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The Ohio Liquor Control Commission's Right to Regulate

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INTRODUCTION

"TOPLESS" AND "BOTTOMLESS" dancing is a recent social phenomenon utilized by liquor permit holders to create an atmosphere that will attract the potential customer to enter the door and buy a drink. Although various sociological theories have been advanced regarding this type of entertainment,[1] its primary motivation is profit.[2]

Just as the potential for profit is great, so arguably is the potential for harm to the community by this "offensive" entertainment. Recognizing this potential, the courts have formulated three rather startling theories to buttress the state's control over liquor regulation. The first theory is that the state enjoys a "super" police power when dealing with the regulation of liquor and may promulgate broad, general regulations without incurring the application of the "void for vagueness"[3] standard to such regulations.[4] Secondly, a liquor license is considered a privilege, revocable by the state at its discretion, and not a vested property right. Absent a statute, such a privilege is not protected by the due process guarantees of the fourteenth amendment, and may be revoked without prior notice or hearing.[5] Thirdly, it has been recognized that "[s]tates may sometimes proscribe expression which is directed to the accomplishment of an end which the state has declared to be illegal when such expression consists, in part, of 'conduct' or 'action'."[6] Thus, the state may constitutionally restrict forms of entertainment or expression normally protected by the first amendment on the authority of the twenty-first amendment which confers "something more than the normal state authority over public health, welfare, and morals."[7]

HISTORY

Regulation of the liquor industry has had a vacillating history. Before the Union was formed, liquor, like any other commodity, was subject to regulation by the colonies. When the Constitution was adopted and the

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[1] *See generally* M. GOLDSTEIN & H. KANT, PORNOGRAPHY AND SEXUAL DEVIANCE (1973).

[2] *See* A.B. Jac, Inc. v. Liquor Control Comm'n, 31 Ohio App. 2d 9, 12, 285 N.E.2d 763, 765 (1972), where the bartender's assertion was: "It's been a long winter and we haven't made any money, and this is the way to make it." *See also* State *ex rel.* Keating v. Film, 27 Ohio St. 2d 278, 272 N.E.2d 137 (1971), for the contention that in Ohio profit is a "dirty" word.

[3] *See* text accompanying notes 39-40 *infra.*

[4] *E.g.*, Salem v. Liquor Control Comm'n, 34 Ohio St. 2d 244, 298 N.E.2d 138 (1973).

[5] *See* A.B.Jac, Inc. v. Liquor Control Comm'n, 31 Ohio App. 2d 9, 285 N.E.2d 763 (1972).

[6] California v. LaRue, 409 U.S. 109, 117 (1972).

[7] *Id.* at 114 *See* Note, 6 AKRON L. REV. 247 (1973).

Government of the United States organized, the states, by operation of the commerce clause, were stripped of the power to prevent or constrict the flow of commerce across their respective borders for their economic advantage.[8] Absent a need for uniformity, however, the federal government's power to regulate was not absolute.[9] The state, through the operation of its police power, could pass legislation governing matters of local concern that affected or regulated interstate commerce in order to promote the health, safety and welfare of its citizenry.[10] Yet, even though a state could regulate the sale or use of liquor by the exercise of its police power, the liquor industry continued to enjoy the protections of both the privileges and immunities clause and the commerce clause of the United States Constitution, which the state regulation could not transcend.[11]

Constitutional guarantees to the liquor industry ceased with the enactment of the eighteenth amendment in 1919.[12] Rights which the liquor industry enjoyed under the Constitution were nullified because the Constitution itself divested the liquor industry of its legal existence. The states were forbidden to permit liquor to be manufactured or sold within their borders.

The repeal of the eighteenth amendment fourteen years later was by no means the rebirth of the liquor industry. While the first section of the twenty-first amendment[13] removed the federal proscription against the States, thereby permitting liquor within their borders, the second section

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[8] *See* Hood & Sons v. DuMond, 336 U.S. 525, 533 (1949); Leisy v. Harden, 135 U.S. 100 (1890); Bowman v. Chicago & Northwestern Railway Co., 125 U.S. 465 (1888); B. SCHWARTZ, CONSTITUTIONAL LAW 108 (1972).

[9] *See* Lake Shore & M.S.R. Co. v. Ohio, 173 U.S. 285 (1899); Cooley v. Board of Wardens, 53 U.S. (12 How.) 144 (1851).

[10] *Id.;* Mintz v. Baldwin, 289 U.S. 346 (1933); Minnesota Rate Cases, 230 U.S. 352 (1913). *See also* Hackensack Meadow Dev. Comm'n v. Municipal Sanitary Landfill Authority, 68 N.J. 451, 348 A.2d 505 (1975).

[11] *See, e.g.,* Leisy v. Hardin, 135 U.S. 100 (1890); Bowman v. Chicago & Northwestern Railway Co., 125 U.S. 465 (1888); Wynhamer v. People, 13 N.Y. (3 Keen) 378 (1856).

[12] U. S. CONST. amend. XVIII, which provides:

> Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

[13] U. S. CONST. amend. XXI provides:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed. Section 2. The transportation or importation into any State Territory, or possession of the United States for delivery or use therein of intoxicating liquors, *in violation of the laws thereof,* is hereby prohibited. (emphasis added).

failed to revive the constitutionally protected rights[14] which existed prior to the passage of the eighteenth amendment.[15]

The broad grant of authority by the twenty-first amendment to the states to regulate the use, distribution, or consumption of liquor has suspended the normal operation of the commerce clause.[16] In *Hostetter v. Idlewild Liquor Corp.*,[17] the United States Supreme Court held that by reason of the twenty-first amendment "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."[18]

The justification for expanding the commercial regulation of the liquor industry under the twenty-first amendment, so as to include the regulation of entertainment in a liquor license premise is founded on a "harmful potentiality" theory.[19] The basis for this theory is that there are obvious harmful potentialities when the sale of intoxicating beverages occurs in retail outlets. These potentialities not only necessitate that the sale of liquor be strictly regulated, but that business conduct and the premises within which liquor is sold must be regulated, as well, to avoid such harm.[20] Activities incidental to the sale of liquor regulated by Ohio are profit margins,[21] price advertising,[22]

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[14] *See, e.g.*, Mahoney v. Triner Corp., 304 U.S. 401, 404 (1937), where it is stated: "A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." For a general treatment of this problem see Note, *Twenty-first Amendment Limitation on Power Granted to the States*, 10 GA. ST. B.J. 336 (1973). *See also* California v. LaRue, 409 U.S. 109, 135 (1972), (Marshall, J., dissenting), ("I am at a loss to understand why the Twenty-first Amendment should be thought to override the First Amendment but not the Fourteenth.").

[15] A.B. Jac, Inc. v. Liquor Control Comm'n, 31 Ohio App. 2d 9, 13, 285 N.E.2d 763, 765 (1972).

[16] Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939).

[17] 377 U.S. 324 (1964).

[18] *Id.* at 330. *See also* Note, 6 AKRON L. REV. 247, at 248-49 & n. 16 (1973).

[19] *See* Ziffrin v. Reeves, 308 U.S. 132 (1939); Major Liquors v. Omaha, 188 Neb. 628, 198 N.W.2d 483 (1972); Solomon v. Liquor Control Comm'n, 4 Ohio St. 2d 31, 212 N.E.2d 595 (1965), *cert. denied*, 384 U.S. 928 (1966).

[20] *See generally* Comment, *The Liquor Industry: The Licensees' Viewpoint, Legislation, Administration, and Enforcement*, 8 CREIGHTON L. REV. 979 (1975); Note, *Control Over Ultra Vires Activity of the Liquor Board*, 19 OHIO ST. L.J. 359 (1958).

[21] *See* OHIO REV. CODE ANN. §4301.041 (Page 1973), which reads in part as follows:

> The liquor control commission may determine and fix by regulation the minimum percentage mark-up for sales at retail of beer, lager beer, ale, stout, porter, or any other brewed or malt liquor or malt beverages, whether in case lot or less.

[22] OHIO REV. CODE ANN. §4301.211 (Page 1973), which provides:

> No holder of a permit issued by the department of liquor control shall advertise the retail price of beer and malt beverages in any newspaper, circular, radio broadcast, television telecast or by any other media of advertising off the premises of the permit holder.

who may purchase,[23] hours of sale,[24] places for consumption,[25] and the type of entertainment which may be presented.[26]

REGULATION IN OHIO

Ohio has delegated the regulation of the liquor industry to the Liquor Control Commission (LCC), an administrative body consisting of three commissioners appointed by the governor. Section 4301.03 of the Ohio Revised Code empowers the LCC to regulate liquor in Ohio:

> The Liquor Control Commission may adopt and promulgate, repeal, rescind, and amend, in the manner required by this section, rules, regulations, standards, requirements, and orders necessary to carry out Chapters 4301 and 4303 . . . .[27]

Realizing that strict scrutiny of all license permit holders would be difficult due to the limited number of supervisors employed by the LCC, the legislature added a self-policing feature to this section of the Code. Subsection (B) of the statute provides that the regulations of the LCC may include the following:

> Rules, regulations, and orders providing *in detail* for the conduct of any retail business authorized under permits issued pursuant to such chapters, *with a view to insuring compliance* with such chapters and laws relative thereto, and the maintenance of public decency, sobriety, and good order in any place licensed under such permits.[28] (emphasis added)

Unlike other jurisdictions which have denied liquor permit holders the usual protections encompassed in procedural due process,[29] Ohio has enacted statutory provisions which require notice, hearing and appeal, prior to

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[23] OHIO REV. CODE ANN. §4301.22(A) (Page 1973), which provides in part: "No beer shall be sold to any person under eighteen years of age . . . ."

[24] OHIO REV. CODE ANN. §4301.22(D) (Page 1973), which provides:

> No sales of intoxicating liquor shall be made after two-thirty a.m. on Sunday or at retail on a primary or general election day between the hours of six a.m. and seven-thirty p.m., except that intoxicating liquor may be sold on Sunday under authority of a permit which authorizes Sunday sale.

[25] OHIO REV. CODE ANN. §4301.64 (Page 1973).

[26] OHIO REV. CODE ANN. §4301.03(B) (Page 1973) which provides:

> Rules, regulations, and orders providing in detail for the conduct of any retail business authorized under permits issued pursuant to such chapters, with a view to insuring compliance with such chapters and laws relative thereto, and the maintenance of public decency, sobriety, and good order in any place licensed under such permits.

[27] OHIO REV. CODE ANN. §4301.03(A) (Page 1973).

[28] OHIO REV. CODE ANN. §4301.03(B) (Page 1973).

[29] Smith v. Iowa Liquor Control Comm'n, 169 N.W.2d 803 (Iowa 1969), *cert. denied*, 400 U.S. 885 (1969); Pinzino v. Supervisor of Liquor Comm'n, 334 S.W.2d 20 (Mo. 1960); *cf* Comment, *Beer Permit Revocations in Iowa: The Need for a More Rational Approach*, 57 IOWA L. REV. 1409 (1972).

revocation of a liquor license.[30] Yet, the LCC, subject to limited judicial intervention, maintains virtual autonomy in the application of its rules and regulations to liquor licensees.[31] An appeal of a LCC ruling is obtained only through the limited provisions of Section 119.12 of the Ohio Revised Code.[32] Under this section the only standard applied on review of a LCC decision is: "[T]hat the order be supported by reliable, probative, and substantial evidence and is in accordance with the law."[33] Thus, an affirmation usually proceeds upon a determination that there is some evidence in the record on which to support the LCC finding.[34]

Although the Ohio liquor licensee enjoys more procedural rights than his counterparts in other states, he is still subject to the often unfettered discretion the LCC wields in determining what activities violate its rules and regulations. Since Ohio public policy regards the sale of alcohol as a suspect activity, any dispute between a licensee and the LCC which involves any doubt as to whether a violation exists will normally be resolved in the state's favor.[35] This attitude is best exemplified by the Ohio Supreme Court's affirmation of the revocation by the LCC of a liquor permit holder's license for 28 days in *Salem v. Liquor Control Commission*.[36] Paul Salem, owner of an Akron nightclub, was charged with violating Liquor Control Commission Regulation 52,[37] in that he

> . . . did knowingly and/or willfully allow in and upon the premises,

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[30] OHIO REVISED CODE ANN. §4301.27 (Page 1973), which provides:

> The board of liquor control may revoke or cancel any permit on its own initiative or on complaint of the department of liquor control or of any person, after a hearing at which the holder shall be given an opportunity to be heard in such manner and upon such notice as prescribed by the rules and regulations of the board.

[31] *See* Salem v. Liquor Control Comm'n, 34 Ohio St. 2d 244, 298 N.E.2d 138 (1973); Angola Corp. v. Liquor Control Comm'n, 33 Ohio App. 2d 87, 292 N.E.2d 886 (1972).

[32] OHIO REV. CODE ANN. §119.12 (Page 1969).

[33] *Id. See generally* Rutledge, *Administrative Review and the Ohio Modern Courts Amendment*, 35 OHIO ST. L.J. 41 (1974); Note, *Judicial Review of Administrative Decisions in Ohio*, 34 OHIO ST. L.J. 853 (1973).

[34] *E.g.*, Angola Corp. v. Liquor Control Comm'n, 33 Ohio App. 2d 87, 292 N.E.2d 886 (1972).

[35] *See* cases cited note 31 *supra*.

[36] 34 Ohio St. 2d 244, 298 N.E.2d 138.

[37] Liquor Control Commission Regulation 52, reads:

> No permit holder shall knowingly or willfully allow in, upon or about his licensed premises improper conduct of any kind, type or character; any improper disturbances, lewd, immoral activities or brawls; or any indecent, profane, or obscene language, songs, entertainment, literature, pictures or advertising materials; nor shall any entertainment consisting of the spoken language or songs which can or may convey either directly or by implication an immoral meaning to be permitted in, upon or about the permit premises.

> improper conduct . . . [in permitting] a female to dance with insufficient attire, to wit, pasties which covered only the nipple and areola portion of her breasts, the overall effect of which was to portray the female as dancing in a 'topless' state.[38]

The *Salem* case is important because it represents the position of Ohio on three controversial issues regarding the regulations of live entertainment in bars. First, although Section 4301.03[39] of the Ohio Revised Code dictates that the LCC rules be promulgated in detail "with a view to insuring compliance", the Ohio Supreme Court chose not to subject LCC regulations to any standard of specificity on their face; rather the court opted to defer such determination to a case by case approach.[40] Second, the court approved the position that a liquor license is a privilege and not a property right.[41] Finally, when the LCC suspends a liquor license on the grounds that the owner of the premises permitted a female to dance "topless", the constitutional guarantees of the first amendment are inapplicable.[42]

SPECIFICITY REQUIREMENTS

A general principle of due process is that a criminal or regulatory statute is void for vagueness if it does not clearly define the prohibited conduct.[43] Three reasons underlie this basic principle. First, prohibited acts must be adequately explicit to give notice and warn the individual, so that he or she is sufficiently informed as to what constitutes proscribed conduct. Second, definite standards must be specified to avoid arbitrary and discriminatory application of the law.[44] Third, vague and obscure laws have a "chilling effect" on first amendment freedoms; because of uncertainty the individual is forced to veer wide of conduct which *may* be characterized as unlawful.[45]

> Entertainment consisting of dancing, either solo or otherwise, which may or can, either directly or by implication, suggest an immoral act is prohibited. Nor shall any permit holder possess or cause to have printed or distributed any lewd, immoral, indecent, or obscene literature, pictures or advertising material.

[hereinafter referred to as Regulation 52].

[38] 34 Ohio St. 2d at 244, 298 N.E.2d at 139.

[39] *See* note 27 and accompanying text *supra*.

[40] 34 Ohio St. 2d at 249, 298 N.E.2d at 142.

[41] *Id.*

[42] *Id. See also* California v. LaRue, 405 U.S. 109 (1972).

[43] *See* Ashton v. Kentucky, 384 U.S. 195 (1965); United States v. Darby, 312 U.S. 100 (1940). *See generally* Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960);Annot., 132 A.L.R. 1430 (1941).

[44] *See* M. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 618-20 (2nd ed. 1973).

[45] Smith v. Gogven, 415 U.S. 566 (1974); Grayned v. Rockford, 408 U.S. 104 (1972); *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

Section 4301.03 (B)[46] of the Ohio Revised Code also mandates the need for specificity. This requirement of specificity was asserted by the liquor licensee in *Salem,* as a defense in an action to suspend his liquor license. In particular, the permit holder complained that the words "improper conduct" as used in Regulation 52 did not describe in sufficient detail the proscribed conduct for which a license could be revoked.[47]

In answering the question of specificity, the Ohio Supreme Court pointed out that the standard for specificity in a civil trial was not as great as the requirement for specificity in a criminal trial.[48] The court, however, failed to state exactly what standard of specificity is required in a civil trial. It chose instead, to rely on the reasoning adhered to in *A.B. Jac, Inc. v. Liquor Control Commission,*[49] that it would be too burdensome for the LCC to spell out in detail any specific requirements for improper conduct:

> The regulation is in general terms, but considering the ingenuity of man, to specify all of the acts which might offend public decency, sobriety and good order, would require a regulation which would go on *ad infinitum.*[50]

Thus the court was unwilling to establish any judicial guidelines for specificity.

This lack of concrete standards has created a situation in which the LCC has complete discretion to decide what is "improper." A subjective rather than objective determination of propriety is the inevitable result of delegating basic policy matters to the LCC. In *Khoury v. Board of Liquor Control,*[51] a member of the State Liquor Board made the following comment about "improper conduct":

> The Board presented its views in no uncertain terms about a year ago that . . . anything that tended toward indecency, or in any way was sexy, would not be tolerated in connection with a permit holder's place of business.[52]

The *Salem* court justified the granting of such broad authority to the LCC on the basis of the state's police power. The court maintained:

> The police power of the state is fully competent to regulate the business,

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[46] *See* note 26 *supra.*

[47] 34 Ohio St. 2d at 246, 298 N.E.2d at 140.

[48] *Id.*

[49] 31 Ohio App. 2d 9, 285 N.E.2d 763 (1972).

[50] 34 Ohio St. 2d at 247, 298 N.E.2d at 141.

[51] 81 N.E.2d 634 (Ohio Ct. App. 1948).

[52] *Id.* at 636.

> to mitigate its evils, or to suppress it entirely . . . . The manner and extent of regulation rest in the discretion of the governing authority.[53]

The court in *Salem* reasoned that since the state can regulate the hours a bar may remain open, it may also regulate the conduct within the bar.[54] This rationale, however, fails to illustrate effectively how a lack of definiteness in the promulgated regulations is permissible. No doubt exists as to the state's authority to regulate the "use, distribution, or consumption" within its borders; yet, it cannot escape its constitutional obligations to establish definite standards of regulation which will afford the liquor licensee notice of what activities would violate LCC regulations. Without such specificity of regulation in matters such as the hours of operation or acceptable entertainment, a liquor permit holder would be forced to guess how late he could stay open and the LCC subsequently could decide his guess was wrong and suspend his liquor permit.

Ohio's policy of granting the LCC authority to promulgate its own regulations in broad and general terms was criticized by Justice Clifford Brown in *A.B. Jac, Inc.*[55] Justice Brown stated that if standards are not established, there is nothing to "prevent the trier of a cause from creating his own standard in each case."[56] Justice Brown reasoned that the regulations and specifically "LCC-1-52 to be valid must describe an act which is definable, and it is required to be definable if we are to elude the 'vice of vagueness'."[57] He further contended that the results precipitating from the enforcement of general regulations may be just as ridiculous as requiring enumerations of "improper conduct" *ad infinitum*:

> Conceivably, since in this case, the regulation was directed solely to dress, or the insufficiency thereof, this empowers the commission to suspend a liquor license because the permit holder willfully allowed 'improper conduct' on the permit premises by consenting to the patrons [sic] enjoyments of refreshments or entertainment, or both, without the adornment of bow ties, cuff links and pincenez glasses. The absence of standards or guidelines can conjure additional multitudinous absurd results.[58]

The liquor licensee's complaint is not that the state has no power to regulate the sale of liquor, but that there are no prescribed standards on

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[53] 34 Ohio St. 2d at 247, 298 N.E.2d at 141.

[54] *Id.* at 246, 298 N.E.2d at 141.

[55] 31 Ohio App. 2d 9, 14, 285 N.E.2d, 763, 766 (Brown, J., concurring).

[56] *Id.* at 15, 285 N.E.2d at 766; *accord* Papachristou v. Jacksonville, 405 U.S. 156 (1972).

[57] 31 Ohio App. 2d at 15, 285 N.E.2d at 766; *see* Watkins v. United States, 354 U.S. 178 (1957).

[58] 31 Ohio App. 2d at 15, 285 N.E.2d at 767.

which they can rely. Although the power granted by the twenty-first amendment to the state is broad, the requirement that regulations be specific, so as to provide notice and establish ascertainable standards, would not impair the state's reasonable exercise of that power. Specificity of standards would result in adjudications based on merit,[59] rather than the whim of the LCC.

LICENSE RELATIONSHIP

The second point of controversy in the regulation of entertainment in bars involves the special licensor-licensee relationship which the Ohio courts consistently have maintained exists between the LCC and the liquor permit holder.[60] The foundation for such a relationship lies in the rationale that the sale of liquor is basically repugnant to the public health, morals and welfare, and only to the extent that it is relegated to the status of a privilege, and not a property right,[61] subject to the discretion of the state legislature,[62] is it tolerable.

The effect of classifying a liquor license as a privilege is twofold. First, vague regulations are not considered offensive, because by accepting the license, the liquor permit holder has impliedly agreed to obey whatever conditions are imposed.[63] Secondly, Ohio courts have consistently maintained that the fourteenth amendment does not apply to liquor licenses.[64] The court in *Salem,* addressing itself to the issue of whether the fourteenth amendment is applicable to liquor licenses, held:

> Realizing that the liquor industry requires . . . regulation, the states have not granted irrevocable permits in the nature of vested property rights to retail liquor businesses, but instead have issued "licenses." A "license" has been consistently considered by courts as a "personal and temporary permit or privilege, and not a natural right, to be enjoyed only so long as the conditions and restrictions governing its continuance are complied with . . . ."[65]

The conditional nature of this privilege was again illustrated by language in *Angola v. Liquor Control Commission,*[66] suggesting that permit holders

[59] Clark v. Fremont, 377 F.Supp. 327 (D.Neb. 1973).

[60] *See, e.g.,* Salem v. Liquor Control Comm'n, 34 Ohio St. 2d 244, 298 N.E.2d 138 (1973); Abraham v. Fioramonte, 158 Ohio St. 2d 213, 107 N.E.2d 321 (1952); State *ex rel* Zugravu v. O'Brien, 130 Ohio St. 23, 196 N.E. 664 (1935). *See also* Annot., 35 A.L.R.2d 1067 (1954).

[61] Angola Corp. v. Liquor Control Comm'n, 33 Ohio App. 2d 87, 292 N.E.2d 886 (1973).

[62] *See, e.g.,* Solomon v. Liquor Control Comm'n, 4 Ohio St. 2d 31, 212 N.E.2d 595 (1965).

[63] Angola Corp. v. Liquor Control Comm'n, 33 Ohio App. 2d 87, 292 N.E.2d 886 (1973). *See also* Solomon v. Liquor Control Comm'n, 4 Ohio St. 2d 31, 212 N.E.2d 595 (1965).

[64] Salem v. Liquor Control Comm'n, 34 Ohio St. 2d 244, 298 N.E.2d 138 (1973).

[65] *Id.* at 245, 298 N.E.2d at 140, *quoting* 45 AM. JUR. *Intoxicating Liquors* §115 (1969). *But see* Page v. Jackson, 398 F. Supp. 263 (N.D.Ga. 1975).

[66] 33 Ohio App. 2d 87, 292 N.E.2d 886 (1972).

may not even question the validity of the regulations of the LCC: "A permit holder enjoys the privilege of doing business in Ohio subject to the regulations imposed by the commission. He may simply meet the requirements or forfeit his privilege."[67] The Ohio Supreme Court has interpreted *Angola* in such a manner that a permit holder must accept what the "Liquor Control Commission *believes* is consistent with 'public decency, sobriety, and good order.' "[68]

This special license relationship has resulted in a double standard for judging conduct. First, a general standard is applicable to entertainment everywhere except where liquor is sold; and second, a strict standard is applied to places which sell alcoholic beverages allegedly to insure that they will be provided with suitable, decent, and proper conduct. *Angola* solidified this double standard:

> We are not concerned with general standards applied to a variety of places of entertainment or amusement involving social mores or community social levels, but the application of a regulatory measure as to the conduct of a permit holder in the operation of his business.[69]

The decisions in *Salem* and *Angola,* however, fail to recognize that the substantial investment by the liquor licensee in his place of business gives him the equivalent of a *"de facto* property interest" in his liquor license.[70] Other courts, recognizing this *de facto* property interest, have been willing to accept that the status of the permit holder, as a businessman, gives him at least some protection.[71] The court of appeals in *Khoury v. Board of Liquor Control,*[72] for example, recognized that, although a liquor license was not a vested property right, the heavy investment of the permit holder in his establishment should be a factor which requires fairness and reliability from the LCC.[73]

DETERMINATION OF OBSCENITY AND THE FIRST AMENDMENT

The third area of controversy in the regulation of an establishment

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[67] *Id.* at 91, 292 N.E.2d at 889.

[68] 34 Ohio St. 2d at 246, N.E.2d at 140. (emphasis added).

[69] 33 Ohio App. 2d at 91, 292 N.E.2d at 889. *See also* A.B.Jac, Inc. v. Liquor Control Comm'n, 31 Ohio App. 2d 9, 14, 285 N.E.2d 763, 766 (1972), where the court simply stated that "a permit holder enjoys a privilege and not a right surrounded by constitutional protections." *But cf.* Wisconsin v. Constantineau, 400 U.S. 433 (1971).

[70] Manos v. Green Bay, 372 F. Supp. 40 (E.D. Wisc. 1974).

[71] Page v. Coggins, Civil No. 75-197 (N.D. Ga. June 6, 1975).

[72] 81 N.E.2d 634 (Ohio App. 1948). *See also In re* Mendlowitz, 9 Ohio App. 2d 83, 222 N.E.2d 835 (1967).

[73] 81 N.E.2d at 637.

operating under a liquor permit is whether the regulation of entertainment such as "topless" dancing conflicts with rights guaranteed by the first amendment. The crux of the problem is whether any first amendment standards of obscenity are applicable to hearings conducted by liquor control boards. The answer seems to be that the LCC is not bound by any constitutional standard for obscenity when judging entertainment, but may apply its own standards as to what is obscene.[74]

The landmark decision in this area, *California v. LaRue*,[75] has been closely followed by the Ohio courts. In *LaRue*, liquor license holders and dancers performing at their premises instituted a declaratory judgment action against the California Department of Alcoholic Beverage Control challenging the constitutionality of the Board's regulations prohibiting *per se* certain live entertainment in bars. These regulations were drafted as a result of numerous complaints to the Department that sexually explicit entertainment in "topless" and "bottomless' bars and nightclubs[76] led to sexual contact between customers and entertainers, prostitution, rape, indecent exposure, and assaults on police officers. The purpose of the Department's regulations was to eliminate these incidental occurrences. To effectuate this purpose, the Department promulgated a series of regulations prohibiting certain conduct in establishments where liquor is served.

The district court in *LaRue* found the following regulations by the California Department of Alcoholic Beverage Control to be unconstitutional on their face:

> (a) The performance of acts or simulated acts, of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law;
>
> (b) The actual simulated touching, caressing or fondling on the breasts, buttocks, anus or genitals;
>
> (c) The actual simulated displaying of the pubic hair, anus, vulva or genitals.[77]

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[74] *See* notes 49-59 and accompanying text *supra*.

[75] 409 U.S. 409 (1972). *See also* Note, *California v. LaRue*, 12 DUQUESNE L. REV. 1008 (1974); Note, *California v. LaRue: The Demise of the "Bottomless" Bar*, 1 PEPPERDINE L. REV. 129 (1973).

[76] Evidence taken at public hearings indicated:

> ... that in licensed establishments where 'topless' and 'bottomless' dancing occurred, numerous incidents of legitimate concern to the Department had developed. Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vaginas of a female entertainer, or on the bar so that she might pick it up herself. Numerous other forms of contact between the mouths of customers and the vaginal area of female performers were reported to have occurred. 409 U.S. at 111.

[77] LaRue v. California, 326 F. Supp. 348 (C.D. Cal. 1971).

On appeal the Supreme Court of the United States reversed the district court's decision. In rejecting the limitations placed on States' authority in this area by the district court, the majority, *per* Justice Rehnquist, stated:

> We conceive the State's authority . . . to be somewhat broader than did the District Court. This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments . . . .
>
> The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.[78]

The majority, however, rejected the proposition that the twenty-first amendment "supercedes all other provisions of the United States Constitution in the area of liquor regulations."[79] The court quoted the decision in *Hostetter v. Idlewild Liquor Corp.*[80] to support this position:

> "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other and in the context of the issues and interests at stake in any concrete case."[81]

In arriving at the result reached in *LaRue,* the court appeared to be more concerned with the immediate facts of the case before it than with the States' pervasive power to regulate liquor licenses.

The opinion paid homage to rights guaranteed under the first and fourteenth amendments by citing the rationales of *Wisconsin v. Constantineau*[82] *and Hostetter,* which imply that constitutional rights exist even in the area of liquor control. However, the opinion then stated that acts which may be "within the limits of the constitutional protection of freedom of expression . . . are not forbidden across the board. They are merely proscribed . . . in establishments that it licenses to sell liquor by the drink."[83]

To buttress its argument that the regulations were constitutionally

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[78] 409 U.S. 109, 118-19.

[79] *Id.* at 115. *See* 409 U.S. at 120n. (Stewart, J., concurring).

[80] 377 U.S. 324 (1964).

[81] 409 U.S. at 115, *quoting* Hostetter v. Idlewild Liquor Control Corp., 377 U.S. at 332.

[82] 400 U.S. 433 (1971).

[83] 409 U.S. at 118.

valid, the majority found it necessary to distinguish between obscenity on the printed page[84] and conduct:

> [That] 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.[85]

After careful analysis the court determined that since the regulations were directed at prohibiting movies or live entertainment "that partake more of gross sexuality than of communication", such acts would be obscene under either standard.[86]

The dissent did not express the same confidence in the wisdom of the state liquor agencies to promulgate regulations which would prohibit only "bacchanalian revelries." Justice Douglas did not agree that first amendment freedoms may be disregarded because liquor regulation was involved: "Certainly a play which passes muster under the first amendment is not made illegal because it is performed in a beer garden."[87]

Justice Brennan dissenting in a separate opinion reasoned that the surrender of first amendment rights as a condition to the grant of a license was an unconstitutional burden: "Nothing in the language or history of the Twenty-first Amendment authorizes the States to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression."[88]

In *Salem,* the Ohio Supreme Court cited *LaRue* to maintain that the state is possessed of substantial state power in regulating the liquor industry from the grant given to it by the twenty-first amendment, and that some

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[84] Whether printed material is obscene is determined by the *Miller* test. The basic guidelines for the trier of facts under the *Miller* test are: (1) whether "the average person applying contemporary community standards" would find that the work taken as a whole appeals to the prurient interest; (2) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work taken as a whole lacks serious literary artistic political or scientific value." Miller v. California, 413 U.S. 15, 24 (1972).

[85] 409 U.S. at 117.

[86] *Id.* at 118, where the court stated:

> But we would poorly serve both the interests for which a state may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

[87] *Id.* at 121.

[88] *Id.* at 123. Also, expressing his views in a separate dissent, Justice Marshall rejected the majority's use of the license "privilege" argument, the state's broad regulatory power under the Twenty-first Amendment, the argument that conduct rather than expression was involved, and that entertainment only of a gross sexual was proscribed. *Id.* at 123-39.

activity done outside the confines of a tavern, which would enjoy first amendment protection, is stripped of such protection when done within tavern walls.[89]

The Ohio Supreme Court also avoided the first amendment question by not deciding whether a "topless" dancer constituted gross sexual conduct or expression under the first amendment. Instead, the court magically transformed the dancer into a "commercial product" and stated that: ". . . the commission, viewing this 'product' as improper, has seen fit to regulate it by suspending the holder's liquor permit."[90]

While the majority language in *LaRue* advocated balancing first amendment freedoms with the twenty-first amendment, the Ohio position expressed in *Salem,* which was decided after *LaRue,* is that the twenty-first amendment gives the States unfettered powers in regulating the sale of alcohol.[91]

Recent decisions have rejected the unfettered power doctrine accepted by *Salem,* and perhaps have narrowed the application of *LaRue* in the process. This trend is evidenced by the federal district court decision in *Peto v. Cook,*[92] which dealt with the constitutionality of liquor regulations,[93] as applied to the prohibition of certain printed material in liquor permit premises. The district court found Regulation 52 to be unconstitutional to the extent that it attempted to regulate printed materials which may have been protected by the first amendment.[94] Specifically determined to be unconstitutional was the administrative action taken against liquor licensees who possessed printed matter which had not been previously found to be unconstitutional.[95] It is important to note that the rationale of *LaRue* was held

> . . . applicable only where certain types of live entertainment . . . "partake more of gross sexuality than of communication"; it reaches only those situations which can be characterized as "bacchanalian revelries."[96]

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[89] Salem v. Liquor Control Comm'n, 34 Ohio St. 2d at 248, 298 N.E.2d at 142 (1973).

[90] *Id.* For a general discussion of "commercial product" see Hodges v. Fitle, 332 F. Supp. 504, 509 (D. Neb. 1971), where the court held even if topless dancing involves expression, it can be classified as commercial advertising because its primary purpose is to promote a product. Therefore, since the dancing is not aimed at the dissemination of opinion communication or information it is not protected by the First Amendment. *See also* Peto v. Cook, 364 F. Supp. 1 (S.D. Ohio 1973), *aff'd,* 415 U.S. 943 (1974).

[91] 34 Ohio St. 2d at 248, 298 N.E.2d at 142.

[92] 364 F. Supp. 1 (S.D. Ohio 1973), *aff'd,* 415 U.S. 943 (1974). *See* Clark v. Fremont, 377 F. Supp. 326 (D. Neb. 1974).

[93] *See* note 37 *supra.*

[94] 364 F.Supp. at 4.

[95] *Id.*

[96] *Id.* at 5.

The significance of *Peto* lies in the fact that not all liquor regulations, based on the authority emanating from the twenty-first amendment and which attempt to control "obscenity", are unchallengeable. *Peto* is also significant in that the court prohibited the use of certain administrative measures, such as the revocation of a liquor license without specific standards to determine whether the challenged material was, in fact, obscene.[97]

LaRue attempted to provide a prophylactic solution to the problems caused by bars utilizing "bacchanalian revelries". But *LaRue* also created a void into which conduct which is outside the scope of "gross sexuality" has fallen.[98] This "no man's land" was characterized by the Federal District Court of Wisconsin in *Escheat, Inc. v. Pierstorff*.[99] "[S]ome shows which fall somewhere between Mary Poppins, on the one hand, and "bacchanalian revelries," on the other, even when performed in a bar, continue to be entitled to first amendment protection."[100] Without specific regulations or a judicial determination of obscenity, the area is exclusively shaped by the LCC.

Clark v. Fremont,[101] provides a rationale which Ohio should adopt in dealing with live entertainment on liquor license premises. If applied to Ohio, *Clark* would strip the LCC of its autonomy. The LCC, then, would not have the broad discretion to arbitrarily revoke or suspend a license for obscene conduct without " a prompt judicial review to determine whether the conduct is indeed obscene."[102]

Clark held that topless dancing per se does not fall within the gross sexual entertainment subject to unrestricted regulation under *LaRue*."[103] The court noted that "*LaRue* . . . was not concerned with the issue of 'topless'

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[97] *Id.*

[98] *See* Clark v. Fremont, 377 F. Supp. 327, 339 (D. Neb. 1974), where the court states: "This court is of the opinion that *LaRue* does not state that, pursuant to the Twenty-first Amendment, the Liquor Control authorities can proscribe all topless dancing." *cf.* Doran v. Salem Inn, Inc., 422 U.S. 922, 932-33 (1975), in which the Supreme Court, per Justice Rehnquist, made the following comments concerning *LaRue*:

> Although the customary "bar room" type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue, 409 U.S.109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *LaRue,* however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing as a part of its liquor license program.

See generally Annot., 49 A.L.R. 3d 1048 (1973).

[99] 354 F. Supp. 1120 (W.D. Wisc. 1973).

[100] *Id.* at 1126.

[101] 377 F. Supp. 326 (D. Neb. 1974).

[102] *Id.* at 340.

[103] *Id.* at 342.

dancing *per se*, and in the light of *Peto* must be limited to the facts out of which the case arose."[104]

Whether "topless" dancing, is protected by the first amendment was not a question answered by the *Clark* Court. The court did, however, recognize that when first amendment protections are involved only the judiciary and not an administrative agency is capable of an independent and objective determination.[105]

Clark established definite guidelines for the standard of review to be utilized where a revocation is based on proscribed conduct such as "topless" dancing. Because *LaRue* sustains the state police power under the twenty-first amendment to prohibit conduct that constitutes gross sexuality, "[f]irst, the question of whether the performance depicts sexual conduct must be decided."[106] Next, the performance must be found to "constitute gross sexuality"[107] to be validly proscribed under the twenty-first amendment. The third criterion applies to entertainment which is not of a gross sexual nature such as "topless" dancing: "If the judicial fact finder determines that the performance does not constitute gross sexuality, the performance must be considered in light of first amendment obscenity standards . . . of *Miller*."[108]

CONCLUSION

The regulation of a liquor permit holder who provides entertainment such as "topless" dancing is another attempt to provide a law to protect man from himself. When a liquor license is suspended because a bar owner presents topless entertainment, many suffer. The permit holder has a loss of income. His employees are hurt by a layoff. The customers of the licensee are deprived of their choice of entertainment and a place to meet with friends.[109]

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[104] *Id.* at 339.

[105] *Id.* at 337. *See* Salem Inn, Inc. v. Frank, 522 F.2d 1045, 1048 (2nd Cir. 1975), in which the Second Circuit held unconstitutional for overbreadth an ordinance which banned topless dancing only in every "cabaret, bar or lounge, dance hall, discotheque, restaurant or coffee shop." With respect to First Amentdment protections, the court recognized that there was only a limited quantity of expression involved in "topless" dancing but that "modicum is one of constitutional significance both to the dancers . . . and, perhaps more to the customers . . . ."

[106] *Id.* at 342.

[107] *Id.*

[108] *Id. See* note 84 *supra* for a discussion of the *Miller* standards.

[109] *See* Salem Inn, Inc. v. Frank, 501 F.2d 18, 21n.3 (1974), where the Second Circuit considered the inequities in this type of censorship:

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

The local, state, and federal governments stop receiving revenue from the sale of alcoholic beverages. The community loses from the cessation of the multitude of services purchased from neighboring businesses. Who wins? Whose interests are protected?

No adult who is offended by such entertainment need enter or remain in a liquor license establishment which offers such entertainment. Neither will the regulation of liquor provide a proper solution for social ills inside or outside tavern walls. Unlawful behavior should be punished through the appropriate criminal statutes. If a "topless" dancer's performance is unlawful, the conduct should be punished under the statute for nudity or public indecency. Unlawful conduct occurring adjacent to liquor permit premises can be controlled through criminal statutes for prostitution, rape, or assault. The judicial system, not an administrative agency, is the proper enforcer of these statutes.

Ohio's position, which denies to liquor license permit holders the guarantees of the first and fourteenth amendments because the regulation of liquor is involved, is wrongly conceived and should not be sustained.

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