Improper Application of First-Amendment Scrutiny to Conduct-Based Public Nudity Laws: *City of Erie v. Pap's A.M.* Perpetuates the Confusion Created by *Barnes v. Glen Theatre, Inc.*

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I. INTRODUCTION

In *Barnes v. Glen Theatre, Inc.*, the United States Supreme Court was asked to decide whether the First Amendment protected the owners of two nude dancing establishments from an Indiana state law that banned public nudity. The Indiana law required that dancers wear, at a minimum, “pasties” and “G-strings” when they danced. The *Barnes* Court upheld the statute, but was unable to support its decision with a majority of the Court. Chief Justice Rehnquist was joined in his opinion by Justices O’Connor and Kennedy. Rehnquist’s opinion was outnumbered by four dissenters, Justices White, Marshall, Blackmun, and Stevens. However, two concurrences, one by Justice Souter and one by Justice Scalia, upheld the outcome. As a result of the fragmented decision, jurists and state and local legislators had no clear rule to rely upon.

Both the Erie, Pennsylvania city council and the Pennsylvania Supreme Court tried to extract a rule from *Barnes*’s three opinions supporting the outcome but focused on very different language and came to two significantly different conclusions. In September of 1994, just three years after *Barnes* was decided, the Erie city council passed an ordinance that made appearing in public in “a state of nudity” a summary offense. The Erie ordinance was patterned after Indiana’s statute, and indeed was almost identical to it in every way except for a preamble that soon became the center of a heated dispute.

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2. The Indiana Statute that was discussed in *Barnes*, section 35-45-4-1 of the 1988 Indiana Code, provides in pertinent part:

   Public indecency; Indecent exposure
   
   (a) A person who knowingly or intentionally, in a public place:
   
   (1) engages in sexual intercourse;
   
   (2) engages in deviate sexual conduct;
   
   (3) appears in a state of nudity; or
   
   (4) fondles the genitals of himself or another person;

   commits public indecency, a Class A misdemeanor. . . .
Pointing to this preamble, which named the negative effects of an increase in “nude live entertainment” as one motivation for the passage of the ordinance, Pap’s A.M., a Pennsylvania corporation that operated a strip club called “Kandyland,” sought an injunction against the City of Erie, arguing that the ordinance violated the First Amendment’s guarantees of freedom of speech and expression. Because of Barnes’s numerous overlapping opinions, the Pennsylvania state courts struggled to determine what standard should be applied.

The Court of Common Pleas for Erie County initially granted a permanent injunction against enforcement of the ordinance, which it held to be unconstitutional. On appeal, the trial court’s decision was reversed and the order was repealed. Finally, the Pennsylvania Supreme Court granted review of the case and again reversed in an opinion that dismissed the Barnes decision due to the fact that Barnes was a plurality decision that the Pennsylvania Supreme Court felt was without precedential value. Undertaking its own First-Amendment analysis, the Pennsylvania Supreme Court “concluded that although one of the

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

Erie City Ordinance 75-1994 provides in relevant part:

(A). A person who knowingly or intentionally does any of the following, in a public place; commits public indecency, a summary offense:
1. Engages in sexual intercourse
2. Engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code
3. Appears in a state of nudity, or
4. Fondles the genitals of himself, herself or another person.

2. “Nudity” means 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; . . . or the exposure of any device worn as a cover over the nipples . . . which device[ ] . . . gives the realistic appearance of nipples and/or areola.

3. The preamble to Ordinance 75-1994 states that the City Council chose to adopt the ordinance for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

Erie, Pa., Codified Ordinances of the City of Erie, Article 711 (1994).

4. Id.


purposes of the ordinance was to combat negative secondary effects, it had as its primary target an unmentioned purpose to impact negatively on the erotic message of the dance. The Pennsylvania Supreme Court therefore held that the Erie ordinance violated the First Amendment rights of strip club owners and dancers and that the ordinance should be struck down.

Finally the case reached the United States Supreme Court on a writ of certiorari and was once more reversed. Justice O’Connor wrote for the Court and upheld the Erie ordinance. In deciding the case, the Court applied the same four-part test from United States v. O’Brien that it had applied in Barnes v. Glen Theatre. In so doing, the Court again failed to gather a majority in favor of its decision, thus failing for a second time to establish a definitive rule or provide any guidance for local legislators and lower court judges with regard to the issue of public nudity statutes.

It is the position of this note that public nudity laws, such as the ones at issue in Barnes and City of Erie, are conduct-based laws that should be weighed against the traditional rational basis standard that applies to valid exercises of state police power. Although the act of appearing nude in public, like any other form of conduct, can be used as a means of expression, these laws are general bans on all public nudity, for whatever reason, and they do not directly regulate expression. Appearing nude is an act of physical conduct, and because the power to police conduct was reserved to the states in the absence of some clear constitutional protection, public nudity laws should not be subjected to federal constitutional scrutiny. It is further asserted that the Court failed for a second time in City of Erie to provide a clear rule on the issue of public nudity laws because the Court continued to rely on the mistaken notion that some First-Amendment analysis must be applied to such public nudity statutes.

As pointed out above, the statutes at issue in these cases were drafted with a primary focus on regulating conduct, not expression, and are general in their scope. Thus they should be weighed against the traditional power and duty of government to prohibit immoral and anti-social conduct that tears at the fabric of a modern society. Applying this reasoning, which Justice Scalia proposed in his concurring opinions to both Barnes and City of Erie, would recognize the fact that the immoral act of appearing nude in public can and should be prohibited, and that any erotic message a strip-tease dance is intended to communicate can be just as adequately conveyed in a state of near-nudity.

9. Id. (quoting City of Erie, 719 A.2d at 279).
Establishing this rule would provide some much-needed guidance to local legislators, allowing them to confidently enact similar ordinances, free up judicial resources, and put the issue to rest once and for all. While a majority adoption of the countervailing viewpoint, which has been ably advocated by Justice O’Connor in both *Barnes* and *City of Erie*, could also provide such guidance to local legislators, it requires a much more cumbersome and complicated analysis. For this reason, the view advocated by Justice Scalia and this paper provides the best means of closing this long-standing argument and providing a predictable and easily applicable means of reaching the same result the Court has reached in its two forays into the area of public nudity laws.

Although it is the primary assertion of this note that public nudity laws such as the ones at issue in *Barnes* and *City of Erie* should not be subjected to First-Amendment scrutiny, some other key First-Amendment cases will be discussed for the sake of contrast. Section II of the note will analyze the *Barnes* decision and the deficiencies and questions left open by the Court’s opinion, as well as the solution offered by Justice Scalia’s concurring opinion. Section III will then move on to a discussion of the confusion that followed the *Barnes* decision because of the improper focus of the Court’s opinion. Section IV will discuss the United States Supreme Court opinions from *City of Erie*, with a focus on the recurring themes in Justice Scalia’s concurring opinions from *Barnes* and *City of Erie*. Finally, Section V will propose a more definitive rule, based primarily upon Justice Scalia’s reasoning and in keeping with the ultimate holdings of both cases, which would provide the final resolution that is needed in this debate and the guidance local and state legislators need in order to adequately address this issue in the future. A brief conclusion will follow.

II. BARNES V. GLEN THEATRE, INC.

A. Facts

In *Barnes v. Glen Theatre*, the owners of two South Bend, Indiana nude dancing establishments brought suit to enjoin enforcement of an Indiana anti-nudity statute.\(^{11}\) The United States Supreme Court upheld the statute in a fragmented plurality decision. The Court came to the questionable conclusion that nude dancing qualifies as “expressive conduct within the outer perimeters of the First Amendment,”\(^{12}\) and the

\(^{11}\) 501 U.S. at 562-63.
\(^{12}\) Id. at 566.
Court’s analysis proceeded to follow the four-step test for evaluating symbolic speech, which was set forth in United States v. O’Brien.13

B. Chief Justice Rehnquist’s Opinion for the Court

1. Previous nude dancing cases

The Chief Justice’s opinion took its first wrong turn when it entered a brief discussion of earlier nudity cases that included veiled references to the First Amendment. Cases such as California v. LaRue,14 Doran v. Salem Inn, Inc.,15 and Schad v. Mount Ephraim,16 were cited for the principle that “[a]lthough the customary ‘barroom’ type of nude dancing may involve only the barest minimum of protected expression . . . this form of entertainment might be entitled to First . . . Amendment protection under some circumstances.”17 The Court then concluded, without any further inquiry or analysis, that the Court of Appeals was correct in finding that nude dancing of the kind discussed in Barnes was expressive conduct, although, the Chief Justice qualified this conclusion by adding, “we view it as only marginally so.”18

2. The O’Brien test

After reaching the conclusion that the conduct of nude dancing was in some measure a form of expression, the Court turned the bulk of its attention to determining “the level of protection to be afforded to the expressive conduct at issue, and . . . [to] determine whether the Indiana statute is an impermissible infringement of that protected activity.”19 It did so by applying the O’Brien test, which is a four-step test that was developed in 1968 to measure infringements on symbolic speech.20 The O’Brien test states that a government regulation is justified if: (1) it is within the constitutional power of the government; (2) the statute furthers some important governmental interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental

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18. Id. at 566.
19. Id. at 566.
20. See U.S. v. O’Brien, 391 U.S. 367 (1968) (upholding conviction under statute prohibiting the burning of a draft card despite the defendant’s insistence that the act was performed with the intent to convey a message).
restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.\textsuperscript{21}

Based upon its application of the \textit{O'Brien} test, the Supreme Court upheld the Indiana statute. In applying the test’s four elements to this statute, the Court pointed out that “the statute’s purpose of protecting societal order and morality is clear from its text and history.”\textsuperscript{22} The Court endorsed this purpose as a valid one, noting, “[p]ublic indecency, including nudity, was a criminal offense at common law,” and that “statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places.”\textsuperscript{23}

There appeared to be no dispute among the Court that the Indiana statute’s attempt to address these concerns was a valid exercise of state police power and was thereby justified. Had the analysis stopped there, the Court would have set forth the clear rule that was so sorely needed. However, the Court’s analysis was not that simple, because the justification of Indiana’s intent to protect “societal order and morality,” although valid, was merely one step in a four-part test that the Court thrust upon this issue.\textsuperscript{24} The Court had decided to entertain the free speech argument, a mistaken application that would continue to cloud the public nudity issue for the next ten years and beyond.

3. \textit{The power to provide for public health, safety, and morals}

As was pointed out above, the plurality opinion written by Chief Justice Rehnquist applied the more straightforward police-powers analysis to the Indiana indecency statute. The police powers analysis involves a simple weighing of government interests against the right to engage in the conduct being regulated. The problem with this analysis was that Rehnquist chose to apply it as merely one factor of the First Amendment \textit{O'Brien} test, rather than recognizing that the case involved regulation of conduct and not expression.

The Chief Justice made many valid points with regard to the police powers element. He pointed out that “[t]he traditional police power of the States is defined as the authority to provide for the public health, safety, and morals,” and that the Court had previously “upheld such a basis for legislation.”\textsuperscript{25} Why Rehnquist chose not to rely on the police powers principle alone is not clear. The Court must have foreseen that introducing a First Amendment analysis would complicate this already

\begin{itemize}
\item \textsuperscript{21} Id. at 376-77.
\item \textsuperscript{22} \textit{Barnes}, 501 U.S. at 568.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. at 567-68.
\item \textsuperscript{25} Id. at 569.
\end{itemize}
heated issue. Justice Scalia, in his concurring opinion, was critical of the
decision to implicate the First Amendment, and chose to rely on the basic
principles that Chief Justice Rehnquist had already set forth.

Scalia’s criticism was justified, given the added confusion and
complication of the test that was established by the Court’s opinion.
Again, Rehnquist’s reasons for implicating the First Amendment and for
evaluating these laws based upon their incidental infringement on the
right of free expression are not entirely clear. It seems that Rehnquist
chose to examine such potential infringement as a preliminary step
before upholding laws that could potentially violate the Constitution.
While this initial investigation was prudent and rational, Rehnquist failed
to back off of the Constitutional analysis when it became apparent that
no First-Amendment rights were violated. By refusing to backtrack to
Scalia’s position, the Court was left with the task of looking for rights
violations where arguably none existed.

C. Justice Scalia’s Concurrence

Justice Scalia, who would also later concur in the City of Erie
opinion, opened his concurring opinion in Barnes by saying,

I agree that the judgment of the Court of Appeals must be reversed. In
my view, however, the challenged regulation must be upheld, not
because it survives some lower level of First Amendment scrutiny, but
because, as a general law regulating conduct and not specifically
directed at expression, it is not subject to First Amendment scrutiny at
all.26

What is interesting is that Justice Scalia actually made many of the
same points that the Chief Justice had made in his plurality opinion.
The difference between the two opinions was not really in their ultimate
reasoning in deciding the case; the difference was that Justice Scalia
made a point of renouncing the theory that the Indiana statute was in
some way tied to expression and thus to the First Amendment. Chief
Justice Rehnquist had not been so careful. Rehnquist had recognized that
“[p]ublic nudity is the evil the State seeks to prevent, whether or not it is
combined with expressive activity,”27 but then clouded the true issue in
his next sentence: “This conclusion is buttressed by a reference to the
facts of O’Brien.”28 In fact, what the Chief Justice was doing was not
buttressing his conclusion, but instead opening the door to a continuing
debate.

26. Id. at 572 (Scalia, J., concurring).
27. Id. at 571.
28. Id.
Scalia pointed out the very trap that the plurality opinion had fallen into when he alluded to the tenuous relationship that any conduct-based law has to some form of expression. He said, “virtually every law restricts conduct, and virtually any prohibited conduct can be performed for an expressive purpose.” While Chief Justice Rehnquist chose to entertain and address the First Amendment argument, Justice Scalia refused, positing that because the Indiana statute was a general prohibition of conduct, “its application to such conduct does not . . . implicate the First Amendment.”

D. Where Barnes Came Up Short

1. The (limited) precedential value of Barnes’s plurality opinion

A fragmented, plurality opinion such as the one handed down in Barnes creates somewhat of a unique situation with regard to precedential value, and this circumstance can often prove quite confusing to legislators and lower courts seeking to rely on the opinion. In Marks v. United States, the Supreme Court stated, “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” This “narrowest grounds” approach often leads to a great deal of confusion in practice, because one trying to divine a rule from the opinion is forced to compare the concurrences and reason out an adapted rule based on the varying language used by several Justices. Thus, many varying rules may be drawn from the same case.

The confusion that the “narrowest grounds” rule creates is demonstrated by the many cases that addressed the public nudity issue following Barnes. In Triplet Grille, Inc. v. City of Akron, a district court attempted to apply the Barnes decision. The court first cited the “narrowest grounds” rule from Marks, and then stated, “Our inquiry, therefore, focuses on the opinions of the plurality, Justice Scalia and Justice Souter.” The Triplet Grille Court continued,

The plurality view, joined by Justice Souter and all dissenting members of the Court, agreed . . . “that nude dancing of the kind sought to be

29. Id. at 576. (Scalia, J., concurring).
30. Id.
32. Id. at 193 (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).
34. Id. at 1252-53.
performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it marginally so.” . . . [while] Justice Scalia . . . felt that the statute was “a general law regulating conduct and not specifically directed at expression.”

After pointing out these differences in agreement, the district court in Tripplett Grille concluded that “Justice Souter appears to rule on the narrowest grounds,” but then held that the “secondary effects” test, which evaluates the government’s need to eradicate the negative societal effects that might flow from unregulated expression, was not controlling because “Justice Souter injected the secondary effects motive even though . . . no prior testimony concerning that issue was offered.” The district court criticized Souter’s introduction of the “secondary effects” test, saying that to “introduce such a phantom motive . . . is inappropriate,” and arguing that Justice Souter had introduced the test based upon “no factual record.”

Another district court, in Nakatomi Investments, Inc. v. City of Schenectady, more openly rejected Souter’s opinion: “This Court must find that Justice Souter’s concurrence did not ‘set forth a subset of principles articulated in the plurality opinion’ nor did it articulate a common underlying approach that comports with the plurality opinion.” The Nakatomi Court chose to follow the view of the Eleventh Circuit, which had earlier held that “[b]ecause Justice Souter wrote only for himself in Barnes, we continue to follow the . . . [earlier] approach of gleaning the government interest at stake from the ordinance itself rather than implying one where none is evident in the ordinance.” Still, despite these contrary views, the Seventh Circuit subsequently held that “Justice Souter’s concurrence is the controlling opinion on this issue.”

This clear split among the circuit and district courts exemplifies the

35. Id. at 1253.
36. Id. at 1254.
37. Id. Under the “Secondary Effects” Test, introduced by Justice Souter and applied later by Justice O’Connor, the balancing test of the police powers/rational basis test is essentially applied as merely one element of a test that evaluates whether an infringement on the right to free speech is justified. In essence, an ordinance or statute is allowed to pass First-Amendment scrutiny if it can be shown to further the important governmental purpose of fighting some “Secondary Effects” that will likely result from allowing the expression/speech to go unregulated. For in-depth arguments for and against the application of this doctrine, see, e.g., Brief of Amici Curiae U.S. Conference of Mayors, et al., City of Los Angeles v. Alameda Books, Inc., et al., (122 S.Ct. 1728 (2002)) (No. 00-799); 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 (Spring 2001).
39. Id. at 998 (citation omitted).
40. Int’l Eateries of Am., Inc. v. Broward County, 941 F.2d 1157, 1162 n.3 (11th Cir. 1991).
41. Schultz v. City of Cumberland, 228 F.3d 831, 842 n.2 (7th Cir. 2000).
confusion that was created by the plurality decision in *Barnes*. Thus the strength of Justice Souter’s opinion, even if it were to be considered controlling, was open to challenge in the courts.

2. Other responses to *Barnes*

*Barnes’s* confusing holding and the decision by the *Barnes* Court to implicate the First Amendment caused, among other things, the spread of a great deal of misinformation, an effect that would later be compounded by the *City of Erie* decision. A quick search of the Internet yields thousands of quotes by strippers and strip-club owners who, without any actual education on the subject, now readily point to the First Amendment as their guardian. For example, Virginia Vitzthum, in an editorial on the nude dancing issue, refers to “the First Amendment protection of ‘expressive conduct.’” Since no part of the United States Constitution refers to “expressive conduct,” it is not clear why Vitzthum chose to use quotation marks in this reference.

Perhaps the most telling example of the misunderstanding created by the *Barnes* Court’s decision to entertain a First Amendment discussion and of the perpetuation of that misunderstanding nine years later by *City of Erie* is drawn from the resultant effect on the city of Erie, Pennsylvania, itself. Although Nick Panos, the owner of Pap’s A.M., Inc. and “Kandyland,” retired and closed the club before his case even reached the United States Supreme Court, he later sold the building to a new owner who then opened a similar club. The new club, called Kandy’s Dinner Theater, soon featured a sign out front that read “First Amendment Rights Headquarters,” thus demonstrating an application of the Amendment that could most certainly never have been foreseen by its framers.

Another troubling result of the fragmented holding in *Barnes* has been the inability of local and state legislators around the country to rely on a clear rule when drafting similar indecency statutes. The scope of

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42. At the time this note was written, a search on google.com using the search terms “strip club first amendment” yielded over 21,000 web page results. The links to web pages featuring assertions made by strippers and strip club owners who claim the right to First-Amendment protection despite an apparent unfamiliarity with the language of the Amendment itself are too numerous to list here.

43. Virginia Vitzthum, *Lighten Up, Sandy Baby*, SALON.COM, at http://www.salon.com/health/col/vitz/2000/04/04/nude_dancing/index.html (last visited Oct. 15, 2002). It is important to note that Ms. Vitzthum’s article was written in response not only to *Barnes*, but to the subsequent *Erie* decision as well. This fact merely illustrates, however, the continuing misunderstanding that has been perpetuated by these cases.

this problem is demonstrated by taking a quick look at the amicus briefs filed in *City of Erie*. Seeking a final resolution of this issue, numerous county and state governments filed briefs in support of the Erie city council. Briefs were filed by, among others: Broward County and Orange County, Florida; the states of Idaho, Kansas, Louisiana, Michigan, Mississippi, Montana, Nebraska, Ohio, South Carolina, Tennessee, and Texas; and the commonwealths of Pennsylvania and Virginia. These briefs urged the Court to adopt a simpler rational basis standard by which to evaluate ordinances and statutes that are general in their scope and target only conduct and not expression. Despite this urging, the Court failed to seize the second chance it was given in *City of Erie* to clarify this issue and develop a test upon which legislators could rely.

### III. LEGISLATIVE AND STATE COURT RELIANCE ON BARNES

#### A. The Erie Ordinance

As was previously pointed out, the language of Erie Ordinance 17-1994 is virtually identical to Indiana Code § 35-45-4-1, which was challenged in *Barnes*. The Erie city council expressly patterned their ordinance after the Indiana Statute. After all, the United States Supreme Court had approved the Indiana statute just three years earlier. It would seem as though the Erie city council should have been able to rely on the *Barnes* precedent for guidance. Unfortunately, however, the problems with *Barnes*’s precedential value, discussed above, posed a great problem for local lawmakers. It was very hard to predict how a state or federal district court might interpret *Barnes* if a challenge was brought. The Erie ordinance’s preamble presented an additional challenge, because it cited an increase in adult entertainment as a motivating factor in the law’s passage.

#### B. The Confusion of the Pennsylvania Supreme Court over the Erie Ordinance

The reaction of the Pennsylvania Supreme Court to the *Barnes*’s precedent echoes that of the federal courts discussed above. Justice O’Connor included an extensive description of the treatment the highest Pennsylvania court had given to *Barnes* in her opinion in *City of Erie*:

> To answer the question whether the ordinance is content based, the court turned to our decision in *Barnes*. Although the Pennsylvania

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Court noted that the Indiana statute at issue in *Barnes* “is strikingly similar to the Ordinance we are examining,” it concluded that “[u]nfortunately for our purposes, the *Barnes* Court splintered and produced four separate, non-harmonious opinions.” After canvassing these separate opinions, the Pennsylvania court concluded that, although it is permissible to find precedential value in a fragmented decision, to do so a majority of the Court must have been in agreement on the concept that is deemed to be the holding. . . . Accordingly, the court concluded that “no clear precedent arises out of *Barnes* on the issue of whether the [Erie] ordinance . . . passes muster under the First Amendment.”

The Pennsylvania Supreme Court’s treatment of *Barnes* demonstrated the need for clear precedent on the issue. Here was a state court that was faced with a statute identical to one upheld by the highest court in the land less than ten years earlier and finding that it had no precedent to rely upon! So, when the United States Supreme Court granted certiorari, all eyes were fixed on the Court to resolve the matter once and for all. Unfortunately, the Court again failed to reach a majority opinion.

IV. *CITY OF ERIE V. PAP’S A.M.* AT THE UNITED STATES SUPREME COURT

A. Justice O’Connor’s Opinion for the Court

1. Justice O’Connor’s reliance on the Secondary Effects Doctrine

Charged with writing for the plurality in *City of Erie*, Justice O’Connor chose to rely heavily on the “Secondary Effects” doctrine in her opinion. Her decision sprung from an initial assumption that nude dancing was a First Amendment issue, an assumption that had been made without recognizing the distinction between general bans on public nudity and bans on nude dancing. Proceeding on the assumption that a nude dancing ban, rather than a general public nudity ban, was at issue, and that such dancing constitutes speech or expression, O’Connor wrote, *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 ordinance prohibiting public nudity is therefore valid if it

46. *City of Erie*, 529 U.S. at 285 (citations omitted ).
47. *See supra*, note 37.
satisfies the four-factor test from *O’Brien* for evaluating restrictions on symbolic speech.49

Again, this statement seems to have been based upon the assumption that Erie had passed a ban on nude dancing, as the preamble to the ordinance might suggest, rather than a ban on all public nudity, which the text of the ordinance itself proscribes. Although O’Connor attempted to shield the Court’s decision by explaining that the Erie ordinance was “unrelated to the suppression” of the expression associated with nude dancing, the damage had been done when O’Connor chose to refer to nude dancing at all.

In the wake of *City of Erie*, a Washington, D.C. strip club owner criticized the opinion’s discussion of the secondary effects caused by nude dancing, saying, “What crime does it cause? We don’t have any drug dealers out front. We don’t have any prostitutes out front.” Thus, by failing to recognize that the substantive effect of the Erie ordinance, rather than the motivation set forth in its preamble, was the real issue to be resolved in *City of Erie*, O’Connor had opened the door to a continuation of the misguided discussion over First Amendment expression rather than public nudity. But the real problems created by the Court’s second plurality decision on the same issue were the questions left unanswered for lower courts and state and local governments, which had been hopefully anticipating the *City of Erie* decision as a resolution of the confusion left by *Barnes*.

2. Questions still left open by the plurality

Much like the *Barnes* decision, *City of Erie*’s plurality opinion left many key issues unresolved, including the question of what precedential value *City of Erie* held. After *City of Erie* was decided, twenty-two states proposed bills that would tighten adult entertainment laws in the year 2000.51 Because *City of Erie* failed to focus on the conduct-based nature of the Erie ordinance, and instead got bogged down in the *O’Brien* First-Amendment analysis, it is unclear whether these laws will face the same challenges as those that followed *Barnes*. “This decision stands comfortably on the shoulders of *Barnes,*” says Pepperdine law professor Bernard James.52 But how strong are *Barnes*’s shoulders? The *Barnes* Court obviously failed to establish a clear precedent; otherwise the Court

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49. *Id.* at 296.


52. *Id.*
would not have needed to accept a nearly identical case in *City of Erie* and address exactly the same ultimate issues. Other commentators have noted that *City of Erie* follows a line of cases in which, "[u]nwill[ing] to appear illiberal, . . . courts have stretched the concept of 'secondary effects' further and further."53 One wonders how far the "secondary effects" rationale will stretch before it becomes apparent that a First-Amendment analysis is not the correct means for evaluating these laws.

### B. Justice Scalia’s Concurrence

Justice Scalia drew a clear distinction in his concurring opinion between regulations like the Erie ordinance, which is a conduct-based regulation that should not be subjected to First-Amendment scrutiny, and a content-based regulation of speech.54 Focusing on the language of the ordinance, Scalia pointed out its general application and countered the assertion that the preamble to the ordinance targets nude dancing. “[T]he preamble, the council members’ comments, and the chosen definition of the prohibited conduct,” Scalia said, “simply reflect the fact that Erie had recently been having a public nudity problem not with streakers, sunbathers, or hot-dog vendors, but with lap dancers.”55 Scalia drove this distinction home with the closing sentence of his opinion: “The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing itself is immoral, have not been repealed by the First Amendment.”56 While Scalia refers to nude dancing in his closing, and asserts that his decision would come out the same if the ordinance were targeted specifically at nude dancing, the message he is sending is clear. Nudity is conduct, and despite specific instances in which any conduct can be engaged in to prove a point, conduct generally does not equal speech.

54. *City of Erie*, 529 U.S. at 307-308.
55. Id. at 308 (citations omitted) (Scalia, J., concurring).
56. Id. at 310.
V. ABANDONING THE FIRST-AMENDMENT ANALYSIS

A. Public Nudity Statutes as a Bar on Conduct Rather than Expression

1. Obscenity and indecency were considered crimes under the old common law

Public nudity and indecency statutes have existed since the very origins of the American common law. Originally drafted and enforced in England, such statutes took hold throughout the colonies and in all of the original states. Frederick Schauer has noted that in the Nineteenth Century “[i]t was established that the common law prohibited ‘whatever outrages decency and is injurious to public morals,’ and the cases interpreted this to included indecent exposure” and other obscene actions.57 Such laws were in place throughout the late Nineteenth and early Twentieth Centuries, and were considered an entirely appropriate use of state police powers.

In Barnes, Chief Justice Rehnquist acknowledged that “[p]ublic indecency, including nudity, was a criminal offense at common law,”58 and cited Winters v. New York,59 for having “recognized the common-law roots of the offense of ‘gross and open indecency.’”60 The Chief Justice even referred to an 1881 Indiana statute that had served as a precursor to the modern version.61 The statute read, “[w]hoever, being over fourteen years of age, makes an indecent exposure of his person in a public place . . . is guilty of public indecency.”62

With such a historical precedent for laws such as those at issue in recent cases, and with the long-established police powers justification for such laws, one might wonder how the Court came to apply a First Amendment standard to these apparently conduct-based laws. The answer lies in the modern concern that laws such as these public indecency laws might be targeted not only at general conduct alone but also at acts that incorporate conduct along with speech or expression.

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58. 501 U.S. at 568.
59. 333 U.S. 507 (1948).
60. Barnes, 501 U.S. at 568 (quoting Winters, 333 U.S. at 515).
61. Id.
62. 1881 IND. ACTS, ch. 37, § 90.
2. *Statutes like those in* Barnes *and City of Erie are general conduct-based prohibitions*

Neither of the statutes that were attacked in *Barnes* and *City of Erie* were directed in any way at expression; both laws continued the long-accepted common law tradition of enacting general prohibitions on public indecency under the authority of state police powers to regulate health, morality, and public standards of conduct. The nearly identical language of both statutes contains the general provision that “a person who knowingly or intentionally, in a public place . . . appears in a state of nudity” violates the statutes’ provisions.63 Much attention was paid to the preamble to the Erie ordinance, and the private petitioners argued that the language of the preamble made the ordinance no longer a generally applicable prohibition. The Preamble to the Erie ordinance intimated that the Erie city council chose to pass the ordinance in part,

> for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.64

Despite this pointed language, which Justice Stevens’s dissent argued was indicative of an intent to suppress expression, Justice O’Connor made clear that “[the] Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive.”65 When she went on to add that “Erie’s asserted interest in combating the negative secondary effects associated with adult entertainment establishments . . . is unrelated to the suppression of the erotic message conveyed by nude dancing,”66 however, O’Connor confused the motivation for passage of Erie’s ordinance with the object of its drafting. Although the preamble to the ordinance cited an increase in adult entertainment as a reason for passage of the law, the language of the law itself enacts a general ban on all public nudity. Thus Erie passed a law that combats the negative effects of public nudity in general, not a narrow law that would only regulate adult entertainment in an effort to curb its negative effects.

63. *Ind. Code* § 35-45-4-1 (1988); Erie, Pa., Codified Ordinances of the City of Erie, Article 711 (1994).
64. Erie, Pa., Codified Ordinances of the City of Erie, Article 711 (1994).
65. *City of Erie*, 529 U.S. at 292.
66. Id. at 296.
Justice Scalia’s concurrence went one step further toward recognizing that the Erie ordinance was a general anti-nudity law:

The facts that a preamble to the ordinance explains that its purpose, in part, is to “limit a recent increase in nude live entertainment that city council members in supporting the ordinance commented to that effect, and that the ordinance includes in the definition of nudity the exposure of devices simulating that condition neither make the law any less general in its reach nor demonstrate that what the municipal authorities really find objectionable is expression rather than public nakedness . . . [T]he preamble, the council members’ comments, and the chosen definition of the prohibited conduct simply reflect the fact that Erie had recently been having a public nudity problem not with streakers, sunbathers, or hot-dog vendors, but with lap dancers.67

Six Justices agreed that the provisions of the Erie ordinance were general in their scope and created an across-the-board ban on any nudity in public, and Justice O’Connor even noted in her opinion that “there is nothing objectionable about a city passing a general ordinance to ban public nudity.”68 Nonetheless, the plurality still was unwilling to uphold the statute without a First Amendment analysis of the effect on expression. Or perhaps the Justices had become conditioned to assume that the First Amendment is implicated in almost any form of regulation pertaining to adult entertainment. In any event, the argument persists that nude dancing is somehow inextricably tied to expression. Proponents of this argument fail to establish a valid connection between nudity and the intended expression and also fail to show any causal link between the prohibition of nudity and any adverse effect on such expression.

Although the distinction between a ban on nudity and a ban on nude dancing may seem subtle, it is in fact of paramount importance. If the discussion were over a law that regulates nude dancing, there may well be First-Amendment implications that would justify looking at secondary effects and then applying the complicated O’Brien test. If however, a law is general in its application and regulates conduct in all contexts, the justification for the law under the police powers must merely be weighed against any infringement on individual freedoms generally. While the Erie City Council may have been imprudent in choosing to include the language of the preamble to the Erie Ordinance, they did not in any way alter the working language of the statute as it had been written by the Indiana Legislature, and the ordinance was therefore a law of general

67. Id. at 308 (citations omitted) (Scalia, J., concurring).
68. Id. at 295.
application to all kinds of unacceptable conduct – that is, public nudity in general.  

B. The Communicative Character of Nude Dancing

Judge Richard Posner, in his concurring opinion in Miller v. Civil City of South Bend, may have offered the best definition of the message a strip-tease dancer intends to send to her audience:

The goal of the striptease – a goal to which the dancing is indispensable – is to enforce the association: to make plain that the performer is not removing her clothes because she is about to take a bath or change into another set of clothes or undergo a medical examination; to insinuate that she is removing them because she is preparing for, thinking about, and desiring sex.

This message referred to by Judge Posner is one that can just as easily be conveyed without the dancer reaching a state of complete nudity. As Justice Rehnquist aptly noted in Barnes, “the requirement that dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.” The American Civil Liberties Union, which filed a brief as Amici Curiae in City of Erie, asserted in its brief that, “laws that have the effect of burdening expressive activities must be subjected to heightened scrutiny,” and that this law “expressly states that it is regulating conduct for the purpose of prohibiting a category of speech.”

The ACLU’s first assertion, that this law in some way burdened the expressive character of the dance, is disputable. The second assertion by the ACLU, that the purpose of the Erie ordinance was to prohibit speech, was expressly rejected by the Court when it held that the preamble to the Erie ordinance did not change the general character of the ordinance’s prohibition of nudity. Further, the very characterization of nude dancing as a form of speech is a questionable one.

69. See infra, notes 63-67 and accompanying text.
70. 904 F.2d 1081, 1091-92 (7th Cir. 1990).
71. Id. at 1091-92.
72. Barnes, 501 U.S. at 571.
74. See WOJCIECH SADURSKI, FREEDOM OF SPEECH AND ITS LIMITS, 45-46 (Kluwer Academic Publishers 1999) (“How far one should go in characterizing various forms of conduct as equivalent to speech involves a subtle judgment of degree, and there is an unfortunate, significant risk of hoax in the argument for protection of expressive conduct. If nude dancing on the stage can be characterized as behaviour protected by the principle of freedom of expression, then why not social dancing or nude bathing? And why not roller-skating? . . . [A]dmittedly, the line will often be difficult to draw. This is partly because, in a trivial sense, every human action is ‘communicative’ or ‘expressive’ in the sense that it ‘communicates’ to other people something about the agent.”).
Perhaps more importantly, however, the ACLU and the respondents in *City of Erie* refer often to a so-called suppression of a right to expression, but fail to ever point to any specific way in which the expressive character of the nude dancing was affected. Not only do they provide no specific assertion of suppression nor any allegation of causation, but in an effort to refute the applicability of the secondary-effects doctrine, the ACLU admits in its brief that like nude dancing, “dancing with ‘a scant amount of clothing’ . . . also conveys an erotic message (albeit somewhat muted in comparison to totally nude dancing).”

Although it is not clear what is meant by the ACLU’s assertion that the message is “muted,” it is clear that a dancer in a state of near-nudity can convey precisely the same message as a totally nude dancer. If there is any difference between the more graphic message a stripper is able to convey without any clothing and that she conveys with the bare minimum, or if her message is in any way “muted,” by the requirement that she wear pasties and a G-string, the difference and effect is slight. When one applies the traditional balancing test between this slight effect on individual rights and police power of the states to enact regulations that protect public health, safety, and morality, it is clear that the scales tip in favor of the police powers.

Furthermore, while the act of appearing nude in public arguably communicates a message to those in the presence of the naked person in the narrow context of nude dancing cases such as *Barnes* and *City of Erie*, the nearly identical laws that were disputed in each of these cases, as noted above, used broad, inclusive language to ban all public nudity. Of all the instances of public nudity that would be subject to prosecution under these bans, relatively few could potentially rise to the level of expression. Thus it would be inappropriate to evaluate the effect of such laws, which are predominantly aimed at nude sunbathing, streaking, and other indecent exposure in public places, against a constitutional standard merely because some small percentage of the conduct that is being regulated was entered into for the purpose of expressing a viewpoint or message that is of questionable social value.

Nonetheless, the Supreme Court chose in *Erie* to ignore its own earlier language recognizing that the ordinance at issue was a ban on all public nudity and apply First-Amendment analysis. This leap by the

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76. This reference presumes that an individual has a right to be without clothing, but this is not a reference to any enumerated constitutional right that would implicate a higher level of scrutiny. As this paper attempts to make clear, the First Amendment refers to “speech,” and merely being without clothing in public, the general conduct prohibited by these ordinances, is not speech.
Court constituted one of the gravest errors in the progressing debate over this issue. Apparently eager to decide the nude dancing issue on First Amendment grounds, presumably to provide a clear constitutional answer to the question, the Court jumped to the conclusion that expression was somehow negatively affected by legislation such as the Indiana statute. The Court would later concede the fact that “pasties and G-strings [do] not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.” The damage had been done, however, and this moment of clarity did not undo the Court’s decision to open the door to a First-Amendment analysis, a mistake that was compounded by the fact that the Court handed down a plurality opinion with disputable precedential value.

C. The Rational Basis Test and the Right of State Governments to Uphold Moral Values as a Valid Exercise of the Police Powers

Application of the secondary effects doctrine opened the City of Erie opinion up to a great deal of criticism it would not have faced had the Court not chosen to embark on the more complicated First Amendment analysis. The secondary effects doctrine itself has injected much unnecessary complication into the decision of otherwise straightforward issues. Commentators Bryant Paul, Daniel Linz, and Bradley Shafer, in a criticism of the doctrine, have argued, “it is imperative that [the application of the secondary effects doctrine] be based on solid evidence that the operation of an adult entertainment business has a deleterious effect on the surrounding community.” Paul, Linz, and Shafer therefore propose a four-step test to examine the validity of empirical tests into negative effects caused by adult entertainment. This four-step test would presumably be used to determine whether the secondary effects doctrine’s balancing test should be applied, in order to determine whether the four-step O’Brien test should control. Despite the Court’s propensity for setting forth balancing tests and prongs, this attempt to objectify an otherwise subjective test is not the correct approach.

As Justice Scalia pointed out in his concurring opinion to City of Erie, government has a traditional power and duty “to foster good morals (bonos mores),” and this police power includes the power to pass general prohibitions on conduct that is found unacceptable by society. In Barnes, Chief Justice Rehnquist observed that the Indiana public indecency statute “follow[ed] a long line of earlier Indiana statutes

77. Barnes, 501 U.S. at 571.
78. Paul et al., supra note 37, at 366.
79. City of Erie, 529 U.S. at 310.
banning all public nudity. The history of Indiana’s public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition . . . [a]s early as 1831.80 The Chief Justice continued by noting that “[t]his and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.”81 Public nudity was a criminal offense at common law, and was considered a crime malum in se.82 At least forty-seven states have public indecency laws of some type.83 And in fact all laws that regulate or prohibit any type of conduct are ultimately based upon a moral choice made by society or the government that represents it. Similarly, as pointed out above, all conduct is ultimately engaged in for some expressive purpose, if nothing more than to show that the actor desires to engage in that conduct.

As has been exemplified by the passages above and the many cases in which rational basis review has been employed to balance individual rights against the need for regulation, state and local governments have a valid right to prohibit public nudity if society at large dictates that such behavior is unacceptable. This basic principle of federalism has long been established under the Tenth Amendment, which provides that states, not the federal government, shall have the exclusive province over the “police powers”; that is, it is the sole responsibility of state and local governments to regulate conduct that they find detrimental to public health, safety, or morals. If it were not so, where would the line be drawn? If lawmakers were to determine that it is not morally offensive to appear nude in a public place, then would they draw the line at deciding that engaging in sexual acts in public is unacceptable? Or acts of brutality? Or violence? The ultimate issue is not whether states, the traditional holders of the police power, have the right to regulate conduct on moral grounds. The question is where should these lawmakers draw the line, and what conduct will and will not be deemed acceptable? At the present time it seems clear that public nudity is a practice that state and local legislators are not ready to condone.

While some cases have admittedly held that conduct can equal expression in some contexts, and it is indisputable that literally any

80. Barnes, 501 U.S. at 568.
81. Id. at 569.
conduct can be engaged in for the purpose of communicating some point of view, no rational person could argue that the government should be stripped of all power to regulate socially offensive conduct merely because it might incidentally take away the right to expression in those few instances in which a legitimate message could be identified. Those who would argue for a First-Amendment treatment of conduct such as public nudity seek to cloud the real issue, which is that our government owes a duty to pass and enforce laws that uphold the traditional mores of society. Again, all conduct involves some measure of expression, but once a mode of conduct has been held unacceptable by society, is there really a need to craft exceptions for those who claim they engaged in the prohibited conduct to make a point? Should some murders be excused because they are politically motivated? Should theft be justified when it is committed to protest against the wealthy establishment? Certainly not. And similarly, there should be no further explanation needed for enforcing a general prohibition of nudity, another form of conduct for which society holds contempt. Nowhere in the United States Constitution is there a passage that states that individuals may do whatever they please. The First Amendment states only that each citizen may say whatever she pleases. It is left to the states and local governments, under the Tenth Amendment, to determine what standards of conduct will be considered appropriate in their own communities.

Had burning paper in public been an act that society agreed was unacceptable, as public nudity is, the O'Brien Court would not have had to engage in a First Amendment analysis. But such is not the case. The law that was broken in O'Brien was a law against burning draft cards, which is not a morally unacceptable act in and of itself and cannot be argued to fall under the traditional police powers. Thus some further analysis was necessary. Unfortunately, O'Brien has since been improperly extended to situations where it is not needed, such as these cases dealing with public nudity. And this extension must be stopped, as the Supreme Court warned in 1986 in Bowers v. Hardwick: “The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the [First Amendment as applied through the] Due Process Clause, the courts will be very busy indeed.”

84. See City of Dallas v. Stanglin, 490 U.S. 19, 25-26 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one’s friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment”).

But busy courts are not the only consequence of such a state of the law. Indeed, if all laws “representing moral choices,” which are nothing new to the law, were to be invalidated by any means, the free-for-all that would ensue would deteriorate the very walls of modern, civilized society.

VI. CONCLUSION

*Barnes v. Glen Theatre, Inc.* created a great deal of confusion when it was decided in 1991 because the Court chose to employ a First-Amendment analysis to a general, conduct-based law, and left lower courts and local legislators with a fragmented, plurality opinion that provided little guidance for future resolution of similar issues. When the issue of the validity of a general public nudity law nearly identical to the one addressed in *Barnes* came up again in *City of Erie v. Pap’s A.M.*, *Barnes*'s plurality opinion and its piecemeal First-Amendment analysis offered no such guidance, and the issue was again tried all the way to the United States Supreme Court. Yet, faced with a second chance to resolve the same issue, the Court dropped the ball again and once again failed to establish a clear and applicable rule, again getting caught up in an unnecessary First-Amendment analysis and producing a broken plurality opinion.

The solution to this inability of the Court to craft a clear and defined rule on the issue of public nudity laws is to realize that such laws, if general in their scope and applicable to the conduct of nudity in any public place, are not governed by First Amendment principles at all. Rather, they are conduct-based prohibitions of morally unacceptable conduct that are justified by the traditional role of state and local governments, which is to apply the police powers to ensure public morality, health, and safety. Public nudity and indecency have long been considered by society and by the common law to be unacceptable and pernicious conduct.

Ultimately, every legislative body faced with the issue of indecency and public nudity must weigh the need to uphold public standards of morality, safety, and health (through application of the police powers) against inconvenience caused by a general ban on conduct such as nudity. Simplifying the test in this manner, in keeping with the reality that nudity itself is not speech, would allow local lawmakers to address the specific needs of their own communities, would save judicial and legislative time and resources, and would also establish a clear and understandable precedent for future decisions. This is the position advocated by Justice Scalia in his concurring opinion to *City of Erie*, in which he echoed many of his earlier warnings from *Barnes*. 
Until the Court recognizes that the First Amendment offers no protection for pernicious conduct such as public nudity whether or not accompanied by some type of expression, and that prohibitions on those forms of conduct considered by society to be morally unacceptable are a valid exercise of the police power, issues like public nudity will continue to take up an inordinate amount of time and judicial resources, and local and state lawmakers will remain in the dark as to what they may and should do with regard to the regulation of such conduct.

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