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Zoning Obscenity: Or, the Moral Politics of Porn

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INTRODUCTION

The last decade has climaxed a trend, burgeoning since the Second World War, which has thrust pornographic land uses into the midst of our major cities. The closet doors containing "stag films" and "dirty books" and the semi-legal clubs and bars featuring explicit sexual entertainment have opened wide. It has been suggested by some that the commercial pornography explosion "proves that a nation gets the kind of art and entertainment it wants and is willing to pay for . . . ."[1] But in recent years a growing recognition of the inability of judges to distinguish what is obscene from what is not,[2] as well as considerable public indignation at the growth of pornographic land uses[3] and their adverse impact on surrounding land values, have led to attempts to regulate pornography through restrictive zoning.[4] Such attempts raise the thorny political, moral and legal questions[5] that are explored in this article.

This article first traces the consequences of the proliferation of pornographic land uses in Boston, Detroit and New York City as examples of the national trend, and analyzes the two basic alternatives for attacking the problem: creation of a "red light" district and anti-

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1. Fahringer and Brown, *The Rise and Fall of Roth—A Critique of Recent Supreme Court Obscenity Decisions*, 62 KY. L.J. 731, 766-67 (1974).

2. *See* notes 97-138 & accompanying text *infra*.

3. U.S. NEWS AND WORLD REPORT, Sept. 13, 1976, at 75-76; TIME, April 5, 1976, at 58-63.

4. *E.g.*, DETROIT, MICH., ZONING ORDINANCE §§ #32.0007, #62.0000, #66.0103 (eff. Nov. 2, 1972). New York City proposed a similar ordinance which is discussed at length in this article. *See* text accompanying notes 45-96 *infra*.

5. Lerner, *Some Sexual Plagues*, N.Y. Post, Dec. 6, 1976, at 43, col. 1.

concentration zoning aimed at dispersal of pornographic land uses.[6] After a brief review of *Young v. American Mini Theatres, Inc.*,[7] where the Supreme Court upheld Detroit's dispersal ordinance, the article presents a brief history of New York City's unsuccessful attempt to adopt a similar ordinance tailored to its own land use patterns.

What follows is an attempt to elucidate the legal climate within which pornography flourishes and withers by examining the post-World War II Supreme Court "obscenity" decisions, which, following the Warren Court's increasing emphasis of first amendment rights, exhibit a trend toward containment of these rights. The Supreme Court's decision in *Young* is shown to be part of this containment policy and is examined with a view toward predicting the Court's likely response to variations on the Detroit scheme such as those proposed unsuccessfully by the New York City Planning Commission in 1977. Among the variations considered is the amortization of nonconforming pornographic land uses on traditional zoning grounds. The roles of public and private nuisance actions are also briefly examined.

The article concludes with an evaluation of the future potential of zoning pornography, which the Burger Court has apparently sanctioned in an effort to replenish the "obscenity" concept partially exhausted by the Warren Court. *Young*'s implications for further zoning incursions into the area of first amendment guarantees is assessed, and some reflections are offered on the affinity between zoning and morality, suggesting a way to resolve the contradiction inherent in entrusting interpretation of first amendment rights to local zoning authorities. Throughout this article particular attention is paid to the New York City experience.

I. The Rise of Pornography and Municipal Attempts to Regulate It: A Tale of Three Cities

A. *Boston and Its "Combat Zone"*

Through an urban renewal program in the late 1950's, Boston cleared the Scollay Square area of its adult use concentrations and transformed it into something of a new civic center. Unlike Detroit, Boston made no attempt to prevent reconcentration of adult uses.[8]

6. Baker, *No Biz Like Sex Biz*, N.Y. Times, Nov. 14, 1976, at 37, col. 5 (offers a sophisticated parody of these alternatives).

7. 427 U.S. 50 (1976).

8. New York City, New York, Mayor's Office of Midtown Manhattan Planning and

By the mid-60's, a new area of concentration began forming; topless bars and cabarets, adult movie theatres, pinball parlors, and adult bookstores proliferated in the lower Washington Street area near the central business district, an area popularly designated the "Combat Zone."[9] Over a decade, the Combat Zone quite unaccidentally became the center for all but a handful of adult uses in the Boston area.[10]

In an effort to keep these uses from spreading to other vulnerable areas, Boston shed its puritanical image and amended its zoning ordinance to establish the Combat Zone[11] formally as "the most logical place" for a designated adult use district; "adult use" became a distinct and apparently readily regulated land use. By regulating rather than eradicating adult uses, Boston sought to contain them in a small, specially-designated area of the city. It was expected that Boston could more readily police these contained uses and substantially prevent them from having a blighting effect on the rest of the city. In addition, the Combat Zone could be easily avoided by those wishing to have no contact with pornographic establishments. Boston banned or made conditional the establishment of adult uses which excluded minors everywhere in the city except in the business-entertainment district ("Adult Entertainment District").[12]

The *effect* of this zoning designation, while achieving the goal of containment, was to create more serious abuses and to exacerbate already-existing enforcement problems in the district.[13] Prior to the zoning amendment, illegal activities such as prostitution, gambling, and the showing of "hard-core" films and books were carried on discreetly. The designation of the area by the city as the "Adult Entertainment District", however, assured the final disintegration of the semblance of law-and-order in the Combat Zone. Perpetrators of crimes sensed a certain immunity from law enforcement and the rest of the populace experienced a feeling of helplessness against the threat of criminal ac-

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Development, Draft Report on Adult Use Zoning, ch. V, at 2 (Oct. 16, 1976) [hereinafter cited as Midtown Report] (A copy of this report is on file with the Counsel's Office of the New York City Planning Commission). All factual references to the growth of pornography in Detroit, Boston and New York in the text of the article are taken from this report.

9. The Combat Zone consisted of a two-block area bounded by the retail core on the north, the Chinatown residential area on the east, the Tufts & New England Medical Center complex on the south, and the Boston Common/Park Square development on the west and northwest. Midtown Report, *supra* note 8, ch. V, at 1.

10. Midtown Report, *supra* note 8, ch. V, at 1.

11. BOSTON, MASSACHUSETTS, ZONING CODE, text amendment no. 38 (1974).

12. Midtown Report, *supra* note 8, ch. V, at 3.

13. N.Y. Post, Nov. 30, 1976, at 1, col. 4; Midtown Report, *supra* note 8, ch. III, at 3, to ch. V, at 3.

tivity in the district. This sense of criminal license effectively undermined the planning goals of the zoning amendment, which had included some cosmetic attempts at urban design. The December, 1976 fatal stabbing, in the Combat Zone, of a Harvard University football player who had argued with prostitutes over an alleged pickpocketing, and the murder in the summer of 1977 of a 17-year old suburban girl last seen soliciting in a Combat Zone bar, among other incidents, have caused sober second thoughts regarding the wisdom of singling out one special commercial sex district in a large urban metropolis.[14]

B. *Detroit's Dispersal Plan Receives Supreme Court Approval*

During the bulldozing of its skid-row district in 1962, the City of Detroit enacted a zoning ordinance that placed locational restrictions and concentration limits on certain land uses ordinarily found in run-down areas.[15] By its action, Detroit hoped to prevent a re-concentration of those uses that had stimulated the growth of a skid-row, and which had been forced out of the area by urban renewal.

Detroit's plan was initially successful. In the early 1970's, however, the number of adult entertainment uses began to increase. In 1969, Detroit had only two adult bookstores, two adult movie theatres, and two topless bars. By 1972, there were well over one hundred adult entertainment uses in existence.[16]

After Detroit's 1962 locational restrictions were working effectively, the city amended them in 1972 to include regulation of adult entertainment establishments.[17] The inclusion of adult bookstores, adult motion picture theatres and adult mini-theatres within the locational and anti-concentration criteria of an anti-skid row zoning ordinance was challenged by operators of two adult motion picture theatres in *Young*.[18]

The 1972 amendments sought to disperse the locations of adult theatres throughout the city. Adult theatres could not, without special waiver, be located within 1,000 feet of any two other "regulated uses," nor within 500 feet of a residential dwelling. "Regulated uses" re-

14. *See* authorities cited in note 13 *supra*.

15. DETROIT, MICH., ZONING ORDINANCE § 742-G (1962). A state's right to require that particular businesses be located at specified distances from one another has been approved in a number of zoning cases. *See, e.g.*, O'Connor v. Board of Zoning Appeals, 140 Conn. 65, 98 A.2d 515 (1953); Glackman v. City of Miami Beach, 51 So. 2d 294 (1951).

16. Midtown Report, *supra* note 8, ch. VI, at 1.

17. Young v. American Mini-Theatres, Inc., 427 U.S. at 54.

18. *Id.* at 58.

ferred to ten different kinds of establishments, including adult bookstores, adult movie theatres, adult mini-theatres, certain cabarets, bars, taxi dance halls, and hotels. Establishments presenting "material distinguished or characterized by an emphasis on matter depicting . . . 'Specified Sexual Activities' or 'Specified Anatomical Areas' " were considered to be of an adult character.[19]

The city's regulation of adult entertainment establishments was upheld in part in the federal district court[20] and subsequently struck down by the Court of Appeals for the Sixth Circuit.[21] The Supreme Court granted certiorari to review the case[22] and on June 24, 1976 overturned the Sixth Circuit's decision.[23] In a 5-4 decision, the Court sustained Detroit's application of its zoning ordinance to movie theaters, bookstores, and peep shows featuring pornography. Erotic content of expression was found to be a valid basis for creating a zoning classification restricting the location of such uses.

Justice Stevens' plurality opinion[24] rested primarily on the view that "it is manifest that society's interest in protecting this type of expression [erotic materials] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment."[25] After carefully noting the absence of any impact on the operation of existing establishments, Justice Stevens found the ordinance's regulatory burden on First Amendment rights

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19. *Id.* at 53.

20. Nortown Theatre Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974). The District Court held invalid the original 500-ft. restriction which was measured from any building containing "a residential dwelling or rooming unit." *Id.* at 369-70. Subsequently, Detroit amended its ordinance to prohibit adult theaters, within 500 feet of a residential zone. This amendment was not before the Supreme Court in *Young*. Young v. American Mini-Theatres, Inc., 427 U.S. at 52 n.2.

21. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975), *rev'd*, 423 U.S. 911 (1975).

22. Gribbs v. American Mini Theatres, Inc., 423 U.S. 911 (1975).

23. 427 U.S. 50.

24. Justice Stevens' opinion was joined by Chief Justice Burger and Justices White and Rehnquist. Justice Powell filed a separate concurring opinion. *Id.* at 73.

25. *Id.* at 70. Justice Stevens continued:

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theatres of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

Id. at 70-71.

to erotic speech to be "slight."[26] Showing great deference to "the city's interest in attempting to preserve the quality of urban life,"[27] Justice Stevens concluded that "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."[28]

Justice Stevens rejected the plaintiffs' attack on the ordinances as being unconstitutionally vague in defining "adult motion picture theatre" as "an enclosed building used for . . . presenting *material distinguished or characterized by an emphasis on matter* depicting, describing or relating to, specified sexual activities or specified anatomical areas."[29] Finding that plaintiffs' cinema operations were not borderline but "unquestionably"[30] subject to the Detroit ordinance, Justice Stevens refused to allow plaintiffs standing to raise the vagueness claim:

> Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.[31]

Justice Powell's concurrence rejected Justice Stevens' notion that "nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression."[32] Instead, after "a careful inquiry into the competing concerns of the State and the interests protected by the guaranty of free expression," he boldly predicated his support of the Detroit ordinance on the primary importance of the local zoning power.[33] Under Justice Powell's approach, both the significance of the police power objective and the degree of interference with speech are weighed. Finding that "the interests furthered by this ordinance are both important and substantial"[34] and that its "impact on these [speech] interests is incidental and

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26. *Id.* at 71-72 n. 35. Justice Stevens continued: "There are myriad locations in the City of Detroit which must be over 1000 ft. from existing regulated establishments." *Id.* (quoting district court opinion, 373 F. Supp. 363, 370 (E.D. Mich. 1974)).

27. *Id.* at 71.

28. *Id.*

29. *Id.* at 53 n.5. (emphasis added).

30. *Id.* at 59.

31. *Id.* at 61. Justice Blackmun's dissenting opinion takes the plurality opinion to task on this point. *Id.* at 96.

32. *Id.* at 73 n.1.

33. *Id.* at 76.

34. *Id.* at 80. Justice Powell continued:

> Without stable neighborhoods, both residential and commercial, large sections

minimal,"[35] Justice Powell concluded that "[t]he Detroit zoning ordinance . . . affects expression only incidentally, and in furtherance of governmental interests wholly unrelated to the regulation of expression."[36]

If one reads the plurality and concurring opinions together, it becomes clear that a majority of the Court has subjected the Detroit zoning regulations to the close scrutiny test—weighing the compelling state interest in quality of life against the fundamental individual right guaranteed by the first amendment—a test not normally applied to social and economic legislation.[37] A minimal scrutiny test was used, for example, in *Village of Belle Terre v. Boraas*,[38] where a restrictive zoning definition of "family" was challenged as a violation of the fourteenth amendment's equal protection clause. Even though *Young* found that a zoning prohibition of the location of adult motion picture theatres within 1,000 feet of two other regulated adult uses does not violate either the first amendment or the equal protection clause of the fourteenth amendment, its use of the close scrutiny test signalled a

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> of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values. While I agree with respondents that no aspect of the police power enjoys immunity from searching constitutional scrutiny, it also is undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life."

Id. (quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)).

35. *Id.* at 78. Justice Powell continued:

> Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them. The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message to reach an audience. On the basis of the Detroit Court's finding, . . . it appears that if sufficient market exists to support them the number of adult movie theaters in Detroit will remain approximately the same, free to purvey the same message. To be sure some prospective patrons may be inconvenienced by this dispersal. But other patrons, depending upon where they live or work, may find it more convenient to view an adult movie when adult theaters are not concentrated in a particular section of the city.

Id. at 78-79 (footnotes omitted).

36. *Id.* at 84.

37. *See* text accompanying notes 166-85 *infra*. A presumption of validity has generally attached to zoning regulations following Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Zoning regulations if found rational, non-discriminatory and non-confiscatory, have been upheld against 14th amendment challenge without application of the "close scrutiny" test.

38. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-18, at 975 (1978).

cautionary "flashing amber" at best, rather than the "green light" sought by local political interests anxious to bring these uses under control.

Detroit has apparently had significant success in meeting its goals through its amended ordinance. Since 1972, when the ordinance was passed, there has been an increase of only 10 adult entertainment uses in the City. Of these 10, five were bookstores, three were topless bars and two were movie theaters. Now that its ordinance has been approved by the Court, Detroit has moved to close the five bookstores and two movie theatres which did not locate in compliance with the ordinance. The three new topless bars located either in compliance with the ordinance or through the neighborhood waiver provision[39] and therefore are legal uses. The Detroit Law Department credits the ordinance with these rather enviable results.[40]

C. *New York City—The Impact of Pornography*

In 1965, there were a total of nine "adult uses" in New York City: four adults-only movie theatres, three adults-only bookstores, and two bars featuring "go-go" dancers.[41] All were located in the general Times Square/Theatre District area. Peep shows were non-existent. Massage parlors in their present advertised form were unknown, although one may presume the existence of discreet houses of prostitution in and around the City. In 1976, however, there were a total of 245 adult uses in the City, including 62 adult theatres (43 in Manhattan), 93 massage parlors, and over 62 bookstores and peep shows or combinations.[42] Moreover, such uses not only increased in number, but spread from their original concentration in the Times Square/Theatre District area to other parts of Manhattan, including East Midtown/Lexington Avenue, East 14th Street, City Hall/Wall Street, and Downtown Brooklyn.

No decisions to make major capital investments (*i.e.*, new office

39. The ordinance authorizes the Zoning Commission to waive the 1,000-foot restriction if it finds:

> a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed. b) That the proposed use will not enlarge or encourage the development of a "skid row" area. c) That the establishment of an additional regulated use in the area will not be contrary to any program of neigh[bor]hood conservation nor will it interfere with any program of urban renewal. d) That all applicable regulations of this Ordinance will be observed.

427 U.S. at 54, n.7.

40. Midtown Report, *supra* note 8, ch. VI, at 3.

41. *Id.*, ch. I, at 1.

42. *Id.*, ch. I, at 1-2.

buildings) in the Times Square/Theatre District area have been made since 1965. Although other factors such as high local taxes, high labor costs, and high energy costs undoubtedly played a major role in decisions not to invest in this area, located just west of Manhattan's midtown central business district, the negative image created by the increasing concentration of adult entertainment uses did nothing to counteract these economic indicators. Large numbers of noisy groups, peddlers, handbillers, and garish sexplicit advertising on the streets tended to clash with headquarters buildings, office users, and tourist visitors in search of the area's legitimate theatres, restaurants, and shops.[43] At the same time that adult entertainment uses were proliferating, economic decline occurred on West 42nd Street. For example, the ratio of tax arrears to tax assessment for the Times Square/Theatre District area was 2½ times greater than for all of Midtown in 1975. In 1972 it had been only twice as great.[44]

These collective problems led to a 1975 proposal to sharply restrict the location of "physical culture establishments" (massage parlors) in the Times Square area and to amortize non-conforming facilities within one year. The proposal was adopted by the City and became part of its zoning resolution.[45] Its amortization features have been uniformly sustained by the courts.[46]

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43. Public hearings revealed that the former manager of the Royal Manhattan Hotel attributed that hotel's difficulties and eventual closing to the deterioration of Eighth Avenue which was brought about by the great increase in numbers of physical culture establishments located there. Several businessmen formerly located in either the Theatre or Clinton districts indicated that they were forced to relocate when a physical culture establishment moved into an adjacent store. An advertising agency representative testified that recruitment of personnel to work in this area was very difficult and that the rate of job turnover had become very high because of the abundance of adult uses located in the area. Residents of Clinton, an adjacent residential community, described dense sidewalk "streetwalkers" solicitation emanating from the nearby physical culture establishments, which was incompatible with residential living and the presence in the community of numerous public and parochial schools. N.Y. City Planning Commission Report CP-23116, cal. no. 22 (Dec. 10, 1975) (adopted by Board of Estimate on Jan. 8, 1976 (Cal. No. 83)). The report is on file at the N.Y. City Planning Commission. *See* Midtown Report, *supra* note 8, ch. II, at 3, 5-6.

44. Other economic indicators also illustrate Times Square's decline. During the period of 1972-1975, tax arrears on West 42nd Street increased 167%. This compared unfavorably with the overall increase for all of midtown of 141%. From 1971 through 1973, sales tax revenue from the Theatre District dropped 43%, while city-wide sales tax revenue increased 11%. The Theatre District also experienced a 5% decrease in retail jobs during this period, as opposed to a city-wide loss of 2%. Midtown Report, *supra* note 8, ch. II, at 3-4.

45. NEW YORK CITY, NEW YORK, ZONING RESOLUTION, Special Theatre District § 81-021, Special Clinton District § 96-524.

46. *See* Walsh v. Anmark Enterprises, Inc., N.Y.L.J., Dec. 5, 1977, at 10, col. 5, and cases cited therein.

It came as no surprise that legitimate commercial and residential Times Square interests hailed *Young*, which they claimed gave local government a zoning green light[47] to apply traditional incompatible use classifications to deal with the problem of adult motion picture theatres, adult bookstores, peep shows and topless bars.

D. *New York City's Attempt to Control Pornography*

Whatever the color of the traffic light, *Young* did signal that adult use regulation experiments would be seriously entertained, at the possible expense of first amendment freedoms. After almost two decades of frustration with the Court's libertarian decisions narrowly confining the objective of obscenity prosecution,[48] city halls now, at last, had a promising means of controlling pornography. To the extent that adult cinemas and bookstores purvey obscene as well as constitutionally protected material, the zoning approach provides means of controlling such material in addition to the regulation of obscenity.

The closeness of the *Young* decision and the majority's use of a close scrutiny test,[49] however, led city planners to proceed with caution in adopting the Detroit techniques to differing land use patterns.[50] A delicate balance had to be struck between community land use pressures and civil libertarian concerns. Owing largely to the difficulties of satisfying such competing interests while maintaining respect for the Court's cloudy strictures against interference with first amendment rights, New York City in the spring of 1977 stumbled into an inextricable political morass from which legislative enactment of adult use zoning controls proved impossible. A description of the political pitfalls along the seemingly inviting route sanctioned by the Court in *Young* may prove instructive to the uninitiated. It all began innocently enough . . . .

After the *Young* decision, Mayor Beame's Midtown Manhattan Action Office together with the Department of City Planning prepared zoning recommendations to deconcentrate and limit adult uses based on a comprehensive study of land use patterns in New York City.

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47. Previous analysis of *Young* demonstrates that the Court's decision, by stressing a close scrutiny approach, has signalled a "flashing amber" rather than a "green" light. *See* text accompanying notes 25-38 *supra*.

48. *See* notes 97-138 and accompanying text *infra*.

49. *See* text accompanying notes 36-38 *supra*.

50. Appendix B lists the major cities across the country which have adopted and rejected adult use ordinances and characterizes the alternative chosen—*e.g.*, Detroit-type ordinance or Boston "combat zone" type.

Their legislative form was closely patterned on the Detroit model.[51] For analytical purposes, the legislation can be broken down into five components: (1) definition of adult uses, (2) location requirements, (3) anti-concentration formulae, (4) amortization of non-conforming uses, and (5) exemption or variance criteria and procedures therefor. A description and discussion of these components follows.

(1) *Definition of adult uses:* Five categories of adult use were defined: adult bookstore, adult motion picture theatre, adult coin-operated entertainment facility (peep show), adult "topless" entertainment establishment (topless bar), and adult physical culture establishment (massage parlor).[52] The first four categories presumptively fell within the protection of the first amendment[53] and were accordingly defined in a manner closely following that adopted by Detroit and impliedly sanctioned by the *Young* decision. These uses were defined as having their primary or predominant[54] activity distinguished or characterized by an emphasis on "specified sexual areas" or "specified sexual activities." The specified areas or activities were in turn defined as in the Detroit ordinance and referred to sexual parts of the human anatomy in various states of arousal.[55] The fifth category of adult use was defined as an establishment which offered massage or body rubs by members of the opposite sex. Such establishments enjoy no first amendment protection[56] and were to be prohibited on a nuisance ra-

51. N.Y. City Planning Comm'n, Report N 760137 ZRY, cal. no. 23, at 11-27 (Jan. 26, 1977).

52. All five categories in their "non-adult" counterparts were found in the pre-existing zoning resolution classifications of use, *e.g.*, motion picture theaters, bookstores, etc.

53. For a discussion of topless bars and the first amendment, see Note, *Topless Dancing and the Constitution: A New York Town's Experience,* 25 BUFFALO L. REV. 753 (1976).

54. The Detroit ordinance used the words "substantial or significant." Young v. American Mini-Theatres, Inc., 427 U.S. at 53 n.5.

55. These definitions were as follows:

'Specified Sexual Activities' [are]:

1. Human genitals in a state of sexual stimulation or arousal;
2. Acts of human masturbation, sexual intercourse or sodomy;
3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

'Specified Anatomical Areas' [are]:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
2. Human male genitals, in a discernably turgid state, even if completely and opaquely covered.

Id. at 53 n.4.

56. As recently as 1976, the Supreme Court, in denying certiorari, let stand a lower court decision upholding a Philadelphia, Pa. ordinance which prohibited a masseur or

tionale one year after the legislation's effective date in all districts of New York City.[57]

(2) *Locational requirements:* Adult uses were barred from locating in all zoning districts of the city except for regional and downtown commercial zones. Regional commercial districts were already mapped in all five boroughs of the city as a part of its comprehensive zoning ordinance,[58] and downtown commercial zoning classifications existed in Manhattan and Brooklyn. Thus, while non-adult cinemas, bars and bookstores were allowed in all commercial and industrial zones as compatible with other commercial or industrial uses therein permitted, adult uses were restricted on traditional land use grounds to areas where they would not adversely impact surrounding development. No adult use was permitted to locate within 500 feet of a residential district, even on a site within a regional or downtown commercial zone.[59] These restricted locations for adult uses should be contrasted with the pre-existing zoning ordinance which, being pornography-blind, allowed adult uses to occupy structures in any commercial or industrially-zoned area regardless of neighborhood character or proximity to residence.

(3) *Anti-concentration formulae:* Within regional commercial zones no more than two adult uses were permitted within 1000 feet of each other; within downtown commercial zones as many as three adult uses were permitted within 1,000 feet of each other. The comparatively more intensive development of the downtown area followed from a finding of lesser impact in such areas of high density,[60] thus permitting a somewhat greater concentration. For purposes of measur-

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masseuse from treating a person of the opposite sex. Colorado Springs Amusements Ltd. v. Rizzo, 524 F.2d 571, 576 (3d Cir. 1975), *cert. denied,* 428 U.S. 913 (1976). In that case, the Third Circuit Court of Appeals relied on earlier Supreme Court dismissals in Smith v. Keator, 419 U.S. 1043 (1974), *dismissing appeal from* 285 N.C. 530, 206 S.E.2d 203 (1974); Rubenstein v. Town of Cherry Hill, 417 U.S. 963 (1974), *dismissing appeal from* No. 10,027 (N.J. Super. Jan. 29, 1974); and Kisley v. City of Falls Church, 409 U.S. 907 (1972), *dismissing appeal from* 212 Va. 693, 187 S.E.2d 168 (1972).

57. The restrictions on massage parlors, *see* text accompanying note 45 *supra,* adopted by the City in 1975 applied only in the Times Square area, while the remainder of the City was blanketed with a one-year moratorium on new parlors. The proposal under discussion here affected new and existing parlors in the rest of the city.

58. Most zoning classification systems differentiate and distribute permissible commercial uses among local neighborhood, regional and downtown commercial districts. Commercial uses are not typically allowed in residential districts.

59. *See* note 20 *supra.*

60. In addition to distribution of uses, typical zoning ordinances differentiate among areas based upon their intensity of use. Thus, bigger buildings will be permitted in downtown commercial districts than in either outlying neighborhoods or regional shopping districts.

ing concentration, each adult use was regarded as a primary use; a pornography "supermarket" or "department store" containing a cinema screen, a book counter and a peep show machine would therefore exhaust the concentration quota of three adult uses in a downtown zone.

(4) *Amortization of non-conforming uses:* All adult uses within 500 feet of a residential district were required to terminate within one year.[61] The amortization provisions provided further that, beyond 500 feet from a residential district where the concentration of "adult uses" exceeded the level permitted (two or three uses within 1,000 feet, depending on the commercial district), the number of these uses would be reduced to the specified concentration level permitted. This meant that within one year from the date of enactment of this legislation, those "adult uses" located in an area which is concentrated with "adult uses" (even though situated more than 500 feet from a residential district) would be subject to amortization measured by their proximity to the residential district. Those "adult uses" closest to the residential district would be amortized first. The process would continue until the required level of concentration was reached.

Amortization provisions in zoning ordinances across the United States have won a fair measure of judicial approval.[62] Under the amortization approach, which has generally been limited to highly obnoxious uses, the use is assigned a period of permitted non-conformity during which time it may continue to exist and function—but at the expiration of that time, it must terminate.[63] The rationale for the

61. Detroit had not used this approach.

62. R. ANDERSON, AMERICAN LAW OF ZONING § 6.64 (2d ed. 1976).

63. Primarily, zoning is a future-oriented method of land-use regulation. The regulation of pre-existing non-conforming uses has, however, assumed greater importance as it has become clear that these uses not only refuse to disappear, but frequently prosper due to their newly-acquired monopolistic position. This problem is particularly serious where the non-conforming uses are so undesirable, as is the case, for example, with junkyards and clusters of adult uses, as to defeat the purposes of the overall zoning plan.

Placing restrictions on non-conforming uses is an alternative to eliminating them entirely via amortization. Such restrictions have included limitations on expansion, restrictions relating to repair, and prohibition of major alteration. This approach, however, often causes the non-conforming uses to become even greater blights on the community because of the various restrictions placed upon those who would undertake needed improvements.

Summary termination of non-conforming uses is generally not permitted. The courts have pointed out the serious constitutional problems associated with an attempt to terminate uses of property summarily, particularly where this would result in severe economic loss to the property owner. *See, e.g.,* Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930).

Perhaps the most equitable, but certainly the most politically controversial, termina-

amortization doctrine relates to the substantiality of the property owner's investment. The greater the invested equity, the longer the period of amortization required to recapture invested equity and plan for relocation prior to termination. Critical to the validity of an amortization provision is the adequacy of the amortization period, which will vary depending on the use to be amortized.[64]

Non-conforming uses which have typically been candidates for amortization include outdoor uses,[65] uses where the only buildings employed are accessory or incidental to such uses (*e.g.*, junkyards),[66] and uses maintained in connection with a conforming building (*e.g.*, plumbing business in a one-family house).[67] New York City officials viewed the theatres, bookstores and bars affected by the proposal as conforming structures readily adaptable to a myriad of conforming tenancies once the "adult" occupants vacated their premises.[68]

A recent New York court decision[69] sustaining New York City's earlier one-year amortization requirement for non-conforming physical culture establishments located within the Times Square area reaffirmed the basic principles governing the amortization concept: amortization of land that is open or being put to a use of far less economic consequence than it might be, or amortization of non-conforming uses of premises that can be put to a conforming use, coupled with the availability of a reasonable period of time within which to amortize investment or "loss," will generally assure judicial approval of an amortization provision.

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tion technique is the use of the municipal power of eminent domain. A properly designed condemnation program has the advantage of being fair to all parties while it efficiently and equitably distributes the costs of implementing the zoning ordinance among the community's property owners, who will presumably benefit from the successful implementation of the ordinance. It seems indisputable that the elimination of non-conforming uses would be a public purpose for the State's exercise of its eminent domain powers.

64. R. ANDERSON, *supra* note 62, §§ 6.66-6.68.

65. *See, e.g.*, Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602 (1959).

66. *See, e.g.*, Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958).

67. *See, e.g.*, City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

68. The zoning ordinance in Seattle provides for amortization of non-conforming adult motion pictures theaters within 90 days. SEATTLE, WASH., ZONING ORDINANCE 1055, § 533 (May 29, 1976). The zoning ordinances in both Atlanta, *see* ATLANTA, GA., ZONING ORDINANCE § 26.49, and Rochester, New York, *see* ROCHESTER, N.Y., ZONING LAW § 115.96J, provide for amortization of non-conforming adult uses within one to four years based on the "value" of the use.

69. *See* Walsh v. Anmark Enterprises, Inc., N.Y.L.J., Dec. 5, 1977, at 10, col. 5 (Sup. Ct. Dec. 2, 1977) summarizing recent cases upholding the amortization requirement.

(5) *Exemption or variance criteria and procedures:* The proposed ordinance allowed the Board of Standards and Appeals and the City Planning Commission respectively to exempt individuals from the amortization and new location requirements of the legislation, despite their failure to meet the concentration restrictions, as long as adverse impact findings could be negated. This safety valve procedure was felt essential to withstand a challenge to the reasonableness of the regulation.

When the complex locational restrictions were mapped in the five boroughs of the City, it was found that Manhattan continued to offer substantial locations for adult use, although at lesser concentration levels, and that the Bronx, Queens and Staten Island allowed scattered adult use sites. No sites were possible in Brooklyn, however, because of the dimensional stinginess of Brooklyn's regional and downtown commercial zones, which are closely ringed by residential zones.[70]

At the public hearing on this proposal before the City Planning Commission,[71] reaction could be classified according to the following groups, most of whom were opposed to the legislation, but often for radically different reasons: (1) support from legitimate businesses, property owners and residents of the adult use capital of the city—Times Square—as well as medical professionals and general residents of the borough of Manhattan; (2) opposition from residents of the Bronx, Brooklyn, Queens and Staten Island who feared dispersion of the Times Square porn concentration into their boroughs; (3) opposition from civil libertarians on grounds of first amendment constitutional violations; (4) opposition from evangelical quarters to an explicit land use recognition and legalization of immoral activities.

Despite this opposition, the Commission decided to proceed with the legislation. Crime statistics offered as part of the public record dramatically illustrated the adverse impact of adult use concentrations in the Times Square area and were a compelling reason for early Commission action.[72] The number of felonious criminal complaints in areas of adult use concentration were comparatively high, according to a New York City Police Department study.[73] This study classified those areas containing one or more adult uses as "morals-prone" posts. Verified

70. This accidental—indeed unintentional—exclusion of Brooklyn, dictated by choice of city-wide mapping criteria, was used by representatives of other boroughs at a later date to support exclusionary amendments which sought to limit adult uses solely to Manhattan. *See* text accompanying note 81 *infra.*

71. *See* note 43 *supra.*

72. *See* N.Y. City Planning Commission, Report N 760137 ZRY, cal. no. 23, at 6 (Jan. 26, 1977).

73. *Id.*

complaints from these posts in Midtown were 69.5 percent higher than the verified complaints from the non-morals-prone posts. Morals-prone posts constituted only 34.5 percent of the total number of posts in these districts of Manhattan, yet they accounted for 47.1 percent of the total complaints. Complaints for felonious assault were 142.3 percent higher and grand larceny complaints were 88.9 percent higher in morals-prone than in non-morals-prone posts.[74] This data clearly supported the anti-concentration approach of the Commission's adult use legislation.

The Commission was reasonably confident that the legislation it presented at the initial public hearing would withstand civil libertarian lawsuits. Although the proposal included amortization of non-conforming uses—an element lacking in Detroit's ordinance—other elements of the New York proposal were less restrictive of speech than Detroit's legislation. For example, New York's "primary and predominant" definition, apart from being more administratively quantifiable[75] and workable than Detroit's "substantial or significant" standard,[76] would have permitted a substantial level of adult communication within the commercial zones where "adult uses" were prohibited—a level sufficient to satisfy all but the most fanatic first amendment guardian. As long as adult films, books, and live entertainment did not become the measurably dominant message in their respective cinemas, bookstores and bars, such "speech" was not constrained in any commercial zone. In the regional and downtown commercial districts, even "speech" which consisted primarily and predominantly of adult messages for adult audiences was permitted. In addition, the presence of safety valve procedures to allow exceptions to the amortization requirements and new location restrictions seemed to lend to the regulations a flavor of reasonableness comparable to that found in the Detroit scheme.[77]

Detroit had not needed an amortization provision; its skid-row district concentration *had already* been bulldozed out of existence by urban renewal and blocked by zoning from returning. Times Square on the other hand was never regarded by the City as an appropriate area for an urban renewal project. For the City simply to proscribe new adult uses from locating in the area and leave the existing con-

74. *Id.*

75. A standard dictionary definition of "predominant" is "superior in number." MERRIAM-WEBSTER DICTIONARY (pocket ed. 1974). In the case of films, books and the like a "predominant" use presumably would constitute 51% of screen time in the case of the motion picture theater, and 51% of stock in trade in the case of the bookstore.

76. Young v. American Mini-Theatres, Inc., 427 U.S. at 53 n.5.

77. Detroit also had used a safety valve variance procedure. *Id.* at 54 n.7.

centrations to fester there was unthinkable. The crime, the nuisance, the adverse impact on still healthy land uses in the area was growing daily.

Land use law sanctions amortization of obnoxious uses where their premises can be put to a conforming use.[78] Times Square's rampant adult theatres, bookstores, peep shows, and bars all had available alternative conforming uses—among them non-X-rated films and books, retail uses, shops and restaurants. While these uses might not pay the top rents generated by pornography, zoning need not allow the highest and best use of land.[79]

After receiving the approval of the Commission, the legislation travelled to the Board of Estimate pursuant to New York City Charter requirements for further consideration and ultimate enactment. The Board has 60 days within which to vote a zoning amendment up or down,[80] and some of its members lost no time in getting word to the Commission that further modifications were necessary if the legislation was to become law. These suggested modifications varied according to the individual Board members: the Queens Borough President wanted the regional commercial zones in his borough put off-limits for adult uses; the Bronx Borough President wanted those regional commercial centers in the Bronx similarly protected[81]—but at the same time he

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78. *See* text accompanying notes 65-67 *supra.*

79. Irony intended. Since Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), courts have sanctioned zoning schemes which restrict land to less than maximally profitable uses, as long as such schemes are in accordance with a non-discriminatory and non-confiscatory plan.

80. *See* 1 N.Y. CITY, N.Y., CHARTER AND ADM. CODE ANN. § 200 (Fisch 1976). The Charter further provides that in a case where the Board of Estimate fails to act, the prior recommendation of the City Planning Commission becomes law. To the author's knowledge no instance of such an occurrence has been recorded.

81. *See* N.Y. Daily News, Mar. 30, 1977, at 47, col. 1.

> Two of our borough presidents, Donald Manes of Queens and Robert Abrams of the Bronx, are making like Horatios at their respective bridges. They insist that the Board of Estimate adopt a zoning ordinance to limit all porno operators to Manhattan, unconstitutional though that may be.
>
> They say their only concern is to protect their boroughs. It looks to us more like political grandstanding in an election year.
>
> The real result of their obstructionism would be to leave their boroughs—as well as the rest of the city—without any defense at all against the smut blight.
>
> The City Planning Commission drew up a sensible plan to end the current legal vacuum that should meet U.S. Supreme Court standards. Mayor Beame supports it. So should Manes and Abrams, if they really want to defend their turfs.
>
> Pornography is a poison that can spread unchecked throughout the boroughs unless the city makes good use of proven zoning laws to limit it.

Id.

attacked the legislation's insensitivity to first amendment concerns,[82] a view shared by the President of the City Council.[83]

Although mindful of the opposition from first amendment absolutists on the one hand, and evangelical absolutists on the other, the Commission saw no way of appeasing such opponents. Nevertheless, it modified[84] the original legislation in three respects in response to pressures from both the Board of Estimate and outer borough residents who feared that a dispersal of Times Square pornography would inevitably push such adult uses to presently pristine suburbs.[85]

First, the lowest density regional commercial zone was dropped as an eligible area for future adult use.[86] Large groups from Staten Island had cited the family trade done by shopping centers in such zones and made a convincing case that adult uses would be incompatible with these shopping areas.[87] This modification had the effect of eliminating any adult use potential in suburban-like shopping centers in Staten Island, Queens, Brooklyn and the Bronx. Second, schools and houses of worship were accorded protective 500 feet halos,[88] within which adult uses were barred from locating or continuing as legal nonconforming uses. This amendment responded to community concerns and further reduced the geographical areas in the City eligible for adult uses. Third, the Commission dropped the definitional threshold for adult use determination from "primary and predominant" to "substantial or significant" concededly a more subjective test, albeit

82. The Bronx Borough President's concerns relating to the legislation's first amendment impact can be found in the minutes of calendar #118 of the Board of Estimate meeting of Feb. 17, 1977.

83. Kaiser, *A 4-Borough Pornography Ban Unexpectedly Loses,* N.Y. Times, Mar. 25, 1977, at 1, col. 1.

84. N.Y. City Planning Commission, Report N 770022 ZRY, cal. no. 1, at 2-3 (Mar. 7, 1977).

85. Orin, *If Times Square's Swept, Will Queens Get the Dirt,* L.I. Press, Feb. 20, 1977, at 1, col. 1. However, a contemporary computer survey of morals-prone uses in the outer boroughs indicated findings somewhat at variance with the prevalent self-image of these areas. According to Borough Commanding Officer, Police Department memoranda (October 8-November 2, 1976), eight topless bars and a pornographic movie theater were operating in Staten Island. Three massage parlors, two pornographic bookstores and/or peep shows, 22 topless bars, and 11 pornographic movie theaters were found in Queens. One massage parlor, two pornographic bookstores, 30 topless bars, and 10 pornographic movie theaters existed in Brooklyn. And 17 topless bars and five pornographic movie theaters turned up in the Bronx. (Memoranda on file with the New York City Planning Commission.)

86. *Id.* This eliminated adult use from the City's C4-1 (lowest density regional commercial zone) districts.

87. N.Y. City Planning Commission, transcript of public hearings of Dec. 1, 1976, at 150. A copy of this transcript is on file at the Commission.

88. *See* note 85 *supra.* An analogous provision for a 200 ft. buffer from "a building occupied exclusively as a school, church, synagogue or other place of worship" may be found in N.Y. ALCO. BEV. CONT. LAW § 64(7) (McKinney 1970 & Supp. 1977).

sustained by the Supreme Court in *Young*.[89] Once adult use zoning legislation was passed, the City presumably could establish administrative standards which would afford bookstores, newstands, cinemas and bars guidance as to how much adult material could be purveyed before the "substantial or significant" threshold was crossed.[90]

These amendments, although supported by a majority of Commissioners nevertheless split the heretofore unanimous Commission. In a dissent joined by two other Commissioners, Gordon J. Davis found that the Commission had increased the risk that the legislation's content-based land use proscriptions on speech and speech-related sex establishments would be found violative of the First Amendment, and that it had ignored the policy of dispersal of these offensive uses which was a principal consideration in formulating the adult uses zoning controls.[91]

Commissioner Davis' dissent contains a thoughtful statement of the concern for competing values which animated the Commission in its approach to this problem:

> There were three overriding and interrelated considerations which guided the Commission when it formulated the Adult Use Legislation. First, we clearly understood that a large proportion of the uses sought to be controlled involved speech or speech-related activities which, no matter how noxious or sexually explicit, were presumptively protected from direct content-based regulation by the First Amendment. In other words, we were not dealing with noxious uses of the type heretofore routinely subject to zoning controls, such as junk yards, slaughter houses, etc. Rather, we were attempting to regulate uses which could not be flatly prohibited or restricted in a manner which would prevent adult audiences from having relatively free access to the type of expression or merchandise which they offered.
>
> Secondly, given that these uses had to be allowed in some parts of the City, the Commission was convinced that their dispersal—as opposed to concentration in a "red-light" district—was by far the wiser strategy to pursue. Boston's "Combat Zone," and indeed, our own Times Square area, provided alarming examples of the destructive consequences which would flow from a policy of concentration.
>
> Thirdly, taking these factors into account, it was clear that the Commission should pattern its regulations of sex-oriented uses involving protected expression after the similar—though less restrictive—zoning legislation enacted by Detroit and recently approved as constitutional by the United States Supreme Court in *Young v. American Mini Theatres, Inc.* . . . . [A] more precise statement of what was

89. 427 U.S. at 53 n.5.

90. For a discussion of the administrative problems created by such a definition, see Justice Blackmun's dissent. *Id.* at 88.

91. N.Y. City Planning Commission, Report N 770022 ZRY, cal. no. 1, at 4-7 (Mar. 7, 1977) [hereinafter cited as Davis Dissent].

> decided [there] by a divided court . . . is difficult to formulate. . . . Although uncertain and obscure in many respects, one thing is clear from *American Mini Theatres:* a zoning scheme which is significantly more restrictive than the one approved by the Court in that decision is far less likely to be sustained by the Federal Courts.[92]

Commissioner Davis warned that the amendments virtually banned adult uses from four of the City's five boroughs.[93] Although hyperbolic at the time, the statement was soon echoed in the chambers of the Board of Estimate—only this time as a *demand*—by citizens of the outer boroughs. By virtue of the recent Commission amendments, the heretofore dispersed and scattered eligible adult use regional commercial zones had been reduced to a handful of readily identifiable concentration targets in these boroughs—and as such, drew sharp denunciations. The Commission was accused of fostering "red light districts" in the outer boroughs and the cry was raised ever more loudly to restrict adult uses to Manhattan.

Never before had an issue so polarized the five boroughs of the City: citizens of the Bronx, Brooklyn, Queens and Staten Island were pitted against citizens of Manhattan. Indeed, many residents of Manhattan outside the adult use purlieus favored restriction of such uses to the present confines of the Times Square area. It was the early days of the Boston "Combat Zone" revisited. Despite the clear advantages of the legislation—pointed out editorially in New York newspapers[94]—in restricting the hitherto unrestricted commercial adult uses, community representatives in the outer boroughs persisted in their ideological stance. Rather than tackling the difficult political questions, the Mayor resorted to highly publicized raids and street demonstrations. (See cartoon opposite page.)

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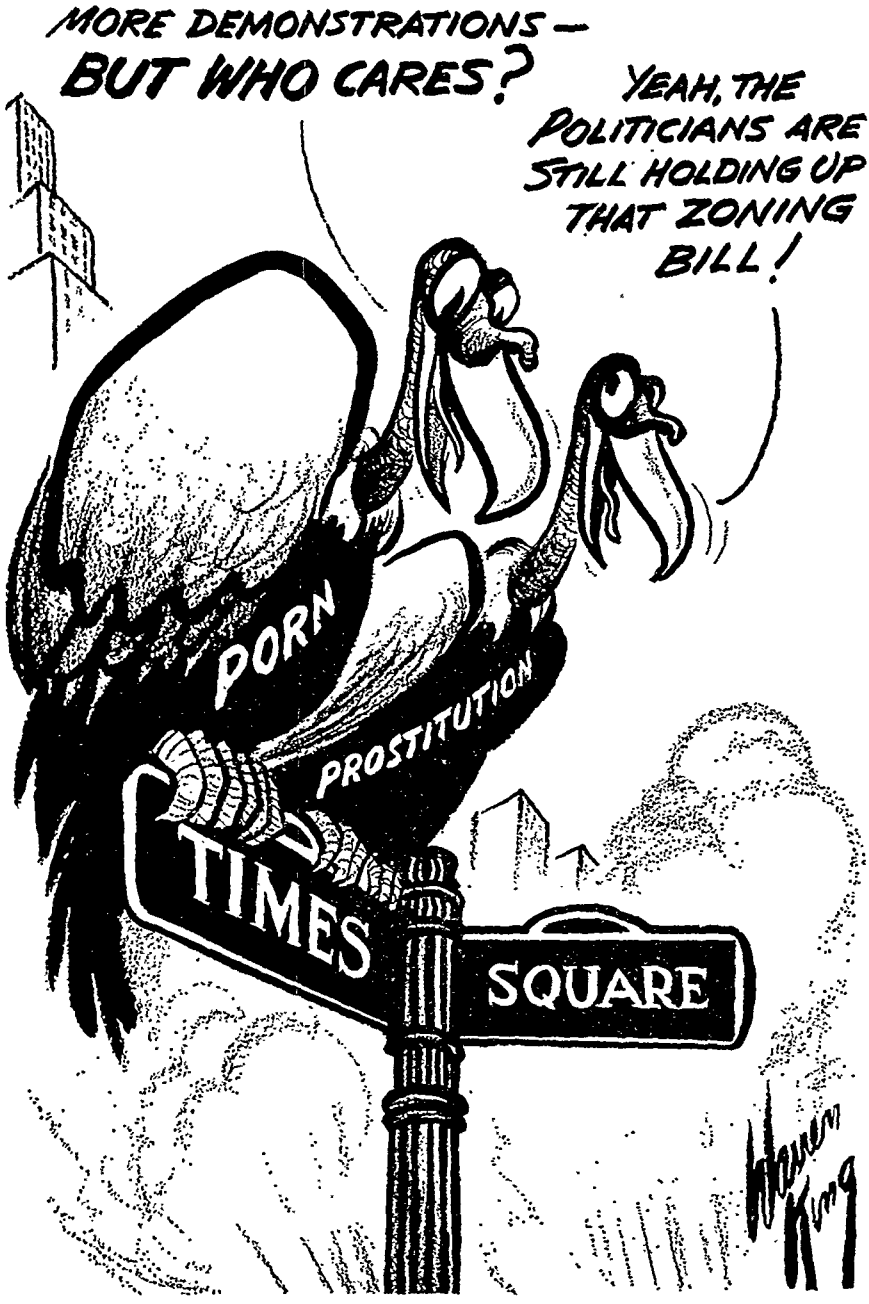
92. Davis Dissent, *supra* note 91, at 5-6. As authority for his third point, Commissioner Davis referred to the following analysis of *Young:*

> *American Mini Theatres* may signal only the willingness of a majority [of the Court] to accept mild regulation of speech in the service of a city's demonstrated need, like Detroit's, to protect the quality of life in its neighborhoods. . . . Thus construed, *American Mini Theatres* [does not extend] . . . to zoning schemes justified only by distaste for expression, such as geographic constraints on the exhibition of non-obscene [sexually explicit] movies unconnected to general zoning schemes.

Davis Dissent, *supra* note 91, at 6 (quoting *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 204 (1976)).

93. Davis Dissent, *supra* note 91, at 3-4.

94. *Pornography in a Twilight Zone,* N.Y. Times, Mar. 28, 1977, at 28, col. 5; *Porn and Politics,* N.Y. Daily News, Mar. 27, 1977, at 19, col. 1; *The People Speak,* N.Y. Daily News, Feb. 22, 1977, at 31, col. 1; *Hope for Times Square,* N.Y. Daily News, Nov. 13, 1976, at 19, col. 1.



The legislation foundered. After several days of parliamentary wrangling preceding its deadline for action, the Board of Estimate rejected the legislation, sending it back to the Commission for further study.[95] This failure by the City's legislative body to act had, among other consequences, the immediate result of leaving massage parlors free to continue operations unrestricted by zoning.[96] While further study did indeed occur, no subsequent proposal intruded upon Board of Estimate calendars prior to the November, 1977, city-wide elections of its sitting members.

II. The Changing Climate for Pornography Under Obscenity Laws

The middle class voters of the Bronx, Brooklyn, Queens and Staten Island failed to find any social value in adult films and books, despite the first amendment protection accorded them. Furthermore, they were outraged by New York City's explicit land use regulation proposal, which they perceived as placing an official imprimatur on pornography. They wished to bar these adult uses from their shores.[97] This morally indignant public was unable to appreciate the fine legal distinction between the pornographic and the obscene urged by city planners as the reason for allowing adult cinemas and bookstores a rightful and reasonable place in the plan of city zoning uses and districts. Etched in a series of post-World War II decisions of the Supreme Court,[98] this distinction protected the first amendment rights of the silent minority to indulge their preference for pornography, free from the constraints of obscenity laws. Lack of public understanding of this legally crucial distinction between pornography and obscenity led to public characterization of the City's zoning proposal itself as immoral and obscene.

Whether a film or book is indeed obscene—and therefore outside the pale of the law's protection—varies with time and place. Weather, being changeable, is an apt metaphor to describe the lack of consistent principle in this demonstrably volatile area of life. Every reader of English literature is aware of its seasonal shifts from the

95. Ranzal, *Beame Bid on Pornography Zoning Sent Back to Planning Commission*, N.Y. Times, Apr. 23, 1977, at 23, col. 1.

96. Massage parlors, to the extent their name was a euphemism for houses of prostitution, continued to be subject to criminal laws. *See* N.Y. Penal Law §§ 230-230.40 (McKinney 1976). Of course, the burden of proof is much higher in criminal cases. *See In re* Winship, 397 U.S. 358 (1970).

97. *See* note 81 *supra.*

98. *See* text accompanying notes 109-23 *infra.*

sexually explicit—often torrid—style of the 16th, 17th, and 18th centuries, as seen in Shakespeare, Swift, Congreve, and Sheridan, to the sexually frigid 19th century Victorian restraint of Dickens, Trollope, and Gaskell. Not only does the obscenity barometer shift within countries over time; it oscillates wildly when travelling in the same time track among countries that lack a common heritage.

The common or dominant anti-obscenity heritage reflected on-and-off in most Western Judeo-Christian nations derives from St. Augustine[99] who wrote between 413 and 426 A.D. that the only proper sexual arousal is that which furthers the reproduction of the human species within the sanctified institution of marriage. Everything else, more or less depending on the subsequent century, is forbidden as obscene.

Webster's derives its definition of obscenity from *ob* meaning against and *caenum* meaning filth.[100] The concept of obscenity hovers around the notion of proper and improper bodily functions. Obscene acts of bodily abomination and uncleanness figure importantly in the Bible,[101] providing moral guidance that contrasts with that of other Biblical passages which celebrate often explicit sexuality between lovers.[102] The Bible, as a document composed over a period of a thousand years, was hardly immune to changes in the climate for obscenity.

No longer are acts of masturbation and frequent marital sexual intercourse regarded as secret vices dangerous to health as they once were.[103] Mere nudity,[104] violence,[105] sacrilege,[106] and vulgarity[107]—without more—have been held not to constitute obscenity. On the other hand, depictions of hard core sexual intercourse, fellatio, cunnilingus, group sex, flagellation, fetishism, sodomy, lesbianism, sadomasochism, and bestiality all have been found obscene under various judicial formulations.[108]

While zoning's middle class constituency might applaud the latter decisions, it is doubtful whether a legislative endorsement for nudity, violence, sacrilege or vulgarity would ever be forthcoming. And yet,

99. AUGUSTINE, THE CITY OF GOD 470-72 (M. Dods trans. 1950).

100. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1557 (1965).

101. The episodes alluding to occurrences in Sodom and Gomorrah are perhaps the most celebrated context for obscene acts in the Bible. *Genesis* 13:13.

102. The lyrics in Song of Solomon best illustrate the erotic side of the Bible. *Song of Solomon*, 4:5, 5:4, 7:8, 10.

103. COMSTOCK, TRAPS FOR THE YOUNG (R. Brenner ed. 1967).

104. Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958).

105. Winters v. New York, 333 U.S. 507 (1948).

106. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

107. Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

108. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Mishkin v. New York, 383 U.S. 502 (1966).

such an endorsement is envisioned by the *Young* decision when it looks to the zoning process for a Solomon-like distribution of first amendment protected adult uses in a city.

The following review of Supreme Court decisions in the obscenity area is intended to give the reader an understanding of the factors protecting pornographic material from the limited reach of obscenity regulation—that is, an appreciation of the dominant and heavy weight accorded first amendment rights in the judicial scale when balanced with local police power obscenity regulations. These free speech factors continued to receive considerable deference from the Court in *Young* and so must be carefully considered when devising any zoning proposal to regulate pornographic uses. Failure to understand and consider these factors in drafting a proposal could render the zoning scheme as potentially violative of the first amendment as those obscenity regulations contained in many of the cases hereinafter discussed. These cases should dispell as well any naive optimism concerning the alacrity with which the political actors in a zoning drama will respond to an opportunity to regulate not-quite-hard-core pornography. In short, the majoritarian attitudes which dominate the zoning process may prove insufficiently malleable to embrace and fairly regulate close-to-hard-core material found non-obscene and entitled to first amendment protection.

The development of objective and manageable standards to enable the trier of fact to distinguish protected pornographic speech from unprotected obscenity has been one of the Supreme Court's major post-World War II preoccupations. The Court has been frustrated, however, in its repeated attempts to identify and define which portion of the speech spectrum lies outside the scope of constitutional protection. The Court's inability to do so became evident in 1957 in *Roth v. United States*,[109] its first attempt to grapple with these highly charged issues. While the Court declared that the first amendment's protective embrace will not extend to material deemed to be obscene,[110] it failed to formulate a test to assist juries in identifying that which is obscene.

The Court's second attempt to formulate appropriate criteria came in 1966 when, in a plurality opinion in *John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*,[111] the Court declared that for a work to be considered obscene:

> [T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient

109. 354 U.S. 476 (1957).
110. *Id.* at 481-85.
111. 383 U.S. 413 (1966).

> interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[112]

For a period of seven years following *Memoirs* the Court remained unable to muster a majority of its members in support of a test for obscenity.[113] The Court was forced to issue summary opinions stating whether or not at least five of its members found the material in question to be obscene.[114] This approach proved highly unsatisfactory since no criteria of what constituted obscenity emerged to guide the lower courts.

In 1973, in *Miller v. California,*[115] the Court announced what appeared at first to be a definitive obscenity test. The basic guidelines for trier of fact were held to be:

> (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 laws; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[116]

In one of *Miller's* companion cases, *Paris Adult Theater I v. Slaton,*[117] the Court held that where a film is clearly obscene under the *Miller* test, a state could constitutionally prohibit its exhibition entirely, even to audiences composed solely of knowledgeable adults.[118]

Under the *Miller* test, constitutional protection is unavailable to material not having "serious literary, artistic, political or scientific value."[119] This aspect of *Miller* represented a considerable retrenchment from *Memoirs,* which denied protection only to material that is "utterly without redeeming social value."[120] The Court, however, re-

112. *Id.* at 418.
113. *See e.g.,* Redrup v. New York, 386 U.S. 767, 770-71 (1967).
114. *See* Hartstein v. Missouri, 404 U.S. 988 (1971); Burgin v. South Carolina, 404 U.S. 806 (1971); Bloss v. Michigan, 402 U.S. 938 (1971); Childs v. Oregon, 401 U.S. 1006 (1971).
115. 413 U.S. 15 (1973).
116. *Id.* at 24.
117. 413 U.S. 49 (1973).
118. *Id.* at 57.
119. 413 U.S. at 26.
120. 383 U.S. at 419.

served for itself the task of determining whether a work is obscene under its own seriousness standards. The remaining elements of the test, the questions of "patent offensiveness" and "prurient interest," were deemed to be questions of fact. By transforming the bulk of obscenity determination into a "factual" inquiry, the Court attempted to imbue the jury with vastly increased power while relieving appellate courts of the need to undertake a burdensome de novo review in each individual case.

These brave goals were seriously impaired the following year in the notorious "Carnal Knowledge" case, *Jenkins v. Georgia.*[121] In overturning an obscenity conviction upheld by the Georgia Supreme Court, the Supreme Court once again constituted itself as the ultimate board of censors by reserving for itself the bulk of obscenity determination, exactly as it had done in the "bad old days" following *Roth.*[122] The objective tests it had articulated in *Miller* to enable local juries to discharge the censorial function were implicitly rejected in *Jenkins.* The *Jenkins* Court paid lip service to the primacy of local jury determination by holding that the values of the local, rather than statewide, community were to govern juries in determining what is obscene under *Miller*'s "contemporary community standards" test. By overturning the Georgia jury's determination, however, the Court implicitly ruled that the members of the jury incorrectly perceived the standards of their own community. The Court's holding would appear to limit severely the degree of flexibility permitted trial juries in applying local standards of morality in obscenity trials. The Court's own example is a precedent for appellate judges to apply their own standards of morality, thus draining the concept of "local community standards" of any vitality.[123]

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121. 418 U.S. 153 (1974).

122. *See* text accompanying notes 109-12 *supra.*

123. To make matters worse, not only did the Court re-establish the appellate level as the primary forum for obscenity determination, it severely eroded the "serious value" aspect of the *Miller* test, the only element of that test truly appropriate for appellate review. That element is generally susceptible to the sort of objective inquiry that cannot usually be applied to questions of "prurient interest" and "patent offensiveness."

In upsetting the defendant's conviction, the *Jenkins* Court chose to ignore what appeared to be the most compelling reason for reversal: the film's significance as a work of serious artistic merit. The Court relied instead on the far more subjective "patently offensive" aspect of the *Miller* test and reversed the conviction based on what it considered an erroneous finding by the jury that *Carnal Knowledge* was "patently offensive." 418 U.S. at 160-61. The Court's failure to discuss "serious value" may have signalled an implicit erosion of that crucial standard by making it unclear how

This shift in the law of obscenity may be desirable insofar as appellate courts are more likely to be responsive to first amendment claims than are local judges and juries. What this means, however, is that the Burger Court, like the Warren Court before it, has reluctantly become a board of supercensors.

Legal commentators have generally been hostile to the Burger Court's subtle expansion of the obscenity concept at the expense of first amendment guarantees, particularly to the Court's enshrinement of local rather than national standards and its abandonment of the "utterly without redeeming social value" test.[124] These commentators emphasize the importance of the pornographic vision to expression and understanding, and decry suppressions of obscenity—such as Bowderlized Shakespeare[125] and President Nixon's "expletives deleted"[126]—as tantamount to a prohibition of meaning. This view is succinctly expressed by David A. Richards: "[I]t is difficult to see why the pornographic vision should not have a place in the marketplace of ideas beside other visions that celebrate the life of the mind, the sanctity of ascetic piety or the usefulness of prudent self-discipline."[127]

If an obscenity law is an expression of popular or majoritarian moral attitudes, this view finds it must collide with the main purpose of the first amendment, which is to secure "the greatest equal liberty of communication compatible with a like liberty for all."[128] The *Miller* test, which enshrines any state law defining depictions of patently offensive sexual conduct as obscene, "would elevate every form of popular prejudice, bigotry, and intolerance, *without more,* into a moral basis for law," according to this critique.[129]

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much evidence the Court will require to review a jury determination that a work lacks "serious value."

The Court's continuing deference to the principle of local community standards can be found in Pinkus v. United States, 46 U.S.L.W. 4478 (May 5, 1978). The Court, per Burger, C.J., held that the attitudes of children may not be incorporated by the judge or jury in determining what the local community standard is.

124. *See* Fahringer and Brown, *supra* note 1; Gellhorn, *Dirty Books, Disgusting Pictures, and Dreadful Laws,* 8 GA. L. REV. 291, 297-98 (1974); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment,* 123 U. PA. L. REV. 45, 79-81 (1974).

125. Dr. Thomas Bowdler eliminated racy passages from Shakespeare's theatrical canon to conform to prevalent 19th century values. W. SHAKESPEARE, THE FAMILY SHAKESPEARE (T. Bowdler ed. 1807).

126. In his release of the celebrated Watergate tape transcripts, President Nixon deleted all offensive expletives on the questionable premise that such censorship did not impair their substantive meaning.

127. Richards, *supra* note 124, at 81.

128. *Id.* at 83.

129. *Id.* at 86.

These attacks on the Burger Court's obscenity decisions are perhaps overstated, since these decisions preserved much of the earlier Warren Court's first amendment libertarian framework, including the requirement of dominant appeal to the prurient interest (*i.e.*, mere nudity is not enough), social value as a strong counterpoise, and the right of private individuals to choose—in private—their own preferred obscenity. Clearly, even these commentators would agree that recent obscenity decisions, standing alone, would hardly rid the nation of smut.

Moreover, an alternative means of controlling the pornography explosion—the civil nuisance procedure—was made ineffective in *Paris Adult Theater I v. Slaton,*[130] when the Supreme Court conditionally approved such a procedure "assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment."[131] The incorporation of an obscenity "standard" was completed in *Erznoznik v. City of Jacksonville,*[132] when the Court held unconstitutional a municipal public nuisance ordinance prohibiting drive-in movie theatres from exhibiting nudity which could be seen from a public street.[133] Several states have followed the Court's stricture by engrafting obscenity standards onto their public nuisance ordinances.[134] Similarly, private nuisance actions, which hold the possibility of avoiding constitutional entanglement,[135] hardly constituted the direct public measure necessary to check the proliferation of non-obscene but still offensive adult pornographic uses.

Perhaps realizing these deficiencies in existing law, Chief Justice Burger, writing for the Court in *Slaton,* suggested a new basis for smut control: "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers."[136] Reacting to the concern directed by Alexander Bickel[137]

130. 413 U.S. 49 (1973).
131. *Id.* at 55.
132. 422 U.S. 205 (1975).
133. *Id.* at 212.
134. *See, e.g.,* LA. REV. STAT. ANN. § 13:4711 (West 1968 & Supp. 1974); OHIO REV. CODE ANN. § 3767.01(c) (Page 1971); Grove Press Inc. v. City of Philadelphia, 418 F.2d 82 (3rd Cir. 1969); State *ex rel.* Ewing v. Without a Stitch, 66 Ohio Op. 2d 223, 307 N.E.2d 911 (1974). *See* 49 IND. L.J. 320 (1974).
135. The constitutional question raised by private nuisance actions is whether or not the requested injunctive relief constitutes state action; if it does not, then the defendant cannot raise the first amendment as a defense. Cases in the race relations area support the inference that private nuisance actions are not state actions. *See, e.g.,* Moose Lodge v. Iris, 407 U.S. 163 (1972); Evans v. Abney, 396 U.S. 435 (1970).
136. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973).
137. Bickel, 22 PUBLIC INTEREST 25-26 (1971).

and others[138] at offensive public conduct "impinging on other privacies," the Burger Court embarked on the yellow-brick-road which was to lead it to *Young* and the potential of land use zoning controls for cleaning up America's tarnished Emerald City of Oz.

III. The Promise and The Peril of Zoning Obscenity

The rigid libertarian limitations placed by the Warren Court on obscenity as a state regulatory weapon were neatly skirted in *Young* through the recognized methodology of zoning incompatible uses far away from each other. "Adult use" as a zoning classification far outstrips the reach of obscenity as a speech classification.[139] While zoning did not censor "adult" speech (as obscenity laws did), it imposed a *cordon sanitaire* around it as city planners had once buffered residences from glue factories. "The quality of life" as protected by local zoning struck a widely shared resonant chord in the environment-conscious 1970's; an equivalent obscenity consensus had proven elusive.

Zoning regulations have historically been designed to prevent harm, *e.g.*, by separating incompatible uses, by limiting the density and scale of particular neighborhoods, by prohibiting or restricting development when public services are unavailable, and by protecting adjoining parcels from invasion of their light and air. It was not until 1926 that the constitutionality of a zoning ordinance was tested by the Supreme Court. In a landmark decision, *Village of Euclid v. Ambler Realty Co.*, [140] the Supreme Court validated a comprehensive zoning plan. The Court's holding was narrow.[141] However, the general test of a zoning ordinance suggested by the Court is still instructive. Before a zoning ordinance can be declared unconstitutional, its provisions must be shown to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[142]

Euclid and its progeny reflect the idea that "general welfare" is a constantly growing and necessary aspect of the sovereign police power. *Euclid* also suggests that the use of zoning is a legitimate mode of pro-

138. *See, e.g.*, P. Devlin, The Enforcement of Morals (1965).

139. Its broader sweep segregates protected adult "speech" as well as obscene adult "speech" from residential and neighborhood retail areas.

140. 272 U.S. 365 (1926).

141. The Court held: "[I]t is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them." *Id.* at 397.

142. *Id.* at 395.

tecting the ever-changing general welfare. Justice Sutherland recognized this trend.

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . . [W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.[143]

Courts have continued to test zoning ordinances under the "clearly arbitrary and unreasonable" standard, and, as the New York Court of Appeals noted, "[r]estrictions upon the use of property, which were deemed unreasonable in 1909, are regarded today as entirely reasonable and natural."[144]

Traditional zoning has a methodology, tested over the crucible of 60 years,[145] for dealing with incompatible uses. Every known use is classified in the zoning system according to benefits and harmful externalities and allowed to locate in those districts where its benefits to society are maximized. Uses are prohibited in those districts where their harmful externalities outweigh their benefits. In a supremely rational society, zoning provides "a place for everything, where everything is in its place."

Since society is always changing, the problem of identifying, analyzing and classifying new uses is hardly novel. Zoning has risen to the challenge of billboards, shopping centers, drive-ins, mobile homes, skateboard parks, fast food, discotheques, and countless other "new uses" in its history. The solution for each challenge has varied with the time and the place; to the extent that a zoning solution might be rationally debatable, courts have been loathe to disturb it.

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143. *Id.* at 386-87.

144. Cromwell v. Ferrier, 19 N.Y.2d 263, 268, 225 N.E.2d 749, 752, 279 N.Y.S.2d 22, 26 (1967) (quoting *In re* Mid-State Advertising Corp. v. Bond, 274 N.Y. 82, 87, 8 N.E.2d 286, 288 (1937) (Judge Finch dissenting)).

145. In 1916, New York City enacted the nation's first comprehensive zoning ordinance. C. BERGER, LAND OWNERSHIP AND USE 662 (2d ed. 1975). In August of 1922, the United States Department of Commerce drafted a standard state zoning enabling act, which was similar to New York's statute. *Id.* at 655-66.

The promise of zoning for dealing with adult uses, which had become more ubiquitous with the passing of time, would be fulfilled by assigning adult uses "a place" on the zoning map based on a rational analysis of benefits and harmful externalities. The peril of content-based zoning of adult uses lurks in zoning's potential for the irrational —albeit politically supportable—classification. For most new use regulation this peril is resolved in favor of the municipality when courts reject fourteenth amendment challenges from property owners as long as the ordinance is not confiscatory and its wisdom at least debatable. In such cases, the charge of arbitrariness cannot be laid at the municipality's door.

But there would seem to be a new constitutional peril where traditional zoning takes on content-based regulation in the teeth of the first amendment, rather than between the bare and tired gums of the fourteenth. The traditional fourteenth amendment zoning tests of arbitrariness,[146] discrimination,[147] confiscation,[148] and "spot zoning"[149] occur in a setting where courts have traditionally deferred to, and been reluctant to intrude their wisdom upon, legislatures who are, after all, elected by and accountable to the people.[150] In the defense of first amendment guarantees, however, courts have not been shy about imposing their views upon local legislatures.[151]

In this context, Powell's emphasis in *Young* on the above-quoted *Euclid* language,[152] envisioning ever-broader general-welfare regula-

146. Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

147. Restrictions applied selectively to properties within a zoning district are not necessarily discriminatory if there is a rational basis for such distinctions. The key to this equal protection test is that the proposed regulation be in accordance with a comprehensive plan. *See* Haar, *In Accordance with a Comprehensive Plan,* 68 HARV. L. REV. 1154, 1166-70 (1955).

148. Courts have consistently held that where the property regulated was not deprived of all profitable remaining use and when the regulation is rationally related to a comprehensive plan, the zoning regulation will be upheld. *See* Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962).

149. Spot zoning is a pejorative expression usually denoting an intention to benefit a single property owner rather than to zone in accordance with a comprehensive plan. The "spot zone," instead of constituting a part of a larger area which is zoned uniformly, sticks out like a sore thumb from its more restrictively zoned neighbors. For an extensive discussion of spot zoning, see R. ANDERSON, *supra* note 62, at §§ 5.08-5.09.

150. With respect to direct voter referenda in the area of zoning, the U.S. Supreme Court has relieved "the people" of the legislature's burden to show that its action in voting for a specific zoning plan is in accordance with a comprehensive or well-considered plan. *See* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976).

151. *See* notes 97-132 & accompanying text *supra.*

152. *See* text accompanying note 143 *supra.*

tory objectives as authority for Detroit's use of zoning to deal with the problem of adult uses, is a meaningful bow in the direction of the fourteenth amendment zoning cases. Measuring Detroit's regulation against fourteenth amendment "taking" claims, Powell finds that the proposed Pussy Cat and Nortown Theatres are "affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation."[153] Justice Stevens views zoning regulations that distinguish adult from general movie theatres as rational and "adequately" motivated by the city's interest in the present and future character of its neighborhoods.[154] This embrace—by a majority of the Court—of the application of traditional zoning techniques to adult uses prompted New York City to graft traditionally accepted techniques for amortization of non-conforming uses[155] onto the Detroit model.

No viable alternative to amortization as a means of diluting the existing concentration of adult uses in the Times Square area was available to New York City. Even assuming the existence of a sufficiently robust municipal treasury, the prospect of paying proprietors of pornographic businesses with public dollars as part of a large-scale condemnation program to terminate their operations would be unacceptable to most segments of the public—as a "payoff" condoning immorality—and would have been a politically impossible program to implement.

New York City's amortization proposal was risky, since Justices Stevens and Powell had both pointed out the purely prospective nature of the Detroit regulation and its "minimal"[156] or "slight"[157] impact on speech. A clue to a more precise standard may be Powell's willingness to entertain some "overall curtailment of adult movie presentations" provided such curtailment does not reach "significant" proportions.[158] It seems clear, however, that should future first amendment challenges to amortization of adult uses reach the Court, its decision will be based on whether, "[v]iewed as an entity, the market for this commodity is essentially unrestrained."[159]

Both Stevens and Powell derive considerable comfort from their

153. 427 U.S. at 78.
154. *Id.* at 72.
155. *See* text accompanying notes 62-65 *supra.*
156. 427 U.S. at 78.
157. *Id.* at 72 n.35.
158. *Id.* at 77-79 (passim).
159. *Id.* at 62. This test would permit substantial elimination of existing adult uses provided that the local public appetite for such fare could be satisfied, if not satiated.

view that Detroit's regulation fills a traditional zoning niche and is therefore heir apparent to all the fourteenth amendment precedents in favor of zoning, starting with *Euclid*. They part company from each other, to say nothing of their distance from the four dissenting justices, when wrestling with the competing values represented by police power zoning and the first amendment.

The plurality, concurring, and dissenting opinions in *Young* can be seen as a tension wire between competing values extending from Powell's dominant police power premise at one extreme, to Stevens' conveniently-created "second-class" or inferior speech category, to free speech dominance expressed by the Stewart[160] and Blackmun[161] dissents at its other end. The Court's decision is thus an unstable blend of Powell's police power and Stevens' second-class speech rationales.

Powell's broad assertion of police power supremacy resolves this tension without regard to the type or content of the speech involved. His police power construct runs the full gamut of traditional objectives: health, safety, morals and general welfare, although the *Young* facts rest principally on a "morals" objective.[162] In contrast, Stevens looks to the character of the speech as well as to the particular police power exercise in resolving the tension.[163] For the dissenting justices, the competing police power objective falls before a sweeping first amendment supremacy assertion.[164] Only future cases will establish whether the Court intends to apply the Powell-Stevens construct to *all* police power objectives or limit the incursion on free speech to public morals or possibly health and safety objectives. One awaits with a sinking feeling new Supreme Court candidates for classification as second-class speech.[165]

It is important to review the accepted range of permissible police power objectives in order to understand the extent of future conflict with the first amendment opened up by the *Young* decision. While this

160. 427 U.S. at 84-88.

161. *Id.* at 88-96.

162. *See generally* Berbysse, *Conflict in the Courts: Obscenity Control & First Amendment Freedoms*, 20 CATH. LAW. 1 (1974).

163. 427 U.S. at 63-73.

164. *Id.* at 84-96.

165. The Supreme Court may have paved the way for Justice Stevens' "second-class" speech idea by refusing to treat certain non-verbal communication as speech in United States v. O'Brien, 391 U.S. 367 (1968). Giving explicit sanction to the notion of a lesser level of speech which is unprotected may open the door to "second-class" characterization of unpopular forms of political expression. *But cf.* Bigelow v. Virginia, 421 U.S. 809 (1975) (eliminating the distinction between "ordinary" and "commercial" speech), *overruling* Valentine v. Chrestensen, 316 U.S. 52 (1942).

range of objectives has grown more extensive over time as a result of favorable judicial action, it is the author's position that many of these recently sanctioned objectives—such as aesthetic zoning—represent questionable choices in a legal tug of war between the competing values of "quality of life" and the first amendment.

Traditional local zoning regulations implement police power granted under state enabling legislation which is typically formulated "to promote the health, safety, morals[166] and general welfare of the people."[167] Occasionally, the enabling authority omits the word "morals." Even in this case, the relationship of a zoning regulation to a moral objective is accepted as a reasonable nexus between regulatory sanctions and the realization of a well-considered or comprehensive plan.[168]

A persuasive relationship between the particular legislation and a permissible public purpose has always been the substantive due process measure for judging the validity of an exercise of police power against an individual's claim of deprivation of constitutional rights. Persuasive police power arguments behind obscenity regulations[169] have included adverse impact on morals, early inducement of criminal conduct, adverse personality attitudes with criminal consequences in the long-term,[170] and reduction in the general quality of life.[171] The impact of obscenity on children has always made the legislative case even more compelling. All of the aforegoing are equally persuasive as the morals nexus of a zoning regulation.[172]

Whether zoning exists to further in a rational manner the legitimate planning goals envisioned in the classical enabling acts or "to reinforce local social biases, which were they not cloaked in police

166. For early Supreme Court recognition of the morals aspect of the police power, see Railroad Co. v. Husen, 95 U.S. 465 (1877) (dictum), and Barbier v. Connolly, 113 U.S. 27 (1885) (dictum).

167. Most jurisdictions possess express enabling statutes to zone for moral purposes. *See* Appendix A for a review of 50 state enabling acts. Courts in jurisdictions without an explicit "morals" sanction in their zoning enabling statute often include upholding community morals as a valid zoning objective. *See, e.g.,* City of Long Beach v. California Lambda Chapter of Sigma Alpha Epsilon Fraternity, 255 Cal. App. 2d 789, 794, 63 Cal. Rptr. 419, 422 (1967); Wiggins v. City of Jacksonville, 311 So.2d 406 (Fla. App. 1975).

168. *See* cases cited in note 167 *supra.*

169. Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 937 (1963).

170. *But see* PRESIDENTIAL COMMISSION ON OBSCENITY AND PORNOGRAPHY REPORT, 233-87 (1970).

171. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-60 (1973).

172. Address by Dr. Victor B. Kline, Professor of Psychology, given at the Rally for Decency, Salt Palace Arena, in Salt Lake City, Utah (Oct. 16, 1976).

power, would be condemned out of hand by the courts"[173] is a Dr. Jekyll and Mr. Hyde conundrum which will probably never be resolved. Nonetheless, local zoning ordinances have at one time or another, despite some criticism,[177] condemned motels,[174] mobile homes[175] and taverns[176] for encouraging immorality. Moreover, it is difficult to perceive anything approaching a fundamental sea-change when "morals" is not included with the words "health, safety and general welfare" in the state act enabling localities to enact zoning laws.

Reported decisions have often emphasized some, and disregarded other, enabling purposes of zoning. Regulations related to health, safety and morals tended to find a more secure footing with the courts than did those regulations premised upon the more ambiguous general welfare purpose.[178] For example, aesthetic regulations not expressly contemplated in the Standard Zoning Enabling Act were, in the early period following *Euclid,* found to have a less explicit relationship to a comprehensive plan than uniform zoning classifications based upon incompatible use or bulk and density regulations.[179] After many years of step-child status under narrow zoning enabling act readings,[180] aesthetics has achieved standing under the police-power general-welfare objective, along with previously accepted health, safety, and morals objectives.[181]

While many regard the admission of aesthetics into the general welfare zoning pantheon as unmitigated cause for rejoicing, caution regarding local aesthetic mandates operating under the police power at the expense of Bill of Rights guarantees is certainly warranted in

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173. Babcock, *"Mr. Commissioner, are You Prepared for Cross-Examination?"* 3 INSTITUTE ON PLANNING AND ZONING 155, 163-64 (1962).

174. *See* Nott v. Wolff, 18 Ill. 2d 362, 163 N.E.2d 809 (1960).

175. *See* Vickers v. Township Committee of Gloucester, 37 N.J. 232, 181 A.2d 129 (1967).

176. *See* Saladino v. City of S. Beloit, 9 Ill. 2d 320, 137 N.E.2d 364 (1956).

177. Note, *Zoning Morality—An Abuse of the Legislative Grant,* 4 TULSA L.J. 76 (1967).

178. R. ANDERSON, *supra* note 62 at § 7.03.

179. *Id.* at § 7.21. *See* Matter of Melita v. Nolan, 126 Misc. 345, 347, 213 N.Y.S. 674, 677 (1926); City of Little Falls v. Fisk, 24 N.Y.S.2d 460 (1941).

180. A good example of this type of case is White's Appeal, 287 Pa. 259, 134 A. 409 (1926), where setback regulations were found not to lie within the state's narrowly construed health, safety or morals enabling act police powers.

181. This trend can be perceived as early as 1927 in Gorieb v. Fox, 274 U.S. 603, 609 (1927), and in the eloquent uncertainties of Judge Cardozo's opinion in People v. Rubenfeld, 254 N.Y. 245, 172 N.E. 485 (1930). It culminates in judicial expressions such as in Berman v. Parker, 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."), and People v. Stover, 12 N.Y. 2d 462, 466, 191 N.E.2d 272, 274, 240 N.Y.S.2d 734, 737 (1963).

view of *Young*. In *People v. Stover*,[182] the New York Court of Appeals sustained a zoning regulation of the Town of Rye prohibiting the hanging of clotheslines in front and side yards of homes in a single-family residential zone. While Rye had denominated its regulation as one enacted for safety reasons, the court, anxious to legitimate aesthetics as a regulatory objective in New York State, found the regulation valid as an exercise of police power to promote particular aesthetics. The defendant had asserted first and fourteenth amendment defenses, claiming that his littered washlines were a protest against excessive property taxation, as well as a necessary use of his front and side yards. The court deferred to Rye's wisdom on Stover's fourteenth amendment challenge and skirted the speech issue by finding that the State could permissibly regulate Stover's "bizarre" conduct in displaying dirty underwear and old rags where all could see them.[183]

In dissent, Judge Van Voorhis expressed grave reservations over the constitutional impact of Rye's regulation, pointing out that "the avoidance by courts, sometimes seemingly to the point of evasion, of sustaining the constitutionality of zoning solely on aesthetic grounds has had its origin in a wholesome fear of allowing government to trespass through aesthetics on the human personality."[184] He further asserted that

> [t]he United States has drawn strength from differences among its people in taste, experience, temperament, ideas, and ambitions as well as from differences in race, national or religious background. Even where the use of property is bizarre, unsuitable or obstreperous it is not to be curtailed *in the absence of overriding reasons of public policy*.[185]

Judge Van Voorhis' concern for safeguarding human personality and idiosyncrasy from regulatory aesthetic incursions is, if anything, more applicable to first than to fourteenth amendment guarantees. Suppose, in the post-*Young* judicial climate, Stover chose to hang signs protesting high taxes from his clotheslines rather than underwear and rags. Whether the courts chose Justice Powell's police-power supremacy rationale or Justice Stevens' more capricious second-class speech distinction as the means of sustaining Rye's aesthetic ordinance, the damage to first amendment guarantees would be equally great.

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182. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963).
183. *Id.* at 470, 191 N.E.2d at 277, 240 N.Y.S.2d at 740.
184. *Id.* at 472, 191 N.E.2d at 278, 240 N.Y.S.2d at 742.
185. *Id.* (emphasis added).

The author here suggests that only an explicit ranking of police power objectives according to their urgency in the Van Voorhis sense of "overriding reasons of public policy"[186] will permit a rational choice between their various values and the value of free speech. Popularity and urgency is a fair test for establishing a police-power-objective hierarchy, since police power regulations are adopted by a legislature accountable to the people.[187] It is a most unfair barometer, however, for ranking differing kinds of speech, the least popular of which is usually in the greatest need of first amendment protection.

For the purpose of resolving first amendment constitutional challenges, the approach suggested here would establish a pecking order among zoning objectives, with those having a strong consensus—health, safety and morals—at the top of the list, and more subjective and debatable general welfare objectives, including aesthetics, at the bottom. Where the objective of land use regulation in curbing locational freedom is found within the health, safety and morals portion of the police power rationale and represents a compelling public interest —as did the adult use regulations in *Young*—it prevails over constitutional claims of a fundamental right premised on the first amendment. Such a close scrutiny approach, requiring the state to show a compelling interest, would resolve the tension between police power and the first amendment not on the basis of the character and content of the speech, but rather on the basis of the object of police power exercise.

This seems infinitely preferable to Justice Stevens' choice of ranking types of speech in order to resolve the tension in favor of Detroit's exercise of police power,[188] an approach that risks loss of our right to receive unpopular forms of communication.[189] The Constitution makes no distinction, based on content, in the degree of protection to be accorded differing forms of speech. Justice Powell's concurrence, on the other hand, points the way to a resolution of the conflict between zoning and speech even while failing to rank objectives of police power exercise. His use of the close scrutiny test to reach this result does at least suggest the importance of both the regulation and the speech.[190] Nevertheless, unless subsequent cases clarify and define the class of zoning regulation which will be able to dominate protected speech (and

186. *Id.*
187. *See* note 150 *supra.*
188. *See* text acccompanying notes 24-28 *supra.*
189. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
190. *See* text accompanying notes 32-38 *supra.*

ignore Stevens' second class speech doctrine as aberrational), *Young* may well foreshadow an eclipse of first amendment protection of unpopular expression brought about by zoning boards sensitive to majoritarian views of the electorate.

CONCLUSION

Whether zoning obscenity will lead to the undermining of rationality in legislation, substituting therefore a notion of popular traditions as a mask for ignorance, "bigotry" and "intolerance,"[191] remains to be seen. The New York City experience reveals the pitfalls to which the political process is prone in this context, and stands as a stark example of the difficulties local governments may experience in using the new police power sword forged by the Supreme Court.[192] Well used, it promises to preserve the quality of life desired by residential and business communities while still allowing significant opportunities for adult speech.[193] Ill-used, it can prove to be a perilous double-edged sword, smiting not only adult speech, but all diversity and non-conformity found "incompatible"—read "threatening"—by the zoning board and the body politic.

As more than one politician has learned, regulation of morals is a prickly business, whether the means employed be zoning or obscenity legislation. The ultimate question posed by commentators on local obscenity laws and their implications for freedom can equally be posed regarding local land use zoning enactments: "When our government posts guards among us to watch over our morals, we must ask ourselves the question put to the Romans by Juvenal 2000 years ago—'But who will guard the guards?' "[194]

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191. Richards, *supra* note 124, at 86.

192. *77% Favor City Zoning of X-Rated Shops: Poll,* N.Y. Daily News, Feb. 22, 1977, at 31, col. 1; *More on the Zone Defense Against Smut,* N.Y. Times, Feb. 15, 1977, at 30, col. 6; *The Zone Defense Against Smut,* N.Y. Times, Feb. 7, 1977, at 18, col. 5; *Zoning out the Porn,* N.Y. Times, Nov. 18, 1976, at 42, col. 1.

193. *See* text accompanying note 158 *supra.*

194. Fahringer and Brown, *supra* note 1, at 767-68 (quoting JUVENAL, SATIRE VI, at 347).

APPENDIX A

STATE STATUTES ENABLING LOCALITIES TO PROMOTE "MORALS" IN ZONING CODES

This table shows which state zoning enabling acts specifically authorize political subdivisions to promote morals, and which do not. Even when a statute does not mention morals as a valid zoning objective, however, state courts may infer that localities have the authority to pursue that purpose in their zoning codes. *See, e.g.*, cases cited in note 167 *supra*.

Symbol	*Meaning*
Y	Statute mentions morals as a valid zoning objective.
N	Statute authorizes the subdivision to zone its land, but does not mention morals as an objective.
n/a	Authority for the subdivision's zoning code is contained in another statute.
—	No state statute authorizes the subdivision to enact a zoning code.

State	Statute	Reference to "morals" applicable to: towns	cities	counties	other
Alabama	ALA. CODE tit. 37, § 11-52-72 (1975)	N	N	—	
Alaska	ALASKA STAT. § 29-33-090 (Supp. 197_)	—	N	—	
Arizona	ARIZ. REV. STAT. § 9-462.01 (Supp. 1975)	N	N	n/a	
	ARIZ. REV. STAT. § 11-802 (Supp. 1975)	n/a	n/a	N	
Arkansas	ARK. STAT. ANN. § 17-1110 (Supp. 1977)	Y	Y	N	
	ARK. STAT. ANN. § 19-2825(a) (1968)	Y	Y	n/a	
California	CAL. GOV'T CODE § 65800 (West Supp. 1976-1977)	—	N	N	
Colorado	COLO. REV. STAT. § 31-23-201 (1973)	Y	Y	n/a	
	COLO. REV. STAT. § 30-28-115 (Supp. 1976)	n/a	n/a	Y	
Connecticut	CONN. GEN. STAT. ANN. § 8-2 (West Supp. 1978)	N	N	—	borough—N district—N
Delaware	DEL. CODE tit. 22, § 301 (1974)	Y	Y	n/a	
	DEL. CODE tit. 9, § 2603 (1974)	n/a	n/a	Y	
District of Columbia	D.C. CODE § 5-413 (1973)	—	—	—	District—Y
Florida	FLA. STAT. ANN. § 163.190 (West Supp. 1977)	Y	Y	Y	
Georgia	GA. CODE ANN. § 69-1207 (1976)	Y	Y	Y	
Hawaii	HAW. REV. STAT. § 46-4 (1976)	—	—	N	
Idaho	IDAHO CODE § 67-6502 to -6503 (Supp. 1977)	—	N	N	

State	Statute	Reference to "morals" applicable to: towns	cities	counties	other
Illinois	ILL. ANN. STAT. ch. 24, § 11-13-1 (Smith-Hurd Supp. 1977)	Y	Y	n/a	village—Y
	ILL. ANN. STAT. ch. 34, § 3151 (Smith-Hurd Supp. 1977)	n/a	n/a	Y	
Indiana	IND. CODE ANN. § 18-1-1.5-10 (Burns 1974)	n/a	N	n/a	
	IND. CODE ANN. § 18-7-4-1 (Burns 1974)	N	N	N	
Iowa	IOWA CODE ANN. § 414.1 (West 1976)	—	Y	n/a	
	IOWA CODE ANN. § 358A.5 (West 1976)	—	n/a	N	
Kansas	KAN. STAT. § 12-704 (1975)	—	Y	n/a	
	KAN. STAT. § 19-2901 (1975)	—	n/a	Y	
Kentucky	KY. REV. STAT. § 100.201 (1971)	—	Y	Y	
Louisiana	LA. REV. STAT. ANN. § 33:4721 (West 1966)	Y	Y	—	village—Y
	LA. REV. STAT. ANN. § 33:107 (West 1966)	n/a	n/a	—	parish—Y
Maine	ME. REV. STAT. tit 30, § 4961 (Supp. 1973)	N	N	n/a	
	ME. REV. STAT. tit. 30, §§ 1301, 4504(3) (A) (B) (1964)	n/a	n/a	N	
Maryland	MD. ANN. CODE art. 66B, § 2.01 (1970)	—	—	n/a	Baltimore—Y
	MD. ANN. CODE art. 66B, § 3.06 (1970)	—	—	Y	municipality—Y
	MD. ANN. CODE art. 25A, § 5(X) (Supp. 1977)	—	—	Y	
Massachusetts	MASS. GEN. LAWS ANN. ch. 40A, §§ 2, 3 (West 1976)	N	N	—	

State	Statute	Reference to "morals" applicable to: towns	cities	counties	other
Michigan	MICH. COMP. LAWS ANN. § 125.203 (1976)	n/a	n/a	Y	
	MICH. COMP. LAWS ANN. § 125.273 (1976)	—	n/a	n/a	township—Y
	MICH. COMP. LAWS ANN. § 125.322 (1976)	—	n/a	n/a	newly incorporated villages—N
	MICH. COMP. LAWS ANN. § 125.581 (1976)	—	N	n/a	village—N
Minnesota	MINN. STAT. ANN. § 462.351 (West Supp. 1977)	n/a	Y	n/a	
	MINN. STAT. ANN. § 394.21 (West Supp. 1977)	n/a	n/a	Y	
	MINN. STAT. ANN. § 366.14 (West 1968)	Y	n/a	n/a	
Mississippi	MISS. CODE ANN. § 17-1-3 (1972)	Y	Y	Y	
Missouri	MO. ANN. STAT. § 89.020 (Vernon 1971)	Y	Y	n/a	village—Y
	MO. ANN. STAT. § 64.090 (Vernon Supp. 1978)	n/a	n/a	Y	
Montana	MONT. REV. CODES ANN. § 11-2701 (1968)	Y	Y	n/a	
	MONT. REV. CODES ANN. § 16-4102 (1967)	n/a	n/a	N	
Nebraska	NEB. REV. STAT. § 84-132 (1976)	—	n/a	n/a	general statute—N
	NEB. REV. STAT. § 14-401 (1977)	—	n/a	n/a	metropolitan cities—Y
	NEB. REV. STAT. § 15-902 (1977)	—	n/a	n/a	primary cities—N
	NEB. REV. STAT. § 19-901 (1977)	—	n/a	n/a	certain cities and villages—Y
	NEB. REV. STAT. § 23-114.03 (1977)			Y	
Nevada	NEV. REV. STAT. § 268.240 (1977)	—	Y	n/a	
	NEV. REV. STAT. § 278.020 (1977)	—	Y	Y	

State	Statute	Reference to "morals" applicable to: towns	cities	counties	other
New Hampshire	N.H. REV. STAT. ANN. § 31:60 (1970)	Y	Y	—	
New Jersey	N.J. STAT. ANN. § 40:55D-62 (West Supp. 1977)	—	—	—	municipality—N
New Mexico	N.M. STAT. ANN. § 14-20-1 (1976)	—	—	Y	municipality—Y
New York	N.Y. VILLAGE LAW § 7-700 (McKinney 1973)	n/a	n/a	n/a	village—Y
	N.Y. GEN. CITY LAW §§ 20 (24)-(25), 21 (McKinney 1968 & Supp. 1976-1977)	n/a	N	n/a	
	N.Y. GEN. MUN. LAW § 239-1 (McKinney 1974)	n/a	n/a	N	
	N.Y. TOWN LAW § 261 (McKinney 1965)	Y	n/a	n/a	
North Carolina	N.C. GEN. STAT. § 160A-381 (1976)	—	Y	n/a	
	N.C. GEN. STAT. § 153A-340 (1974)	—	n/a	Y	
North Dakota	N.D. CENT. CODE § 40-47-01 (1968)	—	Y	n/a	
	N.D. CENT. CODE § 11-33-01 (1960)	—	n/a	Y	
Ohio	OHIO REV. CODE ANN. § 303.02 (Page Supp. 1977)	—	—	Y	
	OHIO REV. CODE ANN. § 519.02 (Page Supp. 1977)	—	—	n/a	township—Y
	OHIO REV. CODE ANN. § 713.06 (Page 1976)	—	—	n/a	municipal corporation—N
Oklahoma	OKLA. STAT. ANN. tit. 11, § 401 (1959)	—	Y	n/a	
	OKLA. STAT. ANN. tit. 19, § 863.13 (1962)	—	n/a	Y	
Oregon	OR. REV. STAT. § 227.220 (1973)	—	Y	n/a	
	OR. REV. STAT. § 215.515 (1973)	—	n/a	N	
Pennsylvania	53 PA. STAT. ANN. § 10604 (Purdon 1972)	n/a	n/a	n/a	municipalities—Y
	53 PA. STAT. ANN. § 10105 (Purdon Supp. 1977)	Y	Y	Y	

State	Statute	Reference to "morals" applicable to: towns	cities	counties	other
Rhode Island	R.I. GEN. LAWS § 45-24-1 (1970)	Y	Y	—	
South Carolina	S.C. CODE § 47-1001 (1962)	Y	Y	n/a	
	S.C. CODE § 14-341 (Supp. 1975)	n/a	n/a	Y	municipality—Y
South Dakota	S.D. COMPILED LAWS ANN. § 11-2-12 (Supp. 1977)	n/a	n/a	N	
	S.D. COMPILED LAWS ANN. § 11-4-1 (Supp. 1977)	Y	Y	n/a	
Tennessee	TENN. CODE ANN. § 13-701 (1973)	Y	Y	n/a	
	TENN. CODE ANN. § 13-104 (1973)	n/a	n/a	n/a	state—Y
	TENN. CODE ANN. § 13-403 (1973)	n/a	n/a	Y	
Texas	TEX. REV. CIV. STAT. ANN. art. 1011a (Vernon 1963)	Y	Y	n/a	village—Y
Utah	UTAH CODE ANN. § 10-9-1 (1973)	Y	Y	n/a	
	UTAH CODE ANN. § 17-27-13 (1973)	n/a	n/a	Y	
Vermont	VT. STAT. ANN. tit. 24, § 4302 (1975)	Y	Y	—	village—Y
Virginia	VA. CODE § 15.1-489 (Supp. 1977)	N	N	N	
Washington	WASH. REV. CODE ANN. § 35.63.080 (1965)	Y	Y	Y	
West Virginia	W. VA. CODE § 8-24-39 (1969)	Y	Y	Y	
Wisconsin	WIS. STAT. ANN. § 62.23 (7) (a) (West 1957)	n/a	Y	n/a	
	WIS. STAT. ANN. § 59.97 (1) (West Supp. 1977-1978)	n/a	n/a	N	
	WIS. STAT. ANN. § 60.74(4) (West 1957)	N	n/a	n/a	
Wyoming	WYO. STAT. § 15.1-83 (1965)	Y	Y	n/a	
	WYO. STAT. § 18-289.1 (Cum. Supp. 1975)	n/a	n/a	Y	

APPENDIX B

City	*Type of Ordinance*	*Citation*
Atlanta	Detroit	Ordinance to Amend the Zoning Ordinance of the City of Atlanta so as to Exclude Adult Businesses, as Defined, from C-L (Commercial Limited) through C-3 (Commercial Residential) Districts, to Provide Definitions for Adult Businesses, (Adult Bookstores, Adult Entertainment Establishments, and Adult Theaters), to Establish Locational Requirements for Adult Businesses in C-4 (Central Business) through M-2 (Heavy Manufacturing) Districts, to Provide that Adult Businesses as Defined Shall Under Certain Circumstances Constitute Nonconforming Uses; to Repeal Conflicting Laws, and for Other Purposes (Nov. 1, 1976) (codified at ATLANTA, GA., ZONING ORDINANCE §§ 3.60, 3.67-.68, 18.31 C, 19.34(b), (i), 20.34 (b), (i), 21.34 (i), 22.54, 24.30 A, 26.49 (1977))
Atlantic City	Detroit	Ordinance No. 39 (Jan. 6, 1977) (amending ATLANTIC CITY, N.J., ZONING AND MERCANTILE ORDINANCES (1977))
Boston	Boston	Text Amendment No. 38 (Nov. 14, 1974) (codified in scattered sections of BOSTON, MASS., ZONING CODE (1977))
Dallas	Detroit	Ordinance No. 15269 (Sept. 13, 1976) (codified at DALLAS, TEX., CITY CODE §§ 46-9.2 to -9.3 (1977)); Ordinance No. 15243 (Aug. 2, 1976) codified at DALLAS, TEX., CITY CODE § 31-26 (1977)); Ordinance No. 15244 (Aug. 2, 1976) (codified at DALLAS, TEX., CITY CODE § 46-9.2 (1976)) (amended by Ordinance No. 15269 (Sept. 13, 1976), *supra*)
Denver	Detroit	Ordinance No. 140 (1977) (codified at DENVER, COLO., REVISED MUNICIPAL CODE ch. 610, art. 619.8 (1977)); Ordinance Nos. 691, 692 (1976) (codified at DENVER, COLO., REVISED MUNICIPAL CODE ch. 610, arts. 612 (scattered sections), 619.7-3(4), 619.44, 619.47 (1977))

City	*Type of Ordinance*	*Citation*
Detroit	Detroit	Ordinance Nos. 742-G, 743-G (Nov. 2, 1972) (codified at DETROIT, MICH., OFFICIAL ZONING ORDINANCE §§ 32.0007, 66.0000, 66.0103 (1977))
Kansas City, Mo.	Detroit	Ordinance No. 46880 (Dec. 19, 1976) (codified at KANSAS CITY, MO., ZONING RESOLUTION § 65.156 (1977))
Los Angeles	Moratorium (Detroit ordinance pending)	Ordinance No. 150,024 (as amended, Nov. 23, 1977)
Oakland, Calif.	Detroit	OAKLAND, CALIF., ZONING RESOLUTION §§ 7017-7019 (1976)
Philadelphia	Detroit	Bill No. 545 (May 2, 1977) (codified at PHILADELPHIA, PA., PHILADELPHIA CODE § 14-1605 (1977))
Rochester, N.Y.	Detroit	Ordinance Nos. 77-130, 77-131 (March 22, 1977) (codified at ROCHESTER, N.Y. ZONING RESOLUTION §§ 115-13 (scattered definitions), 115-29 E(1)(f), -54 C(9), -55 C(6), -56 G(2), -57 G(8), -61 F(7), -62 F(10), -85, -88 (subdivision S), -96(j) (1977))
Seattle	Boston (applies to theaters only)	Ordinance No. 105565 (May 28, 1976) (codified at SEATTLE, WASH., ZONING ORDINANCE §§ 3.21 5.3, 16.2, 17.2 (1976)); Ordinance No. 105584 (June 7, 1976) (codified at SEATTLE, WASH., ZONING ORDINANCE § 18.7 (1976))