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TO BARE OR NOT TO BARE: THE CONSTITUTIONALITY OF LOCAL ORDINANCES BANNING NUDE SUNBATHING

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One of America's favorite and most popular summertime activities is sunbathing. Millions of Americans enjoy this recreational pastime each year.[1] Sunbathing is a form of relaxation shared by all people, regardless of economic or social status in society. In recent years, the social nudism movement has grown and gained considerable support. One statistic boasts that approximately thirty-three million people have, at some time in their lives, engaged in social nudism in one form or another. As a result of this growth, nudist groups have become highly organized national associations with local chapters throughout the country. It is through these national organizations that social nudism beliefs are being channeled—particularly the right to sunbathe in the nude on public beaches. Consequently, while nude sunbathing once was viewed as an individual preference practiced in backyards, it is now a belief which is being fostered by organized associations.

Recently, proponents of social nudism have expressed an interest in public sunbathing.[2] Social nudism advocates the right, if one

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1. There are 2.5 million overnight guests in Virginia Beach motels and hotels annually. Approximately 1.5 million of these guests stay in local hotels and motels during the summer months. Furthermore, it is estimated that there are over 100,000 day visitors, in addition to the overnight guests, on a typical summer weekend in Virginia Beach. Telephone interview with Jim Ricketts, Coordinator for Tourist Development in Virginia Beach (Oct. 17, 1985).

The Assateague Island National Seashore, which is owned by the federal government and is located within Accomack County, Virginia, has approximately 1.5 million people per year visit its seashore. Plaintiffs' complaint at 7, National Capital Naturist v. Board of Supervisors, No. 85-452-Cir. (E.D. Va. filed June 25, 1985) [hereinafter NCN's Complaint].

2. *See, e.g.*, NCN's Complaint, *supra* note 1, wherein National Capital Naturist (NCN) filed suit in the United States District Court for the Eastern District of Virginia on June 25, 1985, challenging the constitutionality of the Accomack County ordinance which prohibits nude sunbathing. NCN is a nonstock Virginia corporation incorporated in 1984, whose purpose is to encourage and promote social nudism. NCN is the largest affiliated chapter of the National Organization of Naturists.

so desires, to go nude on public beaches, in parks and at recreational centers.[3] This nationwide movement promotes social nudism as a wholesome and healthful life-style and seeks to educate the public as to the spiritual benefits of naturism.[4] Proponents of social nudism also advocate that the nude human form is a "physical entity which is neither inherently obscene nor apt to cause erotic stimulation in normal social . . . groups."[5]

However, social nudism groups have met with resistance from local authorities. Several localities in Virginia have enacted ordinances which prohibit nude sunbathing on public beaches.[6] These

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Naturists claim that between one and two million people in the United States practice social nudism. The Naturist chapters tend to be primarily located on both the east and west coasts of the United States. *Cf. infra* note 3 (the American Sunbathing Association is located primarily in Florida).

The Naturist growth began in 1931 when nudism was first introduced to the United States from Germany. However, it was not until the early 1950's under the supervision of Lee Baxendall, the founder of Modern Naturist, that the Naturist movement gained momentum. At that time the Naturist officially split with the American Sunbathing Association, *see infra* note 3, and started their own organization. Since that time, the Naturist movement and social nudism in general have grown to over one million active participants. Telephone interview with John P. McGeehan, counsel for NCN (Oct. 31, 1985). According to some statistics, over thirty-three million individuals have practiced social nudism in one form or another. *See infra* note 3.

3. NCN's Complaint, *supra* note 1, at 4. Social nudism, as articulated by the Naturist, must be distinguished from camp-type nudity which is promoted by the American Sunbathing Association (ASA). The ASA, whose national headquarters is in Kissimmee, Florida, espouses a family-oriented style of nudism that encourages nudity in camp groups. The ASA is the largest nudist group in the country, and currently there are over 200 clubs or resorts in the United States and Canada. The ASA claims membership of over 30,000 people. The ASA, like the Naturist, originated in 1931 when nudity moved to this country from Germany. The ASA was originally called the American League for Physical Culture. This initial nudist group was anti-drinking and anti-overeating. Unlike the Naturist, however, the ASA did not advocate the option of nudity on public property, but instead adhered to camp-type nudity. As a result of the cost of membership at nudity camps, the discrimination against blacks and Jews at the camp, and the general conservative nature of nudity camps, the Naturist split from the ASA in the early 1950's. *See supra* note 2. As a result of this split, there are currently two social groups advocating different types of nudist practices. In 1984, the ASA formed a Free Beach Committee which, like the Naturist, advocates the right to be nude on public beaches. Consequently, the two groups are less in conflict with one another and are now both promoting the right to nude sunbathing. Telephone interview with Arne Eriksen, Executive Director, American Sunbathing Association (Oct. 31, 1985); telephone interview with John P. McGeehan, counsel for NCN (Oct. 31, 1985).

In Virginia there are four ASA resorts or clubs: Forest City Lodge in Melton; Maple Glenn in Sheldon; National Capital Sun Club in Leesburg; and Blue Ridge Bares in Roanoke. Telephone interview with Arne Eriksen, Executive Director, ASA (Oct. 31, 1985).

4. NCN's Complaint, *supra* note 1, at 3.

5. *Id.*

6. *See, e.g.*, ACCOMACK COUNTY, VA. ORDINANCES § 9.3 (1984):

WHEREAS, the governing body of a county, pursuant to the provisions of Section

laws prescribe criminal sanctions for their violation, and in most

15.1-510 of the Code of Virginia of 1950, as amended, may adopt such measures as it may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants; and

WHEREAS, the Board of Supervisors of Accomack County deems it necessary to prohibit certain conduct as herein proscribed in order to secure and promote the health, safety and general welfare of the inhabitants

(A) As used in this Ordinance, "state of nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.

(B) It shall be unlawful for any person to knowingly, voluntarily and intentionally appear in public, or in a public place, or in a place open to the public or open to public view, in a state of nudity or to employ, encourage or procure another person to so appear.

(C) Nothing contained in this Ordinance shall be construed to apply to the exhibition, presentation, showing or performance of any play, ballet, drama, concert hall, museum of fine arts, school, institution of higher learning or other similar establishment which is primarily devoted to such exhibitions, presentations, shows or performances as a form of expression of opinion, communication, speech, ideas, information, art or drama, as differentiated from commercial or business advertising, promotion or explication of nudity for the purpose of advertising, promoting, selling or serving products or services or otherwise advancing the economic welfare of a commercial or business enterprise, such as a hotel, motel, bar, nightclub, restaurant, tavern or dance hall.

(D) Any person violating the provisions of this Ordinance shall be guilty of a Class 1 misdemeanor and upon conviction thereof, shall be punished by confinement in jail for not more than twelve (12) months and a fine of not more than One Thousand Dollars ($1,000), either or both.

(E) Should any section, paragraph, sentence, clause or phrase of this Ordinance be declared unconstitutional or invalid for any reason, the remainder of this Ordinance shall not be affected thereby.

(F) The provisions of this Ordinance shall apply to all areas of Accomack County, including within any incorporated town.

(G) The effective date of this Ordinance shall be upon adoption by the Board of Supervisors of Accomack County.

(H) The provisions hereof shall be enforced by the Accomack County Sheriff's Office, Conservators of the Peace, Special Conservators of the Peace, Policemen and Special Policemen appointed pursuant to the provisions of Sections 19.2-12 to -24 and Sections 15.1-144 to -159.7 of the Code of Virginia so designated.

The City of Richmond, Virginia, in response to nude and topless sunbathing on the banks of the James River, enacted in August, 1985, Ordinance No. 85-202-195. The ordinance amended the Code of the City of Richmond by adding in Chapter 20, Article VI, Division 2, new section number 20-102.20. The new ordinance reads as follows:

Sec. 20-102.20. Public nudity; Class 1 misdemeanor; punishment.

(a) As used in this section, "state of nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of a female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.

(b) It shall be unlawful for any person to knowingly, voluntarily and intentionally appear in public, or in a public place open to the public or open to public view, in a state of nudity or to employ, encourage or procure another person to so appear.

(c) Nothing contained in this section shall be construed to apply to the breastfeed-

ing of infants or the exhibition, presentation, showing or performance of any play, ballet, drama, tableau, production of motion picture in any theater, concert hall, museum of fine arts, school, institution of higher learning or other similar establishment which is primarily devoted to such exhibitions, presentations, shows or performances as a form of expression of opinion, communication, speech, ideas, information, art or drama, as differentiated from commercial or business advertising, promotion or exploitation of nudity for the purpose of advertising, promoting, selling or serving products or services or otherwise advancing the economic welfare of a commercial or business enterprise, such as a hotel, motel, bar, nightclub, restaurant, tavern or dance hall.

(d) Any person, upon conviction thereof, shall be guilty of a Class 1 misdemeanor; that is, by a fine not in excess of one thousand dollars ($1,000.00) and by confinement in jail for a period not to exceed twelve (12) months, either or both.

§ 2. This ordinance shall be in force and effect upon adoption.

RICHMOND, VA., CODE ch. 20, art. VI, § 20-102.20 (1985).

The City of Virginia Beach has also enacted an anti-nude sunbathing ordinance. VA. BEACH, VA., CITY CODE § 6-19 (1981) provides as follows:

It shall be unlawful and a Class 1 misdemeanor for any person not wearing a bathing suit or other clothing to bathe in any lake, pond or in the Atlantic Ocean or Chesapeake Bay within the City.

Closely related to Virginia Beach's nude sunbathing ordinance is its law which generally prohibits public nudity. VA. BEACH, VA., CITY CODE § 22-10 (1981):

(a) As used in this section, "state of nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.

(b) It shall be unlawful for any person to knowingly, voluntarily and intentionally appear in public, or in a public place, or in a place open to the public or open to public view, in a state of nudity or to employ, encourage or procure another person to so appear.

(c) Nothing contained in this section shall be construed to apply to the exhibition, presentation, showing or performance of any play, ballet, drama, tableau, production or motion picture in any theater, concert hall, museum of fine arts, school, institution of higher learning or other similar establishment which is primarily devoted to such exhibitions, presentations, shows, or performances as a form of expression of opinion, communication, speech, ideas, information, art or drama, as differentiated from commercial or business advertising, promotion or exploitation of nudity for the purpose of advertising, promoting, selling or serving products or services or otherwise advancing the economic welfare of a commercial or business enterprise, such as a hotel, motel, bar, nightclub, restaurant, tavern or dance hall.

Special attention should be given to § 22-10(c), which did not prohibit nudity in the fine arts since it is a form of expression. *See infra* notes 74-79 and accompanying text (nude sunbathing as a form of expression). Likewise, the County of Henrico also has an ordinance which prohibits nude sunbathing. HENRICO COUNTY, VA., CODE § 15-33 (1985) states:

(a) As used in this section, "state of nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks or to cover any of them with less than fully opaque covering, or the showing of the female breast or any portion thereof below the top of the nipple, or the covering of the breast or any portion thereof below the top of the nipple with less than a fully opaque covering.

(b) Every person who knowingly, voluntarily and intentionally appears in public or any public place or in a place open to the public or open to public view in a state of nudity or employs, encourages or procures another person so to appear, shall be guilty of a misdemeanor punishable by confinement in jail for not more than six (6)

instances the penalty is a class one misdemeanor.[7] Generally, the ordinances make it unlawful for any person to bathe on public beaches without wearing a bathing suit or other suitable clothing.[8] The announced purpose of these ordinances is "to prohibit certain conduct [public nudity] in order to secure and promote the health, safety and general welfare of the inhabitants."[9]

As a result of these local ordinances, social nudism groups claim that they are being severely restricted from advocating their life-style and beliefs. Consequently, social nudism proponents have sought federal protection[10] by challenging the constitutional validity of the ordinances in federal courts, specifically alleging that the

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months and a fine of not more than five hundred dollars ($500.00), either or both.

(c) Nothing contained in this section shall be construed to apply to the exhibition, presentation, showing or performance of any play, ballet, drama, tableau, production or motion picture in any theater, concert hall, museum of fine arts, school, institution of higher learning or other similar establishment which is primarily devoted to such exhibitions, presentations, shows or performances as a form of expression of opinion, communication, speech, ideas, information, art or drama. (Ord. No. 596, § 1).

Although not prohibiting nude sunbathing, the Virginia Code does prohibit indecent exposure. VA. CODE ANN. § 18.2-387 (Repl. Vol. 1982) states: "Every person who intentionally makes an obscene display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, shall be guilty of a Class 1 misdemeanor." *See* Wicks v. City of Charlottesville, 215 Va. 274, 208 S.E.2d 752 (1974) (indecent exposure statute was not vague or overbroad). *See generally* Annotation, *Criminal Offense Predicated Upon Indecent Exposure*, 94 A.L.R.2D 1353 (1964).

7. *See, e.g.*, VA. BEACH, VA., CITY CODE § 6-19 (1981) (penalty for nude sunbathing is a class one misdemeanor). A class one misdemeanor is defined as confinement in jail for not more than twelve months and a fine of not more than $1,000, either or both. VA. CODE ANN. § 18.2-11 (Repl. Vol. 1982).

8. *See supra* note 6.

9. *See* NCN's Complaint, *supra* note 1, at 8. (Accomack Board of Supervisors enactment of ACCOMACK COUNTY, VA., ORDINANCES § 9.3 (1984)). The Board of Supervisors enacted the local ordinance pursuant to VA. CODE ANN. § 15.1-510 (Repl. Vol. 1981), which permits a locality to adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of its inhabitants. *But see* NCN's Complaint, *supra* note 1, at 13 (challenging the ordinance as beyond the county's authority to enact). Under their police power, localities may enact nudity ordinances if the governing body reasonably believes the action be to contrary to the morals, health, safety and general welfare of the community. KMA, Inc. v. City of Newport News, 228 Va. 365, 323 S.E.2d 78 (1984), *cert. denied*, 105 S. Ct. 2324 (1985); Wall Distribs., Inc. v. City of Newport News, 228 Va. 358, 323 S.E.2d 75 (1984); Wayside Restaurant Inc. v. City of Virginia Beach, 215 Va. 231, 208 S.E.2d 51 (1974); *see also* VA. CODE ANN. § 18.2-389 (Repl. Vol. 1975) (the governing body is authorized to adopt ordinances to prohibit obscenity or conduct paralleling obscenity, provided that the penalty does not exceed jail confinement of twelve months or a fine of $1,000).

10. *See* NCN's Complaint, *supra* note 1; *see also* South Fla. Free Beaches, Inc. v. City of Miami, 548 F. Supp. 53 (S.D. Fla. 1982), *aff'd*, 734 F.2d 608 (11th Cir. 1984); Chapin v. Town of Southampton, 457 F. Supp. 1170 (E.D.N.Y. 1978); Williams v. Hathaway, 400 F. Supp. 122 (D. Mass. 1975), *aff'd sub nom.* Williams v. Kleppe, 539 F.2d 803 (1st Cir. 1976).

local laws infringe upon their first amendment rights and that the ordinances are unconstitutionally vague and overbroad.

This article addresses the procedural obstacles involved in challenging the constitutionality of local ordinances which prohibit nude sunbathing.[11] It includes a discussion of the steps necessary to bring the constitutional challenge in federal court.[12] In addition, the article explores the possible substantive constitutional challenges to these ordinances, including the first amendment right to free speech and expression,[13] the first amendment right to free association,[14] and the fourteenth amendment right of personal liberty.[15] Consideration also is given to the procedural constitutional challenges to these ordinances, in particular the challenges of vagueness[16] and overbreadth.[17] Finally, the article concludes with a projection of how such Virginia ordinances will stand up under federal scrutiny.[18]

I. Procedural Obstacles to Constitutional Challenge of Local Ordinances

As with any suit brought in federal court, there are several procedural hurdles that must be overcome prior to an adjudication of the constitutionality of local ordinances prohibiting nude sunbathing. These include the concepts of jurisdiction, venue, and abstention.

First, the plaintiffs must allege particularized and immediate injury which is sufficient to give them standing.[19] Nude sunbathers

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11. *See infra* notes 19-38 and accompanying text.
12. *See infra* notes 26-27.
13. *See infra* notes 39-86 and accompanying text.
14. *See infra* notes 91-117 and accompanying text.
15. *See infra* notes 119-46 and accompanying text.
16. *See infra* notes 148-69 and accompanying text.
17. *See infra* notes 170-87 and accompanying text.
18. *See infra* note 187 and accompanying text.
19. South Fla. Free Beaches, Inc. v. City of Miami, 548 F. Supp. 53, 56 (S.D. Fla. 1982), *aff'd in part and vacated in part*, 734 F.2d 608 (11th Cir. 1984); *see also* Steffel v. Thompson, 415 U.S. 452 (1974); United States v. SCRAP, 412 U.S. 669, *vacated and remanded*, 414 U.S. 1035 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Hardwick v. Bowers, 760 F.2d 1202 (11th Cir.), *rev'd*, 106 S. Ct. 2841 (1986); Kew v. Senter, 416 F. Supp. 1101 (N.D. Tex. 1976).

The Supreme Court has articulated a two-part standing test which requires the plaintiff to show both that the challenged conduct has caused injury in fact and that the interest sought to be protected is within the zone of interests to be protected by the constitutional guarantee in question. *See* Association of Data Processing Orgs., Inc. v. Camp, 397 U.S. 150

must specifically allege that they have suffered actual "injury in fact." Merely asserting theoretical or ideological claims will not suffice for standing. The recent case of *National Capital Naturist v. Board of Supervisors*,[20] filed in the Eastern District of Virginia, involves a constitutional challenge to Accomack's local ordinance prohibiting nude sunbathing and provides an excellent illustration of the necessary prerequisites for standing to maintain such a suit. The complaint and accompanying affidavits asserted that over "50 persons were arrested and criminally prosecuted for violations of this ordinance."[21] In addition, one affiant asserted that he was "fearful that his continued practice of his beliefs in the healthful benefits of family social nudism [would] result in the criminal arrest of himself and members of his family."[22] If the suit is brought by an organization or association on behalf of its members,[23] the association need not show injury to itself, but only to its members.[24] In *National Capital Naturist*, the suit was brought both by individual defendants and by a nonstock Virginia corporation whose purpose "is to encourage, to advocate and to promote social nudism."[25] The corporation successfully acquired standing through the use of affidavits demonstrating that its members had individually sustained some injury.

The second procedural hurdle requires an establishment of the federal court's jurisdiction to hear the suit. When challenging the constitutionality of a local ordinance, plaintiffs should seek declaratory[26] as well as injunctive relief[27]—a declaration that the local

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(1970); Barlow v. Collins, 397 U.S. 159 (1970). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-17 to -29 (1978); Jaffee, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 488-94 (1972).

20. NCN's Complaint, *supra* note 1, at 10.

21. *Id.*

22. Affidavit of John D. Fitz-Gerald, NCN's Complaint, *supra* note 1, at 10.

23. *See, e.g.*, NCN's Complaint, *supra* note 1, at 1. (National Capital Naturist brought suit in the United States District Court for the Eastern District of Virginia); *South Fla. Free Beaches, Inc.*, 548 F. Supp. 53 (plaintiff brought action individually and in name of South Fla. Free Beaches, Inc.).

24. Warth v. Seldin, 422 U.S. 490 (1975). To survive a standing challenge, the plaintiffs must articulate the injury sustained.

25. NCN's Complaint, *supra* note 1, at 3.

26. 28 U.S.C. §§ 2201, 2202 (1982). *See generally* Note, *Recent Decisions*, 41 GEO. WASH. L. REV. 374 (1972) (review of First Circuit case that held that a federal district court may declare unconstitutional an ordinance which impairs first amendment freedom of expression, despite the failure of petitioners to show the degree of irreparable injury normally required to justify intervention).

27. 28 U.S.C. § 2283 (1982). *See generally* Comment, *Federal Court Intervention in*

ordinance is invalid and an injunction preventing the enforcement of the local statute.

The plaintiffs in *National Capital Naturist* sought both a declaratory judgment that the local ordinance of Accomack County was unconstitutional and an injunction against future arrests and prosecution by the local authorities. Although the court declined jurisdiction by virtue of the abstention doctrine,[28] the federal courts do in fact have original jurisdiction to redress deprivations of constitutional rights, including those which occur under the color of state law or ordinance,[29] as well as the power to award damages or equitable relief for the protection of those rights.[30] To date, however, no federal court has awarded any relief for alleged constitutional rights violations under local ordinances banning nude sunbathing.

The third procedural hurdle to overcome is the requirement of proper venue. In a suit challenging the constitutionality of a local ordinance, proper venue lies where all the defendants reside or where the claim arose.[31] Since the plaintiff will, in all likelihood, be bringing suit against the local governing body and since the claim must have arisen within the locality for the local ordinance to apply, venue is therefore proper in the federal district and division where the municipality is located. The plaintiffs in *National Capital Naturist* sued the Board of Supervisors of Accomack County, the commonwealth attorney for the county, and the local sheriff.

Pending State Criminal Prosecutions—The Significance of Younger v. Harris, 6 U. RICH. L. REV. 347 (1971).

A preliminary injunction is issued to protect the plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits of the case. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2947 (1973 & Supp. 1985). The trial court has the discretion to either grant or deny the injunction. Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); *see also* First Citizens Bank & Trust v. Camp, 432 F.2d 481 (4th Cir. 1970). There are several factors that the trial court considers in evaluating the motion for an injunction. The factors include: (1) the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the balance of hardships between the harm to the plaintiff in denying the injunction and the injury to the defendant in granting the injunction; (3) the probability that plaintiff will succeed on the merits of the case; and (4) the public interest. *See* Allison v. Froehlke, 470 F.2d 1123 (5th Cir. 1972); King v. Saddleback Junior College Dist., 425 F.2d 426, *cert. denied*, 404 U.S. 979 (1970). *See generally* C. WRIGHT & A. MILLER, *supra*, §§ 2947-48 (discussing in detail the factors considered by the trial judge in deciding whether or not to grant an injunction).

28. *See infra* notes 32-38 and accompanying text.

29. 28 U.S.C. § 1343(a)(3) (1982); 42 U.S.C. § 1983 (1982).

30. 28 U.S.C. § 1343(a)(4) (1982).

31. 28 U.S.C. § 1391 (1977). *See generally* Korbel, *The Law of Federal Venue and Choice of the Most Convenient Forum*, 15 RUTGERS L. REV. 607, 609 (1961).

Hence, venue was proper in the federal district where Accomack County was situated.

Finally, the plaintiffs in *National Capital Naturist* encountered what is possibly the most difficult obstacle to a constitutional challenge—the federal abstention doctrines. The court abstained from deciding the constitutionality of Accomack's local ordinance prohibiting nude sunbathing, finding that "the facts and circumstances of this case strongly suggest to the Court that it should abstain and permit the state court to have the first opportunity to deal with the challenged ordinance."[32] The court explained that "the courts of Virginia have extensive familiarity and experience with such matters [determining the constitutionality of local ordinances] and we believe that they should have the initial opportunity to pass upon them."[33] Furthermore, the court suggested that a state adjudication might avoid needless friction between the federal and state governments over the administration of purely state affairs.[34] In addition, it was noted that the state court proceeding would afford the plaintiffs an adequate opportunity to raise the constitutional issues asserted.[35] Of particular importance to the court was the fact that the challenged ordinance had not previously been addressed by the state court, as the opinion concluded that matters of "first impression under state law should be resolved by the state courts."[36]

Under the abstention doctrines,[37] a federal district judge may

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32. National Capital Naturists, Inc. v. Board of Supervisors, No. 85-452-N, slip op. at 3 (E.D. Va. July 12, 1985), *reh'g denied*, slip op. (E.D. Va. Sept. 9, 1985) (mem.). A motion to reconsider the district court's abstention in the case was denied on September 9, 1985. The plaintiffs, on November 29, 1985, appealed the lower court's denial to reconsider its opinion to abstain. This appeal was denied in National Capital Naturists, Inc. v. Board of Supervisors, No. 85-1995 (4th Cir. July 7, 1986).

33. *National Capital Naturists, Inc.*, No. 85-452-N, slip op. at 5 (quoting Fralin & Waldron, Inc. v. City of Martinsville, 493 F.2d 481, 482-83 (4th Cir. 1974)). To date, the plaintiffs have not filed this case in the courts of the Commonwealth of Virginia.

34. *National Capital Naturists, Inc.*, No. 85-452-N, slip op. at 5.

35. *Id.* at 6.

36. *Id.* at 7 (quoting North v. Budig, 637 F.2d 246, 249 (4th Cir. 1981)).

37. There are four alternative forms of the abstention doctrine. The first and the most often used doctrine is known as the "*Pullman* Abstention Doctrine," articulated in Railroad Comm'n v. Pullman, 312 U.S. 496 (1941). Under this doctrine, the federal court may, and ordinarily should, refrain from deciding a case where state action is challenged as violating the federal constitution if there are any unsettled questions of state law that may be dispositive of the case. In other words, the state court should have the first opportunity to decide its own law rather than allowing the federal courts to "forecast" state laws.

If a federal judge, using his discretion, abstains from deciding whether a local ordinance is constitutional, the abstention will, in all probability, be based on the *Pullman*-type absten-

abstain from hearing a case to avoid deciding a federal constitutional question when the case may be disposed of on a question of state law, to avoid needless conflict with the administration by a state of its own affairs, to leave to the state the resolution of unsettled questions of state law, and to ease the congestion of the federal court docket.[38] Since the application of the abstention doctrines is within the discretion of the district judge, there is no guaranteed method of avoiding abstention by the court. As a result, plaintiffs challenging these local ordinances should be prepared to argue that federal abstention is improper in such a case.

II. SUBSTANTIVE CONSTITUTIONAL CHALLENGES

If the procedural hurdles can be successfully negotiated, the focus then turns to substantive challenges regarding the constitutionality of the municipal nudity ordinances. The available substantive challenges worthy of attention include the unconstitutional infringement upon plaintiffs' first amendment

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tion doctrine since the state courts should have the first opportunity to review the challenged ordinance in light of the state constitution. The *Pullman* doctrine thus avoids the need to reach the federal constitutional question. *See generally* Field, *Abstention in Constitutional Cases; the Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

The second type of abstention is known as the "*Buford* Abstention Doctrine" and was outlined in Buford v. Sun Oil, 319 U.S. 315 (1943). Under this second type of abstention, a federal court will abstain in order to avoid needless conflict with the administration by a state of its own internal affairs.

The third type of abstention is abstention in private litigation merely to avoid deciding difficult questions of state law. *See* Meredith v. City of Winter Haven, 320 U.S. 228 (1943); *see also* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). These two cases concerned eminent domain and have helped to clarify the third type of abstention. *Frank Mashuda Co.* and *Louisiana Power & Light Co.* are not easily reconcilable; but they do establish the principle that the abstention doctrine is applicable in eminent domain cases. Where the state law question is unsettled due to the special nature of eminent domain proceedings and where the state law is difficult to ascertain, then abstention is proper.

The fourth type of abstention contemplates staying or dismissing an action by the federal court solely on the basis that there is a similar action already pending in state court. This type of abstention avoids duplicate litigation. *See* Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1 (1983); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Cox v. Planning Dist. I Community Mental Health & Retardation Servs. Bd., 669 F.2d 940 (4th Cir. 1982). *See generally* 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE §§ 4241-4247 (1978 & Cum. Supp. 1985) (thorough discussion of all four types of abstention).

38. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 52 (1976). *But see* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 344-75 (1976) (district court cannot remand case back to state court after removal because the district court considers itself too busy to hear it).

rights of free expression and association including social association with other nudists on public beaches, as well as the fourteenth amendment right of personal autonomy and liberty. These three grounds for challenging local ordinances prohibiting nude sunbathing promise the most potential for successful constitutional attack.

A. *Nude Sunbathing as Symbolic Speech*

The rights and guarantees of the first amendment are some of the most broadly interpreted and universally protected principles of the United States Constitution.[39] Within the first amendment, the specific freedom of expression has earned a "preferred" and more zealously guarded position than any other guarantees.[40] Such

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39. *See* Thornhill v. Alabama, 310 U.S. 88, 95 (1940) ("The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the process of education and discussion is essential to free government.").

> Freedom of expression continues to be accepted as the core of our structure of individual rights. It remains the foundation of our efforts to obtain the proper balance between individual liberty and collective responsibility. And it still provides the framework within which our society tries to achieve necessary, nonviolent, social change.

Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 422 (1980). *See generally* L. TRIBE, CONSTITUTIONAL CHOICES 188-220 (1985); R. ROSSUM & G. TARR, AMERICAN CONSTITUTIONAL LAW: CASES AND INTERPRETATION 367-88 (1983).

40. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 88-96 (1949) (The Court held that the city ordinance prohibiting the use of sound trucks on city streets did not deny plaintiff's freedom of speech. Both the majority opinion authored by Justice Reed as well as the concurring opinion of Justice Frankfurter discussed the "preferred position" of freedom of speech). *See generally* L. TRIBE, *supra* note 19, at 565; Emerson, *supra* note 39, at 430-31, 441-43; Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 65-66 (1975) (discussing the preferred position of freedom of expression as articulated in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)).

The following cases present a chronological account of the evolution of the "preferred position" of freedom of speech: Herndon v. Lowry, 301 U.S. 242, 258 (1937) (the power of the state to abridge freedom of speech is the exception and not the rule); United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4. (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition . . . of the first ten amendments."); Schneider v. New Jersey, 308 U.S. 147, 161 (1939) (where an infringement of free expression is alleged, mere legislative preferences respecting matters of public convenience may be insufficient to justify an infringement of rights so vital to the maintenance of the democratic institution); Bridges v. California, 314 U.S. 252, 262 (1941) (a substantial evil alone will not justify a restriction upon freedom of speech; consequently, the substantive evil must be extremely serious and the degree of imminence extremely high before freedom of expression can be punished); Marsh v. Alabama, 326 U.S. 501, 510 (1946) (Frankfurter, J., concurring) (several of the Jehovah's Witnesses cases refer to the "preferred position" of the first amendment); *see also* Kovacs v. Cooper, 336 U.S. 77, 93 (1949) (for other Jehovah's Witnesses cases); Thomas v. Collins, 323

elevated protection serves "to assure the unfettered interchange of ideas for the bringing about of political or social changes desired by the people."[41] The United States Supreme Court has held that "[c]easeless vigilance is the watchward to prevent their [the fundamental freedoms of speech and press] erosion by Congress or by the States. The door barring federal and state intrusion into [free expression] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."[42] Freedom of expression has greatly contributed to the development of ideas in our society, and this freedom must be preserved if society can hope for continued growth and development.[43] The first amendment protection is not limited to popular mainstream beliefs: "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees."[44] Indeed, the first amendment has been held to protect such controversial beliefs and conduct as adultery,[45] sodomy,[46] communism,[47] labor activism,[48]

U.S. 516, 530 (1945) (only the gravest abuses which endanger paramount interests give reason for permissible limitation on the freedom of expression); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) ("The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved."); *infra* notes 121-48 and accompanying text (discussing liberty interest).

41. Roth v. United States, 354 U.S. 476, 484 (1957). This objective—the unfettered exchange of ideas—was made explicit as early as 1774 in a letter from the Continental Congress to the inhabitants of Quebec:

> The last right we shall mention, regards the freedom of press. The importance of this consists, besides the advancement of truth, science, morality, and the arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.

Id. at 484 (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774)).

42. *Roth*, 354 U.S. at 488.

43. *Id.*; *see also Madison Report on the Virginia Resolutions* in 4 ELLIOT'S DEBATES 546, 571 (1800). For an historical analysis of the first amendment, see Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981); *see also* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

44. *Roth*, 354 U.S. at 484; *see also* Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 689 (1959) ("Its [freedom of expression] guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.").

45. *See, e.g.*, Doe v. Duling, 603 F. Supp. 960 (E.D. Va. 1985), *vacated*, 782 F.2d 1202 (4th Cir. 1986) (Merhige, J., held Virginia's fornication statute unconstitutional); *Kingsley*, 360 U.S. at 689 (1959).

46. *See, e.g.*, Hardwick v. Bowers, 760 F.2d 1202 (11th Cir.), *rev'd*, 106 S. Ct. 2841 (1986).

nazism,[49] racism,[50] totalitarianism,[51] and transvestism.[52]

While the first amendment provides broad coverage for popular as well as unpopular beliefs, it does not serve as a blanket protection for all forms of expression.[53] Obscenity,[54] for example, "is not within the area of Constitutionally protected speech or press."[55] Historically, obscenity has not warranted constitutional protection since it is considered to be utterly without redeeming social importance.[56] By contrast, nudity does have social value, as evidenced by

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But see Doe v. Commonwealth, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976). *See generally* Note, *Doe and Dronenburg: Sodomy Statutes are Constitutional*, 26 WM. & MARY L. REV. 645 (1985).

47. *See, e.g., Herndon*, 301 U.S. 242; Stromberg v. California, 283 U.S. 359 (1931).

48. *See, e.g., Thornhill*, 310 U.S. 88.

49. *See, e.g.*, National Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977); *see also* A. NEIER, DEFENDING MY ENEMY (1979) (Neier was executive director of the ACLU when the organization agreed to represent the Nazi party in its effort to obtain a march permit); L. TRIBE, *supra* note 39, at 219-20.

50. L. TRIBE, *supra* note 19, at 602.

51. *See also* Duval, *Free Communication of Ideas and the Quest For Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 237-42 (1972).

52. *See, e.g.*, City of Chicago v. Wilson, 75 Ill. 2d 525, ___, 389 N.E.2d 522, 524 (1978) (Chicago ordinance prohibiting a person from wearing clothing of the opposite sex was unconstitutional).

53. Hoffman v. Carson, 250 So. 2d 891 (Fla.), *appeal dismissed*, 404 U.S. 981 (1971) (some forms of nude dancing are not protected under the first amendment); *see also* Annotation, *Topless or Bottomless Dancing or Similar Conduct as Offense*, 49 A.L.R.3D 1084, 1099-1103 (1973). The burning of one's draft card is not protected under the first amendment. United States v. O'Brien, 391 U.S. 367 (1968). The making of harassing phone calls does not generally fall under first amendment protection. Walker v. Dillard, 523 F.2d 3, 4 (4th Cir.), *cert. denied*, 423 U.S. 906 (1975).

54. The test for identifying obscenity is

> (a) [W]hether 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) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973). *See generally* R. ROSSUM & G. TARR, *supra* note 39, at 383-86 (reviewing the various obscenity tests previously used by the Supreme Court). Virginia's obscenity statute (VA. CODE ANN. §§ 18.2-372 to -389 (Repl. Vol. 1982 & Cum. Supp. 1985)) complies with the constitutional standards prescribed by the Supreme Court. Grove Press, Inc. v. Evans, 306 F. Supp. 1084 (E.D. Va. 1969). The Virginia Supreme Court has, however, narrowed the definition of obscenity by judicial decisions. *E.g.*, Price v. Commonwealth, 214 Va. 490, 201 S.E.2d 798 (1974). *See generally* Stephenson, *State Appellate Courts and the Judicial Process: Written Obscenity*, 11 WM. & MARY L. REV. 106 (1969); Comment, *The Law of Obscenity in Virginia*, 17 WASH. & LEE L. REV. 322 (1960).

55. *Roth*, 354 U.S. at 485; *see also Miller*, 413 U.S. at 23; *Walker*, 523 F.2d at 4; Commonwealth v. Croatan Books, Inc., 228 Va. 383, 386, 323 S.E.2d 86, 88 (1984).

56. *Roth*, 354 U.S. at 484.

its prevalence in paintings and sculptures,[57] as well as in dramatic productions.[58] Nudity is not per se obscene or immoral.[59] Consequently, nudity in dances,[60] movies,[61] plays,[62] and publications[63] is protected by the first amendment freedom of expression.

Although an activity such as nude dancing does not contain traditional speech characteristics, it nevertheless is afforded constitutional protection because the conduct is communicative in nature.[64] Conduct which expresses certain beliefs is deemed "sym-

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57. *E.g.*, Bruns v. Pomerleau, 319 F. Supp. 58, 67 (D. Md. 1970).

58. *E.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (the action of municipal board denying use of city auditorium for "Hair," which included nudity during the stage production, was an unconstitutional prior restraint).

59. *Erznoznik*, 422 U.S. at 213 (striking down local ordinance prohibiting the showing of films containing nudity by drive-in theater when its screen was visible from the public street).

> Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer . . . . [T]he burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."

Id. at 210-11 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)). The Virginia courts have also held that nudity is not necessarily obscenity. House v. Commonwealth, 210 Va. 121, 169 S.E.2d 572 (1969); *see also* Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (involving the film "Carnal Knowledge"); Manual Enters. Inv. v. Day, 370 U.S. 478 (1962) (involving magazines with pictures of near-nude male models); United States v. Central 25,000 Magazines, Entitled "Revue," 254 F. Supp. 1014 (D. Md. 1966), *aff'd sub nom.* United States v. Central Magazine Sales, Ltd., 381 F.2d 821 (4th Cir. 1967) (not all photographs of nude women in magazines are obscene).

In *Bruns*, the court stated:

> There is hardly an art museum or gallery to which one can go where completely nude statues and pictures are not on constant and prominent exhibition. . . . Nudism may be unappealing and unattractive to some people. It may be repulsive and vulgar to others. But that does not limit its right to constitutional protection. Whether or not it appeals to or repels an individual's sensitivities is irrelevant when a court is bound to apply First Amendment rights which do not incorporate such subjective standards.

Bruns, 319 F. Supp. at 67.

60. *See, e.g.*, Schad v. Borough of Mount Ephriam, 452 U.S. 61, 66 (1981) (local zoning ordinance which prohibited live nude dancing from commercial uses violated plaintiffs' first amendment right of free expression); *see also* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (under some circumstances nude barroom dancing is protected); California v. LaRue, 409 U.S. 109, 118 (1972) (upholding a regulation banning nude dancing, due to the broad powers conferred to the states by the twenty-first amendment; the Court, nevertheless, recognized that some performances are within the constitutional protection of free expression). *See generally* Annotation, *supra* note 53.

61. *See, e.g.*, *Erznoznik*, 422 U.S. 205.

62. *See, e.g.*, *Southeastern Promotions, Ltd.*, 420 U.S. 546 (1975).

63. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 634 (1968) ("girlie" picture magazines involved were not obscene for adults).

64. Live entertainment such as musical or dramatic works falls within first amendment protection. *Schad*, 452 U.S. at 65. Where the purpose of particular clothing is for the expres-

bolic speech" insofar as the communicative intent of the actor is closely akin to pure speech.[65] Similarly, conduct which is a vehicle or substitute for verbal communication is protected by the first amendment since the conduct itself communicates the ideas. Courts have found conduct amounting to protected symbolic speech where one wears a black armband to protest war,[66] burns an American flag to highlight a speech denouncing the government's failure to protect a civil rights leader,[67] refuses to recite the Pledge

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sion of certain views, then the act is symbolic speech falling within first amendment protection. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505 (1969) (wearing black armbands in protest of Vietnam war was protected symbolic speech). *See* Note, *Symbolic Speech*, 43 FORDHAM L. REV. 590 (1975) (comparing communicative and noncommunicative conduct).

65. *Tinker*, 393 U.S. at 508; *see* Stromberg v. California, 283 U.S. 359, 365 (1931) (display of red flag was protected symbolic speech). *But cf.* Cox v. Louisiana, 379 U.S. 536, 555 (1965) (first amendment does not afford the same protection to ideas communicated by conduct as it does to ideas communicated by pure speech). *See generally* Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1105-09 (1968) (analyzing conduct that amounts to protected speech). Several professors have developed differing approaches to determine whether conduct will be protected under the first amendment. *See, e.g.*, L. TRIBE, *supra* note 39, at 198-210 (speech and conduct distinction); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1009-12 (1978) (expression and action dichotomy); Emerson, *supra* note 39, at 431-33, 470-77 (reviewing Profs. Tribe, Baker and Emerson's approach to conduct as speech).

In United States v. O'Brien, 391 U.S. 367 (1968) (burning draft card was symbolic speech, but government's interest in the Selective Service outweighed the infringement on free expression), the Supreme Court stated:

> [W]e cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea . . . . This 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. at 376; *see infra* note 89; *see also* Cox v. Louisiana, 379 U.S. 536, 555-56 (1965) (ideas communicated by conduct are not afforded the same protection as ideas communicated by speech); Giboney v. Empire Storage & Co., 336 U.S. 490, 502 (1949) (holding that it is not an abridgement of free expression "to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language"); *cf.* Note, *Constitutional Law—Freedom of Speech—Desecration of National Symbols as Protected Political Expression*, 66 MICH. L. REV. 1040 (1968) [hereinafter *Desecration of National Symbols*]. Expressions may not enjoy first amendment protection if they are of such slight social value that any benefit that may be derived from them is clearly outweighed by the public interest in limiting their dissemination. *Id.* at 1042-43 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

66. *Tinker*, 393 U.S. at 503.

67. Street v. New York, 394 U.S. 576 (1969); *see also* Spence v. Washington, 418 U.S. 405 (1974) (Washington flag misuse statute was unconstitutional as applied to college student who hung the flag upside down with a peace symbol affixed to it to express his opinion that America stood for peace).

of Allegiance because of religious beliefs,[68] hangs offensive articles on a clothesline to protest high taxes,[69] wears long hair to protest school regulations,[70] burns a draft card in protest of war,[71] displays a red flag in support of communism,[72] and engages in sit-in demonstrations to protest segregation and discrimination.[73]

To be worthy of constitutional protection, nude sunbathing would have to be characterized as nonverbal expression or "symbolic speech."[74] Nude sunbathers, like students who wear black armbands in protest of war, must be shown to be engaging in the conduct for the purpose of expressing certain beliefs. Accordingly, proponents of social nudism assert that they are advocating a separate philosophy and life-style.[75] The idea they are expressing is that the human body is wholesome and that nudity is decent.[76] Furthermore, nude sunbathers allege that acceptance of the nude body is the basis for mental, spiritual and physical well-being, and is a proper orientation for raising children.[77] These nude sunbathers claim that they are not flaunting social mores, but are practicing the philosophy that they advocate and are demonstrating the sincerity of their ideas.

Thus, advocates of social nudism claim that nude sunbathing "conveys a message . . . . It involves essentially symbolic and demonstrative expression of an idea and philosophy that bathing or

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68. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *see also* Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (teacher's first amendment rights were violated when school officials discharged her for standing silently at attention during daily pledge of allegiance).

69. People v. Stover, 12 N.Y.2d 462, 469, 191 N.E.2d 272, 276, 240 N.Y.S.2d 734, 739, *appeal dismissed*, 375 U.S. 42 (1963).

70. Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); *see infra* notes 125-32 and accompanying text (length of one's hair may be symbolic speech, but court chose to treat it as a protected right to be secure in one's person).

71. United States v. O'Brien, 391 U.S. 367 (1968) (although the conduct was symbolic speech, it was nonetheless subject to governmental regulation).

72. *Stromberg*, 283 U.S. 359.

73. Garner v. Louisiana, 368 U.S. 157, 201 (1961) (Harlan, J., concurring). *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); *Desecration of National Symbols*, *supra* note 65; Note, *Symbolic Conduct*, *supra* note 65, at 1094. The mere failure to rise in a courtroom upon the command of a United States marshal is not "behavior," but rather symbolic speech. United States v. Snider, 502 F.2d 645, 660 (4th Cir. 1974).

74. *See supra* notes 65-73 and accompanying text.

75. Brief for Plaintiffs at 10, South Fla. Free Beaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984).

76. *South Fla. Free Beaches, Inc.*, 734 F.2d at 609.

77. NCN's Complaint, *supra* note 1, at 3.

swimming on a public beach can be a wholesome activity without shame and perfectly acceptable under contemporary mores."[78] The plaintiffs in *National Capital Naturist* elaborated in their complaint as the essence of this view as well as its limitations:

> The practice of social nudism lessens morbid curiosity about concealed sexual characteristics and minimizes the manifestations of certain sexual aberrations which are assumed to eminate from the perpetual concealment of the body's erogenic zones. The moderate exposure of the entire human body to sunlight and fresh air, the natural elements of man's ecological environment, is deemed by them to be generally healthful and relaxing. Nudity is considered a reasonable state for engaging in individual and group activity such as swimming, sunbathing, airbathing, physical exercises, and group games and sports . . . . The nudity philosophy does not assert, envision or promote a clothesless society *per se*.[79]

Only a few federal courts have addressed the constitutionality of local ordinances prohibiting nude sunbathing, each having held that nude sunbathing is not an "expression" protected by the first amendment.[80] Although the issue of nude sunbathing as protected symbolic speech under the first amendment was preliminarily raised in *National Capital Naturist*, the question was not resolved due to the court's application of the abstention doctrine. While nude sunbathers allege that they are engaging in conduct which expresses ideas and beliefs, the courts generally hold that nude sunbathing is "fundamentally individualistic and personal rather than expressive or communicative."[81] It is thought that while nudity is itself not obscene,[82] neither is it communicative.[83] Most recently, the Eleventh Circuit held that "[n]udity is protected as speech only when combined with some mode of expression which itself is entitled to First Amendment protection."[84]

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78. Brief for Plaintiffs at 15, *South Fla. Free Beaches, Inc.*, 734 F.2d 608.

79. *See supra* notes 2-3.

80. *See supra* note 10.

81. Williams v. Hathaway, 400 F. Supp. 122, 126 (D. Mass. 1975). The courts have held that nude sunbathing, like wearing one's hair long, lacks communicative character sufficient to warrant the full protection of the first amendment. *See* Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970) (long hair lacks communicative feature).

82. *See supra* note 59 and accompanying text.

83. Chapin v. Town of Southampton, 457 F. Supp. 1170, 1174 (E.D.N.Y. 1978) (ordinance prohibiting nude sunbathing held valid exercise of police power).

84. *South Fla. Free Beaches, Inc.*, 734 F.2d at 610 (quoting *Chapin*, 457 F. Supp. at 1174).

But while the courts have thus far held that nude sunbathing is not symbolic speech, there arguably is some justification for finding such conduct protected. However, nudity in sunbathing alone will deserve constitutional protection only when the act of nude sunbathing is shown to convey a particular message or philosophy. The emergence of the nationwide and well-organized social nudism movement may prove to be instrumental in making such a showing and could be ultimately responsible for attaining constitutional protection for nude bathers. In the past, nude sunbathing had been considered nothing more than a modern form of self-expression and relaxation; however, today the nationally organized associations can advocate nude sunbathing as a medium for expressing certain legitimate nudism beliefs and doctrine worthy of societal recognition and constitutional protection.[85] If, through collective groups, proponents could present nude sunbathing as communicating an idea, belief or message, rather than simply as an individualistic preference, the courts would be compelled to afford nude sunbathing constitutional protection to invalidate local ordinances which seek to prohibit it.

There are similarities between nude sunbathing as an expression of a way of life and the wearing of a black armband as a protest of war. Consequently, the protection afforded the latter should, by analogy, extend to the former. However, plaintiffs undertaking the task of linking nude sunbathing to symbolic speech will undoubtedly encounter much resistance from the judiciary as well as from the general public. The claim that individuals have a *right* to sunbathe in the nude is a far cry from the traditional, mainstream belief held by the general public and most judges. Due to the sensitive and revealing nature of nude sunbathing, the courts will be reluctant to afford blanket first amendment protection to such nontraditional activity. Elevating nude sunbathing to the status of symbolic speech warranting constitutional protection will depend in large part upon the collective efforts of national groups and the strength of the analogies drawn between this activity and others now protected.

In the event that nude sunbathing were held to constitute communicative conduct rising to the level of symbolic speech, the legislation banning nude sunbathing would nonetheless be permissible

85. The first amendment freedom of expression has traditionally protected those ideas—albeit unorthodox—which advocate social change. *See supra* notes 44-52 and accompanying text.

if an overriding important governmental interest were demonstrated. If the regulation satisfies the *O'Brien* test, then the locality may infringe upon the plaintiffs' constitutional right to sunbathe in the nude. Pursuant to the United States Supreme Court decision in *United States v. O'Brien*,[86] incidental limitations on first amendment freedoms may be justified.[87] That decision articulated a four-part test for determining when a governmental interest permits the regulation of expressive conduct. Regulation is permitted (1) if the regulation is within the constitutional power of the government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction of alleged first amendment freedoms is no greater than is essential to the furtherance of the governmental interest.

Local ordinances prohibiting nude sunbathing would appear to exemplify permissible regulation under the *O'Brien* test. First, these ordinances are clearly within the localities' power to enact.[88] Second, these ordinances usually further some governmental interest such as environmental control, traffic flow, litter prevention, or parking regulation.[89] Whether a governmental interest rises to the level of substantiality required by *O'Brien* will depend on the exact interest served by the ordinance and will require judicial interpretation of the particular governmental objective as implied or articulated in the statute or legislative history. Similarly, the third and fourth factors of the *O'Brien* test must be analyzed in light of the particular governmental interest served by the ordinance. Since localities may have different reasons for enacting such an ordinance, it would be impractical to draw any sweeping conclusions which attempt to balance the government's interest against the individual's right of expression. In any event, plaintiffs challenging the local ordinances must be aware of the *O'Brien* test and recognize the localities' right to infringe on symbolic speech, provided that the four requirements of *O'Brien* are satisfied.[90]

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86. 391 U.S. 367 (1968) (upheld constitutionality of federal statute punishing destruction of selective service certificates).

87. *Id.* at 377; *see supra* note 65; *see also* California v. LaRue, 409 U.S. 109, 128 (1972). *See generally* Ely, *supra* note 73; *Desecration of National Symbols*, *supra* note 65, at 1054-55 (reviewing the *O'Brien* analysis).

88. *See supra* note 9.

89. Williams v. Kleppe, 539 F.2d 803, 805-06 (1st Cir. 1976) (upheld constitutionality of ban on nude sunbathing).

90. The Court of Appeals for the Fourth Circuit adopted the four-part *O'Brien* analysis in Jim Crockett Promotions, Inc. v. City of Charlotte, 706 F.2d 486, 491 (4th Cir. 1983); Hart

B. *Nude Sunbathing as a Right of Association*

The second substantive constitutional challenge is the contention that these laws unconstitutionally interfere with the plaintiffs' right of association. The few challenges to these local ordinances thus far have included the assertion that "the first amendment clearly protects the right of nudists to associate with one another to advocate and promote their views."[91] The right of association, like the freedom of expression, may still be limited by reasonable legislation that regulates the time, place, and manner of first amendment guarantees.[92] Consequently, plaintiffs challenging

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Book Stores, Inc. v. Edmisten, 612 F.2d 821, 828-30 (4th Cir. 1979). The Virginia Supreme Court has also followed *O'Brien*. *See, e.g.*, Commonwealth v. Croatan Books, Inc., 228 Va. 383, 388, 323 S.E.2d 86, 88 (1984).

91. Chapin v. Town of Southampton, 457 F. Supp. 1170, 1175 (E.D.N.Y. 1978) (quoting Bruns v. Pomerleau, 319 F. Supp. 58, 65 (D. Md. 1970)) (holding that a person could not be denied a job as a patrolman simply because he is a member of a nudist group). Nudists have the right to associate in camps. Roberts v. Clement, 252 F. Supp. 835 (E.D. Tenn. 1966).

> The wiles and lures of that most peculiar cult completely elude me. It seems in fact something of a mystery why those who engage in its strange practices are willing to suffer both the stings of outraged public opinion and voracious, ravenous insects in order to pursue its illusory rewards. To my personal way of thinking the theories of nudism are not only foolish but down right distasteful and indelicate. But as such theories play no legitimate part in a judicial opinion, I shall call all personal remarks short, simply stating in our triune form of government it is the particular duty of the judiciary to protect individuals and minorities in their constitutional rights even though their beliefs and activities may be heretical or unpopular.

Id. at 850 (Darr, J., concurring) (holding that the law which made it unlawful to engage in nudist practices in Tennessee was unconstitutional since it violated substantive due process).

92. A locality may infringe on first amendment rights if the ordinance merely regulates time, place, or manner. *See* Karst, *supra* note 40, at 28, 35-56. A government clearly has no power to restrict constitutionally protected expression because of its message; nevertheless, "reasonable time, place and manner regulations may be necessary to further significant governmental interests." Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); *see also* Police Dept. of Chicago v. Mosley, 408 U.S. 92, 98 (1972); Cox v. New Hampshire, 312 U.S. 569, 576 (1941). *See generally* Karst, *supra* note 40 (discussing *Mosley* and the principle of equal liberty of expression in the first amendment). The Fourth Circuit in Davenport v. City of Alexandria, 710 F.2d 148, 151-52 (4th Cir. 1983), held (1) that time, place, and manner restrictions and enforcement cannot be based on the content of the speech (citing Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980)); (2) that a compelling governmental interest unrelated to speech must be served (citing Hickory Fire Fighters Ass'n v. City of Hickory, 656 F.2d 917, 923 (4th Cir. 1981)); (3) that the ordinances restricting free expression must be drawn with narrow specificity so as to be no more restrictive than is necessary (citing *Grayned*, 408 U.S. at 116-17); (4) that adequate alternative channels of communication must be left open by the restrictions (citing Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 75 (1981)); and (5) that reasonable time, place, and manner restrictions cannot vest discretion in officials to grant or withhold a permit. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Poulos v. New Hampshire, 345 U.S. 395, 406-07 (1953).

these ordinances under the first amendment rights of association and expression must recognize that if the local ordinance qualifies as a time, place, or manner regulation, then, even though the law infringes upon the plaintiffs' constitutional right to sunbathe in the nude, the ordinance will still be permissible. It would be very difficult for a locality to argue that an ordinance constituting a total prohibition on nude sunbathing, without regard to any specified area of a public beach, regulates merely time, place, and manner.[93] It is significant that plaintiff-nudists, such as those in *National Capital Naturist*, that have attempted to challenge these local ordinances do not advocate nudity on the entire public beach but rather argue that at least a part of the beach should be set aside for optional nude sunbathing.[94]

In order to fully understand the nudists' claim that they have a right to associate together in the nude, it is necessary to review the history of the right and its expansion. The right of association is not explicitly set forth in the first amendment. Nevertheless, it has long been recognized as implicit in the freedoms of speech, assembly, and petition.[95] The "right of association, like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies."[96] Historically, the

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93. *See Grayned*, 408 U.S. at 116-17 (The regulation must be narrowly tailored to further the state's legitimate interest; and free expression cannot be denied under the guise of regulation.); *see also Schad*, 452 U.S. at 75-76 (alternative channels of communication must remain open).

94. *See* Williams v. Kleppe, 539 F.2d 803, 806 (1st Cir. 1976); NCN's Complaint, *supra* note 1, at 4.

95. Healy v. James, 408 U.S. 169, 181 (1972); NAACP v. Alabama, 357 U.S. 449, 460 (1958) (Harlan, J., for a unanimous court); *see also* Baird v. State Bar of Ariz., 401 U.S. 1, 6 (1971); Thomas v. Collins, 323 U.S. 516, 530 (1945); DeJonge v. Oregon, 299 U.S. 353, 364 (1937); National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1016 (4th Cir. 1973). *See generally* Baker, *supra* note 65, at 1003-35; Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 1-3 (1964); Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1, 2 (1977).

96. Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (association itself is a form of expression); Lindenbaum v. City of Philadelphia, 584 F. Supp. 1190, 1194 (E.D. Pa. 1984) ("The decision to affiliate oneself with a particular group carries with it the willingness to be associated with the principles and purposes for which that group stands . . . . Infringement of the right of association necessarily involves infringement of the right of expression."); Emerson, *supra* note 95, at 21-22, 24-26 (the right of association is simply an extension of the individual's right of expression). *See generally* notes 80-86 and accompanying text (nude sunbathing as right of expression).

The right of association has traditionally been employed in the political arena so that organizations may collectively promote a certain belief. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977) (the right to associate for the advancement of beliefs and ideas); Runyon v. McCrary, 427 U.S. 160, 175 (1976) (The right of association is protected

core of the first amendment freedom of association has been the advancement of ideas.[97] This right extends to social, political, religious, and cultural associations,[98] regardless of the unorthodox nature of the beliefs or the manner of expressing them.[99] The United States Supreme Court has held that the first amendment protects the rights of individuals to associate and to advance their personal beliefs.[100] This freedom of association to advance any belief is carefully guarded from both subtle governmental influence and "heavy handed frontal attack" by the government.[101]

The right of association has recently been expanded by federal courts beyond associations which are merely for the purpose of advancing shared beliefs; even purely social and personal associations[102] have been held worthy of protection. This more expansive

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since it promotes and may well be essential to the "[e]ffective advocacy of both public and private points of view, particularly controversial ones that the First Amendment is designed to foster.") (quoting Buckley v. Valeo, 424 U.S. 1, 15 (1976), *aff'g* 515 F.2d 1082 (4th Cir. 1975)); NAACP v. Alabama, 357 U.S. at 460 ("it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by . . . the Fourteenth Amendment."); *see also infra* notes 119-46 and accompanying text (nude sunbathing as a protected liberty interest).

97. *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960).

98. The right to associate is commonly considered in connection with political associations, but the Supreme Court has held that this right pertains to any belief. NAACP v. Alabama, 357 U.S. at 462; *see also Griswold*, 381 U.S. at 483; Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968). The right of association guarantees freedom of association to all persons, regardless of their views or their manner of expressing those views. Bruns v. Pomerleau, 319 F. Supp. 58, 65 (D. Md. 1970); *see also Ringers*, 473 F.2d at 1015 (the right of association protects popular as well as unpopular expressions). If a state denies the right of association to an unpopular group, then the first amendment "will be substantially emasculated." *Id.* at 1016.

99. *Bruns*, 319 F. Supp. at 65.

100. *Healy*, 408 U.S. at 180.

101. *Bates*, 361 U.S. at 523. *See generally* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (overturned convictions based upon vague ordinances which imposed prior restraints on expression); NAACP v. Alabama, 357 U.S. 449 (1958) (struck down compelled disclosure of membership lists); *Thomas*, 323 U.S. 516 (1945) (invalidated registration requirements for labor organizations).

Moreover, the Supreme Court has said that when first amendment rights are at issue the state must show convincingly the substantial relation between the information sought and the infringement on the compelling state interest. Gibson v. Florida Legislative Investigative Comm., 372 U.S. 539, 546 (1963). Even where the government's purpose is legitimate, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be achieved by less drastic means. Shelton v. Tucker, 364 U.S. 479, 488 (1960).

102. *See, e.g.*, Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1984) (holding that a police officer's discharge for dating the daughter of a convicted felon who was reported to be a key figure in organized crime unconstitutionally infringed on the police officer's right of association); Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980) (holding that an individual's first amendment right of association was violated by an overbroad anti-loitering ordinance); *see*

reading of the right of association has been adopted by the Eleventh and Fifth Circuits, as well as by several federal district courts.[103] In analyzing a right of association claim under this expansive interpretation, the question is not whether the individuals advance common beliefs but rather whether they wish to associate with one another.[104] Under this modern interpretation, associations simply for social and personal reasons may be protected.[105]

The federal cases that have dealt with nude sunbathing have held that the activity is more individualistic than associational.[106] Although an issue in other federal cases challenging the local ordinances, the right to sunbathe in the nude was not specifically raised as a protected right of association by the plaintiffs in *National Capital Naturist*. In *Williams v. Hathaway*, the district court held as follows:

> [A nude bather's] purpose and intent is more individualistic than associational. While nude bathers may find comfort in numbers, those numbers have not been caused *by a conscious, collective effort* to seek out other nudists but are merely the result of a heretofore tolerant attitude toward nudity at this beach.[107]

In the past, proponents of nude sunbathing did not argue that they frequented the public beach for organizational or associational purposes, and, consequently, the courts drew a distinction between groups concerned with discussing and promoting a pleasurable activity, and those gatherings of people merely desiring to pursue that activity where it can take place.[108] The courts found that nude sunbathers fell into the latter category of people—those simply

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also McKenna v. Peekskill Hous. Auth., 497 F. Supp. 1217 (S.D.N.Y. 1980), *modified*, 647 F.2d 332 (2d Cir. 1981); Tyson v. New York City Hous. Auth., 369 F. Supp. 513 (S.D.N.Y. 1974); *Bruns*, 319 F. Supp. 1217 (S.D.N.Y. 1980), *modified*, 647 F.2d 332 (2d Cir. 1981).

103. *See supra* note 102.

104. *Wilson*, 733 F.2d at 1543-44.

105. A nudist has the constitutional right to associate with other nudists. *Bruns*, 319 F. Supp. at 65. "It is the interaction, the association, which is protected. The [first amendment] protection does not come into play only when two or more individuals seek to distill the fruits of their relationship into a body of thought or into a political program." *Wilson*, 733 F.2d at 1544.

106. *See supra* note 10.

107. Williams v. Hathaway, 400 F. Supp. 122, 126-27 (D. Mass. 1975), *aff'd sub nom.* Williams v. Kleppe, 539 F.2d 803 (1st Cir. 1976) (emphasis added); *see supra* notes 2-3 (discussing the collective nature of the nudist movement).

108. *Kleppe*, 539 F.2d at 806 n.9, *quoted in* Chapin v. Town of Southampton, 457 F. Supp. 1170, 1175 (E.D.N.Y. 1978).

gathering to individually pursue an activity, rather than associating together to promote a belief. One court has, in dicta, suggested that people may associate together on public beaches and advocate the benefits of nude sunbathing, albeit fully clothed.[109] Other courts have simply dismissed right of association claims based on the individualistic (as opposed to the associational) nature of nude sunbathing.[110]

Under the modern view of association, the right is seen as more social in nature and now encompasses those organizations which do not necessarily purport to advocate ideas. The right of association can be interpreted as a right "to simply meet with others."[111] If this interpretation of the right of association is applied to nude sunbathing, then nude sunbathers may be permitted to interact with one another in the nude without the interference of government regulation. In fact, if the modern trend is adopted, the courts' earlier distinction[112] between an individualistic activity and one prompting an idea will no longer prove a viable basis for denying nude sunbathing constitutional protection. As a result, localities arguably may not infringe upon nude sunbathers' right of association, even though the sunbathers are merely pursuing a pleasurable activity with fellow nudists.[113]

Even under the traditional view of the right of association[114] which states that individuals have the right to gather together and advance common beliefs, nude sunbathing may be entitled to some constitutional protection. However, nude sunbathers must show that they attend the beach for associational rather than individualistic purposes and not merely to express favorable attitudes towards nudity. In the language of the courts, they must demonstrate that they gather "by a conscious, collective effort to seek out other nudists."[115] This associational—as distinguished from an individualistic—purpose for attending the beach will be given more

109. South Fla. Free Beaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984).

110. *Id.* (nude bathers may advocate their beliefs while fully dressed); *see supra* note 10 (nude sunbathers do not have an associational claim because of the personal character of nude sunbathing).

111. *Wilson*, 733 F.2d at 1543 (citing Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980)).

112. *See supra* note 97 and accompanying text.

113. *Cf. Kleppe*, 539 F.2d at 806 n.9 (distinguishing groups concerned with discussing a pleasurable activity from those which gather merely to pursue that activity).

114. *See supra* note 97 and accompanying text. *See generally* Raggi, *supra* note 95, at 4.

115. *Hathaway*, 400 F. Supp. at 127; *see also supra* notes 2, 3 & 107. *See generally* Raggi, *supra* note 95, at 11-14.

legitimacy through the organized groups which advocate the publicized beliefs of nude sunbathers, in stark contrast to loose coalition of individuals enjoying the benefits of nude sunbathing.[116]

In any event, the necessity of showing a valid associational purpose for nude sunbathing will be as crucial to protection under the right of association as the necessity of showing a communicative character for protection under freedom of expression.[117] However, unlike the right of expression theory, the associational claim has not been routinely raised by plaintiffs, and consequently, has not been frequently addressed by the courts. While the federal courts will in all likelihood follow the dicta of the Eleventh Circuit[118] and hold that nude sunbathers have associational rights to gather together and advocate certain beliefs, the right of association will not extend to such gatherings while in the nude. In other words, the courts will likely afford nude sunbathers the opportunity to associate with one another and share their philosophy, but a narrow interpretation of the right will result in little protection to individuals associating while nude on public beaches. The right of association argument should always be asserted by plaintiffs, but the limitations of such a theory and the court's tendency to permit such association only when persons are fully clothed should be recognized.

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116. The growth of both the Naturist and the American Sunbathing Association may prove the collective conscious group necessary to advocate nude sunbathing and to obtain constitutional protection under the right of association. *See supra* notes 2-3 and accompanying text. For a review of the history of ASA, see Roberts v. Clement, 252 F. Supp. 835, 837-38 (E.D. Tenn 1966). Organized groups, rather than individual plaintiffs, are now challenging these ordinances in court. *See, e.g., South Fla. Free Beaches, Inc.*, 734 F.2d 608 (both an association and individual plaintiff, Gary Bryant, brought the suit); National Capital Naturist, Inc. v. Board of Supervisors of Accomack County, No. 85-452-N (E.D. Va. filed June 25, 1985) (this suit was brought by a Virginia nonstock corporation, as well as several individual plaintiffs). When a collective group, speaking for its members, promotes a belief, the expression of those ideas appears more associational than individualistic.

117. The courts that have addressed the constitutionality of local ordinances banning nude sunbathing tend to focus on the individualistic character of nude sunbathing. For instance, the courts have refused to afford freedom of expression protection to nude sunbathing because nude sunbathing is "fundamentally individualistic and personal rather than expressive or communicative." *Hathaway*, 400 F. Supp. at 126. Likewise, the courts refuse to grant protection to nude sunbathing under the right of association because such activity "is more individualistic than associational." *Id.* at 126-27. Therefore, if proponents of nude sunbathing could stress the expressive and associational character of nude bathing, then the likelihood of obtaining constitutional protection is greater. One possible means of advocating the expressive and associational nature of the activity is through a national or regional collective group such as the Naturists or American Sunbathing Association.

118. *South Fla. Free Beaches, Inc.*, 734 F.2d at 610; *see supra* note 110 and accompanying text.

C. *Nude Sunbathing as a Protected Personal Liberty Interest*

The third substantive challenge to these local ordinances is the claim that they unconstitutionally infringe upon plaintiffs' personal liberty or right of autonomy.[119] The protection afforded by the due process clause of the fourteenth amendment encompasses a wide array of liberty interests from choices regarding procreation[120] to the length of an individual's hair.[121] Courts have held

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119. Closely analogous to the personal liberty interest of the fourteenth amendment is the right of privacy contained in the penumbras of the Bill of Rights. Griswold v. Connecticut, 381 U.S. 479, 484 (1965); *see also* Carey v. Population Serv. Int'l, 431 U.S. 678, 684-86 (1977) (recognizing a right of privacy); Whalen v. Roe, 429 U.S. 589, 605 (1977) (fundamental privacy interests); Paul v. Davis, 424 U.S. 693, 712 (1976) (protected zones of privacy). *See generally* R. ROSSUM & G. TARR, *supra* note 39, at 701-11; Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1419-24 (1974) (defining privacy rights). Cases on the right of privacy indicate that constitutional protection extends to individuals making certain decisions of the most intimate kind, such as those relating to marriage, procreation, contraception and abortion. Roe v. Wade, 410 U.S. 113, 152-55 (1973). The cases also indicate that the right of privacy has been interpreted to limit a state's power to intrude on the privacy of the home or to interfere with family ties. Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).

There is recent authority to support the proposition that "[the right to privacy] is not limited to conduct that takes place strictly in private." Hardwick v. Bowers, 760 F.2d 1202, 1211 (11th Cir.) (holding that Georgia's sodomy law infringed upon the fundamental right of plaintiff, a practicing homosexual), *rev'd*, 106 S. Ct. 2841 (1986); *cf.* Doe v. Commonwealth's Att'y of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge district court upheld the constitutionality of Virginia's sodomy law), *aff'd*, 425 U.S. 901 (1976). *See generally* Note, *supra* note 46. Arguably, plaintiffs challenging local ordinances which ban nude sunbathing could argue that their right of privacy allows them to sunbathe in the nude. Nevertheless, most courts of appeals faced with a privacy claim have not accorded constitutional protection to any matters beyond those relating to marriage, procreation and family arrangements. *See, e.g.*, Potter v. Murray City, 760 F.2d 1065 (10th Cir.) (polygamous marriages), *cert. denied*, 106 S. Ct. 145 (1985); Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976) (absolute evidentiary privilege for therapy communications), *cert. denied*, 430 U.S. 954 (1977); McNally v. Pulitzer Publishing Co., 532 F.2d 69 (8th Cir. 1976) (psychiatric report read into record); O'Brien v. DeGrazia, 544 F.2d 543 (1st Cir. 1976) (policemen's financial questionnaire); Fitzgerald v. Porter Memorial Hosp., 523 F.2d 716 (7th Cir. 1975) (father's presence during natural childbirth), *cert. denied*, 425 U.S. 916 (1976); Gotkin v. Miller, 514 F.2d 125 (2d Cir. 1975) (access to hospital records); Keckeisen v. Independent School Dist., 509 F.2d 1062 (8th Cir.) (spouses' right to work at same school), *cert. denied*, 423 U.S. 833 (1975).

120. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); *Griswold*, 381 U.S. 479; *cf.* Kelley v. Johnson, 425 U.S. 238 (1976) (liberty interest asserted did not involve freedom of choice with regard to procreation, marriage or family life).

121. *See, e.g.*, Miller v. Ackerman, 488 F.2d 920 (8th Cir. 1973); Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970). *See generally* Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 760-70 (1973).

The liberty interest protected by the due process clause of the fourteenth amendment includes a parent's right to send his or her child to public or private school. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-400

that the "sphere of personal liberty"[122] protected by the fourteenth amendment includes the right "to be let alone in the governance of those activities which may be deemed uniquely personal."[123] This personal liberty interest "is not composed only of fundamental freedoms, but includes the freedom to make and act on less significant personal decisions free of arbitrary governmental interference."[124] The United States Supreme Court has recognized that

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(1923). The liberty interest also includes the right to travel. *See, e.g.*, Kent v. Dulles, 357 U.S. 116 (1958); *see also* Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969); United States v. Guest, 383 U.S. 745, 757, 759 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964). Many of the cases which assert a liberty interest involve rights expressly guaranteed by one or more of the first eight amendments. *See, e.g.*, Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Alabama, 357 U.S. 449, 460 (1958); Cantwell v. Connecticut, 310 U.S. 296, 303-05 (1940); Schneider v. State, 308 U.S. 147 (1939). Constitutional protection is not limited to specifically enumerated rights, but also encompasses nonenumerated penumbral rights. Roe v. Wade, 410 U.S. 113; *Griswold*, 381 U.S. 479.

122. *Richards*, 424 F.2d at 1284. The right of personal liberties in the fourteenth amendment does not require the state to provide a special forum for the exercise of these personal liberties. However, when the personal liberty interest "takes on the coloration of a First Amendment right, only a more compelling [state] interest will justify a limitation on such activity." *Id.* at 1284 n.6 (citations omitted); *see also Kelley*, 425 U.S. at 250 n.2 (Marshall, J., dissenting) (government regulation of personal appearance may in some circumstances not only deprive plaintiff of liberty under the fourteenth amendment, but also violate his first amendment rights). *See generally* Henkin, *supra* note 119, at 1424-27 (indicating that the new right of privacy creates freedom of personal autonomy and immunity from regulation).

123. *Richards*, 424 F.2d at 1284. " '[L]iberty' seems to us incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty." *Id.* at 1284-85 (citations omitted). *See generally* Note, *supra* note 121, at 760-70 (personal liberty is analogous to a privacy right). At an early date, the Supreme Court recognized the importance of the liberty interest in personal autonomy by holding:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: "[t]he right to one's person may be said to be right of complete immunity; to be let alone."

Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

124. Dwen v. Barry, 483 F.2d 1126, 1130 (2d Cir. 1973), *rev'd in part sub nom.* Kelley v. Johnson, 425 U.S. 238 (1976) (The circuit court had considered plaintiff's argument that a regulation regarding hair length of police officers violated civil rights and held that the district court had erred in granting summary judgment dismissing the action. The Supreme Court reversed, holding that such regulations are sufficiently related to the government's interest in fostering the "espirit de corps."). *But see Kelley*, 425 U.S. at 250-51:

> An individual's personal appearance may reflect, sustain, and nourish his personality and may well be used as a means of expressing his attitude and lifestyle. In taking control over a citizen's personal appearance, the government forces him to sacrifice substantial elements of his integrity and identity as well. To say that the liberty guarantee of the Fourteenth Amendment does not encompass matters of personal appearance would be fundamentally inconsistent with the values of privacy, self-identity, autonomy, and personal integrity that I have always assumed the Constitution was

state regulation of "personal appearance is fundamentally inconsistent with the values of privacy, self-identity, autonomy and personal integrity that . . . the Constitution was designed to protect."[125] Closely related to personal liberties is a universal "right of personhood," as termed by former Fourth Circuit Court of Appeals Judge Craven.[126] This "right of personhood" includes the freedom to wear a hat, to attend a football game or "to do everything which injures no one else."[127]

Proponents of nude sunbathing assert that the protected liberty interest in matters of personal appearance includes the right to sunbathe in the nude.[128] In *Williams v. Kleppe*, the First Circuit Court of Appeals agreed, holding that nude sunbathing as a liberty interest is entitled to some constitutional protection;[129] but that holding must be limited to the facts of the case. Although the liberty interest in nude sunbathing had not been declared a fundamental right by the courts,[130] the *Kleppe* court determined that it

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designed to protect.

Id. at 250-51 (Marshall, J., dissenting) (such regulations must withstand fourteenth amendment scrutiny) (citations omitted). For a review of the personal liberty interest in the due process clause, see Poe v. Pullman, 367 U.S. 497 (1961); *see also* Roe v. Wade, 410 U.S. 110 (right to terminate pregnancy is founded in concept of personal liberty); *Griswold*, 381 U.S. 479 (marital privacy encompassed within concept of liberty). *See generally* Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 817-22 (1973); Note, *supra* note 121, at 762 (the right to be let alone).

125. *Kelley*, 425 U.S. at 251 (1976).

126. Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699.

127. *Id.* at 699. The right of personhood reflects the judicial recognition that personal rights may not be arbitrarily and capriciously invalidated by governmental action unless the personhood right is outweighed by the state interest. Judge Craven further states that "[P]ersonhood . . . is not a narrow concept. Included are those myriad activities, decisions and idiosyncrasies which . . . are not considered to be within the ambit of fundamental rights." *Id.* at 706, 710; *see also* Note, *supra* note 121, at 762 (the right to be let alone).

128. Williams v. Kleppe, 539 F.2d 803, 806-07 (1st Cir. 1976), *aff'g sub nom.* Williams v. Hathaway, 400 F. Supp. 122, 127 (D. Mass. 1975).

129. *Kleppe*, 539 F.2d at 807.

130. *Id.*; *Hathaway*, 400 F. Supp. at 128; *cf.* Appellants Brief at 30-31, *Kleppe*, 539 F.2d 803 ("Fundamentality" is not a talismanic word that triggers heightened judicial scrutiny. A "fundamental right" is simply a right that "is among the rights and liberties protected by the Constitution") (quoting San Antonio Indep. School Dist. v. Rodriques, 411 U.S. 1 (1973) (Powell, J.)). Fundamental rights include interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); privacy, *Griswold*, 381 U.S. 479; voting, Baker v. Carr, 369 U.S. 186 (1962). Judge Craven concludes:

> [T]he rights of man are literally innumerable, but very few of them deserve to be labelled "fundamental." The remaining ones are of varying degrees of importance and are legitimately subject to regulation in pursuance of a countervailing state interest. Under the currently employed judicial method of vindicating individual rights, however, the state is given virtually complete discretion in the regulation of lesser rights, while being precluded from interfering with those rights deemed fundamental.

nevertheless deserved some constitutional protection. The court reasoned that the protected liberty interest was, in part, derived from the traditional use of the area as a nude beach and from the secluded nature of the beach involved in that case.[131] The district court held that its special character as a traditional "nude beach" distinguished it from other public areas; thus, constitutional protection was warranted.[132]

Once a personal liberty interest in nude sunbathing is shown to exist, the individual's interest in the protected liberty must be balanced against the state's legitimate interest in the regulation.[133] If the state's interest in the ordinance outweighs the individual's liberty interest, then the intrusion is justified. Since nude sunbathing is not a fundamental right,[134] the state is not held to the higher level of strict scrutiny which requires the government to show a compelling interest in the ordinances and an exhaustion of less restrictive alternatives.[135] Although nude sunbathing is not a funda-

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Craven, *supra* note 126, at 720.

131. For 40 to 50 years this beach, which was hidden behind some of the highest sand dunes on Cape Cod, had been used by individuals, couples and small groups for skinny-dipping and nude sunbathing. *Kleppe*, 539 F.2d at 805; *see also* NCN's Complaint, *supra* note 1, at 8. The court's constitutional protection in *Hathaway* was limited to this one area since this was the only area shown by the plaintiffs to be a nude beach by tradition and custom. *Id.* at 127 n.1. The plaintiffs' attack on the total ban imposed on nude sunbathing is founded on the theory that they and their predecessors at the beach have, through long-tolerated practice of nude sunbathing, accrued a substantially protected constitutional right. The plaintiffs assert in their brief:

> "[W]here . . . tradition, custom and usage have given rise to the reasonable expectation that one may engage in a harmless, healthful activity outside the sight of those who might be offended without fear of harassment, arrest and prosecution, there exists a right to nudity." Plaintiffs do not claim that the right entitles them to be free from any restraint. They seek "only the right to continue their practice in numbers consonant with environmental needs *somewhere* within the seashore." [Emphasis in brief.] They claim that this right, though acquired through prescription, is one of the smaller liberties entitled to substantive constitutional protection. Government encroachment is only authorized if the government interest involved is important and cannot be served by more selective or less restrictive measures.

Kleppe, 539 F.2d at 806 (quoting plaintiffs' brief).

132. *Hathaway*, 400 F. Supp. at 127.

133. *Richards*, 424 F.2d at 1285; *see, e.g.*, Breithaupt v. Abram, 352 U.S. 432, 439 (1957) (extraction of blood permissible, based on state courts' ability to use evidence even in violation of exclusionary rule); Rochin v. California, 342 U.S. 165, 172 (1952); *cf.* Schmerber v. California, 384 U.S. 757 (1966) (state's interest in obtaining blood sample outweighed person's freedom from unreasonable searches and did not violate fifth amendment privilege against self-incrimination). *But see* Mapp v. Ohio, 367 U.S. 643 (1961) (applied exclusionary rule to state court proceedings).

134. *See supra* note 130 and accompanying text.

135. Under the strict scrutiny or compelling interest tests, the infringement on the plaintiff's fundamental right must be necessary to promote the state's compelling interest. *See,*

mental right, it is nevertheless a significant personal liberty interest[136] and is thus accorded intermediate scrutiny.[137] This standard of review necessitates consideration of three factors: (1) the nature of the liberty interest asserted; (2) the context in which it is asserted; and (3) the extent to which the intrusion is confined to the legitimate public interest to be served.[138]

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e.g., Zobel v. Williams, 457 U.S. 55 (1982) (states' durational requirement of one year waiting period prior to receiving welfare benefits unconstitutionally burdened plaintiff's fundamental right to travel). Strict scrutiny also requires that the state exhaust all less restrictive alternatives. United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

136. *See Kleppe*, 539 F.2d at 807; *Hathaway*, 400 F. Supp. at 127.

137. The court applied an intermediate standard of review in determining whether the state's interest outweighed the plaintiffs' interest in nude sunbathing. *Kleppe*, 539 F.2d at 807; *Hathaway*, 400 F. Supp. at 129.

The Supreme Court has formally adopted only the strict scrutiny test and the rational relationship test, holding that legislation will be sustained if there exists any conceivable basis for the law. Williamson v. Lee Optical, 348 U.S. 483 (1955). However, the Justices have openly taken an intermediate approach to reviewing legislation that affects a significant interest. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (striking down mandatory leave for pregnant teachers as insufficiently related to articulated goals of continuity of instruction); *Eisenstadt*, 405 U.S. 438 (refusing to sustain contraception regulation which made birth control more readily available to married couples); *Meyer*, 262 U.S. 390 (1923) (striking down postwar legislation that prohibited the teaching of modern foreign language). When governmental action infringes on a liberty interest, the government has the affirmative burden of showing a justification for the legislation. *Richards*, 424 F.2d at 1284-85; *see also Dwen*, 438 F.2d at 1130 (any restrictions on personal liberty must be justified by legitimate state interest reasonably related to the regulation); Appellant's Brief at 24-34; *Kleppe*, 539 F.2d 803 (intermediate scrutiny is the level of review when liberty interests are burdened).

138. *Richards*, 424 F.2d at 1285-86. Once the personal liberty interest is shown, the counteracting state interest must be affirmatively shown. In *Richards*, the court found no reason why decency, decorum or good conduct required boys to wear short hair. This intermediate standard of review has been accepted and applied in cases brought by students and firemen challenging restrictions placed on their personal appearance. *See, e.g.*, Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

Another significant factor in the balancing process between the right to nude sunbathing and the state's interest in prohibiting such activity is the public versus private aspect of nudity. One clearly has the right to "appear au naturel at home." *Richards*, 424 F.2d at 1285. On the other hand, public nudity can be banned. Erznoznik v. City of Miami, 422 U.S. 205 (1975). The difference between public and private nudity is not necessarily the ownership of the situs, but rather the privacy of the act itself and the potential offensiveness to others. *Hathaway*, 400 F. Supp. at 127. Nude sunbathers do not advocate that the entire public beach be open to nude sunbathing, but instead argue that a portion of the beach should be set aside for optional nude bathing. NCN's Complaint, *supra* note 1, at 4; Appellant's Brief at 3, *Kleppe*, 539 F.2d 803 (arguing that a total ban was inappropriate and that nude sunbathers should have the right to sunbathe "somewhere" on Cape Cod). By requesting that only a part of the beach be set aside for nude sunbathing, the plaintiffs would not be offending the general population. If a specific section of the beach is allocated to nude

Although the First Circuit found that nude sunbathing was a liberty interest protected under the Constitution, the court applied the above three factors and found that the liberty interest was not "of such constitutional moment as to require an invalidation of the regulation."[139] In analyzing the state intrusion into the personal liberty interest, the court found the intrusion to be a total and complete ban[140] on nude sunbathing. The state's justification for this total intrusion included problems[141] with the environment, litter, sanitation, maintenance of plant life, traffic, parking and trespassing on private property. The court held that the state regulation was sufficiently related to legitimate governmental interests so as to justify the total prohibition on nude sunbathing. Employing both the rational relationship test[142] and the higher intermediate level of review,[143] the court concluded that "barring nude bathing bears a real and substantial relationship to the [state] objectives."[144]

Arguably, the personal liberty interest in matters of personal ap-

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sunbathing, then both the majority of the population opposed to nude sunbathing and the minority who advocate nudity will be satisfied. The majority, by attending all parts of the beach except for the designated nude sunbathing area, would not be exposed to nor offended by nude sunbathers exercising their constitutional right. Likewise, the minority composed of nude sunbathers would be permitted, albeit in specified areas, to practice social nudism on public beaches. Consequently, both the majority and minority would coexist on public beaches. Note, however, the other problems caused by a specifically delineated nude bathing area. *See infra* note 141.

139. *Hathaway*, 400 F. Supp. at 129.

140. Plaintiffs argue that the problems associated with nude sunbathing, *see infra* note 144, could be alleviated through alternative and less restrictive means rather than through a total prohibition of nude sunbathing. *Hathaway*, 400 F. Supp. at 129. For example, the parking problems could be handled by strict enforcement of the parking and towing regulations; environmental problems, particularly dune damage, could be addressed through carefully drawn and strictly enforced laws. *Id.* However, the court considered the alternatives "to be ineffective in dealing with the multifaceted situation created by the increased popularity of nude bathing." *Id.* Under intermediate review, unlike strict scrutiny, the government need not exhaust all lesser restrictive alternatives. *Kleppe*, 539 F.2d at 807.

141. *Hathaway*, 400 F. Supp. at 129; *see Kleppe*, 539 F.2d at 805-06 (environmental problems included gouges to dune tops, cuts into the dune slope, and injury to vegetation on the dunes).

142. *See supra* note 137.

143. *Id.*

144. *Kleppe*, 539 F.2d at 807. The court held that plaintiffs would prevail only if the interest in nude sunbathing was considered fundamental. *Id.*; *see also* note 122 and accompanying text (stating that if the liberty falls within the protection of the first amendment, then the standard of review is higher, and thus, the state's interest in prohibiting the liberty interest in nude sunbathing must be compelling). *But cf. Richards*, 424 F.2d at 1284 (the length of one's hair is not a fundamental interest; nevertheless, the personal liberty interest still outweighed the government's interest in school discipline).

pearance encompasses the right to sunbathe in the nude.[145] Once established, this liberty interest in nude sunbathing must be weighed against the state's legitimate interest in the ordinance. In evaluating the competing interests, the court should consider the three factors articulated in *Richards v. Thurston*.[146] Under this intermediate level of scrutiny, the local ordinance will fall if it does not bear a real or substantial relationship to the state's objectives. Plaintiffs should attempt to characterize nude sunbathing as a protected liberty interest under the fourteenth amendment due to the fact that there is some federal authority supporting such a characterization. The most difficult aspect of this particular basis for constitutional challenge will be showing that the liberty interest outweighs the particular state interest involved. Potential challengers of local ordinances banning nude sunbathing must recognize that similar arguments have not yet been successful in the federal courts.

III. Procedural Constitutional Challenges

As to procedural challenges, the plaintiff can allege that the local ordinance is either vague or overbroad. The "void for vagueness doctrine"[147] would suggest that, as applied to plaintiffs, the ordinance is vague insofar as the plaintiffs did not receive fair warning that their conduct—nude sunbathing—was prohibited by the law.[148] The overbreadth doctrine, on the other hand, alleges that the legislation is overly broad in scope because it prohibits conduct of third parties who are not presently before the court and whose conduct is otherwise protected.

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145. *See supra* notes 125-32 and accompanying text.

146. 424 F.2d at 1285; *see also* supra note 138.

147. *See infra* notes 151-60 and accompanying text.

148. *See* South Fla. Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 611 (11th Cir. 1984), *aff'g in part*, 548 F. Supp. 53, 57-59 (S.D. Fla. 1982) (challenging as vague the terms "naked or insufficiently clothed to prevent improper exposure of (one's) person," "corrupts the public morals," "outrages the sense of public decency," "nudity," "indecent," "lewd," and "provided or set apart for that purpose"); NCN's Complaint, *supra* note 1, at 13 (challenging the vagueness of the terms "public," "in a public place," "in a place open to the public," and "open to public view"). For the specific wording of the statutes challenged in *South Fla. Free Beaches, Inc.* as unconstitutionally vague, *see South Fla. Free Beaches, Inc.*, 734 F.2d at 609 nn.1-3; *Chapin*, 457 F. Supp. 1170, 1176 (E.D. N.Y. 1978) (challenging for vagueness the terms "adjacent waters," "nude," and "suitable bathing dress").

A. *Vagueness*

The first procedural challenge to local ordinances is that these ordinances are unconstitutionally vague under the due process clause of the fourteenth amendment.[149] The due process guarantee of the Constitution requires that legislation be struck down for vagueness if its prohibitions are not clearly defined.[150] "Void for vagueness" simply means that criminal penalties should not attach where one could not reasonably understand that his or her conduct was prohibited.[151] It is important to note that the plaintiff must show that the statute is vague as applied to him.[152] That is, if a statute clearly applies to one's own conduct, then that person cannot successfully challenge the statute as being vague as to him;[153] nor can that person challenge the vagueness of the law as applied to the conduct of others.[154]

The United States Supreme Court has articulated three standards with which to evaluate a vagueness challenge. First, the law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[155] Second, the law must provide explicit standards for those

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149. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (city's anti-noise ordinance was not unconstitutionally vague or overbroad); *cf.* Cox v. Louisiana, 379 U.S. 536 (1965) (breach of peace ordinance held unconstitutionally vague since the ordinance, as construed, permitted persons to be punished for merely expressing unpopular views).

150. United States v. Harris, 347 U.S. 612, 617 (1954) (upholding Lobbying Act since it was not too vague and indefinite to meet due process requirements).

151. Parker v. Levy, 417 U.S. 733, 753-58 (1974) (Uniform Code of Military Justice, which authorized court-martial for conduct unbecoming an officer and a gentlemen, was not unconstitutionally vague or facially invalid because of overbreadth); *cf. infra* note 177 and accompanying text. In an overbreadth analysis, a plaintiff may challenge a statute that arguably infringes on a constitutionally protected activity, whether or not the statute actually does infringe on the plaintiff's activity.

152. *Parker*, 417 U.S. at 756.

153. *See, e.g.*, Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982) (Court should examine the complainant's own conduct prior to analyzing other hypothetical applications of the law).

154. *Id.* at 498; *Grayned*, 408 U.S. at 108-09 (1972); *Parker*, 417 U.S. at 774-75 (Stewart, J., dissenting).

155. *Grayned*, 408 U.S. at 108; *see also Village of Hoffman Estates*, 455 U.S. at 498 (quoting the standards outlined in *Grayned*); *Parker*, 417 U.S. at 774 (vague statutes fail to provide fair notice of precisely what acts are forbidden). This standard presumes that a person is able to choose between lawful and unlawful conduct. *Grayned*, 408 U.S. at 108. Furthermore, vague laws may trap the innocent person by failing to provide adequate warning of the prohibition. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Cramp v. Board of Pub. Instr., 368 U.S. 278 (1961); United States v. Harris, 347 U.S. 612, 617 (1954).

who are applying the law.[156] Third, and perhaps the most important factor, the law must not threaten to inhibit the exercise of constitutionally protected first amendment rights.[157]

The strictness with which these standards are applied depends upon the relative degree of vagueness attributed to the legislation in question.[158] For example, economic regulation is usually subjected to a less strict vagueness test;[159] whereas legislation that touches upon constitutional rights is subjected to a more stringent vagueness test.[160]

Even when the stricter vagueness test has been applied, local ordinances banning nude sunbathing have not been held unconstitutionally vague.[161] In *Chapin v. Town of Southampton*, the municipal ordinance prohibiting nude sunbathing was challenged as unconstitutionally vague on the grounds that the law failed to define such terms as "nude" and "suitable dress."[162] The court held that, although such terms may be unclear, they were nevertheless clear when applied to plaintiffs' own conduct.[163] Furthermore, the court noted that "only one entrapped by vagueness may raise that

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156. *Grayned*, 408 U.S. at 108-09; *see also Village of Hoffman Estates*, 455 U.S. at 498; *Parker*, 417 U.S. at 775 (vague statutes offend due process by failing to provide explicit standards for those who enforce the laws). The second standard was intended to prevent arbitrary and discriminatory enforcement of the laws. *Grayned*, 408 U.S. at 108; *see, e.g., Papachristou*, 405 U.S. at 162; Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 109; *see also* Smith v. Goguen, 415 U.S. 566, 575 (1974) (Massachusetts' flag misuse statute was void for vagueness).

157. *Village of Hoffman Estates*, 455 U.S. at 499 (if the law interferes with the right of free speech or association, then a more stringent vagueness standard should apply); *see also Smith*, 415 U.S. at 572-73 (when a statute reaches first amendment expression, the void for vagueness doctrine requires a greater degree of specificity than in other instances). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75-85 (1960).

158. *Village of Hoffman Estates*, 455 U.S. at 498.

159. *Id.* Economic legislation is subjected to a less strict vagueness standard because its subject matter is often more narrow and because businesses can be expected to consult relevant legislation in advance of action. *Id.*; *see also Papachristou*, 405 U.S. at 162; United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963); *cf. Smith*, 415 U.S. at 574.

160. *See supra* note 157 and accompanying text.

161. *See, e.g., South Fla. Free Beaches, Inc.*, 734 F.2d 608; *Chapin*, 457 F. Supp. 1170. *But cf. South Fla. Free Beaches, Inc.*, 548 F. Supp. 53 (district court found disorderly conduct portion of statute unconstitutionally broad); *Chapin*, 457 F. Supp. at 1176-77 (statute held overbroad but not vague).

162. *Chapin*, 457 F. Supp. at 1176.

163. *Id.*; *see supra* note 151 and accompanying text (void for vagueness is an "as applied" test).

constitutional objection."[164] In discussing the void for vagueness doctrine the court stated that inherently vague terms may be made constitutionally sound by reasonable construction of the statute.[165]

In *South Florida Free Beaches, Inc. v. City of Miami*,[166] the plaintiffs challenged the statute as being so vague that a reasonable person could not conform his behavior to the ordinances.[167] The court held, however, that the term "naked" was perfectly clear to anyone of reasonable intelligence. The court conceded that some terms of the statute may be vague in the abstract; nevertheless they were clear as applied to public nudity and nude sunbathing.[168] The court concluded that even if the language of the statute was not as clear as constitutionally desired, it was sufficiently definitive to survive a vagueness challenge since it gave the plaintiffs fair warning that their conduct—nude sunbathing—was prohibited.[169]

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164. *Chapin*, 457 F. Supp. at 1176 (citing *Parker*, 417 U.S. at 753-58).

165. *Id.* The *Chapin* court, quoting *Harris*, held that:

> If the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise. . . . And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction.

Id. (quoting *Harris*, 347 U.S. at 618).

166. 734 F.2d 608.

167. *South Fla. Free Beaches, Inc.*, 548 F. Supp. at 57.

168. *Id.*; *see also* United States v. Hymans, 463 F.2d 615, 618 (10th Cir. 1972) ("indecent conduct" is not unconstitutionally vague since it does give fair notice of the type of conduct forbidden by the law). The Virginia Supreme Court found that a city ordinance prohibiting common law indecent exposure was not vague or overbroad as applied. Wicks v. City of Charlottesville, 215 Va. 274, 208 S.E.2d 752 (1974).

169. *South Fla. Free Beaches, Inc.*, 548 F. Supp. at 59. Even though terms such as "public decency" and "public morals" are not specifically defined by society, a person of reasonable intelligence would understand the law to prohibit nudity on public beaches. *Id.* In *Harris*, 347 U.S. 612 (1954), holding that fair notice is the key in holding a law void for vagueness, the Court stated:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Id. at 617.

Cf. Coates, 402 U.S. 611 (ordinance making it a crime for two or more persons to assemble on a sidewalk and annoy passersby). The Court in *Coates* declared the criminal provision void for vagueness, not because it "requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.* at 614. The Court also found that enforcement depended on the subjective standard of "annoyance." *Id.*; *see also* Winters v. New York, 333 U.S. 507 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939) (both cases declaring ordinances void for vagueness).

In Virginia, recent challenges have been leveled against local ordinances alleging that terms such as "in the public place" and "open to the public view" are inherently vague. To successfully challenge these local ordinances as unconstitutionally vague, plaintiffs must show that the ordinances did not give them fair notice that nude sunbathing was prohibited in particular areas. Yet, the courts have thus far not been favorably disposed to declare nude sunbathing laws unconstitutionally vague.

B. *Overbreadth*

The second procedural challenge to a local ordinance is the claim that the particular ordinance is overly broad. A statute is overbroad and violative of the first amendment when it burdens more first amendment guarantees than is necessary to protect the compelling state interest.

Generally, a person cannot challenge a statute on the grounds that it is overbroad and might conceivably be unconstitutionally applied to third parties not presently before the court if the legislation is constitutional as applied to that plaintiff.[170] This principle reflects the personal nature of constitutional rights[171] as well as the prudential limitations on constitutional adjudication.[172] The first amendment overbreadth doctrine is, however, an exception to the accepted rule that constitutional rights are personal and cannot be asserted vicariously.[173] In formulating the overbreadth doctrine,

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170. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973); *see also* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 796-98 (1984); New York v. Ferber, 458 U.S. 747, 767 (1982); United States v. Raines, 362 U.S. 17, 21 (1960). *Compare* the overbreadth doctrine, *infra* notes 171-87 and accompanying text, *with* the void for vagueness doctrine, *supra* notes 148-69 and accompanying text.

171. *Ferber*, 458 U.S. at 767; *see also* McGowan v. Maryland, 366 U.S. 420, 429 (1961) (constitutional rights cannot be asserted vicariously).

172. *Ferber*, 458 U.S. at 767. The U.S. Constitution also limits the federal courts' jurisdiction to actual cases and controversies. U.S. CONST. art. III; *see also Ferber*, 458 U.S. at 767 n.20.

173. *Broadrick*, 413 U.S. at 611-12; *see also Ferber*, 458 U.S. at 767. The Court has in the past recognized exceptions to the principle that constitutional rights are personal, but only because of "weighty countervailing policies." *Broadrick*, 413 U.S. at 611. One such recognized exception "is where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their right themselves." *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438, 444-46 (1972); NAACP v. Alabama, 357 U.S. 449 (1958)). The other exception is the first amendment overbreadth doctrine:

> It has long been recognized that the first amendment needs breathing space and that statutes attempting to restrict or burden the exercise of first amendment rights must be narrowly drawn and represent a considered legislative judgment that a par-

the United States Supreme Court recognized an exception for laws that are broadly written and which may inhibit constitutionally protected expression by third parties.[174] This exception is predicated on "a judicial prediction or assumption that the statutes' very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[175] In short, these overly broad statutes may serve as a deterrent to the free flow of protected expression, since third parties fearing criminal sanctions may refrain from exercising their right of expression.[176] Consequently, litigants may be permitted to challenge a statute as overbroad not because their own rights of free expression have been violated, but rather because of the chilling effect that overly broad legislation has on first amendment freedom of expression.[177] However, the court has drawn a distinction between statutes which regulate conduct and those which regulate "pure speech."[178] Generally, the overbreadth scrutiny is less rigid when statutes regulating conduct, as opposed to speech, are challenged as overly broad.[179]

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ticular mode of expression has to give way to other compelling needs of society. *Broadrick*, 413 U.S. at 611-12 (citations omitted).

Consequently, the Court has altered its rules of standing to permit "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Id.* at 612 (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

174. *Taxpayers for Vincent*, 466 U.S. at 798. The overbreadth doctrine originated in Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940) (very existence of some broadly written statutes may deter free expression and should be challenged even by a party whose own conduct may be unprotected). *See generally* Monaghan, *Overbreadth*, 1981 S. CT. REV. 1, 10-14 (1981).

Overbreadth claims have been asserted in cases involving statutes which regulate "only spoken words." *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 520 (1972) (harm to society in allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted). Overbreadth challenges have also been permitted when rights of associations were burdened. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967). Furthermore, overbreadth claims have been allowed where statutes purport to regulate time, place, or manner of expression or communicative conduct. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 114-21 (1972).

175. *Broadrick*, 413 U.S. at 612; *see also Taxpayers for Vincent*, 466 U.S. at 800. The overbreadth doctrine is predicated on the sensitive nature of protected expression. *Ferber*, 458 U.S. at 768-69.

176. *See, e.g.*, Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980); *Gooding*, 405 U.S. at 521.

177. *See* Secretary of State of Md. v. Joseph H. Munson, Co., 467 U.S. 947 (1984) (quoting *Broadrick*, 413 U.S. at 612).

178. *Ferber*, 458 U.S. at 770; *Broadrick*, 413 U.S. at 615. *See generally* Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679, 712-14 (1978).

179. *Broadrick*, 413 U.S. at 614-15. *But see id.* at 630-32 (Brennan, J., dissenting). The

The United States Supreme Court has been cognizant of the overbreadth doctrine as a powerful tool and has sparingly employed the doctrine only as a last resort.[180] Consequently, the alleged overbreadth of a challenged ordinance must be substantial before the legislation will be struck down.[181] Although substantial overbreadth is not easily reduced to an exact definition, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court."[182]

The overbreadth doctrine, in contrast to a vagueness challenge,[183] has met with somewhat greater success in the federal courts.[184] In *Chapin*, the court found that the local ordinance not only prohibited nudity, but also prohibited anything other than "suitable bathing dress" on public beaches. The court determined that the requirement of "suitable bathing dress" unduly restricted the liberty interest of persons to wear expressive clothing on public beaches and, therefore, that it was unconstitutionally overbroad.[185]

Court fails to explain why conduct should be viewed differently from speech in an overbreadth analysis. Artificial distinctions should not be drawn between protected speech and conduct in analyzing an overbroad statute's chilling or deterrent effect on freedom of expression. *Id.*

180. *Broadrick*, 413 U.S. at 613; *see also Ferber*, 458 U.S. at 769.

181. *Broadrick*, 413 U.S. at 613 (overbreadth has not been invoked when a limiting construction could have been placed on the challenged statute). Furthermore, overbreadth claims have been curtailed when invoked against ordinary criminal laws that are applied to protected conduct. *See, e.g., id.*; Cantwell v. Connecticut, 310 U.S. 296 (1940); *see also* United States Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 580-81 (1973) (substantial overbreadth is criterion used by courts in analyzing an overbreadth challenge).

182. *Taxpayers for Vincent*, 466 U.S. at 801 (some conceivably impermissible application of a statute is not enough to make it susceptible to an overbreadth challenge); *see also Joseph H. Munson Co.*, 467 U.S. at 964-95 ("substantial overbreadth" is criterion the Court uses to avoid striking down a statute because of the possibility that it might be applied in an unconstitutional manner); Cleanup '84 v. Heinrich, 759 F.2d 1511 (11th Cir. 1985) (statute prohibiting solicitation of signatures on petitions within 100 yards of polling place on election day was overbroad).

183. *See supra* notes 154-57 and accompanying text.

184. The Naturists are challenging Accomack's county statute as overbroad since it prohibits all "states of nudity." NCN's Complaint, *supra* note 1, at 13.

185. Chapin v. Town of Southampton, 457 F. Supp. 1170, 1176-77 (E.D.N.Y. 1978) ("nudity" was not overbroad since prohibiting nudity on public beaches is restriction on "place" rather than a total ban on nudity); *cf.* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (striking down local ordinance prohibiting the showing of films containing nudity by drive-in theater when its screen was visible from public street). *But see* South Fla. Free Beaches, Inc. v. City of Miami, 548 F. Supp. 53, 59 (S.D. Fla. 1982) ("insufficiently clothed to prevent improper exposure of his person" was not unconstitutionally overbroad), *vacated in part, aff'd in part*, 734 F.2d 608 (11th Cir. 1984). The appellants argued that the legislation was arbitrary since it prohibited all nudity—even artistic and cultural exhibi-

Likewise, the federal district court in *South Florida Free Beaches* found the state's disorderly conduct statute, which prohibited conduct that "corrupt[ed] the public morals, or outrage[d] the sense of public decency," to be overbroad.[186] The court reasoned that the statute prohibited other types of protected conduct in addition to nude sunbathing, which it held was unprotected. For example, the court analogized that to some people the performance of religious rituals in public by members of an unpopular religious cult might be characterized as "corrupting the public morals;" yet such religious conduct would clearly be within the protected liberties of the Constitution.[187] In *National Capital Naturist*, plaintiffs challenging a local Virginia ordinance which bans nudity on public beaches have included an overbreadth claim in their complaint, arguing that such terms as "all states of nudity" are unconstitutionally overbroad. In order to succeed on this overbreadth claim, the plaintiffs need to prove that the legislation is substantially overbroad and burdens more first amendment guarantees than is necessary to protect the state's compelling interest in prohibiting nude sunbathing on public beaches. Furthermore, plaintiffs must demonstrate that there is a real danger of significantly compromising protected rights of free expression. The local ordinance must be found to be substantially overbroad before it is struck down; but the courts have been more likely to invalidate an ordinance due to overbreadth than for vagueness.

IV. Conclusion

In challenging a local ordinance which prohibits nude sunbathing, the plaintiffs will have to prove that nude sunbathing is communicative in nature or that nude sunbathers gather together for associational purposes in order for their conduct to be entitled to first amendment protection. Thus far, the courts' only rationale for refusing to extend constitutional protection to nude sunbathing has been based on the individualistic and nonassociational characteristics of nude sunbathing. If the plaintiffs can demonstrate that

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tions. Appellant's Brief at 29, *South Fla. Free Beaches, Inc.*, 734 F.2d at 608.

186. *South Fla. Free Beaches, Inc.*, 548 F. Supp. at 60-61 (although declared overbroad, the entire statute was not struck down since the unconstitutional portion was severable from the rest). *But see South Fla. Free Beaches, Inc.*, 734 F.2d at 611-12 (since plaintiffs would still not be entitled to the relief sought—a declaration that nude sunbathing is constitutionally protected—the circuit court, on appeal, declined to address the plaintiffs' overbreadth claims).

187. *South Fla. Free Beaches, Inc.*, 548 F. Supp. at 60-61.

nude sunbathing is a vehicle for communicating ideas, the court will be faced with greater difficulty in denying constitutional protection to nude sunbathing. Nevertheless, even if plaintiffs can demonstrate the expressive and associational nature of nude sunbathing, the courts may still find other bases for denying constitutional protection to nude sunbathing. Although not yet raised in connection with nude sunbathing, the courts may find that such conduct violates general and traditional ideas of decency and morals within our Constitution. Consequently, the rights of the greater majority of people not desiring nude sunbathing may outweigh the protected right of the minority which seeks to sunbathe in the nude.