

Preface to the Second Edition

The first edition of this book was prepared by staff and friends of the National Family Legal Foundation (NFLF) and published in 1996. Several people were instrumental in making it possible including Annelle Tate, NFLF's Director of Legal Resources and Services; who coordinated the project; James P. Mueller, who contributed research and writing; Greg Forstie, who created the cover and overall design; Mrs. W.W. Wagley, who funded computerized legal research; Alan E. Sears, who offered many useful suggestions on the book's first draft; and of course, Len L. Munsil,¹ who authored the book. The book continues primarily to be Len's work product. Its foundations rest on an earlier work by Benjamin W. Bull and Alan E. Sears titled, *Time, Place and Manner Regulation of Business Activity* (Southwest Legal Press, Inc. 1990) .

Between 1996 and 2000, the National Family Legal Foundation changed its name to Community Defense Counsel. Community Defense Counsel is no longer active as an independent entity, but since late 2001, the Alliance Defense Fund™ (ADF) has continued its work and mission.² One aspect of that work includes keeping this book current.

Several people have been instrumental in creating this second edition including Alan E Sears, President and General Counsel of ADF, Benjamin W. Bull, Chief Counsel of ADF, and Duane T. Schmidt, Director of the ADF's Blackstone Legal Resource Center.SM A special thanks is also owed to Daniel Rah, a student at the University of Notre Dame Law School and participant in ADF's 2002 [Blackstone Fellowship](#)SM class, who spent a long hot summer updating research.

This second edition offers several enhancements. Citations and appendices have been expanded and updated. Appendix "C" containing key U.S. Supreme Court cases has been removed³ and replaced with a summary outline of First Amendment law as it pertains to the regulation of pornography by Benjamin W. Bull. Chapter 8 has been rewritten to account for U.S. Supreme Court rulings in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (changing the law regarding regulation of nudity in establishments licensed to sell alcohol) and *Erie v. Pap's A.M., TDA "Kandyland,"* 529 U.S. 277 (2000) (affirming the right of communities to prohibit public nudity).

¹ When the first edition was published, Mr. Munsil, served as the Executive Director of National Family Legal Foundation (NFLF). Mr. Munsil presently serves as President of the Center for Arizona Policy, where he continues to battle harmful secondary effects associated with pornography. Visit: <http://www.azpolicy.org>.

² Community Defense Counsel is now a resource of the Alliance Defense Fund, Inc. Visit: <http://www.communitydefense.org> and <http://www.alliancedefensefund.org>.

³ Supreme Court Caselaw is now widely available on the Internet free of charge. See, e.g., <http://www.findlaw.com>

We are pleased to make this revised edition available. Comments and suggestions for future editions are welcomed.

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Forward by Edwin Meese III

A decade has passed since we issued the Final Report of the Attorney General's Commission on Pornography. The blueprint it provided for effective citizen action and constitutional methods of dealing with various types of pornography has been successfully followed by many communities. In addition, Congress has passed into law the statutory recommendations for action at the federal level.

But the legal effort to combat pornography and the damage it does to our society has changed in significant ways since that report was compiled in 1986. Our priority then was to enforce existing state and federal laws prohibiting the sale and distribution of obscene material -- typically in the form of magazines and books sold in seedy bookstores or films exhibited in run-down neighborhoods. We knew that this illegal activity could be stopped if police and prosecutors carried out their responsibilities and enforced the law.

The Commission also recommended other ways that communities could take preventive action against crime, such as by regulating "peep show" booths to prevent unlawful sexual activity in sexually oriented businesses. If these laws are properly enforced, the opportunity for illicit "sex shops" to contaminate a neighborhood is significantly reduced.

Ten years later, despite initial successes around the country, too many law enforcement agencies are failing to protect their communities against illegal obscenity, leaving them defenseless as an onslaught of sexually oriented businesses have proliferated nationwide. After a strong federal law enforcement start in the late 1980s, the pressure has been off the organized-crime-controlled pornography industry. Organizations like National Family Legal Foundation, for which I proudly serve on the Board of Directors, have been inundated with requests for legal assistance from communities across America. In 1993, NFLF provided technical legal resources and assistance to 182 municipalities. In 1994, NFLF assisted 242 communities, an increase of 33 percent. In 1995 the number of municipalities receiving help more than doubled to 581 -- a whopping 140 percent increase!

The very same year the Attorney General's Commission issued its Final Report, the Supreme Court approved another method of dealing with sex businesses. The Court ruled in *Renton v. Playtime Theatres* that a city can constitutionally treat sexually oriented businesses differently than other businesses because of their documented effects on the area surrounding them, even if that treatment makes the exercise of claimed First Amendment rights more difficult or costly for the sex business. This ruling clarified the right of municipalities to provide some measure of protection to business districts and neighborhoods from the negative effects of sexually oriented businesses -- even where other forms of obscenity law enforcement were ineffective, inconsistent, or nonexistent.

As sexually oriented businesses have invaded more and smaller municipalities and rural areas, governments have turned increasingly to time, place and manner regulation to deal with the

negative secondary effects on neighborhoods and communities. Caselaw has established a number of constitutional methods of regulating sexually oriented businesses.

Attorney Len Munsil, who has served National Family Legal Foundation as Executive Director and General Counsel since 1991, has pulled together in this book many of the strategies that have been used successfully and have been upheld in court.

This book is a must for every city and county attorney, local government officeholder and concerned citizen who wants the latest word on legal strategies to combat sexually oriented businesses. Organized in a logical format, this book is a valuable resource that will provide immediate, easy-to-find answers for even the thorniest First Amendment issues relating to sex business regulation. Here you will find what you can and cannot do as clearly spelled out as caselaw will allow, written from the perspective of one who wants to help your community take every step constitutionally possible to protect itself from such establishments.

Munsil details the legal rationale for each area of time, place and manner regulation, and provides a sample ordinance, copies of key cases, summaries of relevant studies of secondary effects, and other important information. This manual is a roadmap to victory against sexually oriented businesses for local communities. It can be used to get a community started in enacting a new ordinance, or provide justification for strengthening existing regulations.

The problems presented by sexually oriented businesses are not going away, so long as there are those in society who can get rich by crassly exploiting man's basest instincts. Local governments must therefore be prepared -- armed with the proper resources and information -- to defend their quality of life.

Ultimately, that is what this book is about. It is about preserving the quality of life in communities; about paying as much attention to cleaning up the moral environment as we do to keeping the air and water clean and garbage out of the streets. It is about self-government, and the right of neighborhoods and communities to decide whether they wish to live in a cesspool of smut or a community that values its citizens, especially its women and children.

In the classic film *It's A Wonderful Life*, Jimmy Stewart's character is given the opportunity to see what would have happened to his community if he had never been born. Without him, the quiet tree-lined downtown of family-oriented Bedford Falls becomes the garish, loud and decadent main street of Pottersville, lined with "adult" establishment and vice. The film's message is about the power each one of us has to affect the people around us, and in a broader sense, the community we live in. We can decide whether we want our neighborhoods to look like Bedford Falls or Pottersville, whether we want safe and wholesome business areas or the "combat zones" of porn shops and "adult entertainment."

Len Munsil has done a great service in writing *Protecting Communities from Sexually Oriented Businesses* and helping citizens and public officials to succeed in protecting and preserving the quality of life most of us seek.

Edwin Meese III
75th United States Attorney General
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Introduction by Len Munsil

In the past few decades America slowly has been victimized by an environmental disaster of epic proportions. Not global warming, not acid rain, not dirty air or water, but rather an attack on the community environment in which we conduct our business and raise our children. Our very quality of life has been assaulted by the invasion of sexually oriented businesses.

Without stringent regulation, pornography profiteers threaten to turn every neighborhood, every commercial district, every industrial section of every town, into a "red light district." By taking advantage of declining community standards and the unwillingness of many prosecutors to vigorously enforce state and federal obscenity laws, those who make money from the exploitation of human interest in sex continue to push into new communities with their questionable enterprises.

Often, such communities are completely unaware of the negative impact of these businesses on their quality of life and totally unprepared legislatively to impose constitutional restrictions to protect their neighborhoods and commercial districts. Existing zoning ordinances are often woefully out of date and ineffective. Subsequent, reactive legislation is often constitutionally suspect when applied to existing businesses or current applicants. Frequently it is hastily and poorly drawn. In almost every case, city officials are unaware of the broad array of legal requirements and restrictions local government may place in the way of sexually oriented businesses in order to protect their communities from the inevitable negative secondary effects.

National Family Legal Foundation is well aware of these problems, because since 1990 we have been involved in aiding many communities that have faced these invasions unarmed and unprepared. While we've helped protect many communities, our greatest frustrations occur when a sex business succeeds in ruining a neighborhood only because the community was not prepared, and we were called too late. We have dealt with far too many anguished city officials and residents, who in their frustration admit that "we never thought they'd come here."

This book is a response to those frustrations. It is an attempt to lay out a strategy for communities to implement before the invasion begins. But it also will outline methods communities can use to update and improve existing ordinances, providing further protection against existing sex businesses.

With permission of the authors and publishers this book is built upon a foundation provided by a previous work: *Time, Place and Manner Regulation of Business Activity*, written in 1990 by Benjamin W. Bull and Alan E. Sears, with contributions by James P. Mueller. While that book provided tremendous help to numerous communities over the past six years, many new court decisions in this exploding area of civil litigation have necessitated this new manual, which also takes a different organizational approach. Funding for the original manual was provided by the Alliance Defense Fund, which also provided a portion of the funding for research and writing. Funding for the computerized legal research was provided by Mrs. W.W. Wagley while the

majority of funding for research and writing was provided by the many faithful supporters of National Family Legal Foundation.

This is not meant to be a neutral overview of current methods of regulating "adult" businesses. This is a "how to" manual for those who are Serious about protecting their communities and doing battle with the incredibly powerful and profitable sex club industry. These sex businesses, despite constant trouble with the law enforcement officials and despite having numerous leaders tossed in jail for organized criminal activity, always have money to throw at lawyers. Frequently, these experienced First Amendment lawyers succeed in threatening and intimidating communities into backing away from effective legislation, sometimes through distortion and misrepresentation of caselaw.

This manual will allow city attorneys and others involved in the defense of reasonable time, place and manner regulations to stand firm against those threats. Let me be clear as well -- our cause is advanced not at all, indeed it is damaged, when unconstitutional legislation is enacted. In this manual, as with our advice to city attorneys, we will be careful to promote only those provisions which have caselaw to support their constitutionality. As in every legal arena, there are some gray areas. And we will be careful to point those out as well.

While this manual is primarily for use by attorneys, either city or county staff or outside counsel, who are attempting to enact, strengthen or defend local government ordinances, it is deliberately written so that non-lawyer city officials and citizens can gain guidance and direction for their efforts.

We know very clearly that where sexually oriented businesses move into a neighborhood, the crime rates go up and the property values go down. We know that where hard-core pornography is made available, sexual assault rates go up.

But in many communities across America, citizens from a cross-section of ethnic, political and religious persuasions have stood up for their rights and their freedom to live in decent neighborhoods, and stood against the organized-crime controlled sex business industry. I've met many of those citizens, and I've stood beside them in family-oriented communities. To those citizens, to the families they represent, and to my own family, this book is dedicated

Len L. Munsil
Scottsdale, Arizona
March, 1996