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'Affront or Alarm': Performance, the Law and the 'Female Breast' from Janet Jackson to *Crazy Girls*

A momentary glimpse of Janet Jackson's breast on American television precipitated an earnest debate on the overstepping of marks (and recording-breaking TiVo replays) – while in many states, most notably Nevada, explicitly sexual performance is a respected contributor to the local economy. In this paper, Jeffrey D. Mason finds a way through the maze of state legislation and Supreme Court decision-making on the subject, exploring the interpretations of a constitutional right to self-exposure in conflict with the perceived need for protection against it; and he assesses the performance of *Crazy Girls*, a typical Las Vegas revue of the more 'acceptable' kind. He argues that the law, 'constituting a text analogous to a playscript in its delineation of roles, actions, interactions, and even costume choices, attempts to impose taste with a special precision by addressing display, intent, and effect; and serves as both an expression of disapprobation and an instrument to censor performance'. Jeffrey D. Mason is Professor of Theatre Arts and Head of the Department of Theatre Arts in the University of Oregon. A shorter version of this article was delivered as a plenary session paper at the annual conference of the American Society for Theatre Research at the Riviera Hotel in Las Vegas, on 20 November 2004.

NEAR the end of MTV's Super Bowl half-time show in Houston on 1 February 2004, Justin Timberlake reached across Janet Jackson and ripped off a portion of her studded black leather bustier, exposing what Alessandra Stanley, in the *New York Times*, described as 'a normal, middle-aged woman's breast', adorned only by a starburst nipple ring, to the view of 71,525 spectators in Reliant Stadium and, for a full second, an estimated 90 million television viewers.[1]

The subsequent furore included apologies from Jackson, Timberlake, MTV, and CBS, a harsh disavowal by the NFL not only of the incident but of MTV in general, a threat of investigation by the Federal Communications Commission including the prospect of a $27,500 fine for each CBS station and affiliate, statements of outrage by the Parents Television Council and the Traditional Values Coalition, a class-action lawsuit seeking monetary damages for exposure to lewd conduct, America Online's announcement that it would not make the half-time show available on its website, an affirmation of prevailing broadcast standards by a White House spokesman, the imposition of a tape delay on the telecast of the Grammy Awards on the following Sunday, and a record-breaking torrent of internet searches and TiVo replays (Sanneh, 'FCC', Carter and Sandomir, 'MTV', Charny).[2]

MTV Chief Executive Tom Freston told reporters, 'There's now going to be an FCC investigation into the nipple' ('MTV'). No one in prominent authority raised serious questions regarding Timberlake's agency in a performance of sexual assault, and indeed, media coverage tended to attach responsibility to Jackson.[3]

Because Timberlake was singing 'Rock Your Body', which concludes with the declaration, 'Gotta have you naked by the end of this song', many were sceptical that the incident actually reflected what the singer characterized as an unintentional 'wardrobe malfunction'.[4] Some observers read the exercise as a deliberate publicity stunt masquerading as an accident in order to avoid sanction; referring to the arc of Jackson's

 NTQ 21:2 (MAY 2005) DOI: 10.1017/S0266464X05000084

career and her imminent album, *Damita Jo*, a public relations professional remarked, 'I don't see any down side for her' ('PR Firms').

Although most reactions focused on the fact of the telecast, with its international audience and multi-million-dollar financial impact, the event was also live and so leads to questions relating to nudity in performance.[5] That the Jackson incident provoked widespread disapproval served to clarify the diversity – or inconsistency – in attitude and policy regarding such nudity in terms of location, situation, expectation, and convention. In stark contrast to the values pertaining at the Super Bowl, the casino hotels on the Las Vegas Strip provide topless performance as a routine and even restrained version of the sexually oriented entertainment so widely available in Clark County, Nevada. Although the Janet Jackson incident created an uproar and could have left the performer vulnerable to a felony charge in at least one state, on the Strip the law not only allows but facilitates nudity in performance for entertainment and considerable financial gain.[6] A long-running topless revue and, perhaps, an exemplar of the form, is *Crazy Girls*, produced by the Riviera Hotel.

The divergent customs of the Super Bowl and the Strip find place and expression in United States statutory and case law. Constituting a text analogous to a playscript in its delineation of roles, actions, interactions, and even costume choices, the law attempts to impose taste with a special precision by addressing display, intent, and effect; and it serves as both an expression of disapprobation and an instrument to censor performance. Although specifics vary between jurisdictions, American law marginalizes nudity, condemns public action that is even arguably sexual in intent or interpretation, and adopts a heterosexist perspective that reduces women to dissociated collections of body parts.[7]

American law presents the 'female breast' (the statutory phrase) as a danger zone, a territory that authority must control and restrict, an agent of transgression and obscenity, one that excites community concern and presents a palpable level of hazard. The breast becomes a synecdoche for the entire body, a focal point of vulnerability that suggests the jeopardy of the whole, whether the performed body or simply the body on public display. Yet in Las Vegas the 'female breast' is a stock in trade, its display contributing to the region's efforts to attract and entertain the estimated 35 million annual visitors who sustain the gaming and tourism-related industries that support the Nevada economy.

Statutorily Naked Breasts

American law has long disapproved of public nudity, usually describing the infraction as 'indecent exposure', although some jurisdictions use the terms 'public indecency', 'lewdness', or 'obscenity'. However, lawmakers struggle to imagine, describe, define, and characterize transgressive nudity, and although the language is fairly consistent with regard to buttocks, genitals, and the pubic area, there is some variation with regard to female breasts.[8] While Delaware and Wyoming prohibit the exposure of any part of the breast, most states – for example, Massachusetts, New York, Virginia, Alabama, Oklahoma, Kansas, Minnesota, and Oregon – limit the ban to any portion of the breast below the top of the nipple or the top of the areola.

In Indiana, Tennessee, Missouri, Louisiana, and Arizona a woman may display any part of her breast except the nipple, but Massachusetts and Oregon specifically define as 'nude' a breast with only the nipple and areola covered.[9] West Virginia recognizes the realities of contemporary fashion with an exception for 'any portion of the cleavage of the human female breast exhibited by a dress, blouse, skirt, leotard, bathing suit, or other wearing apparel provided the areola is not exposed, in whole or in part'.[10]

Some states address the intent or effect of the display, so exposure is illegal only in relation to the ostensible victim. Arizona censures only the woman who is 'reckless' regarding whether or not the person to whose view she exposes her breast would be 'offended or alarmed'.[11] Indiana defines public indecency as appearing 'in a state of nudity

with the intent to arouse the sexual desires of the person or another person', and Louisiana and Wyoming offer similar provisions.[12] A widespread, key standard is 'affront or alarm', appearing in the statutes of at least sixteen states: the 'actor', as the law puts it, is guilty only if her exposure provokes 'affront or alarm' in the viewer.[13]

The various state codes suggest the marginalization of the female breast by the ways they organize and name the relevant laws. Missouri includes its anti-nudity provisions under 'Pornography', Oregon and Alabama group them under 'Obscenity', and Arizona and Delaware use the title 'Sexual Offences'. The Indiana law appears in a chapter entitled 'Indecent Acts and Prostitution', Virginia offers a chapter entitled 'Crimes involving Morals and Decency', while the Massachusetts law appears under the heading, 'Crimes Against Chastity, Morality, Decency, and Good Order'.

In criminal codes, breasts keep questionable company. Definitions of nudity routinely include not only the pubic area, buttocks, and genitals, and occasionally the anus and anal cleft, but also the 'covered male genitals in a discernibly turgid state' – that is, a visibly erect penis qualifies as nude even if thoroughly clothed. As for the other specified body parts, the prevailing standard for infraction is the wearing of 'a less than fully opaque covering'. In Utah, the crime of lewdness includes not only exposure but also public masturbation, sexual intercourse, and sodomy.[14] Massachusetts, Minnesota, and Oklahoma specifically define as 'sexual conduct' any physical contact with a female breast as well as with genitals, buttocks, or the pubic area, while Arizona goes into some detail regarding indirect touching and manipulating of the female breast by any part of the body or by any object.[15] In Alabama, sexual conduct includes not only physical contact with a female breast 'in an act of sexual stimulation, gratification, or perversion', but also urination and defecation.[16]

In summary, the various states require women to cover their breasts because they are alarming but also because they are sexual; and the more erogenous the zone, the greater the legal concern.[17] Most statutes imply an assumption that the woman wilfully exposes herself – so the Timberlake/Jackson paradigm seldom arises – and that in a scenario involving her naked breast and others who view it, she is the perpetrator while they are the ones in need of a legal shield. The intent provision of the Indiana statute clarifies that nudity is indecent only if the individual intends to arouse another's desire; the breast becomes a weapon that a woman may wield against anyone who might find it stimulating or attractive. The body of American law presents desire as undesirable, as cause for shame and danger, and therefore in need of societal control.

The Breast in Performance

Performance sometimes receives special treatment, but not always to its benefit. New York specifically exempts from exposure 'any person entertaining or performing in a play, exhibition, show, or entertainment' but specifies that any local jurisdiction may adopt a statute banning exposure during such an event.[18] California likewise leaves room for counties and cities to regulate exposure by servers or entertainers working in an adult or sexually oriented business, defined as 'regularly featur[ing] live performances which are distinguished or characterized by an emphasis on the exposure of the genitals or buttocks of any person, or the breasts of any female person'.[19]

Texas classifies obscene performance as a misdemeanour, Alabama defines as a felony the showing of a female breast for entertainment, and New Mexico bans not only indecent dancing – 'intentionally exposing . . . intimate parts to public view while dancing or performing in a licensed liquor establishment' – but also 'indecent waitering', referring to identical exposure while serving food or beverages in the same place of business.[20]

Indeed, dancing raises the stakes. There seem to be no laws specifically prohibiting nude speaking or nude singing. Apparently the lawmakers contend that if the naked body is dangerous and transgressive, then there is even more concern and risk attached

https://doi.org/10.1017/S0266464X05000084 Published online by Cambridge University Press

to a naked body that is moving, moving to music, and moving with the skill and intent we ascribe to the dancer. To dance is to focus attention on the body, especially as it moves through space and in relation to other bodies. Dance suggests both physicality and relationship, and if the moving body is sexualized, perhaps even by mimicking a sexual rhythm, then dancing takes nudity to a higher level of concern.

Dancing with the High Court

When cases regarding nude dancing reach the United States Supreme Court, the following portions of the United States Constitution come into play:

- The First Amendment declares that 'Congress shall make no law . . . abridging the freedom of speech, or of the press'; the courts have since debated what speech qualifies as protected expression and under what circumstances conduct, activities, and behaviour enjoy similar protection.
- The Due Process Clause of the Fourteenth Amendment prevents states from asserting their authority in ways that infringe on First Amendment freedoms.
- The Twenty-First Amendment ended federal prohibition of traffic in 'intoxicating liquors' but granted the states broad powers regarding their sale, distribution and consumption. Various jurisdictions have subsequently enacted statutes regarding when, where, and under what circumstances someone may buy a drink, and many such laws address nude dancing and other sexually oriented behaviour in licensed premises.

Since 1973, the controlling decision concerning obscenity has been *Miller v. California*.[21] In his majority opinion, Chief Justice Warren E. Burger sets the paradigm as involving the average person applying local, not national standards; defines obscenity as that which 'appeals to the prurient interest in sex' and describes sexual conduct in a 'patently offensive way'; establishes obscenity as mutually exclusive from 'serious' art and literature, and denies it First Amendment protection. His ruling weakens the earlier standard, set in *Roth v. United States* (1957), by removing the requirement that obscenity be 'utterly without redeeming social importance'.[22]

The language of *Miller* leaves ample room for interpretation and disagreement. We are left to debate what constitutes an 'average' person, how to determine the standard for 'offensive', and what values qualify as 'serious'. A key word is 'prurient'; in his majority decision on *Roth*, Justice William J. Brennan Jr cites the 1949 edition of *Webster's New International Dictionary* to introduce such terms as 'longing', 'morbid', and 'lascivious'; and he offers his own reading of 'material which deals with sex in a manner appealing to prurient interest' as 'material having a tendency to excite lustful thoughts' (footnote 20).

Going back as far as *Chaplinsky v. State of New Hampshire* (1942), the court record provides a lexicon that might serve as an entry in a thesaurus: abominable, disgusting, erotic, filthy, foul, lascivious, lewd, licentious, loathsome, morbid, obscene, offensive, prurient, repugnant, repulsive, revolting, shameful, and vile. The terms rebound on each other in an endless cycle of reference, but the gist of the list is that obscenity is a matter of transgressive sex. Sex is suspect, and sexual pleasure provides grounds for both disapproval by the system and shame by the transgressor.

There are at least two principal interpretations of the third part of the high court's test ('whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value'): first, if it's art, then it can't be obscene; and second, if it's obscene, then it can't be art. In 1989, when Senator Jesse Helms (Rep., NC) proposed an amendment to the funding bill for the National Endowment for the Arts, intending that no federal funds go to support 'obscene or indecent materials', Senator Robert Dole (Rep., KS) remarked, 'I suspect that the overwhelming majority of Americans will thank him for protecting their tax dollars from those pornographers who like to pass themselves off as legitimate members of the artistic community'.[23] In other words, art and pornography are mutually exclusive. During the same debate, Senator Howard M. Metzenbaum (Dem., OH) took the floor to offer an historical challenge to Helms's view:

https://doi.org/10.1017/S0266464X05000084 Published online by Cambridge University Press

> Mr President, I would like to advise my colleague from North Carolina . . . that all depiction of individuals engaged in intercourse – a subject of art going back 2,000, maybe 5,000 years, is not all obscene. The only limitation about which we are speaking is the obscene depiction of individuals engaged in sexual intercourse because, to the best of my knowledge, the mere portrayal of individuals engaged in intercourse has been a subject of some of the greatest artists of the world, and certainly not all of it would be considered obscene. . . . Certainly the Senator from North Carolina would not be standing on the floor saying that something that Michelangelo did, something that was done 2,000 years ago, and is portrayed in some of the finest art museums of this country, is obscene just because it portrays sexual relations between two human beings.
>
> *Congressional Record*, 29 September 1989, §12213

Miller implies that erotic or 'patently offensive' art is inherently valueless. Part of the difficulty, from the artist's point of view, is that the Court appears to find certain *content* troubling but does not deal fully with the potential *uses* of that content. One might represent, depict, or describe a sexual act for any number of purposes, but both intent and effect will be specific to the instance. Helms clarified his own position on the relationship not only between obscenity and art, but also between obscenity and artists along with their supporters:

> Congress may think something is obscene, and the American public may think something is obscene, but under this conference report language before us, the NEA, the arty crowd, will be authorized to fund it, by giving away the taxpayers' money, despite the objections of Congress, despite the objections of the public if, in the opinion of the self-proclaimed art experts, it has all of that gobbledegook that I have read over and over again: 'serious literary, artistic, political, or scientific value'.
>
> *Congressional Record*, 7 October 1989, §12968

Although the vexed question of the the relationship between obscenity and art remains unsettled, *Miller* continues to guide legislation, judicial proceedings, and law enforcement efforts. Judgments must return to intent, context, and comprehension: how the artist intended the work, how she juxtaposes materials, and how the consumer 'reads' the result. Any image, sentence, or performed action might or might not be interpreted or received as 'obscene', depending on how it is presented and on the sensibilities and expectations of the reader or spectator.

Part of the difficulty lies in the point that no sign has inherent or inevitable meaning, and part lies in the rapid spread of the pornography industry, which has accelerated with growing access to the internet. In other words, one can 'read' a naked body in myriad ways, and there's a very lucrative and burgeoning business in certain readings.[24]

In *Miller*, Burger argues that banning obscenity does not blunt the 'true' purpose of the First Amendment:

> To equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. . . . The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.

He appears to be working in terms of an implied hierarchy of activities: the First Amendment protects the exchange of ideas, especially in service of political debate, beneficial social change, and the 'struggle for freedom', but it disfavours obscenity, particularly if presented for commercial gain.

Boundaries of the First Amendment

The Supreme Court has expended some effort trying to define First Amendment boundaries for nude dancing, and the more conservative decisions lean towards a compromise between decency and freedom.[25] In a case that directly addresses concerns inherent in live performance, *Barnes v. Glen Theatre* (1991) split the court on the issue of whether or not non-obscene nude dancing constitutes expressive conduct and so should enjoy First Amendment protection from an Indiana statute against public nudity.[26] With regard to the Kitty Kat Lounge in South Bend, the respondents argued that nude dancing con-

veys an erotic message which is lost to a significant degree if the state requires, as in this case, the dancers to wear pasties and G-strings. The key points of argument included the following:

- the boundaries and nature of expressive conduct;
- the circumstances necessary to bring the First Amendment into play;
- the government's ability to regulate non-speech conduct at the expense of 'incidental limitations on First Amendment freedoms';
- the extent to which nude dancing might expect First Amendment protection;
- the degree of freedom required in order to fulfil the First Amendment's guarantee;
- the potential of nude dancing to encourage prostitution, sexual assault and other criminal activity;
- the degree to which the intent of a law is relevant to its effect on First Amendment rights.

In his opinion for the prevailing plurality, Chief Justice William H. Rehnquist grounds his discussion in the observation that 'public indecency, including nudity, was a criminal offence at common law' with the intent of protecting 'nonconsenting parties from offence'. He argues that the government's interest in 'protecting societal order and morality' takes priority over untrammelled freedom of expression. He holds that in Indiana, nudity itself is 'the evil the State seeks to prevent' – that is, the statute banned public nudity in general, not only in the case of nude dancers who convey an erotic message, so the law had not targeted expressive activity but treated it only incidentally.

He declares that requiring the dancers to wear minimal coverings 'does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic'. In other words, if an artist has one means of communication, then the Court may bar her from using another without damaging her First Amendment rights. The dancer is still free to dance. The conclusion reflects his holding that 'nude 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 only marginally so'.

The Nature of Nudity

Justice Sandra Day O'Connor reaches a similar conclusion in *City of Erie v. Pap's A.M.* (2000), a case involving a city ordinance against public nudity that compelled dancers at a club called Kandyland to cover up. She writes, 'Although being "in a state of nudity" is not an inherently expressive condition, nude dancing of the type at issue here is expressive conduct.' However, she then asserts that 'the requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests [e.g., preventing illegal or disorderly conduct as a consequence of nude dancing in bars], and the restriction leaves ample capacity to convey the dancer's erotic message'.

Concurring in *Barnes*, Justice David H. Souter argues that nudity 'is a condition, not an activity' and that 'calling all voluntary activity expressive would reduce the concept of expression to the point of meaninglessness'. Souter is apparently trying to establish reasonable limits, but his remark doesn't acknowledge that while all voluntary activity might not be expressive all the time, any such activity *could* be expressive at *any* time; the distinction would be a matter of circumstances and intent. He refers to *United States v. O'Brien* (1968), which holds that the government may regulate non-speech conduct if there is 'a sufficiently important government interest' that 'can justify incidental limitations on First Amendment freedoms'; one of the four conditions in *O'Brien* requires that 'the restriction be no greater than essential to further the governmental interest'.[27]

Souter suggests that 'pasties and a G-string moderate the expression, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message'. However, he also writes,

> when nudity is combined with expressive activity, its stimulative and attractive value certainly can

https://doi.org/10.1017/S0266464X05000084 Published online by Cambridge University Press

enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a striptease, are integrated into the dance and its expressive function. Thus, I agree with the plurality and the dissent that an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection.

In his dissent, Justice Byron R. White calls attention to the plurality view that 'nude dancing performed as entertainment enjoys First Amendment protection'. He argues that *O'Brien* places the burden on the state to justify making a distinction 'between expressive conduct which is regulated and nonexpressive conduct of the same type which is not regulated'. He further argues that while statutes against appearing nude in such public places as beaches and parks are designed to protect others from offence, in nude clubs 'the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates.' He goes on to point out that the plurality

concedes that nude dancing conveys an erotic message, and concedes that the message would be muted if the dancers wore pasties and G-strings. Indeed, the emotional or erotic impact of the dance is intensified by the nudity of the performers. . . . The sight of a fully clothed, or even a partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental 'conduct'.

White asserts that the statute does indeed address expressive conduct:

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

He scolds the Court for 'distorting and ignoring settled doctrine' simply because nude dancing 'may not be high art' and might be unappealing.

Concurring with the plurality, Justice Antonin Scalia demands strict limits to First Amendment protection, arguing that 'virtually every law restricts conduct, and virtually any prohibited conduct can be performed for an expressive purpose – if only expressive of the fact that the actor disagrees with the prohibition'. He goes on to offer a hypothetical situation:

The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosierdome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered . . . immoral. In American society, such prohibitions have included, for example, sado-masochism, cock-fighting, bestiality, suicide, drug use, prostitution, and sodomy.

White responds with some humour:

We agree with Justice Scalia that the Indiana statute would not permit 60,000 consenting Hoosiers to expose themselves to each other in the Hoosierdome. No one can doubt, however, that those same 60,000 Hoosiers would be perfectly free to drive to their respective homes all across Indiana and, once there, to parade around, cavort, and revel in the nude for hours in front of relatives and friends. It is difficult to see why the State's interest in morality is any less in that situation, especially if, as Justice Scalia seems to suggest, nudity is inherently evil.

In conclusion, White states flatly that 'in Indiana, nudity in a dancing performance is a crime because of the message such dancing communicates'.

Dissenting justices have criticized compromises in other cases. In *City of Erie*, Justice John Paul Stevens objects to the ruling that the city ordinance was reasonable and 'content-neutral,' asserting that:

nude dancing fits well within a broad, cultural tradition recognized as expressive in nature and entitled to First Amendment protection. . . . The nudity of the dancer is both a component of the protected expression and the specific target of the ordinance. It is pure sophistry to reason from the

premise that the regulation of the nudity component of nude dancing is unrelated to the message conveyed by nude dancers.

In *California v. LaRue* (1972), Justice Thurgood Marshall writes: 'It may be that the Government has an interest in suppressing lewd or "indecent" speech even when it occurs in private among consenting adults. . . . That interest, however, must be balanced against the overriding interest of our citizens in freedom of thought and expression.' With specific regard to theatrical performance, he argues: 'It is senseless to say that a play is "speech" within the meaning of the First Amendment, but that the individual gestures of the actors are "conduct" which the State may prohibit.' Marshall's comparison opens up the problem to the fullness of theatrical production, which of course involves much more than text.

Liquor and the Law

California v. LaRue confirmed that a state may regulate the nature of the entertainment presented in bars and clubs that hold liquor licences. The California Department of Alcoholic Beverage Control held investigatory hearings and determined that nude dancing in licensed premises fostered criminal violations, including a variety of consensual sexual acts, prostitution, indecent exposure, rape, and assault; accordingly, the state banned certain sexually oriented performances, displays, and actions.[28]

In his majority opinion, Justice Rehnquist draws a distinction between 'gross sexuality' and communication; and he adopts a moralistic tone while suggesting a hierarchy of taste in artistic endeavour in arguing that:

> We would poorly serve both the interests for which the 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 theatre.

On various occasions, dissenting justices have taken issue with the position that liquor-related regulation can supersede freedom of speech; perhaps the most persistent critic has been Justice Stevens.[29] In *New York State Liquor Authority v. Bellanca* (1981), he denounces the majority for applying one Amendment to the exclusion of another, referring to the 'mischievous suggestion that the Twenty-first Amendment gives states power to censor free expression in places where liquor is served'. He characterizes the Court's interpretation of the Twenty-first Amendment as 'blatantly incorrect', and warns that the decisions had made it possible for a state to ban any protected activity on premises where liquor is sold, 'no matter how innocuous or, more importantly, how clearly protected.'

On *Newport v. Iacobucci* (1986), Stevens once again warns the Court against holding that the Twenty-first Amendment had in some sense repealed a portion of the First. He points out that a legitimate theatre has to obtain a liquor licence to sell champagne during an intermission, but the *Bellanca* argument suggests that such a theatre could lose its First Amendment protection for the nudity in a production of *Hair*.[30] Acknowledging that the majority was focusing on 'the spectre of unregulated nudity, particularly sexually suggestive dancing', he suggests that a bar room might very well be the most appropriate place for such entertainment since patrons know what to expect and are free to leave if they disapprove.[31]

In general, then, the conservative justices seek to limit First Amendment protection of conduct, and they regard nudity as potentially offensive – even 'evil' or 'immoral' – and so legitimately susceptible to regulation. The liberals accuse the legislators of objecting to the erotic message more than to the nudity that conveys it, banning nudity not on its own merits but for the ideas it expresses so effectively.

Perhaps predictably, laws regarding nudity in Nevada and especially in the Las Vegas area are highly developed and nuanced. In the Nevada Gaming Control Act, the state legislature anticipates that Nevada would continue to be the fastest-growing state in the Union well into the twenty-first century.[32] Yet although they recognize the value

of 'safe and peaceful residential neighbourhoods' that 'provide the scenic beauty and safe environment that is essential for enhancing the quality of life of families and children' in Clark County, home to two-thirds of the state's population, they also firmly declare that the gaming industry is vital to the economies of the state and the county as well as to the general welfare of their residents, leading them to conclude that much depends upon 'the attractiveness, excitement, and vitality of the Las Vegas Strip' and the need to establish a separate, special legal environment for its businesses.[33]

Dancing in Nevada

What's good for gambling is good for the people of Nevada, and clearly, the health of the gaming industry is partly dependent on such supportive infrastructure as hotels, restaurants, transportation, and a variety of entertainments, including myriad sexually oriented shows. Taxable gaming revenues now exceed $9 billion per year, and the Strip alone generates nearly half, so the stakes are high.[34] The law seeks to manage performed nudity with special care, setting boundaries while making it readily available.

Tellingly, in the city of Las Vegas, a female breast is nude if it's exposed at any point below the top of the nipple *and* if it's implicated in sexual conduct, which includes touching the breast 'for the purpose of arousing or gratifying the sexual desire of another person'.[35] The wording of the provision suggests that the touching does *not* arouse the sexual desire of the owner of the breast; she is not subject but object. This distinction provides insight into the role of the breast as a commodity in the gaming industry; the law encourages its performed nudity for the entertainment of straight men who will gamble.[36]

However, most of the Strip is located outside the city limits, so the casino hotels would seem to come under the jurisdiction of Clark County, whose Code focuses attention on three kinds of businesses that can include sexually oriented performances. In treating each category, the Board of County Commissioners includes a set of findings that details the social risks that such an enterprise entails, and they assure the public that regulation is necessary to promote public health, safety, and welfare, while keeping such businesses running. Throughout the Code, a woman exposing her breast 'below a point immediately above the top of the areola' qualifies as topless, while a man or a woman exposing the genitals is deemed nude.[37]

The commissioners explain that ADULT THEATRE ESTABLISHMENTS typically offer 'unsafe and unsanitary conditions' in the 'closed peep-show booths' which provide 'a haven for carnal sexual activity'. In other jurisdictions, patrons come to such booths 'for engaging in sexual acts, particularly between males, including but not limited to intercourse, sodomy, oral copulation, and masturbation'. The law makes no distinction between live performance and film or electronic reproduction, and after listing various 'specified sexual activities', including the fondling of a female breast, the section on definitions goes on to mention 'specified anatomical areas', including the exposed female breast.[38]

In Clark County, ADULT NIGHTCLUBS offer sensual or sexual entertainment, but their performers are neither nude nor topless, and the clubs don't serve liquor. Nevertheless, the commissioners associate such clubs with solicitation and the swindling of patrons by cheating them on drinks that they encourage them to buy by offering sexual stimulation.

The County Code defines EROTIC DANCE ESTABLISHMENTS as businesses that employ a certain kind of dancer: 'a person who dances, models, personally solicits drinks, or otherwise performs for an erotic dance establishment, and who seeks to arouse or excite the patrons' sexual desires'.[39] That is, they acknowledge the explicit sexualization of such dancers and the link between dancing and erotic discourse. The commissioners observe that such businesses sometimes serve as fronts for organized crime and that if left unregulated they will contribute to such criminal activity as prostitution, fraud, and drug and alcohol offences.

The County Code draws careful distinctions in relation to exposure, liquor laws, and

physical contact. A topless dancer exposes her breasts, while a nude performer also reveals the genitals, pubic area, or anus, but *not* in 'a lewd or obscene fashion'.[40] While topless clubs may serve liquor if so licensed, all nude clubs are dry; like many other jurisdictions, Clark County infers that drinking and nudity form a dangerous mixture. The dancers may appear topless or nude in the public area only while dancing; this provision suggests that although dancing enhances the sexual power and risk of the naked body, there are other activities that are even more transgressive.

The statute bans physical contact between dancer and customer involving the anus, pubic region, genitals, or female breasts, if the intention is to arouse or to gratify anyone's sexual desires, but it allows the dancer to touch her own breasts for the same purpose, and to this extent the statute acknowledges the desire of the dancer herself.[41] However, there are two exceptions, designed to permit lap dancing. In a club with a liquor licence, a dancer may allow her clothed anus, pubic region, and genitals to make contact with a patron's leg, and in a dry club she may make the same contact while completely nude.

In neither erotic dance establishments nor adult nightclubs may a dancer (or an attendant or a server) and a patron fondle or caress each other, nor may any patron pay an employee for 'sexual conduct', which can include 'the touching of the . . . female breast of a person for the purpose of arousing or gratifying the sexual desire of another person'.[42] The Code recognizes both adult theatres and erotic dance establishments as offering activities that qualify as constitutionally protected expression.

Such are the boundaries in Clark County, but resort hotels and their showrooms are specifically exempt from these provisions as such.[43] Such establishments fall under the jurisdiction of the Nevada Gaming Control Act and Title 8 of the Clark County Code, which deals with gaming licences. As a gaming licensee, a resort hotel is subject to disciplinary action by the Gaming Board for a variety of infractions, including allowing a person to appear nude or topless on the premises, hiring anyone to serve alcohol while nude or topless, and encouraging patrons to engage in nudity, topless activity, or lewd activity.[44] However, the hotel may provide an ADULT ENTERTAINMENT CABARET and so offer topless performance and serve alcoholic beverages under the same statutes that regulate erotic dance establishments.[45]

The law therefore shapes and positions *Crazy Girls*, and it sets certain limits for the dancers. The women may appear topless as long they keep dancing; and they may touch their own breasts. The law recognizes that the purpose of the show is to arouse and, to a limited extent, gratify sexual desire.[46] The law assumes, as in so many similar situations, that *Crazy Girls* is intended for a heterosexual male audience.

Crazy Girls

Modelled after the *Crazy Horse* revue in Paris, *Crazy Girls* opened on 21 September 1987 with eighteen shows per week, charging $9.95 per ticket.[47] The hotel now offers six weekly performances in a facility that seats 350.[48] Karen Raider, a former 'crazy girl' and now company manager, explains that the show is about 'beauty, bodies, and talent', and because it is, as she puts it, 'youth-based', they hire 'girls', as she calls them, in their early twenties, who tend to stay with the show for around four years.[49] The hotel will reveal neither the percentage of seats sold nor the weekly gross, but they claim that the show is sold out most of the time, even though at the two performances I attended, about one-third of the seats were empty.[50]

Other topless revues playing in resort hotel showrooms include *Midnight Fantasy* at the Luxor, *Skin Tight* at Harrah's Las Vegas, *Naked Angels* at the Plaza, and *Bottoms Up* at the Flamingo.[51] Most of the patrons I observed at *Crazy Girls* were male/female couples, and publicity and conventional wisdom do present such revues as offering the classic Las Vegas topless performance in a setting more genteel and socially acceptable than such establishments as Club Paradise, Satin Saddle, Spearmint Rhino, and Tender Trap, or such all-nude clubs as Little Darlings,

the Pussycat Lounge, Climaxx, the Palomino, and the Tally-Ho.[52]

In theatrical terms, *Crazy Girls* is a ninety-minute revue composed of fifteen dance numbers by the eight eponymous women, who perform on a small proscenium stage with three runways extending out into the audience and seating arranged as if for a thrust configuration, all under a complex lighting design involving saturated colours, a liberal use of patterns, and automated instruments. Each number has its own costume and wig plot, and the dancers lip-synch to recorded vocals. Two men, an emcee and a juggler, add comic elements and interact directly with the audience.[53] Before the live show begins, an eight-minute video puffs the supposed controversy and sexiness of *Crazy Girls* to enhance the audience's anticipation.

In legal terms, *Crazy Girls* is a legitimate topless show in licensed premises; the dancers never make physical contact with the patrons, although they do touch their own breasts in several numbers; and they appear topless only in choreographed dance routines.

The 'erotic message' – the constitutional issue – varies throughout the show. The women are not always topless, and a few numbers present them as innocent or youthfully cute. The song 'You Gotta Have Boobs' certainly calls attention to the performers' breasts, but to comic rather than sensual effect, and even when the women briefly grasp each other's nipples, the action is so perfunctory – just another move in a complicated dance routine – that it has limited potential for (as the law puts it) arousing or gratifying sexual desire.

Two solo numbers are more classical than erotic, and serve to show off the dancers' strength, flexibility, and considerable skill. In three others, the nudity is irrelevant to the choreography or lyrics. Most topless numbers begin topless; in only one does the ensemble evoke a strip routine as each girl removes her top in turn. Although the dance vocabulary frequently relies on such tropes as arched backs, presented buttocks, and high kicks and extensions clearly intended to offer the barely-covered pudenda, the structure of the show and the Las Vegas setting render bared breasts standard or normative; although subjective reactions surely vary, the mere fact of nudity does not necessarily cause the 'affront or alarm' that surely follows if any performing female breast is exposed at the Super Bowl.

Yet the show does raise the sexual tension in four numbers. In one, two women pose, engage in stylized embraces, and lightly caress each other in an ostensible performance of lesbian desire surely intended for the straight male gaze. In each of three others, a sexually suggestive dance ends when the topless soloist turns her back to the audience, carefully releases and removes her G-string, twirls it in the air, lets it drop in full view of the spectators, and so appears to be naked: one working on a chair to a heavy metal blues guitar, one who strips down from a shiny black coat and hat, and one writhing erotically on a tilted platform.

The lighting, the subsequent positions of the dancer's body, or her use of a prop prevents the audience from knowing for sure that she has uncovered herself, but leads them to believe that she is indeed nude and so seeks to hide her pudenda from view. Yet in each case, the full nudity is an illusion, for the dancers wear flesh-coloured G-strings that remain in place. The show therefore offers the simulation of both full nudity and the breaking of the law; they invite the thrill without actually crossing either threshold. *Crazy Girls* and the law engage in a careful interaction regarding what society will accept – and when and where it will do so.

Conclusions

The law locates performed nudity in relation to decency, desire, and profit. We should read even the Supreme Court decisions not only in terms of the expressive rights of the dancers but also with an eye on the commercial interests of those who employ them.[54] Yet in order to understand the relationship between law and performance, we should move beyond the inciting matter of nudity to consider all possibilities. Rehnquist's rationale in *Barnes* opens the door to interference and censorship; from any angle, the state could

The performers in *Crazy Girl*, dressed in the outfits that close the show: they look like they're nude underneath a mesh garment, but are in fact wearing G-strings and linings that permit them to leave the theatre and greet patrons in the lobby even while dressed like this. The suggestion of nudity instead of actual nudity is in keeping with both the show and the laws relating to it. Photo: courtesy of the Riviera Hotel and Casino.

restrict expressive freedom by making the argument that the artist has an alternative means of conveying the message, a hazard that Marshall clarifies in his *LaRue* dissent.

While artists and scholars may regard First Amendment rights as absolute, the high court negotiates and debates both substance and boundaries. *Miller* and related decisions clarify that the American legislative and judicial apparatus proceed from visions of morality, and with reference to obscenity and nudity the objects of concern are sexual pleasure, transgressive sex, and, indeed, sex in general.

In a footnote to *Miller*, Burger suggests that the states have greater power to regulate non-verbal, physical conduct than to suppress depictions or descriptions of the same behaviour.[55] In other words, he extends protection to the representation but not to the thing itself. His argument raises the question of whether the right of free speech fully applies to theatre and dance. Since performance is virtually synonymous with being, the actor or dancer 'representing' sexual desire may very well engage in the actions of sexual desire in full view of the audience, and she could run foul of Burger's distinction.

https://doi.org/10.1017/S0266464X05000084 Published online by Cambridge University Press

Yet the high court has paid scant attention to theatre artists, even if the Senate has targeted them during the NEA debates, so perhaps they are enjoying the benefits of a legal shield primarily intended to keep the dollars flowing in Las Vegas.

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Notes and References

1. Jackson was 37 years old at the time of the incident. Nielsen Media Research estimated the audience to consist of 143.6 million American viewers in 41.3 per cent of the 108.4 million television homes in the USA. Nine months later, with reference to the outcome of the 2004 United States Presidential election, William Safire remarked, 'I think the social, political event of the past year was Janet Jackson's exposure of her right breast on television during the Super Bowl. . . . It was the reaction which was fantastic . . . that sense of "Hey, you're going too far too fast" affects not just evangelicals but a lot of Americans' ('Meet the Press').

2. *Time* magazine reported a 180 per cent spike in TiVo replays after Jackson exposed her breast during the half-time show. NBC announced that it would edit out a scene from its series *E.R.* because it included a brief glimpse of the breast of a female character who would be suffering a heart attack, but John Wells, the show's executive producer, asserted, 'She's eighty years old. To think there is anything salacious there is absurd' (Carter). The plaintiff in the class action proceedings was Terri Carlin, identified in various news stories as a bank worker in Tennessee; she withdrew the suit a week later. CBS banned Jackson but not Timberlake from the Grammy telecast; even though Timberlake committed the action that produced the effect, Jackson's breast became the site of concern and danger. Network executives apparently reasoned that if she didn't appear on the awards show, then her breast would be safely elsewhere.

3. On 12 February 2004, the House Subcommittee on Telecommunications and the Internet approved a revision of the Broadcast Decency Enforcement Act, HR 3717, that increased to $275,000 the maximum penalty for indecency on television and radio. On the floor of the House, Representative Tom Osborne (Rep., NE), who had retired in 1997 as head coach of the University of Nebraska football team and so was no stranger to media issues, referred to the Jackson incident, asserted that the FCC levied only a few minimal fines in a typical year (never targeting a television station), and so was derelict in the performance of its duties in spite of an annual appropriation of $278 million, and concluded by asking Congress 'to hold the broadcast media to a higher standard and to require the FCC to enforce commonly held standards of decency' (*Congressional Record*, 24 February 2004, H 534). On 3 March the House Energy and Commerce Committee voted 49 to 1 to increase the limit to $500,000, and on 11 March Congress approved the increase by a vote of 391 to 22. Federal law bans obscene programming (applying the three-prong test from *Miller v. California*) and restricts to night-time hours (10 p.m. to 6 a.m.) broadcast indecency, which the FCC defines as 'language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities' ('Obscenity, Indecency').

4. Following are the lyrics to 'Rock Your Body':

> Don't be so quick to walk away
> Dance with me
> I wanna rock your body
> Please stay
> Dance with me
> Just let me rock you
> Till the break of day
> Dance with me
>
> Got time, but I don't mind
> Just wanna rock you, girl
> I'll have whatever you have
> Come on, just give it up, girl
> See I've been watching you
> I like the way you move
> So go ahead, girl, just do
> That ass-shaking thing you do
>
> So you grab your girls
> And you grab a couple more
> And you all come meet me
> In the middle of the floor
> Said the air is thick, it's smelling right
> So you blast to the left and you sail to the right
>
> *Repeat first stanza.*
>
> I don't mean no harm
> Just wanna rock you, girl
> Make a move, but be calm
> Let's go, let's give it up, girl
> See it appears to me
> You like the way I move

https://doi.org/10.1017/S0266464X05000084 Published online by Cambridge University Press

I'll tell you what I'm gonna do
Pull you close and share my groove

Repeat third stanza.

Repeat first stanza.

Talk to me, boy
No disrespect, I don't mean no harm
Talk to me, boy
I can't wait to have you in my arms
Talk to me, boy
Hurry up cause you're taking too long
Talk to me, boy
Better have you naked by the end of this song

So what did you come for
I came to dance with you
And you know that you don't want to hit
the floor
I came to romance with you
You're searching for love for ever more
It's time to take a chance
If love is here on the floor, girl

Hey
Dance with me
Yea
Come on baby
Don't be so quick to walk away
(Don't walk away)
(Come on and)
Dance with me
I wanna rock your body
(Let me rock your body)
Please stay
(Come on and)
Dance with me
You don't have to admit you wanna play
(You don't have to admit you wanna play, just)
Dance with me
Just let me rock you
(Do do do do)
Till the break of day
(Come on and)
Dance with me

Repeat eighth stanza.

Don't be so quick to walk away
(Just think of me and you)
Don't be so quick to walk away
(We could do something)
Don't be so quick to walk away
(I like the way you look right now)
Don't be so quick to walk away
(Come over here, baby)

Are you feeling me?
Let's do something
Let's make a bet
'Cause I gotta have you naked by the end
of this song.

5. Marketing Information Masters estimated a total economic impact of $367 million for Super Bowl XXXVII in San Diego, while the Super Bowl XXXVIII Host Committee estimated a $300 million impact in Houston ('Super Bowl Information'). The Super Bowl broadcast typically sells sixty thirty-second spots; 2005 rates are running $2.2 to $2.4 million per advertisement, so gross revenue would come to $132–144 million.

6. In Louisiana, a woman intentionally engaging in public exposure of her nipple 'with the intent of arousing sexual desire or which appeals to prurient interest or is patently offensive' has committed the crime of obscenity, and if she does so in the presence of an unmarried person under the age of seventeen, she is liable to a fine of up to $10,000 and a sentence of two to five years without parole, probation, or suspension (*Louisiana Revised Statutes* 14.106).

7. Even those whose nudity the law condones occupy the margins in various ways: naturists, swingers, nursing mothers, those under ten years old, and models for art classes.

8. Some states don't legislate against public nudity, and there are many regulations against indecency at the county and municipal levels, but in order to mark out a manageable territory I am limiting my review to state codes that do include relevant provisions.

9. *General Laws of Massachusetts*, Chapter 272, Section 31, includes the following definition of nudity: 'uncovered or less than opaquely covered human genitals, pubic areas, the human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple or areola only are covered.' *Oregon Revised Statutes* 167.060 (5) includes, 'For purposes of this definition, a female breast is considered uncovered if the nipple only or the nipple or areola only are covered.'

10. *West Virginia Code*, 7-1-3jj.

11. *Arizona Revised Statutes*, 13-1402.

12. *Indiana State Code* 34-45-4-1 (3), *Louisiana Revised Statutes* 14:106.A (1), *Wyoming Statutes* 6-4-201 (a).

13. Maine, New Hampshire, Rhode Island, New Jersey, Delaware, Pennsylvania, West Virginia, Ohio, Kentucky, Alabama, Missouri, Nebraska, Colorado, Utah, Montana, and Washington.

14. *Utah Code*, 76-9-702.

15. *Arizona Revised Statutes*, 13-1401 (2).

16. *The Code of Alabama 1975*, 13A-12-200.1 (22).

17. In the statutes that define the clothed but erect penis as being just as nude as a naked breast, we can see the legal perception of the connection between sexuality and indecency.

18. *New York Consolidated Laws*, 245.01.

19. *California Penal Code*, 318.6 (b).

20. *Texas Statutes*, 43.21 (1), *The Code of Alabama 1975* 13A-12-200.11, and *New Mexico Statutes Unannotated*, 30–9-14.1 and 30-9-14.2; both of the latter passages appear in Chapter 30, 'Criminal Offenses', Article 9, 'Sexual Offenses'. For an example of the many codes that borrow the key language from *Miller v. California*, see *Texas Statutes Penal Code*, Chapter 43, 'Public Indecency', Subchapter B, 'Obscenity', 43.21 (1).

21. The appellant sought to sell illustrated books characterized as 'adult' material, and he was convicted for distributing obscene matter. The key passage in the decision reads, 'The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'

22. Burger wrote, 'It is neither realistic nor constitutionally sound to read the First Amendment as requiring

that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.' Under *Roth*, only material that offers no benefit to society could be deemed obscene, no matter how well it fit the other criteria. In *Miller*, Burger argued that the requirement created 'a burden virtually impossible to discharge under our criminal standards of proof.'

23. Helms's amendment read, 'None of the funds authorized to be appropriated pursuant to this Act may be used to promote, disseminate, or produce – (1) obscene or indecent materials, including but not limited to depictions of sado-masochism, homo-eroticism, the exploitation of children, or individuals engaged in sex acts; or (2) material which denigrates the objects or beliefs of the adherents or a particular religion or non-religion; or (3) material which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.'

24. I use the term 'pornography' in desperation and with full awareness that this and terms like 'erotica', 'obscenity', and 'lewdness' don't have fixed or reliable meanings. I refer, as I hope is clear from the context, to the distribution and sale of material (primarily photographs and videos) intended primarily to provide sexual stimulation.

25. For the nearly unanimous decision in *Doran v. Salem Inn* (1975), Justice Rehnquist writes that 'the customary "bar-room" type of nude dancing may involve only the barest minimum of protected expression', but he agrees that 'non-obscene conduct in the form of topless dancing' should, indeed, enjoy First Amendment shelter.

26. Note that the case was arguable only if the dancing were designated 'non-obscene', for if it were deemed 'obscene' it would have run foul of *Miller v. California.* Hanna refers to *Barnes* as 'the governing constitutional law in the area of government efforts to restrict or ban nude dancing' (50).

27. In 1966, David Paul O'Brien burned his Selective Service registration certificate, or draft card, on the steps of the South Boston Courthouse in hopes of inspiring others to join his anti-war protest. He argued that the federal law he violated – part of the Universal Military Training and Service Act of 1948 – was unconstitutional because it sought to abridge free speech. Souter's argument rested on the position that nude dancing tended to contribute to prostitution and other crimes.

28. The regulations mentioned the performance or simulation of sexual acts otherwise prohibited by law, including intercourse, sodomy, oral copulation, bestiality, flagellation, and masturbation; touching breasts, buttocks, anus, or genitals; and displaying pubic hair, anus, or genitals.

29. In his dissent regarding *California v. LaRue*, Justice Brennan wrote, '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.' In a separate dissent on the same case, Marshall saw nothing in the history of the Twenty-first Amendment 'which indicates that Congress meant to tamper in any way with First Amendment rights' and objected to the interpretation that 'authorizes the states to regulate liquor in a fashion which would otherwise be constitutionally impermissible'.

30. Stevens also suggested that a production of *Romeo and Juliet* could include a scene that would violate the city ordinance.

31. Stevens drew an analogy referring to past decisions that recognized 'the legitimate interest in keeping pigs out of the parlour. . . . As long as people who like pigs keep them in secluded barnyards, they do not offend the sensibilities of the general public.'

32. The Act constitutes Chapter 463 of the *Nevada Revised Statutes.*

33. *Nevada Revised Statutes*, 462.3072 2(b).

34. From December 2002 through November 2003, statewide taxable gaming revenue came to $9,389,253,000, while revenue on the Strip totalled $4,536,514,000, or 48 per cent of the total (*Gaming Revenue Report* A-01).

35. *Las Vegas Municipal Code* 6.06B.030 (I).

36. Lest we forget that Nevada was once part of the old West, let's note that among the provisions in the *Las Vegas Municipal Code*, immediately following the paragraph concerning lewd exposure, is a law defining as a misdemeanour the putting of a mare to a stud horse within the city limits; clearly, concerns regarding indecency have ranged in a variety of directions over the years (10.40.060).

37. The *Clark County Code* and the *Las Vegas Municipal Code* both include chapters concerning businesses designated as 'erotic dance establishments' and 'adult nightclub establishments'. The language and content of parallel sections range from similar to identical.

38. The activities include masturbation, intercourse, sodomy, and 'fondling or other erotic touching of human genitals, pubic region, buttock or female breast', while the areas include genitals, pubic region, buttock if not adequately covered, and 'human male genitals in a discernibly turgid state' even if covered.

39. It is *prima facie* evidence that a business is an erotic dance establishment if one or more topless or nude employees entice or persuade a patron to buy a drink (*Clark County Code*, 6.160.040).

40. *Clark County Code* 6.160.110 and 6.150.050(a).

41. *Las Vegas Municipal Code* 6.160.110(h) and 6.160.110.

42. The county code defines 'fondle or caress' as 'affectionate touching that is intended to sexually arouse'. 'Sexual conduct' also includes intercourse, oral-genital contact, and the touching of sexual organs, the pubic region, or buttocks.

43. State law defines a resort hotel as providing at least two hundred rooms, a bar seating at least thirty people, a restaurant seating at least sixty and open 24 hours each day, and a gaming area, while the county code explains that a showroom is a facility in a resort hotel seating at least 125 people, serving alcohol, and offering entertainment on a stage (*Nevada Revised Statutes* 463.01865 and *Clark County Code* 8.20.020; the county code goes into more detail in section 8.04.010).

44. 'Lewd activity' includes certain nudity, certain physical contact for the purposes of arousing or gratifying sexual desire, intercourse, oral-genital contact, masturbation, bestiality (actual or simulated) and sado-masochistic abuse. The hotel may provide its guests a designated portion of the swimming pool area for topless sunbathing.

45. 'Adult entertainment cabaret' means an establishment that offers topless dancing, performing or entertaining by a cabaret entertainer' that is licensed according to section 6.95.010(c), licensed to serve alcohol, and is 'subject to erotic dance establishment regulations' (8.20.020). Section 6.95.010(c) explains that 'adult entertainment cabaret' means a public or private establishment which is licensed to serve alcoholic

beverages, which features topless dancers, strippers, male or female impersonators, burlesque, or similar entertainers. If located in a resort hotel, such establishments are considered erotic dance establishments for the purposes of complying with the regulations in section 6.160.

46. The code mentions gratification as permissible only with reference to lap-dancing and a dancer touching her own breasts. With regard to escort services, but applicable to certain other sections, section 8.32.060 defines 'sexual gratification' as 'sexual conduct', which is 'the engaging in or the commission of an act of sexual intercourse, oral-genital contact, or the touching of the sexual organs, pubic region, buttock, or female breast of a person for the purpose of arousing or gratifying the sexual desire of another person'.

47. The 1987 charge comes to about $16.50 in 2004 dollars, so the ticket price has more than doubled to its current $34.95, but the hotel is generous with discount coupons to conventioneers. Alain Bernardin opened the Crazy Horse Saloon in Paris in 1951 in order to bring American-style striptease to France.

48. The Riviera's public relations office provides this figure, but the posted legal 'maximum capacity' sign indicates 410.

49. Raider did not elaborate, but I interpret 'youth-based' to indicate not only that they require the strength and flexibility of a young dancer, but also her flawlessly firm and trim body. Although 'You Gotta Have Boobs' includes the lyric, 'silicone is a girl's best friend', the troupe does not display uniformly large or even identical breasts, so it is not reasonable to infer that the management insisted on surgical intervention to achieve a certain 'look'.

50. 18 and 19 November 2004.

51. Additional shows include *Splash* at the Riviera, *Bite* at the Stratosphere, *Showgirls* at the Rio, *Les Folies Bergère* at the Tropicana, *Le Femme* at the MGM Grand, *Showgirls of Magic* at the San Remo, *Jubilee* at Bally's, and *X – an Erotic Adventure* at the Aladdin.

52. Other all-nude clubs include the Can Can Room, Déjà Vu, and the Talk of the Town.

53. The juggler picks four people sitting in booths and at tables to throw rings towards the stage so he may catch them on his head; when someone throws a ring out of range, he teases them. His standard jokes include asking a patron where he's from, responding, 'I'm sorry,' and when the patron, thinking that he didn't hear correctly, repeats the name of the state or city, he explains that no, he feels sorry that the person lives there. Another standard is pretending to miss a juggling toss, muttering some ostensible obscenities in Spanish, pretending to catch himself, asking if anyone in the house speaks Spanish, and when someone says 'Yes,' assuring the audience, 'I'm Italian.' The emcee picks one or two women in the front of the house, learns their names, and converses with them during his scenes; he also picks a woman to come up on stage, where he tries to get her to dance as a mock audition for *Crazy Girls.* He points to a place near the downstage edge and assures the woman that it's a 'hootchy' camera, but most of the spectators didn't appear to understand the carnival slang reference to a woman's pudenda. He might also flash one of his own nipples by way of mocking the topless nature of the show.

54. As of 2003, the average salary among the 470 dancers in the Las Vegas area was $39,240, nearly 50 per cent higher than the national mean of $26,540, which was equivalent to the mean, say, for 1.85 million secretaries. The Las Vegas mean exceeds the nationwide 75th percentile for dancers (*Occupational Employment Statistics*). As of November, 2004, *Crazy Girls* started dancers at $750 per week (for a total of up to $39,000 per year) with the potential for subsequent increases (Raider).

55. Burger offers this observation in reference to United States v. O'Brien (1968).

56. All available at <http://www.findlaw.com/casecode/supreme.html>.