Litigating Secondary Effects: Lessons from *Daytona Grand*



by

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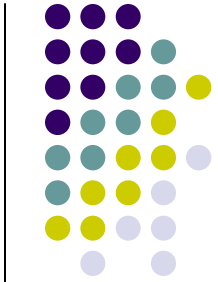
Case Background and History



1970s – Economic downturn, influx of SOBs

1981 – City adopts adult zoning ordinance

1981 – City adopts alcohol/nudity ordinance

1985 – Alcohol/nudity ord. upheld (Fla. Sup. Ct.)

Case Background cont'd...:

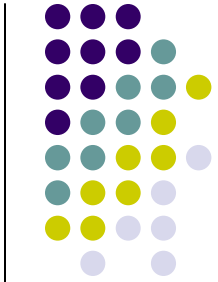
1987 – Zoning ord. upheld (11th Cir.)

2001 – Zoning ord. preliminarily enjoined

2002 – Public nudity ordinance passed (1/2, 1/3)

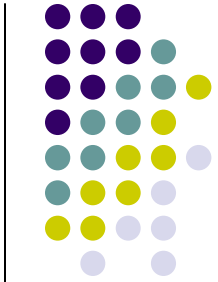
2003 – Amendment: "pasties & G-string" okay
more than 500 feet from alcohol est.

City's Pre-Enactment Evidence



- Economic downturn
- Deemed "City of Sleaze"
- Planning Director / Police Chief Testimony: blight, drugs, prostitution, lewdness, assaults
- Citizen testimony: impacts on nearby businesses

City's Pre-Enactment Evidence cont'd...:



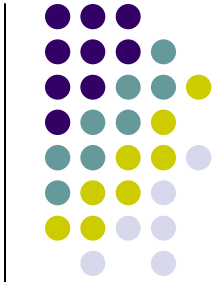
•Cases upholding similar regulations (*LaRue*, *Bellanca*)

• Media articles re: lewd conduct during public events and adverse impacts on family tourism

• Police reports of lewd & lascivious conduct

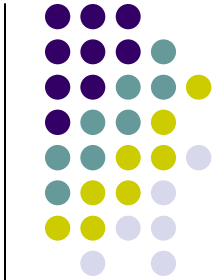
• Articles/studies re: alcohol & erotica

Plaintiffs' Trial Evidence (Expert Studies)



- All City evidence is unreliable, *i.e.*, "shoddy" because:
  - It is "anecdotal"
  - It did not compare SOBs v. non-SOBs to show adult message *causes* the secondary effects
  - In other words, effects around SOBs must, at a minimum, be *greater* than around non-SOBS

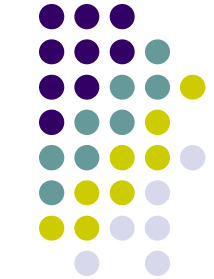
Plaintiffs' Trial Evidence (Expert Studies) cont'd...:



- Fisher: 1981 Study – Comparative analysis (study/control areas) of police calls-for-service ("CFS" or CAD data)

  - "no statistically significant differences in overall rates of crime"

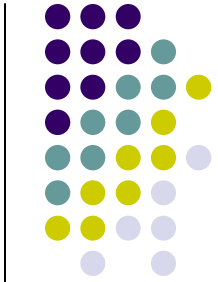
Plaintiffs' Trial Evidence (Expert Studies) cont'd...:



- Linz: 1999-2003 Study – Comparative analysis (study/control areas) w/ CFS data

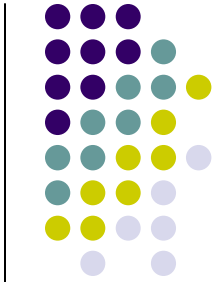
  - Other "demographic variables" are "strongly correlated" to crime, while SOBs "accounted for an insubstantial amount" of crime

Plaintiffs' experts results:



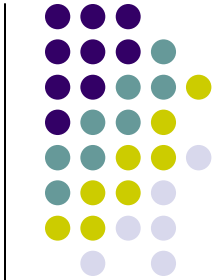
- Linz finds greater CFS in the study (SOB) areas in half of the crime categories
- Linz "statistically control" for this result by attributing effects to variables "known to be associated with crime" (racial composition, males 18-35, *etc.,* derived from census data)
- After applying several variables, no effect left to blame on SOBs
- Demographic variables deemed inappropriate for 1981 study, but used in 2003 study

City's trial (post-enactment) evidence:



- Captain Szabo (CAD data vs. crime records)
- Detective Oakley (observed drugs, oral sex)
- Lieutenant Beres (> 30 assaults at SOBs)
- Sworn citizen affidavits (solicitation, sex acts)

District court's conclusion:



"As persuasively demonstrated by Plaintiffs' expert studies, the City's pre-enactment evidence consists either of purely anecdotal evidence or opinions based on highly unreliable data. Most notably, the City's evidence lacks data which would allow for a comparison of the rate of crime occurring in and around adult entertainment establishments with the rate of crime occurring in and around similarly situated establishments. Absent the context that such a comparison might provide, the City's data is, as Plaintiffs assert, 'meaningless.'"

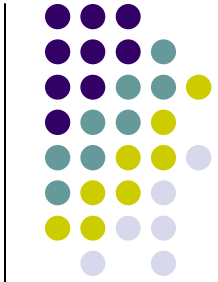
District court's result:

1. City's post-enactment was equally flawed, "shoddy," "meaningless"

2. All 3 nudity ordinances (1981, 2002, 2003) *facially* unconstitutional

3. Plaintiffs sought $247,000 in fees

Key propositions on appeal:

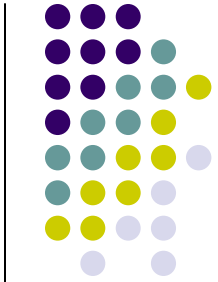


1. Plaintiffs don't dispute the facts, only their significance

2. "Proposition to be proved" (only constitutional requirement) is that regulation will reduce effects without *substantially* reducing speech

3. *Alameda* does not "raise the evidentiary bar or require a city to justify its ordinances with empirical evidence or scientific studies" ("reasonably believed to be relevant")

Key propositions on appeal cont'd...:

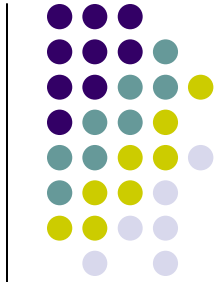


4. The *municipality's rationale* controls, not plaintiffs' theory (*Alameda* plurality at 438-39)

5. One secondary effect enough – direct correlation between nudity regulations and illicit sexual behavior

Challenges to Plaintiffs' expert studies:

1. CAD data fails to capture much crime
2. CAD data is inadequate measure of crime
3. Plaintiffs' experts admit the CAD data errors
4. CAD data shows more police calls near SOBs



Take-away points:

1. Past results do not guarantee future success

2. Litigation becoming much more sophisticated

3. Legislative responses should reflect this:

    a. Diversity of legislative record evidence (cases, articles, “anecdotal” data, studies)

Take-away points cont'd...:

b. Rationale should be clearly expressed per *Los Angeles v. Alameda Books* (2002)

c. Industry's alternative rationale should be clearly repudiated

4. Update and streamline ordinance provisions in light of several recent (2006-07 cases)

Follow-up questions:

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