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Strip Clubs and the Legal Everyday:
Sex Work Studies and the Law

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**Abstract Cover Page**

Strip Clubs and the Legal Everyday: Sex Work Studies and the Law

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An abstract of
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2016

## Abstract

Strip Clubs and the Legal Everyday: Sex Work Studies and the Law

By Nicole Karalekas

The relationship between sex work and law has historically been framed through a debate over abolition or decriminalization. While this debate seems to hinge on a fundamental disagreement about the harms of sex work and the role that law should play in mitigating such harms, this dissertation argues that both sides share an implicit understanding of the power and consequences of law. That is, both sides focus on criminal law. As a result, this debate depicts law as a punitive force that has direct and targeted effects on the sex industry. I argue that this is an impoverished conception of law that obscures broader accounts of its power and consequence for the sex industry.

*Strip Clubs and the Legal Everyday: Sex Work Studies and the Law* develops a more complex account of the relationship between law and the sex industry by shifting focus away from criminal law. Through an exploration of the commercial laws regulating American strip clubs, including laws proscribing bodily contact, zoning laws, and labor and employment laws, the dissertation explores how law shapes and is shaped by everyday practices of meaning making. What emerges is a perspective on law as a field of action that constructs and delimits everyday experiences, rather than a punitive force that acts against a particular set of behaviors. I call this perspective "the legal everyday." Using this perspective as a lens, I argue that strip clubs complicate the oversimplified perspective on law that the abolition versus decriminalization paradigm has engendered by bringing regulatory and commercial laws into the center of analysis. In doing so, the dissertation illustrates previously neglected consequences, pitfalls, and possibilities that law holds for the sex industry.

**Cover Page**

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# Strip Clubs and the Legal Everyday: An Introduction

## "The world's most feminist country"

In March 2010, the small island nation of Iceland made international news when it banned strip clubs. The law states: "It is not permissible for restaurants [which include bars] to offer nude shows, promote or profit in any way from the nudity of staff or others present."[1] Johanna Sigurdardottir, Iceland's prime minister, supported the ban, stating: "The Nordic countries are leading the way on women's equality as equal citizens rather than commodities for sale."[2] Kolbrun Halldorsdottir, the politician who introduced the bill, echoed: "It is not acceptable that women or people in general are a product to be sold."[3] This support of the law was thus based on a critique of bodily commodification. By eliminating bodily commodification, supporters of the ban argued, the law reduced women's inequality and sexual harm. Based on this idea, the law was popularly backed by Iceland's citizens, and reflected a broader trend among Nordic feminists supporting the abolition of sex work.[4]

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[1] Tomas Gabriel Benjamin, "Twenty Thousand ISK Gets You An Illegal Strip Dance,"

[2] Tracy Clark-Flory, "Iceland's Stripping Ban," *Salon,* May 26, 2010. http://www.salon.com/2010/03/26/iceland_bans_stripping_strip_clubs/

[3] Ibid.

[4] The "Nordic Model" attempts to abolish prostitution by criminalizing the purchase of sex or criminalizes business owners and pimps. This model views sex workers as victims, rather than criminals. See Equality Now, "What is the Nordic Model?" August 22, 2015. http://www.equalitynow.org/sites/default/files/Nordic_Model_EN.pdf

Because strip clubs are rarely outlawed in this way, the international press declared Iceland to be "the world's most feminist country."[5] Julie Bindle, a radical feminist who writes for *The Guardian*, argued that the law was uniquely feminist because, by focusing on the critique of bodily commodification, it avoided religious discourses condemning non-marital sex.[6] Bindle's invocation of religion gestures to the notorious alliance that Catharine MacKinnon, the American radical feminist, made with the Religious Right in order to muster support for Minneapolis' anti-pornography ordinance in the early 1980s.[7] In the process, Bindel suggests an implicit relationship between the law's progressivism and its secularism: By disconnecting feminism from the sexual moralism often associated with religion, the law was grounded in a supposedly pure form of feminism, unburdened from sexual prudery.

Despite this pretense of feminist purity, several prominent bloggers criticized the version of feminism found in the strip club ban. Some suggested the law would lead strippers to lose their jobs and therefore failed to account for sex work as a legitimate form of work.[8]

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[5] Julie Bindel, "Iceland: The World's Most Feminist Country," *The Guardian,* March 25, 2010, http://www.theguardian.com/lifeandstyle/2010/mar/25/iceland-most-feminist-country.
[6] Ibid.

[7] Lisa Duggan, "Censorship in the Name of Feminism" in *Sex Wars: Sexual Dissent and Political Culture*, ed. Lisa Duggan and Nan Hunter (New York: Routledge, 2006), 30. While this alliance is widely referenced, Carolyn Bronstein has recently challenged the idea that MacKinnon knowingly worked with the Right to pass the anti-pornography ordinances. See Carolyn Bronstein. *Battling Pornography: The American Feminist Anti-Pornography Movement 1976-1986*. (New York: Cambridge University Press, 2011), 325.

[8] Miriam Zoila Perez, "Iceland Bans Strip Clubs: A Victory for Feminism?" *Feministing* (blog), March 29, 2010. http://feministing.com/2010/03/29/iceland-bans-strip-clubs-a-

Others challenged the ban through the liberal rhetoric of choice, suggesting that women should be free to voluntarily take off their clothes.[9] Thus, critics were concerned that, despite its feminist appearance, the law might potentially harm strippers by restricting their financial autonomy and sexual freedom.

Feminist commentators were thus divided between those supporting the ban and those worried about its potential adverse consequences for strippers. In this way, the coverage took a familiar shape for feminist debates over sex work: abolition versus decriminalization.[10] On one side, feminists favoring abolition argued that the state should play an active role in protecting women from the harms of stripping.[11] Such feminists

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victory-for-feminism/; Jill Filipovic, "Iceland Bans Strip Clubs," *Feministe* (blog), March 26, 2010. http://www.feministe.us/blog/archives/2010/03/26/iceland-bans-strip-clubs/

[9] Clark-Foley "Iceland's Stripping Ban."

[10] For a general overview of these debates see: Ronald Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business*. (New York: NYU Press, 2012); Ronald Weitzer, ed. *Sex for Sale: Prostitution, Pornography, and the Sex Industry*, (New York: Routledge, 2009); Wendy Chapkis, *Live Sex Acts: Women Performing Erotic Labor*, (New York: Routledge, 2013). This debate over decriminalization has recently flared again. In August of 2015, Amnesty International's delegate members from over 60 countries voted to support the decriminalization of all aspects of consensual sex work, including buying sex and brothel ownership (see "Global Movement Votes to Adopt Policy to Protect Human Rights of Sex Workers" August 11, 2015 https://www.amnesty.org/en/latest/news/2015/08/global-movement-votes-to-adopt-policy-to-protect-human-rights-of-sex-workers/." As with Iceland's strip club law, the media framed the debate over AI's policy through a binary opposition between decriminalization versus abolition (see Laura María Agustín "Research is Not Activism: And Whose Interests are at Stake, Anyway" *The Naked Anthropologist* August 31, 2015 http://www.lauraagustin.com/research-is-not-activism-and-whose-interests-are-at-stake-anyway).

[11] For abolitionist perspectives see: Melissa Farley, H Barkan, "Prostitution, Violence, and Posttraumatic Stress Disorder," *Women & Health* 27, issue 2 (1998): 37-49; Catharine MacKinnon, "Prostitution and Civil Rights," *Michigan Journal of Gender & Law,* 1 (1993):13-31; Sheila Jeffreys, *The Industrial Vagina: The Political Economy of the Global Sex Trade.* (New York: Routledge, 2009).

hailed the strip club law as a victory for women's equal rights and the mitigation of sexual harm. On the other—decriminalizationist—side, feminists worried that the criminal dimensions of the law expanded state power over strippers' sexual and financial freedom and could potentially drive the industry underground.[12] In this way, the coverage of Iceland's law framed strip clubs through an abolitionist versus decriminalization paradigm.

As much as the abolition versus decriminalization paradigm focuses on sex work, it also contains implicit assumptions about the power of law and what role, if any, law should play in making feminist political change. For example, in this case, supporters of Iceland's strip club ban not only wanted to abolish strip clubs, but also believed that law was capable of accomplishing this task. They viewed law as a tool for bringing about a predetermined feminist effect: the law would protect women from the potential harms of the strip club industry by effectively eliminating it. Critics of the law were less convinced of the feminist nature of this effect. For these critics, the law itself might actually harm strippers by criminalizing their work; implicit in this contention is an understanding that ostensibly feminist laws can in fact advance anti-feminist aims. Thus, the debate over Iceland's strip club ban fit into already circulating feminist contentions over the role that law, especially in its criminal and carceral mode, should play in enacting social or political feminist change.

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[12] Matthew Yglesias. "Iceland Bans Strip Clubs," *Thinkprogress*. March 29, 2010. http://thinkprogress.org/yglesias/2010/03/29/196688/iceland-bans-strip-clubs/ Yglesias suggests that, in the case of Iceland, the fear of the industry going underground is overblown. Given the small, tight knit population of Iceland, Yglesias points out that, officials would be able to find out about any such underground club.

As with their views on the sex industry, abolitionists and decriminalizationalists seem to disagree over the role that law should play in enacting such change. Abolitionists generally support using the law to eliminate the industry, while decriminalizationists are wary of law's effects. But, in truth, both sides share an implicit conception of the power of law: they both agree that the law operates by prohibiting or permitting targeted behavior. Law, according to abolitionists, eliminates a particular behavior through prohibition, while deciminalizationists argue such laws push the industry underground. As an alternative, decriminalizationists suggest that law should permit prostitution by lifting prohibitive laws. Both sides thus understand law to have targeted effects on particular behaviors. Despite their opposed views on the sex industry, both sides agree that law functions as a punitive and repressive force, with targeted effects.

One reason for this shared perspective is that both sides focus on criminal law. For those favoring abolition, the force of criminal law is a good thing; it can be harnessed in order to do away with an industry that—these thinkers believe—contributes to sexual harm and violence. On the other side, among those favoring decriminalization, criminal law constricts behavior by limiting the freedom of sex workers and their patrons. Indeed, proponents of decriminalization understand criminalization itself to contribute to the stigma and harm that sex workers face.[13] This shared focus on criminal law leads both abolitionists and decriminalizationists to view law as a punitive and repressive force that enacts power through its presence or absence.

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[13] For perspectives on decriminalization see: Weitzer, *Legalizing Prostitution*; Carlin Meyer, "Decriminalizing Prostitution: Liberation or Dehumanization" *Cardozo Women's Law Journal*, 1 (1993-1994): 105-120.

The focus on criminal law has recently been echoed and sharpened in feminist debates over sex trafficking. Sex work scholar Elizabeth Bernstein suggests that by calling for tougher criminal laws against sex trafficking, feminist anti-trafficking discourse has taken a "carceral" turn where the "crime frame has prevailed against competing models of social justice."[14] In other words, feminists working to end sex trafficking have recently turned to law—in its criminal and punishing mode—to enact justice. Bernstein is not only concerned that this carceral turn shifts the focus away from seeking social justice by other means, but also concerned that the intersection between feminist anti-trafficking discourse and right wing perspectives on sex work bolster and empower the state's penal power.[15]

In this way, Bernstein builds on the work of Janet Halley, Wendy Brown, Kristin Bumiller, and Aya Gruber among others who critique feminist calls for the state to punish sexual violence through increased criminal surveillance and punishment.[16] Like Bernstein, these critics are concerned that feminist support for carcerality indemnifies that state and criminal punishment from critique. That is, by engaging criminal law in the name of feminism, carceral feminists fail to recognize the negative consequences of criminal punishment. This is especially problematic given the rise of mass incarceration—especially for people of color and poor people—since the 1970s and its

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[14] Elizabeth Bernstein, "Carceral Politics as Gender Justice? The 'Traffic in Women' and Neoliberal Circuits of Crime, Sex, and Rights." *Theory and Society* 41, no. 3 (2012): 235.

[15] Ibid.

[16] Ibid.

subsequent privatization under neoliberal capitalism.[17] Privatized methods of surveillance and incarceration have led to new modes of racial and class domination, including gendered and sexualized modalities of social control, which ought to be central feminist concerns. By seeking social and political justice through increased criminal laws targeting sexual violence, carceral feminists fail to take the racist, sexist, and often violent consequences of mass incarceration and its privatization seriously.

To be sure, critics of carceral feminism have posed an important challenge to those feminists who carelessly support criminal laws that punish sex trafficking. Nevertheless, by focusing on carcerality in anti-trafficking discourse, these critics inadvertently extend the focus on criminal law that has governed debates over sex work since the emergence of the abolition versus decriminalization paradigm. Consequently, like their predecessors, these critics neglect the broader role that law—especially commercial or regulatory law—plays in shaping sex work and the sex industry. By failing to offer a broader account of law, critics of carceral feminism not only fail to address other laws governing the industry, but also extend a singular perspective on the power of law. That is, they extend a perspective on law—latent in criminal law—as a punitive force that exerts control by prohibiting or permitting behavior. In order to fully understand the relationship between law and sex work, scholars must take a broader account of the power of law beyond the parameters of the abolition versus decriminalization paradigm. Taking a broader account of law and its power will not only offer a more comprehensive account of the *kinds* of laws that are at play in the sex industry, but will also offer a more complex account of the power of law altogether. This

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[17] Ibid.

more complex account of law's power will in turn provide a more complex perspective on all forms of law that govern the sex industry, *including criminal law*. However, in order to provide this new perspective on the power of law and its relationship to the industry, scholars must reframe the debate around law and sex work outside of both the abolition versus decriminalization paradigm and carceral feminism.

This dissertation seeks to better understand the non-criminal and regulatory dimensions of law's relationship to the sex industry through such a reframing.[18] To do this, I focus on the legal regulation of stripping and strip clubs in the United States. Unlike Iceland, the United States does not criminalize stripping. Rather, the legal regulation of stripping in the United States takes place through a number of commercial laws, including zoning, taxation, licensing, and labor law. This network of commercial laws that regulate American strip clubs provides a rich area to analyze the sex industry outside of the narrow, criminal focus of the abolition versus decriminalization paradigm by bringing the non-criminal and regulatory aspects of law into the center of analysis.

This analysis will not only highlight non-criminal dimensions of law, but also bring new perspectives on the power and scope of law to bear on the sex industry. These perspectives will open up a broader discussion of the power, consequences, and potential of law and its relationship to making feminist political change in the industry. In order to develop this perspective on law, I draw from two scholarly discussions in legal theory.

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[18] A brief note on terminology: Throughout the dissertation I draw on Laura María Agustín's definition of the "sex industry" as an umbrella term for "all commercial goods and services of an erotic and sexual kind." See Laura María Agustín, "The Cultural Study of Commercial Sex" *Sexualities* 8, no 5 (2005): 618-631. I also use the word "sex worker" as an umbrella term. It is not limited to a prostitute. Instead, sex worker refers to any person who makes or sells sexual goods and services—including, and especially for my purposes here, erotic dance.

First, I draw on law and society's discussion of law and everyday practices of meaning making. Second, I draw on Foucauldian accounts of law's power in modernity. Finally, because the French social theorist Michel de Certeau theorizes practices of everyday life through a Foucauldian perspective on power, I use his work to stitch these two perspectives on law together. What emerges is a perspective on the power, consequences, and potential of law as a complex force shaping practices of everyday life. I call this perspective the "legal everyday."

Using this perspective on law to analyze the American strip club industry moves the discussion of the relationship between law and the sex industry beyond the impoverished perspective on law that undergirds the abolition versus decriminalization paradigm. Before I explore the alternative perspective that the "legal everyday" offers, I will first examine the legal logic underpinning the abolition versus decriminalization paradigm in greater detail.

**Abolition/Decriminalization: An Impoverished Account of Law**

As I discussed above, the abolition versus decriminalization paradigm typically frames debates over the sex industry through criminal law. This obscures other ways that law shapes and regulates the sex industry. However, even accounts of the legal regulation of the sex industry that focus on non-criminal areas of law share the paradigm's more implicit assumptions about the power of law. That is, they share the perspective that law operates through prohibiting or permitting certain behaviors. For example, in the United States, strip clubs are legal and regulated by a variety of commercial laws. These laws are attenuated by the partial protections that strippers are afforded under the First Amendment. Nevertheless, a group of feminist scholars of strip clubs—who I discuss in

more detail throughout the dissertation—argue that expanding First Amendment rights will protect strippers' sexual expression.[19] Consequently, even though these scholars are focused on commercial laws, they still imagine these laws to exert a repressive force on strippers' expression. In this way, they understand strippers' expression to be disentangled from law; law can either protect it or prohibit it. Thus, the abolition versus decriminalization paradigm's assumptions about the power of law as a punitive force also colors how scholars think about the power of non-criminal laws, especially in relation to the sex industry.

The dominance of this perspective can be traced from the discussions of law that surrounded the feminist anti-pornography movement in the 1980s, which were also shaped by a paradigm of abolition and decriminalization. At that time, American radical feminists—who advocated abolishing pornography—distinguished themselves by making a more pronounced turn toward engaging with law.[20] Together with Andrea Dworkin, Catharine MacKinnon drafted anti-pornography ordinances for Minneapolis and Indianapolis.[21] As an experienced attorney, MacKinnon knew that the ordinances needed

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[19] For feminist support of expanded First Amendment rights for strippers see: Amy M. Adler, "Girls! Girls! Girls!: The Supreme Court Confronts the G-String" *New York University Law Review* 80 no. 600 (January 2005); Judith Lynne Hanna, *Naked Truth: Strip Clubs, Democracy and a Christian Right*. (Austin: University of Texas Press, 2012); Brenda Foley, "Naked Politics: Erie, PA v the Kandyland Club" *NWSA Journal,* 14 No. 2 (Summer 2002): 1-17. I give a more comprehensive and critical perspective on such perspectives in chapter 3 of this dissertation.

[20] Bronstein, *Battling Pornography*, 323. Bronstein argues that the anti-pornography movement did not become explicitly legal until MacKinnon and Dworkin turned to the courts in the early 1980s.

[21] Lisa Duggan, Nan D. Hunter, and Carole S. Vance, "False Promises: Feminist Antipornography Legislation," in *Sex Wars: Sexual Dissent and Political Culture*, ed. Lisa Duggan and Nan Hunter (New York: Routledge, 2006), 43. For the case overturning

to pass the constitutional challenge posed by the First Amendment. Therefore, instead of calling for direct state censorship of pornography, her ordinance invited individual women to sue pornographers for personal harm under tort law.[22] In this way, MacKinnon's legal practice expanded beyond the focus on criminal law that typically underpins abolitionist perspectives.

Despite this, feminist critics of MacKinnon—and indeed, even MacKinnon herself—continued to read this engagement with civil law through criminal law's logic of prohibition. Sex positive feminists did this by accusing MacKinnon of censorship. That is, just as the abolition versus decriminalization paradigm intimates, they understood MacKinnon's tort approach as outlawing pornography through the direct application of a censoring force. For example, Lisa Duggan, a founding, sex positive member of the Feminist Anti-Censorship Taskforce (FACT), wrote:

> In fact, Dworkin and MacKinnon argue that pornography is at the root of virtually every form of exploitation and discrimination known to woman. Given these views, it is not surprising that they would turn eventually to censorship—not censorship of violent and misogynistic images generally, but only of the sexually explicit images that cultural reactionaries have tried to outlaw for more than a century.[23]

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the MacKinnon-Dworkin Ordinance in Indianapolis see American Booksellers v. Hudnut, 771F.2nd 323 (7th Cir. 1985).

[22] Ibid.

[23] Duggan, "Censorship in the Name of Feminism," 42.

Thus, FACT understood Mackinnon and Dworkin's engagement with law as a "turn to censorship" that sought to "outlaw" the industry altogether. As such, they reduce MacKinnon's tort approach to the application of punitive force on pornography in order to eliminate the industry. Consequently, FACT fails to account for the specificity of MacKinnon's engagement with tort law. Instead, by accusing her of censorship, they reduced her engagement with law into the logic of prohibition and permission that undergirds the abolition versus decriminalization paradigm.

Such obfuscation of MacKinnon's engagement with law may be a result of MacKinnon's own refusal to theorize tort law outside of the register of prohibition and permission. According to Duggan, MacKinnon and Dworkin developed their tort approach in response to the city's effort to zone pornography shops. They considered such zoning to tolerate, rather than eliminate, the industry. According to Duggan, "they proposed an alternative [to zoning] that, they claimed, would completely eliminate, rather than merely regulate, pornography." [24] Thus, MacKinnon herself placed both zoning and tort law into the totalizing, criminal framework of abolition versus decriminalization. Instead of offering an analysis of zoning, MacKinnon suggests that zoning supports male dominance by tolerating the sex industry. In this way, zoning, for MacKinnon, is the same as any other form of decriminalization insofar as it affirms male dominance. Similarly, MacKinnon believed her tort approach would abolish the sex industry. Instead of offering a systematic account of what tort law is, how it functions, or derives its power, MacKinnon collapses tort law into abolition. On this view, tort law might as well be criminal law since both lead to abolition. In other words, for MacKinnon, all that

[24] Ibid., 44.

matters is the end goal: does the sex industry exist, or not? Consequently, there is no need to delve into the details of how these legal approaches—zoning, tort, or criminal law—operate or might differ.

Thus, MacKinnon's engagement with law is often mischaracterized as a punitive force of prohibition and censorship, even though it was developed through tort law. This is not to say that Mackinnon's tort approach was better than censorship, but rather to suggest that the abolition versus decriminalization paradigm's overwhelming focus on criminal law's mechanism of prohibition versus permission obscures the specific consequences of MacKinnon's engagement with law. Consequently, feminists on both sides of the paradigm, including MacKinnon herself, fail to theorize the specificity of tort law, not to mention other forms of regulation such as zoning, which are minimized as "merely" regulating the industry. As such, the abolition versus decriminalization paradigm renders such non-criminal areas of law unworthy of analysis and instead fits them into a preconceived perspective of law's punitive power. This perspective reduces all law to a punitive force that permits or prohibits particular behavior.

In a seminal essay of this period, "Thinking Sex," Gayle Rubin also fails to examine the specific effects of non-criminal laws, collapsing all law instead into the logic of permission or prohibition that characterizes criminal law. She does this by tracing the roots of sex law to anti-obscenity laws of the 19$^{th}$ century.[25] Although these laws have been modified and attenuated over the years, Rubin argues that their residuum continues

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[25] Gayle S. Rubin. "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality" *The Lesbian and Gay Studies Reader* Ed. Henry Abelove. (New York: Routledge, 1993), 4-6.

to persecute sexual minorities.[26] She cites sodomy laws, anti-prostitution laws, sexual psychopath laws, writing that "these laws gave the psychological professions increased police powers over homosexuals and other sexual 'deviants.'"[27] She further explains:

> The current period bears some uncomfortable similarities to the 1880s, and the 1950s…. In the spring of 1977… the news media were suddenly full of reports of raids on gay cruising areas, arrests for prostitution, and investigations into the manufacture and distribution of pornographic materials.[28]

Thus, for Rubin, the relationship between law and non-normative sex practices, including those found in the commercial sex industry, is overwhelmingly characterized by punishment and prohibition. Because of this focus, she does not explore other ways that law might operate to shape sexual practices. This focus on prohibition—and its obfuscation of alternative legal logics—situates Rubin's work within the framework of abolition/decriminalization and, in fact, she concludes her essay by calling for the widespread decriminalization of sexual commerce and non-normative sexual practices more generally.[29]

The so-called feminist sex wars of the 1980s—as exemplified by the FACT/MacKinnon debate and Rubin's essay—thus reveal how the abolition versus

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[26] Ibid., 6.

[27] Ibid., 5.

[28] Ibid., 6.

[29] Ibid., 19. Rubin writes: "This requires the repeal of all sex laws except those few that deal with actual, not stator, coercion; and it entails the abolition of vice squads, whose job it is to enforce legislated morality."

decriminalization paradigm has shaped feminist perceptions of the power of law, especially in relation to commercial sex. That is, it promulgates an idea of law as a force that acts to prohibit or permit particular behaviors. This perspective overly focuses on the criminal axis of law, and obscures analysis of non-criminal and regulatory laws. The result is an impoverished feminist analysis of the power of law, especially with respect to the sex industry.

**Beyond Permission and Prohibition: Legal Theory, The Power of Law, and Everyday Life**

Despite the dominance of the aboltion versus decriminalization paradigm in analyzing the sex industry, feminist and legal scholars have long complicated perspectives that suggest law is a punitive force that prohibits or permits behavior. In her book *Split Decisions: How and Why to Take a Break from Feminism*, legal scholar Janet Halley explains how critical legal theory understood law as "much more capacious…than the idea…. of 'the law' as a consolidated entity imposing its norms unilaterally on a social world made up simply of obedient and disobedient subjects."[30] Law, according to Halley and the legal theorists she cites, is not a unified force bearing down against subjects. Instead, it is "capacious;" law encompasses a variety of administrative, civil, criminal, and regulatory modes and operates at different levels of government and through different institutions. Indeed, legal scholars have long suggested that—because of this capaciousness—law spills beyond the institutions it is traditionally associated with

[30] Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism*, (Princeton: Princeton University Press, 2006), 134.

to productively and unevenly shape the non-criminal, more quotidian aspects of daily life.[31]

I call this perspective the "legal everyday" and develop it through three interrelated scholarly conversations on law and power. First, I draw on law and society scholarship that explores law as constitutive of social practices in realms of everyday life. Second, I draw on scholarship that applies Foucault's idea of power in modernity to law. Finally, I synthesize these two discussions by drawing on de Certeau's understanding of the practices of everyday life and their relationship to a Foucauldian understanding of power. The result establishes law as a polyvalent and uneven part of power relations that shape and are shaped by practices of meaning making in everyday life. I apply this everyday perspective to the American strip club industry to challenge the implicit assumptions about law's relationship to the sex industry promulgated by the abolition versus decriminalization paradigm. In turn, I reveal new ways of understanding the power, consequences, and potential of law for sex work and the commercial sex industry. Before I begin this exploration of the sex industry, I will further elaborate the three accounts of law and power that comprise the legal everyday.

*Law and Society*

In the middle of the 20th century, American legal scholars and social scientists began to explore the relationship between "law" and "society." [32] Drawing on empirical methods, these scholars explored law's effectiveness—or lack of effectiveness—in

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[31] See my discussion of law and society scholarship on the power and relation of law to everyday life below.

[32] Susan Silbey, "After Legal Consciousness" in *Annual Review of Law and Social Science* Vol. 1 (2005), 324.

controlling and limiting social life. Over time, scholars of law and society shifted their focus from law's effectiveness to law's constitutive effects. [33] That is, rather than understanding law as a set of rules that proceeds into the social world in order to achieve particular results, these scholars explored how law produces new ways of living, being, and acting in the social realm. Legal scholar Austin Sarat succinctly explains this perspective: "Laws affecting ownership and tenancy [for example] might be said not merely to regulate what was already in place, but to bring into being something new, to constitute new relations and meanings."[34] Law and society scholars, consequently, moved beyond understanding "law" and "society" as discreet spheres, where law imposes rules on the social. Instead, they focused on law as constitutive of social processes of meaning making.[35]

By moving beyond the idea of law as imposing rules on the social world, these scholars necessarily troubled the idea that law is circumscribed by and limited to particular institutions.[36] Instead, law and society scholarship explored the variety of ways that law penetrated and shaped social practices that—on their face—seem distant from traditionally held legal institutions. Scholars explored how legal ideas such as "property" and "ownership" inform seemingly non-legal practices like the construction of public

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[33] Ibid.

[34] Austin Sarat and Thomas R. Kearns, "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life," in <u>*Law in Everyday Life*</u>. Austin Sarat and Thomas R. Kearns ed. (Ann Arbor: University of Michigan Press, 2009), 27.

[35] Ibid.

[36] Patricia Ewick and Susan S. Silbey, "The Common Place of Law" in *The Common Place of Law: Stories from Everyday Life*, Patricia Ewick and Susan S. Silbey ed. (Chicago: University of Chicago Press, 1998), 15.

space. For instance, Susan Silbey raises the example of the social practice of using a chair to save a parking space during the winter months in certain cities. She suggests that such practices rely on legal notions of property and ownership even if no one actually "owns" the parking space via legal contract.[37] In this example, the person who places the chair in the parking spot is engaging law—albeit in a peripheral way—to make meaning in his or her everyday world of parking and snowy weather. By understanding law to shape these kinds of practices, law and society scholars shifted their focus from legal institutions to realms of everyday life.[38] Combined with their understanding of law as constitutive of social practices of meaning making, these scholars invariably moved beyond understanding the power of law to be a force that permits or prohibits certain acts. In this way, such law and society scholarship intersects with scholarly debates over Michel Foucault's account of the power of law in modernity.

*Foucault and the Power of Law*

There has been a lively scholarly debate over the relationship between power and law in Foucault's writing.[39] Perhaps the most well known perspective—which is often offered as a critique of Foucault's work—is that Foucault believed law to be an antiquated mode of juridical power. Juridical power, according to Foucault, operates as an expression of the sovereign's will against its subjects. Foucault suggests that—in

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[37] Ibid., 21.

[38] Ibid.

[39] For an overview of these discussions see Ben Golder and Peter Fitzpatrick, *Foucault's Law* (New York: Routledge, 2009). See especially their chapter "Orientations." For a discussion of Foucault's seeming return to the discourse of rights in the mid 1970s see Golder's *Foucault and the Politics of Rights*, Palo Alto: Stanford University Press, 2015.

modernity—juridical power was supplanted by forms of power that operate through knowledge production.[40] Rather than operating through a sovereign's application of force against preexisting subject, modern forms of power *produce* and *discipline* subjects through processes of knowledge production or "games of truth." Such games of truth include observation, classification, and statistical analysis and are imperative to Foucault's assessment of power relations.[41]

Many scholars equate Foucault's conception of "juridical power" with law more generally. They thus interpret Foucault's argument to mean that modernity had not only supplanted juridical power, but also the power of law. These scholars suggest that Foucault consequently believed law to be at best irrelevant to and at worst a ruse for modern forms of power. Alan Hunt and Gary Wickham famously argued for this perspective, suggesting that Foucault "expelled" law from modernity.[42] Known as the "expulsion thesis," this argument hinges on an almost total identification of law with juridical power. Thus, according to the expulsion thesis, Foucault considered legal power to be a pre-modern residuum.

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[40] Michel Foucault, "Truth and Power," in *Power/Knowledge: Selected Interviews & Other Writings: 1972-1977*. Ed. Colin Gordon. Trans. Colin Gordon, Leo Marshall, John Mepham, Kate Soper. (New York: Pantheon Books, 1980),109-133. Michel Foucault, *The History of Sexuality, Vol. 1: An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1978) 133-161.

[41] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Random House, 1977), 22-24.

[42] Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Chicago: Pluto Press, 1994), 59.

Nevertheless, the expulsion thesis has recently been contested by a number of Foucauldian scholars.[43] These thinkers argue that Foucault's perspective on law is more complex than the expulsion thesis acknowledges. Rather than becoming replaced by modern power, these thinkers argue that law overlaps with and takes on the qualities of such power.[44] Foucault himself expresses this view in the *History of Sexuality.* He writes:

> I do not mean to say that the law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.[45]

Law, for Foucault, is thus neither fully synonymous with nor fully distinct from juridical power. To be sure, law continues to operate as juridical power: "The law always refers to the sword."[46] But, according to Foucault, it is also increasingly taking on the qualities of power in modernity. It is productive, disciplinary, and diffuse, rather than repressive,

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[43] See Golder and Fitzpatrick, *Foucault's Law;* Carol Smart, *Feminism and the Power of Law*. (New York: Routledge, 1998); Vicki Bell, *Interrogating Incest: Feminism, Foucault and the Law*. (New York: Routledge, 2002).

[44] Golder and Fitzpatrick make a helpful distinction between "exegetical" perspectives on Foucault and law, and applied perspective. The former attempt to synthesize a comprehensive theory of law from Foucault's writing. Golder and Fitzpatrick point out that this is difficult considering that Foucault resisted constructing totalizing or grand theories that seem to be necessary for a jurisprudential statement on the meaning, power, and limits of law. The latter—applied scholarship—takes up concepts, like "power/knowledge" or "genealogy" from Foucault's work and apply them to the study of law. See Golder and Fitzpatrick, *Foucault's Law*, 5.

[45] Foucault, *History of Sexuality,* 144.

[46] Ibid.

violent, and coordinated. In this way, Foucault sees the law as sometimes operating in a juridical mode and sometimes through a modern conception of power. [47]

Legal theorists and feminist theorists have drawn on Foucault's nuanced perspective on law to analyze law as part of modern power relations that discipline subjects, manage populations, and shape fields of action.[48] For instance, in the introduction to the anthology *Left Legalism/Left Critique,* Halley and co-editor Wendy Brown write:

> It seems clear to us that "the law" exceeds the figure… of the prohibiting, death-wielding sovereign, and has *incorporated* the managerial, normativizing, regularizing, biopoweristic forms that [Foucault] proposed were distinguishable from the juridical form, even if historically entwined with it.[49]

Building on a Foucauldian perspective on law, Brown and Halley suggest that while law continues to refer back to juridical power, it also comes to operate through modern forms

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[47] Golder and Fitzpatrick underscore this point. They explain that rather than offering a programmatic theory of law, Foucault *theorizes* law throughout his writing in different and sometime conflicting ways. Moreover, Golder and Fitzpatrick assert that while Foucault sometimes understood law as overlapping with both disciplinary, juridical, and biopower in modernity, there was also something "radically uncontainable in Foucault's law." They write: "Our argument is that in his work Foucault sketches two different dimensions of law: law as a determinate and contained entity, and law as thoroughly illimitable and as responsive to what lies outside or beyond its position for the time being…. It is in the movement between these two apparently opposed dimensions that Foucault's law is revealed as a law of possibility, contingency, and lability: that is, as a law always open to possibility of its being otherwise." See Golder and Fitzpatrick, *Foucault's Law,* 6-8.

[48] See note 39.

[49] Wendy Brown and Janet Halley, eds. "Introduction" in *Left Legalism/Left Critique* (Durham: Duke University Press, 2002), 13.

of knowledge and disciplinary arrangements of power that are "managerial, normativizing, and regularizing." As such, laws' power produces subjects, rather than repressing them through the direct application of force. Thus, for these scholars—as for Foucault himself—law is not so much receding from importance in modernity as it is becoming partially entangled with modern relations of power that manage and discipline life through knowledge production.

Just like the law and society scholars, such Foucauldian perspectives challenge the idea of law as a univocal force that exerts itself against the social field. Instead, both perspectives shift focus towards law's effects and understand these effects as constitutive. Law and society scholars focus on how law constitutes realms of the everyday through individual practices of meaning making, while Foucauldian perspectives understand law to produce subjects by taking on the disciplinary and normativising qualities of modern power. In this way, both perspectives on law focus on meaning making—knowledge production, on one hand, and everyday practices of making meaning out of legal categories, on the other. However, the emphasis and focus of these scholars' perspectives on legal meaning making differs.

Returning to the example of using a chair to save parking spots in winter illustrates this subtle difference in focus and emphasis. While the law and society perspective emphasizes the everyday practice of meaning making that engaged the legal concept of ownership, a Foucauldian perspective on the chair, while also interested in laws' everyday effects, would focus more on the disciplinary and biopolitical qualities of law. Such a perspective might focus on measures of population density, winter weather advisories, parking meters, video cameras that ordered public space in a particular way

and—through disciplinary surveillance—lead to particular individualized actions. This perspective understands law to construct both the parking space and the possibility of saving the space with a chair. It accounts for law as part of power relations that shape public space and personal action as well as how such relations engender acts of resistance like placing a chair in an unoccupied parking space. Thus, while sharing the idea that law is a practice of meaning making that has constitutive effects, Foucauldian perspectives on law are more concerned with law as part of knowledge production than their law and society counterparts. By turning to the work of Michel de Certeau, we can get a better sense of the relationship between Foucault's analysis of knowledge production and individual practices of meaning making. Applying this perspective to law will reveal a more comprehensive account of the relationship between law, power, and everyday life than either of these perspectives gives on its own.

*De Certeau and The Everyday*

In *The Practices of Everyday Life*, de Certeau examines and brings to the fore "everyday practices, ways of operating, or doing things."[50] By this he has in mind the seemingly mundane practices of everyday life: "reading, talking, walking, dwelling, cooking, etc." [51] However, his is not an empirical study of individual action. Indeed, much like Foucault, de Certeau considers the "individual" to be an effect of an incoherent plurality of relations.[52] Therefore, rather than focus on individual actors, de Certeau

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[50] Michel de Certeau, *The Practices of Everyday Life,* trans. Steven Rendall (Berkeley: University of California Press, 1984), xi.

[51] Ibid., xvii.

[52] Ibid., xi.

frames his exploration of everyday practices in terms of how "users—commonly assumed to be passive and guided by established rules—operate."[53] He is curious about how such "users" resist, contribute to, and transform dominant discursive formations.[54] The new practices of living, acting, and being that emerge through such transformations are the practices of everyday life. [55]

To illuminate this idea, de Certeau deploys a distinction between "strategies" and "tactics." Strategies bolster dominant discursive formations; they "produce, tabulate, and impose."[56] Tactics, on the other hand:

> Must play on and with a terrain imposed on it and organized by the law of a foreign power. It does not have the means to *keep to itself*, at a distance, in a position of withdrawal, foresight, and self-collection; it is a maneuver 'within the enemy's field of vision.'[57]

Such tactics, however, illustrate that users are not passive victims of strategies. Instead, tactics actively take up, disrupt and resist strategies' imposition. They "use" strategies in

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[53] Ibid.

[54] Ibid.

[55] Ibid.

[56] Ibid., 30. Foucault also discusses power through strategies and tactics. In *The History of Sexuality*, for instance, he writes "there is no power that is exercised without a series of aims and objects. But this does not mean that it results from the choice or decision of an individual subject;…the rationality of power is characterized by tactics that are often quite explicit at the restricted level where they are inscribed…, tactics which, becoming connected to one another, attracting and propagating one another, but finding their base of support and their condition elsewhere, end by forming a comprehensive systems." Thus, like de Certeau, Foucault understands tactics to be produced through a set of power relations, rather than the intentional actions of a subject.

[57] Ibid.

a variety ways, producing new ways of being and acting in everyday life. For de Certeau, tactics therefore explain why our entire society is not reduced to dominant discursive forms and strategies. They explain the plurality of actions and incoherencies that make up everyday life.[58]

By distinguishing between tactics and strategies in this way, de Certeau provides a way to differentiate between power/knowledge and everyday practices of meaning making while still attending to the productive effects of power. De Certeau's example of *la perruque*—the "wig" in French—underscores this point. *La perruque* refers to an employee doing his or her own work on company time or using company resources for his or her own projects.[59] De Certeau explains:

> It differs from absenteeism in that the worker is officially on the job. *La Perruque* may be as simple as a matter as a secretary's writing a love letter on 'company time' or as complex as a cabinetmaker's 'borrowing' a lathe to make a piece of furniture for his living room."[60]

*La perruque* does not steal company profits—after all, in these examples the secretary is still at work and the cabinetmaker will return the lathe. Instead, *la perruque* illustrates how a worker takes up company time or resources in order to produce something new, something outside of the company's profit margins. In this way, *la perruque* disrupts dominant discursive formations under capitalism, while still operating from within capitalism.

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[58] Ibid.

[59] Ibid., 25.

[60] Ibid.

De Certeau's discussion of *la perruque* recalls the chair in the snowy parking space. Of course, parking laws are not intended for chairs; nor could a chair defend itself against a parking ticket in court. Nevertheless, the chair evokes legal meaning in a new way to produce an ownership claim on the parking spot. While this new claim does not negate the relationship between law and power/knowledge that circumscribe the parking spot to begin with, it does disrupt, resist, and transform them into a new, somewhat idiosyncratic, social practice. In this way, de Certeau's theory of the practices of everyday life mediates between Foucault's perspective on power/knowledge and law and society's emphasis on everyday practices of meaning making. While offering a meeting point between these two perspectives on law, de Certeau himself does not explore the role of law in practices of everyday life. I therefore offer this kind of perspective on law by synthesizing these three discussions into a perspective that I call the "legal everyday." Before I articulate what this perspective brings to understanding the commercial sex industry, I will first briefly elaborate this synthesis.

*The Legal Everyday*

By focusing on how users take up and engage dominant discursive formations, de Certeau emphasizes that such formations do not impose an external force of repression against subjects. They do not operate through a univocal yes or no logic of permission or prohibition. Instead, they tabulate, produce, and discipline conditions that make actions possible. In return, "users" operate within these conditions, taking them up, resisting and disrupting them. "Users" are thus engaging everyday practices of meaning making within relations of power/knowledge. In this way, de Certeau's work offers a bridge between law and society's emphasis on everyday practices of meaning making that engage

categories of law and Foucault's description of law as taking on the qualities of modern power relations.

Synthesizing these three perspectives—law and society, Foucault, and de Certeau—is therefore helpful for understanding law as something other than a direct force that operates against subjects to permit or prohibit behavior. In other words, this synthesis challenges the perspective on law that undergirds the abolition versus decriminalization paradigm. On this view, which I call the "legal everyday," law does not act as an external force on subjects, permitting or prohibiting particular behavior. Instead, I focus on law as part of an episteme that produces subjects and how those subjects, once produced, "use," take up, and make new meanings from law. Following de Certeau, in this dissertation, the new meanings that emerge when subjects engage in such tactical use of law—law that is increasingly taking on the qualities that Foucault attributed to modern relations of power—are what I call practices of the legal everyday. I am particularly interested in how these practices of the legal everyday happen in venues and through discursive practices that are seemingly removed from what we traditionally think of as laws' domain: venues like the parking spot covered with snow or a contemporary American strip club.

**Why Stripping?**

Because contemporary American strip clubs are regulated through a variety of commercial laws—including taxation, labor, licensing, and zoning laws—they provide a rich site for analyzing the power of law outside of the criminal focus of the abolition versus decriminalization paradigm. This paradigm has focused on prostitution as a criminal or decriminalized activity. Moreover, as I mentioned above, even feminist

debates over pornography—a legal and commercially regulated part of the sex industry—have fallen into the paradigm's perspective on the power of law. That is, feminist debates over pornography understand non-criminal law through the rubric of a punitive force that permits or prohibits behavior. In this way, pornography's regulated status has gone under-theorized. Focusing on the legal regulation of American strip clubs provides a way out from the abolition versus decriminalization paradigm and its limited perspective on law as punitive force.

Instead of understanding law as a punitive force that acts to prohibit or permit behavior, focusing on American strip clubs reveals the variety of uneven effects that law has on the social field. These effects conflict, compete, or overlap with one another. Nevertheless, focusing on how these effects are produced through specific configurations of power/knowledge—especially around the regulation of the sex industry—and on how users take up the law in order to transform the sex industry through everyday practices of meaning making brings a different perspective on law—the legal everyday—to bear on feminist accounts of the sex industry. In this way, my exploration of law and American strip clubs reveals new ways of understanding the power, consequences, and potential of law for the sex industry.

Just as strip clubs provide this better way to understand the law, my theorization of the legal everyday provides a unique perspective on strip clubs. While stripping has been discussed as an object of legal regulation, such perspectives tend to focus on freedom of speech and therefore easily reduce into the questions of personal freedom that plague the abolition versus decriminalization paradigm.[61] As I argue in chapter one, there

[61] See note 15.

are a variety of laws that shape and are shaped by strip clubs beyond the First Amendment. Focusing on this variety, rather than the narrow perspective of law accounted for in debates around freedom of speech, foregrounds aspects of strip club law that have previously been overlooked in the literature.

**Methodology**

My interest in this project arose from a disjuncture I experienced while studying feminist theory and legal theory at the same time. In feminist and queer theory, I found a group of thinkers who were concerned about the negative consequences of engaging with law in the name of social justice, especially around issues of sexuality and identity.[62] Despite the very real concern that these thinkers expressed, they often did so in abstract terms: law enshrines victims' identities as victims, freezes the terrain of politics, or proscribes resignification. [63] Such abstraction has two unintended consequences. First, because these thinkers focus on the negative consequences of engaging law, they imply that law is typically efficacious and coherent in achieving such effects. After all, if there is concern over the consequences of law, then law must effectively and coherently enact such consequences. Second, when these thinkers move away from the level of abstraction to substantiate their concerns over engaging with law, they often focus on

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[62] See my discussion in Nikki Karalekas, "Is Law Opposed to Politics for Feminists?: The Case of the Lusty Lady" *Feminist Formations* 26:1 (2014): 27-48.

[63] Wendy Brown, *States of Injury*: *Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995); Brown and Halley, *Left Legalism/Left Critique;* Judith Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997).

MacKinnon's work, especially her anti-pornography ordinances.[64] This led me to conclude that, although these theorists did not directly acknowledge it, the sex industry is centrally important to feminist and queer concerns over the power and consequences of law. I began to wonder how such concerns and perspectives on law might shift if MacKinnon's influence was decentered and replaced with a different legal analysis of the sex industry.

At the same time, in studying legal theory, I learned that "law" was hardly as coherent or efficacious as feminist and queer theorists' concerns implied. Instead of viewing law as efficacious and coherent, the legal scholars I studied viewed law as a shifting, polyvalent set of relations that both shapes and is shaped by everyday life.[65] On this view, law is more mutable and perhaps less sinister than queer and feminist theorists fear. Unlike feminist and queer accounts of the negative consequences of law, legal scholars did not derive their perspective mainly from abstractions; instead, they substantiated it with a close examination of law in social and historical context. I felt inspired by such a close account of law and eager to bring the notion of law's polyvalence and mutability into dialogue with the feminist and queer theorists' concern over the negative consequences of engaging it.

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[64] For such critiques of MacKinnon see Brown, *States of Injury;* Halley, *Split Decisions*; Brown and Halley, *Left Legalism*; Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999).

[65] See Duncan Kennedy, *Critique of Adjudication: fin de siècle* (Cambridge: Harvard University Press, 1998); Duncan Kennedy "The Stakes of Law, or Hale and Foucault!" in *Sexy Dressing Etc.* (Cambridge: Harvard University Press, 1995); Patricia J. Williams, *The Alchemy of Race and Rights: A Diary of a Law Professor* (Cambridge: Harvard University Press, 1992). Susan Silbey, "After Legal Consciousness," 324.

In order to accomplish this, my dissertation draws inspiration from legal theory, taking a case study approach to the analysis of the power, consequences, and effects of law. At the same time, given the central role that sex work plays in feminist and queer concerns over the power of law, I have chosen to focus on laws governing strip clubs in the United States. This focus centralizes—but also meaningfully shifts perspective on—the relationship between law and the sex industry that has shaped feminist and queer concerns over engaging with law. Because American strip clubs are legal and regulated through a variety of different laws, examining them foregrounds the polyvalent character of law while also moving beyond the limited criminal focus of the abolition versus decriminalization paradigm. My goal is thus not only to offer a more complex account of law's relationship to the sex industry than that offered by this paradigm, but also to dislocate MacKinnon as the central foil against which feminist and queer theorists express their concern over the negative consequences of engaging with law.

Beyond this contribution, this dissertation aims to make a contribution to the field of sex work studies. Sex work studies emerged in the early 2000s as a field that examined the sex industry outside of the normative dispute over whether sex work should be abolished or decriminalized. This led these thinkers to move away from focusing on an abstract idea of street prostitution, towards a broader and interdisciplinary perspective on the sex industry as "all commercial goods and services of an erotic and sexual kind," where "every one of these activities operates in a complex socio-cultural context in which the meaning of buying and selling sex is not always the same."[66] Through this complex

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[66] Agustín, "The Cultural Study of Commercial Sex, " 618-619.

perspective on the industry, sex work studies scholars displace the binary thinking that has governed much of the scholarship and public debate over the sex industry.

Because law is central to the abolition versus decriminalization paradigm, and its attending binary of oppression versus empowerment, sex work studies scholars tend to associate law with the kind of problematic binary thinking they seek to complicate. Indeed, as I discuss in further detail in the first chapter, sex work studies scholars have asserted that law—especially in its criminal mode—tends to be at best irrelevant to transforming the lives of sex workers and at worst itself a harbinger of binary thinking. In the first chapter, I argue that by linking law to outdated and stultifying binary thinking, sex work studies scholars have abandoned legal analysis and therefore have come to miss how law shapes and is shaped by everyday life outside of these binaries. Through my examination of strip club laws, my goal is to illuminate this *everyday*, non-binary character of law. In this way, the dissertation brings an analysis of law back into sex work studies without falling into the problematic binary thinking that led sex work studies scholars away legal analysis in the first place.

## Chapter Outline

### Chapter 1: Law Beyond the Binaries: Extending the Complexity of Sex Work Studies to Law

In the first chapter of the dissertation, I explore how sex work studies has responded to law. Specifically, I explore how the field has abandoned its pursuit of complexity when it comes to law. Instead, prominent thinkers in the field suggest that law obscures complexity and therefore is at best irrelevant to the complex realities of sex workers' everyday lives, or, at worst, a harbinger for the very binary thinking that sex

work studies seeks to displace. Consequently, these thinkers suggest law is not a good tool to transform the industry. Following the lead of Jane Scoular and Ronald Weitzer, I suggest that this perspective on law is premised on an overly narrow conception of what law is and where to look for its influence.[67] At the same time, even Scoular and Weitzer fail to fully shed this limited perspective on law given their continued focus on laws governing prostitution. Contra this, through an examination of "the legal everyday" in American strip clubs, I argue we can locate laws' continued relevance to the sex industry, albeit in new and surprising places.

In the second half of the chapter, I illustrate this argument through an examination of the scholarly literature on strip clubs. I begin by suggesting that the literature was once heavily influenced by an opposition between oppression versus empowerment, because it focused on the individual transactions between dancers and their patrons. Like the wider field of sex work studies, scholarly literature on strip clubs has intentionally broken with such binary thinking. Rather than focusing only on individual dancers' experiences, the scholarship has expanded to examine the variety of power relations that shape clubs. While this has led to a broader understanding of different aspects of the industry, it has not led to a broader understanding of the relationship between law and strip clubs. Specifically, scholarly accounts of strip clubs—especially self-proclaimed "feminist" accounts—argue for expanded First Amendment protections for strippers. Such First Amendment arguments bring the field back to the same overly narrow focus on individual transactions between dancers and patrons that sex work studies had tried to counteract. In the remaining three chapters of the

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[67] Jane Scoular, "What's Law Got To Do With It? How and Why Law Matters in the Regulation of Sex Work" _Journal of Law and Society_ 37, no. 1 (2010): 12-39.

dissertation, I move beyond this overly narrow account of strip clubs and the law by synthesizing the more expansive perspective on strip clubs with my concept of the legal everyday.

**Chapter 2: Lap Dancing as an American Legal Object**

The second chapter of the dissertation examines laws restricting bodily contact and nudity in strip clubs. These are idiosyncratic and local laws; they include laws requiring dancers' to maintain a certain distance from their clients and laws limiting full nudity, requiring dancers to wear G-strings and pasties. The Supreme Court has twice ruled that such laws do not violate dancers' freedom of speech under the First Amendment. As mentioned above, feminist scholars of strip clubs have nevertheless critiqued these laws and argued for expanded First Amendment rights for strippers. They suggest that restricting strippers' freedom of speech objectifies them: it turns them into an object to be looked at who cannot freely speak.

In this chapter, I argue that this perspective on the nudity laws obscures how dancers and patron's "use" law in de Certeau's sense. Instead of understanding such laws as restricting the bodies of strippers by limiting their sexual expression, I look at how such laws have produced a new sexual practice: the lap dance. The history and ethnography of these kinds of intimate dances illustrate the role law plays in shaping everyday practices in the sex industry. Drawing on legal history, I argue that colonial period antitheatrical laws, the legal splintering of theater between high and low form in the middle of the 19th century, and the emergence of time, place, and manner regulations during the 1970s illustrate how laws produce the conditions that led to lap dancing as the most prominent practice in American strip clubs today.

Foregrounding the productive elements of this history challenges the idea of law as a punitive force that restricts speech. It also troubles the idea that law is not sophisticated enough to be relevant to the complexities of sexuality and everyday practices. Consequently, contra beliefs about the law that undergird feminist First Amendment arguments and sex work studies, I show the lap dance to be at once a legal object and a quotidian practice.[68]

**Chapter 3: Zoning Out Sex? Rethinking Feminist and Queer Critiques of "Time, Place, and Manner" Laws**

As with the previous chapter, the third chapter of the dissertation serves to shift perspective on law's relationship to the sex industry. In this chapter, I focus on the history of "adult-use" zoning in the United States. Such laws delineate where sexual commerce can take place. Historically, in the United States, such zoning laws either concentrated sex businesses into so-called red light districts or dispersed them throughout the city by limiting their proximity from "family" establishments such as schools, churches, and parks or limiting their proximity to other sex businesses.

Feminist and queer scholars have critiqued such laws for restricting sexual freedom and excluding non-normative sexual practices from public urban space. As a result, these critics advance an oversimplified theory of the power of law and its relationship to sexuality. I argue that these thinkers imagine law in general and zoning in particular as only a punitive force of repression and exclusion. I argue that this perspective obscures zoning as a form of biopower that manages populations through the

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[68] As I will discuss in the first chapter, there has been much ethnographic work on strip clubs. I did not conduct such research for this project. I will, however, read the work that has been done for instances of law shaping everyday relations within clubs.

ordering of space and the collection of data. This perspective on zoning illustrates law as a field of action rather than an individualistic and direct force. Looking at zoning through the lens of biopower opens up a new way to think about its consequences for the sex industry. This perspective reveals aspects of law that further subjugation, but also highlights spaces of possibility that law holds for sexual transformation. Such consequences are obscured when law is reduced to a direct and efficacious force that operates against individual subjects.

I begin by giving a historical overview of adult-use zoning in the United States. I then describe both the queer and feminist critiques of zoning. While these critiques take distinct approaches in terms of their objects, geography, and periodization, they share a conception of the power of law. Both feminist and queer critics of zoning, in turn, offer a similar concept of sexual freedom as the antidote to adult-use zoning. After exploring these critiques and their attending notions of sexual freedom, I turn to Foucault's understanding of biopower in order to explore zoning from a different angle. Although zoning still bears the mark of juridical power, I argue that it also takes on the normativizing qualities that Foucault attributes to biopower: specifically, it manages populations through the ordering of space based on a study and conception of social pathology. I conclude by suggesting that viewing zoning through the lens of biopower provides a broader perspective on the effects of law, illustrates the theory of sexual freedom informing the critiques of zoning to be inadequate, and points to the possibility that law may hold potential to politically transform the sex industry.

**Chapter 4: The Legal Everyday: The Case of the Lusty Lady**

Chapters Two and Three of the dissertation illustrate how law produces new sexual practices and how it takes on the qualities Foucault attributed to modern relations of power. I argue that such perspectives are obscured when we focus on law as a direct and efficacious force that acts against subjects. Moreover, I argue that when law is only understood through this narrow perspective our understanding of freedom is similarly limited; that is, we understand freedom to be present when the law is absent or at least minimally operative. These chapters trouble the idea of law's absence, illustrating instead how law is entangled with practices of everyday life that seem unrelated to or untouched by law. Just as these chapters provide a new perspective on law, they also point to the need to retheorize how we think about engaging the law to enact feminist political transformation.

In Chapter Four, I offer this kind of retheorization by focusing on strip club labor law and the unionization of the Lusty Lady Peep Show in San Francisco. I begin the chapter by describing the problems that strippers face as independent contractors—including problems that can develop between strippers in ways that unevenly impact dancers of color—and describe how the dancers at San Francisco's Lusty Lady Club overcame such issues in order to unionize. I next argue that this process of unionization—as a form of everyday legal engagement—is obscured by an overly narrow account of law and its consequences.

Drawing on the more expansive theory of the legal everyday I develop in the first three chapters, I analyze the documentary film *Live Nude Girls Unite!* to illustrate how everyday practices of law lead to surprising spaces of political transformation. The film reveals spaces of affect, humor, and collectivity to be everyday "uses" of law. I argue that

these "uses" of law constitute a form of legalism—or a legal approach to politics. This troubles traditional understandings of what a legalism looks like; conventionally legalism is considered rational (as opposed to emotional), serious (as opposed to humorous), and individualistic (as opposed to collective). I argue that the broader perspective on law I highlight through the legal everyday also highlights new roles that law can play in feminist political transformation.

I conclude the chapter with a discussion of the Lusty Lady's recent closing. I suggest that, although disappointing for many, including some feminists, the club's closing reveals the mutable and polyvalent nature of law that my dissertation brings to light.

**Conclusion: The Legal Everyday Beyond Sex Work Studies**

In the conclusion of the dissertation, I draw together the features of law that the previous chapters described into a coherent articulation of the legal everyday. That is, I draw together law as a practice of meaning making—in so far as it can produce new sexual practices and overlaps with modern relations of power that have epistemic qualities—with de Certeau's idea that users tactically maneuver within strategies and generate new forms of quotidian engagement. The result is a perspective on law as an everyday practice. Contra the overly simplistic perspective on law that emerged from the abolition versus decriminalization paradigm and endures in sex work studies, I argue that the case of strip clubs in the United States reveals law to be polyvalent, mutable, spatialized, embodied, and therefore a part of everyday practices. Understanding the law in this way, as a "legal everyday," has surprising consequences for the sex industry.

I will conclude the dissertation with a discussion of the implications that this theory of law holds for feminist and queer theory beyond sex work studies. I am specifically concerned with the central role MacKinnon plays in feminist and queer understandings of the law. By shifting focus away from the paradigm of law that underpins the abolition versus decriminalization paradigm, and its all or nothing perspective on law, I decenter MacKinnon's jurisprudence. By developing a theory of the legal everyday, I offer a new perspective on law to the broader fields of feminist and queer theory. I suggest that this shift of perspective is important given the contemporary legal skepticism animates these fields.

Chapter 1

# Law Beyond the Binaries: Extending the Complexity of Sex Work Studies to Law

## Introduction

In the introductory chapter of this dissertation, I examined the way that the abolition versus decriminalization paradigm has limited feminist perspectives on the relationship between law and the sex industry. In this chapter, I examine new scholarship on the sex industry that has emerged since the early 2000s. Dubbed "sex work studies," this work has been critical in exposing how binary thinking has limited previous scholarship on the sex industry. Specifically, sex work studies thinkers argue that the binary between oppression and empowerment that often resulted from feminist accounts of prostitution circumscribes sex work in all-or-nothing terms that fail to illuminate the *complexity* of experiences that make up the sex industry. In response to this, sex work studies scholars have expanded the field of inquiry beyond the confines of such binaries, exploring new periods, modes, and spaces of commercial sex. Consequently, sex work studies has developed a more complex and context specific account of sex work.[69]

Despite this fruitful complexity, in this chapter I argue that sex work studies scholars have failed to offer a similarly complex account of the power, consequences, and potential of law. Instead, sex work studies scholars depict law as at best irrelevant to the lives of sex workers or, at worst, itself a harbinger of the very binary thinking that they hope to displace. In this way, despite their rigorous pursuit of complexity elsewhere, sex work studies scholars have abandoned their pursuit of complexity when it comes to law. I

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[69] In this chapter, when I use the term "complex," I am using it as a term of art from sex work studies, which suggests that "complexity" is only revealed by breaking with the binary thinking that has governed past scholarship on and debate over the sex industry.

suggest that one way to pursue such complexity in relation to law is to replace the object of analysis—prostitution—with strip clubs. As I discussed in the introduction to the dissertation, strip clubs offer a complex picture of the power, consequences, and effects of law. Out of this complexity, I develop a concept of the "legal everyday" as one way to understand the relationship between law and sex work outside of the problematic binaries that circumscribed sex work scholarship prior to the advent of sex work studies. In this way, the goal of this chapter—and, indeed, of this dissertation—is to extend the complexities born of sex work studies to law.

I begin the chapter by elaborating sex work studies as a field, arguing that the rejection of binaries is its defining feature. I next examine how sex work studies scholars portray and understand law. These scholars, I suggest, tend to understand law as tethered to the binary thinking that has framed previous scholarship and debate. In this way, they suggest that law fails to control, illuminate, or transform the complexities of the sex trade. I argue perspective is tied to an overly narrow account of law; in fact, law can be more complex than these scholars acknowledge. Strip clubs provide a window on such legal complexity. Scholars of strip clubs, however, have failed to capitalize on this opportunity. I reset the terms of strip club scholarship in order to bring forth the more complex picture of law—the legal everyday—that strip clubs potentially reveal. I conclude the chapter by suggesting that sex work studies can draw on my discussion of strip clubs to extend their idea of "complexity" to the relationship between law and sex work. Taking this more complex perspective on law will consequently offer a new perspective on the potential pitfalls and possibilities it holds for transforming the sex industry.

**Sex Work Studies: Complexities Over Binaries**

At the 2002 International Women's Work Week Conference on "The Business of Bodies: Women and the Global Sex Market" Kamala Kempadoo proposed a new name for emerging scholarship that examined the sex industry: sex work studies.[70] Unlike previous scholarship on the sex industry, sex work studies:

> Complicat[es] the notion of prostitution through analyses of intersections of oppressions, exploitations, subjectivities, and resistances, and with attention to contradictions and ambiguities that arise from this matrix, these studies pose questions to earlier approaches that have explained prostitution as natural or universal, or as unidimensional outcomes of patriarchal power or capitalist economic relations.[71]

Here, Kempadoo highlights the importance of "complexity" to sex work studies. Sex work studies scholars foster such complexity through an examination of previously unexamined periods, modes, and geographies of sex work.[72] They also take a more nuanced perspective on the power dynamics that affect sexual labor. For instance, Kempadoo explains that a sex work studies scholar might examine practices of forced breeding and wet-nursing under American slavery as a form of "sex work,"[73] As a result of taking such context-bound perspectives, which emphasize the power dynamics of sex

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[70] Kamala Kempadoo, "Prostitution and Sex Work Studies." In *Companion to Gender Studies,* edited by Philomena Essed, David Theo Goldberg, and Audrey Kobayashi Eds. Blackwell Publishers, 2004, 255.

[71] Ibid., 261.

[72] Ibid., 261.

[73] Ibid., 260.

work, sex work studies scholars have expanded the field of inquiry. They have consequently created a more complex portrait of sex work.

Sex work studies scholars often inaugurate such complexity by rejecting the binary thinking that has structured and limited past scholarship, especially the all-or-nothing thinking that framed radical feminist accounts of the industry throughout the 1980s. In her 1997 book*, Live Sex Acts*, Wendy Chapkis called for scholars to move away from such binary thinking.[74] She writes, "practices of prostitution, like other forms of commodification and consumption, can be read in more *complex* ways than simply as a confirmation of male domination."[75] Chapkis is thus critical of radical feminist accounts of sex work as a manifestation of male dominance. At the same time, she is also critical of sex radical accounts that react to radical feminism by suggesting sex work is unambiguously empowering.[76] In this way, as an early sex work studies text, *Live Sex Acts* illustrates the central role that rejecting binaries, especially the binaries that framed feminist debates, plays in achieving a more complex account of the sex industry.

Similarly, in her groundbreaking book *Sex at the Margins: Migration, Labour Markets and the Rescue Industry,* Laura María Agustín argues that among feminists "a hyper-production of writings existed on the concept of 'prostitution,' repetitively arguing about whether or not it is always and intrinsically violent or exploitative."[77] Such

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[74] Chapkis, *Live Sex Acts*, 12.

[75] Ibid., 29 my emphasis.

[76] Ibid.

[77] Laura María Agustín, *Sex at the Margins: Migration, Labour Markets, and the Rescue Industry*, (London: Zed Books, 2007), 6.

accounts frame sex work as either inherently oppressive or empowering.[78] Such binary thinking, according to Agustin, imposes a normative framework on the subjects of research and subsequently occludes the *variety* of goods and services that comprise the sex industry.[79] She is especially concerned that framing sex work as either entirely oppressive or empowering obscures sex workers as migrants whose status changes based on geopolitical circumstances.[80] Instead of arguing over whether sex work is oppressive or empowering, Agustín suggests that scholars examine complex, shifting circumstances that shape sex work.

Several recent sex work studies anthologies echo this perspective, suggesting that the oppression/empowerment binary obscures more complex accounts of the sex industry. For example, in the introduction to *Sex for Sale: Prostitution, Pornography, and the Sex Industry*, Ronald Weitzer explains that both sides of the oppression versus empowerment binary "are one-dimensional and essentialist. While exploitation and empowerment are certainly present in sex work, there is sufficient variation across time, place, and sector to demonstrate that sex work cannot be reduced to one or another."[81] For this reason, Weitzer advocates a polymorphous paradigm that "holds that there is a constellation of occupational arrangements, power relations, and worker experiences."[82] Likewise, the editors of *Queer Sex Work* write, "ultimately, our aim in collating this book

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[78] Agustín, "The Cultural Study of Commercial Sex," 618.

[79] Ibid., 619.

[80] Ibid.

[81] Weitzer, "Sex Work: Paradigms and Policies" in *Sex for Sale* (6).

[82] Ibid.

is to disrupt rather than to reproduce the oppositions, dichotomies and polarities that so frequently frame debates about sex work."[83] Both anthologies thus seek to displace the binary thinking that informed and limited previous scholarship and debate over the sex industry by offering descriptive accounts of particular forms of commercial sex across different geographic settings and historical periods. Such variety has consequently expanded the scholarly conversation about sex work beyond the oppression/empowerment binary and, indeed, has led to a more complex account of the sex industry.

Thus, sex work studies emerged as a field in the early 2000s, calling for thinkers to move beyond the binaries that have framed previous sex work scholarship. Most especially, sex work studies scholars aim to challenge the binary between oppression versus empowerment that informed feminist debates over sex work. While sex work studies has successfully bypassed such binaries, leading to a more complex portrait of the sex industry, in the next section I argue that they have failed to extend such complexity to their exploration of law. Instead, I argue that sex work studies sees law as either unable to grasp and control the complexity of sex workers' lives or as a problematic harbinger of the very binary thinking that the field's proponents had hope to leave behind.

**Sex Work Studies: Can Law be Complex?**

By suspending binary thinking, sex work studies scholars have developed a complex and multifaceted portrait of the sex industry. Despite this, the field has by and large failed to extend this complexity to law. Instead, sex work studies scholars argue that

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[83] Mary Laing, Katy Pilcher, and Nicola Smith. "Being, Thinking, and Doing 'Queer' Debates about Commercial Sex," in *Queer Sex Work*, ed. Mary Laing, Katy Pilcher, and Nicola Smith, New York: Routledge 2015, 8.

categories of law are too general to illuminate the complexity of the sex industry. For this reason, scholars working in the field conclude that law is not a useful tool for understanding or transforming the sex industry. It is at best irrelevant to the lives of sex workers or, at worst, a harbinger of the very binary thinking they had hoped to leave behind. As such a harbinger, sex work studies scholars suggest that law stands to bring the most damaging element of such binaries—namely the idea that sex workers are either oppressed or empowered—to bear on the lives of sex workers.

Susan Dewey and Patty Kelly illustrate this perspective in the editorial introduction to the anthology *Policing Pleasure: Sex Work, Policy, and the State in Global Perspective.* In describing the array of locations and practices covered in the anthology, Dewey and Kelly write:

> The highly nuanced and individual nature of these situations do not always lend themselves easily to clear-cut generalizations about sex work. The ethnographic accounts presented here very effectively document an often sharp disconnect between policy and its practice.[84]

While Dewey and Kelly are here focused on policy—a broader category than law, their description of policy certainly applies to law since the chapters of the anthology focus on both policy and law. The important element to note is that the editors contrast the nuanced details of ethnography from the generalizing tendencies of policy. They suggest that such generalities cannot capture the ethnographic details and nuances of the industry. Because policy cannot operate on a small ethnographic scale, it cannot grasp the

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[84] Susan Dewey and Patty Kelly, introduction to *Policing Pleasure: Sex Work, Policy, and the State in Global Perspective*, (New York: NYU Press 2011), 4.

complexities of the sex industry. Policy's scale is too large to touch the complexities of sex workers' "practice." Thus, Dewey and Kelly depict everyday practices of sex work as exceeding policy categories.

Agustín makes a similar argument in her article *Sex and the Limits of Enlightenment: The Irrationality of Legal Regimes to Control Prostitution.* Focusing on law, she explains that it is too caught up in a pretense of rationality to grasp the complexities of the sex industry. Legal projects, she writes:

> [Imagine] the world to be knowable, controllable, and capable of order and movement toward perfection. For believers, history becomes a bettering process, a social development project, advancement, and progress. Progress is seen as steady change for the better, to be acquired through identifiable steps, in a process known as modernization.[85]

Thus, according to Agustín, legal projects are based in the Enlightenment idea that humans—as opposed to God or the King—can control the social world through legal reform; the world can be known, ordered, and subsequently, improved through law. Agustín argues that such rationality fails to grasp the "messy complexities and ambiguities" of the sex work.[86] As a result, she concludes that legal categories cannot actually capture the complexities of the sex industry; law's pretense to rationality requires excluding such complexities from analysis (cite).

Agustín suggests that law not only fails to capture the complexities of the sex industry, but also fails to grasp the complexities of sexuality more generally. She writes:

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[85] Laura María Agustín,"Sex and the Limits of Enlightenment," 74-75.

[86] Ibid., 76.

> The rationalized legal regimes associated with prostitution are often called systems, implying a relationship whose components fit together coherently; a system's whole means more than its parts. There is an implication of machine-like efficiency that seems to many strange when applied to the complex, sometimes ineffable phenomenon of sexual desire.[87]

Here, Agustín suggests that the systemic quality of law is oriented toward smoothing over the complexities of sexuality, stitching them into a coherent whole aimed at "social progress."[88] Consequently, laws governing sexuality must exclude or redefine any part of sexual desire that does not fit neatly into this coherent whole. According to Agustín, sexuality cannot be cohered in this way. It is ineffable and strange, while law is precise and rational. In this way, just as Dewey and Kelly suggested that sex work's complexities exceed policy, Agustín suggests that sex work's messy and complex sexual practices exceed law and its goal of social progress.

Beyond asserting that law fails to grasp the complexities of the industry, sex work studies scholars also suggest that law is an inadequate tool for transforming the conditions of sex work or improving the lives of sex workers. Scholars point out that prostitution laws often fail to achieve their stated goals. Agustín, for instance, points out that although prostitution is illegal in most parts of the United States, it continues to

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[87] Ibid., 75.

[88] Ibid., 81.

thrive.[89] Similarly, Jane Scoular points to empirical studies that reveal how seemingly opposite approaches to the legal regulation of prostitution have similar effects. She writes:

> Strikingly, Sweden and the Netherlands, despite being described as representing a "two-way ideological mirror" appear to display remarkably similar results on the ground in terms of increased marginalization of more public forms of sex work and its participants, and a relative inattentiveness to many forms of indoor work.[90]

While Scoular herself argues for the importance of law despite such findings, she explains that other scholars—including Bernstein and Agustín—have drawn on such empirical results to suggest that law cannot transform the industry in a methodical and planned way. That is, because abolitionist and decriminalizing legal regimes lead to similar effects, sex work studies scholars conclude that such laws offer little by way of transforming the industry.[91]

Agustín takes this conclusion farther by suggesting that law is irrelevant to the sex industry because most sex workers operate "outside" of law in the informal economy. She writes:

> No matter how rational and clear the guidelines for the regulation of sex businesses, many entrepreneurs, tax evaders, freelancers, gangsters, and

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[89] Laura María Agustín. "Sex and the Limits of Enlightenment: The Irrationality of Legal Regimes to Control Prostitution" *Sexuality Research & Social Policy* 5, no. 4 (2008): 76.

[90] Scouler, *What's Law Got to Do With It?,* 13.

[91] Ibid.

> undocumented workers remain *outside* these regimes, risking fines, prison, deportation, and stigma to obtain the profits and benefits of unregulated economies.[92]

Because the law fails to achieve its intended effect of bringing all the players of the sex industry into a compliant, governable whole, Agustín suggests that evaders are "outside these regimes." Here, the line between "inside" and "outside" of law is determined by subject's compliance. Agustín thus only considers law to be relevant to sex workers if it can compel them to act in a particular way. If subjects do not comply with law, Agustín suggests they are outside of its force. She therefore concludes that law is no longer relevant to sex workers' lives.

In addition to suggesting that law is irrelevant to and cannot grasp the complexities of sex workers' lives, sex work studies scholars have become increasingly critical of laws that attempt to regulate or transform the industry. These scholars have been especially critical of American anti-trafficking legislation that developed in the early 2000s. Prominent sex work studies scholars, including Chapkis, Bernstein, Agustín, and Weitzer, have criticized such anti-trafficking laws for expanding immigrant surveillance, detention and deportation.[93] In this way, their critiques make important contributions to the critique of carceral feminism, which I discussed in the introduction to the dissertation. More important for my argument in this chapter, these thinkers criticize

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[92] Agustín. *Sex and the Limits of Enlightenment*. 82.

[93] Wendy Chapkis, "Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants," *Gender and Society,* 17, no. 6 (2003), 923-937;Bernstein, "Carceral Politics as Gender Justice?"; Agustín, *Sex at the Margins*; Ronald Weitzer, "The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade," *Politics & Society* 35, no. 3 (2007): 447-475.

such laws for mobilizing the binary thinking that sex work studies has worked to complicate. Indeed, sex work studies' critiques of anti-trafficking law suggest that law brings the worst and most damning qualities of the binary between oppression and empowerment to bear on the lives of sex workers.

For example, in her 2003 article, "Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants," Chapkis shows how binary thinking informs and limits the Trafficking Victim's Protection Act. Passed by the United States in 2000, this law "exempts a small class of abused and exploited migrants… from punitive immigration and welfare reforms measures."[94] While the law portends to help all victims of trafficking, it actually only offers this protection to women and children who are driven into migrant sex work through "force, fraud or coercion." [95] This severe form of trafficking is distinct from other forms of sex trafficking where women knowingly enter the sex industry in return for assistance with migration. As a consequence of this uneven protection, Chapkis argues, the law constructs a binary between deserving and undeserving sex workers. This binary, subsequently, impedes sex workers' rights. She writes:

> As passed, the law relies heavily on the distinction between "innocent victims" of forced prostitution and "guilty sex workers" who had foreknowledge of the fact that they would be performing sexual labor. As such, the law neither empowers most migrant prostitutes by protecting

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[94] Chapkis, "Trafficking Migration," 924.

[95] Ibid., 927.

> their rights as workers nor offers any assistance of the majority of abused sex workers interested in leaving the trade.[96]

Because of this binary between forced, innocent victim and voluntary, guilty sex worker, Chapkis argues that the law requires a near total identification of women as brutalized victims in order to extend protection. At the same time, the law excludes other sex workers—those who are not tricked or forced into sex work—as knowing criminals.[97] This binary between forced and voluntary sex work maps onto the binary between oppression (forced) and empowerment (voluntary) that has dominated past research and debate over the sex industry. In this way, the Trafficking Victim's Protection Act draws on and strengthens the kind of binary thinking that sex work studies has worked so hard to displace.

Weitzer makes a similar connection between law and binary thinking. In his article "The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade," Weitzer focuses on how a coalition between Christian conservatives and radical feminists created a moral crusade against sex trafficking in the early 2000s. These crusades, according to Weitzer, not only exploited societal anxieties over sex work, but also deployed binary thinking by framing trafficking in all-or-nothing terms. He writes, "crusade leaders consider the problem unambiguous: they are not inclined to acknowledge gray areas and are adamant that a particular evil exists precisely as they depict it."[98] Thus, for crusade leaders, sex trafficking was totally evil and its victims

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[96] Ibid., 929.

[97] Ibid., 935.

[98] Weitzer, "The Social Construction," 448.

were subsequently totally oppressed. In this way, the crusades echoed the binary thinking that has governed past debates over sex work by constructing a stark, mutual-exclusion between oppression and empowerment.

Weitzer suggests that this binary thinking was exacerbated and promulgated as the anti-trafficking crusaders engaged governance projects, including the development of legislation. Specifically, he suggests that the binary between knowing and unknowing victims that informed the TVPA spread to other laws and policies governing the sex trade. For instance, under the Bush administration, the U.S. government adopted a policy of denying funding to organizations that "were not sufficiently committed to abolishing prostitution, or that dispensed condoms and other assistance to workers without trying to rescue them."[99] In order to obtain funding, organizations needed to adopt the TVPA's language of unknowing, innocent victim. These organizations needed to identify sex workers as brutalized victims, without agency, in need of state and legal protection. Thus, Weitzer suggests that the institutionalization of anti-trafficking rhetoric in law promulgates this binary, spreading it across various policy projects and government practices. Consequently, the law, for Weitzer bolsters the kind of binary thinking that sex work studies rejects.

Sex work studies has thus suggested that law cannot grasp the complexities of sex work or meaningfully transform the sex industry. Not only is it irrelevant to the everyday lives of sex workers, but also serves as a potential harbinger for the very binary thinking that the field rejects. As was the case with TVPA, law potentially depicts sex workers as brutalized victims or knowing criminals. In this way, law can bring the

[99] Ibid., 450.

worst elements of binary thinking to bear on the lives of sex workers. Sex work studies thus portrays law as antithetical to the field. After all, sex work studies was founded on valuing complexity over binaries. If law cannot capture such complexity because it reinforces problematic binary thinking, then it stands at odds with the field's defining characteristic.

**Sex Work Studies: A Narrow Perspective on Law**

While the critique of carcerality and specific laws like the TVPA are compelling, and it is not my project here to contest such critiques, the overall picture of law that emerges from sex work studies is overly narrow and lacks the complexity that the field so prizes. First, by suggesting that law is unable to grasp the complexities of everyday life, these thinkers obscure the ways that law is embedded in everyday practices. They instead portray law as somehow disentangled from such everyday practices. Second, sex work studies scholars exacerbate the idea that law is disentangled from everyday life, by suggesting that law is irrelevant to the lives of sex workers. It is only possible to claim that law is irrelevant to sex worker's lives, if the scope of law is limited to its stated aims and effects. Finally, by suggesting that law is a harbinger of binary thinking, sex work studies fails to explore the complexities of law that exist beyond such binaries. In other words, sex work studies scholars lapse in their pursuit of complexity by overly and exclusively focusing their critique on laws that mobilize binary thinking.

This overly narrow perspective on law is most evident in Agustin's argument that law is irrelevant to the sex industry because most its subjects operate "outside" of law in the informal economy. Viewing law through this "inside" and "outside" perspective obscures both the role that law might play in producing subjects whom Agustín views as

somehow "outside" of its grasp. It also obscures how these subjects might take up and engage in legal practices of meaning making outside of the traditional venues and institutions of law. In the passage I cited above, Agustín writes about, "entrepreneurs, tax evaders, freelancers, gangsters, and undocumented workers" and "fines, prison, deportation, and stigma."[100] These categories are all invariably shaped by law. Yet, Agustín asserts that these categories are somehow outside of law. Thus, by asserting that these categories are outside of laws' effects, Agustín misses an opportunity to explore how these categories are themselves shaped by law. Agustín's reliance on a distinction between "inside and outside" law thus obscures the role that law plays in the relations of power/knowledge that produce sexual subjects, including sex workers. Moreover, this inside/outside perspective also obscures any way that these subjects might take up, resist, or transform legal categories. In other words, Agustín's reliance on an inside/outside framework for understanding law obscures what I call the "legal everyday" of the sex industry.

Scoular suggests that the limited perspective on law found in sex work studies, is overly focused on the idea of law as a direct, juridical expression of force.[101] When scholars do not see such force, they conclude that law is irrelevant or, worse, not present. In this way, Scoular argues that sex work studies scholars fail to see law in processes of power relations that do not operate through repression, such as processes of normalization, authorization, and subjectification.[102] If we are to fully understand the

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[100] See note 91.

[101] Scoular, "What's Law Got to do With It?" 14.

[102] Ibid., 30-33.

power, consequences, and potential that law holds for sex work, Scoular argues we need to complicate such accounts and move outside of their narrow conception of law's effects.[103]

Like Scoular, Weitzer is critical of sex work studies scholars' account of law. Weitzer challenges the field, writing, "it is… absolutely *not the case* that these legal systems (criminalizing prostitution or legalizing it) have 'the same empirical effects,' as Scoular and Bernstein claim, or have no effect, as Agustin insists."[104] He continues:

> I maintain that it is farfetched to claim that state policy is wholly unrelated to the social organization of sex work and to participants' lived experiences…. Taken as a whole, the research on legal systems suggests that prostitution *can* be organized in a way that is superior to blanket criminalization. At the same, there is plenty of variation across legal systems in the nature of the regulations and their effects, both intended and unintended.[105]

Thus, Weitzer challenges the field by suggesting that important differences exist between different legal approaches to sex work. In this way, Weitzer extends the complexity of sex work studies to law. Just as sex work studies foregrounds variety, Weitzer here calls for scholars to foreground the variety and differences that exist between legal regimes.

While Weitzer and Scoular both make strides towards complicating sex work studies' account of the relationship between law and the sex industry, they both fall short

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[103] Ibid.

[104] Weitzer, *Legalizing Prostitution,* 75.

[105] Ibid., 76.

of this goal by remaining focused on prostitution. This focus burdens these scholars to show how law is more complicated than binary thinking, while remaining entrenched in a realm of law that has been highly affected by such binary thinking. In other words, by approaching the "complexity" of law through prostitution the cards are stacked against these scholars. As we saw with TVPA, many prostitution laws in the United States are developed through the binaristic language that sex work studies hopes to negate. Moreover, because prostitution continues to be widely criminalized United States, it stands to trigger the idea that law is a punitive and repressive force.

I would suggest that we might gain an even more complex perspective on the relationship between law and the sex industry by suspending the traditional object of analysis in favor of a form of sex work that has long been legally regulated in the United States: strip clubs. Taking this perspective on law would bypass the binaries of "inside/outside," "forced/voluntary," and "oppression/empowerment" that have framed previous discussions of laws governing prostitution. Indeed, building an account of the power, consequences, and effects of law out of an analysis of strip clubs stands to reveal previously overlooked dimensions of law that will themselves offer something to our understanding of laws governing prostitution. Moreover, I will argue that strip club laws reveal how law is embedded in everyday practices of meaning making and relations of power/knowledge in polyvalent and complex ways. Foregrounding this complexity, will allow me to construct a sex work studies approach to law that is more faithful to the field's founding values of complexity and variety than Weitzer's and Scoular's examinations of prostitution law.

**Strip Clubs and Sex Work Studies**

As I discussed above, debates surrounding the oppression or empowerment of sex work and its abolition or decriminalization, have historically focused on an abstract and imagined idea of street prostitution at the expense of other forms of commercial sex. With the rise of antipornography feminism in the 1980s, feminist debates over the meaning and status of sex work incorporated pornography into the oppression versus empowerment framework. American strip clubs have played a comparatively small role in such debates. This is surprising given that these debates reached their peak at the same time that the strip club industry was experiencing rapid grown and gaining cultural visibility in the United States.[106]

Starting in the early 1980s, American strip clubs experienced a significant economic restructuring. Prior to then, strippers worked for minimum wage and earned tips. In the early 1980s, in order to keep pace with the growth of pornography sales from home videos and the liberalization of the economy, clubs reclassified dancers as independent contractors, stopped paying wages, and charged dancers "stage-fees" to perform for tips.[107] As I will elaborate in chapters two and four, this led to the exploitation of dancers' labor, but also expanded the kinds of services that strippers offered. Despite these changes and the rapid growth of the strip club industry in the 1980s, debates over the status and oppression of sex workers failed to address American strip clubs and have ignored most other forms of legal, indoor sexual commerce.[108]

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[106] Katherine Frank, *G-Strings and Sympathy: Strip Club Regulars and Male Desire* (Durham: Duke University Press, 2002), xxi.

[107] Siobhan Brooks, *Unequal Desires: Race and Erotic Capital in the Stripping Industry* (Albany: SUNY University Press, 2008), 60.

[108] Agustín, "The Cultural Study of Commercial Sex," 618.

Nevertheless, during this period, scholars began to examine American strip clubs and the lives of exotic dancers.[109] While American strip clubs did not figure into debates over abolition or decriminalization, early scholarly examinations of strip clubs were informed by the attending binary between oppression and empowerment. As a result, scholarly literature on strip clubs has mirrored the trajectory of the broader field of sex work studies. Scholarship on sex work began by examining isolated transactions between individual sex workers and their clients—focusing on questions of oppression and empowerment. It then challenged the binary thinking that emerged from this narrow focus and shifted to a more complex, varied perspective. Similarly, scholarly work on strip clubs has shifted from focusing on the individual dancers' agency to a more complex account of power relations.

Emerging from the sociological literature on social deviance in the 1970s, early strip club scholarship focused on individual transactions between dancers and patrons.[110] These early studies drew on theoretical frameworks of social interactionism and

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[109] In their review of literature on strip clubs, Wahab, Baker, Smith, Cooper, and Lerum found that sociology was the main contributing discipline to the study of strip clubs. This is followed by criminal justice and law, communication, psychology, social work, and anthropology. Stephanie Wahab, Lynda M. Baker, Julie M. Smith, Kristy Cooper, and Kari Lerum, "Exotic Dance Research: A Review of the Literature from 1970 to 2008," *Sexuality & Culture* 15 (2011): 60.

[110] Jacqueline Boles and Albeno P. Garbin, "The Strip Club and Stripper-Customer Patterns of Interaction," *Sociology & Social Research* 58, no. 2 (1974):136-144; Jacqueline Boles and Albeno P. Garbin, "The Choice of Stripping for a Living: An Empirical and Theoretical Explanation," *Sociology of Work and Occupation* 1, no. 1 (1974): 110-123; Graves E Enck and Preston D. James, "Counterfeit Intimacy: A Dramaturgical Analysis of an Erotic Performance," *Deviant Behavior* 9, no. 4 (1988): 369-381; Craig J. Forsynth and Tina H. Deshotels, "The Occupational Milieu of the Nude Dancer," *Deviant Behavior* 18, no. 1 (1997): 125-142.

dramaturgy.[111] They were preoccupied by questions of dancers' motivations, how they acted out intimacy, and how they managed stigma.[112] The tone of these early studies tended to either victimize or exoticize dancers, focusing on their individual oppression or agency.[113] In this way, early scholarship on strip clubs was stuck in the same binaries that have historically plagued and stifled debates around sex work more generally.

Just as sex work studies has challenged such binaries, the scholarly literature on strip clubs has developed a broader and more complex perspective on the meaning of exotic dance.[114] In the early 2000s, strip club scholarship began to challenge the narrow focus of early sociological studies, troubling the binary between of oppression versus empowerment. For instance, in her 2002 article "Dancing on the Mobius Strip: Challenging the Sex War Paradigm," Bernadette Barton argued that strippers experience both oppression and empowerment throughout the course of their time in the industry and, even, during a single shift.[115] Likewise, in the 2006 anthology *Flesh for Fantasy:*

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[111] Wahab et. Al, *Literature Review,* 65-66.

[112] Ibid.

[113] Ibid.

[114] For an exception to this trend, see Shelia Jeffreys, "Keeping Women Down and Out: The Strip Club Boom and the Reinforcement of Male Dominance," *Signs* 34 no. 1 (Autumn 2008): 151. In this article, Jeffreys reiterates the radical feminist idea that sex work uniformly oppresses women by serving as symbolic and material markers of male dominance and sexual violence. She argues that this is because feminist researchers and the literature on stripping more generally have been overly focused on individual transactions between dancers and their customers at the expense of taking a broader perspective on the power relations that shape the industry. As I explore above, this is a mischaracterization of the trend in scholarship on strip clubs, which has moved away from an individual transaction perspective toward a more complex account of power relations.

[115] Bernadette Barton, "Dancing on the Mobius Strip: Challenging the Sex War Paradigm" *Gender and Society* 16, no. 5 (2002): 587. Barton writes: "What I found in

*Producing and Consuming Exotic Dance,* the editors challenge the inherent and static relationship between sex work and oppression or empowerment. They write, "there is no preordained meaning to sex work—it is neither inherently feminist nor inherently oppressive. Rather, it is carried out under certain political, economic, and ideological conditions that must be explored, challenged, and revisioned."[116] All of the authors featured in this anthology have worked as both scholars and strippers. Consequently, the editors claim these authors are uniquely situated to trouble an all or nothing perspective on oppression versus empowerment.[117]

In addition to challenging this binary, since the early 2000s scholarship on strip clubs has sought to displace the question of empowerment or oppression altogether. To do this, scholars have broadened their focus beyond individual transactions between the dancer and her patron. They have shifted the focus to customers, other club employees, the layout and architecture of clubs. [118] They have foregrounded issues of race and class, and examined strip clubs catering to LGBQ patrons and heterosexual women. [119] These

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the course of my own interviews with dancers is that both sides of the sex wars make defensible claims. However, the veracity of their claims is closely connected to issues of time and contexts. That is, the claims of radical and sex radical feminists seem most pertinent during specific moments in strippers lives."

[116] R. Danielle Egan, Katherine Frank, and Merri Lisa Johnson eds., "Third Wave Strippers: Flesh for Feminist Fantasy." In *Flesh for Fantasy: Producing and Consuming Exotic Dance* (New York: Thunder's Mouth Press, 2006), xv.

[117] Ibid., xii.

[118] Frank, *G-Strings and Sympathy*; R. Danielle Egan, *Dancing for Dollars and Paying for Love: The Relationships Between Exotic Dancers and Their Regulars* (New York: Palgrave MacMillan, 2006); Kim Price-Glynn. *Strip Club: Gender, Power, and Sex Work* (New York: New York University Press), 2010.

[119] Siobhan Brooks, *Unequal Desires: Race and Erotic Capital in the Stripping Industry* (New York: SUNY Press, 2010); Katherine Frank and Michelle Carnes, "Gender and

new studies have also explored theoretical questions of performance and spectacle.[120] Consequently, like sex work studies more generally, scholarship on stripping has successfully shifted its focus from the oppression or empowerment of dancers' to a broader understanding of the variety of practices and power dynamics that shape the industry. In this way, the scholarship on stripping has moved beyond the debates over strippers' individual agency and its attending binary between oppression and empowerment.

**Strip Clubs and Law**

While scholarship on strip clubs has moved away from a binary between oppression and empowerment that plagued early studies, perspectives on the relationship between law and strip clubs have remained tethered to such binary thinking. That is, the relationship between law and strip clubs has largely been figured through debates over the law's role in protecting strippers' freedom or protecting them from oppression. Consequently, just as the broader sex work studies literature has failed to retheorize law outside of the binaries that framed the abolition versus decriminalization paradigm, the literature on stripping has failed to offer a more complex account of law that would parallel its more complex account of the industry.

As I will discuss in greater detail in chapter three, the main scholarly accounts of the relationship between strip clubs and law focus on how regulatory laws in the US

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Space in Strip Clubs" Ronald Weitzer ed. *Sex for Sale: Prostitution, Pornography, and the Sex Industry*. New York: Routledge, 2009 (115-138); Katherine Frank and R. Danielle Egan, "Attempts at a Feminist and Interdisciplinary Conversation about Strip Clubs," *Deviant Behavior* 26, no. 4 (2005): 297-320.

120 Katherine Liepe-Levinson. *Strip Show: Performances of Gender and Desire* (New York: Routledge, 2002); D. Schweitzer, "Striptease: The Art of Spectacle and Transgression," *Journal of Popular Culture* 34, no. 1 (2000): 65-75.

constrict strippers' freedom under the First Amendment. Specifically, they argue that laws proscribing nudity impinge on strippers' sexual expression.[121] This perspective engenders a very narrow conception of the power of law: It can either restrict a strippers' freedom through imposition or it can safeguard a strippers' freedom through permission. In this way, such First Amendment arguments depict law as discrete force that acts for or against subjects through permission or prohibition.

This frame offers a very simple perspective on the power of law. Although it does not explicitly evoke the abolition versus decriminalization paradigm, it places the same faith in the law as an efficacious force. In this case, the force is not intended to alter behavior as much as it is meant to create a buffer zone between stripping and the community. Consequently, much like the perspective on law that underpins sex work scholars' critique of law and policy, this perspective relies on an understanding of the individual, the community, and law as disentangled and discrete entities.

Even one of the few scholarly accounts of the relationship between law and strip clubs that does not conclude with a call for expanded First Amendment rights falls into this simplistic account of law's power—that is, as a juridical force that exerts itself on subjects through its presence or absence. In her chapter "On the Boundaries of the Global Margins: Violence, Labor, and Surveillance in a Rust Belt Topless Bar," Susan Dewey examines contemporary American strip clubs through the lens of neoliberalism and ultimately makes an argument that laws governing strip clubs enact violence against

[121] See note 16.

dancers.[122] In this way, Dewey falls into a juridical conception of the power of law even as she tries to complicate law through her discussion of neoliberalism.

Drawing on ethnographic research on "Vixens," a strip club in the Rust Belt of upstate New York, Dewey argues that, under neoliberalism, stripping has been characterized by increased state surveillance and increased state marginalization.[123] That is, while the state plays an in increasingly large role in controlling strip clubs through surveillance—through zoning and nudity laws—it also and somewhat paradoxically abandons strippers by eroding laws that might protect strippers from exploitative labor practices and systemic violence. This not only renders strippers responsible for protecting themselves from the market and systemic violence that often accompanies sex work, but also exposes strippers to such violence.[124] For example, she explains that zoning laws both survey strip clubs and marginalize them by pushing them into abandoned parts of the neoliberal city.[125] This practice exposes dancers to potential violence. She writes:

> My drive home from Vixens each night was fraught with anxiety after listening to the stories dancers had told me about infatuated clients who followed them home on the empty highway during the predawn hours. I found myself constantly checking my rearview mirror, relieved when the

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[122] Susan Dewey, "On the Boundaries of the Global Margins: Violence, Labor, and Surveillance in a Rust Belt Topless Bar," in *Policing Pleasure: Sex Work, Policy, and the State in Global Perspective* (New York: NYU Press 2011), 73-85.

[123] Ibid., 83.

[124] Ibid.

[125] Ibid., 82.

> reflection revealed only the shadowy outlines of abandoned furniture factories in the former industrial zone of the city.[126]

Thus, while zoning does not enact direct violence against strippers per se, it exposes them to violence through abandonment. Dewey explains, "pervasive neoliberal labor practices, exclusionary zoning policies, and an environment of constant surveillance create a situation with a high potential… of violence."[127]

Dewey's ethnographic details substantiate a relationship between law and violence. Using "fear" as a category of analysis, she argues that the rise of neoliberal labor practices—insecure scheduling, wages, and benefits, as well as more general anti-union practices—have disempowered strippers to mobilize law as a form of protection. One dancer whom Dewey interviewed, for instance, did not feel she could go to the police for help dealing with a customer who had begun to stalk her.[128]

She also writes about a dancer who could not get customers to obey laws that proscribed nudity; this dancer felt coerced, by a customers' mockery, to break the law and remove her top.[129] According to Dewey, this is especially harmful in the face of neoliberalism, which whittles down legal protections for all workers and, as I discuss further in chapter four, strippers in particular. Dewey suggests that ethnographic details

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[126] Ibid.

[127] Ibid., 74.

[128] Ibid., 73.

[129] Ibid., 83.

illustrate how laws under neoliberalism expose strippers to conditions of systemic violence.[130]

Framing these details in this way portrays law as condoning and, even itself, enacting violence against strippers. While strip clubs are legally regulated, under neoliberalism law enacts this violence through its own absence. Neoliberalism, on Dewey's view whittles away any labor laws—minimum wages, benefits, and union protection—that might protect strippers from such violence.[131] Moreover, Dewey argues that, because stripping is stigmatized, strippers cannot mobilize laws against stalking or even laws that proscribe nudity in order to protect themselves.[132] In this way, Dewey seems to agree with Agustín: law fails to be relevant in strippers' lives. It fails to offer real and robust protections for strippers. Through this failure, the law enacts violence—albeit in an indirect way—against dancers. She writes:

> The lives of these women, although situated at the social and legal margins of life in the United States, consistently speak to the exclusionary forces that impact all women, albeit in different ways. Thus, despite Vixens dancers' best efforts to obtain some autonomy for themselves through increased earning power and flexible working hours, a vast array of institutional and interpersonal obstacles consistently place them in a permanent state of fear.[133]

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[130] Ibid., 85.

[131] Ibid.

[132] Ibid., 83.

[133] Ibid., 85.

While Dewey takes a broad perspective on the obstacles that lead to fear and violence, by referencing zoning laws and the erosion of labor laws under neoliberalism, it is clear that law is one such "institutional" obstacle. Thus, for Dewey, law renders strippers vulnerable to violence.

I do not begrudge Dewey her critique of contemporary labor practices in the American strip club industry. Indeed, I discuss these conditions more thoroughly in the last chapter of this dissertation. Nevertheless, she reads this erosion of laws and the subsequent vulnerability of strippers through an overly simplistic account of the law as a force that either gives protection or enacts violence through its presence or absence. In this way, Dewey depicts law as a juridical force that enacts particular effects against its subjects. However, she fails to account for other effects that law might have on everyday practices outside of a direct or indirect expression of force.

**Strip Clubs and the Legal Everyday**

Instead of tethering a discussion of law to questions of oppression and empowerment, decriminalization versus abolition, protection versus freedom, inside versus outside, presence versus absence, I would like to offer sex work studies a more complicated account of law. I want to highlight how law gets involved and embedded in sex work, but I want to do so without suggesting law and everyday life to be discrete categories, where law acts—or does not act—against subjects in their everyday lives. To do this, I explore how law is part of the constitutive relations of power that shape sexual practices in strip clubs. I also highlight how strippers engage with law through practices of meaning making. Drawing on the work of de Certeau, I link these two perspectives into the legal everyday

Although scholars of strip clubs have mostly limited their exploration of the relationship between strip clubs and law to freedom of speech and its attending binaries, strip clubs actually provide a unique perspective on law through what I am calling the legal everyday. First, because strip clubs are legal in the United States, they complicate the binary between decriminalization and abolition that has animated feminist and more general debates over the relationship between sex work and law. Second, although feminists have tried to pull strip clubs into such binary thinking through their First Amendment arguments, stripping's status as free expression is more attenuated than pornography's. Because strip clubs offer this kind of in between perspective, they are uniquely situated to bypass the simplistic perspective on the power of law that often accompanies debates over the sex industry.

This perspective on law is not limited to a law's stated intended effects. Instead, it explores how these effects are mutated and remade as people take them up in everyday contexts through practices of meaning making. For example, in her ethnographic account of strip club regulars, Frank notes that customers experience the strip clubs as relaxing spaces of adventure and freedom.[134] She writes, "interviewees discussed their experiences in the language of "adventure" in addition to "variety," "travel," "[f]un" and "escape."[135] She explains that customers are often drawn to strip clubs to experience illicit sex within the safe confines of a regulated space. She argues that the "dangerous enough" atmosphere arouses sexual desire.[136] In this way, the club is eroticized because it is a

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[134] Frank, *G-Strings and Sympathy*, 127.

[135] Ibid.

[136] Ibid.

place of safe transgression. Law, Frank points out, plays a role in constructing an idea of safe transgression. She writes:

> Despite descriptions of strip clubs as places with "no rules" and as "outside the law," and although customers experience and express feelings of freedom, adventure, or excitement during their visits, the clubs have been tightly regulated.[137]

This reveals law to be embedded in practices of meaning making in so far as regulation comes to create an idea of adventure and excitement. Instead of assuming regulation and sexual expression to be counterpoised, as many First Amendment arguments do, this example reveals law and sexual expression to be mutually constitutive. Instead of understanding this example in opposition to something we might call "actual law," the legal everyday foregrounds such examples of "using law" in practices of meaning making in order to expand the idea of what law is and gain better perspective on its pitfalls and possibilities for the sex industry.

**Conclusion**

Because American strip clubs have not figured prominently in explorations of the relationship between law and the sex industry, they provide a unique lens on this relationship. Like the broader field of sex work studies, scholars of strip clubs have broken with binary thinking and expanded beyond a narrow focus on individual transactions to highlight the agency or oppression of dancers. However, as with the broader field, discussions of the relationship between law and strip clubs tend to fall back into such narrow thinking insofar as they construct normative arguments about what the

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[137] Ibid.,128.

law should do to protect strippers. This way of thinking constructs the law as a direct and efficacious force. When it fails to act in this efficacious manner, sex work scholars have concluded that it is irrelevant to the everyday realities of the sex trade. But here, instead of understanding law and everyday life as opposed, I suggest that strip clubs—given their legal status—provide a case for rethinking law through de Certeau's concept of the practices of everyday life. That is, strip clubs highlight law as overlapping with relations of power/knowledge and entangled with, resisted, and remade through everyday practices of meaning making.

The next three chapters of the dissertation consider different aspects of the relationship between strip clubs and the legal everyday through an examination of laws regulating nudity and bodily contact, zoning, and labor. Through this case study approach, I probe the variety and complexity of strip club law to show how law gets taken up and used within strip clubs in ways that fall outside the binary thinking that plagues how scholars understand the relationship between law and the sex industry. In this way, the dissertation develops takes a sex work studies approach to law, by extending the complexity that the field values to the study of law. In the next chapter, I begin to illustrate this perspective by exploring historical and ethnographic accounts of lap dancing and its relationship to law.

## Chapter 2:

## Lap Dancing as an American Legal Object

*"What was I actually selling to the customers, as I was providing no direct sexual release and no actual bodily contact? Who were these men who were so willing to open their wallets to the dancers night after night, paying us double or triple or quadruple the amount of money that we would make at our day jobs, to receive only a seemingly intangible, ephemeral service in return?"* Katherine Frank, *G-Strings and Sympathy* (xx)

*"Lap dancing foregrounds the complexities that continue to plague policy makers with regard to defining what legally constitutes 'real sex.'"* Katherine Liepe-Levinson, *Strip Show* (160)

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Contemporary American strip clubs offer a unique form of sexual service. On one hand, stripping is a theatrical performance that relies on music, costumes, makeup, stages, poles, lights, and smoke machines to construct meaning around the movement of nude or partially nude bodies. On the other hand, by incorporating audience members into the act—through ritualistic tipping practices, companionship, and private lap dances—stripping is not a purely scopic experience.[138] Beyond stage performances, strip clubs offer a variety of multisensory opportunities for sexual fantasy, play, intimacy, and—even—touch.[139] As a result, stripping is both different from prostitution and pornography, and difficult to distinguish from them. In strip clubs, the boundary between

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[138] Frank, *G-Strings and Sympathy*, 9.

[139] Ibid., 41.

sexual act and sexual performance—which is essential in matters of law—seems rather blurry.

A number of municipalities have developed laws proscribing physical contact in strip clubs in order to clarify this boundary between sex act and performance. These so-called "no touching" laws typically require a dancer to maintain a specified distance from her customer during a lap dance. While these laws are ostensibly aimed at preventing prostitution by proscribing contact, case law highlights the difficulty that they often have in deciphering and limiting the boundaries of sex. Not only does physical contact sometimes occur in defiance of no-touching laws, but sexuality also spills beyond contact through fantasy, conversation, and movement. This gives the impression that such no-touching laws cannot adequately limit sexuality. Indeed, the scholarly quotations that open this chapter both suggest that lap dancing is ephemeral and imprecise. Such imprecision seems antithetical to the clear-cut categories and definitions often favored by law.

In order to deal with such imprecision, legal commentators and practitioners sometimes collapse lap dancing with prostitution. For instance, editor of the blog *Feminist Law Professors,* Bridget Crawford writes: "Is lap dancing prostitution? If prostitution is selling (or buying) use of a body for sexual pleasure, then I suppose the answer is yes."[140] Others, as in the case I discuss below, argue that lap dancing is legal because it is a performance that is protected under the First Amendment. Such legal commentators thus deal with lap dancing's blended nature—as both act and

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[140] Bridget Crawford, "Is Lap Dancing Prostitution?" *Feminist Law Professors* (blog), July 17, 2009, http://www.feministlawprofessors.com/2009/07/is-lap-dancing-prostitution/

performance—by reducing it to one or the other. This contributes to the idea that law cannot actually grasp the specificity of lap dancing. As such, law seems removed from the practice. Indeed, it seems to confirm sex work studies assertion, which I discussed in the previous chapter, that sexuality and sex work exceed the neat categories of law.

By drawing on legal history, however, I show that law was central to the development of lap dancing as the most prominent sexual practice in contemporary American strip clubs. There are three important points in the legal history and development of lap dancing. The first is the emergence of discourses of antitheatricalism that date to the colonial period. These discourses not only illustrate the historic sexualization of performance in America, but also illustrate how theater emerged as a site of the legal regulation of sexuality. The second important moment is the 19$^{th}$ century splintering of American theater between high and low form. This not only led to the construction of the passive audience member, but also to new modalities of sexual performance in working class venues, including practices of audience participation. The final important moment in the development of lap dancing is the emergence of so-called “time, place, and manner” regulations in the late 20$^{th}$ century. These kinds of commercial regulations are often ignored by sex work studies scholars and, as a result, their contribution to shaping the contours of strip club practices such as lap dancing has been overlooked. Taken together, these three moments illustrate how the lap dance was inadvertently created by laws trying to restrict sexual performance and sexual contact. This perspective on lap dancing illustrates how laws regulating sexuality can have unintended consequences and themselves lead to new modalities of sexual practice, even if such new modalities eventually come to seem too complicated for the law to control. In

this way, laws governing lap dancing illuminate how de Certeau's understanding of the practices of everyday life relate to law. By illustrating how strippers and their clients engage with laws ostensibly delimiting sexual contact to construct the quotidian practice of lap dancing, this chapter reveals lap dancing to be a practice of the legal everyday.

I will begin by describing the lap dance and the kind of legal conundrum it presents. I then discuss the California Court of Appeals' decision in *The People v. Karen Kay Janini*. In this decision, the appeals court reversed the lower court's conviction of several dancers for violating a no-touching ordinance and engaging in prostitution. The decision illustrates that the lower court collapsed lap dancing into prostitution, while the court of appeals collapsed it into pure performance comprehensively protected by the First Amendment. Neither of the courts actually grasped the specificity of lap dancing as both sexual act and sexual performance. As a result, their decisions seem to substantiate the idea that lap dancing is too complex a practice for the law to adequately grasp or regulate. In the second half of the chapter, I develop a legal-historical perspective that challenges this idea by showing American lap dancing to be thoroughly shaped and constructed by law. In this way, the chapter illustrates how law can inform practices of sex work even if these practices seem to be removed from and too complicated for law. As a result, lap dancing reveals how law can be taken up in new and surprising ways in everyday practice. As such, lap dancing illustrates how law can be more complex than the binary thinking that sex work studies scholars often associate with it.

**What is a Lap Dance?**

In the early 1980s, in order to keep pace with the proliferation of pornographic home videos, strip clubs began to offer a series of new, intimate, and individualized

services beyond the stage show.[141] These services included private lap dances and less explicitly sexual forms of paid companionship and conversation. Today, exotic dancers earn the bulk of their income—usually tips—from these more intimate services.[142] As a result, in a typical American strip club, dancers will perform onstage only insofar as management requires it and it serves as an advertisement for their more private and individualized services. [143] A stripper's shift is therefore filled with personal interactions with customers that involve varying degrees of physical and emotional intimacy.[144] This personal interaction complicates the idea that stripping is only a theatrical performance, clearly delineated from other forms of sex work, including prostitution.

The content of these personal interactions vary across different clubs and among different performers and patrons. For instance, in some clubs, as anthropologist Katherine Frank extensively documents, strippers spend much of their time talking with patrons, providing them with sympathy and emotional support.[145] In other clubs, personal interactions consist mostly of lap dances where the stripper gyrates against the customer's lap, simulating sex with varying degrees of physical contact and sexual release.[146] Dance anthropologist Judith Lynne Hanna gives the following account of such personal dances:

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[141] Frank, *G-Strings and Sympathy*, 15.

[142] Ibid.

[143] Ibid.

[144] Ibid.

[145] Ibid., xxiii.

[146] Liepe-Levinson, *Strip Show,* 108.

> This focused dance takes place next to where the patron is seated, or in lap dancing (common in some clubs), also on a patron's thighs. The dancer artistically communicates to a patron, through body movement, proximity, touch, and dim light, the fantasy of "I am interested in you and you alone. I understand you, you're special and important to me."[147]

Thus, lap dancing involves a complex interplay of sexual fantasy and contact; the dancer plays with this boundary in order to lend authenticity to the idea of her pleasure and to sexualize the individualized focus on the dance. During this kind of dance, the customer typically remains passive. The dancer controls the kinds of touch and physical contact that occur.[148] This control allows the dancer to perform intimacy in a way that implies that more contact is always possible, even when the dancer knows in advance that it is not.

As I mentioned above, many municipalities attempt to control and limit lap dancing by developing so-called "no-touching" laws. These laws involve restricting the amount of physical contact involved in private dances. Frank, for instance, describes how such laws functioned in the strip club where she conducted fieldwork and also worked as a dancer. She writes:

> These "private" dances involve a more individualized interaction between the dancers and their customers, but although a dancer could disrobe completely and place her hands on the customers' shoulders, other forms

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[147] Judith Lynne Hanna, "Dance and Sexuality: Many Moves," *The Journal of Sex Research* 47, no. 2-3 (2010): 230.

[148] Liepe-Levinson, *Strip Show,* 15.

> of bodily contact were prohibited and she was required to keep at least one foot of distance between herself and the customer. Customers were not allowed to touch either the dancers or their own genitals.[149]

Frank suggests that such laws give dancers a measure of control over the kinds of transactions that take place in strip clubs.[150] She writes that "[i]n six years of dancing, I was touched inappropriately *once*, and the customer was promptly removed from the club when I alerted management."[151] This description implies that no-touching laws—at least in this club—effectively prevented direct contact between dancers and their clients. However, looking more closely at a California case involving such laws complicates the idea of their clear-cut efficacy.

***The People v. Karen Kay Janini***

No-touching laws are seemingly straightforward. They simply proscribe contact between the dancer and her client. Despite this appearance of simplicity, the 1999 case *The People v. Karen Kay Janini* reveals the question of contact, especially sexual contact, to be a complicated legal question. That is, adjudicating a clear boundary between the sexual contact that such laws prohibit and physical contact that is "incidental" to the performance is more difficult than these laws—on their face—acknowledge.[152]

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[149] Frank, *G-Strings and Sympathy,* xxii-xxiii. The club where Frank worked is in an anonymous city in the American south.

[150] Ibid., 274.

[151] Ibid., 275, original emphasis.

[152] Specifically, in *Janini*, the court wonders where the line is between "masturbation of patron or touching incidental to artistic performance?" The People v. Karen Kay Janini et. Al, 89 Cal Rptr 2d, 245 (1999) § 247.

The original conflict in *Janini* involved two undercover operations at the Sahara Club, a strip club in Anaheim, California in 1997. During these operations, officers clandestinely videotaped dancers "brushing their scantily-clad breasts, buttocks, and genitals up against the clothed bodies of their male patrons."[153] The dancers were subsequently arrested, charged, and, in two separate trials, found guilty of violating Anaheim's no-touching law. The law stated:

> No entertainer shall have physical contact with any patron, and no patron shall have physical contact with any entertainer while on the premises, which physical contact involves the touching of the clothed or unclothed genitals, pubic area, buttocks, cleft of the buttocks, perineum, anal region, or female breast with any part or area of such other person's body.[154]

In a subsequent law, the city made violating this law a misdemeanor.[155] While the law's formal intent was to prevent any contact between a dancer and her client, the emphasis of the law is on contact between erogenous zones of the body. Consequently, the law was specifically aimed at restricting sexual contact and, we can infer, preventing prostitution in strip clubs.

Despite this built-in anti-prostitution mechanism, in addition to violating the no-contact law, four of the defendants were also convicted of prostitution.[156] In fact, during the first trial, the city attorney reduced prostitution to physical contact. He argued that

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[153] *Id.*

[154] Cited in *Id.* at Footnote 2.

[155] *Id.* § 248.

[156] *Id.* at § 247. This case incorporated two lower decisions into one.

prostitution encompassed a very broad array of "lewd" behaviors and did not require "sexual intercourse or even any skin-to-skin contact.... There just has to be touching."[157] The attorney instructed the jurors to "put the labels out of your mind because labels don't mean anything. Conduct is what you are concerned about. All you decide is if they did a certain thing on a certain day, that's all you're going to do."[158] As a result, all of the defendants were found guilty of violating the non-touching law, four women were convicted of prostitution, and two club managers—both men—were found guilty of aiding and abetting the dancers.[159]

The appellate division of the superior court of California had reservations about these results and therefore sought to transfer the cases to the state's court of appeals, fourth division. The California court of appeals agreed to the transfer, consolidated the original two cases involved, and heard the appeal as a single case—*The People v. Karen Kay Janini*—in 1999. The court of appeals reversed the lower court's decision, dismissed the alleged violations of the no-touching ordinances, and called for a retrial on the prostitution charges.[160] The Court of Appeals based its decision in two arguments. First, they concluded that the lower court had not considered the "long-established rule against local use of…criminal law in sexual matters."[161] Second, the Court found that the original judge had failed to give comprehensive instructions to the jury regarding the First

[157] *Id.* at § 248.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

Amendment's protection of the dancers "given the theatrical patina of the venue involved."[162] These arguments, which I analyze in the following two subsections, reveal the difficulty that law can have in its encounter with lap dancing, especially in adjudicating the boundary between prostitution and performance. As a result, both arguments seem to substantiate the idea that law is unable to grasp the complexity of lap dancing as both a sexual act and a sexual performance. In this way, it would seem that such laws are removed from the everyday practices of strippers insofar as they cannot grasp their complex realities.

***The Preemption Argument***

The superior court affirmed the original conviction, but asked that the higher court review the case in order to "settle important questions of law regarding the interplay between lap dancing, state preemption, and prostitution."[163] Their concern was that state law should have "preempted" local law. In this case, state preemption refers to the idea that criminal laws governing sexual practices should be decided at the state, rather than the local, level.[164] The California court of appeals explains:

> Subject to constitutional constraints, the rule is that local governments may impose reasonable time, place, and manner restrictions on the operation of adult businesses; but they cannot use the criminal law to prohibit sexual conduct as part of their regulatory activities.[165]

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[162] *Id.* at § 251

[163] *Id.* at § 248.

[164] *Id*.

[165] *Id*.

A city, in other words, may impose regulatory rules on the sex industry—such as rules governing alcohol sales, noise, parking, hours of operation, and land use—but may not punish particular sex acts under criminal law without express legislative authority.[166] Instead of turning to criminal law, cities can enforce their rules through regulatory measures such as revoking permits or prosecuting establishments that operate without a permit.[167] In this case, the court of appeals found that by making their non-touching law a misdemeanor, Anaheim had overstepped the line between "regulation and criminalization."[168] They concluded "[t]he Anaheim City Council may regulate establishments offering lap dancing, but its power to wield a criminal sanction for erotic entertainment violations of a 'sex-oriented business permit' is preempted."[169]

At first, the issue of state preemption seems like a dry jurisdictional dispute between the state and the local municipality.  Upon closer inspection, however, this dispute raises the question of the force that such non-criminal, non-contact local laws have on lap dances. In the decision, the California court of appeals concludes that the non-touching law in question cannot take direct aim at the strippers' dances, their bodies, or the physical contact they have with clients. Instead, cities may only "revoke permits for noncompliance or prosecute for operating without one, they may not punish alleged violations directly as sex crimes without express legislative authority."[170] Since clubs,

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[166] *Id.*

[167] *Id.*

[168] *Id.* at § 247.

[169] *Id.*

[170] *Id.* at § 248.

rather than individual strippers, hold permits to operate, state preemption implies that such regulatory laws only have a minimal and indirect impact on lap dancing. In this way, the relationship between law and lap dancing seems to attest to the argument—supported by the sex works scholars I discussed in the previous chapter—that law is irrelevant to the daily practices of sex workers.

***The First Amendment Argument***

Indeed, in *Janini,* the argument that the court of appeals made regarding the First Amendment jury instructions supports the idea that such no-touching laws only hold minimal consequence for individual dancers and the content of their dances. As I discuss further in the third chapter of this dissertation, in order for laws governing strip clubs to pass constitutional muster under the First Amendment, they must not target or taint the erotic content of the dances themselves.[171] This is known as the doctrine of content neutrality. In *Janini*, the court of appeals found that the lower court had failed to give comprehensive instructions to the jury regarding the First Amendment merits of the case. Instead of instructing the jury on content neutrality, the judge had only instructed the jury on the prostitution charge. These were the judge's instructions:

> 'Prostitution' is engaging in any lewd act between persons for money or other consideration. 'Lewd act,' as used in this instruction, means any act which involves the touching of the genitals, buttocks, or female breast of

[171] City of Erie v. Pap's A.M., 529 U.S. 277 (2000).

> one person by any part of the body of another person and is done with the intent to sexually arouse or gratify."[172]

While it is true that that this case involved "touching with the intent to sexually arouse or gratify," the jury still needed to be instructed that the no-touching law needed to be developed and enforced in a way that did not directly target the erotic content of the dance and therefore did not violate the partial protections that strippers are afforded under the First Amendment. The lower court thus ignored the theatrical dimensions of lap dancing and collapsed the entire case into the prostitution charge.

Indeed, during the trial the city attorney argued that any contact between a dancer and an audience member—any participation by an audience member at all—nullified the First Amendment protections offered to strippers because such contact crossed the line between performance and prostitution. In their reversal, the court of appeals explains:

> Anaheim claimed there were no First Amendment implications because the courts have long recognized that engaging in sex acts with patrons is not protected First Amendment expression and the conduct proved here amounted to masturbation of the patrons by the lap dancers. The contention is that while erotic behavior by performers might be protected by the First Amendment in an otherwise artistic setting of some sort, e.g. a dance not so when customers are introduced into the mix. Then we're talking about prostitution, says Anaheim.[173]

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[172] Cited in *Id.* at § 252.

[173] *Id.* at § 253.

Thus, as far as the city attorney and ultimately the lower court were concerned, audience participation crossed the line from protected performance into unprotected sex act. Their reasoning depended on equating lap dancing—or any audience participation—with prostitution. Since prostitution is not protected by the First Amendment, then the dances—as a kind of prostitution—were not protected by the First Amendment.

The California court of appeals found this argument unsatisfactory, holding that audience participation did not negate the First Amendment protections offered to strippers. In defense of this position, the court cited other performance traditions that rely on audience participation. The decision explains that the American performance tradition of the "'fall guy' asked to volunteer for the use and sometimes abuse, of hypnotists, comedians, magicians, jugglers, singers, and so on—*even dancers.* As most often these 'good sports' have paid to see the show, [thus] audience participation is not sufficient evidence of prostitution."[174] As a result, the court of appeals found that audience participation—in this case lap dancing—did not negate the dancers' First Amendment rights. These dancers were therefore protected because they had performed a dance that had not previously been declared obscene.[175]

However, just as the lower court had failed to account for the specificity of lap dancing by collapsing it into prostitution, the court of appeals failed to account for its specificity by collapsing it into pure performance with comprehensive First Amendment protection. As I mentioned above, stripping—including lap dancing—is not afforded comprehensive First Amendment protection. It is considered to be "on the outer ambit" of

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[174] *Id*.

[175] The First Amendment protects expression that is not previously declared obscenity.

such protection.[176] As a result, laws can regulate stripping provided they do not directly target the erotic content of the dances. Indeed, other Courts have found no-touching laws to be constitutional "time, place, and manner" laws that pass the content neutrality measure.[177]

Content neutrality is, of course, a matter to be adjudicated. But, in *Janini*, the court of appeals fails to address content neutrality altogether. Instead, it equates lap dancing with other theatrical performances. The Court explains:

> The [lower] court did nothing at all to respond to the fact that the dance in a theatrical setting is entitled to the same protection as a D.H. Lawrence novel, a painting by Goya, a Fellini movie, or one of the Bard's plays. A ballet, cabaret, or dance hall interpretation of *Lady Chatterley's Lover* with or without the novel's critical acclaim, would be as protected as the original written work.[178]

Thus, for the court of appeals, lap dancing is not on the outer ambit of the First Amendment, representing a special kind of case given its status as both performance and sex act. Instead, the court equates it with other kinds of performances and artistic works that have historically been afforded more comprehensive protections than stripping.

While suggesting that lap dancing deserves the same protections as other forms of performance seems like a valid perspective, the court's reference to another case dealing

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[176] *Pap's A.M.,* 529 U.S.

[177] Kathy Lynn Gray, "Strip Club No-Touch Law Upheld in Court," *The Columbus Dispatch*, August 29, 2015, http://www.dispatch.com/content/stories/local/2011/09/08/strip-club-no-touch-law-upheld-in-court.html

[178] *Janini*, 80 Cal Rptr 2d, § 253.

with prostitution, physical contact, and stripping reveals that *Janini* rests on unreflective ideas about what constitutes sex and what constitutes performance. Such unreflective perspectives suggest that the court—and we can infer law, therefore—cannot actually adjudicate the line between sexuality and performance. As a result, it cannot grasp the specificity of lap dancing.

***The People v. Maita***

The court contrasts *Janini* from a 1984 case entitled *The People v. Maita*. In *Maita,* a theater owner and several performers were found guilty of pimping and prostitution. The performers, in this case, were not protected by the First Amendment. *Maita* concerned a theater in Redwood City, California where:

> Patrons would pay at the door to watch, and after putting more money on the stage, be permitted to engage in a variety of sex acts (suckling breasts or oral copulation) with essentially naked female performers squatting or sitting on the edge of the stage. A few volunteers would be invited up on stage to be orally copulated themselves, each by one of the different female performers.[179]

Without explanation, the court of appeals in *Janini* suggested that the behavior in *Maita* was "obviously" prostitution. They write, "[in *Maita]* the First Amendment defense was an obvious sham, though, a transparent fig leaf for blatant criminal conduct."[180]

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[179] The People v. Philip Joseph Maita 157 Cal. App. 3d 309, 203 Cal. Rptr. (1984) at § 314.

[180] *Janini* 80 Cal Rptr 2d, at 255.

Conversely, because *Janini* did not involve such seemingly clear-cut sexual behavior, the court concluded that First Amendment protections should apply. The court writes:

> Should the case (*Janini)* have been tried in light of First Amendment considerations? The answer, obviously, is yes. For the reasons we discussed earlier, hypnotists, comedians, and entertainers of various sorts do not lose their First Amendment protection simply by involving paying members of the audience in the performance.[181]

Here again, instead of expounding on lap dancing as a unique category under the law, the court equates it with other—more thoroughly protected—performance traditions. Moreover, just as they suggested that *Maita* "obviously" involved prostitution, the court relies on an assumption of the "obvious" theatrical qualities in *Janini.* Such use of what is "obvious" illustrates the court's unwillingness to thoroughly interrogate and theorize the line between prostitution and performance.

While the court ostensibly raises *Maita* in order to contrast its blatant prostitution with *Janini,* bringing it up only serves to underscore the court's inability to adequately adjudicate the line between sex and performance. Instead of deliberating on the unique qualities and legal specificity of lap dancing, the higher court reduced it to a performance. It thereby eschews lap dancing as a sex act that blurs the line between act and performance. This seems to suggest that the categories and divisions of law are too broad and simple to illuminate the specificity and complexity of lap dancing. The court, consequently, leaves the impression that such complexity is itself somehow untouched by law.

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[181] *Id.*

### *Is Lap Dancing Too Complex for Law?*

Both arguments supporting the *Janini* decision—state preemption and the First Amendment argument—support the conclusion that legal categories are too broad to grasp and illuminate the complex interplay of sex and performance found in lap dancing. In this way, the court supports the perspectives of scholars such as Frank and Liepe-Levison who suggest lap dancing is ephemeral and complex, and defies legal categorization. The First Amendment argument in particular suggests the law cannot adequately define sexual contact in a way that is different from prostitution. Instead, the court falls back into what is supposedly obvious about sexuality and performance—that these are discrete categories.

Moreover, First Amendment arguments—as they are typically applied to cases involving stripping—rely on the doctrine of content neutrality. That is, a law regulating stripping is only constitutional insofar as it does not directly influence or censor the erotic content of the dances. In this way, even on its face, the law is not meant to have direct contact with the content of lap dancing. While the state can use prostitution law to proscribe direct sexual contact between a dancer and her client, local municipalities are more limited in the kinds of regulatory laws they can construct in an attempt to control or, even, impact strippers' performances and their contact with customers through lap dancing.

The failure of such local laws to directly impact lap dancing, combined with the buffer that the First Amendment erects around the erotic content of these dances, raises the question of what impact, if any, these kinds of local regulatory laws can have on lap dancing. These laws seem to be less direct than criminal statues. They also seem to be

less clear in distinguishing sexual contact from sexual performance. In this way, such laws seem to support the argument, which I discussed at length in the first chapter of the dissertation, that law only minimally understands and impacts the daily activities of sex workers, in this case those sex workers engaged in the practice of lap dancing.

However, moving beyond a decontextualized case analysis towards a legal history of lap dancing reveals law as central to its development as a prominent practice among strippers. To make this argument, I will now consider three important historical moments: the antitheatrical laws of the early colonial period, the class conflicts around theater in the middle of the 19th century, and, finally, the emergence of so-called "time, place, and manner" regulations of the sex industry in the 1980s. I will begin by examining the role of discourses of antitheatricalism play in the history of laws governing American performances.

**Historical Moment 1: Antitheatricalism and Theater as a Site of the Legal Regulation of Sexuality**

Over the course of US history, theater has been a site of cultural, religious, political, and legal contention. This history is brimming with religious and political discourses of antitheatricalism. These discourses condemn acting and performance as deceitful mimicry and hedonistic spectacle.[182] Sexuality, especially commercial sexuality, has played a central role in this contentious history and its attendant discourses of antitheatricalism. Early American anti-theater laws and later theater licensing laws were often aimed at controlling the imagined depravity of actors or the lust of male audience

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[182] Robert C. Allen, *Horrible Prettiness: Burlesque and American Culture* (Chapel Hill: UNC Press, 1991), 46-50.

members. As such, these laws represent some of the earliest American efforts to control and regulate sexuality via the law. They illustrate an enduring American connection between sexuality, theater, and law that, I will argue, shaped—and continues to shape—the emergence of the lap dance as the most prominent and regular feature of contemporary strip shows.

Theater did not become a regular leisure activity in America until the 19th century. Before then, discourses of antitheatricalism—including laws—prevented theater from becoming a regular pastime.[183] During the colonial period, Puritan and Quaker leaders viewed theater as a frivolous distraction from pious life.[184] Moreover, these leaders viewed acting as deceptive mimicry that interrupted "the correspondence between external appearance and essential truth."[185] William Penn—founder of the Province of Pennsylvania—illustrated this mistrust of mimicry and external appearances through a critique of theatrical costume and adornment. In his 1669 book *No Cross, No Crown*, he wrote:

> How many pieces of riband, and what feathers, lacebands, and the like did Adam and Eve wear in paradise, or out of it? What rich embroideries, silks, points, etc., had Abel, Enoch, Noah, and good Old Abraham? Did Eve, Sarah, Suzannah, Elizabeth, and the Virgin Mary use to cure, powder, paint, wear false locks of strange colours, rich points, trimmings, laced gowns, embroidered petticoats, shoes with slipslaps laced with silk

[183] Ibid., 47.

[184] Ibid.

[185] Ibid.

> or silver lace, and ruffled like feet, with several yards, if not pieces of ribands? How many plays did Jesus Christ and his apostles recreate themselves at? [186]

Penn thus constructed an opposition between theater and religious life. Compared to the perceived honesty and transparency of biblical figures, theatrical practices of costume and adornment seemed excessive. Penn associated this excess with deception, while he associated religion with direct and honest expression. Consequently, for Penn, a meaningful religious life was thrifty, truthful, and unadorned. He considered this to be incompatible with the frivolous adornment and deception of theater.

Other religious opponents of theater took this critique a step further to suggest that the perceived deceit of acting—its misalignment of inner truth with outward expression—threatened the stability of God's creation.[187] Such critics worried that such deceptive expression would lead people to act deceptively in their daily lives. They worried that, by hiding God's will and creation, acting would teach people:

> How to be false and deceive your husbands, or husbands their wives, how to play the harlot, to obtain one's love, how to ravish, how to beguile, how to betray, to flatter, lie, swear, forswear, how to allure whoredom, how to murder, how to poison, how to disobey and rebel against princes, to consume treasures prodigally, to move to lusts, to ransack and spoil cities

[186] Cited in Ibid.

[187] Ibid.

> and towns, to be idle, to blaspheme, to sing filthy songs of love, to speak filthily, to be proud, how to mock, scoff, and deride any nation.[188]

The deception of acting—that is, its mimicry and its adornment—is here explicitly linked to lust and non-marital sexual pleasure. This passage thus illustrates how antitheatricalism—even early on—was informed by a fear of non-marital and commercial sexual pleasure, specifically prostitution. Given this context, Penn's critique of adornment—which I cited above—can also be read as implicitly connecting theater to prostitution; like professional actors, prostitutes were viewed as excessively adorned and paid for their deceptive performances.[189] Prostitutes were thought to use this adornment to deceive and elicit sexual lust in exchange for money. Thus, non-marital sexual pleasure, especially prostitution, played a central role in early American discourses of antitheatricalism.

As a result of the perceived threat that theater posed to the social-sexual order, both the Quakers of Pennsylvania and the Puritans in Massachusetts passed laws banning plays and other forms of performance, merriment, and masquerade. The "Great Law," passed by the General Assembly in Pennsylvania in 1682, for instance, contained a chapter condemning theater among other forms of hedonistic pleasure and masquerade. It read:

> That whosoever shall introduce into the Province, or frequent such rude and riotous sports and practices as prizes, stage plays, masques, revels,

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[188] Cited in Hugh F. Rankin, *The Theater in Colonial American* (Chapel Hill: UNC Press, 1965), 2.

[189] Brooks, *Unequal Desires*, 12.

> bull baitings, cock-fightings, with such like, being convicted thereof, shall be reputed and fined as Breakers of the peace, and suffer at least ten days' imprisonment at hard labour in the house of correction, or forfeit twenty shillings.[190]

While this law was later repealed and reinstated several times prior to the American Revolution, Massachusetts passed a similar law that remained active until the post-revolutionary period.[191] During the colonial period, theater thus became a site of legal contention and regulation. Discourses of non-marital sexual lust, deception, and prostitution rationalized such laws. Consequently, sexuality—especially commercial sexuality—played a central role in shaping theater as a site of legal intervention.

Antitheatricalism continued into the post-revolutionary period, shifting from a religious belief to a nationalist obligation. Theater historian Heather S. Nathans explains that during the revolution, leaders became preoccupied with the idea that theater would lead people to "forget their political duties."[192] Theater opponents, mainly Anti-Federalist Republicans, viewed patrons of the theater as "Tories" who supported British rule.[193] At the same time, there was an emerging American elite, mainly Federalists, who supported

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[190] Cited in William S. Dye Jr. "Pennsylvania Versus the Theater" *The Pennsylvania Magazine of History and Biography.* 55, no 4 (1931), 339.

[191] Ibid.

[192] Heather S. Nathans, *Early American Theater from the Revolution to Thomas Jefferson: Into the Hands of the People* (Cambridge: Cambridge University Press, 2003), 114.

[193] Ibid., 113-114.

theater in order to gain cultural authority over the post-revolutionary country.[194] One such supporter of theater remarked: "[I]n an age of refinement and in a nation of free men," it was extraordinary "that there should exist a single enemy to the manly, rational amusements of the Theater."[195] Thus, the post-revolutionary period saw both a continuance of anti-theatricalism and an emerging perception that elite theater could serve as a cultural and nationalist institution.

Despite this conflict, anti-theatricalism—with its implicit fear of sexual pleasure—made its way into the emerging government's laws. In 1774, the First Continental Congress passed a law that stated, "we will discountenance every species of extravagance and dissipation, especially all horse-racing, and all kinds of gaming, cock-fighting, exhibition of shrews, plays, and other expensive diversions and entertainments."[196] Here, stage plays were linked to other forms of seemingly frivolous vice. The law's condemnation of the "exhibition of shrews" illustrates that sexuality continued to play a role in discourses of antitheatricalism.

Such discourses not only constructed a link between sexuality and theater, but also created a specific connection between theater and the commercial sex industry, especially prostitution. Indeed, historian Robert Allen notes that early American actresses and women who attended theater were condemned as prostitutes.[197] Because such sexual discourses legitimated early laws proscribing theatrical performances, they were also

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[194] Ibid.

[195] Ibid., 61.

[196] Cited in Ibid., 114.

[197] Allen, *Horrible Prettiness*, 52.

central to constructing theater as a site of legal intervention and regulation. Thus, through early American discourses of antitheatricalism, theater became a site of legal intervention, especially around public sexual display and commercial sex. In this way, early American discourses of antitheatricalism constructed ideas of theater that led to the normalization of theater as a legally regulated space. This was especially true regarding the regulation of sexually explicit theater performances. For this reason, these early American discourses continue to be important in the legal regulation of sexual performance and the emergence of its favored practice, the lap dance, in the contemporary period. Indeed, the idea of theater as a site of the legal regulation of sexuality became more explicitly linked to popular theatrical forms—including what would eventually become contemporary strip clubs—as American theater splintered between high and low form during the second half of the 19th century.

**Historical Moment Two: Sexuality and Law in the Class Division of American Theater**

Despite the aspirations of antitheatricalism, the connection between American theater, sexuality, and law is not a simple story of censorship and restriction. Rather than repressing sexuality in American performance, antitheatricalist discourse constructed theater as a place of imagined wanton sexuality. This, in turn, rationalized laws seeking to limit theater because of its association with sexuality. As theater became more palatable to the American public, such laws were relaxed; however, the association between theater and sexual excess continued. When theater splintered between high and low forms, the burden of this association shifted onto working class, popular venues. As a result, these venues experienced heightened legal scrutiny over the sexual elements of

their performances. This legal scrutiny did not, however, eliminate sexual expression in such venues. Instead, the legal regulation of sexuality in working class venues led to the emergence of new modalities of sexual performance in such settings. These new performance modalities, in turn, set the stage for the emergence of lap dancing as a contemporary strip club practice.

During the first half of the 19th century, as financial and cultural support for theater grew, antitheatrical laws were relaxed and permanent playhouses were established in American cities.[198] Because urban populations were still relatively small during this period, theater managers catered to audiences from a variety of class backgrounds in order to maximize profits.[199] Nevertheless, though the working and upper classes attended the same performances, managers segregated audiences based on class. This segregation was enacted architecturally through a distinction between the pit, where working class patrons stood, and the central boxes, where middle and upper class audiences sat.[200]

The pit and the boxes clashed over ideas of proper theater-going behavior and comportment. Working class people in the pit would often shout out and interrupt performances, while the middle and upper classes tried to bring a superior air of respectability into the theater by holding their applause until the end of a show.[201]

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[198] Nathans, *Early American Theater,* 47

[199] Gillian Rodger, "Legislating Amusements: Class Politics and Theater Law in New York City" *American Music*, 20 No. 4 (Winter, 2002), 383; Theresa Saxon, *American Theater: History, Context, Form* (Edinburgh: Edinburgh University Press, 2011), 110.

[200] Allen, *Horrible Prettiness, 52*

[201] Ibid.

Through these outbursts, working class audiences participated in and exerted a measure of control over the performances.[202] Alexis de Toqueville observed this dynamic in *Democracy in America.* He wrote:

> At the theater alone, the higher ranks mix with the middle and the lower classes; there alone do the former consent to listen to the opinion of the latter, or at least to allow them to give and opinion at all. At the theater, men of cultivation and of literary attainments have always had more difficulty than elsewhere in making their taste prevail over that of the people and in preventing themselves from being carried away by the latter. The pit has frequently made laws for the boxes.[203]

By shouting out from the pit, working class people were able to exert an unparalleled amount of cultural authority in the theater. This unique authority played an important role in shaping theatrical performance during the first half of the century.

In response to this dynamic, laws emerged that were aimed at controlling and quelling outbursts during performances. Such laws emphasized the importance—articulated as a right—of performers to communicate without interruption. In 1854, for example, the Massachusetts Supreme Court upheld such a law and stated:

> Shall not proprietors, authors, composers, artists, visitors, and all other persons interested, be protected in their rights, against willful disturbance, by the operation of that law, which gives them their rights? And yet those

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[202] Ibid.

[203] Alexis de Tocqueville, *Democracy in America Volume Two.* Arthur Goldhammer trans. (New York: Library of America, 2004), 563.

> rights can only be preserved by maintaining such meetings from willful interruption and disturbance, so that the performances may be witnessed, heard and enjoyed.[204]

Such laws empowered managers to eject patrons from the theater if they did not follow the rules.[205] Consequently, these laws shifted control over performances from working class audiences to management.[206] Moreover, because audience members were no longer free to shout their immediate response to the performance, these laws also led to the construction of the passive audience member.[207]

At the same time that theater was undergoing such changes, the urban population—especially the number of single men—was on the rise in major American cities including New York, Chicago, Boston, and Philadelphia.[208] Such urbanization was caused by, but also contributed to, a series of rapid transformations across American society after the Civil War: The main unit of economic consumption shifted from the family to the individual, moral authority shifted from the clergy to the democratic state, and sexuality expanded into the commercial market place.[209] One consequence of such changes was an increased demand for sexual products and industry including prostitution,

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[204] Cited in Allen, *Horrible Prettiness,* 72.

[205] Ibid.

[206] Ibid.

[207] Ibid., 73.

[208] John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America Second Edition* (Chicago: University of Chicago Press, 1997), 10.

[209] Ibid., xvi.

pornography, and nude dancing.[210] As a result of these changes, popular theatrical venues, catering to the sexual desires of single, working class men, proliferated throughout urban areas.[211]

Combined with the legal regulation of working class behavior in the pit, these transformations all contributed to the splintering of American theater between high and low forms in the middle of the 19th century. Musicologist Gillian Rodger notes that by 1850, the upper class elite in New York City were patronizing the Opera and the Philharmonic, while working class audiences attended burlesque performances, concert saloons, and minstrel shows.[212] Such shows not only combined nudity, racist comedy, and historical reenactments, but also served alcohol and continued the working class tradition of audience participation. In so-called "Free and Easies," for instance, working class audiences would sing along with the musicians, and were often treated to dinner, drinks, and the company of "waiter-girls" for the price of admission.[213] Beyond this, certain smaller venues were catering to single, working class men by showcasing sexuality through women's nudity. These theaters, for instance, would host *tableaux vivants* where women posed nude onstage in the likeness of European paintings.[214] Other venues would showcase partially nude women dancing, titillating and enticing their male

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[210] Ibid., 158.

[211] Rodger, "Legislating Amusements," 387.

[212] Ibid., 384.

[213] Ibid., 381.

[214] Ibid., 384.

audiences.[215] Such performance techniques were eventually incorporated into burlesque and striptease, the antecedent to contemporary strip clubs.[216]

While sexuality in upper class shows was generally accepted as part of their artistry, in working class performances, it was viewed as a social threat in need of regulation.[217] If a woman were to perform fully nude on stage, she could be arrested and the theater's license could be revoked.[218] The threat of legal repercussions—whether criminal or commercial—greatly shaped the performance of sexuality in working class venues. Performers often avoided such laws by emphasizing sexuality without technically performing nude: They wore skin-colored stockings and leotards, as well as pasties and G-Strings, used lighting and makeup to hide potentially unlawful nudity, or left the stage before they stripped entirely.[219] Even *tableaux vivants* sidestepped laws proscribing nude dancing, since the performers remained still throughout the performance.[220]

Such practices of subversion illustrate how law shaped the emergence of new modalities of sexual performance. Donning pasties, using lighting, and striking particular moves to avoid punitive laws actively constructed the aesthetics of the performances. Such elements of sexual performance began as strategies for dealing with law, but eventually became standard parts of burlesque and its contemporary incarnation in strip

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[215] Ibid.

[216] Andrea Friedman, *Prurient Interests: Gender, Democracy, and Obscenity in New York* (New York: Columbia University Press, 2000), 66.

[217] Rodger, "Legislating Amusements," 387.

[218] Ibid.

[219] Allen, *Horrible Prettiness,* 93.

[220] Ibid., 94.

clubs. In this way, these practices illustrate how law exceeds the state and the courts, becoming part of everyday practices that are seemingly removed from formal legal institutions; they thus reveal the enmeshed quality of law and the practices of everyday life, which I term the legal everyday. Indeed, as I explore in the next section, some of these elements—wearing pasties and G-strings and manipulating staging and lighting to obscure nudity, for instance—have been assimilated back into law. That is, with the emergence of commercial regulation of strip clubs, some municipalities have created laws that adopt such elements that originally emerged to thwart law. Practices of the legal everyday thus can circle back into legal institutions and shape laws in a more formal sense.

Similarly, both the emergence of audience participation in working class, sexualized venues and the emergence of the idea of the passive audience member are central to the development of lap dancing. Lap dancing, as *Janini* revealed, requires both an element of audience participation *and* an element of audience passivity; the customer needs to remain passive and follow scripted rules with respect to physical contact. As Frank notes, failure to follow such rules can lead management to eject the patron from the strip club.[221] In this way, contemporary lap dances require managerial authority and audience passivity, both of which developed through the class fracturing of American theater in the 19th century. At the same time, lap dancing also depends on the existence of sexual performance in working class settings and the continued outlet for audience participation in such sexual performances that these venues have historically provided. In these ways, the legal dimensions of the division of American theater between high and

[221] Frank, *G-Strings and Sympathy*, 275.

low form in the middle of the 19th century—specifically the construction of manager authority, audience passivity and participation, and the sexualization of working class venues—created the conditions for the emergence of contemporary practices of lap dancing.

**Historical Moment Number 3: The Emergence of Time, Place, and Manner Regulations**

When American theater splintered between high and low forms in the middle of the 19th century, laws aimed at controlling sexual excess disproportionately targeted working class venues.[222] Friedman explains that, unlike middle class audiences, working class, male audiences were considered beyond corruption; their sexuality was thought to be inevitably depraved.[223] As a result, theater was viewed as a needed release of working class, sexual energy.[224] This justified the existence and legality of working class theater performances catering to these audiences. Nevertheless, reformers were concerned about these performances' broader corrupting influence. Though sexual excesses were considered to be localized in the working class performances, the harms they provoked were imagined to have a significantly wider impact. Rather than harming only individual consumers, or even the working class more broadly, sexual performances in working class venues were thought to harm society in general.[225] For this reason, laws seeking to regulate and control sexual performance shifted from more individualistic mechanisms of

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[222] Rodger, "Legislating Amusements," 383.

[223] Friedman, *Prurient Interests,* 63.

[224] Ibid.

[225] Rodger, "Legislating Amusements," 383.

criminalization that targeted individuals for arrest, to commercial laws that shaped the conditions, locations, and possibilities of performances.[226] Such collectively oriented laws were intended to contain the sexual excesses of the working class in a way that an individualized criminal approach could not. This shift from individually-focused criminal mechanisms to more collectively-oriented commercial regulations continues into the contemporary era of strip club laws and is the third legal-historical moment central to the development and emergence of contemporary lap dancing. A key element of this shift was the emergence of laws regulating theater licensing.

As theater managers gained more control over audience behavior in the first half of the 19th century, theater licensing laws emerged as a mechanism for state oversight of managers. The first licensing laws developed in New York City in 1829.[227] Such laws required theaters and other venues of entertainment such as "circuses, gardens, or grounds for exhibition" to apply for and pay for an annual license to operate.[228] The licenses were issued by the Mayor's office. Failure to obtain a license or violating its terms could result in a fine or the revocation of an establishment's license.[229] As a result, licensing attenuated the power that management had previously gained from the development of laws governing audience behavior. Management had to make sure that the terms of their licenses—including following laws related to legality of selling sexual

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[226] Ibid., 389.

[227] Ibid.

[228] Ibid., 390.

[229] Ibid.

goods and services—were followed; otherwise, the state could close their venues.[230] Licensing laws thus brought sexual performance under the dominion of the state.

From the emergence of working class, sexually oriented theaters in the middle of the 19th century through the heyday of burlesque in the early 20th century, licensing laws were constructed in a way that disproportionately targeted working class venues which focused on displaying women's nudity. For example, in April 1862, New York City passed a law prohibiting an entertainment venue from holding a theater license and an alcohol license at the same time.[231] This functionally eliminated concert saloons, which had previously held both kinds of licenses. While, as Gillian Rodger has pointed out, such laws paved the way for the emergence of vaudeville later in the century, they simultaneously served as the mechanism through which venues would be restricted from serving alcohol and providing sexual entertainment.[232] Thus, licensing laws served to further segregate sexual licentiousness within the broad patina of American theater.

Such segregation was justified on the grounds that theatrical sexuality caused social degradation. Burlesque historian Robert Allen explains that working class and sexually explicit performances were considered to pose an especially strong threat to society. He writes that 19th century social reformers "included burlesque in their litanies of urban vice, as something—like the poor, their houses, and their habits—to be cleaned up."[233] In addition to providing a rationale for licensing laws, the link between theater

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[230] Ibid.

[231] Ibid.

[232] Ibid., 383.

[233] Allen, *Horrible Prettiness,* 30

and social decay shaped the license's terms: Revenue generated from the first theater licensing law in New York, for instance, was donated to Society for the Reform of Juvenile Delinquents; such a redistribution of theatrical revenue was considered to be just because juvenile delinquency was itself considered to a symptom of the social decay of sexualized theater.[234] Thus, as the sexualized nature of theater was thought to cause the social problem delinquency, it was only right that theater owners should pay society back the damages it was due.

The link between theatricalism and social decay is representative of a shift in the logic of antitheatricalism: Previous antitheatrical movements had focused on the deceptive nature of acting. Such deceptiveness could only be contained through outright censorship of theater. Late 19th-century antitheatricalism did not judge theater itself to be deceptive; rather, it considered the sexual elements of theater to degrade audiences. The result was a shift from a logic of censorship to one of *containment*. Since the social decay represented by theatrical sexuality was already present, the strongest option was to limit it to certain well-defined areas. There, the money generated could be used to pay back at least some of the damage that theatrical sexuality had caused. Thus, the late-nineteenth century logic of licensing laws combined containment with *debt*. Carefully cordoned off, sexual theater would be mined, through licensing laws, to rectify the social decay it had caused—and was continuing to inflict.

The echo of the 19th century connection between sexual performance and social degradation can be heard in the late 20th century emergence of so-called time, place, and manner regulations. These commercial regulations apply—at the local level—to the adult

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[234] Rodger, "Legislating Amusements," 389.

industry. Such regulations allow local municipalities to govern how, when, and where sexually oriented businesses, including strip clubs, are run. One form of such regulations are the so-called "no contact" laws that I mentioned above. Such laws prohibit strippers from touching their clients. This prohibition, though seemingly innocuous, is based on a putative connection between the stripper's body and social decay.

Such laws construct lap dancing as a social problem. They posit that the nude bodies of strippers and their contact with customers lead to urban decay, as indicated by prostitution, drug sales, and poverty. This is known as the doctrine of "negative secondary effects" of stripping. Such negative secondary effects, under such laws, are present not in the club itself, but rather in the stripper's very body. Thus time, place, and manner regulations signify an intensification of the logic of containment that was inaugurated with laws regulating licensing: While licensing laws contained sexuality within certain specific theaters, time, place, and manner regulations locate a broad array of social problems in the stripper's particularly sexualized form of embodiment. This serves to legitimate the body as a site of further legal intervention. As such, these kinds of laws spill beyond their formal intent to prevent sexual contact; they actively shape the body of the stripper by regulating her costume and movements.

Time, place, and manner regulations thus shape the contours of what a lap dance will be by placing a boundary between contact that is considered incidental to the performance and contact that is considered prostitution. Under such a boundary, contact "incidental" to the performance entails forms of touching that are accidental or peripheral to the sexualized nature of stripping. Contact that is considered to be prostitution, in contrast, exceeds this periphery, transforming the very nature of stripping into a form of

commercial sex. Enforcing this boundary entails regulating the stripper's body via various means: detailing what sorts of bodily motions may be practiced (i.e. gyrating hips, grinding, non-genital caressing) and which are prohibited (i.e. nude genital contact, kissing, groping); what sort of outfits should be worn; and where such motions may take place (i.e. a licensed strip club, as opposed to a parked car). Consequently, time, place, and manner regulations mark an intensification of the logic of containment inaugurated by licensing laws. The result of this intensification is the "lap dance:" a particular form of embodied sexuality and everyday practice that emerges within the environment of the strip club.

Thus, in the previous sections, I have shown how the practice of lap dancing is the result of three legal shifts that have happened in US theater law since the seventeenth century. These shifts provide a new context for understanding the lap dance as both an inherently legal practice and a central part of strippers' everyday experience. In my conclusion, I will discuss the implications of such an understanding of lap dancing for *Janini,* the lap dancing case I discussed above.

**Conclusion: Recontextualizing the Lap Dance Through Legal History**

As I discussed in the first chapter of the dissertation, recent scholars of sex work, including scholars of strip clubs, have argued that sexuality and sex work are too complex for the law to fully grasp or impact. For instance, Agustín argues that law does not have a measurable impact on the practice of sex work since it does not regulate sexuality according to its stated intent. As a result, Agustín advocates eschewing legal approaches in favor of other tactics to improve conditions for laborers in the sex

industry.[235] Scholars of strip clubs have taken a similar perspective on law by suggesting that sexuality in strip clubs is murky and ephemeral, while law is clear and exacting. Thus, key figures in sex work studies have argued that law is irrelevant to the everyday lives of both sex workers in general and strippers in particular.

The irrelevance of law to sex work and everyday practices would seem to be confirmed by the treatment of lap dancing in the cases *People v. Janini* and *People v. Maita*. In *Janini*, the court *desexualized* lap dancing in order to interpret it as a form of speech granted protected status under the First Amendment. In *Maita*, in contrast, the court *hypersexualized* lap dancing in order to criminalize it as a form of prostitution. But in either case, the court did not analyze lap dancing as a form of sexual labor in its own right. From a legal perspective, lap dancing is either speech or prostitution. Consequently, law seems unable to illuminate the specificities of lap dancing as both sexual act and sexual performance. Thus, lap dancing, as represented in *Maita* and *Janini*, seems to elude the categories of law. This failure of law to capture lap dancing would seem to confirm the view of sex work scholars that law is incapable of illuminating or impacting the everyday lives of sex workers or sexuality more generally.

Nevertheless, the legal history of lap dancing that I have presented here tells a different story. Lap dancing, as I have shown, is the product of three key moments in the legal history: first, the antitheatricalism of the colonial period established theater as a site for the legal intervention into sexuality; then, the splintering of American theater between high and low class-based forms leading to the construction of audience passivity, managerial authority and the isolation of sexually-explicit theater in working class

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[235] See note 81.

venues; and, finally, the commercial regulation of theater with regard, first, to licensing and then, "time, place, and manner" laws.

Ultimately, the cumulative effect of these laws has been the very creation of the stripper's performance and the everyday practice of lap dancing. This performance is made manifest in an outfit—G-strings, pasties—that was originally designed to elude 19$^{th}$ nudity laws, but which now, ironically, is legally required under certain "time, place, and manner" regulations. Such regulations also shape the height of the stage, raising the stripper above the customer to both simultaneously reveal and conceal her body. They create the type of quotidian, embodied motions and meanings that the stripper can make, and the limit to which her body is able to make contact with that of her customers. Indeed, one might argue that the very aesthetics of the lap dance mimics the logic of debt and contagion instantiated in late 19$^{th}$ century law: The dancer, on one hand, is imagined to owe the customer pleasure—a pleasure that can be achieved through physical contact and proximity. On the other hand, the dancer is imagined as the bearer of a contagious sexuality that can only legally reach the customer in a highly attenuated form. This push and pull between debt and contagion allows the lap dance to emerge–through a legal logic—as both performance and sex act.

Thus, the three historical shifts that I have described reveal the lap dance to be a legal object. Contra case law that would seem to imply that law is incapable of managing such quotidian practices of sex work, lap dancing illustrates how law shapes everyday practices of sex work even as such practices seem to defy legal control or categorization. In this way, lap dancing provides a window on the legal everyday. Rather than reducing law to its formal expression of direct force, a broader socio-historical perspective reveals

how law can infuse practices of everyday life that would seem to fall outside of traditional institutions of law. Such practices of the legal everyday can subsequently circle back and impact more formal expressions of law. This was the case with lap dancing; as dancers subverted law, their subversions came to be assimilated into law. In this way, lap dancing reveals not only how law shapes practices of everyday life that at first seem too complex for law to manage, but also illustrate how such practices can themselves come to shape more formal incarnations of law. In the next chapter, I foreground this circular aspect of the legal everyday by focusing on relationship between strip clubs and zoning law. Contra critics of zoning, I suggest that zoning has broader effects than simply constricting non-normative sexual practices and that these effects are critical in rethinking the relationship between law and the sex industry. Indeed, they highlight the overlap between law and extra-legal relations of power, including biopower and disciplinary power. In this way, zoning laws offer a rich site for further elaborating the legal everyday.

# Chapter 3:

## Zoning Out Sex? Rethinking Feminist and Queer Critiques of "Time, Place, and Manner" Laws

### Introduction:

In the previous chapter, I suggested that the emergence of "time, place, and manner" regulations of strip clubs played a role in constructing the lap dance as an object saturated by law. This argument was directed towards scholars of sex work, including stripping, who suggest that these practices are too complicated for the law to impact. As I discussed in the first chapter, such scholars conclude that law only holds minimal relevance for the daily practices of sex workers. By moving from a decontextualized case analysis towards an approach based in legal history, I illustrated that lap dancing—a practice that seems to defy legal categorization—is thoroughly shaped by the law. As such, the lap dance is a good example of my concept of the legal everyday.

In this chapter, I shift focus away from those scholars who think that law is irrelevant, towards feminist and queer scholars who are concerned with the consequences of "time, place, and manner" laws and their relationship to sexual practices, including sex work. Unlike those who think that law is too complicated to have consequences for the everyday practices of sex work, these queer and feminist critics argue that "time, place, and manner" laws have tremendous consequences for sex work; specifically, they claim that such laws are overly restrictive of sexual practices and expression. I will first explore this argument by examining queer critiques of adult use zoning laws. Then, I will consider feminist critiques of laws requiring strippers to wear pasties and G-strings. Both of these critiques, I suggest, focus on the exclusionary and repressive qualities of such laws: The queer critics focus on the exclusion of non-normative sex practices from urban

space, while the feminists argue that nudity laws restrict strippers' sexual expression. In this sense, feminist and queer critics suggest that "time, place, and manner laws" are not only relevant to sexuality and sex work, but also essentially restrictive of sexual expression and repress sexuality.

In this chapter, I argue that this focus on the exclusionary and repressive elements of "time, place, and manner" laws leads these critics to miss critical ways that such laws structure urban space and shape embodiment. Specifically, by focusing on "time, place, and manner" laws as a repressive form of power, these critics do not examine the relationship between these laws and biopower. In the *History of Sexuality Vol. 1*, Foucault describes biopower as a shift in modern processes of subjectification from the "ancient right to *take* life" to a "power to *foster* life or *disallow* it to the point of death." [236] Biopower functions not through the repression of individuals, but through "the disciplines of the body and the regulations of the populations," which "constituted the two poles around which the organization of power over life was deployed."[237] Without the consequences of these two poles of biopower, feminist and queer critics of "time, place, and manner" laws not only overlook potential consequences that such laws hold for urban life and sexuality, but also fail to understand how such laws themselves produce sexual subjects, including antinormative subjects. Indeed, by implying that non-normative sexual practices are somehow disentangled from law, these critics promulgate

[236] Foucault, *History of Sexuality,* 138.

[237] Ibid., 139.

the fantasy that Brown and Halley describe as "the left yearning (like the right one) to live "outside the law."[238]

Before I explore the feminist and queer critiques of zoning and nudity laws, I offer a historical overview of the development of such laws, including the major cases that have upheld their constitutionality. I also discuss the—somewhat unexpected—relationship that such zoning and nudity laws have to one another. I will return to this relationship towards the end of the chapter when I am discussing the relationship between such laws and biopower.

**Adult Use Zoning: History and Cases**

In the United States, zoning emerged in the early twentieth century as an attempt by cities to control the harsh living conditions—overcrowding, industrial waste, and pollution—associated with urbanization.[239] It did so by designing laws that designated specific areas in the city for certain land uses. By specifying what kind of businesses and buildings can—and cannot—occupy particular urban areas, zoning laws operated to protect residential areas from businesses and industries that were considered to be harmful. The power to zone was facilitated and formally granted to local governments by the Standard State Zoning Enabling Act (SZEA) in 1924 under the Hoover

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[238] Brown and Halley, introduction to *Left Legalism/Left Critique,* 13.

[239] Jay Wickersham, "Jane Jacob's Critique of Zoning: From Euclid to Portland and Beyond," *Boston College Environmental Affairs Law Review* 28, no. 4 (2001): 548. Stephanie Lasker, "Sex and the City: Zoning Pornography Peddlers and Live Nude Shows," *UCLA Law Review* 49 (2001-2002):1139-1185.

administration.[240] By the end of the 1930s, all state legislatures had adopted SZEA, granting municipalities the power to zone.[241]

Proponents of zoning imagine it to be a way to regulate behavior. By pushing so-called undesirable elements such as noise, crowds, and pollution away from residential areas, zoning theoretically promotes, within certain population groups, behavior that conforms to general morals, public health, and safety.[242] In the United States, such behavioral separation has formed part a larger processes of racial and economic segregation. In this sense, zoning is not simply a legal strategy and an urban planning tool. It is also a form of public health and population control that is justified by—and inseparable from—larger American traditions of social reform and utopian design. Nevertheless, though zoning has often fit within and advanced the interests of dominant population groups in the United States, it has also faced legal challenges throughout its history.

The constitutionality of zoning laws was challenged in the 1926 landmark case, *Village of Euclid v. Ambler Realty Company*. In this case, Ambler Realty ("Ambler") brought suit against the village of Euclid for creating a zoning law that divided the village into proscribed zones for commercial, single family residential, multi family residential, and industrial use.[243] Ambler challenged the law on the grounds that it would devalue its

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[240] Richard Tseng-yu Lai, *Law in Urban Design and Planning: The Invisible Web* (New York: Van Nostrand Reinhold Company, 1988), 81.

[241] Ibid., 85.

[242] Lasker, "Sex and the City," 1158.

[243] Village of Euclid v. Ambler Realty Company, 272 U.S. (1926) at § 379.

land by limiting its use; such devaluation, Ambler argued, was tantamount to a deprivation of the company's liberty and property without due process.[244] Ambler thus based its argument against zoning on the Fourteenth Amendment's Due Process Clause. Ambler won its case in the lower court, but Euclid appealed the ruling, sending the case to the Supreme Court of the United States.[245]

The Supreme Court argued that the question of the constitutionality of the zoning laws would hinge on whether they were found to have a rational basis. If such laws were not found to have a rational basis, then they would be deemed an arbitrary use of power, and invalidated on due process grounds. Nevertheless, if their rational basis could be asserted, they would be allowed to stand over Ambler's objection. Ultimately, the court found that Euclid's zoning laws were rational because they were "made in the interest of preserving character and quality of neighborhood."[246] As such they were not an arbitrary use of power and therefore were constitutional.[247] Due to this decision, zoning that divides up land within an entire jurisdiction became referred to as "Euclidean." Such zoning has flourished throughout the United States since the middle of the 20th century.[248] But it was not until the early 1970s that zoning became utilized as a tool to specifically control the sex industry.

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[244] *Id.*

[245] *Id.*at § 365.

[246] *Id*. at §394.

[247] Wickersham, "Jane Jacob's Critique of Zoning," 547.

[248] Michael Allan Wolf, *The Zoning of America: Euclid v. Ambler* (Lawrence, Kansas: The University Press of Kansas, 2008), 3.

From the late 19th century through the first half of the 20th century, cities had drawn on two predominant legal strategies to control the sex industry: licensing laws and obscenity laws.[249] In the second half of the 20th century, however, the courts increasingly found sexual businesses to be protected as a form of speech by the First Amendment. Laws governing the "time, place, and manner" of such businesses emerged at this time as a way for municipalities to manage the sex industry without violating the constitution. Municipalities turned to zoning as one such "time, place, and manner" tool of containment.[250]

Beginning in the early 1970s, cities began to conceive of zoning as a way to manage the proliferation of pornography shops, x-rated movie theaters, and strip clubs. Proponents of this approach believed that sex businesses had deleterious effects on urban life, spreading blight, prostitution, and drug use. Through zoning, lawmakers believed they could contain such negative effects, by controlling the location of sexually oriented businesses—and, specifically, keeping them away from residential areas. This targeted form of zoning was referred to as "adult use" zoning.

Cities exercised adult use zoning through two distinct strategies: concentration and dispersion. Many municipalities across the United States passed laws concentrating sexually oriented businesses into a single location—so-called red light districts. Cities would typically locate these districts in industrial areas, removed from residential properties, schools, day care centers, parks, and places of worship.[251] Other

[249] Friedman, *Prurient Interests,* 13.

[250] Lasker, "Sex and the City," 1158.

[251] Young v. American Mini Theaters Inc, 427 U.S. 50 (1976) at § 52.

municipalities passed laws preventing adult businesses from concentrating.[252] Such laws dispersed the industry by requiring a certain distance between sexually oriented establishments. Both strategies were aimed at weakening the perceived impact that adult businesses could have on residential areas. By the mid-1990s, most major American cities were using zoning—either by concentrating or dispersing adult businesses—to ward off the sex industry's perceived negative effects on urban life.[253]

In the 1976 case, *Young v. American Mini Theatres*, two Detroit-based pornographic movie theaters challenged a concentrating zoning law, a so-called "anti-skid row" ordinance.[254] The 1972 Detroit ordinance in question required that adult businesses "not be located within 1,000 feet of any to other such 'regulated uses' or within 500 feet of a residential area."[255] The court of appeals had found that the law constituted a prior restraint on people entering the theaters and, consequently, violated the theater owner's rights under the First Amendment; moreover, they had found that the law

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[252] Renton v. Playtime Theatres, Inc. 475 U.S. 41 (1986) at § 41.

[253] Wolf, *Zoning of America,* xi-xii.

[254] *Young*, 427 U.S. at § 52. This case established a hierarchy of protected forms of speech and intimated that sexual speech should only receive low priority protection. The courts did not directly invoke this "low priority status" in the cases I discuss below—Barnes v. Glen and Erie v. Pap's AM. However, Amy Adler points out that the courts implicitly invoked this low priority status when they argued that stripping was only protected by the "outer ambit" of the First Amendment (1151 note 26). Adler continues to explain that the court offered this level of protection with little explanation of what constituted the "outer ambit," nor why stripping was located there (1151 note 26).

[255] *Id.* at § 54.

violated the Due Process Clause of the 14th amendment because it was overly vague in defining what constituted an adult business.[256]

In *Young,* the Supreme Court of the United States reversed this decision. In a 5-4 vote, the majority argued that zoning laws did not constitute a "prior restraint" on people patronizing these businesses.[257] Because the Detroit ordinance considered a concentration of adult businesses to be "especially injurious" to both a particular neighborhood and, more generally, a "high quality of urban life," the majority concluded that it did not target the sexual content of the films, but rather the "negative secondary effects" that the theaters had on their urban surroundings.[258] As a result, the court concluded that the law was neutral with respect to the sexual content of the films and therefore did not violate the First Amendment. Moreover, the court also concluded that the definition of "adult-use" was not overly vague and did not violate the Due Process clause of the 14th Amendment.

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[256] *Id.* at § 56.

[257] *Id.* at § 84.

[258] *Id.* at § 71. This doctrine of "negative secondary effects" is based on a causal relationship between adult businesses and neighborhood decline. Although this relationship has been disputed by social scientists, the court has widely accepted it. For example, in a strip club case I discuss below, the court argued that the "invocation of academic studies said to indicate that the threatened harms are not real is insufficient to cast doubt on the experience of the local government" (Erie v. Pap's A.M.). Here, the inconclusiveness of the empirical data was found inconsequential because the court was more interested in the *intention* and *aim* of the law rather than its outcome. Since the law was *intended* to curb negative secondary effects, the court found it did not violate the First Amendment.

In 1986, the court heard a similar zoning case called *City of Renton v. Playtime Theaters*.[259] In this case, two theater owners in Renton, Washington, a city just south of Seattle, sought an injunction against a local ordinance requiring adult businesses be located at least 1,000 feet away from residentially zoned areas, single or multi-family homes, parks, churches, and schools.[260] The law defined an "adult" business as any "which has as its primary purpose the selling, renting, or showing of sexually explicit materials."[261] By pushing these kinds of businesses away from particular locations, the law functionally concentrated them in a specific location, so-called "red light districts." The theater owners argued that this unconstitutionally prevented customers from entering the theater, thus constituting a prior restraint on their free speech. As in *Young*, the Supreme Court disagreed. The court found that Renton's zoning law did not violate the First Amendment because it targeted the negative secondary effects of the theater, rather than the content of the films.[262]

While *Young* focused on a law dispersing the adult industry and *Renton* focused on a law concentrating such businesses, the rulings in both cases found zoning to be a constitutional "time, place, and manner" regulation of the sex industry. Despite their different approaches, both cases revealed zoning laws to be aimed at the negative secondary effects that the adult industry was believed to have on urban life. In this way, such laws are aimed at promoting the health, safety, and quality of life of city dwellers. In

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[259] *Renton*, 475 U.S.

[260] *Id*. at § 44.

[261] *Id.*

[262] *Id.* at § 46.

order to mitigate these effects, municipalities use zoning to contain the sex industry by carefully manipulating urban space —either by literally containing it or diluting its effects through dispersion.

The logic of zoning is premised on a claim that is at once scientific, medical, and communal. Due to their negative secondary effects, strip clubs purportedly damage the health and well being of the communities in which they are immersed. Laws made in response to such medical claims, in theory, should rest on empirical data connecting strip clubs to urban decay and degraded health.[263] This putative harm is what justifies the special management of strip clubs through law. Law, in this sense, becomes a mechanism of promoting the health of communities by manipulating their boundaries. Thus, logics of health promotion and spatial management intersect in the application of zoning to the adult industry in an effort to prevent negative secondary effects.

**From Zoning to Pasties and G-Strings**

The doctrine of "negative secondary effects" eventually spilled beyond zoning cases and was applied to cases dealing with laws that proscribe nudity in strip clubs. In the 2000 case *Erie v. Pap's AM*, the Supreme Court examined a 1999 law, passed by the

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[263] Social scientists dispute a causal relationship between strip clubs and urban decay. See Bryant Paul, Bradley J. Shafer, and Daniel Linz. "Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordiances: Debunking the Legal Myth of Negative Secondary Effects" *Communication Law and Policy* Vol. 6: 2 (2001): 355-391. Nevertheless, the court has claimed that "invocation of academic studies said to indicate that the threatened harms are not real is insufficient to cast doubt on the experience of the local government" (Erie v. Pap's A.M. 1397). Here, the inconclusiveness of the empirical data was found inconsequential because the Court was more interested in the *intention* and *aim* of the law rather the validity of the empirical research it relied on. The reasoning is, if a law is *intended* to curb negative secondary effects, then it did not violate the First Amendment.

city of Erie, Pennsylvania that required strippers to cover their nipples and genitalia.[264] This case was similar to a 1991 Supreme Court case entitled *Barnes v. Glen*, which also dealt with a law proscribing nudity in strip clubs.[265] Although both cases found local nudity ordinances to be constitutional, they relied on different arguments to reach the same conclusion. *Erie* drew on the zoning doctrine of negative secondary effects to justify the law. In this way, this decision was based in a putatively value-free, scientific argument about the negative effect that the sex industry has on public health, safety, and quality of life. *Barnes,* conversely, was grounded in an expressly value-laden argument about the immorality of public nudity dating back to the 19th century.[266] In this way, the shift between these cases serves as a microcosm for viewing a broader shift from an individualist, censoring approach to sex industry laws to the public health, collective, and containing approach evinced by zoning.

In the first case, *Barnes,* two strip club owners brought a suit against the city of South Bend, Indiana in 1988. The club owners claimed that South Bend's law requiring strippers to wear G-Strings and pasties violated the strippers' First Amendment rights to free expression.[267] In 1991, the Supreme Court heard the case and upheld this law for three reasons: First, the majority argued that stripping was only partially protected by the

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[264] City of Erie v. Pap's A.M., 529 U.S. 277 (2000) at § 283.

[265] Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

[266] *Id.* at 568.

[267] *Id.* at 570.

First Amendment since it was a form of conduct, rather than speech.[268] Second, the court found that the law did not target the actual erotic content of the dances, but rather public nudity in general. Finally, the majority argued that the South Bend law furthered the "substantial government interest in protecting order and morality."[269] This decision was thus strongly based on an assumption that public nudity presented a moral harm that law should prohibit.

The majority argued that because the law rested on a 19th century law banning public nudity, its intent predated the emergence of strip clubs. As such, the strip club law could not have unfairly targeted nudity in strip clubs. Instead, the law targeted public nudity in general. The decision read:

> This public indecency statute follows a long line of earlier Indiana statutes banning all public nudity. This history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition. At least as early as 1831, Indiana had a statute punishing "open and notorious lewdness, or any grossly scandalous and public indecency" In 1881, a statute was enacted that would remain essentially unchanged for nearly a century:

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[268] The court uses what is known as the "O'Brien Test" to evaluate the ways that "expressive conduct" is protected by the First Amendment. In *United States v. O'Brien*, the court found that criminal proceedings against an individual for burning his draft card did not violate his First Amendment rights. The subsequent "O'Brien Test" has been applied to other cases of expressive conduct, establishing that if the government interest furthered by a law is neutral with respect to the content of the conduct the law does not violate the First Amendment. See United States v. O'Brien, 391 U.S. 367 (1968).

[269] *Barnes,* U.S. 501 at 583.

> "Whoever, being over fourteen years of age, makes an indecent exposure of his person in a public place, or in any place where there are other persons to be offended or annoyed thereby,… is guilty of public indecency."[270]

Since the 19th century law was generally applicable to everyone, the court reasoned, it did not unfairly target strippers' performances in particular.[271] Because the law did not target strippers' dances in particular, it did not violate their First Amendment rights.

The court further argued that protecting the public from public nudity was constitutional because it furthered the compelling interest the state has in protecting morality.[272] In other words, the court suggests that it is appropriate for law to protect society from moral harms and to intervene in matters of morality. This perspective is evident in the decision's reference to *Bowers v. Hardwick*, the 1986 case criminalizing sodomy.[273] The majority quoted that notorious sodomy case: "[T]he law, however, is constantly based on notions of morality, and if all laws representing essentially moral

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[270] *Id.* at 565.

[271] *Id,* at 561. It is worth noting that feminist scholar Brenda Foley argues that it is possible that the 19th century law itself was constructed in order to proscribe women from appearing nude on stage. She points out that the time that the 19th century law (in question in *Erie*) was first written there had been many scandals about nudity on stage that had achieved national coverage in the press—these scandals most certainly would have impacted the construction of the law at question in *Barnes* as well. See Foley, "Naked Politics," 5.

[272] *Id.*

[273] *Id.* at 575.

choices are to be invalidated…the courts will be very busy indeed."[274] Thus, in *Barnes*, the court found that by enforcing and upholding moral norms—in this case a prohibition on public nudity and indecency—the law fulfilled a compelling state interest.

This decision was upheld, but subtly revised in the 2000 Supreme Court case *Erie v. Pap's A.M*. Similar in background to *Barnes*, *Erie* dealt with a lawsuit originally brought by the Pap's Corporation, owner of the Kandyland strip club. This corporation challenged the court's decision in *Erie* to proscribe public sex acts, including public nudity.[275] Because the law defined nudity as exposure of nipples or genitalia, it functionally required strippers to wear pasties and G-strings while they performed.[276] The preamble to the law explained the city's rationale:

> For the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.[277]

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[274] *Id*. *Bowers* has since been overturned by Lawrence v. Texas, which was hailed as a victory for LGBT people because it ended the criminalization of sodomy. It is interesting to think about how and if *Lawrence* would impact *Barnes*. However, as I discuss below, nudity restrictions have been upheld for reasons other than public morality, making such an argument moot.

[275] *Pap's A.M.,* 529 U.S.

[276] *Id.* at § 283

[277] *Id.* at § 293.

Thus, the law established a link between nudity in strip clubs and negative aspects of city life. The toll that these negative aspects took on "public health, safety and welfare" was the justification for its proscription of nudity. *Barnes* thus based anti-nudity laws on a logic of negative secondary effects.

This justification in negative secondary effects allowed the law, in the judges' view, to avoid violating the dancers' First Amendment rights. To make this argument, the court drew on their decisions regarding zoning regulations in *Renton* and *Young*, the two zoning cases I discussed in the previous section. The judges identified a similar logic in both zoning and anti-nudity ordinances. The court explained:

> [W]e…treated the zoning regulation as content neutral because the ordinance was aimed at the secondary effects of adult theaters, a justification unrelated to the content of the adult movies themselves. Here, Erie's ordinance is on its face a content-neutral restriction on conduct…. because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing.[278]

Zoning ordinances were thus considered to be "content neutral" because they did not target the erotic content itself, but rather that content's negative secondary effects. Similarly, nudity ordinances were justified, not because of the putative immorality of nude body's "erotic message," but rather because of "negative secondary effects" that the nude body created for the surrounding area. Thus, for the judges of the Supreme Court,

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[278] *Id.* at § 295.

zoning and anti-nudity laws did not violate the First Amendment because they said nothing about the content of erotic speech itself.

Nevertheless, the argument in *Erie* marked an important shift away from the argument made by the court's previous argument in *Barnes*. In *Barnes*, the court proscribed nudity because of the immorality of public nudity in general. In *Erie*, in contrast, the court suggested that the law should proscribe certain elements of erotic performances because of the negative effects these elements have on public health, safety, and quality of life. Such laws were not targeted at sexual expression itself, but rather at its negative secondary effects.

Thus, while both *Barnes* and *Erie* found laws proscribing nudity in strip clubs to be constitutional, they rested on different arguments. *Barnes* rested on a 19$^{th}$ century idea of moral harm and prohibition, while *Erie* rested on the 20$^{th}$ century idea of a scientific zoning doctrine of negative secondary effects. Although this shift from censoring laws to a more regulatory approach could be interpreted as increasing strippers' and adult industry's freedom, feminist and queer theorists have been critical of time, place, and manner regulations such as zoning and the nudity laws precisely for restricting the sex industry and individual strippers' expressive freedom. In the next section, I offer an overview of such critiques.

**Queer Critiques of Zoning**

In "Zoning Out Sex," Michael Warner criticizes zoning as a material manifestation of heteronormativity. He focuses on the redevelopment and rezoning of the West Village—including Christopher Street, home of the famous Stonewall Inn—the Eighth Avenue corridor, and Times Square that took place in New York City during the

late 1990s. He argues that "the desire [of zoning is] to make sex less noticeable in the course of everyday urban life and more difficult to find for those who want sexual materials."[279] He is concerned that such rezoning strategies are, in reality, ways of expelling non-normative sexual practices—and the populations that take part in them. Thus, for Warner, quality-of-life zoning is a strategy for the consolidation of dominant forms of living.

Warner is especially concerned that the zoning laws disproportionately targeted the queer sex industry and public spaces gay men cruised for sex and engaged in non-normative sex acts. He is also critical of mainstream LGBT organizations for supporting the zoning law. He argues that these groups were more interested in assimilating into straight commercial life than in affiliating with and defending non-normative sexual practices.[280] The mainstream LGBT groups claimed that non-normative sex acts, such as public sex, were a symptom of gay men's marginalization and internalized oppression; they argued that once gay men become more accepted there would be less need and desire to engage in such "self-loathing" behavior.[281] For Warner, this support from assimilated LGBT organizations illustrates the law's heteronormativity. That is, these laws and their supporters favored forms of urban living that promoted assimilation into straight or "normal" sexual culture.

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[279] Michael Warner, *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life* (New York: Free Press, 1999), 159.

[280] Ibid., 164-166.

[281] Warner mentions that Ruth Messinger, the mayoral candidate who ran against Giuliani, argued that the law disproportionately impacted gay people. Nevertheless, Giuliani was able to successfully use this position against her in order to win the election (168).

Moreover, Warner ties the rezoning of Time Square to new urbanism and neoliberalism, insofar as the law marked an alliance between large corporate interests and the state. He writes, “It was the Times Square BID (Business Improvement District), even more than Mayor Giuliani’s office, that spearheaded the rezoning effort. The Walt Disney Company insisted on eliminating the porn stores as a condition of its role in changing Times Square.”[282] This alliance also served heteronormativity since the corporate interests reflected normative “family values” that favored tourism and capital accumulation. In this way, the zoning laws’ alliance with large corporate interests essentially transformed Times Square from a place where public life, including queer sex life, flourished to the Disney-saturated, family-oriented, corporatized area that it is today. This functionally pushed non-normative queer sexual practices out of the area’s public life. Heteronormativity was consequently spatialized and made inseparable from urban life through the new zoning laws.

Gayle Rubin articulated a similar critique of zoning and its effects on non-normative sex practices in her influential 1984 essay “Thinking Sex.” In the essay, Rubin argues that the 1880s, the 1950s, and the early 1980s marked times of moral panic around sexuality; these moral panics led to the proliferation of laws—especially obscenity laws—that targeted sexual minorities. Of the early 1980s, for instance, she writes:

> The police crackdown has not been limited to homosexuals. Since 1977, enforcement of existing laws against prostitution and obscenity has been stepped up. Moreover, states and municipalities have been passing new and tighter regulations on commercial sex. Restrictive ordinances have

[282] Ibid., 161.

> been passed, zoning laws altered, licensing and safety codes amended, sentences increased, and evidentiary requirements relaxed.[283]

Thus, for Rubin, the late 1970s-early 1980s were marked by the intensification of laws proscribing non-normative sexual practices. Such laws were part of a "restrictive" apparatus that worked to repress non-normative forms of sexuality. Zoning was one of the instruments of this broader trend toward the restriction of sexual activity.

These queer theorists critique zoning's impact on urban life by suggesting that it functions to push non-normative sex practices out of an area. In this way, they read zoning as persecuting sexual minorities and sanitizing urban life of their supposedly derelict influence. Hence, Warner's title "Zoning Out Sex." Rubin is similarly concerned with the sanitizing impact that zoning laws have on non-normative sexual communities and practices. These scholars thus claim that zoning is heteronormative insofar as it favor forms of life and practices that support heterosexuality. In this way, they understand law to be acting as a repressive force against non-normative sex practices. A strikingly similar argument has been made by feminist scholars in their critiques of nudity regulations.

**First Amendment Feminism and the Nudity Cases**

Feminist scholars have condemned the nudity cases I discussed above for restricting strippers' sexual expression; they have been especially critical of *Erie*'s transposition of zoning's doctrine of negative secondary effects onto the bodies of strippers. In different ways, these thinkers suggest that these problems could be resolved by expanding stripping's protection as expressive speech under the First Amendment.

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[283] Rubin, "Thinking Sex," 6.

Thus, feminist critiques of nudity laws have been based on an opposition that identifies stripping as a form of speech and nudity laws as a kind of censorship.[284]

Dance anthropologist Judith Lynne Hanna has not only developed this kind of argument, but also served as an expert witness in over forty-six legal cases—at county, state, and federal levels—involving strippers' First Amendment rights.[285] Throughout this work, she draws a connection between stripping and her anthropological research on dance to argue that stripping, like all dance, is a form of expressive, non-verbal communication. Since nudity is often the climax of these dances, Hanna argues, it is central to the erotic message conveyed. Consequently, laws proscribing nudity in strip clubs limit the dancers' erotic expression. Hanna thus disagrees with the court's reasoning that covering a nipple or the genitals does not significantly impact or change the erotic message of the dances.[286] She sees such laws as violating strippers' First Amendment rights.

Hanna also criticizes the idea of a causal relationship between strip clubs and negative secondary effects. Indeed, she points out that since 2001 social scientists have debunked such a link, arguing that causality between strip clubs and urban decay is a legal myth [287] Hanna also debunks this myth and agrees with the dissenting opinion in *Erie*, which reads: "To believe that the mandatory addition of pasties and a G-String will

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[284] As I discuss in the second chapter, this same position emerged out of the sex wars as a sex positive way of protecting forms of sexual expression that were under attack by both radical feminists and their unlikely allies on the conservative and religious right.

[285] Hanna, *Naked Truth*, 1.

[286] Ibid., 247.

[287] Ibid., 249. See also Paul, Shafer, and Linz, "Government Regulation."

have any kind of noticeable impact on adverse secondary effects requires nothing short of a titanic surrender to the implausible."[288] By questioning the causal link between nudity and negative secondary effects, Hanna challenges the constitutionality of such laws because the state interest they serve—reducing negative secondary effects—no longer holds.

Feminist performance scholar Brenda Foley is equally skeptical of the application of the zoning doctrine of negative secondary effects to nudity laws. In her article "Naked Politics: Kandyland Club vs. Erie PA," Foley argues that the use of the negative secondary effects doctrine conflates stripper's bodies with urban space and also imagines their bodies as the sites of contagion within the community.[289] She suggests that this follows a Western cultural trope of conflating women's bodies with architectural space that dates back to the 14th century.[290] According to Foley, this objectifies strippers by treating them more like buildings than like subjects capable of expressive speech protected by the First Amendment.[291] Like Hanna, she concludes that the link between bodies and zoning is both tenuous and harmful to the erotic content of the dances. Therefore she concludes by calling for the expansion of First Amendment protections for strippers, suggesting that they be viewed as professional entertainers rather than "low brow" forms of sexual labor.[292]

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[288] Ibid., 249.

[289] Foley, *Naked Politics,* 9.

[290] Ibid.

[291] Ibid.

[292] Ibid., 13.

Hanna and Foley thus both critique the transposition of the zoning doctrine of negative secondary effects onto the naked bodies of strippers. Foley suggests that this transposition objectifies strippers by restricting their right to free expression under the First Amendment. Hanna suggests such laws are a scientific sounding ruse justifying sexual prudishness. Though their criticisms of the laws are different, they both call for expanded First Amendment rights for dancers.

This feminist critique of nudity laws, while distinct from radical feminist critiques of zoning, bears a resemblance to the queer concerns about zoning.[293] Both feminist and queer critics suggest that zoning laws limit sexual freedom. For the queer critics, this takes place through the marginalization of non-normative sex acts and the persecution of sexual minorities. For feminist critics of the nudity laws, applying the zoning doctrine in nudity cases rationalizes laws that restrict sexual expression. Thus, both feminist critics of the transposition of the doctrine of negative secondary effects and queer critics of zoning understand such laws to limit sexual freedom. Removing these laws, in turn, will result in a sexual liberation that these critics conceive of as an unambiguous victory.

**The Limits of Queer and Feminist Critiques of Zoning**

In the previous chapter, I noted a shift in American laws governing the sex industry. While early American laws tended to prohibit sexual expression altogether, later legal strategies shifted toward a more regulatory approach through licensing laws, and

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[293] As I mentioned in the introduction to this dissertation, MacKinnon and Dworkin were opposed to zoning ordinances governing the sex industry. Unlike the feminists I discuss here, who are concerned with the First Amendment restrictions of zoning laws, MacKinnon and Dworkin viewed zoning as "tolerating" male dominance by allowing the sex industry to exist. Thus, the anti-zoning feminists I discuss here share more with the anti-censorship feminism that emerged in response to MacKinnon and Dworkin, than with a radical feminist critique of zoning.

time, place, and manner regulations. Nevertheless, this historical shift has not been considered by the queer and feminist scholars whose work I have analyzed here. These thinkers have continued to view these laws as operating in a manner that is fundamentally *repressive*. As such, they fail to address the specificity of how regulatory laws—such as zoning—operate. In other words, while these thinkers are ostensibly addressing mechanisms of the late 20th century commercial regulation of sex, they treat these laws as if they operate through the same principles of repression, exclusion, and censorship as the laws of the early 20th century. The result is a fundamental misapprehension of how law functions in relation to the contemporary American sex industry.

Queer critics understand zoning as a punitive force that works through the mechanics of repression, exclusion, and, ultimately, persecution. For example, by suggesting that regulatory laws—like zoning—are in service of "police crackdowns" against non-normative sexual practices, Rubin collapses the specificities of zoning into the criminal power of law. Finally, by focusing on the expunging and expelling effects of zoning, Warner too understands the force of law to be operating as a repressive force against non-normative sex practices. While he does not attribute this force to criminal law, he fails to explore how such laws might operate outside of a punitive mode. Thus, both thinkers understand zoning to repress non-normative sexuality.

The feminist critics of nudity laws similarly understand such laws primarily through a punitive lens. Both Hanna and Foley argue that these laws target and limit strippers' erotic expression. The laws do this by restricting nudity, which Hanna and Foley argue forms a crucial element of the dancers' erotic message. Foley also suggests that the transposition of zoning doctrine onto the nudity cases objectifies dancers by

treating them more like buildings than like humans capable of conveying an individual erotic message through a performance. As a result, both Hanna and Foley challenge the court's assertion of content neutrality and advocate for expanded First Amendment rights for strippers. Thus, like the queer critics of zoning, these feminist critics suggest that such time, place, and manner laws limit sexual freedom.

By focusing on the law as a direct and punitive force, both the queer critics of zoning and their feminist counterparts overlook the non-punitive, non-repressive, and regulatory ways that such laws function. In this way, they only focus on law as a punitive force, and fail to see the way that it comes to be embedded in everyday life, shaping expression and sexual practices. As a result, these critics posit the idea that everyday practices, including sexual practices, exist unencumbered by law. For the feminist critics of nudity laws, for instance, this takes the shape of imagining stripping, when protected by the First Amendment, to be a pure form of sexual expression. This expression exists within the stripper herself and, by unleashing it, she expresses her very freedom. But this perspective fails to account for the long established relationship between sexual performance and legal regulation in America, which I discussed in the previous chapter. Such laws have created the very sexual expression that feminist critics seek to liberate. Their belief in such liberation leads them to ignore the manner in which the stripper's nude body is itself a site of power and, indeed, of sexual regulation. By insisting that power resides only in the repressive force of censorship, feminist critics obscure the legal production of the stripper's naked body.

Queer critics of zoning similarly fail to acknowledge how law has shaped the non-normative sex practices they seek to protect. But where feminist theorists counsel refuge

from law in the stripper's putatively untainted body, queer theorists do so in an imagined historical past where non-normative sexual practices blossomed outside of legal regulation or sanction. For instance, Warner's critique of the New York zoning law implies that, prior to the advent of zoning, non-normative sex practices flourished in the everyday life of the city and that this flourishing itself was not shaped by regulatory laws. He suggests that such everyday practices not only evade law, but also come to critically oppose and resist normativizing laws. However, the history of American theatrical regulation, discussed in the previous chapter, illustrates that law has long played a role in shaping everyday life and the sexual dynamics of this area. As American historian Themis Chronopoulous, explains: "The city-government, along with Times Square business interests, have been trying to anticipate, regulate, and transform the entertainment nature of the district since 1892."[294] By ignoring historical struggles over such urban areas, queer critics of zoning romanticize and oversimplify this complex past; in the process, they misunderstand the dynamics of contemporary zoning policies.

Beyond constructing the idea of sexuality unmarred by law, these critics fail to acknowledge the specific ways that zoning and time, place, and manner laws themselves shape—rather than restrict—sexual practices and everyday city life. Zoning, for instance, distributes sexual practices throughout urban space. Such laws therefore do not expel as much as they tabulate, reorganize, and spatialize sexual activity. In this way, instead of excluding subjects from the everyday scenes of city life, they comprise them. They set the context through which subjects move, interact, and practice. As de Certeau noted,

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[294] Themis Chronopoulos, "Morality, Social Disorder, and the Working Class in Times Square, 1892-1954," *Australasian Journal of American Studies* 30, no. 1 (July 2011): 1.

these practices are not devoid of or resistant to power relations, but are shaped and developed through such relations. By reducing such laws to mechanisms of exclusion and repression, queer and feminist critics fail to adequately account for their organizing and distributing effects. Consequently, these critics fail to see how they shape the seemingly quotidian relations of power that structure day-to-day life in the city; they fail to see the biopower in modern urban life.

**Biopower, Law, and Zoning**

In *The History of Sexuality, Vol. 1*, Foucault charts a contrast between two different forms of power: juridical power and biopower. Juridical power is localized in the figure of the sovereign; it functions through the direct enactment of sovereign violence—and threats of violence—against subjects. As discussed above, biopower in contrast focuses on fostering life or *"disallow[ing]* it to the point of death."[295] Biopower is a more modern form of power and is comprised of two interrelated poles. The first pole includes the discipline and optimization of human bodies; this is biopower's more individualizing pole. The second pole focuses on the regulation of a population through measures of biological health: "propagation, births and mortality, the level of health, life expectancy and longevity."[296] This pole is more massifying and thus works through numerical measures of population based data, including those found in statistics, medicine, and public health. As a result, biopower functions to discipline bodies and distribute differences within populations around statistical norms.[297] Foucault writes:

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[295] Foucault, *History of Sexuality*, 138.

[296] Ibid., 139.

[297] Ibid., 144.

> Such a power has to qualify, measure, appraise, and hierarchize, rather than display itself in its murderous splendor; it does not have to draw the line that separates the enemies of the sovereign from his obedient subjects; it effects distributions around a norm.[298]

Such relations of power can then draw on this norm to manage populations through what Foucault calls the "meticulous reodering of space."[299] Rather than doing direct violence to populations, biopower controls the spatial environments in which they live. This spatializing function is a central feature of this new form of power.

Biopower is certainly present in contemporary practices of adult use zoning and "time, place, and manner" regulations more generally. Through the doctrine of negative secondary effects, such laws are concerned with the optimization of populations through managing urban decay, illegal activity, pollution, and poverty. These kinds of laws work through both poles of biopower. They works through the disciplinary, individualizing pole by positing strippers' bodies as the origin of social contagion. Zoning also illustrates the masssfying pole of biopower by seeking to normalize society through an "extremely meticulous ordering(s) of space."[300] I will now offer a critique of feminist and queer critiques of zoning by drawing on this discussion of biopower.

**Rereading the Critique of Zoning through Biopower**

In previous sections of this chapter, I illustrated the model of law underpinning queer and feminist critiques of zoning and anti-nudity laws. These critiques were based

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[298] Ibid.

[299] Ibid., 137.

[300] Foucault, *History of Sexuality*, 145.

in an interpretation of such laws as limiting sexual freedom through repression. This account understands zoning and anti-nudity laws to function according to the logic of what Foucault called juridical power. Such laws operate directly on the bodies of strippers through the censorious and repressive threat of force.

This juridical understanding of these laws conditions the forms of opposition these queer and feminist thinkers recommend: Queer theorists argue that sex should be liberated not only from zoning regulations but also from the public/private distinction; feminists, in turn, recommend expanding First Amendment protections to the stripper's naked body. Both these recommendations are designed to protect sexuality from the force of law—to liberate sex by placing it in a zone putatively outside of legal regulation. Thus, the juridical conception of law underpinning their critiques leads feminist and queer thinkers to recommend strategies that liberate sexuality by removing it from the legal domain.

But zoning law does not operate according to a juridical logic in the Foucauldian sense. Instead, as I have shown, over the course of the twentieth century, laws regulating the sex industry shifted from the juridical logic of anti-theatrical laws to a logic of biopower. Zoning and anti-nudity laws epitomize this shift. As such they are not representative of juridical power, but rather the twin poles—individualizing and massifying—of biopower. They do not function according to a logic of violent prohibition and direct force. They rather produce particular configurations of sexuality through the discipline of bodies and the management of urban space. They do not repress or censor sexuality, but rather create and optimize it. This understanding of power both

undermines existing queer and feminist critiques and signals alternative methods of contestation.

Queer and feminist critiques of zoning depend on the premise that there is, in theory, a protected space outside of the law. But there is no "outside" of law conceived as biopower. As a result, attempts to eschew legal power do not actually do so; rather, they present a fantasy that obscures the actual operation of law in the production of the putatively "unregulated" object. Thus, for example, protecting stripping under the First Amendment does not protect a pure form of speech. It protects a highly stylized and disciplined embodied expression that exists at the nexus of an array of laws, including those regulating labor, commerce, and criminality. Simply "protecting" this expression entails ceding any critical capacity to analyze these laws. It also inhibits feminists and queer theorists from using the law as a way to contest dominant formations of power. In a cruel irony, it is precisely by imagining themselves as outside of such power that they inadvertently maintain it and ensure its prolongation.

Take the queer critique of zoning. This critique argues that zoning operates to constrain sexual activity to certain clearly defined areas. Such constraint is, in turn, interpreted as a form of juridical power that can be opposed by advocating for its erasure. Thus, in theory, eliminating zoning will liberate those sexual practices that had previously been constrained. But an understanding of zoning as biopower challenges such agendas.[301] Because biopower affects distributions around a norm—in this case, through

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[301] In *The History of Sexuality Volume 1,* Foucault is clear that sex—including so-called anti-normative sexual practices—is not somehow outside of the normalizing curve of biopower. He famously wrote, "We must not think that by saying yes to sex, one says no to power; on the contrary, one tracks along the course laid out by the general deployment of sexuality" (157).

the measure and management of populations within urban space—it is not directly opposable through something that queer theorists might call "anti-normative." Any "anti-normative" counterpoint would itself be arranged and distributed along the statistical curve of what is considered normal. [302] The anti-normative counterpoint is thus not outside of power as it operates through the law. Instead, it is itself shaped by laws. If queer theorists imagine that their opposition is somehow outside the law, they risk not only missing how law is operating, but also extending the very reach of its power—a reach they had hoped to resist.

The feminist critique of transposing zoning onto the bodies of strippers is perhaps even more problematic from the perspective of the relationship between biopower and the law. Indeed, arguing for expanded First Amendment rights for strippers presupposes that the law operates according to a juridical mode of power that censors erotic activity. But this perspective on legal power does not challenge laws that operate according to the twin poles of biopower. Not only is the body of strippers disciplined through a host of interrelated relations of power, *including* anti-nudity laws, but it is also tied to the massifying pole of biopower by being portrayed as the point of origin of social decay through the doctrine of negative secondary effects. As such, we are left to ask: why would expanding the notion of the stripper as herself a sovereign juridical subject, entitled to specific forms of sexual and bodily expression, necessarily thwart or resist the optimization of the species and population at play in this doctrine or the discipline of strippers' bodies at play in anti-nudity measures? In other words, the expansion of First

[302] For further elaboration of this perspective and its implications for queer theory see: Elizabeth Wilson and Robin Wiegman, Eds. *Queer Theory without Antinormativity*, *differences: A Journal of Feminist Cultural Studies* 26:1, 2015.

Amendment rights of strippers may simply act as a ruse of freedom that further entrenches biopower. But the liberal politics of "free expression" is incapable of reflecting on this possibility.

A more productive reading of zoning laws would account for their relationship with biopower. Instead of futilely attempting to escape biopower through either a liberal ruse of free speech or through the notion of an outsider, "anti-normative" position, exploring biopower illustrates strippers' bodies and their individual expression to be the consequence of a nexus of disciplinary practices, including laws governing nudity. Moreover, when these laws are tied to spatialization through the doctrine of negative secondary effects, we can see the other pole of biopower emerge: the pole that manages populations and attempts to optimize life through statistical conceptions of normal and good urban life. Contra feminist and queer critiques of time, place, and manner laws, such statistical measures incorporate even the most "anti-normative" of positions. There is no "outside" of such laws from where "anti-normative" subjects react.

Indeed, the transposition of zoning laws onto the bodies of strippers can be read as highlighting the productive qualities of law. That is, law disciplines strippers' bodies in particular fields of action and then spatializes that body by positioning it as the origin of social decay. Such a reading does not obscure biopower by falling back into a juridical conception of law. Instead, this reading illustrates how law functions in mundane and quotidian ways that complicate an overly cynical view of it as always limiting a sexual freedom whose very "liberating" quality is in direct proportion to its distance from law. Thus, the nudity cases highlight the practices of meaning making from

within the productive dimensions of law that form part of my theory of the "legal everyday."

For instance, by advocating expanded First Amendment rights for strippers, feminist critiques of the transposition of zoning doctrine onto the bodies of strippers reduces strippers to their stage performances. In the process, they neglect the bulk of what strippers do: affective and emotional labor.[303] As I discussed in chapter one, the affective and emotional labor of dancers—including lap dances, chatting with customers, never revealing a final, climactic nipple—are all shaped by the local laws, including zoning laws. Thus, the law does not only constrict, but also creates a variety of practices. Law, in part, produces the stripper as an affective laborer.

Strippers then come to use the law in ways that may look quite different from more traditional forms of legal engagement. However, they constitute an engagement with the law nevertheless. For example, one can imagine a stripper walking away from a particularly aggressive client by shouting, "Sorry, taking off my top is against the law!" In this example, the law becomes part of the creative toolkit of the stripper, which she can use to protect herself from a potentially harmful experience. Thus, law is not always as sinister as the free speech argument portends; it is both generative and potentially helpful to dancers who make meaning out of it.

Rather than understanding the law as only limiting dancers' freedom, the transposition of zoning doctrine onto strippers' bodies actually highlights how the body, urban space, and law are enmeshed in ways that complicate any neat idea of the law controlling, objectifying, or repressing the dancers. Since the body itself is notoriously

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[303] Frank, *G-Strings and Sympathy*, 85.

unruly and informs the materiality of everyday life, it may at times exceed and transform any malevolent intent that might be contained within the law. Understanding transposition in this way shows that law is messier—and more potentially generative—than a repressive account of its power allows.

If the law then is more messy and less restricting than the way that queer and feminist critiques of zoning imply, perhaps there are alternative spaces within it where feminist and queer politics can emerge. A politics that is embedded in everyday practices engages law in surprising and seemingly non-legalistic ways; in other words, practices that illustrate my theory of the legal everyday. In the next chapter, I explore this possibility by examining the case of the unionization of the Lusty Lady Strip Club in San Francisco in 1997.

# Chapter 4:

# The Legal Everyday: The Case of the Lusty Lady

## Introduction:

In the last chapter, I explored zoning as an example of how law operates through a logic of biopower. As such, rather than excluding strippers from urban space, zoning laws organize space in a way that establishes strippers' bodies as the origin of social disease and decay. Given that law can function in this way, it is understandable that queer theorists and feminist scholars are skeptical of its ability to transform the lives of sex workers or their industry. Indeed, as I explore below, zoning has certainly not improved strippers' working conditions. At the same time, in Chapter Two I demonstrated that law is highly relevant to the everyday lives of strippers by showing how lap dancing—strippers' main commodity—developed through a series of legal transformations throughout the history of American sexual performance. Thus, on one hand, the law seems to be everywhere, shaping even the most quotidian practices. On the other hand, this pervasive quality seems insidious to the point where law should not be trusted. If law profoundly shapes the daily practices of strippers in this way and if it locates them as the origin of social contamination, then what role, if any, can law play in transforming the conditions of sex workers' lives?

In this chapter, I explore this question through an analysis of the 1997 unionization of San Francisco's Lusty Lady Strip Club. I argue that this example illustrates how "everyday" engagements with law—engagements that reflect how subjects take up and use the law in everyday practices of meaning making that are seemingly removed from the courts and legislatures—hold transformative possibility for

sex workers' lives. I argue that these small transformative possibilities are meaningful even in the face of bigger and overarching political failings. As a result, this example highlights how mundane and everyday forms of engagement with law can transform the lives of sex workers, even though this transformation may be episodic and partial. In sum, if the previous two chapters challenge the idea that sex workers can be liberated from law—because it shapes their bodily practices and functions through a logic of biopower—in this chapter I argue that it continues to hold transformative potential for their lives. Indeed, because the law plays such a significant role in shaping and producing the categories and practices of sex work, it is critical that sex workers and their advocates not give up on engaging it altogether. I thus argue that sex work scholars and advocates should move beyond a critical perspective on law that dismisses it as a tool for political engagement and transformative possibility.

I will begin with a discussion of the challenges and conditions that contemporary strippers face in the American workforce. I will then discuss how the unionization of the Lusty Lady constituted an engagement with law that epitomizes the practices of meaning making which are part of my theory of "the legal everyday." I then examine the less discussed post-union era. During the last decade of the Lusty Lady's existence, the workers purchased the club and formed a worker's cooperative. I argue that this transformation created a conflict for the union and ultimately foreclosed the political potential that unionization had initially promised. I conclude the chapter by showing the political possibility that instances of the "legal everyday" might hold for transforming sex workers' conditions, even if such engagements fall short of a total transformation. The results of legal engagement may be partially problematic.  But this does not discount their

transformative potential. To begin exploring such potential, I will now detail the state of working conditions in US strip clubs.

**Working Conditions in Strip Clubs**

Working conditions in American strip clubs vary quite a bit depending on the club's location and patron demographics. For instance, there are clubs that cater to working class men and those that bill themselves as "gentlemen's clubs" designed for wealthier patrons.[304] Moreover, different clubs cater to men of different races and cultural backgrounds. For the most part, these clubs feature dancers of races that correspond to their clientele, play distinct genres of music, and often operate through their own particular cultural norms.[305] Despite such differences, dancers face strikingly similar working conditions and challenges throughout the United States. Stripping is hard, physical work. The industry favors youth and physical fitness. Maintaining a youthful, fit, and beautiful appearance is therefore part of the job. The burden of this maintenance falls on the strippers themselves. They typically spend their own earnings on grooming and physical upkeep.[306] This can include anything from routine manicures, tanning, and waxing to more invasive and expensive surgeries and treatments, including breast augmentation and botox.[307] These procedures, of course, cannot forever stave off the natural aging process. Stripping is therefore an unusually short-lived career; the average

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[304] Frank, *G-Strings and Sympathy,* 53.

[305] Brooks, *Unequal Desires,* 37.

[306] Forsyth and Deshotels, "The Occupational Milieu of the Nude Dancer," 138.

[307] Ibid.

age of strippers in Las Vegas, for instance, is twenty-four.[308] Dancers often face premature age discrimination and are forced into early or semi-retirement without the safety net of retirement savings. [309]

Although these beauty standards are not hard and fast rules, they are promulgated by the dependent relationships that dancers have with managers. Many dancers get into the business in order to rapidly earn money.[310] As a result, they depend on managers to offer them regular shifts during peak hours. Because of this dependency, managers can uphold and enforce standards and rules as they see fit.[311] If a dancer fails to meet their standards of beauty and physique, management can punish the dancer by changing her schedule or removing her from the roster altogether.[312] Dancers are therefore vulnerable to the whims, rules, and tastes of management.

This problem is compounded because strippers are overwhelmingly classified as independent contractors, rather than employees.[313] While this classification theoretically

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[308] Jennifer Heineman, Rachel T. MacFarlane, Barbara G. Bents. 2012. "Sex Industry and Sex Workers in Nevada" In *Social Health of Nevada: Leading Indicators and Quality of Life in the Silver State,* edited by Dmitri N. Shalin. Las Vegas, NV: UNLV Center for Democratic Culture, http://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1047&context=social_health_nevada_reports, 6.

[309] Barton, *Dancing on the Mobius Strip,* 585.

[310] Sarah Chun, "An Uncommon Alliance: Finding Empowerment for Exotic Dance through Labor Unions," *Hastings Women's Law Journal* 18 (1999), 232.

[311] Curtis A. Fogel, Andrea Quinlan, "Dancing Naked: Precarious Labor in the Contemporary Female Strip Trade," *Canadian Social Science* 7, No. 5 (2011): 53.

[312] Ibid.

[313] Chun, "An Uncommon Alliance," 235.

allows dancers a measure of flexibility—some clubs even allow dancers to sign up for their own shifts—it leads to many of the same problems that characterize the broader contingent workforce. For instance, because strippers are classified as contract workers, the club is under no legal obligation to follow state or federal minimum wage laws.[314] Independent contractors are also ineligible for state and federal benefits including unemployment and worker's compensation.[315] Finally, as independent contractors, dancers are not protected by federal non-discrimination laws such as Title VII of the Civil Rights Act of 1964, the Age Discrimination Employment Act (ADEA), Fair Labor Standards Act (FLSA) the Occupational Safety and Health Act (OSHA) and the Employee Retirement Insurance Security Act (Erisa).[316] Given that stripping is physically demanding and potentially dangerous work, in an industry that is prone to discrimination based on age and appearance, these laws could provide dancers with critically needed protection. Thus, because strippers are classified as independent contractors, they are not offered the same legal protections as employees, even as they are subjected to many of the same problems that labor and employment laws intend to solve.

Many clubs take advantage of this status. For example, a number of strip clubs do not pay wages at all. In these clubs, strippers only earn tips. Clubs often require strippers to split these tips with other workers or managers.[317] Many managers take this exploitation further by charging dancers so-called "stage fees" to work their shifts;

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[314] Ibid., 236.

[315] Ibid., 237.

[316] Ibid.

[317] Ibid., 236.

through this practice, managers require dancers to pay for the "privilege" of dancing and earning tips in their club. These fees can run anywhere from ten to one hundred and fifty dollars per shift.[318] In place of or in addition to such fees, certain clubs require dancers to sell drinks, t-shirts, or other merchandise in exchange for working a particularly busy shift. Dancers who fail to sell the required amount of merchandise or drinks have to pay the difference.[319] Such vulnerability to managerial exploitation is a direct result of the legal status of strippers as independent contractors.

Beyond exposing dancers to these kinds of vulnerabilities, the classification of independent contractor legally prevents strippers from unionizing under the National Labor Relation Act of 1935.[320] This act only applies to employees, and not to independent contractors.[321] Combined with the stigma that many dancers continue to endure as sexual laborers, this status often proves to be an insurmountable obstacle blocking unionization.[322] For instance—as I discuss below—even when dancers are legal employees, the association of stripping with independent contracting provides a barrier to union membership. Unions, in this example, refused dancers representation because they assumed the dancers were independent contractors. Such assumptions can be underpinned by the fear that stripping—as sex work—is associated with illegal activities including drug use, prostitution, and organized crime, and therefore not a legitimate

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[318] Ibid.

[319] Forsyth and Deshotels, "The Occupational Milieu," 134.

[320] Chun, "An Uncommon Alliance," 249.

[321] Ibid.

[322] Ibid., 245.

profession.[323] Though such stereotypes may be unintentional, they provide powerful cultural barriers to union representation that only reinforce the already pervasive structural barrier of independent contractor status itself.

Beyond such discrimination, strippers themselves may not want to unionize. As I discussed above, strippers often get into the industry to earn a large sum of money quickly. For this reason, many dancers do not imagine they will remain in the industry for a long time. Consequently, they may not be interested in paying union dues or participating in meetings and protests to transform their working conditions; indeed, they may be wary of the risks of such participation, seeing them as contrary to their short-term monetary goals.[324] Thus, a combination of discrimination and legal classification, prevents—or structurally disincentivizes—strippers from the pursuit of unionization. Currently, there are no unionized strippers working in the United States. However, in 1997, the strippers at the Lusty Lady club in San Francisco successfully overcame these obstacles and won their fight to unionize. Doing so entailed dramatically transforming their engagement with the law; they not only needed to prove their legal classification as employees, but also had to fight for and negotiate a legal contract protecting the union.

**The Lusty Lady and the Union Years: 1997-2003**

The Lusty Lady was a peepshow in the North Beach neighborhood of San Francisco. It first opened to the public in 1982 and closed in 2013. Workers at the club

[323] Ibid., 233.

[324] Chun, "An Uncommon Alliance," 232.

unionized in 1997.[325] Even prior to the unionization, the Lusty Lady was considered a good place to work because dancers were hired as employees rather than independent contractors.[326] Their status as employees gave dancers job security and benefits that were not enjoyed by dancers in other clubs.[327] The club was also considered a good place to work because it had a reputation for being "sex positive," meaning that the dancers shared a feminist sensibility, an openness towards queer forms of sexuality, and understood their work to be empowering.[328] Nevertheless, there were problems with the Lusty Lady's working conditions and, as I will discuss in detail below, workers of color were disproportionately burdened by these problems.

Unlike other strip clubs, the Lusty Lady did not feature physical contact between strippers and clients. Instead, dancers performed together on a large stage enclosed behind glass windows. Customers sat in private viewing booths and inserted money into a bill feeder to raise the window covering and watch the dancers on a small, mirrored stage.[329] There was also a "Private Pleasures" booth, where customers could view an

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[325] Siobhan Brooks, "Exotic Dancing and Unionizing: The Challenges of Feminist and Antiracist Organizing at the Lusty Lady Theater," in *Feminist & Antiracism: International Struggles for Justice*, edited by France Winndance Twine and Kathleen M. Blee (New York: NYU Press, 2001), 60.

[326] Siobhan Brooks, email message to the author, September 22, 2012.

[327] Ibid.

[328] Jennifer L. Borda, "Negotiating Feminist Politics in the Third Wave: Labor Struggle and Solidarity in *Live Nude Girls Unite!" Communication Quarterly* 57, no. 2 (2009): 124.

[329] Brooks, "Exotic Dancing and Unionizing," 60.

individual dancer.[330] This booth billed at a significantly higher rate and therefore resulted in higher earnings for the dancer.[331] This payment rate became a source of contention between dancers and the management, as well as among dancers themselves, and ultimately led to the effort to unionize the club.

In the early 1990s, a white dancer petitioned management to increase the wages paid to women in the "Private Pleasures" booth.[332] She argued that workers were being exploited because the club was keeping 70% of their earnings in the booth.[333] Many white dancers quickly agreed to sign the petition.[334] Women of color were more skeptical of the petition because it did not mention the club's practice of only scheduling white women to work in the "Private Pleasures" booth to begin with.[335] Though the club tried to justify this practice by suggesting that dancers of color were "threatening" to white patrons—and therefore resulted in lost revenue—dancers of color found this argument to be both racist and inaccurate.[336] These dancers of color argued that they brought in new business from customers of color and that the response of white patrons was more diverse than acknowledged by management. As a result, Siobhan Brooks, one of the few black dancers at the club, created her own petition to end racist scheduling practices at the club

[330] Ibid., 61.

[331] Ibid.

[332] Ibid., 62.

[333] Ibid.

[334] Ibid.

[335] Ibid.

[336] Ibid.

and filed a racial discrimination complaint with the Department of Fair and Equal Housing to end the club's policy of only scheduling white women to dance in the Booth.[337] Brooks was angered not only by this policy, but also by her co-worker's ignorance of how an increase in pay in the "Private Pleasures" booth would exacerbate the already existing inequalities in the treatment between white dancers and women of color in the club.[338]

In addition to these complaints, dancers voiced a myriad of other grievances over the working conditions at the Lusty Lady, including: the use of one-way mirrors, which allowed customers to covertly videotape performances; lack of sick pay; and racist scheduling practices that only allowed one woman of color to perform on the main stage at a time.[339] A dancer known by the stage name "Jane" recounts the pre-union atmosphere in the club:

> Favoritism was the norm, the company's disciplinary policy was unwritten and erratically and inconsistently applied, dancers had their pay cut in half for missing a staff meeting or calling in sick, and were suspended for reasons like not smiling enough. Like all other non-union workers, we had virtually no recourse if we were suspended or fired unfairly.[340]

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[337] Ibid., 62 and 64.

[338] Ibid., 62.

[339] Ibid., 63.

[340] Jane, "'No Justice, No Piece!' Strippers Ratify Union Contract," Bay Area Sex Workers Action Network (BAYSWAN), May 12, 1997. www.bayswan.org/EDjust_piec.html.

Taken together, these grievances led dancers to attempt to form a union. When management learned of the dancers' plan, they removed the one-way glass as a concession, while hiring a notorious anti-union attorney to represent their interests.[341] Despite this combination of concessions and anti-union efforts, the dancers continued in their effort to unionize in order to negotiate for job security, sick pay, and legally equitable recourse for workers who were wrongly fired or treated unfairly.[342]

The unionization effort went through several stages. First, dancers had to demonstrate to the unions that they were classified as "employees," not "independent contractors." As I mentioned in the previous section, even when dancers are classified as employees, the stigmatized association of stripping with independent contractor status can lead unions to reject them. Thus, local unions ignored the Lusty Lady dancers on account of the illegitimacy of their supposed legal status.[343] Additionally, the unions stigmatized the dancers because they were part of the adult industry. The unions were worried about corruption, drug use, and other illegal activity that is stereotypically associated with sex work.[344] This combination of stigma against sex workers and the assumption that all strippers were independent contractors made it difficult for the dancers to find a union willing to represent them.

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[341] Ibid.

[342] Miss Mary Ann, "Labor Organizing in the Skin Trade: Tales of a Peep Show Prole," Bay Area Sex Workers Action Network (BAYSWAN), last accessed September 1, 2015. www.bayswan.org/Labor_Org.html.

[343] *Live Nude Girls Unite!* directed by Funari, Vicki and Julia Query (2000; San Francisco: First Run Features), DVD.

[344] Wilmet, "Naked Feminism," 468. For an account that contests such stereotypes see Paul, Shafer, and Linz, "Government Regulation."

Working with the Exotic Dancer's Alliance, a non-profit organization that had assisted dancers at a different club to sue managers for garnishing stage fees, the Lusty Lady dancers eventually convinced a reluctant Service Employees International Union (SEIU) Local 790 to represent them.[345] With the assistance of the union, the dancers held a National Labor Board Relations (NLRB) election in the summer of 1996.[346] Throughout the campaign, management attempted to thwart unionization by holding mandatory meetings to discuss how dancers would lose pay to union dues.[347] Management also used the club's "sex positive" reputation against the workers, insisting that the Lusty Lady was a great place to work because management did not extort sexual favors and provided the dancers with free hot chocolate.[348] One dancer recalls the result of the election, which officially unionized the dancers: "Despite the lies, deceptive leaflets, threats, harassment of union activists and scripted, tear-filled pleas to give the company a 'second chance,' we stuck it out and won the election 57 to 15. We named our SEIU chapter the Exotic Dancers Union."[349] With the union now in place, management was legally required to begin the process of negotiating a contract.[350]

With the assistance of a contract negotiator from Local 790, the dancers began negotiations for a new contract. The process was slow, because management intentionally

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[345] Jane, "No Justice, No Piece!;" Miss Mary Ann, "Labor Organizing in the Skin Trade."

[346] Ibid.

[347] Ibid.

[348] Miss Mary Ann, "Labor Organizing in the Skin Trade."

[349] Ibid.

[350] Ibid.

tried to stall negotiations with the hope that the dancers would abandon their effort.[351] For example, management spent time accusing the dancers of "sexually harassing themselves" because they used the word "pussy" in the workplace.[352] They also ignored the dancers' grievances about sick pay and job security, instead insisting that any contract must contain language allowing management to fire older dancers who had been with the company for more than a year and a half. As stripping is an industry that prizes youth, this new language was especially threatening to older dancers.[353]

Because of the slowed process, the dancers began to engage in political strategies to get management to take negotiations more seriously. One particularly effective and creative strategy the dancers utilized was a "No Pink" day. This was similar to a work slowdown, but with a sexualized twist. On this day the dancers worked with their legs crossed instead of exposing their genitals.[354] The dancers wrote on their hands and bodies slogans in support of labor such as "Please Don't Spend $ Here Unfair 2 Labor" (See Image 2). By pressing these slogans into the glass, the workers tried to convey their cause to customers. As a consequence of such actions, management fired a worker. In response, the dancers staged a two-day picket outside the club, chanting slogans such as "2, 4, 6, 8, don't go in to masturbate!"[355] In the documentary film *Live Nude Girls Unite!*, Lusty Lady customers discuss their disgust with the management and refuse to cross the

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[351] Ibid.

[352] Ibid.

[353] Miss Mary Ann, "Labor Organizing in the Skin Trade."

[354] Ibid.

[355] *Live Nude Girls Unite!*

dancers' picket line, while people honk their horns in solidarity with the strippers marching and holding signs that read "Do Not Enter! Unfair to Labor!" and "Bad Girls Like Good Contracts!"[356]

Image 2. Film still from *Live Nude Girls Unite!*

Once the dancers began to picket the club, management engaged more earnestly in the negotiation process. The dancers and management agreed to a contract in April of 1997. The contract did not include all of the dancers' demands: For example, it did not include a clause for "agency shop," a requirement that all newly hired employees join the union. Instead, the contract included a clause for "maintenance of membership," which required that new employees meet with union officials without retaliation or penalty.[357] Despite this concession, the contract safeguarded the dancers from arbitrary punishment and dismissal, protected more senior workers, gave workers automatic raises, provided workers with a paid sick day, and allowed them to swap shifts with any other dancer, as

[356] Borda, "Negotiating Feminist Politics," 124.

[357] *Live Nude Girls Unite!*

opposed to a dancer that "looked" like them (a rule particularly burdensome for women of color since "looking" like another dancer was racialized and women of color were a minority in the club).[358] Following this agreement, dancers went back to work in the club.

Most feminist accounts of the Lusty Lady end with the club's unionization.[359] By ending on this note, such accounts represent the story of the club as an unambiguous victory for both worker's rights and feminism; it is seen as a victory for the feminist idea that sex work is a legitimate form of work.[360] But, though there is some truth to this narrative, it elides the events that happened in the Lusty Lady in the sixteen years following the club's unionization. More specifically, the period from 2003 to 2013 raises issues that complicate a triumphant feminist reading of the Lusty Lady's unionization.

**From Union to Worker Cooperative to Closing: 2003-2013**

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[358] Brooks, "Exotic Dancing and Unionizing," 62; Miss Mary Ann, "Labor Organizing in the Skin Trade."

[359] See Tawnya Dudash, "Peepshow Feminism," in *Whores and Other Feminists* Jill Nagle ed. (New York: Routledge, 2013), 98-118; Chun, "An Uncommon Alliance", 232; Miss Mary Ann, "Labor Organizing in the Skin Trade"; Christine Bruckert, *Taking it off, Putting it on: Women Working in the Strip Trade,* Toronto: Women's Press, 2002, 147; Gregory Gall, *An Agency of Their Own: Sex Worker Union Organizing,* Washington: Zero Books, 2012, 20-26. Price-Glynn, *Strip Club,* 35-36. Price-Glynn suggests that the Lusty Lady has been associated with feminist sexual empowerment that is characteristic of the so-called "new burlesque." Because of this association, the Lusty Lady has come to be viewed as something of a feminist icon for both its sexual politics and the unionization.

[360] In her 2012 article, "Sex, Work, and the Feminist Erasure of Class" Brooke Meredith Beloso argues that this perspective was abandoned during the sex wars. Beloso argues that both sides of the sex wars, exemplified by the thought of Rubin and MacKinnon, framed their perspectives of sex work against Marxism. For this reason, Beloso argues that feminism became "declassified" (48-50). Both Rubin and MacKinnon turned feminism away from an analysis of class in relation to prostitution. In this way, my argument dovetails on Beloso's; while she suggests that the sex wars erased class in problematic ways, I suggest that these debates erased the complexity of law in relation to the sex industry. See Beloso, "Sex, Work, and the Feminist Erasure of Class," *Signs* 38, no. 1 (2012): 47-70.

Given the Lusty Lady's sex positive and feminist reputation, it is not surprising that feminist scholars and activists cite the unionization as an unambiguous legal victory. It has come to represent a kind of ideal combination of sex positivity and worker's rights. This reading of the Lusty Lady, however, ignores the conflicts that emerged during the post-union era and ultimately led to club to close its doors in 2013. In part, the neglect of this era is a product of the availability of source materials. The dominant source material on the Lusty Lady is the documentary film *Live Nude Girls Unite!,* which ends at the point of unionization. But, regardless of its causes, the silence around the post-union era risks idealizing the union. More important for my purposes here, failing to address the post-union era contributes to an oversimplified idea of law and legal change—in which such change is always presumed to mark a forward-moving, *improvement* for sex workers. In reality, the picture is more complicated.

Despite marking the endpoint of many feminist accounts of the club, the unionization marked the beginning of a period of conflict in the Lusty Lady's history. In 2003, just six years after the union had formed, the club owners felt its strain. The union had driven up their costs dramatically; furthermore, the owners were tired of dealing with the labor disputes and grievances that the union raised.[361] In order to reduce costs, the owners cut the dancers' wages. The members of the union were enraged by this decision. They held a successful strike against the pay cut and won a higher wage. In response to this increased wage and the continuing labor disputes, the owners announced that the club

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[361] John Koopman, "Lusty Lady Becomes First Worker-Owned Strip Club/From Boas and High Heels to Boardrooms and High Finance," *SF Gate*, June 26, 2003. http://www.sfgate.com/performance/article/Lusty-Lady-becomes-first-worker-owned-strip-club-2567731.php.

would close later that year.[362] The dancers, however, fought this decision: They formed a worker cooperative named "The Looking Glass Collective" and negotiated to purchase the club themselves, borrowing 400,000 dollars from the previous owners.[363]

As a cooperative, dancers and support staff could buy an ownership stake in the company for 300 dollars a year, becoming "employee-owners."[364] Such cooperative members were in charge of running every aspect of the business, while also becoming financial stakeholders in the company. At the end of the year, any profits the club made were split between co-op members based on the number of hours they had worked.[365] At the same time, these members were responsible for repaying the loan they had taken from the previous owners. Thus, the cooperative came with financial benefits, burdens, and new responsibilities.

The cooperative blurred the distinction between owner and employee. As this distinction is central to union politics, the cooperative's blurring of it would seem to create a conflict between it and the club's union. But, in spite of this conflict, one of the first decisions the cooperative made was to retain the union.[366] They made this decision to protect employees who did not buy into the co-op from unfair treatment by cooperative members. A cooperative member explained: "[T]here's no guarantee that, down the road,

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[362] Ibid.

[363] Ibid.

[364] Ibid.

[365] Ibid.

[366] Ibid.

people will be as committed to fairness as we are."[367] Thus, although the cooperative blurred the owner/worker distinction, they maintained the union in the understanding that not all workers would become owners. But while the cooperative members initially wanted to protect non-owners, the distinction between employee/owners and employees would generate a number of conflicts over the years to come.

Though the cooperative was committed to fairness, it was not without hierarchical structure. In particular, the cooperative's board of directors instituted a peer review process, where an elected group of dancers would evaluate all the other dancers based on their appearance, performance, and interaction with customers.[368] The peer review group used this platform to hire dancers of different body types, who came from a range of racial and ethnic backgrounds.[369] As such, peer review extended the Lusty Lady's feminist reputation for transcending strict beauty standards and hiring diverse dancers.[370]

Although members of peer review were newly elected every six months, only dancers could participate in this process. Consequently, dancers controlled the most financially significant part of the club's hiring and scheduling process: decisions about who was hired to dance at the club. Since the club did not charge a cover and did not serve alcohol, the dancers generated the club's profits. Thus, the peer review group's decisions would impact the income of the rest of the cooperative members, including

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[367] Ibid.

[368] Sarah Phelan, "The Lusty Lady Loses its Innocence." *San Francisco Bay Guardian Online*, September 26, 2006, http://www.sfbg.com/2006/09/26/lusty-lady-loses-its-innocence.

[369] Ibid.

[370] Ibid.

support staffers who could not themselves participate in peer review. This process worked as long support staff felt that the peer review group was making decisions in their interest. Though initially the process worked well, such a conflict would eventually emerge.

In 2006, the dancers planned a "BBW"—"big beautiful woman"—night. In response to these performances, customers walked out.[371] The subsequent loss of revenue led to complaints from two support employees who worked at the club's front desk and cleaned the booths. The employees sent an email to the co-op's board of directors complaining that the BBW night featured a block of "unwatchable women."[372] These workers, who were male, wrote that "[p]eople come asking for refunds, because they do not want to see girls that they would not want to have sex with even if they were completely drunk."[373] Because the men were co-op members, they worried that, by scheduling such BBW nights, the peer-review process would damage their financial stake in the company.[374]

A board member, who was also a dancer in the club, claimed that the email had led other dancers to call for the firing of the "BBW" dancers. Such a firing was, she argued, against "everything we stand for"; it was also, she pointed out, "against the law to hire and fire based on size discrimination."[375] Angered by the threat of such

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[371] Ibid.

[372] Ibid.

[373] Ibid.

[374] Ibid.

[375] Ibid.

discrimination, the dancer filed a grievance with the union and posted a copy of the email in the dancers' dressing room. When the other dancers read the email, they became irate over its sexism. Heavier dancers were personally hurt by the support staff's accusations.[376] As a consequence, all of the dancers ostracized the support staffers who had written the email, calling for their termination. Despite this, the dancer who had posted the email in the dressing room was fired for "creating a hostile work environment."[377] It thus seemed that the board of directors was siding with the male support staff and that the union also failed to protect this dancer from wrongful termination.

In the meantime, the men filed their own grievance with the union, arguing that it had failed "to represent [their] grievances [by] treating and representing male and female employees differently."[378] The union dismissed this claim by responding:

> The Lusty is a completely member-owned and member-operated cooperative and that as a shareholding member with the ability to affect the formulation and determination of the Lusty's policy, [t]he men [were]… managerial employee[s]. Accordingly, the Union's duty to fair representation does not extend to you.[379]

The union's argument was based on the distinction between employee/owners and employees: That is, the union would not protect employees who *were* owners since it

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[376] Ibid.

[377] Ibid.

[378] Ibid.

[379] Ibid.

ostensibly existed to protect employees *from* owners. Nevertheless, the men responded to this by arguing that the union was invalid as it negated the dual positions of employee/owners—viewing them solely as owners, not employees.[380] Thus, a dispute that began over dancers' body types led to a conflict between the structure of the worker's cooperative and the union.

Such conflicts became endemic at the Lusty Lady. Their prevalence dramatically slowed the club's ability to conduct business, and led to a diminishment of its revenues. This combination of conflict and financial losses led to a mass exodus of the club's dancers and support staff in 2012.[381] Hoping to find a better way to negotiate their administrative and financial situation, the club hired a general manager in 2012.[382] After a short time running the club, the manager then made a unilateral decision to close it. While the dancers protested his decision, the manager's contract had given him this power.[383] As a result, there was nothing they could do. The Lusty Lady finally closed its doors in 2013.

The union's demise and the Lusty Lady's closing raises the question of how transformational the unionization—as a legal victory—ultimately was for the dancers and other club employees. While it improved working conditions in the short term, in the long run unionization failed to accommodate the feminist and sex positive values—especially

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[380] Ibid.

[381] Lauren Smiley, "Last Days at the Lusty Lady Strip Club." *The New Yorker,* August 22,2013, http://www.newyorker.com/business/currency/last-days-at-the-lusty-lady-strip-club.

[382] Ibid.

[383] Ibid.

around body types and beauty standards—that were of central importance to the dancers and the cooperative. At a basic level, the union had failed to protect the dancer who had posted the email from wrongful termination. At the same time, the union also refused to protect the men or other owner-employees of the co-op. And, finally, the union had proven unable to protect the job stability of the club's workers as a whole. Thus, while unionization at first seemed like an unambiguous feminist victory, its power to resolve the conflicts dividing the club's employees was shown to be significantly limited. Given this, perhaps the case of the Lusty Lady is simply one more example of how law ultimately fails to transform sex workers' lives.

In what follows, I will argue against the idea that the closing of the Lusty Lady negates the transformative aspects of the club's engagement with law during the unionization. I want to suggest that while the end point of the dancers' engagement with law may have ultimately contributed to their own demise, the smaller *processes* of engaging the law—the smaller processes of meaning making through law—still created valuable spaces of political transformation and possibility for the dancers. By focusing on this process, I bring the "everyday" practices of engaging the law into the debate over what value the law holds for the lives of sex workers. While these "everyday" processes may not seem as significant as the end result—unionization and subsequent closure—I argue that they reveal transformational possibilities of engaging the law nevertheless.

**The Lusty Lady and the Legal Everyday**

The unionization of the Lusty Lady and subsequent formation of the cooperative were, first and foremost, legal efforts. The unionization depended on legal rights afforded to the dancers due to their legal classification as employees. This classification allowed

them—after much resistance—to participate in the NLRB election. This participation allowed them to unionize and this unionization, in turn, mobilized a series of laws that required the club's management to negotiate and, eventually, finalize a contract with the strippers. As a cooperative, the workers had to negotiate employment and commercial laws in order to run their business. From beginning to end, this history depended on the workers' active engagement with lawyers and legal categories in order to achieve their ends. In this way, the transformation of the Lusty Lady both required and constituted a formal engagement with law. The resulting conflicts within the club, however, challenge the idea that this engagement with the law was unambiguously triumphant, particularly given the club's eventual demise. Thus, one could conclude that the case of the Lusty Lady supports arguments that the law is not a great tool for transforming sex workers' lives.

But such an evaluation of the Lusty Lady's story is based on a crucial presupposition: that the efficacy of law should only evaluated by its success at achieving its stated goal. There is another way to evaluate law: not based on its achievement of static goals, but rather as a dynamic process that can have an impact on its participants relatively independent of its ultimate outcome. In the case of the Lusty Lady, this conception of the law would require examining not only the dancers' achievement of unionization, but also the manner in which the day-to-day struggle for unionization engaged with law through processes of meaning making. Such day-to-day struggles resist the disciplinary formations that contribute to the stripper as an a-political subject, which I discussed in the previous chapter. These forms of everyday resistances are often interpreted as "outside" of law by sex work studies scholars who only focus on the end

results of engaging the law. Because the unionization effort illustrates such small acts of resistance to be entwined with law, they epitomize what de Certeau called the practices of everyday life. As such, they reveal the transformative potential of what I call the "legal everyday."

Those scholars who represent the Lusty Lady's unionization as an unambiguous legal victory epitomize the sex work studies perspective on law as disentangled from practices of everyday life. They evaluate the club's history solely through the lens of its signature event and ultimate outcome: unionization. This unionization, in turn, becomes representative of the club's engagement with law. This is problematic because it fails to examine how unionization, though resolving some of the club's problems, also generated others, including those that eventually led to its closing. Thus, the focus on the end moment of unionization idealizes certain kinds of legal achievements, while obscuring other dimensions of engagement with the law.

In the process, such thinkers misunderstand the functioning of law in modernity. By focusing on the end moment of unionization, these writers implicitly understand law as a mechanism that works in a relatively direct manner—oriented toward the achievement of a certain set of results. In this understanding, the dancers asked for legal recognition of their rights as workers and the state conferred those rights by recognizing the union. By celebrating this conferral as a legal victory, these writers implicitly support a juridical perspective on the power of law, obscuring its biopolitical dimensions. Here, the law mediates between the subject and the state, offering the subject protection from market forces. As such, the law acts as an external—albeit, in this case, protective—force on subjects. As I detailed in Chapters Two and Three, understanding the law as this kind

of external force obscures the role that law plays in producing subjects. Examining such moments of productive legal power is essential to understanding how the law operates—and, therefore, crucial for understanding the pitfalls and possibilities afforded by legal engagement. At the same time, understanding law in this way also requires developing a new rubric for evaluating the effects of engaging the law to make political change: This rubric would not evaluate such engagements by comparing their intent to their ultimate outcome, but rather would take a much broader focus that looks outside the courtroom to examine the circulation of law in such political projects.

Taking such a focus reveals how law can have transformative political effects even if such potential is seemingly undercut by its end results. Consequently, "everyday" practices—in de Certeau's sense—can be engaged with law in ways that do not look like traditional forms of legal engagement. They are not limited to the courts and legislatures, although they can take place there. What characterizes these engagements with law is the meaning that they generate for the subjects who engage in. Such meanings transform, contest, and resist the original production of strippers under law through biopower. Subjects make such meaning by engaging the law in processes such as resignification and agonistic politics. Such processes are *open*; their meaning is not defined by or limited to their ultimate goal. Nor is it defined by their location. They are not limited to the courtroom; such legal engagements can happen in the streets, in boardrooms, and in the booths of a strip club. Because of their openness, such practices of the legal everyday can generate transformative possibilities. To show how such processes work, I will now offer an alternative interpretation of the unionization of the Lusty Lady.

## The Law and Politics of Open Ended Meaning Making

In their introduction to the anthology to *Left Legalism/Left Critique*, Brown and Halley critique left political projects that invoke the "liberal state's promise to make justice happen by means of law."[384] Such legalism, they claim, obscures law's productive and regulatory capacities, which can foreclose the very forms of justice that left activists seek.[385] The result forecloses "open-ended discursive contestation."[386] Legalism's "adversarial and yes/no structures," they write, "can quash exploration; expert and specialized languages can preclude democratic participation; a pretense that deontological grounds can and must always be found masks the historical embeddedness of many political questions."[387] In other words, legalism limits our understanding of how law functions in historically-situated contexts and limits new forms of meaning that might be generated by a less conclusive form of political engagement.

In place of such legalism, Brown and Halley support forms of politics that promote internal critique, interlocution, and agonistic processes of meaning making. In her book, *States of Injury*, Brown explains that such politics do not lead to closure, but rather to "indeterminacy, ambiguity, and struggle for resignification or repositioning."[388] As such, they open up possibilities for meaning making. The openness of these politics is in contrast to the closed quality of legalism, which seeks to grant state recognition to fixed categories of identity. In the process, it obscures the dynamic conflicts that these

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[384] Brown and Halley, "Introduction," *Left Legalism/Left Critique*, 7.

[385] Ibid, 11.

[386] Ibid, 19.

[387] Ibid.

[388] Brown, *States of Injury,* 27.

categories contain, excludes those groups that do not fit neatly into them, and limits the creation of new meaning. In opposition to this static, exclusionary legalism, Brown and Halley advocate a politics that, by embracing agonistic conflict, is able to generate new meanings.[389]

And yet, by contrasting these forms of politics with legalism, Brown and Halley fail to account for any other roles that law may play in them. Without elaborating the relationship that law has to such politics, Brown and Halley risk limiting their perspective on law to legalism and putting forth a starkly anti-nomian perspective. In the process, their critique of legalism obscures the possibility that the law itself might form part of the kind of open-ended agonistic practices of meaning making that they advocate. Such practices are precisely what I argue comprise the "legal everyday"—and they formed essential parts of the struggle to unionize the Lusty Lady.

The unionization of the Lusty Lady depended on the strippers' use of strategies of resignification. By chanting sexualized slogans such as "2, 4, 6, 8 don't go in to masturbate," writing "Please don't spend money here! Unfair to Labor!" on their hands, and holding the "No Pink" day, dancers transformed the meaning of their performances. They were no longer strippers, but rather strippers utilizing the sexualized aspects of their labor to constitute themselves as union workers. By shifting their performances both on stage and on the picket line, the dancers challenged the power dynamics of the club, where customers observed their every move through the glass. Instead of adhering to such dynamics, dancers shifted the meaning of their performances to be defiantly sexual and political. They also shifted the focus from the individual bodies of strippers, to a

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[389] Brown and Halley, *Left Legalism,* 21.

resistance and politicized collective body. In this way, the unionization posed resistance within biopower.

In this regard, the activist performances of the dancers allowed them to reconstitute themselves as gendered and sexual subjects in ways that recall the drag queens of Judith Butler's *Gender Trouble.* However, unlike those of drag queens, the dancers' performances did not enact a parodic slippage between gender and sex that challenged the entire sex/gender system.[390] Rather, they introduced a slippage between stripping and union organizing. This slippage challenged the sexist practices of both the unions that barred them from admission, as well as the managers who denied them fair pay. The dancers thus succeeded in challenging the sexism implicit in the organization of labor by giving new meaning to the very sexualized female bodies that, previously, had been its bearers. The dancers resignified not only their own bodies, but also their relationship to the organizational hierarchy of the club and the broader environment of labor organizing in San Francisco.

Throughout the negotiation process, dancers also analogized management to strip club customers. Workers humorously imagined management as engaging in a negotiation "circle jerk" and suggested that management was holding out on the dancers just as a customer would hold back his last dollar.[391] Miss Mary Ann writes: "As the lawyers' bargaining session rants wore on, we'd begin to imagine them with their ties flung over their shoulders, the way we were accustomed to seeing their peers in the peep booths at

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[390] Butler, *Gender Trouble,* 175-193.

[391] Jane, "No Justice, No Piece!"; Miss Mary Ann, "Labor Organizing in the Skin Trade."

work."[392] By imaging owners to be more like their customers than their bosses, dancers reversed the prevailing conception of power in the club. The dancers thus transformed the meaning of power relations in the club through humorously sexualizing management.

In addition to these resignifying practices, the unionization effort led to new forms of meaning making. In the film *Live Nude Girls Unite!* dancers are shown sitting around during the periods of downtime in the negotiating process. While this downtime might be easily overlooked or even criticized as a negative feature of engaging law, in the film we see that the dancers filled these seemingly empty hours with informal discussions of their political situation. These discussions could be extremely generative. It was during such downtime, for instance, that dancers resignified their relationship to management, and came up with the idea of the "No Pink" day.[393] In other words, the dancers filled this downtime with collective processes of meaning-making. What emerged during such slow legal moments was a radical and collective conversation about violence, freedom of speech, and the broader issues that the women were facing on the job. These conversations displayed the new, surprising, and difficult solidarities and disagreements forged through the unionization process.

Finally, the unionization effort was agonistic—meaning that it was not based on overcoming conflict, but rather was itself full of conflict.[394] In other words, the agreement

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[392] Miss Mary Ann, "Labor Organizing in the Skin Trade."

[393] *Live Nude Girls Unite!*

[394] For account of the feminist merits of agonistic democracy see Bonnie Honig, "Toward an Agonistic Feminism: Hannah Arendt and the Politics of Identity" In *Feminists Theorize the Political*, edited by Judith Butler and Joan Wallach Scott, 215-235. New York: Routledge, 1992; Brown, *States of Injury,* 50.

that the dancers finally reached was not an endpoint, but rather a stage in what was understood to be an ongoing process of internal and external meaning making. For instance, the "maintenance of membership" clause required union representatives to discuss membership with each new employee. This ongoing dialogue illustrates the continual process of contestation that the union had to engage in even after a contract had been won. In response to the maintenance of membership clause, one employee said:

> It's going to make us work. And I think that maybe in the back of my mind I wanted to believe when this was all over I could rest. And I know that is ridiculous, but in a sense this keeps us honest because we do have to keep doing the work to create a better work environment for people in the sex industry.[395]

Although the unionization effort was primarily an engagement with contract and labor law, it was not premised on an endpoint of consensus that rigidly ossified meaning. Rather, it resulted in a contract, which needed to be reiterated to each new employee. Because of the agonistic structure of the workers' discussion, each new iteration would itself lead to the generation of new meanings and significances for the contract itself. Consequently, rather than freezing meaning, the legal contract allowed dancers to engage in the process of meaning-making from a stronger vantage point than before.

The ongoing nature of the unionization effort is further illustrated through the continued racism of the Lusty Lady's management and white dancers. Brooks notes that, after unionization, the club's work environment was far from perfect for dancers of color. White dancers would often utilize their privilege to complain when they felt outnumbered

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[395] *Live Nude Girls Unite!*

on stage, even though women of color were still often used as tokens.[396] These white dancers also complained that rap music, which many women of color preferred when dancing, was too violent or misogynist. These white dancers would not make similar complaints over the frequently played, sexist rock music performed by white men.[397] Through their own organizing tactics, dancers of color successfully challenged and resisted this racism. For instance, they organized to have signs installed in the booths in English, Spanish, and Mandarin.[398] They also won their battle to keep rap in the jukebox.[399] Such ongoing conflicts demonstrate that although this was a legal effort, the dancers did not come to occupy an immutable and undifferentiated identity category of "worker." Instead, they had to struggle with each other within and between categories in an ongoing way to open up new instances of meaning making.

Such practices of resignification, collective action, and agonistic politics open up meaning and possibilities for sex workers. However, it was the law—engaged in this everyday way—that made such practices possible and became their ultimate vehicle. Were it not for their status as employees, the club's dancers would not have been able to pursue unionization. This status also protected their efforts to resignify their bodies. Their contract negotiations provided both the impetus to reimagine their relationship to management, and the generative "downtime" in which collective conversations about their future could take place. The contracts that resulted from these negotiations were

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[396] Brooks, "Exotic Dancing and Unionizing," 65.

[397] Ibid.

[398] Ibid.

[399] Ibid.

themselves not "final," but rather stages in what was understood to be an ongoing process. Within this process, the protections they provided allowed for the rectification of continuing racist power relations among the dancers and the proliferation of individual meanings. Thus, for the dancers of the Lusty Lady, law became a vehicle through which everyday practices of meaning making took place. And, although the club ultimately closed, the Lusty Ladies' engagement with law speaks to how strippers can remake themselves through creative and quotidian practices of the legal everyday. In this way, the club's closing stands in contrast with a totalizing legal ban, such as the Icelandic ban, because it illustrates law to be a dynamic part of meaning making and relations of biopower that shape everyday life.

**Conclusion**

The unionization of the Lusty Lady was a response to unfair working conditions that plagued—and continue to plague—the strip club industry. While many journalists and activists cite the unionization as a unambiguous legal victory, focusing on the post-union environment in the club and its ultimate closing reveal that unionization was more complicated than such accounts acknowledge. The union came into conflict with the feminist ideals of the cooperative that formed after the workers bought the club in 2013. Such conflicts ultimately contributed to the club's closing in 2013. Thus, some might argue—contra the feminist advocates—that the unionization of the Lusty Lady should serve as a warning to other sex workers and their advocates that they should avoid engaging the law in their attempts to transform the conditions of their work and lives.

However, in shifting the focus away from the end point of engaging the law in a formal capacity toward the process of engaging the law in everyday practices of meaning

making, I have tried to show how such processes can open up transformative possibilities for sex workers. For instance, the legal means that club workers utilized, such as contract negotiation, were both the result of and impetus for subverting management's representation of them as stereotypical strippers who were politically unmotivated. As demonstrated by this case, such engagements with the law do not necessarily limit meaning making or transformative possibilities; on the contrary, they can, in particular circumstances, provide a means for the appearance of new identities, practices, and political groups. The case of the Lusty Lady thus shows that the law continues to hold potential for sex workers despite the critique of law put forth by influential thinkers in sex work studies.

In this dissertation, I have argued for a conception of the law as shaping everyday practices. As part of this conception—which I have labeled the "legal everyday"—I have argued that the dynamic forms of political mobilization that scholars have typically imagined to exist outside of legalism are themselves saturated with law. Thus, the very practices that these thinkers have celebrated, in part, for their non-legal basis, are in fact forms of legal engagment. But their legality need not degrade their importance and effectiveness for transforming the living and working conditions of sex workers. On the contrary, a sensitivity and openness to the place of law in everyday life can provide a wider canvas onto which to imagine the productive power of law and its place in political projects, even as it also offers a more sobering glimpse into the potential for actually existing power relations to constrain the contours of such possibilities. In this sense, an understanding of the legal everyday should be both encouraging and sobering,

opening up a range of possibilities, while clarifying our constitutive inability to isolate ourselves from law's power.

# Conclusion:

# The Legal Everyday, Sexuality Studies, and Beyond

This dissertation has considered the relationship between American strip clubs and law. By examining theater licensing laws, laws proscribing nudity and touch, zoning laws, and labor and employment laws, I move away from criminality and prostitution, which have historically been the focus of debates over the sex industry. By bringing such commercial and regulatory laws into the center of analysis, strip clubs highlight "everyday" features of the law—features that highlight the productive aspects of law and how small acts of engaging with law transform legal categories and meanings—that have heretofore been overlooked in such debates.

The goal of my dissertation has thus been to foreground the legal everyday of strip clubs in order to offer a broader perspective on the power, consequences, and potential of law to the field of sex work studies. I am especially concerned that, by implying that law is irrelevant to the industry, the field has missed the complex ways that law operates through biopower and how subjects engage with law through everyday practices of meaning-making. That is, in addition to repressing, excluding, and marginalizing, sex work laws also discipline, order, tabulate, and regulate. Consequently, law produces new meanings and practices that spill beyond a particular law's formal intent. Such processes not only lead to new problems for sex workers—think of the example of a dancer driving home on an abandoned freeway late at night because her club has been zoned to a post-industrial urban space—but can also potentially open up spaces for remaking law's meaning in ways that are transformative—think of the Lusty Lady. Thus, subjects of law are not just subjects who obey or disobey law's mandate;

they are not just violently repressed by law or altogether excluded from its force. Instead, law produces and, in turn, is produced by a variety of practices of legal meaning making that eschew the either/or logic that has governed past accounts of the relationship between sex work and law. This perspective on law not only challenges the feminist fixation on abolition versus decriminalization, and the shortsighted perspective on law found in sex work studies, but also stands to expand the conversation about law in sexuality studies more generally.

**Sexuality Studies and the Legal Everyday**

The legal everyday has implications for the field of sexuality studies beyond the sex industry. However, before such a broad perspective on the power, consequences, and the potential of law can take hold, sexuality studies has to be willing to suspend its focus on law as a repressive and violent force. Given the history of anti-sodomy laws and police brutality against LGBT people, it is not surprising that LGBT activists and scholars have come to hold this kind of perspective on law. As a consequence of attending to the history of persecutory laws, sexuality studies has developed a skeptical eye towards understanding the law as a mechanism of justice or protection.

In the introduction to the anthology *Feminist and Queer Legal Theory*, Martha Fineman observes that in the 1980s, while many feminists were turning to the state for protection through the law, LGBT activists were coming to see the state and the law as a site of neglect, exclusion, and persecution.[400] Reagan's unwillingness to recognize the

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[400] Martha Albertson Fineman, "Introduction: Queer and Feminist Legal Theory," In *Feminist and Legal Theory: Intimate Encounters, Uncomfortable Conversations.* Martha Albertson Fineman, Jack E. Jackson, and Adam P. Romero eds. (Burlington: Ashgate Press, 2009), 2-4.

AIDS crisis and the 1986 decision *Bowers v Hardwick,* which upheld laws criminalizing sodomy, are two examples of how the American state and law contributed to the persecution and neglect of LGBT communities. During the 1980s, there was thus an urgent need for sexuality studies scholars to critique laws contributing to the neglect, active persecution, and violent repression of LGBT people and communities.

Gayle Rubin highlighted such violent consequences of sex laws in her essay "Thinking Sex." Drawing on the history of sex law, including laws targeting and persecuting LGBT people during the 1950s that culminated in the Stonewall riots of 1969, she writes:

> Sex law is the most adamantine instrument of sexual stratification and erotic persecution. The state routinely intervenes in sexual behavior at a level that would not be tolerated in other areas of social life. Most people are unaware of the extent of sex law, the quantity and qualities of illegal sexual behavior and the punitive character of legal sanctions. Although federal agencies may be involved in obscenity and prostitution cases, most sex laws are enacted at the state and municipal level, and enforcement is largely in the hands of local police.[401]

Rubin highlights the punitive and persecutory mechanisms of law that interfere with consensual sexual practices that should be protected as private. Moreover, her concern with local police authority and enforcement gestures to the history of police brutality against LGBT people. Rubin's focus is thus on the violent and repressive relationship that law has had with sexuality—especially sexual minorities. Law here does not

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[401] Rubin, "Thinking Sex," 159.

primarily protect or enact justice; instead it persecutes already marginalized sexual communities and practices. The violent and repressive force of such laws, for Rubin, intervenes on sexual practices that preexist it.

While sodomy laws have since been found unconstitutional, this perspective on law continues today, in part, because LGBT people continue to be persecuted by the police over acts of consensual sexuality. As I write this, gay activists are protesting the arrest of seven executives at *Rentboy.com*, the world's largest male escort service. The executives are being charged with prostitution, but several LGBT activist groups, including The Transgender Law Center, believe the police and the city of New York targeted the website because it primarily caters to men seeking to have sex with other men or transgender women.[402] The transgender performer and activist Justin Vivian Bond comments:

> To many in our community this feels like a throwback to when the police raided gay bars in the 50s and 60s. This invasion of a consensual hookup site which is run for and by members of the LGBT community feels like a real slap in the face after gentrification and the Giuliani and Bloomberg administrations drove so many gay bars out of business and forced people to meet online instead.[403]

In this comment, Bond links the *Rentboy.com* arrests to the history of repressive laws and police brutality against LGBT people. Specifically, he is drawing a direct link between

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[402] Stephanie Clifford, "Raid of Rentboy, an Escort Website, Angers Gay Activists." *New York Times,* August 26, 2015. http://www.nytimes.com/2015/08/27/nyregion/raid-of-rentboy-an-escort-website-angers-gay-activists.html.

[403] Ibid.

the rezoning of New York City in the 1990s and the emergence of the online escort service. In this way, he is linking the persecution of LGBT people to law's persecution and marginalization of the sex industry.

Indeed, a different activist brought the issue squarely into the abolition versus decriminalization paradigm:

> It's troubling to think that we're investing resources and time to target *Rentboy* and sex workers… when what we really should be having is a reasonable and thoughtful conversation about the decriminalization of sex work. We have an entire police force we should be overhauling, we have murders of trans women happening in large numbers, and we're devoting our time and energy to cracking down on sex work? Who's choosing to prioritize it?[404]

By contrasting the law's active persecution of *Rentboy.com* from law enforcement's neglect of the murder of trans-women, this activist joins law's persecution of LGBT people and sex workers to law's historic failure to protect these people. In this way, this activist is generally concerned with the violence perpetrated through the law against LGBT people—that violence can either be enacted directly by law or indirectly by law's failure to protect. Thus, the story of *Rentboy.com* illustrates a connection between law's persecution and neglect of both sex workers and LGBT people. And it reminds us that critique of these laws and their enforcement is still necessary.

Given the urgency of police brutality, persecution, and murder that underscores such stories, it is not surprising that sexuality studies scholars focus on law as persecuting

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[404] Ibid.

and neglecting LGBT populations. To be sure, exploring these dimensions of law's power continues to be important. However, when this is the most prominent perspective on law, sexuality studies misses how law affects sexuality in ways that fall outside of a violent force of repression, persecution, or neglect.

Moreover, focusing on law in this way posits law as a discrete force that acts or fails to act—through repression, persecution, or neglect—against subjects who are understood to preexist its force. In this way, such perspectives obscure the role that law plays in producing sexual subjects; it obscures law as part of biopower. This is particularly egregious given that, for Foucault, the modern subject is a sexual subject. By obscuring the role that law plays in sexuality beyond a juridical enactment of force, sexuality studies and activists thus obscure how we understand the formation of the modern subject more generally.

I would ask sexuality studies what is risked when we let go of focusing on the law as a force that represses sexuality, or as a juridical force that enacts violence against non-normative sex acts? Moreover, I would ask what gets lost if we only look at the law this way? What modes of legal regulation, legal meaning making, and legal effects are obscured? What aspects of modern subject formation are ignored? How might shining a light on non-juridical, non-criminal, seemingly non-violent processes of law change how we think about its relationship to sexuality? How might it change how we think about the power of law, more generally? What new insights might such a perspective on law bring to the examination of sexuality? How might these insights stir ripples in feminist and queer theory, as they dislocate MacKinnon and the sex wars as the central focus of discussions around law? In this dissertation, I have attempted to answer these questions

for sex work studies, moving beyond the stalemate of the feminist sex wars. However, the broader relationship between sexuality and this perspective on law remains a promising area for further research and theorization.

**Appendix**

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