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BY DAVID L. HUDSON JR.

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David Hudson is research attorney at the First Amendment Center. Hudson writes for the Freedom Forum Online and for other publications devoted to First Amendment issues.

Hudson is a First Amendment contributing editor for the American Bar Association's *Preview of United States Supreme Court Cases*. His articles have been published in *The National Law Journal*, the *ABA Journal* and the *Tennessee Bar Journal*. He is a member of the First Amendment Lawyers Association.

Hudson graduated from Duke University in 1990 and obtained a law degree from Vanderbilt University School of Law in 1994. He has been licensed to practice law in the state of Tennessee since 1994.

After working as a judicial law clerk, Hudson joined the First Amendment Center in 1995. He also teaches classes in legal research, torts, ethics and employment rights at Southeastern Career College. Hudson has written books for young people on the Bill of Rights and the Fourteenth Amendment. He currently is working on a project on student free-speech issues.

Media appearances include interviews in *The New York Times*, *The Washington Post*, *USA TODAY*, *The National Law Journal* and on CNN.com.

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Adult Entertainment and the Secondary-effects Doctrine

How a zoning regulation may affect First Amendment freedoms

BY DAVID L. HUDSON JR.

Unlikely though it may seem, the fate of First Amendment freedoms is irrevocably connected to the ongoing struggle between purveyors of adult entertainment and defenders of public decency.

Supporters of the billion-dollar adult-entertainment industry argue that nude dancing contains the same elements of eroticism found in so-called "legitimate" theater and dance and therefore deserves no less First Amendment protection than more mainstream forms of expression. City officials counter that adult businesses lead to crime and lower property values by demeaning the quality of communities in which they locate; municipalities must be empowered to prevent blight and red-light districts, they say.

City officials wield an array of restrictions that can be levied on adult businesses. These include restrictions on zoning, licensing, clothing, hours of operation and patron-performer buffer zones, to name just a few.

When adult-club owners fight these regulations in the courts, cities are prone to pass new legislation, leading to more lawsuits and more regulations. The cycle has resulted in the development of a substantial body of First Amendment case law and doctrine, which serves to address the continuing tension between governmental efforts to regulate the adult-entertainment industry and the industry's attempts to claim First Amendment protections.

Even the U.S. Supreme Court has waded into the exotic-entertainment issue several times during the past two years, with cases involving a Pennsylvania nude-dancing club, an adult bookstore in Wisconsin, and two adult bookstores in California.

Many people do not understand why the removal of clothes by a dancer is a form of protected expression, but in fact the First Amendment protects many forms of controversial expression. A review of basic First Amendment principles and the history of erotic dance shows why the U.S. Supreme Court has ruled that regulation of nude dancing triggers First Amendment protections.

Traditionally, municipalities have responded to the proliferation of nude-dancing businesses by using zoning powers to stifle the industry's expansion. City officials have argued that these zoning restrictions are a reasonable means of land-use regulation. This has led to judicial creation of the secondary-effects doctrine, which allows government officials greater leeway to regulate nude dancing if they can show they are combating the allegedly harmful side effects (secondary effects) of adult businesses. The Supreme Court has extended the secondary-effects rationale beyond its original application in zoning cases, and city officials now use the law to justify myriad restrictions on the adult-business industry, including restrictions on the content of exotic performances. Many free-speech advocates claim that the secondary-effects doctrine has allowed municipal officials an easy path to censorship.[1]

I. How First Amendment doctrine applies to disrobing dancers

Basic First Amendment principles that relate to nude dancing are:

- The First Amendment protects more than political speech and the expression of lofty ideas.
- The First Amendment protects not only verbal communication but also certain forms of expressive conduct.
- The First Amendment protects expression that some people may find offensive or disagreeable.

- The First Amendment protects sexual expression as long as it does not meet the legal definition of obscenity.

THE FIRST AMENDMENT PROTECTS MORE THAN POLITICAL SPEECH

There's no question that protecting political speech is one of the core values of the First Amendment. Ensuring the right of the American people to criticize government was clearly a major concern of the founding fathers, many of whom had suffered for their criticism of the Stamp Act and other repressive policies by the British government. Many of the early free-speech cases in the 20th century involved political dissidents, such as socialists and anarchists who advocated the overthrow of the U.S. government.

However, the First Amendment protects far more than political speech. In 1948 the Supreme Court reversed the conviction of a New York bookseller who sold magazines that contained fictional stories of murder and bloodshed. In a ringing passage supporting freedom of speech, the Court wrote that it did not accept the argument that "the constitutional protection for a free press applies only to the exposition of ideas." In an oft-cited passage, the majority declared:

> *The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.*[2]

The First Amendment serves to protect speech on a wide variety of nonpolitical topics, including the arts and entertainment. In 1952 the Court extended protection to movies, dismissing the notion that all movies could be banned because of their negative influence on children.[3]

The Court has extended free-speech protection to such different types of speech as literature, art, music, plays, commercial advertising, television and several types of expressive conduct. The First Amendment serves as the blueprint for personal liberty. To restrict freedom of speech only to political matters would severely narrow the scope of liberty.

THE FIRST AMENDMENT PROTECTS MORE THAN VERBAL COMMUNICATION

The most common understanding of "speech" is verbal communication. But people can communicate a message in various ways without verbalizing their thoughts. We communicate through the clothes we wear (or don't wear), the signs we display, the bumper stickers we place on our vehicles and through certain types of conduct in which we engage.

In 1931 the U.S. Supreme Court struck down a California law that criminalized the display of red flags as an "emblem of opposition to organized government." The high court reasoned that government must allow "the opportunity for free political discussion" as a "fundamental principle of our constitutional system."[4]

The courts have determined that certain forms of conduct, called expressive conduct or symbolic speech, are entitled to First Amendment protection. In 1968 the Supreme Court considered the criminal case of David Paul O'Brien, who was convicted of violating a 1965 federal law prohibiting the knowing mutilation of a draft card. He argued that the law violated his First Amendment rights, because he had burned his draft card as a political protest against the Vietnam War and the mandatory draft system. The government contended that O'Brien was punished for his unlawful conduct, not for his speech.

In *United States v. O'Brien*, the Court developed a four-part test for conduct that contains speech and non-speech elements.[5] Under the *O'Brien* test, a regulation passes constitutional muster if:

- The government has the power to pass the regulation.
- The regulation furthers an important or substantial governmental interest.
- The government interest is unrelated to the suppression of free expression.
- The incidental restriction on alleged First Amendment freedoms is no greater than necessary.

The Court affirmed O'Brien's conviction, finding that the law was not designed to suppress free expression but to further important governmental interests in times of war, such as quick induction.

The next year, the Court ruled that several public school students in Iowa had engaged in speech when they wore black armbands to school to protest U.S. involvement in the Vietnam War.[6] The high court distinguished *O'Brien*, in part because the school authorities singled out black armbands for punishment. The Court did not apply the *O'Brien* test because the no-armband rule was intended to suppress free expression, unlike the federal law that prohibited all draft-card burning.

These decisions establish that the First Amendment applies to far more than an oration or literary text. People can communicate messages through their conduct alone.

THE FIRST AMENDMENT PROTECTS EXPRESSION THAT MANY PEOPLE MAY FIND OFFENSIVE OR DISAGREEABLE

The First Amendment, as part of the Bill of Rights, is counter-majoritarian. It protects the viewpoints of those in the minority from being oppressed by what Frenchman Alexis de Tocqueville termed the "tyranny of the majority."[7] The First Amendment serves a particular purpose in safeguarding viewpoints and expression that challenge the existing state of affairs.

Most of us engage in daily discourse in our personal lives without government intrusion. Throughout American history, however, many unpopular groups have challenged conventions and traditional social mores to try to effect change. Abolitionists, Jehovah's Witnesses, woman suffragists, socialists, Communists, civil-rights advocates and anti-abortion protesters have faced considerable public opposition and penalties for their speech.

For most of the 20th century, the Supreme Court recognized that controversial speech is the type of expression most in need of protection. In 1948 the Court overturned the breach-of-the-peace conviction of ex-priest Arthur Terminiello, who gave a racist speech denouncing Jews and African-Americans. The jury instructions at Terminiello's trial defined breach of the

peace as speech which "stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance."

Justice William Douglas responded that the purpose of speech is to invite dispute: "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[8]

Perhaps the best example of unpopular or offensive speech was highlighted in the flag-burning case of *Texas v. Johnson*.[9] When Gregory "Joey" Johnson burned an American flag outside the Republican National Convention in Dallas in 1984, authorities charged him with violating a Texas law that prohibited desecration of the flag if the perpetrator knew the act would "seriously offend one or more persons likely to observe or discover his actions."

Johnson was convicted and sentenced to one year in jail and a $2,000 fine. The U.S. Supreme Court reversed the conviction by a 5-4 vote. In oft-cited language, Justice William Brennan wrote: "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."[10]

As recently as 2000, Justice Anthony Kennedy wrote in *U.S. v. Playboy Entertainment Group* that the "history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."[11]

THE FIRST AMENDMENT PROTECTS SEXUAL EXPRESSION AS LONG AS IT DOES NOT MEET THE LEGAL DEFINITION OF OBSCENITY

Many people confuse the terms "pornography," "indecency" and "obscenity" when discussing sexual expression. Printed materials and other types of expression can discuss or even depict sexual activities and still not meet the legal definition of obscenity.

In First Amendment jurisprudence, the few categories of expression that receive no First Amendment protection include obscenity, fighting words,

child pornography and incitement to imminent lawless action. However, the Supreme Court has struggled mightily over the years to define obscenity. Justice Potter Stewart had such difficulty differentiating the obscene from the non-obscene that he could only write: "I know it when I see it."[12] Another justice referred to the issue as the "intractable obscenity problem."[13]

While materials that depict hard-core sexual conduct may well be obscene, the legal test for determining if they are has varied over the years. Most early U.S. courts followed the rule from the British case *Regina v. Hicklin*,[14] under which a book could be considered obscene if isolated parts of it were determined to be so.

In 1957 the U.S. Supreme Court changed the test for obscenity in *Roth v. United States*.[15] Under *Roth*, a work would not be considered obscene unless, taken as a whole, the material in question appealed to a prurient interest in sex, patently offended community standards and was "utterly without redeeming social value."

In 1973 the U.S. Supreme Court in *Miller v. California* laid out what it termed "basic guidelines" for jurors in determining whether certain material qualifies as legally obscene. These are:

- Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest.
- Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law.
- Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[16]

Prosecutors have targeted a wide range of expressive materials for obscenity charges, including literature, movies, museum art and nude dancing. However, much of the challenged material did not qualify as obscene because it had serious literary or artistic value.

First Amendment jurisprudence distinguishes between obscenity and a category of less graphic sexual expression, often called "indecency." In a 1989 dial-a-porn case, the U.S. Supreme Court wrote that "sexual expression which is indecent but not obscene is protected by the First Amendment."[17] The Court also has struck down federal laws criminalizing indecent speech in cyberspace and restricting indecent speech on cable television.[18]

The Court has recognized that nudity does not necessarily turn protected expression into unprotected obscenity. In *Jenkins v. Georgia* — the Supreme Court ruling that found the film "Carnal Knowledge" was not obscene — the conservative Justice William Rehnquist wrote that "nudity alone is not enough to make material legally obscene under the *Miller* standards."[19]

Nudity is commonplace, not only in exotic dance but also in musicals, plays, operas and artwork. The musicals "Hair," "Oh Calcutta!" and "Equus" feature nudity. Many other plays, such as "Star and Garter" and "The Naked Genius," include strippers as characters. Eve Ensler's play "The Vagina Monologues" focuses on female genitalia. Renée Cox's controversial "Yo Mama's Last Supper," which features a nude picture of the artist as Jesus, drew the ire of then-New York Mayor Rudolf Giuliani early in 2001.

It is clear from the Court's decisions that it believes the Constitution protects expressive conduct, even if such conduct is nonpolitical and offensive, and that it does not equate nudity with obscenity.

II. Dancing: a form of expressive conduct

Dance has roots in ancient history. The Greek poet Euripides described dance in the *Bacchae*. Aristotle wrote in the *Poetics* that the purpose of dance is "to represent men's character as well as what they do and suffer." The modern-day belly dance has been traced back to the Egyptians of the fourth century, and in ancient Rome, dancing was an integral part of the annual festivals Lupercalia and Saturnalia.

"Dance has biblical roots," according to one federal appeals court judge who cited the passages, "Let them praise his name with dancing, making melody to

him with timbrel and lyre!" (Psalms 149:3) and "Praise him with timbrel and dance" (Psalms 150:4).[20]

According to Lucinda Jarrett, author of *Stripping in Time: The History of Erotic Dancing*, "the censorious nature of Christianity has meant that sexual dance flourished in the East long before it emerged in Europe and America."[21]

By the 19th century, however, Spanish gypsies were dancing the erotic flamenco in the cafes of Europe, and nude showgirls were performing in Parisian music halls.[22] England's Windmill Theatre featured such shows as "My Bare Lady," "She Strips to Conquer" and "Yes We Have No Pyjamas."[23]

So-called "leg shows" were introduced into the opera houses of the United States after the Civil War. Many Americans first witnessed Middle Eastern belly dancers at the 1893 Chicago World's Columbian Exposition. Nude dancers graced the stage in Florenz Ziegfield's revues in New York City during the 1920s, and cheaper burlesque shows could be found at less glamorous locations. While many of the latter were raided, the so-called "legitimate" theater survived unscathed.[24]


Judith Hanna

The 1930s and '40s featured famous striptease artists such as Blaze Starr and Gypsy Rose Lee, and the '50s and '60s witnessed the growth of striptease acts and topless go-go dancers. According to dance expert and cultural anthropologist Judith Hanna, "the 20th century placed the fully nude body into 'high art' theater dance — and moved exotic dance towards the mainstream."[25]

Hanna, who has served as an expert witness in numerous adult-club cases, says that "nude dancing in any kind of performance both reflects and configures a society's attitudes toward the body and its presentation."

She explains: "Nudity in exotic dance communicates messages of freedom, independence, gender equality, acceptance of the body, modernity, historical tension between how the body was revealed in the past and is revealed now, empowerment, a break with social norms and challenge to the status quo."[26]

III. The courts and nude dancing

EARLY COURT DECISIONS

Early on, the courts granted city officials broad discretion to prevent expressive activity that they considered lewd or indecent. However, some courts acknowledged that the process of determining whether or not something qualified as lewd was highly subjective. For example, in 1953 the future U.S. Supreme Court Justice Brennan wrote in an opinion for the New Jersey Supreme Court that: "The standard 'lewd and indecent' is amorphous. … There is ever present, too, the danger that censorship upon that ground is merely the expression of the censor's own highly subjective view of morality unreasonably deviating from common notions of what is lewd and indecent, or may be a screen for reasons unrelated to moral standards."[27]

In that decision, the New Jersey court ruled that Newark city officials had violated the First Amendment by denying a theater license to someone they feared would stage indecent burlesque shows. The court reasoned that the performance of a burlesque show was a form of speech entitled to protection under the federal and state constitutions.

In the late 1960s, a few courts began to recognize that nude dancing was a form of expressive conduct meriting some degree of First Amendment protection. In 1968 the Supreme Court of California ruled that it was "potentially a form of communication protected against state intrusion by the guarantees of the First Amendment."[28] The California high court quoted the definitions of dance listed in the Encyclopedia Britannica and the Century Dictionary, noting that "the very definition of dance describes it as an expression of emotions or ideas."

The California case that prompted this decision involved a topless dancer named Kelley Iser and Albert Giannini, owner of the nightclub where she danced. The two had been charged and convicted of willful and lewd exposure. Under state law, lewd conduct was considered obscene.

Giannini and Iser appealed their convictions, arguing that the dancing was a form of expression protected by the First Amendment. The state attorney

general who argued against their position maintained that topless dancing has no social value and is obscene.

In deciding for the dancer and club owner, the California court noted that the First Amendment protects more than political speech. "Thus, the First Amendment cannot be constricted into a straitjacket of protection for political expression alone," the court wrote. "Its embrace extends to all forms of communication, including the highest: the work of art."[29] The First Amendment applies to many different communications media, including motion pictures and various other types of entertainment, said the court, which reasoned that Iser's dance, no matter how vulgar, communicated a message to her audience.

The final question for the court was whether Iser's dance constituted obscenity. The court threw out the convictions because the prosecution failed to introduce evidence about community standards, a factor which the Supreme Court had emphasized since *Roth*. "To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene such conduct or material as is personally distasteful or offensive to the particular juror," the California court wrote.[30]

U.S. SUPREME COURT ON NUDE DANCING

The Supreme Court initially addressed the issue of First Amendment protection for nude dancing in its 1972 decision *California v. LaRue*.[31] In 1970 California's Department of Alcohol Beverage Control had issued rules regulating the type of live entertainment that could occur in businesses serving alcohol. The department was concerned by an increase in topless and bottomless dancing at bars. According to the department, increasing incidents of sexual misconduct (including prostitution and public masturbation) were being reported at many of these businesses.

The regulations prohibited certain activities at bars serving alcohol, including:

- The performance of acts or simulated acts of intercourse, masturbation "or any sexual acts which are prohibited by law."

- The actual or simulated touching of the breast, buttocks, anus or genitals.
- The public displaying of the pubic hair, anus or genitals.
- The showing of any films or pictures which feature the above-mentioned activities.

When local bar owners challenged the constitutionality of the regulations, the state argued that the rules were necessary to prevent sex crimes, prostitution and drug abuse.

The Supreme Court ruled 6-3 in favor of the regulations. Writing for the majority, Justice Rehnquist noted that the states had broad power to regulate alcohol under the 21st Amendment, which gives states power to regulate the distribution of alcohol within their borders. He did, however, hint that some of the dancing in the clubs merited constitutional protection when he wrote that "at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression."[32]

Justice Brennan authored a short dissenting opinion, writing that the California regulations clearly applied to some expression deserving of First Amendment protection.

Justice Thurgood Marshall wrote a lengthier dissent, finding that the state of California could not regulate sexual performances unless they qualified as obscene. He wrote that "the empirical link between sex-related entertainment and the criminal activity popularly associated with it has never been proven and, indeed, has now been largely discredited."[33] Marshall also pointed out that the state could punish sex crimes and drug use directly, rather than engage in a "broadscale attack on First Amendment freedoms."

The Supreme Court in its 1975 decision *Doran v. Salem Inn* again hinted that at least some nude dancing merits a degree of First Amendment protection.[34] The case grew out of an ordinance passed by the town of North Hempstead, N.Y., that prohibited waitresses, barmaids and entertainers from exposing their breasts in public.

The Court ruled that a lower federal court had not abused its discretion in granting several bars a preliminary injunction prohibiting the town from enforcing its anti-nudity ordinance. Again writing for the Court, Justice Rehnquist noted: "Although 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."[35]

Rehnquist distinguished the North Hempstead ordinance from the California regulations in *LaRue* by noting that the town ordinance applied to nudity in any public place, not just in liquor establishments. He also quoted with approval the lower court judge's warning that the town's anti-nudity law could apply to "the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance."

The Court next addressed the constitutionality of restrictions upon nude dancing in its 1981 decision *Schad v. Borough of Mount Ephraim*.[36] The town of Mount Ephraim, N.J., had passed an ordinance prohibiting all live entertainment within its borders. An adult bookstore was charged with violating the ordinance after it began offering live nude dancing in coin-operated booths. The bookstore challenged the constitutionality of the ordinance, arguing that the banning of non-obscene nude dancing violated free-expression rights.

The Supreme Court ruled 7-2 that the ordinance was unconstitutional. In an opinion by Justice Byron White, the majority ruled that the borough's exclusion of live entertainment clearly violated the First Amendment. White wrote that "nude dancing is not without its First Amendment protections from official regulation."[37]

The city had argued that the ordinance was merely a zoning ordinance that did not target the content of expression and that the law's purpose was not to restrict expression but to avoid the problems associated with businesses that offer live entertainment, such as parking, trash and police protection. However, Justice White noted that other permitted businesses would cause these same problems. "We do not find it self-evident that a theater, for example, would create greater parking problems than would a restaurant," he wrote.[38]

Chief Justice William Burger and Justice Rehnquist dissented, finding that "a community of people are — within limits — masters of their own environment."[39]

"Citizens should be free to choose to shape their community so that it embodies their conception of the 'decent life,'" Burger wrote.[40]

The *Schad* ruling stands for the general principle that, while cities may zone adult businesses, they may not totally ban them.

In three cases, the justices had stated in passing that nude dancing was entitled to some degree of First Amendment protection. The justices confirmed this in the 1991 decision *Barnes v. Glen Theatre*.[41]

Barnes concerned an Indiana law that criminalized public nudity and required dancers to wear G-strings and pasties. Even though the Court upheld the public nudity law, eight of the nine members recognized that nude dancing was a form of expressive conduct meriting some degree of First Amendment protection.

A slender majority of the high court ruled against the dancers and the adult clubs. The five members of the majority wrote three separate opinions, making it difficult to understand the court's ruling.

Justices Rehnquist, Sandra Day O'Connor and Kennedy joined in a plurality opinion. They recognized that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."[42]

They determined that requiring dancers to don G-strings and pasties was not a restriction on the First Amendment. They called it a "minimal restriction … [that] leaves ample capacity to convey the dancer's erotic message."[43]

The plurality applied the *O'Brien* test and ruled that the government was justified in passing the public nudity law to protect the government's interests in order and morality. They argued the law did not target erotic dancing but the "evil" of "public nudity."

Justice Antonin Scalia said the law did not implicate the First Amendment but punished unlawful conduct, i.e., public nudity. He determined that the general law targeting public nudity was a generally applicable law that "is not subject to First Amendment scrutiny at all."

In a separate opinion, Justice David Souter, the other justice in the majority, also applied the *O'Brien* test but took a much different approach than the three-justice plurality. He based his decision on a concept called "secondary effects," which had grown out of adult-business zoning cases.

The secondary-effects doctrine provides that government officials may regulate nude dancing as long as their reason for regulation is to combat harmful effects allegedly associated with adult businesses, such as increased crime or decreased property values. Souter reasoned that the nudity ban advanced the government's interest in combating harmful secondary effects allegedly associated with adult businesses.

Four justices — White, Marshall, Harry Blackmun and John Paul Stevens — dissented. They argued that the state had targeted exotic dancers because officials disliked nude dancing. "That the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine," Justice White wrote for the dissent.[44]

The four separate opinions in the 5-4 *Barnes* decision caused great confusion among the lower courts. One federal appeals court described trying to understand the case as "reading tea leaves."[45] Most lower courts, however, followed the reasoning of Justice Souter and used the secondary-effects rationale to regulate nude dancing.

IV. Development of the secondary-effects doctrine

Most restrictions on adult entertainment are now justified by the secondary-effects doctrine. Municipalities claim they are targeting adult-entertainment establishments not because they wish to suppress free expression, but because

they are concerned with certain adverse effects allegedly associated with adult businesses. These adverse effects — the so-called "secondary effects" — include decreased property values, increased crime, prostitution and traffic congestion. The secondary-effects doctrine grew out of adult-business zoning cases.

Cities have traditionally used one of two methods to curtail the harmful effects of adult businesses: They either disperse the adult businesses to locations throughout the city or they relegate them to a certain area. For example, many ordinances prohibit adult businesses from locating within a certain distance from churches, schools or from other adult businesses. Other ordinances confine adult businesses to certain zoning areas, thereby ensuring that such businesses will not open in residential or other areas.

The reach of the secondary-effects doctrine has extended even further than determining the geographic location of adult businesses. In the aforementioned *Barnes* case, Justice Souter extended the secondary-effects rationale to cover the content of nude dancing.

The secondary-effects doctrine has also been used to restrict commercial speech and political speech. Some secondary effects cited by government officials include noise, security problems, residential privacy, appearances of impropriety, employment discrimination, negative effects of gambling, competition in the video-programming market, sexual arousal of readers and harm to children.

YOUNG V. AMERICAN MINI THEATRES[46]

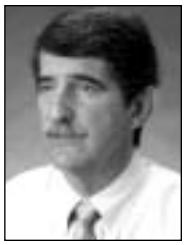
The secondary-effects doctrine had its beginnings in the land-use regulation of adult businesses. The Supreme Court first articulated the doctrine in its 1976 decision *Young v. American Mini Theatres*.

The lawsuit that led to the *Young* decision came about when the city of Detroit amended its "Anti-Skid Row Ordinance" to provide zoning limitations for adult businesses. The ordinance provided that no adult business could be located within 1,000 feet of any two existing adult businesses or within 500 feet of any residential area.

The theater that challenged the law contended that the zoning ordinance was a content-based law that targeted businesses because officials did not like the expressive messages conveyed by the adult material displayed there.

The Supreme Court reasoned that the law was not passed to silence offensive expression but to prevent the deterioration of neighborhoods. In a footnote, Justice Stevens characterized such neighborhood deterioration as a "secondary effect." He wrote:

> *The Common Council's determination was that a concentration of adult movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive speech."*[47]


John Weston

Legal commentators criticized the decision because the Court's majority characterized the zoning ordinance as content-neutral, even though it singled out adult theaters. John Weston, a First Amendment lawyer who argued the *Young* case before the Supreme Court on behalf of the adult theaters, said the case represented "the first chink in the armor."[48]

"During depositions in the case, the government attorneys basically admitted that they were turning to zoning because they couldn't get obscenity convictions against the theater owners," Weston said.[49]

CITY OF RENTON V. PLAYTIME THEATRES[50]

The city of Renton, Wash., a small town near Seattle, passed an adult-business zoning law in 1981 that prevented adult businesses from locating within 1,000 feet of any residential area, school, park or church. Two adult businesses challenged the law on First Amendment grounds.

The plaintiffs argued that the city had passed the law without conducting any research to determine whether adult businesses in fact had any harmful effects on the surrounding community. Instead, Renton leaders relied on the

experience of other cities, including Seattle. The plaintiffs claimed this proved the law was passed because of a dislike for the expressive material involved.

The Supreme Court upheld the zoning law in *Renton v. Playtime Theatres*, concluding that "our result is largely dictated by our decision in *Young*." The majority noted that the zoning law did not closely resemble a content-neutral law. However, the Court ruled that a seemingly content-based law can be considered a content-neutral law for constitutional purposes if the aim of the law was to address harmful secondary effects. The Court wrote:

> *To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, the District Court concluded, the Renton ordinance is aimed not at the content of the films shown at "adult motion picture theaters," but rather at the secondary effects of such theaters in the surrounding community.*[51]

The Court determined the regulation to be content-neutral, even though the zoning law regulated theaters based on the content of their films.

Under this analysis, such a regulation must serve a substantial governmental interest and must not unreasonably limit alternative avenues of communication.

This inquiry remains vital in adult-entertainment zoning litigation. The cases often revolve around how many potential sites are available for prospective adult business owners in the city. The courts will find a challenged zoning ordinance unconstitutional unless a minimum number of sites exist where adult businesses can locate or relocate.

In his dissent, Justice Brennan criticized the majority's determination that the zoning law was content-neutral. He wrote that, while the city of Renton may well have had a compelling interest in combating harmful secondary effects, that "does not mean that such regulations are content-neutral."[52]

The majority in *Renton* also determined that a city does not have to conduct its own study to justify its reliance on the secondary-effects argument. "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already

generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."[53]

Thus, the Court ruled that the city of Renton was not required to conduct its own study of secondary effects. Most courts do require, however, that a city at least consider secondary effects at the time an ordinance is passed rather than using them as a post-hoc, or after-the-fact, rationale.

V. Extension of the secondary-effects doctrine

After *Young* and *Renton*, cities passed numerous zoning laws regulating the location of adult businesses. Cities also enacted further restrictions regulating the content of nude dancing.

The Supreme Court extended the secondary-effects doctrine from its original context to include direct attacks on expression — i.e., regulation of the content of nude dances. One expert describes the process of extending the secondary-effects rationale beyond the land-use scenario as "using football rules in a hockey game."[54] This process began with Justice Souter's concurring opinion in *Barnes v. Glen Theatre*.

Souter considered that the general public-nudity law was not related to the suppression of free expression but was designed to address harmful secondary effects. Souter extended — and, many believe, overextended — the secondary-effects rationale by applying it to a direct attack on free expression.

The extension of the secondary-effects rationale was significant, because *Young* and *Renton* were both zoning cases focusing on the location of adult businesses. *Barnes*, on the other hand, involved a direct restriction on the nature of exotic dancing.[55] Souter wrote that the secondary-effects rationale justified the Indiana law, even though "it is unclear to what extent this purpose motivated the Indiana Legislature in enacting the statute."

Attorney Weston says that many adult-entertainment lawyers were "horrified" at Souter's opinion for many reasons. "The opinion showed a fundamental

misconception about secondary effects," Weston said. "Souter basically extended a time, place and manner concept into a direct attack on free expression."[56]

CITY OF ERIE V. PAP'S A.M.[57]

In 2000 the U.S. Supreme Court considered another First Amendment challenge to a law that prohibited totally nude dancing. After the *Barnes* decision, the city of Erie, Pa., passed a law that targeted public nudity.

The Court upheld this law in *City of Erie v. Pap's A.M.*, saying it was nearly "identical" to the Indiana law in *Barnes*. This time the majority adopted Justice Souter's secondary-effects rationale in *Barnes* as its justification: "We conclude that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishments like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing."

The majority did note that Kandyland (the adult business challenging the law) "had ample opportunity to contest the council's findings about secondary effects before the council itself, throughout the state proceedings, and before this Court."[58]

This last point might be a small nugget of hope for lawyers representing adult businesses, because the opinion could be read to require a city to allow prospective adult businesses to prove that businesses of their sort do not cause certain harmful secondary effects. Weston, who argued the case before the Supreme Court, said that at least the Court did away with what he called "Rehnquist's morality justification in *Barnes*." He says, "At least under *Pap's*, we can attack the validity of the underlying proof by showing that these businesses do not cause adverse secondary effects."[59]

Interestingly, both Justice Stevens, who first used the term "secondary effects" in *Young*, and Justice Souter, who extended the secondary-effects doctrine beyond zoning cases in *Barnes*, dissented in *Pap's A.M.*

Stevens deplored the extension of the secondary-effects doctrine beyond its original application in zoning cases. He wrote:

> *Far more important than the question (of) whether nude dancing is entitled to the protection of the First Amendment are the dramatic changes in legal doctrine that the Court endorses today. Until now, the secondary effects of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech.*[60]

Stevens asserted that "the Court's use of the secondary effects rationale to permit a total ban has grave implications for basic free-speech principles."[61]

Justice Souter also dissented, saying that he had made an error in his concurrence in *Barnes* when he said that a governmental entity did not need localized proof of secondary effects. He wrote:

> *I may not be less ignorant of nude dancing that I was nine years ago, but after many subsequent occasions to think further about the needs of the First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted.*[62]

CURRENT SECONDARY-EFFECTS JURISPRUDENCE

Today the secondary-effects rationale dominates First Amendment jurisprudence in the adult-entertainment context. Attorneys on both sides present expert witnesses and studies showing either the evidence (or lack thereof) regarding secondary effects.


Bruce McLaughlin

Bruce McLaughlin, a Florida-based land-use planner who has analyzed numerous secondary-effects studies, identifies two "primary problems" with these studies, which usually are conducted by a government employee. "First of all, there are a group of studies that show no evidence of secondary effects," he said. "However, these studies get lost in the shuffle and are buried or ignored."[63]

McLaughlin also said that "there is an incestuous relationship among the various studies." He claimed that many of the government studies were not independent. McLaughlin has conducted 40 of his own studies which show

virtually no evidence of adverse secondary effects caused by various adult businesses. For example, he said his examination of police logs showed a greater number of police calls to other businesses than to adult-oriented businesses.[64]

A study cited in a recent 11th U.S. Circuit Court of Appeals decision appears to confirm McLaughlin's point. In 1997 the Fulton County, Ga., police department completed a study in which it examined the number of times during a two-year period that police were called to businesses serving alcohol.

The study concluded that the police received a greater number of calls from non-adult establishments that served alcohol than from adult establishments that served alcohol. The 11th Circuit cited this study as evidence that Fulton County did not have sufficient evidence of harmful secondary effects to prohibit the sale of alcohol at nude-dancing businesses.[65]

The court concluded that in *Flanigan's Enterprises v. Fulton County* the county "may not ban nude dancing in establishments licensed to sell liquor without any factual basis to support the claim that these establishments are connected with negative secondary effects."

McLaughlin called this a "watershed case that could lead us toward a move in the right direction."

On May 13, 2002, the U.S. Supreme Court decided another secondary effects case — *City of Los Angeles v. Alameda Books*.[66] The high court examined a Los Angeles law prohibiting a single adult establishment from functioning as both an adult bookstore and an adult arcade.

The city had passed an amendment banning so-called "multiple-use" adult businesses without showing evidence that these type of businesses caused any harmful effects. Instead, the city relied on a study done six years earlier, which examined the harmful effects of having too many adult businesses in a single area. The city argued it was reasonable to rely on the prior study.

The 9th Circuit struck down the amendment prohibiting multiple-use adult businesses. But the high court reversed the 9th Circuit, writing that the "city

of Los Angeles may reasonably rely on a study it conducted some years before enacting" its new law.[67] However, the Court's ruling only said that the city's ban could not be struck down at this "very early stage in the process." The case now goes back to the lower courts for more litigation.

The case seems to continue the pattern of increased deference to government officials with respect to secondary effects. More litigation will be needed to clarify the ramifications of the Court's decision.

PATRON-PERFORMER BUFFER ZONES

Many municipalities have attempted to restrict contact between dancers and customers by establishing buffer zones. A few courts have upheld buffer zones of 10 feet, which eliminate table dances and lap dances.

The 9th Circuit upheld a 10-foot buffer zone between patron and performer in a Kent, Wash., ordinance. The club owners alleged that the buffer zone banned table dancing, which they argued was a unique form of expression.

The appeals court in *Colacurcio v. City of Kent* said it would "leave the fine-tuning of the distance requirement to the legislative body."[68] The appeals court reasoned that the zone was a narrowly tailored way to prevent illegal sexual contact and drug transactions.

The court reasoned that the 10-foot requirement "does not rob dancers of their forum or their entire audience."[69] As to the club owners' arguments that table dancing is a unique form of expression, the appeals court replied that "uniqueness alone is insufficient to trigger First Amendment protection."[70]

Judge Stephen Reinhardt dissented, finding that table dancing was a unique form of expression compared to stage dancing. He reasoned that the club owners had presented enough evidence, including testimony from cultural anthropologist Hanna, that table dancing is "an altogether different form of expression that depends upon proximity and communicates a different and particular content."[71]

Hanna said buffer zones substantially change the message conveyed by the dancer. She pointed out that "performer-patron touch commonly occurs in the performing arts" and that "much of contemporary theater has been breaking down barriers between spectator and performer."

HOURS OF OPERATION

Many cities attempt to limit the hours of operation of adult businesses. City officials contend that these provisions are reasonable time, place and manner restrictions on speech. They argue that the businesses are still open for most hours of the day and that the regulations are justified by a reliance on secondary effects.

Club owners respond that the rules mandating hours of operation are simply a thinly veiled disguise for prejudice against their form of expression. They contend that more crime is committed at 24-hour convenience stores than at adult establishments.

Most courts have sided with the city regulators. In *DiMa Corp. v. Town of Hallie*, the 7th U.S. Circuit Court of Appeals ruled that an hours-of-operation restriction was constitutional even though the city could point to no evidence that the only adult business in its town attracted crime.[72]

The town argued that its law limiting the hours of operation was based on the experiences of a nearby town. The 7th Circuit determined that the town had only "minimally" satisfied its burden of proof.

The court did note that it had "no reason to believe that this is a significant impairment of Pure Pleasure's business." This seems to imply that if an adult business could show both a lack of crime at its business during late-night and early-morning hours and also a loss of profits, then it might be able to ward off such a restriction.

More and more adult businesses are now commissioning studies, performed by experts such as McLaughlin, to show that adult businesses do not cause a greater incidence of crime than non-adult businesses.

THE CONTENT OF NUDE DANCING

Some municipalities have gone so far as to censor the movements of exotic dancers. Many ordinances prohibit dancers from engaging in lewd or obscene activities. Some provisions go even further.

For example, one Ohio administrative law prohibited dancers from committing "improper conduct of any kind, type or character that would offend the public's sense of decency, sobriety or good order."

A federal judge struck down this provision, ruling that it "goes well beyond what is necessary" to further the state's interest in combating the harmful effects of adult businesses. The judge reasoned that this law would outlaw pop music superstar Michael Jackson's famous crotch grab. The judge also reasoned that this provision would give license to state agents to selectively punish certain dancers.[73]

A Wisconsin city passed a comprehensive ordinance regulating nearly all facets of adult businesses. One provision prohibited dancers from "appearing in a state of nudity or depicting specified sexual activities." The ordinance defined these activities as: "the fondling or erotic touching of human genitals, pubic region, buttocks, anus or female breasts."

The 7th Circuit ruled that under *Barnes* and *Pap's A.M.*, it was constitutional to prohibit totally nude dancing. But the appeals court said that banning specified sexual activities went too far. "By restricting the particular movements and gestures of the erotic dancer, in addition to prohibiting full nudity, [the provision] unconstitutionally burdens protected expression."[74]

LICENSING AND PROCEDURAL SAFEGUARDS

Another method city regulators use to regulate adult businesses is through administrative licensing schemes. If an adult business fails to comply with city codes, regulators may revoke the business' operating permit. If an adult business seeks to operate in a new location, it often must clear certain hurdles before obtaining the necessary approval from city officials.

Many adult-entertainment businesses argue that city officials camouflage their discriminatory intent by hiding behind licensing laws. However, such laws are also subject to First Amendment challenges.

In its 1965 decision *Freedman v. Maryland*, the U.S. Supreme Court said that a Maryland film censorship statute needed three procedural safeguards to be constitutional:[75]

- A decision whether to issue a license must be made in a "specified brief period," and if someone appeals a license denial, the status quo must be preserved pending a final judicial decision.
- The licensing scheme must assure a "prompt final judicial decision."
- The burden of proof must be on the city to prove that its license is constitutional.[76]

In the 1990 decision *FW/PBS v. City of Dallas*, the high court said that the first two prongs of the *Freedman* analysis were applicable to licensing ordinances for adult businesses.[77] These two procedural safeguards include:

- The decision to issue or deny a license must be made within a "specified and reasonable time period."
- "There must be the possibility of prompt judicial review in the event that the license is erroneously denied."[78]

The lower courts are split on the issue of what constitutes "the possibility of prompt judicial review." Some courts define this as mere access to the courts. Other courts require both a prompt hearing and a prompt decision by a judge. The 9th Circuit described the necessity of judicial review as follows:

> *The phrase 'judicial review' compels this conclusion. The phrase necessarily has two elements — (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless. In baseball terms, it would be like throwing a pitch and not getting a call. As legendary major league umpire Bill Klem once said to an inquisitive catcher: 'It ain't nothing*

> *till I call it.' This is also true of judicial review. Until the judicial officer makes the call, it ain't nothing.*[79]

Adult-business owners insist that many licensing schemes operate as prior restraints on expression. The schemes, they say, allow the city to discriminate and target certain businesses it dislikes. City officials counter that the ordinances are necessary to control unlawful behavior.

Many Supreme Court observers expected the Court to clarify the meaning of prompt judicial review in *City News & Novelty v. City of Waukesha*, a case involving an adult bookstore in Wisconsin.[80] However, the Court determined that the case was moot.

Some also thought that the Court might decide the "prompt judicial review" decision in the park-permit case *Thomas v. Chicago Park District*.[81] However, in January 2002, the Court decided the case without addressing the question. The lower courts remain divided on the meaning of prompt judicial review.

VII. Conclusion

In many ways, the adult-entertainment industry tests Americans' commitment to freedom of expression. Exotic dancing in adult-entertainment clubs remains a First Amendment stepchild, on the periphery of protection and subject to a host of regulations.

The strength of First Amendment freedoms can be gauged by the level of tolerance for unpopular expression. Free-speech advocates argue that if society punishes controversial expression, everyone in society loses some measure of their freedom.

Because the adult-entertainment industry features controversial expression and wealthy litigants, the litigation in these cases shapes this country's free-expression jurisprudence. Principles from adult-bookstore cases have been used in a wide variety of cases to lower the level of judicial review on a host of other speech restrictions. For example, the U.S. Justice Department cited the *Renton* and *Pap's A.M.* cases in support of a federal wiretapping law that prohibits the disclosure of intercepted communications.[82] The U.S. Supreme

Court cited *Renton* in support of lowering the government's evidentiary burden to support speech restrictions in the area of campaign contributions and attorney solicitation letters.[83]

The secondary-effects doctrine has proven to be fertile ground for abuse because it enables government officials to conceal their thinly disguised dislike for adult entertainment behind claims of harmful effects. In 1988 Justice Brennan warned that the doctrine "could set the court on a road that will lead to the evisceration of First Amendment freedoms."[84]

The secondary-effects doctrine has been applied in cases far removed from issues relating to the land-use regulation of adult businesses. For example, a federal judge in Kentucky recently used the secondary-effects rationale to uphold the constitutionality of a public high school dress code, determining that the code was really aimed at the "secondary effects of student dress," such as gang activity, violence and inability to identify campus visitors.[85]

The doctrine threatens to undermine existing First Amendment free-speech jurisprudence.[86] For this reason, First Amendment expert Robert O'Neil classifies *Pap's A.M.* as the "most disappointing First Amendment decision decided by the court in the last two years."[87]

Ken Paulson, executive director of the First Amendment Center, noted that "the decision is troubling because it took a short cut that threatens freedom of speech well beyond the confines of a topless bar."[88]

A major question that still has not been clarified by the Supreme Court is what level of proof of secondary effects is required by the Constitution. Lower courts have widely varying requirements for the amount of secondary-effects evidence municipalities must provide in order to justify restrictions on nude-dancing establishments.

Weston argues that the government will continue to suppress erotic expression because it is a convenient target. "Erotic expression is a perfect diversionary topic," he said. "In our society, the government cannot deal with real problems so they try to divert the public's attention to a politically popular topic."

When asked why government officials continue to target the adult industry, Weston responds by quoting journalist H.L. Mencken: "Puritanism: The haunting fear that someone, somewhere, may be happy."

Censorship of the adult industry also appears to contain a dangerous element of class discrimination. Adult bookstores and striptease bars are considered illegitimate, low forms of entertainment, while nudity at higher-priced theaters is considered legitimate, bona-fide expression.

Government officials and many in the community are more offended by the sexual gyrations of a stripper than the artistic skill of a Broadway entertainer. However, federal appeals court Judge Richard Posner terms this "robust paternalism and class consciousness." [89]

Another federal judge expressed the sentiment as follows: "Perhaps the city of Schenectady finds the performance in cabarets more objectionable because the audience is mostly men who prefer to drink Budweiser while they view the naked form engaged in dance, rather than the couples at the opera who prefer Dom Perignon with their falsetto." [90]

Porn magnate Larry Flynt said it this way: "The adult bookstore is the poor man's art museum." [91]

Nude dancing may offend; it may fail to appeal to the higher intellect. But First Amendment protection for nude-dancing establishments affects more than disrobing dancers. It affects all who care about constitutional freedoms.

Endnotes

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

—First Amendment to the U.S. Constitution

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First Amendment Center

Kenneth A. Paulson
EXECUTIVE DIRECTOR

John Seigenthaler
FOUNDER

1207 18th Avenue South
Nashville, TN 37212
615/727-1600

1101 Wilson Boulevard
Arlington, VA 22209
703/528-0800

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