

Profiteers of the Bump and Grind Contests in Commodification

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Negotiations of seduction, negotiations of need, and negotiations of men’s desire move dancers and customers to the lap dance room, where an erotic assembly line of men sit side-by side, two feet from each other, with women dancing on their laps for twenty to forty dollars a song, depending on whether their g-string is on or off.¹

The “erotic assembly line” in strip clubs that Danielle Egan describes evokes images of Fordist-era production lines where side-

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¹ R. DANIELLE EGAN, DANCING FOR DOLLARS AND PAYING FOR LOVE: THE RELATIONSHIPS BETWEEN EXOTIC DANCERS AND THEIR REGULARS 23 (2006).

by-side factory workers mechanically, uniformly, with measured regularity, and often monotonous movement go about their assigned tasks.² While areas allocated for lap dancing may vary among clubs according to the size of the premises and whatever the local zoning and building bylaws, licensing, and liquor licensing regulations require, the physical lay-out of semi-shielded seats in one section of the club appears to be a relatively common industry standard.³

But apart from adopting specific spatial layouts suited to the increasingly diverse services they offer,⁴ clubs maximizing the numerical flexibility of labor may employ different workers to dance on stage, offer table dances and lap dances, or at times to perform these in shifts.⁵ Many strip clubs take a significant cut out of every individual dancer's earnings, sometimes without even having to pay a minimum wage. Seen this way, the profits extracted from lap dances come to resemble the veritable "surplus value"⁶ of classic Marxist analyses. But strip clubs, by utilizing pools of freelance labor and "independent contractors," have not only virtually eliminated the overhead cost of most dancers' labor; in practice, clubs also charge dancers fees in exchange for permission to work in their clubs.

However, by acknowledging individual lap dances as "negotiations of need and desire" between customers and dancers, Egan also highlights the complexities of the labor that comprises stripping and lap dancing. While the assembly line analogy tends to emphasize that

² Apart from using the "assembly line" analogy some exotic dancers also describe the sex work that they perform as the "fast food of the sex industry." GREGOR GALL, *SEX WORKER UNION ORGANISING: AN INTERNATIONAL STUDY* 21 (2006).

³ Separate rooms, which offer more "privacy," (VIP or private rooms) are usually in a different section of the club and cost extra.

⁴ Generally the two types of dances that became common for dancers to perform apart from their onstage performance are the table dance, where dancers perform at the customer's table and lap dances, which by definition involve physical contact between the client and the dancer who gyrates on the customer's lap. Lap dances usually take place in a secluded area of the club. Customers generally pay for dances (per song) and while most clubs charge a fee for the use of VIP or private rooms, the commission per song/dance and policy on tips will vary according to club policy and/or the employment arrangement. For more popular accounts about strip club practices in Toronto see *Five Types of Dances in Toronto's Strip Clubs*, BARE FACTS: EXOTIC DANCER'S GUIDE TO THE LAP OF LUXURY (Aug. 25, 2010), <http://museforallseasons.com/blog/2010/08/5-types-of-private-dances-in-toronto-strip-clubs/>.

⁵ Many clubs also rely on "free lancers" who only work tables and offer lap dances but do not perform on-stage. Some clubs target "amateurs" to perform on-stage. Sometimes clubs will specifically advertise "amateur night" to invite dancers to the club.

⁶ Marx defines "surplus value" as the amount by which the value of the product exceeds the value of its constituent elements. 1 KARL MARX, *DAS CAPITAL* (Frederich Engels ed., Samuel Moore trans., 1st ed., 1887).

the “product” (the lap dance) looks the same because dancers may utilize similar movements and rely on a common repertoire of seduction and body parts, and at times offer similar “favors” to extract tips from customers, each lap dance occurs between individual women dancers and male clients and is defined by both the desires and needs of clients and the desires and needs or resistance of individual performers. Thus, the seemingly identical product is arguably never really quite identical. Chris Bruckert’s depiction of the strip club as a cultural and commercial anomaly, located “somewhere between bar and brothel,”⁷ also captures the paradoxical position of exotic dancing within most regulatory schemes.

In a 2009 study, Natalya Timoshkina and Lynn McDonald estimated that about seventy five percent of exotic dancers working in Toronto’s strip clubs were foreign nationals.⁸ The same study finds that eighty to ninety percent of them come from Eastern Europe and Latin America and the rest from Asia.⁹ This Article is part of a broader inquiry into the notions of welfare, rights and social protection in Canada, and it focuses especially on those caught in what Laura Agustin has coined “no-rights zones”—migrant women in sex work, whose interests are not adequately represented under conventional rights claims as “workers” or as “victims.”¹⁰ For many migrant women exotic dancers in Toronto, the opportunity to earn as an exotic dancer may initially present itself partly because the local work force finds conditions of work and pay unacceptable,¹¹ even deplorable.¹² Agents of bar owners also go out of their way to recruit

⁷ CHRIS BRUCKERT, *TAKING IT OFF, PUTTING IT ON: WOMEN IN THE STRIP TRADE* 33 (2002).

⁸ Natalya Timoshkina & Lynn McDonald, *Building Partnerships for Service Provision to Migrant Sex Workers*, WELLESLEY INSTITUTE, Dec. 2009, at 19, http://wellesleyinstitute.com/files/Building_Partnerships_for_Service_Provision_to_Migrant_Sex_Workers_0.pdf.

⁹ *Id.*

¹⁰ Laura Agustin, *Migrants in the Mistress’s House: Other Voices in the “Trafficking” Debate*, 12 SOC. POL. 96, 112 (2005).

¹¹ While studies have shown that the majority of the women entering sex work know about the character of the job, many of them are misinformed about the rates of pay and additional requirements of the work such as lap-dancing. See LATIN AMERICAN COALITION TO END VIOLENCE AGAINST WOMEN, *COMING TO DANCE, STRIVING TO SURVIVE: A STUDY ON LATIN AMERICAN MIGRANT EXOTIC DANCERS* 29–30 (2002) [hereinafter LACEV].

¹² Writing about the emergence of “lap dancing” in Toronto, Joe Chidley interviewed Katherine Goldberg, a former burlesque dancer who led the campaign to ban lap dancing in the same year. Among others, Goldberg noted the declining rates of pay with the entry of migrant workers stating that “newly arrived Thai women are working for just \$1 a

dancers outside Canada.¹³ In the 1990s, strip club owners began complaining about the scarcity of recruits, noting, “Canadian women won’t take the job.”¹⁴ The arising paradox is a conflation of reward and risk that means potential opportunities for women outside of Canada who are looking for work, as well as the opportunity to travel and even migrate, but also more often than not accepting conditions of work and pay far worse than those available to non-foreign sex workers. Many migrant workers who take on the job as exotic dancers in Toronto’s clubs constantly walk a tightrope and assume risks that are literally now considered “part of the job.”¹⁵ Unlike their nonmigrant counterparts, exercising the option of whether or not to assume these risks is, by design, severely restricted, if not virtually impossible for migrant women in exotic dancing. For the dancers interviewed by the Latin American Coalition to End Violence Against Women and Children (LACEV), in addition to the restricted conditions of work, exposure to abuses by employers was particularly heightened at the time of their arrival in Canada and only gradually eased during the period of settlement and adjustment.¹⁶ In turn, migrant women exotic dancers who arrive and accept these conditions sometimes get blamed for the industry’s declining conditions of work and pay.¹⁷ The many contradictions arising from this situation are often debated in the context of sexuality, exploitation, commodification, labor and worker autonomy, but within the narrowing legal frame, issues tend to get whittled down to the singular one of legal regulation—often criminal regulation—and, more often now, immigration and sex trafficking laws. Only very marginally are they addressed as actual issues of work or labor. This gives rise to additional paradoxes. Purportedly protective police

dance—the other \$9 goes straight to the club-owners.” Joe Chidley, *A No to Dirty Dancing*, MACLEAN’S (Can.), July 1995, at 34–35.

¹³ LACEV, *supra* note 11, at 13.

¹⁴ Estanislao Oziewicz, *Ottawa Eyes Curb on Entry of Strippers*, THE GLOBE AND MAIL (Can.), Feb. 1997, at 1.

¹⁵ Risk as discussed in relation to the work of exotic dancers refers to both the grey areas of the job, such as engaging in physical contact with clients despite the city bylaw prohibiting it, and also the potential for abuse from both the customer and the employer. While all dancers are exposed to the risk of unwanted physical contact and abusive behavior by their customers, the levels of risk will vary accordingly in relation to a variety of factors—for example, the differences in the workplace, management policy, the presence of bouncers, customers, and even the individual dancer’s ability to protect herself.

¹⁶ LACEV, *supra* note 11, at 45–46.

¹⁷ Oziewicz, *supra* note 14.

measures like rescue missions¹⁸ end up limiting if not directly curtailing women's mobility and their opportunity to earn. Such measures also restrict their autonomy with the result that liberal tolerance and an ethos of state deregulation, which are apparently supposed to promote free sexual expression secures freedom for some but not for others.

My project proposes that focusing on sex work, in this case exotic dancing, as labor that is performed in Toronto by a predominantly female migrant work force also requires a much closer inquiry into the global processes of labor restructuring alongside immigration policy and anti-trafficking law, as well as into sexual regulation in general and the sexual entertainment industry in Canada, in particular. In this article, I propose a spatial analysis of labor restructuring as it has affected the exotic dancing industry by focusing on two key policy developments, which began in the 1980s and facilitated transformations in the business and labor of exotic dancing in Canada, particularly in the province of Ontario and the city of Toronto.

As scholars have pointed out, "analytic specificity is important in critiques of the sex industry."¹⁹ "Stripping requires a different kind of labor and occupies a different legal zone than prostitution."²⁰ As Bruckert observes, the different kinds of services and performances by exotic dancers in a single club now require different kinds of labor.²¹

While this Article does not aim to contradict the existence of sex trafficking or to debunk a role for criminal law in such cases, it does take issue with the absolutist abolitionist framework of categorizing all instances of sex work as exploitation and accepts the argument advanced by sex workers that they are worse off because of policing and the current state of Canadian criminal law and more recently,

¹⁸ Studies have noted how raids end up further victimizing women targeted for "rescue," many women were arrested, detained and then perfunctorily deported often without ever being informed about the charges against them. *See, e.g.*, TORONTO NETWORK AGAINST TRAFFICKING IN WOMEN, TRAFFICKING IN WOMEN INCLUDING THAI MIGRANT SEX WORKERS IN CANADA (2000), available at http://www.mhso.ca/mhso/Trafficking_women.pdf; *see also* CHRISTINE BRUCKERT & COLETTE PARENT, ROYAL CANADIAN MOUNTED POLICE ORGANIZED CRIME AND HUMAN TRAFFICKING IN CANADA: TRACING PERCEPTIONS AND DISCOURSES (2004).

¹⁹ R. DANIELLE EGAN ET AL., FLESH FOR FANTASY: PRODUCING AND CONSUMING EXOTIC DANCE xvii (2006); *see also* Prabha Kotiswaran, *Labours in Vice or Virtue? Neo-liberalism, Sexual Commerce, and the Case of Indian Bar Dancing*, 37 J.L. & SOC'Y 105 (2010).

²⁰ EGAN ET AL., *supra* note 19, at xvii.

²¹ BRUCKERT, *supra* note 7.

anti-trafficking policy introduced as immigration reform.²² But while I take issue with the reliance on criminal law and police-led approaches to sex work in which sex workers are subjected to the most amount of regulation, this Article takes off from an observation by Prabha Kotiswaran that the “work” aspect in sex work remains under-theorized.²³ In turn, I propose a preliminary unpacking of the assumptions behind legal claims for the extension of labor protection to exotic dancers in order to ask what these legal claims might mean for migrant women in Toronto’s exotic dancing industry.

I further propose that in coming to grips with the legal regulation of the sexual, equating the question of the public/private dichotomy with a discussion about having “more or less” state regulation can ultimately be misleading,²⁴ mainly because the argument frames a dichotomy between state and private business interests and regulation and control over exotic dancers.²⁵ Indeed, unlike other laborers, whose employment rights and wages merit regulatory protection from the state, sex workers’ (in this case exotic dancers’) labor is subject to a different set of regulatory standards and belongs to a distinct governable space that resembles policing rather than social

²² For a further discussion of the newly adopted anti-trafficking measures, see *infra* notes 32, 94–95 and accompanying text. Among many other sex workers groups in Canada, the Sex Professionals of Canada (SPW) supports a political platform to decriminalize sex work. While prostitution is not illegal in Canada per se, many acts related to prostitution are still punishable under Federal Criminal law. SPW is one of the leading organizations behind the case of *Bedford v. Canada*. In that case, Ontario’s Superior Court of Justice upheld the petitioner sex workers’ claim of unconstitutionality and struck down the Federal penal code provisions on keeping a bawdy house, living off the avails of prostitution and communicating for the purpose of prostitution. *Bedford v. Canada* (2010), 102 O.R. 3d 321 (Can. Ont. Sup. Ct.). While these particular provisions relate directly to prostitution, the “bawdy house” provision has been used against strip club owners and operators many times in the past.

²³ Citing Sunder Rajan, Kotiswaran notes that because the work position is under theorized, feminist discussions fall back into liberal discourse around choice, consent, work, and the market. Prabha Kotiswaran, *Born Unto Brothels—Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area*, 33 L. & SOC. INQUIRY 579, 581 (2008) (citing RAJESWARI SUNDER RAJAN, *THE SCANDAL OF THE STATE: WOMEN, LAW AND CITIZENSHIP IN POSTCOLONIAL INDIA* (2003)).

²⁴ Carolina Ruiz-Austria, *Outside, Hidden and in Between: Locating the Migrant Exotic Dancer in Canadian Legal Discourse and Regulatory Practice* 10 6 OSGOODE RES. L. & POL. ECON., No. 20/2010, at 10 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625857.

²⁵ Jane Scoular, *What’s Law Got to Do With It? How and Why Law Matters in the Regulation of Sex Work*, 37 J.L. SOC’Y 12, 24 (2010). In her approach to the study of the legal regulation of sex work, Scoular notes that law matters specifically in neoliberal settings in constructing the space, subjects, and systems of governance.

protection.²⁶ Ultimately this means that the goal in pro-sex work politics, usually defined as the recognition of sex work as “legitimate labor” worthy of social protection, is something easier said than done. In reality, the practical aspect of subsuming sex work (in its myriad forms) under existing legal categories of employment and labor organization is fraught with difficulty.²⁷

While a central question in this broader project is how to theorize and critique emergent forms and exercises of state power over migrant sex workers,²⁸ in this Article, I explore the ways in which spatiality can facilitate a deeper analysis of the relationship or convergence between public (state) and private (industry) regulatory practices that discipline the sex worker, especially when the sex worker is a foreigner or a migrant worker. In particular, I focus on the changing conditions of work and pay as part of the spatial restructuring process²⁹ during a period when, as Bruckert notes, the industry shifted towards “services,” requiring dancers to employ considerably more, or an altogether different set of skills, face far

²⁶ Emily Van der Muelen & Elya Maria Durisin, *Why Decriminalize? How Canada's Municipal and Federal Regulations Increase Sex Workers' Vulnerability*, 20 CAN. J. WOMEN & L. 289, 293 (2008) (Van der Muelen and Durisin point out that the labor-based understanding of sex work is a relatively new way of conceiving the of the sex industry.).

²⁷ Categories that make distinctions between permanent and temporary work as the basis for making benefits and social protections available are particularly problematic. In this Article, I concentrate on raising preliminary questions regarding the divisions between full-time and part-time workers, employees, and independent contractors, as well as those between local and foreign workers in Toronto's exotic dancing industry as they relate to the question of access to rights and social protection. This is not to say, however, that such categories are fixed in labor law or that there are no possible exceptions. Harry Arthurs notes that part of what sets labor law apart from other fields of law is that it has been conducive to experimentation and alternative approaches. *See, e.g.*, Harry Arthurs, *Labour Law After Labour*, 7 OSGOODE COMP. RES. L. & POL. ECON. No. 15/2011 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791868.

²⁸ Scoular, *supra* note 25, at 13–14. Scoular applies Foucault's notion of “governmentality” to the study of sex work noting how “modern forms of legal power operate to support hegemonic power relations.” Arguing against the dismissals of law as irrelevant, Scoular seeks to highlight the productive and adaptive nature of power to demonstrate how law matters in a more complex manner than previously conceptualized within feminist analyses of sex work.

²⁹ The “spatial restructuring of labor processes” is taken from Wallace and Brady's theorization of the social structures of accumulation (SSA), which involves the spatial division of labor, the threat of spatial relocation to diffuse workers' resistance and fragment their interests along regional and national lines. Michael Wallace & David Brady, *Globalization of Spatialization? The Worldwide Spatial Restructuring of the Labor Process*, in CONTEMPORARY CAPITALISM AND ITS CRISES: SOCIAL STRUCTURES OF ACCUMULATION THEORY FOR THE 21ST CENTURY 121, 121–23 (Terrence McDonough, Michael Reich & David M. Kotz eds., 2010).

more danger, and experience more stress than their counterparts did twenty-five years ago.³⁰

Two aspects of labor reorganization which enabled transformations both of the work spaces and the actual work required of dancers in the exotic dancing industry figure prominently in the period between the 1980s and 1990s—namely what Audrey Macklin observed as: (1) the geographic shift in recruitment and sourcing of “labor” in relation to meeting the demands of local Canadian markets for exotic dancing (i.e., from the United States as the primary source to the emergence of Eastern Europe and the Global South as the new primary sources) and (2) a shift of the literal job site “from the stage . . . [onto] men’s laps.”³¹

My analysis focuses on the 1981 Ontario Labor Relations Board decision on a series of applications filed by the Canadian Association of Burlesque Entertainers (CABE) to represent dancers from various establishments, juxtaposed with an analysis of a series of cases in the 1980s and 1990s, which highlight the shift from criminal policing to licensing as the dominant approach in the regulation of exotic dancing in Canada as well as consider the recent turn towards absolute prohibition through the introduction of policy banning foreign workers from both the adult entertainment and sex industry.³² I also interpret these policy developments alongside the 2002 case study on migrant exotic dancers by LACEV, Bruckert’s ethnographic account of exotic dancers labor in Canada between the 1980s and 1990s, and feminist research on union organizing by dancers’ organizations.

I

SPATIALIZING POLITICAL ECONOMY AND THE PROBLEMATIZATION OF LAW

My main interest in adopting a spatial approach is to offer a way out of the dichotomous position requiring a single explanation of sex work either as autonomous choice or exploitation by drawing attention to the specific “places” that migrant sex workers inhabit as well as the places to which they are relegated and the spaces to which

³⁰ BRUCKERT, *supra* note 7, at 96.

³¹ Audrey Macklin, *Dancing Across Borders: “Exotic Dancers,” Trafficking and Canadian Immigration Policy*, 37 INT’L MIGRATION REV. 464, 468 (2003).

³² Minister Jason Kenney, Minister of Immigration and Multiculturalism, *News Conference to Announce New Measures to Protect Vulnerable Foreign Workers from the Risk of Abuse and Exploitation*, July 4, 2012, available at <http://www.cic.gc.ca/english/department/media/speeches/2012/2012-07-04.asp>.

they lack access.³³ Within feminist politics, there is an urgent need to transcend the pre-framed debates about law, which posit a direct correspondence between the presence or absence of regulation, equating regulation by the state or an overemphasis on penal law with ending exploitation on one hand, and enabling autonomy in sex work simply by removing all kinds of state regulation, on the other.³⁴

Citing the work of Valverde and Rose, Jane Scoular offers the insight that in going beyond law's positivist presentation as a unified phenomenon carried out by specialist institutions, viewing the governable spaces demarcated not just by law but by a whole range of regulatory agents as "spatializations" offers a more complex way of examining why and how law matters, and moves beyond the usual outside/inside or legal/illegal binaries.³⁵ Transcending such binaries also facilitates a closer analysis of the constitution of public and private and helps to make sense of the hyper-regulation of the labor that is stripping/exotic dancing within the context of state de-regulation through partial and de facto decriminalization.

The application of spatial analysis in this project is akin to legal anthropology's methodological identification of a legal field, and its analysis of plural rule networks which overlap and intersect with formal law. I propose that spatiality can help to transcend a strictly "functional" and "structural" analysis of law (and the legal institutions that create law) by offering "thick descriptions" of rule networks, normative fields and social structures within which legal rules are not only embedded but also co-constitutive of.

Indeed one problem with this thesis of de-regulation is that it creates a picture of the liberal state stepping back and relinquishing control as though disappearing from its dominant (and active) role in the overall scheme of regulation, particularly in policing matters of sexual morality. Yet sex work (stripping in particular) is in fact hyper-regulated and still heavily policed as a matter of course.³⁶ Moreover,

³³ The reference to "place" here refers to both material and abstract aspects of social status/position. Sex workers/migrant workers are allowed access to a limited number of spaces and their mobility is usually limited (e.g., urban planning and zoning, sites of work, proscription of changing employers for temporary workers, sites of performance within the club such as stage, private rooms). Temporary migrant workers in general are usually less mobile than local workers not only in terms of being tied to a single establishment or employer but also in terms of not being allowed to undertake skills training and/or education.

³⁴ See Scoular, *supra* note 25, at 13.

³⁵ *Id.* at 29, 35.

³⁶ Ruiz-Austria, *supra* note 24, at 14–16.

accepting the de-regulation thesis tends to take the line between public and private, and what constitutes them, as something that is fixed and given instead of contingent. Spatial analysis can render the complex exclusionary effects of law and regulatory strategies, both public and private, including the overlaps between them, more visible.

Likewise, within the exotic dancing business, which by itself is a diverse, highly class-stratified industry, spatiality enables a much more nuanced theorization of increasingly global markets and sex work which the conventional commodification thesis currently makes possible.³⁷

In her ethnographic work of stripping in Canada between the 1980s and 1990s, Bruckert makes initial sense of the transformation of the labor required from strippers by noting how “the stage receded as the primary site of labor in a strip club.”³⁸ In fact, Bruckert makes many important observations about the transformation of the space of the strip club. Among others, she notes the centrality of “the floor” in the market place that is the strip club, as well as the emergence of “private or champagne rooms” which represented both new opportunities for earning and greater exposure to risk for dancers.³⁹ While Bruckert makes observations about the changing sites and requirements as well as conditions of labor in stripping, and links them with broader economic transformations, her work spans the period just before immigration for the purposes of working in Canada’s exotic dancing industry (particularly in Toronto) begins to figure significantly.

Rather than attempting to resolve the various paradoxes in feminist theory and politics, taking a spatial approach presents a more modest lateral move to consider ways of rethinking the problem of law for

³⁷ One particularly dominant way of conceptualizing the exploitation and degradation in sex work is through the commodification thesis common to Marxist and Socialist feminist analysis, which posits the “spread of markets” into the intimate realms of life such as sexuality, as harmful. Sexuality scholars, especially historians will criticize this account not only for its linear depiction of the relationship between capitalism and the emergence of remunerated sexual labor, but also for how it depicts what is considered “sex work” as static over time and uniform across cultural contexts. For a discussion of feminist engagements of Marxist “commodification,” see MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); Marjolein van der Veen, *Rethinking Commodification and Prostitution: An Effort at Peacemaking in the Battles over Prostitution*, 13 *RETHINKING MARXISM* 30 (2001). For a more general critique of how the relationship between capitalism and sexuality has been conceptualized, see also JEFFREY WEEKS, *MAKING SEXUAL HISTORY* 127–29 (2000).

³⁸ BRUCKERT, *supra* note 7, at 75.

³⁹ *Id.* at 78–81.

feminist theory and politics, particularly in relation to the sex work and trafficking debate.⁴⁰ Jane Scoular notes that despite the depiction of legalization and abolitionism as politically oppositional, recent empirical work reveals, that “the difference in policy effects between these two positions is not as marked as rhetoric would suggest.”⁴¹ A number of feminists adopting political economic approaches to sex work are critical about the narrow terms of the debate between pro-sex work and abolitionist feminists, noting how both “ignore or tacitly reproduce the neoliberal assumptions about the free market and the benefits of globalization for women.”⁴²

Yet within conventional political economic analyses, accounts of law remain structural, where legal and policy contexts are presented, depending on both theoretical and ideological commitments, as contributing if not determining factors for shaping social and economic realities. Without denying that conventional structural analysis contributes a convenient descriptive model for discussing how laws and policies may sometimes function, such a conventional account remains problematic.⁴³ First, it tends not only to reinforce the notion of law as completely discrete from the socioeconomic and political, but to present it as removed from the actual material context as well.⁴⁴ Second, such structuralism continues to bear the imprint of causation and, as a result, tends to reify law-based and legality-focused approaches.⁴⁵ Applying spatiality extends the analysis of law and regulatory practice to material space or the literal places of sex work in order to present a materially grounded political and economic analysis, one that considers the actively contested boundaries of

⁴⁰ See, e.g., Linda McDowell, *Spatializing Feminism: Geographic Perspectives*, in *BODYSPACE: DESTABILIZING GEOGRAPHIES OF GENDER AND SEXUALITY* 28 (Nancy Duncan ed., 1996).

⁴¹ Scoular, *supra* note 25, at 21; see also Sophie Day, *The Law and the Market: Rhetorics of Exclusion and Inclusion Among London Prostitutes*, in *INSIDE AND OUTSIDE THE LAW* 88 (Olivia Harris ed., 1996).

⁴² Stephanie A. Limoncelli, *The Trouble with Trafficking: Conceptualizing Women’s Sexual Labour and Economic Human Rights*, 32 *WOMEN’S STUD. INT. F.* 261, 261 (2009); see also Marie Seagrave, *Order at the Border: The Repatriation of Victims of Trafficking*, 32 *WOMEN’S STUD. INT. F.* 251 (2009).

⁴³ See Wallace & Brady, *supra* note 29.

⁴⁴ Scoular, *supra* note 25, at 25.

⁴⁵ Alan Hunt notes the tendency for a constructivist view of law within structuralism. Hunt points out the dominance of legal constructivism within classical theorizations of law, which are premised on nation-states/sovereignty, viewing law as a tool that *can be and should be* used by the state in regulating human affairs. See Alan Hunt, *The Problematisation of Law in Classical Social Theory*, in *AN INTRODUCTION TO LAW AND SOCIAL THEORY* 13 (Reza Banakar & Max Travers eds., 2002).

regulatory spaces, by highlighting how law both in form and in practice is itself socially produced.⁴⁶ Indeed, many scholars of urban geography note how “the overlapping policies, laws, and licensing procedures . . . have shaped the geographies of sex-related businesses.”⁴⁷ But rather than just theorize law as an additional structuring layer that determines the contours of sex work, I want to draw particular attention to the overlaps between the spatiality of liberal law itself and the material and spatially oriented aspects of regulation. I also seek to highlight not just the authorship of courts in delineating and shaping public and private spaces in the regulation of the sexual in law, but also to underscore how adult entertainment businesses (and Toronto strip clubs in particular) constitute the regulatory discourse through their active engagement of regulatory regimes. The application of spatial analysis in this Article relates particularly to an analysis of the restructuring of the labor (and sites of labor) in stripping, in line with the insight that transformations in the labor process are a key-defining feature of neoliberalism in global economics.⁴⁸

II

TOIL & TROUBLE: EXOTIC DANCERS AS LABOR’S AND RIGHTS’ MISFITS

Today, the classification of sex workers including exotic dancers as “independent contractors” is widely taken for granted not only within the industry in the Canadian context⁴⁹ but also within pro-sex work

⁴⁶ NICHOLAS K. BLOMELY, *LAW, SPACE AND THE GEOGRAPHIES OF POWER* 51 (1994). (Blomely notes that law is crucial not only because law serves to produce space but also because law itself is shaped by the socio-spatial context.); *see also* DAVID DELANEY, *THE SPATIAL, THE LEGAL AND THE PRAGMATICS OF WORLD-MAKING: NOMOSPEHERIC INVESTIGATIONS* (2010) (exploring the significance of legal meaning in the production of spaces, Delaney looks at the conjunction of both performances of legality and material environment as relevant signifiers).

⁴⁷ Phil Hubbard, Roger Matthews & Jane Scoular, *Legal Geographies—Controlling Sexually Oriented Businesses: Law, Licensing, and the Geographies of a Controversial Land Use*, 30 *URB. GEOGRAPHY* 185, 187 (2009).

⁴⁸ Wallace & Brady, *supra* note 29, at 121.

⁴⁹ The Canadian Union of Public Employees (CUPE) acknowledges the legal impediments to the unionization of sex workers because on top of the issue of illegality, the “laws in Canada do not provide for the unionization of autonomous or contract workers where there is no defined employer/employee relationship.” CANADIAN UNION OF PUBLIC EMPLOYEES, *SEX WORK: WHY IT’S A UNION ISSUE* (Apr. 19, 2005), <http://cupe.ca/EqualityPride/samesexworkbackgroundpaper>. It also notes that this is particularly true for those in prostitution. *Id.* The CUPE position is to support decriminalization and does not necessarily include an agenda to organize sex workers. *Id.*

politics.⁵⁰ Arguably the categorization of sex work as independent contracting conveniently resonates with the claim for individual sexual autonomy and sex workers' agency in pro-sex work positions. Bruckert acknowledges the stakes of recognition, noting that: "[t]he organization of strippers' labor is complex and defies easy classification. At the same time, to perceive the arrangement as an anomaly risks reaffirming its marginality by locating it outside of established labor practices."⁵¹

Indeed, because labor protection and the social protection benefits that come with the backing of the state and its agencies hugely depend on the legal recognition of exotic dancers' labor, we can understand why Bruckert's strategic approach, which highlights similarities between the work of exotic dancers and other skilled performers and professionals, makes practical political sense. Like other feminist scholars, she underscores a critique of "legalization." Van de Mulen and Durisin, for example, note that with legalization comes greater state regulation with consequences that many sex workers are not willing to take on, such as the loss of anonymity and control over their sexual transactions.⁵² Within pro sex work politics, "legalization" is often differentiated from "decriminalization" which implies a continuing resistance to state regulation, particularly prohibitive measures that both restrict and criminalize sex workers and/or their clients.⁵³

The key ideological difference between decriminalization and legalization is the social and political conception of the sex industry. With decriminalization, sex work is seen as work or as a job that requires, and is entitled to labor protections and industry guidelines. Legalization conversely looks at sex work as an inevitable and unfortunate aspect of society that should be controlled and policed to the greatest extent possible.⁵⁴

But as Jane Scoular observes, while such neat categorizations aptly describe general political and social aspirations, inevitably huge gaps will exist between the objectives and the modes of intervention.⁵⁵

⁵⁰ Adrienne Couto, *Clothing Exotic Dancers with Collective Bargaining Rights* 38 OTTAWA L. REV. 37, 52 (2006).

⁵¹ BRUCKERT, *supra* note 7, at 66.

⁵² Van der Muelen & Durisin, *supra* note 26, at 306.

⁵³ *Id.*

⁵⁴ *Id.* at 306–07.

⁵⁵ Scoular, *supra* note 25, at 13.

Despite a situation of de facto or partial decriminalization,⁵⁶ the recognition of sex work as labor that is entitled to protection remains both a difficult undertaking and a complex issue, considering that within labor law and policy itself the fundamental question of how to frame entitlement to labor protection is quite problematic. As Judy Fudge notes:

The precarious situation of many of the self-employed squarely raises the question of whether the exclusion of self-employed workers from labour [sic] and social protection can be justified. One of the central purposes of labour [sic] law is to protect vulnerable workers and it is clear that many self-employed workers are vulnerable and in need of protection.⁵⁷

Moreover, as feminist scholars of labor point out, “[t]he overcrowding of women into a limited number of occupations and their greater presence in hard-to-organise [sic] areas, such as small business and part-time work, means that they tend to be in a poor bargaining position.”⁵⁸

⁵⁶ See *infra* Part III. The regulatory turn to licensing strip clubs as “adult entertainment businesses” occasioned a shift in the legal regulation of stripping in Canada—that is from Federal policing through penal law to Provincial policing under the rubric of licensing. While the penal law prohibitions on public nudity as well as “nude performances” remain in place in the Federal Criminal Code, most of these provisions are no longer used against nudity/stripping in the context of strip clubs. Crown prosecutors mainly relied on the “bawdy house” provisions of the penal code, which were intended for prostitution, to file charges against establishments when they began offering new types of services like lap dancing in the 1990s. For a discussion of the shift from Federal to Provincial regulation, see also DEBORAH R. BROCK, *MAKING WORK, MAKING TROUBLE: PROSTITUTION AS A SOCIAL PROBLEM* (1998).

⁵⁷ Judy Fudge, *Self-Employment, Women, and Precarious Work: The Scope of Labor Protection*, in *PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 201, 219 (Judy Fudge & Rosemary Owens eds., 2006). Scholars note the role of courts in shaping the distinctions between full-time and part-time labor or regular employment and self employment (independent contracting) as the relevant categories in determining entitlements to social protection for workers (e.g., benefits and the right to collective bargaining). On the other hand, the availability of social rights regardless of labor participation or the thesis of “decommodification” has been recently revived and raised in the particular case of migrant women workers. See HABIBA ZAMAN, *BREAKING THE IRON WALL: DECOMMODIFICATION AND IMMIGRANT WOMEN’S LABOR IN CANADA* (2006).

⁵⁸ Laura Bennet, *Women and Enterprise Bargaining: The Legal and Institutional Framework*, in *PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES* 112, 113 (Margaret Thornton ed., 1995).

A. Canadian Association of Burlesque Dancers v. Algonquin Tavern (1981)

In 1979, the Canadian Association of Burlesque Entertainers (CABE) was recognized by the Canadian Labor Council and became a chartered local union (Local 1689), the only union-backed association of dancers in Ontario. CABE filed applications for certification claiming recognition in order to become the union representative of burlesque dancers working at various taverns and hotel bars across Ontario. In order to determine whether the dancers that CABE sought to represent were entitled to collective bargaining rights, the Ontario Labor Relations Board (ONLRB) determined whether dancers who had worked for or were working at the four named establishments qualified, either as employees or dependent contractors, by inquiring into the “functions” of the dancers. Only two of the four named establishments took active part in the proceedings through counsel, namely the Waverly Hotel and the Algonquin Tavern.

In its decision, the Board reviewed four tests that had been created and used by courts: (1) the “control test”⁵⁹ which courts have traditionally defined as “the degree of control exercised by the master over the manner in which the servant performed his work,” (2) the “fourfold test”⁶⁰ which added ownership of the tools of labor, the chance of profit and the risk of loss to the usual standard of control, (3) the “organization and integration test,”⁶¹ which addressed the limitations of the fourfold test by focusing instead on whether the work or service being performed was integral to an organization and not merely an accessory to it, and (4) the “statutory purpose test,”⁶² which draws significantly from U.S. case law in emphasizing that the legislative purpose must outweigh technical legal classifications. Not surprisingly, the board cited much difficulty in categorizing the work relationships at hand. After surveying the various “tests” applied and developed by the courts, the board noted:

Despite the undoubted authority of the cases in which they were enunciated, the value of these “tests” lies solely in their utility, in

⁵⁹ See *Denham v. Midland Employers’ Mutual Assurance Ltd.*, [1955] 2 Q.B. 437 (U.K.); see also *Ready Mixed Concrete (S.E.) Ltd. v. Minister of Pensions & Nat’l Ins.*, [1968] 2 Q.B. 497 (U.K.).

⁶⁰ *Montreal v. Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161 (appeal taken from Can.).

⁶¹ *Stephenson, Jordan & Harrison Ltd. v. MacDonald & Evans*, [1952] 1 T.L.R. 101 (U.K.); *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248 (U.K.).

⁶² *NLRB v. Hearst Publ’ns Inc.*, 322 U.S. 111, 128 (1944).

assisting the Board to reach a conclusion which is fair both to the statute, and the context under review. Usually the Board's own jurisprudence is equally is [sic] useful—and herein lies a problem. Trade unions have been active in the entertainment industry for many years, but we were unable to find any exact parallel with the present case—perhaps because the transitory nature of the work relationships, and the multiplicity of employees has [sic] heretofore prevented the development of collective bargaining.⁶³

The Board ended up dismissing the applications in relation to three establishments and ordered further inquiries into the fourth establishment, which did not participate in the procedure. With the exception of two cases in which the dancers were house girls whose relationship with the tavern resembled full-time employment, the Board categorized the dancers as “independent contractors.” Soon after the ruling, CABE folded. While there are continuing efforts to explore collective bargaining as a means of securing labor protection for exotic dancers, those who do support the move are also the first to note the various limitations of this strategy.⁶⁴

III

UNMAPPING THE LABOR SITES OF EXOTIC DANCING: THE CHANGING MODES OF WORK AND PAY IN EXOTIC DANCE

Capital fragments the social . . . to extract value.⁶⁵

In its *Algonquin* decision, the ONLRB grappled with both the “transitory” character of most of the dancers’ employment and at the same time reflected on the relationship that dancers’ performances bore in relation to the business of club and establishment owners. While it recognized that a regular change of performers was a consistent requirement of the business, and that most dancers were transient workers, it also reached the conclusion that the performances themselves were not really integral to the primary businesses of the tavern and hotel owners.⁶⁶

The [t]ransitory nature of the work relationship is related to the number of sources of work “on the circuit”, and the desire of each

⁶³ Canadian Labour Congress (Canadian Association of Burlesque Entertainers, Local Union No. 1689) v. Algonquin Tavern, [1981] CanLII 812 (Can. Ont. Lab. Rel. Bd.).

⁶⁴ Couto, *supra* note 50, at 49–52.

⁶⁵ *PRECARIAS A LA DERIVA*, A VERY CAREFUL STRIKE: FOUR HYPOTHESES § 2 (Franco Ingrassia & Nate Holdren trans., 2006), available at www.commoner.org.uk/11deriva.pdf.

⁶⁶ *Algonquin*, 1981 CanLII at 812; see also Suzane Bouclin, *Bad Girls Like Good Contracts: Ontario Erotic Dancers’ Collective Resistance*, in *VICTIM NO MORE: WOMEN’S RESISTANCE TO LAW, CULTURE AND POWER* 46, 46–50 (Ellen Faulkner & Gayle Macdonald eds., 2009).

hotel or tavern to please their clientele by providing new faces every week. Many of the hotels have a regular core clientele who, it was suggested, would become bored if the same act was constantly repeated. The character of the dancing being what it is, the audience apparently demands a regular change of performers.⁶⁷

It should be noted that at the time of this decision in 1981, the site of exotic dancing had more or less already shifted from theatres as the main site of performances to taverns and bars run by hotels. Robert Fulford's popular account of a burlesque performance⁶⁸ at the Victory Theatre in 1965 describes a period in Toronto when the strip tease was primarily a staged performance and the patrons were a paying "audience" who literally bought tickets to watch the show in theatres.⁶⁹ Worth noting too is that, even then, the contractual relationship of employment between the owner of the theatre and the dancers already had the combined features of an independent contract (since the performers were usually neither "full time" nor "exclusive" to theatres) but also included some of the distinguishing characteristics now associated with regular employment contracts such as applicable employment rates based on standards set by unions.⁷⁰ As noted earlier, many of the dancers were also foreigners—mostly Americans who travelled and performed as members of a circuit. Indeed, while these employment arrangements were anything but regular compared to other industries, they did not necessarily preclude a mechanism for standardizing dancers' fees. Bruckert suggests that in the late 1970s and early 1980s, it could easily be argued that the financial compensation strippers received was consistent not only "with the scarcity of their skills and other attributes brought by them to the market place," but also their willingness and capacity to transcend the traditional propriety and social norms of public nudity.⁷¹

⁶⁷ *Algonquin*, 1981 CanLII at 812.

⁶⁸ This type of strip show (known by what has become arguably a more respectable name, 'Burlesque' is still popular and has gained a broad following and revival in recent years. For more on the history of Burlesque in Canada, see BECKI L. ROSS, *BURLESQUE WEST: SHOWGIRLS, SEX, AND SIN IN POSTWAR VANCOUVER* (2009).

⁶⁹ Robert Fulford, *Robert Fulford on Burlesque*, *TORONTO DAILY STAR*, Feb. 1965, available at <http://pagesofthepast.ca/GetImage/GetImage.asp?ID=1553332&ZyNetId=>; see also ROBERT FULFORD, *CRISIS AT THE VICTORY BURLESK: CULTURE, POLITICS & OTHER DIVERSIONS* 155–59 (1968) [hereinafter *CRISIS*].

⁷⁰ *CRISIS*, *supra* note 69, at 158 (Fulford describes the pay scales of exotic dancers briefly in his article and notes that the negotiated union minimum was \$166.50 a week, for seven days, four hours a day.).

⁷¹ BRUCKERT, *supra* note 7, at 96. Feminist scholars departing from the orthodox Marxist use of prostitution as the ultimate metaphor for exploitation have offered more

It should be noted that at the time of the ONLRB's decision, legally combining alcohol and nudity in the same space as a commercial endeavor had only been allowed in the Province of Ontario for the previous seven years, when recreational facilities, university and college canteens, and theatres, became eligible for liquor licenses through an amendment of the Liquor License Act in 1973.⁷² Unlike Toronto's then newly minted "adult entertainment businesses," the sale of liquor had long been regulated under a licensing scheme at both the Federal and the Provincial government level since legal prohibition.⁷³ At the onset, a licensing regulatory framework, which ostensibly but not technically speaking overtook the Federal Criminal law regulation of various aspects of commercial sex, had to be distinguishable from moral/criminal law policing in order to be upheld as a legitimate exercise of Provincial authority. Thus, creating the businesses category "Adult Entertainment" within a Municipal licensing scheme carved out a space of legality for a variety of commercial sex related establishments, including bars, restaurants, and hotels that featured stripping.

Interestingly, however, once the primary site of labor shifted from theater to tavern, exotic dancers' labor came to be viewed as merely

complex explanations for the proliferation of sex work in the contemporary period. *See* EGAN ET AL, *supra* 17, at xx. (the Authors theorize the rapid increase of stripping in the United States (making note of the fact that in general, explicit sexual intercourse is not offered in strip clubs) and link it with the backlash against feminism, the predominance of women in workplaces, the sexualization of consumption, and the changing patterns of mobility and intimate relationships); *see also* ELIZABETH BERNSTEIN, *TEMPORARILY YOURS: INTIMACY, AUTHENTICITY, AND THE COMMERCE OF SEX* (2007).

⁷² Ontario Regulation No. 614/73 (July 17, 1973) amending Regulation No. 563 (1970), *Liquor License Act*, S.O. 1973; *see also* Robert Campbell, *DEMON RUM OR EASY MONEY: GOVERNMENT CONTROL OF LIQUOR IN BRITISH COLUMBIA FROM PROHIBITION TO PRIVATIZATION* 50–55 (1991) (The liberalization of liquor regulation varied across provinces in Canada. Campbell notes that the British Columbia Liquor Control Board enforced a "no food, no entertainment, no dancing" policy in Vancouver's Beer Parlors only until 1954. In Ontario, this policy was in place until the 1973 amendment.).

⁷³ The regulatory history of alcohol in Canada is in itself a complex topic and closely linked with the regulation of adult entertainment, specifically pubs and restaurants that also happen to be liquor license holders. Vice Squads commonly targeted the combination of liquor sales and nude entertainment in the era of liquor prohibition in Canada. Liquor prohibition and later regulation policies became more varied across Provinces in Canada, especially after World War II, and started shifting from prohibition to regulation in the 1960s. In 1987, the Supreme Court of Canada upheld the authority of provincial liquor license boards to regulate nude entertainment in strip clubs through the imposition of conditions under liquor licenses. *See* *Rio Hotel Ltd. v. Liquor Licensing Board for New Brunswick* [1987] 2 S.C.R. 59 (Can.).

adjunct to the primary business of beverage, food, and/or hotel services.⁷⁴ As the ONLRB in *Algonquin* opined:

The individuals here alleged to be employees are male or female burlesque entertainers, hired to entertain an audience by dancing and removing their clothing either to total nudity or a “G-string.” The respondents, and the alleged employers in these proceedings, are hotels or taverns who (sic) hire burlesque entertainers. There are at least 250 such establishments in the Toronto area, and a number of others in other cities and towns across the province. Their principal business is the supply of food, beverages, or accommodation to the public . . . Entertainment is an ancillary concern, which is provided solely to attract or hold customers, and is scheduled to correspond with the anticipated customer density (i.e. during lunch, dinner or evening periods).⁷⁵

The growing prevalence of strip shows in restaurants and bars, as well as hotels, happened around the same time as the regulatory shift from criminal-law-based policing to the regulation of “adult entertainment”⁷⁶ under a Municipal licensing scheme, occasioned by the jurisdictional shift from federal to provincial regulation.⁷⁷ The irony of this of course is that even when there came to be such a thing as adult entertainment parlors—“premises or part thereof in . . . which is offered services appealing to or designed to appeal to erotic or sexual appetites or inclinations,”⁷⁸ establishments erstwhile serving food and/or drink or providing hotel accommodation could, unlike their “theatre owner” predecessors, actually claim that the work of dancers was merely incidental to their primary business.⁷⁹

Indeed, more than the ONLRB’s non-recognition of the employment relationships of exotic dancers with the establishments that hire them the relocation of the site of exotic dancers’ labor from theaters to taverns, which led to the classification of their

⁷⁴ Canadian Labour Congress (Canadian Assoc. of Burlesque Entertainers, Local Union No. 1689) v. Algonquin Tavern, [1981] CanLII 812 (Can. Ont. Lab. Rel. Bd.). The Supreme Court of Canada echoed this sentiment in *Rio Hotel Ltd. v. Liquor Licensing Board for New Brunswick*, noting that the performances were a “marketing tool” to boost the consumption of alcohol. [1987] 2 S.C.R. at 59 (Can.).

⁷⁵ *Algonquin*, 1981 CanLII at 812.

⁷⁶ TORONTO, ONTARIO, AN ACT TO AMEND THE MUNICIPAL ACT OF ONTARIO § 368b (9) (1978) (Can.).

⁷⁷ BRUCKERT, *supra* note 7, at 52.

⁷⁸ Toronto, Municipal Code, R.S.O. (1990) § 545-362 (Can.). Adult Entertainment Parlours are currently defined as any premises or part thereof in respect of which a license or permit has been issue and is in full force and effect pursuant to the provisions of the Liquor License Act § 129 at which is offered services appealing to or designed to appeal to erotic or sexual appetites or inclinations.

⁷⁹ *Rio Hotel Ltd.*, [1987] 2 S.C.R. 59 (Can.).

performances as ancillary to the primary mode of profit, facilitated key transformations in the work (and work spaces) of exotic dancing undertaken by establishment owners—many of them practices which eventually emerged as the current day industry’s standards.

The more commonly known strip clubs today, which offer their patrons an assortment of sexual services and erotic entertainment and designate separate spaces for on-stage performances, table dancing and private lap dancing within the club premises, are a far cry from the establishments (primarily pubs, restaurants, and bars in hotels that featured a stage for nude performances) which sprung up soon after the decline of burlesque in theatres. The proliferation and mere presence of scantily clad women in a strip club also sets it apart from other bars, and their presence also produces the strip club as a male space.⁸⁰ While some clubs still offer their dancers wages and promise a guaranteed number of hours per shift,⁸¹ industry practices of charging freelancers fees to solicit dances in the club and/or to perform on-stage is an accepted practice. Unlike “house girls,” which have become a rarity, freelancers earn tips, but their services also earn the club fees charged to customers. Dancers themselves have to pay club fees, rationalized as rent, for access to the club and its customers.⁸² In many cases, they also shoulder the income of the club disc jockey.⁸³ According to Bruckert, while the practice results in lowering labour [sic] costs, “freelancing also means that managers are faced with a highly unstable labor force and decreasing levels of control over [dancers].”⁸⁴ Viewed this way, resorting to foreign sources for the labor force it requires emerges as a logical business strategy for the industry.

Under Canada’s Temporary Foreign Workers Program (TFWP), employers are required to secure a positive Labour Market Opinion (LMO) from Human Resources and Skills Development Canada (HRSDC) indicating a shortage of local labor, as well as demonstrate

⁸⁰ BRUCKERT, *supra* note 7, at 146 (Bruckert notes that the strip club is as a male place and the presence of women who enter the club for leisure can be problematic and they are suspect). *But see* Emile Blauche, *Why I go to Strip*, *supra* note 17. While there have been equivalent “male strippers” who perform in female and/or gay clubs since the 1970s, some clubs with female dancers, and which used to cater to an almost all-male clientele, have a growing female clientele.

⁸¹ The back pages of Toronto’s popular weekly magazine NOW, features adult ads that include want ads from strip clubs in the Toronto area. Currently most clubs offer guaranteed hours and a minimum of thirty hours per week at \$12.50 an hour.

⁸² Bouclin, *supra* note 66, at 9–10.

⁸³ BRUCKERT, *supra* note 7, at 35.

⁸⁴ *Id.* at 65.

that efforts were made to recruit and hire local workers, in order to be able to hire foreign workers.⁸⁵ Likewise, foreign workers need to submit their prospective employer's LMO for their work visa application.⁸⁶ In the 1970s and 1980s, however, the HRSDC created an exemption for strippers with job offers from Canadian employers so that temporary work visas could be issued at the port of entry, facilitating an informal "stripper exchange program" between Canada and the United States.⁸⁷ In 1997, this exemption became the focus of controversy when the media linked the 'exotic dancer visa' to trafficking.⁸⁸ Citizenship Immigration Canada (CIC) promptly tightened the process of screening visa applications, resulting in a sharp decline in the overall number of exotic dancers visas issued.⁸⁹ Meanwhile, the Adult Entertainment Association of Canada maintains that the demand for foreign adult entertainers and the shortage of

⁸⁵ *Immigration Act*, 1976–77, c. 52, s. 1 [Can.], 1976. Canada's Temporary Foreign Workers Program (TFWP) category was created under the Non-Immigrant Employment Authorization Program (NIEAP) in 1973 under the auspices of the *Immigration Act* which was introduced in 1973 and adopted in 1976. The *Immigration Act* has been superseded by the *Immigrant and Refugee Protection Act (IRPA)* (2002), S.C. 2001, c. 27, [hereinafter *IRPA*].

⁸⁶ *Id.* Following the passage of IRPA, the Canadian government adopted additional criteria to assess the genuineness of employers' job offers for temporary foreign workers. Employers can be deemed ineligible if, during the two years preceding a Labour Market Opinion (LMO) application, it is found that they have not provided wages, working conditions, or an occupation to a TFW that were substantially the same (STS) as the terms and conditions of the job offer, and for which a reasonable justification has not been provided. If an employer is found to have failed an STS assessment, access to the TFWP may be denied for two years. Likewise, under the new rules, temporary workers may only work for a total of four years (cumulative duration) followed by a mandatory four-year period of ineligibility. See *Temporary Foreign Worker Program*, HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/pamphlet/ecr_pamphlet.shtml.

⁸⁷ The exemption emerged out of a practice of reciprocity between Canada and the United States and intended originally to facilitate touring or travelling dancers crossing the border to work. See Macklin, *supra* note 31, at 467.

⁸⁸ *Id.* at 474.

⁸⁹ Macklin notes that it is impossible to obtain official data from Citizenship and Immigration Canada (CIC) because the agency claims data is not desegregated from the general category of "Buskers" visas. *Id.* at 475. According to Tim Lambrinos, President of the Adult Entertainment Association of Canada (AEAC), the "unofficial" policy adopted since 1997 resulted in the decline of the number of visas issued for foreign exotic dancers. Between 2007 and 2008, Lambrinos claimed that only a total of seventeen were issued out of several thousand applications submitted to Canada's embassies abroad. Letter from Tim Lambrinos, Executive Director of the Adult Entertainment Association of Canada (AEAC), Letter to the Members of the Standing Committee on Citizenship & Immigration, House of Commons, Canadian Parliament (Jan. 10, 2008), available at <http://www.adultentertainmentassociation.ca/> [hereinafter Letter from Tim Lambrinos].

local workers is likely to continue.⁹⁰ In 2009, the HRSDC adopted new guidelines for employers interested in hiring foreign workers as exotic dancers.⁹¹ Under the rules that were initially designed to make it harder for employers (and applicants) to secure a visa, club owners had to apply for, and secure, an individual LMO for each foreign exotic dancer that they intended to hire.⁹² The same rules, which at first also seemed to promise a modicum of protection for would-be exotic dancers,⁹³ have now been superseded by a new anti-trafficking policy that totally bans foreign workers from exotic dancing as well as all other aspects of adult entertainment and sex work.⁹⁴ New legislation adopted in March 2012 gives the Immigration Minister the power to prescribe protective measures for “foreign nationals who are at risk of being subjected to humiliating or degrading treatment, including sexual exploitation” and for the Tories, this means the authority to scrap the “exotic dancer visa.”⁹⁵

⁹⁰ Letter from Tim Lambrinos, *supra* note 89.

⁹¹ *IRPA*, *supra* note 84.

⁹² EMPLOYER INFORMATION BULLETIN, HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA (Jan. 2010), http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ed/edbulletin.shtml#C.

⁹³ A model contract which outlined the obligations of the employer to the women employed as exotic dancers included, among others, provisions safeguarding against some of the most common forms of abuse by employers, such as recouping the costs of travel from the dancers’ pay and the non-payment of the agreed or advertized wage rate. See website of Human Resources and Skills Development Canada (HRSDC): http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/fwp_forms.shtml; see also Instruction Sheet for Employers issued by the HRSDC: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/contracts-forms/contract-ed.shtml.

⁹⁴ Statutes of Canada, (Mar. 13, 2012) Bill C-10 *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, § 206 (1.2) Despite subsection (1.1), the officer shall refuse to authorize the foreign national to work in Canada if, in the officer’s opinion, public policy considerations that are specified in the instructions given by the Minister justify such a refusal and (1.4) The instructions shall prescribe public policy considerations that aim to protect foreign nationals who are at risk of being subjected to humiliating or degrading treatment, including sexual exploitation. See also Statutes of Canada, (June 18, 2012) Bill C-38, *Jobs, Growth and Long-term Prosperity Act*, which granted the Immigration Minister the additional authority to give his instructions retroactive effect. § 706 87.3 (3) (3.1) An instruction may, if it so provides, apply in respect of pending applications or requests that are made before the day on which the instruction takes effect. The new regulations implementing these changes are expected to come out in smmer 2012.

⁹⁵ In various public statements prior to the passage of the Bill, Minister Jason Kenney has made clear the Tories’ intention to scrap the visa for exotic dancers. See Jessica Hume, *Strippers to be Stripped of Work Visas: Kenney*, Ottawa Sun, June 11, 2012, available at <http://www.ottawasun.com/2012/06/11/strippers-to-be-stripped-of-work-visa-kenney>.

In a sense there will always be a shortage of new recruits in exotic dancing for the same reasons that the ONLRB noted—it is characteristic of the industry to require new dancers. Likewise by most accounts, very few women view the work as a long-term job,⁹⁶ and they find it extremely problematic to submit to regulatory schemes that will keep permanent records of their occupation.⁹⁷ One aspect of the so-called “shortage” may be linked closely to the spatially re-ordered labor and space in strip clubs, which Bruckert aptly describes as the shift from the stage to the floor as the key labor site in the club. The floor as the main site of the club requires more dancers. While on-stage stripping remains a key activity in the club, and in general sets the atmosphere for the club, as far as most exotic dancers in Toronto are concerned, it is no longer the main job site because it is not where a dancer can make the most money.

But the shifting modes of work and pay in stripping, from a more or less fixed wage or professional fee for a number of hours, to literally performing for tips solicited from customers means that these shifts also represent new possibilities both for maximizing earnings in cases and contexts where there is a lot of money to be made by way of tips, and also for further reducing and eliminating labor costs. And without assuming that upscale clubs make better employers or treat dancers better, real differences between workplace conditions and pay scales are not only connected to the strip club’s target clientele, but also to the types of services provided in clubs and the social location of dancers:

Just as in the non-sex industry workforce, there is labor market segmentation with primary (higher wages, more stable) and secondary (lower paying, less stable) labor markets. Legal businesses with the most capital are the ones expanding and targeting more upscale customers and profitable markets. Primary labor markets benefit workers who already have the most resources and cultural capital. In the secondary labor markets the pay is likely to be lower and labor conditions worse. *There is deep stratification among workers in the global sex industry. The nature of the product sold is evolving, too.*⁹⁸

Bruckert’s study did not directly engage the issue of race and racial stratification but she acknowledges that the industry standard of beauty is the idealized image of a “blond, tall, well-endowed [white

⁹⁶ Bouclin, *supra* note 66 at 58.

⁹⁷ See, *i.e.*, Couto, *supra* note 49.

⁹⁸ Barbara G. Brents & Kathryn Hausbeck, *Marketing Sex: US Legal Brothels and Late Capitalist Consumption*, 10 *SEXUALITIES* 425, 427 (2007) (emphasis added).

woman] with tan lines and without visible tattoos.”⁹⁹ And even as strip club owners have often insisted that Canadian women are unwilling to take on the job,¹⁰⁰ such a claim actually merits a closer investigation of industry practices in relation to its treatment of workers, particularly those in the margins. As pointed out earlier, the LACEV study documents how the period shortly after the migrant exotic dancer’s arrival, when they are most dependent on their employers, is also the time when they are most vulnerable to abuse. In several instances, those who were recruited to come to Canada reported that they were promised conditions of work and pay that often did not materialize:

When we arrived we were paralyzed. We were hoping for something completely different. To start with, they told us that we were going to go to one of the most exclusive places in Toronto. Imagine, you think that you are going to go to a beautiful place, with all kinds of luxuries and when you arrive it is a place with a bad reputation.

We thought the club was horrible . . . I saw it like the lowest of the low. There were bad looking clients and a lot of women. We are not going to make any money, I thought.¹⁰¹

A consistent advertisement in the back section of Toronto’s *NOW Magazine* provides a curious clue about the variety of strip club practices in relation to modes of pay. Weekly ads by clubs promise dancers not only a set number of hours and a standard rate of pay, specifically for stage and table dancing, but also the opportunity to “keep all gratuities and tips.”¹⁰² However, as observers offering popular accounts of strip club culture in Toronto note, customers rarely ever tip stage and floor performers anymore for a variety of reasons.¹⁰³

⁹⁹ BRUCKERT, *supra* note 7, at 33–34.

¹⁰⁰ Oziewicz, *supra* note 14.

¹⁰¹ LACEV, *supra* note 11, at 40.

¹⁰² BRUCKERT, *supra* note 7, at 59–60, 108. Bruckert also discusses how emphasizing tips as “extras” accompanied the reduction of wages. In the 1990s, dancers were offered the option of working for tips or not working at all.

¹⁰³ Popular accounts of strip club culture all over Canada note different practices in various Canadian cities. An American dancer blogged about her experience in Alberta noting the dangerous practice of tipping stage performers by tossing the two-dollar Canadian looney (a coin) onto a performer’s body. See Justice, *In Canada: Stripper Rules are Decidedly Looney*, LAS VEGAS WEEKLY, Nov. 13, 2008, available at <http://www.lasvegasweekly.com/blogs/stripped/2008/nov/13/canaday-stripper-rules-are-decidedly-looney/>. Anecdotal accounts from a friend who has visited a number of clubs in Toronto confirms most popular accounts also found on the internet which note that customer tipping (especially stage and table dance performers) is generally not a Toronto custom

Within the wider context of service work, gratuities and tips can be a buffer against dwindling rates of pay or a boon for workers subsisting on minimum wages. While this may be true for exotic dancers as well, in cases where the tip is the income itself, or when the rate of pay is less than the comparable minimum wage, working for tips in the context of stripping contributes to the further conflation of rewards and risks for dancers. Worse, not all dancers get to keep the full amount of gratuities that they receive from customers while working. Some dancers in the LACEV study reported that they were not allowed to handle money in the club and instead received “chips” from customers.

We used to dance for chips. We could not have any money . . . at the end of the shift you could go to the office and they give you a piece of paper saying the amount of chips you made that day, but you do not see any money until the end of the month.¹⁰⁴

In the most extreme cases, clubs took fifty percent of the earnings from tips and gave twenty-five percent to the agent, leaving only twenty-five percent for the dancer. In others, women could keep their tips but were charged a daily quota by the club, regardless of the size of their earnings for the day.¹⁰⁵ Bruckert notes that while practices such as withholding of pay and the imposition of fines are recognized as sometimes unreasonable, they are largely taken for granted by the industry’s working women, and she suggests that, on the margins, labor relations are perhaps shaped by the expectation that they will be exploitative.¹⁰⁶ In the case of migrant exotic dancers in LACEV’s study, the pressure to accept the worst conditions of work and pay is directly linked to their severely restricted mobility as foreign workers, often compounded by the language barrier.

A. Numerical, Skill, and Spatial Flexibility: A Continuum of Precariousness

While other industries employ functional flexibility, that is, they vary the tasks of individual workers to suit their production needs for strip clubs, flexibility is part of what the product is: sexual services requiring new skills and tasks from the dancers themselves and

although there are rare exceptions such as visiting American tourists. See BARE FACTS, *supra* note 4.

¹⁰⁴ LACEV, *supra* note 11, at 38.

¹⁰⁵ *Id.*

¹⁰⁶ BRUCKERT, *supra* note 7, at 63.

closely tied to the diversification of both work spaces, performances and available services in the club premises.

Bruckert's account of the practices around stripping in the 1980s through the 1990s mentions on-stage "sets" for the dancers, as well as "working the floor" to solicit table or private dances, as already part of the routine that most dancers were expected to engage in.¹⁰⁷ Before table and private or lap dancing became standard fare in strip clubs, the primary task of a dancer was dancing onstage and stripping. And before the ban on total nudity was lifted, some dancers still claimed that they merely provided the illusion of total nudity.¹⁰⁸

In the *Algonquin* case, the rationale behind the ONLRB's classification of most dancers as independent contractors was its finding that dancers were solely responsible for their performances:

The choreography, movements, arrangement, choice of music, and manner of performing are solely the creation of the dancer. The dancer supplies the tapes for her particular act or routine. The hotel plays them. There is little ongoing supervision or control, of (or even much interest in), the content of the performance, so long as the entertainer is on time. As Mona Pierson put it, her responsibility at the Algonquin was to "show up on time, do good shows and not bother the bartender."¹⁰⁹

But while dancers were indeed responsible for their choreography, clubs also set expectations with regard to the content of dances and were in fact able to enforce the industry's new demands by simply refusing to hire dancers who refused to conform. When CAFE presented cases of dancers who were fired for their refusal to perform "obscene acts" or otherwise submit to the owners' conditions in the certification cases, the ONLRB quite disingenuously, and not without a hint of moralistic bias, responded to what were clearly cases of unfair treatment by noting that the lack of consideration or respect for dancers by establishments was largely due to the transitory character of the job in a business where entertainment is not a primary concern, and where the dancers are virtually anonymous.¹¹⁰ The ONLRB went even further in noting that verbal abuse, while distasteful, was probably *inevitable* or came with the job territory because the "dancers market their sexuality, not just their dancing skills."¹¹¹

¹⁰⁷ *Id.* at 52–53.

¹⁰⁸ *Id.* at 64.

¹⁰⁹ Canadian Labour Congress (Canadian Assoc. of Burlesque Entertainers, Local Union No. 1689) v. Algonquin Tavern, 1981 CanLII 812, ¶ 24 (Can. Ont. Lab. Rel. Bd.).

¹¹⁰ *Id.*

¹¹¹ *Id.* ¶ 34.

Indeed while it is one thing to acknowledge that the social context along with prevailing attitudes towards women, public nudity and sexuality will likely have an impact on the working conditions of exotic dancers, it is another matter altogether for an adjudicative agency of government to literally condone it.¹¹² While a legally fashioned division between regular and transient employees does exist, the ONLRB's comment frames dancers' susceptibility to mistreatment as a logical consequence of what it seems to consider their self-degradation, for example, marketing their sexuality, which, as Margaret Radin points out is not unlike some feminist arguments against the market and the commodification of sex.¹¹³

By the 1990s, it was clear that the requirements of the job were changing. While dancers were still responsible for their choreography, most clubs already required or expected their dancers to offer table, private or lap dancing on top of their stage performances. Bouclin recalls how in 1995 over two hundred dancers in Toronto, organized as the Association of Burlesque Dancers (ABE) and, led by Katherine Goldberg, lobbied the city to outlaw lap dancing.¹¹⁴ Following the passage of Toronto's bylaw,¹¹⁵ the clubs reportedly blacklisted Goldberg and a number of dancers involved in the lobby.¹¹⁶ The ability of club management to pressure its dancers into performing acts beyond what they initially agree to do is actually a complex issue and one which, while certainly related to the vulnerability of individual dancers, the power of management over them, the evolving profit strategies of the industry, and even local law enforcement practices, is hardly ever a matter which can be resolved simply by

¹¹² The Ontario Labour Relations Board (the "Board") was established by section 2 of the Labour Relations Act of 1948 and is continued by subsection 110(1) of the Labour Relations Act of 1995. *See* Labour Relations Act, S.O. 1995, c. 1 (Can.). The Board is an adjudicative agency of the Government of Ontario and its staff is appointed under the Public Service Act. The Board is an independent, adjudicative tribunal issuing decisions based upon the evidence presented and submissions made to it by the parties, and upon its interpretation and determination of the relevant legislation and jurisprudence. It plays a fundamental role on the labour relations regime in Ontario and encourages harmonious relations between employers, employees and trade unions by dealing with matters before it as expeditiously and as fairly as reasonably possible. *See* ONTARIO LABOUR RELATIONS BOARD, <http://www.olrb.gov.on.ca/english/homepage.htm> (last visited Mar. 23, 2012).

¹¹³ MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS AND OTHER THINGS* 148 (1996).

¹¹⁴ Bouclin, *supra* note 66, at 11.

¹¹⁵ Municipality of Metropolitan Toronto, By-law No. 129-95 (1995) (Can.). The bylaw was challenged in 1997 but upheld by the Ontario Court of Appeal. *See* Ontario Adult Entm't Bar Ass'n v. Metro. Toronto Municipality (1997) O.R. 3d 161 (Can. Ont. CA).

¹¹⁶ Bouclin, *supra* note 66, at 12-13.

adopting more legal regulations or even by changing them, particularly when both the approach taken and the purpose behind regulation bear little relation to the safety and welfare of dancers.¹¹⁷ As Bouclin observes, “the anti-lap dancing discourse produces and reproduces hierarchies among women occupying different social locations.”¹¹⁸ While migrant women, whose work permits bind them to specific clubs, restrict their mobility and set limitations to their available options, might experience more pressure to conform to club practices than non-migrants, the legal prohibition against lap dancing that exposes dancers to additional policing and penalties in the form of fines, can hardly be seen as diminishing their vulnerability. Arguably, it can even heighten it. With the adoption of the prohibition against foreigners in adult entertainment and sex work, even dancers who at least had legal status to work stand to lose it.¹¹⁹

The LACEV study features a compelling account about how the requirement of lap dancing as part and parcel of migrant exotic dancers’ work is enforced, even as clubs manage to steer clear of incurring any liability under the bylaw against physical contact between dancers and patrons. While the very existence of VIP rooms in clubs clearly indicates that lap dancing and similar private performances are being promoted and offered by clubs, dancers in the study noted that they often received conflicting messages about such services from club management:

They never tell you that you have to sit on the client, but that is what you see in the club. They do not say anything and everybody does lap dancing. But, they know it is illegal. When we come to the club they gather all the women and tell us not to do it. But, when we are alone they tell us to do it but carefully. We have to do it because otherwise we are not going to make any money. I know that you are not supposed to do lap-dancing, but, if you do not do it, you are not going to make any money. You have to sit on the client and let him touch you. We all do it.¹²⁰

¹¹⁷ Studies have noted how the reliance on criminal law as well as Municipal bylaws has worked to the disadvantage of dancers. In a study conducted between 1995 and 1998, researchers suggested the use of employment-standards law, human-rights law, occupational-health-and-safety law and workers-compensation law, to help control the sexual contact occurring in the clubs and the assault and other forms of violation reported by dancers. See JACQUELINE LEWIS & ELEANOR MATICKA-TYNDALE, NATIONAL HEALTH RESEARCH AND DEVELOPMENT PROGRAM HEALTH CANADA, FINAL REPORT: EROTIC/EXOTIC DANCING: HIV-RELATED RISK FACTORS (1998).

¹¹⁸ Bouclin, *supra* note 66, at 16.

¹¹⁹ HUME, *supra* note 95.

¹²⁰ LACEV, *supra* note 11, at 47.

This attitude and modus operandi illustrates the legal acumen of many owners and managers in the enterprise owing in part perhaps to the fact that the industry is frequently prone to policing and crackdowns, occasioned by recurring moral panics.¹²¹ In 2007, a case against Zanzibar Circus tavern was again dismissed for lack of *mens rea*. The court noted that the word “knowingly” in the bylaw made the provision against physical contact a *mens rea* offence and thus required proof of “intention knowledge or subjective mental fault.”¹²² In this case, the two police officers who posed as the club’s patrons were unable to provide evidence that one of the co-owners, who was present at the club, witnessed any of the violations of the bylaw or that he was willfully blind to their occurrence.¹²³ The police officer who received a lap dance (and later claimed that the dancer placed his hands on her breasts twice and bit his crotch) had no recollection whether the co-owner ever went to the basement VIP rooms.¹²⁴ But dancers who are charged with violations of both the criminal law¹²⁵ and Municipal bylaws usually do not bother to contest the charges laid against them—for a variety of reasons, one of them being the prohibitive cost of legal representation.¹²⁶ Women in LACEV’s study reported experiencing police raids and getting fined, but also noted that club managers were tipped off prior to a raid and thus were able to warn their dancers beforehand.¹²⁷

¹²¹ It should be noted, however, that the industry is rather “pro-active” in its engagement of the law as well.

¹²² *Toronto v. Zanzibar Tavern Inc.*, [2007] ONCJ 401, (Can. Ont. Super. Ct. J.).

¹²³ *Id.* ¶ 212.

¹²⁴ *Id.* (neither of the two officers had sufficient recollection about the co-owner Wally Waterman’s movements, particularly whether he went to the basement VIP rooms or not, while they were in the club conducting surveillance).

¹²⁵ There are few cases involving dancers charged with indecency in a club or theatrical setting that have reached the Canadian Supreme Court. The last cases involving dancers performing strip shows wherein dancers were actually charged with a violation of the criminal law provision on public nudity were, in the case of a woman, *Johnson v. The Queen*, [1975] 2 S.C.R. 160 (Can.), and in the case of a man, *Queen v. Verrette*, [1978] 2 S.C.R. 838 (Can.).

¹²⁶ *Zanzibar Tavern Inc.* ONCJ at ¶ 5. The dancer, Nicole LaForge, charged in violation of the bylaw entered a guilty plea. At the time of the case the applicable penalty imposable would have been a fine. See Toronto Municipal Code Ch. 545-7 (A), art I. Under a subsequent Toronto By-law No. 126-2008, Appendix 1, Schedule B, the City adopted a demerit point system (imposable on top of the fines) under which a dancer receives the equivalent of two demerit points for violating the bylaw against physical contact: the Municipal Licensing and Standards Division will not renew a dancer’s license if the dancer has accumulated seven demerit points in the twelve months immediately preceding the application for renewal.

¹²⁷ LACEV, *supra* note 11, at 46.

IV

POLICING THE PLACES OF COMMERCIAL SEX: FROM PASTIES AND G-STRINGS TO CHAMPAGNE ROOMS

The “successful” transformation of the club space into a space of diversified sexual services and erotic entertainment may be understood as the combined outcome of state regulation and constant legal challenges mounted by establishment owners. As clubs have diversified the services and kinds of performances offered in their clubs, they have also been testing the outer limits of what the courts and the police were willing to tolerate. As such, establishment owners are consistently engaged in actively shaping the overlapping governable spaces on which their businesses were located.

When licensing was first introduced through a handful of bylaws, taverns and hotels already offering nude entertainment did not view the regulatory shift as a move towards liberality at all.¹²⁸ On the contrary, many establishment owners knew that the adoption of Municipal bylaws to regulate exotic dancing had come in the wake of local clean-up campaigns, which while aimed mainly at prostitution, also extended to prostitution-related activities.¹²⁹ Local councils, whose members frequently voiced their disapproval of adult entertainment, usually sponsored such initiatives.¹³⁰ One of the earliest challenges raised by establishment owners who were already in the business of featuring stripping and nude entertainment was filed in 1981, the year of the ONLRB decision.¹³¹ In *Sharlmark Hotels Ltd. v. Municipality of Metropolitan Toronto*, the owner of Sharlmark Hotels challenged Ontario’s 1978 amendment to the Municipal Act, which gave municipalities the power to regulate “Adult Entertainment Parlors,” as *ultra vires*.¹³²

¹²⁸ Licensing remains contested and adult entertainment owners have periodically come up with legal challenges against Municipal bylaws. The most recent challenge to the physical contact ban was in 2007. See *Zanzibar Tavern, Inc.* ONCJ at ¶ 5. Workers in this sector, on the other hand, are not always as well organized as workers from other sectors. For a discussion of the challenges to exotic dancers’ labor organizing, see Ross, *supra* note 67; BRUCKERT, *supra* note 7, at 100–01.

¹²⁹ BROCK, *supra* note 56, at 31–43. See also BRUCKERT, *supra* note 7, at 53–55. The court made a similar observation in the *Sharlmark* case. See *infra* note 127 and accompanying text.

¹³⁰ BROCK, *supra* note 56, at 32–41.

¹³¹ Canadian Labour Congress (Canadian Assoc. of Burlesque Entertainers, Local Union No. 1689) v. Algonquin Tavern, 1981 CanLII 812 (Can. Ont. Lab. Rel. Bd.).

¹³² *Sharlmark Hotels Ltd. v. Municipality of Metro. Toronto*, [1981] 121 D.L.R. 3d 415 (Can. Ont. Sup. Ct.).

Establishment owners opposed the scheme mainly because they resisted the limitations on the types of nude entertainment they could provide, particularly since they were interested in “upping the ante” so to speak. In analyzing some of the outcomes of partial decriminalization on the working conditions of exotic dancers in the 1970s, for instance, Becki Ross refers to a time when dancers in Vancouver experienced pressure from management to include “spreading” (opening the legs to display the female genitalia) in their performances:

Along with the decriminalization of bottomless dancing emerged the trend towards full nudity and “spreading” to exhibit one’s unclothed genitalia. Indeed, the practice reflected bigger changes in the production and distribution of ever-more graphic depictions of female sexuality, including the films *Deep Throat* (1972) and *Behind the Green Door* (1973), the triple-X-rated magazines *Penthouse* and *Hustler*, both launched in the mid-1970s, and the mass distribution of adult films via the then-new VCR technology (Schlosser, 2003: 148). The new imperative that dancers “show the pink” touched off firestorm of protest, especially among dancers who began their careers with g-strings firmly in place.¹³³

By linking partial decriminalization in Vancouver to the trend towards raunchier strip-shows that came alongside the increased availability of sexually graphic pornographic films, Ross demonstrates an important point about the complexity of factors at work behind industry profit-making practices and their consequences for workers.¹³⁴ Indeed, while the initial relaxation of criminal law “indecent” standards gave dancers some respite from a particular form of policing,¹³⁵ it does not necessarily follow that all ensuing conflicts and battles “won” to push back regulation in adult entertainment have directly benefited exotic dancers, least of all,

¹³³ ROSS, *supra* note 67, at 335.

¹³⁴ BRUCKERT, *supra* note 7, at 52–53.

¹³⁵ As discussed earlier, the indecency provisions in the Criminal Code remain in place although authorities prefer to apply Municipal bylaws to regulate the adult entertainment business. A report for the Parliamentary Information and Research Service (PIRS) notes that “local police are in fact more likely to use municipal by-laws to regulate prostitution than to lay charges under the *Criminal Code*, given that it is easier to issue tickets for an infraction of a by-law than to collect evidence for a criminal charge. By-laws can also be more easily moulded to fit a local context.” In the same report, exotic dancing (which is also regulated through Municipal by-laws) is discussed separately as “prostitution-related” activity. See LAURA BARNETT, PROSTITUTION IN CANADA: INTERNATIONAL OBLIGATIONS, FEDERAL LAW, AND PROVINCIAL AND MUNICIPAL JURISDICTION 23–25 (2008), available at <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0330-e.pdf>.

foreign exotic dancers.¹³⁶ As seen in the Zanzibar case, dancers continue to bear the brunt of policing as a result of regulations prohibiting physical contact between dancers and clients.¹³⁷

A. *Shaping the Regulatory Discourse: The Spatial Logics of Liberal Policing*

Bouclin recalls that in 1979, when CABA argued before the city council to oppose licensing, they emphasized that “it would push the most marginalized dancers—older dancers and those with criminal records—out of the clubs into much more precarious street level sex work.”¹³⁸ Notably, while CABA was decrying the pernicious effects of hyper-regulation on the most vulnerable dancers, most legal conflicts, as they were formulated within the dominant regulatory framework of policing and as industry owners argued them before the courts, drew more attention to the regulation of the visual spectacle—performances and exposures of the female body or body parts—which in the liberal legal lexicon often emerges as the symbol, source and site of danger.¹³⁹

David Delaney observes, “liberal legal discourse is an embarrassingly rich source of spatial tropes and metaphors.”¹⁴⁰ But in addition to its rhetoric, the administration of spaces, and particular bodies as spaces for regulation, is the *sine qua non* of liberal legal governance.¹⁴¹ That is, the regulation of what liberal law categorizes

¹³⁶ For a discussion of this see *supra* note 120 and accompanying text.

¹³⁷ See *Zanzibar Tavern Inc.*, [2007] ONCJ 401 (Can. Ont. Super. Ct. J.).

¹³⁸ Bouclin, *supra* note 66, at 6.

¹³⁹ See, e.g., ALAN HYDE, *BODIES OF LAW* (1997).

¹⁴⁰ David Delaney, *Beyond the Word: Law as a Thing of This World*, in *LAW AND GEOGRAPHY* 67, 69 (Jane Holder & Carolyn Harrison eds., 2003).

¹⁴¹ Lisa E. Sanchez, *Enclosure Acts and Exclusionary Practices: Neighborhood Associations, Community Police, and the Expulsion of the Sexual Outlaw* in *BETWEEN LAW AND CULTURE: RELOCATING LEGAL STUDIES* 132 (David Theo Goldberg et al. eds., 2001). Sanchez observes that legal practitioners have attempted to circumvent entanglement in the thorny legal questions raised by laws which effectively amount to treating sex work as a status offense by framing the issue as a problem of geography e.g., zoning vis a vis prostitution. While I agree with Sanchez’ observation regarding the tactic employed by politicians in the enactment of new modes of policing sex workers, I would add that historically, the question of status (legal and political inclusion and exclusion) in the liberal order, as well as the spatially oriented strategies of liberal law overlap and thus material and discursive, are simultaneous. See, e.g., Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, 30 *REPRESENTATIONS* 162 (1990) (Nedelsky’s insight about the “boundary as a central metaphor in the legal rhetoric of freedom” is one example that best describes the spatial sensibility of liberal law. Nedelsky’s work in political philosophy is familiar to legal geographers who also build on her work regarding the division-oriented character of liberal visions of autonomy.); Blomely, *supra* note 45, at 13, 208, 220.

as sexual has primarily been accomplished spatially, particularly through drawing and policing the boundaries of the public and private.¹⁴² In the case of exotic dancing or stripping, the spatial legal logic is arguably even more pronounced. Indeed, the regulation of the exposure of body parts and the female body as literal sites to be policed, as gleaned from both criminal law and licensing contexts, has also been about the control of the spaces where exotic dancing is featured.¹⁴³

The recent changes adopted in Canadian immigration law also demonstrate that liberal policing does not necessarily cancel out prohibitive regimes of regulation. Indeed, female bodies constitute a prominent site for regulating the sexual including the perceived dangers of sex, whether in relation to moral, political or bodily contagion because sexual purity is elemental and not exceptional to the liberal notion of progress.¹⁴⁴

In this case, foreign adult entertainment workers and sex workers have emerged as the default sites and ciphers to evoke these dangers and also for the state to regulate.¹⁴⁵ The adoption of new anti-trafficking measures which ban foreign workers from exotic dancing means that even licensed visa holders in sex related industries are now categorized as trafficking victims (or at least, potential trafficking victims).¹⁴⁶ Under subsequent legislation empowering the Immigration Minister to wipe its backlog slate clean,¹⁴⁷ the government's "industry wide" ban effectively bars both the adult entertainment and sex work industry from accessing the Temporary Foreign Workers Program and consequently prohibits migrant workers from working in the same sectors.¹⁴⁸ Minister Jason Kenney recently also announced that visa applications from those seeking employment in any sex related industry would no longer be processed beginning July 14, 2012.¹⁴⁹ Under the same bill the Minister is also authorized to give his instructions retroactive effect, raising the

¹⁴² Ruiz-Austria, *Outside, Hidden and in Between*, *supra* note 24.

¹⁴³ Carolina Ruiz-Austria, *Baring, Veiling and the National Identity: Sex Politics in Canadian Legal Discourse*, Conference Paper (2011) (unpublished manuscript) (on file with author).

¹⁴⁴ MARIANA VALVERDE, *THE AGE OF LIGHT, SOAP AND WATER: MORAL REFORM IN ENGLISH CANADA 1885–1925*, 105 (2d ed., 2008).

¹⁴⁵ Ruiz-Austria, *supra* note 143.

¹⁴⁶ For a discussion of this, see *supra* notes 94–95 and accompanying text.

¹⁴⁷ Kenney, *supra* note 32.

¹⁴⁸ *Id.*

¹⁴⁹ *Supra* notes 94–95.

possibility that even the visas issued to foreign workers in sex related industries (including exotic dancing) prior to the ban might be revoked even before they expire.¹⁵⁰ The irony of course is that while these new policies have purportedly protective objectives, they effectively withhold (and threaten to withdraw) legal status from those whom the measures' proponents deem vulnerable in the first place. Having abandoned its initial (albeit rather short lived) employment standards approach,¹⁵¹ the law's prohibitionist turn may also be viewed in part as a reaction to recent gains by sex workers' rights whereby the moral panic around the predominance of foreigners in Canada's adult entertainment industry has been recast in terms of a clearly marked socio-political and legal distinction between autonomous Canadian women and their trafficked foreign counterparts.¹⁵² Women on the margins (sex worker and/or immigrant others) are convenient targets in projects of rule and are often treated not as subjects but rather as objects of regulation.¹⁵³ The law uses their bodies discursively—as boundaries, sites and places to be managed.¹⁵⁴

The following cases outline a chronology of regulation and the resistances against them that focus exclusively on the visual spectacle, for example, female nudity—an account that resonates with the progressive narrative emphasizing the gradual toleration of nude entertainment in an era of sexual liberation. Ironically, it also echoes a kind of strip-tease logic: from monitoring hemlines, to the mandatory opaque and flesh-colored coverage, pasties, and finally, the doffing of the G-string. On one hand, the structuring logic of regulation here, controlling the body as a site, is hardly surprising for female bodies and specific female body parts remain the easiest as well as likely targets for both state and non-state regulation.¹⁵⁵

In *Sharlmark Hotels Ltd. v. Municipality of Metropolitan Toronto*, the owner of Sharlmark Hotels challenged Ontario's 1978

¹⁵⁰ Bill C-10 *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, § 206, *supra* note 93.

¹⁵¹ Regulations earlier adopted by the Human Resources and Skills Development Canada (HRSDC) outlined additional procedures for visa applications but also included a number of worker protection oriented measures. *See supra* notes 91–93.

¹⁵² Ruiz-Austria, *supra* note 143.

¹⁵³ *Id.*

¹⁵⁴ HYDE, *supra* note 139, 8–11, 258.

¹⁵⁵ Ruiz-Austria, *Baring, Veiling and the National Identity*, *supra* note 143.

amendments to the Municipal Act, which gave municipalities the power to regulate “Adult Entertainment Parlors” as *ultra vires*.¹⁵⁶ Sharlmark Hotels argued that the Province of Ontario infringed on Federal powers of legislation over criminal matters, in this case over matters concerning immorality, indecency and obscenity, when it authorized the Municipality to adopt a bylaw requiring burlesque entertainers to wear opaque clothing fully covering their pubic areas. In this case, it is worth noting that while the applicant opposed the City’s mandatory minimum dress code for strippers, it did so without necessarily framing the issue as one of free expression,¹⁵⁷ for doing so would have squarely challenged the validity of existing criminal laws that prohibit various nude performances as indecent. Around this time, police permissiveness towards stripping was already the norm and even acknowledged by the Canadian Supreme Court,¹⁵⁸ which meant that existing criminal law was rarely if ever used against strip clubs anymore. At the same time, establishment owners who were already providing various forms of nude entertainment were constantly devising their own ways of circumventing existing statutes that proscribed nudity.

In a media interview, Terry Koumoudouros, one of two brothers who founded and operated the House of Lancaster in Toronto, bragged that they successfully evaded criminal law charges on nudity by making sure the dancers in his club performed topless first and then donned sports jerseys before taking off their bottoms.¹⁵⁹

Without having to question state authority to censor public nudity and nude performances, Sharlmark Hotels merely pointed out the Province’s lack of authority, invoking Federal jurisdiction over matters of morality by relying on a Supreme Court decision¹⁶⁰ and an

¹⁵⁶ Sharlmark Hotels Ltd. v. Municipality of Metro. Toronto, [1981] 121 D.L.R. 3d 415 (Can. Ont. Sup. Ct.).

¹⁵⁷ Prohibitions against public nudity and indecent performances have never been framed squarely as claims of free expression by establishment owners but in a handful of cases this aspect has been raised in addition to other arguments through the testimonies of actual performers who appeared as witnesses in cases filed by adult entertainment parlor owners. Courts have likewise avoided the issue. June Ross observes that, “the few Canadian cases that have dealt with the issue have dismissed or at least avoided the argument.” See June Ross, *Nude Dancing and the Charter*, 2 REV. CONST. STUD. 298 (1994).

¹⁵⁸ *Johnson v The Queen*, [1975] 2 S.C.R. 160 (Can.).

¹⁵⁹ Daniel Dale, *Terry Koumoudouros, 67: Strip Club Owner*, TORONTO STAR, June 1, 2007, available at <http://www.thestar.com/News/article/220317>.

¹⁶⁰ *Johnson v. Att’y. Gen. of Alta.*, [1954] 1 S.C.R. 127 (Can.).

Alberta Court of Appeal judgment¹⁶¹ which both declared provincial legislation forbidding ownership of slot-machines inoperative on the grounds that the statute was identical to Criminal Code provisions dealing with the same subject matter.¹⁶² In addition, they argued that the licensing fee was excessive and amounted to prohibition. Despite the novelty of their arguments, Sharlmark hotels lost the case and the Divisional Court of the Ontario High Court of Justice upheld both the Municipality's G-string bylaw and the provincial law, which gave Municipalities in Ontario the authority to regulate "adult entertainment parlors."¹⁶³ The provincial court noted that the impugned legislation "expresses no moral or value opinion on adult entertainment parlors," adding that the same "does not say or suggest that they are evil, immoral or obscene."¹⁶⁴ Rather than accept Sharlmark's comparison with the bylaws banning slot machines, the court reviewed cases which tackled what it considered comparable legislation directed at licensing and regulating another booming adult entertainment business: body rub parlors.¹⁶⁵ It pointed out that various bylaws regulating body rub and massage parlors, which required clothing for attendants in the cities of Winnipeg, Vancouver, and Edmonton, had already been upheld at the local provincial court and provincial appellate levels.¹⁶⁶ Not without a bit of handwringing, the court upheld the Toronto bylaw.¹⁶⁷ Quite interestingly, Judge Saunders, who wrote the court's opinion in *Sharlmark*, openly expressed his reluctance to uphold the Municipal bylaw directing burlesque dancers to wear opaque coverage on their pubic area: "*Not without some hesitation*, I conclude that the provisions of cl. 28(2) are regulatory and within the powers of the municipality granted to it by s. 368b."¹⁶⁸ In *obiter dicta*, Saunders even speculated about the scope of lawful excuses that could be raised as a valid defense in a charge of nudity or partial nudity offensive to public decency.¹⁶⁹ He noted that

¹⁶¹ *Regent Vending Machines Ltd. v. Alta Vending Machines Ltd. et al.*, [1956] 6 D.L.R. 2d 144 (Can. Alta.).

¹⁶² *Sharlmark Hotels Ltd. v. Corp. of the Municipality of Metro. Toronto*, [1981] 121 D.L.R.3d 415 (Can. Ont. Sup. Ct.).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Cal Investments Ltd. v. Winnipeg*, [1978] 84 D.L.R. 3d 699 (Can. Man. C.A.); *Try-San International Ltd. v. Vancouver*, [1978] 83 D.L.R. 3d 236 (Can. B.C. C.A.); *Moffat v. Edmonton*, [1978] 84 D.L.R. 3d 705 (Can. Alta. C.A.).

¹⁶⁶ *Id.*

¹⁶⁷ *Sharlmark*, [1981] 121 D.L.R. 3d at 415.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

if the performer wore a scarf around her neck, the Crown would have the additional burden of having to prove offense to public decency and order.¹⁷⁰ He opined: “In either case the defense of lawful excuse is available to the accused. Various situations come to mind with respect to lawful excuse such as models in art classes, swimmers in uninhabited areas, actors and actresses in theatrical performances *and possibly, performers in licensed adult entertainment parlors.*”¹⁷¹

The *Sharlmark* ruling was famously overturned in the 1985 case of *Koumoudouros et al. v. the Municipality of Metropolitan Toronto*¹⁷² where the Ontario Court of Appeal reversed a provincial court ruling by holding that the bylaw in question was *ultra vires*. It even went so far to say that its earlier judgment in *Sharlmark* was wrong and should be overruled.¹⁷³ The Koumoudouros brothers, founders and operators of The House of Lancaster in Toronto, built a reputation around their legal victory and have often touted it as a major achievement for the strip-club business.¹⁷⁴

When the brothers filed the case in 1984, they took inspiration from a case that many saw as a relaxation of the law against prostitution and prostitution-related activities in Canada and they were hoping to bank on the newly decided Supreme Court case of *Westendorp v. The Queen*.¹⁷⁵ In the case of *Westendorp*, a Calgary bylaw prohibiting persons from remaining on the streets and/or approaching another person on the street for the purpose of prostitution was struck down as *ultra vires* not only for penalizing acts within the domain of Federal criminal law, but also for expanding the scope of the prohibitions within existing law.¹⁷⁶ Emboldened by the Supreme Court’s libertarian ruling in *Westendorp*, the applicants argued that the central argument under *Sharlmark* could no longer hold.¹⁷⁷ In rejecting the applicants’ claim, the court pointed out that the bylaws struck down by the Supreme Court of Canada in *Westendorp* “were not a part of any regulatory scheme falling within the legitimate provincial jurisdiction.”¹⁷⁸ Standing firm by *Sharlmark*, the court noted that: “[t]he bylaw in *Westendorp* is so different from

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Koumoudouros v. Toronto*, [1985] 24 D.L.R. 4th 638, 638–40 (Can. Ont. C.A.).

¹⁷³ *Id.*

¹⁷⁴ Dale, *supra* note 159.

¹⁷⁵ *Westendorp v. The Queen*, [1983] 1 S.C.R. 43 (Can.).

¹⁷⁶ *Koumoudouros*, [1985] 24 D.L.R. 4th at 638.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

that in *Sharlmark* that the decision striking down the one bylaw does not throw the slightest shadow over the correctness of the other decision.”¹⁷⁹ Yet within the same year of this decision by the provincial court, two cases were elevated to the Ontario Court of Appeal involving bylaws that purported to regulate states of dress and undress by employees of restaurants as well as lodging establishments and adult entertainment parlors in the City of Burlington and the Town of Markham, respectively.¹⁸⁰ These two cases eventually led to the complete reversal of *Sharlmark*.¹⁸¹ When *Sharlmark* was overturned, *Koumoudouros* had to be reversed as well.

In the 1990s, the Supreme Court of Canada began to consider criminal prosecutions of “nude shows” in strip clubs involving a variety of sexual services other than on-stage stripping in the tradition of *burlesque*, which, judging by current standards, may now appear less risqué than contemporary types of exotic dancing.¹⁸² As strip clubs experimented with a repertoire of business strategies along the

¹⁷⁹ *Id.*

¹⁸⁰ In the cases of *Sherwood Park Restaurant Inc. v. Markham*, [1984] 14 D.L.R. 4th 287 (Can. Ont. C.A.), and *Nordee Investments Ltd. v. Corp. of the City of Burlington*, [1984] 13 D.L.R. 4th 37 (Can. Ont. C.A.), the Ontario Court of Appeal found the bylaws in question invalid for being overly broad. And unlike the Provincial Court in *Koumoudouros*, the Court of Appeal found that the *Westendorp* case stood on all fours with the facts of the two cases. It held that like the Calgary bylaws, the dress-code bylaws of Burlington, and thereafter, Markham, sought to control matters covered by the Criminal law. In fact the “dress code” bylaw passed by the City of Burlington went a step further than the G-string bylaw of Toronto when it required “clear non-transparent outer garments covering (a) in case of a female person, the breasts; and (b) in the case of either a male or female person, the pubic area and buttocks.” *Nordee Investments Ltd.*, 13 D.L.R. 4th at 18. Justice Cory noted that the bylaw had the effect of removing all aspects of lawful excuse as a possible defense. *Id.* at 39. Like Judge Saunders in *Sharlmark*, Justice Cory alluded to the availability of the defense of “lawful excuse” to those in the business of staging legitimate theatrical performances that could include nudity, a possibility that had already been entertained by the Canadian Supreme Court since the 1975 case of *R. v. Verette*, [1978] 85 D.L.R. 3d 1 (Can. Que. C.A.). *Id.* at 37. A few months later, the *Koumoudouros* case reached the Ontario Court of Appeal and was reversed in a very brief (if not perfunctory) ruling, which concluded that “[t]he decision of the Divisional Court in *Sharlmark*, is in our judgment, wrong and must be overruled.” *Koumoudouros*, 24 D.L.R. 4th at 638–40.

¹⁸¹ *Sharlmark*, [1981] 121 D.L.R. 3d at 415.

¹⁸² The “everydayness” of strip clubs is observable not only in popular culture, film, television, and even music videos, but also in other commercial activities and spaces. A Las Vegas restaurant called “Strippers,” for example, features pole dancing (by fully clothed dancers) to a general audience. The famous tourist spot includes a statue of a 50-foot cartoon stripper icon clad in a short skirt and boots and is popular with tourists of all ages. It is worth noting that the 2010 movie, *Burlesque* was merely rated-PG and *Striptease* in 1996 was rated-R.

lines of spatially restructuring labor in the club,¹⁸³ the Supreme Court was perhaps the first to notice an emerging regulatory conundrum; namely that these taverns were spaces which were not initially envisioned in the early criminal statutes on indecency. Justice Estey and Lamer made this interesting observation in the *Rio* case:

Meanwhile, the Parliament of Canada, by a series of provisions in the *Code*, has legislated with respect to nudity (s. 170), indecent acts (s. 169), immoral, indecent or obscene performances in a theatre (s. 163), indecent shows in public (s.152 (2) (b)), and causing a disturbance in or near a public place (s.171). *Some of these provisions relate to specified premises and others are made applicable at large. It may well be that Parliament could legislate with respect to conduct in taverns specifically as in the case of theatres, but there is no such provision in the Code at present and apparently no court has been required to answer this question thus far in our constitutional history.*¹⁸⁴

In fact, two of three commonly cited Supreme Court cases involving strip clubs in Canada were criminal prosecutions for violating the bawdyhouse provisions of the criminal code. A bawdy house is defined as “a place that is (a) kept or occupied, or (b) resorted to by one or more persons for the purpose of prostitution *or the practice of acts of indecency.*”¹⁸⁵ As it is worded, the statute was intended to address prostitution rather than stripping. In the 1993 case of *Tremblay*, the Court drew a legal line between public and private *within* the public space of the club. It held that the acts between consenting adults, the female performer and patron, took place behind closed doors, and that this meant that the acts were not a “blatantly public display.”¹⁸⁶ At the same time, the Court accepted the testimony of a former employee that peepholes were used by management for monitoring and enforcing club rules against touching between

¹⁸³ BRUCKERT, *supra* note 7, at 36–37, 75–76 (noting the various changes of club space, Bruckert notes that while Burlesque theatres ran the spectrum from plush to Spartan, in the 1980s a “Mc Strip” model of clubs arose rendering most clubs similar. While there continue to be key differences among different clubs, some elements such as cubicles and/or private areas for lap dances and private dancing have become increasingly common. Still not all clubs have private rooms or separate areas for lap dancing and part of the reason for this may be that clubs are subject to specific conditions in their individual liquor licenses.).

¹⁸⁴ *Rio Hotel Ltd. v. Liquor Licensing Board for New Brunswick*, [1987] 2 S.C.R. 59 (Can.) (emphasis added).

¹⁸⁵ Canadian Criminal Code, R.S.C. 1985, c. C-46, s. 197 (1)(a)–(b), s. 210 (1)–(4).

¹⁸⁶ *R. v. Tremblay*, [1993] 2 S.C.R. 932, ¶ 67 (Can.) (“[t]hus although the acts took place in a public place, as those words are defined in the Criminal Code, they were not a blatantly public display. Rather the closed room was relatively private with only consenting adults present.”).

performers and clients.¹⁸⁷ Despite the mutuality of the exposure, the court in *Tremblay* fixated on the bodies of women and their actions as the locus of controversy.¹⁸⁸ On one hand, the courts (especially at the Federal level) fulfill an important purpose when expressing their liberality and tolerance for nude performances: it showcases sexual liberty, the hallmark of a modern and Western liberal society. On the other hand, maintaining a focus on performing female bodies as the only “legally controversial” public displays,¹⁸⁹ and a strategy of policing that redefines the boundaries of public and private through the regulation of female bodies remain consistent themes in liberal policing.

The 1990s decisions in *Tremblay*,¹⁹⁰ *Mara East*,¹⁹¹ and *Pelletier*¹⁹² by the Supreme Court of Canada may be considered somewhat iconic of the various spatial experiments undertaken by clubs during the period. In *Tremblay*, the Pussycat club in Montreal offered its clients an exclusive show inside private rooms within the club in which dancer and patron masturbated in each other’s presence.¹⁹³ In the case of *Mara* (1997), Cheaters club in Toronto challenged the boundaries of the city’s no-contact prohibition by offering lap dancing as well as varied forms of intimate contact in the club.¹⁹⁴ Finally, by 1999 in

¹⁸⁷ Research reveals multiple uses of management monitoring practices in strip clubs. Some studies mention that clubs monitor their dancers to keep track of the tips they earn during private dances. *See, e.g.*, R. Danielle Egan, *Eyeing the Scene: The Uses and (RE)uses of Surveillance Cameras in an Exotic Dance Club*, 30 CRITICAL SOC. 299 (2004). Chris Bruckert’s study also discusses complex and constantly changing systems of fines and economic sanctions imposed by clubs on dancers, including a cut from dancers’ earnings and tips, which are characteristic of the industry, alongside monitoring by management. *See* Bruckert, *supra* note 7, at 60–66.

¹⁸⁸ Ruiz-Austria, *Baring, Veiling and the National Identity*, *supra* note 123. A key difference of course is how client and dancer stand opposite each other in the commercial transaction. The client pays and the female dancer/sex worker solicits and accepts payment for her performance.

¹⁸⁹ *Tremblay*, [1993] 2 S.C.R. 932. The majority made a mere passing reference to the normality of male masturbation—citing expert evidence—in relation to the male patrons’ acts of “display,” a fact only noticed by the Justices dissenting from the majority. *Id.* This was squarely raised by dissenting Justice Gonthier: “This case, then, does not concern pornographic material, but rather a live performance of sexual activity, by both the client and the dancer, in a public place.” *Id.* ¶ 76.

¹⁹⁰ *Tremblay*, [1993] 2 S.C.R. at 932.

¹⁹¹ *R. v. Mara and East*, [1997] 2 S.C.R. 630 (Can.).

¹⁹² *R. v. Pelletier*, [1999] 3 S.C.R. 863 (Can.).

¹⁹³ *Tremblay*, [1993] 2 S.C.R. at 932.

¹⁹⁴ *Mara and East*, [1997] 2 S.C.R. at 630.

Pelletier, the club's dancers were performing lap dances in semi-shielded cubicles.¹⁹⁵

A cursory reading of the *Tremblay*, *Mara*, and *Pelletier* cases might give the impression that nudity in strip clubs is no longer a potential legal issue and that physical contact between dancers and patrons is the latest discursive space on which legal battle lines are currently being debated. While this is partly true, that is, broadly speaking on the level of dominant public perception, it may well be reflective of liberal attitudes shared by the police, the crown and even the judiciary. As far as the law and the ruling of the Supreme Court in *Rio Hotel Limited v. New Brunswick* stand, provinces retain the power to regulate and presumably even ban nude shows within the regulatory context of liquor licensing.¹⁹⁶

Within this legal discourse of state regulation and resistance that concentrates around female nudity, exotic dancers' bodies emerge as regulatory objects, but the dancers themselves are not legal subjects.¹⁹⁷ CAFE's version of resistance to municipal licensing, as well as its account of the club owners' emerging practice of upping the risqué content in dancers' performances, was waylaid mostly because none of its claims (which echoed workers' concerns and employment standards) properly fit the regulatory framework. In turn, CAFE's bid, along with other feminist attempts to fall back on the same regulatory logic in hopes of representing dancers' interests (when they lobbied in favor of the G-string bylaw and later the no-contact prohibition), cost both the leadership and dancers' associations considerable losses to their credibility.¹⁹⁸

¹⁹⁵ *Pelletier*, [1999] 3 S.C.R. at 863.

¹⁹⁶ *Rio Hotel Ltd. v. Liquor Licensing Board for New Brunswick*, [1987] 2 S.C.R. 59 (Can.).

¹⁹⁷ *Id.* The treatment of dancers as regulatory objects rather than subjects also emerges in key Supreme Court of Canada decisions on lap dancing. In the case of *R v. Mara and East*, for example, the court's definition of "social harm" to women (in the abstract), did not include the actual women dancers. [1997] 2 S.C.R. 630 (Can.). The court distinguished between the risk dancers were exposed to (e.g., sexually transmitted diseases) and the social harm it defined as degradation and dehumanization central to its finding of indecency. *Id.*

¹⁹⁸ Bouclin, *supra* note 66, at 7; see also Amber Cooke, *Stripping: Who Calls the Tune?*, in *GOOD GIRLS/BAD GIRLS: SEX TRADE WORKERS AND FEMINISTS FACE TO FACE* (Laurie Bell ed., 1987).

B. Layers of Policing and Hyper-regulation

The Supreme Court of Canada's decision in *Rio Hotel Limited v. New Brunswick*¹⁹⁹ came just two years after the Ontario Court of Appeal ruling that in effect struck down the city's prohibition on nudity in clubs. In this case, the Supreme Court upheld the validity of conditions imposed on a strip club, this time by the New Brunswick Liquor License Board (NBLLB), on holders of valid entertainment licenses.²⁰⁰ The license terms included, among other conditions, that "the board will not approve nude entertainment or other types of live entertainment that in any form or manner exposes to public view the genital areas or buttocks of a male performer or the genital areas or buttocks or breasts of a female performer."²⁰¹ In *obiter dicta* Justice Estey of the Supreme Court noted in a separate minority opinion with Justice Lamer that the Court of Appeal for Ontario was in error in the cases of *Koumoudouros*, *Sherwood*, and *Nordee*.²⁰² The conditions against nudity were similar to the earlier bylaws issued in the Greater Toronto Areas of Burlington and Markham, but this time they were incorporated into the liquor license as terms and conditions for holding a liquor license. Liquor licensing is an additional, and extremely dense layer of Provincial regulation, but it is still very much in keeping with the features of liberal policing.

Within Canadian jurisprudence, the "licensing justification" is a principle often utilized by the Supreme Court of Canada as a rationale for differentiating between regulatory and pure-crime offenses.²⁰³ This principle provides that the person who chooses to participate in a regulated activity accepts the responsibilities which attach to the regulated activity and that "the protection awarded through regulation comes at a price of reduced liberties."²⁰⁴ Indeed, despite their initial resistance when the state, through the Provinces, turned to licensing strip-shows as adult entertainment, adult entertainment establishment

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ In addition to an apparent 'prohibition,' the terms of the liquor license in issue also included detailed instructions about the organization of club space where nude entertainment is featured.

²⁰² *Rio Hotel*, [1987] 2 S.C.R. at 59.

²⁰³ Marie Comiskey, *Justice Peter de Ceteret de Cory and his Charter Approach to Regulatory Offenses*, 65 U. TORONTO FAC. L. REV. 77 (2007); see also Mariana Valverde, *Police Science: British Style Pub Licensing and Knowledges of Urban Disorder*, 32 ECON. & SOC'Y 234, 234–52 (2003) (Valverde notes that licensing equips police with liberal tools, as such the regulatory framework is still policing, although of a liberal sort.).

²⁰⁴ Comiskey, *supra* note 187, at 85.

owners, particularly strip club operators, continue to challenge and contest the licensing authority of the provinces over their businesses.²⁰⁵ While both owners/operators of strip clubs and the exotic dancers are required to secure licenses from the City of Toronto,²⁰⁶ as the results of implementing the no-contact policy demonstrates, they do stand on very different sides of the risk management framework as far as the adult entertainment business is concerned.²⁰⁷ Despite the variety of employment and contractual arrangements, exotic dancers are subject to the control of club owners through a variety of house rules often accompanied by a system of fines.²⁰⁸ At this point, it is worth noting that the interests of establishment owners and exotic dancers will not necessarily always be at odds. Obviously, a club's popularity can enhance earning opportunities for its dancers.²⁰⁹ Sometimes and particularly when it serves their interests, clubs also provide dancers with legal counsel.²¹⁰

Recently club owners have started campaigning for the repeal of the bylaws against physical contact, as well as calling for reforms in the city's licensing requirements.²¹¹ This time, club owners are pointing out that the regulations perpetuate a stigma, which exotic dancers endure.²¹² At a Toronto City Hall Council Committee meeting wherein a dancer performed a pole dance before Councilors, Tim Lambrinos, the executive director of the Adult Entertainment Association of Canada (AEAC) even noted that "they [dancers] get abused by the bylaw officers and sometimes police, because the

²⁰⁵ Apart from filing cases to challenge Municipal bylaws and Provincial authority, the Adult Entertainment Association of Canada (AEAC) also conducts campaigns to lobby for less regulation. Some of the more recent issues that have been raised by the AEAC include the unofficial suspension of the temporary visa for exotic dancers and more recently, the licensing requirement for dancers themselves. See, e.g., *Letter from Tim Lambrinos, supra* note 89.

²⁰⁶ Not all Municipalities require licenses for exotic dancers although there is always news about various Municipal and City Councils expressing their interest in adopting a similar licensing scheme for exotic dancers (e.g., Mississauga, located in the Greater Toronto area).

²⁰⁷ BRUCKERT, *supra* note 7, at 53.

²⁰⁸ *Id.* at 60–66.

²⁰⁹ The same holds true for other types of commercial sex work such as prostitution. For the same reason, penal law directed at criminalizing clients adversely affects the incomes of people in prostitution. Such an approach has also been linked to driving prostitution further underground.

²¹⁰ *Ontario Adult Entm't Bar Ass'n v. Metro. Toronto*, [1997] 35 O.R. 3d 161 (Can. Ont. C.A.).

²¹¹ David Rider, *A city hall pole (not poll) gets noticed*, TORONTO STAR, Mar. 30, 2012, at 1.

²¹² *Id.*

current laws are vague and are allowing women to be mistakenly called into the court.”²¹³ While such a high level of concern for their workers’ welfare may not have exactly been a strong card for this industry in the past, it is not entirely implausible for the clubs to express an interest in improving the dancers’ working conditions.²¹⁴ In the context of newly adopted immigration restrictions that may have an impact on the available workforce, their efforts may also be seen as a pragmatic business move that may help clubs attract more Canadian workers.²¹⁵

C. In between Politics and Law: Migrant Women in/out of the Mix

While subject to additional regulation as businesses, strip clubs as employers have been left considerably freer to adopt a variety of strategies to reduce, and in some cases eliminate the costs of dancers’ labor altogether. Facilitated initially by the “displacement” of strippers’ labor that occurred with the introduction of legal amendments in liquor licensing and by the legal classification of dancers’ labor as ancillary to their business by the ONLRB, (a view reiterated by the Supreme Court of Canada), establishment owners have pursued profit schemes echoing the tactics of many businesses in the period of deindustrialization e.g., labor flexibility, the spatial restructuring of labor and diversification often with paradoxical results, one of them being that whatever the actual business (e.g., restaurant, bar or sports pub with strip shows), female nudity and the promise of it has now more than ever become the undeniable draw of this class of entertainment, which in turn requires many established strip clubs to continuously recruit more dancers. Arguably, without the proliferation of scantily clad and naked female bodies on the floor, a strip club is just another pub with too much lighting equipment and superfluous cubicle spaces. Likewise, the shifting modes of pay, coupled with policing strategies like the no-contact prohibition, further conflate the rewards of the job with the assumption of risks, a

²¹³ *Id.*

²¹⁴ *Supra* notes 120–26 and accompanying discussion.

²¹⁵ Club owners have also made statements about recruiting international students in anticipation of a shortage of workers. While the purpose of the statement appears to be an attempt to force the government to rethink its ban, the move also openly acknowledges an available loophole. International students with open work visas can work part-time. Anti-trafficking proponents of prohibition have called for even more absolute applications of the ban to include international students. Bill Curry, *Ottawa Brings Down Curtains on Foreign Strippers*, *Globe and Mail*, July 4, 2012, available at <http://www.theglobeandmail.com/news/politics/ottawa-brings-down-curtain-on-foreign-strippers/article4388100>.

risk not seen elsewhere except the financial markets, albeit with far from comparable rates of reward or risk,²¹⁶ and heighten the vulnerability of those working in the margins. As LACEV notes, if the concern with lap dancing is to prevent harm, especially to women, the current regulatory schemes have been anything but effective.²¹⁷

Like other businesses dependent on a transient labor force, strip clubs in Toronto increasingly rely on the labor of temporary foreign workers to boost the bottom line. But while club practices vary across the board (not all clubs' contractual terms qualify as criminal, let alone as exploitative from the perspective of dancers), strategies which either target migrant sex workers as victims,²¹⁸ or worse, those that purport to bar or limit the entry of migrant women interested in employment in Toronto's clubs,²¹⁹ fail to consider the punitive effects of such police-led and anti-trafficking approaches on the women themselves. And while they do not impose additional penal provisions *per se*, the latest round of immigration policy changes certainly have serious consequences for those who face losing their legal work status.²²⁰ Even the AEAC, in seeking to distance itself from the seamier elements of the industry, warns that Citizenship and Immigration Canada's (CIC) "blockade of foreign exotic dance entertainers has . . . produced a phenomenon that has inadvertently coerced a creation of a 'loophole' pathway that will allow a prospective dancer to work in Canada without a temporary work visa (i.e. a Student Visa)."²²¹

William Rountree observes that "(i)n addition to shifts in law and policy, the evolution of sexual commerce was also intimately tied to transformations in the spatial contours of life in industrializing cities."²²² The AEAC estimates that Canadians make twenty-three

²¹⁶ Dancers, after all, take on risks themselves unlike most traders or financial institutions that transfer risks to investors and the public sector. For an example of the insight regarding the conflation of rewards with risk-taking in Finance, see Raghuram G. Rajan, *Has Financial Development Made the World Riskier?* (2005), <http://www.kc.frb.org/publicat/sympos/2005/pdf/rajan2005.pdf>.

²¹⁷ LACEV, *supra* note 11.

²¹⁸ TORONTO NETWORK AGAINST TRAFFICKING IN WOMEN (TNTW), *supra* note 18.

²¹⁹ An Act to Amend the Constitution Act, 1867, C-56 (Can.) (an "Omnibus Crime Bill" filed by the ruling Conservative Party of Canada contains a provision which proposes to make it possible to deny working permits to people who are "vulnerable to abuse or exploitation, including exotic dancers, low-skilled laborers and victims of human trafficking.").

²²⁰ Curry, *supra* note 215.

²²¹ *Letter from Tim Lambrinos*, *supra* note 89.

²²² William Rountree, *Desire, Demand and the Commerce in Sex*, in *REGULATING SEX: THE POLITCS OF INTIMACY AND IDENTITY* 19, 25 (Elizabeth Bernstein ed., 2004).

million visits to adult entertainment establishments annually.²²³ In fact, scholars note that the terminology shift heralded by the legal regulation of “adult entertainment” was itself partly an acknowledgement that sex businesses occupy a central place in the leisure economy of many Western cities.²²⁴

Penelope Saunders also notes that:

For the overwhelming majority of female migrants, it is not brute force, pure deceit, or random abduction that propels them to engage in sexual labor, but rather the desire for economic, social, and geographic mobility, the potentially pleasurable aspects of being an object of affection and desire, and the allure of flexible schedules and instant cash.²²⁵

Instead of taking the presence of migrant women exotic dancers in Canada and the reliance on a migrant labor workforce in Toronto’s commercial sex sector as an emerging complication to liberal inclusion in Canada and an occasion for moral panics, approaching the employment of migrant exotic dancers in Toronto as an already existing “scheme of human association” or “social existence”²²⁶ with an element of pragmatism²²⁷ helps to counter the hypocrisy around recurrent moral panics which invariably lead to additional restrictions being imposed on persons in sex work, and more particularly on lower income or foreign sex workers and/or their clients.²²⁸ But while taking the pro-sex work position seriously requires an element of pragmatism, it should also include an acknowledgement of the limitations and contradictions that arise from it. We should take heed not to fall into what Sophie Day calls “an extraordinary valorization of what looks like precarious and limited autonomy.”²²⁹ Hierarchy in

²²³ Letter from Tim Lambrinos, *supra* note 89.

²²⁴ Rountree, *supra* note 200. Deborah Brock notes that in 1977, the trend towards the regulation of “adult entertainment” was also challenged for opening the gates to corrupting influences. See Brock, *supra* note 56, at 33–34.

²²⁵ Penelope Saunders, *From Identity to Acronym*, in *REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY* 167, 184 (Elizabeth Bernstein & Laure Schaffner eds., 2005).

²²⁶ The terminology is borrowed from Roberto Unger, *The Critical legal Studies Movement*, 96 *HARV. L. REV.* 563 (1983).

²²⁷ I wish to distinguish this pragmatism from what Elizabeth Bernstein has called the “naïve contractarianism and postmodern pragmatism” of libertarians like Camille Paglia. See Elizabeth Bernstein, *What’s Wrong with Prostitution? What’s Right with Sex Work? Comparing Markets in Female Sexual Labor*, 10 *HASTINGS WOMEN’S L.J.* 91, 97–98 (1999). In adopting a pragmatic approach, I do not mean to idealize the market as a zone of complete liberty.

²²⁸ The often-touted Swedish Model, which criminalizes johns, has been criticized for driving sex work underground. See Scoular, *supra* note 25.

²²⁹ Day, *supra* note 40, at 87.

status as well as stratification in the types of work, conditions, and pay certainly prevails among workers in both the adult entertainment industry and commercial sex work, but this is not necessarily all conditioned by markets or patriarchal culture. A spatial account of law demonstrates that the relationship between regulations and their purported regulatory objectives can be quite complex. In 1981, Jeffrey Weeks lamented that “theoretical insights to explain the relationship between capitalism and sexuality have shown a notable paucity of insight.”²³⁰ This is not to suggest, however, that capitalism or neoliberalism has had a uniform effect on sexual relations, let alone on sexual regulation. As Weeks observes, “(c)apitalism did not create a personality type to fit its needs, much less a sexual morality that was essential to the success of capital accumulation.”²³¹

He notes that the articulation between sexual mores and capitalism occurs through complex mediations through moral agencies, political interventions, and diverse social practices whose histories still need to be uncovered.²³² Unfortunately advocates of rescue-minded missions intent on uniformly categorizing migrant women working in adult entertainment or those engaging in sex work as trafficking victims, only make things worse by relying on legal strategies which reinforce state (and police) power over those who are already lacking in power.²³³ The revival of prohibitionist approaches using immigration law and the withdrawal of work legal status discursively positions foreign sex workers outside the ambit of legal subjecthood and casts a pall over race-integrated cultures of public sex.²³⁴ Curiously, the measures also end up introducing a legally inspired cultural taboo on sexual dealings of a commercial nature between Canadians and Non-Canadians.²³⁵

²³⁰ See JEFFREY WEEKS, *SEX, POLITICS & SOCIETY: THE REGULATION OF SEXUALITY SINCE 1800* 22 (2d ed. 1981).

²³¹ *Id.* at 22.

²³² *Id.*

²³³ Some scholars observe that heightened police control and surveillance is part of the trend toward the general restructuring of welfare states away from social services. See for example Paul Chevigny, Foreword to *ZERO TOLERANCE: A QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY* (Andrea McArdle & Tanya Erzen eds., 2001).

²³⁴ ELIZABETH BERNSTEIN, *TEMPORARILY YOURS: INTIMACY, AUTHENTICITY AND THE COMMERCE OF SEX* 68–69 (2007). Bernstein also links the “politics of privatization” or the relocation of commercial sexual encounters with broader trends such as the gentrification of neighborhoods.

²³⁵ Feminists have noted how the discourse of anti-trafficking policies can reinforce racism. MOUSHOULA CAPOUS DESYLLAS, *A Critique of the Global Trafficking Discourse and U.S. Policy*, 34 *J. SOC. & SOC. WELFARE* 57 (2007).

Over the past thirty years, feminist scholars²³⁶ have made key observations about the transformations around the immaterial aspects of domestic labor, including the sale and purchase of intimacy and sex in the context of the global economy.²³⁷ The types of services offered in Toronto's clubs today, as well as the workers that the industry and its patrons rely on to provide them, present a particularly compelling case for examining the blurred boundaries between immaterial and productive labor in the postindustrial setting, not only because the type of work and services offered in strip clubs demonstrates the comingling of intimacy and commerce in a novel albeit not necessarily separate form from prostitution, but also because the exchange is constituted by and in turn constitutive of wider global economic transformations. Elizabeth Bernstein aptly describes these changes as the "spatial, social and emotional privatization of sexual labor."²³⁸ As regulatory lines are re-drawn, even club owners now decry the harmful effects of the ban on foreign exotic dancers but also note its impact on the industry's labor pool.²³⁹ Ironically, a labor shortfall, if it does occur, may well open up opportunities for negotiating better working conditions by the local work force.²⁴⁰

Indeed the continuing importance of collective forms of workers action cannot be discounted, but approaches which fall back on legitimating labor and social protection for sex workers solely through collective bargaining processes, without questioning the

²³⁶ See, e.g., ARLIE HOSCHILD & BARBARA EHRENREICH, *GLOBAL WOMAN: NANNIES, MAIDS AND SEX WORKERS IN THE NEW ECONOMY* (2004); Nicole Constable, *The Commodification of Intimacy: Marriage, Sex, and Reproductive Labour*, 38 ANN. REV. ANTHROPOLOGY 49, 49–64 (2009).

²³⁷ Leopoldina Fortunati, *Immaterial Labor and its Machinization*, 7 EPHEMERA 139, 146 (2007). (As Leopoldina Fortunati points out, today the analysis of domestic labor and its immaterial elements as productive labor that creates surplus value and not merely circulates money is widely shared. Fortunati notes that Marx, in *Grundrisse* considered the work of prostitutes, for example, as "mere consumption of income" or in other words, the simple circulation of money and not the circulation of capital. She adds that the assumption was that time, love, affection in the domestic sphere were more or less activities naturally congenial to human beings. In orthodox Marxist terms, the labor of sex workers as well as service industry workers in general, fall into the category of "immaterial labor," which is distinguished from "productive labor" or the kind of labor that produces capital.)

²³⁸ BERNSTEIN, *supra* note 234.

²³⁹ Curry, *supra* note 215.

²⁴⁰ Depending on the likely impact of the policies on the size of the industry's labor pool, club owners might be in a weaker bargaining position than usual.

underlying divisions and hierarchies²⁴¹ often built into such claims, can end up reinforcing those divisions.

²⁴¹ Not the least of these is national exceptionalism. *See* Arthurs, *supra* note 27, at 23. For a study that looks closely into international organizing efforts, see GALL, *supra* note 2.

