Local Regulation of Pornography

This article recommends that obscenity be regulated by means of local nuisance ordinances prescribing abatement of those aspects of the exhibition or sale of pornography that offend the community. Such means of regulation is less likely than anti-pornography zoning ordinances to infringe upon First Amendment interests of patrons or proprietors of adult bookstores or theatres. Moreover, as demonstrated in this article, nuisance ordinances are preferable as time, place, and manner regulations.

That the regulation of obscenity and pornography[1] is a matter of immediate public concern in California is evidenced by the several recent California cases concerning this area of law.[2] California communities are attempting to reconcile the interests of the patrons of adult bookstores and theatres with the interests of those who see such establishments as threats to moral and proprietary values.[3] The

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[1] The term "obscenity" is used in its legal sense. *See* text accompanying note 17 *infra*. The term "pornography" according to WEBSTER'S THIRD INTERNATIONAL DICTIONARY (unabridged) means "a depiction . . . of . . . lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Although that which is legally obscene is always pornographic, not all pornography is legally obscene.

[2] *See, e.g.*, People *ex rel.* Busch v. Projection Room Theater, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328 (1976); Bloom v. Municipal Court, 16 Cal. 3d 71, 545 P.2d 229, 127 Cal. Rptr. 317 (1976); Carl v. City of Los Angeles, 61 Cal. App. 3d 265, 132 Cal. Rptr. 365 (2d Dist. 1976); People *ex rel.* Camil v. Buena Vista Cinema, 57 Cal. App. 3d 497, 129 Cal. Rptr. 315 (2d Dist. 1976); Gould v. People *ex. rel.* Busch, 56 Cal. App. 3d 909, 128 Cal. Rptr. 743 (2d Dist. 1976).

[3] Attorney Robert Morgan of San Jose, California, is an outspoken supporter of a San Jose zoning ordinance to restrict the location of adult bookstores and theatres. According to Mr. Morgan the purpose of the ordinance is not to suppress pornography, but only to preserve the character of "a downtown area more compatible with the American family than with the hookers, pimps and prostitutes." Letter from Robert Morgan to author (Nov. 2, 1976) (on file with U.C. Davis L. Rev.).

Attorney Joseph Rhine is counsel for a South San Francisco proprietor of an adult bookstore. He views local ordinances restricting the location of adult bookstores as attempts by "local officials [to] keep the decision [of whether such bookstores offend the community] to themselves and away from a jury of their neighbors." Mr. Rhine concludes: "I do not think we elect officials . . . to make those decisions. I think such . . . decision[s] . . . inflict the will of a minority on the will of a majority. . . ." Letter from Joseph Rhine to author (Jan. 26, 1977) (on file with U.C. Davis L. Rev.).

The opinions of attorneys Morgan and Rhine illustrate the division of opinion concerning local regulation of adult bookstores and theatres. According to a

premise of this article is that a compromise solution is preferable to either a laissez-faire approach that allows adult establishments to operate wherever and however the pornography market dictates, or a repressive approach that prohibits even the inoffensively-operated adult establishment. Government has a legitimate interest in protecting the rights of those who prefer not to be exposed to pornography, so long as the First Amendment[4] interests of consumers and distributors of pornography are protected.

The second premise of this article is that the regulation of adult bookstores and theatres is a matter best left to local government. Those who are most directly affected by the presence of adult bookstores or theatres are most qualified to determine whether these establishments detract from the quality of life in their local community, and if so, how the injurious effect can be remedied. The inner city dweller whose children daily pass an adult theatre on their way to school may have little sympathy with the liberal suburbanite's fear that any regulation of adult establishments threatens First Amendment freedoms. Likewise, if a discreetly-operated theatre does not offend local residents, nonresident crusaders against pronography can assert no legitimate interest in support of its closure. Local government is more likely than state or national government to be responsive to the specific concerns of local residents, whether patrons or opponents of adult establishments. General theories regarding the effect of adult establishments upon community values can be empirically tested by the presence of such establishments within the community. Local government can tailor the regulation of adult bookstores and theatres to remedy the specific offenses—if any—they have caused.

Local governments have tried different ways to reconcile the interests of the consumers of pornography with those of its opponents. Local ordinances have been enacted, declaring exhibition or sale of pornography under certain circumstances to be a public nuisance.[5] California state nuisance statutes have been applied by

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recent Gallup poll:

> Although the American people in recent years have grown far more liberal in their sexual attitudes, only a small percentage favor a relaxation in community standards regarding the sale of sexually explicit material. Nationwide, 45 per cent say local standards should be tougher, compared with 6 per cent who say they should be less strict; 35 per cent feel they should be kept as they are now.

San Francisco Chronicle, April 4, 1977, at 4, Col. 5.

[4] U.S. CONST. AMEND. I provides in pertinent part: "Congress shall make no law . . . abridging freedom of speech, or of the press. . . ." The First Amendment applies to the states through the due process clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

[5] DUARTE, CAL., ORDINANCE 369 (Nov. 12, 1974), *construed in* People *ex rel.* Camil v. Buena Vista Cinema, 57 Cal. App. 3d 497, 501, 129 Cal. Rptr. 315, 317 (2d Dist. 1976).

city and district attorneys against adult bookstores and theatres.[6] Zoning ordinances have been enacted to restrict the location of such establishments.[7]

This article examines these three means by which local governments in California might reconcile the interests of the consumers of pornography with the interests of those who oppose the sale or exhibition of pornography within their particular communities. Because the focus is on how to regulate adult bookstores and theatres, the underlying assumption is that government has a legitimate interest in restricting the manner in which pornography may be sold or exhibited. Since legitimate challenges to this assumption have been offered, the epilogue to this article briefly presents the argument that governmental regulation of obscenity or pornography is never justified.[8]

I. BUSCH: ADULT BOOKSTORES AND THEATRES MAY NOT BE ABATED

In *People ex rel. Busch v. Projection Room Theatre*,[9] city officials brought civil[10] abatement proceedings to close down several adult bookstores and theatres. The officials alleged that the establishments in question were "indecent and offensive to . . . the community," and hence constituted public nuisances.[11] The California Supreme Court ruled that adult bookstores and theatres may not be abated

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[6] CAL. PEN. CODE § 370 (West 1970), CAL. CIV. CODE § 3479 (1970), *construed in* People *ex rel.* Busch v. Projection Room Theater, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328 (1976).

[7] DETROIT, MICH., ORDINANCES 742-G and 743-G (Nov. 2, 1972), *construed in* Young v. American Mini Theatres, Inc., 427 U.S. 50, 52 (1976).

[8] *See* text accompanying note 94 *infra*.

[9] 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328 (1976).

[10] California has both civil and criminal nuisance statutes, but their definitions of public nuisance are substantially identical. Compare CAL. PEN. CODE § 370 (West 1970) with CAL. CIV. CODE § 3479 (West 1970). A public nuisance is that which is "indecent or offensive. . . . to the community."

For city officials seeking abatement of an adult bookstore or theatre, a civil nuisance action is preferable to a criminal nuisance prosecution. To prevail in a criminal proceeding the prosecution must prove its case beyond a reasonable doubt, while in a civil proceeding plaintiff need only prove its case by a preponderance of the evidence. E. CLEARY *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 339 (2d ed. 1972).

Prosecution of bookstore or theatre proprietors under the state obscenity statutes is an inadequate remedy for officials seeking to abate adult bookstores or theatres. Conviction of the proprietor does not necessarily result in closure of the business. *See* Comment, *Can an Adult Theater or Bookstore Be Abated as a Public Nuisance in California?* 10 U.S.F. L. REV. 115, 116-17 (1975).

[11] 17 Cal. 3d at 48-49, 550 P.2d at 603, 130 Cal. Rptr. at 331. City officials also sought abatement of the bookstores and theatres pursuant to the one-year closure remedy prescribed by the Red Light Abatement Law. CAL. PEN. CODE §§ 11225-11231 (West 1970). But the court in *Busch* held that the Red Light Abatement Law, enacted to abate brothels, could not be applied to abate bookstores. 17 Cal. 3d at 61, 550 P.2d at 611, 130 Cal. Rptr. at 339.

under state nuisance statutes.[12]

In reaching this decision, the court held that abatement would infringe upon the First Amendment interests of the proprietors and patrons of these establishments. The exhibition or sale of pornography may be indecent and offensive to the community, but pornography that is not legally obscene is expression protected under the First Amendment.[13] Abatement of adult bookstores or theatres would suppress the exhibition or sale of presumptively protected expression.

Although it refused to allow abatement of an entire bookstore or theatre, the court in *Busch* held that a particular book or film may be abated as a nuisance providing it has been adjudged legally obscene.[14] Before ordering abatement of a book or film, the court must hold a "full adversary hearing" to determine the obscenity *vel non* of the matter in question.[15] If the book or film is adjudged obscene, it may be abated under state nuisance statutes. If it is not obscene, it is expression protected under the First Amendment and the city cannot prohibit its exhibition or sale.

The court in *Busch* applied the law of obscenity to limit the utility of public nuisance laws regulating adult bookstores and theatres. Since local officials may abate only matter adjudged obscene, this article will discuss the legal definition of obscenity and how local community standards help determine what is obscene. Next, this article will suggest alternative means by which localities may regulate adult bookstores and theatres while complying with the *Busch* rule that only obscene matter may be abated.

II. WHAT IS OBSCENE?

The California statute[16] defines obscenity in substantially the same way as the United States Supreme Court defined it in *Roth v. United States*[17] and *Miller v. California.*[18] The *Roth* decision is the "cornerstone of American obscenity law."[19] In holding that the First

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[12] 17 Cal. 3d at 58, 550 P.2d at 610, 130 Cal. Rptr. at 337. Abatement of an adult bookstore would impose a "prior restraint" on presumptively protected expression. The landmark "prior restraint" case was *Near v. Minnesota*, 283 U.S. 697 (1931). The case concerned a state nuisance statute allowing courts to enjoin publication of newspapers adjudged obscene or defamatory. The Court held the statute unconstitutional because the prescribed abatement of future publications infringed upon the First Amendment freedom of the press. *See generally* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955).

[13] 17 Cal. 3d at 58, 550 P.2d at 610, 130 Cal. Rptr. at 337-38.

[14] *Id.* at 57, 550 P.2d at 609, 130 Cal. Rptr. at 337.

[15] *Id.*

[16] CAL. PEN. CODE § 311 (West Supp. 1976).

[17] 354 U.S. 476 (1957).

[18] 413 U.S. 15 (1973).

[19] F. SCHAUER, THE LAW OF OBSCENITY 34 (1976). *See generally* A. CRAIG.,

Amendment does not protect obscenity, the Court defined expression as obscene when "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[20] In *Miller*, the Court expanded the *Roth* definition, requiring the following three qualities to coalesce in that which is legally obscene:

(1) to the average person applying contemporary community standards, the work taken as a whole appeals to the prurient interest;
(2) the work depicts in a "patently offensive way" sexual activities described by applicable state law;
(3) as a whole, the work "lacks serious literary, artistic, political or scientific value."[21]

Although the *Miller* definition allows only "hard core" material to be defined legally obscene,[22] not all "hard core" pornography is legally obscene under *Miller*. Such pornography may be exhibited in a community where the hypothetical "average person" is especially resistant to appeals to prurient interest. In such a case, the first prong of the *Miller* definition would not be satisfied. Or, a book or film may in fact offend a large proportion of the community but may not be "patently offensive" as a matter of law.[23] In such a case, the second prong of the *Miller* definition would not be satisfied. Or, under the third prong of the *Miller* definition, a basically "hard core" novel may contain sections of literary value. In none of these cases could the expression in question be adjudged legally obscene. If not legally obscene, such expression is protected under the First Amendment.

According to the first prong of the *Miller* definition, community standards determine whether matter is legally obscene. Thus the *Miller* definition allows a degree of local autonomy in the field of obscenity law. This autonomy is circumscribed, however, by the remaining two prongs of the *Miller* definition. Even if a book or film offends local community standards, it is not legally obscene unless it includes "patently offensive" depictions of sexual acts and is without literary value. If a book or film does include such depictions and is without literary value, local community standards determine whether it is obscene. Variation among juries as to what, by the ap-

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SUPPRESSED BOOKS, A HISTORY OF THE CONCEPTION OF LITERARY OBSCENITY (1963); Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954), and authorities in the field of obscenity law cited therein.

[20] 354 U.S. at 489.

[21] 413 U.S. at 24.

[22] *Id.* at 27.

[23] In *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974), the Court held that the popular film *Carnal Knowledge* was not legally obscene because it contained no "patently offensive" depictions of sexual acts. The jury's finding that the film was "prurient" by local community standards was not sufficient to make it obscene under *Miller*.

plication of local community standards, is obscene follows reasonably from the variations in mores among communities. As the United States Supreme Court has recognized, what is obscene in Maine may be "merely" pornographic in New York.[24]

Since *Busch*, city officials may bring civil nuisance proceedings against books or films that are likely to be adjudged obscene under *Miller*. But abatement of particular books or films is an inadequate remedy when the conduct of an adult bookstore or theatre in general is a nuisance to the community. Piecemeal abatement may eventually force a bookstore or theatre proprietor to close down or diversify if most of his inventory has been removed. Nonetheless, city officials require a more direct and sure means of regulating adult bookstores and theatres. To regulate the manner in which such businesses are conducted, city officials might apply nuisance laws as time, place and manner regulations.

III. Time, Place and Manner Regulations: The First Amendment Is Not Absolute

An exception to the general rule against regulation of constitutionally protected expression follows from the United States Supreme Court's sanction of time, place and manner regulations. In *Grayned v. City of Rockford*[25] the Court upheld a local ordinance that prohibited disruptive conduct near schools.[26] Civil rights demonstrators had been charged with violating the ordinance by picketing outside a school.[27] Although recognizing such picketing as a form of expression protected by the First Amendment, the Court upheld the charges.[28] The First Amendment, said the Court, does not prohibit local governments from enforcing time, place and manner regulations that relocate, but do not suppress, expression.[29] Whether a time, place and manner regulation is constitutionally permissible depends on "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[30]

In *Grayned*, the governmental interest in preventing school disruptions was balanced against the pickets' interest in conducting their demonstration next to a school.[31] Because the benefit of classroom order was greater than the burden of relocating the demonstration, the governmental interest prevailed.

The regulation of adult bookstores and theatres involves a similar

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[24] 413 U.S. at 32.
[25] 408 U.S. 104 (1972).
[26] *Id.* at 107-08.
[27] *Id.* at 106.
[28] *Id.* at 116.
[29] *Id.* at 115.
[30] *Id.* at 116.
[31] *Id.* at 117-19.

balance between competing interests. The governmental interest in preventing offense to those who choose not to view pornography must not infringe upon First Amendment interests of patrons and proprietors of adult establishments. But a *Grayned*-type time, place and manner regulation poses less of a threat to First Amendment interests than does regulation of the exhibition or sale of pornography. The blanket prohibition against disruptive demonstrations does not involve governmental regulation of expression on the basis of content. Disruptive demonstrations are prohibited, regardless of the content of the expression conveyed by the demonstrators. In contrast, regulation of the exhibition or sale of pornography restricts such exhibition or sale on the basis of the pornographic content of the matter regulated.

But a time, place and manner regulation restricting only the public display of pornography regulates content only incidentally. The target of such regulation is the manner in which pornography is publicly displayed, not pornography *per se*. Regulation of pornographic displays on the basis of content is justified because it is precisely that content, publicly displayed, that offends the community.[32]

IV. State Statutes Preempt Local Nuisance Ordinances in Fields of Sex-Related Activity and Expression

Local nuisance ordinances might serve as time, place and manner regulations accommodating the interests of patrons and proprietors of adult establishments with the interests of community residents who are offended by such establishments. The California Government Code delegates to local legislatures broad authority to enact nuisance ordinances.[33] But a California Court of Appeal recently held that state nuisance statutes preempt a local nuisance ordinance prescribing abatement of adult theatres.[34] According to this holding, a local ordinance may not declare adult bookstores or theatres to be a nuisance unless such establishments qualify as a nuisance under state statutes. Local authority to regulate adult establishments by

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[32] In *Young v. American Mini Theatres*, 421 U.S. 50 (1976), the United States Supreme Court reiterated the general principle that the First Amendment prohibits governmental regulation of expression on the basis of content. But the Court added that "we learned long ago that broad statements of principle are sometimes qualified by contrary decisions. . . . When we review this Court's actual adjudications in the First Amendment area, we find this to have been the case with the . . . principle that there may be no restriction . . . because of content." *Id.* at 65. The Court concluded that "though the First Amendment protects [pornography] from total suppression . . . the State may legitimately use the content of these materials as the basis for placing them in a different classification from other [materials]." *Id.* at 71. *See* text accompanying note 58 *infra*.

[33] CAL. GOV'T CODE § 38771 (West 1968).

[34] People *ex rel.* Camil v. Buena Vista Cinema, 57 Cal. App. 3d 497, 503, 129 Cal. Rptr. 315, 318 (2d Dist. 1976).

means of nuisance ordinances is restricted by state statutes defining nuisance and prescribing procedures for abatement.

Local nuisance ordinances regulating adult bookstores and theatres probably are preempted also by state obscenity statutes. It is settled in California that state statutes regulating sex-related activity preempt local regulations in the same field.[35] A local ordinance regulating sex-related activity is preempted even if it was enacted to further enforcement of a state statute.[36] By its comprehensive regulation in the field, the state legislature evidenced its intent to preempt local ordinances regulating sex-related activity.[37] Similarly, comprehensive state regulation of sex-related expression[38] indicates a legislative intent that state obscenity statutes preempt local ordinances regulating adult bookstores and theatres.

In California, then, the rule of state preemption prohibits local government from autonomously regulating the exhibition or sale of pornography. But the state legislature has authorized a limited exception to the preemption rule. By statutory delegation of state authority, localities may regulate topless and bottomless activity in bars.[39] To increase local control over regulation of adult bookstores and theatres, the state legislature might expand this limited exception to the rule of state preemption.

V. A Model for Local Autonomy: Penal Code Sections 318.5 and 318.6[40]

The state legislature enacted Penal Code sections 318.5 and 318.6 after the California Supreme Court's rulings that state statutes pre-

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[35] *In re* Moss, 58 Cal. 2d 117, 373 P.2d 425, 23 Cal. Rptr. 361 (1962) (state statutes regulating sexual activity preempt local ordinance prohibiting fornication); *In re* Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962) (state statutes regulating sex-related activity preempt local ordinance prohibiting obscene performances).

[36] Lancaster v. Municipal Court, 6 Cal. 3d 805, 807-808, 494 P.2d 681, 682, 100 Cal. Rptr. 609, 610 (1972).

[37] *In re* Lane, 58 Cal. 2d 99, 102-03, 372 P.2d 897, 899, 22 Cal. Rptr. 859 (1962).

[38] *See* CAL. PEN. CODE §§ 311-313.5 (West 1970).

[39] CAL. PEN. CODE §§ 318.5, 318.6 (West 1970).

[40] CAL. PEN. CODE §318.5 (West 1970) provides in pertinent part:

> Nothing in this code shall invalidate an ordinance of . . . a county or city, if such ordinance directly regulates the exposure of the genitals . . . buttocks . . . or . . . breasts of any . . . waiter, waitress, or entertainer . . . in an establishment which serves food [or] beverages. . . .
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> The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances.

CAL. PEN. CODE § 318.6 (West 1970) provides in pertinent part:

> Nothing in this code shall invalidate an ordinance of . . . a city or county, if such ordinance relates to any live acts, demonstrations, or

empt local ordinances in the field of sex-related activity.[41] These Penal Code sections permit local ordinances regulating topless and bottomless service in bars and restaurants and topless/bottomless performances in public places generally. The local legislature may choose to prohibit topless/bottomless dancing by declaring it to be a public nuisance subject to civil abatement proceedings instituted by the city attorney. Without Penal Code sections 318.5 and 318.6, state nuisance and obscenity statutes would preempt such a local nuisance ordinance.

To expand this limited exception to the rule of state preemption, the state legislature should enact a new enabling statute. The new statute should specify that state nuisance and obscenity statutes do not preempt local nuisance ordinances regulating adult bookstores and theatres. It might express a legislative intent that local communities' varying standards justify permitting them some discretion in regulating adult establishments within their borders according to their special circumstances.

For two reasons, the new enabling statute should specify that nuisance ordinances are the means by which local legislatures may regulate adult bookstores and theatres. The first reason is that a public nuisance, as something offensive to the community, is by definition a local phenomenon. A theatre marquee or a bookstore window display that offends the residents of a small farming community might blend unobtrusively into the surroundings in North Beach, San Francisco.

Secondly, a properly drawn nuisance ordinance would allow abatement of only those specific features of adult bookstores or theatres that can be proven to offend the community.[42] Since *Busch*, a broadly drawn nuisance ordinance prescribing abatement of entire bookstores or of matter that has not been adjudged legally obscene would be held in violation of the First Amendment. But a narrow ordinance prescribing abatement of specific offensive features of adult bookstores or theatres would avoid First Amendment prob-

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> exhibitions which occur in . . . places open to public view and involve the exposure of the private parts or buttocks of any participant, and if such ordinance prohibits . . . acts which are not expressly authorized or prohibited by this code.
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> The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances.

[41] *In re* Moss, 58 Cal. 2d 117, 373 P.2d 425, 23 Cal. Rptr. 361 (1962); *In re* Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

[42] *See* F. SCHAUER, THE LAW OF OBSCENITY 131 (1976). Recommended evidence to prove community standards includes: expert testimony by prominent community leaders or social scientists, regarding community mores; attitudinal surveys of community residents; samples of matter sold or exhibited within the community.

lems if it expressly prohibited abatement of entire bookstores or theatres or non-obscene books or films. Such an ordinance should be constitutionally permissible as a time, place and manner regulation.

VI. Local Nuisance Ordinances as Time, Place and Manner Regulations

In *Carl v. City of Los Angeles*[43] a California court of appeal considered a local nuisance ordinance that regulated sidewalk newsracks. The court struck down one provision of the ordinance on the grounds of state preemption.[44] The second provision, that the sidewalk display of newspapers with front-page nudity was a nuisance, was held unconstitutional.[45] The court held that prohibition of nudity on the front pages of newspapers sold in sidewalk racks constituted censorship of expression protected under the First Amendment.[46]

In support of its conclusion, the court cited the United States Supreme Court's decision in *Erznoznik v. Jacksonville.*[47] In *Erznoznik* the Court held unconstitutional a nuisance ordinance prohibiting exhibition of films which included nudity in drive-in theatres with screens visible from public streets.[48] The Court held that the blanket prohibition against all nudity in films visible from the street was not justified by a substantial governmental interest.[49] The Court reasoned that the purported governmental interest in protecting children from exposure to pornography did not justify the broad ban of nudity in even the most innocent contexts.[50] Further, the Court rejected the city's claim that a legitimate purpose of the ordinance was to prevent

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[43] 61 Cal. App. 3d 265, 132 Cal. Rptr. 365 (2d Dist. 1976). Shortly before this article went to print, the California Supreme Court decided *Kash Enterprises, Inc. v. City of Los Angeles.* 19 Cal. 3d 294, ___ P.2d ___, ___ Cal. Rptr. ___ (1977). At issue was an ordinance regulating the size and location of sidewalk newsracks. The ordinance also prohibited the public display of sexually-explicit photographs featured in the newspapers. Los Angeles, Cal, Municipal Code § 42.00 (1972). Because the ordinance prescribed removal of offending newsracks without prior notice to newsrack owners, the court struck down the ordinance as "a denial of procedural due process and as insufficiently sensitive to First Amendment rights." 19 Cal. 3d at 313, ___ Cal. Rptr. at ___, ___ P.2d at ___. However, the court added that localities legitimately may enforce time, place and manner regulations against offending newsracks, providing newsrack owners are "notified of . . . imminent seizure[s] and . . . given an opportunity . . . to cure the violation or to contest the seizure in an informal administrative forum." *Id. See also* Comment, *Restricting the Public Display of Offensive Materials,* 10 U.S.F. L. Rev. 232 (1975).

[44] 61 Cal. App. 3d at 269-70, 132 Cal. Rptr. at 368.

[45] *Id.* at 268, 132 Cal. Rptr. at 367.

[46] *Id.* at 273, 132 Cal. Rptr. at 370.

[47] 422 U.S. 205 (1975).

[48] *Id.* at 211-12.

[49] *Id.* at 215.

[50] *Id.* at 212-13.

offense to adults who did not wish to view nudity.[51] The Court ruled that the city had no legitimate interest in protecting adults who could easily avert their eyes from an offensive exhibition.

The California court in *Carl* compared the ordinance in *Erznoznik* with the newsrack ordinance, and held the governmental interest in preventing offense to sidewalk users insufficient to justify the prohibition against the display of newspapers featuring front-page nudity.[52] Rejecting the city's argument that the newsrack ordinance only restricted the manner in which such newspapers could be offered for sale, the court said: "Censorship is censorship."[53]

The holding in *Carl* may be criticized on the same ground as the *Erznoznik* holding on which it relied. The ordinances declared unconstitutional in these two cases should have been upheld as time, place and manner regulations. The ordinance in *Erznoznik* did not prescribe censorship of films featuring nudity, but only required that a drive-in theatre showing such films be located where the screen could not be seen from the street. The requirements of the ordinance would be met by a theatre operator who installed a high fence to block his screen from the street.

Likewise, the ordinance in *Carl* did not prescribe censorship of newspapers featuring nudity. At most, it required that if such newspapers were to be publicly displayed, the publisher would have to move the nude photographs off the front pages. But the requirements of the ordinance would be met if the front-page photographs were covered with removable paper bands, or if the newsracks themselves were covered.

The *Carl* court failed to contrast the weight of the burden the *Erznoznik* ordinance imposed upon theatre operators with the weight of the burden the newsrack ordinance imposed upon newsrack operators. Whether a time, place and manner regulation of expression is constitutionally permissible depends upon the degree to which the regulation infringes upon First Amendment interests, relative to the importance of the government interest served by the regulation.[54] The ordinance in *Erznoznik* posed a far greater threat to First Amendment interests than the ordinance in *Carl.* To relocate or adequately fence a drive-in theatre is a much heavier burden for the theatre owner than covering a newsrack is for the newsrack owner. The theatre owner is more likely to forego showing films featuring nudity than to suffer the costs of relocation or fencing, whereas the newsrack owner's expenses in covering his newsrack are relatively insignificant. It is unlikely that the requirements of the

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[51] *Id.* at 212.
[52] 61 Cal. App. 3d at 273, 276, 132 Cal. Rptr. at 370, 372.
[53] *Id.* at 275, 132 Cal. Rptr. at 371.
[54] *See* text accompanying note 31 *supra.*

newsrack ordinance will induce him to forego selling newspapers featuring nude photographs.

So despite *Erznoznik*, the *Carl* court should have upheld the newsrack ordinance. Balancing the governmental interest in preventing offense to sidewalk users against the burden on the publisher or newsrack owner who would have to cover front-page photographs, the governmental interest should prevail. The ordinance offered a compromise between the interests of those who buy and enjoy the newspapers, and the interests of those who are offended by the public display of nude photographs.

But even if the ordinance in *Carl* had been upheld as a time, place and manner regulation, it probably would have been held preempted by state statutes. Until the state legislature enacts an enabling statute allowing local regulation of the manner in which pornography is sold or exhibited, state nuisance statutes might serve as time, place and manner regulations. Because the state statutes broadly define nuisance as that which is "indecent or offensive to . . . the community,"[55] they provide no guidelines for proprietors of adult bookstores or theatres or sidewalk newsracks. Indeed, this failure to provide notice as to which aspects of the exhibition or sale of pornography are offensive might cause state nuisance statutes to be held impermissibly vague when applied as time, place and manner regulations.[56] But in the absence of local nuisance ordinances specifying that certain aspects of the exhibition or sale of pornography offend the community, city officials must rely upon state nuisance statutes as time, place and manner regulations.

VII. State Nuisance Statutes Applied as Time, Place and Manner Regulations

The California Supreme Court in *Busch* refused to allow abatement of adult bookstores or theatres pursuant to state nuisance laws. But civil abatement proceedings against particular offensive features of such establishments are not necessarily doomed. The state civil nuisance statutes might be applied as time, place and manner regulations, relocating, but not suppressing, expression. Thus an explicit and offensive window display might be abated as a public nuisance. The same display inside the adult bookstore would not be subject to abatement because only patrons of the bookstore would view it. If the nuisance caused by the manner in which pornography is sold can be remedied by a cover on a newsrack or by moving a window dis-

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[55] Cal. Pen. Code § 370 (West 1970), and Cal. Civ. Code § 3479 (West 1970).

[56] United States v. Cohen Grocery Co., 255 U.S. 81 (1921). *See generally* 1 B. Schwartz, A Commentary on the Constitution of the United States: Rights of the Person § 374 (1968).

play inside the bookstore, the patrons of the newsrack or the bookstore retain easy access to pornographic newspapers and books. Dealers in pornography retain the right to advertise in a manner inoffensive to passersby.[57] First Amendment interests of patrons and proprietors of adult establishments are not violated, and the sensibilities of those who are offended by pornography are respected.

Since the *Busch* decision, only particular books or films adjudged legally obscene may be abated as nuisances. Until the state legislature enacts an enabling statute permitting local regulation of adult bookstores and theatres, such local regulation is preempted by state obscenity and nuisance statutes. State nuisance statutes might be applied as time, place and manner regulations to abate particular offensive features of adult bookstores and theatres. But preferable to the vague state nuisance statutes would be local nuisance ordinances proscribing specific offensive aspects of the exhibition or sale of pornography.

VIII. MINI THEATRES: ZONING AS LOCAL REGULATION OF PORNOGRAPHY

Local zoning ordinances are an alternative means by which localities may regulate adult bookstores or theatres. Within days of the California Supreme Court's decision in *Busch*, the United States Supreme Court decided *Young v. American Mini Theatres.*[58] The subject of *Mini Theatres* was an "Anti-Skid Row" zoning ordinance enacted by the Detroit City Council after its determination that areas where adult bookstores and theatres concentrated declined in economic value and social quality.[59]

Under the terms of the ordinance, whether a theatre or bookstore is "adult" depends upon whether it is used to sell or exhibit "material distinguished . . . by an emphasis on matter depicting . . . 'Specified Sexual Activities' or 'Specified Anatomical Areas.'"[60] Included within these specified categories are sexual intercourse, "erotic touching," and even "male genitals in a discernibly turgid state, even if completely . . . covered."[61] The ordinance requires that adult bookstores and theatres locate at least 1,000 feet from one another, and at least 500 feet from residential areas.[62] A provision is included for special waiver of the ordinance requirements when a different location of a particular adult establishment is in the public interest.[63]

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[57]The bookstore operator, for example, might display a conspicuous advertisement reading, "Adult Materials Sold Here."

[58]427 U.S. 50 (1976).

[59]*Id.* at 54.

[60]*Id.* at 53 n.5.

[61]*Id.* at 53 n.4.

[62]*Id.* at 52.

[63]*Id.* at 54 n.7.

Operators of two adult movie theatres brought actions against Detroit city officials, seeking injunctions restraining enforcement of the ordinance and declaratory judgments that the ordinance was unconstitutional.[64] The theatre operators argued that the ordinance violated the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[65] The First Amendment claim was that the ordinance regulated constitutionally protected expression since it imposed restrictions on the exhibition or sale of pornography that had not been adjudged legally obscene.[66] The due process claim was that the ordinance too vaguely defined what was meant by matter "distinguished by an emphasis on" those specified "areas" and "activities."[67] The equal protection claim was that the ordinance discriminated against theatre operators on the basis of the [pornographic] content of their films.[68]

The Supreme Court held the Detroit ordinance immune from constitutional attacks based on either the First or the Fourteenth Amendment. The Court dismissed the claim that the ordinance was so vague as to constitute a violation of due process of law by simply recognizing that plaintiff theatre operators ran businesses that unquestionably fell under the ordinance category of adult theatres.[69] The Court rejected the theatre operators' equal protection claim by accepting as reasonable the city officials' determination that theatres featuring pornography have a less desirable effect on the community than do traditional theatres.[70] The Court held that special restrictions applied against adult theatres are reasonably related to the legitimate governmental interest in minimizing the undesirable effects such theatres impose upon the community.[71]

Finally, the Court rejected the theatre operators' argument that the Detroit ordinance regulates books and films protected under the First Amendment. The ordinance does not violate the First Amendment because under its terms protected expression is not suppressed, but merely relocated.[72] The ordinance infringes upon free expression only to that extent necessary to further governmental interest.[73] Thus, the ordinance was upheld as a time, place and manner regulation.[74]

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[64] *Id.* at 55.
[65] *Id.* at 58.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.* at 59. To avoid "vagueness" challenges against Detroit-type ordinances, city officials drafting such ordinances would be advised to define "adult" theatre and "adult" bookstore as specifically as possible.
[70] 427 U.S. at 55, 71.
[71] *Id.*
[72] *Id.* at 62, 71.
[73] *Id.* at 72.
[74] *Id.* at 63 n.18.

The Court might have simply approved the ordinance after balancing the substantial governmental interest served by the ordinance against its relatively slight intrusion upon First Amendment interests of patrons and proprietors of adult establishments. But instead the Court proceeded to categorize pornography as expression deserving a lesser degree of First Amendment protection than expression of a more reputable content. Said the Court: "[S]ociety's interest in protecting this [pornographic] expression is of a wholly . . . lesser . . . magnitude than the interest in untrammeled political debate. . . . [F]ew of us would march our sons . . . off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theatres of our choice."[75]

The Court's distinction between expression that is fully protected (political debate) and that which is only marginally protected (pornography) tends to eviscerate the First Amendment.[76] The Court implicitly departs from the rule that government may not censor expression on the basis of content unless that content is libelous, or obscene, and traditionally excluded from First Amendment protection. If the Court decides that pornography that is not legally obscene is of less value to society than political debate, it might in a later case decide that expression of an extremist political perspective is of less value than more moderate political expression. If pornography deserves a lesser degree of First Amendment protection than political expression, expression of an unpopular political opinion may deserve a lesser degree of protection than the expression of mainstream politics. The creation of a category of expression that is excluded from full First Amendment protection, not because it is libelous, or obscene, but because it is aesthetically displeasing to the Court, is a dangerous precedent.

IX. BUSCH VS. MINI THEATRES?

The several contrasts between the decision in *Mini Theatres* and the California Supreme Court's decision in *Busch* are instructive. These contrasts illustrate the relative effectiveness of the zoning and nuisance approaches to regulation of the exhibition or sale of pornography.

The *Busch* decision was that abatement of an entire adult bookstore or theatre would constitute a "prior restraint" of presumptively protected expression because matter sold or exhibited in the future, within such bookstore or theatre, might not be obscene. In contrast, the United States Supreme Court in *Mini Theatres* held that a theatre that shows pornographic films today may be subjected to special

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[75] *Id.* at 78.
[76] *Id.* at 85 (Stewart, J., dissenting).

zoning restrictions even though tomorrow's feature is *Winnie the Pooh.*

Theoretically, abatement of an adult bookstore or theatre suppresses presumptively protected books or films, while restricting the location of adult establishments only relocates protected expression. But if in Detroit the would-be adult theatre operator is denied a license to operate his adult theatre within 1,000 feet of another regulated use, he may well be precluded from showing his films anywhere in the city unless another vacant theatre, properly situated, happens to be for sale or rent. Since *Mini Theatres*, when a city that has enacted a Detroit-type ordinance refuses to license an adult bookstore or theatre in a particular location, pornography that is constitutionally protected may be in effect suppressed.

With a Detroit-type zoning ordinance, it is easier for city officials to restrict the location of adult bookstores and theatres than it is to abate a single book or film after *Busch.* The *Busch* decision requires a "full adversary hearing" as to the obscenity *vel non* of any book or film to be abated.[77] Even if its exhibition does in fact constitute a nuisance, a film that is not adjudged obscene may not be abated. In contrast, the holding in *Mini Theatres* allows a city's denial of a theatre license to be based on the pornographic content of the films exhibited within that theatre, with no requirement that the content fit the *Miller* definition of obscenity. The bookstore or theatre is restricted to particular locations even if it would not constitute a nuisance if located in other parts of the community.

The decisions in *Busch* and *Mini Theatres* together indicate that local autonomy in the field of land use regulation is favored, but in the field of regulation of expression is disfavored. In *Busch* the court held that an adult bookstore or theatre may not be abated even if city officials prove that the establishment is a public nuisance. In contrast, in *Mini Theatres* the Court accepted as justification for the zoning ordinance the city officials' determination that adult bookstores and theatres have an adverse effect on the community. Thus in *Mini Theatres* the Court affirmed the desirability of local autonomy in the field of land use regulation.[78] But the California court in *Busch*, instead of sanctioning local autonomy in the field of nuisance regulation, reaffirmed the First Amendment rule that only legally obscene matter may be suppressed.

X. Detroit Plans in California?

A Detroit-type zoning ordinance has appeal for local authorities concerned about the proliferation of adult bookstores or theatres

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[77] *See* text accompanying note 14 *supra.*
[78] 427 U.S. at 71.

within their communities. Such an ordinance restricts the formation of clusters of such establishments. Since the bookstores or theatres are allowed in some sections of the community, the ordinance may be classified as a time, place and manner regulation immune from constitutional attack. Thus the *Busch* holding that an entire adult bookstore or theatre may not be abated does not necessarily preclude a Detroit-type ordinance that merely requires that adult establishments locate within particular parts of the community.

Unquestionably, enforcement of reasonable zoning ordinances is within the police power of the local community. The police power is the power to regulate in behalf of "the public health and safety . . . public good and the public welfare."[79] The U.S. Supreme Court in 1926, in the landmark case of *Village of Euclid v. Ambler Realty*,[80] refused to grant the plaintiff-realtor an injunction against the village's enforcement of a zoning ordinance passed pursuant to Ohio's enabling statute. The Court rejected the realtor's argument that the enforcement of the ordinance constituted a "taking" of (zoned) property without due process of law, and recognized that the local police power includes the power reasonably to zone.[81]

The later case of *Berman v. Parker*[82] involved a condemnation action, when a store owner's property located within a "substandard area" was "taken" as part of an urban redevelopment program. In sustaining the redevelopment scheme as a legitimate exercise of the local police power, Mr. Justice Douglas noted: "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary."[83]

Thus the Court ushered in the legitimacy of aesthetic zoning. In the 1974 case of *Village of Belle Terre v. Boraas*,[84] the Court sustained a local ordinance requiring local residences to be maintained as single-family dwellings. The Court held that the police power exercised in behalf of the general welfare may legitimately regulate not only to protect public health and safety, but also to protect the less tangible quality of life in the community.

In California, "there is a gradually developing acceptance of aesthetic zoning, but California courts still normally find some other justification for such regulations."[85] The question whether an aesthetic zoning ordinance is a legitimate means by which local government benefits the general welfare depends in each particular

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[79] E. YOKLEY, ZONING LAW AND PRACTICE § 2 (1965).
[80] 272 U.S. 365 (1926).
[81] *Id.* at 386.
[82] 348 U.S. 26 (1954). *See also* Annot., 21 A.L.R. 3d 1222 (1968).
[83] 348 U.S. at 33.
[84] 416 U.S. 1 (1974).
[85] 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 459 (8th ed. 1974).

case upon the reasonableness of such an ordinance.[86] Generally, zoning ordinances are presumed reasonable, since the courts are reluctant to second-guess local authorities who have immediate knowledge of the peculiarities of the zoned areas.[87] Accordingly, the California Government Code provides that cities and counties should "exercise the maximum degree of control over local zoning matters."[88]

In *Associated Home Builders v. City of Livermore*[89] the California Supreme Court upheld a zoning ordinance against the claim that the land use restriction violated due process of law insofar as it was not demonstrably related to the local general welfare.[90] The ordinance prohibited issuance of building permits until local educational and other resources were available to support population increase. The court approved the *Village of Belle Terre* holding that the local police power includes the power to enforce zoning ordinances. Such ordinances "are presumed to be constitutional, and come before the court with every intendment in their favor."[91]

Dictum in *Associated Home Builders* in support of aesthetic zoning ordinances suggests receptivity toward the local community's right to protect the quality of life in its neighborhoods by restricting the location of adult bookstores and theatres. Whether such bookstores or theatres do in fact cause a deterioration in that intangible neighborhood "quality" is precisely the kind of aesthetic judgment that some courts hesitate to make.[92] Indeed, there is support for the argument that the late hours kept by bars or adult theatres help to prevent street crime in the immediate vicinity, because patrons "passively police" the otherwise deserted streets as they come and go from these establishments.[93] Of course, if one's objection to adult theatres is that they appeal to and encourage the anti-social tendencies of the prostitute, rapist and mugger, then one is highly unlikely to embrace the theory that such theatre patrons "police" the streets. But in California any dispute over the reasonableness of a Detroit-type zoning ordinance is likely to be resolved in favor of such ordinance. As the California Supreme Court repeated in *Associated Home Builders:* "the land use restriction withstands constitutional attack if it is fairly debatable that the restriction . . . bears a reasonable relation to the general welfare."[94]

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[86] E. YOKLEY, *supra* note 79, at § 4.
[87] *Id.* at § 2.
[88] CAL. GOV'T CODE § 65800 (West Com. Supp. 1975-76).
[89] 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).
[90] *Id.* at 598, 557 P.2d at 476, 135 Cal. Rptr. at 44.
[91] *Id.* at 604-05, 557 P.2d at 486, 135 Cal. Rptr. at 54.
[92] 79 HARV. L. REV. 1320, 1321 (1965-66).
[93] J. JACOBS, THE DEATH AND LIFE OF THE GREAT AMERICAN CITIES, 35, 40 (1961).
[94] 18 Cal. 3d at 601, 557 P.2d at 483, 135 Cal. Rptr. at 51.

Other California communities may well join San Jose[95] in adopting a Detroit-type ordinance, so the California Supreme Court may be presented with the opportunity to reconcile *Busch* and *Mini Theatres*. To approve *Mini Theatres* in light of *Busch*, the court must find that restrictions on the location of all adult establishments are less offensive to the First Amendment than abatement of particular establishments that are offensive to the community.

XV. POLICY PROBLEMS OF OBSCENITY SUPPRESSION AND PORNOGRAPHY REGULATION

Whether obscenity should be regulated at all is, of course, a hotly debated topic. Although a "disagreement over sex censorship is, by implication . . . a discussion of the sexual state of the nation,"[96] the justifications for the censorship of obscenity are not systematically articulated by the courts. For example, in *Paris Adult Theatres v. Slaton*,[97] the United States Supreme Court wrote in support of such censorship:

> . . . Commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior. . . . The sum of experience . . . affords an ample basis for the legislatures to conclude that a . . . key relationship . . . central to family life . . . can be debased . . . by crass commercial exploitation of sex.[98]

The official United States *Report of the Commission on Obscenity*

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[95] *See* note 3 *supra*. The Sacramento County Supervisors also are considering enacting a zoning ordinance to restrict the location of adult establishments. The Sacramento Bee, Apr. 7, 1977, at B3, col. 1.

[96] E. Larrabee, *The Cultural Context of Sex Censorship*, 20 LAW & CONTEMP. PROB. 672, 673 (1955).

[97] 413 U.S. 49 (1973).

[98] *Id.* at 63. The Court has not had an opportunity to decide whether commercial exploitation of violence might have a similar "debasing impact leading to antisocial behavior. If the public display of pornography constitutes a nuisance, so might the exhibition of excessively violent matter in sidewalk newsracks, bookstore windows, or on drive-in theatre screens. Apparently the market in magazines featuring explicit depictions of violence is blossoming:

> It was just a couple of weeks ago that I spotted a new magazine I found to be the most obscene publication I had ever seen. The magazine was called Violent World. It contained no sex; just photographs and descriptions of human carnage.
>
> Violent World . . . was so vile . . . that it seemed to me no mass market publication could ever constitute a more brutal affront to decency and taste.
>
> I was wrong.
>
> This week, on newsstands all over the United States, another new magazine is available. It is called Assasin. . . .
>
> On the cover is a photograph of President Carter, his face seen through the cross hairs of a telescopic rifle sight. A headline next to the . . . picture says, "How Would You Do It? See Special Entry Page." Greene, *Magazine for Killers*, San Francisco Chronicle, Apr. 28, 1977, at 3, col. 1.

and Pornography presented the contrary opinion that there is "no reliable evidence" that the exhibition or sale of obscenity results in an increase in sex offenses.[99] Others argue that there is as much evidence that obscenity serves as a safety valve for the release of sexual aggressions that would otherwise be released through criminal acts, as there is evidence that obscenity encourages such acts.[100] Official compilations of case studies of sex offenders fail to establish a correlation between exposure to obscenity and engagement in sex offenses.[101]

Another justification for the regulation of obscenity is that a democratic government cannot survive a "debased", "self-indulgent" and immature citizenry—the assumption being that exposure to obscenity causes the citizenry to exhibit such character disorders.

> It was the tyrant who could usually allow the people to indulge themselves. Indulgence of the sort we are now witness to did not threaten his rule, because his rule did not depend on a citizenry of good character. . . . [T]he more debased his subjects, the safer his rule.[102]

But this argument, that obscenity erodes democracy, meets its match: "[P]olitical and sexual expression are inseparable, and . . . all repressive societies try to repress both."[103]

Regardless of what conclusions legislatures reach about the sociopolitical impact of obscenity and censorship, judicial rather than legislative standards dominate the field of obscenity law since the *Miller* definition determines what is obscene. If the questions of obscenity and censorship in general are unresolved, problems of the legitimate scope of local regulation of obscenity, pornography, and adult bookstores and theatres are no closer to solution.

If the purpose of such regulation in general is to prevent particular social ills, then the right to regulate should vest where such ills are directly manifested, in the local community. If a particular adult establishment is conducted in a manner offensive to the local community, the city or district attorney has a duty to seek abatement of the offensive features of such an establishment, just as he has a duty to seek abatement of a factory belching smoke. If the city or district attorney must persuade the court that the conduct of the adult

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[99] U.S. COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 139 (1970).

[100] Monaghan, *Obscenity 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, in COMMENTARIES ON OBSCENITY 233 (D. Sharp ed. 1976).

[101] L. FRISBIE, CALIFORNIA MENTAL HEALTH MONOGRAPH: ANOTHER LOOK AT SEX OFFENDERS IN CALIFORNIA (1969).

[102] BERNS, *Beyond the Garbage Pail, or Democracy, Censorship and the Arts*, in THE CASE AGAINST PORNOGRAPHY 282 (D. Holbrook ed. 1973).

[103] Letter from Joseph Rhine to author (January 26, 1977) (on file with U.C. Davis L. Rev.).

bookstore or theatre in question does in fact have a detrimental and substantial impact on the community, abstract theories of obscenity law and sociology become pragmatic and immediate.

Conversely, with the enactment of a Detroit-type zoning ordinance the adverse impact to adult establishments on surrounding communities is presumed. But only clusters of such establishments are proscribed, so that the sale or exhibition of pornography will not be banned completely from the local community. Insofar as it gives proprietors of adult establishments advance notice of their special burdens, a Detroit-type zoning ordinance imposes less of a hardship on such proprietors than does a public nuisance action against the theatre or bookstore after it has settled into the community.

The alternate means of regulation recommended in this article is that of local nuisance ordinances prescribing abatement of those aspects of the exhibition or sale of pornography that offend the community. If city officials can prove that nude photographs displayed in sidewalk newsracks offend pedestrians, abatement proceedings pursuant to a local nuisance ordinance should force the newspaper publisher to cover front-page photographs or the newsrack operator to cover the offending newsracks. To attract customers, a discreet advertisement on the newsrack might read: "This newsrack contains newspapers for the enjoyment of adults only."

A narrowly drawn nuisance ordinance is less likely than a Detroit-type zoning ordinance to infringe upon First Amendment interests of patrons or proprietors of adult bookstores or theatres. The zoning ordinance in *Mini Theatres* was upheld as a time, place and manner regulation, but a nuisance ordinance is preferable as a time, place and manner regulation for two reasons. First, by the zoning ordinance the local legislature presumes that every adult bookstore or theatre unless restricted in location will have an adverse effect on the community. In contrast, the nuisance ordinance should specify that a particular feature of an adult bookstore or theatre may be abated only after officials prove that it offends the community. Thus the governmental interest in regulating a particular bookstore or theatre is presumed under the zoning ordinance, while under the nuisance ordinance governmental interest in each case must be proven. Secondly, the zoning ordinance restricts the location of adult bookstores and theatres, while the nuisance ordinance restricts only the manner in which sexually explicit matter may be publicly displayed. If alternate locations for the bookstore or theatre are unavailable, enforcement of the zoning ordinance may have the same effect as abatement of the business. Enforcement of the nuisance ordinance is far less likely than is enforcement of the zoning ordinance to result in permanent closure of the regulated bookstore or theatre. Local nuisance ordinances furnish the best compromise

between the interest of patrons and proprietors of adult bookstores and theatres and the interests of those who are offended by such establishments in their communities.

Kristen Keller