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Erhardt v. State: Nude Dancing Stripped of First Amendment Protection

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I. INTRODUCTION

Indiana's Public Indecency Statute¹ continues to spawn paroxysmal majority opinions and dissents in a seemingly futile judicial attempt to narrow the legislative prohibition against public nudity. Once limited to the Indiana Supreme Court,² the divisive opinions concerning the constitutional parameters of dancing nude in public now pervade the Indiana Courts of Appeals.³ The differing treatment of nude dancing by Indiana

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¹IND. CODE § 35-45-4-1 (Supp. 1985) provides:

- (a) A person who knowingly or intentionally, in a public place:
 - (1) Engages in sexual intercourse;
 - (2) Engages in deviate sexual conduct;
 - (3) Appears in a state of nudity;
 - (4) Fondles the genitals of himself or another person; commits public indecency, a class A misdemeanor.
- (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.
- (c) A person who, in a place other than a public place, with the intent to be seen by persons other than invitees and occupants of that place:
 - (1) Engages in sexual intercourse;
 - (2) Engages in deviant sexual conduct; or
 - (3) Fondles the genitals of himself or another person; where he can be seen by persons other than the invitees and occupants of that place commits indecent exposure, a class C misdemeanor.

²See *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979).

³*E.g.*, *Adims v. State*, 461 N.E.2d 740 (Ind. Ct. App. 1984) (nude dancing in adult bookstore violated Public Indecency Statute). *Cf.* *Erhardt v. State*, 463 N.E.2d 1121 (Ind. Ct. App. 1984) (dance contestant in "Miss Erotica" contest did not violate Public Indecency

Courts of Appeals marks a continuing uncertainty as to the first amendment⁴ protection afforded this "expressive conduct."⁵

Erhardt v. State,⁶ the most recent decision reflecting this conflict in the appellate courts, generated a majority opinion and a dissent in the Indiana Court of Appeals⁷ and a majority opinion and two dissents in the Indiana Supreme Court.⁸ From these opinions only a few certainties can be gleaned: 1) public nudity is entitled to "some protection," although the nature of the nudity protected and the degree of protection remains uncertain;⁹ 2) nude dancing is devoid of any expressive content meriting constitutional protection;¹⁰ and 3) nude dancing need not be lewd nor obscene to be prohibited by the public indecency statute.¹¹ Perhaps no greater idea can be culled from the *Erhardt* opinions than Justice DeBruler's call for a "remand to the legislature to make plain through its own added language what societal problems it perceives to exist in this area at this point in history, and to draw the line between legitimate public nudity and criminal public nudity."¹²

Although the Indiana Supreme Court majority in *State v. Baysinger*¹³ postulated that the judiciary could cure or narrow whatever overbreadth

Statute when she danced nude), *rev'd*, 468 N.E.2d 224 (Ind. 1984). See also *infra* text accompanying note 80.

"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 the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The first amendment applies to the states through the fourteenth amendment. *Bridges v. California*, 314 U.S. 252 (1941); *Hague v. CIO*, 307 U.S. 496 (1939); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925).

⁴Whether nude dancing is merely conduct or expression of ideas or a hybrid of these two appears to be central to the Indiana Supreme Court's analysis. The court has refused to grant nude dancing the presumption that the expression of ideas may be involved. Instead, the court distinguishes between nude *conduct* and protected *communication*. See *infra* notes 15 and 102 and accompanying text.

⁵468 N.E.2d 224 (Ind. 1984).

⁶463 N.E.2d 1121 (Ind. Ct. App.), *rev'd*, 468 N.E.2d 224 (Ind. 1984) (Judge Miller wrote the opinion of the court of appeals and Judge Young concurred. Presiding Judge Conover dissented with an opinion.).

⁷468 N.E.2d 224. Chief Justice Givan wrote the majority opinion in which Justices Prentice and Pivarnik concurred. Justices DeBruler and Hunter dissented with separate opinions. Justices DeBruler and Hunter have continued their objection to the statute's overbreadth since their dissent in *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979). See *infra* text accompanying note 88.

⁸*Erhardt v. State*, 463 N.E.2d at 1122-23 (citing *State v. Baysinger*, 272 Ind. at 247, 397 N.E.2d at 587 (1979)), *rev'd*, 468 N.E.2d 224 (1984).

⁹*Erhardt*, 468 N.E.2d 224. See also *State v. Baysinger*, 272 Ind. at 247, 397 N.E.2d at 587; *Adims v. State*, 461 N.E.2d at 742.

¹⁰468 N.E.2d 224 (Ind. 1984).

¹¹*Id.* at 226.

¹²272 Ind. 236, 397 N.E.2d 580.

existed in the Indiana Public Indecency Statute,¹⁴ *Erhardt* reflects a continuing reluctance by the court to narrow the statute's proscription to provide for protective expression. Instead, the majority accepts a specious distinction between speech and conduct in first amendment analysis¹⁵ and applies it to nude dancing so to penalize apparently all public nude conduct unaccompanied by Shakespearean verse or MacDermot score.¹⁶ A review of the federal decisions and treatment of this issue by other states reveals that the Indiana Public Indecency Statute is incurably overbroad in regulating expression protected by the first amendment.

II. THE BELLWETHER, THE WEATHERVANE, AND THE STORM

A. *The Bellwether*: State v. Baysinger

In 1980, the Indiana Supreme Court first considered the constitutionality of the Indiana Public Indecency Statute. In *State v. Baysinger*,¹⁷ the defendants, dancers and owners or operators of taverns and bars which offered nude dancing as entertainment, challenged Indiana's Public Indecency Statute as unconstitutionally vague and overbroad. In a decision which has twice been dismissed for lack of a federal question by the United States Supreme Court,¹⁸ the Indiana Supreme Court found the statute sufficiently drawn that " 'men of common intelligence [need not] necessarily guess at its meaning or differ as to its application.' "¹⁹ Moreover, the court concluded that nude dancing in the setting in which it occurred — the barroom or tavern — is merely conduct, not speech, and as such, does not rise to the level of a first amendment claim.²⁰

The majority in *Baysinger* relied on *California v. LaRue*²¹ to support the view that the state has broad authority to control the sale of

¹⁴*Id.* at 247, 397 N.E.2d at 587.

¹⁵The Supreme Court has been unable to formulate "a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression." *Cowgill v. California*, 396 U.S. 371, 372 (1970) (Harlan, J., concurring). See generally Ely, *Flag Desecration: A Case Study in the Role of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493-96 (1975).

¹⁶Galt MacDermot composed the score for the musical "Hair."

¹⁷272 Ind. 236, 397 N.E.2d 580.

¹⁸The *Baysinger* decision was a consolidation of several causes with similar appealable issues. After the Indiana Supreme Court's ruling, certain parties continued their appeal until dismissed by the United States Supreme Court. See 449 U.S. 806 (1980); 446 U.S. 931 (1980).

¹⁹272 Ind. at 238, 397 N.E.2d at 582. The defendants contended that the statute was vague because the word "public" was undefined. Relying upon early case law definitions, the Indiana Supreme Court concluded that "public place" is sufficiently defined as a place " 'accessible to the public' " and " 'where the public is invited and are free to go upon special or implied invitation.' " *Id.* (quoting *Peachy v. Boswell*, 240 Ind. 604, 621-22, 167 N.E.2d 48, 56-57 (1960)).

²⁰272 Ind. at 247, 397 N.E.2d at 587.

²¹409 U.S. 109 (1972).

intoxicating liquors under the twenty-first amendment and to proscribe some acts which are not obscene and possibly within the limits of the first and fourteenth amendments' protection of freedom of expression.²² The defendants' challenge in *Baysinger*, however, unlike the constitutional challenges raised in *LaRue* and in other states at that time over nudity regulations,²³ was directed to a statute which was a "pure" regulation of nudity. The Indiana statute is not limited in its application to establishments where alcoholic beverages are served, nor is it a regulation of nudity by zoning ordinances. The statute is a pure regulation in the sense it proscribes nudity "in a public place."²⁴

The *Baysinger* majority acknowledged case law in other jurisdictions holding that the regulation of nude dancing through public indecency statutes or ordinances is unconstitutional unless the laws are tied to the regulation of alcoholic beverages.²⁵ Nonetheless, the majority supported its decision by classifying nude dancing as conduct unrelated to the expression of ideas. The court reasoned that since there is no right to appear nude in public, the statute did not violate any protective freedom.²⁶

Justices Hunter and DeBruler dissented with separate opinions and emphasized the reach of the statute into areas clearly protected by the first amendment.²⁷ Productions involving nudity for the use of educational purposes, as well as other presumably legitimate entertainment purposes, could be prohibited under the statute.²⁸ The only circumstance in which the United States Supreme Court had allowed a ban on nude dancing

²²*Id.* In *California v. LaRue*, the holders of liquor licenses challenged the constitutionality of regulations issued by the Alcoholic Beverage Control agency prohibiting explicitly sexual live entertainment in bars. The Supreme Court held the states have broad latitude under the twenty-first amendment to control the manner and circumstances under which liquor may be dispensed.

²³*See, e.g.,* *Blatnik Co. v. Ketola*, 587 F.2d 379 (8th Cir. 1978); *Nall v. Baca*, 95 N.M. 783, 626 P.2d 1280 (1980); *Seattle v. Hinkley*, 83 Wash. 2d 205, 517 P.2d 595 (1973).

²⁴*See supra* note 1.

²⁵272 Ind. at 244, 397 N.E.2d at 585 (citing *Jamaica Inn, Inc. v. Daley*, 53 Ill. App. 3d 257, 368 N.E.2d 589 (1977); *New York Toppless Bar and Dancers Assoc. v. New York State Liquor Auth.*, 91 Misc. 2d 780, 398 N.Y.S.2d 637 (N.Y. Sup. Ct. 1977); *People v. Nixon*, 88 Misc. 2d 913, 390 N.Y.S.2d 518 (N.Y. Sup. Ct. 1976)).

²⁶272 Ind. at 247, 397 N.E.2d at 587.

²⁷*Id.* at 248-51, 397 N.E.2d at 587-89 (Hunter, DeBruler, JJ., dissenting).

²⁸*Id.* at 249, 397 N.E.2d at 588 (DeBruler, J., dissenting) (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *California v. LaRue*, 409 U.S. 109 (1972); *Schacht v. United States*, 398 U.S. 58 (1970)). Justice Givan, who concurred with the majority opinion in *Baysinger*, later wrote in *Sedelbauer v. State*, 428 N.E.2d 206 (Ind. 1981), that "a nude model may be presented to an art class to aid instruction of the students as to how to depict the nude human form. The model may be presented in a wholly acceptable manner and not be considered as lewd or obscene." *Id.* at 208.

was when a state included the ban as part of a liquor license program.²⁹ For that reason, the dissenting justices found the statute swept within its ambit protected speech or expression and was therefore unconstitutionally overbroad.³⁰

B. The Weathervane: How Strong is the Implication that Nude Dancing is Protected "Expression"?

The majority's opinion in *Baysinger*, that nude dancing is nothing more than "conduct" and not entitled to first amendment protection, is not unique. In the early 1970's several courts similarly classified nude dancing as mere conduct without a communicative element.³¹ *Crownover v. Musick*,³² the most notable of these, was cited by the majority in *Baysinger* to support the view that when nudity occurs as a public act unrelated to motion pictures and theatrical productions, the nudity is merely conduct and subject to state regulation.³³ In *Crownover*, the Supreme Court of California determined that ordinances regulating nudity in establishments serving food and liquor were not unconstitutionally overbroad. The court held the ordinance did not prohibit speech, expression, or entertainment. The ordinance merely directed that the entertainer could not appear with genitals or breasts exposed.³⁴ The court reasoned that the ordinance proscribed no more than was necessary to ban the nudity which was deemed harmful to the public's welfare or morals.³⁵ The *Crownover* court assumed for the purposes of argument, however,

²⁹272 Ind. at 251, 397 N.E.2d at 589 (citing *California v. LaRue*, 409 U.S. 109 (1972)).

³⁰272 Ind. at 248-51, 397 N.E.2d at 587-89 (Hunter, DeBruler, JJ., dissenting).

³¹See *Jones v. Birmingham*, 45 Ala. App. 86, 224 So. 2d 922 (1970); *Yauch v. State*, 109 Ariz. 576, 514 P.2d 709 (1973); *Robinson v. State*, 253 Ark. 882, 489 S.W.2d 503 (1973); *Crownover v. Musick*, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), *cert. denied*, 415 U.S. 931 (1974); *Hoffman v. Carson*, 250 So. 2d 891 (Fla.), *appeal dismissed*, 404 U.S. 981 (1971); *People v. Moreira*, 70 Misc. 2d 68, 333 N.Y.S.2d 215 (N.Y. Dist. Ct. 1972); *Portland v. Derrington*, 253 Or. 289, 451 P.2d 111, *cert. denied*, 396 U.S. 901 (1969); *Wayside Restaurant, Inc. v. Virginia Beach*, 215 Va. 231, 208 S.E.2d 51 (1974); *Seattle v. Marshall*, 83 Wash. 2d 665, 521 P.2d 793, *cert. denied*, 419 U.S. 1023 (1974); *State v. Maker*, 48 Wis. 2d 612, 180 N.W.2d 707 (1970), *cert. denied*, 401 U.S. 1013 (1971).

³²9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973). The California Supreme Court later overruled *Crownover* in *Morris v. Municipal Court*, 32 Cal. 3d 553, 652 P.2d 51, 186 Cal. Rptr. 494 (1982).

³³272 Ind. at 244, 397 N.E.2d at 585.

³⁴9 Cal. 3d at 418, 509 P.2d at 505, 107 Cal. Rptr. at 689. The *Crownover* court overruled earlier California case law which specifically found that nude entertainment was communicative and entitled to prima facie first amendment protection unless judged to be obscene. See *In re Giannini*, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968).

³⁵9 Cal. 3d at 428, 509 P.2d at 512, 107 Cal. Rptr. at 696.

that in some instances "a communicative element" might exist³⁶ which would invoke the four-fold test of *United States v. O'Brien*.³⁷ In applying the *O'Brien* test³⁸ to the ordinance, the court concluded that: 1) the governmental entity had the inherent power to regulate nude conduct in bars, restaurants, and other public places;³⁹ 2) the ordinance furthered an important or substantial interest in promoting public morals;⁴⁰ 3) the ordinance regulating nude conduct was aimed at conduct, not speech;⁴¹ and 4) the ordinance imposed no more restriction on first amendment freedom of speech and expression than was essential to the furtherance of important or substantial governmental interests.⁴² Thus, the *Crownover* court was satisfied that even if the nude dancing contained some communicative element involving first amendment protection, the ordinance was constitutionally tailored to serve a legitimate interest.⁴³

The *Crownover* analysis was not unlike the reasoning appearing in several decisions at that time.⁴⁴ Little consideration was given to whether nude dancing contained an expressive element deserving first amendment protection. At best it was considered bacchanal revelry or a sales gimmick occurring in a tawdry atmosphere blighting the neighborhood, if not the entire community.⁴⁵ Regulation of this "conduct" was permissible either as incidental to the state's regulation under the twenty-first amendment or the state's interest in protecting public morals.⁴⁶

By the mid 1970's, however, the courts recognized that statutes regulating public nudity violated the first amendment if not limited to

³⁶*Id.* at 426-27, 509 P.2d at 511, 107 Cal. Rptr. at 695.

³⁷391 U.S. 367 (1968).

³⁸The Supreme Court developed a test in *O'Brien* to be applied when speech and nonspeech elements are combined in the same course of conduct. The government regulation must be within the constitutional power of the government and must further an important or substantial governmental interest. The regulation must be unrelated to the suppression of free expression. The incidental restriction on first amendment freedoms must be no greater than is essential to further the governmental interest. 391 U.S. at 376-77.

³⁹Cal. 3d at 427, 509 P.2d at 511, 107 Cal. Rptr. at 695.

⁴⁰*Id.* at 427, 509 P.2d at 511-12, 107 Cal. Rptr. at 695-96. The court observed: "[W]e cannot say that a 'topless' female or 'bottomless' or nude person of either sex in a public place or a place open to the public is socially commonplace or has the support of a societal consensus." *Id.* at 427, 509 P.2d at 512, 107 Cal. Rptr. at 696. (citations omitted).

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.*

⁴⁴*See, e.g.,* Hoffman v. Carson, 250 So. 2d 891 (Fla.), *appeal dismissed*, 404 U.S. 981 (1971); Brandon Shores, Inc. v. Greenwood Lake, 68 Misc. 2d 343, 325 N.Y.S.2d 957 (1971); Portland v. Derrington, 253 Or. 289, 451 P.2d 111, *cert. denied*, 396 U.S. 901 (1969); State v. Maker, 48 Wis. 2d 612, 180 N.W.2d 707 (1970), *cert. denied*, 401 U.S. 1013 (1971).

⁴⁵Cal. 3d at 426, 509 P.2d at 511, 107 Cal. Rptr. at 695.

⁴⁶*See supra* note 44.

places dispensing alcoholic beverages.⁴⁷ Although these decisions were commonly marked by dissent, the majority of the justices of these courts found dicta in United States Supreme Court decisions persuasive in establishing an inference that some public nudity — even the customary barroom type of nude dancing — involved “the barest minimum of protected expression” and statutes prohibiting this nudity were unconstitutional.⁴⁸ Although the Supreme Court alluded to the possible extension of first amendment protection to nude dancing in *LaRue*,⁴⁹ not until *Doran v. Salem Inn, Inc.*⁵⁰ did there emerge a strong implication that the United States Supreme Court would view nude dancing as expression deserving first amendment protection. In *Doran*, a preliminary injunction was issued to enjoin the enforcement of an ordinance of the town of North Hempstead, New York, which banned topless performances in all public places.⁵¹ The Supreme Court sustained the preliminary injunction.⁵² The court distinguished *LaRue*, finding the state’s interest in regulating the sale of liquors in *LaRue* did not apply in *Doran* where the ordinance proscribed nudity in many other establishments as well.⁵³ Justice Rehnquist, writing for the Court, noted that the district court correctly observed that the local ordinance not only prohibited topless dancing in bars, but also prohibited any female from appearing in “any public place” with uncovered breasts. “Any public place” could include the theater, the town hall, the opera house, as well as a public market place, street, or any place of assembly indoors or outdoors. Thus, this ordinance would prohibit the performance of the “Ballet Africains” and a number of other works of unquestionable artistic and socially redeeming significance.⁵⁴

Subsequent Supreme Court decisions strengthened the implication that nude dancing was presumptively afforded constitutional protection; however, the constitutional protection could be counterbalanced by a

⁴⁷See, e.g., *Salem Inn, Inc. v. Frank*, 522 F.2d 1045, 1048-50 (2d Cir. 1975); *Starshock, Inc. v. Shusted*, 493 F.2d 1401 (3d Cir. 1974); *Saxe v. Brennan*, 416 F. Supp. 892, 894-95 (E.D. Wis.), *aff'd*, 544 F.2d 521 (7th Cir. 1976); *Attwood v. Purcell*, 402 F. Supp. 231, 236 (D. Ariz. 1975); *Koppinger v. Fairmont*, 311 Minn. 186, 248 N.W.2d 708, 715-16 (1976); *People v. Nixon*, 88 Misc. 2d 913, 390 N.Y.S.2d 518 (N.Y. Sup. Ct. 1976).

⁴⁸*Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

⁴⁹Justice Rehnquist, writing for the Court, stated, “We do not disagree with the . . . determination that the regulations [prohibiting nude entertainment in bars and other establishments licensed to dispense liquor by the drink] on their face would proscribe some forms of visual presentations that would not be found obscene under *Roth* [v. United States, 354 U.S. 476 (1957)] and subsequent decisions of this Court.” 409 U.S. at 116.

⁵⁰422 U.S. 922.

⁵¹*Id.* at 932.

⁵²*Id.* at 934.

⁵³*Id.* at 933.

⁵⁴*Id.* (citing *Salem Inn, Inc. v. Frank*, 364 F. Supp. 478, 483 (E.D.N.Y. 1973)).

legitimate state interest. In *Schad v. Borough of Mount Ephraim*,⁵⁵ a zoning ordinance excluded from the borough all live entertainment, including nude dancing.⁵⁶ The United States Supreme Court ruled the ordinance unconstitutional and observed:

Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee. Nor may an entertainment program be prohibited solely because it displays the nude human figure. "[N]udity alone" does not place otherwise protected material outside the mantle of the First Amendment. Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation.⁵⁷

Most recently, in *New York State Liquor Authority v. Bellanca*,⁵⁸ the Court noted that the first amendment protection which may be presumptively afforded to nude dancing may be overcome by the state's exercise of broad powers arising under the twenty-first amendment.⁵⁹ Language emanating from the Supreme Court on nude dancing has been consistently rooted in decisions attacking zoning ordinances, as in *Schad*, or alcoholic beverage regulations, as in *Bellanca*. Thus, the Court has never directly addressed the first amendment implications of nude dancing. Justice Stevens, dissenting in *Bellanca*, noted: "Although the Court has written several opinions implying that nude or partially nude dancing is a form of expressive activity protected by the first amendment, the Court has never directly confronted the question."⁶⁰

Nonetheless, the implication of the Supreme Court that nude dancing is a form of expressive activity protected by the first amendment is quite strong. The extensive treatment in *LaRue*, *Schad*, and *Bellanca* concerning the distinction between nude dancing occurring in an establishment which serves alcohol and in an establishment which does not would be pointless if nude entertainment were not entitled to a first amendment protection in either establishment.⁶¹ Lower courts have determined the implication to be so strong that decisions resting upon a finding that nude dancing

⁵⁵452 U.S. 61 (1981).

⁵⁶*Id.* at 63.

⁵⁷*Id.* at 65-66 (citations omitted).

⁵⁸452 U.S. 714.

⁵⁹*Id.* at 718.

⁶⁰*Id.* at 718-19.

⁶¹See *Morris v. Municipal Court for San Jose-Milpitas Judicial District of Santa Clara County*, 32 Cal. 3d 553, 564 n.10, 652 P.2d 51, 57 n.10, 186 Cal. Rptr. 494, 500 n.10 (1982).

constitutes merely conduct are being reevaluated.⁶² The California Supreme Court reevaluated its holding in *Crownover* and confessed that its decision that nude dancing was not entitled to first amendment protection could not stand in view of these later decisions.⁶³ The modern trend has been to strike regulations of public nudity and nude dancing as unconstitutional unless the ban is necessitated by a legitimate state interest and the regulation is narrowly drawn to serve that end.⁶⁴ Where nude dancing occurs in an establishment that sells alcoholic beverages, the courts defer to the states' broad power to regulate the sale of liquor and do not quarrel with the wisdom of the legislature in prohibiting the nudity.⁶⁵ However, when the prohibition extends beyond the reach of the twenty-first amendment to encompass an establishment which does not serve liquor, the courts will scrutinize the regulation to discover the legitimate state interest advanced.⁶⁶ In the absence of a legitimate state interest, the nude conduct must be permitted unless obscene.⁶⁷

C. *The Storm: Erhardt v. State*

At the time the Indiana Supreme Court decided *Baysinger*, the court did not have the advantage of the dicta in *Schad* and *Bellanca* which solidified the implication that nude dancing is deserving of some first amendment protection. However, the trend since 1975 and the United States Supreme Court's suggestion in *Doran* are clearly contrary to the Indiana Supreme Court's holding that nude dancing is merely conduct. In reaching its decision in *Baysinger*, the majority rejected the proposition that the dicta in *Doran* was persuasive on this issue.⁶⁸ Additionally, the majority eschewed those decisions from other jurisdictions that have held that regulations of nude dancing were overbroad unless promulgated as incidental to the states' power under the twenty-first amendment or tailored to serve the states' legitimate interest.⁶⁹

⁶²See, e.g., *Morris*, 32 Cal. 3d 553, 652 P.2d 51, 186 Cal. Rptr. 494 (1982).

⁶³*Id.*

⁶⁴See *Chase v. Davelaar*, 645 F.2d 735 (9th Cir. 1981); *Mickens v. Kodiak*, 640 P.2d 818 (Alaska 1982); *Trombetta v. Mayor & Comm'rs of Atlantic City*, 181 N.J. Super. 203, 436 A.2d 1349 (1981); *People v. Wehnke*, 107 Misc. 2d 881, 436 N.Y.S.2d 137 (1981).

⁶⁵See, e.g., *City of Miami Springs v. J.J.T., Inc.*, 437 So. 2d 200 (Fla. Dist. Ct. App. 1983); *Blau-Par Corp. v. New York State Liquor Auth.*, 106 App. Div. 2d 503, 482 N.Y.S.2d 841 (1984); *Highway Tavern Corp. v. McLaughlin*, 105 App. Div. 2d 122, 483 N.Y.S.2d 323 (1984); *Pennsylvania Liquor Control Bd. v. J.P.W.G. Inc.*, 489 A.2d 992 (Pa. Commw. Ct. 1985).

⁶⁶See *supra* note 64.

⁶⁷See, e.g., *Cabaret Enter., Inc. v. Alcoholic Beverages Control Comm'n*, 393 Mass. 13, 468 N.E.2d 612 (1984); *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978).

⁶⁸272 Ind. at 243, 397 N.E.2d at 584.

⁶⁹*Id.* at 244, 397 N.E.2d at 585.

When later United States Supreme Court decisions added weight to this previously established implication — that nude dancing may be entitled to some first amendment protection — and lower courts began reversing their positions,⁷⁰ the majority's rationale and support in *Baysinger* became increasingly suspect. Not surprisingly, when the Indiana Court of Appeals had the opportunity in 1984, in *Erhardt v. State*,⁷¹ to review the application of the Indiana Public Indecency Statute to nude dancing, the court of appeals concluded that nude dancing performed in an enclosed theater for the entertainment of the paying spectators is presumptively protected as expression under the first amendment.⁷² The Indiana Supreme Court, however, in a five-paragraph decision, set aside the opinion of the court of appeals and reaffirmed its holding in *Baysinger* that nude dancing is not entitled to constitutional protection.⁷³

In *Erhardt*, the defendant was one of eight contestants in a "Miss Erotica of Fort Wayne Contest." The competition, which was open to spectators eighteen years of age or older who paid an admission fee, consisted of several parts, including a question and answer segment, a bathing suit competition, and a dance competition. During the defendant's dance competition, the defendant removed her short negligee and panties and completed the performance using a G-string and scotch tape criss-crossed over her nipples.⁷⁴ The defendant was charged with and convicted of violating Indiana's Public Indecency Statute. Erhardt appealed her conviction, challenging the sufficiency of the evidence to support her conviction under the statute.⁷⁵

The Indiana Court of Appeals noted that the Indiana Supreme Court had hinted in *Baysinger* that courts may be constitutionally required to tolerate or to allow some nudity as part of some larger form of expression meriting protection when the communication of ideas is involved.⁷⁶ Thus, according to the court of appeals, not all nudity is per se unlawful and the statute has a narrower scope than its language suggests. When the nudity is not per se unlawful, the applicable standard is Indiana Code section 35-30-10.1-1 which prohibits, among other things, obscene performances.⁷⁷ The court of appeals concluded that the evidence presented against Erhardt established that Erhardt had performed a dance pre-

⁷⁰See *supra* notes 62, 65.

⁷¹463 N.E.2d 1121.

⁷²*Id.* at 1126.

⁷³468 N.E.2d 224.

⁷⁴463 N.E.2d at 1122.

⁷⁵*Id.*

⁷⁶463 N.E.2d at 1123 (citing *Baysinger*, 272 Ind. at 247, 397 N.E.2d at 587).

⁷⁷IND. CODE § 35-30-10.1-1 (1982). Indiana's Obscenity Statute was repealed in 1983. The current version is IND. CODE § 35-49-1-1 (Supp. 1985).

sumptively entitled to first amendment protection.⁷⁸ Furthermore, no evidence was presented to suggest the dance was lewd or obscene so as to be prohibited by the obscenity statute.⁷⁹

The conclusion in *Erhardt* placed the fourth district court of appeals in conflict with the third district court of appeals which had held, in *Adims v. State*,⁸⁰ that nude dancing in an adult bookstore atmosphere was punishable under the Public Indecency Statute. In *Adims*, patrons dropped twenty-five cents into a timing machine to watch the dancing. Judge Miller, writing for the majority in *Erhardt*, distinguished *Adims* on the assumption that the third district had apparently considered the adult bookstore setting an inappropriate theatrical setting to which to extend first amendment protection.⁸¹ Presumably, because the dancing in *Erhardt* occurred in a different setting and within a "contest" context, the court of appeals found sufficient "theatrical presentation" or "communication of ideas" to warrant first amendment protection.

Judge Conover, dissenting in *Erhardt*, found sufficient evidence to support the conviction.⁸² *Erhardt* had appeared nude in a public place as prohibited under the statute; therefore, no further inquiry was necessary.⁸³ Judge Conover's dissent was adopted by the Indiana Supreme Court on transfer in every respect.⁸⁴ The Indiana Supreme Court similarly found *Erhardt's* nudity to be specifically prohibited by the statute.⁸⁵ The court went on to note that the Public Indecency Statute is constitutional and nude dancing need not be lewd nor obscene in order to be prohibited.⁸⁶ The evidence is sufficient if it establishes a defendant has appeared nude in violation of the statute.⁸⁷

Continuing their objection to Indiana's indecency statute, Justices DeBruler and Hunter dissented from the majority's curt discussion of the statute's application to nude dancing.⁸⁸ The justices observed that *Schad* and *Doran* provide strong support for the view that nude dancing upon a stage of a theater is protected against state restriction unless the dancing is obscene.⁸⁹

⁷⁸463 N.E.2d at 1126.

⁷⁹*Id.*

⁸⁰461 N.E.2d 740 (Ind. Ct. App. 1984).

⁸¹463 N.E.2d at 1125.

⁸²463 N.E.2d at 1126-27 (Conover, J., dissenting).

⁸³*Id.* Justice Conover also dissented from the majority's decision because he found the defendant had waived a constitutional challenge to the statute by failing to file a motion to dismiss prior to arraignment. *Id.* (citing IND. CODE § 35-3.1-1-4(b) (1982)).

⁸⁴468 N.E.2d 224. Although the Indiana Supreme Court apparently adopted Justice Conover's position that the constitutional challenge was inadequately preserved, the court briefly addressed the merits of the challenge. See *infra* text accompanying notes 85-87.

⁸⁵468 N.E.2d at 225.

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸468 N.E.2d at 225-26 (Hunter, DeBruler, JJ., dissenting).

⁸⁹*Id.*

III. A COMMON GROUND: REMEDIES FOR THE OVERBREADTH

Although it appears that several of the justices of the Indiana appellate courts have reached an impasse concerning the first amendment protection to be afforded nude dancing, the justices share one basic premise: not all nude conduct in public can be prohibited.⁹⁰ The United States Constitution protects the individual's freedom of expression and when the nude conduct is inextricably tied to the expression, the nudity may not be prohibited absent a legitimate interest.⁹¹ If developed fully, this premise should permit at least the presumption that nude dancing is protected expression, although the dancing may be subject to regulation if the state demonstrates a substantial interest.⁹²

All the justices on the Indiana Supreme Court apparently recognize that a ban on all public nudity is constitutionally impermissible.⁹³ Certain nudity provides an instructional purpose, such as a nude model in an art class,⁹⁴ or cultural enlightenment, such as "Ballet Africains," or entertainment, such as the dramatic works "Equus" or "Bent."⁹⁵ Banning nudity as it occurs in these instances treads heavily on first amendment rights.⁹⁶ Clearly, the Indiana Public Indecency Statute cannot survive unless its broad language is narrowed to except nudity when it occurs as protected expression. The Indiana Supreme Court has suggested that the court will judicially narrow the statute's proscription upon proper challenge, but the court refuses to accord nude dancing, in any context, the presumption of protected expression.⁹⁷ Such a refusal not only ignores the persuasive dicta from the United States Supreme Court's decisions that nude dancing may be entitled to protection, but also denigrates the history of dance as a form of expression.

⁹⁰Justices Hunter and DeBruler have subscribed to this position since their dissent in *Baysinger*, 272 Ind. 248-51, 397 N.E.2d 587-89. Justice Pivarnik, writing the majority opinion in *Baysinger* in which Chief Justice Givan and Justice Prentice concurred, noted that courts must tolerate some nudity as a part of some larger form of expression meriting protection. *Id.* at 247, 397 N.E.2d at 587. Note, however, that Justices Hunter and Prentice have retired from the court.

⁹¹See, e.g., *Chase v. Davelaar*, 645 F.2d 735 (9th Cir. 1981).

⁹²See, e.g., *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir.), *cert. denied*, 459 U.S. 859 (1982).

⁹³See *supra* note 90.

⁹⁴See *Salem Inn, Inc. v. Frank*, 364 F. Supp. 478 (E.D.N.Y. 1973).

⁹⁵"Equus" and "Bent," dramatic productions involving nudity, have been presented by theater companies in Indiana since the enactment of the Public Indecency Statute. No actor or actress in these productions has been charged with violating the statute. One county prosecutor determined that the performance did not violate the law because there was nothing obscene about the performance. See Brief for Appellant at 12, *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984).

⁹⁶*Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

⁹⁷*Baysinger*, 272 Ind. at 247, 397 N.E.2d at 587.

Dance predates most modes of expressing emotion and dramatic feeling. In its earliest forms, dance was part of the tribal ritual or religious practice.⁹⁸ Biblical passages, especially in the book of Psalms, are replete with references to dance as a form of expressing happiness, contentment, and praise.⁹⁹ Today, the local ballet troupe or modern dance company is not without its loyal subscribers. Local dance halls or discotheques thrive on the public interest in dance both as an activity and as a spectacle. To classify dance as a means of expression less important or less communicative than spoken, printed, filmed, or recorded ideas is folly. The first amendment "market place of ideas" cannot be limited to those items which are solely intellectual in content.¹⁰⁰ Although dance has historically been a mode of expression which is more emotive than cognitive, this distinction does not lessen its protection under the Constitution.¹⁰¹

Presumably, the Indiana Supreme Court accepts dance as a protective form of expression but objects to the injection of an act which is unrelated or disconnected from traditional expression protected by the first amendment.¹⁰² The dance, consisting of rhythmical body movements, may be protected expression but it may not be done in the nude.¹⁰³ Such a proscription, however, misperceives the nature of the act. As with a dramatic work or musical score which attempts to convey an emotive message, the costume, the actor, the set, the consonance and dissonance cannot be separated from the act. All combine to produce emotive expression. No clear distinction can be drawn between that act which is merely conduct in the performance and that which is protected expression.¹⁰⁴

⁹⁸See *In re Gianninni*, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655.

⁹⁹See, e.g., *Psalms* 149:3 ("Let them praise his name with dancing, making melody to him with timbrel and lyre!"); *Psalms* 150:4 ("Praise him with timbrel and dance. . .").

¹⁰⁰See Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29 (1973).

¹⁰¹See *Cohen v. California*, 403 U.S. 15, 26 (1971).

¹⁰²*Baysinger*, 272 Ind. at 244, 397 N.E.2d at 585. "We read *LaRue* to caution against attempting to censor dramatic performances in theaters or movies, which may be protected expression." *Id.*

¹⁰³272 Ind. at 244, 397 N.E.2d at 585 (quoting *California v. LaRue*, 409 U.S. 109, 117 (1972)).

But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of "conduct" or "action."

Id.

¹⁰⁴See *supra* note 100.

Nude dancing, however, has been criticized as containing no expressive element protected by the first amendment.¹⁰⁵ It has been labeled as mere conduct amounting to nothing more than a "sales gimmick."¹⁰⁶ The fact that nude dancing may be carried on for profit is inconsequential for constitutional protection.¹⁰⁷ The more erroneous and potentially dangerous assumption belied by this accusation, however, is the belief that courts can make significant distinctions in the appropriate use of nudity in the ballet and the appropriate use of public nudity in performing a rhythmic dance at the local exhibition hall. The United States Supreme Court recognized, in *Cohen v. California*,¹⁰⁸ that "it is largely because governmental officials cannot make principled distinctions in this area [of offensive conduct] that the Constitution leaves matters of taste and style so largely to the individual."¹⁰⁹ Courts are unlikely arbiters in distinguishing between nudity which insults and degrades and nudity which exalts the beauty of the human form. Although "the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by the judges) or in quality (as viewed by the critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some 'entertainment' with his beer or shot of rye."¹¹⁰ The artistic preferences and prurient interests of the vulgar are entitled to no less protection than those of the exquisite esthete.

Nude dancing must be afforded a presumption of constitutional protection. With a showing that the nude display is merely a pretense for the exhibition of public nudity, the presumption could be overcome.¹¹¹ Furthermore, public displays of nudity even in the form of expressive dance are not immune from regulation.¹¹² As the United States Supreme Court has consistently held in its decisions, the individual's right to expression may be outweighed by the state's interest in regulating the sale of liquor under the twenty-first amendment.¹¹³ Thus, the state may legitimately proscribe the forum in which the expressive dance may occur.

¹⁰⁵*Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979); *Adims v. State*, 461 N.E.2d 740 (Ind. Ct. App. 1984). See also *supra* note 31.

¹⁰⁶See *Morris v. Municipal Court for San Jose-Milpitas Judicial District of Santa Clara County*, 32 Cal. 3d 553, 571, 652 P.2d 51, 62, 186 Cal. Rptr. 494, 505 (1982) (Richardson, J., dissenting).

¹⁰⁷See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (it is immaterial whether an activity which enjoys first amendment protection is carried on for profit).

¹⁰⁸403 U.S. 15 (1971).

¹⁰⁹*Id.* at 25.

¹¹⁰*Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974).

¹¹¹See, e.g., *Hoffman v. Carson*, 250 So. 2d 891 (Fla. 1971).

¹¹²See *supra* note 65.

¹¹³See *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972).

Additionally, if the legislature perceives a legitimate interest in regulating nude dancing, then upon articulating this interest and tailoring the regulation narrowly, the legislature may enact regulations designed to serve that end. Interests such as community planning concerns, parking problems, increasing need for police protection,¹¹⁴ the promotion of public morals, protection of the health of the community, and the exploitation of human nudity in a degrading manner, however, are insufficient interests to satisfy this purpose.¹¹⁵ At least with the legislature's interest articulated, Indiana's Public Indecency Statute can be pared of its overbreadth and tailored to serve those particular goals.

IV. CONCLUSION

Presently, Indiana's Public Indecency Statute encroaches upon legitimate expression involving public nudity. The Indiana courts are reluctant to carve out an exception under the statute or declare the statute overbroad. The majority of the justices of the Indiana Supreme Court appear committed to the idea that public nudity occurring in relation to dance is not entitled to even a presumption of constitutional protection.¹¹⁶ Until the Indiana General Assembly defines the interests sought to be protected and narrows the current statute, or until the composition of the Indiana Supreme Court undergoes a change sufficient to alter the balance of opinions, professional ecdysiasts are prohibited from performing their dances in any public hall, theater, or commercial establishment in Indiana.

Alternatively, professional dancers may seek protection for their communication in a federal forum where the law may be more sensitively applied and where first amendment rights may be zealously guarded.¹¹⁷ A plaintiff seeking first amendment protection in Indiana may be denied his or her request in the state courts, but may simply walk across the street to the federal court and obtain protection. That first amendment

¹¹⁴These interests were expressly rejected by the United States Supreme Court in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), as insubstantial to warrant regulation of nudity.

¹¹⁵In *Morris v. Municipal Court for San Jose-Milpitas Judicial District of Santa Clara County*, the California Supreme Court reviewed these interests as first presented in *Crownover v. Musick*, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973) and concluded the interests were too insubstantial to warrant regulation. 32 Cal. 3d 566-69, 652 P.2d 59-61, 186 Cal. Rptr. 501-03.

¹¹⁶See *supra* text accompanying note 84. See also *supra* note 90.

¹¹⁷On July 29, 1985, the Honorable Judge Allen Sharp, Chief Judge for the United States District Court, Northern District of Indiana, enjoined the City of South Bend, South Bend Police Department, the prosecutor of South Bend, and the Attorney General of the State of Indiana from enforcing Indiana's Public Indecency Statute against any true nude or semi-nude entertainment performed by professional dancers at a northern Indiana adult bookstore. *Glen Theatre, Inc. v. Civil City of South Bend*, No. 585-353, slip. op. at 12 (N.D. Ind. July 29, 1985).

protection for nude dancing depends upon the forum in which the complaint is filed, however, is a concept heretical to all notions of justice. Justice DeBruler's call for a "remand to the legislature . . . to draw the line between legitimate public nudity and criminal public nudity"¹¹⁸ must not go unheeded.

¹¹⁸See *supra* text accompanying note 12.