Baring and Veiling:  
Sex, Politics and National Identity in Canadian Legal Discourse

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_Scholars have noted the centrality of migration laws to mythic constructions of nation and national identity. Taking off from this observation, this article proposes a narrow focus on the process of legal meaning-making by courts and the legislature and how the lines drawn between the public and private spheres figure in these constructions. This article analyses two instances in which female subjects whose bodies are treated as symbols, carry the weight of legal meaning-making in constructing a discursive public or private body. By focussing on the regulation of baring and veiling in the Canadian context, the article considers regulatory effects that lie outside of the formal rules that define the terms of exclusion from the nation, set the conditions for entry, police its borders or extend formal membership. For the women they generally target, the regulation of both baring and veiling is directly experienced as a loss or diminished subjecthood in the form of legal, political and social exclusion, even when the legal principles invoked in support of regulation purport to have egalitarian objectives such as gender equality and preventing social harm. Within the neoliberal script, the bared and veiled targets of regulation are less like subjects and more like objects. Feminist theory has long demonstrated how gender hierarchy limits or prevents full subjecthood but queer analysis pushes this farther by noting that sexuality has proven particularly antithetical to subjecthood. I argue that while both insights are relevant here, a reflexive pause in the legal construction of particular regulated bodies (and regulatory problems) can shift the focus on actual persons who bear the brunt of regulation and transcend simplistic ‘for or against’ formulations of critical questions about law._

I. INTRODUCTION

Woman is neither outside the margins nor at the margins of the political; instead, she constitutes and unsettles those margins. A frontier figure that is neither wholly inside nor wholly outside political space, woman is elusive, sometimes reassuring yet also quite dangerous. She signifies both culture and chaos, one can never be sure which.

—Linda M.G. Zerilli¹

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While neocolonial anxiety regarding migration provides an explanation as to why states are ratcheting up immigration policies and shoring up the nation’s borders, in reality heightened security responses to what states perceive as threats to national identity and sovereignty happen alongside the unabashed deployment of immigration policies in the pursuit of economic growth as well as the achievement of demographic goals. For neoliberal states (especially settler nations), the rather complex task of nation-building is made all the more difficult by the paradoxical demands of the market economy: ensuring steady streams of cheap labour from the global south while at the same time shoring up its borders and protecting its sovereignty against the ‘invading hordes’. On top of it all, states must accomplish both tasks while staying true to their liberal values, among them gender equality and women’s rights.

For the sovereign and bounded nation state at the centre of the modern world, addressing this dilemma usually takes the form of ‘border control’ exercised in the name of identity, community or simple power. These borders are not just material territorial borders but also metaphorical moral borders that for colonially constructed (and settler) nations like Canada, require constant policing. Scholars have noted the centrality of law (migration law in particular) in this mythic fabrication of nation and national identity.

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2. In Canada, for example, political rhetoric about the perils of immigration and accompanying burdens to the system of social support run alongside calls for immigration solutions to address demographic deficits and economic downturns. The recruitment of the right immigrants is also often discussed as a comparison between provinces as well as a competition.

3. C. R. Nagel, Geopolitics by another name: Immigration and the Politics of Assimilation, 21 POL. GEOGRAPHY 981 (2002). The construction of political territory, the spatial enclosure of the nation and the containment of external threats (including ‘floods’ and ‘hordes’ of immigrants) are processes laden with ideological conceptions of self and other.

4. Saskia Sassen, Globalization and Its Discontents (1998). This conflict plays out on multiple scales, which may explain some of the nuances in the different accounts about the impact of liberal values on the issue of immigration. In her analysis of globalisation, Saskia Sassen was the first to note that to some extent, globalisation constrained states in enacting immigration controls. Sassen refers in particular to how the proliferation of human rights norms contributed to denationalise territory; See Catherine Dauvergne, Making People Illegal: What Globalization Means for Migration and Law 20-21 (2008). While acknowledging the importance of Sassen’s observation, Catherine Dauvergne presents a bleaker picture of law and notes that human rights norms have actually done little to assist migrants.

5. Id. at 37. Dauvergne notes the centrality of migration law in this process and notes that the contemporary crackdown on illegal migration in the context of globalising forces demonstrates that migration is being defended as the last bastion of sovereignty.

6. Id. at 45. Dauvergne points out that the notion of nation is inseparable from its people (citizens) but at the same time it is bound up with people’s perceptions of nation and thus myth, symbol and imagination are linked. I agree with Dauvergne’s observation about the stability that law provides to an otherwise unstable endeavour, that is defining the nation. I would add that for states constantly in the process of recruiting immigrants as a key part of its economic growth strategy, exercises in the creation and reinforcement of the national mythology assume even more significance and require constant attention.

7. Id. at 45-47.
In this article, however, I propose a narrower focus on the process of legal meaning-making by courts and the legislature by focusing on how the lines drawn between the public and private spheres figure in this fabrication. This article analyses two instances in which female subjects whose bodies are treated as symbols carry the weight of legal meaning-making in constructing a discursive public or private body. By focusing on the regulation of baring and veiling, I consider regulatory effects that lie outside of the formal rules that define the terms of exclusion from the nation, set the conditions for entry, police its borders or extend formal membership through citizenship and immigration law. While closely linked to immigration discourse, the regulatory effects examined here do not just affect migrant women, or for that matter apply exclusively to women who lack status in Canada. For the women they generally target, the regulation of both baring and veiling is directly experienced as legal, political and social exclusion even when the laws and legal principles in play purport to have egalitarian objectives such as gender equality, judicial transparency or even preventing social harm behind them.

While the act of baring has been considered legally controversial longer than veiling in Canada, the focus of both controversies converges on a common site of regulation: female bodies in public places. In law, however, the ‘trouble’ with baring and veiling is usually articulated on different sides of the legal and sexual conundrum. Baring (especially when the bare body is female) is generally explicitly read and debated as being about sex by the law, whether from the perspective of Crown prosecutors, the police or the courts. On the other hand, veiling, albeit profoundly connected with religious norms related to sexual conduct, is an issue conventionally framed as religious practice and cultural difference. Arguably not all controversies about religious headgear,

8. While debates about the veil and facial coverage in Canada are usually framed as cultural or religious difference, this does not mean that there are never any sexual overtones or references to sexuality. See, e.g., Joan W. Scott, The Politics of the Veil 151-153 (2007). There are, however, profound differences that may be gleaned from accounts about similar debates elsewhere. The symbolism of the veil and its relationship with sexuality and gender roles in the French public debate is described by Scott, who notes that a particular type of sexualised femininity (and masculinity) which highlights gender difference is part of the imagined French identity. In this context, the dresscode for Muslim women, including the head scarf is read as a contradiction of French identity. While the principle of ‘gender equality’ as a marker of Canadianness figures prominently in the debate over the niqab and burqa, which are in turn interpreted as symbols of female patriarchal oppression, even Canadian conservatives have described France’s ban of hijabs as too extreme. See Steve Paikin, Interview with Immigration Canada Minister Jason Kenney, Apr. 13, 2012, available at: http://www3.tvo.org/video/176162/jason-kenney-bottom-line-immigration. The production and consumption of pornography and commercial sex is also used as a marker of difference in making popular claims about French-Canadian and Anglo-Canadian attitudes towards sexuality. In such cases, ‘Frenchness’ functions as shorthand for claiming and attributing
attire and symbols in public places have necessarily focused exclusively on women and conversely not all controversies about public nudity have concerned women or reactions to female bodies.9

Female nudity (in the context of exotic dancing) and female facial coverage (in the form of the niqab or burqa), are, however both legally controversial in Canada in the sense that the trajectories of regulation in both cases are linked to current day anxieties around immigration. In the regulation of both baring and veiling, particular classes of women emerge as default sites and serve as the primary targets of law enforcement.10 In the case of stripping, the government’s latest policy effectively barring strip clubs from accessing the Temporary Foreign Workers Program (TFWP) to hire foreign exotic dancers is suffused with the rhetoric of anti-sex trafficking.11 In fact, sex trafficking is now cited as the rationale


10. See, e.g., R. v. Verret, [1978] 2 S.C.R. 808. In this case, the accused was a male go-go dancer who was convicted under the indecency provision for public nudity without a lawful excuse; See also Grant v. Canada, [1995] 1 F.C. 158 in which the Supreme Court upheld the validity of the Royal Canadian Mounted Police (RCMP) regulations allowing its officers who were practicing Sikhs to wear their turbans instead of the standard RCMP issued felt hat.

11. While controversies about public nudity and religious dress may involve women and men, the way that regulations are both framed and implemented reflects a gendered order and bias on the part both of those charged with creating the rules and of those enforcing them. See, e.g., Mariana Valverde, LAW’S DREAM of a COMMON KNOWLEDGE 68-69 (2008). In 1997, a gay strip bar was charged under the bawdy-house provisions of the criminal code (indecent acts and prostitution) because it featured male strippers masturbating on-stage. Valverde analyses the transcripts of the trials (R v. Potts, [1999] O.J. No. 4237 and R v. McKeigan, [2000] O.J. 1598), and noted the influence of often explicitly heterosexual police discourse on how bodies are read in indecency cases. She also notes the irony of how heterosexual male officers are able to testify from a universal subject position about gay men, women strippers and sexual differences in general.

11. While exotic dancing and the adult industry behind it remains legal in Canada, new legislation authorises the Minister to treat applicants to the industry as being ‘at risk’ of sexual exploitation. See Statutes of Canada, (March 13, 2012) Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts, § 206 (1.2). Despite subsection (1.1), the officer shall refuse to authorise the foreign national to work in Canada if, in the officer’s opinion, public policy considerations that are specified in the instructions given by the Minister justify such a refusal and according to (1.4) the instructions shall prescribe public policy considerations that aim to protect foreign nationals who are at risk of being subjected to humiliating or degrading treatment, including sexual exploitation; See also Statutes of Canada, (June 18, 2012) Bill C-38, Jobs, Growth and Long-term Prosperity Act, which granted the Immigration Minister the additional authority to give his instructions retrospective effect. § 706 (1) (2) (3.1) provides that an instruction may, if it so provides, apply in respect of pending applications or requests that are made
for maintaining provincial and city policing and licensing schemes, which have been criticised by sex workers for aggravating their already marginalised conditions of work. Several scholars have demonstrated how state policies on female trafficking are historically entrenched in moral panics over prostitution, as well as being implicated in the security and border control turn in the regulatory discourse of immigration.

Meanwhile, the polarising debate on religious dress, particularly with regard to Muslim women's head and facial cover in Canada, features prominently in politically charged discussions on multiculturalism. In fact, Muslim women's head dress and facial cover or the niqab is often portrayed as a serious threat to Canadian values and has been officially singled out as an example to frame limits to social inclusion.

II. UNPACKING THE NEOLIBERAL ORDERING SCRIPT

I consider key decisions by the Supreme Court of Canada dealing with public nudity in the context of stripping as well as recently introduced policy changes which impose a putative ban on foreign workers in exotic dancing. Likewise, I analyse a recent ruling tackling the issue of whether a witness should be allowed to wear the niqab while giving testimony before a court alongside related legislation before the Provincial Parliament of Quebec prohibiting the niqab in various public places. I argue that in each case, regulatory impulse driven by a

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14. Government of Canada, Immigration Canada Operational Bulletin 359 (Dec. 12, 2011). In 2011, Jason Kenney issued a guideline requiring candidates to remove any facial covering while taking the oath of allegiance at citizenship ceremonies. While the guideline itself does not appear to be considered unreasonable by many, some Muslim Canadian groups have come out in support of it, critics of the conservative party have pointed out that it blows up the issue as if there was a "burqa epidemic." See also Andy Blanchford, Burqa Ban at the Canadian Citizenship Ceremonies Prompts Debate Amongst Muslims, The Canadian Press, (December 13, 2011), http://www.globanews.ca/canada+bans+facecoverings+during+citizenship+oath/6442540606/story.html.

15. See supra text accompanying note 10.


17. Quebec Bill 94, An Act to Establish Guidelines Governing Accommodation Requests Within the Administration and Certain Institutions, 2nd Sess., 39th Parliament, (2011). The bill was introduced during the 39th legislature, 1st session and was re-instated during the 39th legislature, 2nd session, February 24, 2011.
perceived public benefit focuses on managing particular bodies as default sites or regulatory spaces. In the process of drawing the boundaries between public and private or the process of shaping their substantive meanings, and in the context of articulating the public interest, these female bodies can (and often do) appear less like subjects and more like objects of regulation.\textsuperscript{18}

Much analysis has focused on the racial preferences built into the idea of Canada as primarily an Anglo and French nation, as well as how racial and gendered preferences still figure within citizenship and immigration processes in which socio-economic determinants (along with race and gender) influence how states control and allocate the terms of entry and membership.\textsuperscript{19} Scholars note that where nation-building was premised on the exclusion of Aboriginal peoples and where immigration policies enforced explicitly racist and gendered criteria, even the withdrawal of such criteria (in the case of Canada, over forty years ago) has for a number of reasons not succeeded in ensuring racial and gendered inclusion.\textsuperscript{20}

The analysis of the regulation of baring and veiling that I put forward draws on key insights from Sunera Thobani's work in examining the production of racialised and gendered subjects and in particular the construction of immigrant women subjects who not only embody the problems identified with immigration but also end up as targets of regulation. In her analyses of the Reviews of Social Security Policy (SSR) and Immigration Policy (IPR) by the Canadian government in 1994, Thobani illustrates how welfare reform in the 1990s tied up with major restructuring in immigration policy raised the spectre of 'overpopulation' and 'abuses to the social security system' and she examines how the category of 'immigrant women' relates, defines and produces its opposing category: the Canadian citizen.\textsuperscript{21} She takes note of the particularly racial and gendered consequences of the way in which Canada's problems as such have been constructed:

\textsuperscript{18} See Audrey Macklin, Public Entrance/Private Member, in Privatization, Law and the Challenge to Feminism 219 (Brenda Coshman & Judy Fudge eds., 2002). Macklin observes that the allocation of responsibility between the state, the market and families reverberates in the immigration context at two levels, wherein immigrants may be the targets of privatisation strategies and also constitute the embodied instruments of privatisation.


\textsuperscript{20} Sunera Thobani, Nationalizing Canadians: Bordering Immigrant Women in the Late Twentieth Century, 12 Canadian J. Women & L. 291-293 (2000).

\textsuperscript{21} Id. at 299-308.
The problem of controlling and managing immigration for the future is therefore constructed in such a way as to define immigrant women as requiring increased control and management. The problems with both the ‘quality’ and ‘costs’ of immigration thus become inscribed, quite literally, on the bodies of immigrant women.22

Thobani’s work, along with other scholarship which make observations about the regulatory projects emerging from the anxieties produced by global migration, also inform the broader context of my analysis by foregrounding the discursive context within which regulation (and the resistances to them) occur, that of neoliberalism.23 In particular, my contribution highlights the paradoxical pressures that neoliberalism exerts on states: how to consistently reflect liberal values, not the least of which are liberal rights, even when ensuring access to the same rights runs counter to stated economic goals and interests – especially when those interests are refracted through discourses of the nation and its others.

III. CONUNDRUMS CONTEXTUALISED: FEMINIST AND QUEER ENCOUNTERS WITH LAW

The meanings ascribed to both ‘veiling’ and ‘baring’ as well as their regulation remain hotly debated issues within feminism and are embedded in the uneasy encounters between feminist and queer theory and politics.24 One way to describe these differences is as a problem of equivalence. Wendy Brown points out that law itself is figured differently by those invested in different social categories and social identities. The equality/difference dilemma faced by feminist legal reformers, for example, has no parallel in theorising about race or class and rarely surfaces in discussions of gay rights.25 Within queer politics, claiming legal rights premised on the immutability of sexual orientation and gender identity (a.k.a. the gay gene) is a debate which, as Brown notes, has no parallels in other identity-based critical legal theory.26 These differences translate to palpable disagreements about legal method and generate conflicting accounts about how the law works, what law (or legal change) makes possible and, more specifically, how law relates to power.

22. Id. at 307.
26. Id. at 84.
The regulatory effects concerning ‘baring’ and ‘veiling’ analysed here can be situated along the lines of legally constructed notions about female violability, vulnerability and objectification and they fall within the purview of the much-debated feminist and queer terrain of gender and sexuality. The purported line between feminist and queer theory/politics is usually stated as the conceptualisation of gender and sexuality as distinct domains of analysis. My analysis of the regulation of baring and veiling is not likely to fit neatly into this frame for two reasons. First, while the usual sites of contestation between feminist and queer theory are present here – both female nudity (particularly in a commercial context) and the religious practice of wearing veils that cover a woman’s face, ostensibly occupy opposite poles of sexual liberty and sexual expression – a ‘for or against sex and liberty’ formulation is a gross oversimplification of the issues at play, not to mention a poor depicition of the politics that drive the debates about the regulation of baring or veiling in the Canadian context.

Feminist scholars, for instance, note that unlike the well-defined split between liberal and radical feminists in the U.S., convergences in feminist strategy and practice regarding law and policy in the Canadian context has resulted in more integrative and results-based versions of equality claims. Likewise, while notions of privacy and concerns about de-politicisation and recognition do figure and merge with the productive tensions between queer and feminist theory, they do not necessarily emerge in conventional identity-charged battles for representation. Second, the approach I offer here is particularly aimed at a methodological aspect with the potential to benefit both feminist/

27. Brenda Cosman, Sexuality, Queer Theory and “Feminism After”: Reading and Rereading the Sexual Subject, 49 McGill L. J. 851 (2004). Brenda Cosman describes the somewhat arbitrarily drawn line as a stultifying divide that casts Queer and Feminist theory as antagonistic as if differences between them were incommensurable.

28. This is not to say that queer and feminist politics in Canada do not reflect any of the tensions and conflicts that similar movements elsewhere face. To some extent, issues about legal strategy and reflections about the contradictory results from struggles about recognition are also intra-movement questions. See Brenda Cosman, Sexing Citizenship, Privatizing Sex, 6 (4) CITIZENSHIP STUD. (2002). Because of the way these regulatory issues have been framed by the state, the more prominent divisions that are notable here are the differences between pro sex work feminists and those who take the position that all forms of sex work are exploitation on the one hand and the broader public debate about liberalism and multiculturalism that both baring and veiling are embedded in the other.


30. While legal rights and recognition is a key issue in the case of sex workers, in the case of Muslim women who wear the niqab, the legal issue is usually framed as multicultural accommodation and religious expression. In both cases, however, the 'problem' addressed by regulation is constituted as a threat to a putative public interest.
queer legal theory and practice. Perhaps my approach (and attitude) to
the line-drawing between feminist and queer relates most closely to what
Brenda Cossman calls “feminism after,” that is feminism after queer
critiques and vice versa:

Analyses of sexuality can be enriched by a resuscitated feminism,
precisely because gender often continues to be an operative variable. It
is not everything; nor is it nothing. Theorising sexuality needs to be able
to bring gender, as an axis of power, into view.31

At the onset, it is worth noting that this article intentionally steers
clear of the familiar strategy of ‘unmasking’ patriarchal motives such as a
purportedly uniform ‘male gaze’ behind the legal regulation of ‘veiling’
and ‘baring’.32 Rather this inquiry is concerned with documenting
“effects that are arguably already visible to all,”33 albeit at times taken
for granted, namely that ostensibly female bodies and specific female
body parts remain the easiest as well as the likeliest targets and sites
for regulation. As Oliva Espin notes: “The expectation of conformity
to society’s sexual norms exercises pressures on all women’s sexuality
— regardless of sexual orientation — in ways that do not burden most
men.”34

Indeed, the observation that women and women’s bodies are coded
with significance in symbolising sexual orders which are mutually
constitutive of constructions of politics and culture is not a new one.
Linda P. Zerilli points out that in the realm of traditional political
theory: “Woman has been virtually synonymous with the social
disorder that calls for masculinist strategies of containment.”35 In her
analysis of political theory as a signifying process, she notes how within
the discursive uses of ‘woman’ by Western political theorists “woman
always nearly figures the ab-,” marking the places where rhetoric
collapses.36 Juxtaposing the regulation of ‘veiling’ and ‘baring’ in the
Canadian context, this article draws from various realist and also critical
theory-inspired views of law’s symbolic dimension and law’s relative
heft in the signifying process that is politics.37 In this inquiry, I propose

31. COSSMAN, supra note 27.
32. ALAN HYDE, BODIES OF LAW 129-130 (1997).
33. VALVERDE, supra note 10, at 11-15.
34. OLIVIA ESPIN, WOMEN CROSSING BOUNDARIES: A PSYCHOLOGY OF IMMIGRATION AND TRANSFORMATIONS
   OF SEXUALITY 124 (1999). Espin qualifies her observation by noting the exception of gay men’s
   sexuality.
35. LINDA M.G. ZERILLO, SIGNIFYING WOMEN: CULTURE AND CHAOS IN ROUSSEAU, BURKE, AND MILL 2
   (1994).
36. Id. at 7.
that the oft-cited feminist insight that women’s bodies and the regulation of women’s sexuality tend to be central to the scripts of national identity formation requires extensive unpacking.38

IV. REGULATORY SITES AND LEGAL OBJECTS: PROBLEMATISING SUBJECTHOOD

By focusing on how the legal formulation of the problem sets up particularly gendered bodies (and body parts) as the appropriate targets and sites of state regulation, I reflect on how the legal strategies of policing, containment, hyper-regulation, surveillance and banishment in these cases usually serve more mythic (or symbolic) ends than pragmatic ones.39 Even the perennially labelled-as-sexual female body and its parts need not necessarily always be read as sexual nor presented as such.40 Indeed ‘sexual’ is not a stable category, even if the law requires it to be. As Hyde observes:

Law’s construction of the body is not transparently a construction. It is often naturalised, so that speakers experience themselves as reporting facts about the race, sex, disability, suffering, value, boundaries and social meaning of the body as these features inhered in physical bodies instead of being constructed discursively.41

My objective is rather modest; to facilitate a reflexive pause in the legal construction of particular, regulated bodies (and regulatory problems) mainly as a reminder that there are actual persons who usually bear the brunt of regulation. In between the construction of the legal metaphor


39. See Audrey Macklin, Particularized Citizenship: Encultured Women and the Public Sphere, in Migrations and Mobilities: Citizenship, Borders and Gender 278 (Seyla Benhabib & Judith Resnik eds., 2009). Audrey Macklin’s discussion of Female Genital Mutilation (FGM) raises a relevant point about law’s symbolic function which may not necessarily serve a pragmatic end. She notes how the legal response of including FGM in the Canadian Criminal Code may have implanted a marginalising narrative in the legal text, particularly one that reifies a story of Africans as lawless, disordered and primitive. Macklin also posed a question about law in relation to the veil at a recent public discussion to highlight how legal strategies directed against veiling are usually ill-fitted to pursue their purported objectives, describing law as ‘too blunt an instrument’ of approaching the issue.

40. See Mariana Valverde, Pornography: Not for Men Only, in Sex, Power and Pleasure (Mariana Valverde ed., 1987); Mariana Valverde, Beyond Gender Dangers and Private Pleasures: Theory and Ethics in the Sex Debates, 15 (2) Fem. Stud. 41 (1989). This point is most often debated vis-à-vis the question of pornography (what constitutes it) as well as legally defining the harm that it is or it creates. Mariana Valverde notes that the meaning of a particular representation is inextricably connected to its context.

41. Hyde, supra note 32, at 261.
and the purported goal of regulation (whether egalitarian, libertarian, feminist or queer), law not only produces its subjects but also constructs and reproduces places of social division and hierarchy. As Hyde notes, law constantly constructs bodies as metaphors for a variety of notions, e.g., social inclusion or exclusion and public/private boundaries, and I agree with his observation that approaching the body through metaphor is inevitable and not problematic per se. But I also take interest in one observation he makes regarding the specific uses of female bodies in law: “Women lose their bodies which become rights or zones. At the same time, law acquires a metaphorical body.”

What benefits might be derived from such a reflexive pause? Because a spatial focus fosters analytical specificity, conversations about regulation can transcend the often simplistic ‘for or against’ formulation of critical questions about law. Shifting the focus to the actual subjects affected by legal regulation is a move that situates the analysis of law (e.g. how and where it is deployed and what regulatory technique is adopted) and, more importantly, draws attention to actual “subjects excised from the domain of juridical entitlements.” Here, the gendered targets brought into being by regulation are denied subjecthood (or face difficulty asserting or claiming it) precisely because their bodies bear the burden of evoking legal meaning in the process of constructing and defining what requires regulation. Viewed this way, regulation requires their abstraction. It is the symbolic female body but not the person that is most visible to law.

_Ciphers of the Public and Private_

Focusing on the spatial orientation and techniques of liberal law in the legal regulation of ‘baring’ and ‘veiling’ complicates the picture, as well as the distinction between public and private. These do not emerge as clear-cut categories here, which is not to say, however, that law does not remain committed to fixing or imagining them as such. Here, bared or covered

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43. Hyde, supra note 32, at 258.
44. Id. at 8.
47. See PUBLIC AND PRIVATE FEMINIST LEGAL DEBATES XV (Margaret Thornton ed., 1995). This is particularly true for sex, which, as Margaret Thornton notes, sits uneasily with the concept of the public sphere because of its “private nature and corporeality.” Thornton observes that the public/private distinction, which while being a key characteristic of liberal societies, is also something which changes over time, according to the constitution of the polity.
up female bodies (and body parts) play an important function in fulfilling
liberal law's requirement of drawing the boundaries between public and
private space as well as in constituting their substantive meanings. In
_Bodies of Law_, Alan Hyde notes: "In general, law's discourse of the body
constructs the body like a thing, separate from the person, but the bearer
of that person, and a bearer of that person as constructed as a legal subject
in civil society." Not all social uses of the body in law where bodies are
considered in the abstract necessarily lead law to ignore a rights-claiming
legal subject, especially when such a subject is one that it has no problem
recognising. Both feminist and queer analyses are relevant here. While
early feminist theory provides explorations of how the gender hierarchy
limits or prevents full personhood, queer analysis pushes this further by
noting that sexuality has proven antithetical to personhood.

As Brown points out, both feminist jurisprudence and queer legal
tory have been more "inclined to expand or rework the formal
legal categories that overtly carry the power of gender, class, and
homosexuality," than Critical Race Theory which engages close
readings of the narrative strategies and devices, including analyses of
the uses of symbol, metaphor, metonymy, and analogy, in judicial
opinions. Focusing on the spatial quality of the rules and legal reasoning
in these cases, specifically the symbolic uses of female bodies as sites
of regulation, enables a closer analysis of legal representation and de-
naturalises the legal meaning-making process by setting it apart from
technical questions of legal redress and reform. In between coming
to grips with the protean possibilities of legal meaning-making and the
analytic specificity that spatial analysis can facilitate, a reflexive pause
can also foster a less 'all or nothing' approach to legal engagement by
attending to the discursive limitations of the categories on which claims
for rights, social protection and inclusion are founded.

48. Hyde, supra note 32, at 258.
49. _Id._ at 8.
50. See Brenda Cossman, _Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging_ 2-20 (2007). In classic liberal feminist terms, women's exclusion from public and political
spheres is the consequence of the gendered order or hierarchy. Queer/feminist theorists,
however, observe that as former sexual outlaws have challenged their exclusion and are being
incorporated into citizenship, the very notion of citizenship itself has become privatised and
self-disciplined. Cossman points out that while some former sexual outlaws may now be
proper sexual subjects, they cannot be too sexed. Cossman analyses citizenship as a process
of becoming and explores 'sexual citizenship' as a new modality which produces its set of
good/bad subjects/citizens.
51. While not always entirely separable, in the cases discussed here, de-naturalising legal
representation offers a way to question pre-framed strategies that are often taken for granted
even when they bear little relation to the state's goal of regulation.
52. See e.g., Janet Halley, _Reasoning about Sodomy: Act and Identity in and after Bowers v
V. REGULATING PUBLIC NUDITY IN THE LIBERAL MORAL ORDER

In an historical account of the strip-tease as a staple entertainment of touring carnivals all over North America from the 1860s, Becki Ross notes that white audiences gawked at dancers of colour as well as white women who impersonated the ‘Other’, to be assured of their cultural dominance.\(^{53}\) The colonial trappings and historically racist origins of strip-tease (the precursor of current day exotic dancing) are well-documented.\(^ {54}\) But while the ‘sexualised other’ reinforced the racial superiority of white settlers, it was actually white, working class British women who were both burdened and privileged with the role of constructing the white settler Canadian subject.\(^ {55}\)

Where settler society was overwhelmingly male, the plurality of races and prevalent practices of mixing were often a threat to the colonial project. Perry notes that in the case of British Columbia, which was intended by many to become ‘little England’: “Visions of empire were thwarted by gender as well as by race.”\(^ {56}\) Between 1859 and 1870, for instance, around 130 women, most of them working class, were sent to the settler colony of British Columbia.\(^ {57}\) But while white, working class women’s assisted immigration was accorded a racial mission (which was also in many respects a campaign for sexual purity), their deployment rarely served the interests of empire in a straightforward manner,\(^ {58}\) in part because not all white women settlers seemed to be able to satisfy the bar of ‘whiteness’.\(^ {59}\) ‘Whiteness’ and ‘blackness’ figure prominently as idioms for sexual and moral purity and impurity which sometimes stood

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\(^{54}\) Id.


\(^{56}\) Perry (2004), supra note 55.

\(^{57}\) Id.

\(^{58}\) Id. at 61.

\(^{59}\) Id. at 61; Perry describes how Robert Brown (a scientist), documented his meeting with Isabella Robb, the first white woman settler of Tynemouth: “To Brown’s metropolitan eyes, Robb seemed more aboriginal than white.”
apart from the actual bodies of white and black women. Rendering blackness as pathologically sexual was not only depicted symbolically in art and literature in the nineteenth century, it was the dominant medical and scientific explanatory framework in treatises on 'degeneracy'. Modern-day legal controversies about female nudity in the context of strip-clubs, while not always literally framed around whiteness or blackness, maintain distinctions between the chaste and the impure through court interpretations of 'social harm'. Despite the waning of the influence of the social purity movement by the 1920s, the substance of the legal debate over sexual morality in Canada did not shift until the 1960s. Popular accounts usually discuss how the state's role in moral regulation shifted alongside the liberalisation of sexual mores. One problem with the thesis of de-regulation, however, is that it portrays the liberal state as stepping back and relinquishing control, as though withdrawing from its active role in the overall scheme of regulation. Sex work (stripping in particular) is hyper-regulated and still heavily policed as a matter of course. The de-regulation thesis also tends to

61. Id.
62. There is a dearth of scholarly work that specifically looks into how sex, race and gender are constituted and figure in the regulation of sex (both by the state and the commercial sex industry) in the Canadian context. See CHRIS BRUCKERT, TAKING IT OFF, PUTTING IT ON: WOMEN IN THE STRIP TRADE 25-34 (2002). Bruckert undertook an in-depth study of regulatory as well as socio-economic changes affecting the work of strippers in the 1990s. While Bruckert notes that her study did not tackle the implications of race specifically, she did acknowledge that, at the time of the study, a particular stripper ideal (young, white woman with no visible tattoos) was common in the industry. She also notes that a Montreal-based sex workers advocacy group suggested that some clubs limit the number of visible minority women they employ. This observation was also validated by an informant/dancer who currently works in Toronto. A number of sociologists in the United States have conducted research on the constitution of race, class and gender in stripping. For a review of some of the latest literature, see for example MINDY S. BRADLEY, STRIPPING IN THE NEW MILLENNIUM: THINKING ABOUT TRENDS IN EXOTIC DANCING AND EXOTIC DANCER’S LIVES, 2 (2) SOCIOLOGY COMPASS 511 (2008).
63. PORNOGRAPHY, FEMINISM AND THE BUTLER DECISION 14-17 (Brenda COSMAN & Shannon Bell eds., 1997).
64. See Robin L. West, SEX, LAW AND CONSENT, IN THE ETHICS OF CONSENT: THEORY AND PRACTICE (Alan Wortheimer & William Miller eds., 2008). One reason why this is reflected in popular accounts may be due to the fact that the default liberal position can be summed up as the de-regulation of all manner or forms of 'private consensual sex'.
65. DEBORAH BROCK, MAKING WORK, MAKING TROUBLE: PROSTITUTION AS A SOCIAL PROBLEM 75-76 (1998). Brock recounts the strong resistence to the decriminalisation of prostitution in Canada after the recommendations of the Fraser Report in 1985. The Fraser Report is considered to be the most prominent (if not the biggest) study undertaken about prostitution and pornography in Canada. She noted that the Fraser Committee’s recommendations could not withstand the powerful alliance of police, local-level politicians, and resident’s organisations. Brock further notes that the recommendations were out of step with what was a growing political conservatism in Canada.
66. Id. at 51-68. Bruckert’s study outlines some of the regulations that strippers are subject to at both the state (licensing and policing) and the industry (house rules) level. This general
take the line between public and private, and what constitutes them, as something that is fixed and given instead of contingent. Indeed, while various meanings of both public and private are often evoked through legal constructions of bodies, particular female bodies figure prominently as spaces for regulation in times of crisis and especially when these lines or boundaries are in the process of being redrawn. 67

Sexual Outsiders of the Body Politic

In Law’s Dream of a Common Knowledge, Mariana Valverde observes that strippers are not recognised as “authorised knowers of harm” in the Canadian Supreme Court’s decisions. 68 In the case of Mara v East, 69 this omission results from the court’s construction of social harm which apparently excludes the women working as strippers. 70 In Mara, the court expels female strippers from the space of liberal polity but at the same time evokes liberal modernity’s open-mindedness towards the sexual through their bodies, thereby demonstrating the law’s spatial (not to mention gendered) techniques in ordering public places.

Christopher Nowlin observes that in Canada, “courts have traditionally applied to the law of indecency the same ‘community standard’ of the tolerance principle associated with obscenity.” 71 As Valverde points out, the national community invoked here is not an empirical sum of individual opinions but rather the deep moral consensus of the nation as interpreted by the judges. 72 The standard was first adopted in 1962

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67. Id. at 4, 31-34. In particular, the lines of jurisdiction (and regulation) between the federal, provincial and municipal levels were often the main issue considered by courts in the regulation of sex work in general and prostitution in particular. Brock gives an example of how the sex worker’s body was used as the literal (rather than merely metaphorical) site for policing ‘public decency’ occasioned by a shift in the public’s attitudes to permissiveness in the 1960s. This period, which saw the introduction of the licensing regime, was also a time of economic recession. As Brock observes, the economic interests behind the commercial renewal of properties and neighbourhoods in Toronto coincided with community clean-up campaigns.

68. VALVERDE, supra note 10, at 42-43.
70. VALVERDE, supra note 10, at 62.
72. VALVERDE, supra note 10, at 45-47. Valverde likens the community of community-standards testing to Rousseau’s ‘general will’ as opposed to his ‘will of all’. Christopher Nowlin laments
by the Canadian Supreme Court in the criminal prosecution of D.H. Lawrence's *Lady Chatterley's Lover* in the case of *R v Brodie*, under what was then the recently amended law on obscenity. It superseded the *Hicklin* (1868) standard from English common law which framed the dangers of obscenity primarily as a threat to the "morally vulnerable." Judson, J. introduced the standard with a general reference to the relevance of prevailing community standards in the *R v Brodie* decision, which the Supreme Court of Canada later elaborated in the 1964 case of *R v Dominion News and Gifts*.

The Supreme Court of Canada first applied the community standard principle in a criminal case of indecency in the 1975 case of *Johnson v The Queen*. Johnson was convicted by a lower court and found in violation of the Criminal Code provision penalising indecent performances for doing a strip-tease in a cabaret. The lower court ruled that since another provision of the code, Section 170, penalised public nudity without lawful excuse, it followed that Johnson's public and on-stage performance, which consisted of dancing in the nude before a male audience and getting paid to do it, was immoral.

In reversing the decision, the Supreme Court distinguished between the two provisions, classified respectively as offences tending to corrupt morals and offences against public disorders, noting the difference in legislative intent. The Court also held that the Crown failed to provide evidence that the performance was immoral and it cited the relevance of community standards of tolerance. In this case, the Court considered the testimony of police prosecution witnesses who claimed that they (as audience members) were not offended by the staged performance of a strip-tease. Three justices dissenting from the majority, however, agreed with the lower court's assessment of the 'immorality' of the

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74. *R v Hicklin*, [1868], L.R. 3 Q.B. 350, (Can.)
75. In *R v Jacob*, (1996) 31 O.R. [3d] 350, the Ontario Superior Court noted that the standard in *R v Brodie* supplemented the one laid down in *R v Hicklin*. This means that the 'community standard' did not totally replace the moral vulnerability test.
79. Id.
80. For a closer examination of how police institutions exercise influence and control over sex work, specifically street prostitution, see Nick E. Larsen, *Urban Politics and Prostitution Control: A Qualitative Analysis of a Controversial Urban problem (Bill C-49 & Toronto)*, 8 (1) CANADIAN J. OF URBAN RESEARCH 28 (1999).
performance. Quite interestingly, the court's disagreement turned on a technicality (the erroneous reference to a provision that had nothing to do with immorality) as well as on their divergent views regarding the role and competence of the courts (lower court judges in this case), in making an assessment regarding indecency. The majority was unconvinced that a judgment about the immorality of the act could be made objectively by the lower court judge. For them there was no evidence to support the judge's opinion. The dissenting justices thought otherwise, ruling that the Crown evidence that the nude performance took place before an entirely male audience and for the purpose of gain was sufficient. Ostensibly the Johnson decision reveals very little about the differing views of the majority and the minority regarding 'immorality' or for that matter strip clubs; it frames a lack of both a definition in the law and evidence before the provincial court as its basis for quashing the conviction. The period during which this decision was made coincides with a transition in the legal regulation of commercial sex in Canada when many regulatory lines were being re-drawn.

_Tolerated and Reviled: In between Public and Private._

By the 1990s, however, the criminal prosecution of 'baring' in strip-clubs began to focus on a variety of sexual services other than on-stage stripping in the tradition of burlesque which, judging by current standards, now appears less risqué than other types of exotic dancing. Scholars acknowledge the influential role of the police in ways that the courts have shaped the 'community standard of tolerance' in obscenity and indecency cases. The exercise of prosecutorial discretion, particularly with regard to which statute to use, also merits some attention. Two

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81. The key provisions regarding the regulation of nudity in Canada are §163 (b) of the Criminal Code, which penalises public exhibition of an indecent show, §167 (1), which penalises the lessee, manager, agent or person in charge of an immoral, indecent or obscene performance; §167 (2), which penalises the performer or an assistant; §174, which penalises nudity in a public place without lawful excuse and §173 (1) and (2), which penalises indecent acts and indecent exposure respectively. While the first act is classified as an offence tending to corrupt morals, the two latter provisions are classified as disorderly conduct. While §173 (2) makes offenders who expose their genital organs for a sexual purpose to a person under the age of 16 liable to summary conviction, for the most part the question of whether an act is indecent or not has been up to the courts to decide.

82. _Brock, supra_ note 65, at 4.

83. The growing variety of sexual services in strip-clubs which involve more physical contact, a variety of exhibitions and less dancing and props, provides a contrast to the more traditional forms of burlesque which appear less risqué but is considered quite artistic. It is worth noting that the 2010 movie _Burlesque_ (Sony Pictures Entertainment, 2010) was rated PG while _StripTease_ (Columbia Pictures, 1996) in 1996, was rated R.

84. _Valverde, supra_ note 10, at 52-53; _Nowlin, supra_ note 71; _Larson, supra_ note 80.

85. The Supreme Court of Canada made an interesting observation regarding prosecutorial
of three commonly cited Supreme Court cases involving strip-clubs in Canada were criminal prosecutions for violating the bawdy house provisions of the criminal code. A bawdy house is defined as "a place that is (a) kept or occupied, or (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency."  

In *R v Tremblay* it was an establishment called the PussyCat club provided cubicles for patrons where nude female dancers would assume a variety of suggestive positions for them. The male patrons often took their clothes off and masturbated during the performance. Ruling in favour of the accused performers and club owner, the court noted with approval that the trial judge made use of expert evidence to assess the community standard of tolerance. In this case, expert evidence included the opinions of a psychologist and a sexologist as well as the Fraser Committee Report on pornography and prostitution. Nowlin notes how courts in their references to social science evidence use the findings of experts argumentatively and yet are able to to offer them as factual. I submit that this legal sleight of hand is also accomplished by the court through its manipulation of public and private spaces in the strip-club, that is the court literally and figuratively redefines the boundaries of these spaces accordingly.

In *Tremblay*, the Court drew a legal line between public and private within the public space of the club. It held that the acts between consenting adults (the female performer and patron), had taken place behind closed doors and that this meant that the acts were not a "blatantly public display." At the same time, the Court accepted the testimony of a former discretion in relation to indecency cases in *R v Verrete*, [1978] 2 S.C.R. 838. The Court appeared to be critical of the opinion by the Court of Appeal in the case of *R v McCutcheon*, [1977] C.A. 103. In *McCutcheon*, J.A. Owen criticised the practice of laying down charges under the provision on public nudity (§ 170 of the Criminal Code) instead of filing charges under indecent theatrical performances (§ 163) in a purported attempt to sidestep the obligation to prove immorality, indecency or obscenity.

86. Canadian Criminal Code, R.S.C., 1985, C-46, §210: (1) Everyone who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. (2) Every one who is an inmate of a common bawdy-house, is found, without lawful excuse, in a common bawdy-house, or as owner, landlord, lessee, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house, is guilty of an offence punishable on summary conviction.


89. Nowlin, supra note 71, at 22.

90. *R v Tremblay*, [1993] 2 S.C.R. 932. The Court noted: "Thus, although the acts took place in a public place, as those words are defined in the Criminal Code, they were not a blatantly public display. Rather the closed room was relatively private with only consenting adults present."
employee that peepholes were used for monitoring and enforcing club rules against touching between performers and clients. Not surprisingly, however, the majority of the Justices focused on the female performance as the only ‘legally controversial’ public display in question. They made a passing reference to the normality of male masturbation (citing expert evidence) without mentioning the male patrons’ acts of ‘display’. In fact it was only the dissenting Justices who raised the issue, remarking that the ‘community tolerance for masturbation in public’ was not covered by the Fraser Report.

In Tremblay the majority also seemed to imply that the community standard of tolerance for stripping (at least female stripping in 1993) went without saying in noting that stripping was no longer the subject of police action. Interestingly, when the court made this observation, it also downplayed the (male/client) public nudity and masturbation. Cory, J for the majority notes:

Several witnesses testified that the only difference between the performance by the dancers in the Pussy Cat and that of dancers performing in the strip bars was that the client was permitted to take off his clothes and masturbate. The actions and movements of the nude dancers performing in bars were not subject to any police action.

Highlighting the differential treatment (between female sex workers and their male clientele), while a common foundation of abolitionist arguments in calling for shifting the criminalisation to ‘johns’ and ‘pimps’, does not necessarily have to translate to a legal prescription for penal law. What is interesting to note about the seeming hypervisibility of female bodies to courts is that it reflects how female bodies/the body serves as the default site for legal controversies and disturbances around

91. Id. L’Heureux-Dubé, Cory and McLachlin JJ for the majority with Gonthier and La Forest JJ. Dissenting.
92. Id. Gonthier, J raised the matter in his dissent: “This case, then, does not concern pornographic material, but rather a live performance of sexual activity, by both the client and the dancer, in a public place.” The Supreme Court recently issued a ruling on this issue in the case of R. v. Clark, [2005] SCC 2. In this case, a man who was masturbating in the bedroom of his house before an uncovered window was charged with indecency in a public place after neighbors complained that his act was visible to them from their own windows. In acquitting the accused, the Court ruled here that ‘public place’ within the terms of the Criminal Code provision on public indecency should be interpreted in a manner consistent with physical rather than visual access in order to be coherent.
93. It is worth noting that while the R v. Johnson [1975] 2 S.C.R. 160 (Can.) decision alludes to empirical evidence of community standards of tolerance (in relation to female stripping), it does not really go as far as to lay it down as a requirement. In fact even in the case of R. v. Tremblay, [1993] 2 S.C.R. 932, the Court expressed approval of the lower court’s references to expert evidence in its determination of the community standards of tolerance, and merely considered them advisable.
sex zeroing in on the bodies of women as the locus of controversy. But during key periods in history and at the national level of the federal court, women’s bodies (and tolerance for their nude performances) fulfill an important purpose in reflecting sexual liberty – the hallmark of a modern, liberal society. Hyde notes that “[T]his way of setting up the problem requires the body of a nude dancer in a bar to be both public and private.” In Tremblay the Court’s approval of management’s enforcement of a no-contact policy between the female performers and the male clients introduced a novel addition to the concept of social harm:

In these times when so many sexual activities can have a truly fatal attraction, these acts provided an opportunity for safe sex with no risk of any infections. The absence of any risk of harm could properly be taken into account in assessing community tolerance of the act.96

Feminist scholars have noted how the earliest forms of regulation directed against prostitution (as well as later public health-directed measures) constructed women as the purveyors of disease and contagion.97 Around the time of the Court’s decision in Tremblay, municipal bylaws on adult establishments (including strip-clubs) were already regulating spaces in strip-clubs which now included so-called private or ‘VIP’ rooms. Among other things, Toronto bylaws introduced during this time also required management to enforce a no-contact policy between workers and patrons.98 However, according to the Court in Tremblay, there is actually no fixed legal line on physical contact between performers and their clients and the absence of touching in that case was non-determinative of the absence of social harm, even if it was ‘significant’.99 Contact between customer and sex worker is assessed in relation to broad social harm principles at the level of the national court and at the local level (in the workplace), a no-contact policy serves to regulate how customers and sex workers relate on an individual basis and ‘transact business’.100 ‘Social harm’ (at the national scale) excludes harms that affect exotic dancers and some concern

95. Hyde, supra note 32, at 137.
100. See Ross, supra note 53, at 335. When it was first adopted, the bylaw was also touted (and is, in some circles, still touted) as a protective measure for the working women in exotic dancing. Ross notes the involvement of former exotic dancers in the campaigns against lap dancing which eventually led to the no-contact policy.
for their protection is articulated at the local/police/municipal level, through the no-contact prohibition, the end results do not vary because, in either case, the working women in exotic dancing do not acquire a subject position in any legal sense. They remain mostly the objects and targets of regulation.

Vectors of Social Harm

In *R v Mara and East* (1997), the Court’s concept of social harm began to incorporate some of the dissenting Justices’ arguments in *Tremblay*, such as that of ‘degradation’. In *Mara*, the management and owners of Cheaters’ Club were charged under the provision on indecent performances for making nude lap-dances available in their club. The Court found that there was sexual touching between dancer and patron consisting of the fondling and sucking of the dancer’s breasts by patrons as well as contact between the dancer or patron and another person’s genitals. It also found that these services were being performed in a ‘public tavern’. While the Court’s discussion on public and private spaces was arguably central to its decision (there were no cubicles at Cheaters Club at the time of the case), the line-drawing between public and private is much more cut and dried here than in the *Tremblay* case. What is worth noting here is how the court effectively evicted the strippers from public inclusion when it drew a line between the harms and risks they were exposed to and the ‘social harm’ of degradation and de-humanization that apparently excluded them:

This analysis is sufficient to ground the finding that the performances were indecent. The potential harm to the performers themselves—the risks of harm from STDs and from the activities’ similarity to prostitution—while obviously regrettable is not a central consideration under s 167.

The risk of harm to the performers is only relevant insofar as the risk exacerbates the social harm resulting from the degradation and objectification of women...

Valverde observes that the invocation of the supposedly democratic entity of the ‘community as a whole’ by Canadian courts (for instance in the case of *Mara*) harks back to the old sovereign technology of ‘the tendency to corrupt morals’. I submit that one striking aspect of that

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102. See *Valverde*, supra note 10, at 34. Valverde notes that these feminist terms earlier made their way into the Court’s decisions on obscenity/pornography and hate crimes from the mid-1980s into the 1990s.
similarity is reflected in the Court’s spatially evoked differentiation between female strippers and women in the abstract. Strippers are exposed to one type of harm and abstract women to another. It is important to note, however, that this binary distinction is hardly one that is identical in content to the prudery of nineteenth century moral reform with its distinctly Christian underpinnings:

In these post-Victorian times, the semiotics of vice is somewhat more complex than it used to be. A whore can no longer be distinguished at a glance through her “love of finery.”

‘Degradation’ and ‘objectification’ belong to the lexicon of feminist theories about sexual exploitation. According to a very prominent radical feminist view of sexual exploitation, all women in commercial sex are degraded and objectified victims. To many feminists who take exception to such totalising views about sexual acts and women’s sexual agency, however, degradation and objectification are best understood not in the abstract but in particular contexts. Likewise, feminist/queer objections to these totalising views also include critiques of the use of penal law to regulate sex.

In Mara, however, Valverde notes that feminist terminology converges with the 1950s structural-functionalist concept of the anti-social. She observes this awkward marriage in the famous R v Butler case decided by the Canadian Supreme Court in 1992, in which the Court ruled that degrading and de-humanising sexual representations pose a danger to the Charter values of equality and dignity of a person, but at the same time framed violence against women as a social dysfunction (or as being about deviance). Indeed in Mara, the Court relies heavily on Butler, a case about pornography, to elaborate on the social harm question.

In its decision in Mara, the Court interpreted social harm as attitudinal harm on those watching (and presumably paying for) the performance. The irony here is how social harm came to include the paying men but

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105. Id. at 40.
108. See Lara Karaian, The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory/Praxis, Queer Porn, and Canadian Anti-Discrimination Law, in UNCOMFORTABLE CONVERSATIONS 384-385 (Martha Albertson Fineman et. al. eds., 2010).
109. VALVERDE, supra note 10, at 37.
111. Id.
not the working women. Without actually spelling it out, the strippers were in effect constructed as the source of social harm. How did acts previously read as being between ‘mutually consenting adults’ end up as socially harmful to only one and not both parties? The difference between Tremblay and Mara can also be understood as a dissimilarity in the character of the regulatory space, that is, literally speaking, the strip-club stage, floor, semi-private cubicles and men’s laps. But while legal liberalism’s regulation of sex has always been spatial and accomplished primarily through drawing and policing the boundaries of the public and private, these cases demonstrate that clients and performers bear different spatial relationships to the spaces of stripping. In apparent mutual constitution, the spaces that women occupy (here the strip-club) mark the women’s bodies as the source of harm just as the women constitute the space of the ‘strip-club’ as one of male privilege. The Court in Tremblay treated the act of male masturbation differently from the acts of the female performers. In Mara, individual risk and harm to the performers (STDs etc.) do not make it onto the Court’s register of social harms.

Thus, a material distinction between sex workers and law’s ideal female subject emerges in the liberal court’s treatment of sex workers (in this case, strippers). This distinction was made even more obvious in the case of R v Jacob. In 1991, a philosophy student challenged the law on indecent exposure by strolling topless in a Guelph neighbourhood during a hot summer day. The Court heard a barrage of expert witnesses, including some of the persons who had witnessed and complained about Gwen Jacob’s topless walk. The Court acquitted Jacob and described her act as a “demonstration.” The Court even noted that the men who ogled at her did not pay and that no substantial harm was posed by her

113. See Carolina Ruiz Austria, Profiteers of the Bump and Grind and Contest in Commodification, 14 OREGON REV. INST. L. 203 (2012). In this article, I explore the implications of spatial regulation vis-à-vis the character of the material sites of labour for exotic dance.


115. Id. at 14.

116. Muelen & Durisin, supra note 12. Sex workers’ health risks are a common regulatory conundrum (even at the level of local regulation) when possession of or the presence of condoms may be taken as evidence of prostitution. Van der Muelen and Durisin note that protective measures such as the provision of condoms at massage parlours frequently conflict with the prohibition on bawdy-houses in the Federal Criminal Code. As regulated “Adult Entertainment” establishments, municipal bylaws suppose that no prostitution takes place in massage parlours even if, in reality, sexual services are common.

117. R. v. Jacob [1996], supra note 75.
non-sexual act. Valverde comments: "Jacob's victory over moralism was a lack. She was not a sex worker." Valverde goes on to note that in 1998 a woman in Ottawa who went topless in public "was convicted in large part because she was a known prostitute."

Indeed, while female bodies and body parts remain a prominent site for regulating things sexual, the bodies of women engaged in sex work are the default sites for regulating the perceived dangers of sex, whether in relation to moral, political or bodily contagion. In fact, a 1977 Report of the Special Committee on Places of Amusement (a committee which included members of the Toronto City Council, Chief of Police and legal council) even defined 'specified sexual areas' as human genitals, pubic region, buttocks, and female breasts below a point immediately above the top of the areola. Yet a court in a thoroughly liberal and modern society is not supposed to make moral pronouncements about women's sexual purity/impurity - at least none that it can expect to get away with.

An analysis of key court decisions on strip-clubs and stripping clearly shows that 'public spaces' are not uniform spaces (a strip-club is different from public parks and streets) and that what constitutes their character as public places worthy of regulation, when it comes to baring, is partly constituted by the female bodies that inhabit, occupy or access them. Here the question of state regulation usually turns on whether women are worthy and autonomous legal subjects or law's marginalised others, that is those discursively outside the law's ambit of protective concern in courts' definitions of 'social harm'.

By 2005, the Canadian Supreme Court had reconstituted the 'community standards' test into a harm test in the case of R v Labaye, this time qualifying the harm test that it had originally laid out in R v Butler. Labaye was a case involving club owners who were operating a

118. Id.
119. Valverde, supra note 10, at 40.
121. See Brock, supra note 65, at 33-34.
122. Valverde, supra note 10, at 103. Valverde notes that sexual purity is, after all, elemental and not exceptional to the notion of liberal progress.
123. Toronto Municipal Code, R.S.O. (1990) § 545 (Can.). The notion of adult entertainment establishments as public spaces (albeit privately owned and run) is what makes them available to regulation. The idea of regulable private spaces inside these public places highlights the spaces of the strip-club as hybrid places. Peep-holes and doors without latches or locks are common requirements in municipal ordinances and bylaws regulating adult entertainment establishments and seek to be premised on both privacy and regulatory/surveillance (ergo public) concerns. New amendments to the bylaws which, among others, qualify the interpretation on the no-touching prohibition took effect in February 2013.
swingers club from an apartment in Montreal and were later charged for keeping a common bawdy-house. Taking what many have interpreted as a turn towards liberality, the Court took a more stringent approach to the interpretation of causality between exposure to the alleged indecent acts and harm. The Court held that:

The autonomy and liberty of members of the public was not affected by unwanted confrontation with the sexual conduct in question. On the evidence, only those already disposed to this sort of sexual activity were allowed to participate and watch. There is also no evidence of antisocial acts or attitudes toward women, or for that matter, men. No one was pressured to have sex, paid for sex, or treated as a mere sexual object for the gratification of others. The fact that the club is a commercial establishment does not in itself render the sexual activities taking place there commercial in nature. The membership fee buys access to a club where members can meet and engage in consensual activities with other individuals who have similar sexual interests. Finally, with respect to the third type of harm, the only possible danger to participants on the evidence was the risk of catching a sexually transmitted disease. However, this must be discounted as a factor because it is conceptually and causally unrelated to indecency.

Eventually the Court of Appeal in Montreal demonstrated how working women in strip clubs are unlikely to be beneficiaries of the Labaye ruling anytime soon. In 2010, in the case of Marceau v The Queen, ten women working as dancers at the Le Lavalois Bar Salon were convicted for being in a common bawdy-house. The Court ruled that the dancers, who were providing ten dollar lap dances to clients, were engaged in prostitution, citing Justice Lamer in Tremblay: “while prostitution is not itself a crime in Canada, Parliament has chosen to attack it indirectly by including other provisions in the Criminal Code that make its practice in a lawful manner problematic.” Not surprisingly, when the accused raised the Labaye ruling in their defence, the Court ruled that it was irrelevant to their case. Here we can witness how the sexual acts of autonomous bodies, abstract and anonymous ‘swingers’ who paid a fee either to engage in consensual sex and to be watched by others and/or to watch, emerge unscathed and uncorrupted by commerce (at least

128. Id.
129. Marceau v The Queen, [2010] QCCA 1155.
130. Id. See also Tremblay, [1993] 2 S.C.R. 932.
131. Jochelson, supra note 127.
according to the majority of the Court), unlike women who work as exotic dancers selling ten dollar lap dances. The irony, of course, is that while courts manage to appear somewhat liberal and modern (with respect to sex) by creating hybrid public/private spaces and by appearing tolerant of nude displays and even semi-public group sex, the illiberal exclusion of sex workers is discursively subtle like an undertow. There is, however, no subtlety to the experience of expulsion/exclusion from the res publica. Alan Hyde’s observation proves correct: “the body of the nude dancer may not be permitted synecdochically to represent the ‘public interest’.”

The Sex Worker as Legal Subject: Bedford v Ontario

In October of 2010, the Ontario Superior Court issued a decision in the case of Bedford v Ontario, declaring the unconstitutionality of three key provisions in the Canadian Criminal Code that still penalised acts related to prostitution. While not all directly connected to the work of stripping, one of these provisions was the prohibition against “keeping a bawdy-house,” which includes the indecency provision

132. Indeed, while the Court and the police may have had reason to believe that none of the women and the men engaged in sexual activities in the case of Labaye received any compensation, for the dissenting Justices, Le Bel and Bastarache, it is the only thing that mattered was that it was a place to which the public had access and that fees were collected. It also follows that operations similar to the swingers’ club in Labaye can rely on (and employ) ‘professional’ sex workers to attract their clientele and for sex workers to attract clientele in similar operations.

133. Ten dollars is currently considered the lower end or discounted rate of lap dances in Toronto. The usual rate is twenty dollars per song.

134. Hyde, supra note 32, at 136-137. While Hyde’s analysis is based on U.S. Constitutional law and jurisprudence, his observation about how constructions of public/private require constant policing is a point of interest in my project. Like Hyde, I am also interested in analysing how public/private are constantly constructed/reconstructed and redefined in law. For a discussion about the defence of nude dancing as protected expression under the Canadian Charter of Rights, see June Ross, Nude Dancing and the Charter, 2 Rev. Can. Stud. 298 (1994).


136. See Canadian Criminal Code, supra note 86, at §212-3. The following provisions were struck down: Canadian Criminal Code, (bawdy-houses) supra note 86, at §212: (1) Everyone who [...] (2) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. (3) Every person who in a public place or in any place open to public view [...] (4) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

137. Id. at §210.
used in two of the three cases on stripping discussed here. While the decision is still pending review before the Supreme Court of Canada, the issue of whether this ruling signals the emergence of new regulatory schemes in the near future is already being raised. In the case of stripping, for instance, the lines drawn by the rules (especially when they are enforced) distinguishing sex work done in strip-clubs from other sex work may serve some useful purposes for women who insist on such a distinction since it helps them set limits to what their clients may expect and what employers can actually require of them. Of course, the debate over whether sex workers (particularly exotic dancers) may be coerced into offering ‘additional/more’ services by bar owners is hardly a clear-cut one and it is not solely a function of legal or even penal regulation. What remains the most promising aspect of the *Bedford* case is the provincial judge’s departure from previous court treatment of sex workers as being outside the sphere of social harm. While primarily facilitated by the relaxation of procedural rules which gave the claimants legal personality to file the case (even without criminal cases pending against them), the character of the suit and how it was framed, also led to judicial recognition of the plaintiff sex workers as proper subjects of law with valid claims to state protection.

*Foreign and Exotic: Hypervisible and Hyper-regulated Migrant Exotic Dancers*

On the other hand, exotic dancers (particularly foreign ones) continue to feature prominently on the radar of both conservative and liberal politicians in Canada. After a series of regulatory amendments initially designed to impose additional layers of monitoring on the application and approval of temporary work visas for exotic dancers, the Tories have now adopted a prohibition effectively barring sex related businesses from hiring foreign exotic dancers through the Temporary Foreign Workers

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139. See R. Danielle Egan, *Eyeing the Scene: The Uses and (Re)uses of Surveillance Cameras in an Exotic Dance Club*, 30 CRITICAL SOC. 314-315 (2004). In her ethnographic account of work in strip clubs, Egan noted how some dancers use the no contact policy of the club to negotiate boundaries with clients.

140. See Ross, supra note 53, at 335. Reports about dancers being coerced into providing lap dances (especially when the women began their work as on-stage strippers) came into focus in the 1990s when Katherine Goldberg, a former stripper, actively led campaigns against lap-dancing. Likewise Ross also recalls resistance by strippers against the pressure by management to ‘show the pink’, or ‘spread’ (opening the legs to display genitalia).
Program.\textsuperscript{141} Controversy around the work permits issued to foreign exotic dancers has often been articulated as a concern for sex trafficking and the potential use (or abuse) of the system by traffickers.\textsuperscript{142} The tone, manner and frame in which the issue of the ‘exotic dancer visa’ is currently being debated leaves little doubt that the conflict featured here has so far not been a very substantive one.\textsuperscript{143} As Audrey Macklin noted before the Senate Committee while the bill was being deliberated: by analogy the approach is similar to the idea that we can protect women from sexual harassment in the workplace by forcing them to stay at home.\textsuperscript{144} Ironically the hypervisible (but abstract) foreign exotic dancer

\textsuperscript{141} While exotic dancing and the adult industry behind it remains legal in Canada, new legislation authorizes the Minister to treat applicants to sex-related industries ‘at risk’ of sexual exploitation. Under the authority created by Bill C-10, Immigration Minister Jason Kenney announced that effective July 14, 2012, Human Resources and Skills Development Canada will no longer authorize businesses related to the sex industry to hire temporary foreign workers under the programme. Kenney described strip clubs, escort services or massage parlours as “businesses in sectors where there are reasonable grounds to suspect a risk of sexual exploitation.” Statutes of Canada, (March 13, 2012) Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts, § 206 (1.2). Despite subsection (1.1), the officer shall refuse to authorize the foreign national to work in Canada if, in the officer’s opinion, public policy considerations that are specified in the instructions given by the Minister justify such a refusal and (1.4): The instructions shall prescribe public policy considerations that aim to protect foreign nationals who are at risk of being subjected to humiliating or degrading treatment, including sexual exploitation. See also Statutes of Canada, (June 18, 2012) Bill C-38, Jobs, Growth and Long-term Prosperity Act, which granted the Immigration Minister the additional authority to give his instructions retrospective effect. § 706 87.3 (G) (3.1): An instruction may, if it so provides, apply in respect of pending applications or requests that are made before the day on which the instruction takes effect. See also Speaking Notes for Minister of Citizenship Jason Kenney, New Measures to Protect Vulnerable Foreign Workers from the Risk of Abuse and Exploitation, CITIZENSHIP & IMMIGRATION CANADA, July 4, 2012, http://www.cic.gc.ca/english/department/media/speeches/2012/2012-07-04.asp.

\textsuperscript{142} Audrey Macklin, Dancing Across Borders: “Exotic Dancers,” Trafficking and Canadian Immigration Policy, 37 Int’l. Migration Rev. 482-3 (2003). Macklin notes that when the link between the exotic dancer visa and the global traffic in women first captured media attention, inter-departmental government correspondence revealed a concern that the entry of foreign strippers ran counter to Canada’s well publicized position against the trafficking of women for sexual exploitation.

\textsuperscript{143} See Exotic Dancers No Longer Qualify for Canada Work Visas, FOREIGN WORKER CANADA BLOG, (June 14, 2012), http://www.canadianimmigration.net/news/exotic-dancers-no-longer-qualify-for-canada-work-visas.html. The Tories boast that only 496 permits were issued to exotic dancers under their watch between 2006-2011 compared to a grand total of 1713 permits issued under a liberal regime. See also Jessica Hume, Strippers to be Stripped of Work Visas: Kenney, OTTAWA SUN, (June 11, 2012), http://www.ottawasun.com/2012/06/11/strippers-to-be-stripped-of-work-visas-kenney. Partial records pertaining to Canadian visas and working permits to sex workers and exotic dancers between the years 2000 and 2011 were disclosed by Citizenship and Immigration Canada in August 2011.

\textsuperscript{144} See Audrey Macklin, The Senate Standing Committee on Legal and Constitutional Affairs, Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee
and temporary worker has emerged in the centre of the latest round of political one-upmanship in which the moral worthiness of Canada's political parties gets equated with their record of refusing work status to those who politicians themselves identify as persons who "might have a high chance of being trafficked or exploited." At one point the rules of the Temporary Foreign Workers Program were amended to give temporary workers admitted under the exotic dancer visa programme access to a valid employment contract, with the trappings of legal protection against some of the more common forms of abuse from employers such as failure to pay the promised or advertised rate and the practice of recouping recruitment costs from the dancers' wages. The 'ban' marks the first time that an absolute prohibition has been introduced in relation to the admission of foreign workers into exotic dancing in Canada's Temporary Workers Program. While it initially remained unclear whether other sectors of the adult entertainment industry, such as massage parlours, which to some extent also rely on a foreign work force, were being subjected to the ban, the Immigration Minister recently announced that the policy affects all of the 'sex industry'. Strictly speaking, exotic dancing (and working in massage parlours) are legally licensed occupations in Canada and many women who work in these sectors prefer to make the distinction between adult entertainment and prostitution clear. The fact that adult entertainment is subject to


148. Id. Prior to the amendments giving the Immigration Minister the authority to adopt this prohibition, the strategy available to government was to require additional steps in the application process; See Macklin, supra note 142, at 477. One of these requirements was the employment validation requirement.

149. Speaking Notes for Minister of Citizenship Jason Kenney, New Measures to Protect Vulnerable Foreign Workers from the Risk of Abuse and Exploitation, Citizenship & Immigration Canada, July 4, 2012, http://www.cic.gc.ca/english/department/media/speeches/2012/2012-07-04.asp. The proliferation of foreign workers in the various sex worker trades (from massage parlours to escort services) in many of Canada's cities is an observable fact and openly advertised. There is, however, a dearth of scholarly publications on foreign sex workers in Canada that does not categorise all of them as trafficking victims. See Suzanne Bouclin, Dancers Empowering (Some) Dancers: The Intersection of Race, Class and Gender in Organizing Erotic Labourers, 13 (3/4) RACE, GENDER & CLASS 98-129 (2006). Bouclin notes the detrimental effects of women's location around the varying axes of disadvantage on their capacity to make meaningful choices.

150. Bruckert, supra note 62, at 131-132. Apart from the issue of legal liability, Bruckert notes that the distinction is both a reaction to and a way to manage the stigma of sex work in general and
more policing as a matter of course than sex work (a.k.a. escort services) has been pointed out by feminists.\textsuperscript{151} Partly in reaction to recent gains by sex workers' rights advocates, moral panics around the predominance of foreigners in Canada's adult entertainment industry has resurfaced and has been recast in terms of a socio-political as well as a legal distinction between autonomous Canadian women and their trafficked foreign counterparts. For the first time since it was made available under the Temporary Workers Program, the exotic dancer visa has been revoked under the newly adopted legislation.\textsuperscript{152}

Foreign workers in exotic dancing who have metamorphosed into abject trafficking victims under the law are now the literal discursive site for a debate which, while ostensibly concerning trafficking, has turned out to be about something else entirely.\textsuperscript{153} Meanwhile, confronted with the loss of foreign workers in their businesses, club owners who have already been campaigning for the repeal of Toronto's no-contact prohibition have recently highlighted the pernicious effects of the bylaw on women working in strip clubs, and in the process, drew more attention to the issue than feminists who remain divided on the issue of the bylaw.\textsuperscript{154}

Studies already demonstrate how police-led approaches (including the no-contact bylaw) have not proven effective in their purported

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\textsuperscript{151} Muden & Durisin, supra note 12, at 296-297.

\textsuperscript{152} Under amendments introduced by Omnibus Bill C-38, foreign workers will no longer be issued visas to work as exotic dancers in Canada. Bill C-38 was passed in Parliament on June 18, 2012. Jobs, Growth and Long-term Prosperity Act, SC 2012, c. 19, http://canlii.ca/t/512lp; For a background of the temporary working visa for exotic dancers, see Macklin, supra note 142.

\textsuperscript{153} See Sharron A. Fitzgerald, Biopolitics and the Regulation of Vulnerability: The Case of the Female Trafficked Migrant, 6 (3) Int'l J. L. IN CONTEXT 277–294 (2010). Fitzgerald argues that state regulation of the bodies and behaviours of female trafficked migrants is entangled with anti-immigration agendas. The recently adopted Omnibus Bill was also considered controversial for having revoked by legislative fiat thousands of applications for permanent residence under the Federal Skills Worker Program that were filed before February 27, 2008. Both Liberal and Tory-led governments have dealt with criticism regarding Canada's 'exotic dancer visa' before, but a complete industry-wide and adult/sex industry specific prohibition is the first of its kind in the programme.

\textsuperscript{154} See David Rider, A City Hall Pole (Not Poll) Gets Noticed: 'Acrobatic' Dancing Urges Licensing Committee to Ease Up on Strippers, Toronto Star, March 20, 2012, at GTL. Tim Lambrinos, executive director of the Adult Entertainment Association of Canada, says that unclear rules permit authorities, usually male, to perform unnecessary inspection raids that can be intimidating. He adds: "They (the women) get abused by the bylaw officers, and sometimes the police, because the current laws are vague and are allowing these women to be mistakenly called into court." These comments were made in an interview after presenting a dancer who demonstrated pole dancing before the Toronto City Council last March. See, e.g., The RULES: MAGGIE'S PRACTICAL GUIDE TO STRIPPING ANDEROTIC MASSAGE LICENSING IN TORONTO (2014), http://maggiesresearch.ca/uploads/ -File/The-Rules-Maggies-practical-guide-to-licensing.pdf. Many pro-sex worker groups also oppose the bylaw and note how they are out of date and arbitrarily enforced.
objective to 'protect' exotic dancers, least of all foreign temporary workers who have fewer options. Indeed, framing the issue of exotic dancers' protection primarily, if not solely, as a police matter has not served the intended beneficiaries of legal protection. On the other hand, addressing how employers and the industry in general have been able to require exotic dancers and sex workers to accept what many of them deem unacceptable conditions or terms of work will require broader approaches to regulation and fresh perspectives about fairness and equity in workplaces in the adult entertainment industry.

VI. UNVEILED LEGAL SUBJECTS: PRODUCING THE MODERN MULTICULTURAL NATION

Controversy regarding religious dress in Canada, particularly headdress as well as facial coverage (the burqa and the niqab), is relatively recent compared to disputes regarding indecency. In the 1990s, for instance, a series of incidents led religious dress and headgear to figure prominently in public discussion. In 1993, Sikh Royal Canadian Legion veterans were refused entry into a hall for Remembrance Day ceremonies in Surrey, British Columbia because they did not take off their turbans, and a Muslim woman wearing a hijab was expelled by a judge from a Montreal courtroom. In 1994 a student, Émilie Ouimet, was sent home by a public school in Montreal for wearing a headscarf in violation of the school dress code. The Commission on Human Rights in Quebec later ruled that school dress codes which ban religious symbols such as the

156. Ruiz Austria, supra note 113, at 225–230, 236.
157. See Neil Bissoondath, Selling Illusions: The Cult of Multiculturalism in Canada 42 (1994). Critics of the media have observed how coverage of this issue tended to focus on the most vapid reactions from the public and some members of the Royal Canadian Army without noting that even within the Royal Canadian Army, members had differing opinions on the question. See also Darshahn Singh Talla, The Sikh Diaspora: The Search for Statehood 83–84 (1999); Grant v Canada (Attorney General), [1995] 120 D.L.R. (4th) 556 (F.C.C.A.) The National Legion headquarters as well as the provincial command apologised to its Sikh veterans even when the branch (where the incident occurred) refused to do so. In fact, when the controversy arose, the Solicitor General had already ruled that Sikh members of the Royal Canadian Mounted Police (RCMP) could wear their turbans. When this ruling was challenged by non-Sikh veterans of the RCMP before the Canadian courts as a violation of their religious freedom, the Federal Court of Appeal ruled that "there was no compulsion or coercion of religious expression involved, nor was there a deprivation of life, liberty, or security for persons interacting with the Sikh officers."
159. La Presse, (September 9, 1994), at A1.
headscarf, the Judean kippah or Christian crucifix, violate the religious freedom guaranteed by the Canadian Charter of Rights and Freedoms. In 2010, a woman who refused to remove her facial cover while attending French language classes in Montreal was asked to leave the class. Those in charge of the courses claimed that her facial cover made it impossible to assess her progress in speaking the language she was learning. The irony of the fact: that she was making an effort to learn French to integrate into the French-speaking community she lived in, seemed to be lost on those who found the woman’s conduct objectionable. The incident was the initial ripple of the wave that Bill 94 has been riding on. Bill 94 before the National Assembly of Quebec makes it legal for state agencies in the province to refuse access to services to persons who do not show their faces during the delivery of those services. While it does not spell it out, there is no doubt that the bill singles out women who habitually wear the burqa when venturing out in public spaces.

Further, the bill emerged out of a long (and arguably ongoing) public discussion over previous attempts to regulate the attire of Muslim women who choose to wear veils in school and in the courts. In such contexts, unilateral bans against the headscarf and even the burqa have not yet materialised.

163. Multani v. Commission scolaire Marguerite-Bourgeois, [2006] 1 S.C.R. 256, 2006 SCC 6. Banning the Sikh kirpan from the provincial legislature in Quebec has been raised anew despite the Federal Parliament’s policy to the contrary and the 2006 ruling of the Supreme Court of Canada in a case where a Sikh boy was prevented from bringing a kirpan to school. The Court held 8-0 to allow the boy to do so and defined the kirpan as a religious symbol and not a weapon.
164. Bill 94, supra note 162.
165. Id. The Bill enumerates public services which include education, health, social service and childcare.
166. GÉRARD BOUCHARD & RICHARD TAYLOR, BUILDING THE FUTURE: A TIME FOR RECONCILIATION 16-19 (Report of the Consultation Commission on Accommodation Practices Related to Cultural Differences (Quebec), 2008). While acknowledging the importance of social cohesion, the report attributed the public anxiety over cultural differences to media coverage of the issues, noting that it was “a crisis of perception.” GTA Woman has Niqab Pulled Off in Assault, CBC News, (November 22, 2011), http://www.cbc.ca/news/ca/toronto/story/2011/11/22/toronto-niqab-mall-assault-video.html. There are, however, reported cases wherein women wearing headscarves have been attacked in public. Ines Kadri was shopping with her three-year-old son and two-year-old daughter when two women approached her. One of the women began swearing at her, about her religion and her veil, telling her, “Leave our country. Go back to your country.” The assailant then grabbed her veil and pulled it off. Parts of the incident
Recently, a young Muslim athlete in Montreal provided a novel solution in response to a ban against the hijab which had initially resulted in the exclusion of young girls from a taekwondo competition. By designing a sports-type hijab which addressed the safety concerns raised by those responsible for the ban, the girls were eventually allowed to compete donning a sports-compliant hijab.

While not framed as a ban or as a penal law, what Bill 94 does is to lay out the conditions under which 'accommodation' may be made and withheld, in effect, restricting accommodation in practice. The proposed bill ignores the recommendation of the 2008 Bouchard & Taylor Report, which warns against the use of codified procedures (or law) to address the issue of reasonable accommodation. Here, the end result is an exclusion from public services, a domain commonly acknowledged as elemental to the Canadian notion of citizenship.

Rationing Accommodation: Veiled Outsiders of the Body Politic

Like the expulsion of exotic dancers from the public discourse of social harm, the proposed bill to regulate veiling and facial coverage, in particular from the public sphere, is also carried out discursively and accomplished by employing spatial tropes. Unlike exotic dancers and sex workers who are rarely, if ever, identified as a distinctly representative or homogenous group, women who don the niqab and burqa emerge...
as the gendered and idealised image and symbol of group identity on both sides of the culture clash. As noted earlier, the domain of public services is quintessentially Canadian and elemental to the idea of citizenship. In contrast to the degenerate and hybrid space that is the strip-club, the sphere of public services is one that is not only deemed respectable but also revered in Canadian politics.

Unlike France’s ban on religious symbols in the public sphere, Bill 94 never mentions religious symbols (e.g. hijabs and niqabs) and it does not single out the burqa. The bill’s stated regulatory focus is not religious exercise per se. What is clear, however, is that it categorically defines facial covering as the questionable practice that is a threat to the Canadian liberal polity. How the bill zeroes in on a practice (facial coverage) and women as its subjects of regulation is accomplished in four subtle steps. The first step involves referencing egalitarian and equality-respecting Canadian society, albeit indirectly. The bill links what it calls the ‘adaptation of general practices’ with equality, stating matter-of-factly that the right to equality determines general practices.

Second, while the bill does not explicitly target women, their veils and facial cover, the bill goes on to define ‘showing faces’ as a general practice in the context of giving and receiving public services. This second move is an insidious one because it has the most serious consequences for those considered in defiance of ‘general practice’. It also brings the act of being regulated into a concretely defined (and revered) public space, the space of public services.

Third, not showing one’s face in the same context is then defined as an accommodation, one which has to be reasonable within the parameters of the bill. Finally, the bill outlines when accommodation must be denied, that is if the accommodation involves an adaptation of the practice of ‘showing faces’, and if reasons of security, communication and identification warrant it. Through its initial premise (that equality dictates general practice), the bill sets up the framework of public


173. This is currently the central issue in the much-debated “Quebec Charter of values which focuses on public employees. For the full text of the charter, see Read: Full Text of Bill 60: Quebec's Charter of Values, Global News, (Nov. 7, 2013), http://globalnews.ca/news/952476/ read-full-text-of-bill-60-quebecs-charter-of-values. See Canada Post Feels Heat Over Sexy Lingerie, CTV News, (February 2, 2011), http://www.ctv.ca/CTVNews/Politics/20110202/ racy-canada-post-110202/. This reverence seems to extend even to ‘virtual public spaces’ such as government websites on the internet, as may be gleaned from the reactions of both the ruling Conservative party and the Liberal opposition to Canada Post’s supposed website links to commercial sites selling sex toys and racy underwear.
discussion about multicultural inclusion as a one-sided and closed argument rather than as an ongoing dialogue in which various sides could achieve mutual accommodation.

The bill problematically interprets the universality of equal rights as the uniformity of its claimants’ presentation of themselves. It is worth noting at this point that even without specific legislation mandating the removal of facial and head cover, women who do wear the burqa and traditional face coverage in Canada have been known to honour requests regarding identification (e.g. drivers’ license, passport) requirements even as a few have in some cases requested accommodation in relation to requirements to speak in public without their veil. Framing accommodation as liberal inclusion does not necessarily amount to dismissing what remains a valid feminist critique of religiously imposed dress codes including the burqa. Notably, feminists both outside and within Islam who take issue with women being forced to wear the veil and the burqa have offered such critiques while cautioning against ethnocentric biases. Indeed the question worth posing here is what regulation seeks to accomplish in the first place and how. Even feminists who support Bill 94 and identify the burqa as a sign of oppression often fail to address this question. As Judith Sunderland comments on the resulting irony: “[Burqa bans] violate the rights of those who choose to wear the veil and do nothing to help those who are compelled to do so.”

By transposing the regulation of wearing a burqa onto the space of public service delivery, Bill 94 manages to steer clear of the usual landmines in the ‘religion in the public sphere’ debate precisely because it does not purport to regulate an individual’s manner of dress or even mention religious symbols in public spaces at all. For, unlike previous uniform and dress codes and religious dress-focused regulation (including the

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174. R. v. N.S., [2010] ONCA 670. Apart from the example of the burqa-wearing woman who declined to remove her veil in a French language class, another good example is the recent case of a complainant in a sexual assault case against her uncle. Counsel for the defence alleged that her refusal to remove her facial cover violated the accused’s right to confront the witnesses against him. In an interlocutory order, the Ontario Court of Appeal upheld the woman’s request to don her burqa at the preliminary inquiry. In the same case, the court noted that despite her specific request to keep her facial cover in court, the complainant had actually removed the same to comply with the regulation governing her application for a driver’s license.

175. Schaefer, supra note 172.


French ban on religious symbols), the bill is not framed as the regulation of attire. Further, in the broad definition of its intended subjects — both providers and recipients of public service are those whose acts are being governed here — the bill cannot be faulted for singling anybody out (for instance Muslim women) in a strictly technical sense.

**Equal but Intolerable: You're either in or you're out**

However, as savvy as the wording of the bill is, merely debating the text misses the forest for the trees. Earlier I noted how transposing the regulation of veiling, specifically facial covering, onto the concrete realm of public services poses serious consequences for those deviating from ‘general practices’. Arguably the most troubling aspect of the proposed legislation is that its implicit regulatory logic has less to do with addressing the purported burden and havoc that *burqa*-wearing women are supposed to be wreaking upon Canadian public service systems, than with enabling and justifying limits on the practice of accommodation, in other words with facilitating discrimination. This strategy’s approach is strikingly similar to the ‘conscientious objection’ rationale invoked in anti-choice legislation which gives service providers a license to refuse access to and information about contraception and abortion.\(^{179}\)

Like the no-contact bylaw that affects exotic dancers,\(^ {180}\) the supposedly protective rule ends up imposing the regulatory burden on the very persons who policy makers claim will benefit from it. The end result in this case is exclusion from public service, a denial of access which ironically is claimed to be exercised in the name of equality and rights. Notwithstanding the inextricable link between civil and economic rights, this bill zeroes-in specifically on expulsion from socio-economic entitlements. It seeks to shape the very idea of the Canadian public sphere of social services by referencing an imagined, albeit very much present, Canadian politi, which excludes those who are deemed intolerable by its sponsors.

Yet this is a far more complicated picture than it seems. Bill 94 was filed before the provincial parliament in Quebec, and because a number of controversies (though not all of them) related to the veil have taken place there, the issue often tends to be dismissed as idiosyncratic of

\(^{179}\) See Rebecca J. Cook & Bernard M. Dickens, *The Growing Abuse of Conscientious Objection*, 8 (5) EMERG J. AM. MED. ASS’N 337-340 (2006). While this approach to ‘conscientious objection’ is more common in the United States than in Canada, it is also invoked by some Canadian health professionals, particularly those who support the Roman Catholic position against contraception.

\(^{180}\) Municipality of Metropolitan Toronto, supra note 98.
Quebecois politics and not necessarily affecting the rest of Canada. But while Quebec has indeed emerged as the epicentre of legal debates about religious gear in Canadian public places, the dismissal of anti-Muslim (and racist) sentiments as exclusively French-Canadian, diverts attention from the ever-present Anglo-French dynamic in Canada’s past and present. In the production of its objects for regulation, Bill 94 reproduces its non-Western/non-French-Canadian ‘others’ by evoking the burqa or niqab-covered female form, without having to mention or name those ‘others’ in particular. While it is indeed literal bodies of women that end up targeted and regulated, here the ‘Other’ also constitutes what ‘Western’ might mean or signify just as it also constructs an abstract (albeit admittedly variegated multicultural) Canadian public.

In December 2011, Citizenship and Immigration Canada adopted an official ban on face veils for citizenship oath-taking ceremonies. Unlike Bill 94, the policy comes into play at both the literal and symbolic point of entry into Canadian public life: the oath-taking ceremony for Canadian citizenship. While many of the same issues around how much the burqa and the niqab are supposed to be an anathema to Canadian principles of gender equality resurfaced when the policy was announced, the regulation did not really incite a firestorm of controversy, which perhaps says more about those who adopted the official policy (as well as about the timing of the issuance) than about the actual state of public discussion or disagreement. Interestingly, during an interview about the ban on facial coverage, Minister Jason Kenney emphasised how the measure is nothing “extreme like the French ban” and yet claimed that majority of

183. Elections Act, R.S.Q. C-3.3§333 et seq and §337. In 2007, Quebec amended its Elections Act to require voters in Quebec to show their faces to election officials.
184. Media and the way it frames the discussion around the niqab, burqa and even the hijab (headscarf) is another matter altogether.
185. See Audrey Macklin, Minister Kenney’s Ban on Face Coverings is Ultra Vires, Faculty of Law Blog, Univ. of Toronto, (February 17, 2012), http://utorontolaw.typepad.com/faculty_blog/2012/02/prof-audrey-macklin-minister-kenney-s-ban-on-face-coverings-is-ultra-vires.html. That debates can turn acrimonious in various venues (e.g. legislatures, courts or even in media and on-line discussion boards) sometimes stands in stark contrast to actual life on the streets, especially in parts of Canada where Muslim women who wear traditional head (and sometimes facial) cover are seen out in public places where others who are, relatively speaking, ‘seantily clad’ are also present. Toronto’s public beaches offers one particular example of such a case. Furthermore, Audrey Macklin notes that “citizenship regulations that govern the oath taking ceremony provide an entitlement to religious accommodation, and therefore cut against the legality of the Minister’s instructions.”
Canadians would probably come out in support of a French style measure anyway.\textsuperscript{186}

\textit{Modernity through the ‘Multicultural’ Looking Glass:}

\textit{The case of R v N.S.}

The case of \textit{R v N.S.}\textsuperscript{187} originated from a criminal complaint in Toronto. A 32 year-old woman (N.S.) came forward accusing her cousin and uncle of having sexually assaulted her repeatedly as a child. During the preliminary inquiry when she was called to testify, N.S. came forward to but wanted to do so while wearing her niqab. The two accused sought an order from the court to require the removal of N.S.’ niqab. Conducting a \textit{voire dire}, the court heard N.S. testify that her religious beliefs required her to wear the niqab in public where men (other than close family members) were present. She admitted to having taken off her niqab in public for a security check while crossing the border and also for the photograph on her driver’s license. The court ruled that N.S.’ religious belief “was not so strong” and ordered her to remove the niqab. N.S. applied to the Superior Court of Justice for an order quashing the preliminary judge’s original order. While Justice Marrocco ordered the preliminary inquiry judge to permit N.S. to testify in her niqab, if she asserted a sincere religious reason, he also held that the preliminary inquiry judge would have the option of excluding her testimony as evidence if the niqab was found to have prevented true cross-examination. Both parties appealed and the Court of Appeal returned the case to the preliminary inquiry judge, ruling that if the rights of the witness and the accused could not be reconciled through adapting court procedures, the right to fair trial must outweigh the religious accommodation and N.S. could be required to remove her niqab. N.S. appealed to the Supreme Court of Canada and this time the Women’s Legal Education and Action Fund (LEAF) filed a factum intervention in support of her position.\textsuperscript{188}

News of the \textit{R v N.S.} case pending before the Supreme Court of Canada revived the public discussions around Bill 94 before the Quebec
National Assembly. The issues raised regarding the conflicting rights of the accused to a fair trial and the complainant-witness’ right to religious expression provided a novel frame for discussing Canadian multiculturalism but it also served as fodder for a variety of Islamophobic reactions. LEAF’s legal backgrounder of its position on the N.S. case emphasised that its intervention on the issues should be read against the backdrop of pervasive Islamophobia. Quite interestingly, LEAF also noted in a legal background document it issued separately that it was not taking a position on the niqab itself (whether coming in support of wearing the niqab or denouncing it as oppressive).

Voting in the Supreme Court was split three ways. Framing the main issue in the case as a conflict between two Charter rights – the right to a fair trial and the freedom of religion – the majority outlined a framework for identifying and resolving rights conflicts based on previous cases where the Court considered challenges to publication bans. Refusing to rule with finality on whether or not fair trial rights trump the right to wear a niqab while testifying in court, the Court instead favoured a case-by-case balanced approach and called for the reconciliation of rights through accommodation, citing Canada’s key Charter jurisprudence. The Court then described how judges should consider whether the evidence presented by a witness is peripheral or central to the case in determining whether cross-examination to determine the credibility of the witness is central to the case as well. For the purposes of our discussion, however, the more interesting parts of the Supreme Court decision lay elsewhere, the separate concurring opinion of LeBel, J. on on the one hand and the dissenting opinion by Abella, J. on the other which express opposite views of how the case should have been decided.

While agreeing with the Court’s decision to dismiss the appeal, LeBel, J. was of the view that the Court should have (and could have under existing Canadian Charter jurisprudence) prohibited witnesses in criminal trials from wearing niqabs in courtrooms. Unlike the majority approach which highlighted the importance of considering the conflicting rights

189. See, e.g., Michelle Mandel, Supreme Court to Rule Thursday on Wearing Niqab While Testifying, Toronto Sun, (Dec. 19, 2012), http://www.torontosun.com/2012/12/19/supreme-court-to-rule-thursday-on-wearing-niqab-while-testifying. A variety of comments made over the internet about the headscarf, niqab and Islam in the context of multicultural Canada often descend into racist and generally anti-immigrant vitriol, all while extolling the Canadian values which (quite ironically) almost always include a reference to women’s equality. However, as Internet comments go, these kinds of inflammatory comments are common enough and may not necessarily reflect the actual level of Islamophobia at any given time.

in the context of the actual facts of the case (and in clear avoidance of framing the conflict in the abstract), LeBel's discussion pits 'open and independent courts' against 'the niqab'. Here, the open court and public trial on the one hand, and the niqab on the other, are synecdochically invoked as Canadian democracy and its exact opposite:

The Constitution requires an openness to new differences that appear within Canada, but also an acceptance of the principle that it remains connected with the roots of our contemporary democratic society. A system of open and independent courts is a core component of a democratic state, ruled by law and a fundamental Canadian value. From this broader constitutional perspective, the trial becomes an act of communication with the public at large. The public must be able to see how the justice system works. Wearing a niqab in the courtroom does not facilitate acts of communication. Rather, it shields the witness from interacting fully with the parties, their counsel, the judges and the jurors. Wearing the niqab is also incompatible with the rights of the accused, the nature of the Canadian public, adversarial trials and with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada.\footnote{191}

How LeBel, J. gets from open court and public trial to Canadian democracy and from niqabs to threat, stems from his key disagreement with the way that the majority (as well as the Court of Appeal) framed the issue before the Court. For LeBel, J., it is not a matter of conflict and reconciliation between the rights of the accused and the freedom of religion, but rather the compatibility of the wearing of the niqab with "the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada."\footnote{192} The case itself assumes mythic importance as LeBel, J. opines: "The case engages basic values of the Canadian criminal justice system."\footnote{193} At this level of abstract symbolism, the niqab stands in for an abstract veiled and covered up Muslim woman and Muslim women stand in for their religion. The complainant herself virtually disappears underneath double layers of abstract legal reasoning.

For the dissenting opinion, however, the facts of the case are the relevant starting point. While recognising the complex controversies surrounding the niqab and how it affects women and relates to multiculturalism, Abella, J. clarifies that the Court is not actually required to try to resolve any of these conceptual issues in the case. By bracketing

\footnote{191. R v N.S., supra note 187.} \footnote{192. Id.} \footnote{193. Id.}
the controversies around the *niqab*, Abella, J. manages to keep N.S., the complainant, as well as the facts surrounding the case within view. While dissenting from the majority, Abella, J. actually joins the majority in its consideration of the complainant’s claim to wear her *niqab* in the light of the Charter’s guarantee of religious freedom as the overriding issue in the case. Abella, J. also makes explicit note of the fact that the case arose out of a criminal complaint filed by a woman accusing two male relatives of sexual assault while she was a child: “[t]he order requiring a witness to remove her *niqab* must also be understood in the context of a complainant alleging sexual assault.” 194 Abella, J. then goes on to cite previous Supreme Court rulings where the Court had in fact already considered the conflicting interests of sexual assault victims and accused in assessing the fairness of the trial process. 195 These cases were also the result of hard won (and often protracted) feminist legal interventions and were aimed at demonstrating that systemic inequalities render women and children vulnerable to sexual violence. 196

Abella, J. notes:

[C]reating a judicial environment where victims are further inhibited by being asked to choose between their religious rights and their right to seek justice undermines the public perception of fairness not only of the trial, but of the justice system itself. 197

**Less like a Subject, More like a Regulatory Object**

Thus, in the dissenting opinion, N.S. request to wear a *niqab* (and her freedom of religion) cannot and ought not to be separated from the exercise of her right as a (female) sexual assault victim to access the criminal justice system. Here is where it gets even more interesting. Framing the issue this way constructs the complainant’s claim as a challenge to the criminal justice system’s historically gendered exclusion (or hostility) to women. In other words, the harm of potentially inhibiting sexual assault complainants (most of whom are women and children), from filing complaints against their abusers is considerably greater than the alleged harm to the accused’s fair trial rights. The all-too-familiar conundrum

194. Id.
196. *R v Mills* is a landmark case wherein the Supreme Court of Canada upheld the constitutionality of the "Rape Shield" law which limits an accused person's access to the personal records of the complainant in sexual assault cases. LEAF filed a Factum in Intervention on behalf of the Complainant. See also LEAF Factum, (November 2, 1998), http://leaf.ca/wordpress/wp-content/uploads/2013/02/1999-mills.pdf.
about rights and gendered (specifically women’s) injuries resurfaces here. Is the dissent asking the Court to consider gendered vulnerability as not only closely related to (or simply intersecting with), but rather inseparable from other forms of socially constructed vulnerabilities such as belonging to a religious minority and ethnic minority group? Wendy Brown’s observation is interesting here: “Yet within civil rights law it is nearly impossible to feature subjects marked by more than one form of social power (race, gender, age, sexual orientation, disability) at a time.”

In the main decision, the majority also acknowledged the importance of considering the potential impact (e.g. broader societal harms) that the requirement of removing the *niqab* might pose on sexual assault victims, but it did so only as an instruction for trial courts to consider on a case-by-case basis. Abella, J., however, would have had the Court take this instruction as the basis for a reversal, directing the court at preliminary inquiry (and the trial that may follow) to permit N.S. to wear the *niqab*. Ironically, even as Abella, J. strategically set aside the controversial aspects of the case with respect to the *niqab* and multiculturalism, through her insistence on an unconditional ruling, the very categories that are relied on to specify the complainant’s vulnerability (gender, ethnicity and membership in a religious minority) bring back the *niqab* (and the full weight of the symbols associated with it) into prominent view. While N.S. herself chooses to wear the *niqab* freely, not all Muslim women wear the *niqab* or care to wear it. Rendering this case even more complex is the fact that N.S. claims to have sought assistance regarding the sexual assault as early as 1992. However, after her father intervened, the police ended up not laying charges against the accused.

In the end, the *R v N.S.* decision was a politically safe decision, which was perhaps calculated to allay the worst possible reactions on either side of the *niqab* and multiculturalism debate. At any rate, many were of the opinion that N.S. is probably going to be required to take off her *niqab* during the trial (or at the very least keep it on only during the preliminary inquiry). Unlike the sex workers in *Bedford v Ontario*, N.S. had no hurdles related to technical issues of legal standing. Yet structures of legal reasoning (particularly in the separate concurring opinion) could just as easily render her invisible by reducing her to her *niqab*.

Indeed when law configures particular women’s bodies into regulatory

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198. LEAF Background, supra note 190.
199. Technically, these were not yet facts in evidence in the case which was only in the stage of the preliminary inquiry at the time of the motion. However, these circumstances were widely reported by the media since the complainant was related to the two accused.
sites, it often does so in the service of a separate, highly abstract body, a sacred all-purpose res publica, which stands behind expressions of the public interest. Within legal analysis, both discursive bodies, which are abstract and conflicting, supply the appropriate metaphor for contested political meaning. Less like subjects and more like objects of regulation, particular gendered bodies – usually women on the margins (sex worker and/or immigrant others) – are often the most convenient targets in these projects of rule.

VII. CONCLUSION

Examining how women’s bodies end up as default regulatory sites in law productively engages tensions within feminist/queer analysis which, while doing the work of challenging gender-based exclusion and subordination, can just as easily fall into simplistic approaches to law that merely reinforce categories and treat ‘woman’ as “an embodied social referent whose meaning pre-exists in figuration.”200 In the regulation of ‘baring’ and ‘veiling’, we note how particular female bodies perform specific functions as both sites and ciphers at various scales of legal meaning-making and have both profoundly symbolic and palpably material consequences.

Arguably, female baring, even when partial, gets framed as problematic despite a supposed flight from morality. But as the court decisions here illustrate, while sexual liberty can be evoked through the liberal tolerance of baring (e.g. female stripping before a male audience), women’s claim to freedom (actually being able to bare their bodies on their own terms) has thus far depended on a concomitant disavowal of sex (or at least the appearance of it). While the law evokes liberty and delimits it spatially on abstract female bodies, its resulting material exclusions (especially, albeit not exclusively at the point of law enforcement) are borne by women at the receiving end of regulation. Because they are bodies that stand in as the literal and figurative site of debated sexual meanings, that is what gets to be defined as tolerated sexual displays and what gets considered socially harmful, the actual women who are directly subject to the rules are not recognised as subjects. Lacking autonomy, they are not “authorised knowers,”201 since legal subjects can resist sexualised readings, interpretations (and reduction) of their bodies by disavowals

201. VALVERDE, supra note 10, at 42.
of sex.202 Sex workers whose bodies are ogled at by the paying public end up signifying social harm, contagion and commodification. Their bodies function as spaces for legal regulation. The Bedford case holds some promise as it facilitates the recognition of sex workers as rightful legal subjects. By claiming protection without a concomitant disavowal of sex, sex workers have also challenged the conventional legal construction of women as victims and thereby disturb the legal account of asexual female autonomy. Part of the promise of Judge Himmel’s reasoning in Bedford is a shift in the conversation about social harm (and concerns about social harm) that is not premised on the exclusion of sex workers. On the other hand, the recent turn in policy signalling the adoption of regulations banning foreign exotic dancers as part of its anti-trafficking policy,203 indicates that not all sex workers are likely to get the benefit of legal subjection, if indeed it is forthcoming for any of them.

An analysis of the court decisions on stripping reveals the malleability of public and private spaces and highlights the authorship of courts in the processes of fixing both legal and political meaning. Legislative initiatives such as Bill 94, on the other hand, demonstrate battling political interests and spur contests to permanently re-draw the lines of public inclusion and exclusion to make them more clearly defined by attempts to fix conflicting meanings through law. Indeed, rather than a clearly defined line between public and private, I submit that there are instead interstices in between public and private that are allocated depending on the current state of liberal inclusions and exclusions. In the context of contemporary liberal contestation in Canada, ‘foreignness’ figures in both boundary-drawing exercises with foreign (exotic) female bodies in public space, interpreted as lacking in autonomy as the legal rhetorical tools (and regulatory objects) of choice. Yet even when their degrees of exclusion vary, the displacement of sex workers (in this case exotic dancers) springs from their default role in the control, regulation and management of the danger that is sex. As Lisa E. Sanchez notes: “the figure of the prostitute serves as a limit concept.”204 Admittedly, exotic dancing (even with close contact nude performances) is not exactly the

202 R. v. Jacob, supra note 75. In the Gwen Jacob case, the Court noted the fact that those who ogled at the respondent when she took her topless stroll did not pay to do so. While it did not elaborate why this was relevant – it did not go on to discuss paid stripping – the court’s distinction between Gwen Jacob, the philosophy major and “others” (e.g. sex workers) is clear.

203 Statutes of Canada, (March 13, 2012) Bill C-10, supra note 141.

same as prostitution and most sex workers recognise and value these distinctions.

The insight I wish draw from Sanchez has more to do with her examination of the law’s figuration of the female outlaw and the performative ritual of expulsion enacted on her body. This observation resonates with observations by other scholars linking regulatory projects with periods of moral panic or, in the contemporary moment, neoliberal anxiety. Within the discourse of Canadian multiculturalism, the veiled and burqa or niqab-wearing woman emerges as the prominent site for drawing those lines within the Canadian polity. In Bill 94 she is the limit to accommodation, and to those who dismiss the politics of the bill and the veil as exclusively Quebecois sentiment, she is the height of liberal inclusion in the Canadian multicultural (albeit, apparently vertical) mosaic.

Indeed, while there continues to be numerous issues raised in relation to religious and cultural modes of dress in Canada, the fact that outright legal regulation with serious consequences of public expulsion have converged around the burqa-covered bodies of women, demonstrates the pre-eminence of female bodies in contests of political meaning waged through law. Macklin aptly notes that the enculturated woman’s disruptive presence in the public domain is managed by casting her as a particularised citizen. Interestingly, Valverde’s account of sex workers not being acknowledged in law as “authorised knowers of harm” can also be applied here with an added twist. If the bare female form is used to evoke liberty without necessarily securing full liberty for women, veiling as well as total coverage of the female form is read as its supposed polar opposite in a modern liberal society like Canada. It may well become the ground for the public expulsion of women whose very acts are read in the same polity as a lack of agency.

\[\text{205. Id.} \]
\[\text{206. See, e.g., Macklin, supra note 39.} \]
\[\text{207. Valverde, supra note 10, at 42-43.} \]