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Sarah Chun*

INTRODUCTION

Giggling, the three of us crammed into a small, dark booth at the famous San Francisco Lusty Lady adult theatre. A dancer from inside the peep-show room sauntered to our window and began to dance. She looked into our booth, seemingly amused at the sight of the three voyeurs packed together. I was intrigued and apprehensive at the same time. Never before had I been this close to a female exotic dancer. As she stood gyrating in front of our window, I noticed a button hanging off her g-string which said “Local 790.” A union?

A unionized exotic dancer jarred my preconceived ideas about the legitimacy of nude dancing as a profession. Because I saw strip clubs as vehicles that objectify women into sexual beings, I never stopped to consider these women as workers. The illicit allure of the sex industry overshadowed any alternate contemplation of them. Yet, seeing that union button humanized her in my eyes and made me think about her rights and problems as a worker for the first time.

This Note explores the legal and social barriers that confront exotic dancers1 as workers and the ways in which these obstacles prevent collective action through unionization. It is an attempt to shed light on a sector of society that garners considerable attention as sex objects but receives virtually no concern as workers. Part I considers existing laws designed to prevent employment discrimination and their inapplicability to most exotic dancers. Part II discusses the existing barriers to equality faced by dancers. These challenges include the questionable legal status of dancers as independent contractors instead of employees, as well as the social stigma attached to exotic dancing that hinders the formation of a


1. This Note will only address the social and economic situation specific to female exotic dancers.
collective voice. Part III questions the propriety of unionization as the right alternative for sex workers considering the historic gender bias and the mixed results from past unionizing efforts by dancers. Part IV examines the relationship between unions and dancers and concludes that this seemingly uncommon alliance is indeed a symbiotic confluence. In particular, this section explores the practical implications of unionizing exotic dance clubs and focuses on current organizing efforts in California.

BACKGROUND

Who is an exotic dancer? Exotic dancers are not easily categorized since they come from diverse backgrounds. They may be young or old, but most tend to be younger as the industry places a premium on youth and physicality. Some dance only temporarily, while others become "veteran" performers. Most dancers are not attracted to exotic performance for the work itself; quite often they enter the sex industry as an easy way to earn quick cash — a relatively high pay rate for a vocation requiring no prior schooling or experience.

Dancing is one way for women to earn a living while pursuing other endeavors. Many dancers are also students, pursue other careers or support children. Dancers in general do not have to work full time to make a viable income. Depending on the caliber of the club and the number of customers, a "house" dancer who performs regularly at the club can bring in anywhere from fifty to eight hundred dollars in tips. One San Francisco dancer claims to have made as much as thirteen hundred dollars in one evening. "Feature" dancers who have starred in pornographic movies or adult magazines can bring in even more money for guest performances at strip clubs.

5. See id. See also Andrew Leonard, Market Street Blues, S.F. BAY GUARDIAN, July 14, 1993, at 20.
6. See Sward, supra note 4, at A18.
7. See Hanna, supra note 2, at *21.
Many dancers claim to feel economically and psychologically empowered while dancing.\(^\text{11}\) They have the full attention of their client as well as considerable control over their clients’ spending habits while at the club.\(^\text{12}\) Yet, because of the stigmatized nature of their work, many dancers cannot tell their families or friends about what they do for a living.\(^\text{13}\) Thus, dancers are vulnerable to exploitation by the clubs that employ them because they lack the usual support networks that workers in other industries rely on for advice and encouragement. Traditional society disapproves of exotic dancers, and most communities seek to keep nude dancing establishments out of their neighborhoods through public protest and zoning laws.\(^\text{14}\) Exotic dancing is further demoralized by its association with illegal activities, such as prostitution, and thus adds to a dancer’s reluctance to view her work as legitimate.\(^\text{15}\)

There are additional factors that contribute to a dancer’s silence or inaction when it comes to reporting workplace inequities. Since some dancers consider their work to be illegitimate, they are reluctant to complain to club management or state authorities about working terms and conditions.\(^\text{16}\) Their silence could also originate from the conclusion that their complaints will have no effect. It is the experience of some dancers that clubs either ignore their complaints or tell them to work elsewhere.\(^\text{17}\) There is also the problem of transiency in the profession. Dancers often enter the industry intending to stay only a few months, until they earn enough cash to meet their needs; yet, they can remain in the field longer when the work proves to be more lucrative than other job options.\(^\text{18}\) Workers that intend to remain on a job for short periods of time are less motivated to make or fight for change. Finally, there are those that are financially dependent on dancing to raise children, pursue other goals or even support a drug addiction.\(^\text{19}\) Whatever motivates their decision to

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10. 1997, at 42, 47. The nation’s top pornography stars can earn between $8,000 to $20,000 per performing four 20-minute shows each night. See id.
11. See Hanna, supra note 2, at *19.
12. See id.
13. See Brooks, supra note 3.
16. See Kerwin Brook, Peep Show Pimps, S.F. BAY GUARDIAN, Feb. 4-10, 1998, at 19. For example, in San Francisco, the State Labor Commissioner states that it needs to hear more complaints before it can investigate the alleged unfair labor practices of exotic dance clubs. So far, very few women have come forward, most likely due to fear of losing their jobs. See id. at 21.
18. See Brooks, supra note 3.
19. See id. See also Leonard, supra note 5, at 21.
remain in the industry, club management uses this financial dependency to exploit and threaten workers.\textsuperscript{20} Fearing they will be fired or that management will retaliate against them,\textsuperscript{21} dancers remain silent—even when they know their employers are violating the law.\textsuperscript{22}

**PART I: WHY EXISTING LEGAL REMEDIES ARE INEFFECTIVE FOR ADDRESSING DANCERS’ CONCERNS**

Existing legal remedies which address workplace inequality range from statutory protection to litigation.\textsuperscript{23} At the federal level, two anti-discrimination statutes apply to women in the workplace. The Equal Pay Act of 1963\textsuperscript{24} prohibits sex-based wage discrimination between men and women who perform equivalent, or substantially equal, work. Title VII of the 1964 Civil Rights Act\textsuperscript{25} prohibits discrimination on the basis of gender in hiring, promotion, termination, training and other employment terms. Since these laws attempt to achieve equality in the workplace between men and women,\textsuperscript{26} they fail to address the abuses suffered by exotic dancers who are employed in a largely single-sex work environment.

Moreover, most anti-discrimination statutes only protect employees.\textsuperscript{27} Even if these laws were made applicable to the form of discrimination faced by exotic dancers, many exotic dancers have been purposely misclassified by their clubs as independent contractors and thus would not be covered by laws protecting employees.\textsuperscript{28}

Litigation also presents problems because it can be an expensive, time intensive process which results in a win or lose proposition. To most working class women, potentially waiting several years to resolve a legal dispute, risking termination from their job, and paying exorbitant legal fees present serious deterrents. Even on a basic level, many workers fear that if they make demands directly to management, or report substandard working conditions to the authorities, they will be fired or blacklisted.\textsuperscript{29} Moreover, the reactionary strategy of the club itself is unpredictable. Dancers at one San Francisco club successfully challenged the twenty-five dollar “stage

\begin{itemize}
  \item \textsuperscript{20} See Brook, supra note 16, at 18.
  \item \textsuperscript{21} See Leonard, supra note 5, at 20. See also Brook, supra note 16, at 21.
  \item \textsuperscript{22} See Brook, supra note 16, at 21.
  \item \textsuperscript{24} 29 U.S.C.A. §206(d) (West 1998).
  \item \textsuperscript{25} 42 U.S.C.A. §§2000e-2000e-17 (West 1994).
  \item \textsuperscript{26} See Crain, supra note 23, at 1921.
  \item \textsuperscript{27} See Richard R. Carlson, Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations, 37 S. TEX. L. REV. 661, 682 (1996).
  \item \textsuperscript{28} See Martin, supra note 9, at 52. The independent contractor/employee classification issue will be discussed in further detail in Part II of this Note.
  \item \textsuperscript{29} See Brook, supra note 16, at 21. See also Brooks, supra note 3 (Passar was blacklisted from all clubs in San Francisco because she complained to state authorities about the lack of doors in the bathroom).
\end{itemize}
In response, the club reclassified the dances performed as "property" of the club and charged dancers a one hundred fifty dollar commission for using club "property." By simply recharacterizing the nature of an exotic dancer's performance, club management found a new venue for exploitation, and hence created another legal battle for their workers.

Collective action offers a more powerful and timely remedy than individual or class-action litigation. A club simply cannot operate without willing dancers. Dancers could use this reality to their advantage by acting together to significantly increase their bargaining power for better working conditions. However, collective voice and collective action have drawbacks. Establishing uniform goals for the group is a major challenge for this diverse group of women. Developing the motivation and self-esteem needed to carry through organizing efforts can also be difficult. These obstacles are discussed in Part II and Part III of this Note.

PART II: BARRIERS TO UNIONIZATION

A. INDEPENDENT CONTRACTOR CHARACTERIZATION.

Independent contractors are sometimes categorized and placed in a class of "contingent workers" which includes part-time workers, contract workers and temporary workers. The use of independent contractors and temporary workers is increasing nationally. Independent contractors are growing in popularity with employers because they are a less expensive alternative to full-time employees. Moreover, they are flexible enough to fill in during peak work loads and increase productivity. However, the independent contractor status becomes a disadvantage to employees when employers improperly classify them as independent contractors to avoid providing benefits, paying certain taxes and assuming respondeat superior

30. See Brook, supra note 16, at 18.
31. See id.
32. See id.
The work of an employee and an independent contractor can appear to be the same. Through the eyes of a client, it matters very little whether the dancer is characterized as an employee or an independent contractor. However, there are critical legal distinctions between these classifications for the dancer. Clubs that have characterized their dancers as independent contractors do not pay their dancers a wage, but rather make them rely entirely on tips from customers. Additionally, some clubs require their dancers to pay the club a “stage fee” or a “commission” for the right to dance in the club and collect tips. This flat fee paid to the club is known by various names such as “tip-out,” “shift pay” or “house fee.” These amounts have run anywhere from ten dollars to one hundred fifty dollars. Furthermore, dancers at some clubs are required to split their tips with other workers or with the management. As an employee, she would be guaranteed an hourly wage by state and federal minimum wage laws, as well as be eligible for state workers’ compensation and state unemployment benefits.

In terms of paying taxes and reporting records to the Internal Revenue Service (IRS), classifying workers as employees presents much more work for the employer. Employers must withhold federal and state income taxes, withhold taxes under the Federal Insurance Contributions Act (FICA), pay federal and state payroll taxes, and report wages to both the IRS and employees on IRS W-2 forms. In contrast, independent contractors pose fewer costs and legal obligations to an employer.

37. See id. at 672. See also Burdick, supra note 35, at 80.
39. See Brook, supra note 16, at 18.
40. See Circle C, 998 F.2d at 326.
41. See Harrell, 992 F. Supp. at 1346.
42. See Bomareto, 956 P.2d at 255.
43. See Harrell, 992 F. Supp. at 1346.
44. See Brook, supra note 16, at 18.
46. See, e.g., CAL. LAB. CODE § 1197 (West 1999).
53. See Burdick, supra note 35, at 79-90. See also Benson Fischer, supra note 38, at 535-37.
Employers need only submit an IRS 1099 form for each independent contractor they pay more than six hundred dollars per year.\textsuperscript{54} Workers are then responsible for calculating and paying their own taxes.\textsuperscript{55}

As for employee protection, most labor laws cover only employees, not independent contractors. By and large federal statutes apply only to "employees." Thus independent contractors are excluded from coverage under Title VII of the Civil Rights Act of 1964,\textsuperscript{56} the Age Discrimination in Employment Act (ADEA),\textsuperscript{57} Fair Labor Standards Act (FLSA),\textsuperscript{58} the Occupational Safety and Health Act (OSHA)\textsuperscript{59} and the Employee Retirement Insurance Security Act (ERISA).\textsuperscript{60} More importantly, for purposes of this Note, independent contractors are categorically exempt from coverage under the Labor Management Relations Act (LMRA).\textsuperscript{61} Thus, under the LMRA, independent contractors are free to act collectively, but only employees are protected by the LMRA.\textsuperscript{62} Under California law, independent contractors are not covered by the Fair Employment and Housing Act\textsuperscript{63} which gives employees rights and privileges similar to, but more expansive than, federal Title VII.\textsuperscript{64}

In addition to statutory exclusions, independent contractors are also ineligible for protection under common law respondeat superior liability.\textsuperscript{65} However, numerous exceptions apply to this general rule of nonliability for employers.\textsuperscript{66} Notwithstanding exceptions where employers properly

\begin{footnotes}
\item[55] See Benson Fischer, \textit{supra} note 38, at 537.
\item[58] 29 U.S.C.A. § 203(e)(1)–(4) (West 1998). \textit{But see} Wirtz v. Lone Star Steel Co., 405 F.2d 668 (5th Cir. 1968) (holding label "independent contractor" alone does not take worker out of FLSA protection where work done essentially follows path of employee).
\item[61] 29 U.S.C.A. § 152(3) (West 1998). The LMRA began in 1935 as the Wagner Act or National Labor Relations Act (NLRA) and was amended in 1947 by the Taft-Hartley Act.
\item[62] \textit{See} N.L.R.B. v. United Insurance Company, 390 U.S. 254 (1968) (NLRA does not apply to independent contractors). Anti-trust issues could result if independent contractors acted collectively to restrain trade or commerce. These issues will not be discussed in this Note.
\item[63] \textsc{Cal. Gov't Code} § 12940 (West 1999).
\item[64] FEHA also covers harassment based on pregnancy. \textit{See} \textsc{Cal. Gov't Code} § 12940(h)(3)(C) (West 1999).
\item[65] \textit{See} \textsc{Restatement (Second) of Torts}, § 409, § 426 (1965); Taylor v. Oakland Scavenger, 110 P.2d 1044 (Cal. 1941) (employer generally liable for negligent acts of employee performed within scope of employment, but, independent contractor usually is liable for negligent acts.).
\item[66] \textit{See} \textsc{Restatement (Second) of Torts}, § 410, 411, 413-17, 419, 422, 429 (1965). \textit{See also} Griesel v. Dart Industries, Inc., 591 P.2d 503, 506-07 (Cal. 1979) (employer of independent contractor liable for peculiar risk doctrine for certain harm caused by independent contractor's failure to take precautions, even though employer has provided for
classify independent contractors but still face liability, there are numerous cases where employers are not shielded because they misclassified their workers.  

Some types of workers are not easily classifiable, falling in the gray area between employee and independent contractor status. Performers in general are problematic to categorize because they often exercise a high level of control over their work product, one characteristic of an independent contractor. Additionally, their work can be artistic in nature and often done on a freelance basis. Often, the work of performers does not possess the obvious attributes of employees such as regular working hours, places or duties. Consequently, employers misclassify them because they are unsure of their workers’ status, or they purposely misclassify them to take advantage of independent contractors’ low costs. Exotic dance clubs are one such employer that purposely misclassify their performers as independent contractors.

As far as a legal standard for when a worker is an employee or an independent contractor, there is no single uniform test and no single factor is dispositive. The IRS has adopted a comprehensive twenty-factor test.

such precautions in contract or otherwise); Gipson v. Davis Realty Co., 30 Cal. Rptr. 253 (Cal. Ct. App. 1963) (real estate brokerage still vicariously liable for automobile accident involving agent even though agent’s employment contract characterized him as independent contractor).

67. See Toyota Motor Sales USA v. Superior Court, 269 Cal. Rptr. 647 (Cal. Ct. App. 1990) (trial court’s determination that pizza deliverer was an independent contractor was not supported by substantial evidence; trial court abused its discretion by basing its decision on conclusion that no respondeat superior liability existed).


69. See id.

70. See Carlson, supra note 27, at 664. See also Harrah’s Club v. NLRB, 446 F.2d 471 (9th Cir. 1971), cert. denied, 404 U.S. 912 (1971).

71. See Benson Fischer, supra note 38, at 523; Martin, supra note 9.

72. See Pacynski, supra note 36, at 673.

73. See Rev. Rul. 87-41, 1987-1 C.B. 296. The twenty factors are: (1) whether a worker is required to comply with instructions about when, where and how services are to be performed; (2) whether the worker needs training; (3) whether the worker’s services are integrated into the business operations; (4) whether services are rendered personally; (5) whether the worker hires, supervises or pays assistants; (6) whether there is a continuing relationship between worker and employer; (7) whether the worker must comply with set hours; (8) whether full-time work is required; (9) whether work must be done on employer’s premises; (10) whether the worker must follow the order or sequence set by the employer; (11) whether the worker must submit oral or written reports; (12) whether the worker gets paid on a regular basis or per job or by commission; (13) whether business or travel expenses are paid for; (14) whether the employer furnishes tools and materials; (15) whether the worker makes a significant investment in the facilities used by the worker; (16) whether the worker can realize a profit or loss as a result of the worker’s services; (17) whether the worker renders services for more than one employer at a time; (18) whether the worker makes her services available to the general public; (19) whether the employer has the right to discharge or threaten to discharge a worker; (20) whether the worker has the right to
These factors be grouped into three general categories—control, organization and entrepreneurship or economic realities.\(^{74}\) Despite this comprehensive test, independent contractors have caused tax collection and administration problems for the IRS for over twenty years.\(^{75}\) The thrust of the problem lies in the independent contractor's understatement of income and the failure of employers to pay employment taxes and withhold income by improperly classifying employees as independent contractors.\(^{76}\) The estimated loss to the government as a result of this misclassification runs in the billions of dollars each year.\(^{77}\) The IRS's attempts to crack down on the adult entertainment industry for misclassifications of employees is one step in the right direction.\(^{78}\) However, these penalties directed at club owners do not directly benefit dancers or working conditions.

Under the FLSA, an "economic realities" test is used which looks at whether the putative employee is economically dependent upon the alleged employer.\(^{79}\) A number of cases challenging the independent contractor characterization under the FLSA have resulted in a finding that dancers are employees, not independent contractors. Jurisdictions in Alaska,\(^{80}\) Colorado,\(^{81}\) Florida,\(^{82}\) Illinois,\(^{83}\) Oregon\(^{84}\) and Texas\(^{85}\) have found that terminate her relationship with the employer. \(\text{Id.}\)

74. See Pacynski, supra note 36, at 673.
76. See id. at 19.
77. See id. at 21. In 1992, it was $2 billion. See id.
78. See Bill Alden, Judge: Dancing in the Dark Brings the Tax Code to Light, NAT'L L.J., Mar. 25, 1996, at A27; Kevin Murphy, Court Rules Exotic Dancers are Employees, Wisconsin Rapids Club Must Pay $18,000 in Taxes, Appeals Court Says, MILWAUKEE J. SENTINEL, Nov. 8, 1996, at 5.
79. See Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947). This "economic realities" test considers six factors: (1) the degree of control exercised by the alleged employer; (2) the relative investments of the alleged employer and employee; (3) the degree to which the employee's opportunity for profit and loss is determined by the employer; (4) the skill and initiative required in performing the job; (5) the permanency of the relationship and (6) the degree to which the alleged employee's tasks are integral to the employer's business. See Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1979).
81. See Donovan v. Tavern Talent and Placements, 1986 WL 32746 (D. Colo.) (dancers who are placed at club by agency or bookkeeping establishment are still dancers entitled to minimum wage under FLSA).
84. See Roberts v. Bomareto, 956 P.2d 254 (Or. 1998) (Oregon minimum wage laws based on federal FLSA applies to exotic dancers who were characterized as independent contractors). But see Roberts v. Acropolis McLaughlin, Inc., 945 P.2d 647 (Or. 1997) (employer no longer responsible for payment of minimum wage after employer stopped hiring their own dancers and instead used booking agent to get dancers).
dancers under the conditions presented were employees entitled to minimum wage in addition to any tips they earned. Likewise, under workmen's compensation laws, courts in Oregon 86 and Idaho 87 have found dancers to be entitled to benefits as employees.

The National Labor Relations Board 88 and California 89 use a "right of control" test based on general agency principles to distinguish independent contractors from employees. The factors relied upon by the NLRB are based on the factors set out in the Restatement (Second) of Agency:

(a) the extent of control which, by agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relations of the master and servant; and

89. See S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations, 48 Cal.3d 341 (1989). The definition of employer/employee relationship defined as "the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." Id. at 350, citing Tieberg v. Unemployment Ins. Appeals Bd., 88 Cal. Rptr 175, 177 (Cal. 1970).
(j) whether the principal is or is not in business.90

It is difficult to hypothesize whether dancers in general would be considered employees under this model since the determination is highly fact specific and each dancer’s case is unique. Minimum wage and workers’ compensation cases addressing exotic dancers are a good starting point as they involve many recurring facts that run throughout strip club operations. Applying relevant factors of the “right of control” test to these recurring fact situations, a finding of employee status is a reasonable result.

Exotic dance clubs generally maintain significant control over their performers by instituting clubs rules and setting prices for dances.91 Some clubs impose fines on dancers for tardiness or breaking house rules.92 Dancers in some clubs can choose their own music but often it is subject to the final discretion of the club.93 The skills or training required for dancing are minimal. Many dancers have no prior experience before dancing.94 In fact, some clubs advertise for workers with the lure that “no experience is necessary.”95

Although dancers provide their own “tools” in the form of their outfits, they are not free to wear anything they want. For example, in Reich v. Circle C. Investments, dancers had to wear high heels and their outfits were subject to the ultimate approval of management.96 Dancers at one club were required to dress according to the “theme” of each evening.97 Moreover, clubs control the premises by designing the stage or creating special venues for their customers.98 The relative expense of a dancer’s makeup and costumes is minor in comparison to the sometimes millions of dollars that clubs spend on club atmosphere and facilities.99 Dancers can be itinerant, especially “feature” dancers who travel from club to club; however, “house” dancers are for the most part regular performers of the club.100 Some clubs allow dancers to sign up for their own shifts, indicating a level of independence; but, management can restrict the

92. See Cy Investment, Inc., 876 P.2d at 807; Circle C, 998 F.2d at 324; Harrell, 992 F. Supp. at 1350.
94. See Priba, 890 F. Supp. at 592; Harrell, 992 F. Supp. at 1351; Circle C, 998 F.2d at 328.
95. See Benson Fischer, supra note 38, at 531.
96. 998 F.2d at 327.
97. See Jeffcoat, 732 P.2d at 1076.
98. See Circle C, 998 F.2d at 328; Harrell, 992 F. Supp. at 1350.
99. See Priba, 890 F. Supp. at 593.
100. See Hanna, supra note 2, at 5. See also Benson Fischer, supra note 38, at 546.
dancer’s conduct once at the club. Finally, the dancers are the main attraction to strip clubs and thus integral to the success of the business.

On the other hand, factors that support a finding of independent contractor status are the method of payment and the parties’ belief as to the nature of the relationship. Dancers usually do not get paid from the club, but rather get paid only in tips from customers. Some clubs require dancers to sign independent contractor agreements before performing at the premises. Dancers and clubs also treat their relationship as one of independent contractor/employer for tax purposes. However, these factors militating against a finding of employee status are matters that an employer can manipulate to deny an employee relationship. Requiring a dancer to sign a contract stating that she is an independent contractor should not make her one as a matter of law. More attention should be paid to the acts of the parties, not the conclusory titles established by the employer.

The NLRB has yet to decide the specific issue of whether exotic dancers are employees or independent contractors for purposes of the Act. Cases involving performers have come out both ways, depending on the facts of each case.

In Puerto Rico Hotel Association, the Board affirmed the decision of the Administrative Law Judge (ALJ) who decided that band leaders playing in the dining commons for an association of hotels were employees, not independent contractors. The ALJ placed considerable attention on the extent of control the hotel had over the band members. Among other factors, the ALJ looked at the fact that the hotel set the ambiance of the room and the maitre d’ of the hotel could control the volume of music and require the band to play certain songs. The hotel required the members to wear certain clothes, and set rules of conduct for the musicians while at the hotel. Despite the fact that the band members were highly skilled and provided their own instruments, the ALJ determined that these musicians were employees, not independent contractors.

The hotel association pointed to the fact that it could not dictate the technical aspects of the band, as to the tempo of the music or other musical attributes, as an indication of lack of control. However, the ALJ relied on an example found in the Comments to the Restatement of Agency which

101. See Circle C, 998 F.2d at 328; Harrell, 992 F. Supp. at 1350; Priba, 890 F. Supp. at 592.
104. See Cy Investment, 876 P.2d at 807.
106. See id.
107. See id. at 443.
gives the example of a cook.\textsuperscript{108} "In some cases there may be an understanding that an employer shall not exercise control, [for example, with a full-time cook as servant,] it is understood that the employer will exercise no control over the cooking."\textsuperscript{109} The employer has no control over the manner or style of cooking, but controls enough of the other aspects of employment as to deem the cook an employee.\textsuperscript{110} A case under the same analysis can be made for dancers. Club management does not control how the dancer performs on stage or with a client, but it can nonetheless control enough other aspects of her work to make her an employee.

In \textit{Comedy Store},\textsuperscript{111} the Board affirmed the decision of the ALJ who found a group of comedians were not employees under the Act.\textsuperscript{112} Applying the "right of control" test, along with entrepreneurial considerations to these performers, the ALJ found that the owner of the comedy club, Mitzi Shore, had a significant right of control over the content and style of the performances of the comedians.\textsuperscript{113} She did not pay the comedians for their performances but she did not have to since her club was an important stepping stone for comedians to advance their careers.\textsuperscript{114} Shore had the exclusive power to book performers at her popular club where they could be seen and possibly discovered by talent scouts.\textsuperscript{115}

Despite this control by Shore, the performers in \textit{Comedy Store} engaged in activity that pushed them into the realm of self-employment by which the ALJ deemed them independent contractors.\textsuperscript{116} The comedians in question performed in multiple venues and did not rely solely on respondent's club for work.\textsuperscript{117} The comedians developed their reputation in the community by using stage names, publicizing their talents in trade publications and hiring professional agents to organize and procure bookings.\textsuperscript{118}

The performers from the \textit{Comedy Store} case can be distinguished from exotic dancers. A key element of entrepreneurship is the willingness and ability to take risks for your business. The comedians in \textit{Comedy Store} were willing to work for free because it was part of the risk and investment into building their reputation in the industry. Regular club dancers are simply not in that category. As one court put it:

Defendant would have us believe that a dancer like Ms. Harrell could

\textsuperscript{108} See id.  
\textsuperscript{109} Id.  
\textsuperscript{110} See id.  
\textsuperscript{111} 265 N.L.R.B. 1422 (1982).  
\textsuperscript{112} See id.  
\textsuperscript{113} See id. at 1448.  
\textsuperscript{114} See id. at 1446.  
\textsuperscript{115} See id. at 1445.  
\textsuperscript{116} See id. at 1448.  
\textsuperscript{117} See id.  
\textsuperscript{118} See id. at 1449.
hang out her own shingle, pay nothing in overhead,—no advertising, no facilities, no bouncers,—and draw in a constant stream of paying customers. A dancer at Diamond A risks little more than a daily "tip-out" fee, the cost of her costumes, and her time. . . . As is the case with the zealous waiter at a fancy, four star restaurant, a dancer’s stake, her take and control she exercises over each of these are limited by the bounds of good service: ultimately, it is the restaurant that takes the risks and reaps the returns.119

The dynamic between performers and the Comedy Store is altogether different from that of dancers and strip clubs. It is unlikely that dancers would work at clubs for free. Entry into the industry is not competitive. As long as women are willing and the club approves of their appearance, they will presumably get hired. Although some dancers use booking agents to obtain jobs,120 the club can still maintain significant control over the dancer’s conduct once at the premises.121 Club management also controls the advertising for the club and consequently the flow of customers to the club.122 The entrepreneurial element that persuaded the ALJ in the Comedy Store is not as compelling in the case of dancers.

B. ADDITIONAL BARRIERS TO UNIONIZATION

Outside of worker classification issues, dancers must meet additional hurdles in terms of self-esteem and commitment to unionize. On the most basic level, dancers themselves must have the desire to unionize for collective action. For those who wish not to conform to group activity or want to remain independent,123 a union may seem as controlling as club management since joining a union would obligate them to pay dues and abide by decisions made through majority vote, with or without their personal approval.124

Additionally, it takes self-esteem to create a collective voice because an individual’s convictions must be strong enough to withstand opposition and pressure from an adverse management.125 Some dancers lack the basic

123. For example, after the unionization of the Lusty Lady in San Francisco, IDA dancers (who oppose the "employee" status of exotic dancers and want to retain the independent contractor status) demonstrated in front of the EDA dancers (who oppose the independent contractor status) by chanting: "Go home Local 2. If we wanted a pimp it wouldn't be you." The dancers were mistaken about the union Local number (the Lusty Lady signed on with Local 790), however, the sentiment against unionism is still apparent. See Jack Boulware, Slap Shots, S.F. WEEKLY, Jan. 29, 1997, at 8.
belief that they deserve better working conditions, as conflicting emotions of self-worth and self-loathing are common in the industry. The desire for anonymity and discretion also hampers organizing efforts because it prevents some workers from participating in public demonstrations or outreach programs.

Generally, dancers do not intend to stay in the sex industry permanently. Even while in the industry, they look forward to leaving and usually view their past experience with disdain. This indifferent attitude about their work corners dancers into a paradox of ineffectual choices. An acceptance of unionism may represent a resignation to the sex industry, imbedding a sense of permanency and legitimacy in an occupation intended to be temporary. On the other hand, a refusal to act because they view their work situation as temporary or illegitimate keeps dancers locked into their predicament.

Furthermore, transiency in the profession results in a weak commitment to the industry. It is obvious that workers who intend to remain in an industry for only a short time are more likely to tolerate inequities rather than risk premature termination, or put forth an effort not guaranteed to change their circumstances. Yet, however impermanent, dancers are still deserving of better working conditions while employed in the sex industry.

PART III: IS UNIONIZATION THE RIGHT ALTERNATIVE?

Unionism’s historic gender bias and its predominant association with the concerns of white male workers in the United States may prevent women from believing that a union could be personally beneficial. In 1914, women were almost excluded from union membership by the American Federation of Labor (AFL). In 1918, the AFL changed its view and adopted a resolution to actively recruit women once it realized that the increasing employment of unorganized women posed a threat to the wages and working condition of male union members. Despite the AFL’s policy reversal, it was still slow to address gender restrictions imposed by some member unions.

Unions today remain a male-dominated enterprise from the highest officer positions down to the rank and file. The low percentage of

126. See Brooks, supra note 3; Leonard, supra note 5, at 22.
127. See Brooks, supra note 3.
129. See Crain, supra note 23, at 1907.
130. See id. at 22-23.
131. See Crain, supra note 23, at 1907.
132. See id. at 23.
133. See Crain, supra note 23, at 1908.
female membership does not appear to be from reluctance to participate since women began organizing their own unions as early as 1903 and have successfully participated in traditional pressure tactics and labor-management confrontations. One study suggests the low number of women members could be attributed partly to the organizing styles of certain union campaigns. Conventional organizing styles used by manufacturing unions tend to focus on basic economic issues such as wage and benefits “rather than on social justice issues such as dignity, discrimination, or voice, which are likely to appeal to pink-collar and service workers.” Additionally, since “the target population has historically been conceived of as largely male, organizers ignore comparable worth, sex segregation, sexual harassment, child care, and other issues of concern to women.”

Another factor contributing to women’s lack of participation could originate from the media’s poor portrayal of unions in the news and entertainment industry. During labor strikes, union members are characterized as greedy or unreasonable. The media tends to focus on public inconvenience and harm resulting from strikes, rather than the underlying inequities or intolerable working conditions provoking them. Even the language used by the media when reporting the same crimes differs, depending on whether labor officials or management are being implicated. When labor officials are accused of embezzlement, their involvement is harshly characterized as “racketeering” or “organized crime.” Yet when business leaders allegedly embezzle, news reports sanitize their actions with less offensive phrases like “white collar crime.” Thus, if left solely to rely on the media’s depiction or on popular belief, women may get the impression that labor unions abuse their power, support financially wasteful and unrealistic work rules and provide representation that is unnecessary in modern businesses.

Although low wages is a factor which motivates organization, more often it is poor working conditions or a desire for greater dignity and

134. See CRAVER, supra note 130, at 23.
135. See id.
136. See Marion Crain, Gender and Union Organizing, 47 INDUS. & LAB. REL. REV. 227, 228 (1994).
137. Id.
138. Id.
140. See id. at 5.
141. See id. at 3.
142. See CRAVER, supra note 130, at 53.
143. See id.
144. See id.
145. See PUETTE, supra note 139, at 4.
146. See CRAVER, supra note 130, at 2.
control in the workplace that puts workers in motion. For workers to take this kind of action, they must be willing to upset the status quo. They must also be able to recognize and demand their entitled rights. This is a challenge particularly difficult for exotic dancers to overcome since many do not know their legal rights, or as previously discussed, are apprehensive to assert their rights.

There are many ways to fight for workers’ rights, however, the most effective methods deliberately attract public attention. Since discretion is such a high priority for some dancers, the publicity involved in such popular union tactics as strikes or boycotts deters them from voting for a union or even starting organization efforts. However, despite the desire to remain anonymous, dancers must realize that public outcry is often the only way to resolve inequities in their favor. Group protests are extremely effective in bringing unfair workplace practices to light, especially for those who are oppressed or have little individual political voice.

A greater deterrent to dancers comes from club management efforts to prevent unionization. Most private employers oppose unionization—sometimes going to extremes or engaging in elaborate tactics—to keep their workforce non-union. In the exotic dance club arena, employers are no different from management in other industries. When dancers

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147. See O’FARRELL & KORNBLUH, supra note 125; Christine Fuentes, “Summer Babes” Join Union, S.F. EXAM., Nov. 30, 1997, at M49. Dancers at the Lusty Lady did not begin unionizing efforts until management refused to remove the one-way mirrors which permitted customers to videotape dancers without consent. See id. By the time management removed the mirrors, the dancers had already agreed that organizing was the right choice. See id.
148. See Brook, supra note 16, at 21.
149. See Crain, supra note 23, at 1987. Picketing or public boycotts are highly visible methods that work to garner support from consumers and the general public. See id.
150. See Brooks, supra note 3.
151. See Brook, supra note 16, at 18. For example, in the San Francisco exotic dancer circuit there are allegations of forced prostitution in some clubs. The Labor Commissioner will not investigate because no complaints have been filed—not even anonymous ones. The commissioner simply cannot act unless a person makes a claim. See id.
153. See Brooks, supra note 3. “Most women wanted to organize, but only a few were at the forefront. For many women that was the only job they had, and they didn’t want to lose it.” Id.
154. See Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268 (1965) (employer threat to close business if union voted considered not an unfair labor practice where sole reason to shut down business was to avoid negotiating with union).
155. See CRAVER, supra note 130, at 5. It is estimated that both legal and illegal management tactics ranging from sophisticated election appeals to termination of key union supporters accounts for 40% of the declining success rate of unions in National Labor Relations Board elections. See id.
156. See Fuentes, supra note 147, at M49; Craig D. Rose, Upset Over New Rules, Pacer’s Employees Driving to Unionize, S. D. UNION-TRIB., April 29, 1993, at C1 (Diane, an employee of eleven years was fired for leading the union drive at Pacer’s, a San Diego
successfully vote in a union, management may even seek retribution by making working conditions worse.\footnote{157}

Unionization efforts by various exotic dancer groups have met with mixed results. In 1993 when dancers and employees at Pacer’s, a San Diego exotic dance club, unionized, management retaliated by charging higher prices for employee purchases and eliminated an area where dancers took breaks.\footnote{158} Local 30 of the Hotel and Restaurant Employees and Bartenders International Union immediately filed an unfair labor practice charge on behalf of its new members. The dancers have since decertified the union.\footnote{159} In 1997, dancers at the Oakford Inn in Philadelphia voted 31-6 against union representation.\footnote{160} Because unionized exotic dancers are still a novel concept, union elections at dance clubs are highly publicized. Anticipating the media coverage, one Oakford Inn dancer came to vote in a mask.\footnote{161} In 1996 by comparison, dancers at the Lusty Lady in San Francisco voted 57-15 in favor of representation by Local 790 of the Service Employees International Union.\footnote{162} Additionally, dancers in Alaska have voted to unionize and have made considerable progress in addressing their grievances.\footnote{163} Despite these developments, it is still too early to predict whether this alliance will survive the long run.

PART IV: THE POTENTIAL RELATIONSHIP BETWEEN EXOTIC DANCERS AND UNIONS

Despite what appears to be an odd coupling from the outset, unionization of dancers is a viable alternative, considering the history and statistics of each group. The sex industry is growing rapidly in both recognition and dollars. This multi-billion dollar industry\footnote{164} had its first “gentleman’s club” publicly traded on NASDAQ in 1995.\footnote{165} One study shows that Americans now spend more money on strip clubs than all other forms of live theatre and classical music performances combined.\footnote{166} Nude
dancing cases have also been discussed by our nation’s highest Court. Despite its growing visibility and legal recognition, the focus of attention is on the allure of the industry itself, not necessarily the workers who comprise its varied parts. Labor and employment have confronted this growing body of workers and will undoubtedly continue to affect them.

In contrast, union membership in the private sector has been declining since 1953. The number of unionized workers in the private sector is smaller today than when the Wagner Act was enacted in 1935. To combat their declining membership, unions need to focus on attracting untapped industries and populations such as women, minorities and the service sector. These are sizable underrepresented sectors which have been growing as the globalization of the American economy shifts workers away from manufacturing towards service industries. The Service Employees International Union (SEIU) is the fastest growing union in America. In 1981, membership was at about six hundred thousand. Now, the SEIU is one of the largest unions at 1.3 million members. The SEIU’s growth can be attributed to a number of factors including its focus on social justice and equity as well as its large number of female and minority organizers. Given the SEIU’s reputation for alternative methods, it is not surprising that the Lusty Lady dancers in San Francisco turned to them when they sought unionization.

Unions that recognize the special needs of certain groups will be more successful in their recruitment attempts. Understandably, studies show that oppressed groups, or those that suffer from low self-esteem, require more time and effort by organizers. This element is particularly pronounced in the case of exotic dancers due to the stigmatized nature of their work and the fear instilled in them by management. Younger female organizers

170. See CRAVER, supra note 130, at 4.
171. See Cicero, supra note 169, at 125.
173. See id.
174. See id.
175. See Crain, supra note 136, at 229.
176. See Fuentes, supra note 147, at M49.
177. See Crain, supra note 136, at 229.
178. See Jennifer Bryce, The Daisy Chain: The Autobiography of an Activist (visited Oct. 29, 1998) <http://www.bayswan.org/EdaNews_8.html>. The author recalls her efforts in her class action suit against the dance club where she formerly worked: “I passed out hundreds of fliers with my phone number on it over the last three years, but received very
have brought new energy and vitality into the labor organizing movement. Those who use flexible and unconventional methods of organizing may be more successful at organizing women if they take into account the demanding schedules of working mothers. In the past, family responsibilities often prevented women from attending meetings or participating in organizing efforts. New methods of organizing, which have met with success in organizing women, emphasize access and accommodation through tele-conferencing, potluck meetings, offering child care and providing more advance notice meetings.

Despite past shortcomings of unions, the labor movement has done more for the economic well-being of women and poor people than any other social institution. Women who belong to unions earn higher wages as a result of collective bargaining than those who are not members. Additionally, unions proportionally provide more advantages for women and persons of color than for white men.

The fight for higher wages also acts as a surrogate to remedy other workplace inequities. A high wage may represent an employee’s worth on the job—with higher earnings comes a greater feeling of self-worth and perceived power. For example, when the Lusty Lady dancers in San Francisco decided to unionize, their goals were not limited to economic objectives; their driving purpose was to “secure protection and rights.” Empowerment through higher wages makes an even greater impact on workers who perceive manual labor as meaningless.

Outside of wages, a union can increase job security, provide increased

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180. See Crain, supra note 136, at 239.
181. See id.
182. See id.
185. See id.
187. See id.
188. Fuentes, supra note 147, at M49. A Lusty Lady union organizer on their impetus to organize: “Our decision to unionize wasn’t just based on lunch bucket issues of economics. Money was an issue, but our main drive was to secure protection and rights.” Id.
189. See Pope, supra note 186, at 1111.
employee benefits and better working conditions. In the case of exotic dancers, although there are many high wage earners in the industry, these dancers would still benefit significantly from the support of a union.\textsuperscript{190} The sexual harassment faced on the job from both patrons and management could be taken more seriously if addressed through a union.\textsuperscript{191} Many workers would probably not take the initiative against their employer unless they had union support.\textsuperscript{192} Knowing that a union is fighting on their side may provide critical support to an otherwise isolated and demoralizing working environment.

Although women may be slower to organize than men, once they decide to join collectively their commitment can be stronger than men.\textsuperscript{193} The process of joining in a collective voice is a source of empowerment for women.\textsuperscript{194} Participating in pressure strategies and negotiations further helps reinforce activism.\textsuperscript{195} Mutual participation in joint activities solidifies relationships between workers and strengthens the convictions underlying their commitment.\textsuperscript{196} For example, during the first Lusty Lady collective bargaining agreement process, the dancers used opposition and mockery from management attorneys to strengthen their determination and resolve.\textsuperscript{197} As a result of their collective efforts, they secured regular pay raises according to seniority, one paid sick day and time-and-a-tenth holiday pay for New Year’s Eve.\textsuperscript{198} In 1993, when the employees of Pacer’s sought to unionize, a spokesman for the union found the dancers to be “unbelievably committed” and eager to learn about the union.\textsuperscript{199} It took only a week to get most of Pacer’s one hundred employees to sign union

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\textsuperscript{190} See Rose, supra note 156, at C1.
\textsuperscript{191} See id.
\textsuperscript{192} See Dorothy Haener, Sometimes You Have to Rock the Boat, in ROCKING THE BOAT: UNION WOMEN’S VOICES, 1915-1975, at 165. The author, Dorothy Haener says of the abuses by her supervisor and her first grievance settled by the union:

So I finally worked up the courage to go and complain about it and to ask to be transferred to another job. The union won the grievance for me. I did get the new job and increased pay. The union really was fairly good to me. I would never have taken the initial step to move on to doing inspection work if the union hadn’t been there. I would have been afraid to even question what the superintendent was doing if I had not known there was a union there to support me.

Id.

\textsuperscript{193} See Crain, supra note 136, at 231.
\textsuperscript{194} See id. at 239.
\textsuperscript{197} See “Jane”, supra note 17.
\textsuperscript{198} See Martha Irvine, San Francisco Strippers Enjoy Union Coverage, LAS VEGAS REVIEW-JOURNAL, May 12, 1997, at 1A.
\textsuperscript{199} See Rose, supra note 156, at C1.
Impressed with the success of California dancers, dancers in other states have inquired into or begun their own efforts to unionize. In Alaska, the Alaska Exotic Dancers Union settled with Showboat Show Club in May of 1998 for $40,456 in backpay to those fired for unionizing activities and those who lost wages during a club lockout. Though unionization may not be the answer to all workplace inequities faced by an exotic dancer, it provides a significant step in securing rights and respect as workers.

CONCLUSION

The road to unionization is a long one, especially for dancers yet to be classified as employees. However, if these legal and social barriers can be overcome, unionization can improve working conditions and raise morale. Because many dancers fear retaliation from management, or feel powerless to effectuate a change, a collective voice can benefit them more than other classes of workers. The power of a collective voice and group action can help balance bargaining power between dancers and management. Even for unionization efforts that ultimately fail, the process of organizing can still bring awareness and momentum towards workplace equality.

200. See id.
201. See EDA Newsletter #9 (visited Mar. 6, 1998). <http://www.bayswan.org/EdaNews_9.html>; however, not all unionization efforts have been successful. See Exotic Dancers Vote Against Union, supra note 160, at A12.
202. See Jung, supra note 163, at D1.