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Barnes v. Glen Theatre, Inc.: The Naked Truth

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NOTE

BARNES v. GLEN THEATRE, INC.: THE NAKED TRUTH

I. INTRODUCTION

The First Amendment of the United States Constitution guarantees freedom of speech.[1] The phrase "freedom of speech," long understood to encompass both political and ideological speech, has been held to include some forms of entertainment.[2] Difficulty arises, however, in defining the parameters of protected expression.[3] Expression entails not only words but can encompass certain

1. The First Amendment provides: "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.

2. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981).

3. Legal theorists advance different views on what constitutes expression. Absolutists interpret the First Amendment in its literal sense, while others find room in the First Amendment for a balancing test. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.7, at 942-44 (4th ed. 1991). Justices Black and Douglas are known for subscribing to the absolutist view, which by definition does not allow for a balancing test. Thus, free speech is an absolute right. *Id.* Justice Harlan is identified with the view that various forms of speech may be balanced against regulatory statutes. *Id.* at 943. Through the passage of time, the Supreme Court has extended the protections of the First Amendment normally associated with political speech to some expressive activities including various forms of entertainment. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (musical production); Jenkins v. Georgia, 418 U.S. 153 (1974) (film); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (motion pictures). Because some forms of entertainment have found constitutional protection, the question has arisen as to whether nonobscene adult entertain-

conduct as well.[4] However, conflict occurs when nonverbal behavior is perceived as protected expression by some, but mere conduct by others.[5] Recently, this dilemma rose to the forefront as the Supreme Court addressed the issue of First Amendment protection for nude dancing as expression in *Barnes v. Glen Theatre, Inc.*[6]

In *Barnes*, the issue before the Court was whether the application of an Indiana public indecency statute to nude dancing impermissibly infringed upon freedom of speech. The statute defined public indecency,[7] in part, as "knowingly or intentionally, in a public place: . . . appear[ing] in a state of nudity. . . ."[8] J.R.'s Kitty Kat Lounge[9] and Glen Theatre, Inc.,[10] in separate actions, sought to enjoin the state from enforcing the statute against them as both establishments provided nude dancing as entertainment.[11] Both actions were consolidated on appeal.[12]

Initially, the district court granted the injunction, finding the statute facially overbroad.[13] However, the court of appeals reversed and remanded,[14] whereby the district court held that the nude

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ment in the form of nude dancing can claim First Amendment protection. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 67 (1981) ("[N]ude dancing is not without its First Amendment protections from official regulation."). *See also* Lisa Malmer, Comment, *Nude Dancing and the First Amendment*, 59 U. Cin. L. Rev. 1275 (1991).

4. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7, at 825-27 (2d ed. 1988).

5. *Id.*

6. 59 U.S.L.W. 4745 (U.S. June 21, 1991). In Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990), the court held that nude dancing is entitled to limited First Amendment protection. The majority of the court based its holding on the inherent expressive element of nude dancing. The dissent, however, argued that the regulation was directed at the conduct of nudity.

7. The Indiana statute provides, in part:

(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.

IND. CODE ANN. § 35-45-4-1 (Burns 1985).

8. *Id.* § 35-45-4-1(a)(3).

9. J.R.'s Kitty Kat Lounge is an establishment which serves alcoholic beverages. Miller v. Civil City of South Bend, 904 F.2d at 1082.

10. Glen Theatre, Inc. does not serve alcoholic beverages. *Id.*

11. *Id.*

12. *Id.*

13. Glen Theatre, Inc. v. Civil City of South Bend, 726 F. Supp. 728 (N.D. Ind. 1985).

14. The statute had previously received a limiting construction from the Indiana Su-

dancing at issue was not afforded protection under the First Amendment.[15] The court of appeals again reversed and remanded,[16] but then vacated its own opinion and granted a rehearing en banc.[17] The court of appeals found that nonobscene nude dancing performed as entertainment is expression entitled to limited First Amendment protection, and held the Indiana statute unconstitutional as applied.[18] On certiorari, the United States Supreme Court reversed: Enforcement of Indiana's public indecency statute as applied to nude dancing does not violate the First Amendment.[19]

II. PERSPECTIVE

A. *Expressive Conduct*

The Supreme Court addressed the issue of expressive conduct in the landmark decision of *United States v. O'Brien*.[20] In *O'Brien*, an antiwar protestor burned his draft card and was charged with violating a federal statutory provision which prohibited the intentional destruction of selective service certificates.[21] The protestor argued that the act of destroying his draft card was "symbolic speech," and, therefore, the provision was unconstitutional as applied.[22] The Court, however, disagreed and upheld the provision stating that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[23] Further, the Court established a test to determine whether a regulation is justified despite its incidental restriction on expression.[24]

Under the *O'Brien* test, a regulation will be upheld if it meets

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preme Court, which saved it from overbreadth. Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986).

15. Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414 (N.D. Ind. 1988).
16. Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989).
17. Miller v. Civil City of South Bend, 904 F.2d 1081, 1082 (7th Cir. 1990).
18. *Id.*
19. Barnes v. Glen Theatre, Inc., 59 U.S.L.W. 4745 (U.S. June 21, 1991).
20. 391 U.S. 367 (1968).
21. *Id.* at 370.
22. *Id.* at 376.
23. *Id.*
24. *Id.* at 376-77. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* The nonspeech aspect of O'Brien's activity was the destruction of his draft card. The speech aspect of the activity was demonstration against the war and draft through destruction of the card. *Id.*

four requirements.[25] First, the regulation must be within the constitutional power of the government.[26] Second, the regulation must further a substantial governmental interest.[27] Third, the governmental interest must be unrelated to the suppression of expression.[28] Finally, the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest.[29]

B. Regulation of Adult Entertainment

Constitutional protection under the First Amendment is afforded to an activity that is considered to be expression. Extending this protection to adult entertainment raises the interesting question whether the entertainment is expressive conduct.

The Supreme Court has addressed the issue of First Amendment protection for adult entertainment in previous cases. In *Cali-*

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25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* Symbolic speech was first recognized by the Supreme Court in Stromberg v. California, 283 U.S. 359 (1931). NOWAK & ROTUNDA, *supra* note 3, § 16.48, at 1106. The *O'Brien* Court, however, articulated a working test to be applied to expressive conduct cases. *Id.* § 16.49. Since its creation, the *O'Brien* test has been utilized in cases ranging from the wearing of black armbands to flag desecration. *Id.* at 1108-12. *See* United States v. Eichman, 110 S. Ct. 2404 (1990) (flag desecration); Texas v. Johnson, 491 U.S. 397 (1989) (flag desecration); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) (wearing black armbands to protest Vietnam war). *See also* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (sleeping in national park as form of demonstration). Prior to *Barnes*, decisions involving adult entertainment and First Amendment claims have usually rested upon a state's broad power to regulate liquor under the Twenty-first Amendment or the doctrine of overbreadth. *See infra* text accompanying notes 30-77. However, in analyzing zoning restrictions affecting adult entertainment as reasonable time, place, and manner restrictions, the Court has usually applied the *O'Brien* test or a similar three-part test. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50, 79 (1976); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 n.7 (1981). The Court will uphold a time, place, and manner restriction under the three-part test "as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant interest and leave open ample alternative channels of communication.' " NOWAK & ROTUNDA, *supra* note 3, § 16.47(a), at 1087 (citing United States v. Grace, 461 U.S. 171 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983), *on remand*, 705 F.2d 462 (7th Cir. 1983))).

There are factual distinctions between applying the *O'Brien* test to the destruction of a draft card as a means of protesting and applying the test to nude dancing. There is no indication that the nude dance at issue in *Barnes* is a means of protest. The Court has previously noted, however, that although there may be substantial factual distinctions in applying the test to a regulation affecting adult entertainment, "the essential weighing and balancing of competing interests are the same." Young v. American Mini Theatres, Inc., 427 U.S. 50, 80 (1976).

fornia v. LaRue,[30] the Court upheld regulations prohibiting sexually explicit live entertainment on the ground that states are granted broad latitude under the Twenty-first Amendment to regulate intoxicating liquors.[31] The Court, in upholding the restriction, considered several factors surrounding the enactment of the regulations.[32] Due to California's concern of an increase in sexually explicit entertainment, public hearings were held to address the issue.[33] Evidence of testimony from those hearings[34] was presented, which led the lower court to conclude that "[t]he story . . . was a sordid one, primarily relating to sexual conduct between dancers and customers . . . ."[35] Further, it was discovered that prostitution, indecent exposure, rape, and assaults on officers occurred in the vicinity of such licensed establishments.[36] The Supreme Court reversed the district court's decision that the regulations abridged freedom of expression, explaining that "[w]hile . . . some of the performances . . . are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board."[37] Furthermore, the Court found that the regulations were aimed at performances depicting "gross sexuality" rather than at forms of expres-

30. California v. LaRue, 409 U.S. 109 (1972).

31. *Id.* at 118-19. Justice Rehnquist, writing for the majority, captured six votes to uphold the regulations. Justices Douglas, Brennan, and Marshall dissented, each filing separate opinions.

32. *Id.* at 110-11. The Department of Alcoholic Beverages became concerned with the type of adult live entertainment available in clubs and bars that it licensed. Prior to enactment of the regulations, the department found that over the span of a few years topless dancing progressed to bottomless dancing. *Id.*

33. *Id.*

34. Through the public hearings, the Department of Alcoholic Beverages learned that in some establisments various sex acts were being conducted between the customers and women entertainers. Specifically, "[c]ustomers were found engaging in oral copulation with women entertainers [and] engag[ing] in public masturbation . . . ." *Id.*

35. The district court held that the regulations abridged freedom of expression. La Rue v. State of California, 326 F. Supp. 348 (C.D. Cal. 1971). The district court noted that the law was well settled that theatrical entertainment was constitutionally protected. *Id.* at 354. Further, it found that the California Supreme Court had found dancing and live theatrical performances to fall within the ambit of the First Amendment. *Id.* According to the district court, the state had to justify the regulations as either a prohibition of obscenity or as a regulation directed at conduct under the *O'Brien* test. *Id.* at 354-55. The district court determined that as a regulation of expressive "conduct," the regulations failed the *O'Brien* test. *Id.* In particular, the governmental interest was directly related to the suppression of expression. *Id.*

36. *Id.*

37. *Id.* at 118. The Supreme Court noted that the performances were only prohibited in establishments serving alcohol. Further, the Court recognized California's concern with the combination of sexual performances and the sale of liquor in the same establishment as reasonable. *Id.*

sion with a communicative element.[38] Justice Brennan, dissenting, found the regulations applicable to some forms of protected speech and disagreed that the Twenty-first Amendment authorized states to use their liquor licensing power as a means to prohibit protected, even though undesirable, forms of speech.[39]

Subsequent to its decision in *LaRue*, the Court addressed the constitutionality of an ordinance prohibiting topless dancing in *Doran v. Salem Inn, Inc.*[40] The Court emphasized that, although *LaRue* had found some constitutional protection for nude dancing, the State's interest in regulating alcohol under the Twenty-first Amendment is superior to the minimal expression involved in nude dancing.[41] However, reliance on the Twenty-first Amendment was unnecessary in *Doran* because the ordinance was held to be overbroad.[42] The ordinance prohibited appearing topless "in any public place," not just in establishments licensed to serve alcohol.[43]

Almost a decade after *LaRue*, the Supreme Court again addressed the issue of adult entertainment as expression in the form of nude dancing. In *Schad v. Borough of Mount Ephraim*,[44] the Court struck down as overbroad a zoning ordinance which prohibited live entertainment, including nude dancing.[45] Because the ordinance effected a total ban on all live entertainment, it impermissibly prohibited a "wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments."[46]

The *Schad* majority noted that live entertainment falls within the First Amendment guarantee.[47] While nude dancing was not

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38. *Id.*

39. *Id.* at 123 (Brennan, J., dissenting). Justice Marshall, dissenting, considered the regulations to be overbroad, thereby rendering them unconstitutional. *Id.* at 124-25 (Marshall J., dissenting). "Although the State's broad power to regulate the distribution of liquor and to enforce health and safety regulations is not to be doubted, that power may not be exercised in a manner that broadly stifles First Amendment freedoms." *Id.* at 125.

40. 422 U.S. 922 (1975).

41. *Id* at 932-33.

42. *Id.* The district court granted injunctive relief, noting that the ordinance was "on its face violative of plaintiff's First Amendment rights in that it prohibits across the board nonobscene conduct in the form of topless dancing . . . ." *Id.* at 925. The Court did not disturb the district court's grant of injunctive relief agreeing that the ordinance appeared overbroad. It did note, however, that the district court spoke in terms of an actual holding at the injuctive stage but inferred that the district court intended only to refer to the liklihood of success on the merits. *Id.* at 932-33.

43. *Id.*

44. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

45. *Id.* at 63-64.

46. *Id.* at 65.

47. *Id.* The Court defined entertainment to include "motion pictures, programs broad-

enumerated as an example of the type of entertainment entitled to protection, the Court recognized that "nude dancing is not without its First Amendment protections from official regulation."[48] Nudity alone cannot place otherwise protected material outside the scope of the First Amendment.[49] Finding the ordinance overbroad in its prohibition of all live entertainment, which included musicals, plays, and concerts,[50] the Court did not address the extent to which First Amendment protection encompasses nude dancing. The dissent, on the other hand, found the ordinance permissible in its prohibition against nude dancing,[51] effectively arguing against the overbreadth doctrine itself. The dissent stated that even if nude dancing were a form of expression, Mount Ephraim could regulate it.[52]

The Twenty-first Amendment was again utilized by the Supreme Court in *New York State Liquor Authority v. Bellanca*,[53] to uphold a New York statute prohibiting nude dancing in establishments licensed by the State to serve alcohol. The Court emphasized that the State's power to ban the sale of alcohol justified "the lesser power to ban the sale of liquor on premises where topless dancing occurs."[54]

Consistent with its decision in *Bellanca*, the Court upheld a city ordinance prohibiting nude or nearly nude dancing in *City of Newport, Kentucky v. Iacobucci*.[55] Citing *Bellanca* and *LaRue*, the majority considered the Twenty-first Amendment as granting broad authority to a state or city to regulate alcohol through time, place, or manner restrictions.[56] Thus, it was permissible to prohibit

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cast by radio and television, and live entertainment, such as musical and dramatic works . . . ." *Id.*

48. *Id* at 66.

49. *Id.*

50. A zoning law must be narrowly drawn and serve a substantial government interest for it to be held constitutional. *Id.* at 68. The majority noted that Mount Ephraim had not fulfilled these requirements. *Id.* at 72-74.

51. *Id.* at 85.

52. Justice Burger, joined by Justice Rehnquist, dissenting, found the ordinance to be a "minimal intrusion on genuine rights of expression . . . ." *Id.* at 86-87. Furthermore, the dissent emphasized that people should be "masters of their own environment" within reason. *Id.* at 85.

53. 452 U.S. 714 (1981).

54. *Id.* at 715-17.

55. 479 U.S. 92 (1986).

56. 479 U.S. at 94-96. The Court reasoned:

> "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more

nude dancing through state control over liquor licensing.[57] Further, the Court noted that *LaRue* recognized that the State's interest in regulating alcohol under the Twenty-first Amendment "outweighed any First Amendment interest in nude dancing . . . ."[58]

In a strong dissent, Justice Stevens, joined by Justice Brennan, stated that use of the Twenty-first Amendment in such a manner was improper when the First Amendment is involved.[59] In remarking that the Twenty-first Amendment was originally meant as an exception to the Commerce Clause, Justice Stevens accused the Court of distorting the Amendment through recent decisions.[60] Furthermore, Justice Stevens noted that, under *Schad,* the Court was required to determine whether the City had a substantial governmental interest and whether that interest could be met in a less restrictive manner on First Amendment expression.[61] Instead, the majority allowed the Twenty-first Amendment to take precedence over the First Amendment, thereby upholding a regulation it found to suppress constitutionally protected speech.[62]

The most recent Supreme Court decision addressing regulation of adult entertainment is *FW/PBS, Inc. v. City of Dallas.*[63] In that case, an ordinance regulating sexually oriented businesses[64] was designed to "eradicat[e] the secondary effects of crime and urban blight."[65] The Supreme Court found that the licensing scheme

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than the normal state authority over public health, welfare and morals."
Id. at 95 (quoting California v. LaRue, 409 U.S. 109, 114 (1972)). Thus, a state "has broad power . . . to regulate the times, places, and circumstances under which liquor may be sold . . . ." *Id.* at 96 (quoting New York State Authority v. Bellanca, 452 U.S. 714, 715 (1981)). *See* NOWAK & ROTUNDA, *supra* note 3, § 16.61(e), at 1152. Nowak and Rotunda suggest that *Bellanca* should not be read to allow the Twenty-first Amendment to supercede the First Amendment. They argue the Twenty-first Amendment merely allows the states greater freedom in which to regulate adult entertainment as expression through its power to regulate intoxicating liquors. *Id.* at 1153.

57. *Id.*

58. *Id.* (citing Doran v. Salem Inn, Inc. 422 U.S. 922, 932-33, (1975)).

59. *Id.* at 97. Justice Stevens disagreed with an interpretation which would allow the Twenty-first Amendment to take precedence over the First Amendment. *Id.*

60. While noting that the strength of the Twenty-first Amendment had weakened with respect to Commerce Clause cases, Justice Stevens remarked that the Court, inappropriately, has carved out a role for the Twenty-first Amendment in First Amendment cases. *Id.* at 98.

61. *Id.* at 99.

62. *Id.* at 98-99.

63. 110 S. Ct. 596 (1990).

64. *Id.* at 602. The Dallas ordinance defined sexually oriented businesses as including "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center." Dallas City Code, ch. 41A, Sexually Oriented Businesses Sec. 41A-2(19) (1986). *Id.*

65. *Id.*

created by the ordinance lacked the necessary procedural safeguards for protection of speech.[66] Specifically, the ordinance did not set time limits on inspections required for a license to be issued to the sexually oriented businesses.[67] The Court noted that a licensing scheme that allows indefinite postponement of the issuance of a license "creates the possibility that constitutionally protected speech will be suppressed . . . ."[68] Justice White,[69] concurring and dissenting in part, noted that conduct encompassing both speech and nonspeech elements can be regulated where the regulation targets the nonspeech element and the infringement on the speech element is incidental.[70] Furthermore, Justice White found the ordinance to regulate only those who managed the sexually oriented businesses, not the content of what was sold.[71] Justice Scalia, who also found the ordinance constitutional, focused on the ability to regulate the businesses as marketing obscene material.[72] Although Justice Scalia noted that certain materials sold may not be obscene,[73] he emphasized that "a business devoted to the sale of highly explicit sexual material can be found to be engaged in the marketing of obscenity . . . ."[74] Compliance with the First Amendment was unnecessary because the community could prohibit businesses from marketing obscenity.[75] Stated otherwise, Justice Scalia

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66. The Supreme Court did not, however, decide whether the regulation was content-neutral as a time, place, and manner regulation. *Id.* at 603. In addition to the issue of the ordinance effecting a prior restraint, the Supreme Court addressed three additional issues regarding the Dallas ordinance: (1) the issue of standing regarding a civil disability provision; (2) the issue of sufficient government interest in applying the ordinance to motel room rentals for time periods of less than ten hours; and (3) the issue of freedom of association. *Id.* at 602.

67. *Id.* at 605. Nude dancing establishments were included as among the businesses who challenged the ordinance. *Id.* at 602.

68. *Id.*

69. Justice White, concurring and dissenting in part, joined by Justice Rehnquist, disagreed with what procedural safeguards were necessary. The majority held that in addressing the issue of prior restraint, only two of the three procedural safeguards identified in Freedman v. Maryland, 380 U.S. 51 (1965), were necessary. *Id.* at 606. Justice White, however, found *Freedman* inapplicable. *Id.* at 614.

70. *Id.* at 614. *See* Clark v. Community for Creative Non-Violence 468 U.S. 288 (1984) (demonstrators not allowed to sleep in National Park in Washington, D.C.); United States v. O'Brien, 391 U.S. 367 (1968) (burning of draft card). *See also supra* note 29 and accompanying text.

71. 110 S. Ct. at 615.

72. *Id.* at 617-25.

73. *Id.* at 620-21. Materials taken separately might not be considered obscene under the test of obscenity established in Miller v. California, 413 U.S. 15 (1973). *Id.*

74. *Id.* at 619.

75. *Id.* (citing Ginzburg v. United States, 383 U.S. 463, (1966) as precedent giving strength to Justice Scalia's theory). Justice Stevens noted that *Ginzburg* did not survive

viewed the ordinance as regulating the "business of pandering."[76] Viewed in this limited manner, Justice Scalia differentiated the Dallas ordinance from the one in *Schad* which was held to be overbroad in its prohibition of all live entertainment.[77]

III. *BARNES V. GLEN THEATRE, INC.*: THE NAKED TRUTH

In *Barnes v. Glen Theatre, Inc.*, the Supreme Court held that Indiana's public indecency statute, as applied to nude dancing, did not violate the First Amendment.[78] Writing for the majority, Justice Rehnquist noted prior Supreme Court decisions that suggested that nude dancing is entitled to some form of First Amendment protection.[79] In fact, the Court agreed with the Seventh Circuit that nude dancing is expressive conduct.[80] However, the Court emphasized that this expressive conduct is "only marginally within the outer perimeters of the First Amendment . . . ."[81] As such, the task was twofold. First, the Court had to ascertain the level of protection extended to nude dancing.[82] Second, the Court had to determine whether the statute in question impermissibly infringed upon protected expression.[83]

A. *The O'Brien Test*

The *Barnes* Court began its analysis by noting that the Indiana statute did not prohibit nude dancing, but merely prohibited public nudity.[84] Thus, the focus was permissible time, place, and

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Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), wherein First Amendment protection was held present in commercial speech. *Id.* at 617.

76. *Id.* at 622. In describing this method of viewing the ordinance, Justice Scalia noted that highly explicit sexual material must be involved. Justice Scalia remarked that while a nude pinup would not be considered highly explicit, a nude person performing live would fall into this category. *Id.*

77. *Id.* at 623. "The Dallas ordinance . . . targets only businesses engaged in unprotected activity." *Id.*

78. Barnes v. Glen Theatre, Inc., 59 U.S.L.W. 4745, 4747 (U.S. June 21, 1991).

79. *Id. See* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (zoning ordinance prohibiting all live entertainment held unconstitutional); Doran v. Salem Inn, 422 U.S. 922 (1975) (injuctive relief granted against enforcement of ordinance prohibiting topless dancing); California v. LaRue, 409 U.S. 109 (1972) (regulations prohibiting various forms of adult entertainment upheld through the state's broad power to regulate alcohol under the Twenty-first Amendment).

80. 59 U.S.L.W. at 4747.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

manner restrictions on expression.[85] Applying the *O'Brien* four-part test, the Court held that "Indiana's public indecency statute is justified despite its incidental limitations on some expressive activity."[86] In other words, the Indiana statute met all four requirements of the *O'Brien* test. First, the statute was within the constitutional power of the State.[87] Second, it furthered a substantial governmental interest, namely, societal order and morality.[88] Third, the statute was directed at public nudity and not the expression involved in nude dancing.[89] Finally, the statute was narrowly tailored because it required the dancers to wear a minimal amount of clothing in order to comply with the statute.[90]

Focusing primarily on the third prong of the *O'Brien* test, the Court emphasized that the statute is not directed at preventing nude dancing, nor is it directed at preventing whatever erotic message that might be conveyed thereby;[91] Indiana is merely trying to prevent public nudity.[92] The Court rejected the argument that because the statute is based on morality, the statute is aimed at the expression of nudity.[93] Further, the Court asserted that although many forms of conduct can be construed as expressive, the *O'Brien* Court rejected expanding the category of "expressive conduct" in such a manner.[94]

Justice Scalia concurred in the result, but disagreed with the application of the *O'Brien* four-part test.[95] Asserting that the Indiana statute is a general law directed at conduct and not at expression, Justice Scalia stated that the First Amendment is not implicated at all.[96] Therefore, the intermediate level of scrutiny applied by the Court was unnecessary and inappropriate.[97] According to Justice Scalia, a general law need only have a rational basis for the

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* Although Indiana does not record legislative history, the Court found no difficulty in attributing public morality as the governmental interest sought through the statute. *Id.* at 4747-48.

89. *Id.* at 4748. The Court surveyed the history of Indiana's public indecency statute and found that it was enacted as a general prohibition against nudity. *Id.* at 4747.

90. *Id.* at 4748.

91. *Id.*

92. *Id.* "[I]t [is] not the dancing that [is] prohibited, but simply its being done in the nude." *Id.*

93. *Id.* at 4748.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 4750.

regulation to be upheld.[98]

Focusing primarily on the purpose of the Indiana statute, Justice Scalia responded to the dissent's assertion that the purpose of the statute is protection from offense.[99] He identified the purpose of the statute as that community's effort "to enforce the traditional moral belief that people should not expose their private parts indiscriminately. . . ."[100] He further remarked that society forbids particular activities because the activities are deemed immoral.[101] Thus, the statute is not aimed at any expression conveyed by nude dancing but is aimed at restricting nudity in order to promote morality.

The concurrence by Justice Souter agreed with the use of the *O'Brien* four-part test,[102] but departed from the majority with respect to its discussion of the second prong, namely, the substantial governmental interest.[103] Justice Souter noted that neither Indiana's legislature nor its courts has indicated the actual interest to be served through the statute, and asserted that it was unnecessary to infer that the interest is only that of public morality.[104] Instead, Justice Souter suggested that the Court consider the State's contention that the Indiana statute's application to nude dancing was for the purpose of preventing the secondary effects of nude dancing establishments.[105]

B. The Dissent: The Statute Fails the O'Brien Test

While the majority, Justice Scalia, and Justice Souter agreed that the statute was directed at conduct and not at expression, the dissent found the application of the statute clearly directed toward suppressing the erotic message.[106] Justices White, Marshall, Blackmun, and Stevens, dissenting, accused the Court of distorting and ignoring settled doctrine in order to achieve its result.[107]

The dissent disagreed with the majority's finding that the statute is the kind of general prohibition upheld in prior decisions

98. *Id.* at 4751.

99. *See infra* text accompanying notes 114-15.

100. 59 U.S.L.W. at 4749.

101. Justice Scalia identified such forbidden activities as including prostitution, drug use, and sodomy. *Id.*

102. *Id.* at 4751.

103. *Id.*

104. *Id.*

105. *Id.* The secondary effects were identified as various criminal activity including prostitution and sexual assault. *Id.*

106. *Id.* at 4754.

107. *Id.*

under the exercise of state police powers.[108] However, although the cases cited by the majority were "true" general prohibitions,[109] the dissent argued that the Indiana statute is not a general prohibition because there is no suggestion that it can be applied to nudity occurring anywhere.[110] Thus, because the statute is not a true general prohibition, stricter scrutiny is required.[111]

According to the dissent, the Indiana statute fails the *O'Brien* test. First, a governmental interest in "societal order and morality" does not warrant suppression of "a significant amount of protected expressive activity . . . ."[112] Further, the statute as applied is aimed at expression and not conduct.[113] The dissent reasoned that the purpose behind public indecency statutes is protection of nonconsenting parties from offense.[114] However, because the patrons of nude dancing establishments are consenting adults, the state's purpose must be suppression of "the harmful message" conveyed by nude dancing.[115] Finally, the statute is not narrowly tailored because it "[b]an[s] an entire category of expressive activity. . . ."[116] The dissent suggested that if the state's real concern is the secondary effects associated with nude dancing establishments, it could regulate nude dancing without affecting its expressive element.[117]

IV. CONCLUSION

Barnes posed a problem for the Court in that it involved two different establishments each providing nude entertainment but only one establishment serving alcohol. Thus, the Court could not rest its decision on the State's broad power to regulate alcohol under the Twenty-first Amendment. Furthermore, the State of Indiana had already saved the public indecency statute from being

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108. *Id.* at 4753.

109. *Id.* (citing United States v. O'Brien, 391 U.S. 367 (1968), and Bowers v. Harwick, 478 U.S. 186 (1986)).

110. *Id.* The dissent argued that in both *O'Brien* and *Bowers* the prohibitions on conduct applied everywhere, including conduct in the home. This argument is problematic in that the Indiana statute regulates public nudity, which arguably would not occur in the home.

111. *Id.*

112. *Id.*

113. *Id.* at 4755.

114. *Id.* at 4753.

115. *Id.*

116. *Id.* at 4754.

117. *Id.* The dissent argued that the State could restrict the hours of nude entertainment or disperse nude establishments throughout an area. The dissent further argued the Twenty-first Amendment was a means to regulate nude entertainment in establishments licensed to serve alcohol. *Id.*

declared overbroad. Unable to dispose of this case in the manner of previous decisions involving adult entertainment and First Amendment claims of expression, the Court applied the four-part *O'Brien* test.

The difficulty in applying the *O'Brien* test in this case is that Indiana has not articulated the purpose behind its public indecency statute. Thus, because the governmental interest is unknown, the Court and the dissent reach different results as to whether the regulation is directed at expression.

The Court has consistently implied that nude dancing may be protected expression under the First Amendment. Prior decisions have indicated, however, that whatever the expressive element, nude dancing is not beyond regulation. The *Barnes* decision does hold that nude dancing is expressive conduct, but it fails to define the level of protection afforded nude dancing. The only clear indication by the *Barnes* court is that nude dancing is expressive conduct barely protected by the First Amendment.

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