Duquesne Law Review

Volume 30 | Number 2 Article 11

1992

Constitutional Law - First Amendment - Freedom of Expression - Public Indecency

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CONSTITUTIONAL LAW—FIRST AMENDMENT—FREEDOM OF EXPRESSION—PUBLIC INDECENCY—The United States Supreme Court held that the enforcement of Indiana's public indecency statute to require dancers to wear G-strings and pasties at adult entertainment establishments did not violate the First Amendment.

Barnes v Glen Theatre, Inc., US , 111 S Ct 2456 (1991).

In 1985, Glen Theatre, Inc. (hereinafter "Glen Theatre"), an adult entertainment establishment wishing to feature nude dancing,[1] and two scheduled performers[2] brought suit in federal court to enjoin the state of Indiana from enforcing the Indiana public indecency statute.[3] The United States District Court for the Northern District of Indiana granted the motion for the preliminary injunction,[4] holding that the statute was overly broad on its

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1. *Barnes v Glen Theatre, Inc.*, 111 S Ct 2456, 2459 (1991). Glen Theatre, Inc. was an Indiana corporation with a place of business in South Bend known as the Chippewa Bookstore, which provided adult entertainment including live nude and semi-nude performances by female dancers. *Glen Theatre, Inc. v Civil City of South Bend*, 726 F Supp 728, 729 (N D Ind 1985). Customers would sit in private booths and insert coins in a timing mechanism permitting them to observe the performances through glass panels. *Glen Theatre*, 726 F Supp at 729. Only fee-paying, consenting adults over the age of eighteen could view the performances, and no accidental viewing by a nonconsenting person was possible. Id.

2. *Barnes*, 111 S Ct at 2459. The two performers were Gayle Ann Marie Sutro and Carla Johnson. Id. Ms. Sutro had been a dancer, model, and actress for more than fifteen years and was to perform at the Chippewa Bookstore in conjunction with her appearance in a pornographic movie also being shown in South Bend. Id.

3. Id at 2458. Ind Code § 35-45-4-1 provides in pertinent part:

(a) A person who knowingly or intentionally, in a public place:
(1) Engages in sexual intercourse;
(2) Engages in deviate sexual intercourse;
(3) Appears in a state of nudity; or,
(4) Fondles the genitals of himself or another person, commits public indecency, a class A misdemeanor.
(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

Ind Code § 35-45-4-1 (1977).

From 1983 to 1985, approximately eleven individuals were arrested at the Chippewa Bookstore for violating this statute. *Glen Theatre*, 726 F Supp at 729.

4. Black's Law Dictionary defines "preliminary injunction" as "an injunction granted at the institution of a suit, to restrain the defendant from doing or continuing some act, the right to which is in dispute, and which may either be discharged or made perpetual, according to the result of the controversy, as soon as the rights of the parties are determined." *Black's Law Dictionary* 705 (West, 5th ed 1979).

face.[5]

The United States Court of Appeals for the Seventh Circuit reversed the district court's finding that the statute was unconstitutional on its face.[6] The court of appeals based its decision on the United States Supreme Court's summary dismissal of the appeals from three Indiana Supreme Court decisions which found that the public indecency statute was not overly broad and therefore was constitutional on its face.[7] The case was remanded to the district court to determine if the statute was constitutional as applied.[8]

On remand, the district court consolidated the *Glen Theatre* case with two other cases,[9] and held that the type of nude dancing in question was not expressive activity protected by the First Amendment,[10] but was mere conduct that was within the police

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5. *Glen Theatre*, 726 F Supp at 732. In their complaint, the plaintiffs sought both injunctive relief and a declaratory judgment that the public indecency statute was unconstitutional on its face or in the alternative, that the statute was unconstitutional as applied to the performances at the Chippewa Bookstore. Id at 729.

The district court, through Chief Judge Allen Sharp, found that because the statute prohibited all nude appearances in public places at any time, in any manner, and for any purpose, the statute was overly broad in that it could have a substantial detrimental effect on legitimate expression protected by the First Amendment. Id at 732. The court noted a number of decisions, including *State v Baysinger*, 272 Ind 236, 397 NE2d 580 (1980), and *Schad v Borough of Mt. Ephriam*, 452 US 61 (1981), which indicated that non-obscene nude dancing may be entitled to some form of First Amendment protection. *Glen Theatre*, 726 F Supp at 729.

For a discussion of *Baysinger* and *Schad*, see notes 89-109 and accompanying text.

6. *Glen Theatre, Inc. v Pearson*, 802 F2d 287 (7th Cir 1986).

7. *Glen Theatre*, 802 F2d at 288. The court of appeals noted that the overbreadth challenge to the constitutionality of § 35-45-4-1 was rejected by the Indiana Supreme Court in *Baysinger*. Id. See note 5. Thus the court concluded that the United States Supreme Court's summary dismissal of the appeal in *Baysinger*, along with the appeals in two other cases that raised the identical issue of the overbreadth of § 35-45-4-1, *Clark v Indiana and Lake County Prosecutor*, 446 US 931 (1980), and *Dove v State*, 449 US 806 (1980), amounted to a ruling that the statute was constitutional on its face. *Glen Theatre*, 802 F2d at 289.

8. *Glen Theatre*, 802 F2d at 290.

9. *Glen Theatre, Inc. v Civil City of South Bend*, 695 F Supp 414 (N D Ind 1988). The two cases consolidated with *Glen Theatre* were *Miller v Civil City of South Bend*, No S 85-598, and *Diamond v Civil City of South Bend*, No S 85-722.

The *Miller* case involved an establishment known as JR's Kitty Kat Lounge, Inc., which wished to provide nude entertainment in light of the injunction issued in the original *Glen Theatre* case. *Glen Theatre*, 695 F Supp at 420. The owner of the Kitty Kat Lounge, Inc. and Darlene Miller, a dancer, brought suit for an injunction. Id.

Similarly, in the *Diamond* case, Sandy Diamond, Lynn Jacobs and two corporations (Ramona's Car Wash and the Ace-Hi Lounge) sought injunctive relief against the same defendants to enjoin them from enforcing the public indecency statute. Id at 421.

Prior to the district court's hearing on remand, the Chippewa Bookstore was destroyed by fire, and the cause of action as to that plaintiff became moot. Id at 416.

10. Id at 418. For a discussion of the First Amendment and its applicability to the

power of the state to prohibit or regulate.[11]

The case was again appealed to the Seventh Circuit where a panel of judges unanimously held that the public indecency statute was unconstitutional as applied because the nude dancing in question was expressive activity protected by the First Amendment.[12] Upon a majority vote by the judges sitting in the Seventh Circuit, that opinion was vacated, and a rehearing en banc[13] was granted.[14] On rehearing, the majority[15] concluded that nonobscene nude dancing performed for entertainment is protected expressive activity and that the Indiana public indecency statute impermissibly infringed on that protected activity.[16]

The United States Supreme Court granted certiorari to decide the issue of whether the Indiana public indecency statute as ap-

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states through the Due Process Clause of the Fourteenth Amendment, see notes 54-58 and accompanying text.

11. *Barnes*, 111 S Ct at 2459.

12. Id at 2459, 2460, citing *Miller v Civil City of South Bend*, 887 F2d 826 (7th Cir 1989).

13. *Barnes*, 111 S Ct at 2460. "En banc" refers to a session where the entire membership of the court will participate in the decision rather than the regular quorum. *Black's Law Dictionary* at 472 (cited in note 4).

14. *Miller v Civil City of South Bend*, 904 F2d 1081, 1082 (7th Cir 1990).

15. Circuit Judge Flaum wrote the majority opinion in which Chief Judge Bauer and Circuit Judges Cummings, Wood, Jr., Cudahy, Posner, and Ripple joined. *Miller*, 904 F2d at 1081. In a concurring opinion, Circuit Judge Cudahy, while agreeing that "striptease dancing" is expressive activity, questioned the need to invoke the First Amendment. Id at 1089. He argued that the Founding Fathers did not have "striptease dancing" in mind when drafting the Amendment. Id.

In an exhaustive separate concurring opinion, Circuit Judge Posner attempted to refute every conceivable argument against recognizing striptease dancing as an expressive artform. Id at 1089-1104.

Circuit Judge Coffey wrote a dissenting opinion arguing that the application of the public indecency statute to nude dancing implemented the state's legitimate interest in public morality, which interest was unrelated to the expression prohibited. Id at 1105.

In another dissenting opinion, Circuit Judge Easterbrook, joined by Circuit Judges Manion and Kanne, and joined in part by Circuit Judge Coffey, argued that nudity is conduct, not expression, which may be regulated by the state without violating the First Amendment. Id at 1120.

Finally, Circuit Judge Manion also entered a dissenting opinion, joined by Circuit Judges Coffey and Easterbrook, in which he argued that the statute was valid because the nude dancing in question communicated no ideas. Id at 1131. Additionally he contended that even if nude dancing was expressive, the expressive elements would be outweighed by the State's interest in prohibiting public nudity. Id.

16. Id. The Seventh Circuit in *Miller*, 904 F2d 1081, in concluding that nude dancing for entertainment is expressive activity, reasoned that the nude dancers intended to communicate a message of eroticism and sensuality, and the message was understood by those who viewed it. Id at 1086-87. Thus the state, while retaining the right to establish reasonable time, place and manner restrictions on the expressive activity, could not permissibly impose a total ban on the activity. Id at 1088-89.

plied was an impermissible infringement on an expressive activity protected by the First Amendment.[17]

The Supreme Court, in a 5-4 decision,[18] reversed.[19] Justice Rehnquist began by recognizing that nude dancing for entertainment is expressive conduct within the "outer perimeters" of First Amendment protection.[20] He noted, however, that it was still necessary to determine the level of protection to be afforded to this type of conduct.[21] He likewise indicated a need to determine whether Indiana's public indecency statute impermissibly infringed upon the protected activity of nonobscene nude dancing.[22]

In addressing these issues, the Court cited *United States v O'Brien*,[23] which held that a sufficiently important governmental interest in regulating some forms of expressive conduct can justify incidental limitations on First Amendment freedoms.[24] The *O'Brien* Court had applied the following four-prong test to determine whether the governmental interest is sufficiently justified: (1) the regulation must be within the constitutional power of the government; (2) the regulation must further an important or substantial government interest; (3) the government interest must be unrelated to the suppression of free expression; and (4) the incidental restriction must be no greater than is essential to the furtherance of that interest.[25]

Applying the *O'Brien* test, the Court found that the public indecency statute was within the constitutional power of the state,

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17. *Barnes*, 111 S Ct at 2460.

18. Chief Justice Rehnquist wrote the plurality opinion, joined by Justices O'Connor and Kennedy. Justices Scalia and Souter wrote concurring opinions. The dissent was written by Justice White, joined by Justices Marshall, Blackmun, and Stevens. Id at 2458.

19. Id at 2463.

20. Id, citing *Doran v Salem Inn, Inc.*, 422 US 922 (1975), and *Schad*. See note 5. For a discussion of *Doran* and *Schad*, see notes 79-88, 99-110 and accompanying text.

21. *Barnes*, 111 S Ct at 2460.

22. Id. The respondents in this case were The Kitty Kat Lounge, Inc., and Glen Theatre, Inc., along with dancers Gayle Ann Marie Sutro, Carla Johnson, and Darlene Miller. Id at 2458-59. They contended that the statute was an impermissible infringement in that it limited the performance of the dancers. Id at 2460. The state, however, argued that the restriction on nude dancing under the statute was a valid "time, place, and manner restriction under *Clark v Community for Creative Non-Violence*, 468 US 288 (1984), and was thus not an unconstitutional infringement. *Barnes*, 111 S Ct at 2460.

23. 391 US 367 (1968). *O'Brien* involved a man who had burned his draft card in protest of the Vietnam War in violation of a statute prohibiting the destruction or mutilation of such cards. *O'Brien*, 391 US at 369. O'Brien claimed that the statute was a violation of his First Amendment rights because his act was symbolic and expressive. Id at 376. The Supreme Court upheld his conviction. Id at 386.

24. *Barnes*, 111 S Ct at 2461.

25. Id, quoting *O'Brien*, 391 US at 376, 377.

thereby satisfying the first prong of the test.[26] The Court also found that the second prong of the test was met because the statute furthered a substantial governmental interest in protecting order and morality.[27] Justice Rehnquist noted that a state's police power traditionally included the authority to provide for public health, safety, and morals, and that such bases for legislation have been upheld.[28]

The Court next turned to the issue of whether the government's interest in protecting the public morality was unrelated to the suppression of free expression.[29] Justice Rehnquist determined that the government's interest was not related to the suppression of free expression in that the statute sought to prevent public nudity, not the expressive activity of dancing.[30]

Finally, Justice Rehnquist noted that the restriction that the dancers wear G-strings and pasties was no greater than necessary to further the governmental interest in prohibiting nudity in public places, and was therefore only an incidental limitation that was justified.[31] Thus the Court held that although totally nude dancing was expressive conduct within the outer perimeters of the First Amendment,[32] the enforcement of the Indiana public indecency statute did not violate the respondents' right to freedom of expression.[33]

Justice Scalia, in a concurring opinion, argued that because the statute in question was a general law[34] not specifically directed at

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26. *Barnes*, 111 S Ct at 2461.

27. Id at 2461-62.

28. Id at 2462. The Court here noted that public indecency statutes existed in forty-seven states at that time, and that the current Indiana statute was the latest in a long line of statutes barring all public nudity in the state which could be traced back at least as far as 1831. Id at 2461.

29. Id at 2462.

30. Id at 2463. The Court rejected the respondent's argument that the prohibition of nude dancing was related to suppression of free expression because the state sought to prevent the erotic message of the dance. Id. The Court reasoned that it was the non-communicative aspect of the dance, i.e., the nudity, that the state sought to address, not the erotic expression conveyed in the dance. Id. The Court concluded that a requirement that the dancers wear G-strings and pasties did not deprive the dance of its erotic message. Id at 2462, 2463.

31. Id at 2463.

32. Id at 2460.

33. Id at 2463.

34. Id at 2464-65. To Justice Scalia, a general law is one which regulates conduct and is not directed at expression in particular. Id at 2464. He noted that public indecency, in addition to being a statutory crime in Indiana at least as far back as 1831, was also a crime at common law. Id. Thus, public indecency predated the appearance of barroom dancing by many years. Id. To lend further credence to his position that the statute regulated conduct

nude dancing, it did not require First Amendment scrutiny.[35] Justice Scalia noted that not every law which restricts conduct is entitled to such scrutiny, and that where the suppression of communicative conduct is a mere incidental effect of forbidding conduct for other reasons, the regulation will be upheld.[36]

Justice Scalia concluded that, because the state was regulating conduct (nudity) rather than expression (dancing), the statute required only a rational basis to be upheld, and the moral opposition to public nudity supplied such a basis for its prohibition.[37]

In a separate concurring opinion, Justice Souter agreed that nude dancing is subject to some form of First Amendment protection.[38] He also agreed that the *O'Brien* four-prong test was the appropriate analysis to determine the level of that protection.[39] However, he argued that the government had a more substantial interest in prohibiting nude dancing than the protection of order and morality advanced by the plurality.[40] Justice Souter believed that the governmental interest in preventing the secondary effects of adult entertainment establishments, such as prostitution, sexual assault and other criminal activity, was sufficient to satisfy the second prong of the *O'Brien* test and thus to justify the enforcement of the statute against nude dancing for entertainment.[41] The pre-

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in general and not expression in particular, Justice Scalia contended that it is possible to violate the statute without conveying any erotic message, and that it is also possible to express eroticism without violating the statute. Id.

35. Id at 2465. Under strict First Amendment scrutiny, any governmental regulation prohibiting expressive conduct "precisely because of its communicative attributes" is unconstitutional. Id at 2466. Justice Scalia likewise disagreed with the plurality's application of "an intermediate level of First Amendment scrutiny" under the *O'Brien* test, whereby the governmental interest must be important or substantial. Id at 2467. He argued that the Court should avoid an assessment of the importance of government interests, particularly in the area of morality. Id.

36. Id at 2466. In support of his position that a general law only incidentally affecting a protected activity should be upheld, Justice Scalia cited *Employment Div., Or. Dep't of Human Resources v Smith*, 110 S Ct 1595 (1990). Therein the Court held that a general law prohibiting the use of the drug peyote did not require heightened First Amendment scrutiny although the incidental effect of the law was to diminish the ability of those who used peyote for sacramental purposes to practice their religion. *Smith*, 110 S Ct at 1603. Justice Scalia thus concluded that if the general law is not directed against the protected value itself, whether the value be religion or expression, the law should be upheld without implicating the First Amendment. *Barnes*, 111 S Ct at 2467.

37. *Barnes*, 111 S Ct at 2468.

38. Id. Justice Souter argued that the "stimulative and attractive value" of nudity when combined with expressive activity served to enhance the force of the expression. Id.

39. Id.

40. Id.

41. Id at 2469. Here, Justice Souter noted that South Bend did not have to "await localized proof" of the secondary effects of adult entertainment establishments to legislate

vention of these secondary effects, according to Justice Souter, was unrelated to the suppression of free expression, and thus the third requirement of the *O'Brien* test was satisfied.[42] Justice Souter agreed with the majority that the requirement that dancers wear pasties and G-strings was no greater than necessary to further the government's interest.[43] He thus concluded that the statute was not unconstitutional as applied.[44]

In the dissenting opinion,[45] Justice White began his analysis by addressing the issue of whether nonobscene nude dancing is expressive conduct protected by the First Amendment.[46] Although he agreed that such conduct is a form of expressive activity, he argued that the third prong of the *O'Brien* test, that the governmental interest be unrelated to the suppression of free expression, was not met.[47]

Justice White argued that the Court was wrong in concluding that the statute in question was a "general" proscription on individual conduct.[48] Rather, the purpose of the proscription in the nude dancing context was to protect viewers from what the state believed was the harmful message communicated by nude dancing.[49] Thus the third prong of the *O'Brien* test was not met because the governmental interest was directly related to the sup-

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against them. Id. He cited *Renton v Playtime Theatre, Inc.*, 475 US 41 (1986), in which the Court upheld a city of Renton zoning ordinance designed to prevent the secondary effects of adult entertainment establishments. *Renton*, 475 US at 44. The Court held that the city of Renton was not required to justify the ordinance based on problems that would occur in that city, but could rely on the experiences of other cities as a justification. Id at 50.

42. *Barnes*, 111 S Ct at 2470-71.

43. Id.

44. Id.

45. Justice White wrote the dissent, which was joined by Justices Marshall, Blackmun and Stevens. Id at 2471.

46. Id.

47. Id at 2473-74.

48. Id at 2472. Justice White argued that the cases relied upon by the Court involved nothing less than general proscriptions on activity. Id. Thus in *O'Brien*, the burning of draft cards was prohibited anywhere, even in the home. Id. The law in question here, however, did not involve a general prohibition on nudity because the statute cannot be applied to nudity anywhere, but only to nudity in public places. Id.

Justice White further noted that under *Baysinger*, see note 5, nudity involving the communication of ideas, such as in plays, operas, or ballets, was not prohibited by the statute. Id. Thus, because the statute was not general in effect, the burden is on the state to justify the restrictions. Id.

49. Id at 2473. Justice White contended that the purpose of prohibiting nudity in public places such as beaches or parks is to protect others from the offensive conduct, whereas that purpose is inapplicable to situations such as the one at issue in that all viewers in adult entertainment establishments are consenting adults. Id.

pression of the expressive activity of nude dancing.[50]

Finally, Justice White contended that the restrictions could only be upheld if narrowly drawn,[51] which these restrictions were not because they banned an entire category of expressive activity.[52] He concluded that the Indiana public indecency statute as applied to nonobscene nude dancing for entertainment was unconstitutional as a violation of the First Amendment guarantee of freedom of expression.[53]

The First Amendment of the United States Constitution guarantees the freedom of speech from congressional infringement.[54] Additionally, through the Due Process Clause of the Fourteenth Amendment, the right to free speech is protected from abridgment by the states.[55] The First Amendment also guarantees the right of citizens to engage in many other types of expressive activity in addition to the written and spoken word.[56] One protected type of expressive activity is entertainment, which includes motion pictures, programs on radio and television, and live entertainment.[57] A ca-

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50. Id at 2474. Justice White argued that, "The nudity itself is an expressive component of the dance, not merely incidental 'conduct.' " Id.

51. Id, citing *United States v Grace*, 461 US 171 (1983).

52. *Barnes*, 111 S Ct at 2475. Justice White suggested a number of restrictions a state could adopt without interfering with the expressiveness of nonobscene nude dancing, such as requiring the performers to remain a certain distance from the spectators, that the activity be limited to certain hours, or that the establishments be dispersed throughout the city. Id.

53. Id.

54. The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech. . . ." US Const, Amend I.

55. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." US Const, Amend XIV.

In 1925, the Supreme Court held that the First Amendment was binding on the states through the Fourteenth Amendment. *Gitlow v New York*, 268 US 652 (1925). US Const, Amend 14.

56. Lisa Malmer, *Nude Dancing and the First Amendment*, 59 U Cin L Rev 1275, 1276 (1991). In note seven of *Nude Dancing*, the author cited a number of cases in which certain activities were recognized as expressive conduct entitled to First Amendment protection:

> See, e.g., *Texas v Johnson*, US , 109 S Ct 2533 (1989) (burning American flag to convey political message is protected expression); *Spence v Washington*, 418 US 405, 410 (1974) (per curiam) (attaching peace symbols to American flag and flying it upside down recognized as method of conveying political message); *Tinker v Des Moines School Dist.*, 395 US 503, 505-06 (1969) (wearing armbands to protest Vietnam War was form of protected symbolic speech).

Malmer, 59 U Cin L Rev at 1276 (cited within this note).

57. *Schad v Borough of Mt Ephriam*, 452 US 61, 65 (1981), citing *Joseph Burstyn, Inc. v Wilson*, 343 US 495, 497 (1952) (expression by means of motion pictures was included

veat to the freedom of expression is that obscene material receives no First Amendment protection.[58]

In the 1950's, United States courts first began to address the issue of whether nonobscene nude dancing was a form of expressive activity protected by the First Amendment. The earliest of these cases was *Adams Newark Theatre, Co v City of Newark*.[59] Therein, two operators of a theater that provided live stage shows featuring nude and semi-nude dancers brought suit alleging that the statutory amendments to two city ordinances[60] were unconstitutional infringements on freedom of speech.[61] Noting that recent decisions had placed stage shows and movies within the protection of the First Amendment,[62] the New Jersey Supreme Court[63] addressed the issue of whether the Newark ordinance was a permissible police power limitation on the freedom of speech.[64]

Upon review, the New Jersey Supreme Court applied the "dominant effect" test.[65] This test dictated that a court should look at a

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within free speech guaranty of the First and Fourteenth Amendments); *Schact v United States*, 398 US 58, 62 (1970) ("street skit" was theatrical production protected by the First and Fourteenth Amendments); *Southeastern Promotions Ltd. v Conrad*, 420 US 546, 557 (1975) (theatre and live drama were protected by the First and Fourteenth Amendments); *Erznoznik v City of Jacksonville*, 422 US 205, 206 (1975) (drive-in movies were protected form of expression).

58. *Roth v United States*, 354 US 476, 485 (1957). For a discussion of *Roth* and the modern concept of obscenity, see note 74.

59. 22 NJ 472, 126 A2d 340 (1956), aff'd, 354 US 931 (1957).

60. *Adams Newark Theatre, Co.*, 126 A2d at 341. The two original ordinances (one an ordinance regulating shows and exhibitions, the other a Disorderly Persons ordinance) in general language condemned obscenity and lewdness by actors or shows. Id. The amendments placed specific types of conduct within the general prohibitions of the original statute. Id. Among the activities prohibited by the amendments were "the removal by a female performer . . . of her clothing, so as to make nude, or give the illusion of nudeness" and "the performance of any dance . . . the purpose of which is to direct the attention of the spectator to the breasts, buttocks, or genital organs of the performer." Id at 341-42. The amendments punished the performer as well as the promoter of the show which violated the amendments. Id at 342.

61. Id at 341.

62. Id. See *Joseph Burstyn, Inc. v Wilson*, 343 US 495 (1952); *Adams Theatre Co. v Keenan*, 12 NJ 267, 96 A2d 519 (1953).

63. The New Jersey Superior Court had entered summary judgment in favor of the plaintiffs. *Adams Newark Theatre Co. v City of Newark*, 39 NJ Super 111, 120 A2d 496 (1956). *Adams Newark Theatre*, 126 A2d at 343.

64. *Adams Newark Theatre*, 126 A2d at 342.

65. Id. The "dominant effect" test was first set forth in *United States v One Book Entitled "Ulysses,"* 72 F2d 705 (2d Cir 1934), aff'g 5 F Supp 182 (S D NY 1933). Therein, the United States attempted to prevent the importation of James Joyce's novel *Ulysses*, which was considered obscene. *One Book Entitled "Ulysses,"* 72 F2d at 706. The Second Circuit Court of Appeals stated that where a literary publication is sincere and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the

performance with a sexual theme as a whole and determine whether the "dominant note" of the dance is "erotic allurement."[66] If so, the conduct is considered obscene or indecent and is thus not entitled to any constitutional protection.[67] In applying the test, the court noted that the majority of the acts prohibited, including nude dancing, were acts condemnable as being contrary to "good morals and decency."[68] The court concluded that, because the amendments in question were designed to contribute to the health, welfare and morals of society, they were a valid exercise of the police power and were therefore constitutional.[69]

In *California v LaRue*,[70] the United States Supreme Court for the first time intimated that nude dancing might be entitled to some form of First Amendment protection under certain circumstances.[71] *LaRue* involved certain regulations promulgated by the California Department of Alcoholic Beverage Control (hereinafter "The Department") prohibiting explicit live entertainment and films in establishments licensed to serve liquor.[72] Prior to the issuance of the regulations, the Department held hearings concerning disturbing incidents that had occurred at establishments that featured "topless" and "bottomless" dancing.[73] The district court ruled that the regulations unconstitutionally abridged freedom of expression.[74] The Supreme Court reversed.[75] Justice Rehnquist,

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publication," the work is not obscene. Id at 707. The court held that *Ulysses* was not obscene under this "dominant effect" test. Id at 707-08.

66. *Adams Newark Theatre*, 126 A2d at 342. The term "erotic allurement" has been defined as " 'tending to excite lustful and lecherous desires', dirt for dirt's sake only, smut and inartistic filth, with no evident purpose but to 'counsel or invite to vice or voluptuousness.' " Id, quoting *People v Wendling*, 258 NY 451, 180 NE 169 (1932).

67. *Adams Newark Theatre*, 126 A2d at 342. See *Bonserk Theatre Corp. v Moss*, 34 NYS2d 541 (1942).

68. *Adams Newark Theatre*, 126 A2d at 343. The court did not specify who determines what "good morals" are, but stated that "[I]t must be admitted beyond the realm of debate that the large majority of the acts prohibited are obviously condemnable. . . ." Id.

69. Id at 345.

70. 409 US 109 (1972).

71. *LaRue*, 409 US at 118.

72. Id at 110.

73. Id at 111. These incidents included: "Customers engaging in oral copulation with women entertainers . . . public masturbation . . . numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers." Id.

The Department also found that prostitution, indecent exposure, rape and assaults all took place in and around such establishments. Id.

74. Id at 113. The district court ruled that the regulations had to be justified as either a prohibition of obscenity under the *Roth v United States*, 354 US 476 (1957), line of cases, or as a regulation of "conduct" with a communicative element, as in *O'Brien v United States* (see note 23). *Roth* was the landmark case regarding the general law of obscenity in

writing for the Court, noted that the states have broad power to regulate establishments serving liquor under the Twenty-First Amendment.[76] The Court concluded that the Department made a rational decision that certain sexual performances should not occur on premises that serve alcoholic beverages.[77] The Court indicated, however, that not all such conduct was outside the protection of the First and Fourteenth Amendments.[78]

In *Doran v Salem Inn, Inc.*,[79] the Supreme Court moved closer to recognizing First Amendment protection for nude dancing.[80] In

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the United States. Nude Entertainment as Public Offense, 49 ALR3d 1084 (1973). *Roth* held that obscenity was not protected speech under the First Amendment. *Roth*, 354 US at 485. The Court held that the proper test for determining obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." Id at 489.

The *Roth* test was further delineated in *Memoirs v Massachusetts*, 383 US 413 (1966), wherein the Court held that in order to find obscenity, it is necessary to establish that: (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex, (2) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) the material is without redeeming social value. *Memoirs*, 383 US at 418. This test was modified in *Miller v California*, 413 US 15, 23 (1973). Malmer, 59 U Cin L Rev at 1276, 1277 (cited in note 56). The *Miller* test held that a party charging obscenity must establish that the material: (1) would be found as a whole, by the average person applying contemporary community standards, to appeal to the prurient interest; (2) depicted or described in a patently offensive way sexual conduct as specifically defined by the relevant state law; and (3) as a whole lacked serious literary, artistic, political, or scientific value. *Miller*, 413 US at 24. Malmer, 59 U Cin L Rev at 1276, 1277 (cited in note 56).

For a more thorough discussion of the modern concept of obscenity, see Obscenity, 5 ALR 3d 1158 (1966).

For a discussion of *O'Brien*, see note 23 and accompanying text.

75. *LaRue*, 409 US at 119.

76. Id at 114. The Twenty-First Amendment to the United States Constitution provides in pertinent part: "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." US Const, Amend XXI, § 2.

The Court, citing *Hostetter v Idlewild Liquor Corp.*, 377 US 324 (1964), noted that the state's authority under the Twenty-First Amendment is greater than the normal police power over public health, welfare and morals. *LaRue*, 409 US at 114. For a more thorough discussion of state regulation of nude dancing at establishments serving liquor under the Twenty-First Amendment, see Malmer, 59 U Cin L Rev at 1281 (cited in note 56).

77. *LaRue*, 409 US at 118.

78. Id. Justice Rehnquist wrote: "While we agree that at least some of these performances . . . are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has . . . merely proscribed such performances in establishments that it licenses to sell liquor." Id. While not specifying what types of conduct would be protected, Justice Rehnquist did state that the "sort of bacchanalian revelries that the Department sought to regulate" were not the "constitutional equivalents of a performance by a scantily clad ballet troupe." Id.

79. 422 US 922 (1975).

80. *Doran*, 422 US at 932.

Doran, three corporations which operated bars providing topless dancing as entertainment challenged as a violation of the First and Fourteenth Amendments a North Hempstead, New York, city ordinance[81] prohibiting topless entertainers, waitresses and barmaids.[82] The district court granted a preliminary injunction to enjoin enforcement of the ordinance.[83] The Court of Appeals for the Second Circuit affirmed.[84] The United States Supreme Court, citing *LaRue*, indicated that customary "barroom" nude dancing may be entitled to a bare minimum of protection under the First and Fourteenth Amendments.[85] Agreeing with the district court, the Supreme Court observed that the statute applied not merely to places which serve liquor,[86] but to any "public place" where females appear with uncovered breasts.[87] The Court concluded that the district court was correct in granting a preliminary injunction.[88]

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81. Id at 924. The ordinance in question made it unlawful for females to uncover their breasts "in any public place." Id at 933.

82. Id at 924. The plaintiffs argued that the statute was overbroad because it prohibited nonobscene conduct in the form of topless dancing. Id at 925. The overbreadth doctrine dictates that a government may not enact regulations that reach both protected and unprotected First Amendment activities. Malmer, 59 U Cin L Rev at 1288 (cited in note 56). Thus, regulations that are not narrowly drawn to prohibit only activities which are not protected under the First Amendment, but also prohibit some activities that are protected, will be struck down under the overbreadth doctrine. Id.

83. *Doran*, 422 US at 925.

84. Id at 926. The court of appeals held that the issuance of the preliminary injunction was warranted due to the "deprivation of constitutional rights and the diminution in business" resulting from the prohibitions in the ordinance. Id.

85. Id at 932. Justice Rehnquist delivered the majority opinion in an 8-1 decision. Justice Douglas filed a separate opinion concurring in part and dissenting in part. Id at 923, 924.

86. Id at 933. Although the plaintiffs in this action were all operators of bars, they still had standing to bring an overbreadth action. Id. The Court said that a statute or ordinance may be challenged on the basis of overbreadth "if it is so drawn as to sweep within its ambit protected speech or expression of others not before the Court." Id. Thus, although the ordinance in question may have been constitutional as applied to bar owners, the fact that it was drawn so broadly as to include others not before the Court gave these plaintiffs a right to challenge it. Id.

87. Id. Justice Rehnquist quoted, "There is no limit to the interpretation of the term 'any public place.' It could include the theater, town hall, opera house . . . or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit . . . a number of . . . works of unquestionable artistic and socially redeeming significance." Id, quoting *Salem Inn, Inc. v Frank*, 364 F Supp 478 (1973), aff'd, 501 F2d 18 (2d Cir 1974).

88. *Doran*, 422 US at 934. The Court was careful to emphasize that they were merely holding that the district court did not abuse its discretion in granting a preliminary injunction, and were not intimating a view as to the merits of the plaintiffs' contention. Id. It is important to note here that the Supreme Court, while implying that nude dancing "may involve" the "barest minimum of protection" and that it "might" be entitled to some First

Following *Doran*, many jurisdictions held that state public indecency statutes prohibiting nude dancing were unconstitutional unless they were related to the regulation of establishments serving alcohol.[89] However, other courts, such as the Indiana Supreme Court in *State v Baysinger*,[90] upheld public indecency statutes as valid exercises of the police powers.[91]

In *Baysinger*, dancers and owners of adult establishments offering nude dancing as entertainment challenged the Indiana public indecency statute[92] as an unconstitutional infringement on their First Amendment rights.[93] The Indiana Supreme Court was then faced with the issue of whether the public indecency statute was overbroad.[94]

The plaintiffs contended that the statute was overbroad because it prohibited certain types of protected expression, such as nude dancing, in addition to other forms of non-protected public nudity.[95] The *Baysinger* majority, however, held that barroom

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Amendment protection, was not making a determination on that issue. Id.

89. *Jamaica Inn, Inc v Daley*, 53 Ill App 3d 257, 368 NE2d 589, 594 (1977) (Chicago ordinance prohibiting nudity in any public place is unconstitutionally overbroad); *New York Topless Bar and Dancers Ass'n v New York State Liquor Authority*, 91 Misc 2d 780, 782, 398 NYS2d 637 (NY Sup Ct 1977) (state law prohibiting "topless" dancing in premises licensed to sell alcoholic beverages is not an unwarranted unconstitutional invasion of the freedom of expression); *People v Nixon*, 88 Misc 2d 913, 390 NYS2d 518 (NY Sup Ct 1976) (Yonkers law prohibiting the exposure of a female breast in any public place is unconstitutionally overbroad).

90. 272 Ind 236, 397 NE2d 580 (1979).

91. *Baysinger*, 397 NE2d at 587. The statute at issue in *Baysinger* was Ind Code § 35-45-4-1, the same statute which was analyzed in *Barnes*. Id at 581. The *Baysinger* case was a consolidation of three separate cases each dealing with the same issue of whether the Indiana public indecency statute was overly broad. Id. In two of the cases, the lower court ruled that the statute was indeed unconstitutional and enjoined the state from enforcing it. Id. In the other, charges of indecent exposure pursuant to the statute were dismissed on the basis of vagueness and/or overbreadth. Id.

92. For a discussion of Ind Code § 35-45-4-1, see note 3.

93. *Baysinger*, 397 NE2d at 583.

94. Id. In addition to the overbreadth issue, the statute was also challenged as being unconstitutionally vague in that the term "public place" was undefined. Id at 582. The court found no merit to this contention. Id at 583. The court quoted *Peachy v Boswell*, 240 Ind 604, 167 NE2d 48, 56-57 (1960): "We have concluded that the phrase 'in any place accessible to the public' . . . means any place where the public is invited and are free to go upon special or implied invitation—a place available to all or a certain segment of the public." *Baysinger*, 397 NE2d at 583, quoting *Peachy*, 167 NE2d at 56-57.

95. *Baysinger*, 397 NE2d at 583. The plaintiffs in this case relied heavily on *Doran*, 422 US 922 (1975), discussed in notes 79-88 and accompanying text. *Baysinger*, 397 NE2d at 584. The state asserted that *Doran* merely involved an interlocutory appeal and therefore the Court never reached the merits on the constitutional issue. Id. The State argued that *Doran* merely indicated that some form of nude dancing "*might* be entitled to First and Fourteenth Amendment protection *under some circumstances*. . . ." Id (emphasis added).

nude dancing was conduct, not speech, and thus was not entitled to First Amendment protection.[96] In support of its holding, the court highlighted other cases which distinguished between nudity in films and plays, which is entitled to some sort of protection if part of a larger form of expression, and the public nudity sought to be prohibited by public indecency statutes.[97] The court concluded that public nudity in and of itself was conduct traditionally within the police power of the state.[98]

The United States Supreme Court finally addressed the nude dancing issue indirectly in *Schad v Borough of Mount Ephraim*.[99] In *Schad*, operators of an adult bookstore that featured live nude dancing were charged with violating a borough zoning ordinance that restricted uses in a commercial zone.[100] The defendants were convicted in the County Court.[101] The New Jersey Superior Court

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96. *Baysinger*, 397 NE2d at 587. The court stated:

> It is clear the activity involved . . . appearing nude or dancing in the nude . . . is conduct. Appellees make no claim that there is any pure speech involved in their appearances. . . . This is a claim for some kind of right to appear nude in public . . . for money. This activity is conduct, not speech, and as such . . . does not rise to the level of a First Amendment claim.

Id.

97. Id. The court quoted *LaRue*, 409 US at 117: "As the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases." *Baysinger*, 397 NE2d at 585. The court also cited *Erznoznik*, 422 US at 211: "Scenes of nudity in a movie, like pictures of nude persons in a book. . .[are] distinguishable from the kind of public nudity traditionally subject to indecent exposure laws. . . ." *Baysinger*, 395 NE2d at 586.

98. *Baysinger*, 395 NE2d 587. Other jurisdictions also classified nude dancing as mere conduct not entitled to First Amendment protection, most notably in *Crownover v Musick*, 9 Cal 3d 405, 509 P2d 497 (1973). Therein, the California Supreme Court determined that an ordinance regulating nudity in premises serving food and alcoholic beverages was not a prohibition of protected expression but was a mere proscription of nudity. *Crownover*, 509 P2d at 505. *Crownover* was later overruled in *Morris v Municipal Court*, 32 Cal 3d 553, 652 P2d 51 (1982).

99. 452 US 61 (1981).

100. *Schad*, 452 US at 63. As construed by the New Jersey courts, commercial live entertainment of any kind, including nude dancing, was prohibited within the Borough of Mount Ephriam. Id at 65. However, certain forms of non-commercial entertainment, such as the singing of Christmas carols and the performance of high school plays to which no admission was charged, were permitted under the statute. Id at 66 n 5. Additionally, an exemption to the ordinance was granted to three establishments within the Borough which offered live music prior to the enactment of the ordinance. Id at 64 n 3.

101. Id at 64. The defendants were found guilty in the Municipal Court. Id. The County Court heard the case de novo on the record made in the Municipal Court and again found the defendants guilty. Id. The County Court held that the First Amendment guarantee of freedom of expression was not involved because the case involved a zoning ordinance prohibiting all live entertainment, not merely nude dancing. Id. The county court did recognize, however, that "live nude dancing is protected by the First Amendment." Id.

affirmed.[102]

The United States Supreme Court granted certiorari to determine whether a zoning ordinance which prohibited all live entertainment, including nonobscene nude dancing, violated freedom of expression guaranteed by the First and Fourteenth Amendments.[103] Justice White, writing for the majority, set forth the standard of review applied in zoning cases: "When a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest."[104] Applying this standard, the Court held that Mount Ephriam did not adequately justify the restriction on the protected activity.[105] Because the ban on all live entertainment in general was not narrowly drawn and did not draw upon a sufficiently substantial interest, the Court concluded that the zoning ordinance in question could not be constitutionally applied.[106]

More important than the holding in *Schad* was certain dicta that strongly indicated that the Court would recognize nude dancing as a form of protected activity under the First Amendment.[107]

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102. Id at 65.

103. Id.

104. Id at 68.

105. Id at 72. Justice White wrote: "None of the justifications asserted . . . [were] articulated to the state courts and none of them withstands scrutiny." Id. The Borough set forth four justifications for prohibiting live entertainment. First, it contended that "permitting live entertainment would conflict with its plan to create a commercial area that caters only to the "immediate needs" of its residents. Id. The Court rejected this contention because the only service prohibited in the commercial area was live entertainment. Id at 73.

The Borough next asserted that live entertainment could be excluded to avoid the problems normally associated with live entertainment, such as parking, trash, and police protection; however, this argument was rejected for lack of evidence. Id.

The Court also rejected Mount Ephriam's contention that the prohibition was a reasonable time, place, and manner restriction. Id at 74-75. The Court held that exclusion of live entertainment was not reasonable because it prohibited certain activities protected under the First Amendment. Id at 76.

Finally the Court rejected the argument that the live entertainment prohibited was available in close-by areas outside the borough because there was no evidence presented to support that contention. Id.

106. Id.

107. Id at 66. The Court stated:

> "Nudity alone" does not place otherwise protected material outside the mantle of the First Amendment. *Jenkins v Georgia* [418 US 153 (1974)] at 161; *Southeastern Promotions Ltd. v Conrad* [420 US 546 (1975)]; *Erznoznik v City of Jacksonville* [422 US 205 (1975)] at 211-12, 213. Furthermore, as the state courts in this case recognize, *nude dancing is not without its First Amendment protection from official regulation. Doran v Salem Inn, Inc.* [422 US 922 (1975)]; *Southeastern Promotions Ltd. v Conrad*, supra; *California v LaRue* [409 US 109, 118 (1972)].

Schad, 452 US at 66 (emphasis added)

The dicta was not supported by all members of the Court, however.[108] Chief Justice Burger, in a dissenting opinion joined by Justice Rehnquist, questioned whether nude dancing was entitled to any First Amendment protection.[109] Justice Burger forcefully objected to the notion that states were not free to regulate nude dancing, even if such dancing was entitled to some form of First Amendment protection.[110]

Thus, although the opinions in *LaRue*, *Doran*, and *Schad* led to the strong implication that nude dancing was entitled to some sort of First Amendment protection, the issue of nude dancing was never directly addressed until *Barnes v Glen Theatre*.[111]

Considering the intimations of earlier cases, the Supreme Court's decision in *Barnes*, recognizing a limited amount of First Amendment protection for nonobscene nude dancing, was somewhat predictable. However, the Court's conclusion that the Indiana public indecency statute, which required the performers to wear G-strings and pasties, was nevertheless constitutional, so limited the activity that the Court stated was protected as to, in effect, completely prohibit that form of expression. The Court could have avoided that inconsistency by simply adopting Justice Scalia's view that the statute was constitutional as a regulation of conduct, not expression, and thus did not require any First Amendment scrutiny. The Indiana public indecency statute in question was not aimed at the expressive activity of erotic dancing, but more generally sought to prohibit the conduct of appearing nude in public.[112] Thus any restriction on the protected activity of erotic dancing was merely incidental.

Even if erotic dancing is entitled to some form of First Amendment protection, it does not necessarily follow that nonobscene nude dancing is also entitled to such protection. The state has a rational basis for prohibiting public nudity as a proper exercise of its police power in safeguarding public health, welfare, and morals.

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108. Id at 86.

109. Id. Justice Burger wrote: "Even *assuming* that the 'expression' manifested in the nude dancing . . . is *somehow* protected speech under the First Amendment the Borough of Mount Ephriam is entitled to regulate it." Id at 86-87 (emphasis added).

110. Id at 88. Justice Burger stated: "To say that there is a First Amendment right to impose every form of expression on every community . . . is sheer nonsense. . . . To invoke the First Amendment to protect the activity involved in this case trivializes and demeans that great Amendment." Id.

111. Jeffrey A. Been, *Erhardt v State: Nude Dancing Stripped of Its First Amendment Protection*, 19 Ind L Rev 1, 8 (1986).

112. *Barnes*, 111 S Ct at 2464.

The fact that a person is engaged in a form of expression protected under the First Amendment does not mean that a person has the right to perform the protected activity in public in the nude. A few examples will serve to illustrate this point.

According to *Texas v Johnson*,[113] the burning of the American flag as a form of protest is protected as free expression under the First Amendment.[114] Thus any law banning the burning of the flag could be unconstitutional. If, however, a person decided to make a statement by burning the flag in the nude, that person would be subject to the penalties imposed by a public indecency statute. This is necessarily so because the public indecency statute does not regulate the expressive activity of burning the flag, but merely prohibits generally the conduct involved in performing the activity in the nude.

Similarly, in this case, a person is free to perform an erotic dance, and will be protected in so doing under the First Amendment. If, however, that person chooses to perform the expressive activity while in the nude, that person is still subject to arrest for violating a valid criminal statute aimed at preventing public nudity. The criminal statute is valid because it is not aimed at prohibiting the protected activity of erotic dancing.

One may argue that the nudity involved in erotic dancing, unlike the nudity involved in nude flag burning, is a necessary part of the expressive activity, and therefore the message to be conveyed would be significantly diminished, if not eliminated, by requiring the performers to wear G-strings and pasties. Thus the enforcement of a public indecency statute in that situation would directly infringe on a protected form of expression. However, even in the context of erotic dance, the nudity is merely incidental to the message to be conveyed.

The erotic message sought to be conveyed in adult establishments is a direct result of the dance being performed, not the fact that the dance is performed in the nude. The nudity itself is not the source of the eroticism. Unquestionably, little or no erotic message would be conveyed if the nude performers simply came onto the stage and sat on a stool, or laid down on the floor and went to sleep. Yet, they would still be subject to the penalties of the public indecency statute. This is true because the erotic message and eroticism emanate from the dance, not the nudity. Indeed the ar-

113. 491 US 397 (1989).
114. Id.

gument could be made that the dance performed in G-strings and pasties actually heightens the erotic message, as something is left for the imagination.

Thus, instead of resorting to First Amendment scrutiny and the *O'Brien* test to uphold the Indiana public indecency statute, the Court could have upheld it because it addressed the conduct involved in appearing in the nude in public rather than the protected expression of erotic dancing. Under such an analysis, a nude dancer would be guilty just as a nude flag burner, or nude sunbather, or nude hot dog vendor would be. The Court could thus have avoided the inconsistency inherent in an opinion that recognized nude dancing as a protected activity but upheld a statute that effectively stripped that activity of that protection by requiring "nude" dancers to wear G-strings and pasties. Justice Scalia's distinction between the conduct and the expression achieves the same result.

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