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# STRIPPED: SPEECH, SEX, RACE, AND SECONDARY EFFECTS

LISA CROOMS-ROBINSON\*

## INTRODUCTION

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## INTRODUCTION

On February 24, 1999, New Orleans–based rapper Juvenile told the world “Cash Money Records taking over for the ’99 [and] the 2000.”<sup>1</sup> “Back That Azz Up” was released as a single, and Juvenile proved he had written a check his ass could cash.<sup>2</sup> Twenty years later, “Back That Azz Up” is “the theme song for the proverbial cookout and the national anthem of Twerkanda.”<sup>3</sup> It is hard to find “[a]nyone

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\* Professor, Howard University School of Law. I am indebted to Aleena Asperville (Class of 2019), Miles Taylor (Class of 2018), and Vianca Simpson (Class of 2016). In addition, this Article would not have been possible without the support of Dean Danielle Holley-Walker, Raaechael Johnson, Tiffany Harris, Assistant Dean Ann Marie Waterman, and Dorothy Q. Thomas. I would also like to thank Layla Abi-Falah and the members of the *William & Mary Journal of Race, Gender, and Social Justice*. Any errors are my own. Finally, there is an accompanying Strip(ped) Speech playlist readers can access at <https://music.apple.com/us/playlist/strip-ped-speech/pl.u-yZyVEAxTYgp7oK>.

1. JUVENILE, LIL WAYNE & MANNIE FRESH, *Back That Azz Up*, on 400 DEGREEZ (Cash Money Records 1998).

2. According to Urban Dictionary.com, “‘Your mouth is writing checks your ass can’t cash,’ . . . means that talk is cheap relative to performance, or that promising something and delivering on it are two different things. A phrase similar in meaning is ‘Money talks, bullshit walks.’” *Your mouth is writing checks your ass can’t cash*, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=Your%20mouth%20is%0writing%20checks%20your%20ass%20can%27t%20cash> [<https://perma.cc/B8VB-Y6QC>] (last visited Nov. 4, 2019).

3. Michael Harriot, *On the 20th Anniversary of ‘Back That Azz Up,’ We’re Still Dropping It Like It’s Hot*, THE ROOT (Feb. 24, 2019), <https://www.theroot.com/on-the-20th-anniversary-of-back-dat-azz-up-were-still-1832853771> [<https://perma.cc/CQ8S-VVCR>]; Justin

between the ages of 20 and 55 [who] has [never] a) thrown a twerk to this song; b) caught a twerk to this song; and/or c) carried with them fond twerk memories” with this song as the soundtrack.<sup>4</sup> It is a party anthem that owes a deep debt to “[t]he strip clubs where [it] is unofficially written into its constitution.”<sup>5</sup> Whether in the clubs or in the streets, “[t]he fact that America even knows what twerking is (and didn’t allow Miley Cyrus to drive a proverbial stake through its proverbial heart) is thanks to the bold brilliance of the black girls who (created it and who) swing it, and to Juvenile, Mannie Fresh and Lil Wayne.”<sup>6</sup> Twenty years on, most backing up happens nowhere near a strip club.<sup>7</sup> Rather, “the backing up of azz takes place at baby showers, . . . repast[s],” wedding receptions, company picnics,<sup>8</sup> and “high-cotton” black tie galas. The song is so ubiquitous that you can hear and dance to it without ever stepping foot into a club.<sup>9</sup>

The influence of songs like “Back That Azz Up” outside the strip club has a lot to do with a musical subgenre that has “dominated the

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Tinsley, *Juvenile’s “Back That Azz Up,” 20 years later*, THE UNDEFEATED (Feb. 22, 2019), <https://theundefeated.com/features/juveniles-back-that-azz-up-20-years-later> [<https://perma.cc/2H42-8UK9>]. The Oxford English Dictionary defines “twerking” as dancing “in a sexually provocative manner, using thrusting movements of the bottom and hips while in a low, squatting stance,” and identifies the first use of the word in 1820 when a “twirk” was a “twitch.” *Twerk Dates Back to 1820, Says Oxford English Dictionary*, BBC (June 25, 2015), <https://www.bbc.com/news/entertainment-arts-33265370> [<https://perma.cc/2Q8G-R8NJ>]. The word was first used as a verb in 1848, its current spelling was adopted in 1901, and its current usage dates back to “the early 1990s New Orleans ‘bounce’ music scene.” *Id.* Miley Cyrus “infamously” twerked with Robin Thicke during her performance at the 2013 Video Music Awards and is credited with having helped popularize the dance. Courtney Brogle, *Miley Cyrus is Back to Twerk*, N.Y. POST (July 18, 2019), <https://pagesix.com/2019/07/18/miley-cyrus-is-back-to-twerk> [<https://perma.cc/N78T-ZRZL>]; see also Jessica Pressler, *Miley Cyrus’ Summer of Love*, HARPER’S BAZAAR (July 13, 2017), <https://www.harpersbazaar.com/culture/features/a10290838/miley-cyrus> [<https://perma.cc/L63N-QCLM>]. Big Freedia, a New Orleans-based rapper and ambassador of Bounce music, even features “legendary shake team and Bounce dance moves [include] ‘the twerk’ (popularized by Miley Cyrus in 2013) . . .” during tour performances. BIG FREEDIA, <https://www.bigfreedia.com/bio> [<https://perma.cc/M6RP-25BB>] (last visited Nov. 4, 2019).

4. Tinsley, *supra* note 3.

5. *Id.*

6. *Id.*; see also Jacob “34” Koertge, *Mannie Fresh Breaks Down the Making of Juvenile’s Biggest Hit*, AMBROSIA FOR HEADS (Feb. 17, 2019), <https://ambrosiaforheads.com/2019/02/mannie-fresh-making-of-juvenile-back-beat-video> [<https://perma.cc/Y95A-USY7>] (quoting Mannie Fresh who claims “the most iconic sound of ‘Back That Azz Up,’ . . . the thing that makes girls shake they ass, is the string line in it”). Audre Lorde describes the type of power Tinsley attributes to “black girls” as “the power of the erotic.” AUDRE LORDE, *Uses of the Erotic*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 53–59 (1984). According to Lorde, “[w]e have been warned against [the power of the erotic] all our lives by the male world, which values this [power] enough to keep women around in order to exercise it in the service of men, but which fears this same [power] too much to examine the possibilities of it within themselves.” *Id.* at 53–54.

7. Harriot, *supra* note 3.

8. *Id.*

9. See *id.*

black pop-culture scene for decades.”<sup>10</sup> Ten years before Cash Money Records released “Back That Azz Up,” Luther Campbell and 2 Live Crew broke new ground with “As Nasty As They Wanna Be,” the “first southern rap album to go platinum.”<sup>11</sup> 2 Live Crew showed us how to chart the path to fame that now runs from a select group of strip clubs to radio airplay, awards, and platinum records.<sup>12</sup> Uncle Luke and his compatriots are also responsible for securing First Amendment protection for the sexually explicit music associated with strip clubs.<sup>13</sup> While the music is fully protected against content-based regulation, the same cannot be said for either the strip clubs or the strippers who work in those clubs.<sup>14</sup>

Both the music and the stripping are speech that communicate sexually explicit messages; however, the First Amendment allows them to be regulated differently.<sup>15</sup> On the one hand, music like “As

10. Kirsten West Savali, “‘Selling Hot P—sy’: Strippers Talk Sexuality, Misogyny and Stereotypes,” *THE ROOT* (June 8, 2018, 12:55 PM), <https://www.theroot.com/selling-hot-p-sy-strippers-talk-sexuality-misogyny-1790855572> [<https://perma.cc/LQ2R-RBCP>]. According to Justin Tinsley, the influence of Cash Money Records and Back That Azz Up on white culture is also demonstrated by The Oxford English Dictionary’s adding “Bling Bling” to its pages in 2003. Tinsley, *supra* note 3.

11. Luther Campbell, *Today’s Rappers Owe Everything to ‘As Nasty As They Wanna Be,’* *MIAMI NEW TIMES* (July 22, 2014, 8:30 AM), <https://www.miaminewtimes.com/news/todays-rappers-owe-everything-to-as-nasty-as-they-wanna-be-6543806> [<https://perma.cc/L734-JE9F>]. Campbell claims to have “provided the blueprint for Cash Money Records, Bad Boy Entertainment, Maybach Music Group, and every other independent hip-hop entertainment company that came after Luke Records.” *Id.*

12. Devin Friedman, *Make it Reign: How an Atlanta Strip Club Runs the Music Industry*, *GQ* (July 8, 2015), <https://www.gq.com/story/atlanta-strip-club-magic-city?&fbclid=IwAR14VNVqa1Sb4thgN2SuoiQlrJG9nk06g1rRhR0J-KFdJS4rHsy-8QHGesU> [<https://perma.cc/WDJ6-VFBR>].

The music you hear in Magic City isn’t the music you might expect at a strip club. Magic City Mondays are the most important nights in the most important club in the most important city in the hip-hop industry. Magic City is the place where you hear music before anyone else does, and where it is decided if that music gets played anywhere else . . . Atlanta is, especially, the de facto center of the hip-hop industry, and it is Magic City—and the small number of strip clubs like it—that operates as the underground linchpin of that industry. If hip-hop were Silicon Valley, Magic City would be the place venture capitalists would loiter, looking for talent. “Ninety-nine percent of the time, the first place you ever heard a song is Magic City,” said DJ Escó, who, when it comes to music, pretty much controls Magic City.

*Id.*; see also Mike Jordan, *An Oral History of Magic City*, *ATLANTA MAG.* (Sept. 20, 2019), <https://www.atlantamagazine.com/oral-history-magic-city> [<https://perma.cc/7W75-V2QD>].

13. See *California v. LaRue*, 409 U.S. 109, 118 (1972), *abrogated by* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 533–34 (1996) (nude dancing protected by First Amendment); *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 138–39 (11th Cir. 1992) (“As Nasty As We Wanta Be” is not obscene; therefore it is protected by First Amendment).

14. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570–71 (1991); *LaRue*, 409 U.S. at 118.

15. See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 317 (2000); *Barnes*, 501 U.S. at 566, 581; *Luke Records, Inc.*, 960 F.2d at 138–39.

Nasty As They Wanna Be” and “Back That Azz Up” cannot be criminalized unless the lyrics are obscene within the meaning of the First Amendment.<sup>16</sup> On the other hand, strippers and the clubs in which they work can be regulated based on government concerns about the negative secondary effects of the strippers’ speech on the communities in which the clubs do business rather than any concerns about obscenity.<sup>17</sup> The secondary effects of this nonobscene speech include the crime and urban blight of “ghetto life,” which strip clubs, strippers, and this subgenre of rap music both transact and glorify.<sup>18</sup>

The compulsion to regulate the music, the strip clubs and the stripping, however, is based, in large part, on the view of this cultural milieu as producing low-value speech that threatens social order and morality.<sup>19</sup> To address this threat, the First Amendment makes its protection a function of both forum and form.<sup>20</sup> It depends on forum in the sense that sexually explicit speech in public accommodations can be regulated in ways that the same speech in the privacy of one’s home cannot.<sup>21</sup> It depends on form in the sense that the music and the dancing work together to convey the same sexually explicit message, but the former is assessed in terms of obscenity and the latter is assessed in terms of secondary effects.<sup>22</sup> Both forum and form create an analytical framework that uses the language of secondary effects to conclude public nudity laws incidentally burden the speech as understood by the stripper’s intended audience.<sup>23</sup> This approach appears to subordinate the speaker’s intended messages to the listener’s ability to understand the message in the interest of protecting the public from the crime that is reasonably assumed to follow as the listener’s reaction to the speech. Although the court names its

16. *Luke Records, Inc.*, 960 F.2d at 138–39 (“A work cannot be held obscene unless each element of the *Miller [v. California]* test has been met.”).

17. *Pap’s A.M.*, 529 U.S. at 295–300; *Barnes*, 501 U.S. at 561, 582–86.

18. See, e.g., Robin D.G. Kelley, *Looking for the “Real” Nigga*, in *THAT’S THE JOINT!: THE HIP-HOP STUDIES READER* (Murray Forman & Mark Anthony Neal, eds., 2004); David Frum, *The Cultural Roots of Crime: A Conversation About the Rise and Fall of Violence in America with Criminal Justice Scholar Barry Latzer*, *THE ATLANTIC* (June 19, 2016), <https://www.theatlantic.com/politics/archive/2016/06/the-cultural-roots-of-crime/487583> [<https://perma.cc/L6XT-PFOH>] (explaining the culture of violence in cities like Detroit and Los Angeles that identifies the southern “honor culture” with which Blacks “migrated north in the 20th century . . .”).

19. See Michael Eric Dyson, *The Culture of Hip Hop*, in *THAT’S THE JOINT!: THE HIP-HOP STUDIES READER* 62 (Murray Forman & Mark Anthony Neal, eds., 2004).

20. *Barnes*, 501 U.S. at 566.

21. *Id.*

22. *LaRue*, 409 U.S. at 118 (conceding that “some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression . . .”); see Grant Wahlquist, *Achilles’ Heel: Revisiting the Supreme Court’s Nude Dancing Cases*, 20 *S. CAL. INTERDISC. L.J.* 695, 722 (2011).

23. See *Pap’s A.M.*, 529 U.S. at 295.

doctrine secondary effects, it appears to focus on the speech's primary, not secondary, effects.<sup>24</sup>

The differential treatment the music and the dancing receive is established in three federal court cases decided between 1991 and 2000.<sup>25</sup> In *Barnes v. Glen Theatre, Inc.* and *City of Erie v. Pap's A.M.*, the Supreme Court concluded that generally applicable public nudity laws could be enforced inside strip clubs to ban nude dancing because "requiring . . . pasties and g-strings" incidentally burdens the strippers' speech.<sup>26</sup> This type of ban would not pass constitutional muster if applied to either the public accommodations in which the women perform nor the music to which they strip.<sup>27</sup> In *Luke Records, Inc. v. Navarro*, the Eleventh Circuit concluded that Florida could not use its criminal obscenity law to ban the sale of 2 Live Crew's "As Nasty As They Wanna Be" album.<sup>28</sup> The album was not obscene within the meaning of the First Amendment because it failed to satisfy all three parts of the First Amendment's definition of obscenity.<sup>29</sup> Consequently, the corporeal speech of the women who dance at strip clubs is less protected than either the music to which they dance or the clubs in which they speak.<sup>30</sup>

These three cases demonstrate that while the messages expressed by both the stripping in *Barnes* and *Pap's A.M.* and the music in *Luke Records, Inc.* are sexually explicit, the First Amendment does not require the speech to be treated the same.<sup>31</sup> The dancing can be banned without being adjudged obscene.<sup>32</sup> The music, however, cannot be banned unless it is obscene.<sup>33</sup> The difference between the music and dancing is a matter of both perspective and voice. The music usually tells male stories about women, many of whom are strippers. The dancing is the means by which women tell their own stories.

24. *Boos v. Barry*, 485 U.S. 312, 314 (1988) (distinguishing District of Columbia ordinance from Renton, Washington's zoning ordinance because the former involved an "asserted justification [that] focuses *only* on the content of picket signs and their primary and direct emotive impact on their audience") (emphasis in original).

25. See *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes*, 501 U.S. 560; *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

26. *Pap's A.M.*, 529 U.S. at 301 ("The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimus*."); *Barnes*, 501 U.S. at 567 ("[W]e find that Indiana's public indecency statute is justified despite its incidental limitations on some expressive activity.").

27. *Barnes*, 501 U.S. at 567.

28. *Luke Records, Inc.*, 960 F.2d at 138–39.

29. *Id.*; see *Miller v. California*, 413 U.S. 15, 24 (1973); *infra* Part II.

30. Compare *Pap's A.M.*, 529 U.S. at 302, and *Barnes*, 501 U.S. at 580, with *Luke Records, Inc.*, 960 F.2d at 138–39.

31. Compare *Pap's A.M.*, 529 U.S. at 302, and *Barnes*, 501 U.S. at 580, with *Luke Records, Inc.*, 960 F.2d at 138–39.

32. *Pap's A.M.*, 529 U.S. at 302; *Barnes*, 501 U.S. at 580.

33. *Luke Records, Inc.*, 960 F.2d at 138–39.

The different constitutional limits on the music and the dancing not only belie how the two are connected, but also works to restrain women's ability to speak in their own voices unmediated by the male gaze represented in the music. It demonstrates how the First Amendment reinforces the value of strippers as objects in stories told by men rather than as subjects whose speech allows them to tell their own stories. This strips women of their voices in largely Black spaces where many, in fact, are empowered as cultural creators and "taste-makers."<sup>34</sup> In this space, however, "the stripper's body [is] a site of deep controversy in American culture and legal jurisprudence" because "[h]er dance is seen both as a threat to social order and an act of expression to be protected."<sup>35</sup>

The origin story for the contemporary doctrinal crossroads at which *Barnes, Pap's A.M.*, and *Luke Records, Inc.* are decided begins in Supreme Court cases decided sixty years earlier.<sup>36</sup> This Article considers the constitutional distinction between obscenity and indecency raised by some rap music and stripping within a six-decade juridical journey to define the limits of speech and the government power to regulate speech about sex.<sup>37</sup> Part I briefly reviews three seminal obscenity cases decided by the Supreme Court between 1957 and 1969. In *Roth v. United States, Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, and

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34. Chris Dart, *Read This: Inside the Atlanta Strip Club that Supposedly Runs the Music Industry*, AV CLUB (Nov. 16, 2015, 4:59 PM), <https://news.avclub.com/read-this-inside-the-atlanta-strip-club-that-supposedl-1798286442> [<https://perma.cc/KA6A-4PRD>]; see LORDE, *supra* note 6, at 54–59; see also L.H. STALLINGS, *From the Freaks of Freaknik to the Freaks of Magic City*, in FUNK THE EROTIC: TRANSAESTHETICS AND BLACK SEXUAL CULTURES 176–79 (2015); Erin Haines Wack & Rebecca Burns, *Freaknik: The Rise & Fall of Atlanta's Most Infamous Street Party*, ATLANTAMAG. (Mar. 18, 2015), <https://www.atlantamagazine.com/90s/freaknik-the-rise-and-fall-of-atlantas-most-infamous-street-party> [<https://perma.cc/D5HJ-Y2Z5>].

35. Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization Debate Through the Lens of Strippers' Rights*, 19 MICH. J. GENDER & L. 339, 341 (2013); see also Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1111 (2002) (using a "feminist lens" to reveal how the Court's "nude dancing cases are built on a foundation of sexual panic driven by dread of female sexuality"). According to Adler, this "previously hidden gender anxiety . . . has implications not only for the law of nude dancing, but for First Amendment law more broadly". *Id.*

36. See generally *Stanley v. Georgia*, 394 U.S. 557 (1969); *Book Named "John Clelland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957).

37. State and local governments use the Tenth Amendment's police power to regulate in this fashion. U.S. CONST. amend. X. Congress lacks a general federal police power. *Id.* Therefore, Article I's Commerce Clause is the basis for federal laws that criminalize obscenity and regulate indecency. U.S. CONST. art. I, § 8, cl. 3; see Randy E. Barnett, *The Proper Scope of Police Power*, 79 NOTRE DAME L. REV. 429, 480 (2004); Charles Kellogg-Burdick, *The Meaning of "Police Power"*, 214 THE N. AM. REV. 158, 158–65 (1921); Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 780 (2007).

*Stanley v. Georgia*, the Court attempts to define obscenity by striking a balance between individual liberty and the government's power to regulate.<sup>38</sup> Part II discusses the seven sexually explicit speech cases the Supreme Court decided during its 1972–73 term.<sup>39</sup> Six of these cases are like *Roth* and *Memoirs* in that they turn on the definition of obscenity within the meaning of the First Amendment.<sup>40</sup> The seventh case tests the limits of *Stanley*'s privacy when public accommodations licensed to sell liquor feature live nude dancing.<sup>41</sup> Part III traces the Secondary Effects Doctrine as it develops in the space left unresolved by either the “liquor + nude dancing” or the obscenity decisions from 1972 and 1973, respectively.<sup>42</sup> Zoning to protect public health, safety, and welfare emerges from this space to justify regulating where adult entertainment establishments can do business without running afoul of the First Amendment.<sup>43</sup> Part IV considers the Secondary Effects Doctrine as used in both zoning cases and stripping cases. It also distinguishes the two stripping cases from *Luke Records, Inc. v. Navarro* in which the Eleventh Circuit used the constitutional test for obscenity to overturn a conviction based on the erroneous conclusion that 2 Live Crew's “As Nasty As They Wanna Be” was obscene.<sup>44</sup> This doctrinal crossroads is where secondary effects and obscenity allow indecent strippers' speech to be regulated more than either where the clubs in which they work are located or the content of the music associated with those clubs. Treating the dancing and the music differently means stripping is not assessed as a matter of obscenity, and the dancers' speech is stripped of the constitutional protection afforded the musicians' speech even though both feature the same sexually explicit content. In the context of this industry, this privileges men's voices and messages over women's voices and messages. Consequently, the power women exercise in these spaces both to influence Black popular culture and to exploit the

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38. *Stanley*, 394 U.S. at 563–68; *Memoirs*, 383 U.S. at 418–21; *Roth*, 354 U.S. at 489–94.

39. See generally *Heller v. New York*, 413 U.S. 483 (1973); *Miller v. California*, 413 U.S. 15 (1973); *United States v. Orito*, 413 U.S. 139 (1973); *United States v. 12 200-Ft. Reels of 8MM Film*, 413 U.S. 123 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *California v. LaRue*, 409 U.S. 109 (1972), abrogated by *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

40. *Heller*, 413 U.S. at 490–94; *Miller*, 413 U.S. at 36; *Orito*, 413 U.S. at 145; *12 200-Foot Reels of 8MM Film*, 413 U.S. at 127–30; *Paris Adult Theatre I*, 413 U.S. at 69–70; *Kaplan*, 413 U.S. at 119–22. See *Memoirs*, 383 U.S. at 419–21; *Roth*, 354 U.S. at 489–94.

41. *LaRue*, 409 U.S. at 110–11.

42. See *Miller*, 413 U.S. at 36–37; *LaRue*, 409 U.S. at 116–19.

43. See *City of Los Angeles v. Aledema Books, Inc.*, 535 U.S. 425 (2002); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

44. 960 F.2d 134, 138–39 (11th Cir. 1992).



market demand for their speech to improve their bottom line is restricted. The Secondary Effects Doctrine erects, rather than removes, barriers to women's empowerment, renders their choices incredible, and denies their agency, the expression of which is both choosing to strip and the messages their stripping communicates.

### I. DEFINING OBSCENITY AND PRIVACY: PAVING THE WAY FOR *MILLER V. CALIFORNIA* (1957–1969)

In 1957, the United States Supreme Court first held obscenity is not protected by the First Amendment.<sup>45</sup> *Roth v. United States* defined obscenity as sexually explicit speech that is “utterly without redeeming social importance” and “deals with sex in a manner appealing to prurient interests.”<sup>46</sup> According to this definition, “sex and obscenity are not synonymous.”<sup>47</sup> Therefore, “[t]he portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.”<sup>48</sup> Rather, the absence of redeeming social importance coupled with the content's encouragement of an excessive interest in sex makes sexually explicit speech obscene.<sup>49</sup>

The Court revisited the issue of obscenity eight years later in *Memoirs v. Massachusetts*.<sup>50</sup> Unlike *Roth*, *Memoirs* did not require

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45. *Roth*, 354 U.S. at 492–93.

46. *Id.* at 484, 487.

In *Roth* [sic], the primary constitutional question is whether the federal obscenity statute violates the . . . First Amendment . . . In *Alberts* [sic], the primary constitutional question is whether the obscenity provisions of the California Penal Code invade the freedoms of speech and press as they may be incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment.

*Id.* at 479–80 (footnote omitted). The cases reject the *Hicklin* test for obscenity and its focus on the alleged obscenity's affects on “those whose minds are open to . . . immoral influences. *Id.* at 489–94; *R v. Hicklin*, [1868] L.R. 3 Q.B. 360, 371 (Eng.); see also MODEL PENAL CODE § 251.4 (AM. LAW INST. 1962) (“Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.”).

47. *Roth*, 354 U.S. at 487.

48. *Id.*

49. *Id.* at 484–87; see also *Miller v. California*, 412 U.S. 15, 21 (1973); *Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Att’y Gen. of Massachusetts*, 383 U.S. 413, 418 (1966).

50. See 383 U.S. 413 (1966). Between *Roth* and *Memoirs*, the Court had occasion to

the Court to determine if an obscenity law was constitutional.<sup>51</sup> Rather, the case was the result of “a civil equity suit brought by the Attorney General of Massachusetts . . . to have [a] book declared obscene.”<sup>52</sup> The Court used the following restatement of the *Roth* definition: “(W)hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>53</sup> The Court went on to identify the following three elements, all of which “must coalesce” in order for sexually explicit speech to be obscene, as defined in *Roth*: “(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.”<sup>54</sup>

Like *Roth*, *Memoirs* requires all three parts of the definition to be independently satisfied to be obscene within the meaning of the First Amendment.<sup>55</sup> In addition, all three elements are equally weighted; indeed, none is dispositive on the issue of obscenity.<sup>56</sup> Therefore, “the social value of the book can neither be weighed

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decide “obscenity” cases including the following: (1) *Smith v. California*, 361 U.S. 147, 149 (1959) (holding a strict liability obscenity statute is unconstitutional. “*Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance’s strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold”); (2) *Manual Enters., Inc. v. Day*, 370 U.S. 478, 489–90 (1962) (striking down Comstock Act as applied to gay porn intended to be transported from Alexandria, Virginia to Chicago, Illinois by the U.S. Postal Service and designated by the Alexandria postmaster as nonmailable because obscene. According to the Court, “Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them ‘obscene’”); and (3) *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (concluding a film was not obscene under *Roth*, involved national or local “community” as relevant to defining “contemporary community standards,” and held it was improper to focus only on part of the film rather than the film in its entirety).

51. *Compare Memoirs*, 383 U.S. at 418, with *Roth*, 354 U.S. at 479.

52. *Memoirs*, 383 U.S. at 415. The General Laws of Massachusetts, Chapter 272, § 28C: requires that the petition commencing the suit be ‘directed against (the) book by name’ and that an order to show cause ‘why said book[s] should not be judicially determined to be obscene’ be published in a daily newspaper and sent by registered mail ‘to all persons interested in the publication.’

*Id.* at 415. The issue of obscene content presented in *Memoirs* is very different from the specific issue raised in *Roth v. United States* and its companion case, *Alberts v. California*, i.e., “[t]he constitutionality of . . . criminal obscenity [statutes] . . .” *Roth*, 354 U.S. at 479; see *Memoirs*, 383 U.S. at 418–19.

53. *Memoirs*, 383 U.S. at 418.

54. *Id.* (quoting *Roth*, 354 U.S. at 489).

55. *Id.*; *Roth*, 354 U.S. at 489.

56. *Memoirs*, 383 U.S. at 418–19.

against nor canceled by its prurient appeal or patent offensiveness.”<sup>57</sup> The error in this case was the Massachusetts Supreme Judicial Court’s conclusion that the book both had a “modicum of social value” and was obscene.<sup>58</sup>

In 1969, the Court clarified a limit on the government’s authority to criminalize obscenity based on its prior conclusion that the First Amendment does not protect it.<sup>59</sup> The statute at issue in *Stanley v. Georgia* made knowingly possessing obscene materials in one’s home a crime.<sup>60</sup> The case presented neither direct nor circumstantial evidence that Robert Eli Stanley intended to do anything more than view the seized obscene material in the privacy of his own home.<sup>61</sup> The case arose because *Roth* did not “foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.”<sup>62</sup>

In a unanimous decision, the Court declared Georgia’s criminal obscenity statute unconstitutional.<sup>63</sup> The majority opinion concluded that although Georgia had a legitimate interest in regulating commercialized obscenity, it had neither the authority “to control the moral content of a person’s thoughts” nor the “right to protect the individual’s mind from the effects of obscenity.”<sup>64</sup> To conclude otherwise “is wholly inconsistent with the philosophy of the First Amendment” as well as with “traditional notions of individual liberty,” which include individual privacy.<sup>65</sup>

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57. *Id.* at 419. The Massachusetts Supreme Judicial Court’s “judgment [was] reversed as being founded on an erroneous interpretation of a federal constitutional standard.” *Id.* at 420.

58. *Id.* at 420.

59. *See Stanley v. Georgia*, 394 U.S. 557 (1969).

60. *Id.* at 558–59 n.1.

61. *Id.* at 566–67.

62. *Id.* at 564. *But see, e.g.*, *Redrup v. New York*, 386 U.S. 767, 768, 771 (1967) (per curiam) (suggesting that written materials neither sold to minors nor foisted on unwilling adults are constitutionally protected in the case of a newsstand proprietor convicted for selling two paperback books considered obscene to undercover police). *See generally Roth v. United States*, 354 U.S. 476 (1957).

63. *Stanley*, 394 U.S. at 568.

64. *Id.* at 565; *cf. id.* at 569–72 (Stewart, J., concurring) (deciding case on Fourth Amendment grounds).

65. *Id.* at 565; *see also Mapp v. Ohio*, 367 U.S. 643 (1961). Although the case was decided on Fourth Amendment grounds, the underlying offense with which Dollree Mapp was charged was possession of obscenity. *Mapp*, 367 U.S. at 643. Both *Stanley* and *Mapp* start with searches related to gambling that turn into obscenity conviction because of obscene materials seized during search. *Stanley*, 394 U.S. at 558; *Mapp*, 367 U.S. at 643. *Stanley* was a bookie whose home was searched pursuant to a federal search warrant “authorizing the search of [Stanley’s] dwelling for certain bookmaking records particularly described in the warrant.” *Stanley v. State*, 161 S.E.2d 309, 310 (1968).

## II. REVISITING OBSCENITY: *MILLER V. CALIFORNIA* AND THE SUPREME COURT'S 1971 AND 1972 TERMS

*Roth*, *Memoirs*, and *Stanley* left significant terrain unsettled about the “what” and “where” of obscenity and privacy, respectively. The Court, however, would soon have the opportunity to clarify obscenity, as well as the limits on government power to regulate access to obscene materials outside the home.<sup>66</sup> In January 1972, the Court heard initial oral arguments in *Miller v. California*, *United States v. Orito*, and *United States v. 12 200-Ft. Reels of Super 8MM Film*.<sup>67</sup> Marvin Miller was convicted of violating California law by “knowingly distributing obscene matter” by way of a mass unsolicited mailing to advertise adult materials he offered for sale.<sup>68</sup> George Joseph Orito was charged with “knowingly transport[ing] and carry[ing] in interstate commerce from San Francisco . . . to Milwaukee . . . by means of a common carrier, . . . copies of [specified] obscene, lewd, lascivious, and filthy materials . . . .”<sup>69</sup> In *United States v. 12 200-Ft. Reels of Super 8MM Film*, “graphic material” was transported from Mexico to Los Angeles where it was “seized as being obscene by customs officers at . . . Los Angeles Airport.”<sup>70</sup> All three appeals were based on the constitutional protection afforded both speech and individual privacy.<sup>71</sup>

Answering the question raised by *Miller*, *Orito*, and *12 200-Ft. Reels of Super 8MM Film* proved to be more challenging than the Court apparently expected when it agreed to hear the cases. By the time its term closed in June 1972, other cases were winding their way through the lower courts that raised the same essential issue about sex, speech, and the First Amendment.<sup>72</sup> Scheduling *Miller*, *Orito*, and *12 200-Ft. Reels of Super 8MM Film* for reargument allowed the Court to consider them with four more cases dealing with sexually

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66. See *Miller v. California*, 413 U.S. 15 (1973); *United States v. Orito*, 413 U.S. 139 (1973); *United States v. 12 200-Ft. Reels of 8MM Film*, 413 U.S. 123 (1973).

67. *Miller*, 413 U.S. 15 (1973); *Orito*, 413 U.S. 139 (1973); *12 200-Ft. Reels of 8MM Film*, 413 U.S. 123 (1973).

68. *Miller*, 413 U.S. at 16–17.

69. *Orito*, 413 U.S. at 140 (finding that “[t]he materials specified included some 83 reels of film, with as many as eight to 10 copies of some of the films”).

70. *12 200-Foot Reels of 8MM Film*, 413 U.S. at 125.

71. *Miller*, 413 U.S. at 36–37; *Orito*, 413 U.S. 143–45; *12 200-Ft. Reels of 8MM Film*, 413 U.S. at 129–30.

72. See *Heller v. New York*, 413 U.S. 483 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *California v. LaRue*, 409 U.S. 109 (1972).

explicit speech.<sup>73</sup> By the time the Court's new term opened in October 1972, it had added *Paris Adult Theater I v. Slaton*,<sup>74</sup> *Kaplan v. California*,<sup>75</sup> *Heller v. New York*,<sup>76</sup> and *California v. LaRue* to its docket.<sup>77</sup> Six of the seven cases raised the question, "what is obscene within the meaning of the Constitution?"<sup>78</sup> By contrast, the seventh case, *LaRue*, turned not on the First Amendment protections to which the nude dancing might be entitled, but rather on California's authority to withhold liquor licenses from strip clubs because of the undesirable combination of nudity and alcohol.<sup>79</sup>

### A. *Miller v. California: Obscenity Clarified*

*Miller v. California* was "the first time since *Roth* was decided in 1957, [that] a majority of [the] Court . . . agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment."<sup>80</sup> The *Miller* test identifies the "basic guidelines" for a trier of fact in an obscenity case as follows:

(a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole,

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73. *Miller*, 413 U.S. at 37; *Orito*, 413 U.S. 145; *12 200-Ft. Reels of 8MM Film*, 413 U.S. at 130. See *Heller*, 413 U.S. 483; *Paris Adult Theatre I*, 413 U.S. 49; *Kaplan*, 413 U.S. 115; *LaRue*, 409 U.S. 109. While reargument is uncommon, it is not unprecedented. Among the factors that may result in a case being reargued are justices needing "information from the parties on issues not previously raised in the briefs or during oral arguments," "one or more justices [having] missed [the initial] oral arguments, and justices being "uncertain about either (1) the policy they individually wish to pursue, or (2) the policy that the Court will enunciate in its decision." Valarie Hoekstra & Timothy Johnson, *Delaying Justice: The Supreme Court's Decision to Hear Rearguments*, 56 POL. RES. Q. 243, 351–60 (2003) (reviewing all formally decided cases with rearguments between 1946 and 1985); see also Adam Liptak, *Deadlocks and Rearguments: What's Ahead for the Supreme Court*, N.Y. TIMES (Feb. 18, 2016), <https://www.nytimes.com/2016/02/19/us/politics/deadlocks-and-rearguments-whats-ahead-for-the-supreme-court.html> [<https://perma.cc/2GLP-85CM>] (discussing reargument as an option when a justice dies or retires, the remaining justices are deadlocked, and the newly appointed justice's vote is needed to break the tie).

74. *Paris Adult Theatre I*, 413 U.S. 49.

75. *Kaplan*, 413 U.S. 115.

76. *Heller*, 413 U.S. 483.

77. *LaRue*, 409 U.S. 109.

78. *Heller*, 413 U.S. at 492–93; *Miller*, 413 U.S. at 30; *Orito*, 413 U.S. at 143; *12 200-Ft. Reels of 8MM Film*, 413 U.S. at 125; *Paris Adult Theatre I*, 413 U.S. at 54–55; *Kaplan*, 413 U.S. at 118–19.

79. *LaRue*, 409 U.S. at 114.

80. *Miller*, 413 U.S. at 29. Note that the court equates "hard core pornography" with obscenity. *Id.* This language, however, is inexact because while all obscenity may also be hard core pornography, not all hard core pornography is obscene. See, e.g., *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 333–34 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (holding Indianapolis' Antipornography Civil Rights Ordinance violates the First Amendment because it is a content-based regulation of material that is not obscene within the meaning of the First Amendment).

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.<sup>81</sup>

If the trier of fact cannot answer “yes” to all three parts of the *Miller* test, then the material under review cannot be obscene.<sup>82</sup> If sexually explicit expression is obscene, however, then it falls outside of what the First Amendment protects.<sup>83</sup> This means a regulation that targets obscenity because of its content is assessed under a less demanding level of judicial review than the strict scrutiny usually called for when nonobscene speech is regulated in this manner.<sup>84</sup>

The first part of the *Miller* test restates the *Memoirs* version of the consolidated *Roth* rule.<sup>85</sup> Sexually explicit speech is assessed from the perspective of the average person using contemporary community standards to determine if the speech appeals to the prurient interest.<sup>86</sup> Contemporary community standards allow for some interest in sexual matters.<sup>87</sup> Prurience is involved only when the speech appeals to an “excessive” interest in sex.<sup>88</sup> The government can legitimately exercise its power to address the threat the “crass commercial exploitation of sex” poses to “family life, community welfare, and the development of human personality.”<sup>89</sup> It cannot do so, however, if contemporary community standards indicate otherwise.<sup>90</sup>

When the “tone of . . . society” is threatened by those who buy and sell sexually explicit speech, it is the “right of the Nation and of the States [to act] to maintain a decent society.”<sup>91</sup> This right, however,

81. *Miller*, 413 U.S. at 24.

82. *Id.*

83. *Id.* at 27.

84. *Id.* at 29–30.

85. *Id.*; see also *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966).

86. *Miller*, 413 U.S. at 24.

87. *Id.*

88. *Id.* at 30; see, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 192 (1964) (regarding community standards); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 482–84 (1962) (finding that if the intended audience is gay men, then the material is not *per se* prurient).

89. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) (describing a “legitimate state interest . . . in stemming the tide of commercialized obscenity,” including “the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself”).

90. *Id.* at 94–96.

91. *Id.* at 59–60 (quoting *Jacobellis*, 378 U.S. at 199; Alexander Bickel, *On Pornography: Dissenting and Concurring Opinions*, 22 PUB. INT. 25, 25–26 (Winter 1971)) (regarding “the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future”). *But see Paris Adult Theatre I*, 413 U.S. at 108–09 (Douglas, J., dissenting) (reminding the majority that “Stanley

is not absolute.<sup>92</sup> The government is limited by, *inter alia*, constitutional restrictions that operate as a check on the potential of majoritarianism to deny constitutional protection for unpopular speech and unconventional views.<sup>93</sup> To safeguard the speech of minorities and other marginalized groups, neither popularity nor convention should be a factor to determine what the First Amendment protects. Indeed, the First Amendment is most important when it reaches beyond convention to protect unpopular or unconventional speech that expresses positions that push the boundaries of what is considered acceptable.

The second part of the *Miller* test adds to *Memoirs*' "patently offensive" the requirement that the offending sexual conduct be "specifically defined by the applicable state law."<sup>94</sup> The specificity required under this part is intended to put individuals on notice about the type of sexually explicit matter that will result in criminal prosecution.<sup>95</sup> If state law is promulgated without procedural irregularities, then it reflects standards embraced by the state as a community. Consequently, the first part's "contemporary community standards" may differ from the specific definition of sexual conduct found in state law required by the second part.<sup>96</sup>

The third part of the *Miller* test rejects both *Roth*'s "utterly without redeeming social value" and *Memoirs*' "utterly without redeeming social value."<sup>97</sup> It defines value in terms of "serious literary, artistic, political, or scientific value" which is, in fact, universal.<sup>98</sup> The local and state particularities that are relevant to the first and second parts of *Miller* are largely irrelevant to the third part.<sup>99</sup> This universality, however, is not a guaranteed bulwark against majoritarianism. Indeed, the third part of *Miller* will not necessarily

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[sic] . . . rejected as 'wholly inconsistent with the philosophy of the First Amendment,' the notion that there is a legitimate state concern in the 'control (of) the moral content of a person's thoughts,' and we held that a State 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.' That is not to say, of course, that a State must remain utterly indifferent to—and take no action bearing on—the morality of the community. The traditional description of state police power does embrace the regulation of morals as well as the health, safety, and general welfare of the citizenry") (citations omitted).

92. See *Paris Adult Theatre I*, 413 U.S. at 61.

93. *Id.* at 63–64.

94. *Miller v. California*, 413 U.S. 15, 24 (1973); see *Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Massachusetts*, 383 U.S. 413, 418–20 (1966).

95. See *Miller*, 413 U.S. at 24.

96. See *id.*

97. *Id.* at 24–25; see *Memoirs*, 383 U.S. at 418–20; *Roth v. United States*, 354 U.S. 476, 484 (1957).

98. *Miller*, 413 U.S. at 24–26.

99. *Id.* at 30–34.

prevent those who are inclined to substitute their values for what the test requires.<sup>100</sup> Nevertheless, basing the third part of the *Miller* test on a universal understanding of value provides some protection against the parochialism that could skew the application of Miller’s first two parts against the alleged obscenity under review.<sup>101</sup>

### B. *LaRue—Nude Dancing + Liquor*

Although *California v. LaRue* involved sexually explicit adult entertainment and the First Amendment, it did not involve obscenity.<sup>102</sup> Rather, the central question in *LaRue* was whether California could regulate nude dancing in public accommodations based, in part, on the power to regulate liquor sales and licenses under both federal and state law.<sup>103</sup> The Court found the combination of the Tenth and Twenty-First Amendments, as well as the California State Constitution, imbued the state with a “super police power” that outweighed any asserted First Amendment rights.<sup>104</sup> Specifically, government regulations that ban “lewd or naked dancing” in public accommodations licensed by the state to sell liquor by the drink should not be “limited to . . . decisions as to obscenity, or . . . some forms of communicative conduct . . .”<sup>105</sup> In this case, the state’s expressed intention to regulate in this way because it disagreed with the constitutional protection afforded stripping was not constitutionally fatal.<sup>106</sup>

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100. *Id.* at 24, 26.

101. *Id.* at 24–25.

102. *See California v. LaRue*, 409 U.S. 109, 116 (1972), *abrogated by* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

103. *Id.* at 114.

104. *Id.* at 118–19.

The Twenty-first Amendment . . . does not qualify the First Amendment’s prohibition against laws abridging the freedom of speech. Although the Twenty-first Amendment . . . limits the dormant Commerce Clause’s effect on a State’s regulatory power over the delivery or use of liquor within its borders, the Amendment does not license the States to ignore their obligations under other constitutional provisions.

44 *Liquormart, Inc.*, 517 U.S. at 484; *see also* U.S. CONST. amend. XXI (repealing the Eighteenth Amendment and returning the power to regulate the sale and consumption of alcohol to the states); CAL. CONST. art. XX, § 22 (recognizing California’s “exclusive right and power to license and regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages within the State . . .”).

105. *LaRue*, 409 U.S. at 116.

106. At trial, the District Court made the following observation:

[L]aw enforcement agencies were upset with the decisions of the United States and California Supreme Courts in the field of obscenity. In May of 1970, the Department of Alcoholic Beverage Control began hearings on the Rules which are the subject of this litigation. Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers. It is obvious, after reading



Twenty-three years would pass before the Court repudiated this view of state power, alcohol, and strip clubs.<sup>107</sup> By that time, however, both the facts and dicta set forth in *LaRue* gained traction in the regulation of indecency.<sup>108</sup>

### III. DISTINGUISHING OBSCENITY FROM INDECENCY: EXPRESSIVE CONDUCT, EROTIC MESSAGES, AND SECONDARY EFFECTS

Three lines of cases about sex and speech emerge at the end of the Court's 1972 term.<sup>109</sup> The first line of cases involves obscenity and *Miller*.<sup>110</sup> The second line of cases involves indecent nude dancing, liquor, and *LaRue*.<sup>111</sup> The third line of cases is governed by neither *LaRue* because there is no liquor, nor *Miller* because the speech is not obscene.<sup>112</sup> The Court bridges this doctrinal chasm by building a new rule with dicta from both *Miller* and the other obscenity cases and *LaRue*.<sup>113</sup> This new rule, the Secondary Effects Doctrine, allows state and local governments to regulate public accommodations that feature sexually explicit indecent speech.<sup>114</sup>

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the transcripts, that this is why the Department adopted the Rule which requires certain entertainers to perform on a stage at least six feet away from any customer. It is also obvious why the plaintiffs have abandoned their objection to that Rule. No reasonable person could claim that entertainers and customers have a constitutional right to engage in such conduct in a cocktail lounge.

However, a fair reading of the transcripts of the hearings requires the conclusion that the Department not only desired to prohibit sexual conduct between dancers and customers, but wanted to establish a set of rules which would circumvent United States and California Supreme Court decisions relating to obscenity . . . . It must be stated initially, that displeasure by law enforcement agencies and state administrative agencies with court decisions interpreting the scope of the First Amendment cannot provide the basis for those agencies to adopt rules against entertainment which is protected by those decisions.

*LaRue v. California*, 326 F. Supp. 348, 352–53 (C.D. Cal. 1971).

107. See *44 Liquormart, Inc.*, 517 U.S. 484 (1996).

108. *LaRue*, 409 U.S. at 116. *But see id.* at 123 (Brennan, J., dissenting) (stating that “[n]othing 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”); *id.* at 125 (Marshall, J., dissenting) (arguing that “[a]lthough the State’s broad power to regulate the distribution of liquor and to enforce health and safety regulations is not to be doubted, that power may not be exercised in a manner that broadly stifles First Amendment freedoms”).

109. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Miller v. California*, 413 U.S. 15 (1973); *California v. LaRue*, 409 U.S. 109 (1972).

110. *Supra* Section II.A.

111. *Supra* Section II.B.

112. See *Miller*, 413 U.S. 15 (1973); *LaRue*, 409 U.S. 109 (1972).

113. *Infra* notes 114–25 and accompanying text.

114. See Britt Cramer, *Zoning Adult Businesses: Evaluating the Secondary Effects Doctrine*, 86 TEMP. L. REV. 577, 579 (2014).

Initially, secondary effects focused on zoning ordinances that limited where public accommodations featuring commercialized indecency could do business.<sup>115</sup> The combination of First and Fifth Amendment rights asserted by the proprietors of these businesses supported a rule according to which zoning where they could operate was constitutional only if “[t]he purpose and effect of [the] ordinance [was] to reduce secondary effects and not to reduce speech.”<sup>116</sup> In most cases, this impact is measured in terms of the degree to which the regulation affects the market supply of sexually explicit speech.<sup>117</sup> While ordinances that incidentally burdened sexually explicit speech were constitutional, those that appreciably reduced the supply of that speech were not.<sup>118</sup> In these cases, the Court was obliged to uphold regulations that “decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished.”<sup>119</sup> All but one of the challenged zoning ordinances reviewed by the Supreme Court during this period passed this test.<sup>120</sup>

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115. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986); *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 52 (1976); see also *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 441–42 (2002).

116. *Alameda Books, Inc.*, 535 U.S. at 445. This is “a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional.” *Id.* at 449 (Kennedy, J., concurring). Additional evidence that the zoning ordinances target the non-speech secondary effects of the sexually explicit indecent speech rather than the speech itself is found in concurring opinions in the secondary effects cases that advance analyses rooted in the Fifth Amendment rather than the First Amendment. These concurring opinions are written by justices who see no significant First Amendment issues in the secondary effects cases for different reasons. See *Alameda Books, Inc.*, 535 U.S. at 443; *Playtime Theatres, Inc.*, 475 U.S. at 55; *Am. Mini Theaters, Inc.*, 427 U.S. at 73. Some believe that infringing on the property rights of those who own the regulated public accommodations do not involve speech because the theater owners are neither creators who speak nor the intended audiences for the speech. See, e.g., *Playtime Theatres, Inc.*, 475 U.S. at 55 (Blackmun, J., concurring) (zoning ordinance as implicating theater owners and operators’ Fifth Amendment rights); *Am. Mini Theaters, Inc.*, 427 U.S. at 79 n.2 (Powell, J., concurring) (characterizing the businesses as “commercial purveyor[s]” of materials protected by the First Amendment and the ordinance is “an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent”).

117. See *Alameda Books, Inc.*, 535 U.S. 425, 452 (2002).

118. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 71–72 (1981) (reading *Young* as not allowing state and local governments to “ban all adult theaters—much less all live entertainment or all nude dancing—from its commercial districts citywide”); *Am. Mini Theaters, Inc.*, 427 U.S. at 78–81 (Powell, J., concurring) (using the language of incidental burden to describe the limits of state and local government power to using zoning ordinances to restrict where adult movie theaters could be located); see also *Alameda Books, Inc.*, 535 U.S. at 445.

119. *Alameda Books, Inc.*, 535 U.S. at 445 (Kennedy, J., concurring).

120. Compare *Playtime Theaters, Inc.*, 475 U.S. at 51–52, and *Am. Mini Theaters, Inc.*,

With *Barnes v. Glen Theatre, Inc.* and *City of Erie v. Pap's A.M.*, the Secondary Effects Doctrine turns inward to enforce public nudity laws inside strip clubs to ban nude dancing.<sup>121</sup> Both the focus of the cases, as well as the time during which they are decided, coincide with the Broward County Sheriff's unsuccessful crusade to have "As Nasty As We Wanna Be" declared obscene.<sup>122</sup> All three cases represent state and local efforts to minimize the influence of strip clubs, music, and strippers on public decency, social order, and morality.<sup>123</sup> When obscenity proved unable to give state and local government the power to ban 2 Live Crews' music, secondary effects became an alternate path to reach strippers and strip clubs.<sup>124</sup> Despite the shared messages and attendant stigma of both the stripping and the music, the strippers' speech is less protected than either strip clubs subject to zoning ordinances or the music associated with both the clubs and the stripping.<sup>125</sup>

What follows is a discussion of three problems with the Secondary Effects Doctrine in zoning and stripping cases. In the zoning cases, the Secondary Effects Doctrine: (a) relies on the fiction of content-neutrality to justify using an intermediate rather than strict standard of review; (b) allows state and local governments to regulate sexually explicit indecent speech because they find little or no value in the speech; and (c) employs evidentiary presumptions that, over time, make it easier for governments to prove commercialized indecent speech comes with negative secondary effects and more difficult for proprietors and dancers to rebut the government's presumption.<sup>126</sup>

When the doctrine turns from zoning to stripping, it presents an opportunity to regulate stripping based on judgments about not only the value of stripping and strip culture as a function of both race and sex, but also the particular threat strippers pose to social order, public morality, and decency.<sup>127</sup> Blackness is criminalized in rhetoric

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427 U.S. at 72, *with Schad*, 452 U.S. at 76–77; *see also Alameda Books, Inc.*, 535 U.S. at 442–43.

121. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000); *Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 570–72 (1991).

122. *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (1992); *see Pap's A.M.*, 529 U.S. at 277, 296; *Barnes*, 501 U.S. at 560, 570–72.

123. *See Pap's A.M.*, 529 U.S. at 277, 296; *Luke Records, Inc.*, 960 F.2d 134; *Barnes*, 501 U.S. at 560, 570–72.

124. *See Luke Records, Inc.*, 960 F.2d 134.

125. *Compare Miller v. California*, 413 U.S. 15 (1973), *with Pap's A.M.*, 529 U.S. at 277, 296, *Luke Records, Inc.*, 960 F.2d at 134, *and Barnes*, 501 U.S. at 560, 570–72.

126. *Infra* Sections III.A–C. *See generally Pap's A.M.*, 529 U.S. at 277, 296; *Barnes*, 501 U.S. at 560, 570–72; *Luke Records, Inc.*, 960 F.2d 134.

127. The plurality opinions in both *Barnes* and *Pap's A.M.* identify the governments' interest in social order and morality as substantially unrelated to the speech within the

that features some of the more popular characters in narratives often told about ghetto life.<sup>128</sup> According to this “ghetto” trope, Black super predators, dope boys, and teenage mothers are raised in families headed by single mothers and absent fathers that fail to acculturate properly their members in the ways of the dominant society.<sup>129</sup> This is the backdrop against which *Luke Records*, *Barnes* and *Pap’s*

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meaning of *O’Brien*. *Pap’s A.M.*, 529 U.S. at 277, 302; *Barnes*, 501 U.S. at 560, 585; see Santiago Legarre & Gregory J. Mitchell, *Secondary Effects and Public Morality*, 40 HARV. J. L. & PUB. POL’Y 321, 321–22 (2017) (discussing *Barnes*, *Pap’s A.M.*, and *Alameda Books, Inc.* as “three cases [with] twelve opinions authored by seven different Justices [that] brought into focus an unresolved tension surrounding the legitimacy of morality as a basis for lawmaking.” The authors’ ultimate conclusion is that public morality is an illegitimate basis for legislation purportedly targeting secondary effects, i.e., not a substantial government interest unrelated to suppression of speech); see also Gregory S. Voshell, *Bachelor Parties Beware: The Third Circuit Grapples with Alcohol, Strip Clubs and the Constitutionality of Morality Legislation*, 52 VILL. L. REV. 1095, 1105–11 (2007) (surveying Circuit Court of Appeals decisions that follow *City of Los Angeles v. Alameda Books, Inc.*). But see *Barnes*, 501 U.S. at 585 (Souter, J., concurring/dissenting) (identifying non-speech related secondary effects as crime). See generally Jasper Scherer, *Fla. ‘Loud Music’ Murder: Firing Into Car Full of Teens Playing Rap Music is Not ‘Self-Defense,’ Court Rules*, WASH. POST (Nov. 18, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/11/18/fla-loud-music-murder-firing-into-car-full-of-teens-playing-rap-music-not-self-defense-court-rules/?noredirect=on> [<https://perma.cc/E4TU-8UWZ>]; Michael Walsh, *Florida Man Gets Life in Prison for Killing Teen Over Loud Music*, N.Y. DAILY NEWS (Oct. 17, 2014, 7:21 PM), <https://www.nydailynews.com/news/crime/florida-man-life-prison-killing-teen-loud-music-article-1.1978021> [<https://perma.cc/WH3G-V479>] (In November 2012, Jordan Davis was fatally shot by a white man at a Jacksonville, Florida gas station because the shooter “hate[d] [the] thug music” Davis was playing in his car, and Davis did not comply with the white man’s demand that the car’s occupants turn the music down. Ironically, the song that triggered the shooting was *Beef* by Lil Reese, Lil Durk, and Fredo Santana. After two trials, the white man was convicted of first-degree murder); Janice Williams, *What Donald Trump Said About the Central Park Five Will Be Highlighted in Netflix’s ‘When They See Us,’* NEWSWEEK (May 28, 2019, 4:06 PM), <https://www.newsweek.com/when-they-see-us-netflix-what-donald-trump-said-1437534> [<https://perma.cc/M86N-YTV5>] (the five teens were between 14 and 16 years old. During the trial, Trump ran ads in the *New York Times*, the *Daily News*, the *New York Post*, and *Newsday* in which he urged, “Bring Back the Death Penalty. Bring Back Our Police”); Karen Zraick, *An Arizona Teenager Was Fatally Stabbed. The Suspect Blames Rap Music*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/2019/07/09/us/elijah-al-amin-michael-paul-adams.html> [<https://perma.cc/6C27-55LK>] (17-year-old Elijah Al-Amin was stabbed twice from the back and had his throat cut by a white man who claimed “the rap music [Al-Amin] was listening to made him feel ‘unsafe’”).

128. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

129. See Anne Hendrixson, *Superpredator Meets Teenage Mom: Exploding the Myth of Out-of-Control Youth*, in *POLICING THE NATIONAL BODY: SEX, RACE, AND CRIMINALIZATION* 231, 232 (Jael Silliman & Anannya Bhattacharjee, eds., 2002); Lisa A. Crooms, *The Mythical, Magical ‘Underclass’: Constructing Poverty in Race and Gender, Making the Public Private and the Private Public*, 5 IOWA J. GENDER, RACE, & JUST. 87, 89–90 (2001); Rachel Leah, *The ‘Superpredator’ Myth Was Discredited, but It Continues to Ruin Young Black Lives*, SALON (April 21, 2018, 11:30 PM), <https://www.salon.com/2018/04/21/the-superpredator-myth-was-discredited-but-it-continues-to-ruin-young-black-lives> [<https://perma.cc/GAF7-VYBN>]. See generally *id.*

*A.M.* should be read. This context helps to clarify how the Eleventh Circuit found the trial court judge's racialized judgment insufficient to criminalize "As Nasty As They Wanna Be" as obscene.<sup>130</sup> Indeed, the trial court's conclusion that the album both was obscene and had a modicum of cultural or artistic value was the same type of value judgment about Black popular culture the Eleventh Circuit's opinion fails to give credence in its assessment of "As Nasty As They Wanna Be" as obscene within the meaning of *Miller*.<sup>131</sup> To uphold the enforcement of public nudity laws inside strip clubs, the Court by-passes the *Miller* obscenity inquiry and instead uses secondary effects.<sup>132</sup> Consequently, the music appears to be more protected than the stripping even though both are cultural representations that communicate essentially the same message, albeit from different perspectives.<sup>133</sup> The Court's approach to these cases works in favor of the music in which men overwhelmingly represent the artists who speak about women and against the stripping by which women directly speak.<sup>134</sup> The strip clubs associated with the music feature female dancers whose speech is devalued and assessed with a version

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130. *Luke Records, Inc.*, 960 F.2d at 136.

131. *Pap's A.M.*, 529 U.S. at 291; *Barnes*, 501 U.S. at 571.

132. *Pap's A.M.*, 529 U.S. at 291.

133. *Compare Miller v. California*, 413 U.S. 15, 24 (1973), with *Pap's A.M.*, 529 U.S. at 296, *Luke Records, Inc.*, 960 F.2d at 138–39, and *Barnes*, 501 U.S. at 570–72.

134. Although this analysis assumes the music is predominated by male voices, it is not meant to suggest that women's voices are completely absent from the music. See, e.g., Patricia Hill Collins, *Is the Personal Still Political?: The Women's Movement, Feminism, and Black Women in the Hip-Hop Generation*, in FROM BLACK POWER TO HIP HOP: RACISM, NATIONALISM, AND FEMINISM 161–96 (2006); Nancy Guevara, *Women Writin' Rappin' Breakin'*, in DROPPING SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 49–51 (William Eric Perkins ed., 1996); JOAN MORGAN, WHEN CHICKENHEADS COME HOME TO ROOST: MY LIFE AS A HIP HOP FEMINIST (1999); Imani Perry, *The Venus Hip Hop and the Pink Ghetto: Negotiating Spaces for Women*, in PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP 156–90 (2004); GWENDOLYN D. POUGH, CHECK IT WHILE I WRECK IT: BLACK WOMANHOOD, HIP-HOP CULTURE AND THE PUBLIC SPHERE (2004); Tricia Rose, *Hidden Politics: Discursive and Institutional Policing of Rap Music*, in DROPPING SCIENCE CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 236–57 (William Eric Perkins ed., 1996); see also John Blistein, *Cardi B Slams Jermaine Dupri's Comments That All Female Rappers Rap About Stripping*, ROLLING STONE (July 12, 2019), <https://www.rollingstone.com/music/music-news/cardi-b-jermaine-dupris-female-rappers-response-858199> [<https://perma.cc/T3T2-TDE6>]; Joshua Espinoza, *Jermaine Dupri Suggests Strippers-Turned-Rappers Should Start a New Genre*, COMPLEX (July 27, 2019), <https://www.complex.com/music/2019/07/jermaine-dupri-says-rapping-strippers-should-start-genre> [<https://perma.cc/4Y38-YGTD>] (Jermaine Dupri recently said that the music by former strippers should be called "Strap" music. "I'm telling you. Like, for real. I think just like we have trap [music], they should call it strap. It's the stories of their life [. . .]"); Adrienne Green, *What It's Like to Work as an Exotic Dancer*, THE ATLANTIC (Oct. 19, 2016), <https://www.theatlantic.com/business/archive/2016/10/exotic-dancer/504680> [<https://perma.cc/V2N2-VCE9>] (describing clubs where "[a]ll of the dancers are women [and] DJ's and managers for the most part are men").

of the secondary effects test that is less demanding than the variation used for zoning ordinances.<sup>135</sup> Consequently, the doctrine is more problematic in cases focused on strippers' speech than it is in cases focused on where strip clubs can do business. The specific problems that arise in the stripping cases are that the doctrine: (a) allows speech to be banned without requiring state and local governments either to employ less restrictive means to address the negative secondary effects of stripping or to demonstrate that extant but unenforced zoning ordinances would not effectively address the asserted secondary effects of the strip clubs; (b) disaggregates nudity from the speech of dancing despite the fact that nudity is an essential element of the dancer's message; and (c) relies on evidentiary presumptions that render stripping a universal threat to social order, decency, and morality.<sup>136</sup>

#### A. Content-Neutrality

The Court developed the Secondary Effects Doctrine to use exclusively in cases involving indecent sexually explicit speech in public accommodations.<sup>137</sup> The First Amendment's rules regarding content-neutrality did not prevent the Court in *American Mini Theatres, Inc.* from "hold[ing] that the state may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."<sup>138</sup> The Court calls the doctrine content-neutral because distinguishing between regular movie theaters and those that screened films with indecent sexual content was "justified by the city's interest in preserving the character of its neighborhoods."<sup>139</sup> This is the genesis of the fiction that allows an ordinance purportedly aimed at sexually explicit indecent speech to "be upheld so long as the . . . ordinance [is] designed to serve a substantial government interest [unrelated to the content of the speech] and that reasonable alternative avenues of communication remained available."<sup>140</sup> The kinds of substantial government interest the Court

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135. See generally *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

136. See generally *Alameda Books, Inc.*, 535 U.S. 425 (2002); *Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

137. John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 293 (2009).

138. *Am. Mini Theatres, Inc.*, 427 U.S. at 70–71.

139. *Id.* at 71. Content-neutrality results in scrutiny that focuses on the "incidental burden" of Detroit's zoning ordinance.

140. *Alameda Books, Inc.*, 535 U.S. at 434 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986)).

has found to be unrelated to suppressing speech include decreased property values, as well as crime and general lawlessness.<sup>141</sup> It is more accurate, however, to acknowledge that the doctrine “occupies a kind of limbo between full-blown content-based restrictions and regulations that apply without any reference to the substance of what is said.”<sup>142</sup> This would appear to make the test either content-correlative or content-driven. It would not, however, be content-neutral.

More troubling than the fiction of content-neutrality is the fact that the doctrine permits the regulation of “speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts . . . .”<sup>143</sup> Indeed, “[t]he more precisely the content is identified, the greater is the opportunity for government censorship” of a particular viewpoint.<sup>144</sup> The Court has found this type of viewpoint-based restriction to be *per se* unconstitutional in cases where state and local governments have enacted hate speech ordinances.<sup>145</sup> Here, however, sexually explicit speech expressing a sex-positive view can be targeted without contravening the First Amendment’s prohibition on viewpoint-based regulation.<sup>146</sup>

When we turn to public nudity laws, it appears that the justifications proffered under the guise of the secondary effects test have even more difficulty meeting the definition of content-neutrality

141. This is the result under the Time, Place and Manner (TPM) test of either *United States v. O’Brien* or *Ward v. Rock Against Racism*. See 491 U.S. 781, 803 (1989); 391 U.S. 367, 376–80 (1968). Under these tests, constitutional regulations must either prohibit no more speech than is essential to further the important or substantial content-neutral government interest or be narrowly tailored enough to allow alternative methods to communicate the message. *Id.* For example, in *Young v. American Mini Theatres, Inc.*, the substantial government interests furthered by Detroit’s Anti-Skidrow Ordinance included preventing an “undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.” 427 U.S. at 55.

142. *Alameda Books Inc.*, 535 U.S. at 457 (Souter, J., dissenting); see also Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 287, 321 (2004) (“The secondary effects doctrine gave . . . communities a tool to avoid justifying what otherwise would have been content-based restrictions to strict judicial scrutiny.”).

143. *Alameda Books, Inc.*, 535 U.S. at 457.

144. *Id.*

145. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992). Content-based restrictions are presumptively invalid unless the speech is “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.* at 382–83 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (regarding fighting words but this is a function of whether speech is protected rather than the treatment afforded protected speech). The parallel here would be obscenity versus indecency where the former can be regulated based on its content because it is unprotected by the First Amendment, and the latter is protected and cannot be regulated because of its content.

146. *R.A.V.*, 505 U.S. at 387–90 (holding viewpoint-based discrimination is *per se* unconstitutional).

than the zoning ordinances discussed previously.<sup>147</sup> In the nude dancing cases, the Secondary Effects Doctrine allows the government to use generally applicable public nudity laws to ban nude dancing because the bans only incidentally burden the strippers' erotic message.<sup>148</sup> If nude dancing is banned, the Court opines, then a partially clad dancer has "ample capacity to convey [her] erotic [albeit muted] message."<sup>149</sup> From the Court's perspective, clothing imperceptibly changes the dancing communicates to the dancer's intended audience. This approach would appear to target the speech's primary effects because it analyzes the law's impact on how the message is understood rather than what the speaker intends to say.<sup>150</sup> In addition, it

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147. See *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

148. According to the Court, enforcing a generally applicable public nudity law in a strip club is content-neutral because the law bans public nudity regardless of its location. It does not single out strip clubs for regulation. Under these circumstances, the regulation will be upheld because its impact on First Amendment rights is incidental. See *Pap's A.M.*, 529 U.S. 277; *Barnes*, 501 U.S. 560; see also *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71–73 (1976) (assessing the constitutionality of Detroit's Anti-Skidrow Ordinance based on its "incidental burden" on First Amendment speech). But see *Pap's A.M.*, 529 U.S. at 324 (Stevens, J., dissenting) (advancing an analysis that preserves strippers' First Amendment rights and criticizing the plurality in *Pap's A.M.* for not only "mistaken[ly] . . . equating our secondary effects cases with the 'incidental burdens' doctrine applied in cases such as *O'Brien*," but also "aggravat[ing] the error by invoking the latter line of cases to support its assertion that Erie's ordinance is unrelated to speech"). Stevens notes that "[t]he incidental burdens doctrine applies when 'speech' and 'nonspeech' elements are combined in the same course of conduct,' and the government's interest in regulating the latter justifies incidental burdens on the former . . . . Secondary effects . . . are indirect consequences of protected speech and may justify regulation of the places where that speech may occur." *Id.* Stevens found it "strange" that Erie's alleged concern with the effects of the message that were unrelated to the message itself was combatted by means that required, in fact, "the suppression of the message." *Id.* at 325. This, in Stevens' opinion, was a case of the plurality wanting to "have its cake and eat it too . . ." *Id.* at 326. Stevens sees Erie's choice as either the "ordinance was not aimed at speech and the plurality may attempt to justify the regulation under the incidental burdens test, or Erie has aimed its law at the secondary effects of speech, and the plurality can try to justify the law under that doctrine. But it cannot conflate the two with the expectation that Erie's interests aimed at secondary effects will be rendered unrelated to speech by virtue of this doctrinal polyglot." *Id.*

149. *Id.* at 301; see also *id.* at 307–08 (Scalia, J., concurring in judgment) (contending that the ordinance regulates conduct regardless of any intention to communicate a message. As such, there are no First Amendment issues here. "In *Barnes*, I voted to uphold the challenged Indiana statute 'not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all'").

150. *Id.* at 294–95; see also *Pap's A.M.*, 529 U.S. at 294 (requiring pasties and G strings "mut[es] message" and does not silence the dancers); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 297–99 (1984) (concluding proposed protest against homelessness does not require the National Park Service to issue a permit to allow homeless people and their allies to set up an encampment on the National Mall where the generally applicable rule for permits does not allow this kind of protest and there is insufficient evidence that the Park Services' denial was motivated by its disapproval of or disagreement with the message of the protestors).



disregards the symbiosis of speech between dancers and patrons by failing to analyze the impact of the ban on the messages the dancers intend to convey, and, instead, focusing on how those messages are understood.<sup>151</sup>

In addition, the Court suspends the market-based analysis it used in the earlier zoning cases, only to resurrect it in *City of Los Angeles v. Alameda Books, Inc.*, which is decided after *Barnes* and *Pap's A.M.*<sup>152</sup> Both *Barnes* and *Pap's A.M.* uphold public nudity laws that ban nude dancing not based on the way they irreparably alter the market for sexually explicit speech but rather because they incidentally burden the erotic message understood by the dancer's intended audience.<sup>153</sup> By the time the Court decides *City of Los Angeles v. Alameda Books, Inc.*, the Court upholds a municipal zoning ordinance despite the fact that effectively decreases the supply of sexually explicit indecent speech by half.<sup>154</sup> This result seems possible only because of the analysis deployed in the two stripping/public nudity cases. The relaxed standard that emerges from *Barnes* and *Pap's A.M.* permits zoning regulations to pass constitutional muster that would have been unconstitutional before *Barnes*.<sup>155</sup>

The indecency of the speakers, their audiences, and those who own the public accommodations in which the indecency is sold threaten public health, safety, welfare, and morality of the communities in which they transact business. This analysis positions the strippers outside the public, thereby rendering a threat to be thwarted rather than part of the public whose interests should be protected. Positioned in this way, the dancers' speech is stripped of any legitimacy as a means of "informal politics."<sup>156</sup> This complicates public membership as well as whose and what rights are legitimately part of the "public" in whose interest the state acts.<sup>157</sup> If strippers are part of the public, then they have a "right . . . to participate in the speech by which we govern ourselves."<sup>158</sup> In this way, their speech is "a means of informal politics."<sup>159</sup> The Secondary Effects Doctrine, however, excludes not only strippers from the public, but also their First

151. See *Pap's A.M.*, 529 U.S. at 323.

152. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 436 (2002).

153. See *Pap's A.M.*, 529 U.S. at 301–02; *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570–72 (1991).

154. *Alameda Books, Inc.*, 535 U.S. at 451 (Kennedy, J., concurring).

155. See *Pap's A.M.*, 529 U.S. at 301–02; *Barnes*, 501 U.S. at 571–72.

156. James Weinstein, *Democracy, Sex, and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 865–67, 881 (2007).

157. Dana Meepos, *The Purgatory of Pole Dancing*, 19 U.C.L.A. WOMEN'S L.J. 213, 231–41 (2012) (examining secondary effects' exclusion of strippers from public and casting women as threats to public health, safety, and welfare).

158. Weinstein, *supra* note 156, at 877.

159. *Id.* at 881.

Amendment speech rights from the legitimate public interest state and local governments can act to further.<sup>160</sup> Strippers are denied “a fair opportunity” to use their speech “to influence the sexual mores of the society.”<sup>161</sup> Consequently, the actors most vulnerable to exploitation in transactions involving commercialized sexually explicit indecency are either criminalized or robbed of their agency by analyses that make choosing either to speak or to listen to indecent speech an illegitimate choice.<sup>162</sup> This appears to be for no other reason than the disapproval of those who make and enforce the law.<sup>163</sup>

The gendered impact of the secondary effects analysis means that dancers, most of whom are women, are stripped of the following: (1) their agency; (2) their voices; (3) their right to contribute to public discourse through informal politics; and (4) their membership in the public.<sup>164</sup> The music and the artists who create it are not similarly stripped. The music allows them to operate politically because the music is not obscene.<sup>165</sup> This is one of the reasons why formal

160. Alemzadeh, *supra* note 35, at 343.

161. Weinstein, *supra* note 156, at 878 (discussing “informal politics” and the role sexually explicit speech can play in such informal politics). Although Weinstein’s analysis is limited to the obscenity doctrine for hardcore pornography, it is equally relevant to the Secondary Effects Doctrine and indecency. Indeed, when applied to stripping and secondary effects, the women’s speech is directly implicated and their First Amendment speech rights include, e.g., “the right of each individual to participate in the speech by which we govern ourselves.” *Id.* at 880–82.

162. Alemzadeh, *supra* note 35, at 339 (discussing the discriminatory impact of both labor laws and secondary effects on strippers and their exclusion from the public because they are constructed as a threat); *see, e.g.*, *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986) (holding Indianapolis’ Anti-Pornography Civil Rights Ordinance as unconstitutional); CATHERINE MACKINNON, *FEMINISM & PORNOGRAPHY* (Drucilla Cornell, ed., Oxford Univ. Press 2000); CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE & LAW* (Harvard Univ. Press 1988); Elaine Blair, *Fighting for Her Life*, N.Y. REV. BOOKS (June 27, 2019), <https://www.nybooks.com/articles/2019/06/27/andrea-dworkin-fighting-for-her-life> [<https://perma.cc/TFY7-28V4>]; Molly Crabapple, *It’s Not About Sex*, N.Y. REV. BOOKS (May 23, 2019), <https://www.nybooks.com/articles/2019/05/23/not-about-sex> [<https://perma.cc/S5KB-SJK5>] (noting “[l]ike so many issues involving women, debates about sex work are often bogged down in the question of whether sex work itself is ‘degrading’ or ‘empowering’ . . . . The question ‘Is sex work good?’ has little to do with ‘Should sex workers have rights?’ . . . ‘Sex workers are associated with sex, and to be associated with sex is to be dismissible . . . .’”); *see also* Rob Kuznia, *Among Some Hate Groups, Porn Is Viewed as a Conspiracy*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/2019/06/07/us/hate-groups-porn-conspiracy.html> [<https://perma.cc/FY6E-D7US>] (discussing white supremacist nationalists who blame Jews and the porn industry for attempting “to control [the] sexuality” and reproduction of white men who consume pornography including a Reddit group called “The Proud Boys” who encourage members and allies to kick the pornography habit in the interest of their white supremacist goals and objectives).

163. *See* Alemzadeh, *supra* note 35, at 370.

164. *See id.* at 372.

165. Art Harris, *Not Quite As Nasty As They Wanna Be*, WASH. POST (June 16, 1990), <https://www.washingtonpost.com/archive/lifestyle/1990/06/16/not-quite-as-nasty-as-they-wanna-be/edcb167d-a3e3-4ee6-8713-b185b783cd66> [<https://perma.cc/47SM-WFRG>].

political attempts to censor it have failed.<sup>166</sup> This also reinforces the strippers' collective status, vis-à-vis those who make the music to which the strippers dance, employ them in the clubs in which they dance, or consume the strippers' speech as their intended audiences.<sup>167</sup> The strippers are cast as women who service patriarchy and its interests, thereby making them instrumentally important to advance the constitutional rights of both property owners and musicians. The Secondary Effects Doctrine targets stripping without making it important either to hear the women's voices or to protect their rights to speak.

Among the things that are sacrificed by this stingy view of public interests and secondary effects is the possibility of the First Amendment rights of dancers as content creators.<sup>168</sup> These are interests that state and local governments should be required to protect.<sup>169</sup> The dancers' speech is a legitimate part of public discourse and, as such, should be protected from content-driven regulations that do not meet the strict scrutiny the First Amendment would otherwise trigger. The genesis of the Secondary Effects Doctrine in zoning cases grants proprietors First Amendment rights because of the First Amendment activity featured in the adult entertainment establishments the zoning ordinances seek to regulate.<sup>170</sup> This, however, seems to be a questionable basis for extending First Amendment rights and protections beyond the primary rights holders to those whose connection to the First Amendment is, at best, ancillary rather than primary. The problems associated with this shift in the zoning cases are exacerbated when the analysis is extended to nude dancing.<sup>171</sup> When used to ban nude dancing inside the strip club, the Secondary Effects Doctrine obscures the symbiosis of speech and rights between the dancers and patrons that the First Amendment is supposed to protect.<sup>172</sup> The property owners are involved only because the adult entertainment businesses they own and operate

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166. See also Hunter Schwarz, *25 Years Ago, 2 Live Crew Were Arrested for Obscenity. Here's the Fascinating Backstory*, WASH. POST (June 11, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/06/11/25-years-ago-2-live-crew-were-arrested-for-obscenity-heres-the-fascinating-back-story> [<https://perma.cc/MF3D-R6E9>]. Compare Harris, *supra* note 165, with Jonathan Yardley, *Art and the Oeuvre of 2 Live Crew*, WASH. POST (Oct. 22, 1990), <https://www.washingtonpost.com/archive/lifestyle/1990/10/22/art-and-the-oeuvre-of-2-live-crew/7edd8e65-33c0-4577-b42e-ecb547209ff8> [<https://perma.cc/MF3D-R6E9>].

167. See Harris, *supra* note 165.

168. Weinstein, *supra* note 156, at 884.

169. See *id.*

170. *Id.* at 886.

171. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002).

172. Angela Mae Kupenda, Leslie P. Barry & Mark D. Fijman, *A New Standing Requirement for First Amendment Litigants?: Bar Owners Resting on Their Own Bottoms or Still Resting on the Bare Bottoms of Nude Dancers*, 8 B.U. PUB. INT. L.J. 81, 82 (1998).

facilitate the exchanges between the primary First Amendment rights holders, i.e., dancers and patrons.<sup>173</sup> Framing the issues raised in this way reveals that the owners stand outside this First Amendment relationship because their constitutional rights are based on property rather than the speech transactions that occur on their property.<sup>174</sup> Treating dancers, patrons, and proprietors as if they have the same rights grants proprietors standing to assert the dancers' First Amendment claims. This outcome is inconsistent with general principles regarding third party standing because it relies on the assumption that the interests of the dancers and the proprietors are essentially the same.<sup>175</sup> Although their interests align because public nudity laws impact their collective bottom line, the general adversarial nature of the employer/employee relationship would seem to militate against allowing proprietors to use third party standing to advance First Amendment claims on behalf of the dancers.<sup>176</sup>

The Secondary Effects Doctrine, however, obfuscates this difference by foregrounding the property owners and transforming them into primary, rather than secondary, First Amendment rightsholders.<sup>177</sup> It fails to account for the primacy of the content-creators and audiences as rightsholders.<sup>178</sup> Consequently, the Court strips the

173. *Id.*

174. This is limited to cases in which proprietors face neither criminal prosecution nor property seizure. This should not be understood to suggest that there are no circumstances under which the property owners may properly assert First Amendment claims. Indeed, property owners' First Amendment rights are involved when laws threaten either "a theater owner or a bookseller" with criminal prosecution or censorship. This is because "certain criminal statutes or censorship or licensing schemes" make it so "only the theater owner or the bookseller . . . can protect" the First Amendment rights against impermissible government regulation. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 77 (1976). In addition, Detroit's Anti-Skidrow Ordinance did not result in property seizure or abatement. *Id.* at 54–55. Compare *Heller v. New York*, 413 U.S. 483, 492–93 (1973), with *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (cases in which property owners and establishment proprietors faced criminal prosecution, fines, and property seizure). Although these cases turned on the constitutionality of the statutory definition of obscenity, the penalties faced by the owners and proprietors are analogous to what is not at stake in the secondary effects cases. *Heller*, 413 U.S. 483 at 488–89; *Paris Adult Theatre I*, 413 U.S. at 53–54. At best, these cases present issues of regulatory takings, and the property owners' economic harms place them among the "legion that [have] sustained zoning against claims of serious economic damage." *Am. Mini Theatres, Inc.*, 427 U.S. at 78 (Scalia, J., concurring). Cases like this might also present issue of ripeness and the accompanying defense that any claims regarding economic loss may be speculative where the challenged ordinance has not gone into effect—prophylactic measures and the court not requiring state and local governments to wait until the secondary effects occur before acting. *E.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986).

175. *Kupenda et al.*, *supra* note 172, at 95.

176. *Id.* (questioning First Amendment standing for adult entertainment establishment owners and proprietors because they neither create nor consume speech sold in the establishments).

177. See *Kupenda et al.*, *supra* note 172, at 81.

178. *Am. Mini Theatres, Inc.*, 427 U.S. at 78–79 (Powell, J., concurring) (reframing the

primary rights holders of their First Amendment rights, thereby rendering the dancers largely irrelevant to the adjudicated cases.<sup>179</sup>

Upholding public nudity laws based on the relaxed incidental burdens test relies on an analysis that disaggregates the message and the dancer's nudity. While the erotic message is protected, nudity is cast as conduct that is inessential to the erotic message as either communicated by the stripper or understood by the stripper's intended audience.<sup>180</sup> This approach, however, denies the fundamental fact "that nude dancing is a species of expressive conduct that is protected by the First Amendment."<sup>181</sup> Within this context, public nudity laws that ban nude dancing inside strip clubs take aim at nudity which "is both a component of the protected expression and the specific target of the ordinance."<sup>182</sup> Therefore, "[t]he nudity element of nude dancing performances cannot be neatly pigeonholed as mere 'conduct' independent of any expressive component of the dances."<sup>183</sup> The "pure sophistry" on which the Secondary Effects Doctrine relies ignores the reality that nude dancing is targeted "*precisely because of its communicative attributes*."<sup>184</sup> It is also based on the assumption "that one can separate advocacy from the act itself, even though the act contains an element of advocacy."<sup>185</sup>

Secondary effects' intermediate scrutiny translates into more judicial deference to state and local governments than is given under *Miller's* obscenity test, the strict scrutiny, triggered by content-based regulations, as well as either time, place and manner or *O'Brien* as used in cases involving content-neutral regulations.<sup>186</sup> This is at the

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inquiry in *American Mini-Theatres, Inc.* as follows: "(i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them?"). According to Justice Powell,

the impact of the ordinance on these interests is incidental and minimal. Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them. The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message reach an audience.

*Id.*

179. *Id.*

180. *Id.* at 78–81.

181. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 326 (2000) (Stevens, J., dissenting).

182. *Id.* at 326.

183. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 592–93 (1991) (White, J., dissenting).

184. *Pap's A.M.*, 501 U.S. at 310 (Stevens, Justice dissenting) (emphasis in original).

185. Weinstein, *supra* note 156, at 882.

186. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1982); *Ward v. Rock against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968). The Court has developed two ways to assess the constitutionality of content-neutral laws and regulations. First, Time, Place and Manner (TPM) regulations are content-neutral and

expense of the First Amendment rights of the dancers and the patrons.<sup>187</sup> By the time the Court reviews the constitutionality of public nudity laws, the market-based assessment from the zoning cases seems to have fallen out of favor.<sup>188</sup> The Court's own precedent would seem to suggest two things. First, these cases treat the speakers' intended messages as a secondary rather than a primary concern.<sup>189</sup> Second, it does so based on concerns about the primary rather than secondary effects of the dancers' speech on the clubs' patrons.<sup>190</sup>

### B. Value

The *Miller* test prevents speech from being adjudged obscene merely because the trier of facts views the speech as having no value.<sup>191</sup> Indecency, however, is less protected than non-sexual speech based on the very type of value judgments *Miller* prevents from overdetermining whether sexual speech is obscene.<sup>192</sup> The Secondary Effects Doctrine exists, in large part, because of the difficulty of meeting the high standard from *Miller*, as well as the justice's views about the value of the speech.<sup>193</sup> For example, in his plurality opinion in *American Mini Theatres, Inc.* Justice Stevens makes the following observation:

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narrowly tailored. *Clark*, 486 U.S. at 293; *Ward*, 491 U.S. at 794; *O'Brien*, 391 U.S. at 377. TPM regulations must also serve a significant government interest and leave open ample alternative channels to communicate the speaker's message. *Id.* Second, state and local governments can regulate indecent symbolic speech or expressive conduct only if the regulation is within the constitutional power of the government to enact. *Clark*, 486 U.S. at 299. If this threshold requirement is met, then the regulation is further examined to determine if it furthers an important or substantial government interest, unrelated to the suppression of speech, and it prohibits no more speech than is essential to further the government interest. *Clark*, 486 U.S. at 295; *O'Brien*, 391 U.S. at 376. However, there is some uncertainty about whether these two tests are separate or the same.

187. In these cases, the dancers, not the club owners, are content-creators within the meaning of the First Amendment.

188. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes*, 501 U.S. 560; *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50 (1976).

189. See also *Boos v. Barry*, 485 U.S. 312 (1987) (distinguishing primary from secondary effects of speech). Compare *Pap's A.M.*, 529 U.S. 277, with *Texas v. Johnson*, 491 U.S. 397 (1989) (determining if conduct has enough communicative elements to garner First Amendment protection, a court must consider if "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it").

190. *Pap's A.M.*, 529 U.S. at 291.

191. *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 138 (11th Cir. 1992) (finding that the record in case was "insufficient . . . for [the] Court to assume the fact finder's artistic or literary knowledge or skills to satisfy the last prong of the *Miller* analysis").

192. *Luke Records, Inc.*, 960 F.2d at 135–36.

193. See generally *Miller v. California*, 413 U.S. 15 (1973).

[E]ven though we recognize[d] 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. . . . But few of us would march our sons and daughters off to war to preserve the citizen's right to see the 'Specified Sexual Activities' exhibited in the theaters of our choice.<sup>194</sup>

Under Stevens' analysis, the relatively low value of the sexually explicit speech featured in the zoned movie theaters in Detroit allows the city to regulate them because of their sexually explicit content without having to satisfy strict scrutiny.<sup>195</sup> While this value judgment can support content-based regulations, it appears that, in the zoning cases, it cannot support a ban that "total[ly] suppress[ed]" such speech.<sup>196</sup> Stevens' analysis also assesses the value of sexually explicit speech vis-à-vis political speech.<sup>197</sup> It assumes that sexual speech and political speech are mutually exclusive. Therefore, sexually explicit speech is not political and political speech is not sexually explicit. Used in this way, the First Amendment supports a speech hierarchy based on two basic assumptions. First, all political speech is *per se* high value no matter how crudely that speech is communicated.<sup>198</sup> Second, sexually explicit speech is not political regardless

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194. 427 U.S. 50, 70–71 (1976) (plurality opinion).

195. *Id.*

196. *Id.* at 70.

197. *Id.* at 70–71. Part III of Stevens' opinion in *American Mini Theatres, Inc.* notes that although sexual explicit indecent speech has "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." *Id.* at 70; see also *Luke Records, Inc.*, 960 at 137–39 (holding judges lacked competence to make value judgment about music which led the trial court's decision to be reversed).

198. If concerns about the impact of some speech on public discourse, social mores, and morality are legitimate, then those concerns should be legitimate for speech regardless of its subject matter. Recent events have shown political speech to be crude, vulgar, false, and discriminatory. Members of the political branches have contributed to the overall coarsening of public discourse more than indecent speech about sex.

Within the First Amendment, however, sexually explicit speech is never political; hence, indecent speech is deserving of less protection than political speech. For some, however, sexually explicit speech is, indeed, political. One example of this are the pro-pornography, sex-positive feminists who challenged the conservative positions advanced by, *inter alia*, radical anti-pornography feminists who opposed pornography because it is inherently harmful to women and advances a patriarchal and misogynistic agenda. The privileging of political speech, as well as the devaluation of sexually explicit speech, is a function of particular views about the purpose and objectives of the First Amendment. Oliver Wendell Holmes' dissenting opinion in *Abrams v. United States* is the genesis of the "marketplace of ideas" metaphor that tends to favor less censorship and more speech. According to Holmes, speech is instrumental to the search for truth which, under the best circumstances, emerges from diverse opinions. 250 U.S. 616, 630 (Holmes, J., dissenting). In his

of the speakers' intent.<sup>199</sup> Consequently, political speech and sexually explicit speech are mutually exclusive.

Making the relative value of sexual speech a function of either its similarity to or its difference from political speech not only helps to stigmatize sexual speech, but also leaves it subject to regulations that would not pass constitutional muster for virtually any other type of protected speech.<sup>200</sup> Indeed, freed from the constraints of *Miller's* "all or nothing" test, the Secondary Effects Doctrine gives judges unchecked power to opine about the value of indecent speech despite its status as constitutionally protected.<sup>201</sup> This would seem to be improper. The value of the speech is relevant to determining if the speech is protected rather than the extent of the protection afforded nonobscene speech. Neutralizing the influence of these unchecked value judgments is particularly important where speech is

view, "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.*; see also Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1–46 (2002). Additional objectives attributed to the First Amendment are "speech in furtherance of free self-government" and freedom of expression as necessary to promote individual fulfillment—"when speech is freely chosen by the speaker to persuade others, it defines and expresses the speaker's 'self' and promotes his liberty and 'self-realization' by enabling him to develop his powers, abilities and to make and influence decisions regarding his destiny." *Freedom of Expression—Speech & Press*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-1/freedom-of-expression-speech-and-press#fn410amd1> [<https://perma.cc/5BRN-ZBYN>]; see also Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687–756 (2016) (describing free speech consequentialism as the result of balancing harms and benefits of speech which is used to divide protected and unprotected speech, as well as to define those categories of speech).

199. *City of Erie v. Pap's A.M.*, 529 U.S. at 289. *But see, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 443–44 (Scalia, J., concurring) (concluding secondary effects is unnecessary because "[t]he Constitution does not prevent . . . communities that wish to do so from regulating, or indeed entirely suppressing the business of pandering sex"). Pander—(n) is one who "caters to the lust of others, a male bawd, a pimp, or a procurer;" (v) to pimp; to "cater[] to the gratification of the lust of another" or to entice a woman to enter into a place where prostitution is practiced. HASCAL RUSSEL BRILL, *CYCLOPEDIA OF CRIMINAL LAW* 1661–62 (1923). The use of pandering in this instance instrumentalizes the women and their speech to support a narrative according to which they must be protected from (male) panderers.

200. *Am. Mini Theatres, Inc.*, 427 U.S. at 70–71 (plurality opinion) (holding sexually explicit nature of speech permits total suppression because it does not contribute to "political debate" or discourse). Also, commercial speech, of which stripping is arguably an example, need only be communicated in ways that do not confuse or mislead the public. It is worth noting that the case in which the Court repudiated its "super police powers" analysis from *LaRue* was a commercial speech case. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). *44 Liquormart* not only repudiated this part of *LaRue*, but also reversed the Court's opinion in *Posadas de P.R. Assocs. v. Tourism Co.* Morality and paternalism drove Puerto Rico to ban casino gambling ads in local newspapers and other periodicals because of Puerto Rico's concern about the negative effect gambling would have on Puerto Rico. *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 331–33. The island's casinos were intended for tourists not locals. *Id.* at 331–33.

201. See *infra* Sections III.A and III.B.



both sexually explicit and unpopular with those either cloaked in the power of the state or public figures who influence law and policy.

Inside the strip club, the comparison between *Miller* and secondary effects is starker. Both the music and the stripping featured in the strip clubs find themselves within the cross-hairs of those who seem to see little daylight between the two. The moral crusade to staunch the growing appeal of and demand for sexually explicit speech through both music and dance, however, is at odds with those who find morality too thin a basis for banning either strip clubs or stripping. Moreover, the Secondary Effects Doctrine works to constrain the threat of sexually explicit speech which is made more credible by the types of race and gender narratives about criminality, immorality, and indecency that have become so accepted that municipalities need only assert the threat to render it credible.<sup>202</sup> Obscenity proved unable to justify attempts to criminalize the music.<sup>203</sup> Secondary effects, however, allowed governments to ban the stripping that accompanies that music. Based on *Luke Records, Inc.*, one can safely assume that applying *Miller* to stripping would have yielded a different result.<sup>204</sup> As was the case with “As Nasty As They Wanna Be,” it is unlikely that stripping “lacks serious literary, artistic, political, or scientific value.”<sup>205</sup> State and local government discretion to enforce public nudity laws in strip clubs was upheld based on the Court’s conclusion that the ban’s impact on the erotic speech is *de minimus*.<sup>206</sup> In these cases, what was originally the impact of the ban on the market for indecent speech changes to the impact of the ban on the message understood by the speakers’ intended audience.<sup>207</sup> In the end, this appears to be a matter of primary rather than secondary effects.

Unlike zoning, the view of the low value of stripping as speech can support banning nude dancing.<sup>208</sup> The difference between “the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price” and “the dance viewed by the [man] who . . . wants some ‘entertainment’ with his beer or shot of rye” should be

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202. See Lambros Fatsis, *Grime: Criminal Subculture or Public Counterculture? A Critical Investigation into the Criminalization of Black Musical Subcultures in the U.S.*, 15 CRIME, MEDIA, CULTURE 401, 447–48 (2019) (examining the criminalization of Black musical subgenres as “a persistent feature of ‘policing against black people’ in Britain”).

203. See *Luke Records, Inc. v. Navarro*, 960 F.2d 340 (1992).

204. The results are different because at least the third part of *Miller* could not be satisfied. See *Miller v. California*, 413 U.S. 15, 37 (1973). The type of evidence proffered by *Luke Records* in its case has increased as hip-hop scholars research and write about the music and the culture. See *Luke Records, Inc.*, 960 F.2d at 136.

205. *Miller*, 413 U.S. at 24. See *Luke Records, Inc.*, 960 F.2d 340 (1992).

206. *Miller*, 413 U.S. at 35.

207. See generally *id.*

208. See *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560, 560–61 (1991).

irrelevant to the level of First Amendment protection that speech enjoys.<sup>209</sup> Moreover, the First Amendment should not be used to reinforce the speakers' marginalized collective status, vis-à-vis both those who employ them and those who seek to access their speech. Perhaps including the speakers within the public in whose interest state and local government may act would yield a different result. This shift, however, disrupts the central narratives of threat and danger around which the non-speech secondary effects are constructed. Indeed, a majority of the justices in *Barnes* and *Pap's A.M.* view the limited protection given stripping as justified by the combination of the forms of the sexually explicit message and the forum in which the message is communicated.<sup>210</sup> Secondary effects uses form, i.e., dancing or music, and forum, i.e., public accommodation or private club or residence, to reinforce the relatively low value of the stripping or the sexually explicit message conveyed by all manner of adult entertainment.<sup>211</sup> The music, however, is different because it is not obscene. At best, it is ancillary to the secondary effects analysis of the clubs and stripping because the music is intertwined with both the message and the venue.<sup>212</sup> The interplay between obscenity and secondary effects allows women to be relegated to functioning as instruments to serve patriarchy and its interests. The largely male voices in the music are afforded the highest level of protection from content-based regulation. The establishment owners and proprietors are also protected based on their Fifth Amendment property rights which appear to be enhanced by the First Amendment rights of the dancers and the establishments' patrons. Both the music and the establishments are represented by individuals, the vast majority of whom are men who benefit directly from women's corporeal speech, which is assessed with a more lenient secondary effects test than that used by the Court before *Barnes*. It does so at the expense of the women and makes both women's rights and voices largely irrelevant to legitimate public discourse. It does so without making it important either to hear the women's voices or to protect their rights to speak.

### C. Evidentiary Presumptions

The final reason that the Secondary Effects Doctrine is inadequate to protect both strippers' sexually explicit speech and the clubs

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

210. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 302 (2000); *Barnes*, 501 U.S. at 586–87.

211. *Pap's A.M.*, 529 U.S. at 302; *Barnes*, 501 U.S. at 586–87.

212. *Barnes*, 501 U.S. at 584.

in which they work has to do with evidentiary burdens for both governments and those challenging government regulations.<sup>213</sup> Initially, governments proffered evidence of negative secondary effects such as decreased property values and the overall quality of “urban life” measured by crime and poverty statistics.<sup>214</sup> This type of evidence proved the government’s interest was not only “substantial” or “significant”, but also unrelated to the suppression of speech.<sup>215</sup> This power to zone, however, has to be exercised in a way that “leave[s] the quantity and accessibility of the speech substantially undiminished.”<sup>216</sup> Moreover, municipalities cannot regulate speech because they either disagree with the speech or disapprove of the message.<sup>217</sup>

Initially, cities like Detroit and Los Angeles proffered secondary effects evidence made more credible by widely disseminated and understood “ghetto” narratives.<sup>218</sup> These narratives not only justified

213. See Meepos, *supra* note 157, at 239.

214. The best evidence of the threats secondary effects pose to the communities in which adult business operate is direct contemporaneous evidence of reduced property values and increased crime. In *Young v. Am. Mini Theaters, Inc.* Detroit’s Anti-Skid Row ordinance was supported by empirical data on which the City’s Common Council reasonably relied. 427 U.S. 50, 52–55 (1976). See also *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 453–66 (2002) (Souter, J., dissenting) (noting that the most direct way to establish that the ordinance is truly aimed at the secondary effects of the adult entertainment establishments is to provide evidence of “property devaluation and crime” as the real object of “the regulation.” This can be “show[n] by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them . . . without suppressing the expressive activity itself”). See generally U.S. DEP’T OF HOUSING & URB. DEV., NEIGHBORHOODS & VIOLENT CRIME (Summer 2016), <https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html> (highlighting example of the type of data available to state and local governments to support attempts to regulate the secondary effects of speech).

215. *City of Renton v. Playtime Theaters*, 475 U.S. 41, 49–50, 63 (1986). See also *Alameda Books, Inc.*, 535 U.S. at 457 (Souter, J., dissenting) (identifying negative externalities as “property devaluation and crime”); *Playtime Theatres*, 475 U.S. at 48 (Kennedy, J., concurring) (discussing “protect[ing] and preserv[ing] the quality of [Renton’s] neighborhoods, commercial districts, and the quality of urban life”); *Am. Mini Theatres, Inc.*, 427 U.S. at 71–72 (discussing “the present and future character of . . . neighborhoods” and “the quality of urban life”).

216. *Alameda Books, Inc.*, 535 U.S. at 445 (Kennedy, J., concurring). “A zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it.” *Id.* at 447. For this reason, the Borough of Mount Ephraim, New Jersey claimed its ordinance, which prohibited live dancing in certain commercial zones, was designed to implement “its plan to create a commercial area that caters only to the ‘immediate needs’ of its residents and that would enable them to purchase at local stores the few items they occasionally forgot to buy outside the Borough.” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72 (1981). The Court, however, found “it . . . difficult to reconcile this characterization of the Borough’s commercial zones with the provisions of the ordinance.” *Id.* Moreover, Mount Ephraim claimed “problems . . . such as parking, trash, police protection, and medical facilities,” justified the ordinance’s ban. *Id.* at 73–74.

217. *Alameda Books, Inc.*, 535 U.S. at 455 (Souter, J., dissenting).

218. *Alameda Books, Inc.*, 535 U.S. at 442; *Am. Mini Theatres, Inc.*, 427 U.S. at 54–55; see HERB BOYD, *BLACK DETROIT: A PEOPLE’S HISTORY OF SELF-DETERMINATION* (2017).

excessive and violent policing, but also proved the dangers in cities where Black people occasionally rebelled in full view of television cameras filming footage for the evening news.<sup>219</sup> The best case was when municipalities proffered contemporaneous evidence of negative secondary effects specific to the jurisdiction under review. Some cities were also aided by the Court's own precedent that documented how indecency threatened the quality of urban life.<sup>220</sup> For Los Angeles, for example, the relevant narrative also included the facts from earlier cases, including *LaRue*, *Miller*, and *Kaplan*.<sup>221</sup>

The Court also found Renton, Washington acted reasonably when it did not proffer its own evidence but rather relied on Seattle data and a Washington Supreme Court opinion that recognized the negative secondary effects of adult entertainment establishments.<sup>222</sup> Renton had no choice but to rely on Seattle's data because Renton had no direct experience with the adult movie theaters it wanted to zone.<sup>223</sup> Renton's proximity to Seattle made it reasonable for Renton to use Seattle's data rather than generate its own.<sup>224</sup> Indeed, rather than conclude the ordinance was a prior restraint, the Court noted

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219. In *American Mini Theatres, Inc.*, for example, the data on which the Detroit Common Council relied was credible. 427 U.S. at 71. The data undoubtedly quantified Detroit's larger ghetto narrative of quintessential urban blight, which, according to the data was caused by commercial activities including adult entertainment. *Id.* It did so, however, based on a view that placed the larger institutional and structural causes of what the Common Council sought to address outside the reach of the law. *Id.*; see also BOYD, *supra* note 218.

220. See *Alameda Books, Inc.*, 535 U.S. at 442.

221. See generally GAYE THERESA JOHNSON, SPACES OF CONFLICT, SOUNDS OF SOLIDARITY: MUSIC, RACE, AND SPATIAL ENTITLEMENT IN LOS ANGELES (2013). Los Angeles "urban life" narrative is one that not only involves narratives regarding race and sex, but also with which the Court has a long history. *Id.* The Court's 1972 and 1973 terms featured three California cases in which the constitutionality of sexually explicit speech was at issue. By 2003, Los Angeles' "urban life" narrative involved both racial and sexual impropriety. *Id.* Like Detroit, Los Angeles' judicially noticed facts included urban rebellion, crime, poverty, racial, ethnic, and national origin discrimination, and police violence, as well as spatial segregation, particularly in communities and neighborhoods. *Id.* Like Renton, women and sex work involve sex workers with First Amendment protected as "target." *Id.* Like Detroit, Los Angeles had its own rebellions—1965 Watts and 1992 South Central where both rebellions which occurred in identifiably Black communities. *Id.* In both Detroit and Los Angeles, Blacks migrating from the South made it imperative that black and brown communities be isolated and contained. *Id.* Eventually, Los Angeles would elect a Black mayor at a time when patterns of Black and Brown enfranchisement led whites to flee to Los Angeles' suburbs and beyond. *Id.* Los Angeles' municipal narrative also relied on facts from *LaRue*. *Id.* Although Rehnquist was the only member of the Court to hear both *LaRue* in 1973 and *Alameda Books* in 2002, the First Amendment analysis in both cases appear to share a narrative about sexually explicit speech, sex, and public accommodations. *Id.* This narrative is based, in part, on the threat the sexually explicit speech in both cases appeared to pose to decency and civility. *Id.*

222. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986).

223. *Id.*

224. *Id.* at 44, 51.

it was reasonable for Renton to legislate prophylactically.<sup>225</sup> Renton had no duty to wait for the negative effects to manifest themselves before it was empowered to act in this way.<sup>226</sup> Like Detroit and Los Angeles, Renton's evidence was rendered more credible by the real threat posed by the Green River Valley killer who targeted women sex workers, substance abusers, and runaways.<sup>227</sup> This urban narrative was a cautionary tale about race and sex that seemed to blame women for the dangers they faced at the hands of a serial killer.<sup>228</sup>

The reasonableness of these municipal narratives was enhanced by federal policies intended to wage wars on crime, drugs, poverty, and smut.<sup>229</sup> The primary battlegrounds on which these wars were waged were the inner-city neighborhoods in cities like Detroit and Los Angeles.<sup>230</sup> The crime, drugs, poverty, and smut against which the federal wars were waged proved not only the secondary effects of commercialized indecent speech, but also the real threat posed by the continuing devastation in which many poor people in urban centers lived.<sup>231</sup>

225. *Id.* at 44, 52.

226. *Id.*

227. See Silja A. Talvi, *The Truth About the Green River Killer*, THE TYEE (Nov. 12, 2003), [https://thetyee.ca/Views/2003/11/12/The\\_Truth\\_About\\_the\\_Green\\_River\\_Killer/](https://thetyee.ca/Views/2003/11/12/The_Truth_About_the_Green_River_Killer/) [<https://perma.cc/9K7F-E5PP>].

228. See *id.* In *Renton*, the Green River Killer and the over 40 women he murdered demonstrated the reasonableness of Renton's ordinance because Renton and Seattle faced the same threat. See *id.* For Renton, the "urban life" narrative was a cautionary tale driven by gender and racial impropriety. In the public's imagination, women and sex workers prove the need for regulations to reduce the potential for the danger that is real, rather than speculative. *Id.* When asked why he killed so many women, Ridgway replied, "I thought I was doing you guys a favor, killing prostitutes . . . Here you guys can't control them, but I can." *Id.* Ridgway's killing spree allows Renton to rely on a cautionary tale of sexual impropriety. This is what could happen to women who failed to follow the rules. The narrative made Renton's reliance on Seattle's data reasonable because both municipalities arguably faced the same threat. This placed Renton under siege, but Renton chose to legislate in way that increased, rather than ameliorated, the vulnerability of those affiliated with the adult entertainment industry or sex work. These workers were not part of the public in whose interest Renton legislated. Rather, they were what threatened the public on whose behalf Renton enacted the ordinance.

229. See *id.* Hendrixson, *supra* note 129; Jeff Guo, *America's Tough Approach to Policing Black Communities Began as a Liberal Idea*, WASH. POST (May 2, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/05/02/americas-tough-approach-to-policing-black-communities-began-as-a-liberal-idea> [<https://perma.cc/YDY6-V3QL>] (President Lyndon B. Johnson simultaneously waged wars on poverty and crime that are responsible for "the current regime of militarized policing and mass incarceration"); see also JAMES FORMAN, LOCKING UP OUR OWN (2017) (detailing the efforts of the District of Columbia Courts to deal with crime and drugs in Washington which were overseen by an increasingly black bench). See generally OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965); The LBJ Library, *Commencement Speech at Howard University, 6/4/65. MP2265-66*, YOUTUBE (June 4, 1965), <https://www.youtube.com/watch?v=vcfAuodA2x8> [<https://perma.cc/HU5C-NH4A>].

230. See Guo, *supra* note 229.

231. See *id.* See generally BOYD, *supra* note 218; JOHNSON, *supra* note 221.

With time, the government's evidentiary burden decreases because the Court judicially notices *a priori* presumptions about commercialized indecency and its negative secondary effects.<sup>232</sup> As the presumptions become virtually irrebuttable, they become more pernicious.<sup>233</sup> The evidentiary burdens weigh heavily in favor of municipalities and against the individual proprietors of the zoned businesses.<sup>234</sup> This is unfair to the individual proprietors who challenge the constitutionality of the zoning ordinances. Over time, challengers are expected to proffer evidence and the municipalities are not.<sup>235</sup> As local governments are required to proffer less evidence to demonstrate the reasonableness of their choice, the courts give these choices a higher level of judicial deference than they would otherwise receive.<sup>236</sup>

By 2003, cities like Los Angeles have an affirmative burden to establish the ordinance-secondary effects nexus with "evidence that supports a link between concentrations of adult operations and asserted secondary effects . . . ."<sup>237</sup> They do not, however, "bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with [their] own."<sup>238</sup> This seems to be a requirement reserved for the challengers.<sup>239</sup>

As the object of the regulation shifts from where businesses can operate to the speech inside those businesses, the state and local

232. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 459 (2002) (Souter, J., dissenting).

233. See *id.*

234. Meepos, *supra* note 157, at 239.

235. See *id.*

236. *E.g.*, *Alameda Books*, 535 U.S. at 440. In *City of Los Angeles v. Alameda Books*, Justice Souter noted, "the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government's failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration." *Id.* at 459. Souter continued,

the government has not shown that bookstores containing viewing booths, isolated from other adult establishments, increase crime or produce other negative secondary effects in surrounding neighborhoods, and we are thus left without substantial justification for viewing the city's First Amendment restriction as content correlated but not simply content based. By the same token, the city has failed to show any causal relationship between the breakup policy and elimination or regulation of secondary effects.

*Id.* at 425. In his concurring opinion in the same case, Justice Kennedy accuses the plurality of rushing to reach the quantum of evidence question without first answering the following question, "what proposition does a city need to advance in order to sustain a secondary-effects ordinance?" *Id.* at 449. While Kennedy agrees with the plurality's answer to the quantum question, he disagrees with the plurality because it fails to address the sufficiency of the interests Los Angeles claims the challenged ordinance furthers. *Id.*

237. *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 437 (2002).

238. *Id.*

239. See Meepos, *supra* note 157, at 239.

governments' evidentiary requirement changes.<sup>240</sup> Initially, municipalities appear to be required to proffer the same type of credible evidence to support the conclusion that the regulated businesses come with harmful secondary effects.<sup>241</sup> By the time the Court decides *Barnes and Pap's A.M.*, however, state and local governments are relieved of any significant evidentiary burden to support claims about the negative secondary effects of nude dancing that the public nudity laws are intended to prevent.<sup>242</sup> Both the cause and the effect of public nudity is universalized based on precedent that, when extended beyond zoning in the particular locations in which the cases arose, is stretched beyond recognition.<sup>243</sup> It may be perfectly acceptable for

240. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296–97 (2000) (plurality opinion); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (Souter, J., concurring) (1991).

241. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72 (1981). In *Schad*, for example, the Court concluded Mount Ephraim's ban on all live entertainment was unconstitutional unless Mount Ephraim could proffer credible evidence that live entertainment posed a particular threat to the municipality's character that would warrant banning "a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments." *Id.* at 65. According to the Court, *Young v. American Mini Theatres, Inc.* involved a "restriction on the location of adult movie theaters [that] imposed a minimal burden on protected speech." *Id.* at 71. Detroit's ordinance "did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them." *Id.* Without evidence of both the asserted interest in preserving the character of life in Mount Ephraim and the real, not speculative, threat posed by all live entertainment, Mount Ephraim's ban was far more than a "minimal burden on protected speech." *Id.* The Court noted that the Borough's assertions about the negative impact of live entertainment including the adult entertainment at issue in the case on the quality of life in Mount Ephraim were not "immediately apparent as a matter of experience." *Id.* at 73. This is linked to the spatial narrative on which the municipality attempted to rely, which was at odds with life in Mount Ephraim. The Borough did not have its own history of blight, poverty, and other indicators of compromised quality of life. See *About Us*, Borough of Lawnside, <http://lawnside.net/about> [<https://perma.cc/B5AJ-2A4X>] (regarding the history of Lawnside, New Jersey); *A Brief History of the Borough of Mount Ephraim*, Borough of Mount Ephraim, NJ (2011), <https://www.mountephrain-nj.com/history.html> [<https://perma.cc/PJF5-PC79>]. It was also not close enough to a municipality with that kind of history such as Camden or Philadelphia. *Id.* It is interesting to note that the closest majority Black municipality is Lawnside which has a higher median household income than Mount Ephraim. *Id.* Although Lawnside is the oldest independent Black municipality above the Mason-Dixon line and is almost 90 percent Black, it is not poor. *Id.* The spatial narrative about Mount Ephraim simply could not support the presumption. *Id.* The racial makeup of the municipality, as well as its proximity to other, identifiably Black municipalities did not jibe with Mount Ephraim's asserted conclusion that live entertainment would have a deleterious effect on the quality of life in Mount Ephraim. *Id.* The Court found Mount Ephraim's claim was supported by "no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems of this nature more significant than those associated with various permitted uses." *Schad*, 452 U.S. at 73.

242. Calvert & Richards, *supra* note 142, at 293–94 (examining eleven lower federal court cases decided after *City of Los Angeles v. Alameda Books, Inc.* and concluding, *inter alia*, that "the deferential approach most courts take with regard to legislative judgments about the regulation of sexually oriented business unduly restricts adult entertainment and the First Amendment").

243. *Id.* at 320–22.

the Supreme Court to accept what the highest state court has recognized as a connection between public indecency and the negative secondary effects of that indecency in that state. The same cannot be said, however, for the universal precedential value granted to decisions originally limited to specific places where the evidence and larger narrative about the details of urban life appear to prove the truth and logic of the connection between public accommodations featuring commercialized indecency and the negative secondary effects of adult entertainment.<sup>244</sup> In *Barnes* and *Pap's A.M.*, the Court determined Indiana and Erie acted reasonably when they identified public nudity as anathema to the community's moral and social code.<sup>245</sup> The evidence on which state and local governments can rely include court opinions in which the relationship between adult entertainment and negative effects of the commercialized indecency has been judicially noticed.<sup>246</sup>

Although the Court has not identified with any specificity the exact quantum of evidence a municipality must proffer, there should be a minimum requirement that the evidence be both geographically specific and contemporaneous.<sup>247</sup> If the absence of this type of evidentiary threshold is problematic in zoning cases, then it is even more troubling in the public nudity and stripping cases. Indeed, by the time the Court decides *Barnes* and *Pap's A.M.*, the Court accepts the idea that public nudity is something state and local governments have a substantial interest in eliminating.<sup>248</sup> Geographically specific and particularized narratives about the danger of stripping and strip culture are no longer required.<sup>249</sup> Reading *Luke Records, Inc.*, *Barnes*, and *Pap's A.M.* together seems to clarify the nature and the magnitude of the threat posed by this slice of Black popular culture.<sup>250</sup> The cases also demonstrate how the Secondary Effects Doctrine permits stripping to be regulated in ways that stripper anthems and other Black popular music cannot.<sup>251</sup> This is largely

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244. Compare *Schad*, 452 U.S. at 76–77 (Mount Ephraim could not make this showing by mere recitation; rather, some evidence had to be proffered to render the ordinance reasonable), with *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (plurality opinion), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (1991) (Souter, J., concurring) (noting the Court reasonably relied on studies from other localities to confirm the secondary effects of nude dancing establishments).

245. *Pap's A.M.*, 529 U.S. at 296 (plurality opinion); *Barnes*, 501 U.S. at 584 (1991) (Souter, J., concurring); see Adler, *supra* note 35, at 1140–54 (discussing the “[t]ropes of the [d]angerous [b]ody” at work in *Barnes* and *Pap's A.M.*).

246. See, e.g., Calvert & Richards, *supra* note 142, at 323.

247. *Id.* at 323–25.

248. E.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986).

249. E.g., *id.* at 51–52; see also Calvert & Richards, *supra* note 142, at 322–23.

250. See *Pap's A.M.*, 529 U.S. at 297 (plurality opinion); *Barnes*, 501 U.S. at 570–71, 584 (Souter, J., concurring); *California v. LaRue*, 409 U.S. 109, 118 (1972).

251. Compare *Pap's A.M.*, 529 U.S. at 291–93 (plurality opinion), and *Barnes*, 501 U.S.



due to at least two reasons. First, *Like Records, Inc.* concluded it was improper to resolve questions about “contemporary community standards” in a bench trial where the judge claimed to represent the community and to embrace its contemporary standards.<sup>252</sup> Second, the judge in the 2 Live Crew case dismissed the evidence proffered by 2 Live Crew in favor of evidence not proffered by the sheriff.<sup>253</sup> Both of these were significant errors on which the Circuit Court based its reversal.<sup>254</sup> This outcome, however, is not guaranteed under secondary effects because of the accepted universality of the threat due to beliefs about the music and its impact on social order and decency.<sup>255</sup> There is no need for a particular state or municipal narrative about the negative secondary effects in either South Bend, Indiana or Erie, Pennsylvania. The municipal and state presumption about the relationship between the regulated speech and public accommodations, on the one hand, and the secondary effects of that public speech, on the other hand, is either replaced or augmented by a judicially created presumption that sexually explicit speech *a priori* has secondary effects unrelated to the content of the speech.<sup>256</sup> Consequently, states and municipalities can legislate to prevent those secondary effects even where there is neither direct nor circumstantial evidence of the connection.

### CONCLUSION

While the messages expressed by both stripping and the music to which strippers dance are essentially the same, the First Amendment does not require the speech to be treated similarly.<sup>257</sup> The dancing can be banned if it is indecent.<sup>258</sup> The music can be banned only

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at 585 (Souter, J., concurring), *with* *Luke Records v. Navarro*, 960 F.2d 134, 138–39 (11th Cir. 1992).

252. *Luke Records*, 960 F.2d at 138–39.

253. *Id.* at 137.

254. *Id.* at 138–39.

255. *Barnes*, 501 U.S. at 583–84 (Souter, J., concurring); Kelley, *supra* note 18, at 62–63.

256. *See* Alemzadeh, *supra* note 35, at 362; *see, e.g., Barnes*, 501 U.S. at 584 (Souter, J., concurring). Indiana could justify enforcing its generally applicable public nudity law to ban nude dancing inside public accommodations by extending the assumption on which the United States Supreme Court relied in its opinion in *Renton*. *See generally* *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). That is, the Court makes the local and state-specific presumptions of *Renton* and *Northend Cinema* universally applicable to all similar cases the Supreme Court might consider. By the time the Court considers South Bend, Indiana’s public nudity ordinance, the relationship between commercialized public indecency (particularly totally nude dancing/stripping) is *a priori*; hence, there no longer appears to be a need to proffer any evidence. *See id.*

257. *LaRue*, 409 U.S. at 118 (conceding that “some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression . . .”); *see* Wahlquist, *supra* note 22.

258. Wahlquist, *supra* note 22, at 708.

if it is obscene.<sup>259</sup> Just as stripping is predominated by women's speech, the music to which they dance is predominated by men's speech, which is often about strippers. The First Amendment reinforces the value of strippers as objects in stories told by men rather than as subjects whose speech allows them to tell their own stories.<sup>260</sup> The corporeal speech expressed by women's nude dancing can be prohibited because to do so not only serves a legitimate government interest unrelated to the speech, i.e., addressing negative secondary effects, but also incidentally burdens how the strippers' messages are understood.<sup>261</sup> The First Amendment's Secondary Effects Doctrine strips women voices from legitimate political and public discourse about sex and sexuality, and privileges men's voices that tell stories about women over the women whose stripping tells their own stories.<sup>262</sup> While these problems exist in the zoning cases, they are exacerbated when the Secondary Effects Doctrine turns inward to regulate the speech inside strip clubs.<sup>263</sup> If women's speech was protected to the same extent that the First Amendment protects the music, then women could speak for themselves and fully access what Audre Lorde calls the "erotic as power" as subjects rather than objects.<sup>264</sup> This is a more satisfying and liberating approach to resolving the tension that exists between the constitutional rights of strippers, musicians, and the owners and proprietors of the adult entertainment establishments that feature both the strippers' corporeal speech and the rappers' musical speech.

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259. *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 135–36 (11th Cir. 1992).

260. *See supra* Section II.B.

261. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 295 (2000) (plurality opinion).

262. *See Weinstein, supra* note 156, at 881–88.

263. *See supra* Part IV.

264. LORDE, *supra* note 6, at 53–59.