Exotic Dancing: Taxable Gyrations or Exempt Art

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EXOTIC DANCING:
TAXIBLE GYRATIONS OR EXEMPT ART?
By John O. Hayward

It does not matter if the dance was artistic or crude, boring or erotic. Under New York's Tax Law, a dance is a dance.¹

I. INTRODUCTION

Exotic dancers usually embroil themselves in censorship battles with local authorities.² But recently they have drawn the attention of tax authorities who have tussled with the owners of so-called “gentlemen’s clubs” over whether the exotic dancing performed in their establishments are subject to taxation.³ This paper examines several recent cases where state authorities choose to tax exotic dancing while at the same time exempting what some jurists regard as comparable choreographic performances. In the opinion of these commentators, the tax authorities exhibited a bias against low-brow artistic expression, thus engaging in impermissible content discrimination.⁴ It advances the proposition that judges should not make artistic evaluations, and concludes with a plea that government officials ought not to tax artistic expression simply because they deem it distasteful or offensive.

II. DANCING’S TURBULENT PAST

A. Different Dances and Diverse Interpretations

As long as humans have walked the planet, they have danced.⁵ One commentator has placed...
dancing into historical and cultural perspective. To quote:

The impulse to move is the raw material that cultures shape into evocative sequences of physical activity that we call dance. This phenomenon is universal. Courting and courtly dances; wedding dances and funeral dances; dances of healing and dances of instruction; dances to arouse, amuse, or uplift onlookers; dances to usher in the seasons and dances that appeal directly to the gods; dances that tell stories and dances that seek to create a formal beauty that cannot be put into words…

Dancing has Biblical and historical roots as well, as one federal circuit court judge pointed out:

Dance as entertainment is one of the earliest forms of expression known to man. Its written history goes back at least as far as fifth century classical Greece, where Euripides described the frenzied fertility dance in his drama Bacchae. Dance also has biblical roots. See e.g., Psalms 149:3 ("let them praise his name with dancing, making melody to him with timbre and lirr!"); Psalms 150:4 ("Praise him with timbrel and dance. . ."). In ancient Rome, dancing was an important part of the annual festivals of Lupercalia and Saturnalia which featured wild group dances that were the precursors of the later European carnival. Eroticism in dancing also has ancient origins. The modern-day belly dance, or baladi, can be traced to the Egyptians of the fourth century, B.C. Buonaventura, W. Serpent of the Nile (1990). From these ancient roots one can trace the forms of dance native to America. Indeed dance pervades our culture, from the American Ballet Theater to Broadway's A Chorus Line and West Side Story, from Hollywood's Astaire and Rogers to the local discotheque.

But more importantly, especially for purposes of this essay, is the observation that dancing can impart different meanings to different people, so that the same dance can be susceptible to a wide range of interpretations. As one observer declares:

But meaning as well as beauty is in the eye of the beholder; and one person’s shudder of religious ecstasy may be another person’s shimmy of sexual abandon. So intensely personal is dance, so closely linked to cultural identity, that when people disagree about the meaning and value of specific dances, the resulting confusion may breed, contempt, anger, even violence.

B. Censorship of Dancing

Historically, dances have had to endure the wrath of moral censors. From St. Augustine (354 CE-430 CE) who denounced all wild, abandoned dancing, even when accompanied by psalm-singing, to the New England Puritan Increase Mather, who in his 1685 tract Mixt or Promiscuous

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6 GERALD JONAS, DANCING, THE PLEASURE, POWER, AND ART OF MOVEMENT (Educational Broad-casting Corp; 1992) at 12.
7 Flaum, C.J., in Miller v. City of South Bend, 904 F.2d 1081, 1085 (7th Cir. 1990).
8 Jonas supra note 6, at 12.
9 Id. at 44. St. Augustine nevertheless had to permit dancing because it is mentioned in The BIBLE. See Psalms 149:3, “Let them praise his name with dancing . . .!” and Psalms 150:4, “Praise him with timbrel and dance.”
Dancing, condemned “Gynecandrical Dancing” as the invention of the Devil, through to the Christian missionaries newly arrived in Tahiti in 1797 banning native dances because of their open sexuality, dancing has been no stranger to oppression and condemnation. In colonial America, slaveholders forbade “native-style” dancing among the slaves, fearing it would remind the dancers of their life of freedom in Africa. Dancing fared no better in the Twentieth Century, with the Vatican in 1914 denouncing the South American tango and the U.S. turkey trot. In the nineteen fifties, many assailed the “evil beat” of rock-and-roll, worried that “white youth” were being subverted by “African sensuality.” Twenty years later, half a world away in Cambodia, the Khmer Rouge in 1975 sought to wipe out every vestige of the country’s “feudal past” by banning its dances and hunting down and murdering the nation’s royal dancers.

C. Dancing Defined

But what is dancing? Anthropologist Joann Keali’inohomoku defines it as “… a transient mode of expression, performed in a given form and style by the human body moving through space. [It] occurs through purposefully selected and controlled rhythmic movements; the resulting phenomenon is recognized as dance both by the performer and the observing members of a given group.” The movements need not be planned ahead of time, as improvisation as long been recognized as a feature of dancing, an impression world-renowned twentieth century dancer Isadora Duncan strove mightily to create.

Even courts have grappled with a definition of dancing. To quote one jurist:

Dance has been defined as "the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself." Inherently, it is the communication of emotion or ideas. At the root of all "the varied manifestations of dancing . . . lies the common impulse to resort to movement to externalise states which we cannot externalise by rational means. This is basic dance." Martin, J. Introduction to the Dance (1939). Aristotle recognized in Poetics that the purpose of dance is "to represent men's character as well as what they do and suffer." The raw communicative power of dance was noted by the French poet Stephanie Mallarme who declared that the dancer "writing with her body . . . suggests things which the written work could express only in several paragraphs of dialogue or descriptive prose."

D. Predecessors to Today’s Exotic Dancers

10 Id. at 50.
11 Id. at 19.
12 Id. at 165.
13 Id. at 175.
14 Id. at 182.
15 Id. at 13.
16 Id. at 35.
17 Id. at 197. Duncan often danced naked to connect more closely with the earth. As she said, “Therefore dancing naked upon the earth I naturally fall into Greek positions, for Greek positions are only earth positions.” See ISADORA DUNCAN, THE ART OF THE DANCE (Theatre Art Books; 1969) at 58. Many “exotic dancers” would agree with Duncan, but for reasons having nothing to do with the earth.
18 Miller, supra note 7, at 1085-86.
So-called “exotic dancers” made their way from North Africa and the Middle East into Europe and the United States in the late nineteenth century. Debuting at the 1893 World’s Columbian Exposition in Chicago, their dances were actually quite chaste according to contemporary American standards, but the “belly dancers” [a possible misunderstanding of the Arabic word “baladi” (dance)] gave rise to a new genre that become a staple of burlesque; the prototype was a near-nude entertainer who danced at Coney Island under the name of “Little Egypt.” Therefore, today’s “exotic dancers” are unbeknownst to them the descendants of dancers from Algeria, Syria, Egypt, and Palestine who, more than one hundred years ago, established the precedent for their present-day choreographic gyrations.

III. EXOTIC DANCING CONFRONTS THE TAX COLLECTOR

A. If It’s Around a Pole, Is It Dancing?

Recently dancing has had to contend not only with the censor but also the tax collector.

In Matter of 677 New Loudon Corp. v. State of New York Tax Appeals Tribunal, the operator of an adult “juice bar” in Latham, New York, argued that the admission charges and private dance performance fees it collected from patrons were exempt from state sales and use taxes. New York State collects taxes from many different types of entertainment and amusement. It’s tax law imposed a sales tax on "[a]ny admission charge" in excess of 10% for the use of "any place of amusement in the state." The legislature had expansively defined places of amusement that are subject to this tax to include "[a]ny place where any facilities for entertainment, amusement, or sports are provided." Consequently, the tax applied to many kinds of entertainment including attendances at sporting events, such as baseball, basketball or football games, collegiate athletic events, stock car races, carnivals and fairs, amusement parks, rodeos, zoos, horse shows, arcades, variety shows, magic performances, ice shows, aquatic events, and animal acts.

However, the state legislature, seeking to advance local cultural and artistic performances, created an exemption that excluded from taxation admission charges for a specific form of entertainment, namely, "dramatic or musical arts performances." The “juice bar” owner argued that its exotic stage and couch dances qualified as musical arts performances, and therefore were exempt from the tax. By a 4-3 decision, the Court of Appeals disagreed.

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19 Jonas, supra note 6, at 118.
20 Id. at 119. In the 1920s, African-American dancer Josephine Baker, who reigned as queen of the Folies-Bergère in Paris for many years, made an art form out of cabaret in the naughty world of Parisian nightlife. She performed as near to stark naked as was compatible with the art and beauty of the time, in costumes that were ninety-seven per cent feather headdress. See MARGOT FONTEYN, THE MAGIC OF DANCE (Alfred A. Knopf; 1979) at 40.
21 Id. at 118. For a history of “exotic dancing,” see LUCINDA JARRETT, STRIPPING IN TIME: THE HISTORY OF EXOTIC DANCING (Rivers Oram Press; 1997).
23 Id. at 1122.
24 Id. See NY Tax Law §1105 [f] [1].
25 Id. Tax Law §1101 [d] [10].
26 Id. See 20 NYCRR 527.10.
27 Id. See Tax Law §1105 [f] [1].
28 Id.
The majority agreed with the Tax Tribunal that the “juice bar” dance routines performed in so-called “private rooms” did not qualify as choreographed performances. They reached this conclusion because no evidence was presented depicting such performances and the owner’s expert witness had not observed or had no personal knowledge of such performances even though testimony was presented that the routines in the “private rooms” were the same as those on the main performance stage. In addition, the court found that the Tax Tribunal could properly conclude that the dances performed on the main stage also did not qualify as choreographed performances because it discredited the expert’s opinion that they qualified as such. The court declared it was not irrational for the Tax Tribunal to deny an exemption for “exotic dancing,” otherwise it would permit any act declaring itself a “dance performance” to claim the exemption. Remarking that the legislature had seen fit to deny the exemption to ice dancing in ice shows, the majority stated that …surely it was not irrational for the Tax Tribunal to conclude that a club presenting performances by women gyrating on a pole to music, however artistic or athletic their practiced moves are, was also not a qualifying performance entitled to exempt status. To do so would allow the exemption to swallow the general tax…

Finally, the majority brusquely shrugged off the “juice bar” operator’s constitutional argument describing it as “unavailing.”

The dissent began by declaring that the majority had made “a distinction between highbrow dance and lowbrow dance that is not to be found in the governing statute and raises significant constitutional problems.” It stated that the “dispositive” question was whether the Tribunal was seeking to tax admissions to “choreographic performances” and whether the legislature had used “choreographic” as a synonym for “dance.” It answered both questions in the affirmative. It stated that both the Tribunal and the majority had interpreted “choreographic performance” to mean “highbrow dance,” and as a result, they denied the tax exemption to “exotic dances” because they were not sufficiently “cultural and artistic.” Thus they carved out an exception to the legislature’s definition of “choreography.” Although the dissent found these dances “unedifying,” it was no reason to deny them the tax exemption, analogizing the situation to the government taxing Hustler magazine but not The New Yorker because the former was insufficiently “cultural & artistic.” Such

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29 Id. at 1123.
30 Id.
31 Id. Apparently the majority concluded that the Tax Tribunal was more competent than the expert to determine what is a “choreographed performance,” a competency the Dissent found incompatible with the task of collecting taxes. “The Tribunal seems to have missed the point that ‘ranking,’ either of gymnasts or dancers, is not the function of a tax collector.” Id. at 1124.
32 Id. at 1123.
33 Id. While the majority doesn’t regard “gyrating on a pole to music” as dancing, it is well to remember famed American dancer Fred Astaire dancing with a hat rack in the 1951 MGM film Royal Wedding. Although he didn’t “gyrate” on a pole but around it, everyone agrees its dancing. Of course, dancing around a maypole has been practiced for centuries and its symbolism hotly debated. Some say the maypole represents a tree while others argue it honors the ancient Greek god Priapus. See http://en.wikipedia.org/wiki/Maypole (last visited Aug. 28, 2014.)
34 Id.
35 Id.
36 Id.
37 Id at 1124.
38 Id at 1125.
discrimination based on content, it opined, would surely be unconstitutional.\textsuperscript{39}

The majority did indeed distinguish between “highbrow” and “lowbrow” dance. How can judges separate “high” from “low” art? What criteria can be used and who is doing the evaluating? One jurist put the matter succinctly, commenting that “any attempt to distinguish "high" art from "low" entertainment based solely on the advancement of intellectual ideas must necessarily fail.”\textsuperscript{40} Addressing the issue of judicial appraisal of the artistic value of various dances, his remarks are especially appropriate to the \textit{New Loudon Corp} case:

Though this [nude barroom] dance is clearly of inferior artistic and aesthetic quality as contrasted with a classic ballet such as the Dance of the Seven Veils in Strauss' \textit{Salome}, the erotic message communicated to the viewers is present in both performances. That Strauss' \textit{Salome} tells a compelling story and the nude dancing at the Kitty Kat Lounge may not is not determinative; expression does not lose its protection for lack of a scripted plot. And it is apparent that those who view the respective dances readily comprehend the intended messages, for they advance currency to view them. The success of both the ballerina in an erotic production and the nude dancer in a barroom setting depend on the communication of their sensual message.\textsuperscript{41}

Consequently, judges should not make artistic evaluations from the bench because such appraisals are essentially a matter of taste. To quote Justice Scalia

in my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can.\textsuperscript{42}

I think we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: \textit{De gustibus non est disputandum} [In matters of taste, there can be no dispute.]. Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide "What is Beauty" is a novelty even by today's standards.\textsuperscript{43}

As Justice Harlan said in \textit{Cohen v. California}: "We think it is largely because governmental officials cannot make principled distinctions in this area [artistic merit] that the Constitution leaves matters of taste and style so largely to the individual."\textsuperscript{44} Thus for the purposes of judicial inquiry it is irrelevant that judges find the expression inherent in nude dancing to be at odds with their particular tastes.\textsuperscript{45} In our democracy, the government cannot ban an idea or expression simply because some

\textsuperscript{39} Id. (citing Arkansas Writers' Project, Inc. v Ragland, 481 US 221, 229-230 (1987) (discriminatory taxes on the press held to violate the First Amendment)). See infra note 86.

\textsuperscript{40} Miller, supra note 7, at 1086.

\textsuperscript{41} Id. at 1087.

\textsuperscript{42} Pope v. Illinois, 481 U.S. 497, 504 (1987) (proper inquiry in an obscenity trial under the three-pronged \textit{Miller} test not whether an ordinary member of any given community would find serious value in the allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole).

\textsuperscript{43} Id. at 505.

\textsuperscript{44} 403 U.S. 15, 25 (1970), quoted in \textit{Miller} at 1086.

\textsuperscript{45} \textit{Miller} at 1086.
As the U.S. Supreme Court pronounced in *Texas v. Johnson*:

"if there is a bedrock principle underlying the first amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."  

Accordingly, exotic dancing at any one of New York’s many gentlemen’s clubs is entitled to the same judicial deference as nudity in a ballet or opera at Lincoln Center, a legal principle ignored by the majority in *New Loudon Corp.*

**B. The Hustler Club Case: Taxing Sexual Fantasy**

The *New Loudon Corp* case was cited *In the Matter of the Petitions of HDV Manhattan, LLC, et al.*, an administrative tax law determination involving New York City’s Hustler Club. The business sought to avoid paying taxes on the sale of the club’s script (“Beaver Bucks”) as well as monies floor hosts paid to the club by claiming such amounts were not subject to taxation under a statutory exemption for “live dramatic, choreographic or musical performance.” After viewing video footage of routines representative of the acts performed at the Club and hearing testimony of two entertainers describing their maneuvers on the pole as well as two dance experts, the Administrative Law Judge (ALJ) determined that the performances did not “meet the standards set

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47 *Miller* at 1086, quoting *Johnson* at 414.


50 NY Tax Law Articles 28 & 29. The exemption was sought for the period June 1, 2006 through November 30, 2008. *Id.* at 1, 7.

51 The video was taken when the Club was closed. No theatrical lighting was used and the entertainers did not remove their clothing as they would during an actual performance. *Id.* at 4.

52 *Id.* at 4-5.
forth for exemption." As a result, the ALJ found The Hustler Club was subject to taxation as a place of amusement under New York law, and assessed a tax in the amount of $2,113,204.38

The ALJ gave short shrift to The Hustler Club’s argument that the services the entertainers provided were “choreographic performances” under the statute. To quote:

This adult entertainment establishment provides a service to its patrons that essentially boils down to performers who remove their clothing and create an aura of sexual fantasy. … this service is delivered by means of a striptease act that incorporates elements of dance and certainly choreography. The plain facts of this case have been obfuscated in an attempt to characterize these performances in such a way as to take advantage of an exemption available to live dramatic, choreographic performances. However, the service provided by the entertainers at the Hustler Club is sexual fantasy, not dance.6

The Hustler Club’s constitutional arguments were ruled moot, and consequently not addressed.57

Apparently the entertainers’ routines did not contain enough “elements” to qualify as “dance” in the ALJ’s artistic opinion. Although the ALJ did not regard exotic dancing as “art,” one observer regards it as a form of artistic expression to be celebrated and protected.58 Perhaps the solution is for exotic dancers to become more “arty” by incorporating more “dance elements” into their routines. Thus they would win the approval of the taxing authorities who seem to fancy themselves dance experts even though they most likely have not taken a dance class or seldom, if ever, attend the ballet or a choreographic performance. They ought to keep in mind Justice Scalia’s advice in Pope v. Illinois,59 namely that there is no use arguing about taste, let alone litigating about it.60 On the other hand, the tax authorities could rebut with the dance version of Justice Potter Stewart’s famous quip about hard-core pornography. He commented that, while he couldn’t define it, he knew it when he saw it.

Perhaps what holds sway in the tax authorities’ minds is not so much the lack of dance “elements” as the generous amounts of nudity involved in exotic dancing. However, nudity is no stranger to dancing. The world-renowned twentieth century dancer Isadora Duncan often danced

53 Id. at 7.
55 Id. at 6.
56 Id. at 7-8. The ALJ apparently regards herself as a dance critic, similar to the Majority in New Loudon Corp, and therefore subject to the same criticism, i.e., functioning as a dance expert, not a tax collector, leveled by the Dissent in that case. See supra note 31. As to whether striptease can be an “art,” see RACHEL SHTEIR, GYPSY: THE ART OF THE TEASE (ICONS OF AMERICA SERIES) (2009).
57 Id. at 9.
58 See JUDITH LYNN HANNA, NAKED TRUTH: STRIP CLUBS, DEMOCRACY, AND A CHRISTIAN RIGHT (Univ. of Texas Press; 2012). (an historical and anthropological inquiry into exotic dancing by an author who holds a master’s degree in political science and a doctorate in anthropology).
59 481 U.S. 497 (1987), supra note 42.
60 Id. at 504.
61 Jacobellis v. Ohio, 378 U.S. 184 (1964). “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it…” Id. at 197.
naked\textsuperscript{62} causing one dance commentator and academic to suggest that “undoubtedly sex was at the root of her drive to dance.”\textsuperscript{63} This observer has also written that

Why should the dancer adorn his legs and arms? One could reply that not only the arms and legs but the whole body is the dancer’s expressive medium. Therefore, if arms and legs ought to be bare, why not perform completely naked?\textsuperscript{64}

He continues by noting the exhibitionistic tendency in dance:

Dance, of course, has exhibitionistic connotations, and exhibitionism might imply denudation. Where the erotic element should be underlined, nakedness is nefarious. The talent of a Joan Junyer\textsuperscript{65} is needed to bring upon the stage girls with bare breasts, or costumes suggesting bare breasts, such as were designed for \textit{The Minotaur}. The cancan can teach us a lot about eroticism. From the music halls it has grown into French folklore and will continue to fascinate the public. The discretion that underlies the eroticism of the cancan has its opposite in the nude dance (\textit{Nackttanz}) so fashionable in Germany in the 1920s. Serious efforts were made to promote the nude dance… Today the nude dance mania has disappeared. But exhibitionism is an important element in any dance performance.\textsuperscript{66}

Thus it is evident that dance involves exhibitionism, and often eroticism and various stages of nudity. To deny exotic dancers tax exemption because they are providing sexual fantasy is to ignore the sexual ingredient in many famous ballets and operas that contain nudity or near nudity,\textsuperscript{67} whose very purpose is to create the same sexual fantasy, albeit with a more “high brow” form of artistic expression\textsuperscript{68} that the exotic dancers seek to produce. This smacks of impermissible content discrimination\textsuperscript{69} and transforms tax law into a form of censorship.

\textbf{C. Pooh-Bah Enterprises: Exotic Dancing As Culturally Challenged}

In \textit{Pooh-Bah Enterprises, Inc., v. County of Cook},\textsuperscript{70} the Supreme Court of Illinois accorded exotic dancing no respect and concluded that it not qualify as “modern or traditional dance.”\textsuperscript{71} The court met the impermissible content discrimination argument head-on ruling that what takes place in “adult entertainment cabarets” is not commonly regarded as part of the “fine arts” but rather falls within the “outer ambit of the First Amendment’s protection.”\textsuperscript{72} Consequently, the justices decided that small venue exceptions for “live theatrical, live musical, or other live cultural performances” did not apply to Pooh-Bah Enterprises’ establishment and such exclusions did not constitute

\textsuperscript{62} \textit{See supra}, note 17.
\textsuperscript{63} WALTER SORELL, THE DANCE HAS MANY FACES (2\textsuperscript{ND} Ed.) (Columbia Univ. Press; 1966) at 33.
\textsuperscript{64} \textit{Id.} at 182.
\textsuperscript{65} Spanish visual artist (1904-1994) [Writer’s Note].
\textsuperscript{66} \textit{Id.} at 182-83.
\textsuperscript{67} \textit{See supra} note 48.
\textsuperscript{68} \textit{See supra} note 40 (citing Miller v. City of South Bend, 904 F. 2d at 1086).
\textsuperscript{69} \textit{See supra} note 4 (citing City of Los Angeles v. Alameda Books, 535 U.S. at 434).
\textsuperscript{70} 905 N.E. 2d 781 (Ill. 2009). This case has been cited in 24 Illinois court opinions. See \url{https://www.courtlistener.com/ill/coRZ/pooh-bah-enterprises-inc-v-county-of-cook/cited-by/} (last visited Aug. 28, 2014).
\textsuperscript{71} \textit{Id.} at 803.
\textsuperscript{72} \textit{Id.} (citing City of Erie v. Pap’s A.M, 529 U.S. 277, 289 (2000)).
impermissible content-based discrimination under the First Amendment.\textsuperscript{73}

The case involved amusement tax ordinances with small venue exemptions.\textsuperscript{74} The City of Chicago and Cook County had substantially similar amusement tax ordinances with substantially similar small venue exemptions. The amusement tax was imposed upon the admission fee to enter, witness, view or participate in any "amusement" as defined by ordinance.\textsuperscript{75} Under the City's ordinance, an amusement is:

(1) any exhibition, performance, presentation or show for entertainment purposes, * * * including, but not limited to, any theatrical, dramatic, musical or spectacular performance, promotional show, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition such as boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling, or billiard and pool games; (2) any entertainment or recreational activity offered for public participation or on a membership or other basis including, but not limited to, carnivals, amusement park rides and games, bowling, billiards and pool games, dancing, tennis, racquetball, swimming, weightlifting, bodybuilding or similar activities; or (3) any paid television programming, whether transmitted by wire, cable, fiberoptics, laser, microwave, radio, satellite or similar means.\textsuperscript{76}

Operators of amusements were responsible for collecting the taxes from patrons, keeping accurate books and records, and remitting the taxes on a monthly basis.\textsuperscript{77}

Effective January 1, 1999, the City and the County amended their respective ordinances to add small venue exemptions. These exemptions applied to "live theatrical, live musical or other live cultural performances that take place in a space with a maximum capacity of not more than 750 people."\textsuperscript{78} Both the City of Chicago and Cook County intended the exemptions to foster the production of live performances that offer theatrical, musical or cultural enrichment to its residents and visitors.\textsuperscript{79} They later amended their respective ordinances to define "live theatrical, live musical or other live cultural performance" as:

\textsuperscript{73} Id. at 804.
\textsuperscript{74} Id. at 784.
\textsuperscript{75} Cook County Amusement Tax Ordinance § 3 (1999); Chicago Municipal Code § 4-156-020(A) (2008). Id.
\textsuperscript{76} Chicago Municipal Code § 4-156-010 (2008). Id. at 784-85. Id. at 785.
\textsuperscript{77} Cook County Amusement Tax Ordinance § 5 (1999); Chicago Municipal Code § 4-156-030 (2008). Id. at 785.
\textsuperscript{78} Cook County Amusement Tax Ordinance § 3(D)(1) (1999); Chicago Municipal Code § 4-156-020 (West 2008). Id.
\textsuperscript{79} Id. The following preamble accompanied the County's amendment: "WHEREAS, it is the intent of the County Board to foster the production of live performances that offer theatrical, musical or cultural enrichment to the people of Cook County." Cook County Board of Commissioner's Resolution, November 17, 1998, amending the amusement tax ordinance. The City Council Journal entry accompanying passage of the amendment to the city's ordinance includes the following statements:

"WHEREAS, The City Council wishes to foster the production of live performances that offer theatrical, musical or cultural enrichment to the city's residents and visitors; and

WHEREAS, Small theaters and other small venues often promote the local production of new and creative live cultural performances, and often have the most difficulty absorbing or passing on any additional costs; and

WHEREAS, Costs faced by those who produce live theatrical, musical, or other culturally enriching
a live performance in any of the disciplines which are commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings. This term does not include such amusements as athletic events, races or performances conducted at adult entertainment cabarets [as defined by local ordinance].

The County's zoning ordinance defined "adult entertainment cabaret" to mean:

A public or private establishment which features topless dancers, strippers, male or female impersonators or other entertainers who:

A. Display or simulate the display of `specified anatomical areas;' [sic]

B. Perform in a manner which is designed primarily to appeal to the prurient interest of a patron or person; or

C. Engage in, or engage in simulation of, `specified sexual activities.'

The ordinance then continued by defining “specified anatomical areas” and “specified sexual activities.”

performances at smaller venues are substantial, and such performances often require governmental support since they could not otherwise flourish[.]” City Council Journal Entry, November 12, 1998, Cook County Zoning Ordinance of 2001, art. 14.2.1 (2006).

Cook County Amusement Tax Ordinance § 2 (1999); Chicago Municipal Code § 4-156-010 (2008). Id. at 785-86.


"Specified anatomical areas" were defined as:

"A. Anatomical areas if less than completely and opaquely covered by a bathing suit, blouse, shirt, dress, pants, leotard or other wearing apparel or fabric.

1. Any portion of the genitals or pubic region.

2. Any portion of the buttocks.

3. Female breast(s) below a horizontal line across the breast at a point immediately above the top of the areola, including the entire lower portion of the female breast, but shall not include any portion of the cleavage of the female breast.

B. Genitals in a discernible turgid state, even if completely and opaquely covered.

C. Paint, latex or other non-fabric coverings shall not satisfy the requirement of coverage, irrespective of whether the coverage is complete or opaque." Cook County Zoning Ordinance of 2001, art. 14.2.1 (2006).

"Specified sexual activities" were defined as:

"A. Human genitals in a state of sexual stimulation or arousal.

B. Acts of human masturbation, sexual intercourse or sodomy.

The City’s adult use ordinance contained similar definitions of "adult entertainment cabaret," "specified sexual activities," and "specified anatomical areas."\(^8^4\)

In 2001, Pooh-Bah Enterprises sued the County for declaratory and injunctive relief. It alleged that it operated an establishment ("Crazy Horse Too") whose seating capacity was less than 750 persons where scantily clad (but not completely nude) women gave live performances of exotic dancing. It claimed the small venue exemption because the live performances at its establishment qualified as "live theatrical, live musical, or other live cultural performances." It claimed further that its entertainment qualified either as "modern or traditional dance" or "other live cultural performances." The County denied the exemption on the basis that the dance performances were "performances conducted at adult entertainment cabarets."\(^8^5\) Pooh-Bah conceded that its dancers displayed "specified anatomical areas" as defined in the zoning ordinance, but argued that the amusement tax ordinance violated the first and fourteenth amendments to the U. S. Constitution because it discriminated on the basis of content.\(^8^6\) Pooh-Bah also alleged that the tax ordinance was overbroad in violation of the First and Fourteenth amendments.\(^8^7\)

The circuit court upheld the small venue exemption noting that tax exemptions are a "form of subsidy that is administered through the tax system," having "much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."\(^8^8\) It further concluded that the ordinances were neither overbroad nor vague.\(^8^9\)

On appeal, the appellate court reversed,\(^9^0\) holding that the ordinances violated the First Amendment because they contained content-based regulations on speech that do not serve a compelling state interest.\(^9^1\) It first determined that the small venue exemptions to the amusement tax ordinances were not content neutral because one can only tell if something is an "adult entertainment cabaret" by considering the content of the expression featured at the establishment.\(^9^2\) It continued by reasoning that it was dealing with a content-based differential tax on erotic dance, and therefore

\(^8^4\) Id. Chicago Municipal Code § 16-16-030 (2005).
\(^8^5\) Id.
\(^8^6\) Id. at 786-87 (citing Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) for the proposition that discrimination in taxation based on content violates the first and fourteenth amendments unless it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end). See supra note 39.
\(^8^7\) Id. at 787.
\(^8^8\) Id. (citing Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983) (Section 501(c)(3) of the Internal Revenue Code granting tax exempt status to non profit corporations that do not substantially engage in activities to influence legislation held not to violate the First Amendment or the Equal Protection Clause of the Fifth Amendment); Rust v. Sullivan, 500 U.S. 173 (1991) (federal regulations specifying that no funds from Title X of the Public Health Service Act shall be used in programs where abortion is a method of family planning held not to violate the First or Fifth Amendments since the government may make a value judgment favoring childbirth over abortion and, in so doing, it has not discriminated on the basis of viewpoint but merely chosen to fund one activity over another); and National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (federal law requiring the Chairperson of the National Endowment for the Arts (NEA) to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public" held facially valid, since it did not interfere with First Amendment rights nor was it void for vagueness)).
\(^8^9\) Id. at 788.
\(^9^0\) 881 N.E.2d 552 (2007).
\(^9^1\) 905 N.E.2d at 788.
\(^9^2\) Id.
strict scrutiny review applied. The court held that "Regan, Rust, and Finley d[id] not establish that the government can encourage one private speaker over another based on content or message without implicating first amendment concerns." Finally, the court ruled that it could find no compelling state interest that would justify the adult entertainment cabaret exclusions in the amusement tax ordinances and therefore they violated the First Amendment.

Unfortunately for Pooh-Bah Enterprises, the appellate court’s reasoning did not persuade the Illinois Supreme Court. After a lengthy review and analysis of Regan, Rust, and Finley as well as Rosenberger v. Rector & Visitors of the University of Virginia, Legal Services Corp. v. Velazquez, the Court launched into a discussion of differential tax cases before addressing the issue of whether the small venue exemptions violated the First Amendment. It held that the government can make content-based distinctions when it subsidizes speech and that theatrical productions (e.g. the musical “Hair”) that feature actors who appear naked or partially naked do not come within the statutory definition of “adult entertainment cabarets” because they are not strippers since they already have their clothes off. Furthermore, the Court holds that “adult entertainment cabarets” in the City and county ordinances refers to establishments that regularly feature persons who appear in a state of nudity or semi-nudity and that utilize nudity or semi-nudity or specified sexual content as a permanent focus of their business. Thus by presenting a production of “Hair” a theater does not become an “adult entertainment cabaret.” The Court also pointed out that the amusement taxes are generally applicable taxes that apply to a broad range of amusements with some involving protected speech and some not. It commented that the ordinances are “not a direct regulation of adult entertainment but rather a clearly identified program to foster the production of live performances that offer theatrical, musical or cultural enrichment to the people of Cook County and Chicago.” It held that the city and county were entitled to make reasonable content-based distinctions in creating a program to subsidize the

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93 Id.
94 Id. For Regan, Rust, and Finley, see supra note 88.
95 Id.
96 515 U.S. 819 (1995) (public university’s denial of funds to publish a Christian newsletter violated the free speech clause of the First Amendment). Id. at 793.
97 531 U.S. 533 (2001) (restrictions on government funded legal services advocacy violated First Amendment). Id. at 794.
98 Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) (tax on cost of paper and ink used in production of publications violated the First Amendment because it singled out the press for special treatment); Arkansas Writer’s Project, Inc. v. Ragland, 481 U.S. 221 (1987) (selective taxation of press violated First Amendment because tax status depended on content), see supra notes 39 & 85; Leathers v. Medlock, 499 U.S. 439 (1991) (tax on tangible personal property and specified services that exempted subscription and over-the-counter newspapers and subscription magazine sales but not cable television held not to violate the First Amendment); Speiser v. Randall, 357 U.S. 513 (1958) (compelling veterans to sign loyalty oath to obtain property tax exemptions violated First Amendment). Id. at 795-98.
99 Id. at 799 (citing Davenport v. Washington Education Association, 551 U.S.177 (2007) (does not violate the First Amendment for a state to require its public-sector unions to receive affirmative authorization from a non-member before spending that nonmember’s agency fees for election-related purposes)).
100 Id. at 799-800.
101 Id. at 800 (citing Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir 2000)).
102 Id.
103 Id. at 801.
fine arts and that it would be difficult to imagine a more permissible distinction than that between strip clubs and fine arts venues. The Court held the exemptions do not discriminate on the basis of viewpoint because all small fine arts productions are entitled to the exemption and, further, they apply to performances “which are commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings.” Clearly Pooh-Bah Enterprises cannot plead any facts that would put its activities within what is commonly regarded as part of the fine arts,” said the Court. It is “presenting an entirely different type of entertainment” the Court noted.

Once again a court appears to make a distinction between “high-brow” and “low-brow” entertainment, although in this instance the statute is more explicit as to the legislature’s intent making it easier to exclude exotic dancing from a "live theatrical, live musical or other live cultural performance".

D. If It’s Exotic and Mixed with Alcohol, Tax It

Exotic dancing fared no better in Combs v. Texas Entertainment Association, Inc., where it commingled with alcohol to produce a tax by another name. In Combs, the Texas legislature had passed a statute requiring business owners who offered live nude entertainment and alcohol on their premises to pay a fee for each customer admitted. The state supreme court ruled that the law was content-neutral, satisfied the four-part O’Brien test, and complied with the First Amendment to the U.S. Constitution.

The case began in 2007 when the Texas Legislature enacted the Sexually Oriented Business Fee Act. Section 102.052(a) of the Act stated that: "A fee is imposed on a sexually oriented business

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104 Id. at 802.
105 Id. at 803.
106 Cook County Amusement Tax Ordinance § 2 (1999); Chicago Municipal Code § 4-156-010 (2008). Id.
107 Id.
108 Id. at 804.
109 See the Dissent in New Loudon Corp, 979 N.E. 2d at 1123, supra note 35.
110 See supra note 79.
113 347 S.W. 3d at 283-86. See United States v. O’Brien, 391 U.S. 367 (1968). The O’Brien test sets forth a framework for content-neutral restrictions on symbolic speech. It provides that government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. at 377.
114 347 S.W. 3d at 288.
in an amount equal to $5 for each entry by each customer admitted to the business." The Act defined a "sexually oriented business" as

a nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.\(^{115}\)

The fee was imposed on the business, not the customer, and the business could use its discretion to determine the manner from which it derived the money required to pay the fee. The first $25 million collected was to be credited to the state’s sexual assault program fund, with the balance providing financial assistance to low-income persons.\(^{116}\)

The operator of a sexually oriented business and the Texas Entertainment Association (TEA), an association representing the interests of such businesses in Texas, sued the state Comptroller for declaratory and injunctive relief, asserting that the fee violated the free-speech guarantee of the First Amendment. After a bench trial, the trial court concluded that erotic nude/topless dancing was protected expression under the First Amendment of the U.S. Constitution and that the fee was a "content-based" tax on such expression. Accordingly, it ruled the statute violated the First Amendment and permanently enjoined collection of the fee.\(^{117}\)

A divided court of appeals affirmed, with the majority concluding that the statutory fee was a "content-based" tax, i.e., one directed at constitutionally protected expression in nude dancing. It reached this conclusion for two reasons. First, because the application of the fee depended on the nature of a business's activities (a "wet T-shirt contest" would be taxed but not a play or comedy show); and secondly, the statute singled out certain First Amendment speakers who conveyed messages the taxing body deemed undesirable (i.e. nudity).\(^{118}\)

When the case reached the Texas Supreme Court, the Justices took a very different view. After engaging in a lengthy discussion of the expressive conduct in nude dancing and an analysis of content-based fees,\(^{119}\) they concluded that the fee was not "content-based" nor directed at the "suppression of expression" as the court of appeals had reasoned, but rather aimed at the "secondary effects of the expression in the presence of alcohol."\(^{120}\) The fee was intended to decrease negative effects associated with certain types of expressive speech, i.e. nude dancing, and as such could be regulated by means of the state’s exercise of its zoning power.\(^{121}\) The court quoted with approval U.S. Supreme Court Justice Kennedy in *City of Los Angeles v. Alameda Books, Inc.*,\(^{122}\) who said that

\(^{115}\) *Id.* at 278.

\(^{116}\) *Id* at 278-79.

\(^{117}\) *Id.* at 279.

\(^{118}\) *Id.* at 279-80.

\(^{119}\) *Id.* at 281-87.

\(^{120}\) *Id.* at 286.


There is no First Amendment objection to a measure that decreases the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave[s] the quantity and accessibility of the speech substantially undiminished, . . . even if the measure identifies the problem outside by reference to the speech inside -- that is, even if the measure is in that sense content based.\textsuperscript{123}

The court ended its analysis by declaring that the fee is "clearly directed, not at expression in nude dancing, but at the secondary effects of nude dancing when alcohol is being consumed. An adult entertainment business can avoid the fee altogether simply by not allowing alcohol to be consumed. For these reasons, we conclude that the fee is not intended to suppress expression in nude dancing."\textsuperscript{124}

The fee, the court said, need only satisfy the \textit{O'Brien} test,\textsuperscript{125} i.e., the legislature had the constitutional power to enact it; the state had an important interest in reducing the secondary effects of adult businesses. Furthermore, the court believed that the fee provided some disincentive to present live nude entertainment where alcohol is consumed. Finally, the legislature could reasonably have inferred that the alternative of non-alcoholic venues was sufficient so as not to work a suppression of expression in nude dancing.\textsuperscript{126} Whatever the aim of the legislature in enacting the fee, the court declared its motive in enacting the measure did not invalidate the fee on First Amendment grounds.\textsuperscript{127}

IV. CONCLUSION

Thus we can surmise from these cases that if the state cannot ban exotic dancing outright,\textsuperscript{128} it can tax it in the manner of other "sin" taxes\textsuperscript{129} on cigarettes, alcohol, and more recently, marijuana.\textsuperscript{130} At this writing, the Nevada Supreme has before it a First Amendment challenge to the

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\item \textsuperscript{123} 347 S.W. 3d at 286 (citing 535 U.S. at 445).
\item \textsuperscript{124} \textit{Id.} at 287-88. It is enlightening to note the court of appeals response to the argument that a business can avoid the fee by not serving alcohol. To quote their rebuttal: "While it is true that a sexually oriented business owner may avoid the tax by choosing not to allow the consumption of alcohol on the premises, this aspect of the SOB[sexually oriented business] tax is insufficient to transform a content-based tax into a content-neutral alcohol regulation. In reviewing the plain language, context, and legislative history of the relevant statutory provisions, we are not convinced that "the statute's predominant purpose is with regulating the service of alcohol...." 287 S.W.3d at 862. The court concludes that the tax was directed exclusively at sexually oriented business and was not part of a "web" of alcohol regulations imposed by the alcoholic beverage code. \textit{Id} at 863.
\item \textsuperscript{125} \textit{See supra} note 52.
\item \textsuperscript{126} \textit{Id.} at 288 (citing United States v. O'Brien, 391 U.S. 367, 383-84 (1968)).
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{See supra} note 2.
\item \textsuperscript{129} \textit{See Andrew J. Haile, Sin Taxes: When The State Becomes the Sinner, 82 TEMPLE L. REV. 1041 (2009)} arguing that unless states take action to address the conflict of interest that arises as a result of their dependence on sin tax revenues, the states themselves may become the "sinners" by sacrificing their citizens' health for much-needed revenue. Apparently exotic dancing isn't the only "sin" some desire to tax. \textit{See Jonathan Cummings, COMMENT: Obesity and Unhealthy Consumption: The Public-Policy Case for Placing a Federal Sin Tax on Sugary Beverages, 34 SEATTLE UNIV. L. R. 273 (2010)} arguing a "sin tax" should be imposed on sugary beverages.
\end{itemize}
state’s 10% entertainment tax. The entertainment owners have been paying the tax for the past ten years but are now suing for a refund. Given the decisions we have reviewed, the Nevada challengers have an uphill battle, though it has been suggested that the numerous exceptions in the Nevada law raise the specter of a tax on disfavored expression.

Much like the late comedian Rodney Dangerfield, exotic dancing “don’t get no respect.” Perhaps it is our nation’s Puritan background that is shocked at the specter of scantily clad women gyrating around a pole on a stage being lustily eyed by a group of men engaging in sexual fantasy. But history demonstrates that what is considered shocking and scandalous in one generation is accepted as part of the status quo in the next. Bizet’s opera Carmen, a tragic tale of a soldier’s infatuation with a prostitute, shocked audiences when it first appeared on the Paris stage in 1875. Also Richard Strauss’ Salome with its now famous “Dance of the Seven Veils” outraged the public at its premier in Dresden in 1905 that some opera companies refused to perform it. Today both are well-respected members of the operatic repertoire. Possibly some day erotic dancing will be a socially accepted form of entertainment. Only time will tell. Meanwhile, we can expect government officials to tax it in any way and as often as the courts will allow.

Although many find exotic dancing morally objectionable and decry its eroticism, it is well to remember that in our democracy the government cannot advocate or suppress ideas or points of view some find offensive or muzzle those with whom it disagrees. In like manner, it should refrain from taxing forms of expression because it dislikes or finds them ethically abhorrent. Just as the people are allowed to form their own ideas and opinions free from government interference, so too unpopular forms of expression should be free from taxation grounded simply on a disagreement in matters of taste or art.

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132 Id.
133 Id.
137 “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . . Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment.” Bellotti v. First National Bank, 435 U.S. 765, 790-92 (1978).