PORN WORK, INDEPENDENT CONTRACTOR MISCLASSIFICATION, AND THE LIMITS OF THE LAW

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ABSTRACT

This Article explores independent contractor misclassification through the lens of porn performance. As elsewhere in the gig economy, ubiquitous misclassification allows porn employers to extract maximum profits and enact significant levels of workplace control while also avoiding compliance with standard workplace protections. This Article argues, however, that remedying that misclassification with employer acknowledged and state enforced employee status is not the clean solution many outside the industry imagine it to be. It cautions against recent efforts to refine the qualifications of independent contractor status to meet the realities of the gig economy more broadly. Most performers would rather have no bosses at all than bosses disciplined by a still weak system of worker protection, and a pro-worker regulatory approach should take this desire seriously. Rather than reinforcing artificial boundaries between workers and contractors, this Article advocates a policy approach which supports worker autonomy and detaches benefits and protections from employment status.

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INTRODUCTION

Bold type on a porn producer's work for hire agreement reads "this is not a contract."[1] "I understand that I am an independent contractor," the document goes on, "as such, I understand that the benefits of workmen's compensation laws and pension plans do not apply to independent contractors. I further understand that I am responsible for my own income taxes."[2] The agreement stipulates that the producer may alter or redistribute content "for whatever purpose," and that performers are not entitled to any additional compensation.[3]

None of this is quite accurate. Work for hire porn performance meets the standard legal definition of employment in California—where the producer films—even as the state enforces this unevenly.[4] Moreover, the state's Labor Code and Film Commission define temporary employees (such as porn and mainstream film actors) as *employees* and require employers to

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1. HEATHER BERG, PORN WORK: SEX, LABOR, AND LATE CAPITALISM 155 (2021) [hereinafter BERG (2021)].

2. *Id.*

3. Model Release Agreement (2013) provided to author (on file with the *Columbia Human Rights Law Review*).

4. *See In re* Treasure Island Media, Inc., No. 10-R6D1-1093 (Cal/OSHA App. Mar. 27, 2014) (rejecting an adult film production company's appeal of Cal/OSHA's finding that the company violated workplace safety regulations by eschewing condoms and finding that Bloodborne Pathogens statutes apply to the adult film industry). Most available legal analysis in the porn context focuses on occupational health. *See, e.g.*, Christina Jordan, *The XXX-Files: Cal/OSHA's Regulatory Response to HIV in the Adult Film Industry*, 12 CARDOZO J.L. & GENDER 421, 426 (2005) (describing the debate surrounding whether or not Cal/OSHA should be charged with regulating condom use in the adult film industry because of the lack of clarity surrounding whether adult film performers are employees or independent contractors); Chris Motyl, *Condom Sense: Regulating and Reforming Performer Health Safety in the Adult Film Industry*, 32 HOFSTRA LAB. & EMP. L.J. 217, 240 (2014) (noting the reluctance of Cal/OSHA to regulate the adult film industry because of uncertainty with regards to its jurisdiction over adult film performers). For discussion regarding case law on work for hire in other creative and entertainment labor arenas, see Sarah Chun, *An Uncommon Alliance: Finding Empowerment for Exotic Dancers Through Labor Unions*, 27 HASTINGS WOMEN'S L.J. 167, 171 (2016) (describing how erotic dancers' classification as independent contractors impacts their ability to organize); David Cowley, *Employees vs. Independent Contractors and Professional Wrestling: How the WWE Is Taking a Folding-Chair to the Basic Tenets of Employment Law*, 53 U. LOUISVILLE L. REV. 143, 151–53 (2014) (reviewing the history of employment classification with regard to professional wrestling); MATT STAHL, UNFREE MASTERS: RECORDING ARTISTS AND THE POLITICS OF WORK 182 (2013) (describing debates regarding employment status in the music industry context). On porn as a creative industry, see generally ALAN MCKEE, PORNOGRAPHY AS CREATIVE INDUSTRY (2014) (situating pornography within the context of other creative industries). *See also* REBECCA SULLIVAN & ALAN MCKEE, PORNOGRAPHY: STRUCTURES, AGENCY AND PERFORMANCE 21–23 (2015) (arguing the same point).

secure workers' compensation insurance.[5] When asked about this, the producer responded, "If I hire a talent I'm supposed to follow all the employment laws. We're supposed to do withholding. That's not gonna cut it. It's nothing but a bureaucratic money grab to get more withholding taxes."[6] Porn producers, directors, and studios overwhelmingly share this thinking.[7] Some, like Rodgers, include contractual language they hope will both discourage performers from seeking legal remedy in the event of workplace injury and offer employers some protection in the rare case that a performer does file a complaint.[8]

This dynamic, in the porn industry and elsewhere in the gig economy, has a host of costs for workers, leaving them unprotected by regulations that nominally govern formal employment and without the autonomy the law tells independent contractors to expect.[9] Performers know this. Charity Bangs, who performs for multiple studios, notes that "it seems like directors want to get the benefits of both"—by simultaneously treating workers as both employees and independent contractors.[10] While legal definitions of employment shift among different policy contexts, they share a common interest in the extent to which the "employer" controls the terms of work performance.[11] From a legal perspective, employer control is

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5. CAL. LAB. CODE § 3350; *Insurance Requirement for Filming on State Property*, CAL. FILM COMM'N (2020), https://film.ca.gov/state-permits/insurance-requirements/ [https://perma.cc/AM59-RJG5].

6. Telephone Interview with Jon Rodgers, Porn Producer (Nov. 1, 2013), *in* BERG (2021), *supra* note 1, at 155–56.

7. BERG (2021), *supra* note 1, at 156.

8. Telephone Interview with Jon Rodgers, Porn Producer (Nov. 1, 2013), *in* BERG (2021), *supra* note 1, at 155–56.

9. *See* Richard A Greenwald, *Contingent, Transient, and at Risk: Modern Workers in a Gig Economy*, *in* LABOR RISING: THE PAST AND FUTURE OF WORKING PEOPLE IN AMERICA 111, 111 (Daniel Katz & Richard A. Greenwald eds., 2012) (describing the costs to workers of precarious employment status such as a lack of benefits such as health insurance, sick time, paid time off, etc., contributing to stress and a lack of stability). This dynamic also shapes labor outside the gig economy, where even formally recognized employees find that their labor rights are only "phantom" ones. *See generally* Ian Eliasoph, *Know Your (Lack of) Rights: Reexamining the Causes and Effects of Phantom Employment Rights*, 12 EMP. RTS. & EMP. POL'Y L.J. 197 (2008) (describing how employees often do not understand the content of workplace regulations so they incorrectly rely on norms and intuition about fairness and underestimate the role of advocacy and organizing).

10. Telephone Interview with Charity Bangs, Performer (Nov. 1, 2013), *in* BERG (2021), *supra* note 1, at 158.

11. For example, the common law definition upon which much employment policy is based offers a much narrower definition of an "employee" than the Fair Labor Standards Act of 1938 or the Occupational Safety and Health Act of 1970. The National Labor Relations Act uses this narrower standard to determine protections governing union organizing. David Weil, *Mending the Fissured Workplace*, *in* WHAT WORKS FOR

evidence that the worker in question is an employee, not a contractor.[12] Independent contractors are legally entitled to a level of control unavailable in the vast majority of porn work, and employers have been hugely successful in maintaining this contradiction.[13] Foundational weaknesses in the law, together with poor enforcement and anti-sex worker stigma, make this dynamic possible.[14]

Scholars and activists focused on the question of labor rights in criminalized forms of sex work (such as in-person prostitution) can look to the porn industry for clues about what decriminalization might look like. While the decriminalization of currently criminalized forms of sexual labor is the approach that best serves sex workers' human, civil, and labor rights, decriminalization alone will not ensure safe and equitable work.[15] Once we win the legal battle to establish that sex work is indeed *work*, we confront the harsh realities of workplace regulation as it exists today.

WORKERS?: PUBLIC POLICIES AND INNOVATIVE STRATEGIES FOR LOW-WAGE WORKERS 108, 114 (Stephanie Luce et al. eds., 2013).

12. At the time of the interview with Charity Bangs, California used the "*Borello* test" to distinguish between contracting and employment, which turns on the "right to control." S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 48 Cal. 3d. 341, 355 (1989). Under *Borello* courts consider a number of factors holistically, including: (1) the employer's "right to control" the terms of the work; (2) the worker's investment in the materials required to do the work; (3) the extent to which the job requires a "special skill"; (4) the permanence of the working arrangement, and (5) the extent to which the service is integral to the core business. *Id.* In 2018, California's Supreme Court clarified the scope of the *Borello* test in *Dynamex*. *See* Dynamex Operations W. v. Sup. Ct., 4 Cal. 5th 903, 916–17 (2018). Under *Dynamex*'s new "ABC test," three criteria must be met in order for a worker to qualify as an independent contractor for purposes of California wage orders: (A) the worker is "free from control" and direction of the hirer; (B) the work is outside the businesses' normal operations, and (C) the worker is customarily engaged in an independent trade, occupation, or business of the same nature as the work performed for the hiring entity. *Id.*

13. In this, producers are unexceptional as gig employers who "self-define" as non-employers. Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 58 (2017).

14. *See* Noah Zatz & Eileen Boris, *Seeing Work, Envisioning Citizenship*, 18 EMP. RTS. EMP. POL'Y J. 95, 102–03(2014) (exploring foundational weaknesses in the law, in particular its exclusions surrounding contingent labor); Annette Bernhardt et al., *An Introduction to the "Gloves-Off" Economy*, *in* THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 1, 1–30 (2008) (exploring the ubiquitous non-enforcement of the law); MELISSA GIRA GRANT, PLAYING THE WHORE: THE WORK OF SEX WORK 27–34 (2014) (exploring anti-sex worker stigma and its impacts on working conditions).

15. MOLLY SMITH & JUNO MAC, REVOLTING PROSTITUTES: THE FIGHT FOR SEX WORKERS' RIGHTS 191–207 (2018) (exploring the limitations of decriminalization as a strategy to win labor rights for sex workers, and focusing in particular on decriminalization's limited capacity to serve undocumented workers).

In her analysis of prevailing theoretical approaches to sex work, the legal scholar Adrienne Davis notes that advocates of a framework which treats sex work as work like any other—whom she terms "assimilationists"—fail to ask "*which* type of labor sex work would most likely be assimilated to."[16] The likely answer is that sexual labor would join other feminized, intimate, and gigified work, with all the regulatory precarity that entails.[17] Porn work offers a case study of what this possible future looks like in practice. Nominally spared of the specific state violence that criminalization brings,[18] workers nonetheless find themselves exposed to exploitative business practices, forms of state surveillance that undermine their ability to work safely, and forms of state neglect that leave them unprotected from wage theft, unsafe working conditions, racist hiring norms, and workplace harassment.[19] Again, only some of these conditions would be mitigated by clarified employment status, as workers in mainstream businesses still experience these same issues acutely.[20]

This Article argues, first, that porn workers are misclassified as independent contractors in ways that combine the most employer-friendly aspects of both contractor and employee status. Second, it argues that remedying that misclassification with employer-acknowledged and state-enforced employee status is not the clean solution that many outside the industry imagine it to be. The Article cautions against recent efforts to refine the qualifications of independent contractor status to meet the realities of the gig economy more broadly. Most performers would rather

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16. Adrienne Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 5 CALIF. L. REV. 1195, 1242 (2015) (emphasis in original).

17. *See generally* INTIMATE LABORS: CULTURES, TECHNOLOGIES, AND THE POLITICS OF CARE (Eileen Boris & Rhacel Salazar Parreñas eds., 2010) (exploring precarious conditions in a variety of intimate labors); *see also* Ann Stewart, *Legal Constructions of Body Work*, *in* BODY/SEX/WORK: INTIMATE, EMBODIED AND SEXUALIZED LABOUR 61, 61–76 (Carol Wolkowitz et al. eds., 2013) (examining regulatory precarity in the context of intimate work).

18. *See* SMITH & MAC, *supra* note 16, at 191–207 (discussing the numerous harms that result from criminalization). Even this benefit is often not forthcoming, as many porn workers also labor in criminalized sectors and, even when they do not, face the consequences of policies such as FOSTA/SESTA, which target both criminalized and decriminalized sex industries under the guise of trafficking protection. *See* Allow States and Victims to Fight Online Sex Trafficking Act, Pub. L. No. 115-164, 132 Stat. 1253 (codified as amended in scattered sections of Chapter 18 and at 47 U.S.C. § 230).

19. BERG (2021), *supra* note 1, at 154–92 (discussing sex work and the role of the state, including the harms that result from both state surveillance and state neglect).

20. *See generally* Eliasoph, *supra* note 9 (examining why most Americans vastly overestimate the legal protections they have at work, a phenomenon known as "phantom employment rights").

have no bosses at all than bosses disciplined by a still weak system of worker protection,[21] and a pro-worker regulatory approach should take this desire seriously.

Some caveats: First, this Article focuses on labor regulation in California, the context in which a majority of professional porn production has taken place in recent decades.[22] California has also become a site of heightened debate regarding contractor status due to the 2019 passage of California Assembly Bill No. 5 (AB5), which codified a clarified test for determining employee versus independent contractor status.[23] Second, while this Article focuses on the limits of the law as applied to sets in which a producer hires one or more performers in a work for hire arrangement, seismic changes in the porn industry landscape mean that pornographic content is increasingly filmed outside this traditional arrangement. Performers are increasingly foregoing the traditional set, opting instead for third-party platforms that allow performers to produce and distribute content to consumers directly.[24] Working conditions on these sets look very different from those on traditional sets. Most important for the purposes of this Article, the lines of managerial control that help determine employee status for performers on a work for hire set do not exist in the same way for self-produced content.[25] Indeed, many performers prefer it that way.[26]

This Article's empirical basis draws on ethnographic research for the author's book, *Porn Work,* which explores workers' strategies for navigating and subverting precarious conditions.[27] Worker and manager quotes come from the eighty-one ethnographic interviews the author

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21. *See* BERG (2021), *supra* note 1, at 83, 116–20 (describing interviews and other evidence evincing a widespread desire on the part of the vast majority of sex workers to be free from the control of a boss).

22. Melia Robinson, *How L.A.'s "Porn Valley" Became the Entertainment Capital of the World*, BUS. INSIDER (Mar. 6, 2016), https://www.businessinsider.com/how-porn-valley-came-to-be-2016-3 [https://perma.cc/3PET-XN4F].

23. A.B. 5, 2019–20 Leg. (Cal. 2019).

24. BERG (2021), *supra* note 1, at 17; *see generally* Daniel Laurin, *Subscription Intimacy: Amateurism, Authenticity and Emotional Labour in Direct-to-Consumer Gay Pornography*, 8 ABOUT GENDER 61 (2019) (exploring workers' use of the direct-to-consumer market in the gay porn context); Sophie Pezzutto, *From Porn Performer to Porntropreneur: Online Entrepreneurship, Social Media Branding, and Selfhood in Contemporary Trans Pornography*, 8 ABOUT GENDER 300 (2019) (exploring transgender workers' use of the direct-to-consumer market as a form of entrepreneurship).

25. *See* Jeremias Prassi & Martin Risak, *Uber, Taskrabbit, and Co.: Platforms as Employers—Rethinking the Legal Analysis of Crowdwork*, 37 COMPAR. LAB. L. & POL'Y J. 619, 632 (2015) (discussing the confusion of managerial lines in crowdsourcing platforms, and arguing that mainstream platform-based workers should be classified as employees).

26. BERG (2021), *supra* note 1, at 10.

27. *See* BERG (2021), *supra* note 1.

conducted with performers, directors, producers, agents, industry attorneys, and crew and are attributed according to the interviewees' preferences. The author also spent several years visiting sets and observing industry meetings, including those focused on workplace regulation.

The Article begins, in Part I, with an overview of the three major ways of organizing the porn production process, paying particular attention to how managerial control manifests in each. Part II then turns to a discussion of how liminal employment status shapes porn workers' experiences of the work, focusing on three areas in which the limits of the law make workers precarious. Part III analyzes a case in which the court arbitrated porn performers' employment status and found that performers are indeed employees. Finally, Part IV closes with a discussion of the contemporary scene and critiques the idea that undoing misclassification adequately addresses performers' claims to secure *and* autonomous work.

I. ORGANIZING THE PRODUCTION PROCESS

Employment law's foundational dichotomy between employee and independent contractor status shapes how workers engage with the state. Workers are, in this framework, either subordinates in need of protection *or* tradespeople with claims to autonomy. Fundamental to employment law's rubrics for measuring employment status is the extent to which employers maintain a "right to control" the conditions of work.[28] The traditional bargain is thus: workers who control the terms of their work also bear its inherent risks and can expect only the most limited protection from the regulatory state.[29] Scholars of employment law argue this bargain breaks down in the day-to-day realities of work, particularly when workers in gig-based, temporary, and platform economies[30] face conditions quite unlike traditional forms of employment but without the autonomy independent contractor status nominally requires.[31] The law leaves open

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28. Miriam Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMPAR. LAB. L. & POL'Y J. 577, 581 (2016) (explaining that under U.S. law, whether a worker is an employee or independent contractor is determined through various multifactored tests, including the "control test." This test focuses on a principal's right to control the worker); *see also supra* note 12 and accompanying text (explaining the centrality of the "right to control" measure to determinations of employment status).

29. *See* Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 485 (2016) (identifying "right to control" as a means of determining "which party is best positioned to prevent physical harms").

30. The term "platform economies" refers to forms of work which are facilitated by web platforms, such as Airbnb and OnlyFans.

31. *See* Cherry, *supra* note 29, at 6 (observing the significant control that platforms have over the rideshare work process); Lobel, *supra* note 13, at 58 (arguing

significant loopholes through which employers can manipulate the terms of work and thus evade responsibility to workers. Employers not only structure the workday in ways that "turn employees into independent contractors," writes legal scholar Katherine Stone; "they are also making the distinction between the two groups almost meaningless" through the slow atrophy of the long-term employment model on which employment law is premised.[32]

Policy scholar David Weil identifies the "fissured workplace" as a key tool that gig-based employers use to evade responsibility to workers, because establishing multiple controlling parties who may or may not represent the same core business confuses lines of managerial responsibility.[33] When workers (let alone the state) cannot identify who their boss really is, they struggle to make meaningful claims through an employment law infrastructure that assumes a single employer. In the "fissured workplace," employers disavow responsibility for labor law compliance, the provision of employment benefits, and other entitlements nominally afforded to workers with a single direct employer.[34] Like traditional employers, porn production companies can evade responsibility to workers by fissuring the porn workplace.[35]

Three major modes of organizing the production process shape workers' experience of the work and also their legibility to employment law protection. Across all three, the porn industry's higher representation of workers who are also directors and producers (which is to say managers and employers) at times complicates both class identification and legal standing. Very few porn performers can, or wish to, claim only worker status.[36] This vexes the law's traditional dichotomy between workers and employers. It also means that legal advocacy premised on improving workers' conditions has to contend with the reality that workers' own class identities are shifting and complex.

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that rideshare platforms offer workers greater flexibility and opportunities to profit more directly from one's labor, such as receiving a greater share of the pay, but not the traditional social welfare programs linked to work).

32. Katherine Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 282–83 (2006).

33. Weil, *supra* note 11, at 108.

34. *Id.*

35. *See* SHIRA TARRANT, THE PORNOGRAPHY INDUSTRY: WHAT EVERYONE NEEDS TO KNOW 42 (2016) (describing how one porn production company, Evil Angel, maintains plausible deniability by requiring its directors to finance their own movies, pay for permits and insurance, and assume all responsibility for the shoot).

36. BERG (2021), *supra* note 1, at 96.

The first mode, and the one in which lines of managerial control are clearest, involves cases in which a scene or multi-scene film is directed, produced, and financed by the same person. This could range from productions in which a director contracts performers in work for hire arrangements and uses traditional channels to distribute scenes, to productions in which a performer, producer, or director hires others to perform with them and distributes the scene via direct-to-consumer platforms.[37] Producer/directors who work with distribution company Evil Angel are one example of the first, more traditional arrangement.[38] Within this model, a producer/director contracts performance labor rather than starring in the distribution company's film. "They don't work with us on an employment basis. They submit movies and we distribute them and share in the revenue," explained then-company manager Christian Mann.[39] The company takes a distribution fee, he explained, while directors maintain exclusive ownership of the content.[40] So long as they adhere to Evil Angel's "content guidelines" and "very basic production protocols," producer/directors have control over the production process.[41] Similar cases involve producer/directors who own production studios and distribute their content via various distributors, company websites, or third-party platforms.[42] Increasingly, producer/directors who also perform in the scenes they make have no production studio at all, but rather finance small-scale productions on their own and distribute them through direct-to-consumer platforms.[43] Producer/directors whose work is organized in these ways have significant creative and managerial control.[44]

The second mode of organization involves murkier, more fissured, lines of managerial control. Here, a production company contracts a

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37. Evil Angel is an example of work for hire arrangements under a traditional distribution model. *See About*, EVIL ANGEL, https://www.evildistributor.com/about [https://perma.cc/GEM4-DCJ4]. OnlyFans is an example of a direct-to-consumer platform model. *How It Works*, ONLYFANS, https://onlyfans.com/how [https://perma.cc/3U93-XYWP].

38. EVIL ANGEL, *supra* note 38.

39. Interview with Christian Mann, in Van Nuys, Cal. (2013) (on file with the author).

40. *Id.*

41. *Id.*

42. Heather R. Berg, Porn Work: Adult Film at the Point of Production 61 (2016) (unpublished Ph.D. dissertation, U.C. Santa Barbara) (on file with the *Columbia Human Rights Law Review*) [hereinafter Berg (2016)].

43. KATRIEN JACOBS, NETPORN: DIY WEB CULTURE AND SEXUAL POLITICS 46–50 (2007) (reviewing the broad range of DIY production and arguing that the Internet has "spawned a wide range of independent producers as solo-amateurs or hosts/hostesses of amateur portals").

44. *Id.* at 48.

director to film a scene on their behalf. The company pays the director either a fee on top of other production costs or a flat sum out of which the director takes her own fee as well as other production costs, including performer and crew wages, set rentals, and the like.[45] In this model, production companies have varying levels of artistic and managerial control. They may have oversight regarding the casting process or they may delegate oversight to directors; they may set the terms for which acts are to be performed or leave this to the director's discretion, and they generally set occupational health standards (or lack thereof), which directors are then responsible for enforcing.[46] Production companies, rather than directors, typically maintain copyright in this model.[47]

In other cases, also falling within the second organizational model, contracted directors have even less creative control. They take direction from producers about whom they will cast and what acts they will film (and with what protective measures), and often churn out scenes that follow a tested formula.[48] Directors in this model often occupy many roles simultaneously—performing, operating camera equipment, and directing concurrently.[49] Alex Linko, a performer/director who films "point of view" (POV)[50] scenes, listed the many facets of his job: casting co-stars, handling their paperwork and payment, coordinating location and crew, operating camera and lighting equipment, providing scene direction, and, finally, performing.[51] The women he performs with are paid between $800 and $1,200 per scene, and his budget includes set rental, agent, and makeup artist fees where necessary.[52] He is paid $700 for directing, operating camera equipment, and performing.[53] He is a manager and a worker, but makes less than the people he manages. This system is not uncommon in low-budget scene production.[54]

Both of these ways of organizing the porn production process sometimes involve talent agents. Typically, the agents' 10–15% booking

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45. Berg (2016), *supra* note 43, at 62.
46. *Id.*
47. *Id.*
48. *Id.* at 63.
49. *Id.*
50. In POV or "point of view" scenes, the camera assumes the perspective of the viewer. Typically, a single person will work as both a scene participant and camera operator. Interview with Alex Linko, in Los Angeles, Cal. (2013) (on file with the author).
51. *Id.*
52. *Id.*
53. *Id.*
54. BERG (2021), *supra* note 1, at 114.

fees constitute the entirety of their incomes.[55] Performers' work could, then, be understood as "an integral part of the . . . employer's business"—a key criterion for determining employee status[56]—for agents as well as for producers. Agents execute scheduling, have some power over hiring and firing, and negotiate working conditions and pay.[57] Control was the central issue for performers when we spoke about agents. Workers noted a dynamic in which performers seemed to "work for" agents rather than the other way around. According to Wolf Hudson, "The agent is the boss, which should not be the case. It's the performer [who should be the boss]. 'I'm paying you to do me a service,' and somehow it gets turned around."[58] It is no surprise, then, that many performers try to circumvent the agency system when they can. Self-produced trade shoots offer one way of doing so.

Trade shoots, a mode of organizing the production process in which performers trade performance labor with each other and bypass middle-managers, are least amenable to an employment law system focused on measures of control. Performers undertake trade shoots as a way to "protect their autonomy, reduce the costs associated with producing and owning their own material," and manufacture work opportunities.[59] Avoiding third parties and making informal agreements with other performers, workers either share copyrights or produce more than one scene and alternate who will have these rights, distributing content to consumers directly or via platforms designed for that purpose.[60] This affords workers a unique opportunity to control the conditions of their work and earn significant income from their own scenes. Typically, no wages are exchanged, and scheduling is informal and bypasses agents.[61] Performers doing trade shoots typically abide by age and recordkeeping

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55. Interview with Mark Schechter, in Woodland Hills, Cal. (2013) (on file with the author); *see also* Interview with Chris Caine, in Canoga Park, Cal. (2013) (on file with the author) (reiterating the point).

56. S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 48 Cal. 3d. 341, 355 (1989). The Supreme Court of California affirmed this criterion in 2018, reiterating that whether or not the service rendered was an "integral part" of the employer's business was key for determining employee status. Dynamex Operations W. v. Sup. Ct., 4 Cal. 5th 903, 967 n.12 (2018).

57. Schechter, *supra* note 56; *see also* Caine, *supra* note 56 (likewise describing the control agents have over these actions).

58. Interview with Wolf Hudson, in Los Angeles, Cal. (2013) (on file with the author); *see also* Telephone Interview with Tanya Tate (2014) (one file with the author) (reiterating tensions surrounding agents as managers or assistants to performers).

59. Berg (2016), *supra* note 43, at 64.

60. *Id.* at 65.

61. *Id.*

requirements strictly but are sometimes less observant of internal policies that govern STI testing, external permits, and labor regulations.[62]

The horizontal nature of trade and self-produced shoots makes them a poor fit for employment laws structured around one person working under another. This is significant—the law is designed so that the mode of organizing work that allows workers greatest autonomy and access to profits is also the one in which they are least protected.[63] Nevertheless, performers turn to self-production knowing that the law offers radically limited protection to workers, even for ones who quite clearly work under a boss. The traditional bargain—work under a boss and enjoy some moderate security, or without one and enjoy autonomy but also risk—breaks down.

II. LIMINAL EMPLOYMENT STATUS AND ITS HARMS

Porn workers who do work for hire occupy a liminal status as de facto independent contractors, but without the autonomy that the title legally requires. This dynamic makes employers money while exposing workers to a wide range of precarious conditions. This Part focuses on three major areas where employers have "the benefits of both"[64] employees and contractors, and discusses three areas in which this dynamic shapes the work of porn: occupational health, racist discrimination, and forfeited copyrights. The first Section will begin by providing a brief review of more general areas in which this dynamic emerges.

First, liminal employment status directly impacts workers by increasing their tax burden. By directing performers to file as independent contractors, studios avoid paying and processing withholding for Social

62. On recordkeeping, see 18 U.S.C. § 2257. Federal law requires "producers" to maintain records that include performers' legal names and copies of their photo identifications, *id.*, requirements that workers say present serious privacy concerns. Here, as elsewhere, ostensibly protective regulation designed without sex worker input can make workers more vulnerable: workers suggest that such recordkeeping requirements put them at risk for privacy violations, stalking, and discrimination in child custody and straight work licensure. *See* Pandora Blake, *Age Verification for Online Porn: More Harm Than Good?*, 6 PORN STUDS. 228, 228–37 (2019) (exploring age verification's risks to worker privacy). On internal occupational health regulations, see SULLIVAN & MCKEE, *supra* note 4, at 33–36 (enumerating the porn industry's protocols for workplace health and safety but also detailing the dismissive attitudes many studios have toward their own policies).

63. Berg (2016), *supra* note 43, at 64–66.

64. Bangs, *supra* note 10, *in* BERG (2021), *supra* note 1, at 47.

Security, Medicare, unemployment, and income taxes.[65] This increases workers' tax liability and requires them to navigate the complicated process of filing taxes as an independent contractor.[66]

Furthermore, by managing sets as though wage and hour laws do not apply, directors do not pay the overtime that is required of traditional employers.[67] Because of performers' generally high average hourly rate, minimum wage requirements are less relevant here—even on an exceptionally long day, rates average out to equal more than the minimum hourly wage.[68] But the norm of not paying overtime means that there is little incentive for directors to limit workers' time on set. Since performers and crew are paid the same rate regardless of total hours, they could work for two or twenty hours with no change in pay. Directors have little financial incentive to value performers' time, and performers find it difficult to plan their days.[69] But truly independent contractors have the right to determine when they work.[70] This is simply another area in which liminal employment status takes its toll.

Liminal employment status also creates confusion about what methods of redress are available to workers who contest wage theft, harassment, poor health and safety hazards, or racist discrimination.[71] It leaves workers without protection from retaliation and blacklisting if they complain.[72] At the same time, employer-recognized employment status only

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65. *See* Kathleen DeLaney Thomas, *Taxing the Gig Economy*, 166 U. PA. L. REV. 1415, 1443–45 (2018) (reviewing taxation in mainstream gig work and the burdens placed on independent contractors to navigate complex systems of withholdings).

66. *Id*. at 1422.

67. Overtime pay requirements exist even for those workers who are paid a flat rate and are calculated based on the assumption of an eight-hour workday. CAL. LAB. CODE § 510; *see also* Berg (2016), *supra* note 43, at 48 (explaining that directors do not pay overtime).

68. Average scene pay ranges from $200–1,200. TARRANT, *supra* note 36, at 49. For a five-hour set, this would equal $40–240 per hour.

69. BERG (2021), *supra* note 1, at 116.

70. Nicholas Occhiuto explores this phenomenon in mainstream work by reviewing the centrality of schedule control in determining employment status. *See generally* Nicholas Occhiuto, *Investing in Independent Contract Work: The Significance of Schedule Control for Taxi Drivers*, 44 WORK & OCCUPATIONS 268 (2017) (arguing that a sense of schedule control can generate worker investment in contract work, which tends to be uncertain and unpredictable).

71. Stone explores the legal remedies available for "atypical employees" if reforms in collective bargaining rights, employment rights, and social welfare take place. Stone, *supra* note 33.

72. Misclassification of workers can prevent adequate protection against antidiscrimination, particularly for those "who most need antidiscrimination rights." Charlotte Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 907 MINN. L. REV. 908, 910 (2017).

offers limited protection. Porn worker's' labor conditions are symptomatic of misclassification, but weak legal protection and lax enforcement leave even formal employees at risk.[73] Porn is not alone among industries in which the letter of the law has a limited impact on workers.[74]

What is more, the law leaves considerable space for employers to enforce what political theorist Elizabeth Anderson calls "private government," a system in which employers exert control historically more typical of sovereign states.[75] "The increasingly common blurring of employment status helps facilitate such forms of control," writes Anderson; liminal employment status places workers more precariously at the whims of their would-be employers.[76] The classic test for independent contractor status is, again, the extent to which the employer exercises control.[77] In the employment contract, "in purchasing command over labor, employers purchase command over people."[78] Porn workers, like workers in the mainstream, find countless ways to resist and undermine that control.[79] But regardless of whether employers achieve the levels of control they aspire to, their efforts reveal a porousness between independent contracting and employment, one that has high costs for workers.

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73. Berg (2016), *supra* note 43, at 54.

74. Bernhardt et al., *supra* note 14, at 23 (discussing ubiquitous non-enforcement of employment law in the "gloves off economy"); *see also* SHANNON GLEESON, PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES 82–84 (2016) (contrasting workers' rights as a theoretical matter with legal remedies and evidentiary burdens as a practical matter); Shannon Gleeson, *Brokered Pathways to Justice and Cracks in the Law: A Closer Look at the Claims-Making Experiences of Low-Wage Workers*, 18 WORKINGUSA 77, 97 (2015) (finding that low-wage workers face difficulty in making claims against their employers, especially given inherent power imbalances resulting from "at-will" employment); Orly Lobel, *Enforceability TBD: From Status to Contract Intellectual Property Law*, 96 BOS. U. L. REV. 869, 882–86 (2016) (assessing non-enforcement of intellectual property law in mainstream creative industries).

75. ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 41 (2017).

76. *Id.* at 159.

77. *See supra* note 11 and accompanying text (discussing the centrality of control over the terms of employment as a central means of determining employment status).

78. Anderson, *supra* note 75, at 57.

79. *See, e.g.*, Heather Berg, *"A Scene Is Just a Marketing Tool": Alternative Income Streams in Porn's Gig Economy*, 3 PORN STUDS. 160, 160–74 (2016) [hereinafter "*A Scene Is Just a Marketing Tool*"] (identifying workers' use of alternative income streams as a strategy for diversifying their income base and thus mitigating traditional producers' control).

A. Occupational Health

Performers' liminal employment status both shapes the level of risk they encounter on set and determines what happens when they sustain an infection or injury. Because the Occupational Health and Safety Administration (OSHA) only has jurisdiction over employees,[80] management argues that their workplaces are subject to OSHA regulations.[81] In spite of several high-profile legislative proposals for stricter regulation of occupational health on set, porn industry employers operate overwhelmingly under the radar of regulatory oversight.[82] This is due both to lax enforcement of those formal standards that do exist, such as Measure B, and to recent failures of legislation such as AB 1576, a California state bill that would have required condom usage in porn.[83] In view of the long history of state violence against sex workers, most workers interviewed suggest that this lack of oversight is a good thing.[84] No oversight is better than regulations that make things worse.

In this regulatory vacuum, however, porn employers determine health protocols about which workers have no formal input. For most straight mainstream productions and an increasing number of gay productions, this means a requirement of STI testing through industry-approved providers and working without barrier methods of STI prevention.[85] Because employers are not held liable for the costs associated

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80. Lobel, *supra* note 13, at 67; *see also Health and Safety in the Adult Film Industry*, ST. OF CAL. DEP'T OF INDUS. RELS. (June 2020), https://www.dir.ca.gov/dosh/adultfilmindustry.html [https://perma.cc/K88K-LVK4] ("Cal/OSHA does not have jurisdiction over the safety and health of independent contractors.").

81. *In re Treasure Island Media, Inc*., No. 10-R6D1-1093 (Cal/OSHA App. Mar. 27, 2014).

82. Gold offers a bureaucratic perspective on occupational health regulation in porn, noting lack of enforcement. *See* Deborah Gold, *An Industrial Hygienist Looks at Porn*, 12 J. OCCUPATIONAL & ENVTL. HYGIENE 184, 184–90 (2015). Recent regulatory proposals include Measure B and AB 1576. *See* Bailey Langer, *Unprotected: Condoms, Bareback Porn, and the First Amendment*, 30 BERKELEY J. GENDER, L. & JUST. 199, 201, 210 (2015) (discussing the implications of the condom mandate on bareback porn).

83. L.A., Cal., Municipal Code § 11.39 (2012) (enacting California Safer Sex in the Adult Film Industry ordinance); Occupational Safety and Health: Adult Films, Assem. Bill 1576, 2013–2014, Reg. Sess. (Cal. 2014).

84. BERG (2021), *supra* note 1, at 165.

85. *See* DAVID KOPP, HUMAN RESOURCE MANAGEMENT IN THE PORNOGRAPHY INDUSTRY 69–78 (2020) (describing health and safety practices in the adult film industry intended to address the risk of STIs); SULLIVAN & MCKEE, *supra* note 4, at 34–36 (explaining the health and safety standards that are utilized by some larger companies); TARRANT, *supra* note 37, at 119–20 (describing the support for and opposition to Measure B, "an ordinance mandating condom use by porn performers during filming throughout Los Angeles County").

with workplace infection or injury—workers rarely bring claims in the first instance, anticipating a lack of state support—they lack a financial incentive to ensure safer conditions.[86]

Regulators, meanwhile, have proceeded without input from current workers.[87] They have sought to mandate on-set condom use and/or a state-run testing database for HIV, proposals that workers say will make their on-set work less safe, expose their personal information to both state surveillance and potential stalkers, and expose autonomous self-producers to regulations intended for large-scale producers and directors.[88] Framed as

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86. Here too, the porn work and gig contexts do not differ significantly from that of straight work: mainstream businesses with formal employees routinely put workers at risk without consequence. *See* Michael Grabell & Howard Berkes, *The Demolition of Workers' Comp*, PROPUBLICA (Mar. 4, 2015), http://www.propublica.org/article/the-demolition-of-workers-compensation [https://perma.cc/JM9Y-RJ8G] (discussing contemporary workers' compensation systems' undermined capacity to protect mainstream workers); NATE HOLDREN, INJURY IMPOVERISHED: WORKPLACE ACCIDENTS, CAPITALISM, AND LAW IN THE PROGRESSIVE ERA 107–08 (2020) (detailing the history of workers' compensation and noting that workers' compensation laws did not shift power dynamics to employees); JEFFREY PFEFFER, DYING FOR A PAYCHECK: HOW MODERN MANAGEMENT HARMS EMPLOYEE HEALTH AND COMPANY PERFORMANCE—AND WHAT WE CAN DO ABOUT IT 43 (2018) (describing how mundane contemporary work practices undermine workers' health).

87. Valerie Webber, *Public Health Versus Performer Privates: Measure B's Failure to Fix Subjects*, 2 PORN STUDS. 299, 308 (2015).

88. Conner Habib, *Why The LGBTQ Community Should Oppose AB1576*, SLATE (June 24, 2014), http://www.slate.com/blogs/outward/2014/06/24/_ab1576_why_california_s_condoms_and_hiv_testing_in_porn_bill_is_a_bad_idea.html [https://perma.cc/RDU6-M4VM] (arguing against state-mandated condom use and HIV testing for porn performers and alleging that AB1576 "will find HIV-positive people, expose their status to others, and ban them completely from any sexual representation or sex work," effectively discriminating against any HIV+ person being in porn, even when barriers are used); Lorelei Lee, *Porn Performer: Why I'm Against Government Mandated Condom Use in Porn*, ALTERNET (Jan. 18, 2012), http://www.alternet.org/story/153810/porn_performer%3A_why_i%27m_against_government_mandated_condom_use_in_porn/?page=entire [https://perma.cc/UCL6-LNKS] (arguing against state-mandated condom use for porn performers because it is unenforceable and may reduce pressure on studios to implement more effective STI-prevention techniques such as testing, and suggesting that supporters have launched a pretextual "political campaign against an industry whose health and safety regulations are already working"); *see also* BERG (2021), *supra* note 1, at 161 (presenting porn workers' rejoinders to lobbyists who conflate the roles of performer-producer and producer); David Schieber, *Money, Morals, and Condom Use: The Politics of Health in Gay and Straight Adult Film Production*, 65 SOC. PROBS. 377, 377 (2018) (offering an ethnographic portrait of performers' perspectives on mandated condom use); Chauntelle Tibbals, *"Anything that Forces Itself into my Vagina is by Definition Raping Me . . .": Adult Performers and Occupational Safety and Health*, 23 STAN. L. & POL'Y REV. 231, 237 (2012) (offering an interview-based portrait of performers'

public and occupational health interventions, proposals like these evidence the ways in which the porn worker's body represents a "categorical challenge," writes porn scholar Valerie Webber.[89] Cognizant of the law's long history of targeting sex workers as vectors of disease rather than as workers with a claim to safer conditions,[90] porn workers overwhelmingly reject proposals for interventions such as performer licensure, state-run HIV testing registries, sting operations to enforce condom mandates, and occupational health standards that disregard workers' own expertise.[91] Most performers levy these critiques while being fully aware that their employers cannot, in the absence of worker-friendly and state-enforced regulation, be relied upon to ensure worker safety, either.[92] Caught between employers who prioritize profit over worker wellbeing and a legal apparatus hostile to sex workers' labor rights, workers must navigate the regulatory landscape cautiously.[93]

Proposed regulation also presumes that porn workers' primary occupational health concern is HIV transmission. Claiming a crisis of HIV transmission in spite of very few traceable cases,[94] regulators and lobbyists focus on the sensational over the mundane. But performers' primary concerns center instead on the more everyday risks of torn mucous membranes, athletic injury, the long-term effects of performance enhancing medication, and frequent exposure to treatable STIs whose repeated

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perspectives on mandated condom-use); Webber, *supra* note 88, at 299–300 (discussing mandated condom use from the perspective of public health theory).

89. Webber, *supra* note 88, at 300.

90. *See* YASMINA KATSULIS, SEX WORK AND THE CITY: THE SOCIAL GEOGRAPHY OF HEALTH AND SAFETY IN TIJUANA, MEXICO 83 (Duncan Earle et al. eds., 2010) (discussing a system of public health registration that treats sex workers as those "who are important only insofar as they present a threat to the public health of the community," and provides health services that "do not address the risk priorities of sex workers"); CAROL WOLKOWITZ, BODIES AT WORK 121–25 (2006) (discussing the "historical construction" of the "prostitute body" as "Other" and noting the historical location of "the sin of prostitution in the body of the prostitute, rather than that of the client").

91. Interview with Nina Hartley, in Los Angeles, Cal. (February 17, 2012) (on file with the author) (noting from the perspective of a porn worker that public health interventions that do not consult workers are unlikely to be effective); Interview with Juba Kalamka, in Las Vegas, Nev. (July 17, 2013) (on file with the author) (same); *supra* note 91 and accompanying text (arguing that failing to address the actual risk priorities of sex workers makes proposals for other forms of state intervention including state run testing less effective in addressing the real occupational risks sex workers face).

92. Hartley, *supra* note 92 (discussing distrust of state regulation while also noting occupational health risk); Kalamka, *supra* note 92 (also discussing distrust of state regulation while also noting occupational health risk).

93. BERG (2021), *supra* note 1, at 179 (providing workers' perspectives on the difficulty of navigating various organizing obstacles facing the sex work industry).

94. Webber, *supra* note 88, at 302.

treatment poses the risk of antibiotic resistance.[95] Testing for, treating, and taking time off to heal (or becoming permanently unable to perform) due to these issues is a standard part of the porn work cycle.[96] Performers spend upwards of $300 per month on required STI tests and thousands more in the event of infection or injury.[97] When workers must take time off work in order to heal, or retire because they can no longer work, employers have no enforced responsibility to pay temporary or permanent disability compensation.[98]

For workers, this means that if a workplace illness or injury occurs, their choices are to sue for compensation or cover the costs of testing, treatment, and time off work themselves. Performer Kelley Shibari predicted that if a worker were to sue, "the producer may pay, but then he'll never hire her again."[99] Hoping to avoid blacklisting, most workers opt to cover their own costs.[100] In addition, some modeling releases attempt to protect producers from liability even before the scene has been filmed, and include a field asking performers whether they were injured at work.[101] A producer's assistant explained that part of her job in preparing pre-scene paperwork was to check a box to confirm, "no, [the performer] was not injured," before performers had even arrived on set.[102]

While individual workers bear the costs of testing, treatment, and time off to recover, the entire porn workforce absorbs the costs of the lack of paid sick time. As of 2014, California employers are required to provide paid sick leave, but only to employees who have worked with a firm for longer than thirty days within a year.[103] Independent contractors are not legally entitled to paid sick leave under California law.[104] This means that

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95. BERG (2021), *supra* note 1, at 145.

96. *Id.*

97. For standard testing costs, see *Tests & Prices*, TALENT TESTING SERV., https://www.talenttestingservice.com/tests.asp [https://perma.cc/TMR6-NCCC]. For general expenses, see Berg (2021), *supra* note 1, at 133.

98. *See* Nicholas Broten et al., *Disability Risk and Alternative Work Arrangements* 30 (Nat'l Bureau of Econ. Rsch. Disability Rsch. Paper No. NB 18-08, 2018) (discussing this phenomenon in mainstream work and finding that when injured, workers in alternative work arrangements face "a 26 percent increase in the risk of non-employment after two years when compared to similar direct-hire workers").

99. Interview with Kelly Shibari, in Northridge, Cal. (November 1, 2013) (on file with the author).

100. BERG (2021), *supra* note 1, at 170.

101. Interview with Anonymous Production Assistant, in Northridge, Cal. (October 29, 2013) (on file with the author).

102. *Id.*

103. CAL. LAB. CODE § 246.

104. Celine McNicholas & Margaret Poydock, *How California's AB5 Protects Workers from Misclassification,* ECON. POL'Y INST. (Nov. 14, 2019), https://www.epi.org/

porn workers must choose to either perform while ill or lose critical income. Production companies that require industry-standard testing bar those who have recently tested positive for certain STIs and COVID-19 from performing,[105] but performers may face economic pressure to perform when they suspect infection but before a test with a positive result has been confirmed.[106] Herpes, yeast infections, staph infections, and the common cold or flu are not part of the required test panel,[107] so workers make tough choices about whether to work when experiencing these ailments. Like other gig workers, porn workers bear the financial costs of injury and illness.[108] The industry issued a filming moratorium at the start of the COVID-19 pandemic, as it does in the rare event that a performer tests positive for HIV.[109] During industry-wide shutdowns, workers received no formal, employer-provided financial relief for time off work.[110]

A discourse of individual responsibility places the financial and embodied costs of doing business on workers' shoulders. "Your body is part of your living, and you can't put other people at risk," Diane Duke, then-CEO of the porn industry's trade organization, told me when asked whom she thought should be held responsible for STI risk on set.[111] Directors, and even some performers, shared this understanding. Often likening the body to the tools an independent contractor in other trades might maintain, they

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publication/how-californias-ab5-protects-workers-from-misclassification/ [https://perma.cc/QZX8-HTSR].

105. *FAQ*, PERFORMER AVAILABILITY SCREENING SERV. (PASS), https://fscpass.com/faq [https://perma.cc/VB5B-G9C7].

106. This experience was common in my interviews with performers.

107. *Id.*

108. *See* Gerald Friedman, *Workers Without Employers: Shadow Corporations and the Rise of the Gig Economy*, 2 REV. KEYNESIAN ECON. 171, 183 (2014) (noting contractors' exclusion from workers' compensation coverage); John Howard, *Nonstandard Work Arrangements and Worker Health and Safety*, 60 AM. J. INDUS. MED. 1, 5 (2017) (reviewing the occupational safety concerns inherent in mainstream gig work).

109. *Update on Current Production Hold*, PASS (Mar. 23, 2020), https://www.freespeechcoalition.com/press/blog/2020/03/23/update-on-current-production-hold [https://perma.cc/Q2F9-M9DC].

110. The industry's trade organization initiated a donation-based performer support fund at the start of the COVID-19 pandemic shutdown: upon application, performers could receive "up to $300 toward [their] living expenses." Press Release, Free Speech Coalition, FSC Emergency Fund to Provide Financial Relief for Talent and Crew (Mar. 23, 2020), https://www.freespeechcoalition.com/press/blog/2020/03/23/fsc-emergency-fund-to-provide-financial-relief-for-talent-and-crew [https://perma.cc/M8EE-CQAP]. This structure suggests charity rather than an entitlement.

111. Interview with Diane Duke, in Canoga Park, Cal. (November 5, 2013) (on file with the author).

repeated the idea that work means risk and that it is the worker's responsibility to manage such risk.[112]

These dynamics will be familiar to scholars of other gigified work. Professional wrestlers' contracts, for instance, provide that they can be fired for getting hurt at work.[113] Amazon's Mechanical Turk workers must sign a waiver confirming that they know they are ineligible for workers' compensation benefits.[114] But this bargain in which a contract for hire is also a liability waiver is not unique to gig work, nor is it new. In his history of workplace injury, Nate Holdren explores the body of case law that concretized this idea.[115] In the 1842 case *Farwell v. Boston and Worcester R.R. Corp*, the presiding justice ruled against an injured worker.[116] "Legally speaking, employees had by virtue of doing their jobs agreed to take some degree of chances of harm," writes Holdren.[117] The workers' compensation system that would emerge to ameliorate these harms remains structured by this fundamental idea. "Predictably," writes Holdren, "people at work lose hands, eyes, faces, lives, loved ones . . . . Then they enter into legal processes that hand them small sums of money."[118] Despite these risks, porn and other gig workers' access even to this small sum is constrained by their liminal employment status.[119] Again, porn employers are not alone in insisting that consenting to work means consenting to injury.

B. Racist Discrimination

Porn workers' liminal employment status and the lack of clarity around discrimination policy together create conditions ripe for ubiquitous and unchecked racist discrimination.[120] Agents hire and directors cast actors in explicitly racialized terms. Agent Mark Schechter listed "look, age, demographics, ethnicity" as the primary factors he considers when deciding to take on new talent—he knows directors will be looking at the same

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112. BERG (2021), *supra* note 1, at 59.

113. Cowley, *supra* note 4, at 145.

114. Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of "On-Demand/Gig Economy" Platforms*, 37 COMPAR. LAB. L. & POL'Y J. 653, 669 (2016).

115. HOLDREN, *supra* note 87, at 20.

116. Farwell v. Bos. & W.R.R. Corp., 45 Mass. 49 (1842).

117. *Id.* at 21.

118. *Id.* at 254.

119. Friedman, *supra* note 109, at 172.

120. Here, too, the limitations of the law are not limited to the porn context. *See* Alexander, *supra* note 73 (exploring the relationship between employee misclassification and workers' access to anti-discrimination protection).

things.[121] The question is, simply, whether a performer is "viable for me to market them."[122] In the porn industry's racial hierarchy, as in other sectors of the economy, Black workers in particular face intense workplace discrimination. Black performers are paid less for the same work, rarely hired for high status mainstream productions, and routinely pushed to perform in scenes with racist storylines.[123]

The "market" took on an almost magical air in managers' responses to my questions about racism in the industry.[124] Managers, cultural producers who pride themselves on being rule breakers, follow *these* rules with striking obedience. "Porn is such a racist business, but so is Hollywood," one director told me.[125] She went on:

> It's also marketing. If you're selling to some white trash hick in the Midwest who doesn't want to see a Black guy, you can't sell the movie. So you saturate it with all white people and label it what it is. Then you have the interracial movies and they're labeled as such because that's what is selling. It doesn't really make sense from a social standpoint, but from a sales standpoint it does.[126]

As the director's quote suggests, long-calcified ideas about market viability coexist with the reality that content featuring Black performers actually sells quite well—the fetishizing designations of "interracial" (almost always Black men and white women) and "urban" porn (featuring Black performers exclusively) are profitable.[127] As the porn scholar Mireille Miller-Young details in her study of Black women's pornographic labor, the market popularity of content featuring Black performers coexists with entrenched narratives that their labor is worth less than the labor of white performers.[128]

Invoking "the market" allows decision makers to lament racial inequality while claiming helplessness in the face of the forces that perpetuate it, a dynamic also present in industries such as fashion

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121. Schechter, *supra* note 56.

122. *Id.*

123. *See generally* MIREILLE MILLER-YOUNG, A TASTE FOR BROWN SUGAR: BLACK WOMEN IN PORNOGRAPHY (2014) (describing Black women's representations and exploitation in the porn industry and their fight for agency within an oppressive structure).

124. Berg (2016), *supra* note 43, at 53; *see also* MILLER-YOUNG, *supra* note 124, at 231–33 (discussing the economic imperative to market Black sexuality for profit).

125. Anonymous Performer, *supra* note 102.

126. *Id.*

127. MILLER-YOUNG, *supra* note 124, at 67, 106, 272.

128. *Id.* at 229–33.

modeling.[129] That racism exists at every level of porn's organizational hierarchy makes it easy for individual players to locate responsibility elsewhere. Here, too, the fissuring of the workplace does its work. Producers can point to non-Black stars who will refuse to perform with Black co-stars, non-Black performers can point to agents who advise them against interracial performances, and directors can identify producer rules and genre boundaries over which they claim no control.[130] The lack of a single source for racist exclusion complicates, but does not foreclose, organized pushback. In 2020, the BIPOC Adult Industry Collective formed to address porn industry racism through mutual education and support.[131] Significantly, among the collective's goals is to "further our community's skills in front of and behind the camera," a nod to the reality that self-production is a key means by which performers of color resist industry racism.[132] Rather than wait for the state to make the terms of their work more just, workers hope to improve conditions by wresting direct control over them.

This is, again, because in workplace racism as in occupational health, serious regulatory gaps leave workers unprotected. Title VII of the Civil Rights Act prohibits discriminatory hiring practices and workplace segregation, but explicitly applies only to the employer-employee relationship.[133] The Act has also proven weak in its ability to protect entertainment workers regardless of their employment status.[134]

Beyond the problem of independent contractor status, porn workers' status as entertainment workers further complicates the question of their coverage under anti-discrimination law. Hiring discrimination is, as the director quoted above suggests, ubiquitous in mainstream Hollywood too, and yet rarely subject to legal sanction.[135] The exceptions to Title VII

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129. In her study of fashion models, Ashley Mears traces bookers' and clients' similar invocation of the "market" to sidestep questions of their own complicity in fashion's racial hierarchies. ASHLEY MEARS, PRICING BEAUTY: THE MAKING OF A FASHION MODEL 190 (2011).

130. Berg (2016), *supra* note 43, at 52–54.

131. *Mission & Vision*, BIPOC ADULT INDUS. COLLECTIVE, https://www.bipoc-collective.org [https://perma.cc/SY6P-3V8A].

132. *Id.*

133. Civil Rights Act Title VII, 42 U.S.C. § 2000e (1964); Alexander, *supra* note 73, at 908 (pointing to contractors' exclusion from anti-discrimination protection).

134. Berg (2016), *supra* note 43, at 52.

135. *See generally* Latonja Sinckler, *And the Oscar Goes To; Well, It Can't Be You, Can It: A Look at Race-Based Casting and How It Legalizes Racism, Despite Title VII Laws*, 22 J. GENDER, SOC. POL'Y, & L. 857 (2014) (arguing that in allowing the film industry and Hollywood to disregard Title VII, society has allowed these industries to perpetuate a system that favors one race over others). *See also* Russell Robinson, *Casting and Caste-*

permitted by the bona fide occupational qualification clause (BFOQ) include provisions for gender-based hiring when "necessary for the purpose of authenticity or genuineness," but no such exception exists for race-based hiring.[136] This is true even if employers claim that consumer preference—"the market"—demands discrimination.[137] Because so little case law exists on racist discrimination in casting, legal scholarship on this issue focuses on the hypothetical.[138] Scholars writing on discriminatory casting in Hollywood suggest that, were an actor to file a Title VII claim, workers' protection from discriminatory hiring practices would need to be weighed against producers' First Amendment rights to unencumbered artistic expression.[139] The same would likely be true were a porn performer to file a complaint alleging racist discrimination against an employer.[140]

Hiring discrimination in porn gives way to drastic pay inequality, and Black porn workers routinely make less for the same work.[141] Where a court would weigh claims of hiring discrimination against free speech and artistic expression, Title VII does not include the same potential exception for pay inequality.[142] That is, even if "the market" prefers white performers, it is not legal to pay people of color less for the same work. But here again, the letter of the law matters little when enforcement mechanisms are so weak and the costs to workers of attempting to chase them so high.[143]

Part of this is the story of the ways the law has historically written gigified workers, especially racialized and feminized ones, out of the

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ing: Reconciling Artistic Freedom and Antidiscrimination Norms, 95 CAL. L. REV. 1, 2 (2007) ("Despite [Title VII's ban on discriminatory practices], the film industry regularly uses discriminatory casting announcements . . . and my research did not turn up a single published decision in which a court adjudicated an actor's Title VII claim of race or sex discrimination.").

136. 29 C.F.R. §1604.2(a)(2) (1980).

137. Davis, *supra* note 17, at 1239.

138. *See id.* at 1262–69 (exploring the limitations of anti-discrimination law's potential application to the sex work context); Russell Robinson, *Hollywood's Race/Ethnicity and Gender-Based Casting: Prospects for a Title VII Lawsuit*, LATINO POL'Y & ISSUES BRIEF No. 14 (U.C.L.A. Chicano Stud. Rsch. Ctr.), Dec. 2006, at 1–3 (examining the potential for civil rights litigation in the context of Hollywood casting).

139. Sinckler, *supra* note 134, at 859, 882–83.

140. Berg (2016), *supra* note 43, at 52.

141. MILLER-YOUNG, *supra* note 124, at 10.

142. Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 SAN FRANCISCO L. REV. 473, 477 (2001) (discussing that the bona fide occupational qualification exception in Title VII does not permit pay discrimination).

143. *See* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 107 (Samuel Estreicher & Joy Radice eds., 2016) (surveying stratified access to civil justice, including in the realm of workers' rights).

protections nominally afforded to other working people.[144] But the *nominal* piece is key here, because even formally recognized employees find the benefits of Title VII elusive.[145] Those who hope that treating sex work like any other job will ameliorate workplace discrimination forget, writes Adrienne Davis, that "Title VII is a doctrine riddled with exclusions, tiers, and inconsistencies."[146] More than misclassification stands in the way of racial justice on porn sets.

C. Copyright

Thus far this Article has detailed many areas in which employers benefit from treating workers as contractors rather than employees. The following Section details copyright as one context in which the opposite is the case, and employers benefit from selectively treating porn workers as employees. The control/autonomy dichotomy that animates the formal distinction between employees and independent contractors presents a puzzle for management in creative industries. The law grants intellectual property rights to contractors that employees do not receive.[147] In this case, employers can extract more value from employees than they can from work for hire contractors. This is a space in which employers' access to the "benefits of both" becomes particularly obvious.[148] This contradiction is baked into the modeling releases performers must sign in order to work—conflicting standards can be integrated into a single document in ways that are not quite legal but nonetheless shape the private governance of the porn set.[149]

In addition to language that purports to release the producer of liability in the event of on-set injury or STI exposure, the contract excerpted earlier also ensures the producer full rights over scenes: the rights to alter, redistribute, and profit from images in perpetuity, with no further

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144. Zatz and Boris describe New Deal-era labor protections' foundational exclusion of domestic and agricultural workers and note its continued impact on migrant and home care workers. Zatz & Boris, *supra* note 14, at 103.

145. Stewart, *supra* note 18 (noting that elderly care workers have limited employment protections in practice, in part due to the feminized nature of the work).

146. Davis, *supra* note 17, at 1241.

147. *See* STAHL, *supra* note 4, at 111–13 (finding that recording companies strain to fit musicians into "the form of labor that gives them the most freedom in the market") Charles Tait Graves, *Is the Copyright Act Inconsistent with the Law of Employee Invention Assignment Contracts*, 8 N.Y.U. J. INTEL. PROP. & ENT. L. 1, 1 (2018) (reviewing inherent conflicts in copyright law, specifically the fact that "[t]he work for hire doctrine is more favorable to employee-ownership [of employees' inventions] than the law of invention assignment contracts")

148. BERG (2021), *supra* note 1, at 110–12.

149. Model Release Agreement, *supra* note 3.

payment.[150] The contract is expansive in scope. It permits producers and any entities with which they may have licensing agreements to use scene content in any way they choose, "even though the finished product may be distorted, blurred, altered, or used in composite form, either intentionally or otherwise and subject [the performer] to scandal, ridicule, reproach, scorn or indignity."[151] This provision means that a day's rate buys permanent rights to a performer's image and name and that performers have no input in how scene content is manipulated or marketed.[152] The contract is internally inconsistent because the Copyright Act of 1976 grants intellectual property rights to artists except in cases where "a work [is] prepared by an employee within the scope of his or her employment."[153]

Having full copyright control allows producers to multiply profits by distributing scenes themselves and licensing them to others as well. Porn does not have a royalty or residual structure, and so workers never see the profits from successful films or repackaged scenes.[154] This means that the moment paid work dries up, so too does income. When the industry declares production moratoria, as it did during the COVID-19 pandemic, producers continue to profit while workers lose access to performance income.[155] And when performers face loss of work for other reasons (such as disability, blacklisting, caring for loved ones, or voluntary or coerced retirement), they have no access to the profits still being drawn from previous scenes they performed under work for hire arrangements. This is one reason performers so often pursue self-production—it is a unique means by which they can decouple income security from access to paid scene work.[156]

Together with their exclusion from both voluntary retirement funds and standardized withholding for disability and retirement insurance, porn workers are intensely vulnerable to poverty after they retire.[157] Most of the retirement-age performers I interviewed experienced severe financial insecurity. They had starred in highly successful films such as the iconic *Debbie Does Dallas* and made producers a great deal of money,

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150. *Id.*

151. *Id.*

152. Berg (2016), *supra* note 43, at 111.

153. 17 U.S.C. §§ 101, 201.

154. BERG (2021), *supra* note 1, at 110–12.

155. EJ Dickson, *Will the Porn Industry Be Disrupted by Coronavirus?*, ROLLING STONE (Mar. 6, 2020), https://www.rollingstone.com/culture/culture-news/porn-coronavirus-covid19-962923/ [https://perma.cc/K5DX-CLHK].

156. *A Scene Is Just a Marketing Tool*, *supra* note 80, at 167.

157. This is a concern for gig workers more broadly, who lack access to unemployment, disability insurance, and pension schemes. Friedman, *supra* note 109, at 183.

but their lack of access to intellectual property rights ensured that they never saw even a piece of these profits.[158] Golden Age performer/director Carter Stevens explained, "Ninety-nine percent of the old timers in this business are broke or living on food stamps . . . . The thing with being an outlaw is that the retirement package sucks."[159] Poverty among Golden Age stars is so prevalent that a group of fans and industry historians launched the Golden Age Appreciation Fund in 2014 to raise funds for retired stars in need.[160] The threat of post-retirement financial insecurity persists for today's workers. Many live more or less month-to-month with little savings, and they know to expect hiring discrimination in mainstream jobs once they leave porn, given that sex workers are not a protected class under federal or state anti-discrimination law.[161]

When manipulating scenes post-production, producers can also manufacture content performers would not knowingly agree to shoot. Workers want a say in the representations their names are attached to, and those who can afford to be selective in the work they accept turn down projects they feel are degrading.[162] Performers of color find their images emblazoned with racist epithets in advertisements, for instance, and have little recourse because of contract clauses giving producers total power over how an image is manipulated and marketed.[163] One director, Bella Vendetta, volunteered that she made a point of clearing post-production marketing decisions with performers who work for her.[164] Vendetta is also a performer, and typically produces small-scale BDSM productions without the support of a large studio.[165] She instituted this policy in her own films after being frustrated by how scenes in which she performed were

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158. *See, e.g.*, Interview with Herschel Savage, in Los Angeles, Cal. (April 5, 2013) (on file with the author) (describing being cut off from the profits of hugely profitable pornographic films in which the interviewee had starred).

159. Skype Interview with Carter Stevens (Nov. 1, 2013), *in* Berg (2016), *supra* note 43, at 158. Golden Age refers generally to porn production from 1969-1984.

160. GOLDEN AGE APPRECIATION FUND, http://tgaafund.blogspot.com [https://perma.cc/T49X-DXQ9].

161. *See generally* Derek Demeri, *Who Needs Legislators? Discrimination Against Sex Workers Is Sex Discrimination Under Title VII*, 72 RUTGERS L. REV. 247 (2020) (explaining that sex workers do not constitute a protected class entitled to Title VII employment discrimination protections and elaborating on the legal case for making sex workers a protected class).

162. MILLER-YOUNG, *supra* note 124, at 15, 191, 256.

163. EJ Dickson, *Racism in Porn Industry Under Scrutiny Amid Nationwide Protests*, ROLLING STONE (June 10, 2020), https://www.rollingstone.com/culture/culture-features/racism-porn-industry-protest-1010853/ [https://perma.cc/7SP4-P3AP].

164. Telephone Interview with Bella Vendetta (March 18, 2014) (on file with the author).

165. *Id.*

marketed. "I ended up in a movie called 'Whore of Darkness,'" she said, and explained that "I never consented to being called a 'whore of darkness.'"[166] Here again, employers' level of control over not just the production process but also what comes next makes any legal claim that they are not in fact *employers* rather vexed. If having it both ways helps employers extract the most profit for the least possible return, it also opens them up to legal liability.

III. TESTING EMPLOYMENT STATUS

Until the 2019 passage of California's Assembly Bill 5 (AB5), the state relied on the *Borello* test to determine employment status.[167] Alongside five other criteria, the test treated the workers' "right to control the manner and means of accomplishing the desired result" as the primary measure of employment status.[168] In the 2018 case *Dynamex Operations West, Inc. v. Superior Court*, the California Supreme Court replaced the *Borello* test with the "ABC" test.[169] With AB5, California codified the *Dynamex* ABC test, which attempts to clarify *Borello*.[170] The new test maintains right to control as the primary measure of employment status, and does so in ways that do not fully rectify *Borello*'s limitations.[171] Because no case law yet exists to test ABC in the porn context, this Section explores *Borello*'s application in an earlier case heard by California's Occupational Safety and Health Appeals Board (Cal/OSHA), *In the Matter of the Appeal of Treasure Island Media, Inc.*[172] This Section details the case's findings in light of their implications for porn workers' employee status more broadly.

In 2014, Cal/OSHA's Appeals Board ruled against Treasure Island Media and held that performers contracted by production studio Treasure Island Media were indeed employees.[173] This case was jurisdictional—in order for OSHA to have jurisdiction over Treasure Island's set, performers

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166. *Id.*

167. *Supra* note 12 and accompanying text.

168. S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 48 Cal. 3d. 341, 355 (1989); *see also supra* note 12 and accompanying text (providing the other factors to be considered holistically when determining employment status).

169. Dynamex Operations W. v. Sup. Ct., 232 Cal. Rptr. 3d 1, 8 (Cal. 2018).

170. Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621).

171. The bill's text reads, "This bill would state the intent of the Legislature to codify the decision in the Dynamex case and clarify its application." *Id.*

172. *In re* Treasure Island Media, Inc., No. 10-R6D1-1093 (Cal/OSHA App. Mar. 27, 2014).

173. *Id.* at *17.

would have to be employees who had been misclassified as contractors.[174] *Treasure Island*'s direct implications were thus limited to occupational health regulation, and while the court found that OSHA did have jurisdiction, the case has had limited impact on future enforcement.[175] The case is, however, significant as a unique instance in which porn performance was formally subject to the independent contractor test.

First, a brief note on the specificity of the case: the factors that led the court to decide that porn workers are employees are nearly ubiquitous in the industry.[176] The circumstances surrounding the case were, however, exceptional. A gay studio that specializes in "bareback" (condom-less) sex, relies on serosorting rather than HIV testing,[177] and produces material that fetishizes HIV and HIV transmission, Treasure Island is something of a pariah in a porn business community invested in its own respectability politics.[178] The company has been a haven for performers who would be excluded from work because of their serostatus, as well as an important space for grappling with the politics of desire and risk.[179] Treasure Island's renegade status no doubt contributed to its being subject to OSHA's scrutiny. Indeed, it was the AIDS Healthcare Foundation (AHF, an unaffiliated outside organization), rather than an aggrieved worker, which filed suit against the company.[180] This configuration—policy that might otherwise be a boon to workers delivered through the most stigmatizing

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174. Chris Motyl explores the case's impact on occupational health. *See* Motyl, *supra* note 4, at 246.

175. Whether the employee classification established in the *Treasure Island* case applies outside California or in matters about which agencies other than OSHA have jurisdiction remains to be seen. A worker can be an employee for the purposes of OSHA jurisdiction, and not according to federal wage and hour standards, for example. This lack of consistency and the built-in impossibility of any consistent enforcement are among the major weaknesses of employment law.

176. *In re* Treasure Island Media, Inc., No. 10-R6D1-1093 at 17.

177. Serosorting refers to the practice of pairing with sex partners who share one's HIV status. DAVID HALPERIN, WHAT DO GAY MEN WANT?: AN ESSAY ON SEX, RISK, AND SUBJECTIVITY 15 (2009).

178. Chris Ashford, *Bareback Sex, Queer Legal Theory, and Evolving Socio-Legal Contexts*, 18 SEXUALITIES 195, 202 (2015).

179. On bareback and the politics of desire and risk, see *id.* (discussing queer engagements with bareback as a response to the HIV crisis); TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING 97–144 (2009) (advancing a similar argument in the queer theoretical context). *See generally* JOÃO FLORÊNCIO, BAREBACK PORN, POROUS MASCULINITIES, QUEER FUTURES: THE ETHICS OF BECOMING-PIG (2020) (advancing a similar argument in the contemporary porn context).

180. *AIDS Group Files Complaints with Cal/OSHA Over Condom-less Porn*, AIDS HEALTHCARE FOUND. (Feb. 8, 2013), https://www.aidshealth.org/2013/02/ahf-goes-after-bareback-gay-porn-by-treasure-island/ [https://perma.cc/8NZ6-AC7U].

means possible—speaks to the broader context of sex work's troubled relationship with the state.[181]

Non-workers targeted Treasure Island because of the sexual practices its films represent, not on the basis of a worker's complaint.[182] Referring to the film about which he lodged an OSHA complaint—which depicted a large quantity of semen delivered via turkey baster—the AHF's CEO declared, "exposing a person to a thousand loads of cum is not a trifle. In what bizarre world does Treasure Island think this is normal?"[183] The normal, not workers' wellbeing, was at stake. As a result, Treasure Island's owner described the decision to take the OSHA case to trial as "a matter of principle, not money . . . . This was an attack on our rights, and the rights of our models."[184] Likewise, queer legal theorist Chris Ashford frames the charges as part of broader "attempts to erase the bareback image," adding, "that law should seek to silence such a depiction arguably underlines the radical and transgressive power of bareback."[185] Policing of transgressive sexual expression is constitutive of the story of the *Treasure Island* case. It is also true that Treasure Island, like other employers, has more instrumental reasons for misclassifying workers.[186] The case's very particular politics notwithstanding, it remains an important event for understanding porn workers' employment status.

This Section takes six *Borello* criteria at stake in turn, noting the areas in which the conditions of the productions reviewed in the *Treasure Island* case replicate and, sometimes, diverge from those of the majority of other porn workplaces. *Borello*'s criteria were weighed holistically—not all criteria needed to be met in order to win employee status.[187] The first criteria concerns the extent to which the employer exerts control over the

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181. Dewey and Kelly lay out sex workers' vexed relationships to state regulation more broadly. Susan Dewey & Patty Kelly, *Introduction* to POLICING PLEASURE: SEX WORK, POLICY, AND THE STATE IN GLOBAL PERSPECTIVE 1, 1–15 (Susan Dewey & Patty Kelly eds., 2011).

182. *AIDS Group Files Complaints*, *supra* note 181.

183. Jeremy Lybarger, *Condom Wars in California's Porn Industry*, S.F. WKLY. (Sept. 2, 2015), http://www.sfweekly.com/sanfrancisco/news-san-francisco-condoms-aids-sex-porn-treasure-island-media-michael-weinstein-healthcare-labor-osha-california/Content?oid=4007373 [https://perma.cc/P5HU-AF3F].

184. *The Verdict Is in: Condoms Not that Serious Anymore!*, TREASURE ISLAND MEDIA BLOG (2015), http://blog.treasureislandmedia.com/2015/08/the-verdict-is-in-condoms-not-that-serious-anymore/ [https://perma.cc/W6MR-9LZ9].

185. Ashford, *supra* note 179, at 202.

186. *See supra* Part II (discussing the benefits to employers of keeping workers in a liminal employment status.)

187. Rogers, *supra* note 30, at 488.

production process,[188] and the *Treasure Island* ruling noted a number of characteristics of the porn workplace that demonstrate such control.[189] These include that Treasure Island screened applicants and hired only those who were willing to perform particular sex acts, hired filming crews and provided the workspace (i.e., filming location), directed and scheduled shoots, and edited and produced the final product.[190]

Next, citing a second *Borello* criterion that measured workers' ability to share financial profit and loss associated with final products, the court found similarly that performers, paid by the day and with no other claims to income, meet the standards of employment.[191]

A third *Borello* criterion concerned who supplies work equipment. Workers who supply their own equipment are more likely to be ruled contractors.[192] Here too the court found that the satisfaction of the criterion weighed in favor of classifying performers as employees.[193] Treasure Island asked performers to supply their own sex toys and costumes, but provided work equipment such as cameras and lights.[194] Further, the court noted that the work equipment criterion must be understood in light of the reality that employers may require workers to supply work equipment "in order to bolster the argument that they are independent contractors, as well as to save costs."[195]

Though not relevant to the *Treasure Island* case—the company allows HIV-positive performers to work and does not require that performers test before work[196]—testing costs are another area in which this criterion is meaningful more broadly. Producers require that performers pay for STI tests not only to externalize this cost, but also out of a concern that paying for tests would make production companies look like employers to the courts.[197] An employer's attorney explained to me that proposed legislation requiring that producers pay for tests was an attempt

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188. S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 48 Cal. 3d. 341, 353–55 (1989).

189. *In re* Treasure Island Media, Inc., No. 11-R6D1-1093, 2014 WL 11087589, at *16 (Cal/OSHA App. Jan. 6, 2014).

190. *Id.*

191. *Id.* at *17.

192. *Borello*, 48 Cal. 3d at 351.

193. *In re Treasure Island Media, Inc.*, 2014 WL 11087589, at *17.

194. *Id.*

195. *Id*. at 17 (quoting from the case Shiho Seki dba Magical Adventure Balloon Rides Cal/OSHA App. 11-0477, DPR (Aug. 31, 2011)).

196. *In re Treasure Island Media, Inc.*, 2014 WL 11087589, at *5, *7.

197. BERG (2021), *supra* note 1, at 114, 160.

to "defeat the *Borello* test by requiring employers—[correcting herself] production companies—to pay" for work supplies.[198]

> They know that if you're litigating a case and a production company says, 'Oh yes, I had to pay for testing for these people,' that's gonna weigh heavily because you're basically paying for them to do the work for you. I think who pays for testing is a big factor and I think that [with] that bill [AB 1576], they're trying to work it backwards, to say, 'Okay, if we want these people to be absolutely employees, how are we going to do it?' . . . . They're trying to create scenarios where if you were doing an analysis from *Borello*, you'd be an employee.[199]

One problem with laws governing employment status is that, in circular fashion, externalizing costs onto workers can help to ensure that managers can legally externalize more costs onto workers later.[200] The attorney's linguistic slip—calling producers "employers" even while making a case that they are not, and then quickly correcting—also speaks to the extent to which employment status is in flux, even for those who have much at stake.

A fourth *Borello* criterion concerned whether the service rendered requires "special skill."[201] "Special skill" can help establish a worker as an independent contractor.[202] No doubt informed by the pervasive assumption that sex work is unskilled labor, the *Treasure Island* court found "no evidence" that the performance at hand required special skill.[203] Tellingly, the court demonstrates porn performance's lack of required skill by unfavorably comparing it to plumbing, bricklaying, and other "skilled" trades.[204] Porn work's illegibility as a trade that likewise relies on a special

198. Telephone Interview with Anonymous Att'y (Mar. 10, 2014), *in* Berg (2016), *supra* note 42, at 57.

199. *Id.* at 57–58.

200. *See generally* Alison Davis-Blake & Brian Uzzi, *Determinants of Employment Externalization: A Study of Temporary Workers and Independent Contractors*, 38 ADMIN. SCIENCE QUARTERLY 195 (1993).

201. S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 48 Cal. 3d. 341, 355 (1989).

202. *In re* Treasure Island Media, Inc., 2014 WL 11087589, at *16–17 (Cal/OSHA App. Jan. 6, 2014).

203. *Id.* at *17 (providing that there is no evidence that the work involved special skills).

204. *Id.* (listing "plumbing, bricklaying, electrical work or trenching" as skilled trades, in contrast to sex work, which the *Treasure Island* court deemed not to require "special skill").

skillset speaks to the law's broader failure to grasp the conditions of creative, immaterial, and feminized labor.[205]

Where employment status is concerned, employers have a stake in demonstrating that performers *are* skilled workers, since doing so can help to establish workers as independent contractors under *Borello's* standards. Skill in this case makes one less entitled to workplace protections. When asked whether porn workers might be understood as "day employees"—a designation the Screen Actors Guild has elaborated for Hollywood actors, who, like porn performers, have multiple employers—the attorney quoted above responded, "I would contrast that a bit to adult film performances, [in] which generally, you're hired for the job, but you really bring your own niche and you bring your own skills to the set for a role play or improvisation, as opposed to something that's very scripted and directed."[206] For management, performers are only skilled when it counts.

Borello's fifth criterion concerned the permanency of the employment relationship, and here the court found varying degrees of permanency—some performers were exclusively contracted with the company, while others had shot several scenes, and still others had performed only once.[207] In this case, the employer in his testimony insisted that performers were free to work for other companies, but the court noted that sole employment is not a necessary quality of an employer-employee relationship.[208] Like other areas of employment law that assume a single employer, *Borello* falls apart in an "Uberized" economy characterized by hyper-mobile working relationships.[209]

The reality that performers work for many bosses was a favored response among management asked about worker's compensation, among other costs typically borne by employers. When talent agent Chris Caine was asked, "Who covers treatment costs when performers contract curable STIs?" he responded, "How would you know where you got it? . . . [W]hy would the studio have to pay? You can't hold the studio responsible unless someone falls down and gets injured on set."[210] Caine is very likely right that, as the law now stands, it would be very difficult for workers to prove the origin of a curable STI in the ways required to secure payment from

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205. *See* Zatz & Boris, *supra* note 14, at 96 (questioning on what basis do we call something work, and providing the example that the activities of housewives is not considered work); Stewart, *supra* note 18, at 61–76 (noting the law's conceptual limitations with regulating sex work due to its status as feminized labor).

206. Anonymous Att'y, *supra* note 199.

207. *In re Treasure Island Media, Inc.*, 2014 WL 11087589, at *17.

208. *Id*.

209. Prassi & Risak, *supra* note 26, at 632.

210. Caine, *supra* note 56.

employers.[211] OSHA regulations do provide for multiple employer liability in cases in which multiple parties control a single work environment, such as when a temp agency supplies workers to contracting firms.[212] A talent agent, director, and producer for a single production might fit under this rubric. But it would be tricky to identify a responsible employer when workers labor in discrete workspaces and under the direction of discrete managers.

The sixth *Borello* criterion was whether the services rendered are "an integral part of the employer's business."[213] Here the court found that performers' work was the "key element" of the productions from which the company derived its revenue.[214] Porn production remains obviously integral to the operations of production companies.

Finally, Treasure Island claimed that the copyright of the film in question and the reality that performers are not entitled to royalties meant that *Borello* should not apply in the porn context.[215] Ironically, denying performers media rights in this case actually helped to establish employee status. The court found that the production company structured its model release form "as an employment contract" precisely so that performers would have no ownership rights over final scenes.[216] In so doing, the company undermined its claim that performers are independent contractors.

The *Treasure Island* court's findings establish a strong precedent for understanding porn workers as employees. The features of the porn workplace the court addressed in its discussion of the *Borello* test are, with some exceptions, standard across porn genres.[217] These same features also meet the standards set out in California's post-2019 standard, the "ABC" test.[218] ABC, signed into law with AB5, maintains three key features of *Borello*. All three criterion must be met in order to establish legitimate independent contractor status.[219] True independent contractors (1) must be "free from the control and direction of the hiring entity in connection with the performance of the work and in fact," (2) must do work that is "outside the usual course of the hiring entity's business," and (3) must be

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211. Kate E. Britt, *Workers' Comp and Contagious Disease: History and Future*, Mich. Bar J. 42, 43 (Jan. 2021).
212. Stone, *supra* note 33, at 261.
213. S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 48 Cal. 3d. 341, 355 (1989).
214. *Treasure Island Media, Inc.*, 2014 WL 11087589, at *17.
215. *Id.* at *18.
216. *Id.*
217. BERG (2021), *supra* note 1, at 160.
218. Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019).
219. *Id.* § 2.

"customarily engaged in an independently established" business "of the same nature as that involved in the work performed."[220] With the exception of un-waged, self-produced shoots involving trade or solo performance, porn work quite obviously fails the first two aspects of the test. Waged, work for hire porn work is quite literally subject to direction, and a studio can no more make a case that porn production is outside their normal course of business than Uber can credibly claim that it is not a transportation company.[221] The third aspect of the test is murkier—many porn workers film on a regular basis, but they also do a host of other things, ranging from webcamming to erotic dance and tending their paid Snapchat subscriptions.[222] As ABC requires that all criterion must be met in order for contractor status to be legitimate, the norms of waged porn work clearly establish employment status regardless.

However, there remains a risk that ABC will be less clarifying than the letter of the law suggests and less worker-friendly than advocates hope. "Courts and regulators still seem to impose old-fashioned notions of work," writes the legal scholar Robert Sprague, and it is entirely possible that courts will "confuse the precarity of modern working relationships with independence."[223] Beyond this, this Article argues that we cannot expect ABC's clarified standard to significantly improve working conditions in porn even if it does establish that performers are indeed employees. This is both because it introduces undesirable compromises for workers and because formal employees also fare badly under the law.

IV. STILL WORKING AT THE LIMITS OF THE LAW

ABC has limited capacity to serve working people—on and off a porn set—because employment law is set up in ways that make it very easy

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220. *Id.*

221. Nonetheless, Uber attempts to do just this, and as yet has faced no sanction. *See* Order on the People's Motion for Preliminary Injunction and Related Motions, at 4–5, People v. Uber Techs., Inc., No. CGC-20-584402 (Sup. Ct. S.F. Aug. 10, 2020) (rejecting Uber's contention and finding it qualifies under the Bill 5 standards), *aff'd*, 56 Cal. App. 5th 266 (Cal. Ct. App. 2020), *petition for cert. filed*, No. S265881; Lobel, *supra* note 13, at 6 (emphasizing the measures apps have taken in an attempt to convey the non-employee status of their workers).

222. *A Scene Is Just a Marketing Tool*, *supra* note 80, at 161; *see also* David Schieber, *My Body of Work: Promotional Labor and the Bundling of Complementary Work*, 4 SOCIUS 1, 4 (2018) (detailing the importance and compounding effect of multiple work-types for porn workers). *See generally* Laurin, *supra* note 25 (exploring workers' use of the direct-to-consumer market in the gay porn context).

223. Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 733 WM. & MARY BUS. L. REV. 733, 767 (2020).

for employers to ignore. Courts have historically determined employment status on a case-by-case basis, and then generally only when workers complain to contest their misclassification as independent contractors.[224] In porn as in other contingent work, the heavy costs of civil litigation, together with the risks of employer retaliation, make direct civil action rare.[225] What is more, ABC's more sophisticated means of identifying a controlling employer would not address workers' vulnerabilities to work-related health problems[226] that build over time and are difficult to trace nor their vulnerabilities to the cumulative effects of workplace discrimination which make some performers' "brands" worth more than others.[227] Beyond the problem of demonstrating a single, controlling employer for any given set is the reality that most performers work for different employers over time.[228] This Part explores how the reality of multiple employers will shape future reform efforts.

As the current state of discrimination, occupational health, harassment, and wage theft protection attests, the law leaves even formally recognized employees grossly unprotected. Even employers who do not misclassify their workers routinely flout such protections.[229] Indeed, one reason interviewees often gave for seeking out porn work in favor of mainstream jobs was that the mainstream jobs they previously had, in which they were often recognized as employees, had terrible working

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224. MARK ERLICH & TERRI GERSTEIN, CONFRONTING MISCLASSIFICATION AND PAYROLL FRAUD: A SURVEY OF STATE LABOR STANDARDS ENFORCEMENT AGENCIES 8 (2019).

225. On the problem of access to civil law, see generally BEYOND ELITE LAW, *supra* note 144 (discussing the gap between the legal training U.S. lawyers receive and the unmet demand for legal services, including employment disputes not suitable for class action treatment).

226. These ailments include yeast and bacterial infections, side effects of steroids and performance-enhancing medications, issues associated with over-use of antibiotics, and cumulative muscle strain. The state does not reliably hold employers liable for work demands that are all but impossible to fulfill without risking bodily harm. If it did, mainstream employers would have to answer to the rising incidence of stress-related illnesses among office workers. They do not. PFEFFER, *supra* note 87, at 65–68. Employers are already at work trying to secure liability shields for practices that will obviously expose workers to COVID-19. Ana Swanson & Alan Rappeport, *Businesses Want Virus Legal Protection. Workers Are Worried,* N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/business/economy/coronavirus-liability-shield.html (on file with the *Columbia Human Rights Law Review*). In the current political climate, employers will likely succeed. Even for workers who are recognized as employees and who are clearly injured at work, the burdens of proving causality clearly favor employers.

227. *See supra* Part II.B (discussing the impact of racism on the porn market).

228. Berg (2016), *supra* note 43, at 59.

229. Bernhardt et al., *supra* note 14, at 22 (discussing the role that new forms of business organization play in the degradation of work).

conditions.[230] There too, threats to worker wellbeing were standard, and workers endured them for much less money than they make in porn.[231] The relative autonomy of gig work was worth the increased (but not markedly so) precarity it brought.[232]

Once in the industry, many porn workers prefer the forms of work that most protect their autonomy.[233] Giving a boss control over the work process and the profits from one's labor does not sit well with workers who have taken on significant stigma in order to pursue work that does not feel like clocking in. And so many performers use work-for-hire scenes—those in which the ABC test would likely find employee status—solely as "marketing tools" for the direct-to-consumer products and services over which they have control and keep more of the profits.[234] Here, the "workplace" is not fissured so much as it is diffused beyond recognition—exactly what many workers prefer. The dominant discourse on AB5 frames the debate as a contest between workers and their advocates in favor and employers and their paid lobbyists opposed.[235] But some workers, and not just management toadies, also resist the subsumption of their work into traditional employment categories. They have good reasons to contest the idea that misclassification is the greatest barrier to more just workplaces and real reasons to prefer precarious autonomy to intensified control which will very likely still fail to protect them. This dynamic has already played out for California's erotic dancers. Divided regarding their preferred employment status, dancers reported the usual harms of contractor misclassification as well as that strip clubs in a post-AB5 landscape found ways to weaponize employee status against workers.[236] Paying by the hour, clubs used their new status as employers to extract more of workers' tips and enforce intensified forms of workplace control.[237] Conditions got worse, not better.[238]

AB5 does not change the reality that employment law forces workers to choose between (limited) autonomy and (also limited)

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230. BERG (2021), *supra* note 1, at 14, 161–62.

231. *Id.* at 147.

232. *Id.* at 98.

233. *Id.* at 10.

234. *See A Scene Is Just a Marketing Tool*, *supra* note 80, at 161 (describing how porn workers use scenes as "marketing tools for other income-generating endeavors over which they have more ownership and control").

235. McNicholas & Poydock, *supra* note 105, at 4.

236. Larry Buhl, *Poles Apart: Exotic Dancers Clash Over Employment Status*, CAP. & MAIN (Apr. 5, 2019), https://capitalandmain.com/exotic-dancers-clash-over-employment-status-0405 [https://perma.cc/P5TB-NJWB].

237. *Id.*

238. *Id.*

protection. The law does not do enough to disengage from the idea that doing formally recognized forms of waged work is a necessary qualifier for basic rights and protections.[239] Legal scholar Orly Lobel suggests that well-designed reforms could both contest misclassification *and* decouple rights and protections and access to social citizenship from employment status.[240] This approach might entail such "complimentary" reforms as a clarified test; a guarantee of protections regardless of classification; the creation of tailored rules for those with liminal status; and the provision of social welfare benefits outside of employment systems, such as through the Affordable Care Act.[241] It is not clear that employment policy can do all of those things at the same time, given that narrow definitions of the "employee" were themselves a brittle accord between workers and capital, and one that at once bound those included in those definitions to their employers and left racialized and feminized workers unprotected.[242] Queer legal theorists warn that bids for inclusion into existing regimes threaten to reinforce them.[243] This is exactly the risk of reforms that grant a few more workers entry into a foundationally racist and masculinist system, one which asks workers to choose between autonomy and protection yet reliably grants neither.

A two-pronged alternative path would refuse that foundational dichotomy rather than seek to refine its terms. First, a legal approach concentrated on Lobel's final recommendation—disentangling access to social citizenship from job status[244]—would profoundly empower workers in a range of employment relationships. Healthcare, disability insurance, and security after retirement would be provided by the state, regardless of employment status. Locating claims for security outside a worker's attachment to a single employer would facilitate porn and other gig workers' access to fundamental benefits. It would also undermine

239. Zatz & Boris, *supra* note 14, at 95.

240. Lobel, *supra* note 13, at 6, 13.

241. *Id.* at 6, 10, 13.

242. *See* JEAN-CHRISTIAN VINEL, EMPLOYEE: A POLITICAL HISTORY 126–27 (2020) (discussing the role of "industrial pluralism" in the legal construction of the employee); Zatz & Boris, *supra* note 14, at 102–03 (reviewing foundational racialized and gendered exclusions in the law).

243. *See* DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 68–69 (2015) (contending that because they divide groups into "the deserving" and "the underserving," "legal inclusion and recognition demands often reinforce the logics of harmful systems").

244. Lobel, *supra* note 13, at 69–70.

employers' use of the "public-private welfare state" as a weapon used to tie workers to employers.[245]

Such an intervention might work in tandem with policies that support workers' efforts to labor outside of a boss' control. In the porn industry, horizontal trade relationships leave more room for workers to set the terms for their work.[246] Workers here maintain intellectual property rights, claim the entirety or a larger percentage (depending on whether one distributes content independently or via a platform) of the profits from their labor, and have more control over safety practices, partner choice, earnings distribution, and the representational politics of a scene.[247] Such self-directed work thus mitigates many of the harms outlined in Part II regarding occupational health risk and racist discrimination.[248] However, workers in this context continue to face both the differential valuation of their labor by consumers and market pressure to perform in ways that create some level of risk. These harms cannot be legislated away under capitalism,[249] and so increased autonomy will remain workers' best available tool for mitigating those harms. Freedom from Internet censorship and surveillance is crucial to porn workers' access to that autonomy. A rights-based approach will necessarily take aim at policies such as FOSTA/SESTA, which undermine workers' ability to build a fan base and distribute content independently.[250] Policies which reduce the logistical and financial burdens of operating independently, such as the reduction of burdensome permitting requirements,[251] would also support autonomous production.

Taken together, these interventions address the limitations of employment law by relocating the conversation away from misclassification to other legal arenas entirely. They move, following the

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245. *See generally* JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE (2006) (describing how the discourse of workers as reliant on state welfare has influenced political and legislative approaches to employment law broadly).

246. *See supra* Part I (discussing horizontal work and trade relationships in the porn industry and their effect on workers' autonomy).

247. *See supra* Section II.C. & Part III (discussing intellectual property ownership in the porn industry and its negative effects on workers).

248. *See supra* Sections II.A–B (discussing the risks posed to sex workers in the porn industry as a result of its current legal structure).

249. HOLDREN, *supra* note 87, at 275 (discussing the role of the law in authorizing capitalism's "simultaneous accumulation of wealth and misery").

250. BERG (2021), *supra* note 1, at 133.

251. For example, Los Angeles County requires all producers to obtain an Adult Film Production Public Health Permit. L.A., CAL., Cnty. Code ch. 11.39 (2012).

legal scholar Miriam Cherry's urging, "beyond misclassification."[252] Employment law's fundamental grounding in the autonomy/control dichotomy means that the fight for better work may be best located outside employment law's terrain. Such interventions will doubtless meet the charge of impracticality. Even still, they are no more distant than the goal of fitting contingent workers into a legal apparatus that was designed to exclude them.

CONCLUSION

Porn performers are among the growing numbers of gig workers vulnerable because of fundamental weaknesses in the design and enforcement of employment law. When they work under a boss, they find neither the protections nominally afforded to employees nor the autonomy and profit claims to which independent contractors are legally entitled. There are three areas in which these harms most acutely take their toll: occupational health risks for which workers bear both embodied and economic costs, unchecked racist discrimination, and the long-term economic costs of forfeited copyright. The common sense of worker-friendly legal analysis is to advocate for a clarified test with which courts might determine employment status and stricter enforcement against those employers who misclassify their workers. Indeed, workers in many gigified industries have organized around such demands.

Because full-time waged work is so deeply bound up with social citizenship in the United States, appeals to make gig work look more like standardized employment harden rather than destabilize the boundary between who is and is not protected. That boundary—between worker and non-worker, or employee and gigified contractor—is an artificial one. Inclusion within it comes at a high cost to autonomy and offers meager rewards. Porn performers overwhelmingly reject this approach and its acquiescence to a bargain that asks workers to choose between autonomy and protection. They point to a horizon that renders workers less tethered to their bosses, not more. A policy program premised on undoing the autonomy/control dichotomy rather than refining tests which seek to clarify it best serves porn workers' claims to autonomous work *and* social citizenship. It also responds to the material conditions of the broader world of work, one in which even those with recognized employee status find its benefits more elusive than ever.

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252. Cherry, *supra* note 29, at 577.