ACHILLES' HEEL: REVISITING THE SUPREME COURT'S NUDE DANCING CASES

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I. INTRODUCTION

A G-string is a flimsy thing. A narrow band of fabric, no wider than a shoelace, a G-string passes between the buttocks and up through the groin area, attached to a small, triangular piece of fabric that barely covers the genitals. A G-string is barely there. Despite the minuscule size (and most would say minimal effect) of the G-string as an article of clothing, legal mandates requiring exotic dancers to remain in their G-strings while performing their routines have been the subject of intense scrutiny, including in two United States Supreme Court cases at the latter end of the twentieth century. Inquiry into those cases may appear to be revisiting a battle already lost, or a regressive move to revivify a question others have long since abandoned by those interested in the relationships among law, gender, and aesthetics. This Note reexamines the Court's nude dancing cases precisely because they comprise a body of knowledge necessary for any examination of dance, but they have not been adequately explored. This body of knowledge has been ignored precisely because it problematizes traditional notions of jurisprudence that have consequences reaching far beyond the area of nude dancing.

In *Barnes v. Glen Theatre* and *City of Erie v. Pap's A.M.*, the Supreme Court held that regulations forcing exotic dancers to wear G-strings or pasties while performing were permissible regulations of speech under the United States Constitution's First Amendment.[1] Applying the test for government regulation of expressive conduct formulated in *United States v. O'Brien*, the Court found that such regulations were not directed at the

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[1] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 563 (1991) (plurality opinion); City of Erie v. Pap's A.M., 529 U.S. 277, 277 (2000) (plurality opinion).

content of such expressive conduct, and thus permissibly regulated nude dance.[2] The government's interest was either the purpose of promoting public morality (in *Barnes*), or preventing the deleterious secondary effects of nude dancing (in *Pap's*).[3] The disagreement among the majority, concurring, and dissenting opinions in both cases hinged on the precise meaning of the completely nude female body within the context of the striptease. Interestingly (and unfortunately), neither the Court nor subsequent legal scholarship has adequately examined the precise logic by which the answer to this question might be reached. This Note is an attempt to remedy that oversight by reading the Court's opinions as dance criticism and mining the resources of how dance scholars might approach the issue. It is, thus, a species of interdisciplinary legal and critical scholarship, attempting to put the fields of legal scholarship and dance studies into dialogue with one another to analyze and problematize their relationship.

No law review has ever printed an examination of *Barnes* or *Pap's* through the lens of dance studies scholarship. For whatever reason, either unfamiliarity with dance studies as a discipline or perhaps lack of belief that such interdisciplinary analysis would be meaningful or fruitful, the discourse of dance studies has never been used as a tool by legal scholars to examine the question of whether G-string and pasty regulations are directed at the content of nude dance. Instead, legal scholarship has tended to assume that the question of meaning in dance (and furthermore, the question of the meaning of dance) is transparent and easily answered. This Note demonstrates that such a facile approach to dance is tenuous and ignores how dancers and scholars of dance have repeatedly problematized such an idea.

This Note begins with a brief exposition of the First Amendment and *Barnes* and *Pap's*, and then transitions into an exposition of relevant trends in dance studies scholarship. This exposition is intended to introduce dance studies into the field of legal discourse, as both an object of study and a tool that legal scholars ought to examine when they revisit or newly consider legal doctrines as they are applied to the task of examining dance. Part IV briefly discusses legal scholarship dealing with *Barnes* and *Pap's*, and questions the success or merits of this scholarship in view of dance studies, as well as other relevant facts and studies. The Note then examines the language of the opinions at issue, both questioning their reasoning and conclusions, as well as their rhetoric and method of dance criticism. It may seem odd to read a judicial opinion as a piece of criticism, but this Note assumes that questions related to the meaning of an aesthetic practice, or at

[2] *Barnes*, 501 U.S. at 566–68; *City of Erie*, 529 U.S. at 283.
[3] *See Barnes*, 501 U.S. at 566; *City of Erie*, 529 U.S. at 283.

least how one draws the boundary lines that determine the "content" of an aesthetic practice, is inevitably the task of criticism. As such, this Note attempts to understand the cases not as instances of legal discourse, but rather as instances of inquiry into the meaning of nude dance and, thus, address the question of the meaning of dance in particular as dance criticism. Next, this Note defends the status of nude dance qua dance and supplies an answer to the question of the relationship of nudity to erotic dances' meaning. This reading is intended to meet both the criteria of dance studies for such a question, as well as be sufficient to further the legal discussion at issue in *Barnes* and *Pap's*. Finally, the Note concludes with lessons that may be drawn from the interdisciplinary inquiry above, both practical and theoretical.

On the whole this analysis is meant to demonstrate a number of concepts. First, it assesses the relevance of dance studies to the legal issue at hand. Second, that the opinions in *Barnes* and *Pap's* would not withstand scrutiny from the perspective of the dance scholar. Third, that regulations forcing dancers to wear G-strings or pasties while engaging in striptease are indeed content-directed, and that the cases are thus wrongly decided under the rubric of *O'Brien*. Fourth, that dance in particular exposes certain aporia that exist with respect to the content or conduct (or communication or conduct) distinction that pervades First Amendment law. Fifth, that dance in particular opens up more fundamental questions of the very status of law.

II. THE FIRST AMENDMENT AND AESTHETIC PRACTICES

To begin it is important to understand the various categories of speech that have been recognized in First Amendment jurisprudence. This is of vital importance because where one situates dance within this categorical structure proves to be highly significant. In general, First Amendment jurisprudence recognizes three categories of speech in its analytic structure: first, there is political speech, which merits the highest form of First Amendment protection; second, there is indecent speech, which is protected only to the extent that it touches on political matters, and, as such, is deserving only of modest protection; and third, there are activities that are considered below speech, such as fighting words and obscenity.[4] Expressive conduct—the speech at issue in the case of nude dancing—exists in a problematic relationship with this generally three-tiered structure.

[4] RANDALL P. BEZANSON, ART AND FREEDOM OF SPEECH 51 (2009).

It should be apparent that undergirding this three-tiered or categorical approach to the question of free speech is primary in considering the purpose of the First Amendment. In general, three principal values historically have been considered paramount: the production of truth through rigorous debate within the marketplace of ideas; the necessity of free speech and inquiry to any democratic system of self-government; and the promotion of individual autonomy, self-expression, and individual fulfillment.[5] Scholarly discussion of which particular value is of primary importance (or whether all of them are) is extremely prolific and stretches beyond this Note's scope. Although there are other views, this Note takes the work of Frederick Schauer as illustrative, both for the sake of convenience and also because of its profundity. In Schauer's view, particularly in cases dealing with so-called "low value" speech, the principle purpose of free speech is to enable individuals to participate freely in a democratic system of self-government.[6] For Schauer, free speech is not really about expression at all; rather, communication is the primary value and expressive aspects are always secondary.[7] Schauer emphasizes the communicative message received by the listener rather than the speaker, which many commentators have noticed involves a Cartesian dualism of expression and conduct whereby the listener merely "takes up" what the speaker has intended to communicate, leading to a solipsistic, listener-oriented understanding of the concept of meaning.[8] This distinction between communication and conduct is another way of stating that the content of a speech act is primary, with other aspects remaining secondary or irrelevant. This distinction is important because it leads to the question of how precisely one determines what counts as "content" in expressive activity, which is important to the inquiry at hand.

Contrary to those who see free speech as emphasizing the value of self-expression, Schauer emphasizes that self-expression can be an unworkably amorphous concept.[9] Self-expression is thus "not helpful to an analysis of free speech."[10] When it comes to aesthetic practices, Schauer argues that they should be analyzed with respect to whether or not the art in question fits under the rubric of "communication," rather than whether or not they are merely expressive.[11] Only art with a message merits First Amendment protection; other works that are not communicative might still fall under

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[5] KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 4 (Robert C. Clark et al. eds., 3d ed. 2007).
[6] Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 38 SMU L. REV. 297, 333 (1995).
[7] FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 51 (1982).
[8] *See* Eliot F. Krieger, *Protected Expression: Toward a Speaker-Oriented Theory*, 73 DENV. U. L. REV. 69, 72 (1995).
[9] SCHAUER, *supra* note 7, at 52.
[10] *Id.* at 52.
[11] *Id.* at 109.

the protection of another legal principle (such as the right to privacy), but they are not subject to the free speech principle.[12] As an example, Schauer considers pornography an activity rather than a communication, and a physical rather than a mental experience, meaning that pornography is not a First Amendment problem.[13] Thus, the primary distinction is between conduct and communication.

This is why the nude dancing cases are particularly interesting. They illustrate that the distinction between communication and conduct, particularly expressive conduct, is "the Achilles heel of free expression."[14] This distinction is particularly problematic for aesthetic discourse because it evinces what an aesthetics scholar would consider confusion about how the concept of "meaning" functions with respect to aesthetic practices: it disregards the fact that the delivery method of speech may be so communicatively significant as to constitute content in and of itself.[15] The delivery method, thought of as communicative manner, is central to discussions of artistic or aesthetic quality, which is always central to the discussion of any aesthetic product's meaning.[16]

The Court, perhaps sensing the unique problem of art for the conduct and communication dichotomy, tends to operate with a strategy of general restraint when it comes to discussing aesthetic practices.[17] This is particularly evident relative to questions of beauty and aesthetics, which always have sat awkwardly within Anglo-American political traditions' concern for religious freedom and notions of political participation, which are paramount in traditional understandings of the purpose of the First Amendment.[18] Thus, the point of freedom of speech is "distinctly cognitive and utilitarian, not emotional and sensory: free speech calmed conflict and enabled self-government."[19] This practical, utilitarian approach has remained dominant in free speech legal discourse. With regard to art in general, the question is thus whether or not an artistic practice connects to the communicative notion of free speech. As one scholar noted:

> Is the stripper's work in a bar art? What if the stripper covers her nude body with chocolate, as does [Karen] Finley? Or shouts obscenities? Or intends by her work not to titillate but to symbolize

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[12] *Id.* at 110.
[13] *Id.* at 181–82.
[14] Timothy M. Tesluk, Barnes v. Glen Theatre*: Censorship? So What?*, 42 CASE W. RES. L. REV. 1103, 1110 (1992).
[15] Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1340–41 (2002).
[16] *Id.* at 1361.
[17] BEZANSON, *supra* note 4, at 1.
[18] *Id.*
[19] *Id.*

> the desperate role of women in a conventional and male society? Does a cognitive 'message' strengthen the claim that something is art, or is its effect exactly the opposite?[20]

Many cases examining political speech reveal that emotion, or its force or feeling embodied in an expression, may be part of the connecting fiber between art and politics—but emotional expression itself is always secondary, usually protected only when its subject or object is political in nature.[21]

The relationship of so-called "expressive speech" to the First Amendment, and the appropriate legal rubric for examining the regulation thereof, was supplied by *O'Brien*, which was later employed in both *Barnes* and *Pap's*. In *O'Brien*, Justice Warren laid out the test for the regulation of expressive speech as a four-factor test: (1) Is the regulation within the constitutional power of the government? (2) Does it further an important or substantial government interest? (3) Is that government interest unrelated to the suppression of free expression? (4) Does the regulation go no further than essential in order to further the government's interest?[22] The opinions in *Barnes* and *Pap's* adhere to this framework, with the primary disagreements hinging on the third and fourth factors of the *O'Brien* analysis. With this in mind, this Note temporarily suspends further discussion of *Barnes* and *Pap's* to introduce the reader to dance studies scholarship to enable a more thorough reading of the cases by providing the vocabulary necessary to foster the reader's understanding.

III. A (VERY) BRIEF INTRODUCTION TO DANCE STUDIES

Dance studies, as a discourse, is a relatively recent development, cohering in the 1960s and 1970s, particularly in the writings of Susan Foster.[23] Dance studies is an attempt to link dance and literary studies, evolving as a species of écriture féminine[24] in line with poststructuralist[25]

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[20] *Id.* at 11.
[21] *Id.* at 13.
[22] United States v. O'Brien, 391 U.S. 367, 377 (1968).
[23] Ellen W. Goellner & Jacqueline Shea Murphy, *Introduction* to BODIES OF THE TEXT: DANCE AS THEORY, LITERATURE AS DANCE 1, 2 (Ellen W. Goellner & Jacqueline Shea Murphy eds., 1995).
[24] "Écriture féminine," also known as "feminine writing," was conceived by Helene Cixous, Luce Irigaray, Julia Kristeva, and others in the 1970s as a "literary project/strategy"—one that seeks to read texts in the context of feminine experience:

> The feminine is not conceived in light of a 'given' maleness, but rather as a creative exploration of the absences and gaps that exist in the historical and cultural construction of masculinity in the Western tradition. It attempts to fuse theory and practice, particularly by hybridizing theoretical/critical modes with aesthetic modes of writing such as fiction. It is the inscription of the feminine body and female difference in language and text.

questionings of race and gender, and of the process of assigning meaning to bodies.[26] It is thus concerned with "gender, bodies, fluidity, performance, sexuality, popular culture, and multiculturalism . . . ."[27] It has a particular relationship to gendered, raced, and queered studies, for reasons described below.[28] Dance studies seeks to remedy the denigration and minor position of dance within the arts brought about by dance's ties to the material and concrete world.[29] This minor position has led to a scholarly prejudice against the careful study of dance, which is arguably embodied in the shallow readings of dance done by the Court in *Barnes* and *Pap's*.[30] Behind this prejudice, dance studies scholars see the problem of "dance's grounding in physical bodies and in the now-familiar conceptions about and distrust of the body and bodily practices held by Western scholars working in a logocentric[31] tradition."[32] Thus, dance studies is an attempt to consider the presence of the body and of dance as a unique discipline in which the concepts of "presence" and "the body" can be presented; it is a critical theory that attempts to foreground the mind-body split.[33]

What is logocentrism and why is it relevant to legal discourse? Logocentrism is a dualism of the mind and body, along with a gendering of this distinction in which the body is distinctly feminine and the mind is distinctly masculine, which explains not only the marginalization of dance, but also the marginal position of dance studies as a scholarly discipline.[34] The evidence that dance is gendered is not just theoretical, but also can be illustrated by the experiences of male dancers.[35] Male dancers are keenly aware that dance is denigrated as both feminine and homosexual.[36] Logocentrism as a concept is thus relevant to legal discourse because legal discourse is a logocentric discourse, with its preference for the abstract and its historical domination by highly educated white males. Thus, in terms of logocentrism's dualism, dance is in some sense "the other" of legal

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THE JOHNS HOPKINS GUIDE TO LITERARY THEORY & CRITICISM 162–64 (Michael Groden & Martin Kreiswirth eds., 1994).

[25] Poststructuralism is a philosophical and theoretical method that emphasizes the importance of language, the social construction of meaning and the "real" linguistic and social differences, and the destabilization of meaning and the self. For more on poststructuralism, see generally CATHERINE BELSEY, POSTSTRUCTURALISM: A VERY SHORT INTRODUCTION (2002).

[26] Goellner & Murphy, *supra* note 23, at 1.

[27] Ellen W. Goellner & Jacqueline Shea Murphy, *Preface* to BODIES OF THE TEXT: DANCE AS THEORY, LITERATURE AS DANCE ix, ix (Ellen W. Goellner & Jacqueline Shea Murphy eds., 1995).

[28] Goellner & Shea Murphy, *supra* note 23, at 3.

[29] André Lepecki, *Inscribing Dance*, *in* OF THE PRESENCE OF THE BODY: ESSAYS ON DANCE AND PERFORMANCE THEORY 124, 125 (André Lepecki ed., 2004).

[30] Goellner & Shea Murphy, *supra* note 23, at 4.

[31] For a discussion of logocentrism, see infra the next paragraph.

[32] *Id.*

[33] Lepecki, *supra* note 29, at 3.

[34] Goellner & Shea Murphy, *supra* note 23, at 4.

[35] MICHAEL GARD, MEN WHO DANCE: AESTHETICS, ATHLETICS & THE ART OF MASCULINITY 4 (2006).

[36] Goellner & Shea Murphy, *supra* note 23, at 4.

scholarship. This means that the attempt to think of law and dance studies together involves the attempt to navigate among competing modes of thought, degrees of corporeality, and gendered perspectives.

The logocentrism of the West leads to a deep unease in our culture about embodied experience.[37] In contrast to the logocentric tradition, dance studies scholars offer a "lived-body concept of dance," which cuts against the mind-body split, leading to a dualism that is dialectical and lived rather than ontological.[38] For this reason, many dance studies scholars are wary of uncritically adopting literary models and of supplying a uniform understanding of the body, or of over-theorizing embodied practice.[39] The important concept to the scholar working in dance studies is that in confounding the mind-body split, dancing also confounds the distinction between theory and practice, leading to a promiscuous cross-disciplinarity in the methodology for considering the question of dance's meaning.[40]

In contrast to the logocentric tradition, dance studies begins with and steadfastly remain with the body. This is done "in order to establish the dancing body as a location of signifying practices and to foreground the reflexive relationship existing between the dancing/speaking subject and the dance/language."[41] As such, and importantly with respect to the theories of a legal scholar like Schauer, dance and dance studies sit between conduct and communication, problematizing any attempt to draw concrete boundaries between one and the other. Part of this involves considering how ideology, always linguistic, deposits and constructs the body, meaning that the dance critic's task is always to look beneath the surface of the body and understand how the body is constructed by social practices.[42] Rather than assuming the body has any particular meaning, as seems to be the case with the Court, dance studies scholars adopt the views of sociologist Mary Douglas, for whom the body is a symbol of society that functions across cultures, coming to represent particular threats and powers that ultimately symbolize social boundaries.[43]

The irruption of the body, for dance scholars as for certain legal scholars with an interest in gendered perspectives, can in turn become a

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[37] Andrew Ward, *Dancing Around Meaning (and the Meaning Around Dance)*, *in* DANCE IN THE CITY 3, 11 (Helen Thomas, ed., 1997).
[38] SONDRA HORTON FRALEIGH, DANCE AND THE LIVED BODY: A DESCRIPTIVE AESTHETICS 4 (1996).
[39] Goellner & Shea Murphy, *supra* note 23, at 7.
[40] *Id*. at 7–8.
[41] 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, 23 (Ellen W. Goellner & Jacqueline Shea Murphy eds., 1995).
[42] *Id.*
[43] Janet Wolff, *Reinstating Corporeality: Feminism and Body Politics*, *in* MEANING IN MOTION: NEW CULTURAL STUDIES OF DANCE 81, 82–83 (Jane C. Desmond ed., 1997).

truly revolutionary act.[44] The body is what makes dance unique, as it is always at the center of dance. In other art forms, while the body may be the beginning point, the goal is always a flight toward abstraction, that is, toward language and verbalization.[45] Nevertheless, dance studies is a written discipline and thus sits between doing and writing, striding the fault line between the two, a fact with which many dance scholars struggle.[46] In the end, to dance scholars, the task of dancing is not merely an activity, but a critical theory and a practice that reveals the way the body is always negotiating its position in a powerful struggle for control.[47]

Returning to and reiterating the importance of embodiment, it is necessary to stress that dance has always been represented as a secondary or minor art, defined in relationship only to male-identified art forms of music and drama.[48] Is it any surprise, then, that Justice O'Connor can speak of nude dance as being at the "outer ambit" of First Amendment concerns? Certainly such a claim would not be made with respect to literature. Rather than merely engaging the mind, as literature does, dance specifically draws on the meanings we attach to our bodily existence as a whole, as they appear in the task of moving.[49] Importantly, especially given the Court's comparisons of nude dancing with the high dance form of ballet, dance studies scholars are very suspicious of ballet as political practice. For the modern dancer, ballet, as the "highest" form of dance, was considered such only because it was a patriarchal ceremony of the ballerina ratifying her own subordination to the male choreographer by putting her body on display, in the process reinscribing gender norms and denying her own agency.[50] Contrast this with the modernist dance tradition of a choreographer like Martha Graham, who in turn valorized the "natural" female body by positing an "individualized presymbolic subject."[51] This natural subject often appeared as the hysteric, as the violently active voluptuous female body, which is obviously the female body a scholar like Amy Adler posits in her feminist reading of *Barnes* and *Pap's*, which we will examine later. It is important to note that from a dance studies perspective, this interpretation is somewhat retrograde. Many see this reading of the female body as rooted in masculinist psychoanalytic approaches.[52] Later dance scholars have also called it into question,

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[44] *Id.*
[45] FRALEIGH, *supra* note 38, at 49.
[46] Ward, *supra* note 37, at 6.
[47] André Lepecki, *Introduction* to OF THE PRESENCE OF THE BODY: ESSAYS ON DANCE AND PERFORMANCE THEORY 1, 6 (André Lepecki ed., 2004).
[48] Dempster, *supra* note 41, at 24.
[49] Fraleigh, *supra* note 38, at xvi.
[50] Dempster, *supra* note 41, at 25.
[51] *Id.* at 29.
[52] *Id.*

particularly choreographers like Merce Cunningham, for whom dance is primarily about movement, not expression or meaning.[53] For Cunningham, dance is a deconstructive practice that calls into question the entire existence of presymbolic meaning.[54] This deconstructive approach to dance is especially problematic for First Amendment discourse. If dance is primarily about movement rather than meaning, it falls outside the scope of First Amendment protection, because it is reduced to the level of conduct. Deconstructive practices are always inherently meaningful, however, as the act of calling meaning into question is, itself, a communicative act. In this sense, deconstructive dance opens up an aporia in the very idea of meaning that is profoundly difficult for current First Amendment doctrine to get its hands around.

If there is something on which dance scholars and legal scholars like Adler agree, it is that dance, and nude dancing in particular, is a subversive practice when compared with the Anglo-American legal regime. Adopting a reading of the body and of the law found most notably in the writings of Michel Foucault, dance scholars draw attention to the way society attempts to control the dancing body by submitting it to the rational order to abolish the maternal, the irrational, and the female.[55] As already noted, this postmodern tradition of dance is particularly problematic for the logocentric tradition. Objective postmodern dance, such as that found in the choreography of Cunningham, functions on the assumption that references to the world in dance are a byproduct of motion, but that the link between signifier and signified is not inevitable.[56] This decoupling of meaning from movement is obviously problematic for the logocentric tradition and thus for law, representing a deconstructive movement toward liberation of the body's potential. Reflexive postmodern dance, such as that found in the dance and dance-films of Yvonne Rainer, an American filmmaker, who is particularly attentive to the ways in which bodies will refer to other events, and thus asks how these references are made, simultaneously exploring how the body speaks and is spoken to through attention to the context of dancing.[57]

The current emphasis in contemporary dance, as opposed to ballet, is always on particularity, and, as such, is about heightening awareness of particular bodies and embodied moments (rather than ideal ones), and embracing and living in fleshliness as a rejection of abstract or legal

[53] *Id.* at 30.
[54] *Id.* at 30.
[55] *Id.* at 24.
[56] *Id.* at 30–31.
[57] *Id.* at 31.

hierarchy.[58] Instead of abstract knowledge, other knowledge, such as the kinesthetic and the tactile, are valorized, in the process denying the privilege of the universalizing gaze or reason; postmodern dancers emphasize the polyvalent, plural, and mutable nature of each particular human body's lived experiences.[59] In sum, contemporary dance alludes to the dissolution of all the dichotomous pairings of terms that are fundamental to the Western philosophical tradition (and thus the Anglo-American legal tradition), such as mind-body, flesh-spirit, carnal-divine, male-female, rational-irrational, and most importantly for First Amendment purposes, conduct-content, doing-saying.[60]

How would a dance scholar have the Court consider the meaning of or the meaning in dance? First, it is important to note that dance is transitive, as an expression being done (action) and an expression being transferred (saying).[61] The expression or meaning of a dance is always very tightly tied to its content in such a way that speculating about what a dance would or would not mean in the absence of any particular element is tendentious.[62] Dance is problematic because action and content in dance are always one.[63] The meaning of dance is elusive and slippery, flying in the face of firm and easy pronouncements about it, such as the Court's nude dancing jurisprudence.[64] For this reason many dance scholars argue that dance (at least in its modern-postmodern versions) is not about particular meaning at all, but rather about the problematic nature of meaning itself.[65]

Furthermore, many dance critics strongly reject the idea of ever importing conceptual models and non-dance theoretical explanations, at least when they are not very tightly tied to concrete physical examples. Others say, though, that the meaning of a dance can never be grasped through reading, writing, or speaking at all, but only through the dance itself.[66] Most critics agree, however, that a dance-based analysis of dance will pay attention to the following elements: the material (the dancer's body), the process (of constructing the dance), the work (the dance itself), the participants (the dancers), the observers, the functions of the process (methodologies and reasons for constructing and engaging in performance), the material studied (kinesthetics), the process studied (history of dance instruction), the work studied (history of dance performance), and the

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[58] *Id.* at 33.
[59] *Id.* at 34.
[60] *Id.* at 35.
[61] Fraleigh, *supra* note 38, at 102.
[62] *Id.*
[63] *Id.*
[64] Ward, *supra* note 37, at 12.
[65] *Id.*
[66] JUDITH B. ALTER, DANCE-BASED DANCE THEORY: FROM BORROWED MODELS TO DANCE-BASED EXPERIENCE 3 (1996); Ward, *supra* note 37, at 12.

various viewpoints of all involved.[67] Therefore, any analysis of the meaning of dance in general or of any particular dance does not measure up in terms of dance critique.

Most importantly, though, is that the initial step of analyzing dance must always be the study of the actual physical, psychological, physiological, and cultural experience of the dance, both as conceived by the dancer and as experienced by the audience.[68] In fact, this is necessary not only to recognize the meaning of a dance, but also to recognize that what is occurring is dancing at all (as opposed to some other form of movement).[69] It is important not to tie the meaning of a dance too much to any one participant (dancer, audience, presenter), but to consider that it might have a multiplicity of meanings for all involved.[70] This Note does not intend to suggest that the meaning of a dance can only be known by the dancer, but instead contends that a multiplicity of factors must be examined: the context of presentation, the history of dance and its various subgenres, the social and economic context in which a dance occurs, the broader historical moment in which a particular dance occurs, the intent of the dancer, the expectations and needs of the audience, and so forth. The sum of this introduction to dance studies should make clear that discussing the meaning of or the meaning in dance is an incredibly complex process. It requires vigorous critical inquiry and attention to dance as a unique medium of communication that is fundamentally different from other media, such as visual art or literature.

IV. ARGUMENTS: THE PLAINTIFFS-RESPONDENTS

Now, in light of the brief exposition of dance studies above, this Note moves to the task of understanding *Barnes* and *Pap's*, offering a critique of the understanding of dance in those cases. Turning now to the argumentative strategy deployed by the plaintiffs in both cases, the question becomes whether they adequately stated their case within the language of *O'Brien*. This Note now will focus on the question of complete nudity's meaning in nude dance, since this is the primary point of disagreement among the varying judicial opinions as they lay out their First Amendment analyses in the terms supplied by *O'Brien*. This also is the question for which dance studies will be employed to answer.

The plaintiffs-respondents in both cases failed to point to a specific way in which the regulations affected the expressive character (that is, the

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[67] ALTER, *supra* note 66, at 19.
[68] *Id.* at 176.
[69] Ward, *supra* note 37, at 14.
[70] *Id.*

content) of nude dancing.[71] In fact, in *Pap's*, the plaintiff-respondent's brief conceded that both partly nude and totally nude dancing convey the same message of eroticism, meaning that the difference between fully nude and G-string and pasty dancing would be one of degree, rather than of kind.[72] Thus, the plaintiffs-respondents in both *Barnes* and *Pap's* (the dancers themselves) believed that their nude dancing was expressive, was a species of performance dance, expressed emotions and ideas, and communicated a "particularized message of sensuality and eroticism" that would be affected in its intensity rather than in its message by the regulations.[73] As the plaintiff-respondents in *Barnes* asserted in oral argument, "[N]ude dancing is expressive because performance dance is inherently expressive of emotions and ideas, and, second, because nude dancing communicates a particularized message of sensuality and eroticism."[74]

Particularly important are some factual details and excerpts from the oral argument in *Barnes*. Gayle Ann Marie Sutro, one of the plaintiff-respondents, described herself as a professional performer with extensive dance education and acting experience, and stated that stripping was "an attempt to communicate, as well as to entertain."[75] This emphasis on the communicative nature of dance is not surprising as a legal strategy, given the general emphasis on communicative content in First Amendment law, as seen in the discussion of the writings of Schauer above. In sum, the plaintiffs reached the following dance-critical conclusions: that nude dancing is expressive conduct, that nude dancing is performance dance, that nude dancing expresses "emotions and ideas," and that nude dancing "communicates" "sensuality and eroticism." This is in line with the majority's Analysis in both *Barnes* and *Pap's* of the meaning of nude dancing, although it led to the opposite legal conclusion than the plaintiffs desired.[76]

V. ARGUMENTS: THE DEFENDANTS-PETITIONERS

In contrast with the plaintiffs-respondents' position, the defendants-petitioners in both cases claimed that nude dancing, at least of the type done in strip clubs, was not speech at all. In *Barnes*, the Court asked the defendant-petitioner whether or not a nude dance could communicate a

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[71] Aaron Brogdon, Note, *Improper Application of First-Amendment Scrutiny to Conduct-Based Public Nudity Laws:* City of Erie v. Pap's A.M. *Perpetuates the Confusion Created by* Barnes v. Glen Theatre, Inc., 17 BYU J. PUB. L. 89, 107 (2002).
[72] *Id.*
[73] BEZANSON, *supra* note 4, at 63.
[74] *Id.*
[75] *Id.* at 55.
[76] Brogdon, *supra* note 71.

particularized message or idea of sensuality in order to raise it to the level of speech.[77] In response, there was the following exchange:

> QUESTION: Well, could a dance communicate that?
>
> MR. UHL: Yes, a dance could communicate that.
>
> QUESTION: But this one didn't?
>
> MR. UHL: These dances did not.
>
> QUESTION: Because they were not good enough dancers?
>
> MR. UHL: No, Your Honor, it wasn't the quality of the dancing. Go-go dancing can be good or bad, but in either instance it's [not] speech.[78]

Here, those defending the regulations had reached a number of dance-critical conclusions: that although one might have criteria for judging the quality of nude dance, it is not communicative; that other forms of dancing might be communicative; and that while dancing might be capable of communicating a message of eroticism, nude dancing in the strip club does not. Although the Court ultimately did not agree with this reasoning, it still upheld the statutes.

VI. DANCE CRITIC: JUSTICE REHNQUIST

Justice Rehnquist's majority opinion in *Barnes* stated that nude dancing was in fact expressive conduct, although it merits "barest minimum of protected expression."[79] It is "within the outer perimeters of the *First Amendment*, although we view it as only marginally so."[80] As such, it is subject only to rational basis review, and the purpose of the regulation in *Barnes*, ostensibly about protecting social order and morality, was both permissible and reasonable.[81] Notably, Justice Rehnquist offered no support for his geographic metaphor for dance's position within the First Amendment. Presumably, dance may be in the "outer perimeters" of the First Amendment because it is a mix of conduct and content (à la *O'Brien*). To a dance scholar, however, such a statement rehearses the marginalization of dance that has always existed within the dominant aesthetic tradition of the West. Of interest from a dance-critical perspective, Justice Rehnquist stated that restrictions on nudity are not related to the expressive message of nude dance—that is, in the terms supplied by *O'Brien*, the restrictions were not directed at the content or message of

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[77] BEZANSON, *supra* note 4, at 57.
[78] *Id.* at 58.
[79] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991) (plurality opinion).
[80] *Id.* at 566.
[81] *Id.* at 568.

nude dancing.[82] Justice Rehnquist interprets the message of a nude dance to be an erotic one, and although wearing G-strings or pasties would make that erotic message less graphic, the message itself would not be deprived.[83] Rehnquist believed nude dancing communicated something, but that total nudity was not necessary. This meant, from a critical perspective, that the nude dancing would be just as successful in expressing its message without the particular element of exposed genitalia. Justice Rehnquist supplied no argument whatsoever supporting his contention that complete nudity was not part of the "content" of a striptease.

VII. DANCE CRITIC: JUSTICE WHITE

Justice White's dissenting opinion in *Barnes* paid particular attention to the history of dance as an inherently embodied and expressive art form addressing both emotions and ideas.[84] Dance is able to externalize "states which we cannot externalise [sic] by rational means."[85] In support of his aesthetic conclusions, Justice White alludes to works by both Aristotle and Stéphane Mallarmé, a French critic and poet, discussing dance and its significance.[86] Here, although Justice White clearly has more admiration for the value of dance than Justice Rehnquist does, Justice White uses the same historical tropes of dance as "emotional," of the dancer as "hysteric," that modern scholars of dance would reject. He also fails to cite any theorists of dance in support of his conclusions, but instead punts to Aristotle, a foundational thinker in the logocentric tradition, and Mallarmé, a poet (a critic of the verbal, rather than the physical embodiment of expression).[87] Justice White states that such laws would obviously not be applied to a production of *Salome* or *Hair*, presumably because both are much more narratively involved than the dance form at hand here.[88] Justice White argues that the emotional or erotic impact of nude dancing is "intensified" by clear nudity, and that such nudity is an expressive component of the dance; in other words, it is not incidental, but essential to its meaning.[89]

Justice White also makes an aesthetic distinction between high and low art, although he says the distinction is immaterial for First Amendment purposes.[90] He draws special attention to the context of nude dancing,

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[82] *Id.* at 570.
[83] *Id.* at 571.
[84] *Id.* at 587 (White, J., dissenting).
[85] *Id.*
[86] *See id.*
[87] *See id.* at 587 n.1.
[88] *See id.* at 590.
[89] *Id.* at 592.
[90] *Id.* at 594.

noting that while a Lincoln Center ballet may differ in content or quality from the dancing done in an average strip club, its ultimate meaning may not be different to the average audience member at all, thus problematizing the nature of meaning in nude dance through attention to its possible observers, and in particular, with reference to class distinctions.[91] Attentiveness to class concerns, and the way they affect the production and reception of meaning, is a noble move, particularly from the perspective of a reflexive postmodern scholar of dance such as Yvonne Rainer. Justice White concludes, in light of all this, that the regulation is definitely directed at the message of the dance, and not its means, and is thus subject to more rigorous scrutiny.[92] Justice White, in sum, acknowledges the expressive character of dance, its relation to both the intellect and the emotions, its distinction from linguistic or narrative art forms, such as opera or theatre, the way in which genres are reflective of class, and the importance of context and the multiplicity of meanings implicit in nude dance. Justice White is thus much more akin to a dance studies scholar than Justice Rehnquist is.

VIII. DANCE CRITIC(?): JUSTICE SCALIA

Justice Scalia's concurring opinions in both cases fail to truly engage the task of reading nude dance at all. In *Barnes*, he stated that laws of general applicability regulating conduct and not facially directed at expression should not be subject to First Amendment scrutiny at all, thus allowing him to side-step the task of analyzing the meaning of nude dance.[93] For Justice Scalia, the First Amendment is about oral and written speech, and not about expressive conduct at all.[94] Furthermore, as he states in his concurring opinion in *Pap's*, the ordinances would actually be equally constitutional if applied against more narratively or verbally intensive productions such as *Hair* or *Equus*.[95] While Justice Scalia entertains the question of whether nude dance might communicate something at all, he is not concerned with analyzing that communication or its means in any real sense.[96]

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[91] *Id.*
[92] *Id.* at 596.
[93] *Id.* at 572 (Scalia, J., concurring).
[94] *Id.* at 576.
[95] City of Erie v. Pap's A.M., 529 U.S. 277, 308 (2000) (Scalia, J., concurring joined by Thomas, J.).
[96] *Id.* at 310.

IX. DANCE CRITIC: JUSTICE SOUTER

Justice Souter's concurring opinion in *Barnes* came to dominate the logic of the majority's opinion in *Pap's*, even though he filed a concurring opinion in the latter case for other reasons. Justice Souter distinguishes performance dance from social dance, stating that the latter is not communicative while the former is, which is consonant with the Court's treatment of social dance elsewhere and interesting from a dance-critical perspective.[97] A dance scholar would applaud Justice Souter's attentiveness to how the various genres of dance differ from one another (in that they have varying histories and contexts of presentation), but deride his assumptions about whether one genre is communicative while another is not, at least in the absence of some justification. Justice Souter interprets the meaning of nude dancing to be an endorsement of erotic experience, and interprets specifically from the audience's vantage point.[98] This emphasis on the perspective of the audience is understandable, given First Amendment laws' preference for such a perspective. But, from the perspective of dance studies, attention not only to the audience, but also to the dancer himself and the entire context of presentation, is essential. For Justice Souter, nudity is not inherently meaningful, but may become meaningful when combined with an expressive routine, although the presence of total nudity in nude dance merely enhances its expressive message, rather than fundamentally altering it.[99]

Nevertheless, Justice Souter upheld the ordinances in *Barnes* because he believed (contrary to the facts) that they were aimed at regulating not the message of dance, but secondary effects associated with nude dance, such as prostitution and sexual assault.[100] Justice Souter draws explicit attention to the contextual circumstances in which the body is read when he states that the regulations would obviously be unconstitutional if applied to a theater production like *Equus*, presumably because theaters as performance venues are not associated with the same secondary effects as strip clubs.[101] Again, "[p]asties and a G-string moderate the expression to some degree, to be sure, but only to a degree."[102] The only difference between Justice Souter's concurring opinions in *Barnes* and *Pap's* is that in the latter, he states that the proponent of a regulation must marshal some evidence of the

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[97] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581 (1991) (Souter, J., concurring).
[98] *Id.*
[99] *Id.*
[100] *Id.* at 583.
[101] *Id.* at 585.
[102] *Id.* at 587.

existence of secondary effects rather than merely assuming them before perpetuating the regulation.[103]

X. DANCE CRITIC: JUSTICE O'CONNOR

Justice O'Connor's majority opinion in *Pap's* echoed Justice Rehnquist's opinion in *Barnes* when she stated that nude dancing is expressive conduct, but only at the "outer ambit" of the First Amendment.[104] Again, why such an explicit marginalization of dance? Is it because Justice O'Connor thinks dance is primarily "conduct," and, if so, is such an idea representative of the general prejudice against dance embodied in the Western tradition? She is sure that the statute at issue is not content-directed but content-neutral, and that the message of a nude dance with a G-string or pasties will be the same.[105] Thus, she believes total nudity is not essential to the meaning of a striptease. Justice O'Connor describes the impact of these regulations as "*de minimis*."[106] In particular, she vehemently states that nude dance is of a much lower value than other speech activities, such as "untrammeled political debate."[107] As noted above, the idea that the First Amendment is about fostering the production of truth in the marketplace via rigorous debate and fostering democratic government is relatively uncontroversial. But implicit in Justice O'Connor's statement is the assumption that nude dance does not have a political meaning, or that if it does, any such political meaning does not represent an attempt to engage in the task of discussing governance that is one of the purposes of the First Amendment's protection of speech. What is the evidence for such a claim? Why ist he striptease not political? When might it be? There is no substantive discussion of the relationship of the striptease to political ideas, meaning that Justice O'Connor has put forth one particular understanding of the meaning of nude dance without offering any critical justification. In the end, Justice O'Connor changes the grounds for regulation from that which justified it in *Barnes*, shifting the government interest from the promotion of morality to the prevention of secondary effects.[108]

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[103] City of Erie v. Pap's A.M., 529 U.S. 277, 310–11 (2000) (Scalia J., concurring joined by Thomas, J.).
[104] *Id.* at 289 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy and Breyer, JJ.).
[105] *Id.* at 289, 293.
[106] *Id.* at 294.
[107] *Id.*
[108] *Id.* at 297.

XI. DANCE CRITIC: JUSTICE STEVENS

Justice Stevens's dissent in *Pap's* echoes Justice White's in *Barnes*. To Justice Stevens, it is clear that the regulations are targeted at the message of nude dancing, which is an erotic one, protected by the First Amendment and certainly directed at content within the context of an *O'Brien* analysis.[109] Like Justice White, he draws attention to nude dancing as a broad cultural tradition, analyzing the meaning of total nudity in the striptease against the context of its larger historical and dance-critical significance.[110] Again, Justice Stevens, like Justice White, performs a much more rigorous analysis of nude dancing from a dance studies perspective than do the other justices. He pays attention to history, context, and the intent of those involved, offering reasons (however scant) for his understanding of what counts as "content" within the context of nude dance.

XII. LEGAL SECONDARY LITERATURE, IN PARTICULAR, THE SECONDARY EFFECTS DOCTRINE

In sum, the outcomes of both *Barnes* and *Pap's* turned on questions that are endemic to the field of dance studies, such as: How does one interpret the meaning of a dance? How does one distinguish among various genres of dance? What is the meaning of the body? What role is played by the various intentions and received meanings of the dancer herself, her audience, and her performative venue? What space does the history of a dance tradition occupy in its analysis? How does the meaning of one activity in a particular aesthetic tradition link up to its meaning in other discursive structures? Turning aside from these questions for the moment, it is important to note that extensive critical legal ink has been spilled on the nude dancing cases—but never from the perspective of dance studies. The majority of commentators have focused on nude dancing's expressive qualities. Many raise the question of whether nude dancing is "closer to the nightclub or to the Joffrey," noting the class distinctions at work, but also in the process reifying ballet as the supreme form of dance.[111] Others assume that total nudity is essential to the meaning of the striptease, without explaining why that is necessarily so.[112] Some supply a different message for nude dance than that assumed by the Court above, such as a "message

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[109] *Id.* at 318, 326 (Stevens, J., dissenting joined by Ginsburg, J.).
[110] *Id.* at 326.
[111] Kevin Case, Note, *"Lewd and Immoral": Nude Dancing, Sexual Expression, and the First Amendment*, 81 CHI.-KENT L. REV. 1185, 1216 (2006).
[112] *See* Jerrold J. Kippen, Note, *Sexually Explicit Speech*, 28 HASTINGS CONST. L.Q. 799, 821 (2001).

of temptation and allurement coupled with coy hints at satisfaction."[113] Finally, others have gone so far as to suggest that the nude dancing cases reveal the *O'Brien* test to be fundamentally flawed, trumpeting that it should be allowed to die, without really paying attention to the meaning of nude dance itself.[114]

Particularly important before moving on is to note legal criticism of the secondary effects doctrine as deployed in these cases. To begin with, transcripts of city council hearings concerning the enactment of both regulations completely undermine the claim that the bans were enacted for secondary effects purposes; rather, the regulations were about promoting a particular religious and moral agenda, and when secondary effects were in fact mentioned, many of those included were extremely far-fetched, including "suicide machines" and "drive-by shootings."[115] Furthermore, the Court in both cases speaks of the secondary effects doctrine as if it might apply to any sort of speech, but one commentator has noted that the secondary effects doctrine is not merely incidental to cases involving pornographic speech, but that it is never applied in any other circumstances, meaning that the secondary effects doctrine is in fact a "pornographic speech doctrine."[116] Most important, particularly in light of Justice Souter's claim in *Pap's* that there must be some evidence to support the idea that there are secondary effects associated with nude dancing at all, the literature supporting the effects' existence is fundamentally flawed and likely would not withstand the standards set forth by the *Daubert* test for judicial treatment of expert opinion.[117] Analysis of the most commonly cited study for supporting the secondary effects doctrine shows "absolutely no relationship between sexually oriented businesses and neighborhood deterioration."[118] Rather, the issue was the service of alcohol. Other tests have been found unreliable for other reasons,[119] and in sum the scientific validity of the most frequently used studies is questionable and their methodologies are usually fatally flawed.[120] What this means is somewhat tangential to the concerns of this Note's specific focus on the question of

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[113] Michael McBride, Note, Pap's A.M. v. City of Erie*: The Wrong Route to the Right Decision*, 33 AKRON L. REV. 289, 292 (2000) (citing Miller v. Civil City of South Bend, 904 F.2d 1081, 1089 (1990)).
[114] Mark Bernardin, *The Law and Politics of Dancing:* Barnes v. Glen Theatre *and the Regulation of Striptease Dance*, 14 U. HAW. L. REV. 925, 948 (1992).
[115] 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, 853 (2002).
[116] John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 294 (2009).
[117] Bryant Paul, Daniel Linz & Bradley J. Shafer, *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, 366 (2001).
[118] *Id.* at 377.
[119] *See id.* at 379.
[120] *Id.* at 388.

the meaning of nudity in nude dance, but is still worth mentioning, because it casts doubt on the outcomes of both cases while suggesting a degree of misinformation about nude dance within the Court in general.

XIII. ANOTHER APPROACH: AMY ADLER

Adler points out that almost all of the traditional legal analyses of the nude dancing cases have failed to make sufficient sense of them.[121] She seizes on the idea that *Barnes* and *Pap's* present the problem of the female body, and undertakes the first feminist analysis thereof, interpreting the cases to be based on sexual panic driven by a deep-seated masculine dread of female sexuality.[122] Adler's approach is notable and commendable from a dance studies perspective for both its attention to the female body in particular, and also its use of the same research universe as dance studies in general, since she draws on many of the same theorists and writers that have become part of what might loosely be thought of as the dance studies "canon."

Adler particularly draws attention to the concrete physical manifestation of the regulations—the G-string—questioning how such a tiny piece of fabric can possibly control the explosive and violent secondary effects used to justify the enactment of the regulations in the first place.[123] In her words, "the G-string conceals a very small part of the body, the sight of which is a very big deal."[124] The trouble with completely nude dancing, from a feminist perspective, is that it provokes the horror of female genitals, the source of what in Adler's Freudian reading can best be thought of as castration anxiety.[125] She reads the G-string as functioning like a fetish, crystallizing the moment before entering the world of anxiety and allowing the male viewer to reestablish control of the scene.[126] Thus, the idea, in Justice O'Connor's language, that the G-string is "minimal" is completely false because the absence of the G-string would involve confrontation with "castration, dismemberment, and homosexuality."[127] This particular reading of the cases, and also of the female body, is based in feminist conceptions of the female body as abject, as material that must be censored, controlled, and regulated in order for society to function according to detached, abstract reason.[128]

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[121] Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1110 (2005).
[122] *Id.* at 1110–11.
[123] *Id.* at 1111.
[124] *Id.* at 1129.
[125] *See id.* at 1124, 1130–34.
[126] Adler, *supra* note 121, at 1136–37.
[127] *Id.*
[128] *See id.* at 1143–46.

There are, however, a number of problems even with Adler's interpretation of the cases from a dance studies perspective. First, Adler assumes a male viewer and a female dancer, both presumably heterosexual, which is an illegitimate move. Second, in assuming a male viewer, Adler constructs the meaning of the female genitalia in nude dance from an audience-based, rather than a dancer-based, perspective. While this may be consonant with the prevailing emphasis in current free speech law on the hearer, it may not take adequate account of other participants in the communicative scene from a dance studies-based perspective. Third, Adler (in part due to her selection of sources) trades in modernist notions of the female, of nude dance as the performance of hysteria. She notes that hysterics often did erotic dancing, and assumes that the foundation of the striptease is in the performance of the hysterics of the nineteenth century.[129] Many dance critics would supply another genealogy of the feminine and critique what can be read as Adler's essentialist reading of it. It is important to note, however, that Adler's analysis of the cases represents a step forward in its attention to embodiment, to écriture féminine (a favorite source for dance studies scholars), and to many of the favored figures of dance studies. In particular, her analysis of the figure of Salome[130] in the cases is an excellent segue into a discussion of dance studies: "Salome came to signify a threat not just to the boundaries between sexuality and

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[129] *See id.* at 1148–50.

[130] While unnamed, Salome is the daughter of Herod and depicted in Mark 6:17-29 as a seductress who performs an erotic dance:

> For Herod himself had sent and had John arrested and bound in prison on account of Herodias, the wife of his brother Philip, because he had married her. For John had been saying to Herod, 'It is not lawful for you to have your brother's wife.' Herodias had a grudge against him and wanted to put him to death and could not *do so*; for Herod was afraid of John, knowing that he was a righteous and holy man, and he kept him safe. And when he heard him, he was very perplexed; but he used to enjoy listening to him. A strategic day came when Herod on his birthday gave a banquet for his lords and military commanders and the leading men of Galilee; and when the daughter of Herodias herself came in and danced, she pleased Herod and his dinner guests; and the king said to the girl, "Ask me for whatever you want and I will give it to you." And he swore to her, 'Whatever you ask of me, I will give it to you; up to half of my kingdom.' And she went out and said to her mother, 'What shall I ask for?' And she said, 'The head of John the Baptist.' Immediately she came in a hurry to the king and asked, saying, 'I want you to give me at once the head of John the Baptist on a platter.' And although the king was very sorry, *yet* because of his oaths and because of his dinner guests, he was unwilling to refuse her. Immediately the king sent an executioner and commanded *him* to bring *back* his head. And he went and had him beheaded in the prison, and brought his head on a platter, and gave it to the girl; and the girl gave it to her mother. When his disciples heard *about this*, they came and took away his body and laid it in a tomb.

Mark 6:17–29 (New American Standard).

violence, but also to the First Amendment boundaries between speech and action, and between high value and low value speech."[131]

XIV. THE STRIPTEASE AS DANCE

The task of reading a dance or even of recognizing one is thus infinitely more complicated than the Court acknowledged in *Barnes* and *Pap's*. The Court never undertook a properly dance-critical reading of nude dancing, probably because judges generally are reluctant to engage in aesthetic conversations, particularly those for which they are ill-equipped. The trouble with this hesitancy relative to nude dancing, however, is that with dance in general, the lines between saying and doing become difficult to articulate, if they are articulable at all. This line between saying and doing is rather pronounced in the Court's opinions on social dance, which they interpret as being more of the doing variety. While the Court assumes performance dance is expressive speech worthy of protection, it has held that social dance is not expressive and thus cannot have importance as symbolic conduct.[132] Lower courts have held, however, that social dance, if it occurs in politically charged conducts, such as queer life, cannot help but have an element of performance about it, which might raise its status to the expressive level and thus give it First Amendment protection.[133]

Nevertheless, many dance-studies scholars have written at length about the striptease as dance. To begin with, they note the difficulty of distinguishing between the type of nude dancing that occurs in a strip club and in the context of opera, ballet, or another theatrical performance. Many have questioned whether the difference is merely one of class.[134] The nude dancers involved in the *Barnes* and *Pap's* litigation asserted that improvisation or perhaps any kind of movement could be dance, although the state found this ridiculous because it would then trivialize the First Amendment by casting any expressive movement or motion at all as worthy of protection.[135] Dance scholars who have written on the nude dancing cases believe that Justice Souter's concurring opinions seem to displace the issue of distinguishing among genres of dance by rendering the entire issue contextual, which ignores other issues, such as the intent of the dancers themselves.[136] Dance scholars are perspicuous enough to see that

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[131] *Id.* at 1153.
[132] Paul Siegel, *A Right to Boogie Queerly: The First Amendment on the Dance Floor*, *in* DANCING DESIRES: CHOREOGRAPHING SEXUALITIES ON AND OFF THE STAGE 267, 275 (Jane C. Desmond ed., 2001).
[133] *Id.* at 280.
[134] *See* BEZANSON, *supra* note 4, at 58.
[135] *Id.* at 60.
[136] *See id.* at 72.

the opinions raise the issue of how one fits the erotic meanings of nude dancing into the traditional reasons given for the First Amendment's protection of speech (self-governance, the seeking of truth, among others).[137] They note that the Court considers nude dancing minimally expressive, not for reasons endemic to it as a practice, but because it is difficult to situate within the self-governing, truth-seeking, and individual autonomy goals of the First Amendment.[138]

In contrast, dance scholars attempt to semiotically think through stripping on the same terms as they would any other form of dancing.[139] In these readings, the concrete physical movements that attend the striptease are rigorously scrutinized and analyzed in choreographic terms, leading to extremely lengthy and breathtaking descriptions of every single step of the striptease routine—left leg up, spin around the pole, sit down, stand up, peruse audience, remove blouse, change song, and so on.[140] Attention also must be paid to the historical and cultural construction of the stripper as a symbolic figure. The stripper has been shaped by various historical forces to simultaneously be a victim of the lecherous advances of men and their insatiable appetites, as well as a temptress waiting to lure the unwilling astray. Scholars often call attention to the fact that this double-sided nature is not unique to the modern stripper, but was in fact redolent of the nineteenth century literature about social dancing.[141]

Dance scholars who read stripping in a semiotic way have come to the conclusion that most, if not all, of the anti-exotic dancing laws, such as the ones in *Barnes* and *Pap's*, could just as easily apply to other dance styles in different contexts, and could possibly be used to ban the works of such dance luminaries as Graham, George Balanchine, Jerome Robbins, and Isadora Duncan.[142] On the whole, most agree that exotic dance is dance, in that it fits the implicit definition of dance assumed by dance studies: namely, that it is a "purposeful, intentionally rhythmical, culturally patterned, nonverbal, body movement communication in time and space, using effort and having its own criteria for excellence."[143]

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[137] *Id.* at 79.
[138] *Id.* at 80.
[139] Judith Lynne Hanna, *Right to Dance: Exotic Dancing in the United States*, *in* DANCE, HUMAN RIGHTS, AND SOCIAL JUSTICE: DIGNITY IN MOTION 86, 86 (Naomi Jackson & Toni Shapiro-Phim eds., 2008).
[140] *Id.* at 90.
[141] Elizabeth Aldrich, *Plunge Not into the Mire of Worldly Folly: Nineteenth-Century and Early Twentieth-Century Religious Objections to Social Dance in the United States*, *in* DANCE, HUMAN RIGHTS, AND SOCIAL JUSTICE: DIGNITY IN MOTION 20, 26 (Naomi Jackson & Toni Shapiro-Phim eds., 2008).
[142] Hanna, *supra* note 139, at 87.
[143] *Id.* at 89.

Importantly, particularly with respect to those feminist critics who allege that exotic dance, like pornography, is demeaning to women or politically retrograde, dance scholars pay much more attention to the meanings that exotic dancers attach to their own activity than the Court did in either *Barnes* or *Pap's*. Most nude dancers assert that they are independent subjects creating art and not merely submissive objects of the male gaze.[144] Rather, exotic dancers often self-consciously deploy tropes of femininity, such as the cowgirl in a parodic way, in which case their campy embodiment of the stereotype contains an excess that leads to a critique of gender roles and popular standards of femininity.[145] Scholars of exotic dance, like exotic dancers, are very aware of the history of erotic dancing, which is much longer and more varied than either the Court or a legal commentator like Adler realizes. Its history stretches back to belly dancing and ancient Egyptian dance, adopting popular dance forms (particularly African and African American ones) along the way, and stretching forward into the work of choreographers in other contexts who have self-consciously appropriated it.[146] For example, many modern choreographers, such as Maud Allen and Ruth St. Denis, have acknowledged the importance and influence of the striptease for their own, non-nude dancing.[147] It is thus important to acknowledge that the boundaries between dance forms are porous, as many famous works by ballet or modern choreographers specifically feature the character of the stripper: for example, those by Robbins, Balanchine, Mark Morris, and Bob Fosse.[148]

One of the ironies of the Court's nude dancing jurisprudence is that the Court fails to notice that for many, the striptease may have precisely the political meaning that would elevate it to the highest level of speech protection. Justice O'Connor's opinion in *Pap's*, for example, draws particular attention to the fact that society's interest in nude dancing is less than that of political debate.[149] She rhetorically enhances this position by questioning whether any responsible citizen would, for instance, send their child off to war for the freedom to dance in the nude, as surely aspects of political life, such as the draft, are more emotionally fraught issues than regulating nude dancing.[150]

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[144] *Id.* at 92.
[145] *Id.* at 89.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 103.
[149] *See* City of Erie v. Pap's A.M., 529 U.S. 277, 294 (2000) (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy and Breyer, JJ.) (quoting Justice Stevens from Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976)).
[150] *Id.*

A nude dancer, or any person with an interest in aesthetic practices, civil liberties, or gendered or queer issues might contend otherwise. The restrictions imposed on exotic dance have the potential to impact other arts that touch on themes of unconventional sexuality, bodily disclosure, and homosexuality.[151] One commentator suggests that the development of exotic dance is part and parcel of the same modernist quest that workers in other fields—like Henry Miller in literature—participated in to explore the previously unexplored, to explode limits, and to find new objects for aesthetic contemplation.[152] These artists understood this explorative mandate to be not merely aesthetic, but also political, in that it was informed by an attempt to question social norms and forms of governance.

So what then is the meaning of the striptease? And what role does the completely bare female body play in it? How might that impact a reexamination of the Court's conclusions in *Barnes* and *Pap's*? First, as we have seen above, it is important to note that it is a specious task from the beginning to discuss the meaning in dance, as dance itself is a problematization of meaning, and the meaning of dance is always conveyed through physical and embodied form in particular contexts, in such a way that perhaps it is better to show a dance than to speak of it. Nevertheless, the trouble with looking at dance from a legal perspective is that the law is a verbal discourse, so the task must be assumed if there is to be meaningful discussion at all. Second, assuming one can or should speak of the meaning of nude dance, it is important to note that such meaning is always contextual and depends on the actors involved. A nude dance might have a completely different meaning to different dancers. To the repressed woman from an abusive background, nude dance might mean "liberation" or "recklessness." An economically successful woman who is dancing merely for her own interest might mean "adventure" or "exploration." An economically deprived woman, forced into dancing by an abusive spouse or drug addiction, might convey a much darker meaning. What about the promoter who puts on the dance? One club owner might intend the dances as nothing more than commerce. Another might intend his presentation of nude dancing to be a celebration and admiration of female beauty. What if the promoter is female? The dancer male? The audience queer? The broader social community hedonistic or fundamentalist? All of these variables must be acknowledged.

At any rate, here is one possible meaning out of the many available, selected not quite arbitrarily, but because it is most likely to be deemed worthy of protection by free speech law as it stands, because of and in spite

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[151] Hanna, *supra* note 139, at 102.
[152] *Id.* at 89.

of the challenge it raises to the Western tradition in general. The striptease can be a challenge to the dominance of the female by the male through an unrelenting presentation of female sexuality, a presentation that ultimately can threaten and destabilize the presumably male client.[153] Contrasted with the way in which the female dancer deftly and calmly exhibits and displays her body, always in control of her movements, the male client is subjected to her physical presence and probably responds in physical ways that he cannot control—erection, ejaculation. The female stripper retains her control by being able to confront and touch the male client as much as she pleases, but he can never touch her. In contrast with the view of the stripper as passive victim of the male gaze, this self-confident woman exhibits herself boldly, confronting those in the room with the truth of her body.

In this presentation of the body, nudity is absolutely essential. Western discourse perpetuates its image of the female body as supple and fertile, yet never menstruating, without orifices, simultaneously sexed and sexless. It is, as Mikhail Bakhtin, a Russian philosopher, put it, an especially apropos discussion of dance, a classical body, the body of the ballerina.[154] The nude dancer, in totally revealing her genitalia, represents an irruption of the grotesque body with all of its protuberances, rebelling against the civilizing functions of discourse.[155] Thus, the meaning of total nudity in the striptease is, after all, somewhat akin to what Adler alludes to in her work, albeit in motion: the revealing of the carnivalesque, transgressive body cuts across stereotypes of femininity by restaging them in excess, which can be a revolutionary art.[156] The privileged masculine position within sexual discourse is then ironically subject to challenge.[157] Obviously one could object that this is not at all the message the average strip club patron receives from the striptease; but even if this is taken as true, why should the understanding of the average (presumably male and heterosexual) audience member be determinative in analyzing the meaning of nude dance?[158] Any dance critic would argue that the privileged masculine position is not determinative, and if the veracity of this reading is subject to question, it is nonetheless subject to question as a reading supplied by numerous dance

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[153] *See* Sherril Dodds, *Dance and Erotica: The Construction of the Female Stripper*, *in* DANCE IN THE CITY 218, 231 (Helen Thomas ed., 1997).
[154] Wolff, *supra* note 43, at 84.
[155] *Id.*
[156] *See id.* at 86–89.
[157] Dodds, *supra* note 153, at 231.
[158] Perhaps the Court's emphasis on the understanding of the average strip club patron is the result of its generally listener-oriented approach. However, this listener-oriented approach is itself founded in the very Cartesian dualism between expression and conduct that dance studies and dance itself seek to undermine. Other approaches for First Amendment analysis have been recommended which would be attentive to both speaker and audience, and also to the entire public context of the act of speech, which only makes sense if one is persuaded by a Wittgensteinian analysis of the nature of language. *See generally* SCHAUER, *supra* note 7.

scholars who have studied the subject in detail. If the Court, for example, were to question it, it ought to do so through an honest engagement with nude dance qua dance with special attention to the language of dance studies.

XV. CONCLUSIONS

In view of all the description and analysis above, it is important to return to the question that began this Note, as in the reprise of a dance, albeit with a difference: why revisit the Supreme Court's nude dancing cases now? Perhaps because they represent multiple problems that are much bigger than nude dancing and dance itself. These problems have still not been adequately addressed, at least in the Court, however well they have been considered at the margins of legal scholarship.

First, the nude dancing cases are yet another example of the way in which drawing distinctions between content and conduct, or conduct and communication, can often be a specious enterprise. While the varying opinions in *Barnes* and *Pap's* assume that it is relatively unproblematic to make such distinctions, the literature of dance studies demonstrates that such questions are often hopelessly difficult. Is this to say, then, that legal rules such as the categorization of content-directed versus content-neutral under the *O'Brien* test are unworkable? Not necessarily. But cases involving such distinctions ought to be more carefully considered by judges, in a spirit of humility and with genuine willingness to recognize the difficulty of the task at hand. Second, the Court can and should avail itself of the critical literature on point in whatever communicative tradition it finds itself examining. This is something the Court already does within the field of obscenity law, which pays attention to whether or not a work of art has literary, artistic, political, or scientific value.[159] Why should artistic practices that the Court construes as clearly non-obscene (like nude dancing) receive less consideration of their aesthetic values, stated in terms endemic to the practice itself? Furthermore, the Court should consider the opinion of expert witnesses well versed in the tradition at hand, something that did not happen in the nude dancing cases, but has been well recognized with respect to other artistic practices, such as music.[160]

Third, nude dancing reveals the problems that modernism and postmodernism in general pose for legal theory. Modernist and postmodernist aesthetic practices represent attacks on the established order,

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[159] Miller v. California, 413 U.S. 15, 39 (1973).
[160] *See* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS, 658–59 (1992).

an attempt to call into question received normative values and either replace them with more concrete or abstract answers (as in modernism) or to retreat into the further question of the creation of value itself (as in postmodernism).[161] The evolution of the legal doctrines of obscenity, profanity, and low value speech theory in the middle part of the twentieth century are arguably themselves repudiations of the subversive agenda of modernism as a whole.[162] The postmodern condition, with its suspicion of metanarratives and deconstructive approach to the Western tradition and its logocentrism, as strongly demonstrated in the largely postmodern field of dance studies, "reflect[s] a view of the world that obviously disturbs the Supreme Court."[163] Current controversies in jurisprudence about interpreting the meaning of the Constitution or of statutory interpretation (for example, originalism, literalism, the "living Constitution") exemplify legal anxiety concerning the strengthening of the Anglo-American exaltation of the abstract, the rational, and the verbal, as opposed to the contingent, the embodied, and the historicized.

Fourth, the nude dancing cases call our attention back to the ways in which gender is constructed through concrete social practices. Dance, particularly nude dance, reveals the way in which gender is really just a stylized repetition of physical casts, meaning that the dance floor and the proscenium are precisely the place to consider and investigate the ways that gendered or otherwise sexualized identities are created and sustained.[164] The intersection of law and dance reveals that the regulation of gender can be negotiated by new ways of moving, or by the critical and subversive appropriation of old ones.[165] This is of particular importance as our culture reexamines its attitudes toward gender and sexuality, as we see in debates about the rights of transgendered or intersex persons, whose bodies refuse to obey the legal creation of the gendered body, or in the case of gay, lesbian, bisexual, and queer persons, whose bodies may easily be read as gendered, but whose conduct may not be. The analysis of nude dancing as speech has import because of the significance that many sexual minorities attach to their own nonverbal conduct for communicating intimate ideas, especially when positive verbal expression about their sexuality has been suppressed by American culture.[166]

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[161] *See* Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 249–52 (1987).
[162] *Id.*
[163] *Id.* at 253.
[164] Jonathan Bollen, *Queer Kinesthesia: Performativity on the Dance Floor*, *in* DANCING DESIRES: CHOREOGRAPHING SEXUALITIES ON AND OFF THE STAGE 285, 289 (Jane C. Desmond ed., 2001).
[165] *Id.* at 309.
[166] James Allon Garland, *Breaking the Enigma Code: Why the Law Has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves That It Should*, 12 LAW & SEX. 159, 166, 172 (2003).

Finally, the nude dancing cases raise the particular challenge that dance can pose to the law. In particular, the nude dancing cases reveal that in speech analysis, the Court usually is concerned with the listener's response. They also show the failure of that concern to adequately meet the task of many instances of expressive conduct.[167] Perhaps a better approach to analyzing expressive conduct, and speech generally, would be to examine the speaker's intention, the listener's receptivity, and the entire exchange's broader social context, including relevant bodies of scholarship and knowledge to analyze how the meaning of any act arises.[168] Obviously this approach would add complexity and difficulty to First Amendment discourse and make uncomfortable those judges who desire a bright line rule at any cost. But should the desire for a bright line rule impede the desire to have the law attempt to conform to our understanding of the way in which things actually are? Dance pokes holes in the entire process of signification by revealing the contingency of the connection between sign and signified and the elusive process of constructing meaning, which is always a problem for any theory of jurisprudence.[169]

More generally, and most importantly, dance insists that the body, rather than the law, is the only enduring reality: this implies that the body, by enduring, can resist normative social and aesthetic ideologies.[170] As the dancer resists abstraction and ceaselessly returns to his body, he learns to listen to its intuitive truths and desires, whether or not they fit into a reigning discursive structure. Dance undermines the subject-object dichotomy, and thus pokes holes in the law's preference for the objective position, for the particular masquerading as the universal.[171] The dancer knows that the body is the condition for the existence of his mind, and recognizes the dependence of the abstract and the verbal on base matter. Such knowledge rebukes the law as the vengeance of the figure on the discursive structures that strive to contain it and bring it into coherence.

XVI. POSTSCRIPT

> To the despisers of the body I want to say my words. I do not think they should relearn and teach differently, instead they should bid their own bodies farewell—and thus fall silent.

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[167] Shaman, *supra* note 6, at 318.
[168] *See, e.g.*, *id.* at 318, 323, 342 (discussing the relevance of the speaker's intent, audience and context in analyzing value of speech).
[169] Lepecki, *supra* note 29, at 129.
[170] Ramsay Burt, *Genealogy and Dance History: Foucault, Rainer, Bausch, and de Keersmaeker*, *in* OF THE PRESENCE OF THE BODY: ESSAYS ON DANCE AND PERFORMANCE THEORY 29, 29 (André Lepecki ed., 2004).
[171] Lepecki, *supra* note 29, at 129.

> 'Body am I and soul'—so speaks a child. And why should one not speak like children?
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> But the awakened, the knowing one says: body am I through and through, and nothing besides; and soul is just a word for something on the body.
>
> The body is a great reason, a multiplicity with one sense, a war and a peace, one herd and one shepherd . . . .
>
> Behind your thoughts and feelings, my brother, stands a powerful commander, an unknown wise man—he is called self. He lives in your body, he is your body.
>
> There is more reason in your body than in your best wisdom.[172]

[172] FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA: A BOOK FOR ALL AND NONE, 22–23 (Adrian Del Caro & Robert B. Pippin eds., Adrian Del Caro trans., Cambridge Univ. Press 2006).