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

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

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

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of the families and residents . . . for an end to these "sex oriented"
businesses in their neighborhoods.\textsuperscript{2}

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

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

The question remains whether zoning is effectively ridding resi-
dential and school areas in close proximity to adult entertainment
facilities of resulting adverse effects. This Comment explores this
question and proposes possible solutions. Part I outlines the history
of zoning and discusses a municipality's authority to zone out

\textsuperscript{2} Id. at 17-18.

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

\textsuperscript{4} See infra notes 82-89 and accompanying text.

\textsuperscript{5} See, e.g., Tampa Transcript, supra note 1, at 15-19.

\textsuperscript{6} See Barnes, 501 U.S. at 560; Tampa Transcript, supra note 1, at 15-19.
entertainment businesses. Part II explores the growth of adult use businesses and their First Amendment protection. Part III defines the secondary effects associated with these establishments, evaluates the growth of the effects, and analyzes the relationship between the adult use businesses and the negative effects seen in residential neighborhoods. Finally, Part IV assesses possible zoning solutions and alternative methods to decrease negative secondary effects.

I. THE POWER TO ZONE

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

A. The Evolution of Zoning in the United States

Zoning essentially developed as an outgrowth of nuisance law. By the early twentieth century, the United States Supreme Court upheld at least three municipal land use regulations, basing these decisions on traditional nuisance principles. In 1916, New York City became the first municipality to enact a comprehensive zoning scheme. Within ten years, approximately 425 municipalities,

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9. See DANIEL P. MANDELMAN, LAND USE LAW § 1.3 (1982).
10. See Hadacheck v. Sebastian, 239 U.S. 394, 410-13 (1913) (upholding an ordinance that excluded brickyards within certain areas of the city); Reinman v. Little Rock, 237 U.S. 171, 176-77 (1915) (upholding an ordinance that excluded livery stables from certain areas of the town); Welch v. Swasey, 214 U.S. 91, 107-08 (1909) (upholding an ordinance that divided Boston into two building districts with different height limitations applicable to each).
representing more than half of the country’s urban population, had passed similar measures.12

The Supreme Court reached a landmark decision in Village of Euclid v. Ambler Realty Co.,13 holding that so long as freedom of speech is not threatened, a zoning plan is a valid exercise of local police power if the plan serves a rational interest of the municipality.14 In Euclid, the Court reasoned that the zoning ordinance represented a valid exercise of the police power and rejected the landowner’s argument that the ordinance deprived him of his liberty and property in contravention of the dictates of the Fourteenth Amendment.15 The Court held that so long as the classifications made under a zoning ordinance are “fairly debatable,”16 and the provisions are not “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,” the ordinance will be upheld as constitutional.17

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

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12. See id. at 9.
14. See id. at 389-90.
15. See id. at 397. The landowner relied on the provision of the Fourteenth Amendment which states that no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1, cl. 3.
17. Id. at 395.
19. See id. at 2.
20. See id.
21. See id. at 7.
zoning ordinance and applied the mere rationality test, ultimately upholding the ordinance.\textsuperscript{22}

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

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

\begin{itemize}
\item \textsuperscript{22} See id.
\item \textsuperscript{23} 431 U.S. 494 (1977).
\item \textsuperscript{24} See id. at 498-99.
\item \textsuperscript{25} See id. at 499-500. The Court concluded that although the governmental interests sought to be achieved were "legitimate," the ordinance only has a "tenuous relation" to the achievement of those ends. \textit{Id.} at 500.
\item \textsuperscript{26} See, e.g., \textit{Berman v. Parker}, 348 U.S. 26, 32 (1954) (holding that zoning is permissible for the promotion of safety, health, morals, and the general quality of life in the community); \textit{Zahn v. Board of Public Works}, 274 U.S. 325, 328 (1927) (deferring to the legislature where the validity of a zoning ordinance is fairly debatable).
\item \textsuperscript{27} See \textit{Metromedia, Inc. v. City of San Diego}, 453 U.S. 490, 521 (1981) (holding that a zoning ordinance aimed at curbing pollution and eliminating distractions for pedestrians and motorists by prohibiting noncommercial billboards advertising was an unconstitutional violation of the First Amendment).
\item \textsuperscript{28} See \textit{Carey v. Brown}, 447 U.S. 455, 458-59 (1980) (holding an Illinois statute unconstitutional because it made the impermissible distinction between labor picketing and peaceful picketing); \textit{see also Police Dep't of Chicago v. Mosley}, 408 U.S. 92, 95 (1972) (concluding government regulations cannot be based on the content of First Amendment expression); \textit{Street v. New York}, 394 U.S. 576, 594 (1969) (finding it unconstitutional to convict a person for speaking in defamatory terms about the American flag).
\end{itemize}
B. The Development of Zoning in Florida

The power to zone at the county and municipal level may be granted by the state legislature to local authorities by local or special act. 29 Zoning is an exercise of legislative power residing in the state and delegated to a municipal corporation. 30 The enactment of a zoning ordinance constitutes the exercise of a legislative and governmental function. 31 In Florida, the zoning power of municipalities is derived from article VIII, section 2(b) of the Florida Constitution 32 through the Municipal Home Rule Powers Act. 33 The Florida Legislature grants the governing body of a county the power to establish, coordinate, and enforce zoning and business regulations necessary for the protection of the public. 34 However, the doctrine of separation of powers 35 prohibits delegation of zoning powers to administrative bodies 36 and limits judicial review. 37 Since zoning is primarily legislative in nature, zoning decisions should be made by zoning authorities responsible to their constituents. 38

Zoning laws and regulations are enacted through the exercise of police power. To justify the exercise of police power, the zoning restriction imposed must bear a real and substantial relation to, or be reasonably necessary for the public health, safety, morals, or

29. See State ex rel. Taylor v. City of Jacksonville, 133 So. 114, 115 (Fla. 1931).
31. See id.
32. FLA. CONST. art. VIII, § 2(b).
34. See id. § 125.01(1)(b).
35. See FLA. CONST. art. II, § 3. “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” Id.
36. See Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978) (holding that the legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient).
37. See Town of Indialantic v. McNulty, 400 So. 2d 1227, 1230 (Fla. 5th DCA 1981) (holding that zoning decisions are primarily legislative in nature and should be made by a zoning authority and not by the courts as super zoning review boards).
38. See id.
general welfare.\textsuperscript{39} A city and the courts must consider the public welfare of the whole community when construing a zoning ordinance; a mere or anticipated benefit to a special group within the city is not enough.\textsuperscript{40}

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

Florida courts have considered other purposes and objectives for zoning regulations. Zoning regulations may be employed to protect the economic value of existing uses.\textsuperscript{47} The decrease or

\textsuperscript{39} See Burritt v. Harris, 172 So. 2d 820, 822 (Fla. 1965); see also City of Miami Beach v. 8701 Collins Ave., 775 So. 2d 428, 430 (Fla. 1993).

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

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

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

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

\textsuperscript{44} 233 So. 2d 390 (Fla. 1970).

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

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

\textsuperscript{47} See Trachsel v. City of Tamarac, 311 So. 2d 137, 140 (Fla. 4th DCA 1975).
prevention of traffic congestion\textsuperscript{48} and the prevention of the overcrowding of lands\textsuperscript{49} are proper purposes on which to base zoning classifications. However, the restriction or the control of business competition is not a valid objective or purpose of zoning regulations.\textsuperscript{50}

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

\section*{II. ZONING AND THE ADULT ENTERTAINMENT INDUSTRY}

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

\begin{footnotesize}
\begin{enumerate}
\item See \textit{id.}; see also Mayflower Prop., Inc. v. Watson, 233 So. 2d 390, 392 (Fla. 1970).
\item See \textit{Watson}, 223 So. 2d at 374.
\item See Wyatt v. City of Pensacola, 196 So. 2d 777, 779 (Fla. 1st DCA 1967).
\item See 7 FLA. JUR. 2D Building, Zoning, and Land Controls § 58 (1997).
\item See \textit{id.}
\item See \textit{id.}
\item See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 563 (1991) (upholding a zoning ordinance requiring performers to wear pasties and Gstrings); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 220 (1990) (upholding a zoning ordinance requiring owners and operators of motels that rent rooms for less than 10 hours at a time to comply with licensing requirements of sexually oriented businesses); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding a zoning ordinance prohibiting adult movie theaters from locating within 1,000 feet of a residential zone, church, park, or school); Hang
\end{enumerate}
\end{footnotesize}
between local governments attempting to regulate sexually oriented businesses and owners, operators, and patrons of such businesses seeking protection under the First Amendment. The resulting case law has wrestled with the problem of defining the lawful scope of local zoning power over businesses that arguably deal with these forms of expression.

A. First Amendment Protection of Expressive Speech

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

On, Inc. v. City of Arlington, 65 F.2d 1248, 1254 (5th Cir. 1996) (upholding a zoning ordinance placing a "no touch" requirement on activities between dancers and customers); Matney v. County of Kenosha, 86 F.3d 692 (7th Cir. 1996) (upholding a zoning ordinance requiring that one side of viewing booths in adult establishments remain open or unenclosed).


57. See discussion infra Part II.A.


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

64. See Snepp v. United States, 444 U.S. 507, 510 n.3 (1980) (finding that the government had a compelling interest in reviewing a former CIA agent's publication pursuant to a voluntary employment agreement).
The Supreme Court extended the First Amendment's protection of free speech to cover many types of expressive conduct that are not technically speech. In *Brown v. Louisiana*, the Court ruled that the First Amendment protected individuals engaged in an orderly demonstration at a segregated public library and stated that First Amendment rights "are not confined to verbal expression." In *West Virginia State Board of Education v. Barnette*, the Court held that a student could not be forced to salute the flag, stating that "symbolism is a primitive but effective way of communicating ideas." To determine whether the conduct is expressive or symbolic speech, courts must determine whether it constitutes expressive conduct. In *Spence v. Washington*, the Court held that the conduct is expressive if the actor had an "intent to convey a particularized message," and a great likelihood existed that the audience understood the message.

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

66. Id. at 142.
67. 319 U.S. 624 (1943).
68. Id. at 632.
71. Id. at 410-11.
73. O'Brien, 391 U.S. at 376.
protection of the First Amendment. The Stanglin Court found that the mere activity of the adult entertainment patrons, coming together to engage in recreational activity, is not protected by the First Amendment.

If conduct is found to be nonexpressive, then it does not receive First Amendment protection. For example, in South Florida Free Beaches, Inc. v. City of Miami, the Eleventh Circuit refused to give First Amendment protection to nude sunbathers who challenged a public indecency law on the basis that it infringed on their right to communicate their belief that nudity was not indecent. In upholding minimum dress requirements at public beaches, the Supreme Court has held that "[t]he appearance of people of all shapes, sizes and ages in the nude at a beach...would convey little if any erotic message..." The Court further found that whether or not nudity is combined with expressive activity, a state which has indecency or minimum public dress requirements statutes, is attempting to remedy "the evil" of public nudity.

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

75. Id. at 25.
76. See id. (holding that a social dance group does not involve the sort of expressive association that the First Amendment has been held to protect).
77. See South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 609 (11th Cir. 1984).
78. See id.
80. Id.
81. See Barnes, 501 U.S. at 567-71; see also Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1987) (citing various cases that extend freedom of speech protection to forms of entertainment which contain nudity).
In the last decade those businesses that fall within the definition of "adult entertainment business" have increased tremendously.\(^{82}\) The creation of an appropriate definition for adult entertainment has produced significant litigation. No definition exists that will engender a perfect fit for the entire adult entertainment industry. Perhaps all attempts to formulate a definition for adult entertainment will ultimately end with the conclusion reached by United States Supreme Court Justice Potter Stewart. Stewart noted the difficulty of creating an intelligible definition but stated, "I know it when I see it."\(^{83}\) However, for the purposes of this Comment, adult entertainment will be broadly defined as that which focuses on sexuality, where it contains a certain degree of sexual explicitness and/or erotic use of full or partial nudity. Thus, the adult entertainment industry includes: peep shows, adult video stores, pornographic bookstores, special cabarets,\(^ {84}\) rap parlors,\(^{85}\) liquor lounges, internet web sites,\(^ {86}\) X-rated pay-per-view channels,\(^ {87}\) massage parlors,\(^ {88}\) and 1-900 sex phone lines.\(^ {89}\)

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82. See infra notes 83-89 and accompanying text.
84. A cabaret features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers. See DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.000 (1972).
85. Rap parlors are "establishments at which men may converse with women who are not fully clothed." Alexander v. City of Minneapolis, 698 F.2d. 926, 936-37 n.2 (8th Cir. 1983).
86. Web sites on the internet that offer material, such as nude pictures and sexually explicit "chat-lines," have been at the center of censorship in recent years. See generally ACLU v. Reno, 929 F. Supp. 824, 849 (E.D. Pa. 1996) (finding that the Communications Decency Act violated the First Amendment by prohibiting certain transmissions on the internet).
87. Some cable companies throughout the United States offer services like the Spice Network, where the subscriber may pay for each viewing of a pornographic movie, rather than subscribe to any one particular premium channel. See Playboy Entertainment Group v. United States, 945 F. Supp. 772, 776 (D. Del. 1996).
88. An establishment is a massage parlor when it is engaged primarily in providing sexually oriented massages notwithstanding that it calls itself a health club and provides exercise equipment. See Babin v. City of Lancaster, 493 A.2d 141, 144 n.3 (1983).
89. Long distance carriers offer services where a caller may dial a phone number with the prefix 1-900 with the agreement to pay per minute to speak with a person, usually a woman, about sexually explicit topics. The caller often requests the woman to use sexually arousing language. See Sable Communications, Inc. v. FCC, 492 U.S. 115, 117-18 (1993).
B. Nude Dancing as Expressive Conduct: Eroticism or Obscenity?

Expressive conduct is not limited to communicative speech; it may include symbolic speech that conveys an idea.90 Thus, owners of adult entertainment businesses have argued that the dancers are expressing a message and that their conduct is therefore protected as symbolic speech.91 The respondents in *Barnes v. Glen Theatre, Inc.*,92 argued that their go-go dancers were performing nonobscene nude dancing intended to send a message of eroticism and sexuality.93 In addressing the constitutional protection of nude dancing, Chief Justice Rehnquist stated that nude dancing is expression only “marginally” within the “outer perimeters” of the First Amendment.94 The *Barnes* Court recognized that public indecency laws have long been justified as part of the state’s police powers, reflecting a substantial governmental interest in protecting order and morality.95 The Court also found the government interest unrelated to any message expressed by nude dancing, and in doing so, the Court separated eroticism and the message of nude dancing from nude dancing itself.96 By requiring dancers to wear pasties and a G-string, Indiana had only made the message slightly less graphic. It did not prohibit the message of eroticism, rather it prohibited the message’s transmission through nude dancing.97

The argument has been made that nude dancing constitutes obscenity and is without First Amendment protection.98 The *Miller*

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90. See *Texas v. Johnson*, 491 U.S. 397, 403 (1989) (holding that the burning of the American flag is protected symbolic speech).
93. *See id.* at 569.
94. *Id.* at 566.
96. *See id.* (“While the dancing to which [the indecency statute] was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.”).
97. *See id.* at 373 (Scalia, J., concurring).
Court announced and applied the standard that American courts continue to use when determining what constitutes obscenity. According to the Miller three-part test, material is obscene: (1) if the typical person applying community standards would find the work as a whole appealing to prurient interests; (2) if the work describes or depicts in an obviously offensive manner sexual conduct specifically outlined by the relevant statute; and (3) if the work considered as a whole is devoid of serious artistic, political, literary or scientific value. Applying the Miller test, the Eighth Circuit found, “to the extent that nude barroom dancing contains a message and therefore qualifies as First Amendment ‘speech,’ it may contain a message that nonetheless is categorically unprotected by the First Amendment—that is, an appeal to the prurient interest.”

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

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

100. See Walker v. City of Kansas City, 911 F.2d 80, 87 (8th Cir. 1990).
101. See supra notes 70-71 and accompanying text.
102. 422 U.S. 922 (1975).
103. See id. at 932.
104. Id.
the nude dancing in question, the Court granted the request for injunctive relief without addressing the exact level of protection the First Amendment provides to nude dancing.\textsuperscript{105}

\textbf{C. The Four-Prong Test of Regulating Expressive Speech}

In \textit{United States v. O'Brien},\textsuperscript{106} the Supreme Court formulated a four-prong test for determining whether government regulation aimed at nonexpressive conduct violates the First Amendment.\textsuperscript{107} In \textit{O'Brien}, the defendant was convicted under federal law\textsuperscript{108} for burning his draft card to protest American involvement in the Vietnam War.\textsuperscript{109} The Court stated, “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”\textsuperscript{110} The \textit{O'Brien} Court enunciated a four-prong test, finding that government regulation of conduct is constitutional if: (1) the regulation is a constitutional exercise of the government’s power; (2) it furthers an important or substantial government interest; (3) it is unrelated to the suppression of free expression; and (4) any incidental burden upon First Amendment rights is no greater than necessary to promote the compelling state interest.\textsuperscript{111}

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

\textsuperscript{105} See id. at 933-34.
\textsuperscript{106} 391 U.S. 367 (1968).
\textsuperscript{107} See id. at 376-83.
\textsuperscript{108} See 50 U.S.C. § 462(b) (1965) (stating that any person “who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate . . . may be fined and imprisoned.”).
\textsuperscript{109} See \textit{O'Brien}, 391 U.S. at 376.
\textsuperscript{110} Id.
\textsuperscript{111} See id. at 376-83.
\textsuperscript{112} See id. at 376.
\textsuperscript{113} See id. at 382.
from expressing his view in other ways.\textsuperscript{114} Therefore, the conviction was upheld because the Court found the statute to be content-neutral.\textsuperscript{115}

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

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

The Supreme Court has applied the \textit{O'Brien} test to cases involving the regulation of adult entertainment businesses when the zoning ordinance is content-neutral, and thus, does not restrict conduct because of its message.\textsuperscript{123} \textit{Barnes} first applied the \textit{O'Brien} test in the context of adult entertainment businesses.

\begin{itemize}
\item \textsuperscript{114} See id. at 378-86.
\item \textsuperscript{115} See id. at 381-82. Content-neutral regulations are constitutional and do not involve the regulation of speech. Content-based regulations are generally unconstitutional and are enacted to control the expression of speech. See \textit{infra} notes 126-130 and accompanying text.
\item \textsuperscript{116} 491 U.S. 397 (1989).
\item \textsuperscript{117} See id. at 410.
\item \textsuperscript{118} See id. at 405-06.
\item \textsuperscript{119} See id. at 412.
\item \textsuperscript{120} See id. at 414-17.
\item \textsuperscript{121} Id. at 406.
\item \textsuperscript{122} See id. at 420.
\end{itemize}
test to adult entertainment. In Barnes, owners and dancers in the adult entertainment industry brought suit to enjoin enforcement of Indiana’s public indecency statute that required the dancers to wear pasties and G-strings. After Barnes, the Supreme Court approached government regulation of adult entertainment by evoking various legal theories related to First Amendment protection, including the time, place, and manner test, the overbreadth doctrine, the vagueness doctrine, the prior restraint doctrine, and Twenty-first Amendment principles.

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

124. See id. at 563; see also supra notes 92-97 and accompanying text.
128. See Mosley, 408 U.S. at 95-96.
governments attempting to pass zoning ordinances for adult entertainment businesses must ensure that the ordinance provides: (1) sufficient factual basis to support a finding of substantial governmental interest; (2) narrowly tailored definitions of adult uses affecting only those businesses which the ordinance intends to regulate; and (3) reasonable alternative channels of communication for the affected expression.\textsuperscript{130}

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

The time, place, and manner test was originally formulated to apply only to speech or expressive conduct that takes place in public forums.\textsuperscript{131} However, some courts and scholars have viewed the time, place, and manner test and the \textit{O'Brien} test as essentially the same.\textsuperscript{132} The Supreme Court has used the time, place, and manner test to evaluate state regulation of nude dancing.\textsuperscript{133} This application often arises when owners of adult entertainment establishments claim a zoning regulation is a violation of their First Amendment rights.\textsuperscript{134} Government restriction of expressive activities has been permitted in situations where restrictions fall short of a complete ban and constitute time, place, and manner restrictions.\textsuperscript{135} Essentially, courts have found that although expression covered by the First Amendment cannot be banned, it can be restricted in terms of where, when, and how that expression is presented.\textsuperscript{136} For example, nonobscene sexually explicit material on broadcast television and radio can be restricted to times when

\begin{itemize}
\item \textsuperscript{130} See \textit{City of Renton}, 477 U.S. at 50.
\item \textsuperscript{132} See \textit{Clark v. Community for Creative Non-Violence}, 468 U.S. 288, 298 (1984) (finding that the time, place, and manner test embodies the same standards as those set forth in \textit{O'Brien}).
\item \textsuperscript{133} See infra notes 141-143 and accompanying text.
\item \textsuperscript{134} See \textit{Barnes v. Glen Theatre, Inc.}, 501 U.S. 550, 562-63 (1991); see also \textit{Walker v. City of Kansas City}, 911 F.2d 80, 82, 85 (W.D. Mo. 1988).
\item \textsuperscript{135} See \textit{Erznoznik v. City of Jacksonville}, 422 U.S. 205, 211-12 (1975) (invalidating a zoning ordinance that failed to distinguish movies containing nudity from all other movies which were being restricted, thereby constituting a complete ban on speech).
\end{itemize}
children are less likely to be in the audience.¹³⁷ The Court has given state and local governments leeway in their attempts to control purported adverse effects of adult entertainment, particularly when related to protecting children or others who do not wish to be exposed to adult material.¹³⁸ This leeway has also extended to controlling alleged adverse secondary effects.¹³⁹ Yet, even with time, place, and manner restrictions, courts have set limits concerning how far a government can go when attempting to ban unpopular expression.¹⁴⁰

The Supreme Court first addressed the time, place, and manner restrictions of adult entertainment regulations in 1976 in Young v. American Mini Theatres, Inc.,¹⁴¹ and later in Schad v. Borough of Mount Ephraim,¹⁴² and City of Renton v. Playtime Theatres, Inc.¹⁴³ Each of these cases supplied an important element for an examination of time, place, and manner regulations. Young stressed that the regulation must not suppress protected expression and that access to that expression must remain available.¹⁴⁴ Schad emphasized that the regulation cannot be so broad as to completely prohibit protected expression and that the regulation must further a substantial governmental interest.¹⁴⁵ Renton established a deferential standard of review for cases involving time, place, and manner regulations.¹⁴⁶

a. Young v. American Mini Theatres, Inc.

¹³⁷ See FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978) (finding that because of the use of the public airwaves, broadcasting is subject to somewhat stricter regulation than print media or cable TV).
¹³⁸ See id. at 730 n.1; see also Erznoznik, 422 U.S. at 210-12.
¹³⁹ See Redner v. Dean, 29 F.3d 1495, 1505 (11th Cir. 1994); 11126 Baltimore Boulevard, Inc v. Prince George's County, 886 F.2d 1415, 1420, 1426 (4th Cir. 1989).
¹⁴⁴ See, e.g., Young, 427 U.S. at 70-71.
¹⁴⁵ See Schad, 452 U.S. at 68-69.
¹⁴⁶ See City of Renton, 475 U.S. at 46-48 (deferring to the government's purpose or substantial interest in enacting time, place, and manner regulations).
According to Justice Powell, *Young* was the first case decided by the Supreme Court “in which the interests of freedom of expression protected by the First and Fourteenth Amendments ha[d] been implicated by a municipality’s commercial zoning ordinances.” At issue in *Young* was the constitutionality of certain portions of Detroit’s Anti-Skid Row ordinance that singled out adult bookstores and theaters for special treatment. The original Anti-Skid Row ordinance, passed in 1962, was based on findings by the Detroit Common Council that certain types of businesses, when concentrated, can have a blighting effect on the surrounding neighborhood.

The ordinance forbade adult motion picture theaters, topless cabarets, and other similar establishments from locating within 1,000 feet of each other or within 500 feet of a residential dwelling without first obtaining approval. Although the ordinance was not technically content-neutral because it applied only to adult entertainment, the Court found the ordinance to be a reasonable time, place, and manner restriction of protected speech because the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate. The Court held that the ordinance constituted a permissible content-neutral time, place, and manner restriction because the purpose of the ordinance was not to eliminate, censor, or suppress the protected speech but rather to preserve the quality of urban life by avoiding the secondary effects of these businesses on the community through regulation of the placement and concentration

147. *Young*, 427 U.S. at 76 (Powell, J., concurring).
148. See id. at 54-55.
149. See id. at 56 (citing DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.000 (1972), which states “[i]n the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood.”).
150. See id. at 52.
151. See id. at 70.
of such businesses. Justice Stevens' plurality opinion pointed out that the city's goal of avoiding or mitigating these secondary effects is one which must be accorded high respect and is a sufficient governmental interest to justify the resulting incidental restriction on First Amendment speech.

b. Schad v. Borough of Mount Ephraim

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

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

In Renton, a suit was brought challenging the constitutionality of a zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school. The district court granted summary judgment in the city's favor.

152. See id. at 71.
153. See id. at 71-73 (Steven, J., concurring).
155. Id. at 68 (citing Moore v. East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring)).
156. See id. at 73-74.
157. Id. at 71.
holding that the ordinance did not violate the First Amendment.\textsuperscript{159} The court of appeals reversed, holding that the ordinance constituted a substantial restriction on First Amendment interests and remanded the case for reconsideration of whether the city had substantial governmental interests to support the ordinance.\textsuperscript{160} The Supreme Court held that the ordinance was a valid governmental response to the serious problems created by adult theaters and therefore satisfied the dictates of the First Amendment.\textsuperscript{161} The Court reasoned that the ordinance did not ban adult theaters altogether and was a proper form of time, place, and manner regulation.\textsuperscript{162} The Court reaffirmed that content-neutral time, place, and manner regulations are not unconstitutional as long as they are formulated to serve a substantial state interest and not to unreasonably limit alternative avenues of communication.\textsuperscript{163}

The district court found that Renton City Council's predominate concerns were with the secondary effects of adult theaters on the surrounding community, not with the content of adult films themselves.\textsuperscript{164} This finding was adequate to establish that the city's pursuit of its zoning interests was unrelated to the suppression of free expression, and thus, the ordinance was a content-neutral speech regulation.\textsuperscript{165} The Supreme Court concluded that the Renton ordinance was designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication.\textsuperscript{166} The Court further held that although the ordinance was enacted without the benefit of studies specifically relating to Renton's particular problems, Renton was entitled to rely on the experiences of and studies produced by

\textsuperscript{159} See id.

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

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

\textsuperscript{162} See id. at 52-54.

\textsuperscript{163} See id. at 46.

\textsuperscript{164} See id. at 48.

\textsuperscript{165} See id.

\textsuperscript{166} See id. at 53.
other cities.\textsuperscript{167} The Court found that no constitutional defect invalidated the method chosen by Renton to further its substantial interests\textsuperscript{168} and that cities may regulate adult theaters by dispersing them or by effectively concentrating them as in Renton.\textsuperscript{169}

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

\textsuperscript{167} See id.
\textsuperscript{168} See id. at 52.
\textsuperscript{169} See id. at 51.
\textsuperscript{170} Id. at 52.
\textsuperscript{171} Id.
\textsuperscript{172} See id. at 53.
\textsuperscript{173} See id.
\textsuperscript{174} Id. at 50 (citing Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976)).
evidence will be sufficient to support a finding of substantial governmental interest.\footnote{175}

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

3. \textbf{Issue Three: Whether Twenty-first Amendment Principles are Applicable?}

Another approach that has been taken by the Supreme Court to review a governmental regulation of nude dancing utilizes the Twenty-first Amendment of the United States Constitution.\footnote{177} In \textit{Zwern}, Inc. v. Reeves,\footnote{178} the Court recognized that a state has absolute power under the Twenty-first Amendment to prohibit the sale of liquor within its boundaries.\footnote{179} The Court recognized that pursuant to the Twenty-first Amendment, states have wide latitude to enact laws that prevent establishments which offer nude dancing from acquiring liquor licenses.\footnote{180}

In \textit{LaRue}, bar owners challenged a regulation prohibiting nude dancing where alcohol was served.\footnote{181} The state offered evidence of

\footnote{175} \textit{See id. at 51-52.}
\footnote{176} \textit{See, e.g.,} Phillips v. Borough of Keyport, 107 F.3d 164, 173-74 (3d Cir. 1997); \textit{see also} Mitchell v. Commission on Adult Entertainment Establishments, 10 F.3d 123, 133-34 (3d Cir. 1993).
\footnote{177} U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited."). The Supreme Court has interpreted this language to give the states broad powers to regulate the sale and distribution of alcohol. \textit{See California v. LaRue}, 409 U.S. 109 (1972).
\footnote{178} 308 U.S. 132 (1939).
\footnote{179} \textit{See id.} at 138.
\footnote{180} \textit{See LaRue}, 409 U.S. at 117.
\footnote{181} \textit{See id.} at 110. The California regulations prohibited certain conduct on licensed premises, such as performance of acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts that are prohibited by law; the actual or simulated displaying of pubic hair, anus, vulva or genitals;
sordid and illegal acts occurring in and around the establishments. The Court upheld the regulation recognizing the broad powers states have in regulating the use and distribution of alcohol under the Twenty-first Amendment. The LaRue Court held that the regulations were within California’s power to control the sale and distribution of alcohol within its borders and that the regulations were a rational response to problems created by mixing alcohol with nude entertainment. The Court stressed the “critical fact” that the state did not prohibit nude performances across the board but only in places serving alcohol.

The Supreme Court has further held that a state legislature, pursuant to its power to regulate the sale of liquor within its boundaries, can ban topless dancing in establishments that have a license to serve liquor. A “[s]tate’s power to ban the sale of alcoholic beverages entirely include[d] the lesser power to ban the sale of liquor on premises where topless dancing occurs.” The Court also held that nudity is the kind of conduct that is a proper subject for legislative action as well as regulation by the State Liquor Authority as a phase of liquor licensing. In addition, “[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand.”

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

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

184. See id. at 115-19.
185. Id. at 117.
187. Id.
188. See id. at 717-18.
189. Id. (citing NEW YORK STATE LEGISLATIVE ANNUAL 150 (1977)).
4. Issue Four: Is the Licensing Requirement a Prior Restraint?

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

Some local governments have employed a licensing requirement to prevent a concentration of adult businesses from opening establishments in their community. Adult businesses can be

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

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

198. See id. at 220.
199. Id. at 236. The Court recognized that it was reasonable to believe that shorter
.rental time periods indicate that the motels foster prostitution. See id.
200. See id. at 227 (citing Freedman v. Maryland, 380 U.S. 51 (1965) and finding that a
.censorship board could not prohibit a movie production and release by way of a
.prepublication review requirement to determine obscenity prior to publication).
201. See 11126 Baltimore Boulevard, Inc. v. Prince George's County, 32 F.3d 109, 114
(4th Cir. 1994).
202. See id. at 115 (finding that a 150 day period for the completion of judicial review
.of a decision on an application for an adult bookstore was not an excessive period).
203. See TK's Video, Inc. v. Denton County, 24 F.3d 705 (5th Cir. 1994); Grand
.Brittain, Inc. v. City of Amarillo, 27 F.3d 1068 (5th Cir. 1994).
within a specified brief period, as mandated by *FW/PBS.* Another court has held that the requirement for a conditional use permit was presumptively unconstitutional as a prior restraint on protected expression because no sites were available in the county for adult businesses to operate. The court also found that the code did not contain safeguards against the possibility that officials would deny a permit on the basis of the content of an applicant’s speech. These cases indicate the frequency with which local governments use licensing schemes to restrict the operation of adult businesses.

**D. Restrictive Zoning Regulations in Florida**

Florida, like other states, has attempted to use zoning laws to address concerns regarding the adverse secondary effects attributed to adult businesses. Time, place, and manner regulations have been used by several cities in Florida to disperse or concentrate these establishments with the intention of combating the adverse secondary effects. Those Florida cities that have enacted time, place, and manner regulations affecting the

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204. See *TK’s Video,* 24 F.3d at 708 (60 day period); *Grand Britain,* 27 F.3d at 1070 (11 day period).
205. See *TK’s Video,* 24 F.3d at 708; *Grand Britain,* 27 F.3d at 1071.
206. See *Mga Susa, Inc. v. County of Benton,* 853 F. Supp. 1147, 1150 (D. Minn. 1994) (invalidating a permit requirement for a “recreational facility,” the definition of which included various kinds of adult and nonadult businesses).
207. See id. at 1151.
208. See *T-Marc, Inc. v. Pinellas County,* 804 F. Supp. 1500, 1503 (M.D. Fla. 1992) (upholding a zoning ordinance requiring a three foot distance between dancers and patrons to control secondary effects of adult use establishments); *3299 N. Federal Highway, Inc. v. Board of County Comm’rs of Broward County,* 646 So. 2d 215, 221 (Fla. 4th DCA 1994) (upholding a zoning ordinance providing for a three foot distance between the dancers and the patrons to prevent lapdancing and the adverse effects cause by this activity); *International Eaters of America, Inc. v. Broward County,* 941 F.2d 1157, 1162 (11th Cir. 1991) (upholding a zoning ordinance that furthered a substantial governmental interest in protecting the quality of urban life from the secondary effects of adult businesses).
location and distance patrons must keep from nude dancers, have also had to satisfy the requirements of Renton.

Some local governments have attempted to use zoning laws to “zone out” adult entertainment businesses. For example, in *International Food and Beverage Systems*, the court noted that the evidence revealed only twenty-five locations around the city that were available for adult entertainment businesses. The proposed sites were near the city’s well-fields on the outskirts of town or located near the airport where much of the land was condemned or undergoing drastic change due to construction of a new expressway. The court found that these sites were so patently unsuitable for businesses that the regulations effectively zoned the subject adult entertainment businesses out of the city. Thus, the regulations were unconstitutional because they were not the least restrictive means to achieve the city’s legitimate interests.

Prior to the Florida Supreme Court decision in *City of Daytona Beach v. Del Perco*, the Florida courts had not answered the critical question of whether Florida had delegated its powers under the Twenty-first Amendment to counties and municipalities. Resolution of this question was crucial because local ordinances regulating the sale or consumption of alcohol would be entitled to a presumption of validity conferred by the Twenty-first Amendment if the state had delegated the authority. However, if the state had not delegated the authority, the ordinances would be subject to the stricter review applicable to exercises of the general police power. In 1985, the Florida Supreme Court answered this

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209. See, e.g., *International Eateries*, 941 F.2d at 1157.
211. See *International Eateries*, 941 F.2d at 1161; *T-Marc*, 804 F. Supp. at 1502; see also discussion supra Part II.C.2.c.
213. See id.
214. See id.
215. See id. at 1522.
216. 476 So. 2d 197 (Fla. 1985).
218. See *Krueger v. City of Pensacola*, 759 F.2d 851, 852 (11th Cir. 1985).
question by finding that the powers had been delegated. Since this time, local governments have used these delegated powers to restrict or forbid the sale of liquor at adult businesses.

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

"With the increase of Adult Entertainment Establishments came a public awareness that these type of businesses could have a direct effect on the quality of life in . . . neighborhoods due to the criminal activities associated with these adult businesses and the type of patrons that [they] attracted." Residents of communities located near some of these businesses have many reasons for disliking these establishments. One concern is with drivers who rush out of the parking lots of the businesses while children are nearby. Public hearings have overflowed with similar concerns about traffic, property devaluation, prostitution and other crimes. However, at the core of this concern is the fear of the kind of people a nude dance club attracts; usually undesirables, transient crowds, and unsavory elements.

A. Adverse Effects and Their Causes

Adult entertainment establishments foster criminal activities such as racketeering, arson, murder, narcotics, bookmaking, porno-

219. See Del Pero, 476 So. 2d at 201-04.
220. See Fillingim v. Boone, 835 F.2d 1389, 1399-1401 (11th Cir. 1988) (affirming the conviction of adult night club owner for violating an ordinance prohibiting nude or semi-nude entertainment in an establishment where alcoholic beverages were sold for consumption).
221. Tampa Transcript, supra note 1, at 15.
222. This effect is likely due to the customer’s effort to avoid being seen patronizing the business, usually because of the negative image associated with those who frequent adult entertainment establishments. See It’s Showtime, SEATTLE TIMES/SEATTLE POST-INTELLIGENCER, June 2, 1991, at 22 [hereinafter It’s Showtime].
223. These terms are generally used to negatively depict patrons and supporters of adult businesses. However, those who patronize adult establishments are often businessmen, married men, or others who would be considered upstanding members of the community. See It’s Showtime, supra note 222, at 22; see also Report of the Florida Supreme Court Gender Bias Study Commission, 42 F.L.A. L. REV. 803, 899 (1990).
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graphy, profit skimming, and loan sharking.\textsuperscript{224} Along with these activities, opponents of these establishments argue that the spread of HIV, increased prostitution, increased rape, and neighborhood deterioration are also adverse secondary effects attributed to adult businesses.\textsuperscript{225} Not only does a community have to deal with the increased crime brought by these businesses but also the impact on moral values. Signs erected on public streets and highway billboards intended to solicit patrons ultimately indicate to the community’s youth that the moral standard of the community is to depict women as tools for sexual gratification and fantasy fulfillment, rather than as friends, lovers, mothers, and equals.\textsuperscript{226}

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

\textsuperscript{225} See id. at 21-22.

\textsuperscript{226} “What this particular form of entertainment takes away from men, slowly, incrementally over time, probably unconsciously, is their capacity to appreciate the women in their ordinary lives. And perhaps it blunts even their ability to view women as equals.” See It’s Showtime, supra note 222, at 23.
1. The Spread of HIV

One of the adverse secondary effects attributed to the use and location of adult use businesses is the increased spread of HIV. Many local officials consider the rapid spread of HIV and AIDS in many cities throughout the country, its incurable and fatal nature, and its mode of transmission.\textsuperscript{227} During the 1980s, HIV infection emerged as a leading cause of death in the United States among young adults aged 25 to 44 years.\textsuperscript{228} By 1989, HIV infection had become the second leading cause of death in men and the sixth leading cause of death in women in this age group, accounting for 14% and 4% of deaths respectively.\textsuperscript{229} "[M]ost AIDS cases in men result from HIV transmission by homosexual contact, and high incidence rates of AIDS related to homosexual contact are widespread in many states across the country."\textsuperscript{230} Thus, preventing the spread of HIV has been cited as a reason for enacting ordinances to restrict or prohibit closed viewing booths in adult establishments that provide peep shows of nude dancers or coin-operated X-rated video viewing.\textsuperscript{251}

Many local governments have found that viewing booths in adult establishments have been or are being used by patrons as places to engage in sexual acts, particularly between males, including but not limited to intercourse, sodomy, oral copulation and masturbation, resulting in unsafe and unsanitary conditions.\textsuperscript{232}

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

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

\textsuperscript{229} See id.

\textsuperscript{230} Id.


\textsuperscript{232} See id. at 588 n.1 (citing DELAFIELD, WIS., CODE OF ORDINANCES § 11.14, which lists Milwaukee and Kenosha Counties, Wisconsin; Chattanooga, Tennessee; Newport News, Virginia; and Marion County, Indiana as localities that have found that adult establishments have been used by patrons for sexual acts); The Dayton city commission found that similar activity occurred at local adult establishments in Dayton, Ohio. See Ramon Corp. v. City of Dayton, 923 F.2d 470, 473 (6th Cir. 1990). Minneapolis, Minnesota
The viewing booths at these adult establishments are small closet-sized rooms that are divided from adjoining booths by plywood petitions. The plywood petitions have holes cut in them which permit the occupant of one booth to engage in sexual contact with the occupant of the adjoining booth, and consequently, the potential to spread HIV.233

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

has also passed a similar ordinance based on such findings. See Doe v. City of Minneapolis, 693 F.Supp. 774, 777 (Minn. 1988); Broward County, Florida has conducted an extensive sting operation to uncover these activities. See METROPOLITAN BUREAU OF INVESTIGATION, NINTH JUDICIAL CIRCUIT, AFFIDAVIT / PROSECUTIVE SUMMARY (Sept. 1, 1987) [hereinafter PROSECUTIVE SUMMARY] (stating that agents reported witnessing sexual intercourse, oral copulation, sodomy and fellatio) (on file with author).

233. See Memorandum from the Broward County Dep't of Strategic Planning and Growth Management to the Bd. of County Comm'rs (June 4, 1992) [hereinafter Broward County Memorandum] (on file with author).


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

236. See supra note 234 and accompanying text.


238. See PROSECUTIVE SUMMARY, supra note 232.
the local government's substantial interest in ensuring sanitary public places to retard the spread of sexually transmitted diseases, like AIDS. 239

Danny's New Adam & Eve Bookstore discussed the potential spread of HIV and AIDS in adult entertainment establishments that offer closed viewing booths. 240 A Pennsylvania state appeals court upheld a lower court decision closing down certain areas of two adult bookstores and video establishments that were found to be public nuisances because they threatened the spread of HIV. 241 The decision arose on a consolidated appeal by Danny's New Adam & Eve Bookstore and Book Bin East, which both sold sexually oriented video tapes, books, and magazines, as well as offered coin-operated video viewing booths. 242 Agents for the state testified that a number of the booths had holes between them that allowed patrons to have oral sex with persons in the adjacent booth. 243 A state agent also testified that in the "Couch Dancing" area of the Book Bin East, dancers offered to have sex with him for money. 244 In addition to this testimony, a patron of these establishments testified that he was infected with HIV and that he had engaged in intercourse in the establishments on several occasions. 245

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

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

In *LaRue*, the Court relied upon testimony by law enforcement agents and state investigators that prostitution occurring in and around strip clubs involved some of the female dancers employed at the clubs. The city also presented testimony that indecent exposure to young girls, attempted rape, rape, and assaults on police officers took place on or immediately adjacent to such premises. Numerous studies have been conducted in cities throughout the United States to determine the relationship between increased crime rates and decreasing property values, including Austin, Texas; Orange County, Florida; Dallas, Texas; Los Angeles, California; Tampa, Florida; and Palm Beach County, Florida. The reports describe the methodology and results of studies done between 1984 and 1985 in Los Angeles, California and Austin, Texas and are reasonably detailed. The Austin study compared rates of sex-related crimes and other crimes in four study areas, all of which contained one or two adult businesses, to the corresponding crime rates in control areas, which were said to be near the study areas and similar in land use characteristics, but without adult entertainment establishments. Generally the crime rates were found to be higher in areas containing adult establishments than in their corresponding control areas. Crime rates were higher for both sex-related and non-sex-related crimes.

249. See id. at 111.
250. See Broward County Memorandum, supra note 233; see also T-Marc, Inc. v. Pinellas County, 804 F. Supp. 1500, 1503 (M.D. Fla. 1992) (listing cities that have conducted studies of secondary effects of adult entertainment).
252. See id.
253. See id.
254. See id.; see also Borrego v. City of Louisville, 456 F. Supp. 30, 31 (W.D. Ky. 1978) (upholding an ordinance based on studies on increased crime and undesirable clientele
An independent report found that the number of adult businesses in the Hollywood area of Los Angeles increased from eleven in 1969 to eighty-eight in 1975, a 700% increase.\textsuperscript{255} During the same time period, reports of homicide, rape, and burglary\textsuperscript{256} increased 7.6% in Hollywood and 4.2% citywide, indicating a low rate in the increase of serious crime in both areas.\textsuperscript{257} The report notes that arrests for prostitution, drug offenses, gambling violations, and various misdemeanors\textsuperscript{258} increased dramatically to 45.4% in the Hollywood area compared to a modest increase citywide of 3.2%. Additionally, a New York City study shows that the most severe crime, prostitution, and urban blight occur when adult businesses concentrate in one particular area of a city.\textsuperscript{259} Although most of these studies show a correlation between the location of adult businesses and an increase in crime, the studies' reliability and accuracy have been questioned.\textsuperscript{260} However, surveys of police officers and comments of citizens at public hearings have consistently expressed the view that the presence of adult businesses have had a negative effect.\textsuperscript{261}

Two types of studies have been conducted to determine whether the presence of adult entertainment affects property values.\textsuperscript{262} The most common study approach has been to solicit the opinions of real estate appraisers, lenders, or property owners about the effect of adult businesses on nearby residential or commercial properties.\textsuperscript{263} Results of these surveys show that the majority of people surveyed would not buy a house or open a

\begin{itemize}
  \item \textsuperscript{255} See Fisher, supra note 251, at 10.
  \item \textsuperscript{256} See id. at 11.
  \item \textsuperscript{257} See id.
  \item \textsuperscript{258} See id.
  \item \textsuperscript{259} See Rachael Simon, Note, New York City's Restrictive Zoning of Adult Businesses: A Constitutional Analysis, 23 FORDHAM L. REV. 187, 205 (1995) (referring to this occurrence as the "combat zone effect").
  \item \textsuperscript{260} See Fisher, supra note 251, at 11.
  \item \textsuperscript{261} See id.; see also Simon, supra note 259, at 187, 190.
  \item \textsuperscript{262} See Fisher, supra note 251, at 15; see also Simon, supra note 259, at 206.
  \item \textsuperscript{263} See Fisher, supra note 251, at 15.
\end{itemize}
business near an adult business. Additionally, real estate professionals and residents generally agree that adult entertainment lowers property values “from moderate to substantial amounts.”

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

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

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

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

264. See id.
265. Id.
266. See id. at 16.
267. See id.
268. See id. at 15.
269. See Broward County Memorandum, supra note 253.
270. See EXECUTIVE SUMMARY, supra note 232 (reporting that agents witnessed sexual intercourse, oral copulation, sodomy and fellatio).
271. See Tampa Transcript, supra note 1, at 9, 21-22.
and crime, child molestation rates, and rape. However, following the Final Report of the Attorney General’s Commission on Pornography (Meese Commission Report), numerous researchers independently published contrary findings that no statistical data existed to support a relationship between violent or nonviolent sexually explicit material and rape, molestation, prostitution, and other crimes.

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

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

275. See Minutes of the Bd. of County Comm’rs, Broward County, Fla. 2-7 (July 13, 1993) (identifying 20 citizens who voiced opinions concerning adult entertainment establishments in their neighborhoods); see also It’s Showtime, supra note 222, at 22.
276. See It’s Showtime, supra note 222, at 22. See generally Tampa Transcript, supra note 1.
278. 15192 Thirteen Mile Rd., Inc. v. City of Warren, 626 F. Supp. 803, 825 (E.D. Mich. 1985); see also Genusa v. City of Peoria, 519 F.2d 1203, 1211 (7th Cir. 1980) (finding that “a city need not await deterioration in order to act”).
IV. Possible Solutions to Combat Secondary Effects

Communities have used different strategies to reduce the harmful effects resulting from the presence of adult entertainment. Many communities use zoning as a tool to rid their residential area of these harmful secondary effects. When zoning out the adult entertainment establishment is not a viable avenue, other alternatives may be considered, such as expanding the scope of prostitution statutes or narrowing the scope of materials protected by the First Amendment.

A. Is Zoning the Solution?

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

279. See discussion infra Part IV.A.
280. See discussion infra Part IV.B.1.
281. See discussion infra Part IV.B.2.
282. See MESEE COMM’N REPORT, supra note 273, at 390.
283. Id.
286. See Young v. American Mini Theatres, Inc., 427 U.S. 50, 52 (1976) (upholding a zoning ordinance that restricted the location of adult use businesses to prohibit the
municipalities concentrate adult establishments in industrial, light
industrial, or commercial zones using zoning ordinances.287

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

If a municipality chooses to borrow from other cities’
experiences in building its factual record, the statement of purpose
for the ordinance should clearly identify that a nexus exists
between adult uses and certain secondary effects, the particular

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

287. See City of Renton, 475 U.S. at 46, 52 (upholding a zoning ordinance that restricted
the location of the adult use businesses to industrial and commercial zones).
289. See City of Renton, 475 U.S. at 51-52.
290. See id.
291. See id.
292. See id. at 50-52. A municipality does not need to conduct new studies and build
an independent factual record “so long as whatever evidence the city relies upon is
reasonably believed to be relevant to the problem that the city addresses.” Id. at 51-52.
secondary effects of adult uses that the ordinance seeks to address, and a legislative finding that the ordinance in question addresses those secondary effects.293 In addition to a statement of purpose, the factual record should also contain, when feasible, factual findings that support the nexus between the secondary effects,294 and the method chosen to combat those secondary effects.295 This additional information allows a court to determine that the legislative body understood the secondary effects and made an intelligent determination that the ordinance was reasonably believed to be an effective method of combating the existing secondary effects.296

Conclusively, restrictive zoning of adult use establishments may help curtail adverse secondary effects that adult businesses bring into communities. However, the requirements of Renton297 must be considered to ensure that the constitutional rights of owners and patrons are not violated.

B. Alternative Methods of Solving the Problems of Secondary Effects

1. Expand the scope of prostitution statutes

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

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

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


297. The zoning ordinance must provide sufficient evidence of adverse secondary effects, the definitions must be narrowly tailored and a reasonably available alternative means of communication. See City of Renton, 475 U.S. at 52-54.
Prostitution is the criminal act of exchanging sex for money; an offense that is illegal in most states. The institution of prostitution allows males unconditional sexual access to females, limited only by their ability to pay. Various studies conducted on adult bookstores, peep shows, strip clubs, pornographic modeling studios, and lingerie modeling shops conclude that many of these establishments offer sex for money. Increased prostitution and littering in nearby neighborhoods are among the secondary effects attributable to these adult businesses and are the primary contributors to community complaints about these businesses.

One way to assuage the secondary effects of adult businesses would be to include pornographic filmmakers and owners of adult businesses under the scope of prostitution statutes, thus penalizing any activity in which sex is exchanged for money. Any owner, filmmaker, or photographer who does not encourage or assist in the exchange of sex for money would not fall within the scope of

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

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

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

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

302. See Tampa Transcript, supra note 1, at 21-22.
these proposed prostitution statutes. As seen in numerous states, many patrons engage in sexual activity or lewd acts in adult establishments.\textsuperscript{303} These establishments would be the primary target of expanded prostitution statutes. Decreasing the number of adult establishments that promote and foster sexual activity and lewd acts appears to be the ultimate goal of most local governments which enact restrictive zoning ordinances.\textsuperscript{304} In contrast, this alternative is not intended to dissolve all adult establishments but aims to decrease physical sexual actions.\textsuperscript{305} Thus, these improved statutes would merely exist to eliminate the sexual activity and lewd acts that occur at some adult establishments.

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

In California, some pornographers have been successfully prosecuted under prostitution statutes.\textsuperscript{306} However, the case of \textit{People v. Freeman}\textsuperscript{307} slowed such prosecution by overturning precedent which held to the contrary.\textsuperscript{308} The court found that

\textsuperscript{303} See discussion supra Part III.A.1.
\textsuperscript{304} See City of Renton v. Playtime Theatres, Inc., 475 U.S. at 41, 52-54 (1986).
\textsuperscript{305} See id.
\textsuperscript{307} 758 P.2d 1128 (Cal. 1988) (overturning conviction of an adult business owner charged with procuring another person for the purpose of prostitution).
\textsuperscript{308} See id. at 1133 n.6 ("To the extent that \textit{People v. Fixler}, People ex rel. \textit{Van de Kamp v. American Art Enterprises, Inc.}, and \textit{People v. Zeihm} hold that the payment of wages to an actor or model who performs a sexual act in filming or photographing for publication
paying actors and actresses to engage in "various sexually explicit acts, including sexual intercourse, oral copulation and sodomy" did not come under the statutory definition of prostitution. The court further stated that to constitute prostitution, "the money or other consideration must be paid for the purpose of sexual arousal or gratification..." The Freeman court found "no evidence that defendant paid the acting fees for the purpose of sexual arousal or gratification..."

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

2. Modify the application of Miller v. California

The Supreme Court has held that obscenity does not come under the umbrella of the First Amendment as protected speech or conduct. Although questions of the soundness of the Miller test have produced considerable debate, its practical result has been to constitutes prostitution regardless of the obscenity of the film or publication so as to support a prosecution for pandering... they are disapproved.

309. Id. at 1129, 1135.
310. Id. at 1131.
311. Id.
314. See id. at 845-46.
316. Id. at 313-16.
317. See supra note 98 and accompanying text.
narrowly define the category of materials subject to prohibition as those depicting "hard-core" sexual conduct. 318

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

Certain types of pornographic material showing acts of bestiality, 322 flagellation, 323 sadomasochism and extreme violence 324 do not pose much of a problem for courts when determining whether the material is obscene. However, other types of sexually explicit material have benefited from the protection of the First Amendment, such as dial-a-porn messages, 325 striptease acts, 326 and crudely drawn depictions of women. 327 Perhaps this gap is where the legal system fails to prevent secondary effects caused by adult businesses.

Because obscenity enforcement has never been sufficiently consistent to force pornography syndicates out of business or back underground, video dealers are misled into believing or at least acting as if they believe that hard-core adult business is legal. The

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319. See id. at 155.
320. See id. at 160.
321. See id. at 161.
324. See United States v. Schultz, 970 F.2d 960 (5th Cir. 1992).
326. See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581 (Souter, J., concurring); see also Miller v. Civil City of South Bend, 904 F.2d 1081, 1094 (7th Cir. 1990).
Meese Commission criticized both federal and local prosecutors for letting the problem get out of control and urged federal and local enforcement as the solution to the problem of hard-core pornography.\textsuperscript{328}

If United States attorneys and state and local prosecutors bring strong cases under present laws, perhaps the entire hard-core adult industry will be shown as regularly engaging in the illegal trafficking of obscenity. In a nation-wide survey of law enforcement efforts after \textit{Miller}, the study concluded that obscenity laws have only a minimal effect on the conduct of prosecutors and pornographers.\textsuperscript{329} More than half of the prosecutors surveyed said \textit{Miller} has not affected the odds of conviction, 29\% said \textit{Miller} has helped the prosecution, and 17\% reported it has helped defendants.\textsuperscript{330} The study found that the public had become more tolerant of pornographic material and concluded that this “liberalization of attitudes has in turn influenced prosecutors to handle only cases involving particularly hard core materials.”\textsuperscript{331}

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

\textsuperscript{328} See MEES耶 COMM’N REPORT, supra note 273, at 366-75.


\textsuperscript{330} See id. at 960.

\textsuperscript{331} Id. at 898.

\textsuperscript{332} Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).

analingsus, and masturbation, where penetration, manipulation, or ejaculation of the genitals is clearly visible.\textsuperscript{334}

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

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


\textsuperscript{335} See Taylor, supra note 334, at 278-79.

\textsuperscript{336} See id. at 281.


\textsuperscript{338} See Taylor, supra note 334, at 281.
consistent. In turn, this result would lessen secondary effects associated with adult entertainment establishments in a quite similar way as the alternative advocating the expansion of prostitution statutes.

C. Which Solution is Best?

The above solutions offer unique approaches to combating the secondary effects of adult establishments. Local restrictive zoning ordinances target the location, concentration, and general operations of adult establishments. The expansion of prostitution statutes targets the owners, filmmakers, and photographers who arrange and encourage the exchange of sex for money at their establishments. The modification of Miller would target the actual and depicted sexual acts in photographs and pornographic films. To combat the secondary effects of the adult establishments, one of these solutions should not be chosen over any other. However, if these solutions are utilized together, society will be armed with the proper ammunition to combat the adverse secondary effects of adult establishments. Since each solution offers a different method of attack to combat adverse secondary effects, these solutions should be used in conjunction with one another. Therefore, this Comment advocates that: (1) local governments continue to use zoning ordinances to prevent the effects of secondary effects; (2) state legislatures and local governments enact prostitution statutes that hold all parties involved in the transaction criminally liable; and (3) judiciary entities either modify the application of Miller or establish a per se definition of obscenity.

V. Conclusion

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

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

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