THE PURGATORY OF POLE DANCING

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I. INTRODUCTION

Unlike the burlesque theaters of the early twentieth century that were hidden among impoverished pockets of industrial cities, the new face of exotic dancing is glamorized in mainstream culture. This phenomenon of "stripper chic" is visible in a variety of contexts, as evidenced by many celebrities publicly proclaiming their love of pole-dancing.[1] The "S-Factor Workout," a cardio aerobic dance routine, and its creator Sheila Kelley have garnered all sorts of publicity, and have attracted fans like Martha Stewart, who displayed her S-Factor stripper moves on television.[2] Hip hop artist T-Pain's song "I'm N Luv (Wit a Stripper)," ranked on Billboard's Hot 100 list for nine weeks in 2006.[3]

1. Sara Hammel, *Meet Hollywood's Pole-Dancing Guru: Actress Sheila Kelley,* PEOPLE, Jan. 7, 2010, *available at* http://www.people.com/people/article/0,,20334488,00.html; *see also* Allison Fensterstock, *Stripper Chic: A Review Essay, in* FLESH FOR FANTASY 189 (R. Danielle Egan, Katherine Frank, Merri Lisa Johnson, eds., 2006).

2. Cristina Everett, *Martha Stewart channels her inner stripper as she pole dances to Sheila Kelley's S Factor workout,* NEW YORK DAILY NEWS, Jan. 20, 2010, http://www.nydailynews.com/gossip/2010/01/20/2010-01-20_martha_stewart_channels_her_inner_stripper_as_she_pole_dances_to_sheila_kelleys_.html.

3. Billboard Hot 100 Music Hits (Apr. 6, 2006) http://www.billboard.com/charts/hot-100?chartDate=2006-04-08#/song/t-pain-featuring-mike-jones/i-m-n-luv-

Additionally, local strip clubs regularly host amateur nights where young professionals and college students alike whirl around the pole. Even a literary trend of "stripper-lit" has become increasingly popular.[4]

However, beneath the mainstream depiction of exotic dancing lies a far more conflicted reality:

> A popular face of stripping, as done by celebrities, amateurs, and new burlesque performers, hides another side of the industry, one that is far less glamorous. While stripping may be constructed as fun, mainstream entertainment, it depends on minimizing perceptions of riskiness and deviance in other less-visible contexts. This dual perception amounts to a risky shell game. Under one shell, there are the possibilities for women's sexual self-expression. Under another shell, there are dangerous working conditions for women that are fostered by men's aggression and violence. The shell game conditions mean that one is never certain which possibilities will win. But the rules of gambling dictate the house almost always wins. The question is, who controls the house?[5]

As Professor Kim Price-Glynn points out, the real world of exotic dancing can be a vehicle for self-expression, yet it can also be a risky environment. In Price-Glynn's parlance, I contend that strip club owners control the house, and that they incorporate existing First Amendment and employment law into the house rules to serve their own economic interests.

I argue that current First Amendment jurisprudence and employment laws work together to maximize and perpetuate the oppressive dynamics of the exotic dancing industry because dancers are unable to access the benefits of either body of law. While there has long been a lively feminist debate regarding the sex industry generally,[6] this article is not concerned with whether the

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wit-a-stripper/7717912 (last visited May 12, 2011) (one of the first ballads to focus exclusively on an exotic dancer).

4. *See, e.g.*, KATHERINE LIEPE-LEVINSON, STRIP SHOW: PERFORMANCES OF GENDER AND DESIRE (2002); BRENDA FOLEY, UNDRESSED FOR SUCCESS: BEAUTY CONTESTANTS AND EXOTIC DANCERS AS MERCHANTS OF MORALITY (2005); RACHEL SHTEIR, STRIPTEASE: THE UNTOLD HISTORY OF THE GIRLIE SHOW (2004). The term "stripper-lit" refers primarily to recent books regarding the history and present industry of exotic dancing, ranging in genre from autobiographies to empirical research.

5. KIM PRICE-GLYNN, STRIP CLUB: GENDER, POWER, AND SEX WORK 37 (2010).

6. *See generally* CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS (2005); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); *see also* FEMINISM AND PORNOGRAPHY (Drucilla Cornell, ed. 2000) [collecting works]; *Cf.* Clay Calvert and Robert D. Richards, *Porn in Their*

industry is itself empowering or degrading to women. Rather, in this paper, I intend to make points that will be relevant to both sides of the debate. In addition to the diversity of individual dancers, the forms and fora of exotic dancing are extremely diverse, and result in different experiences.[7] Exotic dancers themselves report varied responses to their work: some find it thrilling, others find it miserable, but most frequently, dancers' perceptions vacillate daily, or even hourly. Taking for granted that the profession of exotic dancing entails both empowering and degrading aspects, I focus on the legal treatment of exotic dancing, and how the current law adversely affects dancers. I have limited my discussion to particular types of strip clubs and base my references to the dynamics or conditions of these establishments upon sociological studies conducted by several experienced researchers.[8]

Section II of this paper explores some paradoxes that plague the exotic dancing industry and the effects these paradoxes have on the dancers. In Section III, I argue that the Supreme Court's treatment of exotic dancing relegates dancers to an inferior position, such that they are "speakers" within the meaning of the First Amendment, but are without the respect accorded to those who are more politically oriented. Further, I argue that the Court's "secondary effects" jurisprudence effectively dismisses and impugns exotic dancers by excluding them from the general public whose welfare is a proper concern of police power and by grouping the dancers together with the "societal ills" the government seeks to eradicate. As a result of these two trends, dancers are not only denied the benefits of being expressive "speakers," but they are also accused of facilitating and perpetuating the adverse secondary effects associated with exotic dancing.

Section IV explores the current application of employment law to strip clubs and to exotic dancers themselves. Here, I contend that employment laws that could protect dancers from oppressive labor practices are largely unavailable and impracticable. Finally, in Section V, I argue that First Amend-

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Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture and the Mainstreaming of Adult Content, 9 VAND. J. ENT. & TECH. L. 255 (2006).

7. *See* MINDY S. BRADLEY-ENGEN, NAKED LIVES: INSIDE THE WORLDS OF EXOTIC DANCE 64-65 (2009); *see also* BERNADETTE BARTON, STRIPPED: INSIDE THE LIVES OF EXOTIC DANCERS 46 (2006).

8. *See* BRADLEY-ENGEN, *supra*, note 7 (published in 2009); PRICE-GLYNN, *supra*, note 5 (published in 2010); BARTON, *supra*, note 7 (published 2006).

ment and employment laws interact in such a way that prevents exotic dancers from benefitting from either body of law, and they work together to solidify and reinforce industry dynamics particularly unfavorable to the dancers.

Ultimately, I conclude that First Amendment and employment laws serve to perpetuate the oppressive aspects of the exotic dancing industry by relegating dancers to a marginalized space - a legal purgatory of sorts - where their interests are ignored in both bodies of law. As a result, strip clubs reap the lion's share of benefits in the current legal regime. Moreover, I conclude that, behind the glossy exterior of "stripper chic," the existing legal treatment of exotic dancers perpetuates an underlying societal stigma associated with the exotic dancing industry, to the detriment of the dancers themselves.

II. PARADOXES OF EXOTIC DANCING

The various forms of exotic dancing are incredibly diverse: for example, there are peep shows, internet videos, private parties, bachelor party performances, and nude and topless strip clubs.[9] Dancers themselves are very diverse, and are often classified not as individuals, but according to their employers and the fora in which they dance.[10] In this article, I will use the term "exotic dancers" to refer to women who work at strip clubs that offer nude and semi-nude dance performances.[11]

Even among strip clubs, there are remarkably different social worlds.[12] Albeit in different forms and degrees of nudity, most strip clubs offer nude or semi-nude stage performances, and

9. *See generally* Margot Rutman, *Exotic Dancers' Employment Law Regulations*, 8 TEMP. POL. & CIV. RTS. L. REV. 515, 521 (1999).

10. *Id.* at 521.

11. Although there are male exotic dancing establishments, the majority of strip clubs feature female dancers and the research regarding the male exotic dancing industry is scarce. It is possible that existing First Amendment and employment laws adversely affect male dancers in the same ways I argue plague female dancers, yet this conclusion is difficult to substantiate given the dearth of sociological research and case law applying current laws to male dancers.

12. *See* BRADLEY-ENGEN, *supra*, note 7, at 89. Professor Mindy S. Bradley-Engen, a sociologist and former exotic dancer, categorizes strip clubs into three categories according to their structural elements and subcultures: the hustle club, the show club and the social club. She concludes that the data:

> suggests that, although all strip clubs sell sexual arousal, there is substantial variation with regard to accomplishing this task. Variation in such features as management style, customer and dancer composition and turnover, method of money making, and formal and informal norms produce contextual differences in the perceptions and appropri-

many offer additional features like lap dances (private dances that involve contact with patrons in secluded areas of a club) and alcohol service, in accordance with state law and local ordinances.[13] Some strip clubs cater to a higher-class crowd, and regularly showcase the dancers in a pageant-like atmosphere, even encouraging the dancers to take pride in their performance skills and appearances.[14] Other clubs are less concerned with the quality of their featured dancers, and more focused on the quantity of private lap dances and alcoholic beverages sold.[15] These clubs emphasize sexual gratification, and operate more like a meat-market than a pageant.[16] Distinctions aside, the majority of strip clubs share the common attribute of vastly unequal bargaining power between dancers and club management.[17] Given the structural and cultural differences in various types of exotic dancing, I use the term "strip clubs" to refer to those exotic dancing establishments that offer stage performances and have a marked power imbalance between the dancers and club management.

In the following sections, I provide an overview of the paradoxical attributes that are inherent in strip clubs. I contend that the paradoxical foundations of the exotic dancing business put dancers in a double-bind that First Amendment and employment laws serve to confirm and reinforce.

A. *Incentives to Enter the Industry v. Stigma for Being There*

On the spectrum of sex industry work, exotic dancing falls somewhere between pornography, which is largely legal, and prostitution, which is illegal in all states but Nevada.[18] Because

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ate corresponding behavior associated with the definition of a dancer and the meaning of dancing.

13. *See* BRADLEY-ENGEN, *supra*, note 7, at 87-88.

14. *Id.* at 56-63, 87. Bradley-Engen refers to these clubs as "show clubs."

15. *Id.* at 87-88. Bradley-Engen refers to these clubs as "hustle clubs," because the emphasis is placed on hustling patrons to purchase drinks and private dances.

16. *Id.* at 90-91.

17. *See id.* at 51-68. According to Bradley-Engen, one notable exception is social clubs, which feature a socially-focused atmosphere, including billiard games and various activities, in addition to topless dancers, who often socialize with the patrons. She adds that there is greater interaction and negotiation between managers and dancers in social clubs than in other establishments that focus primarily on exotic dancing as the main attraction.

18. *See, e.g.*, Carrie Benson Fischer, *Employee Rights in Sex Work: The Struggle for Dancers' Rights as Employees*, 14 LAW & INEQ. 521, 527-528 (1996). Fischer argues that "[t]his legal ambivalence toward sex work is a reflection of society's ambivalence and discomfort with sex work. Sexually-oriented clubs, though legal, are viewed as subversive and subcultural. Society perceives women working as sex-

exotic dancing has been held to constitute expression protected by the First Amendment, it is legal, but the industry is heavily regulated.[19] Consequently, the legal status of exotic dancing forces dancers to tread lightly because one wrong move (for instance, touching a patron in a county that prohibits contact) could expose the dancer to criminal liability.[20]

Exotic dancing can be a lucrative endeavor, potentially paying very well for relatively few working hours. Without any professional training or education, dancers can earn more per hour than nurses or teachers, who must obtain the necessary credentials.[21] They also stand to make significant amounts of money (usually in gratuities) from conversing with patrons, performing table dances, and drinking freely.[22] Furthermore, some dancers enter the business because exotic dancing often provides flexibility, free time, and control, attributes that are especially important to single mothers, students, and artists.[23]

Along with the ostensible benefits of stripping, however, comes the societal stigma of working in the sex industry, and exotic dancers report experiencing frequent shame and discrimination.[24] Unlike female college students who bare their breasts on

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ual entertainers as 'bad girls,' yet simultaneously encourages women to enter into sex work through economic demand for the industry. This stereotyping creates a class of marginalized and forgotten women. Nude dancers become 'throwaway' women, who are dispensable and available for whimsical sexual access, rather than human beings with human needs." *Id.*

19. *See* PRICE-GLYNN, *supra,* note 5, at 40 ("Stripping often exists in a context of legal and social limbo: it is tolerated but constrained as a 'safe' form of sex work, as long as it is still constructed as a deviant activity.").

20. *See Rameses, Inc. v. County of Orange*, 481 F. Supp. 2d 1305, 1325 (M.D. Fla. 2007) (upholding an ordinance that makes it a crime "for an adult entertainment establishment worker to '[i]ntentionally touch the clothed or unclothes body of any customer' " in certain ways).

21. *See* PRICE-GLYNN, *supra,* note 5, at 39. In one particular club, Professor Price-Glynn found that "women's earnings in [the strip club] the Lion's Den are typically greater than those of other women's jobs, given the number of hours worked. Based on self-reported data from 2001 to 2002, strippers earned about $26,000 annually, with a range of over $60,000 to under $10,000, for an average of three working days a week (the range was two to six days with a mode of two days). By contrast, in female-dominated jobs like registered nursing and elementary school teaching, workers earned $38,158 and $35,204, respectively, for forty-hour weeks in 2000." She also points out that "[t]hese peculiarities of stripping place it in a contradictory position relative to other feminized jobs. It is both highly paid and low-prestige work, characteristics that do not typically go hand in hand." *Id.*

22. *See* BARTON, *supra*, note 7, at 43 ("The number-one thing that every dancer said she liked about dancing was the money.").

23. *Id.* at 44.

24. *Id.* at 77-82.

spring break for a *Girls Gone Wild* t-shirt, exotic dancers suffer from a powerful and constant stigma.[25] In an interview with Professor Price-Glynn, a strip club bartender named James said the following about exotic dancers: "If you're a girl going to college who needs extra money, it's not as bad. But if you've got a family, do you really want your kids growing up saying, 'Oh yeah, my mommy's a stripper!'"[26] According to Professor Price-Glynn, James, like many other male employees in strip clubs, "stigmatized stripping because it contradicts the value they associate with femininity. Drawing on their beliefs about gender, men located stripping in opposition to the roles women occupy as mothers and 'good girls.' "[27]

Incentivized by money and flexibility, many women enter the exotic dancing business only to assume a stigmatized identity that can shape their relationships with various people, from strangers to family, friends and employers.[28] As a result, a "don't ask, don't tell" philosophy tends to shroud the lives of exotic dancers, who frequently keep their experiences private.[29]

B. *Powerful Over Customers, Powerless With Club Management*

One curious paradox in the exotic dancing business is that dancers are expected to be skilled negotiators with patrons, yet

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25. PRICE-GLYNN, *supra,* note 5, at 64 (". . .The Lion's Den [strip club] and *Girls Gone Wild* productions act as masculine institutions – contexts in which both the positions and the processes are produced through gender inequalities and characterized by male dominance that yield hostility toward women. Despite these similarities, it is more culturally acceptable for women to strip for a t-shirt in a *Girls Gone Wild* video than to make a living stripping. Reflected in this flawed distinction is an uneasy mix of American titillation with a loathing of women and sex.").

26. *See id.* at 59; *see also* BARTON, *supra*, note 7, at 78 (explaining that a middle-class woman who quits exotic dancing is acceptable, whereas "marrying the job" is something else, "[s]omething that permanently stains the stigmatized individual.").

27. PRICE-GLYNN, *supra,* note 5, at 59; *see also* BARTON, *supra*, note 7, at 78. Barton notes that former dancers who performed before or during graduate school viewed dancing as a temporary stage from which they subsequently distanced themselves. One of Barton's interviewees named Morgan stopped dancing when she entered medical school, and although she didn't hide the fact that she was a dancer, it was clear that the experience was behind her. Similarly, another woman named Beatrice danced while she was graduate student at UC Berkeley, but explained that she stopped upon graduation because "it was time to leave behind her 'stripper phase.'" *Id.*

28. *See* BARTON, *supra*, note 7, at 76.

29. *See id.* at 79 (concluding that "[t]his silencing of one's experiences creates a lasting psychological imprint: it reinforces the dominant perspective that stripping is bad and that you are a bad person for doing it.").

silent and obedient employees with club management. Various types of strip clubs require exotic dancers to be persuasive negotiators with the patrons. In clubs that promote the quality and beauty of their performers, often called "show clubs," dancers exhibit power when negotiating with customers: "That is, although women perceive that they can be easily replaced by management, the portrayal of dancers as 'goddesses' as evidenced by club practices creates a perception of power over customers among dancers."[30] Similarly, in "hustle clubs," those that rely on the sale of lap dances as the primary source of revenue, dancers must personally persuade patrons to purchase private dances by using all sorts of techniques like conning, manipulation, and swindling.[31] Moreover, "[t]he club promotes using these techniques; women are encouraged by management to lie to customers, mislead them, or suggest to them that they will become sexually satisfied if they continue to spend money."[32]

Despite their skill with patrons, dancers often report having little, if any, power in negotiations with their employers. In both show and hustle clubs, dancers are often acutely aware that there are at least several other women lined up to take their jobs at any time. As a result, managers and owners are unwilling to negotiate with dancers, as it is far easier to fire a dancer who causes problems and to hire a new one in her place.[33] One dancer reflected, "We're a dime a dozen here. Jason [the manager] says that all the time. Like, if one girl [is] giving him shit, he'll put up with it, but only for a little while, and only if she's making the club a lot of money. Then he'll just fuckin' fire her."[34] Ultimately, the recurring pattern is that club managers simultaneously encourage dancers to be skilled and powerful negotiators

30. *See* BRADLEY-ENGEN, *supra*, note 7, at 63-64.

31. *Id.* at 39.

32. *Id.*

33. *Id.* at 42.

34. *See id.* at 60-61. Dancers' awareness that they are replaceable seems to be more *implicitly* understood in clubs that emphasize the quality of their dancers ("show clubs") and more *explicitly* communicated in clubs that rely on sales of private dances and drinks ("hustle clubs"). Based on her interviews and personal experience, Professor Bradley-Engen points out that "[d]ancers are aware that there are a number of other women who did not get hired and would eagerly take their jobs. Accordingly, they feel little bargaining power in relation to management expectations. Instead, they focus their energies on issues in which they do have power. . . . They cannot change the standards [or the conditions in which they work] yet they can change *themselves* in order to conform to the beauty or performance expectations and club norms." *Id.*

with patrons, yet tolerate no pushback when dancers have issues with the club or its policies. As a result, club policies create an atmosphere where exotic dancers are both "controlled and controlling."[35]

In sum, exotic dancers frequently report paradoxical experiences both on and off the job. They can earn significant amounts of money for relatively few working hours, but the stigma of sex industry employment keeps them quiet about their line of work. They are empowered vis-à-vis the customers, but are fully replaceable in the eyes of the management. In response to these contradictory dynamics, exotic dancers tend to keep silent about their jobs when talking to family and friends, and do not share their grievances with their employers. This pervading trend of silence sets the stage for the marginalization of dancers in both First Amendment and employment law.

III. First Amendment Jurisprudence

Exotic dancing – more specifically, nude dancing – is expressive activity protected by the First Amendment, but only marginally so. The Supreme Court has emphasized that nude dancing exists in the "outer ambit" of First Amendment protection, and consequently, because it is "low value" speech, state and local governments may regulate this activity as they see fit.[36] In this section, I argue that the Supreme Court's treatment of exotic dancing relegates individual dancers to a subordinated, "low-value" status, such that they are speakers within the meaning of the First Amendment, but are without the respect accorded to those who are more politically oriented. Thus, dancers cannot fully assume the role of "speaker" or "artist," which might minimize the stigma attached to their chosen profession. Further, I argue that the Court's secondary effects jurisprudence simultaneously dismisses and impugns exotic dancers by excluding them from the general public whose interests the government seeks to protect and by lumping the dancers with the societal ills the government attempts to combat. As a result of these two trends,

35. *Id.* at 64 (arguing that this is the result when "[c]lub policies both create an atmosphere in which dancers have little power relative to management and simultaneously promote the image of dancers as goddesses to customers").

36. Erwin Chemerinsky, Constitutional Law: Principles and Policies 1025 (4th ed. 2006) ("[T]here is a category of sexual speech that does not meet the test for obscenity and thus is protected by the First Amendment, but is deemed to be low value speech and thus the government has latitude to regulate such expression.").

dancers are not only denied the respect of being expressive "speakers," but they are also accused of facilitating and perpetuating the adverse secondary effects associated with nude dancing.

A. *Nude Dancing, Protected in the First Amendment's "Outer Ambit"*

1. Supreme Court Jurisprudence

In two key plurality opinions, The United States Supreme Court established that nude dancing, provided that it is not obscene, constitutes expressive conduct that is entitled to protection under the First Amendment.

a. Barnes v. Glen Theatre, Inc.

Prior to 1991, the Supreme Court had frequently addressed aspects of sexually oriented businesses,[37] but *Barnes v. Glen Theatre, Inc.* marked the Court's first experience with nude dancing.[38] In *Barnes,* a plurality of the Court upheld the constitutionality of an Indiana public indecency statute that effectively required exotic dancers to wear pasties and G-strings during their performances. Joined by Justices O'Connor and Kennedy, Chief Justice Rehnquist held that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."[39] He then applied the *O'Brien* test for content-neutral restrictions on symbolic speech, which entails the following elements: (1) the government is regulating pursuant to a Constitutional power; (2) the regulation furthers a substantial government interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the restriction on First Amendment rights is no greater than is essential to further the government's interest.[40] Applying this test, Justice Rehnquist concluded that incidental limitations on nude dancing were acceptable because "the public indecency statute furthers a substantial government interest in protecting order and morality."[41]

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37. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986).

38. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion).

39. *Id.* at 565-566.

40. *Id.* at 567 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

41. *Id.* at 569 (noting that protecting morality and public decency was within the state's traditional police power).

Justice Souter wrote a separate opinion, in which he agreed with the plurality that the statute should be upheld under the *O'Brien* test, but analyzed the second prong differently. According to Justice Souter, "substantial government interest" goes beyond protecting societal order and morality, and includes "the State's substantial interest in combating the secondary effects of adult entertainment establishments[,]" such as prostitution, sexual assaults and other criminal activity.[42]

b. *City of Erie v. Pap's A.M.*

In *City of Erie v. Pap's A.M.*, the Court revisited the issue of nude dancing, yet was again unable to produce a majority opinion. Justice O'Connor wrote for a four-justice plurality, and, applying the *O'Brien* test, concluded that the city ordinance prohibiting public nudity was a constitutionally permissible content-neutral restriction on expressive conduct.[43] Justice O'Connor emphasized that while nude dancing was expressive conduct, it was "within the outer ambit of the First Amendment's protection."[44] Adopting the secondary effects rationale set forth in Justice Souter's *Barnes* concurrence, Justice O'Connor reasoned that the contested regulation could be justified as furthering the government's substantial interest in combating secondary effects of nude dancing. Justice Souter concurred and dissented in part, agreeing with the plurality's analysis, yet finding that the city's evidentiary showing of secondary effects could not justify its regulation.[45]

2. Cementing the "Low Value" Status of Exotic Dancing

Justice Scalia concurred with the result in both *Barnes* and *Pap's A.M.*, yet he reasoned that a prohibition on public nudity "as a general law regulating conduct, and not specifically directed at expression, . . . is not subject to First Amendment scrutiny at all."[46] Doubting the communicative nature of nude dancing, Jus-

42. *Id.* at 582 (Souter, J., concurring). Because Justice Souter's analysis provided the narrowest grounds for the Court's judgment, his opinion constitutes the holding of the case. *See Peek-a-boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1260-1261 (11th Cir. 2003) (citing *Marks v. United States*, 430 U.S. 188 (1997) (establishing the framework for interpreting fragmented Supreme Court opinions)).

43. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289-290 (2000).

44. *Id.* at 289.

45. *Id.* at 291-292 (Souter, J., concurring).

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

tice Scalia concluded that Indiana's law was a proper regulation of conduct, not of expression, "unless we view nude beaches and topless hot dog vendors as speech."[47] In essence, Justice Scalia effectively relegated nude dancing to the realm of expressionless nude sunbathing.

Whether one goes as far as Justice Scalia in contending that exotic dancing is mere conduct, the fact remains that exotic dancing is deemed "low value" speech in First Amendment hierarchy.[48] Despite the Court's provision of First Amendment protection, like Justice Scalia, some of the Justices and many lower courts have indicated a shared doubt regarding the artistic, expressive nature of nude dancing.[49] Additionally, various courts have also indicated doubt as to the artist-like status of the dancers themselves. I argue that this evident skepticism by the Supreme Court has helped to prevent exotic dancers from attaining the respect accorded to other free speakers, and even serves to further the stigma associated with exotic dancing.

a. Doubting The "Artistic Expression" of Nude Dancing

Unlike a performance of the Dance of the Seven Veils in Strauss's *Salomé* – "everyone's favorite example of a constitutionally protected striptease"[50] - exotic dancing does not carry the same artistic significance as a striptease in an opera, even though exotic dancing is also protected as expressive conduct. As evidenced by the opinions in *Barnes, Pap's A.M.* and their progeny, exotic dancing is treated like the disfavored step-sibling to ostensibly more worthy forms of expression, like political speech. Justice O'Connor illustrated this trend in her *Pap's AM.* opinion, in which she relegated nude dancing to the realm of low-value speech: "'society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate,' and 'few of us would march our sons or daughters off to war to preserve the

47. *Id.* at 573 (quoting *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1120 (7th Cir. 1990) (Posner, J., concurring) *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)).

48. *See* CHEMERINSKY, *supra*, note 36.

49. The doubt here pertains to nude dancing performances as symbolic speech, not just physical conduct that is properly regulated. Lap dances and other forms of patron-dancer contact are outside the First Amendment's protection.

50. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1094 (7th Cir. 1990) (Posner, J., concurring) *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

citizen's right to see' specified anatomical areas exhibited at establishments like [the strip club] Kandyland."[51]

Sharing Justice O'Connor's sentiment, other courts have communicated more explicitly their distaste for the "art" of nude dancing, even while reluctantly asserting that nude dancing is protected by the First Amendment.[52] For instance, one court prefaced its analysis with the following statement: "although the dance may be tasteless and indecent to many, like other 'unpopular' speech (whether written, spoken or performed) it is entitled to its place, albeit a modest one, in the marketplace of ideas."[53] Further, in emphasizing the importance of First Amendment protection, the court noted that "[n]o matter how tasteless such performances may appear to many, until the United States Supreme Court changes its view, such dancing is entitled to protection under the First Amendment."[54]

Ultimately, the extent to which lower courts and local governments rely on the sentiment of Supreme Court opinions to address nude dancing issues is unknown. However, the Court's reluctance in deeming nude dancing "speech" within the First Amendment and the Justices' subtle denigration of this practice has apparently had a trickle down effect. Whether quoting the key portions of *Barnes* and *Pap's A.M* or introducing new criticisms, the vast majority of lower court decisions on exotic dancing regulations exhibit the same conflicted sentiment evident in the Supreme Court's opinions.

b. Doubtful Expression, Even More Doubtful "Speakers"

Beyond questioning the communicative value of exotic dancing, some courts have expressed doubt as to the free speech motivations of exotic dancers, or have at least failed to consider the dancers' interests as speakers. Unlike those persons who burn or defile American flags, exotic dancers do not garner the same respect and solemnity accorded to these speakers, whose political message makes their conduct more palatable to the

51. *Pap's A.M.*, 529 U.S. at 294 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. at 70).

52. *See, e.g., Flanigan's Enters. v. Fulton County*, 242 F.3d 976, 986 (11th Cir. 2001) ("Although we might disagree that nude dancing contains any expression protected by the First Amendment, the [O'Brien] test has been given us."). Some courts do acknowledge the artistic value of exotic dancing, but they are few and far between. *See, e.g., Schultz v. City of Cumberland*, 228 F.3d 831, 852 (7th Cir. 2000).

53. *Brownell v. City of Rochester*, 190 F. Supp. 2d 472, 477 (W.D.N.Y. 2001).

54. *Id.*

courts.[55] Furthermore, exotic dancers' expression involves money and the sex industry, and as an apparent result, their artistic, free speech motivations are impeached by these powerful factors.

One of the primary obstacles to taking seriously the art of exotic dancing is that the expressive activity of nude dancing is inextricably linked with economic motivations. Although the government may not constitutionally prohibit compensation for the exercise of First Amendment rights,[56] the economic aspects of nude dancing seemingly detract from the artistic value of such expression and from the possibility that the dancers themselves are artists. For instance, at the very beginning of his *Barnes* opinion, Chief Justice Rehnquist pointed out that one of the respondents, an exotic dancer challenging the ban on nudity, "wished to dance nude because she believes she would make more money doing so."[57]

Another problem that might lead to skepticism about categorizing dancers as free speakers is that the dancers are seldom involved in First Amendment litigation, and they almost never personally defend the expressive aspects of their profession absent economic motivations.[58] In most First Amendment cases, exotic dancers are not even parties to the action,[59] or they are co-

55. *See Street v. New York*, 394 U.S. 576 (1969) (overturning conviction of defendant who had burned a flag); *see also Smith v. Goguen*, 415 U.S. 566 (1974) (overturning conviction of defendant who sewed a replica of the American flag to the seat of his pants).

56. *See, e.g., Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 115-16. (1991).

57. *Barnes*, 501 U.S. at 563 (also pointing out that another dancer/respondent "can be seen in a pornographic movie at a nearby theater").

58. Additionally, patrons and audience members at strip clubs may also have First Amendment rights, and thus exotic dancers must share the analytical spotlight with other citizens seeking to assert their free speech rights. *See Essence, Inc. v. The City of Federal Heights*, 285 F. 3d 1272, 1287 n. 13 (10th Cir. 2002) (concluding that "patrons of nude dancing establishments do have some First Amendment interest in observing nude dancing" but declining to decide "whether those who receive protected expression have a lesser right than those who send such expression."). While this is not particularly a negative result in and of itself, the fact remains that laws and local regulations most intimately affect dancers, yet they are rarely acknowledged by themselves, as opposed to being part of a business or part of a larger group (including patrons) seeking to assert their rights.

59. *See, e.g., 2025 Emery Highway, L.L.C. v. Bibb County*, 377 F. Supp. 2d 1310, 1332-1333 (M.D. Ga. 2005); *Flanigan's Enters. v. Fulton County*, 596 F.3d 1265, 1269 (11th Cir. Ga. 2010).

plaintiffs with the club's business entity and its owners.[60] Typically in First Amendment cases, a plaintiff must assert his own legal rights and interests, and cannot bring claims for relief based on the interests of third parties.[61] However, third party standing is an exception to this general rule, and it permits a plaintiff to litigate the rights of a third party in narrow contexts.[62] In First Amendment cases challenging a regulation on exotic dancing, club entities, owners, and managers often have standing because they have a strong financial interest in the club's primary activities, and unconstitutional ordinances create credible risks of "self-censorship and chilling of expression."[63] Additionally, a club may obtain standing because, as one court asserted, "dancers are unlikely to defend their First Amendment rights in a court of law."[64] Ultimately, the third party standing accorded to the owners of exotic dancing establishments could be yet another reason that dancers' artistic motivations may be questioned.

By allowing third party club owners to assert free speech rights that the dancers exercise in their performances, the dancers' interests are forcibly aligned with those of the club, because the club chooses how to present its case. If one accepts the bald assertion that dancers are unlikely to defend their rights in court, one might argue that third party standing permits vindication of dancers' rights when they would otherwise be overlooked because dancers frequently do not have the time, money, or desire to litigate. However, the problem of excluding dancers from litigation or including them as co-plaintiffs with club entities is that dancers and clubs coalesce around economic incentives to litigate, which often overpowers the desire to defend the purely Constitutional rights associated with dancing. As a result, the

60. *See, e.g,, Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377, 396 (6th Cir. Tenn. 2001); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997).

61. *See Score LLC v. City of Shoreline*, 319 F. Supp.2d 1224, 1229 (Wash. Dist. Ct. 2004).

62. *See Rameses, Inc. v. County of Orange*, 481 F. Supp. 2d 1305, 1313 (M.D. Fla. 2007)(citing *Warth v. Seldin*, 422 U.S. 490 (1975)) (other citations omitted). Third party standing is often available in the following contexts: if those parties share a close relationship, if the third party's rights are asserted as part of an overbreadth challenge to a statute, or if the third party is unable to defend his or her rights in court. *See id.*

63. *Id.* at 1314 (citation omitted).

64. *Id.* Note that the court in *Rameses* did not elaborate as to why dancers would be unlikely to defend their First Amendment rights in a court. Similarly, other cases permitting strip clubs to litigate under the third party standing doctrine have also not elaborated on why dancers are unlikely to litigate.

dancers' perspective on exotic dancing appears before the court as a financial grievance justified by the First Amendment, rather than as a First Amendment claim regarding their free speech rights with incidental financial motivations.[65]

Consequently, due to judicial skepticism regarding exotic dancing or the third party standing doctrine – or, more likely, some combination thereof - exotic dancers are remarkably absent in First Amendment cases. Courts either take for granted that dancers have an interest in free speech, citing *Barnes* and *Pap's A.M.* without much discussion, or they address the dancers' First Amendment interests as presented by third parties with standing. In either scenario, courts tend to engage in First Amendment analysis without considering the dancers' perspectives, which is both ironic and unfortunate because the dancers bear the brunt of the regulations on the most personal level. After all, it is the individual dancers, not the courts or the clubs, who are forced to wear pasties and g-strings when they perform onstage.

B. *The Secondary Effects Doctrine*

Imported into the nude dancing context by Justice Souter's concurrence in *Barnes*, the secondary effects doctrine has served to allow comprehensive regulations of nude dancing. According to the Court, combating the negative secondary effects that result from exotic dancing is a substantial government interest which permits local governments to regulate expressive conduct, even if doing so generates incidental burdens on expression.[66] Whether a regulation of nude dancing is analyzed as content-neutral time, place, and manner restrictions,[67] or under the *O'Brien* test for

65. An additional complication is that dancers and club owners are frequently represented in court by the same attorneys of record. Although there is no evidence regarding the compensation plan for this joint representation, a reasonable inference is that the clubs pay for the dancers' legal fees, either partially or entirely. While it would almost certainly be a violation of a state's rules of professional conduct for an attorney to advocate for the interests for the party paying the legal fees over those of the client, one might question whether the overall objectives of the litigation are properly defined if the clubs engage the lawyers to challenge constitutional regulations. *See, e.g.,* ABA Model Rule 1.5.

66. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (U.S. 2000). The plurality in *Pap's A.M* abandoned a focus on public decency and morality and adopted the secondary effects doctrine to justify the proscription of public nudity.

67. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986). The *Renton* Court employed secondary effects to justify a zoning regulation under the time, place and manner restriction analysis.

symbolic speech, combating secondary effects constitutes the 'substantial government interest' that justifies the regulation.[68]

The studies upon which local governments and courts rely purport to show a broad spectrum of adverse secondary effects stemming from sexually oriented businesses.[69] The main secondary effects allegedly associated with exotic dancing include increased crime rates (particularly prostitution), transmission of sexually transmitted diseases, decreased commercial activity, and declining property values.

1. Application of the Doctrine

In analyzing the constitutionality of a regulation, courts consider whether the ordinance serves to prevent or eradicate the articulated secondary effects associated with exotic dancing. Because the regulation must directly correspond to the secondary effects it seeks to combat, exotic dancers have only two fates in this jurisprudence: to be excluded, or to be grouped with the social ills the government is seeking to prevent. In either case, the dancers' interests give way to those of the general public, and the dancers themselves are forgotten, impugned, and further stigmatized. The application of the secondary effects doctrine, and its solidification in case law, is extremely problematic because the use of secondary effects studies in specific geographical regions leads to broad and unwarranted generalizations about dancers as a group.

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68. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (noting that the four part *O'Brien* test "in the last analysis, is little, if any, different from the standard applied to time, place, or manner restrictions"); *but see Brownell v. City of Rochester,* 190 F. Supp. 2d 472, 477, 486 (W.D.N.Y. 2001) (discussing how the tests are different enough to warrant a clear determination as to which standard applied).

69. *See* Lynn Mills Eckert, *Language Games: Regulating Adult Establishments and the Obfuscation of Gender*, 15 S. CAL. REV. L. & SOCIAL JUSTICE 239, 261-262 (2006). Eckert noted that a 1995 New York City study found that secondary effects include: crime (especially drug and sex-related crimes), drug peddling in front of premises, prostitution, noise in front of premises, parking problems, signage that negatively affects property values and is unpleasant for children, reduction in property values, pornographic litter, greater incidence of sexual violence to women, harassment of women on the street, dead zones that shoppers and pedestrians avoid, excessive nighttime activity, decline in neighborhood oriented businesses, difficulty renting office space in the area, decline in sales tax revenues in the adult establishment's vicinity. However, even though the studies include gender-based harms, such as sexual violence and harassment, these secondary effects are seldom mentioned in the cases. Rather, many of the cases highlight prostitution as the primary crime sought to be prevented.

a. Excluded From The Secondary Effects Analysis

The first pattern that emerges from the First Amendment exotic dancing cases is that the dancers' interests are markedly absent from the analysis. With respect to women generally, very little is said about the gender specific harms of exotic dancing. Rather, "[t]he logic of secondary effects dictates that when regulating gender-based effects, localities must present them as general public safety concerns rather than explicitly recognizing that the harm generated by adult businesses uniquely affects women."[70] For instance, "[w]hen zoning or nude dancing cases mention sexual crimes, such as increases in rape rates, they do not acknowledge that women are overwhelmingly the targets of such crimes."[71]

More specifically, the secondary effects doctrine has the effect of leaving dancers and their interests out of the discussion entirely. Beyond zoning ordinances and wholesale bans on public nudity, the most common regulations include those regarding liquor sales, buffer zones, and licensure requirements. Yet, in these various contexts, dancers' interests are rarely, if ever, considered.

In 2001, the Eleventh Circuit analyzed a Fulton County ordinance that prohibited the sale of alcohol in nude dancing estab-

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70. *See* Eckert, *supra*, note 72, at 263. In her article, Lynn Mills Eckert focuses on pornography in the context of secondary effects to argue that "[t]he zoning and nude dancing decisions downplay the actual harm caused - harm to women - by redirecting the emphasis of the analysis to secondary effects." *Id.* at 241. Eckert contends that by taking studies as valid science and keeping gender out, court doesn't have to deal w/ inherently subordinating aspects of pornography. She argues,

> The reliability of these studies becomes even more questionable when localities discuss the studies in generalized terms and use recycled studies from other cities. The lack of demonstrated validity of these studies creates a problem for those concerned about gender-based harms because the studies discourage and lessen the fundamental debate about whether regulations on pornography are really effects-based or viewpoint-based. By characterizing these studies as scientifically valid and categorizing content-based restrictions under the content-neutral secondary effects doctrine, the Court also avoids discussing whether pornography subordinates and injures women. The Court thereby avoids placing the force of its authority behind the idea that pornography harms women and settles for a far less controversial view: the content-neutral secondary effects doctrine.

Id. at 264.

71. *Id.* at 262; *see Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976))

lishments.[72] The Board of Commissioners was concerned that alcohol coupled with nude dancing created a toxic mixture that caused a depression of property values, an increase in crime, and general "neighborhood blight."[73] However, because the county could not demonstrate a link between the alcohol usage and the stated government interests, the court deemed the ordinance unconstitutional.[74] Years later, the Fulton County Board enacted a new ordinance, but this time relied on ample statistical evidence to demonstrate an increase in crimes (largely prostitution and other sex crimes) and neighborhood deterioration ("general unsafe conditions," dilapidated buildings, lack of lighting and security) around the exotic dancing establishments that permitted alcohol consumption.[75] This time, the Eleventh Circuit upheld the regulation, finding that it was logically connected to the secondary effects. Although alcohol consumption allegedly increases the risk of assault on the dancers themselves and the Board found increased incidence of sex crimes, the court did not feel compelled to mention this causal connection at all, let alone as a justification for the ordinance.

b. Portrayed as Part of the Problem

A second recurring pattern is that local governments and courts, when they specifically mention the exotic dancers, characterize them as part of the problem that the proposed or existing regulation seeks to combat. In particular, dancers are automatically suspected of criminal inclinations and are portrayed as unclean transmitters of disease. Consequently, this permits local governments to create regulations for the general public good, without incorporating the dancers and their welfare.

i. Proclivity for Criminal Behavior

Drug-related crimes and prostitution are the two secondary effects most frequently associated with exotic dancing establishments. When governments and courts justify regulations based on the need to curtail these offenses, there is an implicit sugges-

72. *Flanigan's Enters. v. Fulton County*, 242 F.3d 976, 985-986 (11th Cir. Ga. 2001).

73. *Id.*

74. *Id.* at 986. ("We do not think that Defendants had any reasonable justification for amending Section 18-76 when the county's own studies negated the very interests it purportedly sought to prevent.")

75. *Flanigan's Enters. v. Fulton County*, 596 F.3d 1265, 1270 (11th Cir. Ga. 2010).

tion that the dancers themselves moonlight as prostitutes and drug users or dealers. Courts often uphold no-touch provisions and buffer zone restrictions because properly tailored regulations of this sort serve to further the substantial government interest in curtailing the secondary effect of these crimes.[76]

For instance, the Ninth Circuit exhibited a clear distrust of the dancers when it upheld a regulation demanding a ten-foot buffer zone between dancer and patron, finding that it was a narrowly tailored means of controlling narcotics transactions and prostitution.[77] Further, the Ninth Circuit found that ten feet was a proper distance requirement, burdening no more speech than necessary, because shorter distances "would permit verbal communication between dancers and patrons, thereby failing to curtail propositions for drugs or sex."[78]

The Kentucky Supreme Court, with similar distrust, upheld an ordinance that prevented patrons from directly tipping the exotic dancers.[79] The court reasoned that the provision satisfied the *O'Brien* test:

The no-direct-tipping provision is intended to work in conjunction with the staging requirement and proximity limit to reduce the secondary effects associated with the adult entertainment — prostitution, sexually transmitted diseases, and drug transactions. Indeed, it would defeat the purpose of the buffer zone or a valid "no touch" provision if patrons were allowed to directly tip performers during their performances.[80]

Finally, licensure requirements for dancers are commonly upheld.[81] The overarching justification, whether explicitly stated

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76. *See, e.g., Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. Wash. 1998); *Blue Movies, Inc. v. Louisville/Jefferson County Metro Gov't*, 317 S.W.3d 23, 33 (Ky. 2010).

77. *Colacurcio,* 163 F.3d at 554.

78. *Id.* (noting also that "one-foot and 'no-touch' ordinances would be unenforceable, as both would fail to provide sufficient line-of-vision for law enforcement personnel" and four feet would still permit illegal propositioning to take place).

79. *Blue Movies, Inc.*, 317 S.W.3d at 33. The ordinance stated:

> It shall be a violation of this chapter for any employee, while semi-nude in an adult business, to knowingly or intentionally receive any pay or gratuity directly from any patron or customer or for any patron or customer to knowingly or intentionally pay or give any gratuity directly to any employee, while said employee is semi nude in an adult entertainment establishment.

Id.

80. *Id.*

81. *See, e.g., DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 414-415 (6th Cir. 1997) (upholding disabling provision that prevented applicant who was convicted of

or not, is that dancers (like club operators) who willingly enter the adult entertainment business are more likely to engage in behavior the government seeks to prevent. For instance, the Sixth Circuit upheld an ordinance that required employees and operators of nude dancing establishments to have a permit, as well as the related disabling provision that made individuals with a recent felony or misdemeanor sex crime conviction ineligible to operate clubs or to dance.[82] The court reasoned that the ban was temporary, and "[t]he Ordinance's civil disabilities provisions *serve to weed out those applicants most likely to engage in the type of criminal behavior that the Ordinance seeks to redress*[.]"[83]

In essence, the mandatory license requirements, the no-touch and buffer zone provisions, and the courts that assess them, indicate a silent yet significant distrust for women who engage in the exotic dancing profession.

ii. Unsanitary Transmitters of Disease

The spread of sexually-transmitted diseases is also a commonly cited secondary effect associated with exotic dancing, and courts and local governments characterize individual dancers – rather than exotic dancing businesses generally – as the source of the problem.[84]

In upholding a wholesale ban on public nudity, the Tenth Circuit found that the adverse secondary effects of "unsanitary conditions, unlawful sexual activity, and the transmission of sexually transmitted diseases" justified the ordinance.[85] Curiously, the ordinance's preamble entirely excluded the health interests of the dancers, focusing instead on the patrons and the general public. According to the Tenth Circuit, "the Ordinance's preamble states that it is necessary 'to protect and preserve the health, safety, morals and *welfare of the patrons* of [adult entertainment establishments] *as well as the citizens of the City*' . . . because

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a crime of moral turpitude); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 392 (6th Cir. 2001); *Schultz v. City of Cumberland*, 228 F.3d 831, 852 (7th Cir. 2000) (striking disabling provision for criminal activity but upholding other licensure provisions).

82. *Deja Vu*, 274 F.3d at 392 (finding determinative the temporary ban on obtaining a license that applied only to those who have committed a felony sex crime within the last five years or a misdemeanor sex crime within the last two years).

83. *Id.* (emphasis added).

84. *See, e.g., Heideman v. S. Salt Lake City*, 165 F. App'x 627, 631 (10th Cir. 2006).

85. *Id.*

nude conduct increases the prevalence of, among other things, unsanitary conditions, unlawful sexual activities and sexually transmitted diseases."[86] Further, the court found that the regulation furthered the interest in combating secondary effects, noting that "nude employees were either simulating masturbation or engaging in physical contact with patrons" and "[b]oth of these activities reasonably could relate to the City's concern over unsanitary conditions . . . and [the] relationship to sexually transmitted diseases."[87] The Tenth Circuit's analysis effectively excludes the dancers from the general public whose health and safety the city seeks to protect, and also impugns the dancers as responsible for the unsanitary and dangerous conditions.

Courts have upheld other similar no-touch and distance requirement regulations on the ground of protecting public health, which regularly does not include discussion of the dancers' health.[88] The Sixth Circuit held that a six-foot buffer zone requirement furthered the state's interest in prevention of crime and disease, which were generated by contact between patrons and dancers.[89] Beyond the health concerns posed by lap dances (sometimes called "couch dances"), more unusual (and possibly criminal) conduct presents even greater risks.[90] Although the Sixth Circuit was satisfied that contact between exotic dancers and patrons during couch dances sufficiently generated health

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86. *Id.* at 630 (emphasis added).

87. *Id.* at 632.

88. *But see Centerfolds, Inc. v. Town of Berlin*, 352 F. Supp. 2d 183, 192 (D. Conn. 2004). In analyzing the health risks of "casual sexual physical contact between strangers," the court pointed out that the health risks extended to patrons and the employees. However, this small mention does not atone for the fact that the vast majority of courts never even mention the employees' health and/or safety, let alone the fact that they are more at risk because of the frequency of their intimate contact with patrons, who may also present health risks to the dancers.

89. *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410 (6th Cir. 1997).

90. *See, e.g., 2025 Emery Highway, L.L.C. v. Bibb Cnty., Ga.*, 377 F. Supp. 2d 1310, 1332-1333 (M.D. Ga. 2005), *aff'd*, 218 F. App'x 869 (11th Cir. 2007). A more outrageous set of unsanitary and sexually explicit incidents were described in *2025 Emery Highway, L.L.C.*, where the County presented the shocking evidence of conduct that the court deemed obscene, and thus outside the ambit of First Amendment protection. Applying the *Miller* standard for obscenity, the court reasoned:

> A reasonable person in this community would certainly find that Club Exotica's "lap dances" appealed to the prurient interest. In fact, a reasonable person in this community would find that performances . . . are not only aimed at arousing an inordinate, immoderate, or unwholesome sexual desire, . . . but are also "patently offensive" — especially when combined with crude acts[.]

Id.

risks, the court also noted that there were more egregious incidents, "such as one instance in which a dancer invited customers to spoon-feed themselves whipped cream off her breasts, buttocks, and vaginal area."[91]

Additionally, regulations of a strip club's interior design and architecture may be justified on public health grounds. Citing concerns for sanitation and the prevention of diseases like AIDS, local governments have successfully regulated the height of the stage on which dancers perform[92] and the installation of enclosed booths, cubicles, rooms, or stalls in sexually oriented businesses.[93]

In sum, by excluding the dancers' interests and linking their nudity to the unclean, disease-ridden environments, local governments and courts applying the secondary effects doctrine work in conjunction to marginalize and stigmatize exotic dancers. Not only must the dancers' interests yield to those of the general public, but those interests also are not as weighty a concern as the interests of patrons who frequent strip clubs.

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91. *DLS, Inc,* 107 F.3d at 410.

92. *See, e.g., LLEH, Inc. v. Wichita Cnty., Tex.*, 289 F.3d 358, 369 (5th Cir. 2002) (citing *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, 1304 (5th Cir. 1988) ["In accordance with the prevailing view, . . . the first amendment does not prohibit the City of Dallas from requiring that viewing booths in adult theatres be open".])

93. *See, e.g., Centerfolds, Inc. v. Town of Berlin*, 352 F. Supp. 2d 183, 191 (D. Conn. 2004) (upholding a prohibition on installation of enclosed booths, cubicles, rooms or stalls in sexually oriented businesses as a valid time, place and manner restriction). In *Centerfolds, Inc.*, the court highlighted that there was a strong evidentiary connection between these structures and disease. *Id.* ("These documents cite to studies across the country finding a connection between [sexually oriented businesses] with booths, cubicles, studios and rooms, and prostitution, and the spread of communicable diseases such as HIV and Hepatitis B, and other unhealthful conditions."). Moreover, the court also noted that these structures were directly related to secondary effects in a syllogistic fashion. The court described the link to secondary effects in the following way:

> Specified sexual activities often occur at unregulated sexually oriented businesses that provide live adult entertainment. Specified sexual activities include sexual physical contact between employees and patrons of sexually oriented businesses and specifically include "lap dancing" or manual or oral touching or fondling of specified anatomical areas, whether "clothed" or unclothed. Such casual sexual physical contact between strangers may result in the transmission of communicable diseases, which would be detrimental to the health of the patrons and employees of such sexually oriented businesses[.]

Id. at 192.

2. Adverse Secondary Effects of the Doctrine of Secondary A]ffects

In deploying the secondary effects doctrine to justify regulations, courts and local governments harm exotic dancers in two distinct and discursive ways. First, they effectively erase dancers and their interests from the secondary effects discourse, which essentially communicates that the dancers' welfare is not a concern of either legislative or judicial institutions. Second, by associating the dancers individually with the secondary effects sought to be eradicated (namely prostitution and disease transmission), governments and courts relegate dancers to a societal demimonde. Together, the general indifference to and imputation of dancers serves to perpetuate the existing stigma associated with exotic dancing, which is particularly problematic because, as discussed in detail below, narrow and questionable secondary effects studies lead other courts and local governments to make broad generalizations about dancers as a group.

In a more practical sense, the secondary effects doctrine is extremely detrimental to dancers, as it confines the universe of available protections to those that a court finds to further the substantial government interest in combating specifically named secondary effects.

To illustrate the obstacle of navigating the secondary effects doctrine, consider the following proposition: the younger a woman is, the more susceptible she is to being coerced into exotic dancing.[94] (Although this proposition can be challenged on various grounds, it is a starting point to elucidate doctrinal barriers of the current legal regime.) Suppose that as part of a cumulative regulation based on evidence of secondary effects (including the basics: increased crime, spread of disease, and general neighborhood blight), a municipality enacts an ordinance that restricts licenses for exotic dancing to dancer applicants over twenty-one years of age. If a sexually oriented business challenged this restriction, the court would have to inquire under the *O'Brien* test whether the age restriction furthers the substantial government interest in preventing crime, disease and neighborhood deterioration, and whether it is essential to address these effects. However, the court could not properly consider the benefit of this

94. *See generally* BARTON, *supra* note 7, at 30. Barton reports a particular instance in which the management got a female minor intoxicated, and then used intimidation tactics to transition her from a cocktail waitress to a stripper.

regulation to the dancers themselves (protecting vulnerable young women). Because there is no logical connection between the dancers' welfare and the regulation – if anything, the exotic dancing cases present dancers as part of the problem – the regulation will be struck down.

The Tenth Circuit addressed this very issue in *Essence, Inc. v. The City of Federal Heights*, which pertained to a city ordinance prohibiting anyone under the age of twenty-one from being on the premises of a nude dancing establishment.[95] The court concluded that the city could not show a substantial interest in protecting persons under twenty one; although the city determined that individuals aged eighteen to twenty are at a greater risk than the general population from the secondary effects of nude dancing establishments, there was insufficient evidence in the record to suggest that these younger individuals were more susceptible to secondary effects.[96] Because the dancers' welfare and/or potential exploitation was not a consideration in the secondary effects analysis, the age restriction failed to pass the *O'Brien* test.

To add insult to injury, the oftentimes unclear[97] collateral rules and legal standards accompanying secondary effects jurisprudence reaffirm the doctrine's negative effects. Effectively, these rules serve to marginalize and stigmatize dancers at an accelerated rate, as the fate of exotic dancers in one region is directly affected by studies of dancers in another region. The

95. Essence, Inc. v. City of Federal Heights, 285 F.3d 1272, 1283 (10th Cir. 2002).

96. *Id.* at 1284 n.10. The city needed to establish that banning persons under twenty-one while maintaining nude dancing would combat the secondary effects and it offered an affidavit of a former dancer who testified to seeing dancers under twenty one engaging in the crime of underage drinking. Because of procedural defects, the affidavit was not accepted into the record; however, it is illustrative of the fact that the only way to have saved the age restriction ordinance was to portray the dancers as engaging in criminal activity. *Id.* at 1288.

97. The collateral rules that reaffirm the secondary effects doctrine are not entirely clear. *See, e.g.*, Maggie Sklar, *Nude Dancing*, 5 GEO. J. GENDER & L. 95, 106-107 (2004). Maggie Sklar points out that

> [t]he Circuits disagree as to whether ordinances that rely on the secondary effects doctrine without providing local evidence will be sustained or whether courts should defer to the legislature's claim of secondary effects. Additionally, it remains unclear which side bears the burden of proof concerning adverse secondary effects. Ultimately, until the Court has a majority opinion clearly outlining the standard to be used for nude dancing, the standard to be applied and the resulting application will likely remain inconsistent and result in a continuing circuit split.

following are some examples of the troubling collateral rules and standards.

First, a local government need not conduct its own new studies of deleterious secondary effects associated with exotic dancing if other cities have already generated such studies.[98] Second, although a government must typically have at least some evidence before it enacts a regulation, the standard is not rigid, requiring only "some evidence 'reasonably believed to be relevant' to the problem of negative secondary effects."[99] Third, "a city need not prove that such a link exists or prove that its ordinance will be effective in suppressing secondary effects."[100] Finally, the challenger's burden to counter the regularly-recycled evidence of secondary effects is extraordinarily difficult and, as a result, challenging the studies' conclusions can be a monumental task.[101] Because these collateral rules reaffirm the substantial government interest in combating negative secondary effects of exotic dancing, the dancers themselves continue to be wrapped up in a jurisprudence that both ignores and impugns them without much, if any, investigation.

Moreover, the broad generalizations that arise from the use of recycled studies is especially troubling given recent scholarship finding serious flaws in the most popular secondary effects stud-

98. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986) ("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"); *see also* White River Amusement Pub, Inc. v. Town of Hartford, 481 F.3d 163, 171 (2d Cir. 2007).

99. White River Amusement Pub, Inc., 481 F.3d at 171 (citing Renton, 475 U.S. at 51); *see also* Peek-a-boo Lounge of Bradenton, Inc. v. Manatee Cnty., 337 F.3d 1251, 1267-68 (11th Cir. 2003) (discussing the circuit split regarding pre-enactment evidence). There is some dispute as to whether pre-enactment evidence is absolutely required, and if so, the degree of evidence required to justify a regulation on exotic dancing.

100. White River Amusement Pub, Inc., 481 F.3d at 171. .

101. *See, e.g.*, Heideman v. S. Salt Lake City, 165 Fed. Appx. 627, 631 (10th Cir. 2006) ("Simply put, the record does not contain any evidence to counter the City's concern over unsanitary conditions or the possibility of public health concerns associated with unregulated nude conduct in adult business establishments. Although Plaintiffs submitted evidence in rebuttal of other negative secondary effects cited by the City in its Ordinance, such as diminished property values and crime, they presented no evidence whatsoever that nude conduct does not result in unsanitary conditions, unlawful sexual conduct, or the transmission of sexually transmitted diseases").

ies.[102] In a sense, the secondary effects doctrine – as applied by local governments and courts – stigmatizes exotic dancers and their profession, without providing rights akin to due process of law.

Depending on one's perspective on exotic dancing and its incumbent attributes, one could argue that some local regulations of dancing actually serve to benefit the dancers individually. For example, licensing schemes that require owners and managers to obtain permits and to ensure compliance with health codes can prevent those owners and managers from exploiting dancers.[103] In reality, however, the individual benefits of regulations are few and far between, and cannot justify the glaring absence of dancers' interests from the discussion on regulation. If dancers were to be included with those persons the government seeks to protect through regulations of exotic dancing, the results may or may not be different, but what matters is that the analysis would be different, because their voices would be heard.[104]

Notwithstanding larger debates about the adult entertainment industry, the fact remains that dancers are simultaneously ignored and stigmatized in First Amendment jurisprudence generally, and specifically through the application of the secondary effects doctrine. Whether the root of the problem is the doctrine itself, or the courts applying it, the fact remains that the harm is real. Until exotic dancers' interests are integral to a jurispru-

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102. *See* Bryant Paul, Daniel Linz & Bradley J. Shafer, *Government Regulation of "Adult" Businesses through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL'Y 355 (2001). In response to the widespread recycling of the studies, Paul, Linz and Shafer investigated the validity of some of the most popularly cited secondary effects studies. They concluded as follows: "With few exceptions, the methods most frequently used in these studies are seriously and often fatally flawed. Specifically, these studies do not adhere to professional standards of scientific inquiry and nearly all universally fail to meet the basic assumptions necessary to calculate an error rate—a test of the reliability of findings in science. More importantly, those studies that are scientifically credible demonstrate either no negative secondary effects associated with adult businesses or a reversal of the presumed negative effect." *Id.* at 367.

103. *See, e.g.*, Schultz v. City of Cumberland, 228 F.3d 831, 852 (7th Cir. 2000) (upholding certain portions of an ordinance that implemented a licensure scheme that required proof of employee age, reasoning that it "legitimately relates to the government's interest in preventing underage performers from engaging in adult entertainment").

104. For instance, if dancers' interests were considered, a licensing scheme analyzed under the time, place and manner restriction standard might consider whether protecting the dancers from exploitation could justify a disabling provision that made applicants (owners, operators, managers) ineligible if they were convicted for crimes other than sex-crimes (e.g., gambling, fraud, etc).

dence that affects them more intimately than any other party involved, dancers will remain in the marginalized "outer ambit" of society that the Supreme Court helped to create and that lower courts continue to maintain.

IV. EMPLOYMENT LAW

Just as exotic dancers' interests are excluded from the public good in First Amendment jurisprudence, they are similarly lost in both state and federal employment law. Although various laws exist to protect employees from oppressive, unsafe, and unsanitary working conditions, exotic dancers are frequently unable to take a stand. A commonly cited reason for the lack of initiative is dancers' independent contractor status,[105] yet this is not the only barrier to protection. Rather, the problem lies both in the characterization of dancers as independent contractors and the shortcomings of employment laws that cannot address the unique needs of dancers in the workplace.

As an initial matter, the structures and dynamics of the exotic dancing industry are a serious barrier that prevents dancers from accessing statutory benefits and from advocating legal reform to address their needs. First, as a structural feature of the exotic dancing industry, exotic dancers are a transient workforce, in that dancers often intend to dance temporarily, and as a result, they tend to adopt an attitude of indifference to their employment abuses.[106] Second, dancers report being cognizant of stigma, and often remain silent about their line of work, choosing not to tell family, friends, or authorities about the abuses they

105. Holly J. Wilmet, *Naked Feminism: The Unionization of the Adult Entertainment Industry*, 7 AM. U.J. GENDER SOC. POL'Y & L. 465, 484-85 (1999). Wilmet argues that these oppressive financial arrangements and working conditions are and remain unchecked in the exotic dancing industry for a variety of reasons, including: "(1) many exotic dancers operate with a certain amount of secrecy about what they do, not telling family and friends because of society's disapproval and misunderstanding of exotic dancing, or for safety and privacy reasons; thus there is no public outcry at the practice; (2) most club proprietors are men, while the majority of adult entertainers are women, who have been culturally indoctrinated by an intolerant and unsupportive society to accept such power differentials and sexist treatment without complaint; (3) many exotic dancers are simply unaware of their legal rights and protections, and thus allow the practice to continue unchallenged and unreported; and, finally (4) even if a single dancer did take a stand, without the benefit of collective action she would almost certainly be subject to retaliation by the club, or be branded a trouble-maker and subjected to peer pressure from other dancers." *Id.* (citations omitted).

106. Sarah Chun, *An Uncommon Alliance: Finding Empowerment for Exotic Dancers through Labor Unions*, 10 HASTINGS WOMEN'S L.J. 231, 245 (1999).

suffer.[107] Third, because there is a steady supply of would-be dancers, a strip club's managers and owners often feel little to no need to negotiate with dancers, either before or after employment commences. In considering the employment law issues exotic dancers encounter, it is important to keep in mind the structural barriers that exist as a backdrop.

A. *Working Conditions and Financial Arrangements of Exotic Dancing*

Based on the evidence amassed from interviews, first-hand experience, and public records, sociologists who study exotic dancers generally conclude that the dancers found that this vocation can be extremely difficult, physically, financially, and psychologically.[108] Many dancers described pervasive sexual harassment and even assault by both patrons and club employees.[109] Additionally, exotic dancers often reported bleak, unsanitary, and unsafe working conditions. Some accounts included stories of unusable restrooms, filthy carpets that spread ringworm rashes, and splintered stage flooring that cut the dancers' bodies.[110] Based on her interviews, Professor Price-Glynn concluded that "[s]trippers felt devalued in this dirty and dangerous environment."[111]

Although exotic dancers stand to make a substantial amount of money for the work they perform,[112] the compensation structures of strip clubs can be seriously oppressive, and are "virtually unheard of in any other industry."[113] Almost all strip clubs collect a "stage fee" from dancers, which is frequently a nominal sum the club charges per shift or per dance.[114] Further, almost

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107. BARTON, *supra* note 7, at 79.

108. *See* BARTON, *supra* note 7, at 62; PRICE-GLYNN, *supra* note 5 at 102-04.

109. *See* BARTON, *supra* note 7, at 62-63 (noting that every dancer she interview told her stories about fending off clients who tried to touch her); Fischer, *supra* note 18, at 541 (citing an instance where a supervisor demands sexual favors before granting time off).

110. *See* PRICE-GLYNN, *supra* note 5, at 101 (noting that "the stage itself was both symptom and symbol of the club's lack of regard for the strippers' safety. The physical condition of the stage was a near-constant source of strife between strippers and management").

111. *Id.* at 102.

112. *See* BARTON, *supra* note 7, at 42-44 ("the amount of money a woman makes on any given night is unpredictable and tied to factors as diverse as the weather, the economy, the time of the month, the number of other performers working," etc).

113. *See* Wilmet, *supra* note 105, at 484-85. .

114. *See* BRADLEY-ENGEN, *supra* note 7, at 35; Chun, *supra* note 106, at 236; Rutman, *supra* note 9, at 526 ("stage fees" can range from $10 to $120).

every club requires dancers to pay mandatory tips to the staff, including bouncers, disc jockeys, bartenders, and waitresses.[115] Some clubs impose drink quotas as well, which require the dancer to sell a certain number of drinks at the peril of personally covering the cost of unsold drinks.[116] Sometimes dancers are assessed fines for being tardy or missing a shift, regardless of sickness or personal emergencies.[117]

Additionally, exotic dancers often have no ability to negotiate the terms of their employment, including, but not limited to, provisions pertaining to mandatory tips and stage fees.[118] As a general rule, "[e]xotic dancers possess very little negotiating power to avoid agreeing to the clubs' terms of these oral or written lease agreements. If an exotic dancer dislikes the terms of her employment agreement, she will be fired or simply not hired. Exotic dancers have the option of working at other clubs, but practically all of the clubs operate in a similar manner."[119]

With the lack of bargaining power being a central feature of the dancer-strip club relationship, employment regulations are the main source of dancers' protection. However, exotic dancers are almost always classified as independent contractors and, as a result, are exempted from many state and federal laws that protect employees from the precise exploitation dancers experience at many clubs.

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115. *See* BRADLEY-ENGEN, *supra*, note 7, at 30 (noting that she was $150 "in the hole" at the start of the night); Wilmet, *supra*, note 105, at 483 ("Even worse, dancers must pay the tip-out fees regardless of whether they make any money during their shift. As a result, it is common for dancers to be forced into borrowing money from other dancers, or to use their own money to cover the stage fee on a slow shift. In some cases, the dancers may even 'owe' club management, payable on their next shift. Thus, a dancer may potentially lose money by going to work."); Rutman, *supra*, note 9, at 526-527. Some employers contend that the tips are not a requirement, and that dancers give them voluntarily. *See Morse v. MER Corporation,* 2010 U.S. Dist. LEXIS 55636 at *4-5 (June 4, 2010). However, interviews with dancers revealed this claim to be either untrue, or in the event that the tips truly were voluntary, the dancers who gave the most would get special benefits from deejays and bouncers. *See, e.g.,* BRADLEY-ENGEN, *supra*, note 7, at 36. .

116. *See* Rutman, *supra*, note 9, at 526.

117. *Id.* at 527.

118. *Id. at* 527-528 (noting that the terms of "[t]hese agreements are a product of disparate bargaining power).

119. *Id.* at 527-528.

B. *Employees or Independent Contractors? The Implications of Characterization*

Most exotic dancers are characterized as independent contractors in their employment agreements with strip clubs.[120] There are several suggested reasons for the phenomenon. First, dancers often are not aware of their legal rights or the implications of this characterization, and thus do not know that they could dispute this status.[121] "In a typical hiring scenario, women respond in person to an advertisement offering significant income for dancing, 'no experience required.' . . . [and clubs] portray the job requirements as very flexible. Dancers are told that they will not be forced to do anything they do not want to do and that they will work as independent contractors."[122] Enticed by the promise of independence, "applicants do not [truly] understand the legal implications arising from independent contractor status, but accept the job as an independent contractor out of a belief that they can avoid paying taxes."[123] Second, many dancers actually prefer independent contractor status because of the flexibility and profitability it can offer. Third, and most importantly, characterizing dancers as independent contractors is good for employers, and, given that dancers possess little bargaining power vis-à-vis their employers, it is hardly surprising that employers often impose this status unilaterally.

From the employer's perspective, using the independent contractor label is beneficial because these workers are less expensive to employ (i.e., employers can force them to rely entirely on tips for compensation), and this status allows the employer to avoid having to incur substantial legal and tax obligations, such as worker's compensation, retirement benefits, unemployment

120. *See* Fischer, *supra*, note 18, at 531-532 ("Additionally, many clubs require applicants to sign a waiver of their right to sue the club for any reason. Most clubs do not pay dancers a regular wage. Club owners do not pay taxes or unemployment or workers' compensation taxes on behalf of the dancers working for them.").

121. Admittedly, the lack of bargaining power would almost always present a significant obstacle to dancers who wish to be characterized as an employee if the club prefers independent contractor status. However, not knowing whether to dispute this characterization could also be a reason why dancers are almost always deemed to be independent contractors.

122. Fischer, *supra*, note 18, at 531-532 (adding that "[s]ome club owners require applicants to sign agreements indicating that they are working as independent contractors.").

123. *See id.*

compensation, and minimum wage requirements.[124] Furthermore, when dancers are characterized as independent contractors, employers are likely to avoid vicarious liability for any torts the dancers might commit.

Although there is no single definition of "independent contractor" or "employee," the distinction is critical for determining the employers' obligations and the dancers' benefits.[125] Notwithstanding formal characterizations, much evidence indicates that dancers often perform work that would qualify them as employees under various legal standards.[126] The result is that dancers often perform the work of employees – those workers that the law seeks to protect – yet are precluded from enjoying the benefits accorded to those who hold legal status as employees.

1. Benefits of Employee Status

Exotic dancers who qualify as employees are entitled to a myriad of legal protections. First, they are guaranteed minimum wage as a result of the Fair Labor Standards Act (FLSA) and state law equivalents. If a court disregards an exotic dancer's independent contractor label to find that such a dancer qualifies as an employee under the FLSA's economic realities test,[127] then employers must pay minimum wage, and may even be liable for

124. *See id.* at 537; *see also* Chun, *supra,* note 106, at 235 (noting that independent contractors are also "flexible enough to fill in during peak work loads and increase productivity" and have been rising in popularity in various industries).

125. Although characterization of an exotic dancer in her employment agreement with the strip club is important, it is not determinative, and courts may recharacterize workers for purposes of obtaining the benefits of employment laws reserved exclusively for employees. *See, e.g., Morse v. MER Corporation*, 2010 U.S. Dist. LEXIS 55636 at 4-5 (June 4, 2010). Additionally, dancers will sometimes settle with their employees to obtain benefits without actually being recharacterized as employees by the court. *See* Holli Hartman, *$10 Million Settlement for Exotic Dancers, a Not-So-Exotic Outcome in Wage Class Actions* (Apr. 8, 2011), http://www.employmentclassactionreport.com/flsa/10-million-settlement-for-exotic-dancers-a-not-so-exotic-outcome-in-wage-class-actions/ (last visited May 11, 2011).

126. Fischer, *supra*, note 18, at 532 ("[r]egardless of such up-front agreements claiming independent contractor status, clubs maintain a significant amount of control over the performers they hire."). Fischer also notes that cubs control the dancers' performances, mingling behavior, conduct outside of the business hours, and even personal grooming.

127. The economic realities test includes the following factors: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; (6) whether the service rendered is an integral part of the alleged employer's business.

unpaid wages and be forced to return any fees they required the dancer to pay.[128]

Second, employees[129] get certain rights and benefits, such as meal breaks, regulated hours, and medical leave.[130]

Third, employees may bring sexual harassment and discrimination claims under Title VII. The ability to bring such claims could be particularly beneficial in the exotic dancing context, as many dancers report that club management failed to enforce no-touching policies, or even harassed the dancers themselves.[131]

And, finally, employee status opens the door to unionization.[132] Under the National Labor Relations Act (NLRA), most employees have the right to organize and unionize.[133] However, the NLRA does not extend those same rights to independent contractors. Despite the non-legal problems of unionizing (lack of interest or ability, desire for anonymity, transient workforce), some advocates of unionization still argue that the power imbalance and blatant exploitation of exotic dancers by their employers demands collective action or legal intervention.[134] This goal of unionization is not unrealistic, as some groups of exotic dancers have successfully unionized, most notably at the Lusty Lady

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See Fischer, *supra* note 18, at 539-541 (discussing the application of the FLSA economic realities test to exotic dancers).

128. *See* Rutman, *supra*, note 9, at 538 (noting that "Exotic dancers have had the most success in lawsuits in which they have demanded unpaid back wages and reimbursement for stage fees.").

129. Although independent contractors are not categorically deprived of similar rights and benefits, the majority of the independent contractor's rights and obligations derive from the terms of the contract she negotiates with her employer, and, as discussed above, such terms are frequently imposed unilaterally.

130. For instance, the federal Family and Medical Leave Act of 1993 requires employers to provide family or medical leave for employees in some circumstances. Although "[c]onceivably, the FMLA does apply to exotic dancers, the overall impact on exotic dancers is not as beneficial as it is in other environments. Exotic dancers who become pregnant may need a longer time period than the FMLA permits because they need more recovery time to endure the physically rigorous work. . . . Ultimately, however, exotic dancers covered under the FMLA may be unable to regain employment after they have children if they fail meet the BFOQ of being attractive because club owners have no obligation to rehire dancers when they are out of shape from pregnancy." Rutman, *supra*, note 9, at 536-537.

131. *See* BRADLEY-ENGEN, *supra*, note 7, at 38.

132. *See* Rutman, *supra*, note 9, at 554-555 ("Many union movements, however, never materialize because many exotic dancers recognize that there are greater benefits in maintaining their status as independent contractors."); Chun, *supra,* note 106, at 235-236.

133. 29 U.S.C. § 157 (2010).

134. *See* Chun, *supra,* note 106, at 248.

Theater in San Francisco, the first unionized strip club in the United States.[135]

2. Benefits of Independent Contractor Status

Some dancers prefer to be characterized as independent contractors, particularly because of the money and flexibility. Financially, many dancers report that, as independent contractors, they can earn more in tips than they would otherwise earn through a minimum wage salary.[136] This is a valid concern, as minimum wage requirements only guarantee some income, but, for many dancers, not enough income to make the work feasible, partially because of stage fees and mandatory tips.[137] If an exotic dancer is classified as an employee who demands minimum wage, the money she earns from private dances could possibly be taken in whole or in part by the management as revenue for the club. In this context, the club would likely charge patrons directly, rather than permitting patrons to compensate employees directly with tips.[138] Further, some dancers prefer to be independent contractors in order to enjoy the tax benefits of above-the-line income tax deductions for money spent on costumes, makeup and grooming.[139]

However, the alleged benefits of being an independent contractor are questionable. In particular, these benefits may be reserved for a limited group of exotic dancers who can successfully assert their needs to the management. Although flexibility can

135. In the 1990s, the dancers at the Lusty Lady responded to the oppressive work conditions and exploitative labor practices by organizing collectively to form their own union, Local 790. *See* BARTON, *supra*, note 7, at 158 – noting that after years of contract negotiations the management gave up and the dancers bought the business and reorganized it into a dancer-owner cooperative).

136. *See* Rutman, *supra* note 9, at 554-555.

137. *See id.* at 530-531 ("There is little incentive to become classified as an employee when the club owners can compensate for wages by taking a percentage from each private dance, or by keeping all money earned through private dances.").

138. *See id.* at 530 ("Under FLSA, exotic dancers' wages automatically might be less than regular employees because exotic dancers may qualify as tipped employees, depending on how much the dancers earn in actual tips. Tipped employees may receive less than minimum wage provided they are able to retain all of the tips they receive. In order to be able to pay exotic dancers the lower minimum wage rate for tipped employees, exotic dancers must earn a certain amount of tips per shift. Determining when exotic dancers are being paid for a service or being tipped by customers plays a vital role in determining how much dancers should get paid under the FLSA and state minimum wage standards. In a few clubs, stage tips are not the primary source of income, therefore, the "tip" money may not be enough to qualify exotic dancers for lower minimum wage.").

139. *See id.* at 554.

be an advantage, especially for exotic dancers who attend school or care for children, it is not guaranteed.[140]

Regardless of the particular industry or profession, employers who unilaterally and unfairly impose independent contractor status on workers may harm or otherwise cause those workers pervasive problems. However, this oppressive practice of unfair characterization is especially problematic for exotic dancers: the disempowering dynamics of exotic dancing coupled with industry-favored status of independent contractor has the effect of keeping dancers silent and alienated. Some dancers who successfully contest their independent contractor status in court may obtain a small degree of relief. Yet, for exotic dancers as a collective group of workers, federal and state employment laws offer dancers only dismal protections and few viable opportunities to advocate for their interests.

C. *Lack of Comprehensive and Adequate Options*

As the law currently stands, employers tend to hire exotic dancers as independent contractors, but an employer's mere recitation of this status in the employment contract is not conclusive and a dancer may challenge her characterization in court.[141] Courts can respond and have in fact been responsive to challenges by exotic dancers, in many instances holding dancers to be employees as a matter of law.[142] Recently, a California district court preliminarily approved a $10 million class action settlement in which dancers contended that their employers had misclassified them as independent contractors.[143]

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140. *See* Fischer, *supra* note 18, at 532-534 ("Despite the club's initial representation of a dancing job as flexible, [many] dancers attest that their relationship with the club becomes all-consuming. Not only do dancers spend a majority of their hours each week at the club, but their work typically has significant effects on their personal lives and well-being.").

141. *See* Wilmet, *supra* note 105, at 493 ("Courts have astutely observed that it is a common practice within the adult entertainment industry for a dancer to sign a boilerplate contract, wherein she agrees to define her relationship to the club as one of an independent contractor, tenant or lessee. However, because such contracts are the result of intimidation or an ultimatum, the courts have declared that they may be voided after an examination of the employment circumstances.")

142. *See Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 330 (5th Cir. 1993); *Morse v. MER Corporation*, No. 1:08-cv-1389-WTL-JMS, 2010 U.S. Dist. LEXIS 55636 at *4-5 (S.D. Ind. June 4, 2010); *Chaves v. King Arthur's Lounge, Inc.*, Civ A. No. 07-2505, 2009 Mass. Super. LEXIS 298 at *18 (Mass. Super. Ct. July 30, 2009).

143. *Trauth v. Spearmint Rhino Companies Worldwide, Inc.*, No. 5:09-cv-01316 (C.D. Cal. filed April 4, 2011) (case still pending as of September 14, 2011).

Further, legislation can also mandate employee status, or otherwise protect exotic dancers from abusive employment practices. For instance, in 2000, Governor Gray Davis signed Assembly Bill 2509 into California law, an amendment to existing law which has the effect of prohibiting employers from requiring payment of "stage fees," "commissions," or "quotas" from any portion of dancers' tips.[144]

Despite recent legal developments benefiting exotic dancers, the fact remains that dancers often do not have the ability to elect employee status, and, even if they did, their legal status would not necessarily provide an adequate solution. First, as discussed *supra*, the unequal bargaining power of dancers vis-à-vis owners and managers and the club's use of a standard form contract typically mean that the exotic dancer will be labeled as an independent contractor, and that she will have to sue her employer to receive employee protections.[145] In spite of case law to support dancers' recharacterization, it is far from clear that an exotic dancer who initiates litigation will prevail. Aside from the risk of retaliation and impractical transaction costs of pursuing litigation, exotic dancers are not uniformly successful in these

144. *See* 2000 Cal. Legis. Serv. Ch. 876 (A.B. 2509) (West 2000) ("Existing law prohibits employers from receiving or deducting gratuities intended for employees from wages otherwise payable. Violation is a misdemeanor. Under existing law, this prohibition is not applicable to an employee that has a guaranteed wage or salary that is at least the higher of the federal or state minimum wage. This bill would delete the above exemption, thereby imposing a state-mandated local program. As so revised, the bill would make these provisions applicable to amounts paid by patrons directly to a *dancer* subject to specified orders of the commission. The bill would also impose a state-mandated local program by requiring employers to remit to their employees gratuities paid by credit card, without deduction for credit card fees, not later than the next regular payday following the date the credit card payment is authorized by the patron.") (emphasis added).

145. *See* Rutman, *supra* note 9, at 549-550. ("In response to litigation, club owners have either complied with FLSA minimum wage standards, or restructured their relationship with the exotic dancers to maintain the independent contractor status. Club owners may use one of three methods to restructure their relationship with exotic dancers: pay wages and keep a percentage of each private dance to offset the wages; implement a hybrid system where club owners pay wages and collect a virtual stage fee to offset wages; or restructure the relationship with the dancers so that club owners cannot be considered the employers of the dancers. Many clubs simply continue the practice of classifying exotic dancers as independent contractors and collecting stage fees while using drink quotas and mandatory staff tipping. Some clubs combine legitimate contracts with illegal oral contracts to provide an appearance of conformity. Overall, the industry is desperately trying to maintain classifying exotic dancers as independent contractors to minimize employment tax liability and also render dancers incapable of receiving employment protection.") (citation omitted).

cases.[146] Moreover, even if recharacterization were feasible as a large scale option, it is not necessarily the best answer for individual dancers. If independent contractors do in fact earn more money than employees in the exotic dancing industry, the continued use of independent contractor status may be necessary for dancers to cope with existing exploitative labor practices like mandatory tips and stage fees, absent legislation to curtail such practices. Moreover, the increased earnings from independent contractor status may in fact be necessary for dancers' to cope with the social stigma associated with their line of work.

Second, even if a dancer litigated or otherwise challenged the club's practices, a strip club can reorganize itself to ensure independent contractor status.[147] For instance, The Acropolis strip club in Oregon responded to legal challenges with elaborate measures to prevent exotic dancers from being recharacterized as employees.[148] The Acropolis began to use a booking agent to schedule its exotic dancer performers, and the booking agent leased stages directly from the club.[149] Further, the booking agent made employment agreements directly with the dancers, and the club was not involved with hiring, firing or scheduling dancers. As a result, the Oregon appellate court held that exotic dancers working at The Acropolis were independent contractors, not employees. The court reasoned that The Acropolis's booking and employment practices destroyed the possibility of the club's control over the dancers, and thus the club was not subject to minimum wage laws.[150]

Ultimately, even if dancers were allowed to choose between being independent contractors and employees, neither option would adequately address their unique needs. As an independent contractor, an exotic dancer has the potential to earn more money, but gives up rights to minimum wage, Title VII discrimination and sexual harassment protections, worker's compensation, and other statutory rights. As an employee, an exotic dancer is entitled to a guaranteed income in accordance with

146. *See id.* at 538.

147. *See id.* ("Club owners have responded to these [different case] results by attempting different mechanisms of restructuring the working relationship with the dancers so that they can keep their liability and responsibilities as minimal as possible.").

148. *See State ex rel. Roberts v. Acropolis McLoughlin, Inc.*, 945 P.2d 647, 190 (Or. Ct. App. 1997).

149. *See id.*

150. *See id.* at 192-193.

minimum wage laws and the panoply of state and federal labor protections, but work schedules are likely to be less flexible and her earning potential will likely be capped in those clubs that rely on private dances as a primary source of revenue.

Further, the benefit of statutory protections may be substantially less for exotic dancers than it is for women working in other fields. As Professor Bernadette Barton notes in her book *Stripped*, exotic dancers experience frequent discrimination - both formally in finding housing, new employment, and medical care, and informally, among friends and family - yet often stay silent about such discrimination, as well as their bleak employment conditions, because of a real or perceived feeling of stigma.[151] Thus, asserting her constitutional and statutory rights is no easy task for an exotic dancer. For instance, bringing a statutory claim under Title VII can be a long and protracted battle, and for many dancers, the publicity and time commitment alone can significantly decrease the benefit of this protection, particularly for dancers who view their work as temporary.[152]

Ultimately, when it comes to employment, exotic dancers find themselves between a rock (independent contractor status with almost no statutory benefits) and a hard place (employee status with less money and diluted protections). Neither option fully addresses the unique needs of exotic dancers and the pressures of the exotic dancing business. Moreover, when stigma, transience, and other individual factors compound this legal landscape, the unfortunate result is that the law does not adequately protect exotic dancers.

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151. *See* BARTON, *supra* note 7, at 79-81 ("The stripper or ex-stripper hides the stigmatized behavior, thus colluding in and reinforcing dominant stereotypes about women who work in the sex industry.").

152. Chun, *supra,* note 106, at 234. For a discussion of Title VII claims in the nude dancing context, *see* 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 (1998); *see also* Ann C. McGinley, *Sex for Sale: Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65 (2006). Beyond personal barriers to brining a Title VII claim, there are also procedural complexities that make application to exotic dancers more challenging. First, a hostile work environment or sexual harassment allegation is particularly complicated because much of the conduct that occurs in strip clubs is consensual, although it might be considered sexual harassment in other fields. *See* McGinley, *supra*, at 80. Second, although Title VII protects against discrimination, the Bona Fide Occupational Qualification (BFOQ) doctrine tempers the protection, as the BFOQ theory can permit employers to discriminate against exotic dancers that do not meet their standards. *See* Burstein, *supra*, at 288-289 (discussing BFOQ doctrine in relation to exotic dancers).

V. Positive Feedback Loop With Negative Results

Thus far, I have argued that exotic dancers' interests are excluded from First Amendment jurisprudence and largely unaddressed in the context of employment law. However, the alienation from these two legal arenas is only half the problem. Together, employment laws and First Amendment regulations work together symbiotically to diminish the benefits and protections exotic dancers might possibly obtain from either body of law.

A. *The Impact of First Amendment-Based Regulations on Dancers' Employment*

First Amendment-based regulations impact exotic dancers' employment conditions by limiting their earning potential and by setting the ground rules for what is permissible or prohibited conduct in dancers' performances at work. Additionally, the legal standards and tests to distinguish "employees" from "independent contractors" often require that dancers challenging their independent contractor status to dispute the skill or artistic aspects of exotic dancing. This serves to counter the free speech and expressive qualities of exotic dancing on which the Supreme Court justified First Amendment protection. Together, these bodies of law work together to perpetuate stigma and oppressive industry dynamics by requiring dancers to denigrate the artistic attributes of exotic dancing in order to access statutory remedies for workers.

1. Terms and Expectations of the Employment Relationship

State laws and local ordinances determine what an exotic dancer legally may or may not do in the course of business. When an employer hires an exotic dancer, the law is the default around which the employer constructs the terms and conditions of employment, and the employment agreement memorializing those terms, whether oral or implied, determines the working conditions for exotic dancers. For instance, municipalities that propound no-touch regulations preclude dancers from performing lap dances, and thus lap dances might be explicitly or implicitly prohibited conduct on business premises.

Additionally, even if exotic dancers are categorically deemed "employees," First Amendment regulations of exotic dancing minimize the available employment law protections, es-

pecially with respect to Title VII "hostile work environment" claims. After all, what is "hostile" varies in each profession, and is particularly complicated in sexually-oriented businesses. Professor Ann C. McGinley points out that, "notwithstanding the crude terms or conditions of an entertainer's employment, aggressive sexual behavior such as derogatory name-calling, clearly unwanted touching, stalking, or physical assault may alter those terms or conditions of the dancer's employment and may create a legally cognizable hostile work environment."[153] However, she also acknowledges that both applicable First Amendment regulations and the employment agreement are critical factors in determining which environments are "hostile" for purposes of bringing a claim:

> Whether a patron's touching behavior creates a hostile working environment for the dancer depends on whether the individual dancer welcomes the behavior, and, if not, whether the behavior alters the terms or conditions of employment. *If an employer makes it clear from the onset of the job that a term or condition of employment is touching by customers in a state where touching is permissible, the individual dancer may not make out a cause of action for a hostile work environment on the basis of such touching.* In contrast, if the behavior that the dancers are expected to tolerate is not necessary to the job, essential to the business, or a clear term or condition of employment, whether a hostile work environment exists will depend in large part on the individual dancer's willingness to tolerate the behavior.[154]

In other words, local regulations of exotic dancing based on First Amendment jurisprudence determine the terms and conditions of a dancer's employment relationship in conjunction with the employment agreement (often oral, although sometimes memorialized in writing). Together, the regulations and the contract establish the parameters of the dancer's employment, including the risks she is required to tolerate and the rights she may realistically assert, despite the existence of statutes like Title VII intended to protect workers from sexual harassment.

Moreover, First Amendment-based regulations may affect the dancers' ability to assert their interests because dancers fear penal sanctions. Exotic dancing regulations vary greatly, as they often take the form of ordinances propagated by local governments and municipalities, and sometimes state and local legisla-

153. Ann C. McGinley, *Sex for Sale: Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 Yale J.L. & Feminism 65, 104 (2006).

154. *Id.* at 104 (emphasis added).

tion criminalize the conduct that occurs in strip clubs. The result is that, "[f]or people who work in the exotic dancing industry, concerns over the legality of their business or livelihood often takes precedence over employment law issues. Because many dancers are aware that their work walks a fine line between what is legal and what is illegal, they are wary about asserting their rights. . . . Club owners' recognition of exotic dancers' hesitancy to enforce their rights aids in the perpetuation of these illegal practices."[155] Therefore, the blurry line drawn by First Amendment based regulations directly affects the employment law rights and protections exotic dancers may – or, more realistically, want to – assert.

2. Exotic Dancers' Earning Capacity

Regulations regarding buffer-zones and direct tipping affect the ability of exotic dancers to earn a living, which, because of their frequent independent contractor status, is earned through tips. Regulations that require a particular distance between the dancer and patrons means that many dancers will not be able to perform table dances or private lap dances, and thus they receive less money in tips.

This correlation between First Amendment based regulations and earning potential is no secret to the courts who review such regulations. For instance, the Sixth Circuit acknowledged that the no-touch provision at issue would have a serious economic impact on the club and the dancers individually, yet the court still refused to strike the ordinance on that basis.[156] The Sixth Circuit added that dancers may still receive tips from customers before or after their performances, and "[a]lternatively, the clubs could decide to increase dancers' salaries, rather than requiring them to earn a living wage from their tips."[157] Although recognizing that dancers would be negatively affected by the ordinance, the Sixth Circuit concluded that "any problems dancers may experience with receiving tips or speaking with customers will be caused not by the ordinance, but by the clubs'

155. *See* Rutman, *supra*, note 9, at 556.

156. *See Deja Vu of Nashville, Inc*, 274 F.3d at 397.

157. *Id.*; *see also Blue Movies, Inc.*, 317 S.W.3d at 33 (holding that the impact of the no-direct tipping provision on the dancers' tips was an incidental restriction on free speech that was justified by the government interest in combating secondary effects like crime and prostitution).

refusal to alter their standard operating procedures in response to these constitutional regulations."[158]

The Ninth Circuit took a similar approach in upholding a ten-foot distance requirement. The court explicitly found that even prior to the contested regulation, the club's employment practices took advantage of dancers, yet this finding did not affect the validity of the ordinance: "[t]he fact that [the clubs] hire their dancers on an independent contractor basis, refuse to pay their dancers for dancing on stage, require their dancers to pay rental fees, and limit their dancers' remuneration to tips from patrons, *appears to us to be an effort to maximize profits while minimizing dancers' economic security*."[159] Although the regulation exacerbated the club's unfair labor practices and the dancers bore the lion's share of the burden, the Ninth Circuit upheld the ordinance, leaving it to the clubs to restructure their businesses.[160]

In these cases, the Ninth and Sixth Circuits illustrate the unfortunate predicament of dancers: they suffer from unfairly structured employment relationships, yet their profession is heavily regulated for the benefits of the general public pursuant to First Amendment jurisprudence, which permits burdens to fall on the dancers individually.

B. *The Incompatibility of Employment Law and First Amendment Expression*

As discussed *supra*, there is no single definition of an employee or independent contractor, and the tests for determining the distinction are context specific. One common factor is whether a worker possesses "the skill required in the particular occupation."[161] In recharacterization cases, dancers who wish to allege that they are employees as a matter of law must often contend that they do not possess the skill or initiative that would

158. *Deja Vu of Nashville, Inc*, 274 F.3d at 397.

159. *Colacurcio*, 163 F.3d at 557 (emphasis added).

160. *Id.* (reasoning that the club owners only demonstrated a potential loss of profits, "which arguably could be remedied by restructuring the way they do business.").

161. Restatement (Second) of Agency 220 (1958) (summarizing the common law test); *see also Reich v. Circle C. Investments, Inc.*, 998 F.2d 324 (5th Cir. 1993) (enumerating the factors of FLSA's 'economic realities' test, which includes the "skill and initiative required in performing the job").

weigh in favor of independent contractor status.[162] On the other hand, in response to a dancer's allegations of mischaracterization, strip clubs owners must argue in favor of skill and initiative by the exotic dancers in order to maintain the status quo.[163] Thus, in this backwards context where dancers argue against their skills and clubs argue for them, a favorable analysis for the dancer under the FLSA test will find that the dancer lacks special skills, the only requirement being that she has to be moving, where "the scope of her initiative is restricted to decisions that involve what clothes to wear or how provocatively to dance."[164]

Although the dancers may access the statutory benefits of employees by alleging in court that they lack of skill, through this legal strategy to obtain employment law protections and benefits, dancers are simultaneously chipping away at their already marginal status in First Amendment law.[165] In the First Amendment context, dancers (or, more likely, strip club owners with standing), commentators, and third party advocates for free speech make forceful arguments that exotic dancing is an expressive activity protected by the Constitution. However, in the employ-

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162. *See Harrell v. Diamond A Entertainment, Inc.*, 992 F. Supp. 1343 (Fla. Dist. Ct. 1997). In *Harrell*, the plaintiff argued against her own skill and also argued that she was not a professional that should be exempted from the FLSA, 29 U.S.C. § 213. She contended in her brief that "[the clubs] are not looking for dancing talent, they are looking for attractive young women who will bare their bodies as much as the law allows, and can do some semblance of dancing which will gratify the crowd. . ..Because the artistic quality of the dancing was of no interest to the owners, it follows that whatever quality was required in a dancer's performance could be attained by the average patron of a disco or other nightclub where social dancing was permitted." *Id.* at 1356 (quoting Plaintiff's Response, pp.5-6.); *see also* Wilmet, *supra*, note 105, at 548 ("the only real requirement for nude dancing seems to be female anatomy. Of course, a secondary requirement is simply a willingness to perform the work, to remove clothing as required by the club, to dance the required number of dances, and to meet the club's income quota.").

163. *See Harrell*, 992 F. Supp. at 1350-1351.

164. *Id.* at 1351.

165. Additionally, employment law affects dancers' First Amendment involvement, as the commonly used labor practices prevent the development of solidarity that could empower dancers to speak out. Because exotic dancers are often as independent contractors who live off tips and because there are only so many opportunities to dance onstage or patrons to purchase private dances, fierce competition develops in strip clubs among the dancers, who even resort to theft and sabotage. *See* BRADLEY-ENGEN, *supra*, note 7, at 44. In light of the fact that many exotic dancers report feeling devalued and frustrated in competitive work environments, the potential for engaging in collective bargaining is slim. *See* Chun, *supra,* note 105. Yet, as difficult as collective action might be in the employment context, the possibility of joining together to advocate for the First Amendment value of the striptease is an even more unrealistic.

ment context, dancers challenging their independent contractor status must sometimes contend that their physical appearance and willingness to strip off their clothes are the primary job requirements.[166] Dancers are essentially forced to choose between identifying themselves as employees entitled to statutory protections, but without the respect accorded to other persons exercising their free speech rights, or as free speakers without employment law benefits, but with First Amendment protections severely diluted by the secondary effects doctrine.

Ultimately, exotic dancers are unable to turn to the First Amendment or employment law to protect their interests. When these bodies of law interact, dancers may experience additional burdens, as they are treated neither as respectable free speakers nor as employees deserving of statutory protections, but bear the incidental burdens associated with each role (for instance, heavily regulated "speech" and unfair employment practices). They are left to fend for themselves in an industry that systemically favors strip clubs over the dancers. In this respect, it becomes increasingly evident that the law as it currently stands offers no realistic opportunities for dancers to advocate on their own behalves, and thus the law serves to perpetuate oppressive industry dynamics.

VI. CONCLUSION

Contrary to the glamorous face of exotic dancing in mainstream culture, the full-time job of stripping can be a harsh world where dancers experience stigma and exploitation on a daily basis. This conflicted reality, when combined with First Amendment and employment law jurisprudence, creates a toxic mixture that stymies the ability of dancers to speak out for their free speech or employee rights. Yet the glare from the glossy image of exotic dancing obscures the reality. Unfortunately, when exotic dancers are exalted as sex symbols in mainstream media, the inclination to examine the reality of exotic dancing is markedly lacking.

Female leaders in the adult entertainment industry tout the benefits of free speech and the empowering aspects of sex work; however, it is easy to love the First Amendment from the top of the totem pole.[167] Most exotic dancers exist among the lower

166. *See Harrell*, 992 F. Supp. at 1350-1351, 1356.

167. *See* Calvert, *supra*, note 6.

rungs of the sex worker hierarchy, and are largely unable to leverage the recent glamorization of pole dancing for their benefit. Even after "stripper chic" started to gain traction in the new millennium, exotic dancers have continued to report oppressive working conditions and remain markedly absent from First Amendment-based litigation. As Professor Barton observes, "[i]n the case of exotic dancers, the more the stripper is treated poorly, the more she learns to expect such treatment; the more she believes she deserves it, the harder it is for her to create positive changes in her life. This is part of the psychological toll of oppression."[168]

In light of the stigma associated with exotic dancing, harsh working conditions, and most notably, the failure of First Amendment and employment laws as sources of protection, Professor Price-Glynn's analogy to a shell game becomes more compelling and more convoluted. The exotic dancing industry accords strip clubs with unparalleled bargaining power and resources, which are virtually unavailable to individual dancers. Building on these features, strip clubs then use First Amendment and employment laws to cement their superior position, typically dictating one-sided employment terms and litigating the dancers' First Amendment rights under the third-party standing doctrine to benefit their own economic interests. As a result, clubs "control the house" because they stand to win in virtually every instance, and dancers are lost in the shuffle of the law.

Without advocating a particular path for future legal reform, I contend that to remedy this injustice, one of the first steps must be to reevaluate existing laws and to consider ways to include exotic dancers under the protective umbrella of employment law and First Amendment jurisprudence. While California legislators expressly added provisions for exotic dancers to state labor laws,[169] an alternative approach may be to incorporate dancers into existing First Amendment law. For instance, if dancers can join "the general public" whose interests are protected in the secondary effects doctrine, First Amendment-based regulations

168. *See* BARTON, *supra*, note 7, at 90.

169. *See* Cal. Lab. Code § 350 (West 2011) ("'Gratuity' includes any tip, gratuity, money, or part thereof that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due the business for services rendered or for goods, food, drink, or articles sold or served to the patron. Any amounts paid directly by a patron to a *dancer* employed by an employer subject to Industrial Welfare Commission Order No. 5 or 10 shall be deemed a gratuity.") (emphasis added).

could potentially be tailored to promote their well-being (e.g., by ensuring sanitary work environments), rather than that of the clubs who litigate the cases.

The extent to which First Amendment jurisprudence and employment laws empower strip clubs or disempower dancers remains debatable. However, it is clear that existing laws have helped stack the deck in the strip clubs' favor by serving as tools to enforce and favor the clubs' interests over those of the dancers. This pervasive trend invites an inquiry as to whether legal reform could increase the empowering aspects of exotic dancing, or, at the very least, prevent existing laws from perpetuating the degrading and oppressive attributes of the exotic dancing industry.

Ultimately, until there is adequate legal reform, exotic dancing continues to be a shell game, offering the potential for both sexual self-expression and dangerous and degrading working conditions. Although the glamorization of exotic dancing could eventually serve to alleviate societal stigma, the flashy face of stripping in mainstream media eclipses the unpleasant reality, wherein existing laws reinforce industry dynamics to trap dancers in a complicated house of cards.