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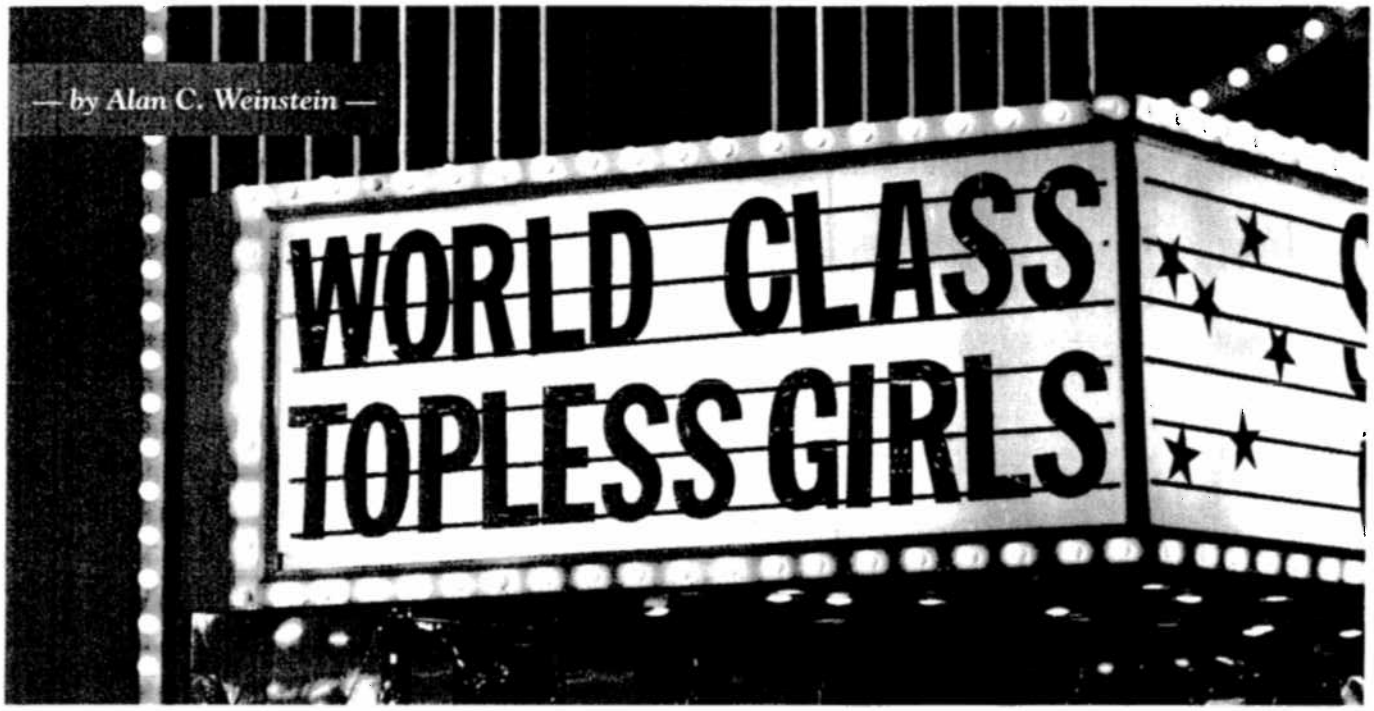

— by Alan C. Weinstein —

Responding to the Adult Industry's Claim About "No Secondary Effects"

In eight decisions since 1976, the U.S. Supreme Court has consistently affirmed that local governments could legitimately seek to safeguard their communities against the negative "secondary effects" associated with adult entertainment businesses.[1] These decisions, and the hundreds of lower court decisions interpreting and applying them, have made it clear that local governments may lawfully regulate such businesses—*provided* that regulations are drafted, enacted, and administered with exacting precision. That proviso is critical because adult entertainment regulations are frequently challenged—often successfully.[2] Adult businesses are lucrative and can hire attorneys who specialize in civil rights or First Amendment litigation. Municipal attorneys, by contrast, are less likely to have the same expertise. Over time, however, this advantage has eroded as municipal lawyers have learned to avoid the legal pitfalls in regulating adult businesses.

Recently, adult business attorneys, assisted by academic experts, have begun raising new challenges that target the claim that local governments regulate adult businesses to control their negative secondary effects. Some of these challenges claim that the secondary effects studies cited by regulators are methodologically flawed and thus, cannot reasonably be relied upon;[3] they also often claim that their expert's study of the jurisdiction in question shows no evidence of secondary effects.[4] Others argue that the jurisdiction has no evidence that a particular type of adult business is associated with negative secondary effects.[5] This article discusses the nature of these challenges, analyzes how they've fared in the courts, and suggests how local governments should respond when faced with these new claims.

The "Methodological" Challenge

The methodological challenge debuted five years ago in *City of Erie v. Pap's A.M.*[6] Although the U.S. Supreme Court upheld the city's anti-nudity ordinance, Justice Souter wrote separately to question whether "the city has made a sufficient evidentiary showing to sustain its regulation,"[7] citing an *amicus* brief filed on behalf of the adult business that argued "scientifically sound studies show no...correlation" between adult businesses and negative secondary effects.[8]

One year later, the argument in that *amicus* brief was set out in detail in a law review article.[9] Co-authored by Daniel Linz, a professor in the Department of Communication at the University of California, Santa Barbara,[10] the article argued that the secondary effects studies relied upon by local governments constituted "scientific evidence" subject to the rigors of the *Daubert* test.[11] Professor Linz then applied the *Daubert* standards he claimed were relevant to the "ten most frequently referenced studies."[12] He concluded that "the scientific validity of the most frequently used studies [was] questionable and the methods are seriously and often fatally flawed," and "[t]hose studies that are scientifically credible demonstrate either no negative secondary effects associated with adult

businesses or a reversal of the presumed negative effects."[13]

Professor Linz has since appeared several times as an expert witness on behalf of adult businesses,[14] usually seeking to discredit the secondary effects studies cited by the regulating jurisdiction and claiming that his own study shows no evidence of negative secondary effects in that community.[15] While he enjoyed initial success,[16] his more recent efforts have met with mixed results, due largely to how the lower courts have interpreted *City of Los Angeles v. Alameda Books, Inc.*,[17] the U.S. Supreme Court's 2002 case that grappled with the issue of how much evidence of secondary effects was necessary to sustain an adult business ordinance.

As often happens with the Court's First Amendment rulings, there was no clear majority in *Alameda Books*. Justice O'Connor's plurality opinion qualified the Court's earlier statement in *City of Renton v. Playtime Theatres, Inc.* (that a municipality may rely on any evidence of secondary effects that is "reasonably believed to be relevant"[18]) by cautioning that a city cannot "get away with shoddy data or reasoning;" rather, its "evidence must fairly support the municipality's rationale for its ordinance."[19] Justice Kennedy's concurring opinion, however, expressed concern that the plurality had subtly expanded what *Renton* permitted.[20] He contended that adult business cases raised two evidentiary questions: "First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition?"[21] He argued that the plurality answered only the second question and, while he believed that answer was correct, in his view more attention needed to be paid to the first.[22] The critical inquiry that Justice Kennedy believed the plurality skipped was "how speech will fare under the city's ordinance."[23] According to him, a "city may not assert that it will reduce secondary effects by reducing speech in the same proportion."[24] In short, "[t]he rationale of the ordinance must be that it will suppress secondary-effects—and not by suppressing speech."[25] That said, he, along with the plurality, argued for significant deference to local government fact-finding in making this inquiry. Cities "must have latitude to experiment, at least at the outset, and that very little evidence is required" to support the proposition,[26] and he cautioned that "[a]s a general matter, courts should not be in the business of second-guessing the fact-bound empirical assessments of city planners."[27]

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The "Methodological" Challenge After *Alameda Books*

After *Alameda Books*, the adult entertainment industry strenuously urged lower courts to view the case as authorizing a far more probing judicial inquiry into the rationale and supporting evidence that local governments offered in support of adult business regulations. As discussed below, in several of these cases, Professor Linz's testimony challenged either the rationale for the regulations, or the evidence in support of the rationale. Generally, courts continued to show significant deference to local government efforts to regulate adult businesses so long as there was some reliable evidence of negative secondary effects and the rationale for regulation was plausible; some courts, however, have been strongly influenced by Linz's claims.

Recent decisions illustrate why some of these challenges fail while others succeed. In *G.M. Enterprises, Inc. v. Town of St. Joseph, Wis.*,[28] the U.S. Court of Appeals for the Seventh Circuit upheld ordinances regulating nude dancing. After first ruling the ordinances did not impermissibly reduce expression in attempting to minimize secondary effects, the court considered whether the plaintiffs had "cast doubt" on the city's rationale for regulation or the evidence supporting that rationale.[29] The court noted that Professor Linz's testimony "arguably" showed that the city "might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses,"[30] but the court found that this was insufficient to shift the burden of proof back to the city, as it viewed *Alameda Books* as having left intact *Renton*'s deferential standard.[31] Critically, the court rejected, as "completely unfounded," Linz's claim that a city could not meet *Renton*'s "reasonable belief" standard unless its studies would be admissible under *Daubert*.[32] The court noted that a "requirement of *Daubert*-quality evidence would impose an unreasonable burden on the legislative process, and further[,] would be logical only if *Alameda Books* required a regulating body to prove that its regulation would—undeniably—reduce adverse secondary effects. *Alameda Books* clearly did not impose such a requirement."[33]

Other cases also found that Professor Linz's testimony was insufficient to cast doubt on a defendant city's

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rationale. In *Annex Books, Inc. v. City of Indianapolis*,[34] the court ruled that Linz's negative assessment of the city's studies, and his own studies claiming to show no evidence of negative secondary effects, were rebutted by the evidence of actual effects caused by plaintiff's establishments, as shown by arrest records.[35] More recently, in *Fantasyland Video, Inc. et al. v. County of San Diego*,[36] the county retained its own expert witness, Richard McCleary, Professor of Social Ecology at University of California-Irvine, both to critique and to rebut Professor Linz's testimony, a role Professor McCleary has carried out for several other jurisdictions.[37]

It is important to note, however, that in the absence of such countervailing expert testimony, some courts have been strongly influenced by Professor Linz's claims. In *J.L. Spoons, Inc. v. Morckel*,[38] involving a challenge to a state liquor control commission's regulation of erotic dancing, the court contrasted the state's reliance on a single out-of-state study with Linz's "thorough investigation of crime rates (and contributing factors to the crime rates)"[39] and described his study as "more persuasive, if counterintuitive, evidence" than that presented by the state.[40]

In *R.V.S., L.L.C. v. City of Rockford*,[41] the Seventh Circuit found that the city's evidence did not support the rationale for regulation of "exotic dancing nightclubs," defined as venues where dancers performed a "striptease" or "erotic dance" while wearing fully opaque clothing over the pubic area, buttocks and breasts.[42] The court found that the city had neither conducted its own studies of such businesses nor relied on any studies conducted by other cities, and the city's only pre-enactment "evidence" consisted of unsupported conclusory statements by two city officials.[43] In contrast, Professor Linz presented evidence that no studies demonstrated adverse secondary effects from establishments featuring clothed dancers, nor did he and another expert believe such effects could be found.[44] While acknowledging that courts should not be "second-guessing" the assessments of local government planners, the Seventh Circuit found that it would not have been reasonable for the city to believe, based on the scanty evidence before it, that there was a connection between negative secondary effects and these types of establishments.[45]

Obviously, regardless of expert witnesses, courts will uphold challenges to adult business regulations where evidence to support the government's rationale is wholly lacking. In *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*,[46] for example, the U.S. Court of Appeals for the Eleventh Circuit found that the county had not considered *any* evidence prior to the enactment of an adult entertainment ordinance. The case of *Flanigan's Enterprises, Inc. of Georgia v. Fulton County, Ga.*,[47] decided before *Alameda Books*, is also instructive. In *Flanigan's*, after the county's own study showed no evidence of adverse secondary effects, the county sought to justify its regulation of nude dancing establishments based on studies from other jurisdictions. The court ruled that it was not reasonable for the county to ignore relevant local studies and rely instead upon "remote foreign studies" in determining whether adverse secondary effects were attributable to the adult businesses.[48]

The "On-site" vs. "Off-site" Challenge

In the adult entertainment context, "on-site" refers to businesses which offer entertainment to be viewed on the premises, as opposed to "off-site" or "take-home" businesses, consisting of adult bookstores and video stores that do not have viewing booths or do not permit on-site viewing.

Adult businesses are claiming that evidence of secondary effects associated with "on-site" adult businesses does not support regulation of "off-site" businesses. In *Encore Videos, Inc. v. City of San Antonio*,[49] the U.S. Court of Appeals for the Fifth Circuit ruled that the city had not met its evidentiary burden for a zoning ordinance that treated "off-site" businesses with as little as 20 percent of adult material as sexually oriented businesses. The court criticized the city's studies because they had either entirely excluded "take-home" businesses, or did not differentiate the data collected from "take-home" businesses from that of "on-site" businesses.[50] In the court's view, "off-site" businesses differed from "on-site" ones: it was "only reasonable to assume that the former [were] less likely to create harmful secondary effects" as customers would not linger in the area and engage in undesirable behavior if they couldn't view the materials at that location.[51] The court's view on the evidentiary issue was significantly colored, however, by the fact that the 20 percent regulatory threshold could potentially ensnare "mainstream" businesses with adult sections.[52]

In contrast, the U.S. Court of Appeals for the Ninth Circuit upheld a restriction on "off-site" businesses in *World Wide Video of Washington, Inc. v. City of Spokane*, despite the fact that the plaintiff's expert demonstrated that the city's studies did not deal exclusively with "take-out" businesses and provided his own studies showing that such businesses did not cause negative secondary effects in Spokane.[53] The court ruled that the plantiff, despite its expert's findings, had not met its burden of "casting doubt" on the city's rationale or supporting evidence. This was because, in addition to the studies from other cities, the city had relied

on citizen testimony linking "off-site" businesses with pornographic litter and public lewdness, and this evidence, "standing alone, was sufficient to meet the 'very little' evidence standard of *Alameda Books*."[55]

Conclusion

The "methodological" challenges being mounted by adult businesses should not be treated lightly. In the absence of such a challenge, a court will normally find that government has satisfied its evidentiary burden under *Renton* and *Alameda Books* merely by citing to studies of secondary effects from other jurisdictions. That is decidedly not the case when the adult business brings a "methodological" challenge that disputes the validity of the studies relied upon or provides an expert's study showing no negative secondary effects in the challenged jurisdiction. In the face of such a challenge, local government must either introduce evidence to support the validity of the studies relied upon, or provide evidence of actual secondary effects associated with adult businesses in the jurisdiction. Some courts have held that police crime reports, or even personal testimony, are sufficient to demonstrate the existence of negative secondary effects; however, if the adult business has offered expert witness testimony along the lines described above, the challenged jurisdiction should seriously consider retaining its own expert to refute those claims.

Notes

1. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); City of Erie v. Pap's A.M., 529 U.S. 277 (2000); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002); City of Littleton, Colorado v. Z.J. Gifts D-4 L.L.C., 541 U.S. 774 (2004).
2. Author's June 2005 Westlaw search in ALLCASES database listing 1,351 adult entertainment cases since 1976.
3. *See, e.g.*, Nite Moves Entertainment, Inc. v. City of Boise, 153 F. Supp.2d 1198, 1201-02 (D. Idaho 2001) (claiming city's land use studies and crime reports were fundamentally flawed and did not comply with the standards for expert testimony in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)); *see also* R.V.S., L.L.C. v. City of Rockford, 361 F. 3d 402 (7th Cir. 2004); J.L. Spoons, Inc. v. Morckel, 314 F. Supp.2d 746 (N. D. Ohio 2004).
4. *See, e.g.*, Fantasyland Video, Inc. v. County of San Diego, 373 F. Supp.2d 1094 (S.D. Cal. 2005).
5. *See, e.g.*, Encore Videos, Inc. v. City of San Antonio, 330 F. 3d 288 (5th Cir. 2003).
6. 529 U.S. 277 (2000).
7. *Id.* at 310-11 (emphasis added).
8. *Id.* at 315, n.3.
9. Bryant Paul, Daniel Linz & Bradley J. Shafer, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL'Y 355 (2001) (hereafter "*Linz*").
10. Linz's co-authors, Paul and Shafer, are, respectively, one of Linz's Ph.D. students and a Michigan adult business attorney.
11. In Daubert v. Merrel Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Court outlined the standards for "reliability" governing the admissibility of expert scientific evidence in federal courts.
12. *Linz*, *supra* note 9 at 369-75.
13. *Id.* at 386-87.
14. *See, e.g.*, Fantasyland Nite Moves Entertainment, Inc. v. City of Boise, 153 F. Supp.2d 1198 (D. Idaho 2001); G.M. Enterprises, Inc. v. Town of St. Joseph, Wis., 350 F. 3d 631 (7th Cir. 2003); R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402 (7th Cir. 2004); J.L. Spoons, Inc. v. Morckel, 314 F. Supp.2d 746 (N.D. Ohio 2004); Annex Books, Inc. v. City of Indianapolis, 333 F. Supp.2d 773 (S.D. Ind. 2004); Fantasyland Video, Inc. v. County of San Diego, 373 F. Supp.2d 1094 (S.D. Cal. 2005).
15. *See, e.g.*, *Fantasyland Video, Inc.*, 373 F. Supp.2d 1094.
16. *Id.*
17. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).
18. 475 U.S. 41, 51-52 (1986).
19. *Alameda Books, Inc.*, 535 U.S. at 438-39.
20. Because there was no majority opinion, Justice Kennedy's concurrence is the narrowest opinion joining the judgment of the Court and is the controlling authority under Marks v. United States, 430 U.S. 188 (1977). *See, e.g.*, G.M. Enterprises, Inc. v. Town of St. Joseph, Wis., 350 F.3d 631, 637 (7th Cir. 2003).
21. Alameda Books, Inc., 535 U.S. at 449.
22. *Id.*
23. *Id.* at 450.
24. *Id.* at 449.
25. *Id.* at 449-50.
26. *Id.* at 451.
27. *Id.* at 451-52.
28. 350 F.3d 631 (7th Cir. 2003).
29. *Id.* at 639.
30. *Id.*
31. *Id.* at 639-40.
32. *Id.* at 640. The court also noted that both the plurality and Justice Kennedy had "bluntly rejected" Justice Souter's suggestion that a city be required to produce empirical data in support of its rationale for regulation, on the ground that "such a contention would go too far in undermining our settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech.'" *Id.*, quoting *Alameda Books*, 535 U.S. at 439. *See also* Center for Fair Public Policy v. Maricopa County, 336 F. 13d 1153 (9th Cir. 2003) (rejecting claim that government must support its rationale with empirical data).
33. G.M. *Enterprises, Inc.*, 350 F. 3d at 640.
34. 333 F. Supp.2d 773 (S.D. Ind. 2004).
35. *Id.* at 786-87.
36. Fantasyland Video, Inc. v. County of San Diego, 373 F. Supp.2d 1094 (S.D. Cal. 2005).
37. Correspondence with Professor McCleary (May 27, 2004) (on file with author).
38. 314 F. Supp.2d 746 (N.D. Ohio 2004).
39. *Id.* at 756.
40. *Id.*
41. R.V.S., L.L.C. v. City of Rockford, 361 F. 3d 402 (7th Cir. 2004).
42. *Id.* at 405.
43. *Id.* at 405-06.
44. *Id.* at 406-07.
45. *Id.* at 410-12.
46. 337 F. 3d 1251 (11th Cir. 2003).
47. 242 F. 3d 976 (11th Cir. 2001).
48. *Id.* at 986-87 ("We simply cannot find it reasonable for a government entity to conduct studies on specific areas and then to reject the conclusions thereof in favor of studies from different cities and different time periods." *Id.* at 987).
49. 330 F.3d 288 (5th Cir. 2003).
50. *Id.* at 294-95.
51. *Id.* The court noted that the Washington Supreme Court had reached a similar conclusion in World Wide Video, Inc. v. City of Tukwila, 816 P.2d 18 (Wash. 1991), but that two federal circuits disagreed that the distinction between on-site and off-site businesses held any legal meaning; *see* Z.J. Gifts, D-2 L.L.C. v. City of Aurora, 136 F. 3d 683 (10th Cir. 1998) and ILQ Investments, Inc. v. City of Rochester, 25 F. 3d 1413 (8th Cir. 1994).
52. *Id.* at 295. *See also* Giggles World Corp. v. Town of Wappinger, 341 F. Supp.2d 427 (S.D.N.Y. 2004) (questioning, on motion for summary judgment, secondary effects basis for ordinance regulating businesses with only 20 percent adult material).
53. 368 F.3d 1186 (9th Cir. 2004).
54. *Id.* at 1195. **ML**