

BUT I THOUGHT THIS WAS SIN CITY!: NEVADA'S RESTRICTIONS ON ADVERTISEMENTS FOR LEGAL BROTHEL SERVICES

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INTRODUCTION

Advertisements enjoy First Amendment protection because, as “tasteless and excessive” as they may sometimes seem, our national economy depends on the free flow of such commercial information to aid “intelligent and well informed” private economic decisions.¹ However, this First Amendment protection is not absolute. Advertisements, unlike political speech, are considered commercial because they are “expression[s] related solely to the economic interests of the speaker and its audience.”² Consequently, state and local lawmakers enjoy some latitude to define and restrict the dissemination of advertisements in accordance with public policy. Within Nevada, the commercial speech debate has historically concerned the extent to which the legislature can restrict gaming advertisements. However, a matter of more current debate concerns the legality of the restrictions placed upon advertisements for legal brothel services.³

Despite prostitution’s legality in certain Nevada counties, Nevada law significantly limits the locations in which the brothels may advertise their services. This Note discusses the constitutionality of these statutory restrictions in light of current Supreme Court jurisprudence on the regulation of commercial speech. Part I surveys the development of First Amendment protection granted to commercial speech in general by the U.S. Supreme Court and explains the two types of restrictions states or localities frequently utilize. Part II examines the level of First Amendment protection granted to commercial speech concerning vice activities or products.⁴ Part III explains the modern test for determining the constitutionality of commercial speech restrictions. Part IV of this

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¹ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

² *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

³ The American Civil Liberties Union filed a lawsuit in U.S. District Court for the District of Nevada during the week of March 12, 2006 challenging the constitutionality of Nevada’s restrictions on advertisements by legal brothels. CITYLIFE newspaper and HIGH DESERT ADVOCATE newspaper joined as plaintiffs. Lynnette Curtis, *ACLU Joins Fight Against Limits on Brothel Ads*, LAS VEGAS REV. J., Mar. 18, 2006, at B1.

⁴ See *infra* notes 44-45.

Note introduces the two types of statutory restrictions imposed on the advertisement of legal prostitution in Nevada and analyzes the Nevada Supreme Court's judgment upholding both restrictions. Finally, Part V applies the test laid out in Part III to the two Nevada restrictions. This Note argues that were the restrictions on brothel advertisement challenged, they would likely be found not to advance directly the State's interest in reducing demand for prostitution services by residents nor to be the least restrictive means by which the State can achieve its asserted goal.

I. COMMERCIAL SPEECH

A. *The Path to Constitutional Protection*

During the first half of the twentieth century, commercial speech received no First Amendment protection.⁵ Quite different from information and opinion regarding matters of political and social importance,⁶ commercial speech was viewed as an "irritating incident"⁷ or perhaps an "undesirable invasion."⁸ The Court began to recalibrate the level of protection afforded to commercial speech in 1964 by granting First Amendment protection to advertisements that contained issues of social concern as well as incidents of commercial solicitation.⁹ The Court noted that "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."¹⁰ Soon, the Court rejected completely any notion that commercial speech should be denied all First Amendment protection.¹¹ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court explicitly held that speech with no other purpose than commercial solicitation was entitled to some, albeit limited, First Amendment protection.¹²

In *Virginia State*, the Court noted that the average person's interest in the free flow of commercial information is "as keen, if not keener by far, than his

⁵ See *Breard v. City of Alexandria*, 341 U.S. 622, 644-45 (1951) (upholding city ordinance prohibiting door-to-door solicitation of magazine subscriptions); *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942) (upholding statutory ban on commercial and business advertisements on public streets or thoroughfares).

⁶ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 (1974) (Brennan, J., dissenting) (distinguishing "speech concerning political and social issues of public importance" from commercial speech).

⁷ *Breard*, 341 U.S. at 627.

⁸ *Valentine*, 316 U.S. at 54-55.

⁹ See, e.g., *Bigelow v. Virginia*, 421 U.S. 809, 811, 818, 822 (1975) (holding that a state statute prohibiting the sale or circulation of any publication to encourage or prompt the procuring of an abortion violated the First Amendment rights of a newspaper editor and that although the advertisement offering abortion services had "commercial aspects," it still received First Amendment protection because it also contained factual material of clear "public interest"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that newspaper's "editorial advertisement" was entitled to the same degree of protection as ordinary speech, in the interests of keeping open an "important outlet for the promulgation of information and ideas").

¹⁰ *Bigelow*, 421 U.S. at 826.

¹¹ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

¹² *Id.*

interest in the day's most urgent political debate."¹³ The Court repudiated the distinction between speech of "public interest" or "importance" and speech that is "entirely commercial," explaining that on its most basic level, advertising "is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price."¹⁴ However, the Court never granted commercial speech absolute equality with political or social speech, holding instead that the inherent differences between commercial and more traditional forms of speech justified its greater regulation:¹⁵

The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *Sine [sic] qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.¹⁶

The resultant "objectivity and hardiness" of commercial speech justify its greater regulation.¹⁷ For example, the state may mandate that the commercial information appear in a certain form or contain warnings or disclaimers.¹⁸ Even now, commercial speech does not command the same level of protection as noncommercial speech, but instead receives "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."¹⁹

Untruthful or misleading commercial speech receives no First Amendment protection, whereas truthful, legal, and nonmisleading commercial speech does.²⁰ The danger of "commercial harms" such as deception and overreaching outweigh the utility of such speech.²¹ Indeed, the potential for mischief in the bargaining process is the principal reason for drawing a distinction between commercial speech and political or social speech.²² However, the same concern for consumers that motivates regulation of untruthful commercial messages "supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages."²³

B. Types of Prohibitions on Truthful, Lawful, Nonmisleading Commercial Speech

Due to the distinctions between commercial speech and more traditional forms of constitutionally-protected speech, local governments retain the author-

¹³ *Id.* at 763.

¹⁴ *Id.* at 765.

¹⁵ *Id.* at 772 n.24.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

²⁰ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 n.7 (1996) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973)).

²¹ *Id.* at 502-03; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993).

²² *Discovery*, 507 U.S. at 426 n.21.

²³ *44 Liquormart*, 517 U.S. at 496.

ity to regulate commercial speech by “modes . . . that might be impermissible in the realm of noncommercial expression.”²⁴ Typically, local legislatures have utilized two types of regulations: the complete ban and the content-neutral ban.

Where the regulation at issue constitutes a complete ban on truthful, legal, and nonmisleading information, the Court has instructed that “special concerns” arise.²⁵ Such total prohibitions usually are not intended to protect against commercial harms²⁶ and are instead usually means to non-speech related policy ends.²⁷ The underlying governmental policy often rests on paternalistic concerns about how the public might misuse the speech if it were not restricted.²⁸ The Court refuses to legitimize this legislative paternalism, instead holding that the First Amendment requires the free flow of truthful information and that people must be permitted to determine their own best interests.²⁹ Complete bans insulate the state’s unarticulated policy choices “from the visibility and scrutiny that direct regulation would entail” and thus permit the state to manipulate its citizens by depriving them of the information needed to make a free choice.³⁰

In *Central Hudson Gas and Electric Corp. v. Public Services Commission of New York*, the Court struck down a New York Public Service Commission regulation that prohibited all electric utilities in the state from promoting electricity use through advertising.³¹ The regulation was a complete ban on truthful, legal, and nonmisleading speech.³² The Court noted that it had in recent years only approved such blanket bans where the speech itself was “either . . . deceptive or related to unlawful activity.”³³ The concurrence expressed an even broader view, arguing that the First Amendment requires that government restrict information only in the face of “clear and present danger” and never for a paternalistic purpose.³⁴

Complete prohibitions on a particular topic of truthful commercial speech about a lawful activity are therefore subject to the most rigorous First Amendment review because they are “[in]consistent with the reasons for according constitutional protection to commercial speech.”³⁵ That is, the free flow of commercial speech affords people the opportunity to determine their own best interests.³⁶ The underlying policies governments seek to enforce by such bans

²⁴ *Ohralik*, 436 U.S. at 456.

²⁵ 44 *Liquormart*, 517 U.S. at 500.

²⁶ *Id.* at 502-03.

²⁷ *Cent. Hudson*, 447 U.S. at 566 n.9.

²⁸ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976). Paternalistic legislation seeks to maintain public ignorance through “policies that prevent men and women from hearing facts that might not be good for them.” 44 *Liquormart*, 517 U.S. at 517 (Scalia, J., concurring).

²⁹ *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

³⁰ *Cent. Hudson*, 447 U.S. at 575 (Blackmun, J., concurring).

³¹ *Id.* at 571-72.

³² *Id.* at 566.

³³ *Id.* at 566 n.9.

³⁴ *Id.* at 574-75 (Blackmun, J., concurring).

³⁵ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

³⁶ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

can often be implemented without regulating speech.³⁷ Complete restrictions that have no purpose in protecting consumers from “misleading, deceptive, or aggressive sales practices” require the “rigorous review that the First Amendment generally demands.”³⁸

Different from complete prohibitions on commercial speech, content-neutral restrictions “control only the time, place, or manner for disseminating advertisements.”³⁹ Unlike bans on speech, content-neutral restrictions leave open alternative methods of disseminating the information.⁴⁰ Content-neutral restrictions thus restrict consumer choice to a much lesser degree than complete bans.⁴¹ Though the information is restricted, it remains available to the public, and the restrictions are more likely to comport with the “typical reason[s] why commercial speech can be subject to greater governmental regulation than non-commercial speech.”⁴² The legitimacy of the motives behind such content-neutral restrictions and the avenues left open for dissemination of the message justify a less strict review than that under which the Court analyzes complete bans.⁴³

II. COMMERCIAL SPEECH: HOW MUCH PROTECTION IS AFFORDED TO TRUTHFUL ADVERTISEMENT OF LAWFUL VICE ACTIVITIES?

A. *The Posadas View*

Within the broad category of commercial speech, certain speech concerns activities that the state has the power to prohibit entirely, such as alcohol consumption, gaming, and prostitution.⁴⁴ Such activities are commonly referred to as “vice” activities.⁴⁵ When a state chooses to permit a certain vice activity that it has the “greater power” to prohibit altogether, the state has been held to also possess the “lesser power” to severely restrict advertisement of the activity.⁴⁶ In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the Court upheld the Puerto Rico legislature’s decision to prohibit gaming enterprises from advertising to the nation’s residents.⁴⁷ The Commonwealth of Puerto Rico decided in 1948 to legalize certain forms of casino gambling.⁴⁸ However, because the legislature intended the “games of chance” to entice

³⁷ 44 *Liquormart*, 517 U.S. at 503.

³⁸ *Id.* at 501.

³⁹ Marrie K. Stone, Note, *The Price Isn’t Right: 44 Liquormart, Inc. v. Rhode Island Promotes Free Speech in Commercial Advertising*, 18 LOY. L.A. ENT. L.J. 133, 150 (1997).

⁴⁰ 44 *Liquormart*, 517 U.S. at 501.

⁴¹ *Id.*

⁴² *Id.* at 502 (internal citations omitted).

⁴³ *Id.* at 501.

⁴⁴ *Id.* at 513 (acknowledging Rhode Island’s power to ban the sale of alcoholic beverages outright); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 346 (1986) (acknowledging the Commonwealth of Puerto Rico’s power to prohibit casino gambling and the general legislative power to prohibit prostitution altogether).

⁴⁵ *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (describing lotteries and gambling as “‘vice’ activit[ies] that could be, and frequently ha[ve] been, banned altogether”).

⁴⁶ *Posadas*, 478 U.S. at 345-46.

⁴⁷ *Id.* at 331.

⁴⁸ *Id.*

tourists and thereby raise revenue for the nation, it decided to restrict the advertisement of such gaming facilities to non-residents.⁴⁹ The government prohibited advertising to locals in an attempt to avoid those “serious harmful effects on the health, safety and welfare of the Puerto Rican citizens” that result from excessive casino gambling.⁵⁰ The Court acknowledged the legislature’s right to prohibit casino gambling altogether and held that this “greater power” necessarily included the “lesser power to ban advertising of casino gambling.”⁵¹

This “greater includes the lesser” approach justified extremely restrictive limitations on advertisement for vice activities for almost ten years. State legislatures were understood to have legitimate interests in regulating demand for and access to “harmful” activities or products, such as alcoholic beverages, gaming, and prostitution.⁵² The Court rejected any notion that the legalization of an activity or product in turn required that advertisers enjoy full freedom to publicize its availability. Indeed, state legislatures were held to retain the authority to “forbid the stimulation of demand for the product or activity” as they saw fit.⁵³

B. *The 44 Liquormart View*

The “greater” finally ceased to include the “lesser” with regard to commercial speech regulation with the Court’s 1996 decision in *44 Liquormart, Inc. v. Rhode Island*.⁵⁴ There, the Court invalidated a state statutory prohibition on advertising the retail price of alcoholic beverages by rejecting the “greater-includes-the-lesser” reasoning as “inconsistent with both logic and well-settled doctrine.”⁵⁵ First, the Court discredited the logic underlying the *Posadas* Court’s assumption that the power to prohibit an activity entirely is somehow “greater” than the power to prohibit speech about it.⁵⁶ Rather, it is illogical to permit state governments to prohibit entire categories of speech on the basis that the power is subordinate to or “lesser” than the power to legalize the activity because words and their dissemination may often prove to be more vital to freedom than actions.⁵⁷

More specifically, the Court proclaimed that the right to speak freely weighs more heavily in the scale of democratic values than does the freedom to engage in conduct.⁵⁸ For example, a local prohibition on the instruction of bicycle riding or fishing may curtail more freedom than the state’s refusal to permit bike riding within its limits or to provide fishing licenses.⁵⁹ Often, the freedom to speak about an activity or product is more crucial to the preserva-

⁴⁹ *Id.* at 332.

⁵⁰ *Id.* at 341.

⁵¹ *Id.* at 345-46.

⁵² *Id.* at 346.

⁵³ *Id.*

⁵⁴ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 508 (1996).

⁵⁵ *Id.* at 508, 511.

⁵⁶ *Id.* at 511.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* (quoting the proverb “Give a man a fish, and you feed him for a day. Teach a man to fish, and you feed him for a lifetime,” *id.* at 511 n.19).

tion of democratic principles than the freedom to partake of those activities or products.⁶⁰

Next, the Court elaborated on the error of the *Posadas* reasoning in light of a more exacting analysis under the First Amendment.⁶¹ The Court examined the text of the First Amendment, concluding that its guarantee of freedom of speech reflects a presumption that the free flow of information is essential to a democratic society.⁶² The Court determined that the text's explicit guarantee mandates that a government may not suppress speech as easily as it may suppress conduct.⁶³ The Court then declared that the free-speech guarantee transcends distinctions between speech concerning vice products or activities and speech concerning commercial goods of a less "harmful" nature.⁶⁴ Freedom of speech guarantees the right to disseminate commercial speech, and such right is not lost "simply because [the state] may constitutionally prohibit the underlying conduct."⁶⁵

A state's decision to permit vice activities or products by licensing its providers does not alter the analysis. Although the state may decide not to "provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right."⁶⁶ Authority to license the provision of vice activities does not authorize the state to prohibit the dissemination of truthful and accurate information about the availability of the activity or product. Nonmisleading advertisements for activities or products that a state may entirely prohibit do not constitute an exclusive category of commercial speech and therefore must be regulated by the same principles that apply to truthful commercial speech in general.

III. THE *CENTRAL HUDSON* TEST FOR DETERMINING THE CONSTITUTIONALITY OF COMMERCIAL SPEECH RESTRICTIONS

Currently, the Court employs a four-part analysis in cases involving regulations of truthful, nonmisleading commercial speech.⁶⁷ First, to be entitled to First Amendment protection, the commercial speech at issue must concern a lawful activity and must not be misleading.⁶⁸ Second, for the restriction to be valid, the state must assert a "substantial interest" to be achieved by its imposition.⁶⁹ Third, the restriction must "directly advance" the asserted governmental interest.⁷⁰ Lastly, the restriction must be narrowly tailored to serve the stated purpose.⁷¹

⁶⁰ *Id.*

⁶¹ *Id.* at 512.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 513.

⁶⁷ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

The first prong of the *Central Hudson* test questions whether the speech sought to be regulated qualifies for First Amendment protection.⁷² To satisfy this prong, the speech at issue must concern a lawful activity, not be misleading,⁷³ and propose a commercial transaction.⁷⁴ The speaker bears the burden of establishing compliance with this part of the test, as it is the speaker who is in the best position to “evaluate the accuracy of [his] messages and the lawfulness of the underlying activity.”⁷⁵

Often, proponents of speech that the government restricts or seeks to restrict will attempt to classify their speech as non-commercial in an attempt to receive the more substantial First Amendment protection afforded to political or social speech.⁷⁶ However, proponents of commercial speech may not avoid regulation merely by “link[ing] a product to a current public debate.”⁷⁷ Combining the commercial elements of speech with other, non-commercial elements is an ineffective method of avoiding government regulation.⁷⁸ Only when commercial speech is combined with non-commercial elements by law or by the nature of the speech may the speech avoid classification as commercial.⁷⁹

The second prong of the *Central Hudson* test requires the state to assert a substantial interest that justifies restricting truthful, nonmisleading commercial speech.⁸⁰ This step is designed to ensure that “[t]he regulatory technique . . . extend[s] only as far as the interest it serves.”⁸¹ Asserting a substantial interest generally presents only a small hurdle as “[v]irtually any underlying regulatory interest connected with furthering the public welfare” will satisfy the Court.⁸² For instance, the Court has considered as sufficiently substantial the goals of energy conservation, fair and efficient electricity rates,⁸³ reducing social ills

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473 (1989) (applying the first prong of the *Hudson* test to “Tupperware parties”).

⁷⁵ *Cent. Hudson*, 447 U.S. at 564 n.6 (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977)); see also Hagar LaBouz, “*Mommy, What’s That Mean?*”: *Commercial Speech Protection and the Hard Rock Hotel Advertisement Controversy*, 1, 12 (2005) (unpublished note, on file with the NEVADA LAW JOURNAL).

⁷⁶ See *Bd. of Trs.*, 492 U.S. at 474.

⁷⁷ *Id.* at 475 (quoting *Cent. Hudson*, 447 U.S. at 563 n.5).

⁷⁸ *Id.* at 474-75.

⁷⁹ *Id.* at 474 (citing *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)). In *Board of Trustees*, the Court refused to grant non-commercial status to “Tupperware parties” despite the discussion at such parties of financial responsibility and running an efficient home. The Court rejected the contention that the commercial aspect of the parties was “inextricably intertwined” with the non-commercial aspects. Instead, the Court held that “[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.” *Id.*

⁸⁰ *Cent. Hudson*, 447 U.S. at 566.

⁸¹ *Id.* at 565.

⁸² Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 AM. BUS. L.J. 587, 600 (2000).

⁸³ *Cent. Hudson*, 447 U.S. at 568-69. The New York State Public Service Commission ordered all electric utilities in the state to cease all advertising that would promote the use of

associated with gambling,⁸⁴ and avoiding “strength wars” among producers of alcoholic beverages.⁸⁵

However, courts may refuse to accept generic statements of purpose, recognizing that they “tend to frustrate judicial inquiry into the real purposes of a governmental entity in instituting a restriction on protected activity.”⁸⁶ The Eleventh Circuit, in *Dills v. City of Marietta, Ga.*, rejected the proffered substantial interest of “safeguard[ing] life, public health, property and welfare,” holding that the “mere incantation of esthetics” was insufficient.⁸⁷ Even further, where the regulation at issue is completely unsupported by a statement of purpose, courts generally will not take judicial notice of unstated and unexplained purposes for restrictions on speech.⁸⁸

The third prong of the *Central Hudson* test calls for proof that the restriction directly advances the asserted governmental interest.⁸⁹ This third prong seeks to ensure that the restriction makes a “meaningful contribution” to the accomplishment of the cited ends.⁹⁰ The government carries the burden of justifying its chosen restriction⁹¹ and must demonstrate that the particular method will alleviate the asserted harms “to a material degree.”⁹² Rather than deferring to the legislative judgment that the chosen restriction is a proper method of advancing the asserted interest,⁹³ the Court demands more from the government than “mere speculation or conjecture.”⁹⁴ The Court prefers empirical evidence, but will settle for anecdotes,⁹⁵ as proof that the restriction chosen will alleviate the stated harms to a material degree.⁹⁶ A restriction will fail the third

electricity. The Commission’s proffered interests were “energy conservation” and the “concern that rates be fair and efficient.”

⁸⁴ *Greater New Orleans Broad. Ass’n, v. United States*, 527 U.S. 173, 185-86 (1999). A federal statute prohibited some forms of broadcast advertising of lotteries and casino gambling. The Solicitor General asserted two interests: “(1) reducing the social costs associated with ‘gambling’ or ‘casino gambling,’ and (2) assisting States that ‘restrict gambling’ or ‘prohibit casino gambling’ within their own borders.” The Court accepted both interests as substantial.

⁸⁵ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995). The Federal Alcohol Administration Act prohibited beer labels that displayed alcohol content. The Government defended the prohibition as necessary to prohibit “strength wars,” or the fear that brewers, left unregulated, “would seek to compete in the marketplace based on the potency of their beer.” *Id.* at 478-79.

⁸⁶ *Dills v. City of Marietta, Ga.*, 674 F.2d 1377, 1381 (11th Cir. 1982).

⁸⁷ *Id.*

⁸⁸ *Nat’l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 555-56 (2d Cir. 1990) (finding state ordinances banning off-site commercial advertising unconstitutional in the absence of identifiable government interests sought to be advanced).

⁸⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

⁹⁰ *Langvardt*, *supra* note 82, at 601.

⁹¹ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983).

⁹² *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

⁹³ *See Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341-42 (1986).

⁹⁴ *Edenfield*, 507 U.S. at 770.

⁹⁵ *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995) (discussing the absence of empirical, anecdotal, or any positive evidence to support the State’s position in support of a restriction on speech in *Edenfield*, 507 U.S. at 771).

⁹⁶ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995).

prong if it “provides only ineffective or remote support” for the stated purpose.⁹⁷

The third *Central Hudson* prong is the most difficult for government restrictions on truthful, nonmisleading speech to pass.⁹⁸ In *44 Liquormart*, the Court enunciated its concern that a complete ban on truthful commercial speech contribute significantly to the accomplishment of the legislative goal.⁹⁹ There, Rhode Island failed to convince the Court that its complete ban on alcohol price advertising directly advanced its asserted goal of promoting temperance.¹⁰⁰ Though the advertising ban might have dissuaded “temperate drinkers of modest means,” no evidence indicated that the ban would have any sort of significant effect on consumption statewide.¹⁰¹ Further, where the state failed to identify the price that would lead to a significant reduction in alcohol consumption and that prices would drop in the absence of a ban, the Court refused to fulfill the third prong by engaging in “speculation or conjecture.”¹⁰² The *44 Liquormart* decision makes clear that a restriction on “accurate commercial information” must directly advance the state’s asserted ends.¹⁰³

The fourth prong of the *Central Hudson* test requires the state to prove that its commercial speech restriction is narrowly tailored to serve its stated purpose.¹⁰⁴ In *Board v. Fox*, the Court emphasized at length that this fourth prong did not require the restriction to be a perfect fit or “the single best disposition,” but instead the restriction had to be merely “in proportion to the interest served.”¹⁰⁵ The Court stressed its policy of deferring to state legislative determinations of what manner of regulation may be best employed as long as the decision was reasonable.¹⁰⁶ However, through subsequent applications of the fourth prong, the Court has consistently held state governments to the higher standard spurned in *Fox*.

In *44 Liquormart* for example, the Court invalidated a blanket ban on advertising liquor prices because it failed prongs three and four of the *Central Hudson* test.¹⁰⁷ Because it was “perfectly obvious” that alternative, less restrictive regulatory methods of achieving the legislative goal of temperance were available, the ban failed even the “reasonable fit” test.¹⁰⁸ Similarly, the Court refused to uphold a federal ban on alcohol content advertising where

⁹⁷ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).

⁹⁸ *See id.* at 569; *Edenfield*, 507 U.S. at 771; *Greater New Orleans Broad. v. U.S.*, 527 U.S. 173, 189 (1999); *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 506-07 (1996). In each of the cited cases, the restriction on commercial speech at issue failed to advance the asserted interest directly.

⁹⁹ *44 Liquormart*, 517 U.S. at 505.

¹⁰⁰ *Id.* at 507-08.

¹⁰¹ *Id.* at 506.

¹⁰² *Id.* at 506-07. (quoting *Edenfield*, 507 U.S. at 770).

¹⁰³ *Id.* at 507.

¹⁰⁴ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n. of N.Y.*, 447 U.S. 557, 569-70 (1980).

¹⁰⁵ *Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

¹⁰⁶ *Id.* at 479.

¹⁰⁷ *44 Liquormart*, 517 U.S. at 506-07.

¹⁰⁸ *Id.* at 507.

alternatives existed that would achieve the government's proffered interests without intruding so greatly on First Amendment freedoms.¹⁰⁹ In practice, the fourth prong requires a state to prove that no viable, less restrictive alternative exists. As Justice Thomas recognized in concurrence, "[b]ecause direct regulation of the activity itself will always prove to be a less restrictive means, regulation of speech regarding the activity will always be more extensive than necessary."¹¹⁰ In practice, then, when a state seeks to impose restrictions on truthful, nonmisleading commercial speech, it must prove the absence of any less costly or less restrictive alternatives.¹¹¹

IV. NEVADA'S STATUTORY RESTRICTIONS ON BROTHEL ADVERTISEMENTS

Nevada Revised Statute § 244.345 legalizes prostitution in counties with populations of less than 400,000.¹¹² County officials in each county have the option of allowing legalized brothels to operate.¹¹³ Currently, brothels are legal in eleven of Nevada's seventeen counties.¹¹⁴ In 1913, the legislature enacted N.R.S. § 201.430, which prohibits legal brothels, or any person acting on behalf of any such brothel, from advertising any house of prostitution (1) in any public theater, on the public streets of any city or town, or on any public highway; and (2) in any county, city, or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute. Thus, N.R.S. § 201.430 prohibits brothel advertisement in any theater or along any roadway in counties in which prostitution is legal, as well as advertisement anywhere in counties in which prostitution is not legal. N.R.S. § 201.440 further prohibits any person or business owner from allowing any person associated with a brothel to promote it through advertisement in his or her place of business.

In 1981, the Nevada Supreme Court held that Nevada's highly restrictive brothel advertising restrictions withstand constitutional attack.¹¹⁵ In *Princess Sea*, the owner of a legal Nye County brothel and two newspaper publishers challenged N.R.S. §§ 201.430 and 201.440, seeking declaratory and injunctive relief from enforcement of the statutes.¹¹⁶ Approaching the statutes with a presumption of constitutionality, the court declared that it would only declare an act of the legislature unconstitutional if "it appear[ed] to be clearly in contra-

¹⁰⁹ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995).

¹¹⁰ *Stone*, *supra* note 39, at 153 (citing *44 Liquormart*, 517 U.S. at 524 (Thomas, J., concurring)).

¹¹¹ *LaBouz*, *supra* note 75, at 15.

¹¹² NEV. REV. STAT. ANN. § 244.345(8) (West 2004). As originally enacted in 1959, the statute permitted prostitution to be legalized only in counties with populations of 200,000 or less. Brothel regulation has been ongoing since the creation of the Nevada Territory in 1861. See Guy Louis Rocha, Presentation by Nevada State Archivist of the History of Prostitution in Nevada (Aug. 4, 1999), http://www.bunnyranch.com/news/history/Nevada_State_Library_and_Archives.

¹¹³ *Kuban v. McGimsey*, 605 P.2d 623, 626 (Nev. 1980).

¹¹⁴ Daria Snadowsky, Note, *The Best Little Whorehouse is Not In Texas: How Nevada's Prostitution Laws Serve Public Policy, and How Those Laws May Be Improved*, 6 NEV. L.J. 217, 224-25 (2006).

¹¹⁵ *Princess Sea Indus., Inc. v. State*, 635 P.2d 281 (Nev. 1981).

¹¹⁶ *Id.* at 284 (Manoukian, J., concurring).

vention of constitutional principles.”¹¹⁷ The court noted the absence of U.S. Supreme Court authority on the issue. Because the Court had not yet heard even *Posadas*, it had not defined the degree of First Amendment protection granted to commercial speech concerning vice activities.¹¹⁸ Lacking definite guidance, the court held that the statutory sections at issue did not “clearly contravene constitutional principles as thus far articulated” by the Supreme Court.¹¹⁹ For over thirty years since *Princess Sea*, brothel owners and operators have been partially restricted from advertising their services in counties in which prostitution is legal and completely banned from advertising in counties in which prostitution is illegal.

The Nevada Supreme Court’s decision in *Princess Sea* must be re-examined in light of the Supreme Court’s 1996 determination in *44 Liquormart* that the power to prohibit an activity does not automatically confer to the state the “lesser” power to proscribe its advertisement. In *44 Liquormart*, the Supreme Court made clear that the principles supporting a complete ban on commercial speech about vice activities buckle under the weight of logic and history.¹²⁰ At the time of *Princess Sea*, the Nevada Supreme Court lacked definite principles by which to guide its analysis. Because the *Central Hudson* test has established itself as the “controlling analytical framework” in determining the constitutionality of commercial speech restrictions,¹²¹ the remainder of this Note will analyze the constitutionality of the restrictions through an application of the test.

V. APPLYING THE *CENTRAL HUDSON* TEST TO NEVADA’S STATUTORY RESTRICTIONS ON ADVERTISING

Nevada statutory law contains two distinct restrictions on locations in which the legalized brothel industry may advertise its services. First, N.R.S. § 201.430(1)(b) prohibits brothel advertisements “in any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.” Subsection (1)(b) thus imposes a complete ban on the advertisement of this particular type of commercial speech. Second, N.R.S. § 201.430(1)(a) prohibits this particular type of commercial speech “in any public theater, on the public streets of any city or town, or on any public highway.” As a restriction on the place of advertisement, subsection (1)(a) imposes a content-neutral prohibition on commercial speech in those counties that allow prostitution.

A. *Does the Speech Qualify for First Amendment Protection?*

This first element of *Central Hudson* requires that the speech sought to be regulated is truthful, nonmisleading, and concerns a lawful activity. Advertisements concerning brothel services or activities do concern a lawful activity

¹¹⁷ *Id.* at 283 (quoting *State ex rel. Tidvall v. Eighth Jud. Dist. Ct.*, 539 P.2d 456 (Nev. 1975)).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 511 (1996).

¹²¹ Langvardt, *supra* note 82, at 599.

because the Nevada legislature has legalized prostitution in counties with populations of less than 400,000.¹²² The existence of a "statutory licensing scheme for houses of prostitution outside of incorporated cities and towns"¹²³ guarantees the legality of the conduct underlying the speech at issue.

There is no reason why advertisements concerning brothel services would be misleading or untruthful.¹²⁴ The goal of most advertising is to entice business. As legitimate businesses, the brothel industry would likely not seek to mislead their potential customers as to the nature or cost of their services because untruthfulness would lead to less profit in the long run. Further, the advertisements at issue in *Princess Sea* were not struck down on the basis that the information sought to be conveyed was untruthful; the information contained in the advertisements was not even at issue.¹²⁵ It is reasonably certain that brothel advertisements would be at least as truthful and nonmisleading as any other advertised product in the marketplace.

B. *Are the State's Interests Substantial?*

In the absence of legislative history for the 1913 enactment of N.R.S. § 201.430,¹²⁶ it is difficult to speculate about what motivated legislators nearly a century ago. It is reasonable to presume that their intent related in some way to preserving the health, safety, welfare, and morals of the state's citizens. The restrictions embodied in N.R.S. § 201.430 are most similar to the restrictions on gaming advertisements in *Posadas*. There, as discussed in Part II, the Puerto Rico Legislature prohibited gaming enterprises from advertising to Puerto Rican citizens.¹²⁷ By this restriction, the legislature sought to "reduc[e] the] demand for casino gambling by the residents of Puerto Rico."¹²⁸ The Supreme Court found this purpose legitimate, holding that the legislature's interest in preventing the "disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime" was sufficiently substantial.¹²⁹

It is likely that the legislative intent behind the passage of N.R.S. § 201.430 rests on analogous concerns for "preserving the quality of life in the community at large."¹³⁰ This supposition is bolstered by other decisions of the Nevada Supreme Court. In *Kuban v. McGimsey*, the court held that N.R.S. § 244.345, which permits houses of prostitution in counties with populations less than 400,000, did not divest individual counties of the power to ban brothels completely.¹³¹ In so holding, the court alluded to the interests implicated by the decision to permit or prohibit prostitution: "We recognize that community

¹²² NEV. REV. STAT. ANN. § 244.435 (West 2004).

¹²³ *Nye County v. Plankinton*, 587 P.2d 421, 423 (Nev. 1978).

¹²⁴ Labouz, *supra* note 75, at 20.

¹²⁵ *Princess Sea Indus., Inc. v. State*, 635 P.2d 281, 282 (Nev. 1981).

¹²⁶ A thorough search of the legislative history revealed nothing informative about legislative motivation.

¹²⁷ *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 332 (1986).

¹²⁸ *Id.* at 341.

¹²⁹ *Id.*

¹³⁰ *Id.* (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986)).

¹³¹ *Kuban v. McGimsey*, 605 P.2d 623, 626 (Nev. 1980).

standards and mores may differ from one community to another and even from time to time in the same community and that the county governing body . . . may see fit to adopt, repeal or amend ordinances to meet prevailing or then contemporary conditions.”¹³² In so stating, the court recognized the interests of local government in respecting the prevailing moral standard of its residents.

Similarly, four years before the court’s decision in *Princess Sea*, in *Oueilhe v. Lovell* the court upheld a Las Vegas city ordinance prohibiting the maintenance or advertisement of businesses offering the opportunity to wrestle with members of the opposite sex where the court found that such enterprises “utiliz[e] wrestling as a subterfuge for sexual pleasure for pay between male and female.”¹³³ The city cited extensive interests in prohibiting such businesses:

[T]he operation of a business of providing wrestling partners of the opposite sex is detrimental to the health and safety of the public and community, . . . such a business is offensive to the public morals and decency, . . . such a business is detrimental to the continued economic development of the community and tends to degrade the City as a provider of good entertainment, and is harmful to the cause of attracting tourists and visitors to the City.¹³⁴

In *Posadas, Kuban*, and *Oueilhe*, the courts recognized legitimate government interests in reducing the demand for the vice activity by residents in efforts to preserve quality of life generally. The State of Nevada’s interest in prohibiting the advertisement of legalized houses of prostitution, both in counties in which prostitution is illegal and in public areas of counties in which it is legal, would likely be the same. Nevada courts would probably “have no difficulty in concluding”¹³⁵ that the Nevada legislature’s interest in reducing the demand for prostitution services by its residents is a substantial government interest.

C. *Do the Restrictions Directly Advance the Asserted State Interest?*

As a “critical” element of the *Central Hudson* test, the requirement of direct advancement mandates that “the Government carr[y] the burden of showing that the challenged regulation advances the Government’s interest ‘in a direct and material way.’”¹³⁶ Evidently, the Nevada legislature believes that prohibiting brothel advertising in counties in which brothels are illegal and restricting such advertising in counties in which they are legal directly advances its interest in reducing the demand for brothel services by Nevada residents. However, the Supreme Court has made clear that deference to legislative judgment is no longer a basis for decision under this third prong.¹³⁷

Instead, the state must prove that its chosen method of regulation alleviates the recited harms to a material degree.¹³⁸ The Court approves of proof in

¹³² *Id.*

¹³³ *Oueilhe v. Lovell*, 560 P.2d 1348, 1349 (Nev. 1977).

¹³⁴ *Id.*

¹³⁵ *Posadas*, 478 U.S. at 341.

¹³⁶ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

¹³⁷ *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 486 (1996).

¹³⁸ *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

the form of empirical studies as well as anecdotes.¹³⁹ The statutory restrictions at issue here are most analogous to those restricting gaming advertisements to the residents of Puerto Rico in *Posadas*. However, the decision in *Posadas* rested on reasoning no longer viable. The Court there upheld the prohibition of gaming advertisements to Puerto Rican residents because the legislature “obviously believed” it directly advanced its goal.¹⁴⁰ Such unquestioning deference is no longer the Supreme Court standard for evaluation of the third prong.¹⁴¹

Rather, the State of Nevada must demonstrate that its chosen methods of restriction directly advance its asserted interest. It is unlikely that, were the issue presented to a court, either method of restriction would be found to advance directly the State’s asserted interest. The “irrationality of the regulatory scheme”¹⁴² is evident when viewed in context. The Nevada Legislature’s decision to permit legalized prostitution represents a legislative judgment that the economic benefits of permitting the industry outweigh any possible perceived social ills that accompany it.¹⁴³ In its history as a mecca for debauchery-seeking tourists, Las Vegas has celebrated its reputation as Sin City.¹⁴⁴ Not only does its newest advertising slogan embody its lascivious roots,¹⁴⁵ but Las Vegas is well known for “the shameless omnipresence of sex, in all its possible commodified forms.”¹⁴⁶

The State of Nevada would be hard-pressed to demonstrate direct advancement of its asserted goals by the complete ban on all forms of brothel advertisement in counties in which prostitution is illegal. To argue that the State seeks to reduce demand by locals for this particular vice activity is nonsensical when compared to the permitted promotion of the topless revues¹⁴⁷

¹³⁹ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (stating “We do not, however, require that empirical data come accompanied by a surfeit of background information. We have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether.”) (internal citations and quotation marks omitted).

¹⁴⁰ *Posadas*, 478 U.S. at 341-42.

¹⁴¹ See *supra* notes 90-92; *Rubin*, 514 U.S. at 490 (requiring more than “various tidbits” of evidence to “overcome the irrationality of the regulatory scheme and the weight of the record”).

¹⁴² *Rubin*, 514 U.S. at 490.

¹⁴³ See *supra* note 132.

¹⁴⁴ John Blackstone, *Vegas Soars to Lavish New Heights*, CBS NEWS, Sept. 19, 2004, <http://www.cbsnews.com/stories/2004/07/19/sunday/main630587.shtml>.

¹⁴⁵ “What Happens in Vegas, Stays in Vegas.” Newt Briggs, *Slogan’s Run*, LAS VEGAS MERCURY, April 8, 2004, <http://www.lasvegasm Mercury.com/2004/MERC-Apr-08-Thu-2004/23579319.html>.

¹⁴⁶ Kenneth Nguyen, *This is Not Kansas*, THE AGE, Apr. 30, 2005, <http://www.theage.com.au/news/United-States/This-is-not-Kansas/2005/04/29/1114635699824.html#top>.

¹⁴⁷ Bite, a show at the Stratosphere, features topless women dressed as vampires, Bite – Entertainment in Las Vegas, <http://www.stratospherehotel.com> (follow “Entertainment” hyperlink); then follow “Bite” hyperlink) (last visited Feb. 28, 2007); Folies Bergere at the Tropicana features topless cabaret numbers, Tropicana Entertainment, <http://www.tropicana.lv.com> (follow “Entertainment” hyperlink) (last visited Feb. 28, 2007); Fantasy at Luxor features topless dance numbers, Luxor Entertainment, <http://www.luxor.com> (follow “Entertainment” hyperlink); then follow “Fantasy” hyperlink) (last visited Feb. 28, 2007); Crazy Girls at the Riviera is billed as the “sexiest topless revue,” and Splash at the Riviera features topless showgirls, Riviera Entertainment, <http://www.rivierahotel.com> (follow “Entertainment” hyperlink) (last visited Feb. 28, 2007); Jubilee! at Bally’s features topless dancers, Bally’s Entertainment, <http://www.harrah.com/EventsDetail.do?detailName=donn->

and “sexual circus[es] of muscular men and slender women with small waistlines and pert breasts”¹⁴⁸ by local gaming enterprises to lure locals into their casinos.¹⁴⁹ In *Greater New Orleans*, the Court struck down a federal law prohibiting advertisements of private casino gambling from broadcast by states in which gambling is legal to states in which gambling is illegal.¹⁵⁰ The Court condemned the federal statute because its “operation . . . and [] attendant regulatory [scheme were] so pierced by exemptions and inconsistencies that the Government [could] not hope to exonerate it.”¹⁵¹ The statute itself contained exemptions that were “squarely at odds with the governmental interests asserted.”¹⁵² Here, the “infirmity” of N.R.S. § 201.430 is evident when contrasted with the Nevada legislature’s “simultaneous encouragement”¹⁵³ of the use of sexually provocative shows to entice patrons to gamble and its failure to regulate adequately the escort service and exotic dancing industry, well known often to be a front for prostitution services.¹⁵⁴

It is unlikely that the State’s interest in reducing demand for prostitution by its residents is directly advanced by completely banning advertisements in all counties in which prostitution is illegal. The Supreme Court instructs courts to “review with special care” regulations that completely ban a particular type of commercial speech as a means to a non-speech-related end.¹⁵⁵ Here, the asserted state interest, while substantial, reflects the decision of the legislature to impose its morals on residents. Because the end is “unrelated to the preser-

ardens-jubilee-detail&locationCode=BLV&eventTitle=DONN+ARDEN%27S+JUBILEE (last visited Feb. 28, 2007).

¹⁴⁸ Sonya Padgett, *Supersize Sisters: Standing Out*, LAS VEGAS REV. J., Oct. 19, 2003 at 1 J (discussing the Zumanity show at the New York New York Hotel Casino).

¹⁴⁹ See generally Denise Cardinal, *Ordinance Would Allow Nude Shows in Downtown Hotels*, LAS VEGAS SUN, June 17, 1998 at A 4, available at <http://www.lasvegassun.com> (discussing an amended City Ordinance that would permit Downtown casinos with more than 300 rooms to feature nude dancers); Adam Goldman, *Sin City Getting Sexy Makeover*, CBS NEWS, May 6, 2003, <http://www.cbsnews.com/stories/2003/05/06/entertainment/main552573.shtml>; Jeff Simpson, *Official: Some Resorts Allowing Risque Behavior*, LAS VEGAS REV. J., May 4, 2002, at A1, available at http://www.reviewjournal.com/lvrj_home/2002/May-04-Sat-2002/news/18674152.html; Casino Watch – *SEXessful Gambling*, Sept. 2003, http://www.casinowatch.org/_cw_files/sex_prostitution/sexessful_gambling.html (compiling excerpts from various online news sites that discuss the growth of Las Vegas as an adult-themed resort-town).

¹⁵⁰ *Greater New Orleans Broad. Ass’n Inc. v. United States*, 527 U.S. 173, 176 (1999).

¹⁵¹ *Id.* at 190.

¹⁵² *Id.* at 191.

¹⁵³ *Id.* at 189-90.

¹⁵⁴ See J. M. Kalil, *Taxi Test Rides Yield Long-Hauls, Prostitution Offers*, LAS VEGAS REV. J., Feb. 22, 2004, at B1, available at http://www.reviewjournal.com/lvrj_home/2004/Feb-22-Sun-2004/news/23249445.html. Reporter J.M. Kalil posed as a tourist and took twelve rides from taxis to and from McCarran Airport between noon and eight p.m. Three of twelve cabdrivers solicited Kalil with business card-sized flyers advertising escort services, informing him that “the companies’ dancing, escort service or other unspecified service was just code for prostitution.”; see also David Strow, *Slot Machine Regulators Concerned About LV Topless Club*, LAS VEGAS SUN, July 13, 2001, at C3, available at <http://www.lasvegassun.com> (discussing the pending decision of the Nevada Gaming Control Board whether to revoke a topless club owner’s gaming license due partly to concerns about a number of dancers’ prostitution-related arrests).

¹⁵⁵ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 n.9 (1980).

vation of a fair bargaining process,” a court would apply “rigorous” review.¹⁵⁶ The complete prohibition on brothel advertising hinders consumer choice,¹⁵⁷ prevents the public from scrutinizing the state’s policy choices,¹⁵⁸ and as such, seeks to encourage public ignorance for paternalistic ends. A court would quite likely hold that the complete prohibition on brothel advertisements in counties in which prostitution is illegal fails to advance materially the State’s asserted interests because it floats alone in a sea of contradiction.

The content-neutral ban on brothel advertisements in counties in which prostitution is legal may meet a different fate under this third prong. Nevada law prohibits legal brothels from advertising “any house of prostitution in *any* public theater, on the public streets of *any* city or town, or on *any* public highway.”¹⁵⁹ Thus, the State imposes a content-neutral restriction on the place of expression.¹⁶⁰ The State will likely find it easier to demonstrate that this restriction directly advances its asserted interest in reducing demand for prostitution services by residents.

Although the content-neutral restriction does not demand rigorous review,¹⁶¹ Nevada must still prove that the restriction advances its asserted interests to “a material degree.”¹⁶² In *Greater New Orleans*, the Court reasoned that a partial restriction on broadcast advertising of lotteries and casino gambling would likely “have some impact on overall demand for gambling.”¹⁶³ Similarly here, it is generally reasonable to assume that by removing advertisements from view in commonly-frequented locations, fewer people visit and purchase prostitution services.

However, the Court in *Greater New Orleans* also found it “reasonable to assume that much of the advertising would merely channel gamblers to one casino rather than another.”¹⁶⁴ Likewise, here it is questionable whether permitting the advertising in places currently prohibited would create a marked increase in demand for prostitution services. In *44 Liquormart*, the Court found that a complete ban on liquor price advertising did not directly advance the state’s interests in avoiding price wars between retailers because the marginal price increase resulting from the absence of competition would not “significantly reduce marketwide consumption. . . . the abusive drinker will probably not be deterred by a marginal price increase and . . . the true alcoholic may simply reduce his purchases of other necessities.”¹⁶⁵ Just as in *44 Liquormart*,

¹⁵⁶ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

¹⁵⁷ *Id.* at 502.

¹⁵⁸ *Cent. Hudson*, 447 U.S. at 575 (Blackmun, J., concurring).

¹⁵⁹ NEV. REV. STAT. ANN. § 201.430 (West 2004) (emphasis added).

¹⁶⁰ *See 44 Liquormart*, 517 U.S. at 501.

¹⁶¹ *Id.*

¹⁶² *See Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999). The Court began its opinion by stating, “[f]ederal law prohibits some, but by no means all, broadcast advertising of lotteries and casino gambling.” *Id.* at 176. Despite the partial restriction, the Court still mandated that the Government “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Id.* at 188.

¹⁶³ *Id.* at 189.

¹⁶⁴ *Id.*

¹⁶⁵ *44 Liquormart*, 517 U.S. at 506.

the restrictions on speech here will not likely deter those people already partaking of prostitution services. The State may assert that the restrictions help prevent a new market for the services; however, the advertisement of brothel services does not guarantee that people who do not currently solicit the services will do so upon viewing the advertisements. In fact, it is reasonable to assume that those residents who do not solicit the services currently are aware of their availability and will not begin to partake upon viewing an advertisement.¹⁶⁶

There are many points of difference between bolstering the constitutionality of the content-neutral restriction a complete ban. The content-neutral restriction does not completely shield from view the underlying governmental policy behind the restriction.¹⁶⁷ Residents are still able to view brothel advertisements and determine for themselves whether to partake of the services offered. Permitting individual people to determine their own best interests is the reason the Court protects the dissemination of commercial speech in the first place.¹⁶⁸ Thus, the content-neutral restriction does not “strike[] at the heart of the First Amendment”¹⁶⁹ so as to demand “rigorous” review.¹⁷⁰ Nonetheless, the State of Nevada would have a tough time convincing a court that the content-neutral restrictions directly advance its interest in reducing the demand for prostitution services by its residents to a material degree. The Court in *44 Liquormart* reiterated its unwillingness to engage in “speculation or conjecture” to find direct advancement of state interests by restrictions on speech.¹⁷¹ Although the proffered interest is substantial, if the restriction on speech “lacks [a] close and substantial relation to the governmental interest[] asserted, it cannot be, by definition, a reasonable time, place, or manner restriction.”¹⁷² Without proof in the form of empirical studies or anecdotes, a court would probably hold the content-neutral restriction to fail the third prong.

D. Is the Restriction on Speech More Extensive than Necessary to Serve the State’s Asserted Interest?

The fourth prong of the *Central Hudson* test calls for an evaluation of the “fit” between the restrictions on speech and the asserted state interest.¹⁷³ While the Court claims not to require the “least-restrictive-means,”¹⁷⁴ in practice it

¹⁶⁶ See generally Barbara Brents & Kathryn M. Hausbeck, *Pro-Family, Pro-Prostitution: Discourses of Gender, Sexuality & Legalized Prostitution in a Nevada Town* 3 (2000) (unpublished paper presented before the Midwest Sociological Association, Chicago, Apr. 2000), <http://www.unlv.edu/faculty/brents/research/msspaper.ely.pdf> (commenting on brothels in Ely: “They are all but invisible, known only to regulars, locals, and those who have either done intentional research or who have heard by word of mouth.”).

¹⁶⁷ *44 Liquormart*, 517 U.S. at 503.

¹⁶⁸ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). (“[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them.”).

¹⁶⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 574 (1980). (Blackmun, J., concurring).

¹⁷⁰ *44 Liquormart*, 517 U.S. at 501.

¹⁷¹ *Id.* at 507 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

¹⁷² *Edenfield*, 507 U.S. at 773.

¹⁷³ *Cent. Hudson*, 447 U.S. at 566.

¹⁷⁴ *Bd. of Trs.*, 492 U.S. at 480.

always looks to find “alternative, less drastic measures” by which the state can accomplish its asserted interest.¹⁷⁵ For instance, in *44 Liquormart*, the Court invalidated the ban on alcohol price advertising where it was “perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal of promoting temperance.”¹⁷⁶ Again, in *Rubin v. Coors Brewing Co.*, the Court refused to sanction a federal regulation that prohibited displaying alcohol content on beer labels when its goal of suppressing strength wars among brewers based on alcohol level could have just as easily been achieved by “several alternatives.”¹⁷⁷ The Court’s enumeration of other options, “such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength . . . , or limiting the labeling ban only to . . . the segment of the market [most vulnerable to strength wars],” was proof that the federal regulation was more extensive than necessary.¹⁷⁸

Beginning with the complete ban on brothel advertisements, it would be nearly impossible for the State of Nevada to demonstrate that its asserted interest could not be achieved by a more narrow restriction. The State bears the burden of proving to the satisfaction of the court that it has carefully calculated the costs and benefits of the total ban,¹⁷⁹ and that it is “no more extensive than necessary.”¹⁸⁰ The State must therefore prove that there is no way other than prohibiting all brothel advertising, regardless of content or place of dissemination, to deter residents who do not already patronize the brothels from becoming customers. A court will likely be hesitant to sanction this paternalistic legislation, which keeps people ignorant out of fear of what they might do with the information.

The State has not yet measured the success of any less restrictive methods. For instance, in an effort to maintain or decrease the number of married men visiting the brothels, the legislature might regulate the content of advertisements to mandate that the businesses include a disclaimer on any brochures, billboards, or print advertisements advising potential customers of the possible dangers posed to a marital or family relationship. Perhaps restricting the place of dissemination in counties with populations of over 400,000, such as Las Vegas and Reno, to freestanding news racks that can only be accessed by payment would avoid attracting new customers. Such a content-neutral restriction on the place of advertisement would ensure that the information reaches only those people actively seeking the services by mandating payment for access. Perhaps the legislature could restrict the location of such news racks to the Strip in Las Vegas and the major tourist centers in Reno and elsewhere to further target tourists with the advertisements. Although none of these pro-

¹⁷⁵ *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 417 n.13 (1993); *see also Cent. Hudson*, 447 U.S. at 570 (finding that the New York Public Service Commission’s ban on promotional advertising by the energy utility in the interest of conserving energy use failed the fourth prong because no showing had been made “that a more limited restriction . . . would not serve adequately the State’s interests”).

¹⁷⁶ 517 U.S. at 507.

¹⁷⁷ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995).

¹⁷⁸ *Id.* at 490-91.

¹⁷⁹ *Discovery*, 507 U.S. at 417.

¹⁸⁰ *44 Liquormart*, 517 U.S. at 507.

posed methods may be a surefire way to restrict advertisements from residents and reach only tourists, all are less restrictive than the complete ban currently in place. Absent a strong showing that the current total prohibition is the only method by which to achieve its goal, the complete ban would fail the fourth prong of the *Central Hudson* test.

The content-neutral restriction prohibits brothel advertising in any theater, along any public street, or on any public highway in counties in which prostitution is legal.¹⁸¹ This restriction appears to be more reasonable and less vulnerable to challenge as overbroad. However, there are less-restrictive alternatives available by which the State could achieve its interest in discouraging the use of brothels by residents and encouraging use by tourists. For example, the legislature could design a statutory scheme allowing advertisement of prostitution along those public highways that run through the entire state. It would logically be by these roads that tourists would come upon the more rural Nevada counties, so permitting advertising along such highways would likely increase tourist traffic, and thereby revenue, in these counties.

This proposed method is not foolproof. Residents of Nevada and county locals certainly travel on these major highways. However, the Nevada legislature has, in other contexts, recognized that the sparsely populated stretches of freeway between urban areas may be governed by different laws than those within urban areas. For example, N.R.S. § 484.3685 instructs generally that the penalty for exceeding a 60- or 70-mile-per-hour speed limit by ten miles per hour and a 75-mile-per-hour speed limit by five miles per hour is twenty-five dollars.¹⁸² However, the statute exempts from this light fine roadways in urban areas¹⁸³ that are located in counties with populations exceeding 100,000. Practically speaking then, drivers in Nevada will incur a twenty-five dollar fine when speeding through sparsely populated areas of the state, but will incur greater penalties when speeding in heavily populated locales. This scheme recognizes that the danger speeding drivers pose is greatest in areas of dense population.¹⁸⁴

¹⁸¹ NEV. REV. STAT. ANN. § 201.430(1)(a) (West 2004).

¹⁸² *Id.* § 484.3685.

¹⁸³ *Id.* § 484.215 (defining "urban area" as "the area encompassed within the city limits of a city whose population is 10,000 or more").

¹⁸⁴ History of SB 137-1997 12, Exhibit G. The legislative history behind the enactment of NEV. REV. STAT. ANN. § 484.3685 is replete with references to the differences between rural and urban areas: "[Assemblyman Anderson] asked why the bill limited the top end speed by only 5 m.p.h. and Senator Rhoads responded the 75 m.p.h. speed limits were mostly in rural Nevada and he thought 75 m.p.h. was a safe speed while going 80 m.p.h. would not be." *Minutes of the Assembly Committee on Transportation*, 1997 Leg., 69 Sess. 12 (Nev. 1997); "Mr. Anderson asked if as a result of the bill, in places like the spaghetti bowl in Reno . . . local authorities might lower the speed limit below 45 to 50 m.p.h. to fit below the speeds of the bill so that drivers would not speed in those areas. Senator Rhoads responded in heavily urbanized areas such as the spaghetti bowl or I-15 in Las Vegas perhaps an Amendment could be proposed." *Id.* Additionally, the Nevada Department of Transportation ("NDOT") was "strongly opposed" to the Bill's passage, but acknowledged its probable passage. Thus, NDOT recommended two modifications to be made to the Bill "to lessen its adverse impacts." *Id.* at Exhibit G1 (Exhibit G is the *Assembly Transportation Committee Hearings on S.B. 137 Reducing Penalty for Speeders*, prepared by NDOT Director Tom Stephens). The second of the proposed modifications was as follows: "The lesser penalty proposed by

Based on this premise, the Nevada legislature should design a permissive brothel advertising scheme that allows advertisements on major highways throughout the state but prohibits them nearer to urban centers. Such an arrangement would accomplish the State's interest in minimizing business from residents while maximizing tourist traffic.¹⁸⁵ The availability of less restrictive measures to regulate brothel advertisement in counties in which the businesses are legal makes it likely that a court would determine that the current restrictions fail the fourth prong of the *Central Hudson* test.

CONCLUSION

The State of Nevada would be hard-pressed to demonstrate that the current restrictions on commercial speech directly advance its interest in reducing demand for prostitution services by residents. The State would be similarly hard-pressed to establish that the restrictions were the least restrictive available by which to achieve the hypothesized interest. Unable to pass prongs three and four of the *Central Hudson* test, litigation over the restrictions would likely result in their invalidation, and the State would be forced to enact legislation that comports with the level of protection granted to commercial speech about lawful vice activities by the First Amendment.

However, certain alterations in the analysis might compel a different result. For example, this Note hypothesized that the State's interest in enacting the regulatory scheme was to reduce demand for prostitution by its residents. Perhaps an alternative interest, such as a preserving the health, safety, welfare, and morals of Nevadans generally would better stand up to constitutional scrutiny under the direct advancement prong. The Supreme Court has long-recognized the power of the state to utilize its police power not only for suppression of what is "offensive, disorderly, or unsanitary," but also for promotion of "the public health, the public morals, or the public safety."¹⁸⁶ Indeed, the State might have little difficulty proving that restrictions currently in place directly advance such broad and generalized interests.

Perhaps an analysis of the restrictions as "time, place, and manner" restrictions might yield a favorable result for the State.¹⁸⁷ The Court has regularly upheld city zoning ordinances aimed at limiting the areas of town where adult-themed businesses can locate.¹⁸⁸ The State's prospects for success appear quite good under such an analysis, as the Court has declared, "[r]easonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted

Bill SB 137 should not apply in heavily populated areas. Nevada may be like Montana or Wyoming in its rural counties but there are nearly a million and a half people living in Washoe and Clark County. The highways in and around these urban areas have a great deal more traffic than the highways in the rest of Nevada." *Id.* at Exhibit G2-3.

¹⁸⁵ See Curtis, *supra* note 3. Bobbi Davis, owner of the Shady Lady Ranch brothel near Beatty, Nevada, explained her desire to advertise in counties in which prostitution is illegal: "We can only advertise locally. . . . I live outside a town that has 1,100 people in it. We don't want the locals, we want the tourists."

¹⁸⁶ Bacon v. Walker, 204 U.S. 311, 317, 318 (1907).

¹⁸⁷ See Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

¹⁸⁸ *Id.*; Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 62-63 (1976).

by the First Amendment.”¹⁸⁹ However, to be valid, a time, place, and manner restriction must “[be] justified without reference to the content of the regulated speech.”¹⁹⁰ The State would therefore bear the burden of proving that the restrictions on speech were not based on the content of the advertisements, but instead on “the secondary effects of such [advertisements] on the surrounding community.”¹⁹¹

If the State were unable to convince a court of its content-neutral intentions, it would be forced to confront “more careful” judicial scrutiny “to ensure that communication has not been prohibited ‘merely because public officials disapprove of the speaker’s views.’”¹⁹² In *Consolidated Edison*, the Court struck down the New York State Public Service Commission’s order prohibiting an energy utility from including inserts in its billing statements discussing “controversial issues of public policy.”¹⁹³ The Commission acknowledged that the distinction it had drawn between permissible and impermissible informational inserts was based precisely on content, and attempted to justify the difference “on the ground that consumers will benefit from receiving ‘useful’ information but not from the prohibited information.”¹⁹⁴ The Court immediately discredited the Commission’s rationale.¹⁹⁵ Under a time, place, and manner analysis, the State of Nevada would bear the burden of proving that the advertising restrictions were not based merely on content, and that even if they were, the restrictions were justified for some reason other than disapproval by public officials.

Notwithstanding alternative justifications, the current restrictions on brothel advertisements do not directly advance the goal of reducing demand for prostitution services by residents but encouraging demand by tourists. Brothels are prohibited from advertising in the most popular tourist destination in the state, Las Vegas, but permitted in smaller, rural counties. Further, the restrictions are not sufficiently narrowly tailored. The State has not experimented with various less restrictive alternatives. In sum, Nevada’s restrictions on brothel advertisements do not provide a level of protection to truthful, nonmisleading commercial speech consistent with that required by the Supreme Court pursuant to the First Amendment.

¹⁸⁹ *Young*, 427 U.S. at 63 n.18.

¹⁹⁰ *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981) (quoting *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (distinguishing valid time, place, and manner restrictions from the impermissible prohibition of prescription drug price advertising at issue)).

¹⁹¹ *Renton*, 475 U.S. at 47. The City of Renton enacted a zoning ordinance prohibiting adult motion picture theaters from locating within 1000 feet of any residential zone, single-, or multiple-family dwelling, church, park, or school. The Court upheld the zoning ordinance as a content-neutral speech regulation, designed not to suppress free expression, but “to prevent crime, protect the city’s retail trade, maintain property values, and generally protect and preserve the quality of the city’s neighborhoods, commercial districts, and the quality of urban life.” *Id.* at 48 (internal citations omitted).

¹⁹² *Consol. Edison Co. v. Pub. Serv. Comm’n* 447 U.S. 530, 536 (1980) (internal citations omitted).

¹⁹³ *Id.* at 532-33.

¹⁹⁴ *Id.* at 537.

¹⁹⁵ *Id.*