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WASHINGTON UNIVERSITY IN ST. LOUIS

Department of History

Dissertation Examination Committee:

Andrea Friedman, Chair

Heather Berg

Shefali Chandra

Mary Ann Dzuback

Douglas Flowe

The “Dread Sex Cases:”
Community, Citizenship, and the Regulation of Adult Theaters in the 1970s
By
Erin Barry

A dissertation presented to
Washington University in St. Louis
in partial fulfillment of the
requirements for the degree
of Doctor of Philosophy

May 2023
St. Louis, Missouri

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Erin Barry

Washington University in St. Louis
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ABSTRACT OF THE DISSERTATION

The “Dread Sex Cases:”

Community, Citizenship, and the Regulation of Adult Theaters in the 1970s

By

Erin Barry

Doctor of Philosophy in History

Washington University in St. Louis, 2023

Professor Andrea Friedman, Chair

Through an innovative examination of scale (local, state, and national regulatory structures), space (the location of theaters, the spatial arrangements inside them) and place (the cities and suburbs in which these battles took place), my dissertation on the regulation of adult theaters in the 1970s raises compelling questions about sexuality, space and the various levels at which citizenship is enacted and policed. I utilize three Supreme Court cases, *Paris Adult Theater v. Slaton*, which dealt with consent and the application of community standards, *Erznoznik v. Jacksonville*, which addressed bans on nudity and pornography at drive-in theaters, and *Young v. American Mini-Theatres*, which validated exclusionary zoning laws as a constitutionally appropriate regulation of adult theaters, as the foundation of my project. While these three cases were litigated at the national level, they emerged from local contexts where the physical presence of adult theaters served as visible reminders of the ways that sexual commerce was remapping the American landscape. Adult theaters in particular offer a way to interrogate the ways visual and physical space complicate notions of public and private. I explore the local contexts of these laws, emerging from Atlanta, Georgia, Jacksonville, Florida and Detroit, Michigan, placing these cases in the wider history of how these cities and suburbs negotiated both the use of space and

racial, sexual and ideological differences in their populace. I consider descriptions of the communities that patronized the theaters against the perceptions of reformers, while also interrogating the possibilities and limitations of the legal system and the imbrications of municipal, state, and national regulatory structures.

Introduction

This dissertation emerged out of a casual question posed to my advisor in my second year of grad school— has anyone written a history of adult theaters. While scholars have certainly touched on the subject (see below section on previous writing on adult theaters), a history that understood them as a compelling subject of inquiry in and of themselves could not be found. Through research I began to see how while scholars and contemporary commentators often understand the porno-chic era as a period of debauchery, with porn invading the minds of the nation— and their living rooms, or predominantly understood through cultural and visual analysis of the pornographic films themselves, few studies look to the consequences of the era on the spatial landscape or notions of citizenry dependent on sexual practice. The adult theater is an ideal explanatory site for studying such dynamics.

Due to the limited source base, a problem for the majority of historians of sexuality, particularly non-normative sexuality, I found that the most fruitful approach to telling this history of adult theaters was through their regulation. The three cases that make up the backbone of my dissertation emerged in the wake of the 1973 decision in *Miller v. California*, wherein the Supreme Court maintained that whether or not material was obscene depended on “whether the average person, applying contemporary community standards, would find that the work taken as a whole, appeals to the prurient interest.” I argue that *Miller’s* embrace of the “local community” as the appropriate arbiter of obscenity enabled these cities to define community through a localized citizenship regime that depended on race, class, and sexual practice. I read these cases both for the way that the judges construct a notion of community for regulatory purposes, but also for what they tell us about how these theaters functioned— both as businesses and as institutions. I draw from the work of Lauren Berlant and Michael Warner in conceptualizing the

prosecution of adult theaters as part of a project of national heterosexuality and interrogating the consequences of demanding privatized sexuality.¹ These cases— and the regulatory response to adult theaters as a whole— are part of a process by which understandings of sexuality and pornography become a technology for constructing both the “pervert” and the upstanding citizen. I track this dynamic down to see the effects of these technologies on a local level. Through obscenity jurisprudence, then, both the lower courts and the Supreme Court found ways to regulate commercial sex, and advance certain property interests, by defining sexual consumers outside the bounds of citizenship.

In *Paris*, the court held that media is not exempt from obscenity charges simply because it is exhibited solely for consenting adults. I analyze *Paris* in conversation with *Miller*, arguing that the decision in *Paris*, as well as contemporary perception of porn theaters themselves, helps to elucidate the motivation behind and consequences of the legal fiction of community (particularly communities united around conceptions of obscenity) established in *Miller*. Much of this work comes in conflicting definitions of public and private space, but also in the raising of questions about which publics matter and whose privacy matters. The invocation of consenting adults in the *Paris* decision offers a compelling framework for considering unequal access to sexual expression while pointing to the arguments anti-smut activists made towards the protection of their own social and property interests. When viewed in partnership with the other cases of this dissertation, as well as the decision in *Stanley v. Georgia*, wherein the court held that private possession of obscene material could not be made a crime, the spatial consequences at the heart of the issue of consent are made clear. Where and when does consent to view matter?

¹ Lauren Berlant and Michael Warner, “Sex in Public,” *Critical Inquiry* 24 No. 2 (Winter, 1998): 549.

Erznoznik v. Jacksonville offers a complicating vision of pornographic film regulation in the 1970s. The rare obscenity case heard before the Burger Court that ended in a loosening of restrictions, *Erznoznik* concerns an ordinance banning exhibition of films containing nudity at a drive-in theater visible from a nearby highway. The court struck down the ordinance along almost contradictory lines— at once the court judged the ordinance invalid for its under—inclusivity, writing that if it was enacted to prevent traffic accidents, it did not ban nearly enough distracting material, while also castigating the ordinance for its overbroad ban on nudity, arguing that it could not be justified through a mandate to protect children as it did not specify that the nudity had to be sexually explicit. The decision in *Erznoznik* serves in contrast to much of the rhetoric of *Miller* and *Paris*, particularly in addressing the dynamic of a ‘consent to view.’ In the majority decision, Justice Lewis Powell criticizes the ordinance’s incursion on the First Amendment’s freedom of speech clause, writing that the “offended viewer can readily avert his eyes” from the material in question. My dissertation thus asks what differentiates the reaction to privacy and film distribution in this case and what framing those differences through the category of consent reveals about the pointing to the spatial dynamics of the drive-in theater and positioning *Erznoznik* as a motivating factor in the changing approach of the anti-smut movement.

Rather than being a case about what constitutes obscenity, *Young* constructs a new regulatory regime— zoning. In *Young*, the Supreme Court ruled in favor of the constitutionality of Detroit city ordinances prohibiting the opening of adult theaters within 1000 feet of buildings with “regulated uses” (liquor stores, cabarets, bars) or within 500 feet of any residential district. Dispersal zoning plans came to dominate many other cities’ approaches to the obscenity problem. While zoning may appear to be solely about city planning, zoning cases are inherently

valuation projects— wherein some groups and spaces are protected and preserved from others. Crucial to this case is Justice Stevens' assertion, writing in the plurality decision, that the speech in question here is of 'lower value;' we must not only ask in response "to whom," but to what end have these decisions shaped the development of the 'city' itself. Young explicitly illuminates the intersections of public space and community and asks us to consider how legal valuations of "uses" and locales come to reflect on community makeup and thus applications of obscenity law. This dissertation is not a work of legal history per se, but engages with court cases to illustrate the evolving nature of obscenity law and its cultural and social implications.

There is a potential for the topic of my dissertation to make some uncomfortable, or prompt them to ask— are adult theaters something we really want to remember and teach about? I answer them by arguing the importance is not just in the historical or legal relevance of adult theaters, but in what we can learn from their rise and fall about the intersections of sex, community and political power that resonate throughout the 20th and 21st centuries and shape our lived landscape to this day. I believe successful histories of sexuality in general, and this dissertation in particular, must inherently rely on an interdisciplinary base. I envision this project as intervening in a number of fields and adopting a variety of methodologies and approaches. I outline these fields and how I believe the history of adult theaters and their regulation works within and with them below.

History of Obscenity

If the history of adult theaters remains largely unwritten, the same is not the case for other targets, tactics and forms of regulation. However, I would argue that the bulk of this historiographical work is centered on the latter half of the 19th century and first half of the 20th

century. Anthony Comstock occupies perhaps an outsized space in the heretofore written histories of obscenity law. Nicola Beisel's *Imperiled Innocents* uses Comstock's moral reform campaigns to explore class formation in the Victorian era, focusing on the role of culture and cultural products in determining class and status.² In that way, I similarly model my treatment of pornographic films and pornographic regulation, which I argue is oft determined by class and the demographics of an area. Other works on obscenity that focus on Comstock include Helen Horowitz's *Rereading Sex*, wherein Horowitz challenges consensus views of the nineteenth century as a period of widespread silence regarding sex and sexuality. Instead, her understanding is that there were four "frameworks—" including evangelical Protestantism—that allowed for and shaped discussions of said topics.³ Similarly, Amy Werbel's more recent treatment of Comstock, *Lust on Trial*, argues that Comstock's campaign to rid America of vice in fact led to greater acceptance of the materials he deemed objectionable.⁴ This is a useful framework and understanding of the backlash or unintended consequences of obscenity regulation, something necessary to keep in mind throughout this dissertation. There is conflicting thought, interpretations and data as to whether the intended regulation put forth in these Supreme Court decisions led to increases or decreases in access to pornographic material, particularly in conjunction with shifting technology.

This same focus on the actors of obscenity law is shown in the number of works focusing on Samuel Roth and Ralph Ginzburg.⁵ While I appreciate much of what these works do, and

² Nicola Kay Beisel, *Imperiled Innocents: Anthony Comstock and Family Reproduction in Victorian America* (Princeton, NJ: Princeton University Press, 1997).

³ Helen Horowitz, *Rereading Rex: Battles Over Sexual Knowledge and Suppression in Nineteenth Century America* (New York, NY: Alfred A. Knopf, 2002).

⁴ Amy Werbel, *Lust on Trial: Censorship and the Rise of American Obscenity in the Age of Anthony Comstock* (New York, NY: Columbia University Press, 2018).

⁵ See Jay A. Gertzman, *Samuel Roth, Infamous Modernist* (Gainesville, FL: University Press of Florida, 2013); Leo Hamalian, "Nobody Knows My Names: Samuel Roth and the Underside of Modern Letters,"

even mirror the model in my second chapter by exploring the role and history of Charles Keating and Hinson McAuliffe, as a whole I think the history of obscenity should broaden to account more for local histories and players. Local actors, activists, and legislators drove the cases that would come to shape obscenity precedent and the effects of obscenity law played out in localized physical spaces— to neglect to consider the local means only half the story is told. Whit Strub’s *Obscenity Rules: Roth v. United States and the Long Struggle Over Sexual Expression* is a model work in bridging telling the history of obscenity through a single case or a single person and placing it in a wider historical, political and cultural context.⁶

Historians covering the history of obscenity in the early to mid-20th century often attribute changes in the treatment of obscene and sexually explicit media to both their increasing availability and changing mores surrounding sexuality. Whit Strub deploys these arguments, particularly the theory of sexual liberalism, in his other work influential to this project— *Perversion for Profit*.⁷ Sexual liberalism, coined by historians of sexuality— and thus sometimes historians of obscenity and regulation— John D’Emilio and Estelle Freedman, argues that in the mid 20th century, the nation, supported by its government, media, and medical professionals, began to view sex as benign or even an emotionally crucial part of marriage.⁸ Sexual liberalism moved away from previous views of sex as a corrupting force and instead valued it as long as it remained in culturally important structures— like marriage. We see sexual liberalism in

Journal of Modern Letters 3, no. 4 (1974): 889-921; Josh Lambert, *Unclean Lips: Obscenity, Jews, and American Culture* (New York, NY: New York University Press, 2013).

⁶ Whit Strub, *Obscenity Rules: Roth v. United States and the Long Struggle Over Sexual Expression* (Lawrence, KS: University of Kansas Press, 2013).

⁷ Strub’s treatment of Charles Keating and suburban politics in this book proved incredibly useful in writing about the Commission on Pornography and Obscenity and Keating himself in Chapter 2 of this dissertation. Whit Strub, *Perversion for Profit: The Politics of Pornography and the Rise of the New Right* (New York, NY: Columbia University Press, 2013)

⁸ John D’Emilio and Estelle Freedman, *Intimate Matters: A History of Sexuality in America Third Edition* (Chicago, IL: University of Chicago Press, 2009).

contemporary obscenity laws, particularly those concerned with the privacy of the home and in the shift in legal concern away from prosecuting materials in general towards prosecuting ‘incorrect’ display and access to said materials. *Lady Chatterley’s Lover* may no longer be banned, but concern could still be raised about who could access it and where they could.

Because the progression of obscenity regulation and law is so central to my argumentation as to the cause, motivation and influence of the three Supreme Court cases, I return to the history of obscenity regulation in Chapter One.

History of Sexuality and Citizenship

In the research and composition of this dissertation I was heavily influenced by the work of previous historians on the co-constitutive relationship of gender, sexuality, and citizenship. These works variably consider the different tactics and approaches taken by the government and other legal bodies to tie gender, sexuality, and sexual practice to citizenship and membership in a democratic community. What I do in this dissertation is introduce obscenity and pornography legislation as another tactic. What this introduction of obscenity and pornography allows is for us to see the spatial and physical consequences of this co-constitutive relationship, something that has only been touched on in regard to government loans and the development of the suburbs.

Both Nancy Cott’s *Public Vows* and Margot Canaday’s *The Straight State* consider how the creation and enforcement of laws and policies regulating gender and sexuality contributed to the process of state building. Through her study of laws (including the Dawes Severalty Act, the Cable Act of 1922, and the Defense of Marriage Act) and cases brought against state and federal bodies, Cott argues that differing regulations on marriage and sexuality played an important role

in changing conceptions of the United States as a nation.⁹ Similarly, Canaday demonstrates how, in the early to mid-20th century, the federal government enshrined policies that penalized homosexuality while privileging heterosexuality. Canaday thus argues this system, enacted across the military, social welfare, and immigration, defined sexual deviants as a second-class group of citizens and fostered the creation of a heterosexual, middle-class body politic. Part of what I argue in this dissertation is that the doctrine of “local community standards” worked to further develop the political influence of that body politic.¹⁰

While both Cott and Canaday’s books discuss how the regulation of sexuality came to define the state and the reach of federal power, Deborah Cohler’s *Citizen, Invert, Queer: Lesbianism and War in Early 20th Century Britain*, despite its different geographical focus, offers the complimentary story. Cohler argues for a decentering of sexology and the medical industrial complex as the primary actors in defining queer sexual identity in favor of the imperialist British government.¹¹ Citizenship and queerness come to be defined in opposition to one another; this co-constitutive relationship has been a foundational idea in my work.

I draw from the way recent works like Anna Lvovsky’s *Vice Patrol: Cops, Courts and the Struggle Over Urban Gay Life Before Stonewall* and Eric Cervini’s *The Deviant War: The Homosexual vs. the United States* deploy legal history to deepen our understanding of how sexuality defined numerous aspects of mid-century life. Both books use the assertion of a co-constitutive relationship between citizenship and queerness as a starting point, going on to

⁹ Ibid.; Nancy Cott, *Public Vows: A History of Marriage and the Nation*, (Cambridge, MA: Harvard University Press, 2003).

¹⁰ Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth Century America* (Princeton, NJ: Princeton University Press, 2009).

¹¹ Deborah Cohler, *Citizen, Invert, Queer: Lesbianism and War in Early Twentieth Britain* (Minneapolis, MN: University of Minnesota Press, 2010).

explore the consequences of a quasi-second class of citizenship, Lvovsky through policing and Cervini through employment.¹²

Other works have engaged with similar questions of the relationship between law, morality, and the body politic; I engage with their ideas and use them as models, but center the question of adult theaters and space as the crucial site where that relationship played out. In her study of New York from 1909 to 1945, Andrea Friedman argues a system of “democratic moral authority” came to characterize obscenity regulation.¹³ Such a system displaced earlier, often feminine, arbiters of obscenity in favor of the average person and their conceptions of what constituted obscenity. I see this system of democratic moral authority as a discursive precursor to the way I understand the doctrine of community standards; furthermore, the reciprocal constitutive relationship she describes as occurring between government regulation and working-class culture serves in some ways as a model for my study of the local. In *Sexual Injustice*, Marc Stein studies the decisions of the Supreme Court from 1965 to 1973 and concludes that the court acted in a counterrevolutionary manner to the sexual revolution, asserting “special rights and privileges for adult, heterosexual, marital, monogamous, private and procreative forms of sexual expression.”¹⁴ I understand Stein’s compulsion to end his analysis with the *Roe* decision in 1973, but suggest that that counterrevolutionary focus of the court continued in the area of obscenity law at least through the end of the decade. I argue that a spatial and local analysis is needed in order to see the full expression of those “special rights and privileges.”

¹² Anna Lvovsky, *Vice Patrol: Cops, Courts and the Struggle Over Urban Gay Life Before Stonewall*, (Chicago, IL: University of Chicago Press, 2021); Eric Cervini, *The Deviant War: The Homosexual vs. the United States* (New York, NY: Farrar, Straus and Young, 2020).

¹³ Andrea Friedman, *Prurient Interests: Gender, Democracy and Obscenity in New York City, 1909-1945* (New York, NY: Columbia University Press, 2000).

¹⁴ Marc Stein, *Sexual Injustice: Supreme Court Decisions from Griswold to Roe* (Chapel Hill, NC: University of North Carolina Press, 2010): 3, 18.

Queer Theory

I consider these works of historical inquiry alongside the theoretical work of Lauren Berlant and Michael Warner in conceptualizing the regulation and prosecution of adult theaters as part of a project of national heterosexuality. Nancy Cott's examination of marriage and Margot Canaday's study of governmental programs and policies illustrate Berlant and Warner's claim that the "nostalgic family values covenant of contemporary American politics stipulate a privatization of citizenship and sex in a number of ways."¹⁵ Berlant and Warner themselves draw from earlier queer theorists, particularly Michel Foucault, in meditating on the boundaries of public and private personhood and sexuality.¹⁶

Here I understand queer theory as the broad post-structuralist field that emerged in the early 1990s; queer theory is interested in the theorization of non-heterosexual and non-normative sexual practices, calling for a deconstruction of "normality" and a renewed understanding of sex and gender as socially constructed. A consideration of queer theory is necessary for this dissertation in that I am writing about sexual practices considered non-normative and pointing to

¹⁵ Lauren Berlant and Michael Warner, "Sex in Public," *Critical Inquiry* 24, no. 2 (Winter 1998): 549.

¹⁶ Ibid: 559. Habermas speaks of the public sphere as an ideology, places where subjects participate as equals in rational discussion in pursuit of the truth- in theory, the ultimate expression of this ideology came in the salons and literary circles of 18th century Europe, the very place where the ideas that would come to serve as the foundation of American governance were brought into the light. However, in reality, the 'public sphere' both in the 18th century and, I argue, now, is restricted to a small group of educated men of means. Property ownership in particular served as a barrier. Habermas further argues that this ideology was corrupted in the 20th century as capitalist driven media led to the manipulation of the public sphere to suit certain opinions and beliefs. While Habermas is not invoked in any of the cases studied in this dissertation— and his primary work on the public sphere, *The Structural Transformation of the Public Sphere*, was not translated into English until 1989— more than a decade past the temporal constraints of this project— I find his conceptualizations of the public sphere useful in analyzing the ways in which the Court deploys notions of property and privacy here, calling on us to observe the contextual undergirding of public and private. Habermas's recognition of the utopian ideal of the public sphere and the actualized hierarchy is reflected in the law— laws or decisions regarding the use of public space often present themselves through the utopian lens of equal access and value, but in practice function as systems of hierarchical power. Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society*, (Cambridge, MA: MIT Press, 1991).

places, adult theaters, where sexuality was enacted and constructed. I am particularly interested in queer theory that challenges that which is understood as natural or obvious; with this dissertation, I hope to reveal some of the legal fictions at the heart of obscenity law, namely in the construction of community, and point to the fluid and unstable boundaries between the categories of public and private. While this dissertation is not necessarily a work of queer theory, the work done by the above-mentioned scholars on the intersections of sexuality, community and belonging, and public space were deeply influential in the ways I thought through the legal arguments against and public reactions to adult theaters.

Although Michel Foucault did not write specifically about adult theaters, they serve as a useful observation site for illustrating the principles and theories offered in a wide variety of his works. I draw on Foucault's writings on state surveillance as a tool of regulation and social control particularly when writing of the visual field and the boundaries of public and private.¹⁷ Foucault's writings on moral governance and the creation of both the delinquent and the governable subject through definitions of normative premises are deeply relevant to my argument that the adult theater was used as a symbolic cudgel to create the "pervert" and the "upstanding citizen."¹⁸ Foucault further maps these dynamics of normativity and surveillance onto space; to Foucault state power is spatially embedded. A significant tool of governance comes in the classification of space into "easily controllable units with known populations;" in fomenting discourse and meaning onto spaces and the people in the spaces, states and governmental bodies deploy power.¹⁹

¹⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York, NY: Pantheon Books, 1977).

¹⁸ Michel Foucault, *The History of Sexuality Vol. 1* (New York, NY: Pantheon Books, 1978).

¹⁹ Michel Foucault, "Governmentality," and "Space, Knowledge, and Power" in *The Foucault Reader* ed. Michel Foucault and Paul Rabinow (New York: Pantheon Books, 1984).

Subsequent queer theorists, including Berlant and Warner, have taken up Foucault's arguments on space and power to consider the consequences and possibilities of queering public and private spaces. I am particularly indebted to these works for the theoretical foundations they provide in considering the way gender and sexuality shape the ways people access and understand space and how the presence of gender and sexual variation changes how others treat and categorize spaces. Among these theorists are David Bell and Gill Valentine, who in their work *Mapping Desire: Geographies of Sexuality* construct compelling ties between space, private life, citizenship and gender performance, and Jose Esteban Munoz, whose work *Cruising Utopias* maps queer performance and memory onto certain spaces, calling on queer theorists to imagine possible futures.²⁰ More recent projects engaging with this queer genealogy of space include the collection *Queer Presences and Absences* and a number of dissertation and early-career projects (some of which I will return to later) which discuss queer and or sexualized space through local histories and through histories of pleasure.²¹

Porn Studies

The work of queer theorists has both influenced and overlapped with the creation of the subfield commonly known as porn studies. The work of Linda Williams in 1989's *Hard Core: Power, Pleasure and the Frenzy of the Visible* and Walter Kendrick in 1987's *The Secret*

²⁰ *Mapping Desire: Geographies of Sexualities* ed. David Bell and Gill Valentine (New York, NY: Routledge, 1995); Jose Esteban Munoz, *Cruising Utopia: Cruising Utopia: The Then and There of Queer Futurity* (New York, NY: New York University Press, 2009).

²¹ *Queer Presences and Absences* eds. Michelle Addison and Yvette Taylor, (London, UK: Palgrave Macmillan, 2003); Finley Freibert, "Obscenity Regulation and Film Exhibition: Policing Gay and Feminist Media Industries in Southern California, 1960-1979" (Ph.D. Dissertation, University of California, Irvine, 2019); Eric Gonzaba, "Because the Night: Nightlife and the Remaking of the Gay Male World, 1970-2000" (Ph.D. Dissertation, George Mason University, 2019); Julio Capo Jr., *Welcome to Fairyland: Queer Miami Before 1940* (Chapel Hill, NC: University of North Carolina Press, 2017).

Museum: Pornography in Modern Culture have often been cited as the foundational in the field.²² Their contrasting approaches to pornography itself mark the complexities of the field. In Kendrick's own words, *The Secret Museum* "devoted less attention to the things [pornographic material] themselves than to what was thought and felt about them—the threat they posed, the victims they claimed, the usually self-appointed rescuers they galvanized."²³ Williams, in contrast, is interested in, quoting her introduction to *Hard Core*, "what the genre is."²⁴ She acknowledges the censorship and squeamishness that has surrounded the topic— both inside and outside of academia— "it is no wonder that so much has been written about the issue of pornography and so little about its actual texts."²⁵ Her desire is for the history of pornography to not elide into the history of censorship; calling instead for the field to consider pornography as a valid and productive source.

This multitudinous approach to porn has continued to define the field. A somewhat mediatory approach— one that focuses on the immediate response and socio-cultural history of the audience watching films (both pornographic and not)— has emerged under the name new cinema history.²⁶ In studying local responses to and uses of adult theaters, I try to build a bridge between these approaches. I do not necessarily offer a visual analysis of the films shown, but I

²² Benjamin Strassfeld, "Indecent Detroit: Regulating Race, Sex, and Adult Entertainment 1950-1975" (Ph.D. Dissertation, University of Michigan, 2018); Russell Logan Sheaffer, "Smut, Novelty, Indecency: Reworking a History of Twentieth Century American Stag Film," (Ph.D. Dissertation, Indiana University, 2017).

²³ Walter Kendrick, *The Secret Museum: Pornography in Modern Culture* (Berkeley, CA: University of California Press, 1997), xiii. Quoted in Strassfeld.

²⁴ Linda Williams, *Hard Core: Power, Pleasure and the Frenzy of the Visible* (Berkeley, CA: University of California Press, 1999): 5.

²⁵ *Ibid.*, 29.

²⁶ *Explorations in New Cinema History: Approaches and Case Studies* eds. Richard Maltby, Daniel Biltereyst, and Phillippe Meers (New York, NY: Wiley, 2011).

am interested in how the films and the physical makeup of the theaters themselves were essential tools in expressions of sexuality.

More contemporary works of porn studies, including Mirielle Miller-Young's *A Taste for Brown Sugar*, Jennifer Nash's *The Black Body in Ecstasy*, Ariane Cruz's *The Color of Kink*, and Linda Williams' *Screening Sex* speak eloquently of the eroticized power dynamics, racial, gender, age, and class, that are often used to characterize the porn industry.²⁷ Of particular use to my project is Linda Williams's interventions in *Screening Sex* as to the lines of voyeurism and masculinity. Her claim regarding the centrality of prurience to every movie-going experience and the way she understands adult film theaters as part of a project to expand the senses available from porn— an “erotic sensorium—“ shape the way I want to approach and understand adult theaters. Miller-Young, Nash, and Cruz offer compelling descriptions and analyses of the role of race in pornography. I use these works to interrogate how the content of the films shown in pornographic theaters and broader perspectives on queer and racialized sexuality dynamically interact with the regulatory rhetoric concerning race and citizenship.

Spatial History

In terms of methodology, my final inspiration draws from the rapidly growing field of spatial history.²⁸ Of particular influence on my work are the monographs *The Color of Law: A Forgotten History of How Our Government Segregated America*, by Richard Rothstein and *A*

²⁷ Linda Williams, *Screening Sex* (Durham, NC: Duke University Press, 2008); Mirielle Miller-Young, *A Taste for Brown Sugar: Black Women in Pornography* (Durham, NC: Duke University Press, 2014); Ariane Cruz, *The Color of Kink: Black Women, BDSM, and Pornography* (New York, NY: New York University Press, 2016); Jennifer C. Nash, *The Black Body in Ecstasy: Reading Race, Reading Pornography* (Durham, NC: Duke University Press, 2014).

²⁸ For an overview of the relationship between queer and sexuality studies and mapping, see Michael Brown and Larry Knopp, “Queering the Map: The Productive Tensions of Colliding Epistemologies” *Annals of the Association of American Geographers* 98, no. 1 (2008): 40-58.

World More Concrete: Real Estate and the Remaking of Jim Crow South Florida by N.D.B. Connolly.²⁹ In their books both men speak to the relationship between urban planning, race and space in the 20th century American city. While these books posit land restriction and zoning laws as part of a project to embed segregation after it was outlawed, I see those same laws as part of a concurrent project to regulate and control sexual behavior and expression.

Historians like Connolly and Rothstein present a model for reckoning with both the spatial implications of law and governance and the immense tool the state has in its ability to patrol and control space. The work of other scholars, namely Thomas Sugrue, Douglas Rae, and Robert O. Self, concerned with the so-called “urban crisis” takes on further spatial connotations and calls for an exploration as to the true meaning and driving narratives behind such a phrase.³⁰ This project is in many ways about the constructions of meanings around spaces— on micro levels within the theaters themselves and within their neighborhoods, but also on a national level as issues with and responses to adult theaters and obscenity more generally took on regional implications.

To that end, while I do not necessarily employ some of the same technological tools many spatial historians employ, I find myself working alongside them in considering the constitutive and destructive power of spatial boundaries. Queer GIS projects, including Mapping LGBTQ St. Louis, The Philadelphia LGBT Mapping Project Google Map, and Queering the Map have been influential as I explore the importance of neighborhood politics in the

²⁹ Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York, NY: WW Norton, 2017); NDB Connolly, *A World More Concrete: Real Estate and the Remaking of Jim Crow South Florida* (Chicago, IL: University of Chicago Press, 2016).

³⁰ Thomas Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* (Princeton, NJ: Princeton University Press, 1996); Douglas Rae, *City: Urbanism and its End* (New Haven, CT: Yale University Press, 2003.); Robert O. Self, *American Babylon: Race and the Struggle for Postwar Oakland* (Princeton, NJ: Princeton University Press, 2003).

representative court cases of this dissertation and in allowing for a comparative study of spaces used for sexual acts and by sexual minority communities.³¹ I have been lucky enough to be able to use some of the GIS work Ben Strassfeld constructed for his dissertation on adult theaters and adult entertainment venues in Detroit to instruct my reading of Detroit's neighborhoods and physical organization.³²

I thus understand my work to be a work of sexual geographies, defined as “the collective and individual constructions of the relationship between sexual behavior, sexual identity and physical space.”³³ Sexual geographies is a field that understands and looks to study the idea and ways space shapes sexuality and sexuality shapes spaces.³⁴ This field locates its origins in the ethnographic studies of gay male spaces and places in the 1970s; many of these studies are cited as primary sources in Chapter 2.³⁵ While I appreciate the mapping and geographic information systems work discussed above (and understand that many of these projects offer more complicated analyses) I find myself agreeing with other historians and social scientists who argue that the study of sexual geographies should move beyond the “simple mapping of lesbian and gay spaces” and towards critical and intersectional analyses of the relationship between space and different sexual minorities and practices.³⁶ With this dissertation, I intend to deploy an

³¹ “Mapping LGBTQ St. Louis,”

<https://storymaps.arcgis.com/stories/9675a82d3d564c80b950361e709dff5e>; “The Philadelphia LGBT Mapping Project” <https://www.google.com/maps/d/viewer?mid=1gyv3dfHs3MS82BHisv8oyZA77Ng&ll=39.97742244889816%2C-75.17435565&z=8>; “Queering the Map” <https://www.queeringthemap.com/>.

³² Strassfeld, 2018.

³³ Elizabeth Morehead, “Public Policy and Sexual Geography in Portland, Oregon 1970-2010” (Ph.D. Dissertation, Portland State University, 2012).

³⁴ Louisa Allen, “Sexual Geographies” in *The Blackwell Encyclopedia of Sociology* (New York, NY: Wiley, 2019).

³⁵ Julie Podmore and John Brown, “Introduction to the Special Issue: Historical Geographies of Sexualities?” *Historical Geography* 43 (2015): 10.

³⁶ Jon Binnie and Gill Valentine, “Geographies of sexuality- a review of progress” *Progress in Human Geography* 23, Issue 2 (1999): 176.

approach that accounts for the physical and spatial structures of the cities in question (the so-called mapping of spaces) while also considering the spatial implications of differing regulatory regimes.

In this dissertation, I use the tactics and approaches of spatial history to emphasize the local, neighborhood spaces where these battles for sexual regulation occurred. The three cases I consider in this study emerge from mid-to-large size American cities, Detroit, Jacksonville, and Atlanta, but much of the so-called “action” occurred in smaller, quasi-suburban or ethnic enclaves. Although these cases were chosen for their importance and relevance in establishing adult theaters as pivotal battlegrounds in the creation of a new obscenity regime, the choice also works to continue some of the geographical decentering work queer and sexuality studies has done over the past two decades.

Many of the foundational works of the history of queer sexuality, including John D’Emilio’s “Capitalism and Gay Identity” and George Chauncey’s *Gay New York* focused on New York (and, to a lesser extent San Francisco) as the basis of their work. Around the turn of the 21st century, other scholars began to push back against this coastal and urban centrism, critiquing the branding of the South and Midwest as anti-queer or inhospitable, places where the creation of a coherent gay identity (in contrast to just performing or participating in gay sexual acts) was unlikely or unstable.³⁷ These scholars included John Howard, whose 1999 work *Men Like That* considers southern male sexuality across four decades, “locating it in the landscape:

³⁷ John Howard, *Men Like That: A Southern Queer History* (Chicago, IL: University of Chicago Press, 1999); Colin R. Johnson, *Just Queer Folks: Gender and Sexuality in Rural America* (Philadelphia, PA: Temple University Press, 2013).

from the farmhouse to the church social, from sports facilities to roadside rest areas.”³⁸ Later scholars have broadened the scope, offering studies of sexuality tied to specific locations.³⁹

I speak above of my goal in this dissertation to consider space on both the micro and macro level. Whereas many of the above-mentioned works were influential for my thinking on the city and national scale, Stephen Vider’s recent work *The Queerness of Home: Gender, Sexuality, and the Politics of Domesticity after World War II* has been incredibly useful as a model for thinking about the relationship between sexuality and space and the way queerness can destabilize, change or shape new meanings of home, place, publicness, and community.⁴⁰

Previous Writing on Adult Theaters

In the previous sections, I set forth the fields in which this dissertation seeks to intervene and the methodologies I deploy in my treatment of adult theaters and their regulation. In considering viewing these cases through lenses focused on dynamics of citizenship and space, my work sits apart from previous writing on the history and study of adult theaters.

To date, what little has been written about adult theaters has fallen into one of four categories. The smallest in number but perhaps the richest of these are the few first-person narratives we have of life within adult theaters. Many of these have taken the form of nostalgic

³⁸ Ibid.

³⁹ See Nan Alamilla Boyd, *Wide-Open Town: A History of Queer San Francisco to 1965* (Berkeley, CA: University of California Press, 2005); Karen Krahulik, *Provincetown: From Pilgrim Landing to Gay Resort* (New York, NY: New York University Press, 2005); Josh Sides, *Erotic City: Sexual Revolutions and the History of Modern San Francisco* (Oxford, UK: Oxford University Press, 2011); Marc Stein, *City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia, 1945-1972* (Chicago, IL: University of Chicago Press, 2000); Timothy Stewart-Winter, *Queer Clout: Chicago and the Rise of Gay Politics* (Philadelphia, PA: University of Pennsylvania Press, 2016); *Queer Twin Cities* Twin Cities GLBT Oral History Project (Minneapolis, MN: University of Minnesota Press, 2010).

⁴⁰ Stephen Vider, *The Queerness of Home: Gender, Sexuality, and the Politics of Domesticity after World War II* (Chicago, IL: University of Chicago Press, 2021).

articles, written upon the closing of local theaters, reminiscing about what they describe as largely forgotten spaces of youthful intrigue and enticement or as aging monoliths of a previous era of sexual expression. Author Samuel Delany's *Times Square Red, Times Square Blue* is the most influential of these first person narratives; within the pages Delany describes his frequenting of adult film theaters in New York City's Times Square, arguing for the spaces as important sites of what he calls "contact."⁴¹ Inspired by Jane Jacobs's *The Death and Life of American Cities*, Delany understands cross class and cross race contact, which he sees the adult theaters as crucial to facilitation, as enriching for all and a life force in American cities. Delaney's work was central in building ties between the field of urban studies and the topic of adult theaters and pornography, calling attention to the centrality of sexuality in conversations regarding gentrification. Perhaps one consequence of Delany's work is the work it does in overly centering Times Square as the most relevant hub of inquiry when discussing adult theaters.

The second grouping of written sources concerning adult theaters in many ways parallels these first-person narratives. Following in the vein of Laud Humphreys' 1970 book *Tearoom Trade*, an ethnographic study of male-male sex encounters in the semi-public location of public bathrooms, there are a number of sociological studies of adult theaters and arcades emerging in the 1960s and 1970s.⁴² These ethnographies and sociological studies not only construct a picture of the theaters, arcades, and their patrons, but in doing so provide insight into the way the actions and identities of those patrons led to notions of consent and citizenship being constructed

⁴¹ Samuel Delany, *Times Square Red, Times Square Blue* (New York, NY: New York University Press, 2019): 175.

⁴² Laud Humphreys, *Tearoom Trade: Impersonal Sex in Public Places* (New York, NY: Aldine Publishing Company, 1970); See Kenneth Perkins and James Skipper Jr., "Gay Pornographic and Sex Paraphernalia Shops: An Ethnography of Expressive Work Settings" *Deviant Behavior* 2 (1981): 187-199; Peter Donnelly, "Running the Gauntlet: The Moral Order of Pornographic Movie Theaters," *Urban Life* 10, no. 3 (1981): 240-261.

differently. The descriptions of the use of these theaters—particularly in the way they fostered community and utilized space—serves to contrast the definitions constructed by the courts in obscenity legislation. As with Laud Humphreys’ work, modern readers must understand both the potential biases in these works and recognize the ethical pitfalls in conducting ethnographic studies without the explicit consent of those under observation. In this project, I aim to use these sources as primary sources, while acknowledging their role as part of a history of academic interest in these sites. These works offer insight into how a unique group— those in academia— understood and responded to both adult theaters themselves and those persons who frequented them.

Adult theaters and those who frequented them pop up in a third category of works within the historiographical record— those concerned with the feminist anti-pornography movement of the mid to late 1970s. These works, notably Carolyn Bronstein’s *Battling Pornography*, delve deeply into the actions, tactics, and motivations of the feminist anti-pornography movement, discussing influential groups like Women Against Pornography, Women Against Violence Against Women, and Women Against Violence in Pornography and Media.⁴³ Adult theaters come into play as central sites of activism for these groups; the tours Women Against Pornography offered of the adult theaters in Times Square, intended to show the horrors and degradation within, were perhaps the most publicized program WAP enacted. Bronstein’s book, and others like it, are less focused on casting judgment on, or defending the feminists’ beliefs regarding pornography, instead focusing their arguments on intergroup cooperation or on the unexpected ties between this feminist movement and the radical evangelical right. To that end, these works are not particularly concerned with adult theaters themselves, viewing them instead

⁴³ Carolyn Bronstein, *Battling Pornography: The American Feminist Anti-Pornography Movement 1976-1986* (Cambridge, UK: Cambridge University Press, 2011).

as just one of many businesses targeted by anti-pornography feminists, but these are useful works in examining some of the concerns and criticisms thrown at adult theaters as well as, considering the timeline of this project, the trajectory of tactics and ideology in opposing pornography and adult theaters.

Finally, I position my work within a growing body of interdisciplinary work on the pornographic industry conducted by young scholars, including Finley Freibert and Christopher Baum. Freibert approaches the study of adult theaters through an explicitly feminist lens, considering the ways women influenced the industry through ownership of theaters and through the production of lesbian pornography.⁴⁴ Baum is concerned with an anthropological study of the policing of pornography in Los Angeles. Both Freibert and Baum locate themselves academically outside the field of history, bringing in the methodology of media studies and critical analysis to their projects. I build on their interdisciplinary example but differ in a focus on the ways adult theaters and their spatial consequences shaped obscenity law and precedent at the highest level.

Sources

In her book *These Truths*, historian Jill Lepore speaks to the struggles of sourcing , writing, “most of what historians study survives because it was purposely kept...the archive is called the historical record, and it is maddeningly uneven, asymmetrical, and unfair.”⁴⁵ This is particularly true for projects considering the history of sexuality. Historian Clare Lyons describes writing a history of sexuality as an act of translation, necessitating the recovery and explanation

⁴⁴ Freibert; Christopher Baum, “Bodies on the Line: The Politics of Regulating Pornography in Los Angeles,” (Ph.D. dissertation, City University of New York, 2021).

⁴⁵ Jill Lepore, *These Truths: A History of the United States* (New York, NY: W.W. Norton, 2018): 4.

of meanings attached to familiar behaviors.⁴⁶ This act of translation is complicated by the dearth of records concerning pornography and sexuality.⁴⁷ Considering non-normative and non-heterosexual sexuality and sex acts can be even more difficult, with historian Jeffrey Escoffier summarizing the challenge, “most of the physical evidence of sex disappears without a trace...and apart from pornography...empirical documentation of homosexual sex is even scarcer.”⁴⁸

Investigating sexual cultures inherently means investigating the problematic, the underground, and messy. Business records from pornographic theaters, perhaps unsurprisingly, do not exist or have a place in many archives. The very nature of the business, consistently boxed in by and forced to adapt to regulation, means that our ability to access the history of pornographic theatres is mediated by a need to remain at least partially underground. What we can access within the archival record tends to stem from the arena of regulation, materials produced by the state; while there are drawbacks to such a limited palette of materials, by viewing the pornographic theatre industry through a regulatory and legal lens, I see great opportunity in court records as well as contemporary writings and media to read around the pages and read into the silences for what we can glean about what these theaters were like, how they functioned and what role they played in their communities. I also heed the methodologies of

⁴⁶ Clare Lyons, *Sex Among the Rabble: An Intimate History of Gender and Power in the Age of Revolution, Philadelphia 1730-1830* (Chapel Hill, NC: Omohundro Institute, University of North Carolina Press, 2006): 8.

⁴⁷ In *The Secret Museum*, Walter Kendrick writes of the importance of the ‘pornographic’ artifacts excavated in Pompeii, holding that much of their value stemmed from the fact that “many of the objects found there had equivalents nowhere else.” The artifacts themselves were the source of a knowledge unavailable elsewhere; Kendrick, 10-11.

⁴⁸ Jeffrey Escoffier, “Sex in the Seventies: Gay Porn Cinema as Archive for the History of American Sexuality,” *Journal of the History of Sexuality* 26, no. 1 (2017): 93.

previous historians in reading into the silences of the archive, noting when, in the words of Natalie Zemon Davis, “silence could be turned into an indicator.”⁴⁹

The documentation of these three cases before the Supreme Court and before lower courts makes up my initial source base for this project. Court records grant insight into the ways the adult theaters and their patrons were understood in communities and the policies and approaches first put forth on the local level. Court records also served for me as a directory into subjects, persons, and places to be investigated in other materials. These other material source bases included the papers of Supreme Court judges (Justice Lewis Powell and Justice Harry Blackmun, among others), deepening my understanding of the argumentation, as well as the papers of the Commission on Pornography and Sexuality. That collection, which not only included drafts of the final report and its dissents, but also materials gathered by the Commission, reports from some of its community hearings, and letters from concerned citizens, all of which help to construct contemporaneous attitudes about pornography and its presence in a variety of communities.

Much of my research was hampered by travel restrictions stemming from the COVID-19 pandemic, however I was able to travel to Detroit in 2021 and study a number of collections held at the Walter P. Reuther Labor Library at Wayne State University. Of particular use for my understanding of Detroit politics and the initial debates behind the zoning ordinance were the papers of city councilmen Mel Ravitz and Garland Lane as well as organizer Ernest Mazey. In Detroit, I also visited the City Records Office and gained access to the original ordinance drafts and other zoning history materials.

⁴⁹ Natalie Zemon Davis, “The Silence of the Archive, The Renown of the Story” in *Historical Knowledge: In Quest of Theory, Method and Evidence* ed. Susanne Fellman and Marjatta Rahikainen (Cambridge, UK: Cambridge Scholars Publishing, 2012): 82.

Though I was unable to travel in person to Jacksonville, Florida, my research was made possible through aid provided by the Jacksonville Public Records Office, who were able to scan minutes from relevant City Council meetings and meetings of the Public Safety subcommittee and materials published online through the University of North Florida Special Collections. The papers of Lewis Powell were also particularly useful in their collection of letters from concerned citizens regarding the Erznoznik decision.

My broad understanding and consideration of pornography and pornographic movie theaters was further supported by previous research trips to the Tamiment Library and Fales Special Collections at the New York University Library and the Schlesinger Library at Harvard University.

Beyond court documents, the ethnographic studies of pornographic theaters outlined in a previous section, and the ephemera found in the archival collections mentioned above, newspapers and magazines serve as a significant source base for this dissertation. Playboy Magazine published a multi-installment “History of Sex Cinema” for nearly a decade, which serves as an excellent secondary recounting of the history of sex on film and pornographic film that was particularly useful in writing my first chapter and a compelling primary source in understanding perceptions of pornographic film in the 1960s and 1970s. City newspapers make up a significant portion of my remaining source base. I selected newspapers with a variety of viewpoints and intended audiences to get the greatest sense of the contemporaneous community, paying attention to the way the newspapers wrote about adult theaters and pornography in general and special attention to letters to the editor pages, where the voices of the community are heard in their own words. I also use the movie advertisement pages to track what pornographic films were shown and how they were advertised; those pages are further useful for the service

they offer in providing addresses of the theaters. For chapter 2, I primarily rely on *The Atlanta Constitution* and *The Great Speckled Bird*, the latter a counterculture underground newspaper. In Chapter 3, I use the *Jacksonville Daily Record*, the *Florida Times Union*, and the *Tallahassee Democrat* for regional reporting. In Chapter 4, my main source newspapers are the *Detroit Free Press* and the *Detroit News*.

Terminology

Our collective discourse over pornography and obscenity has, in many ways, revolved around how and why we define the constituent terms. The struggle inherent with such a task is perhaps best exemplified by Supreme Court Justice Potter Stewart's refusal to offer a testable definition for obscenity in the 1964 case *Jacobellis v. Ohio*, instead submitting to the court the simple phrase "I know it when I see it." I don't wish to offer my own definition here. Offering a singular definition would in many ways hamper this project, which seeks to understand how contemporary individuals and institutions conceived of and interpreted obscenity and pornography.

However, despite their prominence as terms of concern in the historic debate, obscenity and pornography are not the only terms with definitions that need reckoning with. Throughout this dissertation, I use the term "adult film theater," "adult movie theater," and "porn theater" largely interchangeably. While I refer to the same kind of business with each of these terms, there is a need to specify what kind of business that is. This dissertation is primarily concerned with dedicated adult film exhibitors that operated similarly to mainstream movie theaters, with large multi seat auditoriums, set show times, and a ticket booth out front (the exception is the drive-in theater at the center of the *Erznoznik* case). However, there are a variety of businesses

that in some shape or form exhibited film of a sexual nature to audiences. Adult film arcades were similarly prominent throughout the late 1960s and 1970s; at these locales, small single occupancy booths showed short pornographic films on a loop, prompted by the insertion of a coin. These arcades offered increased individual privacy and, in having a variety of booths, catered to differing sexual tastes. Particularly as the ‘porno-chic’ 1970s progressed, mainstream movie theaters often showed pornographic films as part of weekly late-night programs. I also want to differentiate the focus of this project from so-called “movie rooms,” in gay bathhouses and sex clubs— to date notably documented by numerous ethnographers— where pornographic films were projected on walls of rooms intended to facilitate sexual contact or voyeuristic masturbation. I also aim to differentiate from locales that provided live sex shows or erotic dancing and, particularly after the 1977 introduction of the home VCR, businesses that sold pornography for home use. While all these places exhibited pornographic materials— and, of relevance legally— advertised as such, the focus of higher court cases, as well as much of the anti-porn activism, concerned themselves predominantly with adult film theaters.

Chapter Outline

Chapter 1 explores the concurrent histories of obscenity regulation, the development of the film industry, and pornographic media from the 1800s to the 1970s. I construct an argument for how the decisions of the 1970s, particularly community standards as set forth in *Miller v. California* are both a continuance and divergence from previous decisions and how cultural understandings and conveyances of film were important considerations to how these laws were shaped and how communities understood the place of film and sex in their midst.

In chapter 2, I detail the case *Paris Adult Theatre I v. Slaton*. Decided alongside *Miller v. California* in 1973, in this case the Supreme Court held in a 5-4 decision that obscene films did not gain constitutional protection merely because they were shown exclusively to consenting adults. In this chapter, I detail the emergence and early history of this case in Atlanta, Georgia, placing it in context through an examination of three of the political and cultural figures who played a significant role in the regulation of obscenity in the state. This chapter introduces my spatial analysis central to this dissertation, offering a study of the adult theater on the micro level— what they looked like inside, how they were used and how patrons understood the space as sites of sexuality and community. This chapter also serves to introduce my argument as to how governments constructed a conception of proper sexual citizenship around the site of the adult theater.

The third chapter of this dissertation offers somewhat of a contrast in its study of the 1975 case *Erznoznik v. Jacksonville*. In comparison to the other two cases considered in this dissertation, in *Erznoznik* the Supreme Court ruled against increased regulation of ‘adult’ films and film-centered spaces, striking down a Jacksonville ordinance that banned drive in theaters from showing films that included nudity. While the films in question were not necessarily pornographic, this case marks a shift in the centrality of space to notions of film and theater regulation, with the courts paying new attention to questions of visual pollution and public nuisance law. I argue an understanding of this case is crucial to understanding the emergence of zoning as an avenue for the regulation of obscenity and thus an important force in the reshaping of the lived environment and the dynamics of citizenship and access to space.

Chapter 4, entitled “The Survival of Our Community:” Detroit’s Anti-Pornography Zoning Ordinance, Citizenship, and Heteronormativity, considers the 1976 case *Young v.*

American Mini Theatres, wherein the Detroit dispersal model of zoning was given constitutional approval. Under the Detroit law, the 1972-3 origins of which I track in this chapter, “adult-oriented” businesses, including adult theaters, were incorporated into an earlier Skid-Row law and banned from operating within a certain distance of one another. This chapter incorporates adult oriented businesses, and theaters in general into previous academic conversations concerning the exclusionary nature of zoning laws and the segregated landscape of the American city. I am particularly interested in tracking how dispersal zoning laws reflected and responded to the centrality of “community” to obscenity laws.

Chapter One:

“I Couldn’t Begin to Guess What They Think It Isn’t:” A ‘Prehistory’ of Obscenity Regulation and the Film Industry

On March 30th, 1966, the *Times Advocate* out of Escondido, California published a satirical piece from San Francisco columnist Art Hoppe. Responding to the recent Supreme Court decision in *Memoirs v. Massachusetts*,¹ Hoppe imagined a conversation with his recurring “know-it-all” character, now claiming to be an author, Homer T. Pettibone. Pettibone complained of the reaction to his latest book, “Playthings of Lust:” “the reviews were marvelous: ‘hardcore pornography,’ ‘absolutely vile,’ ‘pure slime’...and not one found an iota of literary merit....it must be without literary merit to qualify as smut. Never had I written more poorly. Then this one idiotic critic from the Baptist Seminary Bulletin had to call it ‘a perfect example of the filth contaminating our society.’” Hoppe posed his response, “what’s wrong with that?” Pettibone cried, “you see, the court lifted the ban on *Fanny Hill* solely because it was a perfect example of 18th century pornography,” and thus held some redeeming social importance. “And here, all unknowing,” Pettibone whined, “I’d written a perfect modern example of pornography! How can society ban smut if it has no examples of what smut is? Thus, my socially important work was no longer smut.” Pettibone bemoans the loss of his taboo status. He and Hoppe continued, discussing his next career move, Hoppe suggesting he return to “writing good, clean novels.” Looking aghast, Pettibone concluded the column: “Good gracious, I just explained how

¹ *Memoirs v. Massachusetts* attempted to clarify the decision in *Roth*. Massachusetts courts found the 18th century work *Fanny Hill*, a.k.a. *Memoirs of a Women of Pleasure* obscene, The Supreme Court overturned the lower court’s decision, ruling that while the book met two of the three prongs set forth in *Roth* as the test for obscenity (*Fanny Hill* appealed to the prurient interest and was patently offensive) it could not be proven that the work was without redeeming social value. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

difficult it is to guess what the Supreme Court thinks smut is. I couldn't even begin to guess what they think it isn't."² The very same day this fictionalized conversation was published in Escondido, the movie pages of the *San Francisco Examiner* advertised showings of "Inside a Nude Party," at the Gayety on Turk St, "Japan Underground- 7 Erotic Experimental Shorts" at the Movie on Kearny, near Broadway, and "a daring festival of Camp Nudies" at the Cedar on Geary and Larkin, in the heart of San Francisco's Tenderloin district.³

I include these newspaper snippets to demonstrate the conflicting ideas of what constituted pornography and obscenity in the 1960s as well as the confusing and tangled web of government statutes attempting to meet the issue. At once we can see the frustration and confusion over the vagueness of the laws and how opinions were at their heart very conflicted: calls for the government or the courts to do something about the issue of obscenity butted up against the very real fact that there was a thriving marketplace for that material.

This chapter covers the so-called "prehistory" of the case studies addressed in each subsequent chapter, tracking the history of obscenity regulation in the United States and the history of the film (both mainstream and pornographic) industry. I argue it is impossible and irresponsible to study the continuities and changes in U.S. obscenity policy and treatment enacted by the decisions in *Paris Adult Theatre v. Slaton*, *Erznoznik v. Jacksonville*, and *Young v. American Mini Theatres* without understanding the 200 years of context that came before. Here, I highlight how the issues that came to characterize the decisions in those cases, namely privacy and the threat of moral corruption, find their origins in much earlier history. I also track how considerations of the spatial definition of community— localized or national— were central

² Art Hoppe, "A Problem for Study," *The Times-Advocate* (Escondido, CA) March 30, 1966: 6A.

³ "San Francisco Movies," *The San Francisco Examiner* March 30, 1966. Based on the provided address, this places the "The Movie" Theater a block from the City Lights Bookstore, central site for the Beat scene of the 1950s and 1960s.

to the development of obscenity law throughout most of the mid 20th century. While the question of who gets to decide what constitutes obscenity has long been understood as central to the development of obscenity law, in this history I show that that question is thoroughly intertwined with dynamics of space and place. The shift to spatial regulation as the primary mode of obscenity law in the 1970s thus constituted a new approach, but one drawing from themes long central to obscenity debates.

Through the history of movies, I highlight the ways the film industry evolved in response to accusations of obscenity— both in terms of self-driven regulation and the exploitation of loopholes. I further take note of the ways earlier concerns about the effects of movies on their audiences mirror those raised in later adult film cases. I also emphasize how the movie theater has played a significant role historically in providing physical space for the development of sexual expression and identity.

I choose to tell these histories separately because it is not until quite late in the history of American obscenity law that films become part of the same conversation. Up until 1952, films were explicitly understood as existing outside the protections of the First Amendment.⁴ Furthermore, the history of film regulation reveals significantly more reliance on self-regulatory structures like the Hays Code and the Motion Picture Association of America film rating system. Private regulation tells a significantly different story, with different restrictions and considerations, than that stemming from federal and state bodies. My final argument for keeping the sections separate is that not all of the films and film genres that need to be understood to study the development of the pornographic film industry would have been considered obscene, or subject to similar regulation. Keeping these sections separate thus allows for a fuller

⁴ Joseph Burstyn Inc. v. Wilson, 343 U.S. 495 (1952).

understanding of how the film industry and obscenity regimes grew in contact with one another but not dependent upon one another. It also allows for an exploration of the very real ways obscenity regimes were negotiated.

In placing the history of obscenity and the history of the film industry against one another, I am not doing anything new. Historians and scholars of cinema have long recognized that these fields influenced one another's development. Here I provide the background as to why the clash of adult films and government obscenity regulation in the 1970s was so influential and significant in reshaping both the physical landscape of America and the ways the government understood its role in monitoring sexuality and the sexual expression of its citizens.

Obscenity Law

Legal scholar Geoffrey Stone writes of the American colonies and early republic era as having available an “extraordinary array of erotica.”⁵ Technological advances and increasing literacy rates meant that by the late 1600s, booksellers “were offering sexual representations at prices that professional men could afford” and access.⁶ Beyond written obscenity, Lisa Sigel tracks a broad ecosystem of eighteenth and nineteenth century “homemade and handmade” pornographic and obscene objects and pamphlets.⁷ While any assumption of a sexless,

⁵ Geoffrey Stone, “Sex and the First Amendment,” *First Amendment Law Review* 17 (2019): 135. Stone's later assertion that there were no statutes against obscenity in the eighteenth century is challenged by other accounts, including Helen Horowitz's description of a 1711 Massachusetts state law against obscenity in *Rereading Sex: Battles Over Sexual Knowledge in Nineteenth Century America* (New York, NY: Alfred A. Knopf Publishing, 2002): 41. However, works like Judith Giesberg's *Sex and the Civil War* (Chapel Hill, NC: University of North Carolina Press, 2017) also asserts that there was only one anti-pornography law in the states prior to 1842, a state statute in Vermont. The lack of clarity probably stems from different considerations of obscenity vs. pornography but also reflects the confusion central to the history of obscenity law and regulation in the U.S.

⁶ Horowitz, 32.

⁷ Lisa Sigel, “Handmade and Homemade: Vernacular Expressions of American Sexual History,” *Journal of the History of Sexuality* 25, no. 3 (2016): 437-462.

puritanical and prudish early America neglects to account for the pervasiveness of vernacular sexual culture and discourse, this is of course not to say that moral standards of behavior and around appropriate depictions of sexual activity did not infuse daily life throughout this period.

The regulatory environment of this period towards obscenity can be characterized by dual systems—the common law and the church law. Helen Horowitz states succinctly “it was a minister’s duty in eighteenth century New England to supervise the morality of the town;” communities did not ignore the use of obscenity or sexual deviance in their midst.⁸ Law in early America relied on and derived from English common law; the English common law tradition dealing with printed obscenity began in the early 1700s when the courts “extended the notion of criminal libel to include obscenity,” arguing that to corrupt the morals of the king’s subjects was to corrupt the peace of the king.⁹ Prior to this enshrinement, ecclesiastical courts held sway.¹⁰ In noting the religious authority held over matters of obscenity, the morality of these early obscenity laws is brought into sharper relief. Early obscenity prosecutions tended to occur on a state level, with the earliest noted occurring in Philadelphia over the commercial display of an image of “a man in an obscene, impudent, and indecent posture with a woman,” and in Massachusetts over the infamous novel *Memoirs of a Woman at Pleasure*— also known by its more common name, “Fanny Hill.”¹¹ By the second decade of the nineteenth century the legal system had asserted its jurisdiction over vernacular sexual culture and discourse surrounding obscenity and its regulation.

⁸ Horowitz, 19.

⁹ Horowitz, 38.

¹⁰ Ibid.

¹¹ See *Pennsylvania v. Sharpless*, 2 Serg. & Rawle. 91, 92, 94 (Pa. 1815) and *Commonwealth v. Holmes*, 17 Mass. 336, 336 (1821).

The federal government banned the importation of obscenity, namely “all indecent and obscene prints, paintings, lithographs, engravings and transparencies” in the 1842 Tariff Act, effectively serving to create a domestic market for the production and circulation of pornographic and obscene materials.¹² Historian Donna Dennis emphasizes that this “slowly coalescing law of obscenity did not so much stop the smut trade as shape it.”¹³ After what has been called “the most effective one man lobbying campaign,” stemming from observations of the sexual practices of Civil War soldiers and concerns over the effects of new technological innovations, including photography and cheaper printing processes that made obscenity more easily accessible, in 1873 the federal government enacted the first obscenity laws explicitly dealing with internal trade.¹⁴ Widely referred to as the “Comstock” laws after their most zealous advocate Anthony Comstock, postal inspector and founder of the New York Society for the Suppression of Vice, these federal statutes focused primarily on stopping propagation of obscene materials through the Postal Service. They read, in part,

That no obscene lewd or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of contraception or the procuring of abortion, nor anything intended or adapted for any indecent or immoral use or nature nor any... book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or of whom, or by what means either of the things before mentioned

¹² Also referred to as the “Black Tariff,” usually by Southerners who opposed its passing, President John Tyler reluctantly signed the Tariff of 1842 into law at the urging of northeastern manufacturing states. The effects of the tariff were felt almost immediately; international trade sharply declined in 1843, with imports into the United States nearly halved from the previous year. For the next hundred or so years, tariff legislation continued to restrict the import of obscenity. The Smoot-Hawley Tariff of 1930 included “obscene matter” alongside “articles for causing unlawful abortion” and “matter advocating treason or insurrection” on its list of articles prohibited from importation. Tariff Act of 1842; Tariff Act of 1930 19 U.S.C. ch.4. For more on the Tariff of 1842, see William K. Bolt, *Tariff Wars and the Politics of Jacksonian America* (Nashville, TN: Vanderbilt University Press, 2017) and Daniel Peart, *Lobbyists and the Making of U.S. Tariff Policy 1816-1861* (Baltimore, MD: Johns Hopkins University Press, 2018).

¹³ Donna Dennis, *Licentious Gotham: Erotic Publishing and Its Prosecution in Nineteenth Century New York* (Cambridge, MA: Harvard University Press, 2009): 12.

¹⁴ McIntyre, W. R. (1959). Control of obscenity. *Editorial research reports 1959* (Vol. II). <http://library.cqpress.com/cqresearcher/cqresrre1959072900>

may be obtained or made... shall be carried in the mail, and any person who shall knowingly deposit or cause to be deposited, for mailing or delivery, any of the herein before mentioned articles or things, or any notice, or paper containing any advertisement relating to the aforesaid articles are things... shall be deemed guilty of a misdemeanor.¹⁵

Comstock's beliefs, and the logic behind the laws, derived from a progressive reform movement that understood obscene literature as a "trap that destroyed children both physically and morally."¹⁶ Lust itself was a danger to both children and the social order—the "only solution to the pressing social problems of the day was the eradication of lust through suppression of erotic material and birth control."¹⁷ Comstock's campaign and its legal statutes called for a direct involvement of the federal government in the suppression of sexual expression in the public sphere and the confinement of sexuality to its marital reproductive functions.¹⁸ Subsequent to the adoption of the federal statutes, a number of states and even localities enacted their own versions of "Comstock laws." A 1919 study of criminal statutes on birth control holds that 19 states "have enacted statutes that clearly and definitively refer to the prevention of conception in women as a practice to be declared a crime." Twenty-two other states had adopted statutes that variably treated birth control and the distribution of material related to birth control as a crime. All of these state and local laws, however, were found under headings that named them as statutes dealing with obscenity.¹⁹ Contemporaries often referred to these statutes, mirrored primarily on

¹⁵ Anthony Comstock, *Traps for the Young*, xiii quoted in Nicola Beisel, *Imperiled Innocents: Anthony Comstock and Family Reproduction in Victorian America* (Princeton, NJ: Princeton University Press, 1997): 40.

¹⁶ Beisel, 52

¹⁷ Amy Werbel, *Lust on Trial: Censorship and the Rise of American Obscenity in the Age of Anthony Comstock* (New York, NY: Columbia University Press, 2018): 304.

¹⁸ Estelle Freeman and John D'Emilio, *Intimate Matters: A History of Sexuality in America* 3rd edition, (Chicago, IL: University of Chicago Press, 2012): 156.

¹⁹ J.C. Ruppenthal, "Criminal Statutes on Birth Control," *Journal of Criminal Law and Criminology* 10, no. 1 (1919): 48.

Comstock's New York state law, as "Little Comstock Laws." Like most other obscenity laws of this period, they failed to provide a bounded definition of obscenity beyond contraception, describing the prohibited materials as "lewd and lascivious." Scholars have noted that this vagueness only contributed to their potential for broad social control.²⁰

Contemporaneous critics of Comstock often highlighted his ties to Christian churches and claimed his arguments on the social dangers of lust and obscenity were mere silk screens for enforcement of a religious morality and violations of the church-state divide.²¹ However, numerous modern interpretations of the Comstock laws emphasize the ways obscenity regulation has historically served as a tool for controlling unwanted populations. Comstock himself regularly over-targeted Jews, immigrants, and women for the sale of contraceptive devices while looking the other way for his wealthy benefactors. Historian Whit Strub recounts this startling contrast through the life of Samuel Colgate— at once the president for the New York Society for the Suppression of Vice and heir to a company that marketed products explicitly for contraceptive purposes.²² Historians like Strub and Nicola Beisel further attribute this late 19th century turn towards obscenity regulation as additionally about the shoring up the morality of the bourgeois middle class, particularly through an emphasis on protecting the innocence of children.²³ Beisel in particular ties the strength of anti-vice societies in Boston and New York to the presence and political power of large immigrant populations, writing "growing cities filled

²⁰ Elizabeth Hovey, "Obscenity's Meaning, Smut-fighters, and Contraception: 1872-1936," *San Diego Law Review* 29, no. 13 (1992): 21. For more on the adoption of these "Little Comstock Laws" see Beisel, 72 and 121; Helen Lefkowitz Horowitz, "Victoria Woodhull, Anthony Comstock and Conflict Over Sex in the United States in the 1870s," *The Journal of American History* 87, no. 2 (2000): 403-434, and "Connecticut and the Comstock Law," *ConnecticutHistory.org* March 28, 2021.

²¹ Giesberg, 98.

²² Whit Strub, *Obscenity Rules: Roth v. United States and the Long Struggle Over Sexual Expression* (Lawrence, KS: University of Kansas Press, 2013): 19

²³ *Ibid.*, Beisel, 150.

with aliens generated parental fears about children’s safety and elite anxiety about immigrant political power which censors exploited to solicit support for crusades against obscenity.”²⁴ I emphasize these arguments in this chapter to highlight the perpetuity of these debates over the reach and audience of obscenity regulation and the continuities in the use of obscenity law to regulate undesired populations.

The earliest American obscenity cases recorded reveal how the central question in obscenity cases has historically nearly always been some variation upon “what is obscene” and “does this material in question qualify.” Obscenity law has thus manifested as a series of tests, the *Hicklin* test being the first. Emerging from the 1868 British case of Regina v. Hicklin, and first used, through application of the common law, by the federal criminal court for the Southern District of New York in 1879, the Hicklin test deemed as obscene materials “tending to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”²⁵ In comparison to later tests, the *Hicklin* test specifically considered the sexually explicit content of the material in question rather than the material as a whole— one scene alone could easily condemn a work. In the 1879 case, this meant that no one was allowed to testify or provide context as to the text in question— only specific passages presented by the prosecution could be considered in the determination of obscenity.²⁶ With this test the state established two of its main concerns of obscenity regulation— both the protection of the immature and the prevention of said materials from reaching their hands. The *Hicklin* test substantiated the constitutionality of the Comstock law and confirmed the definition Comstock

²⁴ Beisel, 158.

²⁵ Jeremy Geltzer, *Dirty Words and Filthy Pictures: Film and the First Amendment* (Austin, TX: University of Texas Press, 2015): 212.

²⁶ Horowitz, 24.

held of obscenity— material that could potentially corrupt the young— lending him court validation and power.²⁷

Historians track the forty or so years following the 1873 passage of the Comstock laws as the high point for their enforcement. Comstock regularly bragged about the thousands of arrests made and the tons (over 160) of material destroyed. However, by the second decade of the twentieth century a new embrace of modern technology and modern sexual mores led to the gradual dismantling, culturally if not legally, of many Comstockian codes and statutes. Strub describes the national mood thusly, “though perpetually ambivalent about lust, prurience, and various forms of deviant sexuality, a broad national consensus coalesced around increasing frankness in education and entertainment.”²⁸ Similarly, he tracks an increasing value placed on protection of the private sphere and the reduction of government intrusion into such private matters. A 1913 decision in the U.S. District Court for the Southern District of New York written by Justice Learned Hand encapsulates the legal consequences of the changing society. The case, *United States v. Kennerly*, concerned Daniel Carson Goodman’s *Hagar Revelly*, a “social hygiene novel about the wiles of vice” and was brought before the courts upon the recommendation of Comstock’s very own New York Society for the Suppression of Vice.²⁹ Hand wrote in the decision, “if there be no abstract definition” of the word obscene, “should not the word “obscene” be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now ?” He continued, “If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would

²⁷ Beisel, 92.

²⁸ Strub, 27.

²⁹ Comstock would die at the age of 71 in 1915 though he was retired from his commission with the Post Office at the time of the Kennerly case. Paul Boyer, *Purity in Print: Book Censorship in America from the Gilded Age to the Computer Age* (Madison, WI: University of Wisconsin Press, 2002): 46-48.

seem that a jury should in each case establish the standard much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.” Hand thus articulated two points that would come to culturally shape much of obscenity policy in the following century: first that the morality around obscenity shifted with the times; second that juries should apply community standards rather than base their decisions on the “susceptibilities of society’s most vulnerable members.”³⁰ The Kennerly decision, though not establishing precedent, can thus be understood as an early expression of the tensions at the heart of community standards, namely who constitutes the community and what power should their standards hold.

Twenty years later, the courts once again weakened the *Hicklin* test and the Comstock laws in *United States vs. One Book Called Ulysses*. At issue in the case was whether James Joyce’s 1922 book *Ulysses* was obscene and if it could be imported and sold in the U.S. Critics of the work pointed to its frank language, its descriptions of sex, lesbianism, and menstruation, and its blasphemous treatment of the Catholic Church. Defense attorney Morris Ernst instead sought to present the work as a piece of classic literature. Judge John Woolsey of the US District Court for the Southern District of New York issued his decision in the case, demonstrating, in the words of Strub, an “almost casual dismissiveness towards the *Hicklin* test in approaching *Ulysses* as a whole and not just in its specific dirty parts.”³¹ Woolsey wrote, “whilst in many places the effect of *Ulysses* on the reader undoubtedly is somewhat emetic, nowhere does it tend to be an aphrodisiac.”³² Furthermore, Woolsey positioned a work’s effect on a “person with

³⁰ *United States v. Kennerley* 209 F. 119 United States District Court, S.D. New York (1913). Hand’s comments here, it should be noted, were dicta and did not constitute any sort of precedent.

³¹ Strub, 47.

³² *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, 706 (2d Cir. 1934).

average sex instincts” as the proper barometer of obscenity.”³³ Woolsey’s approach to *Ulysses* was characteristic of a changing landscape for obscenity regulation, one shaped by evolving notions of sexuality and sexual liberalism as well as rapidly evolving technological changes, some of which I consider later in this chapter. However, it is important to note that the legal application of these shifts was happening before the federal courts rather than in state courts, which, throughout the 1930s and 1940s remained reluctant to broaden notions of protected free speech.

Despite large variations in the strictness of its application, the *Hicklin* test remained the law of the land until the creation of a new test for obscenity in 1957’s *Roth v. United States*. The case began with federal charges brought against New York bookseller Samuel Roth for distributing so-deemed obscene materials through the mail. Roth had repeatedly faced obscenity charges, serving at least 5 separate sentences in federal and state penitentiaries prior to the 1957 case. Appealing the conviction before the Supreme Court, Roth and his lawyers explicitly brought the First Amendment into the obscenity conversation. They argued that federal obscenity statutes were in direct violation of the First Amendment, failing to meet the various standards the court had previously set forth for the suppression of speech. Namely, the state failed to prove that the suppressed speech breached the peace, called for the overthrow of government, or present clear and present danger.

The resultant *Roth* test differed significantly from the previously used *Hicklin* test, holding that the test to determine obscenity was “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”³⁴ In a 6-3 majority opinion, Associate Justice William Brennan

³³ Strub, 47.

³⁴ *Roth v. United States* 354 U.S. 476 (1957).

clarified the new test, “all ideas having even the slightest redeeming social importance—unorthodox opinions, controversial opinions, even ideas hateful to the prevailing climate of opinion have the full protection of the First Amendment.” Under such a test, “more graphic more explicit depictions of sex and sexuality were allowable under its tenets, but prurience remained unprotected by the first amendment.”³⁵ Brennan further asserted, “sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex in art, literature, and scientific works is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.”³⁶ Importantly, the opinion in *Roth* made it clear that obscene speech lay outside the protection of the First Amendment, clarifying and enshrining something that had previously only been hinted at or assumed.

In his dissent, one of the court’s two First Amendment absolutists, Justice William O. Douglas, called Brennan’s *Roth* test “community censorship in its worst form.” Although many of his peers believed that *Roth* would be a liberalizing force, Douglas accused the majority of “creating a regime where in the battle between the literati and the philistines the philistines were certain to win.” In doing so, Douglas articulates the tension at the heart of the doctrine of community standards— whose opinions mattered, and whose would count in constructing a standard. If the *Roth* test constituted “community censorship,” the later shift to “local community standards” must have only inflated Douglas’s concerns. Douglas conceded that the federal government held the power to proscribe conduct on the grounds of good morals— a conceit that continue to complicate the creation of obscenity regimes over the next two decades— but did not

³⁵ Strub, 183.

³⁶ *Roth v. United States* 354 U.S. 476 (1957).

see the sale of books and pictures as actionable conduct. According to Strub, Douglas instead saw actionable conduct in acts like public nudity and adultery.³⁷

Historians have largely remembered the *Roth* decision as a failure—it did not in any meaningful way solve the obscenity problem, and the vagueness with which it was applied in later cases led directly to contradictory patterns of obscenity regulation. Strub quotes the legal historian Lucas Powe in describing *Roth* as a “sloppy unpersuasive effort.”³⁸ The decade following the decision saw a stream of obscenity cases before the Supreme Court, each seeking resolution of the remaining issues of *Roth*. In this period, the Supreme Court routinely reversed obscenity convictions, “creating a protective legal environment for the harbingers of the sexual revolution” including the homophile movement.³⁹ A year after the court released its decision in *Roth*, ONE Inc., a publishing spinoff of the Mattachine Society, appealed their obscenity conviction to the highest court. Only citing the decision in *Roth*, the Court reversed the convictions of the lower courts, validating the legality of the pioneering gay rights magazine, concluding that pro-homosexual writing was not per se obscene, and delivering the gay community its first Supreme Court victory in U.S. History.⁴⁰

³⁷ *Roth v. United States* 354 U.S. 476 (1957), (Douglas, J. dissenting); A case concerning nudity was, at the time of the Roth decision, working its way through the courts. In 1955 *Sunshine and Health* magazine, a work originally published by the International Nudist Conference, filed a complaint in U.S. District Court against the continued seizure of the magazine by the Postmaster General. Judge James Kirkland of the U.S. District Court for the District of Columbia “listed a painstaking set of criteria for determining obscenity, including the angle and distance of photography, the age of the subject and the subtleties of pictures.” Upon appeal to the Supreme Court, the case, like many others in the immediate aftermath of Roth, was decided in favor of the publisher with only a brief per curiam decision citing Roth. Whit Strub, *Perversion for Profit: The Politics of Pornography and the Rise of the New Right* (New York, NY: Columbia University Press, 2013): 129-130.

³⁸ Lucas A. Powe, Jr. *The Warren Court and American Politics* (Cambridge, MA: Harvard University Press, 2000): 116, quoted in Strub, 1.

³⁹ Strub, 186.

⁴⁰ *One, Inc. v. Olsen* 355 U.S. 371 (1958).

Jacobellis v. Ohio, decided in 1964, is an early case dealing with two of the central dynamics of this dissertation the regulation of obscene film (rather than obscene books) and the issue of the local vs. national community. Nico Jacobellis' conviction for "possessing and exhibiting" two obscene films was upheld by both the Ohio Court of Appeals and the Supreme Court of Ohio before reaching the Supreme Court, where the majority of justices promptly declared the films in question not obscene.⁴¹ Behind the six unique opinions in this case (pointing to the messiness of obscenity law in this era) was not necessarily a disagreement over whether the films were obscene, but over the scope and implementation of federal obscenity regulation itself. Of concern was the reach of *Roth's* "community standards," about which Justice Brennan decreed, "that the contemporary community standards test might refer to the particular local community from which the case arises...is an incorrect reading of *Roth*...it is , after all, a national constitution we are expounding."⁴² Just because the films read as obscene to multiple Ohio courts did not mean they read as obscene to the nation. This dismissal of differing community standards was not just about obscenity, but about the balancing of federal and state power. Brennan explained, despite the appeal, the court could not simply accept jury decisions in obscenity cases (despite some interpretations of the "community standards" clause) because the First Amendment consequences were too high. Part of what this dissertation is concerned with is how the court shifts in just six years to adopt a reading of community standards as

⁴¹ It is in his *Jacobellis* opinion that Justice Potter Stewart wrote the infamous descriptor of obscenity, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184 (1964) Stewart concurring

⁴² *Roth v. United States* 354 U.S. 476 (1957), quoted in Strub, 187.

meaning local community standards and the consequences of that shift on considerations of space and citizenship.⁴³

The repeated overturnings of obscenity convictions resulted in an unintentional broadening of the *Roth* test. Observers have concluded that works that would not pass the dictates of the *Roth* test in the years immediately following the decision would five or ten years later.⁴⁴ The *Roth* test failed in providing a consistent and understandable basis for obscenity rulings. The developing doctrine of “sexual liberalism” perhaps explains this instability⁴⁵— the “community standards” Roth relied on were consistently evolving and changing. Furthermore, what “community” meant additionally curtailed the effectiveness of the decision— standards differed across the country. The 1966 case of *Ginzburg vs. United States* served an important purpose in reinterpreting the scope of what should be considered when deeming something obscene. Ralph Ginzburg, like Samuel Roth, worked in books, owning three publishing houses. One of those companies published the “The Housewife’s Handbook on Selective Promiscuity,” a purported ‘marriage manual,’ described as “frankly and avowedly concerned with erotica.”⁴⁶ The upholding of Ginzburg’s conviction in the end rested not on the contents of the book, but on Ginzburg’s pandering, on the way he openly advertised the book as containing obscenity, thus appealing to the ever-dangerous prurient interest. Across the courts, no judge was able to convincingly argue ‘The Housewife’s Handbook’ held absolutely no “sex therapeutic value—”

⁴³ *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

⁴⁴ See discussion of the 1969 film *Vixen* in Elena Gorfinkel, *Lewd Looks: American Sexploitation Cinema in the 1960s* (Minneapolis, MN: University of Minnesota Press, 2017): 51.

⁴⁵ Sexual liberalism, proposed by historians John D’Emilio and Estelle Freedman, posits a mid-20th century trend towards understanding sexual pleasure as a crucial part of personal happiness, yet one that should be kept within heterosexual monogamous relationships. Estelle Freeman and John D’Emilio, *Intimate Matters: A History of Sexuality in America* 3rd edition, (Chicago, IL: University of Chicago Press, 2012): xviii, 300.

⁴⁶ *Ginzburg v. United States* 383 U.S. 463 (1966).

the marital manual at the very least met the dictates of sexual liberalism and celebrated normative sexuality within the confines of the marital household. The works explicitly did not meet the *Roth* test for obscenity, but Ginzburg's convictions were nonetheless upheld. Rather than provide any clarity in the attempt to reaffirm the conservative nature of *Roth*, the decision argued that Ginzburg portrayed his works as obscene and that was enough. In response, Justice Potter Stewart concluded "he did not understand what Roth [was] anymore."⁴⁷

The decision in Ginzburg can be seen in some respects as the end of an era of obscenity regulation by the court. In 1967's *Redrup v. New York* the court de facto ended censorship of sexual written material. The decision differentiated from *Ginzburg* in its assertion that Times Square newsstand clerk Robert Redrup did not market to minors nor foist the materials on unwilling audiences. In the years between *Redrup* and 1973's rearticulation of the obscenity test in *Miller*, nearly every piece of written material appealing obscenity convictions to the Supreme Court was deemed acceptable with the court only citing the *Redrup* decision.

The final significant development in obscenity law in the Roth era, 1969's *Stanley v. Georgia*, again reshaped the boundaries of governmental reach, reflecting changing cultural standards and desire for community involvement in the endless search for a definition of obscenity. Atlanta police first entered the home of resident Robert Eli Stanley in search of gambling materials— Stanley was a convicted bookmaker— but instead, left with three reels of pornographic materials seized from a desk drawer in an upstairs bedroom. Stanley was charged by Fulton County District Attorney Lewis Slaton with possession of obscene materials. Despite these events occurring nearly six years before "community standards" was defined as constituting local communities rather than a national community, Slaton defended the charges

⁴⁷ Strub, 198.

his office brought against Stanley by saying “we showed the films before a cross-section of the community,” and arguing it was that cross section that determined the films to be obscene.⁴⁸ Stanley was convicted on the obscenity charge and the Georgia Supreme Court affirmed his conviction. Slaton and Assistant Solicitor General J. Robert Sparks argued the case for the state before the Supreme Court in January of 1969.

On April 7th, the court released the rare unanimous decision, overturning Stanley’s conviction, and thereby invalidating all state laws that forbade the private possession of obscene materials. The decision, made along the grounds of both the First and Fourteenth Amendment (and in Justice Hugo Black’s concurrence, the Fourth Amendment right to protection from illegal seizure), very much reflected the movement of the court towards a focus on individual privacy rights.⁴⁹ The court argued that government intrusion into “the contents of his library” endangered Stanley’s right to “satisfy his intellectual and emotional urges.”⁵⁰ Rather than an articulation or reframing of the *Roth* test, the Court understood Stanley as setting new precedent. Previous obscenity decisions and regimes concerned themselves solely with the sale or distribution of obscenity, not private possession.

Perhaps more so than other precursor case, *Stanley v. Georgia* would play an important role in the development and decision in the first case study of this dissertation, Paris Adult Theater, particularly in its approach to the reach of privacy and in the involvement of many of its actors. One of the State of Georgia’s main arguments, that possessing pornography led to deviant sexual behavior and crimes of sexual violence, was rejected by the courts for a lack of scientific

⁴⁸ “Bets Suspect Indicted on Smut Charge,” *The Atlanta Constitution*, Sep. 28, 1966: 14.

⁴⁹ *Roe v. Wade* was decided four years later along similar privacy lines. *Roe v. Wade* 410 U.S. 113 (1973).

⁵⁰ *Stanley v. Georgia*, 394 U.S. 565 (1969).

basis but would be taken up by the U.S. Congress and the recently formed Presidential Commission on Obscenity and Pornography, again further explored in Chapter 2.

I have outlined in this section the history and progression of obscenity regimes that led the court to its decision in 1973's *Miller v. California* and its companion case *Paris Adult Theater v. Slaton*. Such a survey reveals the struggle over regulating obscenity in the U.S as one reckoning with balancing morality, community attitudes and mores, and the First Amendment. How could the government adequately define something to the specificity required by the law that is inherently indefinable— subject to as many definitions as there are people living in the United States? I argue that the regulation of obscenity in the United States has not in any way followed a linear progression or march toward increased permissiveness; instead, this history reveals a deep ambivalence and uncertainty over the specter of morality. Many historians have attempted to characterize the progression of obscenity regulation as a move away from governmental regulation of morality. While in some respects I understand the argument— a shift is obvious when comparing the Comstock laws to the decision in *Stanley*— the continued focus on community standards and reliance on the reactions of the “average person” cannot be understood as a project free from morality or even religious notions of obscenity. Part of the argument of this larger dissertation is that in reaction to the difficulties in defining and thus regulating obscene content itself, courts and governing bodies did two things. First, they turned their regulatory attention towards the end site of obscene works, theaters, sex shops, etc. rather than the sites of production, and second, in making that change the regulatory statutes shifted towards a spatial approach and one concerned with regulating the viewers of obscenity. Viewing the evolution of obscenity regulation in the United States with this late shift in mind complicates

our understanding of some of the debates and motivations of the earlier cases, particularly those dealing with notions of privacy, community input, and sexual liberalism.

Film/Cinema History

Concurrent with the development of Comstockian obscenity regulation in the United States in the late 19th and 20th century was the development of an emerging new form of media. On June 6th, 1894, inventor Charles Francis Jenkins debuted the phantoscope, projecting a film for an audience of family, friends and reporters. From the very first exhibition, film was understood as a medium with the potential to exhibit the sensual and the erotic: the film in question featured a dance from a vaudeville show. Jenkins eventually sold the phantoscope to Thomas Edison, who brought the technology to the public and started shows at a music hall in New York City. The first storefront theater dedicated to motion pictures opened in New Orleans in 1896 and by the beginning of the nascent century, movie theaters following the nickelodeon model, charging a nickel for a lengthy period of entertainment, populated many American cities. Many vaudeville theaters themselves converted to film exhibition halls as a simple economic decision; filmed, rather than live, performances allowed the theaters to remain open on Sundays.⁵¹

As early as the start of the 20th century, reformers understood the motion picture as a threat to the bourgeois moral equilibrium, with *Playboy's* "History of Sex Cinema" series recounting, "movies and saloons were quite properly equated at that time: both were primarily working-class entertainments and movies, like beer, cost only a nickel. Proponents of the new

⁵¹ Geltzer, 27. That the same sites that housed the controversial vaudeville shows would later house the controversial movie houses prompts continued questions about the spatial dynamics of obscenity regulation and community opinion.

medium argued that, at the very least, movies were better than liquor for the workingman.”⁵² By 1910, almost three fourths of all movie-goers were working class and the very spatial dynamics of the movie theater and the filmgoing experience transformed cinemas into spaces of easy cross-gender and cross-class socialization.⁵³ In particular, Kathy Peiss highlights how the “theater’s darkness and the vocal familiarity of the audience encouraged opportunities for intimacy and spooning.”⁵⁴ The fear of motion picture’s influence on the “workingman” led directly in 1907 to the first film censorship ordinance in the United States. Soon after a film titled “The Great Automobile Robbery” was first exhibited in Chicago, a car was stolen. Subsequently, the Chicago police were placed in charge of previewing pictures; a responsibility understood not merely to encompass the defense of public property but of public morals as well.⁵⁵ *Moving Picture World* reported in October of the same year that Lieutenant Alexander McDonald, chief censor for the Chicago “Five Cent Theater and Dance Hall” taskforce “stopped the display of fourteen pictures this week, pictures that were unfit for exhibition and would easily lead some child or man with a weak mind onto an evil path.”⁵⁶ Progressive reformers alongside a varied population including ministers, social workers, police, women’s clubs and civic organizations accused “movies of inciting young boys to crime by glorifying criminals and of corrupting young

⁵² Arthur Knight and Hollis Alpert, “The History of Sex in Cinema,” *Playboy*, April 1965.

⁵³ Kathy Peiss, *Cheap Amusements: Working Women and Leisure in Turn of the Century New York* (Philadelphia, PA: Temple University Press, 1986): 146; Mihaela Popescu, *Keeping it Dirty: Defining and Redefining Obscenity in American Judicial Discourse*, 141; See Mary Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States 1885-1920* (Durham, NC: University of North Carolina Press, 1995) and Nan Enstad, *Ladies of Labor, Girls of Adventure: Working Women, Popular Culture and Labor Politics at the Turn of the Twentieth Century* (New York, NY: Columbia University Press, 1999) for more on the evolving entertainment and social practices of young women and the responses of moral reform advocates.

⁵⁴ Peiss, 151.

⁵⁵ *Ibid.*

⁵⁶ Quoted in Geltzer, 31.

women by romanticizing illicit love affairs.”⁵⁷ It was no wonder then that those reformers faced little pushback in their calls for censorship boards “on the condescending grounds that...audiences [were] insufficiently sophisticated to critically engage with the sensational imagery.”⁵⁸ Long past the early days of cinema reformers were continuing to refer to moviegoers as “nitwits, dolts, and imbeciles.”⁵⁹ Concerns about the effects of obscenity on the young and vulnerable transcended mediums.

The Supreme Court validated the growth of state-run obscenity review taskforces in 1915, with the decision in *Mutual Film Corporation v. Industrial Commission of Ohio*. The Court held that the free speech protection clause of the Ohio constitution,⁶⁰ which was substantially identical to the free speech protection clause of the First Amendment, did not extend to motion pictures. In its unanimous decision, the court deemed motion pictures a “business, pure and simple, originated and conducted for profit.”⁶¹ In effect, the decision gave the green light to censors to “trim, edit, cut and ban as they saw fit.”⁶² The government regulation, aimed at curtailing dangerous cinema, in fact spawned an underground subculture of violent and pornographic films.

Up until the late 1920s and early 1930s, the industry operated under disparate legal restrictions and guidelines, with individual states and cities deploying diverse obscenity

⁵⁷ Gregory D. Black, *Hollywood Censored: Morality Codes, Catholics, and the Movies* (Cambridge, UK: Cambridge University Press, 1994): 9 .

⁵⁸ Strub, 40.

⁵⁹ Joseph Breen to Father Corrigan, Oct 17, 1930, Box 42 Will Hays Papers, Indiana State Historical Society, Indianapolis, IN quoted in Black, 39.

⁶⁰ Throughout the first 150 years of United States history, the Supreme Court regularly ruled that the Bill of Rights applied solely to the federal government, not state governments (See *Barron v. Baltimore* and *United States v. Cruikshank*). Starting in the 1920s, a series of cases gradually incorporated the Bill of Rights against the states. Notably, the First Amendment guarantee to freedom of speech was incorporated through the 1925 *Gitlow v. New York* and the 1931 *Stromberg v. California*; Freedom of the press was incorporated with 1931’s *Near v. Minnesota*.

⁶¹ *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U.S. 230 (1915).

⁶² Geltzer, 3.

ordinances, some stricter than others. As a result, films from this period of cinema sometimes featured depictions of sexual innuendo, nudity, interracial relationships, drug use, homosexuality, and violence—all things of great concern to censors. The advent of the Great Depression forced movies to increase their levels of sex and violence to make the price of a movie ticket justifiable—limited cash increased calls for displays of the extreme, the new, the interesting.⁶³ Complicating our understanding of the industry and frustrating many contemporary reform groups was the policy of block-booking. Pioneered by Adolph Zukor, block booking forced theater owners to agree to show all of a studio's films in order to guarantee they would be able to show those with the biggest draws.⁶⁴ This practice in particular troubled reform groups, who viewed it as forcing “small town exhibitors to play immoral films because they had to pay for them whether they wanted to show them or not.”⁶⁵

Concurrent with the movement of some filmmakers towards the inclusion of increasingly tantalizing content was an internal movement within the industry for self-regulation. The vertical integration and oligopoly of the film industry led to calls to minimize the dizzying and contradictory policies of censorship boards across the U.S.⁶⁶ The National Board of Review, founded in 1909, was one of the first independent groups making recommendations on the appropriateness of films; the board described their purpose not as censorship but as “judging the real effect of each film on the composite American audience.”⁶⁷ In defending themselves against state censorship through accession to the respectability demands by community groups like the National Review Board, the movie industry at least partially sought to expand their audiences to

⁶³ Arthur Knight and Hollis Alpert, “The History of Sex in Cinema” *Playboy* Nov. 1965.

⁶⁴ Black, 23.

⁶⁵ Ibid.

⁶⁶ Bradley H. Lane, “A Visual Politics of the Perverse: Sexual Predation, Spectatorship and Queer Feminist Cultural Studies,” (Ph.D. dissertation, Indiana University, 2013): 77.

⁶⁷ Black, 32.

the middle and upper classes.⁶⁸ The later downfall of the NRB as an arbitrator of film propriety mirrored the concerns the Supreme Court faced with accepting jury trials—the wide variance the populace had as to what constituted the obscene. In the 1920s, the board was accused of accepting financial support in exchange for directing controversial films towards the most lenient volunteer reviewers.⁶⁹

In 1927, the first industry driven list of content restrictions emerged in the form of The Motion Picture Producers and Distributors of America's (MPPDA) "Don'ts and Be Carefuls" List. While themes, acts, and scenes that fell on the "Don'ts" list were understood by filmmakers to be forbidden, those that fell on the "Be Careful" list were understood to be controversial, yet permitted provided that "vulgarity and suggestiveness might be eliminated and that good taste might be emphasized."⁷⁰ In a move reflexive of contemporary social mores, while "any inference of sex perversion" fell on the "Don'ts" list, a wide variety of 'sins—' including "the sale of women or a woman selling her virtue," "rape or attempted rape," and "extensive or lustful kissing" fell on the "Be Careful" side of the fence. By the early 1930s, the list gradually was institutionalized in the form of the Motion Picture Production Code—often referred to as the Hays Code for the then-president of the MPPDA. The Code, in place for most major motion picture studios from 1934 to 1968, followed similar morals and implemented similar guidelines as the "Don'ts and Be Carefuls" list, but had a stronger enforcement apparatus, the Production Code Administration. Derived as a self-governing policy from the industry itself rather than a legislative body, the Hays code did not face the same accusations of anti-American censorship

⁶⁸ Peiss, 161.

⁶⁹ Black, 30.

⁷⁰ Ibid.

and free speech violations as governmental attempts to define obscenity, perhaps contributing to its longevity and relative success.⁷¹

While the major motion picture studios operated under the auspices of the Motion Picture Code, an underground industry of visual erotica flourished. The Code Era largely overlapped with the era of the stag film. Stag films were produced and shown primarily in secret, with homosocial networks sharing reels and hosting exhibitions. Thomas Waugh offers a definition of stag films as “films that contain an explicit sexual narrative produced and distributed usually commercially to clandestine nontheatrical male audiences between 1908 and 1970 principally in Europe and the Americas.”⁷² The films were short, largely silent, and without color for most of their existence, but can be characterized by their explicit depiction of sexual intercourse. Influential theorist of pornography Linda Williams describes one of the central differences between stag films and later pornography as a contrast between the orgasm shot and the meat shot.⁷³ Rather than the orgasm as the moment of climax, both figuratively and literally, stag films centered the “meat shot—“ a close-up shot of genital penetration. Waugh estimates around 2000 stag films were made, with a total run time of around 300 minutes between 1915 and 1968.⁷⁴ The medium of the stag film evolved over its lifetime; the advent of the 8mm and 16mm film and its popularity in capturing home video led to somewhat of an influx of pornographic material on the

⁷¹ Black, 32-33. This is not to say that the Hays Code faced no opposition. Many critics of the Code linked it to Catholic activism and the imposition of religious values, although they were ultimately unsuccessful in ending it. See Black.

⁷² Thomas Waugh, *Hard to Imagine: Gay Male Eroticism in Photography and Film from Their Beginnings to Stonewall* (New York, NY: Columbia University Press, 1996): 309.

⁷³ Linda Williams, *Hard Core: Power, Pleasure and the Frenzy of the Visible* Expanded Paperback Edition (Berkeley, CA: University of California Press, 1999): 73.

⁷⁴ Thomas Waugh, “Homosociality in the Classical American Stag Film: Off Screen, On Screen” *Sexualities* 4 (3), 2001: 275-6.

underground market. A large collection of these 8 and 16 mm films exists to this day in the collection of the Kinsey Institute.

Waugh sees the stag film genre as both inherently homosocial and as part of a greater pornographic project to access the “truth of sex.”⁷⁵ Scholar of stag film history Al Di Lauro concurs, describing stag film events as “a non-credit course in sex education...prov[ing] that a world of sexuality existed outside one’s limited individual experiences.”⁷⁶ The evocative image of the stag film is one of a travelling projectionist furtively carrying a suitcase of reels into a fraternity or American Legion club.⁷⁷ The choice of exhibition site is not just a consequence of chance; association with community pillars like Veterans’ organizations, fraternities, and volunteer fire departments offered a sort of protection— when stag film parties fell under the reach of the law, producers distributors and dealers faced much harsher punishment than the viewers of these films.⁷⁸ The obscenity battles discussed in the above section were largely not fought over stag films— the truly pornographic scenes in these films were so clearly obscene by the standards of the era that no cause could honestly be brought that they met some kind of redeeming benchmark.⁷⁹ In the early 1970s, at the advent of the adult movie theater, the first showings often consisted of strings of stag films strung together to reach full-length.⁸⁰

The Code Era, particularly in its waning years of the 1950s, did offer at least two avenues for patrons to access the lurid: hygiene movies and foreign films. Foreign films were able to

⁷⁵ Ibid.

⁷⁶ Al Di Lauro and Gerald Rabkin, *Dirty Movies: An Illustrated History of the Stag Film* (New York, NY: Chelsea House Publishing, 1976): 26.

⁷⁷ Di Lauro and Rabkin, 54.

⁷⁸ Arthur Knight and Hollis Alpert, “A History of Sex in Cinema” *Playboy*, Nov. 1967.

⁷⁹ Joseph W. Slade, “Eroticism and Technical Regression: The Stag Film,” *History and Technology* 22, no. 1 (2006): 30.

⁸⁰ Kenneth Turan and Stephen Zito, *Sinema: American Pornographic Films and the People Who Make Them* (New York, NY: Praeger Publishers, 1974): 86.

avoid the production level censorship of the Production Code Administration, but the vertical integration of American film studios, distributors, and theaters meant that they still often struggled to reach American audiences. Furthermore, they remained subject to the nebulous system of local censorship boards; *Playboy* cites the “control and exclusion of dirty foreign films” as one of the original justifications for the New York Censor Board’s existence. As New York was the central hub for foreign and art film theaters, the decisions that stemmed from their Censor Board in effect became national.⁸¹ By the late 1940s, small clubs formed for the purpose of exhibiting these foreign and experimental films under the banner of “education,” thereby avoiding certain censorship ordinances— boards tended to follow a hands off policy of “if it’s educational, it has to be harmless.”⁸² The most influential of these clubs, Cinema 16, operated out of the Provincetown Playhouse in Manhattan. Amos Vogel founded Cinema 16 for the presentation of “outstanding social documentaries, controversial adult screen fare, advanced experimental films and classics of the international cinema and medical psychiatric studies.”⁸³ The largely successful highbrow approach Cinema 16 took in order to display films considered dangerous is an early indicator of the role that class and social positioning played in debates and conversations over obscene film.

While foreign and experimental film clubs often operated ostensibly under the educational banner, a sub-genre of films known as hygiene films were marketed and framed as purely instructional and educational, with no ostensible artistic vision. These films often covered materials like childbirth and sexual education, and only some portrayed matters with an exploitative or prurient eye, yet that still frequently fell victim to the censors’ chopping block.

⁸¹ Arthur Knight and Hollis Alpert, “A History of Sex in Cinema,” *Playboy* Feb. 1966.

⁸² Arthur Knight and Hollis Alpert, “A History of Sex in Cinema,” *Playboy* April 1967.

⁸³ Scott MacDonald, “Cinema 16: Documents Toward a History of the Film Society” *Wide Angle* 19, no. 1 (1997): 30.

Perhaps the most famous of these “educational” films is the often-parodied 1936 film *Reefer Madness*. As the industry moved into the 1950s and early 1960s these ‘educational’ films took on increasingly exploitative subject matters and approaches; movies set or filmed in nudist parks became popular, and many filmmakers began either producing or marketing ‘documentary’ films centered on non-Western cultures as enticing and exotic, often emphasizing differing sexual mores and clothing.⁸⁴ The titillation these films provided, usually centered on images of the naked or partially clothed body, speaks to the direction obscenity-skirting film would take in the progression towards the purported liberalization of the film exhibition industry with *Miller v. California*.

While 1959’s *The Immoral Mr. Teas* will not be remembered in the annals of great film alongside *Citizen Kane* or *2001: A Space Odyssey*, it has nearly as important and influential a role in the history of cinema. The film follows Bill Teas, a voyeuristic door-to-door salesman, who, prompted by dental anesthetic, develops X-Ray abilities. Mr. Teas, living up to his titular description, primarily deploys his newfound skill to mentally strip women of their clothing. While Mr. Teas suffers some embarrassment seeing acquaintances and friends in the nude, the film ends with the decree— “some men are happy to be sick.” What set the *Immoral Mr. Teas* apart was its exploration of the erotic and the stimulating without raising censor’s eyebrows. The formula of Mr. Teas was simple— plenty of skin and nudity, but no sex.⁸⁵ With the courts’ earlier rulings that nudity in and of itself was not obscene, the film faced little legal opposition. The film, filmed on a budget of 24,000 dollars, eventually raised over a million dollars in ticket sales, primarily in art house and exploitation theaters. Influential movie critic Roger Ebert

⁸⁴ Eric Schaefer, “Bold! Daring! Shocking! True!": A History of Exploitation Films, 1919–1959. (Durham, NC: Duke University Press, 1999): 265.

⁸⁵ "'Vulgar, Pointless, In Bad Taste' but 'Mr. Teas' Not Pornography," *Variety*, November 2, 1960.

weighed in both on the relative quality of the film as well as the groundbreaking role it played for its audience, writing, “As plots go, *Teas* was not terrifically subtle. It is essentially a silent comedy with counterpoint narration. But the movie's jolly irony overcame any feeling of embarrassment or self-consciousness on the part of audiences who were, for the most part, seeing a nude woman on the screen for the first time.”⁸⁶

The debut and success of the Immoral Mr. Teas fostered a small industry of films known as “nудie-cuties.” Prototypically, these films followed the model of Immoral Mr. Teas, displaying nudity but no sex, often with some kind of voyeuristic plot. The hero of these films does not outwardly express interest in having sex with the targets of his peeping; he merely wants to look, mirroring the experience of the audience.⁸⁷ The unfettered view the film’s hero gets is part of a larger process bent towards giving the audience the best possible view of the women in question. With the nudie cuties, the voyeuristic experience becomes increasingly central to the erotic dynamic.

Both the Immoral Mr. Teas and the so-called educational art films can be understood as related to, if not belonging to, the genre of sexploitation films. This genre, the existence of which relied upon the loosening applications of the *Roth* test in the early to late 1960s, can be defined by a three-prong test. One, sexploitation films dealt with taboo topics and subjects—described by some as “things that would be on the “Don’ts and Be Carefuls” list of early Hollywood regulations.” Two, they were made cheaply and three, they were distributed independently.⁸⁸ In saying that they were distributed independently, the spatial history of these sexploitation films is

⁸⁶ Roger Ebert, “Russ Meyer: King of the Nudies,” *Film Comment*, *New York*, Vol. 9 Issue 1 (Jan/Feb 1973), 35-46.

⁸⁷ See Linda Williams, *Hard Core*, and *Screening Sex* (Durham, NC: Duke University Press, 2008) for more on the relationship of the audience to material exhibited on screen.

⁸⁸ Gorfinkel, 28.

illuminated; excluded from large movie theater chains, these films found homes in smaller independent movie houses, ones that were often in need of fast cash. A significant indicator of the sexual liberation movement came when theaters like Atlanta's Loew's Grand Theater, once home to the premiere of *Gone With the Wind*, started showing films targeted for obscenity prosecution.⁸⁹ The popularity of sexploitation films was short-lived—the purpose they served in establishing a market for sexual films paved the way for their far more titillating competitors, hardcore films like *Deep Throat*, *Boys in the Sand*, and *Behind the Green Door*.⁹⁰

The decade or so following the Roth decision brought increasingly racy films to market as filmmakers and distributors learned tricks and strategies to work around the vague and easily manipulated dictates from the Supreme Court. However, success varied widely from locality to locality as communities struggled to enact legislative adjustments that both met their understanding of what the Supreme Court allowed and the variety of personal opinions regarding obscenity. The 1964 clarification in *Jacobellis v. Ohio* that Roth's 'community standards' were meant to be applied on a national rather than localized basis only exacerbated the tensions and confusion.

The mixed responses to the 1967 Swedish erotic drama *I am Curious (Yellow)* emphasized the lack of clarity within the standing obscenity doctrine. The film follows a young Swedish woman named Lena through her meditations on and explorations of the social justice movements of the 1960s—as well as her sexual exploits. The film included numerous scenes of nudity—male and female—as well as staged scenes of sexual intercourse.⁹¹ Controversially, in

⁸⁹ “WSB-TV Newsfilm Reel #1678” *WSB-TV Newsfilm Collection*, The Walter J. Brown Media Archives and Peabody Awards Collection, University of Georgia Special Collections.

⁹⁰ *Ibid.*

⁹¹ Marta Kuzma “Whatever Happened to Sex in Scandinavia? I Am Curious (Yellow),” *Afterall: A Journal of Art, Context and Enquiry*, no. 17 (2008): 5.

one scene Lena kisses her lover's flaccid penis— oral genital contact, yes, but how did the lack of penetration and the flaccidness of the organ factor into any sort of obscenity decision? When the film reached Boston in March 1969, the Boston Police Department nearly immediately seized the reels, leading to a case that traveled through the District and Circuit Courts to be tried eventually at the Supreme Court. The highest court chose not to rule on the question of obscenity, thereby returning the case to the circuit court and thus confirming their ruling of “not obscene,” but did stay a temporary injunction that the district court had issued against further prosecution of the theater owners.⁹² Once again the fundamental question and tension within the Supreme Court became how to enact and enforce obscenity law without individual hearings and decrees for each film in question.

While the case of *I am Curious (Yellow)* does not hold the same place in the history of obscenity law as *Hicklin*, *Roth* or *Miller*, and did not instigate any new test, it does represent the pinnacle of a decade of failure for obscenity law and reflects the extralegal trends of sexual liberation and social justice that made calls for a comprehensive obscenity strategy ring all the louder. Reactions to the film varied across the country— southern and rural jurisdictions were far more likely to find the film obscene whereas it was exhibited with less trouble in northern and urban districts.⁹³ Varying levels of knowledge of obscenity laws on the part of police, citizens, and community groups, as well as variance in obscenity laws in different cities, states and on the federal level, “became a recipe for misguided confrontation” and frustrations, provoking calls for the Supreme Court to once and for all solve the issue of obscenity.⁹⁴

⁹² *Byrne v. Karalexis*, 396 U.S. 976 (1969); “*Karalexis v. Byrne and the Regulation of Obscenity: ‘I Am Curious (Stanley)’*,” *Virginia Law Review* 56, no. 6 (1970): 1205–22.

⁹³ Geltzer, 231.

⁹⁴ Gorfinkel, 164.

I am Curious (Yellow) is objectively a movie of its time, celebrating the youth of and optimism of the sexual revolution.⁹⁵ It earned over \$6 million in box office sales, becoming the 12th most popular film of the year in the United States and by the estimation of a *Variety* article, by 1992 the highest grossing foreign language independent film in the United States and Canada.⁹⁶ Perpetuating the film's popularity was a trend of celebrities— including talk show host Johnny Carson and former first lady Jackie Kennedy— photographed patronizing showings.⁹⁷ In the popularity of the Swedish film we can see both the early stirrings of the porno chic era and a reflection of the changing mores of at least cosmopolitan culture regarding sexuality.

We can locate this period of the late 1960s as a dynamic turning point in pornographic filmgoing culture. By 1967 peep show booths in New York were running “beaver films,” featuring solo female performers.⁹⁸ American film director Tom DeSimone, who directed a number of early gay pornographic films under the pseudonym Lancer Brooks, recounts that a switch occurred around 1969, with New York City theaters beginning to show hard core shorts— characterized by exposed genitalia and shots of penetration— alongside soft core features— characterized by nudity (though often with hidden genitalia), with sex acts either absent or alluded to through simulated positioning and camera angles.⁹⁹ Others have placed the arrival of hard core pornography into the gay scene around 1968, with a March 1968 issue of the *Advocate*

⁹⁵ Also of its time? A ‘cameo’ of Martin Luther King, constructed out of footage from his 1966 trip to Sweden. The main character dreams of encountering King and apologizes to him for not being strong enough to commit to nonviolence. *I am Curious (Yellow)* directed by Vilgot Sjöman (Sandrews, 1967).

⁹⁶ “Top Foreign Films in U.S.” *Variety* 31 August 1992: 54.

⁹⁷ Mel Finkelstein, “Jacqueline Kennedy Onassis walks out of Cinema Rendezvous theater on W. 57th St. after seeing ‘I Am Curious (Yellow),’” *NY Daily News* Oct 5, 1969.

⁹⁸ Strub, *Perversion for Profit*, 164.

⁹⁹ Paul Alcuin Siebenand, “The Beginnings of Gay Cinema in Los Angeles: The Industry and the Audience” (Ph.D. dissertation, University of Southern California, 1975): 85.

noting that “movies in bars are becoming quite a fad.” That June, an advertisement appeared for the Park theater on South Alvarado Street, claiming the “first assemblage of films of interest to adult homosexuals— those 18 and over admitted; open 945 AM to Midnight.”¹⁰⁰ For many of the same reasons obscenity law struggled to coalesce in this period— namely differing interpretations and standards in different locations across the country— it is difficult to pin down a date for the first “adult theater.” Ads like those quoted above point to their presence in numerous American cities by the late 1960s. In their creation, the exhibition of sexual films moved from the private spaces, like the VFW hall, to public sites, drawing regulatory attention and concern from the highest level.

On October 23rd, 1967, Congress created the Presidential Commission on Obscenity and Pornography. In the act that established the commission, Congress found that

the traffic in obscenity and pornography is a matter of national concern. The problem, however, is not one which can be solved at any one level of government. The Federal Government has a responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public and particularly to minors and whether more effective methods should be devised to control the transmission of such materials.¹⁰¹

Congress set the ultimate purpose of the Commission as

after a thorough study which shall include a study of the causal relationship of such materials to antisocial behavior, to recommend advisable, appropriate, effective and constitutional means to deal effectively with such traffic in obscenity and pornography.¹⁰²

¹⁰⁰ Finley Freibert, “Obscenity Regulation and Film Exhibition: Policing Gay and Feminist Media Industries in Southern California, 1960 to 1979” (Ph.D. dissertation, University of California Irvine, 2019): 106.

¹⁰¹ Public Law 90-100, “AN ACT Creating a Commission to be known as the Commission on Obscenity and Pornography,” Oct. 23, 1967.

¹⁰² Ibid.

Thus, from the very beginning of the commission, pornography and obscenity were set up as a problem to be solved, one with an assumed relationship to antisocial behavior. While previous historians have largely understood the history of obscenity law as moving away from morality and towards questions of quality of life, the language of the Commission's creation remind us of the inherent morality couched in language of antisocial behavior and the protection of innocents and emphasize the role of lawmakers' individual morals and sexual mores from the written word of the law.

In a true evocation of the separation of powers, as Congress established the Commission and allowed it to begin its work, the Supreme Court continued to accept and rule on obscenity cases. The case of *Stanley v. Georgia*, decided in 1969, reflects the Court's increasing liberal response to cases of obscenity and privacy as well as the growing gap between the actions of the Congress and those of the Court. James Allon Garland describes the unanimous decision in *Stanley v. Georgia* as the court "not only protecting private possession of explicit sex on film under the First Amendment, but also throwing the weight of the United States' whole constitutional heritage behind the decision to do so."¹⁰³ As the court carved out increasing protections for film and media, the industry responded in turn, moving away from the restrictive Production Code in the mid 1960s in favor of the "far more permissive" ratings system.¹⁰⁴

Coda

¹⁰³ James Allon Garland, "Sex as a Form of Gender and Expression After *Lawrence v. Texas*," *Columbia Journal of Gender and the Law* 15, no. 1 (2006): 297.

¹⁰⁴ Christie Miliken, "Rate it X? Hollywood Cinema and the End of the Production Code," from *Sex Scene: Media and the Sexual Revolution*, ed. Eric Schaefer (Durham, NC: Duke University Press, 2014): 34.

In 1972 the Supreme Court heard arguments in a case brought against Marvin Miller, owner of a pornographic book and film mail-order business, for distributing a brochure advertising his wares and featuring graphic pictures of said wares. In issuing their 1973 decision in the case, *Miller v. California*, the Supreme Court modified the national test for obscenity in two ways. First, it shifted the definition of obscenity from "utterly without socially redeeming value" to that which lacks "serious literary, artistic, political, or scientific value. Second, it clarified the meaning of "community standards," first set forth in the 1957 Roth case. Chief Justice Warren E. Burger wrote in the 5-4 *Miller* decision that it was not "constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."¹⁰⁵ *Miller* thus granted states and other localities a legal basis to prosecute obscenity based on their own standards. As a result, the *Miller* test has led to a patchwork of different standards across the country, with some communities allowing the sale and distribution of sexually explicit materials while others have banned them outright. This has created challenges for producers and distributors of sexually explicit materials, who must navigate a complex and constantly shifting legal landscape.

In the aftermath of the decision, Batavia, New York elementary school librarian Diane Medvitz sent a letter to Supreme Court Justice William O. Douglas. In the letter Medvitz applauded Douglas's dissent in the case and expressed concerns about the consequences of the new obscenity regime set by *Miller*. Medvitz wrote,

I don't believe that the idea about basing obscenity on the average person in the community will be effective. Who can decide who is average and does this make allowances for the minorities what are not average {sic?} I purely resent the idea

¹⁰⁵ *Miller v. California* 413 U.S. 15 (1973).

that a watchdog of my morals is going to limit what I can read or buy from the bookstore or the library.¹⁰⁶

Medvitz's letter puts into words the exclusionary possibilities and unequal consequences of the court's decision. In her letter, Medvitz asks two rhetorical questions, "who can decide who is average?" and "does this make allowances for the minorities what are not average? [sic]." These incisive questions illustrate the motivations and contradictions at the heart of U.S. obscenity law in the 20th century. I take up Medvitz's questions as to the effects of a new regime based on local community standards and the openings it presented for social control and consider them through the specific site of the adult theater.

While the justices imagined *Miller* as an answer to the problem of obscenity writ large, the court also released a number of decisions in conjunction with *Miller*, refining the new obscenity regime. One of these cases, *Paris Adult Theater I v. Slaton*, has not been treated to extensive historiographical study, yet in its focus on adult theaters and its discussion of space and consent, it augurs the direction obscenity law would take in the forthcoming decade. It is the subject of my next chapter.

Conclusion

In *Obscenity Rules*, Whit Strub writes that obscenity law was "more conservative... but not necessarily more clear" in the years after the decision in *Miller*.¹⁰⁷ Such a statement might seem at odds with a view of the 1970s as the 'porno chic' era. In the following chapters I will examine the obscenity regimes and decisions of this period and with the context provided by this

¹⁰⁶ Correspondence from Diane Medvitz to Justice William O. Douglas, 3 October 1973, MS-S18853, Box 1602, Folder 71-1051, William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C.

¹⁰⁷ Strub, 216.

chapter consider how communities understood the role of government in obscenity regulation and the role and position of obscenity and pornography in their communities. If *Miller* was just as confusing as previous tests like *Hicklin* and *Roth*, why has it remained the law of the land to this day? And how has the conservative nature of the decision played out spatially and how has it built on the traditional arguments, laid out in this chapter, about those who partake in or view pornography? These are the questions I take forward.

Chapter Two:

“For Adults Only:” Conceptions of Consent, Community Standards and Privacy in Paris Adult Theatre I v. Slaton

On a mid-October afternoon in 1971, William B. Endictor, investigator for the Fulton County, Georgia Solicitor General’s Office raided the Little Art Theater on Houston Street in Atlanta. As he and a fellow investigator approached the box office, a gruff voice asked for their ID. “We’re from the Solicitor General’s office...we want to confiscate the movie and arrest you. May we come inside?” replied Endictor, wielding his signature nine-millimeter pistol that accompanied him to every raid. Inside the theater, the investigators entered the projection booth and read the two young men their Miranda rights; as Endictor leaned over to fill in the warrant, he asked for names. “Thurston White,” replied one. In surprise Endictor looked up and exclaimed, “Oh, I’m sorry Thurston, I didn’t recognize you!” Later, in the backseat of the county’s white Ford, White offered directions to the County Jail, committed to memory from his previous arrests, muttering to himself “Damn sure never thought I’d be giving somebody directions [on] how to take me to jail.”¹

I open with an anecdote of this raid for a number of reasons. First, it effectively illustrates the central battleground that was the adult theater in the supposed war against obscenity— the theater had been raided so many times the police recognized the staff. Second, the way Endictor and his fellow investigator approached the box office, explaining their reasoning and asking for permission to enter, emphasizes how theaters blurred lines of public and private. Yes, theaters were businesses, open to the public, but there was still a boundary between their exhibitions and

¹ “Smut Called Revolution Tool,” *The Atlanta Constitution*, Mar. 30, 1971: 6C.

the busy city. Finally, I share this anecdote because it emerges from the same jurisdiction as the case, *Paris Adult Theatre v. Slaton* at the heart of this chapter: Fulton County, GA.

I argue in this chapter that the decision in *Paris*, wherein the court ruled that even if a film was exhibited solely to consenting adults, it was not free from the threat of obscenity charges, not only spoke to the importance of adult theaters to conceptions of obscenity in the early 1970s, but also revealed the idea of the local community as a legal fiction. In particular, a focus on the spatial questions at the heart of *Paris*, namely the distinctions between public and private and where and when consent mattered to the state, illuminate the way heterosexuality and heterosexual citizens came to form the basis behind the *Miller* doctrine of local community standards.

I draw from the work of Lauren Berlant and Michael Warner in conceptualizing the prosecution of adult theaters as part of a project of national heterosexuality and interrogating the consequences of demanding privatized sexuality.² In their influential work “Sex in Public,” Berlant and Warner write “one of the unforeseen paradoxes of national capitalist privatization has been that citizens have been led through heterosexual culture to identify both themselves and their politics with privacy.”³ I position this work on privacy and heterosexuality alongside the work of Samuel Delany in *Times Square Red, Times Square Blue*, where he writes of his personal experiences with adult theaters and advocates for their academic consideration as important spaces of interclass and interracial contact. He writes,

If every sexual encounter involves bringing someone back to your house, the general sexual activity in a city becomes anxiety filled, class bound and choosy. This is precisely why public rest rooms, peep shows, sex movies, bars with grope

² Lauren Berlant and Michael Warner, “Sex in Public,” *Critical Inquiry* 24, no. 2 (1998): 549, 553.

³ *Ibid*, 553.

rooms, and parks with enough greenery are necessary for a relaxed and friendly sexual atmosphere in a democratic metropolis.⁴

In this chapter I address how notions of privacy and publicness stemming from a heterosexual culture based in sexual liberalism⁵ are reflected in obscenity regimes, emphasizing adult theaters as a particularly visible site of contestation. The decision in *Paris* thus reflects a culture and a country struggling with questions of what publics matter and whose privacy matters.

The work of Margot Canaday in *The Straight State* and Clayton Howard in *The Closet and the Cul-de-sac* effectively illustrates the cultural and legal dynamics that supported and promoted the heterosexual family and the private family home in the years following WWII. Building on the work of Canaday, Howard claims that in the 1950s and 1960s, “adults publicly involved in normative straight relationships, particularly heterosexual marriage enjoyed the fullest benefits of American citizenship, while those who engaged in sex with others of the same sex risked social isolation, economic deprivation and legal prosecution.”⁶ One of the most important benefits extended to heterosexual couples was that of privacy. Throughout the period, courts loosened state control over “what happened behind closed doors,” liberalizing some laws on pornography, birth control, and homosexuality as long as those acts occurred within the confines of the family and the home.⁷ This does not mean these things were legalized, merely that regulation and control fell more heavily on those for whom the private home was not a

⁴ Samuel R. Delany, *Times Square Red, Times Square Blue* (New York: New York University Press, 1999): 127.

⁵ Sexual liberalism, proposed by historians John D’Emilio and Estelle Freedman, posits a mid-20th century trend towards understanding sexual pleasure as a crucial part of personal happiness, yet one that should be kept within heterosexual monogamous relationships. Estelle Freeman and John D’Emilio, *Intimate Matters: A History of Sexuality in America* 3rd edition, (Chicago, IL: University of Chicago Press, 2012): xviii, 300.

⁶ Clayton Howard, *The Closet and the Cul-de-sac: : The Politics of Sexual Privacy in Northern California* (Philadelphia, PA: University of Pennsylvania Press, 2019): 4

⁷ Howard, 13.

viable option as a site for sexual expression or for those who participated in sexual commerce. My work points to obscenity law broadly, and adult theaters particularly, as specific sites towards which state and local municipalities turned in the 1970s to enact this project of national middle-class heterosexuality.

I begin with a recounting of the period immediately preceding and surrounding the 1973 obscenity decisions, addressing the influence of the Presidential Commission on Pornography and Obscenity and three important figures— Charles Keating, Hinson McAuliffe, and the eponymous Lewis Slaton— on the development and prosecution of *Paris Adult Theatre I v. Slaton*. I analyze the case against the Paris Adult Theatre for its prosecutorial logic and trace the journey of the case through the lower courts before arriving at the Supreme Court decision, where I consider how the rhetorical perception of adult theaters and its patrons functioned in alliance with the *Miller* decision and other cases to form a regulatory program. I contrast these perceptions with ethnographic and contemporary reports of the patrons and proceedings within adult theaters, introducing a framework of queer theory to understand the importance and social role of adult theaters in the very communities excluded from the *Miller* test of “community standards.”

Commission on Obscenity and Pornography

Two and a half months after Congress authorized the creation of the Commission on Obscenity and Pornography on October 23, 1967, President Lyndon B. Johnson rang in 1968 by announcing the appointment of 18 members to the investigative body. Numbering among the members were a rabbi, a professor of sociology, a judge in juvenile court, a number of lawyers associated with the film industry and inexplicably, an instructor at the South Dakota School of

Mines. As the Commission began its endeavor— speaking to experts, visiting locales where pornography was, to one degree or another, accessible, and conducting community panels across the country— President Johnson left office, and President Richard Nixon began his first term.

Nixon campaigned and then entered office with an explicit obscenity agenda in mind. By May of 1969, political commentators predicted Nixon would soon “ask Congress for changes in Federal laws dealing with obscenity,” particularly bans on “brown paper wrapped pornographic material.”⁸ Nixon staffed his Oval Office with a number of culturally conservative advisors: one of the most culturally conservative, Pat Buchanan, prepared Nixon’s daily news summary, making sure to highlight every story on “the encroachment of moral decadence.”⁹ His approach to the obscenity problem reflected the midcentury suburban trend towards conservative citizens’ activism groups. In a speech, Nixon declared: “what is required is a citizen’s crusade against the obscene.”¹⁰

President Nixon himself did attempt, however, to exert his obscenity agenda upon the Presidential Commission. In mid-June 1969, within five months of taking office, Nixon appointed Senator Kenneth Keating to the ambassadorship of India, thereby freeing up his seat on the Commission for a Nixon appointee. An anti-obscenity mindset was apparent from the President’s choice: the unrelated Charles Keating. Now largely remembered for his central role in the savings and loan scandal of the late 1980s, in 1969 the majority of Americans knew

⁸ “Keating May Get Anti-Obscenity Post,” *Cincinnati Enquirer*, May 1, 1969.

⁹ Rick Perlstein, *Nixonland: The Rise of a President and the Fracturing of America* (New York: Scribner, 2008): 406.

¹⁰ Perlstein 407. For more on conservative citizens groups see Michelle Nickerson, *Mothers of Conservatism: Women and the Postwar Right* (Princeton, NJ: Princeton University Press, 2012); Lisa McGirr, *Suburban Warriors: The Origins of the New American Right* (Princeton, NJ: Princeton University Press, 2001); Donald Critchlow, *Phyllis Schlafly and Grassroots Conservatism: A Woman’s Crusade* (Princeton, NJ: Princeton University Press, 2008).

Charles Keating as an anti-smut crusader. Upon the announcement of his appointment, Keating declared his modus operandi:

There are criminals running amuck in this nation who are pandering to and titillating the people of this country, particularly our young people, with utterly foul and depraved materials. These unscrupulous merchants have reduced many of the nation's news racks, motion picture screens and even the mailboxes in our homes, to display unimaginable descriptions, stories and pictures of bestiality, perversion and just plain moral rot. I shall serve on the commission with the objective of seeing these criminals jailed. The decent people of this country want to strike back at the filth peddlers.¹¹

Keating, born in 1923 to a Cincinnati Roman Catholic family, was a married father of six when he began serving on the Commission. The Commission was far from Keating's debut on the national scene; a decade before in 1958, Keating testified before the House Judiciary Committee, decrying the capability of mail order pornography to "poison any mind at any age" and "pervert our entire younger generation."¹² The same year— though conflicting sources put the date as early as 1955 or 1956— Keating founded the anti-pornography group Citizens for Decent Literature (CDL), which began as an informal gathering of like-minded friends and grew to constitute over 300 chapters and 100,000 members nationwide.¹³ By 1971, the Georgia state Literature Commission was encouraging the formation of Citizens for Decent Literature groups throughout the state.¹⁴

Keating proposed a solution to the problem of obscenity and pornography that depended on growing cultural opposition from the white middle class while pursuing legal and bureaucratic remedies. Throughout the 1960s, Keating regularly campaigned for appointed

¹¹ "Nixon Names Keating For Fight on Smut," *Cincinnati Enquirer*, June 14, 1969.

¹² Michael Binstein and Charles Bowden, *Trust Me: Charles Keating and the Missing Billions* (New York: Random House, 1993): 87.

¹³ Whitney Strub, *Perversion for Profit: The Politics of Pornography and the New Right* (New York: Columbia University Press, 2010): 88.

¹⁴ "Action Line," *The Atlanta Constitution*, Jan. 2, 1971: 2A.

positions within the federal government. Historian Whitney Strub recounts an early missive published by the CDL imploring Keating supporters to recommend him: “ACT NOW! PLEASE! PLEASE! PLEASE!”¹⁵ Once appointed to the Commission, Keating immediately began to assert his opinions and influence. In September, he demanded a position as a member-at-large, which granted permission to attend all panels and discussions, rather than be given a singular panel assignment. He regularly leaked information from the Commission to the press and to Congress, and when his proposed study on correlation between pornography and sex crimes was denied by the rest of the panel for a lack of scientific integrity, Keating announced that he did not “feel himself bound by the action of this Commission.”¹⁶

Keating’s career, both with the CDL and as an influential anti-smut activist on the national stage, heavily relied on fomenting a particular idealized image. This image of the conservative family-minded crusader as the ultimate arbiter of obscenity would come to be enshrined in the “community standard” dictates of the *Miller* and *Paris* decisions. Keating and his group courted an image as reasonable men and women; CDL literature described Keating as “tall, athletic, and married....no humorless puritan or hot eyed reformer,” and often cited his background as a national swimming champion and service as a navy fighter pilot.¹⁷ CDL sought to appeal to middle class white families, a group that came to define the anti-obscenity movement in this period and the protection of which drove some of the arguments articulated in the later *Paris* case.

In March of 1969, three months before President Nixon appointed Keating to the Commission, Jane Friedman, a professional staff member of the Commission attended the

¹⁵ Strub, 85.

¹⁶ Ibid., 130.

¹⁷ Strub, 88.

National Convention of the Citizens for Decent Literature and submitted a report to the other commission members. Friedman recounts interviewing several police officers, including one from Brooklyn and a juvenile officer from St. Louis. She writes,

Both officers stated that in their opinion the major problem in the high schools today was drug abuse, not pornography. However, the officer from St. Louis stated that the adults in his community seemed more upset about juvenile consumption of pornography than of drugs. When I asked him why this should be so, he responded, “pornography is more visible. The adults know that the kids are smoking marijuana, but they don’t see it. On the other hand, adults walk past bookstores and magazine stands and see public displays of pornography they know that their kids are seeing it too and it upsets them.”¹⁸

These questions of visual pollution and intrusion will be addressed again in the following chapter, which considers *Erznoznik v Jacksonville*, a case dealing with the intersections of obscenity and visual pollution as they play out through the site of the drive-in theater. Here, Friedman’s reporting illustrates not only the centrality of family protection to those concerned with obscenity, but how part of the threat of pornography was in the way it burst a bubble of isolation previously established by dictates of sexual privacy and sexuality’s confinement to the private home. Those deciding obscenity law should not, in the minds of many anti-obscenity advocates, concern themselves solely with the consent of those watching the films in an enclosed theater, but with the consent of the community to have the theaters, specifically, and pornography broadly, in public spaces.

When the Commission released their majority report in 1970, it bucked expectations and stoked fears among large sections of the populace by recommending expanded sex education and recommending against any restrictions on adults’ access to pornographic materials. The majority

¹⁸ Report on the National Convention of the Citizens for Decent Literature March 14-15, 1969, “Anti-Obscenity Organizations” Box 2, WHCF Commission on Obscenity and Pornography, LBJ Library.

report did not regard pornography as a major social issue, rejected the idea that it contributed to crimes of any kind, and described laws restricting pornography as doing more harm than good.¹⁹ Keating, joined by two Reverends serving on the Commission, vehemently dissented. Any concerns that the recommendations of the Commission would lead to a constriction of local authority's ability to target obscenity and pornography were unfounded, particularly after Congress rejected the report wholesale in 1970.

Racialized Space

While I hesitate, without further research, to claim any definite connections, I do want to highlight the possibility of race playing a significant role in obscenity law of this period. The spatial turn of obscenity law I track in this dissertation, with its increased focus on the geographic boundaries of community, visual pollution, and the dynamics of consent versus intrusion, occurred at the same time as white flight and entrenched de facto segregation. In the decade following the desegregation of Atlanta public schools in 1961, the demographics of the city shifted dramatically. In 1960, black people represented a little more than a third of the city's residents, by 1970 over half, and by 1980 a full two-thirds.²⁰ Historian Kevin Kruse argues that the anger from white residents over the desegregation of public spaces dovetailed with anger over the desegregation of their communities.²¹ Withdrawal from the city proper was both

¹⁹ Commission on Obscenity and Pornography. *Technical report of the Commission on Obscenity and Pornography*. (Washington: For sale by the Supt. of Docs., U.S. Govt. Print. Office, 1970).

²⁰ Kevin Kruse, *White Flight: Atlanta and the Making of Modern Conservatism* (Princeton, NJ: Princeton University Press, 2013): 234.

²¹ Whit Strub recounts how racialized ties between Cold War fears and family anxieties manifested in the nascent suburbanization movement, writing, "as middle-class white parents fled cities for suburbs, they also hoped to leave behind the urban culture thought responsible for spawning a supposed wave of juvenile delinquency in the 1950s." The middle-class racialized anxieties Strub identifies propelled not only this anti-smut movement, but also the contemporaneous anti-desegregation movement. The same core group of upper middle class white mothers that populated the meetings of the CDL drove a number

physical and financial and political— white citizens no longer felt connected to the fate of Atlanta.²² On the ground, “black residential incursions” into formerly white neighborhoods were met with assumptions of plummeting property values and subsequently loosened standards for planning and zoning. One black Atlantan complained, “it’s awfully disgusting to pay inflated prices for homes in a residential section and as soon as you begin to get settled here comes white investors throwing up anything that will get by the inspectors...juke joints and pool rooms” and perhaps eventually, adult film theaters.²³ The disruptive nature of pornographic businesses did not belong in white suburbs or in white communities, but perhaps they could be located in places home to racial and sexual others.

Also pointing to the potential racial connotations at play in this period of obscenity law were the descriptions of the users of pornography provided by some anti-obscenity crusaders. In the literature produced by the CDL, Keating sometimes portrays the unnamed non-citizens who use pornography as a working class, racialized other; in one anecdote shared by Keating, he wrote,

of citizen action groups organized around segregation. In the critical site of desegregation (and obscenity regulation) that was the state of Georgia, advocates of segregated schools, including the Mayor of Atlanta, called for a local option, allowing each community to decide whether they wanted to desegregate their public school system. While this ‘local option’ was never enacted, with unwanted desegregation instead met by the growth of racially exclusive private schools, it can be retroactively identified as a prototype of the later ‘community standards’ test for obscenity. Campaigns for segregation and pornography regulation were often co-constitutive. Kruse, 138.

²² Kruse, 107.

²³ Kruse, 74. The idea of obscenity and pornography as part of a “slippery slope” towards property devaluation and urban decline was mirrored in citizen testimony heard before the Commission on Obscenity and Pornography. At the Washington D.C. Public Hearing on May 13, 1970, William Hannon posed to the present Commission members, “if you will take 14th street in our city from New York Avenue to Thomas Circle...up until ten years ago this was a thriving area with many businesses, fully rented premises around there. First came the dirty pictures, the dirty shows, the speakeasy, the swinging waitresses, and then next door the Blue Mirror with its toplessness...the net result of it is that there is a complete economic deterioration to the area.” “Washington D.C. Public Hearing Commission on Obscenity and Pornography Transcript,” May 13, 1970, Washington Hearings Box 26, WHCF Commission on Obscenity and Pornography, LBJ Library

On September 17, 1970, a fur farmer in upper New York wrote me regarding immigrant Puerto Rican and American Indian workers whom he has employed over the past twenty years. The gentleman advised: there has been a big change in our workers in the last year or two. He stated that they have changed from rather manly decent people to rapists being obsessed with sex, including many deviations, I believe, he said, this is mostly due to obscene literature and obscene pictures.²⁴

Keating's focus on the race of pornography users calls back to a long history that understands the sexuality of non-white actors as specifically threatening.²⁵ In a *Reader's Digest* profile of the CDL, Keating described those who use pornography as "weak minds," another term weighted with eugenic and thus racial implications.²⁶ The racialization of pornography users as non-white further aided in Keating's construction of the proper citizen as an anti-smut crusader.

The project of obscenity regulation in this period was a project of regulating the visual sphere and the lines of public and private. While that project was perhaps not explicitly racial, or done with racialized intentions, I want to draw attention to the fact that some of the same considerations of space can be analyzed as tied to racial difference.

Regulation in Atlanta

In Atlanta, the task of regulating pornography largely fell on the backs of two men, Solicitor General Hinson McAuliffe and Fulton County District Attorney Lewis Slaton. The latter drafted some of the first search and seizure laws for the state and remained in his position, first assumed in 1965, for 31 years, later serving as prosecutor in the infamous Atlanta Child

²⁴ Technical report of the Commission on Obscenity and Pornography, 539.

²⁵ See Crystal Feimster, *Southern Horrors: Women and the Politics of Rape and Lynching* (Cambridge, MA: Harvard University Press, 2009); Hannah Rosen, *Terror in the Heart of Freedom: Citizenship, Sexual Violence, and the Meaning of Race in the Post Emancipation South* (Raleigh, NC: University of North Carolina Press, 2009).

²⁶ Hugh Park, "The Booze is Free But Not the Chaser," *The Atlanta Constitution*, Jan. 27, 1971: 19.

Murders case.²⁷ Hinson McAuliffe took office as Fulton County Solicitor General in 1969 after years working his way up through the Solicitor's office. One of the earliest newspaper stories concerning McAuliffe's censorship work opens by describing McAuliffe as "looking like [the] Baptist deacon he is."²⁸ The underground leftist Atlanta newspaper *The Great Speckled Bird* referred to McAuliffe as a "boy scout."²⁹ If Slaton fought obscenity in court, McAuliffe was his man on the street.

He raided the Gay Paree Cinema, located in downtown Atlanta, repeatedly. Though it has been characterized as a "gay pornographic cinema," McAuliffe's raids targeted its showings of both gay and straight films— from "It's a Gay World" to "Deep Throat."³⁰ McAuliffe's reputation was known in Hollywood— the distributors of the Marlon Brando film "Last Tango in Paris" brought a suit against McAuliffe in U.S. District Court claiming he was "trampling on free speech rights by threatening to raid house showing the movie."³¹ McAuliffe ultimately capitulated on the exhibition of "Last Tango," saying he was unsure if present Georgia statutes "could even stop [it]," but not without making his opinion clear: "as far as I'm concerned, anybody that would want to see it is kind of sick, really."³²

Although the majority of adult theaters in Atlanta remained centered around the downtown business district— which tracks with Kruse's account of the shifting demographics

²⁷ "Former Fulton DA Dies at 80" Nov. 18, 2002, WDUN, Atlanta, GA.

²⁸ Margaret Shannon, "Georgia's New White Knight," *The News and Observer* (Raleigh, North Carolina), Aug. 24, 1969: 68.

²⁹ *Ibid.*; "No More Glory of the Fuck or Smut Hunt" *The Great Speckled Bird* 2 no. 24, August 25, 1969.

³⁰ "Gay Paree Cinema," *cinematreatures.org*; Bob Damron, *Bob Damron's Address Book 1977* (San Francisco, CA: Damron, 1976); "2 Movies Are Seized and Workers Arrested in Smut Raid," *The Atlanta Constitution*, Aug. 27, 1971: 3C; Ken Willis, "Grand Jury Charges 5 in Federal Smut Case," *The Atlanta Constitution* Aug. 6, 1975: 8A. See also "Calcutta Ban in Fulton Backed in Federal Court," *The Atlanta Constitution*, June 9, 1972: 13A and Frederick Allen, "Police Seize 'Miss Jones'" *The Atlanta Constitution*, Oct. 25, 1973: 18A.

³¹ Beau Cutts, "Suit Asks 'Tango' Protection," *The Atlanta Constitution*, Oct. 19, 1973: 8B.

³² Gregory Jaynes, "McAuliffe Backs Down on 'Last Tango,'" *The Atlanta Constitution*, Nov. 18, 1973: 15B.

and physical landscape of Atlanta, under McAuliffe's authority, the few that had begun to spread into the suburbs and white residential neighborhoods appear to have faced more aggressive raids. One of McAuliffe's early raids as Solicitor General concerned a showing of the Andy Warhol film "Lonesome Cowboys."³³ The film had been on exhibition at the Mini-cinema in a shopping center near Ansley Park, a "fashionably in and close residential section of Atlanta." Ansley Park sits on the Northside of Atlanta, an area that to this day has remained largely affluent and predominantly white in the midst of the rapidly changing demographics of Atlanta over the last half-century.³⁴ McAuliffe's team arrested the projectionist, turned on the house lights and began taking pictures of the audience—a tactic *The Great Speckled Bird* complained reeked of Nazi Germany.³⁵ McAuliffe traced the root of the raid to a "visit of a representative of the Citizens for Decent Literature who told us what the movie was about."³⁶ The deployment of photography reveals a pathologization of attendees—one can only assume that the use of such photos would either be embarrassment through publication or the creation of a file for repeat offenders. McAuliffe later told *The Atlanta Constitution* that the identification of patrons served an additional purpose: "we wanted to see if we could identify any of the people in the audience. We wanted to see if any of them had records for previous sex offenses. This is the only way we can tell if this type of obscene material is detrimental to the general public."³⁷

This focus on the "effects" of obscene material and a supposed connection between exposure to the obscene and the commission of sex crimes characterized a common concern of this period. News of the use of photography in this raid reached the Commission on Obscenity

³³ The film contained both gay and straight sex as well as a crossdressing sheriff.

³⁴ Blacks represented little more than a third of metro Atlanta residents in 1960, more than half by 1970, and a full two-thirds by 1980. See Kevin Kruse.

³⁵ "No More Glory of the Fuck or Smut Hunt" *The Great Speckled Bird* 2 no. 24, August 25, 1969.

³⁶ Ibid.

³⁷ Margaret Hurst, "More Raids on Movies Coming," *The Atlanta Constitution*, Aug. 9, 1969: 9A.

and Pornography, when Edward Elson, President of the Atlanta News Agency and appointed member of the Commission, mailed staff member Jack Sampson a copy of an article on the raid and an attached letter asking “What do you think!”³⁸ Within the month, a Fulton County Superior Court judge described the patrons of other adult theaters as those who “could hardly be classified as the most intellectual and healthy minded members of the community.”³⁹ The raid was praised by members of the public— William Ridgeway wrote *The Atlanta Constitution* in praise of McAuliffe’s actions, describing the crackdowns as important functions of social control, writing “society has always had to have control measures for those who refused to live and function within standards desired by that society. We cannot relinquish that responsibility now.”⁴⁰

The Atlanta counterculture scene understood this raid as particularly targeted at the city’s homosexuals, who had recently been pushed out of the cruising grounds of Piedmont Park by a similar vice raid. Historians like Clayton Howard have argued that this kind of targeting of homosexuals is deeply tied to the dynamics of suburbanization, writing “as urban areas took on a greater share of their regions’ residents of color, poorer people, and unmarried residents, including many gay men and lesbians...bar raids and police sweeps of parks grew out of a larger fear that sleaze hurt investment and encouraged businesses and white middle class families to relocate to the suburbs.”⁴¹ This raid on a showing of *Lonesome Cowboys* therefore speaks effectively to the intersections of space and identity in adult theater regulation; the theater served to some degree as a form of a more private space for the homosexual community removed from

³⁸ Letter from Edward Elson to Jack Sampson, August 7, 1969, “Jack Sampson Correspondence” Box 33, WHCF Commission on Obscenity and Pornography, LBJ Library.

³⁹ Margaret Hurst, “Fulton Smut Probe Asked,” *The Atlanta Constitution*, Sep. 3, 1969.

⁴⁰ William R. Ridgeway, “Control Obscenity- Pulse of the Public,” *The Atlanta Constitution*, Sep. 6, 1969.

⁴¹ Howard, 11.

Atlanta's parks. However, the theaters' location in a neighborhood understood to be white, respectable, and middle class put the theater in particular danger of regulation.

The dynamics at play in the regulation of the theaters, namely the regulation of homosexual activity, questions around public and private, and a valuation of heteronormativity, have a long history in Atlanta. John Howard's study of the 1953 "Atlanta Public Library Perversion Case" provides useful context to these later raids. In September of 1953, the Atlanta police conducted eight days of raids on a popular gay cruising site—the men's restroom of the Atlanta Public Library, resulting in the arrest of twenty men.⁴² In court, the judge repeatedly mocked the supposed homosexuality of the defendants, admonishing them for never having intercourse with a woman, before rendering what was described contemporaneously as a "humane" verdict, suspending short prison sentences and imposing a fine of up to 200 dollars.⁴³ However, the conditions of this verdict speak far more to the spatial response to public sex and plant the seeds for the later restrictive imbrications of community standards. All men convicted were "instructed never again to visit the Atlanta Public Library on any occasion for any purpose," thus restricting their access to a public institution, and many were required to "relocate in some suitable community other than Atlanta."⁴⁴ Those allowed to remain in the city tended to be those already married or expecting children. Heterosexuality became a literal requirement for continued membership in the Atlanta community. Sixteen years before the raid on *Lonesome Cowboys* and twenty years before the decision in *Miller v. California*, the relationship between sexual practices and membership in the wider community was being articulated and enforced in courtrooms.

⁴² John Howard, "The Library, The Park, and The Pervert: Public Space and Homosexual Encounter in Post-World War II Atlanta," *Radical History Review* 62 (1995): 168.

⁴³ *Ibid.*, 171.

⁴⁴ *Ibid.*

In the years leading up to the initiation of the *Paris* case, McAuliffe's office amped up much of their anti-obscenity actions and hired two additional lawyers, James Clancey and Al Johnson (both of whom had previously worked for the CDL) to advise on obscenity cases. McAuliffe began delegating much of the legwork involved in the raids to a newly hired assistant, William Endictor. Far from acting as a mediating force on McAuliffe's social control agenda, Clancey in particular endorsed the idea that those who produced and utilized pornography should be considered a different class of citizen, excluded from the community of thought and decision-making. In 1971, Clancey appeared before the state police academy and declared, "obscenity is a major tool by which revolutionary groups seek to overthrow this country's government," presenting pornography users as treasonous.⁴⁵

McAuliffe's hardline enforcement tactics and views on pornography and obscenity did not go unchallenged in the diverse Atlanta community. At an Atlanta Public Forum Panel on pornography—a panel with McAuliffe, Slaton, and Keating all as featured speakers—a member of the seventy-person audience questioned the panel's makeup, asking "I thought I came for a public forum? Why aren't there any opposing views?" The event's moderator shut down the audience member, declaring that this was not the "proper place to discuss it."⁴⁶ Later in 1971, the Atlanta Constitution published a letter from community member Anthony J. Foltmann II in

⁴⁵ "Smut Called Revolution Tool," *The Atlanta Constitution*, Mar. 30, 197:6 C. Clancey's interpretation of pornography and obscenity as treasonous was not a singular opinion, but rather shared by like-minded associates across the country. Bishop Mussio of the Diocese of Steubenville in Ohio "classified pornography alongside treason and subversiveness" and suggested "it be treated as a common enemy on our American good order." "US Supreme Court Blamed for Smut Problem," *Southern Cross Newspaper* March 11, 1965, pg. 1. At the same Citizens for Decent Literature conference Jane Friedman attended in 1969, sex researcher W. Cody Wilson reported hearing "many hints that pornography is a part of a larger conspiracy to destroy the American middle-class way of life." W. Cody Wilson Report on the National Convention of the Citizens for Decent Literature, March 14-15, 1969 "Anti-Obscenity Organizations" Box 2, WHCF Commission on Obscenity and Pornography, LBJ Library.

⁴⁶ "Obscenity Definition Stumps Smut Panel," *The Atlanta Constitution*, May 11, 1971.

their “Pulse of the Public” column, criticizing another aspect of McAuliffe’s approach. Foltmann wrote,

I read in the May 12th Constitution that Fulton County solicitor Hinson McAuliffe has shown a hard-core stag film to about fifty local groups who have requested an example of pornography. For some time now I have been enraged at this self-appointed guardian of my morals. He seems intent on spending public monies in closing theaters which cater to adults who wish to indulge and who as adults are capable of judging for themselves their own tastes...I fail to see where his actions in showing the film differs from the supposedly illegal activities of the very theaters which he so ardently wishes to close.⁴⁷

These displays of McAuliffe’s demonstrated, even to fellow members of the community, how seemingly different rules applied for white middle class people who sought to see these films for supposed reasons of information than for the actual theater patrons. McAuliffe explicitly understood the question of pornography through a lens of rights and citizenship, telling *The Atlanta Constitution* in 1972, “where the rights of the individual are overwhelmingly increased, the rights of society are diminished by the same amount. I believe we have gone overboard in the last few years in guaranteeing the rights of individuals.”⁴⁸ Another letter published in the Feedback column of the *Atlanta Constitution* offered a solution to “civic groups that have developed a consuming interest in the nature of pornography...cold showers, strenuous exercise, and involvement in worthwhile community activities.”⁴⁹

Keating and McAuliffe both expressed significant concern about the patrons and users of pornography, invoking them as a specter and calling on the need to protect children and a normative family as central to their fight against so-called smut. At the Washington DC Public Hearing for the Commission on Obscenity and Pornography, James Perrine, affiliated with a

⁴⁷ Anthony J. Foltmann, “Pulse of the Public: McAuliffe and Stag Film Shows,” *The Atlanta Constitution*, May 17, 1971.

⁴⁸ Bill Seddon, “Porno ‘Revs Up’ Some People,” *The Atlanta Constitution*, May 15, 1972: 14-A.

⁴⁹ Bill Cox, “Feedback,” *The Atlanta Constitution*, Jul. 17, 1971: 2.

local adult bookstore, recounted members of the CDL as saying that people look upon those who “sell in these [sites] as ogres, as sniveling, mouthwatering young men or old men looking for young girls.”⁵⁰

Inside the Theaters

Who were the actual patrons of theaters? Did they conform or differ from the discursive constructions created by regulators? At the heart of this case and anti-obscenity activism lies a project of image construction and promotion; the adult theater and its patrons were presented in particular ways both to oppose the idealized middle class, heterosexual, white citizen and to situate the theater as a particularly threatening spatial incursion. While the sparse status of the archive, attributable to the often-denigrated status of materials related to sexuality, as well as the negative reputation of theaters, means that our ability to confirm or deny the established contemporary narrative of the theaters is somewhat limited, there are a small number of ethnographic studies we can consult to critique this narrative.

These ethnographic studies, most of them either conducted contemporaneously to the case in *Paris* or using oral histories of those present in the contemporary scene, introduce the methodology and conclusions of queer theory to this exploration of adult theater regulation. I understand queer theory here to both refer to works that address queered sexual experience and those works that question, disrupt, and undermine structures of ‘normative’ sexuality and systems of power. Queer theory serves as a useful framework for more fully understanding how the regulatory processes supported by *Paris* and *Miller* worked to exclude certain groups from

⁵⁰ Washington D.C. Public Hearing Commission on Obscenity and Pornography Transcript, May 13, 1970, “Washington Hearings” Box 26, WHCF Commission on Obscenity and Pornography, LBJ Library

both the legal community invoked in “community standards” and the cultural community of day-to-day civility.

These ethnographies point to a reading of adult theaters at odds with the one presented by anti-obscenity crusaders. Rather than a threat to public order, the theaters served as a public good, democratizing access to sexual expression and providing space that hid sexual acts from those who did not consent to see them. One of the foremost scholars of ‘sex in public’ and a formative theorist in queer studies, Michael Warner proposes the concept of “the counterpublic.” Warner understands counterpublics as

work[ing] to elaborate new worlds of culture and social relations in which gender and sexuality can be lived, including forms of intimate association, vocabularies of affect, styles of embodiment, erotic practices and relations of care and pedagogy. They can therefore make possible new forms of gendered or sexual citizenship.⁵¹

I propose that a reading of adult theaters as counterpublics offers a useful approach for understanding how adult theaters functioned and what role they played in the lives of their own community of patrons. In offering an alternative site of sexual expression— more private than public parks or public bathrooms— and in welcoming the sexual expression of those denied access elsewhere, the adult theater allowed the creation of a different form of sexual citizenship.

Ethnographic study of the theaters reveals that they were not just sites of passive pornography viewing, but of sexual action. The theaters provided opportunities for sexual expression beyond the visual and offered a modicum of privacy when compared to sexual expression practiced in the streets or in public parks. Noting the actual use of these theaters allows us to more fully understand their role in the lives of their patrons and exposes some of the contradictions at the heart of the anti-porn factions’ arguments about privacy and property. In the

⁵¹ Michael Warner, *Publics and Counterpublics*, (New York: Zone Books, 2005): 57.

theaters explored by the authors of these ethnographies, the content of the exhibited films is largely unimportant— in the words of one theater worker— “nobody in there cares if the film is on or off.”⁵² One ethnographer describes the sexual dynamic of a theater thusly, “masturbation is... permissible if carried out in a prescribed place and time in a certain manner.”⁵³

Ethnographers Brian Douglas and Richard Tewksbury estimated that at one theater they studied, “of the fifty men observed, twenty four were engaged in at least one of four acts— solo masturbation, mutual masturbation, oral sex or anal sex.”⁵⁴ Douglas and Tewksbury offer an extensive spatial study of one theater, mapping out certain locations as sites for unique acts, writing “those who masturbated in the front of the theater masturbated alone and did not seek partnered interaction” in comparison to those “utilizing masturbation to solicit others would do so in the middle to rear portion of the theater.”⁵⁵ Those who sought to perform oral sex on others “squatted in the rear of the theater facing the screen or kneeling in the theater seats facing the rear walkway.”⁵⁶ Finally, those who sought to act as the receiving partner in anal sex “wore their pants low around their hips or...with their naked buttocks prominently displayed...and stood directly behind the rear aisle of seats bent over at the hips.”⁵⁷ Historian Jeffrey Escoffier cites a New York writer describing a secondary form of signaling in the theaters, “often there will be found standing at the back of the theater two or three young men any of who for a fee will accompany one to seats well down front and there practice upon one the same arts that are being

⁵² Kenneth B. Perkins and James K. Skipper Jr. “Gay Pornographic and Sex Paraphernalia Shops: An Ethnography of Expressive Work Settings,” *Deviant Behavior: An Interdisciplinary Journal* 2 (1981): 190.

⁵³ Charles A. Sundholm, “The Pornographic Arcade: Ethnographic Notes on Moral Men in Immoral Places,” *Urban Life and Culture* 2, no. 1 (1973): 97.

⁵⁴ Brian Douglas and Richard Tewksbury, “Theaters and Sex: An Examination of Anonymous Sexual Encounters in An Erotic Oasis,” *Deviant Behavior* 29 (2008): 9.

⁵⁵ *Ibid.*, 11.

⁵⁶ *Ibid.*, 12.

⁵⁷ *Ibid.*, 13.

practiced upon others on screen.”⁵⁸ Spatial dynamics played out within the theaters just as they did in the streets and neighborhoods of Atlanta, with certain areas reserved for certain sexual acts and notions of privacy weighted with heavy meaning.

Legal scholar Carlos Ball describes the confinement of sexuality to the family home as part of an ongoing project to keep those with non-normative sexualities in the closet. The home becomes a place where sex is tolerated because it is hidden from view— because others do not have to think or know about it. Queer theorists have long valued sex in public spaces not only because of its transgressiveness and the work it does to destabilize systems of sexual conformity but because it is so accessible. Public sex does not inherently require anything besides a body— not everyone has a home or space recognized by the state as private.⁵⁹ Early sociologist of ‘public sex’ Laud Humphreys argues that when framed by those in power as dangerous, public sex refers to “sexual acts so situated as to result in the involuntary accessibility of others as sex objects or witnesses.”⁶⁰ Adult theaters present a curious case, then, maligned for harboring acts of public sex, either actual or portrayed on screen, despite the fact that an affirmative choice must be made by a patron to enter the space. To this end, the attorneys in the infamous indecent exposure case of Paul Reubens (known to most as Pee-Wee Herman) argued that if anything adult theaters were spaces specifically designed to prevent public sex acts, providing space specifically put aside for the exposure of genitals.⁶¹

⁵⁸ Jeffrey Escoffier, “Sex in the Seventies: Gay Porn Cinema as an Archive for the History of American Sexuality,” *Journal of the History of Sexuality* 2, no. 1 (2017): 104.

⁵⁹ Carlos Ball, “Privacy, Property, and Public Sex,” *Columbia Journal of Gender and the Law* 18, no. 1 (2009): 2.

⁶⁰ Quoted in Phillip Brian Harper, *Private Affairs: Critical Ventures in the Culture of Social Relations*, (New York: New York University Press, 1999): 75.

⁶¹ Harper, 78.

Contemporary ethnographic studies further characterize adult theaters as populated by those who were denied space elsewhere.⁶² One manager of an adult theater named “The Salon” argued for the continuation of their business, “[we] fulfill a need and desire of people and there’s some lonely people in the world. Through fantasizing, through books or magazines or films, sometimes it’s the only sexual outlet they have.”⁶³ In his work on porn theaters, Paul Siebenand describes Jim Kepner, former reviewer of gay pornography and, at the time of the interview, President of the homophile organization ONE, as deploying “class inflected rhetoric to associate customers of all male cinemas [read: porn cinemas] in general with a lower class status.”⁶⁴ Porn cinemas offered space to have sex not just for those who possessed no private property, but space for those systematically excluded from more acceptable forms of socialization to find sexual partners. Gonzaba cites Philadelphia resident Bill Foster as utilizing adult theaters over bathhouses because “he didn’t really look good in a towel” and John Gussler as preferring the theaters because “you almost sort of did anything with anyone who wanted to do something” whereas patrons of the bathhouses were more selective with their sexual acts and partners.

Depending on the films shown or the outward advertising displayed on the arcade booths, adult theaters could also provide something of a cover for those questioning or exploring their sexuality. In the words of Robert Dowd, the invited expert for the defense in the *Paris* case, pornographic films could allow viewers to experience and explore sexualities, kinks or acts they had not previously considered or had a safe opportunity to consider. Similarly, Gonzaba writes of

⁶² Eric Gonzaba, “Because the Night: Nightlife and Remaking the Gay Male World 1970-2000” (Ph.D. Dissertation, George Mason University, 2019) offers some evidence that theaters that catered to black and brown gay men were raided more often when compared to similar theaters that exhibited heterosexual pornography.

⁶³ Perkins and Skipper, 190.

⁶⁴ Paul Alcuin Siebenand, “The Beginnings of Gay Cinema in Los Angeles: The Industry and the Audience,” (Ph.D. Dissertation, University of Southern California, 1975): 114.

theaters showing gay pornography as providing space for “novice or questioning gay men [to] sit in safety in dimly lit rooms and watch on a large screen intimate sexual actions between men....it was possible for newcomers to the gay world to more slowly introduce themselves into the sexualized nature of the culture.”⁶⁵

The ‘public good’ provided by adult theaters was for the benefit of those society discarded or viewed as outsiders. Instituting localized “community standards” functioned to ensure and perpetuate control over those with non-normative sex practices or desires, while exacerbating control over those who lacked racial or class privilege.

The Case in Lower Courts

In October of 1970, Hinson McAuliffe requested from the Fulton County Commissioners an additional monthly allocation of 1200 dollars for his anti-pornography campaign, arguing the “time is ripe” for prosecution.⁶⁶ The funding supported McAuliffe’s efforts through the end of 1970, though he hoped to renew it in 1971. On December 28th, three days before this first round of additional funding ran out and a mere 8 days after the theater ran its first “Grand Opening” advertisement in *The Atlanta Constitution*, Slaton and McAuliffe filed complaints against the Paris Adult Theatre, located at 320 Peachtree St. for the exhibition of illegally obscene materials.

Peachtree Street runs North to South, bisecting much of central Atlanta. 320 Peachtree sits just south of I-85 in the neighborhood now known as Peachtree Center/Hotel District. The stretch of Peachtree that spanned the Peachtree Center and Tech Square neighborhoods was one of the centers of sexual and cultural variation in 1960s and 1970s Atlanta. A 1970 thesis on Atlanta resident perception of the “hippie subculture” locates its social center between Myrtle

⁶⁵ Gonzaba, 169.

⁶⁶ Margaret Hurst, “McAuliffe Smut Fight is Funded,” *The Atlanta Constitution*, Oct 8, 1970.

Avenue and West Peachtree St. Local businessowners interviewed by the thesis author expressed their disgust, saying of hippies “they’re just plain filthy....they’re an eyesore...I don’t believe they should be allowed on the street,” with the latter businessowner reporting that he “occasionally has to run them out of his restaurant because they sit there and try to make love.” Another storeowner from the broader Downtown Atlanta area declared, with the same language that would later be used to express frustration with obscenity and pornography, “it’s disgusting that decent, tax-paying citizens have to put up with this...we’re going to do something about it.”⁶⁷ The sexual non-normativity of hippies was met with concern about their existence in public and positioned in opposition to appropriate citizenship.

Similarly, editions of Bob Damron’s Address Book from 1968-1972 locate many of Atlanta’s LGBT-friendly businesses in the same few blocks: The Club South Baths at 76 4th St. NW, the Cameo Lounge at 182 Spring St. NW, Whisk’a Go Go at 225 Peachtree (later renamed to The Scene), the Purple Poodle at 659 Peachtree, and the Onyx at 341 Peachtree.⁶⁸ The Paris Adult Theater sat less than a half mile from the branch of the Atlanta Public Library at the heart of the 1953 cruising raid. Although these overlaps in location could perhaps be dismissed as due to this area being the commercial center of Atlanta, noting that language in opposition was similar and tying the location of the pornography in question to other concerns about sexual non-normativity in the same areas highlights the relevance of the regulation of adult theaters to the regulation of persons, citizenship, and community.

At the time of the indictment, the theatre was showing two films, *It All Comes Out in the End* and *Magic Mirror*. The descriptions provided by the county reflect how the prosecutors

⁶⁷ J. Forbes Farmer, “Atlanta Residents Attitudes Towards the Atlanta Hippies” (Master’s Thesis, Atlanta University, July 1970): 11.

⁶⁸ Accessed through *Mapping the Gay Guides*, Amanda Regan and Eric Gonzaba, (2019-): <http://www.mappingthegayguides.org>.

evaluated the films. Slaton and McAuliffe brought charges on the basis that the films in question depicted sexual conduct characterized by Georgia law as “hardcore pornography.” It appears that hardcore pornography was a term defined solely by the presence of specific sex acts—the description of the films provided by the prosecutor’s office consists largely of a narrative list of sexual acts. *It All Comes Out in the End* is described as featuring group sex, heterosexual vaginal and oral sex, as well as female homosexual cunnilingus.⁶⁹ The brief detailing the film recognizes no emotion, pleasure, or even real motivation in these acts, with the exoticizing exception of describing the two women “writhing in lesbianic ecstasy.”⁷⁰

The submitted description of the film *Magic Mirror* does elevate beyond a mere listing of sexual acts, introducing the supernatural as a driving force and offering some mild cultural commentary on the role of regulation and policing of sexuality.⁷¹ The final vignette in *Magic Mirror* is perhaps the most compelling sociologically. A robber enters the apartment of the main female character and begins to burgle her pocketbook—producing a gun and binding her hands with rope. A policeman enters and attempts to apprehend the robber; the woman peers in the titular magic mirror and the scene fades out, resolving on an image of all three players naked and fondling one another. The robber and policeman fight over control of the female’s body and the robber renders the police unconscious with a punch. The robber and female then engage in sexual intercourse across the unconscious policeman’s body. The policeman eventually wakes up and performs cunnilingus on the female as she performs fellatio on both the robber and the policeman. The scene eventually dissolves out of the sexual fantasy to show a fight between the police and the robber that culminates with the robber shot in the stomach, blood gushing from

⁶⁹ “Respondent’s Brief,” *Paris Adult Theatre I v. Slaton* 413 U.S. 49 (1973).

⁷⁰ *Ibid.*

⁷¹ One scene depicts sexual intercourse between two women circulating a petition for the Anti-Smut Society (abbreviated in the film as “A.S.S.”)

the wound “as it spills onto his clothes and the floor.” The policeman leaves to report to headquarters and the female notices that her magic mirror has been shattered in the violence.⁷²

Both films feature explicit violence- *Magic Mirror* ends with a murder, spewing literal blood and guts on screen whereas in *It All Comes Out in the End* depicts aggressive sexual assault and presumed rape. Both films frame sexual activity through a lens of multiple men fighting or competing over the body of a woman, but at no point in the case do either the state or the respondents raise the question of the intermingling of violence and sexuality in these films, an emphatic contrast with the concerns of the later feminist anti-pornography movement. In not raising the question of violence itself as obscene, the city opened itself to a common criticism leveled by the anti-regulation camp—that any invocation of a child’s innocence in regard to sexuality but not violence was hypocritical. What does it mean when parents invoke their desire to keep their children safe from the violence of the urban inner city as justification for increasingly insular suburban communities, but raise no alarm at the violence shown on screen? I would argue that it points to the rhetoric of innocence, parental control, and protectionism consistently invoked in anti-pornography cases as having a distinctly classed and racialized basis.

As the case progressed, the initial charges based on the content of *It All Comes Out in the End* and *Magic Mirror* became increasingly less important; instead, the proceedings of the court tended toward consideration of availability, audience demographics, and spatial control. To that end, Judge Jack Etheridge of the initial trial court dismissed the prosecution’s case, citing that the theater provided “requisite notice to the public of their nature” and offered “reasonable protection against the exposure of these films to minors.”⁷³

⁷² “Respondent’s Brief,” *Paris Adult Theatre I v. Slaton* 413 U.S. 49 (1973).

⁷³ *Slaton v. Paris Adult Theater*, 228 Ga. 343, 185 S.E.2d 768 (Ga. 1971).

Judge Etheridge filed his decision on April 12th, 1971, decreeing the films as not meeting the Georgia state definition of obscenity, failing to show the alleged sexual acts of cunnilingus, fellatio and intercourse. The acts were implied and simulated— meaning the actors posed in ways that the acts could be assumed to be happening— but not explicitly depicted. Etheridge wrote, “assuming that obscenity is established by finding that the actors cavorted about in the nude indiscriminately then, yes, these films may fairly be considered obscene.”⁷⁴ However, simple nudity no longer constituted obscenity.⁷⁵ He continues by describing the films as “childish, unimaginative, and altogether boring in [their] sameness,” a description that conjures a sense of arrested sexual development; contemporary sexual mores understood a failure to achieve heterosexual coupling as indicative of stunted sexuality, thus similar to that of a child or an adolescent.⁷⁶ Such an understanding of the sexuality of patrons complicates the invoked notions of protectionism and the threat of the adult theater— that suburban, middle class, white children could become like this sexually arrested “other.”

By the time the *Paris* case reached the Supreme Court of Georgia, arguments had again shifted, this time to concerns about consent. The city questioned whether proper signage existed in such a way that any who entered the theater was aware of and consenting to the particular contents exhibited within. At the time of the initial raid, the exterior of the theater was painted black, preventing passerby from peering indoors. Signs on the windows carried three messages, “For Adults Only,” “You Must be 21 and Be Able to Prove It” and “If Viewing the Nude Body

⁷⁴ Ibid.

⁷⁵ *MANual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962).

⁷⁶ I think we can attribute some of this to the early projects of sex history centering far more on non-normative sexualities and sexual practices, with the advent of heterosexual studies emerging later. Finley Freibert reminds us though, not to assume the sexualities of patrons of particular theaters, writing “the straight and gay shorthand for adult theaters derives from a simplistic model of spectatorship wherein the screen content is assumed to determine the audience’s,” instead arguing that the “ostensibly gay and straight pornographies of the 1970s had more queerly in common.”

Offends You, Do Not Enter.” The city took issue with this signage, arguing that the theaters did not adequately “forewarn the public, nor even suggest that the films in question depicted fellatio, cunnilingus, sexual congress, lesbian activities or homosexuality. At the most the [signage] would suggest that the films only portrayed and exhibited nude scenes and pictures such as those contained in girlie magazines.”⁷⁷ The lawyers for the theater openly agreed that the Paris Theater posted no notice of the specific acts portrayed within, “but,” they argued “the first time [the theater] put out a sign that said cunnilingual activity and fellatio inside, then [the police/vice squad] would be hauling us in and charging us with pandering, which is what they did in other cases in this jurisdiction.”⁷⁸

The call for signage was presented as a call for transparency— that those in the community would have an explicit understanding of what went on and what was displayed inside these theaters. This ‘public good’ was however, in opposition to any notion of a right to privacy for the consumer. While informed consent served as the stated backbone for this reasoning, what work would these proposed signs actually do? I see in this call for signage a similar tactic to the raids detailed above that deployed photography; the signage arrests any perception of privacy for the patrons of the theater, erasing the mystery and in such clarity labeling more clearly those who enter. The theatre was right in saying that they faced the possibility of prosecution for some of the language on these proposed signs; the specific language the prosecution criticizes the theater for lacking is the same sort of language that only recently served as the target of obscenity regulation. The Atlanta Better Films Council even questioned if signs urging “admittance will be

⁷⁷ “Brief of Respondents in Opposition to the Petition for Writ of Certiorari,” *Paris Adult Theatre I v. Slaton* 413 U.S. 49 (1973).

⁷⁸ “Oral Argumentation,” *Paris Adult Theatre I v. Slaton* 413 U.S. 49 (1973).

denied to all under 18 years of age” functioned as mere teasers to get maximum attendance.⁷⁹

The call for signage could in some ways be read as ensuring consent, but was it in anyway differentiated from pandering, something the Supreme Court had specifically targeted in obscenity law?

The specter of the recent decision in *Stanley v. Georgia*, which emerged from the same jurisdiction, forced consideration of consent in the *Paris* case. The defense argued “If Stanley, in essence, can watch a film of any kind, any sexually oriented film in the privacy of his home, why can’t a few fellows get together and watch it in a commercial setting and have just the same sense of privacy and the same sense of protection.”⁸⁰ While the defense claimed ideological consistency, their argument redefined the private away from the home and towards commercial space. Stanley’s consent mattered because he was a white, well-off suburbanite and his sexual expression occurred within a private home; the consent of the patrons of the theaters held less weight before the court not only because they tended to hold less political influence, but because the site of their sexual expression disrupted notions of proper sexuality. Just as the homeowner is granted additional influence in the community, the private home is privileged and granted rights denied to non-residential buildings.

Shortly after the decision in *Stanley* was released, a sentiment similar to that offered by the defense was published in the *Ann Arbor News*, with a lawyer for a local theater questioning, “it takes a rich man to afford movie prints [to watch in the privacy of his own home]— what about the poorer man? Is the money he pays for his theater seat buying a little privacy in the theater the way a rich man does in his home?”⁸¹ This statement highlights the inequality inherent

⁷⁹ Atlanta Better Films Council, “Restrict Movie Attendance- Pulse of the Public,” *The Atlanta Constitution*, June 17, 1967.

⁸⁰ “Oral Argumentation,” *Paris Adult Theatre I v. Slaton* 413 U.S. 49 (1973).

⁸¹ Lee Wilkins, “Censorship is Rather Still Except in Case of Age,” *Ann Arbor News*, Sep. 7, 1971.

in a position on sexual expression that places the home as the sole domain of privacy. The question of consent thus illustrates more of the spatial consequences of a regime based on middle-class sexual liberalism and reveals a deep discomfort with any transactional form of sexual commerce.

In November of 1971, the Supreme Court of Georgia issued their decision. In a unanimous opinion, the justices held that the films in question “are hard core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the first amendment.” While they agreed that the sexual activity was only simulated, they referred to an earlier decision ruling on the film “I Am Curious Yellow” as constituting hardcore pornography even though in that case, only simulated sexual activity was involved. They summarized, “The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character.”⁸²

Before the Supreme Court

With the 1969 confirmation of Warren Burger to the Chief Justice position and the 1970 confirmation of Harry Blackmun, the Nixon administration achieved a significant shift in the ideological direction of the Supreme Court.⁸³ The deaths of two additional justices between September and December 1971 meant, far from mirroring the liberal activism of the Warren

⁸² Slaton v. Paris Adult Theater 228 Ga. 343 (1971); “Film Ruling Reversed by Court,” *The Atlanta Constitution*, Nov. 6, 1971: 7C.

⁸³ Both of Nixon’s failed nominations came out of the South, leading him to accuse his opposition of an anti-Southern bias, declaring, “I have reluctantly concluded that it is not possible to get confirmation for the judge on the Supreme Court of any man who believes in the strict construction of the Constitution as I do, if he happens to come from the South.” Robert B. Semple Jr. “President Bitter: Pledges to Nominate Third Conservative to the Court Soon,” *The New York Times*, April 10, 1970: 1.

Court, the Burger Court quickly became a symbol of the “conservative retrenchment” promised by Nixon in 1968.

Facing once again the ambiguities and contradictions of established obscenity law, this newly restructured Supreme Court granted certiorari to at least five obscenity-related cases in the 1972 term. Decisions on each of the five cases were released together in June of 1973, packaged alongside a list of cases that had applied for certiorari that the court advised should be reevaluated under the auspices of these new decisions. Of the five decisions released that day, *Miller* served as the overarching theory behind the new obscenity regime, while the other four decisions provide clarification and specific nodes of application.⁸⁴

In conjunction with *Miller*, *Paris* elucidates the construction of the legal fiction of community, revealing its exclusionary motivation while speaking particularly to the spatial and cultural dynamics of privacy and consent. At the heart of the question of community standards, even beyond the geographic ambiguity, is who can be considered a member of a community and who is inherently excluded. The patron of the adult theater functions as an easy scapegoat— one whose opinion on the matter of obscenity is somehow corrupted by his behavior and perversions— but the ties between the anti-obscenity movement and racialized and classed notions of sexuality and space serve to particularly shape the stereotype of the patron. The proper citizen and member of the community is thus understood in contrast, implied to be a protective

⁸⁴ Of the cases decided with *Paris* and *Miller*, both *United States v. Orito* 413 U.S. 139 (1973) and *United States v. 12 200-ft Reels of Film* 413 U.S. 123 (1973) addressed the legality of transporting obscenity and pornography intended for personal use, either across international lines in the Reels of Film case or across state lines in the case of *Orito*. The decisions in these two cases intended to clarify the private possession dictate of *Stanley v. Georgia*; the Court decided that there was no right to import obscenity for private possession and that there was no protection over the interstate transport of obscenity stemming from the use of private couriers. *Kaplan v. California* 413 U.S. 115 (1973) affirmed once again that a written work can be considered obscene and legally regulated even if no pictures or illustrations were included. Each of these cases cited the decisions in *Paris* and *Miller* as established doctrine through which states and other regulatory bodies should consider future obscenity legislation.

parent or at least someone who constrains their sexual behavior to within the marital home. In instituting a legal consideration of “community” the racialized and classed realities of those who patronized adult theaters escalated these questions of community to become questions of citizenship. By refusing to establish an actual definition for obscenity, instead reserving the matter to individual communities, the Supreme Court indirectly prioritized the opinions and morals of the majority community over those with minoritized sexual behaviors. While the specific doctrine of community standards stems from the *Miller* decision, rather than *Paris, Paris* offers both a concrete example of the application of obscenity law (the adult theater) and more directly invokes the patrons of obscenity, positing their consent and choice to view obscenity as something ripe for judgment (both legal and social).

The Supreme Court granted certiorari to the Paris case along the question of whether or not Fulton County was violating the First Amendment. The theatre petitioners based their claims on the decision in *Stanley*, arguing “the State has no legitimate interest in “control [of] the moral content of a person’s thoughts.” They further relied on a reading provided by the initial trial judge that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only; claiming state regulation of “access by consenting adults to obscene material violates the constitutionally protected right to privacy enjoyed by [the theatre’s] customers.” This relied on the case history that recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults.

Thomas Moran, arguing for the state, recognized the larger significance of *Paris*, choosing to position the case within the troublesome history of obscenity law and connecting the timing of this case to the recently released Commission Report. Moran claimed that the views of

the court were increasingly disparate from the views of the majority of Americans. He saw in the respondent's arguments a larger plot:

to have this court make the judgment of this Commission of Obscenity and Pornography; the judgment of this court which would in effect repeal every law on obscenity in the United States. If we say this can be shown in the commercial theater, any material under controlled circumstances, then every law relating to pornography throughout the states would be abolished except as it applies to children.⁸⁵

Moran emphasized the stakes of this case, firmly planting the question of *Paris* as part of a larger cultural reckoning.

Moran's invocation of the Commission set the stage for the justices to retreat into debate; Charles Keating, minority report-writing member of the Commission, submitted the sole amicus brief in the *Paris* case, and the materials the justices carried into their chambers included a lengthy diatribe from his pen that effectively presented his white middle-class racialized and classed view of pornography. Keating opened his brief with a caveat, noting that the importance of his appeal will be "apparent only to those members of [the] court who are willing to recall to mind from memory the vastly superior state of public sexual morality" just a decade ago.⁸⁶ In the dozens of pages that follow, Keating offered his own history of the case, simultaneously recounting some of the lower court cross-examination and offering his own moralizing. Keating took particular umbrage with included testimony from the Fulton County trial court, wherein Dr. Robert Dowd, a professor at Tulane University and supposed expert on the issues of obscenity and juvenile crime, espoused the social benefits of pornography. Dowd argued, "these kind of movies in general helped to eliminate fears and helped to satisfy curiosity about sexual

⁸⁵ Ibid.

⁸⁶ "Brief for Charles Keating as Amici Curiae Supporting Respondent," *Paris Adult Theatre I v. Slaton* 413 U.S. 49 (1973): 4.

matters.” Keating refuted Dowd’s assertions on the positive effects of pornography and obscenity, instead citing University of Pennsylvania sociologist William Kephart:

rates of divorce, venereal disease, crime, and delinquency, adultery, fornication, rape illegitimacy and drug addiction increase with a tempo that makes economic inflation look sluggish by comparison...while it is not possible to pinpoint the relationship between these... and the increase in obscenity and pornography...the coincidence would be one of the most remarkable in history.⁸⁷

Keating denied that these issues were a question of moral erosion but of moral laceration, emphasizing, “it is a Judeo-Christian culture which this court is called upon to interpret.

According to that Judeo-Christian base each citizen enjoys a personal civil right to live free of the debasing influence of public indecency.”⁸⁸ Keating collapsed the differentiation between public and private morality, saying “the great majority of people believe that the morals of ‘bad’ people do, at least in the long run, threaten the security of good people.” He continued, writing

It matters not that in our present morally weakened society there are many members of our adult community who may personally find it difficult to maintain high principles. It is one thing to say that they have a right to lead an immoral life; it is another thing to say that they have a constitutional right to propagate that immorality in the community.⁸⁹

His rhetoric points to an understanding that proper morality should serve as a requirement to function openly in a community and to receive the same rights. Keating’s concern over the “propagat[ion of] immorality” in the community again raises the question of spatial access and who is granted the very right to exist privately.

Keating supported such a view in his concluding paragraphs of the brief, first citing historian Arnold Toynbee’s claim that “19 out of the 21 great civilizations which flourished in

⁸⁷ Ibid., 85-6.

⁸⁸ Ibid., 78.

⁸⁹ Ibid., 122.

world history crumbled into ruin...not because of armed aggression from without, but because of moral decay within,” before returning to his “Judeo-Christian” cultural roots and invoking Sodom and Gomorrah. Keating closed his brief with a rhetorical flourish, leaving the justices with the following as they retreated into deliberation: “Amicus respectfully suggest that the individual members of this court should examine and consider the suggestion that in the biblical days of Sodom and Gomorrah there must have been justices whose liberal views on public morality contributed to the destruction of those two cities.”⁹⁰

To a degree Keating succeeded: the question of morality did in fact weigh heavily on the minds of the justices as they formulated their opinions. However, at stake in their debates was less the very fate of Sodom and Gomorrah and more how to address changing notions of morality. A memo from Clerk Larry Hammond to Justice Lewis Powell responding to circulated draft opinions of *Miller* and *Paris* hearkened back to the precedent established in the famous 1913 Learned Hand decision in which Hand outlined his belief that obscenity law and moral attitudes regarding sexuality inherently change with the times. Hammond wrote, “the moral tenor of the community, insofar as it is portrayed through the written word or other forms of art is to be set by the free marketplace. Sexual acts which were widely condemned only a generation ago as perverted are today pretty widely accepted— at least within the marital unit.”⁹¹ Hammond continued, expressing his fear that under the draft majority decisions in *Miller* and *Paris*, “criminal prosecutions will be haphazard and unpredictable throughout the country, not reflecting as the Chief Justice suggests, differences in community values, but differences in the

⁹⁰ Ibid., 124.

⁹¹ Memo from Larry Hammond, Feb. 2, 1973, *Paris Adult Theatre I v. Slaton*. Supreme Court Case Files Collection. Box 7. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

personalities of judges and prosecutors.”⁹² Hammond’s concern with “community standards” lay in the issue of equal treatment under the law— both for patrons and non-patrons of adult theaters, and for patrons in different parts of the country. While Hammond demonstrated particular foresight in seeing the lack of a clear definition of community as inherently paving the way for the values of individual judges and prosecutors to legislate obscenity, he failed to incorporate into his argumentation either the hierarchical racial or classed makeup of these judges and prosecutors. All of the deliberations over the decision in *Paris* neglected to recognize the outsized role communities already played socially and culturally in the relationship of sexuality and citizenship.

Hammond’s concerns with the drafted decisions in *Miller* and *Paris* continued, writing “in places, the opinions read like the personal crusade of one man (or five men) against smut,” expressing concerns that the court overreaches in making value judgments on the quality of “good and bad books.” For all these concerns, however, Hammond sees a greater good in establishing a new obscenity doctrine. He argued to Justice Powell, “I have been convinced...that one of the most important goals to be accomplished at this time is for at least five justices to agree on a court position.”⁹³ He continued, emphasizing the support for his belief among what can only be assumed to be his fellow clerks, “several of us feel this way and within fairly broad limits are willing to subordinate personal views...to a common basic position which commands a majority.” The clerks, and at least to some degree, the justices themselves, called out for an end to the constant flood of obscenity cases driven by ambiguous laws— the decentralization found

⁹² Memo from Larry Hammond, 7 June 1972, *Paris Adult Theatre I v. Slaton*. Supreme Court Case Files Collection. Box 7. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

⁹³ Memo from Larry Hammond, Dec. 12, 1972, *Paris Adult Theatre I v. Slaton*. Supreme Court Case Files Collection. Box 7. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

in *Miller* and *Paris* is as much a consequence of convenience as it is a ruling of constitutional theory. However, Hammond's concerns over community standards would not, in the end, persuade Powell.

In the offices of Justice Harry Blackmun, who, as with Powell, would go on to join the majority in both *Miller* and *Paris*, debate circulated over the need for differentiation in definitions and applications of obscenity. Blackmun's concerns stemmed from the definition and application of privacy. In a memo to Justice Blackmun, clerk Randall Bezanson expressed concern over the way the Chief Justice presented his standards for obscenity, writing of the Chief Justice's opinion, "the standard of obscenity with respect to consenting adult, and with respect to books and film alike, is, to my surprise, the same as that for nonconsenting adults and juveniles."⁹⁴ Bezanson preferred an approach that followed in the steps of *Stanley* and held the right to privacy paramount. In opposition to prevailing notions of sexual liberalism, Bezanson saw theatres and other commercial enterprises as granted some level of privacy protection by the Constitution. He did concede, however, that the State could "regulate the means or mode of dissemination to a substantial extent, with a view toward limiting the theatre's protection to the bare minimum necessary to protect the privacy interests of the user (consenting adult)."⁹⁵ He wrote in his memorandum of the Chief Justice's belief that extending privacy protection in this way would lead to the legalization of all crimes deemed "victimless." On the contrary, Bezanson argued to Blackmun, protection under the privacy doctrine for consenting adults would stem not from a notion of unlimited privacy, but directly from the First Amendment. Bezanson concluded with recognition that the Nixon-appointed Blackmun may side with the Chief Justice; he

⁹⁴ Memo from Randall Bezanson. 11 January 1973, MS-S84430, Box 159, Folder 71-1051, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

⁹⁵ *Ibid.*

recommends that if Blackmun does so, he dissent partially in order to protect the privacy rights established in *Roe v. Wade*.

Blackmun's concerns over privacy offer insight into the role of consent within the *Paris* decision. In arguing that consent from the patrons of the theaters to watch the movie— even if informed through the presence of signage— is ultimately irrelevant to the legality of the film, the Court reshaped and narrowed the privacy doctrine in *Stanley* by privileging the individual and the closed household over communal and the accessible. What this focus on consent also does is elaborate upon the idea of community standards— the standards of those who consent to patronize adult films are not given any standing. Their consent and their standard for what is appropriate for them to watch do not hold weight according to *Paris*. The *Paris* decision thereby elucidates whose privacy matters and whose consent matters to the “community standards” of *Miller*. The rhetoric, demographics, and tactics of the anti-obscenity activists who understood the community standards doctrine as granting their objections some form of authority, coupled with the lengthy history of racialized and classed interpretations of citizenship and sexuality, means that those excluded from full participation in the ‘community’ tended to be minoritized in one way or another.

Contemporary readings of the Burger Court have held the centrality of property and privacy to their decisions; this focus is apparent if we consider more deeply the implications of the decisions in *Miller* and *Paris*. In the work *The Burger Court: The Counter Revolution That Wasn't*, First Amendment scholars Norman Dorsen and Joel Gora write,

With few exceptions, the key to whether free speech will receive protection depends on an underlying property interest, either private or governmental. In other words, throughout the past decade the values of the First Amendment have been protected it appears mainly when they have coincided with property interests; conversely free

expression has received diminished protection when First Amendment claims have appeared to clash with property interests⁹⁶

The trouble with the obscenity cases before the Burger Court was thus a problem of conflicting property interests— “the rights of commercial purveyors of books and motion pictures versus the rights of property owners in the surrounding community.”⁹⁷ The court’s privileging of homeowner’s property interests reflects a hierarchical value placed upon the class privilege to own a home while entirely removing the patrons of the theaters claims of First Amendment rights.

As in *Miller*, Chief Justice Burger wrote the majority opinion in *Paris*. The opinion began with a series of statements of fact, most of them serving to answer discrete questions set forth in the writ certiorari briefs; Burger admitted that there was no evidence presented that minors had ever entered the theaters, but does clarify that he also saw no evidence that the theater “had a systematic policy of barring minors apart from posting signs at the entrance.” In this decision, Burger advocated a kind of sexual liberalism and a cultural centering of heterosexual family life. He continued, “the issue in this context goes beyond whether someone, or even the majority considers the conduct depicted as wrong or sinful,” arguing that “the states have the power to make a morally neutral judgment that public exhibition of obscene material...has a tendency to injure the community as a whole.”⁹⁸

Burger further composed a distinction between the privacy in *Stanley*, restricted to a singular location— the home, and the “constitutionally protected privacy of family, marriage, motherhood, procreation and child rearing” which is extended not to a particular place or list of

⁹⁶ Norman Dorsen and Joel Gora, “The Burger Court and Freedom of Speech” in *The Burger Court: The Counter Revolution that Wasn’t* ed. Vincent Blasi (New Haven: Yale University Press, 1983): 31.

⁹⁷ *Ibid.*, 39.

⁹⁸ *Paris Adult Theatre I. v. Slaton* 413 U.S. 49, 69 (1973).

places, but to a protected relationship. He continued, citing the work of Constitution scholar Alexander Bickel, who writes in a 1971 article,

a man may be entitled to read an obscene book in his room....we should protect his privacy, but if he demands a right to obtain the books and pictures he wants in the market and to foregather in public places— discreet if you will but accessible to all— with others who share his tastes, then to grant him his right is to affect the world about the rest of us and to impinge on other privacies.⁹⁹

When what is necessary to exercise a right is some kind of private property, how then does the law treat those with more limited resources?

Byron White was the only non-Nixon appointee to join Justices Powell, Blackmun and Rehnquist in Burger’s majority decision. The other four justices dissented, with Justice Douglas writing a solo dissent and Justices Stewart and Marshall concurring with a separate dissent penned by Justice Brennan. Douglas made clear that he does not see obscenity as something excluded from the First Amendment, justifying this belief through a declaration that the “colonies had no law excluding obscenity from the regime of freedom of expression and press that then existed.”¹⁰⁰ Douglas further emphasized his disdain for obscenity restriction, declaring his principle of “never reading or seeing the materials coming to the Court” based on his belief that it would be unconstitutional for him to act as a censor.

Although lacking Douglas’s ideologically driven interpretation of the First Amendment, Brennan’s dissent in *Paris* was additionally concerned with the role of the Supreme Court in dealing with obscenity. Rather than ideological, Brennan’s concerns relate far more to practicality and application, holding that the previous two decades have clearly shown the court’s inability to establish a universal test to distinguish between obscene and non-obscene materials.

⁹⁹ *Paris Adult Theatre I v. Slaton* 413 U.S. 49, 59 (1973).

¹⁰⁰ *Paris Adult Theatre I v. Slaton* 413 U.S. 49 (1973) (Douglas, J. dissenting). Brennan’s dissent— in which he cites a 1726 obscenity law in the Massachusetts Bay Colony— would disagree.

This, Brennan declared, is a constitutional problem that extends even beyond the First Amendment, citing the Due Process Clause of the Fourteenth Amendment, which requires that all criminal laws provide fair notice of what the State commands or forbids. Brennan therefore posited four paths the court can take going forward: first, the court could draw a clear line, one that would necessarily be extremely broad, something akin to “any depiction or description of human sexual organs irrespective of the manner or purpose of the portrayal is outside the protection of the Constitution.” Brennan conceded that the nation has largely moved beyond such a puritanical dictate. Second, they could offer a definition that limits prosecutable obscenity to that which depicts physical conduct and explicit sexual acts. With this definition, Brennan suggested the problem of written obscenity— is just a written depiction of physical conduct enough to convict? Third, he proposed, the justices could renounce their duty and designate juries to rule if something is obscene or not. This third proposal mirrors in many ways the eventual result of community standards— the ideology of a “jury of peers” allows for regional variation in opinion. Finally, Brennan proposed the view of deceased Justice Hugo Black and his partner in thought Justice Douglas, that the first amendment bars the suppression of any sexually oriented expression. To Brennan, none of these are sufficient solutions.¹⁰¹ Brennan thus concluded that it was not possible for the Court to establish obscenity laws that are at once specific enough to meet the Due Process clause and broad enough to satisfy those who wish obscenity to be reduced or eliminated, while not suppressing material protected under the First Amendment.

Perhaps the answer then lies in abandoning one of the fundamental tenets of obscenity law— that there exists a definable class of sexually oriented expression that may be totally

¹⁰¹ *Paris Adult Theatre I v. Slaton* 413 U.S. 49, 93-95 (1973) (Brennan, J. dissenting).

suppressed by the Federal and State governments. Brennan considered recent decisions, namely *Redrup v. New York* and *Stanley v. Georgia*, wherein the court specifically considered state concern for juveniles, pandering, and individual consent to view as factors in determining the legitimacy of an obscenity law. That consideration, he argued, proved that the court held the view that state interests in protecting children and in protecting unconsenting adults stood on a different footing. Looking at the evidence in *Paris* and reflecting on the obscenity cases he had seen in his time on the court. Brennan resolved, “while I cannot say that the interests of the State apart from the question of juveniles and unconsenting adults — are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results.” This, of course, was a dissenting opinion and Brennan’s understanding of obscenity law did not set any precedent. However, moving forward, the areas Brennan identifies as where obscenity law could be most effectively applied—juveniles and unconsenting adults—reoccur as compelling arguments in the continuing move away from a strictly content-based approach and towards a spatial approach for obscenity jurisprudence and legislation.

Reaction to the Decisions

In October of 1973, the *Great Speckled Bird* published an article on a McAuliffe-led raid targeting the film *Deep Throat*. McAuliffe cited the recent Supreme Court decisions in *Miller* and *Paris* as justification for the raid. Sunshine Bright, pseudonymous writer for the *Great Speckled Bird* summarized her feelings about those decisions, writing “it is hard to believe that freedom of the media was designed to be limited and arbitrary.”¹⁰² Following the decisions in

¹⁰² Sunshine Bright, “Deep Throat Gets Choked,” *The Great Speckled Bird*, Oct. 1, 1973.

Miller and *Paris*, the owners and operators of the commercial sex business industry found themselves in a contradictory position. At once, iconic pornographic movies like *Behind the Green Door*, *Deep Throat*, and *The Devil in Miss Jones* drew huge crowds in theaters all over the country, while the Supreme Court seemingly threw the legitimacy of the pornography business to the wolves. Because the court deferred the ultimate decisions on obscenity to lower courts and communities, early responses to, and concern about, the *Miller* and *Paris* decisions varied greatly across the country. However, because the pornographic film industry did not solely operate on a local basis, but rather through a national or even international distribution system, response and fear from the industry tended towards panic— concern that they would henceforth be forced to tailor their offerings for the most conservative areas rather than spend the money to constantly cut and recut the films.

Less than a week after the publication of the Court’s decision over 60 attorneys, all representing owners of commercial sex businesses, predominantly theaters and bookstores, as well as many of their clients, staged an emergency meeting at the City Squire Motel in midtown Manhattan, blocks from the cultural heart of the industry in Times Square, to network and brainstorm solutions for their continued survival.¹⁰³ One attendee complained to a reporter, “so vague was the court’s ruling that libraries and legitimate book and movie companies are in danger.”¹⁰⁴ Cincinnati based attorney Al Brown (described with incredulity by the reporter as looking more like a “disheveled history professor” than a defender of ‘dirty’ films), quipped “these dread sex decisions will stand with Dred Scott.”¹⁰⁵ One New York indie distributor described the situation thusly,

¹⁰³ Marlene Adler, “Attorneys Hold Emergency Meeting to Appeal Supreme Court Decision,” *Los Angeles Free Press*, June 29, 1973.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

This is the biggest thing to happen in the industry since the Consent Decrees and all hell is going to break loose. Hundreds of theaters will close, they'll be all sorts of different censor boards, booking problems will cause havoc and chaos will result throughout the industry....you can spend 2 million on a feature that will only be able to play half the country or less. A picture passed in Burbank won't play in Pasadena. Distributors will be lining up to show their pictures to every policeman's widow and retired fireman in America for approval....we haven't seen anything yet.¹⁰⁶

The invocation of un-credentialed "policeman's widows and retired firemen" proposes a vision of 'community standard' boards as bastions of middle-class civic minded heterosexuality; police and firemen carry an assumption of conservative law enforcement while the 'widow' speaks to the long tradition of obscenity work as the domain of mothers engaging in proper republican motherhood-style citizenship. Such a description of the future of obscenity regulation recognized the roots of the new regime in heterosexual, middle-class, white politics.

A reading of the decisions in *Miller* and *Paris* that promoted community standards as a euphemism for cultural control and hegemony appears particularly in spatialized responses. In St. Paul, Mayor Lawrence Cohen said he hoped the Supreme Court verdicts in *Miller* and *Paris* would give the city the ability to keep *Deep Throat* out of residential neighborhoods, "where kids go by and churches are located," while still allowing the film, and those like it, to play downtown.¹⁰⁷

The effects of *Miller* and *Paris* spread across the country with great speed. Supreme Court decisions are often as much about establishing or shifting the cultural tenor of a country as they are about actual enforcement. In Boston, several theaters switched from their X-rated bills

¹⁰⁶ Addison Verrill, "Porno Thicket Now Jungle," *Variety*, June 27, 1973: 5. The invocation of Consent Decrees here refers to a series of antitrust agreements emerging from the decision in *United States v. Paramount Pictures Inc.* 334 U.S. 131 (1948). Eight film studios were required to sign consent decrees legally binding them to stop monopolistic practices, including fixed minimum ticket prices and block-booking.

¹⁰⁷ "Reactions to Porn Decisions," *Variety*, June 27, 1973: 6.

of fare to more softcore material; a theater raid in Passaic, New Jersey resulted in the arrest not only of the usual suspects—the managers and owners of the theater—but also Georgina Spelvin, star of *The Devil in Miss Jones*, who was at the theater for a special appearance.¹⁰⁸ One contemporary newspaper reported, perhaps unsurprisingly, that admissions and revenues were up at the theaters that maintained their pornographic wares, drawing in patrons rushing to “see pornography while they still could.”¹⁰⁹

The New York Times attributed the decisions to President Nixon’s ability to appoint four justices to the court, describing the majority opinion as Nixon “delivering the goods he promised us when he was running for office: rulings designed to elevate the moral tone of the nation by reversing earlier court rulings that pussy footed around Constitutional rights and coddled smut peddlers.”¹¹⁰ *Variety* magazine predicted that the conservative pressure to enact new “community standard” based obscenity legislation would put “hundreds of potential Mr. Cleans” into office.¹¹¹

In August of 1973, the New York Times ran a lengthy piece seeking to answer the question: “has the Supreme Court saved us from Obscenity?” Rather than a singular opinion, the Times outsourced the question to a number of established voices in the world of film, politics and culture, providing insight into the conflicting perspectives on and consequences of the *Miller* and *Paris* decisions. Jules Feiffer, counterculture cartoonist and screenwriter of the controversial 1971 film *Carnal Knowledge*, argued that the decisions fit into a culture of “freedom from,” meaning that laws passed to provide “freedom from those guys, freedom from weird ideas,

¹⁰⁸ “Reaction to Decision: See Rash of Legislation Litigation in Wake of Rule” *Independent Film Journal*, July 9, 1973, Issue 72 vol. 3: 6.

¹⁰⁹ *Ibid.*

¹¹⁰ Vincent Canby, “The Court Impact on Movies,” *New York Times*, July 14, 1973: 1.

¹¹¹ Addison Verrill, “Porno Thicket Now Jungle,” *Variety*, June 27, 1973, 5.

freedom from bother, freedom from thought, freedom from equality, art and sex” for middle America, an analysis of the case that takes on additional potency when reading *Miller* and *Paris* alongside cases concerning segregation, citizenship and spatial access.. Actress Joan Crawford complained of the potential need for “covering shots” for Memphis or Omaha (to meet their community standards), while Shelley Winters argued that “deciding what adults should and should not see” violates the nation’s commitment to freedom.

Conclusion

Precisely because they took up physical space, the growing number of porn theaters served as visible reminders of the ways that sexual commerce and changing sexual mores were remapping the American landscape. The way the *Miller* doctrine of “local community ideals” interacted with the *Paris* ruling that the consent of adults to watch pornography does not mitigate the illegality or obscenity of the material effectively restructured the American obscenity regime, constructing the foundation for subsequent cases. The cases I consider in the following two chapters take up the notions of space *Paris* introduces through the idea of consent and local community to think more concretely about the ways the regulation of obscenity and pornography can shape the lived landscape. The case studied in the next chapter, *Erznoznik v. Jacksonville*, builds on the language of consent to view when considering the regulation of nudity at drive-in theater

Chapter Three:

Pornography In The Passion Pits: Community, Visual Pollution And The Spatial Regulation Of Adult Theaters

In October of 2008, Christ Church Anglican of Jacksonville, FL purchased the former site of the Playtime Drive-In Theater, aiming to develop the land as a meeting space. In the process of cleaning out the old projection building, the parishioners were met with a surprise. The Playtime Theater began as the Twin Hills Drive-In in the late 1940s before it, like so many other theaters, was renamed in 1971 and began showing pornographic films. When Christ Church Anglican assumed ownership of the site, they uncovered reels and reels of X-rated films, illustrating the Playtime's "sordid past." In response to the discovery, the church held a bonfire, burning each of the reels, with the stated aim of "mov[ing] the land from unholy to holy."¹ In the words of Jacksonville historian Tim Gilmore "the fire would purge the Devil from the land (if not from Miss Jones), not that the pines absorbed one event less than another."² The land itself was imbued with meaning for the parishioners of the Christ Church.

The story of the Playtime Theater is in many ways representative of the progression of both drive-in and adult theaters in the 20th century, from successful mainstream theater to pornographic adult theater, to struggling softcore theater, to abandoned lot. Often historians attribute this trajectory to the rise in home video and internet as mediums for adult entertainment.³ In this chapter I argue that the death of the adult theater began earlier, in what

¹ All Things Considered, "Florida Church Burns X-Rated Film Reels," National Public Radio, Oct. 20, 2008. Accessed Feb. 11, 2022. <https://www.npr.org/templates/story/story.php?storyId=95913049>

² Tim Gilmore, "Playtime Drive-In Movie Theater and Christ Church Anglican," Jax Psycho Geo, June 26, 2020. Accessed Feb. 11, 2022. <https://jaxpsychogeo.com/west/playtime-drive-in-movie-theater-and-christ-church-anglican/>

³ See Peter Alilunas, *Smutty Little Movies: The Creation and Regulation of Adult Video* (Berkeley, CA: University of California Press, 2016); Glenn Ward, "Grinding Out the Grind House: Exploitation, Myth and Memory" in *Grindhouse: Cultural Exchange on 42nd Street and Beyond*, ed. Austin Fisher and

has previously been considered the Golden Age of Pornography, and that the demise can be partially understood as a process of suppression, driven by a desire to protect established racial, classed and sexual norms. As demonstrated in the case of the former Playtime theater considerations of space and thus, spatial regulation came to characterize the manner by which localities restricted obscenity and pornography from the mid 1970s forward. In said shift in approach, Jacksonville would play a significant role.

This chapter considers the drive-in theater as site of obscenity exhibition and quasi-public sexual activity through the 1975 Supreme Court case *Erznoznik v. City of Jacksonville*.

Erznoznik, wherein a 6-3 decision struck down a city ordinance banning the exhibition of nudity at drive-in theaters in the city of Jacksonville, Florida, illustrates the failures of the community-driven obscenity regime set forth in *Miller* and *Paris* and emphasizes the growing importance of space in terms of both opposition to obscenity and resultant regulatory schemes. The different practices of the drive-in theater, both in the audiences they admitted and their exhibition standards, fomented a conversation about the consequences of visual pollution and the fluid (or even nonexistent) boundaries between public and private life. Facing the Jacksonville ordinance, the Supreme Court was confronted with the problematic potential of leaving definitions of obscenity to individual communities: what happens when what a community desires impedes individual constitutional rights.

Erznoznik has been largely neglected in studies of obscenity regulation, with the majority of histories moving from discussions of *Miller* and *Paris*, wherein the content of the films shaped obscenity regulation, to the 1976 decision in *Young v. American Mini Theatres*, wherein the

Johnny Walker (London, UK: Bloomsbury Academic Press, 2016); Carolyn Bronstein, *Battling Pornography: The American Feminist Anti-Pornography Movement 1976-1986* (Cambridge, UK: Cambridge University Press, 2011).

court validated zoning restrictions on adult theaters and businesses.⁴ At once this lack of attention can be attributed to the fact that the theater behind the *Erznoznik* case, Jacksonville, Florida's University Drive-In, did not show the explicit X-rated films exhibited in enclosed theaters, and the fact that in *Erznoznik* the Court struck down a restrictive obscenity ordinance rather than set a new regulatory precedent. However, I argue that a study of *Erznoznik* is crucial to understanding space and spatial regulation as an arena for regulating pornography and obscenity and to understanding the move from regulating content to regulating physical presence. *Erznoznik* thus functions as a bridge case between obscenity regimes, marking the transition to our contemporary treatment of pornography and public space.

Drive-in Theaters

Richard Hollingshead opened the first established drive-in movie theater in Camden, New Jersey in the summer of 1933, patenting the concept the same year.⁵ From its inception, the success of the drive-in theater was dependent on two bastions of middle-class American life: the family automobile and the suburb. The acreage needed for the operation of a drive-in theater prevented these businesses from opening in urban areas; the family automobile in turn therefore acted both as semi-private booth and the means of transport to access the theater.

The initial marketing and customer base of the drive-in theater further reflected the importance of middle-class communities to the business. Early drive-ins appealed to young families, the semi-privacy of the car making it possible for parents of very young children to

⁴ Ben Strassfeld, "Indecent Detroit: Regulating Race, Sex and Adult Entertainment" (Ph.D. Dissertation, University of Michigan, 2018).

⁵ Earlier 'one-off' drive-in film events preceded Hollingshead's venture. Elizabeth McKeon and Linda Everett, *Cinema Under the Stars: America's Love Affair with the Drive-In Movie Theater*, (Nashville, Tennessee: Cumberland House Press, 1998): 3.

enjoy a night out without having to pay for a babysitter.⁶ Literature surrounding the opening of theaters argued they “contributed to the unity and stability” of the family by encouraging time spent together.⁷ Drive-ins often doubled as playgrounds, with trains, swings, and merry-go-rounds populating the edges of the fields.⁸ Drive-ins, like mainstream enclosed theaters, tended to make a significant majority of their profits on concession booth items that appealed to children.⁹ The coinciding of the post-war Baby Boom with the peak of popularity for drive-in theaters was thus an inevitable match.

The design of the theaters also appealed to the elderly, the disabled, and others unable to patronize traditional picture palaces.¹⁰ While the drive-in theater provided access to film for people previously blocked from the amusement, it was attributable to the privacy and individualism fostered by watching the film through the windshield of a personal automobile. The car kept behaviors and individuals society deemed unworthy or unappealing hidden from a larger public, and in many ways perpetuated the idea that the only proper place for some behaviors and peoples was in private. At the moment the experiential space of the movie theater becomes accessible to those socially or physically othered, it is because the spectators remain contained in markers of class and social status— the automobile.¹¹

⁶ Ibid., 9-10.

⁷ Karen Dybis, *The Ford-Wyoming Drive-In: Cars, Candy and Canoodling in the Motor City*, (Mount Pleasant, SC: The History Press, Arcadia Publishing, 2014): 34.

⁸ Ibid., 52.

⁹ McKeon and Everett, 15.

¹⁰ Dybis, 34.

¹¹ In 1972, the number of cars owned per 100 white households stood at 121 and per 100 black households at 72. In terms of income, there were 46 cars owned per 100 households with a reported annual income under \$3,000 and 170 per 100 households earning over \$15,000 per year. “Household Ownership of Cars and Light Trucks- July 1972,” U.S. Department of Commerce, Social and Economic Statistics Administration, Bureau of the Census (February 1973): 1.

The same privacy provided by cars that led to the theater's popularity with young families and other underserved populations inevitably led to the use of drive-in theaters as passion pits, places for young couples, particularly teenagers, to engage in illicit behaviors far from their parents' watching eyes. Drive-in theaters thus took up the mantle established by earlier indoor theaters. In her work *Cheap Amusements*, historian Kathy Peiss traces the emergence of a heterosexual youth dating culture in the early 20th century. She argues, "like dance halls and social clubs, movie houses offered convenient places for meeting men and courting."¹² Much of the appeal lay in the theater's darkness, which provided opportunities for a "steady's arm to encircle a lady friend's waist."¹³ Sam Binder, a supervisor of a chain of drive-in theaters in Canada, confirmed the continued use of theaters for this purpose, telling *The Edmonton Journal*,

what kind of people come here? Young guys who can't take their girlfriends anywhere. A guy who can't take a girl to his house because his parents are at home. So they come here and jump in the back seat. Face it, in an indoor theatre you can put your arm around a girl in a drive-in you can do anything you want.¹⁴

Peiss's work highlights other similarities between early nickelodeons and drive-in theaters, noting that the way nickelodeons were situated within communities allowed for more casual attendance by mothers and families, just as drive-in theaters provided that sense of accessibility.¹⁵

¹² Kathy Peiss, *Cheap Amusements: Working Women and Leisure in Turn of the Century* New York, (Philadelphia, PA: Temple University Press, 1987): 151.

¹³ *Ibid.* While Peiss does argue that the neighborhood character and cross-generational appeal of the nickelodeons reduced the potential for illicit sexual activity, she does understand the theater as an important site for navigating affection outside the family home.

¹⁴ Joe Sornberger, "Passion Pits Still Haven't Lost Their Sex Appeal," *The Edmonton Journal* (Edmonton, Canada), Oct. 1, 1977: 93.

¹⁵ Peiss, 150.

Even at the height of their popularity, drive-in movie theaters were not hugely profitable—“by-the-car” pricing schemes led to cars piled far beyond legal capacity and the often inadequately fenced large perimeter of the viewing field led to nightly issues with people sneaking in and required constant patrolling. In time, the novelty of the drive-in experience wore off and, coupled with the poorer sound quality of the in-car speakers and the fact that many drive-ins were unable to gain access to newly premiered films, attendance and the cultural popularity of the drive-in theater diminished throughout the late 1950s and 1960s.¹⁶ In response, drive-in theaters turned to increasingly niche and adult films to ensure a consistent customer base, adopting year-round the practices that had previously sustained them through the winter months.¹⁷ Newspaper advertisements show that by January of 1971, pornographic and X-rated films were being exhibited at Florida drive-in theaters.¹⁸ By 1982, seven years after the *Erznoznik* case, these wider trends had escalated to a point that, in one study, pornographic films made up fifteen percent of drive-in theater fare compared to one percent of fare in traditional indoor theaters.¹⁹ The reputation of drive-in theaters for hosting illicit sexual behavior and the increasing number of theaters showing pornographic films colored the world from which the *Erznoznik* case emerged.

While I cannot neglect to acknowledge the significant differences between theaters dedicated to adult fare, like the one addressed in the *Paris Adult Theatre* case, and drive-in theaters that occasionally or even frequently hosted more risqué films, I believe a study of the drive-in theater does offer particular insight and a particular perspective to this history of adult

¹⁶ McKeon and Everett, 5.

¹⁷ Sornberger, 1977.

¹⁸ “Blood Rose Advertisement,” *The Orlando Sentinel* (Orlando, FL), Jan. 28, 1971.

¹⁹ Dennis Giles, “Outdoor Economy: A Study of the Contemporary Drive-In,” *Journal of the University Film and Video Association* 35, no. 2 (Spring 1983): 71.

theater regulation. For a number of reasons, drive-in theaters are excellent sites through which to understand the spatial history of urban, suburban and rural regions throughout the United States across the 20th century. Drive-ins innately require a large physical footprint, raising questions about proper space usage and distribution. Because of this need for space, when drive-ins are surrounded by suburban tracts and commercial properties it is more likely than not that the drive-in was the pioneer business in the neighborhood. However, that pioneer status often meant that as the surrounding environs built up commercially, the land used by the drive-in became more valuable than the business itself, contributing to the closure of many drive-ins throughout the 70s and 80s.²⁰

Drive-ins are further an excellent site for study of spatial history for the insight they can provide into modes of transportation and movement. Their very existence speaks to changing notions of accessible space and how automobiles impacted social interaction and flows of people. Patronage numbers can further speak to changing patterns of movement. The flourishing of drive-ins in suburbs and on the outskirts of town both illustrates changing patterns of residential life and population distribution and reflects changing notions of spectatorship.

The drive-in model of providing ‘isolation in public’ calls on us to observe changing forms of public existence and how communities receive minority identities and behaviors. I again return to theorist Jurgen Habermas and his concept of the public sphere to argue that the spatial makeup of the drive-in marked a significant shift away from the concept of an open public arena of speech, thought and experience.²¹ Habermas’s public sphere aimed for a disregard of status and open social discourse. Habermas argued that the public spheres of his

²⁰ Ibid., 74.

²¹ Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, (Cambridge, MA: Massachusetts Institute of Technology Press, 1991).

study— namely the coffeeshops and salons of the European Enlightenment— collapsed under the weight of capitalism reorienting public interest away from politics; as a capitalistic enterprise, the drive-in theater fostered individuality and isolation for commercial gain, minimizing the kind of social contact Habermas describes as necessary. The drive-ins attracted a number of people, of course, with cars filling the lots— but while people in different cars shared a common experience, contact between them was minimized. The barrier of the car meant that proximity did not necessarily breed familiarity or even contact.

In her work on drive-in theaters, Mary Morley Cohen highlights drive-ins as “among the first theaters in the South to desegregate and in some areas, they were the only non-segregated public spaces.”²² I question her analysis here of drive-in theaters as some admirable pioneer, for she neglects to account for the fact that drive-ins isolate individual groups. Yes, there is opportunity for mixing in concession lines or in the playgrounds, but I argue a more spatially oriented analysis must consider that drive-ins were able to desegregate earlier than other businesses because they still retained some semblance of social isolation. Cohen does make a compelling argument for drive-ins as a place of class and social mixing, writing,

By virtue of their location on the edges of towns, drive-ins drew an audience which cut across class and social lines, a mixture of people from rural urban and suburban locations. This rather heterogeneous audience posed a significant challenge to standards of cultural consumption based on the model of the picture palace in the city’s centre.²³

But while this description of the drive-in theater invokes Samuel Delany’s call for cross-class and cross-race interaction and contact to sustain a productive urban environment, Cohen paints too rosy a picture of the inter-class and inter-race potential of the drive-in. Cohen neglects to

²² Mary Morley Cohen, “Forgotten Audiences in the Passion Pits: Drive-in Theaters and Changing Spectator Practices in Post-War America,” *Film History* 6, no. 4 (Winter 1994): 471.

²³ *Ibid.*, 478.

incorporate the automobile as class and race signifier and neglects to interrogate how land use was and is shaped by economic interests and communities.²⁴ I am not outright opposed to her claim that drive-in theaters functioned as heterotopias and/or countersites, but I think such a claim cannot be made on the basis of disrupted patterns of race and class contact, but instead must more critically query space and sexuality through the lens of public and private.²⁵

Such a picture of the drive-in as home to the ‘forgotten audience’ also neglects to account for the significant pushback against drive-ins (including the case addressed in this chapter) for the very social dynamics Cohen highlights. Protests surrounding the 1950 opening of the Ford-Wyoming Drive-In in Dearborn, Michigan, provoked concerns about the theater drawing in outsiders to established communities. Ray McPhea, President of the North Dearborn Civic Association complained to the city council, “the [theater] will invite the element from outside Dearborn who will go to such places for reasons other than to see shows.”²⁶ Resident Mrs. Emma Huth took a bolder stance on the question of theater patronage, again complaining to the city council, “if you let them get the permit, we will have all kinds of riff raff in Dearborn. It is a disgrace to our city.”²⁷ Whatever cross-race and cross-class contact could occur in the drive-in theater setting remained threatening to the character of the wider community. The notion of visual pollution central to the Jacksonville restrictions on drive-in theaters cannot be separated from the spatial and sexual dynamics of the drive-in itself.

Jacksonville

²⁴ Contemporary studies conclude that black Americans were less likely to own a car, even when controlling for income. See Raymond Bauer and Scott Cunningham, *Studies in the Negro Market* (Cambridge, MA: Marketing Science Institute, 1970): 157-60.

²⁵ Morley Cohen., 475.

²⁶ Dybis, 35.

²⁷ *Ibid.*, 36.

Jacksonville, Florida serves as a particularly apt locale for a study of the spatial and sexual dynamics present in the *Erznoznik* case. Its diverse population, geographic location in the Sunbelt South, and the unique political situation that led to the city-county consolidation, or the joining of the city government and the Duval county government into a new single local governmental entity, in 1968, all contributed to the development of the *Erznoznik* case. In the mid-twentieth century, Jacksonville was home to the largest concentration of African-Americans in the state; the urban racial relationship between black and white Jacksonvillians has been subject to numerous academic studies for its both destructive and productive history.²⁸ One history of Jacksonville summarized the situation, “each time black political power rose, white democrats would find legal and economic ways to reduce this power.”²⁹ Throughout the 1960s, Jacksonville was known as one of the most segregated cities in the country; the surrounding Duval County was wealthier, whiter, and younger. In the early 1960s, Duval was third in the state in per capita personal income, third in median family income, and seventh in percent of families with annual incomes of 10,000 dollars or more.³⁰ From 1950-1960, the population of Duval County experienced a growth rate of nearly 50%.³¹ By 1960, the average age in the county was nearly 4 years younger than in the city³² and by 1970, the percentage of the population in the newly consolidated Jacksonville under 18 sat at 38.3, around three percentage points higher than

²⁸ Abel Bartley, *Keeping the Faith: Race, Politics, and Social Development in Jacksonville Florida 1940-1970*, (Westport, Connecticut: Greenwood Press, 2000):

²⁹ Matthew T. Corrigan, *Race, Religion and Economic Change in the Republican South: A Study of a Southern City*, (Gainesville, FL: University Press of Florida, 2008): 28.

³⁰ James Crooks, *Jacksonville: The Consolidation Story from Civil Rights to the Jaguars*, (Gainesville, FL: University Press of Florida, 2004): 11.

³¹ George W. Simons Jr. “Population Characteristics of Jacksonville-Duval Area Planning Region,” (George W. Simons Jr. Publications and Printed Materials: University of North Florida Special Collections, 1960): 2.

³² *Ibid.*, 4.

the national average, indicating that it was an appealing residence for a number of young families.³³

However, unlike in other regions of the county, the interests of an economically struggling urban center did not solely drive consolidation; instead, the decision was arrived at by a coalition of urban and county advocates and derived from diverse policy interests. Prior to consolidation, the county suffered from a deeply inefficient and powerless governance system.³⁴ The county particularly struggled in developing a taxpaying base. In 1964 the Duval county taxpayers association reported that property was assessed locally at around thirty percent on true value; homeowners then took advantage of the Florida Homestead Tax law that allowed homeowners of homes assessed at less than 5000 dollars total exemption. The taxpayer association estimated that in 1963 two-thirds of homeowners in the county were totally exempt from paying taxes.³⁵ Furthermore, in the mid 1960s, nearly a dozen officials in both the city and the county were indicted on 142 charges of bribery and larceny.³⁶ In response, the Florida legislature established a commission to explore consolidation in October of 1965. The commission presented their report in early 1967, listing twenty concerns over the status quo, including discredited schools, inadequate land use patterns, traffic problems, an unworkable assessment policy, and racial unrest, and advocating for a referendum.

Black Jacksonvillians, who made up more than 40 percent of the city's population, were faced with a crucial decision; either they could vote for consolidation and reap the benefits of a wealthier and larger tax base, or they could oppose consolidation and retain political power,

³³ WJXT Research Department, "The Jacksonville Market 1970," (George W. Simons Jr. Publications and Printed Materials: University of North Florida Special Collections, 1970): 11.

³⁴ Bartley, 140.

³⁵ Crooks, 11.

³⁶ Jim Rinaman, "Jacksonville's Consolidated Government," Published 2003 on the Jacksonville Historical Society website.

although even this political power was limited: the first two black members of the pre-consolidation City Council, Sallye Mathis and Mary Singleton, were only elected in 1967.³⁷ In the end, while political leaders in the African American community remained split over the issue, the majority of black voters acquiesced to the consolidation and on October 1, 1968, the new city boundaries were celebrated with a parade and a new status as the largest city by land mass in the United States. In the first election following consolidation, two additional black candidates were elected to the City Council: Earl Johnson, an attorney who led the fight to desegregate Jacksonville's public schools in 1962, and Oscar Taylor. Both men were elected by a majority white voting population.³⁸ Hans Tanzler, who served as the last pre-consolidation mayor of Jacksonville and the first post-consolidation mayor, was a white progressive Democrat known for integrating the Jacksonville police department.³⁹ The new consolidated government called for a "strong mayor-council" system; however, it was not until 2011 that Jacksonville elected its first, and to date, only, black mayor, Alvin Brown. At the time of writing, 5 of the 14 members of the city council and 3 out of 5 at-large members of the city council were black, a makeup that more closely follows the racial demographics of the city.⁴⁰ I follow this story of consolidation to demonstrate the unique spatial history of Jacksonville and to emphasize how the case in question in this chapter emerged from a recently formed governmental structure beholden to a diverse population.⁴¹ How did the consolidation affect how Jacksonvillians thought about their land,

³⁷ Corrigan, 34; James B. Crooks, "The History of Jacksonville Race Relations Part 2: Struggling for Equality" *The Florida Times-Union* (Jacksonville, FL) Sep. 5, 2021.

³⁸ Crooks (2021).

³⁹ James B. Crooks, "Jacksonville's Consolidation Mayor: Hans Tanzler Jr." *The Florida Historical Quarterly* 80, no. 2 (2001): 207.

⁴⁰ "City Council Members," City of Jacksonville Website, Feb. 22, 2023.

⁴¹ For more on consolidation, see Abel Bartley, *Keeping the Faith: Race, Politics, and Social Development in Jacksonville Florida 1940-1970* (Westport, CT: Greenwood Press, 2000); James Crooks, *Jacksonville: The Consolidation Story from Civil Rights to the Jaguars* (Gainesville, FL: University of

their property, and the role their government should play in regulating space? Differing from other cities, where white flight and suburbanization led to separate governments, under consolidation I argue many Jacksonville citizens turn to the protection of the neighborhoods and neighborhood character as central to their relationship with government. The fact that the University Drive-In Theater was located in the Arlington neighborhood, previously part of the county and thus both whiter and more suburban than the urban center, was important to the discourse and understanding of space and access in the Erznosnik case.

The Ordinance

In the early 1970s, Jacksonville was home to several drive-in theaters, capitalizing on the booming population and the temperate weather. The majority of drive-in theaters, including the Blanding Drive-In, the Pine Drive-In, and the Lake Forest Drive-In, showed mixed fare, sometimes delving into B-movie horror and sci-fi. Other theaters, including the Playtime, the Midway and the Fox, switched to the more profitable adult fare in the late 1960s and early 1970s. The University Drive-In Theater, managed by Richard Erznosnik, sat in the heart of the Arlington neighborhood of Jacksonville. Arlington lies on the east side of the St. Johns River, separated from the urban core of Jacksonville. The area experienced significant growth following the opening of the Matthews Bridge in 1953 and, as the decade progressed, became home to several middle-to-upper-class suburban housing developments.⁴² The ‘university’ in the name of the theater referred to its close proximity to Jacksonville University, a private college with Baptist origins. One lot down from the drive-in sat the Resurrection Catholic Church, opened in

Florida Press, 2004); Matthew Corrigan, *Race, Religion, and Economic Change in the Republican South: A Case Study of a Southern City* (Gainesville, FL: University of Florida Press, 2007).

⁴² Deirdre Conner, “Saving Arlington: What Residents Are Doing to Save It,” *The Florida Times-Union* (Jacksonville, FL), Feb. 14, 2010.

1963.⁴³ Another theater in Arlington, the Arlington Theater was involved in an earlier obscenity-related trial, facing an injunction under state obscenity law for showing the film “I Am...Curious (Yellow).” State Attorney T. Edward Austin exhibited the film before a “selected group,” who replied “there was no doubt about” the film’s obscenity, demonstrating an early deployment of the notion of “community-standard-driven” obscenity decisions. While the case reached the level of appeal to the Supreme Court, the parties reached mutual agreement—dropping the case and ending the run of the film.⁴⁴

In July of 1971, at the request of Mayor Hans Tanzler, At-Large Councilman Lynwood Roberts introduced an ordinance regulating drive-ins before the Jacksonville City Council. Tanzler cited a “flood of complaints from parents who said their children could...see everything on the screen” as the driving force behind the ordinance proposal. In particular, parents complained of R-rated films visible from their children’s bedroom windows.⁴⁵ Tanzler argued, “this is just contrary to many people's beliefs. They don't pay to see such films so why should they be subjected to them on public highways,” continuing, “it is not the intent of the ordinance to censor or prevent a showing of any particular film. The movie-going public knows what to expect when they attend an R-rated film. This ordinance is intended only to compel drive-in theaters to shield their screen so they can't be seen from outside the paid admission parking areas.”⁴⁶ Certain mothers, namely Joyce Chaffe, mother of three who lived at 5678 George Court, abutting the site of the University Drive-In, spoke repeatedly of her concerns before the

⁴³ “About Us” Resurrection Catholic Church Website, respar.net.

⁴⁴ “X-rated Movie Court Battle Called a Draw,” *The Florida Times-Union* (Jacksonville, FL), Jun. 29, 1971.

⁴⁵ “Drive In’s Must Screen Nudies,” *The Tallahassee Democrat* Jan. 13, 1972: 6.

⁴⁶ “Bill Urges Cover Up at Nude Drive-Ins,” *The Florida Times-Union* (Jacksonville, FL), July 22, 1971: B1.

City Council.⁴⁷ Her testimony was eventually submitted as part of the city’s case before the Supreme Court. The same day *The Florida Times Union* published their first article about the ordinance, they also ran an article from Jacksonville resident Nancy Stahl complaining about her children being more engrossed in the “necking couple” in the car next to hers than on the film on the drive-in screen.⁴⁸

The ordinance was referred to the Public Safety and Judiciary Committee; the records of their meetings in fall of 1971 reveal the debate over this proposed ordinance as deeply aware of, and involved with, the anti-obscenity efforts across the country. At the September 7th meeting of the Committee, John Kent, Chairman of the Board of the Kent Theater Group,⁴⁹ urged the committee to give the ordinance a great deal of study before acting on it, informing them of forthcoming meetings in New York, gathering the National Association of Theater Owners, and in Orlando, gathering the State Attorneys, aimed at discussing proposed solutions to “obscenity at drive-in theaters.”⁵⁰ The Chair advised Assistant City General Counsel Harvey Alper to attend the latter meeting and report back to the Committee. Two weeks later, Alper reported that, based on concerns about content regulation under the First Amendment, the ordinance had only a fifty-fifty chance of being upheld in court.

The ordinance emerged from committee in an amended form; the amendment, proposed by Councilman I.M. Sulzbacher, removed mentions of specific body parts, thereby removing all specificity from the bill as to what constituted the “certain exhibitions” drive-ins needed to

⁴⁷ Duval County Public Records Indicate this was her address as of 1971.

⁴⁸ Nancy Stahl, “Auto Is X-Rated,” *The Florida Times-Union* (Jacksonville, FL), July 22, 1971: D2.

⁴⁹ The Kent Theater Group, established around 1930, was a family-run chain of theaters from Vero Beach to Tallahassee. The group ran at least three drive-in theaters and at least one enclosed theater in Jacksonville. Max Marbut, “For Three Generations, Law a Family Tradition for Kent Family,” *The Jacksonville Daily Record*, Jan 15, 2018.

⁵⁰ “Minutes of the Public Safety and Judiciary Committee Sep. 7, 71.” Jacksonville City Council.

shield. Harvey Alper, Assistant General Counsel for the City, argued that this amended ordinance would not withstand court challenge, allowing excessive latitude in the application of public nuisance law.⁵¹ While in committee the vote was heavily weighted towards the amendment, before the full council, the reference to specific body parts was re-added to the ordinance. Several councilmen expressed concern that a vague ordinance would, in effect, force drive-ins to shield from public view nearly every screen, threatening to put them out of business.⁵² In its final form, the ordinance stated in part, “it shall be unlawful and it is hereby declared a public nuisance for any...person connected with or employed by any drive-in theatre in the City to exhibit or aid or assist in exhibiting any motion picture...in which the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown...if such motion picture is visible from any public place or street.”⁵³ The bill as drawn would place the responsibility for what was shown on the drive-in screens on almost everyone involved— from managers to owners to ticket takers. The council approved the ordinance on January 11th, 1972.⁵⁴ Three days later, Tanzler signed it into law.⁵⁵

In drafting this legislation, the Jacksonville City Council joined a long history of governing bodies reckoning with the dictates of the First Amendment. Framing the films at the

⁵¹ Franklin Young, “Bill to Require Drive-In Film Shielding Near Vote,” *The Florida Times-Union* (Jacksonville, FL), Jan. 5, 1972.

⁵² “Drive-In Theatre Offerings Curbed” *The Florida Times-Union* (Jacksonville, FL), Jan. 12, 1971.

⁵³ “Section 330.313, Chapter 71-552-519 of the Ordinance Code of the City of Jacksonville.” in “Appellant’s Brief,” *Erznoznik v. Jacksonville* 422 U.S. 205 (1975).

⁵⁴ “City Council Minutes 9-28-71” Jacksonville City Council, City of Jacksonville Public Records Office.

⁵⁵ The question of visual pollution had been raised on a national level in the years leading up to the *Erznoznik* case. The Johnson administration passed the Highway Beautification Act in 1965; by 1971 the state of Florida was facing a loss of federal highway funds if they did not pass a law restricting billboards within 660 feet of Florida highways. Despite concern that the law would merely lead to deforestation and “supersized billboards” as companies cut back timber to 661 feet, the law passed 39-7. Hank Drane, “Billboard Reins Go To Governor on Senate Vote,” *The Florida Times-Union* (Jacksonville, FL), Dec. 7, 1971.

drive-ins as obscene wouldn't rise to court challenges— the films in question did not depict explicit sex acts, but mere nudity. Essentially simultaneously with the drafting of this legislation, the Supreme Court was validating one potential path forward— the time, place and manner restriction. In 1972's *Grayned v. City of Rockford*, the court ruled that the crucial question dictating whether expression could be regulated by government bodies was “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” While the *Grayned* case revolved around picketing near a school, those involved in the Jacksonville case offered an argument that the sexually suggestive themes of the films were innately at odds with the very character of the surrounding suburban neighborhood. In particular, the council and its supporters used the language of a visual, corrupting pollution to describe the theaters, their patrons, and their exhibitions. By positing that the theaters and the films themselves were at odds with the character of the community, the law exposed the ways constructs of community and community character oft enshrined in obscenity and speech regulations regimentally those engaging in sexual behaviors or identities considered improper or outside the norm.

Legally, the city council used this logic of visual pollution to frame certain films shown by drive-in theaters as public nuisances. In contrast to obscenity legislation, which restricted media based on its supposedly prurient contents, public nuisance law contends with noxious behavior and effects, traditionally calling for some ‘special injury’ to be done to the public. A public nuisance is defined by its interference in a right enjoyed by the general public. “Public nuisance” law thus inherently relies on the creation of an exclusionary public, definitively those bothered by the nuisance, in order to function.

The nuisance claimed by the Jacksonville City Council in passing the ordinance is particularly compelling for what it has to say about the lines and borderlands of public and private sexuality. Sociologist Laud Humphreys famously offered a description of public sex as “sexual acts so situated as to result in the involuntary accessibility of others as sex objects or witnesses.” One of the questions raised by considering *Erznoznik* and other drive-in theaters is how the visual complicates these notions of public and private space and public and private sex. While Jacksonville certainly posits the existence of those involuntarily exposed to the nudity and implied sex of the films, the fact that the “public sex” and “public nudity” in question are merely represented on a screen raises important questions. Is an action done in private or public if you can see something that occurs in public from a private home? Is an action done in public or private if you can see something occurring in a private home or on private property from public land? What we see—our visual field—is an important feature of space and one that consistently reappears in cases of obscenity, making forming any easy distinction between public and private difficult.

The text of the Jacksonville ordinance cites the drive-ins as in violation if the offensive images (defined as images of bare buttocks, female breasts and pubic areas) were visible from public streets or other public places. However, when the ordinance was challenged before court, the city offered testimony exclusively from individuals and institutions complaining of the visual pollution of their private property. At once this ordinance, as well as similar laws across the country, sought to concretize boundaries of public and private for where sex can and should happen—within the heterosexual marital bedroom—while they also expand the heteronormative values of the private sphere into the public one. The court previously confirmed the right to privacy (particularly concerning obscene materials) in 1969’s *Stanley v. Georgia*. In

the majority decision, Justice Thurgood Marshall declared, “[i]f 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.”⁵⁶ In advocating for this ordinance, Jacksonville citizens and lawmakers are turning Marshall’s reasoning on its head. The ordinance, in the way it frames the visual field of private homeowners as paramount, can only be understood through a belief that the state does have the right to ensure people see only what they want to see from the privacy of their own home.

Stanley’s articulation of a right to privacy within the home was a marked step forward in allowing sexual expression and access to obscene material goods, but the invocation of the home raised a number of important questions that lay deep at the heart of later *Erznoznik* case. What did this right to privacy mean for those who did not have a home? What are the consequences of a right that can only be exercised through the possession of private property? And most importantly for this case, how far did the borders of the private home extend and how did the concept of visual pollution complicate our understanding of the right to privacy and rearticulate the boundaries of public and private space?

Historians of space have noted the importance of access to public spaces— especially those under regulation by this ordinance— as central to notions of community and citizenship. In *Sidewalks: Conflict and Negotiation Over Public Space*, Anastasia Loukaitou-Sideris and Renia Ehrenfeucht in broad terms summarize the issues that characterized the *Erznoznik* case: “In attempting to make sidewalks orderly comfortable and safe municipalities... run the risk of eroding the public sphere by justifying ordinances that deny some people’s rights to increase

⁵⁶ *Stanley v. Georgia* 394 U.S. 557 (1969).

other people's comfort. The critical underlying questions are what constitutes excessive or normal and who gets to define it."⁵⁷ They continue, "Access to public spaces also is the mechanism by which urban dwellers assert their right to participate in society and these struggles over the right to use public spaces take different forms."⁵⁸ Who can use public spaces like sidewalks and how they can use them is particularly important when bringing questions of sexuality into the conversation and when exploring dynamics of visibility. Brooks Carol Gardner writes in *Passing By: Gender and Public Harassment* of 19th and 20th century ordinances restricting the display of the "disgusting sight" of disability.⁵⁹ Many historians have written of the ways gay men and women, as well as gender non-conforming individuals, participating and appearing in the public square was a crucial step towards asserting the rights of citizenship and self-liberation. Legal scholar Jeremy Waldron, building on a legacy of rights historiography (particularly mirroring conception of positive and negative rights), wrote "no one is free to perform an action unless there is somewhere he is free to perform it."⁶⁰

In the initial debates over this ordinance, Jacksonville Assistant City General Counsel Harvey Alper built an argument around the concept of visual pollution. In response to concern voiced by Councilman I.M. Sulzbacher that the ordinance targeted one media of communication while others were equally guilty of displaying obscenity and nudity, Alper argued for a personal ability and responsibility to "look away" that was absent in the case of drive-in theaters, particularly for those who lived locally to them, but present when it comes to other mediums like

⁵⁷ Anastasia Loukaitou-Sideris and Renia Ehrenfeucht, *Sidewalks: Conflict and Negotiation Over Public Space* (Cambridge, MA: Massachusetts Institute of Technology Press, 2009): 241.

⁵⁸ *Ibid.*, 7.

⁵⁹ Brooks Carol Gardner, *Passing By: Gender and Public Harassment* (Berkeley, CA: University of California Press, 1995): 77.

⁶⁰ Jeremy Waldron, "Homelessness and the Issue of Freedom," *UCLA Law Review* 39 (December 1991): 296.

magazines.⁶¹ He argued it was this dynamic— that of a captive audience— that made the ordinance likely to hold up in court. I suggest that we think about the visual on multiple levels in considering adult theaters, from the films themselves, to the supposedly threatening appearance of the patrons, to the accusation of visual pollution in certain communities, to build a more complete understanding of their spatial function and importance. To that end, the way societies and communities reckon with the relationship between the public, the private, and the visual in *Erznoznik v. Jacksonville* reveals how central obscenity and pornography is to the midcentury physical reshaping of the American landscape and a necessary addition to our historical narrative about the Golden Age of Pornography.

Erznoznik v. Jacksonville

On March 13th, 1972, the city served Richard Erznoznik, manager of the University Drive-In Theater, with a summons for violating the less than two-month-old ordinance by exhibiting the R-rated film *Class of '74*.⁶² While the ordinance applied to drive-ins across Jacksonville, the University Drive-In appears to have been of special concern to Tanzler and the other members of the City Council. In his justification for the ordinance Tanzler cited the proximity of churches to drive-ins and the subsequent threat of visual pollution, saying, “many adults find it offensive to leave Church on Sunday night and see larger-than-life-size

⁶¹ “Minutes of the Public Safety and Judiciary Committee 1-4-1972” Jacksonville City Council, City of Jacksonville Public Records Office.

⁶² *Class of '74* draws from the genres of “sexploitation” and “hippie-ploitation” to tell the story of college student Gabriella’s sexual awakening. While the film does contain nudity it does not highlight or display images of penetrative sex. Conviction under the ordinance did not require the nudity to be prurient or for the film to be sexually explicit- therefore, the R-rated, yet relatively unremembered and benign *Class of '74* was subject to removal. *Class of '74* directed by Mack Bing and Arthur Marks (General Film Corporation, 1972).

Hollywood’s latest sex symbol prancing around stark naked on the 60 by 80-foot screen.”⁶³

Hearings on the ordinance before the City Council featured testimony from Bill Cutting, Chairman of the Parish Council at the Resurrection Church. Cutting told the committee that the theater “was showing objectionable movies which would be viewed from the church grounds and the school’s playground.” In invoking the supposed threat to children, Cutting deployed an oft used tactic in obscenity cases— concerns about exposing children to either the social or visual pollution of pornography and obscenity often seem to serve to pacify concerns about First Amendment violations. Cutting continued by reminding the Committee that the church was built before the drive-in and emphasized that the petition that prompted Mayor Tanzler to propose the ordinance stemmed specifically from “an effort to do something about the kind of movies being shown at this outdoor theater.”⁶⁴

Hearing the case, Municipal Judge Raymond Simpson understood the ordinance not as an obscenity regulation, but as an ordinance parallel to those that banned nude bathing and indecent exposure. Simpson declared “certainly if an act itself, if done in the flesh, can be punished without harm being done to the Constitution, films of such [an] act should also be subject to punishment,” finding Erznosnik guilty of violating the ordinance. ⁶⁵ Invoking similarities to public nudity highlights how the visual pollution of the drive-in theater was understood spatially and physically. These theaters and their presence in the community did more than corrupt minds, they corrupted spaces. What should privacy and the “right to be left alone” look like in public spaces? In targeting the University Drive-in’s showing of the film, even as it continued to be exhibited at enclosed theaters like the Cedar Hills Theater and the Royal Palms, demonstrates

⁶³ Ibid.

⁶⁴ “Minutes of the Public Safety and Judiciary Committee” Sep. 21, 1971, Jacksonville City Council, City of Jacksonville Public Records Office.

⁶⁵ “Appellee’s Brief,” *Erznosnik v. City of Jacksonville* 422 US 205 (1975).

that the approach taken by city governance was not one that was entirely centered on content.⁶⁶ Instead, the city (and community advocates of the ordinance) were primarily focused on the specific visual intrusion and the kinds of people—though mostly the behavior those people would exhibit— a drive-in theater provided access to. In that way, from the moment the ordinance was enforced, space and spatial relationships were understood as part of the equation for obscenity regulation, and, in many ways the ultimate goal.

Upon appeal, Erznoznik and his lawyers challenged the city’s use, and the very nature of, public nuisance law. William Manness, lawyer for Erznoznik and noted Jacksonville civil rights advocate,⁶⁷ questioned what evidence the city had in asserting that the nudity exhibited by the drive-ins was a nuisance: “the statute seeks to denounce the showing of those portions of the human body on theory that it constitutes a public nuisance, but as a matter of fact there is no evidence that it is a public nuisance.”⁶⁸ Ralph W. Nimmons, lawyer for the City, countered, “the point is that the ordinance itself...is a finding by the legislature that this particular type of activity is a public nuisance. And it would be incumbent upon the plaintiffs in this case to show that it is not.”⁶⁹ The city understood that the ordinance itself asserted nudity as a public nuisance. The voices of the community whose complaints prompted the council to pass the law were all the proof that was needed. Circuit Court Judge Harding appeared to be taken aback by the city’s

⁶⁶ “Appendix,” *Erznoznik v. City of Jacksonville* 422 US 205 (1975). In reality, questions of space and content were deeply entangled. With the advent of the MPAA rating system in 1968, the open space and visual access provided by the drive-in meant that children could see specific content (that which earned a film an R-rating) that they could not see at an enclosed theater. The ordinance, of course, was not tailored to target R-rated films, but nudity. That the MPAA rating system was voluntary self-governance by the film studios and not a legally enforced system raises questions; if the ordinance was based not on nudity but on a rating system, would that fare better or worse under a First Amendment and Supreme Court analysis.

⁶⁷ Dana Treen, “Jacksonville Civil Rights Icon Dies,” *The Florida Times-Union* (Jacksonville, FL), Oct. 18, 2011.

⁶⁸ “Appendix,” *Erznoznik v. City of Jacksonville* 422 US 205 (1975)

⁶⁹ *Ibid.*

justification, commenting “it was my understanding...that there were questions of fact and that you being the city were in a position to demonstrate that such scenes tended to corrupt the public morals or manners of the people of the city...now, am I reading from your argument that really there is no question of fact?” The city’s arguments revealed the fictional constructs of laws structured around notions of community or a public. Who is the public in a public nuisance? And what standards and what populations get to decide what is bothersome?

The Circuit Court, in their decision, relied heavily on the 1951 Supreme Court case *Breard v. Alexandria*, wherein the court held that restrictions on door-to-door solicitation did not violate the First Amendment because the Constitution did not make “states or cities impotent to guard its citizens against the annoyances of life.”⁷⁰ The annoyance referred to by Justice Stanley Reed in *Breard* is not necessarily that individuals are being targeted as customers broadly, but the intrusion of capitalism at their door. To that end, the comparison presented by the City is effective— the intrusion is the problem. However, the “annoyance” or the nuisance targeted by the ordinance in question cannot be registered or understood effectively using *Breard* as precedent, because in the ordinance content functions as a distinguishing factor. Unlike in *Breard*, wherein cities could put restrictions on all solicitation without consent, the Jacksonville ordinance would allow a movie like 1970’s *Willy Wonka and the Chocolate Factory* to intrude into a private home but ban the theater from showing films with any kind of nudity.

The limits and definitional quandaries of public nuisance law became ever more relevant as testimony was brought forth by the city that muddled consideration as to what the ‘nuisance’ in this case actually was. In having the ordinance itself as the sole justification for the theaters as public nuisance, the city opened itself up to claims of vagueness. Was the presence of nudity

⁷⁰ *Breard v. City of Alexandria* 341 U.S. 622 (1951).

itself the nuisance? Was it the effects of having people gather outside the theaters to extralegally catch a show? Was it the distracting influence on drivers? Or was it the corrupting influence of the theaters and their nudity on the children of the neighborhood? While perhaps some of these nuisance definitions would hold up to judicial scrutiny, not all would— thus the intent of the city in passing the ordinance became of utmost importance. Arguing that the nuisance was the nudity itself opened the city up to arguments they were restricting free speech. Part of the city’s case relied on the testimony of Officer Edgar Emmanuel of the Jacksonville Police, who described the roadways surrounding the theater as “littered with beer cans, Coca-Cola paper cups, wrappings...very littered with trash.” Nimmons elaborated upon this testimony, adding that the city “[is] prepared to show that this is an area where the teenagers congregate at a time when the R-rated movies are shown and that in fact leave a great deal of litter on public places around that area.” Upon Manness’s objection that this case, and particularly, the ordinance, did not claim to concern itself with litter or the congregation of teenagers, Nimmons in turn argued for an understanding of the public nuisance ordinance as covering “any number of ways in which a particular attraction may be a public nuisance.” Such a statement points to the vagaries of public nuisance law and the ease with which it may be manipulated by municipal powers in order to maintain or enforce particular social dynamics.⁷¹ Nimmons failed to make any argument that

⁷¹ “Appendix,” *Erznoznik v. City of Jacksonville* 422 US 205 (1975). There is a great deal of similarity between the City of Jacksonville’s use of the public nuisance approach to regulate behavior and physical access and their earlier experimentation with vagrancy law. In her book *Vagrant Nation*, legal historian Risa Goluboff describes the purpose of vagrancy laws as “subjecting persons, whose habits of life are such as to make them objectionable members of society, to police regulations promotive of the safety or good order of the community.” Vagrancy laws differed from other criminal laws in that they did not require a crime to be committed nor intent to commit a crime, but instead criminalized the individual themselves. Enforced, vagrancy laws particularly targeted individuals that appeared incongruous to a community— black men and women in white neighborhoods and white men and women (though women to a greater extent) in black neighborhoods. Jacksonville’s vagrancy laws in particular were struck down by the Supreme Court in 1972’s *Papachristou v. City of Jacksonville* 405 U.S. 156. The court ruled that the laws under which the defendants (who included two interracial couples and a part time civil rights organizer) had been arrested were unconstitutionally vague under the Due Process Clause of the 14th

these behaviors are inherently tied to the exhibition of films featuring nudity or even that these behaviors increase during those showings. This argument is a clear illustration of the ties between seemingly direct obscenity laws and the ways they play out in grassroots enforcement and local understanding as innately about quality of life, proper behavior, and access to space.

After the District Court of Appeals affirmed the Circuit Court's decision, and the Supreme Court of Florida denied hearing the case, *Erznoznik* was granted certiorari by the United States Supreme Court with hearings scheduled for the 1974-1975 term. Oral argumentation before the Supreme Court as well as the intra-court negotiations and discussions further illustrate the central role of visual pollution and spatial considerations in this case. Through discussions of the limits and specificity of public nuisance law, the court showed themselves to be interested in, and concerned about, the way visual pollution permeated the borders between public and private space and the consequences of that fact on the character of the suburban neighborhood. In particular, their focus on traffic safety and the family home characterized this path of questioning and debate.

Early in questioning, Justices Potter Stewart and Lewis Powell raised the question of traffic safety, asking Manness whether or not the ordinance would be more or less objectionable if it applied to any film, regardless of content, and was passed with the intent of promoting traffic

Amendment, failing to adequately forewarn the community of what behavior or activities could lead to arrest. Goluboff concludes that with the legal downfall of vagrancy laws in the early 1970s, criminal law remained a method of social control as vagrancy laws were replaced by more specific laws (she cites loitering laws) that could withstand judicial scrutiny. I sustain that we can view the adult theater/1970s obscenity laws as part of this new shift in medium for social control. See Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change and the Making of the 1960s* (Oxford, UK: Oxford University Press, 2016); Kristin O'Brasill-Kulfan, *Vagrants and Vagabonds: Poverty and Mobility in the Early American Republic* (New York: New York University Press, 2019); Sal Nicolazzo, *Vagrant Figures: Law, Literature and the Origins of the Police*, (New Haven, CT: Yale University Press, 2021).

safety.⁷² After Manness confirmed Powell's statement that the ordinance would not be applied if the drive-in was to show the film *Snow White and the Seven Dwarves*, Powell sustained, "to that extent there's a distinction going [that] would suggest that the purpose of this ordinance is not traffic safety." Powell's question about the Disney film emphasized that the nuisance addressed in the ordinance was not content-neutral, failing a key test in assessing time, place, manner restrictions on First Amendment protected speech.⁷³ Justice Rehnquist questioned the primacy of content neutrality, asking "Isn't it permissible for the Jacksonville City Council to say that bare breast and bare buttock may be more distracting to drivers along the highway than the picture of Snow White?"⁷⁴ Justice Thurgood Marshall concurred, stating, "I mean the average person driving on the street, if he sees a bare buttocks on the wall over there, he's going to look at it."⁷⁵ These lines of inquiry once again raise the question of how the visual permeates the boundary between public and private— is a car a private space or not and how does that change when it is being operated on a public road. The court has offered conflicting opinions as to the car as a private space in previous cases, but here is still troubled by the intrusion of the visuals into that

⁷² A close study of the Florida Times Union newspaper surrounding the passing of the ordinance would reveal that traffic safety was likely not on the minds of council members and advocates; in early January of 1972, Charles D. Towers Jr., President of the Greater Jacksonville Safety Council announced that traffic fatalities in the city were down more than 16 percent in 1971 from 1970 despite a 10 percent increase in car ownership. Bill Waller, "Duval Traffic Deaths Drop By 16 Percent During 1971" *The Florida Times-Union* (Jacksonville, FL): Jan. 2, 1972.

⁷³ The fact that Powell invoked a Disney film is perhaps of deeper meaning. Walt Disney World, the corporation's largest amusement park opened in Florida in October 1971. In the months before the park opening, state attorney general Robert Shevin often referred to the park in his arguments for obscenity regulation. Calling for a statewide conference on obscenity regulation in August 1971, he declared, "porno mills can't exist in a state that Walt Disney World calls home." Again serving to remind us both of the centrality of space and the discourse of protecting children of contemporary obscenity regimes. "Shevin Calls Unity Meeting in Smut Drive," *The Florida Times-Union* (Jacksonville, FL), Aug. 17, 1971: B2.

⁷⁴ "Transcript of Oral Argumentation," *Erznoznik v. Jacksonville* 422 U.S. 205 (1975).

⁷⁵ *Ibid.*

space.⁷⁶ The idea of traffic safety as justification for this ordinance was of particular interest to justices and the city’s lawyers in that it showed the possibility of real physical danger stemming from visual pollution, an argument opponents of pornography generally, and the drive-in in particular, had long put forth. Visual intrusion as affecting traffic safety further emphasizes the spatial dynamics at the heart of the ordinance and how part of what offended the particular public of Jacksonville governance was the way the drive-in theater reshaped the urban landscape.

Responding to this line of questioning Manness relied less on the question of visual pollution and instead sought to turn the conversation towards how the ordinance can be interpreted and the dangers of community standards. When confronted with the fact that the ordinance had nothing to say in its original text as to an intent to regulate traffic safety, Justice Rehnquist balked, asking why the justices couldn’t interpret it that way: “if there is an argument that supports rationality and elides concerns about censorship “what more does this court need?”⁷⁷ Manness vigorously opposed this framing, “while you may construe the ordinance that way and uphold its validity, it may not be applied that way by the police officer or the prosecutor who makes the charge. He may bring the prosecution simply because ‘he’s opposed to nudity in any form, at any time in any place.’”⁷⁸ Manness’s concern lies when interpretation of law is based on personal belief and opinion and is not explicit or written in the law— leaving the populace vulnerable to an arbitrary system. Manness’s argument emphasized the need for legal clarity of intent and application that is frequently absent or left implied in laws determined by community standards or in laws determined by the implicit community present in public

⁷⁶ See *Carroll v. United States* 267 U.S. (1925); *Almeida-Sanchez v. United States* 413 U.S. 266 (1975), among others.

⁷⁷ “Transcript of Oral Argumentation,” *Erznoznik v. Jacksonville* 422 U.S. 205 (1975).

⁷⁸ *Ibid.*

nuisance law. One of the dangers of statutory vagueness is that the community that decides the “standard” is reduced to one.

Leaving behind considerations of traffic safety, with the way it tied visual pollution to danger and public harm and the unique position cars had to challenge the solidity of definitions of public and private space, behind, the court instead turned to another crucial site: the family home. The family home had long been at the center of this case, even though the original ordinance prosecuted theaters only if their films could be seen from public roads and sidewalks. The initial petitions stemmed from families who complained their children could see R-rated films from their bedroom windows or from the private Church parking lot. Joyce Chaffee, who repeatedly acted as a witness for the city, derived her authority from her status as a mother to two young children and as a homeowner. Oral argumentation in particular resurrected the image of the congregation of children and teenagers watching the films from outside the boundaries of the theater. Justice Harry Blackmun asked lawyer for the city William Lee Allen, “how your ordinance protects children standing in an adjacent private yard, adjacent to the movie theater complex....suppose the backyard adjoins the parking place for the theater...and the youngsters are all lined up there along the fence. Your ordinance doesn’t protect them in any way?”⁷⁹ Allen was forced to answer no. The language of the ordinance created a world wherein if the children watched the film from the sidewalk in front of their house they were protected, but if they watched it from thirty feet away, lined up along their backyard fence, they were not. The reach of the visual in particular illustrates just how arbitrary and malleable distinctions between public and private were and are.

⁷⁹ Ibid.

But despite these concerns about visual pollution and the protection of children and the private space of the home, the court ruled in favor of Erznoznik. Why? The justices largely seemed favorable to the intent of the ordinance but saw in its drafting and enforcement a failure of specificity and neutrality. In conference, Justices Blackmun and Marshall proposed alternate approaches the city of Jacksonville could have taken to restrict the drive-ins. Marshall argued “an ordinance banning the exhibition of such movies to children would be constitutional;” Blackmun agreed that the ordinance failed to “protect the groups that could be protected.” Blackmun argued the city was further ineffective in failing to concern itself with intrusions into the private home. In doing so, Blackmun again centered the idea of visual pollution and its permeation of the borders between public and private. If the court had previously asserted a right to privacy within a family home, what did that mean for outside incursions into the sanctity of the home or the private backyard?

The letters penned by Justice Powell to Chief Justice Burger further illustrate the justices’ frustrations with the approach of the ordinance. In the first, a sarcastic Powell informed the Chief Justice of his intent to strike down the ordinance, writing “[Clerks] Sally Smith and Joel Klein have persuaded me that it’s ok for kids to look at bare breasts and bare buttocks and accordingly I reverse my vote.”⁸⁰ In a longer subsequent letter, Powell clarified that he remained frustrated by the consequences of overturning the ordinance, namely that the potential for children to be exposed to material Powell deemed inappropriate remained. He conceded however that the “real purpose” of the ordinance— “to ban the exhibition in public view of all scenes in which the

⁸⁰ First Letter from Powell to Burger, March 1, 1975, Lewis F. Powell Jr. Papers (Lexington, VA: Washington and Lee University Law School: Lewis F. Powell Jr. Archives).

described areas of the human body may be visible,” intrudes upon content protected by the First Amendment.⁸¹ Powell concludes this letter in disgust at the participants of this case, writing,

As I reread the miserable briefs filed by the appellant and appellee in this case and recalled the low quality of the oral argument, I was reminded of the appropriateness of your comments in Chicago last week as to the shockingly low level of advocacy to which we are frequently subjected.⁸²

Here, the justices appear aware yet frustrated at the ongoing struggle that was obscenity regulation— the decision in *Miller* had failed to succinctly resolve the issue and balance the interest in regulating obscenity and pornography with the dictates of due process and the First Amendment.

In late June of 1975, Justice Powell delivered the opinion of the court, breaking with the decisions of the lower courts and declaring the ordinance unconstitutional. Powell referred to the dynamics of public and private boundaries, writing, “selective restrictions have been upheld only when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer to avoid exposure.”⁸³ This paradoxical reading of public nuisance— that something is a nuisance only if it intrudes on a private home— only further illustrates the fictitious and ever-shifting nature of the legal distinction between public and private space. He concedes that there are legitimate interests asserted by the city of Jacksonville in this ordinance, but that the current ordinance fails to pass a test of constitutionality. He continues, arguing “the plain if at times disquieting truth is that in our pluralistic society constantly proliferating new and ingenious forms of expression, we are inescapably captive audiences for many purposes. Much that we encounter offends our aesthetic, if not our political

⁸¹ Second Letter from Powell to Burger, March 1, 1975, Lewis F. Powell Jr. Papers (Lexington, VA: Washington and Lee University Law School: Lewis F. Powell Jr. Archives).

⁸² Second Letter from Powell to Burger, March 1, 1975, Lewis F. Powell Jr. Papers (Lexington, VA: Washington and Lee University Law School: Lewis F. Powell Jr. Archives).

⁸³ *Erznoznik v. US* 422 U.S. 205 (1975)

and moral sensibilities.”The primacy of the private home again appears in Powell’s decision. However, in practice, the way localities understood and applied community standards resembled an extension of the realm of private standards into the public sphere—the standards held by people privately came to define laws that determined the bounds of speech and action for the wider public.

Powell qualified his rejection of the Jacksonville ordinance by saying “we are not concerned in this case with a properly drawn zoning ordinance restricting the location of drive-in theaters or with a nondiscriminatory nuisance ordinance designed to protect the privacy of persons in their homes from the visual and audible intrusions of such theaters.”⁸⁴ In doing so he offers a model for moving forward, pointing to approaches for moderating obscenity and content that existed in the liminal space between obscene and merely racy. Beginning with the 1977 *Young v. American Mini-Theatres* case, approaches that centered spatial regulation, like zoning, would dominate obscenity regimes in the United States.

The dissents offered by Justices Burger (with Rehnquist) and White focused largely on the specific medium of film—its distracting qualities and the limited distinction between film content and reality. Burger wrote, “whatever validity the notion that passersby may protect their sensibilities by averting their eyes may have when applied to words printed on an individual’s jacket or a flag hung from a second-floor apartment window,” referring to the court’s previous opinions in *Cohen v. California* and *Spence v. Washington*, “it distorts reality to apply that notion to the outsize screen of a drive-in movie theater.”⁸⁵ Burger posited the aesthetics of film as a unique hurdle to overcome—to what end can averting your eyes be an effective method of avoidance when the film itself is shot and presented in a manner meant to be appealing and draw

⁸⁴ *Ibid.*

⁸⁵ *Erznoznik v. City of Jacksonville*, 422 US 205 (1975) (Burger and Rehnquist, J.J., dissenting).

your eyes in. He cited the “combination of color and animation against a necessarily dark background” as attracting and holding the attention of all observers. Burger cites the majority decision in *Packer Corporation v. Utah*. In the decision, Justice Brandeis argued for a distinction between advertising placed in newspapers and magazines and advertising placed on public billboards. Brandeis wrote of billboards, “advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part.” Brandeis’s opinion complicated First Amendment cases by introducing the concept of a “captive audience,” here deployed by Burger.⁸⁶ As Burger maintained, “unlike persons reading books, passersby cannot consider fragments of drive-in movies as part of the whole work for the simple reason that they see but do not hear the performance,” and those sights are fleeting.⁸⁷ What difference might passersby see between a shot of nudity in a documentary of an indigenous culture and a pornographic film set in an ambiguously exotic locale? Burger theorized that the passerby could attach whatever prurient idea he or she likes to the images. In that way, it almost seems as if Rehnquist is seeking to argue that films shown at drive-in theaters cannot be regulated under the standards established in *Roth* and *Miller* (that a work must be taken as a whole). Under Rehnquist’s argument, the spatial and visual consequences of the drive-in theater call for a carve-out to established obscenity policy— one in which materials that would otherwise not reach the level of obscenity should be subject to enhanced regulation.

The work of Linda Williams is particularly relevant to this conversation about the particular dangers or possibilities of the film medium. She describes film as a highly sensory and affective medium, cheekily quoting the philosophy of Andy Warhol, “sex is more exciting on the

⁸⁶ *Packer Corporation vs. State of Utah* 285 US 105 (1932).

⁸⁷ *Erznoznik v. City of Jacksonville*, 422 US 205 (1975) (Burger and Rehnquist, J.J., dissenting).

screen and between the pages than between the sheets anyways.”⁸⁸ Her writing mirrors much of what Burger wrote in his dissent, describing film as a medium that thrives on the visceral experience of “bodily excess.”⁸⁹ She additionally writes on how the sensory dimensions of film are central to its affective power. Sound, color, movement, and other sensory elements can all contribute to the emotional and bodily responses that films evoke in viewers.⁹⁰ Film as a specific medium provokes these conversations about visual pollution and the consequences of visual pollution on boundaries of space, but as these writings on the medium show, also enacts enormous affective consequences on the body and the body’s relationship to sexuality and sexual practice.

Powell’s decision further turned on the way the ordinance centered nudity, clarifying that though the appellee’s primary justification for the ordinance was in a city’s “right to protect its citizens against unwilling exposure to materials that may be offensive,” as written, the ordinance failed to protect citizens from all movies that might offend. In one of his letters to the Chief Justice, Powell offered up horror and crime movies as containing scenes that might also offend and titillate (or cause traffic accidents) but that were not covered by the ordinance.⁹¹ Instead, the ordinance “singles out films containing nudity presumably because the lawmakers considered them especially offensive.”⁹² Powell argued that a state or municipality may protect individual privacy, but “when the government acting as censor undertakes selectively to shield the public from some kinds of speech on the grounds that they are more offensive than others, the First Amendment strictly limits its power.”⁹³ Furthermore, the nudity covered by this ordinance was

⁸⁸ Linda Williams, *Screening Sex*, (Durham, NC: Duke University Press, 2008): 61.

⁸⁹ Linda Williams, “Film Bodies: Gender, Genre, and Excess,” *Film Quarterly* 44, no. 4 (1991).

⁹⁰ Williams, 2008: 72.

⁹¹ *Ibid.*

⁹² *Erznoznik v. City of Jacksonville* 422 US 205 (1975), (Powell, J.)

⁹³ *Ibid.*

not exclusively of the prurient kind— as Powell states, the ordinance would “bar a film containing a picture of a baby’s buttocks, the nude body of a war victim or scenes from a culture in which nudity is indigenous,” a reach that is unconstitutionally broad.⁹⁴ Thus, one of the lasting precedents emerging from the decision in *Erznoznik* is the idea that nudity itself portrayed in films cannot be presumed obscene solely because it offends someone.⁹⁵

Response

The day after the decision was released to the public, Justice Powell received one of the first responses to his opinion. Robert E. Lincoln of Las Vegas Nevada wrote, “regarding your decision on Jacksonville Florida concerning sex and public drive-in theaters, I would invite you to kiss my posterior region and may God have mercy on your soul.”⁹⁶ On July 1, The Times Herald published a similar “reader reaction” asking “if the supreme court judges belong to a nudist society?”⁹⁷ In a response to the *Erznoznik* decision, syndicated columnist George Will maligned the Court for diminishing “the right to be let alone [and] protection against the laceration of feelings and bombardment of sensibilities to which everyone in compact modern

⁹⁴ Ibid.

⁹⁵ An amicus brief submitted by the Author’s League of America on the side of the theater offered some additional commentary on the question of nudity at drive-ins: “Most drive-ins are built, by necessity, in open areas. When the screens become visible to individuals in their homes, it is because the homes have been built near these pre-existing theatres. The Jacksonville ordinance is like a statute prohibiting bikini bathing suits to protect the sensibilities of homeowners who have chosen to build near the beach.” Such an argument not only directs our thoughts to the important and relevant history of nudity laws, but also illustrates how we can understand this case as about competing rights of whose private space matters. The court, in their frustrations over the limits of the law seem to advocate for the rights of the family home to avoid visual pollution as taking precedence over those of the theater who served as the producers of that pollution. In this we once again see a privileging of certain forms of sexuality and sexual expression and an emphasis on the family and the nuclear family home as the core of the legal structure “community.” “Brief for the Author’s League of America as Amicus Curiae,” *Erznoznik v. City of Jacksonville* 422 US 205 (1975).

⁹⁶ Letter from Robert E. Lincoln to Justice Lewis Powell, June 26, 1975, in The Lewis F. Powell Jr. Papers (Lexington, VA: Washington and Lee University Law School: Lewis F. Powell Jr. Archives).

⁹⁷ “Reader Reaction: Nudity Not Nice,” *The Times Herald* (Port Huron, MI), July 1, 1975: 6.

communities is vulnerable.”⁹⁸ Will invokes the “right to be left alone” as including the right to not be subject to visual pollution.

The Messenger Press out of Allentown, NJ published an editorial criticizing the court, opening “what is not trivial is the continued fetish of the nation’s highest tribunal to give one more breath of life to the commercialized smut dealers of America at public expense.”⁹⁹ The editorial board continues,

Hamstringing elected municipal and state governments from acting to preserve community standards against the aggressive commercial depredations of a small class of entrepreneurs or individuals may seem abstractly noble to some, but to others the essence of a democracy still entails providing the greatest amount of good for the greatest number of people. It is hoped that one day the infatuation with individual rights a preoccupation of our courts will give way to a concern for the welfare of society at large. Maybe then when law and public consensus are more in tune our courts will be worthy of respect.¹⁰⁰

Similarly, *The Atlanta Constitution* opined that the ruling in the Jacksonville case was “[in]consistent with the court’s other recent decision to give some leeway to community standards to decide what is offensive to the general public.” The article concludes, “since [the court] cannot tell us precisely where the line should be drawn, perhaps the court should leave more room for community standards.”¹⁰¹ While we cannot necessarily take these reports as representative of the attitude of the entire nation, they are representative of the continued focus on community standards and the persistent desire of communities to exclude pornography and obscenity from the areas where so-called ‘good’ citizens lived and worked.

In the aftermath of the court’s decision in *Erznoznik*, Perry Reavis, District Manager of Eastern Federation Corporation, which operated the University Drive-In, expressed his pleasure,

⁹⁸ George Will, “Caution: Scenic Highway Ahead,” *The Journal Herald* (Dayton, Ohio), Jun 28, 1975: 4.

⁹⁹ “Editorial: Look the Other Way,” *The Messenger Press* (Allentown, NJ), Jun 26, 1975: 4.

¹⁰⁰ Ibid.

¹⁰¹ “Look the Other Way” *The Atlanta Constitution*, June 29, 1975.

telling the *Tallahassee Democrat*, “I don’t believe in censorship.”¹⁰² However, Reavis clarified with the reporter, moving forward, the theater would maintain a ring of 15 bright quartz spotlights around the perimeter of the drive-in’s grounds “so that if we do have a movie that anyone in the community objects to they don’t have to be offended by accidentally looking at the screen.”¹⁰³ The *Democrat* also spoke with Monsignor Eugene C. Kohls of the Resurrection Catholic Church, who said, “if [the lights] are kept in place, there should be no problem.”¹⁰⁴ While it is possible to look at this solution as perhaps even more intrusive and offensive, for many living on the streets surrounding the University Drive-In, bright lights aimed outwards and towards their homes were understood as an improvement upon the images of nudity. This resolution brings much of the framing of the original ordinance into question— what does a public nuisance or an instance of visual pollution look like if not a series of bright lights pointed into private homes after dusk? What the actions of the city and the theater reveal is how deeply the spatial regulation of adult theaters and obscenity remains a project of social regulation playing out in terms of space; the project to maintain the character of a neighborhood is a project to remove sexual expression and sexual variation. This post-decision approach thus serves as an early indicator of the future direction of obscenity and pornography regulation. Content would not be regulated, but access to the theater would be reduced— particularly for those previously only able to attend the shows by viewing the screen from public places— and the physical presence of the theater in a suburban neighborhood would be minimized and increasingly erased. Neither *Miller* nor *Erznoznik* effectively created an obscenity regime to the satisfaction of many citizens.

¹⁰² “Theater Seeks to Be a Good Neighbor,” *Tallahassee Democrat*, June 24, 1975.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

Post *Erznoznik*, communities who desired stricter obscenity laws turned away from content-based restrictions to those that restricted where and when obscenity could exist. These spatial considerations did not mean a distancing from the social issues at the heart of obscenity laws. Rather in the way they shaped cities and articulated differences of public and private, correct sexuality and the perverse, spatially focused obscenity regimes served to enshrine doctrines of heteronormativity and hierarchies of citizenship into the physical fabric of the American urban terrain. The focus placed in *Erznoznik* on the ability to access the drive-in screen and the intrusion into the idyllic suburban community of Jacksonville grew into the zoning ordinances of *Young*.

Conclusion

In December of 1980, the *Chicago Tribune* published an article entitled “Jacksonville: Free of Pornography.” The article informed the public, “after a five-year campaign led by Baptist ministers, all the city’s adult bookstores are closed and every X-rated movie theater is shut.” According to Sheriff Dale Carson and Mayor Jake Godbold, “[Jacksonville] is the only major city in the United States now that’s free of pornography— and we intend to keep it that way.”¹⁰⁵ The article tracked the campaign back to 1975, shortly after the decision in *Erznoznik*, and describes the lobbying of the city council by local church leaders for tougher ordinances and the round-the-clock pickets organized outside the ‘sites of pornography.’¹⁰⁶ State Representative from Jacksonville John W. Lewis offered a slightly different origin story for Jacksonville’s campaign against obscenity, telling one newspaper, “pornography became an issue here after a widening and beautifying project was completed on Jacksonville’s Main Street last year

¹⁰⁵ “Jacksonville: Free of Pornography,” *The Chicago Tribune*, December 17, 1980.

¹⁰⁶ *Ibid.*

(1976)...but town fathers soon realized that the principal beneficiary of the ‘new’ Main Street...was a string of pornography shops...We [had] the best street in the world for pornographic dealers.”¹⁰⁷ Lewis’s statement again emphasizes the relationship between space and pornographic regulation in this period; rather than the films exhibited by *Erznoznik*, by this point the very shops themselves were ‘polluting’ newly beautified areas. Further reporting points to success in using racketeering charges to prosecute theater owners and employees with one official stating “judges and juries have not been afraid to find this type of material obscene.”¹⁰⁸ In the events recounted by this article, we see the consequences and resolution of the decision in *Erznoznik*. While the specific ordinance was struck down, the case served in many ways as a test case and as a bridge case— on one hand testing the waters for what level of content restriction would be allowed by the Miller doctrine of community standards and on the other providing a bridge towards the more successful restrictions on obscenity and pornography that targeted access, space, and the presence of certain groups who utilized these sites of pornography in a community.

The University Drive-In Theater was not a porn theater. Despite reactions to the contrary, according to the Supreme Court, this was not technically an obscenity case. Why then does this case deserve an entire chapter of this dissertation on porn theaters and obscenity regimes? First, the legal definition of this case as not strictly one concerned with obscenity is far less important culturally than the public response to the case as allowing obscenity at drive-ins. Second, *Erznoznik* illustrates the wide spectrum of sites that exhibited ‘questionable’ content during the mid 1970s. Porn and risqué films (or even those that unabashedly featured nudity) played not

¹⁰⁷ Al Burt, “Young Legislator Bucks the Pack on Jacksonville Pornography Issue,” *The Miami Herald*, Jan. 16, 1977: 4CW.

¹⁰⁸ Charles Bernsen, “Peep Show Owners Indicted in Florida,” *The Commercial Appeal* (Memphis, TN) Dec. 17, 1980: 10B.

only at dedicated porn theaters, but also at certain drive-ins and at local megaplexes. Third, drive-ins have a particular cultural reputation as sites of sexual behavior and offer insight into the intersections of space and sexuality, particularly in more rural and suburban communities.

However, the most significant reason for including this case in this dissertation is the way it signals a shift in approach to obscenity and serves as a bridge between the tactics deployed in *Miller* and *Paris* and those to come in *Young*. With the failure of the courts to expand community standards to include mere nudity or, in the arguments of the Allentown and Atlanta newspaper, to bulldoze individual rights, communities who desired stricter obscenity laws turned away from content-based restrictions to those that restricted where and when obscenity could exist. The focus placed in *Erznoznik* on the ability to access the drive-in screen, the clear framing of the polluting nature of the visual, and the intrusion into the idyllic suburban community of Jacksonville grew into the zoning ordinances of *Young*.

Chapter Four:

“The Survival of Our Community:” Detroit’s Anti-Pornography Zoning Ordinance, Citizenship, and Heteronormativity

In spring of 1974, Detroit resident GQ Ballard wrote in to the “As Our Readers See It” column of the *Detroit Free Press*, to complain about the latest approach to regulating pornography and adult commerce in the city. Ballard responded to the shifting discourse on obscenity, which had honed in on dynamics of quality of life, neighborhood character and property values to justify the expulsion of adult theaters, bookstores, and other businesses. They wrote, “the argument about the lowering of the neighborhoods leaves me somewhat baffled. I cannot seem to find the clause in the constitution that makes the first amendment contingent on property values.”¹

Ballard’s response was in the minority of citizen opinions represented in the historical record. The vast majority of citizen testimony celebrated this renewed focus on quality-of-life concerns and a spatial approach to regulating pornography. While, for many, the same desire for a total ban on pornography remained, an approach that restricted adult businesses, their patrons, and their purported “effects” from certain neighborhoods spoke to the most virulent complaints. I understand this move toward the spatial as derived both from the Supreme Court’s emphasis on the local, “unleashed” in the Miller and Paris decisions, and from the same argumentation and motives behind the *Erznoznik* case, covered in the previous chapter. Ballard’s letter to the Detroit Free Press came shortly after District Court judges ruled on a Detroit city ordinance which both prohibited certain adult businesses from operating within 1000 feet of another ‘regulated use,’ a

¹ GQ Ballard, “As Our Readers See It: The Pornography Ruling: Prudery or Propriety,” *Detroit Free Press*, May 2, 1974.

category that included bars, hotels and motels, pawnshops, billiard halls, secondhand stores and taxi dance halls among others, and required adult businesses to get approval for operation from 51 percent of neighboring business owners and residents. The two clauses of the ordinance speak to the intersections of spatial regulation and community opinion and citizenship in the fight against pornography. While the district judges overturned the 51 percent clause as unconstitutional, in 1976 the Supreme Court upheld the spatial zoning clause of the ordinance in the case *Young v. American Mini Theatres*, thus validating an approach to the regulation of pornography and adult businesses that would come to be known as the Detroit Approach.

Zoning manifests as an inherently exclusionary project, framed in the case of Detroit as both a deliberate attempt to keep a certain kind of person out and to maintain the respectable character of middle-class residential neighborhoods. The Detroit zoning approach, much like the obscenity regulation efforts detailed in the previous chapters, promoted a heteronormative view of public and private space. A question inherent to much of 20th century urban planning is “what behaviors, practices, and identities contribute to a desirable neighborhood?” The answer the city gives in this system of zoning regulation is one that privileges a nuclear, home-owning family, wherein the only sex that occurs is between a married couple and happens behind closed bedroom doors. This zoning ordinance successfully legislates certain people off certain streets and out of public view while restricting expression of identity through behavior. Sexual non-normativity and sexual commerce were connected to notions of urban decline and these ideas came to have a significant effect on the physical and lived space of modern cities. What this study of the Detroit zoning ordinance reveals is the centrality of the question of whose property rights matter to the construction of obscenity regimes. The answer to such a question relies on a notion of citizenship and membership in a community as tied to sexual practice and identity.

In *Young*, the court created what is now known as the secondary effects doctrine, allowing restrictions that otherwise appear to be content based to be treated as if they were content neutral. The courts asserted that the zoning ordinance in question was passed not to silence offensive expression but to prevent the deterioration of neighborhoods. The zoning ordinance is thus not targeting the expressive content shown in the theaters or in bookstores, but the effects of the presence of those businesses. The judicial success of the Detroit zoning ordinance thereby marked a transition in obscenity legislation away from a legal focus on the films themselves and the fraught determination of whether the presence or presentation of one sex act or another made a film obscene, and towards an approach centered on the regulation of space and where adult theaters—and their patrons—could exist. Previous studies of obscenity law have tended to point to this shift as one that minimized the role of morality in obscenity regulation, with questions of property values, secondary effects, and neighborhood character replacing morals as the justification and pretext for the laws. I concur with academics like Pamela Butler and Whit Strub who demonstrate that the language of morality rapidly left the courtroom in the latter half of the 1970s,² with lawyer WG Roesler, in writing about the limits of using conventional zoning to restrict adult entertainment, declaring “the issue of morality must not be raised at all.”³ However, I do find that this approach of taking lawyers and lawmakers at their word that morality was no longer the central motivating factor behind obscenity law obscures the continual project of discrimination and exclusion by the state. The new spatial

² Pamela Butler, “Sex and the Cities: A Reevaluation of 1980s Feminist Politics in Minneapolis and St. Paul,” in *Queer Twin Cities*, ed. Kevin P. Murphy, Jennifer L. Pierce and Larry Knopp, (Minneapolis: University of Minnesota Press, 2010) : 211; Whit Strub, *Obscenity Rules: Roth v. United States and the Long Struggle over Sexual Expression*, (Lawrence, KS: University of Kansas Press, 2013).

³ W.G. Roesler, “Comment: Regulating Adult Entertainment Establishments Under Conventional Zoning,” *The Urban Lawyer*, 19, no. 1: (Winter 1987): 134.

considerations put forth in laws like Detroit's zoning ordinance can be understood through the neoliberal valuation of the privatization and heteronormativity of space.⁴ Part of what I argue in this chapter is that though couched in the language of neoliberal property valuation, the zoning ordinances put forth by the Detroit Common Council remain enmeshed in a moralistic view of adult theaters and specifically the patrons of adult theaters. Thus, even a spatial turn in obscenity legislation cannot be separated from the questions of sexual citizenship and community belonging.

In many ways, the Detroit approach seems to come about as a result of the failure in the *Erznoznik* case to regulate the presence of 'objectionable' sexual material in residential neighborhoods. Such an understanding of the chronology of the 1970s response to adult theaters is tempting, constructing a straight line of proposed regulation and failure followed by a restructuring of the law in response to criticism. This teleological understanding of obscenity regulation fails to account for the multitude of approaches happening co-terminously and the vast variety of interpretations of the *Miller* doctrine. This view of obscenity regulation also diminishes the fact that the ordinance in question in *Young* was put in motion long before the decisions in *Miller* and *Paris* came down from the Court, with zoning itself used as an exclusionary tool to maintain neighborhood character nearly fifty years previously.

When compared to the previously discussed locales of Atlanta and Jacksonville, Detroit has been the subject of a great deal more research on the history of sexuality and obscenity within its borders.⁵ While these have works been an incalculable resource, particularly the work

⁴ Whit Strub, "From Porno Chic to Porno Bleak: Representing the Urban Crisis in 1970s American Pornography," in *Porno Chic and the Sex Wars*, ed. Carolyn Bronstein and Whit Strub, (Amherst, MA: University of Massachusetts Press, 2018): 48.

⁵ See Ben Strassfeld, "Indecent Detroit: Regulating Race, Sex and Adult Entertainment" (Ph.D. Dissertation, University of Michigan, 2018); Timothy Ford Retzloff, "City, Suburb and the Changing Bounds of Lesbian and Gay Life and Politics in Metropolitan Detroit, 1945-1985," (Ph.D. Dissertation,

Ben Strassfeld does in his dissertation with geospatial mapping work and his argument that Detroit's anti-porn politics both shaped and were shaped by the city's racial politics, I differentiate our work on a sense of scale and comparative focus as well as in my focus on the technological function of obscenity regulation towards a construction of sexual citizenship.⁶ My treatment of the *Young* case is particularly attuned on the shift toward spatial politics and the interwovenness of citizenship and property. Broadly speaking, the abundance of historical research concerning 20th century Detroit can be attributed to a number of conditions: the ability to track patterns of urban and suburban growth along lines of economic class and race, the central role Detroit played in the civil rights movement, including the influential 1967 riots, and perhaps most importantly for this work, Detroit's role in shaping the national conversation on obscenity.⁷

Yale University 2014); Heather Ann Thompson, *Whose Detroit?: Politics, Labor and Race in a Modern American City* (Ithaca, NY: Cornell University Press, 2017); Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit- Updated Edition*, (Princeton, NJ: Princeton University Press, 2014).

⁶ Strassfeld.

⁷ Strassfeld's dissertation recounts Detroit's status in the mid 1950s as the "country's main hub of literary censorship," a title attributable to the widespread usage of Detroit's banned book list. Treatment of works targeted by Detroit censors were differentiated along economic lines. The list, compiled by the Detroit Censorship Bureau, in conjunction with the Detroit Police Force, featured two categories of books. The first constituted those books officially banned in the city of Detroit and "distributors or bookstore owners caught selling a banned book would quickly find themselves in court." The second list featured books labeled as 'objectionable;' any complaint from a resident regarding the sale of an objectionable book would necessitate the immediate withdrawal of said book, demonstrating a reliance on community standards at an individual level long before the Supreme Court would enshrine such a concept in law. Economic considerations provided a significant, if unexplored, component of the list. The only books immediately evaluated for placement on the censorship list were paperbacks— hardcover books were only examined on complaint. While the Detroit board itself pointed to the differing content of these paperback books as justification for this separate approach, describing them as "adolescent and weak;" outside commenters questioned why "the buyer of hardback \$3.95 books is free to ruin his morals on his own time" whereas the buyer of a 99-cent paperback would find their options limited. Censorship tactics along the entire spectrum of media have tended to privilege the privileged and punish those who are unable to meet a threshold of economic or social stability that allows for an assumption of privacy. Furthermore, the influence of the Detroit obscenity regime was broad, as other communities, unable to afford their own censorship bureau, adopted Detroit's banned book list for their own use. See Strassfeld, 33, 84-87 and Mona K. Majzoub and Christopher Doyle, "To Inflamm the Censors: Hemingway's Use of Obscenity in *To Have and Have Not*," *Detroit Lawyer*, July 2020: 14-19.

Detroit

Detroit at the time of the *Young* case was a city undergoing deep change. In the decades before WWII, Detroit was a main hub for black southerners during the Great Migration, drawn to the industrial city by the automobile industry. Henry Ford “enjoyed a national reputation as the black man’s friend willing to employ him when others would not,” and the city boomed.⁸ Detroit hit its peak population in 1950, but in the following decade lost over 23 percent of its white population to white flight and the growth of the suburbs.⁹ Black southerners who had fled north were not met with a racial utopia, but instead a deeply segregated society, particularly in terms of land use and housing. In 1943 it became official city policy to “preserve the racial characteristics of neighborhoods in locating public housing projects.” While that policy was rescinded in 1952, it was clear that very little changed; in June 1954 a federal district court enjoined the Detroit Housing Commission for maintaining racially segregated projects, leasing housing units on the basis of color or race, and listing applicants for public housing separately by race.¹⁰ In 1955, as tensions between the black and white communities continued to rise, Detroit’s Commission on Community Relations noted that the most vicious housing violence was erupting in city neighborhoods that were on the periphery of the area most heavily populated by African Americans, “because there is a strong feeling in this border area that it is being invaded by colored people.”¹¹ These same border areas are where the majority of adult businesses not in the downtown core could be found 15-20 years later, pointing to a continued space of cultural and political tension.

⁸ Thompson, 10.

⁹ Thompson, 11.

¹⁰ Sidney Fine, *Violence in the Model City: The Cavanaugh Administration, Race Relations and the Detroit Riot of 1967* (East Lansing, MI: Michigan University Press, 2007), 15

¹¹ Fine, 17

The 1967 Uprising marked an important moment in Detroit's politics, both racial and cultural. Stemming from a raid on an afterhours, unlicensed bar, the resulting violence led to intervention by both the Michigan Army National Guard and the U.S. Army and left 43 dead.¹² In a market opinion research survey conducted in May 1969, 57% of Detroiters sampled thought that the city was worse off than it had been five years earlier; only 11 percent believed that conditions had improved. Mayor Roman Gribbs, elected in 1969, ran as a 'racial moderate' but still won in an incredibly close race. The city was still (though just barely) majority white; Gribbs received only an estimated 4 percent of the black vote. In the same election 1/3 of the city council was black.¹³ By 1973, the black population and its political allies were in the position to elect their choice of mayor; Gribbs declined to run for a second term and the first black mayor of Detroit, Coleman Young, took office in 1974.¹⁴ To some extent then, we can purport that the rapidly shifting demographic and political changes of Detroit and the ways those changes found release in the streets, had some effect on the willingness of the Detroit City Council to turn to a spatial approach to solve concerns about pornography and obscenity. Such dynamics of rapid demographic change may also have had an impact on the depths to which Detroit residents felt loyalty to their neighborhoods and loudly and often expressed their desires to maintain their physical and social character.

History and Uses of Zoning

Although explicitly racial zoning was declared unconstitutional in 1917, before most cities had even begun experimenting with zoning based on different uses, the racial and

¹² Fine, 234.

¹³ Fine, 456.

¹⁴ See Thompson, 38 and Susan Welch, Lee Sigelman, Timothy Bledsoe, and Michael Combs, *Race and Place: Race Relations in an American City* (Cambridge, UK: Cambridge University Press, 2001): 113.

exclusionary aspects of zoning law had a much longer history.¹⁵ In fact, an early study of zoning in New York City describes the first modern zoning ordinance as enacted primarily to protect exclusive Fifth Avenue merchants and their clientele from immigrant garment workers. One advocate of the ordinance is quoted as saying, “the loft buildings have already invaded the side streets with their hordes of factory employees. The employees from these loft buildings cannot be controlled. They spend their time lunch hour and before business on the avenue congregating in crowds that are doing more than any other thing to destroy the exclusiveness of fifth avenue.”¹⁶ Other contemporary observers tied the possible checking power of zoning laws on expansion of commercial and industrial activity that specifically hurt property values.¹⁷

The Supreme Court validated zoning as a technique for land use regulation in the 1926 case of *Village of Euclid v. Ambler Realty Co.*¹⁸ In the decision, the court ruled that zoning laws need “find their justification in some aspect of police power asserted for the public welfare.”¹⁹ In her dissertation “Keeping it Dirty: Defining and Redefining Obscenity in American Judicial Discourse,” communications scholar Mihaela Popescu succinctly summarizes these tensions, writing, “traditional zoning...involves the spatial application of hierarchies, the spatial containment and preservation of symbolic centers and constitutes the backbone of the spatial structuring of social identity and social institutions.”²⁰ Some scholars have made the argument that exclusionary zoning excludes land users just as it excludes land uses; the most popular

¹⁵ *Buchanan v. Warley* 245 U.S. 60 (1917).

¹⁶ Christopher Berry, “Land Use Regulation and Residential Segregation: Does Zoning Matter?” *American Law and Economics Review* 3, no. 2 (Fall 2001): 253-4.

¹⁷ Allison Shertzer, Tate Twinam and Randall P. Walsh, “Race, Ethnicity and Discriminatory Zoning” *American Economic Journal: Applied Economics* 8, no. 3 (2016): 220.

¹⁸ *Village of Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926).

¹⁹ Roesler, 126.

²⁰ Mihaela Popescu, “Keeping it Dirty: Defining and Redefining Obscenity in American Judicial Discourse 1873-2007,” (Ph. D. Dissertation, University of Pennsylvania, 2008): 321.

zoning regulations tend to exclude multifamily housing and set forth minimum building standards, lot size and width, building size density (that is lot coverage) and so forth. Scholar Christopher Berry writes, “although restrictions such as these do not explicitly exclude specific people or groups of people, they effectively establish minimum limits on the cost of housing which fosters economic segregation. And given the correlation between race and income economic segregation has implied racial segregation.”²¹ In writing about the feminist led anti-pornography movement of the 1980s, Marilyn Papayanis makes a connection between the language behind exclusionary zoning practices and campaigns to regulate adult theaters and businesses, saying “for those who would reclaim the city in the name of traditional values, X-rated bookstores and movie theaters, video palaces, topless bars, and peep show parlors rank alongside the homeless and the working poor as quality of life issues, a euphemism for class-motivated warfare on the visible effects of poverty, economic disenfranchisement and difference perceived as deviance.”²² Zoning in these ways makes sense as a logical progression in the treatment of obscenity; the language of pollution and deviance directed at the films and patrons of theaters that was part of the *Paris* and *Erznoznik* cases transitions into constitutionally acceptable arguments when thought of spatially.

Ordinance Origins

The legal approach that came to shape the Detroit zoning ordinances found their origins in an earlier and broader consideration of property devaluation and urban decline. 1962, Detroit enacted Section 66 of the Zoning Ordinance, later known as the ‘Anti-Skid-Row Ordinance,’

²¹ Christopher Berry, “Land Use Regulation and Residential Segregation: Does Zoning Matter?” *American Law and Economics Review* 3, no. 2 (Fall 2001): 253.

²² Marilyn Papayanis, “Sex and the Revanchist City: Zoning Out Pornography in New York,” *Environment and Planning D: Society and Space* 18, no. 3 (2000), 342.

which, in part, read, “it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas.”²³ This ordinance established that within the city boundaries of Detroit, no more than two hotels, bars, pawnshops, secondhand stores, pool halls, etc. could locate within 1000 feet of each other.²⁴ The city relied on the testimony of Councilman and Professor of Sociology at Wayne State University Mel Ravitz to provide the ‘public welfare’ justification required by the courts; Ravitz argued that these types of businesses are a “threat in that [they lead] people to believe the neighborhood is declining and more of the kind of people who accept a declining neighborhood flock there....if people believe something is true, even if it is not originally, they will tend to act as if it were true and in doing so help produce the condition that was originally only believed.”²⁵ Ravitz doubled down on his claims about the impact of these businesses on the very type of people that made up a neighborhood arguing, “concentration of the proscribed uses...allow[s] in people with different standards” and that such action “ruins” a neighborhood.²⁶ Rather than targeting sexual difference or activity, the 1962 Skid Row amendment primarily targeted the unhoused who spent their time on Michigan Ave. While I cannot speak to the motivations of every advocate, the Skid Row ordinance seems to at least have partially been enacted to clear the way for a proposed urban renewal project known as “International Village,” aimed at increasing Detroit’s marketability as a convention host city and

²³ Detroit City Ordinance 66, quoted in “Respondent’s Brief,” *Young v. American Mini-Theatres* 427 U.S. 50 (1976).

²⁴ *Ibid.*

²⁵ Quoted in “Respondent’s Brief,” *Young v. American Mini-Theatres* 427 U.S. 50 (1976).

²⁶ *Ibid.*

possible host of the 1968 Olympics. The project never got off the ground, but points to questions of the role of eminent domain and competing claims of proper use of private property.²⁷

From the onset of organized opposition to adult bookstores and theaters in Detroit, which seemed to arise in the late 1960s in tandem with media coverage of the ‘sexual revolution’ and confusion over the bounds of obscenity law, the fear of an ‘invasion’ of residential neighborhoods by supposedly sexually deviant, poor, and dangerous patrons dominated arguments and testimony. In letters to Ravitz from 1970, residents complained, “we do not need the perverts and other sexually disturbed persons that this kind of activity has brought into our neighborhood.”²⁸ Another wrote, “I have been trying to help the underprivileged to a better life, but what good can we do if we do nothing to stop hardcore pornography....it degrades their minds and keeps them from really trying to uplift themselves.”²⁹ One letter from a BC McSain to the entire Council railed, “If you want to be liberal fine. But don’t be so damn liberal in someone else’s neighborhood. Bring them into the area where you live and you rub elbows with the kooks that it is bringing into the Jefferson Area.”³⁰ McSain’s letter effectively demonstrated the proprietary feelings felt by Detroiters to their community while also, in its invocation of “kooks” pointing at the fact that what was so threatening about the adult businesses in their midst was not so much the visual intrusion of obscene images, but the presence of those people who frequented the businesses— particularly those who did not appear to fit in to the neighborhood. The Schulze

²⁷ Frank Beckman, “Knox Protests Freeze to Council,” *Detroit Free Press*, Sep. 28, 1962: 3A; Gary Tierney and Marvin Josattis, “As Others See It: First Save Skid Row, Then Rehabilitate It” *Detroit Free Press*, Jan. 2, 1962: 4; Curt Haseltine, “Skid Row May Go, But Its People Have No Place,” *Detroit Free Press*, Jul. 19, 1962: 6A.

²⁸ Kenneth and Elizabeth Newman to Mel Ravitz, Aug. 8, 1970. In Mel Ravitz Papers, Box 25 Folder 3, Walter P. Reuther Library, Wayne State University.

²⁹ Mrs. Robert Curtis to Mel Ravitz, Aug. 2, 1970. In Mel Ravitz Papers, Box 25 Folder 3, Walter P. Reuther Library, Wayne State University.

³⁰ BC McSain to Common Council, undated. In Mel Ravitz Papers, Box 25 Folder 2, Walter P. Reuther Library, Wayne State University.

Community Council summated an additional concern reminding the Common Council, “the citizen has no universal right to ask for favors. However, he does have the right to expect the same rights in Russell Woods as he does in Palmer Woods; the same in Northwest Detroit as he does in Rosedale Park.”³¹ By late December of 1970 the Detroit City Council had become bombarded by calls for “something to be done” about the incursion of sexually oriented businesses. At one of these early council meetings, resident Dolores Huber spoke as a member of the group SOCK (Socially Organized Citizens for the Protection of Kids), describing “this foul material” as “an opiate, insidious and surreptitious, deadly in its ramifications and pretension—a form of violence more devastating socially than any other decaying pollutant.”³² At the same council meeting, Councilman and Lutheran Minister David Eberhard proposed “that the city simply padlock smut bookstores and theaters and make the owners **prove** their material was not obscene,” a move that would undoubtedly be overturned by the Court for its violation of both the First Amendment and the prior restraint clause.³³

³¹ Herbert Williams and the members of the Schulze Community Council to the Detroit Common Council, December 10, 1970, in Mel Ravitz Papers Box 34, Folder 9, Walter P. Reuther Library, Wayne State University. The Schultze is a particularly interesting case, as the Mel Ravitz papers possess letters from two consecutive heads of their Community Council, both complaining about the presence of adult businesses. The Schulze neighborhood was one emerging from a decade of enormous demographic change—formerly majority Jewish, in 1970 the neighborhood was more than 80 percent black, whereas in 1960 it was less than one percent black. Earlier in 1970, the neighborhood had campaigned for a rezoning of the neighborhood to limit the influx of businesses. Lino Canevaro, head city planner, acknowledged that the shifting demographics played a role in the neighborhood’s business makeup, saying “it is unfortunate that when an area changes racially the potentially obnoxious uses follow the people.” Michael Maidenberg, “Alarmed Residents Fight for Neighborhood” *Detroit Free Press*, Mar. 30, 1970: 1; 5A.

³² It remains to be seen if there were any other members of SOCK or if Dolores Huber was its sole contributor. Huber appears to have been a repeated campaigner for social reform, appearing in a 1964 *Detroit Daily Press* article on violence in Detroit’s public schools, where she railed against the “hairdos, tight slacks and heavy makeup” of high school girls. “SOCK Newsletter” in In Mel Ravitz Papers, Box 25 Folder 2, Walter P. Reuther Library, Wayne State University; “Worried Mothers Propose Parent Patrol of Schools” *Detroit Daily Press*, Oct. 7, 1964: A2.

³³ “Eberhard Wants Smut Shops Padlocked,” *Detroit News*, Dec. 10, 1970, 26. Eberhard served for many years as a Pastor in Detroit’s Lutheran churches, including Riverside Lutheran on Detroit’s Lower Eastside, a parish “active in the Civil Rights Movement” through several community outreach programs,

By mid 1971, the Detroit City Council, led by Council President Mel Ravitz, had asked City Corporation Counsel Thomas H. Gallagher to explore approaches to the pornography problem, including “licensing all bookstores and theaters annually through the city’s department of building and safety engineering; concentrating on restrictions aimed at protecting young children; and utilizing regulated use zoning restrictions.”³⁴ In his eventual response to the council in late 1971, Gallagher argued against the supposed permissiveness of a licensing or zoning structure and instead advocated an approach that defined, and then shut down businesses that displayed, obscenity. Gallagher’s proposed definition of obscenity was as follows,

For the purposes of this code any material or performance is obscene if a. Considered as a whole its predominant appeal is to prurient, shameful or morbid interest in nudity sex excretion sadism or masochism and b. It goes substantially beyond customary limits of candor in describing or presenting such matters...predominant appeal should be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of dissemination to be designed for children or other especially susceptible audiences.³⁵

While Gallagher’s definition was perhaps more graphic and definitive than others proposed at the time, it did purport a basic moralistic understanding of the relationship between obscenity, prurience and shame. The city did not immediately integrate Gallagher’s proposed definition, but he was recruited to work alongside Councilman Eberhard in drafting new ordinances to tackle the pornography issue. The first ordinance from Gallagher and Eberhard was brought before the council almost concurrently with a feisty open meeting, wherein over 25 people testified, 23 of

including a free clinic and a day care. He also served as pastor at the Holy Trinity Polish Lutheran Church and the Holy Trinity Slovak Lutheran Church, both of which eventually merged with the Holy Trinity Lutheran Church, where Eberhard additionally served as pastor from 1980-2015. Under his leadership the church was designated a Michigan State Historic Site and listed on the National Register of Historic Places. Bill Laitner, “Longtime Detroit Councilman was Church Pastor,” *Detroit Free Press*, May 11, 2016: 5A.

³⁴ David L. Good, “Council May Move Against Smut Peddlers,” *Detroit News*, Sep. 23, 1971.

³⁵ “Ordinance proposed by Thomas Gallagher, Oct 18, 1971” Mel Ravitz Papers, Box 41, Folder 6. Walter P. Reuther Library, Wayne State University.

whom begged the city to curb the “onset of smut.” The two contributors arguing against regulation, Adrienne James of the American Civil Liberties Union, and Dr. Paul Lowinger, a local psychiatrist, were met with derision. Councilman Carl Levin, upon hearing Lowinger’s claim that he did not see a tie between crime and pornography, exclaimed “I think you’re nuts,”³⁶ and WJBK TV 2 offered an editorial from News Director Carl Cederberg the following night refuting Lowinger’s statement that the “city has more important things to worry about than a growing tide of commercialized filth” and asserting that the station “believe[d] that it is the proper business of common council to try to control blatantly degrading books, movies and magazines.”³⁷

It was with this sense of local opinion that the council had to decide on the new Eberhard and Gallagher ordinance. Unsurprisingly, the ordinance took a hard line view, declaring, “no person shall knowingly permit the use of any device regulated by this article to display, expose, produce, or emit any motion picture printed matter, advertisement, writing, music, song or other amusement that is obscene, indecent, or contrary to good morals” in the city of Detroit, thereby expanding city laws to include adult bookshops, movies and nude photo studios among prohibited businesses.³⁸ Among serious concerns regarding the constitutionality of the ordinance (Eberhard crowed, “let them take us to court!”³⁹), the first vote on the ordinance resulted in a 4-4

³⁶ Julie Morris, “Council Hears Blunt Plea for Curbs on Pornography,” *Detroit Free Press*, Jan. 27, 1972, 3A. Carl Levin would go on to serve as a United States Senator from 1979-2015. One biography of Levin recounts him being so frustrated with the U.S. Department of Housing and Urban Development's handling of repossessed houses in Detroit that he and other members of the council, “went out with a bulldozer to help raze some of the houses.” Kurt Stone, *The Jews of Capitol Hill: A Compendium of Jewish Congressional Members* (Plymouth, UK: Scarecrow Press, 2011): 342.

³⁷ “WJBK TV2 News Script- Editorial from News Director Carl Cederberg, January 27, 1972” in Mel Ravitz Papers, Box 41, Folder 6, Walter P. Reuther Library, Wayne State University.

³⁸ Ordinance 664-G” Mel Ravitz Papers, Box 41, Folder 6. Walter P. Reuther Library, Wayne State University; “Council Rejects New Smut Curb,” *Detroit Free Press*, Feb. 16, 1972.

³⁹ David L. Good, “Smut Stores Challenged to Fight New Ordinances,” *Detroit News*, March 1, 1972: 6.

tie. Eberhard spent the two weeks following the vote giving speeches at meetings in Detroit suburbs about the need for a “community [to] be able to protect itself from human filth, corruption and degeneracy which cannot help but pollute the community” and specifically about the need to ban showings of the recently released Stanley Kubrick film *A Clockwork Orange*.⁴⁰ Eberhard brought the ordinances up for a vote again in late February, this time succeeding in a 4-3 vote on account of Councilman van Antwerp’s vacation.⁴¹ On the 3rd of March, Mayor Roman Gribbs signed the ordinance, which would go into effect April 2nd.. This was a content-based restriction, very much reliant on a reading of obscenity law as it stood under the *Roth* test.

Nothing represents the messiness of this era in obscenity regulation than the fact that even as he signed the Eberhard ordinance into law, Mayor Gribbs and his office were also exploring other avenues for combatting the pornographic menace. In late March, the mayor and his “Task Force for Licensing Procedures” revealed their proposed plan to combat pornography: first, require all bookstores and theaters get a license from the city to operate and second, require that both new and existing adult businesses receive approval from a majority of neighborhood residents to be able to operate.⁴² This approach had its biggest constitutional problem in its application to all bookstores rather than making any attempt to differentiate between adult and mainstream texts, but it was the neighbor approval that Councilman Levin opposed, arguing, “you can’t require that someone receive the permission of his neighbors to talk or write. It’s clearly unconstitutional!”⁴³ Levin further criticized these efforts as being beyond the reach of the

⁴⁰ Grosse Pointe Motion Picture Council, “Let’s Fight Human Pollution in Our Community,” *Grosse Pointe News*, Feb. 17, 1972.

⁴¹ Julie Morris, “Council Bans Porno Stores” *The Detroit Free Press*, March 1, 1972: 3A.

⁴² John Woolley, “License Plan Aims at Smut in Stores,” *The Detroit Free Press*, March 22, 1972: 11.

⁴³ David L. Good, “City Anti-Smut Plan Assailed,” *Detroit News*, March 22, 1972: 1B.

mayor's office and impeding on the efforts of the council, declaring them as "a curious transference of power."⁴⁴

The consequences of such a confused system of regulation on the adult industry itself is evident in a case brought forth in May of 1972 that cited the mix of ordinances and restrictions as creating "pervasive atmosphere of official repression constituting a chilling effect upon the exercise of First Amendment rights."⁴⁵ While their immediate complaint revolved around the denial of licenses and building permits under the efforts of the Mayoral Task Force, the civil complaint cites the Eberhard ordinances as unconstitutionally targeting their expression.⁴⁶ Though this case had limited impact on the actual progression of obscenity regulation in Detroit— it primarily exists as an artifact of the confusion in pre-*Miller* jurisdiction and as the first involvement of the American Mini Theatres in challenging Detroit ordinances in court— it does offer insight into the locations and scope of sexually oriented businesses in 1972 Detroit. The titular petitioner, the Lido Cinema Corporation operated at 13625 W. 8 Mile Road.⁴⁷ The Lido thus functioned at the very border of Detroit, with the boundaries of the city of Oak Park, Michigan, an almost exclusively white town, beginning across the street.⁴⁸ Other businesses joining the case included John Scipono's news store, Richard's Place, which operated at 140 Cadillac Square in Downtown Detroit, and Adult Fare Limited, owned by John G. Clark and Martha Fronck, which leased a premises at 8418 Michigan Ave, very close to the Dearborn

⁴⁴ Ibid.

⁴⁵ Complaint," Lido Cinema Corporation v. *Gribbs*, No. 38356 (United States District Court for the Eastern District of Michigan Southern Division), May 24, 1972, exhibit F, in Mel Ravitz Papers, Box 41 Folder 6, Walter P. Reuther Library, Wayne State University.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ "Complaint," Lido Cinema Corporation v. *Gribbs*; United States Department of Commerce, *1970 Census of the Population*, Vol. I "Characteristics of the Population," Part 24 "Michigan." *census.gov*.

border, another nearly totally white municipality.⁴⁹ Unlike the other businesses, which were all previously established, the American Mini Theatres ownership group had only recently obtained building permits for the building and/or remodeling of a structure to become a movie theater, with locations at 16750 Telegraph Road and 22575 W. 8 Mile Road. Both of these sites are on the far west side of Detroit, abutting the suburban township of Redford, a town that engaged in its own battle with pornography.⁵⁰ The Berg-Lahser neighborhood, the proposed home of one of these theaters, first established a community association in 1971, revealing a nascent interest in neighborhood preservation concurrent with the emergence of local adult theaters. While the majority of adult theaters were located either in the downtown business district or in areas with higher proportions of black populations, the theaters that drew the most ire from their neighbors and those that filed the case that reached the Supreme Court were those that operated in more mixed or higher-income areas. Aspects of this case were resolved or dropped with the passing of subsequent ordinances and the decision in *Miller*; the complaints of the American Mini Theatres group reappeared in the titular case of this chapter.

In June, a judge ruled in a separate case brought by Royal News Co, an Ohio-based distributor of adult materials, challenging the Eberhard ordinance. The judge ruled the ordinances “constitutionally defective” and “obviously overbroad and vague.”⁵¹ The city chose not to appeal the decision— likely due to the fact that many council members recognized the ordinance as unconstitutional even before it passed—but instead to push ahead with another approach. Contacted by the *Detroit Free Press* in New Orleans, where he was attending the U.S.

⁴⁹ Ibid.

⁵⁰ See Strassfeld, “Chapter Four: The Blight of Indecency- Anti-Porn Politics and the Urban Crisis in Redford.”

⁵¹ Douglas Glazier and Jeffrey Hadden, “Obscenity Ruling Appeal Unlikely,” *Detroit News*, June 21, 1972: C16.

Conference of Mayors, Eberhard criticized the court's decision and described the ruling as "a typical example of what the courts are doing; we're having government by the courts not by referenda or by elected officials." He continued, "we'll just have to take another tack. We'll try dealing with the problem from the angle of licensing and zoning if we can't do it the other way."⁵² The following day, the newspaper reported Eberhard's intention to run for mayor in the next election, citing the need to "clean up Detroit," referring to pornography, as part of his campaign promise.⁵³ It was around this time that the city placed a moratorium on new licenses for adult theaters and bookstores, citing the influx of requests as a justification.⁵⁴

In late 1972, as the council negotiated their next method for targeting adult businesses, concerned citizens bombarded the council with letters; these letters effectively speak to the way some residents understood and conceptualized their rights as citizens and as members of a particular community. Other letters co-opted concerns about suburban flight and the consequential urban blight in citing the problem of pornography as a reason they'd leave for the suburbs. These letters, like one from Mrs. Phyllis Bohing, argued, "I think the people who are staying in the city deserve better than this."⁵⁵ Letters like the one from B. Szabo characterized adult theaters as a symbol of change in Detroit, declaring, "they definitely do not add to the cultural image of Detroit," seeing the theaters as disturbing a bygone image of Detroit as culturally conservative and perhaps even segregated. Szabo continued in his letter by arguing that adult theaters "encourag[ed] unsavory characters to stay around," pointing again to a vision

⁵² Jonathan Miller, "Court Rejects City Ordinance Against Smut" *Detroit Free Press* 21 Jun 1972: 3A

⁵³ "Eberhard Says He'll Run for Mayor" *Detroit Free Press*, June 22, 1972: 10A.

⁵⁴ Julie Morris, "90 Day Ban Set on Smut Permits," *Detroit Free Press*, May 17, 1972: 12C.

⁵⁵ Phyllis Bohing to Ravitz, Feb. 10, 1972. In Mel Ravitz Papers, Box 41 Folder 7, Walter P. Reuther Library, Wayne State University.

of the patrons of adult theaters as a separate or even invading force.⁵⁶ Some citizen letter writers made their community affiliation clear by subtitled their signatures “lifetime Detroit residents,” thereby confirming their earned role in a community that could set standards.⁵⁷ A letter from a Ronald J. Schulte again highlighted public support for the 51 neighborhood approval statute, writing “this would certainly serve to return to the citizens their right to live in the kind of neighborhood they want and not be subject to the depreciating influences these establishments yield.”⁵⁸

Residents in particular highlighted the effects of the adult theaters and bookstores— most explicitly the presence of their patrons— on neighborhood children. The widow of a former Detective Lieutenant of the Detroit Police Department wrote Ravitz, “I also resent such a business being right under the noses of the children going to Redford High School, Christ the King School and the many St. Mary’s high school students who transfer there. Of course, they are potential for future customers. That is why this vulgar place has opened in that location.” She continued, “I can’t think of any part of Detroit that I dislike enough to suggest a place to which they could move.”⁵⁹ Mother of 11 Josephine van Tiem wrote Ravitz, “one of my adult daughters working downtown reports that the people hanging around these places [adult theaters] are a bit scary to say the least.”⁶⁰

⁵⁶ B. Szabo to Ravitz, Feb. 3, 1972, in Mel Ravitz Papers, Box 41 Folder 7, Walter P. Reuther Library, Wayne State University.

⁵⁷ Charles and Mary Schmidt to Ravitz, Sep. 25, 1972. In Mel Ravitz Papers, Box 41 Folder 7, Walter P. Reuther Library, Wayne State University.

⁵⁸ Ronald J. Schulte to Mel Ravitz, Oct. 17, 1972, in Mel Ravitz Papers Box 41 Folder 7, Walter P. Reuther Library, Wayne State University.

⁵⁹ Alice M. Anderson to Mel Ravitz, undated in Mel Ravitz Papers Box 41, Folder 7, Walter P. Reuther Library, Wayne State University.

⁶⁰ Josephine van Tiem to Mel Ravitz, Oct. 12, 1972, Mel Ravitz Papers, Box 68, Folder 11, Walter P. Reuther Library, Wayne State University; “Josephine I. Hoban Van Tiem Obituary,” *The Detroit News*, Sep. 21, 2002.

One of the few letters Ravitz received in opposition to increased pornography regulations came from a collection of gay and lesbian groups, including representatives of ONE in Detroit, Detroit Gay Activists, Daughters of Bilitis, the Wayne State Gay Liberation Front, the Sexual Freedom League and the Metropolitan Community Church. These groups, spanning the political spectrum from more assimilationist and conservative to politically radical, told Ravitz they found it “regressive for a government body to legislate people’s taste and morality when all such experiments in the past have utterly failed.”⁶¹ What was unsaid in this letter was that crackdowns on pornography in cities had invariably in the past led to crackdowns on gay and lesbian behavior and spaces, regardless of if they sold or displayed sexually explicit materials. The opposition brought forth from these groups also points to the heteronormative bent inherent to the way the city conceived of the problem of adult theaters and pornography— that they could lead to or encourage sexual variation.

In October, the city held two widely attended hearings on new anti-pornography legislation. Members of the community surrounding the 16th Precinct Police Station, less than two miles from the proposed site of the Mini Theater at 16750 Telegraph Road, chartered a bus and brought 48 citizens to the hearing. Two bus-riders, Beverly Drylie and Myron Gelt, brought to the hearing the same arguments seen in many letters. Drylie told the council, “People are using [adult theaters and bookstores] as one more argument to say the city’s done for.... I’d hate to go to the suburbs. I love the city. It has all kinds of people, and that’s what I like,” as she advocated for restrictions on these theaters and bookstores from locating near her home. Gelt, similarly, railed at the council, stating, “if you’re not gonna do something about it, stop calling meetings,

⁶¹ Representatives of One in Detroit, Detroit Gay Activists, Daughters of Bilitis, Town Council and the Wayne State Gay Liberation Front, Sexual Freedom League, Metropolitan Community Church to Mel Ravitz, Jan. 31, 1972. In Mel Ravitz Papers Box 41 Folder 7, Walter P. Reuther Library, Wayne State University.

because we've got more important things to do— like looking for homes in the suburbs.”⁶² Part of the drive behind the anti-pornography movement in Detroit was thus to keep the city's white residential areas looking as much like the suburbs as possible. Writing in 1975, legal scholar Pamela Chapelle considered regulations against adult businesses, arguing that the change in morals inevitably caused by an influx of adult businesses would be more apparent and more distressing in a “low crime residential area comprised of church-going families” than in a neighborhood with established topless bars, houses of prostitution, pool halls or the like.⁶³ Chapelle's invocation of “church-going families” and “residential areas” points to an intractable distinction being made between the sexual behavior in adult businesses and the heteronormativity of the valued citizenry. Chappelle's arguments are restated nearly verbatim in a 1977 editorial from the *Times Herald* of Port Huron, Michigan, a small city located an hour outside of Detroit. The editors write,

the impact an X-rated movie house would have on a run-down, inner-city neighborhood, for example, would be quite different from that of the same showplace opened on the main street of a small town. Residents of the big city might little notice— and perhaps little care— what goes on downtown. But residents of a suburban community, heavily peopled with families and supporters of large school systems might care a great deal about attractions in their neighborhoods.⁶⁴

Drawing from both this academic reading and the letters of concerned citizens, the ordinance can thus be read as protecting a particular middle class, white, heteronormative citizenry above any variation.

⁶² Maryanne Conheim, “Council Hears Foes of Pornography,” *Detroit Free Press*, October 21, 1972: 3.

⁶³ Pamela Chapelle, “Can An Adult Theater or Bookstore be Abated as a Public Nuisance in California?” *University of San Francisco Law Review* 10 (1975): 124.

⁶⁴ “Editorials: Public Well-Being is Local Business,” *The Times Herald* (Port Huron, MI) Dec. 28, 1977: 6A.

A letter sent to Ravitz by Wadean Parker illustrates some of the complications behind the ‘neighborhood character’ protection arguments. President of Schulze Community Council, Parker wrote to Ravitz in August of 1972 communicating her distaste for both the “pornography outlet located at 18914 Wyoming” and the “Black Christian Nationalist Church” that wants to locate in her community. Parker wrote to Ravitz that she “realizes morals cannot be legislated” but she does “recognize that laws can be amended” and advocated for a policy that will require majority approval of neighbors to operate “an establishment which trades on sexual exhibition.” The way Parker pointed to the majority approval clause demonstrates an understanding of it as a workaround for bans on legislating morals. The apparent connection Parker drew between the adult store and the black nationalist church reveals how questions of political and class character intersected with pornography.⁶⁵ A separate letter, addressed to the Board of Zoning Appeals, outlined further her opposition to the black nationalist church: “this church would not benefit our community; in fact it would only attract people from outside of the community,” utilizing language exactly mirroring that deployed by anti-pornography advocates.⁶⁶ We cannot know the racial identity of many of these letter writers, making any kind of broad analysis and the ability to assert definitive conclusions difficult. However, Wadean Parker, a black woman, is an exception. Her letter thus raises questions about the influence of respectability politics and the desire for the black community and predominantly black neighborhoods to be freed of any association with adult businesses. I mention above that the Schultze neighborhood had undergone rapid demographic change from a majority Jewish neighborhood to become majority black by 1972 when this letter was composed. While I hesitate to make sweeping assumptions,

⁶⁵ Wadean Parker to Mel Ravitz, Aug 24, 1972. In Mel Ravitz Papers, Box 41 Folder 7, Walter P. Reuther Library, Wayne State University.

⁶⁶ Wadean Parker to Board of Zoning Appeals, Aug 23, 1972. In Mel Ravitz Papers, Box 41 Folder 7, Walter P. Reuther Library, Wayne State University.

can we understand that in asserting her opposition to the adult theaters in her neighborhood and the sexual deviance of its patrons, Parker was asserting the respectability of herself, her neighbors and her neighborhood and her role in the community? The potential force of respectability politics in the black community perhaps deepens or imbues with more complex political meanings the same concerns held by white residents and communities about declining property values.

In late October, the council voted unanimously to approve the new ordinance recommended by both the Mayor's Task Force and Council President Mel Ravitz. The ordinance incorporated the method advocated by Ravitz, adding adult bookstores, theaters, and modeling studios to the list of regulated business under the 1962 Skid Row ordinance, but it also took the most popular clause from the Mayor's Task Force's earlier offerings, requiring the approval of 51 percent of neighboring residents and business owners for the opening of new adult businesses.⁶⁷ Mayor Gribbs articulated this clause earlier in the year, emphasizing that it would require owners of existing businesses to present the same number of approving signatures within 6 months of the enactment of the law. If neighbors disapproved of the existing businesses, they could be closed by the city.⁶⁸ By the time the ordinances passed, there was no mention of their application to existing businesses. The ordinances were thus met with mixed opinions; most commentators agreed that they had a better chance of standing up to constitutional scrutiny in its focus on protecting property values rather than blatant moralism, but others criticized the ordinances for not outright banning pornography and for failing to restrict the locations of existing adult businesses.⁶⁹

⁶⁷ Gloria Snead, "Council OK's Smut Store Rules," *Detroit News* Oct. 25, 1972: B1.

⁶⁸ Julie Morris, "City Unveils Proposals Against Smut Shops" *Detroit Free Press*, June 23, 1972: 3A.

⁶⁹ *Ibid.*

When asked about the ordinances early the following year, attorney for theaters Stephen Taylor criticized the undergirding logic that, while likely more able to stand up to constitutional scrutiny, mirrored that used to protect segregation. Taylor responded to the interviewer, “what people are saying now in regard to property values and adult type bookstores and theaters is very similar to what they were saying when blacks began moving into an area and just as untrue. They used the excuse to hide basic racism in the first case and they’re using the excuse again to hide their basic unfounded prejudice.”⁷⁰ Taylor understood and was troubled by the way Detroit regulation advocates skirted content restrictions— notoriously tricky under the First Amendment— by instead claiming that it was the effects of the theaters that was so troubling, not the mere fact that they showed sex. In his thoughts, if those claims about property values and danger did not hold up to an examination of constitutionality when considered through the lens of race, why would they be held up as constitutional when they targeted certain sexual practices and expression?

As the question of how to regulate pornography in Detroit evolved, Councilmen Eberhard and Ravitz emerged as figureheads for the two opposing approaches, with Eberhard advocating a radical ban on theaters and bookstores, and Ravitz advocating what would become the moderate position— the zoning ordinance at the heart of this chapter. The eventual success of Ravitz, both in getting the city to deploy his approach to the problem rather than attempting a total ban and in getting that approach approved by the Supreme Court, is in some ways more insidious and undoubtedly more effective in the long term. The zoning ordinance provides a compelling example of how morality was not abandoned by opponents of pornography and adult businesses but how it was rather integrated into a decentralized politics and worldview. Looking

⁷⁰ Louis Heldman, “Ban Helps Smut Peddlers Thrive,” *Detroit Free Press*, Feb. 12, 1973.

forward past this case and into the rest of the 20th century, this integration of morality into shifting politics is clearly played out in the dynamics of sexual citizenship. The consequences of failing to be a proper sexual citizen no longer come to solely rely on a carceral system (i.e., bans on sodomy, Mann Act), and instead on physical exclusions from spaces and the right to exist in public spaces (i.e., zoning ordinances, bathroom bans).

Despite the moves of the council, as 1972 turned into 1973, many citizens remained frustrated at the continuing state of pornography and sexually oriented businesses in Detroit. They saw businesses continuing to exhibit pornography or even showing the new high grossing pornographic blockbusters like *Deep Throat* and *Behind the Green Door*, and awaited with baited breath an imminent obscenity decision from the Supreme Court.⁷¹ In February, the *Detroit Free Press* ran a series of articles on the state of the pornography trade in Detroit; the paper reported that without the competition of new theaters, existing ones thrived.⁷² Reporter Louis Heldman's reporting tracked the majority of the profits of sexually oriented businesses as not going to sketchy mob rings or to those "outside the community" but back into the suburbs. Heldman reported, "the vast majority of the owners of these businesses, a surprising number of them family enterprises, make their homes in suburban neighborhoods."⁷³ This undermining of the accepted notions surrounding sexually oriented businesses did not have a significant impact on the perception of adult theaters as encroaching invaders, but does show to later historians that any reckoning of obscenity laws as black and white between homeowners and community rights and private business flattens the true conflicts and intersections of race place and class.

⁷¹ See *Detroit Free Press*, Jan. 12, 1973: 29 for showings of *Deep Throat*; See *Detroit Free Press*, Jan. 27, 1973: 42, for showings of *Behind the Green Door*.

⁷² Louis Heldman, "Ban Helps Smut Peddlers Thrive," *Detroit Free Press*, Feb. 12, 1973.

⁷³ Louis Heldman, "Pornography Trade Thrives in Detroit," *Detroit Free Press*, Feb. 11, 1973.

In early April, the chambers of the city council were invaded by a group of 50 residents, described as “desperate[ly]... fighting for the survival of our community” by one participant. They had traveled from Northeast Detroit to seek the council’s aid in “halting the showing of adult movies at the Nortown Theater.”⁷⁴ The Art-Deco inspired theater first opened in 1936 and sat around 1000. For most of the theater’s existence, it showed family-friendly mainstream films.⁷⁵ Located at 7706 E. Seven Mile Road, the theatre found its home in a predominantly Italian and Polish neighborhood.⁷⁶ On March 1st, the theater chose to switch to a program consisting only of adult films. The theater received a ticket and citation from the city for illegal operation the following week.⁷⁷ This was not enough for some citizens, with one summarizing their frustration later that spring: “several months ago the Nortown Theater opened up showing adult movies. This in itself was most displeasing but that was not the whole of it. Our city has an ordinance which states that this type of business...must have approval of 51 percent of residents in the adjacent area. How did this theater open in the first place? What powers do the people have?!”⁷⁸ Protestor Matchell Grzelakowski, addressing the Council, threatened to take the issue into his own hands, “if we got to tear up the place, we’re going to do it.”⁷⁹

Challenges

⁷⁴ Don Lenhausen, “Irate Citizens Storm Council Protesting Porno Movies,” *Detroit Free Press*, Apr. 3, 1973.

⁷⁵ “Nortown Theater,” cinematreasures.org, Accessed September 15, 2021.

⁷⁶ See Thomas Guglielmo, *White on Arrival: Italians, Race, Color and Power in Chicago 1890-1945*, (Oxford: Oxford University Press, 2000). According to a contemporary study of ethnic communities in Detroit, Italians and Poles were considered the “least successful” immigrant group when considered in terms of occupation, education and income. *Ethnic Groups in the City: Culture, Institutions and Power*, Otto Feinstein, editor (Lexington, MA: Heath Lexington Books, 1971).

⁷⁷ Billy Bowles, “Suit Challenges Smut Laws,” *Detroit Free Press*, March 15, 1973, 2.

⁷⁸ Joseph Kress to Mel Ravitz, May 1973, in Mel Ravitz Papers, Box 49 Folder 9, Walter P. Reuther Library, Wayne State University.

⁷⁹ *Ibid.*

Both the Nortown, challenging their citation, and the group behind the American Mini Theatres/Pussy Cat Theatres, who filed their own suit later that spring, sought to test the parameters of the ordinances and who they would apply to alongside the constitutionality of the ordinances. The owners of the American Mini Theatres group argued “they had a vested right to open the theater because they had made extensive renovations before the city passed a new law requiring approval of an adult theater by 51 percent of residents living within 500 feet.”⁸⁰ The owners thought that this prior investment into their business should be granted leeway and a license. The case brought by the American Mini Theatres group was quickly quashed by Wayne County Circuit Judge Thomas Roumell, who wrote in his decision, “the firm knew that a moratorium on adult theaters was in effect when they undertook the renovations.”⁸¹

Judge Lawrence Silverman’s ruling on the Nortown Theater case in June 1973 brought another victory for the city. Silverman found the ordinance requiring the approval of 51 percent of nearby business owners and residents for a proposed adult theater or bookstore constitutional. In his opinion, Silverman described the ordinance as a reasonable regulation of speech, one that could be adopted in order to promote the general welfare, public health, public safety and order or public morals.⁸² Silverman continued, declaring,

I hereby serve notice upon all panderers and purveyors of hardcore pornography who violate a law for financial reasons or otherwise that at any time proper proofs are submitted to this court which would permit me to conscientiously make a finding of guilt then this court would not hesitate to impose penalties within the limits permitted by law. Those who reap financial benefits should be punished for not only contributing to the destruction of a favorable environment in which to rear children but for corrupting the community itself to the detriment of its citizens.⁸³

⁸⁰ “Judge Bars Adult Movie Theater,” *Detroit Free Press*, May 17, 1973.

⁸¹ *Ibid.*

⁸² Louis Heldman, “City Wins 1st Smut Battle,” *Detroit Free Press*, June 12, 1973: 5B.

⁸³ Quoted in Don Lenhausen, “Sex Films Bring Term of 90 Days” *Detroit Free Press*, Oct. 17, 1973: 3; 9.

In August, Silverman sentenced Lawrence Cooper, President of the Nortown Theater and Ronald J. Prindal, manager to the theater, to 90 days in jail and a 500 dollar fine, the maximum punishment under the law. The sentence was however, put on hold, awaiting a decision in the appeal. The theater continued to operate, even as its owners faced the city in court. According to a news report, although the content of the film was not necessarily considered in the decision, Silverman “purposely declined to identify the movie in his written opinion on the grounds that it was obviously filth which he did not want to publicize.”⁸⁴ Such a declaration illustrates how even though obscenity regulation under these laws purported to care more about the secondary effects of the theaters, or the opinions of the community members surrounding them, the explicit sexual content of the films still played a significant role in the minds of judges ruling on these ordinances.

Only a week or so after Silverman’s initial ruling on the constitutionality of the approval ordinance, the U.S. Supreme Court announced its decisions in *Miller v. California* and *Paris Adult Theater v. Slaton*, and city officials largely sighed in relief: this rubberstamping of “community standards” should grant great leeway for cities to handle obscenity as they saw fit. Mrs. Maureen Reilly, a Detroit City Attorney, reported she “screamed with delight” when she heard the *Miller* decision and “felt like somebody gave [her] a present.”⁸⁵ On the opposing side, Bruce Randall, a Detroit member of the First Amendment Lawyers Association and defender of local bookstores and theaters, argued that after the *Miller* decision, “there’s a good possibility that [adult businesses] will not be able to exist any longer.”⁸⁶ The decision buoyed hopes for the zoning and approval ordinances while opening the doors for neighboring townships to enact their

⁸⁴ Ibid.

⁸⁵ Louis Heldman, “Sex Movies, Smut Shops Put on Spot,” *Detroit Free Press*, June 22, 1973.

⁸⁶ Ibid.; Barbara Walsh, “Bruce Randall, Lauderdale Attorney,” *South Florida Sun-Sentinel*, Sep. 19, 1990.

own strict curtails on pornography. A month after the decision was released, Meridian township proposed an ordinance that “exiled *Playboy*” and other “nudie magazines” to back shelves or back rooms and banned the display of X-rated movies.⁸⁷

Although the *Miller* decision brought hope to the city that they were well within their rights to regulate obscenity as they saw fit, the cases begun prior to the decision continued to make their way through the courts. And as detailed in earlier chapters of this dissertation, soon after releasing the decision the Supreme Court was quickly forced to narrow and specify their new doctrine of “local community standards.”⁸⁸ Those narrowed and specified limits of the *Miller* doctrine more often than not had restrictive implications for the ability of cities and legislative bodies to regulate pornography. Nearly a year after the Nortown Theater first converted to showing adult movies and commenced a new era of legal battles for the city, the sexually oriented business industry finally received a legal victory. In late March of 1974, US District Judges Cornelia Kennedy and Lawrence Gubow struck down, in an appeal brought by the Nortown against Judge Silverman’s earlier decision, the most popular clause of Detroit’s anti-pornography ordinance: the requirement of approval from 51 percent of neighboring business owners and residents to open a sexually oriented business.⁸⁹ The judges objected to the fact that the city provided no arguments as to how the “prohibition....within 500 feet of a dwelling or rooming unit,” without approval, “furthers the legitimate interest the city has in preserving a residential area or neighborhood.”⁹⁰ They argued that the “imperceptible benefit” of the approval procedure did not outweigh the “severe impact imposed” on the ability of new adult

⁸⁷ “Exile for Playboy,” *Detroit Free Press*, July 20, 1973.

⁸⁸ See *Jenkins v. Georgia* 418 U.S. 153 (1974).

⁸⁹ Louis Heldman, “City Fears New Rush of Porno Bookshops,” *Detroit Free Press*, Mar. 26, 1974.

⁹⁰ Louis Heldman, “Neighborhood Approval Ruled Out,” *Detroit Free Press*, March 23, 1974: 3A.

businesses to open in the city.⁹¹ While the judges upheld the Skid-Row portion of the zoning ordinance, they did say that the Detroit City Plan Commission must waive the restriction in areas “where...grouping won’t have any apparent deleterious effect on the neighborhood.”⁹² In other words, areas that already failed at living up to middle class suburban ideals would not be further protected by the city. Maureen Reilly reassured anti-pornography advocates that this was “a victory for the city,” and “proved that First Amendment rights could be incidentally regulated.”⁹³ However, lawyers for the adult bookstores and theaters who brought the case “said the decision was a victory for their individual clients but it failed to face the constitutional First Amendment questions about the right to show and sell any type of material to consenting adults.”⁹⁴

The approval ordinance had long been more popular than Ravitz’s Skid Row zoning approach. It allowed residents to more tactically envision their contribution to the restriction of adult theaters and bookstores in their midst. Their voice and their opinion directly affected the state of adult businesses — the approval ordinance fit with how many had interpreted the “local community standards” *Miller* reframing and saw in that their chance to completely eliminate the pornography in their midst. Thus, while Reilly and other officials— including new Council President Carl Levin— presented the decision as a win for the city and its ability to regulate adult theaters, the reaction from the public was less than positive. An editorial in the *Detroit Free Press* declared “Detroit’s Common Council will be better off to write a new anti-pornography zoning ordinance than to appeal the US District Court decision which strikes down some of the controls in the existing ordinance.” The editorial located the failure of the ordinance

⁹¹ *Nortown Theatre, et al., v. Gribbs*, No. 39796, 40168, 40198 (United States District Court for the Eastern District of Michigan, Southern Division March 22, 1974).

⁹² Heldman, “Neighborhood Approval,” 9A.

⁹³ Beverly Eckman, “Council Will Bar New ‘Adult’ Outlets,” *Detroit News*, March 30, 1974: 3; Dave Anderson, “City Council Explodes at Sex Shop Hearing,” *Detroit Free Press*, March 30, 1974: 3A.

⁹⁴ Heldman, “City Fears”

in its thinly veiled intent, “There is little doubt that the challenged ordinance was written and enforced with a goal of eliminating such shops. It fell under the weight of its own attempt to impose censorship.”⁹⁵ Within the week of the release of the District Court decision, residents were again holding protests. A group of residents of the area surrounding 8 Mile Road at Schaefer, where a number of adult businesses operated, held a protest rally at Greenfield United Methodist Church, where spokesman Robert Glenn “waved petitions and demanded that a citizens grand jury look into the still flourishing porno trade in the area.” He declared, “we are going to keep fighting this thing until we get smut off 8 Mile Road.”

These residents’ complaints revolved around two issues— crime committed by the patrons (and a more general feeling of discomfort from their presence in the neighborhood) and depreciating property values. Another resident, Mel White, cited “attempted abduction of young girls and boys and soliciting by men who have allegedly emerged from one or more of the nude studios, dirty bookstores, or porno movie theaters along the strip” and described how “the women who live in the area have begun carrying whistles when they walk the streets alone.”⁹⁶

Local business owners tied the presence of the theaters and other businesses to decreased property value— one owner saying “I’d move out tomorrow if I could sell, but nobody wants to buy in here anymore. A firm of attorneys next door moved out recently because their clients were embarrassed to come to the area to do business. The legal offices were valued at 60,000 [but] the firm sold out for 28,000.” The article describing this protest went on to describe the patrons of one of these theaters in question, writing “In the crowded lido about halfway down the aisle a man in a wheelchair sat with his eyes glued to the screen his hands tightly gripping his

⁹⁵ Detroit Free Press Board, “As We See It: Sensible Pornography Control” *Detroit Free Press*, March 27, 1974: 6.

⁹⁶ Bill Michelmore, “Citizens v. Porn Peddlers, As the Sex Strip Thrives,” *Detroit Free Press*, April 1, 1974: 3; 8.

paralyzed legs. There were grey haired men in business suits, their briefcases on their laps. When they walked up the aisle to leave, they turned their eyes away from the other patrons.” While I cannot speak to the intent of the journalist, that he contrasted the description of the patrons with an interview he did with a housewife at the protest, wherein he asked “if they knew if their husbands had ever patronized any of the sex parlors” points to him teasingly undermining the idea that these patrons posed a threat.⁹⁷

The Nortown Theater and the American Mini-Theatres/Pussy Cat Theatres group chose to appeal the decision on the zoning ordinance; after a further year of deliberation, an appeals court panel ruled in a 2-1 decision that the zoning ordinance unfairly targeted adult businesses. The majority acknowledged the “compelling public interest” of the City of Detroit in limiting the decay resultant from adult businesses, but did not find that the city demonstrated “the method which it chose to deal with the problem at hand was necessary and that its effect on protected rights— assumed to mean speech— was only incidental.”⁹⁸ The dissenting voice on the panel, Judge Anthony Celebreeze lauded the city’s justification, saying “it seems to me that if we are to prevent our cities from becoming uninhabitable jungles, we must within constitutional safeguards restore to our cities the rights of self-government.”⁹⁹ In invoking “self-government” as the key to preventing the presence of adult businesses in a neighborhood, Celebreeze constructs an idealized citizenry— that which makes up the self, in self-government— defined by particular presentations and ideas about sexual identity and behavior. Before even reading the decision, City Attorney Reilly asserted the city would appeal. She described Detroit as a leader

⁹⁷ The interviewed housewife, Esta Dawkins, answered “They Better Not. We’ll Kill Them.” Michelmore, 8.

⁹⁸ *American Mini Theatres v. Gribbs*, No. 74-2129, 74-2303 (United States Court of Appeals for the Sixth Circuit, June 16, 1975).

⁹⁹ Kathy Warbelow, “Zoning Unfair, Court Says,” *Detroit Free Press*, June 17, 1975.

in creating innovative responses to the problem of pornography, telling an interviewer, “Detroit is the only city in the country which has attacked the pornography problem through zoning ordinances.”¹⁰⁰ By October 1975, the city had appealed this decision to the Supreme Court and the Court had granted the case a spot on its 1976 docket.

Young v. American Mini Theatres

In the Petitioner’s Brief, the city of Detroit based their argument primarily around the notion of the deleterious effects of the theaters and bookstores on their surrounding neighborhoods rather than offering any comment on the content sold and displayed within. Lawyers for the city Kermit G. Bailer, Maureen Pulte Reilly and John Cross argued that the ordinances came about in response to “complaints from residents and businessmen,” that the presence of the businesses in their midst “decreased property values, [drove] away residents and businessmen, [and] caus[ed] an increase in crime, particularly prostitution” thereby “causing neighborhood decline and the resulting lack of neighborhood pride and generally detracting from the quality of life necessary to maintain a viable neighborhood.”¹⁰¹ They further contended that adult businesses “are not oriented to serve the needs of the immediate neighborhood but primarily attracted persons from without the surrounding community who had little or no concern for the maintenance of a viable neighborhood.”¹⁰² While this conception of the theaters is somewhat incorrect, as there are both broad ethnographic studies of the theaters pointing to middle class white businessmen as a large portion of their clientele and the brief local investigation into the Lido theater recounted earlier this chapter that shared those findings, it is a clear demonstration of how those who advocated for, wrote, and enforced the ordinance

¹⁰⁰ Ibid.

¹⁰¹ Ibid., 6.

¹⁰² Ibid., 11.

understood a particular construction of who belongs in a neighborhood and who is a member of the community. In contending that the businesses do not serve the needs of anyone in the community, locals who patronize the theaters are imagined as excluded from said community and from the decisions made on behalf of that community.¹⁰³

The petitioner's brief also set forth zoning as an appropriate use of governing power and a minimally invasive response to the issue of theaters and bookstores. The city established the very authority of the city council to create zoning ordinances, citing the Michigan Zoning Enabling Act of 1921. The act argues that regulations of business locations should "promote safety and general welfare" and can be drawn in order to "conserve property values and the general trend and character of building and population development." The act, however, fails to outline what general welfare means, leaving it to the interpreter's discretion. In the brief, the city additionally raised the court's defense of family oriented zoning in *Berman v. Parker* and *Village of Belle Terre v. Boraas*, directly citing the latter for the way it recognized the appeal of "a quiet place where yards are wide, people few, and motor vehicles restricted" and advocating the use of police power to "lay out zones where family values [and] youth values" take precedence.¹⁰⁴

Going on to cite *Cady v. City of Detroit*, a zoning case dealing, much like the approval clause of

¹⁰³ See Charles Sundholm, "The Pornographic Arcade," *Urban Life and Culture* 2 (April 1973), 102 and Michelmore, "Citizens v. Porn Peddlers, As the Sex Strip Thrives."

¹⁰⁴ "Brief of Petitioners" *Young v. American Mini-Theatres* 427 U.S. 50 (1976), 12. The case in *Berman* was brought by the owners of a department store in a blighted area of Washington D.C. They objected to the seizure of their property solely for the reason of area "beautification." In a unanimous decision, the court found that the Fifth Amendment did not limit Congress's power to seize private property with just compensation to any particular purpose or reason. *Berman v. Parker* 348 U.S. 26 (1954). The village of Belle Terre in New York state had an ordinance in place that restricted land use to one-family dwellings, family being defined by the ordinance as one or more related persons or not more than two unrelated persons. The case was brought by owners of a house leased to unrelated people who argued the ordinance violated the Due Process Clause and the Equal Protection Clause. In a 7-2 decision, the court ruled that the ordinance did not violate the Equal Protection Clause or the Due Process Clause because it did not unreasonably apply to some individuals and not others and was reasonably related to a "rational state objective." *Village of Belle Terre v. Boraas* 416 U.S. 1 (1974).

this ordinance, with neighbor consent, the city summarized the benefits of zoning, among which, they argued, is attracting a desirable and permanent citizenship.¹⁰⁵ What these cited cases demonstrate is not only the inherent valuation project of zoning ordinances but also how the city openly acknowledged that their intent with these ordinances was to promote a particular practice of sexual behavior and class identity— one based in the white picket fence dynamics of the mid-century suburb.

In a move that reflects the way the parties viewed the constitutional questions at the heart of this case very differently, both respondent’s briefs placed First Amendment concerns at the center of their arguments. The briefs prepared by the lawyers for the Nortown Theater and the American Mini Theatres/Pussy Cat Theatres group both summarized the case through questions of free speech and content censorship, with the Nortown brief offering,

Petitioners assert that the zoning ordinances are aimed at the conduct of the business, not the press materials which the business intends to disseminate.... however, the ordinances themselves emphasize the word adult and that is defined on the basis of the content of the materials intended to be disseminated on the premises. Thus, these zoning regulations cannot be justified as a regulation of conduct where the conduct is the expression itself.¹⁰⁶

This brief gets at the intent behind the ordinance and argues that the spatial zoning in question still relies on content differentiation and restriction, thereby violating the First Amendment. The brief from the AMT/PCT owners offered a more direct connection between the speech of the theaters and bookstores and the opinions and distaste of the surrounding neighborhood:

Respondents contend that an examination of the record establishes at best an interest in restricting unpopular speech deemed offensive by residents and businessmen on the basis of their unfounded and undifferentiated fears and to apprehensions concerning the effect of adult theatres and bookstores on

¹⁰⁵ *Young*, 16. Cady was brought by the owners of an automobile trailer camp challenging a Detroit ordinance requiring 65 percent of the owners of real estate within 600 feet of a property to consent to a license for the operation of an automobile trailer camp. The ordinance was validated by the Supreme Court of Michigan as reasonable. *Cady v. City of Detroit* 289 Mich 499 (Mich. 1939).

¹⁰⁶ “Brief of Respondent Nortown Theatre,” *Young v. American Mini-Theatres* 427 U.S. 50 (1976).

surrounding neighborhoods. At worst, the City's interest is no more than a naked desire to restrict by zoning sexually oriented expression that lies beyond the reach of the State's and City's criminal laws.¹⁰⁷

This brief questioned how the law would respond to the opinions of a majority hoping to restrict the speech of a few in order to maintain a way of life. The lawyers for the theaters cited historical precedent, declaring “a state has no legitimate interest...in restricting the location of adult theaters and bookstores merely because residents are offended by their mere presence. Similar interests have been asserted to justify the exclusion of black citizens from white neighborhoods but this court long ago refused to countenance discrimination for such reasons.”¹⁰⁸

Detroit had to meet a double threshold in order to succeed with the ordinance— first, they had to show their compelling interest in restricting the businesses and second, they had to demonstrate that the ordinance was the least invasive method for doing so. The respondents centered much of their legal argument on the failure of the city to meet that second bar. The Nortown brief raised many of the purported “secondary effects” of the theaters and bookstores, i.e., prostitution, street crimes, and asked why these inherently illegal activities cannot be regulated by existing criminal statutes. In their words, “the city of Detroit is in effect using the sledgehammer in an area which this court has said requires the most sensitive of tools.”¹⁰⁹ The AMT/PCT brief expands this question of minimal invasiveness to consider the intent of the city, demonstrating that even if the “ordinances are intended to protect residential districts....Detroit already is zoned into residential commercial and industrial [zones] and the 1000 foot provision is merely superimposed upon the basic zoning scheme.”¹¹⁰ Residential neighborhoods were already

¹⁰⁷ “Brief of Respondents American Mini Theatres and Pussy Cat Theatres,” *Young v. American Mini-Theatres* 427 U.S. 50 (1976).

¹⁰⁸ *Ibid.*, 13.

¹⁰⁹ “Brief of Respondent Nortown Theatre,” *Young v. American Mini-Theatres* 427 U.S. 50 (1976), 8.

¹¹⁰ “Brief of Respondents American Mini Theatres and Pussy Cat Theatres,” *Young v. American Mini-Theatres*, 427 U.S. 50 (1976).

largely protected by zoning policies that did not differentiate based on the type of business or content it may sell.

For a case that is so reliant on the grassroots opinions of the neighbors of these theaters, the city only submitted two testimonies from residents of Detroit. Both testimonies perpetuated one of the most potent arguments posed by early advocates of the ordinance: that the patrons of adult businesses are those who must be counted outside the community. Detroit resident Ogust Mai Delaney Stewart asserted “I cannot prove the point, but I am inclined to believe that some prurient shops tend to draw sex deviants and attract undesirable persons.”¹¹¹ While this may seem like particularly weak evidence offered by the city, based on one woman’s beliefs, Ogust Mai Stewart was a member of a prominent family with significant name recognition— her uncles were Harlem Renaissance artists Beauford and Joseph Delaney. Her inclusion in the materials provided by the city is perhaps explained by this prominence, but also points to the respectability politics at play in the Black community and the way sexual respectability was tied to community membership and whose beliefs mattered.¹¹² The city additionally offered a letter sent by Carl H. Schmidt to Mayor Roman Gribbs in August of 1972. In the letter, Schmidt said, “I intend to move my company out of the city primarily because an adult bookstore has located next door and [I] have no desire to be this close to it or to the people frequenting it.”¹¹³

The ACLU filed one of two amicus briefs in this case, emphasizing the consequences of the ordinance rather than its stated justification. In it they argued that although the city contended that the ordinances did not “provide a blanket prohibition against the operation of adult

¹¹¹ “Affidavit of Ogust Mai Stewart,” *Young v. American Mini-Theatres* 427 U.S. 50 (1976)

¹¹² Jack Neely, “Artistic Integrity” *Metro Pulse* (Knoxville, TN), 1997.
https://monkeyfire.com/mpol/dir_zine/dir_1997/701-734/713_delaney.html

¹¹³ “Charles H. Schmidt to Mayor Roman Gribbs,” August 11, 1972, *Young v. American Mini-Theatres* 427 U.S. 50 (1976).

businesses within” city limits, the practical effect of the ordinance was such that there was virtually “no location within the territorial limits of the city of Detroit that is not within 500 feet of any residentially zoned district.”¹¹⁴ In de facto zoning theaters and bookstores out of existence, “the effect is the same as if the first amendment were repealed in Detroit.”¹¹⁵ The MPAA, represented by Attorney James Bouras, submitted the other brief in the case. The MPAA drew attention to the national consequences of this case, “the question here is therefore not what Detroit alone may do because what Detroit may constitutionally do, so may other cities and states.”¹¹⁶ Rather than speak about the content of the films themselves, as might have been expected based on the business of the MPAA, the brief focused on the wider implications this decision would have on space and who gets to dictate what is available in the public sphere. Bouras wrote, “this court has long since held that public areas cannot consistently with the first amendment be sanitized to the point where they are palatable to the most squeamish among us,” again tying the decision in this case both to the long history of obscenity regulation and emphasizing the dependent relationship between the zoning dictates and content.¹¹⁷

In oral argumentation before the court on March 24, 1976, City Counsel Maureen Reilly reinforced the idea that one of the secondary effects of the adult businesses the ordinance sought to control was the increased presence of “transient type persons” as opposed to “neighborhood patronage.”¹¹⁸ The perception and understanding of this transient type personage is further revealed to be the antithesis of the heteronormative white middle class Detroiter, as Reilly

¹¹⁴ “Amicus Curiae of the American Civil Liberties Union,” *Young v. American Mini-Theatres* 427 U.S. 50 (1976).

¹¹⁵ *Ibid.*

¹¹⁶ “Amicus Curiae of the Motion Picture Association of America,” *Young v. American Mini-Theatres* 427 U.S. 50 (1976).

¹¹⁷ *Ibid.*

¹¹⁸ “Oral Argumentation,” March 24, 1976, *Young v. American Mini-Theatres* 427 U.S. 50 (1976).

describes the environment supposedly created by the theaters and bookstores, “when these persons left the store...the residents were aware of how they may have been sexually stimulated.”¹¹⁹ The very idea of sexuality experienced outside the home is a threat to traditional structures of heteronormative family life. According to the city’s argumentation, the mere presence of these patrons on the street is unsettling and has a deteriorating effect on the quality of life of the rest of the neighborhood. The zoning ordinance becomes a technology for the regulation and ultimately exclusion from the rights of citizenship for those who express sexual variation in public and those who otherwise stray from the expectations of the social system.

The purported “secondary effect” of the presence of the patrons of these businesses continued to be a point of intrigue for the justices, with Justice William Rehnquist asking Nortown Theatre Attorney Stephen Taylor, “what if the city says pool halls and adult theaters produce exactly the same consequences, attracts adults...kind of a seedy class of adults in the eyes of the city... and we simply want to confine them or limit the closeness at which they are located together? Why can’t the city do that?” The class implications of the descriptor “seedy” notwithstanding, Taylor’s response to Rehnquist’s question emphasizes that the city cannot restrict speech because of a distaste for a certain class of citizen: “the city may be able to do that but would have to come up with a concrete justification...more than merely the city doesn’t like the people who come to the theater because they assume something is going on in the theaters...they assume that the people are sexually excited and therefore they say, this kind of thing we don’t want.”¹²⁰ In answering Rehnquist, Taylor again drew attention to the way this ordinance sought not only to control space, but people.

¹¹⁹ Ibid.

¹²⁰ Ibid.

In conference, the justices struggled through the different justifications and interpretations of secondary effects doctrine and the remaining question of whether or not the ordinance was a restriction of expressive content. Justice Rehnquist argued that while this case was one concerned with content, the government has the constitutional ability to regulate speech when there is a clear and present danger. Rather than the traditional interpretation of such a doctrine, which is usually invoked around the scenario of yelling ‘fire’ in a crowded theater, Rehnquist accepted the city’s view of the secondary effects as a threat to a particular quality and way of life. Blackmun’s papers reveal his opinion that the content specificity of this ordinance was enough to make it unconstitutional. A preliminary memo argued that the restrictive effect of the ordinance is perhaps most clearly seen in the case of the Nortown Theatre, which operated without incident for almost forty years until it changed its content of fare, wherein it was almost immediately targeted by the city.¹²¹ The short time the theater was allowed to operate with an adult bill of fare could hardly have produced significant secondary effects and thus, in one interpretation, the enforcement of the ordinance resembles a violation of prior restraint.

These debates are particularly interesting considering the effects of this case on speech. The majority decision, penned by Justice Stevens, and published June 24, 1976, held that the ordinance did not violate the due process clause of the Constitution along lines of vagueness nor along the principles of prior restraint and that the ordinance had “no demonstrably significant effect on the exhibition of films protected by the First Amendment.”¹²² The decision marked a momentous victory for cities looking to restrict the growth or entry of sexually oriented businesses within their boundaries, not only in granting them more latitude in shaping the

¹²¹ “Preliminary Memorandum” in Harry A. Blackmun Papers, Box 229, Folder 12, Manuscript Division, Library of Congress.

¹²² *Young v. American Mini-Theatres* 427 U.S. 50 (1976).

character of their neighborhoods and who was allowed to exist in the public sphere, but also in classifying previously protected erotic speech as ‘less valuable’ and thus not worthy of the same level of First Amendment protection. Stevens wrote that “society’s interest in protecting [erotic or otherwise adult media] is of a wholly different and lesser magnitude” than protecting other types of speech. Stevens couched this determination in a metaphor tied to American heteronormativity and militarism, writing, “few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘specified sexual activities’ exhibited in the theaters of our choice.”¹²³

The majority decision concluded by differentiating the case and the ordinance from that in *Erznoznik*. The difference according to the court lay in the breadth and competence of the reported justifications. In *Erznoznik*, the “justifications offered by the city rested primarily on the city’s interest in protecting its citizens from exposure to unwanted offensive speech. The only secondary effect relied on to support that ordinance was the impact on traffic— an effect which might be caused by a distracting open-air movie even if it did not exhibit nudity.”¹²⁴ This is somewhat curious in that nowhere in the pages of materials presented to the court does the city present evidence of clear secondary effects that can be proven to have come about as a direct result of the presence of adult theaters. That is, I argue, except in the case of property values and devaluation. While quality of life is hard to pin down, as are the direct reasons behind crime, the city is able to point to specific numbers that tie devaluation of property to the arrival of the theaters and bookstores. This then raises the question of valuation. Although the majority opinion maintained that the zoning ordinance did not completely suppress speech, but limited where it could happen, what the decision does not consider is how that limiting of space innately

¹²³ Ibid.

¹²⁴ *Young v. American Mini-Theatres* 427 U.S. 50, 71 (1976).

restricts who is able to access the right of and products of speech.¹²⁵ In that way the regulatory practices of the zoning ordinance, the focus on the “local community” enshrined as central to obscenity law in Miller, and exclusionary effects on the exercise of rights were linked and intertwined

While Justice Powell joined Justices Stevens, Rehnquist, White and Chief Justice Burger in affirming the ordinance’s legitimacy, Powell penned a concurring opinion, particularly rejecting the idea of multiple levels of speech, each deserving differing levels of protection. He wrote “[I am not] inclined to agree.... that nonobscene erotic materials may be treated differently under the first Amendment.”¹²⁶ Powell posits a view of the ordinance as an “innovative example of land use regulation,” implicating the First Amendment to a negligible degree. Unlike Erznoznik, in Powell’s understanding the Detroit ordinance affects expression “only incidentally.”

The dissent reflected a wholesale rejection of the majority opinion’s understanding of the role of content in media regulation. Author of the dissent, Justice Stewart, writes that “by refusing to invalidate Detroit’s ordinance the court rides roughshod over cardinal principles of the First Amendment.”¹²⁷ Stewart took up the mantle of Stevens’ “marching off to war”

¹²⁵ Some legal scholars have largely taken issue with Justice Stevens’ legitimizing of the secondary effects doctrine. David L. Hudson Jr. wrote of the doctrine, “the net effect of secondary effects doctrine is to allow an easy path to censorship.” Kimberly Smith offered, “commentators noted that most restrictions on speech [ould] be justified under this secondary effects doctrine. For example, a prohibition on speech criticizing the government could be justified as a way to promote government efficiency.” Hudson further took umbrage with the idea that this decision was content neutral, with Hudson understanding Stevens’ approach as one that substituted viewpoint neutrality for content neutrality, writing that Stevens “seemed to suggest that regulating adult films based on content does not violate the government’s paramount obligation of neutrality because it does not restrict a certain social, political or philosophical message or point of view.” David L. Hudson Jr., “The Secondary Effects Doctrine: The Evisceration of First Amendment Freedoms,” *Washburn Law Journal* 37 (1997): 93, 62.; Kimberly K. Smith, “Zoning Adult Entertainment: A Reassessment of Renton,” *California Law Review* 79 vol. 119 (1991), 128.

¹²⁶ *Young v. American Mini-Theatres* 427 U.S. 50 (1976) (Powell, J., concurring).

¹²⁷ *Young v. American Mini-Theatres* 427 U.S. 50 (1976) (Stewart, J., dissenting).

metaphor and argues, “if the guarantees of the First Amendment were reserved for expression that more than a ‘few of us’ would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty.” He continued, “it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height.”¹²⁸ Justice Blackmun offered a separate dissent, one that seems to hearken back to earlier eras of obscenity regulation in its focus on vagueness. Blackmun’s concerns were largely practical, writing of the burden placed on the adult business owner to “know and evaluate not only his own films but those of any competitor within 1000 feet.” The business owner is constantly expected not only to interpret and understand the statutory definitions of the ordinance as they apply to their businesses but also to do that for the businesses around them or, in the words of the Blackmun dissent, “at any moment [the business owner] could become a violator of the ordinance because some neighbor has slipped into a regulated use classification.”¹²⁹ To a degree he becomes responsible not only for his own conduct, but those of the businesses around them.

Reactions

Even before the final decision was released by the court in June of 1976, municipalities across the nation were adopting the Detroit approach as the way forward.¹³⁰ Leaders saw the value in using zoning ordinances over other regulatory approaches. Alan Magazine, County Supervisor in Fairfax County, VA, recounted. “in practical terms, we have made it impossible for

¹²⁸ Ibid.

¹²⁹ *Young v. American Mini-Theatres* 427 U.S. 50 (1976) (Blackmun, J., dissenting).

¹³⁰ “Detroit Plan Key to U.S. Smut Fight” *Detroit Free Press*, Nov. 29, 1976: 12A.

them (pornography businesses) to locate here— even though we were unable constitutionally to ban them completely.” The Fairfax County zoning ordinance limited the location of adult bookstores to “four existing regional shopping centers whose owners are unlikely to rent space to such businesses.”¹³¹ Deemed constitutionally valid, zoning ordinances could have the same impact as the total bans on pornography the court had earlier deemed unconstitutional.

In Indiana, multiple cities adopted similar ordinances, with their justifications for the laws effectively illustrating the role of property valuation and neighborhood protection. A newspaper editorial board just outside of Bloomington, IN commented on the city’s new ordinance, writing “Pornographic shop operators must be afforded the same constitutional guarantees as other citizens, but they can also be treated like industry and other businesses which are restricted as to where they can locate. This should be no violation of their rights and preserves the community’s right to protect the quality of particular areas.”¹³² In Indianapolis, a city that would go on to have an important role in the further development of pornography regulation,¹³³ Mayor Hudnut described the effects of their new zoning measure: “it would require these kinds of businesses to locate at sites where residential communities will not be threatened....for too long residents of established neighborhoods in Indianapolis have witnessed the incursion of adult bookstores, adult theaters, and massage parlors into their communities.” He continued, “These businesses have created an unhealthy environment for children, fostered criminal activity, impaired community identity, and sapped the economic vitality of

¹³¹ Ibid.

¹³² The Bedford Herald Times Opinion Board, “Our Opinion- pornography control” *The Bedford Herald Times* (Bedford, IN) Dec 26, 1976: 14.

¹³³ See Carolyn Bronstein, *Battling Pornography: The American Feminist Anti-Pornography Movement 1976-1986*, (Cambridge, UK: Cambridge University Press, 2011); Jonnie Bray Fox, “Awkward Alliances and the Indianapolis Anti-Pornography Ordinance of 1984” (master’s thesis, Indiana University, 2021) and *American Booksellers Association v. Hudnut* 771 F.2d. 323 (7th Cir. 1985).

neighborhood shopping areas.¹³⁴ While both Fairfax County and the two Indiana towns adopted these new ordinances within a year of the Supreme Court decision, as time progressed, these zoning ordinances came to characterize adult theater regulation across the country. While economic and technological advances played a role in the reduction in the number of adult theaters and adult bookstores, the fact that the few remaining theaters that can be found today are located in industrial eras or along the sides of interstates can be traced back to the rise of these ordinances.

The version of the ordinance affirmed by the court did not allow for application of the zoning laws to established businesses. Thus, adult “XXX” movie listings for the Pussycat Theatre can be found in the pages of the *Detroit Free Press* into 1977 at least. Other theaters showing “XXX” films are found in the same pages, though we can assume these were open long before the ordinance passed, as Maureen Reilly in an interview would assert that only 2 adult businesses had opened after the ordinance passed.¹³⁵ Maureen Reilly herself was appointed to the Detroit Common Pleas Court the first week of 1977.¹³⁶

Conclusion

The court’s decision in *Young v. American* was particularly influential on how obscenity and adult theaters in particular would henceforth be regulated by cities, states, and communities of varying sizes. The decision legitimized the spatial component of the project long disguised within obscenity regulation to shape sexual citizenship along heteronormative and conservative

¹³⁴ Hugh Rutledge, “Adult Sites Draft Gets Hudnut OK” *The Indianapolis News*, Aug. 13, 1976: 4.

¹³⁵ Bedford Herald Times Board, “Our Opinion-Pornography Control.” We can further assume that one of the listed theaters, the Stone Adult Movies Theater, did not last long as its location, 2511 Woodward Avenue was leased to the Detroit Red Wings in 1977 for the construction of Joe Louis Arena.

¹³⁶ Detroit Free Press Board, “Three Judicious Decisions- As We See It” *Detroit Free Press*, Jan. 7, 1977: 6.

lines. The zoning ordinances validated in *Young* remain largely in place today, if not in the exact same language or form, in spirit. In adapting zoning ordinances as a tactic for regulating and suppressing pornography and obscenity, cities and legislative bodies turned the conversation away from the thorny fields of content restriction and its inevitable First Amendment constrictions and towards a spatial approach. This spatial approach did not abandon exclusionary ideas about pornography and its users, but instead enshrined them in the law as valid deleterious effects. Rather than legislate pornography, these ordinances legislated people and actions off the streets and out of view; they legislated in physical form the inevitable consequences put in motion when the courts first established the “local community” as the arbiters of obscenity and pornography.

Conclusion:

After Young

So what happened after 1976? While 1976 marked the culmination of the legal shift towards regulating adult theaters through a spatial lens, it also marked the emergence of a new movement against pornography.

Someone reading about the *Young v. American Mini Theaters* decision may have turned the page of their newspaper to see an ad for *Black and Blue*— the latest Rolling Stones album— or turned to the movie listings and check the showing times for *Snuff*— an exploitation movie loosely based on the Manson murders, but falsely advertised as if it showed actual murders. The ad, which portrayed a woman bound, legs spread and covered in bruises, exclaiming “I’m Black and Blue from the Rolling Stones— and I Love It,” and the film largely served as the catalysts for the emergence of a feminist anti-violence in media movement which would soon evolve into the feminist anti-pornography movement. In her work on the feminist anti-pornography movement, scholar Carolyn Bronstein marks 1976 as the first end of her temporal boundaries; 1976 brought the founding of Women Against Violence Against Women and Women Against Violence in Pornography and Media.

Bronstein argues that this early period of activism concerned itself more with the portrayal of violence against women rather than sexually explicitness, writing “although many organization members resented the increased sexualization of American culture in the 1970s and the public presentation of women’s bodies as sexual objects they did not consider pornography to

be a target for action.”¹ She dates the transition from this focus on violence to a focus on pornography to around 1979.

Speaking at a university in 1978 leader of the anti-pornography side of the movement, Andrea Dworkin railed against the defense of pornography by civil libertarians (the ACLU submitted amicus briefs on the side of the theater owners in the Young case, among others), arguing “the concept of civil liberties in this country has not ever and does not now embody principles and behaviors that respect the sexual rights of women....[those who] ritualistically claim to be the legal guardians of free speech are [in fact] the legal guardians of male profit, male property, and phallic power.”²

Scholars have often looked askance at the feminist anti-porn movement for its coalition building with conservative members of the religious right. While both Andrea Dworkin and Jerry Falwell may have wanted the end of pornography their motivations behind that goal differed. And while this dissertation tracks some conservative and religious involvement in its anti-pornography campaigns, were the motivations of the individuals who called on pornography to be spatially restricted out of their neighborhoods similar or different to these later anti-porn feminists? Anti-porn feminists showed far greater concern for the women in the pornographic films—returning the conversation in many ways to the content of the films, which sex acts they were showing, what fetishes they celebrated, and how central violence was to the sex act—but they also adopted the concerns about and language of ‘effects.’ Much as the activists in this chapter argued that pornography corrupted and polluted their neighborhoods and the minds of

¹ Carolyn Bronstein, *Battling Pornography: The American Feminist Anti-Pornography Movement 1976-1986* (Cambridge, UK: Cambridge University Press, 2011): 4.

² Andrea Dworkin, “Pornography: The New Terrorism” *New York University Review of Law and Social Change* 8 (1978), 201-202 quoted in Lorna Norman Bracewell, “Beyond Barnard,” *Signs* 42, no. 1 Pleasure and Danger: Sexual Freedom and Feminism in the Twenty-First Century (2016), 34.

children, anti-porn feminists often traced their interest in pornography to the question: what makes men think they can and should act this way towards women?³

However, the most concerning ‘environmental’ or ‘atmospheric’ effect of pornography according to anti-porn feminists was the oppressive and degrading conditions it created for women. A panel discussion that occurred in 1979 between law professor Paul Chevingy and again, Andrea Dworkin, offers a compelling critique of this view. While Chevingy agreed with the anti-porn feminists in saying that pornography contributed to an oppressive atmosphere, he argued that the “degrading atmosphere” should not be considered an “effect of pornography” because, as Lorna Bracewell summarizes, “the subordination of women through pornography is a private as opposed to a public harm that admits of no legal remedy.”⁴ If the effects of pornography were to be considered a public harm, one that the government could intrude on in order to resolve, the legal boundaries of public and private would disintegrate and the government could intrude on other matters— like the “emotional relations between men and women.”⁵ In this we see the continuation of public and private life at the center of debates about pornography and sexuality and the role of government in regulating it.

Whereas in the cases detailed in this dissertation that tension was moderated through a regulation of where pornography could occur, rather than if it could occur, the approaches of the anti-pornography feminists abandoned such a premise. The culmination of the anti-pornography feminist movement is often located by scholars at the passing of city ordinances in Minneapolis and Indianapolis banning pornography on civil rights grounds.⁶ The ordinance, written at the

³ Bronstein, 7.

⁴ Bracewell, 35.

⁵ Sylvia Law, moderator. 1979. “Panel Discussion: Effects of Violent Pornography.” *New York University Review of Law and Social Change* 8 (2): 225–45.

⁶ In Minneapolis, while the city council passed the ordinance, it was vetoed by Mayor Donald Fraser on First Amendment grounds.

request of the City of Minneapolis, “singled out pornography as a form of sex discrimination and defined specific acts, including trafficking in pornography, coercion into pornographic performances, forcing pornography on a person and assault or physical attack due to pornography as civil rights violations.”⁷ As a civil law, the ordinance gave “women, as well as any other persons who could prove to the satisfaction of a trier of fact that their civil rights had been violated through a particular piece of pornography a cause of action to sue the producers and distributors for damages.”⁸

This ordinance differed in many ways from the regulatory ordinances put forth in this dissertation: it specifically targeted harm against women, spoke to potential harms on the production side, rather than merely effects of its distribution, and in some ways returned the regulatory conversation to be about the content of pornographic film. For this last reason predominantly, the Indianapolis ordinance was overturned in the 7th Circuit Court of Appeals case *American Booksellers Association v. Hudnut*, wherein judges ruled that the ordinance violated the First Amendment. Pointing to the ultimate circuitousness of obscenity law in the 20th century, the judges in the 7th Circuit raised concerns that the ordinance could lead to bans on James Joyce’s book *Ulysses* because it portrayed women as submissive objects for conquest and domination.⁹

I briefly share this history of anti-porn feminism both because it not only answers the question of where the conversation about pornography turned after the decision in *Young*, but also to put the effects of the decisions covered in this dissertation in context. The narrative of the anti-porn feminists is a compelling one, with its radical arguments, its response to the supposed

⁷ Andrea Dworkin and Catherine A. MacKinnon, *Pornography and Civil Rights: A New Day for Women’s Equality*, (Minneapolis: Organizing Against Pornography, 1988): 101.

⁸ *Ibid.*

⁹ *American Booksellers Association v. Hudnut*, 771 F. 2d 323 (7th Cir 1985).

excesses of sexual liberation, and the unexpected coalition building some groups did with the religious right. Often this is the narrative turned to, alongside the rise of video cassettes and other technologies that allowed for the viewing of pornography in the private home, to explain the death of the golden age of pornography. But part of what I want to do in this dissertation is illuminate the regulatory efforts that developed in the midst of the so-called Golden Age of Porn and point to the ways the specifically spatial regulatory systems continue to hold significance.

The boundaries of this dissertation restrict my study to the three case studies: *Paris Adult Theater v. Slaton*; *Erznoznik v. Jacksonville*, and *Young v. American Mini Theaters*. And while I argue that the study of these three cases tell a compelling story about the emergence of spatial regulation and its ties to the concepts of “the local” and membership in the community, I want to point to some additional questions and directions the research could take. I have identified a number of these in the text— particularly pointing to subsequent cases that rely on a reading of these three cases in their decisions, i.e. Supreme Court cases *City of Renton v. Playtime Theatres, Inc.* and *City of Los Angeles v. Alameda Books* and District Court of Appeals case *Doe v. City of Minneapolis*.¹⁰ A study of these cases would ask how the regulatory regime and systems instituted from 1973 to 1976 grew and were interpreted and adapted in response to new technologies, concerns, and approaches to pornography. I think a study of how a regulatory approach designed around spatial application evolved in an era where pornography entered the private home offers a number of compelling possibilities. I would particularly call on scholars to consider how the bastardization of the “local” in the *Renton* case— it was deemed constitutional for cities to use secondary effect studies conducted in other locales to justify their own regulations— affected the way community standards was understood as a concept.

¹⁰ *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41 (1986); *City of Los Angeles v. Alameda Books* 535 U.S. 425 (2002); *Doe v. City of Minneapolis* 898 F.2d 612 (8th Cir. 1990)

I also call for further study of the way these cases talk about private and public through the lens of private property, capitalism, and business. While I was not able to find significant primary material on the day-to-day business operations of the theaters which raised the cases covered in this dissertation, that is not to say that information does not exist, if not for these theaters, then for others of the same period. Some of these cases point to specific development projects, namely the Joe Louis Arena in Detroit, the International Village in Detroit, and the Peachtree Center in Atlanta, as occupying the same spaces, oftentimes literally the same addresses, out of which adult theaters were regulated. A viable project might consider the intersections of eminent domain, urban planning, and efforts to regulate adult businesses, interrogating how the concept of “blight” served to profit other businesses.

In this dissertation I point to the ways the move towards spatial regulation excluded certain groups. My focus in this dissertation is primarily with the ways sexual behavior and the appearance of abnormal sexuality were excluded from the decision-making body and thus from whose rights mattered. The question was who did the term local community refer to and how was that manipulated in different locales. I want to point however to my suspicion that race played a great role in the determination of who was excluded from the construction of community and point to that as an area ripe for additional research.

In this dissertation, I posit the adult theater as an ideal site for understanding the spatial shift of the Supreme Court and its handling of obscenity law and demonstrate how the spatial is a crucial but heretofore underexplored area for understanding how notions of citizenry became dependent on sexual practice. In considering *Paris* as a case that speaks to consent and the ways obscenity legislation offers a compelling framework for considering unequal access to sexual expression and questions of whose privacy matters and where property is considered private;

Erznoznik as intervening in struggled over how nuisance should be formulated legally and how the visual complicates the assumed boundaries of public and private, and *Young* as solidifying the exclusionary possibilities of zoning and articulating the centrality of space to questions of pornography and obscenity, this dissertation calls for a reframing and a new understanding of this period in the history of obscenity and pornography and in the history of the lived landscape itself.

The week I sent this dissertation to my committee members, I discussed the differences between the *Roth* and *Miller* tests with the students in my course “I Know it When I See It:” A History of Obscenity and Pornography in the U.S.” In discussing the shifting geographical boundaries of community, one student raised the question of how such a doctrine could apply today, when the production, consumption, and distribution of pornography happens in so many different places all at the same time. Their question left me wondering, what do the spatial consequences of *Miller*, *Paris*, *Erznoznik*, and *Young* look like in the Internet era. While this dissertation argues that the specter of the adult theater shaped the physical and lived spaces of cities and towns, when laptops and cellphones make the adult theater portable, should we still rely on the same laws and precedents that imagined a brick-and-mortar building?

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