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## NOTES

# R<sub>XXX</sub>: RESOLVING THE PROBLEM OF PERFORMER HEALTH AND SAFETY IN THE ADULT FILM INDUSTRY

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### I. INTRODUCTION

No matter how much fascination it may provide to the lives of the lonely, the curious, the adventurous, or the ordinary, it is undeniable that pornography poses problems. This statement is not startling or revolutionary; no other industry has unfailingly produced equal parts astounding revenue, excitement, shame, and fear among every echelon of society. For decades, the adult film industry has operated a thriving worldwide empire centered in Southern California, generating billions of dollars in revenue and producing thousands of films per year.<sup>1</sup> Notwithstanding its status as one of the largest industries in a heavily regulated state, the adult film industry has flourished for decades without a discernible trace of government oversight. In recent years, however, a particularly insidious problem within the industry has perched itself precariously at the threshold of the public consciousness and has threatened

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1. See *infra* Part II.B.

to end the government's historical indifference toward the industry's practices.<sup>2</sup>

In the spring of 2004, a spate of HIV<sup>3</sup> infections among performers in the Southern California adult film industry induced a panic when it was discovered that over sixty performers had been exposed to the disease.<sup>4</sup> In response to the potential outbreak, several major pornography companies voluntarily halted production for several weeks,<sup>5</sup> and over fifty performers who had been identified as having sexual intercourse with the infected performers agreed to place themselves on a "quarantine list," ceasing all adult film work while awaiting their HIV test results.<sup>6</sup> Although the industry's proactive response managed to contain the infection's spread, the crisis sharply called into question the adequacy of current screening and

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2. See Josh Gerstein, *Coast Authorities Set to Regulate Porn Industry*, N.Y. SUN, Apr. 23, 2004, available at 2004 WL 65909582. See also *infra* note 4.

3. HIV is an acronym for human immunodeficiency virus, the virus which causes acquired immunodeficiency syndrome ("AIDS"), the most advanced stage of HIV infection. See *What Is HIV?*, Centers for Disease Control and Prevention, Divisions of HIV/AIDS Prevention, <http://www.cdc.gov/hiv/pubs/faq/faq1.htm> (last visited Apr. 15, 2006) [hereinafter *What Is HIV?*]; *What Is AIDS?*, Centers for Disease Control and Prevention, Divisions of HIV/AIDS Prevention, <http://www.cdc.gov/hiv/pubs/faq/faq2.htm> (last visited Apr. 15, 2006). HIV breaks down and compromises the body's immune system by attacking certain white blood cells. See *How Does HIV Cause AIDS?*, Centers for Disease Control and Prevention, Divisions of HIV/AIDS Prevention, <http://www.cdc.gov/hiv/pubs/faq/hiv aids.htm> (last visited Apr. 15, 2006). HIV may be passed from one person to another when infected blood, semen, or vaginal secretions come in contact with an uninfected person's broken skin or mucous membranes. See *What Is HIV?*, *supra*. When a person is infected with HIV, the person is known as "HIV-infected." "HIV-positive" refers to a person who is HIV-infected and has tested positive for HIV. See *id.* A person who is HIV-infected may have no signs of illness, but can still infect others. Most people who are HIV-infected will develop AIDS after a period of time, which can range from several months to several years. See *How Long Does It Take for HIV to Cause AIDS?*, Centers for Disease Control and Prevention, Divisions of HIV/AIDS Prevention, <http://www.cdc.gov/hiv/pubs/faq/faq4.htm> (last visited Apr. 15, 2006) [hereinafter *How Long Does It Take*].

4. In April 2004, adult film actor Darren James tested positive for HIV after returning to the United States from performing in two productions in Brazil. Within days, at least twelve actresses were exposed to the virus through on-screen sexual intercourse with James, and approximately sixty-five performers were identified as subsequently having sexual intercourse with one of the infected actors or with someone who had sexual intercourse with one of the infected actors. See, e.g., *HIV Transmission in the Adult Film Industry—Los Angeles, California, 2004*, MORBIDITY & MORTALITY WKLY. REP. (Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, Atlanta, Ga.), Sept. 23, 2005, at 923–24 [hereinafter *HIV Transmission*]; Caitlin Liu, Kristina Sauerwein & Monte Morin, *2 HIV Cases Put a Scare into Porn*, L.A. TIMES, Apr. 16, 2004, at B1; Nick Madigan, *H.I.V. Cases Shut Down Pornography Film Industry*, N.Y. TIMES, Apr. 17, 2004, at A11; *Pornography Industry Voluntarily Halts Production After Two Actors Test HIV-Positive*, DAILY HIV/AIDS REPORT (Kaisernetwork.org, Menlo Park, Cal.), Apr. 16, 2004, [http://www.kaisernetwork.org/daily\\_reports/rep\\_index.cfm?hint=1&DR\\_ID=23223](http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=1&DR_ID=23223) [hereinafter *Industry Halts Production*]. See also *infra* Part III.B.2.

5. See John Maynard, *HIV Chills a Hot Skinlick Industry*, WASH. POST, Apr. 17, 2004, at C4 (reporting that two of the largest adult movie companies, Vivid Entertainment and Wicked Pictures, agreed to suspend production for up to sixty days pending further information on the infections).

6. See, e.g., *id.*; Madigan, *supra* note 4; *Industry Halts Production*, *supra* note 4.

testing procedures in the adult film industry, and underscored the need for increased preventative measures.

For a brief time following the incident, state and local authorities in California made efforts to impose health and safety standards on the adult film production business.<sup>7</sup> The California Division of the Occupational Health and Safety Administration (“Cal/OSHA”) issued unprecedented citations of over \$30,000 each to two adult film production companies for violating state regulations concerning exposure to bloodborne pathogens and bodily fluids.<sup>8</sup> Additionally, California legislators introduced a bill in the state assembly that would have imposed testing requirements for sexually transmitted diseases (“STDs”) on production companies and given performers recourse against production companies who provided an unsafe work environment.<sup>9</sup> As soon as the headlines about the HIV outbreak faded, however, these legislative reform efforts were tabled indefinitely. Furthermore, the validity of Cal/OSHA’s citations remains uncertain, pending litigation.<sup>10</sup> In other words, the urgent problems of adult film performer health and safety remain unsolved.<sup>11</sup>

This Note will examine the problem of performer health and safety in the adult film industry from legal, economic, and social perspectives, and will evaluate whether state-mandated health and safety regulation is permissible, viable, and desirable.<sup>12</sup> Part II analyzes the legal development

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7. See Gerstein, *supra* note 2. See also Lisa Richardson & Caitlin Liu, *State, County May Require Condoms in Adult Films*, L.A. TIMES, Apr. 20, 2004, at A1 (“After almost a year of urging the adult-film industry to require actors to wear condoms during sex scenes, state and county officials say the recent HIV infection of two porn stars has given them the leverage they need to force change.”).

8. Caitlin Liu & Eric Malnic, *2 Porn Producers Get Safety Citations*, L.A. TIMES, Sept. 17, 2004, at B1 (reporting that Cal/OSHA fined two production companies, Evasive Angles and T.T.B. Productions, \$30,560 each for violating the state’s Bloodborne Pathogens Standard). The production companies contested the citations on the grounds that their performers are independent contractors, not employees, and are thus not protected by Cal/OSHA regulations. See Mark Kernes, *Industry Scores Great Report, Lousy Editorial Note from CDC*, ADULT VIDEO NEWS, Sept. 22, 2005, [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=240971](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=240971). The issue “will likely be settled in court, and if that ruling finds that the talent were independent contractors the citations likely would [sic] be dismissed.” *Id.*

9. See Assemb. B. 2798, 2003–04 Leg., Reg. Sess. (Cal. 2004).

10. See Kernes, *supra* note 8.

11. See *id.*; A.B. 2798 Bill History, [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_27512800/ab\\_2798\\_bill\\_20041130\\_history.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_27512800/ab_2798_bill_20041130_history.html) (last visited Apr. 15, 2006) [hereinafter Bill History].

12. The regulatory mechanisms proposed in this Note derive their focus from legislative proposals and state enforcement agencies in California. Nevertheless, the proposals made here are applicable to any state in which adult films are being made. Given, however, California’s reputation as the pornography production “capital of the world,” see *infra* Part II.B.1, as well as its regard as a “bellwether state” that continuously influences legislation of all kinds on a national scale, a focus on California law seems especially warranted. See, e.g., Nicholas D. Mosich, Note, *Judging the Three-*

of the pornography industry, examining how California's favorable laws have led to the industry's explosive worldwide economic growth and legitimacy over the last three decades. Part III examines the current state of HIV/AIDS infection and prevention both within and outside the adult film industry, detailing the current self-imposed regulations prevalent in the industry, as well as proposals for state-mandated regulations. Part IV conducts both a jurisdictional and a normative inquiry into the viability of state regulations. The latter inquiry is of particular importance, because notwithstanding the jurisdictional permissibility of any proposed regulations, questions still remain regarding the social and economic desirability of implementing such state mandates. Finally, Part V concludes that while the current self-imposed health and safety measures in place in the adult film industry have increased performer awareness of STD infection, they have proven to be inadequate mechanisms for curtailing the spread of disease. As such, the most effective tool for addressing the myriad occupational health hazards in the adult film industry will be a system of worker health and safety regulation, enforcement, and monitoring that is mandated at a state level.

## II. FROM THE FRINGE TO THE FOREGROUND: THE LEGAL AND ECONOMIC DEVELOPMENT OF THE ADULT FILM INDUSTRY

The adult film industry is a powerful and thriving feature of the California landscape. The advent of permissive First Amendment laws in California has allowed pornographic filmmaking to achieve significant power in terms of revenue, political clout, and even increasing legitimacy on Wall Street.

### A. THE LEGALIZATION OF PORNOGRAPHIC FILMMAKING IN CALIFORNIA

Until the 1980s, the production and distribution of pornography was a cottage industry, flirting with the fringes of society, as well as with the

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*judge Panel: An Evaluation of California's Proposed Redistricting Commission*, 79 S. CAL. L. REV. 167, 200 (2005) (noting California's "propensity for leading the nation in novel legislation and influencing the passage of similar laws across the country"); Jeff Chu et al., *California Leads, but a Pack Follows*, TIME, May 23, 2005, at 28 (noting that "[t]he rush is on to copy California" regarding the state's stem-cell research legislation); Alex S. Jones, *The Media Business; Newspapers See a Threat of Spreading Sales Taxes*, N.Y. TIMES, Aug. 19, 1991, at D6 (reporting concern among newspaper and magazine publishing associations that California's decision to repeal its long-established exemption of sales taxes on periodicals could "prompt a flurry of similar tax proposals," given that "California is considered a bellwether state").

fringes of legality.<sup>13</sup> During this period, the term “pornography” was used interchangeably with “obscenity,” and while the First Amendment has always offered protection for free expression,<sup>14</sup> material that is deemed “obscene” falls outside the ambit of protected speech.<sup>15</sup> Therefore, for decades, adult film producers battled a Justice Department crusade against obscenity, wherein the federal government used its Commerce Clause powers to target the transportation across state lines of materials that were deemed “obscene.”<sup>16</sup> As a result, although adult filmmaking still had a notable economic and social influence on the public throughout the first two-thirds of the twentieth century, the questionable legality of most aspects of the industry precluded it from having the multibillion-dollar stronghold on society that it currently enjoys.<sup>17</sup>

One of the most vexing issues for both pornographers and state policing forces was that until the early 1970s, no workable standard existed

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13. See Francisco G. Torres, Note, *Lights, Camera, Actionable Negligence: Transmission of the AIDS Virus During Adult Motion Picture Production*, 13 HASTINGS COMM. & ENT. L.J. 89, 95 (1990) (“In the early 1970s, the production of adult motion pictures in California was a small cottage industry. Producers would gather a group of performers, shoot all week, get busted, and spend the weekend in jail.” (internal quotation marks omitted)).

14. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

15. See, e.g., *Roth v. United States*, 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”).

16. See, e.g., *id.* at 480–81; *United States v. Reidel*, 402 U.S. 351, 353–54 (1971); *Ginsberg v. New York*, 390 U.S. 629, 631–33 (1968); *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General*, 383 U.S. 413, 415 (1966) [hereinafter *Memoirs Case*]; *Jacobellis v. Ohio*, 378 U.S. 184, 193–94 (1964).

Perhaps the most famous federal obscenity prosecutions involved the 1972 film *Deep Throat*, which “was shown in many mainstream movie theaters and is likely the most successful and influential pornographic film of all time.” Ann Hornaday, *When Porn Became Popular*, WASH. POST, Feb. 11, 2005, at C5 (reviewing the 2005 documentary *Inside Deep Throat*, which “examin[es] the cultural, political, and historical legacy of ‘Deep Throat,’ the X-rated film that, more than 30 years after its original release, stands as the most profitable movie ever made in America”); Richard Corliss, *That Old Feeling: When Porno Was Chic*, TIME.COM, Mar. 29, 2005, <http://www.time.com/time/columnist/corliss/article/0,9565,1043267-1,00.html> (discussing *Deep Throat* as part of the “porno chic” culture of the 1960s and 1970s, and noting that “[c]elebrities stood in line” to see the film); Wikipedia, *Deep Throat (film)*, [http://en.wikipedia.org/wiki/Deep\\_Throat\\_%28movie%29](http://en.wikipedia.org/wiki/Deep_Throat_%28movie%29) (last visited Apr. 15, 2006). The 1976 federal prosecutions of more than sixty individuals and companies for conspiracy to transport the film across state lines sent a shockwave through popular culture. In particular, the startling conviction by a Memphis jury of *Deep Throat* leading actor Harry Reems (born Herbert Streicher), the first pornographic film actor prosecuted on federal obscenity charges, “became a *cause célèbre* and [Reems] received considerable support from Hollywood Circles.” Wikipedia, *supra*. See Hornaday, *supra*; Corliss, *supra*. In a highly political and controversial proceeding, Alan Dershowitz represented Reems on appeal and successfully overturned Reems’s conviction. See Hornaday, *supra*; Corliss, *supra*; Wikipedia, *supra*.

17. See generally *infra* Part II.B.

for distinguishing obscene pornographic material, subject to regulation under the states' police powers, from nonobscene pornography, protected by the First Amendment.<sup>18</sup> The Supreme Court first began to build a constitutional framework for analyzing obscenity claims in 1957, with *Roth v. United States*.<sup>19</sup> The *Roth* Court defined material as obscene if, "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."<sup>20</sup> The *Roth* decision, however, ushered in an era of uncertainty and confusion; for the next sixteen years, no majority of Justices could agree on how properly to apply that standard for testing obscenity. Despite the Court's attempts to clarify the standard during this period,<sup>21</sup> the proffered constitutional framework for distinguishing materials that were illegally obscene from those that were permissibly pornographic was vague and imprecise.<sup>22</sup>

By the early 1970s, however, the courts began to parse out a line between materials that were obscene and those that were merely pornographic.<sup>23</sup> The Court in *Miller v. California* finally took the opportunity to reexamine the obscenity standard set by Justice Brennan in *Roth* and announced a tripartite inquiry for determining whether materials

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18. See *Miller v. California*, 413 U.S. 15, 21 (1973) ("Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power."). The *Miller* Court noted the "tortured history of the Court's obscenity decisions." *Id.* at 20.

19. See *Roth*, 354 U.S. at 481 ("Although this is the first time the question has been squarely presented to this Court, . . . expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.").

20. *Id.* at 489.

21. See *Jacobellis*, 378 U.S. at 193-95 (elaborating on the *Roth* standard by clarifying that the "community standards" applicable to an obscenity determination should be national community standards, rather than the standards of the local community from which a case arose). See also *Memoirs Case*, 383 U.S. at 418 (attempting to clarify the *Roth* standard further by emphasizing that under *Roth*, material could not be deemed obscene unless it was "utterly without redeeming social value").

22. See *Miller*, 413 U.S. at 21. Justice Stewart himself even summarized the inherent ambiguity and uncertainty in attempting to make an obscenity determination in his oft-quoted concurrence from *Jacobellis*:

[C]riminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.

*Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

23. See *Miller*, 413 U.S. at 19 & n.2 ("The material we are discussing in this case is more accurately defined as 'pornography.' . . . Pornographic material which is obscene forms a sub-group of all 'obscene' expression, but not the whole, at least as the word 'obscene' is now used in our language.").

are obscene, which remains the test to this day.<sup>24</sup> Under this current standard, the trier of fact must consider (1) whether the average person applying contemporary community standards—not national standards—would find that the work appealed to the prurient interest; (2) whether the work depicts sexual conduct, as defined by state law, in a patently offensive way; and (3) whether the work as a whole lacks serious literary, artistic, or scientific value.<sup>25</sup>

In many ways, the *Miller* ruling was a boon to producers and distributors of adult films, as their work now was able to avoid criminal prosecution under obscenity statutes if “contemporary community standards” dictated that it was “pornographic” rather than “obscene.”<sup>26</sup> In a community as diverse as Los Angeles, however, where much of the pornography was being made, reaching a consensus about what constitutes “prurient interest” or is “patently offensive” can be difficult, if not impossible.<sup>27</sup> Recognizing the difficulty of predicting what courts might find obscene, law enforcement officials after *Miller* attempted different approaches in seeking to stem the tide of pornographic materials being made. One of the most successful of these approaches was the use of a state’s pandering laws, which make it illegal to hire someone for purposes of prostitution.<sup>28</sup>

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24. *Id.* at 24 (vacating the conviction of a man convicted under a state obscenity statute for mailing unsolicited brochures advertising sexually explicit books and movies).

25. *Id.* In effect, under the current standard, if a locality deems material having particular sexual content sufficiently “artistic,” it will not be considered obscene and can evade criminal prosecution.

26. The Supreme Court’s continued endorsement of the “contemporary community standards” test was recently reaffirmed in *Ashcroft v. ACLU*. There, in an 8-1 decision, the Court came out in favor of using “community standards” as a measure for determining what material should be prohibited or regulated online. *See Ashcroft v. ACLU*, 535 U.S. 564 (2002), *remanded to* 322 F.3d 240 (3d Cir. 2003), *cert. granted*, 540 U.S. 944 (2003), *aff’d*, *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

27. *See Philip M. Cohen, Casenote, People v. Freeman—No End Runs on the Obscenity Field or You Can’t Catch Me from Behind*, 9 LOY. L.A. ENT. L. REV. 69, 70 (1989) (“What is ‘smut’ to one person may be ‘beauty’ to another.”). The *Miller* Court echoed this sentiment, stating, “It is neither realistic, nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.” *Miller*, 413 U.S. at 32. But the Court was also careful to warn of the “inherent dangers of undertaking to regulate any form of expression” and noted that “[s]tate statutes designed to regulate obscene materials must be carefully limited.” *Id.* at 23–24.

28. *See, e.g., CAL. PENAL CODE* § 266(i) (West 1999 & Supp. 2005). *See also People v. Freeman*, 233 Cal. Rptr. 510 (Ct. App. 1987) (convicting, on five counts of pandering, a California filmmaker who hired five actresses to appear in a sexually explicit motion picture), *rev’d*, 758 P.2d 1128 (Cal. 1988); *People ex rel. Van De Kamp v. Am. Art Enters.*, 142 Cal. Rptr. 338 (Ct. App. 1977) (successfully prosecuting a photographer and a distributor of sexually explicit material in California under state pandering laws); *People v. Kovner*, 409 N.Y.S.2d 349 (Sup. Ct. 1978) (holding that a producer of a sexually explicit motion picture could also be prosecuted under a pandering statute).

The success of the pandering law approach in California was dramatically changed in 1988, with the California Supreme Court's controversial ruling in *People v. Freeman*.<sup>29</sup> In *Freeman*, a California filmmaker, Harold Freeman, had been convicted of pandering for hiring actors and actresses to appear in a sexually explicit—though not technically “obscene”—film.<sup>30</sup> The California Supreme Court reversed the conviction, holding that the payment of wages to a consenting adult to engage in sexual activities in a nonobscene motion picture will not support a conviction under the California pandering statute.<sup>31</sup> The court reasoned that use of state pandering laws to regulate pornography was an “end run” around the First Amendment, and presaged that, notwithstanding the taboo surrounding the adult film industry, prosecutions such as these impermissibly impinged on protected speech, and would therefore not be tolerated.<sup>32</sup> As the court explained:

Regardless of our view of the social utility of this particular motion picture, our analysis must begin with the premise that a nonobscene motion picture is protected by the guaranty of free expression found in the First Amendment. . . . To subject the producer and director of a nonobscene motion picture depicting sexual conduct to prosecution and punishment for pandering . . . would rather obviously place a substantial burden on the exercise of protected First Amendment rights. To include the hiring and paying of actors for acting in such a film within the definition of pandering would therefore unconstitutionally infringe on First Amendment liberties.<sup>33</sup>

The *Freeman* decision, therefore, conferred a new legitimacy on the adult film industry. Many commentators have even interpreted *Freeman* to mean that an adult filmmaker may, with legal impunity, hire actors and actresses to perform sexual acts so long as the performers are being

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29. *Freeman*, 758 P.2d 1128.

30. *Id.* at 1129.

31. *Id.* at 1129–31 (finding that there was no evidence that Freeman paid the acting fees “for the purposes of sexual arousal or gratification, his own or the actors’,” and that he had instead hired them simply to make a nonobscene film—an act that falls squarely within the purview of the First Amendment).

32. *Id.* at 1130 (“[T]he prosecution of defendant under the pandering statute must be viewed as a somewhat transparent attempt at an ‘end run’ around the First Amendment and the state obscenity laws. Landmark decisions of this court and the United States Supreme Court compel us to reject such an effort.”). See also *id.* at 1131 (“[E]ven if defendant’s conduct could somehow be found to come within the definition of ‘prostitution’ literally, the application of the pandering statute to the hiring of actors to perform in the production of a non-obscene motion picture would impinge unconstitutionally upon First Amendment values.”).

33. *Id.* at 1131–32 (internal citations omitted).

recorded on film.<sup>34</sup> Opponents of the industry, however, lament that in precluding prosecution of pornographic films under the state pandering statute, *Freeman* “[took] away a new and potentially powerful weapon from those who seek to halt the spread of pornographic materials.”<sup>35</sup> Still, both opponents and supporters of the adult film industry would doubtless agree with one commentator who, in the wake of *Freeman*, quipped, “Just like that, making porn was legal in California.”<sup>36</sup>

#### B. PORNOGRAPHY HAS POWER: THE EXPLOSIVE GROWTH OF THE ADULT FILMMAKING INDUSTRY AFTER *FREEMAN*

The growth of California’s adult film industry in the wake of *Freeman* was so astounding that it is not uncommon for commentators to describe it in terms of catastrophic events, such as “[t]he industry exploded,”<sup>37</sup> or there was a “[d]eluge of [p]orn.”<sup>38</sup> Compounding this phenomenal growth was the advent of VCR technology, which lessened the danger of social stigmatization for pornography consumers, allowing them to watch pornographic films in the privacy of their homes, rather than at ill-reputed adult theaters.<sup>39</sup> Furthermore, as personal video camera technology became more accessible, the average consumer could now buy a video camera and make a film himself. As such, a cottage industry of amateur pornographers developed in Southern California, competing against many of the established adult studios, such as VCA Pictures, Wicked Pictures, Sin City Films, Vivid Video, and Evil Angel Productions.<sup>40</sup>

##### 1. Pornography’s Revenue Stream Is Seemingly Boundless

The technological innovations of the late 1980s and 1990s, in tandem with the state’s apparent deference to adult filmmaking, have made California the worldwide center of the adult film industry. Estimates vary widely as to how many pornographic films are made per year in California.<sup>41</sup> While the number of legitimate “Hollywood” motion pictures

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34. P.J. Huffstutter, *See No Evil*, L.A. TIMES, Jan. 12, 2003, § I (Magazine), at 12.

35. Cohen, *supra* note 27, at 93.

36. Huffstutter, *supra* note 34.

37. *Id.*

38. Jim Sleeper, *Behind the Deluge of Porn, a Conservative Sea-change*, SALMAGUNDI, Fall–Winter 2005, available at <http://www.skidmore.edu/salmagundi/148-149/Sleeper.htm>.

39. Huffstutter, *supra* note 34.

40. *Id.*

41. See, e.g., Holman W. Jenkins Jr., *Pornography, Main Street to Wall Street*, POL’Y REV., Feb.–Mar. 2001, available at <http://www.policyreview.org/feb01/jenkins.html> (“[T]he [adult] film industry has gone from 1,000 films eight years ago to 10,000 last year. Ten thousand pornographic

released per year is estimated at 500–550,<sup>42</sup> the number of pornographic films released per year has proven nearly impossible to track, especially with the proliferation of amateur films being produced and released outside of the traditional adult film venues. Recent estimates of adult film output in California have ranged from 4000 to 11,000 films per year.<sup>43</sup>

Estimates of how much annual revenue pornography generates also vary radically.<sup>44</sup> The one point on which various financial analysts, industry insiders, and commentators agree is that pornography producers take in at least several billion dollars annually from cable television programming, videos, and Internet sites “watched by a public whose appetite seems insatiable.”<sup>45</sup> Recently reported figures aver that pornography generates annual domestic revenue ranging from as little as \$4.4 billion to as much as \$15 billion.<sup>46</sup> Financial analysts attribute the

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movies.”); Jeffrey Gettleman, *L.A. Economy's Dirty Secret: Porn Is Thriving*, L.A. TIMES, Sept. 1, 1999, at A1 (“This year, the industry is on track to release 10,000 new titles.”); Dennis Romero, *Foreign Affairs*, L.A. CITY BEAT, May 13, 2004, available at <http://www.lacitybeat.com/article.php?id=898&IssueNum=49> (“There were 11,000 releases in 2002, and 800 million video rentals—more than two rentals a day for every man, woman, and child in the United States.”); *Porn Again*, CBS NEWS, May 18, 2004, <http://www.cbsnews.com/stories/2004/04/16/health/main612200.shtml> (“It’s estimated that as many as 4,000 new videos and thousands of compilations are made each year in the porn industry.”).

42. Motion Picture Association of America, Research & Statistics, <http://www.mpa.org/research/Statistics.asp> (last visited Apr. 15, 2006) [hereinafter MPAA Statistics] (reporting that the total number of new theatrical motion pictures released per year grew from 520 in 2004 to 549 in 2005).

43. See *supra* note 41.

44. Investment banker and financial analyst Dennis McAlpine observes, “You can get estimates of a range from a billion dollars to \$10 billion; nobody really knows. It’s large.” Interview by PBS Frontline with Dennis McAlpine, Analyst, Auerbach, Pollak & Richardson (Aug. 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/porn/interviews/mcalpine.html> [hereinafter McAlpine].

45. Huffstutter, *supra* note 34. See also Larry Flynt, *Porn World's Sky Isn't Falling—It Doesn't Need a Condom Rule*, L.A. TIMES, Apr. 23, 2004, at B13 (opining that the adult film industry in Southern California is “not being run by a bunch of dirty old men in the back room of some sleazy warehouse. Today, in the state, XXX entertainment is a \$9-billion-to-\$14-billion business run with the same kind of thought and attention to detail that you’d find at GE, Mattel or Tribune Co.”); Sallie Hofmeister, *Once-Conservative Adelphia Adds Hard-core Porn to Cable*, L.A. TIMES, Feb. 2, 2005, at A1 (reporting that Tim Connelly, editor and publisher of the industry trade magazine *Adult Video News*, estimates that when strip clubs, magazines, the Internet, TV, and DVDs are included, pornography is a \$10 billion industry); *Porn Profits: Corporate America's Secret*, ABC NEWS, May 27, 2004, <http://abcnews.go.com/Primetime/story?id=132370&page=1> [hereinafter *Porn Profits*] (“Pornography has grown into a \$10 billion business—bigger than the NFL, the NBA and Major League Baseball combined.”).

46. See Joshua Kurlantzick, *Strip Club's Cover Charge Is Voter Registration Card*, N.Y. TIMES, Oct. 5, 2004, at E1 (reporting that the adult entertainment industry is a \$15 billion industry); Madigan, *supra* note 4 (“[T]he San Fernando Valley pornography industry is believed to generate up to \$9 billion a year.”); Gary Rivlin, *The Chrome-shiny, Lights-flashing, Wheel-spinning, Touch-screened, Drew-Carey-wisecracking, Video-playing, 'Sound Events'-packed, Pulse-quickenning Bandit*, N.Y. TIMES, May 9, 2004, § 6 (Magazine), at 42 (“[E]xperts estimate that Americans spend at most \$10 billion a

discrepancy in reported revenue figures to the inclusion of profits from different segments of the industry in purported “totals” of yearly revenue.<sup>47</sup> For a revenue figure as high as \$10 to \$15 billion to be accurate, analysts note that the total must include not only adult video rentals and sales, but also revenue from ancillary markets such as adult video networks and pay-per-view movies on cable and satellite television, in-room hotel movies, websites, phone sex, sex toys, and magazines.<sup>48</sup>

## 2. Pornography Has Political Clout

In the past two decades, pornography companies have not only grown larger and more economically powerful, but they have also grown politically smarter. For example, they have helped fund and form the Free Speech Coalition (“FSC”), a 900-member trade association for the adult entertainment industry.<sup>49</sup> The FSC mission statement asserts that the organization’s goals include lobbying to influence critical legislation, gathering information and disseminating it to FSC members, educating the public on matters affecting the industry, and, “[a]s a last resort,” litigating to protect First Amendment rights.<sup>50</sup> Each spring, members of the FSC travel to Sacramento to meet with California legislators in a “daylong lobbying blitz.”<sup>51</sup> With an annual budget of \$750,000, the FSC’s lobbying efforts have focused on protecting free speech and guarding the business

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year on live sex shows, phone sex and porn in various media from cable to DVD to video and the Internet.”); Davide Dukcevic, *Stock Focus: Adult Entertainment Companies*, FORBES.COM, May 23, 2001, <http://www.forbes.com/2001/05/23/0523sf.html> (stating that “U.S. sales of adult entertainment . . . amount to about \$11 billion”); *Porn Again*, *supra* note 41 (“Estimates on the economic power of the industry vary from \$4.4 billion to as much as \$10 billion.”); Mary J. Thompson, *Porn Profits Go Mainstream*, MSN MONEY, Apr. 13, 2004, <http://moneycentral.msn.com/content/CNBCTV/Articles/TVReports/P80813.asp> (reporting that “[a]dult entertainment is estimated to be a \$12 billion industry in the United States”).

47. As McAlpine noted,

[I]t depends on what you include in [the numbers]. The adult entertainment side, the pay-per-view side, maybe that’s a billion dollars. What the cable guys get . . . maybe all in all that’s a billion dollars. But then you’ve got the whole Internet. New Frontier, for example, is close to \$20 million. . . . So it can be a lot bigger when you start getting things that you can’t get your hands on, you don’t see the money coming in. . . . I would think on the movie side, whatever [adult video producers] get out of the movie business, plus what they get out of home video, plus what they get out of pay-per-view—it’s probably somewhere between \$5 billion and \$10 billion.

See McAlpine, *supra* note 44.

48. Dan Ackman, *How Big Is Porn?*, FORBES.COM, May 25, 2001, <http://www.forbes.com/2001/05/25/0524porn.html>.

49. Huffstutter, *supra* note 34.

50. See Free Speech Coalition, Mission Statement, <http://www.freespeechcoalition.com/missionstatement.htm> (last visited Apr. 15, 2006).

51. Huffstutter, *supra* note 34.

interests of adult filmmakers.<sup>52</sup> Although the FSC may not be received effusively by many state legislators, the economic impact of the pornography industry on the state of California has given pornographers increasing leverage in their lobbying efforts.<sup>53</sup> Industry-funded research has estimated that rentals of pornographic videos garner \$31 to \$36 million in state sales tax alone.<sup>54</sup>

### 3. Pornography Has Increasing Legitimacy on Wall Street

As a testament to the growing political and economic credibility of the pornography industry, “legitimate” financial corporations and financiers have recently and in growing numbers forged relationships with formerly undesirable pornography companies, in what are proving to be mutually beneficial economic relationships.<sup>55</sup> Credit-issuing institutions such as Visa and MasterCard play a significant role in the industry by processing payments.<sup>56</sup> Furthermore, although they do not actively publicize the association, “respectable companies” like AT&T, Time-Warner, and the Hilton hotel chain have surreptitiously, though steadily, become major players in pornography distribution.<sup>57</sup> Adult entertainment content generates substantial added revenue for cable and satellite companies in particular, like Time-Warner, DirecTV, Comcast, Cablevision, Echostar, and Adelphia, with the cable companies often receiving as much as an eighty-percent revenue split with the adult content providers.<sup>58</sup> Additionally, the burgeoning array of Internet service providers (“ISPs”), such as America Online and Yahoo!, have also become major participants

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52. *Id.* The FSC has lobbied against regulation of the adult film industry, and regularly passes out industry-funded research that touts the industry’s impact on the California economy. *Id.* See also Free Speech Coalition, About Us, <http://www.freespeechcoalition.com/aboutus.htm#history> (last visited Apr. 15, 2006).

53. Romero, *supra* note 41 (“The industry has mainstream muscle to back up its resistance. . . . The industry employs 1,200 actors and generates more than \$36 million in state taxes.”).

54. See *id.*; Huffstutter, *supra* note 34.

55. See Jenkins, *supra* note 41 (“Wall Street once wouldn’t have touched the business with a 10-foot pole. Now it may not brag about the association, but reputable brokerages have been glad to help porn-related companies with public listings on U.S. stock exchanges.”).

56. *Id.*

57. *Id.* Commentators also note that it is difficult to estimate accurately how much money cable and media corporations derive from pornography because they do not publicize the associations in their portfolios or anywhere else. See *Porn Profits*, *supra* note 45 (“[Cable and media corporations’] financial statements do not mention profits from adult movies. However, one industry analyst estimated that the combination of cable and satellite outlets makes about \$1 billion a year from the adult-movie market.”).

58. See Thompson, *supra* note 46. Alan Bezosa, an analyst with Friedman Billings Ramsey, maintains that “[the content providers] are getting closer to 20% to 25% revenue split where the cable company gets about 75% to 80% of the revenue.” *Id.*

in the pornography industry; a significant amount of the subscriber traffic for ISPs derives from people seeking access to the plethora of pornography available on the Internet beyond these ISPs' own content sites.<sup>59</sup>

Pornographers have consistently maintained that the adult film industry is no different than any other lucrative business based on a vice, such as the tobacco, gambling, and alcohol industries. And now, in the "straight" business world, the stigmas historically associated with pornography are increasingly being supplanted by the attitude that sex, like any other product, is "merely a commodity to be sold and branded."<sup>60</sup> In the words of one of the chief executives of Vivid Video, a leading supplier of pornographic programming to major entertainment and cable companies, "We are a mainstream business, pure and simple. We are nothing more than widget makers."<sup>61</sup>

The pornography companies of today may in fact be considered "nothing more than widget makers," but they differ from the rest of the widget makers in one fundamental regard: other industries are monitored for health and safety violations in the workplace. Not only does the adult film industry generally *not* monitor health and safety in ways that are typically required in other businesses, but it also often disclaims liability for workers' on-the-job injuries,<sup>62</sup> a practice that is both socially irresponsible and illegal.<sup>63</sup>

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59. See Jenkins, *supra* note 41.

60. Huffstutter, *supra* note 34.

61. *Id.*

62. *Id.* In the heterosexual adult film business, it is regular practice for producers to require performers to sign documents meant to excuse the filmmakers of liability. For example, a typical contract from Vivid Video, Inc., one of the industry's largest studios, declares that the company is not responsible for, and will pay no medical costs for "sexually transmitted diseases . . . such as acquired immune deficiency syndrome (AIDS), herpes, hepatitis and other related diseases." *Id.*

63. Employees cannot be forced to sign away their legal rights to work in a safe environment—or to earn a minimum wage and overtime pay, or to enjoy the protections of workers' compensation insurance. See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (holding that employment contracts cannot be used to waive protections granted to employees by an act of Congress). Producers have still typically shielded themselves from potential legal liability for their actions by arguing that their performers are not employees, but independent contractors, who generally are not subject to state health and safety regulations or workers' compensation laws. The issue of whether adult film performers can properly be classified as independent contractors versus employees has yet to be fully addressed by either the courts or the legislature. This Note addresses the issue in greater detail *infra* in Part IV.A.

### III. DISEASE, THEN AND NOW: THE CURRENT PROBLEM AND POSSIBLE SOLUTIONS

For many Americans, HIV/AIDS has a dangerously ubiquitous presence on the periphery of their daily consciousnesses. The disease has become such a cultural fixture that for many people, fear of the disease has been subsumed by apathy as far as recognizing the insidious danger it still presents to society, both nationally and globally.<sup>64</sup> Although many Americans have become indoctrinated into regarding the disease as a “familiar enemy for much of the last twenty years, the global HIV/AIDS pandemic is only now beginning to be seen for what it is: a unique threat to human society, whose impact will be felt by future generations.”<sup>65</sup>

Adult film performers in particular are among those who are most vulnerable to HIV/AIDS, and yet they are drastically underprotected. Recent attempts to address adult film performers’ health care needs fell off the legislative agenda as soon as news of a possible HIV outbreak receded from the media spotlight, and the problem remains urgent and unaddressed.

#### A. THE NATIONAL IMPACT OF HIV/AIDS

The most explosive growth of the HIV/AIDS pandemic occurred in the mid-1990s,<sup>66</sup> and as of December 2004 an estimated 850,000 to 950,000 people in the United States were living with HIV, including 180,000 to 280,000 people who did not know they were infected.<sup>67</sup> In 2004 alone, the estimated number of new AIDS diagnoses throughout the United

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64. See Madigan, *supra* note 4 (quoting Tim Connelly, publisher of *Adult Video News*, as opining, “Americans think that AIDS is a fad, like disco, and it’s over. It’s not a fad. It’s here.”).

65. WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2004: CHANGING HISTORY 9 (2004), available at [http://www.who.int/countries/gha/publications/overview\\_AnnualreportWHO2003.pdf](http://www.who.int/countries/gha/publications/overview_AnnualreportWHO2003.pdf).

66. *Id.* (reporting that worldwide, an estimated 34 to 46 million people are living with HIV/AIDS and cumulatively, more than 20 million people have died from AIDS).

67. *Diagnoses of HIV/AIDS—32 States, 2000–2003*, MORBIDITY & MORTALITY WKLY. REP. (Dep’t of Health & Human Servs., Ctrs. for Disease Control & Prevention, Atlanta, Ga.), Dec. 3, 2004, at 1106 [hereinafter *Diagnoses of HIV/AIDS*]. Some estimates of the number of people living with HIV/AIDS are as high as 1.185 million. See, e.g., The Body: HIV/AIDS Among Hispanics (Jan. 2006), [http://www.thebody.com/hhs/factsheet\\_hispanics.html#1](http://www.thebody.com/hhs/factsheet_hispanics.html#1) (“Today there are an estimated 1.039 million to 1.185 million HIV-positive individuals living in the United States—the largest number ever according to the Centers for Disease Control and Prevention.”).

States was 42,514.<sup>68</sup> California reported 4679 new cases in 2004, the third highest number of newly reported AIDS cases in the nation.<sup>69</sup>

Although California has the third largest number of *reported* AIDS cases in the nation, the actual incidence of HIV infection in the state was unknown until HIV reporting regulations recently took effect. In July 2002, the California Department of Health Services / Office of AIDS (“DHS/OA”) implemented new regulations establishing a non-name-based HIV surveillance system to capture data for HIV cases diagnosed in California.<sup>70</sup> DHS/OA’s goal in employing a system that allows reporting of HIV infection in addition to AIDS case data was to “allow[] DHS/OA to better monitor the progress of the epidemic and to more effectively target prevention, education, and care resources to affected populations.”<sup>71</sup>

Many other government agencies on both national and state levels have actively begun to emphasize the monumental importance of prevention in curtailing the spread of HIV/AIDS.<sup>72</sup> Many states have promulgated mandatory testing and reporting regulations for individuals whose occupations may put them at risk for exposure to HIV/AIDS. For example, California’s Business and Professions Code requires many professions to comply with Cal/OSHA infection-control guidelines.<sup>73</sup>

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68. Basic Statistics, Centers for Disease Control and Prevention, <http://www.cdc.gov/hiv/topics/surveillance/basic.htm#aidscales> (last visited Apr. 15, 2006).

69. *Id.* California has reported a total of 135,221 cases of AIDS from the beginning of the epidemic through 2004. *Id.* The highest number of reported cases came from New York, which reported a total of 7641 new AIDS diagnoses in 2004 and 166,814 cumulative AIDS cases. *Id.*

70. OFFICE OF AIDS, CAL. DEP’T OF HEALTH SERVS., CALIFORNIA AND THE HIV/AIDS EPIDEMIC: THE STATE OF THE STATE REPORT 2002–2003, at 12 (2003) [hereinafter STATE REPORT]. See also CAL. OFFICE OF AIDS, CAL. DEP’T OF HEALTH SERVS., A BRIEF GUIDE TO CALIFORNIA’S HIV/AIDS LAWS, 2004, at 3–4 (2005) [hereinafter BRIEF GUIDE]. In anonymous HIV testing, the identity of the test subject is not linked to the test result. In accordance with sections 120885, 120890, and 120895 of the California Health and Safety Code, anonymous testing is available at “alternative test sites” administered by county health departments. HIV tests at these sites are free and test site counselors do not collect any identifying information—for example, name, social security number, or driver’s license—from test subjects. Instead, test subjects receive a unique number that corresponds to their specimen and test result. Anonymous testing is also available in some clinical settings other than alternative test sites, such as in STD clinics. See CAL. HEALTH & SAFETY CODE §§ 120885, 120890, 120895 (West 1996 & Supp. 2005).

71. STATE REPORT, *supra* note 70, at 12.

72. A recent example of these efforts is the federal “Advancing HIV Prevention” initiative sponsored by the Centers for Disease Control and Prevention (“CDC”). This initiative purports to encourage HIV testing by making voluntary testing a routine part of regular medical care and by offering rapid HIV testing in nonclinical settings via outreach into high-risk communities. See *Diagnoses of HIV/AIDS*, *supra* note 67, at 1112.

73. See BRIEF GUIDE, *supra* note 70, at 6–7. The infection-control guidelines to which the statute refers are, in the words of one of the applicable statutes,

Included among these professions are physicians, surgeons, podiatrists,<sup>74</sup> physical therapists,<sup>75</sup> nurses,<sup>76</sup> physician's assistants,<sup>77</sup> respiratory therapists,<sup>78</sup> psychiatric technicians,<sup>79</sup> and acupuncturists.<sup>80</sup> The code also requires persons applying for licenses to be professional boxers or martial arts fighters to present evidence that they have tested negative for HIV within thirty days of the application.<sup>81</sup> Additionally, California law requires county health officers to notify certain at-risk employees, such as funeral directors<sup>82</sup> and prehospital emergency medical personnel,<sup>83</sup> when they have been exposed to HIV/AIDS.

Remarkably, then, funeral directors and podiatrists, whose risk of HIV/AIDS exposure is incidental to their job requirements, receive significantly more regulatory HIV/AIDS protection from the state than do adult film actors—actors whose very job description involves repeated sexual intercourse with multiple high-risk partners. Those who arguably need the protection the most—adult film performers—in actuality receive next to no state-mandated protections for their “occupational hazards.”

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the standards, regulations, and guidelines of the State Department of Health Services developed pursuant to § 1250.11 of the Health and Safety Code and the standards, guidelines, and regulations pursuant to the California Occupational Safety and Health Act of 1973 . . . for preventing the transmission of HIV, hepatitis B, and other blood-borne pathogens in health care settings.

CAL. BUS. & PROF. CODE § 2221.1 (West 2003 & Supp. 2005).

74. § 2221.1.

75. CAL. BUS. & PROF. CODE § 2660 (West 2003).

76. *Id.* §§ 2761, 2878 (West 2003 & Supp. 2005).

77. *Id.* § 3527 (West 2003).

78. *Id.* § 3750 (West 2003 & Supp. 2005).

79. *Id.* § 4521 (West 2003 & Supp. 2005).

80. *Id.* § 4955 (West 2003).

81. *Id.* § 18712 (West 1997 & Supp. 2005).

82. See BRIEF GUIDE, *supra* note 70, at 10–11. See also CAL. HEALTH & SAFETY CODE §§ 1797.188–189 (West 1990 & Supp. 2005) (mandating that when an individual with AIDS dies in a health facility, that facility is required to notify the funeral director removing the body that the decedent had AIDS).

83. §§ 1797.188–189 (requiring county health officers to notify prehospital emergency medical care personnel, volunteer or paid, when they have been exposed to a reportable disease, such as AIDS, in the course of providing emergency services or resources, and noting that personnel to whom this statute applies include nurses, emergency medical technicians, paramedics, lifeguards, firefighters, peace officers, and physicians and surgeons who provide prehospital emergency care). See also CAL. HEALTH & SAFETY CODE § 121056 (West 1996 & Supp. 2005) (allowing a criminalist, toxicologist, forensic pathologist, or any employee who conducts DNA or other forensic testing to file an *ex parte* petition to have a specimen tested for HIV if, within the scope of work-related duties, the person performing the forensic test has skin or membrane contact with blood or other bodily fluids).

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B. THE IMPACT OF SEXUALLY TRANSMITTED DISEASE ON THE ADULT  
FILM INDUSTRY

1. The Spread of STDs in the Adult Film Industry

The actual extent of STD infection, including HIV/AIDS, among adult film performers is unknown, because no government or regulatory agency has ever specifically or consistently tracked such data. The limited data that do exist, however, are alarming. Recently, the Adult Industry Medical Health Care Foundation (“AIM”), an industry-backed clinic in Southern California, administered voluntary tests to a group consisting primarily of adult film actors, in order to detect the presence of STDs.<sup>84</sup> Of the 483 people tested, approximately 40% had at least one STD.<sup>85</sup> Nearly 17% tested positive for chlamydia, 13% for gonorrhea, and 10% for hepatitis B or C.<sup>86</sup> By alarming comparison, 101,871 cases of chlamydia were reported for the year statewide—or about .3% of the state’s population, a rate health officials consider epidemic.<sup>87</sup> In other words, for some STDs, the infection rates among adult film performers are about *fifty-seven times higher* than actual epidemic proportions.<sup>88</sup>

2. The Spread of AIDS in the Adult Film Industry

A significant factor in the rapid spread of STDs, including HIV/AIDS, in the adult film industry is the abnormally high number of sexual partners with whom the average performer comes in contact on any given day. As Sharon Mitchell, executive director of AIM, explains, “An average popular male in the industry, through partner-to-partner-to-partner transmission, reaches approximately 198 people in three days. Those are epidemic proportions.”<sup>89</sup>

Compounding the problem, actors and actresses are discouraged from wearing prophylactics during filming because many adult film producers

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84. Huffstutter, *supra* note 34. The AIM tests were administered between October 2001 and March 2002. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* Industry insiders and health officials are quick to note that such statistics can be explained by the relatively small size of the adult film population and its atypically high rate of sexual activity. *See id.*

89. Mark Kernes, *Does Sex Kill?*, ADULT VIDEO NEWS, Aug. 2003, [http://www.adultvideonews.com/cover/cover0803\\_01.html](http://www.adultvideonews.com/cover/cover0803_01.html).

believe that consumers want to see unprotected sex.<sup>90</sup> Only two of the approximately two hundred adult film production companies require their performers to use condoms,<sup>91</sup> and less than twenty percent of adult film actors use condoms regularly while filming.<sup>92</sup> As a result, adult film actors routinely engage in unprotected sexual acts with numerous partners, and then return to their private lives—dating or having relationships with people across Southern California. In the words of former U.S. Surgeon General Jocelyn Elders, when told about the lack of oversight in the adult film industry, “These folks are a reservoir. They don’t just have sex with one another. They have sex with regular people outside their business—doctors, lawyers, teachers, your next door neighbor.”<sup>93</sup>

The adult film industry currently recommends that all performers get tested every thirty days.<sup>94</sup> The HIV test currently preferred in the industry is the PCR-DNA test,<sup>95</sup> which can detect the presence of HIV in the bloodstream as early as two weeks after infection, ten to fifteen days earlier than other tests.<sup>96</sup> The frequency with which performers engage in sexual contact quickly diminishes the reliability of negative STD tests, however. A test result, if accurate to begin with, becomes unreliable as soon as the next sexual contact occurs.<sup>97</sup> Health experts agree that an HIV carrier is expected to transmit the virus in fifteen percent of all unprotected sexual contacts.<sup>98</sup> And once in another person’s bloodstream, the virus multiplies

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90. See *infra* Part IV.B.3.a.

91. See Maynard, *supra* note 5 (reporting that two of the largest adult film studios, Vivid Entertainment and Wicked Pictures, require condom usage in all films they produce).

92. See Caitlin Liu, *Practice Safe Sex or Risk Having It Mandated, Porn Industry Is Told*, L.A. TIMES, Aug. 20, 2004, at B4 (“Before this year’s outbreak, 17% of performers used condoms. Immediately after production resumed, 22.5% used condoms, but the level has since dropped back down to 17%.”).

93. Huffstutter, *supra* note 34.

94. Liu et al., *supra* note 4.

95. See Kernes, *supra* note 89 (commenting that the only acceptable HIV test for adult performers is the PCR-DNA, and quoting Sharon Mitchell as explaining that “the reason we started to use the PCR-DNA . . . was because it’s a test for the inhibitory substance, which is a copy of the disease itself rather than the antibody, because the antibody, as we know, takes up to six months to mature”).

96. *HIV Transmission*, *supra* note 4, at 923–24. See also Andrew Anthony, *Risky Business*, OBSERVER (U.K.), Aug. 1, 2004, <http://observer.guardian.co.uk/magazine/story/0,11913,1272029,00.html>. As Andrew Anthony explains,

[T]he PCR-DNA HIV test . . . measures the actual genetic material of HIV in the blood rather than the antibodies. That removes the lagtime for antibodies to build up, but there is still a delay between infection and detection. Typically, it takes around two weeks after contraction of HIV for sufficient viral load to amass to register in the test.

*Id.*

97. Jan LaRue, *Porn Industry Plagued by HIV and DOJ*, CONCERNED WOMEN FOR AM., Apr. 29, 2004, <http://www.cwfa.org/articledisplay.asp?id=5585&department=LEGAL&categoryid=pornography>.

98. Kernes, *supra* note 89.

rapidly and can be retransmitted almost immediately to another sexual partner.<sup>99</sup> Thus, if an average popular male in the industry reaches nearly two hundred people in only three days through partner-to-partner-to-partner transmission, “performers are playing Russian roulette by relying on the industry’s screening procedure.”<sup>100</sup>

Many industry insiders assert that, despite the high risk associated with their work—and in fact, *because of it*—the adult film community is as safe as, if not safer than, the general public in terms of sexual health, because performers are more aware of STDs and get tested regularly.<sup>101</sup> That inculcated sense of security was severely challenged, however, in the spring of 2004, when a number of adult film performers were suddenly found to be carrying the HIV virus.<sup>102</sup> Darren James, the performer believed to have initially brought the infection to Southern California after performing in a film in Brazil, “was conscientious about his health status. He did not drink or smoke, and he tested for HIV every three weeks.”<sup>103</sup> Nevertheless, after returning from Brazil, James had on-screen sex with twelve female performers, three of whom contracted the virus, before he found out that he was HIV positive. Subsequently, approximately sixty-five performers were identified as having had sexual contact with one of either of the four infected actors or with someone else who did.<sup>104</sup> In response to the prospective outbreak, the potentially infected performers put themselves on a “quarantine list” while most of the major adult film companies agreed to comply with a temporary moratorium on filmmaking until test results for the exposed performers were received.<sup>105</sup>

### 3. Curbing the Potential Outbreak: The Proposed Regulations

The 2004 HIV infections raised pointed questions about the adequacy of the adult film industry’s performer screening and testing methods, and

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99. *Id.*

100. LaRue, *supra* note 97.

101. *See Porn Profits*, *supra* note 45 (reporting one adult film producer’s claim that “[p]eople are aware about their health in this industry”). *See also* Flynt, *supra* note 45 (“You have a greater likelihood of getting HIV from your neighbor, who is not tested on a regular basis, than from a performer in the industry whose medical records are, in effect, an open book. . . . If you’re going to have sex, the adult film industry is probably the safest place to have it.”).

102. *See supra* note 4.

103. Anthony, *supra* note 96.

104. *Id.* (noting that the HIV infection “did not show in the first test [James] took immediately on his return. In Los Angeles he went on to have sex, over the following couple of weeks, with 12 female performers who in turn went on to have sex with an even greater number of male performers.”); Maynard, *supra* note 5.

105. *See supra* note 4.

underscored the need for enhanced prevention. Dr. Peter Kerndt, director of the STD Program for the Los Angeles County Department of Health Services (“LACDHS”), assessed the ineffectiveness of the current laissez-faire testing procedures in the industry: “As good as [HIV testing] has been, we never believed it would always work. [The spring 2004 outbreak] shows what I consider is a complete failure—and a tragic failure—that these people have become infected needlessly.”<sup>106</sup>

After almost a year of unavailingly urging adult film production companies to require actors to wear condoms during sex scenes, state and county officials felt that the HIV outbreak gave them the leverage they needed to effectuate change.<sup>107</sup> State and local authorities in California sought to impose health and safety standards on the adult film production business.<sup>108</sup> California legislators and Cal/OSHA officials issued written warnings to hundreds of producers and directors, advising them to voluntarily begin regulating the industry or risk legislative action.<sup>109</sup> Included in the warnings was a list of suggested “harm reduction strategies” designed to “strike a balanced approach that both respects freedom of speech and provides a reasonable level [of] protection for workers.”<sup>110</sup>

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106. Richardson & Liu, *supra* note 7.

107. *Id.*

108. *See id.* Immediately following the outbreak in April 2004, LACDHS initiated an investigation regarding the HIV transmissions among adult film actors, with the primary purpose of eliciting and notifying potentially infected partners. *See HIV Transmission, supra* note 4. Within the same month, LACDHS made an official request for an investigation by Cal/OSHA regarding the transmission events. *Id.*

109. *See* News Release, Assemblyman Paul Koretz, 42nd Cal. Assembly Dist., Assemblyman Koretz to the Adult Entertainment Industry: Use Condoms or Risk Legislative Action (Aug. 16, 2004), available at [http://democrats.assembly.ca.gov/members/a42/press\\_pdf/press\\_065.pdf](http://democrats.assembly.ca.gov/members/a42/press_pdf/press_065.pdf) [hereinafter News Release]. *See also* Caitlin Liu, *County Health Officials Call for Condoms in Porn Movies*, L.A. TIMES, Oct. 8, 2004, at B3; Stephen Ochs, *State Legislator Koretz Calls for Porn Self-regulation Including Condom Use*, ADULT VIDEO NEWS, Aug. 16, 2004, [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=187117](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=187117) (reporting that in light of the HIV crisis, California Assembly Labor and Employment Committee Chairman Paul Koretz sent a letter to adult industry professionals detailing thirteen “harm reduction strategies” to protect the health and safety of adult film industry performers).

110. *See* Ochs, *supra* note 109 (detailing that the “harm reduction strategies” suggested by Assemblyman Koretz and developed by Dr. Thomas Coates of the UCLA AIDS Institute include “condom use for all non-oral penetration, changes in current STD-testing and screening procedures, mandatory use of herpes-suppressing medications, no ejaculation on eyes, mouth and nose, and more extensive STD-prevention education for performers”).

For the most part, the industry ignored the government's admonitions, and continued to eschew safe sex practices in its films.<sup>111</sup> In the fall of 2004, Cal/OSHA raised the stakes for industry compliance and fined two Los Angeles-area pornography companies over \$30,000 each for allegedly allowing actors to perform unprotected sex acts, in violation of existing state regulations that require employers to protect workers who are exposed to blood or bodily fluids.<sup>112</sup> These citations marked the first time that the state agency had taken concrete regulatory action against the adult filmmaking industry, and many industry insiders and government officials felt that the citations heralded the beginning of a focused effort by state agencies to regulate the health and safety of the adult film industry.<sup>113</sup>

Further evidencing the government's escalating intent to actively begin regulating the industry was a state assembly bill, Assembly Bill 2798 ("AB 2798"), which was proposed in 2004 and addressed adult film performer health and safety. Despite the initial public interest in the bill, it languished in committee in November 2004, and as of this writing, has remained inactive.<sup>114</sup> The proposed bill would have added several sections to the California Business and Professions Code, intended to protect performers in the adult film industry from STDs, and to give them civil recourse against production companies for STDs contracted while working.<sup>115</sup> Under the proposal, adult film producers would have been required, before film production begins, to provide and pay for confidential testing of performers to determine whether they have any STDs.<sup>116</sup> The bill

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111. See Nick Madigan, *Sex-film Industry Threatened with Condom Requirement*, N.Y. TIMES, Aug. 24, 2004, at A15. As Sharon Mitchell, a former adult-film actress who earned a Ph.D. in human sexuality before cofounding AIM, quipped, "Honey this is pornography. . . . People don't pay attention to the Legislature." *Id.* See also Liu, *supra* note 92; Liu & Malnic, *supra* note 8; Madigan, *supra* note 4.

112. See Liu & Malnic, *supra* note 8. Evasive Angles and T.T.B. Productions received citations totaling \$30,560 each for failing to comply with the state's Bloodborne Pathogens Standard, for failing to report a serious work related illness to Cal/OSHA, and for failing to prepare and follow a written safety and health program, known as an injury and illness prevention program. See *id.*; *HIV Transmission*, *supra* note 4; Press Release, Cal/OSHA, Cal/OSHA Issues Citations to Adult Film Companies for Failing to Protect Employees from Health Hazards (Sept. 16, 2004), available at <http://www.dir.ca.gov/DIRNews/2004/IR2004-10.html>. See also *infra* notes 133–34. The pornography companies are challenging the citations, on the ground that adult film performers are independent contractors, not employees, and are therefore not subject to the Cal/OSHA regulations. See *supra* note 8.

113. See Liu & Malnic, *supra* note 8.

114. See Bill History, *supra* note 11.

115. See *Legislative Update*, CAL-OSHA REP., July 16, 2004; Scott Ross, *Adult Industry STD Bill Dead, but Not Forgotten*, ADULT VIDEO NEWS, May 10, 2004, [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=83296](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=83296).

116. *Legislative Update*, *supra* note 115. See Caitlin Liu & Lisa Richardson, *The State—Porn Health Tests Sought*, L.A. TIMES, May 2, 2004, at B8.

would also have prohibited an adult film production company from allowing STD-positive performers to participate in any production, unless the actors had documentation from a physician proving that they were disease-free.<sup>117</sup> Finally, the bill would have paved the way for performers who contracted STDs while working to bring civil suits against production companies.<sup>118</sup>

In an attempt to evaluate the viability of proposed regulations such as AB 2798, the California State Assembly Committee on Labor and Employment conducted an informational hearing in the summer of 2004.<sup>119</sup> The primary goal of the hearing was to explore whether state and local regulators have the authority needed to address the problem of worker health and safety in the adult film industry.<sup>120</sup> Among the presenters at the hearing were state and local health care professionals, adult film industry representatives and spokespersons, HIV specialists, and legal professionals.<sup>121</sup> Representatives from LACDHS advocated for legislation targeting the adult film industry that would require condom usage for all high-risk sexual encounters, implement screening requirements for sexually transmitted diseases, mandate education and training for all performers, and require stringent monitoring by state and local health departments to ensure industry compliance.<sup>122</sup>

Representatives from Cal/OSHA have echoed the endorsements of LACDHS, but have been less certain as to what Cal/OSHA's role should be in enforcing any possible regulations, given its jurisdictional limitations. Cal/OSHA is limited to regulating events that take place in the context of an employer/employee relationship, and thus it cannot regulate treatment of independent contractors.<sup>123</sup> Therefore, determining whether adult film performers can properly be classified as employees, rather than independent contractors, is essential to addressing worker health and safety in the adult film industry.<sup>124</sup> Regardless of the outcome of such a

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117. *Legislative Update*, *supra* note 115.

118. Ross, *supra* note 115.

119. See Mark Kernes, *Public Hearing Seeks Answers to HIV Dilemma: Will Condom Use and HIV Testing Be the Law?*, ADULT VIDEO NEWS, June 6, 2004, [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=105918](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=105918).

120. CAL. STATE ASSEMBLY COMM. ON LABOR & EMPLOYMENT, POST-HEARING REPORT: WORKER HEALTH AND SAFETY IN THE ADULT FILM INDUSTRY, 2003-04 Leg., Reg. Sess., at 1 (2004), available at <http://democrats.assembly.ca.gov/members/a42/pdf/afi.pdf> [hereinafter POST-HEARING REPORT].

121. *See id.*

122. Kernes, *supra* note 119.

123. *See* POST-HEARING REPORT, *supra* note 120, at 1-2. *See also infra* Part IV.A.1.

124. This Note addresses this issue in greater depth *infra* in Part IV.A.2.

determination, the fundamental issue remains: “[W]hy should workers in the adult film industry be subjected to life-threatening incurable diseases as a condition of work when in fact those diseases are preventable?”<sup>125</sup>

#### IV. ARE REGULATIONS PERMISSIBLE, VIABLE, AND DESIRABLE?

An inquiry into the viability of proposals for regulating the adult film industry involves two primary concerns. The first issue is one of jurisdictional viability. The safety regulations that state agencies seek to promulgate are irrelevant if the agencies cannot establish authority over adult film workers.<sup>126</sup> Cal/OSHA’s authority over such workers turns on whether adult film performers are classified as employees or independent contractors.<sup>127</sup> The second issue is a normative one. Notwithstanding the jurisdictional permissibility of state-mandated industry regulations, questions still remain regarding their social and economic desirability, as well as the administrative viability of implementing such state mandates. The overarching question here is one of balancing: a proper evaluation of any regulatory scheme must weigh the social costs incurred by leaving the industry unregulated against the social costs inherent in not only implementing a regulatory system, but also in altering one of the largest revenue-generating industries in the state.

##### A. JURISDICTIONAL INQUIRY

The leading candidate for enforcing and monitoring compliance with possible worker health and safety regulations is Cal/OSHA.<sup>128</sup> Cal/OSHA derives its authority from the California Occupational Safety and Health Act of 1973 (“the Act”),<sup>129</sup> which requires employers to provide a safe and

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125. Kernes, *supra* note 119 (quoting Dr. Jonathan Fielding, Director of Public Health for LACDHS).

126. See POST-HEARING REPORT, *supra* note 120, at 1–2; *infra* Part IV.A.

127. See POST-HEARING REPORT, *supra* note 120, at 1–2; *infra* Part IV.A.

128. See POST-HEARING REPORT, *supra* note 120, at 1–2; Huffstutter, *supra* note 34. Cal/OSHA was created by the California Occupational Safety and Health Act of 1973 to enforce effective standards, to assist and encourage employers to maintain safe and healthful working conditions, and to provide for enforcement, research, information, education, and training in the field of occupational safety and health. See POST-HEARING REPORT, *supra* note 120. The Cal/OSHA enforcement unit conducts inspections of California workplaces in response to reports of industrial accidents or complaints about occupational safety and health hazards, or as part of inspection programs targeting industries with high rates of occupational hazards, fatalities, injuries, or illnesses. Welcome to California DOSH, <http://www.dir.ca.gov/dosh/EnforcementPage.htm> (last visited Apr. 15, 2006).

129. The California Occupational Health and Safety Act of 1973 has been codified in sections of the California Labor Code.

healthful workplace for employees, and to cover the costs of implementing health and safety programs.<sup>130</sup> The Act gives Cal/OSHA jurisdiction over virtually all private employers in California, which inherently includes employers in the adult film industry.<sup>131</sup> If, in the context of an employer/employee relationship, a worker is exposed to a hazard, Cal/OSHA has the authority and the duty to “take reasonable measures to enforce the law in order to remove a hazard and protect employees.”<sup>132</sup> For the adult film industry, the two main standards that Cal/OSHA would be charged with enforcing are the state’s Bloodborne Pathogens Standard<sup>133</sup> and the Injury and Illness Prevention Program Standard.<sup>134</sup>

### 1. What Difference Does Employment Status Make for Adult Film Performers?

Cal/OSHA has regulatory power over workers who are employees but not over those who are independent contractors.<sup>135</sup> Similarly, many state and federal wage and hour laws, antidiscrimination and retaliation laws, and workers’ compensation laws<sup>136</sup> protect employees but not independent contractors.<sup>137</sup> In fact, some workers’ compensation provisions expressly

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130. See CAL. LAB. CODE § 6300 (West 2003).

131. See *id.*; CAL. LAB. CODE § 6307 (West 2003).

132. POST-HEARING REPORT, *supra* note 120, at 2.

133. See *id.* The Bloodborne Pathogens Standard provides that if employees engage in work practices that result in the contact of their skin, eyes, or mucous membranes with blood or other bodily fluids known to transmit bloodborne disease, they are required to be provided with barrier protection. See CAL. CODE REGS. tit. 8, § 5193 (2001).

134. See POST-HEARING REPORT, *supra* note 120, at 2. Since 1991, a written, effective injury and illness prevention program (“IIPP”) is required for every California employer. Each IIPP must be a written plan that describes and implements procedures that must include the following: management commitment or assignment of responsibilities, a safety communications system with employees, a system for ensuring employee compliance with safe work practices, and scheduled inspections and evaluations of workplace hazards. See CAL. CODE REGS. tit. 8, § 3203 (2002). For an example of a model IIPP proffered by Cal/OSHA that applies to employers with “intermittent employees,” and is thus particularly applicable to the adult film industry, see Cal/OSHA, Injury & Illness Prevention Model Program for Employers with Intermittent Employees (Oct. 1996), <http://www.dir.ca.gov/dosh/dosh%5Fpublications/iipintermit.html>.

135. POST-HEARING REPORT, *supra* note 120, at 1–2.

136. See, e.g., *Hale v. Bell Aluminum*, 986 S.W.2d 152, 154 (Ky. 1998).

137. See *Independent Contractor Versus Employee*, [http://www.dir.ca.gov/dlse/FAQ\\_Independent\\_Contractor.htm](http://www.dir.ca.gov/dlse/FAQ_Independent_Contractor.htm) (last visited Apr. 15, 2006) [hereinafter *Independent Contractor*]. See also Myra H. Barron, *Who’s an Independent Contractor? Who’s an Employee?*, 14 LAB. LAW. 457, 457–58 (1999). Myra Barron explains that other worker rights and employer obligations are triggered only when there is an employer/employee relationship. *Id.* at 457. Generally, only employees are protected from discrimination based on race, color, religion, sex, or national origin under Title VII of the Civil Rights Act of 1964; based on age under the Age Discrimination in Employment Act; and based on disability under the Americans with Disabilities Act. *Id.* In general, collective bargaining rights accrue only to employees under the National Labor Relations Act. *Id.* Similarly, only employees are typically entitled

exclude independent contractors from coverage.<sup>138</sup> Even in the absence of an express provision excluding independent contractors from workers' compensation coverage, however, independent contractors have traditionally not been included within the meaning of the term "employee" or similar terms used in workers' compensation acts to designate persons eligible for benefits under such acts.<sup>139</sup>

Another distinction between employees and independent contractors is that employees typically can work with state agencies, such as California's Department of Labor Standards Enforcement ("DLSE"), to seek enforcement of employment laws, whereas independent contractors must initiate litigation on their own to settle employment disputes.<sup>140</sup> For many adult film actors, the significant procedural hurdle of having to sue their employers precludes them from seeking to vindicate their rights, either because they fear retaliation, or because they are simply unaware that their rights are being violated.<sup>141</sup>

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to payments under the Social Security Act and to leave under the Family and Medical Leave Act. Also, normally, only employee retirement and other benefits are protected under the Employment Retirement and Income Security Act. *Id.* at 458.

138. See S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 403 (Cal. 1989).

139. See *id.* at 403–06; Farris v. Gen. Growth Dev. Corp., 354 N.W.2d 251, 255–56 (Iowa Ct. App. 1984). It is important to note that a worker's express or implied agreement to forgo workers' compensation coverage as an independent contractor will be given weight by the courts in making an employment determination. In situations, however, where compelling indicia of employment are otherwise present, a court "may not lightly assume" an individual waiver of the protections derived from that express or implied independent contractor status. *Borello*, 769 P.2d at 409.

140. DLSE is a California state agency that adjudicates wage claims, investigates discrimination and public work complaints, and enforces Labor Code statutes and Industrial Welfare Commission orders. See Division of Labor Standards Enforcement—Homepage, <http://www.dir.ca.gov/dlse/dlse.html> (last visited Apr. 15, 2006).

141. *Now Mainstream, Adult Film Industry Says Government Mandates Could Drive It Back Underground*, CAL-OSHA REP., June 11, 2004 [hereinafter *Drive It Back*]. Fear of retaliation for attempting to assert the right to safe working conditions is not unique to the adult film industry. Workers in many other industries, perhaps most notably in the garment industry—another multibillion-dollar industry driven in large part by low-wage workers being exploited in precarious, and often hazardous, working conditions—have traditionally struggled with this issue. See *id.* See also ASIAN PAC. AM. LEGAL CTR., REINFORCING THE SEAMS: GUARANTEEING THE PROMISE OF CALIFORNIA'S LANDMARK ANTI-SWEATSHOP LAW 6–7, 9 (2005), available at <http://apalc.org/pdf/files/SWRReportFinal.pdf> [hereinafter REINFORCING THE SEAMS].

In response to such fears and substandard conditions in the garment industry and to workers' reluctance to assert their rights, certain states have attempted to remedy these injustices through legislative action. These attempts have met with varying degrees of success. For example, in California, the "garment sweatshop capital of the nation," the state legislature passed and enacted into law in 2000 an assembly bill designed to give garment industry workers wage and overtime guarantees and to provide administrative recourse against employers who denied them these rights. See *id.* at 6–7. See also Assemb. B. 633, 1999–2000 Leg., Reg. Sess. (Cal. 1999). Six years after the bill's passage, however, a report revealed that, although the antisweatshop law can be a powerful tool for garment workers to assert their rights and recover wages, it has not been effectively utilized by the state labor

## 2. Should Adult Film Performers Be Considered Employees or Independent Contractors?

The issue of whether adult film performers should properly be classified as employees or independent contractors has been hotly debated, especially in light of the citations that Cal/OSHA issued to two pornography production companies in late 2004.<sup>142</sup> Complicating the issue is the fact that there is no bright-line rule defining “independent contractor,” and as such, a worker’s classification must be determined on a case-by-case basis, relying on definitions proffered by courts and enforcement agencies.<sup>143</sup> In evaluating employment status, many state agencies start with a presumption that the worker is an employee.<sup>144</sup> This presumption, however, is rebuttable, and the actual determination of whether a worker is an employee or an independent contractor depends on a number of indicia, none of which is dispositive.<sup>145</sup> Many states, including California, use the “economic realities” test articulated in *Rutherford Food Corp. v. McComb* to make the determination.<sup>146</sup> Under the *Rutherford* test, a court will look not to the common law definition of employment,<sup>147</sup> but

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agency charged with its enforcement, and consequently, the law has been ignored by many garment companies that continue to profit from sweatshop labor. REINFORCING THE SEAMS, *supra*, at 7, 19–31. The overall ineffectiveness of the antisweatshop law, relative to its potential efficacy as an organizational and remedial mechanism for typically underrepresented and unprotected workers, underscores the importance of the role of government agencies—in both the garment industry, and by analogy, the adult film industry context—as serving not only a reactive investigatory function for workplace injury and injustice, but also a proactive enforcement function in monitoring and implementing the administrative processes in place under the law to remedy these injustices.

142. See *supra* note 112.

143. See *Richardson v. APAC-Miss., Inc.*, 631 So. 2d 143, 148 (Miss. 1994) (explaining that although various definitions of “independent contractor,” with only slight variations, may be found in judicial opinions in most jurisdictions, it does not appear that a “concise definition” of the term “independent contractor” can be set that will be sufficiently specific, yet comprehensive enough, to apply to all situations that may arise).

144. Independent Contractor, *supra* note 137. See also 3 WITKIN SUM. CAL. LAW AGENCY § 21 (10th ed. 2005) (“As will be seen, the accepted definitions have proved to be of little help in solving problems in this field. The distinction is one of degree, and the decision in a particular case usually requires the weighing of conflicting factors.”).

145. Independent Contractor, *supra* note 137.

146. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726–27 (1947). See also *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399 (Cal. 1989).

147. *Borello*, 769 P.2d at 404 (“Following common law tradition, California decisions . . . uniformly declare that the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” (internal quotation marks omitted)). The *Borello* court continued to note, however, that courts have long recognized that the “control” test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the “most important” or “most significant” consideration, the authorities also endorse several “secondary” indicia of the nature of a service relationship.

rather to the “economic reality” of whether the putative employee is economically dependent on the alleged employer.<sup>148</sup> Here, the most significant factor to consider is whether the alleged employer controls, or has the right to control, the manner and means in which work is performed.<sup>149</sup> Even when control over work details is lacking, an employer/employee relationship may still be found “where the principal retains pervasive control over the operation as a whole, the worker’s duties are an integral part of the operation, [and] the nature of the work makes detailed control unnecessary.”<sup>150</sup>

Currently, some adult film performers are paid as independent contractors—that is, without payroll deductions and with income reported by an IRS 1099 form rather than a W-2 form—and some are paid as employees.<sup>151</sup> These payroll classifications, however, are of little consequence in determining a worker’s employment status, because whether a worker is paid as an independent contractor is of no significance in determining employment status;<sup>152</sup> workers who are traditionally classified as independent contractors for tax purposes by the IRS may still be viewed as employees entitled to the protections and benefits of wage and hour laws, workers’ compensation systems, civil rights laws, and other statutes.<sup>153</sup> Similarly, when adult film performers do have contracts with their producers, the performers are typically specified as independent contractors. This, too, does not necessarily mean that they *are* independent contractors. As with tax classifications, the existence of a written agreement purporting to establish an independent contractor relationship is

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*Id.*

148. See *Rutherford*, 331 U.S. at 726–29.

149. *Borello*, 769 P.2d at 404. Additional factors that may be considered include: whether the work is a part of the regular business of the alleged employer; whether the alleged employer or the worker provides the instrumentalities, tools, and the work location; the alleged employee’s investment in equipment or materials required by the task; the degree of permanence of the working relationship; the method of payment, whether per hour or per job; and the intent of the parties. *Id.* at 404, 407.

150. *Yellow Cab Coop. v. Workers’ Comp. Appeals Bd.*, 277 Cal. Rptr. 434, 439 (Ct. App. 1991).

151. See *Independent Contractor*, *supra* note 137; Notice to Employees and Employers in the Adult Film Industry, <http://www.dir.ca.gov/dosh/adultfilmindustry.html> (last visited Apr. 15, 2006).

152. See *Toyota Motor Sales U.S.A. v. Superior Court*, 269 Cal. Rptr. 647, 655 (Ct. App. 1990) (explaining that the requirements that workers pay their own payroll and income taxes and provide their own workers’ compensation are “merely the legal consequences of an independent contractor status not a means of proving it,” and that “[a]n employer cannot change the status of an employee to one of independent contractor by illegally requiring him to assume burdens which the law imposes directly on the employer”). See also *Barron*, *supra* note 137.

153. *Toyota Motor Sales*, 269 Cal. Rptr. at 655.

not determinative.<sup>154</sup> The actual nature of the relationship must be considered.<sup>155</sup>

It is not surprising that most adult film producers argue that their performers are independent contractors rather than employees, in light of the fact that there is less cost to and regulation of enterprises whose personnel are independent contractors. Many producers, and even some performers, think that “[i]t’s really a stretch to suggest that actors who are hired on a nonpermanent, no-regular-hours situation should be considered payroll employees and not independent contractors.”<sup>156</sup> Despite such sentiment, there is a strong counterargument that these same actors, notwithstanding their general itinerancy, should be considered employees under the law. In the words of one industry advocate, “They’re employees. The companies tell them when to show up, what to wear, where to go, what acts to do.”<sup>157</sup>

Although employment determinations are made on a case-by-case basis, a general application of the economic realities test to typical adult film performers supports the conclusion that they are employees entitled to the benefits of health and safety regulations and workers’ compensation. As described above, under the economic realities test, a fact-finder must consider the degree to which the performer is economically dependent on the alleged employer, as well as the degree of control the alleged employer asserts over the manner and means in which the job is performed.<sup>158</sup>

In the most general sense, the majority of adult film performers are economically dependent on the producers who hire them. A pornographic performer’s economic success is inextricably linked to conditions over which a film producer has complete control. An adult film actor relies on a producer to organize and supervise all aspects of the film’s content and production, including the sets, script, talent, crew, equipment, and financing, as well as all post-production aspects such as scoring and editing. Furthermore, after the film is completed, an actor is dependent on the producer to package, distribute, and promote it.

The film’s producer and director also maintain a high degree of control over the manner and means in which the actor’s job itself is

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154. *Id.* at 652–55.

155. *Id.*

156. Scott Ross & Mark Kernes, *Adult Industry Shocked at Employee Status of Adult Performers*, ADULT VIDEO NEWS, Sept. 18, 2004, [http://www.avn.com/index.php?Primary\\_Navigation=Articles&Action=View\\_Article&Content\\_ID=192323](http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=192323).

157. Huffstutter, *supra* note 34.

158. *See supra* notes 146–50 and accompanying text.

performed. The director tells the performer what to say, how and when to say it, what to wear, and how and when to engage in various sexual acts. An adult film actress who accepts a particular role, for example, may have no control over the number of men and women with whom she will be required to engage in sexual acts, or even over what sexual acts she will be required to perform.<sup>159</sup> Once she accepts the role, she becomes little more than a set of orifices ready to be visually and physically manipulated by the film's producers.<sup>160</sup>

Lending further support to the argument that adult film workers should be classified as employees is *Harrell v. Diamond A Entertainment, Inc.*, a case in which an exotic dancer was held to be an employee covered by the Fair Labor Standards Act.<sup>161</sup> In *Harrell*, the court held that “[a]n entertainer can be considered an independent contractor only if she exerts such control over a meaningful part of the business that she stands as a separate economic entity.”<sup>162</sup> As described above, adult film performers do not exert control over any “meaningful” aspect of the film’s production, nor do they participate in the business of the film’s preproduction or postproduction. In fact, with the exception of a few female star performers, the only meaningful part of the business over which adult film performers exert any modicum of control is whether to accept the job in the first place.<sup>163</sup>

Even if one was to make the tenuous argument that a producer does *not* exert control over the manner and means of an adult film performer’s work, an employer/employee relationship may *still* be found if (1) the producer retains “pervasive control over the operation as a whole,” (2) the performer’s duties are an “integral part of the operation,” and (3) the “nature” of the adult film performer’s work “makes detailed control unnecessary.”<sup>164</sup> First, as the discussion above demonstrates, adult film actors have little or no control over any aspect of a film’s preproduction, production, postproduction, distribution, or marketing. The rendering of the

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159. See, e.g., Anthony, *supra* note 96 (detailing the story of adult film performer Lara Roxx, who reluctantly engaged in a risky and painful sexual act for the first time on an adult film shoot after being told, “[T]hat’s what we need. It’s that or nothing.”).

160. Often a performer’s face will not even be shown in the film itself; male actors, especially, are typically viewed as “little more than lumps of muscle attached to a penis.” Anthony, *supra* note 96 (reporting how one adult film actor, Randy Spears, was recently filmed in such a way that the viewer shared his point of view, and as such, he was directed to arch away from the frame as an overhead camera captured only his genitals, reducing him to “nothing but a penis”).

161. *Harrell v. Diamond A Entm’t, Inc.*, 992 F. Supp. 1343 (M.D. Fla. 1997).

162. *Id.* at 1349 (internal quotation marks omitted).

163. See Anthony, *supra* note 96.

164. See *supra* note 150 and accompanying text.

actor's actual performance is essentially the *only* aspect of an adult film actor's work that is *not* under the producer's manifest control.<sup>165</sup> Therefore, the "pervasive control" of the operation of an adult film as a whole lies squarely in the hands of the adult film producer.

Regarding the second inquiry, as to whether an adult film performer's duties are an "integral part of the operation," it is the very use of the performers' bodies that is the integral "product" being made and sold in the adult film business.<sup>166</sup> Without adult film performers, there can be no adult films. That is the very definition of "integral part of the operation."

Finally, regarding the third inquiry, as to whether the "nature of the work makes detailed control unnecessary," the nature of the adult film actor's work itself—engaging in sexual acts on film—makes detailed control not only unnecessary, but also physically and effectively impossible. An adult film producer can, and does, exercise control over every other aspect of a pornographic film's operations and production, but when it comes to the core of the adult film actor's work—the work that the actor is actually getting paid to do—its highly personal, physical, and often unpredictable nature renders the producer's ability to control it unnecessary and, in fact, futile. This dichotomous control inherent on the adult film producer's part—utterly pervasive in the overall sense, yet unable to actually control the physical, sexual nature of the work itself—provides a resounding "yes" to the inquiry of whether the nature of the adult film actor's work makes detailed control unnecessary.

Demonstrably, under either the traditional economic realities inquiry into control over the manner and means of work details, or the alternative three-part inquiry, it is clear that adult film performers should be classified as employees, not independent contractors. These workers should therefore fall under the jurisdiction of regulatory agencies such as Cal/OSHA and should accordingly be entitled to health and safety protections in the workplace.

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165. See *supra* notes 157–60 and accompanying text.

166. See also 303 W.42nd St. Entm't v. IRS, 916 F. Supp. 349, 357, 362 (S.D.N.Y. 1996) (holding that because the employer's business was adult entertainment, "[t]he only way to put forth the product is by the use of the human figure," that is, the presence of the individual is essential for the distribution of the product, and also noting that "[w]hen the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the worker who performs those services is more likely to be considered an employee than an independent contractor"), *rev'd on other grounds*, 181 F. 3d 272, 276 (2d Cir. 1999) ("[W]e find no error in the lower court's conclusion that the booth performers were employees of Show World during the relevant time period.").

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## B. NORMATIVE INQUIRY

Assuming *arguendo* that adult film performers can be classified as employees subject to the jurisdiction of state regulatory agencies such as Cal/OSHA, the question remains whether such a regulatory scheme is not only administratively viable, but also desirable. For years, the adult film industry has attempted to monitor and enforce self-imposed performer testing and screening methods, and many industry participants feel that these efforts have been sufficient.<sup>167</sup> However, an examination of these self-regulations that accounts for (1) similar government-regulated health and safety procedures in place in comparable industries, (2) economic disincentives to self-regulation leading to inevitable market failure, (3) industry-wide fear of external regulation, and (4) public apathy and indifference to performer well-being, makes clear that the current regulations are grossly inadequate mechanisms for enforcing and monitoring worker health and safety in the adult film industry.

### 1. Comparison to Similar Industries

An examination of both the mainstream film business and legalized prostitution demonstrates that adult film workers are drastically underprotected compared to their peers in analogous industries, and that regulating the health and safety of sex-workers is feasible.

#### a. Performers in Mainstream Motion Pictures

The adult film industry is often described as a “parallel universe” to the mainstream motion picture business, its neighbor situated right across the San Fernando Valley in Los Angeles.<sup>168</sup> These universes may be geographically proximate, but the differences in the treatment of their respective performers are ineffably stark.

Performers in mainstream motion pictures and television are protected by stringent union-enforced regulations concerning performers’ hours, wages, overtime, health insurance, retirement benefits, workers’ compensation, and residual payments.<sup>169</sup> Mainstream performers are protected by organized and powerful unions such as the Screen Actors Guild, whose contracts guarantee that performers working in the areas

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167. See *infra* note 207.

168. Anthony, *supra* note 96 (“They do things differently in the Valley, the parallel universe to Hollywood’s celebrity cosmos. . . . The trip from the major studios to the warehouses where they shoot porn is a brief one along the 405 freeway, but it’s a one-way journey.”).

169. See SCREEN ACTORS GUILD, INC., CONSTITUTION AND BY-LAWS (2002), available at [http://www.sag.org/sagWebApp/Content/Public/SAG\\_Constitution\\_0403.pdf](http://www.sag.org/sagWebApp/Content/Public/SAG_Constitution_0403.pdf).

under union jurisdiction essentially enjoy the benefits and protections of employees.<sup>170</sup> Furthermore, mainstream performers have stunt workers and body doubles to stand in for them when they feel that the demands of their roles have become too risky. Even animals *and insects* appearing in mainstream films enjoy “health and safety” protections.<sup>171</sup>

In sharp contrast, the actors who work in pornographic films put in long hours, often without meal breaks.<sup>172</sup> They do not get paid on a set scale basis, and it is not unusual for their paychecks to bounce several days after they are issued.<sup>173</sup> They often work without clean toilets, toilet paper, soap, or water.<sup>174</sup> They are not represented by any organized unions. The film producers for whom they work provide them with no health benefits or workers’ compensation insurance, and most insidiously, they are exposed on a daily basis to infectious, debilitating, and often fatal diseases.<sup>175</sup> Their very job description involves hazard and risk.

Although the production scope and process are markedly different for mainstream and pornographic films, there exist enough fundamental similarities between the actors’ work in each industry to conclude that the performers that are an integral part of the product being sold in both industries should receive similar health and safety protections. Both groups perform in films for the purpose of entertaining the general public. Both are subject to the control and supervision of producers and directors while working on set. Both groups are part of enormous commercial enterprises

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170. See SCREEN ACTORS GUILD, 2005 CONTRACT SUMMARY, THEATRICAL MOTION PICTURES AND TELEVISION (2005), available at <http://www.sag.org/Content/Public/theatrical-tv.pdf>.

171. The Producer-Screen Actors Guild Codified Basic Agreement of 1998 describes motion picture and television producers’ positions and responsibilities for ensuring the well-being of animals on sets. One provision is that producers must notify the American Humane Association prior to the commencement of any work that involves animals. This section also provides representatives of the American Humane Association with access to sets while animals are being used. See Screen Actors Guild, FAQs: Who Looks After the Well-being of Animals That Appear in Films and TV Shows?, [http://www.sag.org/sagWebApp/application?origin=faq\\_template.jsp&event=bea.portal.framework.internal.refresh&pageid=FAQs&templateType=faq&portletTitle=null&contentType=null&contentSubType=Entertainment+Industry&ln\\_idx=2](http://www.sag.org/sagWebApp/application?origin=faq_template.jsp&event=bea.portal.framework.internal.refresh&pageid=FAQs&templateType=faq&portletTitle=null&contentType=null&contentSubType=Entertainment+Industry&ln_idx=2) (last visited Apr. 15, 2006). For a particularly poignant example, see Huffstutter, *supra* note 34, relating that

[d]uring production of the 1997 movie “Mimic,” American Humane Assn. representatives wandered through the Los Angeles set, ensuring that a herd of cockroaches was well taken care of. Licensed animal handlers were to follow state and federal anti-cruelty laws designed to protect the insects, which had been trained to swirl around actress Mira Sorvino’s feet. The roaches had to be fed at a certain time. They could only work a few hours each day. They could not be harmed.

172. Huffstutter, *supra* note 34.

173. See *id.*

174. *Id.*

175. See *id.*

that garner multibillion-dollar domestic and international revenues.<sup>176</sup> Still, under present circumstances, not just mainstream actors, but dogs and even roaches have more worker health and safety protections than do the thousands of adult film actors who expose themselves to occupational safety hazards every day.

b. Legalized Prostitution in Nevada

The worlds of legalized prostitution in Nevada and adult film production in California are strikingly similar. Nevada's legal brothels employ 250 to 400 licensed prostitutes at any given time, and as in the adult film industry, these workers typically stay in the business for only a brief period.<sup>177</sup> The key difference between the two industries, however, is that in Nevada, legal brothels are subject to stringent oversight by the state; state law requires the women who work in legal brothels to practice safe sex.<sup>178</sup> As a result, physicians and epidemiologists alike report that the regulations have "all but eradicated the transmission of STDs within the workplace."<sup>179</sup>

In Nevada, the State Health Division requires customers in brothels to use condoms.<sup>180</sup> A violation is a misdemeanor, and to be HIV-positive and not use a condom is a felony.<sup>181</sup> Additionally, each brothel is required to have the disease status and test record of each prostitute on file.<sup>182</sup> Once a week, the women are required to see a doctor, which some doctors facilitate by actually coming to the brothels to perform on-site examinations.<sup>183</sup> Blood and urine are drawn and sent to one of a handful of state-regulated labs.<sup>184</sup> Furthermore, local authorities periodically perform

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176. See *supra* notes 46–48 and accompanying text; *supra* Part II.B.1. See also MPAA Statistics, *supra* note 42 (reporting that the domestic box office revenue for mainstream theatrical motion pictures in 2005 was \$8.99 billion, and that worldwide box office revenue for 2005 totaled \$23.24 billion).

177. Huffstutter, *supra* note 34.

178. *Id.*

179. *Id.* In 1999, for example, twenty-eight prostitutes tested positive for either gonorrhea or chlamydia, according to officials within the Nevada Department of Human Resources Health Division. *Id.* State officials say that most of those who were infected contracted their diseases outside the brothels. "What we've found is that the positives are nearly all from women who are being tested [for STDs] as they enter the system for the first time," reports Dr. Randy Todd, Nevada's state epidemiologist. *Id.* "On the rare case that they've contracted after being in the system, we've found that they've had unprotected sex with a boyfriend or husband, and that's where the [infection] occurred." *Id.* (alteration in original). There have been no cases of HIV among legal brothel workers since Nevada's brothels became legal in the mid-1980s. *Id.*

180. NEV. ADMIN. CODE § 441A.805 (1992).

181. NEV. REV. STAT. § 201.358 (1989); Huffstutter, *supra* note 34.

182. Huffstutter, *supra* note 34.

183. *Id.*

184. *Id.*; NEV. ADMIN. CODE § 441A.800 (1992).

on-site visits to the brothels to monitor their compliance with written health record requirements.<sup>185</sup>

Perhaps the strongest reason for the success of the Nevada regulations is that there are many economic incentives for the brothels' continued compliance with them. The first time a brothel worker is caught not using a condom, the house gets fined; the second time it happens, the house is shut down permanently.<sup>186</sup> Compliance with the monitoring requirements is therefore essential in order to "keep the operation thriving."<sup>187</sup> As George Flint, director of the Nevada Brothel Owners Group, remarked, "If we had the disease rate you see in the porn world, we'd be out of business tomorrow. . . . [All it would take is one] customer saying he picked up an STD in one of our houses, and our industry would be gone overnight."<sup>188</sup> Brothel operators who employ HIV-positive prostitutes may be liable for damages to a customer exposed to the virus as a result of that prostitute's employment.<sup>189</sup> Brothel owners are more likely to comply with the regulations because they do not bear the entire cost of compliance; sex workers offset the state's regulatory costs by paying fees out of their own pockets for required medical tests, state registration, and licensing.<sup>190</sup>

Many adult film industry insiders and California state officials believe that the success of Nevada's system for regulating brothels not only provides further support for implementing an analogous system in the adult film industry, but also could serve as a potential model for how such a system might be administered.<sup>191</sup> Admittedly, there are obvious differences between the two industries that could serve as impediments to smooth and incentivized regulation of the adult film industry—namely, consumers in brothels have direct contact with potentially infected "product," whereas adult film viewers have nothing *directly* at stake in terms of the performers' HIV status. If, however, the viewing (and nonviewing) public can be convinced that they have interests *indirectly* implicated by adult film

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185. Huffstutter, *supra* note 34.

186. *Id.* As Dennis Hof, owner of several Nevada brothels, responds to the possibility of being shut down, "[T]hat will not happen to us. That's why we hire people to go in and test the girls [on using condoms] ourselves." *Id.*

187. *Id.*

188. John Patterson, *An American Obsession*, GUARDIAN UNLIMITED (U.K.), Feb. 7, 2003, available at <http://www.guardian.co.uk/arts/fridayreview/story/0,12102,889899,00.html>.

189. NEV. REV. STAT. § 41.1397 (1987).

190. Huffstutter, *supra* note 34 (reporting that in 2002 alone, such fees generated approximately \$175,000 in Nye County, Nevada, where a dozen brothels operate).

191. *See id.* Even the Los Angeles County Director of STD Control, Dr. Peter Kerndt, has remarked, "[E]ven we wonder why we don't have the same legal requirements in California that they have with legalized prostitutes in Nevada." *Id.*

performers' STD status, then consumer preferences and production practices may evolve accordingly.<sup>192</sup>

California, normally regarded as a bellwether state, now appears to have fallen behind its neighbor state Nevada, which has seemingly devised a way to “keep the legal sex business healthy” and profitable by imposing strict controls.<sup>193</sup> Eschewing health and safety practices in pornographic film production currently carries no legal or economic risk for adult film producers in California because no state agency is regularly monitoring their behavior. Although Cal/OSHA's recent citations of two adult film studios indicate that monitoring *is* possible, in order to effectively bring California's regulatory scheme in line with Nevada's, new legislation must be implemented.

## 2. Administrability Hurdles: Self-regulation Is Insufficient

Even if some producers in the adult film industry were willing to monitor and enforce health and safety practices, and to implement a workers' compensation system to address occupational illnesses—as certain adult studios already have<sup>194</sup>—the sustained success of such systems is dubious. Many market-based approaches for addressing occupational illness rely on the theory that workers' compensation and tort liability provide adequate incentives for employers with high injury and illness rates to improve workplace conditions.<sup>195</sup> Workers' compensation programs have generally proven, however, to be inadequate at ensuring an efficient allocation of health resources. The programs do not provide sufficient incentives for employers to invest in a more healthful workplace because benefits are often below the actual costs of injury, and because premiums for individual providers do not directly hinge on the level of risk they impose.<sup>196</sup>

Further complicating the situation is the long latency period of some of the occupational diseases at issue in the adult film industry. For

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192. See *supra* Part III.B.

193. Huffstutter, *supra* note 34.

194. Vivid Entertainment Group, one of the largest pornography producers, requires performers to bring a recent HIV test to the set and to wear condoms during intercourse on all Vivid movies; it has clean facilities, and provides workers' compensation insurance for performers. See Steven Hirsch, David James & Bill Asher, Vivid Entm't Group, Letter to the Editor, *Porn Safety Standards*, L.A. TIMES, Mar. 2, 2003, § 9 (Magazine), at 5.

195. See Occupational Exposure to Bloodborne Pathogens, 56 Fed. Reg. 64,004, 64,086 (Dec. 6, 1991).

196. *Id.*

example, the years it may take for HIV/AIDS to develop<sup>197</sup> may make it difficult for an infected worker to obtain workers' compensation benefits. Furthermore, while the threat of litigation under tort liability is considered an effective market incentive for employers to provide a more healthful work environment, its effectiveness is limited by the fact that in the adult film industry, workers may be precluded from suing pornography companies under workers' compensation statutes, depending on their employment status.<sup>198</sup> Even if adult film workers *are* permitted to bring suit under workers' compensation statutes, additional factors that may deter them from litigating their claims are the sizeable legal fees associated with prolonged litigation, the difficulty of proving that their employers were negligent in the first place, and the tendency of employers to suppress information about workplace hazards.<sup>199</sup>

An examination of the administrative and economic viability of industry self-regulation from a neoclassical economic perspective further indicates that some form of government regulation is in fact warranted in the adult film industry. Neoclassical economics assumes that a "perfectly functioning labor market will efficiently allocate occupational safety and health resources and that government intervention is warranted only when a market failure occurs."<sup>200</sup> In a functioning market, "workers will bargain for wages which will compensate for their expected losses as a result of occupational risks, while employers will reduce the risks in order to reduce their labor costs."<sup>201</sup> The neoclassical theory also typically assumes "perfectly competitive labor markets in which workers, having perfect knowledge of job risks and being perfectly mobile between jobs," command wages that fully compensate them for the risk of a future occupational illness.<sup>202</sup>

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197. The CDC cautions that, because of advances in medical treatments for HIV-infected persons over the past decade, it is difficult to estimate the length of time after which a person infected with HIV will develop AIDS. *See* How Long Does It Take, *supra* note 3. Notwithstanding the uncertainty surrounding the latency period between HIV and AIDS, the CDC does note that prior to 1996, when powerful antiretroviral therapies were introduced into the mainstream, scientists estimated that approximately half the persons infected with HIV would develop AIDS within ten years after becoming infected. *Id.*

198. *See supra* Part IV.A.

199. Moreover, workers often cannot afford to relinquish workers' compensation benefits while awaiting settlement, especially when there is a low probability of winning the lawsuit. *See* Occupational Exposure to Bloodborne Pathogens, 56 Fed. Reg. at 64,086.

200. *Id.* at 64,086-87.

201. *Id.* at 64,087.

202. *Id.*

The adult film industry, however, is far from a “perfectly functioning labor market,” and therefore, the conditions on which these neoclassical assumptions rely simply are not met. Although many workers are aware of the health risks inherent in their work—and industry health organizations such as AIM have made efforts to increase that awareness<sup>203</sup>—for many adult film workers, the risk of not getting hired by the scores of producers who eschew condom usage in their films seems greater and more ominous than the risk of disease.<sup>204</sup> And while an adult film actress might be paid a slightly higher premium to work in a riskier environment—that is, without a condom<sup>205</sup>—such a minor wage premium is in no way an adequate compensation for the risk of contracting HIV/AIDS, a costly and fatal disease. Furthermore, while some adult film actors know that they are entitled to employee protections such as workers’ compensation and overtime, they see no way performers could organize effectively, given their fragmentation, high turnover rate, and fungibility.<sup>206</sup>

Demonstrably, then, the majority of performers, industry health experts, and government officials agree that adopting uniform health and safety practices in the adult film industry is observably in the best interest of pornography performers and derivatively, of pornography consumers. But obstacles such as lack of organization among production companies and performers, economic disincentives to provide workers’ compensation benefits, performer itinerancy and apathy, and competition among health care providers make such unilateral implementation of health and safety practices unlikely, if not impossible. Circumstances such as these—that is, circumstances embodying a heightened and profound risk of market failure in the provision of worker health and safety—are those in which new

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203. See Kernes, *supra* note 119. All new performers are required to watch a twenty-minute version of AIM’s popular informational video, “Porn 101,” during their first testing procedure. The video presents information to newcomers to the industry regarding health and safety practices, social and psychological information relevant to performing in adult entertainment, and HIV and STD transmission. *Id.*

204. See Steve Carney, *Actors’ HIV Cases Halt Production in Porn Film Industry*, BOSTON GLOBE, Apr. 18, 2004, at 20. Producers will often offer adult film actresses up to \$1000 extra to perform without condoms, “an incentive [that] is louder than . . . health warnings,” says Sharon Mitchell. *Id.*

205. See *id.*

206. See Huffstutter, *supra* note 34 (quoting an adult film actress who has worked for several years as saying, “You would have to get every actor and actress in adult [films] to sign up at the same minute. . . . Even if that happened, the studios could easily find replacements. They control everything.”). But see Anthony, *supra* note 96 (quoting Sunset Thomas, a highly successful adult film star and Nevada prostitute as saying about adult film performers, “If all of us got together in this business and said from now on it was condoms, there’s nothing they could do.”).

legislation and government regulation are not only severely wanting, but also crucial.

### 3. Resistance to Regulation from Inside the Industry

Another justification for immediate government regulation of health and safety in the adult film industry is that a pervasive apathy and fear of change have lulled performers and producers into a false sense of security that their current self-regulated system is optimal,<sup>207</sup> when in fact, as explained above, it is profoundly inadequate.<sup>208</sup>

#### a. Market Forces

One of the most common justifications propounded by adult film industry producers for their general resistance to implementing stringent health and safety precautions such as condom-only productions is that market forces dictate that films featuring safe sex practices do not sell as well as those without such practices.<sup>209</sup> Adult films tend to be picked up for distribution faster if the actors are not wearing condoms, and performers typically earn more money for acceding to forgo condom usage.<sup>210</sup> Larry Flynt, adult entertainment mogul and occasional spokesperson for the pornography industry, recently summarized these market preferences:

Market testing—and conventional wisdom—tells us that films that feature actors wearing condoms don't sell. That means that forcing condom use on the industry is more likely to have a negative rather than positive effect on HIV protection. It would drive the industry underground or out of state to where there is no testing, let alone a

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207. See Richardson & Liu, *supra* note 7 (quoting veteran industry performer Adam Glasser regarding the low number of documented HIV transmission cases in the years prior to the outbreak: "The record is pretty good. The reality is, it's not like the system is broke and someone's got to fix it. The system's worked pretty well.").

208. See *supra* Part IV.B.2.

209. Mark Kulkis, president of an adult film production company in downtown Los Angeles that specializes in fetish films, opines, "It's market forces. . . . The bottom line is, customers don't like [to see] condoms. . . . When you see an action movie and you see the hero jumping out the window, you don't want to see the wires holding him up. Nobody wants to see condoms. It's a fantasy." Richardson & Liu, *supra* note 7. See also *California Investigators Urged to Inspect Porn Industry*, AIDS VACCINE WK., May 10, 2004, at 5 (reporting that many pornographic films involve unprotected sex because "insiders say, on-screen condom use spoils the fantasy for viewers and results in lower sales"); Madigan, *supra* note 4 (quoting Graham Travis, head of production at Elegant Angel Video, an adult film company that produces as many as eight new releases a month, as noting, "In any sexual interaction where condoms are used, consumers tend to drift from that. . . . What the consumers want to see is performers without condoms, something that's as real and intimate as possible.").

210. See *supra* note 204.

condom requirement. The net result would surely be more HIV infections.<sup>211</sup>

Such an assumption may be unfounded, however, if one looks at the success of homosexual male pornographic films, in which condom use has been the norm for over two decades.<sup>212</sup> Starting in the late 1980s, widespread deaths due to AIDS among gay male adult film actors, as well as outcries by health care advocates, prompted gay-pornography companies to voluntarily adopt safe-sex practices as their industry standard.<sup>213</sup> While health experts and gay-pornography producers do concede that adopting a condom-only policy in the heterosexual adult film industry will involve “an adjustment period, both culturally and from a business model,” they still maintain that “in no way, shape or form should safer sex be the death knell to the industry.”<sup>214</sup> From an economic perspective, the majority of gay-pornography production companies have suffered no significant losses from their condom-only policies, and therefore, in the words of one gay-pornography industry executive, they have “shown that profit and protection can go hand in hand.”<sup>215</sup>

Most notably, perhaps, the success of widespread condom use in homosexual male adult films derives in large part from the fact that over the past quarter century, a startlingly significant portion of the gay male population has been infected with HIV/AIDS and, in response, the homosexual male population at large has come to practice safe sex.<sup>216</sup> While there may exist a niche audience for films that depict unprotected gay male sex, few distribution outlets will carry such films for fear of drawing public criticism.<sup>217</sup> “They all wear condoms,” says Roger Tansey, former executive director of Aid For AIDS, a West Hollywood, California-based nonprofit organization that provides financial assistance for people infected with HIV.<sup>218</sup> “Gay actors and gay viewers don’t see unprotected sex as a fantasy. They see it as watching death on the screen.”<sup>219</sup> Health experts like Dr. Jonathan Fielding, Director of Public Health for Los

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211. Flynt, *supra* note 45.

212. Caitlin Liu & Lisa Richardson, *Some Gay-porn Producers Have Required Condom Use*, L.A. TIMES, Apr. 22, 2004, at B1. *See also* Huffstutter, *supra* note 34 (“[G]ay pornographers abide by a different set of rules: no condom, no HIV test, no audience. Nearly all gay Triple-X production studios throughout the industry demand condom use and other protections.”).

213. Liu & Richardson, *supra* note 212.

214. *Id.*

215. *Id.*

216. *See id.*

217. Huffstutter, *supra* note 34.

218. *Id.*

219. *Id.*

Angeles County, believe that consumer preferences can similarly evolve in the heterosexual adult film market, thus undercutting the argument submitted by so many adult film producers that consumers do not want to see condoms. Fielding explains, “We know that so many changes in behaviors have come from changing norms. . . . If in every porno flick somebody saw, there was safe sex, that would be the way you’d think of sex.”<sup>220</sup>

b. Fears of Underground Migration

Another substantial explanation for adult film producers’ resistance to government regulation—one that is insinuated by Larry Flynt’s above comment<sup>221</sup>—is the fear that state-mandated testing and condom-use will force the industry either out of state, or “underground,” far from the reach of any oversight protection.<sup>222</sup> Many industry insiders reason that mandatory compliance with state regulations would pose an economic disincentive for “rogue producers” to comply with industry health organizations such as AIM, thus reducing the amount of testing performed by such organizations. As a result, mandatory compliance would “increase the direct health hazard, not only for the talent pool but also for the general community.”<sup>223</sup> Performers and producers who endorse such reasoning believe that a more desirable alternative to government regulation involves “inducing and encouraging people to participate in their own health and safety. . . . [I]t is a question of increasing talent education and not pushing [them] out of the fold of protection by making something illegal that cannot be made to go away.”<sup>224</sup>

220. See Liu & Richardson, *supra* note 212 (reporting Fielding’s comparison of resistance to condom requirements with resistance to antismoking laws: “The most recent public health experience in changing a norm was with smoking, when state law banned smoking in restaurants and bars. They all cried ‘it’s going to kill business,’ but receipts went up 25%.”).

221. See *supra* text accompanying note 211.

222. See Steve Gorman, *AIDS Scare Sparks Call for Calif. Porn Film Probe*, AEGIS-REUTERS, Apr. 21, 2004, available at <http://www.aegis.com/news/re/2004/RE040429.html>. As Sharon Mitchell warns,

If there is a mandatory condom law put in place, these people will scatter and go underground and we will not be able to test them. . . . If you want to see an influx of disease that may affect the general population, then you put a mandatory condom law into effect. . . . I’m very concerned about government intervention in this respect.

*Id.* Furthermore, from the perspective of many performers,

[s]tate-mandated condom use does not encourage security on the set because the people that that person will be working for will be underground, and away from any kind of oversight protection. . . . [I]f there was state-mandated condom use, it is a certainty, a tragic certainty, that a . . . very substantial part of the industry would not be compliant, would no longer participate in AIM.

Kernes, *supra* note 119.

223. Kernes, *supra* note 119.

224. *Id.*

This suggestion, however, does not constitute a viable solution to the current problem of performer health and safety in the adult film industry; rather, it *is* the current problem of performer health and safety in the adult film industry. As this Note has shown, industry self-regulation is tragically inadequate. While the industry has made notable efforts through programs such as AIM to increase education and testing, it is fear and a general sense of apathy on the part of members of the industry who do *not* sufficiently participate in these programs that pose the biggest threat to the industry's health and safety. A migration underground could possibly decrease self-motivated performer testing, monitoring, and safety, but conversely, lack of government regulation will not *increase* testing, monitoring, and overall worker safety—which is, after all, the desired result. The problem cannot be solved by deferring to the status quo. Furthermore, fears of massive underground migration of this enormous, multibillion-dollar industry likely are as hyperbolic as they are unduly reactionary. In the words of one popular adult film actor, scoffing at claims that the industry would go underground or move out of state if more closely regulated: “Where am I going to go? Where is this safe haven? You have to balance the threat against the reality. The number one thought should be the safety of the people working.”<sup>225</sup>

#### 4. Social Apathy Toward Government Regulation

A final reason for government regulation, and a potential explanation as to why the industry has remained unregulated for so long, relates to the social taboo surrounding the adult film industry, and more dangerously, the pervasive public attitude that adult film performers are “disposable.”<sup>226</sup> The overwhelming public sentiment toward the pornography industry is a socially dichotomous one in that consumers value pornography enough to spend billions of dollars on it annually, but widely consider the performers who risk their health to make adult films “throwaway people.”<sup>227</sup> As a result, many public officials do not believe the public is worried about protecting the adult film performers themselves, despite the enormous popularity of the films of which they are an integral part.<sup>228</sup> Former Surgeon General C. Everett Koop has underscored the breadth and severity of this dichotomy, observing that many of the pornography consumers who

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225. *Drive It Back*, *supra* note 141. See also Huffstutter, *supra* note 34 (noting that California is the only state where pornographic filmmaking is unquestionably legal).

226. Huffstutter, *supra* note 34 (“Porn stars—people think they’re not worth the time. The public sees these people as disposable.”).

227. *Porn Profits*, *supra* note 45.

228. Huffstutter, *supra* note 34.

enjoy watching adult films “despise the people they’re watching, and they have no sense of protection for them.”<sup>229</sup>

Furthermore, the public does not apparently view all HIV/AIDS victims equally. For example, when Dr. David Acer, a Florida dentist, was found to have infected three of his patients with HIV,<sup>230</sup> there was a public groundswell of concern for the victims, and insistence on identifying the actual source of infection.<sup>231</sup> In order to confirm the source of the patients’ infections, federal epidemiologists used molecular sequencing studies of the viral strains to show that the strain infecting all of the patients was similar to that of the dentist—and markedly different from other HIV strains collected elsewhere in the community.<sup>232</sup> Despite the proven success of epidemiological techniques such as these, government and police officials have tried to claim that tracking specific HIV transmission paths in the adult film industry is impossible.<sup>233</sup> Medical researchers who identified the earliest AIDS cases reply, “That’s utter rubbish. . . . There is a way to track that information,”<sup>234</sup> pointing to the case of the Florida dentist. There was an important difference, however, in the case of the dentist: “People cared [about] what happened to those patients,” states one of the researchers.<sup>235</sup> “They were seen as innocent. No one sees porn stars as victims.”<sup>236</sup>

Notably, this is not the first time in the history of HIV/AIDS outbreaks that the public has effected an attitude of disdain and indifference to the victims of the disease; similar sentiments were expressed when AIDS first ascended to public consciousness in the early 1980s as a disease that was

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229. *Porn Profits*, *supra* note 45. See also Joseph A. Lea, Letter to the Editor, L.A. TIMES, Feb. 2, 2003, § 9 (Magazine), at 6 (“So the ‘stars’ of California’s porn film industry are contracting VD at an alarming rate. So what? Who cares? As my granddaddy always told me, ‘You sleep with [prostitutes] my boy, you’re bound to get infected.’”). Contrast that sentiment, however, with that of another *Los Angeles Times* reader, who commented,

I am outraged. How is it possible to have a legal industry that is not regulated by California’s employment laws? Not only am I worried about protecting the individuals who are being mistreated, but I am baffled that the porn film industry does not have to adhere to the same employment standards that I do. It saddens me that California officials will not take notice of the issue and the industry’s inhumane working conditions.

Gina Viola, Letter to the Editor, L.A. TIMES, Feb. 2, 2003, § 9 (Magazine), at 6.

230. Lawrence K. Altman, *Report Links 2 More AIDS Infections to a Dentist*, N.Y. TIMES, Jan. 12, 1991, § 1.

231. See Huffstutter, *supra* note 34.

232. Altman, *supra* note 230; Huffstutter, *supra* note 34.

233. See Huffstutter, *supra* note 34.

234. *Id.*

235. *Id.*

236. *Id.*

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claiming primarily members of the gay male community. As with adult film performers, prejudice toward gay males affected the public's response to the disease. It was only when the disease began to increasingly affect the "mainstream" heterosexual community that the majority of the public, as well as the government, began to address the issue seriously.<sup>237</sup> If the public comes to believe that pornographic actors could in fact be their neighbors, children, or acquaintances, and that they are increasingly having sex outside of their insular adult film community, thus putting the "mainstream" public at risk, perhaps then the government will realize that the need to regulate the health and safety of these very real victims is not only urgent, but also long overdue.

## V. CONCLUSION

The adult film industry has enjoyed tremendous growth in recent decades in terms of legality, revenue, and cultural influence. Despite this success, the industry's ability to ensure the health and safety of its workers has progressed at a pace inverse to its economic triumphs. While a select few adult film studios have attempted to implement performer screening and testing procedures, these mechanisms have proven ineffective, as evidenced by the epidemic proportions of general STD infection among performers in the industry, as well as the spring 2004 spate of HIV infections.

The overarching reason why government regulation will be necessary to ensure the health and safety of adult film performers is that the very nature of the adult film business precludes any sustained success of self-regulated health and safety mechanisms. As this Note has demonstrated, a host of factors—a false sense of security that the current system is optimal, industry-wide fear of flouting perceived market preferences, lack of performer organization and motivation, and social apathy and indifference toward adult film performers—impedes successful self-regulation and makes clear the need for government intervention. Regardless of whether adult film performers should be viewed as "victims," they unquestionably are workers who are integral elements of a multibillion-dollar industry. As such, these workers are entitled to the same health and safety protections enjoyed by the members of any other legally permissible, powerful industry. As one scholar has noted, "If California is [going to remain] the only state where it's legal to be paid for having sex in front of a camera, it's

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237. See Ronald Reagan, *We Owe It to Ryan*, WASH. POST, Apr. 11, 1990, at A23.

going to be up to the state of California and the local agencies to do something about regulating it.”<sup>238</sup>

Furthermore, there currently exist state health and safety agencies, such as Cal/OSHA, which could be used to implement, monitor, and enforce health and safety systems in the adult film industry. This Note has shown that the popular argument that adult film actors are independent contractors, rather than employees, and thus fall outside the jurisdictional purview of state regulatory agencies and protections, is not valid. Employment status determinations are made on a case-by-case basis, and the subjective, multifactor approach to making such determinations supports the conclusion that adult film performers generally should be considered employees entitled to state protections.

It is, of course, unrealistic to imagine that the pornography industry can promptly become a bastion of responsible health and safety practices with the wave of a legislative wand. Until, however, the social constraints that have heretofore kept the problem of adult film worker health and safety on the fringes of social and political consciousness are extinguished, and until changes are made to the current inadequate scheme of industry self-regulation, the spread of STD infection will increasingly threaten to consume not only members of the adult film industry, but also members of the “mainstream” public with whom they are having increasing contact. In the words of former Surgeon General C. Everett Koop, “How many people have to be infected with an STD before someone does something?”<sup>239</sup>

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238. Huffstutter, *supra* note 34.

239. *Id.*