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Hands Off!! The Validity of Local Massage Parlor Laws

HANDS OFF!! THE VALIDITY OF LOCAL MASSAGE PARLOR LAWS

I. INTRODUCTION*

Massage parlors are not a recent American phenomenon. They were a pervasive and, to many, a troublesome phenomenon during the "winning of the West."[1] In 1897, the Supreme Court determined that one advertisement by women inviting men to their "Baths" and "Massage" rooms was too obscene to be printed.[2] In recent years there has been a sudden increase

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1. *Ex parte* Maki, 56 Cal. App.2d 635, 133 P.2d 64 (1943). "Respondent points out that in the city of Los Angeles, in 1915, the prevalence of sex evils arising out of massage parlors caused the city council then to enact [a massage parlor law] as a safeguard against the deterioration of the social life of the community." 133 P.2d at 69.

2. Dunlop v. United States, 165 U.S. 486, 497-501 (1897). "The alleged obscene and inde-

of interest in and concern about massage parlors.[3] This note examines the most prevalent legal problems generated by the regulation of massage parlors: the relationship between the police power and massage parlor establishments, the constitutional concerns of equal protection and substantive due process and the various means used in regulating these establishments.

II. MASSAGE PARLORS AND THE POLICE POWER

The regulation of massage parlors is accomplished under the police power residing within each state. Mr. Justice Holmes noted that the police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong preponderant opinion to be greatly and immediately necessary to the public welfare."[4] It is clear that the state possesses broad power to protect the moral climate of the community.[5] However, since the salient characteristic of the police power is adaptability to changed circumstances and opinion,[6] whether or not an isolated exercise of this power is valid may understandably be the subject of much dispute. Challenges to the exercise of the police power are common because its exercise necessarily collides with individual liberty.[7]

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cent matter consisted of advertisements by women, soliciting or offering inducements for the visits of men, usually 'refined gentlemen,' to their rooms, sometimes under the disguise of 'Baths' and 'Massage,' and oftener for the mere purpose of acquaintance." *Id.* at 501. One of the errors the appellant raised was the misleading nature of the District Attorney's definition of massage, which he shared with the jury: "Now, gentlemen, it is not necessary for me to tell you what the massage treatment is; how a man is stripped naked, from the sole of his feet to the crown of his head, and is rubbed with the hands." *Id.* at 498. The problems of the massage parlor phenomenon and the public's apprehension of massage parlors seem to have changed very little in the past eighty years.

3. Writers have used the topic as a springboard for clever titles of articles. "Aye, There's the Rub: Unlicensed Massage Parlors," 24 NATIONAL REVIEW 963 (1972); "Body Shops: Massage Parlors," TIME, December 15, 1975, at 48. A well-written sociological study of the owners, technicians, and patrons of message parlors appears in an article blandly entitled "Massage Parlors," 11 SOCIETY, Nov., 1973, at 63.

4. Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911). "[T]he police power extends to all the great public needs." *Id. citing* Camfield v. United States, 167 U.S. 518 (1897).

5. Regulations forbidding lewd and indecent exposure, distribution of obscene books and films, prostitution and pimping have been sustained. *See generally* 6 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 24.112 *et seq.* (3d rev. ed. 1969); 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 6.07 *et seq.* (1975).

6. Block v. Hirsh, 256 U.S. 135 (1921). "[C]ircumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern." *Id.* at 155.

7. Nebbia v. New York, 291 U.S. 502, 525-39 (1934), provides a fruitful discussion of the conflict between individual liberty and the interests of the government in regulation for the public good. *See also* Crowley v. Christensen, 137 U.S. 86, 89-94 (1890).

The subject matter which a locality may regulate pursuant to the police power is limited by two important principles. First, a locality may regulate only in areas where the state has given it authority.[8] The validity of such delegation of authority will depend upon the language of the grant and the judicial interpretation thereof.[9] A second common problem in the locality's exercise of the police power is pre-emption of any regulation by the state or federal government. In *Lancaster v. Municipal Court,*[10] the court held that a massage parlor law prohibiting massages by the opposite sex constituted a regulation of sexual conduct, an area which had earlier been held[11] to have been pre-empted by the state to the exclusion of all local regulation. It is frequently held, however, that such state and local regulation may coincide with one another when the state has not pre-empted an entire area of law.[12] Because of the supremacy clause of the Constitution,[13] a locality is also barred from enacting any statute which would conflict with any federal law. In *Joseph v. House*[14] and *Cianciolo v. Members of City Council,*[15] two courts pointed to portions of the Civil Rights Act of 1964 which appeared to conflict with the questioned local massage ordinances.[16]

The Supreme Court in *Crowley v. Christensen*[17] drew a distinction be-

8. 6 E. McQUILLIN, MUNICIPAL CORPORATIONS § 24.35 *et seq.* (3d rev. ed. 1969).

9. *Id.*

10. 6 Cal. 3d 805, 100 Cal. Rptr. 609, 494 P.2d 681 (1972), *rev'g* 18 Cal. App. 3d 919, 96 Cal. Rptr. 257 (1971).

11. *In re* Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

12. Colorado Springs Amusements, Ltd. v. Rizzo, 524 F.2d 571 (3d Cir. 1975). In determining whether a pre-emption problem existed, the court noted that under Pennsylvania law "unless the Commonwealth has explicitly claimed the authority itself, or unless there is such actual, material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected" a municipality is not prohibited from legislating in a particular area of the law. *Id.* at 577, *quoting from* United Tavern Owners v. Philadelphia School District, 441 Pa. 274, 280, 272 A.2d 868, 871 (1971). *See also* Wayside Restaurant, Inc. v. City of Virginia Beach, 215 Va. 231, 208 S.E.2d 51 (1974); 6 E. McQUILLIN, MUNICIPAL CORPORATIONS § 24.54 (3d rev. ed. 1969). In North Carolina, the pre-emption concern has been raised twice but circumvented. In Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203, *appeal dismissed,* 419 U.S. 1043 (1974), the court held that massage was not an art of healing subject to sole state control in spite of a contrary ruling by the Commissioner of the Revenue. Thus, the problem of pre-emption was avoided by holding that massagists were subject in the case to no state licensing or regulation. In Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975), the court referred the pre-emption concern to the state courts after disposing of the other bases for federal jurisdiction.

13. U.S. CONST. art. IV, § 2.

14. 353 F. Supp. 367 (E.D. Va. 1973) (preliminary injunction), *aff'd sub. nom.* Joseph v. Blair, 482 F.2d 575 (4th Cir. 1973).

15. 376 F. Supp. 719 (E.D. Tenn. 1974).

16. For a more thorough discussion of the conflict the courts have seen between these ordinances and the Civil Rights Act of 1964, see section IV.A. 2 *infra.*

17. 137 U.S. 86 (1890).

tween harmless occupations and ones harmful in themselves. In *Crowley*, the Court determined the validity of an ordinance preventing the establishment of a saloon without the prior consent of the police commissioners or twelve citizens owning real estate in the same block. Despite the fact that the commissioners' consent was arbitrary and standardless and that there might not have been twelve citizens owning real estate on the same block who could approve the saloon, the Court upheld the denial of the liquor license.[18] Under *Crowley*, occupations which appeared harmful in themselves were subject to much greater regulation than useful or harmless activities.[19] The Supreme Court determined in *Murphy v. California* that an activity was harmful in itself if it appeared, apart from any indiscretion or impropriety of the owner or operator, to carry within itself the seeds of evil which necessarily flowed from the conduct of such business.[20] Activities which tended to create disorder or harm were often treated as "privileges" because they might be totally prohibited by the locality.[21] The en-

18. The Court distinguished this situtation from that of Yick Wo v. Hopkins, 118 U.S. 356 (1886), in which arbitrary discretion in the licensing of laundries was held unconstitutional, but noting that *Yick Wo* involved an occupation "harmless in itself and useful to the community" whereas *Crowley* involved an occupation that "may . . . be entirely prohibited, or subjected to such restrictions as the governing authority of the city may prescribe." Crowley v. Christensen, 137 U.S. 86, 94 (1890). Because alcohol "leads to neglect of business and waste of property and general demoralization . . ." a saloon may "be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils." *Id.* at 91.

19. The list of activities deemed harmful in themselves grew in subsequent years to include exhibitions, Higgins v. Lacroix, 119 Minn. 145, 137 N.W. 417 (1912); dances, 7 E. McQUILLIN, MUNICIPAL CORPORATIONS § 24.209 *et seq.* (3d rev. ed. 1969); fortune telling, White v. Adams, 233 Ark. 241, 343 S.W.2d 793 (1961); billiards, Murphy v. California, 225 U.S. 623 (1912); and pinball and gambling, Bunzel v. City of Golden, 150 Colo. 276, 372 P.2d 161 (1962). Very recently the Supreme Court dismissed an appeal of an appellant who claimed that a municipality could not constitutionally prohibit bona-fide amusement—only coin-operated games solely because they fall within the "pinball" generic category. Albert Simon, Inc. v. Myerson, 423 U.S. 908 (1975).

20. Murphy v. California, 225 U.S. 623 (1912). "That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation." *Id.* at 629. Thus, in Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927), the statutory denial of a pool hall license to aliens was upheld in light of the nature of the business.

21. Booth v. Illinois, 184 U.S. 425 (1902):

> The argument then is, that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore by such prohibition it invades his liberty as guaranteed by the supreme law of the land . . . .

joyment of such privileges was held to be subject to much more stringent regulation than the exercise of inalienable occupational rights.[22]

The Supreme Court, however, has rejected the rights-privileges dichotomy which it had drawn in earlier decisions.[23] In general, courts have been moving away from providing minimal protection to activities deemed harmful in themselves. Many decisions have questioned the limitations upon a due process attack imposed by *Crowley* when dealing with an activity considered to be potentially harmful. While stringent regulation or prohibition of liquor sales (the direct progeny of *Crowley*) has often been upheld,[24] arbitrary discretion and unreasonable distinctions have been held invalid even in this area.[25] In other areas, courts have struck down statutes dealing with activities traditionally considered harmful in them-

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> Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law. *Id.* at 429.

White v. Adams, 233 Ark. 241, 343 S.W.2d 793, 794 (1961) (fortune telling not a "lawful calling pursued as a matter of right"); Bunzel v. City of Golden, 150 Colo. 276, 372 P.2d 161 (1962).

22. Bunzel v. City of Golden, 150 Colo. 276, 372 P.2d 161 (1962). *See also* Morgan, *Protection of Natural and Fundamental Rights,* 2 ARK. L. REV. 203 (1948).

23. *Compare* Barsky v. Board of Regents, 347 U.S. 442, 451 (1954) ("Such practice [of medicine] is a privilege granted by the State under its substantially plenary power to fix the terms of admission.") *with* Schware v. Board of Bar Examiners, 353 U.S. at 239 n.5. ("We need not enter into a discussion whether the practice of law is a 'right' or a 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons." *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

24. Samuels v. McCurdy, 267 U.S. 188 (1925) (The state "has the power absolutely to prohibit.").

25. Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Constantineau v. Grager, 302 F. Supp. 861 (E.D. Wis. 1969); Segal v. Simpson, 121 So. 2d 790 (Fla. 1960) ("bottle clubs" with live entertainment were subject to ten times the licensing fee imposed upon the ordinary bar-restaurant). Although appellants' establishments were "of a character perhaps not affirmatively favored by law, [they] are not *mala in se* nor *mala prohibita* and are therefore to be considered lawful business enterprises . . . . [T]he prohibition of a business not *per se* dangerous, immoral, or contrary to well established public policy may not be accomplished under the power to license." *Id.* at 792.

selves because the statutes represented unreasonable exercises on the police power[26] or arbitrary action by licensing officials.[27]

Massage parlors, because massage has never been classified as an activity harmful in itself, have escaped the virtual prohibition possible under the older analysis represented by *Crowley*. Recognizing the distinction between activities harmful in themselves and those which present only the possibility of harm due to mismanagement, courts have consistently noted that the giving of a massage is not per se harmful, but rather a service of substantial benefit, especially to the infirm.[28]

In summary, the distinction between harmful and harmless occupations has lost most, if not all, of its vitality. Many courts are now requiring procedural due process steps to be followed in the regulation of even those activities deemed harmful per se. An intermediate classification appears to have been drawn to identify activities which, although ordinarily beneficial to the community, might become harmful due to mismanagement.[29] Since massage treatments are per se beneficial to the community and present problems of illicit sex only when mismanaged or used as a subterfuge, the municipality must seek to regulate in order to prevent such indiscretions rather than prohibit the profession altogether.

III. CONSTITUTIONAL ISSUES: AN OVERVIEW

Regulations controlling the operation of massage parlors have been the object of litigation which has raised a variety of constitutional issues. The

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26. Antonello v. City of San Diego, 16 Cal. App. 3d 161, 93 Cal. Rptr. 820, *cert. denied*, 404 U.S. 912 (1971) ("peep show"); Bruner v. City of Danville, 394 S.W.2d 939, 943 (Ky. 1965) ("to outlaw public dances completely would be unreasonable"); Devereaux v. Genesse Twp., 211 Mich. 38, 177 N.W. 967 (1920) (arbitrary discretion not possible in the licensing of "public billiard and pool rooms, dance halls, bowling alleys, and soft drink emporiums"); Garden Spot Market v. Byrnes, 378 P.2d 220 (Mont. 1963) (trading stamps).

27. Tillberg v. Township of Kearney, 103 N.J. Super. 324, 247 A.2d 161 (1968).

28. *Ex parte* Maki, 56 Cal. App. 2d 635, 133 P.2d 64 (1943). "[T]he practice of administering a massage is in itself an innocent and worthy vocation and fulfills a popular demand of the ill and the injured . . . ." *Id.* at 67. J.S.K. Enterprises, Inc. v. City of Lacey, 6 Wash. App. 43, 492 P.2d 600, 607 (1971) ("Massage is one of the oldest forms of therapy.").

29. This would represent a shift away from Booth v. Illinois, 184 U.S. 425 (1902), which lumped together activities harmful in themselves and activities which might become harmful due to mismanagement. *Id.* at 429. Murphy v. California, 225 U.S. 623 (1912), reflects this shift by distinguishing these two types of harmful activities. *See* note 20 *supra*. The Court has more recently showed concern for any form of stereotyping. *See* text, section III.D. *infra*. Massage parlors which through mismanagement have become havens for illicit sexual conduct may be attacked through "disorderly house" or "nuisance per se" statutes. *See* Flannery v. City of Norfolk, 216 Va. 362, 218 S.E.2d 730 (1975), *petition for cert. filed*, 44 U.S.L.W. 3417 (U.S. Jan. 8, 1976) (No. 966); Hensley v. City of Norfolk, 216 Va. 369, 218 S.E.2d 735 (1975).

equal protection clause has been the basis for challenges to ordinances which have apparently singled out massage parlors for more burdensome regulation than other businesses.[30] Other ordinances prohibiting female massage parlor employees from massaging male customers have been attacked on equal protection grounds as being sexually discriminatory.[31] Courts have also dealt with the issues of whether massage parlor ordinances constituted denials of due process,[32] invasions of privacy[33] or undue interference with the right to pursue a legitimate occupation.[34] In short, the apparently inevitable conflict between a municipality's intent to pursue its interest in regulating commercial and moral activities and the massage parlor operator's desire to legitimize his business has been the source of a fairly significant amount of constitutional litigation.

A. The Right to Sexual Privacy

An intriguing issue raised by massage parlor regulation is whether, in view of an apparent trend toward the recognition of an expanded area of sexual privacy,[35] regulations aimed at sexual immorality extend the police power too far into protected zones of privacy. Thus, even if a massage parlor functions as a house of prostitution,[36] the state's interest in prohibit-

30. *See, e.g.*, Kisley v. City of Falls Church, 212 Va. 693, 187 S.E.2d 168 (1972), *appeal dismissed*, 409 U.S. 907 (1972) (differentiation between massage parlor and barber shops not violative of equal protection clause); Cheek v. City of Charlotte, 273 N.C. 293, 160 S.E.2d 18 (1968) (different regulation for massage parlors than for barber shops and YMCA violated equal protection clause).

31. *See, e.g.*, J.S.K. Enterprises, Inc. v. City of Lacey, 6 Wash. App. 43, 492 P.2d 600 (Wash. Ct. App. 1971); *Ex parte* Maki, 56 Cal. App. 2d 635, 133 P.2d 64 (1943). *See* Annot., 51 A.L.R.3d 936 (1973).

32. *See, e.g.*, Connell v. State, 371 S.W.2d 45 (Tex. Crim. 1963); Patterson v. City of Dallas, 355 S.W.2d 838 (Tex. Civ. App. 1962), *appeal dismissed*, 372 U.S. 251 (1963).

33. *See, e.g.*, Hogge v. Hedrick, 391 F. Supp. 91 (E.D. Va. 1975); Geisha House, Inc. v. Wilson, 43 U.S.L.W. 2152 (D.C. Sup. Ct. Sept. 25, 1974).

34. Cianciolo v. Members of City Council, 376 F. Supp. 719 (E.D. Tenn. 1974); Corey v. City of Dallas, 352 F. Supp. 977 (N.D. Tex. 1972), *rev'd*, 492 F.2d 496 (5th Cir. 1974).

35. This trend is evidenced in part by code revisions in some states. For example, Connecticut's revised code states that it is based on the principle that non-commercial, private sexual acts between consenting adults are not the concern of the criminal law. Conn. Gen. Stat. Ann. § 532-65 *et seq.* (1971). *See also* Ill. Ann. Stat., ch.38, § 11 (Smith-Hurd 1972); N.Y. Penal Law, art.130 (McKinney 1967); Ore. Rev. Stat., chs.163, 167 (1971). The ALI Model Code specifically exempts private consensual homosexual acts from criminal prohibition. ALI Model Penal Code § 213.2 (Proposed Official Draft 1962). The Model Code also no longer purports to reach every engagement in sexual activity for hire. *Id.* § 251.3.

36. Prostitution is itself a vast subject and can only be glossed over here. In general, it involves many of the same constitutional issues arising in the massage parlor context. For example, prostitution laws directed explicitly at the female prostitute or enforced almost solely against her raise equal protection issues. In addition, many of the statutes applied

ing consenting adults from engaging in commercialized sex should be examined.[37] The basic issue is whether laws which embody certain conceptions of sexual morality retain their validity.[38]

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against prostitutes are archaic, overbroad loitering and vagrancy statutes which may often violate due process. These issues are discussed in Haft, *Hustling for Rights,* 1 CIV. LIB. REV. 8 (Winter/Spring 1974); Pariente & Rosenbleet, *The Prostitution of the Criminal Law,* 11 AMER. CRIM. L. REV. 373 (1973). Both articles represent the view that prostitution laws form an outdated system of regulations based on misconceptions and moralisms, which are administered without any sense of valid purpose and too often without any regard for basic individual rights.

37. It seems reasonable, as a starting point, to maintain that in the area of laws regulating sexual conduct, the state has a valid interest in (1) protecting individuals from forcible attack, (2) protecting those who are young, immature or incompetent from the sexual advances of the more mature who seek to exploit the youth, ignorance or incompetence of their victims, and (3) protecting the public in general from conduct that openly flouts accepted standards of morality or disturbs the peace. *See* Note, *Victimless Sex Crimes: To the Devil, Not the Dungeon,* 25 U. FLA. L. REV. 139, 147-48 (1972). Taking these three interests as the core of the state's interest in regulating sexual conduct, the issue becomes one of how far beyond that core, if at all, the state's interest should extend. It should be noted that private, consensual sexual acts between adults fall outside that core regardless of whether they take place within the context of a commercial transaction.

Arguments for expanding the sphere of state interest beyond the core of interests described should take account not only of generally accepted moral precepts but also of the social costs incurred by enforcing laws prohibiting private, consensual sexual acts. It should be recognized that such laws are subject to abuse and can be used by both public officials and private persons as a means of blackmail. Moreover, changes in moral attitudes have legitimized practices which unrepealed, dated laws render criminal. *See* 25 U. FLA. L. REV. at 148-53. Finally, assuming the enforcement option is taken, it still remains to ascertain whether there is any utility to exacting criminal penalties against persons who have willingly performed proscribed acts. *See* Comment, *Sexual Freedom for Consenting Adults-Why Not?,* 2 PAC. L.J. 206, 223-24 (1971). Assertions of the right to regulate private sexual conduct which do not consider these issues carefully suffer from a failure to treat the problem of moral regulations with the necessary degree of comprehensiveness.

38. In a related context, obscenity, Justice Brennan has repeatedly argued that in the absence of distribution to juveniles or obstrusive exposure to unconsenting adults, the state and federal governments are prohibited by the first and fourteenth amendments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly obscene contents. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (Brennan, J.. dissenting). *See also* Friedman v. United States, 421 U.S. 1004, 1005 (1975) (Brennan, J., dissenting); Atheneum Book Store, Inc. v. City of Miami Beach, 420 U.S. 982 (1975) (Brennan, J., dissenting); McKinney v. City of Birmingham, 420 U.S. 950 (1975) (Brennan J., dissenting). A similar argument can be made with respect to the state's attempt to regulate private adult sexual activity. Namely, that except where sexual activity between consenting adults is displayed to others against their will or where minors are involved, the right of privacy prohibits the state's intrusion into matters which are properly left to individual conscience.

For a discussion of a philosophy of privacy which strikes a balance between state interests and individual rights to privacy, see Doss, Jr. & Doss, *On Morals, Privacy and the Constitution,* 25 U. MIAMI L. REV. 395, 396-400 (1971). Various articles assert that the right to privacy protects specific kinds of sexual activity. *See, e.g.*, Note, *The Constitutionality of*

A survey of the case law demonstrates that, while the existence of a constitutionally protected right to privacy is not questioned,[39] the zones of activity protected by that right remain largely uncharted. However, one area of privacy which has been well defined is that covering a certain range of individual choices concerning marriage and child rearing. Thus, the right to privacy has been held to protect the freedom to choose to marry,[40] the right to procreate,[41] the right to make choices regarding the custody, care and nurture of one's children,[42] and the right to educate and rear one's children as one desires.[43] These decisions paved the way for others bearing more directly on the issue of sexual privacy.

The breakthrough was the holding in *Griswold v. Connecticut*[44] that the right to marital privacy precluded the state's interference with a couple's decision to practice contraception. The *Griswold* ruling was extended to encompass single individuals in *Eisenstadt v. Baird*.[45] Subsequently, in *Roe v. Wade*[46] the Supreme Court ruled that within certain limits, a woman's decision to have an abortion was a private matter beyond the state's sphere of interest. A unifying principle implicit in all these decisions was the recognition that certain individual choices directly related to personal sexual practices fall within a protected area of privacy.

The Supreme Court has also made less direct statements which appear to expand upon concepts of sexual privacy. For example, the Court's holding that a state cannot deny welfare payments to a family whose mother is living with a man not her husband[47] can be seen as supporting the position that moral judgments as to the propriety of cohabitation cannot

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Laws Forbidding Private Homosexual Conduct, 72 MICH. L. REV. 1613 (1974); Comment, *Oral Copulation: A Constitutional Curtain Must Be Drawn*, 11 SAN DIEGO L. REV. 523 (1974).

39. In Mapp v. Ohio, 367 U.S. 643, 656 (1961), the Court spoke of a "right to privacy, no less important than any other right carefully and particularly reserved to the people . . . ." *See also* Roe v. Wade, 410 U.S. 113, 152-56 (1973), and cases cited therein.

40. Loving v. Virginia, 388 U.S. 1 (1967).

41. Skinner v. Oklahoma, 316 U.S. 535 (1942).

42. Prince v. Massachusetts, 321 U.S. 158 (1944).

43. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

44. 381 U.S. 479 (1965).

45. 405 U.S. 438 (1972).

46. 410 U.S. 113 (1973). *See also* Doe v. Bolton, 410 U.S. 179, 209-15 (1973) (Douglas, J., concurring).

47. King v. Smith, 392 U.S. 309 (1968). *See also* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 535 n.7 (1973), in which the Court notes with approval the lower court's rejection of the Department's contention that the denial of food stamps to households containing an individual unrelated to any other member of the household was justified since it discouraged cohabitation and communal living. The lower court had seen this as an invasion of the right to privacy.

support the state's decision to deny a person benefits to which he is otherwise entitled. Similarly, the line of decisions[48] holding that illegitimate children are not to be denied benefits or entitlements available to legitimate children solely because of the status of their birth implies that the circumstances of a person's birth, and all the moral connotations they may invoke, should be of no concern to the state.

In light of *Griswold* and it progeny, and of the cases involving denials of benefits or entitlements, it seems the Supreme Court is willing to go beyond the bounds of the marital relationships to protect rights of privacy for less conventional relationships.[49] At the very least, the Court has demonstrated its sensitivity for the rights of those discriminated against by the state simply because some aspect of their sexual lifestyle differs from the norm or because moral judgments have been rendered against their parents.

However, despite some evidence of a liberalizing trend, the Court may not be prepared to go much further in expanding rights to sexual privacy. In a zoning case,[50] the Court refused to consider whether a restriction which effectively prohibited six unmarried students of both sexes from renting a house interfered with their right to privacy and upheld the ordinance as a valid exercise of the police power. Moreover, in overturning a Florida statute against interracial cohabitation on equal protection grounds, the Court did not question the validity of a generalized state purpose to prohibit premarital and extramarital promiscuity.[51] Finally, recent obscenity

48. Jimenez v. Weinberger, 417 U.S. 628 (1974); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

49. Lower courts have been willing to go much further in extending the right to privacy to various kinds of sexual conduct. *See* Cotner v. Henry, 394 F.2d 873 (7th Cir.), *cert. denied,* 393 U.S. 847 (1968) (sodomy between husband and wife); Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973). *See also* Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973) (homosexuality), *aff'd on other grounds,* 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974). One decision has gone so far as to hold that fornication, adultery, sodomy and similar consensual behavior by adults are within protected zones of privacy and there is no compelling state interest to warrant their criminalization. *See* United States v. Moses, 41 U.S.L.W. 2298 (D.C. Super. Ct. Nov. 3, 1972).

50. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). The challenged ordinance defined a family as containing no more than two unrelated persons maintaining a common household and excluded all groups of more than two unrelated persons from living in an area zoned for single family dwellings. Justice Marshall dissented on grounds that the restrictions interfered with the right to privacy. *Id.* at 13. Justice Douglas wrote for the majority. While the opinion may have been influenced by a special sensitivity for zoning problems and their environmental implications, the fact that the most assertive of the justices with regard to fundamental rights wrote it is significant.

51. McLaughlin v. Florida, 379 U.S. 184, 193, 196 (1964).

decisions[52] make it clear that regardless of the right to sexual privacy which protects married couples within their homes, public accommodations are not covered by any doctrine of constitutional privacy. The day for the inclusion of private acts of commercial sex between consenting adults within constitutionally recognized zones of privacy has not yet arrived.

B. Equal Protection

1. *Levels of Scrutiny*

The role of a court engaged in equal protection analysis has been described as that of a balancer expected to safeguard constitutional values while at the same time maintaining proper respect for the legislature as a coordinate branch of government.[53] Specifically, a court addresses the question of whether a particular classification or differentiation embodied in a statute is an arbitrary and therefore invidious discrimination[54] which will not be allowed to stand. Traditional equal protection analysis has carried out this evaluation within the context of a two tiered model[55] that allows the court to function as the champion of both legislative prerogatives and constitutionally-protected interests. Thus, applying the minimum rationality[56] standard on one level, the court emphasizes the maintenance of proper respect for the legislature and pays it a great deal of deference. On the second level, the court adopts a strict scrutiny[57] standard and emphasizes its role as the guardian of constitutional values.

Under traditional minimum scrutiny, the party seeking to invalidate a statutory classification bears the burden of establishing that it is arbitrary

52. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). In language easily transferred to the massage parlor context, the Court stated that the exhibition of obscene material in places of public accommodation is not protected by any constitutional doctrine of privacy. A commercial theatre cannot be equated with a private home. *Id.* at 66-67. The Court also declared that not all conduct directly involving consenting adults has a claim to constitutional protection. *Id.* at 68-69. *See also* United States v. Orito, 413 U.S. 139 (1973); United States v. Twelve 200 Ft. Reels of Film, 413 U.S. 123 (1973). The rationale of these cases was followed in upholding the conviction of an operator of a health club frequented by homosexuals for "keeping a disorderly house." *See* Harris v. United States, 315 A.2d 569 (D.C. Ct. App. 1974).

53. *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1078 (1969) [hereinafter cited as *Developments*].

54. "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949).

55. For a discussion of the two tiered model, see *Developments*, *supra* note 53, at 1077-132.

56. This will be discussed more fully. *See* notes 58-62 *infra* and accompanying text.

57. *See* notes 63-73 *infra* and accompanying text.

and unreasonable.[58] The challenger must overcome the presumption of statutory validity by proving the classification bears no fair and substantial relationship to the express or implied purpose which prompted its legislative enactment.[59] The court's task is to determine whether the statute is aimed at the achievement of a constitutionally-permissible purpose and whether the classification is an arbitrary means of effectuating that purpose.[60] The deferential nature of minimum rationality analysis has been demonstrated by the fact that its adoption has amounted to a virtual abandonment of review of equal protection questions.[61] Moreover, this abdication has been supplemented by reasoning which allows apparently arbitrary classifications to stand on the theory that the legislature cannot always address a problem all at once and should therefore be allowed to address it piecemeal.[62]

By contrast, the strict scrutiny standard reverses the presumption of statutory validity characteristic of minimum rationality and casts the burden of proving that a statute is reasonable and not arbitrary on the state.[63] Strict scrutiny is triggered by statutory classifications which have been categorized as suspect or by those classifications adversely affecting fundamental interests.[64] The judicially established suspect classifications are

58. "One who assails the classification . . . must carry the burden of showing it does not rest upon any reasonable basis, but is essentially arbitrary." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

59. F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

60. *See Developments, supra* note 53, at 1077-87.

61. *Id.* at 1087. The nearly limitless scope of discretion accorded state legislatures is illustrated by the majority opinion in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961):

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

This statement was no more, albeit in very explicit terms, than the reaffirmation of long-standing Court practice. Thus, some twelve year earlier in Goesaert v. Cleary, 335 U.S. 464 (1948), the Court sustained a statute prohibiting all women not the wives or daughters of male bar owners from employment as bartenders. Rather than regarding the statute as a measure designed to protect a virtually all male job market from female competition, the Court conceived the legislative purpose as the control of moral and social problems stemming from the employment of women in bars. *Id.* at 465, 467. *See also* McDonald v. Board of Election Comm'rs., 394 U.S. 802 (1969).

62. This was the rationale behind the holding in Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949), that authorities seeking to remove distractions posing hazards to traffic could reasonably ban the sale of advertising space on the side panels of the complainant's trucks while allowing other trucks to advertise the owner's products without denying equal protection to Railway Express. *See also* Central Lumber Co. v. South Dakota, 226 U.S. 157, 160 (1912).

63. *See Developments, supra* note 53, at 1101, 1132-33.

64. *Id.* at 1124-30.

race,[65] national origin[66] and alienage.[67] Judicially recognized fundamental interests include the right to vote,[68] to travel,[69] to procreate[70] and the criminal defendant's right to certain procedural safeguards.[71] A statute subject to strict scrutiny will survive only if the state can demonstrate that the statute furthers a compelling state interest and that it employs the least drastic means available to effectuate the legislative purpose.[72] The rigorousness of this standard is manifested by the fact that a court's decision to adopt it is often tantamount to a predetermination to strike down a statute.[73]

Discontent with the rigid strict scrutiny-minimum rationality dichotomy of traditional equal protection analysis has produced suggestions favoring development of alternate standards.[74] Moreover, comparison between the Warren Court and Burger Court approaches to equal protection evidences that a modification of doctrine leading to the creation of an intermediate level of scrutiny is in fact underway.[75] This evolving standard may be described as a more rigorous form of minimum rationality[76] which

65. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

66. *See, e.g.*, Oyama v. California, 332 U.S. 633 (1948).

67. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

68. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

69. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

70. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

71. *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). For a more recent statement of the Court's position on this issue, see Blackledge v. Perry, 417 U.S. 21 (1974).

72. *See* Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification and Some Criteria*, 27 VAND. L. REV. 971 (1974) [hereinafter cited as *Less Restrictive Alternative*]. Strict scrutiny has also been described as a three pronged standard in which the state must show that "(1) the means . . . are necessary, (2) to further a compelling interest, (3) aimed at a legitimate goal." *Id.* at 997. The rationale behind this particular breakdown is the observation that the Court has in various instances gone beyond the examination of alternative means and extended its inquiry into the question of whether there is any need at all for the classification. *See id.* at 999-1000 and cases cited therein.

73. *Id.* at 997 n.168. *See also*, Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause*, 26 STAN. L. REV. 155, 156 (1973).

74. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting). Justice Marshall, a leading proponent of a change in equal protection analysis, seeks to replace two mutually exclusive standards with a process that balances the character of the classification, the relative importance to individuals in the class of benefits or interests denied them, and the asserted state interests.

75. *See*, Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 19-24 (1972) [hereinafter cited as *1971 Term—Foreword*].

76. *Id.* at 21. Since this intermediate level of analysis is an intensified form of minimum rationality, the compelling state interest component which operates where strict scrutiny is applied does not come into play here.

demands that the state produce empirical evidence supporting the reasonableness of a classification rather than merely supplying a conceivable rational relationship between the classification and the statutory purpose.[77]

2. *Intermediate Scrutiny and the Sex Classification Problem*

The Supreme Court has given no clear indication where intermediate equal protection analysis will be utilized,[78] but one area of application has been that of sex discrimination,[79] an issue which has until recently maintained its viability as the basis for challenges to massage parlor regulations.[80] This represents a departure from traditional approaches to sex-based classifications,[81] but an important one in light of the Supreme

77. An example of this approach is Humphrey v. Cady, 405 U.S. 504 (1972), where the equal protection challenge to a statutory scheme which required jury determinations prior to pretrial commitments under a mental health statute but not for those carried out under a sex crimes statute was found persuasive enough to warrant an evidentiary hearing on remand. See Jackson v. Indiana, 406 U.S. 715 (1972), where differing provisions for pretrial commitment of criminal defendants and the commitment of persons not charged with an offense were held to violate equal protection. In both cases, the Court used the terminology of traditional minimum rationality but in the absence of evidence in support of the state's classifications declined to defer to the legislature.

78. Gunther makes the point that intermediate equal protection analysis allows the Court to decide controversial issues without squarely confronting them. *1971 Term—Foreword, supra* note 75, at 29-36. Thus, in Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court avoided a direct ruling that the right to privacy protected unmarried couples who decided to practice contraception but, nevertheless, established that right by holding that there was no rational basis for the state's interference with a couple's personal decision.

79. *See,* Comment, *The Supreme Court 1974 Term and Sex-Based Classifications: Avoiding a Standard of Review,* 19 ST. LOUIS U.L.J. 375 (1975) [hereinafter cited as *Sex-Based Classifications*].

80. *See, e.g.*, Annot. 53 A.L.R.3d 936 (1973) and cases cited therein. The viability of an equal protection challenge to ordinances which prohibit opposite sex massages has been severely crippled, if not eliminated, by the application of the holding in Hicks v. Miranda, 422 U.S. 332 (1975). Dismissal of an appeal for want of a substantial federal question constitutes a judgment upon the merits which is binding upon the lower federal courts. In three instances, the Supreme Court has dismissed equal protection challenges to opposite sex massage ordinances on that ground. Smith v. Keator, 419 U.S. 1043 (1974); Rubenstein v. Township of Cherry Hill, 417 U.S. 963 (1974); Kisley v. City of Falls Church, 409 U.S. 907 (1972). These developments have led to the holding in Hogge v. Johnson, 526 F.2d 833 (4th Cir. 1975), that all equal protection challenges to opposite sex massage ordinances are now precluded from the federal courts. *See also* Aldred v. Duling, Civil No. 76-0002-R (E.D. Va. January 15, 1976). *See* notes 129-139 and accompanying text *infra*.

81. For example, in Bradwell v. State [of Illinois], 83 U.S. (16 Wall.) 130 (1872), the Court upheld Illinois' denial of a license to practice law to a woman. The Court referred to the "natural and proper timidity and delicacy which belongs to the female sex . . . ." *Id.* at 141 (Bradley, J., concurring). See Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1971).

Court's refusal to declare sex a suspect classification.[82] A case in point is *Reed v. Reed*,[83] which overturned a provision in the Idaho probate code giving automatic preference to men over women when persons of the same entitlement class applied for appointment as administrator of a decedent's estate. Without holding that sex was a suspect classification, the Court did state that the statutory classification at issue was "subject to scrutiny."[84] The clear implication was that sex classifications would not receive the deference characteristic of minimum rationality.

Unfortunately, more recent decisions have not served to establish any consistent pattern of equal protection analysis in sex discrimination cases.[85] Some cases were not decided on equal protection grounds.[86] Others have countenanced benign sex classifications which discriminate in favor of women on the ground that they remedied the effects of past discrimination.[87] Finally, in one extraordinary instance, the Court managed to conclude that provisions of a state insurance code which excluded work-loss due to a normal pregnancy from disability insurance coverage did not involve sex classifications at all and applied the minimum rationality standard.[88] Nevertheless, despite these inconsistencies, sex discrimination cases do illustrate the evolution of equal protection analysis from the rigid pattern of the Warren Court era.[89]

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82. In Frontiero v. Richardson, 411 U.S. 677 (1973), a plurality of four justices (Brennan, Douglas, Marshall, and White) asserted that sex was a suspect classification. *Id.* at 688. However, a majority of the Court has not so held, and subsequent decisions seem to indicate that the Court is intent on backing away from *Frontiero*. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 13 (1975). *See also* notes 85-88 *infra* and accompanying text.

83. 404 U.S. 71 (1971). The reasoning used in *Reed* was cited as controlling in Stanton v. Stanton, 421 U.S. 7 (1975).

84. 404 U.S. at 75.

85. *Sex-Based Classifications, supra* note 79, at 381-94.

86. *See, e.g.*, Turner v. Dep't of Employment Sec., 422 U.S. 44 (1975) (per curiam); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

87. *See* Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). On benign classifications see G. GUNTHER & N. DOWLING, CONSTITUTIONAL LAW: CASES AND MATERIALS 1416-19 (8th ed. 1970) [hereinafter cited as G. GUNTHER & N. DOWLING]. *See also* DeFunis v. Odegaard, 416 U.S. 312 (1974) (Douglas, J., dissenting).

88. *See* Geduldig v. Aiello, 417 U.S. 484 (1974). *But cf.* Turner v. Dep't of Employment Sec., 422 U.S. 44 (1975).

89. The evolution of equal protection analysis has also been manifested in the Court's unwillingness to extend the scope of strict scrutiny by refusing to declare new fundamental interests or new suspect classifications. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (wealth not a suspect classification, education not a fundamental interest); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare payments not a fundamental interest).

C. Substantive Due Process

Oftentimes, the overlap between substantive due process analysis and equal protection analysis is such that there is little reason other than categorical nicety for separating the two.[90] However, the due process clause has served a special and unique function as a repository of constitutional values which have supported a broad spectrum of limitations upon governmental policies of conduct regulation and enforcement.[91] Under due process analysis the judiciary's role is to review the alignment between legislative purpose and recognized values, the implementation of that purpose by the regulatory method and the efficacy of alternative methods.[92] In its simplest terms, due process analysis is designed to ascertain whether a plausible argument can be made that a given legislative act furthers a permissible governmental goal without imposing excessive restrictions upon individual freedoms.

1. *Economic—Substantive Due Process*

The most controversial development in the history of due process analysis has been the now largely discredited policy of judicial interventionism in socio-economic affairs which has been termed economic-substantive due process.[93] The chief rationale behind this policy was a marked antipathy towards legislation which conflicted with laissez faire economic theory on grounds that such legislation impinged upon some vague concept of liberty or property protected by the due process clause.[94]

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90. *See Developments, supra* note 53, at 1132; *Less Restrictive Alternative, supra* note 72, at 981. *See* notes 102-08 *infra* and accompanying text.

91. Ratner, *The Function of the Due Process Clause,* 116 U. Pa. L. Rev. 1048, 1049 (1968).

92. *Id.* at 1050. *See generally* G. Gunther & N. Dowling, *supra* note 87, at 954-82.

93. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 Yale L.J. 920, 940-41 (1973); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial,* 1962 S. Ct. Rev. 34.

94. See G. Gunther & N. Dowling, *supra* note 87, at 954-67; *Less Restrictive Alternative, supra* note 72, at 974-76. In Lochner v. New York, 198 U.S. 45 (1905), the Supreme Court invalidated a maximum working hours law as an excessive interference with an individual's liberty to work as he pleased. In Coppage v. Kansas, 236 U.S. 1 (1915), the Court invalidated legislation directed against exclusionary "yellow dog" contracts on grounds that the law interfered with liberty of contract. In addition to *Lochner* and *Coppage,* the most notorious economic-substantive due process cases are Adair v. United States, 208 U.S. 161 (1908), and Allgeyer v. Louisiana, 165 U.S. 578 (1897). *See* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

The obvious inference was that the Court was seeking to impose its own social views on state legislatures, and this led Justice Holmes to warn his brethren that: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics." Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting). As the Court continued to hand down incon-

The economic-substantive due process line came to an end during the New Deal in a series of decisions which upheld far-reaching economic legislation while simultaneously overruling earlier decisions.[95] Where the Court had been activist it now became deferential to the point of abdication. As the Court itself stated in *Williamson v. Lee Optical Co.*,[96] the day had passed when it would use the due process clause to strike down laws regulating business and industrial conditions because they might be unwise, improvident or out of harmony with a particular school of thought. Finally, in *Ferguson v. Skrupa*,[97] the Court delivered the coup de grace to economic-substantive due process and ruled that, absent a conflict with some specific constitutional provision or some valid federal law, a state has vast power to legislate against injurious practices in its internal commercial and business affairs.

2. *Substantive Due Process and Individual Liberties*

But, if economic-substantive due process has been severely denigrated, the due process clause has been given renewed life in the area of civil liberties and individual rights.[98] The leading case in this area is *Griswold v. Connecticut*,[99] where Mr. Justice Douglas stated that the Court's holding derived its authority from the right to privacy implicit in the Bill of Rights. This was accompanied by other opinions in which five concurring justices and two dissenters chose to view the decision as at least partially based on the due process clause.[100] The abortion cases of 1973 dispelled any remaining doubts as to the revival of substantive due process.[101]

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sistent decisions based on obscure distinctions, the suspicion grew that the only unifying principles behind economic-substantive due process were judicial prejudices. See cases cited and compared in *Less Restrictive Alternative, supra* note 72, at 976 n.24, 978 n.36.

95. *See, e.g.*, Olsen v. Nebraska, 313 U.S. 236 (1941), *overruling* Ribnik v. McBride, 277 U.S. 350 (1928); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), *overruling* Adkins v. Children's Hosp., 261 U.S. 525 (1923). *See generally* G. GUNTHER & N. DOWLING, *supra* note 87, at 962-82.

96. 348 U.S. 483, 488 (1955).

97. 372 U.S. 726, 730-31 (1973), *quoting* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949). *Ferguson* was reaffirmed in North Dakota State Bd. of Pharm. v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

98. *See* Ely, *supra* note 93; Ratner, *supra* note 91; Tribe, *The Supreme Court 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) [hereinafter cited as *1972 Term—Foreword*].

99. 381 U.S. 479 (1965).

100. *Id.* at 486-99 (Goldberg, J., concurring, joined by Warren, C.J., and Brennan, J.); *id.* at 499-502 (Harlan, J., concurring); *id.* at 502-07 (White, J., concurring); *id.* at 507-27 (Black, J., dissenting, joined by Stewart, J.); *id.* at 527-31 (Stewart, J., dissenting, joined by Black, J.).

101. Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973). In *Roe*, the

The standard used in due process cases involving civil and individual rights has been similar to or virtually identical with that used under strict scrutiny in equal protection cases.[102] Thus, in *Griswold,* the Court applied what amounted to a least drastic means[103] approach when it reasoned that enforcement of a ban on the use of contraceptives entailed invasions of marital privacy which were at best superfluous in view of the state's power to regulate their sale and manufacture.[104] In *Roe v. Wade,*[105] the Court paralleled the compelling interest test[106] of equal protection by holding that, prior to fetal viability, the state's interest in protecting potential life did not outweigh a woman's protected privacy rights.[107] In effect, substantive due process can be regarded as a means of subjecting statutes which interfere with fundamental rights not explicitly mentioned in the Constitution to a form of strict scrutiny closely paralleling that employed in equal protection cases.[108]

In general, regulations will invoke due process review whenever they are overbroadly drawn so as to conflict with individual interests in the exercise of certain recognized rights. One locus for such conflict which bears particular relevance to the problem of massage parlor regulations is the area of competition between the state's interest in regulating commercial affairs in order to protect public health, safety and welfare and the individual's

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Court held that Texas' criminal abortion statute was invalid because it violated a woman's right to privacy which was protected by the due process clause of the fourteenth amendment. In *Doe,* the Court ruled that procedural conditions precedent to obtaining an abortion in Georgia interfered excessively with the qualified right to an abortion. For a discussion of *Roe* see Ely, *supra* note 93; *1972 Term—Foreword, supra* note 98, at 10-41.

102. In his *Roe* dissent, Justice Rehnquist objected to the importation of strict equal protection standards into due process. 410 U.S. at 173. Ely, *supra* note 93, sees this mixing of equal protection and due process analysis as the most troublesome aspect of *Roe* because the effect is to require that the state interest be of compelling or strict importance, and this tips the balancing process applied in due process analysis to one side. He contrasts this with economic-substantive due process which, for all its faults, did not go beyond a requirement of a rational relationship to a statutory purpose. *Id.* at 941-43.

103. *See* note 72 *supra.*

104. 381 U.S. at 485. Justice Goldberg echoed this reasoning by stating that the state interest " . . . can be served by a more discriminately tailored statute, which does not . . . [intrude] upon the privacy of all married couples." *Id.* at 498.

105. 410 U.S. 113 (1973).

106. *See* note 72 *supra.*

107. 410 U.S. at 152-56.

108. A good example of a due process case which parallels equal protection analysis is Frontiero v. Richardson, 411 U.S. 677 (1973), where it was held that sex-based distinctions justified on the basis of administrative convenience could not be supported merely on those grounds and therefore violated the due process clause. *Cf.* Schlesinger v. Ballard, 419 U.S. 498 (1975), where a sex-based classification justified as a remedial measure to correct the results of sex discrimination was held to not violate due process.

interest in his right to conduct a legitimate business or to pursue a legitimate occupation.[109] But the success of a challenge to regulations on grounds that they violate occupational rights[110] protected by the due process clause depends on whether the asserted rights are deemed fundamental.[111] The authority directly supporting that proposition is a product of the era of economic-substantive due process and is, therefore, of questionable value.[112] Moreover, the assertions of certain commentators[113] that the dichotomy between civil rights and economic rights should be eliminated is not supported by convincing authority.[114] Consequently, without

109. *See* notes 93-97 *supra* and accompanying text.

110. The term occupational rights is used here generally to denote both the right to conduct a legitimate business and the right to pursue a chosen line of work.

111. *See* notes 102-07 *supra* and accompanying text.

112. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Terrace v. Thompson, 263 U.S. 197 (1923); Truax v. Raich, 239 U.S. 33 (1915).

113. *See 1971 Term—Foreword*, *supra* note 75, at 37-48; McCloskey, *supra* note 93, at 45-50; *1972 Term—Foreword*, *supra* note 98, at 9. In general the argument is that the distinction between individual liberties and personal economic rights may reflect judicial tastes and academic preferences rather than any truly substantive or qualitative distinction between them. McCloskey, *supra* note 93, at 48. It has also been pointed out that an increasing proportion of wealth takes the form of rights and status, a prime example being one's occupation and the status which attaches to it. Reich, *The New Property*, 73 YALE L.J. 733, 738 (1964).

114. A recent statement of judicial dissatisfaction with a rigid civil rights—property rights dichotomy is contained in dictum in Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972), to the effect that the distinction is false. A direct assertion that the right to work is a fundamental right is made in Justice Douglas' dissent in Barsky v. Board of Regents, 347 U.S. 442, 472 (1954).

Arnett v. Kennedy, 416 U.S. 134 (1974), which dealt with a dismissed OEO employee's assertion that, absent a full adversary hearing before removal, he could not, consistent with due process requirements, be divested of his property interest or expectancy in employment. But a divided Court had little to say about the right to work. The plurality (Rehnquist, Burger and Stewart) held that the employee's substantive right to work was a statutory creation subject to statutory limitations. *Id.* at 153-54. Mr. Justice Powell (joined by Blackmun, J., concurring in part and concurring in result in part) argued that even though Congress had originally conferred a substantive right, it could not now take it away without providing appropriate procedural safeguards. *Id.* at 164. Mr. Justice White (concurring in part, dissenting in part) argued that a property right created by Congress was no different than one originating in the private sector and implied that property rights enjoyed a special degree of protection. *Id.* at 180-81. Justices Douglas and Marshall (joined by Brennan, J.) dissented. The former based his dissent on the first amendment. *Id.* at 203. Mr. Justice Marshall displayed some sympathy for occupational rights and for the plight of those deprived of work, but this was not the basis of his dissent. *Id.* at 221.

In another context, the Supreme Court has held that persons cannot be deprived of property interests on the basis of summary proceedings permitting a private party to repossess property without a notification or prior hearing for the party affected. The rationale behind these decisions was the Court's refusal to differentiate between different kinds of *property* interests on the basis of whether or not some were more deserving of protection than others.

clear-cut evidence of a shift away from hostility to economic-substantive due process, a challenge to regulations based on a theory of fundamental occupational rights appears unlikely to succeed.

D. Conclusive Presumptions

A more promising avenue for the parlor operator who believes himself victimized by regulations directed at controlling illegitimate operators may be a challenge to regulations on the theory they embody a conclusive or irrebutable presumption[115] that all massage parlors harbor illicit activities. Statutes scrutinized on this basis are subjected to a hybrid process of analysis which combines elements of both procedural and substantive due process and equal protection.[116] The concern in conclusive presumption cases is less with the overall accuracy of a legislative classification than with the treatment of particular individuals affected by it. The remedy provided is not the outright invalidation of a classification, but a requirement that an individual affected by it be given an opportunity to challenge its application to him.[117] Statutory presumptions will be held constitutional as long as the inference of the presumed fact from the proof of another is rational and not so unreasonable as to be purely arbitrary, and so long as a party enjoys the right to present a defense to the presumed fact.[118]

See North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972). *See also* Goss v. Lopez, 419 U.S. 565 (1975). *But see* Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). These are rather slim threads upon which to support the contention that the Supreme Court has put an end to the civil rights—property rights dichotomy.

115. *See* Note, *Irrebutable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to LaFleur*, 62 GEO. L.J. 1173 (1974); Note, *The Irrebutable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974) [hereinafter cited as *The Irrebutable Presumption Doctrine*].

116. For a critical treatment of the conclusive presumption doctrine, see *id.* at 1544-56. *See also* Note, *Irrebutable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974).

117. *The Irrebutable Presumption Doctrine*, *supra* note 115, at 1547-48.

118. Mobile, Jackson & K. C. R.R. v. Turnipseed, 219 U.S. 35, 43 (1910). Conclusive presumption is not a new doctrine. It was employed by activist judges during the era of economic-substantive due process. *See* Hoeper v. Tax Comm'n, 284 U.S. 206 (1931); Schlesinger v. Wisconsin, 270 U.S. 230 (1926). More recently the concept had been confined largely to criminal cases. *See* United States v. Romano, 382 U.S. 136 (1965). The trend towards applying conclusive presumption analysis to substantive due process cases involving civil rights can be traced to Carrington v. Rash, 380 U.S. 89 (1965) (all migrant servicemen residing in Texas while in the service could not be prohibited from voting). *See also* Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971).

These concepts are illustrated in *Vlandis v. Kline*,[119] which invalidated a Connecticut statute governing residency requirements for in-state tuition benefits at state universities. The law established that all students not residents at the time of their application would not be granted in-state residence at any time during the entire period of their attendance. The Court held that the inference drawn from the fact of a student's nonresident status at the time of application was neither rational nor consistent with the state's goal of ensuring that only bona fide residents receive tuition benefits.[120] In addition, those whom the statute presumed not to have any intention to reside in Connecticut were given no opportunity to demonstrate otherwise.[121] For these reasons, the Court concluded that the statute constituted a denial of due process.[122] While recognizing the legitimacy of the state's goals, the Court rejected the use of means based on a presumption "not necessarily or universally true in fact,"[123] a presumption from which there was no appeal.

The conclusive presumption concept may be of great importance to the employee or operator of a legitimate massage parlor adversely affected by sweeping applications of regulations clearly designed to attack abuses by those who use the business as a cover to traffic in commercialized sex. While conceding the state's interest in safeguarding public morality, a challenge to such regulations would seek judicial determination of whether that interest justifies presumptions which form the basis for classifications based on an easily identifiable trait (*i.e.*, massage parlors employing masseuses who cater to a virtually all-male clientele) that is related to, but not necessarily tantamount to, the evil sought to be prevented (*i.e.*, sexual immorality). The role of the Court is to ascertain whether, in the light of the availability of reasonable regulatory alternatives,[124] and the existence

119. 412 U.S. 441 (1973).

120. *Id.* at 449-50. The Court also noted that a lifelong resident who attended undergraduate school in another state and then applied for admission to graduate school in Connecticut could be forced to pay out-of-state tuition even though his parents had continued to reside in Connecticut. *Id.* at 450.

121. *Id.* at 448.

122. *Id.* at 450.

123. *Id.* at 452. Other recent conclusive presumption cases are Turner v. Department of Employment Sec., 422 U.S. 44 (1975); Weinberger v. Salfi, 422 U.S. 749 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975). *Taylor* held that the systematic exclusion of women from jury duty violated the requirement that juries be drawn from a representative cross-section of the community. The Court conceded that a state could grant exemptions from jury service but noted that the evidence "put to rest the suggestion that all women should be exempt from jury service based solely on their sex and the presumed role in the home." 419 U.S. at 535 n.17.

124. If conclusive presumption analysis is to serve a worthwhile purpose as a delimited, means—focused method of analysis, it should include provisions for the consideration of

or non-existence of opportunities for those affected by a regulation to demonstrate why they do not fit the presumptive model, those who possess the trait but not the evil should suffer the same burden as those who possess both. Finally, in granting its remedy, the Court can protect both sides of the issue by recognizing a valid state interest but requiring that it be implemented only by carefully tailored means in order to avoid undue interference with individual interests.

IV. METHODS EMPLOYED IN REGULATION

A. PROHIBITION OF OPPOSITE SEX MASSAGE

In an attempt to erect a barrier against immoral acts likely to result from intimate familiarity between the sexes,[125] many localities have enacted ordinances with provisions prohibiting massage by members of the opposite sex in a commercial setting.[126] It is this most common provision which

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alternate means. Without consideration of alternatives, conclusive presumption analysis becomes completely a matter of considering legislative ends and thereby becomes little more than an exercise in substantive due process. The danger in this is that a conclusive presumption would then have the effect of prohibiting all state action in a certain area rather than acting to require that the state pursue concededly legitimate ends with more carefully tailored means. *See Less Restrictive Alternative*, *supra* note 72, at 989 & n.113. In this respect it should be noted that Weinberger v. Salfi, 422 U.S. 749 (1975), appears to represent an attempt to avoid these dangers by restricting the applicability of conclusive presumptions and does so by emphasizing the equal protection component in conclusive presumption analysis. *See* Note, *The Supreme Court 1974 Term*, 89 HARV. L. REV. 47, 81-85 (1975).

125. 6 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 24.112, at 687 (3d rev. ed. 1969).

126. *See, e.g.*, FALLS CHURCH VA., CODE ch. 19, § 19.11 (Ord. No. 512):

> *Massages or baths administered by person of opposite sex.* It shall be unlawful for any establishment, regardless of whether it is a public or private facility, to operate as a massage salon, bath parlor or any similar type business where any physical contact with the recipient of such services is provided by a person of the opposite sex. Any person violating the provisions of this section, shall, upon conviction, be punished as provided in this Code; and in addition to such penalty, it shall be the duty of the city manager to revoke the license of the owner or manager of the establishment, wherein the provisions of this section shall have been violated.

Typically such ordinances exclude from their coverage hospitals, nursing homes, medical clinics and doctors' offices, barber shops and beauty parlors. Certain other ordinances that have failed to include language such as "for hire" or "in commercial establishments" contain almost comic implications, yet at least one court has stated that where such language is absent, it would supply the construction necessary to fulfill the meaning of the ordinance. Patterson v. City of Dallas, 355 S.W.2d 838 (Tex. Civ. App. 1962).

A restriction also common to many massage parlor ordinances is the prohibition of both genital contact and exposure of genitals and breasts of females. One federal court has suggested that this provision may be underinclusive in character since it prohibits conduct which if performed elsewhere may be regarded as lawful; however, this finding was in the context of a motion for preliminary injunction in which the court determined that the plaintiffs *may* have succeeded on the merits on this issue. Hogge v. Hedrick, 391 F. Supp. 91, 100 (E.D. Va.

massage parlor operators have repeatedly challenged in state and federal courts.

1. *Constitutional Challenges*

Until recently, challenges to opposite sex provisions on equal protection and due process grounds generally had been successful in the federal courts and had met with defeat in the state courts. This resulted in decisions which were unanimous in neither their reasoning nor their conclusions.[127] The fourteenth amendment issue, however, appears to lack current vitality as a result of the Supreme Court's dismissal of appeals in 1972 and 1974 of state supreme court decisions which rejected constitutional challenges to prohibitive opposite sex massage ordinances,[128] and the Court's subsequent confirmation in *Hicks v. Miranda*[129] that its dismissal of an appeal for want of a substantial federal question should be treated by the lower courts as an adjudication on the merits of the case.[130] Recent lower court adherence to the *Hicks* directive suggests that localities may expect to prevail in the face of constitutional challenges to local ordinances prohibiting opposite sex massage.

1974). It may be reasonably argued that while genital contact and exposure is protected in a private setting, the state may prohabit such conduct in a commercial establishment. In Lovisi v. Slayton, 44 U.S.L.W. 2542 (4th Cir. 1976), the court held that the petitioners, by permitting themselves to be photographed committing sodomidic acts, voluntarily relinquished any rights to privacy that may have surrounded and protected their acts. In Wayside Restaurant, Inc. v. City of Virginia Beach, 215 Va. 231, 208 S.E.2d 57 (1974), the Virginia Supreme Court held, in a case involving a challenge to an ordinance prohibiting exposure of genital parts in a restaurant, that where a line could be clearly drawn between commercial and non-commercial conduct and the prohibited conduct was in the commercial area, the complainant did not have standing to rely upon the hypothetical rights of those in the non-commercial area in mounting an attack upon the constitutionality of a legislative enactment. Numerous other state courts have upheld similar legislation. Seattle v. Marshall, 83 Wash. 2d 665, 521 P.2d 693 (1974); Yauch v. State, 109 Ariz. 576, 514 P.2d 709 (1973); Crownoner v. Musick, 107 Cal. Rptr. 681, 509 P.2d 497 (1973).

127. Colorado Springs Amusements, Ltd. v. Rizzo, 387 F. Supp. 690, 694 (E.D. Pa. 1974), *rev'd*, 524 F.2d 571 (3d Cir. 1975).

128. Smith v. Keator, 419 U.S. 1043 (1974), *dismissing appeal for want of a substantial federal question*, 285 N.C. 530, 206 S.E.2d 203 (1974); Rubenstein v. Twp. of Cherry Hill, 417 U.S. 963 (1974), *dismissing appeal for want of a substantial federal question*, No. 10,027 (N.J. Sup. Ct. Jan. 29, 1974); Kisley v. City of Falls Church, 409 U.S. 907, *dismissing appeal for want of a substantial federal question*, 212 Va. 693, 187 S.E.2d 168 (1972).

129. 422 U.S. 332 (1975).

130. *Id.* at 2289. *See also* 13 WRIGHT, FEDERAL PRACTICE AND PROCEDURE, ch. 2 § 3564 n.8 (1975), which suggested even before *Hicks* was decided that inferior courts should adhere to the view that if the Supreme Court has branded a question insubstantial it remains so except when doctrinal developments indicate otherwise.

In *Kisley v. City of Falls Church,*[131] the Virginia Supreme Court quoted extensively from the leading state case of *Ex parte Maki*[132] and rejected massage parlor operators' arguments that an opposite sex massage ordinance deprived them of property rights without due process of law and denied them equal protection.[133] The Supreme Court's dismissal of an ap-

131. 212 Va. 693, 187 S.E.2d 168 (1972), *appeal dismissed*, 409 U.S. 907 (1972).

132. 56 Cal. App. 2d 635, 133 P.2d 64 (1943). *Maki* was overruled by the California Supreme Court in Lancaster v. Municipal Court, 6 Cal. 3d 805, 494 P.2d 681, 100 Cal. Rptr. 609 (1972), on the basis that the state penal statute prohibiting illicit sexual behavior pre-empted the field. Thus, the California court did not reach the claim that the opposite sex provision was unconstitutional.

133. 212 Va. at 696, 187 S.E.2d at 171. The court also held that the provision of the ordinance which placed barber shops in a separate classification than massage parlors was not a purely arbitrary selection since the barber shop business was fundamentally different from the massage parlor business. *Contra*, Cheek v. City of Charlotte, 273 N.C. 293, 160 S.E.2d 18 (1968).

In *Kisley* and in numerous other state cases which have upheld opposite sex prohibitions, the courts' logic has closely followed *Maki* in concluding that once it is established that the activity has a tendency to induce its participants to commit licentious acts, the state may reasonably restrict that activity by prohibiting intimate contact among members of the opposite sex. *See, e.g.*, Anderson v. City of Chicago, 312 Ill. App. 187, 37 N.E.2d 929 (1941); Cheek v. City of Charlotte, 273 N.C. 293, 160 S.E.2d 18 (1968); Smith v. Keator, 21 N.C. App. 102, 203 S.E.2d 411 (1968); City of Houston v. Shober, 362 S.W.2d 886 (Tex. Civ. App. 1962); Connell v. State, 371 S.W.2d 45 (Tex. Crim. App. 1963); Gregg v. State, 376 S.W.2d 763 (Tex. Cr. App. 1964); Patterson v. City of Dallas, 355 S.W.2d 838 (Tex. Civ. App. 1962), *appeal dismissed for want of a substantial federal question*, 372 U.S. 251 (1963).

Those same courts have also relied upon *Maki* for the proposition that an ordinance cannot be said to have discriminated on the basis of sex if its proscriptions apply equally to both males and females who perform massages for hire.

Nevertheless, the state courts have not been entirely uniform in their approval of prohibitory opposite sex ordinances. The decision in J.S.K. Enterprises, Inc. v. City of Lacey, 6 Wash. App. 43, 492 P.2d 600 (1971), *rehearing*, 6 Wash. App. 433, 493 P.2d 1015 (1972), foreshadowed subsequent federal court holdings in finding that an opposite sex prohibition was an unreasonable exercise of the police power since it classified on the basis of sex and denied *all* massagists, regardless of individual characteristics, the right to serve members of the opposite sex. The court in *J.S.K. Enterprises, Inc.* recognized that a city in the exercise of its police powers may regulate massagists on the grounds of public health, safety and morality, but it specifically declined to follow *Maki* because it did not "recognize the economic, social and legal rights of women and the right of both men and women to be free from sex discrimination in employment as such rights exist today." *Id.* at 603.

The court in Geisha House v. Wilson, 43 U.S.L.W. 2153 (D.C. Sup. Ct. Sept. 25, 1974), interpreted Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), to mean that classifications based on sex are inherently suspect. The prohibition of opposite sex massage failed to pass the test of bearing a logical relationship to a legitimate governmental purpose since by its underinclusiveness it prohibited opposite sex massage only in "licensed" establishments yet permitted the practice elsewhere. 44 U.S.L.W. at 2153. Second, as in *J.S.K. Enterprises, Inc.*, the court concluded that the state may not legislate based upon the "supposition that the participants, somehow, some time, might engage in criminal conduct." *Id.* Finally, the court was also persuaded that if the District of Columbia

peal of the *Kisley* holding for want of a substantial federal question[134] was held to be "perfectly clear precedent," in light of *Hicks v. Miranda*, for the Fourth Circuit's dismissal in *Hogge v. Johnson*[135] of an equal protection challenge to a similarly worded ordinance. Also, in *Colorado Springs Amusements, Ltd. v. Rizzo*,[136] the Third Circuit rejected a constitutional challenge to a municipal ordinance prohibiting opposite sex massage on the strength of the dismissals of *Kisley* and two other recent state court appeals.[137] The court in *Colorado Springs* concluded that the Supreme Court's dismissal in these three cases disposed of the plaintiff's claims based upon "equal but reprehensible, treatment of both sexes; an invidiously discriminatory sex-based classification; an irrational exception in the ordinance for massage treatments given under the direction of a medical practitioner; unreasonable abridgement of the right to pursue a legitimate livelihood; and the irrebuttable presumption doctrine."[138] Thus, until doctrinal developments in the Supreme Court suggest that the Court would be receptive to a re-examination of the sex-based classifications in question, the presumption of illicit activity by massagists or other issues now

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was convinced that immoral and illegal activities were actually occurring in a given massage establishment it had an "arsenal of weapons" with which to combat or suppress them, including criminal and civil penalties. *Id.*

Federal courts had generally paralleled in their decisions the reasoning of *J.S.K. Enterprises, Inc.* and *Geisha House* in overturning ordinances prohibiting opposite sex massage. However, the courts had not been uniform in the emphasis placed upon sex as a sensitive class, conclusive presumptions, less drastic alternatives and the "fundamental" right to work. *See* Colorado Springs Amusements, Ltd. v. Rizzo, 387 F. Supp. 690 (E.D. Pa. 1974), *rev'd*, 524 F.2d 571 (3d Cir. 1975); Cianciolo v. Members of City Council, 376 F. Supp. 719 (E.D. Tenn. 1974) (ordinance held violative of fourteenth amendment and Title VII of Civil Rights Act of 1964); Valley Health Systems, Inc. v. City of Racine, 369 F. Supp. 97 (E.D. Wis. 1973); Corey v. City of Dallas, 352 F. Supp. 977 (N.D. Tex. 1972), *rev'd on other grounds*, 492 F.2d 496 (5th Cir. 1974). *Contra*, Garaci v. City of Memphis, 379 F. Supp. 1393 (W.D. Tenn. 1974) (complainant failed to qualify as an employer under Title VII of the Civil Rights Act of 1964, and further his rights to privacy were not violated since commercial ventures conducted in the public forum are not properly within the ambit of the right of privacy).

134. 409 U.S. 907 (1972).

135. 526 F.2d 833 (4th Cir. 1975). Mr. Justice Clark, sitting by designation, stated his disapproval of the Supreme Court's statements in *Hicks* and noted that it was extremely doubtful that the Court in dismissing the *Kisley* appeal gave such serious consideration to the merits of the case as to justify the precedential value assigned to it. *Id.* at 836.

136. 524 F.2d 571 (3d Cir. 1975).

137. Smith v. Keator, 419 U.S. 1043 (1974), *dismissing appeal for want of a substantial federal question*, 285 N.C. 530, 206 S.E.2d 203 (1974); Rubenstein v. Township of Cherry Hill, 417 U.S. 963 (1974), *dismissing appeal for want of a substantial federal question*, No. 10,027 (N.J. Sup. Ct., Jan. 29, 1974).

138. 524 F.2d at 576. The court concluded that these issues were disposed of by noting that they were included as part of the jurisdictional statements in one or more of the appealed cases.

disposed of, massage parlor operators would appear to be foreclosed from mounting a successful constitutional challenge to prohibitive opposite sex massage ordinances.[139] Since enforcement of such ordinances would be relatively less difficult than the detection of the illicit and prohibited types of activity, and since opposite sex contact is an essential feature of most massage parlors, the economic demise of these businesses in localities with opposite sex ordinances is almost assured.

2. *Challenges Under the Civil Rights Act of 1964*

As an alternative to constitutional challenges of ordinances which prohibit massage of patrons by massage parlor employees of the opposite sex, some parlor operators have successfully contended that by complying with such ordinances an employer is forced to violate certain provisions of the Civil Rights Act of 1964.[140] In *Cianciolo v. Members of City Council*,[141] the court agreed with the massage parlor owner's claim that in complying with the local ordinance's directive, he is forced "to limit . . . his employees (masseuse or masseur) in (a) way which would deprive or tend to deprive (an) individual of employment opportunities,"[142] thus violating the Act.[143] The court noted that the basic guidelines in determining whether a sexual distinction is legitimate have been promulgated by the Equal Employment Opportunity Commission[144] and that "the Commission has submitted that the following bases are not sufficient to find a bona fide occupational qualification:

> (i) The refusal to hire women in general based on *assumptions of the comparative employment characteristics of women in general.*
> (ii) The refusal to hire an individual based on *stereotyped characterization of the sexes.*[145]

In so noting, the court concluded that since the ordinance in question complied with neither the spirit nor the letter of section 2000e-2 of the Civil Rights Act of 1964, it must be declared invalid under the supremacy clause of the Constitution.[146] Language from other cases similarly suggests that if a massage parlor operator qualifies as an employer under Title VII

139. *See* note 130 *supra*. For a discussion of current Supreme Court doctrine in the area of equal protection and due process see section III. *supra*.
140. 42 U.S.C.A. § 2000e-2(a)(1)-(2) (1974).
141. 376 F. Supp. 719 (E.D. Tenn. 1974).
142. 42 U.S.C.A. § 2000e-2(a)(2) (1974).
143. 376 F. Supp. at 722.
144. 29 C.F.R. § 1604 *et seq.* (1975).
145. 376 F. Supp. at 722.
146. *Id.* at 723. *See* U.S. Const. art. VI, § 2.

of the Civil Rights Act,[147] he may be successful in challenging an opposite sex ordinance as requiring him to violate the Act's provisions.[148]

Challenges to such ordinances under the Civil Rights Act, however, may go the way of *Colorado Springs Amusements, Ltd. v. Rizzo*[149] if a recent interpretation[150] of the Supreme Court's dismissal of the appeal in *Rubenstein v. Township of Cherry Hill*[151] is sustained. In an attempt to determine if the ruling in *Hicks v. Miranda* was dispositive of the case before it, the court in *Aldred v. Duling* noted that the plaintiff Rubenstein's brief to the Supreme Court challenged the local ordinance on four grounds, one of which was that the ordinance would force Rubenstein to violate Title VII of the Civil Rights Act.[152] However, as the court further noted, the defendant's responsive pleading left some doubt as to whether Title VII was properly invoked by the plaintiffs in attacking the ordinance.[153] The court stated that it would appear that the Supreme Court assumed applicability of Title VII when it dismissed Rubenstein's appeal for want of a substantial federal question,[154] but that given the doubt raised by the state of the record it was not foreclosed from finding that the instant challenge under Title VII by a qualified employer still presented a substantial federal question. Nevertheless, the court concluded that it is clear that by now the "issues surrounding the regulation of massages of one sex by members of the opposite sex is a matter of local concern presenting no substantial federal question."[155]

The difficulty with the court's cursory treatment of Title VII, assuming the Supreme Court did not recognize this as an issue when it dismissed *Rubenstein,* is that the standards for establishing discrimination by sex are different under the fourteenth amendment and the Civil Rights Act.[156]

147. 42 U.S.C. § 2000e(b) (Supp. III, 1973) defines the term employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . ."

148. *See, e.g.*, Joseph v. House, 353 F. Supp. 367 (E.D. Va.), *aff'd sub nom.* Joseph v. Blair, 482 F.2d 575 (4th Cir. 1973); Corey v. City of Dallas, 352 F. Supp. 977 (N.D. Tex. 1972) (dicta), *rev'd on other grounds*, 492 F.2d 496 (5th Cir. 1974); J.S.K. Enterprises, Inc. v. City of Lacey, 6 Wash. App. 43, 492 P.2d 600 (1971) (dicta), *rehearing*, 6 Wash. App. 433, 493 P.2d 1015 (1972).

149. 524 F.2d 571 (3d Cir. 1975).

150. Aldred v. Duling, C.A. No. 76-0002-R (E.D. Va. Jan. 15, 1976).

151. 417 U.S. 963 (1974).

152. C.A. No. 76-0002-R at 3 (E.D. Va. Jan 15, 1976).

153. *Id.* at 4.

154. *Id.*

155. *Id.* at 5.

156. For an excellent discussion of this question see Communications Workers of America, AFL-CIO v. American Tel. and Tel. Co., 513 F.2d 1024 (2d Cir. 1975). *See also* Zichy v. City of Philadelphia, 392 F. Supp. 338 (E.D. Pa. 1975).

Thus the "issues surrounding the regulation of massages of one sex by members of the opposite sex"[157] are not disposed of by a Supreme Court dismissal solely of the issue of equal protection and due process. Since it would appear that in fact the plaintiff in *Rubenstein* did not qualify as an employer under Title VII,[158] the court should not have avoided the difficult question of applying the strictures of the Civil Rights Act to the instant question. Thus, future litigants might successfully contend that until the Supreme Court either explicitly upholds an opposite sex ordinance in the face of a Title VII challenge or is clear in its dismissal of such actions for want of a substantial federal question, a local ordinance prohibiting opposite sex massage may still be held in violation of the letter and spirit of the Civil Rights Act.

B. LICENSING[159]

The power of localities to license occupations and establishments as a means of regulation is accomplished under the police power;[160] the locality must be given authority to exercise its power of licensing by the state.[161] Because the licensing power is exercised within the police power, the power to license certain occupations has been denied when the object of the regulation did not affect the health, safety, welfare or morals of the com-

157. C.A. No. 76-0002 at 5 (E.D. Va. Jan. 15, 1976).

158. *Id.* at 4. Telephone conversation with Steven Weinstein, counsel for Rubenstein. If the Supreme Court did assume applicability of Title VII to Rubenstein, this lends credence to former Justice Clark's contention that the Court does not give serious consideration to the merits of a dismissed case. *See* note 135 *supra*. Further, the court in *Colorado Springs* did not suggest that the Title VII issue had been presented to the Supreme Court in *Rubenstein*. The complainant in the *Colorado Springs* case, however, failed to qualify as an employer under the Civil Rights Act. 524 F.2d at 577.

159. An exhaustive study of general restrictions upon licensing is beyond the scope of this note. Regarding general requirements of procedural due process in licensing see Note, *Due Process Limitations Upon Occupational Licensing*, 59 VA. L. REV. 1097 (1973). There is a helpful discussion of denial, revocation and issuance of licenses in 9 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 26.80 *et seq.* (3d rev. ed. 1969). There are three important licensing problems deserving full discussion because of the significant impact they could have upon massage parlors: classification schemes, qualification standards, and business regulations.

160. *See generally* 6 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 24 (3d rev. ed. 1969).

161. There is generally considered to be no inherent police power in the locality. In many instances, however, the mere organization of a municipal corporation is sufficient to imply a delegation by the state to the locality of the police power. *Id.* § 24.33. It is not necessary that there be an express delegation to regulate a particular profession or occupation. Courts will often construe a general grant of authority liberally. *Id.* § 24.38 *et seq.* While authority to license is generally inferred from a general granting of power it is best that such a licensing power be made explicit and clear. The power of licensing has been denied when it seemed unclear that the state intended to reach a particular profession. City of Anchorage v. Brady's Floor Covering, 105 F. Supp. 717 (D. Alas. 1952).

munity.[162] The regulation of massage parlors has invariably been held to be within the police power[163] and thus the parlors are subject to various licensing schemes.

1. *Classification Schemes*

The Supreme Court determined in *F.S. Royster Guano Co. v. Virginia*[164] that any classification ". . . must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[165] Thus any classifications embodied in the municipal licensing legislation must be based upon natural and reasonable distinctions germane to the purpose for the licensing.[166] A subclass within an occupation may be removed only if it is reasonably insular.[167]

Massage parlor classifications have been attacked as being underinclusive in two different respects. Often the massage parlor ordinance will specifically exclude barber shops, beauty parlors,[168] YMCA and YWCA health clubs[169] and exercise clubs where only one sex is served and no massages are given.[170] In *Cheek v. City of Charlotte*,[171] the North Carolina Supreme Court struck down an exemption of barber shops, beauty parlors and YMCA and YWCA health clubs. Although noting that "[t]he city council felt that the activities which the ordinance seeks to eliminate were not then being carried on in the exempted establishments," the court held that favoritism which prevents massage parlor employees "from doing acts

162. *See* 51 AM. JUR. 2d *Licenses and Permits* § 14 (1970). Paperhangers, housepainters, florists, and photographers have often been considered to be engaged in innocuous professions whose regulation could have no relationship to the health, safety, welfare and morals of the public. Abdoo v. City and County of Denver, 397 P.2d 222 (Colo. 1964) (portrait photographers); Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957) (tile contractors); State v. Gleason, 128 Mont. 485, 277 P.2d 530 (1954) (photographers).

163. *See Ex parte* Maki, 56 Cal. App. 2d 635, 133 P.2d 64 (1943); 17 A.L.R.2d 1183 (1951).

164. 253 U.S. 412 (1920).

165. *Id.* at 415.

166. Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947) (tax classification); Pavone v. Louisiana State Bd. of Barber Examiners, 364 F. Supp. 961 (E.D. La. 1973), *aff'd* 505 F.2d 1022 (5th Cir. 1974) (distinction drawn between male and female hair to be cut by cosmetologists is unreasonable); State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972), *rev'g* 12 N.C. App. 584, 184 S.E.2d 386 (1971) (no valid distinction between pool hall and bowling alley operations in light of governmental purpose).

167. *See, e.g.*, Midwest Freight Forwarding Co. v. Lewis, 49 Ill. 2d 441, 275 N.E.2d 388 (1971), *cert. denied*, 408 U.S. 932 (1972).

168. *See* Kisley v. City of Falls Church, 212 Va. 693, 187 S.E.2d 168 (1972), *appeal dismissed*, 409 U.S. 907 (1972); Cheek v. City of Charlotte, 273 N.C. 293, 160 S.E.2d 18 (1968).

169. *See* Cheek v. City of Charlotte, 273 N.C. 293, 160 S.E.2d 18 (1968).

170. *See, e.g.*, FALLS CHURCH, VA., CODE § 19-1 (1974).

171. 273 N.C. 293, 160 S.E.2d 18 (1968).

which can be done with impunity under similar circumstances" in a barber shop or YWCA health club, for example, must not exist.[172] In *Kisley v. City of Falls Church,*[173] the Virginia Supreme Court expressed disagreement with the *Cheek* decision. Upholding a statute exempting barber shops and beauty parlors which offered massages to the scalp, face, neck or upper part of the body, the court noted that "the types of massages offered are also different" in that one of the massage parlors in the appeal offered "massages of 'every part of the body'."[174] The court also emphasized the different hours of operation, different advertising techniques and the ancillary character of massages to the primary purposes of barber shops and beauty parlors.[175] It is important to note that the exemption in *Kisley* did not extend to YMCA and YWCA establishments, which might offer massages not of the limited scope prescribed for barber shops or beauty parlors. The distinction between massage parlors and an exempted group would become less significant if the exempted group offered massages to the same areas of the body as those subject to the regulation. Thus, if a massage parlor operator, by choice or by law,[176] confined massages given to those areas massaged by operators within the exempted class, he might successfully challenge the exemptions conferred, notwithstanding the *Kisley* holding.

Another exemption almost uniformly carved out of massage ordinances is that granted to the healing arts.[177] This exemption, initially upheld in *Ex parte Maki,*[178] has been seldom challenged. The court in *Maki* reasoned that there were substantial distinctions between the moral trustworthiness of the physician and the massagist[179] as well as between the professions in general.[180] The sparseness of later case law on the distinction drawn in

172. 273 N.C. 293, 160 S.E.2d 18, 23 (1968).

173. 212 Va. 693, 187 S.E.2d 168, *appeal dismissed,* 409 U.S. 907 (1972).

174. *Id.* at 698, 187 S.E.2d at 172.

175. *Id.*

176. Many statutes contain prohibitions of genital contact. These ordinances remove a significant distinction which may have served as a basis of classification.

177. *See, e.g., Ex parte* Maki, 56 Cal. App. 2d 635, 133 P.2d 64 (1943).

178. *Id.*

179. 133 P.2d at 69. "The physician is obligated not only to adhere to the application of the most advanced methods and remedies in the art of healing but also to scorn immoral behavior and to denounce licentious practices. . . . [The massagist] has no professional standards to uphold. His endeavors are activated by only a personal zeal to promote his own prosperity." The *Maki* court also pointed out that the practice of medicine was already under state supervision. *Id.* 133 P.2d 69.

180. "The massage . . . is practiced by every mother in the land in the normal care of her children. Because it puts the infant to sleep or relaxes the fatigued laborer does not place it in the category of the arts of a physician any more than does applying hot towels to an aching back or an ice pack to a bruised body." *Id.*

Maki seems indicative of its acceptance.[181] This exemption is often phrased in terms of location rather than the doctor-patient relationship.[182] The validity of such an exemption for doctors and other health care professionals seems clear, especially in light of the rationale in *Maki*.[183]

2. *Qualifications*

As noted earlier,[184] because the regulation and licensing of massage parlors are accomplished through the police power, it is necessary that "any qualification have a rational connection with the applicant's fitness."[185] The Supreme Court distinguishes between the denial of a license to follow a particular profession by a licensing board[186] and the denial of a single job opportunity.[187] The granting of a license may vest a person with a property right which may not be revoked without following certain procedural safeguards.[188] Three distinct requirements have been imposed upon prospective licensees of massage parlors: skill and knowledge, health and character. The common denominator for their validity is that they must not be an unreasonable exercise of the police power.

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181. *Cf.* Smith v. Keator, 21 N.C.App. 102, 203 S.E.2d 411, *aff'd*, 285 N.C. 530, 206 S.E.2d 203 (1973), *appeal dismissed*, 419 U.S. 1043 (1974). In *Smith*, the court noted that massage was not an "art of healing" (and thus pre-empted by the state from local control) in spite of a ruling by the Commissioner of the Revenue that massagists had to obtain state licenses for those "practicing any professional art of healing for a reward or a fee." 203 S.E.2d at 415.

182. *See, e.g.*, ALEXANDRIA, VA. CODE § 20A-1 (1974); CHESAPEAKE CITY, VA., CODE § 12-15 (1974): "Excluded are the following: Hospitals, nursing homes, medical clinics, offices or quarters of duly licensed physicians, chiropractors, osteopaths. . . ."

183. One might question the insertion of nursing homes, for the doctor-patient relationship might not be present there. Such massages might be given without medical consultation. However, the logic of the *Kisley* decision might still allow for an exemption upon grounds other than this doctor-patient relationship essential in the *Maki* holding.

184. See discussion of classification schemes in text, Section IV. B. 1 *supra*.

185. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). "Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church." *Id.* at 239. Even in applying permissible standards, state officers "cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards or when their action is invidiously discriminatory." *Id.* The due process and equal protection clauses of the fourteenth amendment apply to the licensing of occupations. *Id.*; Douglas v. Noble, 261 U.S. 165 (1923).

186. Arnett v. Kennedy, 416 U.S. 134, 179 (1974) (plurality decision; opinion of White, J.); Willner v. Committee on Character, 373 U.S. 96 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957). *See also* Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

187. Board of Regents v. Roth, 408 U.S. 564 (1972). "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Id.* at 575.

188. Arnett v. Kennedy, 416 U.S. 134, 180 (1974) (opinion of White, J.).

Each massagist employed may be required to possess certain skills and knowledge.[189] Applicants may be required to attend school for training as a massagist.[190] However, the requirements must be reasonably necessary to protect the public from being misled or mistreated by incompetent massagists.[191] Although courts are extremely deferential with respect to skill requirements in general, they have been willing to strike down provisions which they believe required knowledge or skill only ancillary to the occupation involved.[192] The Florida Supreme Court in *Snedeker v. Vernmar, Ltd.*[193] struck down skill and knowledge requirements of massagists as applied to operators of mechanical tables which provided "passive exercise" of muscles. Although there was a chance of injury to persons with preexisting abnormalities, the court held that the requirement of "not less than 600 hours of instruction in physiology, anatomy, massage, hydrotherapy and other techniques of the trade"[194] would not ". . . enable an operator to diagnose such conditions or eliminate that risk."[195] Thus the course in technical training ". . . would not make the appellees more competent in their particular occupation . . . ."[196] To successfully challenge any massage skill or knowledge requirement, it is necessary to establish that the requirement does not further the competency of the massagist in his or her occupation.[197] Whether the challenge can be successful will depend upon

189. Rogers v. Miller, 401 F. Supp. 826 (E.D. Va. 1975). The court upheld a requirement that a massagist complete a course of study in body massage in connection with an approved school of instruction. A "course of study" was defined as one thousand hours of study. Five hundred hours must be instructional hours. The additional five hundred hours may be accomplished simultaneously with "on the job training."

190. *Id. Cf.* Douglas v. Noble, 261 U.S. 165 (1923) (dentist required to attend dental school); Montejano v. Rayner, 33 F. Supp. 435 (D. Idaho 1939) (barbers required to attend barbering school and undergo apprenticeship).

191. *Cf.* Montejano v. Rayner, 33 F. Supp. 435, 439 (D. Idaho 1939).

192. Thus, requiring a funeral director to meet an embalmer's qualifications by attending a school in mortuary science has been struck down by several courts. Cleere v. Bullock, 361 P.2d 616 (Colo. 1961); Gholson v. Engle, 9 Ill. 2d 454, 138 N.E.2d 508 (1956). While it is permissible to require would-be barbers to have knowledge of bacteriology and physiology of the muscles and nerves of the neck and head, Sellers v. Philip's Barber Shop, 46 N.J. 340, 217 A.2d 121 (1966), it is unreasonable to require barbers to have knowledge of "massaging and manipulating the muscles of the upper part of the body and knowledge of diseases of the nails of a person." Montejano v. Rayner, 33 F. Supp. 435, 439 (D. Idaho 1939).

193. 151 So. 2d 439 (Fla. 1963).

194. *Id.* at 440.

195. *Id.* at 442.

196. *Id.*

197. *See* note 185 *supra*. The court in Rogers v. Miller, 401 F. Supp. 826 (E.D. Va. 1975), rejected attacks based upon the unconstitutional vagueness of the statute. In examining whether the one thousand hours required in training was excessive, the court compared this requirement with the training requirement for barbers (1,248 accredited training hours).

the specifics of the given case. Insofar as skill, schooling and knowledge requirements in similar occupations have been upheld,[198] overcoming the presumption of validity afforded these requirements will be difficult.

Health requirements may also be imposed upon the licensee. Most often these have taken the form of denying applications of those who have "contagious or communicable diseases" at the time of licensing.[199] Furthermore, if while licensed, the licensee contracts a communicable disease, he or she is often prohibited from continuing work as a massagist.[200] A locality may require a physical examination in order to insure these provisions are followed.[201] The test for such health requirements is, again, whether or not they are reasonably related to the health, safety and welfare of the community. It is noteworthy that such health requirements for massage parlors have not been seriously questioned or struck down by courts passing upon ordinances containing them.[202]

Character fitness of the applicant may also be required by licensing authorities. In addition to the concern it has for totally precluding a person's opportunity to follow his or her chosen occupation,[203] the Supreme Court has determined that procedural due process requirements apply where an administrative determination may damage one's "standing and associations in one's community."[204] Because reputation is integral to the concept of liberty, "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[205] Thus procedural due process is necessary when a board's refusal to license is based upon a finding of inadequate moral character.[206]

Thus, the court was unwilling to hold that the requirement did not further the expertise of the massagist.

198. Montejano v. Rayner, 33 F. Supp. 435 (D. Idaho 1939); Sellers v. Philip's Barber Shop, 46 N.J. 340, 217 A.2d 121 (1966). *See* Valley Health Systems, Inc. v. City of Racine, 369 F. Supp. 97 (E.D. Wis. 1973) where the court did not even discuss the requirement of graduation from a massage school.

199. ALEXANDRIA, VA., CODE § 20A-3 (1974); JAMES CITY COUNTY, VA., Ord. 87, § 9-113.1-10 (May 12, 1975); NORFOLK, VA., CODE § 7.1-18 (1974); HAMPTON, VA., CODE § 22.1-9 (1972).

200. ALEXANDRIA, VA., CODE § 20A-10 (1974); HAMPTON, VA., CODE § 22.1-9 (1972).

201. NORFOLK, VA., CODE § 7.1-18 (1974).

202. *See, e.g.*, Hogge v. Hedrick, 391 F. Supp. 91 (E.D. Va. 1975).

203. *See* note 186 *supra*.

204. Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

205. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Hogge v. Hedrick, 391 F. Supp. 91, 110 (E.D. Va. 1975). *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564 (1973), where decisions were based upon the premise that lack of moral character was not instrumental in the administrative determinations.

206. *Id.*

Many localities rely upon what might be termed "legislative litmus tests" in making the determination of character fitness. Such litmus tests involve a determination by the legislative body writing the ordinance that certain factors shall conclusively demonstrate the fitness or lack of fitness of an individual to pursue a particular occupation.[207] Factors upon which the legislative body places such extreme importance must, however, be reasonably related to the applicant's fitness.[208] A frequent factor given conclusive status is the commission of a crime involving moral turpitude. Conclusionary determinations of lack of fitness can be placed at various stages of prosecution for a crime: arrest,[209] the filing of formal charges,[210] the plea of nolo contendere[211] and conviction.[212]

In *Schware v. Board of Bar Examiners*,[213] the Supreme Court assessed the reasonableness of these litmus tests of criminal prosecution stages. Although mere arrest seemed to be of little probative value, the filing of formal charges or conviction upon those charges carried more weight.[214] The test appears to be whether it is reasonable to conclude that the criminal activity can be considered determinative of the applicant's character fitness at the time of the licensing application.[215] Although the Supreme Court is willing to defer to reasonable legislative litmus tests, it

207. *See, e.g.*, HENRICO CO., VA., CODE § 17-11(b) (1974): "The Chief of Police shall issue the permit when the applicant has fully complied . . . [with payment of fees and medical examination] unless . . . (b) The applicant has, within five (5) years immediately preceding the date of the filing of the application, been convicted of or pleaded nolo contendere to or forfeited bond on any felonious criminal charge or any misdemeanor criminal charge involving theft of property, assault or battery, drugs, or violations of Article I of Chapter 4 of Title 18.1 of the Code of Virginia."

208. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957); Baker v. Columbus Municipal Sep. School Dist., 329 F. Supp. 706 (N.D. Miss. 1971).

209. Schware v. Board of Bar Examiners, 353 U.S. 232 (1972). "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. . . . When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated." *Id.* at 241.

210. *Id.*; J.S.K. Enterprises, Inc. v. City of Lacey, 6 Wash. App. 43, 492 P.2d 600 (1971) (if licensee is charged with prostitution, then the board has authority to revoke the license).

211. Berardi v. Rutter, 23 N.J. 485, 129 A.2d 705 (1957); 89 A.L.R. 540, 606 *et seq.* (1963). The general rule is that legislative litmus tests relying on nolo contendere pleas are valid.

212. *See, e.g.*, HENRICO CO., VA., CODE § 17-11(b) (1974).

213. 353 U.S. 232 (1972).

214. *Id.* at 241 *et seq.* The Supreme Court thought that the significance of the filing of formal charges or conviction was to some degree dependent upon how long ago the crime occurred and the nature of the crime itself. *Id.* at 243.

215. *In re* Dreier, 258 F.2d 68 (3d Cir. 1958). "[D]istrict court should . . . grant it [the license] unless . . . [the] applicant is not presently of good moral or professional character." *Id.* at 70.

will not allow arbitrary standards to be used in the granting or denial of licenses.[216] Thus, statutes which barred a would-be massagist from a license upon the basis of a criminal conviction without considering when the conviction occurred[217] or the nature of the criminal act might be successfully opposed. One court has enjoined the enforcement of a provision which would prohibit the issuance of a massage operator's license to any corporation with a stockholder owning more than 5% of the stock who has a significant criminal record.[218]

Ordinances may also rely upon a determination by an administrative official of the applicant's character independent of such litmus tests. Procedural due process is essential in these instances.[219] There should be an opportunity for the applicant to submit evidence, cross-examine and know the reasons for the administrative determination upon the application.[220] The issue in the administrative official's deliberations should be whether the applicant is presently of sufficient character; generally, courts have held that these officials cannot make a decision based upon one factor alone (*e.g.*, past criminal convictions) but rather must consider all relevant evidence in determining present fitness.[221] What may or may not be required of an applicant is often a matter of court discretion.[222]

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216. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). " . . . [A]ny qualification must have a rational connection with the applicant's fitness. . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church." *Id.* at 239.

217. *See, e.g.*, ALEXANDRIA, VA., CODE § 20A-3.2 (1974) (no time limit on sexual offense; absolute bar to license).

218. Hogge v. Hedrick, 391 F. Supp. 91 (E.D. Va. 1975), enjoining § 17-6(b) of the Henrico County, Virginia Code: The Chief of Police shall reject any applicant who has within five years been "convicted of or pleaded nolo contendere to or forfeited bond on any felonious criminal charge or any misdemeanor criminal charge involving theft of property, assault or battery, drugs. . . . If the applicant is a corporation or a partnership, this provision shall apply to each stockholder or partnership owning or having in excess of 5% interest of said corporation or partnership." HENRICO COUNTY, VA. CODE § 17-6(b) (1974).

219. *See* note 153 *supra*.

220. Hogge v. Hedrick, 391 F. Supp. 91, 109-10 (E.D. Va. 1975), provides a valuable discussion of the reasons for and requirements of procedural due process in massage parlor licensing.

221. Schware v. Board of Bar Examiners, 253 U.S. 232 (1957); *In re* Dreier, 258 F.2d 68 (3d Cir. 1958); Tanner v. De Sapio, 150 N.Y.S.2d 640 (S. Ct. 1956).

222. *See* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), where the Court determined that "moral character" may not be as expansive a term as the Board urged. Courts have considered such factors as reputation, Goldberg v. Barger, 37 Cal. App. 3d 987, 112 Cal. Rptr. 827 (1974); honesty, Hora v. City and County of San Francisco, 233 Cal. App. 2d 375, 43 Cal. Rptr. 527 (1965) (massage parlor case); and possible crimes for which the person was not convicted, Jenkyns v. Board of Education, 294 F.2d 260 (D.C. Cir. 1961).

Two massage parlor cases in which a denial of a license was being tested serve as examples of how courts have approached administrative licensing determinations. In *Hora v. City and County of San Francisco,*[223] the court rejected the appeal of a husband for a massage parlor license because his wife, the former licensee, had been convicted of "morals charges" on two occasions. In *Sultan Turkish Bath, Inc. v. Board of Police Commissioners,*[224] another court refused to overturn the administrative revocation of a license to a massage parlor operator. Although the court took note of the many sexual crimes of homosexuality and sodomy which occurred in the parlor, the court was more concerned with the unwillingness of the operator to take adequate steps to prevent their reoccurrence.[225]

In summary, character evaluation by administrative officials raised serious due process concerns. Although courts will pay deference to administrative determinations upon qualifications of an applicant, it will be required that the standards imposed be reasonably related to an applicant's fitness, that administrative discretion be limited, and that certain procedural safeguards be employed in the licensing of massage parlor operators or technicians when "liberty" or "property" interests are involved.

3. *Business Regulation*

Since the Supreme Court has indicated that almost total deference is due a rational legislative choice of the goals and methods of economic and health regulation,[226] there have been virtually no significant challenges to local ordinances which regulate these aspects of massage parlor operations.

In *Saxe v. Breier,*[227] an ordinance which limited the daily hours of operation of a massage parlor to between 8:00 a.m. and 10:00 p.m. was considered to be a legitimate exercise by a municipality of its police powers, as was a provision which required keeping a record of the date and hour of

223. 233 Cal. App. 2d 375, 43 Cal. Rptr. 527 (1965). The court rejected petitioner's pledge that his wife would be uninvolved in the operation of the massage parlor and reasoned that his wife's two convictions reflected negatively upon his character. 233 Cal. App. 2d 375, 43 Cal. Rptr. 527, 530. Good character "means not only freedom from arrests or accusations, but also vigilance to protect others closely associated with the applicant from wrongdoing in their occupation." *Id.*

224. 169 Cal. App. 2d 188, 337 P.2d 203 (1959).

225. 169 Cal. App. 2d 188, 337 P.2d 203, 203. Although the operator had hired a watchman and provided "peepholes" by which the watchman might prevent continual wrongdoing, the court was concerned with the fact that the operator had told the watchman not to monitor his patrons' activities closely. *Id.* It is this tolerance of the illegal activities to which the court pointed in affirming the administrative revocation. *Id.*

226. Ratner, *The Function of the Due Process Clause,* 116 U. PA. L. REV. 1048 (1968).

227. 390 F. Supp. 635 (E.D. Wis. 1974).

each massage, the name and address of the patron and the name of the administering technician.[228] In *Valley Health Systems, Inc. v. City of Racine*,[229] the court held that typical provisions requiring the maintenance of minimum physical plant standards and provisions for individual locker, dressing and shower rooms for male and female patrons were reasonable.

Despite the courts' general acceptance of the reasonableness of these types of regulations, not all of these ordinances have gone unchallenged. For example, in *Hogge v. Hedrick*[230] the court suggested that the county had failed to provide a rational basis for the "unique" provision which required maintenance of records of patrons. The court was troubled by the fact that this requirement placed a greater burden upon the massage establishments than other commercial establishments.[231] The *Hogge* court also suggested that the requirements that the main entrance doors remain unlocked may not be rationally related to the furtherance of the health and safety purposes of the ordinance.[232]

An examination of local ordinances which have been enacted to regulate the operations of business establishments and which have been unsuccessfully challenged in the courts leads to the inevitable and accepted conclusion that most municipal ordinances coming to the courts bring with them a presumption of reasonableness and constitutionality.[233] Further, health measures, like business regulations generally, have evoked the most extreme judicial deference in recent years.[234] Therefore, challenges to their constitutionality may normally be successful only if by clear and convincing evidence the ordinance has no reasonable tendency to preserve the public health and morality.

C. Fees and Taxes

As previously noted,[235] the locality can exercise only that power which has been delegated to it by the state. Any fees which are levied against a

228. *Id.* at 636.

229. 369 F. Supp. 97 (E.D. Wis. 1973).

230. 391 F. Supp. 91, 100 (E.D. Va. 1974).

231. *Id.* It may be argued that record-keeping requirements are reasonably related to the state's interest in tracing the sources of contagious disease; but, as the court noted, this same consideration should require localities to insist that barber shops, for example, providing massages maintain similar records. At least on this basis, the distinction drawn in Kisley v. City of Falls Church, 212 Va. 693, 698, 187 S.E.2d 168, 172 (1972), between barber shops and massage parlors would appear to lack validity. *See* section IV. B. 1. *supra.*

232. 391 F. Supp. at 107.

233. *See generally* 1 C. Antieau, Municipal Corporation Law chs. V and VI (1974).

234. Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 32 (1972). *See* section III. C. 1 *supra.*

235. *See* section II. *supra.*

particular occupation must be examined within this context. It is important to distinguish the purposes behind any fee. A fee may be invalid if a locality was given authority to impose fees only for certain purposes to the exclusion of others.[236] Different restrictions may result from a determination that a particular fee has been levied for taxation rather than to recoup regulatory costs.[237] The courts have applied various tests in determining what is a regulatory fee and what is a revenue measure.[238]

1. *Regulatory Fees*

A regulatory fee[239] is one which is imposed for the purpose of defraying the cost of processing and inspecting regulated businesses. It is generally held that the grant of authority to regulate a given business carries with it

236. Weber Basin Home Builders Ass'n. v. Roy City, 26 Utah 2d 215, 487 P.2d 866 (1971). *Cf.* Rogers v. Miller, 401 F. Supp. 826 (E.D. Va. 1975) (massage parlor case).

237. City of Columbus v. Migqdadi, 195 N.E.2d 923 (Columbus Mun. Ct. 1963); City of Lovington v. Hall, 68 N.M. 143, 359 P.2d 769 (1961).

238. Courts use different language in describing the threshold between a regulatory and revenue measure. Many courts rely upon an examination of the legislative purpose as a means of determining which power is being exercised. State v. Jackson, 60 Wis. 2d 700, 211 N.W.2d 480 (1973); Weber Basin Home Builders Ass'n. v. Roy City, 26 Utah 2d 215, 487 P.2d 866 (1971). Some courts have held that the revenues from a regulatory measure which exceed the actual cost of the administration and enforcement of the regulations are to be considered as a tax. Metropolitan D.C. Refuse Haulers Ass'n v. Washington, 479 F.2d 1191 (D.C. Cir. 1973). Some courts have suggested that mere excess revenue above the cost of regulation does not necessarily invalidate the excess fees as a regulatory measure. Village of Roxana v. Costanzo, 41 Ill. 2d 423, 243 N.E.2d 242, 243 (1968) ("[T]he mere probability that the license fee may exceed [the cost of regulation] . . . will not render the ordinance invalid as a revenue measure."); City of Beloit v. Lamborn, 182 Kan. 288, 321 P.2d 177, 182 (1958); Garden State Racing Ass'n v. Township of Cherry Hill, 42 N.J. 454, 201 A.2d 554 (1964); Silco Automatic Vending Co. v. Puma, 108 N.J. Super. 427, 261 A.2d 674, 676 (1970); City of Chattanooga v. Veatch, 304 S.W.2d 326 (Tenn. 1957). *Cf.* Postal Tel.-Cable Co. v. Borough of Taylor, 192 U.S. 64, 70 (1904) ("If it were possible to prove in advance the exact cost that sum would be the limit of the law."). If it is clear that there are no regulation costs or conditions attached at all, then nearly all courts would consider any licensing fee imposed as a revenue measure, regardless of its stated purpose or how it is identified. City of Florissant v. Eller Outdoor Advertising Co., 522 S.W.2d 330, 332 (Mo. Ct. App. 1975); City of Lovington v. Hall, 68 N.M. 143, 359 P.2d 769 (1961). One of the few definitive statements which can be made with impunity concerning the distinction between regulatory and revenue fees is that the courts have achieved little uniformity in making the distinction. The need to make the distinction dissipates when a municipality having authority to issue both fees does so in one assessment. Rogers v. Miller, 401 F. Supp. 826 (E.D. Va. 1975).

239. The terms "licensing fee" or "licensing tax" normally are used to describe fees imposed to recover costs involved in a system of regulation. Readers of ordinances and cases should be aware, however, that many courts and ordinances use these terms to describe occupational revenue measures as well. For this reason, the term "regulatory fee" is used in this note.

the power of localities to impose regulatory fees.[240] The party questioning the regulatory fee, generally presumed to be reasonable, bears the burden of showing its unreasonableness.[241] In determining the reasonableness of the relationship between the cost incurred and the fee imposed, most courts have allowed the locality to include indirect costs of administering and enforcing the police regulation[242] and additional burdens the business might impose upon the community's resources.[243] The majority of courts seems to hold that a mere excess of revenue over regulatory costs does not invalidate the measure.[244]

It is generally held that a licensing fee must not be so high as to be prohibitory or confiscatory of the business regulated.[245] Some courts go so far as to suggest this to be true even if the cost of the regulation is commensurate with the fee.[246] The fact that an individual businessman cannot

240. ABC Sec. Serv. Inc. v. Miller, 514 S.W.2d 521 (Mo. 1974). *See generally* 9 E. McQUILLIN, MUNICIPAL CORPORATIONS § 26.28 (3d rev. ed. 1969).

241. Monarski v. Alexandrides, 80 Misc. 2d 260, 362 N.Y.S.2d 976, 982 (1974); Commonwealth v. Winfree, 408 Pa. 128, 182 A.2d 698, 703 (1962) ("doubt should be resolved in favor of the reasonableness of the fee").

242. Merrelli v. City of St. Clair Shores, 355 Mich. 575, 96 N.W.2d 144 (1959).

243. Garden State Racing Ass'n. v. Township of Cherry Hill, 42 N.J. 454, 201 A.2d 554 (1964). These costs, one court noted, "must be established by reasonably accurate accounting procedures and not . . . by mere 'guestimate' . . . unsupported by other than speculation." Merrelli v. City of St. Clair Shores, 355 Mich. 575, 96 N.W.2d 144, 150 (1959). Yet it is clear that it is "not essential that the fee constitute the exact or precise expense." ABC Sec. Serv. Inc. v. Miller, 514 S.W.2d 521 (Mo. 1974); *accord*, Opinion of the Justices, 290 A.2d 869 (N.H. 1972).

244. *See* note 238 *supra*. Courts use different language in describing the threshold between a regulatory and revenue measure. Opinion of the Justices, 290 A.2d 869, 872 (N.H. 1972) ("clearly and materially exceed"); City of Beloit v. Lamborn, 182 Kan. 288, 321 P.2d 177 (1958) ("flagrantly excessive"); City of Richmond Heights v. LoConti, 19 Ohio App. 2d 100, 250 N.E.2d 84, 94 (1969) ("wholly out of proportion to any burden imposed upon the municipality"). *Cf.* Postal Tel.-Cable Co. v. Borough of Taylor, 192 U.S. 64, 70 (1904). A licensing tax imposed under the guise of the police power for the purpose of producing revenue will be struck down. City of Georgetown v. Morrison, 362 S.W.2d 289 (Ct. App. Ky. 1962); City of Lovington v. Hall, 68 N.M. 143, 359 P.2d 769 (1961); Weber Basin Home Builders Ass'n. v. Roy City, 26 Utah 2d 215, 487 P.2d 866 (1971). In addition to examining any excess in revenues, some courts have compared the fee imposed upon the particular licensees similarly circumstanced. Gilbert v. Town of Irvington, 20 N.J. 432, 120 A.2d 114 (1956).

245. *See* 3 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 24.11 (1974).

246. *Id.* One court has noted that licensing itself contemplates the existence of the business to be regulated. City of Washington v. Thompson, 160 N.E.2d 568 (C.P. Ohio 1949). Some older opinions draw a distinction between occupations harmful in themselves (which may be prohibited through excessive licensing fees) and those activities which are not harmful (and cannot be prohibited in such a fashion). *See* cases cited in Section II. *supra*. As the comments in that section and later cases indicate, the vitality of this distinction has been sharply curtailed.

make a profit does not make a regulatory fee prohibitive, so long as the fee does not prohibit that class of business activity in the community.[247] Hence, a regulatory fee (if reasonably related to the cost of regulating the enterprise) may be so high as to prevent some persons from entering the business or even drive out small entrepreneurs while enabling larger businesses to survive.[248] Although regulatory fees may not be set at such a prohibitive level as to drive all massage parlors out of business, these fees might still function as a practical deterrent to many massage parlor operators if they reasonably relate to the costs of administering the regulations imposed.

2. *Business Taxes*

Courts approach tax measures quite differently than they approach regulatory fees. A locality may ordinarily impose occupational taxes upon businesses for the purpose of raising revenue. Courts require a locality be given by the state an *express* grant of authority to impose such revenue measures and are unwilling to imply such authority from the state.[249] Once proper authoriztion is shown, courts accord taxation extreme deference. The Supreme Court in *Madden v. Kentucky*[250] and *Lehnhausen v. Lake Shore Auto Parts Co.*[251] established that the presumption of constitution-

247. Tom's Tavern Inc. v. City of Boulder, 526 P.2d 1328 (Colo. 1974); Springston v. City of Fort Collins, 518 P.2d 939 (Colo. 1974) (proof that tax is not prohibitive is that some businesses have paid the tax and are still open); City of Miami v. I.C. Sales, Inc., 276 So. 2d 214 (Fla. Dist. Ct. App. 1973).

248. *Id.*

249. 2A C. ANTIEAU, MUNICIPAL CORPORATION LAW § 21.00 (Supp. 1975); City of Plymouth v. Elsner, 28 Wis. 102, 135 N.W.2d 799, 802 (1965) ("clear and express language" of the grant is required; doubt to be resolved in favor of the person challenging the tax.).

250. 309 U.S. 83 (1940).

251. 410 U.S. 356 (1973). The Court noted that, where taxation is concerned and no specific federal right apart from equal protection is involved, the state has "large leeway" in making classifications. *Id.* at 359. Mr. Justice Douglas, speaking for a unanimous Court, quoted from Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526-27 (1959), which held that, although states were subject in tax measures to the equal protection clause, they may "impose different specific taxes upon different trades and professions" unless such taxes are "palpably arbitrary" or "invidious." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359-60 (1973). The cases cited by the Court indicated the wide latitude given to the states in tax measures. *See* Madden v. Kentucky, 309 U.S. 83 (1940), upholding a discrepancy in tax between money on deposit in the state and outside the state. The Court noted that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Id. See also* Lawrence v. State Tax Commission, 286 U.S. 276 (1932), upholding a classification distinction between individuals and corporations obtaining revenue outside the state. The Second Circuit interpreted the *Lehnhausen* case as sustaining the tax "although classifications were not perfectly related to the stated purpose." Becker v. Levitt, 489 F.2d 1087 (2d Cir. 1973).

ality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. In this regard, taxes do not need to be related to the cost of any regulatory measure imposed upon a given business.[252] Exactly how onerous the localities can make these fees seems unclear in light of dicta in the Supreme Court's decision in *Lehnhausen*.[253] In holding the classification scheme valid, Mr. Justice Douglas noted: "State taxes which have the collateral effect of restricting or even destroying an occupation or a business have been sustained, so long as the regulatory power asserted is properly within the limits of the federal-state regime created by the Constitution."[254] The Court in *A. Magnano Co. v. Hamilton*[255] had upheld Washington State's tax upon oleomargarine while exempting butter.[256] The oleomargarine manufacturer had claimed that the tax was fashioned in order to make its costs of manufacturing oleomargarine prohibitive. The Supreme Court rejected the appellant's argument by noting that a tax will be struck down "[o]nly if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power . . . ."[257] Even though it destroys "particular occupations or businesses" it will be upheld unless "its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise . . . ."[258] The Court determined that the primary inquiry is not whether a lawful occupation was destroyed by the tax but whether the primary purpose of the tax was to accomplish the occupation's destruction.[259]

In 1974 the Supreme Court expressly reaffirmed the *Magnano* reasoning

252. Rogers v. Miller, 401 F. Supp. 826 (E.D. Va. 1975); Springston v. City of Fort Collins, 518 P.2d 939 (Colo. 1974).

253. 410 U.S. 356 (1973).

254. *Id.* at 360. The Court appears to be making reference to the requirement that no state tax burden interstate commerce.

255. 292 U.S. 40 (1934).

256. "It is obvious that the differences between butter and oleomargarine are sufficient to justify their separate classification" for taxation purposes. *Id.* at 43.

257. *Id.* at 44.

258. *Id.*

259. "Taxes are occasionally imposed . . . in the discretion of the legislature on proper subjects with the *primary* motive of obtaining revenue from them and with the *incidental* motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment." *Id.* at 46, *quoting* Child Labor Tax Case, 259 U.S. 20, 38 (1922) (emphasis added).

in *City of Pittsburgh v. Alco Parking Corp.*[260] In *Alco Parking*, the Pennsylvania Supreme Court had ruled that a 20% tax upon the gross receipts of private parking operators amounted to an unconstitutional taking of their property in light of the fact that it gave a definite advantage to city-owned lots not subject to the tax.[261] Nine of the fourteen operators made no profit and the remainder had only marginal earnings.[262] The lower court had held that these facts reflected the exercise of a "different and forbidden power" other than taxation (the confiscation of property).[263] The Supreme Court unanimously reversed. The Court "has consistently refused . . . to hold a tax . . . unconstitutional because it renders a business unprofitable."[264] Even if the revenue resulting had been insubstantial or the revenue purpose only secondary, the Supreme Court indicated it would still "not necessarily treat this exaction as anything but a tax . . ." entitled to a presumption of validity.[265]

Thus, the Supreme Court seems to have rejected the argument that a legitimate business cannot be prohibited through taxation. The Court seems unwilling to venture too far beyond the stated goals of the tax ordinance. That a tax is designed to deter a given business in addition to raising revenue will not cause the Supreme Court to deem the measure defective.[266] Anything short of confiscatory taxes will most likely be approved under the *Magnano* and *Alco Parking* rulings if there is an intent to derive revenue accompanying the intent to discourage a business.[267] The Supreme Court in the *Magnano-Alco Parking* line of cases indicates that analysis of the effect of a tax measure upon a legitimate business is not important in determining a tax's validity. The primary inquiry appears to

260. 417 U.S. 369 (1974).
261. *Id.* at 373.
262. *Id.* at 372.
263. *Id.* at 375.
264. *Id.* at 373.
265. *Id.* at 375.
266. *Id.*
267. *Id.* An exception to this line of cases would be prohibition of occupations or activities involving first amendment concerns. Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) (religion); Grosjean v. American Press Co., 297 U.S. 233 (1936) (tax intended to discourage newspapers with a large circulation). Even prohibitive taxes will be entertained if the tax could reasonably be viewed as a revenue measure as well, notwithstanding the views of lower courts. *See* cases cited in 2A C. ANTIEAU, MUNICIPAL CORPORATION LAW § 21.10 (1974); Tom's Tavern Inc. v. City of Boulder, 526 P.2d 1328 (Colo. 1974); Springston v. City of Fort Collins, 518 P.2d 939 (Colo. 1974); Garden Spot Market v. E.J. Byrne, 378 P.2d 220 (Mont. 1963). Some courts distinguish between the prohibition of a harmless occupation and one harmful in itself in determining whether a locality may issue prohibitive taxes. *See* the discussion of this in Section II. *supra*.

be one of motive analysis.[268] If it is clear that the measure was designed with the sole (or primary) purpose of eradicating massage parlors, such a measure would reflect the exercise of a "different and forbidden power" other than taxation[269] and thus be invalid. This raises several questions. Are the courts bound by the explicit purposes set forth in the tax ordinance, as *Sonzinsky v. United States*[270] suggests? If courts cannot reason the motive from the effect a tax measure has,[271] how is such motive to be determined aside from the stated purposes within the ordinance? Is it important to distinguish primary and secondary motives? The answers to these questions remain unclear.

Massage parlor operators when faced with a tax which might be prohibitive will not be successful by merely establishing that the tax effectively prohibits the exercise of a legitimate occupation. To challenge successfully such a tax, it is necessary to rebut the presumption that the measure is intended as a revenue measure. Courts under the guidelines specified in *Alco Parking* may consider various factors in determining whether the presumption favoring the validity of the tax measure has been overcome. If the tax results in substantial revenue, it is more likely to be viewed as a revenue measure.[272] That a tax produces little revenue is not determinative, however.[273] The fact that an additional motive for the tax is the intent to discourage the operation of massage parlors is not significant.[274] It is less clear how a court should hold if the primary motive of the legislation is to discourage a business.[275] Although the elimination of massage parlors

268. But contrast the Supreme Court's statement in Sonzinsky v. United States, 300 U.S. 506, 513 (1937), that "[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."

269. A. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934).

270. 300 U.S. 506, 513 (1937).

271. *Id. See also* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 375 (1974). (There "are several difficulties with [the assertion that the tax represented a confiscation of property]. . . . The ordinance on its face recites that its purpose is 'to provide for the general revenue by imposing a tax'. . . .").

272. City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 375 (1974).

273. *Id.* The Court referred approvingly to Sonzinsky v. United States, 300 U.S. 506 (1937), which affirmed the validity of the National Firearms Act. This Act imposed heavy taxes upon those who sold or manufactured firearms. The Court noted that the Act produced "some revenue" in that twenty-two persons in the entire United States paid the $200 fee and therefore it was a valid revenue measure.

274. City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 375 (1974).

275. In *Magnano*, the Court seems to indicate that such a primary motive would render the tax invalid. "Taxes are occasionally imposed . . . in the discretion of the legislature on proper subjects with the *primary* motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous." A. Magnano Co. v. Hamilton, 292 U.S. 40, 46 (1934) (emphasis added). In City of Pittsburgh v. Alco

through taxation is a question upon which there is little case law,[276] the principles established in *Magnano, Lehnhausen,* and *Alco Parking* clearly indicate that massage parlor operators would have great difficulty in challenging any taxes levied against them once the state's grant of the power of taxation to the locality has been established.

D. Administrative Warrantless Searches

As an incident to a pervasive massage parlor regulatory scheme, a local ordinance may authorize officials to conduct routine inspections during business hours.[277] The constitutional problems associated with the free right of entry into the premises of a licensed business by public officials for purposes of inspection have been dealt with by the Supreme Court in a frequently inconsistent manner.[278] Before examining those cases dealing with warrantless searches of massage parlors, some general comments on the nature of the constitutional issues involved should be useful.[279]

In *Frank v. Maryland,*[280] the Supreme Court recognized a distinction between criminal searches and administrative investigations in upholding

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Parking Corp., 417 U.S. 369, 375 (1974), the Court indicated that the secondariness of the revenue motive would not necessarily indicate that the tax was anything other than a tax measure. "So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes can not invalidate Congressional action." Hampton & Co. v. United States, 276 U.S. 394, 412-13 (1928).

276. Rogers v. Miller, 401 F. Supp. 826 (E.D. Va. 1975), upholding a $5,000 tax upon massage parlors.

277. *See, e.g.,* Henrico Co., Va., Code ch. 17, art. vi. § 17-20 (1974) which reads:

> For purposes of conducting routine inspections, officials of the County's Office of Building Construction and Inspections, the Department of Public Health, and the Division of Police shall have the right of entry into the premises of any massage establishment during the hours such massage establishment is open for business. It shall be unlawful for any person to hinder, delay, prevent or refuse to permit any lawful inspection or investigation of a massage establishment by any such officer.

278. Sonnereich & Pinco, *The Inspector Knocks: Administrative Inspection Warrants Under an Expanded Fourth Amendment,* 24 Sw. L.J. 418, 420 (1970).

279. For a more thorough discussion of the constitutional problems associated with the administrative warrantless search see generally Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to Camara and See?,* 50 Wash. L. Rev. 341 (1975); Sonnereich & Pinco, *The Inspector Knocks: Administrative Inspection Warrants Under an Expanded Fourth Amendment,* 24 Sw. L. J. 418 (1970); Comment, *Administrative Inspection Procedures Under the Fourth Amendment—Administrative Probable Cause,* 32 Albany L. Rev. 155 (1967); Note, *Warrantless Searches of Licensed Businesses,* 22 Baylor L. Rev. 268 (1970); Comment, *Administrative Inspection Without a Warrant: Camara v. Municipal Court and See v. Seattle,* 42 Conn. B.J. 255 (1968); Note, *Inspections by Administrative Agencies: Clarification of the Warrant Requirement,* 49 Notre Dame Law. 879 (1974).

280. 359 U.S. 360 (1959).

a fine for refusal to permit a public health inspector to enter a private dwelling.[281] In 1967, *Frank* was overturned by *Camara v. Municipal Court*[282] which extended the fourth amendment warrant requirement to area inspections of private dwellings to enforce health ordinances. In the companion case of *See v. City of Seattle*,[283] the warrantless inspection was determined to be also unacceptable in connection with any private area of a commercial establishment.

The Court has limited its formulation of the warrant requirement in connection with administrative inspections by carving out a few broad exceptions.[284] *Camara* itself excepted from the requirement inspections that were consented to[285] or accompanied by circumstances that made it impractical for the official to obtain a warrant[286] and in *See* the Court was careful to note that it did not "imply that business premises may not reasonably be inspected in many more situations than private homes."[287] In *Colonnade Catering Corp. v. United States*,[288] the Court held that a liquor dealer could be fined for refusing entry to inspecting federal agents since liquor dealers under state law have traditionally been subject to

281. Despite that Court's reliance upon the distinction between criminal and administrative search, the Supreme Court had made many statements in the past suggesting that the fourth amendment is not limited in its application to criminal search only. For example, in Weeks v. United States, 232 U.S. 383, 391-92 (1914), the Court said, "The effect of the Fourth Amendment is . . . to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not . . . ."

Justice Douglas argued in his dissent in *Frank* that warrantless inspections might be used by the police in collusion with inspectors to search for evidence of a crime, and further, that an individual's right of privacy should not be subject to discretionary abuse by the administrative official in the field. 359 U.S. at 374.

282. 387 U.S. 523 (1967).

283. 387 U.S. 541 (1967).

284. This may be in response to lower courts' arguments that the stringent requirements of the criminal law in regard to warrants should not be made applicable to administrative inspections. *See, e.g.*, United States v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir. 1970); United States v. Hammond Milling Co., 413 F.2d 608 (5th Cir. 1969); United States v. Greenberg, 334 F. Supp. 364 (W.D. Pa. 1971), and to the recognition that such application might frustrate the administrative agencies in their attempt to preserve the public health, safety and welfare through administrative inspection. Note, *Inspections by Administrative Agencies: Clarification of the Warrant Requirement*, 49 NOTRE DAME LAW. 879 (1974).

285. 387 U.S. at 539-40.

286. *Id.* at 539. By its examples, the Court indicated that the definition of such "emergency" circumstances would be more liberally construed than in a criminal context.

287. 387 U.S. at 546-47.

288. 397 U.S. 72 (1970).

inspection.[289] *United States v. Biswell*[290] subsequently laid to rest any suspicions that *Colonnade* may have been *sui generis* in that it dealt with a state liquor licensing program that had a tradition of warrantless searches.[291] In rejecting the idea that a warrantless search could be justified on the basis of the licensee's unique historical treatment, the Court may have paved the way for free right of entry into the premises of any heavily regulated business.[292] However, it is clear that *Biswell* also introduced limitations upon officials' free right of entry.[293]

Juxtaposing the exceptions provided for licensing programs in *See* with the reasoning of *Biswell* that warrantless inspections are permissible when exigencies so dictate and the statute is limited in scope, it is difficult to know if a licensed business such as a massage parlor now has greater protection from free right of official entry than it did after *Frank*. Conceivably a state may assert that a massage parlor license has no genuine expectation of privacy[294] given the need for frequent health inspections.

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289. *Id.* at 76-77. The Court prohibited the introduction into evidence of a criminal proceeding which had been obtained by federal agents who entered appellant's liquor storage area by force. While *Colonnade* teaches that absent emergency and exceptional circumstances and absent congressional authorization forced warrantless administrative inspection violated the reasonableness standard of *See*, 387 U.S. at 545. Nevertheless the case also stands for the proposition that because of the nature of the business, Congress may provide for the imposition of fines for refusal to grant entry to inspecting officials.

290. 406 U.S. 311 (1972).

291. Biswell was a pawnshop operator, federally licensed to deal in sporting weapons, who had acquiesed to a search by federal agents after having been told that a warrant was unnecessary since the inspection was authorized under the Federal Gun Control Act. *Id.* at 312. The Supreme Court reversed the lower court decision, 442 F.2d 1189 (10th Cir. 1971), that Biswell had not validly consented and that the statute authorizing inspections with neither a warrant nor consent was unconstitutional. The Court analogized a licensee's submission to ostensible lawful authority to a householder's acquiescence in a search pursuant to a warrant:

> In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute. 406 U.S. at 315.

292. Lower federal courts have not limited the decision in its application to only licensing programs involving liquor and firearms control. *See, e.g.*, United States v. Schafer, 461 F.2d 856 (9th Cir. 1972) (Plant Quarantine Act); United States v. Business Builders, Inc., 354 F. Supp. 141 (N.D. Okla. 1973); United States v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371 (D. Del. 1972) (Food Drug and Cosmetic Act); United States v. Montrom, 345 F. Supp. 1337 (E.D. Pa. 1972) (Comprehensive Drug Abuse Prevention and Control Act of 1970).

293. The court noted that inspection was crucial in this instance "to prevent violent crime" which was an "urgent federal interest." Second, proper enforcement of the law was dependent upon "unannounced, even frequent, inspections" since violations of the law could be quickly concealed. Finally, the Court required that the statute be "carefully limited in time, place, and scope." The Court also balanced the "justifiable expectations of privacy" given the realization by the dealer that he was engaged in a heavily regulated business which must be subject to "effective inspection" against the possibility of abuse which it found to be "not of impressive dimensions." 406 U.S. at 315-17.

294. The states may not, of course, impose conditions upon citizens which require the

It may also be argued that the potential for quick concealment of violations of health laws necessitates unannounced inspections as the only vehicle for effective enforcement.

The issue of administrative warrantless inspections of massage parlors pursuant to statutory authority has been examined in detail in only one federal case, that of *Hogge v. Hedrick*.[295] In *Hogge*, massage parlor operators challenged the constitutionality of certain provisions of a Virginia county ordinance regulating massage parlors.[296] The court dealt extensively with the provisions which granted free entry to local health and police officials and granted a preliminary injunction after having determined that the plaintiff parlor operators would in all likelihood succeed on the merits in challenging this provision of the ordinance.[297]

The court in *Hogge* distinguished the problem of national dimension in *Biswell*, namely the increase in the crime rate due to uncontrolled traffic in firearms, from the problems of a local nature unrelated to the incidence of violent crime.[298] The defendant, Henrico County, sought to bring its warrantless search provision within the *Biswell* and *Camara* emergency exception but the court remained unconvinced that the control of disease could not be achieved within the limitations of the warrant requirement.[299] The court did not deal with the language in *See* suggesting that a warrantless inspection may be permitted pursuant to a valid licensing program, under exceptional circumstances, but instead suggested that once it is determined that no emergency existed, the case must be governed by the administrative search requirements established by *Camara*.[300]

While the logic of *Hogge* is sound, it would seem that other courts may decide the issue in a locality's favor on the strength of *See* and *Biswell*. The ordinance in question provided for warrantless inspection only during

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relinquishment of constitutional rights, but the unconstitutional conditions doctrine of Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 594 (1926), may not apply when a statute's purpose is to protect societal interests endangered by activity in the regulated area. Note, *Administrative Inspections and the Fourth Amendment*, 12 WASHBURN L.J. 203, 214-15 (1973). *See also* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

295. 391 F. Supp. 91 (E.D. Va. 1975). In fact, other federal courts which have had occasion to mention inspection of massage parlors by officials have done so in the context of approving such inspections as one of the less onerous alternatives to prohibition of opposite sex massages. Cianciolo v. Members of City Council, 376 F. Supp. 719 (E.D. Tenn. 1974); Corey v. City of Dallas, 352 F. Supp. 977 (N.D. Tex. 1972).

296. 391 F. Supp. at 91.

297. *Id.* at 97.

298. *Id.* at 99.

299. *Id.*

300. *Id.* Since *See* dealt with the inspection of licensed business premises, it may be argued that the Court should have logically dealt more extensively with it and relied less on *Camara*.

business hours[301] and may, in fact, have been necessary to ensure that the massage parlors continually comply with the provisions of the ordinance requiring maintenance of sanitary conditions.[302] Nevertheless, it is doubtful that any court would permit a provision to withstand constitutional attack which gives the local police unlimited right of entry into massage establishments.[303] Should the police suspect that a criminal violation is occurring, they should be bound by the more stringent probable cause standards required for the issuance of a criminal search warrant.[304] Further, since the Court in *See* indicated in a footnote that in certain circumstances a warrant may be issued to an inspecting official prior to request for entry where surprise may be a crucial aspect of routine inspection,[305] there would seem to be logic in requiring the official to at least prove to a magistrate that there was administrative probable cause sufficient to justify the issuance of a warrant.[306] Finally, the logic of *Hogge* is persuasive in its application of the spirit of the fourth amendment and the language that pervades *Camara, See, Colonnade,* and *Biswell* to the effect that, except for unusual circumstances in which an urgent regulatory interest may be proved, the businessman should not be subject to the discretion of inspecting officials.[307]

V. CONCLUSION

Municipalities, acting under the police power, have subjected massage parlors to extensive regulation. This regulation has taken many forms:

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301. "[L]imited in time, place, and scope." 406 U.S. at 315.

302. HENRICO CO., VA., CODE ch. 17, art. v. (1974).

303. The court in *Hogge* dealt summarily with this provision in noting that it in effect was grounded upon the presumption that the massage parlor operators will engage in criminal conduct which can only be deterred by the knowledge that the police may at any time present themselves. 391 F. Supp. at 99.

304. Traditional criminal probable cause is said to exist where the facts and circumstances within an arresting officer's knowledge are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense is being or has been committed. *See* Carroll v. United States, 267 U.S. 132, 167 (1925).

305. 387 U.S. at 545 n.6.

306. See note 279 *supra* for a listing of sources which discuss the less stringent requirements of establishing administrative probable cause. It is not clear to what extent an agency may use evidence uncovered in one of these "civil" searches in a criminal prosecution. *See* Note, *Administrative Inspection and the Fourth Amendment—A Rationale*, 65 COLUM. L. REV. 288 (1965).

307. In a footnote, the court rightfully indicated that if the purpose of the challenged section is to ensure compliance with health and safety regulations, then the county authorities will not have to meet the more exacting probable cause standards for criminal search and arrest warrants, whereas if its purpose is to ferret out alleged criminal activity, the authorities will be held to the more stringent criminal standards in obtaining the warrant. 391 F. Supp. at 100 n.4.

opposite sex massage prohibitions, licensing restrictions, various fees imposed to defray municipal licensing costs and to raise revenue and administrative warrantless searches.[308]

The prohibition of opposite sex massage is not presently vulnerable to equal protection or substantive due process criticism after *Hicks v. Miranda*[309] and the dismissal by the Supreme Court of several appeals "for want of a substantial federal question."[310] However, Title VII of the Civil Rights Act remains a viable but relatively uncharted means of attacking the opposite sex massage prohibition. Licensing restrictions representing a reasonable exercise of the police power provide another means of regulation. Traditionally courts have shown great deference to legislative judgments as to what is reasonable. Administrative warrantless searches used in a licensing program raise serious constitutional concerns, yet may be upheld if limited in scope. Licensing fees will be sustained only if imposed to defray the costs of regulation and not to raise revenue. If the locality has been given sufficient taxation powers by the state, a tax may be imposed for the purposes of raising revenue. High taxes which accomplish the elimination of massage parlors will be sustained if a revenue purpose can be discerned.

Municipalities seem to have a considerable number of tools which might be employed to either eradicate or substantially reduce the number of massage parlors in their communities. While some of the devices employed might be successfully questioned, it seems clear that courts will sustain many forms of regulation which could result in the elimination of massage parlors. Increasingly, it appears the locality has the power to say, "Hands off!"

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308. Zoning is an additional tool with which the locality may regulate massage parlors. *See* Young v. American Mini Theatres, Inc., 44 U.S.L.W. 4999 (U.S. June 24, 1976).

309. 422 U.S. 332 (1975).

310. Smith v. Keator, 419 U.S. 1043, *dismissing appeal for want of a substantial federal question*, 285 N.C. 530, 206 S.E.2d 203 (1974); Rubinstein v. Township of Cherry Hill, 417 U.S. 963 (1974), *dismissing appeal for want of a substantial federal question*, No. 10,027 (N.J. Sup. Ct. Jan. 29, 1974); Kisley v. City of Falls Church, 409 U.S. 907, *dismissing appeal for want of a substantial federal question*, 212 Va. 693, 187 S.E.2d 168 (1972).