Zoning the Voyeur Dorm: Regulating Home-Based Voyeur Web Sites Through Land Use Laws

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INTRODUCTION

A growing aspect of the Internet is the dedication of Web sites to "computer exhibitionists"—people who voluntarily document their lives through the use of video cameras or webcams[1] and allow others to watch over the Internet. Most computer exhibitionists open up their private lives,[2] not for any type of sexual thrill or gratification, but as a way to let others know who they are, to become famous, even if just for a moment.[3] That others—computer voyeurs—would want to watch a stranger typing in front of a computer screen, or reading a book, or sleeping, seems odd, but voyeur Web sites attract a large following.

This should come as no surprise considering the popularity of reality television. Since its controversial beginning with the 1973 PBS series *An American Family*,[4] the number of reality-based television programs has

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[1] A webcam is a camera that is attached to a computer and transmits a still image that is updated either automatically or at the request of the viewer. A video camera or live cam, by contrast, is a camera that continually transmits new images in rapid succession or streaming video. *See* Cam, Homecam, Livecam, or Webcam, *at* http://whatis.techtarget.com/definition/0,289893,sid9gci211738,00html (last updated July 31, 2000).

[2] Numerous articles have been written about the Internet's encroachment on personal privacy and exploitive use for commercial gain. *See, e.g.*, Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273 (1999); Dorothy Glancy, *At the Intersection of Visible and Invisible Worlds: United States Privacy Law and the Internet*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 357 (2000); Kurt Wimmer, *Internet Privacy and Free Expression: New Media for the New Millennium*, 18 COMM. LAW 1 (2000); Maria Pope, Comment, *Technology Arms Peeping Toms with a New and Dangerous Arsenal: A Compelling Need for States to Adopt New Legislation*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1167 (1999).

[3] Andrew Mueller, *Is Anybody Listening?*, SUNDAY TIMES (London), June 18, 2000, at 47, *available at* 2000 WL 23211022.

[4] In 1973, PBS broadcast twelve episodes of *An American Family*, a series that followed the lives of an "ordinary" family in southern California. *See* Jenifer D. Braun, *Is It Real or Is It TV? Welcome to 'The Real World' and All Its Clones. Are You an Exhibitionist or a Voyeur?*, STAR-LEDGER, Nov. 26, 1995, *available at* 1995 WL 11800815. Edited from 300 hours of footage filmed over seven months, the twelve one-hour episodes featured such highlights as one son's announcement of his homosexuality and the breakup of the parents' marriage. *See id.*

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increased dramatically. Reality talk shows and "shockumentaries" are quite common.[5] The more sophisticated, new wave of reality television, such as MTV's *The Real World* or CBS's reality-based game shows *Survivor* and *Big Brother*, have had even broader appeal, garnering high ratings as viewers tuned in to watch cast members banter and bicker in their unscripted fashion.[6]

Unlike reality television, which often places cast members in unrealistic situations, voyeur Web sites generally stick to real life. Because the Internet has few regulations governing content,[7] the potential that viewers might see nudity or sexual interaction on voyeur Web sites increases the titillation factor. Yet titillation is not the only reason computer voyeurs might surf voyeur Web sites. Often computer exhibitionists share more than pictures with their viewers, offering their

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[5] *See generally* Steve James, *No Virtual Reality—Peeping Tom TV Rules*, REUTERS ENG. NEWS SERV., Aug. 10, 2000, *available at* 8/10/00 RTRENGNS 10:14:00 (discussing various reality television programs).

[6] *Survivor*, the most highly rated of the new reality shows, aired during the summer of 2000. In the show, sixteen people were "stranded" on an island in the South China Sea. Each week for thirteen weeks, highlights of the castaways' activities were broadcast, with each episode ending with the removal of one person from the island by vote of the other castaways. The castaway remaining at the end of the show—the survivor—was awarded $1 million. The show's finale was watched by an average of 51.7 million viewers (about as many as would watch the Super Bowl) and overall was the "most-watched summer program" since 1987. *See* Richard Huff, *"Survivor" Lands on Own Special Ratings Island*, N.Y. DAILY NEWS, Aug. 30, 2000, at 85, *available at* 2000 WL 22608710; *see also Survivor*, at http://marketing.cbs.com/network/tvshows/mini/survivor/show/about.shtml (last visited Aug. 20, 2000). Due to its popularity, a sequel to *Survivor* (this time in Australia's Outback) and several similar reality shows on competing networks were aired in the spring of 2001.

The Real World and *Big Brother*, in contrast, take off on the idea of typical voyeur Web sites, with cast members living together in a home and on camera twenty-four hours a day. To further the show's appeal, live coverage of activities within the *Big Brother* house are available twenty-four hours a day via the show's supplementary Web site. *See* Big Brother, at http://webcenter.bigbrother2000.aol.com/entertainment/NON/ (last visited Aug. 20, 2000).

[7] Regulation of sexually explicit material on the Internet has been difficult. Congress has successfully prohibited child pornography on the Internet. *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009. However, other attempts to regulate sexually explicit material have been less successful. In *Reno v. ACLU*, 521 U.S. 844, 859-60 (1997), for example, the Supreme Court struck down as unconstitutionally overbroad the Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133-35, because restriction of the materials from minors would necessarily involve a restriction of the materials from adults. Congress's second attempt at regulation — the Children's Online Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, is currently undergoing judicial scrutiny. *See* ACLU v. Reno, 217 F.3d 162, 181 (3d Cir. 2000) (affirming preliminary injunction of Act). *See generally* Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 (2000) (discussing congressional efforts to regulate sexual speech on Internet).

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thoughts and feelings through computer journals and chat rooms.

Take Jennifer Ringley, for example, whose JenniCam Web site energized the webcam craze.[8] Starting with a single webcam mounted atop the computer in her college dorm room in 1996,[9] Ringley has completely opened the doors to her private life, baring all—both literally and figuratively—through journal entries, regularly updated webcam pictures, and e-mail interaction.[10] Although most activity caught on camera is innocent and often uninteresting, the Web site has occasionally offered nudity and, in some instances, sexual encounters and high drama.[11] Five years after the Web site launched, devoted viewers (ninety percent male) continue to follow her activities and many voluntarily pay an annual fifteen dollar subscription fee to help pay for Web site maintenance.[12]

With the JenniCam Web site generating as many as 175,000 hits per month and subscribers numbering at one time over five thousand,[13] it is not surprising that the JenniCam concept would appeal to others seeking similar attention nor that it would appeal to those wishing to commercially exploit the webcam phenomenon. Enter Bruce Hammil, a down-on-his-luck disc jockey, and Dave Marshlack, a former businessman with a criminal record.[14] Webcasting to the Internet from

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[8] *See* Linton Weeks, *Web Site for Voyeur Eyes; Jenni Has a Camera in Her Room. The Whole World is Watching*, WASH. POST, Sept. 20, 1997, at H01, *available at* 1997 WL 12887539 (identifying JenniCam follower who claims Ringley's site was first fixed-camera site and "still the most authentic"). Although Ringley's site may be the first webcam site devoted solely to a human being as a subject, the Web site showing Cambridge University's Trojan Room coffeepot is often recognized as the first official webcam site. *See, e.g.*, Don Campbell, *Nothing But Net: Can You Believe What You See?*, PORTLAND OREGONIAN, Aug. 13, 2000, at F10, *available at* 2000 WL 5423563. For a history of the Trojan Room coffeepot webcam, see Quentin Stafford-Fraser, The Trojan Room Coffee Pot: A (Non-Technical) Biography at http://www.cl.cam.ac.uk/coffee/qsf/coffee.html (visited Jan. 8, 2000).

[9] *See* Weeks, *supra* note 8, at H01.

[10] *See id.*

[11] *See* Alice Lipowicz, *JenniCam Star's in Love; Net Exhibitionist Angers Fans by Stealing Pal's Beau*, CHI. SUN TIMES, Aug. 8, 2000, at 4, *available in* 2000 WL 6689049; Weeks, *supra* note 8, at H01.

[12] *See* Lipowicz, *supra* note 11; Support the JenniCam Concept http://www.jennicam.org/guests/join.html (visited Jan. 8, 2000). The fees, which generated approximately $70,000 in 1997, are used for updating equipment for the Web site. *See* Brett Lieberman, *Next on JenniCam, Her Boyfriend Will Be Moving In*, HARRISBURG PATRIOT, Aug. 19, 1997, at D02, *available at* 1997 WL 7528287; *see also* Support the JenniCam Concept, *supra* (noting that maintenance of Web site costs several thousand dollars per month).

[13] *See* Weeks, *supra* note 8, at H01; Jonathon Weisman, *Her Life Is Just an Open Web Site*, BALT. SUN, May 13, 1998, at 1E, *available at* 1998 WL 4971521.

[14] *See* Steve Huettel, *Adult Web Site Opens Doors for Owners*, ST. PETERSBURG TIMES,

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servers in a friend's garage in St. Petersburg, Florida, Hammil and Marshlack put together a weekly, low-budget adult entertainment show, available on a subscription basis, that featured pictures of a sometimes nude, sometimes semi-nude woman engaging in simple activities such as cooking or shaving her legs.[15] Seeing the potential in this form of entertainment, Hammil and Marshlack began to look for a better way to capitalize on the market.

They found it in 1998 in the form of a five-bedroom, four thousand square foot, beige stucco house located in a quiet Tampa neighborhood, a house they remodeled to accommodate video cameras in every room, including three in the shower.[16] From this house, Hammil Marshlack, and their new partner Seth Warshavsky, the "26-year-old Internet porn mogul,"[17] launched VoyeurDorm.com,[18] a Web site that would go one step further then the Internet's pre-existing cyberpornography industry with the introduction of reality-based, round-the-clock coverage of the Voyeur Dorm residents.

Aug. 13, 2000 at 1B, *available at* 2000 WL 5629044.

[15] *See id.*

[16] *See* Doug Bedell, *Online and Out of Line? Attempts to Control Gambling, Sex and Questionable Web Sites Reveal Limits of U.S. Laws*, DALLAS MORNING NEWS, Nov. 2, 1999, at 1F, *available at* 1999 WL 29821026; Natalie Clarke & Sarah Chalmers, *Voyeur.Com: These Middle-Class Girls Are All Paid to Appear on the Internet 24 Hours a Day for the Titillation of Millions of Men . . . Welcome to the Dark Side of the Web*, DAILY MAIL, Dec. 18, 1999, at 24, *available at* 1999 WL 30207216; *Entertainment Network, Inc. Acquires VoyeurDorm.com™*, PR NEWSWIRE, Jan. 5, 2000, *available at* 1/5/00 PR Newswire 06:45:00 [hereinafter *ENI Acquires VoyeurDorm.com™*]; Sarah Huntley, *Voyeur Dorm Taking City to Court*, TAMPA TRIB., Sept. 25, 1999, at 1, *available at* 1999 WL 21340579.

[17] Hammil, Marshlack, and Marshlack's father (who owned house) teamed up to form Entertainment Network, Inc., a 50% owner of Voyeur Dorm with Warshavsky's company Internet Entertainment Group. *See* Huettel, *supra* note 14, at 1B; *ENI Acquires Voyeurdorm.com™*, *supra* note 16. Warshavsky, described as the "Larry Flynt of the Internet," and his company Internet Entertainment Group are famous for the distribution of a sexually explicit home video of actress Pamela Anderson Lee and her husband Tommy Lee. *See* Maryanne Murray Buechner et al., *Digital 50: The Most Important People Shaping Technology Today*, TIME MAG., Oct. 4, 1999, at 25, *available at* 1999 WL 25725654 [hereinafter *Digital 50*]; Sharon Waxman, *Internet Porn King Says His Books Are Clean*, WASH. POST, Oct. 20, 1999, at C01, *available at* 1999 WL 20021244. Warshavsky, who has been accused of overcharging thousands of credit card customers for subscriptions to his pornographic Web sites and of regularly failing to pay creditors until they sued, was listed by *Time Magazine* as one of the fifty most important people shaping technology today. *See Digital 50*, *supra*, at 25; Waxman, *supra*, at C01.

[18] This Article refers to the two different Voyeur Dorm locations as follows: "VoyeurDorm.com" refers to the Internet Web site for the Voyeur Dorm. "Voyeur Dorm" refers to the actual physical location of the house in which the women are located.

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The concept of VoyeurDorm.com is simple: move in six "sexy young college girls,"[19] charge for subscriptions and wait for the money to roll in. In exchange for living under the public eye, the women receive free room and board and payment of their college tuition, plus a $250 to $500 weekly stipend depending on their enthusiasm and participation in in-house activities and online chat rooms devoted to subscribers.[20] Residents are limited to two nights out per week and may have guests visit, but no males may stay overnight.[21] For the thirty-four dollar monthly subscription (plus optional sixteen dollar chat fee), subscribers can tune in to as many as seventy-five cameras to watch the residents eat, sleep, shower, sunbathe nude, and have "lingerie parties."[22] Residents are often encouraged to strip during chat sessions (a request they sometimes oblige) and, although there is a "no sex on camera" policy, reports indicate that the policy has not always been followed and hetero- and homosexual activities have been webcast.[23] According to VoyeurDorm.com representatives, however, since its initial broadcast, the Web site has played down the adult aspect of the activities and they now consider it a "live 24-hour documentary viewed over the Internet."[24]

Some speculate that the number of subscribers to VoyeurDorm.com currently ranges anywhere from 5,000 to 50,000.[25] Regardless of the actual number, the Web site is so successful that Hammil and Marshlack have started a similar site with men—DudeDorm.com—housed in

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[19] *See VoyeurDorm.com: Everyone's Watching*, at http://www.voyeudorm.com (visited Jan. 16, 2000). Frequent turnover in the Voyeur Dorm residents is not uncommon. Since its inception in 1998, at least 15 women have moved in and out of the house and few stayed longer than a few months. *See* Robert Green, *News, Trends, Gossip and Stuff to do Lifestyle Pay-Per-View Hall*, L.A. TIMES, Sept. 16, 1999, at E2, *available at* 1999 WL 26176079.

[20] *See* Clarke & Chalmers, *supra* note 16, at 24; Green, *supra* note 19, at E2.

[21] *See id.*

[22] *See* Huettel, *supra* note 14, at 1B; *VoyeurDorm.com: Everyone's Watching*, *supra* note 19. The Web site initially began with only 12 cameras. *See ENI Acquires VoyeurDorm.com™*, *supra* note 16; Huettel, *supra* note 14, at 1B.

[23] *See* Clarke & Chalmers, *supra* note 16, at 24; *Welcome to Me TV*, GUARDIAN, Dec. 10, 1999, *available at* 1999 WL 25750805; *see also* Joel Deane, *Cyberporn King's Latest Headline Grabber*, ZDNet News from ZDWire, Oct. 30, 1998, *available at* 1998 WL 28813778 (quoting Bruce Hammil as stating "The content is what we would call Rated-R. . . . There's nudity, but there's no planned sex. The girls do have their boyfriends around, however, and things happen.").

[24] *See* Huettel, *supra* note 14, at 1B; *Voyeur Dorm.com Answers the City of Tampa's 'Motion to Dismiss' with Plans for a New Web site*, PR NEWSWIRE, Nov. 22, 1999, *available at* 11/22/99 PR Newswire 19:48:00 (quoting Voyeur Dorm owners). Indeed, Hammil and Marshlack bought out Warshavsky's share of Voyeur Dorm after Warshavsky sought to move porn stars into the Voyeur Dorm. *See* Huettel, *supra* note 14, at 1B.

[25] *See* Huettel, *supra* note 14, at 1B.

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Pinellas Park, Florida.[26] Other fee and non-fee Web sites (not necessarily sex-related) that operate along similar lines have also been launched on the Web by other sponsors.[27]

Although voyeur Web sites may not be everyone's cup of tea, the physical locations of the Web sites may be even less appealing to their neighbors. These locations—voyeur residences—often take the form of houses or apartments in residential areas. Even though the voyeur Web site may not be advertised as pornographic,[28] the voyeur residence itself might still be considered an adult entertainment establishment if the Web site receives consideration for offering adult entertainment.[29] Because adult uses (for example, adult bookstores or theaters) are generally excluded from residential neighborhoods by zoning ordinances,[30] voyeur residences located in residential areas may violate zoning laws if they constitute an adult use.[31]

The problem, however, is that voyeur residences are qualitatively different from typical adult uses. Rather than offering adult entertainment on site like adult theaters or men's clubs, the adult entertainment derived from a voyeur residence is offered solely online and much of the content has little, if any, pornographic overtones.[32]

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[26] *See* Steve Huettel, *Where the Dudes Are: Pinellas Park*, ST. PETERSBURG TIMES, Feb. 3, 2000, at 1B, *available at* 2000 WL 5594601. The company has also started a comparable Spanish-language Web site called Voyeur Casa. *See* Voyeur Casa, *at* http://www.voyeurcasa.com (last visited Sept. 21, 2000).

[27] *See, e.g.*, The Dolls' House, *at* http://www.thedollshouse.com (last visited Aug. 22, 2000) (Web site of three women living in apartment sponsored by British television); The Real House, *at* http://www.therealhouse.com (last visited Aug. 22, 2000) (Web site documenting lives of three women and two men); *see also* Cold Turkey (visited Aug. 22, 2000) http://www.questionit.com/ColdTurkey/ (following five smokers living without cigarettes in a two-bedroom apartment).

[28] Some voyeur Web sites contain warnings of the potential adult nature of the site, but deny being pornographic. *See, e.g.*, The Real House, *supra* note 27 ("Although TheRealHouse.com is not intended to be of adult nature, the Web site is 'live' and situations might arise where the content might be interpreted as such. You must be at least 18 years old to view the contents of this Web site.").

[29] *See, e.g.*, Keith Morelli, *Judge Rules Tampa Has Right to Shut Down Voyeur Dorm*, TAMPA TRIB., Nov. 7, 2000, at 5, *available at* 2000 WL 24603556 (discussing district court ruling that Voyeur Dorm constituted adult business).

[30] *See* JULES B. GERARD, LOCAL REGULATION OF ADULT BUSINESSES § 4.07, at 206-09 (2000 ed. 1999).

[31] *See, e.g.*, Morelli, *supra* note 29, at 5.

[32] In discussing voyeur Web sites, this Article makes no distinction between voyeur Web sites that are clearly offered for their pornographic potential (e.g., VoyeurDorm.com) and those that are offered by computer exhibitionists merely as a means for expressive conduct but that charge a fee for the service (e.g., JenniCam.com). Readers should be aware, however, that the intent of the Web sites (as shown by their advertising) may differ

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Further, because the entertainment is offered electronically and is accessed off-premises, negative effects that characterize typical adult uses (e.g., increased crime, prostitution and drug use) are arguably non-existent, especially if the location of the voyeur residence is unknown.

VoyeurDorm.com is a case in point. Voyeur Dorm itself is physically located in a residential neighborhood in Tampa, but until stories about the Web site were featured in the media, neighbors did not know of Voyeur Dorm's location.[33] Indeed, even local authorities were unaware of the location until Voyeur Dorm's lawyers contacted the City of Tampa Zoning Coordinator.[34] Once they knew the location, city officials sought to force Voyeur Dorm to comply with Tampa's zoning ordinance, which prohibits the location of adult businesses within five hundred feet of a residential home.[35]

The Zoning Coordinator for the City of Tampa determined that Voyeur Dorm was an adult use and ordered it to cease operation in its current location.[36] On appeal, the Tampa Variance Review Board upheld the Coordinator's determination in a unanimous decision,[37] which was later affirmed by the Tampa City Council.[38] Voyeur Dorm filed suit in federal district court challenging the constitutionality and enforcement of Tampa's zoning ordinance as applied to Voyeur Dorm's activities.[39]

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markedly even though the content may be very similar. *Compare* Voyeur Casa, *supra* note 26 ("We are here for your viewing pleasure. It turns us on to turn you on."), *and* VoyeurDorm.com: Guest Tour, *supra* note 19 ("Voyeur Dorm is unscripted, unedited, and uncensored! Its [sic] about girls letting loose and letting you watch . . . and we like that!"), *with* JenniCam.com *at* http://www.jennicam.com (visited Sept. 26, 2000) ("jenni.cam 1: a real-time look into the real life of a young woman 2: an undramatized photographic diary for public viewing esp. via internet").

[33] *See* Steve Huettel, *Board Says Voyeur Web Dorm Must Leave Home*, ST. PETERSBURG TIMES, July 14, 1999, at 3B, *available at* 1999 WL 3330717; *20/20: Cyber Dorm* (ABC television broadcast, Aug. 11, 1999), *transcript available at* 1999 WL 6790878.

[34] *See* Complaint for Declaratory and Injunctive Relief and Supplemental Claim of Petition for Writ of Certiorari with Demand for Jury Trial, at 5, Voyeur Dorm, L.C. v. City of Tampa, 99-2180-CIV-T-24-R (Sept. 24, 1999) (on file with author) [hereinafter Voyeur Dorm Complaint]. Counsel for Voyeur Dorm contacted the Zoning Coordinator upon learning of a police investigation into the possible illegality of the Voyeur Dorm location. *See id.*

[35] *See* Tampa, Fla., Code of Ordinances § 27-272(a)(1) (1999) ("No adult use shall be located within five hundred (500) feet of any residential or office district.").

[36] *See* Voyeur Dorm Complaint, *supra* note 34, at ex. B (Letter from Gloria Moreda, Zoning Coordinator, to Mark R. Dolan (Feb. 12, 1999)).

[37] *See id.* at ex. E (Letter from John C. Bates, Chairman, Variance Review Board, to Dan and Sharon Gold Marshlack (July 19, 1999)).

[38] *See id.* at ex. H (Letter from Janett S. Martin, City Clerk, to Dan and Sharon Marshlack (Aug. 27, 1999)).

[39] *See id.* at 1.

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The complaint alleged, among other things, that the ordinance violates the First Amendment, due process, the right to privacy and equal protection.[40] The trial court granted summary judgment to the city, and Voyeur Dorm has appealed.[41] This case, when eventually resolved, may have enormous impact on the future of voyeur Web sites, especially small-scale Web sites operated by a private individual for a fee. Some argue that the impact of the lawsuit may be even greater, extending not just to voyeur Web sites, but to any type of home-based computer business.[42]

The Voyeur Dorm case raises interesting questions regarding whether land use laws should be used to regulate this type of activity. First, one must ask whether voyeur residences constitute an activity requiring prophylactic regulation in residential areas when the activity within the voyeur residence is, for the most part, a residential use. Even if a voyeur residence technically constitutes an adult use, because the use is atypical of normal adult entertainment establishments and may result in none of the effects forming the basis of typical adult use regulation, enforcement of zoning ordinances or even residential covenants against a voyeur residence serves little purpose other than satisfying moral objections to the activity. Further, because the nature of the voyeur residence is residential, regulation seems more intrusive than regulation of other adult uses because the activity being regulated is activity that occurs within the privacy of a home.

The appropriateness of the regulation notwithstanding, a second issue raised by the Voyeur Dorm case is whether a local government can constitutionally exclude voyeur residences from residential neighborhoods. Although zoning ordinances do not prohibit a person from webcasting sexually oriented material, even for a fee, the effect of enforcing an ordinance may arguably result in suppression of sexual speech in violation of the First Amendment. Further, because most zoning ordinances were enacted long before voyeur residences came into existence, the language of zoning ordinances, even though

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[40] *See id.* at 11-12.

[41] *See* Brad Smith, *Voyeur Dorm Heading to Appeals Court*, TAMPA TRIB., Dec. 1, 2000, at 3.

[42] *See, e.g., Voyeur Dorm's Lawyers Series: Editorials*, ST. PETERSBURG TIMES, July 16, 1999, at 16A, *available at* 1999 WL 3331191 (suggesting that enforcing zoning ordinances against Voyeur Dorm "has the potential for shutting down all Internet entrepreneurs and home businesses"); *see also* Robyn E. Blumner, *Voyeur Dorm Best Left Alone*, ST. PETERSBURG TIMES, Aug. 8, 1999, at 1D, *available at* 1999 WL 3334930 (suggesting that the Voyeur Dorm case may be "national test case for the proposition that Internet-based adult-oriented businesses run entirely inside one's home are constitutionally protected and cannot be zoned away").

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constitutionally upheld as applied to normal adult uses, may be vague or overbroad as applied to voyeur residences. Privacy interests may also be at stake because regulation intrudes upon the sanctity of the home, and equal protection questions may arise because of the unequal treatment of those voyeur Web sites that charge for their services and those that do not.

A third issue raised by the Voyeur Dorm case is that, even if a local government can legally zone out a voyeur residence and, assuming that the local authority can find the voyeur residences in order to enforce the ordinance, zoning may be a premature response to an undefined threat. Other mechanisms exist, such as the law of servitudes and the law of nuisance, that may be better suited for regulating voyeur residences considering the unquantified harm that they currently pose. Use of restrictive covenants under the law of servitudes, for example, would allow the neighborhood most impacted by the location of the voyeur residence to enforce a covenant excluding such activity should the effects of the voyeur use become detrimental. Because of the potential that the covenant would be strictly enforced regardless of detrimental impact, however, nuisance law may be better suited for regulating voyeur residences because it avoids unnecessary intrusion into harmless activities within the home.

Using Voyeur Dorm as an example, this Article explores these issues as they relate to fee-based voyeur residences.[43] The Article is divided into three parts. Part I explores the law of use zoning, focusing in particular on adult uses and home occupations and discussing the difficulty of fitting voyeur residences into either category. Part II turns to an analysis of the constitutional implications of enforcing zoning ordinances against voyeur residences and examines potential claims under the First Amendment, due process, the right to privacy and equal protection. Part III then examines the law of servitudes and nuisance as possible alternatives to zoning. The Article concludes that, because of the potential infringement of constitutional rights, the limited knowledge of possible external impacts of voyeur residences, and the potential for misusing land use laws for Internet regulation, the safest course of action is to avoid blanket use restrictions and rely on the law of nuisance to

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[43] The voyeur Web sites discussed in this Article are Web sites that focus on real life activities of computer exhibitionists with occasional sexual content and not Web sites that are exclusively devoted to pornographic activity. However, much of the argument in this Article would also apply to strictly pornographic Web sites if they operate on the same general rules as the voyeur Web sites discussed in this Article, although stronger moral objections against locating those types of Web sites in residential areas may exist.

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control actual detrimental impacts to neighborhoods.

I. USE ZONING AND VOYEUR RESIDENCES

To better understand the constitutional issues surrounding the attempted exclusion of voyeur residences from residential neighborhoods, a basic understanding of zoning law is required. This section details the law of use zoning and the particulars of use zoning as it relates to adult entertainment uses and home occupations. It concludes with a discussion of the difficulties inherent in classifying home-based voyeur residences as either adult uses or home occupations, finding that neither category offers a complete fit.

A. Use Zoning Background and Purpose

Zoning, an outgrowth of public nuisance law, is authorized by a state's police power to protect the "public health, safety, morals or general welfare."[44] Zoning ordinances based on land use, known as "use zoning," divide a political subdivision into areas designated for particular types and intensities of uses (for example, single-family residential, light commercial, heavy industrial or mixtures thereof).[45] In some instances, a governmental body may create "special exceptions" or "special uses" that authorize a different use in a zoned area, "but only upon specific approval by the zoning board of appeals (or adjustment) in individual cases rather than as a matter of right."[46]

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[44] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); *see* ROGER A. CUNNINGHAM, ET AL., THE LAW OF PROPERTY § 9.3, at 543 (2d ed. 1993); JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW § 3.5, at 45 (1998). A state delegates its zoning power to municipalities or other political subdivisions through a zoning enabling act or through its own constitution. *See* JUERGENSMEYER & ROBERTS, *supra*, § 3.5, at 45; Stephen McMillen, *Adult Uses and the First Amendment: The* Stringfellow's *Decision and Its Impact on Municipal Control of Adult Businesses*, 15 TOURO L. REV. 241, 243 (1998). All states have adopted enabling acts modeled after the Standard State Zoning Enabling Act, delegating the state's police power to local governmental subdivisions. *See* Michael A. Lawrence, *A Proposal to Amend the Michigan Zoning Enabling Act to Allow Amortization of Nonconforming Uses*, 1998 DET. C.L. REV. 653, 656 n.18; John Mixon & Justin Waggoner, *The Role of Variances in Determining Ripeness in Takings Claims under Zoning Ordinances and Subdivision Regulations of Texas Municipalities*, 29 ST. MARY'S L.J. 765, 775 n.26 (1998).

[45] *See* JUERGENSMEYER & ROBERTS, *supra* note 44, § 4.1, at 79; Dana M. Tucker, *Preventing the Secondary Effects of Adult Entertainment Establishments: Is Zoning the Solution?*, 12 J. LAND USE & ENVTL. L. 383, 385 (1997). Zoning may also take the form of height, bulk or density restrictions or combinations of the three with use restrictions. *See* JUERGENSMEYER & ROBERTS, *supra* note 44, § 4.1, at 79.

[46] CUNNINGHAM, ET AL., *supra* note 44, § 9.8, at 567. Special uses are not variances.

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Use zoning, also known as Euclidean or cumulative zoning, is based on the idea that some uses merit exclusion of other uses.[47] Under this preference system, single-family residential use ranks the highest, followed by two-family and multi-family residential uses, followed by commercial uses, and finally industrial uses.[48] Under the traditional formulation of use zoning, higher uses are allowed in lower use zones (for example, single-family housing in multi-family or light commercial zones), but lower uses are not permitted in higher use zones (e.g., industrial uses in residential zones).[49] Single-family housing zones, because they are at the top of the ranking system, are generally exclusive.

The basis for distinguishing between higher and lower uses was, at least in part, to protect the home and family from the detrimental effects of lower uses.[50] In the seminal case *Village of Euclid v. Ambler Realty Co.*,[51] for example, the United States Supreme Court approved the concept of use zoning and emphasized the sanctity of the residential neighborhood. The Court referred to the law of nuisance to justify its distinction:

> [T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. . . . A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.[52]

Other early justifications for the distinction were based on economics and prejudice and "more abstractly, . . . [the] desire to preserve neighborhoods that were consistent with domesticity, pastoral, and health ideologies."[53] From the economic perspective, protection of the exclusive use of residential areas protected property values, lowered tax rates of the residential areas, and minimized "net social annoyance"

Unlike variances, special uses are pre-authorized by ordinance and do not require a showing of hardship. *See* JUERGENSMEYER & ROBERTS, *supra* note 44, § 5.24, at 220-21.

[47] *See* JUERGENSMEYER & ROBERTS, *supra* note 44, § 4.3, at 82.

[48] *See id.*

[49] *See id.*

[50] *See id.* § 4.3, at 83.

[51] 272 U.S. 365 (1926).

[52] *Id.* at 388.

[53] Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 402 (1994).

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caused by nuisance conditions resulting from mixed uses.[54] Use zoning also served, however unjustly, to segregate residential areas based on class, ethnicity and race because, at the time zoning ordinances were enacted, few could afford single-family residential homes.[55] From the ideological perspective, exclusive residential areas served to protect the values held by early twentieth century jurists who viewed the home as a haven from the pressures of work and an idyllic sanctuary where one could commune with nature away from pollution and disease and safely raise children in a wholesome environment.[56] Although some of the initial reasons for protecting residential areas are less important today or no longer valid, protecting certain family values continues to play a strong role in zoning law.

B. Adult Entertainment Uses

Protection of home and family serves as a main justification for excluding adult entertainment uses from residential areas and for concentrating or dispersing them throughout a municipality.[57] Zoning of adult uses is an expression of the "vital governmental interest" municipalities have in protecting other areas from the negative secondary effects that arise from adult use establishments.[58] Common secondary effects of adult uses include increased crime, prostitution and disease, decreased property values of surrounding lots caused by neighborhood deterioration, and impairment to the "quality of life and overall character of communities."[59]

Adult use zoning takes two general forms: the cluster method and the dispersal method. The cluster method involves creating "combat zones," that is, placing all adult use establishments in a particular area so that, should deterioration occur because of the use, the deterioration will be limited to that location.[60] The dispersal method seeks to reduce the impact of secondary effects by establishing distancing requirements

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[54] *See id.* at 403-09.

[55] *See id.* at 375-76, 402.

[56] *See id.* at 415-34.

[57] *See* McMillen, *supra* note 44, at 244 (discussing use zoning); Tucker, *supra* note 45, at 407-14 (recognizing Florida's use of zoning laws to address adverse affects attributed to adult businesses).

[58] *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986).

[59] 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); *see* McMillen, *supra* note 44, at 243-44 & n.15; Tucker, *supra* note 45, at 408.

[60] *See* JUERGENSMEYER & ROBERTS, *supra* note 44, § 10.17, at 481.

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between establishments.[61] Special use permits may also be required, and adult uses may be excluded from certain areas, such as residential or family-oriented areas.[62]

The adult use zoning ordinance for the City of Tampa is a typical example of the dispersal method of zoning. Under this ordinance, adult uses are prohibited from locating within one thousand feet of other adult uses and within five hundred feet of the central business district or residential areas.[63] Special permits are required, and applicants must show that:

> (1) The use will promote the public health, safety and general welfare, if located where proposed and developed and operated according to the plan as submitted.
>
> (2) The use . . . complies with all required regulations and standards . . . unless greater or different regulations are contained in the individual standards for that special use.
>
> (3) The use is compatible with contiguous and surrounding property or the use is a public necessity.
>
> (4) The use is in conformity with the Tampa Comprehensive Plan.
>
> (5) The use will not establish a precedent of or encourage more intensive or incompatible uses in the surrounding areas.[64]

Although the zoning authority has limited discretion in determining whether the above showing has been made, it is prohibited from granting a special permit for an adult use in derogation of the specific distancing requirements.[65]

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[61] *See id.*

[62] *See* GERARD, *supra* note 30, § 4.01, at 171-72.

[63] *See* Tampa, Fla., Code of Ordinances §§ 27-272(a), 27-444(a) (1999). The Tampa zoning ordinance includes adult bookstores, adult entertainment establishments, and adult theaters within the definition of "adult uses." *See id.* § 27-523.

[64] *Id.* § 27-269(a).

[65] *Id.* § 27-272(c).

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C. Home Occupations

Within all use zones, accessory uses may be permitted as long as the accessory use is "subordinate or incidental to the principal use."[66] Accessory uses may include home occupations, recreational facilities, and accessory residential uses for relatives or servants.[67]

Home occupations have long been allowed as accessory uses in single-family housing zones, but disputes arise as to what types of occupations are allowed. Most approved home occupations fall into traditional categories. Some ordinances, including the ordinance for Tampa, establish non-exclusive lists of activities recognized as home occupations,[68] while others provide just a broad general meaning for the term.[69] In instances where an ordinance fails to define acceptable uses, judges have often used their own judgment to determine whether a use should be allowed.[70] Even where an ordinance specifically excludes specific activities from the meaning of home occupation,[71] some judges have disregarded the restriction and implied a permissible use.[72]

Most ordinances require that the home occupation be "customary" or "customarily incidental" to the residential use of the dwelling.[73] The

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[66] JUERGENSMEYER & ROBERTS, *supra* note 44, § 4.4, at 84; *see, e.g.*, WILMINGTON, DEL. CODE, § 48-2 (1999) (defining "accessory use" as "a use customarily incidental and subordinate to the principal use and located on the same lot therewith"); Treiman v. Town of Bedford, 563 A.2d 786, 789 (N.H. 1989) ("[A]ll accessory uses, whether defined by ordinance or by common law, must share one characteristic; each must be a subordinate rather than a principal use of the property.").

[67] *See* JUERGENSMEYER & ROBERTS, *supra* note 44, § 4.4, at 85.

[68] *See, e.g.*, DENVER, COLO., REV. MUNICIPAL CODE § 59-80(7)(a) (2000) (specifically permitting as home occupations adult, child and foster care homes, beauty shops, craftwork, sewing activities, individual fine arts studios, laundering, offices, watch and clock repair, limited rooming and boarding, limited tutoring, and "[o]ther similar home occupations as permitted by the zoning administrator" in accordance with specifically prescribed procedures); TAMPA, FLA., CODE OF ORDINANCES § 27-131(1) (1999).

[69] *See, e.g.*, SAN ANTONIO, TEX., CODE OF ORDINANCES, § 35-1041 (2000) (defining home occupation as "any activity carried out for gain by a resident conducted as an accessory use in the resident's dwelling unit").

[70] *See, e.g., Treiman*, 563 A.2d at 789; Tanis v. Township of Hampton, 704 A.2d 62, 68-69 (N.J. Super. Ct. App. Div. 1997).

[71] *See, e.g.*, CITY OF SAN ANTONIO, TEXAS, CODE OF ORDINANCES, § 35-3310 (2000) (excluding vehicle painting, service and repair; barber and beauty shops; animal hospitals, kennels, stables and schools; restaurants and catering; furniture repair and upholstering; and teaching various topics to more than two students at once); TAMPA, FLA., CODE OF ORDINANCES, § 27-131(9) (1999) (excluding auto repair and tune-up facilities, clinics, welding shops, animal hospitals and kennels as possible home occupations).

[72] *See, e.g., Tanis*, 704 A.2d at 62 (implying accessory use despite fact that relevant ordinance prohibited "[a]ll uses not expressly permitted").

[73] *See* H.C. Lind, Annotation, *What Constitutes a "Home Occupation" or the Like Within*

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inquiry into what is customary involves determining whether the activity "amounted to a 'commercial enterprise' or the like which went beyond a mere incident to residential use of the premises or was not customarily carried on in the home, or which, if allowed, would have an adverse effect upon the over-all scheme of zoning."[74] If a particular home occupation is allowed, operation of the business may be limited by the ordinance, such as by limitations on the number of people that can engage in the activity,[75] the types or quantity of signage allowed on the property,[76] or the area that may be used for the business.[77]

Like Tampa's adult use ordinance, Tampa's home occupation provision contains many elements typical of zoning ordinances across the country.[78] The Tampa ordinance requires that a home occupation be "clearly incidental and secondary to the [dwelling's] use for residential purposes" and limits the home occupation to twenty-five percent of the floor area.[79] It includes as permissible home occupations "domestic crafts such as seamstresses, sewing, tailoring, weaving, washing and ironing; beauty shops and barbershops (one-chair operations only); dog grooming (provided no overnight keeping of animals); repair of small household appliances; private tutoring and instruction (limited to five (5) pupils at any one (1) time); and professional services."[80] It specifically excludes auto repair and tune-up shops, clinics, welding shops, or animal hospitals or kennels from allowable home occupations.[81] The

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Accessory Use Provision of Zoning Regulation, 73 A.L.R.2d 439, 441 (1960).

[74] *Id.* at 442. As one scholar explained:

> During the formative period of comprehensive zoning it became evident that districts could not be confined to principal uses only. It had always been customary for occupants of homes to carry on gainful employments as something accessory and incidental to the residence use. The doctor, dentist, lawyer, or notary had from time immemorial used his own home for his office. Similarly the dressmaker, milliner, and music teacher worked in her own home. The earliest zoning ordinances took communities as they existed and did not try to prevent customary practices that met with no objection from the community.

EDWARD M. BASSETT, ZONING 100-01 (2d ed. 1940), *quoted in* Lind, *supra* note 73, at 443.

[75] *See, e.g.*, PADUCAH, KY., CODE OF ORDINANCES § 126-3 (1999) (defining "home occupation").

[76] *See, e.g.*, SAN ANTONIO, TEX., CODE OF ORDINANCES § 35-3310(c) (2000).

[77] *See, e.g., id.* § 35-3310(e) (limiting home occupation to no more than 25% of gross area of dwelling).

[78] *Cf.* Lind, *supra* note 73, at 441-42 (discussing common elements of home occupation ordinances).

[79] TAMPA, FLA., CODE OF ORDINANCES § 27-131(3) (1999).

[80] *Id.* § 27-131(1).

[81] *Id.* § 27-131(9).

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ordinance also specifically limits "employees" of the home occupation to "members of the immediate family residing on the premises," prohibits sales of commodities from the premises, limits on-premises advertising, and requires that the home occupation not generate any traffic greater than one would normally find in the neighborhood.[82]

D. Classifying Voyeur Residences

Because voyeur residences, for that matter any type of home-based computer business, is a relatively new use for residential property, such uses (and their effects) were not considered at the time that most zoning ordinances were drafted. Since voyeur residences and computer Web sites are so unlike traditional commercial activity and may have little to no impact on surrounding neighbors, had such uses been discussed, legislators might have chosen to carve out exceptions to account for the differences. But since technological advances allowing non-detrimental commercial uses in residential areas were not contemplated, broadly sweeping and ill-fitting restrictions now apply to these specialized uses.

Voyeur residences do not fit neatly into either adult use or home occupation classifications. Although they might fall within the adult use classification because of the nudity and sexual content shown on their corresponding voyeur Web sites, this classification might be inappropriate for several reasons. By the same token, the commercial nature of a voyeur Web site suggests a commercial use of the corresponding residential property, but the non-commercial activity that occurs within the home more closely resembles simple residential living rather than a traditional home occupation.

Using the Voyeur Dorm as an example, this section addresses the difficulty of classifying voyeur residences into either traditional zoning category. The result of such classification—fitting a square peg into a round hole—is what raises the constitutional issues that are discussed in Part II below.

1. Voyeur Residences as Adult Uses

One of the difficulties in classifying a voyeur residence as an adult use lies in the distinction between the voyeur residence (where the activity occurs) and the voyeur Web site (where the entertainment is accessed). To be an adult entertainment establishment under the Tampa ordinance, the entertainment must be offered on-premises to a person or the public

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[82] *Id.* § 27-131(2), (4), (7)-(8).

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for a consideration.[83] Arguably, the "premises" covered by the ordinance is not the voyeur residence because the residence is not open to the general public and the residence itself does not "offer" adult entertainment.[84] Rather, any "offer" of or access to entertainment occurs via computer equipment at another physical location. In the Voyeur Dorm situation, for example, the video cameras taping the women's activities do not connect directly to the Internet, but instead transmit their images over telephone lines to a web server located in the offices of Entertainment Network, Inc. (the corporation owned by Hammil and Marshlack) in downtown Tampa.[85] From there, the images are accessed by the public through the Internet for a fee paid to Entertainment Network.[86] Thus, one might argue that the actual "premises" offering entertainment to the public for consideration is the location of the web server or even, as Voyeur Dorm itself argues, the locations of the computer terminals used by computer voyeurs to access the Web site.[87]

The voyeur residence/voyeur Web site distinction aside, a voyeur residence might facially fit within the definition of an adult use because of the nudity and sexual content shown on the Web site.[88] The Voyeur Dorm, for example, appears to fall within Tampa's definition of "adult entertainment establishment," which includes premises that offer, "for a consideration, entertainment featuring or in any way including specified sexual activities[89]... or entertainment featuring the displaying or depicting of specified anatomical areas."[90] Examples of "entertainment"

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[83] *See id.* § 27-523.

[84] *See* Plaintiffs' Memorandum of Law in Opposition to City's Motion to Dismiss Plaintiffs' Complaint with Prejudice, Voyeur Dorm, L.C. v. City of Tampa, 121 F. Supp. 2d 1373, 1375 (M.D.F.L. 2000), No. 99-2180-CIV-T-24F, at 2 (Nov. 1999) (on file with author).

[85] *See* Letter from Mark R. Dolan, Attorney for Voyeur Dorm, to Gloria Y. Moreda, City of Tampa Zoning Coordinator (Jan. 29, 1999) (on file with author).

[86] *Id.* For a layman's discussion of the way the Internet operates and the problems associated with transmitting pornography over the Internet, see *Reno v. ACLU*, 521 U.S. 844, 849-57 (1997).

[87] *See* Plaintiffs' Memorandum of Law in Opposition to City's Motion to Dismiss Plaintiffs' Complaint with Prejudice, Voyeur Dorm, L.C. v. City of Tampa, 121 F. Supp. 2d 1373, 1375 (M.D.F.L. 2000), No. 99-2180-CIV-T-24F, at 2 (Nov. 1999) (on file with author).

[88] *Cf. supra* text accompanying note 11, 23 (discussing allegations of sexual activity broadcast on JenniCam.com and VoyeurDorm.com).

[89] The "sexual activities" specified in the ordinance include stimulated or aroused human genitals, actual or simulated human masturbation, intercourse or sodomy, and "fondling or other erotic touching of human genitals, pubic region, buttocks or female breasts." TAMPA, FLA., CODE OF ORDINANCES § 27-523 (1999). The sexual content alleged to have appeared on VoyeurDorm.com likely falls within this definition.

[90] *Id.* § 27-523. The "specified anatomical areas" includes "less than completely or opaquely covered human genitals or pubic region; buttocks; [and] female breasts below a

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are "books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances, either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities."[91] Because the definition does not specify that the viewer must be on the premises where the activity actually occurs, VoyeurDorm.com arguably constitutes graphic media falling within the adult use definition.[92]

However, an adult use classification does not seem to fit voyeur residences for several reasons. One is the documentary nature of voyeur Web sites. Although nudity and sexual content may occur, it is (arguably) only incidental to the documentation of the computer exhibitionists' lives. As Ringley explains in reference to her Web site: "Real life contains nudity....Real life contains sexual content.... [JenniCam.com] is not a web site about nudity and sex. It's a web site about real life."[93] As such, one might argue, any incidental exposure of forbidden body parts or activities should not require classification of the voyeur residence as an adult use, even if some computer voyeurs view the site for sexual titillation.[94]

Of course where the nudity and sexual content found on a voyeur Web site is marketed for their pornographic rather than artistic or educational value, an adult use classification seems more appropriate and less intrusive because the Web site's actual purpose is to provide adult entertainment.[95] Even so, the justifications for adult use zoning

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point immediately above the top of the areola." *Id.* The nudity shown on VoyeurDorm.com while the women are changing or showering likely falls within this definition.

[91] *Id.*

[92] *Cf.* United States v. Thomas, 74 F.3d 701, 707 (6th Cir.) (finding that GIF files posted to electronic bulletin board fell within materials covered by federal statute prohibiting interstate trafficking of obscene materials), *cert. denied*, 519 U.S. 820 (1996).

[93] Brett Lieberman, *Next on JenniCam, Her Boyfriend Will Be Moving In*, HARRISBURG PATRIOT, Aug. 19, 1997, at D02, *available at* 1997 WL 7528287.

[94] *See* Letter from Mark R. Dolan, Attorney for Voyeur Dorm, to Gloria Y. Moreda, City of Tampa Zoning Coordinator (Jan. 29, 1999) ("These are normal women, engaging in everyday activities, who happen to have cameras documenting their lives. In the ordinary course of their daily lives, the residents may at times expose 'specified anatomical areas,' but not in the context of adult entertainment as defined in Chapter 27 [of the Tampa Code of Ordinances.]").

[95] Indeed, the United States Supreme Court recognizes a similar concept in the context of child pornography. *See* Ginsburg v. United States, 383 U.S. 463 (1966); *see also* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 469 (1997) ("Since nonobscene speech can be considered obscene and unprotected if it is pandered as such, then there appears no reason why similarly pandered

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ordinances—to reduce negative secondary effects—may not necessarily be served by classifying voyeur residences as adult uses. Voyeur Dorm, for instance, is not open to the public and the windows of the house are covered with black curtains "to prevent any [neighbors] or over-enthusiastic fans peeping in the windows without paying their subscriptions."[96] Assuming the location remains unknown and the house continues to be perceived by non-residents as an ordinary home, no negative secondary effects (such as increased crime or decreased property values) should attach to the residence in any amount greater than that caused by other homes in the neighborhood. Indeed, many voyeur Web sites conceal the physical location of the residence to protect the safety of the residents[97] and, by doing so, incidentally reduce or completely prevent negative secondary effects that might otherwise occur.

The problem with this argument, however, is that neighborhoods receive no guarantees that the location of a voyeur residence will remain undisclosed. The physical address of Voyeur Dorm and the private telephone numbers of its residents, for example, although initially confidential, were posted to the Internet by a disgruntled boyfriend of an unsuccessful Voyeur Dorm candidate.[98] Further, even though Voyeur Dorm has instituted security measures to deter stalkers, at least one individual has sought admittance to the residence (in that instance, claiming to be a pool attendant).[99] Chat room talk may also lead to disclosure of a voyeur residence's location and the potential introduction of unwelcome elements into the neighborhood. In San Diego State University's Real House, for example, a resident invited a chat room subscriber to the house, despite a rule prohibiting such invitations.[100] The male subscriber, who pretended to be a woman in the chat room, now "'calls three to four times a day singing songs [and] sending

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virtual child pornography should not be treated as actual.").

[96] Clarke & Chalmers, *supra* note 16, at 24.

[97] *See, e.g.*, Crystal Fambrini, *San Diego State U: Real Drama Unfolds in San Diego State U.'s Real House*, THE DAILY AZTEC, Nov. 10, 1999, *available at* 1999 WL 18823881 (noting that attempts are made to keep location of Real House confidential, but that outsiders do know location of residence); Linton Weeks, *Jenni, Jenni, Jenni: A Life Laid Bare on the Computer Screen Internet*, L.A. TIMES, Oct. 1, 1997, at E4, *available at* 1997 WL 13985250 (reporting that Ringley maintains an unlisted telephone number and does not disclose the actual location of her residence).

[98] *See* Clarke & Chalmers, *supra* note 16, at 24.

[99] *Id.*

[100] *See* Fambrini, *supra* note 97.

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stuff.'"[101] Although he has been barred from the Web site and chat rooms, "no one can control his actions outside of the Internet."[102] JenniCam.com's Ringley has similarly received threatening e-mail and her Web site has been vandalized by hackers.[103]

Although these breaches of security may be disturbing, the effects do not, at this time, rise to the level of the traditional secondary effects that gave rise to adult use zoning. There is no evidence that the activities that occur within a voyeur residence would result in increased criminal or drug-related activity, prostitution, or the spread of AIDS or other disease. Even those instances of stalking that have occurred might be seen as no different than the stalking of any average citizen. Further, decreased property values may be of little concern so long as the use of the house as a voyeur residence remains undisclosed.

In addition, but for the absolute prohibition on location of adult uses in residential neighborhoods, voyeur residences would likely meet the requirements for special use permits like those required by Tampa's ordinance. As long as the house remains indistinguishable from other houses in the neighborhood and as long as the location remains undisclosed, the use would "promote the public health, safety and general welfare" as would any other residence in the neighborhood and would presumably comply with all regulations and standards.[104] The use as a voyeur residence would also be "compatible with contiguous and surrounding property" because the residents are not "working" in the normal sense of the word; rather, their jobs are merely to lead their normal lives within the home (albeit sometimes nude and before a computer audience). Finally, use as a voyeur residence would not necessarily "establish a precedent of or encourage more intensive or incompatible uses in the surrounding areas" because the use is comparable to residential use and is simply not incompatible with a residential neighborhood. Even if more intensive voyeur residence activity was encouraged, so long as the residence or residences remained true to the neighborhood, no harm should result.

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[101] *Id.* (quoting Real House resident).

[102] *Id.*

[103] *See* Weeks, *supra* note 97, at E4.

[104] *See supra* text accompanying note 64 (identifying requirements for special use permit under Tampa zoning ordinance).

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2. Voyeur Residences as Home Occupations

Similar problems result when one attempts to fit voyeur residences into the exemption for home occupations. Clearly, a traditional adult use like an adult theater or bookstore would not fall under the exemption for home occupations; indeed, they would never be allowed in residential areas so long as adult use ordinances were enforced. Voyeur residences, however, are not traditional adult uses and, as discussed above, possibly should not be classified as such. If they were not and were allowed to operate in residential areas, an exemption for a home occupation would be required if the use were classified as an occupation (either because the residents were compensated for living in the home or because the Web site received payment from subscribers). However, voyeur residences make an incomplete fit as a home occupation because one cannot separate the residential use of the property from the business enterprise. The two aspects are one; the business enterprise would not exist but for the residential use and this particular residential use would not exist but for the business enterprise.[105]

Using the Tampa ordinance as an example, voyeur residences and voyeur Web sites are not specifically permitted as home occupations, yet the use of residences as the settings for voyeur Web sites seems less intrusive to the rights of neighbors than those occupations specifically listed in the ordinance.[106] If a home occupation must be "clearly incidental and secondary" to the residential use of the house,[107] the taping of the Voyeur Dorm residents arguably falls within that category. Much of the activity in the Voyeur Dorm differs little from that occurring in any other house in the same neighborhood. Although Voyeur Dorm is a commercial enterprise and the point of using the house is to make money, the physical use of the house by the residents is comparable to residential use. Despite the cameras, while the residents are employed by Voyeur Dorm, the voyeur residence is their home and they use it largely as others would use their homes. Further, Voyeur Dorm does not adversely affect Tampa's zoning scheme because the principal use of the home is comparable to residential use. Indeed, as a residence closed to the public, the use creates even less traffic and adverse effects than those caused by customers or clients accessing the services of other home

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[105] The house, of course, could still be used for residential purposes if the business were prohibited.

[106] *See supra* text accompanying note 80 (listing permissible home occupations under Tampa zoning ordinance).

[107] *See* TAMPA, FLA. CODE OF ORDINANCES § 27-131(3) (1999).

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occupations allowed by the ordinance.

Yet even if one were to view the use of Voyeur Dorm as customary and incidental to residential use, other aspects of the use do not fit within Tampa's requirements for home occupations. For example, under the Tampa ordinance no more than twenty-five percent of the floor area of the residence may be used for the home occupation.[108] The Voyeur Dorm use, however, covers one hundred percent of the residence if the business activity includes not just the location of the cameras, but also the activities of the Voyeur Dorm residents who might use every portion of the house. Moreover, the Voyeur Dorm use might violate the zoning provision limiting employment only to "members of the immediate family residing on the premises."[109] Although the ordinance's definition of "family" includes up to five "unrelated persons living together as a single housekeeping unit, using a single facility in a dwelling unit for culinary purposes," it excludes from this meaning a "fraternity or sorority, club, roominghouse, institutional group or the like."[110] Because of the financial arrangements between the Web site owners and the Voyeur Dorm residents, one might construe the relationship of the residents as a sorority, club or "the like," thereby falling outside the meaning of "family." Further, if the employees covered by the home occupation include the Voyeur Dorm employees who maintain the Web site off-premises or the cameras on-premises, the number of employees would exceed that allowed by the ordinance and would include persons who do not reside on the premises.

Applying these restrictions to voyeur residences, though, may not serve their intended purposes. The intent of the limitation on the usable floor area, for example, appears to be to preserve the residential character of the house and limit growth of the business. Yet a voyeur residence would not necessarily lose its residential character merely because cameras are mounted on walls or other areas[111] and growth of the business by an increase in residents would be limited by the ordinance's residency restriction. Further, if a voyeur Web site's business were to grow through an increase in subscribers, that increase would have no impact on the residential area since the growth occurs off-premises. Similarly, the intent of the family limitation appears to be to

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[108] *See id.*

[109] *See id.* § 27-131(2).

[110] *See id.* § 27-523.

[111] Of course, one might argue that the cameras do cause loss of the house's residential character by turning it into a type of movie set.

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preserve the residential character of the property and to limit traffic caused by off-site employees traveling to and from work. However, since the Voyeur Dorm "employees" are the actual residents of the home, no increased traffic occurs and the residential character of the house is preserved. Even if one were to include any traffic caused by other Voyeur Dorm employees who visit the residence for camera maintenance, the traffic would likely be no greater than that caused by regular visits from a service repairman. Thus, these restrictions have little applicability to the effects caused by voyeur residences.

II. CONSTITUTIONAL IMPLICATIONS OF ZONING VOYEUR RESIDENCES

Because of the difficulties in fitting voyeur residences within traditional zoning categories, local authorities attempting to enforce zoning ordinances against, or redraft ordinances to exclude, voyeur residences might be faced with constitutional challenges like those asserted by Voyeur Dorm.[112] This section addresses four potential claims based on free speech, due process, privacy, and equal protection.

A. Freedom of Speech

Whether an adult use zoning ordinance that excludes voyeur residences from residential neighborhoods constitutes an impermissible restriction on the right to free speech depends on what type of speech is at issue. Speech is divided into two general categories, protected speech and unprotected speech. The level of scrutiny used to determine the validity of laws implicating First Amendment rights varies with each type of speech. Unprotected speech receives the lowest level of review, whereas protected speech may receive either intermediate review or strict scrutiny.

1. Obscenity and the *Miller* Test

The first step in analyzing a First Amendment claim relating to a voyeur residence is to determine whether the speech at issue is protected speech. Obscenity is not protected by the First Amendment because it has been deemed "utterly without redeeming social importance."[113] Restrictions on unprotected speech are subject only to the rational basis

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[112] *See supra* text accompanying note 40.

[113] Roth v. United States, 354 U.S. 476, 484 (1957); *see* Alexander v. United States, 509 U.S. 544, 545 (1993); Paris Adult Theater I v. Slaton, 413 U.S. 49, 57-58 (1973).

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test, the lowest level of review.[114] In 1973, the Supreme Court in *Miller v. California*[115] set out a three-prong test for determining what constitutes obscenity. Under this test, one must consider:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[116]

As to the first *Miller* factor, the Court has never definitively defined "prurient interest," although the Court has indicated that the First Amendment was not meant to protect "the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain."[117] Further, in *Brockett v. Spokane Arcades, Inc.*,[118] the Court struck down a Washington statute because its definition of prurience failed to distinguish between a normal interest in sex, which would be protected by the First Amendment, and a "morbid" or "shameful" interest in sex, which would not.[119] The Court did not, however, provide guidance for distinguishing between these types of interests.

Whether a work "appeals to the prurient interest" or is "patently offensive" depends on "community standards."[120] This requirement was included to ensure that the nation would not resort to the "lowest common denominator" as the standard for obscenity, since the standards held by urban and rural areas might differ.[121] For purposes of this determination, "community" has been interpreted as meaning states, counties, cities, local communities, and federal judicial districts.[122]

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[114] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.1, at 801 (1997).

[115] 413 U.S. 15 (1973).

[116] *Id.* at 39. This test replaced earlier obscenity tests established in *Roth v. United States*, 354 U.S. 476 (1957), and *A Book Named "John Clelan's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413 (1966). For a discussion of the tests established in these cases and the development of obscenity law in general, see DANIEL A. FARBER, THE FIRST AMENDMENT 127-33 (1998).

[117] *Miller*, 413 U.S. at 35.

[118] 472 U.S. 491 (1985).

[119] *Id.* at 499.

[120] *Miller*, 413 U.S. at 30.

[121] FARBER, *supra* note 116, at 134.

[122] *See* Martin Karo & Marcia McBrian, *The Lessons of* Miller *and* Hudnut: *On Proposing a Pornography Ordinance that Passes Constitutional Muster*, 23 U. MICH. J.L. REFORM 179, 187-88

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Scholars now suggest that, with regard to cyberpornography, the lowest common denominator may control because of the global capability of the Internet.[123]

Even assuming that the lowest common denominator applies, societal standards of decency have progressively become more relaxed,[124] and it is unlikely that a voyeur Web site like VoyeurDorm.com would meet the first prong of the *Miller* test. Although "taken as a whole" was not specifically defined by the Court in *Miller*, courts examining the issue have found obscenity where the sexual content was thematically unrelated[125] or was completely unconnected to the non-sexual content[126] or where the "dominant theme" of deviant sexual materials appealed to members of a specific deviant group.[127] Because voyeur Web sites are thematically related (a type of reality television, as it were), isolated incidences of nudity or sexual activity could be considered as only a part of the entire webcast.[128]

Voyeur Web sites generally provide twenty-four hour coverage of the voyeur residences, and the majority of the action on the Web sites is non-sexual. VoyeurDorm.com, for example, captures residents' activity in all areas of the house, including the kitchen, living room, gym, and

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(1989).

[123] *See, e.g.*, Pamela A. Huelster, *Cybersex and Community Standards*, 75 B.U. L. REV. 865, 865-67 (1995) (attempting to answer question "[w]hat constitutes a 'local community' in the context of a global electronic service?"); Jennifer K. Michael, Note, *Where's "The Nastiest Place On Earth?" From* Roth *to Cyberspace, or, Whose Community Is It, Anyway? The United States Court of Appeals for the Sixth Circuit Addresses Local Community Standards in* United States v. Thomas, 30 CREIGHTON L. REV. 1405, 1455-58 (1997) (discussing problems that arise when applying traditional obscenity test to Internet pornography).

[124] *See* DENNIS HOWITT, MASS MEDIA AND SOCIAL PROBLEMS 103 (1982) (noting that "in succession, during the last 50 years worries have been expressed about the effects of Rudolph Valentino in the *Sheik* on the sexual behaviour of young girls; the effects of showing a married couple asleep in the same bed; the effects of portrayals of full frontal nudity; the effects of scenes of sexual intercourse real or stimulated, and so forth.").

[125] *See, e.g.*, Rees v. State, 909 S.W.2d 264, 268-69 (Tex. App. 1995) (finding obscene two parts of three-part program because they were unrelated to safe-sex discussion and only promoted obscene film), *cert. denied*, 519 U.S. 863 (1996).

[126] *See, e.g.*, State v. Harrold, 593 N.W.2d 299, 315 (Neb. 1999) (finding obscene 15-minute videotape in which 16 seconds consisted of nude man masturbating and balance consisted of "no dialog, comprehensible expressive conduct, or, indeed, any meaningful content"), *cert. denied*, 528 U.S. 1142 (2000); State v. Starr Enters., Inc., 597 P.2d 1098, 1103 (Kan. 1979) (finding obscene 55-minute film in which 28-minutes were blank and 27-minutes consisted solely of sexual acts).

[127] *See, e.g.*, Mishkin v. New York, 383 U.S. 502, 508 (1966).

[128] *Cf.* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) ("Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work.").

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backyard pool, as well as those areas where nudity is more likely to occur, such as the shower, bathroom, and bedrooms.[129] Further, although some sexual acts have been webcast from the site, most sexual content appearing on VoyeurDorm.com, according to Voyeur Dorm representatives, is the nudity that occurs while a resident changes clothes, showers, or occasionally flashes subscribers during real-time chats.[130] One might argue that the shower nudity would appeal to the prurient interest (indeed, one of the cameras in the shower is positioned at posterior level),[131] but it is questionable whether the activity viewed is any worse than what might be seen in an R-rated movie.

As to the second prong of the obscenity test, the Court in *Miller* gave two examples of speech that might be considered patently offensive under state laws: "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[132] Since the *Miller* decision, the Court has been unwilling to approve any legislative attempts to define obscenity as going beyond that scope.[133] Assuming an obscenity statute follows the examples given by the *Miller* Court, it is unlikely that the average voyeur resident would meet this prong of the test. Indeed, many computer exhibitionists turn the camera away when changing, engaging in sexual activity, or using bathroom facilities.[134] There is always the possibility, however, that such conduct might occur because none of the voyeur residence activity is scripted. The possibility is even greater with a commercial Web site geared specifically toward providing entertainment of a pornographic nature. Assuming that hard-core pornography is not intended, the fact that residents may shower on camera, sunbathe nude, or flash subscribers should not be considered patently offensive.[135] More intensive sexual conduct, however, would

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[129] *See ENI Acquires VoyeurDorm.com™*, *supra* note 16.

[130] *See supra* notes 22-24.

[131] *See* Clarke & Chalmers, *supra* note 16, at 24.

[132] Miller v. California, 413 U.S. 15, 25 (1973).

[133] *See* GERARD, *supra* note 30, § 3.08(1), at 87-88.

[134] *See* Weeks, *supra* note 97, at E4 (stating that Ringley turns camera away when visitors are uncomfortable on camera); *Welcome to Me TV*, GUARDIAN, Dec. 10, 1999, *available at* 1999 WL 25750805 (discussing residents in The Dolls' House in London).

[135] *Cf.* Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (holding that movie "Carnal Knowledge" was not obscene because there was "no exhibition whatever of the actors' genitals, lewd or otherwise" and indicating that "nudity alone is not enough to make material legally obscene under the *Miller* standards"); State v. Fly, 501 S.E.2d 656, 659 (N.C. 1998) (noting that public indecency statutes would not cover wearers of thong and g-string

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require a separate analysis to determine the obscenity factor.

Finally, the third prong of the *Miller* test requires that the work as a whole must lack "serious literary, artistic, political or scientific value" for it to be considered obscene. Determining the work's value does not involve application of contemporary community standards, but an examination of whether "a reasonable person would find such value in the material taken as a whole."[136] Judging by the national interest shown in CBS's television and Internet presentations of *Big Brother* as well as the followers of JenniCam.com, one could argue that voyeur Web sites do have artistic or scientific value because of the documentary and interactive qualities of the activity. Because the cameras in voyeur residences run twenty-four hours a day, viewers could theoretically watch residents engage in all of their daily activities, following "plot lines" in their interaction with other people and getting to know the residents in chat rooms. Further, one might loosely compare the "art" of voyeur Web sites to the work of performance artists whose art, although deemed obscene by some, is considered by others to have artistic merit.[137] If one takes these views, then it is likely that a voyeur Web site would fail the third prong of the *Miller* test.

2. Adult Uses and the *O'Brien* Test

a. Content-Based and Content-Neutral Regulations

If a voyeur Web site is not considered obscene, it receives greater First Amendment protection. Regulation of protected speech is subject to higher levels of scrutiny depending on the nature of the regulation and, in some instances, the type of speech at issue. Content-based regulations of protected speech (and even within some categories of unprotected speech) receive the highest level of scrutiny and are presumptively invalid because of the potential suppression of speech.[138] A regulation is

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bikinis, although they would cover persons who expose their buttocks to moon others).

[136] Pope v. Illinois, 481 U.S. 497, 500-01 (1987).

[137] *See generally* Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1999) (describing post-modern art as "rebel[ling] against the demand that a work of art be serious, or that it may have any traditional 'value' at all"; Anne Salzman Kurzweg, *Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression*, 34 HARV. C.R.-C.L. L. REV. 437 (1999) (arguing that sexually explicit performance art deserves First Amendment protection).

[138] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994) ("Our precedents apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."); R.A.V. v. City of St. Paul, 505 U.S. 377, 382

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content based if it distinguishes speech based on the content of the message either on its face or based on its purpose or effects.[139] For example, a law that prohibits all picketing except labor picketing would be content based on its face because of the different treatment given labor picketing.[140] By contrast, a law that prohibits all picketing, regardless of the type, would be content neutral because no distinction is made regarding the content of the picketing.[141]

Content-neutral regulations, commonly known as "time, place and manner" regulations,[142] receive an intermediate level of scrutiny" because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[143] In *United States v. O'Brien*,[144] the Supreme Court established a four-part test to determine the constitutional validity of time, place and manner regulations of symbolic speech: (1) the regulation must be "within the constitutional power of the Government"; (2) it must further an "important or substantial governmental interest"; (3) the interest must be "unrelated to the suppression of free expression"; and (4) any incidental restriction on First Amendment rights is "no greater than is essential to the furtherance of that interest."[145] The Supreme Court later clarified the fourth prong of the test in *Ward v. Rock Against Racism*[146] by indicating that time, place and manner restrictions "are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'"[147]

(1992) ("Content-based regulations are presumptively invalid.").

[139] *See* CHEMERINSKY, *supra* note 114, § 11.2.1, at 760, 762.

[140] *See* Carey v. Brown, 447 U.S. 455, 461-62 (1980); Police Dep't v. Mosely, 408 U.S. 92, 100-02 (1972).

[141] *See Mosely*, 408 U.S. at 100-02.

[142] Time, place and manner regulations can generally be understood as regulations that "regulate activities in order to protect governmental interests that are unrelated to the content of any speech that may fall within their purview." GERARD, *supra* note 30, § 2.03, at 9 (citing Cox v. New Hampshire, 312 U.S. 569 (1941)).

[143] *See Turner Broadcasting*, 512 U.S. at 642 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[144] 391 U.S. 367 (1968).

[145] *Id.* at 376-77 (upholding statute prohibiting destruction of draft cards even though burning of draft card to protest war was symbolic speech).

[146] 491 U.S. 781, 797 (1989).

[147] *Id.* at 798 ("Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." (citation omitted)); *see also* United States v. Albertini, 472 U.S. 675, 689 (1985) ("[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent

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Further, the Court in *Grayned v. City of Rockford*,[148] indicated that, in determining the reasonableness of a regulation, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[149]

b. Adult Use Exception

Much of the speech involved in the adult entertainment industry today falls into the non-obscene sexual speech category. Because of the difficulty that prosecutors have in trying (and winning) obscenity cases, most communities attempt to regulate pornography through licensing and zoning requirements.[150] Such regulations, however, tend to be content based because they make distinctions based on the adult nature of the activities. Although most content-based restrictions receive the highest level of scrutiny, the Supreme Court in *Young v. American Mini Theatres, Inc.*[151] treated sexual speech as "low value" speech and therefore deserving of lesser protection from regulation by an adult use zoning ordinance.[152] In *City of Renton v. Playtime Theatres, Inc.*,[153] the Supreme Court reviewed another adult use ordinance and determined that intermediate scrutiny would apply, even though the regulation appeared content based, because its purpose was content neutral.[154]

In *American Mini Theatres*, the Court reviewed the constitutionality of a Detroit dispersal zoning ordinance prohibiting the establishment of adult establishments within one thousand feet of any two other regulated adult uses and within five hundred feet of any residential area.[155] The

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the regulation.").

[148] 408 U.S. 104, 116 (1972).

[149] *Id.* at 116 ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.'" (citation omitted)).

[150] *See* FARBER, *supra* note 116, at 136-37 (noting that obscenity trials are often "lengthy and expensive" and that jurors are unpredictable because they are either "personally unoffended by pornography or believe it to be so widely available as to fall within local community standards").

[151] 427 U.S. 50 (1976) (plurality opinion).

[152] *See id.* at 70.

[153] 475 U.S. 41 (1986).

[154] *See id.* at 47-48; *see also* CHEMERINSKY, *supra* note 114, § 11.3.4.4, at 836 (discussing Justice Stevens' categorization of non-obscene sexual speech as "low value" speech subject to lesser scrutiny); GERARD, *supra* note 30, § 2.03, at 10 (classifying regulations of non-obscene sexual speech as "hybrid regulations" and noting their treatment as type of time, place, and manner regulations).

[155] *See American Mini Theatres*, 427 U.S. at 52. The ordinance amended an "Anti Skid Row Ordinance" that had been adopted by the city based on findings that concentration of adult uses in limited areas led to special injury to the area. *See id.* at 54.

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respondents in the case operated two adult movie theaters, both of which violated the spacing requirements.[156] They challenged the ordinance, arguing that it was content based because the classification as an adult use was based solely on the types of movies shown at the theaters.[157] A plurality of the Court rejected this argument, resting its decision on two bases. First, it noted that, although the ordinance was content based because of its focus on adult theaters, it was viewpoint neutral because the effect on the theaters would be the same regardless of the views espoused in the movies.[158] Second, the Court considered sexual speech to be of low value and deserving of lesser protection than higher valued speech.[159] Therefore, the Court determined, a state could legitimately use the adult content of the movies as a basis for classifying them differently than other movies.[160] The Court upheld the ordinance, finding that it was justified by the city's interest in "the present and future character of its neighborhoods"[161] and because the ordinance's purpose was not to suppress speech but to prevent harmful secondary effects caused by clustered adult uses.[162]

In his concurring opinion in *American Mini Theatres*, Justice Powell disagreed with the plurality's content/viewpoint distinction, viewing the case instead as "an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited

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[156] *See id.* at 55.

[157] *See id.* at 53. Theaters covered by the ordinance were those used to present "material distinguished or characterized by an emphasis on matter depicting, describing or relating to Specified Sexual Activities or Specified Anatomical Areas." *Id.* (internal quotation marks omitted). The ordinance was also unsuccessfully challenged as unconstitutionally vague, *id.* at 58-59, and as a prior restraint, *id.* at 62-63.

[158] *See id.* at 70. A viewpoint-neutral statute is one that prohibits all forms of speech regarding a particular subject matter, for example, political speech or sexual speech. The same type of statute, however, would not be content neutral because its reach is limited only to that type of speech and not all others. *See* GERARD, *supra* note 30, § 2.03(1)(a), at 12 ("For example, a law forbidding all political speeches would be *viewpoint* neutral because it would neither advantage nor disadvantage any particular party or candidate. But it would not be *content* neutral because it would prohibit all speech on the subject of politics.").

[159] *See American Mini Theatres*, 427 U.S. at 70 ("[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.").

[160] *See id.* at 70-71.

[161] *Id.* at 72.

[162] *See id.* at 71 & nn. 34-35 (stating that ordinance was "nothing more than a limitation on the place where adult films may be exhibited").

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extent."[163] In Justice Powell's view, the distinction at issue was not between the types of theaters covered by the statute, but by the type of speech at issue. His analysis therefore focused on two questions: "[Did] the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and...[did] it restrict in any significant way the viewing of these movies by those who desire to see them?"[164] Finding that the answers to these questions sounded in the negative, Justice Powell determined that the *O'Brien* test should be applied to determine the ordinance's constitutionality.[165]

The Court revisited the content neutrality issue in 1986 with its decision in *City of Renton v. Playtime Theatres, Inc.*[166] In *Renton*, the Court reviewed a zoning ordinance that prohibited adult theaters from locating within one thousand feet from residential and other family-oriented areas.[167] The City of Renton adopted the ordinance only after public hearings and considered review of the adult use experiences of other cities.[168] Two existing theaters in the city that planned on showing adult films challenged the Renton ordinance. The Court held, this time with a clear majority, that the ordinance was a content neutral time, place and manner regulation, and required only intermediate protection.[169] In finding content neutrality, the Court looked not just to the terms of the ordinance, but also to its purpose. Because the purpose was to prevent the secondary effects that arise from adult uses and not to suppress speech,[170] the Court found the ordinance content neutral.[171]

The Court then proceeded to determine whether the ordinance was unconstitutional in the fashion of the *O'Brien* test by reviewing whether the ordinance was "designed to serve a substantial governmental

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[163] *Id.* at 73 (Powell, J., concurring).

[164] *Id.* at 78.

[165] *See id.* at 79.

[166] 475 U.S. 41 (1986).

[167] *See id.* at 44.

[168] *See id.*

[169] *See id.* at 48-50.

[170] The ordinance specifically provided that it was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life.'" *Id.* at 48 (citation omitted). Relying on Justice Powell's analysis in *American Mini Theatres*, the Court noted that, had the city sought to suppress sexual speech, it would have either forced the theaters to close or restricted their numbers. *See id.* (quoting Young v. Am. Mini Theaters, 427 U.S. 50, 82 n.4 (1976) (Powell, J., concurring)).

[171] *See id.* at 48-50.

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interest" and whether it allowed "reasonable alternative avenues of communication."[172] Although the court of appeals had ruled that the city's justification for the ordinance was "conclusory and speculative" because it was based on studies not specifically related to Renton,[173] the Supreme Court held that the city was entitled to rely on secondary effects studies of other cities, even if the regulatory method ultimately chosen was different than that chosen by the cities that did the studies.[174] According to the Court, cities are not required "to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."[175] The Court also found that the ordinance was not unconstitutional merely because it failed to regulate other adult uses that would cause the same secondary effects as adult theaters. At the time the ordinance was enacted, the Court explained, no other types of adult uses were in existence, and there was no basis to conclude that the city would not later amend its ordinance to include other adult uses that produced similar secondary effects.[176] Finally, the Court concluded that Renton's ordinance left open other reasonable avenues of communication, even though little more than five percent of land in the city would be available for adult uses.[177] As the Court stated, "we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices."[178]

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[172] *Id.* at 50. Although the Court did not specifically state that it used the *O'Brien* test for determining constitutionality, the lower courts in the case had used the test and the Court's stated considerations fit the *O'Brien* mold. *See id.* at 45-46; *see also* J & B Entm't, Inc. v. City of Jackson, 152 F.3d 362, 372 (5th Cir. 1998) ("*Renton* also instructs us that a government must present sufficient evidence to demonstrate 'a link between the regulation and the asserted governmental interest,' under 'a reasonable belief' standard in order to satisfy this prong of *O'Brien*.").

[173] *See Renton*, 475 U.S. at 50-51.

[174] *See id.* at 52-53.

[175] *Id.* at 51-52.

[176] *See id.* at 52-53 (citing Williamson v. Lee Optical Co., 348 U.S. 483, 488-89 (1955)).

[177] *See id.* at 53.

[178] *Id.* at 54. The Court's decision in *Renton* is significant not only for its classification of adult use ordinances as time, place, and manner restrictions, but also for its decision regarding the standard for secondary effects. By allowing cities to rely on secondary effects studies conducted by other cities, the Court's decision gives cities greater regulatory discretion. Had the Court required cities to conduct their own studies, the Court would have effectively forced local authorities to allow different adult uses in order to determine whether their operation would result in undesirable effects. *See* GERARD, *supra* note 30, § 4.02(4)(b), at 184. Should the city then wish to zone out particular adult uses based on

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c. Application to Voyeur Residences

Since *American Mini Theatres* and *Renton*, the Court has made it clear that adult use regulations are reviewed using the intermediate level of scrutiny set forth in *O'Brien*.[179] Thus, analysis of these factors is required to determine the validity of zoning ordinances as applied to voyeur residences. The first factor of the *O'Brien* test requires that the regulation at issue be "within the constitutional power of the Government."[180] As previously discussed, zoning and its enforcement are authorized by a state's police power.[181] Therefore, the exclusion of voyeur residences from residential neighborhoods through enforcement of zoning ordinances clearly meets the first prong of the *O'Brien* test.

The second and third *O'Brien* factors require that the regulation further an "important or substantial governmental interest" and that the interest be "unrelated to the suppression of free expression."[182] In both *American Mini Theatres* and *Renton*, the Supreme Court found that a city's interest in the reduction of secondary effects caused by adult uses was sufficiently important to justify adult use zoning ordinances and that the interest in reducing those effects was unrelated to suppression of speech.[183] If secondary effects are alleged, the government bears the burden to identify the effects justifying an ordinance, provide evidence of those effects, and show that the ordinance will have an ameliorative

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those effects, the city would have to fashion an appropriate zoning ordinance that took into account the existing adult uses. *See id.*

[179] *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 296-300 (2000) (plurality opinion) (applying *O'Brien* test to enforcement of public indecency statute against nude dancers in adult entertainment establishments); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567-72 (1991) (plurality opinion).

[180] United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

[181] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); *see also supra* text accompanying notes 44-55 (discussing permissibility of use zoning).

[182] *O'Brien*, 391 U.S. at 376-77.

[183] *See Renton*, 475 U.S. at 48-50; Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 72 (1976) (plurality opinion). Evidence of an illicit purpose for adopting an ordinance will not serve as a basis for classifying the ordinance as a content-based regulation as long as its primary purpose is not to suppress speech. *See, e.g., Pap's A.M.*, 529 U.S. at 296-300 ("[T]his Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive."); Artistic Entm't, Inc. v. City of Warner Robins, 223 F.3d 1306 (11th Cir. 2000) (upholding adult use ordinance even though deposition testimony of one city councilperson indicated he was not concerned with crime associated with business and did not look at any of the materials given him for analysis); J & B Entm't, Inc. v. City of Jackson, 152 F.3d 362, 376 (5th Cir. 1998) (rejecting argument that ordinance was enacted for improper reason); Schultz v. City of Cumberland, 26 F. Supp. 2d 1128, 1141 (W.D.W.I. 1998) (finding irrelevant "the shadowy influence of a nefarious right-wing organization").

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impact.[184] Courts have accepted as evidence of secondary effects not only the results of municipal studies, but also city council findings based on the city's past experiences and testimony of police officers.[185] Conclusory allegations of such effects are insufficient.[186]

Courts have not clarified at what point secondary effects merit restriction of First Amendment rights (although it is clear that such effects cannot justify a total ban on expression),[187] nor have they firmly established what level of proof is required to justify an ordinance.[188] Although the Supreme Court in *Renton* indicated that the regulating authority must reasonably believe that the evidence on which it relies to enact an ordinance is "relevant to the problem that the city addresses,"[189] a plurality of the Court in *City of Erie v. Pap's A.M.*[190] seemed to stretch what could be considered reasonable.

In *Pap's*, the Court reviewed a challenge to a public indecency ordinance brought by an adult establishment that offered totally nude

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[184] *See* GERARD, *supra* note 30, § 4.02(4)(b), at 186 (citing DiMa Corp. v. Town of Hallie, 183 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000)).

[185] *See, e.g., Pap's A.M.*, 529 U.S. at 297-302 (holding that "findings" of city council were sufficient proof of secondary effects); Colacurcio v. City of Kent, 163 F.3d 545, 553 (9th Cir. 1998), *cert. denied*, 529 U.S. 1053 (2000) (noting use of secondary effects study of other city as well as testimony of police officers and vice detectives showing correlation between table dancing and illegal sexual activity).

[186] *See Pap's A.M.*, 529 U.S. at 310 (Souter, J., dissenting) ("[I]ntermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed."); *DiMa Corp.*, 185 F.3d at 823 (stating that "conclusory assertions regarding [an ordinance's] goals and its effect are insufficient by themselves to survive a First Amendment challenge because they are not 'evidence' as the Court required in *Renton*"); SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1274 (5th Cir. 1988) ("[W]e will not hypothesize an objective or accept a naked assertion [of secondary effects]. Rather, we intrude into the regulatory decision process to the extent that we insist upon objective evidence of purpose — a study or findings. Insisting upon findings reduces the risk that a purported effort to regulate effect is a mask for regulation of content. That is, evidence of legitimate purpose is supported by proof that secondary effects actually exist and are the result of the business subject to the regulation."), *cert. denied sub nom.* M.E.F. Enters., Inc. v. City of Houston, 489 U.S. 1052 (1989).

[187] *See* Reno v. ACLU, 521 U.S. 844, 867-68 (1997) (refusing to apply *Renton*'s secondary effects analysis to alleged "cyberzoning" by Communications Decency Act because Act was "content-based blanket restriction on speech"); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 71-72 (1981) (plurality opinion) (indicating that, since ordinance at issue involved total ban on nude dancing, Court's decision in *American Mini Theatres* was inapplicable since that case dealt only with "minimal burden on protected speech"); *see also Pap's A.M.*, 529 U.S. at 321 (Stevens, J., dissenting) (applying rule to what dissent considered total ban on nude dancing).

[188] *See Colacurcio*, 163 F.3d at 551; *see also* GERARD, *supra* note 30, § 4.02(4)(b), at 187.

[189] *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986).

[190] 529 U.S. 277 (2000) (plurality opinion).

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erotic dancing.[191] Under the ordinance, exotic dancers were required to wear pasties and g-strings. The plurality determined that the ordinance was not content based because it specifically referenced as its purpose the limitation of negative secondary effects, including "violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects."[192] Evidence of those effects consisted solely of "over more than a century" of city council findings that "certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare."[193] The plurality concluded that the city council was qualified to make those findings because they were "the individuals who would likely have had first-hand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects."[194] Although recognizing that "requiring dancers to wear pasties and g-strings may not greatly reduce these secondary effects," the Court concluded that the ordinance passed the *O'Brien* test, because "*O'Brien* requires only that the regulation further the interest in combating such effects."[195]

Other justices criticized the plurality's blind reliance on the asserted secondary effects. Justice Scalia and Justice Stevens were "highly skeptical" that the ordinance's requirements would remedy the effects alleged.[196] As Justice Stevens stated: "To believe that the mandatory addition of pasties and a g-string will have any kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible."[197] Justice Souter also disagreed with the plurality's analysis, arguing that it was wrong to rely only on the city's findings as the basis for concluding the ordinance was content neutral. In his opinion, "the evidence of reliance must be a matter of demonstrated fact, not speculative supposition."[198] Determining that the record showed only mere conclusions and not factual evidence of the seriousness of the harm caused by nude dancing or the effectiveness of the ordinance in ameliorating that harm, Justice Souter would have remanded the case for

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[191] *See id.* at 283-84.

[192] *See id.* at 289-92.

[193] *Id.* at 297.

[194] *Id.*

[195] *See id.* at 302.

[196] *See id.* at 310 (Scalia, J., concurring); *id.* at 322-23 (Stevens, J., dissenting).

[197] *Id.* at 322-23 (Stevens, J., dissenting).

[198] *Id.* at 314 (Souter, J., concurring in part, dissenting in part).

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further findings.[199]

Since regulation of voyeur residences in residential neighborhoods involves the same type of exclusionary zoning at issue in *Renton*, one might argue that enforcement against voyeur residences should stand against a First Amendment challenge, especially in light of the Court's relaxed reading of the secondary effects standard in *Pap's*. The problem, however, is that voyeur residences may not cause the same secondary effects as other adult use establishments and the same standards should not necessarily apply. At least with regard to content-based regulations, the Supreme Court has recognized that secondary effects that are no different than other effects in an area are insufficient to justify selective exclusion from that area.[200] Such is likely the case for voyeur residences

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[199] *See id.* at 314-17. Interestingly, Justice Souter's analysis was a reversal of his opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), a case based on nearly identical facts. There, Justice Souter argued that secondary effects could justify an adult use statute, even if there was no evidence of a legislative intent to that effect. As Justice Souter explained:

> Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. At least as to the regulation of expressive conduct, "[w]e decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.

Id. at 582-83 (citations and footnote omitted). Relying on the fact that *Renton* found secondary effects sufficient to justify a zoning ordinance, Justice Souter concluded that "[i]t... is no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying 'specified anatomical areas' at issue in *Renton*." *Id.* at 584.

[200] As the Court stated in Schad v. Borough of Mount Ephraim, 452 U.S. 61, 73-74 (1981) (plurality opinion):

> Mount Ephraim contends that it may selectively exclude commercial live entertainment from the broad range of commercial uses permitted in the Borough for reasons normally associated with zoning in commercial districts, that is, to avoid the problems that may be associated with live entertainment, such as parking, trash, police protection, and medical facilities. The Borough has presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems of this nature more significant than those associated with various permitted uses; nor does it appear that the Borough's zoning authority has arrived at a defensible conclusion that unusual problems are presented by live entertainment. We do not find it self-evident that a theater, for example, would create greater parking problems than would a restaurant. Even less apparent is what unique problems would be posed by exhibiting live nude dancing in connection with the sale of adult books and films, particularly since the bookstore is licensed to exhibit nude dancing on films.

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since the general public is not allowed into the residence nor is the house physically distinguishable from any other house in the neighborhood.

Further, unlike the situation in *Pap's*, it would be difficult for a city council to claim any knowledge of the effects that might be caused by voyeur residences. Whereas in *Pap's* the city council had a century's worth of experience with lewd activity in public places, voyeur residences are a relatively new concept and city councils have little experience with the effects of such residences. Indeed, since most adult use zoning ordinances were enacted before the creation of voyeur residences, the effects of voyeur residences were not taken into account in the secondary effects analysis used when adopting the ordinances.

Whether secondary effects studies must take into account impacts of a particular adult use varies by jurisdiction. In *Secret Desires Lingerie, Inc. v. City of Atlanta*,[201] for example, the Georgia Supreme Court struck down an ordinance regulating lingerie modeling studios because the city had failed to consider secondary effects that might be caused by those types of businesses.[202] Other courts, however, have taken a more expansive view, allowing local authorities greater latitude in their zoning decisions. In *ILQ Investments, Inc. v. City of Rochester*,[203] for example, the Eighth Circuit Court of Appeals reviewed application of an adult use zoning ordinance to a bookstore that offered both adult-only and mainstream material.[204] The city's zoning ordinance had been adopted based on the city's consideration of a study dealing with adult use secondary effects generally.[205] The court rejected the argument that the ordinance was not "narrowly tailored to regulate only those uses shown to have caused adverse secondary effects," stating that as long as the ordinance "affects categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, [the city] 'must be allowed a reasonable opportunity to experiment with solutions to admittedly serious

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Id. at 73-74 (citations and footnotes omitted).

[201] 470 S.E.2d 879, 879-80 (Ga. 1996).

[202] *See id.* at 879-80 ("The City is unable to point to any evidence demonstrating that it considered specific studies of the pernicious secondary effects of lingerie modeling studios before enacting the ordinance. Although the trial court found that the City had knowledge of the police officers' conclusions prior to the enactment of the ordinance, the trial court's finding is clearly erroneous. There is not a scintilla of evidence demonstrating that the police officers (or their superiors) alerted the city council to the problems they uncovered.").

[203] 25 F.3d 1413 (8th Cir.), *cert. denied*, 513 U.S. 1017 (1994).

[204] *See id.* at 1416.

[205] *See id.* at 1416-18.

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problems.'"[206] Similarly, in *Restaurant Row Association v. Horry County*,[207] the South Carolina Supreme Court noted that a city did not have to make an individualized showing of secondary effects even when the plaintiff adult cabaret produced expert testimony that no negative secondary effects would result.[208]

Thus, whether enforcement of a zoning ordinance against a voyeur residence can stand based on secondary effects will depend on the jurisdiction. If particularized secondary effects are required, a governmental body would have difficulty finding information on the secondary effects of voyeur residences, not only because they are relatively new, but also because the number of voyeur residences available for study are fewer than other types of adult uses and because the physical location of voyeur Web sites may be difficult to find. On the other hand, if particularized effects are not required, voyeur residences may have a more difficult battle. As long as the regulating authority has a reasonable belief that voyeur residences will result in detrimental secondary effects, under *Renton* the zoning ordinance will stand. In such a case a voyeur residence would have to argue that the reliance on secondary effects is unreasonable. Such an argument might be effective if secondary effects are fewer and differ markedly from those caused by other adult uses or if they do not exist at all.

If secondary effects proved an insufficient justification for excluding voyeur residences from residential neighborhoods, the government might attempt to argue morality as the basis for the exclusion. In *Euclid*, the Court recognized that the police power authorized zoning to protect not only the public's health, safety and welfare, but also public morality.[209] The Court also recognized morality as a permissible justification for a public indecency statute by a plurality of the Supreme Court in *Barnes v. Glen Theatre, Inc.*[210] In *Barnes*, which pre-dated *Pap's*

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[206] *Id.* at 1417 (quoting Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 (1976) (plurality opinion)); *see also* Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683, 686 (10th Cir. 1998), *cert. denied*, 525 U.S. 868 (1998) (reviewing application of adult use ordinance against adult novelty shop offering no on-premises entertainment and finding that study of secondary effects of "slightly dissimilar" adult uses was irrelevant in analyzing ordinance's content neutrality, but might be relevant in determining whether statute was narrowly tailored); Restaurant Row Assoc. v. Horry County, 516 S.E.2d 442, 448 (S.C.), *cert. denied*, 120 S. Ct. 528 (1999) (noting that "*Renton* recognized that local governments need not wait for the secondary effects of adult businesses to actually manifest themselves before implementing zoning restrictions"), *cert. denied*, 528 U.S. 1020 (1999).

[207] 516 S.E.2d at 442 (S.C.), *cert. denied*, 120 S. Ct. 528 (1999).

[208] *See id.* at 448.

[209] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[210] 501 U.S. 560, 569 (1991) (plurality opinion).

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but had essentially the same fact pattern, plaintiffs were prohibited from offering totally nude dancing because of a statute requiring dancers to wear pasties and g-strings.[211] In applying the *O'Brien* test, the Court easily found a substantial governmental interest in "protecting societal order and morality," evidenced by the "ancient origin" of the offense and its widespread criminalization.[212] Justice Scalia concurred, not because the ordinance met the *O'Brien* factors, but because in his opinion an analysis of the *O'Brien* factors was not required.[213] Under his view, a court should only look to whether the statute's purpose was to suppress expression (i.e., whether the statute was content based).[214] If it did not, rational basis review would apply, even if application of the statute would have an incidental impact on expression.[215] Applying rational basis, Justice Scalia found moral opposition sufficient to uphold the statute.[216]

The problem with using morality as a justification for excluding voyeur residences from residential neighborhoods is that the conduct that occurs inside a voyeur residence is qualitatively different from nude dancing. The adult content currently involved with a voyeur Web site is, for the most part, the "adult content" that exists in every person's daily life (e.g., changing clothes or showering); it is not an expressive dance specifically designed to excite spectators. Moreover, whereas public indecency has been criminalized since time immemorial, voyeur residences have not, nor are all voyeur residences excluded from residential neighborhoods.[217] In *Barnes*, the Court explained that the reason public indecency statutes were enacted was because of "moral

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[211] *See id.* at 563.

[212] *Id.* at 568.

[213] *See id.* at 576-80 (Scalia, J., concurring) ("[V]irtually every law restricts conduct, and virtually any prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition. It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even—as some of our cases have suggested—that it be justified by an 'important or substantial' government interest. Nor do our holdings require such justification: We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest." (citations omitted)).

[214] *See id.* at 578-79.

[215] *See id.* In the plurality's view, the incidental impact on expression would require intermediate review under *O'Brien*. *See id.* at 565-66.

[216] *See id.* at 580 (Scalia, J., concurring).

[217] So long as a voyeur Web site does not charge for the service, a voyeur residence would not fall under the adult use classification.

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disapproval of people appearing in the nude among strangers in public places,"[218] but the conduct in voyeur residences is not public in the same sense that nude dancing is. Voyeur residence activity, although in real time, does not occur in the same room as the viewers and, unlike the neighbors of nude dancing establishments, neighbors of voyeur residences would be unaware of the activity if the location of the residence remained secret.

One may argue that, even if explicit nudity or sexual acts are rare, the Web site as a whole is designed for titillation and the webcasts may be morally offensive to a community in the same way that filming an adult movie in a residential neighborhood might be morally offensive. If that were the case, one might question whether the argument was reasonable. If what is morally offensive is the idea that people are undressing, showering or even engaging in sexual activity in front of cameras within a home located in a residential area, then the moral objection should apply not just to voyeur residences affiliated with Web sites that charge for subscriptions but to all voyeur residences, regardless whether payment is required. Adult use ordinances such as the Tampa ordinance, however, do not cover all voyeur residences because they apply only to adult entertainment establishments that receive consideration.[219] Thus, the moral argument is less persuasive because the adult use ordinance does not restrict no-charge voyeur residences.[220]

In addition, it is questionable how strongly one can rely on morality as a justification for zoning ordinances. Only two opinions in *Barnes* relied on morality, the plurality opinion and Justice Scalia's concurring opinion.[221] The plurality opinion, according to at least one court, was a dramatic expansion of the scope of *O'Brien*.[222] By contrast, Justice Scalia argued that morality was a sufficient justification under rational basis review; he did not rest his decision on *O'Brien*'s intermediate review. Moreover, in *Pap's*, the Court's last pronouncement on what justified restrictions on nude dancing, the plurality based its opinion on the secondary effects that could result from nude dancing and not on morality.

Assuming that secondary effects or morality can justify enforcing adult use ordinances against voyeur residences, the third *O'Brien* factor

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[218] *See Barnes*, 501 U.S. at 568.

[219] *See supra* text accompanying note 90.

[220] A governing body is not bound to treat the two types of voyeur residences the same. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52-53 (1986).

[221] *See* Barnes v. Glen Theatre, Inc. 501 U.S. 560 (1991) (plurality opinion).

[222] *See* Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 132 (6th Cir. 1994).

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requires that that interest be unrelated to the suppression of speech. It is likely that this prong would be met. With regard to secondary effects, the Court in *American Mini Theatres* and *Renton* clearly found that the purposes of the adult use zoning ordinances were not to suppress speech but to reduce secondary effects.[223] Based on these decisions, the interest in reducing secondary effects is likely unrelated to enforcement of zoning ordinances against voyeur residences.

Whether morality is unrelated to the suppression of speech requires a comparison to the nude dancing regulation involved in *Barnes*. In that case, the Supreme Court found that, even though the pasties and g-string requirement seemed necessarily related to suppression of the dance's expression, the requirement was actually unrelated because the erotic message was merely muted and not suppressed by the minimum clothing requirement.[224] The dissenting justices criticized the majority's approach, stating that the nudity was just as important as the dance for the message that the dancer intended to convey. As Justice White explained: "The sight of a fully clothed, or even a partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental 'conduct.'"[225] Even if one were to take the dissenting justices' view, it would make little difference to voyeur residences. The zoning provision at issue here is merely a locational requirement. If a city were to enforce the ordinance to further moral values, the ordinance would only require the voyeur residence to move its forum to another location. The sexual speech would remain untouched.

The last requirement under the *O'Brien* test is that the restriction on speech be "no greater than is essential to the furtherance of that interest."[226] In *Renton*, the Court found that the adult use zoning ordinance did not limit alternative channels of communication, even though the ordinance left little more than five percent of the city available for adult use.[227] As the Court explained: "In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this

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[223] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-50 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 & nn. 34-35 (1976) (plurality opinion).

[224] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 570-71 (1991) (plurality opinion).

[225] *See id.* at 592 (White, J., dissenting).

[226] United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

[227] *See Renton*, 475 U.S. at 53.

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requirement."[228] Like the ordinances in that case, an ordinance excluding voyeur residences from residential neighborhoods would not completely limit speech. Instead, the speech would merely be relocated to another portion of the city, and voyeur residences would not be denied a reasonable opportunity for speech.

Further, a voyeur residence could remain in a residential area if it fell outside the definition of an adult use establishment. Hence, if a voyeur Web site no longer charged for subscriptions (and, possibly, if the residents were not being paid), the voyeur residence could not be classified as an adult use since consideration is a distinguishing feature. The limitation on the commercial aspect of the Web site would have little impact on the Web site's message since the sexual content of the speech would remain the same.[229] Moreover, even if the ordinance excluded voyeur residences affiliated with free voyeur Web sites, the sexual speech would not be suppressed because the speech is still allowed outside of residential areas. Therefore, the fourth prong of the *O'Brien* test would be met.

Because of the unique issues posed by voyeur residences, it is unclear whether a First Amendment claim would be effective. Although some factors of the *O'Brien* test appear to be met, it is questionable whether the restriction can satisfy the second prong of the test. Because secondary effects are different or even non-existent, use of secondary effects as a substantial governmental interest will be difficult. Similarly, using morality as a justification may also prove troublesome because of the

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[228] *Id.* at 54.

[229] The consideration requirement of the ordinance would have the obvious effect of discouraging large-scale voyeur residences from locating in residential neighborhoods because of the great possibility of zoning enforcement. But as the Supreme Court stated in *American Mini Theatres*, "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." Young v. Am. Mini Theatres, 427 U.S. 50, 62 (1975).

Although separation of uses based on the commercial nature of activity is constitutional, failure to license a commercial activity involving speech may constitute a prior restraint. *See* GERARD, *supra* note 30, § 2.07, at 39-40. Therefore, even if a voyeur residence were not considered an adult use, if the residence required a home occupation exemption and that exemption were denied, the residence could argue that the exemption requirement constitutes a prior restraint on speech. To overcome the presumption of unconstitutionality that prior restraints bear, the government must show not only that the restraint offers clear guidance for the official's discretion, but also that it has met procedural requirements established under prior restraint doctrine (the *Freedman* standards) to protect speech while the determination on the licensing or exemption is being made. *See id.* § 2.07, at 40. For further discussion of prior restraint doctrine as applied to licensing of adult uses, *see id.* § 2.07, at 39-45.

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differences between voyeur residences and other adult uses. If neither secondary effects nor morality were sufficient, it is possible that a First Amendment claim could prove successful.

B. Vagueness, Overbreadth, and Underinclusiveness

Laws impacting First Amendment rights are also susceptible to challenges for vagueness and overbreadth because of the potential they have for chilling speech[230] and because laws regulating speech may be "impermissibly underinclusive."[231]

1. Vagueness

A law is unconstitutionally vague under due process if a person of "normal intelligence" would not understand what conduct is required or forbidden by the statute.[232] Although there is no set test for determining whether a law is vague, and some uncertainty is to be expected,[233] statutes generally must be "narrowly tailored" for their purpose.[234] Even if a statute is "marked by 'flexibility and reasonable breadth, rather than meticulous specificity,'" it is not unconstitutionally vague if "it is clear what the ordinance as a whole prohibits."[235] In the absence of evidence as to a statute's meaning, a court may "extrapolate its allowable meaning," but it must do so with caution so as not to "construe and narrow" the law.[236]

A vagueness claim regarding voyeur residences would likely focus on what is intended to be covered by an adult use zoning ordinance. For example, the Tampa ordinance defines an "adult use establishment" as "[a]ny premises . . . on which is offered to members of the public or any

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[230] *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) ("[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" (citations omitted)); Reno v. ACLU, 521 U.S. 844, 871-72 (1997); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (reviewing statute aimed at subversive activity).

[231] City of LaDue v. Gilleo, 512 U.S. 43, 51 (1994).

[232] *See* Smith v. Goguen, 415 U.S. 566, 574 (1974); *Grayned*, 408 U.S. at 108.

[233] *See Grayned*, 408 U.S. at 110 ("Condemned to the use of words, we can never expect mathematical certainty from our language.").

[234] *See* City of Houston v. Hill, 482 U.S. 451, 465 (1987).

[235] *Grayned*, 408 U.S. at 110 (citing Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970)).

[236] *Id.* at 110 (citing Garner v. Louisiana, 368 U.S. 157, 174 (1961) (Frankfurter, J., concurring)); *see* United States v. 37 Photographs, 402 U.S. 363, 369 (1971)).

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person, for a consideration, entertainment featuring or in any way including specified sexual activities . . . or entertainment featuring the displaying or depicting of specified anatomical areas."[237] As previously discussed, it is not clear whether the "premises" covered by the ordinance would be the location of the voyeur residence or the location of the server allowing access to the Web site.[238] Therefore, a voyeur residence could argue vagueness on that basis.

A voyeur residence might also challenge the meaning of "for a consideration," a term that is undefined in the ordinance. For example, VoyeurDorm.com clearly operates for a consideration, requiring payment before users may access the actual Voyeur Dorm footage.[239] JenniCam.com, on the other hand, allows anyone access to the JenniCam images updated every twenty minutes, but offers users who pay a fee images that are updated every two minutes.[240] Still others may offer access to any computer voyeur without payment of a fee, but the Web site may receive income from advertisements placed on the Web site.[241] The case for VoyeurDorm.com, and to a lesser extent JenniCam.com, are easy calls—the viewers are the ones that pay the consideration and receive the service. Income from advertising is a closer call. The Web site owner receives consideration, but the consideration is not from viewers but from advertisers. Whether that type of consideration places the Web site within the definition of an adult entertainment establishment is unclear.

Further, a voyeur residence might challenge a zoning ordinance because it is unclear what amount of sexually explicit activity is required before the activity qualifies as an adult use. Although respondents asserted such a claim in *American Mini Theatres*, the Court refused to consider the issue because the adult movies that the theaters showed were unquestionably covered by the ordinance.[242] Whether a voyeur residence falls within an adult use classification is a more difficult inquiry. If a voyeur resident were to flash a viewer once, but offer no other view of a "specified anatomical area," would that one incident place it within the scope of the adult use ordinance? Would fifty such incidents?

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[237] TAMPA, FLA., CODE OF ORDINANCES § 27-523 (1999).

[238] *See supra* text accompanying notes 85-87.

[239] *See* Voyeur Dorm Complaint, *supra* note 34, at 5.

[240] *See* Weeks, *supra* note 8, at H01.

[241] *See* Marjo Johne, *Get a Weblife: Ordinary (yawn) People*, NAT'L POST (May 17, 1999), at E02 *available at* 1999 WL 17664214.

[242] *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 58-59 (1975).

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In addition, would the fact that the voyeur Web site allows real-time viewing twenty-four hours a day or the number of cameras have any impact on the analysis? For example, assume a viewer were to watch VoyeurDorm.com for one week around the clock. One camera captures 168 hours of videotape, two cameras twice that at 336 hours, and seventy-five cameras capture 12,600 hours. Assume each of the five residents flash the camera twice a day, take daily showers, change clothes twice each day, and sunbathe nude an hour daily. Estimating the nude-time of each resident at ten hours per week, does the combined total of approximately fifty hours—out of 12,600 hours—of non-consecutive nudity classify the Web site as an adult entertainment establishment? Would the answer be different if the Web site was run not as a commercial business but for entertainment value by a free-lance computer exhibitionist like Jennifer Ringley? Unlike the situation in *American Mini Theatres*, the adult use question is not as simply answered when it comes to voyeur residences, even in a case like the Voyeur Dorm. Thus, a vagueness challenge to a zoning ordinance by a voyeur residence might prove to be successful.

Assuming that a voyeur residence were not an adult use but required a home occupation exemption to operate from the residential area, a residence might be able to challenge a home occupation provision as vague if the exemption were denied. As previously discussed, because voyeur residences do not fit the mold of traditional home occupations, it is unclear whether the use would be considered incidental and secondary to the residential use since the residence has a commercial nature to it.[243] Moreover, it is unclear whether a voyeur residence would violate the twenty-five percent limitation on floor area because the cameras may take up less than that amount of space, but the residents' activities would cover more than that amount.[244] Finally, if the use were denied based on the relationship of the employees who operated the business, a vagueness challenge might be effective since it is unclear whether the residents would fall under the exclusion for the definition of "family."[245]

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[243] *See supra* text accompanying notes 106-107.

[244] *See supra* text accompanying notes 108.

[245] *See supra* text accompanying notes 109-110.

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2. Overbreadth

Overbreadth challenges often accompany challenges to vagueness. A law is overbroad if it includes within its reach not only legitimately regulated speech, but constitutionally protected speech as well.[246] Thus, in reviewing an overbreadth argument, a court must first determine whether the activity at issue is protected by the First Amendment.[247] A law may be overbroad either on its face or "as applied" in a particular situation.[248] To be facially invalid, the overbreadth must be real and substantial.[249] Courts have interpreted this to mean that facial invalidity requires a showing that the law's "application would be unconstitutional in a substantial proportion of cases."[250] If it is not, the law will stand

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[246] *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981) (invalidating convictions under ordinance that prohibited "all live entertainment, including nonobscene, nude dancing" based in part on overbreadth grounds); Grayned v. City of Rockford, 408 U.S. 104, 114 (1972).

[247] *See Grayned*, 408 U.S. at 114-15.

[248] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 883-84 (1997) (refusing to convert facial challenge to Communications Decency Act to an "as applied" challenge); Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (finding resolution banning all "First Amendment activities" at Los Angeles International Airport facially overbroad); Gooding v. Wilson, 405 U.S. 518, 520-21 (1972) (affirming facial challenge to Georgia statute regulating "fighting words"). For a critical discussion of facial challenges under the First Amendment, see generally Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063 (1997).

The distinction between facial and "as applied" invalidity in the First Amendment context lies in part in who can assert an overbreadth challenge. A facial challenge may be asserted by a person whose own activities might not be protected as long as application of the law to others would be unconstitutional; an "as applied" challenge, on the other hand, requires that the law be unconstitutional as applied to the challenger. *See* CHEMERINSKY, *supra* note 114, § 11.2.2, at 767. The distinction is important for determining when a claim may be asserted. As Professor Gerard explains: "If the law is valid on its face, but is improperly administered, one who is unconstitutionally denied a permit must refrain from speaking and seek to have the improper action of the licensing official set aside by a higher administrative agency or a court. If, however, the law is unconstitutional on its face, the speaker need not even apply for a permit, but can speak in violation of the law and defend against prosecution by arguing its constitutionality." GERARD, *supra* note 30, § 2.05(1), at 44.

[249] *See, e.g.*. City Council v. Taxpayers for Vincent, 466 U.S. 789, 800-01 (1984) ("[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. . . . In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."); Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973).

[250] Ward v. County of Orange, 217 F.3d 1350, 1355 (11th Cir. 2000) (quoting Agan v. Vaughn, 119 F.3d 1538, 1542 (11th Cir. 1997), *cert. denied*, 523 U.S. 1023 (1998)); *see also* City of Houston v. Hill, 482 U.S. 451, 467 (1987) (invalidating as overbroad ordinance prohibiting interruption of police officers while performing their duties because officers were given unguided discretion to enforce ordinance and because ordinance was "susceptible of regular application to protected expression").

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against the facial challenge but might be unconstitutional as applied (i.e., on a case-by-case basis).[251]

A voyeur residence might argue that a zoning ordinance is overbroad because it regulates not only activity that causes negative secondary effects but also activity that does not. Courts have held that laws regulating nude dancing are overbroad if the law does not include an exception for nudity involved with live performances that have "serious literary, artistic, or political value" because such performances do not result in the same negative secondary effects as do typical adult uses.[252] Further, *Renton* itself recognized that an adult use zoning ordinance must be "'narrowly tailored' to affect only that category of [adult uses] shown to produce the unwanted secondary effects."[253] Assuming that voyeur residences do not cause negative secondary effects, one might argue that the ordinance is overbroad and should not include non-harmful activities.[254]

An overbreadth challenge might also be directed at the ordinance provisions relating to home occupations. As previously discussed, use zoning generally allows home occupations if they are "incidental and secondary" to the residential use of the house. Such zoning may be overbroad if it excludes some uses that are incidental and secondary to the residential use. Voyeur residences and other computer-based home businesses may fall into this category because of the negligible impact they have on the residential quality of the home. Although the intent of creating a for-profit voyeur Web site is to make money and the reason particular residents live in the house is because of the Web site, the use of the house by the residents largely mirrors that of an ordinary home. Voyeur residences and other home-based computer businesses also may have little to no impact on the surrounding residential area and would have even less impact than other permissible home businesses. For example, assume that a home occupation exemption allows a doctor or lawyer to work out of his or her home. Patients or clients will cause additional traffic in the neighborhood as well as potential parking

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[251] *See Broadrick*, 413 U.S. at 615-16.

[252] *See, e.g.*, Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 136 (6th Cir. 1994); J.L. Spoons, Inc. v. O'Connor, 194 F.R.D. 589, 593 (N.D. Ohio 2000); *see also* Farkas v. Miller, 151 F.3d 900, 905 (8th Cir. 1998) (holding that statute was saved from being overbroad because of explicit exemption for theaters, concert halls, etc.).

[253] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986).

[254] *Cf.* Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358, 1372 (1999) (Barkett, J., concurring in part, dissenting in part) (arguing that ordinance that limited hours of operation of adult use establishment was overbroad because it required closure at times when no secondary effects were shown to exist), *cert. denied*, 120 S. Ct. 1554 (2000).

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problems. A voyeur residence, on the other hand, will have no traffic or parking problems caused by customers, and what traffic or parking caused by maintenance of the cameras will likely be minor in comparison. Similarly, a stock broker who works out of his or her home will have the same non-impact on the neighborhood. Thus, home occupation ordinances as they are currently written may be overbroad in their scope.

3. Underinclusiveness

The Supreme Court has also recognized that the First Amendment contemplates protection from underinclusive regulation. In *City of LaDue v. Gilleo*,[255] a case dealing with political speech, the Supreme Court noted two instances when a regulation is impermissibly underinclusive: first, when an "otherwise permissible regulation of speech . . . represent[s] a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people,'"[256] and second, "through the combined operation of a general speech restriction and its exemptions, the government . . . seek[s] to select the 'permissible subjects for public debate' and thereby to 'control . . . the search for political truth.'"[257] The Court of Appeals for the District of Columbia has interpreted *LaDue* to mean that "an underinclusive time, place, and manner regulation that is otherwise valid must be upheld as constitutional so long as it does not favor one side of an issue and its rationale is not undermined by its exemptions."[258]

A voyeur residence might argue that a zoning ordinance excluding voyeur residences connected to fee-based voyeur Web sites is underinclusive because the ordinance does not include voyeur residences affiliated with voyeur Web sites that do not charge a fee. This argument would likely fail for two reasons. First, applying *LaDue*, the zoning ordinance does not favor one view over another nor does it attempt to control the message since the same speech is allowed in the residential area so long as a fee is not charged. Second, under *Renton*, a city is free to limit its regulation of adult uses until a time when "other kinds of adult businesses . . . have been shown to produce the same

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[255] 512 U.S. 43 (1994).

[256] *Id.* at 51 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785-86 (1978)).

[257] *Id.* (quoting Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980)).

[258] ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 957 (D.C. Cir. 1995).

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kinds of secondary effects" as the use being regulated.[259] As the Court explained "[t]hat Renton chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has singled out adult theaters for discriminatory treatment."[260] Thus, assuming a court were to otherwise uphold enforcement of a zoning ordinance against a voyeur residence, the fact that other voyeur residences are not included within the sweep of the ordinance would not be impermissibly underinclusive. Indeed, such a finding might be consistent with the differences between those voyeur Web sites that charge a fee and those that do not. If one assumes that fee-based voyeur Web sites have larger subscriber populations than non-fee-based voyeur Web sites, then negative secondary effects caused by subscribers attempting to visit the voyeur residences[261] might occur more frequently or intensely with the larger subscriber populations. If the city later discovered that negative secondary effects occurred at the same frequency from both types of voyeur residences, the city could amend the statute to include non-fee-based voyeur Web sites.[262]

C. Right to Privacy

Should a First Amendment or due process claim prove unsuccessful, a voyeur residence might also claim an infringement of the right to privacy. The right to privacy exists in three basic forms: rights protected through tort law, rights protected under the Fourth Amendment, and constitutional rights protected by substantive due process.[263] The first two forms focus on the concept of informational intrusion, whereas the latter right focuses on intrusion into individual decision making.[264] A

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[259] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53 (1986).

[260] *Id.* at 52-53.

[261] *See supra* text accompanying notes 98-103.

[262] *Cf. Renton*, 475 U.S. at 52-53 (noting that Renton could later amend its ordinance to take into account additional adult uses that moved into city).

[263] *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740 (1989).

[264] *See id.* As Professor Rubenfeld explains, the concept of privacy under tort law and the Fourth Amendment:

> govern[s] the conduct of other individuals who intrude in various ways upon one's life. Privacy in these contexts can be generally understood in its familiar informational sense; it limits the ability of others to gain, disseminate, or use information about oneself. By contrast, the [decisional] right to privacy ... attaches to the rightholder's own actions. It is not informational but substantive, immunizing certain conduct—such as using contraceptives, marrying someone of a different color, or aborting a pregnancy—from state proscription or penalty.

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potential privacy claim attaching to a voyeur residence might involve both types of privacy rights.

Although substantive rights to privacy are not mentioned in the constitution, the Supreme Court has recognized that certain "fundamental rights" deserve protection under the due process clauses of the Fifth and Fourteenth Amendments.[265] To make a case under substantive due process, one must first establish the existence of a fundamental right.[266] If such a right exists and if the right has been infringed, then strict scrutiny applies and the government must show not only that it has a "compelling interest" justifying the infringement, but also that it has chosen the least restrictive means to achieve its goal.[267] If a fundamental right is not at issue, rational basis review applies and a law will be upheld if it has a legitimate purpose.[268]

Over several decades, the Supreme Court has recognized a number of fundamental rights relating to the home and family: the right to procreate or not to procreate,[269] the right to marry,[270] and custodial rights to children among others.[271] A constitutional right to privacy was first recognized by the Supreme Court in *Griswold v. Connecticut*,[272] in which the Court reviewed the constitutionality of an absolute ban on the use of

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Id.

[265] *See* CHEMERINSKY, *supra* note 114, § 10.1.1, at 638.

[266] *See id.* § 10.1.2, at 640.

[267] *See id.* § 10.1.2, at 643.

[268] *See id.*

[269] *See, e.g.*, Doe v. Bolton, 410 U.S. 179 (1973) (striking down law that prohibited abortion except when it endangered mother's health or if fetus was seriously deformed or woman was raped); Roe v. Wade, 410 U.S. 113, 155 (1973) (recognizing woman's decision to terminate her pregnancy, but requiring balancing of state's interest in protecting "prenatal life"); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (finding unconstitutional a complete ban on use of contraceptives by any person and recognizing "notions of privacy surround the marriage relationship"); Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (striking down law allowing involuntary sterilization of repeat offenders of crimes of "moral turpitude").

[270] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding unconstitutional a miscegenation statute prohibiting interracial marriages).

[271] *See* Santosky v. Kramer, 455 U.S. 746, 753 (1982) (recognizing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child" and requiring that a state's permanent termination of custodial rights meet procedural and substantive due process requirements). For a discussion of the various fundamental rights recognized by the Supreme Court, see generally CHEMERINSKY, *supra* note 114, §§ 10.2-10.5, at 644-94.

[272] *Griswold*, 381 U.S. at 479.

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contraceptives.[273] In *Griswold*, Justice Douglas, writing for the Court, drew on protections guaranteed in the Bill of Rights—specifically, the First, Third, Fourth, Fifth and Ninth Amendments—as the basis for recognizing a right to privacy in the marital relationship.[274] The key to the right, in Justice Douglas's view, was the intimacy of marriage. As Justice Douglas stated: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[275]

Later cases recognizing privacy rights focused not on the intimacy aspect as the basis for protection, but on the idea that personal autonomy—the right to make decisions that "fundamentally affect a person's life"—deserves protection.[276] Often these decisions are intensely personal, such as whether to terminate a pregnancy or to refuse life-saving medical care.[277] Yet not all personal decisions are recognized as fundamental rights.

In *Bowers v. Hardwick*,[278] for example, the Court refused to recognize a fundamental right to engage in homosexual sodomy, even if the activity occurs within the confines of a home.[279] In reaching that decision, the Court looked to its own jurisprudence for guidance on what activities would constitute fundamental rights when the activity was not a textual right. As the Court explained:

> In *Palko v. Connecticut* it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered

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[273] *See id.* at 480.

[274] *See id.* at 484 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." (citing Poe v. Ullman, 367 U.S. 497, 516-22 (1961) (Douglas, J., dissenting)).

[275] *Id.* at 485-86.

[276] PATRICIA BOLING, PRIVACY AND THE POLITICS OF INTIMATE LIFE 87-88 (1996) ("The language that recurs in these opinions—'the right of the individual . . . to be free of unwanted governmental intrusions,' 'the Constitution protects individual decisions . . . from unjustified intrusion by the State,' 'the detriment that the State would impose . . . by denying this choice'—draws on the first sense of privacy as autonomy, not subject to government regulation.").

[277] *See* Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (noting that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment"); Roe v. Wade, 410 U.S. 113, 155 (1973) (recognizing right to abortion). For an interesting discussion of privacy issues relating to the body, see Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359 (2000).

[278] 478 U.S. 186 (1986).

[279] *See id.* at 195-96.

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> liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland* where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition."[280]

Looking to the history of sodomy laws, the Court determined that homosexual activity was not a traditionally protected right.[281] Further, it specifically rejected the notion that the activity would be protected because it would occur "in the privacy of the home," finding that "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home."[282]

Determining that rational basis review applied, the Court held that the law withstood scrutiny, despite the assertion that the basis for the statute—"the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable"—was inadequate.[283] As the Court stated:

> The law . . . 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. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis."[284]

In dissent, Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, argued that the majority had mischaracterized the issue before the Court. The majority viewed the issue as whether there was a fundamental right to engage in homosexual sodomy.[285] Justice Blackmun, on the other hand, focused instead on the fact that the statute

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[280] *Id.* at 192 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); Moore v. East Cleveland, 431 U.S. 494, 503 (1977)) (citations omitted in text).

[281] *See id.* at 192 ("Against this [historical] background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty is, at best, facetious.").

[282] *See Bowers*, 478 U.S. at 195-96.

[283] *Id.* at 196.

[284] *Id.*

[285] *See id.* at 190.

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prohibited sodomy in any context, regardless whether practiced by heterosexuals or homosexuals.[286] He saw the issue not as one limited to homosexual activity, but about "'the most comprehensive of rights and the right most valued by civilized men,' namely 'the right to be let alone.'"[287]

Justice Blackmun saw implications to both a "decisional" right to privacy and a "spatial" right to privacy.[288] He first noted that "individuals define themselves in a significant way through their intimate sexual relationships," which suggests that "much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds."[289] The fact that the lifestyle of some may not be the lifestyle chosen by the majority, Justice Blackmun argued, is not a reason to refuse protection to the minority lifestyle: "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[290] Turning to the spatial privacy afforded under the Fourth Amendment, Justice Blackmun noted the "special significance" that the Court had attached to the privacy of a home as further reason to protect the interest at stake.[291] Stating that "the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently,"[292] Justice Blackmun concluded that the Court should have recognized a privacy interest in an individual's right to choose how to

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[286] *See id.* at 199 (Blackmun, J., dissenting).

[287] *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[288] *See id.* at 204.

[289] *Id.* at 205.

[290] *Id.* at 206 (quoting Wisconsin v. Yoder, 406 U.S. 205, 223-24 (1972)).

[291] *See id.* at 206. Justice Brennan stated:

> Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. Even when our understanding of the contours of the right to privacy depends on "reference to a 'place,'" "the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefeasible right of personal security, personal liberty and private property.'"

Id. (quoting California v. Ciraolo, 476 U.S. 207, 226 (1986) (Powell, J., dissenting) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886), and Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

[292] *Id.* at 213 (citing Diamond v. Charles, 475 U.S. 54, 65-66 (1986)).

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conduct his or her intimate relationships.[293]

Despite the Supreme Court's decision in *Bowers*, the Court has recognized that individuals deserve some privacy in their homes. In *Stanley v. Georgia*,[294] the Supreme Court invalidated a conviction of a defendant charged with knowingly possessing obscene materials in his home. The Court based its decision on the individual's fundamental rights "to receive information and ideas, regardless of their social worth" and "to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[295] The fact that the defendant was in his home added a further dimension for the Court. As the Court stated:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[296]

Although the United States Constitution does not specifically identify a right to privacy, several state constitutions explicitly grant a textual right to privacy.[297] The Florida Constitution, for example, provides: "Every natural person has the right be let alone and free from governmental intrusion into the person's private life," except as limited by the constitution itself.[298] Rights recognized under state constitutional provisions have included both protection from informational intrusions and from intrusions into individual decisionmaking.[299] Most states with

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[293] *See id.* at 214.

[294] 394 U.S. 557 (1969).

[295] *Id.* at 564.

[296] *Id.* at 565.

[297] The Alaska, California, Florida, Hawaii and Montana constitutions explicitly provide for a general right to privacy. *See* ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; MONT. CONST. art. II, § 10. The constitutions of Arizona, Illinois, Louisiana, South Carolina and Washington provide for a textual right to privacy in conjunction with their respective search and seizure provisions. *See* ARIZ. CONST. art. II, § 8; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

[298] FLA. CONST. art. I, § 23. The Florida legislature adopted this constitutional right to privacy in 1980. *See* David C. Hawkins, *Florida Constitutional Law: A Ten-Year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693, 826 (1990).

[299] *See* Mark Silverstein, Note, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 228-58 (1989) (discussing state constitutional privacy cases); *see also*

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textual privacy rights have held that the state right to privacy is more expansive than the federal right,[300] but state courts often turn to federal analyses to aid in interpreting the scope of state privacy rights.[301]

A privacy claim regarding a voyeur residence might follow Justice Blackmun's approach in *Bowers* by asserting an invasion into both a decisional right to privacy and a spatial right to privacy. First, a claimant might argue, albeit weakly, that computer exhibitionism is an expression of the individual's identity and therefore should be protected activity. Second, a claimant might assert that enforcement of a zoning ordinance against a voyeur residence that does not interfere with the rights of others unlawfully intrudes upon the privacy of the home. These claims, however, will likely be unsuccessful for two reasons—because the activity prohibited by a zoning ordinance is not merely exhibitionism within the home, but exhibitionism within the home for consideration, and because exhibitionism in any form is not a fundamental right.[302] Therefore, regulation would likely be upheld under rational basis review.

As to the first point, if there is a right to privacy in computer exhibitionism, enforcement of zoning ordinances does not infringe on the right to engage in the activity. Typical zoning ordinances exclude from residential areas adult entertainment for which consideration is received. Home occupation provisions require permits or exceptions for businesses. If a computer exhibitionist chooses to engage in the activity

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In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989) (listing cases dealing with rights protected by state right to privacy).

[300] *See, e.g.*, Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice, 948 P.2d 963, 968 (Alaska 1997); Am. Acad. of Pediatrics v. Lungren, 66 Cal. Rptr. 2d 210, 221-22 (1997); Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985) (quoting State v. Sarmiento, 397 So. 2d 643, 645 (Fla. 1981); State v. Mallan, 950 P.2d 178, 185-86 (Haw. 1998); State v. Guillaume, 975 P.2d 312, 316 (Mont. 1999); State v. Thomas, 1997 WL 568029, at *1 (Wash. App. 1997); *see also* Silverstein, *supra* note 299, at 228-58 (discussing judicial interpretation of state constitutional rights to privacy).

[301] *See, e.g.*, McCoy v. State, 491 P.2d 127, 139 (Alaska 1971); *In re* Scott K., 595 P.2d 105, 108 (Cal.), *cert. denied sub nom*, 444 U.S. 973 (1979); *Mallan*, 950 P.2d at 185-86); Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774, 779 (Fla. 1979); City of Tukwila v. Nalder, 770 P.2d 670, 749-50 (Wash. App. 1989); *see also* Hawkins, *supra* note 298, at 696-97 & n.8 (noting that Florida courts often rely on federal cases when interpreting state constitutional provisions, even when there is no federal textual counterpart, and listing constitutional provisions as examples).

[302] *Cf.* Washington v. Glucksburg, 521 U.S. 701, 720 (1997) (listing fundamental rights); *cf.* SBC Enters., Inc. v. City of South Burlington, 892 F. Supp. 578, 586 (D. Vt. 1995) (finding no fundamental right to nude dancing); Clampitt v. City of Ft. Wayne, 682 F. Supp. 401, 404 (N.D. Ind. 1988) (finding no fundamental right to operate massage parlors and nude modeling studios); People v. Hollman, 507 N.Y.S.2d 977, 982 (1986) (finding no fundamental right to public nudity).

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without receiving consideration, the activity is not regulated and there is no claim to an infringement of privacy.[303]

As to the second point, it is unlikely that computer exhibitionism rises to the level of a fundamental right. Although one might argue, as Justice Blackmun did with regard to homosexuality, that a computer exhibitionist who does not interfere with the rights or interests of others should not be denied rights merely because the person chooses to live his or her life differently then the general public,[304] it is very unlikely that a computer exhibitionist would identify with his or her "lifestyle" in the same way that homosexuality might go to the core of a homosexual's identity. The constitutional right-to-privacy cases to date focus on decisions relating to sexuality, "the conditions under which sex is permissible, the social institutions surrounding sexual relationships, and the procreative consequences of sex,"[305] but it does not include all decisions relating to sexuality.[306] Although sexuality may be a part of computer exhibitionism, it arguably has little to do with any type of intimate relationship or decision that will "fundamentally affect a person's life."[307] Indeed, the only decision at issue is whether to live on-camera or off. In either event, the every day activities presumably remain the same.

Further, computer exhibitionism would not rise to the level of a fundamental privacy right under the majority's analysis in *Bowers*. There

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[303] *Cf.* Mary B. Spector, *Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home*, 31 CONN. L. REV. 547, 575 (1999) ("[A]t least until recently, where state regulation adversely affected economic or property rights and not individual liberties, the [Supreme] Court appeared to substitute reliance upon the legislative articulation of legitimate state goals for rigorous analysis.").

[304] *See supra* text accompanying note 290. Many computer exhibitionists use this medium as a way to express who they are. As one scholar has stated: "'Using the Internet, people are rethinking themselves as human beings, figuring out how they can really use these digital bits of information to make themselves unique or interesting kinds of persons. We are moving out of our skins and becoming sort of cyborgs ourselves—our skins are extended into the Internet.'" Johne, *supra* note 241, at E02 (quoting Kenneth Little, associate professor of anthropology at York University in Toronto); *see also* ANNETTE N. MARKHAM, LIFE ONLINE: RESEARCH REAL EXPERIENCE IN VIRTUAL SPACE 86 (1998) ("Some [computer] users . . . focus on the expression of self and others through [chat room] text. These users, most of whom have integrated online technologies into their lives to a high degree, talk about their experiences *in* or *as* the text. For these users, online technology is a *way of being*. Some consider themselves *cyborgs*—a state in which mind and body merge with the computer, or the mind separates from the body to be inside the machine, creating and expressing the soul in abstraction through language.").

[305] Rubenfeld, *supra* note 263, at 744.

[306] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190-96 (1986) (finding that right to engage in homosexual sodomy was not fundamental right guaranteed by Constitution).

[307] *See supra* text accompanying note 276.

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the Court determined that homosexuality was not a fundamental right by reviewing the limited instances where a non-textual right-to-privacy was found and by looking to whether the activity was "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed'" and whether it was "deeply rooted in this Nation's history and tradition."[308] Here, like *Bowers*, there is no connection between the activity—computer exhibitionism—and the recognized fundamental rights relating to "family, marriage, or procreation."[309] Further, states have historically regulated sexually oriented businesses and some types of sexual conduct,[310] even when that conduct is consensual.[311]

Moreover, as *Bowers* shows us, activity does not constitute a fundamental right merely because it occurs in the home. Although Justice Blackmun attempted to use Fourth Amendment privacy cases in his dissent as a basis for finding a privacy interest in the home,[312] those cases were inapposite because they are geared toward informational invasions rather than invasions into personal autonomy.[313] Even if these cases were used, they would not justify protection of voyeur Web sites. Justice Blackmun relied on the Supreme Court's decision in *Katz v. United States*,[314] which recognized that "the Fourth Amendment protects people,

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[308] *Bowers*, 478 U.S. at 190-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937); Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

[309] *See id.* at 191.

[310] Indecent exposure, for example, has been a criminalized activity at least since the seventeenth century. *See* Winters v. New York, 333 U.S. 507, 515 (1948); Chris Joe, *Can We Express Ourselves Dancing Naked?—*Barnes v. Glen Theatre, Inc.*—The First Amendment And Freedom Of Expression*, Note, 46 SMU L. REV. 263 (1992) (citing LeRoy v. Sidley, 82 Eng. Rep. 1036 (K.B. 1664)) (public nudity considered immoral); 50 AM. JUR. 2D LEWDNESS, INDECENCY, AND OBSCENITY, § 17 (1970), G.R.B., Annotation, *Criminal Offense Predicated Upon Indecent Exposure*, 93 A.L.R. 996, 997-88 (1934)); *see also* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 17-56 (1999) (tracing regulation of homosexuality from 1880's to World War II); Susan E. Thompson, *Prostitution—A Choice Ignored*, 21 WOMEN'S RTS. L. REP. 217, 224-25 (2000) (discussing historical regulation of prostitution in United States); *cf.* Ronald M. Stern, *Sex, Lies, and Prior Restraints: "Sexually Oriented Business"—The New Obscenity*, 68 U. DET. L. REV. 253, 265-79 (1991) (discussing United States Supreme Court cases reviewing regulation of sexually oriented businesses).

[311] *See Bowers*, 478 U.S. at 195-96 ("[I]f respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.").

[312] *See* Bowers v. Hardwick, 478 U.S. 186, 206-07 (1986) (Blackmun, J., dissenting).

[313] *See* Rubenfeld, *supra* note 263, at 749.

[314] 389 U.S. 347 (1967).

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not places."[315] *Katz* is now generally understood as creating a two-prong test for determining when Fourth Amendment protection applies: first, the person claiming the right must have an "actual (subjective) expectation of privacy" and, second, that expectation must be "reasonable."[316] If a person "knowingly exposes [something] to the public, even in his own home or office," protection will not apply even if the person would otherwise have a reasonable expectation of privacy.[317]

Applying this test to voyeur residences, it becomes clear that protection is inappropriate. Although one might have an expectation of privacy in a limited network or in certain types of e-mail communications,[318] that expectation becomes unreasonable if one generally transmits information to the Internet.[319] With voyeur residences, it is not only unreasonable, but verges on the ridiculous. It is difficult to imagine how a person could, on the one hand, assert a right to privacy based on the fact that the activity takes place in the home and, on the other, transmit that same activity worldwide through the Internet.[320] One might argue that, at least in the Voyeur Dorm situation, these images are not accessible except by subscribers and, therefore, some expectation of privacy should attach.[321] However, the subscriptions

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[315] *Id.* at 351.

[316] *Id.* at 361 (Harlan, J., concurring) (citations omitted).

[317] *See id.* at 351. Justice Harlan, in his concurring opinion, further explained:

> [A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Id. For further discussion of the *Katz* test, see Richard S. Julie, Note, *High-Tech Surveillance Tools and the Fourth Amendment: Reasonable Expectations of Privacy in the Technological Age*, 37 AM. CRIM. L. REV. 127, 128-33 (2000).

[318] *See* Allegra Knopft, Note, *Privacy and the Internet: Welcome to the Orwellian World*, 11 U. FLA. J.L. & PUB. POL'Y 79, 83 (1999).

[319] *See id.* ("Cyberspace presents privacy problems because it is accessible by many. Since anyone can log onto the World Wide Web, an expectation of privacy on the Web is not reasonable.").

[320] *Cf.* Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 730-31 (1999) (suggesting that technological advances and increase in opportunities to "earn money and celebrity by giving up privacy voluntarily" and to "consume other people's privacy and private lives on the cheap" have eroded general public's expectations in "physical, informational, and proprietary privacy").

[321] *Cf.* Recreational Dev. of Phoenix, Inc. v. City of Phoenix, 83 F. Supp. 2d 1072, 1078 (D. Ariz. 1999) (challenging zoning ordinance prohibiting operation of live sex clubs by arguing that clubs were private membership organizations protected by right to privacy).

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are available to anyone over the age of eighteen who pays the subscription fee. Therefore, it is likely that any expectation that might arise would be unreasonable, and rational basis review would apply.[322]

A claim under a state constitutional right to privacy might be more successful in garnering a higher level of review, but it may depend on the jurisdiction. Although state courts view state privacy rights as greater than the federal counterpart, the areas that have received higher scrutiny relate to particular aspects of privacy, abortion rights of minors and child visitation, and to rights related to search and seizure.[323] The Alaska Supreme Court, however, in *Ravin v. State*[324] specifically recognized that "privacy in the home is a fundamental right" and held that this right covered an adult's possession of marijuana that was to be used for personal consumption in the home.[325] The court explained:

> The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home. Such a reading is consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.[326]

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[322] *See also* Hendricks v. Commonwealth, 865 S.W.2d 332, 334-35 (Ky. 1993) (finding that membership organization that offered nude dancing was not private club based on application of these factors); *cf. Recreational Dev. of Phoenix*, 83 F. Supp. 2d at 1082 (noting that factors used to determine whether club is private membership organization include "the selectivity of membership, membership control over the operations of the establishment, the history of the organization, the use of facilities by non-members, the purpose of the club's existence, whether the club advertises for new members, whether the club is profit or non-profit, and whether the club uses formalities such as bylaws, meetings, and membership cards").

[323] For cases in which state courts have recognized greater protection for privacy interests under state law, see Major B. Harding, et al., *Right to Be Let Alone?—Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides for a State Right of Privacy, Resulted in Greater Privacy Protection for Florida Citizens?*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 945, 959-86 (2000) (discussing greater state privacy rights in areas of abortions for minors and grandparents visitation rights); Silverstein, *supra* note 299, at 226-58 (discussing cases in which state courts have rejected or diverged from federal right to privacy decisions); Julia B.L. Worsham, Note, *Privacy Outside the Penumbra: A Discussion of Hawaii's Right to Privacy after* State v. Mallan, 21 U. HAW. L. REV. 273, 285-86 (1999) (discussing Hawaii Supreme Court's divergence from federal decisions in finding fundamental right to sell pornography).

[324] Ravin v. State, 537 P.2d 494 (Alaska 1975).

[325] *See id.* at 504.

[326] *Id.* at 503-04.

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The Alaska Supreme Court did note that the privacy interest in the home "must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare."[327]

Assuming a voyeur residence does not cause detrimental secondary effects to a neighborhood, a privacy claim by a computer exhibitionist might receive higher scrutiny in an Alaskan state court because of the increased protection given to the home. Other states, however, have rejected Alaska's approach, finding that the court's decision was likely the result of "social and cultural factors unique to Alaska."[328] If the state protection of the home in those jurisdictions is equivalent to federal protection, then it is likely that a privacy claim would receive only rational basis review.

In the event that rational basis review did not apply, a court would review the regulation under the strict scrutiny standard. As previously mentioned, strict scrutiny requires the government to show a compelling interest justifying infringement of the right to privacy and that it has chosen the least restrictive means to achieve its goal.[329] If a computer exhibitionist were deemed to have a fundamental right to engage in that type of activity, a court would examine "the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[330] Here, as with First Amendment claims, likely justifications for enforcement of zoning ordinances against voyeur residences might be morality and controlling secondary effects. Although states have a substantial interest in the public's health, safety and welfare, those interests must be viewed with care because "[s]uch amorphous standards would permit arbitrary governmental action aimed at the suppression of protected activity solely because the residents of the community disapproved of the [nature of the activity] or were offended by it."[331]

Assuming that computer exhibitionism constitutes a fundamental right, a court would likely reverse the zoning decision without evidence of strong effects on the neighborhood. In *Deerfield Medical Center v. City*

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[327] *Id.* at 504.

[328] State v. Mallan, 950 P.2d 178, 188 (Haw. 1998); *see also* National Org. for Reform of Marijuana Laws (NORML) v. Bell, 488 F. Supp. 123, 133 n.23 (D.C.D.C. 1980); State v. Anderson, 558 P.2d 307, 556 (Wash. App. 1976) (rejecting *Ravin v. State*, 537 P.2d 494 (Alaska 1975), which held that special right of privacy exists in home), *aff'd sub nom.*, 610 P.2d 869 (Wash. 1980).

[329] *See* CHEMERINSKY, *supra* note 114, § 10.1.2, at 643.

[330] Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977).

[331] Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 337-38 (5th Cir. Unit B Nov. 1981) (quoting Bayou Landing, Ltd. v. Watts, 585 F.2d 1172, 1176-77 (5th Cir. 1977)).

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of Deerfield Beach,[332] for example, the Fifth Circuit Court of Appeals reviewed a determination by a city commission to deny a license for an abortion clinic that was to be located in an area zoned for business operations but abutting a residential area. The court reversed the decision, finding that the justifications for the denial were not listed in the ordinance as potential grounds for denying a permit, were irrelevant to the purpose of the district, and did "not integrate the nature of the activity to be conducted within the facility with any typical zoning concerns such as traffic, noise or provision of municipal purposes."[333] Following *Deerfield*, if a zoning authority were unable to show any negative secondary effects, enforcement of the zoning ordinance against a voyeur residence (or denial of a home occupation exemption) would likely be overturned.

The more likely scenario, however, is that rational basis review will apply. Rational basis review requires only a showing of a legitimate purpose.[334] Zoning ordinances, of course, have long been justified by the states' interests in protecting the health, safety and welfare of the city's inhabitants,[335] and *American Mini Theatres* and *Renton* make clear that preventing secondary effects is a legitimate state interest.[336] Further, the Supreme Court in *Bowers* clearly recognized that morality can serve as a legitimate state interest under rational basis review.[337] The difficulty with using these justifications is that there is nothing that currently suggests that the health, safety, and welfare of the neighborhood will be detrimentally impacted by the use of a home as a voyeur residence nor has there been a large outcry condemning voyeur residences. Because rational basis review is very deferential to the governing authority, however, it is likely that these purposes would be sufficient on review.

D. Equal Protection

The basis for an equal protection claim against the application of traditional zoning laws to voyeur residences lies in the different treatment between those that charge a fee for access to voyeur Web sites

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[332] 661 F.2d at 328.

[333] *Id.* at 336.

[334] *See* CHEMERINSKY, *supra* note 114, § 10.1.2, at 643.

[335] *See supra* text accompanying notes 44-56 (discussing justifications for use zoning).

[336] *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 & nn. 34-35 (1976) (plurality opinion).

[337] *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986); *see also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 580 (1991) (Scalia, J., concurring) (finding morality sufficient to uphold public indecency statute applied to nude dancing).

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and those that do not. Using Voyeur Dorm as an example, if Voyeur Dorm is considered an adult use, application of the zoning laws would exclude the use from the neighborhood. If the same type of Web site were offered free of charge, however, the use as a voyeur residence would be permitted because it would not be classified as an adult use, even though the same effects that could result from the commercial operation, if any, might be identical to the effects caused by the private operation.

Traditional equal protection analysis begins with two questions. First, does the law distinguish among classes of people based on a suspect class or gender or in the exercise of a fundamental right?[338] Second, what level of scrutiny does the reviewing court apply?[339] If a suspect class is involved, the legislative action at issue is reviewed under the strict scrutiny standard.[340] Strict scrutiny requires the government to show that the law at issue is "necessary to achieve a compelling government purpose" and that the government "cannot achieve its objective through any less discriminatory alternative."[341] If gender is at issue, intermediate scrutiny applies.[342] Intermediate scrutiny requires a showing that the law is "substantially related to an important government purpose."[343] If neither a suspect class nor gender are at issue, the action is subject to the lowest level of scrutiny, rational basis review, and the government need only show that the law at issue is "rationally related to a legitimate government purpose."[344]

To establish a classification as either a suspect class or gender, one must show either that the law on its face discriminates against a covered group or, if it is facially neutral, that administration of the law has a discriminatory impact or effect.[345] In the case of voyeur residences, it is unlikely that a zoning ordinance would facially discriminate against particular groups because zoning ordinances typically focus on the activity at issue rather than the classes of people who engage in that activity. Assuming that the zoning ordinance would be facially neutral,

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[338] *See* CHEMERINSKY, *supra* note 114, § 9.1.2, at 528, 532; GERARD, *supra* note 30, § 2.08(2), at 59.

[339] *See* CHEMERINSKY, *supra* note 114, § 9.1.2, at 529.

[340] *See id.*

[341] *Id.* (citing Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).

[342] *See id.*

[343] *Id.* (citing Lehr v. Robertson, 463 U.S. 248, 266 (1983); Craig v. Boren, 429 U.S. 190, 197 (1976)).

[344] *Id.* (citing Pennell v. City of San Jose, 485 U.S. 1, 14 (1988); United States Ret. Bd. v. Fritz, 449 U.S. 166, 175, 177 (1980); and Allied Stores v. Bowers, 358 U.S. 522, 527 (1959)).

[345] *See id.* at 528.

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one must turn to the discriminatory impact or effect to determine whether heightened scrutiny is justified. To date, the United States Supreme Court has held that heightened scrutiny applies only if the law discriminates based on "race, national origin, gender, alienage, or legitimacy" and, possibly, religion.[346]

Of these classes, the only potential basis for discrimination is gender. One might argue that the enforcement of zoning ordinances prohibiting adult uses in residential neighborhoods might have a discriminatory impact on women. This argument would most likely fail, however, for two reasons. First, if discrimination exists, it is not against the women who are employed by the business, but it is against the business that is attempting to operate in the neighborhood. Second, even if one were to focus on the women, the ordinance would exclude any adult use, regardless whether the person employed by the business was male or female.[347]

The strict scrutiny standard would also apply if a law or its application results in discrimination in the exercise of a fundamental right.[348] As discussed above, in the voyeur residence situation, enforcement of a zoning ordinance might infringe on the fundamental right to free speech, and to a lesser extent, the right to privacy.[349] Equal protection claims closely intertwine with privacy and free speech issues because the same standards of review apply for each type of claim.[350] Because these issues

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[346] *See id.* § 9.7, at 629 & n.1 (citing Griffin v. Illinois, 351 U.S. 12 (1956)); Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW. & INEQ. 239, 249 (1999) (citing cases supporting each class).

[347] Indeed, the male version of Voyeur Dorm—Dude Dorm—suffered a similar zoning controversy over their location in Pinellas Park, Florida. To avoid the difficulties created by classification as an adult use, Dude Dorm was moved to a compound adjacent to XTC Adult Superstore, located in an area zoned for adult uses. *See* Angela Moore, *Dudes Get New Dorm—And a Surprise Visit*, ST. PETERSBURG TIMES, Mar. 1, 2001, at 1B, *available at* 2001 WL 6965570. Dude Dorm was subsequently ordered to shut down by licensing inspectors for failure to obtain an adult use permit separate from that used by the adult store. *See id.*

[348] *See* CHEMERINSKY, *supra* note 114, § 9.2.1, at 533; GERARD, *supra* note 30, § 2.08(2), at 49.

[349] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n.1 (1995); Police Dep't v. Mosely, 408 U.S. 92, 102 n.8 (1972); *see also* CHEMERINSKY, *supra* note 114, § 11.1.2, at 750-56 (discussing four basic reasons why free speech is considered fundamental right).

[350] *See* GERARD, *supra* note 30, § 2.08(2), at 50 (discussing decision in *Moseley*, 408 U.S. at 92, in which Court extensively discussed First Amendment but rested its ruling on equal protection grounds); *see also* CHEMERINSKY, *supra* note 114, § 10.1.1, at 639 (noting that "little depends on whether the Court uses due process or equal protection as the basis for protecting a fundamental right" because review under either would involve a strict scrutiny analysis); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 206 (1983) (suggesting that adding equal protection clause to analysis under First Amendment "adds nothing constructive to the analysis" but may, "by

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have already been discussed, this section will analyze equal protection only as it relates to classifications.

Assuming that neither a suspect class nor gender are impacted by enforcement of zoning ordinances, rational basis review applies. Under this standard of review, the person challenging the law bears the burden to show that the law's application is not "rationally related to a legitimate government purpose."[351] As long as a court can "conceive any legitimate purpose, even if it was not the government's actual purpose," the law will be upheld.[352] Few laws have failed this extremely deferential standard.[353]

Although cities may zone to protect the public's health, safety, morals or general welfare,[354] the application of a zoning ordinance might be deemed unconstitutional under rational basis review if it rests on an "irrational prejudice" against the group subject to discrimination.[355] In *City of Cleburne v. Cleburne Living Center*,[356] for example, the Supreme Court reviewed a city's denial of a special use permit for the operation of a group home for the mentally disabled in a residential neighborhood.[357] Although the court refused to recognize the mentally disabled as a quasi-suspect class like gender that would receive intermediate scrutiny,[358] it did hold that the permit requirement could not withstand rational basis review.[359] The Court stated that "some objectives—such as a 'bare . . .

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appearing to 'simplify' matters, deflect attention from the central constitutional issue").

[351] *See* CHEMERINSKY, *supra* note 114, § 9.2.1, at 533-34 (discussing Supreme Court's articulation of rational basis standard in *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); and *Lindsley v. Natural Carbonic Gas. Co.*, 220 U.S. 61, 78-79 (1911)).

[352] *See id.* § 9.2.1, at 535.

[353] *See id.* § 9.1.2, at 530; *see also id.* § 9.2.1, at 535-36 (discussing cases in which laws have not passed rational basis test). For a discussion of the history of federal rational basis review and how it has been applied, see Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 238-250 (1998).

[354] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[355] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985).

[356] 473 U.S. 432 (1985).

[357] *See id.* at 436-37.

[358] *See id.* at 442-43 ("[The mentally disabled are] different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.").

[359] *See id.* at 450.

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desire to harm a politically unpopular group,' are not legitimate state interests."[360] Further, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like."[361]

Although some have argued that the Court's analysis in *City of Cleburne* involved a "more rigorous version of the rational basis test—one with 'bite,'"[362] it would be unlikely that the discrimination involved in excluding voyeur residences would receive that type of review. First, computer exhibitionists and the mentally disabled are fundamentally different. In *City of Cleburne*, the Court stated:

> [T]he distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrated not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.[363]

Here, there is no such need; Voyeur Dorm can take care of itself.

Second, it is well-recognized that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process."[364] In *Railway Express Agency v. New York*,[365] for example, the Supreme Court reviewed a law that prohibited the use of "advertising vehicles," but allowed incidental advertising on vehicles "engaged in the usual business or

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[360] *Id.* at 446-47 (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (citation omitted from text)).

[361] *Id.* at 448.

[362] CHEMERINSKY, *supra* note 114, § 9.2.1, at 536 (citing Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 18-24 (1972); Jeffrey Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984)).

[363] *City of Cleburne*, 473 U.S. at 443.

[364] *Id.* at 440 (citing United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174 (1980); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (citations omitted from text)); *see also* Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (stating that zoning ordinance limiting number of non-related individuals in residence was "economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears 'a rational relationship to a (permissible) state objective.'" (citations omitted)).

[365] 336 U.S. 106 (1949).

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regular work of the owner."[366] There, the appellant owned a trucking business and rented the sides of the trucks for display of advertisements generally unconnected with the appellant's own business.[367] The appellant argued that vehicles that advertised businesses other than the owner's would create no greater distraction (prevention of which was the purpose of the regulation) than vehicles that advertised only the owner's business.[368] The Court rejected this argument, finding that the different treatment was rationally related to the city's purpose despite the fact that it was underinclusive.[369] As the Court explained:

> It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.[370]

An equal protection claim by a voyeur residence would probably suffer a similar fate under rational basis review. Like the ordinance in *Railway Express Agency*, the distinction made by adult use zoning ordinances like Tampa's is one based on economics; whereas landowners who use their homes as the settings for non-fee-based voyeur Web sites are allowed to use their land for that activity, landowners who engage in the same type of behavior for consideration (thereby constituting an adult use) cannot. A voyeur residence challenging this distinction would have to show that no reasonable connection exists between application of the ordinance—an absolute ban on adult use establishments in residential neighborhoods—and a legitimate government purpose. A rational connection is likely.

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[366] *Id.* at 107-08.

[367] *Id.* at 108.

[368] *See id.* at 109-10 ("It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. Yet the regulation allows the latter to do what the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.").

[369] *Id.* at 110.

[370] *Id.*

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In *15192 Thirteen Mile Road, Inc. v. City of Warren*,[371] for example, a federal district court reviewed a zoning ordinance that, among other things, prohibited location of adult businesses within five hundred feet of residential zones or existing residential uses.[372] The ordinance, which is similar to the Tampa ordinance, was found to have a legitimate purpose, "the preservation of family life and the protection of its neighborhoods."[373] It is no far stretch to imagine that enforcement of a zoning ordinance against a voyeur residence would be based on a similar purpose, even if there is no visual distinction between the voyeur residence and other homes in the neighborhood. It is possible that a city might consider the mere knowledge of an adult use in the neighborhood to be a detrimental impact on the residential area and its residents, even if the use is hidden behind the façade of a regular house, because it arguably detracts from the residential atmosphere. Further, like other adult businesses, the use may result in secondary effects such as drawing a criminal element (stalkers or other sexual predators) into the neighborhood or encouraging the establishment of similar "hidden" adult uses in the neighborhood. Thus, under rational basis review, a challenge to enforcement of zoning ordinances against voyeur residences based on equal protection would probably prove unsuccessful.

III. ALTERNATIVES TO ZONING

Even if local governments can use their zoning power to exclude voyeur residences from residential areas, zoning may be a premature response to an undefined threat. At this point in time, it is unclear whether voyeur residences will result in the same types of secondary effects that result from other types of adult uses and it is unknown whether the general public will find the location of voyeur residences in residential neighborhoods to be morally offensive. In light of these unknowns, other land use mechanisms, such as the law of servitudes and the law of nuisance, may serve as a better response to voyeur residences because they avoid unnecessary intrusion into activities within the home and avoid presumptions that may, in fact, be groundless.

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[371] 626 F. Supp. 803 (E.D. Mich. 1985).

[372] *Id.* at 808-09.

[373] *Id.* at 813 ("[The City of] Warren acted to minimize the adverse impact which adult uses have on residential areas, much in the same way it has acted to minimize the impact of industrial areas on residential areas.").

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A. Restrictive Covenants

If zoning ordinances could not be used as a means to regulate voyeur residences in neighborhoods or if a municipality chose not to enforce the ordinance, private regulation of voyeur residences may be possible through the law of servitudes. Restrictive covenants provide a means for landowners to regulate the land use of their neighbors through binding promises.[374]

Covenants that run with the land allow a landowner not only to bind the current owner of the neighboring land, but also subsequent persons with an interest in the land who are in privity with the covenanting party or who are on notice of the covenant.[375] Because restrictive covenants encumber the land burdened with the covenant, courts tend to interpret such covenants narrowly and in favor of land use free of restrictions.[376] Covenants created to benefit a residential subdivision, however, are seen as not only burdening each parcel of land in the subdivision, but also as benefiting them as well.[377] As reciprocal covenants, courts tend to give subdivision covenants greater leeway because of the mutual benefits conferred.[378]

Subdivision covenants (the covenants most relevant to this discussion) form a large part of the restrictive covenants in use today.[379] Covenants restricting parcels in a subdivision to single-family use or residential use are common. Whether a voyeur residence violates a restrictive covenant would depend largely on the wording of the covenant at issue. Courts generally construe residential use covenants as allowing incidental uses

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[374] *See* CUNNINGHAM, ET AL., *supra* note 44, § 8.13, at 469-73.

[375] *See id.* §§ 8.17-8.18, 8.28, at 476-80, 492-94. "Running covenants" can be either real covenants or equitable servitudes. Real covenants run at law and breaches of such are remedied with money damages. Equitable servitudes sound in equity and breaches are subject to equitable relief only. *See* JUERGENSMEYER & ROBERTS, *supra* note 44, § 15.4, at 657.

[376] *See* CUNNINGHAM, ET AL., *supra* note 44, § 8.13, at 467. Some jurisdictions, however, appear to have reversed this common law presumption by requiring a liberal construction of residential covenants. *See, e.g.*, Tex. Prop'y Code § 202.003(b) (1999) ("A dedicatory instrument or restrictive covenant may not be construed to prevent the use of property as a family home. However, any restrictive covenant that applies to property used as a family home shall be liberally construed to give effect to its purposes and intent except to the extent that the construction would restrict the use as a family home."); *see also* Ashcreek Homeowner's Ass'n, Inc. v. Smith, 902 S.W.2d 586, 588-89 (Tex. App.—Houston [1st Dist.] 1995) (finding no conflict between Tex. Prop'y Code § 202.003 and the common law construction of restrictive covenants).

[377] *See* CUNNINGHAM, ET AL., *supra* note 44, § 8.13, at 467.

[378] *See id.*

[379] *See id.*

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of a home for non-residential purposes.[380] Thus, residential use covenants serve as a private version of the home occupation provisions in zoning ordinances. Jurisdictions vary over what types of activities violate residential use covenants. Some courts, for example, have not found covenant violations where homes have been incidentally used for beauty shops, professional services, boarding houses, schools, and religious gatherings.[381] Other courts have found such uses to be violations of restrictive covenants.[382]

Firm guidance is unavailable for determining when a particular use will violate a residential covenant, but factors that courts look to include whether the use alters the physical appearance of the dwelling, whether advertisement of the use takes place, whether the dwelling is used primarily as an income source rather than a personal residence, and whether the dwelling is open to the public.[383] The *Restatement of Property* notes special considerations regarding subdivision covenants:

> In subdivisions and common interest residential communities with

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[380] *See* C.D. Sumner, Annotation, *Incidental Use of Dwelling for Business or Professional Purposes as Violation of Covenant Restricting Use to Residential Purposes*, 21 A.L.R.3d 641 (2000).

[381] *See, e.g.*, Sissel v. Smither, 250 S.E.2d 463, 464-657 (Ga. 1978) (operating beauty shop); Shoaf v. Bland, 69 S.E.2d 258, 261 (Ga. 1952) (teaching kindergarten classes); John Hancock Mut. Life Ins. Co. v. Davis, 160 S.E. 393, 393 (Ga. 1931) (boarding house); Briggs v. Hendricks, 197 S.W.2d 511, 513 (Tex. Civ. App. 1946) (providing physician's services); Hunter Tract Improv. Co. v. Corp. of Catholic Bishop, 167 P. 100, 101-02 (Wash. 1917) (performing religious services).

[382] *See, e.g.*, Ellis v. Dearing, 435 So. 2d 1107, 1109 (La. App. 1983) (operating beauty shop); Grubb v. Guilford Assoc., 178 A.2d 886, 138 (1962) (providing physician's services); Proetz v. Central Dist. of Christian & Missionary Alliance, 191 S.W.2d 273, 277 (Mo. App. 1945) (religious services); Kiernan v. Snowden, 123 N.Y.S.2d 895, 899 (Sup. Ct. 1953) (operating boarding house); Sumerlin v. Cox, 344 S.W.2d 742, 743 (Tex. Civ. App. 1961) (teaching music classes).

Group homes often pose a problem for single-family or residential use covenants and courts have inconsistently interpreted the meaning of the covenants, sometimes allowing the group home and sometimes barring it from the neighborhood. *See* Dirk Hubbard, Note, *Group Homes and Restrictive Covenants*, 57 UMKC L. REV. 135, 138-40 (1988); *see also* Robert D. Brussack, *Group Homes, Families and Meanings in the Law of Subdivision Covenants*, 16 GA. L. REV. 33, 52-71 (1981) (providing detailed discussion of courts' interpretations of term "family" in context of applying restrictive covenants to group homes).

[383] *See, e.g.*, Daniels Gardens, Inc. v. Hilyard, 49 A.2d 721, 725 (Del. Ch. 1946) (physical appearance of dwelling); N.H. Engle & Sons, Inc. v. Laurich, 240 N.E.2d 9, 13 (Ill. App. 1968) (outside changes and activities and frequency of public visitation); Swineford v. Nichols, 177 N.E.2d 304, 310 (Ohio Ct. C.P. 1961) (advertisements); Epstein v. Rabinowitz, 83 Pa. D. & C. 197 (1952) (public nature of use); Southampton Civic Club v. Couch, 322 S.W.2d 516, 520 (Tex. 1958) (use as income source), *set aside on different grounds on rehearing*, 2 Tex. Sup. Ct. J. 229 (Tex. 1959).

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> reciprocal servitudes, the legitimate interests of the landowners in controlling activities of other landowners are generally limited to controlling use of common areas and controlling activities that create external effects in the neighborhood. Use of servitudes to control activity involving the exercise of fundamental rights on individually owned property is generally not legitimate unless the activity produces spillover effects that have an adverse impact on other property in the subdivision or community.[384]

Assuming that a voyeur residence has no negative secondary effects and using the factors stated above, it is possible, though not certain, that a court would find that operation of a voyeur residence would not violate a restrictive covenant, unless, of course, the covenant specifically restricted that type or similar types of uses. First, using Voyeur Dorm as an example, use of the house as a voyeur residence has resulted in no outward changes to the appearance of the home. It retains its residential characteristics and is indistinguishable from other homes in the neighborhood. Indeed, as previously mentioned, the outward character of the house was so unremarkable that neighbors of Voyeur Dorm were unaware of the voyeur residence's existence until the media exposed its location to the general public.

Second, the only advertising relating to Voyeur Dorm takes place on the Internet or in other forms of media, but even there, the advertising relates to the voyeur Web site and not the voyeur residence. No advertising is placed on the outside of the voyeur residence, mainly because it is desirable to keep the physical location undisclosed.

Third, part of the concept of Voyeur Dorm is that the residents live their normal lives, using the house as their residence. Although Voyeur Dorm may be an income source for the owners of Voyeur Dorm, the principal use of the house for the residents is as a home; any income the residents receive is arguably incidental to their primary usage of the house as their home. The residential use would occur regardless of whether the activity were being webcast and regardless of whether there was income.

Finally, voyeur residences, including Voyeur Dorm, are not open to the public any more than any other typical residence. Again, the residents are supposed to live their normal lives on camera. This type of activity may include visits from friends, neighbors, relatives, and the like, but, like a regular home, it is not open to the general public.

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[384] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 cmt. k (1998).

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The above analysis is based on the presumption, of course, that the use will result in no negative secondary effects. If there are secondary effects, the neighborhood would have a greater interest in enforcement of a restrictive covenant and a court would likely find a violation of the covenant. If no external impacts existed, refusal to enforce the covenant would not violate public policy.[385]

Use of restrictive covenants to regulate voyeur residences may be a better option than use of zoning regulations because it allows the people who will be most impacted by the residences—the neighbors—to choose whether to force the voyeur residences to relocate elsewhere. If no detrimental impacts result, the neighbors may choose to turn a blind eye to the activity, and even if some neighbors seek enforcement of the covenant, a court might refuse to enforce it if it is low-impact and a social benefit inures to the activity.[386] Although it is arguable whether computer exhibitionism is a social benefit, one could say that a covenant should not be enforced against a voyeur residence because of the danger of suppressing speech. Further, even if a neighborhood decided to seek enforcement of the covenant based on moral considerations rather than secondary effects, the neighbors who are impacted by the activity are the ones who would decide what is morally offensive and not local government officials who are farther removed from the impacts.

Moreover, because local government officials are subject to political pressures, they may be influenced by residents of other neighborhoods who fear the intrusion of voyeur residences within their own neighborhoods. By using residential covenants, each neighborhood could decide on its own whether to allow the operation of voyeur residences in the area. Of course, the problem that one encounters with this argument is that neighborhoods that are better off socio-economically will not only have the resources to seek enforcement of the covenant but also may have greater incentive to enforce the covenants to

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[385] *Cf.* Katharine N. Rosenberry, *Home Businesses, Llamas and Aluminum Siding: Trends in Covenant Enforcement*, 31 J. MARSHALL L. REV. 443, 456-57 (1998) (arguing that modern courts will likely find no violation of residential use covenant by home business that has minimal external impacts).

[386] For example, residential neighborhoods often ignore in-home child care facilities located in the neighborhood because of the social benefit that results from their operation. *See, e.g., id.* at 460-61; Heidi Marie Flinn, Note, *The Necessary Application of the Contract Clause to Cases Involving Restrictive Covenants and Group Family Day Care Homes*, 27 FORDHAM URB. L.J. 1793, 1801 (2000). *See generally* Annotation, Children's Day-Care Use as Violation of Restrictive Covenant, 29 A.L.R. 4th 730 (1996) (listing cases in which courts have considered whether use of premises for children's day care violates restrictive covenant).

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protect property values. This disparity in enforcement ability may result in the greater location of voyeur residences in lower socio-economic neighborhoods. Whether the number of voyeur residences would increase to such a degree that problems would arise, however, remains to be seen.

B. Nuisance

Assuming that voyeur residences could be prohibited through zoning regulations or through private restrictive covenants, the question that must be considered is whether those types of land use controls should be used to regulate voyeur residences. Strictly from the standpoint of land use regulation, one must ask whether it is wise to enforce zoning ordinances or restrictive covenants against voyeur residences when secondary effects currently seem unlikely. Such a decision has greater importance when one considers the potential impact exclusion of voyeur residences might have on other home-based computer businesses. Professor Katharine Rosenberry, for example, has noted that by the year 2014, eighty percent of the United States workforce will telecommute or otherwise work out of their homes.[387] She suggests that the interpretation of covenants as allowing home occupations with minimal external impacts will result in numerous benefits to society, including a great reduction in traffic and its accompanying pollution as well as contributing to a more stable home life for children with working parents.[388] Although from a moralistic standpoint, voyeur residences are less palatable than, say, a stock broker trading from a home computer or a computer programmer designing software at home, the crucial question local governments and neighborhoods face is whether voyeur residences are so distasteful that it is worth setting a dangerous precedent by enforcing the ordinance or covenant.

Because of the potential, not only for limiting other home businesses, but also for infringing constitutional rights, a better mode of regulation would be to resort to the law of nuisance. Nuisance law is a more cautious approach to land use regulation, requiring an individualized analysis rather than blanket restrictions like those used in zoning or restrictive covenants.

If operation of a voyeur residence in a residential area were to create unreasonable secondary effects, a neighborhood could challenge the

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[387] Rosenberry, *supra* note 385, at 457 (citing Robert Treadway, Community of the Future, Remarks Before the Community Associations Institute (May 2, 1997)).

[388] *Id.* at 457.

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activity as either a public or private nuisance.[389] Many states have public nuisance laws that allow abatement of activities to protect health and safety and to promote morality.[390] Although public nuisances originally involved only criminal activity invasive to the rights of the public at large,[391] a public nuisance now is commonly understood as "an unreasonable interference with a right common to the public that impairs the health, safety, morals or comfort of the community."[392] In the majority of jurisdictions, an activity will constitute a public nuisance even if the infringement of the public right impacts only one or a small number of people.[393] In a small number of jurisdictions, however, the infringement must impact a large number of persons or a community before the nuisance will be considered public.[394]

Considering the hidden nature of voyeur residences, it is questionable whether operation of one in a residential neighborhood would rise to the level of a public nuisance. Of course, if negative secondary effects like increased crime, drug use or prostitution were to result from the operation of the business, public nuisance doctrine could step in to abate the nuisance. Indeed, broadly worded public nuisance provisions have

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[389] The difference between the two lies in the nature of the interest invaded by the alleged nuisance. *See* JUERGENSMEYER & ROBERTS, *supra* note 44, § 14.2, at 636; *see also* Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 705 (Ariz. 1972) ("The difference between a private nuisance and a public nuisance is generally one of degree. A private nuisance is one affecting a single individual or a definite small number of persons in the enjoyment of private rights not common to the public, while a public nuisance is one affecting the rights enjoyed by citizens as part of the public. To constitute a public nuisance, the nuisance must affect a considerable number of people or an entire community or neighborhood."). A single activity, however, may constitute both a public and a private nuisance. *See, e.g., id.* at 705 (determining that cattle feed operations adjacent to a residential neighborhood constituted both public and private nuisance).

[390] *See* Spector, *supra* note 303, at 554-55 (noting that public nuisance statutes have included prostitution, illegal alcohol sales, and gambling as immoral activities). Political bodies may legislatively declare an activity a public nuisance, even when that activity would not have been designated such at common law. *See* JUERGENSMEYER & ROBERTS, *supra* note 44, § 14.2, at 637. Professor Mary Spector notes the broad range of activities that may fall within a legislatively enacted public nuisance: "Today, legislatures define public nuisance to include such things as "cruising," maintaining a usurious small loan business, failing to immunize cattle, distributing pornography, and bull-fighting. In Ohio, the public nuisance statute contains seven separate categories of public nuisance conduct. In Arizona the number is twenty." Spector, *supra* note 303, at 559-60 (footnotes omitted).

[391] *See* Spector, *supra* note 303, at 449-51; *see also* Janet Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 37 CAMBRIDGE L.J. 144, 144-45 (1978).

[392] JUERGENSMEYER & ROBERTS, *supra* note 44, § 14.1, at 635.

[393] *See* L. Mark Walker & Dale E. Cottingham, *An Abridged Primer on the Law of Public Nuisance*, 30 TULSA L.J. 355, 357 (1994).

[394] *See id.* at 358; *see also* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 88, at 585 (4th ed. 1971).

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already provided coverage in some jurisdictions for concerns not present at the time the public nuisance statutes were written, such as coverage for environmental problems, pornography and gang-related activity.[395]

Even if a voyeur residence did not amount to a public nuisance, individuals within the neighborhood could claim a private nuisance if voyeur residence activity became unreasonable. Because of jurisdictional differences and the case-by-case nature of nuisance actions, creating a universal definition for private nuisance is difficult. Courts, as well as the *Restatement of Torts*, however, have generally described private nuisances as the unreasonable interference with a person's use, possession or enjoyment of his or her land.[396] Liability will only lie if the invasion is "intentional and unreasonable, or unintentional and otherwise actionable under rules of negligence, reckless conduct or abnormally dangerous situations."[397] Although most jurisdictions continue to limit private nuisance to its original coverage of injuries to property rights,[398] some jurisdictions have expanded the scope to include injury to personal rights as well.[399]

Reliance on nuisance law for regulating voyeur residences ensures that a neighborhood must wait to determine whether negative effects result from the activity before it can limit a neighbor's rights. If no detrimental effects result, no regulation is necessary. Because voyeur residences

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[395] *See* Spector, *supra* note 303, at 560 (citing Fehlhaber v. North Carolina, 675 F.2d 1365 (4th Cir. 1981)); People v. Acuna, 929 P.2d 596, 613-14 (Cal. 1997), *cert. denied sub nom.* 521 U.S. 1121 (1997); Commonwealth v. Barnes & Tucker Co., 319 A.2d 871 (Pa. 1974).

[396] *See, e.g.*, Graber v. City of Peoria, 753 P.2d 1209, 1211 (Ariz. App. 1988) ("A nuisance is a condition which represents an unreasonable interference with another person's use and enjoyment of his property and causes damage."); Mercer v. Keynton, 163 So. 411, 413-14 (Fla. 1935) ("Anything which annoys or disturbs one in the free use, possession, or enjoyment of his property or which renders its ordinary use or occupation physically uncomfortable may become a nuisance and may be restrained."); Phillips Ranch, Inc. v. Banta, 543 P.2d 1035, 1039 (Or. 1975) (en banc) (defining private nuisance as "invasion of plaintiff's interest in the reasonable use and enjoyment of his land" and noting that "invasion can be caused by defendant's conduct which is either intentional, negligent, reckless or ultrahazardous"); RESTATEMENT (SECOND) OF TORTS § 821D (1977) (defining private nuisance as "nontrespassory invasion of another's interest in the private use and enjoyment of land").

[397] JUERGENSMEYER & ROBERTS, *supra* note 44, § 14.1, at 635; *see also* RESTATEMENT (SECOND) OF TORTS § 822 (1977).

[398] *See* DANIEL R. MANDELKER, LAND USE LAW § 4.02, at 98 (4th ed. 1997); *see also* Loengard, *supra* note 391 (describing origins of private nuisance action as action to protect property rights).

[399] *See, e.g.*, Mahoney v. Walter, 205 S.E.2d 692, 697 (W. Va. 1974) ("A nuisance is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort." (citations omitted)).

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raise potential constitutional issues like free speech and privacy, the wisest course of action may be to restrain the reach of the state and its citizens in close cases like voyeur residences until a need for regulation is shown.[400] Because courts are treading new water with the Internet, use of nuisance law will ensure that land use regulations will not be inappropriately used to regulate the content of this medium.

CONCLUSION

Although we may know everything that goes on in a computer exhibitionist's every day life, from the legal standpoint, voyeur residences are an unknown quantity. Whether location of a voyeur residence in a residential neighborhood will have a detrimental impact on the surrounding area is unclear. Whether the general public would be morally offended by a voyeur residence is also unclear. Because of these uncertainties, it is difficult to predict what constitutional rights, if any, may be infringed by exclusion of voyeur residences from residential areas, nor is it clear what impact will result to other home-based computer businesses that have no external impacts. Although governmental authorities and neighbors with restrictive covenants quite possibly have the right to exclude voyeur residences from residential areas, they should exercise restraint because of the potential impacts from enforcement and should instead turn to nuisance law for control of external impacts. Only if those impacts turn out to be greater than first imagined should more restrictive controls be implemented.

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[400] Of course, one might argue that failure to enforce a restrictive covenant will result in waiver of other covenant violations, but because of the presumable lack of external effects, it would be likely that a court would not deem failure to enforce a covenant against a voyeur residence as a blanket waiver of all residential restrictions.

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