BARNES *v.* GLEN THEATRE, INC.
SUPREME COURT OF THE UNITED STATES
501 U.S. 560
June 21, 1991

OPINION: Chief Justice Rehnquist...Respondents...claim that the First Amendment's guarantee of **freedom of expression** prevents the State of Indiana from enforcing its public indecency law to prevent **totally nude dancing...**We reject their claim.

...The Kitty Kat Lounge, Inc. (located in the city of South Bend)...desires to present "totally nude dancing," but an applicable Indiana statute regulating public nudity requires that the dancers wear "pasties" and "G-strings" when they dance. The dancers...receive a 100 percent commission on the first $60 in drink sales during their performances. Darlene Miller...wishes to dance nude because she believes she would make more money doing so.

Glen Theatre, Inc...[has] a place of business in South Bend. Its primary business is supplying so-called adult entertainment through written and printed materials, movie showings, and live entertainment at an enclosed "bookstore." The live entertainment at the "bookstore" consists of nude and semi-nude performances and showings of the female body through glass panels. Customers sit in a booth and insert coins into a timing mechanism that permits them to observe the live nude and semi-nude dancers for a period of time...

We...hold that the Indiana statutory requirement that the dancers in the establishments involved in this case must wear pasties and G-strings does not violate the First Amendment. ...Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board. The Supreme Court of Indiana has construed the Indiana statute to preclude nudity in what

are essentially places of public accommodation such as the Glen Theatre and the Kitty Kat Lounge. In such places, respondents point out, minors are excluded and there are no non-consenting viewers. Respondents contend that while the State may license establishments such as the ones involved here, and limit the geographical area in which they do business, it may not in any way limit the performance of the dances within them without violating the First Amendment. The petitioners contend, on the other hand, that Indiana's restriction on nude dancing is a valid "time, place, or manner" restriction...

The "time, place, or manner" test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a "public forum" (*Ward v. Rock Against Racism*), although we have on at least one occasion applied it to conduct occurring on private property...

O'Brien burned his draft card on the steps of the South Boston Courthouse in the presence of a sizable crowd, and was convicted of violating a statute that prohibited the knowing destruction or mutilation of such a card. He claimed that his conviction was contrary to the First Amendment because his act was "symbolic speech" -- expressive conduct. The Court rejected his contention that symbolic speech is entitled to full First Amendment protection, saying:

> "Even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. 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. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified **if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest**."

...The public indecency statute is clearly within the constitutional power of the State [to protect societal order and morality] and furthers substantial governmental interests...Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places...

The history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition. At least as early as 1831, Indiana had a statute punishing "open and notorious lewdness..." A gap during which no statute was in effect was filled by the Indiana

Supreme Court in *Ardery v. State*, which held that the court could sustain a conviction for exhibition of "privates" in the presence of others. The court traced the offense to the Bible story of Adam and Eve. In 1881, a statute was enacted that would remain essentially unchanged for nearly a century:

> "Whoever, being over fourteen years of age, makes an indecent exposure of his person in a public place, or in any place where there are other persons to be offended or annoyed thereby,...is guilty of public indecency..."

The language quoted above remained unchanged until it was simultaneously repealed and replaced with the present statute in 1976.

This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation. *Paris Adult Theatre I v. Slaton*[1]... And in *Bowers v. Hardwick,* we said:

> "**The law...is constantly based on notions of morality**, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."

Let it not be said that "you can't legislate morality." I submit it is rare when morality does not play some role in legislation. We routinely legislate morality.

Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.

This interest is unrelated to the suppression of free expression. Some may view restricting nudity on moral grounds as necessarily related to expression. We disagree. It can be argued, of course, that almost limitless types of conduct -- including appearing in the nude in public -- are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct" in *O'Brien*, saying:

> "We 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."

...Respondents contend that even though prohibiting nudity in public generally may not be related to suppressing expression, prohibiting the performance of nude dancing is related to expression because the State seeks to prevent its erotic message. Therefore, they reason that the application of

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[1]Case 1A-S-24 on this website.

the Indiana statute to the nude dancing in this case violates the First Amendment, because it fails the third part of the *O'Brien* test: the governmental interest must be unrelated to the suppression of free expression.

But we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers. Presumably numerous other erotic performances are presented at these establishments and similar clubs without any interference from the State, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity...It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose. The judgment of the Court of Appeals accordingly is *Reversed*.

CONCURRENCE: Justice Scalia...The challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all. Indiana's public indecency statute provides:

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

On its face, this law is not directed at expression in particular...**Were it the case that Indiana *in practice* targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools, it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct.**

Respondents have adduced no evidence of that. Indiana officials have brought many public indecency prosecutions for activities having no communicative element...

Perhaps the dissenters believe that "offense to others" *ought* to be the only reason for restricting nudity in public places generally, but there is no basis for thinking that our society has ever shared that Thoreauvian "you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else" beau ideal -- much less for thinking that it was written into the Constitution. The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered...immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality." *Bowers v. Hardwick* (upholding prohibition of private homosexual sodomy enacted solely on the presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable[2]). The purpose of the Indiana statute...is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified. Since that is so, the dissent has no basis for positing that, where only thoroughly edified adults are present, the purpose must be repression of communication.

Since the Indiana regulation is a general law not specifically targeted at expressive conduct, its application to such conduct does not in my view implicate the First Amendment.

The First Amendment explicitly protects "the freedom of speech [and] of the press" -- oral and written speech -- not "expressive conduct." When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication (for instance, to reduce noise, see *Saia v. New York,* to regulate election campaigns, see *Buckley v. Valeo,* or to prevent littering, see *Schneider v. State (Town of Irvington),* we insist that it meet the high, First Amendment standard of justification. But virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose -- if only expressive of the fact that the actor disagrees with the prohibition. *Florida Free Beaches, Inc. v. Miami* (nude sunbathers challenging public indecency law claimed their "message" was that nudity is not indecent). It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even -- as some of our cases have suggested, see *United States v. O'Brien* -- that it be justified by an "important or substantial" government interest. Nor do our holdings require such justification: We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes

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[2]The specific holding referenced to *Bowers v Hardwick* has been overruled by the case of *Lawrence v Texas*.

and the government could not demonstrate a sufficiently important state interest.

This is not to say that the First Amendment affords no protection to expressive conduct. Where the government prohibits conduct precisely because of its communicative attributes, we hold the regulation unconstitutional. *United States v. Eichman*[3] (burning flag); *Spence v. Washington*[4] (defacing flag); *Tinker v. Des Moines Independent Community School Dist.*[5] (wearing black arm bands); *Stromberg v. California*[6] (flying a red flag). In each of the foregoing cases, we explicitly found that suppressing communication was the object of the regulation of conduct. Where that has not been the case, however -- where suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons -- we have allowed the regulation to stand. *O'Brien* (law banning destruction of draft card upheld in application against card burning to protest war);...*Clark v. Community for Creative Non-Violence* (rule barring sleeping in parks upheld in application against persons engaging in such conduct to dramatize plight of homeless)...

All our holdings (though admittedly not some of our discussion) support the conclusion that "the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription." Such a regime ensures that the government does not act to suppress communication, without requiring that all conduct-restricting regulation (which means in effect all regulation) survive an enhanced level of scrutiny...

Indiana may constitutionally enforce its prohibition of public nudity even against those who choose to use public nudity as a means of communication. The State is regulating conduct, not expression, and those who choose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden. For these reasons, I agree that the judgment should be reversed.

CONCURRENCE: Justice Souter...I...write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments...I think that we...may legitimately consider petitioners' assertion that the statute is applied to nude dancing because such dancing "encourages prostitution, increases sexual assaults, and attracts other criminal activity."...In my view, the interest asserted by petitioners in preventing prostitution,

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[3]Case 1A-S-38 on this website.

[4]Case 1A-S-27 on this website.

[5]Case 1A-S-18 on this website.

[6]Case 1A-S-5 on this website.

sexual assault, and other criminal activity, although presumably not a justification for all applications of the statute, is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment at issue here...Accordingly, I find *O'Brien* satisfied and concur in the judgment.

DISSENT: Justice White...The first question presented to us in this case is whether **non-obscene nude dancing** performed as entertainment is expressive conduct protected by the First Amendment.

> Pray tell, what form of totally nude dancing at the Kitty Kat Lounge would be other than **obscene**? I don't think they are doing the fox trot or tango, do you? Or, has Justice White been so burnt out by these cases that the definition of "obscenity" has been eroded. Discuss.

The Court of Appeals held that it is, observing that our prior decisions permit no other conclusion. Not surprisingly, then, the plurality now concedes that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment..." This is no more than recognizing, as the Seventh Circuit observed, that dancing is an ancient art form and "inherently embodies the expression and communication of ideas and emotions."

...Both the plurality and Justice Scalia...overlook a fundamental and critical aspect of our cases upholding the States' exercise of their police powers. None of the cases they rely upon, including *O'Brien* and *Bowers*, involved anything less than truly *general* proscriptions on individual conduct. In *O'Brien*, for example, individuals were prohibited from destroying their draft cards at any time and in any place, even in completely private places such as the home. Likewise, in *Bowers*, the State prohibited sodomy, regardless of where the conduct might occur, including the home as was true in that case...By contrast, in this case Indiana does not suggest that its statute applies to, or could be applied to, nudity wherever it occurs, including the home. We do not understand the plurality or Justice Scalia to be suggesting that Indiana could constitutionally enact such an intrusive prohibition, nor do we think such a suggestion would be tenable in light of our decision in *Stanley v. Georgia,* in which we held that States could not punish the mere possession of obscenity in the privacy of one's own home.

We are told...that...the Indiana Supreme Court held that the statute at issue here cannot and does not prohibit nudity as a part of some larger form of expression meriting protection when the communication of ideas is involved. Petitioners also state that the evils sought to be avoided by applying the statute in this case would not obtain in the case of theatrical productions, such as "Salome" or "Hair." Neither is there any evidence that the State has attempted to apply the statute to nudity in performances such as plays, ballets, or operas. "No arrests have ever been made for nudity as part of a play or ballet."

Thus, the Indiana statute is not a *general* prohibition of the type we have upheld in prior cases. As a result, the plurality and Justice Scalia's simple references to the State's general interest in promoting societal order and morality are not sufficient justification for a statute which concededly

reaches a significant amount of protected expressive activity. Instead, in applying the *O'Brien* test, we are obligated to carefully examine the reasons the State has chosen to regulate this expressive conduct in a less than general statute. **In other words, when the State enacts a law which draws a line between expressive conduct which is regulated and non-expressive conduct of the same type which is not regulated, *O'Brien* places the burden on the State to justify the distinctions it has made**. Closer inquiry as to the purpose of the statute is surely appropriate.

...The purpose of forbidding people to appear nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates. This is why *Clark v. Community for Creative Non-Violence* is of no help to the State: "In *Clark*...the damage to the parks was the same whether the sleepers were camping out for fun, were in fact homeless, or wished by sleeping in the park to make a symbolic statement on behalf of the homeless." That cannot be said in this case: The perceived damage to the public interest caused by appearing nude on the streets or in the parks, as I have said, is not what the State seeks to avoid in preventing nude dancing in theaters and taverns. There the perceived harm is the communicative aspect of the erotic dance. As the State now tells us, and as Justice Souter agrees, the State's goal in applying what it describes as its "content neutral" statute to the nude dancing in this case is "deterrence of prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure." The attainment of these goals, however, depends on preventing an expressive activity.

The plurality nevertheless holds that the third requirement of the *O'Brien* test, that the governmental interest be unrelated to the suppression of free expression, is satisfied because in applying the statute to nude dancing, the State is not "proscribing nudity because of the erotic message conveyed by the dancers." The plurality suggests that this is so because the State does not ban dancing that sends an erotic message; it is only nude erotic dancing that is forbidden. The perceived evil is not erotic dancing but public nudity, which may be prohibited despite any incidental impact on expressive activity. This analysis is transparently erroneous.

...The plurality concedes that nude dancing conveys an erotic message and concedes that the message would be muted if the dancers wore pasties and G-strings...[T]he nudity of the dancer is an integral part of the emotions and thoughts that a nude dancing performance evokes. The sight of a fully clothed, or even a partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental conduct. "We have previously pointed out that 'nudity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Schad v. Mt. Ephraim.*

This being the case, it cannot be that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing

performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women.

Again, what happened to the idea of "obscenity" being unprotected by the First Amendment?

But generating thoughts, ideas, and emotions is the essence of communication. The nudity element of nude dancing performances cannot be neatly pigeonholed as mere "conduct" independent of any expressive component of the dance.

That fact dictates the level of First Amendment protection to be accorded the performances at issue here...Content based restrictions "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Sable Communications v. FCC.* Nothing could be clearer from our cases... The Court's assessment of the artistic merits of nude dancing performances should not be the determining factor in deciding this case..."While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who...wants some 'entertainment' with his beer or shot of rye." *Salem Inn, Inc. v. Frank.*

The plurality and Justice Souter do not go beyond saying that the state interests asserted here are important and substantial. But even if there were compelling interests, the Indiana statute is not narrowly drawn. If the State is genuinely concerned with prostitution and associated evils, as Justice Souter seems to think,...it can adopt restrictions that do not interfere with the expressiveness of non-obscene nude dancing performances. For instance, the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators, that nude entertainment be limited to certain hours, or even that establishments providing such entertainment be dispersed throughout the city.

Boss to dancer: "You must stay 10 feet from the spectators at all times so as to keep you from prostituting yourself after we close." Do you think such a requirement has merit? RWV!

Likewise, the State clearly has the authority to criminalize prostitution and obscene behavior. Banning an entire category of expressive activity, however, generally does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny...We agree with Justice Scalia that the Indiana statute would not permit 60,000 consenting Hoosiers to expose themselves to each other in the Hoosier Dome. No one can doubt, however, that those same 60,000 Hoosiers would be perfectly free to drive to their respective homes all across Indiana and, once there, to parade around, cavort, and revel in the nude for hours in front of relatives and friends. It is difficult to see why the State's interest in morality is any less in that situation, especially if, as Justice Scalia seems to suggest,

nudity is inherently evil, but clearly the statute does not reach such activity...[T]he State's failure to enact a truly general proscription requires closer scrutiny of the reasons for the distinctions the State has drawn...I would affirm the judgment of the Court of Appeals, and dissent from this Court's judgment.