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# Barnes v. Glen Theatre, Inc.: Nude Dancing and the First Amendment Question

Zachary T. Fardon

# RECENT DEVELOPMENTS

## *Barnes v. Glen Theatre, Inc.*: Nude Dancing and the First Amendment Question

## I. INTRODUCTION

Erotic dancers Gayle Sutro, Carla Johnson, and Darlene Miller can no longer dance nude in Indiana. In *Barnes v. Glen Theatre, Inc.*[1] the United States Supreme Court held that Indiana's prohibition of nude dancing did not violate the First Amendment to the United States Constitution.[2] The Court's holding ended years of controversy and debate over Indiana's public indecency statute.[3]

In 1979, in *State v. Baysinger*, the Indiana Supreme Court held that Indiana's public indecency statute could be used to prohibit nude dancing.[4] The court stated that the statute could not prohibit some larger forms of expression involving the communication of ideas.[5] The court concluded, however, that nude dancing was mere conduct without the expression of ideas.[6] Since *Baysinger* the Indiana Court of Appeals has struggled with the constitutional issues surrounding nude dancing.[7]

In 1990 the United States Court of Appeals for the Seventh Circuit considered the application of the Indiana public indecency statute to nude dancing in *Miller v. Civil City of South Bend.*[8] The *Miller* deci-

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1. 111 S. Ct. 2456 (1991) (plurality opinion).

2. *Id.* The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

The First Amendment applies to the states because it is incorporated in the due process clause of the Fourteenth Amendment. Bridges v. California, 314 U.S. 252, 263 n.6 (1941).

3. IND. CODE § 35-45-4-1 (1985) provides in pertinent part:

Public Indecency—Indecent exposure.

(a) A person who knowingly or intentionally, in a public place:

(1) Engages in sexual intercourse;

(2) Engages in deviate sexual conduct;

(3) Appears in a state of nudity; or

(4) Fondles the genitals of himself or another person; commits public indecency, a class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

*Id.*

4. 397 N.E.2d 580 (Ind. 1979), *appeal dismissed sub nom.* Clark v. Indiana, 446 U.S. 931 (1980), and Dove v. Indiana, 449 U.S. 806 (1980).

5. *Id.* at 587.

6. *Id.* The court stated that "the activity involved is appearing nude or dancing in the nude in bars and is conduct . . . . This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim." *Id.*

7. *See* Erhardt v. State, 463 N.E.2d 1121 (Ind. Ct. App.) (holding that a dance contestant did not violate Indiana's public indecency statute when she danced nude), *rev'd*, 468 N.E.2d 224 (Ind. 1984); Adims v. State, 461 N.E.2d 740 (Ind. Ct. App. 1984) (holding that nude dancing in an adult bookstore violated Indiana's public indecency statute).

8. 904 F.2d 1081 (7th Cir. 1990) (en banc).

sion contained six separate opinions, revealing a court sharply divided on the basis of legal analysis as well as personal opinions and cultural views.[9] The majority held that nonobscene nude dancing, performed as entertainment, is expression entitled to limited First Amendment protection.[10] The majority suggested that the Indiana legislature could regulate nude dancing for reasons unrelated to the suppression of free expression.[11] The court, however, found that the public indecency statute's total ban on this protected activity was unconstitutional.[12]

The United States Supreme Court, in *Barnes v. Glen Theatre, Inc.*,[13] reversed the Seventh Circuit.[14] Chief Justice Rehnquist wrote the plurality opinion, joined by Justices O'Connor and Kennedy. Chief Justice Rehnquist conceded that nude dancing is expressive conduct that falls within the outer perimeters of the First Amendment.[15] Nonetheless, he determined that the Indiana statute's prohibition of nude dancing was clearly within the State's constitutional power.[16] In reaching this decision, Chief Justice Rehnquist applied the four-part test announced in *United States v. O'Brien*[17] and concluded that Indiana's substantial governmental interest in promoting morality and protecting societal order justified the application of the statute to this expressive activity.[18] He reasoned that the public indecency statute was unrelated to the suppression of free expression and only incidentally infringed upon the protected activity at issue.[19]

Justices Souter and Scalia filed separate concurrences. Justice Souter wrote separately to identify additional justifications for the statute.[20] Justice Souter found that the harmful secondary effects of nude dancing justified a broad application of the public indecency statute.[21] Justice Scalia also wrote separately because he viewed the statute as regulating conduct, not expression.[22] Thus, he believed the case did not

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9. *Id. See* Walker v. City of Kansas City, 919 F.2d 1339, 1341 (8th Cir. 1990). *See also infra* notes 94-119 and accompanying text.

10. 904 F.2d at 1085.

11. *Id.* at 1088.

12. *Id.* at 1089.

13. 111 S. Ct. 2456 (1991) (plurality).

14. *Id.* at 2463.

15. *Id.* at 2460.

16. *Id.* at 2460-63.

17. 391 U.S. 367 (1968). For a more detailed discussion of the *O'Brien* test, see *infra* notes 139-41 and accompanying text.

18. 111 S. Ct. at 2462-63.

19. *Id.* at 2463.

20. *Id.* at 2468-69 (Souter, J., concurring).

21. *Id.*

22. *Id.* at 2463 (Scalia, J., concurring).

implicate First Amendment analysis.[23]

Justice White, with whom Justices Marshall, Blackmun, and Stevens joined in dissent, agreed with the plurality and Justice Souter that the nude dancing in this case was expressive conduct deserving First Amendment protection.[24] Justice White dissented because the Indiana statute, as applied to nude dancing, targeted the erotic message communicated by the expressive activity.[25] As a content-specific regulation, the statute demanded more exacting scrutiny than the plurality applied through the *O'Brien* test.[26] Justice White concluded that the State's interests in prohibiting nude dancing under this higher standard could not justify the statute's total ban on this constitutionally protected activity.[27]

Since as early as 1931[28] the Supreme Court has attempted to establish the boundaries of First Amendment protection for expressive conduct.[29] The Court, however, has reached varying conclusions concerning a wide range of activities.[30] The *Barnes* case represents the latest development in the continuing struggle to define the outer limits of the First Amendment.

Part II of this Recent Development examines the history of the nude dancing issue in the United States Supreme Court. Part III charts the evolution of *Barnes* as the backdrop for the Supreme Court's first conclusive ruling on the nude dancing issue. Part IV discusses the plurality's reasoning in *Barnes* for upholding Indiana's prohibition of nude dancing, as well as the concurring opinions of Justices Scalia and Souter and the dissenting opinion of Justice White. Part V recognizes two significant flaws in the *Barnes* Court's analysis. First, the Court wrongly

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23. *Id.*

24. *Id.* at 2471 n.1 (White, J., dissenting).

25. *Id.* at 2474.

26. *Id.* at 2475.

27. *Id.* at 2475-76.

28. In Stromberg v. California, 283 U.S. 359 (1931), the Court held that a California statute prohibiting public display of "any flag, badge, banner, or device . . . as a sign, symbol or emblem of organized opposition to government" was an impermissible infringement of freedom of speech. *Id.* at 361.

29. Any conduct may be expressive. *See infra* notes 233-38 and accompanying text. The Court, therefore, has struggled to determine what conduct under what circumstances is sufficiently expressive to merit First Amendment protection. *See infra* note 30. *See also* Jeffrey A. Been, Erhardt v. State*: Nude Dancing Stripped of First Amendment Protection*, 19 IND. L. REV. 1 (1986).

30. The Court has reached conclusions concerning: movies, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); theater, Schacht v. United States, 398 U.S. 58 (1970); rock music, Ward v. Rock Against Racism, 491 U.S. 781 (1989); silent picketing, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); the wearing of black armbands, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969); sleeping in a public park, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); and flag burning, Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 110 S. Ct. 2404 (1990).

concluded that Indiana's statute was a general proscription of all nudity that only incidentally infringed on the erotic message of nude dancing. The Court, thus, erred in applying the less vigorous scrutiny of the *O'Brien* test to Indiana's prohibition of nude dancing. Second, assuming *arguendo* that the Court was correct in applying the *O'Brien* test, the State's interest in regulating public nudity did not justify the complete prohibition of this protected activity. Part VI suggests that the Court's faulty analysis in *Barnes* underscored its reluctance to accept nude dancing as a legitimate form of protected expression. Part VI, therefore, explores the issue of whether nude dancing should be protected under the First Amendment. This Recent Development concludes that the *Barnes* decision reflects the Court's assessment of the artistic merits of nude dancing and suggests that this smokescreen approach to jurisprudence is the most significant and troublesome aspect of the *Barnes* case.

## II. LEGAL BACKGROUND: DANCING AROUND THE NUDE DANCING QUESTION

Over the years, courts have struggled to decide whether nude dancing falls within the protection of the First Amendment.[31] Before *Barnes* lower courts were split on this issue. Some courts took the view that nude dancing was entitled to First Amendment protection[32] and should not be prohibited unless obscene.[33] Other courts concluded that nude dancing was mere conduct without a communicative element and,

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31. *See generally* Erwin S. Barbre, Annotation, *Topless or Bottomless Dancing or Similar Conduct as Offense*, 49 A.L.R.3D 1084 (1973).

32. *See, e.g.*, Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985) (holding that an ordinance banning topless dancing in establishments where alcohol is served was unconstitutional under the First Amendment); Mickens v. City of Kodiak, 640 P.2d 818 (Alaska 1982) (same); *In re* Giannini, 446 P.2d 535 (Cal. 1968) (holding that nude dancing was protected hy the First Amendment unless the performance was obscene), *cert. denied sub nom.* California v. Giannini, 395 U.S. 910 (1969), *overruled by* Crownover v. Musick, 509 P.2d 497 (1973); Erhardt v. State, 463 N.E.2d 1121 (Ind. Ct. App. 1984) (concluding that a dance contestant who danced in a nonobscene manner while wearing only a G-string was entitled to First Amendment protection and could not be convicted under the indecency statute), *rev'd*, 468 N.E.2d 224 (Ind. 1984); People v. Nixon, 390 N.Y.S.2d 518 (N.Y. App. Term 1976) (holding that an ordinance with an across-the-board prohibition of any public breast exposure infringed First Amendment rights); Haines v. State, 512 P.2d 820 (Okla. Crim. App. 1973) (holding that nude dancing constitutes expression that, unless obscene, warrants First Amendment protection). *See also* Koppinger v. City of Fairmont, 248 N.W.2d 708 (Minn. 1976); People v. Wehnke, 436 N.Y.S.2d 137 (Rome City Ct., Oneida County, 1981).

33. The Supreme Court established the modern test for obscenity in Miller v. California, 413 U.S. 15 (1973). According to the *Miller* Court, a work is obscene if it (1) depicts or describes sexual conduct, (2) the sexual conduct is specifically defined by the applicable state law, (3) applying contemporary community standards, the work, taken as a whole, appeals to the prurient interest in sex, (4) the work portrays sexual conduct in a patently offensive way, and (5) taken as a whole, the work does not have serious literary, artistic, political, or scientific value. *Id.* at 39.

therefore, deserved no First Amendment protection.[34] Most courts, in deciding nude dancing cases, focused on the issue of whether the particular performance in question was obscene.[35] Few cases addressed the question of nonobscene nude dancing as expression.[36]

Prior to *Barnes* the United States Supreme Court had grappled with this issue, but had not determined conclusively whether nude dancing invoked First Amendment protection.[37] In several cases the Court stated that some minimal First Amendment interests might be implicated by nude dancing.[38] In each case, however, the Court held that any potential constitutional protections were outweighed by the State's regulatory power under the Twenty-first Amendment.[39]

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34. *See, e.g.*, Starshock, Inc. v. Shusted, 370 F. Supp. 506 (D. N.J. 1974) (holding that nude dancing to rock music fell far short of presenting the issue of "speech" sufficiently important to outweigh the State's interest in curtailing nudity in public places and entitling dancing to First Amendment protection), *rev'd without opinion*, 493 F.2d 1401 (3d Cir. 1978); Yauch v. State, 514 P.2d 709 (Ariz. 1973) (holding that an ordinance prohibiting nude performers did not violate the First Amendment since nudity in restaurants and cabarets is for the obvious purpose of commercial exploitation, and its elimination will not impede the exchange of ideas tending to bring about political or social change), *overruled by* State v. Western, 812 P.2d 987 (Ariz. 1991); Crownover v. Musick, 509 P.2d 497 (Cal. 1973) (holding that ordinances prohibiting nudity in designated establishments were directed at conduct and not at speech), *cert. denied sub nom.* Owen v. Musick, and Reynolds v. Sacramento, 415 U.S. 931 (1974), *overruled by* Morris v. Municipal Court, 652 P.2d 58 (1982); Hoffman v. Carson, 250 So. 2d 891 (Fla.), *appeal dismissed*, 404 U.S. 981 (1971). *See also* Jones v. City of Birmingham, 224 So. 2d 922 (Ala. Ct. App. 1969), *cert. denied*, 396 U.S. 1011 (1970); City of Portland v. Derrington, 451 P.2d 111 (Or.), *cert. denied*, 396 U.S. 901 (1969); Wayside Restaurant, Inc. v. City of Virginia Beach, 208 S.E.2d 51 (Va. 1974); City of Seattle v. Hinkley, 517 P.2d 592 (Wash. 1973).

These cases do not support the proposition that nude dancing is never protected by the First Amendment. Rather, many of these cases were decided in light of the specific circumstances surrounding a particular performance. Thus, only the particular activity at issue was not entitled to First Amendment protection. *See* Barbre, *supra* note 31, at 1099.

At least one court has found humor in the notion of allowing dance First Amendment protection. An Oakland, California Superior Court judge sarcastically stated:

> The high court's lesson is to teach
> that dancing is a form of speech;
> and terpsichorean convolution
> is protected by the constitution
> so bestiality's a crime
> but not if done in three-four time
> and jailers will have little chance
> with felons who know how to dance.

*See id.* at 1087-88 n.4 (quoting N.Y. TIMES, Apr. 6, 1972).

35. *See* Barbre, *supra* note 31, at 1109.

36. *See id.* at 1094.

37. *See infra* notes 40-72 and accompanying text; *see also* New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 718-19 (1981) (Stevens, J., dissenting), in which Justice Stevens stated that "[a]lthough the Court has written several opinions implying that nude or partially nude dancing is a form of expressive activity protected by the First Amendment, the Court has never directly confronted the question." *Id.*

38. *See infra* notes 40-72 and accompanying text.

39. The Twenty-first Amendment rejected the Eighteenth Amendment's prohibition of the

The Supreme Court first addressed the nude dancing issue in *California v. LaRue*.[40] In *LaRue* the Court upheld California Department of Alcoholic Beverage Control regulations that prohibited certain sexually explicit films and live entertainment in licensed bars and nightclubs.[41] The Court agreed that at least some of the performances covered by the California regulations were within the constitutional protection of freedom of speech.[42] Instead of defining the appropriate level of First Amendment protection, the Court simply side-stepped the issue and held that the Twenty-first Amendment allowed the State to ban nude dancing in establishments that serve liquor.[43]

Two years later, in *Doran v. Salem Inn, Inc.*,[44] the Supreme Court again implied that nude dancing was protected expression. In *Doran* the owners of three topless bars sought an injunction against a North Hampstead, New York ordinance that banned topless performances in public places.[45] The Court upheld the lower court's preliminary injunc-

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manufacture, sale, or transportation of alcoholic beverages. Section 2 of the Twenty-first Amendment states: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI. The Court has read § 2 as giving states broad latitude to regulate the conditions under which alcohol is sold or distributed. *See, e.g.*, Seagram & Sons v. Hostetter, 384 U.S. 35, 41 (1966); Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 330 (1964); California v. LaRue, 409 U.S. 109 (1972). In *LaRue* the Court noted that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than normal state authority over public health, welfare, and morals." *Id.* at 114. Thus, the Court has avoided the nude dancing question by suggesting that any First Amendment protection afforded nude dancing would be outweighed by the State's Twenty-first Amendment power to regulate the sale of alcohol. *See* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (discussed *infra* at notes 44-49 and accompanying text); New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (discussed *infra* at notes 60-63 and accompanying text). *See also* Been, *supra* note 29, at 8. *See generally* Daniel Ramczyk, Note, *Constitutional Law—Regulating Nude Dancing In Liquor Establishments—The Preferred Position of the Twenty-First Amendment*—Nall v. Baca, 12 N.M. L. REV. 611 (1982).

40. 409 U.S. 109 (1972).

41. *Id.*

42. *Id.* at 118-19.

43. Justice Rehnquist, writing for the six member majority, stated:

> The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, "performances" that partake of more gross sexuality than of communication . . . . This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

*Id.*

44. 422 U.S. 922 (1975).

45. *Id.*

tion.[46] Citing *LaRue*, the Court stated that nude dancing might be entitled to First Amendment protection in some circumstances.[47] The Court held that the ordinance in *Doran* was overbroad because it applied to all commercial establishments, not just those serving alcohol, and was not justifiable under the Twenty-first Amendment.[48] Thus, the Court decided both *Doran* and *LaRue* on the basis of the states' regulatory power under the Twenty-first Amendment.[49]

The Supreme Court next encountered the nude dancing issue in 1981 in *Schad v. Borough of Mount Ephraim*.[50] The *Schad* case further strengthened the implication that nonobscene nude dancing constituted protected expression. In *Schad* the defendants operated an adult bookstore which contained a coin-operated machine that allowed a customer to watch a live nude dancer perform behind a glass panel.[51] The defendants were convicted under a local ordinance banning all live nude entertainment in the borough.[52] The Supreme Court reversed the convictions by holding that the ordinance was overbroad.[53] The Court, however, still refused to define precisely the scope of the constitutional protection. The Court simply stated that nude dancing was not without First Amendment protection.[54] The Court also noted that nudity alone does not place otherwise protected material outside the scope of the First Amendment.[55]

In *Schad* Chief Justice Burger, joined by Justice Rehnquist, disagreed with the majority's conclusion that the First Amendment demanded reversal of the defendants' convictions.[56] In his dissent, Chief

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46. *Id.* at 934.

47. *Id.* at 932.

48. *Id.* at 933-34.

49. Justice Rehnquist stated:

> In *LaRue* . . . we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program.
>
> In the present case, the challenged ordinance applies not merely to places which serve liquor, but to many other establishments as well.

*Id.* at 932-33.

50. 452 U.S. 61 (1981).

51. *Id.*

52. *Id.*

53. *Id.* at 74.

54. Justice White stated that "as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation." *Id.* at 66.

55. *Id.*

56. *Id.* at 86-88. But see Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990), where Judge Flaum, writing for the majority, stated that Chief Justice Burger's dissent in *Schad* accepted the majority's view on nude dancing. *Id.* at 1084. While Chief Justice Burger's dissent in *Schad* does suggest that nude dancing under certain circumstances may constitute protected expression, Judge Flaum's interpretation of Chief Justice Burger's dissent as "accept[ing] the major-

Justice Burger suggested that, while such a broad ordinance may in some cases violate the First Amendment, it did not in this case.[57] He stated that it was nonsense to impose First Amendment protection on every form of expression in every community.[58] Chief Justice Burger suggested that to protect the activity at issue in this case would trivialize and demean the First Amendment.[59]

In the next nude dancing case before the Supreme Court, *New York State Liquor Authority v. Bellanca*,[60] the defendants were owners of nightclubs, bars, and restaurants that offered topless dancing to their patrons.[61] A New York statute prohibited nude dancing in establishments licensed by the State to sell liquor.[62] Following its holding in *La-Rue*, the Court concluded that any presumptive First Amendment protection implicated by nude dancing was overcome by the State's powers under the Twenty-first Amendment.[63]

In 1986 the Supreme Court again avoided addressing the First Amendment question. In *Young v. Arkansas*[64] the defendant was a nude dancer at a tavern in Little Rock, Arkansas.[65] An Arkansas statute criminalized nonobscene nudity in any public place as long as its purpose was to gratify the sexual desires of another person.[66] Since the statute was not limited to places licensed to serve alcohol, Arkansas could not rely on its regulatory power under the Twenty-first Amendment to justify the statute.[67] The Arkansas Supreme Court ruled that the defendant's conduct violated the statute and that her behavior was not protected by the First Amendment.[68] The Supreme Court denied certiorari in the case.[69] Justice White, joined by Justice Brennan, dis-

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ity's view on nude dancing" ignores the strong language of Chief Justice Burger's opinion. *See infra* note 58.

57. 452 U.S. at 86.

58. Chief Justice Burger stated:

> To say that there is a First Amendment right to impose every form of expression on every community, including the kind of "expression" involved here, is sheer nonsense. To enshrine such a notion in the Constitution ignores fundamental values that the Constitution ought to protect. To invoke the First Amendment to protect the activity involved in this case trivializes and demeans that great Amendment.

*Id.* at 88.

59. *Id.*

60. 452 U.S. 714 (1981).

61. *Id.* at 715.

62. *Id.* at 714.

63. *Id.* at 715-18.

64. 474 U.S. 1070 (1985) (White and Brennan, JJ., dissenting).

65. *Id.*

66. *Id.*

67. *Id.* at 1072.

68. *Id.* at 1071.

69. *Id.* at 1070.

sented from the denial of certiorari because he believed that the Court should confront directly the scope of the First Amendment in this area.[70]

In cases subsequent to *Young v. Arkansas*, the Supreme Court continued to imply that nonobscene nude dancing might be protected by the First Amendment.[71] While the implication that nude dancing was protected expression was clear,[72] the Court was unwilling to address this issue directly. In *Barnes* the Court, for the first time, squarely addressed the issue of whether nonobscene nude dancing was protected by the First Amendment.

## III. SETTING THE STAGE: *MILLER V. CIVIL CITY OF SOUTH BEND*

*Barnes v. Glen Theatre, Inc.* began as three separate actions filed in 1985 in the Indiana district courts. In *Glen Theatre, Inc. v. Pearson*[73] Gayle Sutro, Carla Johnson, and Glen Theatre, Inc. brought the first action against the City of South Bend, Indiana. Glen Theatre ran a business called the Chippewa Bookstore, an adult bookstore in which customers could sit in booths and view live nude and seminude dancers through a glass panel. Glen Theatre did not sell or permit alcoholic beverages in the Chippewa Bookstore.[74] Gayle Sutro and Carla Johnson were nude dancers employed at this establishment.

In *Miller v. Civil City of South Bend*[75] Darlene Miller and JR's Kitty Kat Lounge brought the second action against the City of South Bend and the Indiana Alcoholic Beverage Committee. JR's Kitty Kat Lounge sold alcoholic beverages and offered "go-go" dancing.[76] Darlene Miller was a dancer at the lounge, but she typically did not perform totally nude for fear of criminal prosecution.[77] Ms. Miller danced nude on July 27, 1985 until the police arrived and arrested her.[78]

In *Diamond v. Civil City of South Bend*[79] Sandy Diamond, Lynn

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70. *Id.* at 1072.

71. See Massachusetts v. Oakes, 491 U.S. 576, 591 (1989) (Brennan, J., dissenting), in which Justice Brennan, in a dissent joined by Justices Marshall and Stevens, noted that *Schad* afforded nude dancing protection as expression under the First Amendment. See also FW/PBS, Inc., dba Paris Adult Bookstore II v. City of Dallas, 110 S. Ct. 596, 604 (1990), in which the Court cited *Schad* in suggesting that nude dancing was protected under the First Amendment.

72. *See* Been, *supra* note 29, at 8.

73. 802 F.2d 287 (7th Cir. 1986).

74. Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 419 (N.D. Ind. 1988), *rev'd sub nom.* Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1989) (en banc), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

75. No. S85-598 (N.D. Ind. filed May 5, 1986).

76. 695 F. Supp. 414, 420.

77. *Id.*

78. *Id.* at 420-21.

79. No. S85-722 (N.D. Ind. filed May 5, 1986).

Jacobs, the 720 Corporation (Ramona's Car Wash), and the 726 Corporation (Ace-Hi Lounge) brought the third action against the same defendants as in *Miller*. Both Ramona's Car Wash and the Ace-Hi Lounge sold alcoholic beverages and offered exotic dancing.[80] Sandy Diamond and Lynn Jacobs were go-go dancers at these establishments, but neither woman danced totally nude for fear of criminal prosecution.[81]

The plaintiffs in all three actions sought injunctive relief prohibiting the defendants from enforcing the Indiana public indecency statute.[82] The plaintiffs claimed that enforcement of the statute, which prevented them from performing their dances without pasties or G-strings, violated their freedom of expression under the First Amendment.[83]

In *Glen Theatre, Inc. v. Pearson* district court Judge Allen Sharp granted the plaintiffs' injunction.[84] Judge Sharp held that the statute was overbroad and, therefore, unconstitutional.[85] In the *Miller* and *Diamond* cases, however, a different district court judge denied the preliminary injunction after finding that the Twenty-first Amendment permitted the prohibition of nude dancing where alcohol was sold.[86]

On appeal of Judge Sharp's *Glen Theatre* holding, the Seventh Circuit reversed. Previously, the Seventh Circuit had affirmed the Indiana Supreme Court's holding in *State v. Baysinger*[87] that the public

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80. 695 F. Supp. at 421.

81. *Id.*

82. 695 F. Supp. at 419-20. For the relevant portion of the statute, see *supra* note 3.

83. In Gayle Sutro's affidavit to the district court, she described her nude dancing as "an art form I consider to be artistic," and her dances as "appropriately choreographed and . . . an attempt to communicate as well as entertain." Brief for Petitioners at 5-6, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

The district court described Darlene Miller's testimony of her work at JR's Kitty Kat Lounge as follows:

> Ms. Miller sells drinks and dances at the Kitty Kat. She has worked at the Kitty Kat for about two years and currently makes $250.00 to $300.00 per week. When she dances, Ms. Miller perceives herself as "just entertaining, just dancing". The avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later. Ms. Miller dances "go-go", sometimes fast, sometimes slow. She dances to music from a juke box. Ms. Miller wants to dance nude because she believes she would make more money doing so.

695 F. Supp. at 420.

The district court described Sally Diamond's testimony of her work at Ramona's Car Wash as follows:

> Ms. Diamond dances in costumes designed for her acts; she dances to her own taped music. Her acts are designed to "create a fantasy in the minds" of her patrons. She perceives herself to be acting when she dances, and believes, based upon the applause she receives, that she entertains those who see her perform.

*Id.* at 422.

84. *See* Glen Theatre, Inc. v. Pearson, 802 F.2d 287, 287 (7th Cir. 1986).

85. *Id.*

86. No. S85-598 (N.D. Ind. filed May 5, 1986); No. S85-722 (N.D. Ind. filed May 5, 1986).

87. 397 N.E.2d 580 (Ind. 1979).

indecency statute was not overbroad.[88] The Seventh Circuit, however, remanded *Glen Theatre* to the district court to examine the plaintiffs' evidence and to determine whether the activity at issue should be afforded First Amendment protection.[89] The court also remanded and transferred the *Miller* and *Diamond* cases in order to consolidate all the nude dancing cases.[90]

The *Miller* and *Diamond* plaintiffs submitted videotapes[91] of four nude dancers as evidence for the district court's consideration. The *Glen Theatre* plaintiffs relied only on an affidavit of Gayle Sutro describing her dancing.[92] The district court found that the activity at issue was mere conduct and, as such, was not entitled to First Amendment protection.[93] The *Glen Theatre* and *Miller* plaintiffs appealed this ruling.

On appeal, a sharply divided Seventh Circuit reversed.[94] The court held that all nonobscene nude dancing performed as entertainment was expressive activity protected by the First Amendment.[95] Judge Flaum, writing for the majority, emphasized Supreme Court precedent[96] that supported the court's finding that nude dancing was entitled to First Amendment protection.[97] Judge Flaum also explored the history and meaning of dance and concluded that dance was one of the oldest means of expression known to man.[98] He then rejected the notion of distinguishing high art from low entertainment.[99] He stated that such a distinction would remove First Amendment protection from many forms of nonverbal expression simply because they fail to communicate

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88. *Glen Theatre*, 802 F.2d at 288-90.

89. *Id.* at 291.

90. 695 F. Supp. at 415.

91. The district court described one videotape as follows:

> The tape consists of four separate performances. The performances are basically identical. They consist of a female, fully clothed initially, who dances to one or more songs as she proceeds to remove her clothing. Each dance ends with the dancer totally nude or nearly nude. The dances are done on a stage or on a bar and are not a part of any type of play or dramatic performance. They are simply what are commonly referred to as "striptease" acts.

*Id.* at 416.

92. *Id.* at 419-20. The Glen Theatre burned down in 1988. The cause of action, thus, became moot to that plaintiff. *Id.* at 416.

93. *Id.* at 419.

94. Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir.), *rev'd* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

95. *Id.* at 1085.

96. *Id.* at 1084.

97. Judge Flaum concluded that, from his reading of Supreme Court precedent, "we are constrained to hold today that, as a matter of law, non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment." *Id.* at 1085.

98. *Id.*

99. *Id.* at 1086.

an accepted intellectual idea.[100]

Finally, Judge Flaum applied the two-part test created by the Supreme Court in *Texas v. Johnson*[101] for determining whether an activity is sufficiently expressive to warrant First Amendment protection.[102] He concluded that nude dancing, while clearly of inferior artistic and aesthetic quality, was nonetheless sufficiently communicative to invoke First Amendment protection.[103] Judge Flaum held, therefore, that the Indiana public indecency statute was overbroad and unconstitutional.[104]

In addition to Judge Flaum's majority opinion, the Seventh Circuit filed five separate opinions in *Miller*.[105] Judge Cudahy's concurrence suggested that striptease dancing was undoubtedly expressive.[106] Judge Posner, in a well-reasoned concurrence, argued that expression is a continuum, with a vast gray area between expressive and nonexpressive activity.[107] Judge Posner concluded that placing striptease dancing on the nonexpressive side of that continuum would deprive most art of constitutional protection.[108] Each of the concurring judges agreed that, since nude dancing was protected expression, the Indiana statute as applied was overbroad and unconstitutional.[109]

Judge Easterbrook argued in his dissenting opinion that courts should adhere to the broad categories of speech and conduct in deciding First Amendment issues.[110] He suggested that any attempt to discern expressiveness beyond those broad categories draws the court into the

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100. *Id.*

101. 491 U.S. 397 (1989). For an explanation of the *Texas v. Johnson* test, see *infra* notes 250-54 and accompanying text.

102. *Miller*, 904 F.2d at 1086-87.

103. *Id.*

104. *Id.* at 1089.

105. Judges Cudahy and Posner filed separate concurring opinions. *Id.* at 1089-1104. Judge Coffey filed a dissenting opinion. *Id.* at 1104-20. Judge Easterbrook filed a dissenting opinion in which Judges Manion and Kanne joined and in which Judge Coffey joined in part. *Id.* at 1120-31. Judge Manion filed a dissenting opinion in which Judges Coffey and Easterbrook joined. *Id.* at 1131-35.

106. *Id.* at 1089.

107. *Id.* at 1098-99.

108. Judge Posner stated:

> There are some clearly expressive activities and some clearly nonexpressive ones but there is also a vast gray area populated by street performers who swallow swords or walk on glowing coals or guess people's ages or weights, by people who wish to make a "statement" by dressing outlandishly, by creators of video games, by contestants in dance marathons, and so on without end . . . . What is indefensible is to set up "entertainment" as a category of activities, distinct from "art," that government can regulate without regard to the First Amendment. Or to suppose—unless one is prepared to deprive most art of constitutional protection—that there is a rational conception of "expression" that places striptease dancing on the nonexpressive side of the divide.

*Id.*

109. *Id.* at 1089, 1104.

110. *Id.* at 1129-30.

province of the legislator.[111] Judge Easterbrook stated that nude dancing was conduct, not speech.[112] Thus, he concluded that the Indiana statute's prohibition of nude dancing was constitutional.[113]

Judge Coffey's emotional dissent[114] argued that the Framers of the Constitution never contemplated a living or evolving interpretation of the Constitution that would sanction the protection of nude dancing.[115] Judge Coffey observed that striptease dancing contributed to the degradation of women.[116] Thus, he concluded that no reason existed to prohibit Indiana from banning this activity, regardless of any alleged First Amendment right.[117]

Judge Manion's dissent argued that the court should defer to the district court's finding that the activities at issue contained no expressive element.[118] Judge Manion also argued that the Indiana statute was valid even if nude dancing was inherently expressive because the governmental interest in preventing public indecency and immorality outweighed whatever limited First Amendment rights were implicated by striptease dancing.[119]

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111. Judge Easterbrook stated:

> The First Amendment is designed to get government out of the business of regulating speech while preserving to legislators freedom to act with respect to other human affairs.
>
> . . . "Conduct" and "speech" are the principal categories, and observing that distinction is essential if we wish to maintain the boundary between legislative and judicial roles in a democratic society.

*Id.* at 1130.

112. Judge Easterbrook stated that "[p]arading in a state of undress is conduct, not speech." *Id.* at 1124. Judge Easterbrook also stated specifically that "dancing is not 'speech.' " *Id.* at 1123.

113. *Id.* at 1131.

114. *Id.* at 1104-20. Judge Coffey stated:

> Personally, I do not mind being labeled a "busybody" or a "prude" as I write to uphold the moral ethics, ideals and principles of the majority of the people of the State of Indiana speaking through their legislative representatives . . . . I would add that neither others nor myself are paternalistic or wish to force our moral beliefs on society. We merely recognize the right of the people . . . to implement their beliefs and conceptions of proper moral principles through their legislature.

*Id.* at 1109.

115. *Id.* at 1105.

116. Judge Coffey stated that "nude dancing harms the performers, the audience and society . . . through the degradation of women that results from their treatment solely as objects for lustful male sexual passions and appetites." *Id.* at 1109. Judge Coffey also suggested that striptease dances "undeniably underscore the notion that a woman exists solely for the sexual satisfaction of a controlling group of males." *Id.*

Judge Coffey did not mention the Indiana statute's restriction on male striptease through the prohibition of the "showing of covered male genitals in a discernibly turgid state." IND. CODE ANN. § 35-45-4-1(b) (1985).

117. Miller v. Civil City of South Bend, 904 F.2d 1081, 1110 (7th Cir. 1990). Judge Coffey further suggested that this alleged First Amendment right "is based on a foundation of quicksand." *Id.*

118. *Id.* at 1131.

119. *Id.* at 1135.

## IV. THE PERFORMANCE: *BARNES V. GLEN THEATRE, INC.*

On certiorari the Supreme Court, in *Barnes v. Glen Theatre, Inc.*, reversed the Seventh Circuit's holding in *Miller*.[120] The Court agreed that nude dancing deserved some First Amendment protection,[121] but it held that Indiana's prohibition of nude dancing through its public indecency statute was constitutional.[122] The Court in *Barnes* did not focus on the issue of whether nude dancing was protected by the First Amendment.[123] Instead, the Court focused on Indiana's statute as a constitutional infringement of the protected activity.

### *A. Nude Dancing As Expressive Activity*

A plurality of the Supreme Court concluded, without analysis, that nude dancing was expressive conduct within the outer perimeters of the First Amendment.[124] Chief Justice Rehnquist simply cited prior Supreme Court cases to conclude that nude dancing was protected expression.[125] He proceeded, however, to uphold the Indiana public indecency statute as a constitutional prohibition of that protected activity.[126]

Justice Souter, concurring in the judgment, agreed with the plurality that nude dancing deserved First Amendment protection.[127] Justice Souter stated that not all dancing was entitled to First Amendment protection.[128] He believed, however, that performance dancing aimed at an actual or hypothetical audience was expressive activity.[129] Justice Souter also upheld the Indiana statute as a justifiable regulation of that

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120. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

121. *Id.* at 2460.

122. *Id.* at 2458-63.

123. The *Barnes* Court followed prior nude dancing cases in simply assuming that nude dancing was entitled to some level of First Amendment protection.

124. *Barnes*, 111 S. Ct. at 2460. Chief Justice Rehnquist stated that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we viewed it as only marginally so." *Id.* at 2460.

125. Chief Justice Rehnquist cited language from Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), California v. LaRue, 409 U.S. 109 (1972), and Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). For a discussion of the Court's treatment of the nude dancing issue in those cases, see *supra* notes 40-59 and accompanying text.

126. *Barnes*, 111 S. Ct. at 2458-63. For a discussion of Chief Justice Rehnquist's opinion of the Indiana statute, see *infra* notes 136-55 and accompanying text.

127. *Barnes*, 111 S. Ct. at 2468 (Souter, J., dissenting). Justice Souter stated:

> [D]ancing as a performance . . . gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience. Such is the expressive content of the dances described in the record.

*Id.*

128. *Id.*

129. *Id.*

expressive activity.[130]

Justice White, in his dissent, also quickly disposed of the nude dancing question. He was not surprised that, in light of Supreme Court precedent, the Court conceded that nude dancing deserved First Amendment protection.[131] Importantly, Justice White indicated that the Court, while purporting to recognize nude dancing as expressive activity, distorted and ignored settled First Amendment doctrine.[132] Justice White believed that this manipulation of doctrine achieved a result that reflected the Court's assessment of the artistic merits of nude dancing.[133]

Justice Scalia was the only member of the Supreme Court who did not accept the proposition that nude dancing was a protected activity. He upheld the statute on the basis that it regulated conduct not expression.[134] Justice Scalia suggested that even though some people may employ a prohibited form of conduct as a means of expression, the State is not required to satisfy some higher level of scrutiny to justify its prohibition.[135]

### *B. Indiana's Public Indecency Statute*

After concluding that nude dancing deserved some level of First Amendment protection,[136] Chief Justice Rehnquist, writing for the plurality, held that the Indiana public indecency statute's requirement that dancers must wear pasties and G-strings did not violate the First Amendment.[137] To determine whether the statute was a permissible regulation of the protected activity,[138] Chief Justice Rehnquist applied

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130. *Id.* at 2471. For an analysis of Justice Souter's opinion in upholding the statute, see *infra* notes 156-60 and accompanying text.

131. *Id.* (White, J., dissenting).

132. *Id.* at 2474-75. Justice White stated:

> That the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine. The Court's assessment of the artistic merits of nude dancing performances should not be the determining factor in deciding this case.

*Id.*

133. *Id.*

134. *Id.* at 2463 (Scalia, J., dissenting).

135. *Id.* at 2468. Justice Scalia stated that "[t]he State is regnlating conduct, not expression, and those who choose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden." *Id.*

136. *See supra* notes 124-26 and accompanying text.

137. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2461 (1991).

138. Chief Justice Rehnquist suggested that, since the statute prohibited only nudity and not the dances themselves, the statute was a "time, place, or manner" restriction. *Id.* at 2461. In Ward v. Rock Against Racism, 491 U.S. 781 (1989), the Court stated that even when a government regulation directly infringed upon expression, the First Amendment permitted "reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without

the four-part test set forth in *United States v. O'Brien*.[139]

In *O'Brien* the Court held that expressive conduct could be narrowly regulated in pursuit of a substantial governmental interest that was unrelated to the content of the expression.[140] The Court specifically held that a government regulation that incidentally infringed on First Amendment freedoms was sufficiently justified if: (1) the regulation was within the constitutional power of the government; (2) the regulation furthered an important or substantial governmental interest; (3) the governmental interest was unrelated to the suppression of free expression; and (4) the incidental restriction on the First Amendment freedoms was no greater than necessary to further the governmental interest.[141]

In *Barnes* Chief Justice Rehnquist determined that Indiana's public indecency statute satisfied all four aspects of the *O'Brien* test.[142] Chief Justice Rehnquist began by noting that the statute was clearly within Indiana's constitutional power.[143] He then admitted that it was impossible to identify what interests motivated the Indiana legislature.[144] Chief Justice Rehnquist determined, however, that the language and history of the statute suggested a purpose of protecting societal order and morality.[145] He concluded that Indiana's substantial interest in protecting public order and morality satisfied the second prong of the

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reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Id.* at 791, quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). In *Community for Creative Non-Violence* the Court indicated that the time, place, or manner inquiry embodied the same standards set forth in *O'Brien*. Chief Justice Rehnquist in *Barnes*, therefore, applied the *O'Brien* test to Indiana's prohibition of nude dancing. For a criticism of Chief Justice Rehnquist's treatment of Indiana's complete prohibition of nude dancing as a time, place, or manner restriction, see *infra* notes 211-18 and accompanying text.

139. 391 U.S. 367 (1968). In *O'Brien* the defendant burned his draft card in front of a crowd to protest the Vietnam War. He was convicted of violating a statute that prohibited the knowing destruction or mutilation of draft cards. He challenged his conviction on the basis that his actions were expressive, and, therefore, protected by the First Amendment. *Id.* at 370. The Supreme Court assumed for the purposes of discussion that O'Brien's action was symbolic speech or expressive conduct, but rejected the argument that symbolic speech was entitled to full protection under the First Amendment. *Id.* at 376-77.

140. *Id.*

141. *Id.*

142. *Barnes*, 111 S. Ct. at 2461-63.

143. Under the traditional police power given to the states, Indiana can pass laws regulating public health, safety, and morals. *Id.* at 2462.

144. *Id.* at 2461. It was impossible to discern the statute's specific purpose because Indiana does not record legislative history. *Id.*

145. Chief Justice Rehnquist stated that in general "[t]his and other public indecency statutes were designed to protect morals and public order." *Id.* at 2462. Chief Justice Rehnquist also noted that almost every state has a public indecency statute of some sort. Indiana has had a version of this statute since 1831. *Id.*

*O'Brien* test.[146]

Chief Justice Rehnquist next suggested that Indiana's interest in protecting public order and morality was unrelated to the suppression of free expression.[147] He admitted that almost any type of conduct arguably could be considered expressive.[148] In *O'Brien*, however, the Court had rejected such an expansive interpretation of expression.[149] Chief Justice Rehnquist stated that the Indiana public indecency statute was a broad proscription of any conduct involving nudity.[150] He refused to believe that the statute proscribed nudity because of the erotic message conveyed by the dancers.[151] Chief Justice Rehnquist believed that the evil addressed by the statute was public nudity in general, whether or not the nudity was part of expressive activity.[152]

Last, Chief Justice Rehnquist determined that the Indiana public indecency statute also met the fourth prong of the *O'Brien* test. He suggested that the statute's incidental restriction on the First Amendment was no greater than was essential to further Indiana's interest in public order and morality.[153] He held that the requirement that dancers wear pasties and G-strings was a modest regulation that created a minimal interference with the First Amendment.[154] Chief Justice Rehnquist, writing for the plurality, thus held that Indiana's public indecency statute permissibly infringed on the protected expression of nude dancing.[155]

Justice Souter, concurring in the judgment, also concluded that the

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146. Chief Justice Rehnquist cited Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973), for the proposition that "this Court implicitly accepted that a legislature could legitimately act . . . to protect the 'societal interest in order and morality.' "

147. *Barnes*, 111 S. Ct. at 2462.

148. *Id.* Chief Justice Rehnquist stated:

> It can be argued, of course, that almost limitless types of conduct—including appearing in the nude in public—are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing.

*Id.*

149. "We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968).

150. *Barnes*, 111 S. Ct. at 2463.

151. *Id.*

152. Chief Justice Rehnquist stated:

> The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.

*Id.*

153. *Id.*

154. *Id.*

155. *Id.*

statute's prohibition of nude dancing was constitutional.[156] He agreed with the plurality that the four-part *O'Brien* test was the appropriate standard for analyzing the Indiana statute.[157] He wrote separately, however, to suggest that the State's interest in banning nude dancing was the deterrence of the secondary effects[158] of adult entertainment establishments.[159] Justice Souter found that the statute satisfied the third requirement of the *O'Brien* test because the regulation sought to thwart the evils of striptease establishments and thus was unrelated to the suppression of free expression.[160]

Justice Scalia, in his concurrence, agreed with the plurality that the Indiana statute was constitutionally valid, but disagreed that the regulation triggered First Amendment analysis.[161] He believed that the regulation should be upheld because it was a general law that regulated conduct, not expression.[162] Justice Scalia acknowledged, however, that

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156. *Id.* at 2468.

157. *Id.*

158. The petitioners in *Barnes* stated that Indiana's statute applied to nude dancing because such dancing "encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity." *See id.* at 2469 (quoting Brief for Petitioners at 37).

159. *Id.* Justice Souter was not troubled by his inability to prove that the Indiana legislature was motivated by his secondary effects theory. He felt the "appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Id.* Justice Souter wanted to find a justification for the particular application of the statute at issue, rather than a justification that would support all possible applications of the statute. *Id.*

160. Justice Souter acknowledged the strength of Justice White's argument that Indiana sought to prohibit nude dancing as a means of combating secondary effects because of the message of eroticism that nude dancing communicated. *Id.* at 2470. Justice Souter denied, however, that a causal relationship necessarily existed between the message of the nude dancing and the secondary effects. He stated:

> To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation actually are.

*Id.*

Justice White responded to this argument in his dissent, stating:

> If Justice Souter is correct that there is no causal connection between the message conveyed by the nude dancing at issue here and the negative secondary effects that the State desires to regulate, the State does not have even a rational basis for its absolute prohibition on nude dancing that is admittedly expressive. Furthermore, if the real problem is the "concentration of crowds of men predisposed to the" designated evils, . . . then the First Amendment requires that the State address that problem in a fashion that does not include banning an entire category of expressive activity.

*Id.* at 2474 (White, J., dissenting).

161. *Id.* at 2463 (Scalia, J., concurring). *See supra* notes 134-35 and accompanying text.

162. *Id.* Justice Scalia stated: "In my view, however, the challenged regulation must be upheld, not because it survives some lower level of First-Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First-

expressive conduct might deserve some First Amendment protection.[163] He noted that the government cannot prohibit conduct precisely because of its communicative attributes.[164] He rejected, however, the plurality's application of the *O'Brien* test's intermediate level of scrutiny to Indiana's public indecency statute.[165] Justice Scalia argued that the *O'Brien* test would not apply to such a regulation of pure conduct.[166] Because the Indiana statute regulated conduct, and not expression, Justice Scalia concluded that Indiana could enforce its prohibition of public nudity against those who use nudity as a means of communication.[167]

Justice White, in a dissent joined by Justices Marshall, Blackmun, and Stevens, agreed with the plurality and Justice Souter that nude dancing was expression protected by the First Amendment.[168] Justice White, however, concluded that Indiana's public indecency statute unconstitutionally prohibited nude dancing.[169] Justice White noted that the State did not argue that Indiana's public indecency statute prohibited all nudity wherever it occurred.[170] The State, for example, never attempted to apply the statute to nudity in plays, ballets, or operas.[171] Justice White also noted that in *State v. Baysinger* the Indiana Supreme Court held that the public indecency statute did not prohibit

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Amendment scrutiny at all." *Id.*

163. *Id.* at 2466.

164. *Id.*

165. *Id.*

166. Justice Scalia stated: "It cannot reasonably be demanded, therefore, that every restriction of expression incidentally proceeded by a general law regulating conduct pass normal First-Amendment scrutiny, or even—as some of our cases have suggested, see, *e.g.*, *United States v. O'Brien*, . . . —that it be justified by an 'important or substantial' government interest." *Id.* (citation omitted).

Justice Scalia also indicated that intermediate standards of analysis in general should not exist. *Id.* at 2467. He further stated, "I think we should avoid wherever possible . . . a method of analysis that requires judicial assessment of the 'importance' of government interests—and especially of government interests in various aspects of morality." *Id.*

167. *Id.* at 2468.

168. *Id.* at 2471 (White, J., dissenting). For a discussion of Justice White's treatment of the nude dancing issue, see *supra* notes 131-33 and accompanying text.

169. *Barnes* at 2474-76 (White, J., dissenting).

170. *Id.* at 2472-73. Justice White specifically stated:

> [I]n this case Indiana does not suggest that its statute applies to, or could be applied to, nudity wherever it occurs, including the home. We do not understand the Court or Justice Scalia to be suggesting that Indiana could constitutionally enact such an intrusive prohibition, nor do we think such a prohibition would be tenable in light of our decision in *Stanley v. Georgia*, 394 U.S. 557 (1969), in which we held that States could not punish the mere possession of obscenity in the privacy of one's own home.

*Id.* at 2472.

171. *Id.* at 2473. The State had argued that the evils sought to be avoided by application of this statute to nude dancing would not be served by application of the statute to plays or ballets. *Id.* Justice White also found persuasive an affidavit of a police sergeant which stated that "[n]o arrests have ever been made for nudity as part of a play or ballet." *Id.*

nudity as a part of a larger form of expression.[172] Therefore, Justice White reasoned that Indiana's statute was not a general prohibition of all nudity.[173] Rather, the Indiana law regulated some kinds of nudity while leaving other kinds of nudity unregulated.[174] The *O'Brien* test places the burden on the State to justify such a distinction.[175]

Justice White agreed with Justice Souter that the deterrence of the secondary effects caused by nude dancing was the State's goal underlying this supposedly content-neutral statute.[176] Since the attainment of these goals depended on prevention of the expressive activity, Justice White reasoned that the statutory prohibition was related to the content of the expression.[177] Justice White determined that Indiana sought to regulate nude dancing precisely because of its message of eroticism and sensuality.[178] Justice White, thus, suggested that the statute, as applied, was a content-based restriction and, therefore, should be upheld only if it was narrowly drawn to satisfy a compelling State interest.[179] He concluded that the Indiana statute was not narrowly drawn[180] and

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172. *Id.* at 2473. For a discussion of the Indiana Supreme Court's ruling in *State v. Baysinger*, see *infra* notes 185-92 and accompanying text.

173. *Id.* at 2473. Justice White criticized the plurality and Justice Scalia for failing to recognize that Indiana's statute differed from the laws in *O'Brien* and Bowers v. Hardwick, 478 U.S. 186 (1986). The cases, relied on in the plurality's *O'Brien* analysis, involved "truly *general* proscriptions on individual conduct." *Barnes*, 111 S. Ct. at 2472. In *O'Brien* the federal statute completely prohibited the intentional destruction or mutilation of a draft card. 391 U.S. 367 (1968). In *Bowers* the Georgia statute completely banned sodomy. Thus, in both *O'Brien* and *Bowers* the statutes banned those activities anywhere, anyhow, and anytime.

174. *Barnes*, 111 S. Ct. at 2473.

175. *Id.*

176. *Id.* Justice White observed that Indiana's interest underlying its public indecency statute included the "deterrence of prostitution, sex assaults, criminal activity, degradation of women, and other activities which break down the family structure." *Id.* (quoting Reply Brief for Petitioners at 11).

177. *Id.* at 2474.

178. *Id.* at 2474-76. In addressing the argument that nudity was conduct independent from any expressive element in the dance, Justice White stated:

> The sight of a fully clothed, or even a partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental "conduct."

*Id.* at 2474.

Justice White concluded that the Indiana statute "as applied to nude dancing, targets the expressive activity itself; in Indiana nudity in a dancing performance is a crime because of the message such dancing communicates." *Id.* at 2476.

179. *Id.* at 2474.

180. Justice White stated:

> [T]he State clearly has the authority to criminalize prostitution and obscene behavior. Banning an entire category of expressive activity, however, generally does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny. . . . Furthermore, if nude dancing in barrooms, as compared with other establishments, is the most worrisome problem, the State could invoke its Twenty-first Amendment powers and impose appropriate regulation.

*Id.* at 2475 (citation omitted).

could not withstand strict scrutiny, even if the State could establish a compelling interest.[181]

## V. THE BOTTOM LINE: THE FALLACY OF *BARNES*

The *Barnes* Court's analysis was flawed in two respects. First, the Court wrongly suggested that Indiana's public indecency statute was a general proscription of all nudity that only incidentally infringed on the protected expression of nude dance. The Indiana Supreme Court's interpretation and the State's enforcement of the statute indicated that Indiana selectively prohibited nude dancing because the message of the expression was offensive. The *Barnes* Court, therefore, should have applied a more exacting scrutiny and determined that Indiana's selective prohibition of nude dancing was unconstitutional. Second, assuming *arguendo* that the Court was correct in applying a less vigorous level of scrutiny under *O'Brien*, Indiana's interest in regulating public nudity did not justify the complete prohibition of this important expressive medium.

### *A. The Naked Truth: Indiana's Selective Prohibition of Nudity*

When a state law targets the particular message of a protected activity, the law must withstand strict scrutiny analysis.[182] If the law, however, is a general proscription of conduct which only accidentally infringes on the protected expression, then the less exacting *O'Brien* test is appropriate.[183] The *Barnes* Court applied the *O'Brien* test because it suggested that Indiana's public indecency statute was a general proscription of public nudity that only incidentally interfered with nude dancing.[184] The Court's reasoning, however, ignored Indiana's interpretation and application of its own statute. Thus, the decision in

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Justice White further suggested that other means existed by which the State might address the evils sought to be eliminated by the statute. *See infra* note 232.

181. *Id.* at 2475-76.

182. *See* Texas v. Johnson, 491 U.S. 397, 411-12 (1989); Boos v. Barry, 485 U.S. 312, 317 (1983). Under strict scrutiny analysis, the State must have a compelling interest and the infringement on expression must be no greater than is essential to further that interest. United States v. Grace, 461 U.S. 171, 177 (1983).

183. *See* United States v. O'Brien, 391 U.S. 367 (1968). The *O'Brien* test weighs the interests of the State in regulating the nonspeech against the value of the infringed speech and the extent of the infringement. *See supra* notes 140-41 and accompanying text.

Justice Scalia's constitutional doctrine rejects this weighing of interests when the State's regulation incidentally interferes with constitutional expression. Rather, Justice Scalia believes that the First Amendment only applies when the State specifically targets the protected expression. Since Justice Scalia did not helieve that Indiana targeted nude dancing, he refused to use any halancing test. *See supra* notes 161-67 and accompanying text. He concluded that the First Amendment was not implicated by Indiana's prohibition of nude dancing. *See id.*

184. *Barnes* at 2463 (plurality).

*Barnes* embraced the impermissible result of allowing states to prohibit nude dancing when they find its message offensive.

### 1. Indiana's Interpretation and Enforcement of Its Public Indecency Statute

In *State v. Baysinger*[185] the Indiana Supreme Court first considered the scope of Indiana's public indecency statute. In *Baysinger* the defendants[186] challenged Indiana's public indecency statute as being unconstitutionally vague and overbroad.[187] The Indiana Supreme Court interpreted the statute to prohibit nude entertainment in theaters, nightclubs, and other public establishments.[188] In an effort to save the constitutionality of the statute, the Indiana court conceded that some nudity, as part of expressive performances, would merit constitutional protection.[189] Specifically, the court noted that the statute could not be applied to larger forms of expression involving the communication of ideas.[190] The court concluded, however, that nude dancing was mere conduct without the expression of ideas.[191] The court, therefore, upheld the application of the public indecency statute to the nude dancing at issue.[192]

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185. 397 N.E.2d 580 (Ind. 1979).

186. The defendants in *Baysinger* included dancers and owners or operators of bars and taverns that offered nude dancing.

187. *Baysinger*, 397 N.E.2d at 581.

188. *Id.* at 582-83.

189. *Id.* at 587. The court stated that "it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *Id.*

190. *Id.*

191. *See id.* The court stated:

> A critical part of the final issue to be decided relates to whether appearing nude or performing a nude dance as presented in these cases is simply conduct or is expression entitled to First Amendment protection. In the cases before us it is clear the activity involved is appearing nude or dancing in the nude in bars and is conduct. . . . This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim.

*Id.*

192. *Id.* at 587. Five years later, in Erhardt v. State, 463 N.E.2d 1121 (Ind. Ct. App. 1984), the police charged a dance contestant in a "Miss Erotica" contest under Indiana's public indecency statute when she danced nude during the contest. *Id.* at 1122. Relying on the statements of the Indiana Supreme Court in *Baysinger*, the Indiana Court of Appeals recognized that the public indecency statute had a narrower scope than its language suggested. *Id.* at 1123. The *Erhardt* court interpreted the Indiana statute as not prohibiting all nudity. *Id.* The appellate court held that nude striptease dancing performed in an enclosed theater was protected expression under the First Amendment and, therefore, was not subject to the public indecency statute. *Id.* at 1126.

The Indiana Supreme Court, in a five paragraph decision, set aside the appellate court's ruling in *Erhardt*. Erhardt v. State, 468 N.E.2d 224 (Ind. 1984). The supreme court reaffirmed its holding in *Baysinger* that nude dancing was not constitutionally protected. *Id.* The court made a cursory comment that the statute had withstood constitutional scrutiny in *Baysinger* and stated that Erhardt's conduct fell within the statutory prohibition. *Id.*

In *Baysinger* the Indiana Supreme Court limited the scope of the public indecency statute to save its constitutionality.[193] Without the *Baysinger* exception, the statute was a total proscription of all nudity at all times in all public places.[194] The United States Supreme Court made clear in *Doran v. Salem Inn, Inc.*[195] that such a broad proscription would be unconstitutional.[196]

In creating the *Baysinger* exception, the Indiana court, thus, interpreted the statute as less than a complete proscription of all public nudity.[197] The State's selective enforcement of the statute also showed that the statute was not a general proscription of all public nudity. An Indiana law enforcement official conceded on record that the State did not prohibit all public nudity under the statute. Specifically, the State did not prohibit nudity as part of a play or ballet.[198] Thus, Indiana re-

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193. *See* Been, *supra* note 29, at 2-5.

194. As indicated by the respondents' brief before the Supreme Court, the statute, on its face, criminalized a wide range of activities. The respondents stated:

> [A] simple examination of the statute reveals that it is, unquestionably, facially overbroad, in that it allows criminalization of dress that falls short of total nudity, and applies in circumstances that clearly are not properly subject to criminal proscription. For example, a woman wearing a thong bikini on a beach, which does not "totally" cover the buttocks, is a criminal act. [sic] A model in an art class at a University, if totally nude or "nude" within the statute, can be prosecuted. A male dancer in a ballet, wearing tights in which his genitalia may be in a "discernably turgid state" can be prosecuted, even though *fully* and opaquely dressed, and, of course, anyone caught nude (as statutorily defined) in the local Y.M.C.A. shower had better seek out legal counsel immediately.

Brief for Respondents, at 31 n.19, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

195. 422 U.S. 922 (1974). For a brief analysis of *Doran*, see *supra* notes 44-49 and accompanying text.

196. Then-Justice Rehnquist noted in *Doran* his concern over banning all public nudity in all circumstances. He stated:

> The District Court observed, we believe correctly: "The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in 'any public place' with uncovered breasts. There is no limit to the interpretation of the term 'any public place.' It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance."

*Id.* at 933, *citing* Salem Inn, Inc. v. Frank, 364 F. Supp. 478, 483 (E.D.N.Y. 1973).

197. 397 N.E.2d 580, 587 (1979). Judge Posner stated in *Miller*:

> The state supreme court, in *Baysinger*, and the state's highest law enforcement official, in this case, concur in interpreting the statute not as a blanket prohibition of public nudity (an interpretation that the words of the statute would support), but as a prohibition of nonexpressive public nudity. That interpretation binds us, and demonstrates that what the state is doing is singling out a particular form of erotic but not obscene nude performance for condemnation. We would be inconsistent in affirming the district court's decision out of respect for popular preferences and states' rights while disregarding the meaning imprinted on the statute by the state judges and law enforcement officials.

Miller v. Civil City of South Bend, 904 F.2d 1081, 1103 (7th Cir. 1990) (en banc).

198. " 'No arrests have ever been made for nudity as part of a play or ballet.' " *Barnes* at 2473 (White, J., dissenting) (quoting the affidavit of Sgt. Timothy Corbett).

fused to apply the indecency statute to forms of nude expression that it condoned. The statute prohibited nude dancing in striptease establishments because of the perceived offensiveness of the dancers' message.[199]

### 2. The Impermissible Result of *Barnes*

As discussed above,[200] the Indiana Supreme Court held in *State v. Baysinger* that the public indecency statute could not be applied to prohibit nudity in larger forms of expression. The *Baysinger* court did not think that nude dancing was a larger form of expression.[201] The United States Supreme Court in *Barnes*, however, held that it was.[202] Under the Indiana Supreme Court's limiting construction of the statute, therefore, nude dancing would be protected by the *Baysinger* exception.[203] Yet, the Supreme Court in *Barnes* held that nude dancing was constitutionally prohibited by the Indiana statute.[204] The *Barnes* Court's holding, therefore, created the following unacceptable result: Indiana may apply its public indecency statute to prohibit nude dancing when it finds the message of the dance offensive and allow nude dancing when it does not find the message offensive. In other words, after *Barnes*, the Indiana public indecency statute may ban nude dancing in one context, the tavern or barroom, and allow nude dancing in a different context, for example the play or ballet. The *Barnes* decision, thus, created a distinction between two kinds of nude dancing based on the content of the expression.[205]

If one accepts the plurality's conclusion that the statute served the State's interest of protecting public order and morality, then the distinction between nude dancing in a bar and in a ballet may be understandable. The appropriate question, however, is not whether the distinction is understandable, but whether it is constitutionally permissible. This distinction clearly is based on the offensive nature of the message of nude striptease dancing.[206] Since Indiana has chosen to tar-

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199. *See id.* at 2474 (White, J., dissenting). Justice White stated that "[i]t is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity." *Id.*

200. *See supra* notes 185-92 and accompanying text.

201. *See supra* note 191.

202. *See supra* notes 124-25 and accompanying text.

203. *See* Brief for Respondents at 29, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

204. *Barnes* at 2463. *See also supra* notes 137-55 and accompanying text.

205. The *Barnes* Court, therefore, not only condoned, but embraced Indiana's selective prohibition of nude dancing. It acknowledged that the statute's prohibition would not apply in one expressive context and would function as an absolute ban in another.

206. As Justice White stated:

> Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing

get this offensive message, it must satisfy a strict scrutiny analysis.[207] Even if protecting public morality can be a compelling state interest, the Indiana regulation would not survive strict scrutiny because less intrusive ways of regulating nude dancing exist.[208] In sum, the unacceptable result of the Court's holding in *Barnes* was that Indiana could prohibit expression it found offensive through the selective application of its public indecency statute.

### *B. Song and Dance: Indiana's Interests in Prohibiting Nude Dancing*

In applying the *O'Brien* test, the Court suggested that Indiana's public indecency statute served the substantial interest of protecting morals and public order while interfering only minimally with the protected expression.[209] The Court, thus, concluded that the statute satisfied the *O'Brien* test because the regulation furthered a substantial State interest and the incidental restriction on the protected activity was no greater than necessary to further that interest.[210] Even assuming *arguendo* that the Court was correct in applying the less vigorous scrutiny of the *O'Brien* test to Indiana's prohibition of nude dancing, the

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performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women.

*Id.* at 2474 (White, J., dissenting).

207. *See supra* note 182.

208. Strict scrutiny analysis requires the Court to determine whether the regulation is the least restrictive means available to accomplish a compelling governmental interest. *See* Boos v. Barry, 485 U.S. 312, 317 (1983). As Justice White noted in *Barnes*, "[b]anning an entire category of expressive activity . . . generally does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny." *Barnes* at 2475 (White, J., dissenting) (citing Frisby v. Schultz, 487 U.S. 474, 485 (1988)). The State could, for example, impose restrictions on nude dancing through its Twenty-first Amendment regulatory power or through reasonable time, place, or manner restrictions. *See Barnes* at 2474 (White, J., dissenting). *See also* Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990) (en banc). In *Miller* Judge Flaum, writing for the majority, stated:

> [L]egislative power unquestionably permits the state to bar the imposition of nude dancing upon the public in settings such as streets, parks and beaches. Similarly, it may regulate expressive conduct for reasons unrelated to the suppression of speech. . . . It may also regulate nude dancing under the power granted it by the twenty-first amendment. . . . And it most certainly may ban obscene nude dancing. . . . [T]he total ban at issue here does not fall within any of those constitutionally permissible areas of legislation. If the State wishes to regulate non-obscene expressive activity or public nudity, it may do so, but only in consonance with the first amendment.

*Id.* at 1088-89.

209. Chief Justice Rehnquist suggested that there was minimal inferference with the expression because the erotic dancers were not prohibited from dancing entirely, but were forced to wear pasties and G-strings during performances. *See supra* notes 153-54 and accompanying text.

210. *See Barnes* at 2461-63 (plurality).

Court's analysis was flawed in two respects.

First, Chief Justice Rehnquist wrongly treated the nudity in nude dance as if it were conduct severable from the message of the dance.[211] He suggested that the requirement that the dancers wear pasties and G-strings did not deprive the dance of its protected message.[212] Rather, he argued that these requirements made the message only slightly less graphic.[213] He concluded, therefore, that the statute's prohibition satisfied the *O'Brien* test's incidental restriction requirement.[214]

The nudity in nude dance, an expressive component of the dance,[215] is an essential and fundamental element of the message of eroticism and sensuality.[216] Indiana's prohibition of nude dancing, therefore, was not simply a restriction on the manner in which the dancers communicated their message, but, instead, a complete prohibition of that particular message.[217] A complete prohibition of protected expression cannot satisfy the *O'Brien* test's minimal interference requirement.[218]

The second flaw in the Court's *O'Brien* analysis stemmed from its purported justification for the public indecency statute's prohibition. Chief Justice Rehnquist and Justice Scalia argued that Indiana's interest in creating and enforcing its public indecency statute was the protection of morals and public order.[219] Chief Justice Rehnquist and

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211. *See id.* at 2463.

212. *Id.*

213. *Id.*

214. *Id.* Chief Justice Rehnquist stated: "It is without cavil that the public indecency statute is 'narrowly tailored;' Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose." *Id.*

215. *See id.* at 2474 (White, J., dissenting). Justice White stated that "[t]he nudity element of nude dancing performances cannot be neatly pigeonholed as mere 'conduct' independent of any expressive component of the dance." *Id.*

216. *See id.*; *see also infra* note 247.

217. Indiana's prohibition of nude dancing is, thus, distinguishable from other manner restrictions. *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (dealing with a statute regulating the volume of music); Kovacs v. Cooper, 336 U.S. 77 (1949) (dealing with a statute regulating the noise of sound trucks). In *Ward*, for example, the regulation at issue limited the permissible volume of music. Since the regulation affected only the manner in which the music could be played, the Court treated it as a time, place, or manner restriction. *Ward*, 491 U.S. at 791. Nudity, however, is not to nude dancing as volume is to music. With music, the content of the message does not change with the volume. Nudity in nude dance, on the other hand, goes directly to the content of the message of the dance. Prohibiting nudity from exotic dance is not analogous to regulating volume. Rather, it is analogous to prohibiting certain instruments from playing in the orchestra.

218. *See supra* note 180.

219. *See Barnes* at 2461 (plurality); *id.* at 2464-65 (Scalia, J., concurring). Justice Scalia more specifically stated that "[t]he purpose of the Indiana statute, as both its text and the manner of its enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified." *Id.* at 2465.

Justice Scalia suggested that the State's complete prohibition of public nudity furthered this interest.[220]

Admittedly, Indiana's public indecency statute in some circumstances may serve to protect morals and public order.[221] That purpose, however, cannot justify the application of the statute to prohibit nude dancing.[222] Nude dancing only occurs in closed settings and among consenting adults.[223] If the State's interest in protecting morals and public order extended to nude dancing, it also could extend to nude expression in private, for example, in the home.[224] Indiana made no attempt to regulate nudity in both public and private.[225]

If the State's interest in applying this prohibition was not protecting morality and public order, Justice Souter suggested another possible State interest. As the State argued before the Court[226] and as Justice Souter recognized,[227] the State had an interest in preventing the harmful secondary effects of nude entertainment establishments.[228] Those secondary effects stemmed from nude dancing's message of eroticism and sensuality.[229] Preventing those effects certainly is an important in-

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220. *Id.* at 2463 (plurality); *id.* at 2468 (Scalia, J., concurring).

221. As Justice Souter recognized, the purposes of the statute included, but were not limited to, protecting morality and public order. *See id.* at 2469 (Souter, J., concurring). *See supra* note 159.

222. *See id.* at 2473 (White, J., dissenting). Justice White suggested that:

> The purpose of forbidding people from appearing nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that cannot possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates.

*Id.*

223. *Id.*

224. As Justice White noted, Indianans are free to "parade around, cavort, and revel in the nude for hours in front of relatives and friends. It is difficult to see why the State's interest in morality is any less in that situation." *Id.* at 2476.

225. *See supra* note 173.

226. *See supra* note 158.

227. *See Barnes* at 2469 (Souter, J., concurring).

228. Justice Souter stated:

> I think that we need not so limit ourselves in identifying the justification for the legislation at issue here, and may legitimately consider petitioners' assertion that the statute is applied to nude dancing because such dancing "encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity." Brief for Petitioners 37.
>
> This asserted justification for the statute may not be ignored merely because it is unclear to what extent this purpose motivated the Indiana Legislature in enacting the statute.

*Id.*

229. Justice Souter disagreed with this assertion. He suggested that while the State did use the statute to target evil secondary effects of nude entertainment establishments, those effects were not necessarily related to the expressive message of nude dancing. *Id.* at 2470-71. Justice Souter's *O'Brien* analysis goes awry in this respect. There clearly is a causal connection between nude dancing's message of eroticism and the evil secondary effects that concern the State. Addi-

terest. By conceding that this was the justification for prohibiting nude dancing, however, the State admitted that it targeted the expressive activity precisely because of the message it communicated.[230] Since the State, by its own admission, targeted the expressive conduct, it must satisfy the most exacting scrutiny.[231] Even if the secondary effects of nude entertainment establishments presented a compelling State interest, there were less restrictive means of mitigating those effects.[232]

In sum, the Court's analysis of Indiana's prohibition of nude dancing was flawed in several respects. The Court ignored Indiana's selective prohibition of nude dancing because of the offensive nature of the dancers' message it communicated. The Court misconstrued Indiana's interest in applying its statute to prohibit nude striptease dancing and failed to recognize less restrictive ways of furthering Indiana's interests. The Court's faulty reasoning perhaps underscored its assessment of the artistic merits of nude dancing.

## VI. Skirting the Issue—Should Nude Dancing Be Protected?

The Court in *Barnes* held that nude dancing implicated some minimal First Amendment protection. By manipulating constitutional doctrine, however, the Court reached the same result as if nude dancing were not protected by the First Amendment. Perhaps the Court felt bound by its previous suggestions that nude dancing was protected expression and, thus, sought an alternative method to achieve its desired result. This suggestion begs the question that so deeply divided the Seventh Circuit Court of Appeals: Should nude dancing be protected under the First Amendment?

An inquiry into the nature and history of dance suggests that dance, like verbal communication, is inherently communicative conduct. Furthermore, even if nude dancing is not inherently expressive, striptease dancing of the type found in *Barnes* is sufficiently communicative to be afforded First Amendment protection.

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tionally, as Justice White noted, if there was no causal connection between nude dancing's message and its negative secondary effects, the State had no rational basis for its prohibition of nude dancing. *See supra* note 160.

230. *See supra* note 206.

231. *See supra* note 182.

232. Justice White suggested that if the State desires to curb the evil secondary effects of nude entertainment establishments, it could, for example, "require that, while performing, nude performers remain at all times a certain minimum distance from spectators, that nude entertainment be limited to certain hours, or even that establishments providing such entertainment be dispersed throughout the city." *Barnes*, 111 S. Ct. at 2475.

### A. Dance As Inherently Communicative

The distinction between speech and conduct is elusive. All speech inextricably involves conduct, but not all conduct constitutes speech.[233] Speech is a form of conduct.[234] Communication is the element necessary to carry conduct into the realm of protected speech.[235] Communication implies an actor and an audience.[236] Whether a form of conduct is communicative largely depends on the intent of the actor and the presence of an actual or potential audience.[237]

If a communicator intends to convey a message by her conduct to an actual or potential audience, then such conduct ought to be protected by the First Amendment. Some forms of conduct are used inherently for communicative purposes. Verbal speech is the quintessential communicative conduct. The purpose of speech almost invariably is to communicate. Speech evolved out of the need to communicate.[238]

Other forms of conduct, like speech, are inherently communicative. Written words are a form of inherently communicative conduct.[239] In *Ward v. Rock Against Racism*[240] the Supreme Court recognized music as another inherently communicative form of conduct.[241] Dance also is an inherently communicative form of conduct.[242]

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233. *See* Kristin M. Burt, Note, *Nude Entertainment as Protected Expression: A Federal/State Law Conflict After* Crownover v. Musick, 22 SANTA CLARA L. REV. 211, 214 (1982).

234. *See* Miller v. Civil City of South Bend, 904 F.2d 1081, 1124 (7th Cir. 1990) (en banc) (Easterbrook, J., dissenting). *See generally* Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29 (1973).

235. *See* Nimmer, *supra* note 234, at 36.

236. *See id.*

237. The term "potential audience" refers to those persons who could receive the message, but may or may not be willing to participate. Certain conduct, such as operating a jackhammer, may convey a message to observers, but First Amendment protections do not apply if the acter did not intend to communicate. *See* Nimmer, *supra* note 234, at 36. *See also* JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 16, 42 (1970). Similarly, an actor may intend to communicate a message, but no communication, and thus no First Amendment protection, can exist without an actual or potential audience. *See* Nimmer, *supra* note 234, at 36. Nimmer states that "[t]he right to engage in . . . conduct which no one can observe may sometimes qualify as a due process 'liberty,' but without an actual or potential audience there can be no first amendment speech right." *Id.*

238. *See generally* 28 ENCYCLOPOEDIA BRITANNICA, MACROPAEDIA 85 (1990).

239. The First Amendment covers not only freedom of speech, but also freedom of the press. *See supra* note 2. The Supreme Court has stated that a newspaper comment or a telegram is a "pure form of expression." Cox v. Louisiana, 379 U.S. 536, 564 (1965).

240. Ward v. Rock Against Racism, 491 U.S. 781 (1989).

241. The Court stated:

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. . . . The Constitution prohibits any like attempts in our own legal order.

*Id.* at 790 (citations omitted).

242. Dance has been defined as "the art of moving the body in a rhythmical way, usually to

Dance may have been humanity's first method of communication.[243] The earliest primitive dances probably were simple expressions of pleasure or acts related to courtship.[244] Much like speech or music, dance has been used throughout history to appeal to the intellect and the emotions.[245] To classify dance as conduct less communicative or less deserving of First Amendment protection than speech, writing, or music is sheer folly.[246]

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music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself." *See* 16 ENCYCLOPOEDIA BRITANNICA, MACROPAEDIA 936 (1990). Judge Flaum wrote about dance:

> Inherently it is the communication of emotion or ideas. At the root of all "[t]he varied manifestations of dancing . . . lies the common impulse to resort to movement to externalise states which we cannot externalise hy rational means. This is basic dance."

*Miller*, 904 F.2d at 1085 (quoting J. MARTIN, INTRODUCTION TO THE DANCE (1939)).

243. *See* 16 ENCYCLOPOEDIA BRITANNICA, MACROPAEDIA 935-36 (1990). There is evidence, throughout recorded history, of humans dancing. *Id.*

244. *Id.*

245. *See id.* Biblical passages make reference to dance as a form of expressing happiness and praise. *See, e.g., Psalms* 149:3 ("let them praise his name with dancing, making melody to him with timbre and lire!"); *Psalms* 150:4 ("Praise him with timbrel and dance . . .").

An excerpt from Judge Posner's concurrence in *Miller* provides a helpful perspective on the eroticism in dance. It states:

> Public performances of erotic dances débuted in Western culture in the satyr plays of the ancient Greeks, were suppressed by Christianity, and, with Christianity's grip loosening, reappeared in the late nineteenth and early twentieth centuries. They reappeared in a variety of forms: as the can-can and the music-hall chorus line, from which the Folies Bergère and its tame American counterparts—the Ziegfeld Follies, and more recently the Radio City Music Hall Rockettes and the chorus lines in Broadway and Hollywood musicals—descend. As the Dance of the Seven Veils in Richard Strauss's opera Salome (1905), from which the fan dancing of Sally Rand and the decorous striptease of Gypsy Rose Lee, or of Gwen Verdon in the musical comedy Damn Yankees, may he said to descend. Ballet was nothing new in the nineteenth century; but as the costumes of ballet dancers became scantier, the erotic element in ballet became more pronounced, reaching scandalous proportions in Diaghilev's L'apres midi d'un faune (1912) (an example, and not an isolated one, of male erotic dancing) and becoming a staple of distinguished companies like the New York City Ballet and the American Ballet Theater. "Modern dance," a ballet offshoot pioneered by, among others, the erotic dancer Isadora Duncan, has long been partial to nudity. Examples of erotic dance in non-Western cultures include not only helly dancing but also the overtly erotic nude dancing of Les Ballets Africains de Keita Fodeba, which, but for its exoticism, would be considered shockingly explicit.

Miller v. Civil City of South Bend, 904 F.2d 1081, 1089-90 (7th Cir. 1990) (Posner, J., concurring).

246. *See* Been, *supra* note 29, at 13. Been states that "[t]he first amendment 'market place of ideas' cannot be limited to those items which are solely intellectual in content. Although dance has historically heen a mode of expression which is more emotive than cognitive, this distinction does not lessen its protection imder the Constitution." *Id.*

In City of Dallas v. Stanglin, 490 U.S. 19 (1989), the Supreme Court refused to recognize recreational ballroom dancing as expressive activity. Chief Justice Rehnquist stated that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at the shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Id.* at 25. The issue in *Stanglin* was whether recreational dancing was protected under the First Amendment right to association. *Id.* The Court concluded that recreational ballroom dancing was neither a

The fact that dance is inherently communicative remains regardless of the presence of nudity. The presence of nudity alone does not place otherwise protected activity outside the mantle of First Amendment protection.[247] Thus, any attempt to distinguish modern dance or ballet from striptease or go-go dancing necessarily fails.[248]

Nude dancing may be offensive and displeasing. As with any other method of communication, its artistic or aesthetic value will depend largely on the communicator.[249] Regardless of the tastefulness of a particular performance, the nonobscene striptease dancer is utilizing a medium that is inherently communicative and deserves First Amendment protection.

### *B. The* Texas v. Johnson *Test*

In 1974 the Supreme Court ruled in *Spence v. Washington*[250] that a student's conduct of taping a peace symbol to a United States flag and hanging it out of a window was protected by the First Amendment. The Court held that the student intended to convey a particularized

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form of intimate association nor a form of expressive association. *Id.* at 23-25.

The activity in *Stanglin* differs greatly from the nude dancing at issue in *Barnes*. In *Stanglin* the respondent owned a roller-skating rink in which some persons would dance recreationally while others would skate. *Id.* at 22. Thus, in *Stanglin* there was no intent to perform, no performance, and no audience. With nude dancing, it is possible to have an intent to perform, a performance, and a receptive audience.

247. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981).

Concerning the Indiana Supreme Court's conclusion, in State v. Baysinger, 397 N.E.2d 580 (1979), that nude dance was not protected expression, Professor Jeffrey Been stated:

> Such a proscription . . . misperceives the nature of the act. As with a dramatic work or musical score which attempts to convey an emotive message, the costume, the actor, the set, the consonance and dissonance cannot be separated from the act. All combine to produce emotive expression. No clear distinction can be drawn between that act which is merely conduct in the performance and that which is protected expression.

Been, *supra* note 29, at 13.

248. In *Miller* Judge Easterbrook tried to distinguish nude dance from music or ballet by suggesting that music appeals to the intellect and ballet tells stories. 904 F.2d 1081, 1125 (7th Cir. 1990) (Easterbrook, J., dissenting). Judge Easterbrook later concluded that "[b]arroom displays are to ballet as white noise is to music." *Id.* at 1126.

In their brief before the Supreme Court, the *Barnes* petitioners similarly argued that "[a]rtistic conduct such as ballet communicates an artistic message (regardless of whether it is bad art or good art) which distinguishes it from the aimless wanderings of nude barroom dancers." Brief for Petitioners at 10, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

Not all music, however, appeals to every intellect, and the stories of a ballet are not always clear. *See* Miller, 904 F.2d at 1086. Also, striptease dances are sometimes choreographed to tell a particular story or to portray a particular incident. Even though most striptease dances cannot boast such careful planning, Judge Easterbrook's distinction is faulty because improvisational dance, as much as improvisational speech or music, still maintains its communicative character.

249. In *Miller* Judge Flaum stated that "[w]hile the ideas communicated by a particular dance may well vary according to the context in which it is performed, the communication of expression clearly does not." 904 F.2d at 1086.

250. 418 U.S. 405, 410 (1974).

message and his message probably would be understood by those who viewed it.[251] Fifteen years later in *Texas v. Johnson* the Supreme Court faced the issue of whether the burning of the American flag was similarly expressive conduct protected by the First Amendment.[252] The Court, quoting from *Spence*, articulated a two-part test for determining when conduct should be afforded First Amendment protection. The Court stated that the First Amendment would apply to conduct when there was an intent to convey a particularized message and when the likelihood was great that the message would be understood by those viewing it.[253] The Court concluded that the symbolic burning of the flag was sufficiently communicative to implicate First Amendment protection.[254]

In determining that nude dancing deserved First Amendment protection, the majority of the Seventh Circuit in *Miller* relied on the *Texas v. Johnson* test.[255] In light of the controversy over nude dancing, two questions must be addressed: (1) should the *Johnson* test be applied to nude dancing?; and (2) if *Johnson* does apply, is nude dancing sufficiently communicative to merit protection under the First Amendment?

### 1. Is the *Johnson* Test Applicable to Nude Dancing?

The respondents in *Barnes* argued before the Supreme Court that the test articulated in *Texas v. Johnson* did not apply to nude dancing.[256] According to the respondents, the Court only applied the *Johnson* test to pure conduct that was being performed in a context that communicated a message.[257] The *Johnson* test, therefore, should not apply to an inherently expressive activity such as dance.[258]

In *Johnson* the Supreme Court mentioned several examples of conduct protected by the First Amendment.[259] The examples included the wearing of black armbands,[260] a sit-in by blacks,[261] the unofficial donning of American military uniforms,[262] and picketing.[263] Each of these

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251. *Id.* at 410-11.
252. 491 U.S. 397 (1989).
253. *Id.* at 404.
254. *Id.* at 406.
255. *See* Miller v. Civil City of South Bend, 904 F.2d 1081, 1086 (7th Cir. 1990) (en banc).
256. *See* Brief of Respondent at 24-26, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1990) (No. 90-26).
257. *Id.* at 25.
258. *Id.* at 25-26.
259. Texas v. Johnson, 491 U.S. 397, 404 (1989).
260. Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503, 505 (1969).
261. Brown v. Louisiana, 383 U.S. 131, 141-42 (1966).
262. Schacht v. United States, 398 U.S. 58 (1970).
263. Food Employees v Logan Valley Plaza, Inc., 391 U.S. 308, 313-14 (1968); United States

activities was inherently conduct.[264] Moreover, each type of conduct was protected under the First Amendment only because of the surrounding social and political context. Thus, the *Johnson* test determined under what circumstances conduct, otherwise not communicative, was sufficiently communicative to merit First Amendment protection.

Nude dancing is inherently communicative and should not be subject to a test typically applied to pure conduct. In *Ward v. Rock Against Racism*,[265] a case decided in the same year as *Johnson*, the Court held that music was protected expression under the First Amendment. The Court did not apply the *Johnson* test, but instead concluded that music was protected as a form of expression and communication.[266] Dance, also a form of expression and communication, deserves the same treatment.

### 2. Is Nude Striptease Dancing Sufficiently Communicative Under the *Johnson* Test?

Assuming arguendo[267] that the *Johnson* test applies to nude dancing, it must be determined whether the dancers intended to convey a particularized message and whether the message would be understood by those who viewed it.[268]

If the message communicated by the dancers in *Barnes v. Glen Theatre, Inc.* was one of sensuality and eroticism, those who paid to view it probably comprehended it.[269] The question of the dancers' intent, however, presents greater difficulty. If intent is read to mean actual, subjective intent, then nude dancing would be protected only

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v. Grace, 461 U.S. 171, 176 (1983).

264. See *Johnson*, 491 U.S. at 405, where the Supreme Court stated:

> We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In *Spence*, for example, we emphasized that Spence's taping of a peace sign to his flag was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy.". . .
>
> . . . Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. . . . In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication" . . . to implicate the First Amendment.

*Id.* at 405-06 (quoting from Spence v. Washington, 418 U.S. 405, 409-10 (1974)).

265. 491 U.S. 781 (1989).

266. *Id.* at 790.

267. Part VI(B)(1) of this Recent Development concluded that the *Johnson* test is not appropriate to conduct, such as dance, that is inherently communicative.

268. *See supra* notes 136-39 and accompanying text.

269. See Miller v. Civil City of South Bend, 904 F.2d 1081, 1087 (7th Cir. 1990) (en banc), in which Judge Flaum suggested that "it is apparent that those who view the respective dances readily comprehend the intended messages, for they advance currency to view them."

when the dancer could establish that she had the requisite intent on a particular occasion. Thus, a nude dance of the same variety and in the same place could implicate First Amendment protection when done by one dancer, but not when done by another. *Barnes v. Glen Theatre, Inc.* demonstrated the problems created by this reading of the *Johnson* test. For example, Gayle Sutro claimed to be an artist intending to communicate as well as entertain.[270] Darlene Miller, on the other hand, stated that she simply danced for the money and so that the patrons would buy her more drinks.[271] Thus, under this reading of the *Johnson* test, only Sutro's dancing would be protected expression. A more practical reading of the *Johnson* intent requirement would infer an intent to communicate from the context in which the activity occurred.[272]

The type of nude dancing at issue in *Barnes v. Glen Theatre, Inc.* occurs nightly in thousands of establishments across the country. While the nude dancing in *Barnes* did not occur in the context of a political controversy such as flag burning at the Republican National Convention or sit-ins during the Civil Rights movement, it would be unrealistic to infer that nude dancers did not intend to communicate a message. The dancers communicated messages of eroticism and sensuality, and willing patrons received those messages. Thus, the nude dancing was sufficiently communicative to implicate First Amendment protection.

## VII. Conclusion

The *Barnes* decision reflected the Court's reluctance to treat nude dancing as a legitimate form of expression. The Court's manipulation of constitutional doctrine to uphold Indiana's prohibition of this unique medium was the most significant and troublesome aspect of the *Barnes* case. Nude dancing may not be a widely appreciated activity. Indeed, it often is crude and displeasing. The role of the Court in analyzing state laws prohibiting forms of expression, however, is not to assess the artistic merits of the protected activity.[273] Prohibition of this expressive, al-

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270. *See supra* note 83.

271. *Id.*

272. This is, in fact, what the Supreme Court has done. *See supra* note 264.

273. Justice White stated:

> The Court's assessment of the artistic merits of nude dancing performances should not be the determining factor in deciding this case. In the words of Justice Harlan, "it is largely because governmental officials cannot make principled decisions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25 (1971). "[W]hile entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some 'entertainment' with his beer or shot of rye." *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (CA2 1974), aff'd in part, *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

*Barnes* at 2474-75 (White, J., dissenting).

beit offensive, activity, therefore, deserved more honest scrutiny.

*Zachary T. Fardon**

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