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Regulating Morality Through the Common Law and Exclusionary Zoning

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REGULATING MORALITY THROUGH THE COMMON LAW AND EXCLUSIONARY ZONING

George P. Smith II* & Gregory P. Bailey*

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“From the genes, and perhaps from early childhood development
as well, we obtain our basic sexual drive and preferences. But how
we translate these into actual behavior depends on social factors—
including opportunities, resources, and constraints. Sex is a means
to human ends, and the efficient fitting of means to ends, whether done
consciously or unconsciously, is the economist’s notion of
rationality.”

—Judge Richard A. Posner

“There exists in the mind a strong tendency towards the pleasure
principle, but that tendency is opposed by certain other forces or
circumstances, so that the final outcome cannot always be in
harmony with the tendency toward pleasure.”

—Sigmund Freud

“Our society prohibits, and all human societies have prohibited,
certain activities not because they harm others but because they are
considered, in the traditional phrase, ‘contra bonos mores,’ i.e.,
immoral.”

—Justice Antonin Scalia

“What is pornography to one man is the laughter of genius to another.”

—D.H. Lawrence

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   Reason].
2. Teodros Kiros, Self-Construction and the Formation of Human Values 105
   (1998) (quoting Sigmund Freud, Beyond the Pleasure Principle 4 (James
   Strachey ed., trans., 2d ed. 1961)).
INTRODUCTION AND OVERVIEW

It is through zoning that rationality in land-use development is achieved and means are fitted to ends. Indeed, the very justification for zoning has been to “separate incompatible uses of property.” In land-use regulation, a normative analysis of conduct—and, for purposes of this Article, sexual expression—is evaluated “by [its] practical consequences rather than by [its] conformity to moral, political, or religious ideas.” It is not possible to divorce a zoning plan altogether from these forces, however; nor can the Common Law be expected to be unreceptive to these forces in determining whether an action is, under the law of nuisance, an unreasonable interference with the use and enjoyment of property and thus subject to abatement.

Ideally, then, an argument may be made that land-use regulations should show “rational adaptations to . . . social circumstances,” and, by doing so, these adaptations may be sustained as reasonable exercises of constitutional power. Consequently, to sustain zoning law that infringes upon a zone of protected liberties that are guaranteed by the Constitution as such, it must not only be drawn narrowly, but also must seek to further a governmental interest that is recognized as substantial. In crafting a zoning restriction, care must be taken to narrow the application of a restriction, simply because the more general the focus of a law, “the clumsier a tool for abuse” it becomes.

5. Christopher Serkin, Existing Uses and the Limits of Land Use Regulations, 84 N.Y.U. L. REV. 1222, 1225 (2009); see also David L. Callies et al., Cases and Materials on Land Use 49 (5th ed. 2008) (providing a sample list of zoning districts that separate land into different zones based upon the permitted use of the land); Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Control Law 23 (1998) (“The purposes of zoning were to segregate residential uses from more intensive uses of land such as industrial, and thereby to provide safer, more quiet areas for family life.”).


7. See George P. Smith II, Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Economic Jurisprudence, 74 Nw. L. Rev. 658, 670 (1995) (discussing the cost-benefit analysis involved in determining the proper use of a reasonableness inquiry) [hereinafter Smith, Nuisance Law]; see also Restatement (Second) of Torts § 821B (1979) (defining public nuisance). But see Jared A. Goldstein, Equitable Balancing in the Age of Statutes, 96 Va. L. Rev. 485, 524–25 (2010) (asserting that common law jurisdictions that do not follow the Restatement of Torts standards for determining nuisance actions are at fault for balancing “competing interests as they see fit, considering only ‘the needs of justice’ broadly defined”; there are, quite simply, neither definitive rules nor normative principles to guide courts in determining what interests are appropriate to consider when balancing occurs).


9. See Callies et al., supra note 5, at 1 (stating that, when land-use regulations do not adapt to social circumstances, those regulations may prove unconstitutional).


The Common Law has always been seen as a system shaped by morality,\(^{12}\) which, in turn, is viewed as a “body of imperfect generalizations expressed in terms of emotion.”\(^{13}\) Oliver Wendell Holmes, Jr. has cautioned that, in order to seek truth in the law, it is better to omit emotion and, instead, “ask ourselves what those generalizations are and how far they are confirmed by fact accurately ascertained.”\(^{14}\)

No doubt, one of the fundamental (and imperfect) generalizations of the common law is that an unreasonable use of real property may be abated under the law of nuisance.\(^{15}\) Yet, the extent to which an action by one party causes an unreasonable interference with the use and enjoyment of property and is, thus, subject to restraint in equity through injunctive relief is exceedingly problematic.\(^{16}\) Endeavoring to determine what is unreasonable conduct is nothing short of navigating an “impenetrable jungle.”\(^{17}\)

Although over time the foundational meanings of nuisance have been shown to be quite durable,\(^{18}\) confusion, uncertainty, and inefficiency resulting from its application\(^{19}\) are tied inextricably to the inherently subjective nature of ascertaining when conduct is so “unreasonable” as to be injurious.\(^{20}\) Because of these limitations, the law of nuisance has been said to be impracticable for application and use as a contemporary land-use control-device.\(^{21}\)

The constitutional underpinnings of the limitations on a state or local government’s ability to zone sexually oriented businesses (SOBs) lie in the First and Fourteenth Amendments.\(^{22}\) Early American jurisprudence focused primarily on protecting religious communities in determining what material


\(^{14}\) Id.

\(^{15}\) See Smith, Nuisance Law, supra note 7, at 701–02 (illustrating the balancing inquiry courts conduct between the benefit of abatement and the cost to the defendant of abating the nuisance in order to achieve efficient use of resources).

\(^{16}\) Id. at 663–64.


\(^{18}\) RICHARD A. EPSTEIN, TORTS 356 (1999).


\(^{20}\) Smith, Nuisance Law, supra note 7, at 701–02.

\(^{21}\) CAILLES ET AL., supra note 5, at 10–11 (questioning how well nuisance law serves as a land-control device when it must consider both the social value of the land and economic factors).

\(^{22}\) U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”); U.S. CONST. amend. XIV (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”).
could lawfully be regulated.23 In analyzing this content, the courts applied an
evolving standard for what constituted obscenity and, therefore, non-protected
speech.24 These early attempts at limiting obscenity focused on protection of
churches and their messages and on protection from the harm that could result
from anyone, young or old, coming into contact with obscene material.25

In the 1950s, as the Supreme Court of the United States distanced itself from
a protectionist test and adopted a community-based standard for defining
obscenity;26 communities still sought to protect the public from unfettered
access to pornography.27 Because pornography could no longer be assumed to
fall into the obscene category28—and was therefore transformed into possibly
protected speech29—municipalities enacted zoning laws that attempted to
control the concentration of sexually oriented businesses in their jurisdictions
for the protection of the public.30 The Court has endorsed these ordinances
provided they are supported by factual findings to satisfy the “secondary
effects” test, essentially protecting the community from other social ills by
limiting access to SOBs.31 These ordinances are not restricting the distribution
of non-obscene speech, but rather the location from which it may be done.32

The tension between an obscenity standard that allows a community to
decide what it finds acceptable and a zoning standard that allows a local
government to restrict the location of non-obscene sexually oriented businesses
must be resolved in favor of the zoning ordinances that prevent other social
harms beyond the sexual content. In other words, if communities can justify
regulating the location of sexually oriented businesses based on factors such as
crime or drug use, and not the sexual nature of the material distributed, those
regulations must be upheld and enforced.

23. See infra note 202 and accompanying text.
24. See infra Part III.A–B.
25. See infra Part III.A.
26. See infra Part III.B.
27. FW/PBS, Inc. v. Dallas, 493 U.S. 215, 251–52 (1990) (Scalia, J., concurring in part and
dissenting in part) (noting different means through which communities have attempted to address
sexually oriented businesses).
28. See infra Part III.B.
29. See infra Part III.B; see also David D. Cole, Playing by Pornography Rules: The
Regulation of Sexual Expression, 143 U. PA. L. REV. 111, 112 (1994) (“Even where speech is not
legally obscene, the Court permits the government to regulate ‘offensive’ sexual speech in ways
that it could not regulate ‘offensive’ political speech.”).
30. See infra Part IV.C.
31. See infra Part IV.C.
32. See infra note 260 and accompanying text; see also Carol A. Crocca, Annotation,
Validity of Ordinances Restricting Location of “Adult Entertainment” or “Sex-Oriented
Businesses, 10 A.L.R. 5TH 538, 555 (1993) (discussing Supreme Court jurisprudence validating
“zoning ordinances restricting the location of adult businesses” and “making it clear that adult
entertainment businesses are subject to a municipality’s zoning power like other
businesses . . . .”).
One purpose of this Article is to rebut the arguments that attempt to marginalize the utility of the law of nuisance in land-use control—and specifically its practical use in the regulation of sexually oriented businesses (SOBs). This Article will proceed to demonstrate that the common law of nuisance, guided modernly by the Restatement (Second) of Torts and given new, broad, interpretative power through the use of the concept of “moral nuisance,” remains a strong tool, together with exclusionary zoning and business-licensing requirements, to contain the placement of SOBs and their operations.

Part I investigates the nature of moral reasoning in judicial decision-making focusing on the extent to which moral values are intrinsic to legal reasoning. The Article undertakes a brief historical survey of the vectors of force in colonial America, which were crucial to the subsequent adoption of a value-laden (normative) construct for shaping moral conduct. The extent to which state action is proper to set and enforce moral codes is explored through the works of John Stuart Mill and H.L.A. Hart on the extent of liberty. These debates serve as a useful framework from which to consider how the American legal system continues to grapple with the very same issues of liberty and of responsibility enunciated by Mill in 1859. This analysis serves as a bridge to investigate the “immoral” and insidious nature of the promotion and distribution of obscenity and pornography through the practices of SOBs as well as in the new markets of cyberspace, which have made pornography a significant part of American culture.

Part II examines the common law doctrine of nuisance and probes the extent to which it continues as a useful construct for land-use development.

In Part III of this Article, the evolution of the regulation of obscenity will be traced from its religious-based enactments in early-American history to the community-centered determinations that now govern what is defined as obscene. Additionally, this section explores the underlying constitutional issues that control the modern test for obscenity.

33. See RESTATEMENT (SECOND) OF TORTS §§ 827–28 (1979) (listing factors to consider when determining the gravity of the harm caused by the nuisance and the utility of conduct that caused the nuisance).
34. See generally John Copeland Nagle, Moral Nuisances, 50 Emory L.J. 267 (2001) (discussing a number of instances where the concept of moral nuisances has been used to combat situations normally abated as public nuisances). Actions for anticipatory and aesthetic nuisance may also be control options to regulate SOBs. See infra notes 172, 175.
35. See infra Part 1.A.
36. See infra Part 1.B.
37. See infra Part 1.C.
38. See infra Part 1.C.
39. See infra Part 1.D.
Part IV addresses the use of zoning regulations to control both the influx and the continued operation of non-obscene sexually oriented businesses in communities. This Part also analyzes the combination of community-based obscenity standards and secondary-effects zoning standards. This combination provides a potentially workable, but an uneven and geographically diverse standard for the operation of a sexually oriented business.

This Article concludes by finding that, in reviewing zoning ordinances, courts will rarely hold that an SOB restriction is based on a motive to control the content of adult entertainment; rather, they will hold that these restrictions are content-neutral in order to give deference to local governments to establish zoning schemes in accordance with their police powers.

I. MORAL REASONING AND LEGAL JUDGMENTS

Determining a firm and fair basis for moral judgments cannot be derived exclusively from moral theory.\(^40\) Even though this theory may be used—although limitedly—to serve as a foundation for some moral judgments, it simply “should not be used as a basis for legal judgments.”\(^41\) Any form of “moral subjectivism” must be eschewed in favor of “moral relativism,” which acknowledges that there is no single criterion for testing whether a moral claim is valid.\(^42\) Rather, any determination made of the morality or immorality of conduct is situational and only relative to an individual’s personal standards of morality.\(^43\) The exigencies of life within each culture or community are determinative of the moral code that is structured within it,\(^44\) thus making morality truly a local issue and one that varies from community to community.\(^45\) Seeking to legislate a uniform moral code is therefore problematic.\(^46\)

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41. Posner, Problematics, supra note 40, at 1639; see H.L.A. HART, THE CONCEPT OF LAW 268 (2d ed. 1994) (maintaining that there is no necessary or logical connection between the content of law and morality).

42. Posner, Problematics, supra note 40, at 1642–43.

43. Id. at 1643.

44. Id. at 1650; see also H.L.A. HART, LAW, LIBERTY, AND MORALITY 7–8 (1962) (discussing the differing views on laws against “injur[ing] public morals” in the United States and England) [hereinafter HART, LAW, LIBERTY, AND MORALITY].

45. Posner, Problematics, supra note 40, at 1650.

46. George P. Fletcher, Law and Morality: A Kantian Perspective, 87 COLUM. L. REV. 533, 534 (1987) (discussing the view that “we cannot legislate morality”). Fletcher notes that, “[w]hile the prevailing view today treats law and morality as intersecting sets of rules and rights, the Kantian view treats the two as distinct and nonintersecting.” Id. Equally perplexing is determining the kind of benefit accruing, and to whom, when laws “track morality.” Ray Jackendoff, The Natural Logic of Morals and of Laws, 75 BROOK. L. REV. 383, 405 (2009).
If morality is determined by the local environment, how broad does the concept of locality reach? If the Tenth Amendment extends to states the right to regulate public health, safety, and morals of the individual state, then the legislature of each state has broad powers, virtually free from federal interference, to act as the moral authority for its citizens. In theory, if a citizen disagrees with a state’s interpretation of his moral code, that citizen may leave that state and join citizens with similar moral beliefs, or, better yet, gather other citizens to effectuate change by convincing them that the state’s morals are incorrect and must be changed through the voting process. In essence, this ability to regulate morals should also be extended to counties and local municipalities in order to maximize a person’s “moral liberty.” This view comports with Jean Jacques Rousseau’s ideal of the social contract under which citizens relinquish their own natural liberty in order to subject themselves to civil liberty, which, in turn, is limited by the general will.

Although moral reasoning and legal reasoning are acknowledged as subsets of normative reasoning, “legal questions can and should be answered without first being translated into moral questions, and without the aid of moral theory.” Granted, law surely supports a number of moral principles; yet, morality is not backed up by law. Indeed, in general, morality is not enforced by law. When moral issues are in conflict and are presented to the courts for legal resolution, a sophisticated judiciary should defer such matters to the legislative or political process for resolution.

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47. See Posner, Problematics, supra note 40, at 1650 (“Every society, and every subculture within a society, past or present, has had a moral code, but a code shaped by the exigencies of life in that society or that subculture . . . .”).

48. See Barbara L. Bezdek, To Attain “The Just Rewards of So Much Struggle”: Local-Resident Equity Participation in Urban Revitalization, 35 Hofstra L. Rev. 37, 46 (2006) (discussing the power of local governments to regulate based on “that extremely broad power of government to protect the health, safety, morals, and general welfare of the people that is reserved to the states in the federal Constitution”); see also U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

49. See JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 19 (1947) (“[W]e might add to the other acquisitions of the civil state that of moral liberty . . . .”).

50. Id.


52. Id.

53. Id. at 1694.

54. Id. at 1695; see also Kent Greenawalt, Legal Enforcement of Morality, 85 J. CRIM. L. & CRIMINOLOGY 710, 711 (1995) (arguing that, although “law and social morality will constrain much of the same behavior[,] . . . this does not mean . . . that the law will enforce every aspect of morality that concerns preventing harm to others”).

55. Posner, Problematics, supra note 40, at 1708.
A. Shaping Moral Values in Early America

Whether society has the right to use the law to enforce its moral judgments is a question of great historical moment and one of ongoing debate.\textsuperscript{56} Indeed, from the very formation of American society, colonial legislation sought to regulate morality,\textsuperscript{57} finding its basis for action in “a mixture of biblical and common law sources”\textsuperscript{58} together with the moral law manifested therefrom.\textsuperscript{59}

Alexis de Tocqueville observed in \textit{Democracy in America I} that early legislators were concerned with more than just social order; they were also concerned with society’s morals.\textsuperscript{60} He stated, “The chief care of the legislators in this body of penal laws was the maintenance of orderly conduct \textit{and good morals in the community}; thus they constantly invaded the domain of conscience, and there was scarcely a sin which was not subject to magisterial censure.”\textsuperscript{61} Although de Tocqueville is personally critical of this legislation as being “discreditable to human reason,”\textsuperscript{62} he nonetheless recognized that early American legislation “admirably combined the spirit of religion and the spirit of liberty.”\textsuperscript{63} Thus, in early America, “the legal regulation of morality was striking . . . partly because of the extensive reliance on Scripture and partly because English law itself had religious sources.”\textsuperscript{64} Notably, the founders believed that man had a “fallen human nature,”\textsuperscript{65} and that there was a coordinate need to be guided by “republican virtue” if survival of the new American form of governance was to be assured.\textsuperscript{66}

Even though the harshness of early colonial penal law was mitigated by the time the United States was founded, “the laws of different states still prohibited a variety of moral offenses . . . includ[ing], for example, bigamy, adultery, fornication, sodomy, bestiality, gambling, drunkenness, Sabbath violations, blasphemy, and profanity.”\textsuperscript{67} Acts such as lewdness and public indecency were also recognized with limitations because states believed that such acts

\textsuperscript{56} PATRICK A. DEVLIN, THE ENFORCEMENT OF MORALS 131 (1965).
\textsuperscript{57} Christopher Wolfe, \textit{Public Morality and the Modern Supreme Court}, 45 \textit{AM. J. JURIS.} 65, 69 (2000) (“In early America, the legitimacy of morals legislation was widely accepted.”).
\textsuperscript{58} Id. at 70.
\textsuperscript{59} Id. at 69–70.
\textsuperscript{60} ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 38 (Vintage Books 1990) (1945).
\textsuperscript{61} Id. (emphasis added).
\textsuperscript{62} Wolfe, supra note 57, at 69 (quoting DE TOQUEVILLE, supra note 60, at 39).
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 71 (citing GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN 143–45 (1960)).
\textsuperscript{66} Id. at 566 (citing THE FEDERALIST NOS. 10, 14, 18 (James Madison)).
\textsuperscript{67} Wolfe, supra note 57, at 71.
threatened the core of virtuous society. Notably, “[t]hese laws, for the most part, remained on the books, at least in some jurisdictions, for most of American history.”

B. John Stuart Mill's Legacy

Although many issues related to law and morality have been debated over the course of American history, “[t]he power [of the government] to regulate morality remained a firmly established part of American law until well into the twentieth century.” The modern debate on whether it is legitimate for a government to enforce morality as an end in itself was a revival of the debate that John Stuart Mill began in his 1859 essay, “On Liberty.”

In this essay, Mill set forth the principle that the government’s right to regulate morality is restricted to those individual behaviors that cause harm to others. Mill believed that the government should not have the power to punish individuals simply because others believe their behavior is immoral. Specifically, he stated

[...] that the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise or even right.

Mill also advocated for a broader principle of liberalism, one of harmless action, or as he put it, “liberty of tastes and pursuits . . . of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse or wrong.” He believed that it was inconsistent with the principles of individual liberty to use the government to coerce the individual because “a person’s taste is as much his own peculiar

68. Stanmeyer, supra note 65, at 573–74.
69. Wolfe, supra note 57, at 71.
70. Id.
73. Id.; see also Ku, supra note 71, at 13.
74. Mill, supra note 71, at 13 (emphasis added).
75. Id. at 16; see also THOMAS C. GREY, THE LEGAL ENFORCEMENT OF MORALITY 3 (1983) (quoting Mill, supra note 71, at 16) (noting Mill’s discussion of “a general liberty of action”).
C. Philosophical Interpretations and Judicial Constructs for Decision-Making

On-going debate over Mill’s principle of liberalism has continued through the years and was revised notably in the twentieth century by two Englishmen, Patrick Devlin and H.L.A. Hart.77 In 1958, British judge Sir Patrick Devlin—in response to calls for the statute regulating homosexuality and prostitution to be repealed—argued that “no separate sphere of merely private morality could be marked off as in principle outside the concern of the criminal law . . . [because] the health of a society rested on its firm adherence to a binding moral code,” which he thought must be subject to legal enforcement.78 Soon after Devlin announced his position, British legal philosopher H.L.A. Hart, in his book, *Law, Liberty, and Morality,*79 entered the dispute arguing for a modern revision of Mill’s principle.80

Those subscribing to the Millian principles—which H.L.A. Hart favored—advocate for acceptance of a nation of liberty in action even though the parameters of this ideal remain imprecise and, indeed, even contentious among its supporters.81 In essence, these Millians argue for adoption of a general, rather open-ended, principle which acknowledges that individuals should be free to act autonomously so long as their actions are not injurious to others.82 Even though nuanced in its application by varying factual situations, this position is anchored to the proposition that if an individual is legally competent, he is in the best position to assess and determine the morality of his own personal conduct.83 Hart was especially fearful of majoritarian power to

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76. Ku, supra note 71, at 13 (alteration in original) (quoting Mill, supra note 71, at 103); see Todd E. Pettys, Sodom’s Shadow: The Uncertain Line Between Public and Private Morality, 61 HASTINGS L.J. 1161, 1199 (2010) (discussing the difficulties in determining standards for distinguishing between public and private morality). In contemporary society, “[l]iberalism is often associated with a rejection of corporate authority in favor of individual autonomy and with a belief that important questions can be resolved by rational inquiry.” Kent Greenawalt, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 21 (1988).
77. Grey, supra note 75, at 4–5.
78. Id. at 4. “[H]istory shows that the loosening of moral bounds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.” Devlin, supra note 56, at 13.
79. A second book, or sequel to this book, was The Morality of the Criminal Law in which Hart maintains that conduct viewed as immoral by some is not a sufficient reason to criminalize conduct seen as homosexual. See H.L.A. Hart, THE MORALITY OF THE CRIMINAL LAW (1965).
80. Grey, supra note 75, at 5; see Hart, LAW, LIBERTY, AND MORALITY, supra note 44.
81. Hart, LAW, LIBERTY, AND MORALITY, supra note 44, at 11.
82. See supra text accompanying note 74.
impose upon the minority, through the law, its uncontested view of morality—particularly when questioned actions were not harmful to others. 84

Arguing to the contrary, supporters of the Devlin philosophy maintain that when deciding whether the government has a right to regulate morality, an ad hoc analysis must be undertaken which, of necessity, includes a consideration of all circumstances rather than one a priori principle. 85 Thus, instead of advocating a general principle for governing the law’s right to regulate morality, the Devlinites argue simply that each piece of “morals legislation is an open-ended matter of policy to be decided by weighing all factors that might seem relevant in the circumstances.” 86 For Devlin, himself, popular morality—as shaped by the responses of a reasonable man, although accepted as commonly held views—was not necessarily derived from objective reason, but could be drawn from subjective values and beliefs. 87 Under this view, then, if society believed a certain conduct to be “so abominable that its mere presence [was] an offence,” this would be a proper basis for legal prohibitions to be set in law. 88

Although this debate over the continuing power of the government to regulate morality was raised initially within the context of democratic theory and moral philosophy, it soon touched the formation of law in the United States. 89 Starting dramatically with the Warren Court, the fundamental right of the law to regulate morality began to be challenged constitutionally on the grounds of a newly created right to privacy. 90

Generally, judges during the twentieth century had—when considering issues of morality—either followed a judicial philosophy that precedent directs decision-making or, when confronting constitutional issues, that interpretations be guided by and reflect the moral conditions of society. 91 Judges embracing

84. See HART, LAW, LIBERTY, AND MORALITY, supra note 44, at 77–78 (“[T]he greatest of the dangers . . . was not that in fact the majority might use their power to oppress a minority, but that, with the spread of democratic ideas, it might come to be thought unobjectionable that they should do so.”). Note also that the question of what constitutes “harm” has been the subject of rigorous debate. GREY, supra note 75, at 13–14.

85. GREY, supra note 75, at 11.

86. Id.

87. DEVLIN, supra note 56, at 9, 15.

88. Id. at 17. For example, in arguing for criminalizing homosexual sodomy, Devlin asserted that disgust cannot be ignored “if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached.” Id.

89. GREY, supra note 75, at 6.

90. Id. at 7; see Griswold v. Connecticut, 381 U.S. 479, 485 (1966) (holding that a “right to privacy” existed and was protected “by several fundamental constitutional guarantees”).


[T]raditional judges faced with resolving cases that present controversial moral issues would argue that their task as judges is to preserve the morality built into the law while refusing to enforce laws or promulgate rules of law that do not conform to that
the second philosophy often injected their personal standards of morality into opinions,\textsuperscript{92} which, in turn, determined a number of socially charged issues that, rightly or wrongly, have effected monumental social change in America.\textsuperscript{93} The extent to which the judicial temperament of the present century is either following that of the twentieth century or establishing new parameters for analysis and interpretation has yet to be established.\textsuperscript{94}

\textbf{D. Profiteering in Pornography}

It may be surprising to those that founded, in their perspective, a moral society that pornography is a thriving business in present-day America. The pornography industry’s stock in trade is, quite simply, “fantasy,” which, depending upon the social and the political climate, can change dramatically.\textsuperscript{95} The primary challenge that the industry must meet “is to identify and respond to often bewildering shifts in standards of sexual attractiveness.”\textsuperscript{96} Although exact figures regarding the economic investment in the pornography industry in America are unknown,\textsuperscript{97} informed judgments embedded morality, while judges who read the constitution morally would deny that the positive law is intrinsically moral and capable of resolving moral issues.

\textit{Id.} at 286–87.

\textsuperscript{92} Id. at 286–87.


\textsuperscript{94} See Justin Ewers, Ranking the Politics of Supreme Court Justices, U.S. NEWS & WORLD REPORT (May 12, 2008), http://politics.usnews.com/news/national/articles/2008/05/12/ranking-the-politics-of-supreme-court-justices.html (noting that it is difficult, in some instances, to compare the current Supreme Court with the Court in previous decades). But see George P. Smith II, Judicial Decisionmaking in the Age of Biotechnology, 13 NOTRE DAME J.L., ETHICS & PUB. POL’Y 93, 93 (2008) (“[T]he social constructs and legal tools necessary for the modern judiciary to meet head-on and deal with the contentious issues of bioethics and biotechnology are already in place.”).

\textsuperscript{95} Frederick S. Lane III, Obscene Profits: The Entrepreneurs of Pornography in the Cyber Age 97 (2000).

\textsuperscript{96} Id. Pornography allows men to play out sexual fantasies, which, in turn, bolsters an inflated sense of masculinity. See Gail Dines, Pornland: How Porn Hijacked Our Sexuality xxvii (2010) (discussing pornographic scenes “as a vehicle to mark the feminine as all-powerless and the masculine as all-powerful”). Additionally, one pornography actor, who is also a producer, expressed his belief that men expect the portrayal of violence against women in pornography. \textit{Id.} at xxvi, xxvii, 135.

\textsuperscript{97} This lack of exact figures is simply because the industry itself is seen as operating “as an underground market.” Joe Knowles, X Factor: America Loves Its Smut, but Censors Say Enough’s Enough, \textsc{Redeye}, May 14, 2004, at 8.
“estimate that porn generates at least $4 billion and perhaps as much as $12 billion in annual revenues in the U.S. alone.”

1. Regulating Immoral Conduct

Statistics show that, since 2005, the U.S. Department of Justice has brought less than ten prosecutions for obscenity. This underscores the Department’s aversion to assuming aggressive leadership in this arena. Rather than prosecuting adult pornography—which is not illegal in itself, but can be prosecuted as obscenity under the Miller v. California precedent—the policy of the Department has been directed toward combating child pornography and human trafficking.

2. Second-Hand Smut

Internet obscenity presents a particular challenge to enforcement efforts simply because “law enforcement seems not to have the time, resources or inclination to pursue it.” Since the Federal Communications Decency Act was held unconstitutional in 1997, federal support of actions to limit Internet speech has shifted to legislative efforts at the state and local levels and to

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98. Id. This statistic positions the pornography industry as a bigger income-producing source in the American economy than the National Football League (estimated at $5 billion annually) and the National Basketball Association (estimated at $3 billion). Id. In 2006, the estimated value of the entire porn industry was set “around $96 billion,” with the U.S. market worth approximately $13 billion. DINES, supra note 96, at 47. Another source estimates that $10 billion per year is generated from adult entertainment. Rebecca Leung, Porn in the U.S.A.: Steve Kroft Reports on a $10 Billion Industry, CBS News (Sept. 5 2004), http://www.cbsnews.com/stories/2003/11/21/60minutes/main585049.shtml.


100. Id. at 55–56.

101. 413 U.S. 15, 24 (1973). Pursuant to this decision, if pornographic material “taken as a whole, appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value,” it is declared to be obscene. Id.


reliance on community standards of morality.\textsuperscript{104} Policing Internet use of pornography for approximately 28,258 users per second is simply an impossible situation.\textsuperscript{105}

Today, there is little or no need to pay for pornography at an SOB because it is free on the Internet;\textsuperscript{106} sites that allow watching or streaming pornography on the Internet are common place.\textsuperscript{107} The prevalence of wireless Internet access and the promise of downloadable high-definition movies that will permit pornography to be viewed on portable devices\textsuperscript{108} are creating a new type of lewdness or public nuisance: “second-hand smut.”\textsuperscript{109} At issue here is the appropriateness of viewing Internet pornography in public venues, such as buses, airplanes, gyms, libraries, and at sporting events when these displays may force a bystander to view pornographic images.\textsuperscript{110} With the growing use of portable laptop computers and hand-held electronics, more and more passive, non-accepting occupants of seats adjacent to Internet users are finding themselves unwilling captives of this “second-hand smut.”\textsuperscript{111} In order to limit this conduct in air travel, some airlines announced in 2008 that they are devising ways to filter inappropriate Internet usage.\textsuperscript{112}

\begin{thebibliography}{112}
\bibitem{note104} LANE, supra note 95, at 284–88.
\bibitem{note105} Family Safe Media, Pornography Statistics, \url{http://www.familysafemedia.com/pornography_statistics.html} (last visited Jan. 7, 2011). With Internet porn pages numbering 420 million and porn web sites 4.2 million, it is not surprising that, on a daily basis, there are 68 million search engine requests for pornography. \textsc{Dines, supra note 96, at 47; see also, \textit{The Average Guy and His Income}}, \textsc{Men’s Health, \url{http://www.menshealth.com/mens_wealth/average_guy_income.html}} (William G. Phillips ed.) (last visited Jan. 7, 2011) (noting that porn clips were among three items the “average guy” wishes automatic teller machines would dispense).
\bibitem{note106} Marcus Baram, Free Porn Threatens Adult Film Industry, \textsc{ABC News} (June 11, 2007), \url{http://abcnews.go.com/business/story?id=3259416&page=1}.
\bibitem{note107} Monica Hesse, Publicly a Whole New Lewdness: Everywhere You Look, Porn Is Suddenly Inescapable, \textsc{Wash. Post, Nov. 12, 2009, at C1}.
\bibitem{note108} Mike Musgrove, Mini-Porn Could Be Mega-Business: Video iPods, Cell Phones Provide New Vehicles for Adult Industry, \textsc{Wash. Post, Nov. 15, 2005, at D1}.
\bibitem{note109} Hesse, supra note 107.
\bibitem{note110} Id.
\bibitem{note111} Id.
\bibitem{note112} Id. But see Donna Goodison, Virgin Flights to Allow ‘Adult’ Sites, \textsc{Bos. Herald}, Feb. 11, 2009, at 30 (reporting that passengers on Virgin America air flights from Logan International Airport in Boston, Massachusetts to California can access “naughty” websites). Interestingly, the annual revenues from the hotel industry’s in-room sale of pornographic movies has been placed at approximately $500 million. \textsc{Dines, supra note 96, at 52}.
\end{thebibliography}
3. Victimless Offenses or Causal Theories?

Although the laws that regulate the business practices of SOBs may be considered both a “rational means of promoting ends,” and efficient, laws of this character are nevertheless “inefficacious” because the secondary effects and actual criminal conduct subsequent to allowing SOBs to operate under zoning codes “are either de jure or de facto victimless.” 113 Indeed, the very “fact of victimization is frequently unascertainable.”114

One theory posits that pornography does not only eroticize male sexual-violence toward women by predisposing males to rape, but that it also actually intensifies “the predisposition in other males already so disposed.”115 Put directly, pornography “undermines some males’ internal inhibitions against acting out their desire to rape”116 and promotes sexual arousal for some.117 The conclusion, then, is that a causal link exists that establishes a clear connection between pornography and social harm118—“pornography causes rape,”119 discriminates against and commodifies women,120 and has an insidious effect on the psyche.121

113. POSNER, SEX AND REASON, supra note 1, at 204, 213–14; see POSNER, ECONOMIC ANALYSIS, supra note 11, § 5.7 (discussing the regulation of sexual behavior and its economic impact). The mid-twentieth century saw the creation of adult-use districts, or special-disorder zones referred to as “red-light districts,” where the sex industry was concentrated and derelict housing for the unemployed (termed “skid rows”) was placed. NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 102–04 (2010).

Boston’s adult-use district, formerly the city’s old red-light district, included adult-entertainment venues, pornographic book stores, and strip clubs, and became known as the “Combat Zone.” Scott Van Voorhis, Wrecking Ball Ready for Combat: Towers Will Replace Red Lights, BAS. HERALD, Aug. 20, 2003, at 34. Authorities decided to demolish and replace these businesses with apartment towers. Id.; cf. Nate Schweber, Towns Use Zoning to Limit Sex Businesses, N.Y. TIMES, Jan. 27, 2008, at 6 (discussing zoning laws in some New Jersey municipalities that regulate SOBs by placing them, for example, only in the industrial areas).

114. POSNER, SEX AND REASON, supra note 1, at 204.


116. Id.


118. RUSSELL, supra note 115, at 156.

119. Id.


121. Pamela Paul, The Cost of Growing up on Porn, WASH. POST, Mar. 7, 2010, at B5; see HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW, AND PORNOGRAPHY 64 (1996) (“The purpose [of pornography]—to arouse an elemental passion for other people’s bodies independently of any affection or regard for a particular person—virtually guarantees that human beings will be represented as instruments.”). Whether “inflaming [one’s] sexual passions” can result in harm depends upon one’s perceptions. Andrew Koppelman, Does Obscenity Cause Moral Harm?, 105 COLUM. L. REV. 1635, 1641–42 (2005).
The opposing, and less emotional theory, acknowledges that objective proof of a direct link between attitude and behavior that causes harm needs more empirical research because there is insufficient evidence from psychological experiments that show any concrete connection between social attitudes and behavioral harm such as rape or criminal aggression. Correlations, at whatever level or degree, cannot be taken as proof of a definitive cause, however. Other sources of social violence have been found to be more of a catalyst for aggression than pornography. Such sources include “unstable or disturbed family life, physical and emotional abuse by parents . . . chronic unemployment, drug and alcohol abuse, [and] mental illness.” Considered to be the most powerful of all sources of aggressive behavior, even more than sexual desire, is “the basic need to be regarded as a man.”

II. NUISANCE AS AN EFFECTIVE LAND-USE TOOL

Through its publication in 1979 of the Restatement (Second) of Torts, specifically sections 827 and 828, the American Law Institute (ALI) sought to resolve previously expressed concerns regarding the instability of the law of nuisance. The ALI listed specific, objective factors to be considered when assessing whether the gravity of a plaintiff’s harm or injury is, when weighed against the utility of a defendant’s conduct, so unreasonable that he may seek redress for injunctive relief or damages under the law of nuisance.

Under the Restatement, the five factors for testing the claim of unreasonable conduct under nuisance, which in essence become a template for decision-making both at the initial stage of pleading and in subsequent judicial determinations, are:

(a) the extent of the harm involved;

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Recent statistical studies by Professor Todd Kendall of Clemson University show that expanded Internet access to pornography may well reduce the incidence of rape and validate other current studies concluding that its use does not cause crimes of this motive. Steve Chapman, Does Pornography Cause Sexual Violence?, WASH. EXAMINER, Jan. 12, 2011, at 24.


125. Id. at 237–39.

126. Id. at 239.

127. Id.

128. See supra notes 19–22 and accompanying text.

(b) the character of the harm involved;
(c) the social value that the law attaches to the type of use or enjoyment invaded;
(d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
(e) the burden on the person harmed of avoiding the harm.130

Under the Restatement, a finding that interference with a public right is unreasonable and, thus, actionable requires a consideration of
(a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.131

Traditionally, claims asserting public nuisance have allowed only public authorities to be the moving party132 and, further, have allowed injunctive, rather than legal, relief.133 Over the course of time in some jurisdictions, however, private parties have been permitted to maintain actions under public nuisance if they can show that they have suffered a “special injury,” in other words, if they can show an injury unique in some way from a general injury to the public.134 Notably, actions considered damaging to public morals, and therefore actionable under a claim of public nuisance (for example, indecent exposure and prostitution), have been allowed since the earliest recognition of the tort of nuisance.135 Consequently, the allowance, licensing, and placement

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130. Id. § 827. Section 828 provides:
In determining the utility of conduct that cases an intentional invasion of another’s interest in the use and enjoyment of land, the following factors are important:
the social value that the law attaches to the primary purpose of the conduct;
the suitability of the conduct to the character of the locality; and
the impracticability of preventing or avoiding the invasion.
Id. § 828.
131. Id. § 821B.
133. Id. at 814 (“Historically, the recovery of damages has been an ancillary and unusual remedy when a public nuisance was found to exist.”).
of an SOB within a zoning district raises the issue of when these actions by a municipal authority are reasonable, non-confiscatory (that is, they are not an unlawful taking), and not subject to an action for inverse condemnation by neighborhood property owners.\textsuperscript{136}

\section*{A. Nuisances as Takings}

Can a nuisance ever ripen into a taking? This is an intriguing question requiring an analysis that exceeds the scope of this Article.\textsuperscript{137} It is nonetheless important to note that some courts have chosen to collapse nuisance into the takings determination, effectively treating nuisance as a per se taking.\textsuperscript{138} Others “equate nuisance . . . with regulatory takings.”\textsuperscript{139} Furthermore, the government may effect a taking when it “uses its own property in ways that interfere with the ability of other owners to use and enjoy their properties.”\textsuperscript{140} Accordingly, nuisance law and takings display a “lack of doctrinal coherence.”\textsuperscript{141}

As early as 1883, the U.S. Supreme Court considered the extent to which a government could authorize or create a nuisance.\textsuperscript{142} In \textit{Baltimore & Potomac Railroad Co. v. First Baptist Church}, the Court concluded that even though “Congress could authorize and immunize” actions that could be taken to be public nuisances—in this case the operation of a railroad and related facilities—Congress could not undertake such actions that would, in turn,

\begin{itemize}
\item \textsuperscript{137} For a comprehensive treatment of this issue see generally Ball, supra note 136, and Robert L. Glicksman, \textit{Making a Nuisance of Takings Law}, 3 WASH. UNIV. J.L. & POL’Y 149 (2000).
\item \textsuperscript{138} Ball, supra note 136, at 851–55.
\item \textsuperscript{139} Id. at 824.
\item \textsuperscript{140} Id. at 820.
\item \textsuperscript{141} Id. at 821–22.
\item \textsuperscript{142} See Balt. & Potomac R.R. Co. v. First Baptist Church, 108 U.S. 317, 330–32 (1883).
\end{itemize}
create a private nuisance. 143 Because the burdens of such actions are imposed upon a small number of owners, no immunization is proper.144

Subsequently, the Supreme Court, in Richards v. Washington Terminal Co., expanded on its previous holding in 1883 in First Baptist Church.145 The Court found that, when the land is used by the government or a private party acting with explicit governmental authority in a way that creates a nuisance, the use rises to a taking when the burden placed on the aggrieved party is “peculiar and substantial.”146 The components of this taking standard continue to confound.147

B. Inverse Condemnation

Inverse condemnation is another remedial option available for recovering damages that result from indirect government actions that have the effect of causing a physical invasion to a plaintiff’s land, such as zoning accommodations and allowances for sexually oriented, adult businesses.148 Unless a moving party proves the injury sustained from such an invasion is a foreseeable result of the zoning, however, any recovery under an action for inverse condemnation is likely to suffer a “noncognizable derivative taking.”149

In 2007, a classic issue of inverse condemnation, combined with issues of land use and zoning, as well as nudity, race, and sexuality, arose when the Washington, D.C., City Council decided to relocate up to six adult clubs where pornographic movies were showed, nude dancing occurred, and private sex booths existed.150 The relocation of these SOBs, previously in Ward 6 of the city, was due to the development of the Washington Nationals baseball stadium, which had the effect of displacing primarily those venues that were homosexually oriented.151 Residents of Ward 5, who are predominantly low-income, objected to the effort to move all of the displaced clubs to their neighborhoods, fearing that this business cluster would not only depress the already low real-estate values of private homes there, but also condemn Ward

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144. Id. (citing Balt. & Potomac R.R. Co., 108 U.S. at 332).
146. Id.
147. See generally Stewart E. Sterk, The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Professor Claeys, 99 NW. U. L. REV. 231 (2004). Thornburg v. Portland is regarded as the most important nuisance/takings decision of a state court. Ball, supra note 136, at 851 (citing Thornburg v. Portland, 376 P.2d 100, 110 (Or. 1963) (suggesting nuisance effects a taking)).
148. GARNETT, supra note 113, at 105.
149. Id. (internal quotation marks omitted).
151. Id.
5 to little more than a “red light” district.\footnote{152} The City Council settled the issue by directing that no more than two SOBs would be allowed in each of the eight city wards and that, in order to avoid clustering these operations, there must be 1200 feet between the clubs.\footnote{153}

Concentrating disorder in a particular zone has proven to amplify it, thereby causing spillovers to nearby neighborhoods adjacent to the zone of containment.\footnote{154} Thus, many cities have opted, instead, for dispersing SOBs, which has the practical effect of merely moving the problem elsewhere.

C. Moral Nuisances

Under contemporary community standards, nuisance also has been defined as activity that is taken to be “unneighborly.”\footnote{156} Immoral activity or conduct spawned from the placement and operation of SOBs could be seen, properly, as unneighborly.\footnote{157} Consequently, some proffer a theory of moral nuisance as an additional remedy to fight immoral activity associated with the operation of SOBs.\footnote{158}

Four presumptions are central to the functional applicability of moral nuisance: (1) “that the conduct of one’s neighbor can be judged immoral”; (2) “that such conduct causes real harms”; (3) “that those harms can be remedied by the law”; (4) “that what one does on one’s own land can be limited by the moral sensibilities of one’s neighbors”; and (5) that courts are qualified to render judgments on activities of this nature.\footnote{159} The three decisive factors necessary to establishing an action for moral nuisance are “the value of a defendant’s activity, the location of the defendant’s activity, and . . . the harm suffered by the plaintiff.”\footnote{160} When the activity the moving party complains of

\footnote{152}{Id.}
\footnote{153}{Yolanda Woodlee, District Passes Amended Bill on Relocating of Nude Clubs, WASH. POST, June 6, 2007, at B1; see also Elissa Silberman, Neighbors Protest at Reputed Sex Shop, WASH. POST, Sept. 18, 2007, at B4 (discussing the outrage of luxury condominium owners in a Washington, D.C. neighborhood regarding a Fun Fair Video store that had been operating illegally as a sex shop for more than a decade).
\footnote{155}{Id. at 1108; see Debbie Howlett, Sex Shops Infiltrate Small Towns, USA TODAY, Dec. 4, 2003, at 3A (discussing the move of SOBs into smaller towns due to the dispersal methods used by larger cities).
\footnote{157}{See Drew Lucas, Comment, There is a Porn Store in Mr. Roger’s Neighborhood: Will You Be Their Neighbor? How to Apply Residential Use Restrictive Covenants to Modern Home Businesses, 26 CAMPBELL L. REV. 123, 123–24 (2004) (discussing a web site that streams video of five women engaging in sexual activity who live in a Florida home unrestricted by zoning ordinances despite the complaints of neighbors).
\footnote{158}{Nagle, supra note 34, 266–69.
\footnote{159}{Id. at 268.
\footnote{160}{Id. at 312–13.
is both immoral and illegal, the claim of moral nuisance is strengthened considerably.161 A judgment regarding the morality of the challenged conduct must be grounded in the norms of the community in which a plaintiff resides.162 This, then, becomes a central weakness of the theory because determining those normative standards of morality is fraught with challenges.163

D. Combating a Central Weakness

The central concern for applying the theory of moral nuisance can, perhaps, be resolved in large measure by relying on the secondary-effects doctrine.164 More specifically, if a municipality can justify its regulation of SOBs based on comparative studies of other cities addressing this issue or other evidence which substantiates a reasonable belief165 that certain activities would degrade the moral character or fiber of the community by promoting prostitution and illegal drug use, such as the retail sale of pornographic literature and paraphernalia, that municipality could seek to block the placement of such an immoral business by utilizing this doctrine and the law of anticipatory nuisance.166 If such a business had already been opened, its offensive moral character could be recognized and an action in equity could be undertaken to close the business as a public moral nuisance.167

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161. Id. at 269.
162. Id.; see Posner, Problematics, supra note 40, at 1642 (describing “moral relativism,” the idea that determining morality is “relative to the moral code of the particular culture in which the claim is advanced”).
163. See Posner, Problematics, supra note 40, at 1640–41; supra Part I.
164. See infra Part IV.C.
166. George P. Smith II, Re-validating the Doctrine of Anticipatory Nuisance, 29 VT. L. REV. 687, 688, 696–97 (2005). Under the tort of anticipatory nuisance, a plaintiff endeavors to prevent actions that will become nuisances in due course. Id. at 697. Although recognized at common law, and statutorily in Alabama and Georgia, this tort is seldom used because of an excessively high and complex burden of evidentiary proof, for example “reasonable certainty or high probability,” required to sustain its success. Id. at 688, 703.
Also, an argument could be advanced which asserts that SOBs are, in their signage and other forms of visual advertisement and window displays often with provocatively posed mannequins, aesthetically unbalanced, unreasonable, and inconsistent with either the moral and historic character or business tone of the neighborhood in which they are located.\(^{168}\) In other words, that SOBs are aesthetic nuisances.\(^{169}\)

In modern practice, addressing moral grounds as a justification for regulating personal liberties, which include operating and allowing public access to SOBs, is not uniformly accepted as a valid reason to impose land-use control regulations.\(^{170}\) Indeed, some commentators argue that the resolution of complex moral issues and the restraint of social behavior by and through zoning is inappropriate.\(^{171}\)

Since the U.S. Supreme Court’s decision in \textit{Lawrence v. Texas} in 2003 forbidding state regulation of sexual intimacies among consenting adults,\(^{172}\) it remains an open question whether morality by way of legislative actions taken to maintain a level of sexual morality is a legitimate state goal sufficient to abridge the personal freedoms of privacy and free association, or whether such attempts for restraint must be seen as preserving public health, safety, or welfare.\(^{173}\) Determinations of society’s objections and policy preferences for land development are essential to testing the effectiveness of land-use law.\(^{174}\) What is certain, however, is that the state must act, consistent with the exercise of its police powers, to maintain order within society.\(^{175}\) It is inconceivable and illogical to argue that a personal right of sexual expression should be expanded to state-regulated public business, thus subjecting those businesses to strict constitutional review by the judiciary whenever this right is compromised or disallowed.


\(^{169}\) Smith & Fernandez, supra note 168, at 66–69, 80–83; \textit{see also} Klein, supra note 168 (discussing the anger of the residents and businesses over the opening of an SOB called “Le Tache” in a historic neighborhood in Alexandria, Virginia).


\(^{172}\) 539 U.S. 558, 578 (2003).

\(^{173}\) WING ET AL., supra note 170.

\(^{174}\) CALLIES ET AL., supra note 5, at 1.

\(^{175}\) WING ET AL., supra note 170 (noting that, when the states began to vary their exercise of the police power regarding issues of morality, controversy ensued).
E. Public Health Nuisances

In the early stages of national awareness of the public health hazards associated with the spread of HIV-AIDS, nuisance was, and still is for that matter, a potent weapon for closing places of assignation and debauchery as public nuisances, such as bathhouses.176 Many of these businesses have now “converted” themselves into private clubs;177 yet they continue to be subjected to closure as public health nuisances.178

Because it is concerned with private sexual activity, Lawrence v. Texas179 is of little, if any, real value to the assertion of a constitutional guarantee to freedom of sexual association and intimacy on properties that must be licensed within a community under a proper zoning scheme.180 It strains the limits of credulity to assert that the Lawrence rule applies to sexual expression in publicly licensed venues. Reinventing a bathhouse or other SOB into a private club, for example, still requires a business license, and it is argued that allowing fornication and other sexual perversions in establishments of this order is improper, immoral, and inconsistent with preserving the common good through the advancement of sound public-health policy.181

Although land-use regulations and zoning ordinances are in many ways the preferred tools for regulating SOBs,182 more and more communities utilizing detailed operational land controls, which embody business-licensing ordinances, rather than only zoning plans, are finding better levels of success


177. G AY HISTORIES AND CULTURES, supra note 176 (“In New York, both commercial and private sex clubs have replaced the baths as places for men to gather and have sex . . . .”); Michele Garcia, From Peep Shows to the Look of Luxury: Ten Years After Crackdown, Skin Business Has New Image, WASH. POST, Jan. 7, 2005, at A3 (detailing how the “skin business” of New York City has transitioned into an upscale industry by transforming x-rated and peep show theaters into clubs or adult bars that continue to provide various venues for promiscuous sexual entertainment).


180. Lawrence, 539 U.S. at 578 (noting that “public conduct” was not at issue in the case, and prohibiting the state from declaring private sexual conduct a crime).

181. See supra note 177 and accompanying text.

182. Nagle, supra note 34, at 321.
in regulating SOBs.\textsuperscript{183} This is because licensing permits compliant businesses to operate and provides a procedure for simply closing business operations that violate the strict provisions of the license.\textsuperscript{184} Although considered especially effective as a tool for regulating on-premise entertainment by SOBs, licensing is more problematic when policing bookstores distributing obscene and pornographic literature and selling sex paraphernalia, all of which are protected free speech expressions under the First and Fourteenth Amendments.\textsuperscript{185}

Because of the variety of uses promoted by SOBs, it is preferable to recognize each business as a “separate land-use category.”\textsuperscript{186} For example, mixing lingerie, leather goods, and sexually oriented media or adding sex toys to the product mix of a retail outlet causes it to take on the image of selling sex, which makes it very different from a store that sells books or videos, some of which happen to be sexually oriented. . . . These stores [should] be referred to as “sex shops.”\textsuperscript{187}

Additionally, entertainment presented in closed booths or private rooms is clearly within the definition of an SOB.\textsuperscript{188} Classifying business conduct can, as seen, be quite complicated.

In those cases where, for politically sensitive reasons or economically motivated ones resulting from restricted enforcement budgets, governmental “solutions” to regulating SOBs are too complicated, nuisance law is a potent weapon to consider.\textsuperscript{189} Guided by a common-sense application of sections 821B, 827, and 828 of the \textit{Restatement (Second) of Torts},\textsuperscript{190} the law of nuisance has a place in contemporary land-use control.\textsuperscript{191} The one real caveat for engrafting the theory of moral nuisance onto the general law of nuisance is the substantial difficulty in determining when personal and community standards of morality are so offended by the operations of SOBs that they become actionable in equity.\textsuperscript{192} As observed, perhaps the one hope for “activating” a claim for abatement of a moral nuisance would be through reliance on the doctrine of secondary effects to show evidentiary proof of the claim.\textsuperscript{193}
III. HISTORY OF REGULATING OBSCENITY

A. Early American Attempts

Early regulation of obscenity in the United States followed the lead of regulation in England. Primarily, obscenity regulation was inspired by the religious community and guided by the prospect of offense to churches, as opposed to being focused on the actual sexual content of the material. Protecting the religious communities remained the central focus of obscenity enforcement in the United States until the 1800s. Although the individual states began to enact anti-obscenity laws in the early 1820s, a strong federal presence was not felt in obscenity regulation until after the Civil War. Under the leadership of Anthony Comstock, following passage of a federal law that prohibited the mailing of obscene material, an era of heightened enforcement began.

194. “Obscene refers to that which is repugnant or disgusting to the senses, or offensive, filthy, foul, repulsive, or loathsome. . . . Pornography, on the other hand, derived from the Greek word for harlot . . . is limited to depictions of sexual lewdness or erotic behavior.” Frederick F. Schauer, The Law of Obscenity 1 n.1 (1976). “[W]hile all pornography is obscene, the converse does not hold good. In other words, obscene matter, which produces feelings of disgust, may be, but is not necessarily, pornographic as well.” H. Montgomery Hyde, A History of Pornography 2 (1965). This quote from 1965 is no longer the absolute it once was. Under the community-based test for obscenity that is now employed, all pornography cannot be presumed obscene; indeed, in Roth v. United States, the Supreme Court stated that “sex and obscenity are not synonymous.” 354 U.S. 476, 487 (1957).

195. Schauer, supra note 194, at 8.

196. See id. at 3. “[T]he Christian and common law tradition . . . [regulated sexual expression] only incidentally to the regulation of some other offense (especially blasphemy) and never as an end in itself.” Bret Boyce, Obscenity and Community Standards, 33 Yale J. Int’l L. 299, 305 (2008).

197. Schauer, supra note 194, at 10 (explaining the factors that prompted state legislatures to attempt to control sexually oriented materials in the 1800s); Boyce, supra note 196, at 312 (“During the nineteenth century, in America even more than in Britain, obscenity began to be decoupled from the offenses with which it had historically been closely intertwined: seditition and blasphemy.”).

198. See Schauer, supra note 194, at 10.

199. See id. (discussing the enactment and effect of federal legislation regarding obscene material); Boyce, supra note 196, at 313 (same). Although the first federal law dealing with obscenity was passed in 1842 to stifle the distribution of imported French postcards, “few federal prosecutions resulted.” Boyce, supra note 196, at 313; see also Schauer, supra note 194, at 10 (“The years prior to the Civil War witnessed a proliferation of obscenity and lewdness statutes, but there were still few prosecutions.”).

200. Schauer, supra note 194, at 12–13. Comstock championed the first federal obscenity law and was appointed to direct its enforcement at a national level. Id. at 12. Comstock touted his first-year enforcement accomplishments as including the seizure and destruction of “200,000 pictures and photographs; 100,000 books; [and] 5,000 packs of playing cards.” Id. at 13. Over his career, Comstock is said to have destroyed nearly 160 tons of obscene material and to have bragged about prompting fifteen suicides. Boyce, supra note 196, at 313–14.
Early obscenity laws presented the same central issue found in enacting and enforcing modern-day laws regulating obscenity: the lack of a definition of obscenity.\footnote{Boyce, supra note 196, at 314. Black’s Law Dictionary defines obscenity as “[t]he characteristic or state of being morally abhorrent or socially taboo, esp[ecially] as a result or referring to or depicting sexual or excretory functions.” BLACK’S LAW DICTIONARY (8th ed. 2004). The Oxford English Dictionary defines obscene as “abominable, disgusting, filthy, [and] indecent.” THE OXFORD ENGLISH DICTIONARY 656 (2d ed. 1989).} In the absence of a statutory definition of obscenity, the courts borrowed the standard that was then utilized in England—the Hicklin test.\footnote{Id. at 29. The Hicklin test persisted in the American judicial system—albeit weakening over time—from the early 1800s until the early half of the twentieth century, leading up to the 1950s when the Supreme Court analyzed obscenity from a First Amendment standpoint and created a standard for obscenity based more on the reasonable man than on vulnerable children. See Boyce, supra note 196, at 314–16; see, e.g., Walker v. Popenoe, 149 F.2d 511, 512 (D.C. Cir. 1945) (concluding that a publication’s effect on an ordinary person should determine if it is obscene); United States v. Dennett, 39 F.2d 564, 568 (2d Cir. 1930) (arguing that material is not obscene merely because a child might gain access to a publication); United States v. One Book Called “Ulysses,” 5 F. Supp. 182, 184 (S.D.N.Y. 1933) (concluding that the definition of obscene must be judged based on the average person).} Under the Hicklin test, to determine whether something was obscene, the court had to decide whether the item “would have a tendency to deprave and corrupt the minds of those into whose hands the publication might fall.”\footnote{See, e.g., United States v. Clarke, 38 F. 732, 733 (E.D. Mo. 1889) (citing R. v. Hicklin, (1868) 3 Law Reports 360 (Q.B.) 371) (adopting the obscenity standard announced in England).} This test did not apply a reasonable person standard; instead, it coddled the citizenry by presuming that the possible audience included impressionable children, thus reducing the obscenity standard to a protectionist footing.\footnote{Id.} Through the application of the Hicklin test, courts made ad hoc determinations of obscenity in particular publications; however, “in none of these cases did any court deal with the fundamental relationship between obscenity and the First Amendment.”\footnote{See, e.g., United States v. Clarke, 38 F. 732, 733 (E.D. Mo. 1889) (citing R. v. Hicklin, (1868) 3 Law Reports 360 (Q.B.) 371) (adopting the obscenity standard announced in England).}

B. Transitioning to Community-Based Standards for Defining Obscenity

The Supreme Court finally began to analyze obscenity regulation from a constitutional standpoint in 1957.\footnote{See Roth v. United States, 354 U.S. 476, 481 (1957) (“[T]his is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment.”).} In Roth v. United States, the Court
directly addressed the First Amendment issues raised by attempts to stifle obscene speech and publications.  

The Court recognized that all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties of freedom of speech, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.  

Therefore, the Court provided a more workable and realistic way to distinguish between unprotected, obscene speech and protected, non-obscene speech. In fashioning the new test—which discarded the Hicklin test—the Court stated that the First Amendment protected speech that furthered political or social growth, not all speech. More specifically, the First Amendment did not protect speech that appealed only to a person’s prurient interests. The Court did not, however, note in its repudiation of the Hicklin test that the test was overbroad and may have included material that dealt with sex in a legitimate fashion. 

In rejecting the Hicklin test, the Roth Court cobbled together elements from various tests used by lower courts. The Court set forth the following new test: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” Following the announcement of this test in 1957, obscenity law transitioned from assuming that everything pornographic was

207. Id. at 479 & n.1 (“[T]he primary constitutional question is whether the federal obscenity statute violates the provision of the First Amendment that ‘Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .’” (omissions in original)).  

208. Id. at 484.  

209. See id. at 489.  

210. Id. at 483–84.  

211. Id. (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”). The Court noted that “[o]bscene material is material which deals with sex in a manner appealing to prurient interest.” Id. at 487. The Court defined this type of material as “material having a tendency to excite lustful thoughts.” Id.  

212. Id. at 489 (“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 freedom of speech and press.”).  

213. Id. at 489 & n.26.  

214. Id. at 489; see Stephen Gillers, A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II, 85 WASH. U. L. REV. 215, 296 (2007) (discussing how the Court’s decision in Ulysses set the stage for the test the Supreme Court would later develop to replace Hicklin).
obscene to a community-based legal area in which not even “all hard-core pornography . . . qualified as obscene.”

Following fifteen years of the Supreme Court reversing community-based determinations of obscenity, a new test was announced in 1973. The Court, in *Miller v. California*, set forth a three-part test:

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Court responded to the inevitable criticism of the fluid application of a reasonable person, community-based test by stating: “[t]he mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged.” Further, the Court clarified that only the first and second prongs of the *Miller* test are truly community-based standards, leaving the value-judgment prong as a reasonable person test, not in a certain community, but generally. Drawing on the opinion in *Roth*, which stated the importance of protecting unpopular ideas, the Court wrote that “the ideas a work represents need not obtain majority approval to merit protection.” Therefore, the government does not abridge a First Amendment right if the material is judged by a reasonable person to appeal to a person’s prurient

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218. *Id.* (internal citations omitted) (internal quotation marks omitted).

219. *Id.* at 26 n.9.


222. Pope, 481 U.S. at 500.
interest and if the work, taken as a whole and weighed against a national standard, offers no value to society.\textsuperscript{223}

Although a finding that an establishment is obscene allows a community to completely ban it from operating, finding that a business deals only in non-obscene materials does not end the inquiry.\textsuperscript{224} The Supreme Court has allowed for heightened zoning requirements for even non-obscene SOBs.\textsuperscript{225}

IV. ZONING LAW AND SEXUALLY ORIENTED BUSINESSES

A. Overview of Zoning Schemes

Zoning is a use of local governments’ delegated police powers to “exercise . . . the right to control the use of real property.”\textsuperscript{226} “The essence of zoning is to provide a balanced and well ordered scheme for all activity deemed essential to the particular municipality.”\textsuperscript{227} Zoning schemes can be established as exclusionary or cumulative depending on the desires of the local government implementing the scheme.\textsuperscript{228} An exclusionary scheme restricts the use of the zoned area to only the use for which it is particularly zoned, while a cumulative scheme allows the use for which it is zoned in addition to any higher use, such as residential use.\textsuperscript{229} Within a master zoning plan, there may be isolated instances where land is zoned for a purpose outside the character of

\textsuperscript{223} See Miller, 413 U.S. at 24 (providing that, among the considerations to determine if material is obscene, is “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value”); John E. Nowak & Ronald D. Rotunda, Constitutional Law § 16.56, at 1383 (7th ed. 2004) (discussing the third element of the Miller test and emphasizing that the value of the work depends on the perspective of a reasonable person).

\textsuperscript{224} See infra Part IV.C.1.


\textsuperscript{226} Platte Cnty. v. Chipman, 512 S.W.2d 199, 202 (Mo. Ct. App. 1974) (“Such [zoning] power is not enjoyed by lesser governing bodies, such as, counties and municipalities, in the absence of specific grant or delegation to such bodies by the sovereign.”).

Police power is a concept of obscure and ancient origins. The police power, which protects the state and ensures citizens’ rights against one another is founded on one of the most ancient principles of English common law. This principle is commonly expressed in the old legal maxim: “sic utere tuo ut alienum non laedas,” which is loosely translated as, “enjoy your property in such manner as to not injure that of another.”

\textsuperscript{6} Patrick J. Rohan, Zoning and Land Use Controls § 35.02[1], at 35-3 (Eric Damian Kelly ed., 2010); see also Smith, Nuisance Law, supra note 7, at 680 (“No doubt the most well-established or inherent principle of the law of nuisance as well as its most contentious is to be found in the principle of Sic utere tuo ut alienum non laedas.”).

\textsuperscript{227} J.D. Constr. Corp. v. Bd. of Adjustment, 290 A.2d 452, 456 (N.J. Super. Ct. Law Div. 1972). “The purpose of zoning is to reduce or eliminate the adverse effects that one type of land use might have on another.” King v. Caddo Parish Comm’n, 719 So.2d 410, 415 (La. 1998).

\textsuperscript{228} 7 Rohan, supra note 226, § 39.03, at 39-37 to 39-38.

\textsuperscript{229} Id.
the surrounding land. These isolated parcels are said to have been spot zoned, a practice that is usually considered suspect based on the overriding need for uniformity and the belief that the original zoning classification was purposeful and well thought out.

Zoning ordinances enacted to control the location of SOBs would, in most instances, be considered reverse spot zoning. A general constitutional challenge to spot zoning may lie in procedural due process, which requires adequate notice and an opportunity to be heard. In the zoning or re-zoning of SOBs, however, more is at play. In addition to the typical zoning challenge based on procedural due process, the owner of an SOB would have a cause of action based in the abridgement of his First Amendment right to free speech and his Fourteenth Amendment right to equal protection. Specifically, in Village of Euclid, Ohio v. Ambler Realty Co., the Court, in order to balance the rights of the owner of an SOB with the interests of the community, had to formulate a test which took into account the First and Fourteenth Amendment rights of the owner and the presumptive enforceability of zoning laws formulated under the police powers.

230. Id. § 38A.01, at 38A-3.
231. Id. § 38A.01, at 38A-10.
232. See JUERGENSMEYER & ROBERTS, supra note 5, § 5.10, at 192–93. Reverse spot zoning implies that, instead of special affirmative treatment for a particular parcel of land, the parcel in question is more restrictively zoned than its neighboring parcels. ROHAN, supra note 226, § 38A.01, at 38A-9. “Such action generally has been held to be invalid as unjustifiably discriminatory unless the interests of the community as a whole are served thereby.” Id.
233. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985). The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Id. at 812 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).
234. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . .”); U.S. CONST. amend. XIV (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”).
235. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (“[I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”); see also Jules B. Gerard, Local Regulation of Adult Businesses §§ 2.02, 2.08 (2004 ed.) (discussing the Supreme Court position on the First Amendment and providing an explanation of due process). Nuisance actions provide another option for controlling the influx or growth of SOBs outside the zoning context. See Nagle, supra note 34, at 267–68. Private landowners affected by the secondary effects, which governments seek to limit, may have an action against the neighboring business owner for a moral nuisance. See id. A moral nuisance action “presumes that what one does on one’s own land can be limited by the moral sensibilities of one’s neighbor.” Id. at 268.
B. The Interplay of Obscenity Regulation and Zoning Law

Zoning, as an application of a government’s police powers, must be related to the health, safety, welfare, or morals of the governed public. 236 When, however, a community is zoning SOBs, a two-step inquiry is required. 237 First, there must be a determination under the Miller test 238 of whether the material distributed by the SOB is obscene. 239 If the material is classified as obscene, then it is offered no protection under the First Amendment and the business can be prohibited altogether. 240 If, however, the material is deemed to be non-obscene, but still sexually oriented, the Supreme Court has recognized a community’s right to restrict the location of the distributing business. 241 The determination to restrict the location of SOBs must be based, however, on something other than the desire to suppress non-obscene speech, otherwise known as the secondary-effects doctrine. 242

C. Young v. American Mini Theatres, Inc. and the Secondary-Effects Doctrine

1. The Introduction of the Secondary-Effects Doctrine

In 1972, Detroit enacted zoning ordinances that differentiated “between motion picture theaters which exhibit sexually explicit ‘adult’ movies and those which do not.” 243 Those theaters that do exhibit adult movies were restricted from being “located within 1,000 feet of any two other ‘regulated uses’ or within 500 feet of a residential area.” 244 These ordinances, which

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236. Vill. of Euclid, 272 U.S. at 395.
238. See supra text accompanying note 218.
240. Id. at 193–94.
243. Young, 427 U.S. at 52. To be classified as an adult theater, the theater must display films which show “[h]uman genitals in a state of sexual stimulation or arousal; . . . acts of human masturbation, sexual intercourse or sodomy; . . . fondling or other erotic touching,” or a display of certain delineated anatomic parts. Id. at 53 & n.4 (citation omitted in original).
244. Id. at 52.
amended a ten-year-old “Anti-Skid Row Ordinance,” were enacted to combat the burgeoning influx of crime and unwanted “transients” that can occur in areas where SOBs are located in close proximity to each other. Further, Detroit argued that this co-location caused increased crime, particularly prostitution, and increased urban flight by both residents and businesses. Two operators of adult theaters brought an action challenging the new zoning ordinances on Equal Protection and First Amendment grounds.

In this case of first impression analyzing the interaction between zoning and free speech, the Court began its analysis by noting that all theaters, not merely adult theaters, must satisfy some locational and licensing requirements to receive zoning approval in Detroit. Further, the Court stated that separation requirements did not offend First Amendment principles, classifying this requirement as a proper time, place, or manner regulation in furtherance of “significant governmental interests.” The Court emphasized that in other instances, like commercial speech or distribution of non-obscene pornography to minors, which do not require a secondary-effects analysis to be restricted,

In addition to adult motion picture theaters and “mini” theaters . . . the regulated uses include adult bookstores; cabarets (group “D”); establishments for the sale of beer or intoxicating liquor for consumption on the premises; hotels or motels; pawnshops; pool or billiard halls; public lodging houses; secondhand stores; shoeshine parlors; and taxi dance halls.

Id. at 52 n.3.
245. Id. at 54–55.
246. Id. at 55.
247. Id. at 50; see also U.S. CONST. amends. I, XIV. The adult-theater operators also challenged on due process vagueness grounds, but that argument was summarily rejected by the Court because even if the ordinance was vague as asserted, neither plaintiff had standing to challenge the possibly vague language. Young, 427 U.S. at 58–59.
248. Young, 427 U.S. at 62 (noting that zoning and licensing restrictions do not trigger automatic invalidation of ordinances on First Amendment grounds).
249. Although 500 and 1000 foot separations were the methods chosen by the local government in Young, id. at 52, other avenues of regulation exist. The local government in Renton chose to cluster SOBs in one section of the city, leaving a majority of the city off-limits to these business owners. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 44–45 (1986). The distance and locational requirements weigh less in determining whether to approve a regulation than does the underlying purpose of the exclusionary zones. See New Albany DVD, L.L.C. v. City of New Albany, 581 F.3d 556, 558–59 (7th Cir. 2009) (holding that a 1000-foot buffer is not a dispositive issue as the requirement that a regulation be tailored to serve a significant purpose does not require the most narrowly tailored restriction possible).
250. Young, 427 U.S. at 63 & n.18. A time, place, or manner restriction is a content-neutral regulation that restricts the location of a speech-related activity. NOWAK & ROTUNDA, supra note 223, at §16.47, at 1320. To determine the legitimacy of an alleged time, place, or manner regulation, courts use a three-part test analyzing whether the restriction is “content-neutral, narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication.” Id.
the government can create a content-based regulation without running afoul of the First Amendment or the Equal Protection Clause.251

The Court gave great deference to the city’s assertion that the preservation of “the character of its neighborhoods” was enough justification for this ordinance and that its factual findings were adequate to demonstrate that the desired effect would be achieved through this regulation.252 Further, the Court stated that, because the only thing “at stake [was] nothing more than a limitation on the place where adult films may be exhibited . . . the city’s interest in the present and future character of its neighborhoods adequately support[ed]” its separation requirements for sexually oriented businesses.253 Thus, the secondary-effects doctrine—a new doctrine with which to judge time, place, and manner restrictions on speech—was formulated.254

The secondary-effects doctrine legitimizes the regulation of non-obscene sexually oriented material by focusing, not on the suppression of speech, but on the effects that an SOB may have on the surrounding area.255 The particularized effects experienced in each locality are less important to courts than the local government’s assertion that possible effects exist other than the mere promotion of sexually oriented material.256 Some secondary effects accepted by courts include the reduction of crime, the prevention of decreased property values, and the preservation of the “quality of the city’s neighborhoods.”257 However, the secondary effect most cited as justification

251. Young, 427 U.S. at 68–70 (“Such a line may be drawn on the basis of content without violating the government’s paramount obligation of neutrality in its regulation of protected communication.”). The Court was explicit that total suppression would violate the First Amendment, but “the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.” Id. at 70–71.

252. Id. at 71 (“[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.”).

253. Id. at 71–72. “Detroit has silenced no message, has invoked no censorship, and has imposed no limitation on those who wish to view them.” Id. at 78 (Powell, J., concurring).

254. See id. at 71 n.34.


256. See infra note 292 and accompanying text.

257. City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 434 (2002) (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–49 (1986)). A number of influential studies are referenced when analyzing the secondary impacts of SOBs. See, e.g., Indianapolis Dep’t of Metro. Dev., Div. of Planning, Adult Entertainment Businesses in Indianapolis: An Analysis i–iv (1984), available at http://secondaryeffectsresearch.com/files/Indianapolis,%2084.pdf (discussing a study of the effects of adult entertainment businesses in Indianapolis). The Indianapolis study found a direct correlation between crime and the character of a residential neighborhood and discovered that areas with operating adult-entertainment businesses saw a fifty-six percent increase in crime. Id. at ii. More specifically, sex-related crimes occurred four times more frequently in those neighborhoods. Id. Furthermore, although the state’s overall housing-market was decreasing with regard to the number of houses being placed on the market, the opposite was true in neighborhoods with adult-entertainment businesses where houses were being placed on the market at prices substantially lower than expected. Id. at ii–iii. Eighty percent of real-estate appraisers reported that even one adult business would deprecate the value of surrounding
for certain regulations is the projected introduction or expansion of crime in a certain locality.\textsuperscript{258} Therefore, the government’s assertion in \textit{Young} that it was attempting to curb the secondary effects of increased crime, decreased property values, and increased population flight, was sufficient justification to the incidental imposition on sexually oriented business owners’ First and Fourteenth Amendment rights.\textsuperscript{259}

2. \textit{Is the Secondary-Effects Doctrine Truly Content-Neutral?}

Although most government-imposed restrictions on speech require an analysis under the strict scrutiny test,\textsuperscript{260} a content-neutral regulation is governed by a lesser standard.\textsuperscript{261} Content neutrality requires regulation “without reference to the content of the regulated speech.”\textsuperscript{262} Further, regulations must be reviewed to see if government “disagreement with the message” was the underlying reason for enactment.\textsuperscript{263} Some interference with speech is allowed under content-neutral regulations if that interference is “incidental” and the purpose is “unrelated to the content of [the] expression.”\textsuperscript{264}

Critical analysis demonstrates that zoning ordinances targeting SOBs cannot qualify as content-neutral.\textsuperscript{265} Although these ordinances are upheld under a time, place, and manner test if they only limit the locations of businesses and do not limit the amount of speech allowed,\textsuperscript{266} it must be recognized that they

\textsuperscript{258}. See, e.g., \textit{Alameda Books, Inc.}, 535 U.S. at 436 (discussing a 1977 study that documented increased crime rates in areas populated with sexually oriented businesses); \textit{Barnes}, 501 U.S. at 584 (Souter, J., concurring) (acknowledging significant government interest in “preventing prostitution, sexual assault, and associated crimes”); \textit{Renton}, 475 U.S. at 48 (noting significant government interest in preventing crime).

\textsuperscript{259}. \textit{Young}, 427 U.S. at 71–73.

\textsuperscript{260}. \textsc{Nowak} & \textsc{Rotunda}, \textit{supra} note 223, \S 16.1, at 1131–32. Strict scrutiny requires the government to prove that a restriction on speech “is narrowly tailored to a compelling interest.” \textit{Id.} \S 16.1, at 1131.

\textsuperscript{261}. \textit{Id.} \S 16.1, at 1131–33.


\textsuperscript{264}. \textit{Id.}

\textsuperscript{265}. \textit{See Young v. Am. Mini Theatres, Inc.}, 427 U.S. 50, 70–71 (1976). The Court in \textit{Young} clearly endorsed the use of content as a dividing line for zoning regulations provided the regulation did not completely stifle the protected form of expression. \textit{Id.} Therefore, these are content-based regulations. \textsc{See Nowak} & \textsc{Rotunda}, \textit{supra} note 223, \S 16.1, at 1131–32 (discussing and providing examples of content-based regulations).

\textsuperscript{266}. \textit{See supra} note 249 and accompanying text.
are a judicially created exception to content-based strict scrutiny and not truly content-neutral. The ordinances in Young specifically and overtly regulated one type of speech and expression, that which is sexually oriented, and therefore this cannot be called content-neutral. The Court should acknowledge this anomaly and state that this is one more exception to the strict scrutiny test, which was designed to benefit communities and allow them to exercise their police powers. No such acknowledgment has been made, however, and courts have varied views when addressing sexually oriented zoning regulations, calling some content-neutral, some content-based, and some viewpoint-neutral, though they apply the secondary-effects doctrine to the zoning issues generally.

3. From Young to Alameda

Although Justice Lewis F. Powell’s Young concurrence suggested adopting the four-part test of United States v. O’Brien, the majority chose to articulate a slightly different, but related, test as it continued to wrestle with the zoning of SOBs. In City of Renton v. Playtime Theatres, Inc., the Court announced a three-part test to analyze zoning ordinances with respect to sexually oriented businesses. Under this test, three questions must be addressed: (1) whether


268. See Young, 427 U.S. at 70.


270. See, e.g., Young, 427 U.S. at 70 (discussing a content-based statute under a content-neutral analysis); PMG Int’l. Div., L.L.C. v. Rumsfeld, 303 F.3d 1163, 1172 (9th Cir. 2002) (finding that a law restricting the sale of sexually explicit magazines in military exchanges was “reasonable and viewpoint neutral”).

271. Young, 427 U.S. at 79–80. The Court observed that under the O’Brien test, a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, “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 . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest.”

272. See infra notes 273–75 and accompanying text.

the ordinance is a time, place, and manner regulation; (2) whether the regulation is content-neutral or content-based;\textsuperscript{274} and (3) if it is content-neutral, whether the “time, place, and manner regulations . . . serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.”\textsuperscript{275}

In applying this test to the facts in \textit{Renton}, the Court paralleled many of its findings in \textit{Young}.\textsuperscript{276} The \textit{Renton} Court, in its discussion of the first prong, held that because the ordinance “[did] not ban adult theaters altogether,” it was “properly analyzed as a form of time, place, and manner regulation.”\textsuperscript{277} In turning to the second prong, which concerns the distinction between content-based and content-neutral ordinances, the Court looked first to the underlying motivation for the regulation.\textsuperscript{278} The Court accepted the district court’s finding that “the City Council’s ‘predominate concerns’ were with the secondary effects of adult theaters, and not with the content of adult films themselves.”\textsuperscript{279} Consequently, after accepting the district court finding regarding the city council’s intent, the Court found the regulation to be content-neutral and not violative of First Amendment principles.\textsuperscript{280} Quoting the deferential standard set forth in \textit{Young},\textsuperscript{281} the \textit{Renton} Court went one step further in its analysis of the third prong.\textsuperscript{282} The Court rejected the finding of the Ninth Circuit—that each city must perform individualized research prior to enacting secondary-effect zoning ordinances—and held that reliance on the studies and experiences of a similarly situated city was sufficient to support the city’s assertion that its underlying goal in enacting the ordinance was to prevent deleterious secondary effects.\textsuperscript{283} In looking at the limit to alternative

\begin{itemize}
  \item \textsuperscript{274} The Court must find an ordinance to be content-neutral in order to continue with the test because the “Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.” \textit{Id.}
  \item \textsuperscript{275} \textit{Id.} at 47. The final portion references an intermediate level of scrutiny, as opposed to the strict scrutiny normally required for First Amendment issues. \textit{See Nowak & Rotunda, supra note 223, § 16.1, at 1133.}
  \item \textsuperscript{276} \textit{Playtime Theatres, Inc.}, 475 U.S. at 46.
  \item \textsuperscript{277} \textit{Id.} (“The Renton ordinance, like the one in [\textit{Young v.} American Mini Theatres} . . . merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.”).
  \item \textsuperscript{278} \textit{Id.} at 47.
  \item \textsuperscript{279} \textit{Id.} (internal citation omitted). Specifically, the Court found that “[t]he ordinance by its terms is designed to prevent crime, protect the city’s retail trade, maintain property values, and generally protect[e] and preserve[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life.” \textit{Id.} at 48 (second, third, and fourth alterations in original) (internal citation omitted).
  \item \textsuperscript{280} \textit{Id.} at 48.
  \item \textsuperscript{281} \textit{Id.} at 50 (“[A] city’s ‘interest in attempting to preserve the quality of urban life is one that must be accorded high respect.’” (quoting \textit{Young v. Am. Mini Theatres}, Inc., 427 U.S. 50, 71 (1976))).
  \item \textsuperscript{282} \textit{Id.} at 50–52.
  \item \textsuperscript{283} \textit{Id.} at 50–51.
\end{itemize}
means of communication, the Court noted that both lower courts found that the 520-acre set-aside for adult theaters was “[a]mple, accessible real estate, . . . criss-crossed by freeways, highways, and roads.”\textsuperscript{284} At bottom, the Court determined that Renton’s ordinance regulating sexually oriented businesses was valid and not violative of any constitutional rights.\textsuperscript{285}

Although the case did not involve the zoning of a sexually oriented business, \textit{City of Erie v. Pap’s A.M.}\textsuperscript{286} had the last significant effect on the \textit{Renton} test prior to the Court’s consideration of \textit{City of Los Angeles v. Alameda.}\textsuperscript{287} In \textit{Pap’s A.M.}, the city had enacted a generalized ordinance that banned nudity in all public locations.\textsuperscript{288} The Court stated that “[b]eing ‘in a state of nudity’ [was] not an inherently expressive condition.”\textsuperscript{289} Following that logic, the regulation was determined to be content-neutral and not subject to a strict scrutiny test for suppression of speech.\textsuperscript{290} The \textit{Pap’s A.M.} Court cited to \textit{Renton}, but applied the \textit{O’Brien} test, the four-prong precursor to \textit{Renton}’s three-prong test, and found the ordinance was a valid exercise of the city’s powers.\textsuperscript{291}

More significant than the final conclusion, however, was the support local governments received for their decisions to fight secondary effects. The \textit{Pap’s A.M.} Court found that cities could rely on, not only studies conducted by similarly situated cities, such as the city in \textit{Renton}, but also on judicial

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\textsuperscript{284}. \textit{Playtime Theaters, Inc.}, 475 U.S. at 53 (internal quotation marks omitted) (citing Brief for Appellants app. at 28a, City of Renton v. Playtime Theatre, Inc., 475 U.S. 41 (1986) (No. 84-1360)).

\textsuperscript{285}. \textit{Id.} at 54–55 (“In sum, we find that the Renton ordinance represents a valid governmental response to the ‘admittedly serious problems’ created by adult theaters.” (quoting \textit{Young}, 427 U.S. at 71)).


\textsuperscript{288}. \textit{Pap’s A.M.}, 529 U.S. at 283.

\textsuperscript{289}. \textit{Id.} at 289.

\textsuperscript{290}. \textit{Id.} at 290–92.

\textsuperscript{291}. \textit{Id.} at 295–97, 301–02.
conclusions from other secondary-effects cases. Combining the broad deference given to local governments in the exercise of their police powers through zoning with the ability to rely on previous judicial conclusions regarding possible secondary effects appears to give any carefully crafted legislation wide latitude to locate SOBs within a particular jurisdiction.


Although it appears that the Supreme Court has, in its evolution of the secondary-effects doctrine, reduced the required showing of a local government to uphold an ordinance, lower courts are not following lock-step. When there is doubt regarding the government’s intentions for enacting an ordinance, it is required to rebut that doubt with an evidentiary showing of the secondary effects it intended to inhibit by imposing the ordinance. This evidentiary burden is minimal; the government need only produce evidence that “fairly supports” the asserted secondary effect rationale for the regulation. However, even in light of this low evidentiary burden, the government cannot assert a post facto secondary-effect rationale for a regulation that was initially intended to restrict the distribution of sexually oriented material. Although the Supreme Court has allowed municipalities to rely on studies regarding the secondary effects on neighboring jurisdictions, lower courts appear to give less deference to these ordinances and require a local government to meet the already low standard of “fairly supports.”

292. Id. at 296–97 (“Because the nude dancing of Kandyland is of the same character as the adult entertainment at issue in Renton[ and] Young, . . . it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects.”).

293. See, e.g., New Albany DVD, L.L.C. v. City of New Albany, 581 F.3d 556, 559–60 (7th Cir. 2009) (holding that reliance on other cities’ studies was not sufficient because those cities relied on data for live shows, though the business in question was selling only take-home materials).

294. Id. at 560.


296. See White River Amusement Pub, Inc. v. Town of Hartford, 481 F.3d 163, 171 (2d Cir. 2007) (noting that the “Renton standard suggests that pre-enactment evidence [of secondary effects] is necessary” and that a city must have evidence such that it reasonably believed before enacting the regulation that it would be relevant to the issue sought to be addressed); McCrothers Corp. v. City of Mandan, 728 N.W.2d 124, 134 (N.D. 2007) (concluding a city ordinance was valid because the court was “satisfied that the predominating factor in enacting the zoning ordinances was the negative secondary effects of the adult establishments . . . , rather than an intention to restrict the First Amendment rights of [the ordinance’s challengers]”).

297. See supra note 249 and accompanying text.
V. APPLYING THE SECONDARY-EFFECTS DOCTRINE IN CONJUNCTION WITH OTHER LAND-USE CONTROLS

So long as the genetic code continues to author and, thereby, create an ineradicable human sexual drive, and modern society creates an atmosphere of intrigue, fantasy, and titillation with human sexuality, obscenity and pornography will have a ready market for entrepreneurialism. Indeed, the businesses that pander to and prey upon sexual interests and salacious curiosities will continue to reach every segment of society and every point of geography, both physical and electronic.

The extent to which a free society seeks to regulate sexual expression is problematic. What was defined as immoral or “contra bonos mores” in the twentieth century has become less of an issue in today’s liberal society. Freedom of sexual intimacy and expression are rights protected by the First

298. See Sigmund Freud, Beyond the Pleasure Principle 47–48 (James Strachey, trans., 2d ed. 1961) (“From the very first we recognized the presence of a sadistic component in the sexual instinct.”); Posner, Sex and Reason, supra note 1 (“From the genes, and perhaps from early childhood development as well, we obtain our basic sexual drive and preferences.”).

299. Lane, supra note 95, at 289; see also Gopnik, supra note 220, at E1 (discussing nudity and sexual themes in art).

300. See Lane, supra note 95, at xvi–xxi (discussing, in part, the presence and prevalence of pornography); see also Dines, supra note 96, at 47, 52 (marveling at the “staggering” size of the pornography industry). The “pornographization” of American culture has been advanced significantly by television, such as the series Sex and the City where “porn-type sex is a fixture on the show,” and in the print media by publications such as Cosmopolitan Magazine, which has, over the years, featured pedestrian suggestions for non-traditional levels of sexual gratification. Dines, supra note 96, at xxx, 105–07.

301. Zoning laws in rural communities are not capable of coping with the flux of sexually oriented businesses because “most small towns and counties do little more than segregate property into zones for residences, farms and businesses.” Howlett, supra note 155, at 3A. Thus, “freeway porn” has invaded smaller communities, settling in non-exclusionary zones. Id.

302. See Gerard, supra note 235, § 1.02, at 2–4 (discussing the increased attention given to regulating adult entertainment and businesses throughout the decades); Kelly & Cooper, supra note 171, at 15–22 (discussing the increasing prevalence of sex in the media and entertainment throughout the twentieth century).

303. See generally Cole, supra note 29 (discussing the issues faced throughout the years when trying to regulate sexual expression).


and Fourteenth Amendments. But, with every assertion of a fundamental right or liberty must come a concomitant understanding that there is a coordinate responsibility to exercise that right reasonably. Determining the reasonableness of conduct grounded in these two amendments must be fact-sensitive and guided by community standards. Broad, open-ended moral judgments should be eschewed as foundational bases for legal judgments. Indeed, advancing moral grounds as a justification for regulating personal liberties of sexual expression and association is an invalid means of enacting exclusionary land-use regulations, such as the containment of activities connected with SOBs.

Given contemporary society’s cultural decline and the acceptance of private standards of moral conduct as more relevant than an amorphous ideal of public morality that safeguards the common good, the wiser path for enforcement and regulations of SOBs would be for the state and its municipalities to use their police powers to regulate public health, rather than enforce a standard of public morality. Put simply, threats to public health from the types of promiscuous, random, unsafe sexual conduct that may often occur at SOBs can be better documented by use of the secondary-effects doctrine during the initial licensing phase of the SOB as opposed to attempting to find and prove issues of moral misconduct.

Formulating a bright-line rule to assess when questionable conduct or pornographic material rises to the level of obscenity, and thus should be strictly censured or regulated, is nearly impossible. In trying to either eliminate or contain the operation of SOBs, the most logical and common-sense approach is for legislators, land-use planners, zoning commissioners, and courts to rely upon and use several tools: exclusionary-zoning techniques and common law nuisance fortified by either moral, anticipatory, or aesthetic iterations or

306. See Lawrence, 539 U.S. at 578–79; see also Koppelman, supra note 121, at 908 n.55 (describing the Supreme Court’s protection of sexual expression under the First Amendment).
307. See Posner, Problematics, supra note 40, at 1650 (discussing moral codes as being community-specific).
308. Id. at 1639.
309. WING ET AL., supra note 170.
312. George P. Smith II, Nudity, Obscenity and Pornography: The Streetcars Named Lust and Desire, 4 J. CONTEMP. HEALTH L. & POL’Y 155, 189 (1988) [hereinafter Smith, Nudity, Obscenity and Pornography]. The level at which pornography becomes hard-core and obscene, and “utterly without redeeming social importance” is as elusive today as it was in 1964 in Jacobellis v. Ohio. 378 U.S. 184, 191 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)). In a concurring opinion, Justice Potter Stewart opined that, although he could not define, intelligibly, when pornography became hard core and thus obscene, he nevertheless “kn[e]w it when [he] s[aw] it.” Id. at 197 (Stewart, J., concurring).
models.\footnote{Daniel J. McDonald, Regulating Sexually Oriented Businesses: The Regulatory Uncertainties of a “Regime of Prohibition by Indirection” and the Obscenity Doctrine’s Communal Solution, 1997 BYU L. REV. 339, 341–42 (1997).} Although it is difficult to determine when, under nuisance law, conduct is so unreasonable as to warrant its cessation, the \textit{Restatement (Second) of Torts}\footnote{See \textit{RESTATEMENT (SECOND) OF TORTS} §§ 827, 828 (1979).} provides a workable construct for making that determination. Both strengthened and guided by the doctrine of secondary effects, nuisance actions of all types serve as an additional tool in the arsenal of legal weapons that may be used to regulate effectively SOBs.

Through either dispersal or concentration of SOBs, the practical effect of these models of exclusionary zoning is simply to push their location to other areas within a community or its neighboring regions.\footnote{See \textit{GARNETT}, supra note 113, at 1103, 1108.} When strict licensing standards for initial start-up business operations are introduced as part of a land-use policy for regulating SOBs, however, a stronger, balanced response is achieved.\footnote{See supra text accompanying notes 188–91.}

\section*{Conclusion}

The implementation of a community-based standard of morality for proper regulatory control of SOBs will always present an issue of unpredictability inherent in its underlying flexibility.\footnote{See Smith, Nudity, Obscenity and Pornography, supra note 312, at 187–89 (discussing the inability to concretely define moral perceptions, specifically with regard to obscenity); see also Pettys, supra note 76, at 1215 (observing that “perpetual moral conflict is simply inevitable” because the lines between normative standards for public and private morality are largely ephemeral in today’s society and, thus, subject to conflict at judicial, legislative, and regulatory levels of government).} For the content-neutral regulation of sexually oriented businesses, the only limiting requirement analyzed, aside from ensuring adequate alternative channels of communication, is whether the regulation serves a significant government interest.\footnote{See supra text accompanying note 249.} Further, although the Supreme Court has held repeatedly that preventing a multitude of secondary effects is a significant government interest, the manner in which that goal could be served has not been meaningfully defined or limited.

The secondary-effects doctrine places great power, and corresponding responsibility, in the hands of each local community, but it does so at the peril of uniformity. Although uniformity is not an absolute necessity in the federalist system, the type and severity of secondary effects that may serve as a justification for regulating the location of a sexually oriented business should be clarified. The time, place, or manner restrictions imposed can be left up to each locality to tailor to their needs, but the triggering events for those restrictions must be defined more clearly.