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NUDE ENTERTAINMENT AS PROTECTED EXPRESSION: A FEDERAL/STATE LAW CONFLICT AFTER CROWNOVER v. MUSICK

"A Constitutional distinction between speech and conduct is specious. Speech is conduct and actions speak."1

I. INTRODUCTION

California Penal Code section 318.5 permits cities and counties to regulate the "topless" and "bottomless" exposure of waiters, waitresses, and entertainers in establishments serving food and drink.2 Penal Code section 318.6 permits regulation of public exposure by participants in "live acts, demonstrations, or exhibitions."3 Both statutes contain an exception


2. With regard to public exposure by employees or entertainers in food or beverage establishments, the California Penal Code provides:

   Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a county or city, if such ordinance directly regulates the exposure of the genitals or buttocks of or the breasts of any person who acts as a waiter, waitress, or entertainer, whether or not the owner of the establishment in which the activity is performed employs or pays any compensation to such person to perform such activity, in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such establishment.

   The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances.


3. With regard to public exposure by participants in live acts, demonstrations, or exhibitions, the California Penal Code provides as follows:

   Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a city or county, if such ordinance relates to any live acts, demonstrations, or exhibitions which occur in public places, places open to the public, or places open to public view and involve the exposure of the private parts or buttocks of any participant or the breasts of any female participant, and if such ordinance prohibits an act or acts which are not expressly authorized or prohibited by this code.

   The provisions of this section shall not apply to a theater, concert
that the provisions shall not apply to theaters, concert halls or similar establishments which are primarily devoted to theatrical performances. Although these statutes perform no active role in compelling local adoption of ordinances, they do authorize municipalities to adopt ordinances to regulate nude entertainment. Local regulation pursuant to the penal statutes is deemed a proper exercise of police power, justified on considerations of public morals and welfare. The most commonly articulated justification is that featuring nudity as a commercial exhibition and sales promotion may be detrimental to public peace, morals, and good order of the surrounding community.

A controversy exists as to the validity of ordinances enacted pursuant to these California statutes. Federal and California laws are in conflict as to what criteria should be used in regulating nude entertainment in establishments open to the public. Federal law dictates that nude entertainment can be prohibited in establishments serving alcoholic beverages but not in nonalcoholic establishments without satisfying constitutional standards. On the other hand, the Supreme Court of California in Crownover v. Musick has upheld the prohibition of nude entertainment in any nontheater establishment without prima facie first amendment review.

This comment will explore and compare California and federal case law and the resulting classification criteria by which nude entertainment can be regulated. It will concentrate on the two classification systems and analyze the constitutional standard which the California Supreme Court has sanctioned when a speech element exists in the entertainment. The major premise of this analysis is that nude entertainment in certain instances is speech and, therefore, deserves prima facie constitutional protection.

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6. Id.
7. E.g., Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); California v. LaRue, 409 U.S. 109 (1972); Chase v. Davelaar, 645 F.2d 735 (9th Cir. 1981).
II. THE CONDUCT/SPEECH CONTROVERSY

In Crownover v. Musick, the court examined the "topless" and "bottomless" ordinances enacted pursuant to California Penal Code sections 318.5 and 318.6. Plaintiffs in Crownover were owners and employees of Orange and Sacramento County establishments which serve food and liquor and feature "topless" waitresses and nude entertainers. Plaintiffs contended that the ordinances were unconstitutional in that they infringed upon rights of freedom of speech and expression guaranteed by the first and fourteenth amendments to the United States Constitution. They argued that the ordinances prohibited public nude entertainment which was communicative. Since entertainment is by nature communicative, plaintiffs claimed that the ordinances prohibited exercise of free speech. The basis of their argument was the prior California Supreme Court decision, In re Giannini, which held that nude entertainment deserves prima facie first amendment protection unless judged to be obscene. Thus, the

9. Id. The appeal involved three civil cases and one criminal prosecution arising in two separate California counties. On consolidated appeals, the California Supreme Court held that the city and county ordinances were valid regulations of conduct. Charges in the criminal case were dismissed before appeal; the relating appeal was thereby dismissed as moot. The Supreme Court ruled on the remaining three ordinances, all similar in form. All were adopted pursuant to Cal. Penal Code §§ 318.5, .6 (West 1970), and contain "topless" and "bottomless" provisions as to exposure of waiters, waitresses, entertainers, and performers in public. Only two substantive differences distinguish the ordinances. First, the Sacramento County and City ordinances define the phrase "theater, concert hall, or other similar establishment which is primarily devoted to theatrical performances" as "a building, play house, room, hall or other place having a permanent stage upon which movable scenery and theatrical or vaudeville or similar performances are given and permanently affixed seats so arranged that a body of spectators can have an unobstructed view of the stage." Sacramento County Code chs. 9.44, .48 (1969), quoted in Crownover v. Musick, 9 Cal. 3d at 412 n.6, 509 P.2d at 501 n.6, 107 Cal. Rptr. at 684 n.6; Sacramento City Code § 26.60 (1969), quoted in Crownover v. Musick, 9 Cal. 3d at 415 n.9, 509 P.2d at 503 n.9, 107 Cal. Rptr. at 687 n.9. The Orange County ordinance contains no such definition. Orange County Code §§ 311.021, .031 (1969), quoted in Crownover v. Musick, 9 Cal. 3d at 411 n.4, 509 P.2d at 500 n.4, 107 Cal. Rptr. at 684 n.4. Secondly, legislative findings of the City Council in Sacramento are included to justify the restrictions on the basis of an "increasing trend" towards the proscribed acts in Sacramento. Sacramento City Code § 26.59 (1969), quoted in Crownover v. Musick, 9 Cal. 3d at 415 n.9, 509 P.2d at 503 n.9, 107 Cal. Rptr. at 687 n.9. The other two ordinances are silent on any legislative findings or justifications.

10. 9 Cal. 3d at 418, 509 P.2d at 505, 107 Cal. Rptr. at 689.
11. Id.
13. Id.
Crownover plaintiffs attacked the ordinances as being unconstitutionally overbroad because they prohibited nonobscene speech.14

The court in Crownover ruled that nude dancing is not entitled to prima facie first amendment protection.15 It reasoned that the ordinances were directed at conduct, rather than constitutionally protected speech or "at conduct which [was] 'in essence' speech or 'closely akin to speech.'"16 The court's premise was that nude conduct could be differentiated from protected communication and, therefore, subject to proscription.17 The court concluded that the effect of the ordinances was not to prohibit entertainment but merely to regulate the conduct of entertainers by requiring that they wear clothes while performing.18 However, Justice Tobriner's dissent in Crownover19 describes a possible effect of allowing a conduct/expression dichotomy: "Entertainment, they assert, can be dichotomized into speech and conduct; the State need not touch speech, but by barring conduct associated with that speech, the state may effectively proscribe entertainment."20

The conduct/speech distinction is difficult to conceptualize within the framework of the first amendment free speech guarantee. All communication inextricably involves conduct, much of which is expressive. To divide expression, conduct, medium, and message into distinct elements and to point to those which are noncommunicative is impossible.21 This difficulty has precluded the United States Supreme Court from articulating a basis for the distinction and from successfully classifying specific cases of expression/conduct as "conduct" or "speech."22

14. 9 Cal. 3d at 418, 509 P.2d at 505, 107 Cal. Rptr. at 689.
15. Id. at 425, 509 P.2d at 510, 107 Cal. Rptr. at 694.
16. Id.
17. Id.
18. Id.
19. Id. at 431, 509 P.2d at 514, 107 Cal. Rptr. at 698.
20. Id. at 436, 509 P.2d at 518, 107 Cal. Rptr. at 702.
22. Justice Harlan, concurring in Cowgill v. California, 396 U.S. 371, 372 (1970), declared that the Supreme Court has been unable to formulate "a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitu-
Nevertheless, the first amendment guarantee of free speech clearly extends to more than merely verbal communications. Numerous Supreme Court decisions since 1931 have declared prohibitions of nonverbal conduct to be impermissible abridgements of rights of freedom of speech. Nonverbal conduct, however, does not always constitute protected speech. The prime example is the area of "symbolic speech." In this realm, an actor intends his/her conduct to express or to symbolize an idea. The Supreme Court has afforded a lesser degree of protection to cases within this branch of the first amendment.

The point at which expression is sufficiently colored with conduct as to diminish its protection under the first amendment is difficult to determine from a synthesis of relevant decisions. Various theories have been espoused to reconcile intuition with logic in determining predominance of "expression" or "action" in a particular case. Courts must be sensitive to these decisions and theories because of potential harm to individual constitutional rights. The theoretical implications of mislabelling an expression "mere conduct" prompt an analysis of the conflict between federal and California state law.

tionally protected interest in freedom of expression." See generally Nimmer, supra note 21, which suggests the outlines of a theoretical basis upon which to characterize symbolic speech under the first amendment.


25. This was emphasized by Justice Goldberg in Cox v. Louisiana, 379 U.S. 536, 555 (1965):

We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.


27. The Crownover court declared that the ordinances "regulat[ed] conduct," not constitutionally protected speech. 9 Cal. 3d at 425, 509 P.2d at 510, 107 Cal. Rptr. at 694.
III. The Federal/State Law Conflict

Until 1973, the leading California case was *In re Gian-nini.* Giannini held that nude dancing is a method of expression protected by the first amendment, and cannot be prohibited unless found to be obscene. In 1973, the California Supreme Court reversed its position in *Crownover v. Muisick* and held that nude entertainment is not entitled to prima facie first amendment protection. The court ruled that "topless-bottomless" ordinances, such as those enacted pursuant to California Penal Code sections 318.5 and 318.6, were directed at conduct, not constitutionally protected speech.

As it stands, *Crownover* is controlling law in California. Ordinances patterned after the penal statutes prohibit nude entertainment per se regardless of whether the establishment is one which serves liquor on its premises or not. This is in conflict, however, with rulings in the recent United States Supreme Court decisions in *California v. LaRue* and *Doran v. Salem Inn, Inc.*

In *California v. LaRue,* the United States Supreme Court upheld the facial constitutionality of state regulation proscribing sexually graphic live and filmed entertainment in establishments holding liquor licenses. It declared that nude entertainment in establishments serving liquor need not be accorded prima facie first amendment protection. The ruling was justified by the states' interests in regulating liquor sales

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29. Id.
30. 9 Cal. 3d at 431, 509 P.2d at 514, 107 Cal. Rptr. at 698.
31. Id. The court held that "the ordinances deny neither freedom of speech and expression nor the equal protection of the laws but are in all respects valid and constitutional regulations of conduct. Sections 318.5 and 318.6 of the Penal Code authorizing such ordinances were enacted after our decision in *In re Giannini.* To the extent that it is inconsistent with the views expressed herein Giannini is overruled."
33. Nude entertainment is prohibited unless it occurs in a "theater" or establishment "primarily devoted to theatrical performances." See notes 2 & 3 supra.
34. 409 U.S. 109, 118 (1972).
35. 422 U.S. 922, 932 (1975).
36. 409 U.S. at 116.
37. Id. at 118-19.
under the twenty-first amendment to the United States Constitution.\textsuperscript{38} Although the Supreme Court refused to limit the states' regulatory authority by employing obscenity or other first amendment standards, it did qualify its ruling. Recognizing that such prohibitory regulations would, on their face, bar "some forms of visual presentation that would not be found obscene,"\textsuperscript{39} the Court allowed prohibition of nude dancing only when it occurred in establishments serving liquor. In doing so, it stated that "the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink."\textsuperscript{40}

The effect of \textit{Crownover} is that nude entertainment may be forbidden "across the board," regardless of whether or not the establishment serves alcoholic beverages.\textsuperscript{41} The majority in \textit{Crownover} factually distinguished the holding in \textit{California v. LaRue}. \textit{LaRue} involved the regulation of motion pictures as well as live entertainment,\textsuperscript{42} while the ordinances in \textit{Crownover} regulated only live entertainment. The majority narrowly interpreted \textit{LaRue} to distinguish between the protection afforded to motion pictures and that afforded to live entertainment.\textsuperscript{43}

Justice Tobriner's dissenting opinion in \textit{Crownover} characterized this distinction as "not only directly [in contravention of] the language of \textit{LaRue} but also [violative of] common sense."\textsuperscript{44}

Justice Tobriner's interpretation that the Supreme Court in \textit{LaRue} intended that live nude dancing be within the ambit

\textsuperscript{38} Id. at 114.

\textsuperscript{39} Id. at 116. See generally Miller v. California, 413 U.S. 15 (1973); United States v. O'Brien, 391 U.S. 367 (1968); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957); CAL. PENAL CODE § 311 (West Supp. 1980). These authorities set forth basic guidelines and constitutional standards in determining what constitutes obscenity and, therefore, is not within the area of constitutionally protected speech.

\textsuperscript{40} 409 U.S. at 118.

\textsuperscript{41} This is true if the "theater exemption" in California ordinances is conceded to be unconstitutionally vague. See notes 105-16 and accompanying text infra.

\textsuperscript{42} 9 Cal. 3d at 428 n.15, 509 P.2d at 512 n.15, 107 Cal. Rptr. at 696 n.15.

\textsuperscript{43} Since the majority in \textit{Crownover} only referred to \textit{LaRue} in a footnote, their rationale for distinguishing the two cases is difficult to infer. The court is possibly suggesting that since films are media, they are traditionally entitled to first amendment protection. Alternatively, live entertainment has not always been treated as media and, therefore, receives no prima facie protection. Id.

\textsuperscript{44} 9 Cal. 3d at 436, 509 P.2d at 518, 107 Cal. Rptr. at 702.
of first amendment protection was vindicated in *Doran v. Salem Inn, Inc.* Appellees in *Doran* contested a local ordinance making it unlawful for bar owners to permit waitresses or entertainers to “appear in their establishments with breasts uncovered or so thinly draped as to appear uncovered.” They argued that the ordinance prohibited nonobscene conduct across the board and was a facial violation of first amendment rights. Although *Doran* was decided on procedural grounds, the Court speculated on the likelihood of the outcome on its merits:

> Although the customary ‘barroom’ type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue* that this form of entertainment might be entitled to First and Fourteenth Amendment protection under certain circumstances. In *LaRue*, however, we concluded that the broad powers of the states to regulate the sale of liquor, conferred by the Twenty-First Amendment outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing as a part of its liquor license program.

In this post-*Crownover* decision, the United States Supreme Court adhered to its position that nude entertainment is a candidate for first amendment protection, except in liquor establishments. Since *LaRue* and *Doran*, established federal law has been that nude dancing, except in liquor establishments, is expressive communication entitled to prima facie first amendment protection. *Crownover*, however, is based on the interpretation that nude dancing, as prohibited by county ordinance, is conduct and not protected expression. Thus, the *Crownover* ruling is inconsistent with the *LaRue* decision. It, therefore, is subject to reinterpretation in accordance with the Supremacy Clause of the United States Constitution.

45. 422 U.S. 922 (1975).
46. Id. at 924.
47. Id. at 932.
48. Id. at 932-33.
49. Richter v. Department of Alcoholic Beverage Control of California, 559 F.2d 1168, 1172 (9th Cir. 1977); Attwood v. Purcell, 402 F. Supp. 231, 236 (D. Ariz. 1975).
50. U.S. Const. art. 6, § 2.
A. Classifications: Liquor v. Nonliquor Establishments

Assuming that the California Supreme Court was to reconsider its ruling in *Crownover*, ordinances enacted pursuant to California Penal Code sections 318.5 and 318.6 might violate the first amendment overbreadth doctrine.\(^1\) Such ordinances do not limit proscription of nude entertainment to establishments dispensing alcoholic beverages. The penal code sections allow adoption of ordinances to prohibit nude activity which relates "to any live acts, demonstrations or exhibitions which occur in public places, places open to the public or places open to public view."\(^2\) Ordinances which include similar definitions of "public place" exceed the constitutional limitation placed on the regulation of nude dancing in nonalcoholic establishments by the *LaRue* decision. *LaRue* found the regulations of nude dancing to be "within the limits of the constitutional protection of freedom of expression."\(^3\) Based on powers delegated by the twenty-first amendment, it distinguished between establishments dispensing liquor and nonliquor dispensing establishments; the liquor establishments were subject to total prohibition of nude entertainment.\(^4\)

The inference to be drawn is that the total prohibition of nude dancing in nonliquor establishments violates the first amendment. Nude dancing can be prohibited, regardless of the communicative nature of the dance, in alcoholic establishments. It cannot, however, be prohibited in nonalcoholic establishments without meeting specified constitutional standards. Therefore, the entertainment is still subject to regulation whether occurring in an alcoholic establishment or not. It can only be prohibited per se in alcoholic establishments.

This inference was affirmed by the United States Supreme Court in *Doran v. Salem Inn, Inc.*,\(^5\) which examined a

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\(^1\) A law is void on its face if it "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise" of protected expressive rights. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). See *Chase v. Davelaar*, 645 F.2d 735, 737 (9th Cir. 1981).

\(^2\) *CAL. PENAL CODE* § 318.5 (West 1970). See note 3 and accompanying text supra.

\(^3\) *C. PENAL CODE* § 318.6 (West 1970). See note 3 and accompanying text supra.

\(^4\) 409 U.S. at 118.

\(^5\) See notes 37 & 38 and accompanying text supra.

\(^6\) 422 U.S. 922 (1975).
New York statute containing a similar overinclusive phrase, "any public place." The Court recognized the overbreadth of the ordinance and agreed with the district court's observation:

The local ordinance here attached not only prohibits topless dancing in bars but also prohibits any female from appearing in 'any public place' with uncovered breasts. There is no limit to the interpretation of the term 'any public place.' It could well include the theater, town hall, opera house, as well as public market place, street, or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the 'Ballet Afri-
cains' and a number of other works of unquestionable art-

tistic and socially redeeming significance.  

The ordinance in Crownover, as well as similar ordinances enacted in California, suffer from the same due process infirmity. They do not limit the scope of prohibition to alcoholic establishments. Constitutional requirements are ignored in that the nude acts are absolutely prohibited in whatever context they may take place. Under such broad classification, it would be possible for municipalities to proscribe performances of artistic value such as an outdoor nude ballet, a nude Shake-

speare-in-the-Park, or a nude ethnic dance production.

B. Classifications: The Theater Exemption

According to federal law, nude entertainment is a method of expression protected by the first amendment. It cannot be prohibited unless found to be obscene or performed in an alcoholic establishment. Categories of obscenity/nonobscenity and alcoholic/nonalcoholic are not part of the California system of ordinance classification. California ordinances, such as those in Crownover, are required to be classified merely as

56. Id. at 933 (quoting Salem Inn v. Frank, 364 F. Supp. 478, 483 (E.D.N.Y. 1973)).
57. See notes 2, 3 & 7 and accompanying text supra.
58. The theater exemption is an exception to this statement. It may, however, be too vague to be constitutionally valid. See notes 105-16 and accompanying text infra.
59. See Chase v. Davelaar, 645 F.2d at 737 n.4, in which the court observes types of activities which courts have held to be protected including "operas, educa-
tional exhibitions, and African and other ethnic dances" which could be wrongfully prohibited.
60. California v. LaRue, 409 U.S. at 116-19.
61. See CAL. PENAL CODE §§ 318.5, .6 (West 1970).
theater versus nontheater.\textsuperscript{62} California Penal Code sections 318.5 and 318.6 state that provisions of these sections “shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances.”\textsuperscript{63}

The sale of alcoholic beverages or constitutional requirements of obscenity are not part of the California theater v. nontheater classification system. A basic legal and logical flaw therefore exists in the California ordinance enforcement pattern. To illustrate, the spectrum of nude entertainment can be divided into four separate and independent categories: obscene performances, nonobscene performances, performances in an establishment serving alcohol, or performances in an establishment not serving alcohol. The basic incongruity of the California system is that all the above categories can and do occur both in theaters and nontheaters. Consequently, an ordinance could not be enforced for an obscene performance in a theater selling alcoholic beverages. Alternatively, an ordinance would be enforced for a nonobscene dance performed in a nontheater establishment, whether alcohol was sold or not. The effect of this is that police officers must arrest in nontheater situations regardless of content of the performance. The line between legal and illegal is determined solely on the basis of whether the dance is performed in a theater or not. This is not only in direct contravention to the federal law but carries with it a potential chilling effect on first amendment rights.\textsuperscript{64}

IV. NUDE ENTERTAINMENT IN THE REALM OF SYMBOLIC SPEECH: VIABILITY OF THE O'BRIEN STANDARD

The \textit{Crownover} court concluded that nude dancing ordinances were directed at conduct, not speech.\textsuperscript{65} The court reasoned that the ordinances merely regulated the conduct of performers in requiring them to wear clothes.\textsuperscript{66} Thus, the court declared that the ordinances prohibited neither en-

\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} The effect of this is to achieve indirectly, through selective enforcement, a censorship of communicative conduct that would be clearly unconstitutional when achieved directly. Granting to officials this power to discriminate would violate the overbreadth doctrine. See note 51 supra.
\textsuperscript{65} 9 Cal. 3d at 431, 509 P.2d at 514, 107 Cal. Rptr. at 698.
\textsuperscript{66} Id. at 425, 509 P.2d at 510, 107 Cal. Rptr. at 694.
tertainment nor the exercise of free expression. The court rejected the notion that nudity in bars and other public places is so "inherently communicative by nature as to call for the protection given the 'interchange of ideas.'" In so ruling, the court agreed that regulation of the form or manner of a communicative expression was not unreasonable.

The majority assumed, however, for the purpose of argument that there may be "in some instances a 'communicative' element in conduct . . . sufficient to bring into play the First Amendment." It proceeded to test its hypothetical by employing the "symbolic speech" standard outlined in United States v. O'Brien.

The O'Brien case involved the constitutionality of a federal statute prohibiting knowing destruction or mutilation of selective service registration certificates. The United States Supreme Court upheld a conviction for destruction of a draft card, an act which appellant intended to be a political protest. The lesser degree of protection was afforded the exercise of such "symbolic speech," but the court limited the government's interest in regulating conduct to the "noncommunicative impact" of conduct. The court specified the applicable test when speech and nonspeech elements are combined in the same course of conduct. A government regulation must be within the constitutional power of the government and must further an important or substantial governmental interest. The regulation must be unrelated to the suppression of free expression. Finally, the incidental restriction on first amendment freedoms must be no greater than is essential to further the governmental interest.

The Crownover rationale for employing the O'Brien "symbolic speech" standard is questionable. Until Crownover, in California nude dancing had been measured against the presence of obscenity elements. The LaRue Court left unan-

67. *Id.* at 425-26, 509 P.2d at 510, 107 Cal. Rptr. at 694 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
68. 9 Cal. 3d at 426, 509 P.2d at 511, 107 Cal. Rptr. at 695.
69. *Id.* at 426-27, 509 P.2d at 511, 107 Cal. Rptr. at 695.
70. 391 U.S. 367 (1968).
71. *Id.* at 370.
72. *Id.* at 376.
73. *Id.* at 381-82.
74. *Id.* at 376-77.
swered the question of whether the constitutional standard of obscenity or that of symbolic speech should be applied to nude dancing in nonliquor establishments. The Court presented O'Brien as an alternative route of analysis, although never expressing its preference over the use of obscenity standards. By offering the opportunity to use either standard, the Supreme Court in LaRue implicitly invited lower courts to use their forums as testing grounds for the O'Brien analysis. Crownover seized upon this opportunity.

The Crownover court's use of the O'Brien standard, however, is incorrect. Ordinances enacted pursuant to the California penal statutes concern live entertainment, not protest. The costuming is an integral part of that entertainment. Changing the form or manner of entertainment through regulation of costuming severs the requisite relationship between nudity and the expression of dance. In doing so, the communicative entertainment is prohibited.

Alternatively, the act of burning a draft card is not essentially related to protected communication. The act in itself is not normally perceived as one requiring protection of the first amendment by virtue of its symbolic communicative aspect. It is symbolic conduct, entirely dependent on what the actor intends in any given instance. This can be clearly differentiated from the expression of dance which is performed on a stage as

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76. 409 U.S. at 116. While the Court does not indicate a preference for one standard over the other, it does acknowledge that either may be appropriate in dealing with cases not related to state regulatory authority.
77. The U.S. Court of Appeals in Chase v. Davelaar, 645 F.2d at 739, was hesitant to apply the four-part O'Brien test to resolutions prohibiting topless entertainment because of the absence of a "symbolic speech" issue. The court further justifies rejection of the O'Brien standard because of the Supreme Court's own reluctance to apply the test. "In no subsequent opinion did the Court base its decision on that test. Indeed, the Court refrained from applying the O'Brien test even when confronted with genuine 'symbolic speech' claims." Id. at 740 n.14.
78. Although the court in Crownover held that the ordinances regulated conduct, it assumed for the purpose of argument that in some instances there may be enough of a communicative element in conduct to trigger a first amendment analysis. In this instance, the court held that the O'Brien test would be applicable. 9 Cal. 3d at 426-27, 509 P.2d at 511, 107 Cal. Rptr. at 695.
79. See generally, D. Russell, Stage Costume Design (1973) for an analysis of the effect of costuming on an actor and his/her performance. The author describes costuming as "the strongest element of the visual scene; [costumes] project personality and individual emotion . . . . But more important, as a visual art, costume design can express intangible ideas." Id. at 7, 10.
entertainment for an audience.\textsuperscript{80}

In addition, the law prohibiting draft certificate destruction in \textit{O'Brien} did not abridge free speech on its face. It prohibited knowing destruction of selective service certificates.\textsuperscript{81} The qualification of knowing destruction was intended to protect persons who lose or mutilate their cards accidentally, as well as punish for destruction.\textsuperscript{82} The appellant in \textit{O'Brien}, however, challenged the statute “as applied” for having the effect of abridging free speech rights.\textsuperscript{83} Since nude dance ordinances are challenged as unconstitutional because they proscribe protected activity \textit{on their face}, the challenges in the two cases differ and \textit{O'Brien} becomes irrelevant.\textsuperscript{84}

Assuming, for the purpose of argument, that a court were to utilize the \textit{O'Brien} standard in reviewing a particular nude entertainment ordinance, the ordinance must be evaluated according to the four-prong test set forth in the \textit{O'Brien} case: A government regulation must be within the constitutional power of the government; it must further an important or substantial government interest; that interest must be unrelated to the suppression of free expression; and the incidental restriction on alleged First Amendment freedom must be no greater than is essential to the furtherance of that interest.\textsuperscript{85}

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80. See Chase v. Davelaar, 645 F.2d at 739, in which the court of appeals distinguishes the two situations. The court points out that O'Brien's argument focused on the unconstitutionality of the statute as applied to him because his action was protected "symbolic speech." Nude entertainment resolutions, on the other hand, are "drafted so broadly as to strike at the protected speech of other persons," \textit{i.e.} the audience. \textit{Id.}
81. 391 U.S. at 370.
82. \textit{Id.} at 387-88. In an Appendix to the Opinion of the Court containing an explanation of the Bill, Senate and House reports confirmed the following:

The Committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.

For a person to be subject to fine or imprisonment the mutilation or destruction must be 'knowingly' done. This qualification is intended to protect persons who lose or mutilate drafts cards accidentally. \textit{Id.}
83. \textit{Id.} at 376.
84. Ordinances enacted pursuant to the Penal Code sections 318.5 and 318.6 permit nude entertainers to participate in live acts, demonstrations or exhibitions only in theaters. \textit{See} notes 2 & 3 \textit{ supra}. By limiting the presentation of nudity to theaters, the ordinance expressly prohibits nude entertainment in all other locations.
85. 391 U.S. at 376-77.
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Assuming that the state has some interest in regulating nude entertainment, whether that interest is "substantial" or "important" needs to be examined. The majority in *Crown-over* seemed satisfied that promoting public morals and relieving neighborhood blight is an important governmental interest. An inference can be drawn that courts are assuming the majority of voters deem nude dancing immoral. They conclude, therefore, that such behavior is actually immoral and that it deserves suppression by the state. To the contrary, as Justice Tobriner noted in his dissenting opinion in *Crown-over*, "the courts of this state have recognized the inconclusive and indecisive state of the consensus of society regarding the propriety and morality of public and quasi-public displays of female breasts."

The substantiality of the government interest should also be balanced with individual interest. Viewers of nude entertainment are willing audiences who derive satisfaction from these performances; they voluntarily attend. If the performers and a private willing audience are receiving benefit, no public harm is involved. Therefore, there is no need to be

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86. 9 Cal. 3d at 427-28, 509 P.2d at 512, 107 Cal. Rptr. at 696.
87. But see, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) *Griswold v. Connecticut*, 381 U.S. 479 (1965). The due process privacy cases may suggest that a private right to freedom from governmental regulation exists for some activities that do not harm others. The traditional state interest of protecting morality of its citizens may have been undercut by finding that interest to be noncompelling.
88. 9 Cal. 3d at 442, n.11, 509 P.2d at 522 n.11, 107 Cal. Rptr. at 706 n.11 (Tobriner, J., dissenting) (quoting *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control*, 2 Cal. 3d 85, 102, 465 P.2d 1, 13, 84 Cal. Rptr. 113, 125 (1970) (A "lack of societal concensus" is apparent as to whether nude exposure promotes public immorality.).)
89. See *Cohen v. California*, 403 U.S. 15, 25 (1971), which acknowledged that "one man’s vulgarity is another’s lyric."
90. See also *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), in which an ordinance prohibited the showing of films containing nudity by a drive-in movie theater when its screen was visible from a public street. First amendment rights were pitted against the privacy rights of unwilling viewers. The Court concluded that the government was wrongfully acting as a censor to shield the public from some kinds of speech on the ground that they were offensive to others. It ruled that the first amendment limited that power and unwilling viewers could avert their eyes. Here, arguably the first amendment limits government power to dictate what is morally permissible for the public good. In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court held that the first and fourteenth amendments prohibit making possession of obscene material a crime. *Stanley* suggests that when objectionable material might intrude upon the morals of the public, the government has an interest, but when the government tries to control a person’s private right to enjoy what he/she wishes, the first amendment and privacy rights control.
concerned with promoting public morals.

More practically, the states seek to advance some valid concerns and interests. Nude dancing has been found objectionable because of its effect on the decline of public morality in the form of sex- and drug-related crimes. On the other hand, evidence of a nexus between nude entertainment and the related objectionable conduct has only been demonstrated in liquor-licensed bars and nightclubs where nude entertainment has been featured. The federal courts have dealt with these legitimate concerns by authorizing state departments of alcoholic beverage control to suspend or revoke liquor licenses if continuation of activity is contrary to public morals. Since the departments have been able to demonstrate a valid concern, the federal courts have authorized the use of a narrowly tailored means to promote public interests.

The substantial interest prong of O'Brien becomes irrelevant at this point because a valid concern has already been demonstrated and the means of regulating that interest are sufficiently specific. California public concerns are likely to parallel the federal concerns. By adopting this narrower means of regulating objectionable conduct through the twenty-first amendment, O'Brien becomes inapplicable.

Assuming, however, the government interest is valid or the federal liquor exception is not applied, the third requirement under O'Brien must be examined. The governmental interest must be unrelated to the suppression of free expression. Under the guise of regulating conduct rather than prohibiting speech, advocates of nude dance ordinances might offer a variety of reasons to justify nonsuppression. 1) The ordinances do not prohibit nude dancing but merely restrict dancing to certain public places (i.e. theaters). 2) The ordinances do not prohibit nude dancing but merely regulate the costuming. 3) Finally, the ordinances are not aimed at the

91. California v. LaRue, 409 U.S. at 110-12.
92. The Department of Alcoholic Beverage Control in California held public hearings prior to promulgating its rules regulating the type of entertainment that was allowed to be presented in bars and nightclubs which it licensed. Id. at 110.
93. The Court in California v. LaRue, Id. 114-15, held that the states have broad latitude under the twenty-first amendment to control the manner and circumstances under which liquor may be dispensed.
94. 391 U.S. at 377.
95. See notes 2-4 and accompanying text supra.
96. This is in accordance with the argument in Crowner, that ordinances do
expressive elements of the dance but rather at conduct. The central theme of these rationalizations is that ordinances are not aimed at the expressive elements of dance. Instead, they are aimed at conduct which leads to female exploitation and to the detriment of the public peace, morals, and welfare. Therefore, free speech has not been suppressed. Such a dichotomy, however, was rejected by the *LaRue* and *Doran* courts. Both state that nude dancing is entitled to prima facie first amendment protection. Theoretical separation of the costuming as conduct and the dancing as speech changes the form or manner of the dance, thereby prohibiting a type of communicative entertainment. The assumption cannot be made that nudity bears no relationship to the freedom of expression in dance. In many instances, nudity cannot be separated from a nude dance by proscription without severing the necessary relationship between nudity and the expression of dance.

The first amendment “marketplace of ideas” cannot be limited to those items which are intellectual in content. The emotive content of expression can be equally as important as the cognitive content of expression. To say that emotive content of nudity bears no relation to the dance is to allow control over censoring emotive expressions but not intellectual ones. The U.S. Supreme Court in *Cohen v. California* expressed this view when it declined to “sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.”

In addition to suppression of content, the *O'Brien* Court declared that the incidental restriction on first amendment

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not prohibit nude entertainment but merely require the entertainer to wear clothes. 9 Cal. 3d at 425, 509 P.2d at 510, 107 Cal. Rptr. at 694. 97. This is also in accordance with the *Crownover* holding. 9 Cal. 3d at 425, 509 P.2d at 510, 107 Cal. Rptr. at 694.
98. This protection is qualified here. The entertainment is entitled to protection only if it occurs in a nonliquor dispensing establishment. 422 U.S. at 933-34; 409 U.S. at 118.
99. *But see* 9 Cal. 3d at 425-26, 509 P.2d at 510-11, 107 Cal. Rptr. at 694-95.
100. Nimmer, *supra* note 21, at 34.
freedoms must be no greater than that which is essential to further the governmental interest.\textsuperscript{103} This requires examination of the means by which the government interest is carried out. Ordinances, enacted pursuant to California Penal Code sections, must include provisions to exempt establishments which: 1) qualify as a "theater, concert hall, or similar establishment" and 2) are "primarily devoted to theatrical performance."\textsuperscript{104} Theater exemptions containing these provisions are major restrictions on first amendment freedoms. They are constitutionally vague on their face.\textsuperscript{105} As a matter of due process, a law must provide "a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly" and "provide explicit standards for those who apply them."\textsuperscript{106} In light of this standard, an examination is necessary of judicial consensus as to what constitutes a theater and an establishment primarily devoted to theatrical performance.

An examination of California appellate decisions following \textit{Crownover} reveals the inherent confusion in trying to define the term "theater" and its physical characteristics. One court has rejected a rigid criteria definition of a theater as being too restrictive.\textsuperscript{107} Another court took judicial notice that entertainers usually perform on a stage removed from an audience.\textsuperscript{108} Yet the same court reasoned that "[m]erely because an establishment has a stage, fixed seats, and entertainment does not make that establishment a 'theater.'"\textsuperscript{109} Since the appellate decisions have been unable to define the physical characteristics of theaters, no standards for enforcement have been developed. Due to this lack of specificity, an ordinarily

\textsuperscript{103} 391 U.S. at 377.
\textsuperscript{104} \textsc{Cal. Penal Code} §§ 318.5, .6. See notes 2 & 3 supra.
\textsuperscript{105} Vagueness is a constitutional due process infirmity which occurs when a legislature states its proscription in such indefinite terms that there is too fine a line between legal and illegal conduct. \textit{Grayned v. City of Rockford}, 408 U.S. 104 (1972); \textit{Connally v. General Constr. Co.}, 269 U.S. 385 (1926).
\textsuperscript{107} \textit{Renba Lil v. Kortz}, 65 Cal. App. 3d 467, 472, 135 Cal. Rptr. 287, 289 (1976). A specific definition of a theater was held to invade the area expressly excepted to the state in Penal Code sections 318.5 and 318.6. Also, such a definition is too restrictive because it carries the potential of eliminating theaters which lack one or more of the defined characteristics.
\textsuperscript{109} \textit{Id.}
intelligent person has no reasonable opportunity of knowing what kind of establishment is exempted from ordinance pro-
scriptions. Thus, the ordinances are an onerous means of furthering state interest.

Perhaps even more difficult to determine is exactly what constitutes a theatrical performance. Given the number of
conventional and innovative theatrical modes, the term "the-
atrical performances" is subject to a wide interpretation. This interpretation depends on the interpreter's sophistication and artistic preference.

The clause also requires determination of whether theatrical performances are the primary activity of the location. The court in Theresa Enterprises, Inc. v. Davis has employed an objective commercial test. If the primary purpose of the establishment is to sell food and beverages, then the nude entertainment promotes these sales. Thus, the entertainment is secondary and can be prohibited. A commercial classification is a vague one because it is still open to varied interpretation. If the theatrical productions of an establishment were bringing in more revenue from ticket sales than revenue from food and drink, is it appropriate to say that the entertainment is merely promoting commercial food and beverage sales?

In contrast to the objective commercial classification, the appellate court in Taurus Entertainment Ltd. v. Gates has construed the theater exemption to require a subjective interpretation. One must determine whether a performer's conduct is part of a theatrical production on any given occasion. Individual analysis as to the theoretical nature of a dancer's conduct would be required to determine whether a theatrical performance was taking place. Due to varied interpretation

110. This is especially true since defining rigid criteria would violate the state preemptive doctrine. See note 107 and accompanying text supra.
111. CAL. PENAL CODE §§ 318.5, .6, exempt theaters or "similar establishment[s] . . . primarily devoted to theatrical performances." See notes 2 & 3 supra.
112. Id.
114. Id. at 949, 146 Cal. Rptr. at 807. The court states that "[i]t is obvious that the sale of food and beverage, encouraged . . . by the presentation of nudity for the sake of sexual titillation, rather than the rendition of any First Amendment-protected entertainment is the primary purpose of these establishments." Id.
116. Id. at 20-21, 165 Cal. Rptr. at 533-34.
because of lack of criteria, this aspect of the exemption makes it vague. A great amount of guesswork is involved in trying to come within the theater exception. Exemption provisions cannot be too rigid nor can they be too vague. Obviously, since they are an inappropriate means of promoting government interests, such clauses are greater than necessary restrictions of first amendment freedoms.

The penal statutes are inadequate because they allow adoption of ordinances which are hopelessly vague. More importantly, both the objective and subjective interpretations of the theater exemption have a chilling effect on first amendment freedoms. Such interpretations determine the type of dancing to be allowed on the basis of subjective and objective criteria unrelated to the dance itself. Consequently, potential communicative expression outside of the objective criteria is being excluded from the protection of the theater exemption.

V. ALTERNATIVES

For a claim to be excluded from the operation of the California Penal Code sections 318.5 and 318.6, it must be protected under the theater exemption. Claimants can no longer rely on first amendment protection after Crownover v. Musick. The majority held that the ordinances in question were constitutional because they merely regulated conduct, as distinguished from protected speech. Then, pursuing a fail-safe tactic, the court declared that the ordinances were constitutional under O'Brien if the conduct they regulated included a communicative element which might be entitled to prima facie first amendment protection. The O'Brien test may still be viable since the U.S. Supreme Court acknowledged it in LaRue and Doran. As previously discussed, however, O'Brien is not an appropriate standard.

The more important concern in California is that the result of Crownover has been an erosion of constitutional protections previously afforded to certain forms of nude en-

117. See notes 2 & 3 and text accompanying note 4 supra.
118. The holding in Crownover is that nude entertainment is mere conduct and is not entitled to prima facie first amendment protection. 9 Cal. 3d at 431, 509 P.2d at 514, 107 Cal. Rptr. at 698.
119. Id.
120. Id. at 427, 509 P.2d at 511, 107 Cal. Rptr. at 695.
Having constructed the conflict, several remedial alternatives need to be discussed.

A. Reconstruction of the Penal Statutes

The first alternative is to attempt to reconstruct California Penal Code sections 318.5 and 318.6. Statutes can be applied unconstitutionally if they are overbroad or vague. To remedy this, a court might adopt a construction which will save a statute from constitutional infirmity. An ailing statute, however, can only be given a saving construction if a category of rights may be defined which would clearly fall outside the reach of the amended statute. In the area of nude entertainment no clear definitions have been provided of what constitutes protected activity, and, therefore, a reconstruction would be inadequate to eliminate the infirmity. To illustrate, the theater classification is controversial because it draws a line between what will be labelled good nude dancing versus bad nude dancing. The objective and subjective definitions of what constitutes a theater are vague. Yet, to allow more specific definitions of the term "theater" would not mitigate the infirmity. The statute would remain vague because it has not identified the quality or type of entertainment which should be protected. In other words, the core of constitutionality has not been located. Since the statute cannot be reformed, the California scheme of enforcement must be redesigned.

B. Obscenity, Nuisance, and Zoning Ordinances

Whether the obscenity standard would meet the needs of regulating the types of nude entertainment that violate public morality is questionable. The federal courts have demon-
strated that legitimate concerns, such as sex crimes, drug abuse and prostitution, are linked to nude entertainment in liquor establishments. The obscenity standard, however, is too stringent to deal with the concerns adequately. Regulating sex-related entertainment that can be linked to criminal activity involves a high risk of suppressing first amendment freedoms.

If obscenity standards are employed, the government will be criticized for not pursuing the least onerous alternative to eliminate offenses. Aside from punishing the underlying crimes, nuisance ordinances and innovative land use regulations may be less restrictive means of furthering valid governmental concerns. Such means, however, have been attacked for being drastic departures from established principles of first amendment law. In addition the presumption of validity normally given to local government exercise of its zoning power has not been found in all cases to justify substantial restrictions of protected activity.

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126. See notes 91-93 and accompanying text supra.

127. As the U.S. Court of Appeals pointed out, a nude entertainment ordinance would be "patently overbroad if intended as an obscenity statute, since mere nudity is not per se obscene." Chase v. Davelaar, 645 F.2d at 738 n.7 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975); Jenkins v. Georgia, 418 U.S. 153, 161 (1974)).

128. But see Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), where a nuisance-type ordinance designed to prohibit nude drive-in movies open to public view was invalidated. The majority did not say that nudity could never be suppressed by nuisance ordinances. In this case, however, the Court concluded that the unwilling viewers could avert their eyes.


130. Id. at 85 (dissenting opinion).

131. See Schad v. Mount Ephraim, 49 U.S.L.W. 4597 (1981) in which the United States Supreme Court confirmed that the zoning regulations of communities are not immune from being challenged on first amendment grounds. Land use regulations usually need only survive the constitutional rational relationship test. Appellants who operated an adult bookstore in Mt. Ephraim, New Jersey, installed a coin-operated device permitting customers to view a live nude dancer behind a glass panel. Complaints were filed against the owners charging that the exhibition violated a zoning ordinance under which live entertainment was not a permitted use. The Court found that the justifications asserted (avoiding parking, trash, police protection problems, and desire to attend to the "immediate needs" of residents in its creation of a commercial area) were not addressed narrowly enough by the ordinance. Id. at 4600-01.
C. Federal Liquor Exception

The federal liquor exception dictates that regulations of nude conduct are valid by virtue of a state's general police power, as augmented by the twenty-first amendment. Although the twenty-first amendment does not supersede other provisions of the United States Constitution, it has been recognized as a broad regulatory power. Legitimate government concerns have been identified so that regulation is warranted.

Although this solution is reasonable, it has potential problems. First, there are no guidelines as to how broadly or narrowly the regulations will be applied. Also, expressive nude entertainment remains open to proscription. Nude entertainment occurring in a liquor establishment can be proscribed in a given instance, without proving a legitimate link to criminal activity. Furthermore, nude entertainment will still be judged by classifications and not by the entertainment itself. The liquor/nonliquor category will merely replace the theater/nontheater scheme.

The federal liquor exception, however, appears to be a less restrictive route of regulation than the theater exemption. The majority of establishments falling within the legislative classification of "public establishments offering nude entertainment" are bars, taverns, and nightclubs. Liquor establishments are more readily identifiable than theaters. Since sex- and alcohol-related crimes have been linked to nude entertainment in bars, states can regulate liquor licensing under the twenty-first amendment. This represents a closer fit between the means of regulation and the governmental ends than the California system of prohibition.

VI. CONCLUSION

The California Supreme Court ruling in Crownover v. Musick dictates that the ordinances enacted pursuant to Penal Code sections 318.5 and 318.6 are valid. Nude entertainment, occurring in "any public place" other than a theater, is subject to proscription in accordance with local ordinances.

The California ruling poses a critical problem. By disal-

132. See note 93 and accompanying text supra.
133. 409 U.S. at 115.
ollowing prima facie first amendment protection for conduct that is not obscene, it may abridge first amendment rights of freedom of expression. This conflicts with federal law which dictates that nude dancing is protected expression in non-liquor-licensed establishments.

Neither the California nor federal courts have directly confronted the problem of defining protectable nude entertainment as to its speech components. California courts have upheld a vague classification system which attempts to measure whether entertainment deserves protection through theater criteria. The system has arisen partially because of the difficulty in balancing the competing interests of public morality with protecting the communicative aspect of nude entertainment. The government interests sought to be furthered are apparently legitimate concerns. At this time, however, the means of achieving those interests impinge on important rights of freedom of expression.

Alternative solutions to the problem are available. Nude entertainment can be regulated through nuisance and zoning ordinances. As before, however, nude entertainment is not being defined using speech criteria. The obscenity standard is still a viable route for measuring free speech. It may be too stringent however, to regulate valid concerns in some instances and too suppressive of free speech in others. At this point, the federal liquor exception appears to be the least restrictive of first amendment rights. The major flaw in it is that it does not measure the quality of the entertainment itself. Predictably, courts will continue to use broad classifying criteria to regulate speech and conduct until a theory is articulated defining protectable expression. Failure to identify relevant criteria will perpetuate a lack of precision and harmony between federal and state enforcement patterns.

Whatever criteria are implemented, the speech aspects of nude communicative expression must not be masked by overwhelming government concerns. Ideas of less important social significance are not less worthy of constitutional protection. The consequences of strictly enforcing first amendment rights may occasionally be distasteful. That is a de minimis price to pay for indispensable constitutional freedoms.

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