

Chapter 8: The Problem of Nude Dancing

Quick Guide to Chapter 8:

What negative effects are associated with nude dancing?

Nude dancing establishments are typically associated with prostitution, public sexual contact between dancers and patrons, drugs and other criminal conduct, including higher incidences of sexual assault. (8.1)

Isn't nude dancing protected speech under the Constitution?

The Supreme Court has ruled that it is at the outer parameters of the First Amendment and that whatever speech component it contains can be overridden by a community's concern for the negative consequences of establishments offering nude dancing. Thus, public nudity can be prohibited in establishments open to the public.(8.2)

What types of regulations are permissible for bars that want to offer nude dancing?

Virtually every state has some sort of regulation of nude dancing in bars. Regulations on nude dancing must be aimed at secondary effects and undergo the same kinds of analyses as other SOBs. The presence or absence of alcohol in an SOB does not alter the constitutional legal analysis, but its presence may increase the likelihood of adverse secondary effects. (8.4)

An area of growing concern to many communities is the influx of nude dancing establishments, touted by their owners as the "safe sex alternative in adult entertainment."

This chapter will discuss the significant harms that they can bring into a community and then review the means to regulate nude dancing and prohibit public nudity.

8.1 – Basis for Prohibiting Public Nudity

The primary justification for prohibiting public nudity is that it creates numerous "harmful effects" in communities. Justice Rehnquist described those effects over 30 years ago in *California v. LaRue*, 409 U.S. 109 (1972). Drawing from the District Court's transcript, Justice Rehnquist explained that "prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises." *Id.* at 111. In more graphic terms, Justice Rehnquist explained why states may choose to prohibit nude dancing:

Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.

Id. at 111. These effects were instrumental in the Supreme Court's decision to uphold the California regulation prohibiting nude dancing in establishments serving liquor.

In every case where nude dancing prohibitions have been upheld, a critical element is that the law or ordinance is not targeted at the dancing, but at the negative secondary effects associated with the conduct occurring in the establishment.

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Renton ordinance was aimed "not at the content of the films shown at the 'adult motion pictures theatres', but rather at the secondary effects of such theatres on the surrounding community." 475 U.S. at 47 (1986). Although made in the context of a zoning ordinance, the findings in *Renton* apply to time, place, and manner prohibitions of nude conduct in nude dancing establishments because of the similar negative secondary effects. The government has a significant interest in preventing the harmful secondary effects of nude dancing establishments, and that interest justifies regulation including prohibiting complete nudity.

More recently, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), harmful secondary effects played a key role in the Supreme Court's decision to uphold a public nudity statute that prevented public nude dancing. Secondary effects formed the foundation for Justice Souter's concurring opinion, which provided the fifth vote for upholding the statute. Justice Souter argued that Indiana's statute could apply to nude dancing because such conduct "encourages prostitution, increases sexual assaults and attracts other criminal activity." *Id.* at 522. Prevention of those secondary effects is a substantial state interest.

Harmful secondary effects also played a role in *City of Erie v. Pap's A.M.*, 120 S.Ct. 1382 (2000)

where the Supreme Court upheld Erie's ordinance prohibiting public nudity on grounds that it focused on fighting secondary effects. Writing for the plurality, Justice O'Connor referred to the preamble of the ordinance, which stated, "[C]ertain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity." *Id.* at 1395. In addition, the city could "reasonably" rely on evidence found by other cities. *Id.* at 1395.

In upholding prohibitions against public nudity, including nude "barroom dancing", courts have consistently found a valid exercise of the state's police power, based on various legitimate governmental interests:

(1) concern for public morals: *See, e.g., T Backs Club, Inc. v. Seaton*, 84 F.Supp.2d 1317 (M.D. Ala. 2000); *Recreational Developments of Phoenix, Inc. v. City of Phoenix*, 83 F.Supp.2d 1072 (D.Ariz. 1999); *State v. Ciancanelli*, 45 P.3d 451 (Or. 2002); *Aguirre v. State*, 22 S.W.3rd 463 (Tex. Crim. App. 1999); *Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154 (Wash. 1997); *Smith v. City of Huntsville*, 515 So.2d 72 (Ala. Cr. App. 1986); *Crownover v. Musick*, 509 P.2d 497, 511 (Cal. 1973), *rev'd on other grounds Morris v. Municipal Court*, 652 P.2d 51 (Cal. 1982); *Eckl v. Davis*, 124 Cal.Rptr. 685 (Cal. App. 1975); *Gabriel v. Town of Old Orchard Beach*, 390 A.2d 1065 (Me. 1978); *Curtis v. City of Seattle*, 639 P.2d 1370, 1375 (Wash. 1982) (J. Stafford concurring);

(2) protecting societal norms: *See, e.g., State v. Turner*, 382 N.W.2d 252, 254-55 (Minn.Ct.App. 1986);

(3) preservation of public decency: *See, e.g., Flannigan's Enterprises, Inc. of Georgia v. Fulton Co., Ga.*, 242 F.3d 976, 984 n. 9 (11th Cir. 2001); *8131 Roosevelt Corp. v. Zoning Board of Adjustment of City of Philadelphia*, 794 A.2d 963, 970 (Pa. Commonw. Ct. 2002); *161 Dublin, Inc. v. Ohio State Liquor Control Com'n*, 2001 WL 1651921, 5 (Oh. App. Dec. 27, 2001); *Salt Lake City v. Wood*, 991 P.2d 595 (Utah App. 1999) *Turner*, 382 N.W.2d at 255;

(4) promotion of general welfare, discipline, "peace and good order: *See, e.g., Baby Dolls Topless Saloons, Inc. v. City of Dallas, Tx.*, 295 F.3d 471 (5th Cir. 2002); *Board of County Commissioners of Lee County v. Dexterhouse*, 348 S.2d 916 (Fla. App. 1977); *Curtis*, 639 P.2d at 1375;

(5) prevention of degradation of person exposed: *See, e.g., Gatena v. County of Orange*, 80 F.Supp.2d 1331 (M.D. Fla. 1999); *Village of Winslow v. Sheets*, 622 N.W. 2d 595 (Neb. 2001); *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998) *rev'd on other grounds* 529 U.S. 277 (2000) ; *Purple Orchid, Inc. v. Penn. State Polc, Bureau of Liquor Control Enforcement*, 721 A.2d 84 (Pa. Commw. Ct. 1998) *Yauch v. Arizona*, 514 P.2d 709, 711 (1973) ; *Koppinger v. City of Fairmont*, 248 N.W.2d 708, 711 (Minn. 1976);

(6) prevention of prostitution and pandering: *See, e.g., City of Renton v. Playtime Theatres*,

475 U.S. 41 (1986); *Baby Dolls Topless Saloons, KEV, Inc. v. Kitsap County*, 793 F.2d 1053, 1056, 1059 (9th Cir. 1986); *Ways v. City of Lincoln*, 2002 WL 1742664 (D. Neb. July 29, 2002); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. of California*, 121 Cal.Rptr.2d 729, 735 (Cal.App. 4 Dist. 2002);

(7) preventing public commercial exploitation of sex and sex crimes: *See, e.g., O'Day v. King County*, 749 P.2d 142, 145, n.2, 154 (Wash. 1988); *Koppinger v. City of Fairmont*, 248 N.W.2d 708, 711 (Minn. 1976); *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir. 1982); and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981);

(8) controlling sites of crime problems, such as drug dealing and other illegal conduct: *See, e.g., KEV*, 793 F.2d at 1056, 1059; *Grand Faloon Tavern, Inc.*, 670 F.2d at 949-51;

(9) concern about sexual discrimination: *See, e.g., Crownover v. Musick*, 509 P.2d 497, 509 (Ca. 1973); *Yauch*, 514 P.2d at 711; *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 325-29 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); and

(10) debasement and distortion of sex through crass commercialization: *See, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973); *People v. Karns*, 365 N.Y.S.2d 725 (N.Y. City Ct. 1975).

8.2 – Regulation of Nude Dancing and Prohibition of Public Nudity

Nude dancing establishments can be regulated like other SOBs using content-neutral time, place, and manner regulations. *See Baby Dolls Topless Saloons, Inc. v. City of Dallas, Tex.*, 2002 WL 1339870 (5th Cir. 2002); *LLEH, Inc. v. Wichita County, Tex.*, 289 F.3d 358 (5th Cir. 2002); *Jake's, Ltd., Inc. v. City of Coates*, 284 F.3d 884 (8th Cir. 2002); *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377 (6th Cir. 2001); *Blue Canary Corp. v. City of Milwaukee*, 270 F.3d 1156 (7th Cir. 2001); *BZAPS, Inc. v. City of Mankato*, 268 F.3d 603 (8th Cir. 2001); *Moore v. Brown*, 215 F.3d 1320 (4th Cir. 2000); *Wise Enterprises, Inc. v. Unified Government of Athens Clarke County, Ga.*, 217 F.3d 1360 (11th Cir. 2000); *D.H.L. Associates, Inc. v. O'Gorman*, 199 F.3d 50 (1st Cir. 1999); *Buzzetti v. City of New York*, 140 F.3d 134 (2nd Cir. 1998); *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998). Regulations must be content-neutral, that is, directed not at the expression in nude dancing but at the detrimental effects of such establishments. The regulation must further a substantial government interest. And, the regulation, must allow for “reasonable alternative avenues of communication..

Nude dancing may also be regulated through public indecency ordinances that proscribe nudity in public places. The Supreme Court has repeatedly upheld such ordinances. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (plurality).

Barnes dealt with an Indiana public nudity statute and *City of Erie* dealt with a public nudity

municipal ordinance. Regulations in both cases were worded identically: “A person who knowingly or intentionally, in a public place ... appears in a state of nudity... commits public indecency.” *Barnes*, 501 U.S. at 572; *City of Erie*, 529 U.S. at 284. Indiana considered the offense a misdemeanor and Erie, Pennsylvania considered it a summary offense. The Supreme Court upheld the law in both instances. The Court went through a similar analysis for both cases.

In *City of Erie*, the Court evaluated the ordinance using the *O’Brien* test. To do so, the Court first had to find that the public nudity ordinance regulated conduct and not speech. Because the ordinance “on its face [was] a general prohibition on public nudity” and not aimed at expressive dancing, the Court decided that the ordinance regulated “conduct alone.” *City of Erie*, 529 U.S. at 290. The “one purpose of the ordinance was to combat negative secondary effects.” *Id.* (internal quotations removed). Additionally, dancers could continue dancing as long as they wore some clothing, such as “pasties and G-strings.” *Id.* at 294. Thus, the ordinance had only a “minimal effect on the erotic message” of nude dancing. *Id.* at 294. Because the regulation was found to be a content-neutral restriction on conduct with incidental effects on expression, the *O’Brien* test was the proper test for evaluating its validity.

“The first factor of the *O’Brien* test is whether the government regulation is within the constitutional power of the government to enact. Here Erie’s efforts to protect public health and safety are clearly within the city’s police powers.” *Id.* at 296. Thus the ordinance satisfies the first factor.

“The second factor is whether the regulation furthers an important or substantial government interest.” *Id.* at 296. Preventing the harm caused by public nudity and nude dancing are “undeniably important.” *Id.* at 296. While “requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, ... *O’Brien* requires only that the regulation further the interest in combating such effects.” *Id.* at 301. To prove the harm caused by public nudity and nude dancing, a city may use other cities’ studies. Erie used the information in *Barnes* to show the connection between nude dancing and harmful effects. *Id.* at 297. Erie also used findings of its own expressed “at various times over more than a century.” *Id.* at 297. In addition, the Court acknowledged that the city council members had personal knowledge of the activities and effects that nude dancing establishments had brought into Erie. This information, or “legislative facts”, could be relied upon by the council members. *Id.* at 298. Thus, the council members were not bound to the evidence in the record alone. *Id.* at 298. Erie’s city council had three prongs to which to prove secondary effects: other cities’ studies, their own city’s findings, and the council members’ personal knowledge of secondary effects of nude establishments.

The third factor is whether “the government interest is unrelated to the suppression of free expression. The Court, as previously stated, found 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.” *Id.* at 296. The ordinance is targeting secondary effects not free expression.

The fourth factor requires “that the restriction is no greater than is essential to the furtherance of

the government interest.” *Id.* at 301. The Court found that the restriction of expression was minimal. “[T]he restriction leaves ample capacity to convey the dancer’s erotic message.” *Id.* at 301.

Because the Court found that Erie’s ordinance passed the *O’Brien* test, the regulation was a valid, content-neutral regulation. Cities attempting to pass their own public nudity laws would do well to follow Erie’s model.

8.3 - Post Erie Cases

Following *City of Erie*, at least one U.S. Court of Appeals has ruled that public nudity can be banned where the performance is before a private audience in a private home.

In *Currence v. City of Cincinnati*, 28 Fed.Appx. 438 (6th Cir. 2002) (not recommended for full text publication), a male, exotic dancer who worked in homes and hotel rooms challenged Cincinnati’s ordinance requiring sexually oriented businesses and employees to obtain licenses and pay an application fee. The ordinance also prohibited nudity in any sexually oriented business. *Id.* at 440. The court was called on to decide whether Currence’s activities, dancing for private audiences, had First Amendment protection. Since the Supreme Court had not “distinguished between erotic dancing before private and public audiences”, the Sixth Circuit held that private erotic dancing would be examined under the same scrutiny as public erotic dancing. *Id.* at 444. Applying, the four part *O’Brien* test, the Court upheld the city’s prohibition on nudity even as it applied to private exotic dancing performances before private audiences in a private home or hotel room.

Cities and states should closely analyze regulations under the four prongs of the *O’Brien* test. For example, in *Vaughn v. St. Helena Parish Police Jury*, 192 F.Supp. 2d 562 (M.D.La. 2001), a Louisiana federal district court struck down a public nudity ordinance for failing the 4th prong of the *O’Brien* test, requiring that the restriction on speech not be greater than is essential. In *Vaughn*, a public nudity ordinance that “prohibit[ed] the holder of a retail or wholesale dealer license from permitting ‘any nude or partially nude person’ on the premises.” *Id.* at 567. “Nude” was defined as a “person who is less than completely or opaquely covered such as to expose to view that person’s genitals and/or pubic region, all of the buttocks area or the female breast area below a point immediately above the top of the areola.” *Id.* at 567. This ordinance was passed after the plaintiff’s erotic dancing establishment had been in business with that business specifically in mind. Following *City of Erie*, the district court used the *O’Brien* test to analyze the ordinance after finding it content-neutral. The court, in its analysis, found that the ordinance was more restrictive than the one in *City of Erie*. While the City of Erie allowed dancers to wear pasties and G-strings, the St. Helena Parish ordinance required much more. “While people may wear such [restricted] apparel on the streets of the parish, they must dress up more formally before they enter a bar.” *Vaughn* at 573. Dancers could not even wear certain jogging shorts or “daisy dukes” under the St. Helena Parish ordinance. *Id.* at 573. Therefore, the court found that the ordinance failed the fourth prong of the *O’Brien* test. *See also Nite Moves Entertainment, Inc. v. City of Boise*, 153 F.Supp.2d 1198, 1210 (D. Idaho 2001) (holding that an ordinance requiring

at least “short shorts and a modest bikini top” is “broader than necessary”).

Governmental entities should strive to ensure that they can demonstrate that regulations do in fact further governmental interests as mandated by the second prong of the *O’Brien* test. In *Essence, Inc. v. City of Federal Heights*, 285 F. 3d 1272 (10th Cir. 2002) *petition for cert. filed*, 71 USLW 3094 (Jul 05, 2002)(NO. 02-66) the city ordinance prohibited anyone under the age of twenty-one from being on the premises of a business offering live nude dancing. The city did not demonstrate how the ordinance furthered an important governmental interest and the court struck the age requirements.

The factual foundation for combating secondary effects should be set forth clearly. This burden, however, is not stringent. The Supreme Court allowed the city of Erie to utilize past studies, its own findings, and legislative notice. Courts have also accepted legislative records as evidence.

In *Ranch House, Inc. v. Amerson*, 146 F.Supp.2d 1180 (N.D.Ala. 2001), the court accepted the state’s secondary effects contention based on testimony in the state senate. An Alabama statute prohibited a business from showing, for entertainment, “genitals, pubic area, or buttocks with less than a fully opaque covering” or “the female breast ... below the top of the nipple...” *Ranch House* at 1196. The Court of Appeals for the Eleventh Circuit had remanded the case to the district court to determine whether the statute was content-neutral and aimed at secondary effects. The district court looked not only at the statute itself but also at the legislative record. Based on the testimony of the senate sponsor of the statute and a report of incidents that he had ordered from the sheriff concerning areas surrounding the dancing establishments, the court found that the statute’s purpose was to combat secondary effects. *Ranch House* at 1202. In addition, the statute was written similarly to other statutes, especially the one in *Barnes*. This led the court to conclude that the authors of the statute had considered relevant case law and other laws. The court then analyzed and upheld the statute under intermediate scrutiny pursuant to the *O’Brien* test. *Ranch House* at 1204.

8.4 – Regulation of Establishments That Serve Alcohol

Section 2 of the Twenty-first Amendment to the United States Constitution, provides:

The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

In *California v. LaRue*, 409 U.S. 109, 114 (1972), the Supreme Court held that “the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.” *See generally*, Daniel A. Klein, Annotation, *Supreme Court's Views as to Extent of States' Regulatory Powers Concerning or Affecting Intoxicating Liquors, Under Federal Constitution's Twenty-First Amendment*, 134 L.Ed.2d 1015 (1999).

In *LaRue*, California had created regulations prohibiting nude dancing in places licensed to serve alcohol. The Court upheld this regulation, recognizing the broad power of the Twenty-first Amendment. *LaRue* marked the beginning of a series of decisions that used the Twenty-first Amendment as a justification for the regulation of nude dancing establishments that served alcohol. See, e.g., *New York State Liquor Authority v. Bellance*, 452 U.S. 714 (1981); *Iacobucci v. City of Newport, Ky*, 479 U.S. 92 (1986).

However, in 1996 the string of cases upholding broad SOB regulatory power under the Twenty-first Amendment came to a halt with the decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). This case, dealing with liquor advertisements, had little to do with sexually oriented businesses. However, in discussing the Twenty-first Amendment, the Court dismissed the idea that the Twenty-first Amendment could go where the First Amendment did not allow. The Twenty-first Amendment could not prohibit protected speech. The Court explicitly “disavow[ed] the reasoning” of *California v. LaRue*, but, nevertheless, concluded that the states could “restrict...bacchanalian revelries” regardless of whether alcohol was present. 517 U.S. at 515. The Court noted that, “[e]ntirely apart from the Twenty-first Amendment,” states may forbid the sale of alcohol in establishments with nude dancing. *Id.*

While governmental entities may not rely on the Twenty-first Amendment as a basis for regulating nude dancing, they remain free to regulate the secondary effects of nude dancing. Furthermore, courts have repeatedly recognized that the presence of alcohol increases the likelihood of adverse secondary effects. As the U.S. Court of Appeals for the Seventh Circuit has noted, “[l]iquor and sex are an explosive combination.” *Blue Canary Corporation v. City of Milwaukee* 251 F.3d 1121, 1124 (7th Cir.2001).

In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. of California*, 121 Cal.Rptr.2d 729 (Cal.App. 4 Dist. 2002), the proprietor of a nude dancing bar had been charged by the California Department of Alcoholic Beverage Control with the violation of California SOB laws. The laws forbid dancers in places serving alcohol from exposing themselves within six feet of patrons and from touching themselves on certain areas of their bodies. The lower court noted that “nude performances in conjunction with the sale of liquor led not only to lewd conduct by customers inside the business premises, but also to prostitution, indecent exposure, and sexual assault in the vicinity.” 121 Cal.Rptr.2d at 735. The appellate court held that California had the every justification and power to regulate alcohol and nude dancing under its police powers. “Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations.” *Id.* at 736, quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996). Turning to *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) and the *O’Brien* test, the court decided that the California laws were content neutral and passed muster.

The court held that the California laws are “only attempting to reduce the problems caused by such dancing in front of customers whose inhibitions and ability to control their impulses have been weakened by the consumption of liquor.” *Department of Alcoholic Beverage*, 121 Cal.Rptr.2d at 738. As far as being restrictions of free expression, the court concluded that if

dancers' felt so restricted, they could easily express themselves legally in nude dancing establishments that did not serve alcohol. Thus, "alternative avenues of communication" did exist. *Id.* at 738.

Although the combination of alcohol and nudity may create additional secondary effects justifying additional regulation, the legal analysis for regulating nude dancing establishments serving alcohol is identical to those that do not.

8.5 - Conclusion

While the details of regulating nude dancing establishments have changed in the past thirty years, the broader picture has not. Cities and states may continue to regulate such establishments. As is the case with regulations imposed on other types of SOBs, regulations aimed at nude dancing establishments must be content neutral time, place, manner regulations designed to prevent adverse secondary effects. The presence of alcohol does not change this analysis, but it does enhance the likelihood of adverse secondary effects, since the combination of sex and alcohol is potentially explosive. Communities should also consider adopting ordinances prohibiting public nudity that are closely modeled after those approved in *City of Erie* and *Barnes*. Prudent drafters of such ordinances will be astutely aware of overbreadth concerns.