REGULATING "SIN" USING CODE ENFORCEMENT TOOLS

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OUTLINE

- Examples
- Legal Considerations
- Practical Considerations

EXAMPLES OF REGULATING "SIN"

NEWS

'Footloose', Kevin Bacon jokes abound over Terre Haute dance ordinance



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IndyStar

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'Footloose' Law Repealed by Arkansas Town

The residents of Forth Smith, Arkansas can finally cut loose after officials there repealed their [...]

By DANIEL S. LEVINE - July 16, 2018 03:47 pm EDT

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The residents of Forth Smith, Arkansas can finally cut loose after officials there repealed their *Footloose* rule, a 1953 ordinance that banned public dances on Sunday this week.

REINING IN THE FOOTLOOSE AND FANCY FREE

FOOTLOOSE_TOWN COUNCIL SCENE

JUVENILE CURFEW ORDINANCES

- Birmingham, Alabama
- Columbus, Ohio
- District of Columbia
- Los Angeles, California
- Philadelphia, Pennsylvania
- Texas – HB 1819

DANCE HALLS

- Elkhart, Indiana
- Cleburne, Texas
- Zephyrhills, Florida

POOL HALLS

- Dallas, Texas
- North Platte, Nebraska

CARD GAMES/ GAME ROOMS/ EIGHT LINERS

- Tulare, California
- Austin, Texas

HOOKAH LOUNGES

- Germantown, Ohio
- Selma, California
- New York City (Legislative Findings)
- Irving, Texas

BRING YOUR OWN BOTTLE (BYOB)

- Irving, Texas
- Dallas Borough, Pennsylvania
- North Utica, Illinois

MASSAGE ESTABLISHMENTS

- Hamden, Connecticut
- Goldsboro, North Carolina
- Houston, Texas
- San Francisco, California

SEXUALLY-ORIENTED BUSINESSES ADULT-ORIENTED BUSINESSES

- Elwood, Utah
- Saint Bonifacius, Minnesota
- Fredonia, Arizona
- Fulton, Kentucky
- Austin, Texas

SEXUALLY-ORIENTED PERFORMANCES (NEW TEXAS LAW)

- **SB 12** – Supposed to take effect September 1st
  - Prohibits sexual oriented performances on public property or in the presence of an individual younger than 18 years of age
  - Sexual oriented performance means a visual performance that features: a performer who is nude; or any other performer who engages in sexual conduct; **and** appeals to the prurient interest in sex
  - Sexual conduct means:
    - Exhibition or representation, actual or simulated, of sexual acts, including vaginal sex, anal sex, and masturbation;
    - Exhibition or representation, actual or simulated, of male or female genitals in a lewd state, including a state of sexual stimulation or arousal
    - Exhibition of a device designed and marketed as useful primarily for sexual stimulation of male or female genitals;
    - Actual contact or simulated contact occurring between one person and the buttocks, breast, or any part of the genitals of another person; or
    - Exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics
- Violators could face up to a year in jail, and businesses fined $10,000 for each violation

SEXUALLY-ORIENTED PERFORMANCES (NEW TENN LAW)

- Adult Entertainment Act – Enacted in 2023
  - Bans Adult Cabaret Performances from Public Property or anywhere minors might be present
  - Definition of Adult Cabaret Performances includes "male or female impersonators who provide entertainment that appeals to a prurient interest."
  - Violators could be charged with a misdemeanor or felony for a repeat offense

SEXUALLY-ORIENTED PERFORMANCES (NEW FLORIDA LAW)

- SB 1438
  - Ban on Children at an Adult Live Performance
  - Definition of Adult Live Performance includes "any show, exhibition, or other presentation in front of a live audience, which, in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, or specific sexual activities, lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it:
    - Predominantly appeals to a prurient, shameful or morbid interest;
    - Is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and
    - Taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present."
  - Violators could be fined, lose their liquor license, and individuals can be charged with a first-degree misdemeanor, punishable by up to a year in prison

SEXUALLY-ORIENTED PERFORMANCES (NEW MONTANA LAW)

- HB 359 – Enacted May 22, 2023
  - Forbids anyone from performing in public while wearing "exaggerated makeup" and "adopting a flamboyant or parodic [male or female] persona with glamorous exaggerated costumes and makeup"
  - Designates any venue hosting a drag show as a "sexually oriented business"
  - Creates private cause of action allowing minors and guardians to sue performers



Anti-LGBTQ laws in the US are getting struck down for limiting free speech of drag queens and doctors

DRAG BANS BEING DRAGGED INTO COURT

Tennessee

Florida

Montana

Texas

THAT PESKY 1ST AMENDMENT: WHAT A DRAG!

- Declared Unconstitutional and/or Enjoined:
  - Tennessee - Friends of Georges, Inc. v. Mulroy, No. 223CV02163TLPTMP, 2023 WL 3790583 (W.D. Tenn. June 2, 2023)
  - Florida – HM Florida-ORL, LLC v. Griffin, No. 6:23-cv-950, 2023 WL 4157542 (M.D. Fla. June 23, 2023
  - Montana – The Imperial Sovereign Court of the State of Montana et al. v. Knudsen et al., No. 2:23-cv-00050, 2023 WL 4847007 (D. Mont. July 28, 2023)
  - Texas – The Woodlands Pride, Inc. et al. v. Colmenero et al., No. 4:23-cv-02847 (S.D. Texas [Houston] August 31, 2023)

Madonna truth or dare_threat of arrest

LIFE IMITATING ART

LEGAL CONSIDERATIONS

IS THERE A NEED TO REGULATE?

- What's right for another city isn't always right for your city
- What is the nature of the right implicated?
- What is the government interest at stake requiring regulation?
- Data is paramount to justify regulations, e.g. police calls for service
- Legislative findings in ordinances should be used to bolster the city's position in the event of a challenge
- Ordinances should be crafted to address the specific issue/concern
  - Rational Basis Scrutiny – Regulation must bear a rational relationship to a legitimate government interest
  - Intermediate Scrutiny – Regulation must be substantially related to an important government interest
  - Strict Scrutiny – Regulation must be narrowly tailored to serve a compelling government interest
- Regulatory fees must be based on cost recovery

IS THE PROPOSED REGULATION PREEMPTED UNDER FEDERAL LAW?

- Congress' intent is paramount consideration.

- Types of federal preemption:
  - Express preemption
  - Implied preemption*: Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987).
    - Congressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.
    - Federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law.
      - Impossible to comply with both federal and state regulations.
      - Obstacle to the purposes and objectives of federal law.

IS THE PROPOSED REGULATION PREEMPTED UNDER STATE LAW?

- Oregon Constitution: Article XI, Section 2
- Is the local law incompatible?
  - Both laws cannot operate concurrently
  - Legislature meant for state law to be exclusive.
- Presumption
  - Civil or administrative ordinances - is reasonable to assume that the legislature did not mean to displace local ordinances, unless that intention is apparent.
  - Criminal laws - The analysis of compatibility begins with the assumption that state criminal law displaces conflicting local ordinances which prohibit and punish the same conduct, absent an apparent legislative intent to the contrary.
- *City of Corvallis v. Pi Kappa Phi*, 428 P3d 905 (2018).

IS THE PROPOSED REGULATION PREEMPTED UNDER TEXAS LAW?

- Texas Constitution, Article XI, Section 5(a): City ordinances may not contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.

- *City of Lardeo v. Laredo Merchants Association*, 550 S.W.3d 586 (Tex. 2018).
  - Home-rule municipalities look to state law for limitations, not permissions.
  - A limitation may be express or implied but the limitation "must appear with unmistakable clarity".
    - The mere "entry of the state into a field of legislation does not automatically preempt that field from city regulation".
      - "Local regulation that is ancillary to and in harmony with the general scope and purpose of the state enactment is acceptable."
      - Absent an express limitation, if the regulations can coexist peacefully without stepping on each other's toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency."
  - Courts look at the statutory text and the ordinary meanings of its words.

- *BCCA Appeal Group v. City of Houston*, 496 S.W.3d 1 (Tex. 2016) – Preemption case involving a state regulatory scheme.

- Texas Alcoholic Beverage Code

IS THE PROPOSED REGULATION PREEMPTED UNDER A DEATH STAR BILL?

- **Texas: House Bill 2127 – Effective September 1st**
  - Prohibits cities from enacting any ordinance where state has entered the field of regulation
  - Applies to conduct within the field of regulation occupied under these specific state statutes:
    - Agriculture Code; Business & Commerce Code; Finance Code; Insurance Code; Labor Code; Chapter 229 of the Local Government Code; Natural Resources Code; Occupations Code; Property Code

- **Florida: SB 170 – Effective October 1st**
  - Requires business impact statement prior to city passing an ordinance
  - Allows businesses to sue for ordinances they believe are arbitrary and unreasonable
  - Entitled to injunctive relief and up to $50,000 in attorneys' fees

- **Michigan: HB 4052 – Effective July 1, 2015**
  - Prevents local governments from regulating issues affecting the labor & employment relationship, such as requiring local minimum wage, hours of work, paid sick days, etc.

WILL THE PROPOSED REGULATION VIOLATE STATE REQUIREMENTS FOR SUBSTANTIVE DUE PROCESS?

- Texas Constitution, Article I, Section 19:
  - An economic regulation must be crafted to further a legitimate government interest.
  - The purpose or effect of the regulation is connected to or reasonably related to the government interest.
  - In other words, the requirement imposed by the law must support or work towards achieving the legitimate goal of the regulation.
  - See *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015).
- Ohio Constitution, Article I, Section 16:
  - All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.
  - Is the regulation a blanket prohibition that encompasses too much lawful behavior?
    - *Akron v. Rasdan*, 663 N.E.2d 947 (1995)
    - *Rocky River v. Saleh*, 743 N.E. 2d 944 (2000)

DO THE SCALES TIP IN FAVOR OF PROPERTY RIGHTS OVER THE POLICE POWER?

- To some degree, this will be determined on a state-by-state basis because state constitutions may provide more protection that the federal constitution.
- New Jersey
  - Southland Corporation vs. Township of Edison, 217 N.J. Super. 158 (1986).
    - City ordinance required certain retail businesses to close between 12 AM and 6 AM.
    - Purpose of the law: To discourage and prevent the present trend of robberies and violent capital crime, to protect the safety and welfare of the people who work and use those stores.
    - Sufficient public need to justify the regulation BUT ordinance was overbroad, unreasonable, and irrationally exceeded the need.
  - Upper Deerfield Tp. vs. Seabrook Housing Corp., 604 A.2d 972 (1992).

WILL THE REGULATION IMPAIR THE OBLIGATION OF CONTRACTS?

- Texas: Article I, Section 16
  - In most circumstances, a newly adopted law may not modify or release substantive rights or obligations of the parties in existing contracts.
  - Limitation is not absolute, must be balanced against the government's interest in exercising its police powers.

- Wisconsin: Article I, Section 12
  - No law that impairs contracts shall ever be passed.
  - To impair contracts, the law must have an adequate relationship between the impairment and the law's purpose.
  - The impairment must be reasonable.
  - The law's purpose must be significant and legitimate.
    - Wisconsin Courts will not speculate so go into court ready to prove up.
    - Seems against the idea of a presumption of constitutionality.

WILL THE REGULATION QUALIFY AS A RETROACTIVE LAW THAT VIOLATES THE TEXAS CONSTITUTION?

- Retroactive law: A law that extends to matters that occurred in the past.
- Fundamental objectives: "[I]t protects the people's reasonable, settled expectations"—i.e., "the rules should not change after the game has been played"—and it "protects against abuses of legislative power." *Zaatari v. City of Austin*, 615 S.W.3d 172, 188 (Tex. App. - Austin 2019).
- *City of Grapevine v. Muns*, 651 S.W.3d 317, 344 (Tex. App. – Fort Worth 2021): A court considers three factors in light of the prohibition's objectives:
  - "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings;"
  - "the nature of the prior right impaired by the statute;" and
  - "the extent of the impairment."

WILL THE REGULATION QUALIFY AS A RETROACTIVE LAW THAT VIOLATES THE STATE CONSTITUTION?

- Colorado: Article II, Section 11: No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.

- *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006): A law is retroactive "when it operates on transactions that have already occurred or on rights and obligations that existed before its effective date."

PRACTICAL CONSIDERATIONS

IS AN INSPECTION NECESSARY TO IMPLEMENT, ADMINISTER, OR ENFORCE THE REGULATION?

- The Fourth Amendment protects individuals from unreasonable searches and seizures.
  - A search or seizure without a warrant is presumptively unreasonable.
  - Applies to municipal government (even outside of the police context).
  - Consent to search must be freely and voluntarily given and may be withdrawn at any time.

- Cases
  - *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967): The limitation and warrant requirement apply to code enforcement.
  - *Patel v. City of Los Angeles*, 135 S.Ct. 2443 (2015): The warrantless inspection requirement of a regulatory scheme must provide a constitutionally adequate substitute for a warrant.

IS AN INSPECTION NECESSARY TO IMPLEMENT, ADMINISTER, OR ENFORCE THE REGULATION?

- Is this an inspection that falls under Article 18.05 of the Texas Code of Criminal Procedure?
  - An administrative warrant may be obtained by a fire marshal, health officer, or code enforcement official.
  - The purpose of the administrative warrant is to determine the presence of a fire or health hazard or unsafe building condition or a violation of any fire, health, or building regulation, statute, or ordinance.
- How will the client handle situations when a person refuses an inspection?
  - Initial waiver of rights is not likely to protect the City or the employee.
  - In lieu of a city inspection, would a third-party inspection work?
- Existing City Code provisions that reference right of entry to inspect:
  - Apply those consistent with the Fourth Amendment – the person can withdraw consent.
  - Educate client department.

WHAT ARE THE ENFORCEMENT TOOLS AND LIMITATIONS?

- Business regulations vs. Land Use regulations:
  - Available remedies are different.

- Civil or criminal enforcement tools:
  - Financial penalty limitations.
    - State laws
    - 8th Amendment: *Timbs v. Indiana*, 139 S.Ct. 682 (2019).
  - Statute of limitations provisions.

- Administrative actions:
  - What kind of notice and when will it be required?
  - What does due process look like?
  - What are the decision-making factors to guard against bias/favoritism?

WHAT DOES SUCCESS LOOK LIKE?

