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Can We Express Ourselves Dancing Naked - Barnes v. Glen Theatre, Inc. - The First Amendment and Freedom of Expression

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NOTES

CAN WE EXPRESS OURSELVES DANCING NAKED?—*BARNES V. GLEN THEATRE, INC.*—THE FIRST AMENDMENT AND FREEDOM OF EXPRESSION

Chris Joe

LITIGATION challenging the constitutionality¹ of Indiana's public indecency statute² began in 1985 with the filing of three separate lawsuits in the Northern District Court of Indiana. Wishing to provide nude dancing at adult entertainment establishments, the plaintiffs³ sought to enjoin the enforcement of the statute, which for all practical purposes required the dancers to wear pasties and G-strings while dancing. Cognizant of the fact that the defendant law enforcement officers had arrested and prosecuted nude dancers under the nudity statute in the past and

1. The Constitutional provision involved was the First Amendment: "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 (emphasis added).

2. IND. CODE § 35-45-4-1 (1988). The statute proscribes public nudity across the board stating in pertinent part:

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

- (1) Engages in sexual intercourse;
- (2) Engages in deviate sexual conduct;
- (3) Appears in a state of nudity; or
- (4) Fondles the genitals of himself or another person;

Commits public indecency, a class a misdemeanor.

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

Id.

3. In the initial *Glen Theatre* litigation, Glen Theatre, Inc., Gayle Ann Marie Sutro, and Carla Johnson sued the City of South Bend, the city police chief, the county prosecutor (Michael Barnes), and the state attorney general. In the initial *Kitty Kat* litigation and the initial *Diamond* litigation, Darlene Miller and JR's Kitty Kat Lounge, Inc. (the Kitty Kat plaintiffs) and Sandy Diamond, Lynn Jacobs, 720 Corporation, and 726 Corporation (the Diamond plaintiffs) independently sued the same state defendants as well as the Indiana Alcoholic Beverage Commission. *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F. Supp. 414, 415 (N.D. Ind. 1988), *rev'd*, 904 F.2d 1081 (7th Cir. 1990), *rev'd*, 111 S. Ct. 2456 (1991).

concerned that they intended to continue doing so in the future,⁴ the plaintiffs asserted that Indiana's use of the law to prevent nude dancing in their adult entertainment businesses would infringe on their First Amendment right of freedom of expression.

Plaintiff Glen Theatre's primary business was operating an adult bookstore which sold written and printed publications and displayed movies and live entertainment. Sitting in a private booth, consenting adults could insert coins into a timing mechanism to view nude and semi-nude women dancing behind glass panels. The bookstore did not sell alcoholic beverages.⁵

As a result of eleven arrests for violations of the Indiana nudity statute between March 1983 and March 1985, the bookstore temporarily discontinued showing the nude performances. Glen Theatre then decided to schedule plaintiff Gayle Ann Marie Sutro—a dancer, model, professional actor, and a member of the Screen Actors Guild—to perform nude dancing routines during the summer and fall of 1985 to coincide with the showing of one of her pornographic movies in the area. Sutro stated in an affidavit that she intended to communicate and to entertain in her choreographed nude dance.⁶

Plaintiff Kitty Kat was a nightclub that sold alcoholic beverages and showed "go-go" dancing. Until the police threatened to arrest its dancers, the club had them dance nude as live entertainment for its customers. The owner of the Kitty Kat complied with the demands of the police department. Nonetheless, he still sought a means to entertain his patrons with nude dancing.⁷

The dancers at Kitty Kat were paid entirely by a commission determined by the number of drinks sold during their performances. Plaintiff Darlene Miller, a waitress and dancer at Kitty Kat, depicted her nude dances as "just entertaining, just dancing" and admitted that her purpose for dancing was to get the customers to like her, so they would buy more drinks. Miller wanted to dance nude under the assumption that if she did so, she would earn more money.⁸

The parties to the first litigation (hereinafter referred to as the "*Glen Theatre*" litigation) were Glen Theatre and Sutro and the defendant state law enforcement officials. The district judge granted the plaintiffs' request for a preliminary injunction. This injunction prevented the enforcement of the public indecency statute against the bookstore, based on a finding that the

4. *Glen Theatre, Inc. v. Civil City of South Bend*, 726 F. Supp. 728, 729-30 (N.D. Ind. 1985). Indiana had arrested eleven nude dancers at Glen Theatre's bookstore for violating the nudity law prior to the beginning of litigation in 1985. Using the public indecency act, Indiana had also successfully prosecuted people for activities unrelated to communication of ideas; *In re Levinson*, 444 N.E.2d 1175, 1176 (Ind. 1983); *Preston v. State*, 287 N.E.2d 347, 348 (Ind. 1972); *Thomas v. State*, 154 N.E.2d 503, 504-05 (Ind. 1958); *Blanton v. State*, 533 N.E.2d 190, 191 (Ind. App. 1989); *Sweeney v. State*, 586 N.E.2d 651, 652 (Ind. App. 1985); *Thompson v. State*, 482 N.E.2d 1372, 1373-74 (Ind. App. 1985); *Adims v. State*, 461 N.E.2d 750, 741-42 (Ind. App. 1984); *State v. Elliott*, 435 N.E.2d 302, 304 (Ind. App. 1982); *Lasko v. State*, 409 N.E.2d 1124, 1126 (Ind. App. 1980).

5. *Glen Theatre*, 695 F. Supp. at 419-20, app. A.

6. *Id.*

7. *Id.* at 420-22 app. B.

8. *Id.*

law was facially overbroad.⁹

Subsequently, the *Glen Theatre* case was followed by the second related litigation. The parties to the second case (hereinafter referred to as the "*Diamond*" litigation) consisted of another plaintiff adult nightclub and essentially the same defendants. Finding that the Twenty-first Amendment allowed states to ban nude dancing in bars that sold alcoholic beverages, however, the district judge in *Diamond* denied plaintiffs motions for preliminary injunctions.¹⁰

The defendants appealed the Glen Theatre preliminary injunction. The Seventh Circuit found that the statute was not overbroad¹¹ and reversed the district court's grant of the preliminary injunction.¹² On remand, the *Glen Theatre* and *Diamond* cases were consolidated. Acting under instructions from the Seventh Circuit, the district judge decided that the nude dancing involved was not expressive activity protected by the First Amendment and denied the plaintiffs' requests for injunctive relief.¹³ The judge found that "[t]hese strip tease dances [were] not performed in any theatrical or dramatic context" and that they fell "squarely within the prohibitions of Indiana's Public Indecency statute, which [had] been found constitutional."¹⁴

This time the plaintiffs appealed. A panel of the Seventh Circuit reversed, holding as a matter of law that non-obscene nude dancing was expressive entertainment entitled to some protection under the Constitution, despite having only limited artistic value.¹⁵

The circuit court then granted the state defendants' request for rehearing *en banc* and vacated the panel decision. The court again reversed and en-

9. *Glen Theatre*, 726 F. Supp. at 723-33.

10. *Miller v. Civil City of South Bend*, No. S 85-598 (N.D. Ind. May 5, 1986) (Memorandum and Order of Miller, J.); *Diamond v. Civil City of South Bend*, No. S 85-722 (N.D. Ind. May 5, 1986) (Memorandum and Order of Miller, J.).

11. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986). The circuit court found that the statute was not overbroad because of an Indiana Supreme Court decision that appeared to construe the law more narrowly than it appeared on its face. *Id.*

The Indiana Supreme Court appeared to narrow the breadth of the public indecency statute by limiting its prohibition to only conduct "traditionally . . . held to be public indecency. . . . [The statute] may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *State v. Bayslinger*, 397 N.E.2d 580, 587 (Ind. 1979), *appeal dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979), and *appeal dismissed sub nom. Dove v. Indiana*, 449 U.S. (1980). Construed in this manner by the Indiana Supreme Court, the statute could not be unconstitutional for facial overbreadth. The United States Supreme Court subsequently dismissed Bayslinger's appeals for want of a substantial federal question. It is important to note, however, that the Indiana Supreme Court never affirmatively restricted the scope of the statute. Rather, it stated only that the statute *may* require a limiting construction in certain cases when it appears to conflict with First Amendment guarantees. *Bayslinger*, 397 N.E.2d at 587.

12. *Glen Theatre*, 802 F.2d at 287.

13. *Glen Theatre*, 695 F. Supp. at 419.

14. *Id.*

15. *Miller v. Civil City of South Bend*, 887 F.2d 826, 830 (7th Cir. 1989). Nevertheless, the court went on to say that the state was not without authority to regulate the presentation of nude dancing. The state could "impose reasonable time, place, and manner restrictions . . . regulate the nonexpressive conduct for reasons unrelated to the suppression of speech," regulate nude dancing through the Twenty-first Amendment, or proscribe obscene nude dancing. *Id.*

joined Indiana from enforcing its public indecency statute against the plaintiffs, holding that, as a matter of law, non-obscene nude dancing performed as entertainment was expression and as such was entitled to limited protection under the First Amendment.¹⁶ The court stated that “[w]hile clearly not all conduct is expression, dance as entertainment is a form of conduct that is inherently expressive.”¹⁷ The court decided that the plaintiffs’ nude dancing conveyed the message of “eroticism and sensuality,”¹⁸ even though it determined that nude dancing was artistically and aesthetically inferior in quality when compared with other types of dancing, such as classical ballet.¹⁹ The court concluded that the public indecency statute was unconstitutional since it proscribed the plaintiffs’ ability to convey their messages of eroticism.²⁰

The Supreme Court granted certiorari to determine (1) whether nude barroom dancing or “go-go” dancing was “speech” entitled to First Amendment protection, and (2) if nude barroom dancing in fact was protectable speech, whether Indiana’s public indecency statute was unconstitutional with respect to such dancing. In a five to four plurality decision, the Court ruled that the public indecency law requiring the dancers to wear pasties and G-strings did not violate the First Amendment.²¹

Chief Justice Rehnquist, joined by Justices O’Connor and Kennedy, opined that the nude dancing sought to be performed at these adult entertainment establishments was entitled only to minimal First Amendment protection and that any First Amendment interests were outweighed by the state’s interest in protecting societal order and morality.²²

Justice Scalia concurred with the judgment but found that there were no First Amendment issues at all. Scalia found it important that nothing in the language of the statute suggested any state purpose to directly suppress expression.²³

Justice Souter concurred with the judgment and agreed that the nude dancing was entitled to some First Amendment protection. Souter disagreed with Rehnquist’s emphasis on protecting public morality; instead, he believed that the law was valid because of the state’s interest in preventing crime and other pernicious secondary effects allegedly associated with nude barroom dancing.²⁴

Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented. White argued that Indiana had no compelling state interests supporting the law, since the explicit purpose of applying the statute against nude dancing was to suppress directly the inherent expressive content of

16. *Miller v. Civil City of South Bend*, 904 F.2d at 1085.

17. *Id.*

18. *Id.* at 1086-87.

19. *Id.*

20. *Id.*

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

22. *Id.* at 2460-63 (Rehnquist, C.J.).

23. *Id.* at 2463-68 (Scalia, J., concurring).

24. *Id.* at 2468-71 (Scalia, J., concurring).

nude dancing.²⁵

I. THE FIRST AMENDMENT RIGHT OF FREEDOM OF EXPRESSION

A. *Symbolic Speech or Expressive Conduct*

The Supreme Court has long held that certain kinds of nonverbal conduct could be considered "symbolic speech" or "expressive conduct" entitled to First Amendment protection. In fact, Justice Jackson once wrote that "symbolism is a primitive but effective way of communicating ideas . . . a short cut from mind to mind."²⁶ Some commentators have suggested that there is little distinction between speech and conduct within the meaning of the Constitution in terms of their comparative abilities to communicate messages and ideas.²⁷ Nevertheless, the Court has recognized that there are differences,²⁸ and not all conduct constitutes constitutionally protected speech.²⁹ When a law restricts *oral* or *written* speech, it must pass the strictest First Amendment scrutiny even if its purpose is unrelated to suppression of communication.³⁰ As a minimum, however, *conduct* is classified as constitutionally protected expression only if the actor intended to communicate or convey a message by his conduct.³¹

Consequently, as long as the actor *intended* to communicate a message or express an idea or feeling, his conduct falls within the protective scope of the First Amendment right of freedom of expression. Accordingly, the Supreme Court has invalidated many regulations whose direct purpose was the prohibition of certain activities precisely because of their communicative compo-

25. *Id.* at 2471-76 (White, J., dissenting).

26. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

27. *E.g.*, Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79-80 (1968) ("A constitutional distinction between speech and conduct is specious. Speech is conduct, and actions speak. There is nothing intrinsically sacred about wagging the tongue or wielding a pen; there is nothing intrinsically more sacred about words than other symbols.").

28. *Id.* ("The] meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct.").

29. *Id.* It is arguable that all conduct could be construed as speech. "[A]ll behavior is capable of being understood as communication." FRANKLIN SAUL HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 31 (1981). However, such a broad definition of expressive conduct would result in the unreasonable conclusion that *all* conduct would be protected by the First Amendment. This is simply not the case. *See infra* text accompanying notes 31-48 for further explanation.

30. *See, e.g.*, *Saia v. New York*, 334 U.S. 558, 561 (1948) (reduce noise); *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (to regulate election campaigns); *Schneider v. State*, 308 U.S. 147, 163 (to prevent littering).

31. *See* Mellville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. REV. 29, 36 (1973).

Whatever else may or may not be true of speech, as irreducible minimum it must constitute a communication. That, in turn, implies both a communicator and a communicatee—a speaker and an audience. [Without] an actual or potential audience there can be no first amendment speech right. Nor may the first amendment be invoked if there is an audience but no actual or potential "speaker." [Unless] there is a human communicator intending to convey a meaning by his conduct, it would be odd to think of it as conduct constituting a communication protected by the first amendment.

Id.

nents.³² When suppression of expression was not the primary purpose of the law regulating conduct, but was only an incidental effect of proscribing the activity for other important purposes, the Supreme Court has instead sustained those laws.³³ The Supreme Court described the situation clearly in *Texas v. Johnson*.³⁴

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written word or spoken word. It may not, however, proscribe particular conduct because it has expressive elements. What might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate basis for singling out that conduct for proscription.³⁵

B. Nude Dancing as Expressive Conduct

The Supreme Court has found that nude dancing could be expressive activity and, consequently, protected by the First Amendment.³⁶ In *Doran v. Salem Inn, Inc.*³⁷ the Court stated that "although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression . . . this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances."³⁸

It is important to emphasize, however, that the Court has indicated that not *all* types of dancing are entitled to First Amendment protection as expressive conduct. For example, the Court determined in *Dallas v. Stanglin*³⁹ that social ballroom dancing was not entitled to First Amendment protection.⁴⁰ Nevertheless, it is clear that the Supreme Court has regarded nude dancing as a type of expression that should be granted some protection under the First Amendment.

32. See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Spence v. Washington*, 418 U.S. 405 (1974) (improper use of flag by taping peace symbols on the flag); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (wearing black arm bands); *Brown v. Louisiana*, 383 U.S. 131 (1966) (demonstrating by public library sit-in); *Stromberg v. California*, 283 U.S. 359 (1931) (flying a red flag to demonstrate opposition to organized government).

33. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (upholding statute prohibiting the knowing mutilation or destruction of Selective Service registration certificate, when protester burned his certificate to protest war); *FTC v. Superior Ct. Trial Lawyers Assn.*, 493 U.S. 411 (1990) (upholding Sherman Act when asserted against person protesting low pay for restraint of trade); cf. *United States v. Albertini*, 472 U.S. 675, 687-88 (1985) (prohibiting the entry on a military base to protest war); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (prohibiting sleeping in parks where protestors sleeping in certain parks to demonstrate against hopelessness).

34. *Johnson*, 491 U.S. at 397.

35. *Id.* at 406.

36. E.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) ("[N]ude dancing is not without its First Amendment protections from official regulation."); *but cf.*, *California v. LaRue*, 409 U.S. 109 (1972) (state could prohibit simultaneous sale of liquor and nude dancing).

37. 422 U.S. 922 (1975).

38. *Id.* at 932.

39. 490 U.S. 19 (1989).

40. *Id.* at 25.

C. *The O'Brien Test Measuring the Scope of First Amendment Protection Given to Expressive Conduct*

In *United States v. O'Brien*⁴¹ the Court refused to accept the argument that expressive conduct was entitled to full First Amendment protection, deciding that symbolic speech was entitled only to limited protection. Also, the Court set out a four part balancing test to determine the level of protection that should be accorded such conduct.

The circumstances in *O'Brien* involved an anti-war demonstration, in which the defendant O'Brien burned his Selective Service registration certificate on the steps of the South Boston Courthouse. Unfortunately for O'Brien, the crowd that watched him burn his draft card included several Federal Bureau of Investigation agents. The FBI agents arrested O'Brien, who was later convicted of violating a federal statute prohibiting the knowing destruction of draft cards. On appeal to the Supreme Court, O'Brien argued that he had burned the draft card for the purpose of demonstrating against the war and the draft, and, therefore, his actions constituted protected symbolic speech within the meaning of the First Amendment guarantee of freedom of expression.⁴²

The Court rejected O'Brien's argument and upheld his conviction.⁴³ The Court stated that when "speech" and "nonspeech" elements were intertwined within a single course of conduct, a substantially important governmental interest⁴⁴ in regulating the "nonspeech" component of the expressive conduct could excuse incidental restrictions on First Amendment rights.⁴⁵ The Court then decided that the federal government did have a substantial interest in preventing the destruction of draft cards.⁴⁶

The Court employed a four-part inquiry to determine when a government regulation was important enough to override First Amendment guarantees. According to the Court, the government could constitutionally regulate admittedly expressive conduct: (1) if the law was within the constitutional power of the government; (2) if the regulation furthered an important or

41. 391 U.S. 367 (1968).

42. *Id.* at 369-72 & 376-86.

43. *Id.* at 386.

44. The Court has used several terms to describe the necessary quality of the governmental interest. *E.g.*, *NAACP v. Button*, 371 U.S. 415, 438, 444 (1963) ("compelling" and "substantial"); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) ("subordinating" and "cogent"); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("paramount"); *Sherbert v. Verner*, 374 U.S. 398, 408 (1963) ("strong").

45. *O'Brien*, 391 U.S. at 376.

We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

Id.

46. *Id.* at 377-82.

substantial governmental interest; (3) if the important governmental interest was unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms was no greater than was essential to the furtherance of that interest.⁴⁷

Thus, in *O'Brien* the Court delineated the boundaries within which the First Amendment protects expressive conduct. Governmental regulations are bounded by the need for a substantial governmental interest; otherwise, government may not regulate non-communicative aspects of symbolic conduct. The validity of the governmental interest can be determined by *O'Brien's* four-part inquiry.⁴⁸

D. The History of Public Indecency Laws in the United States and Indiana

Dating back to the English common law, public nudity was considered a criminal offense.⁴⁹ The current Indiana public indecency statute⁵⁰ was only the latest of many general proscriptions on public nudity which Indiana had enacted throughout its history.⁵¹ The laws typically barred "notorious lewdness" or "indecent exposure."⁵² However, despite having an extensive history of enacting public indecency laws, Indiana had neither published legislative histories concerning those laws nor explained the legislative intent

47. *Id.* at 376-77.

To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial, subordinating, paramount, cogent, strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently 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.

Id.

48. For an interesting analysis of the *O'Brien* test, see John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1974).

49. See *LeRoy v. Sidley*, 82 Eng. Rep. 1036 (K.B. 1664) (public nudity considered immoral); *Winters v. New York*, 333 U.S. 507, 515 (1948); 50 AM. JUR. 2D *Lewdness, Indecency, and Obscenity*, § 17 (1970), G.R.B., Annotation, *Criminal Offense Predicated Upon Indecent Exposure*, 93 A.L.R. 996, 997-88 (1934).

50. IND. CODE § 35-45-4-1 (1988). See *supra* note 2 for the relevant text of the Indiana public indecency statute.

51. A brief chronology of Indiana's public indecency laws is as follows: Rev. Laws of Ind., ch. 26, § 60 (1831) (prohibiting "open and notorious lewdness, or . . . grossly scandalous and public indecency"); Ind. Rev. Stat. Pt. III, ch. 8, § 22 (1876 Rev.) (prohibiting "notorious lewdness, or . . . grossly scandalous and public indecency"); Ind. Rev. Stat. pt. III, ch. 8, § 22 (1876 Rev.) (prohibiting "notorious lewdness . . . or who shall, in any public place, make any uncovered and indecent exposure of his or their person"); *Ardery v. State*, 56 Ind. 328 (1877) (brief gap in statutory history filled by case law) (forbidding exhibition of "privates"); 1881 Ind. Acts, ch. 37, § 90 (remained unchanged until replaced with the present statute in 1976) (defining an offender as "[W]hoever, being fourteen years of age, makes an indecent exposure of his person in a public place, or in any place where there are other persons to be offended or annoyed thereby").

52. See *supra* note 51 and accompanying text for the typical statutory language of Indiana's public indecency laws.

behind them.⁵³

E. Purposes in General of Laws Regulating Nudity and Sexual Conduct in Other Jurisdictions

Other legislatures that have enacted laws to control nudity, obscenity, or sexual conduct have generally based their action on the state's traditional police power to protect the public health, safety, and morals.⁵⁴ The United States Supreme Court has endorsed such regulations by holding that a state could enforce anti-obscenity laws enacted to protect "the societal interest in order and morality."⁵⁵ For example, in *Bowers v. Hardwick*, where it upheld a Georgia law prohibiting private homosexual sodomy, the Supreme Court stated that "law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."⁵⁶ The Court has also reviewed and sustained a city zoning ordinance that was explicitly contrived to suppress the allegedly unfavorable secondary effects associated with adult theaters, such as crime and moral degradation.⁵⁷ Clearly, the state's interest in decency, morality, and crime prevention has been one of the primary reasons that courts have cited to uphold laws regulating nudity and sexual conduct.

II. *BARNES V. GLEN THEATRE, INC.*

Given this factual and legal background, the Supreme Court considered *Barnes v. Glen Theatre, Inc.*. Chief Justice Rehnquist announced the judgment of the Court that enforcement of Indiana's public indecency statute against nude dancing in adult entertainment businesses did not violate the First Amendment right of freedom of speech despite the law's requirement that the dancers wear pasties and G-strings while dancing.⁵⁸ In considering the constitutionality of the Indiana proscription, the Court addressed two issues: (1) whether the nude dancing involved in this case could be consid-

53. *Barnes v. Glen Theatre I v. Slaton*, 413 U.S. 49, 61 (1973).

54. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973).

55. *Id.* at 61 (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957), quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

56. *Bowers v. Hardwick*, 467 U.S. 186, 196 (1986). The Court in *Bowers* upheld a law prohibiting sodomy that was enacted solely on "the presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable." *Id.* See also *Dronenburg v. Zech*, 741 F.2d 1388, 1397, & n.6 (1984) (opinion of Bork, J.).

57. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). "The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protect[] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life.'" *Id.* See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976) (zoning ordinance containing legislative findings that "a concentration of 'adult' movie theatres causes the area to deteriorate and become a focus of crime" held constitutional); *California v. LaRue*, 409 U.S. 109, 111 (1972) (administrative findings that crime was associated with adult entertainment); *United States v. Marren*, 890 F.2d 924, 926 (7th Cir. 1989) (prostitution linked to nude barroom dancing); *United States v. Doerr*, 886 F.2d 944, 949 (7th Cir. 1989) (prostitution linked to nude barroom dancing).

58. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2458 (1991).

ered expressive conduct protected by the First Amendment, and if so, (2) whether the public indecency law was unconstitutional when enforced against such dancing.

A. Chief Justice Rehnquist's Opinion

Chief Justice Rehnquist joined by Justices O'Connor and Kennedy delivered the plurality opinion. Chief Justice Rehnquist concluded that nude dancing was only marginally protected by the First Amendment. After observing that the statute passed all four prongs of the *O'Brien* test, Rehnquist decided that the Indiana statute in question could be constitutionally enforced against nude barroom dancing.

1. *Nude Dancing is Expressive Conduct Protected by the First Amendment*

Rehnquist first addressed the issue of whether the nude dancing involved in this case was protected by the First Amendment and decided that it was. Citing past Supreme Court decisions,⁵⁹ Rehnquist concluded that nude dancing was "expressive conduct within the outer perimeters of the First Amendment," and thus subject to some freedom of speech protection.⁶⁰

2. *The Public Indecency Law could be Constitutionally Enforced Against Nude Dancers—The O'Brien Test*

Having found nude barroom dancing was entitled to First Amendment protection, Rehnquist went on to address the second issue: whether enforcement of the Indiana public indecency statute against such nude dancing would be constitutional. Because Rehnquist believed that nude dancing was expressive conduct only "marginally"⁶¹ protected by the First Amendment he turned to the balancing test enunciated in *United States v. O'Brien*⁶² to determine the requisite level of constitutional protection. Government could constitutionally enforce a law incidentally regulating admittedly expressive conduct if the law passed the *O'Brien* test.

Applying the *O'Brien* test to the facts in the case, Rehnquist found that Indiana's public indecency statute was a justified restriction on nude dancing. Addressing the first and second *O'Brien* requirements, Rehnquist succinctly stated that the law was "clearly within the constitutional power of the government"⁶³ and that the statute furthered substantial government interests. Noting that Indiana had never officially explained its purpose behind this legislation,⁶⁴ Rehnquist suggested a governmental interest which he believed the Indiana legislature wished to promulgate through the en-

59. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1991); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *California v. LaRue*, 409 U.S. 109 (1972).

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

61. *Id.*

62. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

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

64. *Id.*

forcement of the law.⁶⁵ Since public indecency laws historically were designed to uphold morality,⁶⁶ Rehnquist proposed that Indiana's interest behind its own nudity statute likewise was intended to protect "morals and public order."⁶⁷ Rehnquist noted that states had always possessed the authority to provide for the public health, safety, and morals,⁶⁸ and that the Court had previously upheld this basis for legislation.⁶⁹ Since the law was promulgated to defend morality and order, he concluded that the nudity law furthered the Indiana's valid interest in protecting morality in the state.⁷⁰

Addressing the third *O'Brien* requirement, Rehnquist rejected the dissent's argument that proscribing nudity for moral reasons was *inherently* related to expression. Rehnquist concluded that the important governmental interest in protecting morality and public order was entirely unrelated to suppressing free expression.⁷¹

The dissent argued that Indiana forbade nude dancing precisely because of the erotic message conveyed by the dancers. The dissenters conceded that proscribing public nudity in general would not necessarily be tied to suppressing expression; however, they contended that Indiana's purpose in using the law to proscribe nude dancing *was* to restrict the erotic message inherent in nude performance dancing. They reached this conclusion after examining the state's implied assumption that the message would cause harm to the public. According to the dissent, this assumption violated the third prong of *O'Brien*, since the statute was drafted to suppress free expression.⁷²

Rehnquist rejected this argument. He concluded that the erotic *message* was substantially the same whether the dancers were semi-nude or totally nude.⁷³ For Rehnquist it was clear that the "speech" and "non-speech" components of the expressive conduct at issue could be neatly separated. The Chief Justice stated: "[T]he requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message is conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity."⁷⁴

For Rehnquist, therefore, the key distinction was that Indiana was attempting to limit immoral *conduct*, not immoral *expression*. Only the expressive component of nude dancing was protected by the First Amendment.

65. *Id.* at 2462.

66. *See supra* notes 54-57 and accompanying text for discussion of historical purposes of public indecency laws.

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

68. *Id.* "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." *Id.*

69. *Id.* Rehnquist cited *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), *Roth v. United States*, 354 U.S. 485 (1957), and *Bowers v. Hardwick*, 467 U.S. 186 (1986), to support his contention that the Court had accepted the justification of protection of morality as an appropriate basis for a law. *Barnes*, 111 S. Ct. at 2462.

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

71. *Id.*

72. *Id.* at 2471-76 (White, J., dissenting).

73. *Id.* at 2463.

74. *Id.*

Consequently, Indiana could enforce its statute to proscribe nudity, regardless of any incidental restriction on expression. The purpose behind the Indiana law was to uphold morality. It upheld morality merely by regulating conduct associated with immorality; thus, the statute could not be directly related to suppressing the expression of eroticism. Importantly, the message of eroticism could be conveyed by other legal means, including dancing with pasties and G-strings. The dancers were free to express the message; only their means of communication were restricted.

To support his argument, Rehnquist compared this case to the facts in *O'Brien*.⁷⁵ In *O'Brien*, the Court permitted the enforcement of a federal statute banning the knowing destruction of draft cards.⁷⁶ The individual charged had burned his card to protest the war in Vietnam. The Court recognized that the plaintiff's burning of his draft card possessed an expressive component. However, he was not convicted for the expressive component of his action. Rather, *O'Brien* was convicted for his wrongful *conduct* of destroying the draft card.⁷⁷ Drawing the same distinction, Rehnquist similarly concluded that the Indiana public indecency statute punished only wrongful conduct and not expression. "So here with the Indiana statute; while the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude."⁷⁸ Relying on this distinction, Rehnquist concluded that Indiana's law was unrelated to suppressing expression.

Addressing the fourth and final requirement of the *O'Brien* test, Rehnquist found that the incidental restriction on the constitutionally protectable expressive activity was no greater than necessary to further the governmental interest.⁷⁹ Indiana's interest was to protect morality, and according to Rehnquist, requiring the dancers merely to wear scant clothing while dancing constituted exactly the "bare minimum necessary to achieve the state's purpose" of upholding morality.⁸⁰

Finding that Indiana's public indecency law met all four prongs of the *O'Brien* test, Rehnquist was satisfied that it could be constitutionally enforced against nude dancing in order to protect public order and morality.

75. *Id.* at 2464 (citing *O'Brien*, 391 U.S. at 367).

76. *See supra* notes 41-48 and accompanying text for a discussion of *O'Brien*.

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

This Court upheld [*O'Brien's*] conviction, reasoning that the continued availability of issued certificates served a legitimate and substantial purpose in the administration of the selective service system. *O'Brien's* deliberate destruction of his certificate frustrated this purpose and "for this non-communicative aspect of his conduct, and for nothing else, he was convicted."

Id. (quoting *O'Brien*, 391 U.S. at 382).

78. *Id.*

79. *Id.*

80. *Id.*

The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public indecency statute is "narrowly tailored;" Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose.

Id.

B. *Scalia's Concurrence*

Justice Scalia agreed with the judgment, but decided that the Indiana nudity statute was not subject to *any* freedom of speech scrutiny. Whereas Chief Justice Rehnquist felt that the law was at least marginally protected by the First Amendment, Scalia believed it a general law regulating conduct and not specifically directed at expression. Thus the statute was removed from the realm of any First Amendment protection.⁸¹ Concluding that the actual text of the statute did not explicitly make expression or communication a required element of the crime of public nudity, Scalia found that the law did not violate the First Amendment.⁸²

1. *Indiana's Public Indecency Law Did Not Directly Aim at Prohibiting Expression*

Scalia first concluded that the public indecency law was not directed in particular at suppressing expression.⁸³ To support this argument, Scalia pointed to the lengthy history of public indecency laws in the United States and in Indiana. Scalia found that the Supreme Court generally had not invalidated laws proscribing public nudity because of conflict with the First Amendment right of freedom of expression.⁸⁴ The Indiana statute had changed little since 1831 and was part of this long tradition of laws restricting public nudity.⁸⁵ Rather than singling out only public nudity which could express an idea, these laws prohibited *all* public nudity.⁸⁶ Likewise, the current Indiana law was also a general proscription on public nudity. Consistent with his point, Scalia conceded that, had the statute been enforced *solely* against expressive public nudity and not at non-communicative nudity, then the enforcement of the law could have been described as being directly targeted at restricting free expression.⁸⁷ But this was not the case here. The statute was enforced against public nudity in general—expressive

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

82. *Id.* at 2464.

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 that statutory offense by conveying the most explicit "message of eroticism," so long as he does not commit any of the four specified acts in the process."

Id. See *supra* note 2 for the "four specified acts" proscribed by the statute: sexual intercourse, deviate sexual conduct, nudity, and fondling genitals in public.

83. *Barnes*, 111 S. Ct. at 2464.

84. *Id.* Public indecency laws date back to English common law and, according to Scalia, are in integral part of the American legal system. *Id.*

85. *Id.* "Indiana's statute is in the line of a long tradition of laws against public nudity, which have never been thought to run afoul of traditional understanding of 'the freedom of speech.'" *Id.*

86. See *supra* note 51 for the relevant text of past Indiana public indecency statutes.

87. *Barnes*, 111 S.Ct. at 2464. "Were it the case that Indiana in practice targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools . . . it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct." *Id.* (citation omitted). Scalia's reference to "nude beaches and unclothed purveyors" came from Judge Easterbrook's dissent in *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1120 (7th Cir. 1990) (Easterbrook, J., dissenting): "Indiana does to regulate dancing. It regulates public nudity. . . ."

and non-expressive—and not against expressive nudity only.⁸⁸ Therefore, Scalia found that the law was not enacted for the precise purpose of restricting expression.

Scalia then attacked the dissent's argument that the actual purpose behind enforcing the public indecency law was to suppress the erotic expression inherent in nude performance dancing.⁸⁹ According to the dissent, there could be multiple purposes behind such a law. The dissent posited that the purpose behind a truly *general* proscription on all public nudity would be to protect the general public from seeing offensive activities. When the law was applied to proscribe nude performance dancing, however, the purpose behind the law could not be to protect other people from offense, since only consenting adults were exposed to nude dancing. Therefore, the dissent concluded that the purpose behind this particular application of the nudity law had to be suppression of the expressive elements of nude barroom dancing.⁹⁰

Scalia took issue with the dissent's argument that "offense to others" was the primary purpose behind a general law regulating all public nudity.⁹¹ Scalia found the purpose behind the statute was not to prevent nude dancers from offending others; rather, the purpose was to protect morality in Indiana. Scalia stressed that this purpose was supported by the fact that the Constitution as a whole had never prevented a state from simply regulating morality without an express provision in the Constitution doing so.⁸⁶ In fact, states had long been allowed to prohibit many activities on the grounds that they were considered immoral.⁹²

Scalia pointed out that, traditionally, the discriminate exposure of ones genitals in front of another, including consenting adults, was considered immoral. The Indiana statute sought only to prevent such conflict. Therefore, it was constitutionally permissible.⁹³ The dissent had argued that the purpose behind the statute in general was prevention of offense to others and that the purpose behind enforcing the statute against nude barroom dancers necessarily was to restrict expression. Scalia found that this conclusion was without foundation.⁹⁴

Almost the entire domain of Indiana's statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech." *Id.*

88. *Barnes*, 111 S. Ct. at 2464. See also *supra* note 4 for a list of cases in which Indiana used the Indiana public indecency law to proscribe non-expressive conduct.

89. *Barnes*, 111 S. Ct. at 2465.

90. *Id.* at 2473-76 (White, J., dissenting).

91. *Id.* at 2465.

[T]here is no basis for thinking that our society has ever shared that Thoreauvian "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. The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosierdome to display their genitals to one another, even if there were not an offended innocent in the crowd.

Id.

92. *Id.* ("sodomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy").

93. *Id.*

94. Scalia defined the term "general law" to mean a law that regulated "conduct without

2. *Indiana's Enforcement of the Statute Should Not Be Subject to First Amendment Scrutiny*

Scalia next decided that because the public indecency statute was not specifically directed at restricting expression, Indiana's use of the law did not give the Court cause to consider any freedom of speech issues. The law was a general law regulating conduct and only obliquely regulated expression. Consequently, there was no basis for the argument that First Amendment rights were violated.⁹⁵

The text of the Constitution expressly states that protection shall be extended to "freedom of speech."⁹⁶ Scalia opined that the framers meant only oral and written speech, not "expressive conduct."⁹⁷ Accordingly, any regulation of oral or written speech should be given full First Amendment scrutiny, regardless of whether the direct purpose of the law was to suppress expression of ideas.⁹⁸ A law that prohibited *conduct*, which was not directed at suppressing expression, however, did not raise any First Amendment issues. Scalia asserted that every regulatory scheme restricted conduct in some fashion and all conduct could arguably communicate a message.⁹⁹ Accordingly, any application of a freedom of speech standard to such a great range of laws would be unreasonable. He therefore concluded that neither the normal First Amendment examination nor the "substantial governmental interest" test of *O'Brien* applied to determine the correct level of First Amendment protection.¹⁰⁰ Either test would be unreasonable and burdensome for the courts to apply.

Clearly, Scalia was aware of past decisions in which the Court had applied the *O'Brien* balancing test though conduct was expressive; nevertheless, he rejected the application of the test to a situation where the statute was simply a *general* law not explicitly directed at suppressing expression.¹⁰¹ According to Scalia, the Supreme Court had never required the application of a substantial governmental interest test weighing the state's interest in enforcing a general proscription against possible expressive conduct, nor had the Court mandated the invalidation of such enforcement merely because the state's interests were not substantial enough to support the enforcement.¹⁰²

regard to whether that conduct is expressive." *Id.* at 2465 n.3. He rejected the dissent's definition that a law could be "general" only if it restricted "the targeted conduct in all places at all times." *Id.* The fact that Indiana prohibited public nudity but not nudity within the privacy of one's own home was irrelevant for the purposes of his argument, because traditional notions of morality frowned upon only public, not private, nudity. Only public nudity was considered immoral. *Id.*

95. *Id.* at 2465.

96. U.S. CONST. amend. I.

97. *Barnes*, 111 S. Ct. at 2465.

98. See *supra* note 30 and accompanying text for examples of cases which involved oral or written speech.

99. According to Scalia, all conduct could be labeled expressive, if only for the fact that the actor was protesting the law by engaging in the proscribed activity. *Barnes*, 111 S. Ct. at 2466.

100. *Id.* (citation omitted).

101. *Id.*

102. *Id.*

Scalia recognized that freedom of speech would prevent the enforcement of laws that restricted expressive conduct. However, for Scalia, the issue was whether the actual, direct, and underlying *purpose* of the statute in issue was to suppress communication or expression.¹⁰³ Consistent with this interpretation, Scalia noted that the Court had upheld other laws proscribing expressive conduct when the regulation resulted in an incidental restriction on the activity and when the incidental restriction was for reasons other than the direct suppression of expression.¹⁰⁴ In these cases, the object of the laws proscribing expressive conduct was *not* to restrict communication, but rather to promote other valid governmental objectives.¹⁰⁵

Thus, for Scalia, the inquiry should begin with an evaluation of the actual purpose of the law in question. If the underlying purpose of the law was unrelated to the direct suppression of communication, then the Court was not required to apply a First Amendment standard in its evaluation of the law. But if the purpose behind the law was explicitly to proscribe expression of the messages communicated in certain conduct, then and only then, did the First Amendment come into play.¹⁰⁶ According to Scalia, this was the appropriate and reasonable test because it achieved a balance. Scalia's test

103. *Id.* Scalia cited several cases to support his claim that only statutes with the explicit purpose of restricting expressive conduct would be held unconstitutional. In *United States v. Eichman*, the Supreme Court found a federal law prohibiting flag burning unconstitutional. 110 S. Ct. 2404 (1990). In *Texas v. Johnson*, the Court invalidated application of a state law designed to prevent expressive flag burning when Johnson burned a flag to protest the Reagan administration's policies. 491 U.S. 397 (1989). In *Spence v. Washington*, the Court held unconstitutional enforcement of a law preventing flag desecration when the defendant put a peace symbol on his flag. 418 U.S. 405 (1974). Additionally, in *Tinker v. Des Moines Indep. Community Sch. Dist.*, the Court refused to uphold a school policy banning students from wearing black armbands to protest the Vietnam war. 393 U.S. 503 (1969). In *Brown v. Louisiana*, the Court invalidated application of a law preventing silent sit-in protests in a "whites only" library. 383 U.S. 131 (1966). In *Stromberg v. California*, the court held unconstitutional a law prohibiting the display of a red flag to voice opposition to the government. 283 U.S. 359 (1931). In each of these cases, the Court found that the implicit purpose behind the laws in question was direct suppression of expression.

104. *Barnes*, 111 S. Ct. at 2466. Scalia cited several cases supporting his assertion that laws only incidentally regulating expressive conduct, but not directed at restricting such conduct, were upheld by the court, including the following: *O'Brien*, 391 U.S. 367, 377 (1968) (law preventing draft card burning); *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) (Sherman Act prohibiting protests as restraint of trade); *United States v. Albertini*, 472 U.S. 675, 687-88 (1985) (rule indirectly barring protests on military base); *Clark v. Community for Non-Violence*, 468 U.S. 288 (1984) (rule indirectly preventing protests in parks).

105. *Barnes*, 111 S. Ct. at 2466.

106. *Id.* at 2467. It is interesting that Scalia cited one of his own dissenting opinions to support his assertion that the test as to whether a law restricting expressive conduct was valid depended on whether the law was explicitly designed to suppress communication.

All our holdings (though admittedly not some of our discussion) support the conclusion that "the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription."

Id. (citing *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (en banc) (Scalia, J., dissenting), *re'd*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)).

prevented the government from violating First Amendment rights, but at the same time, it did not subject every conduct regulating law to strict First Amendment scrutiny.¹⁰⁷

Scalia analogized the issue of protection of free speech in expressive conduct to another First Amendment guarantee—free exercise of religion.¹⁰⁸ According to Scalia, in free exercise cases¹⁰⁹ the Court had upheld *general* laws which were not directly aimed at regulating religious practices, despite some incidental restrictions placed on practicing those religions which were produced by those laws. Not only did the Court uphold these laws, but it also refused to subject them to any First Amendment scrutiny.¹¹⁰

Scalia believed that similar tests were warranted in cases involving laws allegedly proscribing expressive conduct or free exercise. The initial inquiry should begin by deciding whether the law restricting activity was explicitly intended to suppress First Amendment rights. If so, then the Court could apply heightened First Amendment scrutiny to the regulation.¹¹¹

3. *The Court Should Not Have Applied a "Substantial Government Interest" Test*

As indicated above, Scalia disputed the plurality's application of a "substantial government interest" test such as the one in *O'Brien*.¹¹² Scalia believed that it was not the role of the Court to evaluate the "importance" of a government's interests behind a law. This was especially true when the purpose of the law was to protect morality.¹¹³ Rather, the Court should uphold such a proscription on nudity whenever the legislature has a rational basis for supplying the law.¹¹⁴ In this case, the rational basis provided by the Indiana legislature was the protection of societal morality.¹¹⁵

Scalia would approve the use of the Indiana public indecency statute to curb barroom dancing despite the communicative aspects of the dancing.

107. *Barnes*, 111 S. Ct. at 2467.

108. U.S. CONST. amend I.

109. *E.g.*, *Employment Div., Or. Dep't of Human Resources v. Smith*, 110 S. Ct. 1595, 1603 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'") (quoting *Lyng v. Northwest Indian Cemetary Protective Assoc.*, 485 U.S. 439, 451 (1988)); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594-95 (1940) (Frankfurter, J.) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.").

110. *Barnes*, 111 S. Ct. 2467.

111. *Id.* "In the one case, as in the other, if the law is not directed against the protected value (religion or expression) the law must be obeyed." *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 2468.

115. *Id.* Scalia disagreed with the plurality's claim that *Paris Adult Theatre I v. Slaton* and *Bowers v. Hardwick*, see *supra* notes 54 and 56, required the application of an "important government interests" test. The cases upheld laws proscribing conduct for moral reasons, but "neither opinion held that those concerns were particularly 'important' or 'substantial,' or amounted to anything more than a rational basis for regulation." *Barnes*, 111 S. Ct. at 2468.

The purpose of the statute was directed only at conduct, not at expression. Consequently, the statute was beyond the parameters of First Amendment scrutiny. If the dancers wished to communicate by dancing, then had to do so by a lawful means, not by unlawfully dancing nude.¹¹⁶

C. *Souter's Concurrence*

Justice Souter also concurred with the judgment and with the application of the *O'Brien* balancing test for determining what level of First Amendment protection should be allotted to the nudity law. However, he disagreed with Rehnquist's assertion that the purpose of the statute was protection of morality. Rather, Souter believed that the substantial governmental interest in enforcing the statute against nude dancers was the prevention of direct and secondary crime and odious activities which accompanied nude dancing parlors.¹¹⁷

1. *Nude Dancing is Expressive Conduct Subject to Some First Amendment Protection*

According to Souter, nude dancing was one of several forms of dance that fall into the category of expressive conduct and was therefore entitled to First Amendment protection.¹¹⁸ In contrast, social ballroom dancing and aerobic exercise dancing would not usually be categorized as expressive activities protected by the First Amendment, because these dances were not generally used to convey ideas.¹¹⁹ If the ballroom dancing was done in the nude, however, it would be considered expressive conduct subject to strict scrutiny.

Souter asserted that all dancing *performed* before an audience emitted some kind of inherent emotional expression, because the dancers usually intended to communicate. Likewise, semi-nude or totally nude performance dancing could be considered expressive conduct because the dancers intended to convey the message of eroticism.¹²⁰ For Souter, since eroticism was the "speech" element involved in the "conduct" of nude dancing this speech element was entitled to First Amendment protection.

Souter added an important caveat to his conclusion that nude performance dancing was inherently expressive: the simple physical state of being

116. *Barnes*, 111 S. Ct. at 2468.

Indiana may constitutionally enforce its prohibition of public nudity even against those who choose to use public nudity as a means of communication. The State is regulating conduct, not expression, and those who choose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden.

Id.

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

118. *Id.*

119. *Id.* Justice Souter cited *Dallas v. Stranglin*, 490 U.S. 19, 24-25 (1989), as an example of a case where the Supreme Court had specifically held that social dancing was not expressive conduct protected by the First Amendment.

120. *Barnes*, 111 S. Ct. at 2468 ("carrying an endorsement of erotic experience").

nude was not in and of itself inherently expressive.¹²¹ When the condition of nudity and the expressive conduct of performance dancing were combined, however, the value of the expression of eroticism present in regular semi-nude dancing would be enhanced by the dancer's nudity.¹²² It was because of this enhancement that Souter concluded that nude dancing was protected to a limited extent by the First Amendment.

2. *The Correct Test Should Be O'Brien, But the State's Interest was Crime Prevention, Not Protection of Morality*

Souter also agreed with the plurality that the *O'Brien* balancing test was the correct analysis to apply in this case to measure the level of protection afforded to nude dancing.¹²³ He disagreed, however, with Rehnquist's assertion that Indiana's only purpose behind the law was to uphold social morality. Rather, Souter believed that the state was interested in preventing the harmful secondary effects that nude dancing establishments brought about, such as crime and prostitution.¹²⁴

Souter acknowledged that neither the Indiana legislature nor its courts had ever stated any purpose behind Indiana's public indecency law, and maintained that the purpose offered by Chief Justice Rehnquist could be a rational justification for the law.¹²⁵ Nevertheless, Souter thought that the Court should not limit itself "in identifying the justification for the legislation at issue here, and may legitimately consider petitioners' assertion that the statute is applied to nude dancing because such dancing 'encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity.'"¹²⁶

To Souter, the Court should not have focused on the actual motivation of the Indiana legislature when it passed the statute. Rather, the Court should have looked for a current governmental interest that would support the use of the nudity law to regulate nude dancing.¹²⁷ Souter cited *O'Brien* as standing for the proposition that the Court should not find a statute unconstitutional simply because a state legislature had not specified wise reasons for its actions.¹²⁸ Instead, the Court should examine current justifications for the statute to determine whether the state has a substantial governmental inter-

121. *Id.* "Although such performance dancing is inherently expressive, nudity per se is not." *Id.* "It is a condition, not an activity, and the voluntary assumption of that condition, without more, apparently expresses nothing beyond the view that the condition is somehow appropriate to the circumstances." *Id.*

122. *Id.*

123. *Id.* at 2468 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

124. *Id.* at 2469.

125. *Id.*

126. *Id.*

127. *Id.* "Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current government interest in the service of which the challenged application of the statute may be constitutional." *Id.*

128. *Id.* "We decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made 'wiser' speech about it." *O'Brien*, 391 U.S. 367, 384 (1968).

est advanced by the law. Applying this rule, Souter concluded that Indiana's interests in "preventing prostitution, sexual assault, and other criminal activity" was enough justification to use the Indiana public indecency statute to proscribe nude dancing, even though these reasons may not have been the interests contemplated by the legislature at the time the law was passed.¹²⁹

Having determined Indiana's interest, Souter applied the *O'Brien* test to determine the level of First Amendment protection that should be granted to the expressive conduct of nude barroom dancing. As previously discussed, the first prong required that the statute be within the constitutional power of the state to enact. The second prong required that the law further a substantial state interest. The third prong required that the state interest be unrelated to suppressing expression. And the fourth prong required that the restriction on expression be no greater than necessary to accomplish the state's interest.¹³⁰

Considering the first prong, Souter stated that the power to prevent crime was clearly resided in the Indiana legislature by the state's constitution.¹³¹ As to the second prong, Souter concluded that the governmental interest in preventing crime was indeed substantial and that the statute furthered that substantial state interest.¹³²

Souter cited to *Renton v. Playtime Theatres, Inc.*¹³³ to support his argument that the nudity statute furthered the state interest of crime prevention. In *Renton* the Court upheld a city zoning ordinance that restricted the right of adult movie theaters to locate within 1000 feet of a residence, school, park, or church.¹³⁴ The stated purpose of the law was to uphold family values and to prevent crime supposedly associated with adult establishments. Interestingly, the Court allowed the city of Renton to base its connection between adult entertainment and crime on findings by other cities. Further, the Court did not require Renton to establish a nexus between crime and pornography by conducting its own studies on local adult movie theaters.¹³⁵

Souter used *Renton* to support his conclusion that states could simply assume that crime and prostitution would decrease if they enacted statutes regulating nudity and sexual behavior.¹³⁶

In light of *Renton's* recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's bookstore furthered its interest in preventing prostitution, sexual assault, and associated crimes.¹³⁷

129. *Barnes*, 111 S. Ct. at 2469.

130. *O'Brien*, 391 U.S. at 376-77. See *supra* text accompanying notes 41-48 for a discussion of *O'Brien*.

131. *Barnes*, 111 S. Ct. at 2469.

132. *Id.*

133. 475 U.S. 41 (1986).

134. *Id.* at 43.

135. *Id.*

136. *Barnes*, 111 S. Ct. at 2469.

137. *Id.* at 2470.

Indiana had a constitutional and substantial governmental interest in preventing crime and it asserted in its argument that it was enforcing the public indecency law against nude dancing to prevent crime. For Souter, this was sufficient to find that the law furthered the state interest in preventing crime.¹³⁸

Addressing the third prong of *O'Brien*, Souter concluded that the substantial governmental interest in preventing crime was unrelated to suppressing expression.¹³⁹ The dissent argued that if Indiana sought to proscribe nude dancing because of the secondary effects caused by such dancing, the state was in reality attempting to regulate the expression of eroticism by the dancers. The dissent believed that Indiana assumed that the ideas communicated by nude dancing would lead nude dancing patrons to commit crime and that this was the actual motivation behind the law. Therefore, the dissent asserted that the law was directly related to suppressing communication.¹⁴⁰

Souter disagreed with the dissent's argument that Indiana necessarily assumed a direct connection between the expressive content of nude dancing and the secondary effects associated with nude dancing establishments.¹⁴¹ Souter then advanced other possible reasons that crime could increase around adult entertainment areas.¹⁴² In Souter's mind, an increase in crime could be related more to the greater numbers of men predisposed to crime and prostitution congregating at adult entertainment locales than to any supposed effects of erotic expression on men watching nude dancing.¹⁴³ In this example, the crimes committed would not be instigated by any message the dancers conveyed, but rather would be the simple result of more "bad" people congregating in a particular area. This reason, then, clearly was not related to suppressing expression.

Again, Souter pointed to *Renton* for support. In *Renton* the Court chose not to attempt to determine if the communicative effect of the pornographic movies on movie viewers was the proximate cause of increased crime or decreased morality. Rather, the Court concluded that the ordinance was "content neutral" and was unrelated to suppressing communication.¹⁴⁴ In other words, the ordinance in *Renton* was "justified without reference to the con-

138. *Id.* In a footnote, Souter acknowledged that a state may not be able to enforce its public indecency statute against a fully artistic or theatrical production, such as "Hair" or "Equus," if the state could not present a rational state interest in prohibiting such an activity. Souter noted that it would be difficult to understand how artistic or theatrical nude dancing would foster its viewers to commit crime. *Id.* at 2470 n.2.

139. *Id.* at 2470.

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

141. *Id.* at 2470.

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

Id.

142. Note that it was enough for Souter to simply *assume* that there actually was an increased crime and prostitution rate within adult entertainment locations.

143. *Id.* at 2471.

144. *Renton*, 475 U.S. at 48.

tent of the regulated speech."¹⁴⁵

Similarly, Souter concluded Indiana's interest in preventing the odious secondary effects of nude barroom dancing was unrelated to suppressing expression. The Indiana statute was also "content neutral" and "justified without reference to the content of the regulated expression."¹⁴⁶ Thus, Souter held that the enforcement of the public indecency statute against nude dancing in adult entertainment establishments satisfied the third *O'Brien* requirement that the governmental interest be unrelated to suppressing expression.¹⁴⁷

Turning to the fourth *O'Brien* prong, that the restriction be no greater than necessary to achieve the state's objectives, Souter succinctly concluded that the requirement that dancers wear scant clothing—pasties and a G-string—was the bare minimum required to further Indiana's interest in preventing crime and prostitution and other pernicious secondary effects of nude dancing.¹⁴⁸ The dancers could still communicate the message of eroticism either by semi-nude dance or by simple verbal expression.¹⁴⁹

For these reasons, Souter found the application of Indiana's public indecency statute to nude performance dancing constitutional. He disagreed with the plurality only on the identification of Indiana's interest supporting the nudity law. He decided that it was designed to prevent the pernicious secondary effects of nude dancing, not to protect morality.

D. *White's Dissent*

Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented and categorized the Court's reasoning as "transparently erroneous."¹⁵⁰ White agreed with the plurality that nude dancing was protected by the First Amendment, but he took issue with the plurality's application of the *O'Brien* balancing test to the facts in the case. White concluded that it was precisely because of the supposedly harmful erotic message conveyed by nude dancing that Indiana wanted to prohibit the activity.¹⁵¹

1. *Non-Obscene Nude Dancing is Protected by the First Amendment*

White first concluded that nude dancing was protected by the freedom of speech.¹⁵² "This is no more than recognizing, as the Seventh Circuit ob-

145. *Id.*

146. *Barnes*, 111 S. Ct. at 2471. Souter reached this conclusion after noting that "protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression." *Id.* at 2471 n.3. See *Renton*, 475 U.S. at 49 & n.2, (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976)).

147. *Barnes*, 111 S. Ct. at 2471.

148. *Id.*

149. "Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message. Nor . . . is the dancer or her employer limited . . . from expressing an erotic message by articulate speech or representational means." *Id.*

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

151. *Id.*

152. *Id.* at 2471.

served, that dancing is an ancient art form and 'inherently embodies the expression and communication of ideas and emotions.'"¹⁵³ To White, all performance dancing—dancing before an audience—was inherently expressive.¹⁵⁴ White therefore rejected Scalia's assertion that performance dancing was not in fact inherently expressive.¹⁵⁵

2. *There Were No Valid Substantial Government Interests Supporting the Enforcement of Indiana's Public Indecency Statute Against Nude Dancing*

White next disputed the correctness of the plurality's application of the *O'Brien* test to the facts in the case. The plurality concluded that the Indiana statute satisfied all four prongs of *O'Brien* and held that the state had overriding governmental interests in proscribing nude dancing.¹⁵⁶ White disagreed. To the contrary, he contended that the substantial state interests asserted by the plurality were invalid and that Indiana, in fact, did not have any constitutionally valid reasons to enforce the law against nude dancing.¹⁵⁷

White distinguished the authority relied upon by the Court from the circumstances in this case.¹⁵⁸ On one hand, previous Supreme Court cases which had upheld proscriptions on expressive conduct had involved nothing less than truly general prohibitions of individual conduct.¹⁵⁹ On the other hand, in this case, Indiana's public indecency statute was something less than the general proscription analogous to the authority mentioned by the Court. Although, on its face, the statute appeared to be a general proscription, in actuality, it was not, since the Indiana Supreme Court presumably had forbidden the enforcement of the statute against genuinely artistic or theatrical performances.¹⁶⁰ The actual text of the nudity law also supported White's argument that the statute was not a truly general proscription. Be-

153. *Id.* at 2471 (quoting *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1087 (7th Cir. 1990)).

154. *Barnes*, 111 S. Ct. at 2471 n.1. White cited several definitions of dance to support his statement that dance is inherently expressive. *E.g.*, 16 THE NEW ENCYCLOPEDIA BRITANNICA 935 (1989) (Dance is "the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself."); JOHN JOSEPH MARTIN, INTRODUCTION TO THE DANCE, (1939) (dancing enshrines "the common impulse to resort to movement to externalize states which we cannot externalize by rational means. This is basic dance.").

155. *Barnes*, 111 S. Ct. at 2471 n.1. "Justice [Scalia] also asserts that even if dancing is inherently expressive, nudity is not. The statement may be true, but it tells us nothing about dancing in the nude." *Id.*

156. *Id.* at 2472.

157. *Id.* at 2474.

158. *E.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968); *Bowers v. Hardwick*, 467 U.S. at 186 (1986); *Employment Comm'n, Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

159. In *O'Brien*, the Court upheld a total prohibition on destroying draft cards anywhere and anytime. 391 U.S. at 367. In *Bowers*, the Court upheld a law involving a total ban on homosexual sodomy, again wherever and when ever it occurred. 468 U.S. at 186.

160. *State v. Bayslinger*, 397 N.E.2d 580 (1979). There was no "evidence that the State has attempted to apply the statute to nudity in performances such as plays, ballets or operas." *Barnes*, 111 S. Ct. at 2473.

cause it proscribed only public nudity, not nudity in the privacy of one's own home, it could not be said that the Indiana statute was a general statute proscribing all conduct of a certain type.¹⁶¹

According to White, this was a substantial distinction. Since Indiana had chosen to enact a less than general law, the Court should have examined the law with an even stricter scrutiny than that required for a truly general law.¹⁶² "In other words, when the State enacts a law which draws a line between expressive conduct which is regulated and nonexpressive conduct of the same type which is not regulated, *O'Brien* places the burden on the State to justify the distinctions it has made."¹⁶³ White believed that the Court was required to "carefully examine the reasons the state has chosen to regulate this expressive conduct with less than a general statute."¹⁶⁴ Therefore, White identified what he believed to be the actual purposes behind Indiana's nudity law.

Rehnquist and Scalia thought that the purpose of the statute, however, was simply to protect morality, and Souter felt that its purpose was to prevent crime.¹⁶⁵ For White, there could be multiple purposes for a public indecency law depending on the circumstances of its enforcement. According to White, when Indiana used the nudity law to combat nudity in parks, beaches, and other openly public places, the purpose of the law was to prevent nude people from offending others.¹⁶⁶ However, when the state used the law to counter nude dancing, the "offense to others" purpose could no longer apply, since those watching were always consenting adults wishing to view this kind of entertainment.¹⁶⁷ According to White, Indiana was actually attempting to prevent the communication of the perceived harmful message conveyed by the dancers to the viewers. When Indiana asserted that it wanted to prevent crime, it was inherently assuming a direct connection between the erotic message and any resulting increase in crime or destruction of moral values. In White's opinion, any attempt to prevent crime or maintain morality by proscribing nude dancing depended directly on suppressing the expressive content inherent in nude dancing.¹⁶⁸

a. White Challenges Rehnquist and Souter

Given this analysis, White felt that the Court was especially erroneous in its conclusion that the third *O'Brien* prong—that the substantial governmental interest behind the statute be unrelated to the suppression of free expression—was satisfied.¹⁶⁹ The Court made the distinction that it was only the condition of nudity that was banned, not the erotic message, and the evil the

161. *Barnes*, 111 S. Ct. at 2472. "By contrast, in this case, Indiana does not suggest that its statute applies to, or could be applied to, nudity wherever it occurs, including the home." *Id.*

162. *Id.* at 2473.

163. *Id.*

164. *Id.*

165. *Id.* at 2461, 2469.

166. *Id.* at 2473.

167. *Id.*

168. *Id.*

169. *Id.* at 2474.

state wished to prevent was nudity, not communicative erotic dancing.¹⁷⁰ For the plurality, proscribing public nudity was clearly not related to suppressing expression.

White thought the plurality's argument was "transparently erroneous."¹⁷¹ Noting that even the Court had admitted that nude dancing could convey an erotic message and that the lack of nudity could mute the presentation of the erotic message in nude dancing,¹⁷² White believed that the element of nudity had to be considered an integral component of the erotic expression.¹⁷³ In other words, White asserted that there was a distinct difference in the value of the erotic message that depended on whether the dancers were clothed or nude. It was because of this difference that Indiana sought to proscribe nude dancing. According to White, Indiana had to assume that the feelings and emotions generated by nude dancing were more likely to create greater crime and morality problems than the feelings created by mere semi-nude dancing.¹⁷⁴ White, therefore, concluded that this was why the Court had to find the statute directly related to suppressing expression: producing feeling and emotion *was* the definition of expression. According to White, the condition of nudity in nude dancing could not be "neatly pigeonholed as mere 'conduct' independent of any expressive component of the dance."¹⁷⁵

Given this fact, White asserted that the level of First Amendment protection depended on the independent communicative impact of nude dancing.¹⁷⁶ Supreme Court authority¹⁷⁷ required that any "content based"¹⁷⁸ restriction be sustained only if narrowly drawn to accomplish an important state interest.¹⁷⁹ According to White, this statute restricted nude dancing

170. *Id.* at 2463.

171. *Id.* at 2474.

172. *Id.*

[T]he message would be muted if the dancers wore pasties and G-strings. Indeed, the emotional or erotic impact of the dance is intensified by the nudity of the performers. . . . The sight of a fully clothed, or even partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expression component of the dance, not merely incidental conduct."

Id.

173. *Id.*

174. *Id.*

Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thought and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women.

Id.

175. *Id.*

176. *Id.*

177. *E.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *Sable Communications of Cal., Inc. v. FCC*, 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).

178. *Barnes*, 111 S. Ct. at 2474.

179. *Id.*

precisely on the basis of its inherent expressive content.¹⁸⁰ Being a "content based" restriction, the Indiana law could be upheld only if narrowly drawn. And the Indiana law was not narrowly drawn.¹⁸¹

Furthermore, even if the statute were supported by a compelling governmental interest, it was not the minimal restriction required to uphold morality or to prevent crime.¹⁸² White believed the state could have restricted nude dancing in ways that would not result in suppressing expression, but would still be effective in allowing Indiana to enforce its moral values under its police power. As an example, White observed that if Indiana was trying to prevent crime, it could have enacted time, place, or manner restrictions on adult entertainment establishments,¹⁸³ or it could have criminalized prostitution and other crimes supposedly associated with nude dancing,¹⁸⁴ or increased the penalties for violating those penal laws. If nude dancing in businesses selling alcoholic beverages, as distinguished from other establishments, was Indiana's concern, the state could have banned nude dancing in those establishments selling alcohol through the Twenty-first Amendment.¹⁸⁵

Thus, White found no compelling state interests supporting the application of the statute to nude dancing. Therefore, he believed that any attempted enforcement of the statute against nude dancing could not pass the "substantial governmental interest" test.

b. White Tackles Scalia

White then turned his attention to Scalia's opinion that the nudity law was not subject to any First Amendment scrutiny at all in this case, since it was a general law not specifically directed at suppressing expression.¹⁸⁶ White believed that Scalia's argument "suffer[ed] from the same defects" as the plurality's argument.¹⁸⁷ According to White, the Indiana statute was *not*, in fact, the general law proscribing all conduct of a certain type that Scalia had contended it to be.¹⁸⁸ Contesting Scalia's hypothetical that 60,000 people would not be allowed to parade nude in the Hoosierdome because public nudity was considered immoral,¹⁸⁹ White retorted with the assertion that

180. *Id.*

181. *Id.* at 2475.

182. *Id.*

183. *Id.* "For instance, the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators, that nude dancing be limited to certain hours, or even that establishments providing such entertainment be dispersed throughout the city." *Id.*

184. *Id.*

185. *Id.* The Twenty-first Amendment states in pertinent part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein or intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2. The Court has held that the Twenty-first Amendment permits states to proscribe nude entertainment in businesses selling alcohol. *New York Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam).

186. *Barnes*, 111 S. Ct. at 2465.

187. *Id.* at 2475.

188. *Id.*

189. *Id.* at 2465.

those same 60,000 people would, however, be allowed to drive home and then run about disrobed in the privacy of their own homes in front of an audience if they so chose.¹⁹⁰ If nudity really was immoral, as Scalia suggested, one would presume that the state would ban nudity *everywhere*. But Indiana did not do so.

Indiana's failure to enact a truly general proscription required the Court to examine the law with greater scrutiny. White felt that the purpose behind a truly general nudity law was to prevent offense to others,¹⁹¹ and the purpose behind the law as enforced against nude dancing was to prevent the conveyance of perceived harmful erotic messages.¹⁹² According to White, Indiana wanted to prohibit nude dancing precisely because of the erotic message that nude dancing expressed. Thus, the statute's direct purpose was to restrict expression, and for this reason, White would have held the statute unconstitutional.

III. CONCLUSION

Given the fact that *Barnes* was only a plurality decision and that no opinion elicited majority support, it nevertheless appears that a majority will agree on at least two points in the future: first, that nude barroom dancing is protected by the First Amendment; and second, that states, for all practical purposes and in spite of any First Amendment protection given to nude dancing, may proscribe nude dancing in adult entertainment establishments in order to protect public health, safety, or welfare. Eight justices in *Barnes* agreed that nude dancing in adult entertainment businesses was protected by the First Amendment and that the *O'Brien* "substantial governmental interest" balancing test applied to determine the exact level of First Amendment protection. Nevertheless, the Court decided that the state's interest in upholding morality or preventing crime was substantial enough to overcome a dancer's First Amendment right to express eroticism with nudity. Astonishingly, the Court did not require Indiana to prove that these purposes were actually accomplished by the nudity statute. Rather, it was sufficient for the state to assume that proscribing nude dancing would protect moral values or

The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosierdome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "contra bonos mores," *i.e.*, immoral.

Id.

190. *Id.* at 2475-76.

No one can doubt, however, that those same 60,000 Hoosiers would be perfectly free to drive to their respective homes all across Indiana and, once there, to parade around, cavort, and revel in the nude for hours in front of relatives and friends. It is difficult to see why the State's interest in morality is any less in that situation, especially if, as Justice Scalia seems to suggest, nudity is inherently evil, but clearly the statute does not reach such activity.

Id.

191. *Id.* at 2473.

192. *Id.* at 2475.

prevent crime. The Court merely required that Indiana present a rational basis—at least rational to a conservative Court—for its regulation of admittedly expressive conduct. In the mind of the Court, protection of morality and prevention of crime were valid rational bases that could justify restrictions on nude dancing.

Although the Court asserted that nude dancing was protected by the First Amendment guarantee of freedom of expression, given the result, it would seem that this assertion really was unnecessary. The Court decided that these constitutional concerns could be easily overridden. The Court's analysis left states with a very low threshold to cross to justify a proscription on nude dancing. For the Court, simple majoritarian morality was sufficient justification to proscribe an activity admittedly protected by the First Amendment.

Considering the emphasis placed on identifying the substantial governmental interest behind the Indiana law, it is surprising that the Court ignored entirely the language of the 1881 public indecency statute,¹⁹³ which the current law replaced. The 1881 law supported the dissent's argument that the purpose behind the law in general was to prevent offense to others, proscribing "indecent exposure . . . where there are other persons to be *offended or annoyed* thereby."¹⁹⁴ Given that Indiana's legislature and courts had never officially commented on the purpose of the current public indecency law, one would assume that the next most logical place to look for the state's purpose would be the text of past statutes. Instead, the Court chose to disregard this obvious choice, while it looked to more equivocal grounds to justify the law.

Practically, the Court's decision gives states free reign in proscribing nude dancing in adult bookstores, theaters, and nightclubs. Any proscription will be constitutional so long as the state makes the simple assertion that its intent is to uphold morality or avert other deleterious secondary effects supposedly linked to nude "go-go" dancing. In other words, the Court may claim to apply a "substantial governmental interests" test to determine whether a law constitutionally prohibits adult nude dancing, but it appears ready to uphold any such law regardless of the any balancing test. To the Court, a simple statement in an appellate brief that a state is protecting moral values or preventing crime is sufficient justification to bar nude dancing.

It will be interesting to see whether the Court will regard the case narrowly, for any extension of the Court's logic could result in broad restrictions on the freedom of speech. If protection of majoritarian morality is all it takes to justify a proscription on nude dancing, how far could states move to restrict other supposedly immoral activities on the same grounds? It seems easy to construe *Barnes* to allow a state to censor all types of expressive conduct merely because its legislature opines that an activity is

193. 1881 IND. REV. STAT. § 1995.

194. *Id.* (emphasis added).

immoral.¹⁹⁵

The decision certainly gives states a “new option to restrict totally nude entertainment,”¹⁹⁶ “a green light . . . to aggressively enforce [sic] basic standards of decency,”¹⁹⁷ and “a start in . . . bringing some morality back into the community.”¹⁹⁸ But it also “comes very close to saying that as long as the state says its interest is in promoting morality rather than censoring speech, it can censor speech as a way of promoting morality.”¹⁹⁹ One thing is clear: the Court intends to allow the states the liberty to choose how far they want to go in restricting a dancer’s freedom of expression.

195. For an interesting commentary on the case see Stuart Taylor, Jr., *The Bare Minimum of Free Speech: The Nude Dancing Case Might Lead to a Narrowing of Protected Expression*, THE RECORDER, July 19, 1991, at 5.

It’s possible that *Barnes* will go down as little more than a doctrinal tangent reflecting a recognition that a nude woman flaunting her genitals to a crowd of inebriated men waving dollar bills is very far indeed from the First Amendment’s core purposes.

But if its logic is extended, *Barnes* could prove to have broad implications, for majoritarian morality has not previously been held to be a sufficiently compelling state interest to justify restrictions of speech. A great deal of expressive conduct with a weightier claim to First Amendment protection than nude dancing can also give offense to majoritarian morality and might be threatened if the court were to balance the value of particular expression against state interests in order and morality.

One can imagine such logic being used to penalize, say, raucous political protestors like the one who entered a courthouse wearing a jacket emblazoned with “Fuck the Draft,” which the court held to be protected speech in *Cohen v. California*, 403 U.S. 15 (1971). After *Barnes*—and with dissenting Thurgood Marshall now gone, as well as William Brennan, Jr. (whose vote would have tipped the *Barnes* case the other way)—it’s not hard to imagine the court overruling the draft protestor’s case.

For the matter, the court could revisit the celebrated flag-burning decisions of 1989 and 1990—both decided by 5-4 margins—which also involved expressive conduct deeply offensive to the moral views of the majority.

It would take a longer leap from Rehnquist’s logic in *Barnes* to reintroduce censorship of pure speech that glorifies or advocates conduct that has been outlawed on moral grounds—for example, books that revel in adultery or other illegal sexual activity, like the once-banned *Lady Chatterly’s Lover*. A longer leap, but—with much of constitutional law now seemingly up for grabs—not an inconceivable one.

Id.

196. Ruth Marcus, *High Court Upholds Ban on Nude Erotic Dancing; Free Speech Not Violated, Justices Rule 5-4*, WASHINGTON POST, June 22, 1991, at A1 (quoting Indiana Deputy Attorney General Wayne G. Uhl).

197. *Id.* (quoting Thomas Jipping of the Conservative Free Congress Foundation).

198. *Id.* (quoting Louann Hill, a member of a women’s commission supporting the Indiana law).

199. *Id.* (quoting Steven Shapiro of the American Civil Liberties Union).

