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NUDE DANCING

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TO FOLLOW WILLIAM TURNER ON AN ATHENAEUM PROGRAM IS CERTAINLY A DIFFICULT TASK. I CAN ASSURE YOU THAT IT IS PURELY COINCIDENTAL THAT HE AND I HAVE CHOSEN HISTORICAL TOPICS FOR OUR PAPERS THIS EVENING.

CONSTITUTIONAL LAW HAS ALWAYS BEEN AN INTEREST OF MINE. UNFORTUNATELY, OPPORTUNITIES TO PRACTICE IN THIS AREA ARE FAIRLY RARE COMPARED TO OTHER AREAS OF THE LAW, SUCH AS DOMESTIC RELATIONS, BANKRUPTCY, PERSONAL INJURY, ETC.

IN MY FIRST ATHENAEUM PAPER, I OFFERED AN ANALYSIS OF THE SUPREME COURT RULINGS DEALING WITH ABORTION, WHICH INCLUDED AN HISTORICAL REVIEW OF THE CASES THAT DEVELOPED THE PRESENT BODY OF LAW ON THE SUBJECT. IN THIS, MY SECOND ATHENAEUM PAPER, I WILL OFFER A SIMILAR REVIEW AND ANALYSIS OF THE SLIGHTLY LESS PUBLICIZED CONSTITUTIONAL LAW TOPIC OF NUDE DANCING. GENERALLY SPEAKING, THE ISSUE OF NUDE DANCING HAS BEEN THE SUBJECT OF MUCH POLITICAL AND JUDICIAL ACTION AT EVERY LEVEL OF GOVERNMENT OVER THE YEARS, AND IT IS APPARENT THAT IT IS CONTINUING TO RECEIVE THE SAME ATTENTION PRESENTLY IN MANY AREAS OF OUR STATE AND

NATION.

THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES THAT "CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF; OR ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS; OR OF THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE, AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES." THROUGH THE 14TH AMENDMENT TO THE CONSTITUTION, THESE FIRST AMENDMENT RIGHTS, AS WELL AS THE OTHER CONSTITUTIONAL GUARANTEES EXPRESSED IN THE BILL OF RIGHTS, APPLY AS WELL AS TO STATE AND LOCAL GOVERNMENT ACTION.

THE UNITED STATES SUPREME COURT INTERPRETS "FREEDOM OF SPEECH" TO INCLUDE MANY FORMS OF NONVERBAL EXPRESSIVE ACTIVITY. FOR INSTANCE, THIS PROTECTION EXTENDS TO THE WEARING OF BLACK ARM BANDS BY STUDENTS IN OPPOSITION TO WAR, AS WELL AS BURNING THE AMERICAN FLAG. IN JUNE OF THIS YEAR, THE UNITED STATES SUPREME COURT RULED THAT THE CITY OF LADUE, MISSOURI COULD NOT PROHIBIT THE DISPLAY OF RESIDENTIAL SIGNS THAT EXPRESS A POLITICAL MESSAGE UNDER THE FIRST AMENDMENT GUARANTEE OF THE RIGHT OF FREE SPEECH.

AS WITH OTHER CONSTITUTIONAL GUARANTEES, THE

RIGHT OF FREE SPEECH IS NOT ABSOLUTE. FOR INSTANCE, ONE DOES NOT HAVE THE CONSTITUTIONAL RIGHT TO YELL "FIRE" IN A CROWDED THEATER OR TO MAKE LIBELOUS OR SLANDEROUS STATEMENTS. AS IN ALL CONSTITUTIONAL ANALYSES, THE COURTS MUST WEIGH THE INDIVIDUAL'S RIGHTS PROTECTED BY THE CONSTITUTION AGAINST THE INTERESTS OF THE STATE IN PROTECTING THE PUBLIC.

IN THE CASE OF NUDE DANCING, THERE HAS NEVER BEEN ANY DOUBT THAT SUCH CONDUCT CONSTITUTES SPEECH UNDER THE FIRST AMENDMENT. THE ISSUE OF HOW FAR THE GOVERNMENT MAY GO IN REGULATING THIS CONDUCT HAS BEEN THE SOURCE OF MUCH LITIGATION OVER THE LAST SEVERAL YEARS ALL OVER THE COUNTRY AND HERE IN CHRISTIAN COUNTY.

FOR SOME TIME, IT HAS BEEN A WELL ESTABLISHED PRINCIPLE THAT OBSCENE SPEECH DOES NOT ENJOY FIRST AMENDMENT PROTECTION. THIS IS TRUE WHETHER THE PURPORTED OBSCENITY IS SPOKEN, WRITTEN OR REVEALED IN PICTURES OR LIVE ACTS. IN DETERMINING WHETHER PUBLISHED MATERIAL OR A LIVE PERFORMANCE IS OBSCENE, THE COURT MUST DETERMINE WHETHER: [1] THE DOMINANT THEME TAKEN AS A WHOLE APPEALS TO THE PRURIENT INTEREST IN SEX; [2] IT IS PATENTLY OFFENSIVE BECAUSE IT AFFRONTS CONTEMPORARY COMMUNITY STANDARDS RELATING TO THE DESCRIPTION OR REPRESENTATION

OF SEXUAL MATTERS; AND, [3] IT IS WITHOUT REDEEMING SOCIAL VALUE.

AS WE HAVE SEEN IN A RECENT CHRISTIAN COUNTY CASE INVOLVING THE LEASING OF ADULT MOVIES, THE OBSCENITY STANDARD CAN BE DIFFICULT TO MEET. IN THE CASE OF NUDE DANCING, A COURT MUST LOOK TO THE SPECIFIC PERFORMANCE TO DETERMINE WHETHER IT IS OBSCENE. PERHAPS FOR THAT REASON, MOST OF THE LITIGATION DEALS WITH REGULATION OF NUDE DANCING IN OTHER WAYS.

THE SUPREME COURT HAS LONG HELD THAT THE FIRST AMENDMENT PROTECTS NON-OBSCENE NUDE DANCING, EVEN THOUGH IT IS ONLY ENTITLED TO MARGINAL PROTECTION. IN OTHER WORDS, NUDE DANCING IS ON THE EDGE OF CONSTITUTIONALLY PROTECTED SPEECH. REGULATION OF THIS ACTIVITY HAS OCCURRED UNDER TWO AUSPICES. ONE INVOLVES NUDE DANCING ON PREMISES LICENSED TO SELL LIQUOR, AND THE SECOND INVOLVES THE REGULATION OF TIME, MANNER, AND PLACE OF PROTECTED CONDUCT DUE TO AN OVERRIDING STATE INTEREST.

IN 1972, THE SUPREME COURT CONSIDERED THE CASE OF CALIFORNIA V. LaRue. IN THAT CASE, CALIFORNIA HAD ADOPTED A STATUTE PROHIBITING SEXUALLY EXPLICIT LIVE ENTERTAINMENT OR FILMS IN LICENSED BARS AND NIGHTCLUBS. THE STATUTE PROHIBITED SPECIFIC, VERY EXPLICIT SEX ACTS

MOST OF WHICH INCLUDED CONTACT BETWEEN THE DANCERS AND THE PATRONS IN THE LICENSED PREMISES. TOPLESS DANCING WAS NOT PROHIBITED.

WHILE RECOGNIZING THAT SOME OF THE PROHIBITED CONDUCT WOULD ENJOY FIRST AMENDMENT PROTECTION, THE COURT FOCUSED ON THE LOCATION OF THE PROHIBITED CONDUCT AND, SPECIFICALLY, THE STATE'S RIGHT TO REGULATE THE SALE OF ALCOHOL WITHIN ITS BOUNDARIES UNDER THE UNITED STATES CONSTITUTION.

IN 1933, THE 21ST AMENDMENT TO THE CONSTITUTION WAS ADOPTED. AS MOST OF US KNOW, THAT AMENDMENT REPEALED PROHIBITION IN THE 18TH AMENDMENT. HOWEVER, SECTION 2 OF THE 21ST AMENDMENT PROVIDES THAT "THE TRANSPORTATION OR IMPORTATION INTO ANY STATE, TERRITORY OR POSSESSION OF THE UNITED STATES FOR DELIVERY OR USE THEREIN OF INTOXICATING LIQUORS, IN VIOLATION OF THE LAWS THEREOF, IS HEREBY PROHIBITED." ACCORDINGLY, THE CONSTITUTION RESERVES TO THE STATES THE AUTHORITY TO REGULATE THE SALE OF ALCOHOL WITHIN THEIR BOUNDARIES.

IN LaRue, THE COURT RELIED ON THE 21ST AMENDMENT TO UPHOLD THE REGULATION OF ALL ACTIVITIES, INCLUDING ANY PROTECTED SPEECH, ON PREMISES LICENSED TO SELL ALCOHOL. HOWEVER, THE COURT STOPPED SHORT OF SAYING

THAT THE STATE'S RIGHTS GUARANTEED IN THE 21ST AMENDMENT SUPERSEDED THE INDIVIDUAL RIGHTS PROTECTED BY THE FIRST AMENDMENT.

IN 1981, THE SUPREME COURT UPHELD A PROHIBITION AGAINST NUDE DANCING IN NEW YORK STATE LIQUOR AUTHORITY V. BELLANCA. IN THAT CASE, THE NEW YORK LAW IN QUESTION WAS MUCH MORE RESTRICTIVE THAN THE CALIFORNIA REGULATIONS IN THE LaRue CASE. THE STATUTE ESSENTIALLY REQUIRED THE COVERING OF THE BREASTS, GENITALS AND ANUS. AS WITH OTHER SUPREME COURT PRONOUNCEMENTS INVOLVING THE RESTRICTION OF INDIVIDUAL LIBERTIES, MANY OTHER JURISDICTIONS SUBSEQUENTLY ADOPTED THE SAME OR SIMILAR LANGUAGE OF THE NEW YORK STATE LIQUOR AUTHORITY WHICH HAD BEEN UPHELD BY THE SUPREME COURT.

IN KENTUCKY, THE CITY OF NEWPORT ADOPTED AN ORDINANCE IN 1981 CONTAINING LANGUAGE SIMILAR TO THAT OF THE NEW YORK LAW CONSIDERED IN THE BELLANCA CASE. IT WAS CHALLENGED ON THE CONSTITUTIONAL GROUND THAT IN KENTUCKY, UNLIKE NEW YORK, THE DECISION WHETHER ALCOHOL MAY BE SOLD IN A PARTICULAR LOCALITY IS LEFT TO THE CITIZENS TO DECIDE BY REFERENDUM. ACCORDINGLY, THE CITY OF NEWPORT DID NOT HAVE THE AUTHORITY TO ENACT SUCH A ORDINANCE. THE CONSTITUTIONALITY OF THE ORDINANCE WAS ULTIMATELY

CONSIDERED BY THE UNITED STATES SUPREME COURT IN 1986, WHICH DECISION I WILL ADDRESS IN A MOMENT.

IN THE MEANTIME, A NUDE DANCING ESTABLISHMENT CALLED "THE CAT WEST" OPENED IN OAK GROVE, KENTUCKY IN JANUARY, 1984. THE CAT WEST HAD A LIQUOR LICENSE AND SOLD ALCOHOLIC BEVERAGES ON THE PREMISES.

IN FEBRUARY OF THAT YEAR, THE CITY OF OAK GROVE, THE CITY OF HOPKINSVILLE AND CHRISTIAN COUNTY ALL ENACTED ORDINANCES PATTERNED AFTER THE NEWPORT ORDINANCE. THE CLEAR INTENT OF THESE ORDINANCES WAS TO CLOSE DOWN THE CAT WEST AND TO PROHIBIT THE OPENING OF ANY SIMILAR ESTABLISHMENTS.

AS MANY OF YOU WILL REMEMBER, THE ESTABLISHMENT OF "THE CAT WEST" IN CHRISTIAN COUNTY GENERATED CONSIDERABLE PUBLIC CONTROVERSY WHICH, IN TURN, INSPIRED THE QUICK ACTION BY THESE LOCAL LEGISLATIVE BODIES. I CAN RECALL ATTENDING A PUBLIC MEETING AT A PACKED CHRISTIAN CIRCUIT COURTROOM AT WHICH TIME THE FISCAL COURT CONSIDERED ADOPTION OF ITS ORDINANCE. MANY SPEAKERS ROSE TO SPEAK IN SUPPORT OF THE PROPOSED LEGISLATION AND, AS EXPECTED, THE LEGISLATION PASSED. AS I RECOLLECT, ONLY TWO BRAVE SOULS ROSE TO SUGGEST THAT THE ORDINANCE SHOULD NOT BE PASSED.

THE EFFORTS BY OUR LOCAL OFFICIALS RECEIVED CONSIDERABLE MEDIA ATTENTION AS WELL. IN THE COURSE OF HIS INVESTIGATION OF THE CAT WEST, CHRISTIAN COUNTY SHERIFF BILL DILLARD, SURPRISED TO SEE TOPLESS DANCING AT THE CLUB, APPEARED ON TV-43 SAYING THAT THE OWNER OF THE CLUB HAD PROMISED HIM THAT "THOSE GIRLS WOULD HAVE THEIR NIPPLES COVERED WITH PASTRIES." THAT QUOTE RECEIVED STATEWIDE COVERAGE.

OAK GROVE ENACTED ITS ORDINANCE ON FEBRUARY 1, 1984. ON FEBRUARY 14, 1984, OAK GROVE POLICE ARRESTED TWO DANCERS FOR VIOLATION OF THE ORDINANCE. THE DANCERS FILED MOTIONS TO DISMISS THEIR CASES ON THE GROUNDS THAT CRIMINAL SANCTIONS COULD NOT BE IMPOSED AGAINST THEM BECAUSE TO DO SO WOULD VIOLATE THEIR FIRST AMENDMENT RIGHT OF EXPRESSION. OAK GROVE RESPONDED THAT THE ORDINANCE IN QUESTION HAD BEEN CONSIDERED BY THE UNITED STATES SUPREME COURT IN THE BELLANCA CASE AND WAS HELD TO BE CONSTITUTIONAL. AT ISSUE WERE THE CRIMINAL PENALTIES IMPOSED ON THE DANCERS THEMSELVES, AS OPPOSED TO THE OWNER OF THE PREMISES WHO ACTUALLY HELD THE LIQUOR LICENSE. THIS ISSUE WAS NOT ADDRESSED IN THE BELLANCA DECISION.

IN A CAREFUL AND DETAILED ANALYSIS OF THE

LaRue AND BELLANCA DECISIONS, ATHENAEUM MEMBER AND DISTRICT JUDGE PETER MACDONALD HELD THAT THE LICENSING PROVISIONS OF THE ORDINANCE WERE CONSTITUTIONAL, IN THAT THEY CONSTITUTED A LEGITIMATE EXERCISE OF THE POWER TO REGULATE THE SALE OF ALCOHOL UNDER THE 21ST AMENDMENT. HOWEVER, HE FOUND THE CRIMINAL PENALTIES IMPOSED ON THE DANCERS TO BE UNCONSTITUTIONAL, SINCE SUCH PENALTIES WERE UNNECESSARY TO REGULATE THE SALE OF ALCOHOL.

THE CITY OF OAK GROVE APPEALED THIS DECISION TO THE CHRISTIAN CIRCUIT COURT WHERE THE LATE TOM SOYARS UPHELD ALL ASPECTS OF THE ORDINANCE. RECOGNIZING THAT NO CASE AUTHORITY EXISTED FOR THE IMPOSITION OF CRIMINAL PENALTIES UPON NUDE DANCERS, THE COURT CONCLUDED THAT IT WAS A LOGICAL EXERCISE OF 21ST AMENDMENT POWERS FOR OAK GROVE TO IMPOSE PENALTIES ON THOSE PERSONS WHO AIDED THE LICENSE HOLDERS IN VIOLATING THE OAK GROVE ORDINANCE. THE DANCERS SOUGHT A REVIEW OF THAT DECISION BY THE KENTUCKY COURT OF APPEALS, BUT THE REQUEST WAS DENIED.

AT THE SAME TIME THE CRIMINAL ACTION WAS PROCEEDING, THE CAT WEST FILED SUIT IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY TO DETERMINE THE CONSTITUTIONALITY OF THE ORDINANCE. THAT CASE WAS HELD IN ABEYANCE WHILE THE UNITED STATES SIXTH

CIRCUIT COURT OF APPEALS AND, SUBSEQUENTLY, THE UNITED STATES SUPREME COURT, CONSIDERED THE CONSTITUTIONALITY OF THE NEWPORT ORDINANCE.

AS PREVIOUSLY STATED, THE ISSUE IN THAT FEDERAL APPEAL WAS WHETHER ANY KENTUCKY LOCAL GOVERNMENT COULD ENACT AN ANTI NUDE DANCING ORDINANCE SINCE ONLY THE CITIZENS BY REFERENDUM COULD ALLOW OR PROHIBIT THE SALE OF ALCOHOL IN KENTUCKY, AS OPPOSED TO THE GOVERNMENT ITSELF. THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY UPHELD THE NEWPORT ORDINANCES, BUT THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS REVERSED. IN NOVEMBER, 1986, THE UNITED STATES SUPREME COURT REJECTED THIS DISTINCTION AND UPHELD THE NUDE DANCING BAN ON LIQUOR LICENSED PREMISES IN NEWPORT WHICH, OF COURSE, VALIDATED ALL OF THE LOCAL ORDINANCES AS WELL.

DURING THE LITIGATION CONCERNING THE CAT WEST, ITS OWNERS OPENED AN OAK GROVE NIGHT CLUB CALLED "PLAYMATE AFTER HOURS". OPENED IN APRIL, 1985, THIS ESTABLISHMENT ALSO OFFERED NUDE DANCING AS ENTERTAINMENT, BUT IT DID NOT OBTAIN A LIQUOR LICENSE, AND NO ALCOHOLIC BEVERAGES WERE SOLD ON THE PREMISES. AS NO LIQUOR WAS SOLD ON THE PREMISES, THE CITY OF OAK GROVE HAD NO REGULATORY AUTHORITY UNDER THE 21ST AMENDMENT AS IT DID

IN THE CASE OF THE CAT WEST.

TO COMBAT THE OPERATION OF PLAYMATE AFTER HOURS AND THE INCREASED CRIMINAL ACTIVITY REPORTED IN CONNECTION THEREWITH, OAK GROVE ENACTED A NEW ORDINANCE IN JULY, 1985. THAT ORDINANCE DEFINED AND REGULATED PLACES OF ENTERTAINMENT BY REQUIRING THE ISSUANCE OF A BUSINESS LICENSE. IN ORDER TO OBTAIN THE LICENSE, THE PLACE OF ENTERTAINMENT HAD TO FILE AN APPLICATION ALONG WITH A FEE, AFTER WHICH AN INVESTIGATION WAS CONDUCTED BY THE CHIEF OF POLICE AND A LICENSING RECOMMENDATION MADE TO THE MAYOR. SUBSEQUENTLY, THE MAYOR HAD TO CONDUCT A HEARING AND RECEIVE EVIDENCE WITH RESPECT TO GRANTING THE PERMIT. THE ORDINANCE STATED THAT, THE MAYOR COULD NOT ISSUE A PERMIT TO A PERSON OF BAD MORAL CHARACTER, OR TO A PERSON LIKELY TO BREAK THE LAW. AT THE TIME, THE OAK GROVE MAYOR AND CHIEF OF POLICE WERE BROTHERS.

WITHIN ONE WEEK OF THE ENACTMENT OF THIS ORDINANCE, PLAYMATE AFTER HOURS SUED OAK GROVE IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY TO OBTAIN AN INJUNCTION AGAINST THE ENFORCEMENT OF THE ORDINANCE ON THE GROUNDS THAT IT VIOLATED THE FIRST AMENDMENT. PLAYMATE AFTER HOURS WON. IN GRANTING THE RELIEF REQUESTED BY PLAYMATE AFTER HOURS, THE FEDERAL

COURT CONCLUDED THAT THE GUARANTEES OF THE FIRST AMENDMENT WERE NOT LIMITED TO IDEAS WHICH WERE DECENT OR MORAL OR THOSE EXPRESSED ONLY IN PLACES OF ENTERTAINMENT AS DEFINED UNDER THE OAK GROVE ORDINANCE. FURTHER, BECAUSE THE ORDINANCE CONSTITUTED A PRIOR RESTRAINT ON SPEECH, IT HAD TO BE NARROWLY DRAWN IN ORDER TO PASS CONSTITUTIONAL MUSTER. UNDER THE OAK GROVE ORDINANCE, THE MAYOR COULD IMPOSE HIS OWN PERSONAL STANDARDS OF GOOD MORAL CHARACTER AND PROPENSITY TO BREAK THE LAW. THAT IS UNCONSTITUTIONAL. MOREOVER, THE RESTRICTIONS WERE NOT THE LEAST INTRUSIVE MEANS POSSIBLE TO ACCOMPLISH THE GOVERNMENT REGULATORY PURPOSE, WHICH FINDING WAS NECESSARY IN ORDER TO ABRIDGE THE FIRST AMENDMENT RIGHTS OF THE DANCERS.

A MONTH AFTER THE ISSUANCE OF THE INJUNCTION, THE CITY OF OAK GROVE REPEALED THE ORDINANCE WHICH THE COURT HAD ENJOINED. AT THE SAME TIME, OAK GROVE ENACTED A NEW ORDINANCE REGULATING PLACES OF ENTERTAINMENT. INSTEAD OF MAYORAL APPROVAL OF AN APPLICANT'S MORAL CHARACTER AS A CONDITION OF THE ISSUANCE OF A LICENSE, THE LICENSE COULD BE OBTAINED SIMPLY BY SUBMITTING THE NECESSARY APPLICATION AND FILING FEE. ACCORDINGLY, OAK GROVE HAD ELIMINATED THE LICENSING APPROVAL SCHEME FOUND

OFFENSIVE BY THE FEDERAL JUDGE IN THE PRIOR ACTION. THE ORDINANCE PROHIBITED DRUNKEN, DISORDERLY, OR BOISTEROUS PERSONS TO CONGREGATE IN OR ABOUT BUSINESS PREMISES. TO ENFORCE THE ORDINANCE, THE POLICE WERE DIRECTED TO VISIT PLACES OF ENTERTAINMENT ON A REGULAR BASIS. YES -- OAK GROVE REQUIRED ITS POLICE TO VISIT STRIP CLUBS. THE ORDINANCE DID NOT SPECIFICALLY MENTION NUDE DANCING.

AS WITH THE PRIOR ORDINANCE, PLAYMATE AFTER HOURS SOUGHT A TEMPORARY RESTRAINING ORDER ENJOINING THE ENFORCEMENT OF THIS NEW ORDINANCE. THE COURT CONCLUDED THAT OAK GROVE HAD A COMPELLING INTEREST IN CONTROLLING DRUNKEN, DISORDERLY AND BOISTEROUS BEHAVIOR OF THE PATRONS OF THE PLACES OF ENTERTAINMENT, INCLUDING THE PLAYMATE AFTER HOURS. OAK GROVE HAD ENACTED AN ORDINANCE APPLYING TO ALL PLACES OF ENTERTAINMENT IN ORDER TO REGULATE BEHAVIOR AT THE PLAYMATE AFTER HOURS AND NO OTHER ESTABLISHMENT. ACCORDINGLY, OAK GROVE HAD AGAIN FAILED TO USE THE LEAST INTRUSIVE MEANS OF REGULATING CONDUCT. AS THE COURT NOTED, OAK GROVE COULD HAVE ADOPTED A LICENSING SCHEME BASED ON UNPROTECTED BEHAVIOR SUCH AS ON PREMISES ALCOHOL CONSUMPTION OR SIMPLY ENFORCING EXISTING CRIMINAL STATUTES. IN OTHER WORDS, ANY CRIMINAL ACTIVITIES AT PLAYMATE AFTER HOURS COULD BE

CONTROLLED WITHOUT ESTABLISHING A GENERAL LICENSING SCHEME REGULATING ALL PLACES OF ENTERTAINMENT AND REQUIRING THE POLICE TO REGULARLY INSPECT THOSE BUSINESSES. THE CLUB WON AGAIN.

AS AN ASIDE, OAK GROVE WAS REQUIRED TO PAY PLAYMATE AFTER HOURS' LEGAL FEES IN THE INITIAL ACTION SINCE A VIOLATION OF CIVIL RIGHTS OCCURRED AND PLAYMATE AFTER HOURS HAD PREVAILED BY VIRTUE OF OAK GROVE'S REPEAL OF THE ORDINANCE. THIS CERTAINLY HEAPED INSULT ONTO INJURY AND, PERHAPS, INJURY ONTO INSULT.

AFTER THE SECOND DECISION, THE MILITARY DECLARED PLAYMATE AFTER HOURS OFF LIMITS AND BUSINESS DWINDLED DRAMATICALLY. BY REMARKABLE COINCIDENCE, FIRE DESTROYED THE ESTABLISHMENT SOON AFTERWARD AND IT HAS NEVER REOPENED.

AS A RESULT OF THE ABOVE CASES, NUDE DANCING CONTINUES AT THE CAT WEST. AFTER THE FEDERAL DISTRICT COURT ENJOINED ENFORCEMENT OF THE FIRST ORDINANCE, OAK GROVE APPEALED THE DECISION TO THE UNITED STATED CIRCUIT COURT OF APPEALS. IN ITS DECISION RENDERED IN APRIL, 1990, THE DISTRICT COURT WAS REVERSED AND THE LAWSUIT WAS DISMISSED ON THE GROUND THAT NO FEDERAL QUESTION EXISTED IN VIEW OF THE SUPREME COURT DECISION IN THE NEWPORT

CASE. THE CAT WEST REQUESTED THE COURT TO CONSIDER SEVERAL STATE LAW ISSUES WHICH WERE NOT ADDRESSED. ONE OF THOSE ISSUES INVOLVED WHETHER LOCAL GOVERNMENTS HAVE BEEN PREEMPTED BY THE STATE IN ALL MATTERS INVOLVING ALCOHOL REGULATION, WHICH ISSUE IS PRESENTLY BEING LITIGATED IN CASES ARISING IN LOUISVILLE.

AS SOON AS THAT SIXTH CIRCUIT DECISION BECAME FINAL, THE CAT WEST RELINQUISHED ITS LIQUOR LICENSE TO THE CITY. IT IS PRESENTLY OPERATING WITHOUT RESTRICTION. IN OTHER WORDS -- NO PASTRIES.

I AM UNAWARE OF ANY OTHER ATTEMPTS IN CHRISTIAN COUNTY TO START A NUDE DANCING ESTABLISHMENT. THE CITY OF HOPKINSVILLE AND CHRISTIAN COUNTY STILL HAVE THEIR 1984 ORDINANCES ON THE BOOKS, WHICH REGULATE NUDE DANCING IN ESTABLISHMENTS LICENSED TO SELL LIQUOR. HOWEVER, NO LOCAL GOVERNMENT HAS ANY ORDINANCE WHICH ATTEMPTS TO REGULATE NUDE DANCING ON PREMISES OTHER THAN THOSE LICENSED TO SELL ALCOHOL.

ELSEWHERE, THIS ISSUE CONTINUES TO GENERATE CONTROVERSY. AS STATED ABOVE THE PREEMPTION ISSUE IS BEING LITIGATED IN LOUISVILLE. THE KENTUCKY COURT OF APPEALS HAS RULED IN FAVOR OF THE CITY THAT IT CAN REGULATE THIS ACTIVITY IN LIQUOR LICENSED ESTABLISHMENTS.

THE KENTUCKY SUPREME COURT HAS YET TO DETERMINE IF IT WILL CONSIDER THE CASE. IF IT ACCEPTS THE CASE AND RULES IN FAVOR OF THE ADULT ESTABLISHMENTS, ONLY THE STATE OF KENTUCKY WILL BE ABLE TO PASS REGULATIONS GOVERNING NUDE DANCING IN ESTABLISHMENTS LICENSED TO SERVE ALCOHOL.

LIKE OAK GROVE, MANY OTHER COMMUNITIES ADOPTED REGULATIONS DESIGNED TO CURB NUDE DANCING ACTIVITIES IN ESTABLISHMENTS NOT LICENSED TO SELL ALCOHOL. IN 1991, THE UNITED STATES SUPREME COURT CONSIDERED SUCH A STATUTE ADOPTED BY THE STATE OF INDIANA. THAT STATUTE MADE IT A CRIME TO APPEAR IN A PUBLIC PLACE IN A STATE OF NUDITY, WHICH WAS MORE SPECIFICALLY DEFINED IN THE STATUTE. ESSENTIALLY, THE STATUTE REQUIRED SOME COVERING OF THE PUBIC AREA AND BREASTS; IN OTHER WORDS G-STRINGS AND PASTIES. THE PROHIBITION IS SIMILAR TO THAT FOUND IN OUR LOCAL ORDINANCES.

AFTER ADOPTION OF THE LAW, TWO SOUTH BEND, INDIANA ESTABLISHMENTS FILED SUIT SEEKING AN INJUNCTION TO PROHIBIT ENFORCEMENT OF THE STATUTE ON THE GROUNDS THAT IT VIOLATED THE FIRST AMENDMENT.

IN A SPLIT DECISION, THE UNITED STATES SUPREME COURT DECLARED THE LAW TO BE CONSTITUTIONAL. EIGHT OF THE NINE MEMBERS OF THE COURT REAFFIRMED THAT NUDE

DANCING CONSTITUTED EXPRESSIVE CONDUCT UNDER THE FIRST AMENDMENT, AND WAS ENTITLED TO SOME FIRST AMENDMENT PROTECTION. IN REACHING ITS DECISION, THE COURT RELIED ON ITS NOW FAMOUS DECISION IN UNITED STATES V. O'BRIEN RENDERED IN 1968. WHILE THE NAME OF THIS CASE MIGHT NOT BE FAMILIAR TO YOU, I AM CERTAIN THAT THE HOLDING WILL BE RECOGNIZABLE.

IN O'BRIEN, THE UNITED STATES SUPREME COURT UPHELD THE CONVICTION OF A MAN WHO BURNED HIS DRAFT CARD ON THE STEPS OF A BOSTON COURTHOUSE IN FRONT OF A LARGE CROWD. THE FEDERAL STATUTE IN QUESTION PROHIBITED THE DESTRUCTION OR MUTILATION OF A DRAFT CARD.

IN HIS CASE, O'BRIEN ASSERTED THAT THE STATUTE PROHIBITED HIS SYMBOLIC SPEECH IN BURNING HIS DRAFT CARD WHICH SPEECH WAS PROTECTED BY THE FIRST AMENDMENT. THE SUPREME COURT CONCLUDED THAT O'BRIEN'S ACTIONS HAD SPEECH AND NON-SPEECH ELEMENTS AND, THEREFORE, AN IMPORTANT GOVERNMENT INTEREST IN REGULATING THE NON-SPEECH ELEMENT WOULD JUSTIFY AN INCIDENTAL INFRINGEMENT ON THE SPEECH ELEMENT PROTECTED BY THE FIRST AMENDMENT.

THE COURT DEVELOPED A TEST TO DETERMINE THE CONSTITUTIONALITY OF A STATUTE REGULATING EXPRESSIVE CONDUCT. THE KEY IN THE ANALYSIS IS THE SUBSTANTIAL

GOVERNMENT INTEREST WHICH IS UNRELATED TO A SUPPRESSION OF THE PROTECTED EXPRESSION.

IN O'BRIEN'S CASE, THE COURT CONCLUDED THAT THE UNITED STATES HAD A LEGITIMATE INTEREST IN PREVENTING HARM TO THE SMOOTH AND EFFICIENT OPERATION OF THE SELECTIVE SERVICE SYSTEM WHICH WOULD BE FRUSTRATED BY THE DESTRUCTION OF DRAFT CARDS. MOREOVER, THE PURPOSE OF THE LAW WAS NOT TO SUPPRESS SPEECH BUT TO FURTHER THAT LEGITIMATE GOVERNMENT INTEREST. FINALLY, THE LAW WAS NARROWLY DRAWN, AND WAS THE LEAST RESTRICTIVE METHOD TO FURTHER THAT INTEREST.

IN APPLYING THIS ANALYSIS TO THE INDIANA PUBLIC NUDITY STATUTE, THE SUPREME COURT HELD THAT THE STATE OF INDIANA HAD A LEGITIMATE GOVERNMENT INTEREST IN PROHIBITING PUBLIC NUDITY. AS NOTED BY THE COURT, IT HAD LONG BEEN HELD IN INDIANA, AS WELL AS OTHER STATES, THAT PUBLIC INDECENCY STATUTES ARE LEGITIMATE EFFORTS TO MAINTAIN PUBLIC ORDER AND MORALS. ACCORDING TO THE COURT, THIS INTEREST IS UNRELATED TO THE SUPPRESSION OF FREE EXPRESSION. THE PURPOSE OF THE STATUTE WAS NOT AIMED AT NUDE DANCING, BUT AT PUBLIC NUDITY. WHILE THE PROTECTED ACTIVITY OF NUDE DANCING MIGHT BE ADVERSELY AFFECTED, IT IS ONLY IN AN INCIDENTAL WAY. AS THE COURT

STATED: "THE REQUIREMENT THAT THE DANCERS DON PASTIES AND A G-STRING DOES NOT DEPRIVE THE DANCER OF WHATEVER EROTIC MESSAGE IT CONVEYS; IT SIMPLY MAKES THE MESSAGE SLIGHTLY LESS GRAPHIC. . . THE APPEARANCE OF PEOPLE OF ALL SHAPES, SIZES AND AGES IN THE NUDE AT A BEACH, WOULD CONVEY LITTLE IF ANY EROTIC MESSAGE, YET, THE STATE STILL SEEKS TO PREVENT IT. PUBLIC NUDITY IS THE EVIL THE STATE SEEKS TO PREVENT, WHETHER OR NOT IT IS COMBINED WITH EXPRESSIVE ACTIVITY."

IN THE INDIANA PUBLIC NUDITY CASE, THE SUPREME COURT DID NOT CONSIDER WHAT CONSTITUTES A PUBLIC PLACE. WHILE THIS ISSUE HAS NOT BEEN ADDRESSED BY THE UNITED STATES SUPREME COURT, THE KENTUCKY SUPREME COURT HAS INTERPRETED A SIMILAR PROHIBITION. IN ITS BATTLE AGAINST NUDE DANCING ESTABLISHMENTS, THE CITY OF NEWPORT, LIKE THE CITY OF OAK GROVE, PASSED AN ORDINANCE DESIGNED TO REGULATE NUDE DANCING IN ESTABLISHMENTS WHICH DO NOT SERVE LIQUOR. THE CITY OF NEWPORT, LIKE THE STATE OF INDIANA, ENACTED A STATUTE PROHIBITING NUDITY IN A PUBLIC PLACE. IN DEFINING A PUBLIC PLACE, NEWPORT REFERRED TO THAT DEFINITION IN THE STATE STATUTES THAT A PUBLIC PLACE "MEANS A PLACE TO WHICH THE PUBLIC OR A SUBSTANTIAL GROUP OF PERSONS HAS ACCESS."

TWO NEWPORT CLUB OWNERS CHALLENGED THE ORDINANCE ON THE GROUNDS THAT THEIR ESTABLISHMENTS WERE PRIVATE AND DID NOT CONSTITUTE A PUBLIC PLACE AND, THEREFORE, NUDE DANCING COULD NOT BE HELD REGULATED THEREIN.

ALTHOUGH A MEMBERSHIP FEE WAS PAID BY PATRONS OF THE ESTABLISHMENTS AND A MEMBERSHIP CARD ISSUED TO THEM, ANY MEMBER OF THE PUBLIC COULD OBTAIN A MEMBERSHIP CARD AND THERE WAS NO MEMBERSHIP CONTROL OVER THE OPERATION OF THE CLUB.

UNDER THESE CIRCUMSTANCES, THE SUPREME COURT HELD THAT THESE CLUBS CONSTITUTED PUBLIC PLACES. WITH RESPECT TO THE PROHIBITION AGAINST PUBLIC NUDITY, THE COURT RELIED ON THE UNITED STATES SUPREME COURT DECISION UPHOLDING THE CONSTITUTIONALITY OF THE INDIANA PUBLIC INDECENCY STATUTE. IT IS UNLIKELY THAT ANY ORDINANCE DESIGNED TO REGULATE NUDE DANCING IN A TRULY PRIVATE CLUB WOULD PASS CONSTITUTIONAL MUSTER.

THESE SO CALLED "TIME, MANNER AND PLACE" RESTRICTIONS WHICH ARE BASED ON THE DRAFT CARD BURNING CASE WILL BE USED TO IMPOSE FURTHER RESTRICTIONS WHERE A LEGITIMATE GOVERNMENT INTEREST AND A NARROWLY DRAWN STATUTE TO PROTECT THAT INTEREST ARE DEMONSTRATED.

RECENTLY, THE THIRD CIRCUIT COURT OF APPEALS UPHELD A DELAWARE STATUTE LIMITING THE HOURS OF OPERATION OF AN ADULT ENTERTAINMENT ESTABLISHMENT, WHICH INCLUDED MOVIES AND LIVE ENTERTAINMENT, FROM 10:00 A.M. TO 10:00 P.M. MONDAY THROUGH SATURDAY AND A PROHIBITION AGAINST ITS OPERATION ON SUNDAY. IN THAT CASE, THE STATE OF DELAWARE CONVINCED THE COURT THAT IT HAD A LEGITIMATE GOVERNMENT INTEREST IN MINIMIZING THE DISRUPTIVE EFFECT OF THE ESTABLISHMENTS ON THE SURROUNDING NEIGHBORHOOD, CITING PROBLEMS SUCH AS NOISE AND PARKING. EVEN THOUGH ESTABLISHMENTS CHALLENGING THE ORDINANCE PROVIDED PROOF THAT SUBSTANTIAL BUSINESS WAS CONDUCTED AFTER 10:00 P.M., THE COURT CONCLUDED THAT THE GOVERNMENT INTEREST SUPERSEDED IT IN THE LEAST RESTRICTIVE MANNER AVAILABLE. FURTHER, THE COURT NOTED THAT THE PERMITTED HOURS OF OPERATION PROVIDED SIGNIFICANT TIME IN WHICH PATRONS OF THE ESTABLISHMENT COULD VIEW THE REGULATED ACTIVITY.

SIMILAR TIME, MANNER AND PLACE RESTRICTIONS HAVE ALSO BEEN USED TO UPHOLD ZONING RESTRICTIONS REQUIRING THAT THESE ESTABLISHMENTS ONLY LOCATE IN CERTAIN AREAS.

IN VIEW OF THE NUMEROUS CASES ON THIS SUBJECT, INCLUDING THOSE JUST CITED, IT APPEARS THAT SEVERAL LEGAL

CONCLUSIONS CAN BE DRAWN ABOUT THE GOVERNMENT'S RIGHT TO REGULATE THIS ACTIVITY. FIRST, NON-OBSCENE NUDE DANCING IS CONSIDERED EXPRESSIVE ACTIVITY PROTECTED UNDER THE FIRST AMENDMENT TO THE CONSTITUTION.

SECOND, THE 21ST AMENDMENT GIVES STATE AND LOCAL GOVERNMENTS TREMENDOUS POWER IN REGULATING NUDE DANCING IN ESTABLISHMENTS WHICH ARE LICENSED TO SELL ALCOHOL. HOWEVER, THE EXTENT OF THE REGULATION HAS NOT BEEN FULLY DECIDED.

THIRD, GOVERNMENT REGULATION WHICH INFRINGES UPON PROTECTED NUDE DANCING ACTIVITY CAN BE UPHELD IF IT IS NARROWLY DRAWN TO SERVE A LEGITIMATE GOVERNMENT INTEREST OTHER THAN SUPPRESSING SPEECH, PROVIDED THAT THE REGULATION ONLY INCIDENTALLY INFRINGES ON SPEECH.

AS WITH ANY OTHER AREA OF CONSTITUTIONAL LAW, THIS ISSUE WILL CONTINUE TO EVOLVE AS STATE AND LOCAL GOVERNMENTS PASS NEW REGULATIONS TO TRY TO RESTRICT NUDE DANCING AND CURB THE SIDE EFFECTS OF THE PRESENCE OF SUCH CLUBS. WE MAY HAVE AN OPPORTUNITY TO OBSERVE THE HOPKINS COUNTY GOVERNMENT ADDRESS THIS ISSUE IN VIEW OF THE RECENT OPENING OF A NUDE DANCING ESTABLISHMENT THERE. CERTAINLY, THE CURRENT LITIGATION IN LOUISVILLE WILL HELP TO FURTHER DEFINE THE LAW IN KENTUCKY.

NUDE DANCING IS A LUCRATIVE BUSINESS. ACCORDINGLY, OWNERS OF SUCH BUSINESSES HAVE GONE TO GREAT LENGTHS TO INSURE THEIR RIGHT TO OPERATE WITH AS LITTLE GOVERNMENT INTERFERENCE AS POSSIBLE. ON THE OTHER HAND, GOVERNMENT AT ALL LEVELS IS EXPERIENCING A LOT OF POLITICAL PRESSURE TO FURTHER CURB THIS ACTIVITY. AS A RESULT, IT IS APPARENT THAT THIS AREA WILL CONTINUE TO BE A FERTILE AREA FOR LITIGATION.