Show Me How You Burlesque: Why the *O'Brien* Test Underserves and Disproportionately Impacts the Dance Community in the Post-*Barnes* Era

By: Carson Francis, Staff Editor, Vol. 32[1]

I. Introduction

The First Amendment is not the only legal context in which the Supreme Court must weigh competing interests; however, its significance to certain forms of nude and burlesque-style performance, especially considering the expressive qualities inherent in these dance forms, has long been overlooked.[2] The Court, generally, focuses on more traditional, refined art forms and tends to ignore "plotless" dance productions.[3] In one plurality opinion after the next, the Court has yet to devise a workable carveout under the *O'Brien* test to protect necessary forms of expression, even those that some may find immoral.[4] The Court's 1991 decision in *Barnes v. Glen Theatre, Inc.* created overly broad barriers to understanding why dance is unique from any other form of artistic expression in its ability to tell stories not through words, but through bodily movement.[5] Ultimately, dance must be reexamined in the scope of the Court's First Amendment jurisprudence to account for such deep levels of internal reflection and emotional articulation, especially given the economic hits the industry has suffered since the coronavirus pandemic.[6] Therefore, the *O'Brien* test must instead focus on the underlying motivations of public decency

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[1] Carson Francis is a second-year regular division law student at Widener University Delaware Law School. Originally from North Wales, Pennsylvania, Carson earned a B.A. in criminal justice and government from the University of Maryland (UMD), College Park. Carson currently serves as a Staff Editor of *Widener Law Review*, Volume 32, and will be assuming the role of External Managing Editor for Volume 33. Carson is interested in criminal law and intends to pursue prosecution in Pennsylvania after graduation. Carson spent nearly 20 years dancing, including as a former Philadelphia 76ers dancer and President of Unbound Dance Team at UMD.

[2] *See* Daniel Y. Hall, *Stripping Away First Amendment Protection*, 57 MO. L. REV. 629, 652 (1992).

[3] *See id.*

[4] Eric Morrow, *Dancing Around the First Amendment: Symbolic Speech after Barnes v. Glen Theatre, Inc.*, 28 TULSA L.J. 113, 120 (1992).

[5] *See generally* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (describing how the interplay of sexuality and dance inhibits expression in non-traditional forms of dance under the First Amendment).

[6] Zachary Whittenburg, *The Economics of Dance – Dance's Future According to the Numbers*, DANCE MAG. (Feb. 26, 2024), https://dancemagazine.com/dance-economics/#gsc.tab=0.

laws. These laws, as they stand, attempt to restrict nude dancing and other aspects of burlesque dance, not out of concern for minors, but rather to suppress the expressive efforts of performers.

II. Understanding *O'Brien*

It may be illusory to suggest that courts do not at all consider how their judgments impact expression under the *O'Brien* test; however, this characterization, combined with the motivations behind state and local government action, reveals a discrepancy in how courts treat dance under the guise of First Amendment protections.[7] When a government regulation is challenged for violating the First Amendment, it is subject to strict scrutiny if the restriction is content-based and intermediate scrutiny if the restriction is content-neutral.[8] While the Court in *Barnes* applied intermediate scrutiny to the Indiana public decency statute at issue, it determined that the statute passed intermediate scrutiny, given that the government had a substantial interest in protecting children from the secondary effects of indecency.[9]

The *O'Brien* test is used for intermediate scrutiny and was applied in *Barnes*.[10] For a government regulation to be justified under this test, it must (1) fall within the constitutional power of the government, (2) further an important or substantial governmental interest, (3) that is *unrelated to the suppression of free expression*, and (4) any incidental restriction on First Amendment freedoms must be no greater than what is essential to advance the governmental interest.[11] The plaintiffs, the Kitty Kat Lounge and Glen Theatre, challenged the public decency statute in *Barnes*, which demanded dancers to wear pasties and G-strings, but they failed to

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[7] Morrow, *supra* note 4, at 113, 118.
[8] David L. Hudson, Jr., *Content-Based*, Free Speech Ctr. at Middle Tenn. State Univ. (July 2, 2024), https://firstamendment.mtsu.edu/article/content-based/.
[9] *Barnes*, 501 U.S. at 584 (Souter, J. concurring) (contrasting that of the dissent, which believed that the lower courts applied the entirely wrong level of scrutiny, as opposed to reaching a different result under intermediate scrutiny).
[10] *Id.* at 567.
[11] *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

demonstrate that the law was not unrelated to the suppression of free expression.[12] While the Court purported to address the physical state of nudity in upholding the statute, it failed to protect the expressive conduct that is often intertwined with nude or semi-nude performances.[13] This failure has produced snowballing effects that extend beyond local lounges and theatres.[14] Although a state is permitted to act to protect societal interests in order and morality, it cannot itself define what is moral, without making content-based decisions related to free expression.[15]

III. The Spillover Effect of *Barnes*

The Court in *Barnes* "extended the area of important or substantial interest to include 'protecting order and morality' and it did so at the expense of a constitutional right," undermining the proposition that even disagreeable, repugnant ideas deserve First Amendment protection.[16] In recognizing that the third prong of *O'Brien* was satisfied, meaning that the Indiana law was entirely unrelated to the suppression of free expression, the plurality dismissed an entire class of on-stage expression.[17] By overlooking the importance of considering on-stage expression in the analysis, the Court failed to protect an artistic group of both professional dancers and other performers who use movement to express feelings and emotions that they may not otherwise be able to convey.[18]

For example, Ida Claire, an Alabama burlesque dancer, was prohibited from participating in any form of burlesque dance in Alabama while she was involved in a joint custody battle over

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[12] *Barnes*, 501 U.S. at 571.
[13] *Id.*
[14] *Id.*
[15] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973).
[16] Morrow, *supra* note 4, at 125.
[17] Jenna Doviak & Gina Scamby, *Table Dancing Around the First Amendment: The Constitutionality of Distance Requirements in Colacurcio v. City of Kent*, 7 VILL. SPORTS & ENT. L.J. 151, 163 (2000).
[18] *Id.*

her children.[19] The judge declared that Ms. Claire had to refrain from participating in her preferred art form, using either her legal name or stage name, reasoning that such use impacted her ability to raise her children.[20] While it is commonplace for many large-scale arts performances to take place in New York, and not in the South, there is no guarantee that the same standards applied to Ms. Claire will not be applied by other courts across the United States.[21] Without this guarantee, performers' ability to star in expressive, star-studded productions, such as Broadway's *Moulin Rouge* or *Cabaret*, are being severely jeopardized, highlighting the need for a closer evaluation of the law's actual purpose.[22]

The Court's determination in *Barnes* acts as a powerful tool that the government may utilize to infringe upon *supposed* forms of protected, expressive conduct, including not only nude dancing but extending to other risqué types of performance.[23] In *Colacurcio v. City of Kent*, the dissent repeatedly utilized this powerful tool by highlighting the "low value" of nude dancing.[24] Unfortunately, these less-respected views often accompany nude dancing and other expressive forms of art, given judges' substitutions of their own views for that which is constitutionally protected speech.[25] Performers have been severely burdened by a missing framework from the Supreme Court concerning nude and "sexually explicit" dancing, underscoring the need for guidance that both considers and evaluates categories of symbolic, expressive conduct that are commonly deemed immoral.[26]

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[19] *BURLESQUE DANCER BANNED FROM BURLESQUE TO KEEP CUSTODY OF HER CHILDREN*, 21ST CENTURY BURLESQUE (Jan. 28, 2014), https://21stcenturyburlesque.com/burlesque-dancer-banned-from-burlesque-to-keep-custody-of-her-children/.
[20] *Id.*
[21] Hall, *supra* note 2, at 650.
[22] *Id.*
[23] Fred S. Wilson, *Nude Dancing Conveying a Message or Eroticism and Sexuality Is Protected by the First Amendment but Can Be Limited under State Police Powers Provided the Government Establishes a Substantial, Content-Neutral Purpose*, 23 ST. MARY'S L.J. 563, 581 (1991).
[24] Doviak & Scamby, *supra* note 17, at 173.
[25] *Id.*
[26] *Id.* at 166.

IV. Implications Beyond Broadway: Drag Shows

The upholding of the Indiana statute in *Barnes* impacts not only nude or semi-nude performers like Satine in *Moulin Rouge* or Sally Bowles in *Cabaret*, but it also directly threatens dancers who engage in drag performance, which, oftentimes, incorporates dance.[27] It is almost undeniable that drag performers seek to express many messages throughout their performances.[28] In 2023, approximately twenty states introduced bills targeting the limitation or overall elimination of drag performances.[29] Despite the number of proposed bills, the Supreme Court has recognized and continues to recognize that live entertainment falls within the umbrella of First Amendment protection.[30] In addition, the Court has recognized that part of what the First Amendment protects is the right to *receive* speech.[31] In considering these protections, in light of the fact that drag performances may involve nudity, there is no framework under which the Court should categorize nude or semi-nude drag dance any differently from protected classes of speech; however, *Barnes* stands in the way from recognizing any unconventional form of dance as falling within the scope of the Constitution's protections.[32]

V. Conclusion

In announcing the judgment of the Court in its *plurality* opinion, Chief Justice Rehnquist called attention to the alleged perceived evil, public nudity, that the Indiana statute intended to address, regardless of whether such an evil is even combined with an expressive activity.[33] The Chief Justice, however, failed to consider that the issue goes beyond that of just nudity, as being

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[27] Note, *Drag Queens, The First Amendment, and Expressive Harms*, 137 HARV. L. REV. 1469, 1482 (2024).
[28] *Id.* at 1481.
[29] Mark Satta, *Shantay Drag Stays: Anti-Drag Laws Violate the First Amendment*, 25 GEO. J. GENDER & L. 95, 96 (2023).
[30] *Id.* at 104.
[31] *Id.* at 107.
[32] Note, *supra* note 27, at 1485.
[33] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1991).

in a state of undress cannot be separated from the movement of one's body in that state as an ancient art form.[34] The use of the *O'Brien* test, where expressive conduct is alleged to be content-neutral, can no longer stand to serve the unique interests of burlesque-style performance, a performance style that turns on controversial issues of morality and sexuality.[35]

In order to ensure that dance, collectively, and other forms of nude or semi-nude performance remain within the gamut of the First Amendment's protection of individual rights, courts must "rigorously scrutiniz[e] legislative enactments that regulate expression."[36] Because the Court "danced around the First Amendment with a naked disregard for its principles" in *Barnes*, an alternative version of *O'Brien* must now be applied to account for categories of speech that are categorically intertwined with morality, specifically as it relates to the regulation being "unrelated" to free expression.[37] In conclusion, the language of *O'Brien* must be modified to ensure that the core principles of the First Amendment are not discarded by popular forms of morality as they were in *Barnes v. Glen Theatre, Inc*.[38]

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[34] *Barnes*, 501 U.S. at 587.
[35] Morrow, *supra* note 4, at 125.
[36] Hall, *supra* note 2, at 660.
[37] Morrow, *supra* note 4, at 125.
[38] *Id.* at 130.