Regulating Adult Entertainment: Legal Principles and Issues

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The phrase “adult entertainment” might be used to describe a women’s slow-pitch softball tournament or a men’s horseshoe competition but these are not the circumstances to which local officials usually apply it. Rather, “adult entertainment” is commonly used to broadly describe a range of communicative conduct (dancing) or material (books, magazines, videos) with a substantial erotic or sexual character. Thus, a city council or village board member who learns that “adult entertainment” will soon be part of their community does not immediately think about preparing a letter thanking the provider.

Sometimes, the news of commercial adult entertainment activity precedes the adoption of any local sexually-oriented business (SOB) or adult-oriented business (AOB) regulation. This prompts contact with the municipal attorney who is asked what regulations can be implemented after-the-fact. The response leaves the local official unsatisfied because she is advised that the books, magazines, movies, dances and other communicative materials or conduct sold or offered by the SOB or AOB are constitutionally protected speech, provided they are not obscene communications under the three-part test set forth in *Miller v. California*, 413 U.S. 15 (1973) an codified in Wis. Stat. sec. 944.21, which severely diminishes the prospect of meaningful after-the-fact regulation.

The constitutionally protected status of non-obscene adult entertainment speech creates some tension for local officials. Despite a substantial societal presence, it is disfavored speech and the personal or political tendency of a local official is to try and keep adult entertainment speech businesses out of their community. However, she must act contrary to that tendency because there is no legally permissible method to exclude all adult entertainment speech businesses from a city or village. Total bans on adult entertainment speech businesses are unconstitutional. And, implementing policies and regulations that seek such a goal will expose the municipality and the official to significant financial liability. Therefore, this comment seeks to advance effective and legally permissible alternatives by identifying constitutional adult entertainment regulation systems, key constitutional principles and important unresolved issues.

Regulation Systems.

Zoning is probably the most common form of adult entertainment business regulation. There are two types of zoning utilized. The first is “dispersion zoning” which requires specified separation distances between adult entertainment businesses as well as other types of uses such as residences, schools, etc. The second is “concentration zoning” also known as “red light district” zoning which seeks to concentrate adult entertainment businesses to particular areas of a community by prohibiting their location anywhere but selected areas. Both methods are constitutionally permissible “time, place, and manner” restrictions of protected speech, provided the implementing regulations satisfy applicable constitutional principles and rules.

The second common regulation system is licensing. In general, such systems establish requirements for owners and employees of adult establishments. These requirements focus on **how** the adult entertainment business is operated rather than **where** it is located. Thus, they differ from zoning requirements, which apply to the physical property involved irrespective of the owners or operators, in that they establish management requirements on owners/operators. However, as with zoning requirements, there are important constitutional principles restricting adult entertainment business licensing systems that must be followed.

Constitutional Principles

It is well established law that constitutional protection extends to books, magazines, photographs, sculptures, paintings, movies, speeches, plays, dances and other forms of communication that primarily convey an erotic or sexual message and are not deemed obscene under the law. Thus, effective adult entertainment speech regulation hinges on compliance with the principles or rules that define its constitutionally protected status.

The Content Neutrality Principle.

When analyzing speech regulations, courts distinguish between content-neutral and content-based regulations. Content-neutral regulations of speech are not concerned with the nature of the speech affected by the regulation. For example, a regulation that requires all signs in residential neighborhoods to be located at least three feet from a lot line is content-neutral. The regulation applies irrespective of whether the sign message is about a garage sale or a political candidate. In contrast, content-based regulations distinguish favored speech from disfavored speech on the basis of the ideas expressed. An ordinance that places time limits on political signs is one example because the ordinance is concerned with the sign's message.

Content-based regulations are subject to strict judicial scrutiny and are presumed invalid.1 This presumption may be overcome only by a showing that the regulation is "necessary to serve a compelling state interest and employs the least restrictive means to accomplish it."2

There are few judicially recognized "compelling" governmental interests and prohibiting the expression of an idea simply because society finds the idea itself offensive or disagreeable is not one of them. Thus, it is very rare for a court to find a content-based speech regulation valid and adult entertainment speech regulation cannot be based on the fact that a local official or her community is offended by such communication.

Upon examination, it is apparent that adult entertainment speech regulations are content-based. They universally specify coverage of only particular types of speech such as live performances characterized by the exposure of specified anatomical areas or by specified sexual activities; or films, motion pictures, video cassettes, slides, photographic reproductions, or other image producing devices that are characterized by the depiction or description of specified anatomical areas or specified sexual activities; or exotic or erotic dancing or performances that are intended for the sexual interests or titillation of an audience or customers. These adult entertainment speech regulations target certain communicative activities because of their erotic or sexual content. Thus, they could be subjected to the tough strict scrutiny standard by our courts but they are not.

There is an important exception to the general rule that strict scrutiny applies to content-based regulations. Some time, place or manner regulations are treated as content-neutral, even though they are content-based.3

Time, place, or manner restrictions are those government uses to direct speech through certain avenues rather than others. These include restrictions on operating hours, the locations within the community it might occur and specifying open video booths, separation distances between patrons and dancers and other limitations on the way erotic or sexual messages can be conveyed. Significantly, such restrictions are only subject to content-neutral intermediate scrutiny if they "are **justified** without reference to the content of the regulated speech."4 "Such justification is present if the regulation's predominant concern is with the 'secondary effects' of the regulated speech, rather than with the content of that speech."5

Accordingly, content-based time, place or manner restrictions imposed on adult entertainment speech by municipalities are not required to satisfy the more demanding **compelling** governmental interest test associated with content-based speech regulations, so long as the predominant concern of the regulation is controlling adverse secondary effects. However, such regulations cannot go too far and must also be narrowly tailored to serve the government's significant interest in curbing adverse secondary effects.6 And, finally, they must leave open "reasonable alternative avenues" for "adult entertainment" speech communication.7

It is important to note that there are two lines of cases in the adult entertainment speech context with slightly different tests. The *Renton* line deals with zoning regulations aimed at dispersing adult entertainment establishments. The other line, represented by *United States v. O'Brien*, 391 U.S. 367 (1968), deals with regulations directed at expressive conduct such as dancing. However, lower courts recognize that the analytical differences between the tests in each line are not significant.8 Given that zoning is arguably the more prevalent means for controlling adult entertainment speech business and the similarity between the tests, this comment will focus on the three *Renton* test elements.

Secondary Effects.
Recognized adverse secondary effects connected with adult entertainment include increased crime, decreased property values, prostitution, illicit sex, sexually transmitted disease and urban blight.9 It is not constitutionally necessary for any local regulation to be based on all or more than one adverse secondary effect associated with adult entertainment speech. Instead, the secondary effects justification for a content-based time, place and manner regulation of "adult entertainment" speech is present when the "municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance."10

When evaluating the sufficiency of an asserted connection between speech and secondary effects, the courts must "examine evidence concerning regulated speech and secondary effects."11 Thus, local officials must be able

to identify for the courts the secondary effects evidence they relied upon for their regulation decision.

Municipalities are not, however, required to produce their own independent evidence of secondary effects. Rather, a municipality may rely on studies performed elsewhere "so long as whatever evidence the [municipality] relies upon is reasonably believed to be relevant to the problem that [it] addresses."12 However, the Supreme Court cautioned that even though municipalities are not required to independently produce secondary effects evidence, "[t]his is not to say that a municipality can get away with shoddy data or reasoning."13 For the regulation to be upheld, "[t]he municipality's evidence must fairly support the municipality's rationale for its ordinance."14 Thus, there must be a reasonable nexus between a municipality's adult entertainment regulation and the secondary effects evidence upon which it is based.

Narrowly Tailored.
The adverse secondary effects associated with adult entertainment speech provides the constitutionally permissible grounds for content-based time, place and manner regulations. The permissible scope of such regulations is provided by the "narrowly tailored" limitation.

At one level, the "narrowly tailored" requirement is intertwined with the secondary effects justification. An adult entertainment speech ordinance is not narrowly tailored if it captures speech that does not generate the adverse secondary effects linked to erotic speech.15 Thus, local officials must draft regulations that are not overinclusive to avoid violating the "narrowly tailored" requirement.16

On another level, the "narrowly tailored" analysis is not strictly connected to the secondary effects rationale. Here the concern is simply imprecise regulatory language. If regulation terms are too ambiguous or vague, the regulation is arguably not narrowly tailored. However, mathematical precision is not the standard courts use to determine whether a particular term or phrase is constitutionally adequate and avoiding successful claims that regulations are not narrowly tailored because they contain impermissible vague terms or phrases has been relatively easy for municipalities. But, local officials must understand that inadequately drafted ordinances are still inadequate and can lead to adverse court decisions.17

Reasonable Alternative Avenues of Communication.
A content-based time, place or manner regulation of adult entertainment speech is constitutional only if it preserves "reasonable opportunity" to disseminate the speech at issue.18 Thus, "only the provisions of [ordinances] that regulate the time, place or manner of adult entertainment without removing alternative channels of communication are reasonable under the First Amendment."19

In general, the reasonable opportunity for alternative channels or avenues of adult entertainment speech communication duty of municipalities relates to the availability of places in it where adult entertainment speech might be conducted under the regulation. If a regulation effectively eliminates all opportunity, a total ban, than the regulation is unquestionably unconstitutional. But, where is the other end of the "opportunity" spectrum? In other words, how much "opportunity" is constitutionally required?

There is no definitive answer to this question because the courts advise that the analysis is case-by-case.20 To some extent, this makes sense given the variability of circumstances between municipalities. On the other hand, the analytical flexibility this approach attaches to a constitutional right, makes the underlying free speech right appear variable. Nonetheless, in general, "reasonable opportunity" compliance hinges on whether application of the regulation leaves some locations within the municipality's commercial real estate market that could reasonably be used for adult entertainment speech.

An adult entertainment business ordinance that satisfies the foregoing elements of the intermediate scrutiny **Renton** test or even the *O'Brien* test, is not automatically valid. It is a restriction on protected speech and, accordingly, subject to several other important general principles controlling all speech regulations, which include overbreadth, vagueness and prior restraint.

Overbreadth Doctrine.
The overbreadth principle in the speech regulation context is used by the courts in at least two ways. Both applications focus on the constitutional precision of the regulation's language.

In one form, overbreadth refers to a circumstance where a party in a case is allowed to challenge speech restrictions of a regulation that do not directly apply to the party but allegedly chill the speech rights of others who are not a party in the case but "who may be unwilling or unlikely to raise a challenge in their own stead." However, in these "facial challenge" cases, the challenging party must show that the overbreadth of the ordinance "must not only be real but substantial as well, judged in relation to the [ordinance's] plainly legitimate sweep."21 In other words, substantial overbreadth is not demonstrated by a few hypothetical examples of overreach.

Nonetheless, some overbreadth claims have been successful. In *Erznoznik v Jacksonville*, 422 U.S. 205 (1975), the Supreme Court struck down as substantially overbroad a city ordinance that made it illegal for drive-in theater operators to show movies including any form of nudity if the film could be seen from any public road or place. Explaining the ordinance could prohibit clearly constitutional speech with nudity such as newsreel footage of an art exhibit with nude paintings, an image of a baby's buttocks, or film of bare-breasted African dancers, the Court concluded the ordinance reached too much protected speech outside of the city's legitimate concern for protecting minors from sexual images.

Application of the facial "substantial overbreadth" test in "adult entertainment" speech cases is sometimes muddled with the "narrowly tailored" prong of the content-based time, place and manner exception test. Judicial analysis can be found where the court finds that an "adult entertainment" speech regulation is not narrowly tailored because it prohibits speech not associated with negative secondary effects of such speech and concludes the regulation is unconstitutionally overbroad. However, such overlapping analysis is flawed. While a substantially overbroad regulation is certainly not narrowly tailored, an ordinance that is not narrowly tailored is not always **substantially** overbroad. In such cases, a more sound overbreadth inquiry focuses directly on whether the regulation reaches too much speech unrelated to the secondary effects justification, ignoring the "narrowly tailored" analysis altogether.22

In its second form, overbreadth refers to a circumstance where a litigant claims the regulation impermissibly denies the litigant, not a third party, too much protected speech. In these "as applied" cases, the litigant does not have to show **substantial** overbreadth. Rather, this type of overbreadth claim succeeds where the litigant demonstrates that the regulatory language prohibits a constitutionally protected form of speech.23 This means ordinances must be carefully reviewed to determine whether they impermissibly prohibit protected speech.

Vagueness Doctrine.
Related to the overbreadth doctrine is the vagueness doctrine. Like overbreadth, vagueness is concerned with the level of precision provided by the regulation's language.

The vagueness doctrine, an aspect of the due process requirement of notice, provides that a law is facially invalid if persons of common intelligence must necessarily guess as at its meaning and differ as to its application.24 Consequently, a law is void for vagueness if it fails to give fair warning of what is prohibited, if it fails to provide explicit standards for the persons responsible for enforcement and thus creates a risk of discriminatory enforcement, and if its lack of clarity chills lawful behavior.25

In general, greater clarity is required under the vagueness doctrine when the subject regulation affects fundamental rights such as free speech. Nonetheless, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."26 Thus, "[t]o say that precision is a precondition to enforcement is to say that no ordinance regulating speech may stand — a proposition the Supreme Court has rejected over and over again."27

Noted earlier in regard to the "narrowly tailored" requirement, constitutionally permissible imprecision in adult entertainment regulation is an effective shield in most cases to claims that terms or phrases are unconstitutionally vague. However, constitutionally acceptable imprecision is not a shelter for poor drafting. Thus, local officials must faithfully seek to produce an ordinance that is readily understood, given that the alternative will virtually assure litigation.

Prior Restraint Doctrine
Permit and licensing systems for adult entertainment speech enterprises such as conditional use permits and business licenses are prior restraints on speech since they require government permission to speak. Accordingly, these regulatory practices are subject to the doctrine of prior restraint which seeks to prevent the government from quelling expression in advance of its communication.28

While not *per se* unconstitutional, a prior restraint bears a heavy presumption against constitutionality.29 However, prior restraints are upheld where procedural safeguards are in place to "reduce the danger of suppressing constitutionally protected speech."30

The Supreme Court addressed licensing schemes for adult entertainment speech as prior restraints in *FW/PBS*, where the local ordinance required all "sexually oriented businesses" to be licensed in order to operate. A majority of the Court could not agree on whether all of the standards set forth in its leading prior restraint decision, *Freedman v. Maryland*, 380 U.S. 51 (1965), should apply. However, a plurality did agree that an adult entertainment licensing scheme must provide clear standards to guide the decisionmaker and there must be prompt judicial review, prior to which the status quo must be maintained.

The clear standards requirement is designed to eliminate the risk of government censorship. Accordingly, adult entertainment permit or license regulations must not vest a decisionmaker with unbridled discretion that permits either undue delay or subjective decisions. Rather, under *FW/PBS*, such systems must contain narrow, objective and definite standards, including explicit and reasonable time limits for a decision.

For a while, the *FW/PBS* prompt judicial review requirement generated considerable court activity. The issue was whether local regulations must create access to prompt judicial review (difficult since municipalities generally have no power to dictate judicial action) or whether they must guarantee a judicial decision within a specified time. The Supreme Court resolved this issue in *City of Littleton v. Z.J. Gifts* D-4, L.L.C., 541 U.S. 774 (2004), wherein the Court held that ordinary judicial review is sufficient. Thus, municipalities are not required to create judicial review access through their local regulation.

Ongoing Issues

So, are the legal principles guiding adult entertainment speech regulation settled? The answer is no. In part, evidence for this answer is found in the significant number of adult entertainment decisions of the Supreme Court decided by slim majorities or only pluralities. Additional evidence is provided by recent cases which highlight continuing issues tied to one or more of the legal principles already discussed.

Secondary Effects Evidence.
The "reasonably believed to be relevant" standard for secondary effects evidence set forth *Renton* is fairly lenient. Courts regularly defer to the legislative judgment of local officials about what studies are relevant. However, an ongoing issue is the degree of consistency between the secondary effects evidence relied on and the type of adult entertainment speech business regulated.30

Until recently, this issue did not generate a reported judicial decision by a court with Wisconsin jurisdiction. This changed with the *New Albany DVD, L.L.C v. City of New Albany,* 581 F.3d 556 (7th Cir. 2009), decision of a three-judge Seventh Circuit panel.

The case involved an adult store that sold books, magazines and videos for off-premises reading or viewing. The store did not provide any "live or recorded entertainment on site," which undermined the local regulation. The court explained that the local regulation rested on studies that "principally reflect the effects of adult businesses that offer live entertainment or peep shows." Apparently considering this "evidence implying that take-home adult stores do not have adverse secondary effects," the court remanded the case to the trial court for an evidentiary hearing. Thus, *New Albany* appears to add Wisconsin, Illinois and Indiana to the places where a specific connection between the secondary effects study evidence supporting the regulation and the type of business regulated is constitutionally required.

Narrowly Tailored.
In *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997), the Supreme Court intimated that the internet is the principal medium for sexually explicit communication in America. The Court identified the widespread availability of sexually explicit material online, including hard core pornography.32 However, the internet represents an entirely different means of communicating such speech that presents some new challenges for local regulation of adult entertainment businesses.

One issue is drafting language to bring such operations within the scope of the adult entertainment regulation. The *Voyeur Dorm, L.C. v. City of Tampa*, 265 F.3d 1232 (11th Cir. 2001), decision is an interesting example.

Voyeur Dorm, L.C. operated a website that allowed paid subscribers to observe, through the use of webcams and the internet, women living in a dorm residence in Tampa, Florida. This included seeing the women disrobed and potentially involved in intimate acts. City of Tampa officials concluded that the activities at the Voyeur Dorm residence constituted an adult business use and sought to enforce applicable regulations. On appeal, the Eleventh Circuit rejected the City's arguments. It noted that the entertainment occurred in the "virtual space" of the internet and, as such, there was no offering of adult entertainment at the dorm residence as required by the court's interpretation of the City ordinance language.

However, even assuming an ordinance is written or rewritten with sufficient precision to bring internet adult entertainment speech delivery within its regulatory framework, this leaves a potentially more difficult issue for regulation that *Voyeur Dorm* did not answer. The issue is whether such operations generate any recognized secondary effects that would justify a content-based regulation given that such operations do not involve on-site patrons — customers are at home or otherwise off-site. If a sufficient secondary effects nexus cannot be established, like other regulations with this problem in cases noted above, the regulation would presumably be invalidated as not narrowly tailored since it would not further the government's interest in curbing secondary

effects.

Reasonable Alternative Avenues.
The widespread availability of internet sources may someday yield a judicial decision accepting the argument that such availability should be considered when evaluating whether a local regulation unduly denies reasonable alternative avenues of communication for adult entertainment speech. The argument however must confront the general "alternative avenues" concept that the alternatives be located within the jurisdictional boundary of the regulating municipality. However, this aspect of "alternative avenues" analysis is being questioned, particularly in cases involving small communities.

For example, in *Boss Capital, Inc. v. City of Casselberry,* 187 F.3d 1251, n. 2 (11th Cir. 1999), the court determined that the relevant real estate market contained available sites for adult entertainment, including those as far as one and a quarter miles outside city limits. More recently, Judge Easterbrook, writing for a three-judge panel of the Seventh Circuit, commented on this issue in *Illinois One News, Inc. v. City of Marshall*, 477 F.3d 461 (2007).

The case involved a claim that the adult entertainment business regulation of the City of Marshall, Illinois, a small community of 3.2 square miles located in Clark County, which left only four percent of its area for adult business operations failed the "alternative avenues" requirement. The court disagreed and found that four percent was adequate.

The more interesting aspect of the case is Judge Easterbrook's commentary on the relationship between the constitutionally mandated "alternative avenues" duty and the arbitrariness of municipal boundaries. In it, he asked, "But, if land to the north of the City's border would supply a constitutionally adequate venue for the speech if the City extended its border by a half mile or so, why is the same parcel a constitutionally inadequate venue when it is outside the City's border?" He answered this rhetorical question by stating that the "Constitutional rule is that a person have adequate opportunity to speak, not that the land be in one polity (the City of Marshall) rather than another (Clark County)." Thus, there is some support in the Seventh Circuit for the proposition that arbitrary municipal boundaries should not be the touchstone for "alternative avenues" analysis. A future case will show whether that support is converted to legal authority or remains mere dicta.

Conclusion

Municipalities that fail to adopt proactive adult entertainment business regulations may find themselves in an unsatisfactory and unnecessary situation. Many municipalities have successfully adopted zoning and licensing systems which seek to address the negative secondary effects of such businesses. That success follows from a faithful adherence to relevant constitutional principles, careful drafting and attention to ongoing issues.

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1. *City of Renton v. Playtime Theaters, Inc*. 475 U.S. 41, 47 (1986).
2. *See, e.g., Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990).
3. *See City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000).
4. *City of Renton,* 475 U.S. at 48.
5. *Id*. at 47.
6. *Id*.
7. *Id*.
8. *See Hodgkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004) (explaining that the *O'Brien* expressive conduct analysis and the time, place and manner analysis are really just "variations on the same principle."); *see also Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702 (7th Cir. 2003).
9. *City of Renton,* 475 U.S. at 48.
10. *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 408 (7th Cir. 2004).
11. *Id*.
12. *City of Renton* at 51-52.
13. *City of Los Angeles v. Alameda Books,* 535 U.S. 435, 438 (2002).
14. *Id*.
15. *See Schad v. Mount Ephraim*, 452 U.S. 61 (1981).
16. *See e.g., MDK, Inc. v. Village of Grafton,* 345 F.Supp.2d 952 (E.D. Wis. 2004).
17. *See e.g., Entertainment Concepts, Inc. v. Maciejewski,* 631 F.2d 497 (7th Cir. 1980), *cert. denied,* 450 U.S. 919 (1981) (Ordinance that applied to "adult theaters" without defining the term held to be impermissibly vague).
18. *City of Renton*, 475 U.S. at 52.

19. *Schultz v. City of Cumberland,* 228 F.3d 831, 846 (7th Cir. 2000).
20. *See Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 78-79 (1981) (Blackmun, J., concurring).
21. Broadrick v Oklahoma, 413 U.S 601, 615 (1973).
22. See e.g., Lounge Mgmt., Ltd. v. Town of Trenton, 219 Wis. 2d 13, 580 N.W.2d 156 (1998).
23. See Schultz v. City of Cumberland, 228 F.3d 831, 848 (7th Cir. 2000) (Ordinance definition of "specified sexual activities" deprived "the performer of a repertoire of expressive elements with which to craft an erotic, sensual performance" and substantially interfered "with the dancer's ability to communicate her erotic message.").
24. *Connally v General Construction Co*., 269 U.S. 385, 391 (1926).
25. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).
26. *Ward v. Rock Against Racism,* 491 U.S. 781, 194 (1989).
27. *Anderson v. Milwaukee County*, 433 F.3d 975, 978 (7th Cir. 2006).
28. *See Alexander v. United States,* 509 U.S. 544, 550 (1993).
29. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225 (1990).
30. *See Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559 (1975).
31. *See Wolff v. City of Monticello,* 803 F. Supp. 1568, 1572-73 (D. Minn. 1992) (holding an ordinance based on studies of adult uses as principal use is not narrowly drawn if applied to uses where adult aspects were an accessory use); *World Wide Video v. City of Tukwila*, 816 P.2d 18, 21 (Wash. 1991), *cert. denied*, 503 U.S. 986 (1992) (city can not rely on studies of impact of peep show businesses to justify regulation location of adult video store with "take out" only fare).
32. *Id*. at 2336.

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