobin, 258 So. 2d 30 (Fla. 3rd DCA 1972). The injunction was upheld as to certain seized films, although the court found such a restraint could not be imposed against any showing which would occur outside of Dade County, Florida, (the jurisdiction in which the court sat) as the circuit court had ordered. In addition, the court held invalid those portions of the injunction which prohibited the showing of "any motion picture which portrayed certain listed acts" without reference to any seized or specific film. 258 So. 2d at 32.

20. § 847.011 FLA. STAT. (1977).

21. Johnson v. State, 351 So. 2d 10, 12 (Fla. 1977).

the United States District Court for the Southern District of Florida has determined that vigorous enforcement of obscenity laws constitutes an invalid restraint on first amendment rights if its purpose is to force a sexually-oriented enterprise to cease doing business or to refrain from dealing in presumably protected sexually-oriented materials.[22]

2. PRIOR RESTRAINT—AN OVERVIEW

In attempting to regulate the distribution of printed or recorded material based on its content, municipalities have found themselves inexorably enmeshed in the doctrine of prior restraint. That is, a restraint on a form of speech before any actual expression occurs, with an absence of judicial safeguards.[23]

The historical genesis of this doctrine is traced in *Near v. Minnesota ex rel. Olson.*[24] In reversing a finding of public nuisance against an anti-semitic publication, the Court quoted Blackstone[25] in holding that liberty of the press consisted in laying "no previous restraints upon publication."[26]

Prior restraints on free speech are not, however, *per se* unconstitutional. In *Time Film Corp. v. Chicago,*[27] the Supreme Court refused to strike down a section of a Chicago city ordinance requiring the submission of a film to a censor prior to its being exhibited.[28] Although the

22. P.A.B., Inc. v. Stack, 440 F. Supp. 937 (S.D. Fla. 1977).

23. Southeastern Publications, Ltd. v. Conrad, 420 U.S. 546 (1975). Here, municipal authorities denied a promoter of theatrical productions the use of a municipal theatre in which to present the rock musical "Hair," on the basis that the presentation of such a show "would not be 'in the best interest of the community.' " *Id.* at 547-48. The Supreme Court found such denial constituted a prior restraint because the municipal authorities had denied "use of a forum in advance of actual expression." *Id.* at 553. The Court further held that the municipal authorities violated the promoter's first amendment right of free expression when they effected the prior restraint without implementing "procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Id.* at 559.

24. 283 U.S. 697, 713 (1931). In this landmark case, the United States Supreme Court held that a state statute which prohibited, as a public nuisance, the publication of a newspaper or periodical, imposed "an unconstitutional restraint upon publication." *Id.* at 723.

25. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 151, 152 (1765). The full quote reads: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publication." *Id.*

26. 283 U.S. at 715.

27. 365 U.S. 43 (1961).

28. *Id.* at 46.

Court admitted that the ordinance imposed a prior restraint, it indicated that its ruling dealt solely with the issue of the censor's authority to impose a prior restraint for the protection of the public welfare and not with the validity of "any statutory standards employed by the censor or procedural requirements as to the submission of the film."[29] Relying upon the opinion of Chief Justice Hughes in *Near v. Minnesota,*[30] the Court found support for the legitimacy of imposing prior restraints on expression for the protection of the public welfare.[31]

The most significant crystallization of the prior restraint doctrine is found in the Supreme Court decisions of *Freedman v. Maryland*[32] and *Shuttlesworth v. City of Birminghan.*[33] Although the former concerned obscenity and the latter was a product of the civil rights movement, each decision was used by Court to firmly establish strict guidelines to insure a minimum of interference with first amendment rights.

In *Freedman,* unlike *Time Film Corp.,*[34] the Court was presented with the issue of the validity of procedural standards used to implement a prior restraint on the exhibition of a film. The Court, per Justice Brennan, first warned that any system of prior restraints or expression comes to the United States Supreme Court "bearing a heavy presumption against its constitutional validity."[35] More particularly, the Court held that "while the state may require advance submission of all films . . . to bar all showings of unprotected films . . . only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression [and] only a procedure requiring a judicial determination suffices to impose a valid final restraint."[36] Thus, before any restraint on expression may properly occur, there must be a prompt adversary hearing initiated by the censoring authority and resulting in a final judicial determination.[37]

29. *Id.* at 47.

30. 283 U.S. at 715-16. *See also* Gitlow v. New York, 268 U.S. 652, 667 (1925), where the court held that "a State in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare."

31. In *Near,* the Court listed public policy exceptions to the first amendment protection against prior restraints, including "the primary requirements of decency [that] may be enforced against obscene publications." 283 U.S. at 716.

32. 380 U.S. 51 (1965).

33. 394 U.S. 147 (1969).

34. Note 27 *supra* and accompanying text.

35. 380 U.S. at 57, quoting from Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1962).

36. 380 U.S. at 58.

37. *Id.* at 59.

Shuttlesworth[38] arose from the refusal of the city of Birmingham to grant a parade permit to civil rights marchers.[39] The city had adopted an ordinance which permitted the city commission to refuse a parade permit if, in its judgment, the "public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused."[40] In a 6-3 decision, the Supreme Court struck down the ordinance as an unconstitutional prior restraint for its failure to have "narrow, objective and definite standards to guide the licensing authority."[41] Justice Harlan, in his concurring opinion, applied the *Freedman* requirement of "speedy" judicial review,[42] finding that the entire licensing process should "be handled on an expedited basis so that rights of political expression will not be lost in a maze of cumbersome and slow-moving procedures."[43]

Shuttlesworth is particularly significant in that it dealt with the issuance of a license. More precisely, the Court held:

> Although this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, . . . we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.[44]

Thus, it would appear that the United States Supreme Court has clearly expressed serious doubt as to the validity of a prior restraint on any recognized form of expression.

A municipality which desires to curb the proliferation of a class of expression, such as pornography, is faced with a difficult problem. Administrative licensing officials must be provided with some objective guidelines and any determination resulting in a restraint must be presented by officials for judicial review.

While the practical mechanics of licensing as a method of control will be discussed *infra,* one more philosophical question remains to be answered: What if the judicial determination of obscenity has already occurred before the licensing authority becomes involved?

38. 394 U.S. 147.
39. *Id.*
40. *Id.* at 149-50.
41. *Id.* at 150-51.
42. *Id.* at 163.
43. *Id.*
44. *Id.* at 153, quoting from Kuntz v. New York, 340 U.S. 290, 293-94 (1951).

It is established beyond peradventure that once a communication is determined to be obscene, it no longer retains the protection of the first amendment.[45] Moreover, the Supreme Court has held that "there are legitimate State interests in stemming the tide of commercialized obscenity . . . [and] [t]hese include the interest of the public in the quality of life and the total community environment."[46] Therefore, where a particular book or film has already been adjudged obscene, it may be entirely permissible to enjoin its further exhibition.[47]

The Fifth Circuit Court of Appeals, following this line of reasoning, has held that a prior conviction for obscenity serves the same purpose as a pre-restraint judicial determination. In *106 Forsyth Corp. v. Bishop,*[48] challenge was made to the city of Athens, Georgia, ordinance which permitted the mayor and city council to revoke the business license of a movie theatre operator for violation of a Georgia state law prohibiting the exhibition of obscene films. Petitioner's challenge was based on the argument that the ordinance operated as a prior restraint. The District Court for the Middle District of Georgia[49] rejected the claim of prior restraint and, relying on *Near v. Minnesota,*[50] held that "a publisher cannot be restrained by a prior order from publishing what he desires to publish, but [protection against prior restraint] in no sense exonerates the publisher from liability for what he has published."[51] The Fifth Circuit Court of Appeals[52] affirmed the judgment of the district court and held that "the revocation of a movie house license upon a violation of a valid state law or city ordinance forbidding the exhibition of sexually explicit material does not violate the right of free speech vouchsafed under the first amendment."[53]

Restraint, therefore, is not placed upon the publisher or theatre operator with respect to what he intends to express, but calls upon him to account for his past abuses.[54] Thus, the use of prior obscenity convictions by civil authorities could become a significant tool in the control of commercialized obscenity.[55]

45. Miller v. California, 413 U.S. 15, 23 (1973).
46. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-58 (1973).
47. *Id.*
48. 482 F.2d 280 (5th Cir. 1973), *cert. denied,* 422 U.S. 1044 (1975).
49. 362 F. Supp. 1389, 1396 (M.D. Ga. 1972).
50. 283 U.S. 697.
51. 362 F. Supp. at 1396.
52. 482 F.2d at 281.
53. *Id.*
54. 362 F. Supp. at 1396-97.
55. *But see* Hamar Theatres, Inc. v. City of Newark, 150 N.J. Super. 14, 374

3. THE LICENSING POWER

All businesses, however designated, are subject to the reasonable exercise of a state's police power through licensing.[56] That is, the right to engage in any commercial enterprise is subordinate to the public welfare, as determined by the legislature, and even uncompensated obedience to this authority is not a deprivation of property without due process of law.[57] It appears, therefore, that no vested right exists in a licensee which is superior to the police power of local governments.[58]

In addition, the equal protection clauses of the United States and Florida constitutions do not forbid reasonable classifications. Under the United States Constitution, the fourteenth amendment is violated only if the classification rests upon grounds wholly irrelevant to the achievement of the government's objective. Florida law permits classification made on a "reasonable basis" and taking account of "real differences of practical conditions."[59] Thus, the legislative authority may give groups of persons certain rights or burdens not given to others so long as there is a reasonable basis for the dichotomy.[60]

Implicit in the power to grant licenses is the power to deny an application or to revoke an existing license when the licensee has committed acts in direct conflict with matters regulated through exercise of the police power.[61] While the revocation procedure must comply with the essentials of due process and equal protection, such a procedure has been recognized, by at least one Florida court, as an appropriate method of preserving the public order.[62] The United States Supreme Court has held that where licensing and first amendment freedoms collide:

> 1) There must be definite, narrow, distinct guidelines for the licensing authority;

A.2d 502, 504 (Super. Ct. App. Div. 1977) (holding a "denial of a license because of prior obscenity convictions constitutes an impermissible prior restraint").

56. *See* Atlantic Coast Line R.R. Co. v. City of Goldsboro, 232 U.S. 548 (1914).

57. *Id.* at 559. The Florida Supreme Court has used this concept several times. *See, e.g.*, Golden v. McCarthy, 337 So. 2d 388 (Fla. 1976) (regulation of tattooing licenses).

58. *See* E. McQUILLAN, MUNICIPAL CORPORATIONS § 26.81 (3d ed. 1978).

59. *See* Chandler Services, Inc. v. Florida City, 202 So. 2d 11 (Fla. 3rd DCA 1967).

60. *See* Florida Sugar Distributors, Inc. v. Wood, 135 Fla. 126, 184 So. 641 (Fla. 1938).

61. McQUILLAN, *supra* note 58, at § 26.80.

62. *See* Vicbar v. City of Miami, 330 So. 2d 46 (Fla. 3rd DCA 1976).

2) A prompt judicial determination must occur as to whether the subject speech falls within the protection of the Constitution; and
3) The burden of initiating such procedures must be borne by the licensing authority.[63]

The federal courts have considered these principles as they apply to adult entertainment licensees on several occasions, with little agreement among the circuits. In fact, the Fifth Circuit Court of Appeals appears to stand alone among the federal courts in permitting revocation of a book store or movie license on the basis or prior convictions for obscenity.[64]

Among the decisions most frequently cited by advocates of unrestricted adult entertainment is *Avon 42nd Street Corp. v. Meyerson.*[65] In this challenge to a New York City ordinance concerning a motion picture theatre license revocation procedure, the district court found that the law lacked sufficient precise guidelines to restrict the discretion of the administration in regulating licenses and, further, that revocation of a movie house license on the basis of a past conviction for obscenity constituted an invalid prior restraint.[66]

The court expressed concern that revocation of a license on the basis of past speech which was unprotected will inevitably *result* in a restraint on protected speech. That is, protected speech and obscenity are often separated by "a dim and uncertain line"[67] and require "sensitive tools"[68] to be used in delineating this line. In addition, the court also relied in large part on *Near v. Minnesota ex rel. Olsen*[69] to support its disapproval of license revocation where it was held that suppression of a publication because of past offenses "is the essence of censorship."[70]

63. Freedman v. Maryland, 380 U.S. 51 and Shuttlesworth v. City of Birmingham, 394 U.S. 147 and text accompanying notes 32 through 43 *supra.*

64. 106 Forsyth Corp. v. Bishop, 482 F.2d 280 and text accompanying note 48 *supra.* For the proposition that such licenses cannot constitutionally be suspended for prior convictions on matters of obscenity, *see* Hamar Theatres, Inc. v. City of Newark, *supra* note 55.

65. 352 F. Supp. 994 (S.D.N.Y. 1972).

66. *Id.* at 999.

67. *Id.* at 997, citing the language of the Supreme Court in Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1962).

68. *Id.*, citing the language of the Supreme Court in Speiser v. Randall, 357 U.S. 513, 525 (1958).

69. 283 U.S. 697.

70. 352 F. Supp. at 998, discussing the holding of Near v. Minnesota, 283 U.S. 697.

This is not to say, however, that the court failed to recognize the power of municipalities to "validly regulate and license motion picture theatres on the basis of public health and safety by a narrowly drawn ordinance."[71] The court's concern was that terms such as "character," "decency" or "public morality," failed to meet the definite standards required in *Freedman*[72] and *Shuttlesworth.*[73]

While the *Avon* decision clearly disapproved of all but the narrowest restraints on adult businesses involving print or film media, the fifth circuit has taken exactly the opposite position in *106 Forsyth Corp. v. Bishop.*[74] Here, the United States district court[75] and the Fifth Circuit Court of Appeals both found that revocation of a book store or movie house license on the basis of a past conviction is neither vague for failure to provide standards nor violative of first amendment as a prior restraint.[76]

In *Forsyth,* an Athens, Georgia, adult theatre had been convicted of displaying obscene films. The Athens City Code provided:

> Section 417. The Mayor and Council of the City of Athens shall have the right after notice and hearing to revoke any business license issued hereunder on the following grounds:
>
> * * * * *
>
> 2(b) Violation of a law of the State of Georgia which affects the public health, safety, and welfare and which violation occurred as a part of the main business licensed.[77]

Thus, the Athens ordinance provided a three-element formula to guide the licensing authority: (1) violation of a valid law; (2) said violation affects the public health, safety and welfare; and (3) the violation occurred as a main part of the business licensed; *e.g.,* sale of obscene materials by the operator of an adult book store or theatre.

In finding these standards sufficiently explicit, the district court determined that obscenity violations clearly affect the public health, safety and welfare. Further, the ordinance "sufficiently indicates to both

71. 352 F. Supp. at 999.
72. 380 U.S. 51.
73. 394 U.S. 147.
74. 482 F.2d 280.
75. 362 F. Supp. 1389.
76. 482 F.2d at 281.
77. ATHENS, GA., CODE § 417 (1971), set out in the district court's opinion, 362 F. Supp. at 1393.

Mayor and any licensee what conduct may result in a revocation."[78] The court went on to note that the revocation procedure does not intend to restrain the licensee from future publication, but to call upon him to account for past abuses.[79]

The dichotomy between the courts would appear to turn on the perspective given the revocation proceeding. In *Avon,* the court saw the revocation proceeding as a "sword" aimed at eliminating future expressions of unknown quality and, thus, effectively eliminating the public commercial forum for adult materials. In *Forsyth,* however, the court views the revocation proceeding as a "shield" designed to protect the public from proven abusers of the rights of free speech.

It is significant to note that, under the *Forsyth* doctrine, the problem of judicial determination of obscenity raised in *Freedman v. Maryland*[80] is absent. The criminal proceeding resulting in the conviction from which the revocation springs *is* the judicial determination of obscenity.

In *Jordan Chapel Freewill Baptist Church v. Dade Couny,*[81] a Flor-

78. 362 F. Supp. at 1397.

79. *Id.* The district court's analysis of the concept of prior restraint is most significent in that this court and the court in *Avon,* 352 F. Supp. 994, came to opposite conclusions, each basing its decision on the Supreme Court's holding in Near v. Minnesota, 283 U.S. 697. The *Forsyth* court placed considerable emphasis on the penalty for publishing unprotected speech. That is, each person is free to publish without restraint, but "must take the consequence of (his) own temerity." 362 F. Supp. at 1397. The *Forsyth* court saw no prior restraint arising from revocation based on past abuses:

> The non-exhibition of films obscene or non-obscene during said period would not be the result direct or indirect of previous restraint, but would result incidentally from past abuses of immunity from previous restraint just as a person convicted and imprisoned for criminal libel might incidentally and indirectly prevented and thus practically restrained from any and all publications during the period of incarceration.

362 F. Supp. at 1397.

On the other hand, the *Avon* court viewed *Near* as an absolute prohibition against revocation for past abuses. The court looked at revocation as a disabling of the public's right to view certain films. Further, the *Avon* decision ignored the reasoning cited in *Forsyth* and held that *Near* would tolerate only fines for abuses of the first amendment. 352 F. Supp. at 998. Such conflicting opinions defy explanation or reconciliation. Until some higher court addresses these philosophies together, the question will remain subject to debate.

80. 380 U.S. 51. The doctrine is more fully set forth in the text accompanying note 63 *supra.*

81. 334 So. 2d 661 (Fla. 3rd D.C.A. 1976), construing DADE COUNTY, FLA., ORDINANCE No. 75-50 (1975).

ida case involving a challenge to the Dade County Bingo Ordinance which provided for revocation of a license if the licensee was convicted of violating the ordinance, the District Court of Appeal for the Third District of Florida held that "such a procedure provides the best possible due process available in our judicial system since the person must be proved guilty of violating the ordinance beyond a reasonable doubt instead of a mere preponderance of the evidence, as is the standard in civil cases."[82]

Thus, license revocation appears, at least in a general sense, to be an efficacious tool in the attempts of municipal governments to stem the tide of commercialized obscenity.

It should be noted, however, that several state jurisdictions expressly reject *Forsyth*[83] and that Florida still requires a narrowly drawn ordinance in those instances where an *administrative* body is charged with the power to deny or revoke a license.[84]

In *Perrine v. Municipal Court*,[85] the California Supreme Court declared unconstitutional a licensing statute which provided for license denial based on prior convictions for obscenity. Supporting that holding, the court concluded that the penalty for violating the obscenity laws "does not include a forfeiture of First Amendment rights."[86] Further, it was held that the fact that the obscenity penalties might be insufficient to deter future violations cannot justify a prospective forfeiture of those rights on the theory of prior convictions.[87]

The subject ordinance[88] was found invalid for three reasons: (1) An absence of objective and definite standards for issuance of the license; (2) The ordinance conditioned issuance of a license upon qualifications

82. *Id.* at 668. This holding is consistent with *Forsyth*, 362 F. Supp. 1389, in that both courts recognize that revocation flowed directly from the conviction. *See also* Berman v. City of Miami, 17 Fla. Supp. 72 (C.C.D.C. 1960), *aff'd*, 127 So. 2d 683 (Fla. 3rd DCA 1960).

83. Hamar Theatres, Inc. v. City of Newark, 150 N.J. Super. 14, 374 A.2d 502 (Super. Ct. App. Div. 1977); City of Seattle v. Bittner, 81 Wash. 2d 747, 505 P.2d 126 (1973); City of Delevan v. Thomas, 31 Ill. App. 3d 630, 334 N.E. 2d 190 (App. Ct. 1975); Perrine v. Municipal Court, 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), *cert. denied*, 404 U.S. 1038 (1972).

84. Permenter v. Younan, 159 Fla. 226, 31 So. 2d 387, 389 (1947).

85. 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), *cert. denied*, 404 U.S. 1038 (1972).

86. 488 P.2d at 653.

87. *Id.*

88. LOS ANGELES, CAL., COUNTY ORDINANCE NO. 5860 (1969), more specifically § 329.4.

that allegedly bear no reasonable relationship to the occupation licensed; and (3) It is constitutionally impermissible to prohibit a person from selling books solely on the basis of a past criminal conviction.[89]

As to the first reason, there seems to be little debate that definite guidelines are required to guide any licensing authority in the granting or denying of an occupational license. Thus, amorphous terms such as "good character" or "public welfare" are, without more, legally insufficient.[90] Florida seems to have adopted the same rule.[91]

As to the second and third grounds, in *Perrine,* the court was concerned wiith with the applicability of the standards to the business of selling books. The court emphatically noted that, unlike doctors, lawyers and school teachers, sellers of books have no particular professional demands upon them such that moral character would be relevant.[92]

The court went on to note that "sex crimes" are not ordinarily commited in book stores and, therefore, the standards were overbroad. Moreover, the court rejected even a nexus between convictions for obscenity and the operation of book stores where obscene materials were sold, finding revocation on such convictions to be violative of the first amendment.[93]

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89. 488 P.2d at 652.

90. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

91. Vicbar v. City of Miami, 330 So. 2d 46 (Fla. 3rd DCA 1976). The Third District Court of Appeal held that the power of refusal to renew nightclub licenses, when left in the hands of the city manager, is impermissible unless limited by guidelines bearing a reasonable relationship to the public health and welfare.

It should be noted, however, that the concept of revocation was not *per se* unlawful. Rather, the court expressed understanding for the desires of government officials to curtail the activities of businesses known to "engender trouble" for law enforcement authorities and suggested that, given appropriate guidelines, the court had no legal objection to the vesting of revocation power in the licensing authority.

92. 488 P.2d at 652.

93. *Id.* The California court's statements concerning crimes is not entirely correct. While no empirical data exists to show a nexus between pornographic literature and violent sex crimes, there is clearly a nexus between adult businesses and the crime of obscenity. The average commercial book store or theatre may occasionally utter some unprotected speech. An adult business engages in unprotected communication on a regular basis. Thus, adult businesses do foster frequent violations of the law governing their business.

The United States Supreme Court, in Paris Adult Theatre I v. Slaton, 413 U.S. 49, reached another conclusion vis-a-vis the link between obscenity and crime. Rather than rejecting this possible connection, the court referred to the *Hill-Link Report, supra*

This nexus between the crime committed and the trade practiced has been litigated in a number of jurisdictions. Florida has recognized that suspension of a professional license may be made for misconduct which is "malum in se" and thus jeopardizes the interests of the profession and public it serves.[94] Similarly, Florida and other jurisdictions have upheld license denials and revocations on the basis of past convictions for non-professional trades when some definite standards to control the discretion of the licensing authority were provided.[95]

In *City of Miami Beach v. Austin Burke, Inc.*,[96] the Third District Court of Appeal held that "merchandising is a lawful business" which one has an "inherent" right to pursue.[97] In contrast, where the business is not a "lawful business" (*e.g.*, the sale of intoxicating beverages),[98] that "right" is reduced to a mere privilege for which such definite standards are not required.[99] The determinant as to whether a business is lawful or unlawful *per se* appears to be whether the license is regulatory or revenue producing.[100]

Thus, of vital concern is the status which adult entertainment may be said to occupy. As obscenity is unprotected speech, a commercial purveyor of such materials may fairly be said to be engaging in an "unlawful" business or, at least, possesses no "inherent" right to do so. While permanent revocation of a non-professional license has been held invalid and arbitrary, a period of years required between conviction of

note 18, and its suggestion of a correlation between obscenity and anti-social behavior. 413 U.S. at 59.

Whatever socio-psychological conclusions may ultimately be drawn by medical science, there clearly exists some *judicial* approval of legislative efforts to link crime and pornography.

94. Richardson v. Florida State Board of Dentistry, 326 So. 2d 231 (Fla. 1st DCA 1976).

95. *See, e.g.*, State ex rel. Volusia Jai-Alai, Inc. v. Board of Business Regulation, 304 So. 2d 473 (Fla. 1st D.C.A. 1974); Anderson v. Comm'r. of Highways, 126 N.W. 2d 778 (Minn. 1964); Green v. Silver, 207 F. Supp. 133 (D.D.C. 1962). *But see* City of Mesguite v. Alladin's Castle, Inc., 559 S.W. 2d 92 (Ct. Civ. App. Tex. 1977), where a licensing ordinance permitting denial of a license to operate vending machines in an amusement park on the basis of an applicant's "connection with criminal elements" was struck as constitutionally vague.

96. 185 So. 2d 720 (Fla. 3rd DCA 1966).

97. *Id.* at 725.

98. In Florida the sale of intoxicating beverages has been held to be a privilege and not a right. *Id.*, citing Permenter v. Younan, 159 Fla. 226, 31 So. 2d 387, 389 (1947).

99. 185 So. 2d at 725.

100. 31 So. 2d at 389.

a crime and issuance of a license has been held to be a valid regulation designed to eliminate undue prevalence.[101]

The California courts are not alone, however, in disapproving this theory. The *Perrine*[102] decision was followed by the Supreme Court of Minnesota in a 1975 decision involving revocation of an adult theatre's occupational license.[103]

This city of St. Paul's ordinance[104] provided that the city council could revoke or deny any motion picture theatre license on the ground that the "licensee, owner, manager, lessee, employee, or financially interested person" had been convicted of a crime pertaining to the sale, distribution or exhibition of obscene material relative to the operation of the movie theatre license.[105] The St. Paul city council revoked the plaintiff's license on the basis of a prior conviction.

In striking down the St. Paul ordinance, the Minnesota Supreme Court specifically found that motion picture theatres are engaged in activity protected by the first amendment and any licensing power is subordinate to those constitutional dictates.[106] The court specifically rejected an analogy between obscene books and businesses, such as massage parlors or liquor stores and the concept of "unlawful" versus "lawful and ordinary" business, on the ground that massage parlors enjoy no first amendment protection.[107] Referring to *Near v. Minnesota,*[108] the court held that the proper remedy is not in suppression but in criminal prosecutions. Further, the court stated: "The risk that criminal sanctions will be insufficient to deter future violations of the ordinance cannot justify the city's attempt to revoke plaintiff's license in the face of his right to the free speech guaranty of the first amendment."[109]

This holding was also followed by the District Court of Appeals of Illinois.[110] The ordinance in question permitted the mayor to revoke any

101. 185 So. 2d at 725.
102. Note 84 and accompanying text *supra.*
103. Alexander v. City of St. Paul, 303 Minn. 201, 227 N.W. 2d 370 (1975).
104. ST. PAUL LEGISLATIVE CODE, § 372.04(G) (1974).
105. 227 N.W. 2d at 371.
106. *Id.* at 372-73.
107. *Id.*
108. 283 U.S. 697.
109. 227 N.W. 2d at 373.
110. City of Delevan v. Thomas, 31 Ill. App. 3d 630, 334 N.E. 2d 190 (3rd DCA 1975).

occupational license "for good and sufficient cause."[111] Finding this definition to be unduly vague, the court held that permitting revocation on such terms creates a "danger of unduly suppressing protected expression."[112]

More recently, the Superior Court of New Jersey rejected a Newark city ordinance,[113] which based license denial or revocation on past convictions, for reasons similar to *Avon*[114] and its progeny. In this case, a license was refused for the applicant's failure to give full and correct answers on the license application and because the applicant had been previously convicted of showing obscene pictures.[115]

The court found that failure to disclose a 1972 conviction on a license application, in light of disclosure of more recent convictions, was an "inconsequential and insufficient" reason to refuse a license.[116] The court was silent, however, as to what effect a total failure to reveal past convictions would have.

As to the free speech issue, the New Jersey court joined California,[117] Illinois[118] and Minnesota[119] in rejecting the use of license revocations and called for use of criminal sanctions as the only appropriate remedy.[120]

It would thus appear that the United States Fifth Circuit Court of Appeals stands alone in approving the use of past convictions for license revocations.[121] Yet, the division between the jurisdictions is not so clear-

111. DELEVAN, ILL., ORDINANCE No. 73-6 § 12 (1973). § 4 of the ordinance made it unlawful to "offer or present any motion picture or performance which is obscene." 334 N.E. 2d at 191. A finding of obscenity, by the mayor, permitted him to exercise his revocation powers.

112. 334 N.E. 2d at 192, citing from the Supreme Court decision of Freedman v. Maryland, 380 U.S. 51 (1965).

113. Hamar Theatres, Inc. v. City of Newark, 150 N.J. Super. 14, 374 A.2d 502 (Super. Ct. App. Div. 1977), discussing NEWARK, N.J., CITY ORDINANCE No. 5: 8-13(a).

114. 352 F. Supp. 994.

115. 374 A.2d at 503.

116. *Id.*

117. Perrine v. Municipal Court, 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), *cert. denied*, 404 U.S. 1038 (1972).

118. City of Delevan v. Thomas, 31 Ill. App. 3d 630, 334 N.E. 2d 190 (3rd DCA 1975).

119. Alexander v. City of St. Paul, 303 Minn. 201, 227 N.W. 2d 370 (1975).

120. 374 A.2d at 504, citing *Alexander*, 227 N.W. 2d 370.

121. 106 Forsyth Corp. v. Bishop, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044 (1975).

cut. In each of the jurisdictions in which licensing-revocation ordinances were struck down, the courts expressed universal concern over the lack of definite standards. In the fifth circuit, where this procedure was approved, the court particularly noted the clarity of the revocation ordinance.[122]

In the St. Paul ordinance, no legislative effort was made to connect the conviction with the public health, safety and welfare.[123] The Delevan, Illinois, ordinance allowed revocation for "good and sufficient cause," but failed to define that term.[124] Newark's revocation ordinance permitted a license to be suspended "for the furtherance of decency and good order," but, again, no definition of decency or good order was provided by the legislative authority.[125] Lastly, the Los Angeles ordinance failed to connect the enumerated offenses with the public welfare.[126]

In *106 Forsyth,*[127] however, the Athens, Georgia, ordinance suffered from none of these deficiencies. It required a single standard conviction; that the conviction be deleterious to the public welfare; and a showing that the conviction arose from the operation of the licensed business.[128]

It may reasonably be said that a revocation ordinance is not *per se* unconstitutional; rather, that in light of first amendment rights, there exists a heavy presumption against its constitutionality *which can be overcome* if sufficient objective standards exist to guide the licensing authority. As the Florida Supreme Court noted in 1947:

> It has been indicated that a mere lodging of discretion in public officers or bodies to judge the fitness and character of applicants for licenses, permits, etc., does not vest arbitrary power in such officials, but rather calls for the exercise of a discretion of a judicial nature for which no definite rule of action is necessary.[129]

122. *Id.* at 283.
123. 227 N.W. 2d at 373.
124. 334 N.E. 2d at 191.
125. 374 A.2d at 503.
126. 488 P.2d at 650.
127. 362 F. Supp. 1389.
128. *Id.* at 1393.
129. Permenter v. Younan, 159 Fla. 226, 31 So. 2d 387, 389 (1947).

4. DOUBLE JEOPARDY

A collateral issue in the revocation of occupational licenses as a result of criminal convictions is the problem of double jeopardy.[130] That is, in addition to whatever criminal penalty attached to the conviction, it has been argued that the license revocation is unlawful as a second punishment for the same offense.

Perhaps the strongest expression of this double jeopardy argument is found in the Washington Supreme Court decision of *City of Seattle v. Bittner*.[131] The court presumed that persons convicted of obscenity violations had paid the prescribed penalty provided by law for that offense. In mixing this presumption with the doctrine of prior restraint, the court held:

> The Appellant (City of Seattle) has apparently proceeded upon the assumption that a person who has been convicted of the offense of exhibiting an obscene movie . . . is more likely than not to commit the offense again. This must mean in its opinion, the imposition of penalties under the criminal law has neither a deterrent nor a rehabilitative effect, and further that the penalties prescribed are not adequate punishment for the offense. Whether or not this assumption has any validity, we are convinced that the constitution does not permit a licensing agency to deny to any citizen the right to exercise one of his fundamental freedoms on the ground that he has abused that freedom in the past.[132]

Florida, however, has taken the opposite view. Injunctive relief to prevent future showing of films found to be obscene is not a punitive measure but a remedial one.[133] Even an acquittal in a criminal proceeding is not a bar to maintenance of the injunctive proceedings.[134] Further, because judgments in criminal actions are inadmissible in Florida to prove facts in a civil action,[135] the identity of issues and claims is absent and thus res judicata will not apply.

In essence, the civil penalty which flows from an obscenity conviction is not aimed primarily at the offender. Rather, it is merely a mea-

130. U.S. CONST. amend. V: "nor shall any person be subject for the same offense to be twice put in jeopardy for life and limb."

131. 81 Wash. 2d 747, 505 P.2d 126 (1973).

132. 505 P.2d at 131.

133. State ex rel. Gerstein v. Walvick Theatre Corp., 298 So. 2d 406, 408 (Fla. 1974).

134. *Id.*

135. Boshnack v. World Wide Rent-A-Car, Inc., 195 So. 2d 216 (Fla. 1967).

sure of protection for the public. The Florida Supreme Court, in approving revocation of a dental license for drug abuse violations, held that acts done in "persistent disregard" of the law: "offend generally accepted standards of conduct within the profession thereby jeopardizing the interests of the profession and the public it serves."[136]

5. ZONING

In 1926, the United States Supreme Court recognized that local zoning ordinances represent a valid exercise of a state's police power.[137] There it was argued that, where such ordinances are designed to promote public health, safety, welfare and morals, the individual's right must give way to the particular concern of the community.[138]

More recently, the Supreme Court applied these general zoning principles to adult entertainment. In *Young v. American Mini Theatres,*[139] the Court approved a Detroit city ordinance[140] which required a specified distance between buildings housing adult theatres.

The decision is significant for several reasons. First, the Detroit ordinance was approved despite the fact that it singled out a particular type of activity as a "regulated use."[141] Secondly, the ordinance was found not to have an impermissible deterrent effect on first amendment freedoms.[142] Thirdly, and perhaps most importantly, the Court recognized a legitimate governmental interest, through its licensing and zoning power, sufficient to regulate the use of commercial property for the benefit of urban preservation.[143]

In setting apart adult theatres as "regulated uses," the Detroit ordinance defined such theatres as ones in which the material presented was "characterized by an emphasis" on matter depicting or relating to "specified sexual activities" or "specified anatomical areas."[144]

The Court held such classifications were not void for vagueness. As to the "characterized by an emphasis" language, the Court held that a

136. Richardson v. State Board of Dentistry, 326 So. 2d 231, 233 (Fla. 1st DCA 1976).
137. Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926).
138. *Id.* at 373.
139. 427 U.S. 50 (1976).
140. DETROIT, MICH., CITY ZONING ORDINANCE § 66.000 (1972).
141. 427 U.S. at 62.
142. *Id.* at 60.
143. *Id.* at 71.
144. *Id.* at 53.

theatre owner whose "regular fare" involved sexually oriented materials was clearly on notice as to what was expected.[145] Further, the 1000 foot distance requirement between regulated uses was not unconstitutional, in that it was found not to be a regulation of speech on the basis of its content, but: "Rather, it is a regulation of the right to locate a business based on the side effects of its location. The interest in preserving neighborhoods is not a subterfuge for censorship."[146]

What seemed of greatest importance to the Court was the fact that this zoning law did not constitute a prior restraint on the first amendment rights of the licensees. There was no claim made by the theatre owners that they were "denied access to the market" nor that the market denied access to them. The mere fact that the commercial exploitation of material was subject to zoning and the licensing requirement was held not to be a sufficient reason for invalidating these ordinances.[147]

The Court also recognized the city's interest in planning and regulating the use of property for commercial purposes even to the extent that different classifications existed for adult theatres.[148] To support this holding, the Court referred to those prior instances where the content of the speech determined its level of constitutional protection.

For example, it has been held that a public rapid transit system may accept some advertisements and reject others;[149] that a state may properly limit highway billboards to neighborhood businesses;[150] that a regulatory commission may prohibit businesses from making statements which, though literally true, are potentially deceptive.[151] Thus, the measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication.

In recognizing a distinction between adult expression and philosophical or political oratory, the Court noted:

145. *Id.* at 58-59.

146. *Id.* at 57, n. 15, citing the dissenting opinion in American Mini Theatres v. Gribbs, 518 F. 2d 1041 (6th Cir. 1975), the lower appellate decision to the present case. The Supreme Court did, in fact, embrace this thought in its decision by stating that the ordinance was justified "by the city's interest in preserving the character of its neighborhoods." 427 U.S. at 71.

147. 427 U.S. at 62.

148. *Id.* at 62-63.

149. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

150. Markham Advertising Co. v. State, 73 Wash. 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1968).

151. Jacob Siegel Co. v. Fed. Trade Comm'n., 327 U.S. 608 (1946).

> It is manifest that society's interest in protecting this type (adult material) of expression is of a wholly different and lesser magnitude than the interest in untrammeled political debate . . . . Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.[152]

Lastly, the Court ruled that its function did not include an appraisal of the wisdom of the Detroit city government's desire to enact separate treatment for adult theatres. Rather, the city's interest in attempting to preserve the quality of urban life is one deserving of high respect and the city must therefore be allowed a reasonable opportunity to "experiment with solutions to admittedly serious problems."[153]

The *Mini-Theatres* decision can be constrasted with the Supreme Court's rejection of a Jacksonville, Florida, ordinance[154] which prohibited nudity on outdoor theatre screens. That enactment was struck down because it failed to explain how flashes of nudity, without regard to their erotic purpose, could be any more distracting to traffic than non-obscene material. In so holding, the Court noted that the presumption of validity generally accorded statutes has less force when a classification turns on the subject matter of expression.[155]

In the fifth circuit, a zoning ordinance was recently struck down for going beyond the limitations set forth in the *Mini-Theatres* decision.[156] Here, the city of Baton Rouge adopted a resolution withholding the certificate of occupancy from an adult book store, based on the content of its product. The city attempted to defend this resolution on the same basis set forth by the appellant in *Mini-Theatres;* that is, that a city may provide that certain establishments shall operate only in specified neighborhoods.[157] However, the court rejected this argument because the "zoning" resolution was retroactive and piecemeal, thus making it a "highly suspect" act.[158] The court held that "zoning . . . connotes a non-particularized legislative process in which rules are pro-

152. 427 U.S. at 70.
153. *Id.* at 71.
154. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).
155. *Id.* at 215.
156. Bayou Landing, Ltd. v. Watts, 563 F.2d 1172 (5th Cir. 1977).
157. *Id.* at 1175.
158. 563 F.2d at 1175, citing Four States Realty Co., Inc. v. City of Baton Rouge, 309 So. 2d 659, 672 (La. 1975).

mulgated and land areas are designated on a general, prospective basis."[159] In essence, the court found that resolutions aimed at individual businesses, even if delineated as zoning enactments, fail to meet constitutional standards in that restrictions must be " 'no greater than necessary or essential to the protection of the governmental interests.' "[160]

A somewhat different approach to zoning regulations was adopted by the city of Boston in 1974.[161] Rather than attempt to regulate adult entertainment locations by dispersing them throughout particular zoning classifications, the city set aside a specific geographical area, dubbed the "combat zone," for "adult entertainment," in an effort to concentrate such businesses and enhance enforcement activities.[162] This area became the exclusive location within the city where adult entertainment would be permitted. Upon the passage of the enabling legislation, all Adult Entertainment Uses, formerly classified as "Conditional," became "Prohibited" outside the zone.

The zone concept, however, has proven unsatisfactory. In practical effect, the vices contained within the zone continue to spill over to the surrounding community. Of particular concern to law enforcement officials has been the significant increase in violent crimes, including murder.[163] By 1977, the Boston model was being shunned in favor of the Detroit spacing model.[164] In fact, Boston city planners are considering the tearing down of the combat zone and its re-classification as a more conventional commercial district.

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159. 563 F.2d at 1175.

160. *Id.* at 1175-76, citing Baldwin v. Redwood City, 540 F.2d 1360, 1365 (9th Cir. 1976), *cert. denied,* 431 U.S. 913 (1977). The *Watts* court also relied here in part on Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 91 (1977).

Recently, in Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978), a Jacksonville, Florida, zoning ordinance was struck down because it was found to have violated the parameters set down in *Young. See* note 139 and accompanying text *supra.* More particularly, the ordinance impermissibly resulted in the total exclusion of adult businesses. In so doing, the Jacksonville zoning law failed to survive the close scrutiny ascribed to enactments which affect free expression. 450 F. Supp. at 702-03.

161. BOSTON, MASS., CODE § 3-1 (1974).

162. STAFF DRAFT, PLANNING FOR DOWNTOWN ENTERTAINMENT DISTRICT, STUDY DESIGN OF THE BOSTON REDEVELOPMENT AGENCY (November 26, 1973).

163. Gumpert, *Problems in the Combat Zone,* Wall St. J., June 30, 1977.

164. *See* note 140 and accompanying text *supra,* which deal with the Detroit model.

6. NUISANCE

"The nuisance doctrine operates as a restriction upon the right of [an] owner of property to make such use of it as he pleases;"[165] the doctrine will not be invoked so long as this use does not interfere with the rights of his neighbors to use their property.[166] More specifically, the term applies to a "class of wrongs which arises from . . . unlawful use by a person of his property which produces . . . material damage:" generally, the diminution of the value or usefulness of the property surrounding the nuisance.[167]

Of particular concern is this inquiry: Does the maintenance of a "common" or "public nuisance" constitute an act which injuriously affects the safety, health, welfare or morals of the public? A public nuisance must arise from an unlawful act and, therefore, its existence is generally considered a question of law.[168]

As related to obscenity, the nuisance theory has been successful with regard to specific films or books, but is generally rejected as a blanket restraint on a class of activities.

In 1957, the Supreme Court of New Mexico prohibited the state from relying on a nuisance abatement statute in its criminal prosecution of a motion picture theatre owner.[169] First, the court held that applying the statute to enjoin the theatre owner would result in a violation of his due process rights. The state's case rested solely on the term "lewdness" found in the statutory language and the court determined that that term was impermissibly "too vague and indefinite" to support the state's action.[170] Then , in response to the state's assertion that injunctive relief could be sought by invoking the trial court's "general equity powers for

165. 58 AM. JUR. 2d *Nuisances* § 1 (1971); *see* Reaver v. Martin Theatres of Florida, Inc., 52 So. 2d 682 (Fla. 1951).

166. *See* Palm Corp. v. Walters, 148 Fla. 527, 4 So. 2d 696 (1941).

167. 58 AM. JUR. 2d *Nuisances* § 1 (1971).

168. *See generally* 58 AM. JUR. 2d *Nuisances* § 8 (1971).

169. State ex rel. Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957).

170. 317 P.2d at 320. The court offered additional support for its belief that the term "lewdness" in the New Mexico statute could not be relied upon to enjoin the owner from showing obscene films. The statutory construction rule of *ejusdem generis* was applied when the court noted that the term "lewdness" was followed in the statute by the words "assignation or prostitution." " 'Under this rule, general terms in a statute may be regarded as limited by subsequent more specific terms.' " Thus, the court's view was that the legislature intended that the proscribed "lewdness" refer only to acts of "assignation or prostitution" and *not* to the showing of obscene films in theatre establishments as well. 317 P.2d at 319, citing to 50 AM. JUR. *Statutes* § 249 (1944).

protection of public morals," the New Mexico court stated that it would be prejudicial to the owner to permit a "civil action" such as that to be introduced into a criminal proceeding brought under a criminal statute and complaint.[171]

In 1968, the Michigan Supreme Court sustained the use of a municipal licensing ordinance to avert the "nuisance" caused by a drive-in movie screen visible to children in residential areas.[172] Township officials had denied the theatre owner's application for license renewal and he filed suit. In rejecting the owner's first and fourteenth amendment argument, the court held that the right of free speech did not include the right to force material "not fit to be seen by children" on the "children of parents who are unwilling to have [that] done . . . ."[173]

That same year, the Pennsylvania Supreme Court took a substantially more restrictive view of nuisance proceedings.[174] The court rejected injunctions issued after ex-parte hearings on complaints of the district attorney. Instead, the court held that no such injunctions may issue without a prompt, adversarial hearing resulting in a judicial determination of obscenity, as required by *Freedman v. Maryland*.[175]

In 1971, a Louisiana Court of Appeals raised a unique due process argument vis-a-vis the closure of a business premises for maintenance of the nuisance of obscenity.[176] The court found unconstitutional that portion of an injunction which prohibited any use of the building in which the nuisance occurred. It was reasoned that an "unknowing and unparticipating" property owner could be deprived of the use of his property and that judicial policy against prior restraint forbade injunction of publications not contained in the nuisance category. Thus, the maximum injunction permissible was prohibition of "permitting the continued existence of the nuisance."[178]

In 1971, an Ohio Court of Appeals rejected challenge to an Ohio

171. 317 P.2d at 321.

172. Bloss v. Paris Township, 380 Mich. 466, 157 N.W. 2d 260 (1968).

173. *Id.* at 261, 263. The court noted that the theatre owner admitted on the stand and in his newspaper advertisements that the movies shown at his theatre were "not fit to be seen by children below 18 years of age." *Id.* at 261.

174. Commonwealth v. Guild Theatre, Inc., 432 Pa. 378, 248 A.2d 45 (1968).

175. *Id.* at 48. *See* text accompanying notes 35 through 37 and 63 *supra.*

176. Society to Oppose Pornography, Inc. v. Thevis, 255 So. 2d 876 (Ct. App. La. 1971), *cert. denied,* 257 So. 2d 158 (1972), *appeal dismissed,* 273 So. 2d 653 (1973).

177. 255 So. 2d at 881.

178. *Id.*

nuisance statute in *State ex rel. Ewing v. "Without a Stitch."*[179] The appellate court had examined a particular film and, having found it to be obscene upon applying the tests set forth in *Roth v. United States*[180] and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Atty General of Massachusetts*,[181] also found it to be a nuisance.[182] Thus judged as an obscene film, the appellate court held it to be outside the penumbra of the first amendment's protection. Therefore, held the court, the injunctive relief granted by the trial court under the Ohio nuisance abatement statute was not violative of the first amendment.[183]

In 1974, the Ohio Supreme Court granted a motion to certify which "removed the issue of obscenity from [the] case," leaving the court to rule on the constitutionality of the Ohio nuisance abatement statute.[184] Although theatre owners who had been enjoined from showing the movie "Without a Stitch" made repeated attacks on the statute, it was upheld.[185] To their dismay, the court found that, despite the fact that the nuisance abatement statute was directed toward enjoing the exhibition of obscene "films" (in the plural), "the statute was broad enough to include the exhibition of a single obscene film, which is composed of a number of film positives," as are all motion pictures.[186] The court found valid the statute's procedural sections under which temporary and permanent injunctions had been issued. Those sections passed the *Freedman v. Maryland*[187] test in that they allowed the issuance of injunctions only after full judicial adversary hearings on the allegation of obscenity.[188] The court rejected the theatre owners' argument that the statute was "overbroad" because it provided that "any place which exhibits filmed obscenity" is a "nuisance."[189] The court also rejected the theatre owners' contention that the statutory scheme was

179. 28 Ohio App. 2d 107, 276 N.E. 2d 655 (Ct. App. 1971), *modified*, 307 N.E. 2d 911 (1974), *appeal dismissed*, 421 U.S. 923 (1975).

180. 354 U.S. 476 (1957).

181. 383 U.S. 413 (1966).

182. 276 N.E. 2d at 660.

183. *Id.* at 657.

184. State ex rel. Ewing v. "Without a Stitch," 37 Ohio St. 2d 95, 307 N.E. 2d 911, 913 (1974), *appeal dismissed*, 421 U.S. 923 (1975).

185. 307 N.E. 2d at 917-18.

186. *Id.* at 913.

187. *See* text accompanying notes 35 through 37 and 63 *supra*.

188. 307 N.E. 2d at 914.

189. *Id.* at 915.

"unconstitutionally deficient" because it failed to require scienter, *i.e.*, knowledge on the part of the nuisance abatement defendants, as to the content of the film. Although the court agreed that such knowledge is constitutionally required, it noted the statute did, in fact, require scienter, but that the theatre owners failed to assert lack of knowledge in their first appeal.[190] The court further determined that, in accordance with the general rule, the burden of proof under the nuisance statute lay with the complainant, even when the statute itself fails to address the issue.[191] Among the statutory remedies upheld was a one year closing of the theatre "in and upon which the nuisance was maintained . . . ."[192] That remedy received judicial approval because the statute provided that, through compliance with certain prescribed measures, the theatre owner could avoid a closure of the premises. Before giving its approval to the closure avoidance requirements, the court scrutinized each element to determine if any one posed "an unconstitutional prior restraint on an activity generally protected by the first amendment."[193] Even the requirement that the theatre owner demonstrate "that he will prevent . . . the [future] exhibition of the particular film declared obscene" was held not to be a "prior restraint,"[194] although the court did observe that it would have struck a statute whose language required an owner to show that "no film to be exhibited during the one year period will be obscene."[195]

The United States Fifth Circuit Court of Appeals again revisited the issue of closing premises and the problems of prior restraint in 1977. In *Universal Amusement Co., Inc. v. Vance*[196] a split court reversed a district court decision which had invalidated a Texas nuisance abatement statute.[197] In upholding the provision, the court found that a proprietor enjoined under the statute was:

> prohibited only from doing that which he could not lawfully do anyway, since Texas law prohibits him from commercially exhibiting, possessing for sale, or distributing obscene material, Tex. Penal Code Ann. 743.23(a)(1) (1974). A lawful injunction subjects him to no further guess-

190. *Id.* at 916.
191. *Id.*
192. *Id.* at 917-18.
193. *Id.*
194. *Id.*
195. *Id.*
196. 559 F.2d 1286 (5th Cir. 1977).
197. TEX. REV. CIV. STAT. ANN. art. 4667(a)(3) (Vernon 1976).

> work, in determining what is and is not prohibited, than he must already engage in merely to comply with Texas law.[198] In short, as we read the Texas statutes, they authorize restraint of such expression only as is not constitutionally protected and is prohibited by State law. This is not the stuff of which First Amendment violations are made.[199]

This holding was, however, expressly rejected in 1978 by a United States district court in North Carolina.[200] In rejecting a state nuisance abatement statute, the court found that the fifth circuit had ignored the prior restraint issue. That is, the abatement injunction was held to have the effect of prohibiting future speech of an unknown quality because of a past abuse of the first amendment.[201] Although the fifth circuit decision relied on *Forsyth*[202] the North Carolina decision relied on *Nebraska Free Press Association v. Stuart,*[203] for the proposition that:

> A criminal penalty . . . is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative. A prior restraint, by contrast and by definition has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.[204]

In essence, the North Carolina district court saw any injunction which went beyond specific named books or films to be an impermissible restraint.[205] The fifth circuit, by contrast, felt that any purveyor of adult materials was always running the risk of violating the obscenity laws.[206]

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198. 559 F.2d at 1292, n. 11, which states: "Under Texas law the injunctive order must 'be specific in terms' and 'describe in reasonable detail . . . the act or acts sought to be restrained . . .' Tex. R. Civ. P. 683. An order which enjoins the exhibition of obscene material, as the term is defined in the Penal Code, and provides no further guidelines is invalid under Texas Rule 683 . . . ."

199. 559 F.2d at 1292.

200. Felhaber v. North Carolina, 445 F. Supp. 130 (E.D. N.C. 1978).

201. *Id.* at 138.

202. 106 Forsyth Corp. v. Bishop, 482 F.2d 280 (5th Cir. 1973), *cert. denied,* 422 U.S. 1044 (1975). *See* text accompanying notes 35 through 37 *supra.*

203. 427 U.S. 539 (1976).

204. 445 F. Supp. at 139-40, citing 427 U.S. at 559.

205. 445 F. Supp. at 140.

206. 559 F.2d at 1292.

Therefore, an injunction to abate certain unlawful activity as a nuisance subjected the book store or theatre owner to "no further guesswork, in determining what is and is not prohibited, than he must already engage in merely to comply with [the] law."[207]

Florida's state courts have rejected blanket injunctions against obscene materials on a nuisance theory, approving such procedure only when specific films were considered.[208] The California Supreme Court, in a lengthy 1976 decision, joined the ranks of those states disapproving blanket injunctions.[209] In essence, the court adopted the theory that enjoining the distribution of unknown material in the future, without a prior determination of obscenity, is violative of the first amendment proscription on prior restraint.[210]

In its most recent session, the Florida Legislature adopted a statute providing that any places where obscene materials are illegally kept are a public nuisance.[211] Further, drive-in theatres are prohibited from displaying films depicting nudity in a manner harmful to minors, where the film is visible from the public streets.[212]

As yet, this statute is untested, but its validity will in large part rely on the fifth circuit's disposition of *Vance,* which was ordered heard *en banc* in December, 1977.[213] If the fifth circuit follows the national trend,

207. *Id.*

208. Mitchem v. State ex rel. Schaub, 250 So. 2d 883, 886 (Fla. 1971); Paris Follies, Inc. v. State ex rel. Gerstein, 259 So. 2d 532, 533 (Fla. 3rd DCA 1972); *See* Gayety Theatres, Inc. v. State ex rel. Gerstein, 359 So. 2d 915 (Fla. 3rd DCA 1978).

209. People ex rel. Busch v. Projection Room Theatre, 17 Cal. 3d 42, 130 Cal. Rptr. 328, 550 P.2d 600 (1976), in which the court held that any injunction must be "directed to particular books or films already adjudicated obscene." 130 Cal. Rptr. at 337.

210. 130 Cal. Rptr. at 337.

211. FLA. STAT. § 823.13(1) (1978).

212. *Id.*

213. The *en banc* decision was rendered on December 18, 1978. In an 8-6 decision (one judge not participating) the Court of Appeals overturned the three judge decision found at 559 F.2d 1286.

The court, per Judge Thornberry, found that the one year closure requirement of the Texas nuisance statute was unconstitutional as applied to obscenity. In reaching this conclusion, the court looked primarily to Near v. Minnesota, note 24 and accompanying text *supra,* for the proposition that the closure requirement would be an impermissible prior restraint on future and, thus, presumptively protected speech. The dissent sought to distinguish the case on its facts, but cited no new precedents.

This case is significant in that it represents a change in fifth circuit thinking. The *Vance* decision brings the fifth circuit more in line with its sister courts in taking a restrictive view of prior restraints.

then nuisance proceedings resulting in business closures will cease to be a viable alternative for control of adult materials.

7. SELECTIVE ENFORCEMENT

The simplest method of controlling obscenity is vigorous enforcement of the criminal laws prohibiting the distribution of such materials. Yet, such a control device also possesses the greatest potential for abuse.

It is axiomatic that protection of the public from illegal activity is a proper purpose for the exercise of the police power.[214] Furthermore, businesses which are susceptible to the opportunity for criminal activity are "fit subjects" for strict regulation.[215]

A United States district court has held, however, that overly zealous enforcement of the law can reach the proportion of an impermissible prior restraint. In *Bee See Books v. Leary,*[216] the court was faced with considering the legality of a police program of stationing officers in adult book stores. The court found such activity to have effected a prior restraint in that it suggested the materials in the stores were unlawful and inhibited customers from exercising their right of free expression.[217]

The United States Ninth Circuit Court of Appeals reached a similar conclusion in a case involving the repeated filing of obviously spurious criminal complaints.[218] The local police had initiated over one hundred prosecutions against a single corporation, despite the fact that each of the first eleven complaints had resulted in acquittals. Relying on the precedent set in *Yick Wo v. Hopkins,*[219] the court held: "In the vital area of First Amendment rights, it is just as easy to discourage exercise of them by abusing a valid statute as by using an invalid one."[220]

Most recently, a federal district court in South Florida considered

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The unanswered question is the effect of this decision on 106 Forsyth Corp. v. Bishop, notes 48 through 54 and accompanying text *supra. Forsyth* permitted the revocation of occupational licenses based on past obscenity convictions. Presumably, this question will be answered at some future time. Pending that resolution, however, the status of prior restraint in the *licensing* field will remain unsettled.

214. Golden v. McCarty, 337 So. 2d 388 (Fla. 1976).

215. Tally v. City of Detroit, 54 Mich. App. 328, 220 N.W. 2d 778 (Ct. App. 1974).

216. 291 F. Supp. 622 (S.D.N.Y. 1968).

217. *Id.* at 624.

218. Kram v. Graham, 461 F. 2d 703 (9th Cir. 1972).

219. 118 U.S. 356 (1896).

220. 461 F.2d at 707.

the problem of selective enforcement as it affects adult businesses. In *P.A.B., Inc. v. Stack*,[221] the court issued a restraining order against the Fort Lauderdale police and Broward County Sheriff's Office in response to their concentrated efforts against an adult book store. Here, as in *Bee See Books*,[222] the police stationed uniformed officers in front of the book store on a regular basis, frequently had undercover agents in the store, checked the identification of patrons seeking to enter and exit the premises and regularly checked employee identification.[223] The court specifically found, based in part on admissions by the Sheriff in a television interview, that the enforcement drive was aimed at causing financial damage to the store. This pattern of conduct was found to "go beyond that necessary to enforce criminal obscenity laws" and to "chill" protected first amendment rights.[224] The court stated:

> In the area of sexually oriented literature and films, state prosecuting authorities may vigorously enforce obscenity laws where the purpose is to punish the promotion or sale of *obscene* material or to deter such promotion or sale. However, such law enforcement will run afoul of the Constitution if it is to force a sexually oriented enterprise to cease doing business or to refrain from dealing in presumably protected sexually oriented materials. In those circumstances, such activity constitutes an invalid restraint on First Amendment rights.[225]

Where first amendment rights are not directly jeopardized, the standard for selective enforcement becomes proportionately lighter. In 1976, the city of San Antonio, Texas, adopted an ordinance[226] regulating massage parlors which, in part, required each operator to record the name, age and current address of each patron together with the date and the name of the masseur. The Fifth Circuit Court of Appeals expressly rejected an "associational freedom" challenge to that code provision,[227] finding that massage is not protected by the first amendment.[228] In making that finding, the court relied on *Paris Adult Theatre I v.*

221. 440 F. Supp. 937 (S.D. Fla. 1977).
222. 291 F. Supp. 662.
223. 440 F. Supp. at 940.
224. *Id.* at 944.
225. *Id.* at 945.
226. SAN ANTONIO, TEX., CITY CODE, Chapter 18, Art. IV (1976).
227. Pollard v. Cockrell, 578 F.2d 1002, 1015 (5th Cir. 1978). *See also* Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978), discussed more fully at note 160 *supra*.
228. 578 F. 2d at 1015.

Slaton,[229] where the Supreme Court rejected the argument that the right of adults to view obscenity in the home extended to willing customers in commercial theatres:

> Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theatre, open to the public for a fee, with the private home of *Stanley v. Georgia* and the marital bedroom of *Griswald v. Connecticut.* This Court has, on numerous occasions, refused to hold that commercial ventures such as a motion picture house are 'private' for the purpose of civil rights litigations and civil rights statutes.[230]

The level of interference tolerated from law enforcement officials is thus directly related to the quality of the expression. That is, the further an activity strays from "pure speech" toward conduct, the less stringent the test for regulation.

8. CONCLUSION

Because of the nature of the media in which "obscene materials" may appear (motion pictures and books), local governments encounter formidable constitutional obstacles in their attempts to regulate the distribution of these items. The United States Supreme Court appears reluctant to authorize procedures which would have a "chilling effect" upon the distribution of "legitimate" materials through the same media.

The Court's dilemma appears to rise out of a concern for the fundamental rights of individuals and an equally profound recognition of the compelling interests of the states in protecting the health, safety, welfare and morals of their citizens. The constitutional problems are further compounded by the existence of competing policy considerations in interpreting the constitution as it relates to obscenity.

Is the regulation of obscenity a sword to be used against the exercise of individuals' rights to distribute books and films or a shield to protect the public from being exposed to those materials which may be offensive to their sense of morality? The resolution of this question, it appears, would depend upon whether states are empowered to determine what is "good" for their citizens and, more importantly, whether the states and their subdivisions may eliminate what they determine to be "bad."

229. *Id.* at 1016, citing to *Paris,* 413 U.S. 49 (1973).
230. *Id.*

The courts are divided as to whether the states may be *parens patriae* to adults as well as to minors. Many courts appear to have decided that the states must protect their citizens from themselves, by ensuring that access to obscene materials is made difficult by strict regulations, while other courts have decided that unless there is a demonstrably compelling state interest in regulating the distribution of obscene materials—this interest to have been judicially legitimated as to each piece of questionable material—then the right must be unimpaired by regulatory processes.