

CITY OF RANCHO CORDOVA



CONCURRENT MEETING CITY COUNCIL/SUCCESSOR AGENCY TO THE COMMUNITY REDEVELOPMENT AGENCY (CRA)/RANCHO CORDOVA FINANCING CORPORATION (RCFC)

City Hall
2729 Prospect Park Drive, Rancho Cordova

Monday, September 29, 2014

5:30 PM – Special Meeting
Community Board Room

AGENDA

1. SPECIAL MEETING - CALL TO ORDER/ROLL CALL

Council Members Budge, McGarvey, Sander, Terry and Mayor Skoglund.

2. PUBLIC COMMENT

At a special meeting, citizens wishing to address the Council for any matter on the agenda may do so at the time the matter is discussed. Note, under the provisions of the California Government Code, the City Council is prohibited from discussing or taking action on any item not on the agenda.

3. CLOSED SESSION

Council will meet in Closed Session to discuss the following item(s):

CONFERENCE WITH LEGAL COUNSEL--ANTICIPATED LITIGATION

Significant exposure to litigation pursuant to paragraph (2) of subdivision (d) of Section 54956.9: (Number of potential cases: 2).

4. OPEN SESSION - REPORT FROM CLOSED SESSION

The City Attorney will report on action taken in Closed Session.

5. SPECIAL MEETING ITEM

- 5.1 **Subject:** An Urgency Ordinance of the City Council of the City of Rancho Cordova Establishing a Temporary Moratorium on the Establishment and Operation of Establishments Serving Alcohol for On-Site Consumption within 500 Feet of Adult Businesses, to Become Effective Immediately.
- Recommendation:** Adopt Urgency Ordinance No. 25-2014 establishing a temporary moratorium on the establishment and operation of establishments serving alcohol for on-site consumption within 500 feet of adult businesses, pending the review and possible amendment of zoning regulations applicable to this type of establishment.
- Result of Recommended Action:** Adoption of this Ordinance will establish a forty-five (45) day temporary moratorium on the establishment, expansion or relocation of establishment and operation of establishments serving alcohol for on-site consumption within 500 feet of adult businesses. This moratorium is needed in order to: (1) address the community concerns regarding the negative secondary effects, such as assaults, prostitution and other alcohol related crimes resulting from the operation of establishments serving alcohol for on-site consumption in close proximity to adult businesses; (2) study the potential impacts that these types of businesses may have on the public health, safety and welfare; (3) study and determine what local regulations may be appropriate or necessary for establishments serving alcohol for on-site consumption within 500 feet of adult businesses; (4) study and determine the appropriate location for these types of businesses; and (5) determine appropriate measures to ensure the protection of public health, safety and welfare.
- Staff Report:** Paul Junker, Planning Director and Adam U. Lindgren, City Attorney.
- Advances Goals:** 1, 2.

6. ADJOURNMENT

ADDITIONAL INFORMATION

In compliance with the Americans with Disabilities Act, if you need a disability-related modification or accommodation, including auxiliary aids or services, to participate in this meeting, please contact the City Clerk's Office at (916) 851-8720 at least 48 hours prior to the meeting.

CERTIFICATION OF POSTING OF AGENDA

I, Mindy Cuppy, MMC, City Clerk for the City of Rancho Cordova, declare that the foregoing agenda for the Monday, September 29, 2014 Special Meeting of the Rancho Cordova City Council/Successor Agency to the CRA/RCFC was posted and available for review on Friday, September 26, 2014 at City Hall of the City of Rancho Cordova, 2729 Prospect Park Drive, Rancho Cordova, California, 95670. The agenda is also available on the city website at www.cityofranhocordova.org.

Signed Friday, September 26, 2014 at Rancho Cordova, California.


Mindy Cuppy, MMC, City Clerk

CITY OF RANCHO CORDOVA ORDINANCE NO. 25-2014

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF RANCHO CORDOVA ESTABLISHING A TEMPORARY MORATORIUM ON THE ESTABLISHMENT AND OPERATION OF ESTABLISHMENTS SERVING ALCOHOL FOR ON-SITE CONSUMPTION WITHIN 500 FEET OF ADULT BUSINESSES, TO BECOME EFFECTIVE IMMEDIATELY

THE CITY COUNCIL OF THE CITY OF RANCHO CORDOVA DOES ORDAIN AS FOLLOWS:

Section 1. Purpose and Declarations.

A. The Building Department of the City of Rancho Cordova recently received a commercial application for a building permit from an applicant wishing to operate a restaurant within the same commercial center as an existing adult business. The proposed restaurant would occupy a different suite in the same commercial center; and

B. The proposed establishment has not applied for a business license, therefore, the Planning Department has begun to conduct a plan check in order to inform the applicant whether this type of business is allowed in the proposed location. The Planning Department was informed that the business would serve alcohol for on-site consumption. The applicant has already applied for an "on-sale" license from the California Department of Alcoholic Beverage Control Board and the status of this license is pending; and

C. The Economic Development Department has also received inquiries from representatives from another existing adult business considering opening a restaurant or bar serving alcohol for on-site consumption in close proximity and also in the same building as another existing adult business; and

D. The Rancho Cordova Municipal Code is silent with regards to regulations on establishments serving alcohol for on-site consumption in close proximity to adult businesses; and

E. In order to address community concerns regarding the negative secondary effects, such as assaults, prostitution and other alcohol related crimes, resulting from the operation of establishments serving alcohol for on-site consumption in close proximity to adult businesses, it is necessary for the City to study the potential impact such establishments may have on the public health, safety and welfare; and

F. The California Department of Alcoholic Beverage Control ("ABC") adopted Administrative Rule 143.3, effective August 10, 1970, prohibits the sale of alcohol in establishments in which live fully nude dancers perform. (4 C.C.R. section 143.3); and

G. It is necessary that the City study the possible adoption of amendments to the City's Municipal Code and Zoning Code regarding establishments that serve alcohol for on-site consumption within 500 feet of adult businesses. Staff needs time to study whether to establish minimum requirements on the operation of these businesses; and

H. As demonstrated by the recitals herein and the evidence in the record for this urgency Ordinance, there is a threat to the public health, safety and welfare of the community if establishments serving alcohol for on-site consumption operate in close proximity to adult

businesses in the City without proper regulations in place. Absent the adoption of this interim urgency Ordinance, it is likely that the establishment and operation of establishments serving alcohol for on-site consumption in close proximity to adult businesses within the City, without appropriate controls in place to regulate the impacts on the community, will result in harmful effects to the businesses, employees of the adult businesses, property owners and residents of the City; and

I. Article XI, Section 7 of the California Constitution provides that a city may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general laws; and

J. California Government Code Section 65858, subdivision (a) provides: that city legislative bodies may, to protect public safety, health and welfare, adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body is considering or studying or intends to study within a reasonable time; that adoption of such urgency measures requires a four-fifths vote of the legislative body; that such measures shall be of no effect 45 days from the date of adoption, and may be extended a maximum of two times and have a maximum total duration of 2 years; and

K. California Government Code Section 65858, subdivision (c) provides: that legislative bodies may not adopt or extend such interim ordinances unless they contain findings that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional entitlements would result in that threat to the public health, safety or welfare; and

L. The City Council desires to (1) address concerns regarding the on-site consumption of alcohol in establishments in close proximity to adult businesses, (2) study the potential impacts that establishments serving alcohol for on-site consumption in close proximity to adult businesses may have on the public health, safety and welfare, (3) study and determine what local regulations may be appropriate or necessary for establishments serving alcohol for on-site consumption in close proximity to adult businesses, and (4) determine appropriate controls for protection of public health and welfare; and

M. In accordance with California Government Code Section 65858, subdivision (c), which provides that such interim ordinances that have the effect of denying approvals needed for the development of projects with a significant component of multifamily housing (as defined in California Government Code Section 65858, subdivisions (g) and (h)) may not be extended except upon written findings adopted by the legislative body as specified in the subdivision, the City Council hereby finds that the moratorium established pursuant to this Ordinance will not have the effect of denying approvals needed for the development of projects with a significant component of multi-family housing; and that, therefore, the findings specified in Section 65858, subdivision (c), need not be made; and

N. Staff shall commence steps to conduct a study of the potential impacts of establishments serving alcohol for on-site consumption in close proximity to adult businesses, and possible amendments to the City's Municipal Code and Zoning Code for clear, consistent and uniform regulations related to the establishment, location and operation of such businesses; and

O. Pursuant to Section 15001 of the California Environmental Quality Act (CEQA) Guidelines, this Ordinance is exempt from CEQA based on the following:

1. This Ordinance is not a project within the meaning of Section 15378 of the State CEQA Guidelines, because it has no potential for resulting in physical change in the environment, directly or ultimately.

2. This Ordinance is categorically exempt from CEQA under Section 15308 of the CEQA Guidelines as a regulatory action taken by the City pursuant to its police power and in accordance with Government Code Section 65858 to assure maintenance and protection of the environment pending the evaluation and adoption of contemplated local legislation, regulation and policies.

3. This Ordinance is not subject to CEQA under the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. For the reasons set forth in subparagraphs (1) and (2), above, it can be seen with certainty that there is no possibility that this Ordinance will have a significant effect on the environment.

Section 2. Moratorium Imposed.

A. Findings and Purpose.

This Ordinance is declared to be an interim ordinance as defined by California Government Code section 65858. This Ordinance is deemed necessary based on the evidence in the record for this Ordinance, the following findings of the City Council of the City of set forth in Section 1 of this Ordinance, and the additional information set forth below:

1. The purpose of this Ordinance is to protect the public safety, health and welfare from a current and immediate threat posed by the issuance of an applicable license or entitlement for establishments serving alcohol for on-site consumption within 500 feet of adult businesses and adult-related establishments. The City of Rancho Cordova does not currently have standards in the Municipal Code related to the location, operation and concentration of establishments serving alcohol for on-site consumption in close proximity to adult businesses within the City.

2. In 2003 and in 2005, the City adopted urgency ordinances regarding establishment of new sexually oriented businesses and the expansion of existing sexually oriented businesses pending the review and amendments of the City's zoning regulations applicable to such uses. The City referenced findings from the County of Sacramento, set forth in its Zoning Code, and to cases, studies and authorities involving other municipalities around the country clearly establishing that the existence of sexually oriented businesses in a community results in the creation of harmful secondary effects, such as increased crime and decreasing property values, which are a threat to the public safety, health and welfare. In adopting Chapter 4.34, "Adult-Related Establishments," of the City's Municipal Code, the City found that "[t]here has been a demonstrable relationship between high incidence of unlawful prostitution and drug-related crime, and the adult-related establishments regulated by this chapter. Such businesses operate as fronts for houses of prostitution and for illegal drug-related transactions." (Rancho Cordova Municipal Code section 4.34.000.) The records of those prior City and County ordinances are hereby incorporated by this reference.

3. The City Council reaffirms its findings related to the negative impacts that adult businesses can cause if not adequately regulated. The City Council acknowledges First Amendment Constitutional protections afforded to adult businesses. This moratorium is not intended to affect adult businesses, but rather to help reduce the negative impacts and secondary

effects caused by alcohol being sold and consumed on the premises of or in close proximity to adult businesses by preventing more businesses selling alcohol from establishing in close proximity to adult businesses.

4. The problem with alcohol and adult businesses is well documented by the California Department of Alcohol and Beverage Control (“ABC”). ABC adopted Administrative Rule 143.3, effective August 10, 1970, prohibiting the sale of alcohol in establishments in which live fully nude dancers perform, declaring that violations of this rule “are deemed contrary to public welfare and morals.” (4 C.C.R. section 143.3.)

5. ABC’s Administrative Rule 143.3 was upheld by the United States Supreme Court in *California v. La Rue*, 409 U.S. 109 (1972). ABC argued that rules, including Rule 143.3, “further a substantial governmental interest, such as protection of the public welfare and morals from ..., prostitution, narcotics and the protection of minors.” *La Rue vs. State of California*, 326 F. Supp. 348, 355 (C.D. Cal. 1971). ABC argued “that those problems are increased when alcohol and possible sexual stimulation are present within the same premises.” *La Rue*, 326 F. Supp. at 355. The Supreme Court’s decision noted that “[t]he Department’s conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one.” *La Rue*, 409 U.S. at 118.

6. Courts have affirmed the connection between nude and semi-nude entertainment, alcohol consumption, and criminal activity (see *Grand Faloan Tavern, Inc. v. Wiker*, 670 F.2d 943 (11th Cir. 1982)). The Court in *Ben’s Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003) noted that “[p]rohibiting alcohol on the premises of adult entertainment establishments will unquestionably reduce the enhanced secondary effects resulting from the explosive combination of alcohol consumption and nude or semi-nude dancing.”

7. Administrative Rule 143.3 and many courts have established the harm and effects of alcohol served in adult businesses, especially adult businesses such as those in Rancho Cordova, where live full nude dancers perform. Staff needs time to study whether the availability of alcohol for on-site consumption in close proximity to adult businesses also results in the similar negative impacts that ABC and the Courts have documented.

8. Issuing permits, business licenses or other applicable licenses or entitlements providing for the establishment and/or operation of establishments serving alcohol for on-site consumption within 500 feet of an adult business, prior to the completion of the City’s study of the potential impact of such facilities, poses a current and immediate threat to the public health, safety, and welfare including assaults, prostitution and other alcohol related crimes.

9. This urgency Ordinance would not regulate adult businesses and thus does not implicate First Amendment protections on expressive conduct. Rather, this urgency Ordinance will apply to businesses that sell and allow consumption of alcohol because of the particular secondary effects that alcohol consumption can cause.

10. In light of the potential impact of the sale of alcohol for on-site consumption in close proximity to adult businesses, it is necessary, in accordance with Government Code section 65858, to impose a moratorium on the issuance of entitlements for establishments serving alcohol for on-site consumption within 500 feet of adult businesses in the City to provide time for the City Council to further evaluate and consider possible adoption of legislation, guidelines and/or policies as required to avert the potential impacts of establishments serving alcohol for on-site consumption located within 500 feet of adult businesses and adult establishments. No decisions have been

made about whether or not additional requirements are necessary or about the content of any additional requirements that may be considered or adopted.

B. Scope.

In accordance with the authority granted the City of Rancho Cordova under Article XI, Section 7 of the California Constitution and California Government Code Section 65858, from and after the effective date of this Ordinance, no permit or any other applicable license or entitlement for use, including, but not limited to, the issuance of a business license, building permit, conditional use permit, or other land use approval, shall be approved or issued for the establishment or operation of any establishment serving alcohol for on-site consumption within 500 feet of an adult business in the City of Rancho Cordova.

C. Definitions.

1. For purposes of this Ordinance, “adult-related establishment” or “adult business” means any business or establishment which has live nude dancing and is subject to Section 143.3 of Title 4 of the California Code of Regulations. “Adult-related establishment” or “adult business” do not include an adult bookstore, adult motion picture theater, adult mini-motion picture theater, adult hotel or motel, or cabaret.

2. For purposes of this Ordinance, “alcohol served for on-site consumption” means the service of alcohol served for consumption at the establishment requiring an “on-sale” license from ABC.

Section 3. Establishment, Maintenance Or Operation Of Businesses Serving Alcohol For On-Site Consumption Within 500 Feet Of An Adult-Related Establish or Adult Business Are Declared To Be A Public Nuisance.

The establishment, maintenance or operation of businesses serving alcohol for on-site consumption within 500 feet of an adult business or adult-related establishment within the City limits of the City of Rancho Cordova is declared to be a public nuisance. Violations of this Ordinance may be enforced by any applicable laws or ordinances, including but not limited to injunctions, or administrative or criminal penalties under the Rancho Cordova Municipal Code.

Section 4. Severability.

If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this Ordinance are severable. The City Council of the City of Rancho Cordova hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

Section 5. Effective Date and Duration.

This Ordinance shall become effective immediately upon passage and adoption if passed and adopted by at least four-fifths vote of the City Council and shall be in effect for 45 days there from

unless extended by the City Council in accordance with California Government Code Section 65858.

Section 6. Penalties.

Any person who violates any section of this Ordinance shall be guilty of a misdemeanor and subject to a fine of up to one thousand dollars (\$1,000) and/or imprisonment in the county jail for up to a period of six (6) months.

PASSED AND ADOPTED by the City Council of the City of Rancho Cordova on the ____ day of _____, 2014, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Dan Skoglund, Mayor

ATTEST:

Mindy Cuppy, MMC, City Clerk

2336503.4

CITY OF RANCHO CORDOVA



EVIDENCE FOR RECORD

Urgency Ordinance No. 25-2014

Monday, September 29, 2014



BUILDING & SAFETY DIVISION
 2729 Prospect Park Drive | Rancho Cordova, CA 95670
 Phone: (916) 851-8760 | Fax: (916) 851-8762

COMMERCIAL APPLICATION FOR BUILDING PERMIT

OWNER / AGENT APPLICATION Inspection Scheduling Call: (916) 851-8766

A. Building Project Information:

PERMIT # 548449 APN: 07202600290000 Zoning: GMFCOA

Job Address: 3000 Sunrise Blvd Suite 6 Zip Code: 95742

Cross Street: White Rock Rd

Property Owner: Dick Nelson, Nelson Properties Address: 10933 Trade Center Dr Ste 106
Rancho Cordova, CA 95670

Phone: [REDACTED] Fax: [REDACTED] Email: [REDACTED]

Lessee / Tenant: Carlos Ocampo Business Name: South Beach Grill

Phone: [REDACTED] Fax: [REDACTED] Email: [REDACTED]

Licensed Design Professional (Arch. / Engr.): Tom Moran, Jr. License # HC 9956

Mailing Address: 424 Main Street

Phone: [REDACTED] Fax: [REDACTED] Email: [REDACTED]

B. Type of Permit: ☒ Building ☐ Mechanical ☐ Electrical ☐ Plumbing

C. Nature of Work:

☒ New Construction	☐ Addition	☐ Repair	☐ Foundation Only	☐ Re-Roof
☐ Alt. / Remodel	☐ Misc. Structural	☐ Demolition	☐ Partial Permit	☐ Other
☐ First Time T.I.	☐ Pool and/or Spa	☐ Change in Scope	☐ Misc. P, M, & E	

Scope of Work: We will be installing three new floor sinks, a new grease trap, a 250 lbs propane tank, installing new flooring, paint, new kitchen equipment, and replacing an electric water heater with propane. All lighting will remain existing, and
the new back porch

D. Commercial Project Information:

Occupancy: Rest # of Stories: 1 # of Units: 1 Type of Const.: Rest Sprinklers ☐ Yes ☒ No

Conditioned: ☒ Yes ☐ No Public Water: ☐ Yes ☒ No Existing Use: Restaurant Proposed Use: Restaurant

Sq. ft. Office: 1800 Retail: [REDACTED] Warehouse: [REDACTED] Other: [REDACTED]

Total construction valuation by contract, include any permanent equipment: \$50,000

E. Owner Builder Declaration: I hereby affirm under penalty of perjury that I am exempt from the Contractors' State License Law for the reason(s) indicated below by the checkmark(s) I have placed next to the applicable item(s) (Section 7031.5, Business and Professions Code: Any city or county that requires a permit to construct, alter, improve, demolish, or repair any structure, prior to its issuance, also requires the applicant for the permit to file a signed statement that he or she is licensed pursuant to the provisions of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code) or that he or she is exempt from licensure and the basis for the alleged exemption. Any violation of Section 7031.5 by any applicant for a permit subjects the applicant to a civil penalty of not more than five hundred dollars (\$500):

☒ I, as owner of the property, or my employees with wages as their sole compensation, will do ☒ all of or ☐ portions of the work, and the structure is not intended or offered for sale (Section 7044, Business and Professions Code: The Contractors'



BUILDING & SAFETY DIVISION
 2729 Prospect Park Drive | Rancho Cordova, CA 95670
 Phone: (916) 851-8760 | Fax: (916) 851-8762

ACCESS COMPLIANCE FOR EXISTING NON-RESIDENTIAL BUILDINGS

PERMIT # 548449

This form has been designed to help you understand your financial obligation for accessibility features that must be installed, or upgraded, for your project to be approved and code compliant, as per 2013 California Building Code (CBC) Chapter 11B.

Step One:

As required by Chapter 1134B.2.1 Exception 1, please list any alterations to the project space, along with construction valuation, for the previous three (3) years:

Project Date	Project Valuation (\$)
N/A	N/A
N/A	N/A
N/A	N/A

Step Two:

Add the total of the project valuations from Step One, with your project valuation for the currently proposed application:

(1) Total of the Project Valuations from Step One	(2) Construction Valuation of Current Project	(3) Total Valuation for determining % cost for Accessible Features
0	\$40,000	\$40,000

The current Construction Valuation Threshold, as determined by the California Department of General Services, Division of the State Architect (DSA) is \$143,303.00 (as of January 2014).

- If the Total Valuation in Step Two, #3 above, exceeds the current Construction Valuation Threshold, then complete Step Three.
- If the Total Valuation in Step Two, #3 above, does not exceed the current Construction Valuation Threshold, then skip to Step Four.
- If the area being altered is one of the following, regardless of the Total Valuation in Step Two, #3 above, then skip to Step Five:
 - a. Office buildings and passenger vehicle service stations of three stories or more and 3,000 or more square feet (279 m²) per floor.
 - b. Offices of physicians and surgeons.
 - c. Shopping centers.
 - d. Other buildings and facilities three stories or more and 3,000 or more square feet per floor if a reasonable portion of services sought and used by the public is available on the accessible level.

Step Three:

☐ I understand that the existing route-of-travel **must be brought to full compliance with the current California Building Code. (2013 CBC 1134B.2.1).**

Step Four:

☒ I understand that **20% of the Total Cost of Construction (Step Two, #3) must be spent on upgrading the accessible route-of-travel (as defined by CBC 1102B), and, when possible, parking, storage and alarms.**

\$ 40000 x .20 = 20% Obligation \$ 8000
Total Cost (Step Two, #3):

If the cost of the accessible route-of-travel **exceeds** 20% of the construction valuation of the *actual project without these features*, the owner may apply in writing for a Determination of Unreasonable Hardship. A Determination of Reasonable Hardship must be approved by the Building Official. (2013 CBC 1134B.2.1, Exception1).

A signed contract showing costs associated with construction, and accessible features must be provided with the written request for a Determination of Unreasonable Hardship.

If a signed contract cannot be provided, a detailed accounting of the costs associated with the construction and accessible features required to be installed can be listed in the attached table (see section "Cost Breakdowns" on page 5), or separately in writing.

Step Five:

In alteration projects involving buildings and facilities previously approved and built without elevators, areas above and below the ground floor are subject to the **20% disproportionality provisions described in Step Four**, above, *even if the value of the project exceeds the Construction Valuation Threshold as described in Step Two. (2013 CBC 1134B.2.1, Exception 2).*

☒ I understand that **20% of the Total Cost of Construction (Step Two, #3) must be spent on upgrading the accessible route-of-travel (as defined by CBC 1102B), and, when possible, parking, storage and alarms.**

Cost of Construction *without* accessible features as required: \$ 40,000

Cost of Upgrading Accessible Route-of-Travel as required by Chapter 11B: _____

Total Construction Valuation (should equal Step Two, #3, on page 2): \$ 40,000

\$ 40,000 x .20 = 20% Obligation \$ 8,000
Total Cost (Step Two, #3):

If the cost of the accessible route-of-travel **exceeds** 20% of the *actual project without these features*, the owner may apply in writing for a Determination of Unreasonable Hardship. A Determination of Reasonable Hardship must be approved by the Building Official. (2013 CBC 1134B.2.1, Exception1).

Cost Breakdowns:

Check One:

☒ **Full Compliance with Chapter 11B (Step Four);** if this option is checked, skip to the end of the form. All required accessible features to achieve full compliance with Chapter 11B shall be shown on submitted plan sets.

OR

☐ Using the Information in Step Five, show in the following table (or in a separate document) how the 20% cost obligation for accessible features will be broken down. Priority should be given to those elements that will provide the greatest access in the following order:

1. An accessible entrance
2. An accessible route to the altered area
3. At least one accessible restroom for each sex
4. Accessible telephones
5. Accessible drinking fountains
6. When possible, additional accessible elements such as parking, storage and alarms.

1. Accessible Entrance		
Entrance		
Items	Compliance Method	Cost
A. Change of Door		
B. Threshold		
C. Hardware		
D. Kick-Plate		
E. Strike-side Clearance		
F. Other		
Subtotal:		
Signs and Identification		
Items	Compliance Method	Cost
G. Sign at Bldg Entrance		
H. Sign in Bldg Lobby		
I. Other		
Subtotal:		
2. Accessible Route to the Altered Area		
Change of Elevation (s)		
Items	Compliance Method	Cost
A. Ramps		
B. Lifts		
C. Elevators		
D. Others		
Subtotal:		
Doors		
Items	Compliance Method	Cost
E. Change of Door		
F. Threshold		
G. Hardware		
H. Kick Plate		
I. Strike-side Clearance		
J. Signs & Ident. (Braille)		
K. Other		
Subtotal:		
3. One Accessible Restroom for Each Sex		
Items	Compliance Method	Cost
A. Enlarge Restroom		
B. Enlarge Door (s)		
C. Strike-side Clearance		

D. Door Symbols		
E. Signs & Ident. (Braille)		
F. Replacement or Relocation of Fixture (Specify)		
1.		
2.		
3.		
4.		
G. Replacement or Relocation of Accessories (Specify)		
1.		
2.		
3.		
4.		
H. Grab Bars		
I. Other		
		Subtotal:
4. Accessible Telephones		
Items	Compliance Method	Cost
A.		
B.		
		Subtotal:
5. Accessible Drinking Fountains		
Items	Compliance Method	Cost
A. (N) high/low fountain		
B. Alcove		
C. Wing Wall		
D. Other		
		Subtotal:
6. Additional Accessible Elements such as Parking, Storage and Alarms		
Items	Compliance Method	Cost
A. Overlay stall – re-pitch max. 2% slope		
B. Re-stripe		
C. Signage		
D. Curb Ramp		
E. Alarms		
F. Access to Storage		
G. Other		
		Subtotal:

I certify, under penalty of perjury that the information given in the above document, or any attached documents, is true and accurate, and I agree to comply with the information and directions given in the above document.

Applicant Type: ☐ Owner ☒ Lessee / Tenant

Signature: P. Campo

Date: 8/27/14

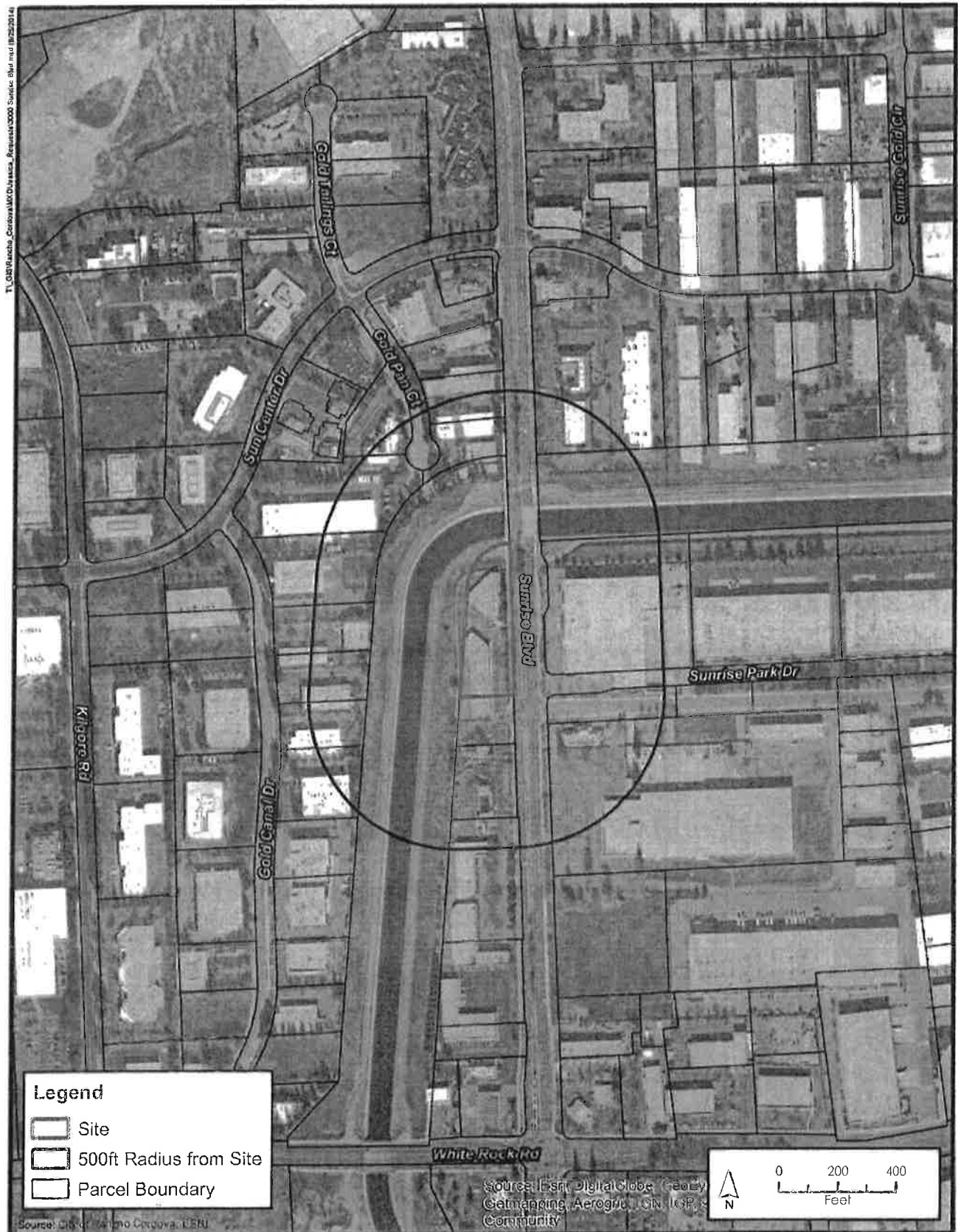


**California Department of Alcoholic
Beverage Control**
*License Query System Summary
as of 9/28/2014*

License Information
License Number: 546376
Primary Owner: SOUTH BEACH ENTERPRISE LLC
ABC Office of Application: 23 - SACRAMENTO
Business Name
Doing Business As: SOUTH BEACH GRILL
Business Address
Address: 3000 SUNRISE BLVD STE 6 Census Tract: 0090.03
City: RANCHO CORDOVA County: SACRAMENTO
State: CA Zip Code: 95742
Licensee Information
Licensee: SOUTH BEACH ENTERPRISE LLC
Company Information
Officer: OCAMPO, CARLOS SANCHEZ (MANAGING MEMBER)
License Types
1) License Type: 41 - ON-SALE BEER AND WINE - EATING PLACE
License Type Status: PENDING
Status Date: 20-JUN-2014 Term: 12 Month(s)
Original Issue Date: Expiration Date:
Master: Y Duplicate: 0 Fee Code: P40
License Type was Transferred On: FROM:
Current Disciplinary Action
<i>... No Active Disciplinary Action found ...</i>
Disciplinary History
<i>... No Disciplinary History found ...</i>
Hold Information
Hold Date: 22-AUG-2014 Type: UNDER CONSTRUCTION (SECT. 24044)
Escrow
<i>... No Escrow found ...</i>

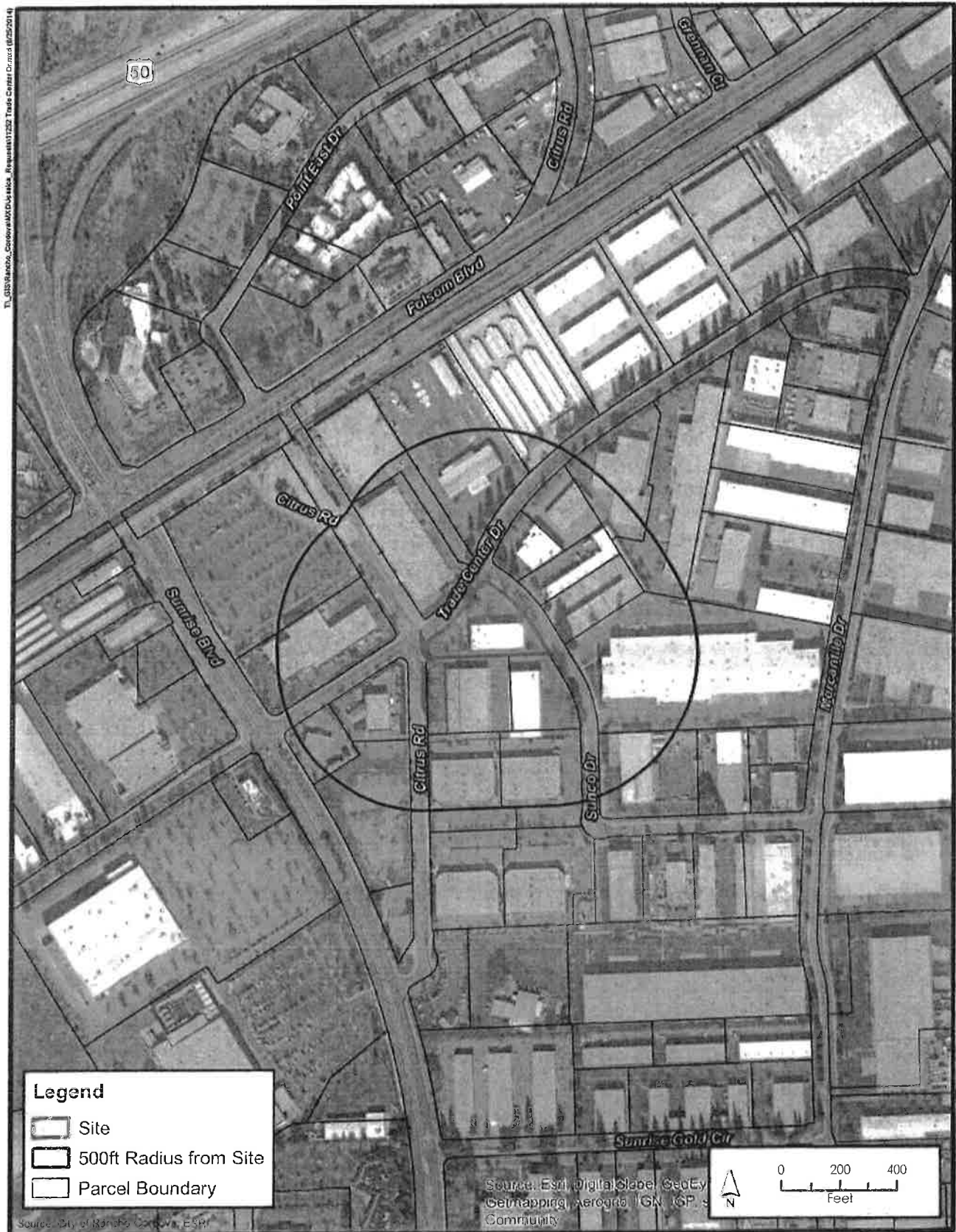
- - - End of Report - - -

For a definition of codes, view our [glossary](#).



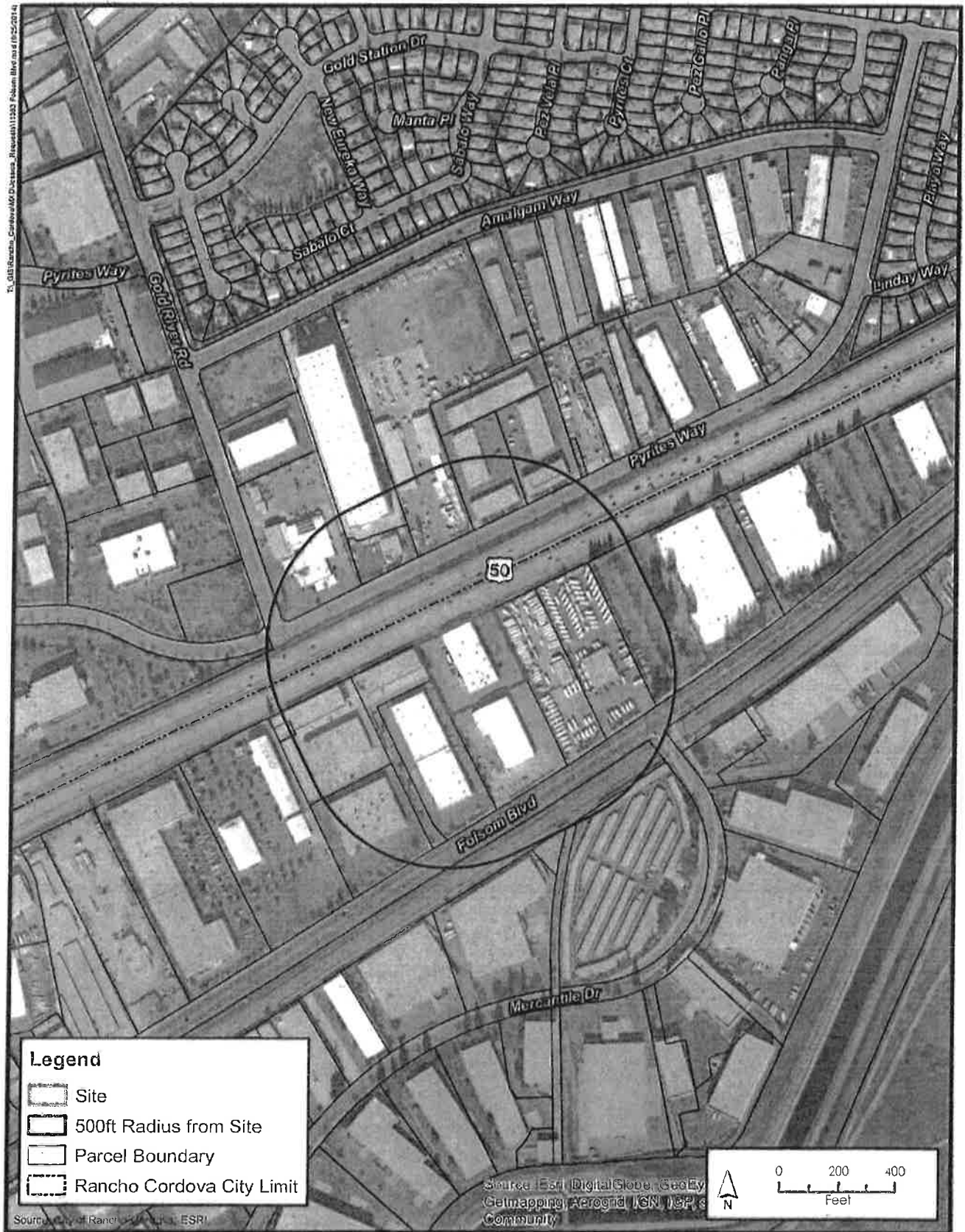
City of Rancho Cordova
Planning Department

3000 Sunrise Blvd



City of Rancho Cordova
Planning Department

11252 Trade Center Dr



City of Rancho Cordova
Planning Department

11363 Folsom Blvd

	Date_Time	Initial	type of case	Case_Cl	case class detail	Address	How_Rcvd	
1	9/18/2012 0:47	415	DISTURBANCE - SPECIFY TYPE	D	Disturbance	11252 TRADE CENTER T		
2	12/1/2012 4:14	415	DISTURBANCE - SPECIFY TYPE	D	Disturbance	11252 TRADE CENTER T		
3	12/4/2012 2:11	211JO	Robbery within 15 mins/no medical	P	Crime Against Person	11252 TRADE CENTER T		
4	12/4/2012 2:58	CS13	CSI request level 3	L	Miscellaneous Service	11252 TRADE CENTER T		
5	12/4/2012 18:23	925	SUSPICIOUS SUBJECT(S)	S	Suspicious Circumstan	11252 TRADE CENTER T		
6	2/23/2013 2:31	952	Incomplete phone call	S	Suspicious Circumstan	11252 TRADE CENTER T		
7	3/12/2013 1:07	415	DISTURBANCE - SPECIFY TYPE	D	Disturbance	11252 TRADE CENTER 9		
8	3/23/2013 1:32	10851	Stolen vehicle	R	Crime Against Property	11252 TRADE CENTER 9		
9	4/20/2013 3:28	952	Incomplete phone call	S	Suspicious Circumstan	11252 TRADE CENTER 9		
10	6/17/2013 8:45	459A	Burglary alarm,audible	A	Alarm	11252 TRADE CENTER A		
11	8/1/2013 3:12	242JO	Assault/battery within 15 mins/no	P	Crime Against Person	11252 TRADE CENTER T		Employee drunk, no indication of where alcohol came from
12	10/20/2013 4:29	594JO	Vandalism within 15 mins	R	Crime Against Property	11252 TRADE CENTER 9		
13	10/20/2013 4:29	459V	Burglary report vehicle	R	Crime Against Property	11252 TRADE CENTER 9		
14	12/4/2013 0:57	415	DISTURBANCE - SPECIFY TYPE	D	Disturbance	11252 TRADE CENTER 9		
15	1/11/2014 4:18	242R	Assault/battery report	P	Crime Against Person	11252 TRADE CENTER T		Victim drunk
16	1/19/2014 0:43	952	Incomplete phone call	S	Suspicious Circumstan	11252 TRADE CENTER 9		
17	1/21/2014 0:21	415	DISTURBANCE - SPECIFY TYPE	D	Disturbance	11252 TRADE CENTER T		
18	3/22/2014 3:32	940A	Meet the citizen	O	Other	11252 TRADE CENTER 9		came to business drunk?
19	4/19/2014 3:04	415C	Disturbance customer	D	Disturbance	11252 TRADE CENTER V		drunk customers causing problems
20	6/26/2014 2:11	415	DISTURBANCE - SPECIFY TYPE	D	Disturbance	11252 TRADE CENTER 9		

	Date_Time	Initial	type of case	Case	case class detail	Address
1	10/15/2012 15:07	211S	ROBBERY ALARM - SILENT	A	Alarm	3000 SUNRISE BLVD [PURE GOLD ENTERPRISE
2	2/24/2013 7:13	459S	BURGLARY ALARM - SILENT	A	Alarm	3000 SUNRISE BLVD[PURE GOLD ENT.
3	2/24/2013 7:33	459A	BURGLARY ALARM - AUDIBLE	A	Alarm	3000 SUNRISE BLVD
4	3/5/2013 23:39	925	SUSPICIOUS SUBJECT(S)	S	Suspicious Circumstances	3000 SUNRISE BLVD [PURE GOLD -ADULT STORE
5	3/8/2013 5:43	459A	BURGLARY ALARM - AUDIBLE	A	Alarm	3000 SUNRISE BLVD
6	4/22/2013 7:52	459A	BURGLARY ALARM - AUDIBLE	A	Alarm	3000 SUNRISE BLVD
7	5/29/2013 7:00	920A	MISSING PERSON - AGE 18 AND OVER	P	Crime Against Person	3000 SUNRISE BLVD [PURE GOLD SHOWGIRLS
8	5/31/2013 9:36	459A	BURGLARY ALARM - AUDIBLE	A	Alarm	3000 SUNRISE BLVD[PURE GOLD VIDEO BUSN
9	8/30/2013 8:01	459A	BURGLARY ALARM - AUDIBLE	A	Alarm	3000 SUNRISE BLVD
10	9/7/2013 1:51	245R	ASSAULT W/DEADLY WEAPON REPORT	P	Crime Against Person	3000 SUNRISE BLVD[Drinking outside of club
11	9/14/2013 8:18	459A	BURGLARY ALARM - AUDIBLE	A	Alarm	3000 SUNRISE BLVD
12	9/17/2013 14:37	REPT	REPORT - SPECIFY TYPE OR CODE	O	Other	3000 SUNRISE BLVD
13	9/19/2013 15:17	ATCO	ATTEMPT CONTACT	O	Other	3000 SUNRISE BLVD
14	11/1/2013 4:46	459A	BURGLARY ALARM - AUDIBLE	A	Alarm	3000 SUNRISE BLVD
15	4/9/2014 20:26	23152	DRIVING WHILE INTOXICATED	T	Traffic Accident/Problem	3000 SUNRISE BLVD
16	5/27/2014 4:07	459A	BURGLARY ALARM - AUDIBLE	A	Alarm	3000 SUNRISE BLVD
17	6/1/2014 9:20	459A	BURGLARY ALARM - AUDIBLE	A	Alarm	3000 SUNRISE BLVD
18	6/20/2014 21:15	927	SUSPICIOUS CIRCUMSTANCES	S	Suspicious Circumstances	3000 SUNRISE BLVD[PURE GOLD SHOWGIRLS

Date_Time	Initial	Type of case	Case case class detail	Address
1 10/4/2012 17:14	23152	DRIVING WHILE INTOXICATED	T Traffic Accident/Pro	11363 FOLSOM BLVD
2 10/28/2012 2:34	415	DISTURBANCE - SPECIFY TYPE	D Disturbance	11363 FOLSOM BLVD[GOLD CLUB CENT
3 1/14/2013 14:48	WELCK	Welfare check - specify type and nature	L Misc Service	11363 FOLSOM BLVD[CENTERFOLDS
4 3/17/2013 20:55	INFO	General information	O Other	11363 FOLSOM BLVD
5 5/31/2013 13:35	POP	Pop project	O Other	11363 FOLSOM BLVD
6 6/3/2013 10:28	INFO	General information	O Other	11363 FOLSOM BLVD
7 11/24/2013 1:58	20002	Hit/run misdemeanor	P Crime Against Perso	11363 FOLSOM BLVD [GOLD CLUB
8 11/30/2013 0:22	952	Incomplete phone call	S Suspicious Circumsta	11363 FOLSOM BLVD[CENTERFOLDS
9 11/30/2013 0:22	415	DISTURBANCE - SPECIFY TYPE	D Disturbance	11363 FOLSOM BLVD [CENTERFOLDS
10 11/30/2013 4:14	415C	Disturbance customer	D Disturbance	11363 FOLSOM BLVD
11 4/25/2014 2:15	417JO	Threats with gun within 15 mins	P Crime Against Perso	11363 FOLSOM BLVD[CENTERFOLDS
12 7/8/2014 22:49	TOW	Request for tow	P Crime Against Perso	11363 FOLSOM BLVD
13 7/28/2014 3:13	WELCK	Welfare check - specify type and nature	L Misc Service	11363 FOLSOM Blvd left in taxi

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Supreme Court of the United States

CALIFORNIA et al., Appellants,

v.

Robert LaRUE et al.

No. 71—36. | Argued Oct. 10,
1972. | Decided Dec. 5, 1972.
| Rehearing Denied Feb. 20, 1973.

See 410 U.S. 948, 93 S.Ct. 1351.

Actions were brought by various holders of California liquor licenses and dancers at licensed premises challenging constitutionality of state-wide rules adopted by Department of Alcoholic Beverage Control prohibiting explicitly sexual live entertainment and films and bars and other establishments licensed to dispense liquor by the drink. The United States District Court for the Central District of California, sitting as three-judge court, held certain of the regulations invalid, 326 F.Supp. 348, and the state appealed. The Supreme Court, Mr. Justice Rehnquist, held that in context, not of censoring dramatic performances in theater, but of licensing bars and nightclubs to sell liquor by the drink, California Department of Alcoholic Beverage Control had broad latitude under Twenty-first Amendment to control the manner and circumstances under which liquor might be dispensed, and conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor unreasonable.

Reversed.

Mr. Justice Stewart concurred and filed opinion.

Mr. Justice Douglas dissented and filed opinion.

Mr. Justice Brennan dissented and filed opinion.

Mr. Justice Marshall dissented and filed opinion.

**392 *109 Syllabus *

Following hearings, the California Department of Alcoholic Beverage Control issued regulations prohibiting explicitly sexual live entertainment and films in bars and other

establishments licensed to dispense liquor by the drink. A three-judge District Court held the regulations invalid under the First and Fourteenth Amendments, concluding that under standards laid down by this Court some of the prescribed entertainment could not be classified as obscene or lacking a communicative element. Held: In the context, not of censoring dramatic performances in a theater, but of licensing bars and nightclubs to sell liquor by the drink, the States have broad latitude under the Twenty-first Amendment to control the manner and circumstances under which liquor may be dispensed, and here the conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor was the prophylactic solution unreasonable. Pp. 394—397.

326 F.Supp. 348, reversed.

Attorneys and Law Firms

**393 L. Stephen Porter, San Francisco, Cal., for appellants.

Harrison W. Hertzberg, Los Angeles, Cal., and Kenneth Philip Scholtz, Gardena, Cal., for appellees.

Opinion

*110 Mr. Justice REHNQUIST delivered the opinion of the Court.

[1] Appellant Kirby is the director of the Department of Alcoholic Beverage Control, an administrative agency vested by the California Constitution with primary authority for the licensing of the sale of alcoholic beverages in that State, and with the authority to suspend or revoke any such license if it determines that its continuation would be contrary to public welfare or morals. Art. XX, s 22, California Constitution. Appellees include holders of various liquor licenses issued by appellant, and dancers at premises operated by such licensees. In 1970 the Department promulgated rules regulating the type of entertainment that might be presented in bars and nightclubs that it licensed. Appellees then brought this action in the United States District Court for the Central District of California under the provisions of 28 U.S.C. ss 1331, 1343, 2201, 2202, and 42 U.S.C. s 1983. A three-judge court was convened in accordance with 28 U.S.C. ss 2281 and 2284, and the majority of that court held that substantial portions of the regulations conflicted with the First and Fourteenth Amendments to the United States Constitution.¹

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Concerned with the progression in a few years' time from 'topless' dancers to 'bottomless' dancers and other forms of 'live entertainment' in bars and nightclubs that it licensed, the Department heard a number of witnesses on the subject at public hearings held prior to the promulgation of the rules. The majority opinion *111 of the District Court described the testimony in these words:

'Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers. . . .' 326 F.Supp. 348, 352.

References to the transcript of the hearings submitted by the Department to the District Court indicated that in licensed establishments where 'topless' and 'bottomless' dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging 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 in order 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 were reported to have occurred.

Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.

At the conclusion of the evidence, the Department promulgated the regulations here challenged, imposing standards as to the type of entertainment that could be presented in bars and nightclubs that it licensed. Those portions of the regulations found to be unconstitutional by the majority of the District Court prohibited the following kinds of conduct on licensed premises:

(a) The performance of acts, or simulated acts, of 'sexual intercourse, **394 masturbation, sodomy, *112 bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law';

(b) The actual or simulated 'touching, caressing or fondling on the breast, buttocks, anus or genitals';

(c) The actual or simulated 'displaying of the public hair, anus, vulva or genitals';

(d) The permitting by a licensee of 'any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus'; and, by a companion section,

(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above. Rules 143.3 and 143.4.²

[2] [3] Shortly before the effective date of the Department's regulations appellees unsuccessfully sought discretionary review of them in both the State Court of Appeal and the Supreme Court of California. The Department then joined with appellees in requesting the three-judge District Court to decide the merits of appellees' claims that the regulations were invalid under the Federal Constitution.³

*113 The District Court majority upheld the appellees' claim that the regulations in question unconstitutionally abridged the freedom of expression guaranteed to them by the First and Fourteenth Amendments to the United States Constitution. It reasoned that the state regulations had to be justified either as a prohibition of obscenity in accordance with the Roth line of decisions in this Court (**395 Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), or else as a regulation of 'conduct' having a communicative element in it under the standards *114 laid down by this Court in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Concluding that the regulations would bar some entertainment that could not be called obscene under the Roth line of cases, and that the governmental interest being furthered by the regulations did not meet the tests laid down in O'Brien, the court enjoined the enforcement of the regulations. 326 F.Supp. 348. We noted probable jurisdiction. 404 U.S. 999, 92 S.Ct. 559, 30 L.Ed.2d 551.

The state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink. In Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 41, 86 S.Ct. 1254, 1259, 16 L.Ed.2d 336 (1966), this Court said:

'Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation

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or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

[4] While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, 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. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330, 84 S.Ct. 1293, 1297, 12 L.Ed.2d 350 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment ‘a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.’ Still *115 earlier, the Court stated in *State Board v. Young's Market Co.*, 299 U.S. 59, 64, 57 S.Ct. 77, 79, 81 L.Ed. 38 (1936):

‘A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth.’

These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations. In *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), the fundamental notice and hearing requirement of the Due Process Clause of the Fourteenth Amendment was held applicable to Wisconsin's statute providing for the public posting of names of persons who had engaged in excessive drinking. But the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment:

‘Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.’ *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, *supra*, at 332, 84 S.Ct., at 1298.

[5] A common element in the regulations struck down by the District Court appears to be the Department's conclusion that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place in bars and cocktail lounges for which it has licensing responsibility. Based on the

evidence from the hearings that it cited to the District Court, and mindful of the principle that in legislative rulemaking the agency may reason from the particular to the general, *Assigned Car Cases*, 274 U.S. 564, 583, 47 S.Ct. 727, 733—734, 71 L.Ed. 1204 (1927), we do *116 not think it can be said **396 that the Department's conclusion in this respect was an irrational one.

[6] [7] [8] Appellees insist that the same results could have been accomplished by requiring that patrons already well on the way to intoxication be excluded from the licensed premises. But wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment. *Joseph E. Seagram & Sons v. Hostetter*, *supra*, 384 U.S. at 48, 86 S.Ct. at 1262. Nothing in the record before us or in common experience compels the conclusion that either self-discipline on the part of the customer or self-regulation on the part of the bartender could have been relied upon by the Department to secure compliance with such an alternative plan of regulation. The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one under the holdings of our prior cases. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487—488, 75 S.Ct. 461, 464—465, 99 L.Ed. 563 (1955).

[9] We do not disagree with the District Court's determination that these regulations on their face would proscribe some forms of visual presentation that would not be found obscene under *Roth* and subsequent decisions of this Court. See, e.g., *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352 (1958), *rev'd per curiam*, 101 U.S.App.D.C. 358, 249 F.2d 114 (1957). But we do not believe that the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in *O'Brien*, *supra*.

Our prior cases have held that both motion pictures and theatrical productions are within the protection of *117 the First and Fourteenth Amendments. In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), it was held that motion pictures are ‘included within the free speech and free press guaranty of the First and Fourteenth Amendments,’ though not ‘necessarily subject to the precise rules governing any other particular method of expression.’

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Id., at 502—503, 72 S.Ct., at 781. In *Schacht v. United States*, 398 U.S. 58, 63, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970), the Court said with respect to theatrical productions:

‘An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance.’

[10] [11] [12] But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of ‘conduct’ or ‘action,’ *Hughes v. Superior Court*, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949).⁴ In *O’Brien*, *supra*, the Court suggested that the extent to which ‘conduct’ was protected **397 by the First Amendment depended on the presence of a ‘communicative element,’ and stated:

‘We cannot accept the view that an apparently *118 limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express in idea.’ 391 U.S., at 376, 88 S.Ct., at 1678.

The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, ‘performances’ that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

Viewed in this light, we conceive the State’s authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought

to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

[13] The Department’s conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first *119 Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.⁵

The contrary holding of the District Court is therefore reversed.

Reversed.

Mr. Justice STEWART, concurring.

A State has broad power under the Twenty-first Amendment to specify the times, places, and circumstances where liquor may be dispensed within its borders. *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330, 84 S.Ct. 1293, 1297, 12 L.Ed.2d 350; *Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 344, 346, 84 S.Ct. 1247, 1249, 1250, 12 L.Ed.2d 362; *California v. Washington*, 358 U.S. 64, 79 S.Ct. 116, 3 L.Ed.2d 106; *Ziffirin, Inc. v. Reeves*, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128; *Mahoney v. Joseph Triner, Corp.*, 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424; *State Board of Equalization v. Young’s Market Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38. I should suppose, therefore, that nobody would question the power of California to prevent the sale of liquor by the drink in places where food is not served, or where dancing is permitted, or where gasoline is sold. But here California has provided that liquor by the drink shall not be sold in places where certain grossly sexual exhibitions are performed; and that action by the State, say the appellees, violates **398 the First and Fourteenth Amendments. I cannot agree.

Every State is prohibited by these same Amendments from invading the freedom of the press and from impinging *120 upon the free exercise of religion. But does this mean that a State cannot provide that liquor shall not be sold in bookstores, or within 200 feet of a church? I think not. For the State would not thereby be interfering with the First Amendment activities of the church or the First Amendment business of the bookstore. It would simply be controlling the

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distribution of liquor, as it has every right to do under the Twenty-first Amendment. On the same premise, I cannot see how the liquor regulations now before us can be held, on their face, to violate the First and Fourteenth Amendments. *

It is upon this constitutional understanding that I join the opinion and judgment of the Court.

Mr. Justice DOUGLAS, dissenting.

This is an action for a declaratory judgment, challenging Rules and Regulations of the Department of Alcoholic Beverage Control of California. It is a challenge of the constitutionality of the rules on their face; no application of the rules has in fact been made to appellees by the institution of either civil or criminal proceedings. While the case meets the requirements of 'case or controversy' within the meaning of Art. III of the Constitution and therefore complies with *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, the case does not mark the precise impact of these rules against licensees who sell alcoholic beverages in California. The opinion *121 of the Court can, therefore, only deal with the rules in the abstract.

The line which the Court draws between 'expression' and 'conduct' is generally accurate; and it also accurately describes in general the reach of the police power of a State when 'expression' and 'conduct' are closely brigaded. But we still do not know how broadly or how narrowly these rules will be applied.

It is conceivable that a licensee might produce in a garden served by him a play—shakespearean perhaps or one in a more modern setting—in which, for example, 'fondling' in the sense of the rules appears. I cannot imagine that any such performance could constitutionally be punished or restrained, even though the police power of a State is now buttressed by the Twenty-first Amendment.¹ For, as stated by the Court, that Amendment did not supersede all other constitutional provisions 'in the area of liquor regulations.' Certainly a play which passes muster under the First Amendment is not made illegal because it is performed in a beer garden.

Chief Justice Hughes stated the controlling principle in *Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 443, 58 S.Ct. 678, 687, 82 L.Ed. 936:

'Defendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts. . . . By the

cross-bill, defendants seek a judgment that each **399 and every provision of the act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the *122 purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation. . . .'

The same thought was expressed by Chief Justice Stone in *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 470—471, 65 S.Ct. 1384, 1393—1394, 89 L.Ed. 1725. Some provisions of an Alabama law regulating labor relations were challenged as too vague and uncertain to meet constitutional requirements. The Chief Justice noted that state courts often construe state statutes so that in their application they are not open to constitutional objections. *Id.*, at 471, 65 S.Ct., at 1394. He said that for us to decide the constitutional question 'by anticipating such an authoritative construction' would be either 'to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow.'² *Ibid.* He added:

'In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes.' *Ibid.*

Those precedents suggest to me that it would have been more provident for the District Court to have declined *123 to give a federal constitutional ruling, until and unless the generalized provisions of the rules were given particularized meaning.

Mr. Justice BRENNAN, dissenting.

I dissent. The California regulation at issue here clearly applies to some speech protected by the First Amendment, as applied to the States through the Due Process Clause of the

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Fourteenth Amendment, and also, no doubt, to some speech and conduct which are unprotected under our prior decisions. See *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The State points out, however, that the regulation does not prohibit speech directly, but speaks only to the conditions under which a license to sell liquor by the drink can be granted and retained. But, as Mr. Justice MARSHALL carefully demonstrates in Part II of his dissenting opinion, by requiring the owner of a nightclub to forgo the exercise of certain rights guaranteed by the First Amendment, the State has imposed an unconstitutional condition on the grant of a license. See *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). Nothing in the language or history of the Twenty-first Amendment authorizes the States to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression. For that reason, I would affirm the judgment of the District Court.

****400** Mr. Justice MARSHALL, dissenting.

In my opinion, the District Court's judgment should be affirmed. The record in this case is not a pretty one, and it is possible that the State could constitutionally punish some of the activities described therein ***124** under a narrowly drawn scheme. But appellees challenge these regulations ¹ on their face, rather than as applied to a specific course of conduct. ² Cf. ***125** *Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). When so viewed, I think it clear that the regulations are overbroad and therefore unconstitutional. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965). ³ Although the State's broad power to regulate the distribution of liquor ****401** and to enforce health and safety regulations is not to be doubted, that power may not be exercised in a manner that broadly stifles First Amendment freedoms. Cf. *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960). Rather, as this Court has made clear, '(p)recision of regulation ***126** must be the touchstone' when First Amendment rights are implicated. *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963). Because I am convinced that these regulations lack the precision which our prior cases require, I must respectfully dissent.

I

It should be clear at the outset that California's regulatory scheme does not conform to the standards which we have previously enunciated for the control of obscenity. ⁴ Before this Court's decision in *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), some American courts followed the rule of *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868), to the effect that the obscenity vel non of a piece of work could be judged by examining isolated aspects of it. See, e.g., *United States v. Kennerley*, 209 F. 119 (1913); *Commonwealth v. Buckley*, 200 Mass. 346, 86 N.E. 910 (1909). But in *Roth* we held that '(t)he Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press.' 354 U.S., at 489, 77 S.Ct., at 1311. Instead, we held that the material must ***127** be 'taken as a whole,' *Ibid.*, and, when so viewed, must appeal to a prurient interest in sex, patently offend community standards relating to the depiction of sexual matters, and be utterly without redeeming social value. ⁵ See ****402** *Memoirs v. Massachusetts*, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (1966).

Obviously, the California rules do not conform to these standards. They do not require the material to be judged as a whole and do not speak to the necessity of proving prurient interest, offensiveness to community standards, or lack of redeeming social value. Instead of the contextual test approved in *Roth* and *Memoirs* these regulations create a system of per se rules to be applied regardless of context: Certain acts simply may not be depicted and certain parts of the body may under no circumstances be revealed. The regulations thus treat on the same level a serious movie such as 'Ulysses' and a crudely made 'stag film.' They ban not only obviously pornographic photographs, but also great sculpture from antiquity. ⁶

***128** *Roth* held 15 years ago that the suppression of serious communication was too high a price to pay in order to vindicate the State's interest in controlling obscenity, and I see no reason to modify that judgment today. Indeed, even the appellants do not seriously contend that these regulations can be justified under the *Roth-Memoirs* test. Instead, appellants argue that California's regulations do not concern the control of pornography at all. These rules, they argue, deal with conduct rather than with speech and as such are not subject to the strict limitations of the First Amendment.

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To support this proposition, appellants rely primarily on *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), which upheld the constitutionality of legislation punishing the destruction or mutilation of Selective Service certificates. O'Brien rejected the notion that 'an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,' and held that Government regulation of speech-related conduct is permissible 'if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' *Id.*, at 376—377, 88 S.Ct., at 1678—1679.

129** While I do not quarrel with these principles as stated in the abstract, their application in this case stretches them beyond the breaking point.⁷ In *O'Brien*, the Court began its discussion by noting that the statute in question 'plainly does not abridge free speech on its face.' Indeed, even O'Brien himself conceded that facially the statute dealt 'with conduct having no connection with speech.'⁸ *Id.*, at 375, 88 S.Ct., at 1678. *403** Here, the situation is quite different. A long line of our cases makes clear that motion pictures, unlike draftcard burning, are a form of expression entitled to prima facie First Amendment protection. 'It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.' *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 72 S.Ct. 777, 780, 96 L.Ed. 1098 (1952) (footnote omitted). See also *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968); ***130** *Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); *Pinkus v. Pitchess*, 429 F.2d 416 (CA9 1970), *aff'd* by equally divided court sub nom. *California v. Pinkus*, 400 U.S. 922, 91 S.Ct. 185, 27 L.Ed.2d 183 (1970). Similarly, live performances and dance have, in recent years, been afforded broad prima facie First Amendment protection. See, e.g., *Schacht v. United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); *P.B.I.C., Inc. v. Byrne*, 313 F.Supp. 757 (Mass.1970), vacated to consider mootness, 401 U.S. 987, 91

S.Ct. 1222, 28 L.Ed.2d 526 (1971); *In re Giannini*, 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535 (1968), cert. denied sub nom. *California v. Giannini*, 395 U.S. 910, 89 S.Ct. 1743, 23 L.Ed.2d 223 (1969).

If, as these many cases hold, movies, plays, and the dance enjoy constitutional protection, it follows, ineluctably I think, that their component parts are protected as well. It is senseless to say that a play is 'speech' within the meaning of the First Amendment, but that the individual gestures of the actors are 'conduct' which the State may prohibit. The State may no more allow movies while punishing the 'acts' of which they are composed than it may allow newspapers while punishing the 'conduct' of setting type.

Of course, I do not mean to suggest that anything which, occurs upon a stage is automatically immune from state regulation. No one seriously contends, for example, that an actual murder may be legally committed so long as it is called for in the script, or that an actor may inject real heroin into his veins while evading the drug laws that apply to everyone else. But once it is recognized that movies and plays enjoy prima facie First Amendment protection, the standard for reviewing state regulation of their component parts shifts dramatically. For while '(m)ere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, (they are) insufficient to justify such as diminishes the exercise of rights so vital' as freedom ***131** of speech. *Schneider v. State*, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939). Rather, in order to restrict speech, the State must show that the speech is 'used in such circumstances and (is) of such a nature as to create a clear and present danger that (it) will bring about the substantive evils that (the State) has a right to prevent.' *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470 (1919). Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951).⁹

When the California regulations are measured against this stringent standard, ****404** they prove woefully inadequate. Appellants defend the rules as necessary to prevent sex crimes, drug abuse, prostitution, and a wide variety of other evils. These are precisely the same interests that have been asserted time and again before this Court as justification for laws banning frank discussion of sex and that we have consistently rejected. In fact, the empirical link between sex-related entertainment and the criminal activity popularly associated with it has never been proved and, indeed, has now been largely discredited. See, e.g., Report of the Commission

on Obscenity and Pornography 27 (1970); Cairns, Paul, & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn.L.Rev. 1009 (1962). Yet even if one were to concede that such a link existed, it would hardly justify a broadscale attack on First Amendment freedoms. The only way to stop murders and drugs abuse is to punish them directly. But the State's interest in controlling material *132 dealing with sex is secondary in nature.¹⁰ It can control rape and prostitution by punishing those acts, rather than by punishing the speech that is one step removed from the feared harm.¹¹ Moreover, because First Amendment rights are at stake, the State must adopt this 'less restrictive alternative' unless it can make a compelling demonstration that the protected activity and criminal conduct are so closely linked that only through regulation of one can the other be stopped. Cf. *United States v. Robel*, 389 U.S. 258, 268, 88 S.Ct. 419, 426, 19 L.Ed.2d 508 (1967). As we said in *Stanley v. Georgia*, 394 U.S. 557, 566—567 89 S.Ct. 1243, 1249, 22 L.Ed.2d 542 (1969), 'if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '(a)mong free men, the deterrents ordinarily to be applied to prevent *133 crime are education and punishment for violations of the law . . . ' *Whitney v. California*, 274 U.S. 357, 378, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). . . . Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.'¹²

**405 II

It should thus be evident that, under the standards previously developed by this Court, the California regulations are overbroad: They would seem to suppress not only obscenity outside the scope of the First Amendment, but also speech that is clearly protected. But California contends that these regulations do not involve suppression at all. The State claims that its rules are not regulations of obscenity, but are rather merely regulations of the sale and consumption of liquor. Appellants point out that California does not punish establishments which provide the proscribed entertainment, but only requires that they not serve alcoholic beverages on their premises. Appellants vigorously argue that such regulation falls within the State's general police power as

augmented, when alcoholic beverages are involved, by the Twenty-first Amendment.¹³

*134 I must confess that I find this argument difficult to grasp. To some extent, it seems premised on the notion that the Twenty-first Amendment authorizes the States to regulate liquor in a fashion which would otherwise be constitutionally impermissible. But the Amendment by its terms speaks only to state control of the importation of alcohol, and its legislative history makes clear that it was intended only to permit 'dry' States to control the flow of liquor across their boundaries despite potential Commerce Clause objections.¹⁴ See generally *Joseph E. Seagram & Sons Inc. v. Hostetter*, 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964). There is not a word in that history which indicates that Congress meant to tamper in any way with First Amendment rights. I submit that the framers of the Amendment would be astonished to *135 discover that they had inadvertently enacted a pro tanto repealer of the rest of the Constitution. Only last Term, we held that the State's conceded power to license the distribution of intoxicating beverages did not justify use of that power in a manner that conflicted with the Equal Protection Clause. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178—179, 92 S.Ct. 1965, 1974—1975, 32 L.Ed.2d 627 (1972). Cf. **406 *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); *Hornsby v. Allen*, 326 F.2d 605 (CA5 1964). I am at a loss to understand why the Twenty-first Amendment should be thought to override the First Amendment but not the Fourteenth.

To be sure, state regulation of liquor is important, and it is deeply embedded in our history. See, e.g., *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77, 90 S.Ct. 774, 777, 25 L.Ed.2d 60 (1970). But First Amendment values are important as well. Indeed in the past they have been thought so important as to provide an independent restraint on every power of Government. 'Freedom of press, freedom of speech, freedom of religion are in a preferred position.' *Murdock v. Pennsylvania*, 319 U.S. 105, 115, 63 S.Ct. 870, 876, 87 L.Ed. 1292 (1943). Thus, when the Government attempted to justify a limitation on freedom of association by reference to the war power, we categorically rejected the attempt. '(The) concept of 'national defense' we held, 'cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country

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has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed, be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which *136 makes the defense of the Nation worthwhile.' *United States v. Robel*, 389 U.S., at 264, 88 S.Ct., at 423—424. Cf. *New York Times Co. v. United States*, 403 U.S. 713, 716—717, 91 S.Ct. 2140, 2142—2143, 29 L.Ed.2d 822 (1971) (Black, J., concurring); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426, 54 S.Ct. 231, 235, 78 L.Ed. 413 (1934). If the First Amendment limits the means by which our Government can ensure its very survival, then surely it must limit the State's power to control the sale of alcoholic beverages as well.

Of course, this analysis is relevant only to the extent that California has in fact encroached upon First Amendment rights. Appellants argue that no such encroachment has occurred, since appellees are free to continue providing any entertainment they choose without fear of criminal penalty. Appellants suggest that this case is somehow different because all that is at stake is the 'privilege' of serving liquor by the drink.

It should be clear, however, that the absence of criminal sanctions is insufficient to immunize state regulation from constitutional attack. On the contrary, 'this is only the beginning, not the end, of our inquiry.' *Sherbert v. Verner*, 374 U.S. 398, 403—404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963). For '(i)t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.' *Id.*, at 404, 84 S.Ct., at 1794. As we pointed out only last Term, '(f)or at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number or reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected *137 speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.' *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972).

Thus, unconstitutional conditions on welfare benefits,¹⁵ unemployment compensation,¹⁶ **407 tax exemptions,¹⁷

public employment,¹⁸ bar admissions,¹⁹ and mailing privileges²⁰ have all been invalidated by this Court. In none of these cases were criminal penalties involved. In all of them, citizens were left free to exercise their constitutional rights so long as they were willing to give up a 'gratuity' that the State had no obligation to provide. Yet in all of them, we found that the discriminatory provision of a privilege placed too great a burden on constitutional freedoms. I therefore have some difficulty in understanding why California nightclub proprietors should be singled out and informed that they alone must sacrifice their constitutional rights before gaining the 'privilege' to serve liquor.

Of course, it is true that the State may in proper circumstances enact a broad regulatory scheme that incidentally restricts First Amendment rights. For example, if California prohibited the sale of alcohol altogether, I do not mean to suggest that the proprietors *138 of theaters and bookstores would be constitutionally entitled to a special dispensation. But in that event, the classification would not be speech related and, hence, could not be rationally perceived as penalizing speech. Classifications that discriminate against the exercise of constitutional rights per se stand on an altogether different footing. They must be supported by a 'compelling' governmental purpose and must be carefully examined to insure that the purpose is unrelated to mere hostility to the right being asserted. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969).

Moreover, not only is this classification speech related; it also discriminates between otherwise indistinguishable parties on the basis of the content of their speech. Thus, California nightclub owners may present live shows and movies dealing with a wide variety of topics while maintaining their licenses. But if they choose to deal with sex, they are treated quite differently. Classifications based on the content of speech have long been disfavored and must be viewed with the gravest suspicion. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 556—558, 85 S.Ct. 453, 465—466, 13 L.Ed.2d 471 (1965). Whether this test is thought to derive from equal protection analysis, see *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267, 280 (1951), or directly from the substantive constitutional provision involved, see *Cox v. Louisiana*, *supra*; *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), the result is the same: any law that has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them . . . (is)

patently unconstitutional.' *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968).

As argued above, the constitutionally permissible purposes asserted to justify **408 these regulations are too remote to satisfy the Government's burden, when First Amendment rights are at stake. See *supra*, at 403—405. *139 It may be that the Government has an interest in suppressing lewd or 'indecent' speech even when it occurs in private among consenting adults. Cf. *United States v. Thirty-seven Photographs*, 402 U.S. 363, 376, 91 S.Ct. 1400, 1408, 28 L.Ed.2d 822 (1971). But cf. *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). That interest, however, must be balanced against the overriding interest of

our citizens in freedom of thought and expression. Our prior decisions on obscenity set such a balance and hold that the Government may suppress expression treating with sex only if it meets the three-pronged Roth-Memoirs test. We have said that '(t)he door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.' *Roth v. United States*, 354 U.S., at 488, 77 S.Ct., at 1311. Because I can see no reason why we should depart from that standard in this case, I must respectfully dissent.

Parallel Citations

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Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- 1 Appellees in their brief here suggest that the regulations may exceed the authority conferred upon the Department as a matter of state law. As the District Court recognized, however, such a claim is not cognizable in the suit brought by these appellees under 42 U.S.C. s 1983.
- 2 In addition to the regulations held unconstitutional by the court below appellees originally challenged Rule 143.2 prohibiting topless waitresses, Rule 143.3(2) requiring certain entertainers to perform on a stage at a distance away from customers, and Rule 143.5 prohibiting any entertainment that violated local ordinances. At oral argument in that court they withdrew their objections to these rules, conceding 'that topless waitresses are not within the protection of the First Amendment; that local ordinances must be independently challenged depending upon their content; and that the requirement that certain entertainers must dance on a stage is not invalid.' 326 F.Supp. 348, 350—351.
- 3 Mr. Justice DOUGLAS in his dissenting opinion suggests that the District Court should have declined to adjudicate the merits of appellees' contention until the appellants had given the 'generalized provisions of the rules . . . particularized meaning.' Since parties may not confer jurisdiction either upon this Court or the District Court by stipulation, the request of both parties in this case that the court below adjudicate the merits of the constitutional claim does not foreclose our inquiry into the existence of an 'actual controversy' within the meaning of 28 U.S.C. s 2201 and Art. III, s 2, cl. 1, of the Constitution.
By pretrial stipulation, the appellees admitted they offered performances and depictions on their licensed premises that were proscribed by the challenged rules. Appellants stipulated they would take disciplinary action against the licenses of licensees violating such rules. In similar circumstances, this Court held that where a state commission had 'plainly indicated' an intent to enforce an act that would affect the rights of the United States, there was a 'present and concrete' controversy within the meaning of 28 U.S.C. s 2201 and of Art. III. *Public Utilities Comm'n of California v. United States*, 355 U.S. 534, 539, 78 S.Ct. 446, 450, 2 L.Ed.2d 470 (1958). The District Court therefore had jurisdiction of this action.
Whether this Court should develop a nonjurisdictional limitation on actions for declaratory judgments to invalidate statutes on their face is an issue not properly before us. Cf. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 56 S.Ct. 466, 480, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Certainly a number of our cases have permitted attacks on First Amendment grounds similar to those advanced by the appellees, see, e.g., *Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964), and we are not inclined to reconsider the procedural holdings of those cases in the absence of a request by a party to do so.
- 4 Similarly, States may validly limit the manner in which the First Amendment freedoms are exercised, by forbidding sound trucks in residential neighborhoods, *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949), and may enforce a nondiscriminatory requirement that those who would parade on a public thoroughfare first obtain a permit. *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). Other state limitations on the 'time, manner and place' of the exercise of First Amendment rights have been sustained. See, e.g., *Cameron v. Johnson*, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968), and *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

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5 Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 52, 86 S.Ct. 1254, 1264, 16 L.Ed.2d 336 (1966), is equally in point here: 'Although it is possible that specific future applications of (the statute) may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that so considered, the legislation is constitutionally valid.'

* This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution. See *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329—334, 84 S.Ct. 1293, 1296—1299, 12 L.Ed.2d 350; *Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362.

1 Section 2 of the Twenty-first Amendment reads as follows:

'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 laws thereof, is hereby prohibited.'

2 Even in cases on direct appeal from state court, when the decision below leaves unresolved questions of state law or procedure which bear on federal constitutional questions, we dismiss the appeal. *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666.

1 Rule 143.3(1) provides in relevant part:

'No licensee shall permit any person to perform acts of or acts which simulate:

'(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

'(b) The touching, caressing or fondling on the breasts, buttocks, anus or genitals.

'(c) The displaying of the pubic hair, anus, vulva or genitals.'

Rule 143.4 prohibits: 'The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

'(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

'(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

'(3) Scenes wherein a person displays the vulva or the anus or the genitals.

'(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

2 This is not an appropriate case for application of the abstention doctrine. Since these regulations are challenged on their face for overbreadth, no purpose would be served by awaiting a state court construction of them unless the principles announced in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), govern. See *Zwickler v. Koota*, 389 U.S. 241, 248—250, 88 S.Ct. 391, 395—396, 19 L.Ed.2d 444 (1967). Thus far, however, we have limited the applicability of *Younger* to cases where the plaintiff has an adequate remedy in a pending criminal prosecution. See *Younger v. Harris*, supra, 401 U.S. at 43—44, 91 S.Ct. at 750. Cf. *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943). But cf. *Berryhill v. Gibson*, 331 F.Supp. 122, 124 (MD Ala.1971), probable jurisdiction noted, 408 U.S. 920, 92 S.Ct. 2487, 33 L.Ed.2d 331 (1972). The California licensing provisions are, of course, civil in nature. Cf. *Hearn v. Short*, 327 F.Supp. 33 (SD Tex.1971). Moreover, the *Younger* doctrine has been held to 'have little force in the absence of a pending state proceeding.' *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509, 92 S.Ct. 1749, 1757, 32 L.Ed.2d 257 (1972) (emphasis added). There are at present no proceedings of any kind pending against these appellees. Finally, since the *Younger* doctrine rests heavily on federal deference to state administration of its own statutes, see *Younger v. Harris*, supra, 401 U.S. at 44—45, 91 S.Ct. at 750—751, it is waivable by the State. Cf. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329, 84 S.Ct. 1293, 1296, 12 L.Ed.2d 350 (1964). Appellants have nowhere mentioned the *Younger* doctrine in their brief before this Court, and when the case was brought to the attention of the attorney for the appellants during oral argument, he expressly eschewed reliance on it. In the court below, appellants specifically asked for a federal decision on the validity of California's regulations and stated that they did not think the court should abstain. See 326 F.Supp. 348, 351 (CD Cal.1971).

3 I am startled by the majority's suggestion that the regulations are constitutional on their face even though 'specific future applications of (the statute) may engender concrete problems of constitutional dimension.' (Quoting with approval *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 52, 86 S.Ct. 1254, 1265, 16 L.Ed.2d 336 (1966). Ante, at 397 n. 5.) Ever since *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), it has been thought that statutes which trench upon First Amendment rights are facially void even if the conduct of the party challenging them could be prohibited under a more narrowly drawn scheme. See, e.g., *Baggett v. Bullitt*, 377 U.S. 360, 366, 84 S.Ct. 1316, 1319, 12 L.Ed.2d 377 (1964); *Coates v. City of Cincinnati*, 402 U.S. 611, 616, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214 (1971); *NAACP v. Button*, 371 U.S. 415, 432—433, 83 S.Ct. 328, 337—338, 9 L.Ed.2d 405 (1963). Nor is it relevant that the State here 'sought to prevent (bacchanalian revelries)' rather than performances by 'scantly clad ballet troupe(s).' Whatever the State 'sought' to do, the fact is that these regulations cover both these activities. And it should be clear that

a praiseworthy legislative motive can no more rehabilitate an unconstitutional statute than an illicit motive can invalidate a proper statute.

- 4 Indeed, there are some indications in the legislative history that California adopted these regulations for the specific purpose of evading those standards. Thus, Captain Robert Devin of the Los Angeles Police Department testified that the Department favored adoption of the new regulations for the following reason: 'While statutory law has been available to us to regulate what was formerly considered as antisocial behavior, the federal and state judicial system has, through a series of similar decisions, effectively emasculated law enforcement in its effort to contain and to control the growth of pornography and of obscenity and of behavior that is associated with this kind of performance.' See also testimony of Roy E. June, City Attorney of the City of Costa Mesa; testimony of Richard C. Hirsch, Office of Los Angeles County District Attorney. App. 117.
- 5 I do not mean to suggest that this test need be rigidly applied in all situations. Different standards may be applicable when children are involved, see *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968); when a consenting adult possesses putatively obscene material in his own home, see *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); or when the material by the nature of its presentation cannot be viewed as a whole, see *Rabe v. Washington*, 405 U.S. 313, 317 n. 2, 92 S.Ct. 993, 995, 31 L.Ed.2d 258 (1972) (Burger, C.J., concurring). Similarly, I do not mean to foreclose the possibility that even the Roth-Memoirs test will ultimately be found insufficient to protect First Amendment interests when consenting adults view putatively obscene material in private. Cf. *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967). But cf. *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971). But I do think that, at very least, Roth-Memoirs sets an absolute limit on the kinds of speech that can be altogether read out of the First Amendment for purposes of consenting adults.
- 6 Cf. Fuller, *Changing Society Puts Taste to the Test*, *The National Observer*, June 10, 1972, p. 24: 'Context is the essence of esthetic judgment . . . There is a world of difference between Playboy and less pretentious girly magazines on the one hand, and on the other, *The Nude*, a picture selection from the whole history of art, by that fine teacher and interpreter of civilization, Kenneth Clark. People may be just as naked in one or the other, the bodies inherently just as beautiful, but the context of the former is vulgar, of the latter, esthetic.
'The same words, the same actions, that are cheap and tawdry in one book or play may contribute to the sublimity, comic universality or tragic power of others. For a viable theory of taste, context is all.'
- 7 Moreover, even if the O'Brien test were here applicable, it is far from clear that it has been satisfied. For example, most of the evils that the State alleges are caused by appellees' performances are already punishable under California law. See n. 11, *infra*. Since the less drastic alternative of criminal prosecution is available to punish these violations, it is hard to see how 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential' to further the State's interest.
- 8 The Court pointed out that the statute 'does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views . . . A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.' 391 U.S., at 375, 88 S.Ct., at 1678.
- 9 Of course, the State need not meet the clear and present danger test if the material in question is obscene. See *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). But, as argued above, the difficulty with California's rules is that they do not conform to the Roth test and therefore regulate material that is not obscene. See *supra*, at 401-402.
- 10 This case might be different if the State asserted a primary interest in stopping the very acts performed by these dancers and actors. However, I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Moreover, it is unnecessary to reach that question in this case since the State's regulations are plainly not designed to stop the acts themselves, most of which are in fact legal when done in private. Rather, the State punishes the acts only when done in public as part of a dramatic presentation. Cf. *United States v. O'Brien*, *supra*, 391 U.S. at 375, 88 S.Ct. at 1678. It must be, therefore, that the asserted state interest stems from the effect of the acts on the audience rather than from a desire to stop the acts themselves. It should also be emphasized that this case does not present problems of an unwilling audience or of an audience composed of minors.
- 11 Indeed, California already has statutes controlling virtually all of the misconduct said to flow from appellees' activities. See Calif.Penal Code s 647(b) (Supp.1972) (prostitution); Calif.Penal Code ss 261, 263 (1970) (rape); Calif.Bus. & Prof.Code s 25657 (Supp.1972) ('B-Girl' activity); Calif.Health & Safety Code ss 11500, 11501, 11721, 11910, 11912 (1964 and Supp.1972) (sale and use of narcotics).
- 12 Of course, it is true that Stanley does not govern this case, since Stanley dealt only with the private possession of obscene materials in one's own home. But in another sense, this case is stronger than Stanley. In Stanley, we held that the State's interest in the prevention of sex crimes did not justify laws restricting possession of certain materials, even though they were conceded to be obscene. It follows a fortiori that this interest is insufficient when the materials are not obscene and, indeed, are constitutionally protected.

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- 13 The Twenty-first Amendment, in addition to repealing the Eighteenth Amendment, provides: '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 laws thereof, is hereby prohibited.'
- 14 The text of the Amendment is based on the Webb-Kenyon Act, 37 Stat. 699, which antedated prohibition. The Act was entitled 'An Act Divesting intoxicating liquors of their interstate character in certain cases,' and was designed to allow 'dry' States to regulate the flow of alcohol across their borders. See, e.g., *McCormick & Co. v. Brown*, 286 U.S. 131, 140—141, 52 S.Ct. 522, 526, 76 L.Ed. 1017 (1932); *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 324, 37 S.Ct. 180, 184, 61 L.Ed. 326 (1917). The Twenty-first Amendment was intended to embed this principle permanently into the Constitution. As explained by its sponsor on the Senate floor 'to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.
- '(T)he pending proposal will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor.' 76 Cong.Rec. 4141 (remarks of Sen. Blaine).
- 15 See *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). But cf. *Wyman v. James*, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971).
- 16 See *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).
- 17 See *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).
- 18 See, e.g., *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).
- 19 See, e.g., *Baird v. State Bar of Arizona*, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); *Konigsberg v. State Bar*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). But cf. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971); *Konigsberg v. State Bar*, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961).
- 20 See, e.g., *Blount v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971); *Hannegan v. Esquire Inc.*, 327 U.S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586 (1946).

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326 F.Supp. 348

United States District Court, C.D. California.

Robert LA RUE, dba the Buckit, et al., Plaintiffs,

v.

STATE OF CALIFORNIA, and Edward J. Kirby,
Director of Alcoholic Beverage Control, Defendants.

Don MacLEAN, dba the Scorpio, et al., * Plaintiffs,

v.

The DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL OF the
STATE OF CALIFORNIA, Defendant.Jerry D. JENNINGS, dba Sugar Shack, Erwin
A. Rohm, dba Chee Chee, Raymond Rohm,
dba Firehouse, Richard Carson and Robert A.
Warner, dba Tuscan Room, Seemaygro, Inc., a
California Corporation, dba Sarong Gals, Robert
E. Poff, dba 1st King, Edward Grimes, dba the
Circle, Harry J. Coleman dba Hi Dollie and
Everett L. Butts, dba the Worlock, Plaintiffs,

v.

Edward J. KIRBY, Director of the Department
of Alcoholic Beverage Control of the State of
California, John J. Canney, Assistant Director of
the Department of Alcoholic Beverage Control
of the State of California, John A. Kelly, Orange
County District Administrator of the Department
of Alcoholic Beverage Control of the State of
California, James F. Meehan, Long Beach District
Administrator of the Department of Alcoholic
Beverage Control of the State of California, Kermit
Q. Greene, Crenshaw District Administrator
of the Department of Alcoholic Beverage
Control of the State of California, Defendants.Civ. Nos. 70-1751-F, 70-1770-
F and 70-1782-F. | April 7, 1971.

Actions by various holders of California liquor licenses and dancers at licensed premises challenging constitutionality of statewide rules adopted by Department of Alcoholic Beverage Control concerning 'sexual conduct' and displays in licensed premises. The three-judge United States District Court, Ferguson, District Judge, held that rules of California Department of Alcoholic Beverage Control prohibiting holding of on-sale liquor license in any premises where

live entertainers engage in certain 'sexual conduct' without showing of whether such conduct is obscene within meaning of Supreme Court tests and where certain films depicting specified 'sexual conduct' or in which certain portions of anatomy are shown without regard to whether such displays are obscene within meaning of court tests are unconstitutional as violative of First, Fifth and Fourteenth Amendments.

Order accordingly.

William P. Gray, District Judge, dissented and filed opinion.

Attorneys and Law Firms

*349 Harrison W. Hertzberg, Los Angeles, Cal., for Robert LaRue, dba The Buckit and others.

Warren I. Wolfe, Donald J. Boss, Los Angeles, Cal., for Don MacLean dba The Scorpio and others.

Berrien E. Moore, Kenneth Scholtz, Gardena, Cal., for Jerry D. Jennings dba Sugar Shack and others.

Evelle J. Younger, Atty. Gen., Los Angeles, Cal., L. Stephen Porter, Deputy Atty. Gen., San Francisco, Cal., for defendants.

Before ELY, Circuit Judge, and GRAY and FERGUSON, District Judges.

MEMORANDUM OPINION

FERGUSON, District Judge:

In 1967, the California Supreme Court, in an obscenity case, declared:

'The United States Supreme Court has wisely recognized that ultimately the public taste must determine that which is offensive to it and that which is not; a public taste that is sophisticated and mature will reject the offensive and the dull; it will in its own good sense discard the tawdry, and once having done so, the tawdry will disappear because its production and distribution will not be profitable. *350 Understandably, such maturity does not come quickly or easily, and, in a time when the strictures of Victorianism have been replaced by wide swings of extremism, it seems hopelessly remote.' People v. Noroff, 67 Cal.2d 791, 796-797, 63 Cal.Rptr. 575, 579, 433 P.2d 479, 483 (1967).

La Rue v. State of Cal., 326 F.Supp. 348 (1971)

After that statement by California's highest court, it is somewhat surprising that a federal district court four years later is called upon to determine whether a state administrative agency may require 'fig leaves' to be worn by entertainers in California.

These three actions are brought pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202, and 42 U.S.C. § 1983, by various holders of California liquor licenses and dancers at licensed premises. A three-judge court was convened in accordance with 28 U.S.C. §§ 2281 and 2284. The actions seek to enjoin the enforcement of certain statewide rules adopted by the Department of Alcoholic Beverage Control and Edward J. Kirby, its director. The parties, by pre-trial stipulations and orders, have acknowledged proper jurisdiction and venue in this court.

Rules in Issue

The Department is established pursuant to Article 20, Section 22 of the California Constitution. That section provides in part:

'The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude.'

That paragraph of the state constitution has been interpreted to reject the contention of the Department that its power over denial, suspension and revocation of liquor licenses is limitless and absolute. It was held that the Department's power over such matters is subject to reasonable legislative enactment. *Kirby v. Alcoholic Beverage Control Appeals Board*, 71 Cal.2d 1200, 81 Cal.Rptr. 241, 459 P.2d 657 (1969); *Samson Market Co. v. Alcoholic Beverage Control Appeals Board*, 71 Cal.2d 1215, 81 Cal.Rptr. 251, 459 P.2d 667 (1969); *Big Boy Liquors, Ltd. v. Alcoholic Beverage Control Appeals Board*, 71 Cal.2d 1226, 81 Cal.Rptr. 258, 459 P.2d 674 (1969).

The Department adopted Rules 143.2, 143.3, 143.4 and 143.5, effective August 10, 1970. The Rules, which are set forth in Appendix A, state generally that certain entertainment on premises licensed by the Department is contrary to public welfare and morals and no liquor license may be held at any establishment where such entertainment is permitted. In summary, they provide:

- (1) 143.2— prohibits topless waitresses.
- (2) 143.3—
 - (a) prohibits nude entertainers;
 - (b) regulates the content of entertainment;
 - (c) requires that certain entertainers perform on a stage.
- (3) 143.4— regulates the content of movies.
- (4) 143.5— prohibits any entertainment which violates a city or county ordinance.

The plaintiffs originally challenged all four Rules. However, at oral argument they withdrew their objections in these actions to the Rules which (1) prohibit topless waitresses, (2) permit local regulations, and (3) require certain entertainers to be on a stage. The plaintiffs thus concede that topless waitresses are not within the protection of the First *351 Amendment; that local ordinances must be independently challenged depending upon their content; and that the requirement that certain entertainers must dance on a stage is not invalid.

The court is, therefore, required to determine (1) whether Rule 143.4, which regulates the content of movies, is unconstitutional, and (2) whether those portions of Rule 143.3 which regulate the content of live entertainment are prohibited by the First, Fifth and Fourteenth Amendments.

Doctrine of Abstention

Prior to the determination of the merits of the litigation, it must be determined whether this court should stay its hand pending state court determination. In *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (Jan. 19, 1971), the Supreme Court invalidated a state law relating to liquor matters due to constitutional infirmities. Under ordinary circumstances, this court might have adopted the reasoning of Mr. Justice Black in his dissenting opinion, when he stated: 'I believe it is unfair to Wisconsin to permit its courts to be denied the opportunity of confining this law

within its proper limits if it could be shown that there are other state law provisions that could provide such boundaries.’ 400 U.S. at 444, 91 S.Ct. at 513.

However, certain of the plaintiffs in this action have been to state court on many occasions to challenge the Rules, but the state courts have refused to assume jurisdiction over their complaints. The California Attorney General has requested the state courts to assume jurisdiction over the litigation presented here, but, rejecting that request, the state courts have refused. The Attorney General, furthermore, has asked that this court not abstain but decide the merits of the litigation.

[1] It, therefore, appears that the doctrine of abstention should not be applied, and this court has the obligation to decide another state obscenity case before the state courts have ruled.¹ However, in order to place the litigation in proper focus, a discussion of the obscenity laws as pronounced by the California Supreme Court, as well as the United States Supreme Court, is necessary.

Background

In 1965, a dancer in a California nightclub danced with her breasts exposed. The California Supreme Court, in *In re Giannini*, 69 Cal.2d 563, 72 Cal.Rptr. 655, 661, 446 P.2d 535, 541 (1958), held that she could not be convicted of either lewd conduct or indecent exposure in the absence of proof that her dance was obscene. The court stated:

‘Nor can we accept the prosecution’s sweeping argument that ‘standards required of an obscenity prosecution are inapplicable in this case’ because the ‘conduct standing alone is clearly unlawful’ and does not become lawful ‘because it is engaged in during an activity’ which would be afforded First and Fourteenth Amendment protections. Petitioner’s apparent ‘unlawful conduct’ consisted of the baring of her breasts; the thrust of the argument presumably is that since such conduct could not be lawfully engaged in at any place and any time and under any and all circumstances it is not entitled to constitutional protection *352 when performed in the different context of a theatrical performance.

‘The conduct here of course took place during a theatrical performance of a dance before an audience. We have previously explained that such a dance enjoys constitutional protection. The proper issue here therefore turns on whether the alleged unlawful conduct, which is inextricably a part

of the dance, forfeits constitutional protection because of its alleged obscene nature.

‘To isolate the questioned conduct and to judge it in an entirely different context would be to distort the nature of this case. By fictitiously changing the manner and place of its performance the prosecution would make the conduct criminal although in the actual manner and place of its performance the conduct should be tested by constitutional standards.

‘Thus acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene. Respondent’s contention would automatically reject the application of the law of obscenity to the instant case. It would adjudicate Iser’s conduct as if it were not performed on the stage, not a dance, and not incorporated in a form of communication. Yet the entire point of the case is that the conduct occurred in that very context.’

Then, in 1968, Robert G. Barrows produced a one-act play in Hollywood, named ‘The Beard’. The play ended with a simulated sex act, and the producer and actors were arrested for violating California Penal Code Sections involving disorderly conduct and obscenity. The California Supreme Court, in *Barrows v. Municipal Court*, 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483 (1970), held that the disorderly conduct statute did not pertain to theatrical performers, and that the then existing California obscenity laws did not encompass live performances as distinguished from books, film and pictures. It was not until November of 1970 that the legislature enacted Section 311(g) of the California Penal Code, which for the first time placed live entertainment within the ambit of the obscenity statutes.

It may be asserted that parts of the Rules are invalid because they do not conform to the obscenity statutes enacted by the California Legislature in light of the trilogy interpreting the relationship between the legislature and the Department (Kirby, Samson Market Co. and Big Boy Liquors, Inc., *supra*). However, that issue is one which does not involve the Federal Constitution and, therefore, is not before this court.

In the meantime, law enforcement agencies were upset with the decisions of the United States and California Supreme Courts in the field of obscenity. In May of 1970, the Department of Alcoholic Beverage Control began hearings on the Rules which are the subject of this litigation. Law enforcement agencies, counsel and owners of licensed

premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers. It is obvious, after reading the transcripts, that this is why the Department adopted the Rule which requires certain entertainers to perform on a stage at least six feet away from any customer. It is also obvious why the plaintiffs have abandoned their objection to that Rule. No reasonable person could claim that entertainers and customers have a constitutional right to engage in such conduct in a cocktail lounge.

However, a fair reading of the transcripts of the hearings requires the conclusion that the Department not only desired to prohibit sexual conduct between dancers and customers, but wanted to establish a set of rules which would circumvent United States and California Supreme Court decisions relating to obscenity. Excerpts from the transcripts are contained in Appendix B. It must be stated initially, that displeasure by *353 law enforcement agencies and state administrative agencies with court decisions interpreting the scope of the First Amendment cannot provide the basis for those agencies to adopt rules against entertainment which is protected by those decisions.

The Issue of Obscenity Regarding Movies

Rule 143.4 prohibits the showing of film, still pictures or other visual reproduction of certain portions of the body and conduct without regard to whether such visual portrayal is obscene.

[2] One must be careful not to permit one's analysis of a theatrical performance to be clouded by his view of the same conduct in a nontheatrical context. The state may certainly regulate both, but the constitutional standards that must be applied to each are quite different. While both fall within the police power of the state, theatrical performances, as well as books, pictures and films, are within the protection of the First Amendment unless they are obscene.

In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 77, 96 L.Ed. 1098 (1952), the Court specifically held that motion pictures are within the free speech and free press guaranties of the First and Fourteenth Amendments. More recently, the Court of Appeals for the Ninth Circuit held, in *Pinkus v. Pitchess*, 429 F.2d 416 (9th Cir. 1970), *aff'd* sub nom. *California v. Pinkus*, 400 U.S. 922, 91 S.Ct. 185, 27 L.Ed.2d 183 (November 23, 1970), that a 'stag' movie of a woman who disrobed and feigned some type of sexual satisfaction from self-induced acts is not obscene.

The State of California may, of course, prohibit obscene movies. That is not the issue here. The issue is whether or not the state may regulate the content of movies by prohibiting those which depict certain conduct, or exposure of portions of the body, without the requirement that the movies be factually and legally determined to be obscene under the standards required by the Supreme Court.

A summary of the obscenity laws is provided in *Roth v. United States*, 354 U.S. 476, 488-489, 77 S.Ct. 1304, 1311, 1 L.Ed.2d 1498 (1957):

'The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina v. Hicklin*, (1868) L.R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press.'

In *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts*, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (1966), the Court held:

'Under this definition (of obscenity), as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.'

[3] It is clear from these cases that isolated portions of a movie cannot be extracted out of the context of the whole. To do so has been uniformly condemned by the Supreme Court. Yet this is exactly what the Department's regulation does. Moreover, it fails to *354 consider any possible redeeming social value of the material taken as a whole and in no way takes contemporary community standards into consideration.

In regard to the social value requirement, the Court, in *Stanley v. Georgia*, 394 U.S. 557, 566, 89 S.Ct. 1243, 1248-1249, 22 L.Ed.2d 542 (1969), stated:

'Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all.'

Assuming that under the California Constitution the Department has the power to prohibit the showing of obscene movies in licensed premises, it may not use a test which was specifically rejected 14 years ago by the Supreme Court.

The Issue of Obscenity Regarding Live Entertainment

Rule 143.3 regulates live entertainment and prohibits certain conduct and exposure. As stated previously, it is well settled that theatrical entertainment falls within the protection of the free speech-free press provisions of the First Amendment, made applicable to the states through the Fourteenth Amendment. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959). In *In re Giannini*, 69 Cal.2d 563, 567-568, 72 Cal.Rptr. 655, 658-659, 446 P.2d 535, 538-539 (1968), the California Supreme Court stated:

'Although the United States Supreme Court has not ruled on the precise question whether the performance of a dance is potentially a form of communication protected against state intrusion by the guarantees of the First and Fourteenth Amendments to the federal Constitution, the very definition of dance describes it as an expression of emotions or ideas. * * * The dance is perhaps the earliest and most spontaneous mode of expressing emotion and dramatic feeling; it exists in a great variety of forms and is among some people connected with religious belief and practice, as among the Mohammedans and Hindus.'

In that case, and *Barrows*, supra, the California Supreme Court held that dancing and live theatrical performances are within the First Amendment.

'The performance of the dance indubitably represents a medium of protected expression. To take but one example, the ballet obviously typifies a form of entertainment and expression that involves communication of ideas, impressions, and feelings. Similarly, Iser's dancing, however, vulgar and tawdry in content, might well involve communication to her audience.' 69 Cal.2d at 570, 72 Cal.Rptr. at 660, 446 P.2d at 540.

[4] It is of no significance that expression which is protected by the First Amendment takes place in a commercial setting. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). Nor does it lose its protection due to the fact that it is presented in an unusual manner. In *Schacht v. United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970), Justice Black stated that a performance is a theatrical one even though it is not performed in a conventional way in a conventional place. There, a mime troop performed outside an induction station, and the Supreme Court held that its members were acting in a theatrical production. The Court stated that 'theatrical productions need not always be performed in buildings or even on a defined area such as a conventional stage. Nor need they be performed by professional actors or be heavily financed or elaborately produced.' 398 U.S. at 61, 90 S.Ct. at 1558.

Nevertheless, the Department contends that live entertainment is not *355 speech within the protection of the First Amendment, and relies on *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). In *O'Brien*, the Court affirmed a conviction for burning a draft card in spite of the assertion by the defendant that his action was symbolic speech. However, *O'Brien* involved destruction of a selective service registration certificate. We are not dealing with violence or destruction when the subject is nothing more than the theatrical performance of dancing.

[5] The Court, in *O'Brien*, set forth four individual tests which a regulation in this area must meet: (1) it must be within the constitutional power of the governmental agency; (2) it must further an important or substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest.

It seems clear that the regulations in question here do not meet the requirements of *O'Brien*. In light of the pretrial stipulation, it is uncontested that none of the legitimate state interests summarized in *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967), in the field of obscenity are involved in the present case. Minors are not allowed to view the entertainment. There is no 'pandering' and the entertainment is presented in such a way that it is not forced upon unwilling individuals.

Moreover, the governmental interest which the Department seems to assert is directly related to the suppression of what may very well be non-obscene free expression. The resulting restriction on First Amendment freedoms is considerably greater than is essential to the furtherance of any legitimate state interest since the Department could, as has been done by the California Legislature, limit its prohibition to obscene entertainment.

The Rule, as it pertains to dancing, runs afoul of the Roth decision, as does the Rule pertaining to movies. While both may be prohibited if they are obscene, neither may be prohibited unless the constitutional test of obscenity is met. One isolated act may not be taken out of context from the whole, and to be considered obscene the whole must meet the three-pronged test set forth in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966).

Of course, sexual conduct between a dancer and a customer could hardly be termed a theatrical performance which is protected by the First Amendment. Hopefully, the stage requirement set forth in Rule 143.3 will have the desired effect of prohibiting such conduct.

Public Welfare and Morals

It is evidence from a study of the transcripts of the public hearings that the Department enacted the Rules in an attempt to circumvent the obscenity laws, as well as to prohibit contact between dancers and customers.

[6] The Department claims the Rules further a substantial governmental interest, such as protection of the public welfare and morals from B-girls, prostitution, narcotics and the protection of minors. The Department asserts that those problems are increased when alcohol and possible sexual stimulation are present within the same premises. Narcotic and prostitution violations may of course be prosecuted under criminal statutes, but certainly cannot be used as a vehicle to impose censorship without complying with the law on obscenity.

The pre-trial order stipulates that it is not disputed that the plaintiffs prohibit the attendance of minors in their establishments, and that they cause the premises and customers to be policed to insure the nonentrance of minors. The pre-trial order sets forth the further undisputed facts (1) that the dancing cannot be viewed from outside the premises, *356 (2) that persons are warned at the entrances of the type

of entertainment that is conducted, and (3) that there is no pandering. It is, therefore, clear that none of the legitimate state interests summarized in *Redrup v. New York*, 386 U.S. 767, 769, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967), are involved in the present action.

[7] Theatrical entertainment may not be prohibited without a constitutional obscenity test because the state deems it necessary to protect the public welfare and morals. That decision was made by the Supreme Court in *Stanley v. Georgia*, supra:

'And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. * * *

'Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. But more important, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that 'among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law * * *.' *Whitney v. California*, 274 U.S. 357, 378, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). See Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 938 (1963):' 394 U.S. at 565-567, 89 S.Ct. at 1248-1249.

In *Carroll v. Princess Anne*, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968), despite the fact that the case involved the threat of violence, the Court held that while sanctions against the plaintiffs may take the form of criminal prosecutions for the violation of valid laws, they may not take the form of prior censorship, absent a showing in an adversary proceeding of a clear and present danger.

Justice Mosk of the California Supreme Court, in *Burton v. Municipal Court*, 68 Cal.2d 684, 696, 68 Cal.Rptr. 721, 728, 441 P.2d 281, 288 (1968), succinctly answered the issue when he stated, 'It is clear that where First Amendment rights are concerned the statute itself and not the evidence in

an individual case establishes the boundaries of permissible conduct. * * *

A state is not free to adopt whatever procedures it pleases for dealing with obscenity. *Marcus v. Search Warrant*, 367 U.S. 717, 731, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). Dancing has always presented a problem to those who see it as representing perils of pagan memories. The First Amendment, however, directs that concepts of public welfare and morality may not prohibit a dance no matter how immoral it may appear to be, unless it violates an obscenity statute that meets the test of Roth. Clearly the Rules as they pertain to entertainment do not meet that test and were, in fact, designed to circumvent it.

The Twenty-First Amendment Argument

Section 2 of the Twenty-First Amendment provides that:

‘Sec. 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 laws thereof, is hereby prohibited.’

In *Colonnade Catering Corp v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970), Mr. Justice Douglas held that in regard to liquor regulations *357 the government has an unquestioned right to enact legislation to assure that the taxing power of the government over the liquor industry is effective. In *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (January 19, 1971), he stated that police power of the states over intoxicating liquors was extremely broad even prior to the Twenty-First Amendment, citing *Crane v. Campbell*, 245 U.S. 304, 38 S.Ct. 98, 62 L.Ed. 304 (1917). Yet it was stated by all Justices, including those who dissented on the doctrine of abstention, that the interest of a state in regulating the liquor business cannot override the Due Process Clause of the Fourteenth Amendment. If it cannot override that clause, it certainly cannot override the First Amendment, which has always received a ‘preferred position’ among the liberties granted to all of us. *Thomas v. Collins*, 323 U.S. 516, 529-530, 65 S.Ct. 315, 89 L.Ed. 430 (1945).

All of the cases cited to the court by the Department interpreting the Twenty-First Amendment involved the interrelationship of that Amendment with the commerce clause and the import-export clause of the Constitution. It is clear that other clauses in the Constitution may not be used to restrict obscenity without complying with the standards established by the Supreme Court. See *Blount v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971).

[8] [9] While it is true that one does not have an absolute right to receive a liquor license, it is equally true that the state cannot place an unconstitutional precondition on the possession of those licenses. As the Supreme Court noted in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963): ‘It is too late in the day to doubt that the liberties of * * * expression may be infringed by the denial of or placing conditions upon a benefit or privilege.’ The fact that no direct restraint or punishment is imposed upon the exercise of speech does not determine the free speech question. Indirect ‘discouragements’ undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines or injunctions. *American Communications Assn. v. Douds*, 339 U.S. 382, 402, 70 S.Ct. 674, 94 L.Ed. 925 (1950). Thus, a state agency cannot exercise its constitutional power to issue, renew or revoke liquor licenses for the purpose of censoring whatever it believes to be undesirable entertainment. To allow this would allow states to circumvent the protection provided by the First Amendment and do indirectly that which they cannot do directly.

Obscenity Must be Determined by the Courts

[10] The Supreme Court, in explicit terms, has stated that the issue of obscenity must be determined by the courts and not merely by an administrative agency, no matter how well meaning it is.

In *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the Court held that any system of censorship must contain, at the minimum, the following procedural safeguards if it is not to contravene the First and Fifth Amendments: (a) any restraint prior to judicial determination must be imposed only briefly; (b) the censor must go to court in a specified brief period; and (c) the safeguards must be contained in the statute itself or be supplied by judicial rule.

In *Blount v. Rizzi*, *supra*, the Court strengthened the requirement that even in noncriminal cases only the courts have the constitutional authority to determine obscenity, and that judicial review must be a swift one. There the Court cited *Freedman v. Maryland*, *supra*: ‘The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.’ 380 U.S. at 58, 85 S.Ct. at 739.

*358 The Rules adopted by the Department of Alcoholic Beverage Control are totally void of any requirement that the Department seek any judicial review of obscenity. The very limited judicial involvement is set forth in California Business and Professions Code § 23090, which provides that:

'Any person affected by a final order of the (Alcoholic Beverage Control Appeals Board), * * * may, * * * apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order.'

In fact, as set forth previously, the Rules were designed to circumvent court decisions dealing with obscenity and to eliminate judicial determinations. That is constitutionally impermissible.

The procedure set forth by the Rules and the California Business and Professions Code requires the licensee to challenge the decision of the Department to suppress obscenity. This method was condemned in *Blount v. Rizzi*, supra, 'the scheme has no statutory provision requiring governmentally initiated judicial participation in the procedure * * *, or even any procedure assuring prompt judicial review'. 91 S.Ct. at 429. Judicial review of the decisions of the Department is limited to appellate review (California Business and Professions Code §§ 23090-23090.7), which does not meet the standard required by *Freedman v. Maryland*, supra, and *Blount v. Rizzi*, supra.

Summary

[11] In summary, we hold that the Rules of the Department as written, which prohibit the content of movies and live entertainment, are void for the reason that they do not conform to the tests established by the United States Supreme Court. The other parts of the Rules, namely, those that regulate (a) the attire of waitresses; (b) the conduct between performers and customers; (c) the place where certain entertainers must perform; and (d) the adoption of local regulations provided they comport with the United States Constitution are not challenged.

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, this opinion shall constitute the findings of fact and conclusions of law of the court.

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, a judgment shall be entered in each of the three cases in favor of the plaintiffs and against the defendants as follows:

'1. Rule 143.4— Visual Displays— is adjudged to be in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and the defendants are enjoined from enforcing the same.

'2. Rule 143.3— Entertainers and Conduct— is adjudged to be in violation of the First, Fifth and Fourteenth Amendments, as it pertains to live entertainment, and the defendants are enjoined from enforcing the same. This injunction does not pertain to any sexual conduct between an entertainer and a customer.

'3. Each party shall bear its own costs.

'4. The court retains jurisdiction to enforce the provisions of this judgment, for the purpose of issuing orders to clarify, modify or amend any of the provisions hereof, and for all other purposes.'

APPENDIX A

'143.2 Attire and Conduct. The following acts or conduct on licensed premises are deemed contrary to public welfare and morals and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

'(1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the *359 female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

'(2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

'(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

'(4) To permit any employee or person to wear or use any device or covering exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

'If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

'143.3. Entertainers and Conduct. Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

'Live entertainment is permitted on any licensed premises, except that:

'(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

'(2) Subject to the provision of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six-feet from the nearest patron.

'No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

'No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

'If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

'143.4. Visual Displays. The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

'The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

'(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

'(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

'(3) Scenes wherein a person displays the vulva or the anus or the genitals.

'(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

*360 'If any provision of this rule or the application thereof to any person or circumstances is held invalid such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

'143.5. Ordinances. Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance.'

APPENDIX B

I

Partial Testimony of Captain Robert Devin of the Los Angeles Police Department

'CAPT. ROBERT A. DEVIN: Mr. Chairman, I'd like to introduce myself. I'm Capt. Robert Devin, commander of the administrative vice division of the Los Angeles Police Department. I have been a member of the police department in the City of Los Angeles for the past twenty-one and a half years. I have been assigned in my current assignment as the commander of the administrative vice division for the past one and a half years. Part of my responsibilities are the coordination, the review of the problem of pornography and obscenity throughout the City of Los Angeles. And in that capacity, I have formed some opinions. I believe I have documented the position that I am about to state to the group, and I'd like to share this information with the rules committee this morning.

'The Los Angeles Police Department supports all three of the rules changes that are proposed. We feel that there is a need for a measure of regulation in the field of live entertainment — rather, the field of nudity as pertains to live entertainment. Coincidentally, the City of Los Angeles is embarked at this time on a revised Cafe Entertainment Ordinance for the City

of Los Angeles, that has been prompted primarily through recent court decisions. The Barrows Case of January 30th, 1970, has compelled us to re-examine our cafe entertainment permit ordinance, and this is in the process of revision. As a matter of fact, it's going to be acted upon by our police commission tomorrow afternoon.

'The main position that we're taking as regards the subject of nudity in locations that are licensed by the Department of Alcoholic Beverage Control, is that there is a compelling need for a separation of the entertainer from the non-entertainer. And this position is based on experience that we have had in the past one and a half years, during which time we've seen the advent and the growth of nude entertainment in our city bars.

'The former novelty of a topless female performer has now been replaced by the bottomless performer. Our first experience, our first knowledge that locations of this type were in existence in Los Angeles occurred approximately in February of 1969. In our opinion, this arose because of a California State Supreme Court decision that followed a prior federal rules, of the stated two important items. No. 1, it gave recognition to the dance as a form of expression, as a form of communication between the performer and the audience, and stated, in effect, that the dance is constitutionally protected under the first amendment. And in the absence of a showing of obscenity, that a dance was constitutionally protected. And secondarily, it imposed, as part of the showing by the people, the necessity for a new contemporary community standard, and that standard would declare to be the standard of the State of California.

'While statutory law has been available to us to regulate what was formerly considered as antisocial behavior, the federal and state judicial system has, through a series of similar decisions, effectively emasculated law enforcement in *361 its effort to contain and to control the growth of pornography, and of obscenity and of behavior that is associated with this kind of performance.'

II

Partial Testimony of Roy E. June, City Attorney of the City of Costa Mesa

'MR. ROY E. JUNE: Good Morning, gentlemen. My name is Roy E. June, and I am the City Attorney for the City of Costa Mesa, and I am here by direction of the City Council of the City of Costa Mesa to support the director in your promulgation of rules and regulations relating to topless and bottomless entertainment.

'The vigilant and reasonable attention to these establishments by the Costa Mesa Police Department has further served to place these activities in their proper perspective. The courts, however, have not been as generous. Section 647(a) of the Penal Code, lewd and dissolute conduct, is no longer available to the prosecution. We can use it under some circumstances, but not as extensively as we could in 1967.

'Portions of Section 615 1/2 of the Penal Code, on indecent exposure, is not as available to the prosecution as it was in the year 1967. There have been inroads on these cases.

'Regulation of live entertainment, unless so broad to be cumbersome and unworkable, is no longer available to the prosecution. It remains, I think, for the Alcoholic Beverage Control Board to effectively regulate bottomless and topless dancers, and pornographic films displayed in these establishments.'

III

Partial Testimony of Richard C. Hirsch of the office of the Los Angeles County District Attorney

'In 1969, the Los Angeles County District Attorney's office filed approximately 781 cases involving bottomless dancing. And almost all of these cases involved performances which were conducted on premises licensed by the Department of Alcoholic Beverage Control. They are almost all bar-type establishments. As of January 1st, 1970, there were approximately 134 convictions under Penal Code statutes. Now, we have to consider what a conviction means in terms of the criminal law. Most of the cases filed were either under Penal Code, Section 647(a) as it then applied, or Section 314.1 of the Penal Code. These are the lewd and indecent exposure statutes. Most of the dances involved totally nude dancing or bottomless-type dancing. There were a few dances, some of which I personally prosecuted which involved topless-type dancing in which the dancer would wear a bikini-type bottom and then be exposed from the waist up without any sort of covering. To convict under the statutes under which these cases were filed, it had to be proven that the dance was obscene, and it had to be proven that such a dance was obscene beyond a reasonable doubt. As you no doubt know, the lewd conduct and indecent exposure statutes use words such as 'lewd,' 'lewdly,' 'dissolute,' but these words have been held to be synonymous with obscene. Therefore, to prove that there was a violation of the criminal law, we had to prove that the three elements of obscenity were established, and prove that these elements were established beyond a reasonable doubt,

each to a reasonable doubt, and beyond a moral certainty. The three elements of obscenity are, number one, that the dances were substantially beyond customary limits of candor in the community, and the Supreme Court of the United States held in the *Giannini* case that the community which was relevant was the entire State of California. Secondly, it had to be shown that the predominant appeal to the dance was to the prurient interest, and that is a shameful or morbid interest in nudity, sex or excretion. And third, it had to be shown, and beyond a reasonable doubt, each of these standards, *362 that the dances in question were utterly without redeeming social importance. * *

'Take an average case. Suppose we have a bottomless dance case and there is a citation issued on the dancer. And, say, the owner of the establishment who is present for aiding and abetting, that case would then be brought into the court. Generally what would happen, and this is the procedure we find in most of the defense in most of these cases, there may be a demur to the statute by the defense on the grounds that the statute on its face is unconstitutional. We have to send a deputy into court to prosecute that demurrer. Then, generally, the defense requests a pretrial hearing. And the pretrial hearing is, in effect, a separate trial. It's full-blown trial in which ordinarily expert testimony is taken on the part of the defense and the prosecution to establish whether or not the material, the dance in question is constitutionally protected. At that time, the judge rules on whether or not it's constitutionally protected. If he rules it is not constitutionally protected, it has been the practice for the case to go up on a writ, prohibition or mandate at that time to the appellate department of the Superior Court. At that time, we have an appellate deputy who would represent our office in the appellate department on that case. Then the case will more often than not come back to the trial court. At that time, we will engage in a full trial, either court or jury trial, which may last anywhere from a few days to a week or more. And, of course, this involves a deputy being tied up in the court for this entire period of time. So, there is, on each case, the possibility of a great deal of time being expended by trial deputies in these proceedings.

'MR. SEXTON: Well, I was interested in the— or concerned about the public welfare in asking that, wondering how much it might cost the taxpayer to have to devote this amount of man-power to this type of entertainment.

'MR. HIRSCH: I don't have any specific totals for you, but I would assume that there are totals available as to what the cost of a jury trial is in a criminal case per day, and you can

figure that out in the number of days that these cases would take. And I think it would be quite a considerable amount of money, plus the fact that expert witnesses must be generally paid. The are usually professional witnesses, psychiatrists in many parts, in many cases psychologists, individuals from the arts and theater who come in and expect to receive some sort of compensation for their time in court. These fees will vary in amount, but, of course, there is that expense also, in that they are first amendment cases that need that type of testimony.'

WILLIAM P. GRAY, District Judge (dissenting):

It seems to me that this is a case in which our court should abstain until the courts of California have had an opportunity to consider the constitutional issues here concerned. This conclusion is reinforced by the decisions of the Supreme Court in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and its five companion cases¹ that were all decided on the same day, and which came after *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), upon which the majority opinion here relies. It is true that *Younger* and its companion cases were concerned with whether a United States District Court should enjoin a currently pending state criminal prosecution, which is a somewhat different issue *363 from the one here involved. However, a principal thrust of those opinions is to suggest to our three judge courts that we should give increased consideration to the concept of comity, which embodies '* * * a proper respect for state functions * * * and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. * * * What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.' *Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971). This seems to me to be a good case in which to apply this principle.

The California courts are just as able as are we to consider whether or not the subject regulations square with the United States Constitution. They should be given the opportunity so to do, and I am by no means persuaded that this record shows them to have declined to assume such responsibility.

Now that this court has determined to rule on the merits of the case at hand, I find myself again in disagreement

La Rue v. State of Cal., 326 F.Supp. 348 (1971)

with the majority. The question here is not simply ‘* * * whether a state administrative agency may require ‘fig leaves’ to be worn by entertainers in California’ (see majority opinion, page 350). I agree with Judge Ferguson that ‘* * * it is well settled that theatrical entertainment falls within the protection of the free speech-free press provisions of the First Amendment * * *.’ (Majority opinion, page 354.) However, this valid assertion of the law does not necessarily carry the day in deciding this case.

Dancing without fig leaves may very well be a form of artistic expression protected by the First Amendment. But such a right is not absolute. For example, the state, under its police power, certainly could prohibit nude dancing on the street corner or on the campus of a junior high school. It is also within the police power to prohibit all sales of alcoholic beverages and to impose reasonable restrictions upon the conditions under which such sales may be made.

If we acknowledge these things, I do not think that it is beyond the constitutional right of California, through its administrative agency, to say, in its wisdom or lack of

Wisdom, that lewd or naked dancing (even though not necessarily obscene) and the serving of alcohol do not properly mix, and that although a person may present one or the other, he may not do both at the same place and time.

As the majority opinion indicates, it is conceded that the regulations prohibiting direct personal contact between customers and naked employees are constitutionally enforceable. The opinion also suggests that this is so because such contact and what may result therefrom are offensive to public morals. At the administrative hearing from which the subject regulation stemmed, there was testimony as to some of the horrendous things that an occasional ‘welloiled’ patron purportedly did to the first girl that he saw, immediately upon leaving a bar after having been aroused and ‘inspired’ by the nude dancing. We might think up logical reasons that would warrant regulations seeking to protect the public morals against on-site offenses, and ignore any subsequent danger. But I believe that nothing in the Constitution requires such a distinction.

Footnotes

* The court was provided with no additional names as plaintiffs in this action.

1 Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); Dyson v. Stein, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971); Byrne v. Karalexis, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed. 792 (1971).

1 With all due respect to Judge Gray, his dissenting opinion warrants the reemphasis of two significant points. First, all parties involved agree that the California courts have refused to consider the significant constitutional questions which confront us. Second, all of the parties insist that this court should resolve these issues. The majority's respect for the California courts is no less than that entertained by Judge Gray, but when the California courts refuse to decide the issues, and when those issues are presented to us under orderly procedures authorized by law, we cannot abdicate our constitutional responsibility until some indefinite time which may never arrive.

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316 F.3d 702
United States Court of Appeals,
Seventh Circuit.

BEN'S BAR, INC., Plaintiff–Appellant,
v.
VILLAGE OF SOMERSET, Defendant–Appellee.

No. 01–4351. | Argued May 30,
2002. | Decided Jan. 17, 2003.

Tavern and two of its nude dancers brought § 1983 action against city, seeking declaratory and injunctive relief against enforcement of ordinance that prohibited sale, use, or consumption of alcohol on premises of “Sexually Oriented Businesses,” alleging violation of their right to freedom of expression under First and Fourteenth Amendments. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Chief Judge, granted judgment for city. Plaintiffs appealed. The Court of Appeals, Manion, Circuit Judge, held that municipal ordinance was reasonable attempt to reduce or eliminate undesirable “secondary effects” associated with barroom adult entertainment.

Affirmed.

Attorneys and Law Firms

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Before FLAUM, Chief Judge, and WOOD, Jr. and MANION, Circuit Judges.

Opinion

MANION, Circuit Judge.

Ben's Bar, Inc. operates a tavern in the Village of Somerset, Wisconsin, that formerly served as a venue for nude and semi-nude dancing. After the Village enacted an ordinance that, in part, prohibited the sale, use, or consumption of alcohol on the premises of “Sexually Oriented Businesses,” Ben's Bar and two of its dancers filed suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the enforcement of the ordinance. The plaintiffs' complaint

alleged, among other things, that the ordinance's alcohol prohibition violated their right to freedom of expression under the First and Fourteenth Amendments to the United States Constitution. Shortly thereafter, plaintiffs filed a motion for a preliminary injunction, which the district court denied. The Village then filed a motion for summary judgment, which the district court granted. Ben's Bar appeals this decision. Because we conclude that the record sufficiently supports the Village's claim that the liquor prohibition is a reasonable attempt to reduce or eliminate the undesirable “secondary effects” associated with barroom adult entertainment, rather than an attempt to regulate the expressive content of nude dancing, we affirm the district court's judgment.

I.

On October 24, 2000, the Village of Somerset, a municipal corporation located in St. Croix County, Wisconsin (“Village”), enacted Ordinance A–472, entitled “Sexually *705 Oriented Business Ordinance” (“Ordinance”), for the purpose of regulating “Sexually Oriented Businesses and related activities to promote the health, safety, and general welfare of the citizens of the Village of Somerset, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of Sexually Oriented Businesses within the Village of Somerset.” The Ordinance regulates hours of operation, location, distance between patrons and performers, and other aspects concerning the operations of Sexually Oriented Businesses.

In the legislative findings section of the Ordinance, the Village noted that:

Based on evidence concerning the adverse secondary effects of Sexually Oriented Businesses on the community in reports made available to the Village Board, and on the holdings and findings in [numerous Supreme Court, federal appellate, and state appellate judicial decisions], as well as studies and summaries of studies conducted in other cities ... and findings reported in the Regulation of Adult Entertainment Establishments in St. Croix County, Wisconsin; and the Report of the Attorney General's Working Group of Sexually Oriented Businesses ... the Village Board finds that:

- (a) Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located.

- (b) Studies of the relationship between sexually oriented businesses and neighborhood property values have found a negative impact on both residential and commercial property values.
- (c) Sexually oriented businesses may contribute to an increased public health risk through the spread of sexually transmitted diseases.
- (d) There is an increase in the potential for infiltration by organized crime for the purpose of unlawful conduct.
- (e) *The consumption of alcoholic beverages on the premises of a Sexually Oriented Business exacerbates the deleterious secondary effects of such businesses on the community.*

(Emphasis added.)

On February 2, 2001, two months before the Ordinance's effective date of April 1, 2001, Ben's Bar, Inc. ("Ben's Bar"), a tavern in the Village featuring nude and semi-nude barroom dance,¹ and two of its dancers, Shannen Richards and Jamie Sleight, filed a four-count complaint against the Village, pursuant to 42 U.S.C. § 1983 and Wis. Stat. § 806.04 (the State's "Uniform Declaratory Judgments Act"), in the United States District Court for the Western District of Wisconsin. The plaintiffs' complaint alleged that portions of the Ordinance were unconstitutional and preempted by Wisconsin law, sought a declaratory judgment resolving those issues, and requested permanent injunctive relief. Specifically, the plaintiffs argued that the Ordinance: (1) violated their right of free expression under the First and Fourteenth Amendments to the United States Constitution and Article I, § 3 of the Wisconsin Constitution;² (2) violated their right to *706 equal protection under the Fourteenth Amendment to the United States Constitution and Article I, § 1 of the Wisconsin Constitution;³ (3) was an illegal "policy or custom" of the Village within the meaning of *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and *Owen v. City of Independence, Missouri*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); and (4) was an *ultra vires* legislative act in violation of Wis. Stat. § 66.0107(3).⁴

On March 19, 2001, the plaintiffs moved for a preliminary injunction against the enforcement of Sections 5(a) and (b) of the Ordinance. Section 5(a) provides that "[i]t shall be a violation of this ordinance for any Person to

knowingly and intentionally appear in a state of Nudity in a Sexually Oriented Business."⁵ Section 5(b) of the Ordinance provides that "[t]he sale, use, or consumption of alcoholic beverages on the Premises of a Sexually Oriented Business is prohibited." Plaintiffs argued that under § 66.0107(3) the Village was prohibited from enacting these regulations of adult entertainment because such conduct is already covered by the state's obscenity statute—i.e., Wis. Stat. § 944.21. They also contended that, notwithstanding § 66.0107, Sections 5(a) and (b) violated their right to free expression under the First and Fourteenth Amendments.

On April 17, 2001, the district court denied plaintiffs' motion for preliminary injunctive relief, holding that they did not have a reasonable chance of succeeding on the merits of their complaint. The district court, utilizing the test established by this circuit in *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir.2000), held that Section 5(a)'s complete prohibition of full nudity in Sexually Oriented Businesses was constitutional under the First Amendment because " 'limiting erotic dancing to semi-nudity [i.e., pasties and G-strings] represents a *de minimis* restriction that does not unconstitutionally abridge expression.' " (quoting *Schultz*, 228 F.3d at 847). The district court also concluded that Section 5(b) passed constitutional muster under *Schultz* because it: (1) was justified without reference to the content of the regulated speech; (2) was narrowly tailored to serve a significant government interest in curbing adverse secondary effects; and (3) left open ample alternative channels for communication. Finally, the district court ruled that the Ordinance was not subject to preemption under Wis. Stat. § 66.0107(3) because the plaintiffs had conceded that: (1) the Ordinance only regulates non-obscene conduct; and (2) they were seeking only to provide non-obscene barroom dancing.

Following unsuccessful attempts at settlement, on August 20, 2001, the Village moved for summary judgment of plaintiffs' complaint. On November 23, 2001, the district court granted the Village's motion, concluding that the Ordinance was constitutional for the reasons expressed in its *707 April 17, 2001 order. The court also addressed plaintiffs' equal protection claim, noting that they had waived the argument by failing to develop it in their briefs. A judgment in conformity with that order was entered on November 26, 2001. Ben's Bar appeals the district court's decision granting summary judgment,⁶ arguing that the court erred in concluding that Section 5(b) does not constitute an unconstitutional restriction on nude dancing under the First Amendment. *See DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 827 n. 2 (7th Cir.1999)

(holding that corporations may assert First Amendment challenges). We review the district court's grant of summary judgment *de novo*, construing all facts in favor of Ben's Bar, the non-moving party. *Commercial Underwriters Ins. Co. v. Aires Envtl. Services, Ltd.*, 259 F.3d 792, 795 (7th Cir.2001).

II.

The First Amendment provides, in part, that "Congress shall make no law ... abridging the freedom of speech" U.S. Const. amend. I. The First Amendment's Free Speech Clause has been held by the Supreme Court to apply to the states through the Fourteenth Amendment's due process clause. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *DiMa Corp.*, 185 F.3d at 826 (acknowledging the applicability of the Supreme Court's "incorporation doctrine" in the First Amendment context). The Supreme Court has further held that "nude dancing ... is expressive conduct *within the outer perimeters of the First Amendment*, though we view it as only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion) (emphasis added). See also *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir.2001) (noting that "[t]he impairment of First Amendment values is slight to the point of being risible since the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a modest social value"). Thus, while few would argue "that erotic dancing ... represents high artistic expression," *Schultz v. City of Cumberland*, 228 F.3d 831, 839 (7th Cir.2000), the Supreme Court has, nevertheless, afforded such expression a diminished form of protection under the First Amendment. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 294, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion) (holding that " 'even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate' ") (citation omitted) (emphasis added).

This case requires us to determine whether a municipality may restrict the sale or consumption of alcohol on the premises of businesses that serve as venues for adult entertainment without violating the First Amendment. On appeal, Ben's Bar's primary argument is that Section 5(b) is unconstitutional because the regulation has the "effect" of

requiring its dancers to wear more attire than simply pasties and G-strings.⁷ This argument *708 may be summed up as follows: (1) Section 5(b) prohibits the sale, use, or consumption of alcohol on the premises of Sexually Oriented Businesses;⁸ (2) Ben's Bar is an "Adult cabaret," a sub-category of a Sexually Oriented Business under the Ordinance,⁹ if it features nude or semi-nude dancers; (3) Section 3(o) of the Ordinance defines "seminude or semi-nudity" as "the exposure of a bare male or female buttocks or the female breast below a horizontal line across the top of the areola at its highest point with less than a complete and opaque covering"; and (4) Ben's Bar's dancers must wear more attire than that required by the Ordinance's definition of "semi-nude or semi-nudity" in order for the tavern to be able to sell alcohol during their performances and comply with Section 5(b)—i.e., more than pasties and G-strings. Ben's Bar contends that Section 5(b) significantly impairs the conveyance of an erotic message by the tavern's dancers¹⁰ and is not narrowly tailored to meet the Village's stated goal of reducing the adverse secondary effects associated with adult entertainment.¹¹

The central fallacy in Ben's Bar's argument, however, is that Section 5(b) restricts the sale and consumption of alcoholic beverages in establishments that serve as venues for adult entertainment, not the attire of nude dancers. In the absence of alcohol, Ben's Bar's dancers are free to express themselves all the way down to their pasties and G-strings. The question then is not whether the Village can require nude dancers to wear more attire than pasties and G-strings, but whether it can prohibit Sexually Oriented Businesses like Ben's Bar from selling alcoholic beverages in order to prevent the deleterious secondary effects arising from the explosive combination of nude dancing and alcohol consumption.

While the question presented is rather straightforward, the issue is significantly complicated by a long series of Supreme Court decisions involving the application of the First Amendment in the adult entertainment *709 context. Because these decisions establish the analytical framework under which we must operate, our analysis necessarily begins with a comprehensive summary of the Supreme Court's jurisprudence in this area.

A. *California v. LaRue*

Initially, we note that the Supreme Court addressed the precise issue before us in *California v. LaRue*, 409 U.S. 109,

93 S.Ct. 390, 34 L.Ed.2d 342 (1972), when it considered the constitutionality of regulations promulgated by California's Department of Alcoholic Beverages ("Department") that prohibited bars and nightclubs from featuring varying degrees of adult entertainment.¹² The Department enacted the regulations, after holding public hearings, because it concluded that the consumption of alcohol in adult entertainment establishments resulted in a number of adverse secondary effects—e.g., acts of public indecency and sex-related crimes. As in this case, adult entertainment businesses filed suit alleging that the regulations violated the First Amendment. *Id.* at 110, 93 S.Ct. 390.

The Supreme Court began its analysis in *LaRue* by stressing that "[t]he state regulations here challenged come to us, not in the context of a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink." 409 U.S. at 114, 93 S.Ct. 390. For this reason, the vast majority of the Court's opinion addressed the States' power to regulate "intoxicating liquors" under the Twenty-first Amendment.¹³ See generally *id.* at 115–19, 93 S.Ct. 390. Specifically, the *LaRue* Court concluded that:

While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, 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.

409 U.S. at 114, 93 S.Ct. 390.

In doing so, the *LaRue* Court rejected the plaintiffs' contention that the state's regulatory authority over "intoxicating beverages" was limited, as applied to adult entertainment establishments, to "either dealing with the problem it confronted within the limits of our decisions as to obscenity [i.e., *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) and its progeny] or in accordance with the limits prescribed for dealing with some forms of communicative conduct in [*United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)]," 409 U.S. at 116, 93 S.Ct. 390, reasoning " '[w]e *710 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.' " *Id.* at 117–18, 93 S.Ct. 390 (citation omitted). The Court found that "the substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of

movies or live entertainment, 'performances' that partake more of gross sexuality than of communication." *Id.* at 118, 93 S.Ct. 390. The Court also concluded that although "at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board ... [but] has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *Id.* The *LaRue* Court ended its analysis by noting that "[t]he Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one," and that "[g]iven the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution." *Id.* at 118–19, 93 S.Ct. 390.¹⁴

B. 44 *Liquormart, Inc. v. Rhode Island*

After the Supreme Court's decision in 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), however, the precedential value of the reasoning anchoring the Court's holding in *LaRue* was severely diminished. In 44 *Liquormart*, the Court held that Rhode Island's statutory prohibition against advertisements providing the public with accurate information about retail prices of alcoholic beverages was "an abridgement of speech protected by the First Amendment and that is not shielded from constitutional scrutiny by the Twenty-first Amendment." *Id.* at 489, 116 S.Ct. 1495. In reaching this conclusion, the Court noted:

Rhode Island argues, and the Court of Appeals agreed, that in this case the Twenty-first Amendment tilts the First Amendment analysis in the State's favor [of the advertising ban] [T]he Court of Appeals relied on our decision in *California v. LaRue* ... [where] five Members of the Court relied on the Twenty-first Amendment to buttress the conclusion that the First Amendment did not invalidate California's prohibition of certain grossly sexual exhibitions in premises licensed to serve alcoholic beverages. Specifically, the opinion stated that the Twenty-first Amendment required that the prohibition be given an added presumption in favor of its validity. *711 *We are now persuaded that the Court's analysis in LaRue would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment. Entirely apart from the Twenty-first Amendment, the State has ample*

power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases, the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of "bacchanalian revelries" described in the *LaRue* opinion regardless of whether alcoholic beverages are involved.... See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). As we recently noted: "*LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." *Rubin v. Coors Brewing Co.*, 514 U.S., at 483, n. 2, 115 S.Ct. 1585. Without questioning the holding of *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment.

Id. at 515–16, 116 S.Ct. 1495 (emphasis added).

The foregoing makes clear that *LaRue*'s holding remains valid after 44 *Liquormart*, but for a different reason. The 44 *Liquormart* Court concluded that "the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment," 517 U.S. at 515, 116 S.Ct. 1495 because "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *Id.* In making this assertion, the 44 *Liquormart* Court relied on the *LaRue* Court's conclusion that: "the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power ... [i.e.,] the normal state authority over public health, welfare, and morals." 409 U.S. at 114, 93 S.Ct. 390. But in recent years, the Supreme Court has held, on a number of occasions, that "non-obscene" adult entertainment is entitled to a minimal degree of protection under the First Amendment, even in relation to laws enacted pursuant to a State's general police powers. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 1739, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring) (noting that "if a city can decrease the crime and blight associated with [adult entertainment] speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of speech substantially undiminished, there is no First Amendment objection"); *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) (holding that city's public indecency ordinance, enacted to "protect public health and safety," must be analyzed as a content-neutral regulation

of expressive conduct); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

Given the foregoing, it is difficult to ascertain exactly what "analysis" the 44 *Liquormart* Court was referring to as having persuaded it that the *LaRue* Court would have reached the same result even without the "added presumption" of the Twenty-first Amendment. We find noteworthy, however, the 44 *Liquormart* Court's citation of the post-*LaRue* decisions of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), in support of its assertion that "the States' inherent police powers provide ample authority to restrict the kind of 'bacchanalian revelries' *712 described in the *LaRue* opinion regardless of whether alcoholic beverages are involved." 44 *Liquormart*, 517 U.S. at 515, 116 S.Ct. 1495. In *American Mini Theatres* and *Barnes*, the Supreme Court held that the adult entertainment regulations at issue were subject to intermediate scrutiny for purposes of determining their constitutionality under the First Amendment. *American Mini Theatres*, 427 U.S. at 79, 96 S.Ct. 2440 (Powell, J., concurring) ("it is appropriate to analyze the permissibility of Detroit's action [zoning ordinance separating adult theaters from residential neighborhoods and churches] under the four-part test of *United States v. O'Brien*"); *Barnes*, 501 U.S. at 582, 111 S.Ct. 2456 (Souter, J., concurring) ("I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in *United States v. O'Brien*").

Like the Fourth and Eleventh Circuits, we conclude that after 44 *Liquormart* state regulations prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments must be analyzed in light of *American Mini Theatres* and *Barnes*, as modified by their respective progeny. See *Giovani Carandola Ltd. v. Bason*, 303 F.3d 507, 513 n. 2 & 519 (4th Cir.2002) (noting the 44 *Liquormart* Court's reliance on *American Mini Theatres* and *Barnes* and holding that "the result reached in *LaRue* remains sound not because a state enjoys any special authority when it burdens speech by restricting the sale of alcohol, but rather because the regulation in *LaRue* complied with the First Amendment"); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996 (11th Cir.1998) (holding that "the Supreme Court [in 44 *Liquormart*] ... reaffirmed the precedential value of *LaRue* and the *Barnes*–*O'Brien* test [and] reaffirmed that the *Barnes*–*O'Brien* intermediate level of review applies to [adult entertainment liquor regulations]"). But see *BZAPS*,

Inc. v. City of Mankato, 268 F.3d 603, 608 (8th Cir.2001) (upholding the constitutionality of an adult entertainment liquor regulation solely on the basis of *LaRue's* holding).

We reach this conclusion notwithstanding the fact that in *LaRue* the Supreme Court upheld the constitutionality of the adult entertainment liquor regulations using the rational basis test, *see* 409 U.S. at 115–16, 93 S.Ct. 390, and explicitly refused to subject the regulations to *O'Brien's* intermediate scrutiny test. *Id.* at 116, 93 S.Ct. 390 (“We do not believe that the state regulatory authority in this case was limited to ... dealing with the problem it confronted ... in accordance with the limits prescribed for dealing with some forms of communicative conduct in [*O'Brien*]”). We do so because the 44 *Liquormart* Court's reference to *American Mini Theatres* and *Barnes* makes clear that the Court is of the opinion that adult entertainment liquor regulations, like the ones at issue in *LaRue*, will pass constitutional muster even under the heightened intermediate scrutiny tests outlined in those cases.

In making this determination, we are by no means suggesting that the Supreme Court's decisions in *American Mini Theatres* and *Barnes* are of greater precedential value than *LaRue*. On the contrary, as noted *infra*, our decision in this case is largely dictated by *LaRue's* holding. At the time *LaRue* was decided, however, the Supreme Court had not yet established a framework for analyzing the constitutionality of adult entertainment regulations. This changed with the Court's subsequent decisions in *American Mini Theatres* and *Barnes*, cases that serve as a point of origin for two distinct, yet overlapping, lines of jurisprudence that address the degree of First Amendment *713 protection afforded to adult entertainment. Given the significant development of the law in this area since *LaRue*, as well as the Court's refashioning of *LaRue's* reasoning in 44 *Liquormart*, we conclude that it is necessary to apply *LaRue's* holding in the context of this precedent.

C. The 44 *Liquormart* “road map”

The 44 *Liquormart* decision established a road map of sorts for analyzing the constitutionality of adult entertainment liquor regulations, i.e., the Supreme Court's decisions in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), providing two separate but similar routes.¹⁵ First, the *American Mini Theatres* decision, as modified by the Court's subsequent decisions in *City of Renton v. Playtime*

Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), delineates the standards for evaluating the constitutionality of adult entertainment zoning ordinances. Second, the *Barnes* decision, as modified by the Court's recent decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), provides guidelines for analyzing the constitutionality of public indecency statutes.

[1] The analytical frameworks utilized in both lines of jurisprudence can be traced back to the four-part test enunciated by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), where the Court held that a statute prohibiting the destruction or mutilation of draft cards was a content-neutral regulation of expressive conduct. *American Mini Theatres*, 427 U.S. at 79, 96 S.Ct. 2440 (Powell, J., concurring) (applying *O'Brien* test); *Barnes*, 501 U.S. at 582, 111 S.Ct. 2456 (Souter, J., concurring) (same). Under the *O'Brien* test, a governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673.

[2] While the *O'Brien* test is still utilized by the Supreme Court in analyzing the constitutionality of public indecency statutes, *see Pap's A.M.*, 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part), the Court currently evaluates adult entertainment zoning ordinances as time, place, and manner regulations. *Alameda Books*, 122 S.Ct. at 1733 (plurality opinion); *id.* at 1741 (Kennedy, J., concurring); *Renton*, 475 U.S. at 46–47, 106 S.Ct. 925. A time, place, and manner regulation of adult entertainment will be upheld if it is “designed to serve a substantial government interest and ... reasonable alternative avenues of communication remain[] available.” *Alameda Books*, 122 S.Ct. at 1734. Additionally, a time, place, and manner regulation must be justified without reference to the content of the regulated speech and narrowly tailored to serve the government's *714 interest. *Schultz*, 228 F.3d at 845.¹⁶

[3] In this case, however, we are not dealing with a zoning ordinance or a public indecency statute. Instead, we are called upon to evaluate the constitutionality of an adult entertainment liquor regulation. Therefore, it is not entirely clear whether Section 5(b) should be analyzed as a time, place, and manner restriction or as a regulation of expressive conduct under *O'Brien's* four-part test; or for that matter whether the tests are entirely interchangeable. See *LLEH, Inc. v. Wichita County, Texas*, 289 F.3d 358, 365 (5th Cir.), cert. denied, 537 U.S. 1045, 123 S.Ct. 621, 154 L.Ed.2d 517 (2002) (noting uncertainty as to which test courts should use in analyzing the constitutionality of adult entertainment regulations: "the test for time, place, or manner regulations, described in *Renton* ... or the four-part test for incidental limitations on First Amendment freedoms, established in *O'Brien*"). For all practical purposes, however, the distinction is irrelevant because the Supreme Court has held that the time, place, and manner test embodies much of the same standards as those set forth in *United States v. O'Brien. Barnes*, 501 U.S. at 566, 111 S.Ct. 2456 (plurality opinion) (relying on *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298–99, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)); *LLEH*, 289 F.3d at 365–66 (same).¹⁷ Moreover, as explained *infra*, two of the Supreme Court's post-44 *Liquormart* decisions—*Pap's A.M.* and *Alameda Books*—make it abundantly clear that the analytical frameworks and standards utilized by the Court in evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable. We, therefore, conclude that it is appropriate to analyze the constitutionality of Section 5(b) using the standards articulated by the Supreme Court in the five decisions comprising the *American Mini Theatres* and *Barnes* lines of jurisprudence. Thus, before proceeding to the merits of Ben's Bar's argument, we begin our analysis by summarizing the reasoning and holdings of these decisions.

715 (1) *Young v. American Mini Theatres, Inc.

In *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Supreme Court addressed, *inter alia*, whether a zoning ordinance enacted by the City of Detroit violated the First Amendment.¹⁸ *Id.* at 58, 96 S.Ct. 2440. The "dispersal" ordinance at issue prohibited the operation of any adult entertainment movie theater within 1,000 feet of any two other "regulated uses" (e.g., adult bookstores, bars, hotels, pawnshops), or within 500 feet of a residential area. *Id.* at 52, 96 S.Ct. 2440. A majority of the Court upheld the constitutionality of the ordinance, but in

doing so did not agree on a single rationale for the decision. *Id.* at 62–63, 96 S.Ct. 2440 (plurality opinion); *id.* at 84, 96 S.Ct. 2440 (Powell, J. concurring). The plurality concluded that "apart from the fact that the ordinance treats adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in respective theaters, *the regulation of the place where such films may be exhibited does not offend the First Amendment.*" *Id.* at 63, 96 S.Ct. 2440 (emphasis added). In reaching this conclusion, the plurality emphasized that "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate." *Id.* at 70, 96 S.Ct. 2440. The plurality also found that the city's zoning ordinance was justified by its interest in "preserving the character of its neighborhoods," *id.* at 71, 96 S.Ct. 2440, and therefore "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* The plurality concluded its analysis by noting that "what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited" *Id.*¹⁹

Justice Powell concurred in the judgment of the Court, agreeing with the plurality that the zoning ordinance "is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content." *Id.* at 78–79, 96 S.Ct. 2440. He disagreed, however, with the plurality's determination that "nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." *Id.* at 73 n. 1, 96 S.Ct. 2440. Instead, Justice Powell concluded that it was appropriate to analyze and uphold the constitutionality of the zoning ordinance under the four-part test enunciated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *Id.* at 79, 96 S.Ct. 2440.²⁰

716 (2) *City of Renton v. Playtime Theatres, Inc.

The Supreme Court's decision in *American Mini Theatres* laid the groundwork for the Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).²¹ In *Renton*, the Court considered the validity of an adult entertainment zoning ordinance virtually indistinguishable from the one at issue in *American Mini Theatres*. *Id.* at 46, 106 S.Ct. 925. Unlike the *American Mini Theatres* plurality, however, the *Renton* Court outlined an

analytical framework for evaluating the constitutionality of these ordinances. The Court's analysis proceeded in three steps. First, the Court found that the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations. *Id.* Next, the Court considered whether the ordinance was content-neutral or content-based. If an ordinance is content-based, it is presumptively invalid and subject to strict scrutiny. *Id.* at 46–47, 106 S.Ct. 925. On the other hand, if an ordinance is aimed not at the content of the films shown at adult theaters, but rather at combating the secondary effects of such theaters on the surrounding community (e.g., increased crime rates, diminished property values), it will be treated as a content-neutral regulation. *Id.* In *Renton*, the Court held that the zoning ordinance was a “content neutral” regulation of speech because while “the ordinance treats theaters that specialize in adult films differently from other kinds of theaters [it] is aimed not at the *content* of the films shown ... but rather at the *secondary effects* of such theaters on the surrounding community.” 475 U.S. at 47, 106 S.Ct. 925. Finally, given this finding, the *Renton* Court found that the zoning ordinance would be upheld as a valid time, place and manner regulation, *id.* at 46, 106 S.Ct. 925, if it “was designed to serve a substantial governmental interest and [did] not unreasonably limit alternative avenues of communication.” *Id.* at 47, 106 S.Ct. 925. The Court concluded that the zoning ordinance met this test, noting that a “‘city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.’” *id.* at 50, 106 S.Ct. 925 (quoting *American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. 2440),²² and that the ordinance allowed for reasonable alternative avenues of communication because there was “ample, accessible real estate” open for use as adult theater sites. *Id.* at 53, 96 S.Ct. 2440.

The Supreme Court's decision in *Renton* is also notable because in addition to upholding the constitutionality of the zoning ordinance, the Court also held that the *717 First Amendment did not require municipalities, before enacting such ordinances, to conduct new studies or produce evidence independent of that already generated by other cities (whether summarized in judicial decisions or not), *Renton*, 475 U.S. at 51–52, 106 S.Ct. 925, so long as “whatever evidence [a] city relies upon is reasonably believed to be relevant to the problem that the city addresses.” *Id.*

(3) *Barnes v. Glen Theatre, Inc.*

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), the Supreme Court was called upon to address the constitutionality of Indiana's public indecency statute. In a splintered decision, a narrow majority of the Court held that the statute—which prohibited nudity in public places—could be enforced against establishments featuring nude dancing, i.e., by requiring dancers to wear pasties and G-strings during their performances, without violating the First Amendment's right of free expression. *Id.* at 565, 111 S.Ct. 2456 (plurality opinion); *id.* at 572, 111 S.Ct. 2456 (Scalia, J. concurring); *id.* at 582, 585, 111 S.Ct. 2456 (Souter, J. concurring). Of that majority, however, only three Justices agreed on a single rationale.

The plurality—Chief Justice Rehnquist and Justices O'Connor and Kennedy—began its analysis by emphasizing that while “nude dancing ... is expressive conduct within the outer perimeters of the First Amendment [w]e must [still] determine the level of protection to be afforded to the expressive conduct at issue, and ... whether the Indiana statute is an impermissible infringement of that protected activity.” *Barnes*, 501 U.S. at 566, 111 S.Ct. 2456. The plurality noted that the public indecency statute did not “ban [] nude dancing, as such, but ... proscribed public nudity across the board,” *id.*, and that “the Supreme Court of Indiana has construed the Indiana statute to preclude nudity in what are essentially places of public accommodation.” *Id.* Next, the plurality concluded that the public indecency statute should be analyzed under *O'Brien's* four-part test for evaluating regulations of expressive conduct protected by the First Amendment.²³ Applying this test, the plurality found “that Indiana's public indecency statute [was] justified despite its incidental limitations on some expressive activity,” *id.* at 567, 111 S.Ct. 2456, because: (1) the statute was “clearly within the constitutional power of the State and furthers substantial governmental interests [i.e., protecting societal order and morality],” *id.* at 568, 111 S.Ct. 2456; (2) the state's interest in protecting societal order and morality by enforcing the statute to prohibit nude dancing was “unrelated to the suppression of free expression” because “the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic [and] [t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity,” *id.* at 570–71, 111 S.Ct. 2456; (3) the incidental restriction on First Amendment freedom placed on nude dancing by the statute was no greater than essential to the furtherance of the governmental interest because “[t]he statutory prohibition is not a means to some greater end,

but an end in itself," *id.* at 571–72, 111 S.Ct. 2456; and (4) the public indecency statute was narrowly tailored because "Indiana's requirement that the dancers wear pasties and G-strings is modest, and the *bare minimum necessary* *718 to achieve the State's purpose." *Id.* at 572, 111 S.Ct. 2456 (emphasis added).

Justice Scalia concurred in the judgment of the Court, but in doing so expressed his opinion that "the challenged regulation must be upheld not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." *Id.* at 572, 111 S.Ct. 2456. Justice Souter also concurred in the judgment of the Court, agreeing with the plurality that "the appropriate analysis to determine the actual protection required by the First Amendment is the four-part inquiry described in *United States v. O'Brien*." *Id.* at 582, 111 S.Ct. 2456. He wrote separately, however, to rest his concurrence in the judgment, "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments" *Id.*²⁴ In doing so, Justice Souter relied heavily on the Court's decision in *Renton*. *Id.* at 583–87, 111 S.Ct. 2456.

(4) *City of Erie v. Pap's A.M.*

The Supreme Court revisited the *Barnes* holding in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), where a majority of the Court upheld the constitutionality of a public indecency ordinance "strikingly similar" to the one at issue in *Barnes*. *Id.* at 283, 120 S.Ct. 1382. Unlike *Barnes*, however, in *Pap's A.M.* five justices agreed that the proper framework for analyzing public indecency statutes was *O'Brien's* four-part test. *Id.* at 289, 120 S.Ct. 1382 (plurality opinion) ("We now clarify that government restrictions on public nudity ... should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech"); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part) (agreeing with the "analytical approach that the plurality employs in deciding this case [i.e., the *O'Brien* test]"). See also *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1278 (11th Cir.2001) (holding that "[a]lthough no opinion in [*Pap's A.M.*] was joined by more than four Justices, a majority of the Court basically agreed on how these kinds of statutes should be analyzed [i.e., *O'Brien's* four-part test]"). A majority of the Justices also agreed that

combating the adverse secondary effects of nude dancing was within the city's constitutional powers and unrelated to the suppression of free expression, *Pap's A.M.*, 529 U.S. at 296, 301, 120 S.Ct. 1382 (plurality opinion) ("Erie's efforts to protect public health and safety are clearly within the city's police powers [and] [t]he ordinance is unrelated to the suppression of free expression"); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part) ("Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression"), thus satisfying the first and third prongs of the *O'Brien* test.

A majority of the Justices in *Pap's A.M.* could not, however, agree on whether the public indecency statute furthered an important or substantial interest of the city (second prong of *O'Brien*), and if so whether the incidental restriction on nude dancing was no greater than that essential to the furtherance of this interest (fourth prong). The plurality—Chief Justice Rehnquist and Justices O'Connor, Kennedy, *719 and Breyer—concluded that Erie's public indecency ordinance furthered an important or substantial government interest under *O'Brien* because "[t]he asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing [e.g., the increased crime generated by such establishments] are undeniably important." *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382.²⁵ The *Pap's A.M.* plurality also found that Erie's public indecency statute was no greater than that essential to furthering the city's interest in combating the harmful secondary effects of nude dancing because:

The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.
529 U.S. at 301, 120 S.Ct. 1382.

Justice Scalia, joined by Justice Thomas, agreed with the plurality that the ordinance should be upheld, but wrote separately to emphasize that "as a general law regulating conduct and not specifically directed at expression, [the city's public indecency ordinance] is not subject to First Amendment scrutiny at all," *Pap's A.M.*, 529 U.S. at 307–08, 120 S.Ct. 1382 (quoting *Barnes*, 501 U.S. at 572, 111 S.Ct. 2456 (Scalia, J., concurring)), and that "[t]he traditional power of government to foster good morals (*bonos mores*

), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.” *Id.* at 310, 120 S.Ct. 1382. Justice Souter concurred in part and dissented in part, stressing his belief that “the current record [does not] allow us to say that the city has made a sufficient evidentiary showing to sustain its regulation” *Id.* at 310–11, 120 S.Ct. 1382. Justice Stevens, joined by Justice Ginsburg, dissented, asserting that the ordinance was a “patently invalid” content-based ban on nude dancing that censored protected speech. *Id.* at 331–32, 120 S.Ct. 1382. Because the plurality’s decision offers the narrowest ground for the Supreme Court’s holding in *Pap’s A.M.*, we find the reasoning of that opinion to be controlling. *Marks*, 430 U.S. at 193, 97 S.Ct. 990.

(5) *City of Los Angeles v. Alameda Books, Inc.*

This past term in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), the Supreme Court upheld, at the summary judgment stage, an ordinance prohibiting multiple adult entertainment businesses from operating in the same building. *Id.* at 1733. The Court reached this conclusion despite the fact that the city had not, prior to the enactment of the ordinance, conducted or relied upon studies (or other evidence) specifically demonstrating that forbidding multiple adult entertainment businesses from operating under one roof reduces secondary effects. *Id.* at 1736 (plurality opinion); *id.* at 1744 (Kennedy, J., concurring). Once again, however, a majority of the Court could not agree on a single rationale for this decision.

*720 The primary issue in *Alameda Books* was the appropriate standard “for determining whether an ordinance serves a substantial government interest under *Renton*.” 122 S.Ct. at 1733. The plurality—written by Justice O’Connor and joined by Chief Justice Rehnquist and Justices Scalia and Thomas—concluded that whether a municipal ordinance is “ ‘designed to serve a substantial government interest and does not unreasonably limit alternative avenues of communication’ ... requires [courts to] ... ask[] whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.” *Id.* at 1737. According to the plurality, this requirement is met if the evidence upon which the municipality enacted the regulation “ ‘is reasonably believed to be relevant’ for demonstrating a connection between [secondary effects producing] speech and a substantial, independent government interest.” *Id.* at 1736. The plurality stressed that once a municipality presents

a rational basis for addressing the secondary effects of adult entertainment through evidence that “fairly support[s] the municipality’s rationale for its ordinance,” *id.*, the plaintiff challenging the constitutionality of the ordinance must “cast direct doubt on this rationale, either by demonstrating that the municipality’s evidence does not support its rationale or by furnishing evidence that disputes the municipality’s factual findings.” *Id.* If a plaintiff fails to cast doubt on the municipality’s rationale, the inquiry is over and “the municipality meets the standard set forth in *Renton*.” *Id.* If, however, a plaintiff succeeds “in casting doubt on a municipality’s rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.” *Id.* Because the plurality concluded that the city, for purposes of summary judgment, had complied with the evidentiary requirement outlined in *Renton*, *id.*, it remanded the case for further proceedings. *Id.* at 1738.

Justice Scalia, in addition to joining the plurality opinion, wrote separately to emphasize that while the plurality’s opinion “represents a correct application of our jurisprudence concerning the regulation of the ‘secondary effects’ of pornographic speech our First Amendment traditions make ‘secondary effects’ analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex.” *Alameda Books*, 122 S.Ct. at 1738–39.

Justice Kennedy concurred in the judgment of the Court, but writing separately because he concluded, *inter alia*, that “the plurality’s application of *Renton* might constitute a subtle expansion, with which I do not concur.” *Id.* at 1739. He began, however, by expressing his agreement with the plurality that the secondary effects resulting from “high concentrations of adult businesses can damage the value and integrity of a neighborhood,” *id.*, stressing “[t]he damage is measurable; it is all too real.” *Id.* He also agreed with the plurality that “[t]he law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech,” *id.*, emphasizing that “[a] city’s ‘interest in attempting to preserve the quality of urban life is one that must be accorded high respect.’ ” *Id.* (quoting *American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. 2440). In Justice Kennedy’s opinion, if a municipality ameliorates the secondary effects of adult entertainment through “the traditional exercise of its zoning power, and at the same time leaves the quantity and accessibility of the speech *721

substantially undiminished, there is no First Amendment objection even if the measure identifies the problem outside by reference to the speech inside—that is, even if the measure is in that sense content based.”²⁶ *Id.* Like the plurality, he concluded that “[a] zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it.” *Id.* at 1740. He also expressed his belief that zoning regulations “do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use ... [and that] [t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional.” *Id.* at 1741.

Based on the foregoing principles, Justice Kennedy believes that two questions must be asked by a court seeking to determine whether a zoning ordinance regulating adult entertainment is designed to meet a substantial government interest: (1) “what proposition does a city need to advance in order to sustain a secondary-effects ordinance?”, *Alameda Books*, 122 S.Ct. at 1741; and (2) “how much evidence is required to support the proposition?” *Id.* According to Justice Kennedy, the plurality skipped the second question, giving the correct answer, but neglected to give sufficient “attention” to the first question, *id.*, i.e., “the claim a city must make to justify a content-based ordinance.” *Id.* at 1742. In his view, “a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact,” *id.*, and “[t]he rationale of the ordinance must be that it will suppress secondary effects ... not ... speech.” *Id.* Justice Kennedy’s primary area of disagreement with the plurality’s analysis was that, in his opinion, it failed to “address how speech [would] fare under the city’s ordinance.” *Id.*

The differences between Justice Kennedy’s concurrence and the plurality’s opinion are, however, quite subtle. Justice Kennedy’s position is not that a municipality must *prove* the efficacy of its rationale for reducing secondary effects prior to implementation, as Justice Souter and the other dissenters would require, see generally *Alameda Books*, 122 S.Ct. at 1744–51; but that a municipality’s *rationale* must be *premised* on the theory that it “*may* reduce the costs of secondary effects without substantially reducing speech.” *Id.* at 1742 (emphasis added). Significantly, while Justice Kennedy believed that the plurality did not adequately address this aspect of the city’s rationale, he agreed *722 with the plurality’s overall conclusion that a municipality’s

initial burden of demonstrating a substantial government interest in regulating the adverse secondary effects associated with adult entertainment is slight, noting:

As to this, we have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; *and if its inferences appear reasonable*, we should not say there is no basis for its conclusion.

Id. at 1742–43 (emphasis added).

The dissenting opinion of Justice Souter, joined by Justices Stevens and Ginsburg in full and by Justice Breyer with respect to part II, asserted that the Court should have struck down the ordinance. *Alameda Books*, 122 S.Ct. at 1747 (Souter, J., dissenting).

Because Justice Kennedy’s concurrence is the narrowest opinion joining the judgment of the Court in *Alameda Books*, we conclude that it is the controlling opinion. *Marks*, 430 U.S. at 193, 97 S.Ct. 990.

D. Does Section 5(b)’s prohibition of alcohol on the premises of Sexually Oriented Businesses violate the First Amendment?

[4] Based on the road map provided by the Supreme Court in 44 *Liquormart*, as described *supra*, we conclude that a liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments is constitutional if: (1) the State is regulating pursuant to a legitimate governmental power, *O’Brien*, 391 U.S. at 377, 88 S.Ct. 1673; (2) the regulation does not completely prohibit adult entertainment, *Renton*, 475 U.S. at 46, 106 S.Ct. 925; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments, *Pap’s A.M.*, 529 U.S. at 289–91, 120 S.Ct. 1382;²⁷ and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues

of communication remain available, *see Alameda Books*, 122 S.Ct. at 1734 (plurality opinion); *id.* at 1739–44 (Kennedy, J. concurring); *or*, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. *Pap's A.M.*, 529 U.S. at 296, 301 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

[5] Applying the foregoing analytical framework here, we conclude that Section 5(b) does not violate the First Amendment. To begin with, the Village's regulation of alcohol sales and consumption in "inappropriate locations" is clearly within its general police powers. *44 Liquormart*, 517 U.S. at 515, 116 S.Ct. 1495; *LaRue*, 409 U.S. at 114, 93 S.Ct. 390. As such, the Village enacted Section 5(b) "within the constitutional power of the Government." *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382 (holding that a municipality's efforts to protect the public's health and safety through its *723 general police powers satisfies this requirement); *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673 (same).

[6] The next two prongs of our test concern the level of constitutional scrutiny that must be applied to Section 5(b). The level of First Amendment scrutiny a court uses to determine whether a regulation of adult entertainment is constitutional depends on the purpose for which the regulation was adopted. If the regulation was enacted to restrict certain viewpoints or modes of expression, it is presumptively invalid and subject to strict scrutiny. *Texas v. Johnson*, 491 U.S. 397, 403, 411–12, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Renton*, 475 U.S. at 46–47, 106 S.Ct. 925. If, on the other hand, the regulation was adopted for a purpose unrelated to the suppression of expression—e.g., to regulate nonexpressive conduct or the time, place, and manner of expressive conduct—a court must apply a less demanding intermediate scrutiny. 491 U.S. at 406–07, 109 S.Ct. 2533; *Pap's A.M.*, 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

[7] [8] The Supreme Court has held that regulations of adult entertainment receive intermediate scrutiny if they are designed not to suppress the "content" of erotic expression, but rather to address the negative secondary effects caused by such expression. *Alameda Books*, 122 S.Ct. at 1733–34 (plurality opinion), *id.* at 1741 (Kennedy, J., concurring); *Renton*, 475 U.S. at 48, 106 S.Ct. 925. Here, Section 5(b), like the liquor regulations at issue in *LaRue*, 409 U.S. at

118, 93 S.Ct. 390, does not completely prohibit Ben's Bar's dancers from conveying an erotic message; it merely prohibits alcohol from being sold or consumed on the premises of adult entertainment establishments. *See, e.g., Wise Enterprises, Inc. v. Unified Gov't of Athens-Clarke County, Georgia*, 217 F.3d 1360, 1365 (11th Cir.2000) (holding that "[t]he ordinance does not prohibit all nude dancing, but only restricts nude dancing in those locations where the unwanted secondary effects arise"); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 998 (11th Cir.1998) (holding that ordinance prohibiting alcohol on the premises of adult entertainment establishments did not ban nude dancing, but merely restricted "the place or manner of nude dancing without regulating any particular message it might convey"). Moreover, it is clear that the "predominant concerns" motivating the Village's enactment of Section 5(b) "were with the secondary effects of adult [speech], and not with the content of adult [speech]." *Alameda Books*, 122 S.Ct. at 1737 (plurality opinion) (quoting *Renton*, 475 U.S. at 47, 106 S.Ct. 925); *id.* at 1739–41 (Kennedy, J., concurring).²⁸ The Village enacted the Ordinance because it believed "there is convincing documented evidence that Sexually Oriented Businesses have a deleterious effect on both existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values." Specifically, the Village concluded that "the consumption of alcoholic beverages on the premises of a Sexually Oriented Business exacerbates the deleterious secondary effects of such businesses on the community." Additionally, in passing the Ordinance, the Village emphasized (in the text of the Ordinance) that its intention was not *724 "to suppress any speech activities protected by the First Amendment, but to enact a[n] ... ordinance which addresses the secondary effects of Sexually Oriented Businesses," and that it was not attempting to "restrict or deny access by adults to sexually oriented-materials protected by the First Amendment"

[9] For all of the foregoing reasons, Section 5(b) is properly analyzed as a content-based time, place, and manner restriction, or as a content-based regulation of expressive conduct, and therefore is subject only to intermediate scrutiny. *Alameda Books*, 122 S.Ct. at 1733–36 (plurality opinion), *id.* at 1741 (Kennedy, J. concurring); *Pap's A.M.*, 529 U.S. at 294–96, 120 S.Ct. 1382 (plurality opinion), *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).²⁹ *See also Artistic Entm't, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1308–09 (11th Cir.2000) (holding that "a prohibition on the sale of alcohol at adult

entertainment venues ... [is] content-neutral and subject to the *O'Brien* test"); *Wise Enterprises*, 217 F.3d at 1364 (holding that "[i]t is clear from these [legislative] statements the County's ordinance is aimed at the secondary effects of nude dancing combined with the consumption of alcoholic beverages, not at the message conveyed by nude dancing [T]he district court was [therefore] correct in [applying] ... intermediate scrutiny"). Regulations that prohibit nude dancing where alcohol is served or consumed are independent of expressive or communicative elements of conduct, and therefore are treated as if they were content-neutral. *Wise Enterprises*, 217 F.3d at 1363.

[10] This brings us to the heart of our analysis: whether Section 5(b) is designed to serve a substantial government interest, narrowly tailored, and does not unreasonably limit alternative avenues of communication, *or*, alternatively, furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. As previously noted, it is not entirely clear whether an adult entertainment liquor regulation is to be treated as a time, place, and manner regulation, or instead as a regulation of expressive conduct under *O'Brien*. See, e.g., *LLEH, Inc.*, 289 F.3d at 365. But in either case, we are required to ask "whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Alameda Books*, 122 S.Ct. at 1737 (plurality opinion). At this stage, courts must "examine evidence concerning regulated speech and secondary effects." *Id.* In conducting this inquiry, we are required, as previously noted, to answer two questions: (1) "what proposition does a city need to advance in order to sustain a secondary-effects ordinance?"; and (2) "how much evidence is required to support the proposition?" *Id.* at 1741 (Kennedy, J. concurring).³⁰

*725 [11] At the outset, we note that in order to justify a content-based time, place, and manner restriction or a content-based regulation of expressive conduct, a municipality "must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects [i.e., is designed to serve, or furthers, a substantial or important governmental interest], while leaving the quantity and accessibility of speech substantially intact [i.e., that the regulation is narrowly tailored and does not unreasonably limit alternative avenues of communication, or, alternatively, that the restriction on expressive conduct is no greater than is essential in furtherance of that interest]."³¹

Alameda Books, 122 S.Ct. at 1741 (Kennedy, J. concurring). The regulation may identify the speech based on content, "but only as a shorthand for identifying the secondary effects outside." *Id.* A municipality "may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* Thus, the rationale behind the enactment of Section 5(b) must be that it will suppress secondary effects, not speech. *Id.*

The Village's rationale in support of Section 5(b) is that the liquor prohibition will significantly reduce the secondary effects that naturally result from combining adult entertainment with the consumption of alcoholic beverages without substantially diminishing the availability of adult entertainment, in this case nude and semi-nude dancing. In enacting the Ordinance, the Village Board relied on numerous judicial decisions, studies from 11 different cities, and "findings reported in the Regulation of Adult Entertainment Establishments of St. Croix, Wisconsin; and the Report of the Attorney General's Working Group of Sexually Oriented Businesses (June 6, 1989, State of Minnesota)," to support its conclusion that adult entertainment produces adverse secondary effects.

Ben's Bar argues that the Village may not rely on prior judicial decisions or the experiences of other municipalities, but must instead conduct its own studies, at the local level, to determine whether adverse secondary effects result when liquor is served on the premises of adult entertainment establishments. This view, however, has been expressly (and repeatedly) rejected by the Supreme Court. *Alameda Books*, 122 S.Ct. at 1743 (Kennedy, J. concurring) (holding that "[t]he First Amendment does not require a city, before enacting ... an [adult entertainment secondary effects] ordinance to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."') (quoting *Renton*, 475 U.S. at 51–52, 106 S.Ct. 925); *Barnes*, 501 U.S. at 584, 111 S.Ct. 2456 (Souter, J. concurring) (same).

Ben's Bar also contends that the Village failed to meet its burden of demonstrating the constitutionality of Section 5(b) because "the Village's evidentiary record did not include any written reports relating specifically to the effects of serving alcohol in establishments offering nude and semi-nude dancing." In *LaRue*, however, the Supreme Court explicitly held that a State's conclusion that "certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not

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an irrational *726 one.” 409 U.S. at 118, 93 S.Ct. 390. Because the adult entertainment at issue in this case is of the same character as that at issue in *LaRue*, it was entirely reasonable for the Village to conclude that barroom nude dancing was likely to produce adverse secondary effects at the local level, even in the absence of specific studies on the matter. *Alameda Books*, 122 S.Ct. at 1736–37 (plurality opinion) (adopting view of plurality in *Pap's A.M.* as to the evidentiary requirement for adult entertainment cases), *id.* at 1741 (Kennedy, J., concurring) (agreeing with the plurality on this point, as a fifth vote); *Pap's A.M.*, 529 U.S. at 296–97, 120 S.Ct. 1382 (plurality opinion) (same); *Giovani*, 303 F.3d at 516 (same). In fact, the Supreme Court has gone so far as to assert that “[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior.” *Bellanca*, 452 U.S. at 718, 101 S.Ct. 2599. *See also Blue Canary*, 251 F.3d at 1124 (noting that “[l]iquor and sex are an explosive combination”); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. of California*, 99 Cal.App.4th 880, 121 Cal.Rptr.2d 729, 737 (2002) (same). For these reasons, we conclude that the evidentiary record fairly supports the Village's proffered rationale for Section 5(b), and that Ben's Bar has failed “to cast direct doubt on this rationale either by demonstrating the [Village's] evidence does not support its rationale or by furnishing evidence that disputes the [Village's] factual findings” *Alameda Books*, 122 S.Ct. at 1736.

Ben's Bar also contends that Section 5(b) is not narrowly tailored because the Village offered no evidence that “the incidental restrictions placed on Ben's [Bar], over and above the pasties and G-strings requirement, ameliorate any purported negative secondary effects.” This argument, however, is problematic for several reasons, two of which we will address briefly.

[12] First, as previously noted, Section 5(b) does not impose any restrictions whatsoever on a dancer's ability to convey an erotic message. Instead, the regulation prohibits Sexually Oriented Businesses like Ben's Bar from serving alcoholic beverages to its patrons during a dancer's performance. This is not a restriction on erotic expression, but a prohibition of nonexpressive conduct (i.e., serving and consuming alcohol) during the presentation of expressive conduct. The First Amendment does not entitle Ben's Bar, its dancers, or its patrons, to have alcohol available during a “presentation” of nude or semi-nude dancing. *See Gary v. City of Warner Robins, Georgia*, 311 F.3d 1334, 1340 (11th Cir.2002) (holding that ordinance prohibiting persons under the age of

21 from entering or working at “any establishment ... which sells alcohol by the drink for consumption on premises” did not violate an underage nude dancer's First Amendment right to free expression because she “remains free to observe and engage in nude dancing, but she simply cannot do so ... in establishments that primarily derive their sales from alcoholic beverages consumed on the premises”); *Sammy's of Mobile*, 140 F.3d at 999 (holding that while nude dancing is entitled to a degree of protection under the Supreme Court's First Amendment jurisprudence, “we are unaware of any constitutional right to drink while watching nude dancing”); *Dept. of Alcoholic Beverage Control*, 99 Cal.App.4th at 895, 121 Cal.Rptr.2d 729 (noting that “[t]he State ... has not prohibited dancers from performing with the utmost level of erotic expression. They are simply forbidden to do so in establishments which serve alcohol, and the Constitution is thereby not offended”). What the First Amendment does require is that establishments like Ben's Bar be given “a *727 ‘reasonable opportunity’ to disseminate the speech at issue.” *North Ave. Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 445 (7th Cir.1996). A “reasonable opportunity,” however, does not include a concern for economic considerations. *Renton*, 475 U.S. at 54, 106 S.Ct. 925.³²

Second, Section 5(b)'s alcohol prohibition, like the one in *LaRue*, is limited to adult entertainment establishments, and does not apply to:

[T]heaters, performing arts centers, civic centers, and dinner theaters where live dance, ballet, music, and dramatic performances of serious artistic merit are offered on a regular basis; and in which the predominant business or attraction is not the offering of entertainment which is intended for the sexual interests or titillation of customers; and where the establishment is not distinguished by an emphasis on or the advertising or promotion of nude or semi-nude performances.³³

Ordinance A-472(6). *Compare Giovanni*, 303 F.3d at 515 (noting that lack of evidentiary support for adult entertainment liquor regulations “might not pose a problem if the challenged restrictions applied only to bars and clubs that present nude or topless dancing”).

Finally, we note that Section 5(b)'s liquor prohibition is no greater than is essential to further the Village's substantial interest in combating the secondary effects resulting from the combination of nude and semi-nude dancing and alcohol consumption because, as a practical matter, a complete ban of alcohol on the premises of adult entertainment establishments is the *only* way the Village can advance that interest. As the Supreme Court recognized in *LaRue*,

Nothing in the record before us or in common experience compels the conclusion that either self-discipline on the part of the customer or self-regulation on the part of the bartender could have been relied upon by the Department to secure compliance with ... [the] regulation[s]. The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one

409 U.S. at 116, 93 S.Ct. 390. See also *Wise Enterprises, Inc. v. Unified Government of Athens-Clarke County, Georgia*, 217 F.3d 1360, 1364–65 (11th Cir.2000) (holding that ordinance prohibiting alcohol on the premises of adult entertainment establishments satisfied *O'Brien's* requirement that restriction on First Amendment rights be no greater than necessary to the furtherance of the government's interest because “[t]here is no less restrictive alternative”). Indeed, unlike the zoning ordinance at issue in *Alameda Books*, there is no need to speculate as to whether Section 5(b) will achieve its stated purpose. Prohibiting alcohol on the premises

of adult entertainment establishments will unquestionably reduce the enhanced secondary *728 effects resulting from the explosive combination of alcohol consumption and nude or semi-nude dancing.

Given the foregoing, we conclude that Section 5(b) does not violate the First Amendment. The regulation has no impact whatsoever on the tavern's ability to offer nude or semi-nude dancing to its patrons; it seeks to regulate alcohol and nude or semi-nude dancing without prohibiting either. The citizens of the Village of Somerset may still buy a drink and watch nude or semi-nude dancing. They are not, however, constitutionally entitled to do both at the same time and in the same place. *Gary*, 311 F.3d at 1338 (holding that there is no generalized right to associate with other adults in alcohol-purveying establishments with other adults). The deprivation of alcohol does not prevent the observer from witnessing nude or semi-nude dancing, or the dancer from conveying an erotic message. Perhaps a sober patron will find the performance less tantalizing, and the dancer might therefore feel less appreciated (not necessarily from the reduction in ogling and cat calls, but certainly from any decrease in the amount of tips she might otherwise receive). And we do not doubt Ben's Bar's assertion that its profit margin will suffer if it is unable to serve alcohol to its patrons. But the First Amendment rights of each are not offended when the show goes on without liquor.

III.

For the reasons expressed in this opinion, Section 5(b)'s prohibition of alcohol on the premises of adult entertainment establishments does not violate the First Amendment. We, therefore, affirm the district court's decision granting the Village's motion for summary judgment.

Footnotes

- 1 Ben's Bar holds a liquor license issued by the Village.
- 2 Article 1, § 3 of the Wisconsin Constitution provides, *inter alia*, that “[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press.” Wis. Const., art. I, § 3.
- 3 Article 1, § 1 of the Wisconsin Constitution provides that “[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.” Wis. Const., art. I, § 1.
- 4 Wis. Stat. § 66.0107(3) provides that “[t]he board or council of a city, village or town may not, by ordinance, prohibit conduct which is the same as or similar to conduct prohibited by § 944.21 [i.e., the state's obscenity statute].”

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- 5 Under Section 3(o) of the Ordinance, "Nudity" or "state of nudity" is defined as "the appearance of the human bare anus, anal cleft or cleavage, pubic area, male genitals, female genitals, or the nipple or areola of the female breast, with less than a fully opaque covering; or showing of the covered male genitals in a discernibly turgid state."
- 6 Plaintiffs Shannen Richards and Jamie Sleight did not appeal the district court's judgment.
- 7 The Supreme Court has, on two separate occasions, held that requiring nude dancers to wear pasties and G-strings does not violate the First Amendment. *Pap's A.M.*, 529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion), *id.* at 307–10, 120 S.Ct. 1382 (Scalia, J., concurring); *Barnes*, 501 U.S. at 571–72, 111 S.Ct. 2456 (plurality opinion), *id.* at 582, 111 S.Ct. 2456 (Souter, J., concurring).
- 8 Section 3(w) of the Ordinance defines "Sexually Oriented Business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency or sexual encounter center."
- 9 Section 3(c) of the Ordinance is the definition for "Adult cabaret," which "means a nightclub, dance hall, *bar*, restaurant, or similar commercial establishment that regularly features: (1) persons who appear in a state of Nudity or Semi-nudity; or (2) live performances that are characterized by 'specified sexual activities'; or (3) films, motion pictures, video cassettes, slides, or other photographic reproductions that are characterized by the depiction or description of 'specified sexual activities' or Nudity or 'specified anatomical areas.' " (Emphasis added.)
- 10 According to Ben's Bar, Section 5(b) goes far beyond the pasties and G-strings regulation upheld by the Supreme Court in *Barnes* and *Pap's A.M.*, prohibiting "any display of the buttocks or of breast below the top of the areola"—i.e., "conservative two piece swimsuits, moderately low-cut blouses, short shorts, sheer fabrics and many other types of clothing that are regularly worn in the community and are in mainstream fashion."
- 11 It is not entirely clear whether Ben's Bar is arguing that Section 5(b) is facially unconstitutional or merely unconstitutional as applied. To the extent Ben's Bar seeks to bring a facial challenge, it faces an uphill battle. Ben's Bar does not argue that the regulation is vague or overbroad, and therefore may only prevail if it can demonstrate "that no set of circumstances exists under which the [regulation] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). *See also Horton v. City of St. Augustine, Florida*, 272 F.3d 1318, 1331 (11th Cir.2001) (noting exception to the *Salerno* rule; that, in the limited context of the First Amendment, a plaintiff may also bring a facial challenge for overbreadth and/or vagueness).
- 12 The regulations at issue in *LaRue* prohibited:
- (a) The performance of acts, or simulated acts, of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;
 - (b) The actual or simulated touching, caressing or fondling on the breast, buttocks, anus or genitals;
 - (c) The actual or simulated displaying of the pubic hair, anus, vulva or genitals;
 - (d) The permitting by a licensee of any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus; and, by a companion section;
 - (e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above.
- 409 U.S. at 411–12.
- 13 The second section of the Twenty-first Amendment provides that "[t]he 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 laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.
- 14 *See also City of Newport v. Iacobucci*, 479 U.S. 92, 95, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986) (upholding the constitutionality of a city ordinance prohibiting nude or nearly nude dancing in local establishments licensed to sell liquor for consumption on the premises); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 717, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (holding that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs"); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932–33, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (noting that under *LaRue* states may ban nude dancing as part of their liquor licensing programs); *City of Kenosha v. Bruno*, 412 U.S. 507, 515, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973) (noting that "regulations prohibiting the sale of liquor by the drink on premises where there were nude but not necessarily obscene performances [are] facially constitutional").
- 15 *See J & B Social Club No. 1, Inc. v. City of Mobile*, 966 F.Supp. 1131, 1136 (S.D.Ala.1996) (Hand, J.).
- 16 In *Renton*, the Supreme Court created some confusion as to the appropriate test for analyzing time, place, and manner regulations by asserting that "time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." 475 U.S. at 47, 106 S.Ct. 925. However, as we emphasized in *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir.1986), "[t]he Supreme Court does not always spell out the 'narrowly tailored' step as part of its standard for evaluating time, place, and manner restrictions." *Id.* at 1553. Moreover, a close examination of *Renton* reveals that the Court did consider whether the zoning ordinance at issue was narrowly tailored. 475 U.S. at 52, 106 S.Ct. 925 ("[t]he *Renton* ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects"). In any event, both the Supreme Court and this circuit have continued to apply the "narrowly

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- tailored" step to time, place, and manner regulations. See *Ward v. Rock Against Racism*, 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988); *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1000 (7th Cir.2002).
- 17 But see *Alameda Books*, 122 S.Ct. at 1745 n. 2 (Souter, J., dissenting) (joined by Stevens, J. and Ginsburg, J.) (noting that "[b]ecause *Renton* called its secondary-effects ordinance a mere, time, place, or manner restriction and thereby glossed over the role of content in secondary-effects zoning ... I believe the soft focus of its statement of the middle-tier test should be rejected in favor of the ... [O'Brien] formulation ... a closer relative of secondary effects zoning than mere time, place, and manner regulations, as the Court ... implicitly recognized [in *Pap's A.M.*]").
- 18 The Court also concluded that the zoning ordinance did not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, *American Mini Theatres*, 427 U.S. at 61, 72–73, 96 S.Ct. 2440; see generally *id.* at 73–84, 96 S.Ct. 2440 (Powell, J., concurring), issues that are not before us on appeal.
- 19 The *American Mini Theatres* plurality also noted, in a footnote, that the city had enacted the zoning ordinance because of its determination that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films," 427 U.S. at 71 n. 34, 96 S.Ct. 2440 (emphasis added), noting "[i]t is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech." *Id.* (emphasis added).
- 20 Under *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), Justice Powell's concurrence is the controlling opinion in *American Mini Theatres*, as the most narrow opinion joining four other Justices in the judgment of the Court. *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 504 (7th Cir.1980).
- 21 Falling in between *American Mini Theatres* and *Renton* is the Supreme Court's decision in *Schad v. Borough Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), where the Court struck down, on First Amendment grounds, a zoning ordinance that did not—like the ordinance in *American Mini Theatres*—require the dispersal of adult theaters, but instead prohibited them altogether. *Id.* at 71–72, 96 S.Ct. 2440 (plurality opinion); *id.* at 77, 96 S.Ct. 2440 (Blackmun, J., concurring); *id.* at 79, 96 S.Ct. 2440 (Powell, J., concurring). The only significance of *Schad*, for purpose of our analysis, is that the holding of that case serves as the basis for the first step in the *Renton* framework—i.e., does the ordinance completely prohibit the expressive conduct at issue? See *Alameda Books*, 122 S.Ct. at 1733 (noting that the first step in the *Renton* framework was the Court's determination that "the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations"); *Renton*, 475 U.S. at 46, 106 S.Ct. 925.
- 22 See also *American Mini Theatres*, 427 U.S. at 80, 96 S.Ct. 2440 (Powell, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial").
- 23 In doing so, the *Barnes* plurality noted that the *O'Brien* test and the time, place, and manner test utilized by the Court in *Renton* have "been interpreted to embody much the same standards" 501 U.S. at 566, 111 S.Ct. 2456.
- 24 Under *Marks*, 430 U.S. at 193, 97 S.Ct. 990, Justice Souter's concurrence is the controlling opinion in *Barnes*, as the most narrow opinion joining the judgment of the Court. *Schultz*, 228 F.3d at 842 n. 2; *DiMa Corp.*, 185 F.3d at 830.
- 25 The *Pap's A.M.* plurality's reliance on *Renton*'s secondary effects doctrine is significant because it marks a departure from the *Barnes* plurality's determination that a public indecency ordinance may be justified by a State's interest in protecting societal order and morality, *Barnes*, 501 U.S. at 568, 111 S.Ct. 2456, and an adoption of the approach advocated by Justice Souter in his concurrence in that case. *Id.* at 582, 111 S.Ct. 2456.
- 26 The plurality in *Alameda Books* characterized the second step of the *Renton* framework as follows: "[w]e next consider[] whether the ordinance [is] content neutral or content based." 122 S.Ct. at 1734. In his concurrence, Justice Kennedy joined the four dissenters, *id.* at 1744–45, in jettisoning the "content neutral" label, noting that the "fiction" of adult entertainment zoning ordinances being "content neutral ... is perhaps more confusing than helpful These ordinances are content based and we should call them so." *Id.* at 1741. In reaching this conclusion, Justice Kennedy emphasized that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Id.* Justice Kennedy concluded, however, that an adult entertainment zoning ordinance is not subject to strict scrutiny simply because it "identifies the problem outside by reference to the speech inside," *id.* at 1740, and, as such, "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.* at 1741. Thus, while the label has changed, the substance of *Renton*'s second step remains the same.
- 27 This prong is, for all practical purposes, identical to the *Alameda Books* plurality's inquiry into whether the zoning ordinance "was content neutral or content based." 122 S.Ct. at 1733–34. Although a majority of the Justices no longer employ the content neutral label when evaluating the constitutionality of a "secondary effects" ordinance, the ultimate inquiry remains the same. See *supra* n. 26.
- 28 Federal courts evaluating the "predominant concerns" behind the enactment of a statute, ordinance, regulation, or the like, may do so by examining a wide variety of materials including, but not limited to, the text of the regulation or ordinance, any preamble or

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express legislative findings associated with it, and studies and information of which legislators were clearly aware. *Ranch House*, 238 F.3d at 1280.

- 29 Compare *G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark, Missouri*, 83 S.W.3d 98, 103 (2002) (holding that because the city presented no evidence that its purpose in enacting an ordinance restricting nudity in establishments where alcoholic beverages are sold "was to prevent the negative secondary effects associated with erotic dancing establishments, and, thus, that the ordinance was unrelated to the suppression of expression, the City had the heavy burden of justifying the ordinance under the strict scrutiny standard").
- 30 As noted *supra*, under *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), Justice Kennedy's concurrence is the controlling opinion, as the most narrow opinion joining the judgment of the Court.
- 31 In this case, it is unnecessary to conclusively resolve which of these two standards is applicable. As explained *infra*, Section 5(b)'s alcohol prohibition is, as a practical matter, the least restrictive means of furthering the Village's interest in combating the secondary effects resulting from the combination of adult entertainment and alcohol consumption, and therefore satisfies either standard.
- 32 In an affidavit filed with the district court, Barry Breault, part-owner of Ben's Bar, stated that:
 The bulk of Ben's Bar's revenues are derived from beverage sales and associated food sales. Revenues from adult entertainment ... account for only about one-third of Ben's revenues. *Ben's Bar cannot operate at a profit without the revenue from the sale of alcoholic beverages, and the business such sales bring in.*
 (Emphasis added.)
- 33 This section of the Ordinance also emphasizes that "[w]hile expressive live nudity may occur within these establishments [those noted in section (6)], this ordinance seeks only to minimize and prevent the secondary effects of Sexually Oriented Businesses on the community. Negative secondary effects have not been associated with these establishments."

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670 F.2d 943

United States Court of Appeals,
Eleventh Circuit.GRAND FALOON TAVERN,
INC., Plaintiff-Appellant,

v.

Robert WICKER, Etc., et al., Defendants-Appellees.

No. 80-5834. | March 15, 1982.

Tavern operator appealed from a judgment of the United States District Court for the Middle District of Florida, John A. Reed, Jr., J., which upheld the constitutionality of a Florida municipality's ordinance prohibiting nude and seminude entertainment in establishments where alcoholic beverages were sold. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that record, which supported municipality's claim of a connection between topless dancing, and alcohol consumption and criminal activity, supported a sufficient justification for incidental burden produced by ordinance prohibiting nude and seminude entertainment in establishments where alcoholic beverages were sold; thus, ordinance was not facially invalid.

Affirmed.

Attorneys and Law Firms

*943 Richard L. Wilson, Orlando, Fla., for plaintiff-appellant.

William E. Weller, Cocoa Beach, Fla., for defendants-appellees.

*944 Appeal from the United States District Court for the Middle District of Florida.

Before MORGAN, HILL and KRAVITCH, Circuit Judges.

Opinion

LEWIS R. MORGAN, Circuit Judge:

On this appeal we are presented with a question of the facial validity of a Cocoa Beach, Florida ordinance prohibiting nude and semi-nude entertainment in establishments where alcoholic beverages are sold. We initially note that the Supreme Court in *New York State Liquor Authority v.*

Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), upheld a similar state statute on the basis of authority conferred under the Twenty-first Amendment. *Bellanca* does not, however, resolve the issue before us because Cocoa Beach, a municipality lacking any delegated regulatory authority under the Twenty-first Amendment, is required to justify the ordinance solely as a legitimate exercise of its police power.¹ See *Bayou Landing, Ltd. v. Watts*, 563 F.2d 1172 (5th Cir. 1979). The District Court for the Middle District of Florida concluded that the municipality had justified the incidental burdens on First Amendment rights created by the regulation of nude entertainment and upheld the ordinance. For the reasons stated below, we affirm.

I

Plaintiff-appellant, Grand Faloon Tavern, Inc. (hereinafter plaintiff) is a Florida corporation which operates a tavern within the City of Cocoa Beach, Florida. Defendants-appellees (hereinafter defendants) are the Chief of Police for Cocoa Beach and the members of the Cocoa Beach City Commission at the time the complaint was filed.

In December 1979, the City of Cocoa Beach enacted an ordinance proscribing the actual or simulated exposure of various private parts or female breasts in establishments selling alcoholic beverages. Cocoa Beach, Fla., Ordinance 612 (Dec. 6, 1979).² *945 At the time the ordinance was passed two establishments, plaintiff's tavern named "Grand Faloon Tavern" and another called the "Booby Trap," offered patrons "topless" dancing as entertainment with alcoholic beverages as refreshment. It is undisputed that enactment of the ordinance was provoked by the distressing situation existing at the Booby Trap. Police records showed that, in response to extensive and varied criminal activity,³ an inordinate number of police calls had to be made to the Booby Trap. The Cocoa Beach City Commission concluded that the separation of nudity and alcoholic beverages would lessen the drain on the city's resources by reducing the incidence of illicit conduct at establishments affected by the ordinance. Defendants admit, however, that the number of police calls to the Grand Faloon was commensurate with many other taverns in Cocoa Beach that did not offer any form of nude entertainment.

Plaintiff filed suit in United States District Court for the Middle District of Florida seeking injunctive and declaratory

relief under 42 U.S.C. s 1983 and 28 U.S.C. s 1343 to prevent enforcement of the ordinance. Plaintiff challenged the ordinance on grounds that it violated the United States Constitution's guarantees of free speech and expression. The argument made by the plaintiff was essentially that the ordinance reached expression entitled to First Amendment protection, and that the records failed to provide sufficient justification for the resulting burden on constitutional rights.

A final hearing was held at which the only evidentiary materials before the court were the parties' pre-trial stipulations, the parties' pleadings and a deposition of City Police Chief Robert Wicker, which was admitted in evidence as the parties' joint exhibit. No testimony was presented at the final hearing. The trial court after hearing arguments by both counsel concluded that the disputed ordinance was a valid exercise of the municipality's police power under the rationale of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); and *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1975). The court found that "the record reflect(ed) a reasonable basis on which the city could have found a relationship between the policy of the ordinance and the purposes it seeks to accomplish." On appeal, plaintiff primarily challenges this determination, arguing that the ordinance has not been shown necessary to achieve the claimed governmental interest.⁴

*946 II

[1] [2] [3] Plaintiff's challenge to the Cocoa Beach ordinance is based on a theory of facial invalidity due to overbreadth. Under the doctrine of overbreadth, a court may deny the enforcement of an ordinance that "at the expense of First Amendment freedoms, ... reaches more broadly than is reasonably necessary to protect legitimate (governmental) interests...." *Reeves v. McConn*, 631 F.2d 377, 383 (5th Cir. 1980). However, as cautioned by the Supreme Court in *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973), the invalidation of a governmental measure for facial overbreadth is a remedy that should be applied "sparingly and only as a last resort." An overbreadth challenge is accordingly disallowed if the measure is readily subject to a limiting construction that would remove the threat of deterrence to constitutionally protected expression. *Id.*; *Dombrowski*

v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). Additionally, where both conduct and expression are involved, the overbreadth of a measure must be both real and substantial, "judged in relation to the (provision's) plainly legitimate sweep." 413 U.S. at 615, 93 S.Ct. at 2917. It is within these limitations that we examine the merits of plaintiff's challenge.

Our analysis of the Cocoa Beach ordinance will essentially be in three parts. First, the scope of the ordinance will be articulated in terms of the constitutional rights implicated. Next we will isolate the nature and extent of the burdens placed on these First Amendment rights by the ordinance. Finally, we will examine the justifications claimed by Cocoa Beach to determine if they are sufficient to authorize the resulting constitutional restrictions under the four step inquiry articulated in *United States v. O'Brien*.⁵

III

The real and substantial impact of the Cocoa Beach ordinance is on nude and semi-nude entertainment in taverns.⁶ The Supreme Court has explicitly recognized that customary barroom dancing, while involving "the barest minimum of protected expression, ... might be entitled to First and Fourteenth Amendment protection under some circumstances." *947 *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1974); *New York State Liquor Authority v. Bellanca*, 452 U.S. at --, 101 S.Ct. at 2600; *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972). The question remains, however, whether nude barroom dancing is entitled to the same degree of protection afforded speech clearly at the core of First Amendment values. A plurality of the Court in *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (Burger, C. J., Stevens, J., White, J., and Rehnquist, J.) took the position that

(while) the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate.... 427 U.S. at 70, 96 S.Ct. at 2452. A majority of the Justices then on the bench (Justice Powell concurring and the four remaining Justices dissenting) took the opposite stance and argued that sexually explicit, non-obscene expression is entitled to the same protection accorded other forms of

communication. The latter position has been assumed by those circuits that have faced the issue. See *Avalon Cinema Corporation v. Thompson*, 667 F.2d 659 (8th Cir. 1981) (en banc); *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1126 (1st Cir. 1981); see also *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 826-28 (4th Cir. 1979).⁷ We do not need, however, to gamble on whether the analysis of the plurality in *Young* has since become the majority position of the Supreme Court. Even according nude barroom dancing full constitutional protection we find the record supports a sufficient justification for the incidental burdens produced by the Cocoa Beach ordinance under the test in *United States v. O'Brien*.

[4] The approach set out in *O'Brien* is properly applied when a governmental entity seeks to regulate non-communicative elements of an activity and thereby imposes incidental burdens on protected expression. 391 U.S. at 376, 88 S.Ct. at 1678. A regulation is then sufficiently justified, despite its incidental impact on First Amendment rights “(1) if it is within the constitutional power of the government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on ... First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.* at 377, 88 S.Ct. at 1679.

The only restriction imposed by the Cocoa Beach ordinance is in terms of the place where nude entertainment may be presented. This type of regulation has been recognized as independent of expressive or communicative elements of conduct in other contexts. See *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (regulation of disruptive noise adjacent to a school); *Cox v. Louisiana*, 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed.2d 487 (1965) (“picketing and parading (are) subject to regulation even though intertwined with expression and association”); see also *Cameron v. Johnson*, 390 U.S. 611, 617, 88 S.Ct. 1335, 1338, 20 L.Ed.2d 182 (1968); *Zwickler v. Koota*, 389 U.S. 241, 249, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967). Yet one circuit has determined that when the conduct being regulated is a performance presented for purposes of entertainment, it is impossible to separate “speech” from “conduct” in order to determine the true subject of the regulation. *948 *Chase v. Davelaar*, 645 F.2d 735, 739 (9th Cir. 1981). Accordingly the court in *Chase* expressed strong reluctance to apply *O'Brien* to facts very similar to those in the instant case. We agree that any attempt to isolate “speech” elements from the “conduct” aspects of nude dancing would

be a labyrinthine task. See also *Stanley v. Georgia*, 394 U.S. 557, 566, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542 (1969) (“The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all.”) We cannot agree, however, that speech must be distilled from conduct, or vice versa, before *O'Brien* can be applied. We find it only necessary to conclude that nude entertainment necessarily involves a substantial degree of conduct, and that any artistic or communicative elements present in such conduct are not of a kind whose content or effectiveness is dependent upon being conveyed where alcoholic beverages are served. See *Young v. American Mini Theatres*, 427 U.S. at 79 n.2, 96 S.Ct. at 2456 n.2 (Powell, J., concurring).

The Cocoa Beach regulation of establishments where nude entertainment may be presented also has only an incidental impact on First Amendment rights. Compared to the “place” restrictions upheld in *Young*, the Cocoa Beach ordinance in the instant case creates equally slight or even lesser impairments to the expression of, and public access to, information and ideas. In *Young* the Court considered a Detroit ordinance that prohibited “more than two (regulated) uses within one thousand feet of each other,” 427 U.S. at 54 n.6, 96 S.Ct. at 2444 n.6. “Regulated uses” included adult bookstores, adult motion picture theatres, adult mini motion picture theatres, cabarets with nude or partially-nude entertainment, dance halls, bars, pool halls, public lodging facilities, pawn shops and shoeshine parlors. *Id.* at 52 n.3, 96 S.Ct. at 2444 n.3. Adult bookstores, adult theatres and adult mini-theatres were described as those “distinguished or characterized by an emphasis on matter depicting, describing or relating to ‘Specified Sexual Activities’ or ‘Specified Anatomical Areas’.” Among the “Specified Anatomical Areas” set out in the statute were “(l)ess than completely and opaquely covered (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola....” (Emphasis added) *Id.*

Cocoa Beach Ordinance No. 612 can be viewed as creating only two “regulated uses”: the sale of liquor for on premises consumption and nude entertainment. Considered in this context, the Cocoa Beach ordinance requires “dispersal” in far fewer instances than required by the Detroit regulation in *Young*. Even in those limited instances where “dispersal” is required by Cocoa Beach, the regulated activities must only be segregated into separate establishments as opposed to the ordinance in *Young* which required a separation of at least 1000 feet between regulated uses. The Cocoa Beach

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ordinance, like the Detroit ordinance, does not directly or indirectly limit the number of establishments where protected expression may occur. Similarly, beyond the requirement of separation of uses there is no restriction contained in the ordinance on the location within Cocoa Beach where nude entertainment may be offered. We note that the Cocoa Beach ordinance applies to existing and future establishments while the regulation in Young applied only to future uses. Under the facts before us, however, we do not consider this factor to be critically decisive. See also *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979). The Cocoa Beach ordinance does not require that the economic burdens of relocation be incurred in order to continue protected expression. Nude dancing may continue at the same locations where such entertainment was offered prior to the enactment of Ordinance No. 612 so long as alcoholic beverages are not sold for on premises consumption. Thus, even with the application of the ordinance to existing establishments, there is no significant impairment of protected expression.

[5] [6] Having concluded that the ordinance has only an indirect and incidental impact on expression we can now apply the four part test of O'Brien to determine if the city's actions are justified by a sufficiently substantial state interest. The presence in the instant case of the first part of the O'Brien test is not disputed. The regulation of activity which has demonstrated a capacity to induce breaches of the peace is a traditional and legitimate subject for the exercise of a municipality's police power.⁸ See *Cantwell v. Connecticut*, 310 U.S. 296, 304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940); *Kew v. Senter*, 416 F.Supp. 1101 (N.D.Tex.1976) (three judge panel). The second question under O'Brien is whether the regulation furthers an important or substantial interest. Plaintiff in a pre-trial stipulation agreed that:

(t)he passage of Cocoa Beach Ordinance No. 612 was based upon the collective belief of a majority of the Commissioners that it would have as its purpose and effect the lessening of police calls at the establishments set forth therein and the lessening of incidents of violations of law at said establishments. (Emphasis added)

Plaintiff does not dispute the legitimate and substantial nature of the interests claimed by the city. Instead plaintiff argues that the record contains insufficient evidence that nudity is the actual source of the problems giving rise to the claimed interest. No federal court authority has been found that sets forth the quantum of evidence required to support a measure imposing the burdens of the type here. Two general observations, however, provide a starting point

for our inquiry. First, it is necessary for the record to contain some factual basis for the claim that entertainment in establishments serving alcoholic beverages results in increased criminal activity. See *Reeves v. McConn*, 631 F.2d 377, 387 (5th Cir. 1980); *Avalon Cinema Corporation v. Thompson*, 667 F.2d 659 (8th Cir. 1981). Second, the government has a greater burden in justifying a significant curtailment of protected activity than when the burden on First Amendment rights is merely incidental. See *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 98 (6th Cir. 1981).

The decisions of the Supreme Court in *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) provide direct authority on the issue before us only when the governmental entity claims authority under the Twenty-first Amendment. In *LaRue* the Court upheld a state statute that included a proscription of the actual or simulated "displaying of the pubic hair, anus, vulva or genitals" in licensed bars and nightclubs. 409 U.S. at 112, 93 S.Ct. at 394. (The statute did not apply to the mere exposure of female breasts.) The Court rested its decision on a determination that

(t)he Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.

Id. at 118-19, 93 S.Ct. at 397.

The statute upheld in *Bellanca* reached both "topless" and "bottomless" nude entertainment in establishments licensed to sell alcoholic beverages. Those challenging the New York Statute argued that *LaRue* was distinguishable because New York State had presented "no legislative finding that *950 topless dancing poses anywhere near the problem posed by acts of 'gross sexuality.' " The Court rejected the argument, stating that "even if explicit legislative findings were required to uphold the constitutionality of this statute as applied to topless dancing, those findings exist in this case." Yet the only

"findings" quoted in the Court's opinion were the following statutory purposes set out in an accompanying legislative memorandum:

Nudity is the kind of conduct that is a proper subject of legislative action as well as regulation by the State Liquor Authority as a phase of liquor licensing. It has been held that sexual acts and performances may constitute disorderly behavior within the meaning of the Alcoholic Beverage Control Law....

Common sense indicates that any form of nudity coupled with alcohol in public place(s) begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand.

The Court concluded that these statements were adequate to justify the ordinance "(g)iven the 'added presumption in favor of the state regulation' conferred by the Twenty-fifth Amendment...."

Arguably the inference raised by the language used in both LaRue and Bellanca is that, absent a "Twenty-first Amendment presumption," similar regulations of nudity would have to be justified by greater "findings" than were presented in those cases. We are hesitant to draw such a negative inference. There is no indication of the analysis the Court would have employed had Twenty-first Amendment considerations not been involved. Further, the record in the instant case clearly offers stronger support for the Cocoa Beach claim of a connection between topless dancing, alcohol consumption and criminal activity than was set out in Bellanca.

[7] The record in the instant case contains the stipulated purpose and believed effect of the ordinance, the deposition of Police Chief Robert Wicker and a fifty-two page listing of the police calls made to and around the Booby Trap between May 6, 1977 and October 31, 1979. The stipulation is essentially equivalent to the "findings" relied on in Bellanca. The report of police calls reveals that many of the activities occurring in and around the Booby Trap were of the same nature and severity as those cited by the Court in LaRue, including prostitution (in some instances by the female dancers), indecent exposure, rape, and numerous assaults. The testimony of Police Chief Wicker provides the necessary linkage between the stipulated purpose of the ordinance and the problems allegedly justifying it.

Wicker had been employed with the Cocoa Beach Police Department since 1961 and had been involved with almost every aspect of police work. He testified that the Booby Trap had the highest incidence of criminal activity of any tavern in Cocoa Beach, but agreed that far fewer police calls had to be made to the Grand Faloon. The amount of criminal activity at the Grand Faloon was, in the estimation of Wicker, equal to or perhaps slightly less than that at some of the Cocoa Beach bars not offering nude entertainment. Plaintiff argues that this lack of an inordinate number of police calls to the Grand Faloon disproves the City's hypothesis that nudity and the cited criminal activity are related. Wicker testified, however, that the lesser crime rate at the Grand Faloon was due to other factors, including such intangibles as "management." Throughout the deposition Wicker consistently testified that, based on his police experience, nude dancing combined with the consumption of alcohol resulted in crimes that would not have occurred had the nudity not been present. At one point in the deposition, counsel for Cocoa Beach elicited the following testimony:

Q In your opinion, as a police officer, and based on your experience in the City of Cocoa Beach, do you believe that the enforcement of the ordinance in question is going to have a reduction in the number of calls that the Police Department is required to make through these establishments that provide this type entertainment?

*951 A Yes, sir, I think so.

Q You believe it would be a significant reduction in the number of police calls?

A Yes, sir.

Later during questioning by plaintiff's attorney, the following exchange occurred:

Q Let me ask you this question hypothetically. If you had two bars, one with nudity and alcohol, one without alcohol, both operated by the same person and that person was a conscientious operator with stringent controls, strict monitor of employees, strict security on the premises, and dedication to obeying the law, would you anticipate a difference in the crime rate between the two businesses?

A I would say, in my opinion, the chances of having trouble at either place would be higher and more likely to occur at the place where you had the nudity with the alcohol.

Q Why?

A Why? I tried to explain it a while ago. In my opinion if you got out here and you started to drinking and you get to feeling good, you are going to naturally do things you wouldn't do under normal circumstances. Plus, if you add nudity to it, you are going to feel a stronger urge to go up and fondle her or vice versa than you would if the girl was completely clothed.

We hold that this testimony is sufficient to support the belief of the Cocoa Beach Commission that Ordinance No. 612 will further the City's legitimate and substantial interests. See also *Hart Bookstores, Inc. v. Edmisten*, 612 F.2d at 828 n.9.

We need not dwell on the remaining two elements of O'Brien for in light of the preceding discussion they are plainly met. The pre-trial stipulation of the ordinance's purpose and effect essentially resolves the third element of the O'Brien test: whether the governmental interest is unrelated to the suppression of free speech. The stipulation effectively precludes any argument that the City Commissioners adopted the ordinance because of their personal dislike for nude dancing or because they sought to protect Cocoa Beach residents from exposure to nude entertainment. Instead the interest of Cocoa Beach's concerns the secondary effects of nude entertainment. In this respect, the instant case is readily distinguishable from *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) and *Salem Inn, Inc. v. Frank (Salem Inn II)*, 381 F.Supp. 859 (E.D.N.Y.1979), *aff'd.*, 522 F.2d 1045 (2d Cir. 1975).⁹

Finally, under the fourth element of O'Brien, we conclude that the incidental restriction on First Amendment rights is no greater than is essential to the furtherance of the City's interests. We have already determined that the City's association of criminal activity with nude entertainment in taverns is sufficiently supported by the record. It must follow that the separation of nude entertainment and on premises alcohol consumption is the least burdensome approach that could have been chosen by Cocoa Beach to serve its substantial interests. This element of O'Brien was not met in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1974) where a municipal ordinance prohibited females from appearing topless in "any public place." In *Doran* the Supreme Court held that the district court had not abused its discretion in granting a preliminary injunction against enforcement of the measure. The Court stated, however, that a more narrowly drawn statute would probably survive judicial scrutiny. 422 U.S. at 932, 95 S.Ct. at 2568. See also *Chase v. Davelaar*, 645 F.2d 735 (9th Cir. 1981).¹⁰

*952 We conclude that Cocoa Beach has sufficiently justified the reach of Ordinance No. 612 under the four part test of O'Brien and that the provision is therefore not facially invalid. The decision of the district court is

AFFIRMED.

Footnotes

- 1 The Twenty-first Amendment refers to the states the power to regulate the distribution and use of intoxicating liquors. In *Board of County Commissioners of Lee County v. Dexterhouse*, 348 So.2d 916, 918 (Fla.App.1977), *aff'd*, 364 So.2d 449 (Fla.1978), the court held that the powers recited in the Twenty-first Amendment had not been shared with local governments under Florida law except for control over hours of operation, locations of businesses and sanitary regulations for establishments selling alcoholic beverages. Defendants therefore concede that the ordinance was enacted exclusively under the municipality's police power and that no authority could be drawn from the Twenty-first Amendment.
- 2 The ordinance provides:
Section 1. Chapter 3 of the Code of Ordinances of the City of Cocoa Beach, Florida, is amended by adding thereto a new section to be numbered 3-11 and to read as follows:
3-11. Nudity on Premises where Alcoholic Beverages are offered for sale.
(a) It shall be unlawful for any person maintaining, owning, or operating a commercial establishment located within the City of Cocoa Beach, Florida, at which alcoholic beverages are offered for sale for consumption on the premises:
(1) To suffer or permit any female person, while on the premises of said commercial establishment, to expose to the public view that area of the human breast at or below the areola thereof.
(2) To suffer or permit any female person, while on the premises of said commercial establishment to employ any device or covering which is intended to give the appearance of or simulate such portions of the human female breast as described in subsection (a)(1).
(3) To suffer or permit any person, while on the premises of said commercial establishment to expose to public view his or her genitals, pubic area, buttocks, anus or anal cleft or cleavage.

(4) To suffer or permit any person, while on the premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus, anal cleft or cleavage.

(b) It shall be unlawful for any female person, while on the premises of a commercial establishment located within the City of Cocoa Beach, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view that area of the human female breast at or below the areola thereof, or to employ any device or covering which is intended to give the appearance or simulate such areas of the female breast as described herein.

(c) It shall be unlawful for any person, while on the premises of a commercial establishment located within the City of Cocoa Beach, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view his or her genitals, pubic area, buttocks, anus or anal cleft or cleavage, or to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus or anal cleft or cleavage.

(d) Any person who shall violate any provision of this Section shall be guilty of an offense against the City punishable as provided in City of Cocoa Beach Code, Sec. 1-8.

Section 2. If any provision of this ordinance, or its application to any person or circumstances, shall be held invalid, the remainder of the ordinance, or the application of the provision to other persons or circumstances, shall not be affected.

Section 3. If the owner, operator, licensee, lessor, lessee, manager, employee, or any other person participating in the operation of a commercial establishment located within the City of Cocoa Beach at which alcoholic beverages are offered for sale for consumption on the premises shall be convicted of any of the offenses designated in Section 3-11(a) as set forth in Section 1 hereof, then the City Finance Director shall revoke the occupational license for said establishment after giving a reasonable notice thereof to the holder of said license and affording the holder an opportunity to be heard as to why the revocation should not be issued.

Section 4. This ordinance shall take effect immediately upon its adoption.

3 The offenses occurring in and around the Booby Trap included homicide, narcotics, robbery, prostitution, lewdness, larceny, assault, battery, drunk and disorderly, and solicitation. In addition, a police department record of police calls to the Booby Trap included several references to rapes, prostitution by Booby Trap employees, and fights between the tavern's patrons.

4 As part of its initial issue on appeal plaintiff claims that the trial court found the activities of appellant's employees to be conduct rather than expression. Plaintiff argues that this finding is contrary to an allegation made in its complaint and admitted by defendants in their answer. We disagree with plaintiff's interpretation of the trial judge's findings as well as the extent of the admissions made by defendant. In Paragraph 12 of its complaint, plaintiff alleged that "nudity during its employees' performances is a part of the expression which the dancers engage in." The trial court in its written decision stated that "the regulated activity involves a substantial element of conduct which is not within the protection of the First Amendment...." After carefully considering both of these statements, we can perceive no conflict between the trial court's findings and the allegations conceded by defendants. Plaintiff's allegation does not mandate a finding that topless dancing constitutes pure expression, and the district court acknowledged that in conjunction with conduct an element of expression is presented by the nudity in the performances of plaintiff's employees. Finally, even if we were to accept plaintiff's argument, it would only be decisive of our decision if the constitutional analysis of an activity were controlled by the intent of the actor to express an idea. This approach was expressly rejected in *United States v. O'Brien*, 391 U.S. at 379, 88 S.Ct. at 1680.

5 In *United States v. O'Brien*, the Supreme Court upheld the conviction of a young man under an amendment to the draft laws making it a felony to knowingly destroy or mutilate a draft card. O'Brien had burned his draft card on the steps of a courthouse to protest the war in Viet-Nam. Although recognizing that O'Brien's actions were a form of expression, the Court concluded that the government's interest in the smooth and proper functioning of the draft sufficiently justified the incidental limitations on First Amendment rights. 391 U.S. at 382, 88 S.Ct. at 1681.

6 The district court held that "the language of the ordinance ... suggest(s) that it probably will be narrowed by state court decisions to nudity employed as a means of promoting the sale of alcoholic beverages within bars and similar establishments. In fact one Florida appellate court has seemingly so construed a similar ordinance. See *Board of County Commissioners v. Dexterhouse*, 348 So.2d 916, 918 (Fla.App.1977)." On appeal plaintiff does not challenge this portion of the lower court's opinion. Moreover, our reading of *Dexterhouse* is in accord with the district court's conclusion.

7 The Second Circuit elaborating on the Supreme Court's evaluation in *Doran* of the First Amendment protection to be accorded nude barroom dancing, stated

(W)e recognize that there is only a modicum of expression involved in the conduct of appellees' dancers. But that modicum is one of constitutional significance, both to the dancers who earn a livelihood by providing their particular form of entertainment, and perhaps more, to the customers of the appellees' establishments who for a variety of reasons, which may include the lack of economic means or mere differences in inclination, choose not to avail themselves of diversions deemed more tasteful or culturally rewarding by others. *Salem Inn, Inc. v. Frank* (Salem Inn II), 522 F.2d 1045, 1048 (2d Cir. 1975).

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- 8 Although Florida municipalities have only limited authority to regulate the sale of alcoholic beverages (see Note 1, *supra*) the Florida courts have ruled that regulation of nudity in establishments serving intoxicating liquors has not been preempted by the State. In *Dexterhouse* the Florida Court of Appeals considered the validity of a municipal ordinance almost identical to the Cocoa Beach ordinance in the instant case. The court noted a material distinction between “enactments which govern conduct of individuals while on the premises of their establishments, as opposed to the regulation of the licensees themselves in the sale and dispensing of alcoholic beverages.” 384 So.2d at 916. The court held that the regulation of topless dancing in bars fell in the former category and thus would not invade the exclusive province of state control.
- 9 In *Salem Inn II* the Second Circuit struck down an ordinance, enacted pursuant to the municipality's police power, that proscribed all nudity in cabarets, bars, lounges, dance halls, restaurants and coffee shops within the Town of North Hempstead. The court had concluded that the ordinance was an effort by municipal officials to shield the public from expression that they found offensive.
- 10 In *Chase* a county ordinance which prohibited topless dancing in all non-theatrical establishments selling food or beverages was struck down on the basis of overbreadth. The court reasoned that “had (the ordinance) applied only to establishments that sell alcoholic beverages it would apparently have been constitutional.... (T)he rationale that appellants have advanced for the resolution suggests no reason why the scope of the ordinance was not (limited to establishments serving liquor).” 645 F.2d at 738.

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173 Cal.App.4th 459
Court of Appeal, Second
District, Division 3, California.

SP STAR ENTERPRISES,
INC., Plaintiff and Appellant,

v.

CITY OF LOS ANGELES,
Defendant and Respondent.

No. B204045. | April 28, 2009.

Synopsis

Background: Adult nude entertainment club appealed city central area planning commission's denial of club's application for a conditional use permit for the sale and on-site consumption of alcohol at the club. The Superior Court, Los Angeles County, No. BS106993, Dzintra Janavs, J., affirmed, and club appealed.

Holdings: The Court of Appeal, Klein, P.J., held that:

- [1] application did not involve a fundamental vested right;
- [2] code provisions relating to the issuance of a conditional use permit for the on-site sale and consumption of alcohol were not impermissibly vague and were a reasonable exercise of the city's police power;
- [3] record did not support contention that commissioners improperly opposed issuance of permit based on an animosity toward adult entertainment;
- [4] commission could deny application on grounds that alcohol use would be inconsistent with unspecified plans for future redevelopment of the community;
- [5] evidence was sufficient to support denial of the application on basis that approval would have a negative impact on the character and integrity of the neighborhood; and
- [6] commission's finding that crime rate was low in area did not mandate issuance of conditional use permit.

Affirmed.

Attorneys and Law Firms

****155** Wellman & Warren, Scott W. Wellman and Stuart Miller, Laguna Hills, for Plaintiff and Appellant.

****156** Rockard J. Delgadillo, City Attorney, Jeri L. Burge, Assistant City Attorney, Tayo A. Popoola and Steven N. Blau, Deputy City Attorneys, for Defendant and Respondent.

Opinion

KLEIN, P.J.

***461** Appellant SP Star Enterprises, Inc. (Star) holds a certificate of occupancy from the City of Los Angeles (the City) permitting Star to operate an adult club featuring nude entertainment in a two-story, 7,000 square-foot converted warehouse/manufacturing facility zoned M3-1 on Ducommon Street north of Little Tokyo. Star also holds a franchise to operate a Penthouse branded adult cabaret. This case involves Star's application for a conditional use permit for the sale and on-site consumption of alcohol at the club.

The City's Zoning Administrator granted Star's application for one year. The Los Angeles Hompa Hongwanji Buddhist Temple (the Temple) and the Fukui Mortuary appealed the approval to the City's Central Area Planning Commission (APC). The appeal was supported by the Los Angeles Police Department, two city council members, the Central City East Association and numerous private citizens who argued the proposed use is not compatible with the religious and community uses in the area or the redevelopment of the area north of Little Tokyo.

Star responded its upscale business would improve tourism in the area as Penthouse cabarets had in other cities and would have no adverse impact on the neighborhood. Further, Star already was licensed to offer fully nude dancing, and issuance of the conditional use permit would trigger Alcoholic Beverage Control (ABC) regulations which limit adult entertainment to topless dancing on stages at least six feet from the nearest patron.

The APC conducted a public hearing at which it upheld the appeal, resulting in the denial of the conditional use permit. Star then sought a writ of mandate. The trial court denied Star's writ petition, indicating it would uphold the APC's ruling whether it applied a substantial evidence or a de novo standard of review. This appeal followed.

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*462 The thrust of Star's attack on the APC's ruling and the trial court's denial of its writ petition is that Star is entitled to preferential treatment because it engages in a disfavored form of protected expression. Thus, the standards under which the APC operated must be strictly scrutinized to avoid giving the APC unbridled discretion to regulate speech. Star also contends the APC's findings were a pretext for discriminating against disfavored speech and were not supported by substantial evidence.

We conclude the case does not involve free speech but the right to sell alcohol, which is not a protected activity and does not involve a fundamental vested right. (*Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 297, 4 Cal.Rptr.2d 280.) Thus, the standards under which the APC upheld the appeal need not reflect the " 'precision of regulation' " required when a municipality regulates protected activity. (*Burton v. Municipal Court* (1968) 68 Cal.2d 684, 691, 68 Cal.Rptr. 721, 441 P.2d 281.) Rather, because the standards applied by the APC are not vague or arbitrary and the APC's decision finds substantial support in the record, we affirm the trial court's order denying Star's writ petition.

FACTS AND PROCEDURAL BACKGROUND

1. Star is granted a conditional use permit; the Temple and Fukui Mortuary appeal.

Star initially obtained a building certificate from the City to convert a two-story **157 warehouse/manufacturing facility into a gentleman's club with seating for 177 patrons, 133 parking spaces, and hours of operation from 11:00 a.m. to 2:00 a.m. daily. The City thereafter granted Star a certificate of occupancy permitting it to offer nude entertainment.

Star then sought a conditional use permit for the sale and consumption of a full line of alcoholic beverages with live entertainment consisting of clothed and topless dancing. The application disclosed the club would have no kitchen and would have Happy Hour from 4:00 to 7:00 p.m. daily.

The Zoning Administrator (ZA) conducted a public hearing and thereafter granted Star's application for a conditional use permit for one year. The approval letter stated the site is a corner parcel with 150 feet of frontage on the north side of Ducommon Street and approximately 138 feet along Vignes Street. The property is improved with a warehouse building with rooftop and interior parking accessed via Commercial Street. Surrounding properties

are characterized *463 by commercial/industrial buildings occupied by perishable food cold storage, food processing operations, and a City maintenance yard.

The Temple and the Fukui Mortuary appealed the approval to the APC, which conducted a public hearing on the matter.

2. The public hearing before the APC.

a. The Zoning Administrator's explanation of the approval.

Zoning Administrator Albert Landini approved Star's application because ABC guidelines for this census tract permit one on-site license for the sale of alcohol and one off-site license and, at the current time, there are no licenses. The area had a low crime rate and, although it had been claimed there were two artists lofts nearby, no residential properties had been identified and residential use in the area clearly was in the minority. Landini noted Star voluntarily had agreed to conditions on the signage of the building, the site has a large amount of parking and construction of the club has been completed. Landini noted the permit had a life of one year and Star had accepted this condition based on its substantial belief in the nature of its business.

b. Position of the proponents of the appeal.

Gerald Fukui, the fifth generation operator of the Fukui Mortuary on East Temple Street, testified the mortuary has been serving the Japanese-American community since 1918. They have a chapel which accommodates 150 people and is used for funerals and memorial services involving all faiths and religions. The mortuary conducts more than 500 services per year, and many services continue into the night as is the Japanese-American custom. The mortuary is approximately three blocks from the site of the proposed permit. The sale of alcoholic beverages in such proximity to the mortuary would be disruptive, dangerous and contrary to the environment of grieving family and friends. Fukui indicated there already was a problem with Little Pedro's, a bar directly across the street from the Temple at First and Vignes Streets. Loud, boisterous patrons of Little Pedro's park and urinate in the mortuary's parking lot and act disrespectfully when passing the entrance to the chapel. Fukui noted the mortuary will be between the new cabaret and Little Pedro's.

On behalf of the Temple, Eric Kurimura testified the permit will create an unsafe environment for families congregating at the Temple. Kurimura feared disruption of numerous

religious services and youth programs. Also, the *464 increased sale of **158 alcohol in the area would be adverse to the changing nature of the community. The Temple operates a day care center from 8:00 a.m. to 6:00 p.m. five days a week. The Temple also has funeral services, memorial services and weddings, most of which take place in the evening. The permit did not require Star to sell food and the Temple was concerned that intoxicated people leaving the cabaret would engage in boisterous conduct.

A member of the Temple noted the cabaret would be open when the children who attended the Nishi Center took monthly field trips and were dropped off on Vignes Street between Ducommon and Temple Streets. These field trips would occur during the hours of operation of the cabaret. Another member of the Temple expressed fear of cars racing on Vignes Street on Friday night when the Temple had approximately 100 children involved in their scout program.

Brandy Chappell, planning deputy for Council Member Jan Perry of the Ninth Council District, expressed concern that issuance of the permit would result in an increase in drunk driving in the neighboring residential communities. Chappell noted problems had occurred at the Grand Avenue Club and the Stock Exchange Club and concluded the conditional use permit was not in the best interests of Little Tokyo or the Arts District. Chappell noted the Little Tokyo community had opposed a conditional use permit for the Neptune project which was at Third and Alameda Streets and was not a cabaret. The opposition was based solely on alcohol use.

Jessica Wethington McLean, the planning director for Council Member Jose Huizar of Council District 14, testified the area is undergoing revitalization. The area had a "tremendous" amount of crime five to seven years earlier but it was "cleaned up, because we have a vision for this area." McLean noted a new Business Improvement District (BID) was scheduled to open in January and the City wanted to mix residential and light industrial uses in the area. The Fukui Mortuary is 18 feet beyond the 500 foot notification limit and the Temple provides religious services to the community, which is "burgeoning." McLean indicated an alcohol permit was not compatible with the Council's vision for the area or the long-term plan.

Estella Lopez, executive director of the Central City East Association which represents the interests of 1,500 property owners, supported the appeal on behalf of the residents of the Arts District, property owners and business owners who

wished to eliminate nuisance uses. The Arts District was in transition with more residential use anticipated and the proposed use was wrong for this community at this time.

*465 The owner of Heet Sound products, 150 feet from the proposed use, opposed the application anticipating the club will cause based on increased noise and drunkenness in the evenings and on the weekend.

Los Angeles Police Lieutenant Tom Brosh indicated that based on 28 years of experience, when alcohol is combined with this type of establishment and late hours, it generally leads to "disaster." "And I can guarantee that I'm going to be out there on some Saturday night at 1:00 in the morning handling a murder, because it's just going to happen. That's just the way it is." Brosh predicted the crime rate would increase dramatically just when the area was undergoing a renaissance. Brosh noted a new multistory residential structure was being built at Temple and Alameda Streets, businesses were trying to revitalize the area and there were artists' lofts in the area. Brosh also noted the county jail was a few blocks away and **159 people are released from the jail at all times of the day and night. Brosh predicted an increase in panhandling and crime. Brosh indicated that even if the cabaret provided security inside the club, problems arise when patrons leave.

Los Angeles Police Lieutenant Raymond Garvin testified the club was seven blocks from the skid row area and the contemplated use would attract the element the police are trying to abate under the Safer Cities Initiative.

c. Opposition to the appeal.

Counsel for Star indicated Star has invested more than \$1 million in the property and Star's licensing agreement with Penthouse required Star to run an upscale club. Also, although the conditional use permit did not require the sale of food, Star's licensing agreement with Penthouse required Star to offer food. Counsel noted that, without a liquor license, the club could offer fully nude dancing. However, with a liquor license, ABC regulations limited the club's entertainment to topless and the performers were required to be on stages six feet from the nearest patron. Counsel noted the building is basically a concrete box which will emit no noise and all parking is on the interior and the roof of the structure. Counsel asserted there would be no need for customers to park on the street or walk in the neighborhood and the business would have security at all times it was open. Also, the funeral home is 518 feet from the site and the Temple is more than 1,000

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feet from the site. Thus, both appellants were outside the 500 foot statutory notice range.

d. Remarks of the commissioners.

Commissioner Chanchanit Martorell indicated the commission had to consider that the community “is experiencing a total turnaround, a revitalization, *466 a [r]enaissance.” Martorell stated the community wants to be hospitable to families and noted Lieutenant Brosh had testified, based on his 28 years of experience, that disaster follows if you combined alcohol, testosterone and late hours. Also the cabaret was in close proximity to the county jail and skid row where there is a great deal of drug and alcohol abuse. Martorell indicated the APC’s obligation was to see that “this community is given a chance—given an opportunity to turn around.” Martorell concluded, “It’s just not a compatible use....” “[W]e want to move forward, not backward.”

Commissioner Franklin Acevedo indicated difficulty reconciling operation of a cabaret with the community spaces located nearby. Acevedo suggested children at the day care center might be in danger of injury from a drunk driving incident after lunch.

Commission President Young Kim indicated Star had a right to operate this type of facility at the location. However, Kim did not think the number of alcohol licenses in this census tract was relevant in that other census tracts have an over-concentration of alcohol permits.

e. The APC’s ruling.

The APC upheld the appeal by a vote of three to one. The APC found the use was not desirable to the public convenience or welfare, was materially detrimental to the character of development of the community and was not in harmony with the objectives of the general plan.

The APC adopted proposed findings of fact as required by the Los Angeles Municipal Code (LAMC).¹ The APC found as **160 follows: “The proposed location will not be desirable to the public convenience or welfare” in that it is “not in accordance with the greater development pattern of the surrounding *467 community. It is not respectful of what is referred to as sacred space; associated with both the nearby Buddhist temple, and with the mortuary. And it provides a potentially dangerous mixture of the sale of alcoholic beverages and [an] otherwise permitted use of land

that, in the opinion of the Los Angeles Police Department, can result in increased crime rates.”

“The use will be materially detrimental to the character of development in the immediate neighborhood, because this area is one that is emerging as a unique residential community in the establishment of various artists and resident lofts....”

The APC also noted that, because of the proximity to downtown, this area will be increasingly important as a residential resource and the proposed use of the land would be detrimental to that use.

The APC further found the proposed location will not be in harmony with the various elements and objectives of the general plan. Although the property is zoned for heavy industrial use, it is also located in an increasingly important area that has been recognized by elected officials as one in which there is a significant change in land use, away from manufacturing to housing and artist activities and the proposed future establishment of a BID. The APC found approval of the requested use “will adversely affect the economic welfare of the community because there has been a wholesale outcry from various public and quasi governmental organizations representing business and cultural activities that claim such use in this neighborhood ... will be detrimental to their long-term goals and objectives of providing a better business environment for the Art[s] District as well as for the Little Tokyo area.”

“While the crime statistics are low for this area, and the associated alcohol beverage sales are also nonexistent in the subject census tract, it can be found that the proposed use will result in undue concentration of premises for the sale or dispensing ... of alcoholic beverages when the larger surrounding community, including ... the downtown area, is taken into consideration. [¶] In this larger area, it has been demonstrated by verbal testimony from the Council office and the police department that there are troublesome issues involving the mixture of alcohol and a nightclub, or other cabaret like activities.”

In finding the proposed use would detrimentally affect the surrounding community, the APC considered the increasing number of residences in the area. Although these residences are outside the immediate notification radius, *468 they are nonetheless in close enough proximity that **161 they should be considered as potentially being troubled by the proposed use.

“Further, in reaching a finding of detrimental impact, the [APC] has considered testimony from the police department regarding the effect of the sale of alcoholic beverages in such establishment, and the resulting criminal activity that is potentially likely to appear.” The APC also considered the impact “sales of alcoholic beverage might have on school children walking to and from school activities, and using a shuttle bus that stops in close proximity to the subject site.”

3. *Star institutes proceedings under Code of Civil Procedure section 1094.5.*

Star sought review of the APC's ruling in the trial court through administrative mandamus pursuant to Code of Civil Procedure section 1094.5. After conducting a hearing, the trial court denied Star's mandamus petition. The trial court found substantial evidence supported the APC's ruling. In so finding, the trial court indicated it would reach the same decision regardless of the standard of review applied. This appeal followed.

CONTENTIONS

Star contends the APC and the trial court denied Star an economic benefit because Star engaged in a disfavored form of protected expression. Star further contends the standards under which the APC operated gave it unbridled discretion to regulate speech, the APC's rationale for denying the permit was a pretext for discriminating against disfavored speech, denial of the permit on the grounds of future redevelopment endowed the APC with unconstitutional discretion to regulate speech and the APC's findings were not supported by substantial evidence.

DISCUSSION

1. *Standard of review.*

The exclusive remedy for judicial review of administrative action affecting land use is a proceeding under Code of Civil Procedure section 1094.5. (*Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1211, 30 Cal.Rptr.2d 95; Code Civ. Proc., § 1094.5, subd. (a).) A trial court's review of an administrative decision is subject to two possible standards depending on the nature of the right involved. (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 320, 90 Cal.Rptr.2d 277.)

[1] *469 If the administrative decision involved or substantially affected a “fundamental vested right,” the superior court exercises its independent judgment upon the evidence disclosed in a limited trial de novo in which the court must examine the administrative record for errors of law and exercise its independent judgment upon the evidence. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143–144, 93 Cal.Rptr. 234, 481 P.2d 242; Code Civ. Proc., § 1094.5, subd. (c).)

[2] Where no fundamental vested right is involved, the trial court's review is limited to examining the administrative record to determine whether the agency's decision and its findings are supported by substantial evidence in light of the whole record. (*Bixby v. Pierno, supra*, 4 Cal.3d at pp. 143–144, 93 Cal.Rptr. 234, 481 P.2d 242.)

[3] [4] Regardless of the nature of the right involved or the standard of judicial review applied in the trial court, an appellate court reviewing a trial court's ruling on administrative mandamus applies a substantial evidence standard. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824, 85 Cal.Rptr.2d 696, 977 P.2d 693; *Bixby v. Pierno, supra*, 4 Cal.3d at pp. 143–144, 93 Cal.Rptr. 234, 481 P.2d 242.) “If a fundamental **162 vested right was involved and the trial court therefore exercised independent judgment, it is the trial court's judgment that is the subject of appellate court review. [Citations.] On the other hand, if the superior court properly applied substantial evidence review because no fundamental vested right was involved, then the appellate court's function is identical to that of the trial court. It reviews the administrative record to determine whether the agency's findings were supported by substantial evidence, resolving all conflicts in the evidence and drawing all inferences in support of them. [Citations.]” (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1058, 48 Cal.Rptr.3d 563, fn. omitted.)

[5] [6] Under the substantial evidence test, the agency's findings are presumed to be supported by the administrative record and the appellant challenging them has the burden to show they are not. (*JKH Enterprises, Inc. v. Department of Industrial Relations, supra*, 142 Cal.App.4th at p. 1062, 48 Cal.Rptr.3d 563; *Mann v. Department of Motor Vehicles, supra*, 76 Cal.App.4th at p. 318, 90 Cal.Rptr.2d 277; *Saad v. City of Berkeley, supra*, 24 Cal.App.4th at p. 1212, 30 Cal.Rptr.2d 95.) “When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior

court.” (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314, 142 Cal.Rptr. 439, 572 P.2d 53.)

***470 2. Star's application for a conditional use permit for the sale and on-site consumption of alcohol does not involve a fundamental vested right.**

[7] Star asserts topless dancing is a recognized form of protected activity. (*J.L. Thomas, Inc. v. County of Los Angeles* (1991) 232 Cal.App.3d 916, 924, 283 Cal.Rptr. 815.) Star argues that because the APC's decision impacts Stars's ability to engage in protected activity, the trial court was required to conduct an independent review of the record. (*Rubin v. City of Burbank* (2002) 101 Cal.App.4th 1194, 1195, 124 Cal.Rptr.2d 867; *Zeitlin v. Arnebergh* (1963) 59 Cal.2d 901, 909, 31 Cal.Rptr. 800, 383 P.2d 152.)

[8] [9] Determination whether a right is fundamental is made on a case-by-case basis. (*Bixby v. Pierno, supra*, 4 Cal.3d at p. 144, 93 Cal.Rptr. 234, 481 P.2d 242.) “[A]s a general rule, when a case involves or affects purely economic interests, courts are far less likely to find a right to be of the fundamental vested character. [Citations.]” (*JKH Enterprises, Inc. v. Department of Industrial Relations, supra*, 142 Cal.App.4th at p. 1060, 48 Cal.Rptr.3d 563.) Thus, “[a]dministrative decisions which result in restricting a property owner's return on his property, increasing the cost of doing business, or reducing profits are considered impacts on economic interests, rather than on fundamental vested rights.” (*E.W.A.P., Inc. v. City of Los Angeles* (1997) 56 Cal.App.4th 310, 325, 326–327, 65 Cal.Rptr.2d 325....) (*Id.* at p. 1061, 48 Cal.Rptr.3d 563.)

It is clear that an initial application for a conditional use permit to sell alcohol for on-site consumption does not involve a fundamental vested right or Star's right of free speech. On the contrary, it is generally accepted that “the liquor business is fraught with danger to the community, and may therefore be either entirely prohibited, or permitted under such conditions as are prescribed by the regulatory agency, which has broad power in this respect. [Citations.]” (*Yu v. Alcoholic Bev. etc. Appeals Bd., supra*, 3 Cal.App.4th at p. 296, 4 Cal.Rptr.2d 280.)

****163** The cases cited by Star, *Rubin* and *Zeitlin*, involve sectarian prayer in city council meetings and whether a book was obscene, respectively. Both of these issues are grounded in constitutional rights. However, the impact of the APC's

decision on Star's business was purely economic. Star already has a certificate to operate as an adult club offering nude entertainment. Thus, the matter in issue in this case is not the right to engage in protected activity, but the right to sell alcohol for on-site consumption. As a result, the trial court properly applied the substantial evidence test, rather than the independent ***471** judgment standard. We therefore review the APC's decision and its findings to determine whether they are supported in light of the administrative record.

3. Vague Standards.

a. Star's arguments.

[10] Star contends the APC's decision was based on vague standards that gave it unbridled discretion “to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.” (*Lakewood v. Plain Dealer Publishing Co.* (1988) 486 U.S. 750, 759, 108 S.Ct. 2138, 100 L.Ed.2d 771.) Star claims the APC's ruling “plainly imposes a financial disincentive only on speech of a particular content.” (*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.* (1991) 502 U.S. 105, 116, 112 S.Ct. 501, 116 L.Ed.2d 476.) Star asserts that because the APC gave Star the option of engaging in protected speech without an alcohol permit or refraining from that speech, the APC was required to base its ruling on “narrow, objective and definite standards....” (*Jersey's All-American Bar v. Wash. Liquor Control* (W.D.Wash.1999) 55 F.Supp.2d 1131, 1138.)

Star argues that, “[i]n considering the constitutionality of ordinances in the category of that involved here “ ‘precision of regulation must be the touchstone’ ” [citation] and the standards set forth therein must be ‘susceptible of objective measurement.’ ” (*Burton v. Municipal Court, supra*, 68 Cal.2d at p. 691, 68 Cal.Rptr. 721, 441 P.2d 281.) Star notes the APC found the “proposed location would not be *desirable* to the public convenience or welfare,” “the location is not *proper* in relation to adjacent uses or the development of the community, the use will be *materially detrimental* to the character of the development in the immediate neighborhood,” and “the use will not be in *harmony* with the various elements and objectives of the General Plan.”

Star contends terms such as “proper,” “materially detrimental,” “in harmony” and “immediate neighborhood” are unconstitutionally vague and fail to give the applicant a standard it can understand and meet. (*Smith v. County of Los Angeles* (1994) 24 Cal.App.4th 990, 1006–1007, 29 Cal.Rptr.2d 680.) Thus, the standards applied by the APC

constitute unconstitutional “administrative censorship in an extreme form.” (*Largent v. Texas* (1943) 318 U.S. 418, 422, 63 S.Ct. 667, 87 L.Ed. 873.) Star concludes the denial of the permit was an unconstitutional burden on speech and, in the absence of precise standards, the APC's decision was arbitrary as a matter of law.

***472 b. Speech versus on-site sale and consumption of alcohol.**

The authority cited by Star uniformly involves speech, not on-site sale and consumption of alcohol. (*Lakewood v. Plain Dealer Publishing Co.*, *supra*, 486 U.S. 750, 108 S.Ct. 2138 [mayor's absolute authority over annual applications to place news racks on public property amounted to a prior restraint]; *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims* **164 *Bd.*, *supra*, 502 U.S. 105, 112 S.Ct. 501 [requirement that proceeds of book sales be turned over to victims imposes a financial disincentive only on speech of a particular content]; *Jersey's All-American Bar v. Wash. Liquor Control*, *supra*, 55 F.Supp.2d 1131 [permit required before liquor license holder could provide dancing or entertainment]; *Burton v. Municipal Court*, *supra*, 68 Cal.2d at p. 687, 68 Cal.Rptr. 721, 441 P.2d 281 [prohibition of exhibiting motion pictures without a permit if the operation did not “ ‘comport with the peace, health, safety, convenience, good morals, and general welfare of the public’ ” or if the applicant is “ ‘unfit to be trusted with the privileges granted by such permit, or has a bad moral character, intemperate habits or a bad reputation for truth, honesty, or integrity.’ ”]; *Largent v. Texas*, *supra*, 318 U.S. at p. 419, 63 S.Ct. 667 [ordinance making it unlawful to sell books or merchandise without a permit].)

Here, Star already has a license to engage in protected activity at the Ducommon Street location. Consequently, this case, unlike those cited by Star, involves not speech but the on-site sale and consumption of alcohol. Indeed, even without the conditional use permit, Star is licensed to offer fully nude entertainment. The denial of a conditional use permit for the on-site sale and consumption of alcohol might render Star's activity less profitable. However, this is not a case in which the APC has “decided to regulate health and safety via a license to speak....” (*Jersey's All-American Bar v. Wash. Liquor Control*, *supra*, 55 F.Supp.2d at p. 1137.)

c. Standard of review applicable to the LAMC provisions at issue.

[11] Because this case involves the on-site sale and consumption of alcohol, we do not subject the LAMC to the strict level of scrutiny applicable in cases involving freedom of speech. “[T]he rule announced in *Burton* [requiring precision in the standards under which a permit may be issued] applies only to those situations in which the operation of a licensing ordinance impinges upon the exercise of First Amendment activities, rather than ordinary commercial enterprises. [Citation.]” (*Sunset Amusement Co. v. Board of Police Commissioners* (1972) 7 Cal.3d 64, 72, 101 Cal.Rptr. 768, 496 P.2d 840.) Absent an ascertainable effect upon First Amendment activities, the provisions of the LAMC provide an adequate standard to guide the APC's discretion, namely, that it must exercise its power in a reasonable, rather than arbitrary, manner to promote the interest of the public. (*Ibid.*)

*473 The provisions of the LAMC relating to the issuance of a conditional use permit based on a finding the “ ‘proposed location will be desirable to the public convenience or welfare and will be in harmony with the various elements and objectives of the Master Plan’ ” specifically have been upheld against challenges of vagueness. (*Stoddard v. Edelman* (1970) 4 Cal.App.3d 544, 548, 84 Cal.Rptr. 443; *Case v. City of Los Angeles* (1963) 218 Cal.App.2d 36, 42, 32 Cal.Rptr. 271; *Wheeler v. Gregg* (1949) 90 Cal.App.2d 348, 203 P.2d 37.)

[12] [13] [14] Further, land use ordinances precluding uses detrimental to the “general welfare” are not unconstitutionally vague. (*Novi v. City of Pacifica* (1985) 169 Cal.App.3d 678, 680, 215 Cal.Rptr. 439.) “In fact, a substantial amount of vagueness is permitted in California zoning ordinances: ‘[I]n California, the most general zoning standards are usually deemed sufficient. “The standard is sufficient if the administrative body is required to make its decision in accord with the general health, safety, and welfare standard.” [Citation.]’ ” (*Id.* at p. 682, 215 Cal.Rptr. 439; **165 *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, 30, 41 Cal.Rptr. 9, 396 P.2d 41.)

In sum, the provisions of the LAMC in issue must be upheld as a reasonable exercise of the City's police power to license and regulate business activities.

4. Personal antipathy.

[15] Star contends the comments of the commissioners at the hearing reveal an acknowledgement that Star had a First Amendment right to issuance of the permit and the APC improperly voted in favor of the appeal based on

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personal antipathy or community opposition. Star relies on the comments by the commissioners and the APC's decision that the combination of alcohol and testosterone is a "recipe for disaster." Star notes the statements of the individual commissioners mirror those contained in *Smith v. County of Los Angeles*, *supra*, 24 Cal.App.4th at p. 1007, 29 Cal.Rptr.2d 680. Star concludes the APC discriminated against it based on the content of its speech.

However, the record does not support Star's claim the commissioners opposed issuance of the conditional use permit based on animosity toward adult entertainment. Rather, the opposition was to the sale and on-site consumption of alcohol and the impact intoxicated individuals would have on the neighborhood, especially the religious services and community activities offered by the Temple and the mortuary. At the hearing, the representative of City Council Member Jan Perry made it clear the opposition to the proposed use was grounded in the sale and consumption of alcohol, which had been opposed at other locations that did not offer adult entertainment. Thus, the *474 record reveals the opposition to Star's permit was not based on Star's intent to engage in protected activity. Rather, the opposition centered on Star's on-site sale and consumption of alcohol.

Smith is distinguishable. In *Smith*, an application for a conditional use permit for a nude dancing club was denied pursuant to a zoning ordinance that applied only to adult businesses. One of the commissioners in *Smith* went on a "tirade" against adult businesses and indicated "everything possible" would be done "to eliminate them entirely from the county." (*Smith v. County of Los Angeles*, *supra*, 24 Cal.App.4th at p. 1007, 29 Cal.Rptr.2d 680.) No similar remarks are found in the present record.

5. Future redevelopment.

[16] Star next asserts the APC repeatedly stated the proposed use would be inconsistent with unspecified plans for redevelopment of the community that included the Arts District, the proposed BID and the Little Tokyo area. Star notes the APC found there had been a "wholesale outcry from the various public and quasi-governmental organizations representing business and cultural activities claiming that the sale of alcoholic beverages at the subject location will be detrimental to their long-term goals of providing a better business environment for the Art[s] District as well as the Little Tokyo area." Star asserts *Gammoh v. City of Anaheim* (1999) 73 Cal.App.4th 186, 86 Cal.Rptr.2d 194 held a

municipality cannot exclude an adult cabaret on the ground it would hinder redevelopment.

Gammoh does not apply here. In *Gammoh*, the City of Anaheim was found to have used redevelopment as "a tool for a city to arbitrarily exclude adult businesses." (*Gammoh v. City of Anaheim*, *supra*, 73 Cal.App.4th at p. 199, 86 Cal.Rptr.2d 194.) *Gammoh* held a city may not deny a permit based on a desire for redevelopment when the exercise of First Amendment rights is involved. As has been noted, Star has a permit to operate an adult business featuring nude entertainment. This case involves on-site consumption of alcohol which properly may be regulated based on anticipated future uses of the area.

6. The APC's findings are supported by substantial evidence.

[17] Star contends the APC improperly denied issuance of the conditional use permit based on conjecture and surmise rather than substantial evidence. (*Reimel v. Alcoholic Bev. etc. App. Bd.* (1967) 255 Cal.App.2d 40, 45, 62 Cal.Rptr. 778.) Star notes that mere proximity to a school or a church is not, as a matter of law, good cause which will sustain denial of a license. (*Ibid.*) Star further contends the trial court's finding that "nearby residents opposed the application" is unsupported because there are no nearby residents and the *475 site, which is zoned M3, is surrounded by industrial uses. Also, the APC's concern about proximity to skid row and the county jail lacks any relevance in determining the impact Star's operation will have on the neighborhood.

Star additionally asserts there was no evidence to support the APC's finding "crime potential exists when you combine alcohol sales and testosterone." Star argues it is settled that topless entertainment is not contrary to public welfare and morals or a justification for limiting the service of alcoholic beverages. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 103, 84 Cal.Rptr. 113, 465 P.2d 1.) Star maintains *Boreta* rejected the notion topless entertainment combined with the service of alcohol leads to "improper activities and socially deleterious consequences...." (*Ibid.*) Star asserts that here, as in *Boreta*, there is "no evidence in the record which would permit us to conclude that the evils which the Department seeks to avoid are in fact related to the use of topless waitresses...." (*Id.* at p. 104, 84 Cal.Rptr. 113, 465 P.2d 1.)

Star argues the combination of alcohol and adult entertainment is inherent in the inclusion of “bar” in LAMC’s definition of an “adult cabaret.” Thus, the municipal code itself contemplates the on-site sale and consumption of alcohol at adult cabarets.²

Star concludes the APC’s hearing and decision were “a search for any reason to deny the CUP for an adult business rather than a dispassionate examination of the evidence and an objective weighing the factors bearing on a correct decision.” (*Smith v. County of Los Angeles*, *supra*, 24 Cal.App.4th at pp. 1007–1008, 29 Cal.Rptr.2d 680.) Star claims other aspects of the APC’s ruling constitute “gibberish,” citing the conclusion the community wanted “the area to move forward, and not move backward, and the sale of alcohol at the subject location will not promote forward movement.” Thus, the APC’s finding lacks substantial support and must be set aside.

Star’s contention fails because the evidence offered at the hearing indicated approval of Star’s application would have a negative impact on the character and integrity of the neighborhood. The owner of the mortuary and representatives of the Temple indicated issuance of the permit would adversely impact the ability of the mortuary and the Temple to conduct services in a dignified and respectful environment **167 based on problems encountered with patrons of another bar in the area. Others expressed concern that issuance of the permit would place individuals attending functions at the Temple and the day care facility at risk of drunk drivers.

[18] *476 Although a liquor license may not be denied solely based on proximity to a school (*Reimel v. Alcoholic Bev. etc. App. Bd.*, *supra*, 255 Cal.App.2d at p. 45, 62 Cal.Rptr. 778), such proximity is an appropriate factor to consider in determining whether to grant a permit (*Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 256 P.2d 1 [proximity to a high school]; *Schaub’s Inc., v. Dept. Alc. Bev. Control* (1957) 153 Cal.App.2d 858, 315 P.2d 459 [proximity to church providing youth services properly considered in denying off-site consumption license to a supermarket]).

[19] Additionally, concern of neighbors is sufficient to constitute substantial evidence that a contemplated use is detrimental to the welfare of the community. (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 337, 25 Cal.Rptr.2d 842; *Harris v. City of Costa Mesa* (1994) 25 Cal.App.4th 963, 31 Cal.Rptr.2d 1.) Harris noted “ ‘expert testimony on these issues is not necessary. It is appropriate

and even necessary for the [agency] to consider the interest of neighboring property owners in reaching a decision whether to grant or deny a land use entitlement and the opinions of neighbors may constitute substantial evidence of this issue. [Citations.]’ ” (*Id.* at p. 973, 31 Cal.Rptr.2d 1.)

With respect to the APC’s assertedly inappropriate correlation of alcohol, testosterone and inappropriate behavior, the case upon which Star places its primary reliance, *Boreta*, is distinguishable. *Boreta* addressed whether the ABC abused its discretion in revoking a liquor license based on the ABC’s determination the “use of topless waitresses, in itself and without more, is conduct contrary to public morals and thus in itself constitutes grounds” for the revocation of a liquor license. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control*, *supra*, 2 Cal.3d at p. 100, 84 Cal.Rptr. 113, 465 P.2d 1.) *Boreta* held such a finding is an abuse of discretion unless the agency first considers and evaluates the effects of the course of conduct. (*Id.* at p. 99, 84 Cal.Rptr. 113, 465 P.2d 1.) Thus, *Boreta* stands for the proposition it is improper to presume that service of alcohol combined with adult entertainment is inherently contrary to public welfare. (*Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1999) 76 Cal.App.4th 570, 575, 90 Cal.Rptr.2d 523.)

Here, the APC did not make a per se finding that alcohol and testosterone do not mix. Rather, the APC based this conclusion on the testimony of Los Angeles Police Department officers who testified against granting the permit based on their experience with similar clubs. Addressing Star’s argument the APC had based its ruling on speculation, the trial court stated: “This is from their observation; this is from their experience. The police officer’s testimony ... was extremely well supported here in this case. Given the many records I have read, this was very convincing here to me.”

*477 We agree with the trial court’s assessment and conclude that substantial evidence supports the APC’s ruling.

7. The low crime rate does not mandate issuance of the permit.

[20] Star notes the APC found “the crime statistics are low for this area and the associated alcoholic beverage sales establishments are non-existent in the subject **168 census tract...”³ Nonetheless, the APC “found that the proposed use will result in an undue concentration of premises for the sale or dispensing ... of alcoholic beverages when the larger

SP Star Enterprises, Inc. v. City of Los Angeles, 173 Cal.App.4th 459 (2009)

93 Cal.Rptr.3d 152, 09 Cal. Daily Op. Serv. 5159, 2009 Daily Journal D.A.R. 6152

surrounding community, including ... the downtown area, is taken into consideration. [¶] In this larger area, it has been demonstrated by verbal testimony from the Council Office and the police department that there are troublesome uses involving the mixture of alcohol and a nightclub, or other cabaret-like activities.”

Star contends the APC's finding the crime rate in the area is low mandates a ruling in Star's favor. Star asserts there is no evidence to support the APC's finding that granting the application will result in “an undue concentration of premises for the sale or dispensing ... of alcoholic beverages” giving consideration to the crime rate.

Star notes it was undisputed the area has a very low crime rate. The APC stated: “[C]rime is not currently a problem and [the] community can maintain that standard in part by the withholding of alcohol beverage permits when such could lead to neighborhood problems.” Star concludes it was denied the conditional use permit because the crime rate was too low.

[21] Problems at existing bars support denial of additional permits in the area. (*Weiss v. State Board of Equalization*, *supra*, 40 Cal.2d at p. 777, 256 P.2d 1 [permit denial upheld

despite no other liquor licenses in the area based on proximity of residential area].)

[22] Here, the testimony and evidence submitted to the APC was rationally related to preservation of the character and integrity of the neighborhood based on current conditions and problems experienced in the area. Thus, the evidence supports the APC's ruling and the trial court's denial of Star's writ petition.⁴

***478 DISPOSITION**

The order denying Star's petition for writ of administrative mandate is affirmed. The City shall recover costs on appeal.

We concur: CROSKEY and KITCHING, JJ.

Parallel Citations

173 Cal.App.4th 459, 09 Cal. Daily Op. Serv. 5159, 2009 Daily Journal D.A.R. 6152

Footnotes

1 LAMC section 12.24E requires the APC to make the following findings before a conditional use permit may be approved: “[T]he proposed location will be desirable to the public convenience or welfare, is proper in relation to adjacent uses or the development of the community, will not be materially detrimental to the character of development in the immediate neighborhood, and will be in harmony with the various elements and objectives of the General Plan.” (LAMC, § 12.24E.)

LAMC section 12.24W1 requires additional findings by the APC for approval of a conditional use permit to sell alcohol. Specifically, the APC must find: “(1) that the proposed use will not adversely affect the welfare of the pertinent community; (2) that the granting of the application will not result in an undue concentration of premises for the sale or dispensing for consideration of alcoholic beverages ...; and (3) that the proposed use will not detrimentally affect nearby residentially zoned communities in the area of the City involved, after giving consideration to the distance of the proposed use from residential buildings, churches, schools, hospitals, publicly grounds another similar uses...” (LAMC, § 12.24W1(a)(1)(2)(3).)

2 LAMC section 12.70(B)(3) defines “ ‘Adult Cabaret’ ” as “a nightclub, bar, restaurant or similar establishment which regularly features live performances which are characterized by the exposure of ‘specified anatomical areas’ or by ‘specified sexual activities’...”

3 The LAMC provides that, in order to grant a permit, the APC must find “the application will not result in an undue concentration of premises for the sale or dispensing for consideration of alcoholic beverages, ... giving consideration to ... the crime rate in the area...” (LAMC, § 12.24–W(1)(a)(2).)

4 The City argues the denial of Star's application may also be upheld on the ground that Star's on-site parking is inadequate in comparison to the capacity of the building. (*See Martin v. Alcoholic Bev. etc. Appeals Bd.* (1959) 52 Cal.2d 238, 247–248, 340 P.2d 1.) The City notes the club has a maximum occupancy of 245 and a code maximum of 434 but parking for only 133 vehicles. However, the issue of adequate parking was not raised before the APC. This court may not affirm the APC's determination on a basis not embraced by the agency itself. (*Southern Cal. Edison Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086, 1111, 102 Cal.Rptr.2d 684.)

LAWEEKLY

Alcohol

Valley Strip Club With Pot Shop Next Door Targeted by L.A. City Hall

By Dennis Romero

Tue, Oct 1, 2013 at 9:02 AM

Categories: Alcohol



Xposed / Facebook

If we told you there was a strip mall in L.A. where guys could spend the day actually, really, truly enjoying the retail environment without moping around, pretending to shop, and checking their smartphones while sitting on the nearest bench, you'd probably say *no such thing*.

But it exists, sort of.

A property near the corner of Canoga Avenue and Roscoe Boulevard in Canoga Park has a fully nude strip club, a bikini bar with alcohol, and a marijuana dispensary. The bikini bar features UFC mixed martial arts matches on its televisions. And there's even a XXX video and adult toy store on-site and a liquor store next door. *Toldja*:

The property has lived with the nudity and alcohol buffet for more than 13 years. But today at least one of the businesses, the Xposed strip club, is against the ropes, the target of an alleged LAPD crackdown and a move by city zoning administrators that could limit operations.

A zoning administrator's decision on what to do about the fully nude venue is due by Friday.

For now, the worst-case scenario for the club, Valley zoning official Alam Choudhury tells the *Weekly*, is that new operating conditions must be met:

People are given a chance to get their act together and get rid of nuisance issues. They're given some time to do that and comply. If that fails, their licenses are taken away.



[View Larger Map](#)

The club's attorney says the crackdown is part of a vendetta by LAPD investigators who tried to shut down owner Brad Barnes for alleged distribution of marijuana at the adjacent dispensary.

Police were unsuccessful; the case was dismissed, Barnes' longtime attorney, Roger Jon Diamond, tells us.

The secret to the clubs' success has been the ingenious proximity of a bikini bar with alcohol to a fully nude strip club that does not serve alcohol. Technically, they are separate businesses called Wet Spot (the bar) and Xposed (the strip club).

But ownership bills the two this way: "The only spot in L.A. with full nude and full bar."

You can park once, get your drink on, and then see fully nude women just by walking next door, something you can't really do almost anywhere else in California. State law forbids fully nude establishments from serving a drop of alcohol.

Wet Spot and Exposed are owned by former adult performer Barnes, who was a vocal opponent 10 years ago of **the city's ultimately unsuccessful attempt to ban lap dances** at bikini bars.

And since then, the pot shop has opened on the property -- so now you can get weed too.

Cops now believe the combination has become just too much for some patrons to handle. Police have received complaints of prostitution, assaults, drunks in public -- and of course, public urination.

But there are few residential neighbors to complain: The clubs are near a car wash, a Costco and a Salvation Army. And **crime stats** for the area police station, the LAPD's Topanga Division, show a 14 percent decrease in violent crime since 2011.



xposedclub.com

But officers insist the strip-club-alcohol-cannabis vortex is a real problem. An LAPD vice official told us:

They came to our attention during the course of routine investigation. Our unit is not the only one involved that has dealings with the whole property. We'll just let it play out with the zoning commissioner. But all the businesses on the property should be considered as a whole.

Lawyer Diamond, who helped overturn City Hall's lap dance ban, contends that police "didn't receive any complaints from neighbors."

He says the clubs are in an "industrial area" anyway.

The root of the city's ire, Diamond alleges, is an unsuccessful attempt by the LAPD to nab owner Barnes for pot distribution for his unspecified role in the pot shop next door. The dispensary is one of approximately 135 in the city that were open before the City Council enacted a moratorium -- and so will be allowed to stay open under new, voter-approved restrictions on weed retailers.

Diamond tells the *Weekly* that cops got a search warrant based on a confidential informant who said cannabis was being sold without proper ID checks. The warrant then allowed cops to search the whole property, including Wet Spot and Xposed, Diamond said.

But a judge threw the case out, based partly on an allegedly flawed warrant, and returned to Barnes his seized cash -- \$500,000, the lawyer said.

Diamond:

LAPD is always hostile to adult gentlemen's clubs. The reason they brought this proceeding was to retaliate against Brad Barnes, who prevailed in a criminal matter. I got the case dismissed.

The attorney alleges the same cops who tried to get Barnes on drug charges are now trying to shut down the clubs.

A shooting last month outside Xposed, following a reported dispute inside the club, hasn't helped its case. The September 6 attack left a man in critical condition, leading area City Councilman Bob Blumenfield to note that the venue would be put under city officials' microscope.

Diamond says situations like that are tough for club owners, though:

The LAPD and the city judge your venue based, in part, on 911 calls. This encourages some spots to avoid calling for help so they don't lose their licenses and come under this kind of scrutiny.

Send feedback and tips to the author. Follow Dennis Romero on Twitter at @dennisjromero. Follow LA Weekly News on Twitter at @laweeklynews.

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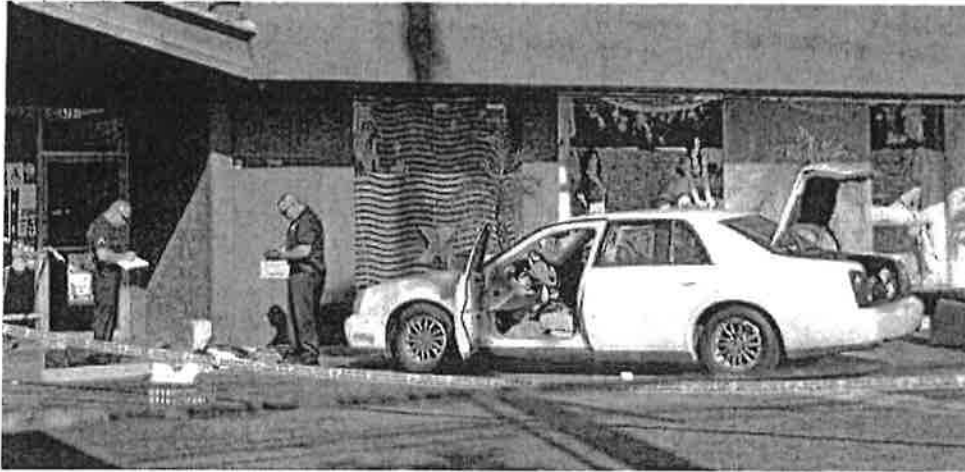
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Shooting highlights city efforts to shut down Canoga Park strip club Xposed

By Rick Orlov, Los Angeles Daily News

DailyNews.com



Los Angeles police are investigating an early morning shooting that left one man in critical condition following a fight at the Xposed strip club in Canoga Park on Friday, September 6,

2013. The bar is located on Canoga Ave. just south of Roscoe Blvd. in Canoga Park, CA. (Photos by Dean Musgrove/Los Angeles Daily News)

An early morning shooting Friday outside a Canoga Park strip club that left one man in critical condition has renewed efforts by local officials to shut down the operation.

Councilman Bob Blumenfield, whose district includes the Xposed Gentlemen's Club and the Wet Spot bar next to it, said he is troubled over the latest incident which follows a series of other problems documented by police.

"This nightclub is currently under review because of several nuisance complaints," Blumenfield said. "Crime and violence have no place in our community and I will continue to work with LAPD to do everything we can to promote security, safety and a high quality of life for our community."

The shooting occurred shortly after 3 a.m. in what police said was a dispute between two men that began inside the club at 8229 Canoga Ave.

An hour after the club closed, the men were still outside in the parking lot and the suspect got into a 2008 silver Toyota Camry to retrieve a gun, and opened fire on the victim as he drove away, police said. The victim, described as between ages 26 and 28, was taken to a hospital and listed in critical condition, officials said.

There was no description released of the suspect and there was no indication if there was any gang affiliation, but police say there were several witnesses to the crime. Detectives are investigating, but don't have a suspect's name and are not combing neighborhoods, police said.

"We are not actively out looking for the suspect right now," said Lt. Stephanie Moten of the LAPD's Topanga Division. "But (the victim) was accompanied by some friends and there were security guards in the parking lot."

The club and its adjoining bikini bar where alcohol is served also are connected to a lingerie/sex toy shop under the same owner and are located on a strip mall property that also hosts a medical marijuana dispensary and a liquor store.

At a hearing before the city last month, police said they have received numerous complaints of prostitution, pandering, assault, public intoxication, public urination and other offenses at the site.

The Los Angeles Police Department asked a zoning administrator to either shut down the operation or impose a number of strict operating restrictions.

At the hearing, club owner Brad Barnes insisted his business was not the cause of the problems and he was taking steps to mitigate the issues. He said the problems were due to the homeless that come to the property and he has begun searching the bags of customers.

Attorney Roger Jon Diamond, who represents the club, said it is being blamed for problems beyond its control.

"The record isn't clear on the cause of the problems," Diamond said Friday. "One of the major problems are the transients in the area, whose behavior is being attributed to Xposed.

"For instance, there are claims of public urination near the post office and things like that. These are caused by people who are not customers of Xposed or the Wet Spot."

Diamond said Barnes has security guards on the grounds to deal with issues that come up and a new policy has been instituted to prevent customers and dancers from bringing alcohol from the adjoining bar into the area where the dancers perform.

"Mr. Barnes was concerned about invading privacy, but he has started searching bags for alcohol to make sure none of it is coming in from the bar area," Diamond said.

Barnes said last month that he has a roster of 1,500 female dancers, none of whom are employees of the club but are considered independent contractors. That limits his ability to control their actions, he said.

One of the conditions suggested by the LAPD was to have the women become employees so they could be better controlled by management.

Also, the LAPD said it wanted access to the club's security cameras and its support in seeking to close the medical marijuana clinic.

Diamond expressed skepticism about the relationship between the club's operations and a shooting which occurred well after it had closed.

"For one thing, the club closes at 2 a.m., so it's hard to see a direct connection with something that happened an hour later," Diamond said.

Zoning Administrator R. Nicholas Brown, who conducted last month's city hearing, said Friday he had not received any information about the shooting, but added that his primary concern is to focus on land-use issues.

"That's the reason I am here, to determine if there are any violations of land use," Brown said. "The LAPD has their own authority and can work through the City Attorney's office."

After the hearing last month, Brown asked both police and the club owner to submit more information by Sept. 6 — Friday — and he would make his final decision by Oct. 4.

Brown said he has received that information from the LAPD and Diamond and would be reviewing it.

Diamond said any recommendations from Brown would have to go to the Area Planning Commission and could be appealed.

Staff Writer Kelly Goff contributed to this report.



Rick Orlov

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Strip club in Canoga Park faces LAPD crackdown

By Kelly Goff kelly.goff@dailynews.com @KellyGoff_DN on Twitter

DailyNews.com



Xposed on Canoga Avenue, south of Roscoe Boulevard. Thursday, August 1, 2013. (Michael Owen Baker/L.A. Daily News)

Los Angeles police are looking to shut down a strip club and bar complex in Canoga Park they say has become a nuisance and a magnet for crime, attracting complaints of prostitution, assaults and other incidents on the property.

The Xposed Gentleman's Club at 8237 Canoga Ave. adjoins a bikini bar serving alcohol called the Wet Spot. While state law prohibits nude clubs from serving alcohol, the proximity of the two -- and their shared dancer and customer base -- allows them to essentially bypass those restrictions, and city officials say the combination leads to crime. The same strip-mall property also hosts a medical marijuana collective and a liquor store.

At a hearing Friday morning before a city zoning commission, officers with the LAPD's Topanga Division said that over the past three years police have received calls for prostitution, pandering, assault, public intoxication, public urination and other offenses at the site. Some of the activity occurred in the parking lot or in the next-door post office's lot, but police said they believe it was connected to the strip club's dancers and customers.

"The number of calls ebbs and flows, but I can no longer afford to waste our officers' time," said Officer Alex Padron, senior lead officer with Topanga Division.

Brad Barnes, who owns both the club and bar, said his business has not been the main cause of the problems and that he is taking steps to mitigate some of the issues. He argued many of the complaints stem from homeless people attracted to the property by the nearby liquor store and that the club has been searching customers' bags at the door. He also said that guards from the club and bar regularly patrol the parking lot to minimize illegal or inappropriate activity.

"We are a legitimate business, and we're the biggest club in the city," Barnes said. "We are out there patrolling day and night, especially at night. Now I have to go out there and take pictures of the bums sleeping in the bushes of the post office parking lot to show the problems aren't coming from us."

But Barnes does admit that many of the calls to police in recent years have been related to the dancers inside the club. Xposed lists about 1,500 female dancers on its rosters, and

roughly 1,000 of those women actively work at the club. Barnes said he does not pay them as employees, but treats them as independent contractors. That definition means that he has little control over what they do on breaks or after-hours, he said. Some work shifts at Xposed and then go next door to Wet Spot to work as bikini dancers on the same day. Many also drink at the bar, and the drinking creates a number of altercations between the dancers or dancers and customers.

Barnes said he's working to mitigate drinking by dancers at the club by inspecting hand bags and purses upon entry, scanning for alcohol that may be brought in.

The property around the club was zoned to prohibit strip clubs years ago, but the club was grandfathered in at the time. Now police are arguing that its exemption should be lifted because of the volume of complaints.

The city could force the bar to close if it deems it a nuisance to the surrounding community; it could also impose strict restrictions on operations in lieu of a shutdown. Roger Jon Diamond, Barnes' attorney, said either action would impact businesses other than the bar.

"Politically, it looks like they're painting a broad stroke against the whole area -- the club, the bar and the nearby marijuana collective," he said.

The small center is also home to an upholstery shop, a lingerie/sex toy shop owned by Barnes, Papa Mac's Liquors, and Big Mama's and Papa's Pizzeria.

Samvel Abramov, who owns the pizza restaurant, said in an interview that the homeless population and the proximity of the liquor store are bigger problems than any caused by the club's customers.

"The biggest problem is that the bums congregate there," he said. "Every time I take out the trash, every time I open the door for my delivery driver to come in (Xposed) security is there. They're not the problem."

City associate zoning administrator R. Nicolas Brown asked for more information from both the club and police by Sept. 6 and said he would make his final decision by Oct. 4, though his action can be appealed.

LAPD said if the city did not want to shut down the businesses, it should impose four conditions: have three licensed, armed security guards on the property who regularly report to LAPD; have the dancers be club employees rather than independent contractors, so club management can maintain better control of their behavior; grant LAPD access to the club's wireless security cameras; and have the club support the closing of the medical marijuana dispensary. If the zoning commission decides it doesn't present enough of a problem through the narrow land use jurisdiction, LAPD could also try to get the City Attorney's Office to shut down the club or work to revoke its cabaret license, which is issued by the police commission.

But Padron, the LAPD officer leading the initiative, said he doesn't plan to stop until the businesses shut down.

"We could have gone through mediation with them, but this wields the most power. Revocation is my ultimate goal," Padron said. "If this doesn't work, we'll try something else."

Fri, Sep 26, 2014 / Updated 1:58 PM EST

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Doctor had trail of troubles before assault accusations exposed past rape conviction

By Scott Dance, The Baltimore Sun
McClatchy-Tribune Information Services

Aug. 30--Amber English was looking for a new job when her mother said their neighbor, the silver-haired doctor, was hiring.

Then 26, English started as a medical assistant for Dr. William Dando in the spring of 2012, helping him with laser surgeries and other cosmetic procedures he had begun performing at his longtime family practice on Frederick Road in Catonsville. But something didn't seem quite right -- she felt uncomfortable around him and noticed that he flirted with patients.

She learned more from a departing colleague who texted: "I think you might want to take a look at this." Attached was a link to a news article from Dando's days as a medical resident in Florida some 25 years earlier, showing that he had been convicted of following a woman home, climbing through her kitchen window and raping her at gunpoint.

Though the article could be found on the Internet with just a few keystrokes, Dando's criminal past was unknown to state health officials until this spring, when a patient at an urgent-care center near Cumberland accused him of an April sexual assault over which he has been indicted.

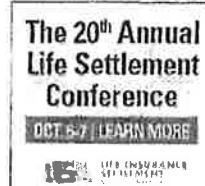
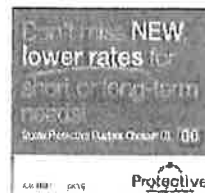
Now, as Dando prepares to stand trial for those allegations, new details from a Baltimore Sun investigation show that on at least five separate occasions, state health regulators, a medical certification board and employers either did not investigate his past or did not see any red flags when they looked -- enabling him to continue practicing.

Maryland Health Secretary Dr. Joshua Sharfstein has acknowledged that Dando wouldn't have received a medical license from the state had officials known details of the rape conviction when he applied in 1996.

That conviction went unnoticed when he applied for a University of Maryland residency program, earned board certification and obtained a state medical license. It never came up when the state put Dando's license on probation for writing improper prescriptions. And it didn't raise an alarm when his most recent employer, MedExpress Urgent Care Center, conducted a background check.

"How in God's name does someone like this get a license to practice medicine?" said Edward Delaney, a Cumberland lawyer representing the 41-year-old Allegany County woman whose accusation prompted the recent criminal charges against Dando.

Neither Dando nor his lawyer, Steven Friend of Cumberland, responded to requests for comment. Dando, 60, has pleaded not guilty to charges related to the April incident; his trial is scheduled for Wednesday in Allegany County.



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Another woman sued Dando, claiming a similar assault last year, and health officials say another woman complained that Dando touched her inappropriately in January, making at least three allegations of sexual assault in the past year from the 60-year-old's patients at the urgent-care center where he worked.

Meanwhile, the Dando case has raised questions about how well the state of Maryland knows the doctors it's licensing. It has also prompted soul-searching among state regulators and his former employer.

Reforms are being drafted to tighten up a state licensing system that Board of Physicians Chairman Dr. Devinder Singh said relies too heavily on the assurances of applicants rather than stringent checks. A requirement to subject physicians to regular background checks is likely to come in the 2015 General Assembly session, Singh said.

Regulators never looked into Dando's vague disclosure that he had "assaulted someone." State officials don't know why that happened, though an inspector general's investigation into the matter began in June.

Dando's disclosure was a far cry from his contrite statements years earlier, as he waited for a Florida judge to impose a sentence for the rape.

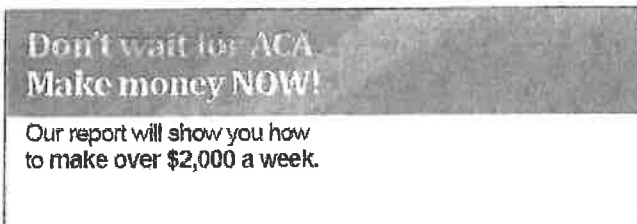
"I think that whatever your judgment, it will be less than what I deserve," Dando told the judge at the September 1987 hearing, according to the Orlando Sentinel. "Had it been another era, it could have meant my life."

A crime in Florida

Born in 1954 in the western New York hamlet of Pavilion, Dando studied medicine a long way from the Finger Lakes -- at the Escuela Autonoma de Ciencias Medicas de Centroamerica, in San Jose, Costa Rica. He graduated in December 1985 and moved to Florida with his wife of six years and two young daughters, accepting a family medicine residency at what was then known as Jackson Memorial Hospital in Miami.

But he never finished his training there. Although the internship began in June 1986 and was to last a year, a hospital personnel record shows that the end date was crossed out and replaced with the word "RESIGNED" and the date "12/11/86" -- one week after an Ocoee, Fla., woman said Dando forced himself on her.

Dando had traveled more than 200 miles from Miami to Orlando for a three-day state licensure exam, but the stress of the grueling process was getting to him, according to Orlando Sentinel reports on court proceedings. He spent the night of Dec. 3, 1986, downing beers at a strip club, and after leaving, followed a woman on her way home from picking up her young daughter.



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At 1:22 a.m., the woman heard the sound of a bottle cap falling to her kitchen floor, dropped as a man climbed in the window. She didn't know it yet, but he had

Doctor had trail of troubles before assault accusations exposed past rape conviction

Page 3 of 7

cut her phone wires, according to police documents obtained by The Sun through a public records request.

"Who's there?" she asked, according to her account to police.

"You don't know me," Dando answered.

When she screamed, he threatened to hurt her or her daughter. He pointed a gun at her and told her to take off her clothes. When she did it too slowly, he did it for her, she said in the report.

As he raped her, he asked questions, she told police. Where did she work? How old was she? "He stated that I was married and wanted me to confirm that," she said.

"During one of his conversations, I asked him why he had the gun," she wrote in curvy cursive handwriting. "He said it was his security. I asked him what my security was and he said I had none."

He kept the gun aimed at her as he asked for Vaseline, and after hesitating, he went to the bathroom to get it -- and the woman made her escape. She got a glimpse of his face in the bathroom mirror before running down the hallway, screaming for help.

In his rush to flee, Dando left a key piece of evidence on her bedroom floor: his wallet. In a matter of hours, an Orange County, Fla., sheriff arrested him.

At his Aug. 31, 1987, sentencing hearing, Orange County Circuit Judge Rom Powell called the incident "one of the most tragic cases to come before this court" and "one of the most difficult sentences I've had to impose."

State guidelines suggested a prison sentence of 12 to 17 years for burglary and sexual battery with the threat of a deadly weapon. But a guilty plea from a remorseful Dando, a letter of apology he sent to the victim and 41 supportive letters from his relatives and friends prompted the judge to limit the sentence to 10 years.

Dando wasn't imprisoned that long, though. As a sex offender, he was ineligible for parole. But he was a model inmate, with no disciplinary sanctions. He worked as a canteen manager and later an administrative clerk at several prisons, according to Florida corrections records. In most months, he shortened his sentence by 20 days for good behavior.

He was a free man on May 15, 1991, and back to medicine -- in Maryland -- soon after.

No questions asked

Within two years of his release from prison, Dando was treating patients as a resident at the University of Maryland Medical Center in Baltimore. When he finished the residency in 1996, he was licensed to practice medicine on his own in Maryland.



It's unlikely that any background check was conducted when Dando applied and was accepted for the residency, officials at the Association of American Medical Colleges said. Such checks weren't automatically performed at that time, and employment screenings varied by hospital.

University of Maryland Medical System officials declined to provide any of Dando's personnel records and said they did not know what residency application protocols

Doctor had trail of troubles before assault accusations exposed past rape conviction

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were at the time. A spokeswoman said background checks into criminal records and credentials are now routine.

Being "of good moral character" is the first qualification Maryland law requires of doctors, but the code doesn't bar aspiring physicians based on any particular crimes. Instead, it asks applicants to list past arrests, charges and convictions on licensure applications and takes them at their word.

Dando's admission to the Board of Physicians that he had once "assaulted someone" while under the influence of alcohol landed him in an alcohol abuse treatment program for physicians in 1993 when he started his residency, state health officials said.

But such an admission should also trigger an investigation before a license is awarded, officials said.

That background check never occurred, a misstep that is now the subject of the inspector general's probe.

Dando's early years practicing did not raise any red flags. He and his wife bought a home on Hunter Way, across the street from Catonsville High School. In 1998, and in 2000 he established a family practice just a mile and a half away at the Catonsville Professional Center, tucked behind a McDonald's on Frederick Road.

After a divorce in 2003 -- his wife accused him of adultery and abandonment -- he moved to another part of the town and remarried.

The American Board of Family Medicine certified Dando in 1997, and he held the distinction until Maryland officials suspended his license in June. That board does not conduct its own background checks, instead relying on the seals of approval of residency programs and state licensing boards. The family medicine board requires doctors to participate in ongoing educational activities and pass an all-day written exam once every 10 years, as well as have an unrestricted and active medical license.

Some patients said he never raised concern.

"He was always very courteous and very nice," said Anna Mae Stuples, whose daughter had been a patient of Dando's for a decade when she suggested her mother see him. Referring to revelations about his past and the recent accusations, she added, "It seems like they're talking about somebody else."

Others who knew Dando described him as a bohemian free spirit.

Mary Mitchell, a neighbor on Harbor Wood Road, where Dando lived with his second wife, said parties held at his home were rowdy. "It just got out of hand. It was 2 a.m. and it was like you were down at the harbor at a concert at Pier Six."

Before long, trouble surfaced for Dando.

In 2009, the Maryland Board of Physicians charged him with failing to meet proper standards of medical care and failing to keep adequate medical records. Its investigation revealed missteps involving seven patients. For one, medical investigators said, he repeatedly wrote prescriptions for Xanax, a commonly abused anti-anxiety drug, even as the patient suffered seizures and became suicidal while on the medication. His license was placed on probation in April 2010.

Dando maintained his board certification even while on probation because the sanctions did not violate the board's policies, said Robert Cattoi, spokesman for the American Board of Family Medicine.

About that time, one of Dando's patients died of a prescription drug overdose, according to a wrongful-death lawsuit the woman's family filed against him in 2013. The lawsuit alleges that Dando began prescribing narcotics including Percocet and oxycodone to the Dundalk woman, Grace Elliot, in 2003, and continued through at least 2009 despite concerns from her and her family that she was addicted to the drugs. Early in her treatment, in August 2003, Elliot wrote Dando a letter saying she "just can't stop this medication," the lawsuit said.

Dando denied responsibility in a court filing. The trial, twice postponed, is now scheduled for June 2015.

Dando had meanwhile been contracted to provide breast and cervical cancer screenings for the Baltimore County Health Department from 2001 to 2004 and again from 2008 to 2010, but the relationship was terminated when officials learned that his license was on probation, according to state health officials.

Patients and neighbors said they noticed changes in Dando amid the turmoil.

"We thought a lot of him, but at the same time he was getting a little too liberal with some of the medicines he was giving me," said patient Missy Blucher. She said he prescribed as much as 40 milligrams of Valium each day for her post-traumatic stress disorder, and told her he gave other patients more. Typical daily dosages can range from 4 milligrams to 40 milligrams, according to the U.S. National Library of Medicine.

In 2011, Dando began expanding his business into cosmetic procedures, but the Catonsville practice didn't last much longer. Around March 2013, he told his staff the office was closing. English, the medical assistant, said the move didn't surprise her, given signs the business was struggling. Patients said there were frequent insurance billing problems.

Dando filed for personal bankruptcy in October, listing \$2.1 million in liabilities -- including potential damages from the wrongful-death lawsuit of \$1 million or more. Among his \$742,000 in assets was the Harbor Wood Road home, a home in Western Maryland and a timeshare at a Marriott resort in Aruba. A bankruptcy judge discharged the case in February, releasing Dando from his debts. Medical equipment, including two laser machines, was sold in an online auction in March that netted \$32,000.

A new job at MedExpress in LaVale offered a fresh start for Dando last year. The company had expanded rapidly, growing from locations in four states in 2011 to nearly a dozen states this year. As part of its hiring process, it contracted with a third party to conduct background checks of Dando and all employees -- a system it is scrutinizing to see where improvements can be made, spokeswoman Kelly Sorice said.

But less than a year after Dando's hire, the company said it fired him when a woman told police he performed a pelvic exam behind a locked door, without a female chaperone present. She was visiting the facility over concerns of an ear infection, Delaney, the woman's lawyer, said. Dando examined the woman without wearing gloves, asking her "if it hurt or felt good," she told investigators, according to a Board of Physicians order suspending Dando's medical license in June.

The board investigation revealed in June that another woman had complained Dando touched her inappropriately. Last month, a third woman made similar allegations in a lawsuit filed in Allegany County Circuit Court.

Soon, state health leaders expect to recommend policy changes designed to close loopholes that allowed Dando to continue practicing medicine in Maryland despite a conviction and serious claims of misconduct. Health officials will likely recommend that background checks occur at the time a physician is licensed and at some intervals thereafter, said Singh, chairman of the physicians board and a plastic surgeon at University of Maryland Medical Center.

"While most physicians have the moral character to tell the truth, it's particularly in the cases of individuals who have committed egregious crimes that they may not tell the truth," Singh said. "It almost defeats the point."

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Timeline

--Dec. 4, 1986 -- An Orange County, Fla., sheriff arrests William Dando after his wallet is found in the home of a woman who said she was raped at gunpoint. He is later convicted of rape.

--May 15, 1991 -- Dando is released from a Florida prison after serving less than half of a 10-year prison sentence.

--June 28, 1996 -- Maryland grants Dando a license to practice medicine after he completes a residency at the University of Maryland Medical Center in Baltimore. Though he told regulators he had assaulted someone while under the influence of alcohol in the past, they did not investigate his background.

--August 2000 -- Dando establishes his own family medicine practice on Frederick Road in Catonsville.

--April 28, 2010 -- The Maryland Board of Physicians places Dando on probation on charges he gave substandard care to several patients, including writing improper prescriptions for painkillers.

--May 2013 -- After closing his Catonsville practice, Dando moves to Allegany County and begins working at a MedExpress Urgent Care Center just west of Cumberland.

--April 6, 2014 A woman tells police Dando sexually assaulted her in a locked examination room at MedExpress; he is indicted six weeks later. State health officials suspend his medical license and launch an investigation after his past rape conviction is revealed. He is slated to stand trial for the alleged assault on Wednesday.

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PEOPLE v. MACK

NO C062717

THE PEOPLE, Plaintiff and Respondent, v. RASHAD DELRICO MACK, Defendant and Appellant.

Court of Appeals of California, Third District, Sacramento.
Filed June 7, 2011.

NOT TO BE PUBLISHED

MAURO, J.

A jury convicted defendant Rashad Delrico Mack of first degree murder and attempted robbery. On appeal, defendant contends the trial court prejudicially erred when it (1) refused to instruct the jury that, in evaluating the credibility of a witness, they could consider whether the witness was promised a benefit in exchange for his testimony, and (2) removed a juror during deliberations for intentionally concealing material information during voir dire.

We conclude that (1) the requested optional bracketed portion of CALCRIM No. 226 was not supported by the evidence, and the trial court did not err in declining to modify it; and (2) the trial court did not abuse its discretion in removing a juror who intentionally concealed material information during voir dire. We will affirm the judgment.

BACKGROUND

The night before the murder, victim Jesse Reiter and his friend Michael Boyd visited two bars in Woodland, drinking beer and shots of liquor. At closing time, they used some of Reiter's cocaine and drove to Sacramento in Boyd's Jeep Cherokee. They went to Club Fantasy, a strip club on Richards Boulevard. The men stayed at the strip club until it closed around 4:00 a.m.

Defendant's cousin, Peter Walker, and one of Walker's friends, Cheryl Cruz, were also at Club Fantasy until it closed. Walker and Cruz had been drinking alcohol and smoking marijuana at defendant's house in the south area of Sacramento prior to visiting the strip club. When they left the club, they encountered Reiter and Boyd in the parking lot.

Reiter and Boyd asked Walker and Cruz if they knew where to find "some hoers and snow," the term "snow" referring to cocaine. Walker mentioned something about going down to Stockton Boulevard, but Reiter and Boyd instead decided to get a room at the nearby Governors Inn where they planned to call strippers to their room. Walker and Cruz also drove to the Governors Inn. In the motel parking lot, Walker told Reiter that he had a friend who was a stripper, and invited Reiter and Boyd to follow their car. Reiter and Boyd agreed, following Walker and Cruz to the south Sacramento neighborhood. During the drive, Walker spoke to defendant on his cell phone.

Around the corner from defendant's house, Walker and Cruz pulled over and motioned for their followers to pull up beside them. Walker told Reiter and Boyd: "[W]ait here, we'll be back." Walker dropped Cruz off at her car and went to defendant's house. Cruz also went to defendant's house and saw Walker and defendant leave together.

Meanwhile, Reiter and Boyd used some more cocaine while they waited for Walker's return. Five to ten minutes later, Walker and defendant pulled up behind Reiter and Boyd. Reiter got out of the Jeep, leaving the passenger door open. Walker then entered the Jeep through the passenger door and removed the keys from the ignition. Realizing that nothing good would come from this encounter, Boyd sat motionless in the driver's seat, staring straight ahead in a state of shock. He then heard either Walker or defendant say "give me all of it," followed by the sounds of a struggle, and finally, a gunshot.

Defendant shot Reiter with a .410 caliber shotgun. The blast ripped through Reiter's right thigh, severing his femoral artery and causing a massive amount of bleeding. As shock turned to panic, Boyd bolted from the Jeep and ran to a nearby house. Walker and defendant departed while Reiter screamed: "They shot me. They shot me. Call 911. I got hit in my femoral artery. Call 911. Help. Help." Boyd called 911. He then went to Reiter and tried to stop the bleeding. Emergency services arrived a short time later, but the blood loss was too extensive. Reiter did not survive.

Following the shooting, Walker and defendant went back to defendant's house. In the kitchen, Walker told defendant: "[W]hy did you do that? It didn't have to go like that." Defendant responded: "[F]uck, man, it wasn't supposed to go down like this."

Later in the day, defendant told one of his friends, Kenneth Jones, that he and his cousin had gone "around the corner" the night before to get cocaine from "two white guys." When Jones asked defendant if he got the cocaine, defendant answered: "[N]o, man, dude was playing with me[,] so I shot him. I shot him in his artery." Defendant showed Jones the shotgun he used to shoot Reiter, took the gun apart, and had Jones hide the barrel beneath his backyard deck, where it was ultimately found. Twelve .410 caliber shotgun shells were also found in defendant's bedroom.

A jury convicted defendant of first degree murder and attempted robbery. (Pen. Code, §§ 187, subd. (a), 664, 211.)¹ The jury also found that defendant committed the murder during the commission of a robbery (§ 190.2, subd. (a)(17)), and that he intentionally and personally discharged a firearm causing Reiter's death. (§§ 12022.53, subd. (d), 12022.5, subd. (a)(1).) The trial court sentenced defendant to a term of life in prison without the possibility of parole for the murder, plus a consecutive term of 25 years to life for the firearm enhancement. Pursuant to section 654, the trial court stayed a consecutive term of ten years for the enhancement of discharging a firearm

causing death, a consecutive term of three years for the attempted robbery, and a consecutive term of 25 years to life for the firearm enhancement attached to the attempted robbery.

DISCUSSION

I

Defendant contends the trial court prejudicially erred by refusing to instruct the jury that, in evaluating the credibility of a witness, they could consider whether the witness was promised a benefit in exchange for his testimony. According to defendant, this error "deprived [him] of his constitutional due process right to present a complete defense and his constitutional right to a jury determination of every material fact presented by the evidence including his defense." We disagree.

CALCRIM No. 226 provides: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony." The instruction then lists several factors the jury may consider in evaluating a witness's credibility, including the following bracketed factor: "Was the witness promised immunity or leniency in exchange for his or her testimony?" (CALCRIM No. 226.)²

This instruction must be given sua sponte by the trial court in every criminal case, but certain paragraphs may be omitted if they are not supported by the evidence. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 964, 883-884 (*Rincon-Pineda*)).

Defendant asked the trial court to include the bracketed portion concerning promises of immunity or leniency in exchange for testimony. He argued that the bracketed portion was supported by substantial evidence that Kenneth Jones had implicated defendant in the shooting during his interview with police because of certain promises purportedly made to Jones by Detective Schneider. Specifically, Jones testified that he had been arrested on an outstanding Nevada warrant charging a probation violation, that Detective Schneider threatened to have his children taken by the Department of Social Services (DSS), and that Jones offered information about the shooting if Detective Schneider would promise that he would not be sent to Nevada, and that his children would be allowed to live with his mother instead of being taken by DSS. According to Jones, Detective Schneider said "he would see what he could do" about the DSS situation. Jones also testified that Detective Schneider told him: "Unless you work with us, you go back to Nevada. You have no friend, nobody on your side. Reno comes to take you back. But if you work with me, you'll have someone on your side, and I'll talk to the Reno folks, see if there is a way you can do your time here[.]"

Detective Schneider denied threatening to have Jones's children taken by DSS, and further denied making any promises to Jones in exchange for his statement. Nowhere in the transcript of the interview was there any mention by Detective Schneider of DSS taking Jones's children. However, Detective Schneider did acknowledge that Jones was afraid of being sent to Nevada because he "felt there was a hit on his head." He also told Jones that, while he could not promise Jones that he would be able to stay in California, he would speak to the Nevada authorities on Jones's behalf.

Detective Schneider sent a letter to the Nevada Department of Parole and Probation informing them of Jones's cooperation in the investigation, and conveying Jones's fear for his safety and request to have his probation transferred to California. Despite this letter, Jones was returned to Nevada to be incarcerated, and remained a Nevada inmate at the time he testified at trial.

Defendant does not contend that any promises were made in exchange for Jones's testimony at trial. His argument is based solely on the promises purportedly made in exchange for Jones's statement to police. The trial court declined to include the requested bracketed factor, agreeing with the People's argument that this factor refers to a promise of immunity or leniency given in exchange for testimony at trial, and not to a promise given in exchange for a statement to police. The trial court did allow defendant's attorney to argue that such promises made Jones's testimony at trial unreliable under the general language of the instruction: "In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony." (CALCRIM No. 226.)

The trial court did not err in omitting the requested bracketed portion of CALCRIM No. 226. The bracketed portion of the instruction was not supported by the evidence. Jones was not promised immunity or leniency in exchange for his testimony. (CALCRIM No. 226.) While there is evidence that if Jones cooperated with the police, Detective Schneider would inform the Nevada authorities of Jones's cooperation and would "see what he could do" about Jones's DSS situation, this cannot be construed as a promise of immunity or leniency. Nor was the promised benefit offered in exchange for Jones's testimony at trial. Indeed, by the time of trial, Jones had been sent to Nevada to be incarcerated. Thus, any perceived benefit to Jones had evaporated by the time he took the stand to testify against defendant.

Nevertheless, relying on *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), defendant argues that the trial court was required to modify the bracketed portion of the instruction to apply to this situation rather than reject it altogether. According to defendant, the bracketed factor should have been modified to read: Was the witness promised a "consideration or benefit" in exchange for his "extrajudicial statements" to police or testimony at trial? *Falsetta* does not impose such an obligation on the trial court. There, after upholding the constitutional validity of Evidence Code section 1108 (which permits the admission in a sex-offense case of evidence of a defendant's other sex crimes for the purpose of demonstrating a propensity to commit such crimes), our Supreme Court held that the trial court erred by refusing to give a requested limiting instruction regarding the jury's consideration of the other crimes evidence. (*Falsetta*, *supra*, 21 Cal.4th at p. 924.) While the requested instruction was "partially incorrect," the trial court had a duty to "tailor [the] proposed instruction to give the jury some guidance regarding the use of the other crimes evidence, rather than denying the instruction outright." (*Ibid.*, citing Evid. Code, § 355 [mandating limiting instruction on request].)

This case is distinguishable. *Falsetta* neither considered nor decided whether a trial court is required, upon request, to modify an inapplicable bracketed portion of CALCRIM No. 226 in order to render that portion applicable to the facts of defendant's case. Cases are not authority for propositions not considered and decided. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620; *LEG Investments v. Boxler* (2010) 183 Cal.App.4th 484, 496-497, fn. 5.)

Moreover, the requested modification in this case is similar to the modification rejected in *People v. Roberts* (1992) 2 Cal.4th 271. There, our Supreme Court held that the trial court properly declined the defendant's request to modify CALJIC No. 2.20 to "specify that the jury must also consider the state's specific promises and payments to certain prosecution witnesses in evaluating credibility" because the "requested instruction would have been too argumentative." (*Id.* at p. 313.) The court explained: "A criminal defendant is entitled, on request, to an instruction 'pinpointing' the theory of his defense. [Citations.] As we recently explained, however, instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories 'is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.' [Citation.] Here the defense ably attacked the witnesses' credibility throughout the trial, which was the proper place to emphasize the state's promises and payments." (*Id.* at pp. 313-314.)

Similarly, in the instant case, the trial court allowed defendant's attorney to argue that the promises made to Jones in exchange for his statement to police rendered his testimony at trial unreliable under the general language of CALCRIM No. 226: "In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony." (CALCRIM No. 226.) This was the proper place to emphasize these purported promises.

Nor was defendant "deprived . . . of his constitutional due process right to present a complete defense and his constitutional right to a jury determination of every material fact presented by the evidence including his defense." While defendant correctly points out that he is "entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor" (*Matthews v. United States* (1988) 485 U.S. 58, 63 [99 L.Ed.2d 54, 61]), and that he is further "entitled, on request, to an instruction 'pinpointing' the theory of his defense" (*People v. Roberts*, *supra*, 2 Cal.4th at pp. 313-314), CALCRIM No. 226 merely informs the jury how to assess the credibility of witnesses. (See *People v. Campos* (2007) 156 Cal.App.4th 1228, 1240.)

Simply put, the trial court was not obligated to completely rewrite the bracketed factor concerning promises of leniency or immunity in exchange for testimony in order to make it applicable to defendant's case. Because inapplicable portions of CALCRIM No. 226 may be omitted (see *Rincon-Pineda*, *supra*, 14 Cal.3d at pp. 883-884), the trial court did not err when it omitted this portion of the instruction.

II

We also disagree with defendant's assertion that the trial court prejudicially erred by removing a juror during deliberations for intentionally concealing material information during voir dire.

A

On the eighth day of jury deliberations, a juror sent an anonymous note to the court, which stated: "I must share a concern regarding a fellow juror. I do not know his juror number but his name is Bill. Bill made statements last week in reference to personal matters involving prior interactions with the law. He stated, and I paraphrase, 'I have been there, I know what it is like to be accused falsely.' I feel this is influencing his responsibility to this case and I question if he can be impartial."

The trial court expressed two concerns: first, that these prior interactions with the law, in which the juror felt falsely accused, might make him biased against law enforcement; and second, the juror made no reference to these interactions with the law on his juror questionnaire or during voir dire. For instance, question No. 30 of the juror questionnaire asked: "Have you or anyone close to you ever been arrested for or accused of a crime of any kind?" (Original emphasis.) The juror answered: "No." Question No. 27 of the questionnaire asked: "Have you ever had any direct contact with any city, county, state or federal law enforcement agency, including the filing of reports, lodging complaints, being questioned regarding yourself or others, or being cited for a traffic violation, or otherwise?" The juror answered: "Ticket for expired registration."

The trial court then explained that the prosecutor had located a misdemeanor complaint filed against the juror in 1993 charging him with possession of a controlled substance. This charge arose out of an incident in which a backpack containing methamphetamine (along with several documents identifying the juror) was found at the juror's place of employment. An arrest warrant was mailed to the juror's home, but apparently no other attempt was made to inform the juror of the charges, and the complaint was ultimately dismissed "due to [a] lack of service."

Over the objection of defense counsel, the trial court brought in the juror for questioning. The juror denied having been falsely accused of any crime, and further denied any knowledge of the incident involving the methamphetamine found in the backpack. He did admit to stating during deliberations that, "in the old days," he was pulled over and searched "on a regular basis" simply because he had long hair and drove a van. The juror further explained that he was stopped and searched approximately 20 times over the span of roughly 13 years, but did not disclose these incidents on his juror questionnaire because he "never got a ticket for them."

The trial court removed the juror, explaining that his "response to question number 27 was not truthful and forthcoming." As the court explained its reasoning, the question clearly and unambiguously asked whether the juror had any "direct contact" with law enforcement, including the filing of reports, lodging complaints, being questioned, being cited for a traffic violation, "or otherwise," and the juror intentionally concealed roughly 20 occasions in which he was pulled over and searched by law enforcement, and believed the searches were conducted solely because he had long hair and drove a van. The court found that this intentional concealment raised a presumption of prejudice within the meaning of *People v. Blackwell* (1987) 191 Cal.App.3d 925 (*Blackwell*) and removed the juror.

As an independent ground for removing the juror, the trial court explained that the juror's demeanor during questioning and "carefully qualified" answers caused the court to conclude by clear and convincing evidence that he was not being truthful about the incident involving the methamphetamine found in the backpack.

B

Defendant asserts that his constitutional rights to due process and to a fair trial by an unbiased jury were infringed by the removal of this juror "because the record fails to establish that the juror intentionally concealed material information on his questionnaire or during voir dire." According to defendant, "[a]ny failure to disclose pertinent information . . . was likely unintentional or inadvertent." We are not persuaded.

Section 1089 gives the trial court the authority to discharge a juror who, upon good cause shown, is found to be unable to perform his or her duty. Because "[a] juror's duty is to weigh the evidence and credibility of witnesses with impartiality and to reach a fair and unbiased verdict," a finding of "actual bias, which would have supported a challenge for cause, renders [the juror] 'unable to perform his [or her] duty' and thus subject to discharge and substitution" under section 1089. (*People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484.)

We review the trial court's decision to discharge a juror under the deferential abuse of discretion standard, and will uphold the decision unless it falls outside the bounds of reason. (*People v. Earp* (1999) 20 Cal.4th 826, 893; see also *People v. Halsey* (1993) 12 Cal.App.4th 885, 892 [noting few cases have found an abuse of discretion].) "The substitution of a juror for good cause pursuant to section 1089, even after deliberations have commenced, 'does not offend constitutional proscriptions.'" [Citation.] (*People v. Wilson* (2008) 44 Cal.4th 758, 820-821 (*Wilson*)). However, in order to protect a defendant's constitutional rights to due process and to a fair trial by an unbiased jury, "a juror's inability to perform as a juror must be shown as a 'demonstrable reality.'" (*Id.* at p. 821; see also *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

Where a juror intentionally conceals material information or provides false answers during the voir dire examination, actual bias may be presumed and the juror removed. (*Wilson*, *supra*, 44 Cal.4th at pp. 822-823; *People v. McPeters* (1992) 2 Cal.4th 1146, 1175 (*McPeters*), abrogated by statute on another point as recognized in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107; see also *People v. San Nicolas* (2004) 34 Cal.4th 614, 644.) However, "mere inadvertent or unintentional failures to disclose are not accorded the same effect. '[T]he proper test to be applied to unintentional "concealment" is whether the juror is sufficiently biased to constitute good cause for the court to find under [section 1089] that [the juror] is unable to perform his [or her] duty.'" (*McPeters*, *supra*, 2 Cal.4th at p. 1175.) In determining whether the juror intentionally concealed material information, we must consider "whether the question propounded to the juror was (1) relevant to the voir dire examination; (2) whether it was unambiguous; and (3) whether the juror had substantial knowledge of the information sought to be elicited." (*Blackwell*, *supra*, 191 Cal.App.3d at p. 930.)

We conclude that question No. 27 was both relevant and unambiguous, that the juror had substantial knowledge of the information sought to be elicited, and that he nonetheless concealed roughly 20 occasions in which he had "direct contact" with law enforcement. Thus, the trial court did not abuse its discretion in removing the juror for intentionally concealing material information during voir dire.

Defendant's reliance on *People v. Dyer* (1988) 45 Cal.3d 26 (*Dyer*), *Wilson*, *supra*, 44 Cal.4th 758, and *Sanders v. Lamarque* (9th Cir. 2004) 357 F.3d 943 (*Sanders*), is misplaced.

In *Dyer*, *supra*, 45 Cal.3d 26, a juror was asked whether any member of her family had been a "crime victim." While her brother had been shot and killed five years earlier, she answered "no" because she believed the shooting was an accident. (*Dyer*, *supra*, 45 Cal.3d at p. 58.) The trial court found that the juror was telling the truth and denied defendant's motion for a mistrial. (*Id.* at pp. 58-59.) Our Supreme Court found no abuse of discretion, explaining: "The questions defendant prepared for voir dire were ambiguous; if the question at issue had asked whether any member of the family had been shot or killed by another person, [the juror's] answer probably would have been different. There is no evidence that [the juror] was lying when she answered 'no' to the question and its reference to 'crime victims.'" (*Id.* at p. 59, citing *Blackwell*, *supra*, 191 Cal.App.3d at pp. 929-931.)

Here, the juror was asked whether he had any "direct contact" with law enforcement, including the filing of reports, lodging complaints, being questioned, being cited for a traffic violation, "or otherwise." Unlike the question posed in *Dyer*, this question is not ambiguous. The juror explained that he did not reveal the many occasions in which he was pulled over and searched because he never received a ticket. However, while being cited for a traffic violation was included as a specific example of direct contact with law enforcement, the question asked for "any direct contact" (italics added), and included the phrase "or otherwise" after the list of examples. Being pulled over and searched on numerous occasions certainly qualifies as direct contact with law enforcement. Moreover, unlike *Dyer*, the trial court concluded that the juror was not telling the truth, based on the juror's demeanor while answering questions.

In *Wilson*, *supra*, 44 Cal.4th 758, a juror was removed during the penalty phase of a capital murder trial. He was the sole juror voting for life imprisonment, and made a number of comments concerning race during penalty phase deliberations, including: "'I don't expect you to understand; you're not black.' 'Black people don't admit being abused.' 'Black kids have a different relationship with their fathers.'" (*Id.* at p. 818.) The trial court found that he "concealed his racial biases and fundamental

belief in racial stereotypes on voir dire." (*Id.* at p. 819.) Our Supreme Court disagreed: "The record fails to demonstrate that [the juror] concealed anything. He was never asked whether he would interpret evidence of any abuse defendant may have suffered as a child through the prism of his own experiences; indeed, we expect jurors to use their own life experiences when evaluating the evidence. [Citation.]" (*Id.* at p. 823.) While the juror affirmed during voir dire that "he would not consider defendant's race to benefit or disadvantage him and that he would treat him like he would anyone else," he explained during the penalty phase that "he viewed the mitigating evidence favorably because defendant came from a broken, disadvantaged family, not simply because he was African-American." (*Ibid.*) And while the trial court "apparently concluded that [the juror] had concealed certain race-based assumptions regarding the nature of family dynamics in African-American families, especially with regard to young men who grow up without strong positive male role models," he was not asked about that subject during voir dire, and the "failure to express his views about African-American family dynamics is not the kind of concealment that would justify [his] removal from the jury under section 1089, i.e., something showing 'good cause' he was 'unable to perform his . . . duty [as a juror].'" (*Id.* at pp. 823-824.)

This case is not like *Wilson*. Here, the juror was not removed for concealing views that he was not asked about during voir dire. Instead, he was removed for failing to reveal roughly 20 times in which he was pulled over and searched, purportedly because he had long hair and drove a van, after he was specifically asked to reveal "any direct contact" with law enforcement.

Nor is this case like *Sanders*, *supra*, 357 F.3d 943, in which a juror was removed because the trial court erroneously concluded that she failed to disclose her sons' gang affiliation or that she lived in a neighborhood where there was gang activity. In reality, the juror "answered questions about her sons' activities in detail and did not, in fact, live 'in a neighborhood where apparently there was . . . gang activity going on.'" (*Id.* at pp. 947-949.) Here, unlike *Sanders*, the record fully supports the trial court's conclusion that the juror in this case failed to disclose numerous direct contacts with law enforcement despite the fact that this was precisely what he was asked to disclose during voir dire.

The trial court did not abuse its discretion in removing the juror for intentionally concealing material information during voir dire.

DISPOSITION

The judgment is affirmed.

We concur.

RAYE, P. J.

NICHOLSON, J.

FOOTNOTES

1. Undesignated statutory "Further section" references are to the "Penal Code" Penal Code.
2. CALCRIM No. 226 provides in full:


<http://www.chicagotribune.com>

Aldermen seek to curb unauthorized strip clubs

Proposed rules would give some establishments more leeway, though

February 28, 2014 | By Hal Dardick, Tribune reporter

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The Chicago City Council is aiming to put an end to the impromptu conversion of adult bookstores, movie theaters and late-night bars into strip joints under liquor and zoning amendments aldermen endorsed Thursday.

Though the measure would explicitly outlaw strip clubs in places not licensed and zoned as "cabarets," it would make clear that clubs can mix drinks and erotic, seminude dancing if the owners of those places jump over a strict set of hurdles to obtain the right kind of adult-use license and zoning approval.



(<http://www.trbimg.com/img-531003b7/turbine/chi-court-report-image/400/400x225>)
(Tribune illustration)

Under current city rules, strip clubs that serve or allow alcohol cannot feature fully nude performers, and that won't change under the measure. But the way Ald. Scott Waguespack's proposal was drafted would also allow greater levels of nudity in strip joints where liquor is sold. As written, the measure would allow performers to go topless.

The measure is scheduled for a full council vote next Wednesday after members of the Zoning Committee gave it a unanimous recommendation. Waguespack, 32nd, said his primary aim was to stop late-night bars from bringing in strippers to attract late-hours business.

City liquor and zoning code disallowed that practice, and police often made efforts to shut down those strip clubs, but city code was not clear enough, the alderman said. "They could basically just start doing that type of activity because the code was vague enough to get away with it," Waguespack said.

If someone sought to open a new club with drinks and partial nudity, it could do so only if it obtained a cabaret license, met strict zoning codes and obtained a special-use permit that would require community hearings. Under city zoning code, cabarets must be 1,000 feet from homes, schools and houses of worship and not in what's known as a planned manufacturing district, city Zoning Administrator Patty Scudiero said.

Ald. Edward Burke, 14th, who in 1977 proposed those zoning restrictions to limit strip clubs, cited the Near North Side establishment VIP's while supporting the portion of the new proposal that would explicitly allow booze and partial nudity.

"There's been no police reports of any kind of misconduct," Burke said of VIP's, which for 19 years fought the city in court to stay open. "The neighbors don't object. And frankly, a world-class city like Chicago in terms of entertainment ought to have realistic kinds of adult entertainment venues that don't create a problem in the neighborhood. There's no residences near this place."

hdardick@tribune.com (mailto:hdardick@tribune.com) Twitter @ReporterHal



The SAVE Act (Sexual Assault Victims' Equity Act), or SB 782 (DeSaulnier)

FACT: Sexual assault is an epidemic in the United States

- Nearly 1 in 5 women (or 22 million) have been raped at some point in their lives in the U.S.¹
- Nearly 1 in 2 women have experienced sexual violence other than rape at some point in their lives. This equates to more than 53 million women in the U.S.¹
- Nearly 1 in 5 men (or 25 million) have experienced sexual violence other than rape at some point in their lives in the U.S.¹

FACT: Many Californians are survivors of sexual assault

- It is estimated that there are 8.5 million survivors of sexual violence other than rape in California.¹
- There are an estimated 2 million female victims of rape in California.¹
- 5.6 million women in the state have been victims of sexual violence other than rape.¹
- It is estimated that there are 3 million male survivors of sexual violence other than rape in California.¹

FACT: Sexual assault is a public health issue

- This fee seeks to ameliorate some of the known secondary effects associated with the connection between alcohol use, the strip club experience, and sexual assault. User fees are not a novel concept. Items like tobacco, sugary drinks, and alcohol already have added fees to mitigate the costs of treating the secondary effects associated with these products. Strip clubs are not the cause of sexual violence as a general whole, but there are indisputable, undesirable secondary effects associated with their existence.
- The fees imposed by this measure are intended to ameliorate the negative secondary effects associated with the combination of sexually oriented businesses and alcohol as to promote the health, safety, and welfare of the citizens of California.²

FACT: This fee is not an attack against the First Amendment

- No party is trying to limit the *expression* of exotic dancing, which is protected speech under the Constitution. This is also not an attack or a moral judgment of club employees or patrons. Rather, we are addressing the secondary effects associated with the connection between strip clubs, alcohol, and sexual violence.
- In 1991, the U.S. Supreme Court ruled in *Barnes v. Glen Theatre, Inc.* that nude dancing is "expressive conduct within the outer perimeters of the First Amendment." In this same case, the Supreme Court ruled that the test in "*United States v. O'Brien*" should be used to determine when nude dancing can be regulated by a government entity.

FACT: Admission fees already exist in California

- Admission fees are not a new idea in California. Several local communities currently impose admission fees. Since 1986, the City of Santa Cruz has imposed a 5% fee on the price of admission or registration for events within the city limits of Santa Cruz.³
- San Mateo imposes a 50-cent fee on admission to horse or harness racing events.³

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- The city of Fairfield has a \$5 admission fee for golf. The State Athletic Commission also imposes a fee on admission to boxing contests or wrestling exhibitions.³

FACT: The fee will not be passed on to the employees at the strip clubs

- Payment of the fee is left to the club owner's discretion. However, the bill explicitly states that the per patron, per entry fee cannot be passed on to the entertainers—who are often independent contractors—in the strip clubs. The fee shifts the focus away from the entertainers and provides an opportunity for consumers to be part of the fight to end sexual violence.

FACT: California Rape Crisis Centers (RCC's) provide support and resources for survivors

- According to fiscal year 2011-2012 data from the California Emergency Management Agency, the governmental agency that funds services to victims, 31,790 survivors received crisis intervention services from a California RCC.⁴ While this is a sizeable number of Californians, it is a small percentage of the real number of survivors in the state (please see the NISVS figures on the previous page for the number of sexual assault survivors in California).

FACT: Rape crisis centers currently cannot meet the needs of all survivors

- Many rape crisis centers in the state have waiting lists for survivors who want to receive services. Additionally, the depth of services that centers can currently provide to survivors is limited in nature. For example, a survivor could need months of counseling due to his or her experience with violence, but the centers are currently unable to provide that level of service due to a lack of resources. Increased funding would increase the quality and quantity of services provided to survivors in the state.

FACT: The state of California only contributes \$1.42 per sexual assault survivor from its general fund.⁴

- The California State Budget General Fund commits only \$45,000 annually to sexual violence programs.⁴
- Since 31,790 Californians accessed crisis intervention services in fiscal year 2011-2012, this equates to only \$1.42 for each person served.⁴

FACT: Strip clubs exist in the same arena as sexual violence and contribute to the climate of violence

- Sexual objectification is a major cause in gender inequality - it also is how strip clubs make money. Strip clubs contribute to a climate in society that encourages sexual objectification of women, which is the same attitude held by those who commit sexually assault. Since equity and justice for sexual violence is an issue that affects everyone, strip clubs should be given every opportunity to contribute to the reduction and prevention of sexual assault.

FACT: Similar legislation has already been passed in other states.

- In 2007, the "Sexually Oriented Business Tax Act" was passed in Texas. This mandates that a \$5 per entry fee be collected, though the fee does not have to be passed onto the customers. Owners can decide how to come up with the fee. In 2011, the Texas Supreme Court ruled that the fee was constitutional. In January 2012, the U.S. Supreme Court refused to hear the case, upholding the Texas Supreme Court's ruling.
- In 2012, "The Live Adult Entertainment Facility Act" was passed in Illinois, which collects a \$3 fee per customer, per entry on alcohol-serving clubs.

Sources

1. The National Intimate Partner and Sexual Violence Survey (NISVS), 2010, The Centers for Disease Control and Prevention.
2. The California State Assembly Legislative Analysis of AB 2441, April 2012
3. State Board of Equalization Staff Legislative Bill Analysis AB 2441, February 24, 2012.
4. The California Emergency Management Agency Joint Legislative Budget Report fiscal year 2011-2012 (pages 112-113).

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Ball State officer 'extremely drunk,' 'belligerent' during strip club arrest

Posted 4:10 PM, June 12, 2014, by [Matt Adams - Web Producer](#), Updated at 10:00am, June 13, 2014

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MUNCIE (June 12, 2014) – A Ball State University police officer was “rambling” and his words “extremely slurred” following a disturbance involving a knife at a Muncie strip club early Wednesday morning.

According to a report from the Muncie Police Department, officers arrived at Joker’s Wild, 2206 S. Madison St., in response to an incident involving Eric Wayne Reffitt, 30, Albany. Investigators said Reffitt’s blood alcohol content tested at 0.234 percent—nearly three times the state’s legal limit to drive. Reffitt resigned from the department Thursday, according to Ball State officials.

He’s accused of cutting a friend in the stomach and hip while waving a knife inside the establishment. After the incident, he trudged across the street to a nearby Taco Bell and demanded to be let inside.

The worker said Reffitt “was placing his police credentials up against the glass and yelling something about being a cop, all while talking on the phone,” according to the report.

“Reffitt was swaying back and forth and struggling to maintain his balance,” Officer Ryan Plummer wrote of Reffitt upon his arrival to the scene. “I got closer and was able to detect the distinct odor of ingested alcoholic beverages.”

A bouncer at Joker’s Wild told police Reffitt shoved a bartender before leaving. The bartender said Reffitt was attending a bachelor party when he “got upset all of the sudden stating that two guys were trying to steal money from him, and then drew his knife and started waving it around wildly,” according to the report.

One of Reffitt’s friends said he’d been accidentally hit with the knife. He’d initially told officers he didn’t know anything about the incident but later told police what happened. The man said he “didn’t want anything to happen to Eric (and) that the cut was just an accident.”

The cut, Plummer wrote, went through two shirts and “left a long scratch on (the victim’s) right abdomen and hip.”

One officer said Reffitt threatened to shoot two officers who’d arrived to investigate the accident, [according to the Star Press](#). He was armed only with the knife, police said.

Charges against Reffitt include criminal recklessness with a deadly weapon, intimidation and public intoxication. He was taken to the Delaware County Jail and released on a \$5,000 bond.



News » Neighborhoods

February 17, 2014

Proposal would ban some new liquor businesses on Broadway in North Beach

By Jonah Owen Lamb @Jonahowenlamb



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Neighborhood groups have tried for years to tame the party on two blocks of Broadway in North Beach.

Two blocks in North Beach, which are bedecked with overhead neon signs, have for some time been the neighborhood's bane, but a new proposal looks to limit the kinds of new businesses along Broadway's strip club row for the next two years as a way to help clean up the area.

Legislation put forward by Board of Supervisors President David Chiu, whose district includes North Beach, would amend the planning code and create a Broadway Alcohol Restricted Use District. That district would create a moratorium on new bars in the two blocks of Broadway from Columbus Avenue to Montgomery Street. Liquor establishments that serve food would not be limited.

"A broad community coalition of neighbors and merchants has been working diligently to address the public safety and nightlife issues that have plagued Broadway for years, and this proposal is important to their efforts," Chiu wrote in an email to The San Francisco Examiner. "The community has made it clear that it wants fewer of the kinds of clubs that have caused problems historically."

The legislation, which was postponed last week at the Planning Commission, has its opponents.

"I might have selfish interests, but I'm not thinking it's a good thing and I don't think my interests are particularly selfish," said Green Tortoise Hostel owner Gardner Kent, who said it's a misguided attempt to clean up the street.

Jordan Angle, whose family has owned property on the two-block stretch for years and has been trying to remodel and open a nightclub there, said the law will backfire.

"General moratorium we think will be disastrous for the neighborhood at large," he said.

The proposal comes after years of efforts to increase safety on Broadway. Recent efforts by neighborhood groups to clear the area of violent and rowdy crowds include creating a neighborhood benefit district, Top of Broadway Community Benefit District, to collect dues and use the funds to police and clean up the street.

Stephanie Greenburg, a resident of the area and head of the business district, said the code change is a way to discourage certain businesses and promote more restaurants and other types of operations on the blocks.

"This is not prohibiting liquor licenses," she said. "There are only two that are being restricted and they are new licenses."

But Kent said the whole thing is misguided since it overly focuses on nightclubs.

"They have a dream that Broadway will be a place we want to go," he said.

Kent said all the moratorium will accomplish is making the existing liquor licenses for bars, called type 48s, more valuable.

Joe Carouba, who owns BSC Management, which runs The Penthouse Club and Centerfolds, among others, said the moratorium won't impact property owners or businesses that now operate.

"I don't believe it makes it any harder to get a 48 in the area unless it's on those two blocks that already have many 48s," Carouba wrote in an email. "As for giving the current 48 license holders an advantage, I don't think so. For the simple reason it's only for two years, and it's only the two blocks."

Nader Marvi, owner of the club Monroe, says the idea of the moratorium is to ultimately make sure people who run bars and nightclubs in the area are responsible. The problems have mostly come from clubs with huge crowds and irresponsible promoters, he said.

"I'm not saying strip clubs are not the problem," he said, but clubs bring party buses and larger crowds.

Still, Marvi said Kent has a point about the type of businesses that are opening in the area.

"If I take my 48 license, no one is going to come here with a [restaurant liquor license] because it cost too much to build a restaurant, but that's the case with or without the moratorium," Marvi said.

[More Neighborhoods »](#)

Tags: Neighborhoods, North Beach, David Chiu, San Francisco Planning Commission, Top of Broadway Community Benefit District



JONAH OWEN LAMB

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Bio:

Born and raised on a houseboat in Sausalito, Lamb has written for newspapers in New York City, Utah and the San Joaquin Valley. He was most recently an editor at the San Luis Obispo Tribune for nearly three years. He has written for *The S.F. Examiner* since 2013 and covers criminal justice and planning.

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FULTON COUNTY POLICE
Study of Calls for Service to
Adult Entertainment
Establishments
Which Serve Alcoholic Beverages
January 1995 - May 1997

[EXCERPTS]

Prepared by: Capt. Ron Fuller
Lt. Sue Miller
Date: June 13, 1997

RESOLUTION RELATING TO
REGULATION OF ALCOHOL
CONSUMPTION IN ADULT
ENTERTAINMENT ESTABLISHMENTS

WHEREAS, the Board of Commissioners of Fulton County has reason to believe that the consumption of alcoholic beverages in adult entertainment establishments may contribute to increased crime in the vicinity of such adult entertainment establishments; and

WHEREAS, the Board of Commissioners of Fulton County further has reason to believe that adult entertainment establishments which serve alcoholic beverages may have a negative impact on surrounding real property values; and

WHEREAS, Article III, Section VI, Paragraph VII, Constitution of the State of Georgia, delegates authority to counties and municipalities A. . . for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages. . .@; and

WHEREAS, the Supreme Court of Georgia, on March 17, 1997, in the consolidated cases of Goldrush II, et. al., v. City of Marietta, et. al.; Varsalona's Italian Restaurant d/b/a Boomer's et. al.; v. City of Marietta, et. al.; and Tudor d/b/a Cyprus Lounge v. City of Marietta, et. al. upheld a City of Marietta, Georgia, ordinance which prohibits the serving or consumption of alcoholic beverages in adult entertainment establishments; and

WHEREAS, the Georgia Supreme Court, in Chambers v. Peach County, 266 Ga. 318 (1996), has previously held that, before enacting an ordinance to combat undesirable secondary effects of adult entertainment, a legislative body is required to consider specific evidence of the undesirable secondary effects that it reasonably believes relevant to the problems it seeks to address by passing the ordinance; and

WHEREAS, the Board of Commissioners desires that the Fulton County Police Department prepare a report concerning calls for police assistance and crimes occurring at, or in the vicinity of, adult entertainment establishments where alcohol is consumed; and

WHEREAS, the Board of Commissioners desires that the Fulton County Police Department and the Department of Planning and Economic Development, in consultation with the County Attorney, assemble any studies available which identify and document negative secondary effects related to the serving and consumption of alcoholic beverages in adult entertainment establishments; and

WHEREAS, the Board of Commissioners further desires that the County Attorney prepare proposed amendments to Sections 33-1-16 through 33-1-23, Code of Fulton County, Georgia, relating to licensing of adult entertainment establishments, and to Article A, Chapter 5, Code of Fulton County, Georgia, relating to alcoholic beverage licenses, and any related proposed ordinance amendments which will have the effect of prohibiting the serving or consumption of alcohol at adult entertainment establishments, and which will be consistent with the above-cited March 17, 1997, ruling of the Georgia Supreme Court, and with the constitutional, statutory, and decisional law of the State of Georgia and the United States; and

WHEREAS, it is the intent of the Board of Commissioners to enact, if warranted by the said studies, a carefully tailored regulation to minimize the negative secondary effects of the serving and consumption of alcoholic beverages at adult entertainment establishments; and

WHEREAS, it is not the intent of the Board of Commissioners, in enacting any such ordinance amendment, to deny to any person rights to speech or expression protected by the United States or Georgia Constitutions, nor is it the intent to deny or restrict the rights of any adult to obtain or view any sexually oriented performance or materials protected by the United States or Georgia Constitutions, but to adopt a content neutral measure to address the secondary effects of adult entertainment establishments where alcoholic beverages are served or consumed;

NOW, THEREFORE, BE IT RESOLVED that the Fulton County Police Department is hereby directed to prepare within forty-five days hereof a study concerning calls for police assistance to, and crimes occurring at, areas wherein adult entertainment establishments which serve alcoholic beverages are located;

BE IT FURTHER RESOLVED that the Fulton County Police Department and the Planning and Economic Development Department, in consultation with the County Attorney, are hereby directed to assemble within forty-five days any studies available which document the negative secondary effects of the serving and consumption of alcohol in adult entertainment establishments;

BE IT FURTHER RESOLVED that the County Attorney is hereby directed to prepare within sixty days proposed amendments to Sections 33-1-16 through 33-1-23, Code of Fulton County, Georgia, relating to licensing of adult entertainment establishments, and to Article A, Chapter 5, Code of Fulton County, Georgia, relating to liquor licenses, and any related proposed ordinance amendments which will have the effect of prohibiting the serving or consumption of alcohol at adult entertainment establishments, and which are consistent with the March 17, 1997, opinion of the Georgia Supreme Court, and consistent with the constitutional, statutory, and decisional law of the State of Georgia and the United States;

PASSED AND ADOPTED this sixteenth day of April, 1997.

BOARD OF COMMISSIONERS OF FULTON COUNTY, GEORGIA

By: _____

Mitch J. Skandalakis, Chairman

By: _____
Commissioner Gordon L. Joyner
District 2

ATTEST:

Clerk to the Board

APPROVED AS TO FORM AND LEGALITY:

County Attorney

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- Section 2: Overview of total number of calls and reports received by Fulton County Police
- Section 3: Calls for Service: Charts & computer print outs for the following locations:
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 - 5495 Old National Hwy. (Crowes [*sic*] Nest)
 - 5840 Roswell Road, (American Pie)
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 - 6300 Powers Ferry Road, (Mardi Gras)
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 - 5343 Old National Hwy, (Club Legend)
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- Section 4: Reports Taken: Charts & computer print outs for the locations and a sampling of reports from Adult Entertainment Establishments for 1996
- Section 5: Conclusion

SECTION 1

INTRODUCTION

Brief Summery of

Goldrush II, et al., v. City of Marietta, et al.;

Varsalona=s Italian Restaurant d/b/a Boomer=s, et al., v.
City of Marietta, et al.; and Tudor d/b/a Cyprus Lounge
v. City of Marietta, et. al.

1. Amendment to Georgia Constitution provides that counties and municipalities shall have authority A . . . for the purpose of regulating, restricting, or prohibiting the exhibiton of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages...@ [Article III, Section VI, Paragraph VII, Georgia Constitution.]
2. In January, 1995, the City of Marietta amended its adult entertainment license ordinance to prohibit the serving, selling, distributing or consumption or possession of liquor in adult entertainment establishments.
The prohibition ultimately was intended to extend to existing adult entertainment establishments serving alcohol.
3. The Georgia Supreme Court upheld the Marietta ordinance on March 17, 1997, and approved the Marietta ordinance's application to already existing businesses.
4. The Georgia Supreme Court, citing Chambers v. Peach County, 266 Ga. 318 (1996), reiterated that a legislative body must have appropriate studies before it documenting the Anegative secondary effects@ (e.g., such as crime, diminishing property values, and increased urban blight) before legislating any regulation of such negative secondary effects.

Introduction

On April 16, 1987, [*sic*] a Resolution Relating to Regulation of Alcohol Consumption in Adult Entertainment Establishments was passed and adopted.

This resolution directed the Fulton County Police Department to prepare a report concerning calls for police assistance and crimes occurring at, or in the vicinity of adult entertainment establishments where alcohol is sold and consumed. This was based on the reasonable belief that the consumption of alcoholic beverages in adult entertainment establishments may contribute to increased crime in the vicinity of these establishments.

The statistical information included in this study was obtained through the Fulton County Police Departments [*sic*] computerized incident and calls for service reporting program.

Each call for police assistance, if taken over 911 enhance, is captured by a communication assisted dispatch (CAD) system. This information is available on every address in Unincorporated Fulton County where the police department is dispatched.

Each report that is generated from a police call for service is identified with a departmental case number that is unique to that reported incident. (It should be noted that a police report is not generated for every call for service, and that officer initiated calls are not captured on the CAD system).

The time period covered by this study is for January 1, 1995 through May 31, 1997.

There are twelve (12) establishments included in this study. Six (6) are adult entertainment establishments that serve alcoholic beverages. The others are those establishments that serve alcoholic beverages with no adult entertainment.

Several of the locations B Frankie's, Crow's Nest, Mardi Gras, Riley's, Babes, Fannies and Club Twenty Grand B have addresses that are common to other businesses on the same property. For this reason, the number of police calls for service to these locations cannot be attributed solely to the specific business that serves alcoholic beverages.

SECTION 5
CONCLUSIONS
Statement of Facts

The following data has been based on several known facts. They are as follows:

From **January 1, 1995, to May 31, 1997** the Fulton County Police Department responded to **199,324** calls for service North and **152,002** calls for service South. The total calls for service being **351,326**.

From **January 1, 1995, to May 31, 1997** the Fulton County Police Department made **34,680** incident reports North and **29,060** incident reports South. The total number of incident reports taken being **63,740**.

From **January 1, 1995, to May 31, 1997** there were **no** **Murders or Kidnappings** [*sic*] reported at any of the establishments listed in this study. There were **2 Rapes, 11 Robberies and 10 Aggravated Assaults** reported in the establishments that served alcoholic beverages but **do not** have adult entertainment. There was **1 Rape, 16 Robberies and 5 Aggravated Assaults** reported in the adult entertainment establishments that serve alcoholic beverages.

Conclusions

From **January 1, 1995, to May 31, 1997** the Fulton County Police Department responded to **728** calls for service to incidents reported at or in the vicinity of adult entertainment establishments that serve alcoholic beverages in this study. During the same time period the police department responded to **1718** calls for service to establishments in this study that serve alcoholic beverages but **do not** provide adult entertainment.

Conclusion: There were **990** more calls for service to the establishments that **did not** provide adult entertainment.

The total number of calls for service to establishments in this study totaled 2446. Of those, 259 were alcohol related by call sign only. Signal 28 Public Drunkenness, Signal 29 Drunk and Disorder/Fight, Signal 30 Driving Under the Influence, and Signal 38 Illegal Alcohol/Drugs. 178 of these calls were to non-adult entertainment establishments that serve alcohol. 81 were to adult entertainment establishments that serve alcohol.

Conclusion: There were 97 more alcohol related calls for service to those establishments that did not provide adult entertainment.

Based on this statistical study of calls for service and reported crime at adult entertainment establishments, there is no statistical correlation that shows that there is an increase in crime at adult entertainment establishments that serve alcoholic beverages. However, there is a statistical correlation that would indicate that there is greater instances of calls for service and reported crime at non-adult entertainment establishments that serve alcoholic beverages.

There is nothing in the statistics of this study that would indicate why there is such a discrepancy in the calls to service and reported crimes in these types of establishments.

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

DANA M. TUCKER*

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

* J.D., Florida State University College of Law (1997); B.S., Florida Agricultural and Mechanical University (1993). The author would like to give special thanks to J.C. and her family who have supported her throughout the writing and editing of this article. The author also thanks Anthony Davis and Sheldon Graves for their assistance in helping her understand the dynamics and aspects of adult use establishments.

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

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

The adult entertainment industry has grown rapidly over the past twenty years, especially with the emergence of 1-900 phone lines, pay-per-view adult movies, and pornographic internet 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.³ With this potential for protection has come an increase in businesses that offer adult entertainment.⁴

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

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

2. *Id.* at 17-18.

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

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

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

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

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.⁷ To be valid, zoning laws must balance individual property rights with the government's substantial interests in promoting the public welfare.⁸

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

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

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

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

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

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

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

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

12. *See id.* at 9.

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

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.

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

17. *Id.* at 395.

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

19. *See id.* at 2.

20. *See id.*

21. *See id.* at 7.

zoning ordinance and applied the mere rationality test, ultimately upholding the ordinance.²²

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

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

22. *See id.*

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

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

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

26. *See, e.g., Berman v. Parker*, 348 U.S. 26, 32 (1954) (holding that zoning is permissible for the promotion of safety, health, morals, and the general quality of life in the community); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927) (deferring to the legislature where the validity of a zoning ordinance is fairly debatable).

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

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

B. The Development of Zoning in Florida

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

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

31. See *id.*

32. FLA. CONST. art. VIII, § 2(b)

33. FLA. STAT. § 166.021(4) (1995).

34. See *id.* § 125.01(1)(h).

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

36. See *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978) (holding that the legislature is not free to 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.³⁹ A city and the courts must consider the public welfare of the whole community when construing a zoning ordinance; a mere or anticipated benefit to a special group within the city is not enough.⁴⁰

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

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

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

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

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

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

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

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

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

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

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

prevention of traffic congestion⁴⁸ and the prevention of the overcrowding of lands⁴⁹ are proper purposes on which to base zoning classifications. However, the restriction or the control of business competition is not a valid objective or purpose of zoning regulations.⁵⁰

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

II. ZONING AND THE ADULT ENTERTAINMENT INDUSTRY

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

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

49. *See Watson*, 233 So. 2d at 374.

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

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

52. *See id.*

53. *See id.*

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

55. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 563 (1991) (upholding a zoning ordinance requiring performers to wear pasties and 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*

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

A. First Amendment Protection of Expressive Speech

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

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).

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

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

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

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

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

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

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

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

64. See *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*,⁶⁵ the Court ruled that the First Amendment protected individuals engaged in an orderly demonstration at a segregated public library and stated that First Amendment rights "are not confined to verbal expression."⁶⁶ In *West Virginia State Board of Education v. Barnette*,⁶⁷ the Court held that a student could not be forced to salute the flag, stating that "symbolism is a primitive but effective way of communicating ideas."⁶⁸ To determine whether the conduct is expressive or symbolic speech, courts must determine whether it constitutes expressive conduct.⁶⁹ In *Spence v. Washington*,⁷⁰ the Court held that the conduct is expressive if the actor had an "intent to convey a particularized message," and a great likelihood existed that the audience understood the message.⁷¹

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

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

66. *Id.* at 142.

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

68. *Id.* at 632.

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

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

71. *Id.* at 410-11.

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

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

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

protection of the First Amendment."⁷⁵ The *Stanglin* Court found that the mere activity of the adult entertainment patrons, coming together to engage in recreational activity, is not protected by the First Amendment.⁷⁶

If conduct is found to be nonexpressive, then it does not receive First Amendment protection.⁷⁷ For example, in *South Florida Free Beaches, Inc. v. City of Miami*, the Eleventh Circuit refused to give First Amendment protection to nude sunbathers who challenged a public indecency law on the basis that it infringed on their right to communicate their belief that nudity was not indecent.⁷⁸ In upholding minimum dress requirements at public beaches, the Supreme Court has held that "[t]he appearance of people of all shapes, sizes and ages in the nude at a beach . . . would convey little if any erotic message"⁷⁹ The Court further found that whether or not nudity is combined with expressive activity, a state which has indecency or minimum public dress requirements statutes, is attempting to remedy "the evil" of public nudity.⁸⁰

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

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.*

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

80. *Id.*

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

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

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

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

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

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

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

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

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

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

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*

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

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

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

93. See *id.* at 569.

94. *Id.* at 566.

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

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

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

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

Court announced and applied the standard that American courts continue to use when determining what constitutes obscenity. According to the *Miller* three-part test, material is obscene: (1) if the typical person applying community standards would find the work as a whole appealing to prurient interests; (2) if the work describes or depicts in an obviously offensive manner sexual conduct specifically outlined by the relevant statute; and (3) if the work considered as a whole is devoid of serious artistic, political, literary or scientific value.⁹⁹ Applying the *Miller* test, the Eighth Circuit found, "to the extent that nude barroom dancing contains a message and therefore qualifies as First Amendment 'speech,' it may contain a message that nonetheless is categorically unprotected by the First Amendment--that is, an appeal to the prurient interest."¹⁰⁰

Nevertheless, the Supreme Court's willingness to engage in First Amendment analysis in nude dancing cases indicates that the Court does not view all nude dancing as obscene. Numerous Supreme Court decisions indicate that nude dancing constitutes expressive conduct intended to convey a particularized message, and thus, meets the *Spence* standard.¹⁰¹ In *Doran v. Salem Inn, Inc.*,¹⁰² the Court upheld a preliminary injunction that enjoined enforcement of a city regulation that prohibited topless dancing.¹⁰³ In *Doran*, the Court noted that nude dancing may be protected expression "although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, . . . this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances."¹⁰⁴ Finding the ordinance overbroad as applied to

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.¹⁰⁵

C. The Four-Prong Test of Regulating Expressive Speech

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

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

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

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

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

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

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

110. *Id.*

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

112. See *id.* at 376.

113. See *id.* at 382.

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

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

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

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

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

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

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

117. See *id.* at 410.

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

119. See *id.* at 412.

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

121. *Id.* at 406.

122. See *id.* at 420.

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

test to adult entertainment. In *Barnes*, owners and dancers in the adult entertainment industry brought suit to enjoin enforcement of Indiana's public indecency statute that required the dancers to wear pasties and G-strings.¹²⁴ After *Barnes*, the Supreme Court approached government regulation of adult entertainment by evoking various legal theories related to First Amendment protection, including the time, place, and manner test, the overbreadth doctrine, the vagueness doctrine, the prior restraint doctrine, and Twenty-first Amendment principles.¹²⁵

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

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

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

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

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

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

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

governments attempting to pass zoning ordinances for adult entertainment businesses must ensure that the ordinance provides: (1) sufficient factual basis to support a finding of substantial governmental interest; (2) narrowly tailored definitions of adult uses affecting only those businesses which the ordinance intends to regulate; and (3) reasonable alternative channels of communication for the affected expression.¹³⁰

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

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

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

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

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

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

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

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

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

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).

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

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

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

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

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."¹⁴⁷ At issue in *Young* was the constitutionality of certain portions of Detroit's Anti-Skid Row ordinance that singled out adult bookstores and theaters for special treatment.¹⁴⁸ The original Anti-Skid Row ordinance, passed in 1962, was based on findings by the Detroit Common Council that certain types of businesses, when concentrated, can have a blighting effect on the surrounding neighborhood.¹⁴⁹

The ordinance forbade adult motion picture theaters, topless cabarets, and other similar establishments from locating within 1,000 feet of each other or within 500 feet of a residential dwelling without first obtaining approval.¹⁵⁰ Although the ordinance was not technically content-neutral because it applied only to adult entertainment, the Court found the ordinance to be a reasonable time, place, and manner restriction of protected speech because the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate.¹⁵¹ The Court held that the ordinance constituted a permissible content-neutral time, place, and manner 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.¹⁵² Justice Stevens' plurality opinion pointed out that the city's goal of avoiding or mitigating these secondary effects is one which must be accorded high respect and is a sufficient governmental interest to justify the resulting incidental restriction on First Amendment speech.¹⁵³

b. *Schad v. Borough of Mount Ephraim*

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

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

In *Renton*, a suit was brought challenging the constitutionality of a zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school.¹⁵⁸ The district court granted summary judgment in the city's favor,

152. *See id.* at 71.

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

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

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

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

157. *Id.* at 71.

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

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

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

159. *See id.*

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

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

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

163. *See id.* at 46.

164. *See id.* at 48.

165. *See id.*

166. *See id.* at 53.

other cities.¹⁶⁷ The Court found that no constitutional defect invalidated the method chosen by Renton to further its substantial interests¹⁶⁸ and that cities may regulate adult theaters by dispersing them or by effectively concentrating them as in Renton.¹⁶⁹

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

167. *See id.*

168. *See id.* at 52.

169. *See id.* at 51.

170. *Id.* at 52.

171. *Id.*

172. *See id.* at 53.

173. *See id.*

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

evidence will be sufficient to support a finding of substantial governmental interest.¹⁷⁵

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

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

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

In *LaRue*, bar owners challenged a regulation prohibiting nude dancing where alcohol was served.¹⁸¹ The state offered evidence of

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

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

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

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

179. See *id.* at 138.

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

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

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

The Supreme Court has further held that a state legislature, pursuant to its power to regulate the sale of liquor within its boundaries, can ban topless dancing in establishments that have a license to serve liquor.¹⁸⁶ A "[s]tate's power to ban the sale of alcoholic beverages entirely include[d] the lesser power to ban the sale of liquor on premises where topless dancing occurs."¹⁸⁷ The Court also held that nudity is the kind of conduct that is a proper subject for legislative action as well as regulation by the State Liquor Authority as a phase of liquor licensing.¹⁸⁸ In addition, "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand."¹⁸⁹

and the actual or simulated touching, caressing or fondling on the breast, buttocks, anus, or genitals. *See id.* at 111-12.

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

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

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

185. *Id.* at 117.

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

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

Some local governments have employed a licensing requirement to prevent a concentration of adult businesses from opening establishments in their community.¹⁹⁷ Adult businesses can be

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

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

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

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

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

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

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

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

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 Britain, Inc. v. City of Amarillo, 27 F.3d 1068 (5th Cir. 1994).

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

D. Restrictive Zoning Regulations in Florida

Florida, like other states, has attempted to use zoning laws to address concerns regarding the adverse secondary effects attributed to adult businesses.²⁰⁸ Time, place, and manner regulations have been used by several cities in Florida to disperse or concentrate these establishments with the intention of combating the adverse secondary effects. Those Florida cities that have enacted time, place, and manner regulations affecting the

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 Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1162 (11th Cir. 1991) (upholding a zoning ordinance that furthered a substantial governmental interest in protecting the quality of urban life from the secondary effects of adult businesses).

location²⁰⁹ and distance patrons must keep from nude dancers,²¹⁰ have also had to satisfy the requirements of *Renton*.²¹¹

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

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

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

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

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

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

213. See *id.*

214. See *id.*

215. See *id.* at 1522.

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

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

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

question by finding that the powers had been delegated.²¹⁹ Since this time, local governments have used these delegated powers to restrict or forbid the sale of liquor at adult businesses.²²⁰

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

"With the increase of Adult Entertainment Establishments came a public awareness that these type of businesses could have a direct effect on the quality of life in . . . neighborhoods due to the criminal activities associated with these adult businesses and the type of patrons that [they] attracted."²²¹ Residents of communities located near some of these businesses have many reasons for disliking these establishments. One concern is with drivers who rush out of the parking lots of the businesses while children are nearby.²²² Public hearings have overflowed with similar concerns about traffic, property devaluation, prostitution and other crimes. However, at the core of this concern is the fear of the kind of people a nude dance club attracts; usually undesirables, transient crowds, and unsavory elements.²²³

A. Adverse Effects and Their Causes

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

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

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

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

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

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

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

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

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

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

1. *The Spread of HIV*

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

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

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

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

229. See *id.*

230. *Id.*

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

232. See *id.* at 588 n.1 (citing DELAFIELD, WIS., CODE OF ORDINANCES § 11.14, which lists Milwaukee and Kenosha Counties, Wisconsin; Chattanooga, Tennessee; Newport News, Virginia; and Marion County, Indiana as localities that have found that adult establishments have been used by patrons for sexual acts); The Dayton city commission found that similar activity occurred at local adult establishments in Dayton, Ohio. See *Bamon Corp. v. City of Dayton*, 923 F.2d 470, 473 (6th Cir. 1990). Minneapolis, Minnesota

The viewing booths at these adult establishments are small closet-sized rooms that are divided from adjoining booths by plywood partitions. The plywood partitions 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, 1993) [hereinafter Broward County Memorandum] (on file with author).

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

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

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

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

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

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

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

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

241. See *id.* at 122.

242. See *id.*

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

244. *Id.* at 121.

245. See *id.* at 122.

246. *Id.*

247. *Id.* at 121.

court considered the spread of HIV a legitimate state concern to justify regulation.

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

In *LaRue*, the Court relied upon testimony by law enforcement agents and state investigators that prostitution occurring in and around strip clubs involved some of the female dancers employed at the clubs.²⁴⁸ The city also presented testimony that indecent exposure to young girls, attempted rape, rape, and assaults on police officers took place on or immediately adjacent to such premises.²⁴⁹ Numerous studies have been conducted in cities throughout the United States to determine the relationship between increased crime rates and decreasing property values, including Austin, Texas; Orange County, Florida; Dallas, Texas; Los Angeles, California; Tampa, Florida; and Palm Beach County, Florida.²⁵⁰ The reports describe the methodology and results of studies done between 1984 and 1985 in Los Angeles, California and Austin, Texas and are reasonably detailed.²⁵¹ The Austin study compared rates of sex-related crimes and other crimes in four study areas, all of which contained one or two adult businesses, to the corresponding crime rates in control areas, which were said to be near the study areas and similar in land use characteristics, but without adult entertainment establishments.²⁵² Generally the crime rates were found to be higher in areas containing adult establishments than in their corresponding control areas.²⁵³ Crime rates were higher for both sex-related and non-sex-related crimes.²⁵⁴

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

249. See *id.* at 111.

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

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

252. See *id.*

253. See *id.*

254. See *id.*; see also *Borrage 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.²⁵⁵ During the same time period, reports homicide, rape, and burglary²⁵⁶ increased 7.6% in Hollywood and 4.2% citywide, indicating a low rate in the increase of serious crime in both areas.²⁵⁷ The report notes that arrests for prostitution, drug offenses, gambling violations, and various misdemeanors²⁵⁸ increased dramatically to 45.4% in the Hollywood area compared to a modest increase 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.²⁵⁹ Although most of these studies show a correlation between the location of adult businesses and an increase in crime, the studies' reliability and accuracy have been questioned.²⁶⁰ However, surveys of police officers and comments of citizens at public hearings have consistently expressed the view that the presence of adult businesses have had a negative effect.²⁶¹

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

around adult establishments). *But see* *California v. LaRue*, 409 U.S. 109, 131-33 (1972) (Douglas, J., dissenting) (rejecting the causal connection between sex-related entertainment and criminal activity).

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

256. *See id.* at 11.

257. *See id.*

258. *See id.*

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

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

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

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

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

business near an adult business.²⁶⁴ Additionally, real estate professionals and residents generally agree that adult entertainment lowers property values "from moderate to substantial amounts."²⁶⁵

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

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

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

Although local governments have relied on these studies to support the passage of restrictive zoning ordinances, researchers disagree over whether a relationship exists between adult entertainment businesses and adverse secondary effects. The National Coalition Against Pornography, Inc. has distributed leaflets and fact 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 233.

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

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

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

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

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

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

273. ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEPT OF JUSTICE, FINAL REPORT 215 (1986) [hereinafter MEESE COMM'N REPORT].

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

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

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

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

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

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

A. Is Zoning the Solution?

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

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

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

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

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

283. *Id.*

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

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

286. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976) (upholding a zoning ordinance that restricted the location of adult use businesses to prohibit the

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 Devaluation of Nonobscene Eroticism as a Form of Expression Protected By the First Amendment*, 67 TUL. L. REV. 1231, 1235-37 (1993). Many jurisdictions have found alternatives to get around the *Miller* standard, thus leading to inconsistent results. *See id.*

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

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

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

290. *See id.*

291. *See id.*

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

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 *Renton*²⁹⁷ must be considered to ensure that the constitutional rights of owners and patrons are not violated.

B. Alternative Methods of Solving the Problems of Secondary Effects

1. Expand the scope of prostitution statutes

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.

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

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

Prostitution is the criminal act of exchanging sex for money; an offense that is illegal in most states.²⁹⁸ The institution of prostitution allows males unconditional sexual access to females, limited only by their ability to pay.²⁹⁹ Various studies conducted on adult bookstores, peep shows, strip clubs, pornographic modeling studios, and lingerie modeling shops conclude that many of these establishments offer sex for money.³⁰⁰ Increased prostitution and littering in nearby neighborhoods are among the secondary effects attributable to these adult businesses³⁰¹ and are the primary contributors to community complaints about these businesses.³⁰²

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

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

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

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

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.³⁰³ These establishments would be the primary target of expanded prostitution statutes. Decreasing the number of adult establishments that promote and foster sexual activity and lewd acts appears to be the ultimate goal of most local governments which enact restrictive zoning ordinances.³⁰⁴ In contrast, this alternative is not intended to dissolve all adult establishments but aims to decrease physical sexual actions.³⁰⁵ Thus, these improved statutes would merely exist to eliminate the sexual activity and lewd acts that occur at some adult establishments.

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

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

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

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

305. See *id.*

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

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

308. See *id.* at 1133 n.6 ("To the extent that *People v. Fixler*, *People ex rel. Van de Kamp v. American Art Enterprises, Inc.*, and *People v. Zeilm* hold that the payment of wages to an actor or model who performs a sexual act in filming or photographing for publication

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

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

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

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

constitutes prostitution regardless of the obscenity of the film or publication so as to support a prosecution for pandering . . . they are disapproved.").

309. *Id.* at 1129, 1135.

310. *Id.* at 1131.

311. *Id.*

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

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

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

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

316. *Id.* at 313-16.

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

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

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

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

319. *See id.* at 155.

320. *See id.* at 160.

321. *See id.* at 161.

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

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

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

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

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

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

Meese Commission criticized both federal and local prosecutors for letting the problem get out of control and urged federal and local enforcement as the solution to the problem of hard-core pornography.³²⁸

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

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

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

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

330. See *id.* at 900.

331. *Id.* at 898.

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

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

analingus, and masturbation, where penetration, manipulation, or ejaculation of the genitals is clearly visible."³³⁴

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

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

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

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

336. See *id.* at 281.

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

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

consistent.³³⁹ In turn, this result would lessen secondary effects associated with adult entertainment establishments³⁴⁰ in a quite similar way as the alternative advocating the expansion of prostitution statutes.³⁴¹

C. Which Solution is Best?

The above solutions offer unique approaches to combating the secondary effects of adult establishments. Local restrictive zoning ordinances target the location, concentration, and general operations of adult establishments. The expansion of prostitution statutes targets the owners, filmmakers, and photographers who arrange and encourage the exchange of sex for money at their establishments. The modification of *Miller* would target the actual and depicted 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 Servodidio, *supra* note 286, at 1235.

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

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

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.

