lications. Whether this represents a distinction between live performances and other entertainment media, or whether it signals a more permissive approach overall to governmental regulation of non-obscene but sexually explicit material, remains to be seen. In *Barnes v. Glen Theatre, Inc.*,[1391] the Court upheld application of Indiana's public indecency statute to require that dancers in public performances of nude, non-obscene erotic dancing wear "pasties" and a "G-string" rather than appear totally nude. There was no opinion of the Court, three Justices viewing the statute as a permissible regulation of "societal order and morality," [1392] one viewing it as a permissible means of regulating supposed secondary effects of prostitution and other criminal activity,[1393] and a fifth Justice seeing no need for special First Amendment protection from a law of general applicability directed at conduct rather than expression.[1394] All but one of the Justices agreed that nude dancing is entitled to some First Amendment protection,[1395] but the result of *Barnes* was a bare minimum of protection. Numerous questions remain unanswered. In addition to the uncertainty over applicability of *Barnes* to regulation of the content of films or other shows in "adult" theaters,[1396] there is also the issue of its applicability to nudity in operas or theatrical productions not normally associated with commercial exploi-

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[1391] 501 U.S. 560 (1991).

[1392] 501 U.S. at 568 (Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy).

[1393] 501 U.S. at 581 (Justice Souter).

[1394] 501 U.S. at 572 (Justice Scalia). The Justice thus favored application of the same approach applied to free exercise of religion in Employment Division v. Smith, 494 U.S. 872 (1990).

[1395] Earlier cases had established as much. *See* California v. LaRue, 409 U.S. 109, 118 (1972); Southeastern Promotions v. Conrad, 420 U.S. 546, 557–58 (1975); Doran v. Salem Inn, 422 U.S. 922, 932 (1975); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981); New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 716, 718 (1981). Presumably, then, the distinction between barroom erotic dancing, entitled to minimum protection, and social "ballroom" dancing, not expressive and hence not entitled to First Amendment protection (*see* City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989)), still hangs by a few threads. Justice Souter, concurring in *Barnes*, 501 U.S. 560, 587 (1991), recognized the validity of the distinction between ballroom and erotic dancing, a validity that had been questioned by a dissent in the lower court. Miller v. Civil City of South Bend, 904 F.2d 1081, 1128–29 (7th Cir. 1990) (Easterbrook, J.).

[1396] Although Justice Souter relied on what were essentially zoning cases (Young v. American Mini Theatres and Renton v. Playtime Theatres) to justify regulation of expression itself, he nonetheless pointed out that a pornographic movie featuring one of the respondent dancers was playing nearby without interference by the authorities. This suggests that, at least with respect to direct regulation of the degree of permissible nudity, he might draw a distinction between "live" and film performances even while acknowledging the harmful "secondary" effects associated with *both*.