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To Strip or Not to Strip: The Demise of Nude Dancing and Erotic Expression Through Cumulative Regulations

Clinton P. Hansen

TO STRIP OR NOT TO STRIP: THE DEMISE OF NUDE DANCING AND EROTIC EXPRESSION THROUGH CUMULATIVE REGULATIONS

A free society will always draw the line between what it considers immoral and what it makes illegal as close as possible to the more serious, direct, immediate, and physical of the harms, and it will leave to the operations of social pressure, education, and self-restraint the control of behaviors whose harm to others is less serious, less direct, less immediate, and less physical.[1]

I. INTRODUCTION

The use of dance to express a sexual or erotic message has existed for ages.[2] In Biblical times, Salomé, daughter of Heródias, danced for King Herod in a provocative manner that persuaded Herod to offer her anything she desired, even half of his kingdom.[3] In other ancient societies, dance was used as a method of encouraging marriage and procreation.[4] In modern society, alertness to the sexual messages conveyed through dance has been seen by one scholar as necessary to the survival of the human race.[5]

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[1] FRANKLYN S. HAIMAN, 'SPEECH ACTS' AND THE FIRST AMENDMENT 85 (1993) (quoting John Stuart Mill's essay *On Liberty*).

[2] JUDITH LYNNE HANNA, DANCE, SEX AND GENDER 22 (1988). Hanna acknowledges this when stating:

> The sexuality of dance and its potential to excite has long been recognized. Dancing can lead to altered states of consciousness and hence to altered social action. Dance spectators may have vicarious, empathic experiences. The Greeks linked dance, bacchanals, and political unrest; Plato feared the subversive impact of the arts-mimesis aroused the feeling being imitated.

Id.

[3] *Mark* 6:22-23; *see also* RICHARD A. POSNER, SEX AND REASON 363 (1992).

[4] HANNA, *supra* note 2, at 60 ("In the early Chou period [of China] (ca. 1100-77 B.C.), rural communities organized spring fertility festivals, where young men and women danced together. Liaisons formed and became regularized as marriages if the girl became pregnant.") (citing ROBERT HANS VAN GULIK, SEXUAL LIFE IN ANCIENT CHINA 21 (1961)).

[5] *Id.* at 13 ("Because the instrument of dance and of sexuality is one - the human body - dancing motion attracts attention. Human survival depends upon alertness to moving objects and reproduction."); *see also id.* at 46 stating:

> The inherent sexuality of dance may be a reason why dance is a nearly universal activity and why gender is coterminous with sexuality in dance. Sexual intercourse is seen to be life generating, an action with miraculous power and a magical sense of pleasure and relief. Courtship and foreplay arouse and anticipate. Signs of sexuality evoke

Nude or erotic dancing at strip clubs (or adult use establishments) has also existed for ages and despite its failure to attain the status as a necessary tool for the survival of the human race, it has been recognized by the United States Supreme Court as a valid form of communication subject to First Amendment protection.[6] Nonetheless, these adult use establishments often cause a moral uprising and conflict within the communities that house them, leading to the drafting of restrictive ordinances for the purpose of protecting the community from the supposed harms.[7] Originally, the restrictions were simple and limited to bans on total nudity or a ban on the distribution of alcoholic beverages at establishments that exhibited totally nude dancers.[8] However, in time these restrictions were expanded to include restraining the hours of operation, requiring a minimum distance between patrons and dancers, and eliminating all contact between dancers and patrons.[9]

Using the United States Supreme Court precedent from *Barnes v. Glen Theatres*,[10] the lower courts upheld many of these individual restrictions as acceptable limitations on adult use establishments. In more recent times, communities have attempted to cripple the operations

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> these erotic images and sentiments. They also serve as symbolic references to other domains of power.

Id.

[6] *See* Barnes v. Glen Theatre, 501 U.S. 560, 565 (1991); *see also* Margot Rutman, *Exotic Dancer's Employment Law Regulations*, 8 TEMP. POL. & CIV. RTS. L. REV. 515, 516 (1999) stating:

> As of February 1997, Americans "spend more money at strip clubs than at Broadway, off-Broadway, regional, and nonprofit theatres; at the opera, the ballet, and jazz and classical music performances - combined." U.S. News and World Report stated, "the number of strip clubs in the U.S. roughly doubled between 1987 and 1992." The annual revenues from these clubs range from $500,000 to more than five million at well run, upscale, "gentlemen's clubs."

Id.

[7] *See* POSNER, *supra* note 3, at 357. Posner noted how the casual attitude toward sex was altered with the change in religious values:

> [The pervasive attitude toward sex] changed with the coming of Christianity. Nudity became taboo; sexual desire was disparaged, and with it efforts either to stimulate it or to satisfy it through masturbation. The sexual ideology of the Church left no room for erotic representations, and the poverty and illiteracy of the Middle Ages would have limited the production and dissemination of erotic art and literature in the best of circumstances....

Id.

[8] *See generally* Schad v. Mount Ephraim, 452 U.S. 61, 66 (1981); *see also* California v. LaRue, 409 U.S. 109, 118 (1972).

[9] *See generally infra* note 16.

[10] 501 U.S. 560 (1991) (allowing a ban on nudity). *Barnes* is considered the landmark case in this respect. *Id.*

of these adult use establishments[11] by compiling the individual restrictions upheld by lower courts into cumulative ordinances, thus imposing significant restriction on these establishments. The purpose of this Note is to analyze the constitutionality of a cumulative or overrestrictive ordinance, and to prove that the restrictions imposed would not stand up to the judicial scrutiny currently utilized by the United States Supreme Court.

Lake County, Illinois,[12] recently drafted and enacted an ordinance to help regulate the four adult use establishments in that county.[13] Two of those regulated establishments provided erotic or cabaret dancing ("strip clubs") to patrons while the other two establishments sold books, videos, and other adult use paraphernalia ("adult bookstores").[14] The ordinance is similar in many ways to other local city and county ordinances whose purpose is to alleviate the problems associated with nude dancing establishments.[15] The ordinance restrictions proposed by

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[11] An adult use establishment is commensurate to an adult entertainment establishment defined in Lake County's 1998 ordinance as an adult cabaret, an adult store, or an adult theatre. Lake County Ordinance, *see infra* note 13, at 4.

[12] Lake County, Illinois borders Lake Michigan between the southern border of Wisconsin and the northern border of Cook County, Illinois. Cook County is the county in which Chicago lies.

[13] Lake County, Ill., Ordinance 6:1-15 (Feb. 10, 1998) (unpublished ordinance, on file with author) [hereinafter Lake County Ordinance]. The main use of the term adult use ordinance within this note is equivalent to the ordinance's adult cabaret definition which states:

> Adult Cabaret. Any Commercial Establishment that as a substantial or significant portion of its business features or provides any of the following:
> (a) Persons who appear Semi-Nude.
> (b) Live performances that are distinguished or characterized by an emphasis on the exposure, depiction, or description of Specified Anatomical Areas or the conduct or simulation of Specified Sexual Activities.
> (c) Films, motion pictures, video or audio cassettes, slides, computer displays, or other visual representations or recordings of any kind that are distinguished or characterized by an emphasis on the exposure, depiction, or description of Specified Anatomical Areas, or the conduct or simulation of Specified Sexual Activities.

Id. at § 3.

[14] The scope of this Note will be limited to analyzing the impact of the ordinance on erotic or cabaret dancing and will not analyze the impact of placing regulations on adult bookstores.

[15] *See generally* Colacurcio v. City of Kent, 163 F.3d 545 (9th Cir. 1998) (stating a ten foot barrier from the dancer to the patron was constitutional); J&B Entm't, Inc. v. City of Jackson, 152 F.3d 362 (5th Cir. 1998) (stating public nudity restrictions were content neutral); Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993 (11th Cir. 1998) (stating that a ban on alcohol sales at adult use establishment was constitutional); DLS, Inc. v. City of Chattanooga, 107 F.3d 403 (6th Cir. 1997) (stating a six foot barrier and eighteen inch

Lake County, Illinois, and other local communities include, but are not limited to, a ban on total nudity, a ban on serving alcohol at the establishment where erotic dancing occurs, distance and separation requirements between patrons and performers, elimination of all contact with the patrons by the entertainers, restrictions on directly tipping performers during their routine, a limit to the number of hours an establishment can stay open, a licensing and registration requirement for the employer and employees, and limitations on the type of signs permitted outside the establishment.[16] Later, the Lake County Board reconvened and passed a zoning restriction limiting the distance an adult use business could be located from certain entities within the county known as "protected uses."[17]

The purpose of the ordinance, spelled out in its recitals,[18] is to save the community from the emergence of overwhelming secondary effects[19]

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stage was constitutional); Café 207 v. St. Johns County, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir. 1995) (stating that regulations on public nudity were constitutional); 11126 Balt. Blvd. v. Prince George's County, 886 F.2d 1415 (4th Cir. 1989) (stating that zoning regulations on adult use ordinances were constitutional); J.L. Spoons, Inc. v. City of Brunswick, 49 F. Supp. 2d 1032 (N.D. Ohio 1999) (stating that various requirements on adult use establishments were constitutional); Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288 (M.D. Fla. 1997) (stating that zoning restrictions on adult use ordinances were constitutional); Toy Box, Inc. v. Bay County, 989 F. Supp. 1183 (N.D. Fla. 1997) (stating that ordinance banning the sale of alcohol at adult use establishment was constitutional); Nakatomi Invs., Inc. v. Schenectady, 949 F. Supp. 988 (N.D.N.Y. 1997) (stating that restrictions on nudity and restrictions on location of establishment were constitutional); Bright Lights, Inc. v. City of Newport, 830 F. Supp. 378 (E.D. Ky. 1993) (stating that a bikini ordinance was a constitutional restriction on nudity); City of Colo. Springs v. 2354 Inc., 896 P.2d 272 (Colo. 1995) (stating that licensing requirements imposed by adult use ordinance were constitutional); 7250 Corp. v. Bd. of County Comm'rs, 799 P.2d 917 (Colo. 1990) (stating restrictions on hours and age restrictions for employees and patrons were constitutional); 2300, Inc. v. City of Arlington, 888 S.W.2d 123 (Tex. App. 1994) (stating that a 'no touch' ordinance was constitutional).

[16] *See generally* Lake County Ordinance, *supra* note 13, at 17-21.

[17] Lake County, Ill., Amendment to Lake County Zoning Ordinance (May 12, 1998) (unpublished amendment to ordinance, on file with author) [hereinafter Lake County Zoning Ordinance]. The amendment defined "protected uses" as: (a) a church, synagogue, mosque, or other place of worship; (b) a public or private nursery, elementary, or secondary school; (c) a child care facility, licensed by the Illinois Department of Children & Family Services; (d) a public park, playground, playing field, or forest preserve; (e) a public or private cemetery; (f) a public housing facility. *Id.* at 6.

[18] Lake County Ordinance, *supra* note 13, at 1-3. Stating in two such recitals:

> WHEREAS, Sexually Oriented Business Activities can cause or contribute significantly to increases in criminal activity in the areas in which they are located, thereby taxing crime prevention, law enforcement, and public health services; and WHEREAS, Sexually Oriented Business Activities can cause or contribute significantly to the deterioration of residential neighborhoods, can impair the character and quality of such neighborhoods and the housing located

associated with strip clubs, because these clubs have been shown in other instances to devalue the surrounding real property values as well as the overall quality of life in the communities near and around these establishments. [20] This secondary effects justification for drafting restrictive ordinances has been broadly construed by counties and municipalities throughout the country as a way of circumventing the constitutional infringement imposed by these laws and ordinances.

The most recent United States Supreme Court case addressing the restrictions of adult use ordinances and the restrictions of symbolic speech in general is *Barnes v. Glen Theatres, Inc.*[21] In *Barnes*, the Court held in a plurality decision that nude dancing was protected under the First Amendment.[22] However, the restrictions enacted in that particular situation[23] were established principles articulated by past Supreme Court cases dealing with the suppression of symbolic speech.[24]

This Note proposes that since *Barnes*, local municipalities such as Lake County, Illinois, have compiled the individual restrictions upheld as constitutional by the judicial interpretation and reasoning set forth in *Barnes* and other significant cases resulting in a cumulative ordinance that unlawfully infringes on constitutional rights and overregulates adult use establishments. This Note further asserts that by passing cumulative ordinances under the guise of judicial backing of individual restrictions and the prevention of harmful secondary effects, the local ordinances have misinterpreted the underpinnings of the United States Supreme

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> within such neighborhoods, and can inhibit the proper maintenance and growth of such neighborhoods, limiting or reducing the availability of quality, affordable housing for area residents and reducing the value of property in such areas.

Id.; *see also* Lake County Zoning Ordinance, *supra* note 17, at 1-4.

[19] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51 (1986). In *Renton*, the Supreme Court defines secondary effects and also states that the city of Renton could rely on the studies done by other cities and municipalities in drafting its own ordinance to prevent the same deterioration of property values and increase in crime from occurring in their city. *Id.* at 51.

[20] *See generally* Barnes v. Glen Theatres, 501 U.S. 560, 569 (1991); J&B Entm't, Inc. v. City of Jackson, 152 F.3d 362, 371 (5th Cir. 1998); National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 734 (1st Cir. 1995); SDJ, Inc. v. City of Houston, 636 F. Supp. 1359, 1363 (S.D. Tex. 1986).

[21] 501 U.S. 560 (1991).

[22] *Barnes*, 501 U.S. at 565.

[23] The restrictions imposed by the Indiana indecency law consisted of a complete ban on public nudity, including nudity at an establishment showcasing nude, erotic dancing. *Barnes*, 501 U.S. at 569.

[24] *Id.* at 565-66; *see also* United States v. O'Brien, 391 U.S. 367, 376-77 (1968); Clark v. Cmty. for Creative Non-Violence, 408 U.S. 288, 294 (1984).

Court's analysis in *Barnes* and by-passed the blockades established to protect individual rights and uphold the Constitution.

Part II of this Note will provide a brief history of the development of individual rights by way of the First Amendment and the development of nude dancing as symbolic speech. Part III will provide the current status of adult use ordinances, including a discussion of *Barnes v. Glen Theatres* and a recent Pennsylvania Supreme Court case which refused to recognize *Barnes* as valid precedent due to the inconsistent methods employed by the Justices when reaching their plurality opinion.[25] Part IV will analyze how independent regulations are upheld and why the cumulative regulations imposed by local communities would not meet the necessary requisites to qualify as constitutional, regardless of the methodology used. Part V will explain why the Lake County Ordinance would fail to meet the constitutional requirements under current United States Supreme Court precedent and it will propose a model criminal statute that could be used as an alternative method to regulate adult use establishments.[26]

II. HISTORY AND DEVELOPMENT OF SYMBOLIC SPEECH

Our forefathers drafted the first guarantee of freedom of speech[27] in response to the countless years of continual English exploitation and repression that had plagued the colonies before the Revolution.[28] After the American Revolution, the overwhelming feeling throughout the newly-formed states was that certain individual freedoms or rights must be preserved and hallowed by all citizens.[29] When the original draft of

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[25] PAPS A.M. v. City of Erie, 719 A.2d 273 (Pa. 1998), *rev'd & remanded*, 120 S.Ct. 1382 (2000).

[26] The purpose of this criminal statute would be to increase penalties for violations around adult use establishments, thereby increasing the deterrent factor and eliminating the need to impose cumulative regulations on these establishments; *see infra* notes 304 and 306 for examples of state statutes currently employing alternative penalty measures to increase the deterrent factor.

[27] U.S. CONST. amend. I. (stating that "Congress shall make no law...abridging the freedom of speech"). *Id.*

[28] Daniel T. Rodgers, *Rights Consciousness in American History, in* THE BILL OF RIGHTS IN MODERN AMERICA 3, 4 (David J. Bodenhamer & James W. Ely, Jr. eds. 1993) (surmising that one key moment in the history of American politics was the beginning of the struggle against the colonial policies imposed by the English resulting in "an explosion of popular rights claims, the habit of thinking about rights with 'natural' as the key term, a passion for rights declarations-and a nervous reaction against them-out of which, scarred and truncated, came the Federal Bill of Rights").

[29] *Id.* at 6. In 1776, Virginia was the first state to put together a Declaration of Rights which included a mixture of individual rights (freedom of press and free exercise of religion)

the Constitution, lacking any reference to individual rights,[30] was put before the States for ratification, the citizens of those States made the framers fully aware of the significance and prominence that individual rights had in their minds.[31]

Subsequently, the members of Congress began the task of incorporating a statement of individual rights by drafting an amendment which would identify and protect certain fundamental human rights such as freedom of religion and the freedom of speech.[32] When finished, Congress amended the Constitution to include the Bill of Rights[33] although Congress was not completely convinced of the true need for all of the amendments.[34] The First Amendment, part of this Bill of Rights, is made applicable to the states through the Fourteenth Amendment of the Constitution.[35]

A. Written or Verbal Speech

The Freedom of Speech clause in the First Amendment has been pulled, twisted, stretched, and interpreted to encompass a boundless array of ideas too vast to briefly summarize for purposes of this Note.[36] However, out of the vast body of case law interpreting the First

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along with other "pious statements of morality" to serve as the "basis and foundation" of its Constitution. *Id.*

[30] *Id.* at 7. The drafters had already carefully deleted every instance of the term "rights" in favor of a more cautious reference to "immunities and privileges." *Id.*

[31] *Id.* ("The Anti-Federalists had made enactment of a Bill of Rights a condition upon their acquiescence.").

[32] Freedom of religion and freedom of the press were two mainstays desired by the masses. *See supra* note 29.

[33] On December 15, 1791, Virginia became the required eleventh state to ratify ten of the twelve proposed amendments, and Secretary of State Thomas Jefferson proclaimed them a part of the Constitution. JETHRO K. LIEBERMAN, A PRACTICAL COMPANION TO THE CONSTITUTION 68 (1999). For purposes of this Note, the relevant subject matter from the much-debated Bill of Rights is the freedom of speech.

[34] THE COMPLETE BILL OF RIGHTS THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 118 (Neil H. Cogan ed., 1997). Quoting a letter from Pierce Butler to James Iredell, August 11, 1789 stating:

> A few milk and water amendments have been proposed by Mr. M[adison], such as liberty of conscience, a free press, and one or two general things already well secured. I suppose it was done to keep his promise with his constituents, ... but if I am not greatly mistaken, he is not hearty in the cause of the amendments.

Id.

[35] U.S. CONST. amend. XIV.

[36] JETHRO K. LIEBERMAN, A PRACTICAL COMPANION TO THE CONSTITUTION 204 (1999) ("Next to Due Process, no other constitutional provision embraces a greater variety of people, events, and concerns.").

Amendment, a hierarchy of speech has clearly emerged.[37] Pure speech is roughly defined as verbal expression used to convey political messages or individual opinions and is entitled to absolute protection under the First Amendment.[38] Conversely, a speech category regarded as low value speech such as libel and slander, obscenity and pornography, hate speech, and fighting words is entitled to little, if any, protection from the First Amendment.[39] This speech hierarchy still exists, despite the legal questions raised by the classification scheme and the protests from legal scholars implying a haphazard interpretation of the true meaning of freedom of speech.[40]

The first step to analyze a free speech issue is to determine where in the hierarchy the speech falls and what level of protection is given to the speech in question.[41] A relative constant is that protection for pure political speech[42] is nearly absolute, and regulations based on the content of the speech will not be permitted unless those restrictions meet the strict scrutiny standard of serving a compelling government interest by narrowly tailored means.[43] Speech types of lesser or lower value have often developed their own unique tests for determining the constitutionality of their particular speech through precedent,[44]

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[37] *Id.* at 470.

[38] Paul L. Murphy, *Symbolic Speech and the First Amendment, in* THE BILL OF RIGHTS IN MODERN AMERICA 43 (David J. Bodenhamer & James W. Ely, Jr. eds. 1993).

[39] LIEBERMAN, *supra* note 36, at 470 ("From time to time, this lesser-breed category has included subversive advocacy, libel and slander, obscenity and pornography, hate speech, fighting words, offensive and indecent speech, commercial speech, and speech amounting to breach of the peace.").

[40] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 840 (1997) (questioning whether sexually orientated speech that is not obscene should be regarded as low value); *see also* Steven G. Gey, *The Case Against Postmodern Censorship Theory, in* FIRST AMENDMENT LAW HANDBOOK 221 (James L. Swanson ed., 1998-99 ed. 1999) (finding "free speech no longer commands universal support among progressive constitutional scholars and legal activists").

[41] Logically, this decision must be made so that the speaker can assess a proper course of action based on the judicial scrutiny applied.

[42] *See supra* note 38 and accompanying text for a definition of pure speech.

[43] LIEBERMAN, *supra* note 36, at 470 (averring that Justice Harry A. Blackmun's decision in *Burson v. Freeman*, 504 U.S. 191 (1992), pointed out three central concerns of the First Amendment: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech).

[44] For example, obscene speech is determined by use of the test provided by Chief Justice Burger in *Miller v. California*, 413 U.S. 15, 24 (1973) finding that:

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c)

reaffirming the notion that the type of speech dictates the test used to protect it. For example, the test to determine whether a regulation is constitutional differs when the speech in question involves libel against a public official rather than libel against a private individual.[45] The multitude of tests for determining what qualifies as protected speech, although often confusing and vague, is critical to maintaining the intent of the Constitution's Framers.[46]

B. Speech and Conduct

Speech that contains an additional element of conduct has been referred to as symbolic speech or "speech plus."[47] The "plus" element signifies when pure speech, defined in the minds of the public, has become so entangled with an action or symbolic representation that it is difficult to determine where speech stops and where conduct begins. By classifying the conduct in question as a form of speech, the courts are forced to determine the extent of First Amendment protection given to this symbolic speech or "speech plus."[48]

Symbolic speech, however, is not a recently created category or form of speech.[49] Despite a slight retreat during World War I when recognition was denied,[50] the freedom to speak through symbolic speech has evolved to include a broad array of mediums including those outlets

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whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id.

[45] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 333 (1974).

[46] LIEBERMAN, *supra* note 36, at 204 ("In the eighty-odd years that the Supreme Court has been paying attention to the Free Speech Clause, the lines of doctrine have become so multitudinous that no single formula can come close to explaining free speech, and no single summary can possibly fit all the cases.").

[47] Paul L. Murphy, *Symbolic Speech and the First Amendment, in* THE BILL OF RIGHTS IN MODERN AMERICA 43 (David J. Bodenhamer & James W. Ely, Jr., eds., 1993) (noting the political culture in the 1950's, '60's, and '70's resulted in the increased protesting of the government and government policy through marches, picketing, and sit-ins evolved into a new derivative of 'pure speech' (i.e. verbal expression) called 'speech plus').

[48] *Id.* at 43-44.

[49] *See id.* "Symbolic expression is as old as mankind. It has played a vital role in political, and certainly in religious, life for centuries. The colonial cause in the American Revolution was expressed symbolically at many turns, the Boston Tea Party being a prime example." *Id.*

[50] *Id.* "Government used symbolism to rally patriotism to the defense of the nation and the status quo in the face of external and internal assault and criticism. And it used the Espionage and Sedition Acts, passed by Congress in 1917 and 1918, to prosecute individuals who criticized the war overtly or symbolically, whether in speech or print." *Id.*

which, upon first glance, would never have been considered speech in the past.[51]

The real issue with symbolic speech is how to distinguish it as speech and how to regulate it, if at all. To determine what speech qualifies for regulation, the Supreme Court determined that two elements were essential.[52] In order to qualify as speech, the conduct must first be intended to be communicative, and secondly, the message conveyed must be reasonably understood by the viewer.[53] Once it is established that the conduct is communicative under the previous two-part definition, it may be forbidden or regulated only if a difficult four-pronged test[54] proposed in *United States v. O'Brien*[55] is met.[56]

In *O'Brien*, the Supreme Court upheld the conviction of O'Brien, who burned his draft card on the steps of the South Boston Courthouse.[57] This decision was important because the Court stated that it would allow the government to make incidental restrictions on "speech plus," or symbolic speech.[58] In this case and the cases that followed it, the restrictions on free speech were allowed due to the distinction between a content-based restriction and a content-neutral or a time, place, and manner restriction.[59]

Content-based restrictions or regulations of speech are given less deference by the Court because the content or message of the speech itself is what is vital to maintaining the individual freedoms granted by

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[51] *See* Stephen L. Carter, *Does the First Amendment Protect More Than Free Speech?*, 33 WM. & MARY L. REV. 871 (1992). In 1977, the underlying sentiment at Yale was that everything was protected by the First Amendment. *Id.* at 871. The author describes how clothes hanging on a line to dry would qualify for First Amendment protection. *Id.*

[52] Texas v. Johnson, 491 U.S. 397, 404 (1989).

[53] *Id.* at 404, 406 (holding that flag burning qualified as expressive conduct subject to First Amendment protection); *see also* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984).

[54] *See infra* note 65 and accompanying text for the test proposed by *United States v. O'Brien*.

[55] 391 U.S. 367 (1968).

[56] *Clark*, 468 U.S. at 294.

[57] *O'Brien*, 391 U.S. at 372. In its reasoning, the Court found that the power of Congress to raise and support armies was broad and sweeping. *Id.* at 377. Also, the Court found that the draft certificates served an important function in allowing the government to track those who registered and punish those who did not. *Id.* at 380.

[58] *Id.* at 376 (finding that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on the First Amendment freedoms").

[59] *Id.* at 376-77.

the framers.[60] Thus, to regulate content based conduct the Court adopts the strictest standard of review by requiring a compelling government interest coupled with means that are narrowly tailored to meet that government interest.[61]

Content-neutral restrictions or regulations do not regulate the content of the speech *per se*, but they regulate the manner or method used to convey the speech.[62] Two decisions that provide an example of tests used to determine the constitutionality of a content-neutral regulation are *O'Brien* and *Clark v. Community for Creative Non-Violence*.[63] In the first example, the *O'Brien* Court ruled that a regulation of content-neutral speech would be sustained if the regulation was within the constitutional power of the Government, if it furthered an important or substantial government interest, if the interest was unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms was no greater than was essential to the furtherance of that interest.[64]

In the second example, *Clark*, the Court held that symbolic speech was subject to valid time, place, and manner restrictions as long as the restrictions were justified without reference to the content of the regulated speech, the restrictions were narrowly tailored to save a significant government interest, and they left open ample alternative channels for communication of the information.[65] Both content-neutral tests convey the same basic requirements for restricting symbolic speech

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[60] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986) ("This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.").

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

[62] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.").

[63] 468 U.S. 288 (1984).

[64] *O'Brien*, 391 U.S. at 377. O'Brien burned his draft card in public in violation of the Selective Service Act of 1948. *Id.* at 369-70.

[65] *Clark*, 468 U.S. at 293. In this case, demonstrators had applied for permits to camp in Lafayette National Park in downtown Washington, D.C., to demonstrate the plight of the homeless. *Id.* at 291-92. In accordance with the license, the campers were not allowed to stay in the park overnight. *Id.* at 292. The campers argued that sleeping outside in the park was an integral part of their protest because it would demonstrate the struggle to survive without a place to stay, thereby bringing the issue to the attention of lawmakers. *Id.* at 296. The Supreme Court held that the camping permit restrictions were not aimed at the content of the speech but more so the manner in which the demonstration can be carried out and therefore they were not unconstitutional. *Id.* at 295.

and have been used interchangeably by the United States Supreme Court.[66]

Based on these past decisions, "symbolic speech" emerged, requiring the combination of a message and conduct. As the variety and forms of symbolic speech grew, the question arose as to whether nudity or erotic dance qualified for similar status.

C. Nudity and Erotic Dance as Speech

Nudity in public places has long been viewed as contrary to public decency.[67] However, when nudity is combined with dancing, a communicative element is added to the nudity which may influence the type of analysis utilized by the courts when ruling on the protection afforded such dance.[68] Despite the mystery surrounding the origins of erotic dance, the display of naked flesh during dance appears to have originated in the cancan and music hall chorus lines of the nineteenth century.[69] As societal views changed, the standard for what triggered the sexual message associated with nude dance also changed, culminating in a decrease in the amount of clothing to the point of nudity.[70] The United States Supreme Court recognized that sexually

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[66] *Barnes*, 501 U.S. at 566.

[67] *Id.* at 568. The Supreme Court states that "Public indecency, including nudity, was a criminal offense at common law, and this Court recognized the common-law roots of the offense as 'gross and open indecency' in *Winters v. New York*, 333 U.S. 507, 515 (1948). Public indecency statutes . . . reflect moral disapproval of people appearing in the nude among strangers in public places." *Id.*

[68] *See* POSNER, *supra* note 3, at 364 stating:

> But to return to the striptease, what is its specific erotic representation? Striptease, is not, after all, just the exhibition of a naked women. It is a form of undressing. It is undressing for sex - that, at least, is the impression that the performer seeks to convey by her gestures and facial expression. It is nudity plus an additional signal of erotic intention or disposition, much as *Venus with a Mirror* is nudity plus an additional signal supplied by the presence of Cupid. In both cases there is an implicit narrative which the viewer is left to complete in his imagination. That is why it is important that the striptease not end in a bathing suit, because a bathing suit is for swimming, not for sex. If the striptease performer is an accomplished dancer and the musical accompaniment is of high quality as well, the striptease may, like a work of art, embody formal properties that have an appeal to the nonerotic sensibility may *be* a work of art. But the erotic signal that I have described imparts to striptease an unmistakably, and ordinarily a dominant, aphrodisiacal effect.

Id.

[69] *Id.* at 363.

[70] *See id.* at 363-64 stating:

> For nudity to be an erotic signal, it must be associated with sex, so the norm of privacy in sexual relations entails the rejection of public nudity, and public

orientated speech such as nude dancing, although low on the proverbial First Amendment ladder, was protected by the First Amendment when it struck down a city ordinance used by a locality in *Schad v. Mount Ephraim*[71] to prohibit all live entertainment and to facilitate the closing of strip clubs.[72] Other regulations on nude dancing were upheld in *California v. LaRue*,[73] in which California banned the sale of alcohol at all strip clubs.[74] As the number of restrictive ordinances increased, the United States Supreme Court was forced to answer the mounting question of just how much protection nude dancing was allowed under the First Amendment.

III. CURRENT STATUS OF ADULT USE ORDINANCES

Prior to the landmark decision in *Barnes v. Glen Theatres, Inc.*,[75] handed down by the Supreme Court in 1991, the Court definitively recognized that erotic dancing qualified as symbolic speech under the First Amendment.[76] In *LaRue*, actions were brought by owners of taverns against the California Department of Alcoholic Beverages Control for imposing regulations limiting the type of entertainment that could be performed in an establishment that serves liquor.[77] The

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> nudity in turn implies a transgression of sexual norms. There are of course degrees of nudity. The stronger the nudity taboo, in the sense of the more fully clad the body is expected to be, the smaller is the amount of nudity required to imply a sexual context and therefore to convey an erotic signal. When the nudity taboo was very strong in our society, the decorous striptease - even the bare thighs of the Radio City Music Hall Rockettes - conveyed a distinctly erotic image. Now that the taboo has greatly weakened, and many respectable women go about their everyday business in what would have been considered a state of nudity or the garb of prostitutes a couple of generations ago, a striptease that ended with the stripper clad in a bathing suit would not convey a strong erotic signal. For that, more is needed: complete nudity, or at least the exposure of the sexual organs.

Id.

[71] 452 U.S. 61 (1981).

[72] *See* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 66-67 (1981) (stating nude dancing falls within the First Amendment but also leaving the extent of protection unclear as a result of the local ordinance being found as substantially overbroad); *see also* CHEMERINSKY, *supra* note 40, at 838.

[73] 409 U.S. 109 (1972) ("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.") *Id.* at 114.

[74] *LaRue*, 409 U.S. at 118-19.

[75] 501 U.S. 560 (1991).

[76] *Barnes*, 501 U.S. at 565.

[77] *LaRue*, 409 U.S. at 110-112. California was concerned with the rapid progression in the entertainment at these establishments from topless to bottomless dancing. *Id.* Evidence was also produced in this case which showed an increase in the amount of prostitution in

performances occurring in these establishments were topless and bottomless dancing.[78] The Court held that the liquor restrictions imposed by the California Department of Alcoholic Beverage Control were constitutional.[79] A critical notion that arose from this case, in terms of the current status of case law, is that the United States Supreme Court also recognized that the type of dancing, topless or nude, which occurred in these California bars was subject to protection under the First Amendment.[80]

Three years later, the Court revisited the issue of topless dancing in *Doran v. Salem Inn, Inc.*[81] when bar owners contested a local ordinance banning topless dancing.[82] The Court again affirmed its position that barroom dancing has some First Amendment privileges,[83] however, in contrast with *LaRue*, the Court struck down this local ordinance because it was too broad and encompassed restrictions that would take away certain speech qualities from other protected modes of media like artistic exhibitions.[84]

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and around the establishments with nude dancing, as well as an increase in other serious crimes like sexual assaults, rapes, and indecent exposures. *Id.*

[78] *Id.* at 110.

[79] *LaRue*, 409 U.S. at 118. The Court stated:

> The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

Id.

[80] *Id.* The Court compares the message conveyed in nude dancing to the message conveyed in a ballet performance and indicates that the former is given less weight in terms of First Amendment Protection. *Id.; see also supra* notes 37-40, which establish that a hierarchy exists for purposes of a First Amendment analysis.

[81] 422 U.S. 922 (1975).

[82] *Id.* at 924.

[83] *Doran*, 422 U.S. at 932. The Court recognized that the standard proposed in *California v. LaRue* was applicable to this situation when it stated that this form of entertainment was worthy of First and Fourteenth Amendment protection. *Id.* The Court, however, found this ordinance to be unconstitutional by distinguishing it from the ordinance in *LaRue*. *Id.* at 932-33. In *LaRue*, California's Twenty-first Amendment powers outweighed any State interest in the protection of nude dancing under the First Amendment. *Id.* The ordinance in *Doran* covers not only places that sell liquor, but "any public place," as well. *Id.* at 933.

[84] *Id.* The Court re-affirms this message by pointing out the broad definition of any public place and how this interpretation could lead to banning of truly artistic plays and exhibitions. *Id.*

The different conclusions reached in the *LaRue* and *Doran* cases highlight a distinction between establishments that serve liquor and those that do not.[85] *LaRue* relied on the state's power under the Twenty-First Amendment while *Doran* viewed the ordinance as overbroad.[86] However, the common thread that links these cases is the principle that nude dancing is protected by the First Amendment.[87]

In 1989, the City of South Bend, Indiana, sought to enforce the State of Indiana's Public Indecency Statute[88] against local establishments that provided adult entertainment and nude dancing because these establishments included dancing and exhibitions of semi-nude and totally nude women in violation of the statute.[89] After an unsuccessful attempt to obtain an injunction against enforcement of the statute by the State of Indiana, the case was refiled citing a new cause of action: a violation of First Amendment privileges.[90] The district court, on remand, ruled that the nude dancing sought to be protected was not an expressive activity and not worthy of First Amendment protection.[91] On

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[85] Miller v. Civil City of South Bend, 904 F.2d 1081, 1083 (7th Cir. 1990).

[86] *Id.*

[87] *Id.*

[88] IND. CODE ANN. § 35-45-4-1 (West 1998) (amended 2000).

> (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; (4) fondles the person's genitals or the genitals of another person; commits public indecency, a Class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.
>
> (c) A person who, in a place other than a public place, with the intent to be seen by persons other than invitees and occupants of that place: (1) engages in sexual intercourse; (2) engages in deviate sexual conduct; or (3) fondles the person's genitals or the genitals of another person; where the person can be seen by persons other than invitees or occupants of that place commits indecent exposure, a Class C misdemeanor.

Id.

[89] *Miller*, 904 F.2d at 1082; *see also Barnes*, 501 U.S. at 563. One plaintiff to the action, the Kitty Kat Lounge, offered totally nude dancing to its patrons while the other plaintiff, Glen Theatre, mostly provided written and printed adult material but also had live entertainment consisting of totally and semi-nude women through glass panels. *Barnes*, 501 U.S. at 563.

[90] *Barnes*, 501 U.S. at 563-64. The district court initially granted the injunction on overbreadth grounds but was reversed by the Court of Appeals for the Seventh Circuit on the grounds that the Indiana Supreme Court had limited the construction of the statute to save it from an overbreadth attack. *Id.* The case was remanded to the District Court for the plaintiffs to refile under a First Amendment claim. *Id.*

[91] Glen Theatre, Inc. v. City of South Bend, 695 F. Supp. 414, 419 (N.D. Ind. 1988).

appeal, the Seventh Circuit reversed the lower court's decision by holding that the dancing was constitutionally protected by the First Amendment.[92]

The appellate court then heard the case en banc and concluded in a majority opinion that nonobscene[93] nude dancing is symbolic conduct protected by the First Amendment, and that the Indiana public indecency statute was unconstitutional because its purpose was to suppress the erotic message conveyed by the dancers.[94] Due to the confusion and contradiction seen in this particular line of decisions as well as in past United States Supreme Court decisions,[95] the Court granted certiorari to definitively decide what level of constitutional protection erotic or nude dancing should receive.[96] Unfortunately, no majority opinion resulted,[97] and the plurality decision which followed led to further indecisiveness as is exemplified by the recent Pennsylvania Supreme Court decision in which the plurality decision of the United States Supreme Court was abandoned.[98]

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[92] Miller v. Civil City of South Bend, 904 F.2d 1081, 1086-87 (7th Cir. 1990). The court noted:

> The dominant theme communicated here by the dancers is an emotional one; it is one of eroticism and sensuality. Though this dance is clearly of inferior artistic and aesthetic quality as contrasted with a classic ballet such as the Dance of the Seven Veils in Strauss' Salome, the erotic message communicated to the viewers is present in both performances.

Id.

[93] *See supra* note 43 for *Miller v. California*'s definition of obscene conduct.

[94] *Miller*, 904 F.2d at 1086-87. In holding the dancing was protected, the court relied upon many factors including the historical background of dancing as expressive speech, prior Supreme Court precedent, and prior judicial interpretation at the federal court level. *Id.*

[95] *See supra* note 79-90 and accompanying text.

[96] Barnes v. Glen Theatre, Inc., 498 U.S. 807 (1990).

[97] CHEMERINSKY, *supra* note 40, at 839.

[98] In *PAP'S A.M. v. Erie*, 719 A.2d 273 (Penn. 1998), the Pennsylvania Supreme Court first sarcastically adopts the underlying view of the United States Supreme Court, which supports nude dancing as protected speech when it states "although *Barnes* was an otherwise *hopelessly fragmented* decision, eight of the nine members of the Court agreed that nude dancing, as it portrayed an erotic message, is expressive conduct and is entitled to some quantum of protection under the First Amendment." *Id.* at 276 (emphasis added). Next, the Pennsylvania Supreme Court summarily dismisses the use of the plurality decision as precedent.

> While we empathize with the [lower court's] plight when faced with trying to make sense out of *Barnes*, we cannot agree that Justice Souter's concurring opinion is binding precedent. We agree that it is possible to cobble together a holding out of a fragmented decision. Yet, in order to do so, a majority of the Court must be in agreement on the concept which is to be deemed the holding. It is certainly permissible to find that a Justice's opinion which stands for the "narrowest grounds" is precedential, but only where those "narrowest grounds"

Chief Justice Rehnquist wrote the plurality decision in which the Supreme Court acknowledged that the type of nude dancing at issue in *Barnes* was previously recognized by the Court as having constitutional value under some circumstances.[99] He also deemed the pubic indecency restriction as content-neutral thus triggering the analysis in *United States v. O'Brien*.[100] *Barnes* provides guidelines for determining when symbolic speech can be regulated by a government entity.[101]

The plurality decision argues that the first and second prongs[102] of the *O'Brien* test are met because of the clear constitutional power of Indiana to pass an indecency law and the substantial government interest Indiana is attempting to achieve, namely the regulation of morality.[103] The third prong of the *O'Brien* test states that the interest must be unrelated to the suppression of free expression.[104] Although conceding that restricting nude dancing could be related to the expression of the speech,[105] the plurality dismissed this notion by stating that the restriction on nudity was not imposed to minimize the erotic message, but rather to address the evil of nudity by making the erotic

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> are a sub-set of ideas expressed by a majority of other members of the Court. The mere finding that one Justice expressed a narrower belief than others does not dispense with the requirement that a majority of the Court need agree on a concept before that concept can be treated as binding precedent.

Id. at 278 (footnote omitted).

[99] *Barnes*, 501 U.S. 560, 565 (1991) (Rehnquist, J., plurality opinion).

[100] *Id.* at 566-67. Chief Justice Rehnquist states that because of the similarity in the two analyses, the Court will turn to the rule enunciated in *O'Brien*. *Id.*

[101] *Id.* at 567. "The Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.*

[102] *See supra* notes 56-65 and accompanying text for a discussion of the four part *O'Brien* analysis.

[103] *Barnes*, 501 U.S. at 567-68 (Rehnquist, J., plurality opinion); *see also* Jeffrey P. Dunlaevy, Note, *Dirty Dancing: The South Carolina Supreme Court Rejects Local Authority to Ban Nude Dancing by Fast-Stepping Around the Plain Meaning of the South Carolina Constitution*, 49 S.C. L. REV. 1025, 1029 (1998).

> Although it is plausible that morality supports the proscription of public nudity, it is unclear why such an interest is categorically substantial. The determination of substantiality seems best made by the community, which ultimately expresses its degree of moral disapproval of public nudity by enacting or not enacting laws prohibiting the conduct. In the final analysis, a court cannot determine the strength or legitimacy of a community's morality any better than the community itself.

Id.

[104] *O'Brien*, 391 U.S. 367, 377 (1968).

[105] *Barnes*, 501 U.S. at 570 (Rehnquist, J., plurality opinion).

message less graphic.[106] Finally, the plurality found that the G-string and pasties requirement is no greater than necessary to further the governmental interest because the Indiana clothing requirement "is modest, and the bare minimum necessary to achieve the State's purpose."[107]

The most conservative decision from the *Barnes* opinion was that proposed by Justice Scalia where he declined to award erotic dancing any First Amendment protection.[108] Justice Scalia reasoned that the regulation of conduct not specifically directed at expression did not demand First Amendment scrutiny.[109] Because the purpose of the Indiana statute was to enforce a traditional moral belief that exposing private parts is wrong, Justice Scalia found there was no need to address the communicative aspect of this claim.[110]

Justice Souter concurred in the *Barnes* opinion by agreeing with the plurality on all aspects except one.[111] The reason for writing separately lies in Justice Souter's preference for the use of preventing harmful secondary effects as a substantial government interest, in accordance with the second prong of the *O'Brien* test, over the use of morality as justification for regulation.[112] By using adverse secondary effects to

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[106] *Id.* at 571. Chief Justice Rehnquist writes:

> Likewise, the requirement that the 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 perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes, and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.

Id.

[107] *Id.* at 572.

[108] *Id.* (Scalia, J., concurring).

[109] *Id.*

[110] *Barnes*, 501 U.S. at 575 (Scalia, J., concurring).

> [T]he only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription.

Id. at 578.

[111] *Barnes*, 501 U.S. 581-82 (Souter, J., concurring). Justice Souter states "thus I agree with the plurality and the dissent that an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection. I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part inquiry described in *United States v. O'Brien*." *Id.*

[112] *Id.* at 582.

support the Indiana indecency law, the Court is not limiting itself to determining the moral justifications or reasons for a law from the legislative record.[113] Justice Souter relied on the holding from *Renton v. Playtime Theatres*,[114] which allowed the city of Renton to rely on the results and data obtained from studies done by other nearby cities as sufficient proof of the substantial government interest in protecting society.[115] By assimilating the *Renton* scenario with the situation resulting from Indiana's indecency law, Justice Souter found that this prong of the *O'Brien* test was met.[116]

Justice Souter argued that the third prong of *O'Brien*, which requires that the government interest be unrelated to the suppression of free expression, was met regardless of the erotic expression's association with the associated evils as the support for imposing the restriction.[117] The mere existence of the dancing establishment is the catalyst for the adverse secondary effects and not the expressive message being conveyed and, therefore, restricting these establishments satisfies the third prong of the *O'Brien* test.[118] The fourth prong of the *O'Brien* test is casually dismissed as satisfied by Souter when he states, "[d]ropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message."[119]

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[113] *Id.* Justice Souter recognizes the difficulty caused by the lack of legislative history and thus he supported a more forgiving approach when he states "[W]e need not so limit ourselves in identifying the justification for the legislation at issue here, and may legitimately consider [*Barnes*]' assertion that the statute is applied to nude dancing because such dancing encourages prostitution, increases sexual assaults, and attracts other criminal activity." *Id.*

[114] 475 U.S. 41, 51 (1986).

[115] *Barnes*, 501 U.S. at 584 (Souter, J., concurring). Souter states:

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

Id.

[116] *Id.* at 585-86.

[117] *Id.* at 586.

[118] *Id.* Justice Souter states "[T]he 'secondary effects' justification means that enforcement of the Indiana statute against nude dancing is 'justified without reference to the content of the regulated expression', which is sufficient, at least in the context of sexually explicit expression, to satisfy the third prong of the *O'Brien* test." *Id.*

[119] *Barnes*, 501 U.S. at 587 (Souter, J., concurring).

Aside from Justice Scalia, the plurality and the concurring Justice agreed that the symbolic speech represented in this scenario qualified for First Amendment protection.[120] They also employed a similar test in analyzing the content-neutral restriction on speech when reaching their conclusions.[121] However, because of a lack of a majority opinion and because Justice Souter's concurring opinion is decided on the narrowest grounds,[122] the use of Justice Souter's reasoning is seen as the controlling precedent for issues addressing erotic and nude dancing as symbolic speech.[123]

The dissenting opinion[124] in this landmark case first attacks the plurality and concurring Justices' use of the *O'Brien* test, starting with the substantial government interest prong.[125] The dissent finds flawed reasoning in the plurality's use of protecting the public from a moral indecency, especially when the viewers of this erotic dance have most likely entered a private establishment on their own free will and have paid to view the erotic dancing and the message conveyed therein.[126] Next, the dissent attacks the plurality's denial of "proscribing nudity because of the erotic message conveyed by the dancers."[127] The plurality's reasoning is that the true goal of the law is to forbid the nudity, which is morally wrong, and not the erotic message being conveyed by the dance.[128] However, because the law allows the erotic dance to continue with a G-string and pasties, it is precisely this nude

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[120] Justice Rehnquist states "[N]ude 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." *Id.* at 566 (Rehnquist, J., plurality opinion). Justice Souter states "But dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience." *Id.* at 581 (Souter, J., concurring).

[121] *See supra* notes 103 and 114 and accompanying text.

[122] Precedent dictates that Souter's concurring opinion controls. *See* Mark v. United States, 430 U.S. 188, 193 (1977) ("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 judgment on the narrowest grounds.").

[123] J&B Entm't v. City of Jackson, 152 F.3d 362, 370 (5th Cir. 1998); DLS, Inc. v. Chattanooga, 107 F.3d 403, 408 (6th Cir. 1997).

[124] Justice White, Justice Marshall, Justice Blackmun, and Justice Stevens dissented from this opinion. *Barnes*, 501 U.S. at 587.

[125] *Id.* at 589-91 (White, J., dissenting).

[126] *Id.* at 591. Forbidding nudity in public could not be the true reason for regulation "since the viewers are exclusively consenting adults who pay money to see these dancers." *Id.*

[127] *Id.*

[128] *Id.* at 591-92.

component which adds a certain expressive element, unlawfully forbidden by the statute.[129]

The dissent favors a strict scrutiny analysis because it views the nude dancing as a type of artistic dance[130] worthy of the most exacting scrutiny.[131] Because the Indiana indecency statute is not narrowly tailored, it cannot be upheld as constitutional.[132] The dissent even proposes alternative methods for protecting against the associated secondary effects such as distance requirements, hour restrictions, and zoning restrictions,[133] some of which can be seen in the Lake County, Illinois, ordinance.[134]

Despite the United States Supreme Court ruling in *Barnes* and the continued reliance placed on Justice Souter's concurring opinion as precedent for erotic dance issues, the definitive legal analysis remains unclear.[135] As previously discussed, the Pennsylvania Supreme Court reviewed *PAP'S A.M. v. Erie*[136] to reopen the issue,[137] and in doing so it did not adopt the precedent handed down by *Barnes* because of the lack

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[129] *Id.* at 592.

[130] The Court states:

> [W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some 'entertainment' with his beer or shot of rye.

Barnes, 501 U.S. 594 (White, J., dissenting) (citing to Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 (2nd Cir. 1974)).

[131] *Barnes*, 501 U.S. 593 (White, J., dissenting). The dissent likens the symbolic conduct to the scenario depicted in *Texas v. Johnson*, 491 U.S. 397, 411-12 (1989), wherein the Court state, "[w]hether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct . . . . We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.'" *Id.*

[132] *Barnes*, 501 U.S. at 594 (White, J., dissenting).

[133] *Id.*

[134] *See supra* notes 17-19 and accompanying text.

[135] Evidence of the unclear precedent can be seen by the United States Supreme Court's need to revisit the erotic dance issue by granting certiorari to PAP'S A.M. v. Erie, 119 S.Ct. 1753 (1999); *see also* Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 134 (6th Cir. 1994) (noting that following the United States Supreme Court's precedent on this issue was hopelessly limited to "reading the tea leaves of *Barnes*").

[136] 719 A.2d 273 (1998).

[137] Danielle N. Rodier, *Strippers, Justices to Meet Again: High Court Will Hear a Second Nude Dancing Case*, 22 Pa. L. Wkly. 1034 (1999) ("Bare breasts will once again be a source of contention in the state Supreme Court, now that the justices have agreed to hear an argument against the constitutionality of a Liquor Control Board law that requires strippers to cover up certain areas of their bodies.").

of clarity disseminated by the "hopelessly fragmented *Barnes* Court."[138] It did, however, follow the same methodology when it attacked the erotic dance issue.[139] The court's first obstacle was to determine if the regulation was content-based or content-neutral.[140] If the ordinance was content-based, or related to the suppression of expression, then strict scrutiny would apply.[141] If the ordinance was content-neutral, then the less stringent standard for regulating noncommunicative conduct proposed by *O'Brien*[142] would control the analysis.[143]

In spite of its acknowledgment of the secondary effects addressed by the Erie County ordinance,[144] the Pennsylvania Supreme Court could not overcome the suppression of the expressive element within the erotic dance, and thus it used a content-based analysis and the strict scrutiny standard that accompanies it.[145] When applying this standard through

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[138] *See supra* notes 125-26 and accompanying text (discussing the use of Souter's opinion as precedent); *see also PAP'S A.M.*, 719 A.2d at 278 for a discussion of the Pennsylvania Supreme Court's abandonment of Souter's concurring opinion.

> It is simply not possible to find that Justice Souter's position in *Barnes* commanded five votes. Even if we were to assume arguendo that his concurring opinion provided an approach which was "narrower" than, and yet still encompassed by and consistent with, the one taken by the Chief Justice, such a concession would provide only four votes for Justice Souter's position. The fifth vote for Justice Souter's position is not forthcoming. It cannot be provided by Justice Scalia, who believed that restrictions on nude dancing are not to be analyzed pursuant to the First Amendment. Nor can it be said that the dissenters, who rejected the notion that the state's goal of combating secondary effects via the statute rendered the statute content-neutral, were in agreement with Justice Souter.
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> We find that the Commonwealth Court's determination that Justice Souter's "secondary effects" rationale represents the "holding" of Barnes is simply not borne out. In fact, aside from the agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed. Thus, although we may find that the opinions expressed by the Justices prove instructive, no clear precedent arises out of *Barnes* on the issue of whether the Ordinance in the matter sub judice passes muster under the First Amendment.

Id.

[139] *PAP'S A.M.*, 719 A.2d at 277.

[140] *Id.*

[141] *Id.*

[142] 391 U.S. 367 (1968); *see also supra* note 65 and accompanying text.

[143] *PAP'S A.M.*, 719 A.2d at 277.

[144] *Id.* at 279.

[145] *Id.* In its choice of a content-based analysis, the Pennsylvania Supreme Court states:

> It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating

its own analysis,[146] the court easily surpasses the compelling interest requirement only to stumble on the second requirement of narrowly tailored means to meet the strict scrutiny standard.[147] In its reasoning, the court finds it suspect and circuitous to attempt to prevent sex crimes by adding a layer of clothing, as opposed to the more narrowly tailored method of imposing greater criminal and civil sanctions.[148] The court also suggests that to avoid strict scrutiny, other viable restrictions (e.g. distance requirements between patrons and dancers, limited operation hours, and zoning restrictions)[149] could be imposed that would be viewed as content-neutral and thereby valid time, place, and manner restrictions subject to the less stringent scrutiny found in *O'Brien* and *Clark*.[150]

Recently, the United States Supreme Court reversed and remanded the *PAP'S A.M.* case back to the Pennsylvania Supreme Court.[151] Despite what may have been a subversive attempt by the Pennsylvania court at obtaining a definitive ruling on the issue of nude or erotic dance, the Supreme Court regrettably could not reach a majority opinion.[152] In the plurality opinion, Justice O'Connor, reemphasized the use of the four part content-neutral analysis from

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> such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication.

Id. at 279; *see also* Kimberly K. Smith, Comment, *Zoning Adult Entertainment: A Reassessment of Renton*, 79 CAL. L. REV. 119, 143 (1991). Wherein the author states:

> The perceived danger of sexual speech is not the view it espouses, but the words or symbols themselves. Our emotional reaction to sexual speech, like our reaction to the word 'fuck,' stems not from the idea it expresses, but from the violation of social taboos; it is a matter of cultural effrontery. There is a risk that this emotional reaction will motivate excessive government censorship of all discussion on the topic, regardless of the viewpoint expressed. Therefore, the Court should be more, rather than less, suspicious of subject-matter restrictions of sexual speech.

Id. (citations omitted).

[146] The City of Erie's reliance on *Barnes* precluded it from including a strict scrutiny analysis, thus forcing the court to decipher the problem on its own. *PAP'S A.M.*, 719 A.2d at 280.

[147] *Id.* ("It is beyond cavil that curbing crimes such as prostitution and rape is a compelling governmental interest.").

[148] *Id.*

[149] *Id.*

[150] *See supra* notes 62-68 and accompanying text.

[151] City of Erie v. PAP'S A.M., 529 U.S. 277, 286 (2000) (O'Connor, J., plurality opinion).

[152] *See generally id.* for the Justices' plurality, concurring, and dissenting opinions.

O'Brien, which was applied in *Barnes*, as the analysis to be used when reviewing the protection afforded erotic dance.[153]

Despite the Pennsylvania Supreme Court's attempt to redefine the law through a rejection of *Barnes*, this landmark decision and the methodology employed by it is nonetheless the current standard for deciding issues involving erotic dance.[154] However, in *Barnes* and both *PAP'S A.M.* cases, only the restriction on public nudity is challenged as unconstitutional.[155] In all three opinions, other methods of regulating adult use establishments are proposed as an alternative to a restriction on nudity.[156] In the Lake County, Illinois, ordinance, these alternatives are enacted as well as a restriction on nudity.[157] The analysis that follows will critique the individual restrictions imposed by the Lake County ordinance under the current United States Supreme Court case law and other lower court decisions. Additionally, this Note will analyze two ordinances which qualify as cumulative ordinances.

IV. THE DEVELOPMENT OF A CUMULATIVE ORDINANCE

In analyzing restrictions on adult use ordinances, courts consistently apply the content neutral analysis followed by the United States Supreme Court. However, as previously discussed, the Pennsylvania Supreme Court favors a content based analysis due to its different definition of erotic dance and the message it conveys. Distinction between the two methods is irrelevant for purposes of this Note as the analysis that follows will prove that regardless of the methodology used, the cumulative ordinance fails to meet either standard.

A. Individual Restrictions

Before analyzing the constitutionality of a cumulative adult use ordinance, this Note will independently address nine of the individual restrictions commonly used by local communities, including Lake

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[153] *Id.* at 1395 (O'Connor, J., plurality opinion).

[154] Despite the failure of *PAP'S A.M.* to follow the ruling from *Barnes*, the Pennsylvania Supreme Court's approach to the issue is similar to that of United States Supreme Court. 719 A.2d at 278-79.

[155] *Barnes*, 501 U.S. at 565-66 (Rehnquist, J., plurality opinion); *PAP'S A.M.*, 719 A.2d at 275-76; *PAP'S A.M.*, 529 U.S. at 289 (O'Connor, J., plurality opinion).

[156] *Barnes*, 501 U.S. at 594 (White, J., dissenting); *PAP'S A.M.*, 529 U.S. at 315-16 (Souter, J., concurring); *PAP'S A.M.*, 719 A.2d at 280.

[157] *See generally* Lake County Ordinance, *supra* note 13.

County, Illinois.[158] These restrictions will be addressed in the following order: restrictions on nudity, restrictions on the sale of alcohol at nude dancing establishments, elimination of all physical contact between patron and dancer, distance and separation requirements, restrictions on the method of tipping, a limit to the hours of operation, a licensing requirement, a limitation on the adult use establishment's signage, and the establishment of adult entertainment zones. By presenting the individual ordinances and reviewing the court's use of prior precedent, the analysis of these individual restrictions will demonstrate that municipalities are finding more and more creative ways to individually regulate the adult use establishments concluding in the cumulative ordinance.

1. Restrictions on Nudity

Regulation of nudity as an individual regulation is a relatively simple analysis due specifically to the decision handed down in *Barnes*, which rules on this exact issue.[159] As previously discussed in Part II, the analysis hinges on the validity of time, place, and manner restrictions imposed on erotic dancing.[160] Generally, most lower courts have followed the high court's methodology when assessing the constitutionality of the restrictions on public nudity by finding that regulations prohibiting nudity are content-neutral restrictions subject to valid time, manner, place restrictions. Somewhat concerning, however, is the broad interpretation of *Barnes* followed by the enactment of more restrictive ordinances in some jurisdictions.

In *Café 207 v. St. Johns County*,[161] the definition of what constitutes nudity was expanded to include a larger portion of the breast and buttocks.[162] The court found no logical reason why G-strings and pasties should constitute the maximum amount of coverage available in an adult use ordinance.[163] By expanding the current United States Supreme Court

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[158] *Id.*

[159] *See Barnes*, 501 U.S. 560 (1991).

[160] *See supra* Part II; *see also supra* notes 62-68 and accompanying text.

[161] 856 F. Supp. 641 (M.D. Fla. 1994).

[162] *Id.* at 643 ("One distinctive feature of the ordinance is its definition of the terms 'breast,' 'buttocks,' and 'nudity.' In net effect, a female is 'nude' whenever more than two-thirds of the buttocks or more than three-fourths of the breasts are exposed . . . .").

[163] *Id.* at 646. The court noted:

> Once it is established that a burden may be imposed on the expressive content of erotic dancing by requiring some clothing-pasties and a G-string-then it does not seem to me from a constitutional standpoint that a modest increase in the

precedent to facilitate a more restrictive ordinance and deferring the ultimate decision back to the United States Supreme Court, this court is unknowingly promoting and facilitating the cumulative ordinance's development and existence. [164]

In *Bright Lights, Inc. v. City of Newport*,[165] the court went one step further by requiring erotic dancers to wear a bikini top.[166] This court also relied on *Barnes* and the content neutral test advanced by *O'Brien*. However, in its application, the court cited moralistic and protectionist reasons as the substantial government interest and thus found that the bikini requirement was not greater than necessary.[167] In this instance, the interests of fairness take a back seat to the court's interest in supporting the local town council's attempts at cleaning up the city of Newport despite the decision's judicial reverberations which

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amount of body covering required by the law really adds any significant, incremental burden on the expressive component of the dance.

Id.

[164] Instead of attacking the merits of the issue, this district court deferred to other courts for interpretation of the unclear line deciding how much restriction constitutes too much when it stated:

> To be sure, so long as an anti-nudity statute is subject to any First Amendment scrutiny, . . . there must be a line in every case beyond which the law makers cannot go in requiring clothing or prohibiting exposure in some contexts....Definition of that constitutional line, however, must await a case-by-case development of the law and further guidance from the [United States] Supreme Court.

Id. at 646.

[165] 830 F. Supp. 378 (E.D. Ky. 1993).

[166] The following represents the Bikini Ordinance as written by the city of Newport:

> Sec. 4-81. Persons prohibited from performing nude or nearly nude activities.
> It shall be unlawful for, and a person is guilty of, performing nude or nearly nude activity when that person appears on a business establishment's premises in such a manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, or when any female appears on a business establishment's premises, in such manner or attire as to expose to view the portion of the breast below a horizontal line across the top of the areola at its highest point or simulation thereof. This definition shall include the *entire lower portion* of the human female breast, but shall not include any portion of the cleavage of the human female breast, exhibited by a dress, blouse, shirt, leotard, bathing suit, or other wearing apparel provided the areola is not exposed in whole or in part.

Id. at 381 (emphasis added).

[167] *Id.* at 383-84.

unknowingly invite and encourage cities to pass cumulative ordinances in the future.[168]

Notwithstanding the continued reliance on the United States Supreme Court precedent, some lower courts have taken a closer look at anti-nudity ordinances and the local community's reasons for passing such ordinances. In *J&B Entertainment, Inc. v. City of Jackson*,[169] the Fifth Circuit vacated summary judgment in favor of the city due to the city's failure to present clear evidence supporting how the secondary effects furthered the city's interest of protecting the community.[170] This decision shows that in some jurisdictions, local communities must provide more than the mere indication of a proposed purpose to withstand judicial scrutiny. In *Nakatomi Investments, Inc. v. City of Schenectady*,[171] the Northern District of New York also invalidated an anti-nudity ordinance finding that the ordinance did not further a substantial government interest.[172] Again, the court determined that in order to pass the anti-nudity ordinance the city must make a strong connection between the restrictions on erotic expression and the underlying reason for passing the ordinance.[173] The court further found that restrictions merely for the sake of preventing nudity at erotic dance establishments was insufficient proof under the current United States Supreme Court precedent[174] and, therefore, was unconstitutional.[175]

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[168] *Id.* at 384 (noting the court's conclusion that "[s]ome leeway must be afforded the reform efforts of the City Council of Newport. This body has been elected by the citizens to attempt to 'clean up the image' of the City").

[169] 152 F.3d 362 (5th Cir. 1998).

[170] *Id.* at 374-75.

> No explanation of what specific secondary effects motivate Jackson to enact the ordinance appears in its text, and the City Council failed to make any specific legislative findings prior to enactment .... Moreover, because the district court granted summary judgment before the record was fully developed, the City did not present evidence in court to demonstrate "a current governmental interest" that might validate the Ordinance.

Id. at 374.

[171] 949 F. Supp. 988 (N.D.N.Y. 1997).

[172] *Id.* at 996-99.

[173] *Id.* at 997.

[174] *Id.* The courts stated:

> What the District Court [in *Café 207*] and Justice Souter ignore, however, is that the constitutional limitation is the requirement that the incremental restriction on expression must result in an incremental furthering of the purported governmental interest. To wit, each additional piece of required clothing must result in a further reduction in pernicious side effects. Without demanding this connection at each step, each additional layer of restriction can be legally added simply on the basis that the previous restriction was valid, until the entire

In defense of nude dancing and erotic expression, the Ninth Circuit invalidated the county ban on nudity due to a lack of concrete evidence linking the nude dance to the amount of crime in the same area.[176] This same case invalidated an adjacent county's ban on nudity for similar reasons.[177] The failure to recognize secondary effects as a valid reason appears to be grounded more so on the fact that the two counties ignored the First Amendment protection afforded erotic dance.[178] Nonetheless, this case is seemingly outdated, because refusal to

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> activity is banned: i.e. nude dancing is permitted so long as the dancers wear pasties and G-strings; then bathing suits; then t-shirts; then long pants and a sweater .... In recognition of the danger of creeping encroachment, the First Amendment requires, not that the restriction be merely related to the governmental interest asserted, but rather that each restriction imposed furthers an important or substantial government interest.

Id.

[175] *Id.* at 1000 ("Despite the city's laudable concerns, the ban at issue here does not fall within any of these constitutionally permissible areas of legislation. If the city wishes to regulate non-obscene expressive activity, it may do so, but only in consonance with the First Amendment.").

[176] BSA, Inc. v. King County, 804 F.2d 1104, 1108 (9th Cir. 1986).

> The Pierce County Sheriff presented testimony and data to the County Council that were designed to show that the "soda pop" topless dancing clubs caused and encouraged illicit activities such as prostitution, narcotics, and violence, and therefore, such clubs had an added need for law enforcement services. The sheriff provided statistics on the number of police calls to the topless clubs. The data provided are [sic] not limited to calls to particular clubs, but include "the immediate vicinity." The record indicates that the areas where these clubs are located may be conducive to criminal activity by the combination of liquor taverns, inexpensive motels, and topless clubs. No meaningful comparative statistics are provided on hotels where prostitution occurs, or the bars where alcohol is served. The data on police calls to two taverns is of little assistance given that there are fifty to seventy-five in the County. In sum, the County's proof does not show that topless dancing is anymore a cause of lawlessness than any of the other businesses.

Id. at 1108.

[177] *Id.* at 1109.

> Snohomish County has not shown a substantial governmental interest to justify this ban on nude performances. Other than reports of several narcotics transactions at one club, the evidence before the County Council consisted of letters and petitions from church groups and ministers asserting that barroom nude dancing is corrupt and immoral; a sheriff's statement that topless dancing is perceived as vice-ridden, it corrupts public morals and is a drain on police resources; and testimony of several individuals that topless dancing is immoral, lewd, and degrading to womanhood. there are numerous biblical references. No empirical evidence was presented to the Council.

Id.

[178] *Id.* at 1107 ("The Counties contend that they can prohibit common barroom nude dancing and other non-expressive nudity because it is afforded no protection under the First Amendment.").

allow secondary effects as a valid reason for restrictions on nude dancing pre-dates the *City of Renton v. Playtime Theaters*[179] decision which upholds not only the use of statistical studies, but also the use of studies from surrounding communities. [180]

Despite the minor discrepancies between the courts as to the use of secondary effects to restrict nudity, the forced draping of erotic dancers appears to be constitutional on an individual basis.[181] Limiting nudity is the first of many restrictions often used to eliminate adult use establishments. Along with nudity, another common restriction frequently addressed by the courts is a restriction on serving alcohol at adult use establishments.

2. Restrictions on Distribution of Alcohol

In *Toy Box, Inc. v. Bay County*,[182] the Northern District of Florida upheld the ban of alcohol sales at establishments that exhibit nude or partially nude erotic dance.[183] As part of its reasoning, this court relied on the previous United States Supreme Court rulings in *Barnes* to uphold this ordinance.[184] Individually, a ban on the sale of alcohol would not seem to conflict with the erotic message conveyed in the nude dance unless it can be argued that alcohol enhances such erotic expression.[185] The court found that because *Barnes* "squarely holds, a statute banning

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[179] 475 U.S. 41, 50-51 (1986) (upholding secondary effects as a compelling government interest).

[180] *Renton*, 475 U.S. at 51-52.

[181] *See* Smith, *supra* note 148, at 159 wherein the author notes:

> The Renton test is appropriate for adult-use zoning ordinances because, although they are content-based speech restriction, they present less danger of censorship than other content-based restrictions. Application of the test, however, raises considerable difficulties. Zoning restrictions come in a multiplicity of forms; they may contain waivers, grandfather clauses, and a variety of definitions. Correct application of the Renton test, therefore, requires a clear understanding of the first amendment issues implicated by adult-use ordinances. In the absence of this understanding, the test will fail to guard against censorship.

Id.

[182] 989 F. Supp. 1183 (N.D. Fla. 1997).

[183] *Id.* at 1186.

[184] *Id.* at 1184-85.

[185] The author contends that alcohol as a depressant puts the viewer in a more relaxed state and thus makes them more receptive to the communicated message. As proof, *see generally* PRINCIPLES OF AMBULATORY MEDICINE 224 (L. Randol Barker et al. eds., 4th ed. 1995) ("Alcohol intoxication may be characterized by . . . relaxation and sedation, euphoria, [and] . . . lowered inhibitions . . . .").

public nudity in places where liquor is or is not used or sold survives first amendment [sic] challenge, then the more limited ordinances at issue in the case at bar, which ban public nudity only in places where liquor is used or sold, also are constitutional."[186]

In *Sammy's of Mobile, Ltd. v. City of Mobile*,[187] the Eleventh Circuit found a logical connection between the restriction of alcohol at an adult use establishment and nudity when it stated, "explicit entertainment coupled with alcohol in public places 'encourages undesirable behavior and is not in the interest of public health, safety, and welfare.'"[188] The court also relied on the United States Supreme Court's reasoning that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior."[189] The Eleventh Circuit argued that the restriction on serving alcohol has nothing to do with the message conveyed in the symbolic speech present but more likely it is aimed at preventing the harmful effects caused by the alcohol.[190] This again ignores the argument that when nudity and alcohol are combined the effect is an enhanced erotic message.[191] This argument, however, would likely fail in the eyes of the United States Supreme Court. Because the Court in *Barnes* failed to add significant value to the nude component of erotic dance, it would hardly seem likely that alcohol would fare any better.[192]

Individual regulations on the dancer and establishment have continually been upheld as constitutional by the court system. Purportedly, this is due to the court's ability to succinctly separate the erotic message from the regulation being inflicted. The current support for restrictions on nudity and the distribution of alcohol has lead to further restrictions imposed to ban the ability of a dancer or performer to contact or touch a patron.

3. Elimination of All Contact Between Patrons and Dancers

In *Hang On, Inc. v. City of Arlington*,[193] the city council passed an ordinance which forbade adult entertainers from touching the patrons,

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[186] *Toy Box, Inc.*, 989 F. Supp. at 1184-85.
[187] 140 F.3d 993 (11th Cir. 1998).
[188] *Id.* at 997.
[189] *Id.* (citing to *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981)).
[190] *Id.*
[191] *See supra* note 188.
[192] *Barnes*, 501 U.S. at 571 (Rehnquist, J., plurality opinion).
[193] 65 F.3d 1248 (5th Cir. 1995).

affectionately called a "no touch ordinance."[194] The purpose of the ordinance was "to promote the health, safety, morals and general welfare of the citizens of the City."[195] In its decision upholding the "no touch" provision, the court accepted *Barnes* by acknowledging nude dancing as an expressive form of communication.[196] However, it rejected the notion that contact between a patron and an erotic dancer could combine to enhance the erotic experience.[197] Rather, the court viewed the proscription on contact as just another valid time, place, or manner restriction on nude dancing.[198] The same ordinance was contested by another local adult establishment in *2300, Inc. v. City of Arlington*.[199] Again, the contact between a dancer and a patron was dismissed as a content neutral restriction of symbolic conduct.[200] However, this opinion differed from *Hang On, Inc.* in that the court recognized touching as a part of the expressive message conveyed by nude dancing.[201]

Regardless of the difference in opinion as to whether a valid connection exists between the erotic message and body contact, the mere support of this individual restriction in both cases curtails the overall nude dance experience through the elimination of interaction between the dancers and the patrons. This restriction effectively reduces the communicative impact of the nude-dancing medium by making it less personal. If elimination of all contact between patrons and dancers is a valid restriction on nude dancing the next logical step is the separation of employees and the patrons through buffer zones and stage requirements.

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[194] *Id.* at 1251. The no touch provisions were as follows:

> Section 5.01 Additional Regulations for Adult Cabaret
>
> A. An employee of an adult cabaret, while appearing in a state of nudity, commits an offense if he touches a customer or clothing of a customer.
>
> B. A customer at an adult cabaret commits an offense if he touches an employee appearing in a state of nudity or clothing of the employee.

Id.

[195] *Id.*

[196] *Id.* at 1253.

[197] *Id.* ("[I]ntentional contact between a nude dancer and a bar patron is conduct beyond the expressive scope of the dancing itself.").

[198] Interestingly enough, the court in finding that the ordinance met all four prongs of the *O'Brien* test also noted that Arlington disclaimed any intent to infringe upon protected expression. *Hang On, Inc.*, 65 F.3d at 1254. By that logic, circumventing the First Amendment would seemingly only require municipalities to disclaim themselves of any fault in order to be free of constitutional infringement.

[199] 888 S.W.2d 123 (Tex. App. 1994).

[200] The Texas Appellate Court used precedent from *Renton v. Playtime Theatres* to support the city council's goal of limiting secondary effects, "namely crimes such as prostitution, drug trafficking and assault." *Id.* at 128.

[201] The Texas Court of Appeals assimilates the touching with the total experience of nude dancing and does not distinguish it as a separate component. *Id.* at 128-29.

The rapid progression and court support of individual limitations on adult use establishments provides further proof of the movement to a cumulative ordinance.

4. Distance and Separation Requirements

A restriction requiring the dancers to be at least six feet away from the patrons and on an eighteen-inch stage during their performances was upheld as constitutional by the Sixth Circuit in *DLS, Inc. v. City of Chattanooga*.[202] The court again relied on current precedent when analyzing this content-neutral restriction.[203] Use of conclusive independent studies by the local community provided sufficient proof that a buffer zone between the patrons and dancers would limit the opportunity for the harmful secondary effects intended to be curbed by the restriction.[204]

In *Colacurcio v. City of Kent*,[205] the city passed an ordinance that required the dancers to perform on a stage at least two feet higher than the seating area and be at least ten feet from any patron.[206] The court found the restriction to be both content-neutral and reasonable as to time, manner, and place.[207] However, a slightly different methodology

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[202] 107 F.3d 403 (6th Cir. 1997). The ordinance stated:

> No entertainer, employee or customer shall be permitted to have any physical contact with any other [sic] on the premises during any performance and all performances shall only occur upon a stage at least eighteen inches (18") above the immediate floor level and removed at least six feet (6') from the nearest entertainer, employee and/or customer.

Id. at 406.

[203] *Id.* at 408-09.

[204] Proof of the use of a buffer zone to prevent harmful secondary effects was found and the court stated:

> An officer of the Chattanooga Health Department testified that such contact poses a risk of the transmission of disease. Furthermore, the particular dances described in the record–such as one instance in which a dancer invited customers to spoon-feed themselves whipped cream off of her breasts, buttocks, and vaginal area–pose a particularly acute risk of the transmission of disease.

Id. at 410.

[205] 163 F.3d 545 (9th Cir. 1998).

[206] *Id.* at 549. The applicable sections of the ordinance state the following:

> The portion of the exotic dance studio premises in which dancing and adult entertainment by an entertainer is performed shall be a stage or platform at least twenty four (24") inches in elevation above the level of the patron seating areas. No dancing or adult entertainment by an entertainer shall occur closer than ten (10') feet to any patron.

Id.

[207] *Id.* at 551-54.

was used by the Ninth Circuit when it determined that the ordinance was content-neutral and unrelated to the suppression of speech.[208] Traditionally, most courts would only look to the stated purpose in the recitals of the ordinance to find a permissible purpose, whereas in this case, the court performed a stricter examination, including a review of such things as "the face of the statute, the effect of the statute, comparisons to prior law, facts surrounding enactment, the state purpose, and the record of proceedings."[209] Because the city could show that considerable resources were devoted to establishing the right restrictions, the court upheld it as justified without reference to the speech.[210]

In *DCR, Inc. v. Pierce County*,[211] the Washington state appellate court came to a similar conclusion, except it made the argument that the proximity of the dancer to the patron was completely unrelated to the expressive component of the erotic dance.[212] By separating the issue of proximity from the expressive message conveyed by erotic dance, the court was able to bar contact without interfering with the constitutional protection afforded nude dancing as a whole.[213] This logic lends itself to the cumulative restriction analysis which is to follow. By analyzing each individual restriction in a light which characterizes that component as a small insignificant portion of the whole, the restrictions do not seem like an infringement on the protected expression.

After placing numerous restrictions on dancers and their ability to convey an erotic message (requiring G-strings and pasties, requiring

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[208] *Id.* at 552.

[209] *Id.*

[210] Colacuricio v. City of Kent, 163 F.3d 545, 553 (9th Cir. 1998). The court noted:

> Kent's ordinance was based on a comprehensive study of adult entertainment businesses and their secondary impacts. In formulating the ordinance, the City relied on the study, concluding that regulation of adult uses was an important factor in controlling prostitution, drug dealing, and other criminal activity .... The record also includes affidavits and statements by police officers and vice detectives documenting the connection between table dancing and illegal sexual activity.

Id.

[211] 964 P.2d 380 (Wash. Ct. App. 1998).

[212] DCR, Inc. v. Pierce County, 964 P.2d 380, 388 (Wash. Ct. App. 1998) ("The 10-foot rule minimizes opportunity for illegal activities, which are not protected conduct. But the 10-foot rule does not restrict expressive content of the dance itself ....") (citation omitted).

[213] *Id.* at 387 ("The issue here is whether proximity of the erotic dance, as contrasted to the movements of the dance, constitutes communicative 'expression' in the nature of constitutionally protected speech, or whether it is unprotected mere conduct.") (emphasis omitted).

separation between the dancer and the patron, and disallowing touching), the next place a municipality could attack would be the actual business of running an adult use establishment, starting with a restriction on tipping of dancers.

5. Restrictions on Tipping

In addition to a distance and separation requirement, Kent's ordinance also prohibits dancers from soliciting or receiving tips from patrons.[214] The adult use establishment contended that a restriction limiting dancer's revenue would make dancing "uneconomical and therefore impossible for exotic dance studios to open and operate in [the city]."[215] The Ninth Circuit was not persuaded by this argument, instead holding that the true test for overrestrictive regulations was "whether a business could operate under the regulation at issue, not whether a particular business will be able to compete successfully within the market."[216] The court's failure to consider the economic impact led to further restrictions limiting adult use establishments such as restricting the number of hours the establishment can stay open.

6. Limitation on the Hours of Operation

In *7250 Corp. v. Board of County Commissioner*[217] and *Ben Rich Trading, Inc. v. City of Vineland*,[218] local communities passed ordinances which restricted the hours of operation at adult use establishments.[219] In *7250 Corp.*, the Colorado Supreme Court utilized the four-part test proposed by *O'Brien* to determine if a limit on hours was permissible.[220] Central to the court's decision to uphold the time restriction was its reasoning that the ordinance was passed in furtherance of preventing

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[214] *Colacurcio*, 163 F.3d at 549.

[215] *Id.* The revenue from tipping is the main source of revenue for the dancers and therefore, when the dancers are not compensated for stage dances, it results in an economic hardship. *Id.* at 556. In essence, table dancers are independent contractors who pay rental fees to the dance studio, effectively making up a majority of its revenues as well. *Id.* at 557.

[216] *Id.* at 556-57 (emphasis omitted) ("[I]n the absence of any absolute bar to the market...it is irrelevant whether '[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business.'").

[217] 799 P.2d 917 (Colo. 1990).

[218] 126 F.3d 155 (3d Cir. 1997).

[219] In the first instance, hours were restricted to 4:00 pm to 12:00 midnight, Monday through Saturday of each week. *7250 Corp.*, 799 P.2d at 919. In the latter case, hours were limited to 8:00 am to 10:00 pm, Mondays through Saturdays. *Ben Rich Trading, Inc.*, 126 F.3d at 158.

[220] *7250 Corp.*, 799 P.2d at 924.

harmful secondary effects, including property destruction and criminal activity.[221]

In *Ben Rich Trading, Inc.*, the Third Circuit found time restraints to be content-neutral and not a burden that was substantially greater than necessary to further the governments legitimate interest.[222] In its opinion upholding the time limits as allowable the court stated, "the [statute] allows those who choose to hear, view, or participate publicly in sexually explicit expressive activity more than thirty-six hundred hours per year to do so. We think the Constitution requires no more."[223] In lieu of limiting the number of hours, other communities have increased the amount of hands-on regulation by requiring adult use establishments to qualify for and to maintain an adult use license.[224]

7. Licensing Requirements

Chattanooga, Tennessee, enacted an ordinance that required owners and operators of adult cabarets to obtain a license in order to continue to operate.[225] Again, the court used the *O'Brien* analysis to

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[221] *Id.* at 926 ("Adams County must rely upon the express terms of the Nude Entertainment Ordinance as the method of preserving the character and quality of residential neighborhoods within the county.").

[222] *Ben Rich Trading, Inc.*, 126 F.3d at 162. The court used the approach proposed by *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), which stated, "the principal inquiry in determining content neutrality in speech cases generally and in time, place, and manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 160-61.

[223] *Id.* at 163 (quoting Mitchell v. Comm'n on Adult Entm't, 10 F.3d 123, 139 (3d Cir. 1993)).

[224] *See infra* notes 225 through 233 and accompanying text.

[225] Broadway Books, Inc. v. Roberts, 642 F. Supp. 486 (E.D. Tenn. 1986). The application for a license required the following information:

> (b) The application for a license shall be upon a form provided by the City Treasurer. An applicant for a license including any partner or limited partner of the partnership applicant, and any officer or director of the corporate applicant and any stockholder holding more than five (5) percent of the stock of a corporate applicant, or any other person who is interested directly in the ownership or operation of the business, shall furnish the following information under oath:
>
> (1) Name and address, including all aliases.
>
> (2) Written proof that the individual is at least eighteen (18) years of age.
>
> (3) All residential addresses of the applicant for the past three (3) years.
>
> (4) The applicant's height, weight, color of eyes and hair.
>
> (5) The business, occupation or employment of the applicant for five (5) years immediately preceding the date of the application.
>
> (6) Whether the applicant previously operated in this or any other county, city or state under an adult-oriented establishment license or similar business license; whether the applicant has ever had such a license revoked or suspended, the

determine if the restriction was constitutional.[226] The majority of the licensing requirements were upheld due to the city's attempts to curtail harmful secondary effects, mainly health hazards and the spread of sexually transmitted diseases, like Acquired Immune Deficiency Syndrome, which are often transmitted as a result of prostitution and sexual improprieties.[227]

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reason therefor, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation.

(7) All criminal statutes, whether federal or state, or city ordinance violation convictions, forfeiture of bond and pleadings of *nolo contendere* on all charges, except minor traffic violations.

(8) Fingerprints and two (2) portrait photographs at least two (2) inches by two (2) inches of the applicant.

(9) The address of the adult-oriented establishment to be operated by the applicant.

(10) The names and addresses of all persons, partnerships, or corporations holding any beneficial interest in the real estate upon which such adult-oriented establishment is to be operated, including but not limited to, contract purchasers or sellers, beneficiaries of land trust or lessees subletting to applicant.

(11) If the premises are leased or being purchased under contract, a copy of such lease or contract shall accompany the application.

(12) The length of time the applicant has been a resident of the City of Chattanooga, or its environs, immediately preceding the date of the application.

(13) If the applicant is a corporation, the application shall specify the name of the corporation, the date and state of incorporation, the name and address of the incorporation, the name and address of the registered agent and the name and address of all principal shareholders, officers and directors of the corporation.

(14) A statement by the applicant that he or she is familiar with the provisions of this ordinance and is in compliance with them.

(15) Written statements of at least five (5) persons who are not related to the applicant that the applicant is of good moral character.

(16) All inventory, equipment, or supplies which are to be leased, purchased, held in consignment or in any other fashion kept on the premises or any part or portion thereof for storage, display, any other use therein, or in connection with the operation of said establishment, or for resale, shall be identified in writing accompanying the application specifically designating the distributor business name, address, phone number, and representative's name.

Id. at 498-99.

[226] *Id.* at 490-91.

[227] The city of Chattanooga has cited the following:

> These adult oriented establishments are a substantial law enforcement problem for the Chattanooga Police Department - and particularly for its vice squad. Since 1982, Chattanooga police officers have arrested numerous people at these establishments for sex-related crimes such as prostitution, selling obscene material to juveniles, indecent exposure, assignation, and solicitation to commit an unnatural sex act. There have been 112 such arrests since 1982. These are in addition to numerous arrests at these establishments on other charges such as gambling, assault and battery, and public drunkenness. Some of the arrests have been of employees at these establishments including [Broadway Books']

Similarly, in *City of Colorado Springs v. 2354 Inc.*,[228] the Colorado Supreme Court upheld certain provisions of a licensing scheme that the city imposed on adult use establishments.[229] The court analyzed the licensing scheme as a prior restraint.[230] Since prior restraints are invalid *per se*, to prove the scheme was constitutional the City of Colorado Springs had to provide adequate judicial procedural safeguards and prove that the restriction serves a compelling government interest with means narrowly tailored to meet that interest.[231] In defense of the licensing scheme, the Colorado Supreme Court found that conditioning an erotic dance license on the age of its patrons and dancers was a narrowly tailored means of protecting youths under the age of twenty-one from potentially harmful consequences and was therefore valid.[232] The other restrictions that the court upheld despite the strict scrutiny standard included: time limits for approval or denial of applications, regulation of managers and employees of licensed adult businesses,

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> establishments. On numerous occasions, plain-clothes police officers and others at these places have been grabbed by the genitals or otherwise solicited for homosexual activity.

Id. at 491.

[228] 896 P.2d 272 (Colo. 1995).

[229] *Id.* at 292 (upholding all provisions of licensing restrictions applied to nude dance establishments except a provision requiring good moral character to obtain a license and a provision requiring the identification of all corporate shareholders holding 5% or more of the outstanding shares of stock).

[230] *Id.* at 279 ("Because no alternative means of access to those ideas are available, the licensing provisions of the Ordinance constitute a prior restraint that subjects certain communications to governmental regulation in advance of the time that such communications are to occur.").

[231] *Id.* at 279; *see also* Smith, *supra* note 148, at 152, noting:

> The crucial difference between a licensing statute and a zoning ordinance is the discretion vested in the permitting authority. Licenses may be denied on the basis of the permitting authority's distaste for the applicant's message, rather than a legitimate non-speech-related reason. Any regulation that leaves the right to free speech as a discretionary matter carries the potential for government censorship. Courts have guarded against the danger of censorship by discretionary licensing statutes by requiring such statutes to include extensive procedural safeguards. For the same reasons, a zoning ordinance vesting discretion in the permitting authority should be subject to these safeguards.

Id.

[232] City of Colo. Springs v. 2354 Inc., 896 P.2d 272, 287 (Colo. 1995); *see also* 7250 Corp. v. Bd. of County Comm'rs, 799 P.2d at 917, 926 (Colo. 1990), which stated:

> Furthermore, in light of the evidence concerning reported property destruction and criminal activity associated with nude entertainment establishments, we may reasonably presume that the age restrictions in the ordinance reflect a legitimate legislative judgment by the county commissioners that youths under 21 years of age should be protected from the potentially harmful consequences associated with such establishments.

Id.

periodic inspection of premises, and factors warranting suspension, revocation and expiration of issued licenses.[233] In addition to finding it constitutional to regulate the adult use establishments hours of operation and to require those establishments to obtain licenses, municipalities found other ways to impose individual regulations, including a limitation on the amount of signage the business was able to display.

8. Limitations on the Adult Use Establishment's Signage

The court upheld a limitation on the number and type of signage displayed at an adult use establishment in *SDJ, Inc. v. City of Houston*.[234] The ordinance was drafted to require "that the exterior portions of establishment be free from flashing lights, words, lettering, photographs, silhouettes, drawings, or pictorial representations and, with few exceptions, the exterior portions of the establishment must be painted a single achromatic color."[235] The district court upheld these restrictions, reasoning that the regulations were directed at the signs themselves and not the protected activity.[236] As if it recognized the flaw in this reasoning, the court supported its decision by finding that the restrictions served a legitimate public interest and where appropriate, to prevent the deterioration and decline of the surrounding properties.[237] Furthermore, because it was not a complete ban on the businesses' signage, the court allowed the restriction.[238] Finally, in addition to the numerous individual restrictions on the dancers and the adult use facilities, the local communities and county boards have relied on commercial zoning restrictions to further regulate the impact of erotic dancing on their communities.

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[233] *2354 Inc.*, 896 P.2d at 277.

[234] 636 F. Supp. 1359, 1369 (S.D. Tex. 1986).

[235] *Id.*

[236] *Id.* True to form, the courts continue to separate the restricted activity from the erotic expression thereby eliminating the need to justify the restriction. *Id.*

[237] The mere suggestion that signage restrictions aimed at adult use establishments were not caused by the protected activity within prompted the secondary effects justification from the court. *Id.*

[238] *Id.* The court further reasoned:

> A restriction on the signage and exterior portions which allows modest, subdued advertising is appropriate in order to prevent a decline in the values of surrounding properties, and thus prevent deterioration of neighborhoods.... Unlike the [o]rdinance in [another case], The City of Houston Ordinance does not completely ban topless bars from advertising. It merely places limits on the number, size, and details of the signs. Regulations on the exterior portions and signage of sexually oriented businesses that serve a legitimate public interest, such as the prevention of detrimental effects on minors, are not unconstitutional.

Id. at 1369.

9. Restrictions on Location through Zoning

Limiting the location of adult use establishments through zoning laws is the final individual restriction to be addressed. In *Nakatomi Investments, Inc. v. City of Schenectady*,[239] the city passed an ordinance that required the adult use establishment to obtain a zoning permit authorizing the existence of the entertainment establishment.[240] To obtain such a permit, the placement of the adult use establishments had to be at least 500 feet from a dwelling unit, 500 feet from any other adult use establishment, 500 feet from any church or place of worship, and 1000 feet from any public, private or parochial school, library, park or playground.[241] In analyzing the constitutionality of such a zoning requirement, the court relied on the test used by the United States Supreme Court case in *City of Renton v. Playtime Theatres*.[242] To pass constitutional muster under *City of Renton*, the government's interest in regulating these establishments has to be substantial and reasonable alternative avenues of communication must be available.[243] Due to the lack of an adequate record, the court was unable to determine if Schenectady's ordinance allowed the reasonable alternative avenues proscribed by *Renton* and thus, it found that there was little likelihood of a successful challenge to this ordinance.[244] However, due to the permit requirements imposed in addition to the zoning requirements, the court found the ordinance to be a prior restraint and therefore unconstitutional.[245]

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[239] 949 F. Supp. 988 (N.D.N.Y. 1997).

[240] *Id.* at 1000 n.7.

[241] *Id.*; *see also infra* note 247 for another example of a zoning ordinance.

[242] 475 U.S. 41, 43 (1986) (upholding a zoning restriction prohibiting a movie theater from locating within 1000 feet of any residential zone, single or multiple family dwellings, church, park, or school).

[243] *Id.* at 50, 53; *Nakatomi Invs., Inc.*, 949 F. Supp. at 1002.

[244] *Nakatomi Invs., Inc.*, 949 F. Supp. at 1002. Inconsistent with the required test, the court ignored the substantial government interest prong altogether assuming the prevention of crime and the goal of maintaining the quality of the city's neighborhoods was a substantial government interest. *Id.*

[245] *Id.* at 1003. In so holding, the court reasoned:

> In determining the constitutionality of a permit ordinance, a court must move beyond the *Renton* and *O'Brien* tests and deal with the issue of prior restraints. Unlike the zoning ordinance at issue in *Renton*, which merely required set distances between adult establishments, and unlike the Indiana statute at issue in *Barnes*, which banned public nudity, a conditional use ordinance acts as a prior restraint on speech; a permit scheme qualifies as a prior restraint because it essentially requires the permittee to obtain the government's permission or approval before engaging in an act of First Amendment protected speech . . . .

A similar fate befell a zoning ordinance passed by St. Petersburg, Florida, in *Centerfold Club, Inc. v. City of St. Petersburg*.[246] In this case, however, the key analysis centered on the availability of alternative avenues of communication.[247] This decision was reached mainly because

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> Accordingly, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license or permit must be declared unconstitutional unless it contains narrow, objective, and definite standards to guide the licensing authority.

Id. at 1002-03. Due again to the lack of an adequate record, the court found it could not determine if the Schenectady ordinance contained a narrow objective and thus it found for the plaintiff. *Id.* at 1003.

[246] 969 F. Supp. 1288 (M.D. Fla. 1997). The ordinance stated:

> Section (e) of the Ordinance describes the "Location of Adult Uses":
>
> (1) No adult use establishment may be located within 700 feet of any of the following uses which is legally in existence or has received legal authority to locate on a lot or parcel: a. any property within a residential district; b. any portion of a mixed use zoning district developed and utilized as a nonaccessory residential use; or c. any church, school, child care facility or public park;
>
> (2) No adult use establishment may be located within 700 feet of any other adult use establishment which is legally in existence or has received legal authority to locate on a lot or parcel.
>
> (3) Neither the residential districts described in subparagraph (1)a. nor any of the uses described in subparagraphs (1)b. or c. may be located within 700 feet of any adult use establishment which is legally in existence or has received legal authority to locate on a lot or site. Such legal authority shall be presumed where there is a valid certificate of compliance or adult use permit for the adult use establishment on the lot or site.
>
> (4) The distance requirements under section (1), (2) and (3) above shall be measured along a straight line from the nearest property line within a residential district or the nearest property line of the church, school, child care facility, public park, residential use in a mixed use zoning district or adult use to the closest property line of the adult use. In a multi-tenant or multi-user building, such as a shopping center, said distance requirement shall be measured from the unit or closest portion of the building, unit or structure utilized by and containing or being utilized by any facet of the adult use establishment.
>
> (5) Nothing in this Section shall be construed to permit the operation of any business or the performance of any activity prohibited under any other part of this Section, state or county law, other ordinance of the City or the City Code. Additionally, nothing in this Section shall be construed to authorize, allow or permit the establishment of any business, the performance of any activity, or the possession of any item, which is obscene under the judicially established definition of obscenity.

Id. at 1299 n.15.

[247] *Id.* at 1302. The court stated:

> We are therefore not particularly concerned with determining how much acreage was actually available .... What is important is the number of adult business locations that the acreage will support given the spacing requirements. That is what determines whether there are sufficient alternative sites available, and that is our focus in reviewing the sufficiency of the evidence.

Id.

the number of sites in comparison to the community's population was severely inadequate.[248] While these two previous cases demonstrate that a poorly drafted ordinance will fail, *Renton* allows these restrictions as long as they meet the requirements from the two-part test previously discussed.[249]

In short, numerous types of restrictions covering regulation of the dancer and the adult use establishments have been held to be constitutional. Next, this Note will analyze two cumulative ordinances to demonstrate how courts analyze a combined ordinance which imposes numerous individual restrictions on the adult use establishment.

B. Cumulative Restrictions

A cumulative ordinance adopted by the city of Chattanooga combined four of the previously discussed individual restrictions by requiring a ban on touching, a six foot buffer zone between the patron and the dancer, performance on a stage eighteen inches higher than viewing area, and a licensing scheme.[250] The Sixth Circuit chose to address only two parts: the six-foot buffer zone requirement and the licensing scheme.[251] Despite the plaintiff's challenge of "virtually every

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[248] The court stated:

> Although there is no bright line rule for making this determination, the Court finds the relationship between the number of available sites and the population of the community important . . . . St. Petersburg . . . has a population of 238,726, creating a ratio of one site per 12,565. In comparison [to other city's ratios] the City of St. Petersburg's ratio is inadequate.

Id. at 1305-06.

[249] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) ("[T]he appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication."); *see also* Smith, *supra* note 148, at 146-47 which stated:

> The limited scope of adult-use zoning ordinances prevents them from effectively censoring sexual speech, regardless of the community's desire to do so. Because these restrictions do not pose the same risk of censorship as most content-based restrictions, and because the Renton test adequately addresses the risks such restrictions do pose, it is unnecessary to subject them to strict scrutiny. Moreover, the importance of a city's interest, in comparison to the minimal burden a restriction imposes on speech, justifies a relaxed standard of review.

Id.

[250] DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 406 (6th Cir. 1997). A previous version of this ordinance was contested in Broadway Books, Inc. v. City of Chattanooga, 642 F. Supp. 486 (E.D. Tenn. 1986), which is discussed previously by this Note. *See supra* notes 226 through 228 and accompanying text.

[251] *DLS, Inc.*, 107 F.3d at 408.

paragraph, jot and title," the court was silent on a majority of the challenges, including the eighteen inch stage requirement and the no touching portion of the ordinance.[252]

In its analysis, the court defended the six-foot buffer zone portion of the ordinance by using the *Barnes/O'Brien* test.[253] The court found that the first and second prongs of this test were satisfied, as the plaintiff (*DLS, Inc.*) appeared to concede that the prevention of crime and disease were within the government's power and the ordinance furthered an important or substantial government interest.[254]

The third prong of *O'Brien* was justified by relying on Justice Souter's statement in *Barnes*, that "on its face, the governmental interest in combatting prostitution and other criminal activity is not at all inherently related to expression."[255] The final prong was also found to be satisfied as the court found the six-foot buffer zone not substantially greater than necessary to achieve the city's interest in the prevention of crime and disease.[256] In so holding, the court justified its position by stating, "[W]e are mindful that a regulation of speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."[257] Individually, the distance restriction was found to be constitutional, which is consistent with the other cases analyzed above.[258]

The second part of the decision analyzed the constitutionality of the licensing and permit procedures.[259] After finding that the plaintiffs

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[252] *Id.* at 408 ("Plaintiffs have continued the shotgun approach on appeal, firing conclusory arguments haphazardly, in the hope that some part of the ordinance may be crippled."). The court completely failed to consider the fact that touching was a valid component of the erotic message conveyed by nude dance and therefore its analysis made little mention of the no touch provision. *Id.* at 412-13.

[253] *Id.* at 410; *see also supra* note 65 and accompanying text.

[254] *DLS, Inc.*, 107 F.3d at 410.

[255] *Id.* at 411.

[256] *Id.* at 412.

[257] *Id.* The court also stated, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.*

[258] *See generally* Part IV.A.

[259] *DLS, Inc.*, 107 F.3d at 413. The licensing and permit process requires three substantive requirements:

> [T]he applicant: (1) must be at least eighteen years of age; (2) must not have been convicted of or pleaded nolo contendere to a felony or any crime involving moral turpitude, prostitution, obscenity, or other crime of a sexual nature within the

had standing to file a lawsuit, the court found no violation of First Amendment rights.[260] In its opinion upholding the ordinance, the court focused on the inability of city officials to "exercise discretion by passing judgment on the content of the protected speech," as well as the objective criteria constraining the ordinance and restricting the decision makers.[261]

Although the ordinance was cumulative in nature, the Sixth Circuit chose to analyze each part individually, thus allowing it to pass constitutional muster.[262] By addressing the restrictions individually, the court ensured that the result would not "burden substantially more speech than is necessary to further the government's legitimate interests."[263] But this approach is flawed because it ignores the total impact of the cumulative ordinance on the erotic message conveyed by the dance. By separating the ordinance into pieces, it is easier for the courts to justify each piece as a valid restraint. Taken as a whole, the restriction would appear to place substantially more restrictions on the speech than is required to combat the issue at the heart of the municipality's complaint: the harmful secondary effects of these establishments. By separating the ordinance, each prong can be found to be no more necessary than required to meet the government's interest and not infringe on speech.

The second cumulative ordinance to be analyzed involves substantially more regulation through the use of a cumulative ordinance than the *DLS, Inc.* case. In 1999, the City of Brunswick, Ohio, passed an even more comprehensive ordinance, placing substantial limitations on adult use establishments which included a licensing scheme, mandatory inspections, zoning restrictions, limitations on the hours of operation, a ban on appearing in a state of nudity, a ten-foot distance and two-foot stage requirement, a restriction on tipping performers, and restrictions on touching while in a semi-nude state.[264] To determine the validity of this ordinance and the potential for a preliminary injunction, the court relied on four factors: (1) whether there is a substantial likelihood or

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past five years; and (3) must not have been found to have violated the ordinance within the past five years.

Id. at 414.

[260] *Id.*

[261] *Id.* at 414-15.

[262] *Id.* at 415.

[263] *Id.* at 412.

[264] *See generally* J.L. Spoons, Inc. v. City of Brunswick, 49 F. Supp. 2d 1032 (N.D. Ohio 1999). This cumulative ordinance was passed in response to a prior Brunswick ordinance which was found facially overbroad and in violation of the First Amendment. *Id.* at 1037 n.2.

probability of success in the merits, (2) whether there is a threat of irreparable harm to the plaintiff, (3) whether issuance of the injunction would cause substantial harm to others, and (4) whether the public interest would be served by granting injunctive relief.[265] Under the first prong of this four-part test, the court analyzed the plaintiff's likelihood of success on the merits by attacking the ordinance in its individual parts.[266]

Initially the court attacked the licensing scheme, and in doing so, found that it contravened the requirements of the First Amendment.[267] The court found that the scheme was problematic because it conditioned the license upon receiving the County Health Department's consent within a 30-day period.[268] The scheme also failed to provide prompt judicial review or appellate procedures.[269] Likewise, the court found the mandatory search provision in the licensing scheme to be unconstitutional due to the Fourth Amendment concerns involved.[270]

The zoning portion of the ordinance was summarily dismissed by the court as unlawful.[271] In its brief analysis on this issue, the court found that the zoning ordinance was in conflict with the Ohio Constitution as well as the Ohio Revised Code, due to the ordinance's retroactive nature.[272] Despite arguments from the city that the zoning ordinance was actually a licensing requirement, the court found it

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[265] *Id.* at 1037-38.

[266] *See id.* at 1038-46.

[267] *Id.* at 1039.

[268] *J.L. Spoons, Inc.*, 49 F. Supp. 2d at 1038. The court found that allowing a 30 day window for city approval which was conditioned upon a County operated department was unfair due to the low probability of attaining that County certificate within the allotted time frame. *Id.*

[269] *Id.* at 1039. Allowing a civil lawsuit as the only means of judicial review did not constitute the proper method for allowing prompt review or appeal of the city's decision to issue a license. *Id.*

[270] *Id.* at 1039-40 ("Administrative searches are significant intrusions upon the interests protected by the Fourth Amendment, and generally require that a government official possess 'a substantially restricted' search warrant.").

[271] *Id.* at 1041.

[272] *Id.* The ordinance stated:

> Section 12(H) reads as follows: Any sexually oriented business lawfully operating on the date of passage of this ordinance that is in violation of subsection A through F of this Section shall be permitted to continue for a period not to exceed one year, unless sooner terminated for any reason or voluntarily discontinued for a period of thirty (30) days or more. Such nonconforming uses shall not be increased, enlarged, extended, or altered except that the use may be changed to a conforming use.

Id.

unconstitutional.[273] The provision restricting the hours of operation was also found to contravene state law and was thus determined to violate the plaintiff's rights.[274]

The next section of the ordinance discussed by the district court was the ban on nudity.[275] This restriction was not only analyzed by using the four part *O'Brien* test in conjunction with *Barnes*, but also by utilizing an overbreadth analysis.[276] Relying on the government's power to pass ordinances aimed at the prevention of crime and disease, the court found that this restriction met the first, second, and third prongs of the *O'Brien* analysis.[277] Likewise, relying on *Barnes*, the court found that the restriction on nudity did not burden the speech in a way substantially broader than necessary because "the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message."[278] The overbreadth challenge was dismissed due to the inability of the adult use establishment to show the restriction was substantially overbroad.[279]

Because they were contained as subsections to the nudity restriction, the remaining three regulations of distance and stage requirements, limitations on tipping, and limitations on touching were all briefly discussed under the fourth prong of the *O'Brien* test.[280] The

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[273] *J.L. Spoons, Inc.*, 49 F. Supp. 2d at 1041.

[274] *Id.* at 1042 ("[W]hen a local ordinance 'restricts an activity which a state license permits, the ordinance is in conflict with a general law of the state and violates . . . the Ohio Constitution.'").

[275] *J.L. Spoons, Inc.*, 49 F. Supp. 2d at 1042.

[276] *Id.* at 1043-44.

[277] *Id.* at 1044. The court stated:

> Applying [the *O'Brien*] analysis to the case at bar, there is no dispute that promulgation of the ordinance, and § 16 in particular, is within the City's police powers. With respect to the second and third prongs of the *O'Brien* test, it is evident that the City is concerned with the harmful secondary effects of sexually oriented businesses . . . . In light of *Barnes*, then, § 16 of the ordinance satisfies the second and third requirements of *O'Brien*.

Id. (citation omitted).

[278] *Id.* at 1045 (quoting *Barnes*, 501 U.S. at 587).

[279] *Id.* at 1045.

[280] *J.L. Spoons, Inc.*, 49 F. Supp. 2d. at 1044.

> The fourth *O'Brien* condition . . . is satisfied so long as the regulation is "narrowly tailored." That is, § 16 must promote the City's interest in curbing harmful secondary effects, and may not result in a burden on speech that is substantially broader than necessary to achieve the City's goal. This court finds it is appropriate to assess each sub-part of § 16 separately for compliance with the fourth prong of *O'Brien*.

Id. (citations omitted).

ten-foot buffer zone was found unconstitutional because the distance when combined with a two-foot stage requirement was greater than necessary to support a secondary effects attack.[281] Finally, the limitation on tipping and the no touch restriction are both found constitutional as they were both narrowly tailored to combat the adverse secondary effects associated with erotic dance.[282]

Interestingly enough, these final three restrictions were not subject to the individual critique of prongs one, two, and three under the *O'Brien* test.[283] Presumably, the court forewent the formality to save time; however, in support of this Note, the court unknowingly engaged in a cumulative analysis of the four restrictions. In general, as past discussions of individual restriction have shown, the individual ordinances will satisfy the first three prongs of the *O'Brien* test.[284]

The first prong requiring the regulation to be within the constitutional power of the government is always justified under the particular state's constitution. The second prong requiring the furtherance of an important or substantial government interest is met by drafting the ordinance to combat the negative secondary effects associated with adult use establishments, including sexual assaults and the deterioration of property values and health risks. The third prong requiring the government interest to be unrelated to the suppression of free expression is skirted by claiming the restriction is a content-neutral limitation that is more concerned with the secondary effects than the restriction of speech. However, this case demonstrates that the prong most likely to fail under the *O'Brien* test is the fourth prong, which requires that the incidental restriction on alleged First Amendment freedoms be no greater than was essential to the furtherance of that interest.

Using a cumulative approach, those portions of the ordinance that are greater than essential to further the government interest should be dropped, thereby leaving a valid ordinance that facilitates the removal of harmful secondary effects while not overly burdening the speech. Too often, the motive of cities is not to regulate the speech, but instead to

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[281] *Id.* at 1045-46.

[282] *Id.* at 1046 ("Section 16(C) [forbidding tipping] bans conduct rather than speech; it prohibits the exchange of money or the initiation of such an exchange. Such a restriction directly targets the City's interest in preventing prostitution.").

[283] *Id.* at 1044.

[284] *See supra* note 65 and accompanying text.

eliminate the adult use establishments.[285] By modifying the analysis of restrictions from an individual approach to a cumulative approach the courts can sufficiently guard against the ordinances that are overly burdensome.

The United States Supreme Court will generally not strike down a governmental action for failure to leave open ample alternative channels of communication, unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community.[286] In reality the elimination of the entire medium is the goal and the final effect of passing these ordinances.[287] By drafting these cumulative ordinances, municipalities are forcing these establishments out of business. Ironically, once all adult use establishments are eliminated from a certain area due to the inability to operate under the cumulative restrictions, a new establishment could arguably sprout up and have the ordinance overturned due to a lack of existing conduits for erotic expression; thereby repeating the cycle.

In both *DLS, Inc.* and *J.L. Spoons, Inc.* the courts analyzed individual portions of the ordinances using a content neutral analysis

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[285] In support of the notion that ordinances are passed merely to eliminate the businesses, *see* David Templeton, *Legal Scuffles Just Beginning: Ordinance to Control Adult Fare is Passed; Raises Company's Ire*, PITTSBURGH POST-GAZETTE, Mar. 1, 1998, at Metro, *available at* 1998 WL 5235765, which states:

> Janavitz [attorney for proprietor of adult bookstore] said Highway News Adult Bookstore, which has operated for 23 years at the Kammerer exit, has never created problems for the community. That's particularly true, [Janavitz] said, because it's located along a desolate stretch of I-70. And that would hold true for the nude dancing business [now operating in the bookstores place].
>
> "What secondary effects have happened there?" Janavitz asked. "It's in the middle of nowhere - on an off-ramp. It might as well be in the middle of the Gobi Desert. This might be the highest and best use for that property.
>
> If people were dying as a result of the store being there, I suggest that they would have evidence of it after 23 years," he said. "Ultimately, the proof is in the pudding. If nothing has gone wrong in 23 years, what's the problem?"

Id.

[286] *See Colacurcio*, 163 F.3d at 555.

[287] When drafting adult use ordinances, municipalities often ignore the specific community problem to be addressed and copy the language from previously litigated cases to avoid judicial review. *See* Kristen Hays, *U.S. Supreme Court to Consider Nude-Dancing Issue with Erie Case*, ASSOCIATED PRESS NEWSWIRES, Nov. 8, 1999, which displays one attorney's surprise at the Pennsylvania Supreme Court's failure to follow United States Supreme Court precedent when he states, "We took the language of [Indiana's statute upholding a ban on nudity] and adapted it almost verbatim for our *nudity*-public indecency law." *Id.* (emphasis added).

from *Barnes*. On the whole, it would appear that in a content-based scenario the cumulative ordinance would fail due to the communities inability to use the least restrictive means available to meet the compelling government interest. If the government's goal is to prevent sexual assaults and the crime of prostitution, then restrictions on nudity and the dancer in general should be enforced. Alternatively, if the concern is other crimes and the reduction of property value, then the regulations should focus on the establishment itself such as limitations on hours, zoning, and signage restrictions. The combination of the two government concerns into one compelling interest makes it difficult to tailor the restriction to the specific concern because of the multitude of other more narrowly tailored means available for such a large compelling interest.

While it seems justified to attack these ordinances individually, it would seem more appropriate to analyze the ordinance cumulatively. The underlying purpose of these ordinances is to attack and eliminate nude or erotic dancing under the guise of eliminating secondary effects. To an extent, local communities should be allowed to regulate and restrict some of the activities at adult use establishments as long as the erotic message is not muted. Cumulative regulation should be reviewed with caution to ensure that the purpose of the community's ordinance is not to completely eradicate these establishments but rather to improve the quality of living in the surrounding community. Despite the common distaste for erotic expression, it is recognized as a form of speech and should therefore receive adequate protection under the First Amendment against these cumulative ordinances.

V. THE EXAMINATION OF A CUMULATIVE ORDINANCE AND THE PROPOSAL OF A MODEL STATUTE

This Note contends that cumulative adult use ordinances restricting erotic dancing are unconstitutional. To support this contention, this section will show through model judicial reasoning how the Lake County, Illinois adult use ordinance fails to pass constitutional muster under both a content-based and a content-neutral analysis. In addition to this analysis, this Note will propose an alternative statute which will increase the penalty for committing a criminal act in the vicinity of an adult use establishment.

A. Model Judicial Reasoning

1. Content-Based Analysis

In a content-based analysis, the regulation or restriction must meet a compelling government interest with means that are narrowly tailored to meet that interest.[288] As shown by the judicial reasoning employed in *PAP'S A.M.*, the problems normally do not occur when finding a compelling government interest, but rather when the government body is attempting to narrowly tailor the restriction to meet the compelling government interest.[289]

The Lake County ordinance begins with three pages of recitals, which detail the reasons for enacting this ordinance.[290] In these recitals, the county cites every conceivable reason for drafting an adult use ordinance, ranging from the more concrete reason of preventing crime and disease to the more hollow reason of preventing the negative perception of neighboring businesses and preventing the adverse impact of adult advertising on young people and students.[291] Arguably, most of

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[288] *PAP'S A.M.*, 719 A.2d at 279.

[289] *Id.* at 280 ("The most compelling government interest which could be articulated in connection with the Ordinance is the interest in deterring sex crimes.").

[290] Lake County Ordinance, *supra* note 13, at 1-3 (unpublished ordinance, on file with author).

[291] *Id.* at 2. Lake County indicates that the negative perception "quickly can lead to . . . a decline and deteriorat[ion], prompting businesses and residents to flee the affected area to avoid the consequences of such decline and deterioration." *Id.* It then takes a paternalistic approach by stating "the exterior appearance, including signage, of Sexually Oriented Business Activities can have an adverse impact on minors and students." *Id.* Both of these recitals tend to ignore the societal change in values over the last decade resulting in a more liberal attitude toward sex and sexual related activities. Such things as condom commercials on prime time radio, sultry Victoria Secret underwear advertisements on prime time television, and partial nudity on network television programming support this notion; *see also* Rutman, *supra* note 6, at 516-17 noting:

> The growth in the [adult entertainment] industry, however, seems more closely linked to the infiltration of pornography and other sexually explicit material into popular culture. The porn industry is now being used as a vehicle for promoting consumer items and raising movie and television ratings. The popularity of Hollywood movies such as Boogie Nights, Striptease, Showgirls, and The People v. Larry Flynt illustrates the cultural fascination with porn stars and adult entertainers. Some clothing lines have recently begun using porn actresses as models because the industry is being recognized as a unique advertising technique. Adult entertainers are now being hired as actresses in mainstream Hollywood movies and television shows. Playboy models Pamela Anderson, Jenny McCarthy, and Carmen Electra successfully made the transition from being adult entertainment models to mainstream actresses and television show hostesses.

the reasons mentioned qualify as a compelling government interest; however, are these restrictions narrowly tailored to specifically address each of the compelling interests proposed?

Again, when viewed individually, the correct restriction can be matched up with the proper compelling interest. Zoning, licensing, restrictions on serving alcohol and limitations on hours could provide reasonable restraints on the adult use establishments by controlling the overall operation of those businesses. Additionally, restricting nudity, contact, and tipping could potentially reduce the sexual desire of patrons by dulling the erotic component of the dance, thereby reducing sexual attacks and prostitution. However, when viewed in totality as a cumulative ordinance, the regulation fails.

By imposing such a broad range of constraints, the intent of the county board becomes clear: to eliminate the erotic dance medium. And because of this attempt to foreclose the entire medium of erotic dance across the landscape of Lake County, it is unlikely that the United States Supreme Court would uphold such an ordinance.[292]

2. Content-Neutral Analysis

To analyze the Lake County ordinance in conjunction with the current United States Supreme Court precedent of using a content neutral analysis, this Note will apply the *O'Brien* test to the ordinance as a whole.[293] Under the *O'Brien* test, in order for the government to justify the regulation, it must have the constitutional power to pass such a regulation, the regulation must further an important or substantial government interest, it must be unrelated to the suppression of free expression, and the restriction imposed must be no greater than is essential to the furtherance of the interest.[294] As proven by the prior analysis on individual ordinances, critiquing the various restrictions of an ordinance individually results in the restriction often standing up to judicial scrutiny.[295] The question, once again, is how will the ordinance fare on the whole?

The first prong of the *O'Brien* test requiring the governmental entity to have the constitutional power is plainly met. As stated in the

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Id.

[292] *See supra* note 67 and accompanying text.

[293] *Barnes*, 501 U.S. at 566; *see also supra* note 65 and accompanying text.

[294] *O'Brien*, 391 U.S. at 377.

[295] *See supra* notes 162 through 250 and accompanying text.

recitals, Lake County clearly has the power and authority pursuant to "its general police powers to protect the public health, safety, morals and general public welfare, the provisions...of the Counties code..., and all other applicable provisions of law."[296]

The second and third prongs of *O'Brien* test require that the regulation must further an important or substantial government interest and be unrelated to the suppression of free expression, respectively.[297] The first of these prongs can be summarily dismissed, because it is clear from the recitals that the main purpose of the ordinance is to further the county's interest in protecting the population from crime, disease and moral impropriety.[298] The second of these two prongs can also be dismissed as the county clearly states that its purpose in passing such an ordinance is to address the secondary effects associated with the adult use establishments and not to suppress speech.[299] The crucial part of this cumulative analysis occurs when analyzing the fourth prong of the *O'Brien* test.

The fourth prong of the *O'Brien* test requires that the restriction imposed be no greater than is essential to further the interest of the government.[300] The analysis is similar to the analysis utilized by the court in *J.L. Spoons, Inc.* when, in the interests of convenience, it inadvertently analyzed four portions of the adult use ordinance together.[301] Taken cumulatively, the ordinance places numerous restraints on both the performer and the adult entertainment establishment. These restraints cover every aspect of the business from

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[296] Lake County Ordinance, *see supra* note 13, at 3.

[297] *See O'Brien*, 391 U.S. at 377.

[298] Lake County Ordinance, *supra* note 13, at 2 ("WHEREAS, the Chairman and Members of Lake County Board have determined that Sexually Oriented Business Activities will, unless properly regulated, have these and other severe adverse impacts and secondary effects on the County and its residents.").

[299] *Id.* at 3. The ordinance clearly states:

> WHEREAS, the regulations established pursuant to this Ordinance are in no way based on the content of the protected speech, if any, associated with Sexually Oriented Business Activities, and the purpose and intent of the regulations established pursuant to this Ordinance is not to restrict or prohibit protected speech, if any, associated with Sexually Oriented Business Activities, but rather is to address, mitigate, and, if possible, eliminate the adverse impacts and secondary effects of Sexually Oriented Business Activities on the areas in which such Activities are located or take place and to ensure that these Activities are established, managed, and operated in a safe and legal manner at all times.

Id.

[300] *See O'Brien*, 391 U.S. at 377.

[301] *See supra* notes 280 through 284 and accompanying text.

licensing employees who work at the establishments to eliminating the ability of a dancer to obtain tips after a performance. Truly, the amount of restriction is overbearing and excessive when viewed in light of its purpose. Half of these restrictions taken together would adequately prevent secondary effects without impacting the erotic message being conveyed. However, to ensure success the County Board imposed a numerous amount of regulations so that together, it could prevent the activity from occurring under the guise of preventing secondary effects. By cumulatively regulating these establishments, the county has crafted an ordinance, that leaves little room for the erotic message to be conveyed. This contradicts the underlying reasoning promoted by the United States Supreme Court in *Barnes*.[302] In *Barnes*, the Court's main reason for upholding the restriction on nudity was because it deemed this restriction "minor when measured against the dancer's remaining capacity and opportunity to express the erotic message."[303] Clearly, the restrictions imposed in this case are not minor and thus they would fail.

B. Proposed Statute

As an alternative to imposing individual and cumulative restrictions on adult use establishments, this Note proposes a statute to increase the penalty for committing a crime near an adult use establishment. Simply put, the statute will double the criminal and civil fines for committing offenses in and around an adult use establishment similar to a state law which doubles the penalty for speeding in a construction zone.[304] The zoning would be relatively easy as many of the adult use ordinances, including Lake County's Ordinance, have already established these "adult use" zones.[305] Similar to school and

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[302] Barnes v. Glen Theatres, 501 U.S. 560, 587 (1991).

[303] *Id.*

[304] 75 PA. CONS. STAT. ANN. § 3326 (West 1996).

§ 3326. Duty of Driver in construction and maintenance areas

(c) *Fines to be doubled.* — The fine for any of the following violations, when committed in a construction or maintenance area manned by workers acting in their official capacity, shall be double the usual amount.

(d) Notice. — Whenever practical, signs designed in compliance with regulations of the department shall be appropriately placed to notify motorists that increased penalties apply for moving violations in construction or maintenance areas.

Id. (emphasis added).

[305] *See* Lake County Zoning Ordinance, *supra* note 17, at 8.

1. Adult Entertainment Establishments.

a. Minimum Distance From Other Adult Entertainment Establishments. No Adult Entertainment Establishment shall be established, maintained, or operated on any lot that has a property line within 1,000 feet of the property line of any

construction zones, notice of the increased penalty could be given to the public by the use of clearly marked signs indicating entrance into such a zone.[306] By increasing the deterrence value through harsher penalties, this statute could contribute to the elimination of harmful secondary

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other lot on which any other Adult Entertainment Establishment is located, established, maintained, or operated.

b. Minimum Distance From Protected Uses. No Adult Entertainment Establishment shall be established, maintained, or operated on any lot that has a property line within 1,000 feet of the property line of any other lot on which a Protected Use is located, established, maintained, or operated.

c. Minimum Distance From Residential Property. No Adult Entertainment Establishment shall be located, established, maintained, or operated on any lot that has a property line within 250 feet of the property line of any Residential Property.

Id.

[306] 625 ILL. COMP. STAT. ANN. 5/11-605 (Supp. 1999).

§ 11-605. Special speed limit while passing schools or while traveling through highway construction or maintenance zones.

(a) For the purpose of this Section, "school" means the following entities:

(1) A public or private primary or secondary school.

(2) A primary or secondary school operated by a religious institution.

(3) A public, private, or religious nursery school.

On a school day when school children are present and so close thereto that a potential hazard exists because of the close proximity of the motorized traffic, no person shall drive a motor vehicle at a speed in excess of 20 miles per hour while passing a school zone or while traveling upon any public thoroughfare where children pass going to and from school.

For purposes of this Section a school day shall begin at seven ante meridian and shall conclude at four post meridian.

This section shall not be applicable unless appropriate signs are posted upon streets and highways under their respective jurisdiction and maintained by the Department, township, county, park district, city, village or incorporated town wherein the school zone is located. With regard to the special speed limit while passing schools, such signs shall give proper due warning that a school zone is being approached and shall indicate the school zone and the maximum speed limit in effect during school days when school children are present

(b) No person shall operate a motor vehicle in a construction or maintenance zone at a speed in excess of the posted speed limit when workers are present and so close to the moving traffic that a potential hazard exists because of the motorized traffic.

(d) For the purpose of this Section, a construction or maintenance zone is an area in which the Department, Toll Highway Authority, or local agency has determined that the preexisting established speed limit through a highway construction or maintenance project is greater than is reasonable or safe with respect to the conditions expected to exist in the construction or maintenance zone and has posted a lower speed limit with a highway construction or maintenance zone special speed limit sign.

(e) A violation of this Section shall be a petty offense with a minimum fine of $150.

Id.

effects in these designated areas while eliminating the need to suppress the erotic message being conveyed by erotic dance. The statute would look as follows:

Special Penalty for Committing a Criminal Act in an Adult Use Zone.

(a) For the purpose of this statue, an Adult Use Zone is defined as:

(1) A 1,000 foot perimeter surrounding an Adult Use Establishment.

(2) Measurement shall be judged by a straight line, without regard to intervening structures or objects, from the nearest point on the property line of the lot on which the Adult Use Establishment is located.

For purposes of this Section, an Adult Use Zone shall begin at the hour of noon and shall conclude at midnight on the normal days of operation including Monday through Saturday.[307]

This section shall not be applicable unless appropriate signs are posted upon streets and highways under their respective jurisdiction and maintained by county, city, village, or incorporated town where the Adult Use Zone is located. With regards to the additional penalty for committing a criminal act while passing an adult use establishment, such signs shall give proper due warning that an adult use zone is being approached and shall indicate the hours of operation and penalty in effect.

(b) For purpose of this statute an Adult Use Establishment is defined as:

(1) Adult Cabaret. Any Commercial Establishment that as a substantial or significant portion of its business features or provides any of the following:

(a) Persons who appear Semi-Nude.

(b) Live performances that are distinguished or characterized by an emphasis on the exposure, depiction, or description of Specified Anatomical Areas or the conduct or simulation of Specified Sexual Activities.

(c) Films, motion pictures, video or audio cassettes, slides, computer displays, or other visual representations or recordings of any kind that are distinguished or characterized by an emphasis on the exposure, depiction, or description of Specified Anatomical Areas, or the conduct or simulation of Specified Sexual Activities

(2) Adult Store. Any Commercial Establishment (a) that contains one or more Adult Booths; (b) that as a substantial or significant portion of its business offers for sale, rental, or viewing any Adult Materials; or (c) that has a segment or section devoted to the sale or display of Adult Materials.

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[307] This time frame was adopted from the Lake County Ordinance and could be altered to coincide with local regulations. *See* Lake County Ordinance, *supra* note 13, at 17.

(3) *Adult Theater. Any Commercial Establishment that, as a substantial or significant portion of its business, features or provides (a) films, motion pictures, video, or audio cassettes, slides, or other visual representations or recordings that are distinguished or characterized by an emphasis on the exposure, depiction, or description of specified anatomical areas, or the conduct or simulation of specified sexual activities; or (b) live performances that are distinguished or characterized by an emphasis on the exposure, depiction, or description of specified anatomical areas or the conduct or simulation of specified sexual activities.*[308]

(c) ***Penalty to be doubled.*** *The penalty for violation of any crime categorized as sexual abuse, sexual assault, prostitution, solicitation of prostitution, assault and battery, distribution or possession of a controlled substance, destruction of property, or any derivation therein of the previously mentioned crimes shall receive a fine, penalty or sentence that shall be double of that proscribed by law when committed in an adult use zone during the hours previously mentioned in section (a).*

By using this proposed statute, the number and extent of restrictions on adult use establishments would be reduced because arguably, the adverse secondary effects would be reduced by the increase in the deterrent factor, thereby allowing the erotic speech to continue relatively unfettered.

VI. CONCLUSION

Under the guise of secondary effects and content neutral restrictions, cumulative ordinances are infringing on the First Amendment rights of adult use establishments. The current United States Supreme Court precedent is inadequate due to the vagueness of the opinions and the unclear interpretation given to it by lower courts. Individually, many of the restrictions are valid content neutral restrictions on speech which withstand judicial review. However, when numerous individual ordinances are combined, the cumulative effect requires an analysis beyond that of individual regulations. This Note has attempted to show that under either a content based or content neutral scenario, these cumulative ordinances would fail. Alternatively, a statute was drafted to increase the deterrent factor around these adult use establishments so that the erotic message conveyed within their walls could continue on undiminished.

Clinton P. Hansen

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[308] Definition of an adult use establishment was modeled after the Lake County Ordinance definition, *see* Lake County Ordinance, *supra* note 13, at 4-5.