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BARING INEQUALITY: REVISITING THE LEGALIZATION DEBATE THROUGH THE LENS OF STRIPPERS' RIGHTS

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INTRODUCTION

The debate over legalization of prostitution has fractured the feminist legal community for over a quarter century.[1] Pro-legalization advocates promote the benefits attending government regulation of prostitution, including the ability to better prosecute sex crimes, increase public health and educational resources for individuals in the commercial sex trade, and apply labor and safety regulations to the commercial sex industry in the same manner as they are applied to other businesses.[2] Some anti-legalization advocates identify themselves as "new abolitionists,"[3] and argue that government recognition of prostitution reinforces gender inequality.[4] Often, this debate is framed in the hypothetical: What *would* happen if sex work were legalized? When deploying the hypothetical, advocates elide the reality that the commercial sex industry *is* legal in the United States for a large swathe of workers in the industry: strippers.[5]

Stripping, as this Article will describe, is analogous to prostitution in that every interaction between stripper and customer is a performance of intimacy geared toward sexually and emotionally satisfying the customer in exchange for money. During these performances, strippers are often isolated with customers, thereby vulnerable to physical and sexual assault.[6] Applying the argument of legalization advocates, strippers should experience better protection than individuals engaging in prostitution because their work is

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1. *See* Katie Beran, *Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform*, 30 LAW & INEQ. 19, 21-23 (2012).

2. *See generally* K. KEMPADOO & J. DOEZEMA, GLOBAL SEX WORKERS: RIGHTS, RESISTANCE AND REDEFINITION (1998); Norma Jean Almodovar, *For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians and Judges*, 10 HASTINGS WOMEN'S L.J. 119, 127 (1999).

3. This approach focuses on increasing criminal penalties for the purchase of sex and considers prostitution "one of the most serious expressions of the oppression of and discrimination against women." Donna M. Hughes, *Governmental Approaches to the Demand for Prostitution: The Emergence of the New Abolitionist Movement*, *in* DEMAND DYNAMICS: THE FORCES OF DEMAND IN GLOBAL SEX TRAFFICKING 73, 78 (Morrison Torrey & Sara Dubin eds., 2004) (internal quotation marks omitted).

4. *See, e.g.*, Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13 (1993); Melissa Farley, *Prostitution, Trafficking and Cultural Amnesia: What We Must* Not Know *in Order To Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J. L. & FEMINISM 109 (2006).

5. Strippers are not the only individuals involved in the commercial sex trade whose work is legal. Moreover, in the context of stripping, as will be discussed below, there are blurry lines between the commission of legal and non-legal activities, both by strippers and their patrons.

6. SHEILA JEFFREYS, THE INDUSTRIAL VAGINA: THE POLITICAL ECONOMY OF THE GLOBAL SEX TRADE 96 (2009).

legal and thus subject to government oversight.[7] But does this argument hold true?

This Article examines strippers' experiences as a case study for how the legalization argument for prostitution falls short of its promises. Despite the fact that stripping for money is legal, the stripper's body[8] remains a site of deep controversy in American culture and legal jurisprudence. Her[9] dance is seen both as a threat to social order and an act of expression to be protected. Her work, legally recognized labor, is nonetheless ignored when it is not reviled. Unlike workers whose labor is seen as "legitimate" in the eyes of the law, the stripper operates in a murky zone of legal protection laden with qualifications and contradictions. While legalization has led to heavy regulation, it has failed to protect strippers and has arguably made them more vulnerable by lending a false veneer of legitimacy to strip clubs' labor practices. In the past thirty years, legal doctrine has developed in two distinct substantive areas that exacerbate strippers' poor working conditions: 1) strippers' classification as independent contractors and consequential exclusion from protective labor statutes, and 2) First Amendment jurisprudence that permits regulation of strip clubs, but has not produced meaningful protective regulations for strippers. These doctrinal developments are entangled in underlying social narratives about the worth of sexual labor and the place of the strip club in a morally upright community.

Strippers are commonly classified as independent contractors, meaning they are not legally employed by the strip club.[10] This classification disqualifies them from statutory protections that solely apply to legal "em-

7. *See* Almodovar, *supra* note 2, at 127 ("Those prostitutes who are truly the victims of violence are denied access to help because they are outside the law.").

8. While it is the stripper herself who is the focus of this Article, many of the laws discussed focus only on the stripper's body, further objectifying strippers and legitimizing the notion that they raise a "threat" to social order. For examples of laws that fixate on the body itself, see, for example, Barnes v. Glen Theatre, 501 U.S. 560, 585–86 (1991), where the Supreme Court wrangled with the constitutionality of ordinances requiring strippers to wear g-strings and pasties.

9. Strippers will be referred to by using feminine pronouns throughout this paper because the strip club industry largely caters to the male gaze. *See, e.g.*, Lynn Mills Eckert, *Language Games: Regulating Adult Establishments and the Obfuscation of Gender*, 15 S. CAL. REV. L. & SOC. JUST. 239, 251 (2006). However, male strippers experience many of the same legal paradoxes and economic dilemmas as female strippers. This paper focuses primarily on gendered stereotypes that permeate the strip club industry and are premised in patriarchal control over the feminized stripper, whether male or female.

10. Carrie Benson Fischer, *Employee Rights in Sex Work: The Struggle for Dancers' Rights as Employees*, 14 LAW & INEQ. 521, 531–37 (1996).

ployees."[11] However, strip clubs often exert a level of control over strippers that undermines their independent contractor status.[12] Even when strippers successfully argue they are employees of their strip club, existing legal protections are ill-fitted to the realities of the strippers' jobs. These analytical deficiencies could be remedied through doctrinal development and legislative reform, but courts and lawmakers have been reluctant to actively improve strippers' working conditions, arguably for fear of being tainted by a morally repugnant enterprise.

At the same time, local governments have zealously mobilized to regulate sexually oriented businesses in ways that destabilize rather than improve the economic security of strippers. Communities strive to regulate strip clubs out of existence,[13] arguing under the First Amendment that the "secondary effects" (extrinsic harms) of strip clubs harm business and community health, and therefore strip clubs should be zoned to the outskirts of municipalities. In discussing negative secondary effects, the Supreme Court addresses the intrinsic harm of gender-based violence in the strip club in a fashion that is cursory at best.[14] In glossing over strippers' vulnerability to sexual harm, courts reveal their reticence to take up the cause of strippers in their First Amendment analyses.

The source of inconsistency in government regulation is public refusal to understand or address the systemic roots of the commercial sex industry and gender-based exploitation. The result is that the stripper is mired in legal regulations that impose more constrictions than protections. It is hard to see how individuals engaging in prostitution would achieve a different fate, which undermines the notion that legalizing prostitution provides greater protection to those involved in it. In this Article, I argue that without deeper cultural recognition of the gender-based inequities underlying sexualized labor and meaningful acknowledgment of the dignity and worth of members of the commercial sex industry, legal regulations on the indus-

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11. KELLY HOLSOPPLE, STRIP CLUBS ACCORDING TO STRIPPERS: EXPOSING WORKPLACE SEXUAL VIOLENCE (1998), *available at* http://www.uri.edu/artsci/wms/hughes/stripc1.htm.

12. Unlike employers' ordinary treatment of independent contractors, strip club operators heavily monitor strippers, including dictating their appearance, interactions with customers, work schedules and minute to minute movements when working. *See* Jeffreys, *supra* note 6, at 90–99.

13. *See, e.g.*, Eric D. Kelly & Connie B. Cooper, *Everything You Always Wanted to Know About Regulating Sex Businesses*, *in* PLANNING ADVISORY SERVICE REPORTS 2000 (Am. Plan. Ass'n, Nos. 495–496, 2000). *See also infra*, Section IV.

14. *See, e.g.*, Barnes v. Glen Theater, 501 U.S. 560, 585–86 (1991) (mentioning sexual assault in passing as one of many "evils" that takes place near strip clubs, including prostitution and "other criminal activity").

try will remain limited in their capacity to ameliorate the endemic sexism, exploitation, and violence that strippers experience.

Section I of this Article describes the complex emotional and sexual labor involved in stripping and examines how the stripper's precarious relationship with customers is further compromised by the exploitative wage compensation models commonplace to strip clubs. In Section II, I argue that the classification of strippers as independent contractors is doctrinally unjustifiable. Then I examine the shortcomings of the existing legal protections for strippers, specifically in the realm of sexual harassment law. In Section III, I turn to the First Amendment doctrine on stripping to explore which regulations governments *are* willing to impose on strip clubs, and how the stripper's body is discursively imagined within courts' varying modes of analysis. Finally, Section IV explores the dynamic between the bodies of law discussed in Sections II and III and argues that they leave the stripper in a position as insecure, if not more so, than before government regulation of strip clubs. I will use this conclusion to critique broader arguments that legalizing prostitution would lead to greater protection for individuals engaged in prostitution.

I. DEFINING THE PROBLEM: EMOTIONAL TRANSACTIONS AND ECONOMIC VULNERABILITIES

> "No one but us really knows how or what it is like to be truly naked."[15]

A. Emotional Labor at Social Cost

In order to fully understand the effects of legal doctrine on strippers, it is critical to situate that doctrine within the sociological and economic contexts of the strip club. This Section will deconstruct the labor that occurs in the strip club and investigate how different types of labor uniquely compromise strippers' autonomy and physical integrity in the client-stripper interaction. The stripper's "job" is often reduced to removing her clothes for money. However, strippers' testimonials reveal that beyond their physical performance, intense emotional labor is required to create a fantasy that customers will pay for.[16] Emotional labor is best described by Carol Ronai and Carolyn Ellis, who state that a table dancer must:

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15. Dawn Passar, *I Dance for a Living*, 10 HASTINGS WOMEN'S L.J. 225, 226 (1999).

16. *See generally* KIM PRICE-GLYNN, STRIP CLUB: GENDER, POWER, AND SEX WORK 105 (2010) (one stripper interviewed shared: "You have to make believe that you're in love with everyone that you dance for"); KATHERINE FRANK, G-STRINGS AND SYMPATHY: STRIP CLUB REGULARS AND MALE DESIRE 190 (2002) (one customer interviewed stated, "There's a couple of cool girls that I can hang out with [at the

> [B]e a charming and sexy companion, keep the customer interested and turned on, make him feel special and be a good reader of character and a successful salesperson. At the same time, she must deal with her own negative feelings about the customer or herself, negotiate limits and then keep him under control to avoid getting fired by management.[17]

This labor has been referred to as "counterfeit intimacy,"[18] "seduction rhetoric,"[19] or "commodified [sic] intimacy."[20] Strippers must delicately gauge and conform to the emotional needs of each customer. At the same time, they must attempt to draw clear boundaries to manage possessive customers, sexual demands, and physical aggression.[21] One example of this negotiation occurs during the lap-dance. STAR, a Toronto-based website providing safety tips for strippers, advised: "If a customer is trying to manhandle you, try holding his hands in a sexy way to control him. But be aware that touching violates some municipal bylaws. If you're being assaulted, scream."[22] Thus, strippers are constantly blurring the line between fantasy and reality and drawing tenuous distinctions between manageable "manhandling" and criminal assault. Reaching the appropriate balance for each client demands keen intuitions and strong boundaries.

This negotiation may come at a high price, since part of a stripper's duty is to conform to historicized, racialized, and classed notions of men's sexual desires and fetishes. Becki Ross explored performances of "colonial tropes" at one exotic dance club in 1950s Vancouver, including dancers costumed as Nubian slaves.[23] She explained that at the club, the work was "never about sex alone . . . it was tangled up with economic, cultural and political privileges of a white body politic."[24] More recently, Katherine Frank interviewed an African American stripper who reported wearing costumes with animal prints to evoke a "jungle theme," "consciously playing

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strip club Diamond Dolls] that are doing it not so much to make money but to hang out. That's the ones I like best. [pause] Whether it's real or not.").

17. Carol Rambo Ronai & Carolyn Ellis, *Turn-Ons for Money: Interactional Strategies of the Table Dancer*, 18 J. CONTEMP. ETHNOGRAPHY 271, 272 (1989).
18. *Id.*
19. *Id.* at 283.
20. Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 79 (2006).
21. Ronai & Ellis, *supra* note 17, at 272.
22. SEX TRADE ADVOCACY AND RESEARCH, DANCING MATTERS 4 (2004), *available at* http://web2.uwindsor.ca/courses/sociology/maticka/star/index.html.
23. Becki L. Ross, *Bumping and Grinding on the Line: Making Nudity Pay*, 46 LABOUR/LE TREVAIL 221, 238 (2000).
24. *Id.*

on" customers' racialized expectations of black women, including hypersexuality and aggression.[25] In a comparative study of "gentlemen's clubs" and "working-class strip joints," Mary Nell Trautner noted that tips were far more likely to be received on the body, and flashing was more common, in "working-class" establishments.[26] Thus, strippers must not only sell sex, but create a custom-made fantasy for each customer, often sacrificing dignity and personal authenticity in the process.

B. Economic Marginalization: Wages, Tip-Outs and Stage Fees

Beyond the problems intrinsic to selling sexual performances, strippers operate in a precarious economic environment with little to no job security, and minimal, if any, legal recourse in the face of labor rights violations. Strippers rarely receive any compensation except their tips,[27] a reality that is seldom communicated to customers.[28] Some strip clubs charge for entry, which leads customers to erroneously believe that strippers receive some fraction of the club's revenues. Strippers often cannot charge for table dances, as that would amount to asking for money in exchange for sex, which could open them to prosecution for sexual solicitation.[29] Thus, they must couch their requests for tips in gentler language, asking for "suggested contributions."[30] In addition, some strippers describe "upping the ante," where personal boundary lines are drawn and redrawn as more money is offered for requests that inch closer to propositions for prostitution.[31] This is particularly the case in strip clubs where other strippers engage in prostitution and create competition because propositions are more frequent and "customers [have] the opportunity to choose from women willing to engage in a variety of sexual acts."[32]

Even more significantly, the stripper's economic realities are shaped by the club itself. Strippers have an extremely ambiguous legal relationship with the clubs that hire them to dance. This ambiguity has led clubs to

25. Frank, *supra* note 16, at 218–19.
26. Mary Nell Trautner, *Doing Gender, Doing Class: The Performance of Sexuality in Exotic Dance Clubs*, 19 GENDER & SOC'Y 771, 782 (2005).
27. Fischer, *supra* note 10, at 532.
28. Judith Lynn Hanna, *Undressing the First Amendment and Corsetting the Striptease Dancer*, 42 DRAMA REV. 38, 60 (1998).
29. Ronai & Ellis, *supra* note 17, at 275. Strip clubs are also sites of sex trafficking in the United States. For example, in 2005, a trafficker out of Brooklyn, New York was prosecuted for trafficking twenty-five Russian women to perform in strip clubs. Jeffreys, *supra* note 6, at 95.
30. *Id.*
31. BERNADETTE BARTON, STRIPPED: INSIDE THE LIVES OF EXOTIC DANCERS 95 (2006).
32. *Id.* at 96.

utilize and take advantage of "taxi-cab" or "hair salon" contract models that require strippers to rent out a space in the club to dance.[33] Thus, it is customary for strippers to give a "stage fee," where they pay a down payment to dance at the club.[34] Other clubs enforce "tip-outs," where a substantial percentage of strippers' tips are paid back to the club, and/or distributed to other employees, such as the bouncer, DJ, or bartenders.[35]

There are many permutations to the above contract models that stifle strippers' opportunities to reap financial gain. Déjà vu Club in San Francisco charged each dancer $9 for every $20 nude lap dance that she sold, in addition to a $10 ladies' drink fee, regardless of whether she drank.[36] Often, clubs collect these fees at a flat rate, regardless of the tips a stripper has collected for a specific shift.[37] In Austin, Holly Wilmet reported that the collection of "daily registration fees, taxes, and tip-outs cost dancers $30–50 per shift."[38] Dancers at Mitchell Brothers O'Farell Theater in San Francisco were required to "pony up" a month's worth of stage fees prior to working their first shift.[39] Other clubs impose lap-dance quotas on dancers, obliging them to sell a certain number of lap-dances per shift for which proceeds must go to the club. Falling short of an assigned quota can serve as grounds for termination.[40] Thus, strippers will often pay to work, and leave their shifts owing debts to their managers.

This compensation structure shapes strippers' interactions with both their fellow strippers and their customers. The tip-out model creates a highly competitive working environment where strippers working during slow shifts vie for customers.[41] This type of cutthroat work environment erodes workplace camaraderie, thereby foreclosing opportunities for strippers to organize for better wages, benefits and workplace safety.[42]

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33. Passar, *supra* note 15. Such comparisons refer to business models of many hair salons and taxi driving companies, in which the worker purchases a seat in a salon or taxi-cab on an inventory loan from the salon or cab proprietor and then repays the salon or cab company through their commission. This model results in service workers starting out indebted to the business proprietors for whom they work.
34. Sarah Chun, *An Uncommon Alliance: Finding Empowerment for Exotic Dancers Through Labor Unions*, 10 HASTINGS WOMEN'S L.J. 231, 236 (1999).
35. *Id.*
36. Holly J. Wilmet, *Naked Feminism: The Unionization of the Adult Entertainment Industry*, 7 AM. U. J. GENDER SOC. POL'Y & L. 465, 483 n.114 (1999).
37. *Id.* at 483.
38. *Id.* at 483 n.112.
39. *Id.*
40. *Id.* at 482 n.105.
41. Samantha A. Majic, *LIVE! NUDE!... Organized Workers? Examining the Organization of Sex Workers in Las Vegas, Nevada* 24–25 (June 19, 2005) (unpublished conference paper) (on file with the Inst. for Women's Policy Research).
42. Price-Glynn, *supra* note 16, at 56, 146.

Workplace competition is even more problematic when viewed in conjunction with the stripper's relationship to her customer. As discussed above, strippers' economic relationships with their customers are complex and have the potential for friction when strippers set boundaries that customers challenge, either through physical force or economic coercion.[43] Isolated from the greater dynamics of the strip club, strippers' must continuously negotiate the line between customer satisfaction and illegality. They must also weigh the benefits of a good tip against the potential for abusive conduct from their patrons. The added pressure of having to avoid incurring debt to the club may lead strippers to permit customer behavior that they otherwise would not tolerate. Thus, the notion of consent becomes dangerously murky, as workers submit to customers' advances for the sole purpose of breaking even.[44] Since tipping occurs on the body, dancers might be more willing to allow customers to grope them when they tip.[45] This creates a nebulous transition from stripping to prostitution, placing workers in an even more unstable and risky situation,[46] where before long "'hustle' becomes 'solicitation,' customers become 'johns,' strip clubs become 'bordellos' and club owners become 'pimps.'"[47]

Thus, the stripper operates in an extraordinarily competitive and high-stakes economic environment. The nature of her work places her in a framework of false autonomy: creating a coercive "choice" between accruing debt to the club or redrawing personal boundaries of consent and bodily integrity. While the tip-out and stage fee structures compound the intense pressure facing the stripper, they highlight strippers' existing state of compromised autonomy. At its root, the stripper's job is a constant negotiation between personal safety and monetary profit. As one stripper poignantly recounted, in choosing a customer, she would often ask herself, "What do I want more right now? Money or someone non-threatening to sit with?"[48] Another stripper used a fake name and address with customers to prevent stalking and sexual assault, because fellow strippers had been followed home by patrons.[49] These strategies reveal an additional layer of emotional labor that strippers engage in: not only must they manipulate and

43. *See supra* notes 21–22 and accompanying text.

44. This concept was developed in an interview with Anita Allen, Professor of Law, University of Pennsylvania Law School (Feb. 24, 2009).

45. One example of tipping on the body is putting cash tips in a stripper's garter, thereby providing an opportunity for customers to make physical contact. Ronai & Ellis, *supra* note 17, at 277.

46. Wilmet, *supra* note 36, at 482.

47. *Id.*

48. Ronai & Ellis, *supra* note 17, at 279.

49. Price-Glynn, *supra* note 16, at 92.

manage the choices of their customers, but they must also reconcile themselves to the boundaries they "choose" to set for their transactions.

As will be demonstrated in the following sections, government regulation of strip clubs to "protect" strippers against the above realities has come in all the wrong places. While the above account demonstrates strippers' extreme vulnerability to abuse and exploitation, legal doctrine has focused primarily on the stripper's threat to public morality, crime, and disease.[50] Where strip club regulations could equalize power differentials between strippers and their employers, laws instead have vested deference in employers, allowing them to evade legal obligations concerning wages, collective bargaining, protection from harassment and workers' compensation. This legal trajectory reflects cultural ambivalence toward the stripper, trivializing her as undeserving of legal protection while enforcing stringent legal regulation to protect the body politic from her presence.[51]

II. STRIPPERS AS UNPROTECTED WORKERS: A LEGAL BLIND EYE SHAPES LABOR PROTECTIONS IN THE ADULT ENTERTAINMENT INDUSTRY

> We're not fighting for the money. We're fighting for the human rights and respect every paid worker gets.[52]

This Section will examine how strippers' legal classification as independent contractors[53] reflects the broader trend of lawmakers deregulating the employment relationship to enhance labor market flexibility. It will then expose how strippers' independent contract classification misrepresents the actual dynamics of the strip club, given that strippers work in a tightly controlled, heavily monitored environment that hardly bespeaks a legally cognizable "independent contract" relationship. Where true independent contractors exercise greater autonomy and flexibility in their work, strippers have little to no control over their terms and conditions of employment.[54] In misclassifying the employment relationship, employers are able to evade vital workplace protections for strippers. Without the "employee" status that more aptly defines their relationship to strip clubs, strippers exist in a vacuum of legal protection. They are vulnerable to workplace injury, harass-

50. Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1147 (2005).

51. *Id.*

52. Fischer, *supra* note 10, at 554 (referencing a news article quoting Julie Chavira, age 23, a stripper working out of Minneapolis).

53. *Id.* at 531.

54. *See* Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503 (1997); *see supra* note 42 and accompanying text.

ment, discrimination, retaliation, and wage violation with no legal recourse against their employers. Yet, even if strippers were categorized as employees, employment protections themselves—particularly sexual harassment law—inadequately address the harms suffered by strippers.

A. Strippers as Independent Contractors: A Void of Legal Protection

In the past thirty years, employment relationships have been transformed from long-term assurances of job security and fixed pensions into transient relationships, short tenures, and transferable benefits.[55] This trend exacerbates the limited nature of protections under major federal employment laws, such as the Fair Labor Standards Act (FLSA), Title VII, worker's compensation statutes, and the National Labor Relations Act (NLRA), which only apply to legal "employees."[56] "Employee" is a legal term of art determined through doctrinal tests that vary from jurisdiction to jurisdiction.[57] The most standard tests for determining whether a worker is an "employee" are the common law agency test, the economic realities test, or some hybrid of the two.[58]

The common law agency analysis focuses on employers' control over their workers as the deciding factor of whether the worker should be considered an employee or an independent contractor.[59] Factors that are commonly taken into account are: the party exercising control over details of the work, the type of occupation, the level of supervision, the level of skill required for the work, the supplier of the instrumentalities of the work, the length of time for which the person is employed, the method of payment, and the subjective beliefs of each party as to whether they are in an employment relationship.[60]

The economic realities test focuses more heavily on the worker's dependence on the employer to gauge whether the worker is sufficiently "tied" to the business to be considered an employee.[61] Factors taken into account include: the hirer's control of work duties; the method of payment; the

55. *See generally* Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective on Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153 (2003).

56. *See* TIMOTHY P. GLYNN, RACHEL ARNOW-RICHMAN & CHARLES A. SULLIVAN, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 14 (2d ed. 2011) (citing 29 U.S.C § 158(b)(4)(i) (2006); 29 U.S.C. § 201(2) (2006); 42 U.S.C. § 2000e(f) (2006)).

57. *Id.* at 5–7, 15.

58. *Id.* at 15.

59. RESTATEMENT (SECOND) OF AGENCY §220 (1958).

60. *Id.*

61. For an example of a case application of the economic realities test, see Beck v. Boce Group, L.C., 391 F. Supp. 2d 1183, 1186 (S.D. Fla. 2005).

rights of hiring, firing, and discipline; and whether the performance of duties is an integral part of the employer's business.[62] The economic realities test tends toward a more liberal construction of employee status, and thus is used when determining workers' qualification for statutory protections that define employment broadly, such as the Fair Labor Standards Act.[63]

While the independent contractor relationship is not a uniformly negative legal classification, it is harmful to strippers because they gain none of its benefits. Strippers work in a highly controlled environment. Often, they do not choose their own work shifts, nor do they always have a say over the number of shifts they work.[64] As discussed above, their employers closely regulate their wages.[65] There are strict rules regulating how many stage dances strippers must perform per shift,[66] how often they are allowed to take breaks,[67] what costumes they wear,[68] and even how many of them are allowed to use the bathroom at any given time.[69] Some club managers install cameras in dressing rooms to monitor strippers' conduct for illegal activity.[70] When strippers violate rules, miss shifts or are tardy, clubs will impose fines to discipline them.[71] Bouncers, bartenders, and DJs also participate in the monitoring of strippers as part of their job duties, ensuring that strippers do not engage in sexual contact with customers.[72]

Given these strict regulations, under both the common law agency test and the economic realities test, strippers can make a persuasive claim that

62. *See, e.g.*, Antenor v. D & S Farms, 88 F.3d 925, (11th Cir. 1996) (In determining whether workers were jointly employed by defendant, the court examined "the nature and degree of control over the workers . . . the degree of supervision of the work . . . the right of the employer to hire, fire and modify work conditions. . .the power to determine pay rates and method of payment . . . preparation of payroll and payment of wages. . .ownership of facilities where work occurred . . . performance of a line job integral to business . . . investment in equipment and facilities"); Lilley v. BTM Corp., 958 F.2d 746, (1992) (upholding lower court's holding that plaintiff, a salesman who received commission, was an employee under the ADEA because he had to request authorization to quote prices to potential buyers, was provided with an office and stationery with the defendant's name on it, and was "integrated into BTM's normal business operations").

63. *See* Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184 (S.D.N.Y. 2003).

64. Fischer, *supra* note 10, at 532.

65. *Id.*

66. *Id.* at 545.

67. *Id.*

68. *Id.*

69. *See* Reich v. Circle C Inv., 998 F.2d 324, 327 (5th Cir. 1993).

70. Ross, *supra* note 23, at 249.

71. Fischer, *supra* note 10, at 534.

72. Kim Price, *"Keeping the Dancers in Check": The Gendered Organization of Stripping Work in the Lion's Den*, 22 GENDER & SOC'Y 367, 375–77 (2008).

they are legal employees. However, the common trend has been for employers to misclassify strippers as independent contractors,[73] thereby avoiding their legal obligations without relinquishing any of their control. Thus, strippers operate in a contrived legal framework that affords them all the costs and none of the benefits of an independent contract. The stripper's status as an independent contractor reflects a larger trend by employers towards strategic de-regulation of the employment relationship through misapplication of existing legal rules.[74] When strippers are refused the protections and entitlements their legal relationship requires, their rights are being violated.[75] As independent contractors, strippers are commonly denied medical coverage, vacation time, medical leave, or family leave.[76] Yet, even when members of the commercial sex industry are able to negotiate benefits into their employment contract, contracting around sexual labor has had little success in courts. For example, pornography actors have been reluctant to seek redress in court because of their ambiguous legal status.[77] When workers move forward with their cases, courts are likely, as a matter of public policy, to be ambivalent about enforcing adult entertainment contracts. Even when pornography contracts do not entail illegal behavior, they implicate policy concerns regarding specific performance and prostitution.[78] For example, California courts have held that contracts are unenforceable if they use sexual consideration (that is, sexual performance in exchange for money) because sexual consideration raises public policy concerns about prostitution.[79] Applying this analysis, it is reasonable to expect that strippers would encounter challenges in enforcing their contract rights if courts interpret their damages claims as seeking compensation for sexual services.

B. Fair Labor Standards Act

In the absence of enforceable contract rights, workers turn to statutory protections to vindicate their rights against their employers. Most statutory protections at the federal level apply specifically to "employees," which places strippers outside the compass of federal legal protections.

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73. *See* Fischer, *supra* note 10 at 531.

74. Jenna Amato Moran, *Independent Contractor or Employee? Misclassification of Workers and Its Effect On the State*, 28 BUFF. PUB. INT. L.J. 105, 106 (2009–2010).

75. Fischer, *supra* note 10, at 535.

76. Hanna, *supra* note 28, at 59–60.

77. Andrew Gilden, *Sexual (Re)consideration: Adult Entertainment Contracts and the Problem of Enforceability*, 95 GEO. L.J. 541, 546 (2007) (explaining that adult entertainers are distrustful of the legal system due to historical persecution and do not believe they can successfully sue on an industry contract when it has been breached).

78. *Id.* at 547, 557.

79. *Id.* at 557 (citing Marvin v. Marvin, 18 Cal. 3d 660 (1976)).

The Fair Labor Standards Act (FLSA) regulates the wages and hours of low-skilled workers to ensure that employers pay the federal minimum wage and overtime when employees work over forty hours per week.[80] The FLSA has been the most heavily applied legal protection in the context of strippers' rights. Several courts have granted strippers employee status when determining their legal entitlements under the FLSA in lawsuits against their employers. In *Reich v. Circle C Investments*, the U.S. Secretary of Labor brought an action against a strip club for wage and record-keeping violations of the FLSA.[81] The court used the economic realities test and found that the plaintiff strippers were eligible for FLSA protections as employees.[82] Similarly, in *Jeffcoat v. Department of Labor*, the Alaska Department of Labor brought an action on behalf of a dancer whose employer maintained that she was an independent contractor of the club.[83] The court found that the dancer had a valid complaint for wage violations and qualified as an employee under the economic realities test, despite the fact that the club ordered her to purchase a business license and her wages were primarily earned through tips.[84] However, this line of reasoning has been largely confined to the application of the FLSA, possibly because the FLSA contains particularly explicit statutory language indicating that the employment relationship should be construed broadly to fulfill the legislative purposes of the act.[85] It remains unclear whether courts will apply this more expansive reasoning to other labor laws, or whether the argument that strippers are employees will remain confined to the FLSA context.

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80. *See generally*, Compliance Assistance - Fair Labor Standards Act (FLSA) - Wage and Hour Division (WHD), UNITED STATES DEPARTMENT OF LABOR, *available at* http://www.dol.gov/whd/Flsa/index.htm.

81. Reich v. Circle C Inv., 998 F.2d 324, 326 (5th Cir. 1993); *see also* Martin v. Priba Corp., Civ. A. No. 3: 91-CV-2786-G, 1992 WL 486911 at *5 (ruling that where dancers had signed an independent contractor contract, dancers were employees within the meaning of FLSA because of dancers' economic dependence on the club).

82. *Reich*, 998 F.2d at 328–29.

83. Jeffcoat v. Alaska Dep't. of Labor, 732 P.2d 1073, 1075 (Alaska 1987).

84. *Jeffcoat*, 732 P.2d at 1077–78. The court also stated that "the parties' intent to contract is not a determinative factor." *Id.* at 1077.

85. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (ruling that the terms of the FLSA have been interpreted with "striking breadth" to "stretch . . . the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles"); Thornton v. Crazy Horse, Inc., No. 3:06-cv-00251-TMB, 2012 U.S. Dist. LEXIS 82770, at *57 (D. Alaska 2012) ("The remedial purposes of the FLSA necessarily requires a 'broad' interpretation of the term . . . .").

C. National Labor Relations Act

The National Labor Relations Act (NLRA) prohibits employer interference or obstruction when employees engage in protected concerted activities, including organizing for "mutual aid and protection . . . ."[86] Dancers' unionizing efforts began in the 1940s, when the American Guild of Variety Artists litigated on behalf of a large number of dancers for payment of the minimum wage.[87] In 1971, the Ninth Circuit held that various entertainers were not legally "employees" of the defendant nightclub in an appeal from a National Labor Relations Board decision.[88]

Without protection under the NLRA, strippers are vulnerable to retaliation from club owners for attempting to assert their rights as employees through litigation or collective action. For example, when the Las Vegas Dancers' Alliance (LVDA) attempted to organize rallies in 2002, club owners threatened retaliation against dancers if they participated in the rally.[89] While the rally was organized to challenge an expensive city requirement that dancers purchase "work cards" to demonstrate they were not involved in criminal activity, club owners feared the rally would foster underlying organizing goals, such as establishing an official bargaining unit for the LVDA and fighting for official recognition of dancers' employee status.[90] As a result, the rally turned out dismal numbers and organizing efforts dwindled.[91] As independent contractors, the dancers did not have a right of action under the NLRA against the club owners who crushed their organizing efforts.[92]

One of the few successful unionizing attempts was at the Lusty Lady Dance Theater in San Francisco. In 1997, dancers were able to unionize, ultimately negotiating a seniority-based pay scale, dance, lunch and prep breaks, and removal of one-way windows for peep shows.[93] Removal of the one-way windows was particularly important to workers because they allowed customers to videotape strippers without their knowledge or consent.[94] Dancers at the Lusty Lady were able to engage in more robust collective bargaining negotiations with theater management than dancers at

86. 29 U.S.C. §§ 157–58.

87. Wilmet, *supra* note 36 at 466.

88. *Id.*; Harrah's Club v. Nat'l Labor Relations Bd., 446 F.2d 471, 480 (9th Cir. 1971).

89. Majic, *supra* note 41, at 22.

90. *Id.* at 20–22.

91. *Id.*

92. *See id.* at 23; 29 U.S.C. § 152(3) (2006) (stating that "The term 'employee' . . . shall not include . . . any individual having the status of an independent contractor").

93. Wilmet, *supra* note 36, at 467.

94. Siobhan Brooks, *Exotic Dancing and Unionizing: The Challenges of Feminist and Antiracist Organizing at the Lusty Lady Theater*, 33 SIECUS REPORT 12, 13 (2005).

other establishments.[95] Unionization was in part made possible by partnering with the Exotic Dancers Alliance, an organization that had been fighting to achieve employee status for dancers.[96] To date, no other strip club has unionized in the United States.[97] The Lusty Lady's isolated success demonstrates how the stilted legal conceptualization of strippers' employment status prevents the NLRA from being an effective mechanism for protecting and fostering industry-wide organizing efforts among strippers.

D. Title VII

Title VII is protective legislation that was passed to prevent discrimination on the basis of race, religion, national origin, and gender in the public and private workplace. Title VII, like the above statutes, requires workers to be "employees" to qualify for protected status.[98] Title VII enables employees to file a lawsuit against their employers for failure to prevent or redress harassment, either by staff or third parties (customers), if employers should reasonably have known that such harassment was likely to occur.[99]

Sexual harassment law developed out of Title VII's prohibition on sex discrimination and seems the most likely fit for strippers' claims. However, wooden applications of sexual harassment law present yet more barriers to meaningful protection for strippers under federal anti-discrimination laws. To qualify for sexual harassment protection, an employee must show harassment because of sex that is "severe or pervasive" enough to "alter the conditions of [the victim's] employment and create an abusive working environment."[100] Even if a stripper qualifies as a protected employee, it is unclear whether judges would view a Title VII claim favorably because of the complicated interplay between sexual harassment law and the essence of the stripper's job duties.[101]

Social commentators and strippers themselves have expressed skepticism as to whether a worker who signs up to sexually entice customers can credibly claim sexual harassment when their enticement is successful. One

95. *Id.*

96. *Id.* at 13–14.

97. Rachel Aimee, *In Search of Stripper Solidarity*, IN THESE TIMES, May 7, 2012, http://www.inthesetimes.com/article/13089/in_search_of_stripper_solidarity/.

98. 42 U.S.C. § 2000e(f) (2006). To determine employee status under Title VII, courts will apply the economic realities test, the common law agency test, or some hybrid of the two, as discussed above in notes 57 and 58 and accompanying text.

99. *See* Breda v. Wolf Camer & Video, 222 F.3d 886, 889 (11th Cir. 2000).

100. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

101. Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can It Support a Hostile Work Environment Claim Brought by a Nude Dancer?* 24 N.Y.U. REV. L. & SOC. CHANGE 271, 291 (1998).

stripper commented: "obviously it would be ridiculous to accuse a customer, who pays specifically for the right to regard a dancer as a sexual object, of breaking sexual harassment codes when he does so."[102] A CBS commentator disparaged Hooters' waitresses for bringing a sexual harassment claim stating, "These are women who deliberately sought out and accepted employment at a place called Hooters. Did they really think it was about owls?"[103] In response to lawsuits, Hooters wrote clear terms into its employment manual that waitresses were required to sign before accepting employment. The terms read:

> I hereby acknowledge and affirm . . . that the Hooters concept is based on female sex appeal and the work environment is one in which joking and innuendo based on female sex appeal is commonplace. I also expressly acknowledge and affirm that I do not find my job duties, uniform requirements or work environment to be offensive, intimidating, hostile or unwelcomed.[104]

While technically employees cannot contract to waive their right to file charges with the Equal Employment Opportunity Commission,[105] this clause is designed to weaken potential harassment lawsuits by demonstrating that waitresses did not find behavior that could constitute harassment to be subjectively offensive. Moreover, such clauses have the more insidious effect of misleading workers into thinking they have signed away their rights, even though such a clause would not bar them from filing a discrimination charge.

Legal commentators have advanced parallel arguments for denying strippers' sexual harassment claims in the tort language of "assumption of risk." Strippers, they argue, should be able to exercise agency in deciding to assume the risk of harassment by customers in the course of their job duties.[106] Thus, the argument goes, strip club liability is superseded by the mutual understanding between strippers and club owners when entering into the employment contract. Part of strippers' "job duties" is managing third-party risk. In describing her own job duties, a stripper recounted, "a stripper must entice her audience but keep an eye out for the type of guy

102. *Id.* at 299.
103. *Id.* at 295.
104. *Id.* at 296.
105. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Understanding waivers of discrimination claims in Employee Severance Agreements*, http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html (last updated Apr. 2010).
106. McGinley, *supra* note 20, at 69–70 (citing Kelly Ann Cahill, Note, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1145 (1995)).

who tries to take liberties while he attempts to tuck a dollar in your G-string."[107] Some clubs have gone so far as to threaten punishing strippers for "mismanaging" their harassment. In one strip club, the employer stated:

> Unless the customer is being a blatant asshole (continuing to break the laws after them being explained to him), I see no reason to kick anybody out. What I do see is kicking the dancer out after being completely assured that you know she knows the laws and [is] allowing the customer to continue to break them without seeking assistance.[108]

The assumption of risk model reflects cultural attitudes, some of which are internalized by strippers, that a woman who chooses to undress for men for a living is "asking" for aggressive male advances. This attitude is reflected in the comments of op-ed editor Stephanie Robertson, who criticized Hooters' plaintiffs: "at some point people have to assume responsibility for their actions and use common sense. A woman should anticipate sexual remarks if she prances around with various parts of her anatomy hanging out."[109]

From a legal perspective, this argument is unprecedented. Title VII protections against sexual harassment are not seen as "negotiable" in any other profession. In no other context would it be acceptable for workers to sign a contract saying they wanted to place a monetary premium on their bodily integrity.[110] And yet, such terms and conditions are memorialized in the handbooks of establishments like Hooters and strip clubs. From a practical perspective, this practice is untenable because it places the burden of risk management on the stripper, who is the economic actor least able to control customers' behavior.[111] Bouncers and club management have often installed monitoring devices for the strippers, and these systems could easily be used to protect strippers from harassment as well.[112] Furthermore, the club foresees harassment of its workers as keenly as the workers themselves. However, given the wage structure in most clubs, it is the club that reaps the profit of harassment. Thus, the club should assume the risk.[113] To delegate management of aggressive behavior to the only workers whose wages are contingent on customer satisfaction is a farcical attempt to control third

107. Burstein, *supra* note 101, at 302.
108. Price-Glynn, *supra* note 16, at 93.
109. Burstein, *supra* note 101, at 304.
110. *Id.* at 311–12
111. McGinley, *supra* note 20, at 91.
112. *Id.* at 92.
113. Burstein, *supra* note 101, at 307.

party harassment. Deborah Ellis, the former legal director of the NOW Legal Defense Fund, denounces the assumption of risk argument: "women should not have to choose between having a job and being treated with dignity."[114] The editorial remark noted above, that women should "anticipate" certain male reactions when they bare their bodies, is uncannily similar to a well-entrenched rape myth. Rape victims who are not virgins or who were victimized as a result of non-conformity to traditional gender roles (for example, being out late at night without a male chaperone) are often portrayed as lacking in common sense, which becomes repainted as the central cause of their victimization.[115] Similarly, women who choose to strip expose their sexuality in the masculine public sphere, and thus are viewed as "fair game" for sexual violence.[116]

Applying assumption of risk doctrine to strippers who are assaulted, abused and humiliated at work rests on the foundational premise that the service economy should meet consumer demand for women's sexual subordination. From a feminist perspective, the limitations of sexual harassment law mirror the distorted autonomy presented to strippers when club owners appropriate their wages through imposing tip-out and stage fee wage structures. Here, security from harassment is an anomaly, since dancers can only earn decent wages at the expense of their bodily integrity.

The stripper's vulnerability to unchecked harassment is the product of a problematic market analysis where power rather than sex becomes a legitimate object of sale. Lack of legal or legislative intervention, either to restructure current wage models in strip clubs or to more stringently apply sexual harassment law, reflects a discomfort by government officials to take meaningful steps to protect members of the commercial sex industry. While the past century has seen the enactment of a plethora of protective statutes for employees' rights, and in spite of the fact that stripping is legal "work," the laws have limited use because stripping is not work that courts and lawmakers consider worth protecting.[117] Strippers' rights have been marginalized, obscured, and left to resolution through fundamentally asymmetrical power relationships within the four walls of the strip club.

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114. *Id.* at 306.

115. *Id.* (quoting a Minnesota attorney who brought a lawsuit against Hooters, critiquing the assumption of risk defense by using a rape analogy: "People say, 'Didn't she ask for it? She walked in the park. Didn't she ask for it? She went out with the guy.'").

116. McGinley, *supra* note 20, at 91.

117. Fischer, *supra* note 10, at 523–24 ("In its reluctance to embrace legal endorsement of sexually-oriented work, American society has been slow to acknowledge that these women [strippers] are denied their workplace rights.").

E. The Social Ramifications of Government Inaction

The root of strippers' shortage of labor protection is their inability to claim employee status, placing them outside the ambit of statutory protections against wage violations, employer retaliation, discrimination, and unsafe working conditions. However, this is a threshold barrier that often diverts inquiry into the larger problem: many existing protections fail to address the complex emotional and sexual labor strippers perform. The unwillingness of courts and legislators to take up the cause of strippers' employment rights reflects lawmakers' unwillingness to enter such a morally contested site of labor and exploitation. One can conceive this indifference as complicity with the widespread and unpunished rape, physical battery, and sexual assault that permeate the strip club. In sitting out this legal fight, lawmakers and judges demonstrate a lack of political will to protect members of the commercial sex industry, regardless of the fact that their work is legal, and thus ripe for regulation.

III. STRIPPERS AND THE FIRST AMENDMENT: RELUCTANCE TO REGULATE IN THE MIDST OF PROTECTIVE ZEAL FOR PUBLIC MORALITY

> To invoke the First Amendment to protect the activity involved in this case [stripping] trivializes and demeans that great Amendment.[118]

While the federal government has been reticent to protect strippers' rights, municipalities and state legislatures have energetically regulated strip clubs to protect communities from the perceived dangers of disease, property devaluation, community erosion, and crime. Erotic expression was the most litigated First Amendment issue in the mid to late 1990s.[119] Localities have enacted a plethora of zoning regulations, no-touch ordinances, anti-nudity statutes and licensing requirements to drive strip clubs out of business.[120] Entire handbooks have been created around regulations on adult

118. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 89 (1981) (Burger, C.J., dissenting).

119. Ross, *supra* note 23, at 249 (citing Clyde DeWitt, *Legal Commentary*, ADULT VIDEO NEWS, July 1995, at 112–17).

120. *See generally*, Kelly & Cooper, *supra* note 13; *see also* Judith Lynne Hanna, *Exotic Dance Adult Entertainment: A Guide for Planners and Policy-Makers*, 20 J. PLAN. LITERATURE 116, 131 (2005).

entertainment establishments.[121] Community battles have produced an amorphous body of Supreme Court jurisprudence concerning the relationship of free speech to the strip club. The dearth of legislation protecting workers, in stark contrast to heavy regulations protecting "community values," further illustrates the infusion of cultural disdain and fear of the stripper into legal regimes. Even when the government regulates strip clubs, regulations are often designed to protect society from the stripper, rather than to afford the stripper meaningful protection against sexual exploitation. This Section will present the First Amendment doctrine relating to nude dancing and then proceed to critiques of the methodology and logic that inform courts' decision-making. Then, it will examine the legal dialectic of the stripper as a threat to social order and community cohesion. Finally, this Section will survey a new wave of regulations on strip clubs that specifically focus on violence prevention.

A. First Amendment Doctrine for Sexually-Oriented Businesses

The Supreme Court first acknowledged that the First Amendment protected nude dancing as expressive speech in *Schad v. Borough of Mount Ephraim*.[122] From that point on, states could not limit expressive "erotic dance" without first identifying a compelling state interests in doing so. The level of scrutiny applied to state interests became the deciding factor in upholding a statute. Once the Court deemed erotic dancing a form of protected speech, any regulations directly obstructing erotic messages became "content-based," and thus triggered strict scrutiny.[123]

In contrast, "content-neutral" statutes were statutes that had the auxiliary effect of limiting the expression, but were not motivated by the expression.[124] These statutes were subjected to a lower level of scrutiny.[125] Far from the context of stripping, *United States v. O'Brien* concerned the act of burning a selective service registration card.[126] The Supreme Court held that

121. *See, e.g.*, Eric D. Kelly & Connie B. Cooper, *Everything You Always Wanted to Know About Regulating Sex Businesses, in* PLANNING ADVISORY SERVICE REPORTS 2000 (Am. Plan. Ass'n, Nos. 495–496, 2000).

122. *Schad*, 452 U.S. at 66 (relying on other Supreme Court decisions concerning distribution of obscene materials, topless dancing and nudity in theater performances to conclude that nude dancing "is not without its First Amendment protections from regulation").

123. *Schad*, 452 U.S. at 66–69.

124. Gregory Voshell, *Bachelor Parties Beware: The Third Circuit Grapples with Alcohol, Strip Clubs and the Constitutionality of Morality Legislation*, 52 VILL. L. REV. 1095, 1100 (2007).

125. Voshell, *supra* note 124, at 1103, (citing United States v. O'Brien, 391 U.S. 367, 373–75 (1968)).

126. *O'Brien*, 391 U.S. at 370.

the military was permitted to limit the conduct of burning a draft card to serve government interests in raising and maintaining an army.[127] The *O'Brien* inquiry asked 1) whether the regulation was within the constitutional power of the government, 2) whether it furthered a substantial interest of the government, 3) if the interest was unrelated to the suppression of free expression, and 4) if the incidental restriction was no greater than that which was essential to the furtherance of the government interest.[128]

The Supreme Court later applied this test specifically to the stripping context in *Barnes v. Glen Theatre, Inc.*, where the Court examined whether conduct regulations on strippers' table and lap dances were constitutional. Strippers at the Glen Theatre were prohibited from absolute nudity and were required to wear G-strings and pasties at all times of employment. Justice Rehnquist found the anti-nudity requirement of G-strings and pasties for nude dancers sufficiently tailored to the state interest of preserving public morality to meet the *O'Brien* standard of scrutiny.[129] Justice Rehnquist further stated that while the First Amendment protected nude dancing, it was at the "outer perimeters" of its protection.[130] This analysis led to a chasm in the Court, because some Justices argued that labeling public morality a "state interest" was akin to regulating the content of the erotic message.[131] Justice Souter advanced a concurring theory citing "secondary effects"—that is, effects emanating from the general presence of the strip club in the neighborhood—as the reason the state had a legitimate interest in imposing regulations.[132]

The Court relied on Justice Souter's secondary effects theory in *City of Renton v. Playtime Theatres, Inc.*,[133] which created the foundation for an analytical inquiry that diverged from *Barnes*' value-laden approach.[134] In this case, the court upheld an ordinance prohibiting any adult entertainment sites within 1,000 feet of any residential zone, church, park or school. This ordinance effectively prevented owners of the movie theater from exhibiting pornographic films.[135] The Court found that the ordinance was a

127. *O'Brien*, 391 U.S. at 377.

128. Voshell, *supra* note 124, at 1100.

129. *Id.* (citing *Barnes*, 501 U.S. at 567–72).

130. *Barnes*, 501 U.S. at 566.

131. *Barnes*, 501 U.S. 560, 592–93 (1991) (White, J., dissenting).

132. *Barnes*, 501 U.S. 560, 584 (1991) (Souter, J., concurring) (arguing that *O'Brien*'s requirement that the state present a substantial interest in enforcing a regulation on free speech could be fulfilled by articulating a substantial interest in combatting the "negative secondary effects associated with" strip clubs).

133. Voshell, *supra* note 124, at 1103–04 (citing City of Renton v. Playtime Theatre, Inc., 475 U.S. 41 (1986)).

134. *Id.* at 1101.

135. *Renton*, 457 U.S. at 48.

time, manner, and place restriction rather than an outright ban on adult entertainment and that because it targeted the secondary effects of adult entertainment—namely, the degrading of Renton's quality of "urban life"—the municipality was justified in regulating the theater out of existence.[136] The ordinance was deemed to survive First Amendment challenges because its purpose was to fight crime and protect business and property values, rather than to impede clubs from distributing their erotic or pornographic messages.[137] In effect, the ruling permitted municipalities to reframe any mild disturbance that an adult entertainment franchise—including a strip club—could conjecturally cause, as a secondary effect. This analysis flew in the face of the fact that such restrictions would effectively eliminate strippers' ability to engage in what had previously been found to be protected speech.[138]

In *City of Erie v. Pap's A.M.*, the Court expanded the *O'Brien* test to examine the constitutionality of an anti-nudity statute. The municipality of Erie, Pennsylvania cleverly passed a statute making public nudity a summary offense, thereby preventing the respondent corporation from operating "Kandyland," a strip club.[139] Even though the Pennsylvania Supreme Court struck down the statute as an unconstitutional content-based ban, the U.S. Supreme Court reversed the decision and found that the statute passed constitutional muster.[140] Rather than focusing on *Barnes*' public morality reasoning, it focused instead on the less controversial secondary effects of the strip club to justify the substantial state interest at stake.[141] The court adopted Justice Souter's secondary effects rationale and collapsed it into the *O'Brien* inquiry to create a hybrid test.[142] As Justice Souter had proposed in his concurring opinion in *Renton*, municipalities could show that strip clubs produced negative secondary effects to satisfy *O'Brien*'s requirement that the

136. *Renton*, 457 U.S. at 48 (holding that "the ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally '[protect] and [preserve] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views"); Voshell, *supra* note 124, at 1103.

137. *Renton*, 457 U.S. at 48; *see* Eckert, *supra* note 9, at 242.

138. *Renton*, 457 U.S. at 51–52 (the Court approved the city's conjectural application of secondary effects by explaining that "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses").

139. City of Erie v. Pap's A.M., 529 U.S. 277, 283–84 (2000) (plurality opinion).

140. *Pap's A.M.*, 529 U.S. at 290.

141. *See* Voshell, *supra* note 124, at 1104–05.

142. *Id.*

government present a substantial state interest in regulating expressive speech in the strip clubs.

The secondary effects doctrine laid out in Justice Souter's concurring opinion and applied by the majority in *Erie* was reaffirmed in *City of Los Angeles v. Alameda Books*, where the Supreme Court upheld another time, manner, and place ordinance. Los Angeles passed a law prohibiting strip clubs from operating in proximity to schools and parks based on a study performed twenty-five years earlier that found that neighborhoods with strip clubs had higher crime rates.[143] Notably, in *Alameda Books*, the court tightened the *Renton* inquiry by stating that a municipality must demonstrate concrete empirical evidence of secondary effects in a specific jurisdiction in order to establish a legitimate government interest.[144] However, given that the Court permitted such an outdated report to form the basis of Los Angeles' restrictions on strip clubs, the heightened standard was somewhat questionable.

Lower courts have applied the above line of cases either through a rote application of *Renton's* majority opinion or by adopting a hybrid analysis incorporating secondary effects into the *O'Brien* test.[145] The cases have solidified a general baseline assumption by courts that statutes regulating nude dancing establishments do not infringe on speech when they do not ban stripping outright and a municipality demonstrates a substantial state interest that requires regulations.[146] However, courts diverge when determining whether the state interest justifying the regulation in a particular case is adequate.[147] While some courts require empirical documentation of negative secondary effects to uphold restrictions on strip clubs, others presuppose that strip clubs derogate community standards and are in any circumstance subject to strict regulations.

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143. City of Los Angeles v. Alameda Books, 535 U.S. 425, 429–30, 436–37 (2002).

144. Bryant Paul, Daniel Linz & Bradley Shafer, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL'Y 355, 365 (citing *Pap's A.M.*, 529 U.S. at 313 (Souter, J. concurring in part and dissenting in part)).

145. Voshell, *supra* note 124, at 1106.

146. *Id.* (stating that "circuit courts are either (1) applying *Renton* and its progeny; or (2) applying some combination of *Renton* and *O'Brien* in light of Justice Souter's plurality opinion in *Pap's A.M.*").

147. *Id.* at 1106–08 nn.68–82 (explaining in detail that while the Seventh Circuit has applied the *Renton* majority's analysis, it appears that the Third, Fourth, Fifth, Sixth, and Eight Circuits have adopted the secondary effects doctrine laid out by Justice Souter in the *Renton* concurrence and codified by *Pap's A.M.*).

B. Secondary Effects Studies: Methodological Inaccuracies

While courts differ in how they scrutinize the legitimacy of state interests, localities consistently advance secondary effects arguments to trigger a more lenient standard of scrutiny for regulations. However, secondary effects doctrine is mired in methodological inconsistencies and often fails to meaningfully address the full breadth of harms a strip club can bring to a community—not least of all, the abuse and exploitation of its workers.

Secondary effects studies have been roundly criticized for lacking convincing evidentiary support.[148] Critics have demonstrated that studies on secondary effects have been methodologically inconsistent and recycled in communities with stark differences to the community in which the original study was conducted.[149] For example, courts often permit localities to introduce data that is decades old and from across the country.[150] Courts have not articulated a clear standard for evidentiary support, thereby permitting a range of unreliable information based on subjective surveys, out of town appraisals, and outdated crime information to guide legal analysis.[151] In a critical study of the top ten secondary effects studies used by localities to justify regulation of sexually oriented businesses, social scientists found that most of the studies did not fulfill "professional standards of scientific inquiry" and "basic assumptions necessary to calculate an error rate."[152]

Further, there has been criticism within the Supreme Court regarding the efficacy of the preventive regulations imposed. For example, many ordinances require G-strings and pasties for nude dancers, regardless of whether they perform lap dances or stage dances.[153] Justice Souter[154] and Justice Ste-

148. Paul et al., *supra* note 144, at 366–76.

149. *Id.*

150. *See, e.g.*, Ben's Bar, Inc. v. Vill. of Somerset, 316 F.3d 702, 725 (7th Cir. 2003); *see also* Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 287, 317, 323 (2003–2004).

151. Calvert & Richards, *supra* note 150, at 323 ("The old adage about comparing apples and oranges is particularly relevant in the secondary effects context because many courts allow municipalities to consider studies and other evidence arising from far different circumstances."); Paul et al., *supra* note 144, at 391 ("the courts may be best served by turning to standards laid out in *Daubert* for the admissibility of scientific evidence. The application of such standards, bolstered by Justice Souter's opinion in *Pap's*, may force the courts to reject the studies previously relied upon as evidence of negative secondary effects, and require new, more methodologically sound, studies to demonstrate a compelling government interest in regulating nudity.").

152. Paul et al., *supra* note 144, at 374.

153. *See* Adler, *supra* note 50, at 1127–29.

154. City of Erie v. Pap's A.M., 529 U.S. 277, 319 (2000).

vens[155] have openly questioned the purported potential such scanty regulations have to ameliorate secondary effects caused by completely nude dancing. Even Justice Scalia, while concurring in *Pap's A.M.*, wrote, "I am highly skeptical, to the tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease."[156]

Arguments attacking both the existence of secondary effects and the efficacy of regulations purporting to control them *expose* such regulations as a front for content-based attempts to shut down strip clubs altogether.[157] However, courts have embraced faulty secondary effects studies in order to preserve a route through which municipalities can move strip clubs—and the strippers they employ—to the margins of their communities. At the same time, courts and municipalities have largely ignored the labor abuses and sexual violence that occurs in the strip clubs, which is arguably the most salient justification for state regulation. The continued use of such legal reasoning—which ignores the harms strippers experience and instead furthers strippers' marginalization—greatly undermines arguments that legalization of prostitution will lead to successful integration of members of the commercial sex trade into their communities.

C. A Feminist Critique of First Amendment Analyses

Aside from the methodological weaknesses of the secondary effects doctrine, its ideological underpinnings—and the harmful effects it ignores—have come under substantial criticism from feminist legal scholars. These critics argue that the secondary effects doctrine's focus on property devaluation, prostitution and public health gloss over the most pervasive and dangerous harm of all—harm to women inside the club.[158] While shoppers' unwillingness to buy on the same street as a strip club motivates lawmakers' regulation of strip clubs, women's vulnerability to harassment and assault inside the clubs does not.

Even more problematically, legal analysis places the stripper at the heart of the threat to the community, rather than identifying her as a key member of the community under threat. For example, municipalities enact "no-touch ordinances" regulating the distance between a stripper and her customer out of a desire to control the spread of disease and illicit prostitution, rather than to protect the stripper from unwanted touching or sexual

155. City of Erie v. Pap's A.M., 529 U.S. 277, 317–23 (Stevens, J., dissenting).
156. City of Erie v. Pap's A.M., 529 U.S. 277, 310 (Scalia, J., concurring).
157. Calvert & Richards, *supra* note 150, at 290, 301.
158. Paul et al., *supra* note 144, at 374; Eckert, *supra* note 9, at 266.

assault.[159] Much of the justification around regulating the distance between strippers and their customers is couched in "public health" language, thus envisaging the transaction as tainted, unsafe, and diseased.[160] Amy Adler criticizes doctrinal analysis because it "unwittingly replicates a deeper cultural trope in which the nude woman's body stands for danger, debasement, crime, violence, disease, a threat to the institution of heterosexuality, and even death."[161] In identifying secondary effects, courts often fail to state explicitly that the increases in crime surrounding a strip club are crimes of gender-based violence[162] and that strippers often experience coercion into prostitution due to unfair labor practices. In other words, gender is a forgotten—or forbidden—word in First Amendment analysis of the harmful effects of the strip club.[163]

One possible reason for this analytical omission is that gender-based harms might be construed as primary rather than secondary effects. If lawmakers argued that the message communicated by the dance itself was the source of gender-based violence in the club, then that could potentially implicate the erotic content of the stripper's performance and trigger strict scrutiny.[164] Lawmakers could assert that the state's interest in protecting women from gender-based violence should surmount even the highest form of scrutiny reserved for content-based regulations. However, the Supreme Court has never meaningfully addressed whether gender-based violence in strip clubs is a negative secondary effect, let alone whether regulations to prevent such violence would constitute a compelling state interest.

Legislators and courts are not willing to wash their hands entirely of the delicate problem of strip clubs. Where the lines of public morality are easy to draw, they are prepared to step in as protectors of the innocent constituents who suffer from the strip club's presence in their neighborhoods. Indeed, innovative legal arguments have developed justifying economic and geographic marginalization of sexually oriented businesses. Beyond the fact that most of these regulations offer little protective value to strippers, some argue their sole purpose is to drive business away from strip clubs.[165] If legislatures achieve this goal, regulations exert further economic

159. *See generally* Eckert, *supra* note 9 at 264; Adler, *supra* note 50, at 1127.

160. Eckert, *supra* note 9, at 263–64.

161. Adler, *supra* note 50, at 1127.

162. *See* Jeffreys, *supra* note 6, at 99 (citing STRIP MAGAZINE, which warns "the odds of being stalked, mugged and attached (sic) are on increase and you must always keep your guard up").

163. Eckert, *supra* note 9, at 252.

164. *Id.* at 263.

165. Calvert, *supra* note 150, at 329.

strain on the stripper as business becomes slower and tips become even more difficult to collect.[166]

Where local lawmakers have not had to disrupt the baseline assumption that strippers are undeserving of protection, they have vigorously pushed to regulate the tawdry world of the strip club. Consequently, efforts to regulate strip clubs elide meaningful analyses of the gender-based indignities and inequities of strip clubs. As Amy Adler notes, this enables First Amendment jurisprudence to "paradoxically picture the stripper as infectious and inconsequential all at once."[167] This conception has made government regulation more of a hindrance than a help to the stripper's social predicament.

D. Recent Developments in First Amendment Doctrine

In recent years, state rape crisis coalitions have used the secondary effects doctrine to propose taxes on strip clubs to fund rape crisis centers. These taxes have been controversially labeled "pole taxes"[168] or "skin taxes"[169] and ignited a public debate around whether the strip club industry should take responsibility for contributing to sexual exploitation.[170] Notably, efforts by the rape crisis community to pass such taxes have elevated the public conversation around the rights of strippers and their right to be free from gender-based violence like all members of their community.

This string of legislation began in 2007, when the Texas Association Against Sexual Assault proposed the Sexual Oriented Business Fee Act, which for the first time proposed a five dollar head tax on strip clubs that served alcohol, the proceeds of which were primarily used to establish a

166. *See* Majic, *supra* note 41, at 24–25. Majic points out Las Vegas clubs increase supply of strippers to heighten competition between strippers for tips. Logically, it follows that decreased demand (caused by zoning ordinances that make clubs less accessible) would cause heightened competition and thinner distribution of tips, making strippers even more economically vulnerable.

167. Adler, *supra* note 153, at 1147.

168. Dahleen Glanton, *Parsing the "pole tax,"* CHI. TRIB., Aug. 28, 2012, *available at* http://articles.chicagotribune.com/2012-08-28/news/ct-talk-glanton-rape-20120828_1_pole-tax-strip-clubs-strip-club-owners.

169. Ray Long & Alissa Groeninger, *Illinois strip clubs could face $5 "skin tax,"* CHI. TRIB., Feb. 16, 2012, *available at* http://articles.chicagotribune.com/2012-02-16/news/ct-met-illinois-stripper-tax-20120216_1_pole-tax-strip-clubs-d-olympia-fields.

170. *Is Illinois Strip Club Tax Funding Rape Crisis Centers Fair?*, HUFFINGTON POST, Aug. 24, 2012, *available at* http://www.huffingtonpost.com/2012/08/24/illinois-strip-club-tax_n_1829040.html.

sexual assault program fund.[171] Advocates pushed the bill to fund the incredible need for increased resources in the rape crisis community.[172]

The bill ignited uproar in the entertainment industry, and the Texas Entertainment Association (TEA) sued state officials after the bill went into effect.[173] The TEA argued that the bill unconstitutionally infringed First Amendment speech.[174] The Texas Supreme Court held that the bill was constitutional, focusing on the fact that the tax was not intended to limit the expressive element of nude dancing, but to prevent the negative secondary effects of sexual harm that arose from the combination of alcohol and live adult entertainment.[175] The TEA appealed to the Supreme Court, which denied writ of certiorari.[176]

Since the Supreme Court's denial of certiorari, Illinois has passed a similar law, integrating some of the Texas Supreme Court's secondary effects arguments directly into the body of its statute.[177] In its legislative findings, the law states explicitly that "[i]t is the intent of the General Assembly to ameliorate the negative secondary effects associated with the combination of sexually oriented businesses and alcohol so as to promote the health, safety and welfare of the citizens of Illinois."[178] In a press conference introducing the Illinois bill, State Senator Toi Hutchinson stated: "We all need to be working toward a society that understands violence against women is inappropriate in all circumstances, and all times."[179] Hutchinson's statement powerfully acknowledged, for possibly the first time by a public official, that strippers' dignity and safety was as important as the safety of all women who experience gender inequality and the violence that arises from it.[180]

Other states have introduced or strategized about introducing bills similar to those of Texas and Illinois, continuing to innovate on legislative language to ensure strippers receive protection from industry backlash

171. H.B. 1751, 80th Tex. Leg. §§ 47.001–47.004 (Tex. 2007), *available at* http://www.legis.state.tx.us/tlodocs/80R/billtext/html/HB01751F.htm.

172. *Id.*

173. Morgan Smith, *High Court Approves "Pole Tax" on Strip Clubs*, TEX. TRIB. (Aug. 26, 2011), *available at* http://www.texastribune.org/texas-taxes/strip-club-fee/high-court-approves-pole-tax-strip-clubs/.

174. Combs v. Tex. Entm't Ass'n, Inc., 347 S.W.3d 277, 279 (Tex. 2011).

175. *Combs*, 347 S.W.3d at 287–88.

176. Tex. Entm't Ass'n v. Combs, 2012 U.S. LEXIS 1015 (2012).

177. *See, e.g.*, 30 ILL. COMP. STAT. 175/3 (2012).

178. *Id.*

179. Ray Long & Alissa Groeninger, *Illinois strip clubs could face $5 'skin tax'*, CHI. TRIB., (Feb. 16, 2012), http://articles.chicagotribune.com/2012-02-16/news/ct-met-illinois-stripper-tax-20120216_1_pole-tax-strip-clubs-d-olympia-fields

180. The Pole Tax, workshop at Revive, Rethink, Reclaim! National Sexual Assault Conference (Aug. 22, 2012) (speakers included Torie Camp and Polly Poskin).

against taxation.[181] In California, for example, legislatures introduced a bill that explicitly prohibited strip clubs from "reimbursing" the tax from their employees, attempting to prevent further exploitation of strippers through the collection of such a tax.[182] The bill died in the Assembly's Appropriations Committee.[183]

While these developments demonstrate a growing sensitivity that strippers are victims, rather than agents, of the negative secondary effects of strip clubs, their use to date remains limited to raising taxes, which does not directly ameliorate the labor conditions of strippers or prevent ongoing attempts by municipalities to push strippers to the outskirts of their communities. None of the arguments put forth to advance the passage of strip club taxes has been utilized to impose regulatory requirements on strip club owners to improve safety measures or labor conditions within their establishments. While the rhetoric of gender-based violence in the pole tax debate has raised awareness about the dangers facing strippers on a daily basis, it has not yet been parlayed into meaningful reforms to address labor practices that exploit strippers, and draconian zoning ordinances that enable such exploitation to persist.

IV. THE STRIPPER'S BODY AS A SITE OF ENTANGLEMENT: IMPLICATIONS FOR LEGALIZED SEX WORK

Strippers inhabit an artificially constrained legal universe bound by underlying contradictions in cultural norms. The strip club is rife with exploitation when strippers' unprotected employment status enables employers to create arbitrary wage schemes and take a sizeable portion of strippers' wages while denying them basic safety and anti-discrimination protections. Given the intimacy of the labor involved, this economic pressure from strippers' bosses distorts the consensual nature of stripping and further undermines the rights of strippers as workers. Lack of public will to regulate this relationship denies strippers positive rights to fair wages, regulated hours and freedom to organize, as courts incorrectly define their legal relationship to strip club owners. Legislative reticence to intervene on behalf of strippers emblemizes public disdain of the stripper and reinforces the notion that stripping is not work worthy of legal protection.

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181. *Id. See also* Ellen Yin-Wycoff, *Illinois Passes Strip Club Tax*, CALIFORNIA COALITION AGAINST SEXUAL ASSAULT (Aug. 23, 2012), *available at* http://calcasa.org/calcasa/illinois-passes-strip-club-tax/.

182. The Pole Tax, *supra* note 180; *see also* A.B. 2441 § 3 (Cal. Leg. 2011–2012); Yin-Wycoff, *supra* note 181.

183. Yin-Wycoff, *supra* note 181.

At the same time, the government sees stripping as a market good worth protecting. The First Amendment has been invoked to safeguard erotic expression,[184] which has been placed in conceptual tension with secondary injuries to surrounding communities. Harm suffered by strippers has never meaningfully fallen into the ambit of government interests sufficient to regulate strip clubs. Thus, the main impact that strippers experience from local restrictions is a drop in business, which raises the financial stakes and intensifies the economic coercion they already experience. These regulations can thus be conceived as truncating strippers' negative rights against the government to make independent choices regarding their livelihood.

The twin pressures of morality-based, secondary effects regulation and economic deregulation of the employment relationship situates the stripper in a vacuum of legal protection. Strippers inhabit a high-risk market providing no corresponding state protection, wherein they are coerced to perform services they otherwise would not, outside of the view of the community at large and with no legal recourse to address resulting harms. Unfortunately, the morass of legislation and regulation entangling the stripper obscures the legal vacuum. Few would surmise that an industry so laden with restrictions and licensing rules could evade basic legal requirements for a fair and safe workplace.

The stripper's predicament raises serious questions about the legalization of sex work in other industries. One of the most salient arguments in favor of legalization of prostitution is that workers could obtain greater protection through government regulation and monitoring of abuses against individuals in the sex trade.[185] Advocates argue that regulated "sex work" would lift prostitution out of the underworld of organized crime, bring a veneer of professionalism to the practice, lead to government funding for disease and violence prevention, foster better allocation of scarce law enforcement resources, and generally alleviate the stigma and attendant state negligence of prostitutes' well-being and safety.[186] So, too, can the American stripper's experience be seen as a failed experiment in legalization: courts and legislators have made doctrinal contortions to avoid protecting strippers from the systematic exploitation endemic to the industry.

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184. For an interesting discussion of the Supreme Court's euphemistic word choice of "erotic" expression, see Eckert, *supra* note 9, 256–57. Eckert discusses the conceptual difference between erotica, derived from the Green root *eros* and indicating consensual and equal love, and pornography, whose etymological root is *porne*, and which refers to a harlot, prostitute or female captive.

185. *See generally* Chrisje Brants, *The Fine Art of Regulated Tolerance: Prostitution in Amsterdam*, 25 J.L. & Soc'y 621 (1998); John F. Decker, Prostitution: Regulation and Control (1979).

186. *See generally* Decker, *supra* note 185.

This begs the question: Would legalizing prostitution really afford greater legal protection? What if legalizing prostitution gives the commercial sex industry a false veneer of legitimacy that obscures the accepted exploitative practices that occur beneath its surface? It is highly unlikely that individuals engaged in prostitution would be seen as employees even if they worked for brothels or organized escort services. It is likely that such institutions, if legalized, would receive similar treatment to strip clubs, forcing prostituted people into inequitable contracts and constructing a legal relationship that preempts employer liability. Further, considering that prostitution is one of the central "secondary effects" that justifies regulating strip clubs, there is little doubt that a flood of regulatory restrictions would be placed on a legalized prostitution industry. Whether people in prostitution would fare better than strippers under such regulations is unclear; however, the stripper's experience suggests that government regulations on prostitution will be motivated by vice control, rather than a meaningful response to sexual exploitation.

In a moral universe where the commercial sex industry, whether stripping or prostitution, is simply tolerated, legal determinations will lack the legitimacy necessary to enforce meaningful labor protections. Thus, advocates must raise awareness about the stripper's work as work, rather than as a deviant social activity conducted at the margins of social order. There are serious moral problems intrinsic to the strip club, not least of all that women's bodies are sold for money, sexual subordination is legitimized as a market good, and gender inequality is reinforced through imbalances of power. Ignoring these abuses compounds the deep-seated gender, class and race inequalities that lead women to the commercial sex industry in the first place.

A number of reforms have potential to acknowledge the social realities of the stripper without legitimizing the abuses and indignities of stripping. First of all, mandating that strippers who qualify under prevailing legal definitions be treated as employees, rather than independent contractors, for purposes of the FLSA, Title VII, the NLRA, and other state and federal labor statutes would help alleviate current abusive practices in the strip club.[187] One successful method of implementing such a reform is creating employee misclassification statutes that penalize employers for listing employees as independent contractors in order to evade their legal obligations. New Jersey, Michigan, Colorado, Pennsylvania, Illinois, Maryland, and New York have passed misclassification statutes protecting specific industries, and federal legislation is pending to penalize misclassification of em-

187. Fischer, *supra* note 10, at 552–53.

ployees under an amendment to the FLSA.[188] Conferring employee status on strippers who meet the requirements of the economic realities test provides strippers with desperately needed legal protections and drives up the cost of business for club owners, forcing them to engage in serious restructuring of current labor practices. It also eliminates the most egregious forms of abuse from the customer's menu of options. Secondly, courts and legislatures should work to eradicate exploitative tip-out and commission models that tether workers to indentured sexual servitude to their employer, limiting their freedom to enter and exit their employment at-will.

In the context of First Amendment jurisprudence, localities and individuals could enact regulations that impose criminal and civil sanctions on abusive customers and employers. Rigorous anti-harassment policies for strippers could be incorporated into licensing requirements for strip clubs. While these types of protections might be deemed content-based, courts have the purview to find rape prevention and bodily protection of strippers a substantial state interest that passes muster under even the most rigorous scrutiny. At the very least, communities could engage in meaningful public dialogue about the harms suffered by those inside the strip club with the most limited amount of choice to be there. The pole tax debate has helped to initiate such dialogue, but the next step should be to use these newer, more sensitive explications of strip clubs' negative secondary effects to promote stricter regulation of the labor practices inside the clubs. Finally, a sea change in communal attitudes can only occur in conjunction with heightened organizing protections for strippers, so that strippers can communicate their experiences to each other and to the larger community without fear of employer retaliation.

The fact that these measures have not been even remotely broached in public discourse belies the claim that legalization of sex work fluidly leads to protection of sex workers. Until these types of reforms are meaningfully addressed in an already legalized sex industry, advocates for legalization of prostitution should reconsider the purported benefits of "legitimizing" sex work through legal recognition.

CONCLUSION

Workers in many industries are paid to make others feel "good," and that duty is often infused with sexual expectations.[189] The stripper is situated on a spectrum of sexual exploitation, which includes the prostitute, but can and has also encompassed the waitress, the stewardess, the hostess, and

188. Employee Misclassification Prevention Act, H.R. 3178, 112th Cong. (2011).

189. *See* McGinley, *supra* note 20, at 91.

other members of the service industry. Sex is seen as a legitimate market good to be purchased and sold. To fail to recognize the stripper on a continuum of sexualized labor is to cast out the stripper using capricious distinctions.[190] Legal discourse has the ability to meaningfully explore the problems surrounding commoditized sexual labor, but in the context of the strip club, courts have remained woefully silent. This silence permits the market demand for sexual exploitation and explains its persistence.

The presence of the legalized strip club is a reflection upon society as a whole. It cannot be ignored or explained away through legal contrivance. Mistreatment of the stripper is a manifestation of social entitlement to satiate desires for control and sexual subordination at the proper price. To divorce a "community" from the strip club customers who comprise it amounts to a collective disavowal of social responsibility. Ignoring the legal and economic dilemmas of the stripper creates the most significant erosion of all to a community: it reinforces the notion that a person's dignity can be bought and sold. Workers everywhere, clothed or unclothed, "legitimate" or cast aside, suffer as a result. To avert this danger, lawmakers and courts must extricate the stripper from the troubled dialectics of vice regulation and labor deregulation and vindicate the legitimate claims to safety and bodily integrity that she rightfully deserves. ♣

190. *Id.* at 95.