SWINGERS CLUB CASE LAW STUDY

I. Introduction

Swingers clubs, which tout themselves as a forum for the practice of a free sexual lifestyle, often called the "swinging lifestyle," or for the promotion of open marriages, cater typically to married people or attached couples who claim that such extramarital sex will save their marriage, solve what they see as boredom in the bedroom and promote trust in their relationship.

A typical swingers club[1] is a place where usually married couples go to engage in extramarital sexual activity, with group sex being fairly common. Typically, to gain entry the patron will come to the door of a club – which can sometimes be in someone's house or in a nightclub setting or at a vacation spot – be required to fill out an "application," provide proof of his or her ID and be charged a fee, which can sometimes be as low as five dollars. Often the club has rules, such as a ban on alcohol or illegal drugs. Also, the clubs typically deny admission to the following types of people: intoxicated people, those who appear unsavory or unwashed, practicing prostitutes, on-duty police officers and journalists, and sometimes single men. However, single women are often welcome.

Swingers clubs got their start during modern times in the 1950's when it was dubbed "wife swapping" and by the 1970's they were labeled swingers clubs. Swingers clubs are increasing in popularity,[2] with more than 300 such clubs listed on the Internet.

However, not all members of the community have welcomed their presence. Cases have reported that residential and business neighbors complain of loud parties, public nudity and public sex acts. Also swingers' parties and swingers' conventions have been held at hotels and vacation spots, resulting at times in hotel patrons complaining of public nudity and public sex acts.[3]

In addition, the risky sexual activity engaged in such clubs during the promiscuous pre-AIDS era of the 1970s, for example Plato's Retreat in New York City, appears not to have changed. Cases have reported that there is little use of condoms in swingers clubs – despite the fact that the club operators claim to distribute condoms at the door and post AIDS prevention posters on the walls – and as a result some municipalities see the clubs as a risk to public health and take steps to close them down.

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[1] Swingers clubs can also fall under names such as Partner-Swapping Clubs, Wife-Swapping Clubs, Sex Clubs, Swingers Parties, Sexual Encounter Establishments or Sexual Encounter Centers, Alternative Lifestyle Clubs, Adult Encounter Parlors or Adult Encounter Centers.

[2] Some estimates put the percentage of couples that have at least dabbled in the activity anywhere from four percent to one percent of all married couples in the country. The North American Swing Club Association has put the figure as high as 15 percent of all couples having engaged in the activity. Such clubs exist in almost every state in the United States and in Canada, England, France, Germany and Japan. And, the profile of the "typical swinger" is white, married, middle-aged and in the middle to upper-middle classes. "Today's Alternative Marriage Styles: The Case of Swingers" By Dr. Curtis Bergstrand and Ms. Jennifer Blevins Williams, Electronic Journal of Human Sexuality, Vol. 3, Oct. 10, 2000.

[3] Please note that a particular state's public indecency or public nudity statute, if worded properly, may be applicable to swingers club activities.

Phoenix Blueprint

In 1998, Phoenix, Arizona adopted an ordinance called the Live Sex Act Business Code that effectively banned all swingers clubs within the city. (See Appendix II for a copy of the Phoenix City Code §23-54, Live Sex Act Business Code) To date, the Phoenix Code appears to be the most legally sound and well-drafted ordinance banning swingers clubs.

The Phoenix ordinance allows the city to either arrest the operators of a business, or to close down a business, that meets the Code's definition of a "Live Sex Act Business."

The ordinance declares that any business that meets the definition of a Live Sex Act Business is a disorderly house and a nuisance per se. By declaring a type of business a nuisance per se, the city is not required to establish proof that the business has become a nuisance to the community, but simply that the activity so defined in the ordinance is taking place. To enforce the nuisance per se provision of the Code the city can petition a judge to issue a closure order against the business that meets the Code's definition.

The Code further declares that it is unlawful to operate and maintain a Live Sex Act Business and any violator is guilty of a Class 1 misdemeanor. (See Appendix II for Phoenix City Code Chapter 1, General Provisions, Sec. 1-5. General Penalty; continuing violations.) Therefore, the city has two enforcement options, one is criminal – under which the operators can be arrested – and the other is civil – in which case the business can be closed down.

The city's justification for the ordinance, which is stated in the Code's findings section, was to prevent the spread of sexually transmitted diseases, and to protect the health, safety, general welfare and morals of the city's inhabitants. (Please see the findings section of the Code in Appendix II.)

The city also made sure it defined all the activities that would take place in a "Live Sex Act Business" and added a provision exempting non-obscene performances, such as plays, cultural performances and ballet from the category of a "Live Sex Act Business."

The ordinance was tested in court and passed muster. The plaintiffs, owners and members of swingers clubs in the Phoenix area, sought a preliminary injunction to prevent enforcement of the ordinance.

In *Recreational Developments of Phoenix, Inc. v. City of Phoenix*, 83 F. Supp. 2d 1072 (1999), the U.S. District Court for the District of Arizona upheld the ordinance, which was affirmed by the Ninth Circuit, 2000 U.S. App. LEXIS 24046.

In the District Court decision – labeled "thorough and reasoned" by the Ninth Circuit – U.S. District Court Judge Roslyn O. Silver dealt with a number of arguments put forth by the plaintiffs. The decision wound its way from First Amendment considerations to privacy rights, among other issues. An outline of the District Court decision can be found in Appendix I.

The latest developments in the case occurred on August 27, 2002 when the city of Phoenix was granted its motion for summary judgment. (See *Recreational Developments of Phoenix v. City of Phoenix*, 2002 U.S. Dist. LEXIS 16855.) The summary judgment decision is currently on appeal before the Ninth Circuit.

II. Relevant United States Supreme Court Cases

While there are no United States Supreme Court rulings exclusively dealing with swingers clubs, the High Court has ruled on various issues that involve their activities, i.e.: sexual activity in a commercial context, and on the constitutional issues commonly raised by swingers clubs.

The legal issues at stake in a swingers club case are typically the right to privacy, free speech and the right of association, both intimate and expressive. Intimate association involves the right to engage in highly personal relationships, which is protected under the due process clause of the Fourteenth Amendment. Expressive association involves the right to engage in activities expressly stated in the First Amendment, namely, speaking, worshipping and petitioning the government.

Plaintiff swingers clubs have made other case arguments, such as overbreadth and vagueness, but they are specific to each ordinance and set of facts. (See Appendix III for a list of swingers club cases by state)

Right of Intimate Association

Two landmark cases on the right of intimate association are: *Griswold, et al. v. Connecticut*, 381 U.S. 479 (1965); and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Griswold involved a violation of state law that prohibited dispensing or using birth control devices to or by married couples. The U.S. Supreme Court found that the statute was invalid due to its unconstitutional invasion on the rights of privacy of married persons.

In *Eisenstadt*, the U.S. Supreme court case involved a conviction for distributing contraceptive foam to an unmarried woman. The Supreme Court affirmed the appellate court's holding that the statute prohibiting distribution of contraceptives to unmarried women violated the equal protection clause of the U.S. Constitution by providing dissimilar treatment to married and unmarried persons, and held that the right of privacy regarding the use of birth control was the same for married and unmarried alike.

However, in both *Eisenstadt* and *Griswold* the sexual activities were held to have a right to privacy due to the familial and private personal relationships involved.

Also of interest is *Bowers v. Hardwick*, 478 U.S. 186 (1986). In that case, which involved a Georgia statute criminalizing sodomy, the Supreme Court rejected the notion that a right to privacy "stands for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscriptions." The case is relevant in that the Court rejects the notion that any type of sexual conduct deserves protection merely because it occurs in private.

Of particular relevance to swingers clubs, the Supreme Court has held that sexual activity that takes place in a commercial context or public place does not enjoy a right to privacy. Specifically, in the adult theater case *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the U.S. Supreme Court refused to extend the privacy rights that the Court had recognized in *Griswold* to a commercial context.

The Court in *Paris Adult Theatre I* declined to equate the privacy in one's home with "a zone of privacy that follows a distributor or consumer… wherever he goes."

Paris Adult Theatre I held that obscene materials shown in a commercial context do not enjoy constitutional immunity from regulation simply because they were shown to consenting adults only.

The Court stated:

> The idea of a "privacy" right and a place of public accommodation are, in this context, mutually exclusive. Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

Also, the *Paris Adult Theatre I* Court refused to apply its holding in *Stanley v. Georgia*, 394 U.S. 557 (1969) – which upheld possession of allegedly obscene material in one's own home – to commercial enterprises. The *Paris* Court said:

> It is unavailing to compare a theater open to the public for a fee, with the private home of *Stanley* v. *Georgia*, 394 U.S., at 568, and the marital bedroom of *Griswold* v. *Connecticut, supra*, at 485-486. This Court, has, on numerous occasions, refused to hold that commercial ventures such as a motion-picture house are "private" for the purpose of civil rights litigation and civil rights statutes.

Although not a U.S. Supreme Court case, *IDK, Inc. v. County of Clark*, 836 F.2d 1185 (1988), held that a commercial escort service is not protected by the right of intimate or expressive association. The U.S. Court of Appeals for the Ninth Circuit concluded:

> [T]he Constitution may afford some protection to dating and other social groups because of their value as intimate and expressive associations. The escort services, however, have little claim on the protections afforded intimate associations because the relationship between an escort and client possesses almost none of the constitutional aspects of intimate associations. They also lack a substantial claim to the protections given expressive associations because the escort services' activities and purposes are primarily commercial rather than communicative.

Private Membership Club

Some swingers clubs claim that they are private membership clubs and therefore are protected by the right of intimate association and expressive association.

The landmark private membership club case, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), involved a club that excluded women from membership in violation of a Minnesota statute. The Supreme Court held that the club was not a private membership club and that requiring admission of women did not violate the male member's freedom of intimate association nor their freedom of expressive association.

The *Jaycees*' Court cited several characteristics in determining whether a club was private in the following: "[F]actors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."

The Supreme Court went on to specify why the Jaycees fell outside the category of a private membership club:

> The undisputed facts reveal that the local chapters of the Jaycees are large and basically unselective groups. At the time of the state administrative hearing, the Minneapolis chapter had approximately 430 members, while the St. Paul chapter had about 400. Report, App. to Juris. Statement A-99, A-100. Apart from age and sex, neither the national organization nor the local chapters employ any criteria for judging applicants for membership, and new members are routinely recruited and admitted with no inquiry into their backgrounds. See 1 Tr. of State Administrative Hearing 124-132, 135-136, 174-176. In fact, a local officer testified that he could recall no instance in which an applicant had been denied membership on any basis other than age or sex. *Id*., at 135. Cf. *Tillman v. Wheaton-Haven Recreation Assn., Inc.*, 410 U.S. 431, 438 (1973) (organization whose only selection criterion is race has "no plan or purpose of exclusiveness" that might make it a private club exempt from federal civil rights statute); *Sullivan v. Little Hunting Park, Inc*., 396 U.S. 229, 236 (1969) (same); *Daniel v. Paul*, 395 U.S. 298, 302 (1969) (same).

The *Jaycees'* Court also held that the personal affiliations that implicate the freedom of intimate association are the creation and sustenance of a family, marriage, childbirth, raising and educating children, and the cohabitation with one's relatives.

The Court defined those relationships in the following:

> The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family – marriage, *e. g.,*

> *Zablocki v. Redhail,* supra.; childbirth, *e. g., Carey v. Population Services International*, supra.; the raising and education of children, *e. g., Smith v. Organization of Foster Families*, supra.; and cohabitation with one's relatives, *e. g., Moore v. East Cleveland,* supra. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities -- such as a large business enterprise -- seems remote from the concerns giving rise to this constitutional protection. Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees. Compare *Loving v. Virginia,* 388 U.S. 1, 12 (1967), with *Railway Mail Assn. v. Corsi,* 326 U.S. 88, 93-94 (1945). (Emphasis added)

In regard to the right of expressive association, the Court said that even if the club is such that it is protected by such right, "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."

As previously noted, the Supreme Court's criteria in determining whether an entity is a private membership club includes the following: the selectivity of the club, its size, whether any criteria is employed for judging applicants, and whether new members are routinely recruited and admitted. (See also *Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987))[4]

[4] The *Rotary* Court is quoted as follows: "The evidence in this case indicates that the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection. The size of local Rotary Clubs ranges from fewer than 20 to more than 900. App. to Juris. Statement G-15 (deposition of Herbert A. Pigman, General Secretary of Rotary International). There is no upper limit on the membership of any local Rotary Club. About 10 percent of the membership of a typical club moves away or drops out during a typical year." 481 U.S. 537, 546.
The *Rotary* Court continues with: "Many of the Rotary Clubs' central activities are carried on in the presence of strangers. Rotary Clubs are required to admit any member of any other Rotary Club to their meetings. Members are encouraged to invite business associates and competitors to meetings." *Id.* at 547.

In terms of selectivity and membership criteria employed by swingers clubs, most such clubs are well-advertised, charge a minimal fee at the door, have applicants fill out an "application" which has the primary effect of providing the club with his/her name and address, offers condoms at the door but does not enforce their use, generally admit only couples or at times single women or men. Admission is typically denied only if the person appears intoxicated or unbathed, is carrying illegal drugs or weapons, or is an on-duty police officer or journalist. Also, there is typically no ceiling on the number of members, nor, typically, are there any geographic restrictions.

For these reasons, many courts have held that the swingers clubs in question were not private membership clubs. (For an outline of these cases see Appendix III titled Swingers Club Cases)

First Amendment

Swingers clubs often claim they engage in First Amendment protected expression. However, the Supreme Court has held that conduct alone, without some expressive element, is not protected by the First Amendment free speech clause.

Our First Amendment discussion will begin with a brief background in the landmark conduct-as-speech case *U.S. v. O'Brien*, 391 U.S. 367 (1968).

In *U.S. v. O'Brien*, the Supreme Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

The decision, which involved a Vietnam War protestor's claim that burning his draft card was expression under the First Amendment, stated:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.

The *O'Brien* court detailed what constitutes sufficient justification for a government regulation with the following test:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Assuming *arguendo* that swingers clubs have an expressive element, the state can regulate them under *O'Brien* as long as there is a legitimate government interest in regulating the conduct and the ordinance is drafted in a content-neutral manner. In the case of swingers clubs the government interest is generally to curb the secondary effects of such businesses and to protect the public health from sexually transmitted diseases.

However, the Supreme Court has implied in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), that such commercial sexual activity does not constitute expression under the First Amendment. In the case in which a variety of sexually oriented businesses challenged an ordinance, Justice O'Connor implied that certain types of businesses, such as sexual encounter centers, do not fall under the First Amendment in: "[T]he ordinance applies to some businesses that apparently are not protected by the First Amendment – *e.g.,* escort agencies and sexual encounter centers..."

And in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), the Supreme Court held that an adult bookstore that allowed illegal sexual activity to take place on the premises may be closed down due to such illegal sexual activity, despite the fact that the business also engaged in the First Amendment activity of book selling.

Also, in *Dallas v. Stanglin*, 490 U.S. 19 (1989), which involved an ordinance that restricted admission to a dance hall to minors between 14 and 18 years old, the Supreme Court said:

> It is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons – coming together to engage in recreational dancing – is not protected by the First Amendment. Thus this activity qualifies neither as a form of "intimate association" nor as a form of "expressive association" as those terms were described in *Roberts*.

Also relevant is *Spence v. Washington*, 418 U.S. 405 (1974), which was a symbolic speech case involving the public display of a peace symbol superimposed over the U.S. flag in violation of a Washington statute that prohibited superimposed symbols over the flag. The Supreme Court held the display to be protected First Amendment expression and characterized symbolic speech as that which is "direct, likely to be understood…" and later stated that "An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."

Symbolic speech, or conduct as speech, therefore must be such that the message is likely to be understood by the viewer.

The *Recreational Developments* court held – in reference to the *Spence* holding and in answer to the Phoenix swingers clubs' claim that they are conveying a message in their activities – that the sexual activity in swingers clubs does not convey a message easily understood by viewers. (See Appendix I for an outline of the *Recreational Developments* decision.)

APPENDIX I

AN OUTLINE OF THE PHOENIX CASE

Recreational Developments of Phoenix, Inc. v. City of Phoenix
83 F.Supp.2d 1072
Decided Aug. 23, 1999
U.S. District Court for the District of Arizona

The Phoenix City Live Sex Act Business ordinance, which allows the city to close down a business that meets the Code's definition of Live Sex Act Business, was challenged in the U.S. District Court for the District of Arizona. The district court upheld the ordinance and on appeal the Ninth Circuit affirmed that decision.[5]

The plaintiffs, owners and members of swingers clubs in the Phoenix area, sought a preliminary injunction to prevent enforcement of the ordinance passed by the Phoenix City Council in 1998, specifically Code § 23-54. (See Appendix II for a copy of the Code.)

The ordinance declared that any business that meets the definition of a Live Sex Act Business is a disorderly house and a nuisance per se and allows the city to petition a judge to issue a closure order against the business.

The city's justification for the ordinance was to prevent the spread of sexually transmitted diseases, and protect the health, safety, general welfare and morals of the city's inhabitants. (Please see the findings section of the Code in Appendix II.)

U.S. District Court Judge Roslyn O. Silver dealt with a number of arguments put forth by the plaintiffs and ruled in favor of the city of Phoenix.

First Amendment

Our discussion on the decision will begin with the swingers clubs' First Amendment claims in the case and will initially address their claim that by engaging in sexual acts the members are expressing "a message of social and sexual liberation."

The court specifically held that sexual conduct, as it is defined in the ordinance, "does not constitute expression within the meaning of the First Amendment."

First, the court said the plaintiffs bear the burden of proof on this issue and they failed to meet this burden. The court cited the landmark U.S. Supreme Court case involving the burning of a Vietnam War draft card, *U.S. v. O'Brien*, 391 U.S. 367 (1968), for the concept that conduct with an expressive component may be entitled to First Amendment protection. The court also cited *Spence v. Washington*, 418 U.S. 405 (1974), which held that a student's conduct – i.e.: the display of his own U.S. flag with a peace symbol affixed to it – was protected expression as a form of symbolic speech.

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[5] The Ninth Circuit affirmed the trial court's denial of a preliminary injunction by using the standard of review in such cases, which is limited to abuse of discretion. Such a standard means the Circuit Court reviews the trial court's decision for erroneous legal standards or clearly erroneous factual findings. In the Circuit Court's language "Applying that standard to the district court's thorough and reasoned order, we cannot say that the district court abused its discretion. We therefore affirm…"

The *Recreational Developments* court held that the swingers club activity, sexual conduct, did not meet the conduct-as-expression standard set forth in *Spence* – a case the swingers clubs relied upon heavily in their First Amendment argument. The court reasoned, in light of the *Spence* holding, that such sexual conduct had no intended particularized message nor was the purported message able to be uniformly understood.

The *Recreational Developments* decision, regarding the First Amendment claim, relied on several other important cases, namely *Dallas v. Stanglin*, 490 U.S. 19 (1989), in which it quoted the U.S. Supreme Court in: "It is possible to find some kernel of expression in almost every activity a person undertakes …. but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."

The *Recreational Developments* decision, citing *Spence*, said:

> In *Spence*, the Court noted that the conduct constituted expression because the message was likely to be understood by "the great majority of citizens[,]" rather than a great majority of those passing by the student's apartment, suggesting that in order for conduct to constitute expression, the relevant message may be required to be understood by the public as a whole rather than merely those viewing the message at the time it was sent or by a discrete group of persons. 418 U.S. at 410 (emphasis added). If that is the standard, Plaintiffs would confront an even higher hurdle, because it is unlikely that a great majority of non-swingers would understand the message they claim to be sending by engaging in sexual conduct in the clubs.

The *Recreational Developments* court went on to cite the various depositions in which testimony revealed confusion or contained conflicting statements regarding the purported message conveyed by the sexual conduct at the swingers club.

In regard to the deposition testimony of those who viewed the activity, the court said:

> [N]ot every witness confirmed Plaintiffs' counsel's assertion that those engaging in sexual acts intended to convey a particularized message and that the message had a substantial likelihood of being uniformly understood, even by those who viewed the act within the confines of the club.

The court also cited the Ninth Circuit case *Ellwest Stereo Theatres Inc. v. Wenner,* 681 F.2d 1243 (1982) and interpreted *Ellwest* in the following: "Although expressions of sexual arousal and enjoyment may be a communication of a sort, they are not, without more, entitled to constitutional protection."

Importantly, the court also mentioned *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990) – a First Amendment case brought by a variety of sexually oriented businesses – and quoted Justice O'Connor with: "[A]lthough the ordinance applies to some businesses

that apparently are not protected by the First Amendment, e.g., escort agencies and sexual encounter centers…"

Therefore, the *Recreational Developments* court held, that sexual encounter centers, a category in which swingers clubs would fall, do not enjoy First Amendment protection.

Interestingly, the court also cited a Sixth Circuit decision regarding a First Amendment case brought by the publisher of a swingers club magazine, from which it quotes: "[T]he First Amendment also would not protect the right to engage in the depicted sexual conduct publicly under the theory that the sexual act itself constitutes protected expression." *Connection Distributing Co. v. Reno*, 154 F.3d 281 (1998).

The decision also quoted a California Appeals Court in a case involving swingers club conduct, *People v. Morone*, 150 Cal. App. 3d Supp. 18 (1983), with the following: "'Swinging,'….does not per se qualify for First Amendment protection.'"

The court also dismissed plaintiffs' argument that because the clubs feature some cage dancing and striptease dancing the ordinance violated the First Amendment because the clubs engage in protected expression.

The *Recreational Developments* court held that the "alleged infringement of plaintiffs' First Amendment right to engage in expression is without merit."

In support of this holding, the court cited *Arcara v. Cloud Books*, 478 U.S. 697 (1986), which held that the closing of an adult bookstore was not a violation of the First Amendment when it was determined that prostitution, masturbation and sexual activity between patrons was occurring on the premises. In other words, the Supreme Court held that when an establishment that engages in protected expression, i.e.: bookselling, is allowing illegal activity to occur on the premises, the government is not precluded from enforcing the law in the form of shutting down the business.

The Supreme Court in *Arcara* states: "[W]e conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books."

To conduct a thorough analysis of the plaintiffs' First Amendment argument, the *Recreational Developments* court, as part of its decision, assumed *arguendo* that the swingers club activities did fall under the First Amendment and applied the *O'Brien* test. In accordance with *O'Brien*, the *Recreational Developments* court held the ordinance to be clearly within the municipality's police power; that it furthered an important or substantial government interest in "slowing the spread of sexually transmitted diseases"; that the interest is unrelated to the suppression of free expression; and for the fourth prong of the *O'Brien* test:

> [T]he Supreme Court has held that "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *U.S. v. Albertini,* 472 U.S. 675, 689, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985). Given the prevalence of high risk sexual activity in the clubs and the failure to enforce the use of condoms, the government's interest in limiting the

> transmission of sexually transmitted diseases would be achieved less effectively absent the ordinance.

In conclusion, the *Recreational Developments* court held, "The ordinance survives the *O'Brien* test even if it were applied."

Right to Privacy

In addition to their First Amendment argument, plaintiffs claimed that the ordinance violated their right to privacy protected by the Fourteenth Amendment's Due Process Clause.

The court ruled against plaintiffs on this issue and held that the plaintiffs' right to privacy claim cannot form a basis for the injunction.

The decision cited *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which it quotes the Supreme Court as rejecting the notion that a right to privacy "stands for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."

The court also cited *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), for the proposition that the privacy of the home does not follow the consumer wherever he goes.

The *Recreational Developments* decision also quoted the Ninth Circuit *Ellwest* case in the following: "we decline to hold that the 'right' to unobserved masturbation in a public theater is 'fundamental' or 'implicit in the concept of ordered liberty.'"

Private Membership Club

The *Recreational Developments* decision also grappled with the plaintiffs' argument that it was a private club and the members consider the club an extension of the home.

The court ruled against plaintiffs and said, "the membership status of the clubs is more fiction than reality. It is clear that the clubs are no more private than those in other cases in which courts have rejected the self-characterization of entities as private membership organizations." The court cited *31 West 21st Street Associates v. Evening of the Unusual Inc*., 480 N.Y.S.2d 816 (1984) and *Hendricks v. Commonwealth*, 865 S.W.2d 332 (1993).

The decision also pointed to several aspects of the swingers clubs as definitive of a public place, saying their degree of selectivity of membership falls far short of the level required by the courts.

Specifically, the decision stated that the clubs' membership criteria is "virtually nonexistent" and listed several reasons: the clubs advertise and promote themselves on web sites; most of their revenue appears to come from per-visit usage fees and not from membership dues, which can be as low as one dollar a year; there were few numerical or geographical limitations on membership, with clubs having as many as 12,000 members, some of which lived in foreign countries; and finally, members have no control over the selection of other members.

The decision compared the so-called "selection criteria" at swingers clubs – which typically ban only those people who are inappropriately dressed, appear intoxicated or who are carrying illegal weapons or drugs – to that of public nightclubs

where bouncers select those standing in line who are suitably attired or at clubs where only those intoxicated are prohibited.

As a result, the court held the clubs do not have a right to privacy and are not private membership clubs.

Freedom of Intimate Association and Expressive Association

Among the plaintiffs' arguments was a freedom of intimate association claim.

A landmark case on freedom of association rights is *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), wherein the U.S. Supreme Court determined that there are two main branches of associational rights, expressive association and intimate association.

The Recreational Developments court quoted the *Jaycees* Court regarding the types of relationships that would enjoy a right of intimate association in the following:

> [T]hose that attend the creation and sustenance of a family – marriage, childbirth, the raising and education of children, and cohabitation with one's relatives. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

The *Jaycees'* Court stated that only relationships "with these sorts of qualities" would fall under the right to freedom of intimate association.

The *Recreational Developments* court denied the plaintiffs' claim that the ordinance violated their freedom to engage in intimate associations, pointing out, among other factors, the clubs' large membership.

The court also cited a Ninth Circuit case involving an escort service, *IDK Inc. v. County of Clark et al,* 599 F.Supp.1402 (1984), for the proposition that a paid escort and his/her client do not have such a relationship that would fall under the freedom of intimate association.

The court cited the *IDK* court specifically with the following, "we do not believe that a day, an evening, or even a weekend is sufficient time to develop deep attachments or commitments. In fact, the relationship between a client and his or her paid companion may well be the antithesis of the highly personal bonds protected by the fourteenth amendment."

The *Recreational Developments* court struck down the plaintiffs' claim of freedom of expressive association. The *Jaycees'* ruling, noted above, regarding freedom of expressive association to meet to share political and social views etc., also did not apply to the swingers clubs, according to the court.

The clubs own advertisements were cited as proof that the clubs were places at which one would engage primarily in sexual conduct and not a place wherein verbal discussions were the primary draw, specifically the court said, "the clubs' advertisements make no reference to the clubs as intellectual salons…"

Also, the decision stated that there was nothing in the ordinance that restricted the swingers from engaging in any intellectual discourse on the "swinging" lifestyle, or from meeting to discuss or advocate the swinging lifestyle. The court also went on to say that the ordinance does not prohibit members from "engaging in the sexual activities that are associated with the swinging philosophy in their homes or possibly even in clubs that are truly private."

Overbreadth Doctrine

The *Recreational Developments* court next dealt with the overbreadth doctrine, which involves the concept that a law is overbroad if it targets not just the activities within the allowable area of governmental control, but sweeps within its reach other activities that are protected, such as free speech or associational rights. In other words, the ordinance is worded in such as way as to make illegal otherwise legally protected conduct or speech.

The court cited *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), for the proposition that standing to bring a facial overbreadth challenge is limited, specifically when conduct and not speech is involved and quoted the *Broadrick* Court in: "[W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

Therefore, since the behavior prohibited was narrowly defined and limited to specific conduct, the *Recreational Developments* court held that the ordinance was not overbroad.

The court quoted the Supreme Court with "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." (*Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984))

Also, Phoenix had enacted an amendment to the Code, a week after the Code was enacted, which makes an exception for any "non-obscene presentation, showing, or performance of any play, drama, or ballet in any theater, concert hall, fine arts academy, school, institution of higher education, or similar establishment…."

The defendants pointed to this amendment as an answer to the plaintiffs' overbreadth argument.

The court was convinced and held that the ordinance was not overbroad.

Vagueness Argument

The plaintiffs' next attack came in the form of a vagueness challenge to the ordinance. Plaintiffs asserted that the Code was impermissibly vague because it must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." (*Grayned v. City of Rockford*, 408 U.S. 104 (1972))

The plaintiffs claimed that numerous terms in the Code are undefined and ambiguous, specifically the term "act" "live" "conduct" "fondling" "consideration" and "similar establishment."

The court, however, cited *Grayned* for the proposition that legislative words should be viewed in their context and in light of their associated words to come to an understanding of their proper meaning and that words can never reach a level of exactness. "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, *supra* at 110.

Also, the decision pointed to the fact that the plaintiffs themselves advertise the opportunity to engage in or view live sexual acts.

The court ruled that the ordinance did not suffer from vagueness and held "Plaintiffs have engaged in such creative thinking, but the Court is unconvinced that a person of ordinary intelligence would not be able to determine how to conform his or her conduct to the ordinance."

Unconstitutional Takings Claim

The plaintiffs also claimed an unconstitutional takings, which is defined as land use regulations that do not substantially advance legitimate state interests or deny the owner of the economically viable use of his land.

As to the first prong of the takings test, the court held that the ordinance does not constitute an unlawful taking because the statute advances a legitimate public purpose, specifically the ordinance's purpose of combating the transmission of sexually transmitted diseases and for preserving societal order, and that the plaintiffs failed to meet their burden of proving that the ordinance fails to substantially advance a legitimate state interest.

As to the claim that the owners were denied the economically viable use of their land, the court held that the claim was not ripe because the plaintiffs had not sought relief through the proper procedural route.

The court clearly sided with the municipality regarding the legitimate state interest in stemming the tide of AIDS and other communicable diseases when it cited *Doe v. Minneapolis*, 898 F.2d 612 (1990) and *City of New York v. New Saint Mark's Baths*, 497 N.Y.S.2d 979 (1986), for the proposition that preventing the spread of such diseases is a "critical health concern." (See Appendix III for more on the New York case *New Saint Mark's Baths*).

The court also said, "The legislative record indicates that undercover police officers witnessed dozens of individuals engaging in sexual intercourse and oral sex within the clubs, none of whom used condoms."

APPENDIX II

Phoenix City Code

Chapter 23 Morals and Conduct
Article IV Offenses Involving Morals
Division 1. Prostitution and Fornication

Sec. 23-54. Findings; definitions; live sex act businesses prohibited.

A. The City Council makes the following findings:

1. The operation of a business for purposes of providing the opportunity to engage in, or the opportunity to view, live sex acts is declared to be a disorderly house and a public nuisance per se which should be prohibited; and

2. The operation of a live sex act business contributes to the spread of sexually transmitted diseases; and

3. The operation of a live sex act business is inimical to the health, safety, general welfare and morals of the inhabitants of the City of Phoenix.

4. Evidence in support of these findings may be found in the Sex Clubs, Factual Record, and the Sexually Oriented Businesses, Factual Record, Supplement.

B. In this section, unless the context otherwise requires:

1. *Consideration* means the payment of money or the exchange of any item of value for:

a. The right to enter the business premises, or any portion thereof; or

b. The right to remain on the business premises, or any portion thereof; or

c. The right to purchase any item permitting the right to enter, or remain on, the business premises, or any portion thereof; or

d. The right to a membership permitting the right to enter, or remain on, the business premises, or any portion thereof.

2. *Live sex act* means any act whereby one or more persons engage in a live performance or live conduct which contains oral sexual contact or sexual intercourse.

3. *Live sex act business* means any business in which one or more persons may view, or may participate in, a live sex act for a consideration.

4. *Operate and maintain* means to organize, design, perpetuate or control. Operate and maintain includes providing financial support by paying utilities, rent, maintenance costs or advertising costs, supervising activities or work schedules, and directing or furthering the aims of the enterprise.

5. *Oral sexual contact* means oral contact with the penis, vulva or anus.

6. *Sexual intercourse* means penetration into the penis, vulva or anus by any part of the body or by any object or manual masturbatory contact with the penis or vulva.

C. It shall be unlawful for any person to operate and maintain a live sex act business.

D. Operation of a live sex act business is a public nuisance per se which may be abated by order of the Phoenix Municipal Court.

E. The City Attorney, in the name of the City of Phoenix, may apply to the Municipal Court for an order permitting the City to abate violations of this section.

F. After notice to the operator of a live sex act business, the judge shall conduct a hearing and take evidence as to whether a live sex act business is being operated in violation of this section.

G. If, at the conclusion of the hearing, the judge determines that a live sex act business is being operated in the City of Phoenix in violation of this section, an order shall be entered authorizing the City to abate the violation by closing the business. A copy of the order shall be delivered to the operator of the business and mailed to the owner of the property upon which the business is located.

H. Nothing in this section shall be construed to apply to the non-obscene presentation, showing, or performance of any play, drama, or ballet in any theater, concert hall, fine arts academy, school, institution of higher education, or similar establishment as a form of expression of opinion or communication of ideas or information, as differentiated from the promotion or exploitation of sex for the purpose of advancing the economic welfare of a commercial or business enterprise.

Phoenix City Code

Chapter 1 General Provisions

Sec. 1-5. General penalty; continuing violations.

Except for civil traffic violations for which the maximum sanction shall be two hundred fifty dollars unless a specific other penalty is provided for, whenever in this Code or in any ordinance of the City any act is prohibited or is made or is declared to be unlawful or an offense or a misdemeanor or whenever in such Code or ordinance the doing of any act is required or the failure to do any act is declared to be unlawful, where no specific penalty is provided therefor, any person violating any such provisions of this Code or any ordinance is guilty of a Class 1 misdemeanor punishable by a fine not exceeding two thousand five hundred dollars or imprisonment for a term not exceeding six months or probation not to exceed three years or any combination of such fine and imprisonment, and probation in the discretion of the City magistrate. Each day any violation of any provisions of this Code or of any ordinance shall continue shall constitute a separate offense.

In addition to the penalties hereinabove provided any condition caused or permitted to exist in violation of any of the provisions of this Code or any ordinance shall be deemed a public nuisance and may be, by the City, abated as provided by law and each day that such condition continues shall be regarded as a new and separate offense.

APPENDIX III

SWINGERS CLUB CASES

As mentioned previously in this case law study, there are several key issues that arise in swingers club litigation, namely, the rights of privacy, free speech, and association. The cases listed in this summary – which includes all reported swingers club cases decided by both State Courts, U.S. District Courts and Circuit Courts – hold that swingers clubs do not enjoy any of these enumerated rights.[6] Please note, the U.S. Supreme Court has never ruled on a case exclusively involving swingers clubs.

Regarding the right to privacy, the courts have held that commercial establishments do not enjoy a right of privacy, as would a private home, and therefore the right of privacy does not extend to sexual conduct within commercial establishments. (See *People v. Katrinak*, 136 Cal. App. 3d 145 (1982); *City of New York v. New Saint Mark's Baths,* 497 N.Y.S.2d 979 (1986), *aff'd.*, 562 N.Y.S. 2d 642 (1st Dept. App. Div. 1990); *Wigginess v. Irwin Fruchtman,* 482 F. Supp. 681 (1979); *31 West 21st Street Associates v. Evening of the Unusual, Inc.,* 480 N.Y.S. 2d 816 (1984); *New York City v. Big Apple Spa* 497 N.Y.S. 2d 988 (1986); *Recreational Developments of Phoenix, Inc. v. City of Phoenix*, 83 F. Supp. 2d 1072 (1999), see Appendix I for an outline on *Recreational Developments.*)

In addition, the following cases have held that swingers clubs do not meet the definition of a private club and are therefore considered public places. (See *31 West 21st Street Associates v. Evening of the Unusual, Inc.,* 480 N.Y.S.2d 816 (1984); *New York City v. Big Apple Spa,* 497 N.Y.S.2d 988 (1986); *State v. Lunati* 665 S.W.2d 739 (1983); *Recreational Developments of Phoenix, Inc. v. City of Phoenix*, 83 F. Supp. 2d 1072 (1999) see Appendix I for an outline on *Recreational Developments.*)

Regarding the First Amendment, the courts have held that the free speech clause does not protect purely physical conduct that lacks any corresponding expressive element. (See *People v. Katrinak*, 136 Cal. App. 3d 145 (1982); *Sunset Amusement Co. v. Board of Police Commissioners*, 7 Cal.3d 64 (1972); *Las Vegas Nightlife, Inc. v. Clark County* 38 F.3d. 1100 (1994); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (1995); *Stansberry v. Holmes*, 613 F.2d 1285 (1980))

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[6] If an ordinance regulates an activity that falls outside the fundamental rights, such as free speech or freedom of association or right of privacy, then the courts would apply a rational basis standard of review. This level of review is the lowest threshold, ie: the government needs only a legitimate objective and the means chosen are rationally related to the objective. Also, when rational basis is applied the burden of proof is on the party challenging the government. Generally, the ordinance will be struck down only if the government acts arbitrarily and irrationally.

If an ordinance regulates a First Amendment activity, such as nude dancing, the ordinance should be drafted as a content-neutral, time, place and manner regulation. In such cases, the court would apply an intermediate level of review, ie: the government objective is important and the means are substantially related to the objective. Any content-based regulation involving a First Amendment activity, or a fundamental right, would be reviewed according to the strict scrutiny level, ie: the government's objective must be compelling and the means chosen be necessary to achieve the goal.

Specifically, in relation to swingers clubs, the following courts have held that the sexual activity at the clubs does not constitute expression under the free speech clause. (See *People v. Morone,* 150 Cal. App. 3d Supp. 18 (1983); *N.W. Enterprises v. City of Houston*, 27 F.Supp.2d 754 (1998); *Recreational Developments of Phoenix, Inc. v. City of Phoenix*, 83 F. Supp. 2d 1072 (1999))

As for the freedom of association, the courts have held that sex clubs are not protected by associational rights. (See *People v. Morone,*150 Cal. App. 3d Supp. 18 (1983); *City of New York v. New Saint Mark's Baths,* 497 N.Y.S.2d 979 (1986); *Wigginess v. Irwin Fruchtman,* 482 F. Supp. 681 (1979); *Recreational Developments of Phoenix, Inc. v. City of Phoenix*, 83 F. Supp. 2d 1072 (1999))

CALIFORNIA

People v. Morone
150 Cal. App. 3d Supp. 18 (1983)
(Appellate Department, Superior Court of California, Los Angeles)

In this California case, appellants operating a "swing club" were convicted of conducting a health club without a license in violation of a Los Angeles County ordinance. Appellants argued that U.S. Constitutional Amendment I exempts their business from the licensing requirement and that the business did not fall under the ordinance's definition of a health club.

Appellants operated a business to provide its patrons with rooms to promote, discuss and practice "swinging." This business was operated for profit and an entry fee was charged.

The court, rejecting the claim that the type of activity engaged in by the business and its patrons is a constitutionally protected activity, said: "The First Amendment, which protects both the freedom of speech and the freedom of association does not embrace purely physical activity." (Citing *People v. Katrinak*, 136 Cal. App. 3d 145 (1982))

Therefore, the court concluded, "'Swinging,' which is a 'free heterosexual activity,' therefore does not per se qualify for First Amendment protection."

The court went on to quote from the Supreme Court case *U.S. v. O'Brien*, 391 U.S. 367 (1968), with the following: "To hold otherwise would require us [to] adopt the already discredited view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

And regarding the First Amendment freedom of expressive association, the court said:

> The "communal" nature of the activity adds nothing, because it is the "freedom to engage in association *for the advancement of beliefs and ideas* … (*Sunset Amusement Co. v. Board of Police Commissioners,* 7 Cal. 3d 64, 74 (1972)), not the mere assemblage of persons, which is embraced by the First Amendment. (*Id* at pp. 74-75; accord, *People v. Katrinak*, 136 Cal. App. 3d 145, 152 (1982).

The court concluded that the business was not protected by the U.S. Constitution, because the conviction was solely concerned with the commercial impacts of the enterprise and it also found that the business clearly fell within the definition of a health club under the ordinance.

Poppell v. City of San Diego
149 F. 3d 951 (1998)
(United States Court of Appeals for the Ninth Circuit)

Plaintiff had brought a civil rights suit based on malicious prosecution against defendants, the city and its zoning administrator.

Defendants appealed the judgment of the U.S. District Court for the Southern District of California, which found in favor of plaintiff nudist club operator, that defendants engaged in malicious prosecution in the form of systematic efforts to close plaintiff's business.

Plaintiff Elbert Poppell operated a swinger's club, regarded by law as an adult entertainment establishment, at many locations in San Diego throughout the ten years of its existence. Local law permitted him to operate such establishment, but only under specified circumstances, i.e., in the correct zone and at a certain distance from churches, schools, other adult establishments, and residential areas.

Over the years, Poppell became embroiled in numerous zoning disputes with the city and as a result of a criminal prosecution, the plaintiff was convicted of the strict liability offense of operating and maintaining an adult entertainment establishment in an area not zoned for such use, and of related misdemeanors. Plaintiff's convictions were subsequently overturned on habeas corpus review by a federal district court.

The court reversed the lower court decision in favor of plaintiff holding that defendant zoning administrator was entitled to qualified immunity and did not engage in malicious prosecution and only enforced the law against the plaintiff.

The court held, "[W]e are left with the unshakable conclusion that the case as to [zoning administrator] Carr was at best about an understandable bureaucratic mistake as to the Sunrise location, not malice or any purpose to deprive Poppell of his constitutional rights."

**Also relevant is the escort-services case *People v. Katrinak*, 136 Cal. App. 3d 145, 185 Cal. Rptr. 869 (1982), decided by the Court of Appeal of California, Second Appellate District, Division Three. In this case the court held that "While the privacy right clearly encompasses certain fundamental personal decisions concerning family life, the Ordinance under attack does not touch upon the family but instead, regulates an essentially commercial relationship. Sale of companionship does not occupy the same position under our laws as the sort of personal intimacy protected under the concept of a right to privacy." (Emphasis added)

**And, in a roller skating rink case, *Sunset Amusement Co. v. Board of Police Commissioners*, 7 Cal.3d 64 (1972), the Supreme Court of California stated, "[T]hey contend that the operations of a roller skating rink are entitled to First Amendment protection. They claim that such activities include the 'entertainment' or 'amusement' of

their patrons, whose rights of free speech and assembly assertedly would be affected by the licensing ordinance. However, no case has ever held or suggested that simple physical activity falls within the ambit of the First Amendment, at least in the absence of some element of communicating or advancing ideas or beliefs." (Emphasis added)

ILLINOIS

People v. Goldman
7 Ill. App. 3d 253 (1972)
Appellate Court of Illinois, Fourth District

(**Although the following case involved only the promotion of a swingers club and the premises were apparently not used for swingers club activities, this case would apply to premises wherein swingers clubs were advertised or promoted.)

The case involved a place known as "Adult Book and Cinema Shop" which was issued a temporary injunction from displaying and disseminating pornography and promoting a swingers club. The state statute, Public Nuisance Act, was at issue in the case and the relevant section read as follows:

> That all buildings and apartments, and all places, and the fixtures and movable contents thereof, used for purposes of lewdness, assignation, or prostitution, are hereby declared to be public nuisances, and may be abated as hereinafter provided. The owners, agents, and occupants of any such building or apartment, or of any such place shall be deemed guilty of maintaining a public nuisance, and may be enjoined as hereinafter provided.

The court held that the defendant shop did not engage in activity that the state's statute was meant to curb, namely houses of prostitution.

The court said "this statute is aimed solely and only at houses of prostitution. Only if we can equate the statutory 'lewdness' with 'obscenity' would we be justified in characterizing 'places' for its dissemination and display as public nuisances." The court concluded that the Act does not cover the activity in the bookstore, and added "The fact that a place, in addition to disseminating and displaying obscene materials is also a place where a cognate activity, a 'swingers club' is promoted, does not alter the situation in our opinion."

NEVADA

Las Vegas Nightlife, Inc. v. Clark County
38 F.3d. 1100 (1994)
(United States Court of Appeals for the Ninth Circuit)

(**Please note, although this is not a swingers club case, it reinforces the concept that sexual activity, absent an expressive element, does not enjoy First Amendment protection.)

County legislation that regulated adult nightclubs was challenged as a violation of free speech by plaintiffs. The businesses, by plaintiffs' own admission, were adult nightclubs that offered no dancing or entertainment.

According to the facts as quoted by the court:

"The plaintiffs' evidence shows only commercial activities conducted by women … These activities occur either in a completely public area or in the so-called private rooms, which according to the plaintiffs' own evidence allow visual and aural monitoring and are in fact constantly monitored by other employees."

The court held for the county and sheriff defendants, and said that in order to claim freedom of speech protection, plaintiffs had to show that the county's regulation reached "a substantial amount of constitutionally protected conduct." The court held that the adult nightclubs, which offered no "exotic dancing," failed to show that their business involved substantial conduct qualifying for free-speech protection and that "Ordinary commercial activity of the kind conducted by the clubs is subject to governmental regulation without offending the First Amendment."

**Also relevant is an escort services case *IDK, Inc. v. Clark County*, 599 F.Supp. 1402 (1984), in which the U.S. District Court for the District of Nevada held that the right of association does not extend to purely commercial relationships.

NEW MEXICO

State v. Hall
704 P.2d 461 (1985)
(Court of Appeals of New Mexico)

The defendant was an employee of a swingers club, the Club of Albuquerque, and a bouncer for the party house that was a meeting place for those who attended the swingers' club parties. Evidence was admitted that women were hired to take care of the party house on condition that they engage in sex with club members.

Testimony of two women proved defendant's conduct as culpable under the state statute. One woman testified that she was paid for sex and another described the defendant as a pimp who prodded the women like cattle. This was sufficient evidence that defendant managed and maintained a place where prostitution was allowed and was sufficient evidence to support the promotion charge and showed enough cooperation between defendants to support conspiracy charges.

The club maintained an office and a party house at separate locations and advertised in papers and when people answered an ad they were invited to the office where the club was described to them. Various membership prices were available depending on whether the person wanted a one-night party or a longer membership. The membership allowed members to use the club house to party and engage in sex.

The court held that evidence that a woman was paid by defendant for a specific act of having sex with swingers' club members and that defendant and codefendant hired

women to take care of party house on condition that they attend parties and have sex with club members was sufficient to support defendant's conviction on promoting prostitution. Promoting prostitution is proscribed in NMSA 1978, Section 30-9-4. Jury was instructed that prostitution was sex for hire.

NEW YORK

City of New York v. New Saint Mark's Baths
497 N.Y.S.2d 979 (1986)
(Supreme Court of New York, Special Term, New York County)

Plaintiff brought a nuisance action to close defendant's homosexual bathhouse citing a risk to public health. Defendants claimed the city's move violated their rights of privacy and association.

The Supreme Court of New York, Special Term, New York County, held in favor of city plaintiff because of the compelling state interest in preventing the spread of AIDS. Also, closing the business was the most reasonable remedy available and the impact on defendants' rights were tangential to the risk of public health.

The State Sanitary Code prohibits establishments with facilities "... available for the purpose of [high risk] sexual activities... such facilities shall constitute a public nuisance dangerous to the public health." The city inspectors, following numerous on-site visits, described 49 acts of high-risk sexual activity, including acts of fellatio, and oral intercourse, occurring at St. Mark's bathhouse.

The court said:

> The privacy protection of sexual activity conducted in a private home *(e.g., Griswold v. Connecticut*, 381 U.S. 479; *Stanley v. Georgia*, 394 U.S. 557; *accord, People v. Onofre,* 51 NY2d 476) does not extend to commercial establishments simply because they provide an opportunity for intimate behavior or sexual release (*Paris Adult Theatre I v. Slaton*, 413 U.S. 49; *Matter of Dora P.*, 68 AD2d 719; *Cherry v. Koch,* 129 Misc. 2d 346; *J.B.K., Inc. v. Caron*, 600 F2d 710, *cert denied* 444 U.S. 1016; *Pollard v. Cockrell*, 578 F2d 1002, 1005). As stated in *Stratton v. Drumm* (445 F Supp 1305, 1309 [U.S. Dist. Ct., D. Conn. 1978]): "privacy and freedom of association … rights do not extend to commercial ventures."

The court continued:

> [S]tate police power has been upheld over claims of 1st Amendment rights of association where the nature of the assemblage is not for the advancement of beliefs and ideas but predominantly either for entertainment or gratification (*People v. Morone*, 150 Cal App 3d Supp 18, 198 Cal Rptr.

316, 318, involving a heterosexual "swinging club", *Sunset Amusement Co. v. Board of Police Commrs.*, 7 Cal 3d 64, 67, 496 P2d 840, 845-846, *appeal dismissed* 409 U.S. 1121, involving a skating rink; *Cornelius v. Benevolent Protective Order of Elks*, 382 F Supp 1182, 1195-1196,

"the associational activities of the Elks and Moose are purely social and not political and therefore do not come within the core protection of the right to associate"). A tangential impact upon association or expression is insufficient to obstruct the exercise of the State's police power to protect public health and safety (*Daly v. Sprague,* 742 F2d 896, 899; *County of Sullivan v. Filippo*, 64 Misc. 2d 533, 556-557; *People v. O'Sullivan*, 96 Misc. 2d 52, 53).

City of New York v. The New St. Mark's Baths
562 N.Y.S. 2d 642 (1990)
(Supreme Court of New York, Appellate Division, First Department)

On appeal to the Supreme Court of New York, Appellate Division, First Department, the defendants claimed that a right to privacy prohibits regulation of gay sexual activity in private rooms on the premises.

The court held that the right to privacy only applies to private conduct in a non-commercial setting.

New York City v. Big Apple Spa
497 N.Y.S. 2d 988 (1986)
(Supreme Court of New York, Special Term, New York County)

City sought an injunction against the swingers club based on a public nuisance relating to allegations that prostitution was taking place on the premises and also because the club was operating without a certificate of occupancy.

Big Apple Spa, doing business as Plato's Retreat, promoted open sex between consenting patrons. Admission was gained by paying a fee of between $10 and $50 and signing an application at the door. Defendants claimed precautions were taken against prostitution including: a security guard at the door and in the locker room, employee monitoring of patron activities, membership application and card, as well a posting that prostitution is not welcome. Two inspectors from Consumer Affairs were allegedly solicited for sex for money. Accordingly, police officers from the Moral Squad made four arrests for prostitution, but obtained only one prostitution conviction.

The Supreme Court of New York held that one incident of prostitution and the lack of a certificate of occupancy does not constitute a nuisance and denied the city's petition for an injunction.

In relation to the prostitution issue, the court held that the city would have to show a "frequency of the conduct, the knowledge or even encouragement by the defendant of its existence."

Also, the court dismissed the defendant's claim that the club was a private place and was therefore not protected by a constitutional right to privacy, saying, "[T]here is nothing private about Plato's Retreat. Defendant's position would allow the penumbra of privacy to creep over any place where there is a front door to shut."

(**It is significant to note that in the *Big Apple Spa* case the city lost on its prostitution claim and did not make any claim regarding a public health hazard relating to the spread of AIDS. However, newspaper accounts record the permanent closure of the club as occurring in the Mid-80's and an article dated January 1986 reports that the city closed the establishment based on inspectors observing practices associated with the spread of AIDS – although there is no reported case law regarding this closure action.)

Wigginess v. Irwin Fruchtman
482 F. Supp. 681 (1979)
(United States District Court for the Southern District of New York)

Plaintiffs, several "adult physical culture establishments," sought to block New York City from enforcing the city's zoning ordinance regulating such establishments, claiming that it violates the U.S. Constitution. The plaintiffs businesses include massage parlors and a swingers club.

In 1978, New York City amended its zoning resolution requiring that all adult physical culture establishments within the entire city are to close down in one year from the date of the ordinance. An adult physical culture establishment is defined as any establishment, club or business which offers or advertises or is equipped or arranged so as to provide as part of its services massages, body rubs, alcohol rubs, baths or other similar treatment by members of the opposite sex.

Plaintiffs claimed this definition is vague and overbroad, and violated constitutionally protected rights of privacy and association. Also, plaintiffs claimed that the ordinance violated the equal protection clause because it stands contrary to federal laws prohibiting sex-based employment discrimination.

Additionally, plaintiffs argued that the one-year amortization period is unreasonably short, and as such it constituted the taking of private property without just compensation, thus violating the Fifth Amendment.

The court granted defendants' motion to dismiss with respect to all of plaintiffs' claims except the issue involving the one-year amortization before plaintiffs would have to close business, which was set for a trial on the issue of a proper period of time.

The court said:

> The Supreme Court has never recognized a right of privacy for activities such as those carried on in plaintiffs' leisure spas, swingers clubs and health clubs. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), the Court expressly refused to extend the privacy rights it had recognized in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (marital procreation decisions), and *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542

> (1969) (possession of allegedly obscene material in one's own home), to commercial enterprises. The Court's reasoning in *Paris Adult Theatre I* applies equally to Wigginess, Spartacus and Sigelow's leisure spas, to Lea's health club and to New Wave's swingers club. The services of each of these establishments are open by individual purchase or by membership to the general public.
>
> It is also clear that freedom of association does not apply to the activities in question here. That constitutional guarantee has been judicially derived by implication from the express guarantees of the First Amendment and is therefore limited to activities involving speech, press, petition and assembly. See, e.g., *Buckley v. Valeo,* 424 U.S. 1, 15, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958), and L. Tribe, American Constitutional Law S 12-23 (1978).

31 West 21st Street Associates v. Evening of the Unusual, Inc.
480 N.Y.S. 2d 816 (1984)
(Civil Court of the City of New York, New York County)

Landlord brought summary proceeding to evict tenant based on the unlawful use of the premises as "a place of assignation for lewd persons," in violation of N.Y. Real Property Actions and Proceedings Law § 711(5) and for staging obscene performances in violation of the New York obscenity laws.

Patrons of tenant's business, Club O, paid an entrance fee in return for which they were permitted to engage in various sadomasochistic activities combined with sexual conduct. There were no formal membership restrictions and the receptionist's personal judgment prevented entry by prostitutes. Club owner ran ads advertising "swinging" and similar acts in a local newspaper.

The court held that landlord is entitled to a judgment of eviction based on respondent's violations of N.Y. Real Property Actions and Proceedings Law § 711(5).

The court held, "I thus find that petitioner has established that the respondent has violated the obscenity laws in question, therefore constituting an 'illegal act' within the meaning of RPAPL 711 (subd 5)."

As to the obscenity issue, the court said:

> Without hesitation, I find that the conduct at the respondent's premises depicts sexual intercourse, sodomy, sadism and masochism in a lewd and patently offensive manner. … I hold that, applying the relevant standard – the activities taken as a whole at Club O are patently offensive to the average contemporary New Yorker.

The court also held that the term house of assignation for lewd persons is not limited solely to conventional houses of prostitution, but may include facilities where patrons pay an admission fee to engage in various forms of sexual conduct and which encourage and permit sexual activity between consenting adults.

In addition, the court said that the club is a commercial establishment and as such is not entitled to constitutional rights of privacy. The business is not a private club as there were no criteria for membership, entry was gained by paying an entrance fee, and advertisements to the public were placed in a newspaper.

In relation to the tenant's First Amendment claims, the court held:

> [R]espondent argues that the First Amendment protects their right of "free will". Thus a holding in the petitioner's favor, they assert, would hamper their rights of individual free choice. The Supreme Court was also faced with this argument in *Paris* and rejected it. They noted: "We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice – those in politics, religion, and expression of ideas – are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society … The States, of course, may follow such a 'laissez-faire' policy and drop all controls on commercialized obscenity … but nothing in the Constitution *compels* the States to do so with regard to matters falling within state jurisdiction." (The court cited *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63-64 (1973)

TENNESSEE

State v. Lunati
665 S.W.2d 739 (1983)
(Court of Criminal Appeals of Tennessee, at Jackson)

Appellants appealed convictions for charges of attempting to procure females to become prostitutes in violation of the state statute and of engaging in prostitution.

Appellants, Anthony Ernest Lunati and Ralph P. Lunati, were indicted for offenses ranging from prostitution to possession of obscene films. Freewheelin Social Club was charged and convicted of possession of obscene films.

The Lunatis operated the Freewheelin Social Club in Memphis, which is described as a swingers club, wherein the patrons engaged in sexual activities. Two undercover police officers infiltrated the club and for a small fee were allowed entry. Each night they paid the fee and signed a license agreement, which meant they agreed to comply with the rules of the club and agreed not to bring drugs on the premises.

According to the case, the officers witnessed the showing of films depicting sexual intercourse, oral sex and masturbation, which were shown each night the officers were there. The officers also witnessed games, such as guessing measurements of the women, and strip spin-the-bottle. There were three bedrooms in which mattresses were

spread on the floors and participants were invited to go to the bedrooms to engage in sexual intercourse in pairs and in larger groups. Also, the officers reported that the doors to the bedrooms were never closed so that the officers and other participants were able to view various sexual acts.

On the third night, the club was raided and the management and patrons arrested. The appellants challenged the charges on several grounds, including that the term "licentious sexual intercourse" in TCA § 39-2-631(a), does not conform to due process standard of certainty and violated the rights of individual privacy, expression and association in accordance with the First and Fourteenth Amendments of the United States Constitution and Article 1, Sections 8, 19 and 23 of the Tennessee Constitution.

Ernest Lunati was indicted under TCA § 39-2-632, which provides as follows:

> It shall be unlawful to engage in, or to knowingly aid or abet in, prostitution or assignation or to procure or solicit or to reside in, enter, or remain in any vehicle, trailer, conveyance, place, structure, or building for the purpose of prostitution or assignation, or to keep or set up a house of ill fame, brothel or bawdy house, or to receive or direct any person for purposes of prostitution or assignation into any vehicle, trailer, conveyance, place, structure or building, or to permit any person to remain for the purpose of prostitution or assignation in any vehicle, trailer, conveyance, place, structure, or building, or to direct, take, or transport, or to offer or agree to take or transport, or to aid or assist in transporting or directing any person to any vehicle, conveyance, trailer, place, structure, or building, or to any other person with knowledge or having reasonable cause to believe that the purpose of such directing, taking or transporting is prostitution or assignation, or to lease or rent or contract to lease or rent any vehicle, trailer, conveyance, place, structure, or building, or part thereof, believing that it is intended to be used for any of the purposes herein prohibited, or to knowingly aid, abet, or participate in the doing of any of the acts herein prohibited.

The law's definition of prostitution was also challenged. The statute provided that:

> The term "prostitution" shall be construed to include the giving or receiving of the body for sexual intercourse for hire (or for licentious sexual intercourse without hire).

The parenthetical clause is the definition under which the Lunatis were charged and they asserted that the term "licentious sexual intercourse without hire" is too vague and therefore violates due process.

The appellants also contended that the right of privacy extends to sexual behavior between consenting adults. The appellants argued that the swingers parties were held in a

private home and only involved consenting adults and therefore the state had no right to intrude and that it left too much discretion with arresting officers so that conceivably even married couples or unmarried people engaging in sexual activity could be arrested.

The court held, as to the vagueness claim, that the statute was not so vague that "men of common understanding would have any difficulty ascertaining that these commercially operated swingers parties are included within the term. The statute is constitutional and this issue has no merit." The court also said that the term "licentious" can be readily ascertained and that it is not necessary to resort to legal research materials and can be referenced in any dictionary, adding that the phrase "licentious sexual intercourse" must be interpreted within its context, i.e.: in the statute dealing with prostitution.

As to the right of privacy claim, the court held that the "appellant's contention that the acts were committed in private is patently without merit." The court pointed to several facts that indicated that it was not a private place so as to afford it a right to privacy, namely that the club was widely advertised as a "Swingers Party" on large billboards and signs along busy streets and that for an admission fee and a signing of a license agreement participants were admitted to watch or engage in sexual activities.

Also, the court said, "This was a 'public' facility where members of the public were admitted and clearly was not a private party in a private home. There was no violation of the appellant's right of privacy and this issue has no merit."

And finally, the court cited a case decided by the Supreme Court of Tennessee, at Knoxville (*City of Chattanooga v. McCoy*, 645 S.W.2d 400 (1983)), "[W]hich upheld the constitutionality of a Chattanooga city ordinance prohibiting certain sexual conduct in "public places". Among the definitions of "public place" contained in the ordinance were "private, fraternal, social, golf or country clubs."

TEXAS

Wishnow v. Texas Alcoholic Beverage Commission
757 S.W.2d 404 (1988)
(Court of Appeals of Texas, Fourteenth District, Houston)

Appellant, Bernard Wishnow d/b/a Wish's Club and Restaurant, admitted that his bar was a club for swingers or spouse-swappers, according to the case. Undercover Texas Alcoholic Beverage Commission agents visited the club in question several times and found incidents of indecent exposure by several patrons of the club and the possession, sale and delivery of cocaine to an agent by a club employee.

The Texas ABC order suspended club owner's mixed beverage and late hours permits for 60 days due to violation of ABC code §§ 11.61(b)(7) and 104.01(2), which states that the commission may suspend or cancel a license if it is found that the place or manner in which licensee conducts his business warrants the cancellation or suspension based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency; and (104.01) that no person authorized to sell beer may engage in or permit conduct on premises which is lewd, immoral, or offensive to public decency, including, but not limited to, the exposure of a person or permitting a person to expose his person.

Appellant was also charged with violating the Texas lewdness statute. Court held the lewdness statute was not vague as to the conduct in the case and that similar conduct has been held to violate the statute.

The court held that regardless of whether the members actually engage in sexual conduct at the club or off premises, the owner is charged with notice of the potential for this type of activity since it is a sexually oriented business and therefore his claim that he did not see the actual acts of exposure is no defense. The proper test of whether a licensee permits certain conduct is not his actual observation or knowledge but rather whether he knew or should have known of them.

The court also held that the code passed a vagueness and due process challenge despite the fact that code did not define the words "lewd, immoral, exposure of person and offensive to public decency."

N.W. Enterprises v. City of Houston
27 F.Supp.2d 754 (1998)
(United States District Court for the Southern District of Texas, Houston Division)

The U.S. District Court for the Southern District of Texas, Houston Division, held that adult encounter parlors do not enjoy First Amendment protection.

The case involved a challenge to Houston's amendments to its sexually oriented business ordinance by numerous businesses, including adult modeling studios and possibly adult encounter parlors, as well as adult cabarets, adult theaters, adult bookstores, etc.

The Houston ordinance included "adult encounter parlor" among its definition of sexually oriented businesses.

The court held that adult encounter parlors, like adult modeling studios and adult tanning salons, are not covered under the First Amendment and a rational basis review will be applied to such businesses, and said, "The only types of adult businesses to which the Supreme Court has expressly extended First Amendment protection are adult bookstores, adult movie theatres, adult video stores, and enterprises that feature nude dancing."

The court said these types of enterprises are attempting to "piggyback on the First Amendment claims of the other plaintiffs simply because they provide nudity," and these businesses provided no evidence of any constitutionally protected "modes of expression." The court held that only a rational basis review was applicable, and said that, "When an entity does not receive special constitutional protection and rational basis review applies, the court may hypothesize permissible objectives and accept naked assertions." Therefore, the court held, all provisions of the ordinance as applied to enterprises not covered by the First Amendment, are constitutionally valid.

The court cited the language in *FW/PBS v. City of Dallas,* 493 U.S. 215 (1990), wherein "escort agencies and sexual encounter centers" received mention, saying that the Supreme Court noted that such businesses are not "purveying sexually explicit speech" and are not protected by the First Amendment.

The court also cited a 1980 Fifth Circuit decision, *Stansberry v. Holmes*, 613 F.2d 1285, and is quoted as saying that the Fifth Circuit, "expressly declined to extend First Amendment protection to 'massage parlors, nude studios, modeling studios, love parlors, and other similar commercial enterprises.' There the [Fifth Circuit] court concluded that,

because the Supreme Court had not extended heightened protection to these types of businesses, 'no First Amendment interests are at stake here.'"

The court also invoked the decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) with the following: "The [Supreme] Court expressly rejected the proposition that nudity itself constitutes protected expressive activity."

The *N.W. Enterprises* court continued with a direct quote from *Barnes* with the following:

> Although such performance dancing is inherently expressive, nudity *per se* is not. It is a condition, not an activity, and the voluntary assumption of that condition, without more, apparently expresses nothing beyond the view that the condition is somehow appropriate to the circumstances. But every voluntary act implies some such idea, and the implication is thus so common and minimal that calling all voluntary activity expressive would reduce the concept of expression to the point of the meaningless.

The court also quoted from a 1995 Fifth Circuit case, *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, with the following: "nudity is protected speech only when combined with some other mode of expression which itself is entitled to First Amendment protection."