

## Ohio Anti-Adult Bill Goes to Extremes

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You can't say that religious conservatives haven't learned from their mistakes – and ours. Ohio House Bill 23, dubbed the "Community Defense Act of 2005," painstakingly incorporates the worst parts of just about every anti-adult ordinance that's been passed (and in many cases upheld) anywhere else in the country, as well as portions of the most adverse U.S. Supreme Court decisions affecting adult, in the past 30 years.

Overall, this is a very bad bill. For one thing, it permits zoning regulation on a township-by-township basis, allowing township attorneys or their hires to "abate [adult businesses] as a nuisance," and to thereafter sell the business' contents and apply the proceeds to their own attorney fees! (Can you say "Fifth Amendment taking"?)

Ohio women who use tampons can now rest easy that they're engaging in "sexual conduct," which is now defined under Sec. 2907.01 as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

Likewise, office workers will want to take care who they bump into at the water cooler, since "sexual contact" is now "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." And violators of either standard will also find that they have engaged in "sexual activity."

Adult video producers who plan to relocate to Ohio should probably know that "prostitute" is defined as "a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another." (Where's Hal Freeman when you need him?)

Sec. 2907.01(F) attempts to define "obscene," but aside from the usual mentions of "prurient interest," the ghost of Andrea Dworkin also rears its ugly head in subsection (2), where the criterion is that the work's "dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite." (We're confident that Mae West would say, "Honey, there's nothin' 'mere' about it!")

Ohio doesn't have a lot of beachfront, but swimmers will want to take note of the definition of "nudity," which means, in part, "the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering." No doubt, a court will determine how much of someone's ass crack or cleavage constitutes "less than a full, opaque covering."

Cabarets, however, have it particularly bad, since the portion of the law covering establishments has its own definitions of "nudity" and "semi-nudity": "Nudity,' 'nude,' or 'state of nudity' means the showing of the human male or female genitals, pubic area, vulva, anus, anal cleft, or cleavage with less than a fully opaque covering; or the showing of the female breasts with less than a fully opaque covering of any part of the nipple."

"Seminude' or 'state of seminudity' means a state of dress in which opaque clothing covers not more than the genitals, pubic region, and nipple of the female breast, as well as portions of the body covered by supporting straps or devices." (Guess department stores will no longer be allowing patrons to try on skimpy bathing suits, lest they get labeled "adult businesses"!)

You've heard of "doors off" ordinances for viewing booths? How about "sides off"? "No person who has custody, control, or supervision of a commercial establishment, with knowledge of the character of the visual material or performance involved, shall knowingly permit the use of, or offer the use of, viewing booths, stalls, or partitioned portions of a room located in the commercial establishment for the purpose of viewing visual materials or performances depicting sexual conduct unless ... (1) The inside of each booth, stall, or partitioned room is visible from, and at least one side of each booth, stall, or partitioned room is open to, a continuous and contiguous main aisle or hallway that is open to the public areas of the commercial establishment and is not obscured by any curtain, door, or other covering or enclosure."

On the other hand, the law says it's a legitimate defense if the sexually explicit material is being "disseminated or presented for a bona fide medical, scientific, educational, *religious*, governmental, judicial, or other proper purpose and by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, *member of the clergy*, prosecutor, judge, or other person having a proper interest in the visual materials or performances." [Emphasis added] Gonna be a hot time at the old monastery tonight!

We're guessing that the writers of this law have been apying attention to the recent controversy in New York City, which amended its zoning ordinance to define an "adult store" not only by its percentage of adult contents, but by the (constitutionally impermissible) measure of how much profit is derived from the sale of sexually oriented materials. Hence: "'Adult bookstore,' 'adult novelty store,' or 'adult video store' means a commercial establishment that, for any form of consideration, has as a significant or substantial portion of its stock-in-trade in, derives a significant or substantial portion of its revenues from, devotes a significant or substantial portion of its interior business or advertising to, or maintains a substantial section of its sales or display space for the sale or rental of any of the following," the "following" being a wide assortment of media which are capable of displaying "specified sexual activities or specified anatomical areas," as well as "Instruments, devices, or paraphernalia that are designed for use or marketed primarily for stimulation of human genital organs or for sadomasochistic use or abuse of self or others."

But wait! Suppose someone comes up with a "loophole" that he/she thinks will exempt his/her business from the definition of "adult business"? No problem!: "An establishment may have other principal business purposes that do not involve the offering for sale, rental, or viewing of materials exhibiting or describing specified sexual activities or specified anatomical areas and still be categorized as an adult

bookstore, adult novelty store, or adult video store. The existence of other principal business purposes does not exempt an establishment from being categorized as an adult bookstore, adult novelty store, or adult video store so long as one of its principal business purposes is offering for sale or rental, for some form of consideration, such materials that exhibit or describe specified sexual activities or specified anatomical areas."

The phrase "one of its principal business purposes" is the type of weasel-word language that makes attorneys rich and wastes taxpayer money by the barrel in years of litigation.

To present just a taste of how obsessively thorough this bill tries to be, check out this preamble to Sec. 4301.25(3)(C): "Based on evidence concerning the adverse secondary effects of adult uses on communities presented in hearings and in reports made available to the legislature and on findings incorporated in the cases of *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C. (2004)*, 541 U.S. 774, *City of Erie v. Pap's A.M. (2000)*, 529 U.S. 277; *Barnes v. Glen Theatre, Inc. (1991)*, 501 U.S. 560; *City of Renton v. Playtime Theatres, Inc. (1986)*, 475 U.S. 41; *Young v. American Mini Theatres (1976)*, 426 U.S. 50; *California v. LaRue (1972)*, 409 U.S. 109; *DLS, Inc. v. City of Chattanooga (6th Cir. 1997)* 107 F.3d 403; *East Brooks Books, Inc. v. City of Memphis, (6th Cir. 1995)*, 48 F.3d 220; *Harris v. Fitchville Township Trustees (N.D. Ohio 2000)*, 99 F. Supp.2d 837; *Bamon Corp. v. City of Dayton (S.D. Ohio 1990)*, 730 F. Supp. 90, *aff'd (6th Cir. 1991)*, 923 F.2d 470; *Broadway Books v. Roberts (E.D. Tenn. 1986)*, 642 F. Supp. 486; *Bright Lights, Inc. v. City of Newport (E.D. Ky. 1993)*, 830 F. Supp. 378; *Richland Bookmart v. Nichols (6th Cir. 1998)*, 137 F.3d 435; *Deja Vu v. Metro Government (6th Cir. 1999)*, 1999 U.S. App. LEXIS 535; *Threesome Entertainment v. Strittmather (N.D. Ohio 1998)*, 4 F.Supp.2d 710; *J.L. Spoons, Inc. v. City of Brunswick (N.D. Ohio 1999)*, 49 F. Supp.2d 1032; *Triplett Grille, Inc. v. City of Akron (6th Cir. 1994)* 40 F.3d 129; *Nightclubs, Inc. v. City of Paducah (6th Cir. 2000)*, 202 F.3d 884; *O'Connor v. City and County of Denver (10th Cir. 1990)*, 894 F.2d 1210; *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County (6th Cir. 2001)*, 2001 U.S. App. LEXIS 26007; *State of Ohio ex rel. Rothal v. Smith (Ohio C.P. 2002)*, Summit C.P. No. CV 01094594; *Z.J. Gifts D-2, L.L.C. v. City of Aurora (10th Cir. 1998)*, 136 F.3d 683; *Connection Distrib. Co. v. Reno (6th Cir. 1998)*, 154 F.3d 281; *Sundance Assocs. v. Reno (10th Cir. 1998)*, 139 F.3d 804; *American Library Association v. Reno (D.C. Cir. 1994)*, 33 F.3d 78; *American Target Advertising, Inc. v. Giani (10th Cir. 2000)*, 199 F.3d 1241; and other cases and on reports of secondary effects occurring in and around adult entertainment establishments in Phoenix, Arizona (1984); Minneapolis, Minnesota (1980); Houston, Texas (1983); Indianapolis, Indiana (1984); Amarillo, Texas (1977); Garden Grove, California (1991); Los Angeles, California (1977); Whittier, California (1978); Austin, Texas (1986); Seattle, Washington (1989); Oklahoma City, Oklahoma (1986); Cleveland, Ohio (1977); Dallas, Texas (1997); St. Croix County, Wisconsin (1993); Bellevue, Washington (1998); Newport News, Virginia (1996); Tucson, Arizona (1990); St. Paul, Minnesota (1988); Oklahoma City, Oklahoma (1986 and 1992); Beaumont, Texas (1982); New York, New York (1994); Ellicottville, New York (1998); Des Moines, Iowa (1984); Islip, New York (1980); Adams County, Colorado (1987); Manatee County, Florida (1987); New Hanover County, North Carolina (1989); Las Vegas, Nevada (1978); Cattaraugus County, New York (1998); Cleburne, Texas (1997); Dallas, Texas (1997); El Paso, Texas (1986); New York Times Square study (1994); Report to ACLJ on the Secondary Impacts of Sex Oriented Businesses (1996); the findings from the Report of the Attorney General's Working Group On The Regulation Of Sexually Oriented Businesses (June

6, 1989, State of Minnesota); and on testimony to Congress in 136 Cong. Rec. S. 8987; 135 Cong. Rec. S. 14519; 135 Cong. Rec. S. 5636, 134 Cong. Rec. E. 3750; and also on findings from the paper entitled 'Stripclubs According to Strippers: Exposing Workplace Sexual Violence,' by Kelly Holsopple, Program Director, Freedom and Justice Center for Prostitution Resources, Minneapolis, Minnesota; and from 'Sexually Oriented Businesses: An Insider's View,' by David Sherman, presented to the Michigan House Committee on Ethics and Constitutional Law, Jan. 12, 2000; and from various other police reports, testimony, newspaper reports, and other documentary evidence, the General Assembly finds" ...

It goes on to list every claimed adverse secondary effect ever reported in various 20-year-old studies (the most commonly used of which have been discredited in a meta-analysis and study performed by Dr. Daniel Linz and attached to an *amicus* brief in the U.S. Supreme Court case of *City of Erie v. Pap's A.M.*) and "reports" published by pro-censorship groups and their contractors, none of which have been peer-reviewed for verification. To get a feel for the scatter-shot approach taken here, note that a couple of the cases cited here were *won* by the adult business petitioner or defendant, or adult businesses' supporters!

Few laws – in fact, none of which we're aware – go so far as to define: "(H) 'Distinguished or characterized by their emphasis upon' means the dominant or principal character and theme of the object described by this phrase. For instance, when the phrase refers to films 'that are distinguished or characterized by their emphasis upon the exhibition or description of specified sexual activities or specified anatomical areas,' the films so described are those whose dominant or principal character and theme are the exhibition or description of specified sexual activities or specified anatomical areas."

Cabaret dancers had really better love their profession, since HB 23 prohibits tipping – and patrons can get busted for attempting to tip – which would be difficult in any case since "No person, while nude or seminude, knowingly shall ... Touch any patron, customer, or client, or the clothing of any patron, customer, or client." Putting tips in a tip jar, however, is okay ... but a lot less fun.

This law also includes one of the most restrictive hours of operation plans we've seen – and one of the most convoluted: "Sec. 3768.03. No adult entertainment establishment shall be open for business at any time before ten a.m. or after eleven p.m., except that an adult entertainment establishment that holds a liquor permit pursuant to Chapter 4303. of the Revised Code may remain open pursuant to the terms of the permit but may not conduct adult entertainment during the hours granted by the permit that are before ten a.m. or after eleven p.m. except for performances by persons who appear in a state of seminudity and not in a state of nudity."

And if all that weren't enough: "Sec. 3768.06. Nothing in this chapter preempts or prevents political subdivisions in this state from adopting or enforcing additional lawful and reasonable restrictions, licensing requirements, zoning or other regulations, or other civil or administrative provisions pertaining to the location, configuration, code compliance, or other aspects of the business operations of adult entertainment establishments" unless the place has a liquor permit.

The final section of the law is a sort of "cover your ass" litany of why the state thinks it has the proper power to require its regulations, and it's filled with falsehoods like,

"(5) There is convincing documented evidence that adult entertainment establishments, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them and cause increased crime, particularly in the overnight hours, and the downgrading of property values." Yada-yada.

Ohio House Bill 23 next must be approved by the Senate before these proposed regulations become a reality.

Ohio: Working to be just as unfriendly to adult businesses as Missouri!