Approved: 2/25/09
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on February 9, 2009, in Room 143-N of the Capitol.

All members were present except:
Representative Jason Watkins- excused
Representative Kevin Yoder- excused

Committee staff present:
Melissa Doeblin, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the committee:
Bill Colby, Kansas Judicial Council-End of Life Decisions Advisory Committee
Honorable Judge Tony Powell, Kansas Judicial Council-End of Life Decisions Advisory Committee
Jerry Slaughter, Kansas Medical Society
Sandy Kuhlman, Kansas Hospice Palliative Organization
Mae Lovell, AARP Kansas
Steve Sutton, Board of Emergency Medical Services
Deborah Stern, Kansas Hospital Association
Pam Scott, Kansas Funeral Directors Association
Senator Terry Bruce
Representative Raj Goyle
Kris Ailslieger, Kansas Attorney General's Office
Ann Swegle, Kansas County and District Attorney Association
Phillip Cosby, National Coalition for the Protection of Children and Families
Scott Bergthold, Attorney from Tennessee, via phone,
Charles O'Hara, Attorney, Wichita, Kansas
Ron Hein, Motion Picture Association of America
Philip Bradley, Kansas Licensed Beverage Association
Representative Joe Patton
Dougles G. Zillinger, Property Owner, Phillips and Graham Counties,
Jeffrey Dunaway, Homeowner
Wes Ashton, Black Hills Energy and on behalf of various utilities
Dan Jacobson, AT&T Kansas
Mike Murry, EMBARQ

Others attending:
See attached list.

The hearing on **HB 2109 - Kansas uniform health care decisions act** was opened.

Proponents:
Bill Colby, a member of the Kansas Judicial Council-End of Life Decisions Advisory Committee, appeared before the committee as a proponent and provided an overview of the bill. In December 2005, the Judicial Council assigned to its End of Life Decisions Advisory Committee the task of reviewing Kansas statutes relating to durable powers of attorney for health care decisions and other advance directives with the goal of consolidating these statutes into a single act, along with new provisions as appropriate. Mr. Cosby provided six concepts the new Act was built around. (Attachment 1)

Honorable Judge Tony Powell, also a member of the Kansas Judicial Council-End of Life Decisions Advisory Committee, also testified in support of the bill. He said the bill recognizes several important provisions such as the right of an individual to decide all aspects of his or her health care, second the bill recognizes the right

of an individual to tailor the scope of this agency authority as broadly or as narrowly as the individual chooses and give such powers to an agent and third, simplifies and facilitates the ability of an individual to issue an advance directive. In order to avoid the controversy which surrounded the Terri Schiavo case, an individual must clearly and specifically authorize the discontinuation of food and water. The bill also allows health care providers to decline to comply with a health care decision for reasons of conscience, and the legislation does not authorize mercy killing, assisted suicide or euthanasia. (Attachment 2)

Jerry Slaughter, Kansas Medical Society, appeared in support of the bill. He also offered several suggested amendments that he believes would add greater clarity to the bill. (Attachment 3)

Sandy Kuhlman testified on behalf of Kansas Hospice and Palliative Care Organization and the Kansas LIFE Project, in support of the bill and also spoke on the repeal of the Pre-Hospital DNR directive and stated the only reliable substitute is Physician orders. She said one model gaining recognition in many states is the POLST (physician orders for life sustaining treatment) paradigm. (Attachment 4)

Mae Lovell, spoke in support of the bill on behalf of the AARP Kansas Executive Council and stated the AARP believes all sates should enact laws with a comprehensive approach to health care decision making, such as the provisions in the Uniform Health Care Decisions Act. (Attachment 5)

Steve Sutton, Board of Emergency Medical Services, supports the bill and said it does not affect the operations training, or scope of practice of emergency medical service attendants, however, the bill does afford the Board the ability in the future to revise its current regulations in relation to do not resuscitate orders (DNR) and living wills. He stated the language will allow the Board to continue its discussions on implementing a requirement for the development of protocols to address the overall provisions of "advanced directives". (Attachment 6)

Deborah Stern, Kansas Hospital Association spoke in favor of the bill and said it has been positively received by the health care community, but she also asked that consideration be given to revisions to Section 8, 9 and 14. (Attachment 7)

Neutral:
Pam Scott, Kansas Funeral Directors and Embalmers Association spoke as a neutral position on the bill because the bill does not contain provisions to allow the agent for health care decisions to make decisions concerning autopsy or disposition of the body of the principal upon death. Therefore, she offered several proposed amendments that would allow the intent of K.S.A. 65-1734 to remain intact. (Attachment 8)

There were no opponents.

The hearing on **HB 2109** was closed.

Hearing on **HB 2250 - Rules of evidence; admissibility of prior acts or offenses of sexual misconduct** was opened.

Proponents:
Senator Terry Bruce spoke in support of the bill and said KSA 60-455 must be changed to allow for the successful prosecution of heinous crimes. He stated the bill is an admirable goal and a good step forward, however, the court could still apply the strikingly similar standard. He offered a draft of a Senate bill he had worked on to address the elevated standard issue created in State v Prine and suggested it could be used to help address this concern. (Attachment (9)

Representative Raj Goyle supported the bill and stated the Kansas Supreme Court recognized this flaw in our evidentiary laws in the State v Prine and explicitly invited the Legislature to take action to close this loophole. Simply put, prior bad acts of sexual misconduct should be allowed to be entered as evidence. (Attachment 10)

Kris Ailslieger, Assistant Solicitor General on behalf of the Kansas Attorney General's office stated the Attorney General's office strongly supports this bill. The language in this bill came primarily from the federal rules and

the advantage of using this language is that is has already been tested in the courts. (Attachment 11)

Ann Swegle, Deputy District Attorney spoke as a neutral on the bill on behalf of Nola Tedesco Foulston, District Attorney Eighteenth Judicial District and the Kansas County and District Attorneys Association. They are pleased that consideration is being given to make K.S.A. a more useful tool but intend to offer suggestions as to how the statue should be further amended. (Attachment 12)

The hearing on **HB 2250** was closed.

The Hearing on **HB 2144 - Establishing the community defense act** was opened.

Proponents:
Phillip Cosby, National Coalition for the Protection of Children and Families, appeared before the committee as a strong proponent and pointed out the negative effects of Sexually Oriented Businesses(SOB)on communities. He further stated communities are overwhelmed or intimidated and do not have the means to stand up against this industry that boasts their revenue is greater than all professional sports, football, baseball and basketball combined. Mr. Cosby also stated this statute was crafted by one of the most successful constitutional SOB ordinance attorneys in the nation. (Attachment 13)

Scott Bergthold, Attorney from Chattanooga, Tennessee, testified as a proponent via phone, discussed the types of secondary effects these businesses have on the community (provided each committee member with a supporting CD),and also provided information about cases that upheld similar regulations. (Attachment 14)
Note: Attachment 14 includes a list of contents of six three ring notebooks of additional supporting documentation along with a CD. This information may be reviewed by contacting Jerry Ann Donaldson, Legislative Research Department at 785-296-3181.

Opponents:
Charles O'Hara, Attorney, Wichita, Kansas spoke as an opponent and stated there is no need for a state law and that the local community standards should control and gave examples for the communities of Wichita and Derby.(Attachment 15)

Ron Hein appeared as an opponent on behalf of Motion Picture Association of America (MPAA). He stated the MPAA administers the Classification and Rating Administration (CARA) which awards the familiar G, PG, PG-13, R, or NC-17 ratings to motion pictures to help parents determine which motion pictures their children should see. He respectfully urges the committee to either delete the reference to the MPAA and the reference to the ratings system and such ratings, in Section 3(e), or to recommend the bill adversely. (Attachment 16)

Philip Bradley, Kansas Licensed Beverage Association, spoke as an opponent stating this bill covers several areas including retail establishments and also entertainment venues that should be split into separate measures. He urges the committee to not advance this bill but if the committee wanted to pursue this act, suggested a sub-committee be appointed and offered to work with such group. (Attachment 17) Note: Attachment 17 includes a list of contents of thirteen spiral bound notebooks of additional supporting documentation. This information may be reviewed by contacting Jerry Ann Donaldson, Legislative Research Department at 785-296-3181.

Written:
John C Peterson, Capitol Strategies, LLC submitted written testimony as an opponent on behalf of the following: Tuck Duncan, Kansas Wine and Spirits Wholesalers Association; Larrie Ann Lower, Wine Institute; Neal Whitaker, Kansas Beer Wholesalers Association, John Bottenberg, MillerCoors LLC; Philip Bradley, Kansas Licensed Beverage Association; John Peterson, Anheuser-Busch Companies Inc. (Attachment 18)

The hearing on **HB 2144** was closed.

The hearing on **HB 2167 - Landowners' bill of rights, utility company work on property** was opened.

Proponents:

Minutes of the House Judiciary Committee at 3:30 p.m. on February 9, 2009, in Room 143-N of the Capitol.

Representative Joe Patton spoke as a proponent of the bill because several constituents had negative encounters with utility companies when entering the property owners easement land and the intent of this bill is to provide some guidelines for this encounter to allow some input from the homeowner while facilitating good customer service. He also suggested sub-contractors may not be following the policy of the actual utility company. (Attachment 19)

Written:
Dougles G. Zillinger, Property Owner, Phillips and Graham Counties, provided written testimony in support of this bill, regarding an experience with an Oil Industry. (Attachment 20)

Jeffrey Dunaway, provided written testimony in support of this bill as a homeowner. (Attachment 21)

Opponents:
Wes Ashton, Black Hills Energy testified in opposition of the bill. With respect to the committee to avoid repetition, he also spoke on behalf of Atmos Energy, Kansas Gas Service-a division of Oneok, Midwest Energy, Westar, KEC, KMU and KCP&L. He stated the written notice would create undue burden and the KCC already addresses any customer complaints and monitors utility companies. (Attachment 22)

Dan Jacobson, President of AT&T Kansas also testified in opposition to the bill and said they leave a bright colored door hanger notice which has a contact phone number on it. Their employees have card identification to identify themselves and are also regulated by the KCC. (Attachment 23)

Mike Murry, EMBARQ spoke in opposition of the bill and said it would cause delays in service. He also pointed out this bill would not cover cable television companies as they are not a utility. (Attachment 24)

Written:
Darci Meese, Water District # 1, Johnson County provided written testimony in opposition of the bill. (Attachment 25)

Ron Gaches, Gaches, Braden and Associates, provided written testimony in opposition, on behalf of Southern Star Pipelines. (Attachment 26)

The hearing on **HR 2167** was closed.

The next meeting is scheduled for February 10, 2009.

The meeting was adjourned at 5:35 p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: February 9, 2009

NAME	REPRESENTING
DAN JACOBSEN	AT & T
Phillip Cosby	NCPC+F
Pam Scott	KS funeral Directors Assn
John Carney	KHPCO
BILL COLBY	Center for Practical Bioethics
STEVE SUTTON	KS BOARD OF EMER MED SVCS
Phil Bradley	KLBA
Sandy Kuhlmen	Kansas LIFE Project & KHPCO
[illegible]	[illegible]
Kimberly [illegible]	KMU
Chris [illegible]	KHCA
David Dayvault	KIOGA
DEBORAH STERN	KHA
[illegible] Smith	SCL Health System
Mick Urban	Kansas Gas Service
LON STANTON	Northern NATURAL GAS
Mark Schreiber	Westar Energy
Whitney Damron	KS Gas Service
Mike Murray	Embarq
Scott Jones	KCP&L
[illegible]	Doches Braden

Mack Smith, Exec. Sec. KS St Bd of Mortuary Arts

Jean Miller, Capitol Strategies

Kansas House Judiciary Committee
Testimony of William Colby on H.B. 2109
February 9, 2009

Chairman Kinzer, and members of the House Judiciary Committee, good afternoon. My name is Bill Colby; I am a lawyer (U. of Kansas, 1982), and currently the Senior Fellow, Law and Patient Rights, at the Center for Practical Bioethics in Kansas City. I live in Prairie Village, Kansas. I have been involved in the questions raised by the intersection of law, medicine and technology since the spring of 1987, when I became the lawyer for Nancy Cruzan and her family. Nancy's tragic case ultimately ended up in the U.S. Supreme Court. In 1990 that case established our right to make decisions about our own medical treatment, including, if we choose, to refuse medical treatment – what some call our constitutional "right to die." I appreciate the opportunity that I've had to serve on the Kansas Judicial Council advisory committee which reviewed the end-of-life laws in Kansas, and appreciate the opportunity to talk to the Committee today about our work.

To start, I thought it might be useful to share some background that sets the foundation, at least for how I think about the laws that affect our decisions at the end of our lives. A generation ago there were no living wills, no healthcare powers of attorney, no state laws defining "death." The issues addressed by H.B. 2109 did not yet exist. The first cardiac ICU in the world was opened right here in Kansas on May 20, 1962. (Kansas would also become the first state to define "brain death," eight years later in 1970.) The seriously-ill patients in that first cardiac ICU took all the treatment the doctor had to offer, and either got better, or died. No questions about the appropriateness of treatment were needed or asked. All treatment available was given, and accepted gladly.

House Judiciary
Date 2-9-09
Attachment # 1

The rapid advance of medical technology has changed that dynamic forever. Consider how unusual these laws are in many ways. Most doctors practice medicine for a living so that they can help people; most patients want that help. The idea of saying "no" to the doctor who wants to help you is new. The idea is also complex, raising fundamental questions for doctors, patients and for society generally: "What is the purpose of medicine? When do we use it? And when should we stop?"

These questions are never black and white; they exist in the gray zones of our society, and people of good will can differ on what the "right" answers are. The advisory committee of the Kansas Judicial Council which reviewed Kansas law brought together Kansans coming at these questions from a variety of viewpoints. Our deliberations, which spanned more than two years, were marked by thoughtful and respectful debate, leading this group to the compromise that is the 2009 Kansas Uniform Health-Care Decisions Act. I believe that this Act, taken as a whole, is a significant step forward for Kansans in a complex area of law.

Thank you.

Anthony J. Powell
District Court Judge
Division 18

Phone: (316) 383-7442
Fax: (316) 383-7560
tpowell@dc18.org
http://dc18.org

DISTRICT COURT
EIGHTEENTH JUDICIAL DISTRICT
SEDGWICK COUNTY COURTHOUSE
525 N. MAIN, 4th FLOOR
WICHITA, KANSAS
67203

TESTIMONY IN SUPPORT OF H.B. 2109

February 9, 2009

Mr. Chairman,

It is a pleasure to appear before you today in support of H.B. 2109, the Kansas Uniform Health Care Decisions Act. The bill before the committee represents months of hard work by the End of Life Advisory Committee of the Kansas Judicial Council. H.B. 2109 essentially reworks the patch quilt of current Kansas statutes governing durable power of attorney for health care decisions, living wills, and other advance directives with the goal of consolidating such statutes into a single uniform act. To do this, the Advisory Committee used as a starting point the Uniform Health-Care Decisions Act, and made changes and amendments to it to make it better conform to current Kansas law while at the same time making important improvements. Overall, it is my view that this bill represents a modest improvement over current Kansas law, and perhaps even more importantly, represents a consensus of widely divergent views on a topic that is difficult and gut wrenching. When I think about how difficult it can be to reach consensus on something like tax policy, imagine how even more difficult it is to reach consensus on such an emotional issue as how one makes decisions at the end of life.

As a member of the End of Life Advisory Committee, I am proud of the fact that our committee was able to reach a consensus on the bill before you. Believe me, it was no small achievement. Because it represents a carefully balanced consensus, I urge the Committee to avoid tinkering with it too much. While certainly members of the Judiciary Committee, as representatives of the people, have every right to make changes, I can say that the Committee can have confidence that nearly every possible issue or concern on the matters this bill addresses has been dealt with in some fashion. I would hate to see the modest step forward that this consensus bill represents be stopped because of well meaning efforts to tip the balance of the bill in one direction or another.

While I will not present a complete summary of the bill to you, there are several important provisions in the legislation that I believe merit your support. First, the bill recognizes the right of an individual to decide all aspects of his or her health care, and

House Judiciary
Date 2-9-09
Attachment # 2

give such power to an agent. Second, the bill recognizes the right of an individual to tailor the scope of this agency authority as broadly or as narrowly as the individual chooses. Third, the bill also simplifies and facilitates the ability of an individual to issue an advance directive.

However, the bill also protects the people of Kansas' interest in promoting a culture of life. In order to avoid the controversy which surrounded the Terri Schiavo case, an individual must clearly and specifically authorize the discontinuation of food and water. The bill also allows heath care providers to decline to comply with a health care decision for reasons of conscience, and the legislation does not authorize mercy killing, assisted suicide, or euthanasia.

I urge the Committee to support H.B. 2109. I am happy to stand for questions.

KANSAS MEDICAL SOCIETY
KMS

623 SW 10th Avenue
Topeka KS 66612-1627
785.235.2383
800.332.0156
fax 785.235.5114

www.KMSonline.org

To: House Judiciary Committee

From: Jerry Slaughter
Executive Director

Date: February 9, 2009

Subject: HB 2109; Uniform Health Care Decisions Act

The Kansas Medical Society appreciates the opportunity to appear today in support of HB 2109, which consolidates Kansas law concerning advance directives (e.g. living wills and durable power of attorney) into one act. This bill is the work product of the Judicial Council's End of Life Decisions Advisory Committee, which spent over two years studying existing Kansas law on advance directives. We believe the Committee's decision to combine all relevant Kansas statutes into a comprehensive, uniform act was a sensible approach that will help clarify this area of law, and promote better understanding and use of advance directives.

The public policy behind the use of advance directives is well-established and accepted. The right of a competent individual to accept or decline health care, including decisions to discontinue care that has been initiated, is fundamental. The Uniform Act locates all relevant Kansas law in one place, and simplifies the process for making an advance directive. Additionally, the Act addresses some important concepts such as surrogate decision-making, and the right of health care providers to refuse to provide medically ineffective care, or to comply with a directive for reasons of conscience.

Assuming that the Judicial Council and others will address the background for the policy decisions and issues contained in the bill, we would like to confine our comments to several suggested amendments that we believe add greater clarity to the Act, particularly as it relates to several definitions. We do not believe our amendments alter in any way the substance or effect of the Act. Our suggestions for your consideration are:

1. Amend New Section 2, subsection (c), page 1, lines 28-34, to read as follows:

(c) ''Capacity'' means an individual's ability to understand to a minimally reasonable extent the significant benefits, risks and alternatives to proposed health care and to make and communicate a health care decision with reasonable accommodation, interpreter or assistive technology when needed. A determination of capacity made by a responsible physician pursuant to New Section 3, subsection (f) ~~by a physician that an individual lacks capacity~~ does not constitute a determination that the individual is incompetent as a matter of law.

House Judiciary
Date 2-9-09
Attachment # 3

Our reason for including the new underscored language is that the last sentence in the definition of "capacity" seems to be in conflict with subsection (f) of New Section 3 (page 4, lines13-16), which requires the individual's primary physician to make a determination of capacity. We understand that the Advisory Committee added the final sentence in the definition of "capacity" to distinguish that such a determination is a clinical, not a legal, determination. However, we believe our amendment helps to make it clear that physicians have the responsibility to make a capacity determination under the Act.

2. Amend New Section 2, subsection (n), page 1, lines 30-34, to read as follows:

(n) ''~~Primary~~ Responsible physician'' means a physician designated by an individual or the individual's agent, guardian or surrogate, to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility.

Our suggested change from "primary" to "responsible" is intended to avoid any possible confusion that may occur from the use of the word "primary." Because this word is used very broadly and commonly to designate a physician specialty such as family medicine, pediatrics or internal medicine, we felt that its use in this specific statute could be a bit confusing. We have suggested using the term "responsible" physician instead, and it would need to be substituted in every other place in the Act that refers to "primary physician." The references we found that would need to be changed are in New Section 2 (subsections j, n, and r), New Section 3 (subsection f), New Section 6 (subsection a), and New Section 8 (subsection c).

3. Amend New Section 2, by the addition of a new subsection to read as follows:

(t) "Medically ineffective health care" means medical services or treatment that in the judgment of the health care provider or institution will not provide the patient any significant benefit.

This amendment is being suggested to address the provisions of New Section 8, subsection (f), on page 8, lines 4-7, in which health care providers may decline to provide treatment that is "medically ineffective." Those terms are not defined in the Act, and as such, could create uncertainty and confusion for physicians and others involved in the care and decision-making process. In the commentary accompanying the Act, the uniform law commissioners referred to a definition of "medically ineffective health care," and the suggested definition above was taken from that, with only minor modifications to fit our Act.

4. Amend New Section 2, by the addition of a new subsection to read as follows:

(u) "Principal" means an individual who has granted the power of attorney for health care decisions to an agent.

This amendment adds a definition of the term "principal", as it is referred to several times throughout the portion of the Act (e.g. New Section 3) that addresses the Power of Attorney provisions.

5. Amend New Section 6, subsection (i), page 6, lines 35-38, to read as follows:

(i) An individual with capacity at any time may disqualify another, including a member of the individual's family, from acting as the individual's surrogate by a signed writing or by personally informing the supervising health care provider of the disqualification.

This is obvious, of course, but if a person doesn't have capacity they wouldn't have the ability to make an informed, reasoned decision regarding a surrogate. Adding "with capacity" simply clarifies this point.

6. Amend New Section 10, by the addition of a new subsection (4) as follows:

(4) declining to comply with an individual instruction or health care decision pursuant to the provisions of subsections (e) or (f) of New Section 8.

This suggested language amends the section of the Act that provides protection from civil, criminal or disciplinary action against health care providers when they act in good faith and according to generally accepted health care standards. Our proposed amendment of a new subsection (4) adds to such protection the two provisions that allow health care providers to decline to follow an individual instruction or health care decision based on reasons of conscience, or when it would involve providing medically ineffective health care.

While we do not have a suggested amendment to offer, we do have a question about New Section 14, subsection (e), page 9, lines 33-36. This provision prohibits a surrogate or agent from consenting to admission of the patient to a mental health care institution without express authorization in the individual's directive. Since "mental health care institution" is not defined in the Act, nor specifically in the Care and Treatment Act for Mentally Ill Persons, KSA 59-2945, *et seq.*, which is referenced in subsection (f), the language in subsection (e) could be construed to prohibit the treatment by a psychiatrist or other mental health professional unless the individual's directive *expressly so provides*. We doubt that such a narrow interpretation is intended, but it might be helpful to provide some clarification to avoid conflicts in the future.

Finally, while it is probably necessary to address the issue of medically-assisted nutrition and hydration (New Section 3, subsection (d), page 3-4) separately since it is so controversial, this change is significant and will require quite a bit of education among health care providers and the public to see that it is properly addressed in advance directives. As written, the Act would require an individual to separately initial (authorize) any provision in a directive or power of attorney that could result in withholding or withdrawal of nutrition or hydration.

In summary, we believe the Act is a significant step in the right direction, in that it clarifies and combines all existing Kansas law regarding advance health care directives into one statute. Thank you for the opportunity to offer these comments.

Febr 9, 2009
Judiciary Committee
Kansas House of Representatives
House Bill No. 2109
Public Testimony in Support

Chairman Kinzer and Members of the House Judiciary Committee, I am Sandy Kuhlman and I am here today to testify on behalf of the Kansas Hospice and Palliative Care Organization and the Kansas LIFE Project in support of House Bill No. 2109.

KHPCO and LIFE Project support this measure. We have appreciated the opportunity to have been involved in the Kansas Judicial Council's End-of-Life Committee over the past three years. We support this measure and recognize the possible need for an amendment to address the issue of the disposition of the body.

I would like to limit my remarks to the repeal of the Pre-hospital DNR directive.

- The original law adopted in 1994 was intended to ensure that individuals (or declarants) located outside acute care settings who did not want to be resuscitated during cardiac arrest would not be subjected to those attempts
- The law was to be limited to those individuals who could declare such a wish and sign the document or instruct someone to sign on the declarant's behalf
- The law was not intended to interfere with methods or documents for physicians issuing Do Not Resuscitate **orders.**
- One of the primary purposes of the law was to provide immunity for EMS when those wishes were honored; protecting providers from civil action or claims of unprofessional conduct.

Over time, in some institutional settings, the form has been used to limit care for frail patients who cannot benefit from resuscitation attempts. In those instances, individuals other than the declarant or a person instructed by the declarant have signed the document. The law, however, does not contemplate that type of documentation. The only reliable substitute is Physician orders and we should rely on those.

The repeal of the pre-hospital directive would allow:

1. Adoption of new models which have emerged over the course of the past 15 years to address patient preference and match those preferences to physician orders. One model gaining recognition in many states is the POLST (physician orders for life sustaining treatment) paradigm. A number of Kansas communities are exploring this model.
2. Improvements in documenting a broader array of appropriate treatment interventions. More than ¾ of patients who do not want to be resuscitated do want other forms of life sustaining treatment but studies have shown that out of hospital DNR documents are often interpreted as a do not respond.
3. Surrogate and agents to concur with physician orders on a variety of life sustaining treatment options as conditions change
4. Physician orders to guide conduct by medical personnel for frail patients in all settings. Portability of orders is an essential element of continuity of care that the newer models have integrated into their design. We need that flexibility and portability to provide better care for the frailest among us.

Thank you for your time.

Sandy Kuhlman, RN, Executive Director, Hospice Services, Inc.
424 8th Street; PO Box 116; Phillipsburg, KS 67661; 785-543-2900; skuhlman@hospicenwks.net
Representing The Kansas Hospice and Palliative Care Organization as Chair of the Public Policy Committee
Representing The Kansas LIFE Project as Chair of the Board of Directors

House Judiciary
Date 2-9-09
Attachment # 4

AARP Kansas
555 S. Kansas Avenue
Suite 201
Topeka, KS 66603

T 1-8[illegible]-448-3619
F 785-232-8259
TTY 1-877-434-7598
www.aarp.org/ks

February 9, 2009

The Honorable Lance Kinzer, Chairman
House Judiciary Committee

Reference – HB 2109

Good afternoon Chairman Kinzer and Members of the House Judiciary Committee. My name is Mae Lovell and I am a member of the AARP Kansas Executive Council. We represent the views of our over 375,000 members in the state of Kansas. Thank you for allowing us to present our comments in support of HB 2109.

Currently every state permits competent adults to execute advance directives: living wills and/or durable powers of attorney for health care. These documents allow people to make known their treatment wishes under specific medical circumstances and/or appoint a surrogate decision maker to act for them should they become incapacitated. However, we believe that there are gaps in the laws creating confusion as to which type of directive is most appropriate and questions about the implementation of advance directives by health care providers.

The National Conference of Commissioners on Uniform State Laws has adopted model legislation (the Uniform Health Care Decisions Act) that takes a comprehensive approach to health care decision making.
It includes provisions for:

- oral and written instructions;
- single advance directives that permit health care instructions, as well as directives for choosing an agent to make decisions and appointing a surrogate decision maker in the absence of a more complete advance directive;
- compliance by health care providers and institutions;
- procedures for dispute resolution; and
- portability of advance directives between states.

AARP believes that all states should enact laws with a comprehensive approach to health care decision making, such as the provisions in the Uniform Health Care Decisions Act.

This legislation should:

- protect the right of a terminally ill patient to be treated at all times with dignity, respect and kindness; maintained in a comfortable state without pain; and permitted to refuse medical treatment.
- allow competent adults to execute advance directives (living wills, health care powers of attorney, or combined forms) that allow patients to communicate their medical treatment wishes and/or appoint a surrogate to make treatment decisions for them in the event of their incapacity. Covered treatment decisions should

House Judiciary
Date 2-9-09
Attachment # 5

include (but not be limited to) the use, withholding or withdrawal of artificial nutrition and hydration.

- authorize nonjudicial surrogate decision making in the event that an incapacitated patient has not executed an advance directive.
- include a definition of and nonjudicial process for determining incapacity;
- detail who, in order of priority, may make health care decisions for the incapacitated individual, including provisions for "unbefriended" patients without relatives or friends to serve as decision makers;
- establish the standard that surrogates should use in making decisions—preferably the patient's expressed wishes, the "substituted judgment test" (i.e., what the patient would have wanted, if the wishes were known to the surrogate), or if those wishes are not known, the patient's best interests, based on all relevant information available to the surrogate;
- include provisions for the resolution of disputes that may arise; and
- provide that a surrogate decision maker's authority is equal to that of an agent or proxy appointed in an advance directive.
- establish a nonjudicial means (such as mediation) for resolving disputes that may arise in the implementation of advance directives,
- provide guidelines for advance directives—such as nonhospital "do not resuscitate" orders—that protect incapacitated adults' rights to refuse life-sustaining treatment when they are not in a health care facility, and
- ensure that any advance directives accompany an incapacitated individual moved from one facility to another.

Therefore, AARP Kansas supports HB 2109, the Kansas Uniform Health Care Decisions Act.

We respectfully request your support of HB 2109. We appreciate the opportunity to provide this testimony.

Thank you.

KANSAS

DENNIS ALLIN, M.D., CHAIR
ROBERT WALLER, EXECUTIVE DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

BOARD OF EMERGENCY MEDICAL SERVICES

Testimony

Date: February 7, 2009

To: House Judiciary Committee

From: Steve Sutton, Deputy Director

RE: 2009 House Bill 2109

Chairman Kinzer and members of the House Judiciary Committee, my name is Steve Sutton. I am the Deputy Director for the Kansas Board of Emergency Medical Services (KBEMS). I would like to provide testimony on 2009 House Bill 2109.

2009 House Bill 2109 would amend the Kansas uniform health care decisions act. The bill does not, as introduced, affect the operations, training, or scope of practice of emergency medical service attendants. However, the bill does afford the Board the ability in the future to revise its current regulations (109-2-5 (x)(4) in relation to do not resuscitate orders (DNR) and living wills. The language will allow the Board to continue its discussions on implementing a requirement for the development of protocols to address the overall provisions of "advanced directives".

The Board supports the concept of the bill

Conclusion

Thank you for allowing me to testify in support of House Bill 2109.

LANDON STATE OFFICE BUILDING, 900 SW JACKSON STREET, ROOM 1031, TOP
Voice 785-296-7296 Fax 785-296-6212 www.ksbems.o

Thomas L. Bell
President

TO: HOUSE JUDICIARY COMMITTEE

FROM: DEBORAH STERN
VICE PRESIDENT CLINICAL SERVICES AND GENERAL COUNSEL

DATE: FEBRUARY 9, 2009

RE: HOUSE BILL 2109 - KANSAS UNIFORM HEALTH CARE DECISIONS ACT

The Kansas Hospital Association (KHA) appreciates the opportunity to comment regarding the provisions of House Bill 2109. We have distributed this bill to our members and this legislation is viewed as a step in the right direction.

We have received some comments, however, that we would like to emphasize. Section 8 states that a health care provider may decline to comply with an individual instruction or health care decision for reasons of conscience. In this instance, the health care provider would continue to treat the patient until the patient is transferred to another health care provider and/or institution. The concern voiced is that it may be difficult or impossible to find another health care provider or facility willing to take the patient.

Although Section 9 gives a person authorized to make health care decisions the same rights as the patient to request, receive, examine, copy and consent to the disclosure of medical or any other health care information, we read this as not permitting this authorized person the ability to obtain medical records of the deceased patient without going through a probate proceeding. Including language that would permit a spouse, next of kin, or surrogate decision maker the authority after the patient dies, to obtain the medical records of the deceased without the requirement to take their request through a probate proceeding would erase the burden that our current law requires.

Section 14 (e) states that an agent or surrogate cannot consent to the admission of an individual to a mental health care institution unless the advanced directive expressly so provides. Since an agent or surrogate is the person specifically chosen by the patient, who may not have anticipated the future need for mental health services, we would request that this issue be revisited and consideration given to permit an agent or surrogate to have the authority to consent to mental health services for a patient.

While this proposed legislation has been positively received by the health care community, we ask that the above revisions be given due consideration. Thank you.

Kansas Hospital Association
215 SE 8th Ave. • P.O. Box 2308 • Topeka, KS • 66601 • 785/233-7436 • Fax: 785/2

1200 Kansas Ave. Topeka, KS 66612 785.232.7789
785.232.7791 fax www.KSFDA.org

Testimony Before the
House Judiciary Committee
on House Bill No. 2109
By Pam Scott, Executive Director
Kansas Funeral Directors and Embalmers Association

February 9, 2009

On behalf of the Kansas Funeral Directors and Embalmers Association (KFDA), I appreciate the opportunity to appear before you today concerning House Bill No. 2109 which proposes to overhaul the Kansas Power of Attorney for Health Care Decisions law.

This bill is of interest to the KFDA because K.S.A. 65-1734, which sets forth who has the right to control the disposition of a deceased body, currently lists an agent for health care decisions as the person with paramount authority to make disposition decisions. Unfortunately due to oversight, the bill before us does not contain provisions to allow the agent for health care decisions to make decisions concerning autopsy or disposition of the body of the principal upon death. Therefore, we are offering amendments to several sections of the bill to make the new law work with disposition issues which are somewhat different than health care issues. The proposed amendments are as follows:

New Sec. 1: We would like to see a definition of "disposition of the body" added to the bill. Disposition of the body means any lawful manner of disposition including arranging for a funeral service, burial, cremation, entombment or anatomical donation.

New Sec. 3: It is necessary to amend subsection (b) to provide that a power of attorney for health care can include the authority to make decisions concerning disposition of the body. Also, it is necessary to add language to state that the death of the principal does not invalidate the power of attorney or the agent's ability to make decisions concerning disposition of the body. These provisions were left out of the new act although they are contained in current law.

New Sec. 4 We also have some concerns with the revocation provisions contained in New Section 4. In particular, we are concerned with subsection (a)(3) which allows for revocation by a verbal expression of intent to revoke. Oftentimes when a power of attorney for health care is used to direct disposition, there is a contentious

House Judiciary
Date 2-9-09
Attachment # 8

family situation. It would be easy for one person who did not like the fact that another was named the agent to contend that the power of attorney for health care was verbally revoked. Such an assertion may be difficult to prove or disprove since the principal is now dead. Therefore, we would recommend that language be added to provide that unless the writing is received by the supervising health care provider prior to death, the verbal revocation is not effective as to the agent's authority as to disposition of the body upon death.

New Sec. 6 The surrogate provisions in this section of the bill conflict with K.S.A. 65-1734. Therefore, we are proposing that we add language to Sec. 6 to assure that the surrogate language does not apply to disposition of body decisions. Such decisions only should be made pursuant to a durable power of attorney or according to K.S.A. 65-1734. Another alternative would be to provide that this section shall not apply to the authority to make decisions concerning disposition of a person's body.

New Sec. 10 The current Durable Power of Attorney for Health Care Decision law, K.S.A. 58-625 et seq., contained a provision providing immunity from liability for those acting in good faith without knowledge of the invalidity of the durable power of attorney. The KFDA asked for those provisions to be added in 1994. The way the immunity provisions are written in the new law, it does not appear they apply to funeral establishments or funeral homes. Therefore we are offering language similar to that in current law to extend the protection. We are not married to the language but would like to be included with others in receiving protection.

We respectfully ask that these provisions be included in any new power of attorney for health care law so that decisions concerning disposition of a body can be made by an agent under the act as it was in the previous Durable Power of Attorney for Health Care Decisions law. This will allow the intent of K.S.A. 65-1734 to remain intact.

Thanks you for your time and I will be happy to answer any questions.

HOUSE BILL No. 2109

By Committee on Judiciary

1-27

AN ACT concerning health care; enacting the Kansas uniform health care decisions act; amending K.S.A. 39-1401, 40-2130 and 65-1734 and K.S.A. 2008 Supp. 58-654, 59-3075, 65-2837 and 65-4974 and repealing the existing sections; also repealing K.S.A. 58-625, 58-626, 58-627, 58-628, 58-629, 58-630, 58-631, 58-632, 65-28,101, 65-28,102, 65-28,103, 65-28,104, 65-28,105, 65-28,106, 65-28,108, 65-28,109, 65-4941, 65-4942, 65-4943, 65-4944, 65-4945, 65-4946, 65-4947 and 65-4948 and K.S.A. 2008 Supp. 65-28,107.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. Sections 1 through 16, and amendments thereto, shall be known and may be cited as the Kansas uniform health care decisions act.

New Sec. 2. As used in the Kansas uniform health care decisions act:

(a) "Advance health care directive" means an individual instruction or a power of attorney for health care.

(b) "Agent" means an individual designated in a power of attorney for health care to make a health care decision for the individual granting the power.

(c) "Capacity" means an individual's ability to understand to a minimally reasonable extent the significant benefits, risks and alternatives to proposed health care and to make and communicate a health care decision with reasonable accommodation, interpreter or assistive technology when needed. A determination by a physician that an individual lacks capacity does not constitute a determination that the individual is incompetent as a matter of law.

(e)~~(d)~~ "Guardian" means a judicially appointed guardian as defined in subsection (e) of K.S.A. 59-3051, and amendments thereto, having authority to make a health care decision for an individual.

(f)~~(e)~~ "Health care" means any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition.

(g)~~(f)~~ "Health care decision" means a decision made by an individual or the individual's agent, guardian or surrogate, regarding the individual's health care, including:

(d) "Disposition of the body" means any lawful manner of disposition including arranging for a funeral service, burial, cremation, entombment or anatomical donation.

8-3

(1) Selection and discharge of health care providers and institutions;

(2) approval or disapproval of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate; and

(3) directions to provide, withhold or withdraw nutrition and hydration provided through medical intervention and all other forms of health care.

(h) ~~(g)~~ "Health care institution" means an institution, facility or agency licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business.

(i) ~~(h)~~ "Health care provider" means an individual licensed, certified or otherwise authorized or permitted by Kansas law to provide health care in the ordinary course of business or practice of a profession.

(j) ~~(i)~~ "Individual instruction" means an individual's direction concerning a health care decision for the individual.

(k) ~~(j)~~ "Life-sustaining procedure" means any medical procedure or intervention which, when applied to a patient, would serve only to prolong the dying process and where, in the judgment of the primary physician, death will occur whether or not such procedure or intervention is utilized. "Life-sustaining procedure" shall not mean the administration of medication or the performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain.

(l) ~~(k)~~ "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(m) ~~(l)~~ "Physician" means a person licensed to practice medicine or surgery by the state board of healing arts.

(n) ~~(m)~~ "Power of attorney for health care" means the designation of an agent to make health care decisions for the individual granting the power.

(o) ~~(n)~~ "Primary physician" means a physician designated by an individual or the individual's agent, guardian or surrogate, to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility.

(p) ~~(o)~~ "Reasonably available" means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the person's health care needs.

(q) ~~(p)~~ "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

(r) ~~(q)~~ "State" means a state of the United States, the District of Columbia, the commonwealth of Puerto Rico or a territory or insular possession

H-8

bject to the jurisdiction of the United States.

~~(r)~~ "Supervising health care provider" means the primary physician or, if there is no primary physician or the primary physician is not reasonably available, the health care provider who has undertaken primary responsibility for an individual's health care.

~~(t)~~ ~~(s)~~ "Surrogate" means an individual, other than a person's agent or guardian, authorized under this act to make a health care decision for the person.

New Sec. 3. (a) An adult or emancipated minor may give an individual instruction. The instruction may be oral or written, except that an instruction directing the withholding or withdrawal of life-sustaining procedures shall be in writing and signed by the principal or by another person in the principal's presence and by the principal's expressed direction. The instruction may be limited to take effect only if a specified condition arises.

(b) An adult or emancipated minor may execute a power of attorney for health care, which may authorize the agent to make any health care decision the principal could have made while having capacity. The power must be in writing and signed by the principal. The power remains in effect notwithstanding the principal's later incapacity and may include individual instructions. Unless related to the principal by blood, marriage or adoption, an agent may not be an owner, operator or employee of an adult care home or a long-term care unit of the medical care facility at which the principal is receiving care.

(c) An individual instruction directing the withholding or withdrawal of life-sustaining procedures or a power of attorney for health care shall be:

(1) Signed in the presence of two or more witnesses at least 18 years of age, neither of whom shall be the agent, the person who signed the individual instruction on behalf of the principal, related to the principal by blood, marriage or adoption, entitled to any portion of the estate of the principal according to the laws of intestate succession of this state or under any will of the principal or codicil thereto, or directly financially responsible for the principal's medical care; or

(2) acknowledged before a notary public.

(d) If a person has executed, and has not revoked, an individual instruction directing the withholding or withdrawal of life-sustaining procedures or a power of attorney for health care, and if withholding or withdrawal of nutrition or hydration provided through medical intervention would in reasonable medical judgment be likely to result in or hasten the death of the person, it may be withheld or withdrawn only if the instruction specifically authorizes the withholding or withdrawal of nutrition or hydration or both provided through medical intervention, or the

The power may authorize the agent to make decisions relating to autopsy or disposition of the principal's body after death.

Death of the principal shall not prohibit or invalidate acts of the agent in arranging for autopsy or disposition of the body.

8-5

power of attorney for health care either specifically authorizes its withholding or withdrawal or authorizes the agent to direct its withholding or withdrawal, either by a statement in the signer's own words or in a separate section, separate paragraph or other separate subdivision that deals only with nutrition or hydration or both provided through medical intervention and which section, paragraph or other subdivision is separately initialed, separately signed or otherwise separately marked by the person executing the directive.

(e) Unless otherwise specified in a power of attorney for health care, the authority of an agent becomes effective only upon a determination that the principal lacks capacity and ceases to be effective upon a determination that the principal has recovered capacity.

(f) Unless otherwise specified in a written advance health care directive, a determination that an individual lacks or has recovered capacity, or that another condition exists that affects an individual instruction or the authority of an agent, must be made by the primary physician.

(g) An agent shall make a health care decision in accordance with the principal's individual instructions, if any, and other wishes to the extent known to the agent. The powers of an agent shall be limited to the extent set out in writing in the power of attorney for health care and shall not include the power to revoke or invalidate a previously existing individual instruction by the principal.

(h) A health care decision made by an agent for a principal is effective without judicial approval.

(i) A written advance health care directive may include the individual's nomination of a guardian of the person.

(j) An advance health care directive is valid for purposes of this act if it complies with this act, regardless of when or where executed or communicated.

(k) An individual instruction made before July 1, 2009, shall not be limited or otherwise affected by the provisions of this act. A power of attorney executed before July 1, 2009, that specifically authorizes the attorney in fact or agent to make decisions relating to the health care of the principal, shall not be limited or otherwise affected by the provisions of this act.

(l) Any individual instruction which is valid under the laws of the state of the principal's residence at the time the individual instruction was made shall be an individual instruction under this act. Any power of attorney for health care which is valid under the laws of the state of the principal's residence at the time the power of attorney for health care was signed shall be a power of attorney for health care under this act. All acts taken by an agent in this state under such a power of attorney for health care, which would be valid under the laws of this state, shall be valid acts.

8-6

5-8

All acts taken by an agent for a principal whose residence is Kansas at the time the power of attorney for health care is signed shall be valid if valid under Kansas law.

New Sec. 4. (a) An individual may revoke a written advance health care directive at any time by any of the following methods:

(1) By obliterating, burning, tearing or otherwise destroying or defacing the advance health care directive in a manner indicating intent to cancel;

(2) by a written revocation of the advance health care directive signed and dated by the individual or person acting at the direction of the individual; or

(3) by a verbal expression of the intent to revoke the advance health care directive, in the presence of a witness at least 18 years of age who signs and dates a writing confirming that such expression of intent was made. Any verbal revocation shall become effective upon receipt by the supervising health care provider of the above-mentioned writing. The supervising health care provider shall record in the person's medical record the time, date and place when the provider received notice of the revocation.

(b) A health care provider, agent, guardian or surrogate who is informed of a revocation shall promptly communicate the fact of the revocation to the supervising health care provider and to any health care institution at which the person is receiving care.

(c) A decree of annulment, divorce, dissolution of marriage or legal separation revokes a previous designation of a spouse as agent unless otherwise specified in the decree or in a power of attorney for health care. The designation of an agent shall be revoked effective upon the filing of an order of protection by the principal against the agent. The agent shall be reinstated upon the termination of the order of protection.

(d) An advance health care directive that conflicts with an earlier advance health care directive revokes the earlier directive to the extent of the conflict.

New Sec. 5. An advance health care directive shall be deemed sufficient if in substantial compliance with the form set forth by the Kansas judicial council.

New Sec. 6. (a) A surrogate may make a health care decision for a person who is an adult or emancipated minor if the person has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available.

(b) An adult or emancipated minor may designate any individual to act as surrogate by personally informing the supervising health care provider. In the absence of a designation, or if the designee is not reasonably

Unless the writing is received by the supervising health care provider prior to death, the verbal revocation is not effective as to the agent's authority as to disposition of the body upon death.

Decisions as to disposition of the body after death can only be made by an agent under a durable power of attorney or as prescribed by K.S.A. 65-1734

available, any member of the following classes of the person's family who is reasonably available, in descending order of priority, may act as surrogate:

(1) The spouse, unless legally separated;

(2) an adult child;

(3) a parent; or

(4) an adult brother or sister.

(c) If none of the individuals eligible to act as surrogate under subsection (b) are reasonably available, an adult who has exhibited special care and concern for the person, who is familiar with the person's personal values and who is reasonably available, may act as surrogate.

(d) A person shall be disqualified from acting as surrogate if the patient has filed an order of protection against that person and the order is still in effect.

(e) A surrogate shall communicate the surrogate's assumption of authority as promptly as practicable to the members of the person's family specified in subsection (b) who can be readily contacted.

(f) If more than one member of a class assumes authority to act as surrogate and they do not agree on a health care decision and the supervising health care provider is so informed, the supervising health care provider shall comply with the decision of a majority of the members of that class who have communicated their views to the provider. If the class is evenly divided concerning the health care decision and the supervising health care provider is so informed, that class and all individuals having lower priority are disqualified from making the decision.

(g) A surrogate shall make a health care decision in accordance with the person's individual instructions, if any, and other wishes to the extent known to the surrogate. Otherwise, the surrogate shall make the decision in accordance with the surrogate's determination of the person's best interest. In determining the person's best interest, the surrogate shall consider the person's personal values to the extent known to the surrogate.

(h) A health care decision made by a surrogate for a person is effective without judicial approval.

(i) An individual at any time may disqualify another, including a member of the individual's family, from acting as the individual's surrogate by a signed writing or by personally informing the supervising health care provider of the disqualification.

(j) Unless related to the person by blood, marriage or adoption, a surrogate may not be an owner, operator or employee of an adult care home or a long-term care unit of the medical care facility at which the person is receiving care.

(k) A supervising health care provider may require an individual

claiming the right to act as surrogate for a person to provide a writ declaration under penalty of perjury stating facts and circumstances reasonably sufficient to establish the claimed authority.

New Sec. 7. (a) If, following execution of a power of attorney for health care, a court of the principal's domicile appoints a guardian charged with the responsibility for the principal's person, the guardian has the same power to revoke or amend the power of attorney for health care that the principal would have had if the principal were not impaired.

(b) In exercising the authority provided for in subsection (a), a guardian remains subject to the provisions of K.S.A. 59-3075, and amendments thereto.

(c) A health care decision made by a guardian for the ward is effective without judicial approval.

New Sec. 8. (a) Before implementing a health care decision made for a patient, a supervising health care provider, if possible, shall promptly communicate to the patient the decision made and the identity of the person making the decision.

(b) A supervising health care provider who knows of the existence of an advance health care directive, a revocation of an advance health care directive or a designation or disqualification of a surrogate, shall promptly record its existence in the patient's health care record and, if it is in writing, shall request a copy and if one is furnished shall arrange for its maintenance in the health care record.

(c) A primary physician who makes or is informed of a determination that a patient lacks or has recovered capacity, or that another condition exists which affects an individual instruction or the authority of an agent, guardian or surrogate, shall promptly record the determination in the patient's health care record and communicate the determination to the patient, if possible, and to any person then authorized to make health care decisions for the patient.

(d) Except as provided in subsections (e) and (f), a health care provider or institution providing care to a patient shall:

(1) Comply with an individual instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make health care decisions for the patient; and

(2) comply with a health care decision for the patient made by a person then authorized to make health care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity.

(e) A health care provider may decline to comply with an individual instruction or health care decision for reasons of conscience. A health care institution may decline to comply with an individual instruction or health care decision if the instruction or decision is contrary to a policy

8-8

of the institution which is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to a person then authorized to make health care decisions for the patient.

(f) A health care provider or institution may decline to comply with an individual instruction or health care decision that requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the health care provider or institution.

(g) A health care provider or institution that declines to comply with an individual instruction or health care decision shall:

(1) Promptly so inform the patient, if possible, and any person then authorized to make health care decisions for the patient;

(2) provide continuing care to the patient until a transfer can be effected; and

(3) unless the patient or person then authorized to make health care decisions for the patient refuses assistance, immediately make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision.

(h) A health care provider or institution may not require or prohibit the execution or revocation of an advance health care directive as a condition for providing health care.

New Sec. 9. Unless otherwise specified in an advance health care directive, a person then authorized to make health care decisions for a patient has the same rights as the patient to request, receive, examine, copy and consent to the disclosure of medical or any other health care information.

New Sec. 10. (a) A health care provider or institution acting in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for:

(1) Complying with a health care decision of a person apparently having authority to make a health care decision for a patient, including a decision to withhold or withdraw health care;

(2) declining to comply with a health care decision of a person based on a belief that the person then lacked authority; or

(3) complying with an advance health care directive and assuming that the directive was valid when made and has not been revoked or terminated.

(b) An individual acting as agent or surrogate under this act is not subject to civil or criminal liability or to discipline for unprofessional conduct for health care decisions made in good faith.

New Sec. 11. (a) A health care provider or institution that intentionally violates this act is subject to liability to the aggrieved individual for

(c) A funeral establishment or funeral director who in good faith acts pursuant to the terms of a power of attorney for health care without knowledge of its invalidity shall be immune from liability that may be incurred or imposed from such action.

5-8

STATE OF KANSAS

TERRY BRUCE
STATE SENATOR
34TH DISTRICT
RENO COUNTY

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
VICE CHAIR: JUDICIARY
MEMBER: JOINT COMMITTEE ON SPECIAL CLAIMS AGAINST THE STATE
AGRICULTURE
ASSESSMENT & TAXATION
NATURAL RESOURCES

RE - Testimony on HB 2250

Chairman Kinzer and Committee Members,

KSA 60-455 must be changed to allow for the successful prosecution of heinous cases.

For no apparent reason, the Kansas Supreme Court decided to elevate the standard for admissibility of prior crimes or prior bad acts from reasonably similar to strikingly similar. In this same case, State v Prine, the court found the acts in question to be so horrible that intent was no longer appropriate.

Proposed HB 2250 attempts to allow for the introduction of prior bad acts or prior crimes to infer the defendant committed a crime charged under article 35 of chapter 21. This is an admirable goal and a good step forward. However, the court could still apply the strikingly similar standard.

I have attached a draft of a Senate bill I have worked on to address the elevated standard issue created in State v. Prine. I do not have any objection to having a specific statutory subsection for sex crimes, but I would ask that you set out a lower standard for introducing any prior crimes or prior bad acts evidence than that created by the court. Perhaps the attached draft could be used to help address this concern.

Terry Bruce
Reno County State Senator

HOME
401 E. SHERMAN
HUTCHINSON, KS 67501
620-662-6830

DISTRICT OFFICE
FORKER, SUTER & ROSE, LLC.
129 WEST SECOND AVE, SUITE 200
PO BOX 1868 HUTCHINSON, KS 67504-1868
PHONE: 620-663-7131 FAX: 620-669-0714

DRAFT

2009 9rs0635

SENATE BILL NO. ____

By

AN ACT concerning evidence; relating to other crimes or civil wrongs; amending K.S.A. 60-455 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 60-455 is hereby amended to read as follows: 60-455. (a) Subject to K.S.A. 60-447, and amendments thereto, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion ~~but~~.

(b) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(c) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, such evidence is admissible to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes when the method of committing the prior acts is so similar to that utilized in the current case before the court that it is reasonable to conclude the same individual committed both acts.

Sec. 2. K.S.A. 60-455 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the Kansas register.

9-2

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

DOCKING STATE OFFICE BLDG.
7TH FLOOR
TOPEKA, KANSAS 66612
(785) 296-7885
goyle@house.state.ks.us

214 S. LOCHINVAR
WICHITA, KANSAS 67207
(316) 681-8133

RAJ GOYLE
87TH DISTRICT

Chairman Kinzer, Vice Chairman Whitham, Ranking Member Pauls, and Committee Members:

Thank you for allowing me to testify in support of HB 2250, a bill that will help prosecute sexual predators and protect Kansas citizens from these awful crimes.

The current laws of evidence make it too easy for sexual perpetrators to successfully appeal their convictions. Under K.S.A. 60-455, evidence of a defendant's prior acts of sexual misconduct is susceptible to being excluded from court. The Kansas Supreme Court recognized this flaw in our evidentiary laws last month in *State v. Prine* (2009 Kan. LEXIS 1) and explicitly invited the Legislature to take action to close this loophole. HB 2250 addresses the Court's concern and will help the Attorney General and local law enforcement prosecute sex crimes.

Under HB 2250, evidence of prior sex crimes would be allowed as evidence in a prosecution if the judge finds the evidence relevant to the defendant's propensity to commit these types of crimes. In *Prine*, the Court justified this by stating, in the context of child sex crimes, "modern psychology of pedophilia tells us that propensity evidence may actually possess probative value for juries faced with deciding the guilt or innocence of a person accused of sexually abusing a child. In short, sexual attraction to children and a propensity to act upon it are defining symptoms of this recognized mental illness."

Simply put, prior bad acts of sexual misconduct should be allowed to be entered as evidence. HB 2250 does just that while providing adequate due process to the defendant.

We on the Judiciary Committee must give prosecutors in Kansas every tool possible to prosecute sex crimes and I urge the Committee to pass HB 2250 favorably for passage. Thank you very much

House Judiciary
Date 2-9-09
Attachment # 10

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

STEVE SIX
ATTORNEY GENERAL

120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.KSAG.ORG

House Judiciary Committee
House Bill 2250
Assistant Solicitor General Kris Ailslieger
February 9, 2009

Mr. Chairman and members of the committee, thank you for allowing me to provide testimony in support of House Bill 2250. I am the Assistant Solictor General responsible for appellate case work in the office of Attorney General Steve Six.

House Bill 2250 would allow for propensity evidence to be admitted at trial by the prosecution regarding crimes of a sexual nature.

The impetus for this proposed change came from the Kansas Supreme Court's recent suggestion in *State v. Prine*, ___ Kan. ___, No. 93,345 (Jan. 16, 2009), that K.S.A. 60-455 needs modification. Specifically, the Court stated:

> We are compelled to make one final set of brief comments on the K.S.A. 60-455 issues raised by this case.
>
> Extrapolating from the ever-expanding universe of cases that have come before us and our Court of Appeals, it appears that evidence of prior sexual abuse of children is peculiarly susceptible to characterization as propensity evidence forbidden under K.S.A. 60-455 and, thus, that convictions of such crimes are especially vulnerable to successful attack on appeal. This is disturbing because the modern psychology of pedophilia tells us that propensity evidence may actually possess probative value for juries faced with deciding the guilt or innocence of a person accused of sexually abusing a child. In short, sexual attraction to children and a propensity to act upon it are defining symptoms of this recognized mental illness. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, pp. 527-28 (4th ed. 1994) (302.2- Pedophilia). And our legislature and our United States Supreme Court have decided that a diagnosis of pedophilia can be among the justifications for indefinite restriction of an offender's liberty to ensure the provision of treatment to him or her and the protection of others who could become victims. See

House Judiciary
Date 2-9-09
Attachment # 11

> K.S.A. 59-29a01 *et seq.*; *Kansas v. Crane*, 534 U.S. 407, 409-10, 151 L. Ed. 2d 856, 122 S. Ct. 867 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 356-60, 371, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997) (Kansas' Sexually Violent Predator Act narrows the class of persons eligible for confinement to those who find it difficult, if not impossible, to control their dangerousness.). It is at least ironic that propensity evidence can be part of the support for an indefinite civil commitment, but cannot be part of the support for an initial criminal conviction in a child sex crime prosecution.
>
> Of course, the legislature, rather than this court, is the body charged with study, consideration, and adoption of any statutory change that might make K.S.A. 60-455 more workable in such cases, without doing unconstitutional violence to the rights of criminal defendants. It may be time for the legislature to examine the advisability of amendment to K.S.A. 60-455 or some other appropriate adjustment to the statutory scheme.

While in *Prine*, the Court spoke only of changes to 60-455 as it pertains to sex crimes against children, it makes little sense to so limit any modification of the statute because the same issues are relevant to cases involving sex crimes against adults.

For guidance, we looked at Federal Rules of Evidence 413 (Evidence of Similar Crimes in Sexual Assault Cases) and 414 (Evidence of Similar Crimes in Child Molestation Cases), and California Evidence Code § 1108 and Arizona Revised Statutes Annotated § 13-1420. Both the California and Arizona rules incorporate language from the federal rules. The language in House Bill 2250 came primarily from the federal rules. The advantage of using this language is that it has already been tested in the courts and upheld.

As the chief prosecutorial agency responsible for appeals in the state of Kansas, the Attorney General's office strongly supports HB 2250 and believes that it is an appropriate response to the request for action made by the Kansas Supreme Court in State v. Prine. Thank you for your consideration. I would be happy to answer any questions.

Office of the District Attorney
Eighteenth Judicial District of Kansas
at the Sedgwick County Courthouse
535 N. Main
Wichita, Kansas 67203

Nola Foulston
District Attorney

Ann Swegle
Deputy District Attorney & Chief Legal Counsel

February 9, 2009

Testimony Regarding HB 2250
Submitted by Ann Swegle, Deputy District Attorney
On Behalf of Nola Tedesco Foulston, District Attorney
Eighteenth Judicial District
And the Kansas County and District Attorneys Association

Honorable Chairman Kinzer and Members of the House Judiciary Committee:

Thank you for the opportunity to address you regarding House Bill 2250. On behalf of Nola Tedesco Foulston, District Attorney, Eighteenth Judicial District, and the Kansas County and District Attorneys Association, I would like to bring to your attention issues related to K.S.A. 60-455 and its interpretation by the Kansas appellate courts that have led to this proposed legislation.

Our system of justice is predicated on the idea that justice will be had if the truth is made known. To that end, the statutory scheme that sets out the rules to be applied in determining the admissibility of evidence clearly envisions that the triers of fact shall have access to all evidence that is relevant to the matters to be considered, unless the probative value of such relevant evidence is substantially outweighed by its prejudicial effect to a party. In enacting these statutes, the Legislature affirmatively and strongly declared it to be the public policy of this State that jurors in all cases are to receive evidence that would lead them to the truth.

On January 16, 2009 the Kansas Supreme Court issued its opinion in *State of Kansas v. Prine*, reversing convictions of rape, aggravated criminal sodomy, and

aggravated indecent liberties with a child stemming from the defendant's conduct with a six year-old girl. The Court found that evidence of the defendant's prior criminal sexual contact with other children should not have been admitted because it was not so "strikingly similar" to the conduct at issue in the case as to constitute a "signature act". This opinion arguably creates a new standard – and a heightened barrier – for the admission of certain relevant evidence if that evidence is also evidence of another crime or civil wrong. This standard is not required by the language of the statute controlling the admission of this type of evidence, K.S.A. 60-455, or by any other statute. This standard imperils the ability of jurors to get to make findings based on all relevant evidence, leaving them instead to make vital determinations based on a less than complete set of facts.

In *Prine*, the Court recognized the body of evidence that "tells us that propensity evidence may actually possess probative value for juries faced with deciding the guilt or innocence of a person accused of sexually abusing a child." It virtually invited the proposal that you are now considering when it stated, "Of course, the legislature, rather than this court, is the body charged with study, consideration, and adoption of any statutory change that might make K.S.A. 60-455 more workable in such cases, without doing unconstitutional violence to the rights of criminal defendants. It may be time for the legislature to examine the advisability of amendment to K.S.A. 60-455 or some other appropriate adjustment to the statutory scheme."

K.S.A. 60-455 has been subjected to frequent and conflicting analyses and interpretations by the courts since its enactment, and not just in regard to admission of prior crimes evidence related to child sexual abuse, but as to every aspect of its potential application. Because of this troublesome history, amendments to the statute should address all concerns related to its application and be made after careful review and consideration. The Kansas County and District Attorneys Association is pleased that you are considering legislation that would make K.S.A. 60-455 a more useful tool to ensure that triers of fact are allowed to receive probative evidence so long as the probative value is not substantially outweighed by any prejudicial effect. We intend to offer suggestions as to how the statute should be further amended to reach that end as the legislative process progresses and our members have an opportunity to reflect upon how best to accomplish the desired end.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Ann Swegle
Deputy District Attorney
Eighteenth Judicial District

TESTIMONY OF PHILLIP COSBY
KANSAS CITY DIRECTOR, NATIONAL COALITION FOR THE PROTECTION OF CHILDREN AND FAMILIES
KANSAS HOUSE JUDICIARY COMMITTEE
HB 2144 February 9th, 2009

Chairman Kinzer and honorable members of the Judiciary Committee, my name is Phillip Cosby. I am a native of Kansas and currently the Executive Director for the Kansas City office of the National Coalition for the Protection of Children and Families. I am honored to have the privilege to speak to you in support of HB 2144 "The Community Defense Act".

These past five years I have spoken to thousands of Kansans citizens and civic officials concerning the negative effects of Sexually Oriented Businesses (SOB) in communities. Today I am providing each of you summaries of negative secondary effect studies, a recent study conducted in Kansas City and with these summaries is a CD containing 1,500 pages of detailed court recognized studies of twenty cites and in addition twenty-two court cases all awarding municipalities the constitutional right to regulate Sexually Oriented Businesses and reduce negative secondary effects. Deleterious effects which constitute a harm which the State has a substantial government interest in regulating.

Two famous examples, among scores are (1) the cleaning up of NYC's Times Square and the subsequent decrease in crime and increase of tourism, and (2) the current reputation of Atlanta Ga. as the sex trafficking capital of the US. These are not my words but the words of Atlanta's mayor, Shirley Franklin. (*Atlanta Journal-Constitution March 21st 2007)* Strip clubs promised Atlanta GA. prosperity and an "upscale cosmopolitan" appeal as they expanded to accommodate the International Olympics. What Atlanta inherited was a series of strip clubs that breed prostitution and sex trafficking or sexual slavery. Sex trafficking has now become the international #2 moneymaker for organized crime, right behind illegal drugs.

The evidence of harm is not anecdotal; the lawful regulation of the sex industry is based on real negative effects on communities and has been constitutionally upheld for over thirty years. (Reference attachment) The documented effects are primarily increased crime, increased STD's, blight, property devaluation, prostitution, human trafficking and drug trafficking. One judge recently commented "it is not just the evidence of negative effects, it is common sense."

We all sense it. Every day the news relays the latest heartbreaking story of abductions, child molestations, human trafficking, solicitations, sexual misconduct at the highest levels of sacred and secular trust, urban blight, rising STD rates, fantasy driven rape and even murder. Our sense of safety, wholesomeness and innocence is evaporating. When you and I were in grade school we played freely with our friends on Saturdays in our neighborhoods and beyond. Our parents did not have to be unduly fraught with concerns for our personal safety. For us, the general rule was, when those street lights flicker on you better be home. Those days of experiencing such freedom and safety are long since gone for today's children. Outside of organized and supervised sports, where are those groups of playful youngsters today?

Communities are overwhelmed or intimidated by an industry that boasts that their annual US revenue is greater than all professional sports; football, baseball and basketball combined.

House Judiciary
Date 2-9-09
Attachment # 13

Many counties and communities in Kansas have no regulatory protection in place. SOB's often ambush unprotected rural areas, along the interstate system or main streets of cities and boldly declare that there is nothing the community can do and if they do enact an SOB regulation, their attorneys threaten and do file lawsuits. Such intimidation strategies more often than not, do work. If civic leaders do muster the wherewithal to enact SOB ordinance protection, lengthy litigation is a certainty. As in the case of Abilene Kansas , litigation was going into its fifth year when an out of court compromise closed the case. SOB ordinance law is not a specialty of most city and county attorneys who are not confident or lack the resources to challenge such a lucrative industry. SOB's behave like water seeking the lowest level, if a community is fortunate enough to be protected by a sound constitutional ordinance, SOBs will seek out and surprise a more vulnerable community.

Legislative bodies on many levels are behind the curve in recognizing and reacting to the cause and effect relationship of the sex industry and its related negative secondary effects. These brick and mortar sex businesses may be the tip of the iceberg of a larger problem of easy cyber access to pornography and obscenity but at least it is a place where case law has driven a stake where we can make a constitutional stand to address this growing public safety and health crisis.

Too often the disingenuous drum beat sounds like; this is a parental responsibility or let local communities contend with the problem on their own. How can parents and communities contend against such pervasive, aggressive and well funded enterprises? Would it be good public policy if there were a polluted water source to simply instruct the community to install their own filter?

The Ohio legislature did blaze this trail with their court upheld community defense act. Even Denmark with its infamous anything goes approach to the sex industry has corrected its misdirection with recent regulations stemming the tide of correlating negative effects.

This is a real pocketbook issue. In Kansas prisons one third of the inmates are incarcerated for sexual crimes at a cost of $30,000 annually per prisoner. You can't raise enough taxes, build enough prisons and buy enough ankle bracelets for this tsunami. Recently the Center for Disease Control reported that 26% of teenage girls are now infected with a sexually transmitted disease. The list of STD's has now grown to over twenty-nine. Ladies and gentlemen what we have is an epidemic and we must act in concert with parents and communities. HB 2144 is a compelling governmental interest.

This state statute model was crafted by one of the most successful constitutional SOB ordinance attorneys in the nation. Law Office of Scott D. Bergthold, Chattanooga, TN, 423.899.3025 web site: www.adultbusinesslaw.com

Phillip Cosby
Kansas City Office,NCPC&F
11936 W. 119th St. # 193
Overland Park, Kansas 66213 Cell# 913-787-0075 pcosby@nationalcoalition.org

Attachment to Cosby testimony presented on February 9th 2009 to the Kansas House Judiciary Committee relative to HB 2144 "The Community Defense Act"

Findings and Rationale. Based on evidence of the adverse secondary effects of adult uses presented in hearings and in reports made available to the Kansas Legislature, and on findings, interpretations, and narrowing constructions incorporated in the cases of *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *California v. LaRue*, 409 U.S. 109 (1972); *N.Y. State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); and

Farkas v. Miller, 151 F.3d 900 (8th Cir. 1998); *United States v. Evans*, 272 F.3d 1069 (8th Cir. 2002); *United States v. Mueller*, 663 F.2d 811 (8th Cir. 1981); *BZAPS, Inc. v. City of Mankato*, 268 F.3d 603 (8th Cir. 2001); SOB, *Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003); *United States v. Frederickson*, 846 F.2d 517 (1988); *ILQ Invs. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994); *Ctr. for Fair Public Policy v. Maricopa County*, 336 F.4d 1153 (9th Cir. 2003); *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441 (7th Cir. 1996); *World Wide Video of Washington, Inc. v. City of Spokane*, 386 F.3d 1186 (9th Cir. 2004); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007); *Déjà Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson County,* 274 F. 3d 377 (6th Cir. 2001); *Fantasy Ranch, Inc. v. City of Arlington,* 459 F.3d 546 (5th Cir. 2006);

and based upon reports concerning secondary effects occurring in and around sexually oriented businesses, including, but not limited to, Negative Secondary Effects of Sexually Oriented Businesses: Summaries of Key Reports; Austin, Texas - 1986; Indianapolis, Indiana - 1984; Garden Grove, California - 1991; Houston, Texas - 1983, 1997; Phoenix, Arizona - 1979, 1995-98; Chattanooga, Tennessee - 1999-2003; Los Angeles, California - 1977; Whittier, California - 1978; Spokane, Washington - 2001; St. Cloud, Minnesota - 1994; Littleton, Colorado - 2004; Oklahoma City, Oklahoma - 1986; Dallas, Texas - 1997; Greensboro, North Carolina - 2003; Amarillo, Texas - 1977; McCleary Expert Report - 2006; New York, New York Times Square - 1994; and the Report of the Attorney General's Working Group On The Regulation Of Sexually Oriented Businesses, (June 6, 1989, State of Minnesota),

(1) Sexually oriented businesses, as a category of commercial enterprises, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation.

(2) Sexually oriented businesses should be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other sexually oriented businesses, to minimize the secondary effects associated with such uses and to prevent an unnecessary concentration of sexually oriented businesses in one area.

(3) Each of the foregoing negative secondary effects constitutes a harm which the State has a substantial government interest in preventing and/or abating. This substantial government interest in preventing secondary effects, which is the State's rationale exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses. Additionally, the State's interest in regulating sexually oriented businesses extends to preventing future secondary effects of either current or future sexually oriented businesses that may locate in the State.

RECAP OF DOCUMENTATION FROM: Scott Bergth

Philip Cosby
Kansas City Director- National Coalition for the Protection of Children and Families
11936 West 119th Street, 193
Overland Park, Kansas 66213
913-839-1643 or © 913-787-0075
Email pccosby@nationalcoalition.org

Summary on a **CD** containing 1,500 pages of detailed court recognized studies of twenty cities and in addition twenty-two court cases all awarding municipalities the constitutional right to regulate Sexually Oriented Business and reduce negative secondary effects.

Notebook 1: Negative Secondary Effects Court Cases (22 different cases)

Notebook 2: Negative Secondary Effect Studies:

1. Spokane, Washington
2. City of St. Cloud
3. City of Littleton, Colorado
4. City of Oklahoma City
5. Dallas, Texas
6. City of Greensboro
7. Amarillo, Texas
8. Dickinson County, Ks

Notebook 3: Negative Secondary Effects Studies

8. Dickinson County, Ks. continued
9. Time Square, New York City
10. State of Minnesota
11. Austin, Texas
12. Dallas, Texas

Notebook 4: Negative Secondary Effects Studies

13. Indianapolis
14. City of Garden Grove
15. City of Houston, Texas

Notebook 5: Negative Secondary Effects Studies

15. City of Houston, Texas continued
16. City of Phoenix
17. Chattanooga, Tennessee
18. Minneapolis, Minnesota

Notebook 6: Negative Secondary Effects Studies

19. City of Los Angeles
20. Whittier City

House Judiciary
Date 2-9-09
Attachment # 14

Scott Bergthold
Via phone to
Judiciary Cmte
2-9-09.

Lawyer-
Tennessee
423-802-9459

Negative Secondary Effects of Sexually Oriented Businesses HB 2144

by

Scott D. Bergthold

presented to
House Judiciary Committee
Kansas Legislature
February 9, 2009

Speaker background:

Co-author, *Local Regulation of Adult Businesses, 2008 Ed. (Thomson West)*

Cases:

- **City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004)**
- **5634 East Hillsborough v. Hillsborough County, 294 Fed. Appx. 435(11th Cir. 2008)**
- **Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291 (6th Cir. 2008)**
- **Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860 (11th Cir. 2007)**
- **Heideman v. South Salt Lake City, 165 Fed. Appx. 627 (10th Cir. 2006)**

14-2

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding 1,000-ft. rule)

1. Legislatures can be proactive to prevent negative effects
2. Any evidence "reasonably believed to be relevant" is sufficient
3. Government is given leeway to address negative effects

Sources of Secondary Effects Information

1. Land Use Studies
2. Crime Reports
3. Judicial Opinions
4. Investigator Affidavits
5. Anecdotal Reports

Types of Secondary Effects

1. Adverse impacts on surrounding properties
2. Crime and its attendant public safety risks
3. Illicit sexual conduct and potential disease
4. Illicit drug use and trafficking
5. Litter, aesthetic impacts, noise, blight

Cases upholding similar regulations:

1. ***People ex rel. Deters v. Lion's Den***, No. 5-05-0413 (Ill. Ct. App. 2007) (1,000-ft. setback)
2. ***City of Erie v. Pap's A.M.***, 529 U.S. 277 (2000) (nudity prohibition)
3. ***Heideman v. South Salt Lake City***, 165 Fed. Appx. 627 (10th Cir. 2006)
4. ***Jake's Ltd., Inc. v. City of Coates***, 284 F.3d 884 (8th Cir. 2002) (6-ft. rule)
5. ***Richland Bookmart, Inc. v. Nichols***, 137 F.3d 435 (6th Cir. 1998) (statewide hours)

HB 2144 includes common-sense regulations that have been repeatedly upheld by the courts

Every **federal appellate case to consider dancer-patron buffers, no-touch rules, hours of operation, and open-booth regulations has upheld them as constitutional.**

Secondary effects data relevant to regulating sexually oriented clubs and bookstores:

1. **Summaries of Key Reports**
2. **Phoenix, Arizona**
3. **Indianapolis, Indiana**
4. **Garden Grove, California**
5. **Whittier, California**

Secondary effects data relevant to regulating sexually oriented businesses:

6. Austin, Texas
7. Greensboro, North Carolina
8. Amarillo, Texas
9. Kennedale, Texas
10. Spokane, Washington Evidence re: Retail Adult Bookstores
11. 2008 Jackson County, Missouri Expert Report (describing flaws in industry reports)

Findings of expert witnesses:

1. Finding of secondary effects from sexually oriented businesses is scientifically robust, being confirmed in wide variety of data sources
2. The legislature has a substantial government interest in regulating adult businesses to prevent the identified negative secondary effects
3. Industry "counter-studies" based on ever-changing methodologies and faulty data (calls-for-service (CFS) to the police)
   - CFS are weakly correlated to actual crime
   - Most vice crimes never result in CFS

Industry experts' attacks insufficient:

1. ***City of Erie v. Pap's A.M.***, 529 U.S. 277 (2000) (Linz)
2. ***Daytona Grand, Inc. v. City of Daytona Beach***, 490 F.3d 860 (11th Cir. 2007) (Linz, Fisher)
3. ***Doctor John's, Inc. v. Wahlen***, 542 F.3d 787 (10th Cir. 2008)
4. ***Heideman v. South Salt Lake City***, 165 Fed. Appx. 627 (10th Cir. 2006)
5. ***SOB, Inc. v. County of Benton***, 317 F.3d 856 (8th Cir. 2003) (Linz)

Industry experts' attacks insufficient (cont'd):

6. ***Gammoh v. City of La Habra***, 395 F.3d 1114 (9th Cir. 2005) (Linz)
7. ***G.M. Enterprises, Inc. v. Town of St. Joseph***, 350 F.3d 631 (7th Cir. 2003) (Linz)
8. ***World Wide Video of Washington v. Spokane***, 368 F.3d 1186 (9th Cir. 2004) (McLaughlin)
9. ***Fantasy Ranch, Inc. v. City of Arlington***, 459 F.3d 546 (5th Cir. 2006) (Morris)
10. ***Fantasyland Video, Inc. v. County of San Diego***, 505 F.3d 996 (9th Cir. 2007) (Linz, Goldenring)

NEGATIVE SECONDARY EFFECTS OF SEXUALLY ORIENTED BUSINESSES: SUMMARIES OF KEY REPORTS

GARDEN GROVE, CALIFORNIA
September 12, 1991

This report by independent consultants summarized statistics to determine whether adult businesses should be regulated because of their impact on crime, property values and quality of life. Statistics were measured from 1981 to 1990, and included crime data and surveys with real estate professionals and city residents. Garden Grove Boulevard, which has seven adult businesses, was selected as the study area. The study incorporated many control factors to insure accurate results. The report included a brief legal history of adult business regulation and an extensive appendix with sample materials and a proposed statute.

Crime increased significantly with the opening of an adult business, or with the expansion of an existing business or the addition of a bar nearby. The rise was greatest in "serious" offenses (termed "Part I" crimes: homicide, rape, robbery, assault, burglary, theft and auto theft). On Garden Grove Boulevard, the adult businesses accounted for 36 percent of all crime in the area. In one case, a bar opened less than 500 feet from an adult business, and serious crime within 1,000 feet of that business rose more than 300 percent the next year.

Overwhelmingly, respondents said that an adult business within 200-500 feet of a residential and commercial property depreciates that property value. The greatest impact was on single family homes. The chief factor cited for the depreciation was the increased crime associated with adult businesses.

Phone calls were made in a random sample of households in the Garden Grove Boulevard vicinity. The public consensus was that adult businesses in that area were a serious problem. Nearly 25 percent of the surveyed individuals lived within 1,000 feet of an adult business. More than 21 percent cited specific personal experiences of problems relating to these businesses, including crime, noise, litter and general quality of life. Eighty percent said they would want to move if an adult business opened in their neighborhood, with 60 percent saying they "would move" or "probably would move." Eighty-five percent supported city regulation of the locations of adult businesses, with 78 percent strongly advocating the prohibition of adult businesses within 500 feet of a residential area, school or church. Women commonly expressed fear for themselves and their children because of adult businesses.

The report concluded that adult businesses have a "real impact" on everyday life through harmful secondary effects and made four recommendations: (1) keep current requirement of 1,000 feet separation between adult businesses; (2) prohibit adult establishments within 1,000 feet of residential areas; (3) enact a system of conditional use permits for adult businesses with

14-8

police department involvement in every aspect of the process; and (4) prohibit bars or taverns within 1,000 feet of an adult business.

NEW YORK CITY, NEW YORK (TIMES SQUARE)
1994

Insight Associates performed this study in 1994 - one year after the City of New York passed extensive legislation that restricted and regulated sexually oriented businesses. The study focused on the Times Square Business Improvement District, especially on the areas of sexually oriented business concentration.

Researchers combined analysis of available data on property values and incidence of crime with a demographic and commercial profile of the area to show relationships between the concentration of adult-use establishments and negative impacts on businesses and community life. The study also included anecdotal evidence from property owners, businesses, community residents and others regarding public perceptions of the impact of sexually oriented businesses on their neighborhoods.

The study cited the strategies of several other big cities as possible methods to regulate sexually oriented businesses, including dispersal and concentration strategies.

Using crime and pollution statistics from 1992 and 1993, the study showed that the streets were significantly less polluted and overall crime in the area had dropped drastically since the increase in regulation.

Survey respondents acknowledged the improvements in the area and voiced optimism about the future of Times Square. They also complained of the increase of adult establishments on Eighth Avenue. Many respondents felt that some adult establishments could exist in the area, but that their growing number and their concentration on Eighth Avenue constituted a threat to the commercial prosperity and residential stability achieved in the preceding years in that section of the city.

Some data from before the recent increase in adult establishments was unobtainable, and the study thus could not show if there had been an increase in actual complaints corresponding to the proliferation of sexually oriented businesses. The study did, however, reveal a reduction in criminal complaints corresponding to the distance from the major concentration of sexually oriented establishments. In addition, from 1985 to 1993 property values increased 26% less in concentrated sex-business areas than in the control group areas.

DALLAS, TEXAS
April 29, 1997

An analysis of the effects of sexually oriented businesses on their surrounding neighborhoods was completed by The Malin Group on December 14, 1994 and supplemented by them on April 29, 1997. The analysts reviewed similar studies of adult entertainment completed by five other major cities and found that comparable results were obtained in each study. This study compared two control areas—one with no sexually oriented businesses and one with two sexually oriented businesses more than a half mile apart—with a study area

having similar land-use and traffic patterns and containing a high concentration of sexually oriented businesses. The Malin Group also interviewed property owners, real estate brokers and agents who are actively leasing, listing, managing, buying or selling properties in the study and control areas. The Malin Group also collected and analyzed crime statistics within the study areas and the two control areas.

The study revealed that the number of sex-crime arrests in the study area containing sexually oriented businesses was five times higher than in the control area with no sexually oriented businesses, and nearly three times higher than in the control area with two isolated sexually oriented businesses.

The study determined that in areas with sexually oriented businesses, crime rates are higher, property values are lower, or the properties take longer to lease or sell. Heightened concentrations of these businesses correlate to heightened impact on their neighborhoods. Negative public attitudes toward areas of concentrated sex-related land uses create "dead zones" unattractive to shoppers, store owners, and investors, and greatly decrease property marketability and values in the vicinity of the sexually oriented businesses. Several interviewees indicated concern for the safety of children and other pedestrians in the area.

The study indicated that the location of multiple sexually oriented businesses in one neighborhood can have a major impact on the neighborhood by contributing to crime, driving away family oriented businesses and impacting nearby residential neighborhoods. When concentrated, sexually oriented businesses typically compete with one another for customers through larger, more visible signs and graphic advertising. They tend to be magnets for certain types of businesses such as pawnshops, gun stores, liquor stores, check-cashing storefronts and late-night restaurants. Even residences in the vicinity of concentrated sexually oriented businesses tend to be relegated to rental use, as families move out of them but find them difficult to market due to diminished resale value.

The study indicated that sex-related crimes occurred five times more frequently in the study areas than in the area without sexually oriented businesses, and nearly three times more frequent than in the area with widely separated sexually oriented businesses.

The Milan Group reviewed records of police calls emanating from 10 different sexually oriented businesses over a four-year period from 1993 through 1996 and found that such businesses were a major source of police calls. The seven sexually oriented businesses in the study area collectively averaged more than one call to the police per day. Those performing the study also reviewed records of sex-related arrests from the four-year period ending in March, 1997. The number of arrests for sex crimes—including rape, prostitution and other sex offenses—was 396 in the study area including the concentration of seven sexually oriented businesses. By contrast, the control area without sexually oriented businesses had 77 sex crime arrests during the study period, and the control area with two widely spaced sexually oriented businesses had 133. The evidence demonstrated that there were increased arrests for sex crimes, other criminal acts, and disturbances that required increased police presence in the vicinity of sexually oriented businesses.

In most cases, the other localities considered in the study had prohibited sexually oriented businesses from locating in all but a few zoning districts. They set minimum distances between sexually oriented businesses and residential, religious, educational and recreational uses. These distances were generally 500 or 1,000 feet. Most localities established amortization periods after the enactment of their ordinances. In most cases, local authorities

could "grandfather" certain sexually oriented businesses through a public hearing process. Most of the clubs that were grandfathered were isolated establishments which advertised discreetly and were buffered from residential uses.

The study noted that in several instances, state and federal courts have upheld local ordinances controlling sexually oriented businesses, and have deemed them constitutional as long as the localities provided for a sufficient number of relocation sites.

These studies in the other localities "found that adult entertainment uses have negative secondary impacts such as increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life."

The study results indicated that even a single sexually oriented business impacts the properties immediately surrounding it, and those adverse impacts increase in proportion to the visibility of the business.

ENVIRONMENTAL RESEARCH GROUP REPORT
March 31, 1996

In 1996, Environmental Research Group (ERG) of Philadelphia, PA performed a study of the negative effects of sexually oriented businesses. The study involved examining several municipal land use studies and historical data from the 1970s through 1996, compiling data and drawing conclusions based on statements and conclusions of previous land use studies.

This study concluded that sexually oriented businesses provide a focus for illicit activities pertaining to prostitution, pandering, and other illegal sex acts. Also noted was an increase in crime statistics, especially sexual crimes such as illegal exposure. The most frequent clients of sex businesses are (and have been since at least the late 18th century) young, transient, single males. Statistically, this social category has interests that are in conflict with those of social groups consisting of families and/or the elderly. Studies of businesses in Bothell, WA and Austin, TX revealed that fewer than three percent (3%) of the vehicles parked in the lots were registered to owners residing a mile or less away.

ERG concluded that the impact of sex businesses upon small towns is more intense than that upon big towns. The business district of a small town is not as large and not capable of "dividing up" sections of town. A national survey of real estate appraisers and lenders revealed that the placement of a sexually oriented business is generally an indicator of the decline of a community - in a small town, the business district as a whole is impacted. Also, the target audience in a small town will not suffice for a sex business, which must draw business from a larger surrounding region. Sex businesses also set the tone of the pedestrian traffic in the area. Interviews with non-sex-business patrons and passers-by indicated a likelihood that a person on foot in the vicinity of sexually oriented businesses will be propositioned for sex acts or sexually harassed.

Finally, a review of surveys of real-estate appraisers suggests that the establishment of a sexually oriented business in either a residential or a commercial neighborhood will predictably lead to a significant drop in neighborhood property values.

HOUSTON, TEXAS

14-11

November 3, 1983

Report by the Committee on the Proposed Regulation of Sexually Oriented Businesses determined the need and appropriate means of regulating such businesses. Four public hearings provided testimony from residents, business owners, realtors, appraisers, police and psychologists. The committee and legal department then reviewed the transcripts and drafted a proposed ordinance. More hearings obtained public opinion on the proposal and the ordinance was refined for vote by the City Council.

The testimony was summarized into six broad premises:

1. The rights of individuals were affirmed.
2. Sexually oriented businesses can exist with regulations that minimize their adverse effects.
3. The most important negative effects were on neighborhood protection, community enhancement and property values.
4. Problems increased when these businesses were concentrated.
5. Such businesses contributed to criminal activities.
6. Enforcement of existing statutes was difficult.

The proposed ordinance: (1) required permits for sexually oriented businesses (non-refundable $350 application fee); (2) imposed distance requirements of 750 feet from a church or school, 1,000 feet from other such businesses, and 1,000 feet radius from an area of 75 percent residential concentration; (3) imposed an amortization period of six months that could be extended by the city indefinitely on the basis of evidence; (4) required revocation of permit for employing minors (under 17), blighting exterior appearance or signage, chronic criminal activity (three convictions), and false permit information; and (5) required age restrictions for entry.

TUCSON, ARIZONA
May 1, 1990

This report records the investigation following citizen complaints to the Tucson Police Department regarding incidences of illegal sex and unsanitary conditions in sexually oriented businesses. Undercover police verified the complaints and noted several other violations, also making arrests.

A major concern of the report is the issue of doors on peep show booths. The booths were the major area of sanitation and public health concerns in that the police ascertained that 81% to 96% of samples obtained from such booths tested positive for semen. The report described a compromise between the city and sex businesses, such that the businesses were allowed to keep doors on the booths but were required to remove the bottom 30 inches of the doors. It was thought that this would reduce opportunities or likelihood for customers to masturbate privately, or to engage in anonymous sex through the use of "glory holes" in the walls between adjoining booths—practices previously common in such establishments—while

allowing the management to observe and control the booths to ensure use by paying customers only.

The police also made arrests for illegal sexual performances and acts of prostitution. The police also determined that underage females (including one who was 15 years old) were being employed as nude dancers with the full knowledge and support of management and required to perform nude, engaging in masturbatory acts several times an hour on stage.

LOS ANGELES, CALIFORNIA
June, 1977

The Department of City Planning studied the effects of the concentration of sexually oriented businesses on surrounding properties for the years 1969-75 (a time of proliferation for such businesses). The report focuses on five areas with the greatest concentration of these businesses (compared to five "control" areas free of them), and cites data from property assessments/sales, public meeting testimony, and responses from two questionnaires (one to business/residential owners within a 500 foot radius of the five study areas and a second to realtors/real estate appraisers and lenders). Crime statistics in the study areas were compared to the city as a whole. Also included: a chart of sexually oriented business regulations in 11 major cities, details of current regulations available under state/municipal law, and appendices with samples of questionnaires, letters and other study materials.

While empirical data for 1969-75 did not conclusively show the relation of property valuations to the concentration of sexually oriented businesses, more than 90 percent of realtors, real estate appraisers and lenders responding to the city questionnaires said that a grouping of such businesses within 500-1,000 feet of residential property decreases the market value of the homes. Also residents and business people at two public meetings spoke overwhelmingly against the presence of sexually oriented businesses, citing fear, concern for children, loss of customers and difficulty in hiring employees at non-adult businesses, and the necessity for churches to provide guards for their parking lots.

More crime occurred where sexually oriented businesses were concentrated. Compared to city-wide statistics for 1969-75, areas with several such businesses experienced greater increases in pandering (340 percent), murder (42.3 percent), aggravated assault (45.2 percent), robbery (52.6 percent), and purse snatching (17 percent). Street robberies, where the criminal has face-to-face contact with his victim, increased almost 70 percent more in the study areas. A second category of crime, including other assaults, forgery, fraud, counterfeiting, embezzlement, stolen property, prostitution, narcotics, liquor laws and gambling increased 42 percent more in the study areas over the city as a whole.

The study recommended distances of 1,000 feet between separate sexually oriented businesses, and a minimum of 500 feet separation of such businesses from schools, parks, churches and residential areas.

14-13

PHOENIX, ARIZONA
May 25, 1979

The study examined crime statistics for 1978, comparing areas that have sexually oriented businesses with those that do not.

The results show a marked increase in sex offenses in neighborhoods with sexually oriented businesses, and increases in property and violent crimes as well.

Three study areas (near locations of sexually oriented businesses) and three control areas (with no sexually oriented businesses) were selected. The study and control areas were paired according to the number of residents, median family income, percentage of non-white population, median age of population, percentage of dwelling units built since 1950, and percentage of acreage used for residential and non-residential purposes.

Three categories of criminal activity were included in the study: property crimes (burglary, larceny, auto theft), violent crimes (rape, murder, robbery, assault), and sex crimes (rape, indecent exposure, lewd and lascivious behavior, child molestation).

On average, the number of sex offenses was 506 percent greater in neighborhoods where sexually oriented businesses were located. In one of the neighborhoods the number was 1,000 percent above the corresponding control area. Of the sex offenses, indecent exposure was the most common offense and the largest contributor to the increase of crimes in areas where sexually oriented businesses were located. Even without considering the crime of indecent exposure the number of other sex crimes, such as rape, lewd and lascivious behavior, and child molestation, was 132 percent greater than in control areas without sexually oriented businesses.

On average, the number of property crimes was 43 percent greater in neighborhoods where sexually oriented businesses were located, and the number of violent crimes was 4 percent higher in those areas.

The Phoenix ordinance requires sexually oriented businesses to locate at least 1,000 feet from other sexually oriented businesses and 500 feet from schools or residential zones. Approval by the City Council and area residents can waive the 500 foot requirement.

A petition signed by 51 percent of the residents in the 500 foot radius who do not object must be filed and be verified by the Planning Director.

WHITTIER, CALIFORNIA

January 9, 1978

After experiencing a rapid growth of sexually oriented businesses since 1969, the Whittier City Council commissioned a study of the effects of the businesses on the adjacent residential and commercial areas. At the time of the study, Whittier had 13 "adult" businesses: six model studios, four massage parlors, two bookstores and one theater. Utilizing statistics, testimonies and agency reports, the study compared two residential areas and four business areas over a span of 10 years (1968-1977). One residential area was near the largest concentration of adult businesses, the other had no commercial frontage but was chosen because of similar street patterns, lot sizes and number of homes. For businesses, Area 1 had six adult businesses, Area 2 had one, Area 3 had three and Area 4 had none. Two chief concerns cited in the report are residential and business occupancy turnovers and increased crime.

After 1973, 57 percent of the homes in the adult business area had changes of occupancy, compared to only 19 percent for the non-adult business area. Residents complained of "excessive noise, pornographic material left laying about, and sexual offenders (such as exhibitionists) venting their frustrations in the adjoining neighborhood." Citizens also expressed concern about drunk drivers coming into the area. Business Area 1, with the most concentration of adult businesses (six), experienced a 134 percent increase in annual turnover rate. Area 3, with three adult businesses at one location, showed a 107 percent turnover rate. Area 2 (with one adult business) had no measurable change and Area 4 (with no commercial or adult businesses) experienced a 45 percent decrease in turnover from similar periods.

The City Council looked at crime statistics for the two residential areas for the time periods of 1970-73 (before adult businesses) and 1974-77 (after adult businesses). In the adult business area, criminal activity increased 102 percent (the entire city had only an 8.3 percent increase). Certain crimes skyrocketed (malicious mischief up 700 percent; all assaults up 387 percent; prostitution up 300 percent). All types of theft (petty, grand and auto) increased more than 120 percent each. Ten types of crime were reported for the first time ever in the 1974-77 period.

The Council's report recommended a dispersal-type ordinance that prohibits adult businesses closer than 500 feet to residential areas, churches and schools, and 1,000 feet from each other. In addition, the study proposed a 1,000 foot separation from parks because of their use by citizens after normal working hours. Adult businesses would be given an 18-36 month amortization period (if the change involved only stock in trade, a 90-day period was recommended).

INDIANAPOLIS, INDIANA
February, 1984

14-15

After a 10-year growth in the number of sexually oriented businesses (to a total of 68 on 43 sites) and numerous citizen complaints of decreasing property values and rising crime, the city compared six sexually oriented business "study" areas and six "control" locations with each other and with the city as a whole. The study and control areas had high population, low income and older residents. In order to develop a "best professional opinion," the city collaborated with Indiana University on a national survey of real estate appraisers to determine valuation effects of sexually oriented businesses on adjacent properties.

From 1978-82, crime increases in the study areas were 23 percent higher than the control areas (46 percent higher than the city as a whole). Sex-related crimes in the study areas increased more than 20 percent over the control areas. Residential locations in the study areas had a 56 percent greater crime increase than commercial study areas. Sex-related crimes were four times more common in residential study areas than commercial study areas with sexually oriented businesses.

Homes in the study areas appreciated at only half the rate of homes in the control areas, and one-third the rate of the city. "Pressures within the study areas" caused a slight increase in real estate listings, while the city as a whole had a 50 percent decrease, denoting high occupancy turnover. Appraisers responding to the survey said one sexually oriented business within one block of residences and businesses decreased their value and half of the respondents said the immediate depreciation exceeded 10 percent. Appraisers also noted that value depreciation on residential areas near sexually oriented businesses is greater than on commercial locations. The report concluded: "The best professional judgment available indicates overwhelmingly that adult entertainment businesses -- even a relatively passive use such as an adult bookstore -- have a serious negative effect on their immediate environs."

The report recommended that sexually oriented businesses locate at least 500 feet from residential areas, schools, churches or established historic areas.

OKLAHOMA CITY, OKLAHOMA
March 3, 1986

This study contained the results of a survey of 100 Oklahoma City Real Estate Appraisers. Appraisers were given a hypothetical situation and a section to comment on the effects of sexually oriented businesses in Oklahoma City. The hypothetical situation presented a residential neighborhood bordering an arterial street with various commercial properties which served the area. A building vacated by a hardware store was soon to be occupied by an "adult" bookstore. No other sexually oriented businesses were in the area and no other vacant commercial space existed. With less than a one month response time, 34 completed surveys were received by the city.

Thirty-two percent of the respondents said that such a bookstore within one block of the residential area would decrease home values by at least 20 percent. Overwhelmingly, respondents said an "adult" bookstore would negatively affect other businesses within one block (76 percent). The level of depreciation is greater for residents than businesses. The negative effects on property values drop sharply when the sexually oriented business is at least three blocks away. In the subjective portion, 86 percent of the respondents noted a negative impact of sexually oriented businesses on Oklahoma City. Frequent problems cited by the appraisers included the attraction of undesirable clients and businesses, safety threats to residents and other shoppers (especially children), deterrence of home sales and rentals, and immediate area deterioration (trash, debris, vandalism).

Oklahoma City's findings supported results from other national studies and surveys. Sexually oriented businesses have a negative effect on property values, particularly residential properties. The concentration of sexually oriented businesses may mean large losses in property values.

AMARILLO, TEXAS
September 12, 1977

This Planning Department report cited several sources including national news magazines, "adult business" ordinances from other cities, an American Society of Planning Officials report and pertinent Supreme Court decisions. Lengthy explanation of the Miller test with legal definitions, discussion of Young v. American Mini Theatres, and a comparison of the Boston and Detroit zoning models are included. The city defined "adult businesses" as taverns, lounges, lounges with semi-nude entertainment, and bookstores or theaters with publications featuring nudity and explicit sexual activities. (At the time, Amarillo had three such theaters and four bookstores with space for such publications).

The police department provided an analysis showing that areas of concentrated "adult only" businesses had two and one-half times the street crime as the city average. The Planning Department concluded that concentrations of these businesses have detrimental effects on residential and commercial activities caused by: (1) noise, lighting and traffic during late night hours; (2) increased opportunity for street crimes; and (3) the tendency of citizens to avoid such business areas. The study noted that lack of zoning regulations would lead to concentrations of sexually oriented businesses (causing increased crime) or more such establishments locating near residential areas or family and juvenile oriented activity sites (churches, parks, etc.).

The report recommended: (1) adult businesses locate 1,000 feet from each other, (no distance was specified from residential zones or family/juvenile activities); (2) city development of an amortization schedule and permit/licensing mechanism; (3) city regulation of signs and similar forms of advertising; (4) vigorous enforcement of State Penal Code, especially relating to

"Harmful to Minors"; (5) city amendments prohibiting minors from viewing or purchasing sexually oriented materials (enforced physical barriers).

AUSTIN, TEXAS
May 19, 1986

The report was the basis for developing an amendment to existing sexually oriented business ordinances. At the time, 49 such businesses operated in Austin, mostly bookstores, theaters, massage parlors and topless bars. The study examined crime rates, property values and trade area characteristics. The study is also useful because it summarizes many other city studies.

The report focused on sexually related crimes in four study areas (with sexually oriented businesses) and four control areas (close to study areas and similar). Two study areas had one sexually oriented business and the others had two such businesses. To determine the effects of these businesses on property values, the city sent surveys to 120 real estate appraising or landing firms (nearly half responded). For trade area characteristics, three businesses (a bookstore, theater and topless bar) were observed on a weekend night to determine customer addresses.

Sexually related crime ranged from 177 to 482 percent higher in the four study areas than the city average. In the two study areas containing two sexually oriented businesses, the rate was 66 percent higher than in the study areas with one such business. All control areas had crime rates near the city average.

Eighty-eight percent said that a sexually oriented business within one block of a residential area decreases the value of the homes (33 percent said depreciation would be at least 20 percent). Respondents also said such a business is a sign of neighborhood decline, making underwriters hesitant to approve the 90 to 95 percent financing most home buyers require. They said commercial property is also negatively affected by such businesses.

Of 81 license plates traced for owner addresses, only three lived within one mile of the sexually oriented business; 44 percent were from outside Austin.

The report recommended: (1) sexually oriented businesses should be limited to highway or regionally-oriented zone districts; (2) businesses should be dispersed to avoid concentration; and (3) conditional use permits should be required for these businesses.

BEAUMONT, TEXAS
September 14, 1982

This report by the city Planning Department encouraged amendments to existing "adult business" ordinances to include eating or drinking places featuring sexually oriented entertainment (strippers, etc.). Zoning laws required "adult uses" to locate 500 feet from residential areas; 300 feet from any other adult bookstore, adult theater, bar, pool hall or liquor store; and 1,000 feet from a church, school, park or recreational facility where minors congregate.

Police verified that bars, taverns and lounges (especially those with sexually oriented entertainment) are frequent scenes of prostitution and the sale/use of narcotics. On the whole, all criminal activity was higher at sexually oriented businesses.

The report recommended: (1) adding eating/drinking places that exclude minors (under Texas law), unless accompanied by a consenting parent, guardian or spouse, to list of protected uses; (2) require specific permits for areas zoned as General Commercial - Multiple Family Dwelling Districts; and (3) reduce the required distance of sexually oriented businesses from residential areas, schools, parks and recreational facilities from 1,000 to 750 feet.

STATE OF MINNESOTA, REPORT OF THE ATTORNEY GENERAL'S WORKING GROUP ON THE REGULATION OF SEXUALLY ORIENTED BUSINESSES
June 1989

The Minnesota Attorney General's Working Group reviewed studies performed in a number of large U.S. cities, consulted with police departments in a number of other cities, researched enforcement strategies from other states, and heard testimony concerning the impact of sexually oriented businesses on their surrounding neighborhoods and concerning the relationship of sexually oriented businesses to organized crime.

The Working Group concluded that there was "compelling evidence that sexually oriented businesses are associated with high crime rates and depression of property values." The Working Group recommended that communities take steps to minimize the negative secondary effects of sexually oriented businesses. Among the steps recommended were:

- that communities reduce negative secondary effects by enacting and enforcing zoning restrictions on sexually oriented business locations, including prohibitions against locating multiple such businesses in the same building, and against locating any such businesses within certain minimum distances of sensitive uses such as residences, schools, and parks, and within certain minimum distances of liquor establishments and other sexually oriented businesses;

- that communities adopt regulations to reduce the likelihood of criminal activity on sexually oriented business premises, and to require licensure of sexually oriented businesses and provide for revocation or denial of licenses when the licensees commit certain relevant offenses;

- that communities regulate exterior features of sexually oriented businesses and enforce the existing state law requiring sexually oriented material to be provided only in opaque covers; and

14-19

- that communities vigorously prosecute violations of obscenity laws and other sex-
related crimes, making use of asset forfeiture and injunctive procedures where possible.

ISLIP, NEW YORK
September 23, 1980

This study was performed through a review of studies and ordinances from Detroit, MI, Norwalk, CA, Dallas, TX, Prince George's County, MD, and New Orleans, LA, a survey of media coverage and public reaction arising out of the establishment of a sexually oriented bookstore in the city, and inspection of sexually oriented businesses.

Islip's study recommended basing an ordinance on the dispersal-style 1976 Detroit ordinance. Its authors reviewed the existing case law that required space to be available for adult uses and forbade attempting to zone adult uses out completely.

Islip planers observed that two sex businesses in the downtown area were responsible for creating a "dead zone" that people not interested in adult uses actively avoided—at a detriment to neighboring businesses. Also, short-term parking was used long term by patrons of the sex business. In some cases the authors observed that the sexually oriented businesses that were close to other businesses appeared to have had a negative impact on those nearby businesses. Also, they noted that a significant number of the owners and managers had ties to organized crime, with multiple arrests and convictions.

Islip planners recommended that adult uses be restricted to industrial zones. They also recommended a 500' buffer between adult uses and residential and public facilities. Because Islip has a rural highway with sex-businesses located an average of 1.1 miles apart, for 5 miles, the planning department recommended that a buffer of a half mile be placed between any sex businesses on this specific highway to prevent the development of a "Combat Zone" on the road into the town. They also recommended establishing an amortization system by which nonconforming sexually oriented businesses would be phased out over a period of years. More broadly, they recommended that the entire ordinance be focused on reducing the negative effects of sex businesses.

The proposed ordinance (included as an appendix to the study) was upheld in substantial part by New York's highest court in *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989).

NEW YORK CITY, NEW YORK
1994

This extensive and well-assembled study was performed by New York City's Department of City Planning ("DCP"). The DCP reviewed studies and ordinances from other localities and studied the industry as it existed in New York City—among other things, meeting with members of the sexually oriented business industry. The DCP reviewed accounts of secondary effects from sources as diverse as the City Planning Commission, the Office of Midtown Enforcement, the Chelsea Business Survey, the Task Force on the Regulation of Sex-Related Businesses,

the Times Square Business Improvement District Study, and a number of newspaper reports and correspondence from citizens. DCP examined signage and neighborhood conditions in six study areas containing sexually oriented businesses, also surveying local organizations, businesses, police officers, real estate brokers, and sanitation department officials in each of the six areas. It also comparatively analyzed criminal complaints and assessed property values in the study areas and in control areas without sexually oriented businesses.

The DCP concluded that other localities' studies had found sexually oriented businesses to have negative secondary effects including "increased crime rates, depreciation of property values, [and] deterioration of community character and the quality of urban life." It found that between 1984 and 1993 the number of sexually oriented businesses in New York City increased from 131 to 177. The DCP found that sexually oriented businesses tend to cluster, especially in central areas and along major vehicular routes connecting central business districts with outlying city areas and suburbs. Crime report statistics in New York City did not show higher crime rates in areas with sexually oriented businesses than in areas without them, but property values in proximity to sex businesses grew at an appreciably slower rate than in areas away from such businesses. The DCP found widespread fear of sex businesses' secondary effects on the part of the citizenry, and also found that survey respondents indicating that their businesses or neighborhoods had not suffered adverse secondary effects tended to be the ones living in areas with isolated sex businesses. Real estate brokers overwhelmingly reported that sex businesses would have negative effects on surrounding property values. Finally, the DCP found that signage for adult businesses tended to be larger and more garish than other nearby signage—a source of concern to residents living nearby.

Based on its findings, the DCP recommended special regulation of sexually oriented businesses, advising that the city specifically consider "restrictions on the location of adult uses in proximity to residential areas, to houses of worship, to schools and to each other."

OKLAHOMA CITY, OKLAHOMA
June, 1992

Jon Stephen Gustin, a retired sergeant of the Oklahoma City Police Department, authored a report on the successful abatement of adult oriented business nuisances in Oklahoma City, Oklahoma from 1984 – 1989. This report narrates the history of Oklahoma City's successful efforts to combat the negative secondary effects of sexually oriented businesses.

Active police enforcement of laws relating to sex businesses began after a strong, grass-roots campaign called for a response to the concentration of so many sex-businesses in one city. Initially, prosecution of illegal sexual activities was hampered by poor or nonexistent laws and lax police enforcement.

The police began an active anti-prostitution effort and arrest records were published by the media and TV stations carried names and faces of the people involved. Initially, police made several arrests at known houses of prostitution. Adult bookstores with peepshow booths also posed particular problems. Specimens of seminal fluid on walls and floors contributed to the forced closure of several such businesses. The district attorney's office consistently won the cases it brought against those committing illegal acts in sexually oriented businesses.

Nude dancing businesses were also the source of several criminal and illicit sexual conduct, with undercover police officers making arrests for illegal sex acts on the premises of

the businesses. A police department "escort service" sting operation resulted in the arrest of many men soliciting prostitution through such businesses.

Sergeant Gustin reported that by 1992, most of the original sexually oriented businesses had shut down, with only a few remaining under the newly-enforced and stringent regulations.

HOUSTON, TEXAS
January 7, 1997

This report by Houston's Sexually Oriented Business Ordinance Revision Committee was prepared to supplement prior reports issued in 1983, 1986 and 1991, with the aim of reforming the existing sexually oriented business ordinance if necessary and assessing possible improvements to protect the interests of the public and the rights of sexually oriented businesses.

Hearing testimony and evaluating evidence from many sources, including police and parties favoring and disfavoring regulation of sexually oriented businesses, the committee concluded that criminal activity associated with sex businesses justified licensure requirements for such businesses and their entertainers and managers. It noted difficulties in obtaining convictions through sting operations. It viewed video evidence concerning "glory holes" between peepshow booths, whereby patrons of such establishments engage in anonymous sex with one another on the premises, and recommended prohibition of such holes. It found that sex businesses with inadequate lighting or without clear lines of sight to all parts of the premises encouraged lewd behavior and illegal sexual activity. It found that many sex businesses had locked rooms on their premises, serving as venues for prostitution. It entertained requests that public parks be included among the sensitive uses shielded from sexually oriented businesses by minimum distance requirements, and that increased prior public notice be given to neighborhoods in which sexually oriented businesses intend to locate.

The Committee recommended various means of streamlining the licensure and enforcement processes. It proposed increasing some of the minimum distances required between sex businesses and other land uses, and strengthening of signage regulations, and more strenuous licensure requirements for sex business managers and employees. The committee recommended prohibition of the touching of customers by sex business employees engaging in display of specified anatomical areas or other specified sexual activities. Finally, the committee reviewed and opted to retain the city's amortization scheme, as an "appropriate balancing of interests" of the sex businesses and the community. The final portion of the report consists of specific proposed changes to the language of Houston's sexually oriented business ordinance.

CRIME-RELATED SECONDARY EFFECTS OF SEXUALLY-ORIENTED BUSINESSES

REPORT TO THE JACKSON COUNTY LEGISLATURE JACKSON COUNTY, MISSOURI

Richard McCleary, Ph.D.

May 9, 2008

14-23

TABLES AND FIGURES

INTRODUCTION

Expressive activities that occur inside sexually-oriented businesses (SOBs), such as X-rated bookstores, video arcades, peep-shows, or erotic dance clubs, have broad First Amendment protection. Nevertheless, governments are allowed to regulate the time, manner, and place of expressive activities so long as the regulations are motivated by and aimed at ameliorating the potential secondary effects of SOBs. Governments typically attempt to regulate SOBs through zoning or planning codes, business licensing codes, and where applicable, through alcoholic beverage control codes. Regardless of the mechanism, of course, regulations must be aimed narrowly at the secondary effects of the businesses. Regulation ordinarily begins with legislative fact-finding. This report is part of the fact-finding process.

I am a Professor at the University of California, Irvine with appointments in the Departments of Criminology, Environmental Health Science, and Planning. My *curriculum vitae* is attached to this report. My degrees include a B.S. from the University of Wisconsin and an M.A. and Ph.D. from Northwestern University. I have taught graduate courses in statistics and criminology at the University of California, Irvine; the University of Minnesota; the University of Michigan; the University of New Mexico; Arizona State University; the State University of New York, Albany; and the University of Illinois, Chicago. I have supervised more than two-dozen doctoral students in statistics and/or criminology at these universities. My students hold appointments at major research universities in the U.S. and U.K.

My training and experience qualify me as an expert in criminology and statistics. I joined the American Society for Criminology and the American Statistical Association in 1977 and am currently a member of both scholarly societies. My scholarly contributions in these fields have been recognized by awards from Federal and state government agencies and scholarly societies. As an expert in these fields, I have served on Federal and state government task forces and panels and have served on the editorial boards of national peer-reviewed journals. I am the author or co-author of five books more than 70 articles in these fields.

Throughout my career, I have applied my expertise in statistics and criminology to the problem of measuring site-specific public safety hazards, especially the hazards associated with sexually-oriented businesses (SOBs). These hazards are also called "ambient crime risks" or "crime-related secondary effects." I have advised local, county, and state governments on these problems for nearly 30 years. Based on my background and research, I have three opinions that are relevant to Jackson County:

> **Opinion 1**: The criminological theory of ambient crime risk, known as the "routine activity theory of hotspots," predicts that SOBs as a class will have large, significant crime-related secondary effects. The effect is the product of three factors. (1) SOBs draw patrons from wide catchment areas. (2) Because they are disproportionately male, open to vice overtures, reluctant to report victimizations to the police, *etc.*, SOB patrons are "soft" targets. (3) The high density of "soft" targets at the site attracts predatory criminals, including vice purveyors who dabble in crime and criminals who pose as vice purveyors in order to lure or lull

potential victims.

Opinion 2: In the last thirty years, empirical studies employing a wide range of quasi-experimental designs have found that SOBs have large, significant crime-related secondary effects. Since these studies are quasi-experiments, each can be criticized on narrow methodological grounds. Since no single methodological critique applies to all (or even most) of these studies, however, the consensus finding of the literature is scientifically robust.

Opinion 3: Given that strong criminological theory predicts the effect, and given that the prediction is corroborated consistently by the empirical literature, it is a *scientific fact* that SOBs pose ambient crime risks.

This report will expand on and explain these opinions. **Section 1** introduces the criminological theory of secondary effects. The secondary effects "debate" often misses this important point: Criminological theory *predicts* that SOBs will generate ambient public safety hazard. The same theory informs the regulation of SOBs, explaining how effective mitigation strategies can be incorporated into codes.

After developing the theoretical foundation, **Section 2** reviews the early that constitute the voluminous "secondary effects literature" that, following the *Renton* standard, governments have relied upon.[1] *Without exception*, the early studies corroborated theoretical expectations in that all found that SOBs posed large, significant ambient public safety hazards.

In the last decade, the validity of the consensus finding of the early literature has come under attack from experts retained by SOBs. To be fair, the early studies were conducted without modern computers and related resources. Although these studies could have been "done better," the validity of the consensus finding has survived the critics' attacks. Nevertheless, in the last decade, the secondary effects literature has grown more voluminous.

The more recent literature, reviewed in **Sections 3-5**, reinforces the consensus finding of the earlier studies. Reflecting an emerging theme, many of the more recent studies focus on SOB subclasses, including adult cabarets (**Section 3**), video arcades (**Section 4**), and "off-site" adult bookstores. As criminological theory predicts, all three SOB subclasses have large, significant secondary effects.

Secondary effects studies sponsored by the SOB industry invariably contradict the consensus finding that SOBs pose large, significant public safety hazards. In many instances, the "null findings" reported by these studies rest on bizarre interpretations of numerical results. In other instances, the reported "null findings" are an artifact of design – *i.e.*, the methods used to

---

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

conduct the study. It should be no surprise that a study's results can be influenced (or biased) by the study's design. Methodological rules have evolved to guard against design abuses. Two of the most important methodological rules are discussed in **Section 6**.

The first methodological rule concerns ambient crime risk measures. For purposes of a secondary effects study, criminologists prefer to measure ambient crime risk with crime incident reports, such as the Uniform Crime Reports collected by local police agencies. Experts retained by the SOB industry prefer 911 calls. The rationale for this preference, put simply, is that 911 calls generate a bias in favor a "null finding." If these biases are corrected, the null finding is rejected.

The second methodological rule concerns the criteria under which a "null finding" can be interpreted to mean that SOBs have no secondary effects. To illustrate, suppose that I search for my car keys but cannot find them. Although it is possible that I could not find them because they do not exist, it is also possible that I did not look hard enough. An analogous dilemma arises in secondary effects research when no secondary effect is found. Although it is possible that none exists, it is also possible that the search for secondary effects was too superficial.

A "quick and dirty" study is the easiest way *not* to find a secondary effect. The potential for abuse is addressed by the methodological convention of "statistical power." Put simply, any researcher who fails to find a secondary effect must demonstrate that the search was sufficiently powerful. Otherwise, the unsuccessful search is *inconclusive*.[2] Many of the studies sponsored by the SOB industry use inherently weak designs to produce "null findings." When widely accepted methodological conventions are applied to these findings, of course, they are *inconclusive.*

[2] The Latin aphorism "*Negativa non probanda*," attributed to Isaac Newton, is translated roughly as "Finding nothing proves nothing."

1. THE CRIMINOLOGICAL THEORY OF SECONDARY EFFECTS

It is a *scientific fact* that SOBs, as a class, pose large, statistically significant ambient public safety hazards. The public safety hazard is realized not only in terms of "victimless" crimes (prostitution, drugs, *etc.*) but, also, in terms of the "serious" crimes (assault, robbery, *etc.*) and "opportunistic" crimes (vandalism, trespass *etc.*) that are associated with vice.

Table 1 - Secondary Effect Studies Relied on by Legislatures

Los Angeles, CA	1977	Times Square, NY	1994
Whittier, CA	1978	Newport News, VA	1996
St. Paul, MN	1978	Dallas, TX	1997
Phoenix, AZ	1979	San Diego, CA	2002
Minneapolis, MN	1980	Greensboro, NC	2003
Indianapolis, IN	1984	Centralia, WA	2003
Austin, TX	1986	Daytona Beach, FL	2004
Garden Grove, CA	1991	Montrose, IL	2005
Manhattan, NY	1994	Sioux City, IA	2006

I call the SOB-crime relationship a "*scientific fact*" because, first, it is predicted by a strong scientific theory; and second, because the theoretical prediction has been corroborated empirically. On the second point, Table 1 lists eighteen empirical studies whose findings corroborate the claim that SOBs pose large, significant ambient public safety hazards. The remarkable range of time-frames, locations, and circumstances represented by these studies suggests that the consensus finding is general and robust.

1.1 THE ROUTINE ACTIVITY THEORY OF "HOTSPOTS"

The consensus finding of this literature becomes *scientific fact* when it is interpreted in the context of a scientific theory. In this instance, the SOB-crime relationship is predicted by the central "organizing theory" of modern scientific criminology. The so-called routine activity theory[3] answers the what-when-where questions of victimization risk. As applied to "hotspots of predatory crime," such as SOB sites, the theory holds that ambient crime risk, generally defined as the number of crimes within 500-1000 feet of a site, with the product of four risk factors. This

---

[3] This theory is due to Cohen and Felson (1979; Felson and Cohen, 1980; Felson, 1998). The routine activity theory is one of the most validated theories in modern social science. In 2005 alone, according to the *Social Science Citation Index*, the 1979 Cohen-Felson article was cited 621 times. The "hotspot" application of the theory is due to Sherman, Gartin, and Buerger (1989) and to Brantingham and Brantingham (1981; 1993).

can be written as:

$$\textit{Ambient Crime Risk} = \frac{\textit{N of Targets} \times \textit{Average Value}}{\textit{Police Presence}} \times \textit{Offenders}$$

An increase (or decrease) in the number of targets at the site or in their average value yields an increase (or decrease) in ambient crime risk. An increase (or decrease) in police presence, on the other hand, yields a decrease (or increase) in ambient crime risk.

1.1.1 TARGETS

SOB sites are crime hotspots because they attract potential victims, or targets, from wide catchment areas. SOB sites are no different in that respect than tourist attractions (Dimanche and Lepetic, 1999; Danner, 2003) and sporting events (Corcoran, Wilson and Ware, 2003; Westcott, 2006). Compared to the targets found at these better known hotspots, however, the targets found at SOBs are exceptionally attractive to offenders. This reflects the presumed characteristics of SOB patrons. The patrons do not ordinarily live in the neighborhood but travel long distances to the site.[4] They are disproportionately male, open to vice overtures, and carry cash. Most important of all, when victimized, they are reluctant to involve the police. From the offender's perspective, they are "perfect" victims.

1.1.2 OFFENDERS

The crime-vice connection has been a popular plot device for at least 250 years. John Gay's *Beggar's Opera* (1728), for example, describes the relationship between MacHeath, a predatory criminal, and the vice ring composed of Peachum, Lucy, and Jenny. This popular view is reinforced by the empirical literature on criminal lifestyles and thought processes. The earliest and best-known study (Shaw, 1930; Snodgrass, 1982) describes the life of "Stanley," a delinquent who lives with a prostitute and preys on her clients.

This routine activity theory of hotspots assumes a pool of rational offenders who move freely from site to site, choosing to work the most attractive site available. These offenders lack legitimate means of livelihood and devote substantial time to illegitimate activities; they are "professional thieves" by Sutherland's (1937) definition. Otherwise, they are a heterogeneous

---

[4] In 1990, as part of an investigation, Garden Grove police officers ran registration checks on motor vehicles parked at SOBs. Virtually all of the vehicles were registered to addresses outside Garden Grove. The 1986 Austin, TX study arrived at the same finding. More recently, the Effingham County Sheriff's Department ran registration checks on motor vehicles parked at an SOB in the Village of Montrose. Except for employees' vehicles, all were from outside the county.

group. Some are vice purveyors who dabble in crime. Others are predatory criminals who promise vice to lure and lull their victims. Despite their heterogeneity, the offenders share a rational decision-making calculus that draws them to adult business sites.

1.1.3 TARGET VALUE

Criminological thinking has changed little in the 75 years since Shaw's (1930) *Jack-Roller*. To document the rational choices of predatory criminals, Wright and Decker (1997) interviewed 86 active armed robbers. Asked to describe a perfect victim, all mentioned victims involved in vice, either as sellers or buyers. Three of the armed robbers worked as prostitutes:

> From their perspective, the ideal robbery target was a married man in search of an illicit sexual adventure; he would be disinclined to make a police report for fear of exposing his own deviance (p. 69).

The rational calculus described by these prostitute-robbers echoes the descriptions of other predators (see Bennett and Wright, 1984; Feeney, 1986; Fleisher, 1995; Katz, 1988, 1991; Shover, 1996).

1.1.4 POLICE PRESENCE

Controlling for the quantity and value of the targets at a site, rational offenders choose sites with the lowest level of visible police presence. In strictly physical terms, increasing (or decreasing) the number of police physically on or near a site reduces (or increases) ambient risk. However, police presence can also be virtual through remote camera surveillance and similar processes.

Whether physical or virtual, the *effectiveness* of police presence can be affected – for better or worse – by broadly defined environmental factors. For example, due to the reduced effectiveness of conventional patrolling after dark, crime risk rises at night, peaking around the time that taverns close. Darkness has a lesser effect on other policing strategies, which raises the general principle of *optimizing* the effectiveness of police presence. One theoretical reason why SOB subclasses might have qualitatively different ambient risks is that they have different optimal policing strategies.

1.2 WHAT DOES CRIMINOLOGICAL THEORY SAY ABOUT SUBCLASSES?

In lawsuits, SOB plaintiffs have argued that their narrowly-defined SOB subclass is exempt from criminological theory. But in fact, the relevant criminological theory applies to all subclasses. To the extent that two SOB subclasses draw similar patrons from similarly wide catchment areas, theory predicts similar ambient crime risks. Put simply, similar causes (the presence of many high-value targets and low levels of police presence) have similar effects (*i.e.*, high ambient crime risk). This theoretical expectation is consistent with the data. Although the

applies identically to all SOB subclasses, however, at the same time, it allows for qualitative differences among the subclasses.

In some instances, subclass-specific risks arise because the defining property of the subclass implies (or creates) idiosyncratic opportunities (or risks) for particular types of crime. Compared to the complementary subclass, for example, SOBs that serve alcohol present idiosyncratic opportunities for non-instrumental crimes, especially simple assault, disorderly conduct, *etc.* SOBs that provide on-premise entertainment present idiosyncratic opportunities for vice crime, customer-employee assault, *etc.* Criminologists call this etiological crime category "opportunistic." There are many obvious examples and SOB regulations often treat subclasses differently because their ambient opportunity structures are different.

Qualitative differences also arise when the defining property of the subclass compromises the effectiveness of common policing strategies. Policing SOBs that offer on-site entertainment (adult cabarets, peep shows, *etc.*) may require that police officers inspect the interior premises, for example. Because this places officers at risk of injury, policing on-site SOBs requires specially trained and equipped officers, prior intelligence, specialized backup manpower, and other resources. Because potential offenders can wait inside the premises without arousing suspicion, moreover, routine drive-by patrols to "show the flag" are less effective.

The optimal policing strategies for two subclasses are sometimes incompatible or even mutually exclusive. To illustrate, an optimal policing strategy for SOBs that do not offer on-site entertainment, such as adult video and book stores, often involves neighborhood patrols by uniformed officers in marked cars. Visibility is a key element of this strategy. For peep shows and adult cabarets, on the other hand, the optimal policing strategy often involves boots-on-the-ground deployments of plainclothes officers and unmarked cars. Invisibility is a key element of this strategy. Obviously, neighborhood patrols by plainclothes officers driving unmarked cars would defeat a major purpose of drive-by patrols; likewise, sending uniformed officers into an adult cabaret would be an inefficient method of control and might pose a physical danger to the officers, patrons, and employees. As a general rule, distinct SOB subclasses may require distinct policing strategies to mitigate ambient crime risks.

To some extent, differences among the optimal policing strategies for SOB subclasses amount to differences in cost. In many (but certainly not all) instances, the least expensive policing strategy involves drive-by patrols by uniformed officers in marked cars. Beyond the deterrent value of visible drive-by patrols, patrol officers can keep watch for known offenders and suspicious activity. When potential problems are spotted, the patrol officers can forward the information to a specialized unit or, if necessary, handle it on the spot, requesting backup

resources only as needed.[5] It is important to realize, nevertheless, that the implementation of a policing strategy is determined in large part by local exigencies.

1.3 THE THEORETICAL ROLE OF ALCOHOL

Proximity to alcohol is a key component of the criminological theory of secondary effects. Alcohol aggravates an SOB's already-high ambient crime risk by lowering the inhibitions and clouding the judgments of the SOB's patrons. In effect, alcohol makes the soft targets found at the SOB site considerably softer. The available data corroborate this theoretical expectation in all respects. Predatory criminals prefer inebriated victims,[6] *e.g.*, and SOBs that serve alcohol or that are located near liquor-serving businesses pose accordingly larger and qualitatively different ambient public safety hazards.[7] Governments rely on this consistent finding of crime-related secondary effect studies as a rationale for limiting nudity in liquor-serving businesses.

1.4 THE CRIMINOLOGICAL THEORY OF MITIGATION STRATEGIES

The routine activity theory points to strategies for mitigating the crime-related secondary effects of SOBs. In principle, the effects of a mitigation strategy can be *direct* or *indirect* . *Direct* effects are typically realized through *direct* manipulation of the risk factors to reduce ambient risk. *Indirect* effects are realized by making the risk factors more efficient. In practice, of course, some of the strategies are expensive or otherwise impractical. I begin with one of the most expensive, least practical mitigation strategies.

1.4.1 INCREASING THE LEVEL OF POLICE PRESENCE

The simplest, surest way to mitigate ambient crime risk is to assign more police to SOB neighborhoods. Although the relationship between police presence and ambient crime risk is

---

[5] See, e.g., National Research Council. *Fairness and Effectiveness in Policing: The Evidence*. National Academies Press, 2004.

[6] See, *e.g.*, Wright and Decker (1997, p. 87): "[E]ach of (the armed robbers) expressed a preference for intoxicated victims, who were viewed as good targets because they were in no condition to fight back." (p. 70); "Several [armed robbers] said that they usually chose victims who appeared to be intoxicated because, as one put it, 'Drunks never know what hit them.'"

[7] A 1991 study of Garden Grove, California by McCleary and Meeker found a large, significant increase on ambient crime risk when an alcohol-serving establishment opened within 500 feet (*ca.* one city block) of an SOB. Secondary effect studies in Greensboro (2003) and Daytona Beach (2004) found that alcohol-serving SOBs had larger secondary effects than retail alcohol outlets. These studies are reviewed in Section 2.

complicated and complex, criminologists generally accept the aphorism: "more police, less crime."[8] Unfortunately, this simplest, surest mitigation strategy is expensive and impractical. From the government's perspective, increasing the number of police patrols in a neighborhood is prohibitively expensive. From the perspective of the SOB and its patrons, police presence can be highly intrusive, bordering on "harassment."

In principle, fixed levels of police presence can be made more effective by fine-tuning *status quo* policing strategies. Police patrols can be made more visible, *e.g.*, by using uniformed officers in marked vehicles instead of plain-clothes officers in unmarked vehicles. Most police departments have already optimized their strategies, however. Police effectiveness can also be enhanced by incorporating rational enforcement policies into SOB codes. Several examples are described in subsequent sections.

1.4.2 DISTANCING SOB SITES FROM SENSITIVE USES

Reducing the density of targets in an SOB neighborhood is a more economical, practical mitigation strategy. As a rule, the most problematic secondary effects are associated with dense concentrations of SOBs (*e.g.*, Boston's "combat zone" model). Accordingly, many governments require minimum distances between SOB sites (*e.g.*, the Detroit model). In addition to reducing per-site target density, thereby reducing aggregate risk, this model minimizes many obstacles to routine policing.

Figure 1.4.2 demonstrates the rationale for a related mitigation strategy.[9] The vertical axis of this "risk-distance fuinction" is calibrated in units of Part I personal crime (homicide, aggravated assault, robbery, and rape) risk, relative to the neighborhood risk, for 28 Greensboro SOBs for 1996-2005. The horizontal axis is calibrated in distance from an SOB. The unit of distance is a city block which, in the Greensboro neighborhoods from which these data are taken, is approximately 400 feet.

Suppose that a person exits a building five city blocks (*i.e.*, 2,000 feet) from an SOB. As this person walks toward the SOB, his or her victimization risk rises. For the first few blocks, the risk increments are modest; thereafter, the risk increments grow large. At two blocks from the SOB, the person's risk is double what it was at start of the five-block walk. At one-half

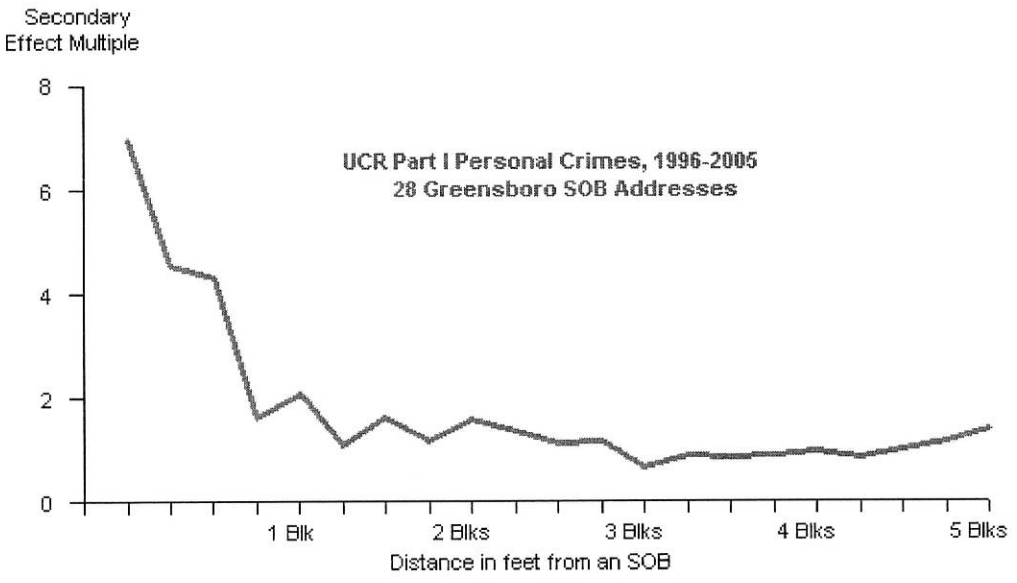
---

[8] See, *e.g.*, S.D. Levitt. Using electoral cycles in police hiring to estimate the effect of police on crime. *American Economic Review*, 1997, 87:270-290. "Increases in police are shown to substantially reduce violent crime but have a smaller impact on property crime. The null hypothesis that the marginal social benefit of reduced crime equals the costs of hiring additional police cannot be rejected." (p. 270). Some "victimless" vice crimes are an exception to the rule, of course.

[9] Risk-distance functions are revisited in Sections 3-4 below.

block. the risk is six times higher. If the person walks away from the SOB site, his or her victimization risk falls until, at a distance of three blocks from the site, the risk decrements are imperceptible.

Figure 1.4.2 - Robbery Risk by Distance from an SOB



Governments can take advantage of the risk-distance relationship plotted in Figure 1.4.2 by setting minimum distances between SOBs and other sensitive land uses. SOB patrons have no choice but to "run the gauntlet." The victims of some ambient crime incidents are not SOB patrons, however, but rather, are neighborhood residents and by-passers. By setting minimum distances between SOBs and the land uses frequented by these people, the government mitigates the SOB's ambient crime risk secondary effect.[10]

1.4.3 LIMITING THE HOURS OF OPERATION

Another economical and practical strategy for mitigating the ambient crime risk of SOBs is to limit the hours of operation. Criminological theory reduces to the aphorism, "more targets,

---

[10] I am often asked to specify a distance sufficient to fully mitigate an SOB's ambient crime risk. The correct answer to this question – "As far as possible" – is not helpful. Although the risk-distance function plotted in Figure 1.4.2 seems to answer this question, remember that it is the *average* of 28 SOB sites. By definition, some sites are "better," some "worse." Planners must assume a worst case scenario but, then, must balance this assumption with practical (and legal) considerations.

more crime." And in the overnight hours when businesses close and people go home, the crime rate drops. While the crime *rate* drops, however, the *per-target* risk rises. When a business stays open around-the-clock, its victimization risk rises steadily after sundown, peaking in the early morning. Darkness softens a target, increasing its appeal to predatory criminals.

Several mechanisms operate here but the most salient is that routine policing is more difficult and less effective in darkness. When bars and taverns close, police resources are stretched thinner yet, making soft targets even softer. Governments typically mitigate this risk by closing high-risk public places (playgrounds, beaches, parks, *etc.*) from dawn to dusk; by imposing curfews on high-risk persons (teen-agers, parolees, *etc.*); and by limiting the operation of high-risk businesses (bars, SOBs, *etc.*) during times of acute risk. Not surprisingly, this theoretical prediction is confirmed by the empirical evidence.

1.4.4 "HARDENING" SOB SITES[11]

In principle, ordinances can mitigate ambient crime risk requiring SOBs to "harden" their properties. Mandating outdoor lighting, parking lot surveillance cameras, and anti-"cruising" structures illustrate strategies for hardening the site's exterior. This list of exterior hardening options is short, unfortunately; and although the effectiveness of exterior hardening strategies depends to some extent on local circumstances and conditions, there is little evidence that any of the typical options can mitigate ambient crime risk.

Regulating the interior configurations of SOBs, in contrast, has a stronger rationale in criminological theory. Interior hardening strategies are often less costly moreover, more practical, and in theory, more effective. Three widely used strategies illustrate the general principle:

- Ordinances that eliminate interior blind spots
- Ordinances that prohibit closed viewing booths
- Ordinances that restrict entertainers to raised stage areas

Each of these strategies reduces the risk of on-premise victimization of patrons and employees.[12] In some respects, the risk reduction mechanism is obvious. Removing blind spots and opening up closed booths obviously reduces the opportunity for lewd behavior, *e.g.* Though less obvious, to the extent that patron-on-patron, patron-on-employee, and employee-on-patron confrontations are precipitated by lewd behavior, these strategies also reduce the risk of assault.

---

[11] The classic statement on "hardening" is Oscar Newman's *Defensible Space: Crime Prevention Through Urban Design*. (New York: MacMillan, 1973).

[12] The strategies also facilitate routine enforcement while minimizing the risk of injury to police officers. Those topics will be discussed separately in the next section.

The risk of patron-on-patron, patron-on-employee, and employee-on-patron crime is most acute inside SOBs that feature live entertainment; and of course, alcohol aggravates the risk. The risk can be mitigated by separating patrons and entertainers. Ideally, separation is achieved by mandated structures, such as raised stages. By creating a tangible "wall" between employees and patrons, raised stages reduce unintentional (or intentional) "touching," thereby reducing the risk of patron-on-employee and employee-on-patron crime.

1.4.5 POLICE OFFICER SAFETY

While assaults on police officers are rare, they are among the most serious crimes that occur inside SOBs. In theory, moreover, they are preventable. The risk of assault begins when officers enter the SOB and continues until they leaves. Mitigation strategies aim at minimizing the number of times officers must enter SOBs and, having entered, the amount of time they must spend inside. Strategies that focus on the latter factor are more practical.

Police officers enter SOBs either in response to a reported crime incident or to inspect the premises as part of routine enforcement. By reducing the risk of the on-premise crime incidents, the interior target-hardening strategies described in the preceding section reduce the number of times that officers must enter SOBs to respond to reported incidents. Otherwise, there are few options for reducing the number of times that officers must enter SOBs. Not withstanding the risk to officers, routine inspection can be an effective mitigation strategy. By focusing attention on SOB sites, routine inspection reduces ambient risk through a complex set of pathways referred to, collectively, as "broken windows."[13]

Regardless of how officers come to be inside an SOB, any strategy that minimizes the amount of time spent inside reduces the risk of injury. Ordinances aimed at improving interior visibility illustrate these strategies. In many instances, officers can accomplish their purpose with a quick visual inspection. If the interior of the SOB is well lit and obstacle-free, the inspection can be completed by one officer in a minute or two. If the interior is dark and/or labyrinthian, the same inspection may require two (or more) officers for a longer period of time.

In SOBs that feature live entertainment, a raised stage reduces the risk of injury to police officers through the same mechanism. If an ordinance mandates, say, a six-foot distance between patrons and entertainers, absent a raised stage, enforcing (and/or detecting willful violations of) the ordinance may require that several plainclothes officers spend an hour or more inside. With a raised stage, on the other hand, a comparable level enforcement and detection of violations can

---

[13]The best known statement of this effect is "Broken windows: The police and neighborhood safety." by J.Q. Wilson and G.L. Kelling, *Atlantic Monthly*, 1982, 249:29-38. Wilson and Kelling argue persuasively that police visibility in a neighborhood can have a greater impact on victimization risk than police activities that target crime *per se*. Modern police methods are based on this theory.

be accomplished with shorter, more superficial inspections. Raised stages also facilitate self-enforcement. Ensuring that patrons and entertainers comply with a distance rule, absent a raised stage, demands constant attention and keen judgement by the SOB. A raised stage facilitates self-enforcement by the SOB, thereby reducing the risk of patron-patron and employee-patron confrontations.

1.4.6 TAILORING REGULATIONS TO FIT LOCAL NEEDS

The ideal SOB ordinance marries low compliance costs for the SOB to low enforcement costs for the government. To some extent, compliance and enforcement costs depend on local circumstances and conditions and these often dictate differences in codes and/or enforcement strategies. A code or strategy that is optimal for one set of circumstances may be less than optimal for another. If a local variation is aimed at rationalizing regulation and optimizing mitigation, it should be encouraged.

By definition, local conditions are too numerous to list. Nevertheless, the principle is straightforward. Legislatures adapt and modify codes to take advantage of local idiosyncracies. In most instances, modifications are designed to facilitate compliance and minimize enforcement costs. Toward that end, legislatures often consult local enforcement officers and, to the extent possible and appropriate, incorporate the views of experts into the regulations.

1.5 CONCLUDING REMARKS: CRIMINOLOGICAL THEORY

The legal debate over crime-related secondary effects ignores the crucial role of criminological theory. *Without exception*, criminological theory predicts that SOBs will generate ambient public safety hazards. Plaintiffs' witnesses produce study after study to show that SOBs have *no* crime-related secondary effects or, sometimes, that SOBs have salutary public safety impacts on their neighborhoods. I will discuss the details of these studies at a later point. For present purposes, the criminological theory that I have described is internally consistent and compelling – it makes sense in other words. As it turns out, the theory also agrees with the data.

2 EARLY EMPIRICAL STUDIES CORROBORATE THE THEORY

Scientific theory leads us to *expect* secondary effects in SOB neighborhoods and, in fact, *that is exactly what we find.* Table 1 lists eighteen studies conducted over a 30-year period in rural, urban, and suburban settings; the studies span all regions of the U.S. and every conceivable SOB subclass. Despite this diversity, these eighteen studies have one thing in common. Each reports what I call the "consensus finding" of the literature: a substantively large, statistically significant crime-related secondary effect. Given the theoretical prediction, this consensus finding is a scientific fact.

The eighteen studies listed in Table 1 are also *methodologically* diverse. Some of the studies use a before/after difference to estimate a secondary effect. Others use SOB-control differences for that purpose.[14] Some of these SOB-control studies select control zones by "matching." Others use statistical models (regression, *e.g.*) to adjust irrelevant differences between the SOB and control zones. Methodological attacks on the literature typically focus on idiosyncratic design features of each study. Despite their methodological idiosyncracies, the studies all report remarkably similar findings. *This consensus renders any methodological challenge implausible.*

Ideally, one could read each of the eighteen studies listed in Table 1 and draw inferences from their similarities and differences. Given the broad consensus finding, however, there is little to learn from the minor details of specific studies. My review will focus on SOB subclasses and, to a lesser extent, on methodological idiosyncracies. I will return to the methodological issues in subsequent sections.

2.1 SOB-CONTROL CONTRASTS: PHOENIX, 1979

In many respects, true experiments are the strongest designs.[15] But since true experiments are not possible, crime-related secondary effect studies rely on *quasi-experimental designs.* Except for random assignment, quasi-experimental and true experimental designs use similar structures to control threats to validity. The strongest quasi-experimental design compares

---

[14] My authority on quasi-experimental design is *Experimental and Quasi-Experimental Designs for Research* by D.T. Campbell and J.C. Stanley (Rand-McNally, 1966). Campbell and Stanley call before/after designs "pretest-posttest" designs; they call SOB-control designs "static group comparison" designs. In general, before/after comparisons are prone to fewer threats to internal validity and, hence, are "stronger" than SOB-control designs.

[15] An experimental design controls common threats to validity by random assignment. To estimate the crime-related secondary effects of SOBs experimentally, *e.g.*, we would compile a list of the business sites in a jurisdiction and open SOBs in a random sample of sites. Random assignment (and hence, experimenting) is not possible, of course.

ambient crime risk at a site before and after the opening of an SOB. Before-after contrasts are not always possible, unfortunately.

A somewhat weaker quasi-experimental design compares ambient crime risk at an SOB site to ambient crime risk at a control site. Though weaker in principle, SOB-control contrasts are often more practical. The validity of an SOB-control contrast is a function of similarity of the SOB and control sites. Barring out-and-out dishonesty, the differences will be small and roughly random, thereby favoring neither side.

In 1979, the City of Phoenix conducted a study of crime-related secondary effects. Although the actual work was conducted by City employees, Arizona State University faculty served as advisors and consultants. I was a Professor of Criminal Justice at Arizona State University at that time and met on a weekly basis with the City employees who conducted this research.

To estimate the crime-related secondary effects of SOBs, the researchers compared crime rates in areas with SOBs to crime rates in "matched" control zones (*i.e.*, similar areas that had no SOBs). The comparisons are summarized in my Table 2.1. The property and personal crime rates reported in Table 2.1 were estimated from Uniform Crime Report (UCR) data. The percentages reported in the right-hand column (in red) are the secondary effect estimates derived from the crime rates. Compared to crime rates in the control zones, the UCR property crime rate was 39.8 percent higher; the UCR personal crime rate was 13.7 percent higher; and the UCR sex crime rate was 480.2 percent higher in the adult business areas. By any reasonable standard, these are *large, significant* crime-related secondary effects.

Table 2.1 - Secondary Effects in Phoenix, AZ

	SOB Areas	*Control Areas*	*Secondary Effect*
Property Crime Rate	122.86	87.90	139.8 %
Personal Crime Rate	5.81	5.11	113.7 %
Sexual Crime Rate	9.40	1.62	580.2 %

Source: ADULT BUSINESS STUDY, City of Phoenix Planning Department, May 25, 1979; Table V

In the 30 years following this study, legislatures around the U.S. have accepted and relied upon its findings. Witnesses retained by SOBs and SOB plaintiffs, on the other hand, have argued that the 1979 Phoenix study is "fatally flawed" and that its findings are wholly

implausible. This position is wrong, in my opinion. Although the design of this study leaves much to be desired – especially by today's standards – many of the study's methodological shortcomings minimize the size of the effect. A stronger design would have produced a larger effect estimate.

2.2 BEFORE-AFTER CONTRASTS: GARDEN GROVE, 1991

Prior to 1990, virtually all crime-related secondary effect studies compared crime rates in police districts with SOBs to crime rates in districts without SOBs.[16] By contemporary standards, the design of these studies was weak. Existing police districts comprised areas of several square miles, *e.g.*, and sometimes had several SOBs. Researchers handled these problems as best they could by matching and, rarely, by statistical adjustment. The wide use of weak "static group comparison" designs was dictated by economics, of course. Prior to 1990, relatively few police departments had sophisticated management information systems.

Citing these methodological flaws, witnesses hired by the SOB industry characterized these studies as exemplars of "shoddy research" whose findings are not to be trusted. Ironically, the methodological flaws in these early studies favor a *null* finding.[17] Stronger designs would most likely have yielded larger, more significant effect estimates. Ignoring this point, the "static group comparison" design assumes that SOB and control neighborhoods are equivalent on relevant crime risk factors. If this assumption is unwarranted, observed secondary effects cannot be attributed to the SOBs. The surest, simplest way to control this threat to validity is to use a before-after design.

In the early 1990s, James W. Meeker and I conducted a secondary effect study in Garden Grove, CA that is considered to be the most scientifically rigorous, valid study of crime-related secondary effects in the literature.[18] The design of our 1991 Garden Grove study differed from what had been done previously in many respects. We had location-coded crime incidents, *e.g.*, so we could estimate crime rates within 500 feet of an SOB; we had ten years of crime data, so we could use relatively stronger before/after contrasts; and we had several nearly ideal control businesses for our contrasts.

---

[16] Studies in Los Angeles (1977), Amarillo (1977), Whittier (1978), St. Paul (1978), Phoenix (1979), Indianapolis (1984), and Austin (1986) used this design.

[17] "Null finding" means "finding that SOBs have no secondary effects."

[18] *Final Report to the City of Garden Grove: The Relationship between Crime and Adult Business Operations on Garden Grove Boulevard.* October 23, 1991. Richard McCleary, Ph.D. and James W. Meeker, J.D., Ph.D.

Observing ambient crime before and after an SOB opened in a neighborhood, Meeker and I found that crime risk rose whenever an SOB *opened* its doors for business; when an SOB *closed* its doors, crime risk fell. The validity of a before/after design requires that other plausible explanations for the rise and fall of crime be ruled out. The change may be a coincidence, *e.g.*; perhaps crime rose or fell throughout the city. To control these common "threats to internal validity," Meeker and I replicated each before/after analysis for other SOBs in Garden Grove. We reasoned that, if a rise or fall in ambient crime were a coincidence, we would observe the effect at other Garden Grove SOBs. If we did not observe the same effect at these control sites, on the other hand, the effect could be attributed confidently to the newly opened SOB.

Secondary effects for three business openings are reported in Table 2.2. When a new SOB opened, total "serious" crimes in a 500-foot radius around the site rose, on average, 67 percent. To control for the confounding effects of city-wide crime trends, changes in police activity, and other common threats to internal validity, these before-after differences were compared to the analogous differences for the addresses of existing SOBs. Total "serious" crimes in a 500-foot radius around these "control" sites rose, on average, only six percent. The secondary effect observed when new SOBs open is, thus, substantively large and statistically significant.

Table 2.2 - Secondary Effects in Garden Grove, CA: Business Openings
Total "Serious" Crime, One Year Before/After

	Test Sites			*Control Sites*		
	Before	***After***		***Before***	***After***	
March, 1982	71	106	1.49	76	78	1.03
March, 1986	31	68	2.19	80	92	1.15
August, 1988	32	50	1.56	41	40	0.98
Total	134	224	1.67	197	210	1.06

Source: *Final Report to the City of Garden Grove*, pp. 26-28

Social scientists (and their government clients) learned two things from the 1991 Garden Grove study. First and foremost, when relatively stronger before-after quasi-experimental designs are possible, the same ambient public safety hazards are found. The Garden Grove findings corroborate the findings in the Los Angeles (1977), Phoenix (1979), Indianapolis (1984) studies. Second, however, and more important, the 1991 Garden Grove study taught us how expensive a crime-related secondary effect study can be. I will have more to say about this shortly.

2.3 WHAT WE LEARNED FROM THE EARLY STUDIES

By contemporary standards, the early secondary effects studies – say, those conducted prior to 1995 – are relatively unsophisticated. The early studies compared ambient crime risk in existing police precincts, *e.g.*, rather than in the smaller impact areas suggested by criminological theory. The use of weak quasi-experimental designs in these early studies was dictated by fiscal reality.[19] Yet despite their design weaknesses, these studies generated a consistent picture that came into sharper focus as stronger, more sophisticated studies added to the consensus finding; *i.e.*, as a business class, SOBs have large, statistically significant crime-related secondary effects.

The relatively weak designs used in the early literature open the door to charges, by SOB plaintiffs, that the strong consensus finding of the literature is an artifact; had the studies used stronger designs, according to the plaintiffs, all would have arrived at the opposite conclusion.[20] But in fact, the very consistency of the early literature rules out an artifactual explanation. First, virtually all design weaknesses bias the study in favor of the *null* finding. Second, more recent studies that use stronger, more sophisticated designs yield the same finding as the weaker, less sophisticated early studies.

---

[19] In our 1991 Garden Grove study, Jim Meeker and I spent more than $100,000 (adjusted for inflation) for a stronger, more sophisticated quasi-experimental design. The study's cost was a minor scandal.

[20] The best-known statement of this view is "Government regulation of 'adult' businesses through zoning and anti-nudity ordinances: de-bunking the legal myth of negative secondary effects." (B. Paul, D. Linz, and B.J. Shafer. *Communication Law and Policy*, 2001, 6:355-391).

3 RECENT EMPIRICAL STUDIES: ADULT CABARETS

Adult cabarets are the oldest and, in some respects, the most interesting SOB subclass. In principle, furthermore, estimating the secondary effect of an adult cabaret is straightforward. If we agree that live nude entertainment is the essential difference between adult cabarets and other businesses that sell alcohol by the drink (or "taverns" as I will call them), the secondary effect can be estimated by comparing the ambient crime rates for adult cabarets and taverns. Although the differences between adult cabarets and taverns are often more complicated than this simplest, straightforward design admits, several studies have used taverns as controls for adult cabarets. *All find that adult cabarets have higher ambient crime rates than taverns.*

3.1 GREENSBORO, 2003

In 2003, Dr. Daniel Linz conducted a crime-related secondary effect study in Greensboro, NC.[21] Analyzing police calls-for-service (CFSs) Dr. Linz concluded that:

> The presence of adult cabarets and adult video/bookstores in "neighborhoods" was unrelated to sex crimes in the area. We found that several of an (*sic*) adult video/bookstore were located in high person and property crime incident "neighborhoods." We examined the "neighborhoods" and local areas surrounding the adult video/bookstores (1000 foot radius) further and we found that the adult video/bookstores were not the primary source of crime incidents in these locations ... (T)here is no support for the City of Greensboro's theory that adult businesses produce adverse secondary effects. The results of our study show that adult businesses are not associated with crime events.[22]

Due to the technical nature of Dr. Linz' statistical analyses, the City of Greensboro retained me to "translate" Dr. Linz' numerical results into plain words.[23]

Dr. Linz' report was a difficult read, even for statisticians. The numbers on which his conclusion was based were scattered across 18 pages of computer output in an appendix. Few report readers consult appendices under any circumstances. But in this instance, a critical

---

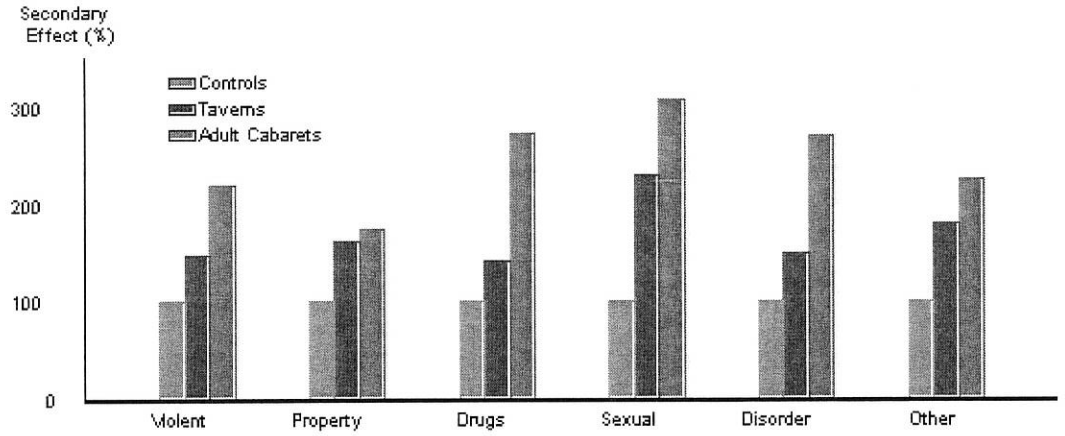
[21] *Evaluating Potential Secondary Effects of Adult Cabarets and Video/Bookstores in Greensboro: A Study of Calls for Service to the Police* by Daniel Linz, Ph.D. and Mike Yao, November 30th, 2003. A Professor of Communication at the University of California, Santa Barbara, Dr. Linz is a prolific witness for SOB plaintiffs, often in collaboration with Dr. Fisher.

[22] P. 3 (counting the title sheet as p. 1) of the Linz-Yao Greensboro *Study*.

[23] R. McCleary. *A Methodical Critique of the Linz-Yao Report: Report to the Greensboro City Attorney.* December 15, 2003.

reading of the report's appendices required technical skills (that most of the report's readers lack) and great tolerance for numerical detail. When the actual numbers were finally examined, it became clear that Dr. Linz had overstated the basis of his strongly-worded conclusion. Put simply, Dr. Linz' numbers contradicted his words.

Figure 3.1 - Results of the 2003 Greensboro Study



Source: Tables 14-19, *Evaluating Potential Secondary Effects of Adult Cabarets and Video/ Bookstores in Greensboro: A Study of Calls for Service to the Police.* D. Linz and M. Yao, November 30th, 2003.

The results of Dr. Linz' analyses are plotted in Figure 3.1. The green bars report the ambient crime levels[24] for Greensboro's "control" neighborhoods that have no taverns and no SOBs. The blue and red bars report the ambient crime levels for neighborhoods with taverns and neighborhoods with adult cabarets, respectively. To facilitate interpretation, I have fixed the ambient crime levels in control neighborhoods at 100 percent; the ambient effects in tavern neighborhoods (blue bars) and adult cabaret neighborhoods (red bars) are easily interpreted, thus, as multiples of the control neighborhood effects (green bars).

Since the social, demographic, and economic variables that are presumed to "cause" crime vary across neighborhoods, unadjusted crime levels may be deceiving. To control for these confounding effects, Dr. Linz adjusted his raw numbers with a statistical model whose technical details will not be discussed here. As the adjusted effects plotted in Figure 3.1 show, Dr. Linz found that ambient crime in tavern neighborhoods (blue bars) range from 148 percent (violent crimes) to 229 percent (sexual crimes) of the ambient crime in control neighborhoods. Since tavern neighborhoods are the criminological "gold standard" of ambient crime, that result

[24] I use the term crime "levels" because, strictly speaking, crime "rates" are difficult to tease out of police CFSs. I will return to this issue later.

was expected.[25] What Dr. Linz did not expect, however, was that adult cabaret neighborhoods (red bars) would have more crime than the tavern neighborhoods (blue bars).

Crime-related secondary effects in Greensboro's adult cabaret neighborhoods ranged from 175 percent (for property crime) to 307 percent (for sexual crime) of the ambient crime levels in control neighborhoods. These effect estimates are large in every sense and, of course, they are not surprising. To me, the only surprise was that the estimates in Figure 3.1 were reported in a study commissioned by a consortium of SOB plaintiffs.

3.2 DAYTONA BEACH, 2004

In 2004, Dr. Linz collaborated with Dr. Randy D. Fisher on a Daytona Beach secondary effect study.[26] With minor exceptions, the design of the Daytona Beach study was identical to the Greensboro design.[27] Analyzing CFSs once again, Drs. Linz and Fisher concluded that adult cabarets, had no significant crime-related secondary effects:

> We are able to account for crime events in Daytona Beach with a moderately high level of accuracy using variables found by other researchers to be related to crime…The social disorganization variables and especially the presence of an (*sic*) alcohol beverage retail sale establishments in the blocks (that did not feature adult entertainment) accounts largely for this explanatory power. The presence of an adult cabaret in the census block explained only to (*sic*) a trivial amount of variability in crime incidents when these other variables were considered ... From these analyses we are able to reliably conclude that once we control for variables

---

[25] Most of the research on the relationship between taverns and ambient crime risk is due to my colleague of 30 years, Dennis W. ("Denn") Roncek. See D.W. Roncek and M.A. Pravatiner. Additional evidence that taverns enhance nearby crime. *Social Science Research*, 1989, 73:185-188.

[26] *Evaluating Potential Secondary Effects of Adult Cabarets in Daytona Beach, Florida: A Study of Calls for Service to the Police in Reference to Ordinance 02-496* by Daniel Linz, Ph.D., Randy D. Fisher,Ph.D. and Mike Yao, April 7th, 2004. Dr. Fisher is an associate Professor of Psychology at the University of Central Florida. He is also a prolific witness for SOB plaintiffs.

[27] Since the Daytona Beach SOBs were adult cabarets, Linz, Fisher, and Yao excluded bookstores and video arcades from the study. Instead of defining "neighborhoods" as Census Block Groups, in Daytona Beach, Linz, Fisher, and Yao used Census Tracts. The Greensboro and Daytona Beach designs are otherwise identical.

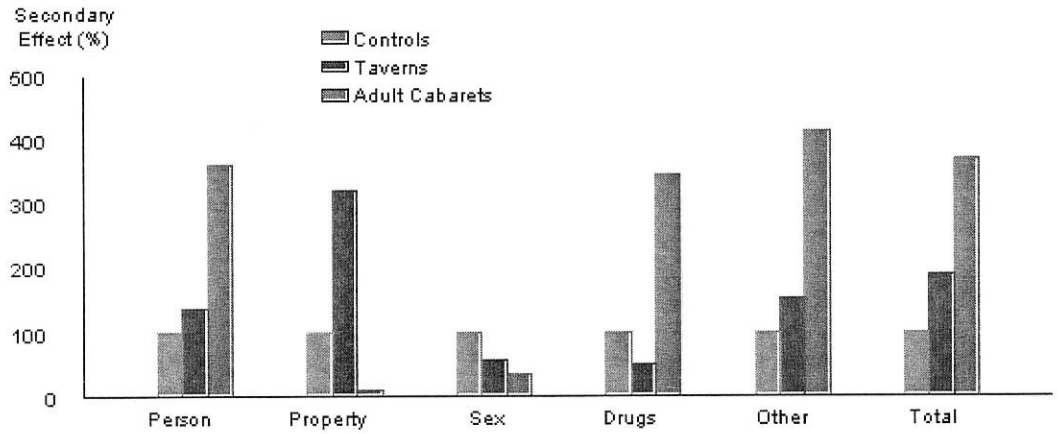
> known to be related to crime there is not a meaningful relationship between the presence of an adult cabaret in the neighborhood and crime events.[28]

This conclusion is worded more cautiously than the conclusion in Greensboro. Indeed, the authors go so far in the Daytona Beach report as to admit that, as in Greensboro, the Daytona Beach results amount to statistically significant crime-related secondary effects:

> There are analyses reported below where there are small but statistically significant relationships due to the exceptionally large N (sample size) employed in the analyses (at times over 1,100 census blocks)...[But] we favor "strength" over a technical "significance."[29]

This is a highly technical statistical issue, of course. In my opinion, Drs. Linz and Fisher misunderstand the assumptions of their model as well as the statistical problem of an "exceptionally large N" that, in their opinion, obviates the statistical model. Put simply, they are incorrect.

Figure 3.2 - Results of the 2004 Daytona Beach Study



Source: Tables 7-19, *Evaluating Potential Secondary Effects of Adult Cabarets in Daytona Beach, Florida: A Study of Calls for Service to the Police in Reference to Ordinance 02-496.* D. Linz, R.D. Fisher, and M. Yao, April 7th, 2004.

Not withstanding the large *statistical* size of their effect estimates, the effect estimates reported by Drs. Linz and Fisher in Daytona Beach are *substantively* large. Figure 3.2 plots the

---

[28] P. 36 (counting the title sheet as p. 1) of the Linz-Fisher-Yao Daytona Beach study.

[29] P. 23 (counting the title sheet as p. 1) of the Linz-Fisher-Yao Daytona Beach study.

results of the Daytona Beach analyses using the same conventions used in Figure 3.1 (for Greensboro). The ambient crime levels in control neighborhoods (green) are fixed at 100 percent again so that the levels in tavern neighborhoods (blue) and adult cabaret neighborhoods (red) can be interpreted as multiples of the controls. With two exceptions, adult cabaret neighborhoods have higher ambient crime levels than tavern neighborhoods. Given the well-known relationship between taverns and ambient crime, the Daytona Beach analyses corroborate the consensus finding of the literature. Like the broader SOB class, adult cabarets, pose large, statistically significant ambient public safety hazards.

Figure 3.2 speaks for itself. Tavern neighborhoods (blue) have 90 percent more total crime than control neighborhoods (green). Adult cabaret neighborhoods (red) have 270 percent more total crime than control neighborhoods (green). In substantive terms then, taverns have *large* secondary effects and adult cabarets have even *larger* secondary effects. The fact that these effect estimates are also *statistically* large adds little to our understanding of Figure 3.2.

The estimates *are* statistically large, of course – *i.e.*, statistically *significant* – and that poses a dilemma for Drs. Linz and Fisher. If the estimates were statistically small, Drs. Linz and Fisher could argue that they were due to chance (regardless of their substantive size). Denied this solution to the dilemma, Drs. Linz and Fisher argue that statistical significance is an artifact of an "exceptionally large N." This is a specious argument, however, on two grounds. First, samples of 1,100 are not large enough to obviate the statistical model used by Drs. Linz and Fisher. But second, if samples of 1,100 *were* large enough to obviate the statistical model, as claimed, *all* of effect estimates would be statistically significant. In fact, of the 84 parameter estimates reported by Drs. Linz and Fisher, 42 are statistically significant and 42 are not. I will return to this issue in Section 3.4 below.

3.3 PALM BEACH COUNTY, 2004

Comparing 911 calls to the addresses of nine adult and seven non-adult cabarets in Palm Beach County, FL, Dr. Terry A. Danner found that the adult cabaret addresses had fewer crime-related 911 calls (2.5 per month *vs.* 2.9 for SOB addresses) but more order-related 911 calls (3.1 per month *vs.* 2.0 for SOB addresses). Based on these comparisons, Dr. Danner concluded that the contrast "does not provide compelling evidence that the addition of various levels of nude dancing to the 'nightclub type environment' produces a pattern of crime and public disorder that appears to be uniquely attributable to the adult cabaret category of business."[30]

---

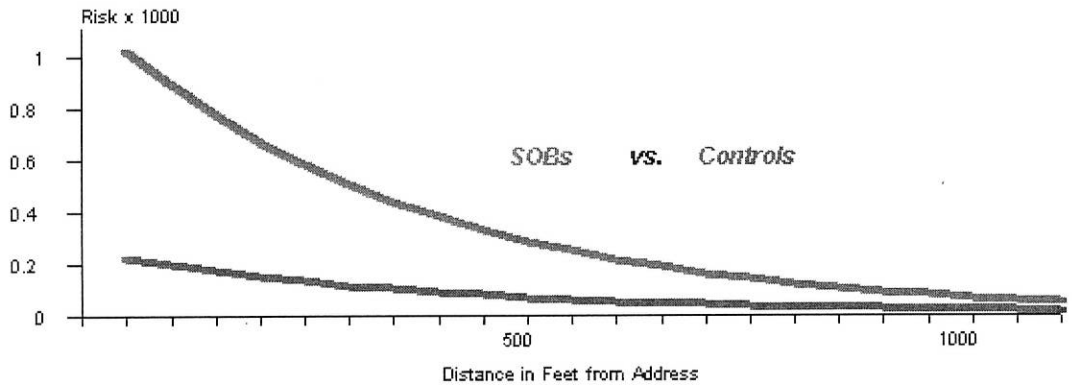
[30] P. 8, *The Crime-related Secondary Effects of Adult Cabarets in Palm Beach County* by Terry A. Danner, Ph.D. Report submitted in *Palm Beach County v. Casablanca East*, CA-02-03813 AF, Circuit Court, 15th Judicial Circuit, Palm Beach County, 2005. A professor of criminal justice at St. Leo's University, Dr. Danner is a prolific expert for the SOB industry.

Dr. Danner's idea of comparing adult and non-adult cabarets makes good sense. The legal difference between adult and non-adult cabarets is, after all, the quantity and/or quality of clothing worn by employees. Changing the quantity and/or quality of clothing changes the non-adult cabaret into an adult cabaret and *vice versa*. It follows from this argument that ambient crime rate differences between adult and non-adult cabarets must be due to nudity.

Aside from the idea of comparing adult and non-adult cabarets, however, Dr. Danner's study is problematic in two respects. First, Dr. Danner uses 911 calls to measure ambient crime risk. Although 911 calls are *correlated* with ambient crime risk, however, the correlation is weak at best. Second, Dr. Danner considers only the subset of 911 calls to the immediate addresses of the adult and non-adult cabarets. Calls to *nearby* addresses are excluded. If ambient crime risk "seeps out" across the adult cabaret neighborhood, of course, as the theory predicts, excluding these calls biases the secondary effect estimate in an unknown way.

Irvine colleagues Valerie Jenness, James W. Meeker, and I were retained by Palm Beach County to evaluate and, if necessary, replicate Dr. Danner's study. Given the problematic use of address-specific 911 calls, we questioned Dr. Danner's conclusion.[31] Our replication used the same adult and non-adult cabaret sites. Instead of using 911 calls, however, we used crime incident reports; and instead of restricting the analyses to the specific addresses, we included all crime incidents that occurred within 1,100 feet of the adult and non-adult cabarets.

Figure 3.3 - Palm Beach County Risk-Distance Functions, *Total Crime*



The results of our replication are plotted in Figure 3.3. In terms of total crime, SOBs (in red, nine adult cabarets) and controls (in blue, seven non-adult cabarets) are both risky places.

---

[31] *Crime-Related Secondary Effects of Sexually-Oriented Businesses: Report to the County Attorney, Palm Beach County, Florida.* Valerie Jenness, Ph.D., Richard McCleary, Ph.D., and James W. Meeker, J.D., Ph.D. August 15, 2007.

Moving toward an "average" site, whether SOB or control, victimization risk rises. Moving away, risk diminishes. With that said, compared to control sites, SOB sites are much riskier on average. How much riskier? At 500 feet, approximately one long city block, ambient risk at the SOB is four times greater. At 1,000 feet, the risk is substantially lower for all sites. But even at that distance, SOB sites are 3.5 times riskier than control sites.

Although risk-distance plots have been widely used to document the ambient crime risks at "nuisance" sites, including SOBs,[32] most of uses have foregone statistical significance tests of the plots. Given the quantity and quality of data that were available in Palm Beach County, we were able calculate confidence intervals for the risk-distance functions plotted in Figure 3.3. At the conventional 95 percent confidence level, both the SOB (red) and control (blue) functions are statistically significant as is their difference. Rejecting both null hypotheses then, the functions plotted in Figure 3.3 have the obvious interpretation.

Some readers may question the use of *total* crime. Why not some subcategory of crimes? Total crime is the convention in secondary effects studies – all of the studies referenced in Table 1 use total crime – and the convention rests on theoretical and practical grounds. As a practical matter, breaking total crime down into subcategories is expensive. As a theoretical matter, SOBs are expected to generate "victimless" vice crimes (prostitution, drugs, *etc.*), predatory crimes (robbery, assault, *etc.*) that are associated with vice, and opportunistic crimes (vandalism, theft, *etc.*) associated with the influx of strangers to the SOB neighborhood. In short, *total* crime.

Nevertheless, to investigate the statistical robustness of our findings, Jenness, Meeker, and I replicated the risk-distance analyses for property crime (burglary, theft, vandalism, *etc.*), personal crime (robbery, assault, *etc.*), and the residual category of all other crime (including most notably, vice crimes). This is not the only possible taxonomy, of course; but it is a reasonable taxonomy and one that is easily understood. The risk-distance functions for these three complementary crime categories lead to the same interpretation and conclusion.

3.4 CONCLUDING REMARKS ON ADULT CABARETS

The three studies of adult cabarets reviewed here illustrate a range of designs. Two use 911 calls, one uses crime incident reports. Two compare SOB and control neighborhoods, one compares adult and non-adult cabarets. Yet all three studies support the conclusion that adult cabarets have large, statistically significant secondary effects.

Nevertheless, there is a remarkable difference in how the studies interpret their findings. Whereas the Greensboro and Daytona Beach studies find large, statistically significant secondary

---

[32] See, *e.g.*, *An Analysis of the Relationship between Adult Entertainment Establishments, Crime, and Housing Values*. M. McPherson and G. Silloway. Minnesota Crime Prevention Center, Inc. October, 1980.

effects, the authors give their findings the opposite interpretation. The secondary effect study summarized in Figure 3.2 was commissioned by the plaintiffs in *Daytona Grand v. City of Daytona Beach*.[33] Drs. Fisher and Linz used a two-prong argument to challenge the City's secondary effects evidence. First, the studies relied on by the City were methodologically flawed. Second, local data showed that neighborhoods with adult businesses had the same number of 911 calls as other neighborhoods. To refute these arguments, the City cross-examined the experts. The trial court was unimpressed, however, and struck down those parts of Daytona Beach ordinance that regulated nudity.

The trial court's decision in *Daytona Grand* provoked a mild panic among Florida governments. Two years later, however, the U.S. Eleventh Circuit reversed the trial court.[34] The Eleventh Circuit decision reaffirmed the *Renton* standard in the most crucial respect: If the government's interpretation of its secondary effects evidence is "reasonable," there is no need to show that its interpretation is the *only* reasonable interpretation. The fact that plaintiffs can draw alternative conclusions from the evidence does not bar the government from "reaching other reasonable and different conclusions."

The Eleventh Circuit addressed three other relevant issues. First, the panel explicitly rejected the methodological arguments of Paul, Linz and Shafer.[35] Second, the panel rejected the use of 911 calls to demonstrate the absence (but *not* the presence) of a secondary effect. Third, the panel noted, as I have, that several of the secondary effect estimates reported by Drs. Linz and Fisher were statistically significant.

> The experts are no doubt correct that factors other than the presence of adult theaters affect crime rates in Daytona Beach: crime is plainly caused by many factors. But that does little to undermine the City's conclusion that adult theaters *also* affect crime rates, especially when the experts' own analysis shows a statistically significant correlation between adult theaters and increased crime in half of the areas in the study.[36]

This observation by the Eleventh Circuit panel is consistent with Figure 3.2 above.

---

[33] *Daytona Grand Inc. v. City of Daytona Beach, Florida* 410 F. Supp. 2d 1173 (2006).

[34] *Daytona Grand, Inc. v. City of Daytona Beach, Florida* No. 06-12022 (11th Cir. 2007)

[35] Paul, Linz, and Shafer (Government regulation of adult businesses through zoning and anti-nudity ordinances: Debunking the legal myth of negative secondary effects. *Communication Law and Policy,* 2001, 6:355-391) argue that the government's secondary effects evidence must satisfy *Daubert* admissibility criteria.

[36] *Id.*, at 47-48

4. THE "COMMERCIALLY NATURAL IF NOT UNIVERSAL" SOB

In the past, one of the most common SOB business models combined the sale of adult DVDs (or tapes) with coin-operated booths where the DVDs could be viewed. In principle, the viewing booths allowed customers to sample DVDs to inform their purchasing decisions. This SOB subclass was so common twenty years ado that Justice Souter called it the "commercially natural, if not universal" model.[37] Although the subclass continues to flourish, competition from other SOB business models appears to have made inroads. Because private (and semi-private) viewing booths create opportunities for sexual contact, this SOB subclass poses special problems for routine policing.

4.1 CENTRALIA, 2003

Centralia, Washington is a small city (*ca.* 14,000 population) on Interstate 5 between Olympia and Portland. In December, 2003, an adult bookstore opened in a building that had been a residential dwelling. In addition to selling videos for off-premise viewing, the SOB had coin-operated viewing booths. Shortly after opening its doors for business, the City moved to enforce zoning ordinances prohibiting SOBs in residential neighborhoods. When the SOB filed a lawsuit,[38] the City defended itself with the crime incident statistics summarized in Table 4.1.

Table 4.1 - UCR "Serious" Crime, Centralia, WA

	Before	After	Change	Odds Ratio
SOB Area	9	17	1.889	–
All Other Centralia	3358	3358	0.966	1.956
Control Areas	23	19	0.826	2.058

Source: Richard McCleary, *Crime Risk in the Vicinity of a Sexually Oriented Business: Final Report to the City Attorney's Office.* February 28th, 2004.

In the impact area, defined by a 250-foot radius around the SOB site, serious crime rose by nearly 90 percent after the SOB opening. In the rest of Centralia, during the same period, serious crime dropped by nearly four percent. The statistical significance of these before-after contrasts can be tested by comparing the value of the odds ratio reported in Table 4.1 to its standard error. By chance alone, odds ratios larger than this one occur less than eight times in

---

[37] City of Los Angeles v. Alameda Books, Inc, 535 U.S. 425 (2002) at 465.

[38] *Washington Retailtainment, Inc. et al. v. City of Centralia, Washington.* U.S. District Court for the Western District of Washington at Tacoma, Case No. C03-5137FDB

one thousand trials or samples.

Although it is highly unlikely that the effect reported in Table 4.1 is due to chance, it is always possible that the observed effect is due to some uncontrolled threat to internal validity. If that were the case, we would expect crime to rise when any other type of business, say, for example, a bread store, moves into a vacant residential structure. In fact, three businesses *did* open in Centralia during this time frame. But as reported in Table 4.1, ambient crime in a 250-foot radius around the sites dropped when these non-SOBs opened.

4.2 LOS ANGELES, 2008

In 1977, the City of Los Angeles conducted a comprehensive secondary effects study[39] that found, among other things, an association between ambient crime and SOB concentrations. Based on this finding, Los Angeles required a minium distance between SOB sites. When SOBs began to evade the minimum distance rule by merging, the City amended its ordinance to require minimum distances between distinct *activities*. The amendment forced "commercially natural if not universal" SOBs to segregate DVD sales from viewing booths.

In 1995, two affected SOBs challenged the amended ordinance. Because the 1977 study did not address the secondary effects of combining multiple activities under one roof, it was argued, Los Angeles had no evidence that multiple-activity businesses generated secondary effects. The trial court agreed and the Ninth Circuit Court affirmed. The U.S. Supreme Court reversed, reaffirming *Renton* and allowing that a government could infer, from the findings of the1977 study, that concentrations of distinct *activities* – in particular, DVD sales and viewing booths on the same site – generated secondary effects. In a complicated split decision, the Court remanded the case for trial.

In 2006, the City of Los Angeles retained me to examine the secondary effects rationale for the amended ordinance. Would dividing a multiple-activity SOB into single-activity SOBs, as required by the amended ordinance, yield a reduction in ambient crime risk? Ideally, this question could addressed by finding a member of the "commercially natural if not universal" SOB subclass that had been divided into discrete units that sold DVDs (but had no booths) and that operated coin-operated viewing booths (but did not sell DVDs). If the amended ordinance had a legitimate rationale, one would expect the ambient risk for the multiple-activity SOB to be greater than the sum of the risks for its constituent single-activity SOBs.

Unfortunately, there were no ideal "natural experiments" of this sort to be found in Los Angeles. Alternatively, using the same logical argument, one could compare the ambient crime

---

[39] Los Angeles Dept of City Planning, *Study of the Effects of the Concentration of Adult Entertainments in the City of Los Angeles* (City Plan Case No. 26475, City Council File No. 74-4521-S.3, June 1977) as cited in *Alameda Books* at 429.

risks for multiple-activity SOBs – which I will call "bookstore-arcades" – to the ambient risks for single-activity "bookstores" and "arcades." Since there were no *pure* arcades[40] in Los Angeles, however, only part of this alternative design could be implemented. Though less than the ideal – which is almost always true – the partial design tells us much about the phenomenon.

Figure 4.2 - Risk by Distance from the Site, UCR "Serious" Crime

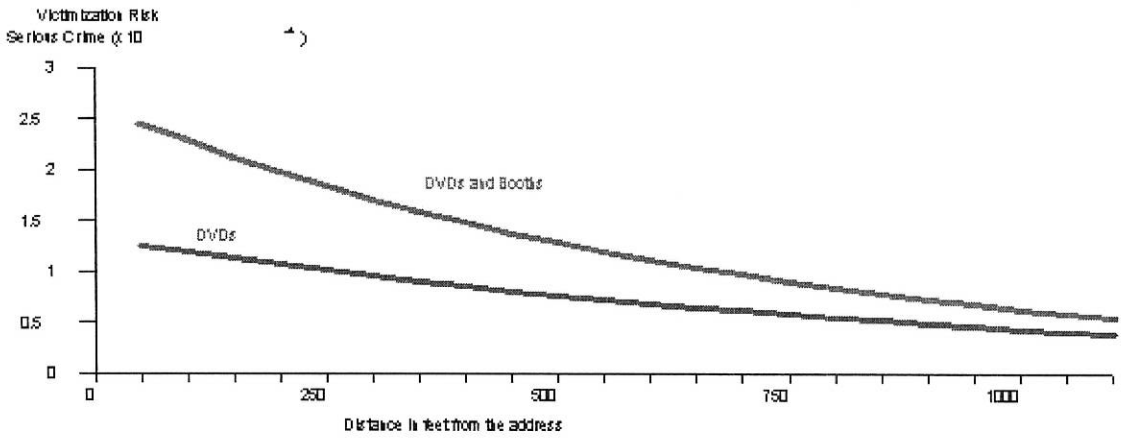


Figure 4.2 plots the risk-distance functions for twelve bookstore-arcades (in red) and seven bookstores (in blue). The vertical axis is calibrated in annual UCR Part I ("serious") crime incidents (homicide, aggravated assault, robbery, rape, burglary, theft, auto theft, and arson) per square mile. The horizontal axis is calibrated in distance from the site. As Figure 4.2 shows, both SOB subclasses are risky places. Since both risk-distance functions are statistically significant at the conventional 95 percent confidence level, both SOB subclasses have secondary effects. Compared to bookstores, however, bookstore-arcades are riskier at all distances and the difference between the two functions is significant.

4.3 CONCLUDING REMARKS

Some subclass specific risks arise because the defining characteristic of a subclass or creates idiosyncratic opportunities for particular types of crime. Other subclass-specific risks arise when the defining characteristic of the subclass compromises the effectiveness of common policing strategies. The relatively higher ambient risks of bookstore-arcades accrues from both sources. Nevertheless, the failure of economical policing strategies is the greater problem. The optimal policing strategy for SOBs with viewing booths requires that police inspect the interior,

---

[40] SOB arcades that sell *no* adult merchandise whatsoever are rare. But there are many that derive very little revenue from the same of adult merchandise.

placing officers at risk of injury. Accordingly, policing this subclass requires specially training and equipment, prior intelligence, backup manpower, and other resources.

Absent viewing booths, the optimal policing strategy rests heavily on routine drive-by patrols. Since the ambient risk function for this subclass can cover a several- block area (see Figure 4.2), drive-by patrols are an efficient way to provide a visible police presence to the neighborhood. Visibility is *per se* a deterrent. Routine patrols can keep watch for known offenders and suspicious activity. When problems are spotted, the routine patrol can forward the information to a specialized unit or, if necessary, handle it on the spot, requesting backup resources only as needed. Needless to say, neighborhood patrols by plainclothes officers in unmarked cars would be inefficient. Whereas visibility is central to policing SOB bookstores, the presence of viewing booths requires invisible (plainclothes) police presence inside the SOB. The optimal policing strategies the two subclasses are incompatible.

5. "OFF-SITE" SOBs

Suppose that distinct SOB subclasses has a unique "average" secondary effects. This implies that one of the subclasses would have the lowest effect. The effect might be so minimal as to fall below the Constitutional threshold where a government could regulate that subclass. Or if the effect fell just above the threshold, the configuration and operation of the subclass might be "tweaked" to force the effect below the threshold.

What might this "bullet-proof" SOB subclass look like? Common sense suggests that it would be a store that sells adult merchandise for *off-site* use. Customers drive to the store; park; go in; make a purchase; come out; and drive away. Except for the merchandise purchased, the SOB's routine activity is indistinguishable from the activities of convenience stores, dry cleaners, and libraries. Common sense argues then, that the secondary effects of off-site SOBs are likely to be no larger than the effects of convenience stores, dry cleaners, and libraries.

Off-site SOBs – book and DVD stores – have made this common sense argument and some courts have found it persuasive. In *Encore Videos, Inc. v. City of San Antonio*,[41] an ordinance classified off-site book and DVD stores as SOBs if their inventories included 20 percent adult material. When the ordinance was challenged, the Fifth Circuit found that San Antonio had relied on studies that not addressed the (presumably) unique effects of off-site SOBs. In the Court's view, moreover, the City's rationale for ignoring the differences between on-site and off-site businesses was weak.

> Off-site businesses differ from on-site ones, because it is only reasonable to assume that the former are less likely to create harmful secondary effects because of the fact that consumers of pornography are not as likely to linger in the area and engage in public alcohol consumption and other undesirable activities.[42]

Other factors influenced the decision, of course, and a more recent Fifth Circuit decision clarifies *Encore Videos* in the most crucial respect.

Nevertheless, based on common sense, the Court's theoretical rational is appealing. It ignores theoretically relevant characteristics of off-site SOBs, however. To the extent that off-site SOBs attract similar "soft-target" patrons, the routine activity theory of hotspots outlined in Section 1 above predicts that the subclass will have similar secondary effects. The findings of two recent secondary effects studies corroborates the theory.

---

[41] 330 F.3d 288 (5th Cir. 2003), *cert. denied*, 540 U.S. 982 (2003), and opinion clarified, 352 F.3d 938 (5th Cir. 2003).

[42] *Id.* at 294-5

5.1 SIOUX CITY, 2006[43]

Adult businesses are nothing new to Sioux City, Iowa. Two adult businesses had operated without incident in the city's older downtown area for decades. Although both businesses sold sexually explicit DVDs for off-site use, most of their revenue came from coin-operated viewing booths. Nevertheless, strictly speaking, both belonged to the adult business model that Justice Souter characterized as the "commercially natural, if not universal" model. In terms of "look and feel," the two businesses were indistinguishable from adult businesses in larger cities.

In March, 2004, a third SOB opened in Sioux City. Unlike the two existing SOBs, *Dr. John's* had no viewing booths. It was located in a newer area of the city and lacked the garish appearance associated with adult businesses generally and, in particular, with Sioux City's two existing SOBs. During subsequent litigation, the trial judge commented on this fact:

> [T]he first impression of the store is a far cry from the first image that most people would likely have of an "adult book store" or "sex shop." There is nothing seedy about the neighborhood, store building, or store front. In fact, from a quick drive-by, one would likely assume that the business was a rather upscale retail store for women's clothing and accessories. There are no "adult" signs or banners proclaiming "peep shows," "live entertainment booths," "XXX movies," "live models," "adult massage," or any of the other tasteless come-ons all too familiar from adult entertainment stores that exist in virtually every American city of any size and which one may find scattered along interstates and highways even in rural America.[44]

The trial judge's drive-by impression may overstate the point. Few passers-by would mistake *Dr. John's* for anything other than what it was.

Regardless of its look and feel *Dr. John's* was located in a prohibited zone. When Sioux City attempted to enforce its zoning code, *Dr. John's* sued, arguing that off-site adult businesses lacked the typical crime-related secondary effects associated with adult businesses. To counter this argument, Sioux City produced police reports of incidents occurring within 500 feet of *Dr.*

---

[43] This case study is based on a paper written by Alan C. Weinstein and me: "Do 'off-site' adult businesses have secondary effects? Legal doctrine, social theory, and empirical evidence." The paper was presented in Atlanta at the November, 14th, 2007 meeting of the American Society for Criminology.

[44] *Doctor John's, Inc. v. City of Sioux City, IA.*, 389 F.Supp.2d 1096, 1103 (N.D. Iowa 2005), quoting from court's ruling on plaintiff's motion for preliminary injunction.

John's during the four years between January 1st, 2002 and December 31st, 2005. For purposes of quasi-experimental control, reports of incidents occurring with 500 feet of a nearby motel were also retrieved.

To control plausible threats to internal and statistical conclusion validity, the City collected analogous police incident reports for an adjacent control area, a 500 circle centered on a non-SOB. Because the two circles are tangent to each other and face the same thoroughfare, they have similar traffic flows. And because they have similar mixes of businesses and similar incident rates, their underlying ambient crime risks are similar. Because the underlying risk factors are identical in the two circles, any effect found in one of the circles should be found in the other as well. But that was not the case.

Table 5.1 - Total Crime Before and After the Opening of *Dr. Johns*

	Before		*After*			
Total Incidents	***N***	***Rate***	***N***	***Rate***	***After/Before***	***Ratio***
Dr. John's	17	7.8	41	22.4	2.86	
Control	44	20.3	46	25.1	1.24	2.31
	Before		***After***			
"Victimless" Excluded	***N***	***Rate***	***N***	***Rate***	***After/Before***	***Ratio***
Dr. John's	12	5.5	31	16.9	3.08	
Control	26	12.0	32	17.5	1.46	2.11

The first rows of Table 5.1 breaks down total incidents for the 793 days before and 668 days after the SOB opened. In the *Dr. John's* circle, the annual crime rate rose from 7.8 to 22.4 incidents per year, an increase of approximately 190 percent. Crime in the control circle rose as well but the increase was more modest. The rise from 20.3 to 25.1 incidents per year amounts to a 25 percent increase. Based on a crude comparison of these rates, *Dr. John's* appears to pose an ambient victimization risk.

To test whether the effect might be a chance fluctuation, we take advantage of the fact that crime incidents in the two circles are not different than Poisson (Haight, 1967: 94-95). Under a Poisson hypothesis, the after/before odds for the *Dr. John's* and control circles, reported in Table 2, are distributed as unit-mean log-Normal variables. The ratio of the two odds, also distributed as unit-mean log-Normal, the a maximum-likelihood estimate of the secondary effect. In this instance,

$$\text{Odds Ratio} = 2.31$$

implies that, compared to the control circle, ambient crime rose by 131 percent after *Dr. John's* opened for business. Because an effect estimate of this magnitude or larger occur by chance with probability smaller than 0.01, the null hypothesis is rejected.

The second set of rows in Table 5.1 reports the analogous breakdown with "victimless" crime incidents excluded. If the opening of *Dr. John's* lead to heightened police surveillance, it is possible that the before-after effect is a simple "instrumentation" artifact. Indeed, in a critique of the 1977 Los Angeles secondary effects study relied upon in *Alameda Books*, Paul, Linz and Shafer cite this possibility:

> Although the findings of this study suggested high levels of criminal activity within these clusters, any implication that this is connected to the presence of adult businesses is invalidated by the fact that the researchers admitted to "stepped up" surveillance within these areas. Put simply, the police most likely found greater amounts of crime in the adult establishment areas because they were trying harder to find it.[45]

Whereas this explanation might be plausible for prostitution, drugs, and other "victimless" vice crimes, however, it is implausible for homicide, robbery, and the other "street" crimes reported in the 1977 Los Angeles study. On the contrary, heightened police surveillance will reduce the risk of these crimes. So if the *instrumentation* hypothesis is plausible, the secondary effect should vanish when "victimless" crimes are excluded. As reported in Table 5.1, excluding "victimless" crimes from the estimate leads to the same conclusion.

5.2 MONTROSE, 2003[46]

The relevance a the government's secondary effects evidence can be challenged through either of two arguments. The first is predicated on the fact that the evidence has ignored some *relevant* difference among distinct SOB subclasses. Challenges by off-site SOBs illustrate this argument. The second is predicated on the fact that the evidence has ignored some idiosyncratic (but nevertheless *relevant*) local condition. In 2004, an SOB in rural Kansas used criminological theory to argue that the sparsely-populated rural environment precluded the possibility of secondary effects. And since the local government had not studied this issue prior to enactment, the ordinance should be struck down.

---

[45] P. 379, "Government regulation of 'adult' businesses through zoning and anti-nudity ordinances: de-bunking the legal myth of negative secondary effects." *Communication Law and Policy*, 2001, 6:355-391.

[46] This case study is based on "Rural hotspots: the case of adult businesses." *Criminal Justice Policy Review*, 2008, 19:1-11.

Rejecting this argument, the trial court granted the defendant's summary judgment motion. On appeal, however, in *Abilene Retail*,[47] the Tenth Circuit agreed with the plaintiff's interpretation of criminological theory:

> All of the studies relied upon by the Board examine the secondary effects of sexually oriented businesses located in urban environments; none examine businesses situated in an entirely rural area. To hold that legislators may reasonably rely on those studies to regulate a single adult bookstore, located on a highway pullout far from any business or residential area within the County would be to abdicate out "independent judgment" entirely. Such a holding would require complete deference to a local government's reliance on prepackaged secondary effects studies from other jurisdictions to regulate any single sexually oriented business of any type, located in any setting.[48]

Because the SOB was located in an isolated rural area, and because the County had no evidence to suggest that rural SOBs would have secondary effects, the Tenth Circuit reversed the summary judgment and remanded the case for trial.

Ignoring the question of *relevance*, the argument's predicate is correct. Because most criminological research is conducted in urban areas, criminological theories do not *necessarily* generalize to rural areas. In fact, it is entirely possible that some obscure criminological theory might not generalize to rural areas and populations. But the relevant routine activity theory of hotspots, outlined in Section 1 above, generalizes to any accessible area, urban, suburban, or rural. This is corroborated by a recent case study. When an SOB opens on an interstate highway off-ramp in a sparsely populated rural community, ambient crime risk rises precipitously, turning the community into a rural "hotspot of predatory crime."

An unincorporated village of 250 residents, Montrose, Illinois is located on I-70 midway between St. Louis and Indianapolis. I-70 separates Montrose's residential dwellings from its businesses: a convenience store-gas station, a motel, and for a short period, a tavern. Other than gas and lodging, cross-country travelers had no reason to exit I-70 at Montrose prior to February, 2003. In that month, the *Lion's Den* opened on a service road within 750 feet of the I-70 off-ramp. A large, elevated sign let I-70 travelers know that x-rated videos, books, and novelties could be purchased "24/7." The store was successful by all accounts.

The residents of Montrose did not welcome the new business. Unlike the village's other businesses, the *Lion's Den* was located on the residential side of I-70. Complaining that the store

---

[47] *Abilene Retail #30, Inc. v. Board of Commissions of Dickinson County, Kansas*, 492 F.3d 1164, 1175 (10th Cir. 2007)

[48] *Id.* at 1175.

disrupted their idyllic life-style, villagers picketed the site on several occasions. Traffic was a chronic complaint. The narrow gravel access road connecting the site to I-70 could not support the weight of big-rig trucks; it soon fell into disrepair. The *Lion's Den* offered to build a new, larger access road from I-70 to its site. But fearing an even larger volume of traffic, the villagers declined the offer.

Like all Illinois villages, Montrose had no SOB ordinances. The *Lion's Den* was located within 1,000 feet of a public park, however, in violation of an Illinois statute. When the State moved to enforce its statute, the *Lion's Den* sued, arguing that "off-site" SOBs could not generate the public safety hazards associated with adult cabarets, video arcades and other on-site SOBs. The trial in *State v. The Lion's Den et al.* lasted four days. The court upheld the statute and, in July, 2005, the Montrose *Lion's Den* closed its doors.

Table 5.2 - Crime-Related Secondary Effects of a Rural Adult Business

	Open		*Closed*				
					Log Effect	λ	***t***
Property Crimes	23	9.54	15	7.20			
Personal Crimes	3	1.24	5	2.40	Constant	-3.267	-17.60
All Other Crimes	28	11.61	9	4.32	Open	0.475	2.06
Total Crimes	54	22.39	29	13.92	$e^{0.475} \approx 1.61$		

At the trial, the State presented evidence of the *Lion's Den*'s adverse impact on the surrounding area: sexually explicit litter and decreased use of the nearby park. Neither party presented local crime data, however. Table 5.2 reports data bearing on this issue. During the 1,642-day period beginning January 1, 2002, the Effingham County Sheriff's Office recorded 83 crime incidents in the Village. The most common incidents involved the theft or destruction of property. Incidents of disorder and indecency, traffic-related incidents, and alcohol-drug offenses were nearly as common. But Incidents involving danger or harm to persons (robbery, assault, *etc.*) were rare.

The columns labeled "Open" and "Closed" in Table 5.2 break the incidents down into an 881-day segment in which the *Lion's Den* was open and a 761-day segment in which it was closed. Crime rates are 22.39 and 13.92 total incidents per year for the "Open" and "Closed" segments. From these raw rates, it appears that crime risk in Montrose rose when the *Lion's Den* opened and fell when the *Lion's Den* closed. The magnitude of the effect is proportional to the exponentiated effect estimate reported in Table 5.2 ($e^{0.475} = 1.61$). The crime rate in Montrose was 61 percent higher while the Lion's Den was open.

Could the effect be due to chance? That is unlikely. The effect estimate reported in

Table 5.2 is statistically significant at the conventional 95 percent confidence level. Could the effect be due a coincidental increase in the frequency of patrols the Effingham County Sheriff? That too is unlikely. Whereas heightened surveillance can exaggerate "victimless" crime rates, heightened surveillance would not *not* produce higher rates of serious crime and, while the *Lion's Den* was open, crime in the Village grew more "serious," including two armed robberies, one committed by a gang of four men wearing ski masks and armed with shotguns. Both armed robberies were committed at site of the *Lion's Den*, moreover, and were the only robberies recorded in the Village's modern history.

The timing of the crime incidents reinforces this point. While the *Lion's Den* was closed, Montrose's modal crime incidents were "drive-off" thefts from the Village's gasoline station and vandalism at the Village's motel. Most of these incidents occurred in daylight and required no immediate response from the Sheriff's Office; and because the businesses were separated from residences by I-70, the model incidents attracted little attention. While the *Lion's Den* was open, on the other hand, a majority of incidents occurred at night and demanded immediate response; as more incidents began to occur on the residential side of I-70, crime became more noticeable to Village residents.

5.3 CONCLUDING REMARKS

Criminological theory is clear on the threshold question of whether off-site SOBs are exempt. They are not. As it turns out, moreover, the Fifth Circuit had not intended its *Encore Videos* decision to be interpreted as a comment on applicability of criminological theory. Four years later, the Fifth Circuit upheld a Kennedale, Texas ordinance aimed at off-site SOBs.[49] Unlike the San Antonio ordinance under challenge in *Encore Videos*, the Kennedale ordinance relied on studies of off-site SOBs. The Court took the opportunity, furthermore, to clarify the short note in *Encore Videos* that had been misinterpreted as questioning the applicability of criminological theory.

On March 1st, 2007, exactly one week after the Fifth Circuit's *H and A Land Corp.* decision, a man parked his car in a dark lot near an off-site SOB in Kennedale, Texas. Returning to his car, the man was confronted by a robber and shot.[50] Though seriously injured, he survived. Governments would not want to rely on anecdotal evidence alone. Nevertheless, anecdotes of

---

[49] *H and A Land Corp. v. City of Kennedale, TX.*, 480 F.3d 336 No. 05-11474 (5th Cir. Feb. 22nd, 2007).

[50] Bourgeois, P. "Man shot outside video store in Kennedale." *Fort Worth Star-Telegram*, March 1st, 2007.

this sort constitute legitimate secondary effects evidence.[51] In addition to its corroborative value, this particular anecdote has some legal relevance because the off-site SOB was a plaintiff in *H and A Land Corp.*

The Tenth Circuit may not have found the Montrose results relevant to *Abeline Retail.* Every case study is unique in some respect, after all; and although the U.S. Census Bureau considers both Effingham County, Illinois and Dickinson County, Kansas to be "rural," the Tenth Circuit may have focused on idiosyncratic, legally relevant factors. Nevertheless, the case study results demonstrate that, whether urban, suburban, or rural, hotspots are hotspots. Whether the area is urban, suburban, or rural, SOBs attract patrons from wide catchment areas. Because these patrons are disproportionately male, open to vice overtures, and reluctant to report victimizations, their presence attracts offenders, generating ambient victimization risk – a hotspot of predatory crime. This theoretical mechanism operates identically in rural, suburban, and urban areas but, because rural areas ordinarily have lower levels of visible police presence, rural hotspots may be riskier than their suburban and urban counterparts.

Solving the problem by allocating more police to rural areas is politically unfeasible. Governments allocate public safety resources across regions on utilitarian grounds. Per capita allocations have the greatest impact on per capita crime rates. This poses an obstacle to rural problem-oriented policing (Weisheit, Falcone, and Wells, 1999), of course, but it is a rational policy for a government.[52] Because the targets attracted to the rural hotspot live outside the jurisdiction, and because victimizations are under-reported, ignoring the hotspot is a more realistic strategy.

The future is unclear. The relocation of adult businesses to rural areas parallels the post-war "flight" of inner-cities families. From the perspective of adult business proprietors, the urban environment has become hostile. Zoning codes force adult businesses into "ghettos" where their operations are strictly regulated and where competition with other adult businesses is fierce. Rural areas have few regulations, on the other hand, and little competition; access to interstate highway traffic is a bonus. As urban environments become more hostile, more adult businesses will relocate to rural areas, forcing state and county governments into policy decisions.

---

[51] See, *e.g.*, *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1195-96 (9th Cir. 2004) ("Anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects ...").

[52] For a review of the problems involved in rural policing, see *Community policing in a rural setting.* (by Q. Thurman and E.G. McGarrell; Anderson Publishing, 1997) or *Crime and policing in rural and small-town America* (by R.A. Weisheit, D.N. Falcone, and L.E. Wells; Waveland Press, 1999).

6. METHODOLOGICAL RULES

In the last five years, legislatures and courts have been bombarded with expert opinions from both sides. Plaintiffs' experts argue that *every* government-sponsored secondary effect study is "fatally flawed" while *every* study conducted by a plaintiffs' expert is "methodologically rigorous." Plaintiffs' experts are incorrect, of course, but ignoring this point for the present, the clash of experts raises this question: *How can two sets of experts look at the same data and arrive at different conclusions?* The short answer to this question is that the experts recognize and obey different methodological rules.

A more complete answer requires a discussion of the rules. Like all rules, the rules of statistical inference are unambiguous and binding. Although investigators on both sides of a debate are bound by the same set of rules, the rules can have slightly different interpretations. If investigators frame the research question differently then, or if they make different assumptions, or if they use different statistical models, even following the same rules, they can arrive at different findings. With that point in mind, if an investigator *wanted* to produce a null finding,[53] that goal could be achieved by using the weakest possible quasi-experimental design.

6.1 WEAK MEASURES OF AMBIENT CRIME RISK[54]

The most salient difference between government-sponsored secondary effects studies, such as those listed in Table 1, and the industry-sponsored studies that began to appear after the *Alameda Books* decision, is way that *ambient crime risk* is measured. Whereas government-sponsored studies use crime incident reports (*e.g.*, Uniform Crime Reports or UCRs), for the most part, industry-sponsored studies use 911 calls-for-service (CFSs).

Although UCRs and CFSs are roughly comparable under some (but *not* all) conditions, in statistical terms, UCRs are always the "better" measure of ambient crime risk. To explain this important point, define the *crime risk measure* (CFSs or UCRs, *e.g.*) as the sum of *crime risk* and *noise*:

$$\textit{CRIME RISK MEASURE} = \textit{CRIME RISK} + \textit{NOISE}$$

Defined this way, the *signal-to-noise* ratio as the ratio of *crime risk* to the *crime risk measure*[55]

---

[53] Again, "null finding" means "finding that SOBs have no secondary effects."

[54] This section and the next are based on R. McCleary and J.W. Meeker, "Do peep shows "cause" crime?" *Journal of Sex Research*, 2006, 43:194-196.

[55] The terms in the numerator and denominator of this expression are population variances. Although I call this expression the "signal-to-noise ratio," it is the *squared* correlation

$$\textit{SIGNAL-TO-NOISE} = \frac{\textit{CRIME RISK}}{\textit{CRIME RISK MEASURE}} = \frac{\textit{CRIME RISK}}{\textit{CRIME RISK} + \textit{NOISE}}$$

The higher the signal-to-noise ratio, the "better" the measure. Relative to CFSs, UCRs are a "better" measure of crime risk because they have a higher signal-to-noise ratio.

Figure 6.1 - Crimes *vs.* 911 Calls-for-Service (CFSs)

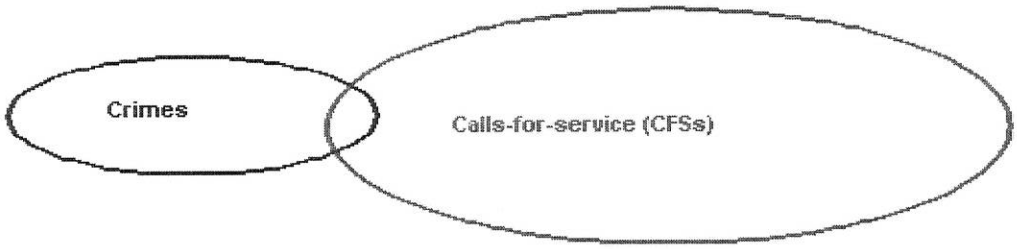


Figure 6.1 depicts the statistical relationship between CFSs and crime risk. In any jurisdiction, CFSs outnumber crimes by a large factor. The relative areas accorded to CFSs (in red) and crimes (in blue) depicts this aspect of the relationship. The signal-to-noise ratio is proportional to the overlapping area. The larger the overlapping area, relative to the total area, the higher the signal-to-noise ratio. In this case, the signal-to-noise ratio is relatively small.

The non-overlapping areas in Figure 6.1 fall into two categories. The first category consists of CFSs that have nothing to do with crime. Examples include duplicated or unfounded CFSs; CFSs that have no apparent basis; and CFSs that are precipitated by false alarms. The second category consists of crimes that circumvent the 911 system and, thus, leave no CFS records. Examples include crimes that the police discover through routine or proactive patrolling and crimes that the police discover through specialized unit activity, especially "victimless" vice crimes, particularly drugs and prostitution.[56]

(or R^2) for crime risk and its measure. See McCleary, R. and J.W. Meeker. Do peep shows "cause" crime? *Journal of Sex Research*, 2006, 43:194-196.

[56] In the *Annex Books v. City of Indianapolis* decision, *e.g.*, "Specifically, the data revealed that the police made forty one (41) arrests at Annex Books for public masturbation between December 5, 2001 and November 5, 2002. Def.'s Br. at 24. In the before/after crime analysis Dr. Linz conducted, we note that he collected police call data for 2001 and 2003, but not for 2002. We need not delve into the intricacies of Dr. Linz's analysis in order to conclude, as we do, that the City has rebutted Plaintiffs' evidence to the contrary on adverse secondary effects. We find the data regarding the number and type of actual arrests at Annex Books for the year period compelling." (333 F. Supp. 2d 773; 2004 U.S. Dist. LEXIS 17341)

CFSs in the first category tend to *over*state the crime rate; CFSs in the second category tend to *under*state the crime rate. In addition to errors that *over*- and *under*-state the crime rate, CFSs have errors that limit their use for finer inferences about *where* and *when* crimes occur.

Address-specific ("hotspot") analyses assume that the address recorded on a CFS is the address where the precipitating crime occurred. The address on a CFS instructs responding patrol units where they go to "see the man," however, and this is often not the address of the precipitating incident. If X calls 911 to report a disturbance at Y's house, *e.g.*, the responding patrol unit will be asked to "see the man" at X's address. Although the disturbance occurred at Y's address them, X's address will be recorded on the CFS record.[57]

Time-specific analyses of CFSs are limited by analogous errors. The time recorded on a CFS is not necessarily the time of the crime incident. For property crimes such as burglary and theft, victims call 911 when the crime is discovered. This may be hours (or even days) after the fact. Given these errors, CFSs allow for relatively crude, approximate inferences about the times and places of crimes.

Table 6.1a - San Diego CFSs by Final Disposition

88,215	CFSs were cleared by report	14.6 %	
31,035	CFSs were cleared by arrest	5.1 %	(19.7 %)
71,686	**CFSs were cancelled or duplicated**	**11.8 %**	
32,757	**CFSs were unfounded**	**5.4 %**	
332,014	**CFSs were disposed of without report**	**54.8 %**	
52,196	**CFSs had other or unknown disposition**	**8.3 %**	**(80.3%)**

Table 6.1b - San Diego Burglary CFSs by Initial and Final Disposition

Total CFSs		607,903	100.0 %
	CFSs initially classified as burglaries	147,127	24.2 %
	Burglary CFSs initiated by an alarm	110,111	18.1 %
	False alarms	109,135	18.1 %
	CFSs initiated by actual burglaries	**37,992**	**25.8 %**

Source: *A Methodical Critique of the Linz-Paul Report: Report to the San Diego City Attorney's Office.* R. McCleary and J.W. Meeker, March 12, 2003.

Tables 6.1a-b illustrate the magnitude of the "noise" component in CFSs. In a 2002 San

[57] To obscure a business' public safety hazard, the proprietor can ask 911 to send a patrol unit to "5th and Main" instead of to "521 East Main."

Diego secondary effects study, Drs. Daniel Linz and Bryant Paul analyzed 607,903 CFSs. As reported in Table 6.1a, fewer than 20 percent of these CFSs began with a crime; more than 80 percent were cancelled, duplicated, unfounded, disposed of without report,[58] or had some other non-crime disposition. This 80:20 ratio of CFSs-to-crimes is typical of the overstatement found in many large cities.

Table 6.1b illustrates another aspect of the problem. Nearly 25 percent of the CFSs analyzed by Drs. Linz and Paul were initially classified as burglaries. Of these, 74.8 percent were initiated by burglar alarms, 99.1 percent of which turned out to be false; only 25.8 percent of burglary CFSs were actual burglaries. CFSs initiated by auto and robbery alarms aggravate the problem that seen for burglaries. Considering "serious" crimes, like burglary, auto theft, and robbery, in most large cities, CFSs overstate the crime rate by a substantial factor.

In light of these well known properties of CFSs, one might wonder why any researcher might prefer to use CFSs to measure of crime risk. One answer – and there are several – is that the relatively low signal-to-noise ratio of CFSs biases statistical tests in favor of a null finding. I will explain this rather technical point after a short historical digression.

6.1.1 HISTORICAL NOTE ON THE USE OF CFSS

Until recently, virtually all secondary effect studies used UCR-based measures of ambient crime risk. The millennial year, 2001, marked an historical turning point. Four years earlier, in 1997, the Fulton County, GA Police Department issued a "quick and dirty" report that compared CFSs at the addresses of adult cabarets and taverns.[59] The design of the report reflects the obvious common sense notion that, other things equal, an adult cabaret is a tavern that offers nude or semi-nude entertainment; clothe the entertainers and the adult cabaret becomes a tavern. It follows from this common sense argument that any difference in CFSs is the secondary effect of nudity.

The results of the comparison surprised the Fulton County Commission. Over a 29-month period, more CFSs were logged to tavern addresses. At a minimum, this implied that adult cabarets posed no ambient public safety hazards; and this in turn implied that Fulton County had no legitimate secondary effects rationale for regulating adult cabarets. And that,

---

[58] CFSs end without a report when the responding patrol unit finds no complainant, informant, victim, or evidence of a crime. Most of the CFSs disposed of as "other/unknown" do not require responses; "all units" CFSs, *e.g.*, describe suspects or vehicles. Strictly speaking, Drs. Linz and Paul should have analyzed only those CFSs that ended in an arrest or report.

[59] *Study of Calls-for-Service to Adult Entertainment Establishments which Serve Alcoholic Beverages.* June 13th, 1997, Capt. Ron Fuller and Lt. Sue Miller.

more or less, is how the U.S. Eleventh Circuit Court interpreted the data.[60]

Following the 2001 decision in *Flanigan's Enterprises*, CFSs became the preferred crime risk measure for experts retained by the SOB industry. Whereas government-sponsored studies continue to use UCR-based measures, after 2001, most SOB industry-sponsored studies use CFS-based measures of ambient crime risk. The 2002 San Diego study, to be reviewed below, and the 2003 Greensboro and 2004 Daytona Beach studies, reviewed in Section 3 above, illustrate the trend. All used CFSs; all purported to find no secondary effects.

In our critique of the 2002 San Diego study by Drs. Daniel Linz and Bryant Paul, Jim Meeker and I pointed out the problems inherent to CFSs generally and their use in secondary effects studies particularly. Drs. Linz and Paul countered by arguing, first, that there is a debate among criminologists about the statistical properties of CFSs; and second, that CFSs are widely used in government-sponsored secondary effects studies. Both arguments are incorrect.

On the first point, shortly after the advent of computerized 911 systems, criminologists experimented with CFSs, sometimes even using them as surrogate measures of crime risk. The results of this experiment led to a consensus view that CFSs are not the *best* – or even a *good* – measure of ambient crime risk. Few criminologists study CFSs for any reason; but no criminologists study CFSs to learn about ambient crime risk. The published literature review summarized in Table 6.1.1 supports both of these opinions. During a recent five-year period, four general criminology journals published 705 items. Most of the items were either non-empirical (essays, reviews, *etc.*) or else, analyzed phenomena other than crime (police behavior, sentencing decisions, *etc.*). Of the 254 articles that analyzed a crime statistic, 134 (52.8 percent) analyzed UCRs; 119 (46.8 percent) analyzed victim or offender surveys. Only five items (1.9 percent) analyzed CFSs.[61] Of these five, *only one used CFSs as a crime risk measure.*

---

[60] *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001)

[61] Table 6.1.1 was compiled from the independent judgements of eight students. Inter-rater reliability among the eight was nearly .95. Because some of the 254 articles analyzed multiple statistics, the rows may sum to more than 100 percent.

Table 6.1.1 Crime Statistics in Criminological Journals, 2000-2004

	Total Items	Crime Stats	UCRs	Survey	CFSs
Criminology	193	52	37	16	0
Justice Quarterly	152	48	23	23	2
J of Quantitative Criminology	95	47	30	17	0
J of Criminal Justice	265	107	44	63	3
	(705)	(254)	(134)	(119)	(5)

On the second point, other than the 1997 Fulton County study, analyses of CFSs are rarer than hen's teeth in government-sponsored studies. Finally, however, recent case law supports the views of criminologists and governments. At least four U.S. Circuits have rejected attempts by SOB plaintiffs to use 911 calls to cast direct doubt on an ordinance.[62] In short, analyses of CFSs these data are not sufficient to meet the standards required under *Alameda Books* to cast doubt on the secondary effects evidence relied on by the government to support an ordinance.

6.1.2 ANECDOTAL EVIDENCE OF BIAS IN CFSS

All large police agencies record 911 calls for planning and budgeting purposes.[63] In a pinch, 911 databases can generate "quick and dirty" snapshots of crime problems. In the long run, however, police agencies use crime incident reports to measure crime risk. Criminologists have the same views. Nevertheless, 911 calls-for-service seem to be the preferred secondary effect measure for SOB plaintiffs.

One reason why SOB plaintiffs might prefer 911 calls is that, because relatively few "victimless" crimes (drugs, prostitution, *etc.*) come in through 911 channels, 911 calls understate the incidence of these crimes by a large factor. Another reason is that 911 calls can be used to mask an address-specific public safety hazard. This last problem merits special comment. If a

---

[62] In *Daytona Grand* (at 44-46), the Eleventh Circuit outlined the limitations of 911 calls and in footnote 33, noted that three other Circuits had rejected attempts by plaintiffs to use 911 calls to cast direct doubt on an ordinance: *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126-27 (9th Cir. 2005), *G.M. Enter., Inc.*, 350 F.3d 631, 639 (7th Cir. 2003), and *SOB, Inc.*, 317 F.3d 856, 863 & n.2 (8th Cir. 2003).

[63] These legitimate uses of 911 calls are discussed in most undergraduate policing texts. See, e.g., Roberg, R.R., J. Crank and J. Kuykendall, *Police and Society*. Wadsworth, 1999.

business is familiar with the coding conventions, 911 records can be manipulated to make the business look more or less in need of police service. To build a case for more police service, the proprietor can complain to the police about problems that might otherwise be handled informally. Or alternatively, to mask a public safety hazard, the proprietor can handle problems informally, thereby creating fewer 911 records and making the business seem safer than it actually is.

Manipulations of this sort are legal, strictly speaking. At the extreme, manipulating the 911 record-keeping system crosses the line. In a recent Manatee County case, for example, an SOB bribed at least two deputies to illegally circumvent and/or to falsify 911 records.

> Another Manatee deputy, Daniel E. Martin, 35, told sheriff's investigators that one of the Cleopatra's door girls had his cell phone and would call him personally to quell customer disturbances ... Former Manatee deputy Joshua R. Fleischer, 25, who resigned this month, told a detective that whenever he was dispatched to Cleopatra's for a disturbance he listed the address as the "3900" block of U.S. 41 – deliberately misidentifying the actual address in the 3800 block. Fleischer, according to the detective, did not want his reports associated with the club.[64]

The investigation into this scandal has spread to surrounding counties. The relevant point, for our purposes, is that business proprietors who are familiar the geo-coding conventions can (and in Manatee County, at least, *do*) attempt to manipulate the system.

6.2 SUBSTANTIVE *VS.* STATISTICAL SIZE

A relatively low signal-to-noise ratio does not disqualify CFSs as a measure of ambient crime risk. On the contrary, ignoring their inherent biases, CFSs could provide a crude measure of ambient crime risk. When CFS-based risk measures are used to test statistical hypotheses, however, their relatively low signal-to-noise ratio biases the test in favor of a null finding. In effect, the low signal-to-noise ratio of CFSs makes *substantively* large secondary effects look *statistically* small.

The distinction between the *substantive* and *statistical* size of a secondary effect requires an explanation. In their 2002 San Diego secondary effects study, Drs. Linz and Paul found that SOB areas had 15.7 percent more CFSs than control areas. Most San Diegans would consider a 15.7 percent difference in CFSs to be *substantively* large. The budgetary implications of a 15.7 percent difference in CFSs boggle the mind. Nevertheless, according to Drs. Linz and Paul, the difference is *statistically* small and, hence, should be ignored. In fact, Drs. Linz and Paul are wrong. The *substantively* large secondary effect is also *statistically* large. After a short digression, I will review the 2002 San Diego study.

---

[64] *StripClub News*, September 22nd, 2006, "Investigation tied to strip club leads to resignations and charges."

Figure 6.2.1 - Jury Trials and Hypothesis Tests

	But in Reality, the Defendant is ...	
	Guilty	**Not Guilty**
The Jury Convicts	**95% Confidence**	**5% False Positives**
The Jury Hangs	**?**	**?**
The Jury Acquits	**20% False Negatives**	**80% Power**

6.2.1 STATISTICAL HYPOTHESIS TESTING

Figure 6.2.1 summarizes the principles of statistical hypothesis testing by analogy to a jury trial. Suppose that an SOB stands accused of posing an ambient crime risk. After hearing the evidence, the jury can convict, acquit, or hang. If the jury convicts, there is a small (but non-zero) probability that the jury convicted an innocent SOB; *i.e.*, a false-positive (or "Type I" or "α-type") error. If the jury acquits, on the other hand, there is a small (but non-zero) probability that the jury acquitted a guilty SOB; *i.e.*, a false negative (or "Type II" or "β-type") error. Finally, if the jury hangs, there was no decision and, hence, no possibility of error.

In real-world courtrooms, the probabilities of false-positive and false-negative verdicts is unknown. Courts enforce strict procedural rules to minimize these probabilities but we can only guess at their values. In statistical hypothesis testing, on the other hand, the values are set by rigid conventions, to five percent for false-positives and twenty percent for false negatives.[65] Adopting these same values, to convict, the jury must be 95 percent *certain* of the SOB's guilt.

---

[65] The most comprehensive authority on this issue is Chapter 22 of *The Advanced Theory of Statistics, Vol. 2, 4th Ed.* by M. Kendall and A. Stuart (Charles Griffin, 1979). This authority requires a strong background in mathematics, however. J. Cohen's *Statistical Power Analysis for the Behavioral Sciences, 2nd Ed.* (L.E. Erlebaum Associates, 1988) and M. Lipsey's *Design Sensitivity: Statistical Power for Experimental Research.* (Sage Publications, 1990). Both Cohen (pp. 3-4) and Lipsey (pp. 38-40) set the conventional false-positive and false-negative rates at α=.05 and β=.2, respectively. These rates can be set lower, of course. The convention also sets the ratio of false-positives to false-negatives at 4:1, implying that false-positives are "four times worse than" false-negatives. The 4:1 convention dates back at least to 1928 (J. Neyman and E. Pearson, "On the use and interpretation of certain test criteria for purposes of statistical inference." *Biometrika*, 1928, 20A:175-240). It reflects a view that science should be conservative. In this instance, for example, the 4:1 convention works in favor of the SOB. When actual decision error costs are known, the actual ratio is used.

To acquit, the jury must be 80 percent *certain* of the SOB's innocence. To ground the 95 and 80 percent certainty levels, we could try each case in front of a large number of independent juries. To convict, 95 percent of the juries would have to return the same guilty verdict; in the case of an acquittal, 80 percent would return the same not guilty verdict.

Correct decisions are painted blue in Figure 6.2.1. Five percent of all convictions are false-positives and 20 percent of all acquittals are false-negatives. Incorrect decisions are painted red in Figure 6.2.1. When the levels of certainty are too low to support conviction *or* acquittal, of course, the jury hangs. Non-decisions, painted yellow in Figure 6.2.1, depend on factors such as the strength of evidence, credibility of witnesses, and so forth. So as not waste a jury's time, the prosecutor doesn't bring obviously weak cases to trial. Likewise, faced with strong evidence of guilt, the defense counsel seeks a plea bargain in order to avoid trial.

The analogy to statistical hypothesis testing is nearly perfect. The researcher considers two complementary hypotheses. The SOB either has secondary effects; or alternatively, the SOB does not have secondary effects. Based on the magnitude of the expected and estimated effects, the researcher then accepts one of the two hypotheses.

- If the false-positive rate for the estimated is smaller than five percent, the hypothetical secondary effect is accepted with 95 percent *confidence*. The SOB has a large, significant secondary effect.

If the false-positive rate is larger than five percent, researcher does not automatically accept the alternative hypothesis but, rather, conducts a second test.

- If the false-negative rate for the expected effect is smaller than twenty percent, the alternative hypothesis is accepted with 80 percent *power*. The SOB does not have a secondary effect.

But lacking *both* 95 percent confidence *and* 80 percent power, neither hypothesis is accepted; *the results are inconclusive*. Since inconclusive results invariably arise from weak research designs, and since the relative strength of a design is known *a priori*, inconclusive results should be rare. But in fact, many of the secondary effects studies sponsored by SOB plaintiffs have inconclusive results. An example illustrate the plaintiffs' rationale.

6.2.2 SAN DIEGO PEEP SHOWS

Analyzing San Diego CFSs, Drs. Daniel Linz and Bryant Paul found no statistically significant difference between SOB and control areas.[66] When Jim Meeker and I re-analyzed the

---

[66] *A Secondary Effects Study Relating to Hours of Operation of Peep Show Establishments in San Diego, California.* September 1, 2002. Daniel Linz and Bryant Paul. Submitted in

data,[67] we discovered that the SOB areas *actually* had 15.7 percent more CFSs than the control areas. In the view of police, legislatures, and citizens, a 15.7 percent difference in any crime-related statistic is *substantively* large. In *statistical* terms, however, the effect was not so large. Drs. Linz and Paul used the *statistically* small size of the effect to argue that the "real" secondary effect was zero:

> ... statistically nonsignificant result and must be interpreted, as meaning that there is no significant difference between these two averages – an indication that the level of criminal activity for [peep-show areas] is equal to the level of criminal activity for [control areas].[68]

The substantively large 15.7 percent increase is not "real," in other words. If the effect estimate is not *statistically* significant, then it does not exist.

A mundane analogy reveals the fallacy in this argument. If I cannot find my car keys, I might conclude that my car keys do not exist. But although this may be true, it may also be true (and certainly more likely) that I did not look hard enough for my car keys or that I looked in the wrong place.[69] By analogy again, if a "quick and dirty" secondary effect study fails to find a statistically significant effect, one might want to conclude that no effect exists. Although this may be true, it may also be true that the study was "too quick" or "too dirty."

As it turns out, Drs. Linz and Paul did not "look hard enough" for a secondary effect in San Diego *and*, worse, looked "in the wrong place." The false-negative error rates plotted in Figure 6.2.2 were calculated by Jim Meeker and me from statistics reported by Drs. Linz and Paul. As shown, the reported 15.7 percent secondary effect estimate has a false-negative rate of .508. What this means, simply, is that the reported null finding is more likely (51 percent) to be *in*correct than it is to be correct (49 percent).

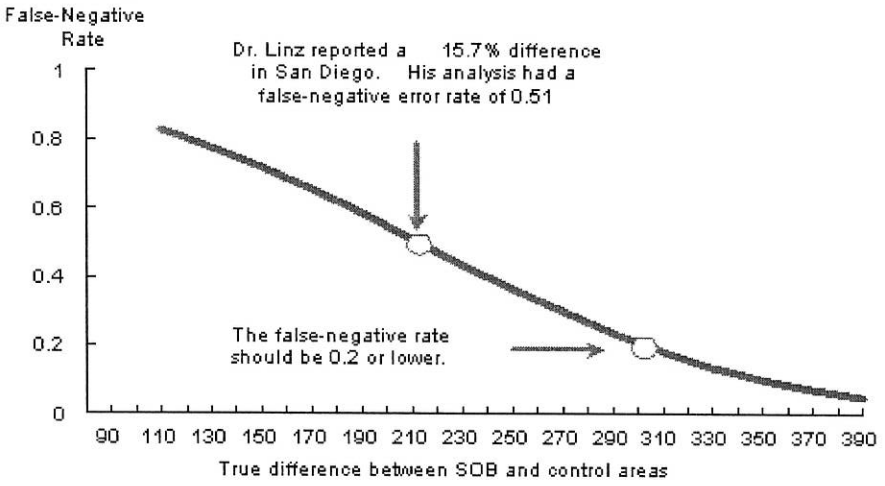
Mercury Books v. City of San Diego. U.S. District Court, Southern District of California (00-CV2461).

[67] R. McCleary and J.W. Meeker, *A Methodical Critique of the Linz-Paul Report: A Report to the San Diego City Attorney's Office.* March 12, 2003.

[68] p.15, *A Secondary Effects Study Relating to Hours of Operation of Peep Show Establishments in San Diego, California.* September 1, 2002. Daniel Linz and Bryant Paul.

[69] Newton made this point with his aphorism "*Negativa non Probanda.*" "Finding nothing proves nothing."

Figure 6.2.2 - False-negative Rates for the San Diego Finding



Whereas Drs. Linz and Paul interpret their null finding as evidence that San Diego SOBs do *not* have secondary effects, in fact, their results are inconclusive. The secondary effect would have to exceed 22.7 percent (304.5 CFSs) before the effect could be detected with 80 percent power. Although many elements of the design contribute to its inherent weakness, the use of CFSs is a major culprit. Jim Meeker and I have demonstrated that, correcting for low signal-to-noise ratio of the San Diego CFSs, the *substantively* significant secondary effect estimate is *statistically* significant as well.[70]

6.3 CONCLUDING REMARKS

The mathematics of statistical hypothesis testing is so demanding that few social scientists understand the concepts or their importance to research.[71] The conventional 80 percent power level was proposed and adopted in the 1920s when statistical hypothesis testing was in its infancy. The convention has survived for eighty years because it serves two useful, crucial functions.

- Anyone with a modest background in research methods can design a study in a way that favors – or even guarantees – a null finding. The convention minimizes abuses by malicious investigators.

---

[70] The correction is reported in R. McCleary and J.W. Meeker, "Do peep shows 'cause' crime?" *Journal of Sex Research*, 2006, 43:194-196.

[71] *E.g.*,"I attributed this disregard of power to the inaccessibility of a meager and mathematically difficult literature..." (p. 155, "A power primer." J. Cohen, *Psychological Bulletin*, 1992, 112:155-159).

- Haphazardly designed "quick and dirty" studies favor the null finding. The convention minimizes the impact of spurious findings generated by naive (but benign) investigators.

Lay audiences, who must rely on common sense, cannot always distinguish between weak and strong designs or between benign and malicious investigators. Scientific conventions guard against both abuses. In this particular instance, the 80 percent power convention allows the lay audience to trust the validity of a null finding.

Recognizing the conventions, crime-related secondary effect studies can assigned to one of three categories: studies that report secondary effects with 95 percent *confidence*; studies that report null findings with 80 percent *power*; and studies that are *inconclusive*. All of studies listed in Table 1 above either report large, significant secondary effects or else are *inconclusive*. No studies report null findings with the conventional 80 percent power. This reinforces a statement that I made in the introduction to this report: It is a *scientific fact* that SOBs pose large, significant ambient crime risks.

7. REFERENCES

7.1 STATISTICAL AND METHOLOGICAL AUTHORITIES

Campbell, D.T. and J.C. Stanley, *Experimental and Quasi-Experimental Designs for Research* (Rand-McNally, 1966).

Cohen, J. *Statistical Power Analysis for the Behavioral Sciences, 2nd Ed.* (L.E. Erlebaum Associates, 1988)

Cook, T.D. and D.T. Campbell, *Quasi-Experimentation: Design and Analysis Issues for Field Settings* (Houghton-Mifflin, 1979).

Diggle, P,J. *Statistical Analysis of Spatial Point Patterns, 2nd Ed.* Arnold, 2002.

Feller, W *An Introduction to Probability Theory and its Applications, Volume I, 3rd Ed.* (Wiley, 1968 [*1st Ed.*, 1950]).

Kendall, M. and Alan Stuart, Chapter 22 of *The Advanced Theory of Statistics, 4th Ed.* (Charles Griffin and Co., 1979 [*1st Ed.*, 1946]).

Lipsey, M. *Design Sensitivity: Statistical Power for Experimental Research.* (Sage Publications, 1990).

Shadish, W.R., T.D. Cook, and D.T. Campbell, *Quasi-Experimental Designs for Generalized Causal Inference* (Houghton-Mifflin, 2002).

Stuart, A. And J.K. Ord. *Kendall's Advanced Theory of Statistics, Volume I (3rd Ed.)*. London: Oxford University Press, 1986.

7.2 CRIMINOLOGICAL AUTHORITIES

Akers, R.L. *Criminological Theories: Introduction and Evaluation*. Los Angeles: Roxbury, 2000.

Bennett, T., and R. Wright. *Burglars on Burglary: Prevention and the Offender.* (Gower, 1984).

Clarke R. V. and M Felson. *Routine Activity and Rational Choice: Advances in Criminological Theory* New Brunswick: Transaction Publishers, 1993.

Cohen, L.E. and M. Felson. Social change and crime rate trends: A routine activity approach. *American Sociological Review*, 1979, 44:588-608.

Cohen, L.E., J.E. Kluegel and K.C. Land. Social inequality and predatory criminal victimization: An exposition and test of a formal theory. *American Sociological Review*, 1981, 46:505-524.

Danner, T.A. Violent times: A case study of the Ybor City Historical District. *Criminal Justice Policy Review*, 2003, 14:3-29.

Feeney, F. Robbers as Decision-Makers. Pp. 53-71 in Cornish D. and R. Clarke (eds.), *The Reasoning Criminal: Rational Choice Perspectives on Offending*. (Springer-Verlag, 1986).

Felson, M. *Crime and Everyday Life, 2nd Ed.* Pine Forge Press, 1998.

Felson, M. *Crime and Nature*. Sage, 2006.

Fleisher, M. *Beggars and Thieves: Lives of Urban Street Criminals.* (U Wisconsin Press, 1995).

Frank, K. *G-Strings and Sympathy: Strip Club Regulars and Male Desire*. Duke University Press, 2002.

Garnett, N.S. Relocating Distorder *Virginia Law Review,* 2005, 91:1076-1134.

Goldstein, H. *Problem-Oriented Policing*. Wiley, 1990.

Katz, J. *Seductions of Crime: Moral and Sensual Attractions in Doing Evil* (Basic Books, 1988).

Katz, J. The Motivation of the Persistent Robber. In Tonry, M. (ed.), *Crime and Justice: A Review of Research* (U Chicago Press , 1991).

Kennedy, L.W. and D.R. Forde. Routine activities and crime: An analysis of victimization in Canada. *Criminology*, 1990, 28:137–152.

Klinger, D. and G.S. Bridges. Measurement errors in calls-for-service as indicators of crime. *Criminology*, 1997, 35:529-41.

McCleary, R. and J.W. Meeker. Do peep shows "cause" crime? *Journal of Sex Research*, 2006, 43:194-196.

Miethe, T.D. and R.F. Meier, *Crime and its Social Context: Toward and Integrated Theory of Offenders, Victims, and Situations* Albany, NY: State University of New York Press, 1994.

Mustaine, E.E. and R. Tewksbury. Predicting risks of larceny theft victimization: a routine activity analysis using refined lifestyle measures. *Criminology*, 1997, 36:829–858.

National Research Council. *Fairness and Effectiveness in Policing: The Evidence*. National Academies Press, 2004.

Newman, O. *Defensible Space: Crime Prevention Through Urban Design* (MacMillan, 1973).

Roberg, R.R., J. Crank, and J. Kuykendall, *Police and Society* Wadsworth, 1999.

Roncek D.W. and M.A. Pravatiner "Additional Evidence That Taverns Enhance Nearby Crime." *Social Science Research*, 1989, 73:185-188.

Sanchez, L.E. *Sex, violence citizenship, and community: an ethnography and legal geography of commercial sex in one American city.* Ph.D. Dissertation, Criminology, Law and Society, University of California, Irvine, 1998.

Scott, M.S. *Assaults in and Around Bars*. U.S. Department of Justice, Office of Community Oriented Policing. 2002.

Shaw, C.R. *The Jack-Roller: A Delinquent Boy's Own Story*. University of Chicago Press, 1966 [1930].

Sherman, L.W., P.R. Gartin and M.E. Buerger. Hot spots of predatory crime: routine activities

and the criminology of place. 1989, *Criminology*, 27:27–56.

Shover, N. *Great Pretenders: Pursuits and Careers of Persistent Thieves.* (Westview, 1996).

Skogan W.G. *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods.* University of California Press, 1992.

Wilson, J.Q. and G.L. Kelling. Broken windows: The police and neighbor-hood safety. *Atlantic Monthly*, 1982, 249:29-38.

Wright, R.T. and S.H. Decker. *Armed Robbers in Action: Stickups and Street Culture* (Northeastern U Press, 1997).

7.3 ALCOHOL-EROTICA AUTHORITIES

Davis, K.C., J. Norris, W.H. George, J. Martell, and R,J. Heiman. Men's likelihood of sexual aggression: The influence of alcohol, sexual arousal, and violent pornography. *Aggressive Behavior*, 2006 (in press).

Davis, K.C., J. Norris, W.H. George, J. Martell, and R.J. Heiman. Rape myth congruent beliefs in women resulting from exposure to violent pornography: effects of alcohol and sexual arousal. *Journal of Interpersonal Violence*, 2006 (in press).

Norris, J., K.C. Davis, W.H. George, J. Martell, and J.R. Heiman. Alcohol's direct and indirect effects on men's self-reported sexual aggression likelihood. *Journal of Studies on Alcohol*, 2002, 63, 688-695.

7.4 SECONDARY EFFECT STUDIES RELIED UPON BY LEGISLATURES

Amarillo, TX, 1977. *A Report on Zoning and Other Methods of Regulating Adult Entertainment in Amarillo.* City of Amarillo Planning Department, September 12th, 1977.

Austin, TX, 1986. *Report on Adult Oriented Businesses in Austin.* Office of Land Development Services, May 19th, 1986.

Centralia, WA, 2004. *Crime Risk in the Vicinity of a Sexually Oriented Business: A Report to the Centralia City Attorney's Office.* Richard McCleary, Ph.D. February 28, 2004.

Crime-Related Secondary Effects Of Sexually-Oriented Businesses. Report to the Board of County Commissioners, Manatee County, FL, R. McCleary, April 5th, 2005.

Dallas, TX, 1997. *An Analysis of the Effects of SOBs on the Surrounding Neighborhoods in Dallas, Texas.* Peter Malin, MAI. April, 1997.

Daytona Beach, FL, 2004. *Evaluating Potential Secondary Effects of Adult Cabarets in Daytona Beach Florida: A Study of Calls for Service to the Police in Reference to Ordinance 02-496*. D. Linz, R.D. Fisher, and M. Yao. April 7th, 2004.

Daytona Beach. FL, 2006. *A Methodological Critique of Evaluating Potential Secondary Effects of Adult Cabarets in Daytona Beach, Florida: A Study of Calls for Service to the Police in Reference to Ordinance 02-496*. R. McCleary, May 1st, 2006.

Ft. Wayne, IN, 2001. *Measurement of Negative Secondary Effects Surrounding Exotic Dance Nightclubs in Fort Wayne, Indiana*. Daniel Linz and Bryant Paul. February 13th, 2001.

Garden Grove, CA, 1991. *Final Report to the City of Garden Grove: The Relationship between Crime and Adult Business Operations on Garden Grove Boulevard*. October 23, 1991. Richard McCleary, Ph.D. and James W. Meeker, J.D., Ph.D.

Greensboro, NC, 2003. *Evaluating Potential Secondary Effects of Adult Cabarets and Video/Bookstores in Greensboro: A Study of Calls for Service to the Police*. Daniel Linz and Mike Yao, November 30th, 2003.

Greensboro, NC, 2003. *A Methodical Critique of the Linz-Yao Report: Report to the Greensboro City Attorney*. R. McCleary. December 15th, 2003.

Indianapolis, IN, 1984. *Adult Entertainment Businesses in Indianapolis, An Analysis*. Department of Metropolitan Development, Division of Planning. March, 1984.

Los Angeles, CA, 1977. *Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles*. Department of City Planning, June, 1977.

Los Angeles, CA, 2007. *Crime-Related Secondary Effects of Sexually-Oriented Businesses: Report to the Los Angeles City Attorney*. Richard McCleary, Ph.D. May 6th, 2007.

Minneapolis, MN, 1980. *An Analysis of the Relationship between Adult Entertainment Establishments, Crime, and Housing Values*. Minnesota Crime Prevention Center, Inc. M. McPherson and G. Silloway, October, 1980.

Montrose, IL, 2005. *Report to the Effingham County Attorney*. R. McCleary. April 26th, 2005.

Newport News, VA, 1996. *Adult Use Study*. Department of Planning and Development. March, 1996.

New York Times Square, NY, 1994. *Report on the Secondary Effects of the Concentration of Adult Use Establishments in the Times Square Area*. Insight Associates. April, 1994.

Phoenix, AZ, 1979. *Adult Business Study*. City of Phoenix Planning Department, May 25, 1979.

San Diego, CA, 2002. *A Secondary Effects Study Relating to Hours of Operation of Peep Show Establishments in San Diego, California*. Daniel Linz and Bryant Paul. September 1, 2002.

San Diego, CA, 2003. A Methodical Critique of the Linz-Paul Report: A Report to the San Diego City Attorney's Office. R. McCleary and J.W. Meeker. March 12, 2003.

St. Paul, MN, 1978. *Effects on Surrounding Area of Adult Entertainment Businesses in St. Paul*. Department of Planning and Economic Development and Community Crime Prevention Project, June, 1978.

Sioux City, IA, 2006. *Affidavit of Richard McCleary, Ph.D.* Doctor John's *vs.* City. U.S. District Court, Northern District of Iowa, Western Division, Civil No. C03-4121 MWB. January 31st, 2006.

Toledo, OH, 2004. *Evaluating Potential Secondary Effects of Adult Cabarets and Video/Bookstores in Toledo, Ohio: A Study of Calls for Service to the Police.* Daniel Linz and Mike Yao. February 15th, 2004.

Toledo, OH, 2004. *A Methodological Critique of the Linz-Yao Report: Report to the City of Toledo, OH.* R. McCleary and J.W. Meeker. May 15th, 2004.

Whittier, CA, 1978. *Staff Report, Amendment to Zoning Regulations, Adult Businesses in C-2 Zone with Conditional Use Permit, Case No. 353.015*. January 9th, 1978.

7.5 OTHER MISCELLANEOUS REPORTS

Anonymous. "Investigation tied to strip club leads to resignations and charges." *StripClub News*, September 22nd, 2006.

Baker, D.F. and J. Hughes, "Two officers kill robber's alleged getaway driver." *San Diego Union-Tribune*, April 19th, 2007.

Bourgeois, P. "Man shot outside video store in Kennedale." *Fort Worth Star-Telegram*, March 1st, 2007.

C.B. Cooper and E.D. Kelly. *Everything You Always Wanted to Know About Regulating Sex Businesses*. American Planning Association (PAS 495/496), 2001.

Crime-Related Secondary Effects of Sexually-Oriented Businesses: Report to the Hillsborough

County Commission. Richard McCleary, Ph.D. August 30th, 2006.

Crime-Related Secondary Effects Of Sexually-Oriented Businesses. Richard McCleary, Ph.D. Presentation to the Flagler Beach City Commission, April 3rd, 2006.

Danner Report: The Crime Related Secondary Effects of Adult Cabarets in Palm Beach County An expert report submitted in the case of Bond, Lynch, and Song v. Palm Beach County Case No. 04-80213 by Terry A. Danner.

Enriquez, R., J.M. Cancino and S.P. Varano. A legal and empirical perspective on crime and adult establishments: A secondary effects study in San Antonio, Texas. *American University Journal of Gender, Social Policy and the Law*. 2006, 15.

Fisher Report: Do adult businesses have adverse effects on the communities that surround them? An empirical and historical analysis of the concept of 'Adverse Secondary Effects An expert report submitted in the case of: Bond, Lynch, and Seng v. Palm Beach County Case No. 04-80213 by Randy D. Fisher.

Examining the link between sexual entertainment and crime: The presence of adult businesses and the prediction of crime rates in Florida. Fisher, R.D., Benton, C.V, Linz, D. and Paul, B. Manuscript under review at *Law and Human Behavior*.

Linz, D., B. Paul, K.C. Land, M.E. Ezell and J.R. Williams. An examination of the assumption that adult businesses are associated with crime in surrounding areas: A secondary effects study in Charlotte, North Carolina. *Law and Society Review*, 2004, 38(1):69-104

Paul, B., D. Linz and B.J. Shafer. Government regulation of "adult" businesses through zoning and anti-nudity ordinances: de-bunking the legal myth of negative secondary effects. *Communication Law and Policy*, 2001, 6:355-391.

Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses. Hubert H. Humphrey III, Attorney General, State of Minnesota, June 6, 1989.

Curriculum Vitae for
Richard McCleary

28061 Modjeska Grade
Silverado, CA 92676

School of Social Ecology
University of California
Irvine, CA 92697-7070

Phones: 949-285-7620 (Home)
949-856-7280 (Office)
949-824-2056 (FAX)

mccleary@uci.edu

Citizenship: USA

EDUCATION

Ph.D., Northwestern University, 1977
M.A., Northwestern University, 1975
B.S., University of Wisconsin, 1974

ACADEMIC APPOINTMENTS

University of California-Irvine: Professor of Social Ecology (Environmental Health Sciences and Policy; Criminology, Law and Society; Planning and Policy), 1988-Present.

University of Minnesota: Visiting Professor of Public Health (Epidemiology Division), 1998.

University of New Mexico: Associate Professor of Sociology, 1983-1988; Associate Director, New Mexico Statistical Analysis Center 1986-1988.

Human Relations Area Files, Yale University: Senior Research Scientist, 1986-1989.

University of Michigan: Instructor, ICPSR Summer Institute in Quantitative Social Science, 1983-1984.

State University of New York-Albany: Associate Professor of Criminal Justice, 1982-1983.

Arizona State University: Associate Professor of Criminal Justice, 1980-1982; Assistant Professor of Criminal Justice, 1978-1980; Director, Program in Applied Statistics, 1980-1982.

University of Illinois, Chicago: Assistant Professor of Criminal Justice and Sociology, 1977-1978; Lecturer in Criminal Justice, 1976-1977.

MEMBERSHIPS

American Society of Criminology
American Statistical Association
Justice Research and Statistics Association

EDITORIAL BOARDS

Behavioral Assessment: Associate Editor, 1980-1984
Criminology and Public Policy, Senior Editor, 2006-7
Evaluation Studies Review Annual: Associate Editor, 1986
J. of Criminal Law and Criminology: Consulting Editor, 1982-Present
J. of Quantitative Criminology: Associate Editor, 2001-Present
J. of Research in Crime and Delinquency: Consulting Editor, 1981-Present
Justice Quarterly: Associate Editor, 1991-Present
Law and Policy Quarterly: Associate Editor, 1978-Present
New Direction for Program Evaluation: Advisory Editor, 1991-Present
Research Methods in Social Relations, 4th Ed.: SPSSI Board of Advisors
Social Pathology: Associate Editor, 1994-Present

COMMUNITY SERVICE

Board of Directors, Prevent Child Abuse - Orange County, 1997-2003
Board of Directors, Orange County Youth and Family Services, 1995-2002
Technical Advisory Board (HealthLink), Robert Wood Johnson Foundation
Executive Committee, UCI Mental Retardation Research Center, 1995-2000
Executive Committee, UC Institute for Brain Aging and Dementia, 1995-2003
Faculty Chair, UC Irvine School of Social Ecology, 2002, 2003
Member, UC Irvine Institutional Review Board "C," 2003-present
Chair, UC Irvine Council on Research, 2005-present

FINISHED WORK -- Books

Bernard, T.J. and R. McCleary (eds.) *Life Without Parole.* Los Angeles: Roxbury, 1996.

Bernard, T.J., R. McCleary, R. Wright (eds.) *Life Without Parole: Living in Prison Today, 2nd Edition*. Los Angeles: Roxbury, 1999.

R. McCleary. *Dangerous Men: The Sociology of Parole.* Beverly Hills and London: Sage,

1978, 202 pp.[72] *Second Revised Edition*. New York: Harrow and Heston, 1992.

R. McCleary and R.A. Hay, Jr. *Applied Time Series Analysis for the Social Sciences*. Beverly Hills and London: Sage, 1980, 328 pp.[73]

D. McDowall and R. McCleary. *Interrupted Time Series Analysis*. Volume #21, University Papers Series: Quantitative Applications in the Social Sciences. Beverly Hills and London: Sage, 1980.[74]

H.P. Friesema, J.A. Caporaso, G.G. Goldstein and R. McCleary. *Aftermath: Communities After Natural Disaster*. Beverly Hills and London: Sage, 1978, 281 pp.

FINISHED WORK -- Articles and Chapters

McCleary, R. Rural hotspots: The case of adult businesses. *Criminal Justice Policy Review*, 2008, 19:1-11.

McCleary, R. Crime and Incarceration, Editorial Introduction, Do prison releases cause crime? *Criminology and Public Policy*, 2007, 3:585-5988.

McCleary, R. and J.W. Meeker. Do peep shows "cause" crime? *Journal of Sex Research*, 2006, 43:194-196.[75]

McCleary, R., K. S. Y. Chew, V. Merrill and C. Napolitano. Does legalized gambling elevate the risk of suicide? An analysis of U.S. counties and metropolitan areas. *Suicide and Life-Threatening Behavior*, 2002, 32: 209-221.

McCleary, R. and K.S.Y. Chew. Winter is the infanticide season: seasonal risk for child homicide. *Homicide Studies*, 2002, 6:228-239.

---

[72]Reviewed in *Crime and Delinquency*, 1980, 26, 410-414; and *Urban Life*, 1981, 10: 219-220.

[73]Reviewed in *Contemporary Sociology*, 1981, 10, 818-819; *Quantitative Sociology Newsletter*, 1981, 26, 191-2; *Quality and Quantity*, 1982, 566-7; *Scientometrics*, 1982, 401-3; *Sociology and Social Research*, 1981, 101-2.

[74]Reviewed in *Contemporary Psychology*, 1981, 720; *Quality and Quantity*, 1981, 473-474; *Australian Journal of Psychology*, 1986, 92-3.

[75]Cited by tje U.S. Circuit Court of Appeals for the Eleventh Circuit, *Daytona Grand, Inc. v. City of Daytona Beach, Florida* (Case No. 06-12022).

McCleary, R. Time series quasi-experiment. In T.D. Cook (ed.), *Encyclopedia of the Social Sciences*. Amsterdam: Elsevier, 2001.

Chew, K.S.Y., R. McCleary, V. Merrill, and C. Napolitano. Visitor suicide risk in casino resort areas. *Population Research and Policy Review*, 2000, 19:551-570.

McCleary, R. Evolution of the time series experiment. Chapter 10 in L. Bickman (ed.), *Contributions to Research Design: Donald T. Campbell's Legacy*. Newberry Park, CA: Sage, 1999.

Chew, K., R. McCleary, M. Lew, and J. Wang. Epidemiology of child homicide: California, 1981-90. *Homicide Studies*, 1999, 2:78-85.

McCleary, R., S. Schuck, and J.M. Swanson. Ecological correlates of ADHD. Under review at *Journal of Attention Disorders*.

Head, E., R. McCleary, F.W, Milgram, and C.W. Cotman. Region-specific age-at-onset for β-amyloid disease in canine brains. *Neurobiology of Aging*, 2000, 21:89-96.

Johnson, J.K., R. McCleary, M.H. Oshida, and C.W. Cotman. Initiation and propagation stages of β-amyloid are associated with distinctive Apolipoprotein-E, age, and gender profiles. *Brain Research*, 1998, 798:18-24.

Crinella, F., R. McCleary, and J. Swanson. How a regression artifact can make intermediate care facilities look harmful. *Mental Retardation*, 1998, 36:219-25.

Land, K.C. and R. McCleary. Missing data in time series analyses. *Criminology*, 1996, 34:281-288.

McCleary, R. *et al.* Ishihara color plates and dementia. *Journal of the Neurological Sciences*, 1996, 142:93-98.

McCleary, R., R. Mulnard, and W.R. Shankle. Hysterectomy risk in dementia: evidence from the 1986 Mortality Followback Survey. *Alzheimer's Research*, 1996, 2:181-184

Buckwalter, J.G. A.A. Rizzo, R.McCleary, *et al.*Gender comparisons of cognitive performances among vascular dementia, Alzheimer's disease, and non-demented older adults. *Archives of Neurology*, 1996, 53:436-439.

McCleary, R. *et al.* Full-information models for multiple psychometric tests: annualized rates of change in normal aging and demenia. *Alzheimer's Disease and Related Disorders*, 1996, 10:1-14.

Chew, K.S.Y and R. McCleary. The seasonality of suicide: a world survey. *Current Issues in Public Health*, 1996, 2:241-246.

Chew, K.S.Y. and R. McCleary. A cross-national study of the spring suicide peak. *Social Science and Medicine*, 1995, 40:223-230.

Chew, K.S.Y. and R. McCleary. A life-course theory of suicide risk. *Suicide and Life-threatening Behavior*, 1994, 24:234-244.

Ross, H.L., R. McCleary and H. Klette. Recent trends in Scandinavian drunk-driving law. *Traffic Medicine*, 1992, 20:59-70.

R. McCleary and W.N. Welsh. Philosophical and statistical foundations of time series experiments. Chapter 4 in T.D. Kratochowill and J. Levine, *Designs for Single Subject Research*. New York: Lawrence Erlebaum and Associates, 1992.

R. McCleary, K.S.Y. Chew, J.J. Hellsten and M. Flynn-Bransford. Age and sex-specific cycles in U.S. suicides. *American Journal of Public Health*, 1991, 81:1494-1497.

K.S.Y. Chew, R. McCleary, B. Sandeen and J. Meyer. Who cares about public schools? *American Demographics*, 1991, 13:38-39.

B.H. Olson, R. McCleary and J.W. Meeker. Background and models for bacterial biofilm formation and function in water distribution systems. Chapter 12 in C.J. Hurst (ed.), *Modeling the Environmental Fate of Microorganisms*. Washington, DC: American Society for Microbiology, 1991.

H.L. Ross and R. McCleary. Can mandatory jail sentences deter drunken driving? Evidence from the Arizona case. *Journal of Criminal Law and Criminology*, 1990, 81:156-170.

M. Stiger and R. McCleary. Confirmatory spatial analysis by regressions of a Poisson variable. *Journal of Quantitative Anthropology*, 1989, 2:13-38.

W.B. Groves, R. McCleary and G.R. Newman. Religion, modernization, and crime. *Comparative Social Research*, 1985, 8:59-78.

D.B. McGaw and R. McCleary. PAC spending, electioneering, and lobbying: a vector ARIMA time series analysis. *Polity*, 1985, 17:574-585.

J.G. Jorgenson and R. McCleary. Social indicators in native village Alaska. *Human Organization*, 1985, 44:2-17.

H.L. Ross and R. McCleary. Liberalization and rationalization of drunk-driving laws in

14-86

Scandinavia. *Accident Analysis and Prevention*, 1984, 16:471-487.

R. McCleary and D. McDowall. A time series approach to causal modeling: Swedish population growth, 1750-1849. *Political Methodology*, 1984, 10:357-375.

M.H. Baker, B.C. Nienstedt, R. Everett and R. McCleary. The impact of a crime wave: perceptions, fear, and confidence in the police. *Law and Society Review*, 1983, 17:319-335.

H.L. Ross and R. McCleary. Methods for studying the impact of drunk driving laws. *Accident Analysis and Prevention*, 1983, 15:415-428.

R. McCleary. Probation and parole: supervision. Pp. 1255-1260 in S.H. Kadish (ed.), *The Encyclopedia of Crime and Justice*. New York: The Free Press, 1983.

R. McCleary and J.E. Riggs. The impact of Australia's 1975 Family Law Act on divorce rates: a general model for evaluating legal impacts. Pp. 7-18 in G.H. Forehand (ed.), *New Directions in Program Evaluation: Applications of Time Series Analysis in Evaluation*. San Francisco: Jossey-Bass, 1982.

R. McCleary, J.M. Erven and B.C. Nienstedt. Uniform Crime Reports as organizational outcomes: three time series experiments. *Social Problems*, 1982, 29:361-372.[76]

G.A. Cavender and R. McCleary. Bar association surveys and the merit retention of judges: an empirical assessment. *Criminal Justice Review*, 1982, 7(1).

H.L. Ross, R. McCleary and T.F. Epperlein. Deterrence of drinking and driving in France: an evaluation of the law of July 12, 1978. *Law and Society Review*, 1982, 16:345-374.[77]

R. McCleary, J.M. Erven and B.C. Nienstedt. Interrupted time series analysis of crime statistics: the case of organizational reforms. Chapter 1 in J.A. Hagan (ed.), *Methodological Advances in Criminological Research*. Beverly Hills and London: Sage, 1982.

R. McCleary, M.J. O'Neil, T.F. Epperlein, C. Jones and R. Gray. The effects of legal education and work experience on perceptions of crime seriousness. *Social Problems*, 1981, 28:276-289.

---

[76]Excerpted in M. Klein and R.R. Ritti (eds.), *Understanding Organizational Behavior, 2nd Ed.* Boston: Kent, 1984; reprinted in S. Stojkovic, J. Klofas and D. Kalinich (eds.), *The Administration and Management of Criminal Justice Organizations*. Prospect Heights, IL: Waveland Press, 1990.

[77]Excerpted in R. Cales (ed.), *Trauma Care Systems*, Denver: Aspen System, 1985.

D. McDowall, R. McCleary, A.C. Gordon and M.D. Maltz. A note on regression artifacts in correctional program evaluations. Pp. 27-48 in S.E. Zimmerman and H.D. Miller (eds.), *Corrections at the Crossroads: Designing Policy*. Beverly Hills and London: Sage, 1981.

R. McCleary and M.C. Musheno. Floor effects in the time series quasi-experiment. *Political Methodology*, 1980, 7:351-362.

M.D. Maltz, R. McCleary, D. McDowall and A.C. Gordon. An artifact in pretest-posttest designs: how it can mistakenly make delinquency programs look effective. *Evaluation Review*, 1980, 4:521-534.

R.A. Hay, Jr. and R. McCleary. Box-Tiao time series models for impact assessment. *Evaluation Review*, 1979, 3:245-292.

R. McCleary, D. McDowall, M.D. Maltz and A.C. Gordon. How a regression artifact can make any delinquency program look effective. Pp. 626-652 in L. Sechrest (ed.), *Evaluation Studies Review Annual, Volume 4*. Beverly Hills and London: Sage, 1979.

L.J. McCain and R. McCleary. The statistical analysis of the simple interrupted time series quasi-experiment. Chapter 6 in T.D. Cook and D.T. Campbell (eds.), *Quasi-experimentation: Design and Analysis Issues for Field Settings*. Chicago: Rand-McNally, 1979.[78]

M.D. Maltz and R. McCleary. Recidivism and likelihood functions. *Evaluation Review*, 1979, 3:124-131.

R. McCleary. On becoming a client. *Journal of Social Issues*, 1978, 34:57-75.

M.D. Maltz and R. McCleary. Rejoinder on "The stability of parameter estimates in the split population exponential distribution." *Evaluation Review*, 1978, 2:650-654.

R. McCleary. How parole officers use records. *Social Problems*, 1977, 24:576-589.[79]

M.D. Maltz and R. McCleary. The mathematics of behavioral change. *Evaluation Review*, 1977, 1:421-438.

---

[78]Reviewed in *Contemporary Psychology*, 1980, 25(10).

[79]Reprinted in S.E. Messinger and E. Bittner (eds.), *Criminology Review Yearbook*. Beverly Hills and London: Sage, 1979; E. Rubington and M.S. Weinberg (eds.), *Deviance: The Interactionist Perspective, 4th Ed.* New York: MacMillan, 1980; D.H. Kelly (eds.), *Readings in Deviance*. New York: McGraw-Hill, 1990.

14-88

R.A. Berk and R. McCleary. Descriptive distortions in covariance based statistics. *Social Science Research*, 1975, 5(1).

R. McCleary. How structural variables constrain the parole officer's use of discretionary power. *Social Problems*, 1975, 23(2)[80]

FINISHED WORK -- Reviews, etc.

McCleary, R., R. Crepeau and K. Delaire. Chaos from disorder: a consumer's guide to the recent literature. *Social Pathology*, 1996, 2:230-242.

Review of *Statistical Methods for Meta-Analysis* by L.V. Hedges and I. Olkin; *Issues in Data Synthesis* by W.H. Yeaton and P.M. Wortman (eds.); and *BASIC Meta-Analysis: Procedures and Programs* by B. Mullen and R. Rosenthal. *Contemporary Sociology*, 1987.

Worker artifacts as a source of spurious statistics: a response to Ginsberg. *Evaluation and Program Planning*, 1984, 7, 290-1.

Review of *Time-Series Analysis: A Comprehensive Introduction for Social Scientists* by J.M. Gottman, *Journal of the American Statistical Association*, 1983, 78(383).

Review of *Criminal Lawyers: An Endangered Species* by P.B. Wice, *Urban Life*, 1982, 11(2).

Review of *Beyond Probation* by C.A. Murray and L.A. Cox, *Crime and Delinquency*, 1980, 26(3), 387-389.

Evaluating a delinquency intervention program: a comment. *Criminal Justice Newsletter*, 1978, 9(16).

FUNDED RESEARCH

Grant #P30-95-S7 from the National Institute of Childhood Health and Development to the University of California Regents: "MRRC Biostatistics Core," $580,000 (PI).

Grant #AGA24806 from the American Gaming Association to the University of California Regents: "Suicide in Casino Gaming Areas," $35,000 (PI).

Contract #C91-37 from the City of Garden Grove to the Principal Investigator, "Public safety hazards associated with adult entertainment businesses," $35,000 (PI).

---

[80]Reprinted in W.J. Sanders (ed.), *Decision-making in the Criminal Justice System*. New York: Holt, Rinehart and Winston, 1977.

Grant #JS2-47 from the U.S. Bureau of Justice Statistics to the University of New Mexico: "The New Mexico Criminal Justice Statistical Analysis Center," $50,000 (Co-PI).

Contract #14-12-001-30300 from the U.S. Department of the Interior to Human Relations Area File, Yale University: "Alaskan OCS Social Indicators System," $1,200,000 (Co-PI).

Contract #SOJ-85019 from the Alaska Department of Corrections to the Justice Center, University of Alaska, Anchorage: "A forecast of prison population through the year 2000," $15,000 (Co-PI).

Contract #BJS-82-007 from the Alaska Department of Public Safety to the Justice Center, University of Alaska: "Forecasting crime rates in Alaska and Oregon," $45,000 (Co-PI).

Contract #AG-82-1 from the Arizona Auditor General to the Principal Investigator: "An evaluation of Arizona's vehicle emissions inspection program," $17,000 (PI).

Grant #CF-80-08-0070(a) from the Arizona JPA to the Center of Criminal Justice, Arizona State University: "Technical assistance project in evaluation research," $40,000 (Co-PI).

Contract #22820 from the City of Phoenix to the co-principals: "Telephone survey of citizen attitudes toward team policing," $10,000 (Co-PI).

Contract #0772 et seq. from the State of Arizona to the Principal Investigator: "Evaluation of 'scared straight'/PLIP program," $17,000 (PI).

Contract #UIACC3-47-32-25-3-51 from the Illinois Department of Corrections to the Center for Criminal Justice, University of Illinois, Chicago: "Re-evaluation of UDIS," $8,000 (PI).

Grant #77-NI-99-0073 from the National Institute of Law Enforcement and Criminal Justice to the Center for Research in Criminal Justice, University of Illinois, Chicago: "Measurement of recidivism," $225,000 (Co-PI).

Federal court once again upholds Ohio's Community Defense Act
Court rules that state law regulating sexually oriented businesses is constitutional

Cincinnati, OH – Sep. 2008 In a victory for families, the U.S. District Court in Cleveland ruled late Friday that a recent law passed by the Ohio General Assembly, known as the Community Defense Act, that regulates sexually oriented businesses is constitutional and can be enforced.

Last year, the voters of Ohio brought the bill to the Legislature through an initiative petition, arguing that such ordinances are crucial for the prevention of crime and blight in communities.

"Residents have the right to be protected from the harmful effects of sexually oriented businesses in their neighborhood," said CCV President Phil Burress. "The presence of unregulated peep booths, porn shops, and strip joints presents a host of problems to the community, most from the increase in crime, in addition to causing urban decay. The courts have recognized this once again."

When 75% of the members of the Ohio General Assembly voted in favor of enacting the reasonable regulations on the hours of operation and prohibiting physical contact between patrons and dancers that leads to prostitution, operators of sexually oriented businesses challenged the law in court.

The law also provides significant local control by allowing municipalities and townships to extend local regulations beyond the minimum state industry standards established in the law with the assistance of the Attorney General's office. In the event of further litigation by a sexually oriented business, local communities have the defense and indemnification of the State.

In October 2007, a federal judge first rejected a request for a temporary restraining order, declaring the law constitutional, and allowing it to immediately go into effect. Attorneys for the State and a number of the 68 local city law directors and county prosecutors who were sued in the case argued in the preliminary injunction trial that the law was not only constitutional but necessary to fight the harmful secondary effects of sexually oriented businesses.

Federal Judge Solomon Oliver, Jr. ruled Friday that the State provided more than enough evidence, including legislative findings, police reports, private investigators, and former dancers, to show the negative effects of sexually oriented businesses on the community, stating:

"The court finds that the evidence provided by Defendants demonstrates that the Ohio General Assembly, after extensive hearings and consideration of Plaintiffs' arguments, enacted [the Community Defense Act] to minimize the adverse effects of sexually oriented businesses in Ohio and benefit its citizens."

The evidence presented to this judge echoed what studies and other courts have confirmed for decades. This decision will help ensure that communities maintain their ability to protect families and their neighborhoods from these threats.

14-91

A rule that bans nudity in Ohio establishments holding a liquor license has been upheld by the U.S. 6th Circuit Court of Appeals.

Rule 52 originally was enacted by the Ohio Liquor Control Commission in February 2004 to protect Ohio communities from the high incidence of undesirable secondary effects associated with nude dancing in an environment where alcohol is served – effects that include prostitution, drug trafficking and assault.

On the day that Rule 52 was to go into effect, however, strip club owners filed suit in federal court, claiming that the rule was "overbroad and unconstitutional." The club owners immediately were granted a Temporary Restraining Order, and later a preliminary injunction, to prevent the Rule 52 from being enforced while the overbreadth question was debated. In January 2007, the federal district court granted the sex business owners a permanent injunction, agreeing that Rule 52 was unconstitutionally overbroad.
The case finally was argued before a panel of three judges on the 6th Circuit Court of Appeals in March of this year.
In a 2-1 decision handed down on Friday, August 15, the Appeals Court upheld Rule 52, reversing the lower court's decision that Rule 52 was constitutionally overbroad.

Delivering the court's opinion, Judge Eugene E. Siler, Jr. wrote:

> *"Invalidating Rule 52 as overbroad would impose substantial societal costs because it would hamper Ohio's legitimate interest in curtailing the negative secondary effects, such as prostitution and drug trafficking, associated with an environment mixing alcohol with nudity and sexual activity."*

This is a just, excellent and important decision for Ohio's families and communities. The Court recognized that Rule 52 is in the best interest of Ohio communities and understood that the sex business owners' overbreadth argument was based on highly improbable scenarios.
Judge Siler wrote:

> *"(A) law is not invalid simply because some impermissible applications are conceivable."*

He stated further:

> *"Rule 52 has a minimal impact on the marketplace of ideas because persons desiring to perform mainstream works of art involving nudity and sexual activity may do so in an establishment that is not licensed to sell liquor. In the alternative, they may perform their works in an establishment licensed to sell liquor if they wear clothing…and avoid sexual conduct or sexual contact."*

This decision to uphold Rule 52, combined with last week's decision by federal district court Judge Solomon Oliver, Jr. upholding the constitutionality of the Community Defense Act, has the ***potential*** to significantly curtail the multiple ills inevitably associated with unregulated sex businesses.

But as in all endeavors, the potential can be far removed from the reality.
The key to converting the potential of any law to reality is enforcement!

Both Rule 52 and the Community Defense Act have been enacted – and now upheld – due to the documented negative effects that unregulated sex businesses bring to communities.

14-92

HB 2144

CHARLES A. O'HARA
O'HARA & O'HARA
1223 E. First Street
Wichita, Kansas 67214

- **I am not going to argue the constitutionality, unconstitutionality or type of legal attacks the owners might pursue.**

- **I will speak regarding the practical considerations of what happens with lawsuits when laws like this are passed. Large amounts of money are spent. The lawsuits become embarrassing for both sides.**

- **I am someone who has actually gone to court in Kansas many times in this type of case (U.S. District Court, Kansas Court of Appeals and State District Court).**

- **Local community standards should control.**

- **In South Central Kansas there are ordinances and laws in effect which govern and control the conduct.**

- **The Sedgwick County Council, Wichita City Council, Derby Council all have ordinances.**

- **Wichita City Council has an ordinance in effect with some grandfather clauses.**

- **Sedgwick County has an ordinance in effect with some grandfather clauses.**

- **City of Derby has an ordinance in effect with some grandfather clauses.**

- **In Sedgwick County (a case which happened after 2003)**

    - **Criminal charges were filed**
    - **Owners and government met together**
    - **Clubs and government were able to settle the disputes**

House Judiciary
Date 2-9-09
Attachment # 15

- **In City of Derby (U.S. District Case No. 07-1098-JTM)**

    - **Clubs filed injunction in State Court**
    - **City of Derby removed the case to Federal Court**
    - **A number of days of trial where Derby City Council members were called to testify and examined**
    - **Correspondence and e-mails of the individual Derby council members were produced**
    - **Judge Marten strongly told the City of Derby and Michelle Borin to settle the matters**
    - **It was settled and United States District Court Judge Tom Marten approved the dismissal**

- **The local communities have invoked these local standards with the input of Federal and State Judges.**

- **Many of these establishments are operating under agreements with local government.**

- **If this law is passed it will interfere with the agreement made by the local government (at least one after the urging of a federal Judge).**

- **No need for this - Local community has taken care of this concern.**

- **State and Federal Judges have been involved in recent years.**

- **It will cost large sums of money to litigate in court.**

- **The discovery which will have to be produced will be very detailed and quite large.**

CONCLUSION

- **Local authorities can handle this issue based on the local community standards and have controlled this. There is not a purpose, it is not needed.**

HEIN LAW FIRM, CHARTERED

5845 SW 29th Street, Topeka, KS 66614-2462
Phone: (785) 273-1441
Fax: (785) 273-9243

Ronald R. Hein
Attorney-at-Law
Email: rhein@heinlaw.com

Testimony re: HB 2144
House Judiciary Committee
Presented by Ronald R. Hein
on behalf of
Motion Picture Association of America
February 9, 2009

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Motion Picture Association of America (MPAA), the trade association representing the nation's leading producers and distributors of motion pictures on film, home video, the Internet, satellite, cable, subscription and over-the-air television broadcast. MPAA is a trade association representing the leading producers and distributors of motion pictures in the United States. All MPAA member companies produce and distribute motion pictures for theatrical exhibition and for subsequent release on DVD, videocassette, pay, cable, satellite, Internet and broadcast television. MPAA also administers the Classification and Rating Administration (CARA) which awards the familiar G, PG, PG-13, R, or NC-17 ratings to motion pictures. CARA was established in 1968 to provide parents with information to help them determine which motion pictures their children should see.

The MPAA opposes HB 2144. MPAA supports the right of parents to know and participate in what their children view. However, our concerns relate to the provisions of HB 2144 which incorporate the voluntary Motion Picture rating system into law. We believe incorporating the rating system into law compromises its integrity and has the potential to jeopardize participation by film makers. Moreover, courts have determined that incorporation of the voluntary rating system violates the U.S. Constitution.

I have attached a copy of the MPAA memorandum regarding the issues raised with HB 2144.

For these reasons, MPAA respectfully urges the committee to either delete the reference to the motion picture association of America and the reference to the ratings system and such ratings, in Section 3(e), or to recommend HB 2144 adversely.

House Judiciary
Date 2-9-09
Attachment # 16

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20006
(202) 293-1966

MEMORANDUM IN OPPOSITION TO KANSAS HOUSE BILL 2144

On behalf of the Motion Picture Association of America, Inc. (MPAA), we are writing to respectfully submit our opposition to House Bill 2144, a bill to establish the community defense act. While we have no objection to legislation that regulates sexually oriented businesses, we must oppose the HB 2144 as it incorporates the voluntary Motion Picture rating system in law. We would urge Section 3(e) of the legislation be deleted, eliminating the reference to rating system.

MPAA supports the right of parents to know and participate in what their children view. We believe incorporating the rating system into law compromises its integrity and has the potential to jeopardize participation by filmmakers. Moreover, courts have determined that incorporation of the voluntary rating system violates the U.S. Constitution.

MPAA is a trade association representing the leading producers and distributors of motion pictures in the United States. All MPAA member companies produce and distribute motion pictures for theatrical exhibition and for subsequent release on DVD, videocassette, pay, cable, satellite, Internet and broadcast television. MPAA also administers the Classification and Rating Administration (CARA) which awards the familiar G, PG, PG-13, R, or NC-17 ratings to motion pictures. CARA was established in 1968 to provide parents

*The MPAA members include: Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLLP; Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.

16-2

with information to help them determine appropriate motion pictures for children's viewing.

INCORPORATION OF VOLUNTARY MOVIE RATINGS SYSTEM INTO LAW THREATENS EFFECTIVENESS OF THE SYSTEM

The MPAA and its member companies are concerned that if this proposed statute is enacted, it would seriously erode the effectiveness of the voluntary MPAA-administered Motion Picture Rating System. It is important to recognize that the MPAA Rating System is voluntary and strictly advisory with no force of local, state or federal law. We strongly encourage voluntary enforcement of the MPAA-administered Motion Picture Rating System by theaters, retailers and others. However, CARA would be unable to fulfill its mandate of providing parents with information if it were forced to become part of a state's statutory framework. Tied to government regulation, the rating system could lose its independent ability to respond to changes in social attitudes and judgments in making recommendations about the suitability of motion pictures for particular age groups. Once the rating system becomes subject to state regulation, producers may simply stop submitting their films for rating in order to get around regulation. The movie rating system has stood the test of time and is better left without the force of law imposed by any state.

UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY

House Bill 2144 raises some constitutional concerns because it specifically identifies the MPAA rating system. The incorporation into law of the rating classifications is unconstitutional. Enforcement of the rating system cannot be tied to any governmental body, and identifying the system in the legislation impermissibly puts the government imprimatur on those ratings. Courts throughout the country have invalidated the incorporation of MPAA ratings in a variety of statutory contexts. See Swope v. Lubbers, 560 F.Supp. 1328 (W.D. Mich, S.D. 1983) (use of MPAA ratings was improper as a criteria for determination of constitutional protection); Drive-In Theater v. Huskey, 305 F.Supp. 1232 (W.C.N.C. 1969) aff'd 435 F.2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating).

Furthermore, the delegation of legislative authority to any entity such as the MPAA to legally determine which motion pictures may be viewed by segments of the population is a violation of the Due Process clause of the U.S. Constitution. Due Process is violated when a government regulation or

ordinance delegates the regulations for the operation and enforcement of a statute to a body or process that is not subject to narrowly and reasonably drawn definitive standards. The MPAA rating system is a voluntary system not governed by the necessary definitive standards. See Rosen v. Budco, Inc., et al., 10 Phila. 112 (1983); Engdahl v. Kenosha, 317 F.Supp. 1133 (E.D. Wisc. 1970) (criminal statute that prohibited minors from viewing "R" and "X" rated films found to be unconstitutional prior restraint); Motion Picture Association v. Specter, 315 F.Supp. 824 (E.D. Pa 1970) (statute that penalized exhibitors who showed films and previews that were "not suitable" for children as determined by MPAA ratings found unconstitutional for vagueness). Similarly, the rating system cannot be used as a standard by which to determine whether an establishment meets the definition of adult motion picture theater or other adult entertainment establishment.

INCORPORATION OF MOVIE RATINGS SYSTEM CONTRAVENES THE FIRST AMENDMENT

House Bill 2144 defines an adult motion picture theater by excluding those business establishments that show, sell or rent materials rated NC-17 or R by the Motion Picture Association of America. Incorporation of the MPAA Rating System by governmental entities also has serious constitutional problems because it relies on the ratings as a standard to permit or prohibit access to films on videocassette or in the theatre that have received that self-applied classification. Motion pictures are a form of expression which are protected by the First Amendment to the U.S. Constitution, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Eronoznik v. City of Jacksonville, 422 U.S. 205 (1975); Jenkins v. Georgia, 417 U.S. 153 (1974). The exhibition of a motion picture to an adult may be proscribed only if the motion picture is legally found obscene, and in regard to minors, access may be prohibited only if the motion picture is found legally "harmful to minors."

It is important to keep in mind that the ratings are strictly advisories, and are not determinations that particular motion pictures are obscene or harmful to minors based on aforementioned U.S. Supreme Court decisions.

CONCLUSION

For the reasons specified, we respectfully request that Section 3 (e) be deleted from House Bill 2144, or alternatively that the legislature defeat this bill.

February, 2009

16-4

KLBA

Kansas
Licensed
Beverage
Association

February 9, 2009 Testimony on HB 2144, House Judiciary

Mr. Chairman, and Members of the Committee,

I am Philip Bradley representing the Kansas Licensed Beverage Assn., the men and women, in the hospitality industry, who own, manage and work in Kansas bars, breweries, clubs, caterers, hotels and restaurants where beverage alcohol is served. These are the over 3000 places you frequent, enjoy and the tens of thousands of employees that are glad to serve you. Thank you for the opportunity to speak today.

We **oppose HB 2144** and ask you to not advance or support this act. This measure addresses many issues that appear simple on the surface but are very complex attempting to further expand government regulations. While one may or may not agree with current law and the courts interpretations of that law, those elements together have attempted to find a balance; the very important and critical balance. One between the individual rights, personal responsibilities and individual freedoms citizens are guaranteed and the duties of the government to protect its citizens. Our country is founded on the principles and beliefs that although certain practices and beliefs may not be shared by all and even be disapproved by some, they are worthy of protecting in the greater cause of our rights and freedoms.

These subjects are difficult to discuss objectively, and especially difficult to discuss in a forum such as this on a short schedule. They may be embarrassing to some. These issues are complex and need a thoughtful considered, deliberation before altering the status quo. This measure covers several areas including retail establishments and also entertainment venues that may and should be split into separate measures and considered individually.

HB 2144 proposes serious issues and need serious consideration. My testimony won't be covering the legal arguments that others have already addressed. My members are primarily concerned with the businesses defined in this measure in page 2 Line 16-19, *(c) "Adult cabaret" means a nightclub, bar, juice bar, restaurant, bottle club or other commercial establishment, regardless of whether alcoholic beverages are served, which regularly features persons who appear semi-nude.*, and we generally limit ourselves to those places serving/selling beverage alcohol.

We have at the very least, object to the banning of alcohol in new section 8a and hours of operation in 8b, requiring the changing of floor plans, interior rebuilds, installation of cameras/spying devices, hiring of additional personnel, and new additional operation procedures. We object that all of these new requirements be completed within 180 days. We also feel that the word "habitual", is open to subjective and varied interpretations.

We urge you to not advance this bill. However if the committee wishes to pursue this wide reaching and comprehensive act, we suggest that a sub-committee be appointed and we offer to work with such a group.

Thank you for your time.

Philip B. Bradley

The difficulty in life is the choice
. The Bending of the Bough, Act

CEO
Philip Bradley

P.O. Box 442066
Lawrence, KS 66044

V: 785.766.7492
F: 785.331.4282
www.klba.org
info@klba.org

ABL
AMERICAN BEVERAGE LICENSEES

Drink Respo
Drive Re

House Judiciary
Date 2-9-09
Attachment # 17

Recap of Documentation From:
Philip Bradley, Kansas Licensed Beverage Association
P.O. Box 442066, Lawrence, KS 66044
785-766-7492

1. Testing Assumptions Made by the Supreme Court Concerning the Negative Secondary Effects of Adult Businesses: A Quasi-Experimental Approach

2. Summarizing and Evaluating Studies and reports that examine whether Adult Businesses cause Adverse Secondary Effects

3. A Study of Secondary Crime Effects in the Township of Union New Jersey

4. A Legal and Empirical Perspective on Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas

5. An Examination of the Assumption that Adult Businesses are Associated with Crime in Surrounding Areas: A Secondary Effects Study in Charlotte, North Carolina

6. Testing Supreme Court Assumptions in California v. la Rue: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments that Sell Liquor

7. FULTON COUNTY POLICE Study of Calls for Service to Adult Entertainment Establishments Which Serve Alcoholic Beverages

**8. Examining the Link Between Sexual Entertainment and Crime:
The Presence of Adult Businesses and the Prediction of Crime Rates in Florida**

**9. COMMUNICATION LAW AND POLICY
The Journal of the Law division of the Association for Education in Journalism and Mass Communication**

**10. Legislative Talking Points:
Regulating Adult Entertainment Exotic Dance Clubs (Including clubs with alcohol, nudity & incidental touch between dancer & patron)**

**11. Exotic Dance Adult Entertainment:
A Guide for Planners and Policy Makers**

**12. Exotic Dance Adult Entertainment:
Ethnography challenges false mythology**

13. The Economic Impact of Three Adult-Oriented Clubs in Rancho Cordova

HOUSE JUDICIARY COMMITTEE
February 9, 2009
OPPOSITION TO HOUSE BILL 2144

HB 2144 would prohibit the sale, use or consumption of lawful beverages on legal premises even when appropriately licensed and regulated as a private club, drinking establishment or a CMB establishment.

We oppose HB 2144.

Tuck Duncan
Kansas Wine & Spirits Wholesalers Assn.

Philip Bradley
Kansas Licensed Beverage Assn.

John Peterson
Anheuser-Busch Companies Inc.

John Bottenberg
MillerCoors LLC

Larrie Ann Lower
Wine Institute

Neal Whitaker
Kansas Beer Wholesalers Assn.

House Judiciary
Date 2-9-09
Attachment # 18

STATE OF KANSAS

JOE PATTON
REPRESENTATIVE, 54TH DISTRICT
800 S.W. JACKSON #1414
TOPEKA, KANSAS 66612

STATE CAPITOL
TOPEKA, KANSAS 66612
(785) 296-7699
joe.patton@house.ks.gov

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: CORRECTIONS AND JUVENILE JUSTICE
MEMBER: JUDICIARY
ADMINISTRATIVE RULES AND REGULATIONS

Testimony in Support of HB 2167

Representative Joe Patton

February 9, 2009

Chair Kinzer and Members of the House Judiciary Committee:

Allow me to give you some background information concerning this bill. I have heard from several constituents about encounters they have had with utility companies. As you know, utilities have an easement that allows them to enter upon the land for a variety of purposes. Sometimes the utility will have to enter upon the land in order to make some physical changes to the property. This can be very upsetting and disrupting if done without the knowledge or input from the homeowner. The intent of this bill is to provide some guidelines for this encounter. The hope is that this simple procedure would allow some input from the homeowner while facilitating good customer service.

House Judiciary
Date 2-9-09
Attachment # 19

Testimony for Passage of House Bill 2167
Presented by: Douglas G. Zillinger
Farmer/Rancher in Phillips and Graham Counties, Kansas

I am in favor of House Bill 2167 because of the experiences that I have had with the Oil Industry in Kansas for the past 30 years of my business life. We should be able to co exist on a piece of property just as a home owner and renter do in the city setting, however, that is not the case at this time.

Currently, property that I operate agricultural interests on, I have the following situations. One company had a tank battery leak in 2007 and performed a clean up operation. They claimed that they had everything corrected and that they were done with the leak.....The land does not produce anything because the leak was salt water, not oil as they indicated and no damages have been offered as the lease specifies. I was notified by a neighbor 2 days after the leak and they had not notified the state. That same year, another company on the same property came in just before harvest and dozed down about 5 acres of feed and drove all over another 10 acres before the dozer operator called my brother in law to ask about changing the access road going into the property. Of course I was more than upset with the loss of the winter feed crop and the measly $500 check for the damages as that was "all they pay for a well site." That same company called me before they drilled the second well, made arrangements to meet with me on a Friday. They stated that they wouldn't be able to start drilling until Monday as they needed a permit. I arrived on Monday to find them nearly completed and the pits were placed in a wetlands area instead of on the hill as we had agreed to in order to avoid hitting ground water. They closed the pits within a month of drilling to hide the problems. No damages have been collected yet. In November 2008, a different company had a similar leak. They destroyed a 10 acre hillside catching the spilled salt water, have now built a dike around the battery and have still to notify me. Another company has been moving their lease road over about every 2 years because they destroyed a terrace with their road and the water now goes down their road. When it gets too deep, they move over because, in their words, "State statute gives them a 60 foot right of way into the well." I can't find this statute and my lawyer can't. It is our opinion that it don't exist and they will not pay damages or fix the problem.

Our only recourse at this time is to give their names to the lawyer and hope we get a settlement and that there is enough left over at the end of the settlement to fix the problem. Many of these problems could be avoided if we just knew when they are coming on the property. I don't know of a single farmer that wouldn't help them get into and out of the property in a least invasive manner if we just knew when they were coming.

I encourage the passage of House Bill 2167 so we can minimize damages and get the settlement proceedings under way before they enter to disturb the surface, which is our livelihood and our backyard.

House Judiciary
Date 2-9-09
Attachment # 20

I am writing to you as a proponent of HB 2167. I am a property owner in Topeka and have been for 31 years. I am dismayed at the lack of respect shown by utility companies for homeowners. My family has maintained our home and property well. We have taken pride in doing so. I understand the need for utility companies to upgrade, repair, replace, and provide new technology to their consumers. As a consumer, I appreciate their diligence in updating their materials. However, I do believe the companies should be responsible to the property owner by repairing/replacing any damage done to the homeowner's property.

In June of 2008, my wife came home at mid-day to discover someone with equipment digging in our yard. She approached them to ask who they were and what they were doing. They replied they were from AT&T and were running cables. If my wife had not arrived home at that time, we would not know why a section of our lawn was destroyed. Luckily, nothing happened to our sprinkler system. If it had, we would not know who to contact about replacing it.

When AT&T finished running cables, they removed some dirt from the yard without our permission; dumped a bunch of straw on the site and left. The dirt had not been smoothed out and was left in rough condition. The straw kept sprouting weeds that were about two foot tall and required frequent pulling. The lawn was not in this state of disarray prior to their work.

Representative Joe Patton provided me with contact information for AT&T's manager of construction. I spoke with her and expressed concerns about how I felt concerning their of lack of respect for homeowners, quality of the work, etc. I didn't feel satisfied with that conversation. She apologized several times - obviously has had lots of experience at that - but let me know that it was their right. The only thing we agreed upon was that I didn't want them to return and do anything to attempt to fix the yard. She said that wouldn't happen. I accepted her word on this matter.

My wife and I reworked our yard around the first of September 2008. I dug the clay out of the hole where they had dug and replaced it with dirt from my garden. We had grass coming up and things looking good. Then on September 26th they were back and covered the area with dirt. I managed to catch them and stopped it at that point. That kept them from spreading straw (and the weeds from it that I to pull the last time they were here) on it. The man that had dumped dirt on the area said he saw the grass but was told to dump dirt on it.

The area supervisor from Rylie Equipment & Contracting came by with more apologies but also told me that they could have dug up the entire yard if they had desired. This added to my belief about utility companies not respecting homeowner's property.

I have always taken pride in my home and yard. After this episode I have been disheartened and feel less inclined to do so. My belief is that we need something that is fair to everyone.

Thank you for your time and for providing me the opportunity to express my concerns.

Sincerely,

Jeffrey L. Dunaway
4012 SW 35th Terrace
Topeka, Kansas 66614
785-249-6246

House Judiciary
Date 2-9-09
Attachment # 21

Black Hills Energy

110 East 9th Street
Lawrence, KS 66044
F: 785.832.3901

Legislative Testimony of Wes Ashton on HB 2167
Government Affairs, Black Hills Energy
Before House Judiciary Committee
February 9, 2009

Good afternoon, Mr. Chairman and members of the Committee. I am Wes Ashton, Government Affairs for Black Hills Energy for Kansas and Colorado. I appreciate the opportunity to offer testimony in opposition to HB 2167.

I am testifying today on behalf of not only Black Hills Energy, but Atmos Energy, Kansas Gas Service, a division of Oneok, Midwest Energy, Westar, KEC, KMU and KCP&L. All of the concerns with this bill are shared equally with the gas and electric utilities and many of the water and wastewater utilities of Kansas, so to avoid repetition we are filing this testimony jointly.

HB 2167 would amend state law to require all utilities to first give written notice to a landowner before entering their property, with the sole exception of an emergency situation. While we are supportive of the inherent rights of a landowner, there are a number of issues that would arise with the passage of this legislation.

There are several instances when the electric or gas company may need to enter the property of a landowner that would cause an imposition if this bill were to become law. On a monthly basis, electric and gas companies send representatives to do meter reading, which determines the monthly bill. Meters are usually located on the property. Often main and service lines are located in utility easements that require passage across private property. Utility easements are usually negotiated with cities in our franchise agreements, which give the utility rights to reach our property for the customers benefit.

Utility companies also enter property for the purpose of maintaining our system integrity. An electric company needs to monitor their transmission and distribution lines. The gas companies are constantly performing leak surveys, which are required by state law. We also monitor cathodic protection, or pipeline corrosion. Like preventative health care, these would not qualify under the "emergency" exception in HB 2167, but are policies designed to avoid emergencies and promote safe, reliable service.

Another requirement in current law is the Kansas OneCall system, which requires utilities to stake all underground lines and pipes within 48 hours of receiving the request. It would be difficult to give written notice within the 48 hour timeframe of OneCall.

There are other situations that giving written notice in advance of entry would be problematic to the utility companies. When customers refuse to make payments, a representative of the utility company must enter the property to make collections or turn off service. We also may become aware of situations entailing diversion of service, when

House Judiciary
Date 2-9-09
Attachment # 22

a customer may be stealing the commodity. These diversions not only raise costs to all other customers on the system but pose safety concerns for our employees and customers. Utilities may also have issues in discovering and giving notice to the actual landowner of a property rather than a tenant.

The two biggest conceptual issues with the proposed legislation is a significant increase in cost to the customer and the movement away from the current public policy.

Utilities strive for the most efficient system possible while ensuring public safety and reliability. By requiring written notice before entering property, our system will end up less efficient. If an employee is on-site, they may not be able to do the work and have to return at a later point. The inefficiency would raise costs for the utility and therefore raise costs for the customer. Utilities strive to keep the costs as low as possible, particularly in our current difficult economic times.

This bill also moves us away from the current state and federal laws that are in place to promote a policy of system integrity and maintenance. Natural gas, electric and water utilities must be operated in the safest possible manner and there shouldn't be policies in place that inhibit proper system integrity.

Whether referring to the electric grid of a neighborhood or pipeline system, the services we provide are inter-connected through many landowners' real property. If we had given written notice to one landowner and are providing maintenance to the system, the problem could extend far beyond the necessary timeframe if we are required to give notice before going house to house.

The final point I would offer deals with the final section of the bill that would require utilities to treat the landowner with courtesy, respect and fairness. All utilities in the state strives to provide the best possible service, and representatives of our companies are expected to provide be courteous and respectful at all times. This section may be difficult, if not impossible, to require or measure in legislation. Additionally, the Kansas Corporation Commission already addresses any customer complaints and monitors each utility.

Thank you for the opportunity to address the Committee and offer our testimony in opposition to HB 2167. I will be happy to stand for any questions of the Committee at the appropriate time.

at&t

Dan Jacobsen
President-Kansas

AT&T Kansas
220 SE 6th Street
Suite 500
Topeka, KS 66603

785.276.8201 Phone

Testimony of Dan Jacobsen, President – AT&T Kansas
In opposition to HB 2167 – which places requirements on utilities entering another's property
Before House Judiciary Committee
February 9, 2009

Mr. Chairman and Members of the Committee,

My name is Dan Jacobsen. I am the President of AT&T Kansas. I appreciate this opportunity to speak with you regarding HB 2167. We are opposed to this bill because it would place unnecessary restrictions on our ability to quickly install or restore service to customers. I'd like to explain the work we do on private property. Much of our facilities are underground. Except for the service line that goes into a home or business, the majority of our lines are located in public rights-of-way or privately negotiated easement, which is land set aside for use by utilities. These spaces are normally along the street, in front of the house or a strip of land that runs between properties. When we or our contractors are engaged in scheduled excavation work for deploying or upgrading these facilities, our procedure is to give nearby property owners about seven days advance notice. We ask our employees and contractors to be respectful of this property, and to knock on doors and/or place door hangers to inform customers about upcoming work. Door hangers identify the name of the company that will be doing the work, the nature of the work, when the work will begin and end, and includes a phone number to contact for more information. Even though we make every attempt to restrict our work to rights-of-way and easements, personnel and equipment may need to cross private property to reach the area or access a small amount of private property when performing the work.

Locating and marking the lines of underground utilities prior to excavation is another example of work that often requires accessing public and private property. Flags are placed and paint is sprayed on the ground to mark the location of facilities to prevent damage when work is being initiated by a utility, or by a property owner who may have reason to dig, such as installing a fence. While locating lines does not involve excavation, it is crucial to protecting the lives of property owners or workers who may be digging in the yard.

House Judiciary
Date 2-9-09
Attachment # 23

We also enter private property to install or repair service. While we do provide advance notice on scheduled infrastructure projects, we don't think this type of notice makes sense when we are installing or repairing individual customer service. In order to install or restore service as quickly as possible, we make appointments and then notify the customers when we arrive at the site. Our technicians present photo ID to customers and they explain the steps they are taking to install or restore service. We appreciate that HB 2167 provides an exception for emergencies, but we doubt that every service outage or installation would be considered an "emergency". The Kansas Corporation Commission has adopted service quality requirements. For example, they expect the average service outage to be restored within 30 hours. Failure to meet these requirements subjects AT&T and other providers to fines. We would have trouble meeting these requirements if we had to provide advance written notice each and every time we entered private property to restore service. We think that customers want us to restore and install service as quickly as possible. Very few customers complain about advance notice issues. We urge you to not adopt this bill because existing notice procedures are adequate.

Thank you for this opportunity to explain our position.

Before the House Judiciary Committee
HB 2167
Michael R. Murray, Embarq
Monday, February 9, 2009

EMBARQ™

Embarq Corporation
EMBARQ.com

Mr. Chairman and Members of the Committee:

Embarq opposes adoption of HB 2167 which would place onerous and unnecessary requirements on utility's ability to install, maintain, repair, remove or do other work without first giving written notice to the customer.

This would delay restoring basic telephone services including the customer's ability to call 911.

Under the law, we have the right to access the public right-of-way without seeking permission from the property owner. K.S.A 17-902 speaks to city's ability to require the utility to restore the right-of-way to its functional equivalent before the work was begun.

Embarq complies fully with this provision.

Embarq technicians are required to go to the customer's door; they wear identification badges and uniforms; identify themselves to the customer; and let the customer know they are there to perform whatever service is requested or required.

This bill would impair the ability of Embarq and its contractors to locate facilities when a location request is issued by Kansas One Call. All utilities identified in HB2167 are required by law to locate utility lines within two days for the purpose of preventing damage to underground utility wires, cables and pipes when there is a need to excavate. The 2-day requirement would be virtually impossible to meet under this bill.

Many owners do not live on or close to the property. This legislation requires written notice be sent to the owner, not the renter or the lessee who is, in many cases, the one who requested installation or repair. Obviously, this bill would delay our ability to deliver timely service to the customer.

Another concern is that HB 2167 does not place the same requirements for written notice on cable television service because cable television is not a utility under the law.

Finally, in line 38 of the bill, the terms courtesy, respect and fairness are not defined and I would expect interpreting that standard would be quite subjective.

Respectfully, we ask that the Committee not adopt HB 2167.

House Judiciary
Date 2-9-09
Attachment # 24

WaterOne

Setting the Standard for Utility Excellence

Water District No. 1 of Johnson County

TESTIMONY OPPOSING
HOUSE BILL 2167

To: Members of the House Judiciary Committee

From: Darci Meese, Governmental Affairs Coordinator
Water District No. 1 of Johnson County, Kansas (WaterOne)

Date: February 9, 2009

RE: House Bill 2167—Landowner Bill of Rights

On behalf of Water District No. 1 of Johnson County, Kansas, ("WaterOne"), I would like to thank you for consideration of our comments regarding House Bill 2167.

As a public water supply system operating approximately 2600 miles of water transmission and distribution mains and approximately 140,000 residential/commercial water meters, the requirements of House Bill 2167 give us great concern. Customer service is the primary objective of WaterOne and anytime we are working on or near private property we make every effort to conduct the work with as little disruption to the landowner as possible. However, part of our mission to provide excellent customer service also involves keeping the water system in good condition. Many of our facilities, particularly water meters, are located on or very near private property. We have several programs, such as our meter replacement program, that involve "fill-in" work---i.e. work our crews can perform in between larger, planned projects, where we do not have the ability to provide the advanced detailed notice described in House Bill 2167. Even in the case of these smaller projects, we provide some level of notice to the customer of our activities. If we are performing a more extensive project, such as a water main relocation or replacement, affecting private property, we usually do provide the landowner with advance notice and coordination of activities. WaterOne employees are always charged with being courteous and respectful to property owners. To our knowledge we have had few complaints from property owners with regards to our work.

The requirements of House Bill 2167 would cause public utilities to either do away with ongoing maintenance projects because of the undue cost to comply with the notice requirements or pass the cost directly on to the customer. We would respectfully request the Committee consider the collateral consequences of House Bill 2167 and oppose its passage.

Darci Meese, Governmental Affairs Coordinator
Water District No. 1 of Johnson County, Kansas
913-895-5516 direct
913-579-9817 cell
dmeese@waterone.org

House Judiciary
Date 2-9-09
Attachment # 25

GACHES, BRADEN & ASSOCIATES
Government Relations & Association Management

825 S. Kansas Avenue, Suite 500 • Topeka, Kansas 66612 • Phone: (785) 233-4512 • Fax: (785) 233-2206

Testimony of Southern Star Pipelines
Before the House Judiciary Committee
In Opposition to HB 2167: Establishing the Landowners' Bill of Rights
Submitted by Ron Gaches
Monday, February 9, 2009

Thank you Chairman Kinzer and members of the Committee for this opportunity to submit comments on behalf of Southern Star regarding HB 2167, a proposal establishing the Landowners' Bill of Rights. As currently drafted, it is unclear whether or not the bill would apply to natural gas pipelines and storage fields. Given that natural gas pipelines and storage fields are generally regarded as utilities and the term "utility service" as it is defined in the bill does not explicitly exclude pipelines and storage fields we believe we should comment.

The restrictions and requirements contain in Section 1(c) of the bill could interfere with the ability of Southern Star and similar companies to protect the public health, safety and welfare. The language appears to attempt to abrogate contractual rights granted to utilities, assuming proper easements are in place, to enter property in order to operate and maintain the facilities placed on others' land pursuant to valid easements or deeds. The net effect of this bill appears to supersede, or at the very least severely restrict, the easement rights Southern Star has purchased to operate, maintain and access our pipelines and related facilities.

The taking of these rights without just compensation, would seem to violate previously established legal principals applying to property rights. Said another way, a utility easement owner is also a property rights owner and this bill appears to restrict or diminish our property rights.

The bill creates practical problems as well. Many times it is not possible to know the address of the landowner. Throughout rural Kansas, absentee ownership is common and there's no assurance that written notice to the last known address of an absentee landowner will be effective. Further, the detail required by the written notice envisioned by the bill would unnecessarily impose on the flexibility of the natural gas company. For example, an inspection of the property may reveal the need for maintenance work that fails the "emergency" test, but otherwise could be completed except for the requirement to provide written notice to the landowner. Also, identifying the persons to perform the work could delay the timing of needed maintenance should an employee become ill or need to be reassigned to other work.

It is worth noting that the Interstate Natural Gas Association of America (INGAA) has been working on landowner initiatives and is committed to training company agents on the subjects of landowner rights, communications and proper behavior. Southern Star has already commenced this training with our employees. As such, these concerns are already being addressed by the private sector and the bill is unnecessary.

We respectfully ask that the committee not advance this bill. While there are occasional and unfortunate instances where landowners believe they have been treated badly by utility companies, this particular solution overreaches.

House Judiciary
Date 2-9-09
Attachment # 26