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## New York's Taxable Lap Dancing ...at a Strip Club Near You!

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## New York's Taxable Lap Dancing ...at a Strip Club Near You!

### Abstract

In today's difficult economic times, state governments are more hard pressed than ever to come up with new sources of revenue to at least stay revenue neutral. Leave it to the perpetually money-hungry State of New York to come up with this gem of an idea for generating tax revenues: In 2005, the New York State Department of Taxation and Finance attempted to impose sales tax on a nightclub's offering of exotic dancing to its customers. This resulted in one nightclub instigating a legal challenge to the state's attempt to impose sales taxes on exotic dancing. This resulted in the matter of *677 New Loudon Corp. v. State of New York Tax Appeals Tribunal*, which was ultimately decided by the New York Court of Appeals in October 2012.

### Keywords

sales tax, strip clubs, exotic dancing, 677 New Loudon Corp., New York

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*Article*

**New York's Taxable Lap Dancing  
...at a Strip Club Near You!**

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***Abstract***

In today's difficult economic times, state governments are more hard pressed than ever to come up with new sources of revenue to at least stay revenue neutral. Leave it to the perpetually money-hungry State of New York to come up with this gem of an idea for generating tax revenues: In 2005, the New York State Department of Taxation and Finance attempted to impose sales tax on a nightclub's offering of exotic dancing to its customers. This resulted in one nightclub instigating a legal challenge to the state's attempt to impose sales taxes on exotic dancing. This resulted in the matter of *677 New Loudon Corp. v. State of New York Tax Appeals Tribunal*, which was ultimately decided by the New York Court of Appeals in October 2012.

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## INTRODUCTION

In today's difficult economic times, state governments are more hard pressed than ever to come up with new sources of revenue to at least stay revenue neutral. Leave it to the perpetually money-hungry State of New York to come up with this gem of an idea for generating tax revenues: In 2005, the New York State Department of Taxation and Finance attempted to impose sales tax on a nightclub's offering of exotic dancing to its customers. This resulted in the matter of *677 New Loudon Corp. v. State of New York Tax Appeals Tribunal*, ultimately decided by the New York Court of Appeals in October 2012, where one nightclub instigated a legal challenge to the state's attempt to impose sales taxes on exotic dancing.<sup>1</sup>

## I. THE FACTS

The plaintiff corporation operated an adult entertainment establishment called Nite Moves ("the club").<sup>2</sup> Nite Moves is an adult juice bar "where patrons may view exotic dances performed by women in various stages of undress."<sup>3</sup> Revenue is generated from four sources:

general admission charges, which entitle patrons to enter the club, mingle with the dancers and view on-stage performances, as well as any table or lap dances performed on the open floor; 'couch sales,'

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<sup>1</sup> *677 New Loudon Corp. v. State of New York Tax Appeals Tribunal*, 979 N.E.2d 1121 (N.Y. 2012), *cert. denied*, 134 S.Ct. 422 (U.S. Oct. 15, 2013) (No. 13-38).

<sup>2</sup> *677 New Loudon Corp v. State of New York Tax Appeals Tribunal*, 925 N.Y.S.2d 686, 688 (N.Y. App. Div. 2011).

<sup>3</sup> *Id.*

representing the fee charged when a dancer performs for a customer in one of the club's private rooms; register sales from the nonalcoholic beverages sold to patrons; and house fees paid by the dancers to the club.<sup>4</sup>

During a 2005 audit, the Division of Taxation ("the Division") audited the club and determined that the club's door admission fees and private dance fees were subject to New York State sales taxes, which the Division alleged that the club did not pay.<sup>5</sup> Thus, the Division assessed the club's unpaid sales taxes in the amount of \$124,921.94.<sup>6</sup> Needless to say, the club did not agree with Division's assessment, and challenged the Division in court. Unfortunately for Nite Moves, the New York Appellate Division ruled in favor of the Division of Taxation.<sup>7</sup> The Appellate Division found, among other things, that the Division of Taxation had a rational basis for subjecting the club's exotic dancing to the sales tax,<sup>8</sup> that the club failed to meet its burden of proof that it qualified for a sales tax exemption,<sup>9</sup> and most importantly, that exotic dancing is not a choreographed, artistic performance that merits exemption from the sales tax.<sup>10</sup>

## II. THE ISSUE

According to New York State Tax Law, the state will impose a tax on admissions fees in excess

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 692.

<sup>8</sup> *Id.* at 690.

<sup>9</sup> *Id.* at 691.

<sup>10</sup> *Id.* at 691-92.

of ten cents on:

the use of any place of amusement in the state, *except* charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or *dramatic or musical arts performances*, or live circus performances, or motion picture theaters, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools.<sup>11</sup>

Thus, the central issue that the New York Court of Appeals had to decide was whether exotic dancing was in fact a choreographed, artistic activity that qualified for exemption from the New York State sales tax. The club contended that its dance activity was in fact choreographed performances that should be exempt from taxation while the Division contended that the club's activities were well within the statutory definition of a taxable place of amusement. The statute defines places of amusement as "any place where any facilities for entertainment, amusement, or sports are provided."<sup>12</sup>

### III. THE MAJORITY OPINION

In a 4-3 decision,<sup>13</sup> the New York Court of Ap-

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<sup>11</sup> N.Y. TAX LAW § 1105(f)(1) (Consol. 2012) (emphasis added).

<sup>12</sup> N.Y. TAX LAW § 1101(d)(2) (Consol. 2012).

<sup>13</sup> 677 New Loudon Corp. v. State of New York Tax Appeals Tribunal, 979 N.E.2d 1121 (N.Y. 2012). Judges Ciparick, Graffeo, Pigott and Jones concur in the judgment. Judge Smith wrote a dissenting opinion joined by Chief Judge Lippman and Judge Read.

peals affirmed the Appellate Division's decision,<sup>14</sup> holding that exotic dancing is not a choreographed, artistic event thus subject to the New York State sales tax. In its majority opinion, the court first noted the Division's legislative history showed wide latitude in defining those entertainment activities which are subject to taxation.

The Legislature expansively defined places of amusement that are subject to this tax to include "any place where any facilities for entertainment, amusement, or sports are provided." The tax, therefore, applies to a vast array of entertainment including attendances at sporting events, such as baseball, basketball or football games, collegiate athletic events, stock car races, carnivals and fairs, amusement parks, rodeos, zoos, horse shows, arcades, variety shows, magic performances, ice shows, aquatic events, and animal acts. Plainly, no specific type of recreation is singled out for taxation.<sup>15</sup>

Therefore, if one accepts the premise that lap dancing is indeed a form of "entertainment," then it would logically follow, according to the majority, that exotic dancing is included in the non-exhaustive listing of taxable entertainment activity.

However, in relying on the legislative intent, the court also noted that the Legislature created a specific exception for certain forms of entertainment. Thus, if an entertainment activity fell within the definition of "dramatic or musical arts" performances, then the venue that provided the performances

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<sup>14</sup> 677 *New Loudon Corp.*, 979 N.E.2d at 1122.

<sup>15</sup> *Id.*



would be exempt from having to collect and pay New York sales tax. “[W]ith the evident purpose of promoting cultural and artistic performances in local communities, the Legislature created an exemption that excluded from taxation admission charges for a discrete form of entertainment – ‘dramatic or musical arts performances.’”<sup>16</sup>

The majority’s second point in its opinion was that the club’s entertainment activities did not qualify for the tax exemption. This is because the court agreed with the Appellate Division and thus believed that the club did not meet its burden of proof that its exotic dance routines qualified as artistic choreographed performances.<sup>17</sup> The majority believed the club’s evidence supporting its position was faulty for two reasons.

Firstly, the club’s expert witness, who was a cultural anthropologist who researched the field of exotic dancing, never saw any of the dances performed at the club herself.<sup>18</sup> “Petitioner’s expert, by her own admission, did not view any of the private dances performed at petitioner’s club and, instead, based her entire opinion in this regard upon her observations of private dances performed in *other* adult

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1123 (“In order for petitioner to be entitled to the exclusion for “dramatic or musical arts performances,” it was required to prove that the fees constituted admission charges for performances that were dance routines qualifying as choreographed performances. Petitioner failed to meet this burden as it related to the fees collected for the performances in so-called “private rooms”; none of the evidence presented depicted such performances and petitioner’s expert’s opinion was not based on any personal knowledge or observation of “private” dances that happened at petitioner’s club.”).

<sup>18</sup> 677 *New Loudon Corp. v. State of New York Tax Appeals Tribunal*, 925 N.Y.S.2d 686, 690 (N.Y. App. Div. 2011).

entertainment venues.”<sup>19</sup> Consequently, the Division completely discredited the club’s expert, and determined the performances to be taxable.<sup>20</sup>

In my opinion, the expert witness certainly should have exercised some due diligence (and some common sense) and personally seen some of the club’s dance routines herself. However, just to play Devil’s Advocate here, we should consider the following: (1) the expert was a cultural anthropologist by profession;<sup>21</sup> (2) she extensively researched the field of exotic dancing;<sup>22</sup> and (3) she had witnessed similar dance routines at other venues.<sup>23</sup> Therefore, this is a person with both the academic training and practical experience who could make an informed judgment as to whether the club’s routines were in fact choreographed dances.

Secondly, the court upheld the Appellate Division’s finding that the club’s exotic dance routines were not choreographed performances. The Appellate Division determined that this type of dancing does not rise to the level of a choreographed perfor-

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<sup>19</sup> *Id.* at 691.

<sup>20</sup> *Id.* (“Although petitioner argues that the detailed testimony of its expert was more than sufficient to discharge its burden on this point, the Tribunal essentially discounted this testimony in its entirety, leaving petitioner with little more than the Nite Moves DVD to demonstrate its entitlement to the requested exemption.”); *see also* 19 N.Y.3d at 1060. (“The Tribunal articulated a rational basis for discrediting her: it found her testimony was compromised by her opinion that the private performances were the same as the main stage performances despite the fact that she neither observed nor had personal knowledge of what occurred in the private areas.”).

<sup>21</sup> *Id.* at 690.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

mance that requires formalized training. “The record reflects that the club’s dancers are not required to have any formal dance training and, in lieu thereof, often rely upon videos or suggestions from other dancers to learn their craft.”<sup>24</sup>

In my opinion, this suggests that both the majority and the Appellate Division strongly believe that any idiot (male or female) could walk into any nightclub, apply for a position as an exotic dancer, *and* get the job. I defy any of those self-appointed critics to try it themselves and see if they could pull it off. If any of them can (and I *absolutely* doubt it!!!), then I will retract everything I have written here and shut up.

#### IV. THE DISSENTING OPINION

Judge Smith’s dissenting opinion hits the majority hard with his assertion that the majority is imposing its own moral judgment on what kind of dancing is taxable. He makes quite clear that although he finds exotic dance personally unappealing, it is grossly unfair to subject it to taxation solely on that basis.

Like the majority and the Tribunal, I find this particular form of dance unedifying — indeed, I am stuffy enough to find it distasteful. Perhaps for similar reasons, I do not read Hustler magazine; I would rather read the New Yorker. I would be appalled, however, if the State were to exact from Hustler a tax that the New Yorker did not have to pay, on the ground that what appears in Hustler is insufficiently “cultural and artistic.” That sort of discrimination on

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<sup>24</sup> *Id.* at 691.

the basis of content would surely be unconstitutional. It is not clear to me why the discrimination that the majority approves in this case stands on any firmer constitutional footing.<sup>25</sup>

Judge Smith takes exception to the majority's splitting dance activity into what it deems acceptable versus what it deems objectionable. "The majority, and the Tribunal, have implicitly defined the statutory words 'choreographic . . . performance' to mean 'highbrow dance' or 'dance worthy of a five-syllable adjective.'"<sup>26</sup> This lends itself to the possibility that a performance of the Joffrey Ballet at New York's Lincoln Center is completely safe from taxation, whereas a striptease in a low rent bar on the wrong side of town is taxable. How fair is that? In Judge Smith's opinion, a dance is a dance is a dance – period. "The people who paid these admission charges *paid to see women dancing*. It does not matter if the dance was artistic or crude, boring or erotic. Under New York's Tax Law, a dance is a dance."<sup>27</sup> I believe Judge Smith is spot on with his analysis. Whether it is tap dancing, ballet dancing, ballroom dancing, salsa dancing, *Dancing with the Stars*, or even exotic dancing in this case, the operative word in all those titles is still *dance*.

Next, Judge Smith rips apart the majority's conclusion that exotic dancing is not choreography. He noted that the actual tax regulation included the word "choreography" within the definition of "musi-

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<sup>25</sup> 677 New Loudon Corp. v. State of New York Tax Appeals Tribunal, 979 N.E.2d 1121, 1125 (N.Y. 2012) (Smith, J., dissenting) (citation omitted).

<sup>26</sup> *Id.* at 1124 (Smith, J., dissenting).

<sup>27</sup> *Id.* (emphasis added).

cal arts” that would be exempt from the tax.<sup>28</sup> Thus, as long as the entertainment in question involved choreographed routines, it would be exempt from the sales tax – irrespective of its tastefulness.

## V. WHAT IS DANCE AND WHAT IS CHOREOGRAPHY, THEN?

According to Dictionary.com, dance is defined as “to move one’s feet or body, or both, rhythmically in a pattern of steps, especially to the accompaniment of music.”<sup>29</sup> Dictionary.com also defines choreography as “the technique of representing the various movements in dancing by a system of notation.”<sup>30</sup>

Choreography requires both practice and precision. In order to successfully complete any dance routine, the person or persons involved must get their timing down, be physically coordinated, and most importantly, have the talent and ability to be successful. In Judge Smith’s eyes, this point is equally applicable irrespective of the type of dance performance. “It is undisputed that the dancers worked hard to prepare their acts, and that pole dancing is actually quite difficult. . . .”<sup>31</sup> If even pole dancing requires actual talent, this blows apart the majority’s presumption that anybody can do exotic dancing. Why? Even exotic dancing requires rhythm, timing, coordination, and practice. Not everyone has the ability to dance; dancing is a special-

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<sup>28</sup> *Id.*

<sup>29</sup> Dance, DICTIONARY.COM, <http://dictionary.reference.com/browse/dance> (last visited Mar. 2, 2014).

<sup>30</sup> Choreography, DICTIONARY.COM, <http://dictionary.reference.com/browse/choreography> (last visited Mar. 2, 2014).

<sup>31</sup> 677 *New Loudon Corp.*, 979 N.E.2d at 1124.

ized skill.

## **VI. SIMILAR ACTIVITIES TREATED DISSIMILARLY: ARKANSAS WRITERS' PROJECT, INC. V. RAGLAND**

The issue of differentiating between similar activities is not new. Obviously no one knows if the United States Supreme Court will step in to decide if there is a constitutionally impermissible distinction between nude dancing and other types of dancing.

In *Arkansas Writers' Project, Inc. v. Ragland*, *Commissioner of Revenue of Arkansas*, the Court examined the constitutionality of an Arkansas sales tax that was imposed on some publications but not others.<sup>32</sup> The tax was imposed on all sales of tangible personal property.<sup>33</sup> However, the state allowed several exemptions to the tax, including newspapers, and certain other publications related to sports, religion, and trade or professional journals.<sup>34</sup>

The *Arkansas Times* ("the *Times*") was a monthly general interest magazine. "The magazine includes articles on a variety of subjects, including religion and sports."<sup>35</sup> The state, after an audit, assessed taxes on the *Times*.<sup>36</sup> The *Times* agreed to pay the assessment and future taxes on the condition that it could renew its challenge to the Arkansas tax

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<sup>32</sup> *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

<sup>33</sup> *Id.* at 224.

<sup>34</sup> *Id.* ("These include '[g]ross receipts or gross proceeds derived from the sale of newspapers,' § 84-1904(f) (newspaper exemption), and 'religious, professional, trade and sports journals and/or publications printed and published within this State . . . when sold through regular subscriptions.' § 84-1904(j) (magazine exemption).").

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

exemption if there were any future court rulings or changes in the tax law that would justify such a challenge.<sup>37</sup>

Subsequently, the Supreme Court decided *Minneapolis Star v. Minnesota Commissioner*, in which it invalidated a Minnesota use tax on “the cost of paper and ink products consumed in the production of a publication.”<sup>38</sup> The Court struck down the tax on the grounds that the tax and exemption scheme was targeted at the press. In other words, the taxing scheme in that case put an impermissible burden on publishers to pay the use tax while it was never imposed on any other business in the state of Minnesota.

We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment. A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment, and the judgment below is *Reversed*.<sup>39</sup>

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<sup>37</sup> *Id.* at 225 (“Appellant initially contested the assessment, but eventually reached a settlement with the State and agreed to pay the tax beginning in October 1982. However, appellant reserved the right to renew its challenge if there were a change in the tax law or a court ruling drawing into question the validity of Arkansas’ exemption structure.”).

<sup>38</sup> *Minneapolis Star v. Minn. Comm’r*, 460 U.S. 575, 577 (1983).

<sup>39</sup> *Id.* at 592 (citation omitted).

Back in Arkansas, the *Times*, relying on the *Minneapolis Star* case, brought a lawsuit against the state to get a refund of all the sales taxes it had paid since October 1982.<sup>40</sup> The litigation went all the way to the Arkansas Supreme Court, which denied the *Times*' petition and upheld the tax.<sup>41</sup> The U.S. Supreme Court, however, reversed the Arkansas court and struck down the tax on the ground that, even absent a discriminatory motive, this tax was unconstitutional because it was imposed on some Arkansas publishers, but not others.

On the facts of this case, the fundamental question is not whether the tax singles out the press as a whole, but whether it targets a small group within the press. While we indicated in *Minneapolis Star* that a genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible, the Arkansas sales tax cannot be characterized as nondiscriminatory, because it is not evenly applied to all magazines. To the contrary, the magazine exemption means that only a few Arkansas magazines pay any sales tax; in that respect, it operates in much the same way as did the \$100,000 exemption to the Minnesota use tax. Because the Arkansas sales tax scheme treats some magazines less favorably than others, it suffers from the second type of discrimination identified in *Minneapolis Star*. Indeed, this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between

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<sup>40</sup> *Arkansas Writers' Project, Inc.*, 481 U.S. at 225.

<sup>41</sup> *Id.* at 226.



magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*. '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'<sup>42</sup>

The bottom line, obviously, is that if a taxing authority is going to impose a tax, it should be uniformly imposed on all within the jurisdiction. It certainly would not look good if the state of New York were to grant a sales tax exemption to the *Wall Street Journal*, generally accepted to be an upscale publication, but not the *Weekly World News*, a publication (and I use that term loosely as applied to it here) that I believe does not let little things like accuracy and veracity get in the way of a good, attention grabbing headline. Some of the notorious headlines the *Weekly World News* is rather infamous for include the following: "Earth to Collide with Nibiru on December 21, 2012!,"<sup>43</sup> "Sean Penn to Replace Chavez,"<sup>44</sup> "Dennis Rodman Named Leader of North Korea,"<sup>45</sup> "Super Bowl Blackout – Joe Biden Did

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<sup>42</sup> *Id.* at 229 (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)) (citation omitted).

<sup>43</sup> Frank Lake, *Earth to Collide with Nibiru on December 21, 2012!*, WEEKLY WORLD NEWS, Dec. 20, 2012, <http://weeklyworldnews.com/aliens/42896/earth-to-collide-with-nibiru-on-decembe-21-2012/>.

<sup>44</sup> Frank Lake, *Sean Penn to Replace Chavez*, WEEKLY WORLD NEWS, Mar. 6, 2013, <http://weeklyworldnews.com/headlines/55101/sean-penn-to-replace-chavez/>.

<sup>45</sup> Tap Vann, *Dennis Rodman Named Leader of North Korea*, WEEKLY WORLD NEWS, Mar. 4, 2013, <http://weeklyworldnews.com/headlines/55030/dennis-rodman-named-leader-of-north-korea/>.

It!,”<sup>46</sup> or my favorite, “Bigfoot Kept Lumberjack as Love Slave.”<sup>47</sup>

Even if one does not hold the *Weekly World News* in the highest esteem, it would be grossly unfair to impose a tax on it merely because it is a bit lowbrow. Yet, this is the very same thing the New York State Department of Taxation and Finance is doing by excluding nude dancing from the generic definition of “choreographed dance” for tax purposes.

## VII. IS NUDE DANCING REALLY ENTITLED TO FIRST AMENDMENT PROTECTION? YES, BUT...

Supreme Court jurisprudence has given nude dancing First Amendment protection. In fact, the court noted that activities that are protected by the First Amendment included nudity. For example, in *Schad v. Borough of Mount Ephraim*, the Court recognized that nude dancing was expressive speech within the First Amendment.<sup>48</sup>

Nor may an entertainment program be prohibited solely because it displays the nude human figure. “[N]udity alone” does not

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<sup>46</sup> Tap Vann, *Super Bowl Blackout – Joe Biden Did it!*, WEEKLY WORLD NEWS, Feb. 4, 2013, <http://weeklyworldnews.com/headlines/54471/super-bowl-blackout-joe-biden-did-it/>.

<sup>47</sup> K. Thor Jensen, *Tabloid Headlines We Wish Were Real*, UGO (Feb. 29, 2012), <http://www.ugo.com/web-culture/tabloid-headlines-we-wish-were-real-bigfoot-kept-lumberjack> (displaying picture of the headline “Bigfoot Kept Lumberjack as Slave”); Steve Mandich, *A Year in the Life of Bigfoot*, BIGFOOT IS REAL, <http://www.stevemandich.com/otherstuff/bigfootyear.htm> (last updated Jan. 13, 2011) (describing the October 30, 2001 story “Bigfoot Kept a Lumberjack as a Slave” as “a Tacoma lumberjack held captive by Bigfoot for three months came to call the beast ‘Wookums.’”).

<sup>48</sup> *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation.<sup>49</sup>

In two later cases, however, the Court upheld public indecency statutes. In upholding the statutes, the court mentioned that nude dancing was within the very limited purview of the First Amendment, but the plurality opinion in both cases also mentioned that their First Amendment protections are neither unlimited nor absolute.

First, in *Barnes v. Glen Theatre, Inc.*, a 1991 case, the U.S. Supreme Court upheld an Indiana statute outlawing public nudity.<sup>50</sup> The statute here required that exotic dancers wear pasties and a G-string while performing.<sup>51</sup> Even then, the Court recognized that nude dancing still had First Amendment protection, albeit limited. Chief Justice Rehnquist, probably not a fan of nude dancing, stated in the opinion: “[n]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as marginally so.”<sup>52</sup>

Nine years later, in 2000, the Court decided *Erie v. Pap's A.M.*<sup>53</sup> Here, the Court looked at an Erie, Pennsylvania statute that provided the following:

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<sup>49</sup> *Id.* at 66.

<sup>50</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

<sup>51</sup> *Id.* at 563.

<sup>52</sup> *Id.* at 566.

<sup>53</sup> *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

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 . . . .<sup>54</sup>

In *Pap's A.M.*, Justice O'Connor wrote the plurality opinion, in which she reinforced the *Barnes* Court's rationale that nude dancing is entitled to only limited First Amendment protection. "Being 'in a state of nudity' is not an inherently expressive condition. As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection."<sup>55</sup> As a result of these two cases, the Court places nude dancing, allegedly expressive *speech*, on a much lower pedestal than, say, political speech or commercial speech.

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<sup>54</sup> *Id.* at 283 n.\* (quoting Ordinance 75-1994, codified as Article 711 of the Codified Ordinances of the City of Erie).

<sup>55</sup> *Id.* at 289.

Interestingly, Chief Justice Rehnquist never defined exactly how “marginal”<sup>56</sup> First Amendment protection for nude dancing really is, and Justice O’Connor never gave a definitive description of her “outer ambit”<sup>57</sup> of First Amendment protection for nude dancing, either. Justice O’Connor also mentions in *Pap’s A.M.* that society has a much greater interest in protecting political speech than exotic dancing, which she considers akin to being an unwanted stepchild.

And as Justice Stevens eloquently stated for the plurality in *Young v. American Mini Theatres, Inc.*, 427 U. S. 50, 70 (1976), “even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate,” and “few of us would march our sons and daughters off to war to preserve the citizen’s right to see” specified anatomical areas exhibited at establishments like Kandyland.<sup>58</sup>

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<sup>56</sup> *Barnes*, 501 U.S. at 566.

<sup>57</sup> *Pap’s A.M.*, 529 U.S. at 289; see also Kevin Case, “*Lewd and Immoral*: Nude Dancing, Sexual Expression, and the First Amendment”, 81 CHI.-KENT L. REV. 1185, 1201 (2006) (“Like Chief Justice Rehnquist in *Barnes*, she provided no explanation for why nude dancing was banished to the ‘outer ambit,’ although she, like Justice Souter in *Barnes*, quoted the passage from *American Mini Theatres* about society’s interest in protecting sexual expression being of a ‘wholly different, and lesser, magnitude’ than the interest in protecting political speech.”).

<sup>58</sup> *Pap’s A.M.*, 529 U.S. at 294.

Can this possibly be true? Is “unfettered political debate” that important in helping society where we would otherwise be hopelessly lost without it? Does Justice O’Connor really believe we would prefer to send our sons and daughters off to war to preserve the First Amendment rights of political office holders to lie to their constituents on a daily basis?<sup>59</sup> To each his own, I suppose. In my opinion, if Justice O’Connor were that concerned about societal harm, I would suggest to her that *professional liars* (who I will call “politicians”) routinely inflict much more harm on society than exposing certain body parts ever could.

### **IX. JUDICIAL ANTIPATHY TOWARDS NUDITY**

From the day that Adam and Eve realized that they were naked in the Garden of Eden,<sup>60</sup> nudity has always been a hot topic, especially in the legal world. Yet, as the *Barnes* and *Pap’s A.M.* cases have shown, the Court, at best, has given a lukewarm endorsement to the proposition that nude dancing (no matter how distasteful) is a form of expressive speech. This type of speech, allegedly under the umbrella of First Amendment protection, is deemed not really worthy of strict scrutiny analysis that other forms of pro-

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<sup>59</sup> See, e.g., Bill Haltom, *The Constitutional Right to Lie*, 43-NOV TENN. B.J. 32 (2007) (“Let’s face it, my fellow Americans. Lying politicians are as American as apple pie.”).

<sup>60</sup> *Genesis* 3:8-11 (“Then the man and his wife heard the sound of the LORD God as he was walking in the garden in the cool of the day, and they hid from the LORD God among the trees of the garden. But the LORD God called to the man, ‘Where are you?’ He answered, ‘I heard you in the garden, and I was afraid because I was naked; so I hid.’ And he said, ‘Who told you that you were naked? Have you eaten from the tree that I commanded you not to eat from?’”).

tected speech would be given.

Why exactly do courts hesitate to give nude dancing full protection under the First Amendment? Could it be that there might be some deep-seated, patriarchal cultural mindset that would suggest that the nude female body is “evil,” and somehow something to be afraid of? And perhaps the only way to suppress the evilness is for courts to make sure that the nude female form does not gain access to legal protection (free speech, taxation, equal protection under the Fifth and Fourteenth Amendments of the United States Constitution, and who knows what else)?

There is at least one paradigm<sup>61</sup> that does suggest a judicial aversion to the nude female form that, I believe, is completely devoid of any rational basis (how ironic).

What is it about the nude female body that inspires irrationality, fear, and panic-demonium, or at least inspires judges to write bad decisions? In *City of Erie v. Pap's A.M.* and *Barnes v. Glen Theatre, Inc.*, the Supreme Court's “nude dancing” cases, the Court accepted and acted upon culturally entrenched views of the nude female form: that the female body is a site of unreason; that it is barely intelligible; that it is inviting yet dangerous; and that it causes mayhem, disease, and destruction. This view of the seductive, dangerous, writhing woman, so powerful that she is inextricable from the wreckage she causes, has a long and feverish history in Western culture, be it the Bi-

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<sup>61</sup> See generally Amy Adler, *Girls! Girls! Girls! The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1109 (2005).

ble, great literature, or pulp movies. This time she has caused more trouble: She has wreaked havoc in the First Amendment.<sup>62</sup>

Evidently, there does not seem to be a similar judicial hysteria when it comes to male nudity. Assuming the above quote is true, this must mean that exposed male genitalia is not nearly as dangerous, potentially attractive, and simultaneously fear inducing as female genitalia. Thus, women looking at a nude, gyrating male body would not result in male prostitution, female-on-male rape, or the decline in real estate values in neighborhoods where nude male entertainment would be available.

Surely, there are images of male virility embodied in certain celebrities, for example, that would inspire naked animal lust in the female heart as well. I would assume male figures like Brad Pitt, George Clooney, Denzel Washington, Mel Gibson or even the Rat Pack (Frank Sinatra, Dean Martin, Sammy Davis, Jr. and Peter Lawford) in their prime would inspire similar lustful thoughts in the female gender. The above examples of male libido notwithstanding, the male body is obviously not nearly as sexy or dangerous in the minds of middle-aged to elderly judges.

The courts have implicitly recognized that without some coherent limiting principle, all sorts of businesses could adopt sexualized branding, making gender-specific sex appeal a qualification for nurses, secretaries and even lawyers. Although such a rule would also allow employers to sexualize male employees, and might seem su-

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<sup>62</sup> *Id.*



perficcially equal, it would not be in practice. Because more business owners are male and prevailing gender norms encourage men to commodify women, there would be a stronger demand for female sexuality than male sexuality, just as movie audiences appear to prefer to see female nudity more than male nudity.<sup>63</sup>

That said, does the exposure of female body parts really lead to all this lawlessness the *Pap's A.M.* Court so greatly fears? Can an exposed pair of breasts or an uncovered vagina really lead to the end of civilization as we know it? We shall soon see...

### ***A. The Ridiculous, Illogical "Secondary Effects" Rationale of Pap's A.M.***

In *Pap's A.M.*, the plurality opinion relied quite heavily on the so-called secondary effects resulting from full nudity in live entertainment. The City of Erie, in enacting its ban on public nudity, justified its ordinance on the premise that live, nude entertainment automatically leads to criminal activity.

The preamble to the ordinance states that "the Council of the City of Erie *has, at various times over more than a century, expressed its findings* that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal

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<sup>63</sup> Russell K. Robinson, *Casting and Caste-ing; Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 36-37 (2007).

activity.<sup>64</sup>

Admittedly, I am hard pressed to come to that conclusion. Actually, I see several logical flaws in the Court's attempt to justify its secondary effects argument.

First, this reasoning assumes that *anyone* who goes into a strip club will automatically lose his wits and self-control, get drunk, get into fights, do drugs, and solicit a prostitute (at best) or commit rape (at worst). Although I am not a fan of strip clubs myself, I have gone to strip clubs several times in my younger days. At no time thereafter did I feel the need to commit any crime as the involuntary after-effect of going into a strip club. If anything, I was just plain bored. I have to believe that common sense would suggest that most people do not cave in to some irresistible primal impulse to engage in criminality and/or debauchery after seeing a live nude performance. In my view, this argument is very weak, at best.

The next logical flaw in the Court's justification was that the City of Erie wanted to place limitations on live nude entertainment in response to an increase in such establishments.

In the preamble to the ordinance, the city council stated that it was adopting the regulation for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitu-

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<sup>64</sup> City of Erie v. Pap's A.M., 529 U.S. 277, 297 (2000).

tion, the spread of sexually transmitted diseases and other deleterious effects.<sup>65</sup>

Taking this argument at face value, this seems to suggest that if nude entertainment were available at a private office party in an upscale neighborhood (as opposed to the seedy areas where strip clubs presumably operate), the perceived incidences of violence, prostitution, drunkenness and the like would be at a much lower rate. This does not make any logical sense to me. Prostitution, for example, is defined as “the act or practice of engaging in sexual intercourse for money.”<sup>66</sup> Where is it written in stone that nude dance clubs are automatic training grounds for prostitutes? Yes, it is true that some strippers are also prostitutes.<sup>67</sup> There are some who will trade sex for drugs.<sup>68</sup> There are some who work at high-end “escort” services who serve wealthy, influential clients (former New York Governor Eliot Spitzer, for example).<sup>69</sup> The point here is that these

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<sup>65</sup> *Pap's A.M.*, 529 U.S. at 290.

<sup>66</sup> Prostitution, DICTIONARY.COM, <http://dictionary.reference.com/browse/prostitution> (last visited Mar. 2, 2014).

<sup>67</sup> See, e.g., Daily Mail Reporter, *Former Prostitute and Stripper BACK in the Classroom (But This Time She's Only Teaching Adults)*, MAIL ONLINE (Aug. 13, 2013, 8:20 AM), <http://www.dailymail.co.uk/news/article-2187698/Melissa-Petro-Former-prostitute-stripper-BACK-classroom-time-shes-teaching-adults.html>.

<sup>68</sup> See, e.g., Jan Skutch, *Savannah Doctor Accused of Trading Drugs for Sex with Strippers*, AUGUSTA CHRON. (Jan. 31, 2013, 7:59PM), <http://chronicle.augusta.com/news/crime-courts/2013-01-31/savannah-doctor-accused-trading-drugs-sex-strippers>.

<sup>69</sup> Danny Hakim & William K. Rashbaum, *Spitzer is Linked to Prostitution Ring*, N.Y. TIMES (Mar. 10, 2008), <http://www.nytimes.com/2008/03/10/nyregion/10cnd-spitzer.html>.

bad acts can happen *anywhere*, and I would not be so quick to assume that nude entertainment automatically leads to the dark side of the human condition.

The third logical flaw in the Court's secondary effects rationale exposes the weakest point of them all: the idea of requiring female dancers to wear pasties and a G-string would miraculously eliminate the secondary effects (which would include raising the neighborhood property values; the Court never bothered to try to explain how *that* could be possible). Perhaps that idea might be plausible if the pasties had barbed wire in front and back, and the G-string was actually a cast iron chastity belt. This logic (or lack thereof) further assumes that if I for example wanted to meet a prostitute for the weekend and smoke crack with her after having sex, I would lose that desire the very second I saw a female dancer wearing pasties and a G-string. No matter how strong my "cravings" might be, they would automatically disintegrate as soon as I saw covered-up body parts. This idea is just laughable; if I wanted it bad enough, I can certainly find it. Needless to say, (but I will) I think the absolute stupidity of the Court's reasoning speaks for itself here, and I can certainly understand the original premise<sup>70</sup> regarding the fear of the nude female body that can result in some court decisions (such as this one) that are just *asinine*!

Aside from the potential implications of *Pap's A.M.*, the fact remains that applying the secondary effects doctrine in the context of nude dancing to justify public nudity laws like the Erie ordinance simply fails to pass the laugh test. Compliance typically requires nothing but pasties and a G-string.

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<sup>70</sup> Adler, *supra* note 61, at 1109.

How much of an effect can this possibly have on the harmful secondary effects that cities like Erie assert? Will the mere masking of a nipple with a dime-sized circle of latex magically send prostitutes elsewhere, eliminate assaults, reduce AIDS, and restore property values? The premise is ludicrous. Justice O'Connor attempts to respond to this obvious flaw in her secondary effects analysis by arguing that cities should have latitude to 'experiment' with solutions to such serious problems. Some experiments, however, are more justified than others. Perhaps Justice O'Connor should have applied the same 'common sense' that she so approved of when discussing a municipality's burden in showing secondary effects.<sup>71</sup>

### CONCLUSION

As ridiculous as it sounds, consider the following: In New York City, the sales tax rate (as of this writing) is 8.875 per cent.<sup>72</sup> Now that the New York Court of Appeals has ruled in favor of the Department of Taxation and Finance, this now means that the next time someone goes into a strip club and wants to give a ten dollar tip to an exotic dancer, it will not be enough; he will have to give a tip of ten dollars and eighty nine cents. If we carry this scenario to its logical conclusion, the dancer could conceivably wedge the ten-dollar bill into her G-String. But then, where does she put the other eighty-nine

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<sup>71</sup> Case, *supra* note 57, at 1211.

<sup>72</sup> NEW YORK STATE DEP'T OF TAX & FIN., ST-810, QUARTERLY SALES AND USE TAX RETURN FOR PART-QUARTERLY (MONTHLY) FILERS 3 (2013), [http://www.tax.ny.gov/pdf/current\\_forms/st/st810.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st810.pdf).

cents? Might she need to have a change purse or coin sorter somehow attached to her costume? In addition, this could raise the possibility that she may claim the coin sorter as an itemized deduction on her federal tax return for work related clothing.<sup>73</sup>

On July 5, 2013, Nite Moves filed a petition with the United States Supreme Court to review the Court of Appeals' decision.<sup>74</sup> My prognostication at the time was that the currently conservative Court would most likely hide behind its secondary effects illogic and uphold the New York tax. Unfortunately, things did not make it that far. On October 17, 2013, the United States Supreme Court denied Nite Moves' petition for certiorari.<sup>75</sup> Now that this is the final disposition of the issue, I have a suggestion where Nite Moves could provide nude entertainment and *still* qualify for the sales tax exemption.

My suggestion is this: Nite Moves could give nude performances of Shakespeare plays (*Macbeth*, *Hamlet*, *King Lear*, *Taming of the Shrew*, etc. They could even throw in a nude interpretation of *Ocean's Eleven*.<sup>76</sup>). The hook would still be live nude entertainment, and I think such a performance would be well within both the spirit (and more important) the *letter* of the law. I doubt that anyone from the Division could convincingly (let alone coherently) argue that Shakespeare is not art. As the old adage suggests, "where there's a will, there's a way." Thus, as

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<sup>73</sup> I.R.C. § 162 (2012).

<sup>74</sup> 677 New Loudon Corp. v. State of New York Tax Appeals Tribunal, 979 N.E.2d 1121 (N.Y. 2012), *petition for cert. filed*, 2013 WL 3458158 (U.S. Jul. 5, 2013) (No. 13-38).

<sup>75</sup> 677 New Loudon Corp. v. State of New York Tax Appeals Tribunal, 979 N.E.2d 1121 (N.Y. 2012), *petition denied*, 134 S.Ct. 422 (U.S. Oct. 15, 2013) (No. 13-38).

<sup>76</sup> OCEAN'S ELEVEN (Warner Brothers, 1960).

long as such a performance is planned and done right within the rules of New York State tax law, not even a G-string could get in the way.