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Paps' A.M. v. City of Erie: The Wrong Route to the Right Direction

Michael McBride

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2000]

PAP'S A.M. V. CITY OF ERIE

**PAP'S A.M. V. CITY OF ERIE¹: THE WRONG ROUTE TO THE
RIGHT DECISION**

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 [at the local pub].²

As the United States emerged from the sexual revolution of the late 1960's, courts and policy makers battled over the role the government should play in setting the moral tone for the nation.³ One of the hottest battle grounds of this debate has been the role of the government in limiting expression and actions of a sexual nature.⁴ While the Supreme Court has clearly defined the role the government can play in limiting obscenity⁵ and child pornography,⁶ courts across the nation have struggled with the limitations local governments can place on nude dancing.⁷

¹ *Pap's A.M. v City of Erie*, 719 A.2d 273, 277 (Pa. 1998), *reargument denied*, 1999 Pa. LEXIS 58 (Pa. 1998), *cert. granted*, 1999 LEXIS 3201 (U.S. 1999).

² *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974) *aff'd in part*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)

³ See e.g., *Roe v. Wade*, 410 U.S. 113, 151 (1973) (holding women have a fundamental right to reproductive freedom); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (stating there is not a fundamental right to have homosexual sex).

⁴ See e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing the current standards for obscenity); *City of Renton v. Playtime Theaters*, 475 U.S. 41, 50 (1986) (ruling that a zoning ordinance which prohibited an adult movie theater from locating within 1000 feet of a residential property, church, park, or school was constitutional).

⁵ In *Miller*, the Court held obscenity was not an expression protected by the First Amendment. *Miller*, 413 U.S. at 24-5. The Court established a narrow three prong test for obscenity. *Id.*

⁶ In *Ferber v. New York*, the Court held that child pornography was not protected by the First Amendment to the United States Constitution because of the physical and psychological effect on the children depicted in the materials. *Ferber v. New York*, 458 U.S. 747, 756 (1982).

⁷ *Barnes v. Glen Theater*, 501 U.S. 560, 566 (1991) (holding that the application of a nudity law to nude dancing was constitutional); Cf., Gianni P. Servodidio, Comment, *The Devaluation of Nonobscene Eroticism as a Form of Expression Protected by the First Amendment*, 67 TUL. L. REV. 1231, 1233-35 (1992). Servodidio states that the current debate over the limitations of adult business is a result of the "failed test" established in *Miller*. Because many individuals might find materials that fail to meet the *Miller* test offensive according to contemporary community standards, "many cities and states have found

This note will examine the Pennsylvania Supreme Court's decision in *Pap's A.M. v. City of Erie*,⁸ by looking at the policy behind the decision,⁹ while also examining the decision in light of the previous United States Supreme Court decision in *Barnes v. Glen Theatre*.¹⁰ The note will examine why the decision in *Pap's A.M.* was an unnecessary misinterpretation of the United States Constitution.¹¹ It will examine how and why the Pennsylvania Supreme Court could have settled the issue of nude dancing in Pennsylvania and avoided review by the United States Supreme Court by deciding the case under the Pennsylvania Constitution instead of the First Amendment to the United States Constitution. Finally, this note will examine the ramifications of this choice of law when the United States Supreme Court hears this case during the 1999-2000 term.¹²

I. BACKGROUND

In *Pap's A.M.*,¹³ the major issue involved the constitutionality of an Erie, Pennsylvania nudity ordinance. This section of the note will examine the method courts have used to analyze restrictions on nude dancing including whether nude dancing is expression, the theories of content-based and content-neutral limitations, and the overbreadth doctrine.

A. Nude Dancing as Expression

The legal basis for the protection of nude dancing evolves under the First and Fourteenth Amendments to the United States Constitution,¹⁴ and in the various states from similar constitutional provisions.¹⁵

inventive ways to avoid the rigorous *Miller* test by suppressing nonobscene eroticism indirectly." *Id.*

⁸ *Pap's A.M. v City of Erie*, 719 A.2d 273, 277 (Pa. 1998), *reargument denied*, 1999 Pa. LEXIS 58 (Pa. 1998), *cert. granted*, 1999 LEXIS 3201 (U.S. 1999).

⁹ *Infra* Analysis section I.

¹⁰ *Barnes v. Glen Theater*, 501 U.S. 560, 566 (1991); See, *Infra* Analysis section II.

¹¹ *Infra* Analysis section III.

¹² On May 17, 1999, the United States Supreme Court granted a writ of certiorari in *Pap's A.M. v. City of Erie*, 1999 LEXIS 3201 (U.S. 1999). BLACK'S LAW DICTIONARY 90 (Pocket ed. 1996)

¹³ *Pap's A.M. v City of Erie*, 719 A.2d 273, 277 (Pa. 1998), *reargument denied*, 1999 Pa. LEXIS 58 (Pa. 1998), *cert. granted*, 1999 LEXIS 3201 (U.S. 1999).

¹⁴ U.S. CONST. amend. I. (freedom of speech); BLACK'S LAW DICTIONARY 90 (Pocket ed. 1996) (equal protection under the law); *Barnes v. Glen Theatre*, 501 U.S. 560, 572

2000]

PAP'S A.M. V. CITY OF ERIE

The first step courts take in analyzing whether an action is afforded First Amendment protection is a determination of whether the action is expressive.¹⁶ While the text of the First Amendment states "Congress shall make no law . . . abridging the freedom of speech,"¹⁷ the United States Supreme Court has held that speech is not merely limited to the spoken or written word.¹⁸ The Court has nearly been unanimous in holding that nude dancing is expressive conduct.¹⁹

(1991) (deciding in a plurality opinion that an Indiana nudity statute as applied to nude dancing was constitutional); Lisa Malmer, Comment, *Nude Dancing and the First Amendment*, 59 U. CIN. L. REV. 1275, 1278 (1991); The theories regarding regulation of nude dancing generally fall into four theories which can be seen in the split of opinions of the Supreme Court in *Barnes*.

¹⁵ See, e.g., Pa. CONST., art. I, sec. 7, which states "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." *Id.*

¹⁶ James H. Taylor, Note, *Constitutional Law: Nude Dancing's Marginal Status Under the First Amendment*, 44 FLA. L. REV. 141 (1992).

¹⁷ U.S. CONST. amend. I.

¹⁸ **Texas v. Johnson 491 U.S. 397, 404 (1989) (holding that burning the American Flag was expressive conduct and a law banning the burning of the American flag was unconstitutional because it limited political expression).**, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983). Stone writes, "the Court begins with the presumption that the first amendment protects all communication and then creates areas of nonprotection only after it affirmatively finds that a particular class of speech does not sufficiently further the underlying purposes of the first amendment." *Id.*

¹⁹ **Barnes v. Glen Theatre, 501 U.S. 560, 572 (1991).** In *Barnes*, eight of the Justices held that nude dancing was expression. Malmer, *supra* note 14, at 1276. The view of the Court that nude dancing is expressive is a relatively new concept. *Id.* During the 1950's and 60's the Court did not recognize First Amendment protection for nude dancing. *Id.* However, as America began to emerge from the sexual revolution, the courts recognized the expressive elements of entertainment. *Id.* The Court clarified this theory when eight of the Justices recognized the expressive nature and constitutional protection of nude dance in *Barnes*. *Id.* The Court in several case began to recognize entertainment as expressive conduct entitled to First amendment protection. See e.g., *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (holding film was afforded First and Fourteenth Amendment protection); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 369 (1969) (establishing the standards of constitutional protection for broadcasting). Cf., *Barnes* 501 U.S. at 580, (Scalia J. concurring). Scalia wrote nude dancing was not protected conduct. *Id.* According to Scalia, "[m]oral opposition to nudity supplies a rational basis for its prohibition, and since the First Amendment has no application to this case no more than that is needed." *Id.* See, Robert

In *Texas v. Johnson*,²⁰ the Court not only recognized the expressive nature of burning the flag, but also set out a two prong test to determine what is expression.²¹ The Court stated that an action is expressive and within the scope of the First Amendment if an "intent to convey a particularized message was present and the likelihood was great that the message would be understood by those who view it."²² The theory that nude dancing is protected by the First Amendment is based on a presumption that nude dancing "expresses a message."²³

The lone Justice that argued that nude dancing was not expressive was Justice Scalia.²⁴ Justice Scalia wrote, the state has a traditional right and duty to punish anti-social behavior even if the audience chooses to view the entertainment.²⁵ Scalia argued that general laws are not invalid because the conduct being restricted was for expressive purposes, but rather the tradition and the culture of the people will determine if conduct is worthy of First Amendment protection.²⁶ According to Scalia, the legislature needs only a

Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250 (1995). The court doctrine that allocates constitutional protection if a speaker intends to convey a message is not plausible. *Id.* See, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) (arguing the founding father only sought to protect political speech.)

²⁰ *Johnson*, 491 U.S. at 109.

²¹ *Id.*

²² *Miller*, 904 F.2d at 1089. Nude dancing meets this test. *Id.* As Circuit Judge Cudahy wrote, "[i]t seems to me beyond doubt that a barroom striptease is 'expressive.' Even if relatively restrained a striptease sends an unadorned message to a male audience. It is a message of temptation and allurements coupled with coy hints at satisfaction." *Id.*

²³ *Johnson*, 491 U.S. at 109; *Miller v. South Bend*, 904 F.2d 1081, 1089 (7th Cir. 1990), *rev'd* *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

²⁴ See e.g., *Barnes*, 501 U.S. at 576.

²⁵ *Id.* In writing about the Indiana nudity law in *Barnes*, Justice Scalia states:
 [I]f 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, in the traditional phrase, "*contra bonos mores*," i.e., immoral.

Id. Cf., Miller, 904 F.2d at 1089, (Posner J., concurring) The theory that nude dancing is not expression is a misapplication of the obscenity doctrine. *Id.* Society established a standard to limit obscene dancing. *Id.*

²⁶ *Id.* See e.g., Post, *supra* note 19, at 1251. A law against defaming public buildings

2000]

PAP'S A.M. V. CITY OF ERIE

rational basis to limit nude dancing, because nude dancing is outside the perimeters of the First Amendment.²⁷

B. Content-Based Restrictions²⁸

While all expression does not have First Amendment protection,²⁹ once words or actions are determined to be protected expression, the constitutionality of a governmental limitation is the product of a two-tiered analysis.³⁰ The first step in the analysis is to determine if the goal of the law is to end expression.³¹ The second step is a determination whether the limitations are an attempt to quiet the expression because of the message it conveys.³² If the limitation meets both these tests it is content-based.³³ If a limitation is

would not be an unconstitutional violation of the First Amendment because of the message that is spray painted on the side of a building. *Id.*

²⁷ *Barnes*, 501 U.S. at 580. See, *Bowers v. Hardwick* 478 U.S. 186, 196 (1986) (explaining the rational basis test grants deference to legislative action if there is a legitimate governmental purpose that will be forwarded by the law). See, Robert C. Farrell, *Successful Rational Basis Claims In The Supreme Court From The 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 359 (1999). When a court uses a rational basis test the court grants deference to the will of the legislature. *Id.* The court does not examine the real purpose of a law but instead only requires some legitimate purpose. *Id.*

²⁸ *Stone*, *supra* note 18, at 189. “Perhaps the most intriguing feature of contemporary first amendment doctrine is the increasingly invoked distinction between content-based and content-neutral restrictions on expression. *Id.*”

²⁹ Allan Ides and Christopher N. May, *Constitutional Law: Individual Rights-Examples and Explanations* 273 (1998), See, e.g. *Miller*, 415 U.S. at 15 (holding obscenity was not afforded First Amendment protection); See, e.g., *Terminiello v. V. Chicago*, 337 U.S. 1, 2 (1949) (ruling offensive and provocative words likely to cause an immediate and serious harm [fighting words] are not afforded First Amendment protection); See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding words “directed to inciting or producing imminent lawless action and is likely to produce such action” are not protected by the First Amendment); See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964).

³⁰ *Taylor*, *supra* note 16, at 141.

³¹ *Id.*

³² LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 789-92 (2d ed. 1988); see *Boos v. Barry*, 485 U.S. 312, 321 (1989) (“An ordinance which regulates speech due to its potential primary impact. . . must be considered content-based.”).

³³ *Boos*, 485 U.S. at 321 (1988); See, David L. Hudson Jr., *The Secondary Effects Doctrine: The Evisceration of First Amendment Freedoms*, 37 WASHBURN L.J. 55, 59 (1997). Distinctions between content based and content neutral restrictions

determined to be content-based, it is subject to strict scrutiny.³⁴ A limitation to be constitutional must serve a compelling government interest and be narrowly tailored to meet that interest.³⁵ The application of the strict scrutiny analysis to expression is “speech-protective”³⁶ which is virtually an absolute protection.³⁷

The content-based theory contends that limitations on nude dancing are attempts to limit the message of the dance.³⁸ This theory argues the reason behind nudity laws is to limit people in public places where nudity would be inappropriate and offensive, not to stop expression.³⁹ The theory contends limitations on nude dancing are intended to stop a message which may not be

are largely the product of the intent of the creator of the restrict. *Id.* If the intent is to limit the message then the restriction is content based and subject to a higher level of scrutiny. *Id.* at 60.

³⁴ *Boos*, 485 U.S. at 321 (1988).

³⁵ *Id.*, *Stone*, *supra* note 18, at 201. Stone writes, “Under current doctrine, however, the Court subjects the content-based restrictions to a more stringent standard of justification than the more suppressive content-neutral restrictions.” *Id.* at 203.

³⁶ *Stone*, *supra* note 18, at 196.

³⁷ *Id.* Cf., Paul B. Stephen III., *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 205 (1982). Stephen writes the Court’s contention of a near-absolute content neutrality rule is not evidenced by the Court’s decisions. *Id.* Stephen writes, “This divergence of judicial doctrine and judicial action has prompted confusion and concern. The lower courts have tried to interpret the mixed signals they have received from the Court, but the disarray of their decisions suggests the difficulty of their task.” *Id.* at 206.

³⁸ *Barnes*, 501 U.S. at 591.

³⁹ In *Barnes*, 501 U.S. at 591, Justice White wrote:

Legislators do not just randomly select certain conduct for proscription; they have reasons for doing so and those reasons illuminate the purpose of the law that is passed. Indeed, a law may have multiple purposes. 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.

Id.

2000]

PAP'S A.M. V. CITY OF ERIE

accepted by the majority of the public, and eliminate the message,⁴⁰ allowing the government to sanction one type of expression over another.⁴¹

A determination of whether speech is content-based or content-neutral generally decides the constitutionality of a limitation on expression.⁴² The Court turns to the motivation behind a law to determine whether it is content-based.⁴³ The Court will apply a content-based analysis if they believe the limitation creates a "deliberate interference" with a certain message.⁴⁴

C. Content-Neutral Limitations

If an analysis indicates that a law is not intended to suppress a message, the regulation is content-neutral.⁴⁵ The test for content-neutral expression was established in *United States v. O'Brien*.⁴⁶ The *O'Brien* test requires a restriction (1) be within the constitutional power of the government; (2) serve a "substantial government interest;"⁴⁷ (3) not be related to the suppression of free expression;⁴⁸ and (4) not be any greater than necessary to

⁴⁰ *Miller*, 904 F.2d at 1089, (Posner J., concurring). Posner states that "differentiating between nude dance and other forms of expression is a judge-made exception for 'expressive' nudity discriminates between upper-class and lower-class nonobscene erotica." *Id.*

⁴¹ *Barnes*, 501 U.S. at 593 (White J., dissenting). Limitations on nudity in an adult club is a type of class heresy in which the message expressed by exotic dancers is limited, while the message of highbrow theatre or ballet would not be limited; *Id.* "[T]he performances. . . may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine. The Court's assessment of the artistic merits of nude dancing performances should not be the determining factor in deciding this case." *Id.* at 594. *Cf.* Stone, *supra* note 18, at 196, contends that Court balance the level of protection a class of expression is entitled to by balancing the protection the class receives. *Id.* Stone cites obscenity, commercial speech, and fighting words as examples of the balancing. *Id.* at 197.

⁴² See Hudson, *supra* note 33, at 58.

⁴³ Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Case*, 48 VAND L. REV. 1335, 1355 (1995) (writing that the court looks at motivation behind a law to determine if the law is content-based).

⁴⁴ *Id.*

⁴⁵ *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

⁴⁶ *Id.*; Servodidio, *supra* note 7, at 1250. The *O'Brien* Court had concluded punishment for burning a draft card punished only the non-communicative element of the act even though the act contained communicative elements. *Id.*

⁴⁷ *O'Brien*, 391 U.S. at 377.

⁴⁸ *Id.*

serve the substantial government interest.⁴⁹

The application of the *O'Brien* test to nude dancing has been analyzed two different ways.⁵⁰ The first application contends that limitations against nudity do not effect the message of the dance.⁵¹ The laws effect nudity, which was a non-speech element of the performance.⁵² The fact that the law permits the same performance to occur if the dancer wears “pasties and a G-string,”⁵³ indicates that the erotic message of the dance could still be presented absent the nudity.⁵⁴

The second application of the *O'Brien* content-neutral analysis evaluates nude dancing using a “secondary effect” analysis.⁵⁵ In *Renton v. Playtime Theatres*,⁵⁶ the Court upheld a zoning ordinance which prevented adult theaters from opening within a large part of the city.⁵⁷

The Court allowed the limitations in *Renton* to stand on the grounds that the ordinance was enacted to eliminate the crimes associated with an adult oriented business.⁵⁸ The Court agreed that this ordinance was not intended to limit the message exhibited by the adult theaters and was “a valid governmental response to the ‘admittedly serious problems’ created by adult theaters.”⁵⁹

⁴⁹ *Id.*

⁵⁰ ***Barnes v. Glen Theatre*, 501 U.S. 560, 566 (1991)**

⁵¹ *Id.* at 571 (Rehnquist CJ.) (limiting an Indiana nudity statute punish the non-expressive elements of the dance).

⁵² *Id.*

⁵³ Indiana Code § 35-45-4-1 section 1 (b) (1988) (defining nudity and stating that a person wearing pasties and a g-string would not be nude).

⁵⁴ ***Barnes*, 501 U.S. at 571; cf. *Miller v. South Bend*, 904 F.2d 1081, 1091 (7th Cir. 1990), *rev'd Barnes v. Glen Theatre*, 501 U.S. 560 (1991), Judge Posner contends that nudity may be required in today's society to provide the message intended from the dance. He argues “[a] striptease that ended in a degree of nudity no longer suggestive of preparations for sex – a striptease that left the stripper garbed as she might be for an expedition to the supermarket – might lack erotic punch today.”**

⁵⁵ *See e.g.*, *Renton v. Playtime Theaters. Inc.*, 475 U.S. 41 (1986); *See e.g.*, *Barnes* 501 U.S. at 582.; Hudson *supra* note 33, at 62, the application of the secondary effects doctrine has been almost only been used to control adult oriented businesses.

⁵⁶ *Renton v. Playtime Theaters. Inc.*, 475 U.S. 41 (1986).

⁵⁷ *Id.* at 51; Daniel J. McDonald, comment, *Regulating Sexual Oriented Businesses: The Regulatory Uncertainties of a “Regime of Prohibition by Indirection and the Obscenity Communal Solution*, 1997 BYU L. REV. 339, 342 (1997) (arguing the control of adult oriented businesses by zoning laws is a legal fiction).

⁵⁸ *Id.*

⁵⁹ *Id. Cf.*, In his dissent Justice Brennan wrote that the City of Renton “selectively

2000]

PAP'S A.M. V. CITY OF ERIE

D. The Overbreadth Doctrine

One of the strongest challenges that can be made to a limitation on free expression is the overbreadth doctrine.⁶⁰ The overbreadth doctrine is an exception to the normal rules of standing only available in First Amendment cases.⁶¹ The Court explained:

Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it [the statute] also threatens others not before the court--those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."⁶²

If a statute is determined to be overly broad the statute is unconstitutional "on its face" and a court can invalidate the statute as a whole.⁶³

The policy behind the doctrine is that overly broad limitations on expression can have a chilling effect on areas of expression that are clearly protected by the First Amendment.⁶⁴ Courts have required that a statute be substantially overly broad before they elicit the use of the overbreadth doctrine

imposes limitations on the location of a movie theater based exclusively on the content of the films shown there. . . ." *Id.* at 55 (Brennan J., dissenting). Hudson, *supra* note 33, at 62, "the secondary effects doctrine has engendered an assault on the adult entertainment industry. The doctrine empowers those who dislike adult expression to restrict it under the guise of protecting society." Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 655 (1992). Blasi argues the First Amendment is best interpreted by the use of broad propositions. *Id.* He contends when the Court decides First Amendment issues based on the fairness of the specific facts of a case, it abdicates its duty to determine the law. *Id.*

⁶⁰ *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135 (6th Cir. 1994) (ruling a nudity ordinance was overly broad); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (upholding the right of a minister to distribute religious materials in an airport).

⁶¹ *City Council of Los Angeles v. Taxpayers for Vincent*, 468 U.S. 789, 801 (1981). In *Taxpayers for Vincent*, the Court said: "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id.*

⁶² *Board of Airport Comm'rs*, 482 U.S. at 574.

⁶³ *Id.*

⁶⁴ *TRIBE*, *supra* note 32, at 803.

and declare a statute unconstitutional.⁶⁵

II. STATEMENT OF THE CASE

A. *Statement of the Facts*

On September 24, 1994, the City of Erie, Pennsylvania enacted City Ordinance 75-1994.⁶⁶ The ordinance stated it was a crime to appear in a "state of nudity."⁶⁷ In order not to violate the ordinance, a female older than

⁶⁵ *Board of Airport Comm'rs*, 482 U.S. at 574, the court said that the policy of sparing use of the overbreadth doctrine was a result of the fact that the doctrine was "strong medicine." *Id.* Cf. Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063, 1077 (1997). Hill contends, the courts claim that the overbreadth doctrine is used only in cases where a statute is substantially overly broad is a fallacy. *Id.* Hill contends courts will not invalidate a statute if it can be saved by simply changing the statute. *Id.*

⁶⁶ *Pap's A.M. v Erie*, 719 A.2d 273, 275 (Pa. 1998), *reargument denied*, 1999 Pa. LEXIS 58 (Pa. 1998), *cert. granted*, 1999 LEXIS 3201 (U.S. 1999).

⁶⁷ ERIE, PA., ORDINANCE 75-1994, states in relevant part:

1. A person who knowingly or intentionally in a public place:
 - a. engages in sexual intercourse;
 - b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code;
 - c. appears in a state of nudity, or
 - d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.
2. "Nudity" means the showing of the human male or female genital (sic), 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; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.
3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

2000]

PAP'S A.M. V. CITY OF ERIE

ten years old would be required to wear at least a g-string and pasties.⁶⁸ The ordinance also included places where adult entertainment is offered in its definition of a "public place."⁶⁹ The plaintiff, Pap's A.M., does business as "Kandyland" a business that features nude exotic dancing females.⁷⁰

B. Procedural History

The plaintiff brought suit in equity against the City of Erie, the Mayor of Erie, and Erie City Council in the Erie County Court of Common Pleas.⁷¹ The plaintiff asked for a declaratory judgment that Ordinance 75-1994 is unconstitutional.⁷²

After a hearing, the Erie County Common Pleas Court determined Ordinance 75-1994 placed an overly broad restriction on free expression in violation of the United States and Pennsylvania Constitutions and held that the ordinance was unconstitutional "on its face".⁷³ The court struck down the

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- 4. The prohibition set forth in subsection 1(c) shall not apply to:
 - a. Any child under ten (10) years of age; or
 - b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age. . . .

6. CONSTRUCTION AND SEVERABILITY--It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this ordinance. Should a court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

⁶⁸ *Id.* § 2, *Pap's A.M.*, 719 A.2d at 275;. WEBSTERS NEW WORLD DICTIONARY defines "pasties" as: "a pair of small adhesive coverings worn by stripteasers." WEBSTERS NEW WORLD DICTIONARY 1039 (2d ed. 1984).

⁶⁹ ERIE, PA., ORDINANCE 75-1994 § 3.

⁷⁰ *Pap's A.M.*, 719 A.2d at 276.

⁷¹ *Id.*

⁷² *Pap's A.M. v Erie*, 719 A.2d 273, 275 (Pa. 1998), *reargument denied*, 1999 Pa. Lexis 58 (Pa. 1998), *cert. granted*, 1999 Lexis 3201 (U.S. 1999). Additionally the plaintiff sought injunctive relief and attorney's fees. *Id.*

⁷³ *Id.*; *See supra* Part II (C), for a discussion of the overbreadth doctrine.

ordinance and granted the plaintiff a permanent injunction.⁷⁴

Both parties appealed the decision to the Pennsylvania Commonwealth Court.⁷⁵ The Commonwealth Court reversed the lower court's decision, and held that the ordinance was not overly broad.⁷⁶ The court also determined that Ordinance 75-1994 did not violate the plaintiff's right to free expression.⁷⁷ The Commonwealth Court found the United States Supreme Court decision in *Barnes v. Glen Theatre*,⁷⁸ to be binding precedent.⁷⁹ While the Commonwealth Court admitted no majority of the *Barnes Court* reached the decision on the same grounds, the Commonwealth Court:

[S]elected the concurring opinion authored by Justice Souter as expressing the position of the Court and accorded it the status of binding precedent. In arriving at this conclusion, the Commonwealth Court quoted the United States Supreme Court's dictum that where "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .and applied the theory to decide the case.⁸⁰

Pap's A.M. then appealed to the Pennsylvania Supreme Court, which agreed to review the case.⁸¹ The Pennsylvania Supreme Court agreed to determine whether the ordinance was overly broad and whether it violated an individual's right to free expression, guaranteed by both the United States and the Pennsylvania Constitutions.⁸²

C. Holding

The Pennsylvania Supreme Court, in an opinion authored by Justice

⁷⁴ *Pap's A.M. v Erie*, 719 A.2d 273, 275 (Pa. 1998), *reargument denied*, 1999 Pa. LEXIS 58 (Pa. 1998), *cert. granted*, 1999 LEXIS 3201 (U.S.1999), the Common Pleas Court denied the plaintiffs request for attorney fees.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Barnes v. Glen Theatre*, 501 U.S. 551 (1991).

⁷⁹ *Pap's A.M.*, 719 A.2d at 275.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Pap's A.M. v Erie*, 719 A.2d 273, 276 (Pa. 1998), *reargument denied*, 1999 Pa. LEXIS 58 (Pa. 1998), *cert. granted*, 1999 LEXIS 3201 (U.S. 1999).

2000]

PAP'S A.M. V. CITY OF ERIE

Cappy,⁸³ held Ordinance 75-1994 to be an unconstitutional infringement on free expression.⁸⁴ First, the court determined that nude dancing was expression entitled to First Amendment protection.⁸⁵ Second, the court determined Ordinance 75-1994 was a content-based limitation on free expression.⁸⁶ Third, the court applied strict scrutiny analysis to the ordinance and determined it was not the least restrictive way to achieve a compelling governmental interest.⁸⁷ Finally, the court determined that it could not cure Ordinance 75-1994 by severing the portions of the ordinance that make it unconstitutional.⁸⁸

⁸³ *Id.*, 719 A.2d at 284. Justice Cappy was joined by Chief Justice Flaherty and Justice Nigro. *Id.*

⁸⁴ *Pap's A.M.*, 719 A.2d. at 281; The court's opinion held that the Ordinance 75-1994 violates the plaintiff's first amendment right of free expression. *Id.* The court did not decide whether the ordinance was constitutional under the Pennsylvania State Constitution. *Id.* The court also determined that there was no need to determine whether the ordinance was overly broad, *Id.* at 281 n. 12.

⁸⁵ *Id.* at 276. While the court determined that being nude alone, is not entitled to First Amendment protection, nude dancing contains an expressive message; *Id.* at 278. The court used the opinions of eight justices in *Barnes* as precedent that nude dancing is expression entitled to First Amendment Protection. *See, Barnes v. Glen Theater*, 501 U.S. 560 (1991) (holding by eight Justices that nude dancing is expression); *See infra*, Section II(A).

⁸⁶ *Pap's* at 278, The Pennsylvania Supreme Court did not agree with the Commonwealth Court's opinion that Justice Souter's Opinion in *Barnes v. Glen Theater* was binding precedent, because five justices did not agree on this issue; *Id.* With no clear precedent the Pennsylvania Supreme Court undertook an independent analysis of Ordinance 75-1994. *Id.* at 279. Using Justice White's dissent in *Barnes* as persuasive authority the court determined that the intent of the "Ordinance is inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing." *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 280. While Pennsylvania law requires the court to sever unconstitutional portions of a law the court stated that was impossible with this ordinance. *Id.* Pennsylvania statutes require the court to cure the unconstitutionality of a statute by severing unconstitutional language unless the severed portions are essential to the statute. *Id.* In this case the Appellees requested that the court cure the ordinance by only limiting it to non-expressive conduct. *Id.* The court stated that because the ordinance does not differentiate between expressive and non expressive conduct, the modification of the ordinance would require the court to perform a legislative duty, violative of the separation of powers doctrine. ERIE PA. ORDINANCE 75-1994 § 6, *supra* note 67, for the full text of the "Construction and Severability" clause of the Ordinance. *See also*, 1 PA. CONS. STAT. ANN. § 1925 (West 1998) (stating provisions regarding severability of unconstitutional portions of statutes).

Justice Castille's, concurring opinion⁸⁹ argued that *Barnes*,⁹⁰ provided binding precedent that the Pennsylvania Supreme Court was obliged to follow regarding the interpretation of the First Amendment to the United States Constitution.⁹¹ However, the concurring Justice's joined the court in its judgment determining that Ordinance 75-1994 violated the rights of free expression created under the Article I, Section 7, of the Pennsylvania State Constitution.⁹²

III. ANALYSIS

The majority in *Pap's A.M.* correctly interpreted the policy behind free expression in a democratic society in regards to nude dancing. However, the court failed to use the correct route to make their decision. If the court in *Pap's A.M.* would have followed the analysis of the concurring justices, the Pennsylvania Supreme Court could have clearly defined the ability of local governments to regulate nude dancing in their Commonwealth.⁹³ Instead, by deciding the case under the First Amendment to the United States Constitution, the Pennsylvania Supreme Court appears to have ignored the will of the United States Supreme Court and invited a needless reversal of their decision.

A. *Pap's A.M. in Light of Barnes*

Interpreting the law can be a difficult task. When a state court examines an issue of United States constitutional law, they look to the United States

⁸⁹ *Pap's A.M.*, 719 A.2d. at 281. Justice Castille's concurring opinion was joined by Justice Zappala. *Id.*

⁹⁰ *Barnes v. Glen Theater*, 501 U.S. 560 (1991).

⁹¹ *Pap's A.M. v Erie*, 719 A.2d 273, 282 (Pa. 1998), *reargument denied*, 1999 Pa. LEXIS 58 (Pa. 1998), *cert. granted*, 1999 LEXIS 3201 (U.S. 1999). The concurring Justices argued that five Justices did agree on a central issue in *Barnes*. *Id.* They contend that in *Barnes*, five Justices (a majority) agreed that a similar ordinance was not intended to stifle the expression (i.e. content-neutral). *Id.*

⁹² *Id.* Article I section 7 of the Pennsylvania Constitution affords broader protection than the United States Constitution. *Id.* Justice White's dissent in *Barnes* provides persuasive authority that should be used to interpret the Pennsylvania Constitution. *Id.* at 283. "The true purpose of the ordinance, as applied to appellant and others similarly situated, is to prevent the customers in appellant's and like establishments from being exposed to the distinctive communicative aspects of nude dancing." *Id.* Lawmakers can not limit communication because they do not agree with the message. *Id.*; *Barnes*, 501 U.S. at 590-92 (White J., dissenting).

⁹³ ***Commonwealth v. Campana*, 304 A2d. 432, 239 (1973) (holding when the United States Supreme Court reverses on a federal issue the Pennsylvania court can reaffirm its decision on state constitutional grounds).**

2000]

PAP'S A.M. V. CITY OF ERIE

Supreme Court⁹⁴ for guidance.⁹⁵ In the case of nude dancing, state courts have a more difficult time analyzing the law because a majority of United States Supreme Court Justices have not settled on a distinct legal theory.⁹⁶ In *Pap's A.M.*, the court was confronted with issues recently decided by the United States Supreme Court⁹⁷ and they ignored that decision.⁹⁸

Ignoring *Barnes* as binding precedent is premised on a faulty line of reasoning. According to the United States Supreme Court, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the

⁹⁴ In *Marbury v. Madison*, 5 U.S. 137, (1805), Chief Justice Marshall established the doctrine of judicial review when he wrote, “those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.” *Id.* at 177.

⁹⁵ *Martin v. Hunter's Leasee*, 14 U.S. 304, 332 (1816) (holding the United States Supreme Court has appellate jurisdiction over the decisions of state courts in all case arising under the constitution, treaties, or laws of the United States.) See, JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 18 (3rd ed. 1986). State laws are subordinate to the United States Constitution, federal treaties, and statutes through the supremacy clause of Article VI of the United States Constitution. *Id.*

⁹⁶ Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 *CORNELL L. REV.* 1593, 1596 (1992). (defining a plurality decision as a decision in which less than five justices of a nine member court do not make a decision based on the same rule.)

The absence of a simple majority creates precedential uncertainty in plurality decisions. This precedential uncertainty may be seen as a function of three factors: (1) the difficulty in identifying a particular legal rule that a numerical majority of Justices support, (2) the difficulty in identifying a particular outcome that is justified in light of a single legal rule, and (3) the difficulty in explaining an adequate connection between the identified legal rule and the identified outcome. The critical inquiry is the identification of a legal rule that should have binding precedential impact.

Id.

⁹⁷ Compare, *Barnes v. Glen Theater*, 501 U.S. 560 (1991) (stating the application of nudity laws was constitutional); with, *Pap's A.M. v Erie*, 719 A.2d 273, 277 (Pa. 1998), *reargument denied*, 1999 Pa. LEXIS 58 (Pa. 1998), *cert. granted*, 1999 Lexis 3201 (U.S. 1999) (ruling an Erie Pennsylvania nudity ordinance was an unconstitutional limit on free expression).

⁹⁸ *Pap's A.M.*, 719 A.2d. at 727. In *Barnes v. Glen Theater*, the United States Supreme Court “splintered and produced four separate, non- harmonious opinions.” *Id.* at 727.

narrowest grounds.”⁹⁹ Applying the “narrowest grounds model” to *Barnes*, Justice Souter’s opinion can be identified as binding precedent.¹⁰⁰ Five of the Justices decided that the restrictions in *Barnes* were not attempts to restrict expression.¹⁰¹

While it can be argued that Ordinance 75-1994, fails as a proper time, place, and manner restriction,¹⁰² it appears unlikely the current Court will be receptive to the argument. Only Justice Stevens remains from the *Barnes*

⁹⁹ *Id.*; Kimura, *supra* note 96, at 1603-05, the “narrowest grounds model” from *Marks* is the only Supreme Court recognized way the court has provided to interpret plurality decisions. *Id.* “The narrowest grounds model succeeds in coherently justifying the particular outcome of the case. The outcome of a plurality decision is a logical consequence of the legal rules that the concurring Justices provide. The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule.” *Cf., Id.* at 1602. Another method of analyzing plurality opinions is the “Duel Majority Model.” *Id.* Under the Duel Majority Model, any rule that secures a majority of a court is a binding precedent. *Id.* The problem with this model is that a binding rule may not justify the outcome of the case. *Id.* Kimura cites a situation when the dissent and concurring opinions may agree on a rule of law that is inconsistent with the judgment in the case. *Id.*

¹⁰⁰ *Pap’s A.M. v Erie*, 719 A.2d 273, 277 (Pa. 1998), *reargument denied*, 1999 Pa. LEXIS 58 (Pa. 1998), *cert. granted*, 1999 LEXIS 3201 (U.S. 1999). ; *Triplett Grille, Inc. v. The City of Akron*, 40 F.3d 129 (6th Cir. 1994), referring to *Barnes*, “Because Justice Souter’s opinion articulates a common underlying approach, it may be said to decide the question presented to the Court in *Barnes* the “narrowest grounds.” *Id.* at 134.

¹⁰¹ *Barnes v. Glen Theatre*, 501 U.S. 550, 569 (1991), Chief Justice Rehnquist, Justice Kennedy, Justice O’Connor decided that the act of nudity was not protected because the same message could be expressed if pasties and G-strings were worn. *Id.* at 569. Justice Souter stated that the ordinance in *Barnes* was a constitutional time, place, and manner restriction because it was intended to lessen the secondary effects (i.e. sex crimes) that accompany nude dancing. *Id.* at 575 (Souter J., concurring).

¹⁰² *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). (holding a city can rely upon studies from other cities as evidence that secondary effects was the predominate reason for enacting an ordinance). *Id.* Videotape Transcript of Erie City Council Meeting, (September 28, 1994). There is question as to whether the City ever discussed the effect of the ordinance on “secondary effects” basis. In the debate prior to passage of Ordinance 75-1994 the City Council appears to be concerned with establishing a moral tone for the city, not to deal with specific problems that would be served by a time, place and manner restriction on nude dancing. *Id.* at 3, Council Member Mrs. Thompson by letter wrote, “[t]he value of this total nudity ban as added publicity reaffirms the commitment of its supporters to be guardians of the community standards of decency and respect long established in this family-oriented city. *Mitchell v. Commission on Adult Entertainment Establishments*, 802 F.3d 123 (3d Cir. 1993) (holding that secondary effects must be proved through studies and the city enacted regulations “incidental” to expression).

2000]

PAP'S A.M. V. CITY OF ERIE

dissent and the five justices that makeup the “narrowest grounds” in *Barnes*, all remain on the Court.¹⁰³

B Policy Behind Pap's

The Pennsylvania Supreme Court could have eliminated the review of the United States Supreme Court by analyzing Ordinance 75-1994 under Article 1, Section 7 of the Pennsylvania Constitution instead of the First Amendment to United States Constitution.¹⁰⁴ The Pennsylvania Supreme Court could have clearly established the law regarding limitations on nude dancing in Pennsylvania by adopting the analysis of the concurring opinion. The court should have acknowledged *Barnes* as a binding precedent and decided the case on independent state grounds.¹⁰⁵

¹⁰³ Chief Justice Rehnquist, Justice Kennedy, and Justice O'Connor, participated in the Courts opinion; Justice Scalia joined in judgment holding nude dancing was not protected by the First Amendment, and Justice Souter concurred using the secondary effects analysis. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

¹⁰⁴ **NOWAK ET AL., *supra* note 95, at 20 (stating that while state supreme courts are bound to the interpretation of the United States Supreme Court regarding federal, state courts are the highest authority of the individual state law).**

¹⁰⁵ ***Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (“[Supreme Court] jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment.”); *Commonwealth v. Edmunds*, 586 A.2d. 887, 894 (Pa. 1988), Pennsylvania Courts are not bound by the rulings of the United States Supreme Court on issues arising under the Pennsylvania Constitution. *Western Pennsylvania Socialist Workers v. Connecticut General Life Insurance*, 515 A.2d 1331, 1335 (Pa. 1986) (holding Article 1, Section 7 of the Pennsylvania Constitution is a restraint on the power of government to limit free expression). See, William J. Brennan Jr., *State Constitutions and the Protections of Individual Rights*, 90 HAR L. REV. 489, 491 (1977). Justice Brennan writes:**

[s]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

***Id.* Justice Brennan argues that States feel compelled to expand individual rights beyond the minimal limits of the United States Constitution because of inactivity of the Supreme Court in regards to civil liberties. *Id.* See, *TRIBE, supra* note 32, at § 3-33, 123, at a minimum a state law must meet the fundamental**

An analysis of the policy and legislative history of Ordinance 75-1994 shows that the Pennsylvania Supreme Court correctly determined that the limitations in *Pap's A.M.*, were content-based.¹⁰⁶ While the Supreme Court has a right and power to determine federal law, as policy Justice Souter's concurring opinion in *Barnes* and the Court's decision in *Renton* are a misapplication of the doctrine of content-neutral speech.¹⁰⁷

The basic idea behind the First Amendment is "that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹⁰⁸ In *Barnes* and *Renton*, the Supreme Court has subrogated sexually oriented expression to a lower level of First Amendment protection and made a determination based on the content of the speech.¹⁰⁹

The legislative history of Ordinance 75-1994 shows that the City Council of Erie enacted Ordinance 75-1994 to establish a community standard for morality by stopping the expression of nude dancing.¹¹⁰ Erie City Council Member Thompson urged the passage of Ordinance 75-1994 by writing "the problem here is we are talking about public standards and public decency. . . [w]e're not talking about nudity. . . [w]e're talking about what is indecent and immoral."¹¹¹ The Council enacted Ordinance 75-1994 not because of

fairness requirement of the Fourteenth Amendment. *Id.*

¹⁰⁶ *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) (Brennan J., dissent).

¹⁰⁷ *The Supreme Court- Leading Cases*, 100 HARV. L. REV. 190, 200 (1986), The basis of the application of a content-neutral restriction on adult oriented businesses is actually a content-based limitation on free expression creating a slippery slope upon which all expression could slide. *Id.*

¹⁰⁸ **Police Department of the City of Chicago v. Mosely**, 408 U.S. 92, 95 (1972). **See, Stone, *supra* note 18, at 212-13. Stone explains the basic concept of the First Amendment when he writes:**

[t]he Court has long embraced an "antipaternalistic" understanding of the first amendment. It has observed, for example, that the first amendment assumes that ideas and information are not in themselves harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Id.

¹⁰⁹ Servodidio, *supra* note 7, at 1245, "In contrast to the decisions in the context of zoning, the courts directly weigh the expressive value of nude dancing against the various interests asserted by the state in support of suppression." *Id.*

¹¹⁰ Videotape Transcript of Erie City Council Meeting (September 28, 1994).

¹¹¹ **Videotape Transcript of Erie City Council Meeting, 3-4 (September 28, 1994).**

2000]

PAP'S A.M. V. CITY OF ERIE

secondary effects, or to establish a time, place, and manner restriction, but rather the Council set out to establish a moral climate for the City.¹¹²

In *Pap's A.M.*, the court accepted the dissent as persuasive authority contending the dissent captured the policy behind the right of free expression.¹¹³ Article I, section 7 of the Pennsylvania constitution protects the same policy the dissent claimed the First Amendment protected.¹¹⁴ Using the same policy that was used in the dissent, the court could have determined Ordinance 75-1994 is a content-based limitation on free expression and applied a strict scrutiny analysis to the ordinance.¹¹⁵ While the prevention of sex crimes is a compelling government interest, the ordinance is not narrowly tailored.¹¹⁶ Based on this logic Ordinance 75-1994 is an unconstitutional

Peter M. Cicchino, Reason And The Rule Of Law: Should Bare Assertions Of "Public Morality" Qualify As Legitimate Government Interests For The Purposes Of Equal Protection Review?, 87 GEO. LJ 139, 140 (1988). "Bare public morality" arguments defend a law by asserting a legitimate government interest in prohibiting or encouraging certain human behavior without any empirical connection to goods other than the alleged good of eliminating or increasing, as the case may be, the behavior at issue. Id.

¹¹² *Id.* at 4. Council Member Mr. Maras said, "One person called me and asked me, they knew I voted for the ordinance last time, and it was a woman . . ., say, you know, 'If I – these people that are for this total nudity, wonder if they had a daughter eighteen years old or older . . . would they allow their daughter to dance totally nude in the Erie area?' I doubt if many would stand up and come before us tonight and say they would."

¹¹³ *Pap's A.M. v Erie*, 719 A.2d 273, 277 (Pa. 1998), *reargument denied*, 1999 Pa. LEXIS 58 (Pa. 1998), *cert. granted*, 1999 LEXIS 3201 (U.S. 1999).

¹¹⁴ *Id.* at 279.

¹¹⁵ *United States v. Grace*, 461 U.S. 171, 177 (1983), (holding content based restrictions will be upheld if they are narrowly written to meet a compelling governmental interest).

¹¹⁶ *Pap's A.M. v Erie*, 719 A.2d 273, 279 (Pa. 1998), *reargument denied*, 1999 Pa. LEXIS 58 (Pa. 1998), *cert. granted*, 1999 LEXIS 3201 (U.S. 1999). While the court agreed that the prevention of sex crimes (i.e. rape and prostitution) was a compelling government interest, the court did not believe the nudity ordinance was narrowly tailored to reach that interest. *Id.* at 279. The court stated that less restrictive methods could serve to reduce sex crimes. *Id.* The court indicated that regulations regarding the hours of operation, distance between patrons and dancers or dispersing the businesses through the City would be less restrictive ways of achieving the compelling interest. *Id.* See, Ron Kalyan, comment, *Regulation of Nude Dancing in Bring Your Own Bottle Establishments in the Commonwealth of Pennsylvania: Are the Commonwealth's Municipalities Left to Fend for Themselves?*, 99 DICK L. REV. 169, 181 (1994) (writing that municipalities can utilize regulations such as control of the locations of clubs and restriction of hours to reduce conflicts with residents and reduce

restriction on free expression.¹¹⁷

The Pennsylvania Supreme Court would not be alone if they followed this line of reasoning. Other state's have also held similar provisions against nude dancing are unconstitutional using their state constitution.¹¹⁸ The key factor in these decisions is that "[n]udity of the dancer is an integral part of the emotions and thoughts that a nude dancing performance evokes."¹¹⁹ These states and Pennsylvania have recognized that limits upon the message of expression leads to a slippery slope in which policy makers can place themselves as the arbiter of what expression should be permitted.¹²⁰

IV. CONCLUSION

Ultimately, the speculation and the analysis of this note will be finally decided.¹²¹ The United States Supreme Court will redecide what the United States Constitution allows in regard to limitations on nude dancing. If the Court holds as it did in *Barnes*, the Pennsylvania Supreme Court will likely have an opportunity to revisit the case using only Pennsylvania law.¹²² However, time and confusion could have been avoided if the Pennsylvania Supreme Court used the proper route to their proper decision. By applying Pennsylvania law in *Pap's A.M.*, the Pennsylvania Supreme Court could have clearly established the limits of state power to control nude dancing in the Commonwealth of Pennsylvania.

Michael McBride

crime).

¹¹⁷ *Id.*

¹¹⁸ See, e.g., *O'Day v. King County* 749 P.2d 142 (Wash. 1988) (holding non-obscene nude dancing to be constitutionally protected); *7250 Corp. v. Bd. of County Comm's*, 799 P.2d 917 (Colo. 1990) (holding free speech was a fundamental right protected by the United States and Colorado Constitution, only content neutral restrictions regarding time, place, and manner of speech are constitutional).

¹¹⁹ *Barnes v. Glen Theatre* 501 U.S. 550, 560 (1991) (White J., dissent); *Schad v. Mt. Empraim*, 452 U.S. 61, 66 (1981) (holding nudity alone does not place protected material outside the mantle of the First Amendment).

¹²⁰ *Cohen v. California*, 403 U.S. 15, 25 (1971) (holding a man could not be prosecuted for wearing a shirt which said "Fuck the Draft") Justice Harlan wrote, "because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.*

¹²¹ The United States Supreme Court will hear the case during the 1999-2000 term.

¹²² *Commonwealth v. Campana*, 304 A2d. 432, 239 (1973).