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Constitutional Law - Regulating Nude Dancing in Liquor Establishments - The Preferred Position of the Twenty-First Amendment - Nall v. Baca

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CONSTITUTIONAL LAW—REGULATING NUDE DANCING IN LIQUOR ESTABLISHMENTS—THE PREFERRED POSITION OF THE TWENTY-FIRST AMENDMENT—*Nall v. Baca.*

INTRODUCTION

In *Nall v. Baca*[1] the New Mexico Supreme Court addressed the issue of whether a statute which prohibits nude dancing in a licensed liquor establishment abridges the constitutional right of free speech.[2] The court held that the statute was constitutional. The court limited its result to the specific facts presented in the case.[3] The statute in question prohibited both nude dancing in liquor establishments and nude dancing in public places.[4] The court refused to determine the potential overbreadth of a statute which prohibits nude dancing in public places.[5] The opinion in *Nall v. Baca* applies only to the prohibition of nude dancing in liquor establishments. Because the court limited its result, any discussion of nude dancing in public places would be speculative and advisory in nature.[6]

The court analyzed the case not in terms of the first amendment, but in terms of a state's power to regulate the sale and distribution of alcohol pursuant to the twenty-first amendment of the federal constitution. Because the court was, as it stated,[7] also confronted with a first amendment issue, such reasoning was incomplete and left the issue open to further litigation.

It is possible that other constitutional challenges will be made to New Mexico's indecent dancing statute. Other New Mexico liquor

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1. 95 N.M. 783, 626 P.2d 1280 (1980).

2. The New Mexico Supreme Court framed the issue as: "Does the prohibition of nude dancing in a licensed liquor establishment by Section 30-9-14.1 violate N.M. Const., Art. 2, Section 17 [free speech]?" 95 N.M. at 786, 626 P.2d at 1283.

3. 95 N.M. at 788, 626 P.2d at 1285.

4. N.M. Stat. Ann. §30-9-14.1 (Cum. Supp. 1980). The applicable text of this provision reads: "Indecent dancing consists of a person knowingly and intentionally exposing his intimate parts to public view while dancing or performing for compensation in a licensed liquor establishment or public place . . . Whoever commits indecent dancing is guilty of a petty misdemeanor . . . A liquor licensee or his agent who allows indecent dancing on the licensed premises is guilty of a petty misdemeanor and his license may be suspended or revoked pursuant to the provisions of the Liquor Control Act."

5. 95 N.M. at 788, 626 P.2d at 1285.

6. The New Mexico State Legislature deleted the prohibition of nude dancing in public places from the indecent dancing statute in 1981. N.M. Stat. Ann. §30-9-14.1 (Cum. Supp. 1981).

7. *See* note 2, *supra.*

licensees who wish to offer nude dancing performances in their establishments may challenge the prohibition of such entertainment by raising first and fourteenth amendment arguments.[8] Should the New Mexico Supreme Court again be asked to rule on the constitutionality of the statute which prohibits nude dancing in liquor establishments, a more complete and informative analysis would include the determination of the constitutional status, if any, of nude dancing, and a delicate and thorough balancing of conflicting constitutional interests.

This Note provides an overview of the case law arising under the twenty-first amendment in light of the issues addressed in *Nall v. Baca*. The specific question of whether the twenty-first amendment should be employed to prohibit operators of liquor establishments from presenting non-obscene nude dancing performances will also be addressed.

STATEMENT OF THE CASE

Lancett Nall, plaintiff-appellant, owned a dispenser's license and operated a liquor establishment. Nude dancing had been presented on the premises since 1970. On August 3, 1979, Jim Baca, the Director of Alcohol Beverage Control of the State of New Mexico,[9] ordered his agents to cite Nall for violating the state's indecent dancing statute.[10]

Nall and Maria Dyer, one of the dancers he employed, filed suit

8. The plaintiffs could demand that the court establish firmly whether nude dancing is constitutionally protected under the first amendment. Equal protection, as guaranteed by the fourteenth amendment of the federal constitution could also be argued. For example, the statute could be overbroad because it applies to those whose nude dancing does not cause violence or immoral behavior. Thus, the statute may create a class whose activities are forbidden without a rational relationship to the legitimate state interest.

The court in *Nall* did not decide, but only mentioned, the issue of the overbreadth of the "public place" part of the statute. The overbreadth of a statute which prohibits nude dancing in bars and in public places was discussed in one of the very cases cited in Nall v. Baca. In Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), the United States Supreme Court said that a statute which prohibited nude dancing in liquor establishments and public places could be unconstitutionally overbroad. No actual decision on the overbreadth was offered by the Supreme Court, because it was only considering the validity of an injunction against the enforcement of the statute. The New Mexico Supreme Court in Nall v. Baca stated that the potential overbreadth of the indecent dancing statute was not an important consideration, because the statute could be severed to include only the prohibition of nude dancing in liquor establishments. 95 N.M. at 788, 626 P.2d at 1285.

The statute could also be challenged as underinclusive, because it does not apply to those "fully-clothed" dancers whose suggestive dancing may cause violent or immoral behavior.

9. N.M. Stat. Ann. §60-4B-2(A)(1) (Cum. Supp. 1981), describes the liquor director's duties: "The director is responsible for the operation of the department. It is his duty to supervise all operations of the department and to: (1) administer and enforce the laws the administration of which the department is charged."

10. 95 N.M. at 784, 626 P.2d at 1281.

for a declaratory judgment holding the statute unconstitutional and for an injunction against enforcement of the statute. The plaintiffs claimed that the statute deprived the dancers of their right to free speech. The trial court denied the plaintiffs' requested relief, holding that New Mexico's indecent dancing statute did not violate any constitutional guarantee to free speech.[11] Plaintiffs appealed and the New Mexico Supreme Court affirmed the district court's decision.[12]

DISCUSSION AND ANALYSIS

Originally, Nall and Dyer had asked the trial court to adopt the following findings of fact and conclusions of law: (a) nude dancing had become an accepted art form by the local community; (b) nude dancing was an historical, as well as a recent form of expression for the dancer as well as her audience; and (c) there was no evidence to show that the nude dancing in Nall's establishment was obscene.[13] Nall and Dyer had hoped to establish with those findings that Dyer's nude dancing was protected by the first and fourteenth amendments to the federal constitution and by the "liberty of speech" provision of the New Mexico Constitution.[14] The trial court refused to adopt these findings on the ground that the findings were immaterial and irrelevant to the determination of the constitutionality of the New Mexico indecent dancing statute.[15]

On appeal, the New Mexico Supreme Court offered three lines of reasoning for holding the statute constitutional: (a) the twenty-first amendment gives a state broad powers in the area of state liquor regulations;[16] (b) any first amendment interest in nude dancing in liquor establishments is outweighed by the state's interest in regulating alcohol;[17] and, (c) even if nude dancing is constitutionally protected in liquor establishments, the dancing, itself, has never been the subject of the regulation.[18]

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11. *Id.*
12. *Id.*
13. *Id.* at 785, 626 P.2d at 1282.
14. The federal provision states that, "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I. The state provision says, "no law shall be passed to restrain or abridge the liberty of speech. . . ." N.M. Const. art 2, § 17.
15. 95 N.M. at 785, 626 P.2d at 1282.
16. *Id.* at 786–87, 626 P.2d at 1283–84.
17. *Id.* at 787, 626 P.2d at 1284.
18. *Id.* In this somewhat vague line of reasoning, the court suggested that the subject of regulation had always been alcohol. There is a question why, if the purpose of the statute is to regulate the sale of alcohol, N.M. Stat. Ann. § 30-9-14.1 (Supp. 1980) is a criminal statute, and is not part of the New Mexico Liquor Control Act, N.M. Stat. Ann. § 60-3A-1 (Repl. 1981). Furthermore, even if the court regarded the indecent dancing statute as a regulation of alcohol, the practical effect is the prohibition of nude dancing. Liquor licensees will always stop nude dancing performances before they risk having their licenses revoked.

In *Nall,* the New Mexico Supreme Court did not actually decide the threshhold issue of whether nude dancing is protected by the first amendment. The court focused its attention only on the twenty-first amendment. With that analysis, the court failed to provide lower courts or practitioners with guidance as to whether nude dancing is a protected form of expression under the first amendment. Should the question again arise, a more informative analysis would address the following issues. First, the court should decide whether nude dancing is a type of speech or speech-related conduct. Second, the court should consider whether nude dancing is a protected form of expression. Finally, if nude dancing is protected, the court should balance the state's interest in regulating alcohol against an individual's interest in free speech as expressed through nude dancing.[19]

A. *Nude Dancing and the First Amendment*

The issue of whether nude dancing is protected by the first amendment has never been resolved by either the United States Supreme Court or the New Mexico Supreme Court. In a recent United States Supreme Court decision, *New York State Liquor Authority v. Bellanca,*[20] Justice Stevens, in his dissenting opinion, noted:

> Although the Court has written several opinions implying that nude or partially nude dancing is a form of expressive activity protected by the First Amendment, the Court has never directly confronted the question.[21]

Nude dancing, under appropriate circumstances, may be a protected form of expression.[22] For example, an actor, as part of a theatrical production, is entitled to constitutional protection.[23] Similarly, the United States Supreme Court has maintained that pro-

19. By ignoring the potential first amendment status of nude dancing, the New Mexico Supreme Court may have implied that such a concern was frivolous. Admittedly, nude dancing may not be important enough to outweigh the interests underlying a state's power to regulate alcohol. Legitimate allegations of a first amendment violation should, however, be taken seriously and should be resolved in an appropriate manner. Thus, if prohibiting nude dancing in a liquor establishment was more important than Nall's and Dyer's first amendment interests in nude dancing, the court should have explained why this was so.

20. 49 U.S.L.W. 3950 (June 22, 1981).

21. *Id.* at 3951 (Stevens, J., dissenting opinion).

22. The United States Supreme Court said in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), "Although the customary 'bar room' type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue, 409 U.S. 109, 118 (1972) . . . that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." 422 U.S. at 932.

23. The United States Supreme Court, in Schacht v. United States, 398 U.S. 58 (1970) said, "An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech. . . ." *Id.* at 63.

tected speech may include forms of expression which entertain.[24] Dancing as entertainment or theatrics, therefore, should have the same sort of protection as other forms of theatre or entertainment.

Even if nude dancing cannot be labeled pure speech,[25] the dancing should not automatically be excluded from the protective parameters of the first amendment, and should receive a full first amendment analysis. Speech-related conduct is also protected by the first amendment. In *United States v. O'Brien*[26] the United States Supreme Court decided that when the government attempts to suppress speech-related conduct, the government must show that the regulation advances a substantial government interest when it regulates the conduct.[27] A government interest is justified if "it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[28]

If the nude dancing in an establishment such as Nall's is characterized as speech or speech-related conduct, then an important, substantial interest must be demonstrated to allow a prohibition of such conduct. The New Mexico Supreme Court, in *Nall v. Baca,* said that nude dancing, even if protected by the first amendment, was not the subject of regulation. The court thus implied that N.M. Stat. Ann. §30-9-14.1 (Supp. 1980) was regulating the sale of alcohol and not regulating nude dancing.[29] It is irrelevant whether the State of New Mexico and the New Mexico courts characterize the statute as regulating alcohol or nude dancing. Section 30-9-14.1 forbids nude dancing in liquor establishments.[30] The practical effect of the statute, therefore, can also be the censorship of speech or speech-related conduct in liquor establishments.[31] As a result, the State of New Mexico, under the *O'Brien* decision, should be required to demonstrate

24. Winters v. New York, 333 U.S. 507 (1948). In *Winters,* the United States Supreme Court said that a distinction between speech which entertains and speech which informs is too vague to form the basis for prohibiting expression. At issue in the Winters case was a statute which prohibited the distribution of magazines that contained news and stories of violence, bloodshed, and crime. The local government felt that such material would incite violence.

25. The distinction between speech and conduct has never truly been helpful in analyzing first amendment issues. "The trouble with the distinction between speech and conduct is that it has real content. Expression and conduct, message and medium, are . . . inextricably tied together in all communicative behavior. . . ." L. Tribe, American Constitutional Law (1978).

26. 391 U.S. 367 (1968).

27. *Id.* at 376-77.

28. *Id.* at 377.

29. 95 N.M. at 787, 626 P.2d at 1284.

30. *See* note 4, *supra.*

31. *See* note 18, *supra.*

significant governmental interests in the regulation of alcohol. No such interest was ever presented in *Nall v. Baca.*[32]

If the speech or speech-related conduct is obscene, it cannot receive any first amendment protection at all. A showing of obscenity makes the activity a valid subject of state regulation.[33] The United States Supreme Court said that obscenity is "no essential part of any exposition of ideas and . . . of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[34] If nude dancing were afforded first amendment protection, that protection would be withdrawn if the dancing were found to be obscene. That, however, is an issue to be determined by the fact-finder.

Once the distinction between protected expression and obscenity is established, the next logical step is the difficult chore of creating a definitional test for obscenity. As the United States pointed out in *Miller v. California,*[35] "no majority of the Court at any given time has been able to agree on a standard to determine what constitutes obscene pornographic material . . . ."[36] The current test for obscenity apparently requires the fact-finder to conclude that: (a) the average person applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interest; (b) the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, (c) the work taken as a whole lacks serious literary, artistic, political or scientific value.[37] States remain free to adopt their own standards of prurience.[38] The United States Supreme Court may object, however, to standards which are unreasonable.[39]

Given the fact that the dancing in Nall's establishment was not proven obscene,[40] the dancing should not have been prohibited.

32. The opinion in Nall v. Baca says, "Baca offered no evidence to show that nude dancing performed at the Lancer's Club injured, harmed or threatened the public health, safety and morals." 95 N.M. at 783, 626 P.2d at 1281.

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

34. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1941). Chaplinsky involved the use of derisive language in public which allegedly was likely to cause a breach of the public peace and order.

35. 413 U.S. 15 (1973).

36. *Id.* at 22.

37. *Id.* at 24.

38. L. Tribe, American Constitutional Law 662-63 (1978).

39. For example, in Jenkins v. Georgia, 418 U.S. 153 (1974), the United States Supreme Court found that no jury could reasonably conclude that the film, "Carnal Knowledge" was obscene. The Court said that juries do not have unlimited discretion in determining what constitutes obscene material. In *Jenkins,* the Supreme Court viewed the movie and noted that although there was nudity, the scenes did not depict or describe "patently offensive hard core sexual conduct." *Id.* at 160. As such, the movie was not obscene.

40. 95 N.M. at 784, 626 P.2d at 1281.

Without a showing of obscenity, nude dancing may fall into the category of speech or speech-related conduct which is protected by the first amendment, absent a justifiable state reason to prohibit such conduct. The court should decide whether nude dancing is protected by the first amendment. If it is, the individual's protected interests must then be balanced against the state interest under the twenty-first amendment.[41]

B. *The First Amendment vs. The Twenty-first Amendment*

It is reasonable to assume that the New Mexico Supreme Court in *Nall v. Baca* was confronted with a valid first amendment argument. Thus, *Nall v. Baca* clearly presented the court with the problem of dealing with two separate and competing constitutional provisions. Plaintiff-appellants argued that nude dancing was protected by the first amendment, while the State of New Mexico argued that the twenty-first amendment allowed the prohibition of such conduct in liquor establishments.[42]

The method of analyzing and resolving conflicting constitutional provisions was discussed by the United States Supreme Court in *Hostetter v. Idlewild Liquor.*[43] The issue addressed in *Hostetter* was whether the twenty-first amendment completely superseded the commerce clause[44] of the federal constitution. The United States Supreme Court in *Hostetter* specifically stated that in analyzing competing sections of the constitution, "each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case."[45] The Court examined the underlying interests of each constitutional provision and concluded that the twenty-first amendment did not outweigh the stated purpose of the commerce clause as presented in the case before them.[46]

The New Mexico Supreme Court's analysis in *Nall v. Baca* did not contain a similar balancing of the constitutional interests involved. First, the court failed to determine whether nude dancing was a pro-

41. U.S. Const., amend. XXI, §2 provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

42. 95 N.M. at 783, 626 P.2d at 1280.

43. 377 U.S. 324 (1964).

44. U.S. Const., Art. I, §8 provides: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes."

45. 377 U.S. at 332. This case involved the transportation of liquor to consumers in foreign countries. The commerce clause was allowed to supersede the state's interest in regulating alcohol.

46. 377 U.S. at 333-34.

tected form of expression under the first amendment.[47] Because the court did not determine whether any first amendment protections were to be afforded to nude dancing, there was nothing to balance against the twenty-first amendment. As a result, a balancing of competing constitutional provisions was not possible. Second, the court upheld the New Mexico indecent dancing statute without a showing that nude dancing caused any harm to the public.[48] The state's interest in regulating alcohol was never presented. Should the issue again arise, the court should first, as discussed above, decide whether nude dancing in bars is a protected form of speech or speech-related conduct and is or is not obscene. Then the court should balance the interests involved in each amendment to decide which should prevail.

1. The first amendment

When balancing the interests involved, the New Mexico Supreme Court should first evaluate the individual's potential first amendment interest in nude dancing in a bar. Great emphasis has traditionally been placed on protecting a person's first amendment rights. The United States Supreme Court in *Thomas v. Collins*[49] said that the preferred place given to the first amendment in the overall scheme of democratic freedoms "gives these liberties a sanctity and . . . any attempt to restrict these liberties must be justified by clear public interest. . . ."[50] The emphasis on first amendment rights has led some people to believe that such first amendment rights are absolute.

> A recurring debate in modern first amendment jurisprudence has been whether first amendment rights are absolute in the sense that government may not abridge them at all or whether the first amendment requires balancing of competing interests. . . ."[51]

Such an absolutist viewpoint has never really prevailed, however. For example, speech which incites violent or illegal conduct is not

47. 93 N.M. at 784, 626 P.2d at 1281. Instead, the New Mexico Supreme Court said that even if nude dancing is protected, any first amendment interest is outweighed by the twenty-first amendment. How one constitutional interest can outweigh another interest without a determination that two constitutional interests exist is indeed difficult to comprehend.

48. 95 N.M. at 784, 626 P.2d at 1281. While the indecent dancing statute itself does not require a showing of harm in order for the dancing to be indecent, such a showing should be necessary if the state's interest in regulating alcohol is to be balanced against a first amendment claim.

49. 323 U.S. 516 (1945). *Collins* involved the appellant's alleged right to encourage workers to join labor unions without first receiving permission from the government.

50. 323 U.S. at 529-30.

51. L. Tribe, American Constitutional Law 582 (1978).

protected under the first amendment.[52] Libelous speech is also unprotected.[53] Obscene speech, as discussed earlier, is excluded from the guarantees of the first amendment.[54] These examples all involve weighing the importance of the type of speech against the harms caused by the speech.

In the case of nude dancing, the court should evaluate the right to individual expression involved in nude dancing and consider the potential harms which might be caused by the conduct. Any further discussion of the value of individual expression through nude dancing, for the purposes of this casenote, would be entirely speculative. A court, presented with such an issue, would have to make the ultimate determination.

2. The twenty-first amendment

After identifying any potential first amendment interests in nude dancing, the New Mexico Supreme Court should then proceed to identify the state's interest in regulating such behavior in liquor establishments. The New Mexico Supreme Court relied heavily on the twenty-first amendment in justifying its decision in *Nall v. Baca.* A brief history of the twenty-first amendment may help to explain the court's reliance on that particular constitutional provision.

Control of the liquor industry has long been viewed as being well within the scope of a state's traditional police powers.[55] The adoption of the twenty-first amendment gave an added presumption of validity to the state's power of alcohol control. Originally, application of this constitutional provision created conflicts with the commerce clause of the United States Constitution.[56] More often than not, the twenty-first amendment has been held to be more important than typical commerce clause concerns, though some decisions did uphold the necessity for the commerce clause over twenty-first amendment concerns. In *Ziffrin v. Reeves,*[57] for example, the United States Supreme Court declared commerce clause concerns relatively unimportant when the twenty-first amendment was involved. The *Ziffrin* court emphasized a state's right under the twenty-first amendment to enact legislation regulating the manufacture, trans-

52. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Schneck v. United States, 249 U.S. 47 (1919).

53. Beauharnais v. Illinois, 343 U.S. 250 (1952).

54. *See* text accompanying notes 29-33, *supra.*

55. Crowley v. Christensen, 137 U.S. 86 (1890). The Court noted that "[t]he police power of the State is fully competent to regulate the [liquor] business—to mitigate its evils or to suppress it entirely." *Id.* at 91.

56. *See* note 43, *supra.*

57. 308 U.S. 132 (1939).

portation, sale, and distribution of intoxicating liquors. The court said, "The twenty-first amendment sanctions the rights of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause."[58] In another case, *Seagram & Sons v. Hostetter,*[59] the United States Supreme Court upheld a New York policy regulating the sale of liquor. The policy required alcohol prices to remain within certain price boundaries. The Court stated that while the twenty-first amendment did not repeal the commerce clause, the amendment did grant the states wide latitude in the area of liquor control.[60]

The twenty-first amendment is not, however, without limitations. The United States Supreme Court has said that, "The operation of the twenty-first amendment does not alter the application of equal protection standards."[61] The United States Supreme Court has said, too, that although the police power of the states over intoxicating liquors is extremely broad, procedural due process requires notice and the opportunity to be heard.[62] Thus, the twenty-first amendment does not automatically supersede all other constitutional provisions and it should be balanced, as in the case of *Nall v. Baca,* with any first amendment concerns.

3. Balancing the constitutional interests

The status of the twenty-first amendment in relation to the first amendment and nude dancing was first addressed in *California v. LaRue,*[63] a United States Supreme Court decision. The issue addressed in *LaRue* was essentially the same issue as that presented in *Nall v. Baca.* The United States Supreme Court was asked to determine the constitutionality of a statute which prohibited nude dancing in bars.[64] The Court said that the twenty-first amendment allowed a state to prohibit in liquor establishments certain types of entertainment, including nude dancing.[65] In *LaRue,* the Court

58. *Id.* at 138.

59. 384 U.S. 35 (1966).

60. *Id.* at 42.

61. Craig v. Boren, 429 U.S. 190, 209 (1976). *Craig* involved a statute which forbade the sale of 3.2% beer to females under the age of eighteen and to males under the age of twenty-one. The Court held that such a regulation violated equal protection standards.

62. Wisconsin v. Constantineau, 400 U.S. 433 (1971). The state attempted to prohibit the sale of alcohol to "problem drinkers." The state issued lists of such people to liquor stores, informing the stores that they were not to sell liquor to the people whose name appeared on the list. The Court held that such action, without judicial determination, denied a party's right to due process.

63. 409 U.S. 109 (1972).

64. *Id.* at 110.

65. *Id.* at 117.

recognized that the twenty-first amendment gives a presumption of validity to state regulations involving the sale of alcoholic beverages. The Court said that some forms of expression could be constitutionally prohibited if the expression caused harm to the public.[66] In the context of nude dancing, if such dancing in liquor establishments caused members of the audience to react violently or immorally, thereby causing harm to the surrounding community, such otherwise protected expression could be prohibited.

The crucial difference between *LaRue* and *Nall v. Baca* involved the nature of the evidence presented to the courts. In *LaRue,* the United States Supreme Court expressly recognized and mentioned the evidence collected by the California Department of Alcoholic Beverage Control which extensively documented injuries to the public caused by nude dancing.[67] The evidence included numerous incidents of valid concern to the Department. Aside from vulgar physical contact between the dancers and the customers, the Department found that prostitution involving young girls had occurred, as well as attempted rape, actual rape, and assaults on police officers, all examples of proscribed activity which were attributable to the effect of nude dancing on the public.[68]

Even in its more recent decision involving the constitutionality of nude dancing in liquor establishments, *New York State Liquor Authority v. Bellanca,*[69] the Supreme Court appeared to be uneasy about upholding a statute which prohibited topless dancing without some showing of a state interest in regulating alcohol. The *Bellanca* opinion, which upheld the state's prohibition of topless dancing, clearly referred to a legislative memorandum issued by the New York Legislature which discussed "the disturbances associated with mixing alcohol and nude dancing."[70]

Some jurisdictions have held that *LaRue* stands for the proposition that a statute regulating alcoholic beverages is to be presumed constitutional, even absent any showing of harm to the public.[71] Other jurisdictions, however, have held that *LaRue* is limited to its facts, due to the vulgarity of the regulated activity and the graphic social harms. For example, in *Birkenshaw v. Haley*[72] the United States District Court for the Eastern Division of Michigan said that

66. *Id.*
67. *Id.* at 111.
68. *Id.*
69. 49 U.S.L.W. 3950 (June 22, 1981).
70. *Id.* at 3951.
71. *E.g.,* Castlewood Int.l. Corp. v. Simon, 596 F.2d 638 (5th Cir. 1979); Blantik Co. v. Ketola, 587 F.2d 379 (8th Cir. 1978); Paladino v. City of Omaha, 471 F.2d 812 (8th Cir. 1972).
72. 409 F. Supp. 13 (E.D. Mich. 1974).

the regulations in *LaRue* were upheld because the regulations were "particularly aimed at combating . . . social evils which had resulted from placing inebriated patrons in close proximity to nude or semi-nude entertainers."[73] In *Clark v. City of Fremont, Nebraska*[74] the court noted that *LaRue* involved evidence of problems associated with explicit entertainment. In light of such evidence, the court said that "the Supreme Court felt that the department's choice of a prophylactic solution to the problem was neither irrational nor unreasonable."[75]

The decision in *Nall v. Baca* can only be explained if the New Mexico Supreme Court relied on the added presumption of validity of a state regulation pursuant to the twenty-first amendment.[76] This presumption, however, does not begin to solve the problems presented by the lack of any first amendment analysis or showing of public harm, actual or potential, in *Nall*. It is possible that the court implicitly adopted the findings of the related activities which supported the prohibition of nude dancing in *LaRue*. There was, however, no indication that the *Nall* court adopted the California court's findings of fact. The *Nall v. Baca* decision, in effect, seemed to presume that any nude dancing in bars would be sufficiently likely to cause harm to the public. Such a presumption by the court would have to be a substitute for the state interest in regulating alcohol.

Without any first amendment analysis, the decision in *Nall v.*

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73. *Id.* at 17. *Birkenshaw* involved the court's granting of an injunction against enforcement of a statute prohibiting nude dancing in a liquor establishment. The court said that the injunction would remain in effect until the vagueness of the statute was resolved and until obscenity was shown.

74. 377 F. Supp. 327 (D. Neb. 1974). The court held that a statute which prohibited nude dancing in bars was unconstitutional to the extent that the opportunity for judicial review of the nature of the dance was denied. Only if the nude dancing was shown to be obscene could the state constitutionally prohibit the dancing.

75. *Id.* at 331.

76. The New Mexico Supreme Court cited a United States Supreme Court opinion, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), for the proposition that any first amendment interest in nude dancing in liquor establishments was outweighed by the interests of a state in regulating alcohol. 95 N.M. at 787, 626 P.2d at 1284. *Doran* can be distinguished from Nall v. Baca on two grounds. First, the standard enunciated in *Doran* is not the same standard expressed by the United States Supreme Court in its most recent decision involving the first amendment and nude dancing. In New York Liquor Authority v. Bellanca, the United States Supreme Court definitely weighed competing interests. *See* text accompanying notes 69-70, *supra*. Thus, even if *Doran* supports Nall v. Baca, the standard of review in *Doran* is outdated. Second, *Doran* involved a request for a preliminary injunction. The Court only had to determine the likelihood of success of the petitioners' claims. The Court never made any final decision on the merits of the case. Whether the Court in *Doran* would have actually upheld a criminal statute prohibiting nude dancing, such as New Mexico's Indecent Dancing Statute, is difficult to say. The *Doran* Court might have been more cautious in its decision if confronted with the knowledge that its decision would carry more impact than that which accompanies the granting of a preliminary injunction.

Baca effectively granted unlimited scope to the twenty-first amendment, as it relates to the exercise of free expression in liquor establishments in New Mexico. A chilling effect to free expression could be one unfortunate result of the *Nall v. Baca* decision.[77] For example, a court could, by applying the holding in *Nall v. Baca,* determine that the twenty-first amendment gives added validity to a regulation prohibiting speech which is likely to cause harmful effects, even if evidence of such an effect is absent. After *Nall,* a challenger to the statute is likely to be required to defend his or her first amendment right to freedom of expression by overcoming a heavy presumption of validity afforded to such a statute by the twenty-first amendment. Meanwhile, that challenger's potential first amendment rights would be effectively denied. Such a burden of proof is not justified. The United States Supreme Court in *Southeastern Promotions, Ltd. v. Conrad*[78] said with regard to the first amendment and prior restraint:

> First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.[79]

The Court in *Southeastern Promotions* said that a city's prior restraint of free expression in the musical production, "Hair," was unconstitutional, because the material was not proven to be unprotected.[80] The court did not say that the production was not obscene. Instead, the court said that the city of Chattanooga had not provided adequate procedural safeguards under which the first amendment interests could be assessed.[81]

Admittedly, *Southeastern Promotions* did not involve a balancing of the first and twenty-first amendments. The decision, however, does show a reluctance on the part of the United States Supreme Court to prohibit free expression on the basis of a *likelihood* of harm, as opposed to an actual demonstration of injury.

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77. The United States Supreme Court has held that a regulation can be challenged even if it falls short of a direct prohibition against the exercise of first amendment rights. This proposition was upheld both in Laird v. Tatum, 408 U.S. 1 (1972), and in Baird v. State Bar of Arizona, 401 U.S. 1 (1971). By requiring a plaintiff to overcome the presumption of the twenty-first amendment before that plaintiff may exercise his freedom of expression, the New Mexico Supreme Court indirectly places a burden on plaintiffs' first amendment rights.

78. 420 U.S. 546 (1975).

79. *Id.* at 560.

80. *Id.* at 561-62.

81. *Id.* at 562.

If the New Mexico Supreme Court had properly balanced the first and twenty-first amendment interests presented in *Nall v. Baca,* the state's interest in regulating alcohol might have outweighed the appellants' interests in free expression. Because the court did not evaluate and balance these interests, however, the appellants lost their right to free expression without any discernible justification.

CONCLUSION

Non-obscene nude dancing in New Mexico liquor establishments may be entitled to protection under the first amendment. A substantial state interest should be demonstrated before such activity is prohibited. In *Nall v. Baca,* the New Mexico Supreme Court upheld a statute which prohibited such expression without any showing of a substantial state interest. The court held that the twenty-first amendment was controlling, because the regulation of alcohol was a necessary part of state police powers. The court did not explain what twenty-first amendment interests were being served. More important, the court did not determine what, if any, first amendment interests were being sacrificed. Prohibiting nude dancing in liquor establishments without appropriate constitutional analysis will probably not destroy our federal constitutional right of free expression. It could, however, provide a chilling effect on the freedom of expression in liquor establishments in New Mexico. If continued, the type of constitutional analysis employed in *Nall v. Baca* could definitely present a threat to our legitimate concern in free speech.

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