

## Chapter 11000

### NUDITY PER SE

0.01 Nudity per se is not obscene.

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

*Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

*Jenkins v. Georgia*, 418 U.S. 153 (1974).

*BSA, Inc. v. King county*, 804 F.2d 1104 (9th Cir. 1986).

*Turoso v. Cleveland Municipal Court*, 674 F.2d 486 (6th Cir. 1982).

*Chase v. Davelaar*, 645 F. 2d 735 (9th Cir. 1092).

*Penthouse Interantional, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980), *cert. denied*, 447 U.S. 931 (1980).

*Parmelee v. United States*, 233 F. Supp. 745 (E.D. Pa. 1964).

*Contemporary Arts Center v. Ney*, 735 F. Supp. 743 (S.D. Ohio 1990).

*International Eateries of America v. Broward County, Fla.*, 726 F. Supp. 1568 (S.D. Fla. 1989), *aff'd*, 941 F.2d 1157 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 1294 (1992).

*H.B.O. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

*Wild Cinemas of Little Rock, Inc. v. Bentley*, 499 F. Supp. 655 (E.D. Ark. 1980).

*Siegal v. Salisbury*, 379 F. Supp. 317 (W.D. Pa. 1974).

*Bruns v. Pomerleau*, 319 F. Supp. 58 (D. Md. 1970).

*United States v. Baranov*, 293 F. Supp. 610 (S.D. Cal. 1968), *rev'd*, 418 F.2d 1051 (9th Cir. 1969).

*Sunshine Books Co. v. Summerfield*, 128 F. Supp. 564 (D.D.C. 1955), *aff'd*, 249 F.2d 114 (4th Cir. 1957), *rev'd*, 355 U.S. 372 (1958).

*Freeman v. Commonwealth*, 288 S.E.2d 461 (Va. 1982).

*Mickens v. City of Kodiak*, 640 P.2d 818 (Alaska 1982).

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

*State v. Amato*, 343 So.2d 698 (La. 1977).

497 P.2d 807 (Cal. 1972).

*City of Rochester v. Carlson*, 202 N.W.2d 632 (Minn. 1972).

*House v. Commonwealth*, 169 S.E.2d 572 (Va. 1969).

*Commonwealth v. Moniz*, 155 N.E.2d 762 (Mass. 1959).

*Excelsior Pictures Corp. v. Regents*, 165 N.Y.S.2d 42 (N.Y. 1957).

*Schultz v. State*, 811 P.2d 1322 (Okla. Crim. App. 1991).

*Smith v. State*, 413 N.E.2d 652 (Ind. App. Ct. 1980).

*City of Belleville v. Morgan*, 376 N.E.2d 704 (Ill. App. Ct. 1978).

## Nudity

*Carl v. City of Los Angeles*, 132 Cal. Rptr. 365 (Cal. Dist. Ct. App. 1976).

*Koppinger v. City of Fairmont*, 248 N.W.2d 708 (Minn. 1976).

*People v. Taylor*, 342 N.E.2d 96 (Ill. App. Ct. 1976).

*People v. Better*, 337 N.E.2d 272 (Ill. App. Ct. 1975).

*Yauch v. State of Arizona & City of Tucson*, 505 P.2d 1066 (Ariz. Ct. App. 1973), *rev'd on other grounds*, 514 P.2d 709 (Ariz. 1973).

*City of Youngstown v. DeLoreto*, 251 N.E.2d 491 (Ohio Ct. App. 1969).

*People v. Biocic*, 224 N.E.2d 572 (Ill. App. Ct. 1967).

0.013 Cases holding nudity non-obscene have consistently done so based on a non-sexual context.

*Scherr v. Municipal Court for Berkely-Albany Judicial District*, 93 Cal. Rptr. 556 (Cal. Ct. App. 1971).

0.014 The portrayal of humankind as God made them is not obscene because there can be no obscenity in God's own handiwork.

*City of Youngstown v. DeLoreto*, 251 N.E.2d 491 (Ohio Ct. App. 1969).

*City of Newark v. Licht*, 200 A.2d 508 (N.J. Super. Ct. App. Div. 1964).

0.016 **Magazines and Films** - Non-erotic depictions of nudity in magazines or films will not be held to be obscene.

*Potomac News v. United States*, 389 U.S. 47 (1967).

*Mounce v. United States*, 355 U.S. 180 (1957).

*Cf. United States v. Central Magazine Sales, Ltd.*, 381 F.2d 821 (4th Cir. 1967).

*United States v. Central Magazine Sales, Ltd.*, 381 F.2d 821 (4th Cir. 1967).

*Parmelee v. United States*, 113 F.2d 729 (D.C. Cir. 1940).

*City of Chicago v. Geraci*, 264 N.E.2d 153 (Ill. 1970).

*People v. Noroff*, 63 Cal. Rptr. 575 (Cal. 1967), *cert. denied*, 390 U.S. 1012 (1968).

*Commonwealth v. Moniz*, 155 N.E.2d 762 (Mass. 1959).

*People v. Cohen*, 255 N.Y.S.2d 813 (N.Y. Sup. Ct. App. Div. 1964).

*State v. Martin*, 213 A.2d 459 (Conn. Cir. Ct. 1965).

*Cf. State v. Lerner*, 81 N.E.2d 282 (Ohio Ct. C.P. Hamilton Cty. 1948).

*State v. Lerner*, 81 N.E.2d 282 (Ohio Ct. C.P. Hamilton Cty. 1948).

0.0161 **Nudity in films and magazines may be protected expression** - A protected form of expression under the First Amendment is simple, non-obscene nudity in photographs and films.

*Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989), *rev'd, sub nom. Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991).

*Osborne v. Ohio*, 495 U.S. 103 (1990), *reversing and remanding*, 525 N.E.2d 1363 (Ohio 1988), *on remand*, 557 N.E.2d 1210

## Chapter 11000

(Ohio Ct. App. 1989). *See also*, 560 N.E.2d 765 (Ohio 1990).

*Schmitt v. State*, 563 So.2d 1095 (Fla. Ct. App. 1990), *modified*, 590 So.2d 404 (Fla. 1991), *cert. denied*, 112 S.Ct. 1572 (1992).

0.017 An obscene nude is a nude that allures.

*Excelsior Pictures Corp. v. Regents*, 165 N.Y.S.2d 42 (N.Y. 1957).

0.018 Nowhere in the nudist magazine is there any provocative or suggestive pose that smacks of prurient appeal.

*Luros v. United States*, 389 F.2d. 200 (8th Cir. 1968).

*Cf. Excellent Publications, Inc. v. United States*, 309 F.2d 362 (1st Cir. 1962).

0.019 Magazines Displaying erotic nudity have been held obscene in the past.

*Cf. Collier v. United States*, 283 F.2d 780 (4th Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

*Collier v. United States*, 283 F.2d 780 (4th Cir. 1960), *cert denied*, 365 U.S. 833 (1961).

*Hadley v. State*, 172 S.W.2d 237 (Ark. 1943).

*King v. Commonwealth*, 233 S.W.2d 522 (Ky. Ct. App. 1950).

*People v. Fellerman*, 276 N.Y.S.198 (N.Y. Sup. Ct. App. Div. 1934), *aff'd*, 200 N.E. 30 (N.Y. 1936).

*People v. Stabile*, 296 N.Y.S.2d 815 (N.Y. City Crim. Ct. N.Y. Cty.1969).

*Cf. People v. Stabile*, 296 N.Y.S.2d 476 (N.Y. Sup. Ct. N.Y. Cty. 1952).

*Sunshine Book Co., et al. v. McCaffrey*, 112 N.Y.S 2d 476 (N.Y. Sup. Ct. N.Y. Cty. 1952).

*People v. Gonzales*, 107 N.Y.S.2d 968 (N.Y.C. Mag. Ct. N.Y. Cty. 1951).

0.02 Nudity cannot be exploited without limit by films or pictures exhibited or sold in places of public accommodation.

*Miller v. California*, 413 U.S. 15 (1973).

*Curtis v. City of Seattle*, 639 P.2d 1370 (Wash. 1982).

*Sanders v. State*, 649 S.W.2d 59 (Tex. Crim. App. 1982).

*Ballew v. State*, 227 S.E.2d 65 (Ga. Ct. App. 1976).

*Cf. Sanza v. Maryland State Board*, 226 A.2d 317 (Md. Ct. App. 1967).

*Sanza v. Maryland State Board of Censors*, 266 A.2d 317 (Md. Ct. App. 1967). [Peep Show]

0.021 **Nudity alone** - Nudity alone is not enough to establish obscenity.

*State v. Valdes*, 552 So.2d 1372 (La. Ct. App. 1989), *cert. denied*, 558 So.2d 580 (La. 1990).

0.0211 **Not obscene** - Nudity in itself is not obscene. When combined with other forms of expression such as nude dancing it may be protected as a form of expression.

*Tri-State Metro Waterwaste v. Lowers Township*, 529 A.2d 1047 (N.J. Super. Ct. App. Div. 1987).

## Nudity

0.0212 Mere nudity is not obscene as to either minors or adults.

*Upper Midwest Booksellers v. City of Minneapolis*, 602 F. Supp. 1361 (D. Minn. 1983), *aff'd*, 780 F.2d 1389 (8th Cir. 1985).

0.0213 **Limited first amendment protection** - Non-obscene nude dancing as expressive entertainment is entitled to limited first amendment protection.

*Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989), *rev'd, sub nom. Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991).

0.0214 **Not Obscene** - Nudity alone does not place otherwise protected material outside the mantle of the First Amendment.

*Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D.N.Y. 1997).

*Tolbert v. City of Memphis, Tennessee*, 568 F. Supp. 1285 (W.D. Tenn. 1983).

0.0215 All nudity is not obscene

*Glen Theater, Inc. v. City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988).

0.022 **Total Nudity** - Total nudity is not necessarily obscene and enjoys constitutional protection as much as partial nudity.

*Intern. Food & Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986).

0.03 **Child Porn Nudity** - Mere nudity cannot be constitutionally made a crime in a child porn statute, some element of scienter must exist to impose criminal responsibility.

*Mattingly v. Commonwealth*, 878 S.W.2d 797 (Ky. Ct. App. 1993).

0.04 **Intent of Defendant** - Intent of defendant must be considered in case of mere nudity.

*Egal v. State*, 469 So.2d 196 (Fla. Dist. Ct. App. 1985).

0.05 **Nudity may be regulated Lewd** - There is no requirement that nudity in contexts other than artistic expression must be accompanied by lewd indecent interest to be regulated by the government.

*State v. Turner*, 382 N.W.2d 252 (Minn. Ct. App. 1986).

0.051 **Fraudulently Induced Consent** - Fraudulently induced consent to publish photographs is legal equivalent to no consent at all.

*Braun v. Flynt*, 10 Med. L. Rptr. 1497 (5th Cir. 1984).

0.052 **Theatrical Exception** - Statute does not apply to activities such as the theatrical appearance involved herein, which may not be prohibited absent a finding of obscenity.

*Erhardt v. State*, 463 N.E.2d 1121 (Ind. Ct. App. 1984), *aff'd*, 468 N.E.2d 224 (Ind. 1984).

### O.L.R. Note 1

Some of the nude magazines depictions, such as those in *United States v. Potomac News* (.05) were held obscene at the lower court level. Reversals of some of these decisions may have been influenced by the per curiam *Redup*, reversals, (.201) a practice specifically abandoned in *Miller v. California*. Such depictions today would be tested under the new *Miller* definition, see (.20).

## Chapter 11000

0.053 **Nude Model** - A nude model may be presented to an art class to aid in the 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. However, one could take that same model and by a slight change in pose and setting transform that same person into a lewd and obscene object. The difference would be readily discernible to any member of society.

*Sedelbauer v. State*, 428 N.E.2d 206 (Ind. 1981), *cert. denied*, 455 U.S. 1035 (1982).

0.054 **Must be More than Vulgar Display** - Live lewd conduct (either by a "flasher" or by a paid exhibitionist), in order to be entitled to First Amendment protection, must be more than the vulgar display of sex organs for the purpose of sexual desire.

*State v. Walters*, 440 So.2d 115 (La. 1983).

0.055 **Topless Sunbathing Not Symbolic Speech** - Appellant's topless sunbathing is not protected symbolic speech and we held that the regulation is not overbroad in its application to her.

*State v. Turner*, 382 N.W.2d 252 (Minn. Ct. App. 1986).

0.06 A four second segment of total frontal nudity of female swimmer does not violate the Arizona public display statute.

*B.B.S. Productions v. Purcell*, 360 F. Supp. 801 (D. Ariz. 1973).

0.061 **Live Nudity in Oregon** - There is no difference in exhibiting a photograph of a nude person, showing genitals, to members of the public or exhibiting the person to members of the public. Nudity, without more, is not a crime.

*City of Portland v. Gatewood*, 708 P.2d 615 (Or. Ct. App. 1985), *review denied*, 713 P.2d 1058 (Or. 1986).

0.07 **Right of Free Expression** - The mere depiction of nudity may not be prohibited, because in Oregon, it infringes on the constitutionally protected right of free expression.

*City of Portland v. Gatewood*, 708 P.2d 615 (Or. Ct. App. 1985), *review denied*, 713 P.2d 1058 (Or. 1986).

0.071 Nudity is not in and of itself a constitutionally protected activity.

*McGuire v. State*, 489 So.2d 729 (Fla. 1986)

0.072 To the same effect

*Contemporary Arts Center v. Ney*, 735 F. Supp. 743 (S.D. Ohio 1990).

*International Eateries of America v. Broward County, Fla.*, 726 F. Supp. 1568 (S.D. Fla. 1989), *aff'd*, 941 F.2d 1157 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 1294 (1992).

*Schultz v. State*, 811 P.2d 1322 (Okla. Crim. App. 1991).

0.08 **Overbreadth** - An ordinance which limits its proscription to intentional, nude displays in public places and those open to public view is not overbroad in its scope.

*United States v. Biocic*, 730 F. Supp. 1364 (D. Mo. 1990), *aff'd*, 928 F.2d 112 (9th Cir. 1991).

0.081 **Striptease ordinance overbreadth** - The striptease ordinance is overly broad because it criminalizes non-obscene dancing at places where liquor is not served.

## Nudity

*State v. Western*, 812 P.2d 987 (Ariz. 1991).

0.082 **Statute not overbroad** - The Minnesota statute is not overbroad.

*State v. White*, 464 N.W.2d 585 (Minn. Ct. App. 1990), *cert. denied*, 112 S.Ct. 77 (1991).

0.09 **Authoritatively Construed** - Statute which did not meet portions of the Miller standards in that it was not clearly restricted to sexual conduct, but apparently included nudity, among other things, without requiring any sexual connotation could be authoritatively construed to incorporate the Miller standards.

*People of City of East Detroit v. Vickery*, 244 N.W.2d 404 (Mich. Ct. App. 1976).

### PROVOCATIVE NUDES

0.1 Magazines featuring nude pictures of females in various insinuating poses were held to be obscene in Pre-Roth, Pre-Redrup, Pre-Miller cases.

*Lynch v. United States*, 285 F. 162 (7th Cir. 1922).

*Ultem Publications v. Arron Publications*, 1 N.Y.S.2d 933 (N.Y. Sup. Ct. N.Y. Cty. 1938).

*Freedmam v. New York Society For Suppression of Vice*, 290 N.Y.S. 753 (N.Y. Sup. Ct. App. Div. 1936), *aff'd*, 274 N.Y. 559 (N.Y. 1937).

*People v. Eagle*, 117 N.Y.S.2d 380 (N.Y. City Mag. Ct. 1952).

0.101 Views taken from the side or posterior views of females held not obscene.

*Sunshine Books Co. v. Summerfield*, 128 F. Supp. 564 (D.D.C. 1955), *aff'd*, 249 F.2d 114 (4th Cir. 1957), *rev'd*, 355 U.S. 372 (1958).

0.102 Nude depictions in magazines showing breasts but not genitals held not obscene.

*Com. v. Hueston*, 11 D&C.2d 97 (Pa. Q.S. Mercer Co. 1956).

0.103 Nude females in various states of undress accentuating parts of human anatomy held obscene under Roth.

*State v. Vollmar*, 389 S.W.2d 20 (Mo. 1965).

*City of Cincinatti v. Walton*, 145 N.E.2d 407 (Ohio Mun. Ct. 1957).

0.104 "Beaver" type magazines held obscene under Roth.

*Miller v. United States*, 431 F.2d 655 (9th Cir. 1970).

*United States v. 77 Cartons*, 300 F. Supp. 851 (N.D. Cal. 1969), *rev'd*, 444 F.2d 80 (9th Cir. 1971).

*United States v. 25,000 Magazines Entitled "Revue"*, 254 F. Supp. 1014 (D. Md. 1966), *aff'd*, *United States v. Central Magazine Sales, Ltd.*, 381 F.2d 821 (4th Cir. 1967).

*State v. Simpson*, 201 N.W.2d 558 (Wis. 1972).

*City of Youngstown v. DeLoreto*, 251 N.E.2d 491 (Ohio Ct. App. 1969).

*People v. Adler*, 101 Cal. Rptr. 726 (Cal. App. Dep't Super. Ct. 1972), *vacated*, 413 U.S. 912 (1973).

## Chapter 11000

0.105 Fleeting shots of nudity on screen not obscene under Roth.

*Duggan v. Guild Theater, Inc.*, 258 A.2d 858 (Pa. 1969).

*People v. Revo*, 257 N.Y.S.2d 173 (N.Y. 1965).

0.106 It is not the female vagina itself which is obscene, but the manner in which it is posed that offers the insult to sex and the human spirit.

*People v. Abronovitz*, 310 N.Y.S.2d 698 (N.Y. Cty. Ct. 1970) *aff'd in part, rev'd in part*, 327 N.Y.S.2d 137 (N.Y. Sup. Ct. App. Div. 1971), *rev'd* 286 N.E.2d 721 (N.Y. 1972).

0.107 Pictures of day to day activity in a nudist camp are not comparable with erotic nude female depictions.

*United States v. Womack*, 509 F.2d 368 (D.C. Cir. 1974), *cert denied*, 422 U.S. 1022 (1975).

*State v. Weitershawsen*, 78 A.2d 595 (N.J. Super. Ct. App. Div. 1951).

0.108 Mixed nudity may create obscenity.

*United States v. Baranov*, 293 F. Supp. 610 (S.D. Cal. 1968), *rev'd*, 418 F.2d 1051 (9th Cir. 1969).

### O.L.R. Note 2

*Miller v. California*, 413 U.S. 15 (1973), laid down a three pronged test for depicted or described obscenity of (1) appeal to prurency, (2) patently offensive conduct, and (3) lack of certain forms of serious value. Among the examples of patently offensive conduct it gave was "Lewd exhibition of the genitals." *Miller* indicated its examples were not exhaustive and pointed to laws in Oregon and Hawaii

as repositories of other examples of defined conduct without specifically approving at that time of their use within the second prong of a state obscenity statute. The Oregon statute referred to, included in a definition of sexual conduct "Any touching of the genitals, pubic areas or buttocks of the human male or female, whether alone or between member of the opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification." The Hawaii statute included physical contact with a person's pubic area, buttocks or the breast or breasts of a female for the purpose of sexual stimulation, gratification or perversion. In the 1974 *Hamling* case, the Supreme Court indicated that a state (in using the flexibility permitted by *Miller* to add to the *Miller* examples,) could not wander too far from the frame of reference given by such examples. It appears clear, however, that certain types of nude depictions of males or females can be proscribed by the federal government or a state or municipality under the rule in *Miller*

0.1081 **Males and Females** - The publications in the instant case depict in varying degrees nude males and females with prominently exposed genitalia and are properly found to be obscene.

*Sanders v. State*, 203 S.E.2d 153 (Ga. 1974).

0.2 "Beaver" type girlie photos in magazine with legs spread apart and genitals displayed are obscene under *Miller v. California*

*Conner v. City of Hammond*, 389 U.S. 48 (1967).

*Burgin v. So. Carolina*, 404 U.S. 806 (1971).

## Nudity

*Bloss v. Dykema*, 398 U.S. 278 (1970).

*Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967).

*Mazes v. Ohio*, 388 U.S. 453 (1967).

*Redrup v. State of New York*, 386 U.S. 767 (1967).

*Schackman v. California*, 388 U.S. 454 (1967).

*Penthouse Interantional, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980), *cert. denied*, 447 U.S. 931 (1980).

*Hunt v. Keriakos*, 428 F.2d 606 (1st Cir. 1970).

*United States v. Baranov*, 418 F.2d 1051 (9th Cir. 1969).

*United States v. Potomac News*, 389 F.2d 635 (4th Cir. 1967).

*Orito v. Powers*, 347 F. Supp. 150 (E.D. Wis. 1972).

*Cf. Rocester v. Carlson*, 202 N.W.2d 632 (Minn. 1973).

*Rochester v. Carlson*, 202 N.W.2d 632 (Minn. 1973).

*State v. Getman*, 195 N.W.2d 827 (Minn. 1972).

*City of Chicago v. Geraci*, 264 N.E.2d 153 (Ill. 1970).

*In Re Seven Magazines v. .*, 268 A.2d 707 (R.I. 1970).

*House v. Commonwealth*, 169 S.E.2d 572 (Va. 1969).

*Hunt v. State*, 475 S.W.2d 935 (Tex. Crim. App. 1972).

*State v. Oregon Bookmark Corp.*, 492 P.2d 504 (Or. Ct. App. 1972).

### O.L.R. Note 3

In the period 1967-1972, the Supreme Court of the United States could not agree on a single approach to obscenity cases and a practice was begun of majority per curiam reversals of lower court decisions without articulating the reasons for the same. In *Redrup v. State of New York*, 386 U.S. 767 (1967), it was the majority view expressed in a per curiam opinion that girlie type "beaver" magazines were not obscene. A great number of lower court decisions were reversed citing only *Redup* in that period. The lower federal and state courts then began applying a concept that *Redrup* type magazines could not be held obscene and so held at trial. In January 1972, Justices Power and Rehnquist joined the court and the new court began upholding convictions of "beaver" type magazines over the objections of the minority that *Redtup* counseled otherwise. This occurred in *Monger v. State*, 249 So. 2d 433 (Fla. Sup. Ct. 1971), *cert. denied*, 405 U.S. 958 (1972) and *McKinney v. Alabama*, 254 So. 2d 714 (Sup. Ct. Ala. 1971) *cert. denied*, 405 U.S. 1073 (1972). The *Miller* court specifically abandoned the *Redrup* approach in 1973 in *Miller v. California* and set new standards for judging obscenity. As a consequence *Redrup* and the *Redrup* reversals and all lower court cases decided with *Redrup* as their touchstone no longer have any precedential value on this point. They are, nevertheless, included below for identification and historical notation.

0.201 The "Beaver" type magazines depicting spread eagle female nudity were deemed not obscene by the United States

## Chapter 11000

Supreme Court during the period 1967 to January 1972 and by lower courts following its lead.

*United States v. Potomac News*, 389 F.2d 635 (4th Cir. 1967).

### SERIOUS VALUE

0.3 Patently offensive nudity appropriate for second prong of Miller

*Salt Lake City v. Piepenberg*, 571 P.2d 1299 (Utah 1977).

0.31 Contra

*Wild Cinemas of Little Rock, Inc. v. Bentley*, 499 F. Supp. 655 (E.D. Ark. 1980).

*City of Belleville v. Morgan*, 376 N.E.2d 704 (Ill. App. Ct. 1978).

0.32 Beaver type girlie photos in magazine with legs spread apart and genitals displayed are obscene under Miller v. California

*Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980), cert. denied, 447 U.S. 931 (1980).

*Cf. United States v. Womack*, 509 F.2d 368 (D.C. Cir. 1972), cert. denied, 422 U.S. 1022 (1975).

*Miller v. United States*, 507 F.2d 1100 (9th Cir. 1974), cert. denied, 422 U.S. 1025 (1975) [See 431 F.2d 658 where photographs are described].

*Huffman v. United States*, 502 F.2d 419 (D.C. Cir. 1974).

*United States v. Womack*, 509 F.2d 368 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975).

*Cf. People v. Taylor*, 342 N.E.2d 96 (Ill. App. Ct. 1976).

*People v. Taylor*, 342 N.E.2d 96 (Ill. App. Ct. 1976).

0.33 Operator of record store did not violate obscenity ordinance by displaying drawings of a woman reclining in a spread eagled manner so as to expose her 'pubic area' since the drawings were sufficiently abstract so as to permit a variety of non-obscene interpretations.

*City of St. George v. Turner*, 860 P.2d 929 (Utah 1993).

### PUBLIC NUDITY

0.4 **Nudity in public is subject to greater control by states than nudity in the pictorial or written context** - The states have greater power to regulate nonverbal physical conduct than to suppress depictions or descriptions of the same behavior.

*Miller v. California*, 413 U.S. 15 (1973).

*Chapin v. Town of South Hampton*, 457 F. Supp. 1170 (E.D.N.Y. 1978).

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

0.4001 **Live Nudity** - There is no difference in exhibiting a photograph of a nude person, showing genitals to member of the public or exhibiting the person to members of the public. Nudity, without more, is not a crime.

*City of Portland v. Gatewood*, 708 P.2d 615 (Or. Ct. App. 1985), review denied, 713 P.2d 1058 (Or. 1986).

0.401 **Nudity is Not Protected** - Nudity which is public is not protected.

## Nudity

*Miller v. California*, 413 U.S. 15 (1973).

*Glen Theater, Inc. v. City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988).

0.402 We are not presented here with the problem of regulating lewd conduct itself.

*Miller v. California*, 413 U.S. 15 (1973).

0.403 Scenes of nudity in a movie, like pictures of nude persons in a book must be considered as part of the whole work. In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent exposure laws. No one would suggest that the First Amendment permits nudity in public places.

*Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

*Richard v. Thurston*, 424 F.2d 1281 (1st Cir. 1970).

*Cf. Chapin v. Town of Southampton*, 457 F. Supp. 1170 (E.D.N.Y. 1978).

*Chapin v. Town of South Hampton*, 457 F. Supp. 1170 (E.D.N.Y. 1978).

### 0.404 To the same effect -

*Naturist Society, Inc. v. Fillyaw*, 736 F. Supp. 1103 (S.D. Fla. 1990), *modified*, 958 F.2d 1515 (11th Cir. 1992).

0.4042 **Public Nudity** - Prohibiting public nudity is plainly within the police power.

*People v. Craft*, 509 N.Y.S.2d 1005 (N.Y. City Ct. Monroe Co. 1986).

0.4043 **Public nudity** - Nudity in public falls within the common meaning of the term "indecent." Intentional public nudity is

thereby disallowed in a federal regulation proscribing indecency.

*United States v. Biocic*, 730 F. Supp. 1364 (D. Mo. 1990), *aff'd*, 928 F.2d 112 (9th Cir. 1991).

0.4044 **Public Nudity** - There are limits to nude exhibitions and sale of nude depictions in public places.

*Walker v. City of Kansas City*, 911 F.2d 80 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 2234 (1991).

0.4045 **Public Nudity** - Since there is no First Amendment protection of public nudity, the state may protect other governmental interests and regulate conduct, such as requiring a minimum amount of clothing.

*Naturist Society, Inc. v. Fillyaw*, 736 F. Supp. 1103 (S.D. Fla. 1990), *modified*, 958 F.2d 1515 (11th Cir. 1992).

0.4046 **Public Nudity** - Public nudity is not a constitutional right.

*People v. David*, 549 N.Y.S.2d 564 (N.Y. City Ct. Rochester Cty. 1989). [See also 585 N.Y.S. 2d 149 (1991).]

0.405 **Nonexpressive conduct regulations** - The state government may regulate non-expressive conduct for reasons not related to the suppression of speech.

*Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989), *rev'd, sub nom. Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991).

0.4051 **Public attire** - *O'Gorman* tested the ordinance that people wear "customary street attire." It established that it may be reasonable to prescribe that men and women cover themselves, at least in public.

## Chapter 11000

*People v. Duyck*, 559 N.Y.S.2d 79 (N.Y. Sup. Ct. 1990), *cert. denied*, 111 S.Ct. 2798 (1991).

**0.4052 Ordinance regulating public nudity** - The ordinance to regulate public nudity exceeds its authority.

*Nadeau v. Charter Township of Clinton*, 827 F. Supp. 435 (E.D. Mich. 1992).

**0.4053 Proof of offensiveness not necessary** - An ordinance proscribing intentional nude displays in public places and those open to public view is not made invalid because it does not require proof that an observer was offended by the display.

*United States v. Biocic*, 730 F. Supp. 1364 (D. Mo. 1990), *aff'd*, 928 F.2d 112 (9th Cir. 1991).

**0.406 Form of Conduct Not Speech** - Public nudity is a form of conduct not protected speech.

*O'Day v. King County*, 749 P.2d 142 (Wash. 1988).

*State v. Rowley*, 764 P.2d 1233 (Haw. 1988).

**0.4061 Combined with Some Mode of Expression** - Nudity is protected as speech only when combined with some mode of expression which itself is entitled to First Amendment protection.

*South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608 (11th Cir. 1984).

**0.4062 Combined with Some Mode of Expression** - Nudity is protected as speech only when combined with some mode of expression which itself is entitled to First Amendment protection.

*County of King ex rel. Sowers v. Chisman*, 658 P.2d 1256 (Wash. Ct. App. 1983).

**0.4063 A state statute may prohibit nudity in a public place without requiring the application of the three pronged test for obscenity provided exceptions are made for performances protected by the First or Fourteenth Amendments** - There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or allow some nudity as part of some larger form of expression meriting protection when the communication of ideas is involved.

*Curtis v. City of Seattle*, 639 P.2d 1370 (Wash. 1982).

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

*Gabriel v. Town of Old Orchard Beach*, 390 A.2d 1065 (Me. 1978).

*Cf. Eckl v. Davis*, 124 Cal. Rptr. 685 (Cal. Ct. App. 1975).

*Eckl v. Davis*, 124 Cal. Rptr. 685 (Cal. Ct. App. 1975).

*Cf. People v. Conway*, 162 Cal. Rptr. 877 (Cal. Super. Ct. L.A. Cty. 1979).

*People v. Conway*, 162 Cal. Rptr. 877 (Cal. Super. Ct. L.A. Cty. 1979.)

**0.4064 Municipal ordinance outlawing nudity and other sexual conduct in public places is a conduct not speech regulation.**

*City of Chattanooga v. McCoy*, 546 S.W.2d 400 (Tenn. 1983).

**0.4065 Nor Primarily Expressive in Nature** - While the public indecency law appears to proscribe any nude appearance, our Supreme Court has indicated the statute has

## Nudity

narrower scope and serves to criminalize only certain public conduct which is not primarily expressive in nature.

*Erhardt v. State*, 463 N.E.2d 1121 (Ind. Ct. App. 1984), *aff'd*, 468 N.E.2d 224 (Ind. 1984).

0.407 **Not ABC Premises** - The statute in question applies to public nudity and does not include any reference to establishments which serve alcoholic beverages. If that were the case, the Twenty-First Amendment of the Constitution of the United States would come into play.

*Glen Theater, Inc. v. City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988).

0.408 **Nudity in State Parks** - Before defendant can be successfully prosecuted under an administrative rule prohibiting nudity in state parks, the rule itself must be promulgated in compliance with the rule making procedures of the statute.

*State v. Rowley*, 764 P.2d 1233 (Haw. 1988).

0.41 Local ordinance or statutes that broadly prohibit nudity in public places held overbroad on their face or as applied to protected performances in public places such as theaters, concert halls, taverns and restaurants.

*Doran v. Salem Inn, Inc.*, 442 U.S. 922 (1975).

*Felix v. Young*, 536 F.2d 1126 (6th Cir. 1976).

*Hughes v. Cristofane*, 486 F. Supp. 541 (D. Md. 1980).

*San Juan Liquors, Inc. v. City of Jacksonville*, 480 F. Supp. 151 (M.D. Fla. 1979).

*Berkenshaw v. Haley*, 409 F. Supp. 13 (E.D. Mich. 1974).

*Salem Inn, Inc. v. Frank*, 381 F. Supp. 859 (E.D.N.Y. 1974), *aff'd*, 522 F.2d 1045 (2d Cir. 1975).

*Siegal v. Salisbury*, 379 F. Supp. 317 (W.D. Pa. 1974).

*Southeastern Productions, Inc. v. Conrad*, 341 F. Supp. 465 (E.D. Tenn. 1972), *aff'd*, 486 F.2d 894 (6th Cir. 1973), *rev'd*, 420 U.S. 546 (1975).

*Entertainment Ventures, Inc. v. Brewer*, 306 F. Supp. 802 (M.D. Ala. 1969).

*Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982 (Colo. 1981).

*Commonwealth v. Allsup*, 392 A.2d 1309 (Pa. Super. Ct. 1978).

*Jamaica Inn, Inc. v. Daley*, 368 N.E.2d 694 (Ill. App. Ct. 1977), *reversed*, 381 N.E.2d 694 (Ill. 1978).

*Carl v. City of Los Angeles*, 132 Cal. Rptr. 365 (Cal. Dist. Ct. App. 1976).

*Glancy v. Sacramento County*, 94 Cal. Rptr. 864 (Cal. Ct. App. 1971), *superseded*, 107 Cal. Rptr. 681 (1973) *cert. denied*, 415 U.S. 931 (1974).

*People v. Wehnke*, 436 N.Y.S.2d 137 (N.Y. City Ct. Oneida Cty. 1981).

*Lucifers Gate, Inc. v. Town of Van Buren*, 373 N.Y.S.2d 304 (N.Y. Sup. Ct. 1975).

## Chapter 11000

**0.411 Some states have construed their statutes as applied to given situations to prohibit the exposure of the female breast** - Since the beginning of civilization, public nudity has been considered improper. The legislature intended to prohibit adult females from appearing in public places including Florida public beaches with openly exposed breasts. The statute is constitutional.

*Moffet v. State*, 340 So.2d 1155 (Fla. 1977).

0.413 Mere nudity is not communicative.

*Chapin v. Town of South Hampton*, 457 F. Supp. 1170 (E.D.N.Y. 1978).

**0.414 Obscenity Finding Not required** - Public nudity in and of itself, is not entitled to constitutional protection and could be prohibited without a finding of obscenity.

*Erhardt v. State*, 463 N.E.2d 1121 (Ind. Ct. App. 1984), *aff'd*, 468 N.E.2d 224 (Ind. 1984).

**0.415 Indecent by Community Standards** - Legislative intent was not to preclude a municipality from prohibiting public nudity of a character which does not rise to the level of lewdness as therein defined but which nevertheless regards as indecent by prevailing community standards.

*Borough of Belmar v. Buckley*, 453 A.2d 910 (N.J. Super. Ct. App. Div. 1982).

**0.416 Part of Some Larger Form of Expression** - It may be constitutionally required to tolerate some nudity as a part of some larger form of expression meriting protection when the communication of ideas is involved.

*Erhardt v. State*, 463 N.E.2d 1121 (Ind. Ct. App. 1984), *aff'd*, 468 N.E.2d 224 (Ind. 1984).

**0.4161 Nudity as Protected Speech** - Nudity is protected as speech only when combined with some mode of expression which itself is entitled to first amendment protection.

*Elysium Institute, Inc. v. Los Angeles County*, 283 Cal. Rptr. 688 (Cal. Ct. App. 1991), *cert. denied*, 112 S.Ct. 1180 (1992).

**0.417 Not Unconstitutionally Overbroad** - Ordinance aimed at the prohibition of public nudity or indecent exposure which is not intended as protected symbolic or communicative act is not unconstitutionally overbroad.

*City of Portland v. Tyler*, 725 P.2d 949 (Or. Ct. App. 1986).

**0.4171 Preemption** - Public nudity as defined by statute preempts the definition of the ordinance.

*Nadeau v. Charter Township of Clinton*, 827 F. Supp. 435 (E.D. Mich. 1992).

**0.41711 Overbreadth** - An ordinance which limits its proscription to intentional nude displays in public places, and not those open to public view is not overbroad in its scope.

*United States v. Biocic*, 730 F. Supp. 1364 (D. Mo. 1990), *aff'd*, 928 F.2d 112 (9th Cir. 1991).

**0.418 Live Peep Shows** - Girls dancing nude or partially nude in an adult bookstore atmosphere where men dropped twenty-five cents to watch them perform is proscribed by our public nudity statutes inasmuch as the dancing took place in a public place.

*Erhardt v. State*, 463 N.E.2d 1121 (Ind. Ct. App. 1984), *aff'd*, 468 N.E.2d 224 (Ind. 1984).

## Nudity

0.4181 **Booth Surrounding Common Dance Floor** - While police officers and other patrons may have been in single little booths surrounding the common dance floor, the dancers were not performing for individual viewers at one time: thus constituting "public" nudity.

*Adims v. State*, 461 N.E.2d 740 (Ind. Ct. App. 1984).

0.4182 **Nudism not Speech** - We do not consider *Elysium's* practice of nudism to be a form of speech protected by the federal or state constitutions.

*Elysium Institute, Inc. v. Los Angeles County*, 283 Cal. Rptr. 688 (Cal. Ct. App. 1991), *cert. denied*, 112 S.Ct. 1180 (1992).

0.41821 **Nudist Club** - The use of property to operate a nudist club does not constitute a use, permitted by right, in accordance with the county zoning ordinance.

*Board of Supervisors of Madison County v. Gaffney*, 422 S.E.2d 760 (Va. 1992).

0.42 **Nude but not lewd** - Defendant is not guilty of violating indecent exposure statute where the parties had stipulated that defendant was, in a public place, nude but not lewd.

*United States v. Naked Person Issued Notice of Violation*, 841 F. Supp. 1153 (M.D. Fla. 1993).

0.421 **Nude dancing studio as public place** - Nude dancing establishment is a "public place" because no expectation of privacy exists and anyone from the general public is admitted upon payment of an admission fee.

*Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993).

0.422 **Not Vague** - Public nudity ordinance is not unconstitutionally vague as applied to nude dancing.

*Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993).

0.423 **Nor overbroad** - City ordinance prohibiting public nudity is not overbroad where it is sufficiently clear so that any reasonable or ordinary person could understand what conduct was prohibited.

*Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993).

0.424 **Sexual activity not required** - Statute prohibiting "indecent exposure" does not require an act of a sexual nature in order for public nudity to constitute a violation of the statute.

*State v. Sandoval*, 857 P.2d 395 (Ariz. Ct. App. 1993).

0.425 City ordinance prohibiting public nudity is constitutional. It did not ban nude dancing.

*Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993).

0.426 **Conduct Not Speech** - The state may regulate nonexpressive conduct such as public nudity for reasons unrelated to the suppression of speech.

*Stevenson v. City of Vicksburg*, 900 F. Supp. 1 (S.D. Mass. 1994).

0.427 **Failure to Exclude Serious Value Nudity** - The Akron public indecency ordinance prohibits all public nudity including live performances with serious literary, artistic or political value without attempting to regulate only those expressive activities associated with harmful secondary effects.

## Chapter 11000

*Triplette Grille, Inc. v. City of Akron*, 816 F. Supp. 1249 (N.D. Ohio 1993), *aff'd*, 40 F.3d 129 (6th Cir. 1994).

0.4271 Akron's wide ban on public nudity sweeps within its orbit expressive conduct not generally associated with prostitution sexual assault or other crimes.

*Triplette Grille, Inc. v. City of Akron*, 816 F. Supp. 1249 (N.D. Ohio 1993), *aff'd*, 40 F.3d 129 (6th Cir. 1994).

0.428 **Exclusions in Definition** - The exclusion from "public place" of restrooms, doctor's offices, dressing and locker rooms has no effect on the validity of the law.

*Deja Vu of Nashville v. Metropolitan Government*, No. 3:94-0494 (M.D. Tenn. 1994), *aff'd* No. 96-6512 (6th Cir. 1999).

0.4281 The exclusions of modeling classes and of theatrical performances are consistent with Barnes.

*Deja Vu of Nashville v. Metropolitan Government*, No. 3:94-0494 (M.D. Tenn. 1994), *aff'd* No. 96-6512 (6th Cir. 1999).

0.429 **Tennessee Statute Constitutional** - The Tennessee nudity statute is not unconstitutional in light of Barnes.

*Deja Vu of Nashville v. Metropolitan Government*, No. 3:94-0494 (M.D. Tenn. 1994), *aff'd* No. 96-6512 (6th Cir. 1999).

0.43 **Definition of nudity** - Some lower courts are upholding more restrictive definitions of nudity than articulated in Barnes

*Stevenson v. City of Vicksburg*, 900 F. Supp. 1 (S.D. Mass. 1994).

0.44 **Failure to Evidence Secondary Effects** - Akron ordinance (based on Indiana

law) which banned all public nudity, but which failed to link harmful secondary effects, such as prostitution and other crimes, is overly broad under the Souter opinion in Barnes.

*Triplette Grille, Inc. v. City of Akron*, 816 F. Supp. 1249 (N.D. Ohio 1993), *aff'd*, 40 F.3d 129 (6th Cir. 1994).

0.441 **Governmental Interests** - It is well established that the regulation of nudity in public places advances a substantial governmental interest in maintaining order and morality.

*Stevenson v. City of Vicksburg*, 900 F. Supp. 1 (S.D. Mass. 1994).

0.442 Gross indecency statute applies to public fellatio.

*People v. Lino*, 527 N.W.2d 434 (Mich. 1994).

0.443 A restroom stall, enclosed by partitions of sufficient height so that user's conduct or condition is not visible to the casual public eye, is not a public place.

*Chubb v. State*, 640 N.E.2d 44 (Ind. 1994).

0.45 **Failure of Content Neutrality** - City ordinance prohibiting nudity in liquor establishments is not valid time, place, and manner restriction on public nudity. Purpose of ordinance prohibiting "certain types of entertainment" in liquor establishments is not content-neutral.

*Knudston v. City of Coates*, 506 N.W.2d 29 (Minn. Ct. App. 1993), *rev'd*, 519 N.W.2d 166 (Minn. 1994).

0.451 **Limited to Licensed Liquor Establishments** - Although a city may correctly assert a substantial government

## Nudity

interest in prohibiting public nudity, ordinance that applied only to licensed liquor establishments, prohibiting nude dancing, is a government interest directly related to the suppression of free expression.

*Knudston v. City of Coates*, 506 N.W.2d 29 (Minn. Ct. App. 1993), *rev'd*, 519 N.W.2d 166 (Minn. 1994).

**0.452 Peep show booths as public** - State provided sufficient proof that "lewdness" or "public sexual activity that is reprehensible or disgusting in nature" existed in adult entertainment arcade. Evidence showed that patrons were engaging in sexual activity inside the booths.

*State v. Lion's Den*, 627 N.E.2d 629 (Ohio Ct. App. 1993).

**0.453 Exposure of Female Breasts** - The City's objective of protection of public decorum sensibility and morals in enacting an ordinance prohibiting exposure of breasts in public are legitimate and important legislative goals.

*City of Tucson v. Wolfe*, 917 P.2d 706 (Ariz. Ct. App. 1995).

**0.454** An act of public lewdness did not occur since the defendant to pains to conceal himself.

*United States v. Doe*, 884 F. Supp. 78 (E.D.N.Y. 1995).

**0.4541** Indecent exposure requires a knowing and intentional exposure of the primary genital area to public view. Defendant's behavior occurred in his home and not in a public view, and he did not intentionally position himself to be visible or accessible to the general public.

*State v. Henderson*, 865 P.2d 1185 (N.M. Ct. App. 1993), *aff'd*, 865 P.2d 1181 (N.M.

1993), *overruled in part by*, *State v. Meadors*, 908 P.2d 731 (N.M. 1995).

**0.455 Female Breasts Equal Protection** - Prohibition of females and not males exposing their breasts in public does not violate equal protection.

*City of Tucson v. Wolfe*, 917 P.2d 706 (Ariz. Ct. App. 1995).

**0.4551 Exposed Areola Indicates Nudity** - Definition of a "state of nudity" including failure to opaquely cover the areola is valid.

*Messina v. State*, 904 S.W.2d 178 (Tex. Crim. App. 1995).

**0.46 Public Nudity is Not Expression** - The Chief Justice in Barnes found that public nudity is not per se expression.

*Pap's A.M. v. City of Erie*, 674 A.2d 338 (Pa. Commw. Ct. 1996).

**0.461** Public nudity ordinance did not violate defendant's right of free speech.

*State v. Moll*, 67 L.W. 3005 (Fla. Cir. Ct 1997).

**0.47 Husband and Wife** - Sexual intercourse between a husband and wife can violate gross indecency statute depending on the circumstances.

*People v. Jones*, 563 N.W.2d 719 (Mich. Ct. App. 1997).

**0.471 Females in Public** - Sexual contact between females in a public place is an act of gross indecency.

*People v. Brown*, 564 N.W.2d 919 (Mich. Ct. App. 1997).

## Chapter 11000

0.472 **Streets, Parks and Beaches** - Legislative power unquestionably permits the city to bar the imposition of nude dancing upon the public in settings such as streets, parks and beaches.

*Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D.N.Y. 1997).

0.48 **Lewd vis-...-vis non lewd nudity** - A state's ban of lewd public nudity while remaining silent on nonlewd public nudity does not give rise to an inference that state has expressed an intent to permit nonlewd public nudity.

*J & B Entertainment, Inc. v. City of Jackson, Mississippi*, 152 F.3d 362 (5th Cir. 1998).

0.485 **Children and non-consenting adults** - While normal heterosexual intercourse is ordinarily not grossly indecent, such act may violate statute when done in public place with minor children and non-consenting adults present.

*People v. Jones*, 563 N.W.2d 719 (Mich. Ct. App. 1997).

0.49 **Use of phrase "public license establishment" is overbroad** - A prohibition against public nudity to combat negative secondary effects in "public licensed establishments" including private hotel rooms, campgrounds, taverns, and theaters is overbroad.

*Lounge Management, Ltd. v. Town of Trenton*, 580 N.W.2d 156 (Wis. 1998).

### NUDE ENTERTAINMENT

0.5 An ordinance banning the display of female breasts in any place that serves food or alcoholic beverages except theaters, concert halls, or similar establishments is overbroad.

The ordinance would prohibit non-obscene entertainment. Cabarets would be prohibited from showing the musical "Hair."

*Chase v. Davelaar*, 645 F. 2d 735 (9th Cir. 1092).

*Salem Inn, Inc. v. Frank*, 381 F. Supp. 859 (E.D.N.Y. 1974), *aff'd*, 522 F.2d 1045 (2d Cir. 1975).

*Koppinger v. City of Fairmont*, 248 N.W.2d 708 (Minn. 1976).

*Cf. Glancy v. Sacramento County*, 94 Cal. Rptr. 864 (Cal. Ct. App. 1971).

*Glancy v. Sacramento County*, 94 Cal. Rptr. 864 (Cal. Ct. App. 1971), *superseded*, 107 Cal. Rptr. 681 (1973) *cert. denied*, 415 U.S. 931 (1974).

*Steffens v. State*, 343 So.2d 90 (1977).

0.501 Topless dancing prohibition not restricted to A.B.C. premises may be unconstitutional.

*Doran v. Salem Inn, Inc.*, 442 U.S. 922 (1975).

*Saxe v. Brennan*, 416 F. Supp. 892 (E.D. Wis. 1976), *aff'd*, 544 F.2d 521 (9th Cir. 1976).

*Attwood v. Purcell*, 402 F. Supp. 231 (D. Ariz. 1975).

*Salem Inn, Inc. v. Frank*, 381 F. Supp. 859 (E.D.N.Y. 1974), *aff'd*, 522 F.2d 1045 (2d Cir. 1975).

0.5012 **Licensing ordinance** - Licensing ordinance lacked procedural safeguards allowing administrator to determine issuance of license for sexually oriented business (topless dancing), thus constituting prior restraint on speech.

## Nudity

*Orrell v. City of Hot Springs*, 844 S.W.2d 310 (Ark. 1992).

0.502 Indiana statute that prohibits a female from appearing nude in a public place is not in conflict with the First Amendment free speech clause nor is it overbroad.

*State v. Baysinger*, 397 N.E.2d 580 (Ind. 1979). [See O.L.R. Note 5, *infra*].

0.5021 **Non-ABC Establishments** - An enactment prohibiting non-obscene nude dancing which extends beyond establishments serving alcohol is presumptively overbroad.

*Erhardt v. State*, 463 N.E.2d 1121 (Ind. Ct. App. 1984), *aff'd*, 468 N.E.2d 224 (Ind. 1984).

0.51 A broad municipal ban on all nude dancing is unconstitutional.

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

0.51001 **To the Same Effect** - The United States Supreme Court has acknowledged in at least four decisions that nude dancing is entitled to some First Amendment protection.

*Glen Theater, Inc. v. City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988).

*Tolbert v. City of Memphis, Tennessee*, 568 F. Supp. 1285 (W.D. Tenn. 1983).

0.510011 **Nude dancing as protected expression** - Nude dancing, the Supreme Court has held, has first amendment protection.

*U.S. Partners Financial Corp. v. Kansas City*, 707 F. Supp. 1090 (W.D. Mo. 1989).

0.51002 **Expressive nude dancing** - Expressive nude dancing is protected by the First Amendment.

*Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989), *rev'd, sub nom. Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991).

0.51003 **Enclosed Theater** - Non obscene nude dancing performed in an enclosed theater for the entertainment of the paying spectators is presumptively protected a expression under the First Amendment.

*Erhardt v. State*, 463 N.E.2d 1121 (Ind. Ct. App. 1984), *aff'd*, 468 N.E.2d 224 (Ind. 1984).

0.51004 **Theater exception** - Local ordinance prohibiting full or partial nudity in public places but makes exception for "theaters" is not overly broad.

*Rosenberg v. Ohio*, 555 N.E.2d 316 (Ohio Ct. App. 1989), *review denied*, 111 S.Ct. 2887 (1991).

0.5101 **Constitutional Protection** - Nude dancing is not without its First Amendment protections from official regulation.

*BSA, Inc. v. King county*, 804 F.2d 1104 (9th Cir. 1986).

0.5102 **Non-Obscene Nude Dancing** - *Schad* did not explicitly find that non-obscene nude dancing was always protected nor has any Supreme Court of the United States case directly confronted the question.

*Glen Theater, Inc. v. City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988).

0.51021 **Police Power** - At least three different state supreme courts have held that nude dancing may be prohibited as a valid exercise of a city's or a state's police power.

*Tolbert v. City of Memphis, Tennessee*, 568 F. Supp. 1285 (W.D. Tenn. 1983).

## Chapter 11000

0.510211 **Nude dancing** - The Minnesota statute would not suppress all nude dancing.

*State v. White*, 464 N.W.2d 585 (Minn. Ct. App. 1990), *cert. denied*, 112 S.Ct. 77 (1991).

0.5103 **Ban Violated First Amendment** - The district court correctly found that the ban on nude dancing violated the First Amendment.

*BSA, Inc. v. King county*, 804 F.2d 1104 (9th Cir. 1986).

0.51031 **Barroom Nude Dancing** - Barroom nude dancing is not related solely to the economic interests of the audience nor does it propose a commercial transaction. Moreover, even purely commercial speech is not without First Amendment protections.

*BSA, Inc. v. King county*, 804 F.2d 1104 (9th Cir. 1986).

0.510312 **Complete Prohibition** - The United States Supreme Court in *Schad* and *Bellanca* recognized that some nude dancing may be protected.

*Erhardt v. State*, 463 N.E.2d 1121 (Ind. Ct. App. 1984), *aff'd*, 468 N.E.2d 224 (Ind. 1984).

0.51032 **Complete Prohibition** - The U.S. Supreme Court in *Schad* and *Bellanca* recognized that some nude dancing may be protected.

*Erhardt v. State*, 463 N.E.2d 1121 (Ind. Ct. App. 1984), *aff'd*, 468 N.E.2d 224 (Ind. 1984).

0.5104 **Strict Scrutiny** - The nude dancing proviso must be examined under a strict scrutiny.

*Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985).

0.51041 **Level of scrutiny** - Nude dancing is primarily conduct and somewhat expressive and for equal protection purposes deserves a standard of intermediate level scrutiny that questions whether the legislative classification is narrowly tailored to serve a substantial governmental interest.

*7250 Corp. v. Board of County Comm'rs.*, 799 P.2d 917 (Colo. 1990).

0.5105 **Nude Dancing May be Protected** - Appellant's admission that the entertainment involved topless dancing does not by itself remove the case from the ambit of the First Amendment since even nude dancing may, under some circumstances, be entitled to constitutional protection.

*Felix v. Young*, 536 F.2d 1126 (6th Cir. 1976).

0.5106 **Nude Dancing Protected** - The nude dancing and other exhibitions conducted at Plato's Retreat are concededly protected by the First Amendment.

*New York City v. Big Apple Spa*, 497 N.Y.S.2d 988 (N.Y. Sup. 1986).

0.5109 **Live Nude Dancing** - Nudity, including nude dancing, is not per se obscenity and is therefore a means of expression protected by both the 1st and 14th Amendments.

*Highway Tavern Corp v. McLaughlin*, 483 N.Y.S.2d 323 (N.Y. Sup. Ct. App. Div. 1984).

0.511 Statute prohibiting nudity in public places except for works of art held unconstitutional under Miller and Roth.

## Nudity

*Entertainment Ventures, Inc. v. Brewer*, 306 F. Supp. 802 (M.D. Ala. 1969).

*State v. Todd*, 296 So.2d 296 (La. 1974).

0.5111 **Total Ban Cannot Stand** - A municipal ordinance which amounts to a total ban on "barroom type" topless dancing or non-obscene nude dancing anywhere in the municipality cannot stand.

*City of Pasco v. Rhine*, 753 P.2d 993 (Wash. Ct. App. 1988).

0.5112 **Conditional Use Permit** - The injunction issued by Court prohibiting defendants from using the premises for nude or semi-nude dancing without first obtaining a conditional use permit is plainly in excess of any injunction authorized under either the pertinent St. Paul ordinance or the Minnesota statute.

*St. Paul v. Carlone*, 419 N.W.2d 129 (Minn. Ct. App. 1988).

0.5113 **Refusal to Grant Permit** - The refusal to approve a live entertainment permit by a police chief was not a prior restraint or a deprivation of night club owner's freedom of association.

*Bradfield v. Blesma*, (W.D. Mich. 1987).

0.5114 **License requirement** - A license requirement for nude dancing is valid.

*Richter v. City of San Diego*, 499 U.S. 919 (1991).

0.51141 **Notice of license revocation for nudity violation** - The statutory requirements for notice of license revocation for nudity violation were satisfied.

*State ex rel. Richardson v. Pierandozzi*, 784 P.2d 331 (Idaho 1989).

0.5119 **Nudity Alone** - Nudity alone does not take dance out of the realm of protected expression.

*Sekne v. City of Portland*, 726 P.2d 959 (Or. Ct. App. 1986).

0.512 **To the Same Effect** - Nudity alone does not take dance out of the realm of protected expression.

*Kitsap County v. Kev, Inc.*, 720 P.2d 818 (Wash. 1986), *companion case*, 793 F.2d 1053 (9th Cir. 1986).

*Sekne v. City of Portland*, 726 P.2d 959 (Or. Ct. App. 1986).

0.52 An ordinance enacted under an enabling law which prohibits nude entertainment in establishments serving food or beverages other than a concert hall, theater or similar establishment primarily devoted to theatrical performances is overbroad and unconstitutional.

*Morris v. Municipal Court*, 652 P.2d 51 (Cal. 1982).

*Cf. Lee v. Davis*, 190 Cal. Rptr. 682 (Cal. Ct. App. 1983).

*Lee v. Davis*, 190 Cal. Rptr. 682 (Cal. Ct. App. 1983).

*Cf. Glancy v. Sacramento County*, 94 Cal. Rptr. 864 (Cal. Ct. App. 1971).

*Glancy v. Sacramento County*, 94 Cal. Rptr. 864 (Cal. Ct. App. 1971), *superseded*, 107 Cal. Rptr. 681 (1973) *cert. denied*, 415 U.S. 931 (1974).

### O.L.R. Note 4

This decision by the California Supreme Court reverses a policy of upholding such ordinances first established in *Crownover v. Musick*. 509 P.2d 497 (Cal. Sup. Ct.

## Chapter 11000

1973). California ordinances adopted under that authority may now be overbroad. See for example *Taurus Entertainment v. Gates*, 165 Cal. Rptr. 530 (Cal. Ct. App. 1980). And *Theresa Enterprises, Inc. v. Davis*, 146 Cal. Rptr. 802 (Cal. Ct. App. 2d Dist. 1978). The reversal of *Crownover* was due to the court's interpretation of the development of the case law under *LaRue v. California*, 409 U.S. 109 (1973) and the recent Supreme Court opinion *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (60) *on remand*, 429 N.E. 2d 765 (N.Y. Ct. App. 1981) *cert. denied*, 456 U.S. 1006 (1982).

0.521 Live entertainment is not preempted by State.

*Robbins v. County of Los Angeles*, 56 Cal. Rptr. 853 (Cal. Ct. App. 1966).

0.5211 An ordinance prohibiting nude entertainment in non-alcoholic establishments is unconstitutional unless otherwise supported by a substantial state interest.

*Morris v. Municipal Court*, 652 P.2d 51 (Cal. 1982).

0.5212 **Contra:** - An ordinance prohibiting certain forms of topless dancing in a soft drink establishment are valid time, place and manner restrictions on protected activity.

*County of King ex rel. Sowers v. Chisman*, 658 P.2d 1256 (Wash. Ct. App. 1983).

0.53 A statute prohibiting nude dancing on licensed A.B.C. premises and prohibiting nude dancing in any public place is severable. Court upholds A.B.C. provision and abstains on, "Any public place" provision.

*Nail v. Baca*, 626 P.2d 1280 (N. M. 1980).

0.54 The exclusion of live nude dancing in Atlantic City prohibits a wide range of expression that has long been held to be within the protection of the first and fourteenth amendments.

*County of King ex rel. Sowers v. Chisman*, 658 P.2d 1256 (Wash. Ct. App. 1983).

*Trombetta v. Mayor and Commissioners of Atlantic City*, 436 A.2d 1349 (N.J. Super. Ct. App. Div. 1981), *aff'd*, 454 A.2d 900 (N.J. Super. Ct. App. Div. 1982).

0.5401 **Live or Filmed Nude Dancing** - Nude dancing entertainment, whether live or on film, is a form of expression within the protective mantle of the First Amendment.

*Little v. City of Greenfield*, 575 F. Supp. 656 (E.D. Wis. 1983).

0.5402 **Form of Expression** - Nude and semi-nude dancing are a form of expression.

*O'Day v. King County*, 749 P.2d 142 (Wash. 1988).

0.55 A nude bar dancer cannot be convicted of indecent exposure. A dance before a live audience is an artistic pursuit.

*Commonwealth v. Allsup*, 392 A.2d 1309 (Pa. Super. Ct. 1978).

*Haines v. State*, 512 P.2d 820 (Okla. Crim. App. 1973).

0.551 A nude bar dancer cannot be charged with the crime of outraging public decency since Miller tests are not incorporated in the statute.

*State v. Walker*, 568 P.2d 286 (Okla. Crim. App. 1977).

## Nudity

0.56 **Contra** - Indecent exposure is not protected simply because it occurs in a theatre, nightclub or on stage.

*Cf. Birkenshaw v. Haley*, 409 F. Supp. 13 (E.D. Mich. 1974).

*Berkenshaw v. Haley*, 409 F. Supp. 13 (E.D. Mich. 1974).

*Hoffman v. Carson*, 250 So.2d 891 (Fla. 1971).

*People v. Wilson*, 291 N.W.2d 73 (Mich. Ct. App. 1980).

0.561 While a dance can be a method of expression protected by the constitution, not all activity which is labeled dance is so protected.

*San Juan Liquors, Inc. v. City of Jacksonville*, 480 F. Supp. 151 (M.D. Fla. 1979).

*Cf. County of King ex rel. Somers v. Chisma*, 658 P.2d 1256 (Wash. Ct. App. 1983).

*County of King ex rel. Sowers v. Chisman*, 658 P.2d 1256 (Wash. Ct. App. 1983).

*Cf. People v. Bercowitz*, 308 N.Y.S. 1 (N.Y.C.Crim. Ct. N.Y. Cty. 1970).

*People v. Bercowitz*, 308 N.Y.S.2d 1 (N.Y. City Crim. Ct. N.Y. Cty. 1970). [Lewd performance of the play "Che."]

### O.L.R. Note 5

The *Baysinger* case (.502) was dismissed for want of a substantial federal question. This is a decision "on the merits" under *Hicks v. Miranda* and *City of Chattanooga v. McCoy*, *infra* at (.861).

0.5611 **Nude dancing** - It is well settled that nude dancing falls, marginally, within the protection of the First Amendment in that it is a form of expressive conduct.

*State ex rel. Miller v. Private Dancer*, 613 N.E.2d 1066 (Ohio Ct. App. 1992).

*State v. White*, 464 N.W.2d 585 (Minn. Ct. App. 1990), *cert. denied*, 112 S.Ct. 77 (1991).

0.57 Nude dancing which cannot be characterized as obscene is entitled to some protection under the First and Fourteenth Amendments.

*Doran v. Salem Inn, Inc.*, 442 U.S. 922 (1975).

*California v. LaRue*, 409 U.S. 109 (U.S. 1972).

*Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 516 (1995).

*Lady J. Lingerie, Inc. v. City of Jacksonville*, 973 F. Supp. 1428 (M.D. Fla. 1997).

*3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268 (C.D. Cal. 1996).

*Jorgenson v. County of Volusia*, 625 F. Supp. 1543 (M.D. Fla. 1986)

*Attwood v. Purcell*, 402 F. Supp. 231 (D. Ariz. 1975).

*Wood v. Moore*, 350 F. Supp. 231 (D. Ariz. 1975).

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

## Chapter 11000

*State v. Jones*, 865 P.2d 138 (Ariz. Ct. App. 1993).

*City of Chicago v. Hanson*, 435 N.E.2d 120 (Ill. App. Ct. 1982).

*People v. Conway*, 162 Cal. Rptr. 877 (Cal. Super. Ct. L.A. Cty. 1979.)

*New York Topless Bar & Dancers Association v. N.Y. State Liquor Authority*, 398 N.Y.S.2d 637 (N.Y. Sup. Ct. 1977).

*People v. Nixon*, 390 N.Y.S.2d 518 (N.Y. Sup. Ct. 1976).

*Cf. People v. Conway*, 162 Cal. Rptr. 877 (Cal. Super. Ct. L.A. Cty. 1979)

**0.575 Nude Employee Ordinance** - The plaintiffs who are personally subject to arrest under the nude employee ordinance have standing to challenge the same.

*Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985).

**0.576 Standing of Bar Owner** - The bar owner has standing under *Craig v. Boren* to assert the First Amendment rights of a nude bar performer.

*Proctor v. County of Penobscot*, 631 A.2d 355 (Me. 1994).

**0.577 Non-performing Nudes not Protected** - Nonperforming nude employees cannot claim First Amendment protection solely by virtue of their nudity.

*Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995).

**0.578 Loss of Standing by Ouster** - Where operators of a nude dancing club were ousted from the property they lost standing.

*Sneakers of Cobb County v. Cobb County*, 455 S.E.2d 834 (Ga. 1995).

**0.58 Massachusetts Role** - Before 1975, prohibition of topless or bottomless dancing was widely upheld as directed against conduct rather than speech. It now seems clear that such ordinance violates the First Amendment if not limited to places dispensing alcoholic beverages.

*Commonwealth v. Sees*, 373 N.E.2d 1151 (Mass. Sup. Jud. Ct. Suffolk 1978).

**0.581 Intent to Create Sexual Arousal** - One's intent to create or not create sexual arousal in a nude dance ordinarily cannot be shown by direct evidence but must be inferred from the facts and circumstances.

*Young v. State*, 692 S.W.2d 752 (Ark. 1985), *cert. denied*, 474 U.S. 1070 (1986)

**0.5811 Money Need not be Exchanged** - The law does not limit its scope to those activities whereby money is exchanged for nudity and thereby proscribes a wide range of private, non-commercial conduct that could not be regulated by the state and is overly broad.

*K. Hope, Inc. v. Onslow County*, 911 F. Supp. 948 (E.D. N.C. 1995).

**0.58111 Prurient appeal** - Nude dancing is protected as First Amendment speech, but if its message is an appeal to the prurience, it is not protected speech.

*Walker v. City of Kansas City*, 911 F.2d 80 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 2234 (1991).

**0.5812 Serious Value Exception** - It is constitutional to ban the performance of actual or simulated sex acts in businesses required to obtain a sales tax permit with an exception made for cultural establishments such as where theatrical performances are held.

## Nudity

*Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998).

0.5813 **Injunction Premature** - Injunction enjoining adult cabaret, nude modeling studio, and an adult bookstore from operating, prior to a final judgment, should be stayed pending appellate review.

*Maloy v. City of Lewisville, Tex.*, 848 S.W.2d 380 (Tex. Crim. App. 1993).

0.5814 **FW/PBS not followed** - County adult business licensing scheme failed to impose reasonable time limits on license decision makers and fails to assure prompt judicial review as required by *FW/PBS v. Dallas*.

*Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 169 (1995).

0.5815 **Private Activity Improperly Covered** - Ordinance prohibiting "total nude dancing" and restricting "partial nude dancing" is overbroad and not considered narrowly drawn when it does not distinguish between private and public behavior or between adults and children.

*Pel Asso, Inc. v. Joseph*, 427 S.E.2d 264 (Ga. 1993).

0.5816 **Admission Fee Tax** - Operator of an adult entertainment establishment selling soft drinks and near beer included in the admission fee is subject to retailer's occupation tax.

*Soho Club, Inc. v. Dept. of Revenue*, 645 N.E.2d 1060 (Ill. Ct. App. 1995).

0.5817 **Obscene Performacne Prohibited** - The protection of the First Amendment does not extend to sexual performances that are obscene in nature.

*State v. McGraw*, 879 P.2d 1147 (Kan. Ct. App. 1994).

0.5818 **Lounge not a public place** - D.C. Lounge was not open to the public when the all nude performance took place.

*State v. Albert*, 666 So.2d 1186 (La. Ct. App. 1995).

0.582 **State constitution** - The nude entertainment ordinance must meet United States and state constitutional standards.

*7250 Corp. v. Board of County Comm'rs.*, 799 P.2d 917 (Colo. 1990).

0.5821 **Conduct not speech** - The statute affects expressive conduct not speech.

*State v. White*, 464 N.W.2d 585 (Minn. Ct. App. 1990), *cert. denied*, 112 S.Ct. 77 (1991).

0.583 **Striptease ordinance overbreadth** - The striptease ordinance is overly broad because it criminalizes non-obscene dancing at places where liquor is not served.

*State v. Western*, 812 P.2d 987 (Ariz. 1991).

0.584 **The term shall** - The term shall is mandatory not directory in that the Mayor shall revoke public place of amusement (nude and semi-nude dancing) license within 15 days.

*Puss N Boots, Inc. v. Chicago Mayor's License Commission*, 597 N.E.2d 650 (Ill. App. Ct. 1992).

0.59 **Touching not expressive** - Contact between a nude dancer and a bar patron is conduct beyond the expressive scope of the dancing itself.

## Chapter 11000

*Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995).

0.5901 While nude dancing is protected expression it does not necessarily follow that touching between a nude performer and a customer is protected expression.

*Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995).

0.5902 Patrons have no First Amendment right to touch a nude dancer.

*Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995).

0.5903 **Six foot rule is valid** - Whatever communicative element "mostly" nude dancing may have will only be slightly less effective from six feet away.

*D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995).

0.5904 The six foot requirement is not a burden on First Amendment freedoms greater than is essential to further a legitimate government interest. It meets O'Brien requirements.

*D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995).

0.5905 Chattanooga undercover agents have either experienced themselves or observed a considerable amount of bodily contact between patrons and dancers.

*D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995).

0.5906 The ordinance is well tailored to regulate the environment of adult cabarets in terms of the physical exchanges between the dancers and patrons.

*2300, Inc. v. City of Arlington*, 888 S.W.2d 123 (Tex. Crim. App. 1994).

0.5907 **Four foot rule** - A city may classify and regulate nude dancers differently from other employees and require performers to remain four feet from patrons prohibiting also direct tips.

*Club Southern Burlesque, Inc. v. City of Carrollton*, 457 S.E.2d 816 (Ga. 1995).

0.5908 **No-touch rule** - No-touch municipal adult cabaret ordinance is not facially overbroad.

*2300, Inc. v. City of Arlington*, 888 S.W.2d 123 (Tex. Crim. App. 1994).

0.591 There is no right of a topless dancer to touch patrons.

*2300, Inc. v. City of Arlington*, 888 S.W.2d 123 (Tex. Crim. App. 1994).

0.592 Dancing at adult cabarets is at least marginally protected.

*D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995).

0.593 **No Legislative History Required** - The court does not need legislative history to tell it that the six foot requirement will limit sexual contact in adult cabarets.

*D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995).

### NUDITY ON A.B.C. PREMISES

0.6 **The Broad Power Granted the States by the Twenty-First Amendment Permits the States to Ban Topless and Bottomless Dancing in Establishments Licensed to Sell Alcoholic Beverages Regardless of Whether Such Performances**

## Nudity

**are Obscene** - Whatever artistic and communication value may attach to topless dancing is overcome by the state's exercise of its broad power arising under the Twenty-First Amendment.

*Three K. C. v. Richter*, 279 N.W.2d 268 (Iowa 1979).

*N.Y. State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), *on remand*, 429 N.E.2d 765 (N.Y. 1981), *cert. denied*, 456 U.S. 1006 (1982).

*California v. LaRue*, 409 U.S. 109 (U.S. 1972).

*Blatnik Company v. Ketola*, 587 F.2d 379 (8th Cir. 1978).

*Frejlach v. Butler*, 573 F.2d 1026 (8th Cir. 1978).

*Paladino v. City of Omaha*, 471 F.2d 812 (8th Cir. 1972).

*Martin v. Board of County Commissioners of Lee County*, 364 So.2d 449 (Fla. 1978). [Used police power and not 21st amendment].

*Midtown Palace, Inc. v. City of Omaha*, 229 N.W.2d 56 (Neb. 1975).

*Yauch v. State of Arizona & City of Tucson*, 514 P.2d 709 (Ariz. 1973), *rev'g*, 505 P.2d 1066 (Ariz. Ct. App. 1973).

### O.L.R. Note 6

For a complete review of A.B.C. statutes and regulations relating to nudity, obscenity and indecency, see this subject under 51000.

0.6001 **Commercial Exploitation** - The Yauch Court found that nudity in the setting of bars and restaurants where spiritous liquor was served was for commercial exploitation, and its

elimination would have no chilling effect upon the freedom of speech and the exchange of ideas.

*Longbridge Investment Co. v. Moore*, 533 P.2d 564 (Ariz. Ct. App. 1975).

0.6002 **Combined Uses of Nudity and Alcohol** - Ordinance does not impose a total ban on nude entertainment in the county, but is rather responsive to the distinctive problems associated with the combined uses of nudity and alcohol, at commercial establishments, and as such, represents a legitimate restriction on such entertainment.

*Fillingham v. State*, 446 So.2d 1099 (Fla. Dist. Ct. App. 1984).

0.61 A liquor license may be revoked for nude dancing without the necessity of proving that it was more a form of gross sexuality than communicative expression.

*Barmat v. Robertson*, 611 P.2d 101 (Ariz. Ct. App. 1980), *cert. denied* 449 U.S. 894 (1980).

*Cf. Commonwealth v. Tris-Dad, Inc.*, 448 A.2d 690 (Pa. Commw. Ct. 1982).

*Commonwealth v. Tris-Dad, Inc.*, 448 A.2d 690 (Pa. Commw. Ct. 1982).

0.62 LaRue does not require an evidentiary showing that consumption of alcoholic beverages occurred simultaneously with proscribed conduct.

*Stanich v. State Liquor Control Commission*, 292 N.Y. 2d 469 (Mich. Ct. App. 1980).

0.621 **Definitions not vague** - The terms pubic hair and cleft of buttock were clearly defined in the statute.

## Chapter 11000

*State ex rel. Richardson v. Pierandozzi*, 784 P.2d 331 (Idaho 1989).

0.63 Topless and bottomless dancing may be prohibited in A.B.C. premises under police power without use of Twenty-First Amendment.

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

**0.631 Any Portion of the Breast -** Ordinance which declares that any portion of the breast below the areola must not be exposed is overbroad because it also bars acceptable, legitimate attire or conduct.

*Del Percio, Inc. v. City of Daytona Beach*, 449 So.2d 323 (Fla. Dist. Ct. App. 1984), *quashed and remanded*, 476 So.2d 197 (Fla. 1985).

**0.635 Twenty-First Amendment -** The broad powers of the States to regulate the sale of liquor, conferred by the Twenty-First Amendment, out-weighed any First Amendment interest in nude dancing; a state could therefore ban such dancing as a part of its liquor license program.

*Tolbert v. City of Memphis, Tennessee*, 568 F. Supp. 1285 (W.D. Tenn. 1983).

**0.6351 To the same effect -**

*Walker v. City of Kansas City*, 911 F.2d 80 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 2234 (1991).

*State ex rel. Richardson v. Pierandozzi*, 784 P.2d 331 (Idaho 1989).

**0.63511 ABC Rule -** Nude entertainment may prohibited under a public nudity statute.

*Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989), *rev'd, sub nom. Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991).

**0.6352 Public nudity ordinance/standing -** Manager of a local bar which serves alcoholic beverages does not have standing to challenge a public nudity ordinance.

*Rosenberg v. Ohio*, 555 N.E.2d 316 (Ohio Ct. App. 1989), *review denied*, 111 S.Ct. 2887 (1991).

**0.6353 Alcoholic setting -** The minimal speech interests of nude and seminude dancing are outweighed by constitutional state authority to regulate alcoholic beverages.

*W.D.C., Inc. v. City of Jacksonville*, 710 F. Supp. 782 (M.D. Fla. 1989).

**0.63531 Nude dancing prohibition -** It is within the power of a municipality to ban nude dancing as incident to alcohol regulation.

*Southern Entertainment v. City of Boynton Beach*, 736 F. Supp. 1094 (S.D. Fla. 1990).

**0.6354 Twenty-First Amendment -** The state's power to regulate the sale of alcoholic and non-alcoholic beverages as provided by the Twenty-First Amendment outweighs the protections of the First and Fourteenth Amendments.

*Misleh v. State*, 799 P.2d 631 (Okla. Crim. App. 1990).

**0.636 Florida Rule -** In Florida, counties and cities may also use the Twenty-First Amendment as authority to regulate nude dancing in establishments dealing in alcohol.

*Jorgenson v. County of Volusia*, 625 F. Supp. 1543 (M.D. Fla. 1986)

## Nudity

0.63601 **Protection Under Some Circumstances** - Although the customary "barroom" type of nude dancing may involve only the barest minimum of expression, this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances

*Tolbert v. City of Memphis, Tennessee*, 568 F. Supp. 1285 (W.D. Tenn. 1983).

0.64 Whatever artistic or communicative value may attach to topless dancing is overcome by the state's exercise of its broad power under the Twenty-First Amendment.

*Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983).

0.6401 **Police Power** - The artistic and communicative value attached to nude dancing may be overcome by the state's authority to regulate alcoholic beverages.

*Jorgenson v. County of Volusia*, 625 F. Supp. 1543 (M.D. Fla. 1986)

0.65 **Patently Lewd and Indecent Conduct** - Whatever protections extend to the customary "barroom" type of dancing those protections do not extend to the patently lewd and indecent conduct found to have been permitted or suffered by the petitioner in the case at bar.

*Highway Tavern Corp v. McLaughlin*, 483 N.Y.S.2d 323 (N.Y. Sup. Ct. App. Div. 1984).

0.66 **Valid Regulation** - Although nude dancing implicates First Amendment considerations, there is some scope for valid regulation.

*Highland Tap of Boston Inc. v. City of Boston*, 526 N.E. 253 (Mass. App. Ct. 1988).

*Highway Tavern Corp v. McLaughlin*, 483 N.Y.S.2d 323 (N.Y. Sup. Ct. App. Div. 1984).

0.661 **Contact between Male Go-Go Dancers and Female Patrons** - A licensee is responsible for the acts of its servants and agents (in this case contact between male go-go dancers and female patrons) who violate the Liquor Code, even if the licensee has no personal knowledge of the violation.

*In re New Look Lounge, Inc. v. .*, 459 A.2d 68 (Pa. Commw. Ct. 1983).

0.6611 **Go-Go not a constitutional right** - There is no protected liberty interest in the display of go-go girls at a licensed drinking establishment.

*Walker v. City of Kansas City*, 111 S.Ct. 2234 (1991).

0.6612 **Go-Go governmental justification** - The refusal to allow go-go dancing was based on belief that it would have a negative effect on the surrounding community.

*One Toma, Inc. v. Heide*, 758 F. Supp. 1322 (W.D. Mo. 1991).

0.6613 **ABC premises** - The Boynton Beach ordinance did not regulate nudity as incident to alcohol regulation.

*Southern Entertainment v. City of Boynton Beach*, 736 F. Supp. 1094 (S.D. Fla. 1990).

0.67 **Police Power** - The findings in the ordinance are sufficient to justify an ordinary exercise of the police power in prohibiting nude employees in places serving food and drink.

*Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985).

## Chapter 11000

0.671 **Harmful to Minors** - The only nude dancing performance for which minors are excludable because of age are dance performances which, not only feature nudity, but which, in addition, meet the statutory definition of "harmful to minors."

*St. Paul v. Carlone*, 419 N.W.2d 129 (Minn. Ct. App. 1988).

0.672 **Mere Exhibition** - Mere exhibition of nudity does not constitute either obscenity or being "harmful to minors" in a constitutional sense.

*St. Paul v. Carlone*, 419 N.W.2d 129 (Minn. Ct. App. 1988).

0.673 **Total ban permissible** - The state has the power to ban obscene, nude dancing totally in places where alcohol is served.

*Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989), *rev'd, sub nom. Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991).

0.674 **Selective enforcement** - The enforcement of the liquor laws of Idaho prohibiting nude dancing does not render it arbitrary if there is a lack of such enforcement elsewhere.

*State ex rel. Richardson v. Pierandozzi*, 784 P.2d 331 (Idaho 1989).

0.68 **44 Liquormart Rule** - The Twenty-First Amendment is not a license for the state to ignore their obligations under the First Amendment.

*44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996).

0.6801 The Twenty-First Amendment in no way limits the force of the Supremacy Clause.

*44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996).

0.6802 **Reliance on the Twenty-First Amendment is not Necessary** - The Supreme Court's analysis in *LaRue* would have led to precisely the same result even if it had placed no reliance on the Twenty-First Amendment.

*44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996).

0.6803 Entirely apart from the Twenty-First Amendment a state has ample power to prohibit the sale of alcoholic beverages in inappropriate locations.

*44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996).

0.6804 **Scienter not Required** - The Alcohol Beverage Control Law is a public welfare offense for which scienter is not required.

*State v. Larson*, 653 So.2d 1158 (La. 1995).

0.6805 Enacting a special regulatory measure to ensure that the illegal activity of public nudity does not occur in conjunction with the sale of alcoholic beverages is a reasonable restriction that does not impermissibly curtail First Amendment activities.

*Doe v. Brainerd International Raceway, Inc.*, 533 N.W.2d 617 (Minn. 1995).

*State v. Larson*, 653 So.2d 1158 (La. 1995).

0.6806 There is no constitutional violation in holding a barroom owner strictly liable for nudity on his premises, even though it would cause him to prevent others from exercising

## Nudity

their First Amendment right to dance nude at his establishment.

*State v. Larson*, 653 So.2d 1158 (La. 1995).

0.6807 The nudity ordinance of the county, prohibiting actual or simulated display on licensed liquor premises of the genitals, pubic area, buttocks or anus, did not violate the First Amendment rights of a nude dancer under New York Liquor Authority v. Bellanca.

*Proctor v. County of Penobscot*, 631 A.2d 355 (Me. 1994).

0.6808 Here, as stated in Bellanca, the clear purpose of the ordinance is to "avoid the disturbances associated with mingling alcohol and nude dancing."

*Proctor v. County of Penobscot*, 631 A.2d 355 (Me. 1994).

0.6809 City ordinance prohibiting nudity in liquor establishments is not valid time, place, and manner restriction on public nudity. Purpose of ordinance prohibiting "certain types of entertainment" in liquor establishments is not content neutral.

*Knudston v. City of Coates*, 506 N.W.2d 29 (Minn. Ct. App. 1993), *rev'd*, 519 N.W.2d 166 (Minn. 1994).

0.681 Although a city may correctly assert a substantial government interest in prohibiting public nudity, ordinance that applied only to licensed liquor establishments, prohibiting nude dancing, is a government interest directly related to the suppression of free expression.

*Knudston v. City of Coates*, 506 N.W.2d 29 (Minn. Ct. App. 1993), *rev'd*, 519 N.W.2d 166 (Minn. 1994).

0.6811 The state's power to regulate liquor under the Twenty-First Amendment does not limit the free speech protection of the state constitution.

*Knudston v. City of Coates*, 519 N.W.2d 166 (Minn. 1994).

0.6812 **Public Welfare** - The curtailment of free expression is nominal and incidental and insufficient to cancel the public welfare concerns of the community.

*Knudston v. City of Coates*, 519 N.W.2d 166 (Minn. 1994).

0.6813 **Restrictions are minimal** - It is not clear how the minimal prohibition on nudity impairs whatever non-obscene erotic message the dancer is seeking to express.

*Knudston v. City of Coates*, 519 N.W.2d 166 (Minn. 1994).

0.6814 **Police Power Sufficient** - The no-nudity in bars ordinance can be viewed as a reasonable exercise of the police powers.

*Knudston v. City of Coates*, 519 N.W.2d 166 (Minn. 1994).

0.6815 **Twenty First Amendment Power** - In the context of liquor licensing, the Twenty-First Amendment confers broad regulatory powers on the States, including the authority to ban nude dancing as part of a liquor license control program.

*Connor v. Town of Hilton Head Island*, 442 S.E.2d 608 (S.C. 1994).

0.6816 **Delegation of Authority** - A local government has the power to ban nude barroom dancing where the state has delegated its authority over alcohol.

## Chapter 11000

*Connor v. Town of Hilton Head Island*, 442 S.E.2d 608 (S.C. 1994).

0.6817 **Twenty First Amendment** - The Supreme Court has interpreted the Twenty-First Amendment to allow a state to prohibit nude dancing in establishments that sell alcohol despite nude barroom dancing being protected under the First Amendment.

*Connor v. Town of Hilton Head Island*, 442 S.E.2d 608 (S.C. 1994).

0.68171 **Preemption by Statute** - The State of Wisconsin by the enactment of 944.21 and 66.051(3) restricting municipalities from prohibiting conduct which is the same and similar to conduct prohibited by 944.21 has preempted regulation of nude dancing.

*City of Green Bay v. Blackridge*, #97 CV 612 (Wis. Civ. Ct. 1997).

0.6818 **Justified by Secondary Effects** - A ban on nudity at licensed establishments is rationally related to the state's goal of curtailing the undesirable secondary effects that often accompany alcoholic beverage outlets.

*State v. Larson*, 653 So.2d 1158 (La. 1995).

0.6819 **Ban on Advertising Alcohol** - Baltimore's restrictions banning stationary outdoor advertisements of alcoholic beverages in areas where children walk to school or play in their neighborhood, while excepting commercial and industrial zones, materially advances substantial governmental interest in promoting welfare and temperance of children.

*Anheuser-Busch v. Mayor of Baltimore City*, 63 F.2d 1305 (4th Cir. 1995).

## NEW YORK RULE

0.7 Although the United States Supreme Court has ruled that a New York topless and bottomless dancing prohibition on A.B.C. premises is constitutional without requiring a showing of obscenity, the New York Court of Appeals holds it invalid as to its topless provisions under the New York State Constitution.

*Bellanca v. New York State Liquor Authority*, 429 N.E.2d 765 (N.Y. 1981), *cert denied*, 456 U.S. 1006 (1982).

0.701 A.B.C. regulation of topless dancing held unconstitutional under *Bellanca v. N.Y. State Liquor Authority*, 407 N.E. 2d 460 (N.Y. Ct. App. 1980), *rev'd*, 452 U.S. 714, 69 L.Ed. 2d 357 (1981), on remand, 429 N.E. 2d 765 (N.Y. Ct. App. 1981), *cert. denied*, 456 U.S. 1006, 73 L.Ed.2d 1300 (1982).

*92-07 Restaurant, Inc. v. New York State Liquor Authority*, 435 N.Y.S.2d 989 (N.Y. Sup. Ct. App. Div. 1981).

*People v. Karns*, 365 N.Y.S.2d 725 (N.Y. City Ct. Rochester Cty. 1975).

0.702 A New York Municipal ordinance prohibiting nudity or lewdly exposing the person or private parts in a public place held unconstitutional as overbroad.

*TJPC Restaurant Corp. v. State Liquor Authority*, 402 N.Y.S.2d 483 (N.Y. Sup. Ct. App. Div. 1978), *aff'd*, 400 N.E.2d 1348 (N.Y. 1979).

0.7021 Unlike topless dancing, experience has taught that conduct of the kind contemplated by Rule 36: The appearance on licensed premises of any person unclothed or in such manner or attire as to expose to view any portion of the pubic hair, anus, vulva or genitals was incompatible with the

## Nudity

maintenance of order in establishments licensed to sell alcoholic beverages.

*Highway Tavern Corp v. McLaughlin*, 483 N.Y.S.2d 323 (N.Y. Sup. Ct. App. Div. 1984).

### O.L.R. Note 7

The *TJPC* case and the New York Court of Appeals *Bellanca II* case both call into question the 1967 and 1970 Amendments to the Female Breasts Statute N.Y. Penal Law 245.01 (permitting cities, town and villages to make such exposure also unlawful even where communications activity involved) which was adopted to overcome the preemption problem noted in *Town of Babylon v. Conte*, 3407 N.Y.S. 2d 735 (N.Y. Sup. Ct. 1970).

0.7022 **Police Power** - As a matter of Federal constitutional law, "The broad powers of the states to regulate the sale of liquor, conferred by the Twenty-First Amendment, outweigh any 1st Amendment interest in nude dancing" and a state can therefore "ban such dancing as a part of its liquor license program."

*Highway Tavern Corp v. McLaughlin*, 483 N.Y.S.2d 323 (N.Y. Sup. Ct. App. Div. 1984).

0.7023 **Non-Obscene Topless Dancing** - Non-obscene topless dancing may not be prohibited in the absence of sufficient findings that the prohibition is "so functionally related to the exercise of the state's authority to regulate the sale and consumption of alcoholic beverages as to overcome the applicable constitutional guarantee of freedom of expression."

*Highway Tavern Corp v. McLaughlin*, 483 N.Y.S.2d 323 (N.Y. Sup. Ct. App. Div. 1984).

0.7024 **Prohibition of Nude Dancing Constitutional** - An outright prohibition of all

topless dancing in establishments that sell alcoholic beverages does not violate the First Amendment. A fortiori, prohibition or regulation of nude, lewd or indecent dancing patently cannot violate the First Amendment.

*Blau-Par Corp. v. New York State Liquor Authority*, 482 N.Y.S.2d 841 (N.Y. Sup. Ct. App. Div. 1984).

0.7025 **No Equation between Topless and Fully Nude** - This Court finds no basis to support the equation of constitutionally protected non-obscene topless dancing with the appearance on licensed premises of any person unclothed or in such manner or attire as to expose to view any portion of the pubic hair, anus, vulva, or genitals.

*Highway Tavern Corp v. McLaughlin*, 483 N.Y.S.2d 323 (N.Y. Sup. Ct. App. Div. 1984).

0.7026 **Lewd and Indecent Nude Dancing** - Although the Court of Appeals has held that an outright prohibition of non-obscene topless dancing violates the guarantee of free expression set forth in the New York State Constitution, that decision did not extend to lewd and indecent nude dancing, and remains in effect despite the initial Court of Appeals decision in *Bellanca*.

*Blau-Par Corp. v. New York State Liquor Authority*, 482 N.Y.S.2d 841 (N.Y. Sup. Ct. App. Div. 1984).

0.7027 **Nude Entertainment** - Nude entertainment may be regulated in connection with a state's program providing for the licensure of establishments selling alcoholic beverages.

*Highway Tavern Corp v. McLaughlin*, 483 N.Y.S.2d 323 (N.Y. Sup. Ct. App. Div. 1984).

## Chapter 11000

### MASSACHUSETTES RULE

0.703 Topless dancing on licensed premises held to be protected expression under state constitution.

*Cf. City of Revere v. Aucella*, 338 N.E.2d 816 (Mass. 1975).

*City of Revere v. Aucella*, 338 N.E.2d 816 (Mass. 1975), *appeal dismissed, sub nom., Charger Invest., Inc. v. Corbett*, 429 U.S. 877 (1976).

*Commonwealth v. Sees*, 373 N.E.2d 1151 (Mass. Sup. Jud. Ct. Suffolk 1978).

0.7031 **No Merit for Revocation** - Where patrons were forewarned of nude dancing, and where there was neither contention that the performances were obscene nor mingling of the performers and the patrons there is no merit for revocation of all-alcoholic beverages license.

*Cabaret Enterprises, Inc. v. ABC Commission*, 468 N.E.2d 612 (Mass. 1984).

### ALASKA

0.704 Alaska constitution protects live nude dancing on A.B.C. premises.

*Mickens v. City of Kodiak*, 640 P.2d 818 (Alaska 1982).

0.705 Georgia is not alone in using the state's constitutional guaranty of freedom of expression to find unconstitutional a statute or ordinance proscribing nude dancing in establishments with liquor licenses.

*Goldrush, Inc. v. City of Marietta*, 482 S.E.2d 347 (Ga. 1997).

0.706 Georgia extends the broad power to ban the sale of alcoholic beverages on premises where nude dancing occurs.

*Top Shelf, Inc. v. Mayor and Alderman for the City of Savannah*, 832 F. Supp. 361 (S.D. Ga. 1993). (But See, *Goldrush* case, above).

### INDECENT EXPOSURE

0.8 **Indecent Exposure Defined** - An indecent exposure of the person means exhibition of such parts of the body as modesty requires to be covered.

*State v. Rocker*, 475 P.2d 684 (Haw. 1970).

*Commonwealth v. Broadland*, 51 N.E.2d 961 (Mass. 1943).

*State v. Baugess*, 76 N.W. 508 (Iowa 1898).

0.81 Indecent exposure is committed when a person either willfully or lewdly exposes his person or the private parts thereof in any public place or in any place where there are present persons to be offended or annoyed thereby.

*People v. Swearington*, 140 Cal. Rptr. 5 (Cal. Ct. App. 1977).

0.8101 **Exposure of Vaginal and Anal Areas** - Exposure of the dancer's vaginal and anal areas was, by its very nature, nothing short of obscene.

*Highway Tavern Corp v. McLaughlin*, 483 N.Y.S.2d 323 (N.Y. Sup. Ct. App. Div. 1984).

0.82 Indecent exposure must be willful and lewd. Lewd is sexually unchaste or licentious.

## Nudity

497 P.2d 807 (Cal. 1972).

*Cf. State v. Hazle*, 20 Ark. 156 (Ark. 1859).

*State v. Hazle*, 20 Ark. 156 (Ark. 1859).

0.82031 **Lewd and lascivious** - The terms lewd and lascivious are synonymous in Florida criminal law and both require intent, offense or intrusion upon others rights.

*Schmitt v. State*, 563 So.2d 1095 (Fla. Ct. App. 1990), *modified*, 590 So.2d 404 (Fla. 1991), *cert. denied*, 112 S.Ct. 1572 (1992).

0.82032 **Privacy** - The law must protect the privacy interest, therefore, Florida does not make it a crime for a parent or child to appear unclothed in the family home where the intent is neither lewd or abusive.

*Schmitt v. State*, 563 So.2d 1095 (Fla. Ct. App. 1990), *modified*, 590 So.2d 404 (Fla. 1991), *cert. denied*, 112 S.Ct. 1572 (1992).

0.83 **Scienter required** - In order for the defendant to be guilty of indecent exposure and lewdness, the state must prove that the defendant acted knowingly.

*State v. Bergen*, 677 A.2d 145 (N.H. 1996).

0.832 **Scienter** - One consideration which distinguishes defendant's behavior from conduct in some other cases which was found not to be lewd and lascivious is that defendant appeared nude at the door twice, and it is clear that defendant knowingly exposed himself in front of the young girl when he returned to the door where the girl was waiting.

*Egal v. State*, 469 So.2d 196 (Fla. Dist. Ct. App 1985).

0.84 **Masturbation** - There is no fundamental right nor is it implicit in an ordered concept of liberty to practice unobserved masturbation in a public theater.

*Ellwest Stereo Theaters, Inc. v. Wenner*, 681 F.2d 1243 (9th Cir. 1982).

0.841 **Peep show booth** - Defendant in peep show booth acted recklessly and was properly convicted of indecent exposure.

*Hefner v. State*, 934 S.W.2d 855 (Tex. Crim. App. 1996).

0.842 **Public Urination** - A lewd or obscene showing of the genitals is not required to raise public urination to the level of a crime.

*Elliot v. State*, 435 N.E.2d 302 (Ind. Ct. App. 1982).

0.843 **Not Publicly Viewed** - The mere fact that the charged conduct of each defendant took place in an area where no member of the public could see the defendant does not remove the conduct from the reach of the statute under which they were charged.

*State v. Walters*, 440 So.2d 115 (La. 1983).

0.844 **Obscene Exhibition of the Person** - By obscene exhibition of the person is meant any offensive, disgusting and indelicate presenting to view, show or display of the person.

*State v. Hazle*, 20 Ark. 156 (Ark. 1859).

0.8445 **Female Breasts Constitute Erogeous Zone** - The female breasts unlike the male breasts constitute an erogenous zone and are commonly associated with sexual arousal.

## Chapter 11000

*State v. Turner*, 382 N.W.2d 252 (Minn. Ct. App. 1986).

0.845 **Indecent Exposure** - Dismissing appeal of contention denied in Illinois Circuit Court, that nudism or naturism is not an exercise of religion and is not protected by the First Amendment.

54 L.W. 3195 (7th Cir. 1985).

0.84501 "Private Parts" in an indecency ordinance refers to the genital organs.

*State v. Fly*, 488 S.E.2d 614 (N.C. Ct. App. 1997).

0.8451 Answering an urgent call of nature is not public indecency.

*City of Cleveland v. Pugh*, 674 N.E.2d 759 (Ohio Ct. App. 1996).

0.8452 Revealing pubic hair does not amount to indecent exposure.

*Commonwealth v. Arthur*, 650 N.E.2d 787 (Mass. 1995).

0.8453 Statute prohibiting "indecent exposure" does not require an act of a sexual nature in order for public nudity to constitute a violation of the statute.

*State v. Sandoval*, 857 P.2d 395 (Ariz. Ct. App. 1993).

0.8454 An indecent exposure offense does not require that the exposers' genitals be visible.

*People v. Rehmeier*, 24 Cal. Rptr. 2d 321 (Cal. Ct. App. 1993), *review denied*, (Cal. 1994).

0.8455 Although the term "private parts" is not defined in the Virginia code, other

related phrases make clear the legislature's intent to include the groin and buttocks within that category.

*Hart v. Commonwealth*, 441 S.E.2d 706 (Va. Ct. App. 1994).

0.8456 The legal writers and scholars have long conceived the phrase to signify and relate to lascivious exhibitions of those private parts of the person which instinctive modesty and common propriety require shall be customarily be kept covered in the presence of others.

54 L.W. 3195 (7th Cir. 1985).

*Yauch v. State of Arizona & City of Tucson*, 514 P.2d 709 (Ariz. 1973), *rev'g*, 505 P.2d 1066 (Ariz. Ct. App. 1973).

0.8457 Lewd, lascivious, and indecent are synonymous and connote wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator.

*Wonyetye v. State*, 648 So.2d 797 (Fla. Ct. App. 1994).

0.8458 Indecent exposure in Texas requires that the appellant act recklessly about whether another is present who will be offended by his act.

*Hefner v. State*, 934 S.W.2d 855 (Tex. Crim. App. 1996).

0.8459 Unlike the determination of obscenity, the determination of indecency and immorality depends on the context and surrounding circumstances.

*Her Majesty Ludacka v. .*, Court of Appeals Ontario, Canada 1996

## Nudity

- 0.85 **Mens Rea Requirements** - Exposure per se is not prohibited by state absent mens rea requirements that exposure be sexually motivated and inflicted upon an unwilling party.
- State v. Bauer*, 337 N.W.2d 209 (Iowa 1983).
- 0.85001 In determining whether act violates the gross indecency statute, the court must look not only at the act itself, but also at the circumstances in which act occurred.
- People v. Jones*, 563 N.W.2d 719 (Mich. Ct. App. 1997).
- 0.8501 Defendant can be convicted of the crime of gross lewdness as a joint venturer.
- Commonwealth v. Gray*, 660 N.E.2d 695 (Mass. App. Ct. 1996).
- 0.8502 **Not vague** - The indecent exposure statute is not unconstitutionally vague.
- People v. Murphy*, 513 N.W.2d 451 (Mich. Ct. App. 1994), *appeal denied*, 521 N.W.2d 617 (Mich. 1994).
- 0.8503 Prior charges of a sexual nature are admissible on a lewdness charge.
- State v. Zeidell*, 691 A.2d 866 (N.J. Super. Ct. App. Div. 1997).
- 0.8504 Uncorroborated testimony of victim was sufficient to support conviction for public indecency and attempted criminal deviate conduct.
- Orr v. State*, 612 N.E.2d 213 (Ind. Ct. App. 1993).
- 0.8505 The crime of indecent exposure is credibly established by the evidence.
- State v. Devaney*, 657 A.2d 832 (N.H. 1995).
- State v. Gradick*, 687 So.2d 1074 (La. Ct. App. 1997).
- People v. Boulerice*, 37 Cal. Rptr. 2d 441 (Cal. Ct. App. 1995), *review granted*, 40 Cal. Rptr. 2d 838 (Cal. 1995).
- State v. Cutro*, 657 A.2d 239 (Conn. App. Ct. 1995).
- State v. Caulfield*, 885 S.W.2d 349 (Mo. Ct. App. 1994).
- 0.8506 Defendant was not guilty of indecent exposure under circumstances of the case.
- Commonwealth v. Arthur*, 650 N.E.2d 787 (Mass. 1995).
- Beasley v. State*, 906 S.W.2d 270 (Tex. Crim. App. 1995).
- 0.851 **Bare-Breasted Women** - Bare-breasted women offend public sensibilities. An important governmental objective is to prevent such offense.
- People v. Craft*, 509 N.Y.S.2d 1005 (N.Y. City Ct. Monroe Co. 1986).
- 0.852 **Translucent Tape** - Coverage of breast nipples with translucent tape does not make for non-exposure.
- State v. Jacobsen*, 459 So.2d 1285 (La. Ct. App. 1984).
- 0.853 **Nipples Covered by Transparent Tape and Buttocks Exposed** - Evidence that appellant danced in the nude with her nipples covered by transparent tape and with her buttocks exposed brings her conduct squarely within the prohibition of the statute.

## Chapter 11000

*Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984).

**0.85301 Liberties Do Not Encompass Nude Sunbathing** - It is clear that the Fifth Amendment liberties requiring the kind of protection urged here by appellants do not encompass the right to bathe in the nude at National Park.

*Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976).

**0.85311 Nude Sunbathing Not A Constitutional Right** - Nude sunbathing is not a right of constitutional dimension.

*New England Naturalist Association v. Larsen*, 692 F. Supp. 75 (D. R.I. 1988).

**0.8532 Sunbathing Not Standard Mode of Expression** - Nude sunbathing is not associated with dance, literature, or any other standard mode of expression.

*South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608 (11th Cir. 1984).

**0.85321 Nude Sunbathing Not Protected Speech** - There is no support for the notion that nude sunbathing, by itself, is a form of speech protected by the First Amendment.

*Tri-State Metro Waterwaste v. Lowers Township*, 529 A.2d 1047 (N.J. Super. Ct. App. Div. 1987).

**0.8533 Sunbathing Not Speech** - Sunbathing is not speech.

*South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608 (11th Cir. 1984).

**0.8534 No Fundamental Right to Appear Nude** - There is no fundamental right to appear nude or topless in public.

*United States v. Biocic*, 730 F. Supp. 1364 (D. Mo. 1990), *aff'd*, 928 F.2d 112 (9th Cir. 1991).

*People v. Craft*, 509 N.Y.S.2d 1005 (N.Y. City Ct. Monroe Co. 1986).

**0.853401 Constitutional interest** - There is no constitutionally protected liberty interest in partial or complete public nudity as there is in privacy.

*United States v. Biocic*, 730 F. Supp. 1364 (D. Mo. 1990), *aff'd*, 928 F.2d 112 (9th Cir. 1991).

**0.85341 Interest in Nude Bathing Not Fundamental** - Only if the interest in nude bathing were considered fundamental would appellants prevail.

*Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976).

**0.85342 No Right to Sunbather or Associate in the Nude** - The case law on this subject has uniformly rejected arguments that nude sunbathing on a public beach is constitutionally protected either as a mode of expression or as a form of association or as a privacy right.

*New England Naturalist Association v. Larsen*, 692 F. Supp. 75 (D. R.I. 1988).

**0.8535 Sunbathing Not Associated with Artistic Expression** - Nude sunbathing is not associated with dance, literature or any other form of expression.

*McGuire v. State*, 489 So.2d 729 (Fla. 1986)

**0.85351 Sunbathing nudity** - The Constitution does not protect unassociated nudity (I.e. sunbathing) from exposure to governmental limitations).

## Nudity

*Elysium Institute, Inc. v. Los Angeles County*, 283 Cal. Rptr. 688 (Cal. Ct. App. 1991), *cert. denied*, 112 S.Ct. 1180 (1992).

0.8536 Sunbathing in the nude is not per se illegal in Hawaii. It must be coupled with an intent to indecently expose oneself. If it is likely to be seen by others, it is enough.

*State v. Bull*, 597 P.2d 10 (Haw. 1979).

*State v. Rocker*, 475 P.2d 684 (Haw. 1970).

0.8537 A female in New York cannot be found guilty of public lewdness for sunbathing on a public beach.

*People v. Hardy*, 357 N.Y.S.2d 970 (N.Y. Sup. Ct. App. Div. 1974). *But See, Chapin v. Town of Southampton*, 457 F. Supp. 1170 (E.D.N.Y. 1978).

0.8538 Nude sunbathing is conduct rather than expression and merits little if any constitutional protection.

*South Florida Free Beaches, Inc. v. City of Miami*, 548 F. Supp. 53 (S.D. Fla. 1982).

0.8539 Female appearing on public beach with breasts exposed is a disorderly person.

*Moffet v. State*, 340 So.2d 1155 (Fla. 1977).

0.854 **Chilling Effect** - To prohibit the display of breasts in public circumstances would do irreparable harm because of the chilling effect upon recognized First Amendment rights.

*Tolbert v. City of Memphis, Tennessee*, 568 F. Supp. 1285 (W.D. Tenn. 1983).

0.85401 **Outside of an Artistic Performance** - It is incredulous that the

Legislature intended to permit complete female nudity (outside of an artistic performance) and to bar only exposition of the areola portion of the breast.

*People v. Gilmore*, 468 N.Y.S.2d 965 (N.Y. City Ct. Mt. Vernon 1983).

0.8541 A New York statute specifically prohibits a female from uncovering her breasts in public.

*People v. Gilbert*, 339 N.Y.S.2d 457 (N.Y. City Crim. Ct. Kings Co. 1972).

*People v. Moriera*, 333 N.Y.S.2d 215 (N.Y. Dist. Ct. Suffolk Cty. 1972).

0.8542 The display of female breasts do not violate the Hawaii open lewdness statute. Exposure of one's private parts does.

*State v. Crenshaw*, 597 P.2d 13 (Haw. 1979).

0.8543 **Non-Artistic Nudity** - Courts have consistently held that non-artistic nudity, such as nude sunbathing is not, in itself First Amendment expression.

*State v. Turner*, 382 N.W.2d 252 (Minn. Ct. App. 1986).

0.8544 **Seashore's Conservation Purposes** - The record in this case establishes that barring nude bathing bears a real and substantial relationship to the objectives of the seashore's conservation purposes.

*Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976).

0.8545 **Female Breasts Constitute Erogeous Zone** - The female breasts, unlike the male breasts, constitute an erogenous zone and are commonly associated with sexual arousal.

## Chapter 11000

*State v. Turner*, 382 N.W.2d 252 (Minn. Ct. App. 1986).

**0.855 Need Not Be Public** - The place need not necessarily be public nor must exhibition be to more than one person because one might go to a private house and outrage another by obscene exhibition of his person.

*State v. Hazle*, 20 Ark. 156 (Ark. 1859).

**0.85552 Nude sunbathing** - Simply put, the focus of the legislation was to proscribe nude sunbathing by ordinary citizens. (Titone, J. concurring).

*People v. Santorelli*, 587 N.Y.S.2d 601 (N.Y. 1992).

**0.856 Totality of Circumstances** - Although the evidence did not show that defendant spoke any words or made any motions evidencing an illicit intent, nevertheless the totality of the circumstances was such that the jury could properly have concluded that defendant's conduct violated the statute.

*Egal v. State*, 469 So.2d 196 (Fla. Dist. Ct. App. 1985).

**0.857 Lascivious Exposition** - In order for there to be a violation of statute, there must be, coupled with mere nudity, "lascivious" exposition or exhibition of the defendant's sexual organs.

*Goodmakers v. State*, 450 So.2d 888 (Fla. Dist. Ct. App. 1984).

**0.86 Mixed nudism in a gymnasium in New York** is not an act openly outraging public decency.

*People v. Burke*, 276 N.Y.S. 402 (N.Y. Sup. Ct. App. Div. 1934), *aff'd*, 196 N.E. 585 (N.Y. App. 1935).

**0.861 Under New York law public lewdness** requires a showing of lewd conduct.

*People v. Hardy*, 357 N.Y.S.2d 970 (N.Y. Sup. Ct. App. Div. 1974).

*People v. Ventrice*, 408 N.Y.S.2d 990 (N.Y. City Crim. Ct. N.Y. Cty. 1978).

*Cf. People v. Hardy*, 357 N.Y.S.2d (N.Y. Sup. Ct. 1974).

*People v. Abronovitz*, 310 N.Y.S.2d 698 (N.Y. Cty. Ct. 1970) *aff'd in part, rev'd in part*, 327 N.Y.S.2d 137 (N.Y. Sup. Ct. App. Div. 1971), *rev'd* 286 N.E.2d 721 (N.Y. 1972).

*United States v. Ellwest Stereo Theaters of Memphis, Inc.*, (1990).

**0.862 Taking pictures of females nude to the waist on a public street** is a notorious act of public indecency.

*Kitchens v. State*, 52 S.E.2d 564 (Ga. Ct. App. 1949).

*Martin v. State*, 144 S.E. 36 (Ga. Ct. App. 1928).

**0.863 Nudist colony in Michigan** is held to be unlawful activity.

*Commonwealth v. Hildabridge*, 92 N.W.2d 6 (Mich. 1958).

*People v. Ring*, 255 N.W. 373 (Mich. 1934).

**0.864 Nudity may be prohibited on federal enclaves.**

*Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976).

*United States v. Hymans*, 463 F.2d 615 (10th Cir. 1972).

## Nudity

0.865 Not all forms of nude or seminude behaviour are embodied with sufficient communicative content to warrant the protection of the First Amendment. A modern day streaker crying "free speech" will find no responsive chord in the constitution.

*Berkenshaw v. Haley*, 409 F. Supp. 13 (E.D. Mich. 1974).

0.866 Indecent exposure must be lewd or lascivious. A nude female partially dressed in a sign is not such.

*Duvallon v. State*, 404 So.2d 196 (Fla. Dist. Ct. App. 1981).

0.867 **Dress Restrictions** - The Town's interest in regulating the dress of its citizens at large, in the form of prohibiting male joggers from appearing in public without a shirt, is so manifestly weak that it cannot justify the intrusion upon defendant's liberty interest in his chosen mode of dress.

*DeWeese v. Town of Palm Beach*, 812 F.2d 1365 (11th Cir. 1987).

0.868 **Nude Dancing As Indecent Exposure** - Appellant's nude dancing can be covered by an indecent exposure statute.

*Young v. State*, 692 S.W.2d 752 (Ark. 1985), *cert. denied*, 474 U.S. 1070 (1986)

0.8811 **Female breast exposure** - The People do not dispute that New York is one of only two states which criminalizes the mere exposure by a woman in a public place of a specific part of her breast.

*People v. Santorelli*, 587 N.Y.S.2d 601 (N.Y. 1992).

0.88111 **Equal Protection** - Where unequal treatment of males and females is substantially related to the achievement of an

important governmental concern, equal protection is not violated.

*People v. Craft*, 509 N.Y.S.2d 1005 (N.Y. City Ct. Monroe Co. 1986).

0.8812 **Private parts** - The term "private parts" does not include female breast in public indecency statute.

*State v. Jetter*, 599 N.E.2d 733 (Ohio Ct. App. 1991).

0.89004 **Female breast nudity statute** - The state's objective in passing the female breast nudity statute is to protect the public from invasions of its sensibilities as currently reflected in community standards. The prohibition is substantially related to the achievement of an important governmental interest or concern.

*People v. David*, 549 N.Y.S.2d 564 (N.Y. City Ct. Rochester Cty. 1989). [See also 585 N.Y.S. 2d 149 (1991).]

*People v. Craft*, 509 N.Y.S.2d 1005 (N.Y. City Ct. Monroe Co. 1986).

0.890041 **New York statute prohibiting exposure of female breast** - The New York statute prohibiting exposure of the female breast is founded on a rational basis and is a reflection of New York's current moral standards which creates a valid constitutional classification between female and male nudity.

*People v. David*, 549 N.Y.S.2d 564 (N.Y. City Ct. Rochester Cty. 1989). [See also 585 N.Y.S. 2d 149 (1991).]

0.89402 **Nudist colony** - Elysium's practice of nudism is not considered to be a form of speech protected by the federal or state constitutions.

## Chapter 11000

*Elysium Institute, Inc. v. Los Angeles County*, 283 Cal. Rptr. 688 (Cal. Ct. App. 1991), *cert. denied*, 112 S.Ct. 1180 (1992).

### OBSCENE NUDE DANCING

0.9 The Tennessee nudity statute is not unconstitutional in light of *Barnes*.

*Deja Vu of Nashville v. Metropolitan Government*, No. 3:94-0494 (M.D. Tenn. 1994), *aff'd* No. 96-6512 (6th Cir. 1999).

0.90001 **Bikini ordinance** - requiring the wearing of a bikini top in addition to wearing pasties and a G-string is constitutional, furthering the substantial government interest in regulating the evils attached to adult establishments.

*Bright Lights v. City of Newport*, 830 F. Supp. 378 (E.D. Ky. 1993).

0.9001 The requirement that the dancers wear "pasties" and "G strings" does not regulate the communicative aspects of the dancing, since the conduct and message of eroticism is still portrayed although in a less graphic manner. Thus, the state's substantial interest in protecting the public health, safety and morals is enough to justify the slight infringement of First Amendment rights.

*Pap's A.M. v. City of Erie*, 674 A.2d 338 (Pa. Commw. Ct. 1996).

0.9002 **Prohibition of All Topless Dancing** - The Supreme Court has held that in light of the powers to regulate alcoholic beverages provided by the States by the Twenty-First Amendment an outright prohibition on all topless dancing in establishments that sell alcoholic beverages does not violate the First Amendment. A fortiori, a prohibition or regulation of nude, lewd or indecent dancing patently cannot violate the First Amendment.

*State v. Jacobsen*, 459 So.2d 1285 (La. Ct. App. 1984).

0.901 State laws governing nudity do not prohibit nude dancing per se.

*Connor v. Town of Hilton Head Island*, 442 S.E.2d 608 (S.C. 1994).

0.902 The states can take greater measures to regulate nude dancing.

*Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341 (E.D. Cal. 1995).

0.903 The expressive aspect of nude dancing does not merit the absolute protection of the First Amendment.

*K. Hope, Inc. v. Onslow County*, 911 F. Supp. 948 (E.D. N.C. 1995).

0.904 To determine whether a law regulating conduct such as nude dancing impermissibly infringes on protected expression we must determine whether (1) The act furthers an important government interest; (2) It is unrelated to the suppression of speech and that the incidental restriction of speech is no greater than essential to further the government interest.

*Granelly v. Bacon*, 429 S.E.2d 663 (Ga. 1993).

0.905 The narrowing construction means that the nude dancing ordinance does not prohibit the live performance of plays, operas, or ballets at theaters, concert halls, museums, educational institutions, or similar establishments.

*Granelly v. Bacon*, 429 S.E.2d 663 (Ga. 1993).

## Nudity

0.906 Term "simulated" conduct is not unconstitutionally vague since reasonable persons and performers need not guess when a dance involves "simulated male genitals".

*Bright Lights v. City of Newport*, 830 F. Supp. 378 (E.D. Ky. 1993).

0.907 No evidence indicates that the drafters of the 1998 Amendments relied upon any studies nor did the City Council consider any study attempting to link semi nude dancing to the production of secondary effects previously linked to sexually explicit conduct.

*MD II Entertainment, Inc. v. City of Dallas, Texas*, 935 F. Supp. 1394 (N.D.Tex. 1995).

0.908 In enacting amendments aimed solely at the dancer's attire, the city has ignored other contributing factors.

*MD II Entertainment, Inc. v. City of Dallas, Texas*, 935 F. Supp. 1394 (N.D.Tex. 1995).

0.909 No evidence indicates that a requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects.

*MD II Entertainment, Inc. v. City of Dallas, Texas*, 935 F. Supp. 1394 (N.D.Tex. 1995).

0.91 Akron ordinance (based on Indiana law) which banned all public nudity, but which failed to link harmful secondary effects, such as prostitution and other crimes, is overly broad under the Souter opinion in *Barnes*.

*Triplette Grille, Inc. v. City of Akron*, 816 F. Supp. 1249 (N.D. Ohio 1993), *aff'd*, 40 F.3d 129 (6th Cir. 1994).

0.91002 **Commercial Speech** - Since a commercial transaction is proposed in the advertisement for a nude dancing club, the advertisement is considered commercial speech.

*Leuth v. St. Clair County Community College*, 732 F. Supp. 1410 (E.D. Mich. 1990).

0.9103 **Respondent superior** - The corporate licensee is chargeable with improper conduct since it had the opportunity through reasonable diligence to acquire knowledge of said conduct.

*17 Fortune Corp. v. State Liquor Authority*, 567 N.Y.S.2d 304 (N.Y. Sup. Ct. App. Div. 1991).

0.911 A statute that regulates granting or denying permits required by persons who wish to dance partially nude in licensed premises fails to comply with due process requirements when uncontrolled discretion is left to the chief of police in granting such permits.

*Pel Asso, Inc. v. Joseph*, 427 S.E.2d 264 (Ga. 1993).

0.912 **Mere Conduct** - The dances are mere conduct not constitutionally protected expression.

*Glen Theater, Inc. v. City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988).

0.913 **Striptease Not Expressive Activity** - In light of the Indiana Supreme Court decisions the type of dancing these plaintiffs wish to perform (striptease) is not expressive activity protected by the Constitution of the United States and falls squarely within the public indecency statute.

*Glen Theater, Inc. v. City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988).

## Chapter 11000

0.914 **Nude Dancing Not Commercial** - Other courts have found that nude dancing is not commercial speech.

*Glen Theater, Inc. v. City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988).

0.91403 **Exposure of genital areas** - The record clearly indicates that on two occasions, various female dancers were observed in the licensed premises soliciting tips in such manner as to expose their genital area.

*17 Fortune Corp. v. State Liquor Authority*, 567 N.Y.S.2d 304 (N.Y. Sup. Ct. App. Div. 1991).

0.91404 **Indiana public nudity statute** - It is concluded that the Supreme Court would not permit the application of the Indiana public nudity statute to the presentation of non-obscene, nude dancing as expressive entertainment.

*Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989), *rev'd, sub nom. Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991).

0.91405 **Striptease ordinance overbreadth** - The striptease ordinance is overly broad because it criminalizes non-obscene dancing at places where liquor is not served.

*State v. Western*, 812 P.2d 987 (Ariz. 1991).

0.915 Barnes, a plurality decision, involved the constitutionality of an Indiana statute which is virtually identical to the one in our case.

*Pap's A.M. v. City of Erie*, 674 A.2d 338 (Pa. Commw. Ct. 1996).

0.916 Requiring exotic dancers in juice bars not to perform in the nude, but to wear pasties and G-strings, is constitutional.

*Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998).

0.917 The statement of Justice Souter casts doubt on the proposition that his concurrence articulated a subset of the principles contained in the plurality opinion. He appears to rely on an different and distinct governmental interest.

*Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D.N.Y. 1997).

0.9171 **Vagueness** - In order to regulate a spontaneous, nude performance, the ordinance must be specific and detail prohibited conduct.

*City of Wichita v. Wallace*, 788 P.2d 270 (Kan. 1990).

0.918 As the Sixth Circuit has observed, deriving the significance of Barnes decision is like "reading tea leaves."

*Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D.N.Y. 1997).

0.919 Dancers strip down to "G-string" or "T-bar" of which their status could be described as "mostly nude".

*D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995).

0.9191 It was within the district court's discretion to deny motion for preliminary injunction sought by restaurant owner who featured nude female dancers. Court was within its discretion in determining that plaintiff's efforts to stop the enforcement of an

## Nudity

anti-nudity statute had no substantial likelihood of prevailing on the merits.

*Cafe 207 v. St. John's County*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1544 (1996).

0.92 Nude dancing enjoys a prima facie presumption of protection under the 14th Amendment.

*Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 169 (1995).

*CR of Rialto, Inc. v. City of Rialto*, 975 F. Supp 1254 (C.D. Cal. 1997).

*Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D.N.Y. 1997).

*Dia v. City of Toledo*, 937 F. Supp. 673 (N.D. Ohio 1996).

*Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341 (E.D. Cal. 1995).

*Stevenson v. City of Vicksburg*, 900 F. Supp. 1 (S.D. Mass. 1994).

*Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981).

*Chambers v. Peach County*, 467 S.E.2d 519 (Ga. 1996).

*T & D Video, Inc. v. City of Revere*, 670 N.E.2d 162 (Mass. 1996).

*JJR, Inc. v. City of Seattle*, 891 P.2d 720 (Wash. Ct. 1995).

*Granelly v. Bacon*, 429 S.E.2d 663 (Ga. 1993).

*2300, Inc. v. City of Arlington*, 888 S.W.2d 123 (Tex. Crim. App. 1994).

*State v. Jones*, 865 P.2d 138 (Ariz. Ct. App. 1993).

*Sanita v. City of Los Angeles Board of Police Commissioners*, 104 Cal. Rptr. 380 (Cal. Dist. Ct. App. 1972).

0.921 **Lesser Degree of Protection** - Nude or semi-nude dancing receives a lesser level of constitutional protection because it falls on the outer perimeters of the First Amendment.

*Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341 (E.D. Cal. 1995).

*City of Las Vegas v. 1017 South Main Corp.*, 885 P.2d 552 (Nev. 1994).

*Turner v. State*, 650 N.E.2d 705 (Ind. Ct. App. 1995), *cert. denied*, 116 S.Ct. 1050 (1996).

*3299 N. Federal Highway v. Broward County Comm'rs.*, 646 So.2d 215 (Fla. Dist. Ct. App. 1994).

0.922 Nude dancing is not protected if it is obscene.

*People v. Better*, 337 N.E.2d 272 (Ill. App. Ct. 1975).

*Starshock, Inc. v. Shusted*, 370 F. Supp. 506 (D. N.J. 1974), *rev'd*, 493 F.2d 1401 (3rd Cir. 1974).

*Cf. Slaton v. Paris Adult Theater I*, 201 S.E.2d 456 (Ga. 1973), *cert. denied*, 418 U.S. 939 (1974).

## Chapter 11000

*Slaton v. Paris Adult Theatre I*, 201 S.E.2d 456 (Ga. 1973), *cert. denied*, 418 U.S. 939 (1973). [Film].

*Greenlee v. State*, 648 S.W.2d 783 (Tex. Crim. App. 1983).

*Commonwealth v. Kocinski*, 414 N.E.2d 378 (Mass. App. Ct. 1981).

*State v. Colasuonno*, 432 A.2d 334 (Del. Super. Ct. 1981).

*Bell v. State Liquor Authority*, 403 N.Y.S.2d 804 (N.Y. Sup. Ct. App. Div. 1978), *appeal dismissed*, 439 U.S. 1060 (1979).

*People v. Taylor*, 342 N.E.2d 96 (Ill. App. Ct. 1976).

*People v. Better*, 337 N.E.2d 272 (Ill. App. Ct. 1975).

0.9221 **Not necessarily Obscene** - Although obscene dancing is illegal, nude dancing is not necessarily so.

*State v. Bean*, 490 S.E.2d 16 (S.C. Ct. App. 1997).

0.923 A statute prohibiting lewd dancing held not sufficiently specific to meet the requirements of Miller.

*State v. Crater*, 388 So.2d 802 (La. 1980).

0.924 Striptease requires proof performance obscene.

*State v. Gagliardi*, 381 A.2d 1068 (Conn. 1977).

0.925 **Ban Cannot be Sustained** - A ban on nude dancing cannot be sustained on a theory that it regulates only conduct.

*Erhardt v. State*, 463 N.E.2d 1121 (Ind. Ct. App. 1984), *aff'd*, 468 N.E.2d 224 (Ind. 1984).

0.9251 **Overbreadth** - The legitimate application of the Pierce and Snohomish ordinance is the prohibition on obscene nudity. The overbreadth challenge arises because the ordinances also prohibit non-obscene nude performances. Ultimately, only one prong of the three-part Miller "obscenity" test "appeal to the prurient interest" - is preserved by these ordinances.

*BSA, Inc. v. King county*, 804 F.2d 1104 (9th Cir. 1986).

0.9252 Local ordinance which added fondling of the buttocks, anus, breast or genitalia to second prong of Miller test for obscenity is not overbroad.

*People v. Better*, 337 N.E.2d 272 (Ill. App. Ct. 1975).

0.9253 Live nude dancer arrested under allegedly void obscenity ordinance gives rise to a claim under Civil Rights Act of 1871.

*Ziegman Productions, Inc. v. City of Milwaukee*, 511 F. Supp. 711 (E.D. Wis. 1981). [Performance of "Hair"].

0.9256 Ordinance prohibiting "total nude dancing" and restricting "partial nude dancing" is overbroad and not considered narrowly drawn when it does not distinguish between private and public behavior or between adults and children.

*Pel Asso, Inc. v. Joseph*, 427 S.E.2d 264 (Ga. 1993).

0.92561 The language "Topless or bottomless dancers, go-go dancers, exotic dancers, strippers or similar entertainers" is nebulous and subjective and does not define

## Nudity

with reasonable precision the dancing activity or degree of nudity.

*State v. Jones*, 865 P.2d 138 (Ariz. Ct. App. 1993).

0.92562 Public nudity ordinance is not unconstitutionally vague as applied to nude dancing.

*Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993).

0.92563 The definition of "total nude dancing" and "partial nude dancing" is void for vagueness where no sufficient warning exists as to permit persons to avoid that which is forbidden.

*Pel Asso, Inc. v. Joseph*, 427 S.E.2d 264 (Ga. 1993).

0.92564 LaRue did not involve commercial speech about alcohol but instead concerned the regulation of nude dancing in places where alcohol is served.

*44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996).

0.92565 The nudity ordinance of the county, prohibiting actual or simulated display on licensed liquor premises of the genitals, pubic area, buttocks or anus, did not violate the First Amendment rights of a nude dancer under *New York Liquor Authority v. Bellanca*.

*Proctor v. County of Penobscot*, 631 A.2d 355 (Me. 1994).

0.92566 The plaintiff, operator of a topless bar on a site zoned for such use has standing to challenge as a conditional use provision in a zoning ordinance.

*Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341 (E.D. Cal. 1995).

0.92567 Where nude dancers perform in a manner determined to be lewd and lascivious, owners of their club cannot be convicted of knowingly allowing such conduct without any evidence indicating this is so.

*State v. Bean*, 490 S.E.2d 16 (S.C. Ct. App. 1997).

0.92568 Nude dancing establishment is a "public place" because no expectation of privacy exists and anyone from the general public is admitted upon payment of an admission fee.

*Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993).

0.92569 The definition of nudity covers the female dancers at the institutions at issue.

*Hamilton Amusement Center v. Poritz*, 689 A.2d 201 (N.J. Super. Ct. App. Div. 1997).

0.9257 By using latex paste and makeup, dancers make their breasts appear bare.

*D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995).

0.92571 The word "depicts" in a topless ordinance includes actual live nudity.

*J & B Social Club, No. 1 v. City of Mobile*, 920 F. Supp. 1241 (S.D. Ala. 1996).

0.92572 The bar owner has standing under *Craig v. Boren* to assert the First Amendment rights of a nude bar performer.

*Proctor v. County of Penobscot*, 631 A.2d 355 (Me. 1994).

## Chapter 11000

0.92573 Although a city may correctly assert a substantial government interest in prohibiting public nudity, ordinance that applied only to licensed liquor establishments, prohibiting nude dancing, is a government interest directly related to the suppression of free expression.

*Knudston v. City of Coates*, 506 N.W.2d 29 (Minn. Ct. App. 1993), *rev'd*, 519 N.W.2d 166 (Minn. 1994).

0.92574 The ordinance clearly demands that establishments not located in an industrial zone keep female breasts at least 50% covered.

*City of Jackson v. Lakeland Lounge of Jackson, Inc.*, 688 So.2d 742 (Miss. 1996).

0.92575 Gentleman's club featuring female topless dancing and male striptease was properly subject to an injunction under terms of zoning ordinance, as the first amendment was not implicated by such injunction.

*Township of Concord v. Concord Ranch*, 664 A.2d 640 (Pa. Commw. Ct. 1995).

0.92576 The greater protection of the Texas constitution does not apply to restrictions on topless dancing.

*2300, Inc. v. City of Arlington*, 888 S.W.2d 123 (Tex. Crim. App. 1994).

0.92577 Ten foot rule for erotic dancing is constitutional.

*DCR, Inc. v. Pierce County*, 964 P.2d 380 (Wash. Ct. App. 1998).

0.92578 County commissioners are not expected to know that a statute violated the First Amendment if a law involving the constitutionality of nude dancing was "unstable" at the time permit was denied.

*B Street Commons v. Board of County Comm'rs.*, 835 F. Supp. 1266 (D. Colo. 1993).

### PROSTITUTION

0.93001 To utilize the secondary effects doctrine in the face of a challenge the government must establish a "substantial interest" in the regulation by compiling a record with evidence that there is a reasonable connection between the problem addressed and the proposed regulation based on testimony, local studies or experiences of other cities.

*J & B Entertainment, Inc. v. City of Jackson, Mississippi*, 152 F.3d 362 (5th Cir. 1998).

0.93002 Where adverse secondary effects are not problematic such as in nudity in artistic venues, the state can make exception for this type of public nudity while banning it otherwise without violating content neutrality.

*J & B Entertainment, Inc. v. City of Jackson, Mississippi*, 152 F.3d 362 (5th Cir. 1998).

0.93003 Government must produce evidence that a challenged ordinance may advance its interest in combating secondary effects which accompany nude dancing. The government is not limited to using evidence gathered before the enactment of the statute, but may present subsequently developed evidence at trial.

*J & B Entertainment, Inc. v. City of Jackson, Mississippi*, 152 F.3d 362 (5th Cir. 1998).

0.93004 Schenectady's ban is not a ban on nudity generally, but at seven enumerated establishments.

*Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D.N.Y. 1997).

## Nudity

0.93005 Ordinances which do not ban topless dancing but restrict areas in which it may occur are characterized as "time place and manner" regulations, especially if they are justified on the basis of alleged "secondary effects".

*Young v. City of Simi Valley*, 977 F.Supp. 1017 (C.D. Cal. 1997).

0.93006 The ordinance does not prohibit nudity but instead places reasonable locational requirements on adult cabaret.

*DI MA Corp. v. City of St. Cloud*, 562 N.W.2d 312 (Minn. Ct. App. 1997).

0.93007 Where nude dancing is prohibited in a venue where food and drink is served, it is a valid zoning decision where such dancing is permitted elsewhere as of right.

*Crown Street Enterprises, Inc. v. City of New Haven*, 989 F. Supp. 420 (D. Conn. 1997).

0.93008 The definition of nudity covers the female dancers at the institutions at issue.

*Schleuter v. City of Fort Worth*, 947 S.W.2d 920 (Tex. Crim. App. 1997).

0.93009 There were no grounds to grant a bar variance from the zoning code of the city of Philadelphia to operate an adult cabaret. (Note: The issue of grandfathering apparently was not raised).

*Teazers, Inc. v. Zoning Bd. of Adjustment*, 682 A.2d 856 (Pa. Commw. Ct. 1996).

0.9301 In 1979 the Chattanooga Police Department was called to the Classic Cat 262 times, 1908- 73 times; 1981 - 42 times; 1982 - 162 times, 1983 - 94 times and 1984 - 55 times. Most of the calls were for run of the mill assaults and related crimes but some sex crimes.

*D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995).

0.93011 A change in the nature of a tavern's entertainment from male strippers to "juice bar" requires a use variance.

*Marzocco v. City of Albany*, 629 N.Y.S.2d 847 (N.Y. Sup. Ct. App. Div. 1995).

0.93012 The zoning ordinance for live entertainment permits had sufficient standards, regardless of its failure to define "live entertainment."

*Inter Urban Bar Association of New Orleans, Inc. v. City of New Orleans*, 652 So.2d 1038 (La. Ct. App. 1995).

0.93013 Local zoning restrictions are not preempted by the liquor code.

*1916 Delaware Tavern, Inc. v. Zoning Board of Adjustment*, 657 A.2d 63 (Pa. Commw. Ct. 1995).

0.93014 Manager of adult dancing establishment aided and abetted a violation of Indiana's Public Indecency Law when he permitted dancers to wear "G" strings, exposing their buttocks.

*Turner v. State*, 650 N.E.2d 705 (Ind. Ct. App. 1995), *cert. denied*, 116 S.Ct. 1050 (1996).

0.93015 Once it is established that a burden may be imposed on the expressive content of erotic dancing, requiring some clothing, then a modest increase in the amount of body covering only amounts to an incremental burden on the expressive component of the dance and the limitation is considered minor when measured against the dancer's remaining capacity and opportunity to express the erotic message.

## Chapter 11000

*Cafe 207 v. St. John's County*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1544 (1996).

0.93016 The City of Chattanooga has no burden to produce legislative history to show secondary effects motivation.

*D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995).

0.93017 As applied to female nightclub entertainers, the additional clothing requirement is narrowly drawn and not unduly burdensome mandating only that those females cover the nipple and areola.

*City of Tucson v. Wolfe*, 917 P.2d 706 (Ariz. Ct. App. 1995).

0.93018 The statute requires that the buttock not show without a complete opaque covering.

*Turner v. State*, 650 N.E.2d 705 (Ind. Ct. App. 1995), *cert. denied*, 116 S.Ct. 1050 (1996).

0.93019 Nude dancing is not immune from federal regulation under O'Brien.

*Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 169 (1995).

0.9302 The City failed to present evidence linking expressive nudity in "high culture" entertainment to harmful secondary effects, thus the ordinance is substantially overbroad.

*Triplette Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994).

0.93021 The Akron public indecency ordinance prohibits all public nudity including live performances with serious literary, artistic or political value without attempting to

regulate only those expressive activities associated with harmful secondary effects.

*Triplette Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994).

0.93022 Topless dancing may be regulated in Texas on a time, place or manner basis.

*2300, Inc. v. City of Arlington*, 888 S.W.2d 123 (Tex. Crim. App. 1994).

0.93023 Public policy "to restrict non-conforming uses in order to ultimately eliminate them" allows the granting of a preliminary injunction against a non-conforming Juice Bar Adult Entertainment Use without having to resort to the three pronged test for injunctions.

*City of Albany v. Feigenbaum*, 611 N.Y.S.2d 719 (N.Y. Sup. Ct. App. Div. 1994).

0.93024 The secondary effects of adult cabarets include crimes such as prostitution, drug trafficking and assault.

*2300, Inc. v. City of Arlington*, 888 S.W.2d 123 (Tex. Crim. App. 1994).

0.93025 The no-touch provisions are content neutral since they do not discriminate on the basis of content but are directed against the secondary effects of adult cabarets.

*2300, Inc. v. City of Arlington*, 888 S.W.2d 123 (Tex. Crim. App. 1994).

0.93026 An ordinance is well tailored to regulate the environment of adult cabarets in terms of the physical exchanges between the dancers and patrons.

*2300, Inc. v. City of Arlington*, 888 S.W.2d 123 (Tex. Crim. App. 1994).

## Nudity

0.93027 A valid restriction on nude dancing must be content neutral.

*Connor v. Town of Hilton Head Island*, 442 S.E.2d 608 (S.C. 1994).

0.93028 A statute that regulates granting or denying permits required by persons who wish to dance partially nude in licensed premises fails to comply with due process requirements when uncontrolled discretion is left to the chief of police in granting such permits.

*Pel Asso, Inc. v. Joseph*, 427 S.E.2d 264 (Ga. 1993).

0.93029 Zoning ordinance prohibiting establishments featuring nude dancing, topless dancing and stripping in areas that are within 1,000 feet of residence, school, church or public park is a valid time, place and manner regulation of speech since it is aimed at the secondary effects of expression rather than the content of the expression.

*O'Malley v. Syracuse*, 813 F. Supp. 133 (N.D.N.Y. 1993).

0.9303 It is permissible to rely upon the experience of other communities to show that adult establishments featuring strippers have harmful secondary effects on surrounding neighborhoods.

*O'Malley v. Syracuse*, 813 F. Supp. 133 (N.D.N.Y. 1993).

0.93031 An ordinance prohibiting nudity and explicit sex in an alcoholic beverage establishment is not a zoning ordinance.

*T.J.R. Holding Co. v. Alachua County*, 617 So.2d 798 (Fla. Dist. Ct. App. 1993).

0.9304 Nude performance followed by acts of prostitution at a stag party does not add up to promoting prostitution.

*People v. Galluci*, 404 N.Y.S.2d 768

0.93041 **Nudity Ordinance Not at Issue** - In light of our treatment of defendant's plea of prior adjudication and our disposition of the solicitation at issue, we need not address the constitutionality of the nudity ordinance.

*Jamaica Inn, Inc. v. Daley*, 381 N.E.2d 694 (Ill. 1978).

0.93042 **Mutual Nude Dancing for a Price** - When an individual openly advertises mutual nude dancing and body painting for a price, displays a photo album containing a photo of a prostrate nude male with erection and genitals painted with body paint, . . . And individuals are found in a compromising position, there is substantial evidence supporting the jury verdict that the appellant committed the crime of prostitution in that she agreed to have sexual intercourse for compensation paid.

*State v. Baldwin*, 703 P.2d 858 (Mont. 1985).

### RATIONALE FOR NUDITY LAWS

0.94001 **Rationale for Nudity Statutes** - The state has a legitimate interest in regulating nudity in certain contexts. On a crowded street, nudity, albeit exercised without a lewd interest, is a matter of some governmental concern. It may constitute a threat to the maintenance of the public peace. It is thrust upon unwilling observers and at the very least may constitute a traffic hazard.

*Yauch v. State of Arizona & City of Tucson*, 505 P.2d 1066 (Ariz. Ct. App. 1973), *rev'd on other grounds*, 514 P.2d 709 (Ariz. 1973).

## Chapter 11000

0.9401 Legislation may proscribe constitutionally protected nude dancing on a public street as a time, place and manner restriction.

*Yauch v. State of Arizona & City of Tucson*, 505 P.2d 1066 (Ariz. Ct. App. 1973), *rev'd on other grounds*, 514 P.2d 709 (Ariz. 1973).

0.9402 The end sought to be suppressed is not only the infliction of nudity upon a beholder's moral sensibilities, but also the public degradation and debasement of the individual exposed.

*Yauch v. State of Arizona & City of Tucson*, 514 P.2d 709 (Ariz. 1973), *rev'g*, 505 P.2d 1066 (Ariz. Ct. App. 1973).

*Yauch v. State of Arizona & City of Tucson*, 505 P.2d 1066 (Ariz. Ct. App. 1973), *rev'd on other grounds*, 514 P.2d 709 (Ariz. 1973).

0.9403 The purpose of the legislation is not to regulate sexually motivated conduct but rather to insure the peaceful and undistracted enjoyment of the parks and public beaches.

*Eckl v. Davis*, 124 Cal. Rptr. 685 (Cal. Ct. App. 1975).

0.9404 Actions of public indecency were always indictable as tending to corrupt the public morals.

*People v. Kitchum*, (Mich. 1894).

*Commonwealth v. Dejardin*, 126 Mass. 46 (Mass. 1878).

*Britain v. State*, 3 Hum. 203 (Tenn. 1842).

*Commonwealth v. Sharpless*, 2 Serg. & Raw. 91 (Pa. 1815).

0.9411 The public nudity law serves a substantial governmental interest in protecting societal order and morality.

*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

0.9412 The attempt to prevent public nudity because it may reasonably interfere with and impose on the public's health and safety and welfare is accordingly within the city council's legislative authority if it does not violate the constitutional prohibitions of Article I, section 8, and restrict speech.

*City of Portland v. Gatewood*, 708 P.2d 615 (Or. Ct. App. 1985), *review denied*, 713 P.2d 1058 (Or. 1986).

0.9413 **Current Mores of Majority** - The legitimate basis for banning public nudity is the concept fairly held that public nudity runs afoul of the current mores of a majority of the community.

*Tri-State Metro Waterwaste v. Lowers Township*, 529 A.2d 1047 (N.J. Super. Ct. App. Div. 1987).

0.9414 **Moral Views and Sensibilities of Others** - When nudity occurs in public it runs afoul of the moral views and sensibilities of others.

*Tri-State Metro Waterwaste v. Lowers Township*, 529 A.2d 1047 (N.J. Super. Ct. App. Div. 1987).

0.94141 **Naturists Impose Their Choice** - It is when naturists impose their choice on others that generally accepted standards are offended.

*Tri-State Metro Waterwaste v. Lowers Township*, 529 A.2d 1047 (N.J. Super. Ct. App. Div. 1987).

## Nudity

0.94142 **Not protected Association** - No authority has been advanced to support the notion that a gathering of nudists in public converts what is otherwise permissibly banned activity into protected association.

*Tri-State Metro Waterwaste v. Lowers Township*, 529 A.2d 1047 (N.J. Super. Ct. App. Div. 1987).

0.94143 **Au Naturel at Home** - The right to appear au naturel at home is relinquished when one sets foot on a public sidewalk.

*Tri-State Metro Waterwaste v. Lowers Township*, 529 A.2d 1047 (N.J. Super. Ct. App. Div. 1987).

0.94144 **Right to Dress as One Pleases** - The right to dress as one pleases has little or no First Amendment implications. There is no standing in a nude conduct ordinance to assert rights of others.

*McGuire v. State*, 489 So.2d 729 (Fla. 1986)

0.94145 **Liberty to Sunbathe Nude in Public** - Even if there is a constitutionally protected liberty to sunbathe nude in public, a sufficiently legitimate state interest has been demonstrated to justify the regulation that this ordinance contains.

*Tri-State Metro Waterwaste v. Lowers Township*, 529 A.2d 1047 (N.J. Super. Ct. App. Div. 1987).

0.94146 **Nude Sunbathing Not Expressive or Communicative** - There is little in nude sunbathing that merits first amendment protection. It's akin to wearing one's hair long. Both acts are fundamentally individualistic and personal, rather than expressive or communicative.

*Tri-State Metro Waterwaste v. Lowers Township*, 529 A.2d 1047 (N.J. Super. Ct. App. Div. 1987).

0.94147 Snohomish County's overriding purpose was to exclude barroom topless dancing because some found it morally offensive. As such, the county's interest in this ban on nude performances is directly related to the suppression of free expression. This is not a legitimate governmental interest. The restriction violates the first amendment.

*BSA, Inc. v. King county*, 804 F.2d 1104 (9th Cir. 1986).

0.9416 **Nude Sunbathing Not Expressive or Communicative** - There is little in nude bathing that merits First Amendment protection. It's akin to wearing one's hair long. Both acts are fundamentally individualistic and personal rather than expressive or communicative.

*Tri-State Metro Waterwaste v. Lowers Township*, 529 A.2d 1047 (N.J. Super. Ct. App. Div. 1987).

0.9417 Snohomish County's overriding purpose was to exclude barroom topless dancing because some found it morally offensive. As such, the County's interest in this ban on nude performances is directly related to the suppression of free expression. This is not a legitimate governmental interest. The restriction violates the First Amendment.

*BSA, Inc. v. King county*, 804 F.2d 1104 (9th Cir. 1986).

9415 **Liberty to Sunbathe Nude in Public** - Even if there is a constitutionally protected liberty to sunbather nude in public, a sufficiently legitimate state interest has been demonstrated to justify the regulations this ordinance contains.

## Chapter 11000

*Tri-State Metro Waterwaste v. Lowers Township*, 529 A.2d 1047 (N.J. Super. Ct. App. Div. 1987).

### EQUAL PROTECTION

0.9501 **Leads to Other Crimes** - Topless dancing, especially where alcohol is served leads to other crimes.

*Del Percio, Inc. v. City of Daytona Beach*, 449 So.2d 323 (Fla. Dist. Ct. App. 1984), *quashed and remanded*, 476 So.2d 197 (Fla. 1985).

0.951 **Police Power Derived from State Constitution** - Although Twenty-First Amendment does not directly confer authority upon municipalities or counties to oversee conduct in licensed beverage premises, that authority is, however, derived from state's constitution and statutes.

*Fillingham v. State*, 446 So.2d 1099 (Fla. Dist. Ct. App. 1984).

0.952 **Twenty-First Amendment** - The state may regulate nude entertainment under the Twenty-First Amendment.

*Jorgenson v. County of Volusia*, 625 F. Supp. 1543 (M.D. Fla. 1986)

0.953 **Police Power** - Prohibiting public nudity is plainly within the police power.

*People v. Craft*, 509 N.Y.S.2d 1005 (N.Y. City Ct. Monroe Co. 1986).

0.954 Because the use of alcohol at adult entertainment businesses could lead from sexually explicit dancing to prostitution, ordinance regulating such business is rational.

*DFW Vending, Inc. v. Jefferson County, Texas*, 991 F. Supp. 578 (E.D. Tex. 1998).

0.955 The governmental interest in protecting health, safety, welfare and morals justifies regulation of nudity.

*Shetler v. State*, 681 So.2d 730 (Fla. Dist. Ct. App. 1996).

0.95501 It is interesting to note that in *Barnes*, Justice Souter assumed that the legislators took the secondary effects into consideration.

*Pap's A.M. v. City of Erie*, 674 A.2d 338 (Pa. Commw. Ct. 1996).

0.9551 Justice Souter's concurrence was based not on society's moral views, but on the state's substantial interest in combatting the secondary effects of this type of adult entertainment.

*Pap's A.M. v. City of Erie*, 674 A.2d 338 (Pa. Commw. Ct. 1996).

0.9552 A challenge to a municipal ordinance relating to one-on-one modelling sessions and mingling between customers and employees of an adult bookstore was improperly dismissed where no governmental interest shown.

*Columbus v. Quetgles*, 450 S.E.2d 677 (Ga. 1995), *cert. denied*, 115 S.Ct. 1794 (1995).

0.9553 When nudity is employed in sales promotion in bars and restaurants it is conduct and may be regulated.

*Shetler v. State*, 681 So.2d 730 (Fla. Dist. Ct. App. 1996).

0.9554 The City has not articulated any reason for prohibiting total or partial nudity within adult entertainment businesses.

## Nudity

*Stevenson v. City of Vicksburg*, 900 F. Supp. 1 (S.D. Mass. 1994).

0.9555 The State has a valid interest in prohibiting activities (such as nude dancing in a public place) considered immoral.

*Long v. State*, 666 N.E.2d 1258 (Ind. Ct. App. 1996).

0.9556 The no-nudity in bars ordinance can be viewed as a reasonable exercise of the police powers.

*Knudston v. City of Coates*, 519 N.W.2d 166 (Minn. 1994).

0.956 Statutes and ordinances forbidding women from appearing in public with uncovered breasts do not deny equal protection of the law. Nature, not the legislative body, created the distinction between that portion of a women's body and that of a man's torso. Unlike the situation in respect to men, nudity in the case of women is commonly understood to include the uncovering of the breasts. The classification is reasonable not arbitrary and rests upon a ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced are treated alike.

*Eckl v. Davis*, 124 Cal. Rptr. 685 (Cal. Ct. App. 1975).

*People v. Gilbert*, 339 N.Y.S.2d 457 (N.Y. City Crim. Ct. Kings Co. 1972).

0.9561 **Operas, Ballets and Plays** - Court-made exclusion of operas, ballets, and plays from scope of female breast ordinance violated plaintiffs rights to due process and equal protection.

*Tolbert v. City of Memphis, Tennessee*, 568 F. Supp. 1285 (W.D. Tenn. 1983).

0.9562 **Female Breasts** - In our culture, female breasts are a justifiable basis for a gender-based classification.

*Tolbert v. City of Memphis, Tennessee*, 568 F. Supp. 1285 (W.D. Tenn. 1983).

0.9563 **Oppression of a Certain Class** - The effect of the statute as applied by the local authorities is to oppress a certain class or genre of citizen entrepreneur or individuals and unreasonably interfere with their presumptively legitimate activities: the exposure of a female for the purposes of photographing her in a private studio and for a fee.

*People v. Wilhelm*, 330 N.Y.S.2d 279 (N.Y. City Ct. Erie Cty. 1972).

0.9564 Where adverse secondary effects are not problematic such as in nudity in artistic venues, the state can make exceptions for this type of public nudity while banning it otherwise without violating content neutrality.

*J & B Entertainment, Inc. v. City of Jackson, Mississippi*, 152 F.3d 362 (5th Cir. 1998).

0.9565 **Zoning Adult Uses** - Plaintiffs cannot successfully make an equal protection argument based on zoning adult uses differently. Such was reflected in Renton and Young and was rejected by the Fifth Circuit specifically as to topless bars.

*Specialty Malls of Tampa v. City of Tampa, Fla.*, 916 F. Supp. 1222 (M.D. Fla. 1996).

0.9566 **No Violation of Equal Rights** - Law relating to the female breast "state of nudity" does not violate the Equal Rights Amendment.

*Messina v. State*, 904 S.W.2d 178 (Tex. Crim. App. 1995).

## Chapter 11000

0.9567 **New York statute prohibiting exposure of female breast** - The New York statute prohibiting exposure of the female breast is founded on a rational basis and is a reflection of New York's current moral standards which creates a valid constitutional classification between female and male nudity.

*People v. David*, 549 N.Y.S.2d 564 (N.Y. City Ct. Rochester Cty. 1989). [See also 585 N.Y.S. 2d 149 (1991)]

0.95671 **Sex-based distinctions** - Sex-based distinctions are allowed by law if physical characteristics require such distinctions.

*M.J.R., Inc. v. City of Dallas*, 792 S.W.2d 569 (Tex. Crim. App. 1990). [See also 823 S.W.2d 327 (Tex. Ct. App. 1991), *writ denied* 1992.]

0.95672 **Nudity definition** - The ordinance definition of nudity distinguishes between male and female performers.

*M.J.R., Inc. v. City of Dallas*, 792 S.W.2d 569 (Tex. Crim. App. 1990). [See also 823 S.W.2d 327 (Tex. Ct. App. 1991), *writ denied* 1992.]

0.95673 **Female breast exposure** - The People do not dispute that New York is one of only two states which criminalizes the mere exposure by a woman in a public place of a specific part of her breast.

*People v. Santorelli*, 587 N.Y.S.2d 601 (N.Y. 1992).

0.95674 **Price Rationale** - Penal Law Section 245.01 when originally enacted was aimed at discouraging "topless" waitresses and their promoters. (*People v. Price*) - Considering the statute's provenance, we held in *Price* that a woman walking along the street wearing a fishnet, see-through, pull-over blouse did not transgress the statute and that it should not be

applied to the non-commercial, perhaps accidental and certainly not lewd exposure alleged. Though the statute and the rationale for that decision are different, we believe that the underlying principle of *Price* should be followed.

*People v. Santorelli*, 587 N.Y.S.2d 601 (N.Y. 1992).

0.9568 **Equal protection** - Content (adult entertainment uses) may be the basis for a separate zoning classification.

*U.S. Partners Financial Corp. v. Kansas City*, 707 F. Supp. 1090 (W.D. Mo. 1989).

0.95681 **Equal protection** - The state enabling statute must satisfy equal protection requirements.

*7250 Corp. v. Board of County Comm'rs.*, 799 P.2d 917 (Colo. 1990).

0.95682 **Level of Scrutiny** - Nude dancing is primarily conduct and somewhat expressive and for equal protection purposes deserves a standard of intermediate level scrutiny.

*7250 Corp. v. Board of County Comm'rs.*, 799 P.2d 917 (Colo. 1990).

0.95683 **Governmental interest** - The regulation of the public exposure of the female breast, given the historical approach to the subject and the objectives of the community in protecting its moral values, is substantially related to an important governmental interest.

*United States v. Biocic*, 730 F. Supp. 1364 (D. Mo. 1990), *aff'd*, 928 F.2d 112 (9th Cir. 1991).

## Nudity

0.95684 **Governmental justification** - The regulation of nudity promotes the substantial governmental interest of order and morality.

*D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991).

0.95685 **Sunbathing nudity** - The Constitution does not protect unassociated nudity (e.g. sunbathing) from exposure to governmental limitations.

*Elysium Institute, Inc. v. Los Angeles County*, 283 Cal. Rptr. 688 (Cal. Ct. App. 1991), *cert. denied*, 112 S.Ct. 1180 (1992).

0.95686 **Governmental interest** - In this case, the People have made no attempt to demonstrate that the statute's discriminatory effect serves an important governmental interest, the regulation of public nudity, or that the classification is based on a reasoned predicate.

*People v. Santorelli*, 587 N.Y.S.2d 601 (N.Y. 1992).

0.95687 **Lewd Conduct** - Nor can it be argued that Penal Law 245.01 was intended to be confined to conduct that is lewd or intentionally annoying. (Titone concurring).

*People v. Santorelli*, 587 N.Y.S.2d 601 (N.Y. 1992).

0.95688 **Governmental purpose** - The explicit purpose of the new law was to protect parents and children who use public beaches and parks from the discomfort caused by unwelcome public nudity. (Titone, J. concurring).

*People v. Santorelli*, 587 N.Y.S.2d 601 (N.Y. 1992).

0.95689 **Legislative purpose** - It was the purpose of the legislature to prohibit the combination of alcohol with nudity, sexual conduct, and depictions of the same in public places.

*Geaneas v. Willets*, 911 F.2d 579 (11th Cir. 1990).

0.9569 **Nude conduct** - The regulation of nonverbal, physical conduct is a greater power of the state than the suppression of depictions or descriptions of the same behavior.

*Walker v. City of Kansas City*, 111 S.Ct. 2234 (1991).

### TIME, PLACE AND MANNER RESTRICTIONS

0.96 Prohibiting nudity on the public beaches and not throughout the town is a place restriction.

*Chapin v. Town of South Hampton*, 457 F. Supp. 1170 (E.D.N.Y. 1978).

0.9601 Speech which exploits sexually explicit conduct is subject to some regulation although that speech stops short of obscenity.

*Gluck v. County of Los Angeles*, 155 Cal. Rptr. 435 (Cal. Ct. App. 1979).

0.9602 Prohibiting nudity in places of business patronized by minors was vague and overbroad.

*But see, M.S. News v. Casado*, 721 F.2d 1281 (10th Cir. 1983).

*American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981).

## Chapter 11000

0.9603 The Court was also correct in ruling that the distance requirement for all nude entertainment was a proper place and manner restriction.

*BSA, Inc. v. King county*, 804 F.2d 1104 (9th Cir. 1986).

0.9604 **Permit Requirement** - A municipality may subject the exercise of First Amendment freedoms to the prior restraint of a permit requirement, but only when it requires narrowly drawn, objective, reasonable and definite standards to guide the administering officials.

*Little v. City of Greenfield*, 575 F. Supp. 656 (E.D. Wis. 1983).

0.963 Not all nudity is obscene even as to minors.

*State v. Siegal*, 354 A.2d 103 (N.J. Super. Ct. App. Div. 1975).

*Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

*State v. Frink*, 653 P.2d 553 (Oe Ct. App. 1982).

*State v. Cardwell*, 539 P.2d 169 (Or. Ct. App. 1975).

0.9631 But it may be.

*Freeman v. Commonwealth*, 288 S.E.2d 461 (Va. 1982).

0.964 A local ordinance prohibiting certain types of topless dancing (in a non-alcoholic setting) and regulating activity that is patently offensive is a valid time, place and manner restriction.

*County of King ex rel. Sowers v. Chisman*, 658 P.2d 1256 (Wash. Ct. App. 1983).

0.96501 **Six-foot rule** - Six-foot rule prohibits nude dancers at licensed establishments from dancing within six feet of patrons. It exempts theatrical performance establishments. It is applicable to business licensed as theatre and devoted exclusively to nude entertainment. It was not intended to restrict six-foot rule to businesses that have nude entertainment licenses. It is a valid place or manner restriction.

*Richter v. City of San Diego*, 499 U.S. 919 (1991).

0.965011 **Three foot rule/chilling effect** - The three foot rule requiring three foot distance between nude dancer and patron does not have a chilling effect on expressive freedom.

*T- Marc, Inc. v. Pinellas County*, 804 F. Supp. 1500 (M.D. Fla. 1992).

0.96502 **Non-consensual publication of nudity** - It was violative of the New York Civil Rights Law for the magazine to publish a nude photograph of a woman without her consent.

*Gallon v. Hustler Magazine*, 732 F. Supp. 322 (N.D.N.Y. 1990).

0.9652 **Statute neutral** - This statute is neutral since it neutrally prohibits all public displays of nudity regardless of the actor's purpose. The statute is not vague.

*People v. Craft*, 564 N.Y.S.2d 695 (N.Y. Cty. Ct. Monroe 1991).

0.96521 **Content Neutrality** - Kansas City may implement nude, content-neutral regulations that serve a substantial governmental interest and are not an unreasonable limitation on alternate means of communication.

*U.S. Partners Financial Corp. v. Kansas City*, 707 F. Supp. 1090 (W.D. Mo. 1989).

## Nudity

0.9653 **Secondary effects** - Legislators may consider secondary effects of adult entertainment facilities on the community.

*U.S. Partners Financial Corp. v. Kansas City*, 707 F. Supp. 1090 (W.D. Mo. 1989).

0.9655 **Narrow tailoring** - In order to achieve a desired objective, the means taken to regulate advertising must be tailored narrowly.

*Leuth v. St. Clair County Community College*, 732 F. Supp. 1410 (E.D. Mich. 1990).

0.96551 **Narrow tailoring** - The city zoning ordinance affecting nude dancing is narrowly tailored.

*D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991).

0.9656 **Time, place and manner restriction** - The ordinance is a valid time, place and manner restriction as the business cannot make its statement using nudity within a limited distance of other specified land uses.

*D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991).

0.9657 **Time, place and manner restrictions** - Kansas City may regulate time, place and manner of adult entertainment.

*U.S. Partners Financial Corp. v. Kansas City*, 707 F. Supp. 1090 (W.D. Mo. 1989).

0.96571 **Time, place and manner restrictions** - A state government may impose reasonable time, place and manner restrictions on protected expression.

*Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989), *rev'd, sub nom. Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991).

0.96572 **O'Brien rule** - Barnes acknowledged a marginal inclusion of nude dancing within First Amendment perimeters. Barnes also acknowledged that nude dancing may convey an "erotic message." If the "erotic message" conveyed by nude dancing is incidentally restricted it must meet the O'Brien test.

*D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991).

0.96574 **O'Brien Test** - The Texas ordinance's definition of nudity was challenged on constitutional grounds and the ordinance must face the four part analysis of the O'Brien Test.

*MJR's Fare of Dallas v. City of Dallas*, 792 S.W.2d 569 (Tex. Ct. App. 1990).

0.9658 Adult entertainment ordinance - Kansas City has the right to zone property uses that are otherwise constitutionally protected.

*U.S. Partners Financial Corp. v. Kansas City*, 707 F. Supp. 1090 (W.D. Mo. 1989).

0.9659 **Definition of adult cabarets** - The definition of adult cabarets or theatres is limited in the ordinance to those that "regularly feature" nudity.

*MJR's Fare of Dallas v. City of Dallas*, 792 S.W.2d 569 (Tex. Ct. App. 1990).

## VAGUENESS

0.97 **Vague nudity statutes are unconstitutional** - The phrase "offend public morals or decency" is unconstitutionally vague.

*Cf. State v. Metzger*, 319 N.W.2d 459 (Neb. 1982).

*People v. Turner*, 128 Cal. Rptr. 638 (Cal. App. Dep't Super. Ct. 1976).

## Chapter 11000

0.971 Exposure of pubic hair, legs or buttocks, or all three, do not constitute exposure of the sexual organ.

*G & B of Jacksonville v. Department of Business Regulation*, 362 So.2d 951 (Fla. Dist. Ct. App. 1979).

0.975 Public place in nudity statutes has been construed to include places where persons may enter at will.

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

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

*Cf. State v. Brooks*, 550 P.2d 440 (Ore. 1976).

*State v. Brooks*, 550 P.2d 440 (Or. 1976).

*Cf. Yauch v. State*, 514 P.2d 709 (Ariz. 1973).

*Yauch v. State of Arizona & City of Tucson*, 514 P.2d 709 (Ariz. 1973), *rev'g*, 505 P.2d 1066 (Ariz. Ct. App. 1973).

0.976 Use of phrases "anal region, "pubic hair region" in ordinance not invalid.

*Eckl v. Davis*, 124 Cal. Rptr. 685 (Cal. Ct. App. 1975).

0.977 **Not Vague** - There is nothing vague about the prohibition of nudity in the ordinance.

*Tri-State Metro Waterwaste v. Lowers Township*, 529 A.2d 1047 (N.J. Super. Ct. App. Div. 1987).

0.9771 Word "lewdness" is not vague.

*State v. Club Recreation & Pleasure*, 500 P.2d 1194 (Or. Ct. App.), *cert. denied*, 446 U.S. 982 (1979).

0.9772 Phrase "lewd or indecent conduct" is not vague as applied.

*Blood Brothers, Inc. v. Alabama Alcoholic Beverage Control Board*, 386 So.2d 218 (Ala. Civ. App. 1979), *rev'd*, 386 So.2d 220 (Ala. 1980).

0.9773 The term "lewdness" was not void for vagueness since it described a public sexual activity that is reprehensible or disgusting in nature.

*State v. Lion's Den*, 627 N.E.2d 629 (Ohio Ct. App. 1993).

0.9774 The nudity ordinance is not unconstitutional.

*Shetler v. State*, 681 So.2d 730 (Fla. Dist. Ct. App. 1996).

0.9775 The indecent exposure statute is not unconstitutionally vague.

*People v. Murphy*, 513 N.W.2d 451 (Mich. Ct. App. 1994), *appeal denied*, 521 N.W.2d 617 (Mich. 1994).

0.9776 Statute limiting where nude dancing can occur to artistic centers such as concert halls and museums but disallowing nude dancing in adult businesses such as juice bars because of genuine fear of secondary effects is neither overbroad nor vague.

*Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998).

0.9777 Term "simulated" conduct is not unconstitutionally vague since reasonable

## Nudity

persons and performers need not guess when a dance involves "simulated male genitals."

*Bright Lights v. City of Newport*, 830 F. Supp. 378 (E.D. Ky. 1993).

0.9778 The language "Topless or bottomless dancers, go-go dancers, exotic dancers, strippers or similar entertainers" is nebulous and subjective and does not define with reasonable precision the dancing activity or the degree of nudity.

*State v. Jones*, 865 P.2d 138 (Ariz. Ct. App. 1993).

0.9779 The definition of "total nude dancing" and "partial nude dancing" is void for vagueness where no sufficient warning exists as to permit persons to avoid that which is forbidden.

*Pel Asso, Inc. v. Joseph*, 427 S.E.2d 264 (Ga. 1993).

0.97791 **Live entertainment/specificity** - Because live entertainment, including non-obscene nude dancing is recognized as a form of expression protected by the Constitution, an ordinance regulating nude "erotic dance studios" must specify in detail the conduct that will be prohibited in light of the spontaneous nature of the behavior being addressed.

*City of Wichita v. Wallace*, 788 P.2d 270 (Kan. 1990).

0.97792 **Nudity definition** - The ordinance definition of nudity distinguishes between male and female performers.

*M.J.R., Inc. v. City of Dallas*, 792 S.W.2d 569 (Tex. Crim. App. 1990). [See also 823 S.W.2d 327 (Tex. Ct. App. 1991), *writ denied* 1992].

0.97793 The terms "appears in various degrees of undress" and "employs body motions including" has no precise or ascertainable meaning and is vague.

*State v. Western*, 812 P.2d 987 (Ariz. 1991).

### VOIR DIRE

0.98 Juror who expressed a firm belief on voir dire that nudity is obscene should be excused for cause.

*Evert v. State*, 561 S.W.2d 489 (Tex. Crim. App. 1978).

### DRIVE-IN THEATRES

0.99 **Drive-In ordinance prohibiting depiction of "nudity" is unconstitutional** - The ordinance is not directed against sexually explicit nudity nor is it otherwise limited. It violates freedom of speech, is overbroad and underinclusive.

*Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

0.991 A drive-in theater provision prohibiting depiction of erect male genitalia is valid.

*Pel Asso, Inc. v. Joseph*, 427 S.E.2d 264 (Ga. 1993).

*People v. Starview Drive-In Theater*, 427 N.E.2d 201 (Ill. App. Ct. 1981), *appeal dismissed sub nom., Starview Drive-In Theatre, Inc. v. Cook County*, 457 U.S. 1113 (1982).

0.9911 **Ban on Displays of Nudity** - The United States Supreme Court explicitly rejected the argument that the ban on displays of nudity in drive-in theaters were necessary to prevent minors from being exposed to such displays.

## Chapter 11000

*St. Paul v. Carlone*, 419 N.W.2d 129 (Minn. Ct. App. 1988).

### PREEMPTION

0.992 A state statute prohibiting the sale of obscene material does not preempt a local ordinance prohibiting live sex shows.

*Expo, Inc. v. City of Passaic*, 373 A.2d 1045 (N.J. Super. Ct. App. Div. 1977).

0.9921 **Preemption** - A state law proscribing obscene exposure does not preempt local ordinance that regulates non-obscene nudity.

*United States v. Biocic*, 730 F. Supp. 1364 (D. Mo. 1990), *aff'd*, 928 F.2d 112 (9th Cir. 1991).

0.99215 Live entertainment is not preempted by State.

*Robbins v. County of Los Angeles*, 56 Cal. Rptr. 853 (Cal. Ct. App. 1966).

0.99216 Local zoning restrictions are not preempted by the liquor code.

*1916 Delaware Tavern, Inc. v. Zoning Board of Adjustment*, 657 A.2d 63 (Pa. Commw. Ct. 1995).

### NUISANCE

0.993 A common law nuisance action may be maintained against live obscene sex shows.

*City of Chicago v. Festival Theater Corp.*, 438 N.E.2d 159 (Ill. 1982).

*Cf. Commonwealth v. Kocinski*, 414 N.E.2d 6 (Mich. 1958).

*Commonwealth v. Hildabridle*, 92 N.W.2d 6 (Mich. 1958).

*Commonwealth v. Kocinski*, 414 N.E.2d 378 (Mass. App. Ct. 1981).

*People v. Better*, 337 N.E.2d 272 (Ill. App. Ct. 1975).

*Cf. People v. Better*, 337 N.E.2d 272 (1975).

0.9931 Complete closure of adult entertainment arcade for all purposes at the temporary injunction phase was proper since under court order the lwed conduct was to cease. To allow the arcade to have operated in any capacity would not have insured abatement of the nuisance.

*State v. Lion's Den*, 627 N.E.2d 629 (Ohio Ct. App. 1993).

### BODY STUDIOS

0.994 A body studio ordinance construed to apply to nude touching only for a fee is valid.

*Curtis v. City of Seattle*, 639 P.2d 1370 (Wash. 1982).

*City of Seattle v. Jarrett*, 655 P.2d 1209 (Wash. Ct. App. 1982).

0.9941 A place and license ordinance restriction location of nude studios is valid.

*Memet v. State*, 642 S.W.2d 518 (Tex. Crim. App. 1982).

*Schope v. State*, 647 S.W.2d 675 (Tex. Crim. App. 1982).

### CHILD PORNOGRAPHY

0.995 Depiction of children in sexual acts or lewdly exhibiting genitals may be proscribed even if not obscene under Miller.

## Nudity

*New York v. Ferber*, 458 U.S. 747 (1982).

0.9951 The child porn law covers lascivious exhibition of a child's clothed genitals and does not require nudity.

*United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994), *cert. denied*, 115 S.Ct. 897 (1995).

0.99511 **Mere Child Nudity** - Nudity without more is protected expression even where the subject depicted is a child.

*State v. Young*, 525 N.E.2d 1363 (Ohio 1988).

0.99512 **Morally Innocent Conduct** - The clear purpose of the exceptions for protection of mere nudity in *Ferber* is to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent.

*State v. Young*, 525 N.E.2d 1363 (Ohio 1988).

0.995122 **Ohio statute not overly broad** - The Ohio statutory exemptions and proper purposes provisions, it would seem, preclude any substantial overbreadth.

*Osborne v. Ohio*, 495 U.S. 103 (1990), *reversing and remanding*, 525 N.E.2d 1363 (Ohio 1988), *on remand*, 557 N.E.2d 1210 (Ohio Ct. App. 1989). *See also*, 560 N.E.2d 765 (Ohio 1990).

0.99513 **Not Overbroad** - The statute's proscription as construed, is not so broad as to outlaw all depictions of minors in a state of nudity but rather only those depictions which constitute child pornography.

*State v. Young*, 525 N.E.2d 1363 (Ohio 1988).

0.99514 **Graphic Focus on Genitals** - As we construe it today, the statute prohibits the possession or viewing of material or performance of a minor who is in a state of nudity where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.

*State v. Young*, 525 N.E.2d 1363 (Ohio 1988).

0.9952 Clothed genital may qualify as an "exhibition" under the federal child porn law.

*Knox v. United States*, 63 L.W. 3181 (1994).

0.99521 **Generic Warrant** - Read in tandem with the specific language in the affidavit for the search and seizure warrant for a "quantity of nude photographs, commonly referred to as 'child pornography,'" that generic term takes on the particularity required for proper guidelines in the execution of the search warrant.

*State v. Jordan*, 665 P.2d 1280 (Utah 1978).

0.9953 **Diaper Commercials** - Where statutory language "to pose in the nude" is clearly modified by qualifying purposes, contention that nudity per se and thus diaper commercials on the public airwaves could be swept within the ambit of the statute is not well taken.

*State v. Jordan*, 665 P.2d 1280 (Utah 1978).

0.99531 Where one was prohibited by statute from knowingly possessing obscene matter which contains a visual reproduction of a person less than 17 years old, hand drawn pictures depicting sex acts between naked girls

## Chapter 11000

and naked men did not constitute such obscene "matter".

*R.K.D. v. State*, 712 So.2d 754 (Ala. Crim. App. 1997).

0.9954 Phrase "lewd exhibition" in child pornography statute is not unconstitutionally vague even though term "lewd" is not expressly defined since it is a commonly used word which when used in a criminal statute connotes an unlawful indulgence in lust or eagerness for sexual indulgence.

*State v. Meyer*, 852 P.2d 879 (Or. Ct. App. 1993).

0.9955 It is error to admit erotic photos of adults contained in an album with child porn pictures, but error was harmless.

*State v. A.H.*, 566 N.W.2d 858 (Wis. Ct. App. 1997).

0.996 Where statute permitted parent to sign release for a minor, use of a non-obscene nude picture of a ten year old will not be prohibited unless utilized in a porn magazine.

*Shields v. Gross*, 9 Med. L. Rptr. 1466 (N.Y. 1983).

0.99601 **Lascivious** - Any frontal nude image of a person in what might otherwise be called an "erotic" pose is likely to be included as "lascivious."

*American Library Ass'n v. Thornburgh*, 713 F. Supp. 469 (D.D.C. 1989), *vacated as moot*, 956 F.2d 1178 (D.C. Cir. 1992). But see, *American Library Ass'n v. Barr*, 794 F. Supp. 412 (D.D. Colo. 1991).

0.9961 But a picture of a person naked on a beach used in a sexually explicit magazine without permission violates the statute.

*Hansen v. High Society Magazine*, 5 Med. L. Rptr. 2398 (N.Y. Sup. Ct. N.Y. Cty.).

0.99611 **Child porn/consent no defense** - Sexual conduct with a child is an intrusion of the child's rights, regardless of the child's consent or the origin of the conduct.

*Schmitt v. State*, 563 So.2d 1095 (Fla. Ct. App. 1990), *modified*, 590 So.2d 404 (Fla. 1991), *cert. denied*, 112 S.Ct. 1572 (1992).

0.9962 **Child porn** - There is no violation of First Amendment rights when a state prohibits using minors in a sexual performance, whether or not it is obscene.

*State v. White*, 464 N.W.2d 585 (Minn. Ct. App. 1990), *cert. denied*, 112 S.Ct. 77 (1991).

0.9963 **Mistake of age defense** - Minnesota statute does not allow a mistake of age defense in child porn cases.

*State v. White*, 464 N.W.2d 585 (Minn. Ct. App. 1990), *cert. denied*, 112 S.Ct. 77 (1991).

0.9964 **Child porn/expressive conduct** - Federal constitutional law allows the application of the child porn statute to expressive conduct in order to insure the commonwealth's interest in protecting children.

*Commonwealth v. Oakes*, 551 N.E.2d 910 (Mass. 1990).

0.9965 **Child porn overbreadth** - Section of the Florida statute that restricts the creation and possession of altogether innocent and innocuous activities that involve children and families is overbroad.

*Schmitt v. State*, 563 So.2d 1095 (Fla. Ct. App. 1990), *modified*, 590 So.2d 404 (Fla. 1991), *cert. denied*, 112 S.Ct. 1572 (1992).

## Nudity

0.9967 **Posing and photographing semi-nude minor** - Defendant's posing and photographing of his semi-nude 14 year-old stepdaughter was neither pure speech nor merely conduct, but was expressive conduct for First Amendment purposes, which may be subject to limitations.

*Commonwealth v. Oakes*, 551 N.E.2d 910 (Mass. 1990).

0.9968 **Child porn - "lewdness" limitations** - By limiting the Ohio statute to lewdness, the court avoided any penalty for viewing or possessing innocuous photographs of naked children.

*Osborne v. Ohio*, 495 U.S. 103 (1990), *reversing and remanding*, 525 N.E.2d 1363 (Ohio 1988), *on remand*, 557 N.E.2d 1210 (Ohio Ct. App. 1989). *See also*, 560 N.E.2d 765 (Ohio 1990).

0.997 **Parental Release** - The release executed by the mother/next friend for the publication of the nude pictures of her minor children, the plaintiffs, was valid. No judicial approval was required.

*Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341 (N.D. Tex. 1985), *aff'd*, 799 F.2d 1000 (5th Cir. 1986).

0.9971 **Involuntary Use of Photos** - Where publication of photo was non-consensual, identification demands are satisfied if woman can identify nude photo as a picture of herself and her child even if their faces are not visible.

*Cohen v. Herbal Concepts, Inc.*, 52 L.W. 2551 (N.Y. Sup. Ct. App. Div. 1984).

0.9972 **Context** - We agree with the trial judge that no reasonable person could consider the photographs as indicating plaintiff's approval of Hustler, or that they were willing to pose nude for Hustler.

*Faloona v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir. 1986).

0.997201 **Context** - We agree with the trial judge that no reasonable person could consider the photographs as indicating plaintiff's approval of Hustler, or that they were willing to pose nude for Hustler.

*Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D.N.Y. 1997).

0.997202 **Context** - We agree with the trial judge that no reasonable person could consider the photographs as indicating plaintiff's approval of Hustler, or that they were willing to pose nude for Hustler.

*D.L.S., Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997).

0.997203 **Context** - We agree with the trial judge that no reasonable person could consider the photographs as indicating plaintiff's approval of Hustler, or that they were willing to pose nude for Hustler.

*D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995).

0.997204 **Context** - We agree with the trial judge that no reasonable person could consider the photographs as indicating plaintiff's approval of Hustler, or that they were willing to pose nude for Hustler.

*Pap's A.M. v. City of Erie*, 674 A.2d 338 (Pa. Commw. Ct. 1996).

0.997205 **Statute overbroad** - A statute that sweeps within its proscriptions protected, nude expression is unconstitutionally overbroad under both the Washington and federal constitutions.

## Chapter 11000

*Turner v. State*, 650 N.E.2d 705 (Ind. Ct. App. 1995), *cert. denied*, 116 S.Ct. 1050 (1996).

0.997206 **Statute overbroad** - A statute that sweeps within its proscriptions protected, nude expression is unconstitutionally overbroad under both the Washington and federal constitutions.

*Shetler v. State*, 681 So.2d 730 (Fla. Dist. Ct. App. 1996).

0.997207 **Statute overbroad** - A statute that sweeps within its proscriptions protected, nude expression is unconstitutionally overbroad under both the Washington and federal constitutions.

*McCarville v. Baldwin*, 828 F. Supp. 626 (E.D. Ohio 1993).

0.997208 **Statute overbroad** - A statute that sweeps within its proscriptions protected, nude expression is unconstitutionally overbroad under both the Washington and federal constitutions.

*S.B.C. Enterprises, Inc. v. City of South Burlington*, 896 F. Supp. 354 (D. Vt. 1995).

0.997209 **Statute overbroad** - A statute that sweeps within its proscriptions protected, nude expression is unconstitutionally overbroad under both the Washington and federal constitutions.

*D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995).

0.99721 **Statute overbroad** - A statute that sweeps within its proscriptions protected, nude expression is unconstitutionally overbroad under both the Washington and federal constitutions.

*City of Seattle v. Johnson*, 791 P.2d 266 (Wash. Ct. App. 1990).

0.9973 **Nude photographs** - Nude photographs that lack a judicial finding that they are obscene, are protected by the First Amendment.

*Cincinnati v. Contemporary Arts Center*, 566 N.E.2d 214 (Ohio Mun. Ct. 1990). *See also*, 735 F. Supp. 743 (S.D. Ohio 1990).

0.9974 **Overbreadth doctrine** - When, because of vagueness, an ordinance has the effect of precluding or severely restricting activities protected under the first amendment, a defendant may raise unconstitutional overbreadth claims as applied to him/her-self and to others.

*City of Wichita v. Wallace*, 788 P.2d 270 (Kan. 1990).

0.9975 **Oklahoma statute not overbroad** - The statute does not impinge upon artistic, theatrical performances that the First Amendment protects.

*Misleh v. State*, 799 P.2d 631 (Okla. Crim. App. 1990).

0.99751 **Burden of proof** - People have the burden of proving that there is an important government interest at stake regulating public nudity and that the gender classification is substantially related to that interest.

*People v. Santorelli*, 587 N.Y.S.2d 601 (N.Y. 1992).

0.9976 **Burden of proof/Child porn** - The defendant bears the burden of proving a nudity requirement is a requisite for a child porn exhibition.

*United States v. Knox*, 977 F.2d 815 (3rd Cir. 1992), *remanded*, 114 S.Ct. 375 (1993),

## Nudity

*aff'd*, 32 F.3d 733 (3rd Cir. 1994), *cert. denied*, 115 S.Ct. 897 (1995).

0.9977 **Lasciviousness** - Nudity alone is insufficient to constitute a lascivious exhibition.

*United States v. Knox*, 977 F.2d 815 (3rd Cir. 1992), *remanded*, 114 S.Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3rd Cir. 1994), *cert. denied*, 115 S.Ct. 897 (1995).

0.9978 **Lascivious exhibition** - The Villard analysis to determine whether an exhibition is lascivious includes whether the child is fully or partially clothed or nude.

*United States v. Knox*, 977 F.2d 815 (3rd Cir. 1992), *remanded*, 114 S.Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3rd Cir. 1994), *cert. denied*, 115 S.Ct. 897 (1995).

0.9979 **Exhibition** - Nude exposure of the genitals or pubic area is not necessary for a child porn exhibition to take place.

*United States v. Knox*, 977 F.2d 815 (3rd Cir. 1992), *remanded*, 114 S.Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3rd Cir. 1994), *cert. denied*, 115 S.Ct. 897 (1995).

0.998 **Child porn statute** - The statute is clear that nudity is not a prerequisite for a lascivious exhibition.

*United States v. Knox*, 977 F.2d 815 (3rd Cir. 1992), *remanded*, 114 S.Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3rd Cir. 1994), *cert. denied*, 115 S.Ct. 897 (1995).

0.9981 **Pending ordinance doctrine** - In the absence of a pending ordinance doctrine, the City, having no constitutional ordinance in effect which imposes use and location restrictions on adult entertainment (topless dancing) is enjoined to issue a building permit.

*City of Jackson v. Lakeland Lounge of Jackson, Inc.*, 800 F. Supp. 455 (S.D. Miss. 1992).