"LEWD AND IMMORAL": NUDE DANCING, SEXUAL EXPRESSION, AND THE FIRST AMENDMENT

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INTRODUCTION

Attempts to regulate nude dancing invariably raise a host of thorny First Amendment issues. First and foremost is the question of whether nude dancing is "speech." Does nude dancing express anything? If so, what? Or is it merely "conduct," rather than expression? And if it is speech, should it receive the full protection of the First Amendment?

The Supreme Court has struggled with these questions. The Court has twice held that nude dancing is expressive activity that is protected by the First Amendment, while simultaneously upholding regulations that restricted nude dancing. Neither decision produced a majority opinion, and each plurality opinion rested on a completely different rationale.[1] Moreover, neither rationale is convincing. In the absence of coherent guidance from the Court, the First Amendment issues posed by nude dancing can and should be explored anew. This Note discusses some of these issues, namely, what nude dancing expresses, the value of that expression, and possible objections to affording nude dancing full (or a lesser degree of) First Amendment protection.

This Note concludes that nude dancing should receive the full protection of the First Amendment. Nude dancing has the potential to convey a powerful and particularized message of sexual desire and availability, as well as a message of appreciation of the nude female form. Attempts to label nude dancing as mere "conduct" are doomed to failure. Moreover, erotic messages such as those conveyed by nude dancing are not without value. The likely objections to the value of nude dancing, such as those grounded in morality, aesthetics, or the subjective intent of the dancer, fail to justify affording nude dancing less protection than is afforded to other

* J.D., 2006, Chicago-Kent College of Law. The author wishes to thank Professor Steven J. Heyman for his thoughtful guidance, comments and suggestions.

1. *See* City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); *see also* discussion *infra* Part I.B–C.

types of expressive activity. Attempts to regulate nude dancing should therefore receive no lesser degree of constitutional scrutiny.

Part I of this Note discusses the Supreme Court's attempt to articulate a coherent and principled rationale for regulating nude dancing under the First Amendment, and its failure to do so convincingly. Part II discusses whether nude dancing should be afforded First Amendment protection, and if so, to what degree. This section begins with a discussion of the nature of the message of sexuality conveyed by nude dancing, and it rejects the argument that nude dancing is mere conduct rather than expression. In particular, this Note asserts that nude dancing cannot be distinguished from other types of expressive activity based on circumstances such as the intent of the performer or the aesthetic qualities of the dance. After concluding that nude dancing is expressive activity that should be protected by the First Amendment, Part II continues with a discussion of whether nude dancing is nonetheless "low value" speech that should receive a lesser degree of protection. This section concludes that attempts to characterize nude dancing as "low value" are generally grounded in morality, which cannot serve as justification for either excluding nude dancing from the First Amendment or affording it a lesser degree of protection. Part II then considers but rejects the argument that nude dancing has little value because it may dehumanize or objectify women. Given the failure of these objections, this Note concludes that nude dancing can and should receive the full protection of the First Amendment.

I. THE SUPREME COURT STRUGGLES WITH THE FIRST AMENDMENT IMPLICATIONS OF NUDE DANCING

The issue of whether nude dancing is shielded by the First Amendment has proved vexing for the Supreme Court. The Court has twice been confronted with regulations that prohibited public nudity and that were challenged because of their effect on nude dancing at adult entertainment establishments. In *Barnes v. Glen Theatre, Inc.*, and *City of Erie v. Pap's A.M.*—decided in 1991 and 2000, respectively—the Court upheld the regulations, which had the effect of requiring dancers to wear G-strings and pasties.[2] Both cases, however, failed to yield a majority opinion. Moreover, the Court failed to articulate a consistent rationale; the plurality opinion in each case rested on an entirely different analysis. Before discussing these two cases, however, it would be helpful to provide a brief overview of cur-

2. *See Pap's A.M.*, 529 U.S. at 283–84; *Barnes*, 501 U.S. at 563.

rent First Amendment jurisprudence in the context of expressive conduct in general.

A. *Expressive Conduct and the First Amendment: Content Neutrality and Secondary Effects*

The First Amendment protects far more than the spoken and written word.[3] In fact, the Supreme Court has long recognized that the expression of an idea through conduct is entitled to the protection of the First Amendment if the conduct is "sufficiently imbued with elements of communication."[4] The test is whether "[a]n intent to convey a particularized message [is] present," and whether the likelihood is great that the message would be understood by those viewing it.[5] Applying this standard, the Court has found that activities such as burning a flag as a form of political protest,[6] attaching a peace sign to an American flag,[7] and wearing a black armband to protest the Vietnam War[8] are all constitutionally protected.

First Amendment protection does not, however, guarantee that conduct containing sufficient elements of expression is exempt from regulation by governmental entities. Rather, the Court has directed that the next question—after determining that conduct is indeed expressive—is whether the regulation of the conduct by the government is related to suppression of the expression involved.[9] This test reflects a crucial principle of modern First Amendment jurisprudence.[10] In broad terms, courts distinguish between regulations that are aimed at the "communicative impact" of speech, and regulations that are aimed at the "noncommunicative" impact; the former are considered "content-based," and the latter "content-neutral."[11] In the case of expressive conduct, the result of this "content-neutrality test" is that

3. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word.").

4. *Id.* (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)) ("[C]onduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'").

5. *Spence*, 418 U.S. at 410–11.

6. *Johnson*, 491 U.S. at 406 (quoting *Spence*, 418 U.S. at 409) ("Johnson's burning of the flag was conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment." (citation omitted)).

7. *Spence*, 418 U.S. at 406, 415.

8. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504–05 (1969).

9. *Johnson*, 491 U.S. at 403.

10. *See* DANIEL A. FARBER, THE FIRST AMENDMENT 21–26 (2d ed. 2003).

11. *See* Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)?*, 30 SETON HALL L. REV. 551, 554 (2000).

content-based regulations—those targeted at the expressive elements of the conduct—will be subject to a demanding strict scrutiny test.[12] Content-neutral regulations—those unrelated to expression—are reviewed under a less stringent standard of intermediate scrutiny.[13] In addition, the Court has identified several categories of so-called unprotected speech, such as "fighting words" and obscene speech, that are outside of First Amendment protection altogether.[14]

The Supreme Court stated its rationale for the content distinction in *Police Dept. of Chicago v. Mosley*: "[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[15] Thus, where the government attempts to regulate expressive conduct because it disagrees with or disapproves of the message conveyed, such a regulation will be subject to the most exacting judicial scrutiny.[16] Moreover, this full First Amendment protection applies even to expressive conduct that the overwhelming majority of citizens find distasteful or offensive. Thus, in *Texas v. Johnson*, the Court found that a Texas statute prohibiting flag burning failed the content neutrality test because the regulation was aimed at the form of political protest conveyed by the act of burning the flag.[17] The Court reiterated its rationale: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[18]

If, however, the regulation is not targeted at the expression conveyed, but at the conduct associated with the expression, then the regulation is considered content-neutral and something less than "full First amendment protection" is afforded the expressive activity.[19] In *United States v. O'Brien*, the Court upheld the conviction of a defendant who burned his draft card on the South Boston courthouse steps, in violation of a federal statute prohibiting the knowing mutilation of a Selective Service registration certificate.[20] The Court rejected O'Brien's argument that his act was a form of expression deserving of full First Amendment protection, stating, "We cannot accept the view that an apparently limitless variety of conduct

12. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 278 (2000).
13. *Id.*; *Johnson*, 491 U.S. at 403.
14. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992).
15. 408 U.S. 92, 95 (1972).
16. *Johnson*, 491 U.S. at 412.
17. *Id.* at 411–12.
18. *Id.* at 414.
19. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567 (1991) (quoting United States v. O'Brien, 391 U.S. 367, 376–77 (1968)).
20. *O'Brien*, 391 U.S. at 369–72.

can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[21] The Court then formulated a four-part test to be applied when conduct is imbued with expressive elements, but the regulation at issue regulates the conduct with only "incidental limitations" on expression. Under this test, a content-neutral regulation is permissible if (1) the regulation is "within the constitutional power of the government"; (2) the regulation "furthers an important or substantial governmental interest"; (3) "the governmental interest is unrelated to the suppression of free expression"; and (4) the incidental restrictions on First Amendment freedoms are no greater than is essential to the furtherance of that interest.[22] Later decisions emphasized that the *O'Brien* test, rather than strict scrutiny, is applied to content-neutral regulations that aim to regulate conduct (rather than expression) and that have merely incidental effects on expression.[23]

Although the distinction between content-based and content-neutral regulation is fairly easy to grasp conceptually, the content distinction—and the resulting use of separate tests to be applied to each category of regulation—is subject to an increasingly important exception known as the secondary effects doctrine.[24] Under this doctrine, a facially content-based regulation will be analyzed as content-neutral—that is, under the lesser, *O'Brien* level of scrutiny—if it can be found to have been aimed not at the communicative effect of the speech, but rather at its harmful "secondary effects," such as crime or decreased property values.[25] For example, in *Young v. American Mini Theatres, Inc.*, the Court upheld a Detroit ordinance that mandated geographic dispersal of adult theaters.[26] The ordinance was obviously content-based—its application turned on whether the theaters played adult films—yet the Court found it aimed not at suppression of the adult material, but at the "secondary effects" of adult theaters, namely crime.[27] Similarly, in *City of Renton v. Playtime Theatres, Inc.*, the Court upheld an ordinance that prohibited adult movie theaters within 1000 feet of residences, churches, parks, and schools.[28] The Court could not deny that the ordinance was content-based, as it treated adult movies differently than nonadult movies; however, following *American Mini Thea-*

21. *Id.* at 376.

22. *Id.* at 376–77. The Court has applied a similar test to so-called time, place, and manner restrictions. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293–94, 298 (1984) (noting "little, if any" practical difference between the two tests).

23. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 278 (2000); *Johnson*, 491 U.S. at 403.

24. *See* Raban, *supra* note 11, at 556.

25. *Id.* at 556–57; *see also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–49 (1986).

26. 427 U.S. 50, 52 (1976).

27. *Id.* at 71–72; *see also id.* at 71 n.34.

28. 475 U.S. at 43.

tres, the Court classified the ordinance as content-neutral because the ordinance was "predominantly" aimed not at the content of the movies, but at the secondary effects of adult theaters on surrounding neighborhoods in terms of crime, lower property values, and the neighborhoods' quality of life.[29]

One of the consequences of the secondary effects doctrine to the application of the content-neutrality test is a highlighted focus on the purpose behind the regulation. As the Court noted in *Ward v. Rock Against Racism*, "[t]he government's purpose is the controlling consideration" when determining whether a regulation is content-neutral or content-based.[30] However, the subjective intent of legislators is not the principal inquiry.[31] Rather, a regulation will be deemed content-neutral so long as it is "*justified* without reference to the content of the regulated speech."[32] Thus, in *Renton*, the Court disregarded evidence that the city council's desire to restrict pornography was a motivating factor behind the ordinance, and concluded that concern over secondary effects was the "predominate" motive.[33] As will be discussed, the Court in the nude dancing cases was even more eager to disregard the subjective intent of legislators when categorizing regulations as content-neutral under the secondary effects doctrine.[34]

29. *Id.* at 47–50.

30. 491 U.S. 781, 791 (1989).

31. *See* United States v. O'Brien, 391 U.S. 367, 382–84 (1968). The Court rejected O'Brien's argument that the "real" purpose behind the statute prohibiting the burning of draft cards was to suppress freedom of speech. *Id.* The Court stated,

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

Id. at 383–84.

32. *Renton*, 475 U.S. at 48 (internal quotations and citations omitted) (emphasis in original).

33. *Id.* at 47–48.

34. *See infra* notes 113–16 and accompanying text. In *Barnes*, for example, Justice Souter noted of the governmental interest in combating the allegedly harmful effects of nude dancing establishments,

> It is, of course, true that this justification has not been articulated by Indiana's Legislature or by its courts. . . . I think that we need not so limit ourselves in identifying the justification for the legislation at issue here. . . . 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 governmental interest in the service of which the challenged application of the statute may be constitutional. . . . In my view, the interest asserted by petitioners in preventing prostitution, sexual assault, and other criminal activity, although presumably not a justification for all applications of the statute, is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment at issue here.

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 582–83 (1991) (Souter, J., concurring).

In sum, First Amendment protection for expressive conduct is generally analyzed under a well-established framework. First, for the First Amendment to apply at all, the activity must be "sufficiently imbued with elements of communication." Next, if the activity passes that test, the degree of First Amendment protection available—provided, of course, that the speech does not fall within a category of "unprotected" speech such as "fighting words" or obscenity—will depend on whether the attempted regulation of the conduct or activity is content-based or content-neutral. If the regulation is content-based, strict scrutiny is applied; if the regulation is content-neutral, the more lenient *O'Brien* test is used. However, even content-based regulations can be analyzed under the content-neutral standard—despite the content-specific nature or application of the regulation—if the governmental purpose is targeted not at the expressive aspect of the activity, but rather at its undesirable secondary effects.

B. Nude Dancing: Barnes v. Glen Theatre, Inc*., and* City of Erie v. Pap's A.M.

This brief overview of current First Amendment doctrine on expressive conduct is designed merely to provide some background against which to discuss the issue of whether nude dancing is shielded by the First Amendment. As an initial matter, the Supreme Court has never considered nude dancing—or nudity in general—to be obscene.[35] Thus, the Court has never analyzed regulations affecting nude dancing under its obscenity jurisprudence, in which material or conduct deemed to be obscene is left completely unprotected by the First Amendment.[36] In fact, as will be discussed, despite the fractured and varied opinions in *Barnes* and *Pap's A.M.*, a majority of the Supreme Court has agreed that nude dancing is expressive activity protected to at least some degree by the First Amendment: eight Justices in *Barnes*,[37] and seven in *Pap's A.M.*[38]

35. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) ("'[Nudity] alone' does not place otherwise protected material outside the mantle of the First Amendment." (citations omitted)); Jenkins v. Georgia, 418 U.S. 153, 161 (1974) ("[N]udity alone is not enough to make material legally obscene.").

36. *See* Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."); Roth v. United States, 354 US 476, 484 (1957) (finding obscene material "utterly" without value).

37. *Barnes*, 501 U.S. at 565–66 (Rehnquist, J., plurality opinion) (opinion joined by Justices O'Connor and Kennedy); *id.* at 581 (Souter, J., concurring); *id.* at 587–88 (White, J., dissenting) (opinion joined by Justices Marshall, Blackmun, and Stevens). Only Justice Scalia disagreed. *Id.* at 576 (Scalia, J., concurring).

38. City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (O'Connor, J., plurality opinion) (opinion joined by Justices Rehnquist, Kennedy, and Breyer); *id.* at 310 (Souter, J., concurring in part and dissenting in part); *id.* at 326 (Stevens, J., dissenting) (opinion joined by Justice Ginsberg). Justice

The problem is that nude dancing does not fit neatly into the First Amendment analytical framework outlined above. Despite the agreement among the majority of Supreme Court Justices that nude dancing is expressive conduct, such a conclusion is not automatic.[39] As will be discussed in greater detail in Part II of this Note, dancing—nude or not—involves physical conduct that may or may not be intended to express an idea. Some forms of dance, however, unquestionably contain "expressive" elements; indeed, the precise object of classical and modern ballet, for example, is to express stories, ideas, and emotions through movement.[40] If those stories or ideas contain erotic themes—themes that might be enhanced by the dancer's use of nudity—then such performances would clearly be "sufficiently imbued" with communicative elements to be considered "expressive activity" for First Amendment purposes.[41] Nonetheless, some might have trouble equating an erotically tinged performance at the Joffrey Ballet with a bump-and-grind at the Kitty Kat Lounge. In the words of Judge Frank Easterbrook, "Barroom displays are to ballet as white noise is to music."[42] Does this mean that the Joffrey should be shielded by the First Amendment, while the Kitty Kat should be left unprotected? Or should both be afforded some First Amendment protection, but to different degrees?

Content neutrality poses another problem. Nude dancing cases often arise in response to general public nudity statutes, which have the effect of criminalizing the final act of the dance, i.e., the removal of the last stitch. Is a general nudity statute content-neutral, or is it aimed at nude dancing? Should it matter what was on the minds of the legislators who passed the regulation? Should the secondary effects doctrine apply? The Court struggled with these questions in *Barnes* and *Pap's A.M.*, without reaching a satisfactory resolution.

1. *Barnes v. Glen Theatre, Inc.*

In *Barnes*, two adult entertainment establishments, each joined by a dancer who performed at the establishments, sued to enjoin the enforcement of an Indiana "public indecency" statute that prohibited total nudity in

Thomas joined Justice Scalia, who repeated his argument from *Barnes* that nude dancing is not entitled to First Amendment protection at all. *Id.* at 307–08 (Scalia, J., concurring).

39. *See Barnes*, 501 U.S. at 577 n.4 (Scalia, J., concurring) (expressing skepticism that dancing—any kind of dancing, let alone nude dancing—is "inherently expressive").

40. *See id.* at 587 n.1 (White, J., dissenting).

41. Miller v. Civil City of South Bend, 904 F.2d 1081, 1090 (7th Cir. 1990) (en banc) (Posner, J., concurring), *rev'd sub nom. Barnes*, 501 U.S. 560.

42. *Id.* at 1126 (Easterbrook, J., dissenting).

a public place.[43] The statute[44] had the effect of requiring the dancers to wear G-strings and pasties;[45] the plaintiffs argued that this statutory requirement violated the First Amendment.[46] In an en banc decision, a majority of the United States Court of Appeals for the Seventh Circuit found that nude dancing was a form of expression protected by the First Amendment, and that Indiana's statute was an improper infringement of that expressive activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers.[47] The Supreme Court reversed.[48]

a. Chief Justice Rehnquist's Plurality Opinion

In a plurality opinion joined only by Justices O'Connor and Kennedy, Chief Justice Rehnquist began by agreeing that nude dancing fell within the protection of the First Amendment.[49] This was not a novel conclusion; in fact, the Chief Justice cited to three previous decisions in which the Court had indicated that nude dancing might be entitled to constitutional protection in some circumstances.[50] He qualified this statement, however, by declaring that nude dancing was expressive conduct only within the "outer perimeters of the First Amendment," and even then "only marginally so."[51] He provided no explanation as to why nude dancing was entitled to only "marginal" protection, nor why it was relegated to the "outer perimeters" of First Amendment protection.[52]

Despite finding nude dancing entitled to at least some protection as expressive activity, the Chief Justice upheld the validity of Indiana's ban on public nudity.[53] Finding that Indiana had "proscribed public nudity

43. 501 U.S. at 563–64.

44. The statute made it a misdemeanor for a person to "knowingly or intentionally" appear in public "in a state of nudity." *Id.* at 569 n.2 (quoting IND. CODE § 35-45-4-1 (2004)). Indiana defined "nudity" as "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 the covered male genitals in a discernibly turgid state." *Id.*

45. "Pasties" are adhesive coverings designed to conceal the nipples so as to conform with prohibitions on exposure. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 848 (10th ed. 2001).

46. *Barnes*, 501 U.S. at 563–64.

47. *Miller*, 904 F.2d at 1082, 1086–87.

48. *Barnes*, 501 U.S. at 572.

49. *Id.* at 565–66 (Rehnquist, J., plurality opinion).

50. *Id.* at 565. In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975), the Court noted, "[A]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue* . . . that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981), the Court stated that "nude dancing is not without its First Amendment protections from official regulation."

51. *Barnes*, 501 U.S. at 566.

52. The possible reasons for this lower level of protection will be discussed in Part II.B.1 *infra*.

53. *Barnes*, 501 U.S. at 572.

across the board," rather than selectively targeting nude dancing, he applied the four-part *O'Brien* test and concluded that the statute imposed merely "incidental limitations on some expressive activity."[54] The first prong of *O'Brien* was easily satisfied, as the statute was "clearly within the constitutional power of the State."[55] He then found that the statute satisfied the second prong because it furthered Indiana's "substantial government interest in protecting order and morality."[56] According to Chief Justice Rehnquist, "public indecency" statutes such as Indiana's were "designed to protect morals and public order" and "reflect moral disapproval" of public nudity.[57] Thus, he viewed Indiana's interest as nothing more than protecting morality, an interest the protection of which he contended was within the State's traditional police power.[58]

Having thus emphasized Indiana's interest in morality and its disapproval of nudity, the Chief Justice applied the third prong of *O'Brien* and found this interest unrelated to the suppression of free expression.[59] He concluded that the statute aimed to prohibit public nudity in general, and not the particular erotic message conveyed by nude dancing.[60] Moreover, the application of the statute to the dancers—forcing them to don pasties and G-strings—did not "deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic."[61] Finally, in a possible attempt to inject some humor, he found that the statute passed the fourth prong of the test because the requirement of pasties and G-strings was the "bare minimum" necessary to serve Indiana's interest in protecting morality.[62]

b. Justice Scalia's Concurrence

Justice Scalia agreed that Indiana's statute should be upheld, but not because it passed the *O'Brien* test. In typical blunt fashion, Justice Scalia declared that, because the statute was "a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all."[63] Although Scalia did not dispute that nude

54. *Id.* at 566–67.
55. *Id.* at 567.
56. *Id.* at 569.
57. *Id.* at 568–69.
58. *Id.* at 569.
59. *Id.* at 570.
60. *Id.* at 570–71.
61. *Id.* at 571.
62. *Id.* at 572.
63. *Id.* at 572 (Scalia, J., concurring).

dancing might be considered expressive conduct, he contended that the First Amendment was implicated in cases involving expressive conduct only when the government regulated conduct "*precisely because of its communicative attributes*."[64] Because the law "on its face . . . [was] not directed at expression in particular," there was no need for the *O'Brien* test at all.[65] Scalia would have applied only rational basis scrutiny, which he found satisfied by "moral opposition to nudity."[66]

Justice Scalia thus proposed a different approach than the analytical framework that is traditionally applied to issues of expressive conduct under the First Amendment. Rather than first looking to whether the conduct is "sufficiently imbued" with expressive elements, he would instead look to the regulation and apply a form of content-neutrality test. If the regulation regulated only conduct, and did not regulate such conduct *because* of its expressive elements, then there would be no need for any relaxed *O'Brien*-type of intermediate scrutiny; the First Amendment would simply not be implicated.

Justice Scalia was careful, however, to limit his approach to expressive *conduct*; he noted that attempts to regulate "oral and written speech" are always subject to strict scrutiny, whether or not the regulation is "general" in nature.[67] For Justice Scalia, the initial inquiry is based on a speech/conduct distinction, rather than a content-neutrality/content-based distinction. Thus, all regulations of "speech" are subject to First Amendment strict scrutiny regardless of whether they are content-based; but regulations of "conduct" that have the effect of restricting expression are outside the First Amendment altogether, unless the regulation of conduct has the express purpose of suppressing expression.[68] In that case, strict scrutiny is applied.[69] Content neutrality thus still has its place in Justice Scalia's approach, but only *after* the speech-conduct distinction is made, and then only when the regulation targets conduct.

64. *Id.* at 577 (emphasis in original).

65. *Id.* at 572, 580.

66. *Id.* at 580.

67. *Id.* at 576.

68. *See* Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 647 (1992).

69. A good example would be *Texas v. Johnson*, where Justice Scalia joined the majority opinion. *See* 491 U.S. 397 (1989). There, the regulation was a general law regulating conduct—flag burning—rather than one that, on its face, restricted expression. *Id.* at 400 n.1. Under Justice Scalia's approach, this might seem to place it outside the First Amendment; however, as the statute prohibited flag burning only when it was conducted for purposes of giving offense, and expressly allowed burning for "patriotic" destruction of a worn flag, the First Amendment was implicated and strict scrutiny applied. *Id.* at 411–12.

c. *Justice Souter's Concurrence*

Justice Souter agreed with the plurality that nude dancing was entitled to First Amendment protection "to a degree." Unlike the Chief Justice, Justice Souter provided a more thoughtful explanation. He began by noting the expressive message conveyed by erotic dancing: "dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience."[70] He then noted the *non*expressive quality of nudity alone: "Although such performance dancing is inherently expressive, nudity *per se* is not. 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."[71] For Souter, however, the integration of erotic dance and nudity resulted in a particular form of expression that could not be conveyed by each element on its own: "But when nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a striptease, are integrated into the dance and its expressive function."[72]

Although he thus found nude dancing subject "to a degree of First Amendment protection," Justice Souter clearly did not find nude dancing subject to *full* First Amendment protection, for rather than apply strict scrutiny to the Indiana statute, Justice Souter, like the plurality, applied the *O'Brien* test.[73] Like Chief Justice Rehnquist, he provided no explanation for *why* nude dancing was afforded less protection than other forms of expression. Justice Souter quoted the Court's bold declaration in *Young v. American Mini Theatres*—language that will be discussed in Part II of this Note—that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," but he declined to say why.[74]

Unlike the plurality, Justice Souter identified a different governmental interest for the second *O'Brien* prong than the protection of public morals: combating the secondary effects of adult entertainment establishments.[75]

70. *Barnes*, 501 U.S. at 581 (Souter, J., concurring).
71. *Id.*
72. *Id.*
73. *Id.* at 581–82.
74. *Id.* at 584 (quoting Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976)).
75. *Id.* at 582.

For Justice Souter, the governmental interest in preventing "prostitution, sexual assault, and other criminal activity" was sufficient under *O'Brien*.[76] Because this interest was unrelated to the expressive activity itself, the third prong was satisfied as well.[77] Justice Souter thus imported the secondary effects doctrine from the content-neutrality test into the *O'Brien* test, not for purposes of classifying a regulation as content-neutral, but to justify an already content-neutral regulation.

Justice Souter found immaterial the fact that the Indiana legislature had never articulated any concerns about the secondary effects of nude dancing. For Souter, assessing the governmental interest at stake did not involve any inquiry into the subjective intent of the legislators; rather, he sought only "the existence . . . of a current governmental interest in the service of which the challenged application of the statute may be constitutional."[78] Nor did Justice Souter require any proof that nude dancing actually leads to such undesirable secondary effects. Declaring that nude dancing was "of the same character" as the activity to which the Court had applied the secondary effects doctrine in *Renton* and *American Mini Theatres*—by which he likely meant "sexual character"—he concluded that it was "no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films . . . in *Renton*."[79]

Thus, in *Barnes*, Justice Souter appeared to propose an application of the secondary effects doctrine where, regardless of a regulation's actual "purpose," one can simply cast about, long after the regulation's passage, until finding a governmental interest that seems legitimate. If that interest is in combating secondary effects, Justice Souter would require no proof of any connection between the activity and the secondary effects. Perhaps realizing the implications of such a forgiving approach, Justice Souter, as will be discussed, repudiated this aspect of his *Barnes* concurrence in *Pap's A.M.*[80]

d. Justice White's Dissent

Justice White, joined by Justices Marshall, Blackmun, and Stevens, began his dissent in *Barnes* by agreeing with the plurality and with Justice

76. *Id.* at 583.
77. *Id.* at 586.
78. *Id.* at 582.
79. *Id.* at 584.
80. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 316–17 (2000) (Souter, J., concurring in part and dissenting in part).

Souter that nude dancing is the kind of expressive conduct that the First Amendment protects.[81] He declined, however, to offer similar qualifying language such as "outer ambit" or "to a degree." Justice White also sharply disagreed with the plurality's and Justice Scalia's characterization of the Indiana public indecency statute as a "general" regulation.[82] He noted that the statute does not proscribe nudity in the home, and that the Indiana Supreme Court indicated that the statute would not apply to nudity in theatrical productions such as "Salome" or "Hair."[83] Thus, the statute did not impose a truly *general* prohibition on nudity, which to Justice White mandated a much closer scrutiny of the governmental interest asserted under the second and third prongs of *O'Brien*.[84]

Justice White found the purpose of any prohibition on nudity to be the protection of others from offense.[85] This governmental interest could not possibly apply here, he argued, because the audience for nude dancing performances consists entirely of consenting adults.[86] Moreover, this interest could not be unrelated to suppression of expression: because Indiana would allow erotic dancers to wear G-strings and pasties, the State did not prohibit the message conveyed by erotic dancing itself, but only the message conveyed by erotic dancing accompanied by nudity (as nudity is defined by the statute).[87] Thus, he concluded, the statute must necessarily be targeted at the expression conveyed by (totally) nude dancing.[88]

Justice White found any asserted interest in combating secondary effects to be similarly unpersuasive. Achieving this interest could not possibly be unrelated to suppression of activity because achieving the State's purported goals of deterring prostitution, sexual assaults, degradation of women, and "activities which break down the family structure" necessarily depended on preventing the expressive activity of nude dancing.[89]

Because Justice White thus found the statute to be targeted at expression, he considered *O'Brien* inapplicable and would have applied strict scrutiny.[90] He concluded that the statute failed strict scrutiny because it was not narrowly tailored: even if the State had a compelling interest in combat-

81. *Barnes*, 501 U.S. at 587 (White, J., dissenting).
82. *Id.* at 589–90.
83. *Id.* at 590.
84. *Id.*
85. *Id.* at 590–91.
86. *Id.* at 591.
87. *Id.* at 592.
88. *Id.*
89. *Id.* at 591.
90. *Id.* at 593.

ing crime as a secondary effect, a more appropriate action would be the enforcement of criminal laws rather than suppression of expression.[91]

e. After Barnes

The 5–4 holding reversed the Seventh Circuit and upheld Indiana's ban on public nudity. With four separate opinions, however, and a plurality of only three Justices, *Barnes* failed to give clear guidance to lower courts on the issue of regulation of nude dancing.[92] Eight Justices did agree that nude dancing should be afforded at least some protection under the First Amendment. The three-Justice plurality reasoned that nude dancing could be prohibited under *O'Brien* in the interest of morality. Justice Scalia agreed on the moral interest, but would have analyzed the issue outside the scope of the First Amendment. Justice Souter advocated for regulation in the name of combating secondary effects. Four dissenting Justices found that the "general" ban on nudity was actually a restriction aimed at expressive conduct. Nine years later, the Court gave itself another chance to provide some clarity, in *City of Erie v. Pap's A.M.*

2. *City of Erie v. Pap's A.M.*: The New Secondary Effects Rationale

In 1994, the Erie, Pennsylvania, city council enacted a "public indecency ordinance" that prohibited anyone from knowingly or intentionally appearing in a "state of nudity" in a place open to the general public, including places of entertainment.[93] Unlike the statute in *Barnes*, which had been on the books in one form or another since 1831,[94] it was unclear whether Erie had any similar existing ordinance in 1994.[95] Moreover, the city council was crystal clear about why it enacted the ordinance: the pre-

91. *Id.* at 594.

92. *See* Pap's A.M. v. City of Erie, 719 A.2d 273, 278 (Pa. 1998). The Pennsylvania Supreme Court, noting the "hodgepodge of opinions" in *Barnes*, failed to find any point upon which a majority of the Justices agreed, other than the fact that nude dancing was entitled to some First Amendment protection. *Id.* The court concluded that "no clear precedent arises out of *Barnes* . . . ." *Id.*

93. City of Erie v. Pap's A.M., 529 U.S. 277, 283 (2000). The ordinance defined "nudity" as

> the showing of the human male or female genital [*sic*], 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; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

Id. at 283 n.*.

94. 501 U.S. at 573 (Scalia, J., concurring).

95. *Pap's A.M.*, 529 U.S. at 331 n.18 (Stevens, J., dissenting).

amble declared that it was adopted "for the purpose of limiting a recent increase in nude live entertainment within the City."[96]

Although this was the stated *purpose* of the ordinance, the council offered different views on its *reasons* for adopting it. One prominent reason was morality-based: the preamble opined that "certain lewd, immoral activities carried on in public places for profit . . . lead to the debasement of both women and men."[97] One of the council members put it succinctly at a public hearing: "We're talking about what is indecent and immoral. . . . We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion."[98] However, the preamble also stated a "secondary effects" rationale: "nude live entertainment . . . provid[es] an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects."[99]

To comply with the ordinance, nude dancers in Erie clad themselves in G-strings and pasties.[100] Two days after the ordinance went into effect, Pap's, a corporation that operated a nude dancing club called Kandyland, which had previously featured totally nude dancing, sued in state court for a permanent injunction against enforcement of the ordinance.[101] The case reached the Pennsylvania Supreme Court, which held that the ordinance violated the First Amendment.[102] The court noted that eight Justices in *Barnes* had agreed that nude dancing was protected by the First Amendment, but found no other point upon which a majority of Justices agreed; thus, the court considered *Barnes* nonbinding.[103] Finding Justice White's dissent in *Barnes* to be the most persuasive of the opinions, the court concluded that the ordinance was content-based because it was "inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing."[104] Accordingly, the court applied strict scrutiny, which the ordinance failed on narrow-tailoring grounds because any interest in combating secondary effects would be better served through prosecution of the actual crimes or other content-neutral time, place, or manner restrictions.[105]

96. *Id.* at 327.
97. *Id.* n.10.
98. *Id.* at 329.
99. *Id.* at 290 (plurality opinion) (citation omitted).
100. *Id.* at 284.
101. *Id.*
102. Pap's A.M. v. City of Erie, 719 A.2d 273, 280 (Pa. 1998).
103. *Id.* at 278.
104. *Id.* at 279.
105. *Id.* at 279–80.

The United States Supreme Court reversed.[106] Once again, however, the Court failed to produce a majority opinion.[107] Six Justices agreed that the judgment of the Pennsylvania Supreme Court should be reversed, but only Chief Justice Rehnquist and Justices Kennedy and Breyer joined Justice O'Connor's plurality opinion.[108] Justices Scalia and Thomas concurred in the judgment, Justice Souter concurred in part and dissented in part, and Justices Stevens and Ginsburg dissented.[109]

a. Justice O'Connor's Plurality Opinion

Justice O'Connor reiterated the plurality's conclusion in *Barnes* that nude dancing was expressive conduct, but that it fell "only within the outer ambit of the First Amendment's protection."[110] Like Chief Justice Rehnquist in *Barnes*, she provided no explanation for why nude dancing was banished to the "outer ambit," although she, like Justice Souter in *Barnes*, quoted the passage from *American Mini Theatres* about society's interest in protecting sexual expression being of a "wholly different, and lesser, magnitude" than the interest in protecting political speech.[111] The bulk of her opinion was devoted to whether the Erie ordinance was content-based, or content-neutral and thus subject to the *O'Brien* test.

Justice O'Connor began her content-neutrality analysis with a speech-conduct distinction, finding that the ordinance was "on its face a general prohibition on public nudity," which "[b]y its terms . . . regulates conduct alone. . . . [I]t bans all public nudity, regardless of whether that nudity is accompanied by expressive activity."[112] She rejected the argument that the moralistic language in the preamble suggested a prohibition targeted at erotic expression.[113] She instead focused on the preamble's "secondary effects" language, and noted that the Pennsylvania Supreme Court had determined that one purpose of the ordinance was to combat secondary effects.[114] She thus found the ordinance "aimed" not at expression, but at "combating crime and other negative secondary effects" of adult clubs like

106. *Pap's A.M.*, 529 U.S. at 283 (plurality opinion).

107. This discussion concerns only the Court's opinion on the First Amendment issue. There was also a mootness issue, which is not relevant here. *See id.* at 287–89.

108. *Id.* at 282.

109. *Id.* at 302–10 (Scalia, J., concurring) (opinion joined by Justice Thomas); *id.* at 310–17 (Souter, J., concurring in part and dissenting in part); *id.* at 317–32 (Stevens, J., dissenting) (opinion joined by Justice Ginsberg).

110. *Id.* at 289.

111. *Id.* at 294.

112. *Id.* at 290.

113. *Id.* at 290, 292.

114. *Id.* at 290.

Kandyland.[115] She warned that considering a motive other than combating secondary effects—presumably, a motive reflected in the morality-based comments of council members—would involve an inquiry into the legislators' *actual* motives, and that *O'Brien* prohibited any such inquiry into an allegedly illicit motive.[116] Having decided that the true purpose of the ordinance was in combating secondary effects, Justice O'Conner concluded that this interest was unrelated to suppression of expression.[117] Moreover, the ordinance placed only "incidental burdens" on expression.[118] She opined that wearing G-strings and pasties would have merely a "de minimis" effect on the erotic message conveyed.[119]

Thus, Justice O'Connor found the ordinance content-neutral on two grounds. First, it was facially neutral because it regulated only conduct.[120] Second, even if the council subjectively enacted it for the purpose of restricting live nude dancing, the ordinance should be considered content-neutral under the secondary effects doctrine because the purpose behind the restriction was combating secondary effects associated with nude dancing clubs, a purpose she found "unrelated to the suppression of the erotic message conveyed by nude dancing."[121]

Having declared the ordinance content-neutral, Justice O'Connor turned to the *O'Brien* test. Here, she abandoned Chief Justice Rehnquist's moral-interest approach from *Barnes* and instead adopted Justice Souter's approach: the governmental interest identified under the second prong of *O'Brien* could be in combating the "harmful secondary effects associated with nude dancing."[122] Furthermore, Justice O'Connor clarified what kind of showing the government must make in order to sufficiently establish an interest in combating secondary effects—basically, very little. A city is not required to conduct its own studies of the secondary effects of nude dancing, and can rely on evidence proffered by other cities in other cases.[123] The only requirement is that whatever evidence the city offers, it must reasonably believe it to be "relevant to the problem that the city addresses."[124] Here, it was perfectly permissible for Erie to offer the findings of *American Mini Theatres*—a twenty-four-year-old decision originating in another

115. *Id.* at 291.
116. *See id.* at 292.
117. *Id.* at 293.
118. *Id.* at 295.
119. *Id.* at 294.
120. *Id.* at 296.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51–52 (1986)).

state—as evidence of the harmful secondary effects of adult establishments.[125] As if the evidentiary burden was still too high, Justice O'Connor stated that the Erie city council could rely on its *own* statement in the preamble of the ordinance that the council had found that nude dancing caused harmful secondary effects.[126] Moreover, despite refusing to inquire into the council members' actual subjective motives for enacting the ordinance when considering content neutrality, Justice O'Connor noted that the council members were familiar with the city and would likely have firsthand knowledge enabling them to make "expert judgments" about the pernicious effects of nude dancing.[127] Summarizing a breathtakingly deferential standard for evaluating a government's proffered *O'Brien* interest, she declared, "In the absence of any reason to doubt it, the city's expert judgment should be credited."[128]

Finding Erie's interest in combating secondary effects sufficient under the second *O'Brien* prong, Justice O'Connor held that the ordinance passed the third prong because the ordinance was unrelated to the suppression of expression (for the same reasons that she had determined made the ordinance content-neutral).[129] The fourth prong was satisfied because the requirement of pasties and G-strings was a "minimal restriction in furtherance" of the interest in combating secondary effects, and because the restriction "leaves ample capacity to convey the dancer's erotic message."[130]

b. Justice Souter's Opinion

Surprisingly, given that the plurality chose his *Barnes* concurrence as the basis for its holding in *Pap's A.M.*, Justice Souter declined to join the plurality opinion. He did agree that the *O'Brien* test was the proper test to be applied to the Erie ordinance, and he agreed that Erie's interest in combating secondary effects was the proper governmental interest to evaluate under *O'Brien*.[131] He dissented because of the lack of evidence establishing a link between nude dancing and the alleged harmful secondary effects—an odd concern, considering that he required no such evidence in *Barnes*. Not-

125. *Id.* at 297.
126. *Id.*
127. *Id.* at 297–98.
128. *Id.* at 298.
129. *Id.* at 301.
130. *Id.*
131. *Id.* at 310 (Souter, J., concurring in part and dissenting in part).

ing the discrepancy, Justice Souter declared frankly that he made a "mistake" in *Barnes* and "should have demanded the evidence then."[132]

Justice Souter noted that "[t]he proposition that the presence of nude dancing establishments increases the incidence of prostitution and violence is amenable to empirical treatment. . . ."[133] He would allow a regulating government to rely on evidence from other cities, or evidence that had been accepted by a court in a judicial opinion; however, he would insist that such reliance be "a matter of demonstrated fact, not speculative supposition."[134] Here, the preamble of the Erie ordinance simply recited conclusions linking nude dancing to harmful secondary effects, without citing to any factual basis. Thus, he would have remanded the case to give Erie a chance to make the required showing.[135]

Justice Souter raised a final, important point: Erie could have accomplished its asserted interest in reducing secondary effects simply by enforcing *existing* zoning laws.[136] These laws would have allowed Erie to regulate *where* nude dancing could occur, without affecting *what* the dancers could actually do. If Erie was indeed concerned with combating crime and protecting property values, then the location of the nude dancing, rather than the manner in which it was done, would appear to be a more efficient approach. Given the fourth prong of *O'Brien*—the incidental speech restriction should be "no greater than essential to achieve the government's legitimate purpose"—the zoning approach would appear to be a better way to achieve Erie's goals, with little effect on expression other than where it occurred.[137] Justice Souter suggested that the existence of this less restrictive alternative means—regulation through zoning—"requires an evidentiary response."[138] Thus, while acknowledging the possibility that a government could regulate nude dancing under *O'Brien* in the interests of combating secondary effects, Justice Souter would require both proof that nude dancing is linked to harmful secondary effects, and proof that the government could not accomplish that goal through means having no effect on expression—not even an "incidental" effect.

132. *Id.* at 316–17.
133. *Id.* at 314 n.3.
134. *Id.* at 313–14.
135. *Id.* at 317.
136. *Id.* at 315–16. For twenty-three years, Erie had had a zoning regulation that would have allowed the city to regulate the location of clubs like Kandyland, but the city had not enforced it. *Id.* at 316.
137. *Id.* at 315.
138. *Id.* at 316.

c. Justice Scalia's Concurrence

Justice Scalia, joined this time by Justice Thomas (who was not yet on the Court for *Barnes*), again argued that a general ban on nudity regulates conduct, not speech, and is thus not subject to First Amendment analysis at all.[139] Moreover, Justice Scalia contended that even if Erie's ordinance was not a "general" ban, but rather targeted nude dancing in particular, the ordinance *still* regulated only conduct and was thus outside the First Amendment: "[E]ven were I to conclude that the city of Erie had specifically singled out the activity of nude dancing, I still would not find that this regulation violated the First Amendment unless I could be persuaded . . . that it was the communicative character of nude dancing that prompted the ban."[140]

Thus, the fact that a city might single out and ban nude dancing is insufficient to implicate the First Amendment because such targeting, absent more, "would not establish an intent to suppress what (if anything) nude dancing communicates."[141] Absent such intent, Scalia saw no need for Erie to justify its ordinance on any basis other than the "traditional power of government to foster good morals."[142] No "secondary effects" analysis was required.[143]

Thus, for Justice Scalia, government is free to ban activity of which it disapproves, even if that activity has expressive elements, as long as government does not ban the activity *because* it disapproves of those expressive elements in particular. Scalia did not, in *Pap's A.M.*, indicate what would establish such an "intent to suppress" the expression itself. One could certainly argue that the references to nude dancing as "lewd" and "immoral" established on the part of the Erie city council a clear disapproval of the "character" of nude dancing. And although Scalia declined to find the character of nude dancing to be "communicative," it must have communicated something to the Erie city council in order to inspire such condemnation. Significantly, the Erie city council did not indicate that it found *public nudity in general* to be "lewd" or "immoral"; rather, the preamble to the ordinance declared that its purpose was to combat the perceived immorality of nude *dancing* in particular.[144] Nowhere did the

139. *Id.* at 307–08 (Scalia, J., concurring).

140. *Id.* at 310.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 331 (Stevens, J., dissenting) ("It is clear beyond a shadow of a doubt that the Erie ordinance was a response to a more specific concern than nudity in general, namely, nude dancing of the sort found in Kandyland."). Indeed, one of the Erie council members declared, "We're not prohibiting

council express concern over any other type of public nudity; in fact, Erie acknowledged that it would not have applied the ordinance to nudity in mainstream theatrical productions.[145] It is thus a bit of a stretch for Justice Scalia to maintain that disapproval of the expression associated with nude dancing is not what prompted the ordinance's prohibition on nudity. Perhaps he may only be willing to find an "intent to suppress" when it is spelled out in black and white in the regulation itself.[146]

d. Justice Stevens's Dissent

Justice Stevens focused on the difference between the message conveyed by totally nude dancing and the message conveyed by dancing in pasties and a G-string.[147] While expressing skepticism over Justice O'Connor's characterization of the difference as "de minimis," he was willing to accept, *arguendo*, that the difference might be small.[148] The fact that the messages were different at all was dispositive, however, because Erie's ordinance effectively banned one and not the other.[149] Thus, the ordinance effected a "total ban" on a particular type of expression.[150]

Justice Stevens strongly protested the application of the secondary effects doctrine to such a "total ban."[151] He noted that in *American Mini Theatres* and *Renton*, the doctrine was used to uphold restrictions on location only, and not on the expressive activity itself.[152] Moreover, he pointed out the obvious—that the addition of G-strings and pasties would have very little effect on the alleged secondary effects; any argument to the contrary would require "nothing short of a titanic surrender to the implausible."[153]

He also sharply disagreed with Justice Scalia's assertion that Erie's ban on nudity was not prompted by an intent to suppress expression: "It is pure sophistry to reason from the premise that the regulation of the nudity component of nude dancing is unrelated to the message conveyed by nude

nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." John B. Kopf III, Note, City of Erie v. Pap's A.M.*: Contorting Secondary Effects and Diluting Intermediate Scrutiny to Ban Nude Dancing*, 30 CAP. U. L. REV. 823, 832 (2002). "We're not talking about nudity," the council member insisted. *Id.* n.87.

145. *Pap's A.M.*, 529 U.S. at 328 (Stevens, J., dissenting).

146. This would explain why Scalia joined the majority in *Texas v. Johnson*. *See supra* note 69.

147. *Pap's A.M.*, 529 U.S. at 318–19 (Stevens, J., dissenting).

148. *Id.*

149. *Id.* at 319.

150. *Id.*

151. *Id.*

152. *Id.* at 319–21.

153. *Id.* at 323.

dancers."[154] Moreover, he viewed the evidence as establishing "beyond a shadow of doubt" that the ordinance was enacted not to combat nudity in general, but to ban nude dancing at establishments such as Kandyland.[155] He pointed to the fact that the council chose not to enforce the ordinance against a long-running production of *Equus* that featured full frontal nudity.[156] He also noted the ordinance's rather bizarre definition of "nudity," which included "any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola."[157] Who else, contended Justice Stevens, was likely to don such "devices" besides Kandyland dancers?[158] Such language clearly was aimed at nude dancers, not the general public.[159]

e. After Pap's A.M.

Justice Souter was the "swing vote" in *Pap's A.M.* Because he joined the plurality in using the *O'Brien* test, five Justices agreed that *O'Brien* is the proper standard for evaluating the effect of public nudity statutes on nude dancing. Moreover, because Justice Souter suggested that a governmental interest in combating secondary effects could be a proper interest under *O'Brien* if supported by adequate evidence, such statutes would thereafter be analyzed under the secondary effects doctrine.[160] Nonetheless, because of Souter's concerns over proof, a question remained over what a government would have to show in terms of establishing a link between nude dancing and the alleged harmful secondary effects.

The Court clarified the necessary showing of proof in *City of Los Angeles v. Alameda Books, Inc.*[161] There, the Court concluded that Los Angeles could justify a present-day ordinance prohibiting more than one adult business in the same building by relying on a 1977 study that noted a correlation between the location of adult businesses and higher crime rates.[162] In another four-Justice plurality opinion, Justice O'Connor held that a municipality may rely on any evidence that it reasonably believes to be relevant in demonstrating the secondary effects, and that the party challenging

154. *Id.* at 326.
155. *Id.* at 331.
156. *Id.* at 328 n.13.
157. *Id.* at 331.
158. *Id.*
159. *Id.*
160. *See, e.g.*, SOB, Inc. v. County of Benton, 317 F.3d 856, 860–64 (8th Cir. 2003) (upholding a public nudity statute following *Pap's A.M.* and using both the *O'Brien* test and the secondary effects doctrine).
161. 535 U.S. 425 (2002).
162. *Id.* at 435–39.

the evidence has the burden of casting doubt on it.[163] She rejected Justice Souter's dissenting argument that Los Angeles should have provided empirical data, finding it sufficient that the city showed "by appeal to common sense" that the ordinance would reduce crime.[164] Justice Kennedy, concurring in the judgment, agreed that "very little evidence is required."[165] Thus, five Justices adopted the low threshold of proof set forth in the plurality opinion in *Pap's A.M.* for demonstrating a link between regulated conduct and harmful secondary effects. This link, in turn, establishes a "substantial or important governmental interest" that satisfies the second prong of the *O'Brien* test.

C. Criticism of Pap's *and its Application of the Secondary Effects Doctrine*

Prior to *Pap's A.M.*, the Court had used the secondary effects doctrine in the adult entertainment context not to justify restrictions on expression itself, but to justify zoning regulations that primarily affect where the expression can occur.[166] In *American Mini Theatres*, for instance, the Court used the doctrine to uphold a Detroit ordinance that regulated the location of adult movie theaters, without affecting the content of the films: "Detroit has silenced no message, has invoked no censorship. . . . The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content."[167] In *Renton*, where the Court upheld an analogous ordinance, the regulation did not affect the content of the films that adult theaters could show, but rather "'circumscribe[d] their choice as to location.'"[168] In *Pap's A.M.*, on the other hand, the prohibition on nudity forced the dancers to alter their performance by donning G-strings and pasties. The plurality accepts the proposition that nude dancing is an expressive activity, and acknowledges

163. *Id.* at 438–39. Justice O'Connor established a burden-shifting regime:

> The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id.

164. *Id.* at 439.

165. *Id.* at 451 (Kennedy, J., concurring).

166. City of Erie v. Pap's A.M., 529 U.S. 277, 319–21 (2000) (Stevens, J., dissenting).

167. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 78–79 (1976) (Powell, J., concurring).

168. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–48 (1986) (quoting *Am. Mini Theatres*, 427 U.S. at 82 n.4).

that the G-strings and pasties do affect the expression conveyed—even if the effect is only "de minimis."[169] Thus, one does not even have to accept Justice Stevens's characterization of the Erie ordinance as imposing a "total ban" on a particular type of expression to acknowledge that the Erie ordinance, unlike the ordinances in *American Mini Theatres* and *Renton*, affected communicative content. Moreover, even accepting Justice Scalia's argument that nude dancing is merely "conduct," rather than expression, *Pap's A.M.* is still distinguishable from the prior secondary effects cases. The Erie ordinance forced individual persons to alter their conduct in specific and intimate ways; the other cases merely governed where business establishments could be located. The Erie ordinance was thus highly intrusive in terms of personal autonomy, even aside from the issue of expression.

Pap's A.M. thus recognized a significant expansion of application of the secondary effects doctrine to regulations that restricted both expression and personal conduct. This kind of expansion has been the focus of much criticism.[170] As Justice Stevens warned, such an expansive application of the secondary effects doctrine "has grave implications for basic free speech principles."[171] In fact, the Court has even suggested that the doctrine could be used to justify restrictions on political speech, which is traditionally the most highly protected form of speech.[172] *Pap's A.M.* thus paves the way for "a possible avenue for governmental censorship whenever censors can concoct 'secondary' rationalizations for regulating the content of political

169. *Pap's A.M.*, 529 U.S. at 289, 294 (plurality opinion).

170. *See, e.g.*, Marc M. Harrold, *Stripping Away at the First Amendment: The Increasingly Paternal Voice of Our Living Constitution*, 32 U. MEM. L. REV. 403, 431–33 (2002) ("For the first time, the Court has determined that subjective appraisals and perceptions of factors, such as a lowering of property values, noise, or crime would allow for a total suppression of speech that amounts to censorship."); David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55, 60–61 (1997) (warning of the dangers of expanding the secondary effects doctrine even before *Pap's A.M.*: "The secondary effects doctrine, a fertile ground for abuse, insidiously eviscerates free expression by allowing government officials to characterize content-based regulations as content-neutral. In practice, government officials use the doctrine to silence expression they dislike."); Raban, *supra* note 11, at 569 (labeling the secondary effects doctrine "an unprincipled exception and nothing more").

171. *Pap's A.M.*, 529 U.S. at 322 (Stevens, J., dissenting).

172. *See* Boos v. Barry, 485 U.S. 312, 320–21 (1988) (plurality opinion). There, a District of Columbia ordinance prohibited the display of protest signs near a foreign embassy. *Id.* at 316. Finding the ordinance content-based, Justice O'Connor rejected the District's argument that this "display clause" was aimed at secondary effects rather than content. *Id.* at 320–21. However, she did so not because the restriction involved political speech, but because the restriction was aimed at the "[l]isteners' reactions to speech," rather than more typical secondary effects such as traffic congestion or security issues. *Id.* at 321. Justice Brennan wrote separately to warn of the dangers in extending any kind of secondary effects analysis to the political speech arena. *Id.* at 334–38 (Brennan, J., concurring in part and concurring in the judgment).

speech."[173] Indeed, the doctrine has expanded well beyond the adult entertainment context; a district court in Kentucky, for example, used the doctrine to uphold a dress code at a public high school.[174] Relying on *Pap's A.M.*, the judge found the dress code aimed not at the students' expression through wearing clothing, but at allegedly harmful secondary effects of student dress such as gang activity and "tensions between students who fight over attire."[175]

The expansion of the secondary effects doctrine to expression and content takes on added significance in light of the extraordinarily low threshold of proof required to assert an interest in combating secondary effects. No empirical evidence is required to show that the regulated activity is actually associated with the harmful secondary effects; the Court would allow governments to make a "common sense" determination.[176] However, an assertion that nude dancing causes crime and lowers property values is not at all a "common sense" conclusion. Indeed, since Justice Souter suggested in *Pap's A.M.* that the issue is "amenable to empirical treatment,"[177] researchers have taken him up on his challenge. One result was a comprehensive study of adult dance clubs in Charlotte, North Carolina, that found no support for the proposition that crime rates are higher around such establishments; in fact, the opposite was true—areas surrounding the clubs had smaller numbers of reported crimes than the control areas.[178] Yet, following *Pap's A.M.*, cities can continue to regulate nude dancing in the name of secondary effects, by relying on nothing more than a bald assertion of harms such as crime and decreased property values, with perhaps a citation to *American Mini Theatres* or *Renton* thrown in for good measure. If the doctrine continues to expand outside the adult entertainment context, this permissive burden of proof creates the very real possibility that governments could use similar assertions as pretexts for regulating any expression of which they disapprove.

173. *Id.* at 335 (Brennan, J., concurring in part and concurring in the judgment).

174. Long v. Board of Educ., 121 F. Supp. 2d 621, 624–25 (W.D. Ky. 2000).

175. *Id.* at 625.

176. *See* City of Los Angeles v. Alameda Books, Inc, 535 U.S. 425, 439 (2002).

177. City of Erie v. Pap's A.M., 529 U.S. 277, 314 n.3 (2000) (Souter, J., concurring in part and dissenting in part).

178. Daniel Linz et al., *An Examination of the Assumption That Adult Businesses Are Associated with Crime in Surrounding Areas: A Secondary Effects Study in Charlotte, North Carolina*, 38 LAW & SOC'Y REV. 69, 97 (2004). *See also* Bryant Paul et al., *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL'Y 355, 355–56 (2001) (concluding that all "scientifically credible" studies "demonstrate either no negative secondary effects associated with adult businesses or a reversal of the presumed negative effect").

Aside from the potential implications of *Pap's A.M.*, the fact remains that applying the secondary effects doctrine in the context of nude dancing to justify public nudity laws like the Erie ordinance simply fails to pass the laugh test. Compliance typically requires nothing but pasties and a G-string. How much of an effect can this possibly have on the harmful secondary effects that cities like Erie assert?[179] Will the mere masking of a nipple with a dime-sized circle of latex magically send prostitutes elsewhere, eliminate assaults, reduce AIDS, and restore property values? The premise is ludicrous. Justice O'Connor attempts to respond to this obvious flaw in her secondary effects analysis by arguing that cities should have latitude to "experiment" with solutions to such serious problems.[180] Some experiments, however, are more justified than others. Perhaps Justice O'Connor should have applied the same "common sense" that she so approved of when discussing a municipality's burden in showing secondary effects.

Moreover, the idea that secondary effects will be somehow alleviated by the ordinance directly contradicts Justice O'Connor's evaluation of the ordinance's effect on expression. She declares that G-strings and pasties have only a "de minimis" effect on the message conveyed by nude dancing; yet, she finds it reasonable for Erie to assert that the addition of such garments is needed to fight crime and maintain property values. In effect, she contends that G-strings and pasties have a "de minimis" effect on the erotic message, but a "de maximus" effect on eradicating the myriad of evils Erie desires to combat. One cannot have it both ways.

Another troubling aspect of *Pap's A.M.* is that its application of the secondary effects doctrine reinforces a connection between sex and violence. One often hears protests about "sex and violence" on television, or in the movies. Why should the two inexorably be linked? Sex and violence are qualitatively different activities; the latter inflicts injury on others, while the former is indispensable to the continuation of the species. Sex can—and should—have positive, healthy connotations. Violence has few, if any, redeeming attributes and is almost universally condemned on religious and moral grounds. But by continually linking sex and violence, the idea of sex becomes intertwined with evils of violence. *Pap's A.M.* takes the connection a step further by assuming a link between *nudity* and violent

179. As Justice Stevens put it, "To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible." *Pap's A.M.*, 529 U.S. at 323 (Stevens, J., dissenting) (emphasis in original). Justice Souter agreed: "It is not apparent to me as a matter of common sense that establishments featuring dancers with pasties and G-strings will differ markedly in their effects on neighborhoods from those whose dancers are nude." *Id.* at 313 n.2 (Souter, J., concurring in part and dissenting in part). Justice Scalia was "highly skeptical" as well. *Id.* at 310 (Scalia, J., concurring).

180. *Id.* at 301 (plurality opinion).

crime. This is simply absurd. As will be discussed later, the Court's acceptance of this negative association is indicative of America's discomfort with sexual expression and nudity in general, and it is this discomfort—and not any "secondary effects" smokescreen—that may be the true purpose behind the regulation of nude dancing.

Finally, even if one were to accept the notion of a link between nude dancing and secondary effects, there are, as Justice Souter points out, alternative means to accomplish the goal of combating such secondary effects.[181] The most obvious solution is zoning. Zoning regulation of the location of nude dancing clubs would affect only *where* the conduct occurs, and would have no effect on *what* is being expressed through the conduct. Such regulation would clearly be upheld following *American Mini Theatres* and *Renton*.[182] With such a plausible, noncontroversial, and effective option available to combat the allegedly harmful effects of adult entertainment establishments, there is no need for imposing restrictions on expression and personal autonomy by forcing dancers to wear pasties and G-strings. Or, as Justice White suggested in *Barnes*,[183] if a municipality is worried about crime, it can prosecute the crime itself. Either way, there are alternatives. The fact that regulations like the Erie ordinance are enacted despite these alternatives suggests that the purpose of such regulations has nothing at all to do with secondary effects, and everything to do with suppressing conduct determined to be "lewd and immoral."[184]

D. Can O'Brien *Be Used at All to Justify Regulations on Nude Dancing?*

As the above discussion illustrates, the secondary effects rationale utterly fails as a justification for regulating nude dancing under the *O'Brien* test. Thus, if *O'Brien* is to be used at all, one must identify a different—and more plausible—governmental interest to be evaluated under the second and third prongs of the test. Although abandoned in *Pap's A.M.*, Rehnquist's approach in *Barnes* suggests a possibility: a governmental interest in morality. Asserting this interest fails, however, because it is unlikely that an interest in morality can ever be unrelated to expression in this context. A decision to regulate conduct in the interest of morality implicitly contains a judgment that the conduct is immoral. This judgment

181. *Id.* at 315–16 (Souter, J., concurring in part and dissenting in part).

182. Of course, a municipality cannot ban nude dancing clubs altogether, for that would be an outright elimination of an expressive activity. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66, 72–76 (1981) (striking down as unconstitutional an ordinance prohibiting "all live entertainment").

183. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 594 (1991) (White, J., dissenting).

184. *See Pap's A.M.*, 529 U.S. at 329 (Stevens, J., dissenting).

may in some circumstances be entirely unrelated to expression; for example, a decision to regulate prostitution on grounds of immorality has nothing to do with any "message" expressed by prostitution. However, once the determination is made that conduct is sufficiently expressive to be afforded First Amendment protection—a determination that has necessarily been made if the *O'Brien* test is being applied—then any regulatory response in the name of morality suggests that it is not merely conduct that has been judged "immoral." It makes little sense to decide that conduct is sufficiently expressive to receive First Amendment protection, but then declare that an objection on moral grounds has nothing to do with what is being expressed. Such a determination contains an inherent tension: on the one hand, the expressive qualities of the conduct are emphasized, and on the other hand, those same qualities are disregarded.

More importantly, as a practical matter the expressive attributes of conduct likely trigger the moral response, rather than the mere fact of the conduct itself. Moral objection to nudity in *Barnes* and *Pap's A.M.* was not occasioned by random acts of nonexpressive public nudity, but by the expressive subset of public nudity called nude dancing. Thus, when an entire class of conduct is regulated—for instance, a ban on all public nudity, anytime and anywhere—in the name of morality, it is probably the expressive part of that conduct—nude dancing—that is truly at issue. When asserting a moral interest in regulating conduct, the expressive tail wags the nonexpressive dog.

Moreover, in the nude dancing context, it is much more difficult to make the same kind of conduct/expression distinction that courts have made in "symbolic speech" cases like *O'Brien*. In *O'Brien*, the conduct and the expression were discrete, separate elements: the conduct was burning a strip of paper, while the message was one of protest against Vietnam and the draft.[185] Thus, the message—the "expression"—became relevant only because the burned object had a preexisting, independent significance, wholly apart from the actual act of burning. Put another way, the message had nothing to do with the conduct itself; the message owed its existence to a source other than the physical act. The "message" conveyed by nude dancing,[186] in contrast, grows directly out of the act of dancing in the nude: the expression and the conduct are necessarily intertwined. The nude body need not be independently construed as something it is not, for the message to be conveyed. In other words, the nude body is not a "symbol" for the message; it *is* the message.

185. *See* United States v. O'Brien, 391 U.S. 367, 369–70 (1968).

186. See *infra* Part II.A.1 for a more detailed discussion of what nude dancing might express.

Finally, in the case of regulations like the Erie ordinance in *Pap's A.M.*, one must suspend disbelief to credit the assertion of a moral interest unrelated to expression. As discussed above, the Erie council asserted no moral objection to the "conduct" of public nudity in general, and in fact found nothing immoral about full frontal nudity in theatrical productions. Rather, *nude dancing in particular* was "lewd and immoral." Such a targeted moral objection makes it difficult to maintain that any asserted interest in morality is completely unrelated to expression, as required by the third prong of *O'Brien*. Perhaps this is why Chief Justice Rehnquist essentially disavowed his own approach from *Barnes* by voting with the plurality in *Pap's A.M.*[187]

A governmental interest in morality as a basis for regulating nude dancing thus fails the third prong of *O'Brien* because it is likely not unrelated to expression. Moreover, this suggests that maybe the test should not be used in the first place; that is, perhaps such regulations are not content-neutral at all, and must receive strict scrutiny. Certainly, the Erie ordinance does not seem content-neutral, given the references to the "lewd and immoral" nature of nude dancing, the stated purpose of curtailing nude dancing, and the bizarre definition of "nudity" that targeted garments that only nude dancers were likely to wear. As a matter of common sense, it "blinks reality"[188] to consider such a regulation to be anything other than content-based.

Thus, the governmental interests of morality and secondary effects fail to justify regulation of nude dancing under the *O'Brien* test. Moreover, as such regulation likely fails the content-neutrality test in the first place, *O'Brien* probably should not even be applied. Under current First Amendment doctrine, then, the only appropriate course in cases like *Pap's A.M.* would be to apply strict scrutiny. Indeed, this was the position adopted by the four dissenting Justices in *Barnes*.[189] But is this the right result? If regulations restricting nude dancing are subject to strict scrutiny, then the same protection is afforded to nude dancing as to political speech. Many Americans might have difficulty in equating political dissent with naked gyrations at a sleazy strip club. Could this really be what the Founding

187. In addition, the Chief Justice in *Barnes* relied heavily on *Bowers v. Hardwick*, 478 U.S. 186 (1986), for the proposition that morality is a proper basis for regulation. *See Barnes*, 501 U.S. at 569. *Bowers*, of course, was subsequently overruled by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Although *Lawrence* did not foreclose the possibility of laws based solely on morality, it likely undermined the strong assertion in *Bowers* of the role of morality in legislation.

188. Hill v. Colorado, 530 U.S. 703, 748 (2000) (Scalia, J., dissenting) (arguing that a facially content-neutral statute prohibiting persons from approaching patients at health facilities was in fact content-based because it was obviously targeted at "sidewalk counseling" by abortion protesters).

189. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 593 (1991) (White, J., dissenting).

Fathers had in mind?[190] The question illustrates the problem stated earlier: nude dancing simply does not fit neatly into the analytical framework in which the Court considers First Amendment issues.

II. SHOULD NUDE DANCING BE AFFORDED FIRST AMENDMENT PROTECTION, AND IF SO, HOW MUCH?

Current First Amendment doctrine would appear to leave little choice other than to subject regulations such as those at issue in *Barnes* and *Pap's A.M.* to strict scrutiny, either because the regulations fail *O'Brien*, or because the regulations are in fact content-based and *O'Brien* should not be applied at all. Although most Supreme Court Justices have consistently maintained that nude dancing is protected to some degree by the First Amendment, the failure of the Court to articulate a coherent rationale suggests that perhaps the question of whether nude dancing should be afforded protection at all should be reexamined. If nude dancing falls outside the First Amendment altogether, then rational basis scrutiny, rather than strict scrutiny, should be applied to any regulation of nude dancing.[191]

If nude dancing does indeed fall within the First Amendment, the issue becomes whether it should be afforded full protection, or some lesser degree. Should nude dancing be relegated to the "outer ambit" of the First Amendment, as the Court suggests? If nude dancing is deemed to be "low value" speech, deserving of only marginal protection, then there must exist some principled justification for characterizing it as such. This section discusses what nude dancing expresses and addresses several potential objections to affording it full First Amendment protection.

A. *Is Nude Dancing Expressive Activity, or Is It Merely Conduct?*

To answer the above questions, one must begin by asking what, if anything, is expressed by nude dancing. Indeed, the only way nude dancing falls within the First Amendment is if it expresses some kind of message.[192] If nothing is communicated, then Justice Scalia is right: it is merely conduct, and the First Amendment is not implicated at all.

190. *See* Miller v. Civil City of South Bend, 904 F.2d 1081, 1124 (7th Cir. 1990) (en banc) (Easterbrook, J., dissenting), *rev'd sub nom. Barnes*, 501 U.S. 560 ("James Madison would have guffawed had anyone suggested public nudity as an example of 'freedom of speech.'").

191. *See Barnes*, 501 U.S. at 580 (Scalia, J., concurring).

192. *See* Spence v. Washington, 418 U.S. 405, 410–11 (1974).

1. What Nude Dancing Expresses

The act of dancing—clothed or naked—may or may not express anything. At one end of the spectrum, a person jumping up and down in a club to a dance mix is most likely expressing nothing. She might be expressing the fact that she is having a good time, but she is not dancing for the purpose of conveying any kind of message; nor is any particular type of message likely to be received and understood by those observing her. At the other end, dancers at the Joffrey Ballet clearly express messages. The very object of their performance is to tell stories or to express emotions or ideas. No one in the audience could rationally believe that this is mere expressionless conduct. This kind of dancing conveys a message, and the audience is likely to understand, at least minimally, what is being expressed.[193]

When communicative dance is combined with nudity, the message does not disappear along with the clothing. Nudity does not nullify expression. Indeed, artists throughout history have used nudity *as* expression in paintings and sculptures of the naked female form.[194] For a dancer who aims to express ideas or emotions through movement, nudity adds an entirely new element of expression. If a dancer at the Joffrey Ballet intends to express an erotic message—for instance, if the story calls for a seduction scene, or simply to show the dancer's state of sexual arousal—then nudity greatly enhances the force of that message. Or, the message can be wholly aesthetic in nature, intended to express appreciation and celebration of the nude female body. In such a case, nudity not only enhances that message but is essential to it.

Thus, it is clear that dance can indeed be quite expressive, and, when accompanied by nudity, can potentially convey a powerful and specific kind of erotic or aesthetic message. Just as not all dance is expressive, however, not all nude dancing is expressive. The nightclub dancer who expresses nothing substantial while mindlessly hopping around clothed fails to express anything extra by mindlessly jumping around naked. The question becomes, then, whether the kind of nude dancing at issue in *Barnes* and *Pap's A.M.*—strip club dancing—is closer to the nightclub or to the Joffrey.

As will be discussed, much depends on the particular circumstances of the nude dancing. In general, however, nude dancing at adult establishments generally involves more than the dancer simply walking out naked

193. The test adopted by the Court for expression-through-conduct lends itself well to the dance illustration: whether "[a]n intent to convey a particularized message [is] present, and whether "the likelihood [is] great that the message would be understood by those who view[] it." *See id.*

194. *See Civil City of South Bend*, 904 F.2d at 1093–94 (Posner, J., concurring).

and jiggling around; this might be true at the "Bada Bing" on HBO's *The Sopranos*, but most strip clubs involve precisely that—stripping. The essence of the dance is the act of going from clothed to naked.[195] Yet the dancer does not remove her clothing clinically, as she would for a medical exam; rather, with provocative movements, set to music with a thumping beat, she expresses her intent in removing her clothing to be sexual in nature.[196] The message conveyed appeals to a stereotypical male fantasy that a man might indulge when viewing a clothed woman to whom he is attracted: he wonders what she looks like under her clothes, and he wonders if and hopes that she would want to have sex with him. The striptease answers both questions. The dancer removes her clothing to reveal an attractive form, and the provocative movements and the culmination of the dance in a state of total nudity convey the message that this attractive and desirable woman indeed desires and is available for sex.[197]

One can certainly debate—and I will—the merits of this message, and the value to society of indulging male sexual fantasies. One cannot, however, deny that this message exists in nude dancing, and that nudity is an essential component. Without the culmination of the dance in total nudity, the mystery of the dancer's body remains a mystery, and the message of sexual availability is muted or even contradicted. By failing to completely disrobe, the dancer suggests something less than a whole-hearted desire for sex; in fact, she could be indicating that she is holding back, that she is not actually available, and that she does not desire sex after all.[198] This too can be a message, of course, but it is an entirely different one. Moreover, to the extent that the dance conveys a message of appreciation of the nude female form, that message is necessarily inhibited if the dancer is not nude. Fi-

195. In *Barnes*, for example, the initial district court decision contained the following pithy description:

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

Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 416 (N.D. Ind. 1988), *rev'd sub nom.* Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986).

196. *See Civil City of South Bend*, 904 F.2d at 1091 (Posner, J., concurring).

197. *Id.*

198. Part of the reason why total nudity is necessary for the message of total sexual availability is that today's fashions leave little to the imagination. It is acceptable these days for women to go out in public wearing very little; thus, essentially all clothing must be removed to emphasize that the woman's state of undress is related to a desire for sex, rather than simply being an everyday outfit. *See id.* at 1091. As Judge Posner points out, in Victorian times a bare ankle might have been sufficient to express the erotic message of sexual desire and availability. *Id.*

nally, if the dancer disrobes to reveal not her natural body, but latex nipple coverings, the message takes on an element of pure absurdity.

This is admittedly an idealized description of nude dancing and what it represents and expresses. There are, of course, different kinds of strip clubs. Some clubs feature dancers who remove their clothes in desultory fashion as mere background accessories to the real business of selling overpriced drinks. There are other clubs, appointed like upscale restaurants, where a maitre'd in a tuxedo greets the customer at the door, the dancers are featured in programmes with professional "bios," and the performances are akin to any mainstream theatrical performance. Both examples, however, feature "nude dancing" with the same basic elements: the dancer removes her clothing bit by bit, dances in a provocative manner, is accompanied by music, and ends up in a state of total nudity. I will discuss below whether principled "artistic" distinctions can be made that take nude dancing out of the First Amendment. For the moment, however, the above description of nude dancing illustrates that it has at least the *potential* to express a distinct and powerful message of sexual desire, availability, and appreciation of the nude female form.

2. But is it still merely "conduct"?

Despite the *potential* of nude dancing to express a particular erotic message, one could object that in reality, nude dancers express nothing at all.[199] For example, Judge Frank Easterbrook, dissenting in the Seventh Circuit's *Barnes* decision, makes two arguments: first, that nude dancers convey no message because they do not *intend* to convey a message; and second, that nude dancing simply has no artistic merit.[200] Thus, he maintains, nude dancing is merely conduct.[201] Implicit in both arguments is an assertion that courts can and should engage in line drawing to determine whether expressive conduct is "worthy" enough to be afforded protection under the First Amendment, either by ascertaining the expressive intent of the dancer or by judging the quality of the performance. Both arguments fail because this assertion indulges pure judicial elitism: the notion that judges should dole out constitutional protection according to their own personal aesthetic and artistic taste.[202]

199. *Id.* at 1124 (Easterbrook, J., dissenting) ("Go-go dancing is not 'speech'. . . . Parading in a state of undress is conduct, not speech.").

200. *Id.* at 1125–27.

201. *Id.* at 1124–26.

202. *See* Harrold, *supra* note 170, at 408–19.

The "intent" argument fails at the outset because the subjective intent of *any* performer cannot serve as a principled basis for determining whether a performance is "expressive" and thus subject to First Amendment protection. Judge Easterbrook relies on statements by the nude dancers in the *Barnes* case that they were not trying to express anything, but were merely attempting to get better tips and sell more drinks.[203] In this respect, however, the dancers are not necessarily distinguishable from many "mainstream" artists and performers. Musicians in a rock band on a long tour are likely not trying to express anything by the time of the thirty-eighth show in Peoria; rather, they could be just going through the motions, which have been so perfected that the audience would be unable to tell if the band was merely "phoning it in." Classical musicians in a symphony orchestra do not struggle to convey particular messages to the audience in their hundredth performance of Beethoven's *Fifth Symphony*. The musicians could be (and often are) thinking about where they are going for dinner after the concert or when they are getting paid, rather than expressing emotions and ideas.[204] Indeed, the musicians essentially read notes off of a page and perform the corresponding physical actions with accuracy; no intent to express anything is required. Similarly, a dancer in the Joffrey's *Nutcracker* could very well perform with no conscious thought whatsoever by the end of her tenth annual five-week run. Yet most people would easily label the above performances "expressive." In short, for *any* kind of expressive activity, basing a First Amendment inquiry on the subjective intent of the person engaging in the expression would lead to highly unreliable results. The only way to credit subjective intent is to assume that nude dancing has nothing in common with the kind of performances illustrated above.[205]

Yet Judge Easterbrook is comfortable treating nude dancing differently from other types of performance: "Barroom displays are to ballet as white noise is to music."[206] He characterizes nude dancing as nothing more

203. *Civil City of South Bend*, 904 F.2d at 1125 (Easterbrook, J., dissenting); Glen Theatre, Inc. v. City of South Bend, 695 F. Supp. 414, 420–21 (N.D. Ind. 1988), *rev'd sub nom.* Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986) (dancers' statements in the district court's findings of fact).

204. This is not pure speculation; I draw here on my own experience as a former professional symphonic musician.

205. One could attempt to distinguish a strip tease from "high art" based on the intent of the dancer by taking a more sociological approach; namely, that nude dancers, unlike Joffrey dancers, do not really perform of their own free will, but are coerced into it by desperate financial circumstances or predatory males. No doubt some dancers are motivated by these circumstances. Absent hard evidence that this is the typical motivation for the overwhelming majority of nude dancers, however, this distinction would require the same highly unreliable case-by-case inquiry into the subjective intent of the dancer. Aside from lurid tales on late-night cable television, there is little evidence that nude dancers are routinely forced to strip. One must assume, without evidence to the contrary, that whatever the dancer's personal circumstances, she dances of her own free will.

206. *Civil City of South Bend*, 904 F.2d at 1126 (Easterbrook, J., dissenting).

than "naked women gyrat[ing] in the pub," and condescendingly labels the viewing audience "Joe Sixpack."[207] He declares that courts can and should draw lines based on artistic merit to "distinguish serious art from swill."[208] One should, he argues, credit the difference between a painting by Rembrandt and "a bucket of paint hurled at a canvas."[209] His second test for First Amendment protection, it would seem—after ascertaining subjective expressive intent—is whether the court thinks the expression has value. As one commentator puts it, "Judge Easterbrook only finds expression where he himself gets the message."[210]

In the same decision, Judge Posner forcefully rebuts this line-drawing approach. He acknowledges that the Indiana strippers may not have given performances of the highest artistic quality: "The dancers are presentable although not striking. . . . They dance . . . with vigor but without accomplishment . . . ."[211] Nonetheless, "aesthetic quality cannot be the standard that judges use to determine which erotic performances can be forbidden and which cannot be."[212] He notes that there are simply "no objective standards of aesthetic quality . . . ."[213] The difference between an acknowledged "artistic" presentation of a nude female body and the dancers at the Indiana club "is not a difference in kind; it is not a difference between expressive and non expressive activity; . . . It is a difference in aesthetic quality" that cannot serve as a basis for justifying suppression of expression.[214] Whatever the artistic merits of nude dancing, it cannot be considered devoid of expression: "If the striptease dancing at the Kitty Kat Lounge is not expression, Mozart's piano concertos and Balanchine's most famous ballets are not expression."[215]

As one illustration, Judge Posner compares a typical strip tease with the "Dance of the Seven Veils" from the opera *Salome* by Richard Strauss.[216] The comparison is apt. The basic elements of the *Salome* dance and a striptease are identical: (1) the woman dances in a provocative manner, (2) accompanied by music, and (3) gradually removes her clothing

207. *Id.* at 1125.

208. *Id.* at 1126.

209. *Id.* at 1125. This approach would take the paintings of Jackson Pollock—a highly regarded and influential figure in contemporary art—entirely out of the realm of expression. *See* Harrold, *supra* note 170, at 416–17.

210. Harrold, *supra* note 170, at 416.

211. *Civil City of South Bend*, 904 F.2d at 1091 (Posner, J., concurring).

212. *Id.* at 1098.

213. *Id.*

214. *Id.* at 1095.

215. *Id.* at 1093.

216. *Id.* at 1094, 1103.

until she is totally nude.[217] One can be labeled superior to the other only on the basis of a personal preference as to the artistic merit of the particular method used in each element. For instance, the dance elements in *Salome* are usually choreographed by the production's artistic director, whereas the striptease is likely choreographed by the dancer herself. Whether one dance is "better" than the other is a matter of taste, and given that the role of Salome is played by an opera singer with likely little or no experience in professional dancing—let alone erotic dancing—it is not implausible that the stripper will give a "superior" dancing performance. Similarly, one could argue that the music of the dance is distinguishable, for in *Salome* the dance is accompanied by music composed by a master of the classical idiom, while a strip tease is likely to feature the strains of a thumping dance or hip-hop mix. Nonetheless, both are music; the only way to distinguish the two is to make an artistic judgment that Strauss is "better" than dance music or hip-hop—a judgment that, given the present popularity of 50-Cent in comparison to *any* classical composer, is not automatic. Finally, it does not at all follow that the dancer's state of total nudity at the end of the "Dance of the Seven Veils" is superior to that of the stripper. In fact, given that opera singers are known more for the attractiveness of their voices than their figures,[218] whereas strippers are featured precisely *because* of their physical attributes, the end result is likely to be far "superior" at the Kitty Kat Lounge than at the Chicago Lyric Opera. A contrary conclusion can only be supported by a judge's own personal opinion that the "Dance of the Seven Veils" is more to his liking, or that the striptease is so "low-brow" that it is not even in the same league. Both opinions rest on nothing more than aesthetic judgments based on personal taste.[219]

217. Some performances of *Salome* use a transparent body stocking instead of total nudity. *See id.* at 1103. Using such a stocking would not satisfy the Indiana statute in *Barnes* because it is not an "opaque" covering, *see supra* note 44, nor the Erie ordinance in *Pap's A.M.*, which prohibited not only nudity but "devices" intended to simulate nudity, *see supra* note 93.

218. *See* Robin Pogrebin, *Soprano Says Her Weight Cost Her Role in London*, N.Y. TIMES, Mar. 9, 2004, at E1 ("The renowned soprano Deborah Voigt has been dropped from a production featuring her signature role at the Royal Opera House at Covent Garden in London because, she says, she was deemed too big for a little black dress.").

219. One could argue that judges are allowed—and in fact are instructed—to make these kinds of determinations when evaluating material under the obscenity standard. *See Civil City of South Bend*, 904 F.2d at 1126 (Easterbrook, J., dissenting). Certainly, a determination whether an obscene work can be "redeemed" by its aesthetic quality requires an artistic or aesthetic judgment. This judgment is applied, however, to works that have already been determined to be "worthless" and outside of First Amendment protection; the aesthetic judgment is not the basis for the First Amendment exclusion. Thus, although aesthetic judgment is utilized as part of the test for obscenity, it is not—and should not—be the basis for determining whether *non*obscene material is "expressive" or is merely conduct. *See id.* at 1098 (Posner, J., concurring) ("[W]hile we allow obscene works to be 'redeemed' by 'evidence' of aesthetic quality, it hardly follows that we should allow works that are not obscene to be condemned on the basis of evidence suggesting a lack of aesthetic quality.").

This is not to say that a strip tease and the "Dance of the Seven Veils" are indistinguishable. The context, setting, and expectations of the audience are obviously quite different for each. But "different" is not the same as "better." The above illustration demonstrates that when "better" serves as the legal standard for First Amendment protection, the determination necessarily turns on individual preferences of merit.[220] Americans would likely be uncomfortable with the notion that a determination of what art they are allowed to enjoy is based on judges' personal tastes. Moreover, the art that Judge Easterbrook, for example, considers to be worthy of First Amendment protection—Strauss's "Dance of the Seven Veils", Bach's *Mass in B Minor*, Stravinsky's *Agon*[221]—is not the kind of art that most Americans enjoy. Indeed, Americans spend more money at strip clubs than at the opera, ballet, theatre, and jazz and classical music performances *combined*.[222] Judges should not dole out First Amendment protection to activities that they personally consider worthy, rather than to those that the "unwashed masses" might prefer. If Judge Easterbrook's approach were followed, the result would be the worst kind of elitist, arrogant, and "activist" First Amendment jurisprudence.

Thus, nude dancing is not mere "conduct." It is an expressive activity that conveys a message of sexual desire and availability, perhaps in conjunction with an expression of appreciation of the nude female body. Any assertion that nude dancing—or any kind of dancing, for that matter—is invariably nothing more than nonexpressive "conduct"[223] is simply off base. Although one can argue that this message may not exist in all instances of nude dancing, the only way to distinguish nude dancing from mere conduct on the basis of circumstance is either to inquire into the subjective intent of the dancer, or to make an aesthetic judgment of the dance itself. The intent-based approach fails because subjective intent is an unreliable basis for determining whether a message is expressed by *any* kind of

220. Judge Easterbrook is not alone in his indulgence of personal aesthetic taste. The plurality opinions in both Supreme Court nude dancing cases made similar, if less blatant artistic determinations: in *Barnes v. Glen Theatre, Inc.*, Chief Justice Rehnquist declared that G-strings and pasties had no effect on the message other than rendering it "slightly less graphic," 501 U.S. 560, 571 (1991), while in *City of Erie v. Pap's A.M.*, Justice O'Connor similarly decided that the devices would have only a "de minimis" effect on the expression, 529 U.S. 277, 294 (2000), and that they would leave "ample capacity to convey the dancer's erotic message," *id.* at 301. One can only wonder on what basis the two Justices made these aesthetic judgments. Did they do a side-by-side comparison of nude dancers versus pasty-clad dancers? Probably not.

221. *Civil City of South Bend*, 904 F.2d at 1125 (Easterbrook, J., dissenting).

222. *See* Margot Rutman, *Exotic Dancers' Employment Law Regulations*, 8 TEMP. POL. & CIV. RTS. L. REV. 515, 516 (1999).

223. *See Barnes*, 501 U.S. at 577 n.4 (Scalia, J., concurring); *Civil City of South Bend*, 904 F.2d at 1123 (Easterbrook, J., dissenting).

conduct, including mainstream artistic performances that are commonly considered "expressive." The aesthetic approach fails because it relies on nothing more than the personal taste of judges or government officials. Such personal preferences should not be the basis for deciding whether a nonobscene activity receives First Amendment protection. The "I know it when I see it"[224] approach might work for some determinations of obscenity, but nude dancing is not considered obscene.[225] Therefore, as most of the Justices in *Barnes* and *Pap's A.M.* recognized, nude dancing is "expressive conduct" that clearly falls within the protection of the First Amendment.

B. Is Nude Dancing "Low Value" Speech That Should Be Afforded Less First Amendment Protection?

The question remains, however, whether nude dancing should be afforded something less than full First Amendment protection. Clearly the Court believes so, in light of the references to the "outer ambit" and "outer perimeters" of the First Amendment. This section will discuss why nude dancing is likely considered to be of "low value," and whether that label is justifiable.

1. Nude Dancing at the "Outer Ambit" of the First Amendment

The Supreme Court has consistently maintained that nude dancing is entitled to less protection than other types of speech. The Court has not, however, explicitly said why. As noted above, Chief Justice Rehnquist in *Barnes* declared without explanation that nude dancing fell within the "outer perimeters of the First Amendment," and even then "only marginally so."[226] Justice Souter waxed poetic about the expressive qualities of nude dance, but gave no reason for nonetheless labeling it less worthy of protection than political speech.[227] Justice O'Conner in *Pap's A.M.* similarly and inexplicably relegated nude dancing to the "outer ambit of the First Amendment's protection."[228]

Curiously, the Court has never used the terms "outer ambit" or "outer perimeter" in any First Amendment case other than *Barnes* and *Pap's A.M.* The language appears to be limited to the nude dancing context. Moreover,

224. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart J., concurring).

225. *Civil City of South Bend*, 904 F.2d at 1091 (Posner, J., concurring) ("Thirty years ago a striptease that ended in complete nudity would have been thought obscene. No more.").

226. *Barnes*, 501 U.S. at 566.

227. *Id.* at 581, 584 (Souter, J., concurring).

228. City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000).

it appears that only two Courts of Appeals have used the term "outer perimeter" in First Amendment contexts. The Second Circuit, holding an anti-loitering statute unconstitutional, rejected the argument that begging was entitled only to the "'minimal protection' afforded by the 'outer perimeters of the First Amendment.'"[229] The D.C. Circuit used the term in reference to the Ku Klux Klan, similarly holding that the Klan's message could not fall only within the "outer ambit": "the Klan's expressive activity here, however characterized . . . cannot be relegated to any 'outer perimeter[]' of the First Amendment."[230] Thus, not only has the Supreme Court carved out a special "outer ambit" niche for nude dancing, but other courts have explicitly declined to place other, more disagreeable activities in that niche. Why, then, is nude dancing seen as somehow less worthy of First Amendment protection, and so much so that it deserves its own special category in which it receives less protection than that afforded to street begging and racist hate speech?

A clue can be found in the liberal use, in both *Barnes* and *Pap's A.M.*, of a particular quote from *Young v. American Mini Theatres, Inc.*[231] In *American Mini Theatres*, where the Court upheld under the secondary effects doctrine a Detroit zoning ordinance that regulated the location of adult theaters, Justice Stevens declared that sexual-themed speech was "low value" speech and thus entitled to less First Amendment protection than political speech:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a *wholly different, and lesser, magnitude* than the interest in untrammeled political debate. . . . [F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.[232]

Justice Souter uses the "wholly different" language in his *Barnes* concurrence,[233] and Justice O'Connor adds the full "sons and daughters off to war" treatment to her plurality opinion in *Pap's A.M.*[234]

Clearly, then, the "outer ambit" is reserved for expression that is sexual in nature, and nude dancing must be banished there because its message

229. Loper v. New York City Police Dept., 999 F.2d 699, 701, 704–06 (2d Cir. 1993).

230. Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. District of Columbia, 972 F.2d 365, 371–72. (D.C. Cir. 1992) (quoting *Barnes*, 501 U.S. at 566).

231. 427 U.S. 50 (1976).

232. *Id.* at 70 (emphasis added).

233. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 584 (1991) (Souter, J., concurring).

234. City of Erie v. Pap's A.M., 529 U.S. 277, 294 (2000). Justice Stevens, dissenting in *Pap's A.M.*, declined to refer to his own famous language, even while discussing *American Mini Theatres*. *Id.* at 319–20 (Stevens, J., dissenting).

is a sexual one. If nude dancing is expressive—as the Court consistently acknowledges—and if "erotic materials" are "low value" speech, then nude dancing is afforded less protection because it expresses an erotic message. Thus, implicit in the Court's treatment of nude dancing is a determination that sexual or erotic messages, however expressive, are of little value. Sexual or erotic messages, it seems, are deemed distasteful and unworthy—more distasteful, even, than the Ku Klux Klan.

2. The Moral Objection

The likely source of this distaste is morality. In any discussion of nude dancing, morality is the elephant in the room: everyone knows that moral disapproval of nudity and sexual expression through nudity is the actual intent of attempts to regulate nude dancing, but no one (except perhaps Justice Scalia) comes right out and says so. One cannot, for moral disapproval of protected expression has never been a valid basis for restricting speech. Indeed, even when moral disapproval is the stated purpose of the restriction, as in the Erie ordinance in *Pap's A.M.*, attempts are made to dance around the issue through "secondary effects," or "it's-conduct-not-speech" arguments. But the real reason behind the restriction is always lurking in the wings: nude dancing is, in the words of the Erie city council, "lewd and immoral."[235] It is this moral objection that has led to the determination that the sexual message expressed through nude dancing is of such little value that it is deserving of such little First Amendment protection. And just as a moral objection cannot serve as a principled basis for excluding an activity from the First Amendment, neither should it justify banishing it to the "outer ambit."

Americans are uncomfortable with nudity and sexual expression in general. Examples abound. When Janet Jackson exposed a breast during the halftime show at the 2004 Super Bowl, "American society seemed to some to be on the verge of crumbling"[236]—even though her nipple was shielded by precisely the kind of covering that would prevent her from violating the regulations in *Pap's A.M.* and *Barnes*. In the midst of the War on Terror, Attorney General Alberto Gonzales has identified as a "top priority" a crackdown on obscenity—not child pornography, but that which depicts and is marketed to consenting adults.[237] In 2002, then-Attorney

235. Kopf, *supra* note 144, at 832.

236. Bradley J. Shafer & Andrea E. Adams, *Jurisprudence of Doubt: Obscenity, Indecency, and Morality at the Dawn of the 21st Century*, MICH. B. J., June 2005, at 22, 22.

237. Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST, Sept. 20, 2005, at A21. In response, one FBI agent sarcastically remarked, "I guess this means we've won the war on terror." *Id.*

General John Ashcroft ordered that a statute depicting Justice in the press room of the Justice Department be covered by a blue curtain because the statute was partially nude under a toga.[238] Meanwhile, nudity and sexual content trigger adult ratings on television and in movies, while extreme violence gets a pass.[239]

It is not difficult to see why nude dancing would trigger the moral objection. The moral objection to nudity is likely not to nakedness *per se*. After all, we are all naked at some point. We strip to take showers, when visiting the doctor, or to go skinny-dipping on a warm summer night. And aside from John Ashcroft and a vocal few on the fringe, most of us have no problem with nude statutes or paintings in museums. What likely triggers the moral objection is nudity when it is associated with sexuality in particular.[240] Nudity that is suggestive of a desire for sex appears to cause the most commotion. Had Janet Jackson's "wardrobe malfunction" occurred accidentally as she was merely walking off the stage after the song, few would have objected. But because her breast was exposed when Justin Timberlake tore off her garment during a song that was itself suggestive of sex, the nudity became sexualized. This association of nudity with sex caused the uproar, rather than the mere fact that her breast was (partially) revealed.

Nude dancing, of course, *relies* on this association. As discussed above, nude dancing conveys, through nudity, as a message of sexual desire and availability. Although it can also express a celebration of the female body, the primary message is that the dancer is thinking about sex, desires sex, and is available for sex.[241] The association between nudity and sexuality is not incidental to the activity; it is the whole point of the expression. If the moral objection is strongest when nudity is suggestive of sexuality, then nude dancing—which has as its very goal the suggestion of sexuality—pushes all the right buttons.

But First Amendment protection cannot be denied to an expressive activity that would otherwise be shielded simply because of the moral discomfort of a number of citizens—even if that number is great. While nothing prohibits the government from regulating an activity based on the

238. Maureen Dowd, Op-Ed., *A Blue Burka for Justice*, N.Y. TIMES, Jan. 30, 2002, at A27.

239. *See* Michael Phillips, Commentary, *"Zorro" Slashes Logic of Movie Ratings System*, CHI. TRIB., Oct. 30, 2005, § 7, at 4 (noting that the movie *The Legend of Zorro*, which featured "gross butchery" and several brutal deaths was rated PG, while nudity and sex invariably trigger stricter ratings).

240. As the Erie council member remarked, "We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." Kopf, *supra* note 144, at 832.

241. *See* Miller v. Civil City of South Bend, 904 F.2d 1081, 1091 (7th Cir. 1990) (en banc) (Posner, J., concurring), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

moral objections of dominant political groups, the government can only regulate up to the point at which the activity is protected by the First Amendment.[242] And once an activity is sufficiently imbued with elements of expression, it falls within the First Amendment.[243] A moral objection thus cannot be a basis for excluding an expressive activity from First Amendment protection altogether.[244] As the Court stated in *Texas v. Johnson*, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[245]

There is no principled reason why a moral objection that cannot serve as a justification for excluding an expressive activity from the First Amendment should be able to justify affording that activity something less than full protection. If moral disapproval of nudity and the message of sexual desire and availability expressed by nude dancing is insufficient to exclude nude dancing from the First Amendment, then that same moral disapproval should not be a basis for relegating it to the "outer ambit" like a sinner banished to one of Dante's Circles of Hell. If morality cannot strip nude dancing of protection altogether, it should not suffice to weaken that protection. As one commentator has observed, "Obviously, something is wrong here. If speech is protected, even low value speech, it cannot be precluded simply because it is immoral."[246]

Moreover, a good deal of this discomfort is grounded in religion. As Judge Posner points out, "Anxiety about nudity has deep roots in Christian thought, . . . and the roots of our culture are Christian."[247] If religion is indeed the source of hostility to the message expressed by nude dancing, then attempts to restrict nude dancing on this basis might implicate the Establishment Clause of the First Amendment as well.[248] In short, if nude dancing cannot be excluded from the First Amendment altogether on moral

242. *Id.* at 1104.

243. Spence v. Washington, 418 U.S. 405, 409 (1974).

244. In *Barnes*, Chief Justice Rehnquist used the moral objection as the governmental interest under *O'Brien* after finding that nude dancing was protected by the First Amendment; he did not attempt to use morality to deny First Amendment protection in the first place. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569–72 (1991). Similarly, Justice Scalia would have used an interest in morality to uphold Indiana's statute under a rational basis test, but that was *after* he determined that nude dancing was mere "conduct" and not subject to First Amendment protection at all. *Id.* at 580 (Scalia, J., concurring).

245. 491 U.S. 397, 414 (1989).

246. Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195, 219 (2001).

247. *Civil City of South Bend*, 904 F.2d at 1104 (Posner, J., concurring) (citations omitted).

248. U.S. CONST. amend. I. An in-depth discussion of the Establishment Clause is well beyond the scope of this Note.

grounds—and clearly it should not be—then morality cannot justify affording nude dancing a lesser degree of protection. The moral objection alone cannot justify a determination that nude dancing is "low value" speech.

3. The Value of Nude Dancing and a Feminist Objection

Although any determination on moral grounds that nude dancing is of "low value" and must receive only minimal First Amendment protection cannot hold as a matter of principle, the message expressed by nude dancing must have at least some positive value to overcome the sheer force of the moral objection. As noted above, nude dancing expresses an erotic message of sexual desire and availability, along with, perhaps, an appreciation of the nude female form. It is worth exploring the value of this message.

Erotic expression in a general sense is valuable to society. On a biological level, messages that stimulate sexual feelings are positive, for anything that encourages sex and procreation furthers the species. On an emotional level, sex can and should be a pleasurable activity that can serve as a major component of personal happiness. Moreover, the value of erotic expression finds support in First Amendment theories such as the "marketplace of ideas" and the theory of self-realization or self-fulfillment.[249] The marketplace theory might seem inapplicable at first, but it depends on how that marketplace is defined. If the marketplace is confined to concrete "ideas," then all artistic expression—erotic or not—is excluded; but if it is understood to encompass expressive activity concerned with emotions as well as ideas, then music, art, and dance are part of the marketplace as well.[250] Erotic performance, with its expression and stimulation of sexual emotion that forms a major part of our emotional lives, would necessarily be a valuable addition to the marketplace.[251] Similarly, erotic expression is valuable under a theory of self-realization, for a deeper understanding of one's sexuality can and often does lead to a deeper understanding of one's self.

249. *See* Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (introducing the theory of the marketplace of ideas); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (self-realization or self-fulfillment theory). Erotic expression likely finds no support, however, under a theory that speech is protected if it is likely to bring about political or social change. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) ("Constitutional protection should be accorded only to speech that is explicitly political."). Of course, little artistic or literary expression is supported by this theory. *Id.* at 27–28.

250. *Civil City of South Bend*, 904 F.2d at 1097–98 (Posner, J., concurring).

251. *Id.*

Thus, if the message expressed by nude dancing is to be devalued, there must be a principled way of distinguishing nude dancing from other types of erotic expression.[252] As discussed above, no principled distinction can be made on the basis of the intent of the dancer to express a message, or of the aesthetic qualities of the dance itself.[253] A possible way of distinguishing nude dancing can be found, however, in terms not of the intent of the dancer, but in terms of her personal autonomy and value as a human being. As noted above, the message expressed by nude dancing indulges male sexual fantasies. Thus, while the dancer's *intent* may or may not be to express the message of sexuality, her *purpose* is not expression, but the satisfaction of others. Here, the self-realization theory fails; the dancer does not attempt to come to any deeper understanding of herself, but rather assists in the self-realization of the men in the audience. She then becomes a mere tool, used as a means for others to gratify themselves. In the Kantian sense, this would seriously undermine the value of nude dancing.

Moreover, the dancer is not only being used for the purposes of others, but she is dehumanized. She becomes an object, devoid of personality, existing only for the purpose of gratifying a male sexual fantasy.[254] Not only does this devalue her as a person, but it contributes to the dehumanization and objectification of women in general. In the pornography context, some have argued that this kind of global dehumanization and objectification leads to sexism, repression of women, and even violence against women.[255] Certainly, the argument applies to "live" instances of objectification such as nude dancing, as well as to pornography on film or in magazines.[256]

This argument is not unpersuasive. There are, however, two fatal flaws. First, once again, it is difficult to distinguish nude dancing from other, more "mainstream" artistic performances. To some extent, *all* artistic performances exist for the purpose of the gratification of those in the audience; *all* performers are used as a means to serve the ends of others. The

252. *Id.* at 1098.

253. *See supra* Part II.A.2.

254. *See* Harry M. Clor, *Obscenity and Freedom of Expression*, *in* CENSORSHIP AND FREEDOM OF EXPRESSION 97, 101–02 (Harry M. Clor ed., 1971) (arguing that pornographic nude portrayals present the woman "as nothing more than an object for the gratification of the viewer's passions. She is not a woman but a plaything. All the indicators of human personality have been removed from the picture.").

255. *See, e.g.*, Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 16–20 (1985).

256. MacKinnon's definition of "pornography" includes where "women are presented dehumanized as sexual objects, things, or commodities; . . . [or] presented in postures of sexual submission, servility or display . . . ." *Id.* at 1 n.1. Thus, nude dancing would be considered pornography under MacKinnon's definition if that definition were not limited to "pictures and/or words." *See id.* Of course, a videotape of a nude dance would bring it within the definition.

audience member at a Chicago Symphony Orchestra performance does not view the third-chair second violinist as a human being who is to be valued for her personality; rather, she exists for the purpose of playing the right notes and satisfying the audience member's desire to hear a good performance of a symphony by Mahler or Brahms. Similarly, a dancer at the Joffrey Ballet could be expressing a message of sexual desire, akin to that of a dancer at the Kitty Kat Lounge; but the audience member does not necessarily see the Joffrey dancer as more of a "person" than the stripper. Both are used, and both are mere tools for expressing a message. If this would be grounds for devaluing speech, then much artistic expression would be automatically devalued.[257]

Second, even if the dehumanization and objectification of women at strip clubs could serve as a way of limiting or even denying First Amendment protection to nude dancing, what would be the remedy? Certainly, pasties and a G-string would fail to "re-humanize" the dancer. The only solution would be to prohibit erotic dancing at strip clubs altogether, along with any other kind of erotic expression that treats women as objects rather than as persons. Belly dancing would be banned. Modern ballet would be policed to ensure that any kind of erotic message contained enough elements of narrative to prevent objectification of the dancers. In short, the only way to address the perceived evil would be through the much greater evil of wholesale censorship.

Thus, the "objectification" argument fails to serve as a justification for characterizing nude dancing as "low value" speech.[258] In light of this fail-

257. Despite the rhetoric regarding the evils of the objectification of women, it should be noted that society has not deemed objectification to be a *per se* evil. Both men and women continually objectify and are objectified in popular culture: men objectify Angelina Jolie, and women objectify Brad Pitt. Whatever the merits of MacKinnon's arguments—a discussion of which is beyond the scope of this Note—her vilification of objectification has not gained widespread popular acceptance.

258. An argument could be made that the prevention of the dehumanization and objectification of women can serve as a "substantial government interest" under *O'Brien*. The problem again appears at the remedy stage, however, for the only way to "further" that interest would be banning erotic dance altogether—G-strings and pasties would do little to prevent objectification. Far from having only "incidental effects" on expression, this would eliminate expression altogether, something *O'Brien* is not intended to sanction.

For an entirely different feminist analysis of the nude dancing cases, see Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005). Professor Adler, viewing *Barnes* and *Pap's A.M.* through a psychoanalytical and feminist lens, argues that the Supreme Court acted on "a foundation of sexual panic driven by dread of female sexuality." *Id.* at 1110–11. In particular, she focuses on the ubiquitous G-string requirement in light of Freud's theory of castration anxiety, in which the exposed vagina signifies a "terrifying threat of castration to the male viewer." *Id.* at 1129–31. The G-string, she concludes, is a "perfect fetish" that "hides what is most important, the wound of castration." *Id.* at 1136. Although Professor Adler's theory is provocative and intriguing, she does not explain how Justice Sandra Day O'Connor—the author of the plurality opinion in *Pap's A.M.*—could have been thus affected.

ure, and given the similar failure of the moral objection, the "intent of the dancer" argument, and the aesthetic distinction, there appears to be no principled basis upon which to deny nude dancing full First Amendment protection.

CONCLUSION

Nude dancing is an awkward fit with the First Amendment. Current doctrinal analysis would appear to leave little choice but to subject the regulation of nude dancing to strict scrutiny—the same level of judicial scrutiny applied to political speech. It is understandable, however, that some might have difficulty extending the full protection of the First Amendment to an activity that may seem like mere "conduct" to some, low class and aesthetically unworthy to others, and simply "lewd and immoral" to many more. Indeed, the issue seems tailor-made for the "culture wars" and the battleground of "moral values." My intent has not been to belittle these objections, but merely to illustrate their inability to justify restrictions on a powerful, particular, and ultimately legitimate form of expression.

Of course a person is entitled to be worried that their property values might decrease if they live next to a strip club; and of course every citizen has the right to their opinion that public sexual expression through nudity is immoral. These concerns, however, fail to justify the abridgment of expression. If the worry is over property values and crime, the solution is zoning—a remedy that regulates where the expression may occur, but not the expression itself. If the concern is over immorality, the solution is even simpler: do not go to a strip club. After all, strippers do not routinely force their way into our homes and hold us hostage while they disrobe in front of our horrified children. The audience at strip clubs consists of consenting adults. If nude dancing is restricted, these consenting adults will be deprived of expression they seek; but if nude dancing is permitted, those who object on moral grounds need not be affected at all.

James Madison may not have had nude dancing in mind when he drafted what would become the First Amendment. He was concerned, however, as were all the Founding Fathers, with matters of liberty and tyranny. Political tyranny and "moral" tyranny are not entirely different animals; the tyranny that occurs when one group of citizens forces its moral views on the rest is no less a threat to liberty than political repression. Pasties and G-strings may seem a small, almost insignificant restriction. But there exists the very real danger that such restrictions are but the first step

on the road to "institutionalized puritanism."[259] Whichever side one chooses in the "culture wars," no American should be comfortable with that particular path.

259. Miller v. Civil City of South Bend, 904 F.2d 1081, 1098 (7th Cir. 1990) (en banc) (Posner, J., concurring), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).