Naked Feminism: The Unionization of the Adult Entertainment Industry

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HOLLY J. WILMET

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I. INTRODUCTION

With the power and membership of labor unions declining every year\(^1\) and the popularity and revenue from adult entertainment products and services rising at astronomical rates,\(^2\) it is logical that

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\(^1\) Union membership has declined steadily since the 1960s and last year fell another 159,000 to 16.1 million members, just 14 percent of the work force. To replenish its diminishing ranks, the American Federation of Labor—Congress of Industrial Organizations (AFL-CIO) now vows to actively recruit women, who make up approximately 40% of the nation’s trade union membership. See Kieran Murray, Dwindling Labor Unions Recruit Women, CHI. TRIB., Apr. 19, 1998, at 9.

\(^2\) Revenues from the legal adult entertainment industry are conservatively estimated at at least $10 billion a year and include home video sales and rentals at $3.1 billion a year; adult content films and sexually oriented interactive games on CD-ROMs at $300 million a year; internet services; cable, satellite, and pay-per-view TV; and “gentlemen’s clubs,” upscale strip
organized labor would, at some point, turn its attention to one of the last unorganized and disenfranchised groups of workers in America: adult entertainers. Not only are adult entertainers appropriate for union organization, but they want to be organized. Nevertheless, organized labor has all but turned its back to the exotic dancers and pornographic movie actors seeking assistance in securing minimum wages, benefits and job security. But, unlike most workers who are

clubs offering tuxedo doormen, valet parking, and stock options traded on NASDAQ, which bring in over $100,000 a week, not to mention revenues from the over 2,200 more traditional strip clubs, peep shows, X-rated theatres, and adult bookstores. See Anthony Flint, Skin Trade Spreading Across U.S. High Tech Finds Boom for $106 Industry, BOSTON GLOBE, Dec. 1, 1996, at A1.


4. The mission of the AFL-CIO includes: "To aid workers in securing improved wages, hours, and working conditions . . . to promote the organization of the unorganized into unions of their own choosing for mutual aid, protection and advancement . . . to encourage all workers without regard to race, creed, color, sex, national origin, religion, age, disability, or sexual orientation to share equally in the full benefits of union organization." AFL-CIO CONSt., art. II, Objects and Principles 5-4.

5. Exotic dancers' unionizing efforts date back to the 1940s when the American Guild of Variety Artists (AGVA) individually represented a large number of dancers through recognition agreements, casual engagement contracts, and standard contracts for minimum wages on a dancer-by-dancer, club-by-club basis. The relationship between AGVA and dancers ended abruptly in 1973 when a federal court first declared nightclub performers to be independent contractors. Telephone Interview with Paul Bales, Executive Director of AGVA, Southern California Chapter (Apr. 14, 1998).

Group organizing efforts started up again, without AGVA's assistance, in the early 1990s at Pacer's, a San Diego, Cal. strip club. See Martha Irvine, San Francisco Strippers Enjoy Union Coverage, LAS VEGAS REV. J., May 12, 1997, at 1A. Those efforts were short-lived, however; the dancers voted to decertify the union in 1999, due largely to management's misinformation, threats, and the hiring of dancers who would not join the union. Id. See also WIS. STATE J., Sept. 4, 1999.

In early 1996, strippers of the Lust Lady peep show in San Francisco, Cal. began organizing themselves in an effort to persuade club management to remove the one-way mirrors in customer booths that allowed customers to clandestinely photograph and videotape dancers, the product of which they feared would begin appearing on the Internet or on bootleg videos without dancer permission or financial gain. See Kuntz, supra note 3, at 7; see also Telephone Interview with "Jane," Organizer/Dancer at the Lusty Lady (Apr. 10, 1998); Jane, No Justice, No Piece (last modified June 12, 1997) <http://www.bayswan.org/Edjust_piece.html> (explaining how strippers went from no recognition to union contact ratification). Since then, organizing efforts have begun in Hollywood, Cal.; Philadelphia, Pa.; Anchorage, Alaska; Massachusetts; New Jersey; and some provinces within Canada. NEWSLETTER 10 (Exotic Dancers' Alliance, San Francisco, Cal.) 1998 (on file with author).

6. In what is generally representative of the working condition demands of most strippers, the Lusty Lady dancers' first collective bargaining agreement secured for them the right to be treated by management "with dignity, respect, courtesy, and trust" to be free from "an intimidating, offensive, or hostile work environment;" to "just cause" dismissals which include "[e]mployer's opinion regarding employee sexiness while performing, customer interaction and/or customer satisfaction . . . ."; to one paid sick day; to be free from the arbitrary docking of pay for missed meetings and sick days; to family/personal leave, provided that "the [e]mployer approves . . . based on scheduling considerations, the employee's request, in writing, when she expects to return, the dancer's appearance has not changed materially since she started her leave (i.e., employee has no additional tattoo or piercing . . . no significant weight gain or loss), employee returns to work within one week or stated return date;" to a guaranteed
customarily approached by union organizers\(^7\) these adult entertainers have had to go door-to-door at the AFL-CIO in an effort to find a union willing to represent them;\(^8\) or, in the porn actress’s case, right to the door marked “Screen Actors’ Guild.”\(^9\) So why then, won’t these labor

pay scale ranging from $12.00 per hour for new hires to $21.00 per hour for dancers employed 31 weeks, plus tips; extra pay for working in the Private Pleasures/talk dirty booth at 50% of gross receipts; to 10-minute breaks every 40 - 50 minutes on stage, and a 30-minute lunch break, provided that it is “taken before midnight, Sunday through Thursday, and before 1:00 a.m. Friday and Saturday”; to paid 15 minutes preparation time; to pay for dancers who undertake the “selecting, purchasing, and programming” of music; to time plus 1/10 pay for working New Year’s Eve; to remove the one-way windows; to a grievance and arbitration procedures; and support staff [bouncers, cashiers, and janitors] to receive two 15-minute paid breaks and one unpaid 30-minute lunch. \textit{See Collective Bargaining Agreement (CBA) between Multivue, Inc., The Lusty Lady and Local 790, Service Employees International Union, and AFL-CIO, ratified Apr. 4, 1997 (on file with author); see also Kuntz, supra note 3; Irvine, supra note 5.}

In their second CBA, ratified on April 4, 1998, the benefits increased to include up to four paid sick days (based on hours worked) with no monetary penalty for additional sick; time and one-half pay for New Year’s Eve; a guaranteed pay scale of $22.00, which the employer can increase to $28.00 - $25.00 per hour; and their biggest coup, a hiring cap on the number of dancers employed at a particular time. \textit{See Jane, supra note 5} (contract on file with author).


8. The Lusty Lady dancers, who sought out Service Employees International Union (SEIU), Local 790 for representation, initially encountered resistance from the union; but Local 790 had an informal affiliation with the Exotic Dancers’ Alliance, a San Francisco-based advocacy group, and with their assistance, persuaded Local 790 to represent them. \textit{See Jane, supra note 5.}

In the cases of dancers in Philadelphia and Anchorage the situation was much worse. At the Oakford Inn in the Philadelphia suburbs, the International Brotherhood of Teamsters, AFL-CIO, initially agreed to represent the dancers, and had gone so far as to collect signature cards, petition the NLRB for approval, schedule an election, and begin a campaign, when they inexplicably abandoned the effort and the dancers, in mid-campaign. \textit{See Jane, supra note 5.} Unsurprisingly, the dancers failed to get enough votes to certify the union, and the effort failed. \textit{Not Covered Strippers Reject Chance to Form Union, MILWAUKEE J. SENTINEL, Oct. 30, 1997, at 5.}

In Anchorage, the Alaska Exotic Dancers’ Union, an independent union, sought out and initially affiliated with the Teamsters. The Teamsters agreed to represent the dancers of the Showboat Show Club, but they suddenly abandoned the dancers mid-campaign, warning organizers “not to call back.” \textit{Telephone Interview with Tora Brawley, Alaska Exotic Dancers’ Union, Dancer/Organizer of the Showboat Show Club (Apr. 21, 1998) [hereinafter Brawley Interview].} As a result of diligent efforts on the part of the dancers’ organizer, the Showboat’s dancers informally affiliated with the Hotel Employees Restaurant Employees, AFL-CIO. \textit{Id.}

9. As its name suggests, the Screen Actors’ Guild (SAG) is the major representative for movie actors, with a membership of nearly 90,000. Dade Hayes, \textit{Porn Actress Takes Case to National Labor Board Films: Performer Files Complaint After Getting Cold Shoulder From the Screen Actors Guild, L.A. TIMES, Nov. 8, 1997, at B5.} It operates as a closed union, requiring applicants to either work on a project financed by a guild signatory (usually a major movie studio or production company), work three days (or collect three vouchers) as an extra on approved shows, or be a member of an affiliated entertainment union, prior to being eligible for membership. \textit{Id.}

In November 1996, Dalny Marga Valdes, star of more than 70 X-rated films, was denied Guild membership, and as a result filed charges with the National Labor Relations Board (NLRB) against SAG for discriminatory and arbitrary denial. \textit{Telephone Interview with attorney, NLRB, Southern Cal. Office (Apr. 4, 1998).} Those charges were eventually dismissed by the NLRB for lack of case. \textit{Id.} Ms. Valdes seemingly did not meet SAG’s standards for admission and now has little recourse because SAG, as a private organization, is entitled to set standards for admission so long as those standards are not constitutionally forbidden. \textit{Id.} SAG is under no legal duty as a labor union to accept everyone seeking membership. \textit{Id.}
unions accept ready-organized contingents of strippers or porn stars?

Although one could speculate that labor’s reluctance is due to the controversial and sexual nature of these professions, the industry’s reputed ties to organized crime, fear of public backlash, or any combination thereof, the primary reason for labor’s reluctance may actually be our nation’s labor laws.12

The National Labor Relations Act [hereinafter “NLRA”] grants most employees the right to organize and join unions.13 It does not, however, grant those same rights to supervisors or independent contractors, and therein lies the distinction.14 By arbitrarily classifying their exotic dancers as “independent contractors” rather than “employees” and

10. Organized labor’s reaction to strippers is representative of the general public’s, and includes such sentiments as “not taking [them] seriously” and assuming that exotic dancing/entertaining is “not an honest day’s work.” Wesley Pruden, A Jungle Out There and It’s Boiling Hot, WASH. TIMES, May 6, 1997, at A4. The porn industry has taken a bold step to be heard above the roar of condemnation: lobbying. In a successful effort to defeat California state legislation that would have taxed pornographic materials, a 40-person porn star delegation went to the state capital and personally lobbied state representatives. The porn industry currently keeps a full-time lobbyist on payroll. See Mark Katches, Touch of Savvy Helps Porn Industry Avoid Tax, ORANGE COUNTY REG., June 22, 1997, available at 1997 WL 7429157; see also, Free Speech Coalition, Celebrate Free Speech Lobbying Days 1998 (last modified Feb. 10, 1999) <http://www.freespeechcoalition.com/industry/legislation/celebrate.htm>.

11. Rumored affiliations between strip clubs and organized crime are numerous and notably include: ties to Jack Ruby and the assassination of John F. Kennedy (Ruby, a strip club owner, said he was not at the assassination because he was at his club dealing with union/Mafia problems), Report of the President’s Commission on the Assassination of President John F. Kennedy [a.k.a., Warren Commission Report], Sept. 24, 1964; ownership of San Francisco strip clubs, including Mitchell Brothers O’Farrell Theatre, the club subject to a class-action suit discussed herein, Interview by Siobhan Brooks with Daum Passar, Co-Founder of the Exotic Dancers’ Alliance, (visited Apr. 18, 1999) <http://www.bayswan.org/siobln.tw.html>; “Scores,” a high-class New York City strip club that is the focus of a recent extortion case brought by the government against John Gotti, Jr., alleging that he demanded payments of both the dancers and the club owner, Greg B. Smith, Junior’s Brand New Jam: Enforcer Implicates Gotti in Escort Cases, N.Y. DAILY NEWS, Apr. 3, 1998, at 7; Showboat Show Club, the Anchorage, Alaska strip club, which is the subject of current unionizing efforts by dancers, rumored to be controlled by the Hell’s Angels motorcycle gang, a rumor supported in the continued presence of leather-clad, armed Hell’s Angels at management-union meetings. Brawley Interview, supra note 8.

12. See infra notes 13-18 and accompanying text.

13. The National Labor Relations Act’s (NLRA) most important provision, section 7, states: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (1994).

14. Id.

15. Independent contractors are explicitly excluded from the NLRA’s section 7 rights and other related provisions by section 2(3). 29 U.S.C. § 152(3) (1994). This distinction is important because, although it is not widely known, exotic dancers are of one of two types: “house” dancers or “features.” See Christine Fuentes, Boogie Nights: The ’70s Are Alive and Well at S.F.’s Gold Club, S.F. EXAMINER, Nov. 30, 1997, at M16. House dancers comprise the majority of exotic dancers and are the ones classified as independent contractors. Id. Generally, these women work on a continuing basis for one particular club; on exception they may alternate or simultaneously work for more than one club located in the same area and owned by the same enterprise. Id. However, it is rare for a dancer to work equal amounts of time for two more
charging them fees to work rather than paying them wages, proprietors of strip clubs have, until recently, been able to stop organizers in their tracks, thereby denying dancers the protection and benefits of collective action. The courts have become an active partner in the continuing financial exploitation of adult entertainers (namely exotic dancers) by legally classifying various types of stage entertainers as independent contractors, and thus denying these workers protection of the labor laws enacted for their benefit.

That may be about to change, however. Several class action law suits, collectively involving over 5000 exotic dancers and thirty-one strip clubs, have been filed in the state courts of California and Nevada. The independently owned strip clubs. Thus, a multiple-employer situation would not arise during unionization and collective bargaining.

A “Feature” is hired by the club for promotional purposes for a limited engagement. The feature is often a pornographic movie actress, magazine centerfold, or other sex industry celebrity, who will sign autographs or take photos with customers but rarely dance. See, e.g., Fuentes, supra note 15, at M16. Those who do dance tend to be individually recognized and advertised as they travel a “circuit” of strip clubs (i.e., Los Angeles to San Francisco to Las Vegas). Id. When the clubs visited are owned by separate enterprises, the feature dancer is properly classified as an independent contractor, and would not be able to join a union. Id. An exception may arise, however, if the visited clubs are all owned by the same enterprise (which they often times are). Existing labor law permits union members, once properly part of a bargaining unit, to work at different job sites of a single employer, and in some cases of different employers, so long as each employer is party to a collective bargaining relationship with the union. See Combined Century Theatres, Inc. v. NLRB, 120 N.L.R.B. 1879 (1960), mod. and enforced, 278 F.2d 306 (2d Cir. 1960) (stating that thirteen movie theatre companies are considered a single employer under the NLRA).

16. An outrageous industry-wide practice requires exotic dancers to pay their employing strip club for each shift they work. This practice is believed to have originated at the Mitchell Brothers O’Farrell Theatre in the late 1980s, quickly spreading nationwide. Brooks, supra note 11. These fees, commonly called “stage fees,” “house,” “tip-out,” “rent,” “commission,” “leases,” etc., purported to be for the right of use of the owner’s facilities as dancers ply their “independent trade.” Brooks, supra note 11. The fees are often fixed amounts, usually referred to as “stage fees,” and range between $25-100 per shift. Alternatively, the fees are “tip-outs”—where the amount to be remitted to the club is determined by a percentage of the dancer’s daily earnings on “tips,” the price customers pay dancers directly for private table or lap dances. NEWSLETTER 8 (Exotic Dancers Alliance, San Francisco, Calif.) 1997 (on file with author). At some clubs, such as the Market Street Cinema and Century Theater in San Francisco, the fees reach amounts as high as $150 per shift. Id.; see Ino Ino, Inc. v. City of Bellevue, 997 P.2d 154, 169 (Wash. 1997) (adjudicating where the Club charged dancers $65 or more for a six to eight hour shift).

17. Brooks, supra note 11.

18. See Associated Musicians of Greater Newark v. Bow & Arrow Manor, 206 N.L.R.B. 591 (1973) (orchestra leader and strolling musicians of restaurant club considered independent contractors under NLRA); Harrah’s Club v. NLRB, 446 F.2d 471 (9th Cir. 1971) (casino house band members considered to be independent contractors under NLRA); Radio City Music Hall Corp. v. United States, 135 F.2d 715 (2d Cir. 1943), aff Harding, Inc. v. NLRB, 370 U.S. 304 (1962) (holding movie theatre intermission stage performers are to be considered independent contractors).

19. Prior to publication of this article, the first of two California cases, infra note 20, settled for $2.85 million, which included attorneys’ fees and restitution. Julie N. Lynem, O’Farrell Settles With 500 Dancers: $2.85 Million Includes Restitution, Legal Fees, S. F. CHRON., July 10, 1998, at A22. Because the settlement reportedly did not include any admission of liability, the claims and issues contained therein remain untested in the courts. It is, therefore, in this author’s opinion, appropriate to discuss the issue as a pending matter (with this disclaimer).
legal basis of each suit is that strip club proprietors have improperly classified their exotic dancers as independent contractors, rather than employees, in violation of state and federal wage and hour laws.\footnote{20} Success on the merits would mean the dancers are legally entitled to back wages, reimbursement of stage fees, and other damages.\footnote{23} To win their cases, these women must demonstrate that their classification as independent contractors is a subterfuge (likely created by club owners to avoid employment-related costs and taxes);\footnote{24} that the reality of their employment situation clearly demonstrates that club owners, not dancers, control the actual working conditions within the clubs; and that, accordingly, exotic dancers lack the business independence required for classification as independent contractors.\footnote{25}

This article explores the legal basis for the dancers’ claims, from the treatment of employees and independent contractors under the NLRA, the Fair Labor Standards Act, and California and Nevada state laws, to the corresponding federal and state courts’ interpretations, tests, and

\footnote{20. Two class-action lawsuits have been filed in California to date. In the first, Vickery v. Cinema Seven, Inc., 480 former exotic dancers of the O’Farrell Theatre—a unique multi-theme roomed strip club in San Francisco, billed as “the adult Disneyland,” and best known for on-stage and private seating live performances of sexual acts involving multiple dancers and/or sexual “props/toys”—sued the club for back wages and reimbursement of stage fees. See Caren Benjamin, 

Strippers Expand Wage Lawsuit to Additional Las Vegas Clubs, LAS VEGAS REV. J., June 12, 1997, at 5B. The dancers alleged that in 1998 the club impermissibly changed the classification of its exotic dancers from employees to independent contractors, simultaneously stopping the payment of wages and implementing the practice of charging stage fees. \textit{Id.} The dancers were granted class action status in May 1995. \textit{See id.}

The second lawsuit, filed in Los Angeles Superior Court on December 9, 1998, pits five exotic dancers (seeking to represent a class that includes all dancers employed at the clubs since 1994) against 23 strip clubs in the Southern California, San Fernando Valley region. See Peter Harlaub, 

Strippers Sue Clubs Over Work Status, L.A. DAILY NEWS, Dec. 10, 1998, at N8. Here too, the dancers allege a “sham independent contractor arrangement” exists between the clubs and the dancers that work at them. \textit{Id.} The dancers hope that this lawsuit will reward them with punitive damages and employee-status, and the benefits that accompany that status, such as hourly wages, disability insurance, job benefits, workers’ compensation and overtime pay. \textit{Id.}

\footnote{21. In Roe v. Cheetah’s Lounge, over 5000 former and present exotic dancers as a § B(2) class, are suing for unpaid wages, overtime wages, reimbursement of monies paid to the clubs as “tip-outs, rent, commission, locker fees,” reimbursement for costume/uniform expenses, and declaratory judgment prohibiting the future sharing of tips and gratuities, and requiring payment of minimum wages. Petitioners’ First Amended Complaint for Class Action Relief at 8-13, Roe v. Cheetah’s Lounge (D. Ct. Nev.) (No. A371500) (on file with author).

\footnote{22. Benjamin, supra note 20, at 5B.}

\footnote{23. Benjamin, supra note 20, at 5B.}

\footnote{24. The manner in which the principal handles any tax obligations is of no significance in determining employment status under California law. Letter from Miles Locker, Attorney for Cal. Labor Comm’n (Oct. 10, 1997) (citing Toyota Motor Sales v. Superior Court, 220 Cal. App. 3d 864, 877 (1990) (“An employer cannot change the status of an employee to one of an independent contractor by illegally requiring him to assume a burden which the law imposes directly on the employer.”)) (on file with author).

\footnote{25. See Yard Bird, Inc. v. Virginia Employment Comm’n, 503 S.E. 2d 245, 253 (Va. Ct. App. 1998) (explaining that the club exercised actual or potential control over dancers, and dancers were not engaged in independently established businesses).}
classification of exotic dancers. The facts suggest that these cases would be successful under both California and Nevada law, as well as federal law. Furthermore, these lawsuits present the court with an ideal opportunity to apply the Fair Labor Standards Act’s model of employee/independent contractor law to the adult entertainment industry. Such a definitive judicial application would not only benefit public policy and the working conditions of thousands of working women, but may also have possible persuasive value in any subsequent NLRA action.

Assuming that judicial determination of exotic dancers’ employee status on a class-wide basis would subsequently lead to an industry-wide change in the practice of treating dancers as independent contractors—either voluntary, through further legal action, or by collective action on the part of dancers—this article explores the future of their unionization and the unavoidable implications for the feminist movement.

II. APPLICABLE LAWS

The primary statute granting employees the right to organize and collectively bargain is the NLRA. Since 1935, despite subsequent amendments in 1947 and 1959, it has acted as the primary power-equalizing tool for employees. Not only does the NLRA grant

26. See infra Part II.
27. See infra Part II.
28. It should be noted that the NLRB has complete autonomy in deciding cases arising under the NLRA, and therefore would not be bound by a trial court’s determination of dancers’ employee status. The Board may, however, be influenced by such action. See 29 U.S.C. § 141 (1994) (stating the purpose of the Act to be to benefit public policy and working conditions).
29. See infra Part II (discussing how the case of pornographic movie actors differs from that of exotic dancers in that their unionization issues turn more on the labor laws regarding union representation and membership, rather than wage and hour laws). Unfortunately, there is no legal precedent holding a union responsible to an individual for denied membership in that union. As a result, the unionizing efforts of pornographic movie actors will not be specifically discussed further in the context of this article.
30. In 1947, an anti-Labor, Republican-led Congress amended the NLRA with the Taft-Hartley Act, which was significant in two respects: First, it specifically excluded independent contractors from NLRA protection, a direct response to the Supreme Court’s decision in NLRB v. Hearst Enterprises, 322 U.S. 111 (1944) (using the “economic factors” test [a.k.a., “statutory purpose” test] and finding newboys to be employees covered under the NLRA); second, the amendments permitted employers to actively campaign against unions during the pre-election campaign, provided that there was “no threat of reprisal, or force, or benefit.”
31. As stated in the National Labor Relations Act:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes, and by providing for prompt and effective handling of such disputes.
employees collective action rights, it also prevents employers (and unions) from impinging on those rights. In addition, the Act protects employers and unions from each other’s activities by defining specific acts which constitute “unfair labor practices.” With broad coverage extending to all enterprises “affecting commerce,” few businesses are beyond the NLRA’s reach.

Enforcement power for the NLRA is vested in the National Labor Relations Board [hereinafter “Board”], an independent federal agency created by Congress in 1935 to specifically administer the NLRA through “two principal functions:” (1) to determine, through secret-ballot elections, the free democratic choice of employees whether they wish to be represented by a labor union in dealing with their employers, and if so, by which union; and (2) to prevent and remedy unlawful acts (a.k.a., unfair labor practices) by either employers or unions.

The Board “does not act upon its own motion in either function.” It proceeds only after petitions for elections or charges of unfair labor practices are filed with one of the fifty-two Board offices nationwide.

In reviewing an order or decision issued by the Board, the reviewing federal court of appeals must give deference to the Board’s findings of fact and accept them “if supported by substantial evidence on the record considered as a whole.” What constitutes “substantial evidence,” however, is undefined in the Act. This omission has resulted in the type of inconsistencies between Board and court decisions commonly found in judicial review of administrative action.

The NLRA vaguely defines the term “employee” as “includ[ing] any employee . . . but shall not include . . . any individual having the status

or other working conditions, and by restoring equality of bargaining power between employers and employees.


32. See id. (encouraging “the practice and procedure of collective bargaining”).

33. 29 U.S.C. § 158(a) (1994) (including unfair practices by the employer).

34. 29 U.S.C. § 141(b) (1994).

35. 29 U.S.C. § 152(2)(3) (1994) (defining the term “employer”). Section 152(3) specifically excludes certain businesses from NLRA coverage. See 29 U.S.C. § 152(3) (excluding employees such as agricultural laborers, domestic servants, employees hired by a parent or spouse, independent contractors, supervisors, or workers hired under the Railway Labor Act from NLRA protections).


40. See id.
of an independent contractor.” While the NLRA fails to define “independent contractor,” it has been left to the Board and the courts to define the parameters of the term. In the absence of statutory guidance, the Board and the courts have, since 1947, generally applied the common law respondeat superior “right of control” test.42

Under the right of control approach, an

[i]ndependent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.”43

In determining the right of control, “the test lies in the degrees to which the principal may intervene to control the details of the agent’s performance.”44 The narrowness of this approach has resulted in mixed treatment of adult entertainers’ employment status in the courts.45

Cases arising under the Fair Labor Standards Act [hereinafter “FLSA”],46 however, have consistently held that “employee” and “independent contractor” should not be used in their common law respondeat superior sense when used in federal social welfare legislation.47 Accordingly, the right of control test has usually been rejected in favor of the broader “economic reality” test, which encompasses elements of the control test and is indistinguishable from the common law test for

42. See e.g., Romero v. Shumate Constructors, 888 F.2d 940, 946 (N.M. Ct. App. 1994) (holding that, in common law, the right of control test applies to determine if an employer should be held vicariously liable).
44. Radio City Music Hall Corp. v. United States, 135 P.2d 715, 717 (2d Cir. 1943) (finding stage entertainers to be independent contractors); cf. Hanson v. BCB, Inc. 754 P.2d 444, 446 (Idaho 1988) (stating that the right of control test includes: "1) direct evidence of the right; 2) method of payment; 3) furnishing major items of equipment [dancer's body held not to be piece of equipment for test's purpose]; 4) right to terminate the employment relationship").
agency.48

Under the economic reality test,49 a court must consider several factors in evaluating whether an employer-employee or employer-independent contractor relationship exists between two parties: (1) the extent to which the services in question are an integral part of the "employer's" business; (2) the amount of the "employer's" investment in facilities and equipment; (3) the nature and degree of control retained or exercised by the "employer;" (4) the "employee's" opportunities for profit or loss; (5) the amount of skill, initiative, judgment, or foresight required for the success of the claimed independent enterprise; and (6) the permanency and duration of the relationship.50

The Supreme Court has expressly approved of the application of the aforementioned factors to entertainment employment situations.51 Thus, not surprisingly, courts asked to determine the employment status of exotic dancers by applying the "economic reality" test have overwhelmingly found the dancers to be employees under the FLSA, the Social Security Act, and tax and worker's compensation laws.52 California courts employ a similar analysis in determining employee status under state law.53 To date, this analysis has not been explicitly

48. See United States v. Silk, 331 U.S. 704, 712-19 (1947) (holding liability for employment taxes under Social Security Act requires evaluation of totality of circumstances in employment relationships); see also Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 518 (1992) (holding common law agency principles includes evaluation of economic factors and should be used to determine employment relationship when Congress provides only nominal definitions); Wilde v. County of Kandiyohi, 15 F.3d 103, 105 (8th Cir. 1993) (explaining that the agency approach is substantially the same as economic factors approach); Frankel v. Bally, 987 F.2d 86, 90 (2d Cir. 1993) (holding both approaches employ list of factors to determine whether employer controls work environment).

49. See Mitchell v. Crowley & Brother, 292 F.2d 105, 109 (5th Cir. 1961) (explaining the economic reality test).


52. See e.g., Reich v. Circle C. Invs., Inc., 998 F.2d 324 (5th Cir. 1993) (applying economic reality test factors to find exotic dancer was employee under FLSA); 303 West 42nd St. Enter., Inc. v. IRS, 916 F. Supp. 349 (S.D.N.Y. 1996) (stating that private booth/peep show exotic dancers were employees for tax purposes over employer's contentions that a landlord/tenant relationship existed; signed contract for "lease" of space held not controlling); Reich v. Priba Corp., 890 F. Supp. 586 (N.D. Tex. 1995) (recognizing that an exotic dancer is an employee under FLSA); Pagones v. Industrial Accident Comm'n, 72 P.2d 888 (Cal. Dist. Ct. App. 1937) (holding that an exotic dancer was an employee covered under worker's compensation).

53. Under California law, whether or not a person is an "employee" depends on the degree of control that the purported employer has to exercise over that person; in other words, where the purported employer has the right to control the mode and manner of doing the work, an employer-employee relationship exists. See CAL. LAB. § 2750 (citing Randolph v. Budget Renta-Car, 97 F.3d 319 (9th Cir. 1996)). An "independent contractor," by comparison, is "any person who renders service for a specified result, under the control of his principal as to the result of her work only and
applied to exotic dancers by the courts in a precedent-setting action.\(^5^4\)
It has, however, been the subject of several actions by the California Labor Commission.\(^5^5\)

not as to the means by which such result is accomplished."

The seminal California Supreme Court case regarding the test to determine employee/independent contractor status is Borello & Sons v. Department of Indus. Relations, 48 Cal. 3d 541 (Cal. 1989), where the court found migrant cucumber pickers who had signed a 60 day employment contract were, nonetheless, employees of the farm that hired them. The court, rejecting the common law "right of control" test, employed a multi-factored test, which weighed the following factors: (1) extent of the principal's right to control the manner in which the work is performed; (2) whether the person performing the services is engaged in a business or occupation distinct from that of the principal, or whether the services rendered are part of the regular business of the principal; (3) whether the principal or the worker supplies the instrumentalities, tools, and the place in which the work is performed; (4) whether the person providing the service has an opportunity for profit or loss based on his managerial skill; (5) the degree of permanence of the working relationship; (6) whether the service requires special training and skills characteristic of licensed contractors; (7) and whether or not the parties believe they are creating an employer-employee relationship. See id. at 351.

Compare these factors with the 20 factors the Internal Revenue Service uses to determine whether a worker is an employee or independent contractor for tax withholding purposes under W2 or § 1099, respectively: (1) making a profit or loss; (2) work on specific premises; (3) offering services to general public; (4) right to fire; (5) furnishing tools and materials; (6) method of payment; (7) working for more than one firm; (8) continuing relationship; (9) investment in equipment or facilities; (10) business or travel expenses; (11) right to quit; (12) instructions; (13) sequence of work; (14) training; (15) services performed personally; (16) hiring assistants; (17) set working hours; (18) working full-time; (19) oral or written reports; (20) integration into business. IRS 20 Factor Control Test (visited Feb. 25, 1999) <http://www.mindsrc.com/20rules_body.html>.

\(^{54}\) The exception to this statement is Williams v. Bijou Group Inc., No. 969116 (S.F. Sup. Ct. 1995). What began as a wage and hour case brought by an exotic dancer of the Market Street Cinema, San Francisco, Calif., and the California Labor Commission, turned into a contentious bankruptcy action upon the issuance of a tentative ruling by the court, which found that: (1) Plaintiff was an employee of Defendant, not an independent contractor, and thus was entitled to payment of minimum wage; (2) Defendant's failure to pay minimum wage violated California law; (3) Defendant's collection of stage fees violated California law, which prohibits an employer from charging its employee a fee to work; (4) the independent contractor agreement that Plaintiff signed was a fiction and a subterfuge, thus rendering the agreement void; (5) Defendant's bad faith failure to pay minimum wage compelled imposition of liquidated damages; (6) Plaintiff was entitled to costs, including reasonable attorney's fees; (7) Plaintiff was entitled to pre-judgment interest on the unpaid wages. Williams v. Bijou Group, No. 969116, Tentative Ruling (filed Oct. 5, 1995) (on file with author). Three years following the court's ruling, the club honored the judgment and paid Ms. Williams the monies due to her. Telephone Interview with Miles Locker, Attorney for Cal. Labor Comm'n (July 14, 1998).

\(^{55}\) The California Labor Commission investigates charges of discriminatory employer conduct, wage and hour violations. In March 1996, the Labor Commission decided its first exotic dancer case in favor of the dancer who was arbitrarily fired for refusing to sign an independent contractor agreement with the Crazy Horse strip club. The dancer was awarded back wages and reimbursement of stage fees. See NEWSLETTER 9 (Exotic Dancers' Alliance, San Francisco, Calif.) 1997 (on file with author); see also Locker, supra note 24.

Applying the Borello factors, see supra note 53, the Labor Commission determined that the degree of control exercised by strip management was more like that of an employer-employee, not employer-independent contractor relationship. Such factors included management requirement that dancers schedule particular shifts to work or be available to work; management decisions regarding dance rotation; management control over what a dancer wears or does not wear (i.e., must be nude by certain time), or what the dancer may look like (i.e., lose weight, have breast enhancement surgery, no tattoos, piercings, etc.), or to what music she may dance; management-required minimum or maximum charges for private dances; management prohibition against dancers leaving premises during shift; essentialness of dancers' services in function and purpose of
Use of the FLSA to determine employee status, however, creates a potential problem for exotic dancers under that act’s “professional” exemption. The consequence of this exemption, should it apply, is that exotic dancers would be held to be employees, but the employing clubs would not be required to comply with minimum wage or working hours requirements. The professional exemption in this case would affect only the dancers’ ability to collect a minimum wage and overtime pay, not their right to collectively act and organize under the NLRA. Since “professional” is undefined in the FLSA, the courts may rely on regulations promulgated pursuant to express legislative directive. Hence, two tests are available under the regulation that defines professional employees in a recognized field of artistic endeavor.

The argument that an exotic dancer is an exempted professional fails for at least two reasons. First, most dancers receive their income exclusively from customer tips, not employer-paid wages. Such income has been held inapplicable to meet the preliminary burden of the tests: the minimum wage liability requirement. Second, exotic dancers seeking artistic recognition and legitimacy for their profession are caught in a catch-22 because vindicating their rights under the FLSA necessarily means repudiating the artistic integrity of their profession.

While finding that exotic dancers are entitled to minimum wage...

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57. See e.g., Chevron U.S.A. v. National Resources Defense Council, Inc., 467 U.S. 837, 842 (1984) (holding that if the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute).

58. The "short test" requires the exemption of an employee who is paid $250 or more per week, and "whose primary duty consists of... work requiring invention, imagination, or talent in a recognized field of artistic endeavor." Harrell v. Diamond A Enter., Inc., 992 F. Supp. 1343, 1355 (M.D. Fla. 1997) (quoting 29 C.F.R. § 541.3 (1994)). Alternatively, the "long test" requires only $170 wages per week, but burdens the employer with showing that the job requires "innovation, imagination, or talent" in a recognized field of artistic endeavor, that the employee's work is "original and creative in character," that it requires the "consistent exercise of discretion and judgment," and that it "is predominately intellectual and varied in character." Id. at 1357.

59. See Reich v. ABC/York-Estes Corp., No. 91-C-6265, 1997 WL 264379, at *6 (N.D. Ill. 1997) (holding that dancers received tips from customers through the collection of "dance fees"); see also Harrell, 992 F. Supp. at 1346 (noting that the exotic dancer plaintiff relied entirely on tips and dance fees compensation).

60. See id. at 12; see also ABC/York-Estes, 1997 WL 264379 at *7 (money earned by exotic dancers are tips and cannot be used to offset employer's obligation to pay minimum wages).

61. See 29 C.F.R. § 541.3 (1998) (stating that professional work is exempted from the provisions of FLSA if the worker satisfies a minimum income level and the work is original and creative in a recognized field of artistic endeavor).
requirements, the courts have determined that exotic dancing does not require the type of “innovation, imagination, and talent” contemplated by the regulation. 62 Finally, although courts have yet to proceed so far into the tests, it can be reasonably argued, that exotic dancing would not qualify as a “recognized field of artistic endeavor,” and thus, would also fail the professional exemption requirements. 64

An illustrative case is Harrell v. Diamond A Enterprises, Inc. 65 In Harrell, not only did the court hold the exotic dancer was an employee of the strip club under the economic factors test, 66 but it also soundly rejected the club’s contention that the dancer was, alternatively, an exempted professional employee under the FSLA. 67 It is this comprehensive and recent analysis of the employment relationship between stripper and strip club that offers the best framework for analysis of the aforementioned class action lawsuits.

III. ANALYSIS

A. Control

The first factor to be considered under the economic factors/reality test 63 is the degree of control that strip club proprietors exert over the working conditions of their exotic dancers. 69 In Harrell, the court found substantial club control when: 1) the club established a set fee dancers had to charge for table dances; 2) each dancer was obligated to

62. See Harrell, 992 F. Supp. at 1355-57 (stating that work product being purchased by customers is not dancing skill but dancer’s ability to titillate male customers). The Harrell case was a case of first impression to the court because previous exotic club defendants had not attempted to invoke the § 541.3 exclusion from minimum wage requirements. Id. at 1354.

63. See id. at 1354 n.13 (quoting a Department of Labor interpretation of § 541.3) (emphasis added).

64. See id. at 1356-57 (refusing to construe broadly the term “dancer” to include erotic dancing for consideration of artistic integrity). The court tried to balance its decision to grant the plaintiff recovery of unpaid minimum wages under the FLSA with a public policy distinction that erotic dancing is not “dancing” as contemplated under § 541.3. Id. at 1357. In so doing, the court held that there was no evidence before it to indicate that the plaintiff was doing anything more than “moving.” Id.


66. See id. at 1348-54 (analyzing the plaintiff’s working conditions to determine if an employer-employee relationship existed). After analyzing each of the seven parts of the FLSA test for employment, the court held that an employment relationship existed between the plaintiff and defendant. Id. at 1359-54.

67. See id. at 1354-56 (analyzing the nature of the plaintiff’s work to determine if the plaintiff met the requirements for the professional exemption).

68. See id. at 1348 (citing Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947) (holding that employment will be determined if an employee is “economically dependent upon the alleged employer”). In determining economic dependence, the court must analyze six independent factors. Id.

69. See id. at 1348-50.
perform on center stage during her shift; 3) the club required the dancer to purchase and wear costumes consisting of high heeled shoes and provocative lingerie; 4) the club employed bouncers to protect the dancers from unruly customers; 5) the club controlled advertising, club atmosphere, and customer volume, thereby making the dancer completely dependent upon the club for her earnings.\footnote{70}

Although the exotic dancer exercised discretion in scheduling her hours, the selection of music to be played, the number of table dances she performed, and was not required to report her earnings or undergo training,\footnote{71} the court, nonetheless, concluded that the club exerted control over the "meaningful" parts of the business.\footnote{72}

Each class action lawsuit contains similar factors weighing in favor of the strip clubs' exercise of control over the dancers.\footnote{73} The first factor indicative of club control is mandatory scheduling of work shifts.\footnote{74} Strip clubs usually schedule two 6-8 hour shifts: a day shift for the lunch crowd, and a busier and more profitable, but more competitive, night shift.\footnote{75} Dancers are often required to work a minimum number of hours per shift, per week.\footnote{76} Dancers unable to work a scheduled shift, even in cases of illness, often must find substitute dancers who bear a physical resemblance in size, shape, and coloring, to cover that shift.\footnote{77} Dancers failing to find such suitable substitutes risk club-imposed penalties ranging from removal of the dancer from a popular shift, scheduling for less profitable shifts, arbitrary fines, or even termination.\footnote{78} Unlike most others around the country, strip clubs in

\footnote{70. See Harrell v. Diamond A. Enter., Inc. 992 F. Supp. 1343, 1349-50 (M.D. Fla. 1997).}
\footnote{71. See id. (detailing the areas where the exotic dancers had discretion in their positions within the club).}
\footnote{72. The court held that the correct analysis of the case required the court to determine whether the amount of discretion provided to the dancers was symptomatic of economic independence or if it merely covered up economic dependence. Id. at 1349. The court finally held that the control of the club over the dancers was dispositive of the argument that the dancers were independent contractors. Id. at 1350.}
\footnote{73. See Reich v. Circle C. Invs., 998 F.2d 324, 327 (5th Cir. 1993).}
\footnote{74. See id. (finding that dancers were required to comply with mandatory work schedules that the club compiled based upon the days each dancer wished to work); see also Jefcoate v. State Dep't of Labor, 732 P.2d 1073, 1075 (Alaska 1987) (noting that the dancers were hired to work six days a week, eight hours a day, for a six week period).}
\footnote{75. Cf. Carrie Benson Fischer, Employee Rights in Sex Work: The Struggle for Dancers' Rights as Employees, 14 LAW & INEQ. 521, 534 n.75 (1996) (stating that some clubs schedule shifts for dancers with a break during slow periods to maximize hours while minimizing compensation).}
\footnote{76. See Jefcoate, 732 P.2d at 1075 (observing that the club hired dancers to perform an eight hour shift).}
\footnote{77. Jane, supra note 5.}
\footnote{78. See Reich, 998 F.2d at 327 (finding that the use of fines to enforce work attendance where dancers missed scheduled shifts to be indicative of employer-like control).}
Las Vegas are open for business twenty-four hours a day. In order to guarantee that a large number of dancers are present at all hours, these clubs are more rigid and controlling in the scheduling of dancers than clubs that are not open all day long.

Clubs also use the schedule as an arbitrary means of control by rewarding “pet” dancers with numerous “choice” hours, while punishing disfavored dancers and those who violate the club’s unwritten and often unarticulated rules by scheduling them fewer hours or even no hours at all. The arbitrariness by which hours are assigned perpetuates the economic uncertainty among dancers created by the tips-only compensation system. If an exotic dancer was truly an independent contractor, as the defendant in Harrell argued, she would likely have the freedom to work at whatever times, on whichever days, and for however long she wanted, so long as she completed the piece of work for which she contracted with the club.

This raises one of the most obvious, yet unaddressed questions regarding the independent contractor/employee distinction: What is the work for which the exotic dancer is being hired? Furthermore, how is satisfaction to be measured? The inability to easily answer these questions demonstrates the improbability of an exotic dancer being an independent contractor.

A second factor indicating employer control over the dancers’ working conditions is mandatory prices for table/lap dances. A true independent contractor would be free to charge any price she wanted for a private dance, subject only to the laws of supply and demand.
By setting prices, the strip clubs take away one of the most important element of business independence in a free-market system, and effectively converts the dancer from an independent contractor into an employee.\footnote{See Harrell, 992 F. Supp. at 1349 (indicating that the club’s control over the price of table dances was a significant form of control over the dancers).}

In Las Vegas, private dance prices are generally set by the strip clubs;\footnote{See id., 992 F. Supp. at 1346.} however, at the Mitchell Brothers O’Farrell Theatre in San Francisco, dancers engaged in “specialty dances” set their own prices, surreptitiously alluded to as “gifts” by the dancers.\footnote{Price of individual performances at Mitchell Brothers varies quite dramatically, and often depends upon such factors as the length and type of act performed, the number of dancers involved, the number and type of sexual props used, costing the customer ten dollars to over one hundred dollars per dance, per dancer. Interview with “John Doe,” patron of O’Farrell Theatre, in Washington, DC (Apr. 13, 1998).} As a result of set prices for private dances, the Las Vegas exotic dancers clearly satisfy the Harrell standards,\footnote{See Harrell, 992 F. Supp at 1348-54 (analyzing the various standards that distinguish independent contractors from employees).} while the San Francisco dancers may not.\footnote{The San Francisco dancers at O’Farrell Theatre differ from the Las Vegas dancers enough to make the determination of employment uncertain. For example, the San Francisco dancers exercise more control over the compensation for private dances than have dancers in previous cases. See id. at 1346 (finding that the club regulated the prices assessed for private dances). Accordingly, the San Francisco dancers may be independent contractors under the Harrell court’s analysis.}

The performance of mandatory stage dances provides free dances for all patrons.\footnote{See id. (noting that the public dances were paid for by the club from a flat weekly rate to the dancers). The obvious implication of requiring public dances was to provide free entertainment to entice male patrons in the club, while the other dancers solicited drinks and dances from the patrons. Id.)} Such mandatory performances preclude dancers from earning money for private dances.\footnote{See id. (noting that dancers received most of their money from private dances, not the public dances the club required them to perform).} In many of the Las Vegas clubs, dancers must rotate on raised stages for the traditional striptease/erotic dances, thereby meeting the Harrell requirements for employer control. Mitchell Brothers in San Francisco, requires the dancers to perform on various types of stages and in various settings.\footnote{Mitchell Brothers O’Farrell Theatre has five different theme rooms: the “New York Live” room, in which each dancer performs “individually in her own personal style” (e.g., “little girl next door,” “glamorous showgirl,” “sexy dominatrix”) for two songs that leave her completely nude; the “Green Door Show,” billed as the “most explicit” in the club, in which a round stage with numerous dancers rises from the floor to eye-level for an “orgy-style show” several times daily, after which each pair of dancers is available for a private showing at the patron’s command; “Private Cabanas,” which offer one-on-one shows where the patron “controls the action;” the “Ultra Room,” a “fast-action, peep-show style” domination scene, after which the dancer will visit private, curtained customer booths; and finally, the “Kopenhagen,” a} In addition, the dancers affect the market price for that good or service, irrespective of the true value of that good or service.\footnote{93. See id. (noting that dancers received most of their money from private dances, not the public dances the club required them to perform).}
must get on their hands and knees, become completely nude, and
perform interactively as a group what is commonly called a "daisy
chain." Strip club proprietors would be hard pressed to find a court
that would not find this demeaning, unsafe sexual requirement
indicative of employer control.

The fourth factor indicating employer control is mandatory
costumes/uniforms. In Las Vegas strip clubs, exotic dancers are
required to purchase and dry clean their own uniforms at their own
expense, in violation of both Harrell and Nevada state law. The
O'Farrell Theatre dancers must not only purchase lingerie and
costumes at their own expense, but must buy sexual props to use in
their performances. Again, this factor indicates employer-like control
over the dancers' working conditions, rather than an independent
contractor relationship.

Additionally, strip clubs, as in Harrell, are responsible for controlling
unruly customers, as well as advertising, club atmosphere, and customer
volume. These factors directly affect an exotic dancer's opportunity
for profit and increase her economic dependence on the club. Many
strip clubs also charge an admission fee, which while increasing club
profits may decrease a dancer's ability to profit if the fee operates to
leave customers with less disposable income to spend on dances and
drinks.

completely darkened room where two dancers "perform their theme show," illuminated only by
the airplane controller-like flashlights held by the customers. Mitchell Brothers, A Mini Theatre


96. The requirement that a dancer be topless or nude at a certain time during her dance
(i.e., by the end of the first song) is arguably analogous to the requirement that she wear a
specific uniform, and therefore indicative of employer control.

97. See Nina Martin, Dancers Cope With the Latest Labor Trend: Making Employees Independent
Contractors, CAL. LAW., July 1995, at 50, 52.

Cheetah Lounge, No. A371500, First Amended Complaint for Class Action Relief (D. Ct. Nev.),
filed May 29, 1997 at 11-12 (requiring employees to launder uniforms by special processes (i.e., dry
cleaning) violates Nevada law) (on file with author) (citing NEV. REV. STAT. § 608.165 (1997)
(placing the duty on the employers to clean uniforms or accessories without cost to its employees).

99. Martin, supra note 97, at 52.

100. See Harrell, 992 F. Supp. at 1349.

101. See id.

102. See Judith Lynne Hanna, Undressing the First Amendment and Consorting the Striptease Dancer, 42
DRA MA REV. 6 (June 22, 1993). Mitchell Brothers O'Farrell Theatre, for example, charges a fee of
approximately thirty dollars for admission, making it one of the steepest fees in the nation. Other
than fees for dances, some clubs require dancers to sell drinks as a way of making money. In return
for having a patron buy the dancer a drink at an inflated price, the dancer receives a drink voucher.
The voucher entitles her to a remittance or commission. Often, the commission is reduced if a
customer pays by credit card, rather than in cash. If a dancer fails to meet the required drink quota,
the manager drags her into the First Bowling Theater, as noted above.
Finally, mandatory tip-outs and stage fees\textsuperscript{103} not only indicate employer control, but also violate the FLSA.\textsuperscript{104} In addition, mandatory tip-outs and stage fees constitute an independent cause of action under both California\textsuperscript{105} and Nevada\textsuperscript{106} law. Exotic dancers in Las Vegas are compelled to pay their employers anywhere from $25 to $50 per shift,\textsuperscript{107} and $75 per shift when a convention is in town.\textsuperscript{108} In San Francisco, strip club dancers commonly pay over $100 per shift,\textsuperscript{109} excluding the percentage of tips which must be shared with the disc jockey, bartenders, wait staff, and management,\textsuperscript{110} all of whom are usually paid by the club as wage-earning employees. Dancers at Mitchell Brothers O'Farrell Theatre are forced to "pony up" a month's worth of stage fees prior to working their first shift.\textsuperscript{111}

\textsuperscript{103} See Hanna, \textit{supra} note 102, at 22 (stating that the "stage fee" is a fee the dancer pays to the club for the performance space, and "tip outs" are tips paid out of the dancers earnings to the disc jockey, bartender, and management).


\textsuperscript{105} See \textsc{Cal. Lab. Code} § 351 (West 1989) (prohibiting an employer to directly or indirectly claim any part of employees' tips). While workers can be compelled to share tips with other employees, they cannot be forced to give tips to employers in any form, nor can tips be credited against the minimum wage that the employer must pay. \textit{See id.}.

Unfortunately, some employers have begun to circumvent this restriction by paying dancers a minimum wage, but imposing dance "quotas" on the dancers. This means that the club can require dancers to sell a minimum number of lapdances, the proceeds of which must be relinquished to the club. Dancers failing to meet this quota can be fired. \textit{See Jane, \textit{supra} note 5.} The Bijou Group, after having been found liable for wage and hour violations, has responded to legal action by changing its stage fee practice. \textit{See Bijou Group, No. 969116} (S.F. Sup. Ct. 1995). It has implemented a complicated and, to date, legally unchallenged practice of charging the dancers $150 per shift, $42 of which is returned to the dancers in "paychecks," thus resulting in a $108 stage fee. \textit{Jane, No Justice, No Piece, \textit{supra} note 5, at 12}. The Great Alaska Bush Company, in Anchorage, Alaska, instituted a similar practice whereby dancers are paid $4.75 per hour by the club, but must pay the club $56 for every hour they work, in addition to tipping the bartenders and DJ. \textit{See Melissa, Working a Broad, DAZINE, Sept. 1995, at 4.}

\textsuperscript{106} Nevada law prohibits both the sharing of tips and gratuities by employees with their employers, while also prohibiting confiscation or conversion by an employer of tips and gratuities earned by their employees. \textit{See Nev. Rev. Stat.} § 686.160 (1997).

\textsuperscript{107} Shirimin, \textit{supra} note 80.

\textsuperscript{108} In 1997 alone, Las Vegas hosted 3,749 conventions. Telephone Interview with Kevin Bagger, Las Vegas Convention and Business Authority, Research and Statistics Office (Oct. 19, 1998). This suggests that the $75 fee is in place more often than not.

\textsuperscript{109} \textit{See Telephone Interview with Johanna Breyer, Co-founder, Exotic Dancers' Alliance (Apr. 21, 1998); see also Martha Irvine, Strippers Get Ground-breaking Labor Pact, L.A. DAILY NEWS, Apr. 12, 1997, at W11} (stating that "a lot of women are told they have to make $150 to $200 in four hours just to meet cash quotas"); \textit{Jane, \textit{supra} note 5.}

\textsuperscript{110} Hanna, \textit{supra} note 102, at 22.

\textsuperscript{111} Jane, \textit{supra} note 5, at 13.
Considering that the average club-mandated price for a table dance ranges from $5 to $30 per dance,\textsuperscript{112} it becomes clear how clubs financially exploit their exotic dancers:\textsuperscript{113} each dancer must dance anywhere from two to fifteen dances in addition to the free stage dances she must perform just to break even for the night. Compounding this situation is the fact that many clubs take an initial cut of the fee a dancer earns for doing private dances.\textsuperscript{114} Thus, the dancer may actually earn only one-half to two-thirds of a dance fee prior to the pay out of any stage fees.

Even worse, dancers must pay the tip-out fees regardless of whether they make any money during their shift. As a result, it is common for dancers to be forced into borrowing money from other dancers, or to use their own money to cover the stage fee on a slow shift. In some cases, the dancers may even "owe" club management, payable on their next shift. Thus, a dancer may potentially lose money by going to work.\textsuperscript{115}

More importantly, the practice of charging stage fees, in combination with the dissatisfaction refund policy,\textsuperscript{116} arguably leads to the creation of a slippery slope towards prostitution, whereby the selling of sexual imagery quickly becomes the selling of actual sex.\textsuperscript{117} This occurs when customers demand more and more explicit performances from dancers who, already struggling to pay the skyrocketing stage fees, must submit to market pressures until brothel-like services become the norm, thereby transforming a legal profession into an illegal one.\textsuperscript{118} When this happens, a dancer's

\textsuperscript{112} For example, in Austin, Texas, table dances at the nude club are $20 (no touching of dancers allowed), and $30 (light touching permitted) at the topless clubs. Dancers must dance on several stages 2-3 times per 6-8 hour shift for song sets. Daily registration fees, taxes, and tip-outs cost dancers $30-50 per shift. \textit{See Teresa Dulce, Working a Broad, DANZINE, June/July 1996, at 3. At the Great Alaskan Bush Company in Eugene, Oregon, table dances are $5 when performed topless $10 for a nude version. See Employment in Eugene, DANZINE, Jan. 1996, at 5.}

\textsuperscript{113} Irvine, supra note 5, at N11.

\textsuperscript{114} The Déjà Vu chain owns and operates four strip clubs in San Francisco, California. The practice at each is for the dancer to pay the club $9 for every $20 nude lap dance she sells, in addition to a $10 "ladies' drink fee," which must be paid whether or not the dancer actually drinks anything. Jane, supra note 5, at 11. Compounding the dancers' frustration at paying these fees is the chain's heavy-handed practice of having someone spy on the dancers by walking around the clubs, secretly recording the number of dances each dancer sells. \textit{Id.}

\textsuperscript{115} Hanna, supra note 5, at 22.

\textsuperscript{116} Under this policy, if a patron is not satisfied, the dancer must return tips without argument. Martin, supra note 98, at 52.


\textsuperscript{118} \textit{See Jane, supra note 5, at 11; Exotic Dancers' Alliance, Inside Focus '98, (last modified May 16, 1998) <http://www.bayswan.org/InsdFocus2.html>.
"hustle" becomes "solicitation,"119 customers become "johns," strip clubs become "bordellos," and club owners become "pimps." Although many strip clubs (and local ordinances) forbid any physical contact between dancers and patrons, it is not uncommon for some strip clubs to condone, and even encourage, such behavior in their clubs, often providing customers with private V.I.P. rooms, cubicles, couches and beds on which their dancers perform.120 Not only does this perpetuate many societal stereotypes about exotic dancers, it also highlights the power imbalance inherent in the existing employment structure, as well as the immediate need for legal intervention or collective action to remedy that power differential.

Financial arrangements, such as stage fees and employee out-of-pocket refunds, are virtually unheard of in any other industry, and arguably go unchecked in the adult entertainment business for any number of reasons including: (1) many exotic dancers operate with a certain amount of secrecy about what they do, not telling family and friends because of society's disapproval and misunderstanding of exotic dancing, or for safety and privacy reasons; thus there is no public outcry at the practice; (2) most club proprietors are men, while the majority of adult entertainers are women,121 who have been culturally indoctrinated by an intolerant and unsupportive society to accept such power differentials and sexist treatment without complaint;122 (3) many exotic dancers are simply unaware of their legal rights and protections, and thus allow the practice to continue unchallenged and unreported;123 and, finally (4) even if a single dancer did take a stand, without the benefit of collective action she

119. Many states outlaw the public performance of actual or simulated sexual acts. In Oregon, for example, it is unlawful for any person to knowingly engage in sexual contact (defined as "any touching of the sexual organs or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party") (emphasis added) or sadomasochistic acts (defined vaguely as "flagellation or torture by [or] upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one or both clothed" in a live public show). See OR. REV. STAT. § 167.062 (1997); see also Teresa Dulce, 411 en T-n-A, DANZINE, Sept. 1995, at 2 (quoting OR. REV. STAT. § 167.062). This type of law would apply to two dancers who, during a performance, touch each other physically or with a sexual toy or prop. Id. at 3. Furthermore, when a customer pays for the performance, or if the dancers agree to do such a performance for money, the act becomes solicitation of prostitution. Id.

120. Mitchell Brothers, which bluntly advertises "See It, Touch It, Taste It," "rents" to its dancers private rooms, equipped with beds to dance on, for $150 during the day shift, and $250 for the night shift. See Jane, supra note 5, at 13; see also Irvine, supra note 109, at N11.

121. Martin, supra note 99, at 84.


123. Id. at 183.
would almost certainly be subject to retaliation by the club, or be branded a trouble-maker and subjected to peer pressure from other dancers. 124

Many of the factors contributing to the continuous financial and physical exploitation of exotic dancers can be changed only by altering our societal views towards the sex industry. Until society openly recognizes the adult entertainment industry as a collection of legitimate, profitable, and necessary professions, the struggle of the women who comprise the majority of the industry will continue unnoticed, taking a backseat to the demands of consumers, the greed of the profit-makers, and the vocal opposition of anti-pornographers, like Andrea Dworkin, Catharine MacKinnon, and the Christian Coalition, all of whom seek to end the industry altogether. 125

124. See e.g., Bryce, supra note 95; see also Breyer, supra note 109; Machen, supra note 122, at 177.

125. In addition to strip clubs, massage parlors, and adult movie theaters, the adult entertainment industry is comprised of various segments involved in the production and sale of adult-oriented magazines, books, novelty products, and movies. The adult video industry, centered in California, comprises the largest portion of the industry and is made up of producers, manufacturers, wholesale distributors, retailers, and mail order companies, who together employ thousands of people. Free Speech Coalition Employment Statistics (last modified Feb. 10, 1999) <http://www.freespeechcoalition.com/industry/truth/employment.html>. In 1995, adult video retail sales and rentals made up 13.3% of the entire video market, accounting for $3.1 billion. Free Speech Coalition, Statistical Information (last modified Feb. 10, 1999) <http://www.freespeechcoalition.com/industry/truth/stats.html>. In California alone, approximately 2,800 retail stores carry adult videos for sale and/or rental, each store stocking an average of 700 titles for rental purposes. Id. In 1995, 609 million rentals of adult videos were reported; almost 92,000,000 of them in California. Id. These rentals generated a minimum of $22 million in sales tax for the state of California, demonstrating how potentially valuable the adult video industry can be to the states where the product is made and sold. Id. Throughout the United States, adult videos are carried in more than 25,000 retail outlets; in stores carrying both adult and general release films, adult video sales and rentals accounted for 28.1% of total business. Id.

126. The fervor with which some feminist activists, led by Dworkin and MacKinnon, have rallied against pornography and, by implication, the sex industry, is ironic since opposition to pornography is also a conspicuous feature of the religious right’s conservative political agenda. ELLEN WILLIS, NO MORE NICE GIRLS: COUNTERCULTURAL ESSAYS 15 (1992). In fact, Dworkin and MacKinnon have drafted and introduced legislation to ban pornography throughout the United States and Canada. See e.g., Joan Kennedy Taylor, Does Sexual Speech Harm Women? The Split Within Feminism, 5 STAN. L. & POL’Y REV. 49, 50 (1994).

In an effort to explain how such opposing forces unite on a topic such as the anti-pornographers have with regard to sexual imagery and practices, author Carol Queen has put forth a provocative theory she coins “absexuality.” Carol Queen, Dirty Pictures, Moral Outrage, and the New Absexuality: Why Antiporn Crusaders Have Sex on the Brain, PLAYBOY, Aug. 1997, at 41. Queen theorizes that “absexuals,” literally meaning “away from sex,” developed their anti-sex mindset during childhood because of varying degrees of early trauma about sex, either because of physical sexual abuse (such as Dworkin says she experienced) or mental and emotional abuse, often religiously inspired. Id. In Queen’s view, social learning theory best explains the genesis of an absexual: a sexually abused child grows up, looks for an explanation of what happened to her and targets pornography; a religiously abused child is obsessively punished and made ashamed of her own sexual feelings, resulting in an inordinate focus later on other people’s sins. Id.
B. Relative Investments

Courts addressing relative investments have universally concluded that an exotic dancer's investment in costumes is minor compared to a club owner's investment in the club. The courts all have looked to the club owner's total investment in the strip club as a business operation and have considered such factors as facility, advertising, location, hours of operation, maintenance, supply and selection of food and drinks, utilities, et cetera. Therefore, it is likely that the California and Nevada courts would use the same analytical framework and similarly would find this factor weighing in favor of dancers' economic dependence. One factor that has not been considered by any court thus far, but could seemingly weigh against dancers and in favor of clubs in the relative investment analysis, is the increasingly common practice of undergoing breast augmentation and cosmetic surgery if dancers pay for the procedures themselves. While there are no firm numbers on how many dancers undergo such procedures, it is clearly evident that many are electing to do so. Nonetheless, the clubs' investments in facilities and products would likely continue to outweigh the cost of cosmetic surgery. Furthermore, a club may have the burden of proving that a dancer underwent cosmetic surgery as an investment in her career, rather than for personal or medical reasons.

It remains to be seen whether any clubs will make such an argument.

C. Skill and Initiative

Potentially, the most important type of initiative attributable to exotic dancers is their ability to mingle and socialize with male patrons to solicit private dances from them, which is known as "hustling." The argument that hustling is a factor weighing in favor of independent


128. See id.; see also Reich v. Circle C. Invs., 993 F.2d 324, 328 (5th Cir. 1993) (noting club's investment included liquor license, inventory of refreshments, leases on stage and lights, sound equipment, maintenance and renovation, and advertising).

129. See, e.g., Harrel, 992 F. Supp. at 1350 (finding that because courts have universally concluded that a dancer's investment is minor compared to the club's, this factor works in favor of economic dependence).

130. See Hanna, supra note 102 (finding that many dancers feel pressured to surgically alter their bodies rather than risk replacement, since demand for such jobs is high).

131. See Hanna, supra note 102 (stating that some club rules actually require dancers to surgically alter their bodies).

132. See Machen, supra note 122, at 194-95 (discussing willingness of business to suffer added expense because women are integral to the business and are what customers pay to see).

133. "More reliable than table dances, it is conversation that reaps in the Regulars—a smart dancer's sustenance." Fuentes, supra note 15, at M16.
contractor status has been universally rejected by every court to consider it as a type of initiative different from that contemplated by the test.\textsuperscript{134}

The dancer’s initiative is therefore restricted to decisions involving what costume to perform in, what style of hair and makeup to wear, and how provocatively to dance.\textsuperscript{135} Such limited initiative is more consistent with the status of a service employee than an independent contractor.\textsuperscript{136}

Evidence that exotic dancing requires specialized exotic dancing skills could be demonstrated by specific criteria or standards for dancers, seminars, instruction booklets, or choreography.\textsuperscript{137} Most clubs “audition” potential exotic dancers either by requiring applicants to disrobe in front of the manager, gyrate on stage to music, or to dance for audience approval in an “amateur contest.”\textsuperscript{138} These auditions serve as an opportunity to evaluate the dancer’s figure and sexiness, not her formal dance training.\textsuperscript{139} Many exotic dancers have no prior exotic dancing experience,\textsuperscript{140} and no court has held this a sufficient skill requirement, absent specific criteria for evaluation.\textsuperscript{141}

The California court, for example, could rigorously analyze this element on two fronts. First, Mitchell Brothers auditions potential dancers with a rather critical eye; unlike most clubs, an audition does not guarantee a dancer a job.\textsuperscript{142} Second, there is a limited possibility that the Mitchell Brothers O’Farrell Theatre dancers’ abilities to plan, choreograph, and sell their unique live sex routines may be considered above the average skill level and initiative exercised by traditional exotic dancers.\textsuperscript{143} Whether that carries them over to the skill level and

\textsuperscript{134} “The ability to converse with club clientele in an effort to generate a larger tip is not the type of initiative contemplated [by this factor]. Customer rapport much more closely parallels efficiency than initiative . . . .” See Harrell, 992 F. Supp. at 1350 (quoting Reich v. Priba Corp., 890 F. Supp. 586, 593 (5th Cir. 1995) (defining initiative as activities that expand client base, goodwill, and/or contracting possibilities, such as those of an independent businessperson)).


\textsuperscript{136} See id. at 1351 (finding that club’s only requirement that dancer “had to be moving” was insufficient to prove special skill or initiative).

\textsuperscript{137} Id.


\textsuperscript{139} See Harrell, 992 F. Supp. at 1351 (according to plaintiff/dancer, the only requirement for a prospective dancer was that she had to keep moving and that dancers who failed the try-outs were few and far between).

\textsuperscript{140} See id.

\textsuperscript{141} See id; see also Reich v. Priba Corp., 890 F. Supp. 586, 592 (5th Cir. 1995) (finding no special skills where exotic dancers had no prior experience and strip club had no skill requirement).

\textsuperscript{142} Jane, supra note 5, at 13.

initiative exercised by an independent contractor remains to be seen. In any case, such an analysis would be a novel issue for the California court.\footnote{Overall, however, the skill and initiative factor supports a finding that dancers are economically dependent on the club.}

\textbf{D. Opportunity for Profit and Loss}

Like the relative investment analysis, the key determinants for profit and loss to be considered are those of a successful business enterprise (i.e., hours of operation, atmosphere, advertising, set fees for dances, etc.).\footnote{Profit opportunities for exotic dancers depend a great deal upon the club's reputation, advertising, dance prices, and generally those factors that initially attract customers to one strip club as opposed to another.} Las Vegas strip clubs have increased their opportunity for profit beyond those of other clubs by installing and operating casino games within the strip clubs themselves, thereby creating more control over the profit/loss determinants.

An exotic dancer's risk for loss is limited to the amount of the stage fee/tip-out, which may be controlled by the strip club.\footnote{In this manner, strip clubs completely control both the dancers' opportunity for profit and amount of loss. The same types of practices are involved in San Francisco and weigh heavily in favor of employee status.} Because adult entertainment is an industry built around creating, arousing, and...

\begin{footnotesize}
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\item \footnote{See Associated Musicians of Greater Newark v. Bow & Arrow Manor, 206 NLRB 581 (1973) (orchestra leader and strolling musicians of restaurant club considered independent contractors under NLRA); Harrah's Club v. NLRB, 446 F.2d 471 (9th Cir. 1971) (casino house band members considered to be independent contractors under NLRA); Radio City Music Hall Corp. v. United States, 135 F.2d 715 (2d Cir. 1943), affg 50 F. Supp. 929 (S.D.N.Y. 1942) (holding movie theatre intermission stage performers to be considered independent contractors).}
\item \footnote{See Priva Corp., 890 F. Supp. at 593 (explaining each party's risk related to profit and loss).}
\item \footnote{See Hanna, supra note 102, at 12 (explaining that clubs may be glamorous or sleazy, expensive or free, serve alcohol or not, depending on a customer's expectations).}
\item \footnote{See e.g., Harrell, 992 F. Supp. at 1946 (discussing plaintiff's stage fee and tip-out).}
\item \footnote{See Machen, supra note 122, at 188-91 (describing the wage practices at the O'Farrell Theatre in San Francisco).}
\item \footnote{See Hanna, supra note 102, at 53 (describing new dancers as "a stream of young women often at the dam ready to take a vacated place"); see also Machen, supra note 122, at 192 (asserting that strip clubs are eager to have young, inexperienced workers).}
\end{itemize}
\end{footnotesize}
exploiting customers' sexual fantasies, which are as varied and fluctuating as the customer base itself, the numerous young, new faces are more valuable to a strip club than are fewer, older, more experienced ones.\(^{150}\) Accordingly, courts place less emphasis on this factor, relying instead on the weight of the other factors combined to demonstrate economic dependence.\(^{151}\)

A high number of dancers is good for the club and even good for the customers, but not good for the dancers since a dancer's ability to earn is inversely proportionate to the number of dancers working at a given time.\(^{152}\) This occurs because there is a fixed number of potential customers and a fixed number of potential dances available.\(^{153}\) Assume, for illustrative purposes, that there is only one dance available, per customer, per song. If a club had forty customers and twenty dancers scheduled at a given time, each dancer would potentially have two customers per song. Similarly, if forty dancers were scheduled for the same customer base, the potential number of patrons a dancer could dance for decreases to one. Finally, if more than forty dancers were scheduled, there would be some dancers who would be numerically excluded from selling any dances. Consider as well that if each song lasts an average of four minutes, each dancer can only sell, at best, a maximum of fifteen dances per hour, regardless of how many potential customers are present.

It is a rare occurrence for a strip club to be consistently crowded during all hours of operation, and with all customers buying private dances, the preceding hypothetical is optimistic. Many patrons prefer to withhold their money and act as voyeurs, simply looking on as other patrons buy dances, or watching the free dances being continuously performed on stage.\(^{154}\)

This scenario is very common throughout the industry and creates

\(^{150}\) See Hanna, supra note 102, at 22 (describing how customers fantasize about getting the "personal attention of an attractive female who would not otherwise 'give him the time of day'."

\(^{151}\) Reich v. Circle C. Invs. Inc., 993 F.2d 324, 328-29 (5th Cir. 1993) (holding that the balance of other factors outweighs the lack of permanency); Reich v. Pribo Corp., 890 F. Supp. 586, 593 (5th Cir. 1995) ("Because dancers tend to be itinerant, the court must focus on the nature of their dependence"); Martin v. Circle C. Invs., Inc., No. MO-91-CA-43, 1991 WL 33369 (W.D. Tex. Mar. 27, 1991) (the fact that dancers are transitory is not determinate).

\(^{152}\) See e.g., Harrell, 992 F. Supp. at 1349-50, 1353 (noting that dancers had no control over the customer volume at the night club, which employed about 80 dancers).

\(^{153}\) See e.g., Hannah, supra note 102, at 20 ("[C]lub managers may schedule more performers than needed and the dancers compete for the few customers available.").

\(^{154}\) See Hanna, supra note 102, at 17 (discussing the types of dances performed in strip clubs and the responses of members of the audience).
fierce competition among dancers for customers. Such competition acts as a formidable barrier to union organization.\textsuperscript{155} Unless union organizers persuade dancers to view each other not as competitors, but as allies, obtaining the majority support necessary for union recognition will prove difficult, if not impossible.\textsuperscript{156}

It is also important to emphasize that these hypothetical figures include neither the number of dances the dancer is required to perform free on stage, nor the time she must spend talking to the customers, building the rapport necessary to sell a dance.\textsuperscript{157} Both expectations further decrease the number of dances she can potentially sell. The time spent "hustling" is vital to the sale of private dances because the dancer is not selling the mere image of her nude body, but actually the illusion that she is personally interested in the male patron – in other words, that he has in some way attracted her attention.\textsuperscript{158} This is the process by which dancers build clientele, a group of "regulars" who frequent the club to see a particular dancer.\textsuperscript{159} This dynamic further reduces the number of potential customers to whom other dancers can sell dances. For these reasons, a hiring cap on the number of dancers employed or scheduled at any one time has tremendous economic value to the dancers, and is potentially one of the most desirable provisions in obtaining a collective bargaining agreement.\textsuperscript{160}

The fact that an adult entertainer's career is so fleeting tends to support a socio-economic theory that many women, although certainly

\textsuperscript{155} See Hanna, supra note 102, at 50 (noting that conflict exists among strippers).

\textsuperscript{156} See Hanna, supra note 102, at 54 (detailing the difficulty two dancers experienced in organizing other dancers in an effort to present their complaints about working conditions to the management).

\textsuperscript{157} See generally Katherine Liepe-Levinson, Striptease: Desire, Mimetic, Jeopardy, and Performing Spectators, 42 DRAMA REV. 9 (1998) (detailing the distinction between stage dances and lap dances). See also Hanna, supra note 102, at 22.

\textsuperscript{158} Fuentes states that:

One dancer has described the process as follows: "Making good money is luck and hustling. It's a business. Girl walks around the club, sees who's checking her out. When she sees someone she makes her way over. In a second she's sized him up and decided her approach. She says all the right things: if he thinks black is white, it's white ... . Now, the guy may start to think that he's got something here, so he starts coming in more regularly during her shifts. She's sure to keep it going; her face lights up when he walks in the club, she pays attention only to him, and does what she needs to make it look like he rocks her world. Soon, he's paying more and more money just to sit with her. She takes the money, looks sad when he has to go and laughs about it backstage later with her friends.

Fuentes, supra note 15.

\textsuperscript{159} See e.g., Working a Broad, DANZINE (Nov. 1995), at 4 (on file with author).

\textsuperscript{160} See Hanna, supra note 102, at 54 (describing the types of union agreements some dancers have negotiated).
not all, enter the adult entertainment industry because it provides an immediate source of income which is available to women without much commitment in the way of education, training, or financial investment.\textsuperscript{161} The flexible schedules accommodate women who are mothers, students, actors, or employees in need of additional income.\textsuperscript{162} In many cases, the income a woman makes from dancing is the difference between work and welfare.\textsuperscript{163} This type of economic dependency makes adult entertainers more susceptible to the illegal demands of their employers, while simultaneously ensuring their silence about their mistreatment.\textsuperscript{164} It is also arguably one of the main reasons that feminists should be supportive of adult entertainers' legal and unionizing efforts.\textsuperscript{165} Without the opportunities that the adult entertainment industry provides, many women would lack financial empowerment and independence, and thus would remain dependent on the largess of men or society.\textsuperscript{166} 

Many people who speak out publicly against the sex industry are the same people who salivate over it and financially support it in private.\textsuperscript{167} By denying its existence and legitimacy, a hypocritical society pushes the industry underground and out of sight, whereby illegal and exploitative practices such as those described herein, are allowed and even encouraged to flourish unabated and unchecked.\textsuperscript{168} Perhaps a better solution is one where all factions of the adult entertainment industry are recognized, tolerated, legitimized, legalized, and regulated when necessary, either by state or local government — as are Nevada's brothels\textsuperscript{169} — or through the collective bargaining relationships that

\textsuperscript{161} See Hanna, supra note 102, at 11 (noting dancers' diverse backgrounds).
\textsuperscript{162} Hanna, supra note 102, at 51.
\textsuperscript{163} Hanna, supra note 102, at 40.
\textsuperscript{164} See Hanna, supra note 102, at 53 (characterizing the abusive tactics employed by some strip club owners in an effort to minimize the willingness of dancers to complain and to ensure that dancers will tolerate abuse in order to avoid loss of their job).
\textsuperscript{165} Hanna, supra note 102, at 54.
\textsuperscript{166} Hanna, supra note 102, at 40.

\textsuperscript{168} Swaggart, supra note 167, at 28.
\textsuperscript{169} See \textit{NEV. REV. STAT. ANN. § 201.354} (Michie 1997) (allowing acts of prostitution to be conducted legally in licensed houses of prostitution while making the same acts illegal outside of such houses).
unions provide.\textsuperscript{170} In this way, those working in the industry can be assured of safe and non-exploitative working conditions, acceptable wages, access to necessary medical and social services, and legislative protection. Society would, in return, benefit from a decreased risk of transmittable social diseases, less burden on the welfare system and increased tax revenues.\textsuperscript{171}

\textbf{F. Integral Part of Employer's Business}

Strippers are an integral and essential part of a strip club's operation.\textsuperscript{172} No court examining the issue has found otherwise; therefore, the courts are logically concluding that "[w]hen the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the worker who performs those services is more likely to be considered an employee than an independent contractor."\textsuperscript{173}

The same will likely be true of the lawsuits evaluated in this paper.\textsuperscript{174} However, if by a slim chance the Las Vegas strip clubs can demonstrate that gambling, rather than exotic dancing, is the integral part of their business, then they may be able to convince a court that their dancers should remain independent contractors. The nature of the seven strip clubs involved, however, negates this argument.\textsuperscript{175} The clubs' dependence on the dancers is, therefore, highly indicative of an employee-employer relationship between stripper and strip club.\textsuperscript{176}

When the aforementioned factors are considered "collectively and

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\textsuperscript{170} Hanna, supra note 102, at 54.  
\textsuperscript{171} Hanna, supra note 102, at 40.  
\textsuperscript{172} See Liepe-Levinson, supra note 157 (reporting statements made by a strip club owner relating to the amount of money an individual dancer can earn in a single day and the way that this income supports a lucrative business).  
\textsuperscript{173} 303 West 42nd St. Enters. v. IRS, 916 F. Supp 349, 357 (S.D.N.Y. 1996); see also, Harrell v. Diamond A. Enter., 992 F. Supp. 1345, 1352 (M.D. Fla. 1997) ("Exotic dancers are obviously essential to the success of a topless nightclub."); cf, Reich v. Circle C. Invs., 998 F.2d 324, 327-28 (5th Cir. 1998) (finding dancers' economic dependence on nightclub without considering the factor of the nightclub's success depending on the dancers' performance of services). The court determined that the dancers were economically dependent on the nightclub, and thus, employees within the meaning of the Act. \textit{Id.} See also Locker, supra note 24, citing Borello & Sons v. Department of Indus. Relations, 48 Cal. 3d 341, 357 (1989) ("[P]ermanent integration of the workers into the heart of [a] business is a strong indicator that [the principal] functions as an employer...") (citations omitted). "The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business service." \textit{Id.}

\textsuperscript{174} "After all, what would the O'Farrell Theatre be without the dancers... [a] mirrored warehouse with faded carpet and a snack bar attached." Bryce, supra note 95.

\textsuperscript{175} One only needs the briefest visit to any of the clubs involved to observe that the women are indeed the club's main feature. Investigation by Author, in Las Vegas, Nev. (Sept. 19-20, 1998); Telephone Interview with John Roe, patron of Crazy Horse Saloon (Oct. 1, 1998).

\textsuperscript{176} Investigation by Author in Las Vegas, supra note 175.
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qualitatively," it appears obvious that in the reality of strip club practice, exotic dancers are highly controlled in most aspects of their employment and are economically dependent upon the strip clubs employing them. For that reason, exotic dancers are not independent contractors as claimed by the clubs; rather, they are employees of the clubs.

Interestingly, this analysis is not affected by the existence of an employment contract between the stripper and a strip club. Courts have astutely observed that it is a common practice within the adult entertainment industry for a dancer to sign a boilerplate contract, wherein she agrees to define her relationship to the club as one of an independent contractor, tenant, or lessee. However, because such contracts are usually the result of intimidation or an ultimatum, the courts have declared that they may be voided after an examination of the employment circumstances.

Considering the broad tests applied to previous exotic dancer cases brought before the courts, the similarity to the facts discussed herein, and the inherent inequity of the existing system, it seems inconceivable that the courts would find exotic dancers in California and Nevada to have independent contractor status. Therefore, the only fair and equitable solution is for the courts to hold these exotic dancers to be employees of the strip clubs they work for, entitled to all the

178. See Reich, 998 F.2d at 327 (finding that club owners control their dancers by requiring them to comply with work schedules and fining them for absences and tardiness).
179. See Harrell, 992 F. Supp. at 1346 (noting that the defendant night club owner argued that the plaintiff dancer was an independent contractor and not an employee).
180. See Reich, 998 F.2d at 328-29 (holding that exotic dancers are employees based on the five factors of the economic reality test set forth by the court).
181. See Harrell, 992 F. Supp. at 1353 (observing that the contracts which the dancers signed contained a boilerplate independent contractor provision).
182. See Yellow Cab Cooper., Inc. v. Worker’s Compensation Appeals Bd., 226 Cal. App. 3d 1288, 1301-02 (1991) (“Where the principal offers no real choice of terms, but imposes a particular characterization of the relationship as a condition of employment, the workers’ acquiescence in that characterization does not by itself establish a forfeiture of the act's protections”); Brown v. Industrial Accident Comm’n of Cal., 163 P. 664, 665 (Cal. 1917) (explaining that the terms contained in an employment contract do not necessarily determine the existing relationship between parties; such a relationship may be, “and often is, governed entirely by the subsequent conduct of the parties”).
183. See generally Reich, 998 F.2d at 8-29 (finding that exotic dancers are employees under the economic reality test). See also 303 W. 42nd St. Enters., Inc., 916 F. Supp. at 959 (S.D.N.Y. 1996) (reviewing whether exotic dancers are employees for tax purposes under standards that are broader than the common law). Section 530 of the IRS Code permits treating a worker as a non-employee irrespective of the worker’s status under common law, provided such treatment is “consistent” and there exists a “reasonable basis” for such treatment. Id.
184. See generally 303 W. 42nd St. Enters. Inc., 916 F. Supp. at 354 (describing the club owner’s arguments that exotic dancers were not employees); Martín v. Priha Corp., Civ. A. No. 91-CV-2786-G, 1992 WL 486911, at *8-4 (N.D. Tex. Nov. 6, 1992) (recounting the club owner’s view that exotic dancers are independent contractors).
benefits and protections of the state law, the FLSA, and by implication, the NLRA.

IV. PROFESSIONAL EXEMPTION

The FLSA's professional exemption is the last legal hurdle the exotic dancers might face in their bid to become wage-earning employees once it has been determined that they are employees under the economic reality test.185 In this case, the employer will raise the exemption as a defense to a finding of employee status. Hence, the employer bears the burden of establishing that its employees are exempted professionals.186

While the performances that many of the exotic dancers of the Mitchell Brothers O'Farrell Theatre give are too graphic for description in this paper,187 it suffices to say that these performances may come close to the professional exemption of the FLSA if considered to be imaginative and innovative.188 It is unlikely, though, that this type of "dance" would fall within the professional exemption's threshold requirement of a "recognized field of artistic endeavor."189 However, it could be argued that such a proposition is supported by a California law that legalizes live sex acts. This law classifies "sexual conduct engaged in as part of any stage performance, play, or other entertainment open to the public" as a form of artistic expression.190 This analysis is not required for the San Fernando Valley or Las Vegas exotic dancers, since these dancers generally perform the more traditional stage, lap, and/or table dances that were found in Harrell to be lacking artistic qualities.191

V. CONCLUSION

The unionization of adult entertainers is already in progress and promises to continue with ever-increasing speed as greater numbers of dancers, informed of their legal rights and empowered by their

185. See 29 U.S.C.A. § 213 (a)(1) (West 1998) (mandating that professionals are exempted from the minimum wage rules of the FLSA even if they are found to be employees under FLSA).
186. See, e.g., supra notes 56-67 and accompanying text.
187. See discussion, supra notes 20, 95, 120.
188. See 29 C.F.R. § 541.302 (1999) (proclaiming that the result of an artistic endeavor derives primarily from the "invention, imagination or talent of the employee").
189. See 29 C.F.R. § 541.3 (1999) (defining "a recognized field of artistic endeavor" as "music, writing, the theater and the plastic and graphic arts").
190. Fuentes, supra note 15, at M16.
191. See Harrell, 992 F. Supp. at 1356 (finding that the dancer's work did not fulfill the "invention, imagination, or talent" requirement).
brethren's success, gather the knowledge and courage to stand up for their legal and civil rights. The unionization of exotic dancers promises to be like no other in modern history. Not only will it be a new chapter in the history of the labor movement, but it promises to be the birth of a new breed of feminism: a movement where beauty is a sword, not a shield; and where women bare their bras, not burn them.

Although unaware of it themselves, these strippers may become the next feminist leaders. Unlike modern feminists who decry beauty,
femininity, and sexuality as weapons of a patriarchal plot to keep women submissive,\textsuperscript{195} strippers take what is inherently theirs—feminine sexuality—and they exaggerate it to extremes, using surgery, make-up and sensuous movements. Then, they confidently use their bodies as weapons against the very men who believe they are using the stripper. Playing on men’s desires and arrogance, strippers manipulate these men into believing that they (the strippers) are attracted to them. Ultimately, the men pay for perpetuating such false and sexist beliefs with hard currency, if not increased sensitivity. If the beauty culture is truly a patriarchal plot against women, then the patriarchy has failed miserably, because, like Madonna, strippers know that sexuality is power, that power is money, that money buys independence, and in that independence is equality. Having interviewed two extraordinary women at the center of this movement, having heard their stories of threats and intimidation,\textsuperscript{196} of abuses by male-dominated club management,\textsuperscript{197} of criticism by other women,\textsuperscript{198} having heard how they

by white, middle-class women, and reputation for man-hating. See id.

Obviously, Second Wave feminism is incompatible with the stripper unionization-feminist movement since this movement is generally viewed as sexually judgmental, or even anti-sexual because it refuses to accept the existence of differences between the sexes, thus also requiring an androgynous sexuality from women. This movement is also judgmental of other women’s sexuality and appearance. It idealizes women’s child-bearing capacity as evidence of women being closer to nature and better than men, and it believes that women are naturally cooperative, peace-loving, and non-competitive. See, e.g., NAOMI WOLF, FIRE WITH FIRE 147-49 (1993) [hereinafter FIRE].

195. This view has been espoused in a variety of contexts by several feminists, most notably by Naomi Wolf in her bestseller, The Beauty Myth. See NAOMI WOLF, THE BEAUTY MYTH (1990).

196. As with most other industries facing unionization for the first time, threats of violence and intimidation are common practices by management. When the possible involvement of organized crime is added to that already volatile situation, it comes as no surprise that dancer/activists have been threatened with, and subject to, everything from blacklisting to physical violence. See supra note 11 and accompanying text.

Exotic Dancers’ Alliance co-founder, Johanna Breyer, was blacklisted from all San Francisco strip clubs after she began organizing other dancers. Jane not only faced various methods of management retaliation (i.e., arbitrary firings, lock-outs, verbal abuse, etc.) during her organization of the Lusty Lady, but she also faced threats of personal harm (e.g., broken legs) from management of the Showboat Show Club when she attempted to assist Tora Brawley in organizing that strip club. During the organization of the Showboat Show Club, Tora Brawley, wearing only a bikini and stiletto heels, was physically escorted by an armed guard to the Showboat owner’s basement office, where she alleges that she was falsely imprisoned, then verbally and physically threatened by the club owner, Terry Stallman. Brawley, supra note 193, at 6. She and other dancers of the Showboat received numerous threats from management and their affiliated Hell’s Angels motorcycle gang. Brawley Interview, supra note 8.

197. The stories dancers tell of the demeaning, humiliating, and illegal abuses they have suffered at the hands of management are horrific and probably unbelievable to the uninformed. Such abuses include: hostile environment, sexual harassment, regularly being called “bitches” and “whores” at company meetings, and club tolerance for nude, hostile customers. See, e.g., Brawley, supra note 198. There is also quid pro quo sexual harassment, such as being fired for not allowing management or their friends to fondle them, or having the DJ play the wrong music during the stage performance of a dancer after she refuses to date him. Also, forced prostitution is often required as a condition of employment. Bryce, supra note 95. This includes permitting customers
have only become more encouraged by these obstacles, not less, I can confidently say "[t]hese are not the traditional feminists of years past. These are the 'bad girls' of power feminism." They have passion, they
to touch, lick, fondle, or even molest them. For example, one club promotes its "Sundays" as a night when the dancers' genitals are covered with whipped cream and a cherry and customers can pay for the opportunity to eat it off. Some dancers are forced to perform unsafe sex acts (forced sexual battery) with other dancers as a condition of employment. See Brawley Interview, supra note 8.

198. Even within the ranks of exotic dancers, there is dissent regarding organization and legal action. The reasons are numerous but can be narrowed to a few prominent theories: (1) successful management anti-union propaganda campaigns based on threats, misinformation, and outright lies persuade and intimidate many dancers into believing union membership would actually be harmful, rather than beneficial; (2) many dancers do not report their income on tips to the IRS which both prevents having to pay taxes and allows them to receive welfare money for their families; if classified as employees, not only would the income have to be reported, but it would also be taxed, thereby reducing what is usually an already poverty-level income; and (3) management often threatens dancers with termination or physical violence if they support other dancers' organizing/legal efforts. Those reasons are suspected to be at the heart of the repeated efforts of the Independent Dancers Association (IDA) to intervene in the Mitchell Brothers class action lawsuit. The IDA, composed of the present dancers at Mitchell Brothers O'Farrell Theatre, have unsuccessfully attempted to intervene three times in the lawsuit. E.D.A. General Information, NEWSLETTER 8, 1997, at 2 (on file with author). Finally, filing a separate lawsuit against one of the major plaintiffs, Jennifer Bryce, which not only was dismissed as a retaliatory action under the state's "anti-slap" statute, but also resulted in the IDA being sanctioned and ordered to pay plaintiff's attorney fees. Id. The IDA also appeared at a fundraising event for the Exotic Dancers' Alliance, accompanied by one of the defendants in the case to protest the union's involvement. Bryce, supra note 95, at 6.

199. Ironically, it is Naomi Wolf, in her theory of "power feminism," who unwittingly offers a blueprint for the stripper unionization/feminist movement. To Wolf, [p]ower feminism means taking practical giant steps instead of ideologically pure baby steps; practicing tolerance rather than self-righteousness. Power feminism encourages us to identify with one another primarily through the shared pleasures and strengths of feminality, rather than primarily through our shared vulnerability and pain. It calls for alliances based on economic self-interest and economic giving back rather than on a sentimental and workable fantasy of cosmic sisterhood." FIRE, supra note 194, at 77.

Wolf argues that for power feminism to occur, women must shake off their ambivalence toward using power and get in touch with the part of their psyche she calls the "inner bad girl," the part which is "mischievous and boisterous." FIRE, supra note 194, at 334. Wolf would not have to look long at the stripper-cum-feminist to see her "bad girl" in the flesh:

Every molecule of the [girl] seeks every pleasure. She is sensuous, grasping, self-absorbed, fierce, greedy, megalomaniacal, and utterly certain that she is entitled to have her ego, her power and her way.... She is a very naughty girl... At her worst she is narcissistic and destructive; at her best, she is the force of creativity, rebellion against injustice, and primal self-respect.

Id. at 334:36.

But it is in the principles of Wolf's power feminism that its applicability to the stripper movement and the distance from the victim feminism becomes most obvious. In power feminism women have the right to determine their lives, women's experiences matter, and a woman's choices affect the people around her and can change the world. A woman must be unapologetically sexual, understanding that good pleasures make good politics. Women should be tolerant of other women's choices about sexuality and appearance, believing that what every woman does with her body and in her bed is her own business. Women can hate sexism without hating men. Women should actively seek power and use it responsibly to make the world more fair to others. Aggression, competitiveness and desire for autonomy and separation is as much a part of the female psyche as is nurturing behavior. Poverty is not glamorous. Women should acquire money for their own dreams, independence, and security as well as for social change. Making social change does not have to be put in the same box as making
have a plan, and soon they will have the power of the law.

fun. Their motto could be "If I can't dance, it's not my revolution." Id. at 149-50.