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Volume 25 | Number 2

Article 6

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1-1-1992

### **Barnes v. Glen Theatre, Inc.: Application of Indiana's Public Indecency Statute to Nude Dancing-Is the Supreme Court Stripping Away First Amendment Protections to Reveal a New Standard**

Ingrid Kristin Campagne

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#### **Recommended Citation**

Ingrid K. Campagne, *Barnes v. Glen Theatre, Inc.: Application of Indiana's Public Indecency Statute to Nude Dancing-Is the Supreme Court Stripping Away First Amendment Protections to Reveal a New Standard*, 25 Loy. L.A. L. Rev. 595 (1992).

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**BARNES V. GLEN THEATRE, INC.: APPLICATION OF  
INDIANA'S PUBLIC INDECENCY STATUTE TO NUDE  
DANCING—IS THE SUPREME COURT STRIPPING  
AWAY FIRST AMENDMENT PROTECTIONS TO REVEAL  
A NEW STANDARD?**

*If the only way to exclude nude dancing from the protection of the [First A]mendment is to exclude all nonpolitical art and literature as well, the price is too high. "A rule cannot be laid down that would excommunicate the paintings of Degas."*<sup>1</sup>

**I. INTRODUCTION**

The First Amendment right to freedom of speech has long enjoyed a special place in American society. The United States Supreme Court has described the constitutional right of free expression as "putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that the use of such freedom will ultimately produce a more capable citizenry and more perfect polity."<sup>2</sup> Recently, in *Barnes v. Glen Theatre, Inc.*,<sup>3</sup> the Court considered whether an Indiana statute banning all public nudity met the requirements of the United States Constitution.<sup>4</sup> In a five to four decision, the Court held that such a statute, as applied to nude dancing, does not violate the First Amendment.<sup>5</sup>

This Note analyzes the plurality's reasoning, and discusses its incorrect interpretation and application of precedent in this case. Additionally, this Note discusses the development of the Court's theory of "lesser value" speech, including its application in *Barnes*, and identifies the dangers of its continued application.<sup>6</sup>

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1. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1096 (7th Cir. 1990) (en banc) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903)), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991). The First Amendment reads "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. *Cohen v. California*, 403 U.S. 15, 24 (1971).

3. 111 S. Ct. 2456 (1991).

4. *Id.* at 2458.

5. *Id.*

6. Because each Justice, with the exception of Justice Scalia, expressed the opinion that the nude dancing at issue in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), is expressive conduct meriting some First Amendment protection, this Note does not consider whether

## II. BACKGROUND

### A. First Amendment Jurisprudence: Standard of Review

Generally, government is considered to have restricted speech if a regulation is facially targeted<sup>7</sup> at the suppression of ideas or information, or if a governmental regulation is facially neutral<sup>8</sup> but was motivated by an intent to single out constitutionally protected speech for regulation.<sup>9</sup> Therefore, if the government wishes to regulate the expressive activity because of the communicative impact of a speaker's message, the regulation should be strictly scrutinized<sup>10</sup> to determine whether the government had a compelling reason<sup>11</sup> to restrict the speech. The government has somewhat more latitude to regulate expression, however, when it is doing so for reasons independent of the speech's content.<sup>12</sup> Regulations based only upon the time, place or manner<sup>13</sup> of speech are said to be content-neutral. A content-neutral regulation is valid if it is: (1) justifiable without reference to the content of the regulated speech; (2) narrowly tailored to serve a significant governmental interest; and (3) it

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nude dancing should, per se, be considered expression for the purposes of the First Amendment. For an interesting discussion regarding the expressive aspects of nude dancing, see *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1089-1104 (7th Cir. 1990) (en banc) (Posner, J., concurring), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

Additionally, this Note does not consider the validity of anti-pornography statutes or the potentially harmful effects of pornography on women. For an interesting and in-depth discussion on the constitutionality of feminist anti-pornography statutes see Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460 (1984).

7. Facial targeting means that the statute restricts expression on the face of the regulation. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 789 (2d ed. 1987).

8. A facially neutral regulation does not textually single out a certain category of speech for regulation but may have the effect of suppressing speech and therefore may be unconstitutional. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 230 (1989); *United States v. Albertini*, 472 U.S. 675, 687-88 (1985); *Wayne v. United States*, 470 U.S. 598, 602-05 (1984).

9. TRIBE, *supra* note 7, § 12-2, at 789-90, 794.

10. In order for a content-based regulation to be valid, the regulation must be necessary to serve a compelling state interest and must be narrowly drawn to achieve that interest. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) (regulation must serve compelling state interest and be narrowly drawn to achieve that interest); see also *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991) (content-based regulations must be narrowly drawn and based on compelling state interest); *Metro Broadcasting v. Federal Communications Comm'n*, 110 S. Ct. 2997 (1990) (regulations based on content must be based on compelling interest and must be narrowly tailored).

11. For application of the compelling state interest standard, see *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969).

12. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

13. See *infra* notes 12-21 and accompanying text for a discussion of the time, place and manner test.

leaves open adequate alternative avenues for the protected communication.<sup>14</sup>

The time, place and manner test has been applied in a number of situations involving the regulation of adult entertainment.<sup>15</sup> In *City of Renton v. Playtime Theatres, Inc.*<sup>16</sup> the Court upheld a city zoning regulation that strictly limited the placement of adult theaters showing non-obscene adult films.<sup>17</sup> The Court acknowledged the statute's burden on speech but upheld the regulation nonetheless.<sup>18</sup> The *City of Renton* opinion, authored by Justice Rehnquist, reasoned that the seemingly content-based distinction between adult theaters and other theaters was valid because the zoning ordinance was aimed at eliminating the secondary effects caused by the presence of adult theatres, not the dissemination of "offensive" speech.<sup>19</sup> Justice Rehnquist noted that the appropriate inquiry is whether the ordinance is designed to serve a substantial governmental interest and whether it allows for alternative avenues of communication.<sup>20</sup> In *City of Renton* the city's zoning regulation was upheld because it left some areas of the city open for the protected communication, and was thus considered a content-neutral restriction.<sup>21</sup>

### 1. Symbolic speech

The Court has held that certain forms of conduct, as well as speech, have the potential to communicate ideas and are, therefore, protected by the First Amendment.<sup>22</sup> Where expression is coupled with conduct,

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14. The time, place and manner test has been applied in a number of First Amendment cases including: *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515-16 (1981); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

15. See *City of Renton*, 475 U.S. at 46 (adult theater zoning ordinance); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74-77 (1981) (ordinance regulating nude dancing); *Young*, 427 U.S. at 63 (zoning ordinance targeting adult theaters); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (ordinance regulating topless dancing).

16. 475 U.S. 41 (1986). In *City of Renton* the Court relied heavily on its previous decision in *Young* which upheld, as a content-neutral time, place and manner restriction, a Detroit zoning ordinance that prohibited the location of an adult theater within 1000 feet of any two "regulated uses" or within 500 feet of any residential zone. *Young*, 427 U.S. at 72-73.

17. *City of Renton*, 475 U.S. at 43.

18. *Id.* at 54.

19. *Id.* at 47.

20. *Id.* Under the time, place and manner test used in *City of Renton*, a regulation is valid if it is "designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Id.*

21. *Id.* at 54.

22. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (burning American flag considered

however, the standard of review is somewhat less stringent than that used to analyze restrictions on verbal speech alone.<sup>23</sup> The test for gauging the validity of restrictions on expressive conduct was established in *United States v. O'Brien*.<sup>24</sup>

To protest American involvement in the Vietnam War, O'Brien burned his draft card in front of a sizeable crowd and was convicted under a federal statute that prohibited the willful destruction or mutilation of draft cards.<sup>25</sup> In his defense, O'Brien claimed that the act of burning his draft card was expressive conduct in the manner of symbolic speech and that his conviction, therefore, violated the First and Fourteenth Amendments of the United States Constitution.<sup>26</sup> This argument was not accepted by a majority of the Court, however, which held that when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in restricting the nonspeech element can justify incidental limitations on First Amendment freedoms.<sup>27</sup> Specifically, the Court in *O'Brien* stated that where speech and nonspeech elements of conduct are combined, a governmental regulation is justified if it is within the "constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>28</sup> In *O'Brien* the Court found that a nonspeech element of conduct (burning the draft card) was combined with a speech element (protest of the Vietnam war).<sup>29</sup> In applying the newly established test, the Court found that the government's interest in a pool of available draft registrants needed to facilitate quick induction into the military was a substantial enough governmental interest to justify the incidental restriction on speech.<sup>30</sup>

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expressive conduct); *Spence v. Washington*, 418 U.S. 405 (1974) (hanging flag upside down and attaching peace symbols considered expressive conduct); *Cohen v. California*, 403 U.S. 12 (1971) (wearing jacket bearing the words "Fuck the Draft" considered expressive conduct); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (wearing armbands to protest war considered expressive conduct).

23. See *TRIBE*, *supra* note 7, § 12-7, at 832.

24. 391 U.S. 367, 376-77 (1968).

25. *Id.* at 369.

26. *Id.* at 376.

27. *Id.*

28. *Id.* at 377.

29. *Id.* at 376.

30. *Id.* at 379.

## 2. Obscenity

The Supreme Court has stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>31</sup> The Court has held, however, that certain categories of expression—fighting words, defamation and obscenity, for example—do not fall within the realm of constitutionally protected expression.<sup>32</sup> Of these categories, obscenity has proved one of the most difficult to define.<sup>33</sup> Following a lengthy struggle, the Court finally agreed upon the modern definition of obscenity in *Miller v. California*.<sup>34</sup> The *Miller* test contrasts the use of contemporary community standards with the potential artistic, literary or political value of the work.<sup>35</sup> In applying this standard to state and local regulation of obscene material, the Court acknowledged that the states are free to regulate the display of obscene materials in public places—but must adhere to the Court's definition of obscenity in drafting regulations.<sup>36</sup>

## 3. Adult entertainment & nude dancing

The Court has addressed several cases in which the content of the expressive activity at issue was considered "offensive" to some because of its focus on an explicit sexual message, but did not fall within the formal definition of obscenity.<sup>37</sup> In the area of adult entertainment, the Court

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31. *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 95 (1972).

32. *E.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (setting forth categories of unprotected speech).

33. *See Roth v. United States*, 354 U.S. 476 (1957). In a post-*Roth* decision, Justice Stewart highlighted the difficulty in defining a workable definition of "hard core" pornography, which he believed to be obscenity, with the following statement: "[I would not attempt further to define] the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

34. 413 U.S. 15, 24 (1973).

35. In *Miller* the Court held that the trier of fact must determine: (1) whether the average person, applying "contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest"; (2) whether the work "depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (3) whether the work, "taken as a whole, lacks serious literary, artistic, political or scientific value." *Id.*

36. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973). The Court intended that the obscenity standard encompass only "hard core" pornography because the Court felt that only "hard core" pornography was so lacking in educational and artistic merit that it was not entitled to any constitutional protection whatsoever. *See Roth*, 354 U.S. at 485 (1957).

37. *See Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding FCC regulation restricting broadcast of indecent but not obscene language);

has struggled to develop a standard for judging limitations on these types of expression without violating the spirit of the First Amendment. When the Court considers restrictions on certain categories of expression, such as nude dancing or pornographic material, often it is faced with the burden of weighing the precepts of free expression against claims that the expression should be subjected to lesser scrutiny because of its inferior value in the marketplace of ideas.<sup>38</sup>

One such area concerns the Court's treatment of nude entertainment. Development of Supreme Court precedent in the area of nude dancing has been both slow and curious. Historically, although various cases suggested that nude dancing fell within the ambit of the First Amendment,<sup>39</sup> none expressly stated that conclusion prior to the Court's decision in *Schad v. Borough of Mount Ephraim*.<sup>40</sup> In *Schad* the Court overturned a total ban on live entertainment as violative of the First and Fourteenth Amendments.<sup>41</sup> Although the proposition that nude dancing is entitled to some First Amendment protection is now generally accepted by the courts, until its decision in *Barnes v. Glen Theatre, Inc.*,<sup>42</sup> the Supreme Court had not defined the proper scope and level of protection.<sup>43</sup>

Clues pointing to an emerging standard of review for nude dancing cases could be found in several Supreme Court decisions. For example, in *California v. LaRue*<sup>44</sup> the Court upheld a California Department of Alcohol Beverage Control regulation that prohibited the service of alcohol in establishments where certain "grossly sexual exhibitions are performed."<sup>45</sup> In upholding the regulation, the Court noted that the state was empowered to regulate such entertainment in establishments that

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*Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (holding facially invalid as infringement on First Amendment rights ordinance making it public nuisance and punishable offense for drive-in movie theater to exhibit films containing nudity when screen is visible from public places); *Cohen v. California*, 403 U.S. 15 (1971) (finding that state may not make simple display of single word expletive criminal offense).

38. See *infra* notes 240-68 and accompanying text for a discussion of the theory of "lesser value" speech.

39. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *California v. LaRue*, 409 U.S. 109, 118 (1972).

40. 452 U.S. 61 (1981).

41. *Id.* at 77. The Court in *Schad* concluded that "nude dancing is not without its first amendment protections from official regulations." *Id.* at 66. An entertainment program may not be prohibited "solely because it displays the nude human figure." *Id.* (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-12, 213 (1975)).

42. 111 S. Ct. 2456 (1991).

43. *Id.* at 2460.

44. 409 U.S. 109 (1972).

45. *Id.* at 119 (Stewart, J., concurring).

serve liquor under the United States Constitution's Twenty-First Amendment.<sup>46</sup> In *LaRue* Justice Rehnquist, writing for the majority, stated that "the critical fact is that California has not forbidden these performances across the board[—][i]t has merely proscribed such performances in establishments that it licenses to sell liquor."<sup>47</sup> Similarly, in *Doran v. Salem Inn, Inc.*<sup>48</sup> the Court invalidated as overbroad a New York statute that prohibited topless dancing in all public places.<sup>49</sup> Justice Rehnquist, again writing for the majority, stated that the statute exceeded the state's power under the Twenty-First Amendment because it applied to all commercial establishments, not just those serving alcohol.<sup>50</sup>

Prior to its decision in *Barnes*, the Court's last significant word on nude dancing appeared in the case of *Schad v. Borough of Mount Ephraim*.<sup>51</sup> In *Schad* the majority opinion, authored by Justice White, declared a city zoning ordinance prohibiting all live entertainment unconstitutionally overbroad.<sup>52</sup> Although Justice Rehnquist disagreed with the *Schad* majority on the overbreadth ruling, he agreed that nude dancing is constitutionally protected expression.<sup>53</sup> Because the statute was invalidated on overbreadth grounds, no standard of review for nude dancing was established. A possible clue to an emerging standard, however, could be gleaned from Chief Justice Burger's dissenting statement that "[t]he fact that [nude dancing] enjoys some constitutional protection does not mean that there are not times and places inappropriate for its exercise."<sup>54</sup>

## B. Barnes v. Glen Theatre, Inc.

### 1. Factual and procedural history

In 1976 the Indiana State Legislature passed an indecency statute flatly prohibiting any form of public nudity.<sup>55</sup> Shortly thereafter two In-

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46. *Id.* at 118. See *infra* note 222 for the text of the Twenty-First Amendment.

47. *LaRue*, 409 U.S. at 118.

48. 422 U.S. 922 (1974).

49. *Id.* at 933-34.

50. *Id.*

51. 452 U.S. 61 (1981).

52. *Id.* at 77.

53. *Id.* at 86 (Burger, C.J., dissenting, joined by Rehnquist, J.).

54. *Id.* at 87 (Burger, C.J., dissenting, joined by Rehnquist, J.).

55. Act of 1976, Pub. L. No. 148, § 1, 1976 Ind. Acts 752-53 (codified at IND. CODE ANN. § 35-45-4-1 (Burns 1985)). Indiana's public indecency statute provides:

- (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



diana establishments, the Kitty Kat Lounge and the Glen Theatre, wishing to provide totally nude dancing as entertainment, along with two dancers employed at these establishments, filed suit in the United States District Court for the Northern District of Indiana to enjoin the enforcement of the statute.<sup>56</sup>

The establishments and dancers argued that the Indiana statute's complete prohibition of nudity in public places violated the First Amendment.<sup>57</sup> The district court initially granted their request for an injunction, finding the statute facially overbroad and therefore, unconstitutional.<sup>58</sup> The Seventh Circuit Court of Appeals reversed, however. It found that the limiting construction previously given the statute by the Indiana Supreme Court precluded such a challenge because the statute could not be applied to otherwise constitutionally protected public nudity.<sup>59</sup> The case was then remanded and the district court was instructed to consider whether or not the Indiana indecency statute violated the First Amendment as applied to the plaintiffs' dancing.<sup>60</sup>

On remand the district court upheld the Indiana statute finding that the type of dancing provided by the plaintiffs was not expressive conduct

(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.*

56. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2459 (1991).

57. *Glen Theatre, Inc. v. Civil City of South Bend*, 726 F. Supp. 728, 731 (N.D. Ind. 1985), *rev'd sub nom. Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986), *on remand*, *Glen Theatre v. Civil City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988), *rev'd sub nom. Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989), *aff'd*, 904 F.2d 1081 (7th Cir. 1990) (en banc), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

58. *Id.* at 732. "'Overbreadth' is a term used to describe a situation where a statute proscribes not only what constitutionally may be proscribed, but also forbids conduct which is protected, e.g., by the First Amendment's safeguards of freedom of speech and press." *Overstock Book Co. v. Barry*, 305 F. Supp. 842, 851 (E.D.N.Y. 1969).

59. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287, 288-89 (7th Cir. 1986), *on remand*, *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988), *rev'd sub nom. Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989), *aff'd*, 904 F.2d 1081 (7th Cir. 1990) (en banc), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991). The Indiana Supreme Court said that "it may be constitutionally required to tolerate or allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *State v. Baysinger*, 397 N.E.2d 580, 587 (Ind. 1979). Five years later an Indiana appeals court dismissed a conviction under the statute in a case involving a partially nude dance at the "Miss Erotica of Fort Wayne" contest. *Erhardt v. State*, 463 N.E.2d 1121, 1122 (Ind. App. 1984). The decision of the appeals court, however, was later reversed by the Indiana Supreme Court. *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984).

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

and therefore not protected by the United States Constitution.<sup>61</sup> The case was then, once again, appealed to the Seventh Circuit.<sup>62</sup> A panel of that court reversed the decision of the district court holding that the type of dancing at issue *was* expressive conduct and therefore was protected by the First Amendment.<sup>63</sup>

The case was then heard, *en banc*, by the Seventh Circuit Court of Appeals.<sup>64</sup> A majority of the court decided that nonobscene<sup>65</sup> nude public dancing performed for entertainment is expressive conduct that is protected by the First Amendment.<sup>66</sup> They concluded that the Indiana public indecency statute was an unconstitutional infringement on that expressive conduct because it sought to prevent the message of eroticism and sexuality conveyed by the dancers.<sup>67</sup>

Shortly thereafter, the United States Supreme Court granted certiorari.<sup>68</sup> In a five to four decision, the Court held that the statute, which would require dancers in the challenging establishments to wear at least "pasties" and "G-strings," did not violate the First Amendment.<sup>69</sup>

## 2. The Court's reasoning

### a. Chief Justice Rehnquist: *The plurality opinion*

In determining whether or not the dancing at issue in this case should be considered "expressive conduct," Chief Justice Rehnquist relied on previous Court decisions<sup>70</sup> and concluded that nude dancing falls within the purview of the First Amendment, but that it is only "marginally"<sup>71</sup> within its "outer perimeters."<sup>72</sup> Although the Chief Justice believed that customary barroom dancing is expression,<sup>73</sup> he suggested that

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61. *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*, 887 F.2d 826 (7th Cir. 1989), *aff'd*, 904 F.2d 1081 (7th Cir. 1990) (*en banc*), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

62. *Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989), *aff'd*, 904 F.2d 1081 (7th Cir. 1990) (*en banc*), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

63. *Id.* at 830.

64. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) (*en banc*), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

65. See *supra* notes 31-36 and accompanying text for a discussion of obscenity.

66. *Miller*, 904 F.2d at 1085, 1087.

67. *Id.* at 1088.

68. 111 S. Ct. 38 (1990).

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

70. *Id.* at 2460; see *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *California v. LaRue*, 409 U.S. 109, 118 (1972).

71. *Barnes*, 111 S. Ct. at 2460.

72. *Id.*

73. *Id.*

it deserves only the "barest minimum" of constitutional protection.<sup>74</sup>

Chief Justice Rehnquist next considered the proper level of protection for the expression in question.<sup>75</sup> He turned to the Court's decision in *United States v. O'Brien*,<sup>76</sup> which held that expressive conduct may be narrowly regulated or forbidden if a substantial or important governmental interest is implicated and if that interest is unrelated to the suppression of expression.<sup>77</sup> He noted that the time, place and manner test<sup>78</sup> was originally developed to evaluate restrictions on expression taking place on *public property* which had been deemed a "public forum,"<sup>79</sup> but that in the case of *City of Renton v. Playtime Theatres, Inc.*<sup>80</sup> the doctrine was used to evaluate a restriction on speech occurring on *private property*.<sup>81</sup> Because the *O'Brien* and *City of Renton* tests are similar, Chief Justice Rehnquist considered application of the *O'Brien* analysis appropriate in this case.<sup>82</sup>

In applying the four-part *O'Brien* inquiry<sup>83</sup> to the facts of this case, Chief Justice Rehnquist found that Indiana's public indecency statute fell within the constitutional power of the state because: (1) it furthered a "substantial governmental interest," that of protecting societal order and morality;<sup>84</sup> (2) the state's regulation was unrelated to the suppression of expression because it was a general law uniformly applied to all public nudity;<sup>85</sup> and (3) the statute was narrowly tailored as Indiana's requirement that the dancers wear at least pasties and a G-string was the barest minimum necessary to achieve the statute's purpose.<sup>86</sup> Chief Justice Rehnquist concluded that it was permissible for the state to regulate public nudity "whether or not it is combined with expressive activity."<sup>87</sup>

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74. *Id.* (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)).

75. *Id.* at 2461.

76. 391 U.S. 367 (1968).

77. *Id.* at 376-77. See *supra* notes 22-30 and accompanying text for a discussion of the *O'Brien* test.

78. See *supra* notes 12-21 and accompanying text for a discussion of the time, place and manner test.

79. *Barnes*, 111 S. Ct. at 2460.

80. 475 U.S. 41 (1986).

81. *Barnes*, 111 S. Ct. at 2460.

82. *Id.* at 2460-61.

83. See *supra* notes 22-30 and accompanying text for a discussion of the *O'Brien* test.

84. *Barnes*, 111 S. Ct. at 2461.

85. *Id.* Chief Justice Rehnquist cited a number of public indecency prosecutions for activities having no communicative element. See, e.g., *Bond v. State*, 515 N.E.2d 856, 857 (Ind. 1987); *In re Levinson*, 444 N.E.2d 1175, 1176 (Ind. 1983); *Blanton v. State*, 533 N.E.2d 190, 191 (Ind. Ct. App. 1989); *Adams v. State*, 461 N.E.2d 740, 741-42 (Ind. Ct. App. 1984).

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

87. *Id.* Although not directly stated, Chief Justice Rehnquist implied that the nude aspects of the dance are nonexpressive elements of otherwise expressive conduct. *Id.* at 2462.

*b. the concurring opinions**i. Justice Scalia*

Justice Scalia began his concurring opinion by noting that he agreed with the judgment of the Court upholding Indiana's public indecency statute not because it survived some lesser level of scrutiny but because the statute was unrelated to expression.<sup>88</sup> Justice Scalia argued that there is a distinction between actual "speech" and expressive conduct.<sup>89</sup> He reasoned that the First Amendment specifically protects the "freedom of speech," meaning oral and written speech, but *not* expressive conduct.<sup>90</sup> He noted, however, that when the government prohibits conduct precisely because of its communicative attributes, the regulation is unconstitutional.<sup>91</sup>

Justice Scalia believed that the appropriate First Amendment analysis applicable to laws that do not directly or indirectly impede "speech" starts with a threshold inquiry regarding whether the purpose of the law was to suppress communication.<sup>92</sup> If the statute was not intended to suppress communication, then it does not violate the First Amendment.<sup>93</sup> Justice Scalia felt that Indiana's ban on public nudity was not intended to suppress communication because the "intent to convey a 'message of eroticism' (or any other message) is not a necessary element of the statutory offense of public indecency; nor does one commit the statutory offense by conveying the most explicit 'message of eroticism' " so long as one does not commit any of the four specified acts in the process."<sup>94</sup>

Justice Scalia also considered the traditional role and treatment of public nudity in American society. In Justice Scalia's opinion, our society prohibits certain activities, including public nudity, not because these

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He wrote, "[i]t 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.* Chief Justice Rehnquist argued that "the court rejected this expansive notion of 'expressive conduct' in *O'Brien*." *Id.*

88. *Id.* at 2463 (Scalia, J., concurring). Justice Scalia argued that "[a]lmost the entire domain of Indiana's statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech." *Id.* at 2464 (quoting *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1120 (7th Cir. 1990)).

89. *Id.* at 2465-67 (Scalia, J., concurring).

90. *Id.* at 2466 (Scalia, J., concurring).

91. *Id.* (Scalia, J., concurring).

92. *Id.* (Scalia, J., concurring).

93. *Id.* (Scalia, J., concurring).

94. *Id.* (Scalia, J., concurring). See *supra* note 55 for the specified acts forbidden by the Indiana statute.

activities harm others but because they are considered immoral.<sup>95</sup> Specifically, Justice Scalia said that "there is no basis for thinking that our society has ever shared that 'you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else' beau ideal—much less for thinking that it was written into the Constitution."<sup>96</sup> He added that the Constitution does not generally prohibit state regulation on the basis of morality.<sup>97</sup>

## ii. Justice Souter

In his concurring opinion, Justice Souter<sup>98</sup> first discussed the potentially expressive and nonexpressive elements of both nudity and dancing and pondered which elements should be entitled to First Amendment protection.<sup>99</sup> Justice Souter noted that neither "nudity"<sup>100</sup> nor "dancing"<sup>101</sup> are per se entitled to blanket constitutional protection but concluded that "nude dancing" is protected by the First Amendment because the dancer's movements, in going from clothed to nude, are included in the dancer's act for expressive purposes—specifically, to endorse the message of eroticism.<sup>102</sup>

Justice Souter disagreed with the plurality's suggestion that society's moral views are enough to justify the limitation at issue.<sup>103</sup> Instead, he based his concurrence on what he viewed as the state's substantial interest in combatting the secondary effects caused by adult entertainment establishments.<sup>104</sup>

Justice Souter agreed with the plurality's application of the four-part *O'Brien* inquiry to determine the proper level of protection required by the First Amendment.<sup>105</sup> In applying the *O'Brien* test to the Indiana statute, Justice Souter relied heavily on the Court's previous decision in

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95. *Barnes*, 111 S. Ct. at 2465 (Scalia, J., concurring).

96. *Id.* (Scalia, J., concurring).

97. *Id.* (Scalia, J., concurring).

98. Notably, this is Justice Souter's first independent opinion as a Supreme Court Justice regarding the freedom of expression.

99. *Barnes*, 111 S. Ct. at 2468 (Souter, J., concurring).

100. *Id.* (Souter, J., concurring).

101. *Id.*; see *Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (ballroom dancing not protected by First Amendment). Justice Souter also noted that dancing for aerobic exercise would be outside of the purview of the First Amendment. *Barnes*, 111 S. Ct. at 2468 (Souter, J., concurring).

102. See *Barnes*, 111 S. Ct. at 2468 (Souter, J., concurring).

103. See *id.* (Souter, J., concurring).

104. *Id.* at 2468-69 (Souter, J., concurring). Among the secondary effects referred to by Justice Souter are increased prostitution, increased sexual assaults and the attraction of other criminal activity. *Id.* (citing Brief for Petitioners at 37, *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991) (No. 90-26)).

105. *Id.* at 2468 (Souter, J., concurring).

*City of Renton v. Playtime Theatres, Inc.*<sup>106</sup>

In *City of Renton* the Court upheld a city's zoning ordinance designed to eliminate the secondary effects of adult entertainment by limiting the placement of adult theaters to only five percent of the city.<sup>107</sup> Justice Souter noted that in *City of Renton* the Court did not require the city to justify its regulation with studies showing harm from secondary effects that were specific to that city.<sup>108</sup> Instead, the City of Renton was allowed to rely on the studies and experiences of other cities.<sup>109</sup> Justice Souter reasoned that the adult entertainment provided by the Kitty Kat Lounge and the Glen Theatre was directly analogous to the adult entertainment at issue in *City of Renton*.<sup>110</sup> Justice Souter concluded that the Indiana statute was constitutional under the *O'Brien* test because the State of Indiana could reasonably decide that forbidding nude dancing furthers its interest in preventing prostitution, sexual assault and associated crimes.<sup>111</sup> Because this interest was unrelated to the suppression of expression,<sup>112</sup> the requirements of *O'Brien* were satisfied by the Indiana statute.<sup>113</sup>

*c. Justice White: The dissenting opinion*

Justice White, writing for the dissent,<sup>114</sup> fundamentally disagreed with the reasoning of the plurality in a number of areas. First, he believed that the plurality was incorrect in assuming that Indiana's public indecency statute was a law of general proscription.<sup>115</sup> Second, Justice White believed that Indiana's statute was aimed at suppressing expressive activity and should, therefore, be subjected to strict First Amendment scrutiny.<sup>116</sup> Finally, he believed that banning an entire category of expressive activity did not satisfy the requirement that such regulations be

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106. 475 U.S. 41 (1986).

107. *Id.* at 53-54. The ordinance at issue in *City of Renton* protected approximately 95% of the city area from the placement of motion picture theaters emphasizing "matter describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein." *Id.* at 44.

108. *Barnes*, 111 S. Ct. at 2469 (Souter, J., concurring).

109. *Id.* (Souter, J., concurring); see *City of Renton*, 475 U.S. at 51 (City of Renton allowed to rely upon experiences and findings of Seattle, Washington and other cities).

110. *Barnes*, 111 S. Ct. at 2470 (Souter, J., concurring).

111. *Id.* at 2470-71 (Souter, J., concurring).

112. *Id.* (Souter, J., concurring).

113. *Id.* (Souter, J., concurring).

114. *Id.* at 2471 (White, J., dissenting). Justices Marshall, Blackmun and Stevens joined in Justice White's dissenting opinion. *Id.*

115. *Id.* at 2472 (White, J., dissenting).

116. *Id.* at 2473 (White, J., dissenting).

narrowly tailored to promote a substantial governmental interest,<sup>117</sup> as required by *United States v. O'Brien*.<sup>118</sup>

Justice White argued that Indiana's public indecency statute was not a general prohibition, as asserted by the plurality and Justice Scalia.<sup>119</sup> He noted that previous Supreme Court decisions upholding the state's exercise of police power involved truly general proscriptions that forbade the prohibited conduct wherever and whenever it might occur.<sup>120</sup> In distinguishing the Indiana statute, Justice White noted that the statute did not, and could not, constitutionally apply to nudity whenever and wherever it might occur.<sup>121</sup> He reasoned that, for example, the statute could not be extended to apply to people appearing nude in their own homes.<sup>122</sup> In addition, the statute had never been applied to performances such as plays, ballets or operas, suggesting that the statute was *not* a general prohibition and was *not* uniformly enforced.<sup>123</sup>

Justice White argued that because the statute was not one of general proscription, *O'Brien* placed the burden on the state to explain why an expressive element of the conduct was regulated (nude dancing) but a nonexpressive element of the same conduct (appearing nude in one's home) was not.<sup>124</sup>

The Justice believed that the actual purpose of the Indiana statute was to protect viewers from what the state believed to be the harmful message communicated by nude dancing and not the potential damage caused by nude appearances on city streets or in city parks.<sup>125</sup> He felt that Indiana aimed to prevent exposure to the communicative aspects of the nude dance, specifically to its erotic message, in an attempt to limit the harms that might follow from reaction to that message—such as increased prostitution and the degradation of women.<sup>126</sup> Justice White believed that because the purpose of the statute was content-based it failed

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117. *Id.* at 2475 (White, J., dissenting).

118. 391 U.S. 367, 376-77 (1968).

119. *Barnes*, 111 S. Ct. at 2472 (White, J., dissenting).

120. *Id.* (White, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)) (generally prohibiting consensual sodomy even in one's home); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (generally prohibiting peyote use even in religious ceremonies); *O'Brien*, 391 U.S. 367 (generally prohibiting draft card burning at all times and in all places).

121. *Barnes*, 111 S. Ct. at 2472 (White, J., dissenting).

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

123. *Id.* at 2473 (White, J., dissenting).

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

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

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

the third part of the *O'Brien* test<sup>127</sup> and therefore should be subjected to the higher level scrutiny demanded of content-based restrictions on speech.<sup>128</sup>

In addition, Justice White believed that Indiana's statute was not narrowly tailored, and therefore, failed strict scrutiny examination because it banned outright an entire class of expressive activity.<sup>129</sup> He suggested that there were less restrictive alternatives available to the state.<sup>130</sup> For instance, the state could require that nude performers remain a specified distance from the audience,<sup>131</sup> that nude performances take place only during designated hours,<sup>132</sup> or that establishments providing nude entertainment be dispersed throughout the city.<sup>133</sup>

### III. ANALYSIS

#### A. *Level of Scrutiny in Barnes v. Glen Theatre, Inc.*

In determining an appropriate level of scrutiny, Chief Justice Rehnquist rephrased petitioner's argument that the Indiana statute was a valid time, place and manner restriction.<sup>134</sup> The plurality's opinion stated that the time, place and manner doctrine is generally used to evaluate restrictions on speech taking place on public property deemed a "public forum"<sup>135</sup> but in at least one case it was used to evaluate a restriction on speech occurring on public property.<sup>136</sup> Chief Justice Rehnquist's examination of the "time, place and manner" doctrine ended there, however. He noted that "this test has been interpreted to embody much the same

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127. *Id.* at 2473-74 (White, J., dissenting). See *supra* notes 22-30 and accompanying text for a discussion of the *O'Brien* test.

128. *Barnes*, 111 S. Ct. at 2473-74 (White, J., dissenting); see *Sable Communications, Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 126 (1989); *Boos v. Barry*, 485 U.S. 312, 321 (1988); *United States v. Grace*, 461 U.S. 171, 177 (1983).

129. *Barnes*, 111 S. Ct. at 2475 (White, J., dissenting).

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

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

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

133. *Id.* (White, J., dissenting) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

134. *Id.* at 2460. The time, place and manner test has been used to test a number of regulations restricting speech in several cases including: *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981); *Metro-media, Inc. v. City of San Diego*, 453 U.S. 490, 515-16 (1981); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). See *supra* notes 12-21 and accompanying text for a discussion of the time, place and manner test.

135. *Barnes*, 111 S. Ct. at 2460 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

136. *Id.* (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).



standards as those set forth in *United States v. O'Brien*,<sup>137</sup> and turned, with no further mention of the time, place and manner test, to the four-part inquiry enunciated in *O'Brien*.<sup>138</sup>

Instead of applying the *City of Renton* time, place and manner test in *Barnes v. Glen Theatre, Inc.*,<sup>139</sup> the Court chose instead to apply the rule enunciated in *O'Brien*. The Court's choice of the *O'Brien* inquiry can perhaps best be explained by examining the differences between the *City of Renton* and *O'Brien* standards.

Under the *City of Renton* standard, any regulation restricting protected speech must further a substantial governmental interest and must leave open an adequate alternative channel for the communication.<sup>140</sup> Therefore, if the *City of Renton* requirements were applied to the statute at issue in *Barnes*, the statute would necessarily fail because it bans *all* public nudity<sup>141</sup>—even nudity that is concededly expressive conduct—while leaving no alternative avenue open for the protected communication. Alternatively, the *O'Brien* standard requires only that where speech and nonspeech elements are combined in the same conduct, the conduct may be regulated if the government has a substantial interest in doing so—even if the regulation proves to incidentally restrict the protected speech.<sup>142</sup> Therefore, a statute regulating nude dancing could potentially pass the level of scrutiny required in *O'Brien* even though it completely bans an entire category of expressive conduct.

A question naturally arises regarding the Chief Justice's choice to scrutinize the Indiana statute using the *O'Brien* inquiry rather than the time, place and manner inquiry as urged by the petitioners.<sup>143</sup> The plurality's choice of *O'Brien* seems especially odd in light of the fact that the time, place and manner test seems to have become the analysis of choice for examining restrictions on forms of constitutionally protected adult entertainment.<sup>144</sup> One explanation is that in this case Chief Justice

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137. 391 U.S. 367 (1968).

138. *Barnes*, 111 S. Ct. at 2460.

139. 111 S. Ct. 2456 (1991).

140. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986).

141. IND. CODE ANN. § 35-45-4-1 (Burns 1985). See *supra* note 55 for the text of the Indiana statute.

142. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

143. *Id.*

144. See *City of Renton*, 475 U.S. at 46 (applying time, place and manner test to adult theater zoning ordinance); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74-77 (1981) (applying time, place and manner test to ordinance regulating nude dancing); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976) (applying time, place and manner test to zoning ordinance targeting adult theaters); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (applying time, place and manner test to ordinance regulating topless dancing).

Rehnquist did not wish to uphold the Indiana statute merely on the basis of the secondary effects associated with adult entertainment establishments but rather on the basis of a state's "moral interest" in banning such entertainment.

### B. *An Improper Standard*

The statute at issue in *Barnes v. Glen Theatre, Inc.*<sup>145</sup> is distinguishable from regulations analyzed under the *O'Brien* standard in several other cases.<sup>146</sup> This dichotomy suggests that the application of the *O'Brien* standard is inappropriate in this case. In *Barnes* Chief Justice Rehnquist reasoned that because the time, place and manner test, as used in *Clark v. Community For Creative Non-Violence*,<sup>147</sup> is similar to the *O'Brien* conduct versus speech distinction standard,<sup>148</sup> the plurality would apply the *O'Brien* test to the facts of *Barnes*.<sup>149</sup> Although both tests are very similar, there are important differences.<sup>150</sup> Perhaps because of this, the Court often applies both the *O'Brien* standard for symbolic conduct and the time, place and manner test to the facts of a single case.<sup>151</sup>

In *Clark*, for example, the Court analyzed a National Park Service regulation that forbade sleeping in parks not designated for overnight camping.<sup>152</sup> The Community For Creative Non-Violence wished to stage demonstrations in two parks, both in the heart of Washington D.C., during which symbolic tents would be set up to dramatize the plight of the homeless.<sup>153</sup> The organization was granted a permit to stage the demonstration on the condition that the demonstrators would not sleep in the tents.<sup>154</sup>

The Court in *Clark* primarily relied on the time, place and manner test,<sup>155</sup> but considered the validity of the regulation under the *O'Brien*

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145. 111 S. Ct. 2456 (1991).

146. See *supra* notes 22-30 and accompanying text for a discussion of the *O'Brien* standard.

147. 468 U.S. 258 (1984).

148. *Barnes*, 111 S. Ct. at 2460; see *Clark*, 468 U.S. at 293-94.

149. *Barnes*, 111 S. Ct. at 2460.

150. See *supra* notes 22-30 and accompanying text for a discussion of the *O'Brien* standard. See *supra* notes 12-21 and accompanying text for a discussion of the time, place and manner test.

151. See *United States v. Albertini*, 472 U.S. 675, 689 (1985); *Clark*, 468 U.S. at 294-98; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804-05, 808-10 (1984).

152. *Clark*, 468 U.S. at 289-91.

153. *Id.* at 291-92.

154. *Id.*

155. *Id.* at 294-98.

standard as well.<sup>156</sup> In *Clark* the Court found the regulation valid under *O'Brien* because: (1) the government had a substantial interest in conserving National Park land; (2) the government's interest was unrelated to the suppression of expression; and (3) the regulation was narrowly tailored.<sup>157</sup>

The Court's decision in *Clark* is arguably distinguishable from the statute at issue in *Barnes* for several reasons. *Clark* involved a clear distinction between conduct and speech in that potential damage of the parks would be the same regardless of who slept on the park grounds, whether the camping was being done for expressive or nonexpressive purposes. In *Barnes*, however, the state sought to avoid damage to the public by preventing nude appearances in public places.<sup>158</sup> It is conceivable that exposure to nudity could be harmful in limited circumstances, perhaps with children<sup>159</sup> or unwilling viewers.<sup>160</sup> It is hard to imagine, however, that the same damage could be caused when consenting adults congregate to view nude dancing in a private nightclub. It is even more difficult to understand why sanctioned theatrical performances such as ballets or operas would not cause the same damage.<sup>161</sup>

Even more important, in *Clark* the demonstrators could provide the same message by remaining awake in the park or by staging their demonstration in a park that allowed overnight camping.<sup>162</sup> In *Barnes*, however, the nude portions of the dance provided an essential part of the dancers' message.<sup>163</sup> Unlike the demonstrators in *Clark*, the dancers involved in *Barnes* could not take their "demonstration" elsewhere because the essential nude aspects of the dancers' message were illegal throughout

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156. *Id.*

157. *Id.*

158. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2460 (1991).

159. *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (regulating hours indecent speech may be broadcast on radio). *But see* *Cohen v. California*, 403 U.S. 15 (1971) (invalidating conviction for display of jacket reading "Fuck the Draft" even though jacket potentially visible to children).

160. *Pacifica Found.*, 438 U.S. at 748; *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975); *see, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 106-07 (1973) (Brennan, J., dissenting).

161. *Barnes*, 111 S. Ct. at 2473 (White, J., dissenting).

162. *See Clark*, 468 U.S. at 298.

163. *Barnes*, 111 S. Ct. at 2468 (Souter, J., concurring); *id.* at 2471 (White, J., dissenting). Justice Souter specifically stated that "dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed . . . is eroticism, carrying an endorsement of erotic experience." *Id.* at 2468 (Souter, J., concurring). Justice White noted that the dancing inherently "embodies the expression and communication of ideas and emotions." *Id.* at 2471 (White, J., dissenting).

the State of Indiana.<sup>164</sup> As a result, the statute at issue in *Barnes* banned an entire category of expressive activity, whereas the regulation at issue in *Clark* did not.

The same is true of the Court's use of the *O'Brien* analysis in *United States v. Albertini*.<sup>165</sup> In *Albertini* the defendant reentered a military base during an open house ceremony after having been instructed, several years before, that he needed explicit permission to do so because of prior bad behavior on the base.<sup>166</sup> The Court found that the government's interest in military security justified the neutral application of a statute that required certain people to obtain permission before entering military bases<sup>167</sup> and that the regulation would be valid under both the time, place and manner test<sup>168</sup> and the *O'Brien* test.<sup>169</sup> As in *Clark*, the demonstrator in *Albertini* had ample opportunity to voice his opinions elsewhere, or even at the military base had he obtained the appropriate clearance.<sup>170</sup> Therefore, the neutral regulation involved in *Albertini* did not, in fact, ban an entire category of expression as did the Indiana statute.

This same distinction extends to the facts of *O'Brien*. The demonstrator in *O'Brien* would have had ample opportunity to convey the same message by burning a copy of his draft card, for example, rather than the actual card itself.<sup>171</sup> Because the Court found that the state had a valid interest in preserving draft cards needed to facilitate quick induction into the military<sup>172</sup> and because *O'Brien* had ample alternative means for his communication, his conviction was upheld under the new test, established in that case, for analyzing restrictions on expression where conduct and speech are combined.<sup>173</sup> The Court's decision in *Barnes*, however, is distinguishable. Because of Indiana's blanket prohibition of public nudity, the nude dancers at the Glen Theatre and at the Kitty Kat Lounge did not have an analogous opportunity to convey their message by some alternative method.

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

165. 472 U.S. 675 (1985).

166. *Id.* at 677.

167. *Id.* at 687.

168. *Id.* at 689. See *supra* notes 12-21 and accompanying text for a discussion of the time, place and manner test.

169. *Albertini*, 472 U.S. at 689. See *supra* notes 22-30 and accompanying text for a discussion of the *O'Brien* test.

170. See *Albertini*, 472 U.S. at 687.

171. See *O'Brien*, 391 U.S. at 388-89 (Harlan, J., concurring) (suggesting that *O'Brien* could have conveyed message in other ways).

172. *Id.* at 379.

173. *Id.* at 377, 382. See *supra* notes 22-30 and accompanying text for a discussion of the *O'Brien* test.

### C. Failure of the Statute Under the O'Brien Standard

Even if the plurality's choice of the standard from *United States v. O'Brien*<sup>174</sup> is accepted, its application to the facts of *Barnes v. Glen Theatre, Inc.*<sup>175</sup> does not support the Court's holding. First, the plurality's blanket assertion that the Indiana statute serves as a general prohibition of the type upheld in *O'Brien* is arguably not supported by previous Supreme Court precedent,<sup>176</sup> nor is it supported by the facts of *Barnes*.<sup>177</sup> Second, the plurality's assumption that the Indiana statute is unrelated to the suppression of expression is erroneous.<sup>178</sup> Finally, the plurality's assertion that the statute is sufficiently narrowly tailored to meet the *O'Brien* requirement is incorrect.<sup>179</sup>

#### 1. General prohibition requirement

In his plurality opinion, Chief Justice Rehnquist stated that the "history of Indiana's public indecency statute shows that it predates bar-room nude dancing and was enacted as a general prohibition."<sup>180</sup> Chief Justice Rehnquist cited several cases upholding the state's police power in enacting general prohibitions including both *O'Brien*<sup>181</sup> and *Bowers v. Hardwick*.<sup>182</sup> In *O'Brien* the burning of draft cards was generally prohibited<sup>183</sup> and in *Bowers* the act of engaging in consensual sodomy was likewise generally prohibited.<sup>184</sup>

Chief Justice Rehnquist's assertion that Indiana's prohibition of public nudity fits neatly into the *O'Brien* and *Bowers* general prohibition category is less than sound. Previous Supreme Court cases upholding state exercise of police powers involved truly general prohibitions on individual conduct whereas the Indiana statute<sup>185</sup> does not. For example, in *Bowers* the statute prohibited the act of consensual sodomy whenever

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174. 391 U.S. 367, 377, 388 (1969).

175. 111 S. Ct. 2456 (1991).

176. See *supra* notes 39-54 and accompanying text for a discussion of previous Supreme Court precedent in the area of nude dancing.

177. See *supra* notes 55-69 and accompanying text for a discussion of the facts of *Barnes*.

178. See *infra* notes 201-16.

179. See *infra* notes 217-39.

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

181. *Id.* at 2460-61 (citing *United States v. O'Brien*, 391 U.S. 367, 369 (1969) (upholding general prohibition of draft card burning)).

182. *Id.* at 2462 (citing *Bowers v. Hardwick*, 478 U.S. 186, 188 & n.1 (1986) (upholding general prohibition of consensual sodomy)).

183. *O'Brien*, 391 U.S. at 385.

184. *Bowers v. Hardwick*, 478 U.S. 186, 188 n.1, 189 (1986).

185. See *supra* note 55 for the text of the Indiana statute.

and wherever that conduct might occur.<sup>186</sup> This prohibition extended even into the privacy of the home.<sup>187</sup> Analogously, in *O'Brien* the act of burning draft cards was prohibited at all times and in all places.<sup>188</sup>

The Indiana public indecency statute falls outside of the category of general prohibitions, however.<sup>189</sup> The statute facially prohibits all public nudity<sup>190</sup> but, to date, has not been applied to public nudity occurring in other theatrical performances.<sup>191</sup> In addition, the Indiana statute, unlike the regulations at issue in previous Supreme Court general prohibition cases, does not purport to regulate nudity occurring in the home.<sup>192</sup> In fact, a ban on nudity in the home would likely be untenable in light of Supreme Court precedent such as *Stanley v. Georgia*,<sup>193</sup> in which the Court held that an individual could not be punished for the possession of obscenity in the home.<sup>194</sup> Thus, the Indiana public indecency statute<sup>195</sup> is not, in fact, a general prohibition of the kind previously upheld by the Court.

The statute's enforcement history also shows that the Indiana statute is not one of general prohibition. On its face the statute bans all public nudity,<sup>196</sup> however, the statute was given a specific limiting instruction by the Indiana Supreme Court to exclude its application in certain situations.<sup>197</sup> The Indiana Supreme Court held that "it [may be] constitutionally required to tolerate or to allow some nudity . . . as a part of some larger form of expression"<sup>198</sup> meriting protection, when the com-

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186. *Bowers*, 478 U.S. at 195; see GA. CODE ANN. § 16-6-2 (Michie 1984).

187. *Bowers*, 478 U.S. at 195.

188. See *O'Brien*, 391 U.S. at 370, 380. This reasoning has been extended to cases not involving expressive activity. In *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 873 (1990), the Court held that the state's general prohibition on the use of peyote was valid even though it prohibited use of the drug in religious ceremonies.

189. See *O'Brien*, 391 U.S. at 367, 370 (discussing general prohibitions).

190. IND. CODE ANN. § 35-45-4-1 (Burns 1985). See *supra* note 55 for the text of the Indiana statute.

191. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2473 (1991) (White, J., dissenting).

192. IND. CODE ANN. § 35-45-4-1 (Burns 1985). The Indiana statute regulates only "public" nudity.

193. 394 U.S. 557 (1969).

194. *Id.* at 568. Subsequent cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), which upheld the right of married couples to use contraceptives and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), which extended this right to unmarried couples, suggest that the Court recognizes the right to enjoy intimate relationships in the privacy of one's home as well as the right to make choices regarding child bearing. See GERALD GUNTHER, *INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW* 179-82 (4th ed. 1986). Arguably, a statute that forbids nudity in the home would necessarily violate these rights and would, therefore, be unconstitutional.

195. See *supra* note 55 for the text of the Indiana statute.

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

197. *State v. Baysinger*, 397 N.E.2d 580, 587 (Ind. 1979).

198. *Id.* See *supra* note 59 for the text of the Indiana Supreme Court's limiting instruction.

munication of ideas is involved. To date, there has been no attempt to apply the statute to theatrical performances such as plays, ballets or operas.<sup>199</sup> In fact "no arrests have been made for nudity as part of a play or ballet."<sup>200</sup> A statute that allows for and, following the Indiana court's limiting instruction, requires that the statute not be applied to certain types of public nudity cannot validly operate as a general prohibition. When application of a statute depends upon the message that is being conveyed rather than on the conduct itself, enforcement of the statute can no longer be said to be general.

## 2. Suppression of expression requirement

The plurality opinion asserted the Indiana statute met the third part of the *United States v. O'Brien*<sup>201</sup> test because the purpose of the statute was unrelated to the suppression of expression.<sup>202</sup> Citing many years of Indiana public indecency laws,<sup>203</sup> the plurality argued that the purpose of the statute could not be to suppress the expressive elements of nude dancing because similar statutes were in existence long before nude dancing existed in Indiana.<sup>204</sup> The plurality further argued that the only conceivable purpose of these public indecency laws was to protect societal order and morality.<sup>205</sup>

The plurality's reasoning in this area perhaps can be best described as linguistic maneuvering. Facially, a statute that prohibits public nudity may promote the purpose of protecting order and morality. Along these lines, there are somewhat restricted but valid reasons for preventing nude appearances in unregulated public places such as "parks, beaches, [and] hot dog stands."<sup>206</sup> The state has a limited but valid interest in protecting children<sup>207</sup> and unwilling viewers<sup>208</sup> from offense. There seems to be no valid reason, however, for preventing paying, consenting adults from

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199. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2473 (1991) (White, J., dissenting).

200. *Id.* (White, J., dissenting) (quoting affidavit of Sgt. Timothy Corbett).

201. 391 U.S. 367, 376-77 (1968).

202. *Id.* at 376.

203. *Id.*; see IND. CODE ANN. § 35-45-4-1 (Burns 1985); Ind. Acts, ch. 87, § 90 (1881) (punishing open and notorious lewdness); Rev. Laws of Ind., ch. 26, § 60 (1831).

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

205. *Id.*

206. See *id.* at 2464 (Scalia, J., concurring).

207. *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 747 (1978). But see *Cohen v. California*, 403 U.S. 15 (1971) (invalidating conviction for display of jacket reading "Fuck the Draft" even though jacket was potentially visible to children).

208. *Pacifica Found.*, 438 U.S. at 748; *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975); see also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 106-07 (1973) (Brennan, J., dissenting) (regulating adult theaters).

viewing nude dancing in theaters and barrooms. In these contexts, the only purpose of the statute could be to prevent *willing* viewers from exposure to the potentially harmful message conveyed by nude dancing. The fact that certain theatrical performances, but not nude dancing, were exempted from the statute's reach<sup>209</sup> serves to strengthen the argument that one of the statute's purposes was to prevent communication of the message conveyed by nude dancing.

Chief Justice Rehnquist argued that the statute met the requirements of *O'Brien* because the state's interest in protecting societal order and morality<sup>210</sup> was not only valid—but was substantial and that such an interest was unrelated to the suppression of expression.<sup>211</sup> This argument must fail even if the Indiana statute is analyzed using the *O'Brien* test for determining the validity of regulations burdening expression where conduct and speech are combined.<sup>212</sup> Supreme Court precedent in areas such as flag burning makes clear that restrictions on conduct are only acceptable, absent a compelling state interest, if the government's interest in preventing the act is *not* the suppression of expression.<sup>213</sup> It has been suggested that in order to test the government's motive in advancing the interest, one should consider whether the same harm would be done if a person engaged in the conduct in the privacy of his or her home.<sup>214</sup> In the case of nude dancing, Indiana asserts that it has an interest in protecting order and morality regardless of where the conduct occurs.<sup>215</sup> Yet, the statute only applies to nudity that occurs in public.<sup>216</sup>

More perplexing is why activities that are considered inherently "immoral" suddenly become "moral" when performed in one's home. If the regulation is truly content-neutral it should follow that participation in the forbidden activity would harm the government's interest no matter where the activity occurred. Situations, such as that presented by the Indiana statute, however, in which an activity is forbidden only in a public forum, suggest that the government's true interest lies not in preventing undesirable conduct but in suppressing the message that such conduct has the potential to convey.

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209. See *supra* note 55 for the text of the Indiana Statute.

210. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461-62 (1991).

211. *Id.* at 2462-63.

212. See *supra* notes 22-30 and accompanying text for a discussion of the *O'Brien* test.

213. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); see also *Spence v. Washington*, 418 U.S. 405 (1974) (flag desecration); *Street v. New York*, 394 U.S. 576 (1969) (verbal insults aimed at flag); *Stromberg v. California*, 283 U.S. 359 (1931) (display of red flag).

214. *TRIBE*, *supra* note 7, § 12-3, at 801.

215. *Barnes*, 111 S. Ct. at 2461.

216. See *supra* note 55 for the text of the Indiana statute.



### 3. Narrow tailoring requirement

Even if acceptable as a general proscription unrelated to the suppression of expression, the Indiana statute cannot legitimately pass scrutiny under the third requirement of *United States v. O'Brien*<sup>217</sup>—that the incidental restriction on expression be no greater than is essential to the furtherance of the government's interest.<sup>218</sup> Generally, a requirement that a statute be narrowly tailored means that it targets and eliminates no more than the exact source of the "evil" it seeks to remedy.<sup>219</sup> The Indiana standard, however, does not fit this description. Chief Justice Rehnquist argued that Indiana's requirement that dancers wear at least pasties and G-strings is the "bare minimum necessary to achieve the state's purpose."<sup>220</sup> Although this appears to be a convincing argument,<sup>221</sup> an examination of other available regulatory alternatives reveals the argument's weaknesses.

States wishing to regulate adult entertainment have found a valuable ally in the Twenty-First Amendment.<sup>222</sup> In numerous cases,<sup>223</sup> including *California v. LaRue*,<sup>224</sup> the Court has upheld state regulations that disallow the service of alcohol in establishments that provide adult entertainment. Although the Court in *LaRue* determined that the Twenty-First Amendment does not supersede all other provisions of the Constitution in the area of liquor regulation,<sup>225</sup> it has nevertheless afforded states broad regulatory power where adult entertainment and alcohol are com-

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217. 391 U.S. 369, 377 (1969).

218. *Id.* at 376-77.

219. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984); *see also Sable Communications, Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 124 (1989) (stating that regulations restricting speech must be narrowly drawn); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (stating that legitimate governmental alternatives could have been achieved with less restrictive alternatives); *Schneider v. State*, 308 U.S. 147, 164 (1939) (governmental objectives achievable through less restrictive means).

220. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2463 (1991).

221. Chief Justice Rehnquist is linguistically correct—you cannot get much "narrower" or "more tailored" than pasties and a G-string. Chief Justice Rehnquist is using a play on words—the allowable briefness of clothing, to substitute for the *O'Brien* requirement of narrow tailoring. It is doubtful that this is what the *O'Brien* Court had contemplated when it decided that regulations restricting speech must be "narrowly tailored." *O'Brien*, 391 U.S. at 377.

222. U.S. CONST. amend. XXI, § 2. The text 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." *Id.*

223. *E.g., New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (1981); *Seagram & Sons v. Hostetter*, 384 U.S. 35, 41 (1966).

224. 409 U.S. 109 (1972).

225. *Id.* at 115.

bined.<sup>226</sup> Therefore, if Indiana wished to pass a statute that prohibited the service of alcohol in establishments providing nude dancing, there would be no constitutional barrier.

In addition to the states' broad Twenty-First Amendment powers, the Supreme Court, first in *Young v. American Mini Theatres, Inc.*,<sup>227</sup> and later in *City of Renton v. Playtime Theatres, Inc.*,<sup>228</sup> upheld the power of cities to strictly curtail the placement of adult entertainment establishments through zoning regulation.<sup>229</sup> According to the results in *City of Renton*<sup>230</sup> and *Young*,<sup>231</sup> if a city wishes to eliminate the harmful secondary effects caused by adult theaters, it may pass zoning ordinances spreading the establishments throughout the city<sup>232</sup> or ordinances concentrating adult theaters in very small areas,<sup>233</sup> so long as some avenue for the communication of protected expression remains available.<sup>234</sup>

The state's regulatory opportunities do not stop there, however. The state would still be free to impose other reasonable time, place and manner restrictions on nude dancing.<sup>235</sup> For example, the state could legitimately limit the hours during which nude dancing could be performed<sup>236</sup> or, as Justice White suggested in his dissent in *Barnes v. Glen Theatre, Inc.*,<sup>237</sup> the state could regulate the distance that the audience must remain from the dancers.<sup>238</sup> Thus, the *O'Brien* requirement that regulations be narrowly tailored to impose the minimum necessary re-

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226. In *LaRue* the Court noted that "[c]onsideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment." *Id.* at 114 (quoting *Seagram & Sons v. Hostetter*, 384 U.S. 35, 41 (1966)). The Court concluded that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *Id.*

227. 427 U.S. 50 (1976). See *infra* notes 248-55 and the accompanying text for a discussion of *Young*.

228. 475 U.S. 41 (1986). See notes 12-21 and accompanying text for a discussion of *Renton*.

229. *City of Renton*, 475 U.S. at 54-55; *Young*, 427 U.S. at 63.

230. *City of Renton*, 475 U.S. at 41.

231. *Young*, 427 U.S. at 62.

232. *Id.* at 52, 63.

233. *City of Renton*, 475 U.S. at 53.

234. *Id.* at 84; see *Young*, 427 U.S. at 62.

235. See, e.g., *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972); *Seagram & Sons v. Hostetter*, 384 U.S. 35, 41 (1966). See also *supra* notes 12-21 and accompanying text for a discussion of the time, place and manner test.

236. See *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978) (regulating hours during which indecent speech may be broadcast on radio).

237. 111 S. Ct. 2456, 2475 (1991) (White, J., dissenting).

238. *Id.* (White, J., dissenting). Generally, distance requirements place dancers out of the audience's reach by requiring them to remain a specified distance from the audience or by requiring the dancers to perform on an elevated stage. Requirements such as this have been upheld by federal circuit courts. See, e.g., *Kev, Inc. v. Kinsap County*, 793 F.2d 1053, 1060-61 (9th Cir. 1986).

striction on speech<sup>239</sup> is not satisfied by the Indiana statute.

#### D. Lesser Value Speech

##### 1. Toward a theory of lesser value speech

It has been suggested that the Constitution's Framers would turn over in their graves if they knew that the First Amendment was being used to protect nude dancing.<sup>240</sup> There is ample evidence to suggest that many Supreme Court Justices, both of the past and present, feel the same way.<sup>241</sup> With few exceptions, however, the Court has traditionally held that once an activity is deemed expressive, it is protected by the First Amendment no matter what its value.<sup>242</sup>

In recent years, however, the notion that generally all speech merits the same level of protection has become highly problematic. Traditionally, all protected speech has been regarded as having the same First Amendment protection.<sup>243</sup> Just two terms ago, the Court reaffirmed its belief that "[i]f there is a bedrock principle underlying the First Amendment, it is that government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>244</sup> For a number of years nonobscene sexually explicit adult entertainment has necessarily been included in the category of protected speech.<sup>245</sup> Perhaps uncomfortable with the notion that speech of questionable social value is

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239. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). See *supra* notes 22-30 and accompanying text for a discussion of the *O'Brien* test.

240. See *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1105, 1114 (7th Cir. 1990) (Coffey, J., dissenting), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

241. In an oft quoted passage in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), Justice Stevens said that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *Id.* at 70.

242. See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

243. See *id.*

244. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

245. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *California v. LaRue*, 409 U.S. 109, 118 (1972). The Court's decision in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), is especially odd in light of recent Supreme Court precedent. For example, in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986), the Court invalidated an ordinance drafted by a feminist group that forbade "pornography" redefined as "the graphic sexually explicit subordination of women." *Id.* at 324. This definition of pornography was substantially more narrow than the test previously established by the Court in cases such as *Miller v. California*, 413 U.S. 15, 24 (1973). See *supra* notes 31-36 and accompanying text for a discussion of obscenity and the *Miller* standard. The court found the ordinance unconstitutional because it was an effort to control the way people think about women and sex. *American Booksellers Ass'n*, 771 F.2d at 325.

deserving of precisely the same protection as core political speech,<sup>246</sup> various Justices have sought to whittle away at the protection granted various categories of speech including the category of adult entertainment.<sup>247</sup> The emergence of a theory of lesser value speech is most prominent in *Young v. American Mini Theatres, Inc.*<sup>248</sup> In more recent years the theory seems to have gained greater acceptance<sup>249</sup> as evidenced by *City of Renton v. Playtime Theatres, Inc.*<sup>250</sup> and *Federal Communications Commission v. Pacifica Foundation*.<sup>251</sup>

In *Young* a plurality of the Supreme Court upheld a zoning ordinance that dispersed the location of adult movie theaters throughout the City of Detroit.<sup>252</sup> Although the regulation was seemingly content-based, Justice Stevens, writing for the plurality, gave two reasons to justify the departure from the strict content-neutral standard previously applied by the Court. First, Justice Stevens reasoned that the statute did not violate the content-neutrality standard in principle because the regu-

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246. The Court has determined that political speech is "at the core of our electoral process and of the First Amendment freedoms." Buckley v. Valeo, 424 U.S. 1, 39 (1976) (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

247. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). In *Young* Justice Stevens said that "[t]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." *Young*, 427 U.S. at 61.

248. 427 U.S. 50 (1976).

249. This acceptance is evident in the area of commercial expression. In the case of *Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557 (1980), Justice Powell established the following four part analysis for examining restrictions on commercial speech. First, in order to be protected by the First Amendment, commercial speech must concern a lawful activity and must not be misleading. *Id.* at 564. Second, in order for commercial speech to be subject to regulation, the governmental interest must be substantial. *Id.* Third, the regulation must directly advance the governmental interest asserted. *Id.* Finally, the regulation must be no more restrictive than is necessary to serve that interest. *Id.* In his concurring opinion, Justice Blackmun asserted that this test created an "intermediate" level of scrutiny in the commercial arena. *Id.* at 573 (Blackmun, J., concurring). The test announced in *Central Hudson Gas* has been applied in a number of commercial speech cases. *E.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68-69, 75 (1983) (invalidating federal statute prohibiting unsolicited mailing of contraceptive advertisements); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507, 521 (1981) (finding that restrictions on commercial billboard advertising do not violate Constitution).

250. 475 U.S. 41 (1986) (finding that city zoning ordinance regulating location of theaters that show adult movies upheld under time, place and manner test previously reserved for strictly content-neutral regulations).

251. 438 U.S. 726 (1978). In upholding the FCC's censorship of comedian George Carlin's "Filthy Words" monologue, the Court held that banning indecent words has a "primary effect on the form, rather than on the content, of serious communication." *Id.* at 743 n.18. "[T]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Id.*

252. *Young*, 427 U.S. at 62.

lation did not regulate on the basis of point of view, rather the statute sought to regulate the secondary effects caused by the presence of adult theaters.<sup>253</sup> Second, Justice Stevens argued that certain sexually explicit expression is of lesser value than other forms of protected speech.<sup>254</sup> The Court ultimately upheld the regulation because it left open adequate channels for the protected speech.<sup>255</sup>

In *Federal Communications Commission v. Pacifica Foundation*<sup>256</sup> the Court upheld a decision of the Federal Communications Commission (FCC) to censure a radio station that had broadcast comedian George Carlin's satiric "Filthy Words" monologue.<sup>257</sup> The monologue was aired mid-day and contained several indecent although concededly not obscene words.<sup>258</sup> Justice Stevens, writing for the majority, found the monologue "vulgar," "shocking" and "offensive" and said that because "content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible."<sup>259</sup> Ostensibly, the majority found the FCC's regulation valid as a measure to protect children from exposure to offensive language and to protect unwilling listeners from invasion of offensive language into their homes.<sup>260</sup> Practically, however, the Court's decision in *Pacifica Foundation* stands for the notion that certain categories of speech, that the Court feels are of a lesser value, deserve less protection, and thus, a lower level of scrutiny will be used for regulations affecting these types of speech.<sup>261</sup>

Even more recently in *City of Renton*, the Court upheld a zoning ordinance even more restrictive than that upheld in *Young*.<sup>262</sup> Writing for the majority, Justice Rehnquist noted that the Renton statute which regulated only adult theaters was not content-based because the ordinance was aimed not at the content of the movies shown at adult motion picture theaters but at the secondary effects of such theaters on the surrounding community.<sup>263</sup> Justice Rehnquist's opinion was heavily criti-

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253. *Id.* at 70.

254. *Id.*

255. *Id.*

256. 438 U.S. 726 (1978).

257. *Id.* at 730. The monologue included several words that "you couldn't say on the public . . . airwaves." *Id.* at 751.

258. *Id.* at 731.

259. *Id.* at 747-48 (emphasis added).

260. *Id.* at 748-49.

261. See GUNTHER, *supra* note 194, at 775-76 for a brief discussion of the theory of "lesser value" speech.

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

263. *Id.* at 47.

cized by Justice Brennan who authored the dissenting opinion.<sup>264</sup> Justice Brennan argued that the fact that the adult theaters may have caused harmful secondary effects could potentially have given Renton a compelling reason to regulate such establishments, but the mere fact that adult theaters may have caused such effects does not make the regulation "content-neutral."<sup>265</sup> Justice Brennan noted that when a regulation is content-based, any governmental action must be carefully scrutinized to ensure that the communication has not been prohibited "merely because public officials disapprove of the speaker's views."<sup>266</sup> Justice Brennan concluded his opinion by noting that the warning of *Young*—that zoning enactments not be used to suppress or greatly restrict access to lawful speech<sup>267</sup>—had not been heeded by the majority.<sup>268</sup>

## 2. The *Barnes* decision

The Supreme Court's recent decision in *Barnes v. Glen Theatre, Inc.*<sup>269</sup> suggests that the theory of lesser value speech continues to be applied to otherwise protected expression. Evidence of Chief Justice Rehnquist's belief that nude dancing constitutes a "lower" form of expression is prevalent throughout his opinions on the subject. In *Doran v. Salem Inn, Inc.*<sup>270</sup> Justice Rehnquist expressed the belief that customary "barroom" nude dancing may be entitled to only the "barest minimum" constitutional protection.<sup>271</sup> In *Schad v. Borough of Mount Ephraim*<sup>272</sup> Justice Rehnquist joined Chief Justice Burger's dissent in which the Chief Justice said that although nude dancing enjoys some form of protection, this "does not mean that there are not times and places inappropriate for its exercise."<sup>273</sup>

Further indication that the theory of lesser value speech has been accepted by the present Court may be inferred from the fact that the *Barnes* decision marks a significant departure from prior Supreme Court

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264. *Id.* at 55 (Brennan, J., dissenting).

265. *Id.* at 56 (Brennan, J., dissenting). See *supra* notes 8-14 and accompanying text for a discussion of content-neutrality.

266. *City of Renton*, 475 U.S. at 57 (Brennan, J., dissenting) (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring))).

267. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 n.35 (1976).

268. *City of Renton*, 475 U.S. at 65 (Brennan, J., dissenting).

269. 111 S. Ct. 2456 (1991).

270. 422 U.S. 922 (1975).

271. *Id.* at 932.

272. 452 U.S. 61 (1981).

273. *Id.* at 87 (Burger, C.J., dissenting).

precedent in the area of adult entertainment.<sup>274</sup> The underlying principle in the Court's prior adult entertainment decisions was that nonobscene adult entertainment could be heavily regulated but not banned;<sup>275</sup> the decision in *Barnes* significantly changes that standard. The Court's decision in *Barnes* makes it possible for a state to completely eliminate an entire category of expressive conduct. The reasons for this change are not completely clear.<sup>276</sup> Perhaps because the Indiana statute could not be upheld under any of the previous standards applied to adult entertainment, the Court sought a new way to uphold the regulation. Because restrictions on the freedom of expression must generally meet a very high burden of justification,<sup>277</sup> the standard of *United States v. O'Brien* presented the only viable alternative. Even the *O'Brien* standard, however, does not provide the proper fit for a statute of this nature.<sup>278</sup> As such, if closely examined under the *O'Brien* standard, the Indiana statute should not have been upheld.

### 3. The dangerous path

The First Amendment covers a tremendous array of speech and protects widely differing varieties of expression. In a society where a unitary approach to First Amendment scrutiny, vis-à-vis a single heavy burden of justification, has admirably protected free speech, the wisdom of creating a bifurcated system for determining differing levels of scrutiny, on the basis of the "value" of the speech is highly questionable.<sup>279</sup> Arguably, a system that creates a hierarchy of speech categories would unduly fragmentize First Amendment analysis.<sup>280</sup> In opinions spanning several decades the Court has expressed discomfort with the possibility that legislatures or judges themselves be permitted to make distinctions between valuable and less valuable speech. Justice Harlan, in *Cohen v. California*,<sup>281</sup> noted that it is because "governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of

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274. See *supra* notes 39-54 for a discussion of prior Supreme Court precedent in the area of nude dancing.

275. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62 (1976).

276. See *supra* notes 134-44 and accompanying text.

277. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972). See *supra* notes 7-21 and accompanying text for a discussion of the standards necessary to impose a burden on expression.

278. See *supra* notes 174-239 and accompanying text for an application of the *O'Brien* standard to the *Barnes* case.

279. GUNTHER, *supra* note 194, at 775-76.

280. *Id.*

281. 403 U.S. 15 (1971).

taste and style so largely to the individual.”<sup>282</sup> Perhaps that is the reason why, with very few exceptions, a unitary standard for reviewing restrictions on speech has, until recently, remained intact.

The trend toward allowing stringent regulation merely on the basis of the value of the speech presents a very real danger. Attempts to distinguish “high” art from “low” entertainment could potentially give legislatures and judges the power to regulate only laypersons’ forms of “art” and “entertainment” while leaving their own forms of “art” and “entertainment” protected. Judge Oakes of the Second Circuit Court of Appeals illustrated this point nicely. He argued that while the

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 [at the local pub].<sup>283</sup>

It is precisely this type of distinction, on the basis of “content” and “value” that the Court has long struggled to prevent.

A comparison of the dances performed by the dancers at the Glen Theatre and at the Kitty Kat Lounge with a classic ballet, such as the Dance of the Seven Veils from Strauss’s *Salome*, reveals that the “messages” of both dances are very much the same.<sup>284</sup> Both types of dancing convey an obvious message of eroticism. The success of both the ballerina, in the performance of *Salome*, and the nude dancer, in the performance of the barroom dance, depends heavily upon the communication of their sensual message.<sup>285</sup> The differences between the Dance of the Seven Veils from *Salome* and the performances at the Kitty Kat Lounge and Glen Theatre are not differences of kind, nor of expressive

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282. *Id.* at 25. In *Jacobellis v. Ohio*, 378 U.S. 184 (1976), Justice Black warned that if “despite the Constitution . . . this Court is about to embark on the dangerous road of censorship, . . . this Court is about the most inappropriate Supreme Board of censors that could be found.” *Id.* at 196.

283. *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *aff’d in part sub nom. Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

284. During the Dance of the Seven Veils in Strauss’ ballet *Salome*, the dancer slowly removes several veils of clothing and eventually wears nothing but a completely transparent bodystocking—officially “nude” under the Indiana statute’s definition. See *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1087 (7th Cir. 1990) (en banc) (Posner, J., concurring), *rev’d sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991). At the Kitty Kat Lounge and Glen Theatre, the dancers dance on stage “with vigor but without accomplishment, to the sound of a jukebox, and while dancing they remove articles of clothing (beginning, for example, with a glove) until nothing is left.” *Id.* at 1091 (Posner, J., concurring).

285. *Id.* at 1087.



versus nonexpressive activity; nor do they reflect the differences between arty nudes and naked bodies.<sup>286</sup> The only "difference [is] in aesthetic quality, and while such differences can redeem obscene art, . . . they cannot justify the suppression of the nonobscene."<sup>287</sup> Given the similarities between these two forms of expression, one which remains protected and the other which, after the Court's decision in *Barnes*, does not, the danger inherent in allowing the judiciary to rely on the unappealing nature of the nude barroom dance to justify otherwise inappropriate regulation is obvious.

#### IV. CONCLUSION

The United States Supreme Court has stated, "[w]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of [expression] on the grounds that they are more offensive than others, the First Amendment strictly limits its power."<sup>288</sup> The Court's decision in *Barnes v. Glen Theatre, Inc.*<sup>289</sup> suggests that this statement may no longer carry substantial weight. In *Barnes* the Court was faced with the decision of whether a state could constitutionally ban an entire category of concededly expressive activity. When that activity was nude dancing, the Court found that it could.

When questions arise regarding which types of speech should be protected by the First Amendment, the temptation to make value judgments always presents itself. Few would argue that restrictions on political discourse should be strictly scrutinized. Likewise, few would argue that certain categories of speech such as fighting words and obscenity should be left unprotected. Confusion arises, however, when we are forced to determine an appropriate level of protection for a category of speech that is in a grey area—somewhere between the categories of speech that we intuitively want to protect and those that, because of their propensity to cause harm, we do not wish to protect at all. The category of adult entertainment falls within such a grey area.

The proposition that "the First Amendment forbids the State of Indiana to require striptease dancers to cover their nipples,"<sup>290</sup> does in fact, sound ridiculous. Many would argue that it is absurd to afford wildly differing categories of speech (categories as different as political discourse and nonobscene pornographic material) the exact same level of constitu-

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286. *Id.* at 1095 (Posner, J., concurring).

287. *Id.* (Posner, J., concurring).

288. *Id.* at 1088 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

289. 111 S. Ct. 2456 (1991).

290. *Miller*, 904 F.2d at 1100 (Posner, J., concurring).

tional protection. Perhaps it is unfortunate that the Constitution explicitly establishes only one broad category of speech but that is precisely what the Constitution does. Because the Constitution offers no textual guidance, any categorical distinctions made on the basis of the expression's value are necessarily left in the hands of judges and legislators. Recognizing that no one man or woman can be perfectly impartial, the Court has long struggled to prevent such classifications.

The danger in applying an analysis like that applied in *Barnes* is apparent. It gives judges and legislators a broad power to censure unfavorable or unpopular ideas. Although the vast majority of judges and legislators fulfill their roles in a fair and unbiased manner, no matter how well intentioned, some may occasionally favor their own ideas and values over those of others. Potentially, the decision in *Barnes* will allow a select few to strictly regulate laypersons' forms of nude "entertainment" while simultaneously leaving their own forms of nude "art" protected.

Although the prediction is an ominous one, evidence of such a trend is already evident in Indiana where the indecency statute is regularly enforced against establishments offering "barroom" type nude dancing, but is not enforced in situations where nudity is a part of established theatrical performances such as ballets and operas. While it is possible that the Constitution's Framers never imagined the First Amendment would be used to protect nude dancing, they undoubtedly never imagined that the First Amendment would be used to make arbitrary distinctions between valuable and valueless speech.

*Ingrid Kristin Campagne\**

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\* The author wishes to thank both Professor Karl Manheim for his helpful comments and suggestions and Professor Lawrence B. Solum for his course in constitutional law. Special thanks to my mother and to David for their enduring patience and support.

