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I would like to thank the editors and staff of the New York City Law Review for their patience and hard work editing this note. Thank you always to Ruthann Robson for inspiring myself and many others to publish by saying, "You can do this!" Props to the spring 2005 sexuality class for inspiration and many laughs about penises, dildos, and much more.

SHAKEN FROM HER PEDESTAL:¹ A DECADE OF NEW YORK CITY'S SEX INDUSTRY UNDER SIEGE

Jennifer Cook*

INTRODUCTION

Driven by Mayor Rudolph Giuliani's moral disapproval for the sex industry and his administration's incessant campaign against open sexuality, The New York City Council voted in 1995 to censor 98% of the city.² This regulation was the first of its kind, blatantly expressing hostility towards sexual freedom. This is not an original conflict, however; rather, it exists as part of an ongoing ebb and flow between exertions of sexuality and shifting sources of political power, resulting in a tyranny against licentiousness, periods of withdrawal, reorganization, and ultimate resurfacing in compliance with existing legal interpretations.³ This circular pattern of sexual vigor, damning, and regeneration, as well as the continuous dialogue regarding sexual freedom, embodies society's moral conflict over sexuality. This pattern is easily repeated since both consumers and initiators of deviant sexual activity may be labeled, targeted, and ostracized. Some feminists argue that such stringent assaults on the sex industry result in the increased persecution of sex workers, poor women, and immigrants.⁴ Still other feminists counter this by denouncing pornography and sex work as legitimating

¹ The *Vamps & Virgins: The Evolution of American Pinup Photography 1860-1960* exhibit at The Museum of Sex featured text adorning the wall reading, "In the 19th century the nude was shaken from her pedestal and let loose on the street. The medium [photography] had an erotic power unparalleled at the time—and certainly unavailable in painting or sculpture no matter how realistic it was." This exhibit ran from October 7, 2004 through June 12, 2005.

* J.D., City University of New York School of Law, May 2005. I would like to thank the editors and staff of the New York City Law Review for their patience and hard work editing this note. Thank you always to Ruthann Robson for inspiring myself and many others to publish by saying, "You can do this!" Props to the spring 2005 sexuality class for inspiration and many laughs about penises, dildos, and much more.

² Benjamin Shepard, *Sex and Worldmaking: A Review of New York's Museum of Sex*, 6 SEXUALITIES 479, 485 (2003) (on file with New York City Law Review); see N.Y., N.Y., ZONING RESOL. §§ 32-01, 42-01 (1995).

³ Shepard, *supra* note 2, at 483.

⁴ See Feminists for Free Expression Mission (2000-2004), <http://www.ffeusa.org/html/mission/index.html> (last visited Feb. 2, 2006). Feminists for Free Expression is a not-for-profit organization founded in January 1992 in response to the many efforts made to use censorship to solve society's problems.

harm to women.⁵ Framing the sex business in such antithetical ways, particularly within a seemingly cohesive “liberal” movement to strengthen women’s rights, emphasizes the complex nature of categorizing sexual freedom and culture.⁶ Yet another method of analyzing sex work, typically employed by politicians, is to consider the ways in which the surrounding community is harmed.⁷ The community harm, or secondary effects, is the underlying premise commonly used to uphold legislation that chills certain types of speech. Such is the case in New York City, where politicians have successfully portrayed strip clubs and other sex businesses as causing crime and the deterioration of property values.⁸ New York City, however, does not stand in isolation, but rather it reflects a growing trend across the country to heavily regulate sex businesses and curtail sexual freedom.⁹ From urban centers, such as Los Angeles and New York City, to rural areas in Illinois and Minnesota, courts are so frequently deferential to legislators that, when applying the secondary effects doctrine, evidentiary standards have eroded to the point that they beg the question—why bother providing any standard at all?

This article illustrates that New York City’s dogmatic politicians enacted the 1995 Adult Entertainment Ordinance by using sex workers, and the sex industry as a whole, as scapegoats for the regulation of public activity. Part I of this Article briefly explores the history of New York City’s sex industry dating back to the 1800s. The Kinsey studies¹⁰ and the sexual liberation of the 1960s helped to turn Times Square into a booming “sex capital,” and thus, by the 1970s, a more free-spirited sexual era became prone to social and political attack. Part II focuses on New York City’s adop-

⁵ Catherine MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

⁶ Shepard, *supra* note 2, at 482.

⁷ See *id.* Examples are Anthony Comstock’s success in garnering support for laws against obscenity, President Lyndon Johnson’s Commission on Pornography, the Meese Commission’s examination of pornography and Mayor Rudolph Giuliani’s campaign against sex businesses in New York City. See *id.* Johnson’s Commission found “no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior among youth or adults.” *Id.*

⁸ *Id.*

⁹ Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 287 (2003-2004).

¹⁰ See JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 285-87 (2d ed. 1997). The Kinsey studies, scientific studies published by Alfred Kinsey in 1948 and 1953, described the sexual habits of male and female Americans, including masturbation, pre-marital sex, and homosexuality. *Id.*

tion of a zoning ordinance to restrict sex-oriented businesses,¹¹ a move that sparked an ongoing battle between sex shops and then-Mayor Rudolph Giuliani. The ordinance was upheld but later strictly interpreted in favor of sex shops.¹² In response, amendments were adopted in 2001 to close “loopholes” in the original ordinance and to prevent “sham compliance.”¹³ In a challenge by Ten’s Cabaret, a sexually oriented business in New York City, these amendments were initially deemed unconstitutional,¹⁴ but they were upheld on appeal as a legitimate exercise of police power.¹⁵ Part III critiques the secondary effects doctrine by looking at community and moral forces behind its momentum and tracing its origins and development.¹⁶ Part IV discusses the core arguments presented by New York City and the plaintiffs in the appeal of *Ten’s Cabaret*, as well as the report used to support New York City’s secondary effects theory. Even though the legislative encroachment upon sexual expression created by the ordinance and subsequent amendments is unsupported by statistical data, the regulations have been upheld because of society’s moral disapproval of sex work. When interpreting whether adult entertainment ordinances infringe upon First Amendment rights, the judiciary too often defers to the legislature and secondary effects studies, thereby undermining the integrity of the adjudicative process. In this battle between defining and expressing sexual identity and the resulting subjugation of it, New York City’s sex workers bear the blame for society’s evils, regardless of whether they actually cause such degradation. As a result of triumphs against licentiousness, New York City has undoubtedly been shaken from her pedestal as the sexiest city in America.

I. THE TUMULTUOUS BACKGROUND OF NEW YORK CITY’S ADULT ENTERTAINMENT ORDINANCE

A. *The Ups and Downs of New York City’s Sex Business*

Gotham City. The city that never sleeps. Sex capital of the

¹¹ See N.Y., N.Y., ZONING RESOL. §§ 32-01, 42-01 (1995).

¹² *City of New York v. Les Hommes*, 724 N.E.2d 368, 369 (N.Y. 1999).

¹³ Brief for Appellant at 24, 37, *For the People Theatres of New York, Inc. v. City of New York*, No. 121080/02 (N.Y. App. Div. 2005) [hereinafter NYC Brief].

¹⁴ *Ten’s Cabaret, Inc. v. City of New York*, 7 68 N.Y.S.2d 786 (N.Y. Sup. Ct. 2003).

¹⁵ *For the People Theatres of New York, Inc. v. City of New York*, 798 N.Y.S.2d 356, 366 (N.Y. App. Div. 2005).

¹⁶ See generally Christopher J. Andrew, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175 (2002).

United States. The backdrop for the hit HBO series *Sex and the City*. Everyone knows that New York City is sexy. It captivates people because, just like sex, it can be exhilarating, exhausting, and dirty. Part of the allure stems from capturing the range of nuances and expressions of humankind's sexual desires.¹⁷ Describing his intimacy with Times Square's sex industry, Samuel Delany hypothesized that "[c]ontact and its human rewards are fundamental to cosmopolitan culture, to its art and its literature, to its politics and its economics; to its quality of life."¹⁸

Despite New York's historical and consistently flourishing sex industry, its local politicians continue crusading against strip clubs, porn shops, and peep shows. Prior to a 1995 Adult Entertainment Ordinance, New York City administrations had been unable to pass a zoning ordinance distinguishing "between adult entertainment and commercial businesses without adult character."¹⁹ Nevertheless, several city politicians since the 1960s imposed stricter regulations on the sex industry in one way or another.²⁰ These restrictions attempted to diminish the presence of the ugly and perverse, and therefore "other," to create a unified system of normalcy and moral social order.²¹

Notwithstanding attempts to suppress it, sex has been for sale in New York since the city's infancy. In the mid-1800s, prostitution was common and vendors sold erotic postcards and photographs.²² Women brought customers to brothels, and both sexes alike drank, kissed, cursed, and swore together in "bawdy houses."²³ During the Great Depression, Times Square's theater district expanded the types of entertainment it offered to include "grinder" houses—theaters that continuously showed nudist films and sexually explicit movies.²⁴

During the post-war Baby Boom era, Americans praised motherhood and domesticity.²⁵ The Kinsey studies, however, revealed that people were more sexually savvy than imagined.²⁶ These studies helped define cultural attitudes about sex and, in turn, created

¹⁷ SAMUEL R. DELANY, *TIMES SQUARE RED, TIMES SQUARE BLUE* 45 (2001).

¹⁸ *Id.* at 199.

¹⁹ *Ten's Cabaret*, 768 N.Y.S.2d at 788.

²⁰ N. R. Kleinfield, *It's Not Easy to Push Sex Into the Shadows*, N.Y. TIMES, Mar. 1, 1998, at 29.

²¹ See DELANY, *supra* note 17, at xiii-xiv, xx.

²² Kleinfield, *supra* note 20, at 29.

²³ D'EMILIO & FREEDMAN, *supra* note 10, at 50.

²⁴ Kleinfield, *supra* note 20, at 29.

²⁵ D'EMILIO & FREEDMAN, *supra* note 10, at 253.

²⁶ *Id.* at 286.

the backdrop for the Supreme Court to define “obscenity.”²⁷ During the watershed years of 1957 through 1967, the liberal Warren Court decided several obscenity cases, generally holding that sex is appropriate for public consumption.²⁸ The liberal climate of the 1960s embraced the proliferation of pornographic books, magazines, and films.²⁹ New York City’s 1961 Zoning Regulation reflected these tolerant times as it did not distinguish between the use of land for adult entertainment, other commercial businesses, or residences.³⁰ Times Square’s retail sex industry took advantage of the liberal atmosphere, adding to its repertoire the “peep show,” which soon made the area notorious as the nation’s retail sex capital.³¹ The sex industry of Times Square boomed during the 1970s, offering more than 100 sex shops and topless bars. Prostitutes worked at dozens of massage parlors dotted throughout midtown; and Show World, a glitzy multi-story sex emporium, became a landmark of the sex industry.³² Such a bustling showcase challenged conventional morality and gave every overzealous city politician the opportunity to add an attractive cause to his or her platform.

In much the same way domesticity and conformity were glorified in the 1950s, New York City’s local politicians in the 1960s began attacking sexual freedom in the name of safety.³³ In each era, dominant forces within society engineered a social agenda that defined atypical sexuality as dangerous and unwanted. During this effort, Mayor John V. Lindsay set up a task force in 1969 to begin dismantling sex-oriented peep shows and magazine stores.³⁴ By 1977, the City Planning Commission (CPC) concluded that adult

²⁷ See *id.* at 285-87. The Kinsey studies, published in 1948 and 1953, shocked most Americans’ sense of morality. They described the sexual habits of male and female Americans, including masturbation, pre-marital sex, and homosexuality. The male study revealed that most masturbation is universal, almost 90% had experienced pre-marital intercourse, and over one third had had a homosexual experience. Although the numbers were slightly less for women, they demonstrated that women were not the pillars of sexual propriety society deemed them to be.

²⁸ See *Roth v. United States*, 354 U.S. 476, 484 (1957) “All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment], unless excludable because they encroach upon the limited area of more important interests.” *Id.*

²⁹ *E.g., id.*

³⁰ *Ten’s Cabaret*, 768 N.Y.S.2d at 788.

³¹ See Kleinfield, *supra* note 20, at 29.

³² *Id.*

³³ See DELANY, *supra* note 17, at 122.

³⁴ Kleinfield, *supra* note 20, at 29.

entertainment had negatively impacted the City.³⁵ The CPC proposed a zoning regulation that would have limited locations for adult-use businesses.³⁶ This proposal, however, was rejected.³⁷ Residents appealed, and, in response, the Nuisance Abatement Law was adopted, making it easier to close illegal sex shops.³⁸ Officials soon targeted numerous neighborhoods and began closing adult video stores and bars throughout New York City and its boroughs.³⁹

Mayor Ed Koch continued to enforce the Nuisance Abatement Law, which, combined with market forces, propelled the sex industry into rapid decline in the 1980s.⁴⁰ The recession of the early 1990s brought a renewed momentum to the sex industry as businesses reinvented themselves and pornographic video stores survived under the nuisance statute.⁴¹ Also, due to depressed housing prices, landlords in other parts of the city more readily accepted sex shops as tenants.⁴² As a result, sex shops proliferated in residential neighborhoods, such as Chelsea, the Upper West Side, Greenwich Village, Forest Hills, and Sunset Park.⁴³ Between 1984 and 1993, adult entertainment establishments increased by 35%, of which more than 75% were located in residential areas.⁴⁴ Consequently, many residents and community groups expressed concern that adult entertainment businesses were having a negative impact on their neighborhoods.⁴⁵

B. Morality and Public Pressure Force Sexual Minorities to Bear the Blame for Negative Societal Conditions

Even before the efforts of Mayors Lindsay, Beame, and Giuliani, New York City has long been a place where promiscuous sex-

³⁵ *Ten's Cabaret*, 768 N.Y.S.2d at 788.

³⁶ *Id.* at 788.

³⁷ *Id.* at 789.

³⁸ See Kleinfield, *supra* note 20, at 29.

³⁹ *Ten's Cabaret*, 768 N.Y.S.2d at 789 (noting that adult video stores and bars were closed in neighborhoods such as Astoria, Jackson Heights, Chelsea, Murray Hill, Forest Hills, and Bay Ridge; and that the number of adult establishments decreased from 151 in 1976 to 131 in 1984).

⁴⁰ See Kleinfield, *supra* note 20, at 29. "Increasingly, people favored watching sex tapes on their own VCRs. Between 1975 and 1986, according to the Office of Midtown Enforcement, the number of sex shops and pornographic movie houses in central Manhattan plunged to 44 from 147. Massage parlors and topless bars all but vanished." *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *id.*

⁴⁴ *Id.*

⁴⁵ NYC Brief, *supra* note 13, at 6.

ual activity has been demonized. During the mid-nineteenth century, when New York City's bawdy houses and brothels were prospering, the *New York Tribune* characterized them as "the system of Society which produce the dreadful social evils."⁴⁶ Public response to sexual immorality ignited in New York City when a mob of several hundred attacked places where prostitution proliferated, such as brothels and gentlemen's residences.⁴⁷ The historical and ever-present demonization of sex workers illustrates that, while they themselves are expressions of sexual liberation, their actions are equated with loss of morality and social marginalization.⁴⁸ Legislation aimed at censoring sexual activity is especially sensitive because of the fear that such laws could be broadly construed to repress "gays and lesbians, artists, and others."⁴⁹

In much the same way that New York City's sex industry is blamed for high crime rates and lower property values, homosexual bathhouse activities were blamed for the rapid spread of AIDS in the 1980s. One of the most significant quellings of public sexual activity in New York City was the anti-bathhouse activism of the 1980s and 1990s. During the early 1990s, several activist groups banded together to regulate public sex in an effort to reduce AIDS transmission.⁵⁰ These groups relied on conservative media representations that attributed the rise of HIV transmission to bathhouse activity.⁵¹ Under an appearance of concern for AIDS safety, politicians successfully made homosexual acts themselves illegal.⁵² Because of visibility and easy classification, sex workers and homosexuals were two groups of sexual minorities particularly at risk for public attack.

⁴⁶ TIMOTHY J. GILFOYLE, *CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX, 1790-1920* 163 (1992).

⁴⁷ D'EMILIO & FREEDMAN, *supra* note 10, at 39. The riot protested the rape acquittal of Harry Bedlow. He had met a seventeen-year-old seamstress named Lanah Sawyer and they had "walked out" together on several occasions before Bedlow and Sawyer had sex at a "bawdy house." *Id.*

⁴⁸ GILFOYLE, *supra* note 46, at 181.

⁴⁹ Daphne Read, *(De)Constructing Pornography: Feminisms in Conflict*, in *PASSION AND POWER* 281 (Kathy Peiss & Christina Simmons eds., 1989).

⁵⁰ See Alison Redick, *Dangerous Practices: Ideological Uses of the "Second Wave,"* in *POLICING PUBLIC SEX* 91-92 (Dangerous Bedfellows ed., 1996). These groups include Gay and Lesbian HIV Prevention Activists (GALHPA); AIDS Prevention Action League (APAL); and Community AIDS Prevention Activists (CAPA). See *id.*

⁵¹ See *id.* at 93; RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE AND THE AIDS EPIDEMIC* 315-17 (1987). On September 11, 1993, *And the Band Played On* aired as an HBO movie that gave a narrative account of the beginning of the AIDS crisis. It portrayed sexually promiscuous activities in bathhouses and the culture of public sex in the 1970s as the primary reasons for the rapid spread of HIV among gay men.

⁵² DELANY, *supra* note 17, at 91.

Social studies, however, conflicted with media portrayals of HIV transmission, revealing that regulation of gay bathhouses had little impact on the prevalence of gay men's risky behavior.⁵³ Anti-bathhouse groups conflated public sex with unsafe sex, thereby contributing to cultural fears and stereotypes that all homosexual activity is dangerous. Municipalities contributed to the condemnation of gay sexual activity by isolating homosexual activity as the single cause of AIDS and using police power to combat the systemic problem.⁵⁴

In an effort to combat the AIDS epidemic, New York City first agreed to keep bathhouses open for purposes of sex education by licensing them through the Health Department.⁵⁵ Mayor Ed Koch initially supported using bathhouses as advantageous forums for educating the gay community about unsafe sex practices that contribute to the spread of HIV. The well-known St. Mark's Baths in New York City espoused safe-sex behavior by providing free condoms and asking patrons to pledge to safe-sex guidelines. Koch later reconsidered his position, however, when some in the gay community voiced opposition to the bathhouses.⁵⁶

Regulatory bodies in New York City, as well as in other municipalities throughout the country, relied on the threat of AIDS as a justification for regulating homosexual spaces.⁵⁷ For example, in the mid-1980s, the New York State Public Health Council created regulations that targeted private establishments where "high-risk sexual activity" occurred.⁵⁸ The regulations empowered local

⁵³ See William J. Woods et al., *Public Policy Regulating Private and Public Space in Gay Bathhouses*, 32 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 417 (2003). Public policies prohibiting either public or private space in gay bathhouses vary across cities. New York, San Francisco, Los Angeles, and Chicago all have different policies. The objective of this study was to assess reported risky behavior as an indicator of success of one policy over another. Gay men were equally likely to report unsafe sex with a casual partner regardless of the rules about the physical arrangement of space in bathhouses. Data indicated that the rate of HIV transmission was no higher in places such as New York City where gay men frequent bathhouses more often. *Id.*

⁵⁴ See Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U. CHI. LEGAL F. 73, 92-93 (2002).

⁵⁵ Jane Gross, *Bathhouses Reflect AIDS Concerns*, N.Y. TIMES, Oct. 14, 1985, at B3.

⁵⁶ *Id.* The controversy began at the St. Mark's Baths where, for the price of a locker or a room, patrons received free condoms, enclosed in a package on which was written, "the contents of this envelope could save your life." *Id.*

⁵⁷ Joe Rollins, *Secondary Effects: AIDS and Queer Identity*, 6 LAW & SEXUALITY 63 (1996).

⁵⁸ Maurice Carroll, *State Permits Closing of Bathhouses to Cut AIDS*, N.Y. TIMES, Oct. 26, 1985, at 1. State Sanitary Code 10 NYCRR § 24.2 specifically authorizes local officials to close any facilities in which high-risk sexual activity takes place. The regulation provided: "Prohibited Facilities: No establishment shall make facilities available

health officials to lock any bathhouses considered to be “public nuisances” for sixty days.⁵⁹

Although these regulations reflected popular opinion,⁶⁰ not all of the state’s health officials were convinced that bathhouses were the pivotal link to the spread of HIV. In fact, New York City’s Health Commissioner Dr. David J. Sencer criticized the State’s stance against bathhouses because the approach contributed “little if anything to the control of AIDS.”⁶¹ Further, he described the regulations as a coercive attack on the places where human behavior takes place when the real issue was the human behavior itself.⁶²

Nonetheless, in an effort to enforce the regulation, the city filed an action against St. Mark’s Baths, which then challenged the constitutionality of the law.⁶³ St. Mark’s argued that the Public Health Council adopted the regulation without an adequate scientific basis and urged that enforcing the use of condoms would be a more appropriate regulatory response than a total ban on bathhouses.⁶⁴ St. Mark’s also asserted that its safe-sex policies and education assisted in combating AIDS, thereby serving as a communication link between public health officials and the gay community.⁶⁵ Although the court assumed that HIV is spread through high-risk sexual behavior, the city did not establish that such behavior occurred at a higher rate in bathhouses than it would otherwise occur. Instead, the city linked the spread of AIDS among gay and bisexual males to promiscuous sex, including anal sex and other kinds of sexual contact. Nonetheless, the regulations were upheld as the court readily accepted the city’s efforts to protect public safety by reducing the spread of HIV transmission. Calling the AIDS epidemic a health crisis in New York City, the court cited the number of new AIDS cases per year and the death rate among those infected.⁶⁶ Additionally, the court stated that sexual

for the purpose of sexual activities, where anal intercourse, vaginal intercourse, or fellatio takes place. Such facilities shall constitute a threat to the public health.”

⁵⁹ *Id.* See also *City of New York v. New Saint Mark’s Baths*, 497 N.Y.S.2d 979, 982 (N.Y. Sup. Ct. 1986) (citing the Nuisance Abatement Law: “[T]he [c]ity is empowered to enjoin public nuisances . . . including a building, erection, or place (other than certain one or two family dwellings) which is a nuisance . . . or a building wherein a criminal nuisance . . . is occurring.”).

⁶⁰ Gross, *supra* note 55.

⁶¹ Carroll, *supra* note 58.

⁶² *Id.* at 30.

⁶³ *New Saint Mark’s Baths*, 497 N.Y.S.2d at 981.

⁶⁴ *Id.* at 983. St. Mark’s relied on Commissioner Sencer’s statement that the city’s approach contributes “little if anything to the control of AIDS.” *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 980.

privacy rights do not extend to commercial establishments, even if they provide space for intimate relations.⁶⁷

In its opinion, the court focused on affidavits submitted by city officials who conducted on-site inspections of St. Mark's and reported high rates of risky sexual activity.⁶⁸ Based on these inspections, the court determined that high-risk sexual activity was taking place at St. Mark's on a "continuous and regular basis" and that a less intrusive regulatory measure was not available.⁶⁹ The court held that state police power prevails over a "tangential impact" on the First Amendment right to freely associate when the regulated activity is primarily for entertainment or gratification. *New St. Mark's Baths* is just one of many judicial opinions infused with homophobic comments, shedding light on the true anti-gay animus that underlies the regulation of bathhouse activity.⁷⁰

Similar to high crime rates and deteriorated property values, AIDS has been promulgated as an adverse secondary effect, thereby reducing First Amendment protections and allowing hetero-normative legislation to pass constitutional muster.⁷¹ By creating a social construct that homosexuals' public sexual activity is the cause of AIDS, the public was able to distinguish itself as part of some other group who is at less risk of contracting the disease.⁷² This damning of traditional notions of democracy and liberty has generated fervent opposition and ensuing legal battles, reinforcing the ongoing unrest with sexual identity and expression.

C. Giuliani and New Promises

In 1993, the citizens of New York City elected Republican Rudolph Giuliani for Mayor based on his promise to improve the city's quality of life.⁷³ His administration made its quality-of-life

⁶⁷ *Id.* at 983.

⁶⁸ *Id.* at 982. "Following numerous on-site visits by [c]ity inspectors, over 14 separate days, these investigators have submitted affidavits describing 49 acts of high risk sexual activity (consisting of 41 acts of fellatio involving 70 persons and 8 acts of anal intercourse involving 16 persons)." *Id.*

⁶⁹ *Id.*

⁷⁰ Rollins, *supra* note 57, at 69 (citing *Berg v. Health & Hosp. Corp.*, 865 F.2d 797, 803 (7th Cir. 1989)). The city's bathhouse regulation is clearly consistent with the government's responsibility "to protect, promote or improve public health" and to "control disease." *Id.* The court's opinion is laden with anti-gay language such as "no known cure," "its incurable, fatal nature," and "casual sexual activity, including anal intercourse." *Id.*

⁷¹ *See id.* at 68.

⁷² *See id.* at 72.

⁷³ Elizabeth Kolbert, *Not Too Adult to Make Issue of Sex Stores*, N.Y. TIMES, Sept. 29, 1997, at B1.

views well-known, intimating that sex businesses could anticipate strict regulation.⁷⁴ By 1997, crime rates in the city had markedly declined for the fifth straight year.⁷⁵ This change, however, was driven by forces other than Giuliani's policies, including shifting demographics and an improving economy.⁷⁶ During this time, other large cities such as Los Angeles also saw a decline in violent crime, even though they did not embrace New York City's tough-on-crime approach.⁷⁷ Nevertheless, residents and visitors purportedly felt safer walking streets that had a stronger police presence and higher arrest rates.⁷⁸ People's comfort level, however, may be largely attributable to the socially constructed fears of walking the streets of a big city, especially one known for its lasciviousness.⁷⁹

While the Giuliani Administration was frequently applauded for its policies, other New Yorkers criticized Giuliani's aggressive attack on civil liberties, particularly because these efforts disproportionately affected minorities.⁸⁰ During his tenure, the New York Civil Liberties Union brought thirty-four suits challenging the abridgment of citizens' First Amendment rights.⁸¹ Additionally, some saw the Mayor's transformation of Times Square as detrimen-

⁷⁴ *Id.*

⁷⁵ Editorial, *Crime Is Down All Over*, N.Y. TIMES, Oct. 14, 1997, at A26.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See generally DELANY, *supra* note 17, at 156.

⁸⁰ Bob Herbert, Op-Ed, *Hounding the Innocent*, N.Y. TIMES, June 13, 1999, at 17.

⁸¹ Donna Lieberman, Letter to the Editor, *The Legacy of Rudy Giuliani*, N.Y. TIMES, Jan. 1, 2002, at A20 (as Executive Director of the New York Civil Liberties Union, urging the newly elected Mayor Michael Bloomberg and the City Council to "put an end to the egregious First Amendment violations that that have been so pervasive during the last eight years."). An abridged version of this letter appeared in the January 1, 2002 issue of the *New York Times*. The body of the letter went as follows:

To the Editor:

An assessment of the Giuliani mayoralty should encompass the whole record ("Mayor Giuliani Bows Out," editorial, Dec. 30). During his tenure, the New York Civil Liberties Union went to court in 34 separate cases to challenge what we considered First Amendment violations. In nearly every case, the court rejected the city's policies, including the retaliatory firing of a police officer for testifying before the City Council about racial profiling and the attempt to censor the "Sensations" exhibit at the Brooklyn Museum. And lest we think these transgressions are a pre-Sept. 11 phenomenon, only last week a federal court ordered an end to police harassment of homeless people sleeping on the steps of the Fifth Avenue Presbyterian Church, finding it a violation of religious freedom. We hope that our new mayor and City Council will put an end to the egregious First Amendment violations that have been so pervasive during the last eight years.

Id.

tal to the average citizen, instead giving big business and wealthy investors an opportunity to gentrify the area.⁸² Gentrification significantly altered the diverse makeup of the community by forcing out many local residents and small businesses.⁸³ Without commercial and residential variety, communities lose their vitality and lively street life—the very essence that attracts people to urban areas and satiates their desire for the unexpected.⁸⁴

Under the guise of safety and morality, New York City's local politicians have elicited open hostility towards the City's sex industry in an effort to bolster their own political campaigns. In 1997, Giuliani held a ceremonious unveiling of Disney World's thirty-four million dollar renovation of the New Amsterdam Theatre in Times Square.⁸⁵ During this public relations display, Michael Eisner, CEO of Disney World, said that he first had reservations about bringing Disney's family-oriented commercialism to Times Square because of the prevalence of sex shops.⁸⁶ Giuliani had convinced him otherwise, however, when he looked Eisner in the eyes and promised, "Michael, they'll be gone."⁸⁷ Giuliani's animus mirrored that of former Mayor Abraham Beame, who stated, in response to questions concerning possible campaign politics behind his public condemnation of pornography: "If you think as Mayor, I'm just going to sit in my office because this is an election year, you have another think [sic] coming. We want to focus attention on the need to wipe out this menace."⁸⁸ Such representations have reinforced the notion that the sex business, rather than any other social force, is responsible for crime and decay in the city.

Giuliani kept his promise because, shortly after his election, the city responded to citizens' concerns that the sex industry was deteriorating their neighborhoods. Giuliani authorized the Department of City Planning (DCP) and the CPC to conduct an analysis and publish a report on the impact of adult entertainment

⁸² See DELANY, *supra* note 17, at 103. Delany recalls a conversation with a resident of Times Square who gave his opinion of the Times Square renovation. The resident said, "Well, they cleaned it up. . . . But I think they got carried away. They took away lots of legitimate small places too. I mean the hot dog stands. The little stores. The rice and beans places. They did that for the money—believe me, not for their health. The real estate's all gone sky high. . . . Eventually it'll all work out—for the rich, anyway. But not for the average man." *Id.*

⁸³ See generally Bruce Weber, *Disney Unveils Restored New Amsterdam Theater*, N.Y. TIMES, Apr. 3, 1997, at B3.

⁸⁴ See generally JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

⁸⁵ Weber, *supra* note 83.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Mayor Beame Leads Pornography Raids*, N.Y. TIMES, Mar. 25, 1977, at 36.

establishments on communities.⁸⁹ This DCP Report focused on sexually explicit book and video stores, topless bars, strip clubs, and adult theaters.⁹⁰ The DCP concluded that areas of New York City were negatively impacted by high concentrations of adult entertainment establishments.⁹¹ In the realm of adult business regulation, negative secondary effects have been defined as “impacts on public health, safety, and welfare.”⁹² This impact is different from the primary effects that the expression has on viewers when they are watching nude dancing or looking at pornographic magazines.⁹³ Similar to other cities that had conducted quality of life studies, such secondary effects included “increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life.”⁹⁴ Additionally, the DCP found that the overall number of sex businesses had risen sharply over the previous ten years.⁹⁵ Based on these findings, the DCP recommended that the city restrict the locations of adult entertainment establishments.⁹⁶

Shortly thereafter, the New York City Council adopted a temporary, one-year moratorium on creating or expanding sex businesses until the DCP could develop permanent regulations.⁹⁷ Once the CPC reviewed the findings, the City Council removed the moratorium and adopted an amendment to the existing zoning regulation in 1995.⁹⁸ The amendment prohibited an adult business from extending or enlarging its existing facility and forbade any existing establishment in New York City from converting to an

⁸⁹ See NYC Brief, *supra* note 13, at 6; New York City Department of City Planning, <http://www.nyc.gov/html/dcp/html/about/plancom.shtml> (last visited Oct. 11, 2005). The City Planning Commission is an arm of the Department of City Planning and is comprised of thirteen members, including the Chair and six members who are appointed by the Mayor. *Id.* The Commission is responsible for the conduct of planning relating to the orderly growth and development of the city and meets regularly to hold hearings and vote on applications concerning the use, development, and improvement of real property subject to city regulation.

⁹⁰ NYC Brief, *supra* note 13, at 7. The 1993 DCP Report also included testimony from a 1993 hearing held by the Task Force on the Regulation of Sex-Related Businesses, a 1993 Chelsea Action and Manhattan Community Board study, and a 1994 Times Square Business Improvement District Study. *Id.* at 8-9.

⁹¹ *Buzzetti v. City of New York*, 140 F.3d 134, 136 (2d Cir. 1998).

⁹² See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000).

⁹³ Calvert & Richards, *supra* note 9.

⁹⁴ *Buzzetti*, 140 F.3d at 136 (citing N.Y. CITY DEP'T OF PLANNING, ADULT ENTMT'T STUDY 67 (1994)).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *For the People Theatres of N.Y. v. City of New York*, 793 N.Y.S.2d 356, 358-59 (N.Y. Sup. Ct. 2003).

⁹⁸ *Id.* at 359.

adult enterprise.⁹⁹ In addition, the amendment separated adult entertainment establishments from other commercial businesses so that the city could restrict the location of adult uses.¹⁰⁰ It prohibited sex businesses from being in proximity to residential areas, places of worship, schools, and each other.¹⁰¹ The resolution applied and continues to apply to any “adult establishment” that includes a “substantial portion” of sexually explicit activity.¹⁰²

By 2000, the number of adult establishments in Times Square had again been reduced, reflecting the recurring vacillation in the character of Times Square.¹⁰³ This area’s unique sexual culture that “helps shape the very streets of New York City” has been used as a political tool time and again.¹⁰⁴ A once notorious, albeit garish, area that challenged societal restrictions on sexual freedoms, Times Square had been subjugated into a more acceptable, sterile form of expression.

II. LET THE POLITICAL SHOWDOWNS BEGIN

A. *Controversy and Legal Interpretation of the 1995 Resolution*

The AIDS epidemic and the resultant societal reaction in the mid-1980s marked the beginning of a political and social transformation in New York City and throughout the United States. During this time, Reagan-era economics and political conservatism on the macro level molded local politics. This shift from liberalism to social conservatism caused reactionary opposition among those

⁹⁹ *Ten’s Cabaret*, 768 N.Y.S.2d at 789.

¹⁰⁰ *Id.*

¹⁰¹ Adult establishments are not permitted in various zoning districts, including residential districts and some commercial and manufacturing districts; they must be located at least 500 feet from a place of worship, school, or another adult establishment. N.Y., N.Y., ZONING RESOL. §§ 32-01(b),(c), 42-01(b),(c) (1995). Only one adult establishment is permitted on a single zoning lot, and no adult establishment is permitted to exceed 10,000 square feet in floor area and cellar space. §§ 32-01(d),(e), 42-01(d),(e). The resolution also includes special sign regulations for adult establishments. See §§ 32-68, 42-55(d),(e).

¹⁰² The resolution defines an adult establishment as a commercial establishment where a “substantial portion” of the establishment includes an adult bookstore, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof. § 12-10. Adult bookstores are defined as bookstores that have as a “substantial portion” of their stock-in-trade books, magazines, photographs, films, video cassettes, or other printed matter; or visual representations that are characterized by an emphasis upon the depiction or description of “specified sexual activities” or “specified anatomical areas.” *Id.* Non-conforming adult establishments must terminate within one year of the effective date of resolution. § 52-77.

¹⁰³ CITY PLANNING COMMISSION, REPORT ON PROPOSED 2001 AMENDMENTS AND PLANNING CONSIDERATIONS 6 (2001).

¹⁰⁴ Shepard, *supra* note 2, at 481.

groups whose rights were infringed. By the late 1990s, over 100 owners and operators of adult establishments sought to enjoin the city from enforcement of the 1995 resolution.¹⁰⁵

In a consolidated action brought by Stringfellow's of New York, Ltd. (now Ten's Cabaret, Inc.), a cabaret featuring topless dancers, the New York Court of Appeals held that the resolution met federal and state constitutional standards.¹⁰⁶ The court gave considerable deference to the municipal authorities in their task of maintaining the health, safety, and welfare of its citizens.¹⁰⁷ As an exercise of the state's police power, the court presumed, as it commonly does, that such zoning regulations are constitutional even if their necessity is "fairly debatable."¹⁰⁸ Although the court recognized that the zoning resolution implicated issues of freedom of expression, it was satisfied that the city's predominant purpose for adopting the regulation was not to restrict speech but rather to protect its citizens.¹⁰⁹ Even though the DCP report was inconclusive, the court read it "as a whole" to indicate that negative perceptions of adult businesses resulted in lower investment in the community and deteriorated the social and economic fabric of the surrounding area.¹¹⁰ The court also deemed the resolution narrowly tailored since it targeted only the New York City residential areas that were most vulnerable to adverse impacts.¹¹¹

The plaintiffs to the *Stringfellow's* action also challenged the resolution's "substantial portion" language, arguing that it was "un-

¹⁰⁵ *Stringfellow's of New York, Ltd. v. City of New York*, 694 N.E.2d 407, 413 (N.Y. 1998).

¹⁰⁶ *See id.* at 411.

¹⁰⁷ *Id.* at 413. Because they are legislative enactments, land-use regulations generally enjoy a strong presumption of constitutionality as valid exercises of the state's police power to advance the public health, safety, and welfare. *Id.* (citing *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1242 (N.Y. 1985)).

¹⁰⁸ *Id.* (quoting *Town of Bedford v. Vill. of Mount Kisco*, 306 N.E.2d 155, 159 (N.Y. 1973)).

¹⁰⁹ *See id.* at 398. Article I of the New York State Constitution provides in relevant part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. CONST. art. I, § 8. The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See Near v. Minnesota*, 283 U.S. 697, 707 (1931).

¹¹⁰ *Stringfellow's*, 694 N.E.2d at 416.

¹¹¹ *Id.* at 417.

constitutionally vague.”¹¹² However, the court stated that for purposes of enforcement, the Operations Policy and Procedure Notice (OPPN)¹¹³ defined “substantial portion” as any establishment that has at least 40% of its stock or floor area devoted to adult materials or adult uses.¹¹⁴ The resolution was upheld¹¹⁵ and the OPPN equation, now known as the “60/40 allocation,” has governed since 1998.¹¹⁶ Sex-oriented businesses began altering their stock and floor spaces so as not to fall within the “adult establishment” definition in the zoning law.¹¹⁷ Some shop owners adapted by accumulating non-adult videos and books, showing both adult and non-adult movies, or having their dancers wear bikinis.¹¹⁸ For example, the owner of Manhattan Video on West 39th Street built new shelving units to stock horror, war, and family-oriented movies.¹¹⁹ Times Square’s infamous Show World converted 75% of its stock into tourist-related products such as luggage, perfume, and souvenirs.¹²⁰

Meanwhile, Giuliani’s task force had spent more than a year compiling files on sex shops and strip clubs so that, once the regulation passed judicial muster, establishments could be immediately closed down.¹²¹ Of the businesses challenging the law, 107 asked the Second Circuit Court of Appeals for a delay in enforcement to give them time to appeal, which Giuliani criticized: “We’ve learned in the past that they try to exhaust every single opportunity to abuse our legal system [W]e’ll be able to get rid of them.”¹²² In speeches about his quality-of-life improvements, the Mayor called the businesses “corrosive institutions” that destroy neighborhoods and discourage “legitimate businesses.”¹²³

¹¹² *Ten’s Cabaret*, 768 N.Y.S.2d at 790 (citing *Hickerson v. City of New York*, 997 F. Supp. 418 (S.D.N.Y. 1998)).

¹¹³ The New York City Department of Buildings’s OPPNs illustrate the official policies of the Department and act as a guide in following operational procedures. N.Y. CITY DEP’T OF BLDGS., POLICY AND PROCEDURE NOTICES, <http://www.nyc.gov/html/dob/html/reference/oppn1.shtml> (last visited Nov. 8 2005).

¹¹⁴ *Ten’s Cabaret*, 768 N.Y.S.2d at 790.

¹¹⁵ *Stringfellow’s*, 694 N.E.2d at 421.

¹¹⁶ *Ten’s Cabaret*, 768 N.Y.S.2d at 790.

¹¹⁷ *See id.* at 791.

¹¹⁸ Dan Barry, *Federal Court Upholds City Zoning Law to Curb Sex Shops*, N.Y. TIMES, June 4, 1998, at B1.

¹¹⁹ *Id.*

¹²⁰ David Rohde, *Sex Shops Try to Obey Law, as Written*, N.Y. TIMES, Aug. 6, 1998, at B3.

¹²¹ Mike Allen, *Giuliani Tells Sex-Based Shops That the End Is Drawing Near*, N.Y. TIMES, July 20, 1998, at B1.

¹²² *Id.*

¹²³ *Id.*

Less than a year after the enforcement of the resolution, the City of New York brought claims against businesses that were supposedly in “sham compliance” with the resolution.¹²⁴ The trial and appellate courts defined this as facially or formalistically complying with the OPPN 60/40 ratio, but maintaining the “essential nature” of an adult establishment.¹²⁵ New York’s Court of Appeals, however, interpreted the zoning regulation literally, refusing to inquire whether the non-adult material is profitable, stable, or continuously supplemented.¹²⁶ Proponents hailed the decision as a victory for the First Amendment, hoping it would discourage overzealous enforcement of the 1995 regulation.¹²⁷ Giuliani, on the other hand, admonished the court and vowed to continue vigorously enforcing the law to safeguard residences, schools, and places of worship from “the shadows cast by strip clubs and other sex-related businesses.”¹²⁸

B. Another Mayor, Another Attack: The 2001 Amendments

Giuliani was replaced in 2001 by Mayor Michael R. Bloomberg, another city politician who, like his predecessor, promised to vigorously pursue quality-of-life issues.¹²⁹ Almost immediately, a new series of amendments to the OPPN were adopted. The new amendments removed the “substantial portion” language and defined an adult eating or drinking establishment as any business that has adult entertainment, regardless of the percentage.¹³⁰ Un-

¹²⁴ *Les Hommes*, 724 N.E.2d at 371.

¹²⁵ *Id.*

¹²⁶ *Id.* “The City’s own guidelines interpret the zoning resolution literally. Nowhere in the operative OPPN No. 6/98 are factors other than amount of stock and floor space mentioned. Instead, the focus is solely on the appropriate percentages of stock and floor and cellar space which the City drew at 40%.” *Id.*

¹²⁷ See Richard Perez-Peña, *City Loses Another Round in Fight with Topless Bars*, N.Y. TIMES, May 5, 2000, at B3.

¹²⁸ See *id.*

¹²⁹ Dean E. Murphy, *The Ad Campaign; Promises of Law and Order, and Some Praise for Giuliani*, N.Y. TIMES, July 21, 2001, at B3. During the 2001 mayoral election, Bloomberg ran a television advertisement stating: “The Mike Bloomberg plan means new technology to help police catch fugitives. Continue to fight quality-of-life crimes. Improve recruitment, training and community relations. Crack down on gangs. On crime, Mayor Giuliani’s leadership has made a difference. Mike Bloomberg understands we can’t take progress for granted.” *Id.*

¹³⁰ N.Y., N.Y., ZONING RESOL. §§ 12-10 (1995). “An ‘adult establishment’ is a commercial establishment which is or includes an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof.” The amendment described types of establishments; for example:

(a) An adult book store is a book store that offers “printed or visual material” for sale or rent to customers where a “substantial portion”

daunted, Herald Price Fahringer, the attorney who had previously litigated on behalf of the adult establishments, stated that he was confident of victory.¹³¹

Businesses challenged the new amendments on grounds similar to those asserted against the original 1995 amendments, namely because they unreasonably limited freedom of expression under the federal and state constitutions.¹³² In a summary judgment motion, the plaintiffs argued, and the court agreed, that the City could not use the 1993 DCP report to support the new amendments because the report did not fairly support the City's rationale that 60/40 establishments cause negative secondary effects.¹³³ The plaintiff, Ten's Cabaret, also urged that the amendments were overly broad, causing the establishments financial hardship.¹³⁴

The city asserted that the amendments merely clarified the 1995 resolution, accurately expressed the legislative intent for enacting the law, and closed loopholes used by adult establishments.¹³⁵ Nonetheless, the trial court found that the city never researched the negative secondary impacts of 60/40 establishments, an interpretation of the law that did not even exist at the

of its stock-in-trade of "printed or visual material" consists of "adult printed or visual material," defined as "printed or visual material" characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas";

- (b) An adult eating or drinking establishment is an eating or drinking establishment which regularly features in any portion of such establishment any one or more of the following:
 - (1) live performances which are characterized by an emphasis on "specified anatomical areas" or "specified sexual activities"; or
 - (2) films, motion pictures, videocassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas"; or
 - (3) employees who, as part of their employment, regularly expose to patrons "specified anatomical areas"; and which is not customarily open to the general public during such features because it excludes or restricts minors.

Id.

¹³¹ Clyde Haberman, *Where Have You Gone, Live Girls?*, N.Y. TIMES, Apr. 10, 2002, at B3. "We tried 27 cases, and we won 27," Mr. Fahringer said. "It's not because I'm a particularly good lawyer but because of the way the law was worded and honored." *Id.*

¹³² *Ten's Cabaret*, 768 N.Y.S.2d at 792.

¹³³ *Id.* at 793.

¹³⁴ Brief for Plaintiff-Respondent at 48-49, *For the People Theatres of N.Y. Inc. v. City of New York*, No. 121197/02 (N.Y. App. Div. 2005) [hereinafter *Ten's Cabaret Brief*].

¹³⁵ See NYC Brief, *supra* note 13, at 44-45.

time the original regulation was adopted.¹³⁶ The trial court found that the 2001 amendments could not be valid unless a study determined that the 60/40 rule curbed negative secondary effects.¹³⁷

III. IDENTIFYING PARAMETERS OF THE SECONDARY EFFECTS DOCTRINE: MORALITY AND GAPS

A. *Morality Shakes Its Finger at Eroticism, Giving It Less Constitutional Protection than Other Forms of Speech*

Protectionist notions of women and children serve as justification for the moral condemnation of the sex business. Churches and concerned citizens have long joined forces to protect their standards of decency by battling public sexuality.¹³⁸ Spawned by the explosion of Hollywood's motion picture industry, a purity movement in the mid-1930s through the 1950s worked hard to battle "filth."¹³⁹ The Legion of Decency, an organization propelled by the Catholic Church, rated movies primarily based on their sexual content and successfully encouraged many Catholics to boycott those movies it deemed to be immoral.¹⁴⁰ Similarly, organizations such as the National Organization for Decent Literature attacked print media.¹⁴¹ In the 1950s, many large cities, including New York City, launched aggressive investigations and raids on distributors and retail outlets.¹⁴² Purity campaigns portrayed sex as an uncontrollable and chaotic force that, if left unbridled, would seize upon children.¹⁴³

Organizations today rally against adult establishments using similar messages about protecting children.¹⁴⁴ The National Coali-

¹³⁶ *Ten's Cabaret*, 768 N.Y.S.2d at 794.

¹³⁷ *Id.* at 793.

¹³⁸ D'EMILIO & FREEDMAN, *supra* note 10, at 280-81.

¹³⁹ *Id.* In 1927 movie producers established moral standards, albeit absent enforcement mechanisms, whereby movies were given guidelines. "'Don'ts' included licentious or suggestive nudity, sex perversion, white slavery, and miscegenation. . . . '[B]e carefuls' [cautioned against] first-night scenes, lustful kissing, and men and women in bed together." *Id.*

¹⁴⁰ *Id.* at 281.

¹⁴¹ *Id.* at 282.

¹⁴² *Id.* at 283. In one month 276,000 pornographic paperbacks were seized. *Id.*

¹⁴³ *See id.* at 284.

¹⁴⁴ For example, the Community Defense Counsel's mission is to "provide direct legal assistance and educational resources to those concerned about health and crime issues affecting children and their neighborhoods, particularly the sexual violence empirically proven to accompany sexually oriented businesses and illegal pornography, including child pornography." Community Defense Counsel: Protecting Children and Their Neighborhoods, <http://www.communitydefense.org/faq/aboutcdc.html> (last visited Nov. 8, 2005).

tion for the Protection of Children and Families is one such organization. The coalition stays abreast of legal developments concerning the zoning of “sexually oriented businesses” and disseminates this information to concerned citizens through church outreach, legal and public policy mobilization, victim assistance, and other strategic partnerships.¹⁴⁵ Another protectionist organization Community Defense Counsel prefers to ban sex-oriented businesses altogether, but it recognizes the legal parameters that it must work within.¹⁴⁶ The counsel suggests centering secondary-effects arguments on enhancing the general welfare, health, morals, and safety of citizens by combating crime related to sexually-oriented businesses.

Not only are reformists trying to save society from immorality, but they are also protecting women from themselves by shielding them from making foolish decisions.¹⁴⁷ By doing so, reformists and the government seek to be the saviors who rescue women from compromising situations. Such a justification is based on an assumption that women are forced into sex work, ignoring the possibility that a woman may autonomously choose to use her sexuality in exchange for compensation.¹⁴⁸ By suppressing sexual behavior, reformists hope to save society from immorality and the dangers that accompany it.

Because states are given the responsibility of fashioning local laws that protect the welfare and safety of their citizens, sex work has less First Amendment protection than other forms of communication. The proffered underlying concerns about strip clubs and porn shops are that they raise crime rates, lower property values, and deteriorate the quality of life.¹⁴⁹ Often, these effects are said

¹⁴⁵ National Coalition for the Protection of Children and Families, *What You Need to Know to Protect Your Community, Business and Property from the Harmful Secondary Effects of Sexually Oriented Businesses*, <http://www.nationalcoalition.org/aboutus/aboutus.html> (last visited Nov. 8, 2005). The coalition seeks to counteract “the sexualized messages of our culture” by aiming to “move the people of God to embrace, live out, and defend the biblical truth of sexuality.” *Id.*

¹⁴⁶ See Community Defense Counsel, *1986 Final Report: Attorney General’s Commission on Pornography*, Chapter 6 at 388, available at http://www.communitydefense.org/cdcdocs/AG_Final_Report_1986/AG_Final_Report_353-403.pdf.

¹⁴⁷ PAUL R. ABRAMSON ET AL., *SEXUAL RIGHTS IN AMERICA* 125 (2003).

¹⁴⁸ *Id.*

¹⁴⁹ James E. Berger, *Zoning Adult Establishments in New York: A Defense of the Adult-Use Zoning Text Amendments of 1995*, 24 *FORDHAM URB. L.J.* 105, 110 (1996) (citing N.Y. CITY DEP’T OF PLANNING, *ADULT ENTMT STUDY* i (1994)). Mr. Berger is former counsel for the Office of City Legislative Affairs, Office of the Mayor, New York, NY. He worked with the New York City Department of City Planning, Department of Buildings, Law Department, and Council in developing the adult-use amendments, and

to outweigh any benefits the sex businesses may offer, even considering the infringement upon individual liberties.¹⁵⁰ The First Amendment generally protects “freedom of speech,”¹⁵¹ which has been interpreted by the Supreme Court to be broader than mere verbal communications.¹⁵² A form of expression falls under the protection of the First Amendment if it is made to convey a specific message and that expression would likely be understood within its context.¹⁵³

This does not mean, however, that all expression is afforded the same amount of protection. Although nude dancing and sex shops qualify as forms of expression within the meaning of the First Amendment,¹⁵⁴ the secondary effects doctrine distinguishes between speech that is harmful and that which is not. If a law regulates conduct considered “non-communicative” (content-neutral) rather than “expressive” (content-based), it circumvents the strict scrutiny generally used to analyze protected speech under the First Amendment.¹⁵⁵ These so-called secondary effects create a fiction, whereby a court may apply intermediate scrutiny to a law aiming to suppress the secondary effects of the speech and not the speech itself.¹⁵⁶ Regulating erotic speech differently than ordinary speech assumes that pornography, peep shows, and stripping is more akin to conduct than communication and therefore not necessarily subject to strict First Amendment protections.¹⁵⁷ Such a distinction assumes that the patron’s sexual arousal is achieved regardless of whether there is visual stimulation or tactile means. In this context, the means of arousal are not communicative and the participants are neither agents nor objects of communication.¹⁵⁸ This

represented the Office of the Mayor before the Council during the deliberations preceding their enactment.

¹⁵⁰ ABRAMSON, *supra* note 146, at 119.

¹⁵¹ See U.S. CONST. amend. I.

¹⁵² *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

¹⁵³ *Id.*

¹⁵⁴ See *City of Erie*, 529 U.S. at 285.

¹⁵⁵ *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (holding defendant’s act of burning his selective service draft card was noncommunicative conduct and therefore not subject to First Amendment strict scrutiny analysis).

¹⁵⁶ *Texas v. Johnson*, 491 U.S. 397, 403 (1989) (holding that flag burning constitutes expressive conduct subject to First Amendment protection).

¹⁵⁷ Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity.” An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922-23 (1978-79); see Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 22-23 (1992) (Pornography does not “amount to part of an appeal to deliberative capacities about public matters, or about matters at all—even if this category is construed quite broadly . . .”).

¹⁵⁸ Schauer, *supra* note 157, at 922-23.

simplification does not, however, acknowledge that eroticism must be processed in order to create a physical response.¹⁵⁹

Another justification for treating sexual communication differently has been that obscenity lacks social value.¹⁶⁰ More likely, it has the *wrong* social value.¹⁶¹ By creating a tiered approach of morally approved and disapproved communications, courts continue to reinforce the dominant social hierarchy.¹⁶² By doing so, sexual minorities and other persons on society's fringes have less constitutional protections than society at large.

B. *Shaping the Secondary Effects Doctrine Requires Some Leaps of Faith*

The secondary effects doctrine is well-traversed First Amendment territory. This doctrine springs from a 1976 plurality opinion footnote that differentiated between speech restrictions based on content and the secondary effects of the communication.¹⁶³ This distinction was later solidified, and some argue inappropriately expanded, in *Renton v. Playtime Theatres*¹⁶⁴ to content-neutral regulations such as zoning ordinances.¹⁶⁵ In *Renton*, the Court held that

¹⁵⁹ Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 Mich. L. Rev. 1564, 1594 (1988); Christopher Thomas Leahy, *The First Amendment Gone Awry: City of Erie v. Pap's A.M., Ailing Analytical Structures, and the Suppression of Protected Expression*, 150 U. Pa. L. Rev. 1021, 1053 n.174 (2002). "The most elegant explanations of the expressive viewpoint of nude dancing over less revealing forms of erotic dance are offered in a concurring opinion by Judge Richard Posner. Posner aptly observes that '[t]he goal of the striptease—a goal to which the dancing is indispensable—is to enforce the association: to make plain that the performer is not removing her clothes [for other reasons]; to insinuate that she is removing them because she is preparing for, thinking about, and desiring sex The sequel is left to the viewer's imagination. This is the 'tease' in 'striptease.'" *Id.* (quoting *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1091 (7th Cir. 1990)).

¹⁶⁰ *Roth*, 354 U.S. at 485. "It has been well observed that [lewd and obscene] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

¹⁶¹ Gey, *supra* note 159, at 1595.

¹⁶² *Id.*

¹⁶³ The footnote reads, in relevant part:

[T]he First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material.

Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.33 (1976) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 113 (1973)).

¹⁶⁴ 475 U.S. 41 (1986).

¹⁶⁵ See Andrew, *supra* note 16, at 1195.

an ordinance regulating speech is per se invalid unless it is content-neutral, in which case it is upheld if it serves a substantial government interest and leaves reasonable alternative avenues of communication.¹⁶⁶ Negative secondary effects qualify as a substantial government interest so long as they are not speculative or serve as pretext for creating the ordinance.¹⁶⁷ A city may rely on studies conducted in other areas to justify its regulation, resulting in a significant expansion of the doctrine. A city is not required to conduct a new and independent study assessing the secondary effects so long as it reasonably believes the evidence to be relevant.¹⁶⁸

Following *Renton*, the Court struggled with refining the purpose, nature, and scope of the secondary effects doctrine.¹⁶⁹ A sharply divided Court in *City of Los Angeles v. Alameda Books, Inc.* once again addressed the doctrine after the owners of an adult entertainment bookstore and video arcade challenged a Los Angeles ordinance.¹⁷⁰ Los Angeles had expanded its original zoning ordinance to prohibit more than one adult-use establishment per building.¹⁷¹ It did not, however, provide a new study that ad-

¹⁶⁶ *Renton*, 475 U.S. at 47. After holding public hearings and reviewing the experiences of Seattle and other cities, the City Council of Renton, Washington adopted a zoning resolution which applied to adult-use movie theatres. The plaintiff had purchased two theaters in Renton with the intention of exhibiting adult films and sought to overturn the resolution, which prohibited any “adult motion picture theater” from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school. *Id.* at 43. It contained a clause explaining that such businesses “would have a severe impact upon surrounding businesses and residences.” *Id.* at 44. The Supreme Court held that the ordinance did not substantially restrict First Amendment interests: Renton was not required to show specific adverse impact from the operation of adult theaters; it could rely on the experiences of other cities; and the restriction imposed by the ordinance was “content neutral” and necessary to prevent the secondary effects of such theaters. *Id.* at 46, 51-52.

¹⁶⁷ *Id.* at 60.

¹⁶⁸ *Id.* at 51.

¹⁶⁹ See Andrew, *supra* note 16, at 1196.

¹⁷⁰ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

¹⁷¹ *Id.* at 431. In *Alameda Books*, the Court discussed the history of a city-enacted ordinance which directs that “the distance between any two adult entertainment businesses shall be measured in a straight line . . . from the closest exterior structural wall of each business.” *Id.* (quoting L.A., CAL., MUN. CODE § 12.70(D) (1978)).

Subsequent to enactment, the city realized that this method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure. Concerned that allowing an adult-oriented department store to replace a strip of adult establishments could defeat the goal of the original ordinance, the city council amended § 12.70(C) by adding a prohibition on ‘the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof.’

Alameda Books, 535 U.S. at 431 (quoting L.A., CAL., MUN. CODE § 12.70(C) (1983)).

addressed the secondary effects related to such a prohibition. Rather, Los Angeles relied on a previous study its police department had conducted, which indicated that Hollywood, compared to the citywide area, had the largest concentration of adult-use establishments and a rapidly growing crime rate.¹⁷² The Supreme Court reversed both lower court decisions, finding that Los Angeles had met its evidentiary burden.¹⁷³ Although the Court cautioned against “shoddy” data or reasoning, it allowed for a chain of inferences to be drawn that linked crime with a concentration of establishments.¹⁷⁴ The Court stated that Los Angeles need not “prove that its theory [was] the only one that [could] plausibly explain the data.”¹⁷⁵

The *Alameda Books* decision allowed for a virtually limitless expansion of the secondary effects doctrine. In the last few years, circuit courts throughout the country have expanded the application of the secondary effects doctrine beyond that originally set out by the Supreme Court.¹⁷⁶ Evidently regulations are “reasonably believed to be relevant” even if they are based on decade-old studies that document entirely different test cites.¹⁷⁷ Concerned citizens’ testimony often influences a judge’s opinion that sex business is bad for the community.¹⁷⁸ A regulation could be upheld based on another city’s experience and studies—even if inconclusive—if it is supported by what a local politician considers wise and sensible for the community.¹⁷⁹

Recent expansion of the secondary effects doctrine gives courts license to rely on outdated studies conducted in dissimilar test sites and to give weight to biased and unreliable testimonial

¹⁷² *Id.* at 430. “In 1977 the city of Los Angeles conducted a comprehensive study of adult establishments and concluded that concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities.” *Id.*

¹⁷³ *Id.* at 443.

¹⁷⁴ *Id.* at 438.

¹⁷⁵ *Id.* at 437.

¹⁷⁶ *See, e.g., SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003) (upholding a public indecency ordinance that prohibits nude dancing).

¹⁷⁷ *Alameda Books*, 535 U.S. at 438.

¹⁷⁸ *See SOB*, 317 F.3d at 862 (before enactment, the County Commissioners listened to concerned citizens speak in favor of an adult entertainment ordinance at a public hearing); *see also Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1309 (11th Cir. 2000) (upholding an adult entertainment ordinance, partly based on the wealth of testimony presented to the City Council).

¹⁷⁹ *Sammy’s of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 997 (11th Cir. 1998) (“the experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as [officials’] own wisdom and common sense” were sufficient evidence).

evidence.¹⁸⁰ For example, in *SOB, Inc. v. County of Benton*, the plaintiffs, an alcohol-free cabaret called Sugar Daddy's and three of its dancers, argued that the alleged government interest was pretextual.¹⁸¹ At a public hearing, concerned citizens spoke in favor of the ordinance while Sugar Daddy's presented evidence that it did not cause higher crime rates nor depress property values. Additionally, Sugar Daddy's offered a study published in a law journal that criticized the methodologies of secondary effects studies as empirically flawed.¹⁸²

Nonetheless, when interpreting the Supreme Court's most recent decisions, the *SOB* court found Sugar Daddy's arguments unsound.¹⁸³ The court instead found it likely that this type of club violated "long-established standards of public decency" and therefore "will foster illegal activity such as drug use, prostitution, tax evasion, and fraud."¹⁸⁴ This decision has been called "particularly egregious" for relying on secondary effects such as tax evasion and fraud since they are not the type of crimes typically contributing to public health, safety, and welfare.¹⁸⁵ Decisions such as *SOB* reflect repugnance to sexual "deviance" to the point that almost any amount of evidence presented by a local municipality could withstand judicial muster. This is not universal, however: Some courts, uncomfortable imposing such liberal and unwarranted standards, refuse to give unyielding deference to legislators and instead apply a more exacting evidentiary standard.

C. Sometimes Moral Justification, Speculation, and Leaping Are Not Enough

The dissenting Justices in *Renton* did not believe that the city had shown it was "seriously and comprehensively addressing" the

¹⁸⁰ *SOB*, 317 F.3d at 856; BENTON COUNTY MINN., DEMOGRAPHICS AND LOCATION INFO. (2002), http://www.co.benton.mn.us/about_us/demographics.htm. Benton County is a rural county located in Minnesota; the largest city has about 10,000 residents. *Id.*

¹⁸¹ *SOB*, 317 F.3d at 862. Benton County stated that its purpose was to "prohibit public indecency in order to deter criminal activity, to promote societal order and public health and to protect children." *Id.* It included findings that public indecency can increase disorderly conduct and sexual assault, expose children to an unhealthy and nurtureless environment, foster social disorder, and present health concerns. *Id.*

¹⁸² *Id.* at 863. See generally Bryant Paul, et al., *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL. 355 (2001) (study used by Sugar Daddy's).

¹⁸³ *SOB*, 317 F.3d at 863 (analyzing *City of Erie*, 529 U.S. 277 and *Alameda Books*, 535 U.S. 425).

¹⁸⁴ *Id.*

¹⁸⁵ Calvert & Richards, *supra* note 9, at 325.

purported secondary effects.¹⁸⁶ The majority relied on the fact that Renton had amended its original complaint to include reasons and conclusory findings for passing the ordinance, a seemingly fabricated pretext.¹⁸⁷ Several legal commentators have voiced concern that *Renton* carved out an exception to the secondary effects doctrine that would not apply to other types of speech regulations.¹⁸⁸ A recent law review article *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses* criticized courts for giving local municipalities such wide latitude in resolving problems within the community.¹⁸⁹ After examining numerous federal district and appellate decisions decided in 2003, the authors caution that the secondary effects doctrine is flawed. They accurately argue that circuit courts have distorted the *Alameda Books* line of cases to expand the doctrine in directions the Supreme Court never contemplated.¹⁹⁰

Like the dissenting Justices in *Renton*, Justice Souter, in his dissent in *Alameda Books*, urged that the chain of inferences was unsatisfactory, as Los Angeles had not demonstrated that more than one adult-use establishment per building causes more crime than those that are freely standing.¹⁹¹ Justice Souter also cautioned that judgments relying on inconclusive studies should be “carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose.”¹⁹² In his concurrence, Justice Kennedy raised two questions that appear to be somewhat ambiguous: First,

¹⁸⁶ *Renton*, 475 U.S. at 57 (Brennan, J., dissenting) (quoting *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 531 (1981)).

¹⁸⁷ *Id.* at 58-59 (Brennan, J., dissenting).

Shortly *after* this lawsuit commenced, the Renton City Council amended the ordinance, adding a provision explaining that its intention in adopting the ordinance had been ‘to promote the City of Renton’s great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land use planning.’ The amended ordinance also lists certain conclusory ‘findings’ concerning adult entertainment land uses that the Council purportedly relied upon in adopting the ordinance. The city points to these provisions as evidence the ordinance was designed to control the secondary effects associated with adult movie theaters, rather than to suppress the content of the films they exhibit.

Id.

¹⁸⁸ Andrew, *supra* note 16, at 1195.

¹⁸⁹ Calvert & Richards, *supra* note 9, at 322.

¹⁹⁰ *Id.* at 322-29. The authors address five areas of concern: a) studies having faulty logic, i.e. no causal link; b) an overly broad definition of secondary effects; c) burden on the plaintiff to disprove secondary effects; d) allowing for increased regulations such as buffer zones; and e) broad discretion in granting licenses. *Id.*

¹⁹¹ See *Alameda Books*, 535 U.S. at 459-60 (Souter, J., dissenting).

¹⁹² *Id.* at 458 (quoting *Metromedia*, 453 U.S. at 510) (Souter, J., dissenting).

what qualifies as an appropriate proposition for enacting a secondary effects ordinance; and second, how much evidence is required to support it?¹⁹³ In answering these questions, Kennedy set forth a proportionality guideline that suggests a city cannot reduce secondary effects and speech by the same amount.¹⁹⁴ This holding hints that the secondary effects doctrine is not merely a vehicle through which municipalities may restrict speech with wild abandon.

A recent case in the Seventh Circuit also suggests that a higher evidentiary burden should be required than what was articulated in *Renton*.¹⁹⁵ Here, plaintiff RVS planned to open an “upscale” restaurant in Rockford, Illinois called Moulin Rouge, which would feature exotic dancing.¹⁹⁶ RVS was forestalled from opening due to a newly enacted ordinance directed at “exotic dancing nightclubs.”¹⁹⁷ In order to open, RVS would need to apply for a special use permit, and submit to an evaluation by the Zoning Board of Appeals to determine whether the club would be “detrimental to or [would] endanger the public health, safety, morals, comfort, or general welfare.”¹⁹⁸ In approving the ordinance, the City Council did not rely on any secondary effects studies to support the regulation, nor was the ordinance supported by legislative findings. The only evidence the City Council relied on was personal opinion that exotic nightclubs attract prostitution, lower property values, and raise the incidence of crime.¹⁹⁹ At trial, the city offered testimony of several police officers who had received complaints from residents about sexually oriented establishments and personally believed that these businesses contributed to decreased property values, unattractive property appearance, and prostitution.²⁰⁰

¹⁹³ *Id.* at 449 (Kennedy, J., concurring). Justice Kennedy also added that the “Los Angeles City Council knows the streets of Los Angeles better than we do.” *Id.* at 451-52.

¹⁹⁴ *Id.* at 451.

¹⁹⁵ *R.V.S., L.L.C., v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004).

¹⁹⁶ *Id.* at 404.

¹⁹⁷ *Id.* The ordinance defined an “exotic dancing nightclub” as a “business establishment at which one or more exotic dancers perform or provide entertainment to a patron or patrons.” *Id.*

¹⁹⁸ *Id.* at 405 n.1 (citing ROCKFORD, ILL., ZONING ORDINANCE § 1603.3 (2002)). Once the general welfare hearing is held, the Zoning Board of Appeals (ZBA) forwards its recommendation to the City Council, which then makes the final decision. If the ZBA recommends permit approval, a majority of the City Council is required for issuance, and a super-majority (ten of fourteen members) is required if the ZBA recommends denial of the permit. *Id.*

¹⁹⁹ *See id.* at 405-06.

²⁰⁰ *Id.* at 406. Ald. Holt testified that he received complaints from residents concerning sexually oriented businesses located in the area, relating to their advertising and signage, hours of operation, and density. . . . Ald. Nancy Johnson . . . testified

In evaluating the constitutionality of the ordinance, the *RVS* court inquired into whether Rockford's "predominant concerns" were to combat secondary effects or to regulate the content of the speech.²⁰¹ Although this language is taken from the *Alameda Books* plurality opinion, the court applied it to the *Renton* framework.²⁰² The *RVS* court described this application as an "inquiry into the purpose behind an ordinance rather than an evaluation of an ordinance's form."²⁰³ Thus, the *RVS* court created a more stringent burden for enacting an ordinance. After the appeals court reviewed the legislative findings and testimonial record, it declared the Rockford ordinance unconstitutional. The court recognized the distinct possibility that Rockford could have been using its police power as pretext for suppressing expression when its true motivations stemmed from "open and explicit hostility toward and disapproval of the speech itself."²⁰⁴

Just as the *RVS* court refused to endorse public condemnation of exotic dancing, the *Stringfellow's* court should have applied a similar analysis. In applying Kennedy's proportionality guideline from *Alameda Books*, the *RVS* court chided the Rockford for its utter lack of evidence: While the ordinance would clearly reduce speech, there was not enough evidence to show that the ordinance would reduce secondary effects "by the same degree, if at all."²⁰⁵ As a final point, the *RVS* court expressed hesitancy in applying the *Renton/Alameda Books* analysis when it was unclear to what extent the regulated speech would be "sexual" in nature. By regulating exotic

that she received calls from residents, complaining about noise, traffic, and litter caused by . . . an Exotic Dancing Nightclub in her ward. *Id.*

²⁰¹ *Id.* at 409.

²⁰² *Id.* at 407-08 (citing *Alameda Books*, 535 U.S. at 440-41).

As he notes that "zoning regulations . . . have a prima facie legitimate purpose: to limit the negative externalities of land use," it is possible that he believes this inquiry to be unnecessary, as long as an ordinance may be characterized as a zoning regulation. However, as Justice Kennedy does not explicitly repudiate the "predominant concerns" inquiry and our cases subsequent to *Alameda Books* have continued to employ it, we will include it in our analysis.

Id. at 408 n.3 (quoting *Alameda Books*, 535 U.S. at 449) (internal citations omitted). "We will follow our Court's practice in cases applying *Alameda Books* and treat Justice Kennedy's concurrence as more demanding of the third step of the *Renton* analysis and not merely a restatement of the first step." *Id.* at 409 n.4.

²⁰³ *Id.* at 407.

²⁰⁴ *Id.* at 410 (addressing the Ald. Mark's comment that although the Exotic Dancing Nightclubs caused no problems in Rockford, "there were some concerns that some people just don't like this type of entertainment."). *Id.*

²⁰⁵ *Id.* at 411. "Indeed, while courts may credit a municipality's experience, such consideration cannot amount to an acceptance of an 'if they say so' standard." *Id.*

dancing, the secondary effects doctrine expands to include not only sexually explicit activities, but also those that express sexuality in less licentious ways.²⁰⁶ Scrutinizing political motivations is a path that the *Stringfellow*'s court mistakenly failed to take and one that the *Ten's Cabaret* trial and appellate courts did not adequately address, either.

IV. APPLICATION OF THE SECONDARY EFFECTS THEORY TO *TEN'S CABARET*

A. *Arguments Set Forth in Ten's Cabaret Hinge on Sufficiency of Evidence*

On appeal, New York City asserted that a new secondary effects study was unnecessary. The city urged that current adult-use establishments need not be re-evaluated because they were exactly what the 1995 resolution intended to cover.²⁰⁷ *Renton* reiterated that new secondary effects studies are not required if a city council reasonably relies on a relevant study conducted in another city.²⁰⁸ The city argued that the court inaccurately applied the standard of review for the secondary effects analysis because municipalities are not required to conclusively prove a correlation between adult establishments and negative secondary effects.²⁰⁹ The determination should be based on whether the City Council could have reasonably believed that the 60/40 adult-use establishments cause such effects—not whether they “in fact” did.²¹⁰

The city also argued that in *Alameda Books* Los Angeles faced a similar loophole situation that New York faces in enforcing its ordinance.²¹¹ According to the city's brief, to prohibit multiple adult-use establishments in a single structure, Los Angeles amended the original ordinance but did not conduct a new secondary effects study.²¹² Nonetheless, the Supreme Court upheld the ordi-

²⁰⁶ *Id.* at 414. “Even under our narrow reading of ‘exotic dancing,’ a number of expressive activities may fall within Rockford’s definition that are not ordinarily regulated under a secondary effects theory.” *Id.* Such language may cut a broader swath across expression, applying a secondary-effects analysis to laws that do not simply regulate sexually explicit speech. *Id.* at 415. “Indeed, it remains questionable how and if the *Renton/Alameda Books* analysis would apply in a case with even more tangential of a relationship to businesses purveying sexually explicit materials and entertainment.” *Id.* (citing *Boos v. Barry*, 485 U.S. 312, 334-35 (1988)) (Brennan, J., concurring).

²⁰⁷ NYC Brief, *supra* note 13, at 37.

²⁰⁸ *Renton*, 475 U.S. at 50-51.

²⁰⁹ NYC Brief, *supra* note 13, at 43.

²¹⁰ *Id.* at 37.

²¹¹ *Id.* at 42.

²¹² *Id.* at 43.

nance.²¹³ According to the court, Los Angeles could infer that a concentration of establishments would negatively impact neighborhoods, regardless of whether the businesses were in the same building or not.²¹⁴ The city cited the deference given to municipalities in allowing for a chain of inferences to satisfy the link between adult establishments and secondary effects.²¹⁵ The city's final argument urged the court to defer to the city legislature with respect to land-use matters that affect citizens' quality of life.²¹⁶

Despite the city's appeal, plaintiff Ten's Cabaret was fairly confident that summary judgment would be affirmed and the amendments would be held unconstitutional.²¹⁷ The plaintiff's core argument rested on the fact that the 1993 DCP Report proved no correlation between adult-use establishments and secondary effects.²¹⁸ Regarding the adverse correlation to crime, the report stated:

In summary, it was not possible to draw definitive conclusions from the analysis of criminal complaints. Land uses other than adult entertainment establishments, e.g., subway station access, appear to have a far stronger relationship to criminal complaints. It was not possible to isolate the impact of adult uses relative to criminal complaints.²¹⁹

Moreover, in relation to property values, the 1993 DCP Report states: "The analysis of trends in assessed valuation relative to adult entertainment uses was inconclusive. It would appear that if adult entertainment uses have negative impacts, they are overwhelmed by other forces that increased property values overall, at least as measured by assessed values."²²⁰ The plaintiff asserted that no new studies were conducted in creating the 2001 amendments; rather, the city merely relied on the inconclusive studies advanced in the 1993 Report.²²¹ The plaintiff used *Alameda Books* to support its claim that the city had not met its burden of proof. Ten's Cabaret contended that the 1993 DCP Report was an example of the "shoddy data" the *Alameda Books* court warned against,²²² and that

²¹³ *Alameda Books*, 535 U.S. 425.

²¹⁴ *Id.* at 436.

²¹⁵ *Id.*

²¹⁶ NYC Brief, *supra* note 13, at 38.

²¹⁷ E-mail from Mark J. Alonso, attorney for Ten's Cabaret, to author (Oct. 24, 2004) (on file with author).

²¹⁸ See Ten's Cabaret Brief, *supra* note 134, at 4, 5, 8, 9.

²¹⁹ *Id.* at 9 (quoting N.Y. CITY DEP'T OF PLANNING, ADULT ENTMT STUDY 57 (1994)).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 26 (quoting *Alameda Books*, 535 U.S. at 438).

the report did not “fairly support” the city’s rationale for enacting the ordinance since it did not show a secondary effects correlation in 1993—much less the current day.²²³ The ordinance at issue in *Alameda Books* sought to resolve a continued “clustering” problem that existed when Los Angeles enacted the amendments. Unlike *Alameda Books*, Ten’s Cabaret, along with other sex-oriented establishments in New York City, were different in character than they were in 1993.²²⁴ Moreover, the court had already stated that the City could not rely on studies from other localities because 60/40 clubs were a legal interpretation unique to New York City.²²⁵ Absent “judicial rubber-stamping,” the plaintiff’s attorney was not concerned that the city could produce a forthcoming secondary effects study in support of the 2001 amendments.²²⁶

Despite the initial ruling and without a new secondary effects study, the New York Appellate Division reversed the trial court’s summary judgment ruling, agreeing with the city that the 2001 amendments were not contrary to *Alameda Books*; the essential nature of the 60/40 establishments remains unchanged; and the plaintiffs did not cast doubt on the city’s rationale or factual findings.²²⁷ In making this determination, the court accepted the city’s assertion that the amendments merely clarified the intent of the original 1995 ordinance and found that there was a rational relationship between the means and ends of the legislation.²²⁸ The court found that the City Council’s predominant focus when writing the original ordinance—and again when drafting the amendments—consistently targeted sexually explicit materials and topless or nude women.²²⁹ Because the “essential nature” of Ten’s Cabaret and other sexually oriented businesses has remained unchanged, the court did not accept assertions that the amendments unconstitutionally infringed on First Amendment right of freedom of expression.²³⁰

The plaintiffs set forth substantial evidence which seemed to undermine the secondary effects theory put forth by the city. The court gave more weight to the city’s experts, however, finding that

²²³ *Id.*

²²⁴ *Id.* at 25.

²²⁵ See *Ten’s Cabaret*, 768 N.Y.S.2d at 794.

²²⁶ Alonso, *supra* note 217.

²²⁷ *For the People Theatres of N.Y.*, 793 N.Y.S.2d at 370. This case consolidated two judgments of the New York Supreme Court, including *Ten’s Cabaret*.

²²⁸ See *id.* at 367-68.

²²⁹ *Id.* at 368.

²³⁰ *Id.*

removal of the “substantial portion” language in the original ordinance merely clarified which establishments were devoted to adult entertainment.²³¹ In particular, the court relied on affidavits by counsel for DCP stating that the 60/40 delineation is a faulty legal interpretation not contemplated by the drafters of the original ordinance.²³² Counsel cited the 1994 DCP Report as support for the conclusion that the amendments clarified and strengthened the 1995 ordinance.²³³

In support of their motion, the plaintiffs provided an affidavit from a professor of urban planning and public affairs at Columbia University who criticized the amendments as a departure from sound zoning principles.²³⁴ The professor stated that the amendments impermissibly micro-managed sex businesses by converting land use into inventory control and concluded that he could not find a statistically significant relationship between 60/40 establishments and adverse impacts on property.²³⁵ The plaintiffs also presented an affidavit from a criminologist who had written extensively on the subject of adult uses.²³⁶ The criminologist found that fewer violent offenses were reported in areas where 60/40 establishments were prevalent in Manhattan than in areas without adult businesses.²³⁷ Additionally, he observed no correlation between the concentration of 60/40 establishments and an increased rate of violent felonies or arrests for prostitution.²³⁸

Although the Appellate Division favored the city’s evidence over the plaintiffs’, there is an important distinction between the affidavits. Both of the city’s experts were employees of the DCP, the city-funded agency that conducted the 1993 secondary effects study. The plaintiffs’ experts, on the other hand, were members of the scientific and academic community and were therefore presumably less biased than persons in a working relationship with the party for whom they were vouching. When reviewing the affidavits from these individuals, the court should have considered the witnesses’ relationship to the respective parties and accorded less

²³¹ *Id.* at 362.

²³² *See id.* at 365.

²³³ *Id.*

²³⁴ *Id.* at 364.

²³⁵ *Id.*

²³⁶ *Id.* at 364-65.

²³⁷ *Id.*

²³⁸ *Id.* This evidence was criticized by a Director within the DCP as being too restrictive because the criminologist only analyzed prostitution arrests “in the immediate vicinity” of the 60/40 establishments. *Id.*

weight to those persons who had more of an interest in the outcome of the case.

In analyzing the above-mentioned evidence, the appellate court was somewhat contradictory. It discussed the admonition set forth by Justice Kennedy in the *Alameda Books* concurrence, but it found that the plaintiffs had not discredited the city's rationale for adopting the amendments. The court quoted Kennedy's cautionary caveat: "It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech."²³⁹ Despite this controlling language, the court willingly accepted anecdotal evidence, reported experience, and the inconclusive DCP report.²⁴⁰ To support its decision, the court unsurprisingly cited *City of Erie v. Pap's A.M.*, one of the more conservative Supreme Court decisions concerning adult use establishments.²⁴¹ The court also relied on *Ben's Bar v. Village of Somerset*,²⁴² a recent Seventh Circuit case that cited Justice Scalia's endorsement of the government's power to foster good morals.

The plaintiffs are currently appealing the ruling that granted summary judgment in favor of the city. Considering the long history of New York City's thriving sex business as well as the decade-long effort to regulate adult-use establishments more heavily, it is difficult to predict how the Court of Appeals will rule. While the Court of Appeals upheld the original zoning ordinance, it later ruled in favor of sex businesses by refusing to consider the profitability of their inventory for purposes of complying with the 60/40 rule.²⁴³ The court construed the language of the ordinance literally, thus favoring property owners over the municipality.²⁴⁴ In doing so, the court seemed to send the message that although it is willing to defer health and safety priorities to local politicians and agencies, there are limits to the amount of deference it could af-

²³⁹ *Id.* at 370.

²⁴⁰ *Id.* at 367. "In the proper context, anecdotal evidence and reported evidence can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects." *Id.* (quoting *Stringfellow's*, 694 N.E.2d at 417).

²⁴¹ *Id.* at 368 (citing *City of Erie*, 529 U.S. at 296).

²⁴² *Id.* at 370 (citing *Ben's Bar v. Vill. of Somerset*, 316 F.3d 702 (7th Cir. 2003)). The court also footnotes Scalia's concurring opinion in *Alameda Books*: "As I have said elsewhere, however, in a case such as this our First Amendment traditions make 'secondary effects' analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex." *Id.* (quoting *Alameda Books*, 535 U.S. at 443-44 n.6).

²⁴³ *Les Hommes*, 724 N.E.2d at 369.

²⁴⁴ *Id.* at 370.

ford. Additionally, the Court of Appeals may consider that many sex businesses relied on the court's interpretation of the 60/40 rule and made significant expenditures to comply. On a whole, it seems more likely than not that the Court of Appeals will once again rule in favor of sex businesses. When it reviews *Ten's Cabaret*, in addition to applying appropriate evidentiary thresholds, the Court of Appeals should inquire into the motivations and possible pretext for the 2001 enactments.

B. Defective Report Used by the City of New York is Outdated and Uses Dissimilar Test Sites

The controversial 1993 DCP Report cannot be considered an accurate indicator of whether sex businesses cause negative secondary effects in New York City because it examined dissimilar test sites. The report used a two-tiered approach, combining data from studies done around New York City with information from other jurisdictions.²⁴⁵ It summarized the findings of nine cities throughout the United States and concluded that adult-use establishments contributed to negative secondary effects, including increased crime rates and decreased property values.²⁴⁶ For example, Manatee County, Florida, a rural area known for being one of the state's top ten watermelon producers, was one of the test sites.²⁴⁷ While the *Stringfellow's* court acknowledged that these sites are significantly different from New York City, it still accepted the City Planning Commission's argument that the studies are relevant to various neighborhoods.²⁴⁸ These cities were used as benchmarks for measuring secondary effects in New York City even though none of them even remotely mirror New York City's diverse makeup and its densely packed population of eight million people.²⁴⁹

²⁴⁵ Berger, *supra* note 149.

²⁴⁶ *Id.* The 1993 DCP Report analyzed data from the following nine places: Islip, NY; Los Angeles, CA; Indianapolis, IN; Whittier, CA; Austin, TX; Phoenix, AZ; Manatee County, FL; New Hanover County, NC; and the State of Minnesota.

²⁴⁷ *Id.* Manatee County's population in 2000 was 264,002. MANATEE COUNTY PLANNING DEP'T, COMPREHENSIVE PLANNING DIV., GROWING GREEN: AN EVALUATION AND APPRAISAL (E.A.R.) OF THE 2020 MANATEE COUNTY COMPREHENSIVE PLAN, DRAFT #5 (Aug. 2004), [http://www.co.manatee.fl.us/internet/planning_site.nsf/0/c2be8650bedd2b6e85256f7200653e5c/\\$FILE/eardraft5.pdf](http://www.co.manatee.fl.us/internet/planning_site.nsf/0/c2be8650bedd2b6e85256f7200653e5c/$FILE/eardraft5.pdf). The county also ranks among the top ten tomato producers in the state. *Id.*

²⁴⁸ See *Stringfellow's*, 694 N.E.2d at 417.

²⁴⁹ Herald Price Fahringer, *Zoning Out Free Expression: An Analysis of New York City's Adult Zoning Resolution*, 46 BUFFALO L. REV. 403, 421 (1998). Fahringer is a practicing lawyer in New York City; he represented the plaintiffs who challenged New York City's 1995 zoning resolution.

Not only is the report based on dissimilar test sites, but it also does not reflect a contemporary embodiment of the city. The second portion of the report examined several impact studies that were done in New York City between 1977 and 1993.²⁵⁰ Overall findings showed that the number of sex-oriented businesses had grown in the previous ten years; these businesses tended to be concentrated in one area; real estate brokers perceived these businesses lead to negative secondary effects; and the establishments have sexually graphic signs.²⁵¹ DCP also studied various areas within the city to compare business conditions, property values, criminal complaints, and sanitation conditions. However, this independent analysis began almost thirty years earlier—Jimmy Carter was president, *Happy Days* was the number-one-rated television show, and AIDS had not yet surfaced.²⁵² This report nowhere near reflects the New York City of today. Furthermore, the city found no correlation between adult-use establishments and negative secondary effects.²⁵³

Even without conclusive results, however, the original zoning ordinance was upheld based on the 1993 DCP Report.²⁵⁴ In making its conclusions, the DCP was highly swayed by businesses and community organizations that believe “their neighborhoods are adversely affected by the presence of adult uses” leading to the “deterioration in the social and economic well-being of the surrounding area.”²⁵⁵ Reliance on this type of evidence runs contrary to the secondary effects doctrine. A municipality may regulate speech by creating a content-neutral ordinance, but it cannot suppress the speech itself.²⁵⁶ In other words, it is not enough that members of the community dislike or are offended by a particular type of business and develop a negative perception based on this belief. Reliance on inconclusive correlations reflects judicial reinforcement of

²⁵⁰ Berger, *supra* note 149, at 112. The New York City impact studies were conducted by the City Planning Commission in 1977; the Mayor’s Office of Midtown Enforcement in 1983; the Chelsea Action Coalition and Manhattan Community Board Four in 1993; the Task Force on the Regulation of Sex-Related Businesses in 1993; the Times Square Business Improvement District in 1993; and a survey compiling media accounts of specific incidents and effects and complaint correspondence with city agencies and officials since 1993. *Id.*

²⁵¹ *See Ten’s Cabaret*, 7 68 N.Y.S.2d at 789.

²⁵² Super Seventies Rocks!®, http://www.superseventies.com/tvshows_H-M.html (last visited Nov. 8, 2005).

²⁵³ Berger, *supra* note 149, at 113.

²⁵⁴ *See Stringfellow’s*, 694 N.E.2d at 417.

²⁵⁵ *Id.* at 412, 416.

²⁵⁶ *See generally Alameda Books*, 535 U.S. 425.

society's moral fears about freedom of sexual expression.²⁵⁷ New York City's original ordinance endured not because of evidentiary support but because of the political climate and open hostility towards the sex industry—motivations that undermine the integrity of the adjudicative process.

C. Animus for Sexuality Is the True Driving Force Behind Curtailing First Amendment Rights of Sex Businesses

Local politicians have historically used zoning laws as a tool for segregating a city according to its uses. Following industrialism, developers and city planners recreated urban residential areas into “wholesome” housing that would be protected from incompatible uses. Zoning regulations solved problems related to industrialization, but in doing so these restrictions sacrificed the chaotic vitality and cultural richness that metropolitan street life offers.²⁵⁸ While separating residential from industrial areas may be necessary and beneficial to the health and safety of citizens, “adult use” zoning has morphed into a way for morals to shape the vibrancy and character of a city.

In regulating sexual behavior, politicians have used social or moral panic as a means of focusing public attention on degenerate or immoral behavior.²⁵⁹ While society may shift its animus from one issue to another, there is always a focal point at any given time. “[M]oral panic ‘crystallises [sic] widespread fears and anxieties, and often deals with them not by seeking the real causes of the problems and conditions which they demonstrate but by displacing them on to ‘Folk Devils’ in an identified social group.’”²⁶⁰ Both politicians and courts channel social fear and hostility towards sex workers, homosexuals, and other fringe groups. Although courts must articulate legitimate government concerns for upholding adult entertainment regulations, dicta illustrates true animus and hostility towards non-conformist sexuality.

This moral disapproval for sex businesses is largely responsible for the meager evidentiary standard needed to support a secondary effects theory. Justice Scalia has said that finding negative secondary effects is unnecessary since “[t]he traditional power of government to foster good morals (*bonos mores*), and the acceptability of

²⁵⁷ See Fahringer, *supra* note 249, at 420.

²⁵⁸ JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 951-53 (Richard A. Epstein et al. eds., 2002).

²⁵⁹ Read, *supra* note 49, at 281-82.

²⁶⁰ *Id.* at 282 (quoting JEFFREY WEEKS, SEX, POLITICS AND SOCIETY: THE REGULATION OF SEXUALITY SINCE 1800 14 (1989)).

the traditional judgment . . . that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.”²⁶¹ In *Barnes v. Glen Theatre, Inc.*, which came a decade before *Alameda Books*, the Supreme Court upheld an Indiana statute requiring dancers to wear pasties and G-strings.²⁶² Interspersed throughout the opinion, the Justices repeatedly referred to “morals” and “public order” as legitimate government interests for restricting sexual expression.²⁶³ Reliance on this language supports the belief that eliminating secondary effects is not the underlying reason for upholding these ordinances; rather morality is the justification.²⁶⁴

Although Justice Souter concurred in the *Barnes* opinion, nine years later in *City of Erie* he recanted his earlier lapse in judgment, demanding a higher evidentiary standard.²⁶⁵ In reconsidering the need for First Amendment scrutiny, Justice Souter cautioned, “I have come to believe that a government must toe the mark more carefully.”²⁶⁶ Similar to Souter’s error in applying First Amendment scrutiny in *Barnes*, the *Stringfellow*’s court easily dismissed comments made by City Council members that indicated an ulterior motive. The court insisted that ameliorating secondary effects was the “[c]ity’s *only* goal.”²⁶⁷ When reviewing *Ten’s Cabaret*, Justice Souter’s “too little, too late” warning should be taken seriously, guiding the Court of Appeals to carefully consider the city’s motivations for adopting the 2001 amendments and whether they do in fact serve as pretext for suppressing constitutionally protected expression.

²⁶¹ *City of Erie*, 529 U.S. at 310 (Scalia, J. concurring) (disbelieving “that the addition of pasties and G-strings will at all reduce the tendency . . . to attract crime and prostitution, and hence to foster sexually transmitted disease.”).

²⁶² *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

²⁶³ *Id.* at 569. “The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.” *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

²⁶⁴ *See Ben’s Bar*, 316 F.3d at 719; *SOB*, 317 F.3d at 862.

²⁶⁵ *See Barnes*, 501 U.S. at 572.

²⁶⁶ *Pap’s A.M.*, 529 U.S. at 316 (Souter, J. dissenting in part). Souter explained that his partial dissent rested on a demand for an evidentiary basis that he had failed to make earlier in *Barnes*: “My mistake calls to mind Justice Jackson’s foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, ‘Ignorance, sir, ignorance.’” *Id.* Souter also said that he hopes this enlightenment is acceptable even if a little late. *Id.* at 317.

²⁶⁷ *Stringfellow’s*, 694 N.E.2d at 415-16. “Courts will not invalidate a municipal zoning ordinance simply because one or more legislators sought to suppress protected expression.” *Id.* at 416.

V. CONCLUSION

New York City's sex industry has a long history. Much like an epic novel or a rock star's career, it has soared and faltered. Following the sexual freedom of the 1970s, suppression came in the form of a 1995 zoning ordinance restricting the location of adult-use establishments. Under political pressure and societal condemnation, New York's courts upheld the regulation. This pattern of curtailing sexual expression is occurring not only in New York City but in small towns and other urban areas throughout the country. Sexual zoning has codified eroticism such that it may be defined, labeled, and transformed from an authentic glimpse of humanity into a commodified marketing concept.²⁶⁸ Once neatly packaged, politicians eagerly sell the impression that their city or county is a lively yet respectable place, a concept that constituents, tourists, and courts readily consume. Contentious zoning regulations passed in an effort to protect the public from the dangers of public sex continue to shape and redefine the sexual climate in New York City and the rest of the United States. As part of a larger dialogue regarding morality, regulations restricting the time, place, and manner of sexual expression are a significant force within the ebb and flow of American sexuality.

In addition to political packaging, the scant evidentiary standard used to support a secondary effects theory is thinly veiled moral disapproval of sexual expression. The Supreme Court has stated that municipalities may not only rely on other city's studies, but a chain of inferences may be drawn to connect sex shops to secondary effects.²⁶⁹ Despite such a low threshold for proving secondary effects, some courts do, however, hesitate in expanding the doctrine.²⁷⁰ Specifically, various courts have scrutinized the motivations behind enacting a regulation to determine whether the law was spawned by public fears and dislike for open sexual expression.²⁷¹

Amidst the controversy of adult-use zoning ordinances, one might wonder why residents of New York City and other areas should sacrifice their wholesome community for the sake of sexual expression. Part of the answer lies in protections under the First

²⁶⁸ See JAMES TRAUB, *THE DEVIL'S PLAYGROUND: A CENTURY OF PLEASURE AND PROFIT IN TIMES SQUARE* 182 (2004).

²⁶⁹ See *Alameda Books*, 535 U.S. at 425.

²⁷⁰ See generally *Ten's Cabaret*, 768 N.Y.S.2d 786; R.V.S., 361 F.3d 402.

²⁷¹ See R.V.S., 361 F.3d at 410; *Gammoh v. City of Anaheim*, 86 Cal. Rptr. 2d 194, 201-02 (Cal. Ct. App. 1999).

Amendment and notions of freedom that the United States was founded upon. Also, subverting an unpopular activity or form of expression does not solve a perceived problem. Rather, it conceals a slice of raw humanity that, if shunned in favor of dominant hegemonies, will surely resurface in another form.

Yet another answer may lie in the unique character of New York City as an urban mecca that has historically been tolerant and open to unpopular ideas. Put another way, “What’s Times Square without sex?”²⁷² Adult-use zoning can be particularly dangerous when it invites and responds to special interests such as powerful politicians and big business. The Times Square district of New York City, once famous for its glamorous sex appeal and decadence, has been transformed into a regular—some would argue hollow—corporate enterprise.²⁷³

²⁷² TRAUB, *supra* note 268, at 195. Gretchen Dykstra, executive director of the Times Square Business Improvement District (BID), posed this question. *Id.* at 193. Even after the adult-use zoning laws cleaned up Times Square, they did not make it “squeaky-clean.” *Id.* at 195.

²⁷³ TRAUB, *supra* note 268, at 190.