

ARTICLES

GIRLS! GIRLS! GIRLS!: THE SUPREME COURT CONFRONTS THE G-STRING

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What is it about the nude female body that inspires irrationality, fear, and pandemonium, or at least inspires judges to write bad decisions? This Article offers an analysis of the Supreme Court's nude dancing cases from a perspective that is surprising within First Amendment discourse. This perspective is surprising because it is feminist in spirit and because it is literary and psychoanalytic in methodology. In my view, this unique approach is warranted because the cases have been so notoriously resistant to traditional legal logic. I show that the legal struggles over the meanings and the dangers of the gyrating, naked female body can be fully understood only when placed within a broader context: the highly charged terrain of female sexuality. By rereading the cases as texts regulating gender and sexuality and not just speech, a dramatically new understanding of them emerges: The nude dancing cases are built on a foundation of sexual panic, driven by dread of the female body. Ultimately, this analysis reveals a previously hidden gender anxiety that has implications not only for the law of nude dancing, but for First Amendment law more broadly. By presenting the ways in which irrational cultural forces shape the Court's supposedly rational analysis in the nude dancing cases, in the end I point toward an unusual conception of First Amendment law: Free speech law governs culture, yet in surprising ways, culture also governs free speech law.

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INTRODUCTION

“[N]either death nor woman’s sex can be faced directly. To write about female sexuality is to disclose a dangerous secret . . .”

—Sarah Kofman, *The Enigma of Woman*¹

“Striptease . . . [is] a spectacle based on fear.”

—Roland Barthes, *Mythologies*²

What is it about the nude female body that inspires irrationality, fear, and pandemonium, or at least inspires judges to write bad decisions? In *City of Erie v. Pap’s A.M.*³ and *Barnes v. Glen Theatre, Inc.*,⁴ the Supreme Court’s “nude dancing” cases, the Court accepted and acted upon culturally entrenched views of the nude female form: that the female body is a site of unreason; that it is barely intelligible; that it is inviting yet dangerous; and that it causes mayhem, disease, and destruction. This view of the seductive, dangerous, writhing woman, so powerful that she is inextricable from the wreckage she causes, has a long and feverish history in Western culture, be it the Bible, great literature, or pulp movies. This time she has caused more trouble: She has wreaked havoc in the First Amendment.

The holdings of the nude dancing cases may be simply stated: In both, the Supreme Court ruled that nude dancing constituted a mar-

¹ SARAH KOFMAN, *THE ENIGMA OF WOMAN: WOMAN IN FREUD’S WRITINGS* 20 (Catherine Porter trans., Cornell Univ. Press 1985) (1980).

² ROLAND BARTHES, *MYTHOLOGIES* 84 (Annette Lavers trans., Hill & Wang 1972) (1957).

³ 529 U.S. 277 (2000).

⁴ 501 U.S. 560 (1991).

ginal form of First Amendment “speech” and that it was constitutionally permissible to address the problems associated with that speech by requiring strippers to wear G-strings rather than dancing totally nude. Yet critics have repeatedly maligned the cases for their illogical reasoning. Indeed, the cases have been sources of embarrassment for the Court.

This Article offers a reading of the nude dancing cases from a perspective that is unusual within First Amendment discourse. The approach is unusual both because it is feminist in spirit and because it is grounded in literary and psychoanalytic theory. In my view, this unique approach is warranted because the cases have been so notoriously resistant to traditional legal logic. I will show that the legal struggles over the meanings and the dangers of the dancing nude female body can be fully understood only when placed within a broader context: the highly charged terrain of female sexuality.

No one has ever done a feminist analysis of these cases. This omission is particularly striking given the richness of the subject matter for a feminist reading: Never before in the history of the Court has the problem of the female body presented itself so squarely—naked, front and center—before the Court’s eyes.⁵ But the lack of a feminist analysis is even more extraordinary when one considers the failure of traditional legal methodologies to explain these otherwise perplexing opinions. Quite simply, the cases have never made sense when analyzed as conventional First Amendment cases.⁶ What I will

⁵ The Supreme Court took up these cases at a moment when the human body had emerged as a central site of inquiry and contestation in academia, particularly in the humanities. In this Article, I introduce some of the recent, voluminous literature from other disciplines on the subject of the body. I pay particular attention to literature grounded in linguistics, psychoanalysis, and feminism, in which the body is read as discursive or textual. Works taking the body as a central theme have been published in remarkable numbers in virtually every field of the humanities in recent years. To list only a few titles, chosen in somewhat random fashion: in philosophy, ALPHONSO LINGIS, *FOREIGN BODIES* (1994); in feminist studies, ELIZABETH GROSZ, *VOLATILE BODIES: TOWARDS A CORPOREAL FEMINISM* (1994); in intellectual and cultural history, *THE BODY IN PARTS: FANTASIES OF CORPOREALITY IN EARLY MODERN EUROPE* (David Hillman & Carla Mazzi eds., 1997) and JONATHAN SAWDAY, *THE BODY EMBLAZONED: DISSECTION AND THE HUMAN BODY IN RENAISSANCE CULTURE* (1995); in religious studies, *RELIGION AND THE BODY* (Sarah Coakley ed., 1997); in art history, MARTIN KEMP & MARINA WALLACE, *SPECTACULAR BODIES: THE ART AND SCIENCE OF THE HUMAN BODY FROM LEONARDO TO NOW* (2000); in literary criticism, ROBERT BURNS NEVELDINE, *BODIES AT RISK: UNSAFE LIMITS IN ROMANTICISM AND POSTMODERNISM* (1998); in film studies, YVONNE TASKER, *SPECTACULAR BODIES: GENDER, GENRE AND THE ACTION CINEMA* (1993); in queer studies, *LOOKING QUEER: BODY IMAGE AND IDENTITY IN LESBIAN, BISEXUAL, GAY, AND TRANSGENDER COMMUNITIES* (Dawn Atkins ed., 1998).

⁶ See *infra* notes 68–72 and accompanying text (discussing assorted doctrinal problems). This Article focuses on two particularly vexing problems in the nude dancing cases: the attribution of grave danger to the female body and the dubiousness of the G-

show is that by reading the cases through a feminist lens, a dramatically new understanding of them will emerge: The nude dancing cases are built on a foundation of sexual panic driven by dread of female sexuality. Ultimately, this reading reveals a previously hidden gender anxiety that has implications not only for the law of nude dancing, but for First Amendment law more broadly.

This feminist perspective enables me to offer new analyses of two aspects of the cases that have vexed critics: Why did the Court attribute such tremendous danger to the nude female body; and if the nude female body were so dangerous as to be a source of “violence” and “criminal activity,” as the Court found,⁷ then why did the Court accept the admittedly flimsy solution of a G-string as a legitimate way to ward off such profound danger? Even the Justices in the majority acknowledged the frailty, if not silliness, of this reasoning. The dissenting Justices were more blunt: They criticized this reasoning, the crux of the case, for its “titanic surrender to the implausible”⁸ and its abandonment of “common sense.”⁹ In this Article, I argue that the very implausibility—indeed the irrationality—of the cases suggests that a better reading, one that takes irrationality as its starting point, is in order. By showing that these decisions were driven by fantasies and anxieties surrounding female sexuality, I offer a way to make sense of the troubling illogic at the heart of the cases.

I have two broad goals in this Article. My primary goal is to reconceptualize and ultimately to problematize the nude dancing cases, which have always been categorized as First Amendment cases. By rereading the cases as texts regulating gender and sexuality and not just speech, I show that more is at stake than has previously been supposed. To accomplish this rereading, I borrow throughout from the cases’ subject matter of striptease. My methodology is itself an act of stripping the cases down to reveal the cultural tropes of the female body that inform them:¹⁰ the female body as dangerous, diseased, abject, trivial, and hysterical. I suggest that these cultural associations

string as a solution to this danger. The Court’s reasoning about both of these issues seems insufficiently supported by logic. I also consider, to a lesser extent, the Court’s peculiar assignment of nude dancing to the “perimeter” of the First Amendment, and the Court’s merger in the *Pap’s* case of two arguably incompatible First Amendment doctrines: the secondary effects analysis and the expressive conduct analysis from *United States v. O’Brien*, 391 U.S. 367 (1968). See *infra* notes 24–27, 64–68, and accompanying text.

⁷ *Pap’s A.M.*, 529 U.S. at 297; see also *Barnes*, 501 U.S. at 584 (Souter, J., concurring in judgment).

⁸ *Pap’s A.M.*, 529 U.S. at 323 (Stevens, J., dissenting).

⁹ *Id.* at 313 n.2 (Souter, J., concurring in part and dissenting in part).

¹⁰ As will be evident, I do not mean to suggest that I will reveal, as a result of this stripping, the true essence of the woman’s body. Cf. *KOFMAN*, *supra* note 1, at 105 (“[W]omen are not concerned with Truth . . . they know perfectly well that there is no such

are deeply embedded in the cases and that they shape the Court's reading.¹¹ In fact, I show that the Court attempts to cover up its ideological gaps, in its own act of fetishism.

The second broad goal of this Article is to begin to pave the way for a new approach to free speech law. I suggest not only that there is room for feminist intervention in areas of free speech law that have so far been unexamined by feminist scholars, but also that my analysis of the nude dancing cases could set the stage for rethinking our approach to free speech law on a more fundamental level. The First Amendment is frequently invoked to resolve disputes over gender, sexuality, and other deeply contested issues in our society.¹² My reading of the nude dancing cases shows, however, that these cultural disputes may have an unacknowledged role in forming the very law that governs them. By presenting the ways in which cultural forces shape the Court's analysis in the nude dancing cases, I thus point toward a broader vision of the influence of culture on the First Amendment. My approach to the nude dancing cases suggests an unusual conception of First Amendment law:¹³ Free speech law governs culture, yet in surprising ways, culture also governs free speech law.

thing as 'truth,' that behind their veils there is yet another veil, and that try as one may to remove them, one after another, truth in its 'nudity,' like a goddess will never appear.'").

I should also note that the very use of the terms "woman" or "female" raises significant definitional problems in feminist theory in the wake of poststructuralist feminist battles about sex and gender. The complex meaning of the term "woman" in Lacanian psychoanalytic theory, from which I occasionally borrow, only makes matters more difficult. Indeed, the question of how to define the term "woman" is an exceptionally thorny one, and I could not begin to do justice to it within the confines of this piece. Throughout most of the Article, I use the word "woman" to designate the conventional understanding that has been assigned to it in our culture; that is, I use the word "woman" to describe the category of woman as it has been socially constructed. Although this conventional understanding is premised on a notion of a stable, sexed body, by using the term "woman" in this way, I do not mean necessarily to endorse that underlying premise or, for that matter, to endorse any claim that there is an essential pre-discursive woman. See TORIL MOI, *WHAT IS A WOMAN? AND OTHER ESSAYS* (1999); see also Amy Adler, "Shake, Shake, Shake!": The Naked Female Body "Speaks" 7-11 (Aug. 7, 2005) (unpublished manuscript, on file with the *New York University Law Review*) [hereinafter Adler, *The Naked Female Body "Speaks"*].

¹¹ I suspect that some of my analysis would apply to other kinds of sexual speech cases that the Court has considered. Ultimately, I suggest that the analysis could extend to many secondary effects cases. See *infra* text accompanying note 164. Nonetheless, my work here depends on a close textual reading of the nude dancing cases themselves, their exceptionally fertile facts, and their peculiar doctrinal problems.

¹² For my analysis of First Amendment case law and theory about gender and race, see Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499 (1996) [hereinafter Adler, *What's Left?*].

¹³ As part of this project, in a separate companion article, I reconsider the nude dancing cases as part of a larger problem in First Amendment jurisprudence that I do not address in this Article. There I argue that the Court has failed to answer adequately one of the most fundamental and yet most vexing questions in First Amendment law: the ques-

Part I of this Article summarizes the nude dancing cases and analyzes a series of doctrinal problems that emerge from them. Part II uses psychoanalytic and feminist literature to reread the cases as dramas of castration anxiety and fetishism. In Part III, I explore tropes of the female body that inform the decisions. There I show that the Court's analysis unwittingly reproduces a culturally entrenched vision of the female body, particularly the dancing female body, as a site of disease, danger, and death. I conclude in Part IV by suggesting how my reading of these cases points to a new way of thinking about the uncomfortable relationship between First Amendment law, sexuality, and culture.

I

THE LAW OF NUDE DANCING

In *Barnes v. Glen Theatre, Inc.*,¹⁴ the Court held, 5-4, that an Indiana public indecency statute¹⁵ requiring erotic dancers to wear "pasties" and "G-strings" rather than stripping down to total nudity did not violate the First Amendment.¹⁶ The plaintiffs in the case were the owners and the dancers at two clubs, the Kitty Kat Lounge and the Glen Theatre, who wanted to present "totally nude dancing."¹⁷

tion of "what is 'speech' for First Amendment purposes?" By analyzing the nude dancing cases as well as other Supreme Court opinions, I will show that, surprisingly, gender and sexuality are significant factors that bear on the Court's categorization of expression as "speech" or "not speech" for First Amendment purposes. Adler, *The Naked Female Body "Speaks," supra* note 10.

In developing this approach, I will also draw on some of my previous work. See, e.g., Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001) [hereinafter Adler, *Child Pornography*] (positing perverse relationship between child pornography law and cultural forces that produced it).

¹⁴ 501 U.S. 560 (1991). In *Barnes*, two establishments in South Bend, Indiana and dancers who worked in them originally sued in the district court to enjoin enforcement of Indiana's public indecency statute. *Id.* at 562-63. Initially, the district court granted the injunction, holding that the statute was facially overbroad. *Id.* at 564. The Seventh Circuit reversed, deciding that plaintiffs' only option was an as-applied challenge to the statute. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287, 291 (7th Cir. 1986). On remand, the district court held for the defendants, deciding that plaintiffs' dancing was not expressive conduct protected by the First Amendment. *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F. Supp. 414, 419 (N.D. Ind. 1988). The Seventh Circuit again heard the case, this time en banc. Accompanied by notable separate opinions from Judges Posner and Easterbrook, the majority decided that nonobscene nude dancing was unqualifiedly "speech" for purposes of the First Amendment, and that Indiana's statute unconstitutionally infringed on plaintiffs' expression because its purpose was to silence the erotic and sexual message of the plaintiffs' dances. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1082 (7th Cir. 1990) (en banc), *rev'd sub nom.* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

¹⁵ IND. CODE § 35-45-4-1 (1981).

¹⁶ *Barnes*, 501 U.S. at 563.

¹⁷ The district court in *Barnes* gave the following description of the dances:

The Supreme Court's first hurdle in *Barnes* was to determine whether a woman's nude, dancing body was "speech"—expressive conduct¹⁸—or whether it was mere conduct and thus outside of the First Amendment's reach.¹⁹ The Court's answer was strange: This was speech, but only scarcely so.²⁰ Without further explanation, the plurality wrote: "[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."²¹ Even though the Court thus exiled nude dancing to this undefined and previously unheard of "margin" of the First Amendment, the dance was still protected.²² Yet in spite of its protected status, the Court held that

[A] female, fully clothed initially . . . dances to one or more songs as she proceeds to remove her clothing. Each dance ends with the dancer totally nude or nearly nude. The dances are done on a stage or on a bar and are not a part of any type of play or dramatic performance.

Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 416 (N.D. Ind. 1988).

¹⁸ It is well settled that the First Amendment's protections extend to nonverbal "expressive conduct" or "symbolic speech." The Court has defined "expressive conduct" as conduct that is "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[]." *Spence v. Washington*, 418 U.S. 405, 409 (1974). For further discussion of *Spence*, see *infra* note 19.

¹⁹ Oddly, neither the *Barnes* nor the *Pap's* Court ever invokes the "*Spence* test"; the *Spence* Court developed a formula to determine when nonverbal activity qualifies as expressive conduct, thus bringing it within First Amendment protection. See *Spence*, 418 U.S. at 410–11 ("An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."). Although the opinions in *Barnes* and *Pap's* do not rely on *Spence*, what little analysis the Court offers in those cases about the expressive value of nude dancing loosely tracks the principles set forth in *Spence*. For example, Justice Souter's analysis in *Barnes* seems to draw on *Spence* principles when he writes:

Not all dancing is entitled to First Amendment protection as expressive activity. . . . But dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience.

Barnes, 501 U.S. at 581 (Souter, J., concurring in judgment).

Courts have sometimes upheld restrictions on erotic dance as proper bans on lewd conduct or prostitution rather than as improper bans on expressive conduct. See, e.g., *People v. Hill*, 776 N.E.2d 828 (Ill. App. Ct. 2002) (upholding prostitution provision that prohibits dance involving physical contact with patron through clothing as neither vague nor overbroad); *State v. Conforti*, 688 So. 2d 350 (Fla. Dist. Ct. App. 1997) (holding that sex acts performed by dancers on each other to music are not expressive conduct and may be prohibited as lewd conduct). But see *Ways v. City of Lincoln*, 274 F.3d 514 (8th Cir. 2001) (striking down ban on sexual contact in commercial establishment without arts exception as overbroad).

²⁰ *Barnes*, 501 U.S. at 566.

²¹ *Id.* Although *Barnes* was a case famous for the inability of the Justices to agree on anything, eight of the nine agreed that nude dancing was subject to marginal First Amendment protection.

²² The Court was constrained by several previous cases in which it had suggested that dancing could be speech. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981)

Indiana's statute, which prohibited all nude dancing, was constitutional.²³ The fractured *Barnes* majority could not agree on a rationale to reach this result.

The three-judge plurality, in an opinion written by Chief Justice Rehnquist and joined by Justices O'Connor and Kennedy, analyzed nude dancing as expressive conduct under the four-part test established in *United States v. O'Brien*.²⁴ The *O'Brien* test applies when the government seeks to impose a content-neutral²⁵ regulation on expressive conduct; it governs situations in which "'speech' and 'non-speech' elements are combined in the same course of conduct."²⁶ To

(invalidating ordinance which banned all live entertainment, including nude dancing); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (upholding preliminary injunction to prevent enforcement of prohibition on topless dancing); *California v. LaRue*, 409 U.S. 109 (1972) (upholding state ban on nude dancing in establishments licensed to sell liquor). All of the previous opinions acknowledged that nude dancing had some First Amendment value. *Schad*, 452 U.S. at 66 ("nude dancing is not without its First Amendment protections"); *Doran*, 422 U.S. at 932 ("Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression," . . . nude dancing "might be entitled to First and Fourteenth Amendment protection under some circumstances."); *LaRue*, 409 U.S. at 118 ("at least some [types of dancing] are within the limits of the constitutional protection of freedom of expression"). Other than citing these precedents, the *Barnes* Court did not explain its curious assignment of nude dancing to the margins or outer perimeter of the First Amendment.

The *Barnes* Court did not invoke the "low value" speech doctrine. See, e.g., *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality) (finding hierarchy of First Amendment values in which political speech is paramount and sexual or pornographic speech is of little value). In *Young*, a plurality of the Court suggested that some speech, such as sexual speech, is simply not as important as other speech. The question never arose in *Young* whether the low value material qualified as "speech" for First Amendment purposes. It was assumed to be speech. Instead, the question was whether some sexual speech merited a lower degree of protection: Was there a hierarchy of First Amendment values, in which some kinds of speech (political) mattered more than others (pornographic)? In contrast, *Barnes* was an expressive conduct case in which a threshold question was whether nude dancing qualified as First Amendment "speech" to begin with. It is interesting to consider that the speech in *Young* was pornographic film, as opposed to the live performance in *Barnes*. In a future article, I will evaluate how mediation affects the Court's analysis of sexual speech; I consider how the same speech act, depending on whether it is live or filmed, might trigger different analyses and garner different levels of First Amendment protection. Amy Adler, *The Object Stares Back: Speech, Mediation and Gender in First Amendment Discourse* (Aug. 7, 2005) (unpublished manuscript, on file with the *New York University Law Review*).

²³ 501 U.S. at 565.

²⁴ 391 U.S. 367 (1968).

²⁵ For the classic exploration of content-neutrality in First Amendment law, see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987), concluding that in analyzing content-neutrality, the Supreme Court has failed to make clear its standard of review.

²⁶ *O'Brien*, 391 U.S. at 376. If the government interest is related to the content of the expression, however, then the regulation is subject to strict scrutiny and is no longer governed by the *O'Brien* test. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 403 (1989) (finding regulation of flag burning, considered expressive conduct, to be content-based).

satisfy the test, a government regulation: (1) must be “within the constitutional power of the Government”; (2) must further “an important or substantial governmental interest”; (3) must be “unrelated to the suppression of free expression”; and (4) cannot create an incidental restriction on First Amendment freedoms “greater than is essential to the furtherance of that interest.”²⁷

Applying the *O'Brien* test, Justice Rehnquist, writing for the *Barnes* plurality, reasoned that the Indiana statute’s purpose lay in “protecting societal order and morality” by preventing the evil of public nudity.²⁸ Citing the now discredited *Bowers v. Hardwick*,²⁹ Rehnquist wrote that such a purpose had a long history both in Indiana and nationwide,³⁰ and that it constituted an important or substantial government interest under *O'Brien*.³¹ The plurality further found that the State’s interest in protecting morality was “unrelated to the suppression of free expression.”³² It reached this questionable³³ conclusion by noting that Indiana’s statute restricted not “nude

²⁷ *O'Brien*, 391 U.S. at 377.

²⁸ *Barnes*, 501 U.S. at 568.

²⁹ *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding statute that criminalized consensual sodomy in part on grounds that proscriptions against such conduct have “ancient roots”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003). The *Barnes* plurality relied on *Bowers* for the proposition that regulating morality is a substantial state interest. *Barnes*, 501 U.S. at 569. *Lawrence* has cast significant doubt on the continuing validity of this proposition. *See Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (arguing that majority’s holding “effectively decrees the end of all morals legislation”); *see also infra* note 69 (discussing implications of *Lawrence* for nude dancing cases).

³⁰ *See Barnes*, 501 U.S. at 568–69 (citing 1881 IND. ACTS, ch. 37, § 90; IND. REV. STAT., ch. 53, § 81 (1834); REV. LAWS OF IND., ch. 26, § 60 (1831)); *Ardery v. State*, 56 Ind. 328 (1877) (sustaining conviction based on exhibition of “privates” in public and tracing offense to biblical story of Adam and Eve); *see also* IND. CODE ANN. § 35-45-4-1 (Michie 2004) (public indecency).

³¹ *Barnes*, 501 U.S. at 567–68.

³² *Id.* at 570. The plurality argued that “[t]his and other public indecency statutes were designed to protect morals and public order,” not to suppress expression, and were therefore content-neutral regulations. *Id.* at 569. Reasoning that restricting nudity on moral grounds does not relate to the restriction of expression, the Court held that the regulation satisfied the third prong of *O'Brien*. *Id.* at 570. The plurality supported its reasoning with an analogy to nude beaches: Bathers at such a beach “would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.” *Id.* at 571.

³³ The dissent vigorously challenged the majority’s characterization of the statute as unrelated to the suppression of free expression. *See id.* at 592–93 (White, J., dissenting). Much of the debate in *Barnes* turned on whether the restriction on speech was only incidental to a broader ban on conduct, or whether speech was a primary target of the legislation. *Compare id.* at 570 (“[W]e do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers.”) *with id.* at 591 (White, J., dissenting) (arguing that regulation targeted “the communicative aspect of the erotic dance”).

dancing as such,” but rather “public nudity across the board.”³⁴ Such blanket restrictions precluded a finding that the statute’s intention was to ban the (marginal) expressive value of nude dancing.³⁵ Finally, the plurality reasoned that the Indiana law satisfied *O’Brien*’s fourth prong because it was only a minimal imposition on the expressive value of the speech. The plurality wrote that “Indiana’s requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State’s purpose.”³⁶

Justice Souter voted with the majority but wrote separately. Although he agreed with most of the plurality’s application of the *O’Brien* test, Justice Souter preferred to characterize the governmental interest not as the protection of morality, but as the prevention of tangible “secondary effects” associated with nude dancing.³⁷ The majority’s fifth vote came from Justice Scalia, who argued that the regulation at issue was not specifically targeted at expressive conduct, and that therefore the First Amendment did not apply to the case at all.³⁸ In dissent, Justice White, joined by Justices Marshall, Blackmun, and Stevens, argued that the true purpose of the Indiana statute was to regulate expression, not conduct, and that it was therefore a content-based regulation in violation of the First Amendment.³⁹

Nine years later, in the 2000 case of *City of Erie v. Pap’s A.M.*,⁴⁰ the Court considered an ordinance “almost identical” to the one in *Barnes*.⁴¹ The ordinance made it illegal to “knowingly or intentionally

³⁴ *Id.* at 566.

³⁵ *Id.* at 571–72.

³⁶ *Id.* at 572.

³⁷ The secondary effects doctrine is premised on the distinction between effects that “happen to be associated with” a form of speech and regulations targeting “the direct impact of speech on its audience.” *Boos v. Barry*, 485 U.S. 312, 320–21 (1988). See *infra* notes 50–55 and accompanying text for further discussion of secondary effects.

³⁸ See *Barnes*, 501 U.S. at 572 (Scalia, J., concurring).

³⁹ *Id.* at 592–93 (White, J., dissenting).

⁴⁰ 529 U.S. 277 (2000).

⁴¹ *Id.* at 289. Erie, Pennsylvania enacted Ordinance 75-1994 on September 28, 1994, later codified as Article 711 of the Codified Ordinances of the City of Erie. This public indecency statute made it illegal to “knowingly or intentionally, in a public place . . . appear[] in a state of nudity.” *Pap’s A.M.*, 529 U.S. at 283. Respondent Pap’s operated a club called Kandyland, which featured completely nude dancing, and filed suit seeking permanently to enjoin the statute’s enforcement. The Court of Common Pleas granted the injunction, and the Commonwealth Court reversed. The Pennsylvania Supreme Court reversed again, holding that the ordinance violated respondent’s rights to freedom of expression. After determining that no clear decision had resulted from *Barnes*, the Pennsylvania court held that along with a purpose to combat deleterious secondary effects arising from nude dancing establishments, another purpose was “[i]nextricably bound up with this stated purpose”—“an unmentioned purpose” to bar nude dancing for the message the dances conveyed. *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 279 (1998), *rev’d*, 529 U.S. 277 (2000). On remand, the Pennsylvania Supreme Court once again invalidated the

appear in public in a 'state of nudity.'"⁴² Given the similarity of the two statutes, it seems odd that the Court needed to review the Erie legislation at all; the city council had specifically crafted it to conform to the *Barnes* holding.⁴³ Even more surprising was that the Pennsylvania Supreme Court had struck down the statute under the First Amendment, reaching the opposite result from that reached in *Barnes*. One problem was that the *Barnes* decision had confused lower courts.⁴⁴ Indeed, the Pennsylvania Supreme Court remarked that the decision in the *Barnes* case was so "splintered" that it yielded "no clear precedent."⁴⁵ "[A]side from the agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection," wrote the Pennsylvania Supreme Court, "we can find no point on which a majority of the *Barnes* Court agreed."⁴⁶

statute, this time under the Pennsylvania Constitution. *Pap's A.M. v. City of Erie*, 571 Pa. 375, 394 (2002).

⁴² *Pap's A.M.*, 529 U.S. at 283.

⁴³ The city council made one significant mistake, however. The preamble to the ordinance explicitly stated that it was drafted "for the purpose of limiting a recent increase in nude live entertainment within the City." *Pap's A.M. v. City of Erie*, 719 A.2d at 279. In *Barnes*, a majority of the Court had insisted that the target of the regulation was nudity in general, not nudity in performance, which the Court had decided was speech. This preamble to the legislation in *Pap's* revealed that the law's target was nude dancing, not nudity in general. The plurality was able to overcome this problem in part, however, by reframing the question through the lens of the secondary effects doctrine. Now the plurality said that the target of the ordinance was only the secondary effects of the speech, not the speech itself.

⁴⁴ State courts and lower federal courts, following *Barnes* as best they could, have upheld public nudity ordinances that require pasties and G-strings or greater amounts of coverage. See, e.g., *Farkas v. Miller*, 151 F.3d 900, 905 (8th Cir. 1998) (public nudity law and sexually oriented business ordinance requiring G-strings and pasties in businesses, with theater exception, upheld); *J&B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 371 (5th Cir. 1998) (remanding for evidence on secondary effects of public nudity ordinance requiring pasties and G-strings, with serious social value exception); *SBC Enters. v. City of South Burlington*, 892 F. Supp. 578, 582–83 (D. Vt. 1995) (upholding public nudity ordinance requiring G-strings and pasties); *Cafe 207, Inc. v. St. Johns County*, 856 F. Supp. 641, 643 (M.D. Fla. 1994) (upholding ordinance requiring "slightly" more coverage than pasties and G-strings—at least one-fourth of breasts and one-third of buttocks), *aff'd per curiam*, 66 F.3d 272 (11th Cir. 1995); *Village of Winslow v. Sheets*, 622 N.W.2d 595, 598 (Neb. 2001) (upholding public nudity ordinance requiring covered buttocks while performing any service, with bona fide ballet, play, or drama exception). See *infra* note 46, for further discussion of lower courts' interpretations of *Barnes* and its precedential weight.

A few public nudity ordinances have nonetheless been invalidated for overbreadth. See, e.g., *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135–36 (6th Cir. 1994) (public indecency ordinance requiring G-strings and pasties without arts exception overbroad); *Nite Moves Entm't, Inc. v. City of Boise*, 153 F. Supp. 2d 1198, 1210 (D. Idaho 2001) (public nudity ordinance requiring short shorts and halter top overbroad).

⁴⁵ *Pap's A.M. v. City of Erie*, 719 A.2d at 277–78.

⁴⁶ *Id.* at 278; see also *Triplett Grille*, 40 F.3d at 134 (comparing interpretation of *Barnes* to "reading . . . tea leaves"); Alan J. Howard, *When Can the Moral Majority Rule?: The*

Thus in the *Pap's* case, the U.S. Supreme Court set out to solidify its position on nude dancing. As in *Barnes*, the Court agreed that while nude dancing is expressive conduct, "it falls only within the outer ambit of the First Amendment's protection."⁴⁷ Again as in *Barnes*, a plurality of the Court found that the regulation requiring dancers to wear pasties and G-strings satisfied the *O'Brien* test.⁴⁸ In a break from *Barnes*, however, five members of the Court adopted a new analysis.⁴⁹ Employing this analysis, the four-member plurality justified the purpose of the law banning nudity not by an appeal to morality, but by a concern for "secondary effects."⁵⁰ Justice Souter's approach in his *Barnes* concurrence had won the day,⁵¹ and eclipsed the *Barnes* plurality's dubious reliance on morality.⁵²

Under the secondary effects doctrine, speech may be regulated only when it is aimed at combating effects which are not related to the meaning or "the content of the . . . speech."⁵³ The Court's earlier

Real Dilemma at the Core of the Nude Dancing Cases, 44 St. Louis U. L.J. 897, 897 (2000) (calling *Barnes* decision "incomprehensible" and "virtually useless").

Most lower courts have viewed Justice Souter's opinion as the narrowest basis for the *Barnes* holding, and have thus interpreted it as the key to *Barnes*. See, e.g., *Tunick v. Safir*, 209 F.3d 67, 83 (2d Cir. 2000); *Dima Corp. v. Town of Hallie*, 185 F.3d 823, 830 (7th Cir. 1999); *Farkas*, 151 F.3d at 904; *J&B Entm't*, 152 F.3d at 370; *Triplett Grille*, 40 F.3d at 134; *Int'l Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157, 1160-61 (11th Cir. 1991).

⁴⁷ *Pap's A.M.*, 529 U.S. at 289.

⁴⁸ See *id.* at 289 ("[G]overnment restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech."). For a discussion of the *O'Brien* test, see *supra* notes 26-27 and accompanying text.

⁴⁹ Both the four-member plurality in *Barnes* and Justice Souter adopted this framework of analysis, although Souter reached a different conclusion about its application to this case. *Pap's A.M.*, 529 U.S. at 310 (Souter, J., concurring in part and dissenting in part). Once again, Justice Scalia wrote a concurring opinion (joined this time by Justice Thomas) in which he insisted, as he had in *Barnes*, that the First Amendment did not apply to the case at all. See *id.* at 307-08.

⁵⁰ *Pap's A.M.*, 529 U.S. at 291.

⁵¹ See *supra* note 46 (discussing lower courts' reliance on Justice Souter's opinion in *Barnes*). Note that Justice Souter partially recanted that position in *Pap's*, where he demanded a higher evidentiary standard for governments seeking to regulate speech based on a secondary effects rationale. *Pap's A.M.*, 529 U.S. at 316 (Souter, J., concurring in part and dissenting in part) ("[M]y partial dissent rests on a demand for an evidentiary basis that I failed to make when I concurred in *Barnes*.").

⁵² Morality has always been a problematic justification for banning speech; it has become even more so in light of the Court's decision to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003), on which the *Barnes* plurality had partially relied. See *supra* notes 29-30; see also *infra* note 69 (discussing morality and speech and *Lawrence's* implications for nude dancing cases).

⁵³ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (upholding local zoning ordinance whose purpose was not to suppress expression, but rather to "prevent crime, protect the city's retail trade, maintain property values, and generally [protect] . . . the quality of urban life") (internal quotation marks omitted). The Court first used the term "secondary effect[s]" in a footnote in *Young v. Am. Mini Theatres*, 427 U.S. 50, 71

decision in *City of Renton v. Playtime Theatres, Inc.* had paved the way for the *Pap's* analysis: *Renton* had permitted the zoning of "adult" theaters based on evidence of adverse effects on neighborhoods where such theaters were clustered.⁵⁴ The ordinance at issue in *Renton* applied only to theaters displaying "adult" films.⁵⁵ Theaters showing any other kind of films were exempt. It would seem hard to imagine a law that was more obviously a regulation of speech based on its content. Yet the Court, in an impressively bold act of illogic, deemed the ordinance content-neutral. It did so by stating that although the law seemed to single out certain "adult" speech on the basis of its content, the *purpose* of the law was to combat only secondary effects, and not the content of the speech. Thus the justification for the law, not the face of the law, became dispositive of its First Amendment validity.⁵⁶

Drawing on *Renton*, the *Pap's* plurality found that the Erie statute was designed not to silence the erotic message of the dancers but instead to combat the secondary effects said to be associated with nude dancing.⁵⁷ Thus, the Court reasoned that the law was "not related to the suppression of expression,"⁵⁸ a proposition fervently

n.34 (1976) (Stevens, J., plurality opinion) (using term to characterize stated tendency of adult movie theaters to "cause[] the area to deteriorate and become a focus of crime").

⁵⁴ 475 U.S. 41 (1986). *Renton* considered the constitutionality of a zoning ordinance restricting the location of adult bookstores and movie theaters. Other Supreme Court cases also discuss secondary effects, but do not necessarily ground their holdings on this doctrine. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 867–68 (1997) (finding statute regulating indecent speech on Internet to be directed at "primary" effect of indecent speech); *Barnes*, 501 U.S. at 582 (Souter, J., concurring); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring) (including "perceived secondary effects" as possible basis for closing down store that sold indecent books). The Court recently revisited the secondary effects doctrine in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437–38 (2002), where it discussed evidentiary requirements for the legislature in targeting the secondary effects caused by adult establishments.

⁵⁵ In its details, the ordinance prohibited "any 'adult motion picture theater' from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school." *Renton*, 475 U.S. at 44.

⁵⁶ *Renton* has been the subject of a good deal of criticism. See *Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring in judgment) ("The fiction that this sort of ordinance is content neutral . . . is perhaps more confusing than helpful . . ."); see also *Boos*, 485 U.S. at 335 (Brennan, J., concurring) (noting that secondary effects doctrine permits suppression "whenever censors can concoct 'secondary' rationalizations for regulating" content of speech); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 59–61 (2000) (criticizing *Renton*, *Pap's*, and secondary effects doctrine); Marcy Strauss, *From Witness to Riches: The Constitutionality of Restricting Witness Speech*, 38 ARIZ. L. REV. 291, 317 (1996) (*Renton* "permits an end run around the First Amendment: the government can always point to some neutral, non-speech justification for its actions.").

⁵⁷ See *Pap's A.M.*, 529 U.S. at 296–97 (finding challenged regulation to be clearly within city's police power).

⁵⁸ *Id.* at 293.

rejected by the dissent.⁵⁹ Once the characterization of the law as content-neutral was secured, all of the pieces of the *O'Brien* test fell into place.⁶⁰ The plurality reasoned further that even if some part of the expression *were* suppressed by the ban on total nudity, the fact that the dancers *were* “free to perform wearing pasties and G-strings” meant that “[a]ny effect on the overall expression [was] *de minimis*.”⁶¹

As Justice Stevens argued in dissent, however, the validity of applying *Renton’s* reasoning to *Pap’s* was questionable. Zoning cases govern only the *regulation* of speech, whereas *Pap’s* resulted in an outright *ban* on a type of expression, namely nude dancing.⁶² In zoning cases, the speech in question is still available albeit in a new location; zoning thus raises much less severe First Amendment problems than do outright bans on speech.⁶³ Justice Stevens found

⁵⁹ *Id.* at 326–27 (Stevens, J., dissenting).

⁶⁰ It is interesting to consider how the same dance would have been treated had it been filmed. The relatively tame sexual content of the dance would (almost certainly) have assured that it was protected if challenged as obscene under the current three-pronged obscenity standard of *Miller v. California*, 413 U.S. 15, 24 (1973).

⁶¹ *Pap’s A.M.*, 529 U.S. at 294. Later, I address the peculiarity of this analysis. The Court asks us to accept two propositions that seem to be in tension with one another: one, that the secondary effects of nudity pose a significant danger; and, two, that the addition of nothing more than pasties and a G-string, an assertedly “minimal” alteration of the speech, suffice to combat such grave danger. See *infra* Part II.

⁶² See 529 U.S. at 320–22 (Stevens, J., dissenting). The majority rejected the characterization of the ordinance as a ban. *Id.* at 292–93.

⁶³ Nude dancing cases are frequently litigated in the zoning context. Some of these zoning cases focus on the location and dispersal of strip clubs, while others focus on the details of performance, such as the distance between dancers and viewers, or on lighting requirements. Federal and state courts have generally upheld zoning ordinances requiring dispersal of adult entertainment establishments or sexually oriented businesses based on the need to combat secondary effects. See, e.g., *LLEH, Inc. v. Wichita County*, 289 F.3d 358, 367 (5th Cir. 2002) (holding that non-urban locality may rely on evidence of secondary effects gathered in urban area); *Lindsay v. Papageorgiou*, 751 S.W.2d 544, 549–50 (Tex. Ct. App. 1988) (same).

However, zoning ordinances have been struck down where they have been interpreted to operate as prior restraints or as effective bans on adult entertainment by leaving too few alternative sites available for use. See, e.g., *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1312 (11th Cir. 2003) (holding zoning portion of adult business ordinance unconstitutional for failure to leave open ample alternate means of communication); *Deja Vu of Nashville v. Metro. Gov’t of Nashville*, 274 F.3d 377, 400–01 (6th Cir. 2001) (holding that ordinance failed to provide judicial review safeguards required for prior restraint to be constitutional); *Young v. City of Simi Valley*, 216 F.3d 807, 814 (9th Cir. 2000) (enjoining permit scheme that would allow private party to block adult businesses by acquiring sensitive use permit); *Univ. Books & Videos, Inc. v. Miami-Dade County*, 132 F. Supp. 2d 1008, 1015 (S.D. Fla. 2001) (enjoining zoning ordinance that would reduce market for adult fare by “at least two-thirds”); *R.W.B. of Riverview, Inc. v. Stemple*, 111 F. Supp. 2d 748, 756 (S.D. W. Va. 2000) (enjoining regulation effectively banning all new nude entertainment businesses).

Courts have also generally upheld zoning ordinance restrictions on use of space within establishments for nude dancing, such as requirements of buffer zones that effectively ban

deeper problems with the plurality's analysis. Terming the opinion a "doctrinal polyglot,"⁶⁴ he insisted that the plurality's conflation of the *O'Brien* test and the secondary effects doctrine was premised on a fundamental error: The *O'Brien* test evaluates regulations aimed at conduct that have some incidental effect on speech, whereas the secondary effects doctrine applies to regulations aimed at speech directly, but only because of its secondary effects.⁶⁵ Thus, Justice Stevens viewed the collapse of the two doctrines into a single standard as incoherent.⁶⁶

The nude dancing cases have provoked significant criticism.⁶⁷ For example, critics have attacked the Court's expansion of the secondary effects doctrine in *Pap's*;⁶⁸ the questionable legitimacy of morality as a

table or lap dancing, as content-neutral time, place, and manner regulations. See, e.g., *Deja Vu*, 274 F.3d at 396–98 (6th Cir. 2001) (upholding buffer zone requirement); *Colacurcio v. City of Kent*, 163 F.3d 545, 556–57 (9th Cir. 1998) (same); *DLS v. City of Chattanooga*, 107 F.3d 403, 412–13 (6th Cir. 1997) (upholding buffer zone and stage requirements); 3299 N. Fed. Highway v. Bd. of County Comm'rs, 646 So. 2d 215, 221 (Fla. Ct. App. 1994) (upholding buffer zone requirement); *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't*, 60 S.W.3d 572, 580 (Ky. Ct. App. 2001) (upholding buffer zone and stage requirements); *Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154, 170–71 (Wash. 1997) (upholding buffer zone requirement); *DCR, Inc. v. Pierce County*, 964 P.2d 380, 388–89 (Wash. Ct. App. 1998) (same).

⁶⁴ See *Pap's A.M.*, 529 U.S. at 326 (Stevens, J., dissenting).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ For law review articles discussing and criticizing *Barnes* or *Pap's* or both, see generally Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611 (1992); Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 339–41 (1995); Howard, *supra* note 46; Anne Salzman Kurzweg, *Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression*, 34 HARV. C.R.-C.L. L. REV. 437 (1999); Richard A. Seid, *A Requiem for O'Brien: On the Nature of Symbolic Speech*, 23 CUMB. L. REV. 563 (1993); Christopher Thomas Leahy, Comment, *The First Amendment Gone Awry: City of Erie v. Pap's A.M., Ailing Analytical Structures, and the Suppression of Protected Expression*, 150 U. PA. L. REV. 1021 (2002); Melanie Ann Martin, Note, *Constitutional Law—Non-Traditional Forms of Expression Get No Protection: An Analysis of Nude Dancing Under Barnes v. Glen Theatre, Inc.*, 27 WAKE FOREST L. REV. 1061 (1992); Andrew L. Reisman, Note, *Speak of the Devil: First Amendment Protection of Immoral Conduct*, 1992 U. ILL. L. REV. 879 (1992); Joshua Waldman, Note, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1857–58, 1875–80 (1997); Teno A. West, Comment, *First Amendment Protections Stripped Bare: Barnes v. Glen Theatre, Inc.*, 27 NEW ENG. L. REV. 475 (1992).

⁶⁸ See *Pap's A.M.*, 529 U.S. at 323–26 (Stevens, J., dissenting); see also Marc M. Harold, *Stripping Away at the First Amendment: The Increasingly Paternal Voice of Our Living Constitution*, 32 U. MEM. L. REV. 403, 431–33 (2002) (terming *Pap's* expansion of secondary effects doctrine "disturbing"); John B. Kopf III, Note, *City of Erie v. Pap's A.M.: Contorting Secondary Effects and Diluting Intermediate Scrutiny to Ban Nude Dancing*, 30 CAP. U. L. REV. 823, 848 (2002) ("The *Pap's A.M.* decision stretches and contorts the Court's secondary effects doctrine.").

justification for banning speech in *Barnes*;⁶⁹ the Court's tortured and fractured opinions in *Barnes*;⁷⁰ and the attempt in both cases to categorize the regulations as content-neutral.⁷¹ In the following pages, I offer a new analysis of two particularly vexing problems in the nude dancing cases: the attribution of grave danger to the female body and the dubiousness of the G-string as a solution to this danger.⁷² I do so by taking an unconventional approach to the cases.

⁶⁹ For example, the *Harvard Law Review* lamented that "[w]ith little discussion but with far-reaching implications, the three-member *Barnes* plurality transformed the protection of morality into an 'important or substantial' state interest. . . . Protecting morality had never before been considered a sufficient justification for restricting otherwise admittedly protected speech. . . ." *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 292–93 (1991). *But cf.* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (articulating moral basis of obscenity regulation). For a discussion of *Barnes* and the legitimacy of morality as a basis for regulating speech, see generally Blasi, *supra* note 67 and sources cited therein. For further discussion of the constitutionality of using morality as a basis for legal regulation, see generally Gey, *supra* note 67. For a classic discussion of moral regulation and its relation to criminal law, see generally PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

In any event, the Court's 2003 ruling in the Texas sodomy case has undermined the legitimacy of *Barnes*'s reliance on morality as a justification for banning speech. See *Lawrence v. Texas*, 539 U.S. 558, 571–74 (2003) (rejecting morality-based arguments from *Bowers v. Hardwick* for criminalization of homosexual sex). In his dissent in *Lawrence*, Justice Scalia wrote that the Court had "relied extensively on *Bowers* when we concluded, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991), that Indiana's public indecency statute furthered 'a substantial government interest in protecting order and morality.'" *Lawrence*, 539 U.S. at 590 (emphasis added). Still, the full implications of *Lawrence* for other morality-based laws remain to be seen. See, e.g., Andrew Koppelman, *Lawrence's Penumbra*, 88 MINN. L. REV. 1171 (2004) (offering interpretation of *Lawrence*'s implications for anti-gay laws). Justice Scalia, dissenting in *Lawrence*, argued that the Court's decision signaled a descent into what he saw as moral upheaval by calling into question a host of morals-based laws. 539 U.S. at 599 (arguing that majority's holding "effectively decrees the end of all morals legislation"). Recently, a district court took Scalia up on his prediction, citing *Lawrence* to strike down federal obscenity law as applied to an online purveyor of particularly hard-core pornography. The court held that after *Lawrence*, the government could no longer rely on the advancement of a moral code as a legitimate state interest to impede private adult consensual sexual conduct. *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578, 591, 593 (W.D. Pa. 2005); see also *id.* at 590–91 (citing array of law review articles assertedly supporting Court's position on implications of *Lawrence* for morals-based obscenity law).

⁷⁰ See, e.g., *Pap's A.M. v. City of Erie*, 719 A.2d 273, 277–78 (Pa. 1998) (finding *Barnes* decision too "splintered" to provide clear precedent on "whether the Ordinance . . . passes muster under the First Amendment"), *rev'd*, 529 U.S. 277 (2000); see also *supra* notes 43–44 and accompanying text.

⁷¹ See *Barnes*, 501 U.S. at 560, 590–93 (White, J., dissenting); *Pap's A.M.*, 529 U.S. at 318–19 (Stevens, J., dissenting).

⁷² See *infra* Parts II and III.

II

SEX PANIC: READING THE CASES AS DRAMAS OF
CASTRATION ANXIETY AND FETISHISM

"We read in Rabelais of how [even] the Devil took to flight when the woman showed him her vulva."

— Sigmund Freud, *Medusa's Head*⁷³

Why is nude dancing so dangerous? And if it is so dangerous, why would the Court and the legislature take solace in a mere piece of string to ward off this threat? On a rational level, the cases simply do not hold up. Even the Court acknowledges the apparent silliness of the legislative solution it labors to uphold. Justice Stevens, dissenting in *Pap's*, argues that the Court's reasoning about the G-string "requires nothing short of a titanic surrender to the implausible."⁷⁴ Justice Souter admits that the G-string solution does not comport with "common sense."⁷⁵ In this section, I argue that the very irrationality of the cases suggests that a better interpretation, one that takes irrationality as its starting point, is in order. Thus I take an unconventional approach: I turn to Freud's theory of castration anxiety and fetishism to offer a new reading of these puzzling aspects of the cases.

This perspective allows us finally to make some sense of the Court's peculiar reasoning. It will also show that the Court's First Amendment analysis was flawed. The Court insisted that there was an insignificant difference in the meaning of the "speech" conveyed by all-nude dancers as opposed to G-string clad dancers. And yet, as I will show, from a feminist, psychoanalytic perspective, the difference in meaning is dramatic. My analysis thus contradicts the Court's assertion that the G-string requirement was an insignificant burden on the meaning of the "speech" and that it therefore did not intrude on the dancers' First Amendment rights.

A. *The Legal Analysis of Danger and Covering Up*

1. *Is It Dangerous?*

Although the Court could not decide with certainty what the speech meant, it did decide that the speech was dangerous. Both the *Barnes* and *Pap's* Courts thought so, although it was not until *Pap's* that a plurality relied on this danger as essential to its opinion. For the *Barnes* plurality, morality was the central justification for banning the

⁷³ SIGMUND FREUD, *Medusa's Head*, in 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 273, 274 (James Strachey et al. eds., James Strachey trans., 1955) (1922) [hereinafter FREUD, *Medusa's Head*].

⁷⁴ *Pap's A.M.*, 529 U.S. at 323 (Stevens, J., dissenting).

⁷⁵ *Id.* at 313 n.2 (Souter, J., concurring in part and dissenting in part).

speech, but the opinion also referred to public nudity as a threat to “public order.”⁷⁶ Only Justice Souter, in his *Barnes* concurrence, relied on the supposed danger associated with nude dancing, rather than on its threat to morality, as the sole basis for upholding the legislation.⁷⁷

Although Souter later repudiated in part his reasoning in *Barnes*, the plurality in *Pap's* adopted and expanded it.⁷⁸ Now the Court's justification for banning speech was not protection of morals as in *Barnes*, but rather, protection of the public from danger in the form of secondary effects.⁷⁹ The city council that had adopted the ordinance in *Pap's* emphasized the threat of nude dancing to the “public health, safety and welfare.”⁸⁰ The council warned that nude dancing contributed to “violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.”⁸¹ The *Pap's* plurality accepted this alert, crediting the council's finding that nude dancing was “highly detrimental to the public health, safety and welfare, and [led] to the debasement of both women and men, promote[d] violence, public intoxication, prostitution and other serious criminal activity.”⁸²

What exactly is so dangerous about the naked female body? Why make this leap from sexuality to violence?⁸³ On one level, this con-

⁷⁶ *Barnes*, 501 U.S. at 569–70.

⁷⁷ *Id.* at 584, 586 (Souter, J., concurring) (relying on “correlation of [nude] dancing with other evils,” including “pernicious” criminal activity, as basis for regulation). Note that lower courts interpreted Justice Souter's opinion as the key to *Barnes*. See *supra* note 44. Thus the secondary effects analysis became the widespread approach to nude dancing in lower courts even before *Pap's*.

⁷⁸ See *Pap's A.M.*, 529 U.S. at 310 (Souter, J., concurring in part and dissenting in part) (arguing that state did not meet its evidentiary burden to establish presence of secondary effects, view that he elaborated in his dissent in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 454–60 (2002)).

⁷⁹ The First Amendment analysis depends on construing this danger as a secondary rather than primary effect of the speech. This distinction is unimportant for my present purpose, which is to establish that the Court found a link between this speech and danger, regardless of whether that link was characterized as primary or secondary. I should add that I believe the doctrinal distinction between primary and secondary effects is flawed and artificial, but I leave that for another discussion.

⁸⁰ *Pap's A.M.*, 529 U.S. at 290 (citing *Pap's A.M. v. City of Erie*, 719 A.2d 276, 279 (Pa. 1998)).

⁸¹ *Id.*

⁸² *Pap's A.M.*, 529 U.S. at 297.

⁸³ The Court did not consider the argument made by some feminists (and contested by others) that sex work, such as stripping or prostitution, along with the sexual display of women in pornography, subordinates women and leads in turn to a state of social affairs under which all women are vulnerable to violence. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 148 (1987) (“Along with the rape and prostitution in which it participates, pornography institutionalizes the sexuality of male supremacy . . .”); Andrea Dworkin, *Prostitution and Male Supremacy*, 1 MICH. J. GENDER

nection seems logical. The zoning cases have frequently relied on studies that show a correlation between “adult” entertainment, prostitution, and other crime.⁸⁴ Yet on another level, the connection to crime and disease seems strained. Indeed, some critics have vigorously contested the studies often relied on in the zoning cases, arguing that accurate studies show that adult businesses do not cause any such secondary effects.⁸⁵ Nonetheless, the Court has continued to accept legislative assertions of such a correlation.⁸⁶ Justice Souter suggested in *Pap’s* that the emotionally fraught subject matter of nude dancing undermined the legitimacy of the legislature’s findings of negative secondary effects. Rejecting the evidentiary record as insufficient, he wrote that the city council’s recitation of secondary effects caused by nude dancing “does not get beyond conclusions on a subject usually

& L. 1, 2–3 (1993) (“Prostitution in and of itself is an abuse of a woman’s body.”). For a discussion of the feminist debates on pornographic representations of women, see generally Adler, *What’s Left?*, *supra* note 12, and sources cited therein.

⁸⁴ New York City’s experience with zoning in the 1990s is illustrative of the process by which local governments gather evidence to support zoning legislation. In 1993, the New York City Department of City Planning began a study of the impact of adult establishments on the quality of urban life. See *Stringfellows of New York, Ltd. v. City of New York*, 694 N.E.2d 407, 411 (N.Y. 1998). “Adult establishments” included not only strip clubs, but also bookstores, theaters, and stores offering sexual materials. *Id.* Published in 1994, the study drew both on similar studies conducted in nine other cities as well as on specific research about New York City. *Id.* The study concluded that adult businesses often have negative secondary effects. These secondary effects included crime, property devaluation, and blight. *Id.* at 411–12. In 1995, the City adopted an Amended Zoning Resolution to combat the secondary effects that were attributed to adult establishments. *Id.* at 412. The resolution included an array of site limitations and anti-clustering provisions. *Id.* at 413. The ordinance withstood constitutional challenge. *Id.* at 411, 421 (upholding ordinance in analysis under *Renton*). The city amended the zoning ordinances in 2001, purportedly to correct loopholes in the 1995 law; the revisions have so far withstood constitutional challenge. For the *People Theatres of N.Y., Inc., v. City of New York*, 793 N.Y.S.2d 356, 371 (App. Div. 2005) (declaring amendments constitutional). For a critique of the New York City regulations and their impact on gay life, see generally MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999). Warner’s work sets forth a theory of queer sexuality rooted in an ethic of dignity in shame and analyzes New York zoning restrictions from this theoretical perspective.

⁸⁵ See, e.g., Bryant Paul et al., *Government Regulation of “Adult” Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL’Y 355, 355–56 (2001) (analyzing empirical studies of secondary effects of adult business and claiming that all “scientifically credible” studies demonstrate either no secondary effects associated with adult entertainment or “a reversal of the presumed negative effect”); see also Daniel Linz et al., *An Examination of the Assumption that Adult Businesses Are Associated with Crime in Surrounding Areas: A Secondary Effects Study in Charlotte, North Carolina*, 38 LAW & SOC’Y REV. 69, 97 (2004) (analyzing empirical data and finding that areas surrounding adult business sites have smaller numbers of reported crime incidents than do corresponding areas).

⁸⁶ For the most recent case considering such evidence, see *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 430 (2002).

fraught with some emotionalism.”⁸⁷ And other critics have expressed skepticism about the asserted justifications for regulation. Consider, for example, Judge Posner’s recent Comment in the *Stanford Law Review*, where he wrote: “The ostensible justification for [restricting nude dancing], it is true, is the ‘secondary effects’ that establishments which offer erotic materials or entertainment are thought to engender, such as prostitution and disorderly conduct But the ostensible justification cannot be taken seriously.”⁸⁸

I suggest here another interpretation of the connection between nude dancing and danger, one that supplements the conventional (and contested) account. The goal is to provide a fuller picture of what motivated the Court to undertake what Justice Stevens termed its “implausible” reasoning.⁸⁹ In my reading, the Court’s analysis unwittingly replicates a deeper cultural trope in which the nude woman’s body stands for danger, debasement, crime, violence, disease, a threat to the institution of heterosexuality, and even death.

2. *Should We Cover It Up? The Legal Analysis of the G-String*

The Court’s attribution of such terrible danger to dancing nude bodies seems odd to begin with. But the opinions take another seemingly illogical turn. Even if we accept that these bodies are so dangerous, the solution makes no sense: We must accept that the addition of pasties and a G-string can really solve such grave problems as disease, mayhem, and violence.⁹⁰ Can a G-string really do all that? What a powerful weapon.

In *Barnes*, the Court offered little comment on the efficacy of G-strings when it approved the legislative scheme requiring dancers to wear them. In the curiously punning and suggestive tone that characterizes many of the nude dancing opinions,⁹¹ the *Barnes* plurality offered only this: “Indiana’s requirement that the dancers wear at

⁸⁷ *Pap’s A.M.*, 529 U.S. at 314 (Souter, J., concurring in part and dissenting in part).

⁸⁸ Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 *STAN. L. REV.* 737, 741–42 (2002) (suggesting that real justification may be that society finds such speech offensive) (comment).

⁸⁹ *Pap’s A.M.*, 529 U.S. at 323 (Stevens, J., dissenting).

⁹⁰ See *supra* notes 76–77 and accompanying text.

⁹¹ The opinions in the nude dancing cases, particularly in the Seventh Circuit, were punctuated with lighthearted puns. Judge Easterbrook’s opinion in the Seventh Circuit was particularly jocular and punning in tone. He wrote, for example: “Members of the majority say that Indiana’s interest in clothing is tissue-thin.” *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1121 (7th Cir. 1990) (en banc) (Easterbrook, J., dissenting), *rev’d sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Other examples of such wordplay from Easterbrook’s opinion include: “If nude dancing is ‘speech’ it is so by the barest margin,” *id.* at 1130 (emphasis added); “[W]ell-read judges can *tease* out of dancers’ acts thoughts the dancers never had,” *id.* at 1129 (emphasis added); and “the Court’s resort to

least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose."⁹²

By the time of the *Pap's* decision, however, the peculiarity of the legislative solution became a topic of discussion for the Court. How could the addition of such miniscule pieces of fabric avert "serious criminal activity"⁹³ and other dangerous secondary effects associated with nude dancing? Within the structure of the Court's own First Amendment argument, the logic seemed to break down: The G-string was supposed to have a *de minimis* effect on meaning but a major effect on crime. The plurality noted weakly: "To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects."⁹⁴ It offered no further justification for the legislative solution.

The other opinions in the case were not so forgiving.⁹⁵ As I noted above, Justice Stevens vigorously rejected the secondary effects justification.⁹⁶ Although he adopted a more charitable tone, Justice Souter reached the same conclusion, writing: "It is not apparent to me as a matter of common sense that establishments featuring dancers with pasties and G-strings will differ markedly in their effects on neighborhoods from those whose dancers are nude. If the plurality does find it apparent, we may have to agree to disagree."⁹⁷ And Justice Scalia also chimed in, writing: "I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of

overbreadth analysis implies that nude dancing is not always *clothed* with expression," *id.* at 1128 (emphasis added). See *infra* note 192 for discussion of the significance of this tone.

⁹² *Barnes*, 501 U.S. at 572.

⁹³ *Pap's A.M.*, 529 U.S. at 297.

⁹⁴ *Id.* at 301. It is worth comparing here a Tenth Circuit decision on nude dancing in which the court of appeals required more than the *Pap's* Court did. The court of appeals stated, regarding secondary effects: "The *O'Brien* test is not satisfied, however, merely by the existence of a substantial governmental interest in regulating secondary effects. The city must also prove that its chosen weapon against these secondary effects will further its mission." *Essence Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1287 (10th Cir. 2002). The court of appeals then rejected the city's restriction on the age of dancers, finding that the restriction did not further the governmental interest. *Id.* at 1287-89; see also *Brownell v. City of Rochester*, 190 F. Supp. 2d 472, 489 (W.D.N.Y. 2001) ("[T]here is simply no basis upon which one can reasonably conclude that the restrictions in question [banning certain activities such as lap dancing] will in any way further the governmental interest asserted here, *i.e.*, combating the secondary effects that the Ordinance is ostensibly intended to address."). For the Court's recent attempt to clarify the evidentiary burden borne by a legislature that wishes to zone speech based on its secondary effects, see *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 433-42 (2002).

⁹⁵ These doubts about the efficacy of the legislative solution should in turn cast doubts on the secondary effects rationale itself.

⁹⁶ *Pap's A.M.*, 529 U.S. at 317-23 (Stevens, J., dissenting).

⁹⁷ *Id.* at 313 n.2 (Souter, J., concurring in part and dissenting in part).

establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease.”⁹⁸

3. *Fighting Crime with the G-String*

Why all this *Sturm und Drang* over a G-string? Why would the Court labor over these cases which turn on such a tiny distinction—between nudity and near nudity? After all, a G-string is such a scanty piece of fabric. It barely covers anything, except the slit of the vagina. What difference could it possibly make to cover up the sight of the female genitals? If lap dancing were an issue here, worried legislators might find some solace that the G-string would deter penetration. (The solace would be slight, because the barrier to penetration is slight—a G-string can easily be worked around.) But that is not what these cases are about. Lap dancing is not an issue.⁹⁹ Touching is not even an issue. These cases are about spectacle, not physical contact.

So once again: Why all this angst over a tiny piece of fabric? Why protect us from the sight of the vagina? For a glimpse of what’s at issue, consider King Lear on women’s bodies:

Down from the waist they are centaurs,
Though women all above.
But to the girdle do the gods inherit,
Beneath is all the fiend’s.
There’s hell, there’s darkness, there is the sulphurous pit; burning,
scalding, stench, consumption. Fie, fie, fie!¹⁰⁰

Well, there’s one answer. Or, to quote a contemporary psychoanalyst: “[T]here is something innately horrifying about the vagina . . . that has perpetually brought to men’s minds the stigmata of humiliation, degradation, mutilation, and death.”¹⁰¹ Perhaps Freud said it best, when he mused that “[p]robably no male human being is spared the fright of castration at the sight of a female genital.”¹⁰² In other words, my answer to the question I posed (“why protect us from the sight of the vagina?”) is this: The G-string conceals a very small part of the body, the sight of which is a very big deal. It covers the hole, the evidence that the woman does not have a penis. And as we shall see in the following section, the sight of the woman’s “lack” ushers in

⁹⁸ *Id.* at 310 (Scalia, J., concurring).

⁹⁹ See, e.g., *id.* at 318 n.1 (Stevens, J., dissenting) (“Respondent does not contend that there is a constitutional right to engage in conduct such as lap dancing.”).

¹⁰⁰ WILLIAM SHAKESPEARE, KING LEAR act 4, sc. 6.

¹⁰¹ LOUISE J. KAPLAN, FEMALE PERVERSIONS: THE TEMPTATIONS OF EMMA BOVARY 44 (1991).

¹⁰² SIGMUND FREUD, *Fetishism*, in 21 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 152, 154 (James Strachey et al. eds., James Strachey trans., 1961) (1927) [hereinafter FREUD, *Fetishism*].

the panic of castration anxiety for the male viewer. The woman's vagina—her bleeding hole—signifies not only a terrifying threat of castration to the male viewer; it also signifies a hole in language, a threat to the very possibility of stable meaning on which speech, and thus First Amendment law, depend.¹⁰³ “Fie, fie, fie!” indeed.

4. *Castration Anxiety*

In this subsection, I turn directly to Freud's theory of castration anxiety to offer a new reading of the G-string requirement. But before I go on, I want to address some problems that arise from invoking Freud at all. My analysis in this section relies on contemporary deconstructive readings of Freud and assumes to some extent a reader familiar with those readings and with the “Freud debates” more generally. These debates about Freud have been taking place not only within the narrow parameters of “Freud studies,” but across the humanities.¹⁰⁴ Although my description is an oversimplification, at its heart, the conflict is between Freud as scientist who continually promised biological proof, versus Freud as writer and cultural critic who approached biology and the body metaphorically and who continually subverted his own claims to authority, certainty, and mastery. It is this latter Freud who is most often invoked in the humanities right now, particularly in the study of language and meaning,¹⁰⁵ and it is this latter Freud to whom I refer here. On this view, Freud's work destabilized notions of scientific truth, rational knowledge, or epistemological certainty. Thus, in the argument that follows, I am *not* citing Freud as a “correct” scientist whose work can be proven. Instead, I invoke the Freud whose narrative of the human psyche,

¹⁰³ I turn to the connection between castration, language, and gender and the relevance of these concepts for First Amendment law in a companion piece to this Article. See Adler, *The Naked Female Body “Speaks,”* *supra* note 10. There I draw on the complex Lacanian notion that the “Woman” stands for what is “unrepresentable,” beyond language, and in fact, subversive of the possibility of meaning or mastery. In this way, female sexuality threatens the idea of a coherent and stable language on which the First Amendment depends. See, e.g., JACQUES LACAN, *God and The Jouissance of The Woman. A Love Letter*, in *FEMININE SEXUALITY* 137, 144 (Juliet Mitchell & Jacqueline Rose eds., Jacqueline Rose trans., 1982) (1975) (“There is no such thing as *The Woman* . . .”); see also JACQUES LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS* (Jacques-Alain Miller ed., Alan Sheridan trans., 1977) (1973); JACQUES LACAN, *The Signification of the Phallus*, in *ÉCRITS: A SELECTION* 281, 289 (Alan Sheridan trans., 1977) (1966) [hereinafter *ÉCRITS*].

¹⁰⁴ See, e.g., *WHOSE FREUD? THE PLACE OF PSYCHOANALYSIS IN CONTEMPORARY CULTURE* (Peter Brooks & Alex Woloch eds., 2000) (collecting essays from 1998 Yale interdisciplinary symposium organized to assess status of psychoanalysis as discourse in contemporary culture).

¹⁰⁵ See, e.g., *id.*; MARTIN GLISERMAN, *PSYCHOANALYSIS, LANGUAGE, AND THE BODY OF THE TEXT* (1996); AGNES PETOCZ, *FREUD, PSYCHOANALYSIS, AND SYMBOLISM* (1999).

regardless of whether it was true or not, was so powerful that it has irreversibly shaped our culture and our conceptions of ourselves.¹⁰⁶ As I will show, Freud's theory has surprising explanatory power when applied to the nude dancing cases.

Much of Freud's conception of the human personality depends on the following idea: The mere sight of the female genitals provokes terror in the form of castration anxiety in men.¹⁰⁷ Castration anxiety is not a marginal perversion that affects only a few sick patients. In the passage quoted above, Freud emphasizes the universality of castration anxiety: "Probably *no male human being* is spared the fright of castration at the sight of a female genital," he writes.¹⁰⁸

In Freud's account of the etiology of castration anxiety, it begins when the little boy catches sight of a female's genitals (usually his mother's), and discovers that she does not possess a penis. According to Freud, the

terror of castration . . . is linked to the sight of something. Numerous analyses have made us familiar with the occasion for this: it occurs when a boy, who has hitherto been unwilling to believe the threat of castration, catches sight of the female genitals, probably those of an adult, surrounded by hair, and essentially those of his mother.¹⁰⁹

¹⁰⁶ See, e.g., Thomas Nagel, *Freud's Permanent Revolution*, N.Y. REV. OF BOOKS, May 12, 1994, at 34 ("Great intellectual revolutionaries change the way we think. They pose new questions and devise new methods of answering them—and we cannot unlearn those forms of thought simply by discovering errors of reasoning on the part of their creators . . .").

¹⁰⁷ My analysis does not depend on a literal reading of the Freudian account of castration. Ultimately, I am influenced by Lacan's reading of castration as a metaphor for the idea of linguistic "lack." See *supra* text accompanying note 103. Castration thus becomes a metaphor of what is essential to the structure of language. It is also worth noting that the Freudian analysis of fetishism, see *infra* Part II.A.5, finds its complement in the Lacanian notion that the woman is desirable only if her lack is veiled. See, e.g., HENRY KRIPS, *FETISH: AN EROTICS OF CULTURE* 9 (1999) (theorizing fetish as instance of Lacan's "objet-a," which sustains possibility of desire by veiling lack).

¹⁰⁸ FREUD, *Fetishism*, *supra* note 102, at 154 (emphasis added). It is important to note the crucial centrality of castration anxiety to psychoanalytic theory. See, e.g., Juliet Mitchell, *Introduction-I*, in *FEMININE SEXUALITY*, *supra* note 103, at 6–8 (referring to castration anxiety as key to understanding sexual difference).

¹⁰⁹ FREUD, *Medusa's Head*, *supra* note 73, at 273. See also SIGMUND FREUD, *The Dissolution of the Oedipus Complex*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 173, 175–76 (James Strachey et al. eds., James Strachey trans., 1961) (1924) (referring to development of castration anxiety as "deferred effect"); SIGMUND FREUD, *Some Psychological Consequences of the Anatomical Distinction Between the Sexes*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 248, 252 (James Strachey et al. eds., James Strachey trans., 1961) (1925) (offering retroactive interpretation of castration anxiety). On the connection between visibility and Freud's theory, see Thomas Albrecht, *Apotropaic Reading: Freud's*

There are then two key steps. First, the little boy assumes that the mother has been castrated. Second, he fears that if she has been castrated, he too could suffer that same fate. The boy reasons that "if a woman had been castrated, then his own possession of a penis was in danger."¹¹⁰ So deep is his "horror"¹¹¹ upon this realization, that the boy panics as a grown man would if both the "Throne and Altar [were] in danger."¹¹²

Castration anxiety, foundational to Freud's understanding of the personality, has proved pivotal in contemporary cultural criticism. For example, some contemporary critics argue that the very presence of a woman as icon in film signals the threat of castration. In her classic essay on film theory, *Visual Pleasure and Narrative Cinema*, feminist critic Laura Mulvey relies on Freud's theory to explain cultural representations of women.¹¹³ Mulvey describes the presence of the woman in cinema as "bearer of the bleeding wound";¹¹⁴ in her account, "the woman as icon . . . always threatens to evoke the [castration] anxiety it originally signified."¹¹⁵ From this point of view, cultural representations of even clothed women conjure the threat of castration; certainly the stripper peeling down to complete nudity would do so.¹¹⁶

At this point, the reader may have (at least) two objections. Resistance to Freud's account of castration typically takes two different avenues:¹¹⁷ The first critique objects to the apparent phallocentrism of Freud's account.¹¹⁸ The second (and, in my experience, more

"*Medusa's Head*," LITERATURE & PSYCHOL., 1999 No. 4, at 1 (discussing visibility and play between presence and absence in Freudian theory of castration).

¹¹⁰ FREUD, *Fetishism*, *supra* note 102, at 153.

¹¹¹ SIGMUND FREUD, *On the Sexual Theories of Children*, in 9 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 209, 217 (James Strachey et al. eds., James Strachey trans., 1959) (1908) [hereinafter FREUD, *Sexual Theories of Children*] ("Legends and myths testify to the upheaval in the child's emotional life and to the horror which is linked with the castration complex . . .").

¹¹² FREUD, *Fetishism*, *supra* note 102, at 153; *see also* KAPLAN, *supra* note 101, at 45.

¹¹³ LAURA MULVEY, *Visual Pleasure and Narrative Cinema*, in VISUAL AND OTHER PLEASURES 14, 14 (1989).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 21.

¹¹⁶ "Laplanche would claim that perception and castration are ineluctably linked, and linked by way of the child's narcissism." Neil Hertz, *Medusa's Head: Male Hysteria Under Political Pressure*, in THE END OF THE LINE: ESSAYS ON PSYCHOANALYSIS AND THE SUB-LIME 161, 167 (1985).

¹¹⁷ I addressed previously objections to the invocation of Freud in general. *See supra* notes 103-05 and accompanying text (discussing objections to Freud as scientist).

¹¹⁸ The basis for finding phallocentrism in Freud's account, and thus for questioning its utility for feminist theory, is on one level quite obvious: His theory of castration and penis envy pictures the female genitals as mutilated and inferior to the male genitals. Of course, the debates over the utility of Freud for feminist theory are extensive and complex, as are the debates about the extent to which Freud's theories were rooted in a biological as

common) objection goes something like this: “Well, if female genitalia invoke such horror, then why are people so turned on by seeing women’s bodies?” Or, more directly, the objection goes like this (usually said with some male, heterosexual swagger): “Well, *I* am certainly not panicked by seeing women’s bodies.” (Freud himself suggested the relation between castration anxiety and what we would now call “homosexual panic.”)¹¹⁹

A clarification of Freud’s theory should solve this second concern. Freud acknowledged that men¹²⁰ *of course* feel excitement at the sight of the female genitalia, but that this excitement masks castration anxiety. As Sarah Kofman, a poststructuralist Freud critic, explains, “Woman’s genital organs arouse an inseparable blend of horror and pleasure; they at once awaken and appease castration anxiety.”¹²¹ In Freud’s famous *Medusa’s Head*, he explores this dual reaction in the context of the Medusa myth. Essentially, Freud posits that Medusa’s severed head, the Greek symbol of terror worn by

opposed to a cultural understanding of sex. I note here, however, that there is certainly not a “feminist” consensus on Freud and that many feminist theorists depend on Freud in their work. Indeed, many feminist critiques of Freud have proceeded by working within his structure of thinking rather than rejecting him outright. These subversive critiques have been particularly effective—see, for example, some of the essays in *IN DORA’S CASE: FREUD—HYSTERIA—FEMINISM* (Charles Bernheimer & Claire Kahane eds., 2d ed. 1990) as well as Sarah Kofman’s scholarship. *E.g.*, KOFMAN, *supra* note 1. For a feminist defense of Freud and Lacan, see Juliet Mitchell’s introduction to Lacan’s *Feminine Sexuality*. Mitchell, *supra* note 108, at 8. For another defense of Lacan on feminist grounds, see ELLIE RAGLAND-SULLIVAN, *JACQUES LACAN AND THE PHILOSOPHY OF PSYCHOANALYSIS* 267–308 (1986).

¹¹⁹ See the discussion of homosexuality and fetishism, *infra*, Part II.A.5. See also Amy Adler, *Gender, Power and Heteronormativity In Sexual Performance* (Aug. 7, 2005) (unpublished manuscript, on file with the *New York University Law Review*).

¹²⁰ I use the word “men” advisedly. Freud’s account addresses a male, heterosexual perspective. What about the straight or lesbian woman’s reaction? Women who view the naked female genitals may also be reminded of their own form of castration complex: penis envy. Freud writes:

The castration complex of girls is also started by the sight of the genitals of the other sex. They at once notice the difference and, it must be admitted, its significance too. They feel seriously wronged, often declare that they want to “have something like it too”, and fall a victim to “envy for the penis”

SIGMUND FREUD, *New Introductory Lectures on Psycho-Analysis*, in 22 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 5, 125 (James Strachey et al. eds., James Strachey trans., 1964) (1932) [hereinafter FREUD, *New Introductory Lectures*]. As for the woman who feels sexual excitement at the sight of the female genitals, Freud at times suggested that female homosexuality could be interpreted as one of a number of substitutes for the lost penis that a female subject might seek out. *Id.* at 130.

¹²¹ KOFMAN, *supra* note 1, at 85. I note here Louis Marin’s reading of Medusa as both attractive and repulsive. “We have, then, two Medusas in one: a horrible monster as well as a striking beauty” Louis Marin, *Caravaggio’s “Head of Medusa”: A Theoretical Perspective*, in *TO DESTROY PAINTING* (Mette Hjort trans., 1977) (1977), reprinted in THE MEDUSA READER 137, 140 (Marjorie Garber & Nancy J. Vickers eds., 2003).

Athena the virgin goddess to repel all sexual desire, serves not only as “a representation of the female genitals,” but also as a defense against this sight.¹²² (He observes more broadly that things that arouse horror in themselves often “serve actually as a mitigation of the horror.”¹²³) Noting that the terror of seeing Medusa’s head is always accompanied in the myth by turning to stone, Freud reads this stiffening as signifying an erection; the erection then serves as a consolation to the spectator that he is “still in possession of a penis.”¹²⁴ Thus, the horror at the sight of the woman’s genitals has as its counterpart the “erect male organ.”¹²⁵ The snakes of hair on Medusa’s head also represent the lost penis, now multiplied.¹²⁶ Indeed, man’s display of his penis in sexual relations with women bears a note of defiance. It is, Freud writes, as if “to say: ‘I am not afraid of you. I defy you. I have a penis.’”¹²⁷ Thus, one defense against castration anxiety, revealed in the story of Medusa’s head, is sexual excitement itself.

5. *The Fetish*

Yet in spite of the triumph of pleasure over anxiety in Freud’s account, the victory is always fragile. And the need to secure this fragile victory is urgent; Freud notes that there are risks of surrendering to the horror. Indeed, castration anxiety may turn men away from women’s bodies altogether; so great is its power that Freud marvels that more men do not turn to homosexuality as a refuge from the confrontation with women’s bleeding wound. He admits that he is puzzled as to why a “great majority” of men manage to remain heterosexual in the face of female genitalia.¹²⁸ Given the persistence of castration anxiety and its threat to the very institution of heterosexuality, a further solution is often required.

The solution is the fetish. Freud writes: “[T]he fetish is a substitute for the woman’s (the mother’s) penis that the little boy once believed in and—for reasons familiar to us—does not want to give

¹²² FREUD, *Medusa’s Head*, *supra* note 73, at 273–74. Note that others have offered readings that emphasize the peculiarly feminine horror of the Medusa. “[W]hatever the horror the Medusa represents to the male imagination, it is in some sense a female horror. In mythology, the Medusa was said to be powerless against women, for it was her feminine beauty that constituted the mortal threat to her admirers.” John Freccero, *On Dante’s Medusa*, in *MEDUSA: THE LETTER AND THE SPIRIT* (1972), reprinted in *THE MEDUSA READER*, *supra* note 121, at 109, 115.

¹²³ FREUD, *Medusa’s Head*, *supra* note 73, at 273.

¹²⁴ *Id.*

¹²⁵ *Id.* at 274.

¹²⁶ *Id.*

¹²⁷ *Id.*; see also KOFMAN, *supra* note 1, at 85 (discussing this passage).

¹²⁸ FREUD, *Fetishism*, *supra* note 102, at 154–55.

up."¹²⁹ Basically, belief in the fetish is an exercise in denial. The fetish allows the subject to maintain, despite evidence to the contrary, that castration is not a danger to him and, in fact, that it has not even befallen the woman.¹³⁰ By focusing on a compensatory object—be it a shoe, or a piece of cloth (perhaps a G-string?)—the male viewer of female sexual organs “masters” the threat of castration posed by the very sight of her body. (The fetish may explain a commonly held belief: that the body becomes less sexy when totally nude.¹³¹ In the logic of fetishism, we might say that the body loses its sexual appeal when deprived of its fetish, because then its horror is in plain sight.) In this way, the fetish “remains a token of triumph over the threat of castration and a protection against it.”¹³² Indeed, the fetish is a triumph over not only castration and the woman who signifies this threat, but over homosexuality as well. According to Freud, the fetish “saves the fetishist from becoming a homosexual, by endowing women with the characteristic which makes them tolerable as sexual objects.”¹³³ Yet even this triumph is incomplete.¹³⁴ Despite the fetishist’s repression of castration anxiety, there remains “an aversion, which is never absent in any fetishist, to the real female genitals.”¹³⁵

What form does the fetish take?¹³⁶ In the Freudian narrative, it takes the form of whatever the little boy sees just before he witnesses his mother’s castration: often a shoe, or a piece of hair or fur (the

¹²⁹ *Id.* at 152–53.

¹³⁰ *Id.*

¹³¹ See, e.g., Roland Barthes, *Striptease*, in *MYTHOLOGIES* 84, 84 (Annette Lavers trans., 1972) (1957) (“Woman is desexualized at the very moment when she is stripped naked.”).

¹³² FREUD, *Fetishism*, *supra* note 102, at 154.

¹³³ *Id.*

¹³⁴ Inherent within the fetish itself is an undecidability. Freud writes that the fetish allows the fetishist to believe both “that women were castrated and that they were not castrated.” *Id.* at 156. For a fascinating discussion of Freud’s theory on this point, see KOFMAN, *supra* note 1, at 86–89. Kofman argues that the logic of fetishism is “an undecidable compromise.” *Id.* at 88. A fetish hides woman’s wound, and thus leaves doubt as to whether woman is or is not castrated. It is therefore a compromise “between denial and affirmation of castration.” *Id.* at 86.

For further discussion of the relation between the fetish and undecidability, see JACQUES DERRIDA, *GLAS* 231–32 (1974). For Lacan’s analysis, see Jacques Lacan & Wladimir Granoff, *Fetishism: The Symbolic, the Imaginary and the Real*, in *PERVERSIONS: PSYCHODYNAMICS AND THERAPY* (Sandor Lorand & Michael Balint eds., 1956); and see also KRIPS, *supra* note 107 (blending psychoanalytic and social theory to analyze Lacan’s theory of fetishism).

¹³⁵ FREUD, *Fetishism*, *supra* note 102, at 154.

¹³⁶ On one reading, the cultural emphasis on a perfected, artificial presentation of the woman’s body (as in pornography, fashion, or celebrity culture) is itself fetishistic. See, e.g., JACQUELINE ROSE, *SEXUALITY IN THE FIELD OF VISION* 232 (1986) (“[W]omen are meant to *look* perfect, presenting a seamless image to the world so that the man, in that confrontation with difference, can avoid any apprehension of lack.”).

latter two represent in the unconscious the mother's pubic hair).¹³⁷ Freud also notes that undergarments are frequently fetishes. He explains that "pieces of underclothing, which are so often chosen as a fetish, crystallize the moment of undressing, the last moment in which the woman could still be regarded as phallic."¹³⁸

It should be apparent by now that the G-string is a perfect fetish. Although a small piece of fabric, it hides what is most important, the wound of castration, and thereby allows the viewer to maintain the fantasy that the woman has a penis (thus preserving his dream of the phallic mother). The G-string also takes a form that would suit a fetishist: It is underclothing, and therefore "crystallizes the moment of undressing," the moment before the boy was ushered into a new world of anxiety—and peril.¹³⁹ Suddenly all those references to danger and violence in *Barnes* and *Pap's* make sense: The sight of the vagina is dangerous and does lead to horrifying and violent possibilities, if only in the unconscious mind of the viewer.¹⁴⁰ The G-string as solution is hard to make sense of in the world of First Amendment or

¹³⁷ FREUD, *Fetishism*, *supra* note 102, at 155.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ The question might arise: Why does a market persist for all nude dancing as opposed to G-string clad dancing? One answer is that although castration anxiety is universally shared by men, according to Freud, fetishism is not. Most men, in Freud's account, are able to triumph over castration anxiety and to enjoy the pleasure (mixed with horror) of viewing the female genitals; they do not require the further help of the fetish. See FREUD, *Fetishism*, *supra* note 102, at 152, 154 ("Why some people become homosexual as a consequence of [castration anxiety], while others fend it off by creating a fetish, and the great majority surmount it, we are frankly not able to explain.") (emphasis added). Still, some of these same men might enjoy the relief and comfort that the fetish lends to a sexual experience. (This is in contrast to the fetishist who does not merely enjoy the fetish, but requires it in order to function.) An alternative Freudian reading might even say that the vagina itself becomes a fetish for some, in the sense that a fetish may function by displacement. See SIGMUND FREUD, *Splitting of the Ego in the Process of Defence*, in 23 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 275, 277 (James Strachey et al. eds., James Strachey trans., 1964) (1938) ("The boy did not simply contradict his perceptions and hallucinate a penis where there was none to be seen; he effected no more than a displacement of value—he transferred the *importance* of the penis to another part of the body . . ."). I also note that many strippers' bodies are so artificially enhanced, e.g., with fake breasts, that they are already fully fetishized. See *supra* note 136 (discussing artificial perfection of female body as serving fetishistic function to hide abjection and castration).

But then a second question arises: Why did the Court and the legislators who enacted G-string laws prefer the fetish? I believe that from an institutional perspective, the Court and the legislature would of course be interested in pursuing precisely what a fetish accomplishes: warding off violence, chaos, and disorder. Class may have also played some role in the Court's preference for the G-string in contrast to the preference shown by some sector of the market for all-nude dancing. Judge Posner wrote at some length of the class-based distaste for the lowly activity of nude dancing. See, e.g., *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1093–96, 1098 (7th Cir. 1990) (en banc) (Posner, J., concurring) (dis-

conscious logic. But in the drama of castration anxiety and fetishism, the function performed by the G-string could not be more urgent or necessary. By warding off the threat of castration, it restores order and function.¹⁴¹

My psychoanalytic interpretation of the G-string in these cases therefore contradicts the conclusion of both the *Barnes* and *Pap's Courts*, that a G-string is only a “minimal”¹⁴² imposition on the meaning of the speech, a “restriction [that] leaves ample capacity to convey” the same message.¹⁴³ As my reading shows, there is a dramatic difference in meaning between the naked female genitals and G-string-clad female genitals. While the former requires a confrontation with castration, dismemberment, and homosexuality, the latter wards them off.

B. The Fetishistic Relationship Between the Cases: How the Cases Reenact the Drama of Castration and Fetishism

Strangely, the jurisprudential progression from *Barnes* to *Pap's* replicates the fetishism that the opinions approve. Here I read *Barnes*

cussing role of class in censorship of nude dancing as opposed to other forms of expression); see also *infra* note 222 (discussing role of class in history of censorship).

¹⁴¹ The Court's repeated invocation of the value of modesty reinforces my reading: that the opinion resorts to a fetishistic solution. For example, in *Barnes*, the plurality opines: “Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose.” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991). Freud views female modesty itself as a fetish, employed by women to attract men who would otherwise be driven away by a confrontation with the vagina. For example, in his essay *Femininity*, Freud writes that the purpose of female shame about nudity is to serve as a “concealment of genital deficiency” in women. FREUD, *New Introductory Lectures*, *supra* note 120, at 132. Sarah Kofman observes here that the artifice of shame and modesty allows women to “excite and charm men, who would otherwise recoil in horror before that gaping wound that threatens to contaminate them, and who would then be condemned to homosexuality.” KOFMAN, *supra* note 1, at 49–50. She reasons that women have a stake in veiling their nudity: “[M]en and women alike benefit from the fact that the feminine ‘riddle’ is not solved.” *Id.* Given this analysis, the Court's reliance on the notion of “modesty” reinforces my reading of fetishism. In its discussion of morality, the *Barnes* Court invokes the founding story of modesty, the biblical story of Adam and Eve, to which the Court traces the offense of public nudity. *Barnes*, 501 U.S. at 568.

¹⁴² *City of Erie v. Pap's A.M.*, 529 U.S. 277, 294, 301 (2000) (emphasis added).

¹⁴³ *Id.* at 301; see also *Barnes*, 501 U.S. at 572. In his thoughtful opinion when *Barnes* was heard in the Seventh Circuit, Judge Posner concluded, for different reasons than I do, that the G-string may significantly change the meaning of the speech. *Miller*, 904 F.2d at 1089–1104. “It would violate the First Amendment to require museums to place figleaves and brassières on their paintings and statues. Perhaps the Indiana statute effects a parallel mutilation of striptease dancing.” *Id.* at 1102; cf. *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1273–74 (11th Cir. 2003) (remanding for evaluation under *O'Brien's* fourth prong nudity ordinance requiring more coverage than pasties and G-string because it might “significantly impact” erotic message).

as the castrated, feminine decision and *Pap's* as the Supreme Court's fetishistic solution. The cases thus play out within First Amendment doctrine precisely the drama of castration and fetishism that I described above. The Pennsylvania Supreme Court in *Pap's* had depicted *Barnes* as a weak, wounded decision; it was as if it suffered from the very problems that attend the castrated woman. (Law review articles had already spearheaded this view of *Barnes*, terming the case, for example, "incomprehensible" and "virtually useless.")¹⁴⁴ Quoting in part the Pennsylvania Supreme Court's decision, the *Pap's* plurality described the *Barnes* decision as if it had suffered some sort of unsightly injury: It was "splintered," "non-harmonious," and "fragmented."¹⁴⁵ As the state court below had concluded, *Barnes* "simply had no clear point."¹⁴⁶ There was just *something* missing. (I wonder what?)

It was not merely that the *Barnes* decision was wounded, but the way in which it was wounded that has significance for this reading. *Barnes* was not just broken but rather "fragmented" and "splintered."¹⁴⁷ The multiplicity of the *Barnes* decision, the Court's inability to speak in a unified voice, prefigures a crisis in meaning that the female body invokes: her threat to the possibility of stable singular meaning.¹⁴⁸ For example, Judith Butler sets forth the Lacanian idea that multiple meanings in language, as opposed to a unified message, always carry the association of femininity: Describing Lacan's work, Butler writes that "language . . . structures the world by suppressing multiple meanings (which always recall the libidinal multiplicity which characterized the primary relation to the maternal body) and instating univocal and discrete meanings in their place."¹⁴⁹

The *Pap's* decision served a fetishistic role in relation to *Barnes*. It set out to "clarify" *Barnes* and to rescue the decision from its embarrassing castrated predicament.¹⁵⁰ And yet, in true fetishistic

¹⁴⁴ Howard, *supra* note 46, at 897; see also *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 297 (1991) (criticizing "fractured" *Barnes* Court for creating "uncertainty").

¹⁴⁵ *Pap's A.M.*, 529 U.S. at 285 (citing *Pap's A.M. v. City of Erie*, 719 A.2d 273, 277 (Pa. 1998)). Justice Stevens in his dissent called the *Barnes* decision "fractured." *Id.* at 318.

¹⁴⁶ *Pap's A.M. v. City of Erie*, 719 A.2d at 277.

¹⁴⁷ *Pap's A.M.*, 529 U.S. at 285 (citing *Pap's A.M. v. City of Erie*, 719 A.2d at 278).

¹⁴⁸ See *supra* note 144.

¹⁴⁹ JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 101 (2d ed. 1999). The use of the word "fractured" to describe *Barnes* recalls the notion of the "fractured sexual subject" in Lacan. See, e.g., Mitchell, *supra* note 108, at 26.

¹⁵⁰ A common strategy in dealing with metaphorical castration is attempting to fix it, even if the solution is based on a mere fantasy of coherence. Thus when Freud wrote about fixing the fragment of Dora's broken-off, partial case analysis, others psychoanalyzed Freud's remarks as evidencing an epistemological castration anxiety. See Toril Moi,

fashion, the *Pap's* solution is flimsy and weak; like all fetishes, it is imperfect.¹⁵¹ It is no wonder that Kathleen Sullivan described the decision as a "fig leaf."¹⁵² To the extent that *Pap's* may have appeared to achieve greater clarity and unity than *Barnes*,¹⁵³ it did so only by denying, and even covering up, its own doctrinal complexity. In its thoughtless conflation of the secondary effects doctrine and the *O'Brien* analysis, *Pap's* rewrote two doctrines into one.¹⁵⁴ Justice Stevens, writing for the dissenters, commented that "[t]he Court's commendable attempt to replace the fractured decision in *Barnes v. Glen Theatre, Inc.* with a single coherent rationale is strikingly unsuccessful; it is supported neither by precedent nor by persuasive reasoning."¹⁵⁵

Indeed, *Pap's* blithe and superficial reading seems to deny not only the doctrinal incompatibility between *O'Brien's* incidental burdens doctrine and the secondary effects doctrine, but the deeper incoherence that characterizes current First Amendment law, which this case threatened to expose.¹⁵⁶ *Pap's* is based on a fantasy of coherence in free speech doctrine that simply does not hold up. My point is that the female body and the fear it provokes often elicit that compensa-

Representation of Patriarchy: Sexuality and Epistemology in Freud's Dora, in IN DORA'S CASE: FREUD-HYSTERIA-FEMINISM, *supra* note 118, at 181, 196-97. Freud writes,

In face of the incompleteness of my analytic results, I had no choice but to follow the example of those discoverers whose good fortune it is to bring to the light of day after their long burial the priceless though mutilated relics of antiquity. *I have restored what is missing*

SIGMUND FREUD, *Fragment of an Analysis of a Case of Hysteria*, in 7 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 7, 12 (James Strachey et al. eds., James Strachey trans., 1953) (1901) (emphasis added). One might remark that Freud created rather than restored what was missing.

¹⁵¹ See *supra* note 134 (discussing views of fetish as "incomplete" and "compromise" by, among others, Freud, Lacan and Derrida).

¹⁵² Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 738 (2001).

¹⁵³ The decision still yielded only a plurality opinion, yet Justice Souter, concurring in part and dissenting in part, stated that he agreed with the plurality's analytic framework, and only disagreed with part of its application. *Pap's A.M.*, 529 U.S. at 310-11 (Souter, J., concurring in part and dissenting in part) ("I . . . agree with the analytical approach that the plurality employs in deciding this case."). In contrast to *Barnes*, one general approach had thereby gained the approval of five Justices. Justice Scalia maintained his separate concurring position in both cases. *Id.* at 307-10. Yet the rest of the majority now advanced one theory instead of two as in *Barnes*.

¹⁵⁴ For an analysis of the dangers of this conflation, see *Pap's A.M.*, 529 U.S. at 325-26 (Stevens, J., dissenting).

¹⁵⁵ *Id.* at 318 (Stevens, J., dissenting) (citation omitted).

¹⁵⁶ See generally Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1249-50 (1995) ("First Amendment doctrine is . . . striking chiefly for its superficiality, its internal incoherence").

tory fantasy of coherence. *Pap's* erected a fetish, a doctrinal structure that hid the messy fragmentation it confronted.¹⁵⁷

III

STRIPPING THE CASES: TROPES OF THE DANGEROUS BODY

“Can it be that in the West, in our time, the female body has been constructed not only as a lack or absence [of the penis] but with more complexity, as a leaking, uncontrollable, seeping liquid; as formless flow; as viscosity, entrapping, secreting; as lacking not so much or simply the phallus but self-containment . . . [as] a disorder that threatens all order?”

—Elizabeth Grosz, *Volatile Bodies*¹⁵⁸

Although castration anxiety might be the basis for the danger attributed to the nude female body, the missing penis does not tell the whole story. On the foundation of lack that defines the castrated woman, our culture has erected a construction of the woman's body as a sign of danger, debasement, disorder, and disease. In this section, I re-read the cases from a broader cultural perspective by exploring these other visions of the female body and tracing their resonance within the opinions. I tease out the connection between the legal and legislative analysis of nude dancing on the one hand, and the cultural anxieties surrounding the female body on the other. Ultimately, I show how the drama of the woman as dangerous, infectious, and chaotic finds a reenactment in the cases, where the stripper comes to signify to the Court a threat to the logic and cleanliness of the First Amendment.

The association of the woman with danger and mayhem is such an old story, not to mention a persistent one, that it is hard to know where to begin. You could start with Eve, responsible for the downfall of mankind (and summoned up by the *Barnes* Court as evidence that public nudity offends morality).¹⁵⁹ Of course, the Greeks also blamed a woman for the downfall of mankind: They had Pandora, whom the gods put on earth “to be a sorrow to men” by introducing evil, work, and sickness into the world.¹⁶⁰ The list could go on and on.

¹⁵⁷ Cf. Rose, *Introduction II*, in *FEMININE SEXUALITY*, *supra* note 103, at 43 (“Meaning is only ever erected; it is set up and fixed.”).

¹⁵⁸ GROSZ, *supra* note 5, at 203.

¹⁵⁹ See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991) (citing *Arderly v. State*, 56 Ind. 328, 329–30 (1877)).

¹⁶⁰ HESIOD, *The Works and Days*, in *THE WORKS AND DAYS, THEOGONY, THE SHIELD OF HERAKLES* 15, 25–29 (Richmond Lattimore trans., 1959) (700 B.C.).

I do not attempt to set forth yet another examination of the cultural construction of the woman as dangerous. (Some might say that to do so would account for most of Western culture.) Instead, my goal in this Part is more modest. I wish to explore a few variations on the theme of the dangerous woman that have particular relevance for the nude dancing cases, which unwittingly reify these cultural tropes. I begin with the association of the woman's body, and particularly her orifices, with danger in the form of disease and impurity, a link that the *Pap's Court* repeats.¹⁶¹ I then turn to two cultural representations of menace surrounding the *dancing* female body, and I show how the Court's analysis of the danger and disease attending nude dancing draws on and reproduces these cultural anxieties.

The longstanding cultural attribution of danger and disease to the female body corresponds to much of Freud's theory of castration. Indeed, Freud himself claimed that "[l]egends and myths testify" to the power of the castration complex.¹⁶² I do not highlight this correlation between Freud's theories and the tropes that follow to prove that Freud was "right" or that he had discovered some truth about gender. Like the Supreme Court's nude dancing jurisprudence, Freud was a product of, as well as an influence on, a deep-rooted cultural tradition. Perhaps Freud's theory of castration was itself symptomatic of the cultural fear of female sexuality that I explore below.

Through my examination of the cultural roots of these opinions, I seek to problematize further the nude dancing cases, and more broadly, the foundations of the secondary effects doctrine regarding sexual speech.¹⁶³ Although they do so far less explicitly than the nude dancing cases, the secondary effects cases often justify restrictions on speech based on associations between the sexualized female body and danger, crime, and disease.¹⁶⁴ Yet as I noted before, Judge Posner has

¹⁶¹ My account draws primarily on literature and a cultural tradition that assumes (albeit silently) that the woman in question is white. I thus leave aside (I hope for another day) the very important question of how race intersects with gender. The cultural tropes producing (white) women as dangerous and abject apply also to women of color. In addition, however, the sexuality of women of color has often been depicted as excessive and animalistic. These depictions raise a host of interesting questions that I do not address here. See, e.g., Ella Shohat, *Introduction*, in *TALKING VISIONS: MULTICULTURAL FEMINISM IN A TRANSNATIONAL AGE* 1, 23 (Ella Shohat ed., 1998) (describing cultural and political uses of images "of black, Latin, or Arab women in 'heat'").

¹⁶² FREUD, *Sexual Theories of Children*, *supra* note 111, at 217.

¹⁶³ See *supra* notes 50–66 and accompanying text (discussing secondary effects doctrine); see also *Boos v. Barry*, 485 U.S. 312, 337–38 (1988) (Brennan, J., concurring in part and concurring in judgment) (arguing that secondary effects doctrine is limited to sexual speech).

¹⁶⁴ Secondary effects cases address sexual speech, such as pornography, without addressing gender. In general, the cases do not pause to consider that the vast majority of pornography and other "adult" speech (of course, not all) displays the female body for a

written of this body of law that the “ostensible justification” for nude dancing restrictions and secondary effects restrictions on erotic materials—connections to crime and disorder—“cannot be taken seriously.”¹⁶⁵ In this Part, I suggest that a different justification explains the nude dancing cases: They are driven by longstanding dread of female sexuality. This is a justification that should cause us to pause before we build laws upon it. The nude dancing cases and, to an extent, the secondary effects cases more generally, are built on a hidden foundation of sexual panic.

Ultimately, by reframing the cases in this context, I hope to unsettle some of our assumptions about legal sources to show that when the Court writes about the female body it is constrained not just by legal precedents, but also by unacknowledged cultural ones. As my reading below will suggest, irrational forces shape the Court’s supposedly rational analysis.

A. *The Infectious, Abject Body*

“The man is afraid of being weakened by the woman, infected with her femininity”

—Sigmund Freud, *The Taboo of Virginity*¹⁶⁶

As we have discussed, one iteration of this idea of the dangerous woman links the female body with danger in the form of disease and infection. The *Pap’s* case repeats that link. The city council in Erie, Pennsylvania had stated in the preamble to its G-string legislation that nude dancing posed a threat to the “public health” in general, and that in particular, it led to the “spread of sexually transmitted diseases” (in spite of there being no sexual contact between strippers and patron).¹⁶⁷ The Supreme Court accepted and reiterated that assumption. The threat of the female body as infectious is also manifest in the Court’s opinions themselves, which depict the tawdry subject of the nude female body as if it were contagious, a threat to the clean boundaries of the body of First Amendment law.

male, heterosexual audience. I suggest that in spite of the silence in the cases on this subject, the gendered nature of the speech nonetheless affects the analysis.

¹⁶⁵ Posner, *supra* note 88, at 742.

¹⁶⁶ SIGMUND FREUD, *The Taboo of Virginity, in Contributions to the Psychology of Love*, 11 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 191, 198–99 (James Strachey et al. eds., James Strachey trans., 1957) (1918); see also Joan Riviere, *Womanliness as a Masquerade*, in FORMATIONS OF FANTASY 35, 43 (Victor Burgin et al. eds., 1986) (“[W]omanliness [itself is] a mask, behind which man suspects some hidden danger”).

¹⁶⁷ *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 279 (Pa. 1998).

Why the association of the female body with disease? On one reading, the connection seems rooted in logic. In *Barnes*, for example, Justice Souter's concurrence relies on the government's claim that nude dancing leads to an increase in prostitution,¹⁶⁸ a connection the plurality reiterates in *Pap's*.¹⁶⁹ Since it is commonly (though not universally) assumed that prostitutes spread sexually transmitted diseases,¹⁷⁰ it seems plausible to draw a connection between nude dancing and disease, with prostitutes serving as the intermediary. I seek to show here, however, that unrecognized cultural anxieties also enter the Court's analysis. In particular, the opinions draw on entrenched cultural constructions of the female body as impure and diseased, as a marker of what Kristeva called the "abject."¹⁷¹

The association of the woman's body with infection has a long and fevered history. Describing the link between femininity and "contagion and disorder," Elizabeth Grosz writes that "[t]he representation of female sexuality as an uncontainable flow, as seepage associated with what is unclean . . . has enabled men to associate women with infection, with disease"¹⁷² Kristeva, whose theory of abjection raised the investigation of dirt to an art form, offers an analysis of this association between the female body and abjection. At the risk of oversimplifying, Kristeva starts with the position that the child comes into his fantasy of having a defined, clean self by repudiating

¹⁶⁸ Souter also cited two cases to support this conclusion: *United States v. Marren*, 890 F.2d 924, 926 (7th Cir. 1989) (associating prostitution with nude dancing establishment); and *United States v. Doerr*, 886 F.2d 944, 949 (7th Cir. 1989) (same). *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 583 (1991) (Souter, J., concurring in judgment). Disease was not explicitly mentioned in the Supreme Court's opinion in *Barnes*.

¹⁶⁹ *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297-98 (2000).

¹⁷⁰ See, e.g., *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1113 (7th Cir. 1990) (en banc) (Coffey, J., dissenting) (connecting nude dancing to prostitution and sexually transmitted diseases, including AIDS). But see Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 CAL. L. REV. 523, 546, 550 (2000) (concluding that "[t]he facts do not support the assumption that commercial sex workers are primary transmitters of venereal disease," and noting that "there is substantial evidence that women who work in commercial sex are far more likely than other people to use condoms and engage in safer sex practices that prevent the transmission of disease.").

¹⁷¹ See generally JULIA KRISTEVA, *POWERS OF HORROR: AN ESSAY ON ABJECTION* 102 (Leon S. Roudiez trans., Columbia Univ. Press 1982) (1980) (describing imagery in Leviticus depicting female body as quintessentially abject and threatening).

¹⁷² GROSZ, *supra* note 5, at 203, 206. For a discussion of the dependence of the subject on the abject, and the threat that the abject therefore poses to the subject, see JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* 2-8 (1993) ("[T]he subject is constituted through the force of . . . abjection.").

The categorization of the female body as abject has a further implication for my analysis. The abject body is both threatening and lowly, like a piece of refuse. This aspect of abjection surfaces in the worries expressed by some courts about the triviality and degradation they might bring to the First Amendment just from "touching" the female body in their analysis. See *infra* notes 181-183 and accompanying text.

the mother's body, with which he was once one.¹⁷³ The mother's body, and ultimately the female body, comes to represent the improper, the unclean, and the threat of engulfment.¹⁷⁴ Kristeva and others dwell on the female body's fluidity and penetrability as markers of abjection: The flow of menstrual blood and the body's fluctuations in pregnancy serve as sources of this association.¹⁷⁵ Simone de Beauvoir captured the fluid quality of this female abjection very well in *The Second Sex*, when she wrote: "woman lies in wait like the carnivorous plant, the bog, in which insects and children are swallowed up. She is absorption, suction, humus, pitch and glue, a passive influx, insinuating and viscous"¹⁷⁶

Although the woman's body in general bears these associations with dirt and disease, the orifices of the body are particularly threatening. Mary Douglas, for example, in her work *Purity and Danger*, tied the polluting threat of the body specifically to its orifices.¹⁷⁷ Once again, the solution of the G-string to cover up the female genitals takes on a new meaning when viewed from this perspective.¹⁷⁸

¹⁷³ KRISTEVA, *supra* note 171, at 13 ("The abject confronts us . . . with our earliest attempts to release the hold of *maternal* entity [The child pursues] a reluctant struggle against what, having been the mother, will turn into an abject."); see also JULIA KRISTEVA, *BLACK SUN: DEPRESSION AND MELANCHOLIA* 27-28 (Leon S. Roudiez trans., Columbia Univ. Press 1989) (1987) ("For man and for woman the loss of the mother is a biological and psychic necessity, the first step on the way to becoming autonomous.").

¹⁷⁴ KRISTEVA, *supra* note 171, at 13, 70-73.

¹⁷⁵ *Id.* at 71 (describing defilements of excrement and menstrual blood as stemming "from the *maternal* and/or the feminine, of which the maternal is the real support"); *id.* at 99-101 (exploring pregnant body in Leviticus and its associations with impurity and abjection). For discussions of the female body as a marker of abjection, see GROSZ, *supra* note 5, at 202-07. See also Barbara Creed, *Lesbian Bodies: Tribades, Tomboys and Tarts*, in *FEMINIST THEORY AND THE BODY: A READER* 111-12 (Jane Price & Margrit Shildrick eds., 1999) (arguing that Kristeva portrays female body as "quintessentially" abject).

¹⁷⁶ SIMONE DE BEAUVOIR, *THE SECOND SEX* 406-07 (H.M. Parshley ed. & trans., Knopf 1980) (1949). In an essay on the photographer Cindy Sherman, Mulvey links this apprehension of the female body's threatening decay to the wound of castration. Mulvey claims that the fetishization of the female body, the emphasis on its cosmetically perfected surface, conceals the hidden abjection. Laura Mulvey, *A Phantasmagoria of the Female Body: The Work of Cindy Sherman*, 188 *NEW LEFT REV.* 136 (1991).

¹⁷⁷ She writes in particular that "bodily orifices seem to represent points of entry or exit to social units" MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* 4 (1966).

It is interesting to observe here the connection drawn at the turn of the century between female criminal violence and menstruation. See HAVELOCK ELLIS, *MAN AND WOMAN: A STUDY OF HUMAN SECONDARY SEXUAL CHARACTERS* 346 (A. & C. Black 1926) (1899) ("Whenever a woman commits a deed of criminal violence, it is extremely probable that she is at her monthly period.").

¹⁷⁸ This reading also gives insight into the requirement that pasties cover dancers' nipples. Describing the abject, Elizabeth Grosz argues that the female breasts are "a site of potential social danger" because they are associated with the flow of milk. GROSZ, *supra* note 5, at 207. A further reading of the pasties requirement also arises here. One psycho-

It is fitting that the woman's body also appears as diseased on a deeper level in these cases, as a threat to the First Amendment itself, as if the dirty sexual subject threatened to infect the clean realm of First Amendment law.¹⁷⁹ The need to barricade the female body within strict boundaries comes to symbolize the doctrinal danger at play in these cases. Mary Douglas writes about the symbolic power of the body: "The body is a model which can stand for any bounded system. Its boundaries can represent any boundaries which are threatened or precarious."¹⁸⁰ In my view, anxiety about the threatened boundaries of the body of First Amendment law underlies the Court's analysis. Indeed, there is a palpable anxiety about the degradation that the judiciary might bring to the body of First Amendment law just by "touching" the female body in its analysis and by bringing the female body into the corpus of First Amendment "speech."¹⁸¹

Consider, for example, the image of a paradise lost evoked in Judge Cudahy's opinion when *Barnes* was in the Seventh Circuit: "[T]he need to invoke the First Amendment here strikes me as a bit trivializing and, perhaps, unworthy. . . . [T]he high purposes of the Amendment seem, in these circumstances, in some danger of being lost."¹⁸² Judge Cudahy's statement recalls Justice Burger's dissent in *Schad v. Borough of Mount Ephraim*, a zoning case in which the Court first tangentially discussed the expressive value of nude dancing. Justice Burger wrote that "[t]o invoke the First Amendment to protect the activity involved in this case trivializes and demeans that great Amendment."¹⁸³ Once again, the female body plays its role

analyst reasoned that the child's loss of the mother's nipple during weaning was the root of the castration complex and that retrospectively, the lost nipple becomes, in the child's mind, a castrated penis. August Stärcke, *The Castration Complex*, 2 INT'L J. OF PSYCHOANALYSIS 179, 182-83 (1921). In this light, the requirement of the pasties would be another act of fetishistic covering, consistent with my reading of castration anxiety.

¹⁷⁹ After all, to write about vaginas and G-strings is not an easy subject for most people, let alone for an august institution that must be concerned about its own legitimacy. To write about female sexuality is itself a way of approaching castration anxiety. As Sarah Kofman has written, "[t]o write about female sexuality is to disclose a dangerous secret, is in one way or another to display openly, to dis-cover, woman's fearsome sex." KOFMAN, *supra* note 1, at 20. And yet, this was the task that the Court undertook. For discussion of the anxiety manifest in the opinions, see *infra* pages 1146-47.

¹⁸⁰ DOUGLAS, *supra* note 177, at 116.

¹⁸¹ The Court's obvious unease manifested itself in various ways: its relegation of the speech to the previously unmentioned "perimeter" of the First Amendment, its paradoxical treatment of the speech as simultaneously trivial and dangerous, and its joking tone.

¹⁸² *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1089 (7th Cir. 1990) (en banc) (Cudahy, J., concurring).

¹⁸³ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 88 (1981) (Burger, C.J., dissenting).

as threatening and lowly, spreading its abjection to whatever it touches.

B. *The Dangerous, Diseased, Dancing Body*

"[T]he dancer, the mortal woman, the soiled vessel, ultimate cause of every sin and every crime."

—Joris-Karl Huysmans, *Against Nature*¹⁸⁴

"Put the Blame on Mame."

—Rita Hayworth's striptease song in *Gilda*¹⁸⁵

In the following sections, I trace the persistent historical connection between the *dancing* female body, pathology, and ruin to show that the nude dancing cases are firmly, if unknowingly, rooted in cultural tropes going back thousands of years, even to the Bible. Earlier I discussed how the Court's assumption of a link between the female body and danger is contested by some legal critics, warped by what Justice Souter called "emotionalism," and not fully based in logic.¹⁸⁶ Here I show that this aspect of the Court's reasoning—its attribution of danger and disease to the dancing female body—has a long cultural history. The nude dancing cases are simply another act in an ancient drama that equates the dancing female body with both menace and pathology. By placing nude dancing into this historical context, I delve further into the "emotionalism" that clouds the subject.¹⁸⁷

The trope of the dangerous, erotic woman dancer has a long lineage going back to the Greeks and the Romans.¹⁸⁸ Here I focus on two particular ancestors of the stripper, one modern and one ancient. I consider the contemporary stripper as the descendant of Charcot's hysterics on the one hand—the spectacular gyrating woman, entertaining yet sick—and of Salome on the other—the bewitching dancing woman, whose enthralling performance leads to death and destruc-

¹⁸⁴ JORIS-KARL HUYSMANS, *AGAINST NATURE* 66 (Robert Baldick trans., 1959) (1884).

¹⁸⁵ *GILDA* (Columbia Pictures 1946).

¹⁸⁶ See *supra* notes 87–91 and accompanying text. For discussion of the psychological factors, see *supra* Part II.A.

¹⁸⁷ *City of Erie v. Pap's A.M.*, 529 U.S. 277, 314 (2000) (Souter, J., concurring in part and dissenting in part).

¹⁸⁸ The Greeks had the Maenads, a female cult that worshipped Dionysus, engaged in wild sexual dancing, and indulged in violence and mutilation; they were famous for having torn the poet Orpheus to pieces and cast him into the river. The Romans had the equivalent female cult of Bacchus. Livy recounts that their "lascivious discourse," loss of "modesty," and "debaucheries" spread to crimes such as "poison and secret murders." LIVY, *History of Rome*, Book XXXIX, BACCHANALIBUS ROMAN RELIGIOUS TOLERATION: THE SENATUS CONSULTUM DE BACCHANALIBUS (186 B.C.), reprinted in 3 THE LIBRARY OF ORIGINAL SOURCES 65, 65 (Oliver J. Thatcher ed., 1907) (banning cult by decree). The Romans outlawed the sect in 186 B.C. *Id.* at 65–77.

tion. These family histories provide another way to supplement the conventional and contested connection drawn by the Court between nude dancing, disease, and danger. They suggest that the opinions reproduce deep-seated fears of female sexuality.

1. *The Hysterical Dancing Body: Pleasure and Pathology*

“[H]ysteria is assimilated to a body as site of the feminine, outside discourse, silent finally, or, at best, ‘dancing.’”

—Jacqueline Rose, *Dora: Fragment of an Analysis*¹⁸⁹

In this Section, I suggest that the stripper who emerges in the nude dancing cases bears a strange resemblance to the late nineteenth-century hysteric, who crystallized a conflation of disease and sex; danger and delight; and muteness and speech.¹⁹⁰ In the fabled halls of Charcot’s Salpêtrière hospital in nineteenth-century Paris, a new showcase emerged for the public display of crazy, sexy, dancing women.¹⁹¹ Hysteria, of course, was considered a disease; but under Charcot, it also became a performance, one that was sexual through and through. As we shall see, in the figure of the late nineteenth-century hysteric, two constructions of women merged: pathological female sexuality on the one hand; and the spectacular female body, writhing and gyrating in paroxysms of sexualized madness, on the other. This split view of the sexually performing woman, as conveying both sickness and trifling pleasure, has persisted. Traces of both these aspects of the hysteric may be found in the striptease cases, which paradoxically picture the stripper as infectious and inconsequential¹⁹² all at once.

¹⁸⁹ Jacqueline Rose, *Dora: Fragment of an Analysis*, in *IN DORA’S CASE: FREUD—HYSTERIA—FEMINISM*, *supra* note 118, at 128, 129.

¹⁹⁰ See *infra* note 214 for a discussion of hysteria as a “language” of the body.

¹⁹¹ Although a small percentage of hysterics were male, the disease has always been understood as feminine. See, e.g., RACHEL P. MAINES, *THE TECHNOLOGY OF ORGASM: “HYSTERIA,” THE VIBRATOR, AND WOMEN’S SEXUAL SATISFACTION* 21 (1999) (remarking that hysteria has been “constructed as quintessentially feminine”); Ian Hacking, *Automatisme Ambulatoire: Fugue, Hysteria, and Gender at the Turn of the Century*, in 3 *MODERNISM/MODERNITY* 31, 32 (1996) (“Hysteria has been called the body language of female powerlessness.”).

¹⁹² Several factors contribute to this portrait of the stripper as inconsequential. First, the nude dancing opinions were often punning and jocular in tone. See *supra* notes 91–92 and accompanying text (quoting puns in some nude dancing opinions). Second, as I have described, some judges have worried about whether analyzing nude dancing as speech would “trivialize” the First Amendment. See *supra* notes 182–83 and accompanying text. As Judge Cudahy wrote, “[T]he need to invoke the First Amendment here strikes me as a bit trivializing and, perhaps, unworthy” *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1089 (7th Cir. 1990) (en banc) (Cudahy, J., concurring). Finally, the Supreme Court trivialized the value of nude dancing by placing it on the margins of the First Amendment. See *supra* notes 21–22 and accompanying text.

Charcot, the inventor of modern hysteria,¹⁹³ was considered “the most celebrated doctor of his time.”¹⁹⁴ Under his influence, hysteria grew from a relatively rare disorder to a full-scale European epidemic, affecting approximately 17% of all women by 1883.¹⁹⁵ Foucault famously remarked that Charcot’s Salpêtrière became both an “enormous apparatus for observation” and a “machinery for incitement” of hysteria.¹⁹⁶

The theatrical quality of hysteria is clear: Charcot’s patients gave twice-weekly performances in his amphitheater at the hospital. (Freud, a one-time student of Charcot, kept a lithograph of a painting depicting one of these performances, Brouillet’s 1887 oil “A Clinical Lesson at the Salpêtrière,” hanging always in his office.)¹⁹⁷ “[A] showman with great theatrical flair,”¹⁹⁸ Charcot supplied an august audience that swelled at times to as many as five hundred.¹⁹⁹ He also provided other trappings of the theater. He gave the hysterics props and accessories, such as hats with long feathers, to dramatize their convulsions.²⁰⁰ Music accompanied them in the sound of gongs and tom-toms, used to induce their hysterical fits.²⁰¹ Indeed, the patients played their roles like actors. Some of his patients, such as Augustine, even emerged as “stars.” (Augustine went on to become a favorite of

¹⁹³ For more discussion of Charcot’s place in the history of hysteria, see generally JAN GOLDSTEIN, *CONSOLE AND CLASSIFY: THE FRENCH PSYCHIATRIC PROFESSION IN THE NINETEENTH CENTURY* (1987); MARK S. MICALÉ, *APPROACHING HYSTERIA: DISEASE AND ITS INTERPRETATIONS* (1995).

¹⁹⁴ AXEL MUNTHE, *THE STORY OF SAN MICHELE* 284 (1929), *quoted in* ELAINE SHOWALTER, *HYSTORIES: HYSTERICAL EPIDEMICS AND MODERN CULTURE* 30 (1997).

¹⁹⁵ SHOWALTER, *supra* note 194, at 31.

¹⁹⁶ MICHEL FOUCAULT, *1 THE HISTORY OF SEXUALITY: AN INTRODUCTION* 55 (Robert Hurley trans., 1978) (1976).

¹⁹⁷ SHOWALTER, *supra* note 194, at 31.

¹⁹⁸ *Id.* Charcot was fascinated with photography, and with reproducing his hysterics’ performances in photographs. Freud famously called Charcot a *visuel*. The visual nature of the disease, its connection with photography and the image, are well known. Charcot described himself by saying: “[A]ll I am is a photographer. I describe what I see.” Rhona Justice-Malloy, *Charcot and the Theatre of Hysteria*, 28 J. POPULAR CULTURE 133, 137 (1995). For discussion of the connection between hysteria and photography, see, for example, Hacking, *supra* note 191, at 31, 38 (“Charcot and his assistants were ‘fascinated by what they called the iconography of the mad. They were delighted to compare representations of the insane in medieval art with photographs prepared in their clinic.’”); Darwin Marable, *Photography and Human Behavior in the Nineteenth Century*, 9 HIST. PHOTOGRAPHY 141 (1985). Although Charcot loved photography as a medium, he was an omnivorous *visuel*. Justice-Malloy, *supra* at 137. And one of his favorite venues for producing visual images was his amphitheater, where hysteria as a live theatrical performance was born.

¹⁹⁹ SHOWALTER, *supra* note 194, at 31.

²⁰⁰ Justice-Malloy, *supra* note 198, at 135–36.

²⁰¹ *Id.*

the Surrealists.)²⁰² For such crazy, out-of-control women, the hysterics were excellent performers. The doctors could induce the women's hysterical seizures on cue to commence their performances before audiences.²⁰³

Hysteria was not just any kind of live theatrical performance, but a performance with *dancing*, as the patients contorted their bodies and flung themselves around the stage. Since seizures were the major sign of hysteria according to Charcot, the patient's physical movements became central. The dancing quality of the hysterics and the doctor's fascination with their movement are evident in Charcot's photographic record, showing his attempt to record the women in the throes of "hysterical convulsions."²⁰⁴ Eadweard Muybridge, the pioneer of recording movement in photography, was a central influence for Charcot.²⁰⁵ Dance scholars have noted the striking parallels between hysterical seizures and modern dance.²⁰⁶

Hysterics did not do just any kind of dancing; they did *erotic* dancing. Of course, well before Charcot, the etiology of hysteria was popularly considered sexual. What Charcot did, however, was to take this sexualized history of hysteria, and to turn it into a performance so powerful that it fed an epidemic. But let's not forget hysteria's history (not to mention its etymology), going back to the Greeks' theory that hysteria was caused by the wanderings of the uterus.²⁰⁷ In the nine-

²⁰² *Id.* at 137.

²⁰³ See SHOWALTER, *supra* note 194, at 36 (discussing Charcot's coaching of hysterical performers). In fact, some of Charcot's contemporaries expressed suspicion about the veracity of the hysterics' illness because of their rote professionalism. Paul Dubois, the Swiss neurologist, noted skeptically of Charcot's hysterics that they all "resemble each other. At the command of the chief of the staff, or of the internes, they begin to act like marionettes, or like circus horses accustomed to repeat the same evolutions." PAUL DUBOIS, *THE PSYCHIC TREATMENT OF NERVOUS DISORDERS* 15-16 (4th ed. 1908), *cited in* SHOWALTER, *supra* note 194, at 37. Foucault has described the Salpêtrière as a place where hysteria became a matter of "truth and falsehood" staged and restaged. FOUCAULT, *supra* note 196, at 55-56.

²⁰⁴ GILLES DE LA TOURETTE, *TRAITE CLINIQUE ET THERAPEUTIQUE DE L'HYSTERIE PAROXISTIQUE* 433 (1895), *quoted in* MAINES, *supra* note 191, at 39.

²⁰⁵ LINDA WILLIAMS, *HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE"* 47-48 (1989).

²⁰⁶ See, e.g., Linda Hutcheon & Michael Hutcheon, *Staging the Female Body: Richard Strauss's Salome*, in *SIREN SONGS: REPRESENTATIONS OF GENDER AND SEXUALITY IN OPERA* 204 (Mary Ann Smart ed., 2000). For more discussion of hysteria and dance, see generally Felicia McCarren, *The "Symptomatic Act" Circa 1900: Hysteria, Hypnosis, Electricity, Dance*, 21 *CRITICAL INQUIRY* 748 (1995). On gender and dance more generally, see Elizabeth Dempster, *Women Writing the Body: Let's Watch a Little How She Dances*, in *BODIES OF THE TEXT: DANCE AS THEORY, LITERATURE AS DANCE* 21-35 (Ellen W. Goellner & Jacqueline Shea Murphy eds., 1995).

²⁰⁷ For example, Plato wrote:

A woman's womb or uterus, as it is called, is a living thing within her with a desire for childbearing. Now when this remains unfruitful for an unseasonably

teenth-century heyday of hysteria, doctors other than Charcot attributed its causation to the usual suspects: sexual disappointment, sexual trauma, and masturbation.²⁰⁸ One American doctor even theorized that women fall into hysterical fits in order to attract the advances of men and to overcome supposedly natural female reticence.²⁰⁹

In Charcot's amphitheater, the sexual appeal of the women was always evident along with their supposed pathology. To get the erotic flavor of Charcot's concoction, consider this medical report about one eighteen-year-old girl diagnosed with hysteria at Salpêtrière:

[P]hysician notes with interest that she cries out "Oue! Oue!" tosses her head back and forth, and then rocks and flexes her torso very rapidly. Then, her body curves into an arc and holds this position for several seconds. One then observes some slight movements of the pelvis . . . [S]he [then] raises herself, lies flat again, utters cries of pleasure, laughs, makes several lubricious movements and sinks down onto the vulva and right hip.²¹⁰

Nineteenth-century doctors were transfixed by the patients' "voluptuous sensations," "flushing of the skin," and brief loss of control during their convulsions.²¹¹ One doctor, the aptly named Désiré Magloire Bourneville, published in 1878 a massive multi-volume medical text illustrated by "voyeuristic photographs of women stimulating their own nipples or arched in ecstatic paroxysms (with captions like 'Lubricité')." ²¹² Charcot called his patients' poses "*attitudes passionnelles*," and gave these poses sexual titles such as "amorous supplication," "eroticism," and "ecstasy."²¹³

Thus was the modern stripper born: in a hospital, as someone who needed to be cured of a disease, an object of both ridicule and desire. There has always been ambivalence in the medical treatment of hysteria, a curious mix of fear and delight in the woman's body and its display of sickness as spectacle. The Court's ambivalent treatment of the nude dancer echoes this history. By relegating nude dancing to the perimeter of the First Amendment and by using a joking tone, the Court treats the nude dancer as trivial and amusing. Yet at the same

long period of time, it is extremely frustrated and travels everywhere up and down her body. It blocks up her respiratory passages, and by not allowing her to breathe it throws her into extreme emergencies, and visits all sorts of other illnesses upon her . . .

PLATO, *Timaeus*, in PLATO, COMPLETE WORKS 1224, 1290 (Donald J. Zeyl trans., John M. Cooper ed., 1997) (360 B.C.).

²⁰⁸ See MAINES, *supra* note 191, at 32-44.

²⁰⁹ *Id.* at 41 (citing A.F.A. King, *Hysteria*, 24 AM. J. OBSTETRICS, 517-22 (1891)).

²¹⁰ MAINES, *supra* note 191, at 40 (internal citations omitted).

²¹¹ *Id.* at 8.

²¹² *Id.* at 40.

²¹³ SHOWALTER, *supra* note 194, at 33.

time, the Court's secondary effects analysis regards the dancer as anything but trivial; she is a threat to "public order" and a source of disease. These connections between nude dancing and hysteria suggest that at the root of these cases is an unacknowledged trope of female sexuality as simultaneously entertaining, trivial, and sick.²¹⁴

2. *Salome and the Deadly Dancing Body*

"[Salome became] the symbolic incarnation of undying Lust, the Goddess of immortal Hysteria, the accursed Beauty . . . the monstrous Beast, . . . poisoning, like the Helen of ancient myth, everything that approaches her, everything that sees her."

— Joris-Karl Huysmans, *Against Nature*²¹⁵

It is fitting to my discussion of the dangerous dancing woman that the *Barnes* Court invokes *Salome*, Strauss's 1904 opera, in its analysis. The Court summons the *Salome* story in response to an extended discussion about it in the Seventh Circuit's opinions, where the question of whether nude barroom dancing should be treated differently from nudity in a performance of *Salome* illustrated a larger cultural battle between high and low, between art and lowly eroticism. Of course, the association between the nude dancing cases and the *Salome* myth is obvious. *Salome's* Dance of the Seven Veils has often been viewed as a precursor of modern-day striptease. But the conjuring of *Salome* also gives insight into the assumption, most prominent in the *Pap's* case, that nude dancing is a dangerous activity. Never has the trope of the threatening erotic female dancer been more forcefully personified than in the figure of *Salome*, whom Huysmans called the "true harlot," the "ultimate cause of every sin and every crime."²¹⁶ Indeed, in the figure of *Salome*, we find one of the origins for the link between striptease, violence, and death.

Although the *Salome* story has biblical roots, appearing in the Gospels of Matthew and Mark, it found new life in the late nineteenth and early twentieth centuries, most famously in Oscar Wilde's 1893 play and Strauss's 1904 opera. French writers and painters of the late

²¹⁴ Some critics have noted another aspect to the medical treatment of hysteria: They have interpreted hysterical dance as a type of failed language, as if these women's performances became a method of primitive, second-rate speech, communicated through the medium of their convulsing bodies.

In the companion piece to this Article, I take up this aspect of hysteria. There I confront directly the Court's ambivalent treatment of nude dancing as a kind of borderline speech and show the resonance between the Court's First Amendment analysis of stripping and the interpretation of hysteria as a borderline, failed language of the body. See Adler, *The Naked Female Body "Speaks," supra* note 10.

²¹⁵ HUYSMANS, *supra* note 184, at 66.

²¹⁶ See *id.* at 66–68.

nineteenth century adored the story: Huysmans, Flaubert, Moreau, and others retold it, sometimes (as was the case with Moreau) over and over again.²¹⁷ The basic story is simple: before the lustful Herod, Salome dances the Dance of the Seven Veils, an erotic striptease culminating in nudity. She demands in exchange that Herod bring her the head of John the Baptist. Herod reluctantly fulfills her request. In some versions, when Salome kisses the severed head, Herod orders that she be killed.²¹⁸ Interestingly for our purposes, the Salome story connects both to the Medusa myth and to hysteria. The decapitation in the story, a symbolic castration, explains in part why representations of Salome have frequently drawn on the Medusa myth.²¹⁹ And the vision of Salome as a hysteric was well known. For example, one contemporary critic of Strauss's, influenced by the medical vocabulary of hysteria, called the whole opera "unwholesome, unclean, hysterical."²²⁰

Salome therefore stands for a slippery slope, from striptease to carnage, that seems to have unconsciously penetrated the Court's reasoning in *Pap's* and its assumption that striptease posed a threat of criminal "violence."²²¹ But Salome also stands in the Court's analysis for another kind of slippery slope, one which preoccupied some of the judges who heard the *Barnes* case en banc in the Seventh Circuit. To them, Salome seemed to threaten a different sort of slippage: the blending of class boundaries,²²² of high and low, of pornography and art, and, ultimately, of speech and conduct. Whereas Judge Posner argued that nude dancing was simply Strauss's *Salome* for a lower-

²¹⁷ MARJORIE GARBER, *VESTED INTERESTS: CROSS-DRESSING & CULTURAL ANXIETY* 339–40 (1992).

²¹⁸ *Id.* at 340, 344. Salome's death was a detail added by Wilde. It did not occur in the biblical account. *Id.* at 342.

²¹⁹ See Hutcheon & Hutcheon, *supra* note 206, at 204.

²²⁰ *Id.* at 214; see also HUYSMANS, *supra* note 184, at 66 (calling Salome "Goddess of immortal Hysteria").

²²¹ *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290 (2000) (quoting 719 A.2d 273, 279 (Pa. 1998)).

²²² In this sense, the opinions fell into a long tradition in which censorship has appeared to stem from class anxieties. For an excellent historical account of the role of class in censorship, see WALTER KENDRICK, *THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE* 237 (1987), asserting that "pornography" is a term used historically to describe sexual materials that "gentlemen" wished to keep from three groups: women, children, and the poor. See also *THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS OF MODERNITY, 1500–1800*, at 9–47 (Lynn Hunt ed., 1993) (tracing history of pornography through its social and politically-subversive functions). For a discussion of the role of class in battles over burlesque striptease in the early twentieth century, see Anna McCarthy, *The Invisible Burlesque Body of La Guardia's New York*, in *HOP ON POP: THE POLITICS AND PLEASURES OF POPULAR CULTURE* 415, 417 (Henry Jenkins et al. eds., 2002), describing the "horrifying coupling of sexual spectacle and working-class, masculine enjoyment."

class, “Joe Sixpack”²²³ audience, and therefore worthy of First Amendment protection, Judge Easterbrook insisted that nude dancing at the Kitty Kat Lounge was not protected speech. He found the very comparison to *Salome* a threat to a coherent free speech division between ideas and actions, high and low. To him, comparing Strauss’s *Salome* to nude dancing was like comparing “Tolstoy’s *Anna Karenina*” to “the scratching of an illiterate” or like comparing a Rembrandt painting to “a bucket of paint hurled at a canvas.”²²⁴ The Seventh Circuit’s battle prefigured the Supreme Court’s assignment of nude dancing to its weird and unexplained status as “marginal” to the First Amendment, on the very perimeter of the First Amendment division between speech and action.

In this way, *Salome* came to signify a threat not just to the boundaries between sexuality and violence, but also to the First Amendment boundaries between speech and action, and between high value and low value speech.²²⁵ According to literary critic Marjorie Garber, the *Salome* story has always stood for a kind of transgression. Garber writes that “the essence of the dance itself, its taboo border-crossing, is not only sensuality, but gender undecidability, and not only gender undecidability, but the paradox of gender identification.”²²⁶ Here *Salome* stands for another kind of “undecidability,” between speech and other forms of action. This tension remains in the Supreme Court’s exile of striptease to the “outer perimeters” of the First Amendment, condemned to the border between protected speech and unprotected conduct.²²⁷

²²³ The phrase is Judge Cudahy’s. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1089 n.1 (7th Cir. 1990) (en banc) (Cudahy, J., concurring).

²²⁴ *Id.* at 1125 (Easterbrook, J., dissenting). The debate between Easterbrook and Posner is interesting, as Vincent Blasi points out, for the judges’ views on the relation between aesthetics and class, and on whether “art” by its nature conveys a message and thus merits First Amendment protection. Blasi, *supra* note 67, at 625–39.

Curiously, Judge Easterbrook’s image of “paint hurled at a canvas” raises associations with the painter Jackson Pollock. (One wonders about Judge Easterbrook’s taste for modernism.) In any event, the Supreme Court has specifically mentioned Pollock’s work as an example of artistic speech that would “unquestionably” merit First Amendment protection. *Hurley v. Irish Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995).

²²⁵ For a brief discussion of the low value speech doctrine see *supra* Part I.

²²⁶ GARBER, *supra* note 217, at 342; see also FRANÇOISE MELTZER, *SALOME AND THE DANCE OF WRITING: PORTRAITS OF MIMESIS IN LITERATURE* (1987); Alex Ross, *Mysterries of Love: Karita Mattila’s Transfixing Salome*, *NEW YORKER*, Apr. 5, 2004, at 84 (reviewing Metropolitan Opera’s recent staging of *Salome* and its use of contemporary costumes which conjure up theme of cross-dressing); Anthony Tommasini, “*Salome*” *Unveils Emotions (and a Soprano)*, *N.Y. TIMES*, Mar. 17, 2004, at E1 (same).

²²⁷ See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (“[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we [the Justices] view it as only marginally so.”). For further discussion, see *supra* notes 19–22 and accompanying text.

CONCLUSION: TOWARD A CULTURAL THEORY OF THE
FIRST AMENDMENT

My goal in this paper has been to unsettle our understanding of the nude dancing cases. I do not present an easy solution that shows how the Court can now, thanks to my work, do things differently. Indeed, one of the aims of my reading has been to expose how deeply the Court is constrained by the weight of culture. It is not as if the Court, or any of us, can simply break free from this constraint; we will always be bound to a certain extent.²²⁸ A first step to any change, however, must be to "problematize" the existing state of affairs, and that is what I have sought to do here. In that sense, then, I aspire to the goal Foucault identified when he described bringing about a situation where people "'no longer know what to do', so that the acts, gestures, discourses which up until then had seemed to go without saying became problematic."²²⁹

When the Court writes about nude dancing, it has entered a highly charged cultural terrain. It has to confront not only legal precedent, but hidden cultural anxieties and associations as well. In my view, these anxieties and associations drive the opinions, and yet conventional legal accounts have ignored the role of these cultural links. The analysis of nude dancing cases that I have presented thus offers a radically new way to approach cases that have otherwise perplexed First Amendment critics. But it also suggests that these cases are more problematic than previous scholars have recognized: They are built on entrenched cultural biases against female sexuality and corporeality.

On a deeper level, the analysis I have offered is the beginning of a larger project in which I seek to rethink our traditional approach to free speech law more broadly.²³⁰ Normally we presume that First Amendment law is rational and objective, based on a continually evolving, often contested, set of legal principles. When we question these assumptions, we often limit our discussion to whether "politics" is a force that could undermine claims to law's neutrality.²³¹ My reinterpretation of the nude dancing cases as texts about gender and sexu-

²²⁸ Cf. BUTLER, *supra* note 149, at 40 (arguing that idea of sexuality "'before,' 'outside,' or 'beyond' power is a cultural impossibility and a politically impracticable dream, one that postpones the concrete and contemporary task of rethinking subversive possibilities").

²²⁹ Michel Foucault, *Questions of Method: An Interview*, 8 IDEOLOGY AND CONSCIOUSNESS, Spring 1981, at 3, 12.

²³⁰ The project will draw as well on some of my previous work. See, e.g., Adler, *Child Pornography*, *supra* note 13 (suggesting perverse relationship between child pornography law and cultural climate which produced it).

²³¹ I am, referring, of course, to the extraordinary contributions of critical legal studies scholars. See also Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. (forth-

ality, however, points toward a very different vision of the First Amendment, as a body of law that is weighed down with unacknowledged cultural baggage, that is surprisingly irrational and contingent. This vision—call it a cultural theory of the First Amendment—invites us to consider the ways in which legal rules, especially when related to speech, are steeped in cultural anxieties, fantasies, and prejudices.

I want to leave you with a tease, and, I hope, wanting more. I suppose, appropriately enough, that in this piece I have not “taken it all off.” More remains to be said about the G-string. In a future article, a companion to this piece, I will return to the odd marginal status of striptease as speech that I have touched on here.²³² There I will suggest that the nude dancing cases (as well as other sexual speech decisions) are covering up a troubling gap in free speech law: the Court’s failure to adequately answer that most basic and yet difficult of questions, “what counts as ‘speech’ for First Amendment purposes?”

coming 2005) (arguing that legal scholars must take account of pervasive political influences upon judges).

²³² Adler, *The Naked Female Body “Speaks,” supra* note 10.