

Barnes v. Glen Theatre, Inc. 111 S. Ct. 2456 (1991)

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set forth terms detailing the precise responsibilities of the parties as well as specify how the manuscripts will be published. Ω

Rhonda L. Lorenz

1. The contract read, "[t]he Author will deliver to the Publisher on a mutually agreeable date one copy of the manuscript of the Work as finally arranged by the editor and satisfactory to the Publisher in form and content." *Wildenstein v. Wallis*, 578 N.E.2d 981, 982 (Ill. 1991).

2. The contract read, "[w]ithin a reasonable time and a mutually agreeable date after delivery of the final revised manuscript, the Publisher will publish the Work at its own expense, in such style and manner and at such price as it deems best, and will keep the Work in print as long as it deems it expedient; but it will not be responsible for delays caused by circumstances beyond its control." *Id.* at 982-983.

3. *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 515 N.E.2d 61, 65 (Ill. 1987).

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Introduction

In *Barnes v. Glen Theatre, Inc.*, the United States Supreme Court upheld an Indiana statute requiring barroom dancers to wear pasties and G-strings, thereby overruling the decision of the Seventh Circuit in *Miller v. Civil City of South Bend*.¹ The Supreme Court followed the four-part test of *United States v. O'Brien* and found that the statute did not violate the protection of expression afforded by the first amendment.² Although nude dancing was considered expressive conduct, the Supreme Court found that the statute's incidental limitations on this form of expression were justified in light of the substantial and legitimate interests of the state in regulating this conduct.³

Facts

Respondents The Kitty Kat Lounge, Inc. and Glen Theatre, Inc. were adult entertainment businesses located in South Bend, Indiana. Respondents sought to present totally nude dancing in their establishments but were prevented by an Indiana regulation of public nudity which required dancers to wear pasties and G-strings.⁴ Respondents Miller and Sutro were dancers at the Kitty Kat Lounge and Glen Theatre, respectively, who, along with the establishments, contested the validity of the Indiana statute based on the first amendment's protection of expression.

Respondents sued to enjoin the enforcement of the Indiana statute in the United States District Court for the Northern District of Indiana and prayed for an injunction. The District Court found the statute

facially overbroad and granted respondents' injunction. The Court of Appeals for the Seventh Circuit reversed, finding that respondents' challenge was precluded by previous statutory litigation, and remanded the case to the District Court in order for the plaintiffs to pursue their first amendment claim. The District Court held that the dancing was not protected and ruled in favor of the defendants. On appeal to the Seventh Circuit, in *Miller v. Civil City of South Bend*, the court held that non-obscene, nude barroom dancing performed as entertainment was expressive conduct protected under the first amendment and that the Indiana statute was unconstitutional as applied.⁵

Legal Analysis

The Supreme Court first addressed the question of whether nude dancing was expressive conduct. The Seventh Circuit asserted that nudity alone does not preclude material from first amendment protection and that within the context of communicative expression, "the Constitution leaves matters of taste and style so largely to the individual."⁶ As long as there exists an intent to convey a specific message and the message is likely to be understood by the audience, protection is warranted by the first amendment.⁷ In this case, the Seventh Circuit found that an emotional message of eroticism and sensuality was intended by the nude dance and that the profits from the dance attested to its successful conveyance.⁸

The Supreme Court agreed with the Seventh Circuit's determination that the nude dancing involved here was expressive conduct. However, the Supreme Court asserted that nude dancing was afforded limited constitutional protection because this type of conduct was only marginally "within the outer perimeters of the first amendment."⁹

To determine the protection afforded by the first amendment and the permissive level of governmental restriction on symbolic speech, the Supreme Court applied the four-part test used in *United States v. O'Brien*. *O'Brien* held that a government regulation is sufficiently justified if: (1) it is within the government's constitutional power; (2) it furthers an important or substantial governmental interest; (3) it is unrelated to the suppression of free expression; and (4) the least restrictive means is used to further that interest.¹⁰

The state asserted, and the Supreme Court accepted, that Indiana may constitutionally exercise its police powers by enacting a statute to promote the health, safety, and morals of its citizens. The Supreme Court held that Indiana's long history of bans on public nudity was proof of the legitimacy of