Condom Sense: Regulating and Reforming Performer Health & Safety in the Adult Film Industry

Chris Motyl

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Labor and Employment Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol32/iss1/6
Condom Sense: Regulating and Reforming Performer Health & Safety in the Adult Film Industry

"The result of this unsafe work environment is a public health crisis..."

I. INTRODUCTION

On August 21, 2013, adult film actress Cameron Bay announced her recent infection with human immunodeficiency virus ("HIV") at a Hollywood press conference coordinated by the AIDS Healthcare Foundation ("AHF"). Surrounded by members of the media and other adult film actors, Bay emotionally recounted the last scene she performed in at a public bar in San Francisco for internet pornography company Kink.com. While filming a sex scene without the use of a condom, Bay was exposed to a bleeding cut on the genitalia of her unidentified co-star. Despite the male performer's open wound, which elevated the already obvious and inherent hazards of unprotected sex,

---

1. The reader is advised of the necessarily descriptive and graphic language inherent in discussing the issue of condom use in adult films and analyzing health risks posed to workers including the acquisition and transmission of sexually transmitted diseases and human immunodeficiency virus.

2. AB 1576 (Hall) Adult Film Worker Safety FACT SHEET, Assemblymember Isadore Hall III, http://asmdc.org/members/a64/attachments/AB1576FactSheet.pdf (last updated June 18, 2014).

3. See About HIV/AIDS, CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/basics/whatishiv.html (last updated Feb. 12, 2014). HIV is the acronym for human immunodeficiency virus, the virus that causes acquired immunodeficiency syndrome ("AIDS"), the most advanced stage of HIV infection. See id.

4. AIDS HEALTHCARE FOUND., http://www.aidshealth.org/#/about (last visited Oct. 9, 2014). The Aids Healthcare Foundation (AHF) is the largest global AIDS organization, currently providing medical care and/or services to nearly 350,000 individuals in thirty-six countries worldwide in the United States, Africa, Latin America, Asia, and Europe. Id.


6. See id.

7. Id.
the cameras kept rolling.\(^8\)

In response to Bay’s positive HIV test, the adult film industry’s (“AFI”) chief trade group, the Free Speech Coalition (“FSC”),\(^9\) imposed an industry-wide moratorium, halting the filming and production of adult film for six days.\(^10\) Just one week after the moratorium was lifted, Rod Daily, another adult performer and Bay’s long-term boyfriend, announced that he had also tested positive for HIV.\(^11\) Despite the second HIV contraction in two weeks, a second moratorium was not implemented until two days later, when a third actor came forward with another HIV-positive test result.\(^12\) In response to the third HIV transmission within the adult film community, the FSC froze industry production for two weeks, from September 6, until September 20, 2013.\(^13\) In addition, the FSC publicly announced plans to increase the frequency of HIV/STD testing from a monthly basis to mandatory testing for all actors every fourteen days.\(^14\)

It was this series of HIV outbreaks in such a brief time span that reignited the frenzied debate over mandatory condom use in the AFI in Southern California.\(^15\) In November 2012, the Safer Sex in the Adult Film Industry Act (“Measure B”) was introduced to voters as a ballot initiative during the county election.\(^16\) The proposed law was introduced as a mechanism to preserve the health and safety of both the adult film community and the public at large, and among other provisions, would have required mandatory condom use during the production of adult

\(^8\) See id.


\(^10\) Kathleen Miles, Yet Another HIV-Positive Porn Performer Leads to Third Shutdown, HUFFINGTON POST (Dec. 6, 2013, 7:02 PM), http://www.huffingtonpost.com/2013/12/06/fourth-hiv-porn_n_4401064.html.


\(^12\) Chris Morris, Mounting HIV Cases Have Porn Industry Questioning Its Own Trade Group, CNBC (Sept. 12, 2014, 2:30 PM), http://www.cnbc.com/id/101029395.


\(^14\) See id.

\(^15\) See discussion infra Part II.A. The debate on implementing mandatory condom use in adult film surfaced multiple times throughout the 2000s in response to similar outbreaks of HIV among industry performers. See infra Part II.A.

films in Los Angeles County. \(^\text{17}\) AHF, the country’s largest non-profit HIV/AIDS healthcare provider, \(^\text{18}\) and vigorous supporters of Measure B were met with vehement opposition from AFI executives, producers and performers alike. \(^\text{19}\) This turmoil between industry executives and public health organizations reached a fever pitch after the controversial legislation passed via referendum on November 6, 2012, with fifty-six percent of Los Angeles voters in favor of Measure B. \(^\text{20}\)

The adult film industry responded to the passage and subsequent attempt by county officials to implement Measure B with staunch opposition in the media, rampant noncompliance, and legal action. \(^\text{21}\) In August 2013, Steve Hirsch, the founder and CEO of Vivid Entertainment, LLC ("Vivid"), along with performers Logan Pierce and Kayden Kross, filed a request to the Ninth Circuit Court of Appeals to accelerate a hearing to reverse U.S. District Court Judge Dean D. Pregerson’s ruling in Vivid Entertainment LLC v. Fielding that had upheld the constitutionality of Measure B. \(^\text{22}\) In *Vivid*, the court denied plaintiff’s request for a preliminary injunction against implementation of Measure B in Los Angeles County, citing the likelihood that plaintiff’s First Amendment claim against the condom requirement for filming pornography would likely fail. \(^\text{23}\) The court also noted that interveners, \(^\text{24}\)
AHF, was required to present ample evidence to illustrate that Measure B targets harms that "are real, not merely conjectural, and that [Measure B] will in fact alleviate those harms in a direct and material way." Data provided by the Los Angeles County Department of Public Health concerning transmission of sexually transmitted diseases ("STDs") within the adult film community persuaded the court that requiring condoms on adult film sets would provide a health benefit to performers. Vivid and its co-plaintiffs sought to effectively repeal Measure B.

Meanwhile, nearly a year after the passage of Measure B, County Officials continued to struggle in developing an efficient method for implementing and enforcing Measure B across the sprawling landscape of Los Angeles County. The inadequacies of Measure B, the AFI's ability to circumvent application of the law by shifting production to neighboring counties and exploiting other jurisdictional loopholes, and the ambiguity and inconsistency surrounding the ability of California's Department of Industrial Relations, Division of Occupational Safety and Health's ("Cal/OSHA") to regulate the AFI prompted Assemblymember Isadore Hall, III (D-Compton) to introduce legislation to effectively expand Measure B to the entire state of California by creating a new section of the state labor code specific to regulation of the
Assemblymember Hall has publicly announced frustration towards the industry’s treatment of adult film performers, stating: “Enough is enough. Adult film actors placed their trust in an industry that has put porn profits above worker safety. It is time for the Free Speech Coalition and the adult film industry to stand up for the workers that made them successful.”

Despite two previously failed attempts to expand Measure B to the state level, supporters of industry reform are optimistic that the legislation reintroduced on January 30, 2014 as AB 1576, will be successful in the spring 2014 senate term.

The recent HIV outbreaks and industry-wide moratoriums, coupled with current action in the courts and legislature, have rekindled the flames on both sides of the debate over mandatory condom use in the AFI. The media has added fuel to the fire with coverage of stories like that of Cameron Bay, and reports highlighting the prevalence of HIV and other STDs within the historically self-regulating AFI.

The realm of adult film, formerly considered to be taboo and on


When it comes down to it, adult film actors are employees, like any other employee for any other business in the state . . . We have an obligation to ensure that all workers, regardless of the type of work, are protected from workplace hazards and injury. AB 332 will give these actors a proven way to prevent the spread of disease while creating a safer workplace for actors throughout this growing industry.


34. See generally, e.g., Abram, supra note 33.
35. See infra Part II.A. (discussing the history of HIV outbreaks in the AFI).
36. See infra part II.B.
the fringes of society, has emerged as a pervasive and commercially lucrative institution globally, nationally, and locally in Southern California. After accepting the shortfalls of industry self-regulation and largely overlooking the safety of an entire class of workers exposed to obvious, intrinsic, grave, and preventable risk since the 1980s, it is finally time for regulatory reform in the AFI.

This note will examine the need for government regulation of the AFI with a specific focus on implementation and oversight of actor health and safety measures. Part I of this note will track the rapid evolution of the AFI from its origins as a fledgling, peripheral trade in Southern California to a multi-billion dollar industry that currently enjoys a universal presence. Part II will explore the presence and prevalence of grim and life-threatening risks to which workers in the AFI are needlessly and routinely exposed. Part III will sternly analyze the deficiencies in the industry’s current system of “self-regulation,” and will thoroughly examine the legislation governing actor safety in the AFI prior to the passage and implementation of the largely ineffective and jurisdictionally limited Measure B. Part IV will provide a solution to the critical threat to actor safety in the AFI through legislative means. This section will argue that the California Legislature should approve and implement the legislation proposed by Assemblyman Hall mandating condom use during the production of all adult films produced in the state of California.

Finally, this note will present a blueprint for implementing and enforcing mandatory condom use in the AFI through a comparative analysis of the AFI to the legal prostitution industry in Nevada. An industry that is strikingly similar to the AFI and poses similar health and safety concerns for its workers can be used as a model for the AFI as it transitions from self-regulation to an era of reform and oversight under a newly adopted provision of the California state labor provision.

38. See de Cesare, supra note 30, at 670-71, 677-78.
II. "THE SAN PORN-ANDO VALLEY"—THE ORIGIN AND ECONOMY OF THE AFI IN SOUTHERN CALIFORNIA.

A. Adult Film & the First Amendment

Prior to the 1980s "pornography" and "obscenity" were virtually synonymous.\(^{40}\) In *Roth v. United States*, the Supreme Court held that the standard for judging obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest."\(^{41}\) Pursuant to the Supreme Court’s decision in *Roth*, material deemed "obscene" fell decidedly outside the scope of the First Amendment and its protection for freedom of expression.\(^{42}\) For this reason, pornography was largely taboo, and the creation and distribution of pornographic materials was conducted in a predominantly clandestine manner.\(^{43}\) During the early 1970s pornography’s status as purely obscene material began to evolve.\(^{44}\) Through a series of decisions, the courts began to tweak and refine the obscenity standard established in *Roth*.\(^{45}\)

In *Miller v. California* the court seized the opportunity to reexamine the paramount decision in *Roth* and explore the distinctions between materials that are pornographic and those that are obscene.\(^{46}\) The *Miller* Court created a new three-prong test to determine whether material is obscene.\(^{47}\) This test requires the trier of fact to consider:

1. whether the average person applying contemporary community standards—not national standards—would find that the work appealed to the prurient interest;
2. whether the work depicts sexual conduct, as defined by state law, in a patently offensive way; and
3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

---

42. *Id.* at 485 (holding that "obscenity is not within the area of constitutionally protected speech or press.").
43. See de Cesare, *supra* note 30, at 671 n.13, 674.
44. See *id.* at 671-72.
45. See *Memoirs v. Massachusetts*, 383 U.S. 413, 418-19 (1966) (holding that material is not obscene unless it is "utterly without redeeming social value"); *Jacobellis v. Ohio*, 378 U.S. 184, 191-92, 195 (1964) (expanding the Roth standard by holding that "community standards" applicable to an obscenity determination should be "national community standards" rather than the context of the local community standards in which a given case may arise).
47. *Id.* at 19-20, 24; de Cesare, *supra* note 30, at 672-73.
work as a whole lacks serious literary, artistic, or scientific value.48

This decision advantageously impacted those working in the AFI, as they were now able to produce and distribute pornography without the looming threat of a criminal prosecution.49

In the post-Miller era, law enforcement officials and prosecutors sought other ways to hinder production of pornography.50 A notable and rather successful approach entailed the prosecution of producers of adult films under California's pandering laws, which made it illegal to hire persons for the purpose of prostitution.51 In 1988, the California Supreme Court precluded the application of state pandering statutes to the hiring of paid performers for participation in a non-obscene commercial film portraying explicit sexual acts, citing First Amendment grounds.52 Essentially, the court in People v. Freeman made a notable distinction between prostitution and "being paid to have sex on camera as an actor."53

By eliminating pandering statutes as a viable basis for attacking the filming of sexual acts on camera, the Freeman decision brought a new validity to adult film.54 The Freeman decision effectively legalized the production of adult film in California.55 The production of adult film quickly moved out of the shadows of society and into the limelight of Southern California's booming and iconic entertainment industry.56

48. de Cesare, supra note 30, at 673; see Miller, 413 U.S. at 24.
49. See de Cesare, supra note 30, at 673.
50. See id. at 673, 673 n.28.
51. See id.
52. See People v. Freeman, 758 P.2d 1128, 1129, 1131-32 (Cal. 1988) (holding that the first amendment permits actors to be hired to perform sexual acts on camera for the purpose of creating a non-obscene movie as long as they are not being paid "for the purpose of sexual arousal or gratification [of the filmmaker] or the actors").
54. See de Cesare, supra note 30, at 674.
55. See id. at 675; Sbardellati, supra note 16 at 142. California is one of just two states that recognize the production of pornography as a legal undertaking. The other state is New Hampshire. See New Hampshire v. Theriault, 960 A.2d 687, 689-90, 692 (N.H. 2008) (holding that the prostitution statute was overly broad as applied to the defendant, who had offered to remunerate a couple to have sexual intercourse while being videotaped). The Court emphasized the facts unique to the case and the charges brought by the prosecution: "We note that the State did not charge the defendant with offering to pay them to engage in sexual contact, which would have required the state to prove that he acted for 'the purpose of sexual arousal or gratification' and thus engaged in conduct that was not constitutionally protected." Id. at 692. See also Marc J. Randazza, N.H. Supreme Court Rules that Porn is Not Prostitution, DIGITAL MEDIA LAW PROJECT (Dec. 12, 2008), http://www.dmlp.org/blog/2008/nh-supreme-court-rules-porn-not-prostitution.
56. See de Cesare, supra note 30, at 675-76, 676 n.45.
B. Capitalism in the "Porn Capital": The Industry Boom in the Post-Freeman Era

Under the People v. Freeman decision, California became the first state to permit the production of pornography and, as a result, functioned as the headquarters of a burgeoning new industry. The epicenter of this newly legal business established its foothold in the San Fernando Valley. Juxtaposed next to the global entertainment hub of Hollywood, the AFI was able to take advantage of the abundance of resources available in Los Angeles County, ranging from studio space and warehouses for filming, to numerous local manufacturing and packaging firms to aid in the distribution of adult films. The Valley’s proximity to Hollywood primed Southern California, specifically Los Angeles County, for its reign as the de facto “porn capital of the world.” For this reason, Los Angeles County is home to some of the largest, most established studios in the industry, such as Wicked Pictures, Vivid Entertainment, Sin City Films, and Evil Angel Productions.

While Los Angeles County is famous for its large-scale adult film studios, California’s milestone legalization of pornography, paired with the technological innovations of the VCR and handheld video camera, sparked the development of a cottage industry of independent amateur adult film producers. Affluent sections of the Valley provide a surplus of “opulent mansions that often serve as theatrical backdrops” for smaller scale producers seeking to film in private residences rather than at major studio sites. The progression and innovation of internet and webcam technology has further increased the capability of individuals to produce and distribute adult films on an even greater scale. A report

57. See id. at 675.
58. See Kriegel, supra note 39 ("The porn industry became centered here in the 1970s. The adult film production companies needed large, cheap warehouse spaces to store the thousands of adult film videos that were being shipped all over the world. Those secluded warehouse spaces turned out to also be a perfect spot for filming.").
60. See Kriegel, supra note 39; see also, e.g., de Cesare, supra note 30, at 675 (calling California “the worldwide center of the adult film industry”).
61. See de Cesare, supra note 30, at 675.
62. See id.
63. See Christina Jordan, Note, The XXX-Files: CAL/OSHA’s Regulatory Response to HIV in the Adult Film Industry, 12 CARDOZO J.L. & GENDER 421, 423 (2006); see also de Cesare, supra
issued in 2006 revealed that U.S. internet porn sites, a segment of the AFI, generated $2.84 billion in revenue in that year alone, with more than 260 new sex sites being launched online daily.64

Another resource pivotal to the success of the AFI in Los Angeles County is its seemingly endless talent pool of young, aspiring actors, producers and filmmakers.65 While the business fosters a high turnover rate, which can make tracking employment statistics difficult, the county’s roughly 200 registered production companies employ an estimated 1200-1500 adult film actors at any given time.66 Additionally, it is estimated that the industry provides roughly 10,000 jobs in ancillary fields, ranging from carpentry and set design to make-up artists, lighting technicians, manufacturing, packaging, web design, payroll processing and food service positions.67

Similar to its employment figures, tracking the annual revenue generated by adult film can prove difficult and often varies dramatically. In the industry’s heyday, annual revenue estimates ranged anywhere from $4.4 billion to $15 billion.68 Financial experts explain such variances in generated revenue as the result of calculating and attaching profits generated by ancillary market segments.69 To put such a revenue stream into perspective, the motion picture and agriculture industries in the state of California generate revenues of $22 billion and $37 billion respectively.70 However, like most other industries, the sphere of adult

---

65. See Jordan, supra note 63, at 423 (discussing the abundance of young talent that flocks to Los Angeles each year in search of fame in Hollywood).
67. See Rogers, supra note 16.
68. See de Cesare supra note 30, at 676; see also, e.g., Chris Morris, HIV Strikes Again—What Does it Mean for the Porn Industry?, CNBC (Sept. 4, 2013, 3:19 PM), http://www.cnbc.com/id/101008596.
69. See de Cesare supra note 30, at 676-77. Ancillary market segments contributing to inflated AFI revenues include income generated by "adult video networks and pay-per-view movies on cable and satellite television, in-room hotel movies, websites, phone sex, sex toys, and magazines." Id. at 677.
70. Thomas D. Elias, Los Angeles County Porn Condom Law Gets a Test, L.A. Daily News,
film has not been immune to the protracted economic downturn that began in 2009. While revenue streams purportedly reached as high as eleven figures in years past, a recent market analysis suggests a more modest income. Mark Kernes, an editor at the AFI trade magazine, Adult Video News, estimated that the industry generated $6 billion in revenues in 2007, just prior to the recession. Diane Duke, the Director of the FSC, suggested that revenues may have declined as much as 30%-50% in 2009, noting that one producer claimed revenue falloffs up to 80%. Today it is estimated that the AFI rakes in anywhere from $1.8 billion to $3 billion annually.

The approximate number of traditional motion pictures produced annually in Hollywood ranges from 500 to 550. The Theatrical Markets Statistics Report, most recently issued by the Motion Picture Association of America (“MPAA”) in 2012, revealed a slight uptick in the production of traditional motion pictures, reporting 677 films released in 2012. This figure is dwarfed by the estimated 3000 to 4000 adult films made each year in Southern California. At the peak of its

73. Fritz, supra note 72, at 53.
74. Id.
75. Sbardellati, supra note 16, at 139.
76. de Cesare, supra note 30, at 676.
79. See Fritz, supra note 72 (stating that while the recession has been detrimental to the production output and revenue streams of registered production companies, the problem has been "exacerbated" by piracy). "Piracy is the main problem. And the internet, with its copious free clips, is an increasingly viable alternative to the paid stuff." Id. But see also de Cesare, supra note 30, at 676-77 (noting that other reports on annual pornography production in Southern California have
adult film production in the 1980s and early 1990s, it was estimated that Los Angeles County produced as much 90% of all adult film. Today experts estimate that Los Angeles likely corners 60%-75% of the market, losing ground to competing locales such as Miami and Las Vegas. Los Angeles County neighbor, Ventura County, and areas around Phoenix, Arizona have also reported unsanctioned adult film shoots. As of November 15, 2013, Film L.A. had reported that only twenty-four permits for adult films had been filed in Los Angeles for the year, representing nearly a ninety-five percent falloff compared to requests filed at this time in the previous year.

Despite dips in revenues in recent years resulting from a lingering economic slump, adult film piracy, and the explosion of websites offering free adult content, financial analysts and industry experts maintain that the pornography business remains viable and vigorous. Vivid Entertainment, representing just one of the more than 200 registered production companies in Los Angeles County, boasted revenues in excess of $100 million in 2013.
III. INHERENT HEALTH RISKS IN THE AFI

The Center for Disease Control estimates that "[m]ore than 1.1 million people in the United States are living with HIV infection," nearly sixteen percent of whom are unaware of their HIV positive status.87 Studies also estimate that there are over 56,000 new HIV infections in the United States each year.88 While many can fall victim to HIV transmission, performers in the world of adult film are particularly vulnerable due to the very nature of their occupation.89 Performers are often required to engage in high-risk sexual acts, with great frequency, for extended periods of time and with multiple sexual partners.90 Like the AFI in Los Angeles County, the presence of STDs and fortunately, to a lesser extent, HIV transmission, are ubiquitous realities within the community of adult film performers.91 Stories of HIV transmission effecting adult film performers like Cameron Bay are not a recent phenomenon impacting the adult film landscape nor are they inexplicable fluke occurrences.92

A. A Timeline of HIV Outbreaks

The deadly, incurable disease of HIV has been looming in the milieu of the adult film community since the early days of the industry when it took root in Los Angeles County.93 The first outbreak of HIV within the AFI occurred in the 1980s and sent shockwaves through society and an industry still struggling to comprehend the life-threatening implications and severity of the largely unknown disease.94 This outbreak of HIV spanned from 1985 to 1989 and resulted in the deaths of twenty-seven adult film performers, including John C.95

90. See id.
91. See infra Part II.A-B.
92. See infra Part II.A.
Holmes,\textsuperscript{95} regarded by many as one of the most famed and prolific performers of all time.\textsuperscript{96}

Between 1992 and 1997 the industry faced additional encounters with this deadly disease when five female adult film performers contracted HIV.\textsuperscript{97} Los Angeles County health officials reported fourteen cases of HIV positive adult film performers between 1998 and 2003.\textsuperscript{98} An additional twenty-two cases were documented over a five-year period between 2004 and 2009, including sixteen confirmed and previously unpublicized cases.\textsuperscript{99} The most notable and publicized HIV outbreaks within the AFI occurred in 1998, 2004, 2010, and most recently in 2013.\textsuperscript{100}

In 1998, male performer Marc Wallice infected at least five female performers after exploiting the lax testing regime common in the industry and falsifying his HIV certificate.\textsuperscript{101} This incident marked the first large-scale outbreak within the industry since the 1980s.\textsuperscript{102} In 2004, male performer Darren James tested positive for HIV upon returning from an adult film shoot in Brazil,\textsuperscript{103} an exotic locale offering low-cost production and a talent pool of young woman willing to film unprotected sex scenes, requiring a minimal investment by directors and producers.\textsuperscript{104} It was widely believed within the industry that James contracted the disease on set in Brazil then carried it with him back to Southern California.\textsuperscript{105} Upon returning to the United States, James performed a scene with Canadian adult film actress Lara Roxx.\textsuperscript{106} The

\textsuperscript{95} Morality in the Media, supra note 93.
\textsuperscript{96} See John Holmes Biography, IMDb, http://www.imdb.com/name/nm0001360/bio?ref_=nmv_0 (last visited Oct. 7, 2014); see also, e.g., McNeil, supra note 94 (calling John Holmes “the most famous male actor of that era”).
\textsuperscript{97} Morality in the Media, supra note 93.
\textsuperscript{99} Id. (discussing the largest outbreak of HIV in the AFI since 2004).
\textsuperscript{100} See infra pp. 21-25.
\textsuperscript{102} See Morality in the Media, supra note 93.
\textsuperscript{103} See Jordan, supra note 65, at 424.
\textsuperscript{104} See id. at 423-24 (noting that in Brazil, many young female performers are willing to shoot films without condoms for nominal increases in pay). “Brazil boasts an 80% condom usage rate in their adult films, while still maintaining a large share of the international market as the world’s second largest adult film industry.” Grudzen & Kerndt, supra note 66, at 2 (footnote omitted).
\textsuperscript{105} See Jordan, supra note 65, at 424.
\textsuperscript{106} Id.
two tested positive for HIV on April 10, 2004. Thirty production companies within the industry responded by participating in a sixty-day moratorium and scrambling to prevent further transmission of the disease by testing all performers that came in contact with James and Roxx. James reported that in the weeks following his return from Brazil he engaged in unprotected sexual acts on camera with thirteen female partners, three of whom tested HIV positive after having tested negative in the previous thirty days. James, the index patient, was confirmed as the source of HIV infection for the three infected women: the individual source of his HIV transmission is unknown.

A similar spate of HIV rocked the AFI in 2010. In December of 2010 the Los Angeles County Department of Public Health reported that male crossover performer, Derrick Burts, had been diagnosed with acute HIV infection in October. Following the positive test result, the actor identified fifteen sexual partners he had contact with prior to his diagnosis. Of the fifteen contacts, including five men and ten women, fourteen were occupational encounters, while the remaining contact occurred in Burts’ personal life. Of the fifteen partners, five sexual contacts were available for testing: the lone non-occupational contact was diagnosed with pharyngeal gonorrhea, two professional contacts

107. Id. at 424-25.
108. Id. at 424-25.
109. HIV Transmission in the Adult Film Industry — Los Angeles, California, 2004, supra note 89.
111. See Jordan, supra note 65, at 424 (“It is believed that James contracted the virus while working on a production in Brazil on March 10, 2004.”) (emphasis added).
112. See Brian Chase, An Analysis of Potential Liability Within the Adult Film Industry Stemming from Industry Practices Related to Sexually Transmitted Diseases, 23 STAN. L. & POL’Y REV. 213, 227 (2012) (clarifying that “crossover” performer is the moniker denoting an adult film performer who performs in both the heterosexual and homosexual adult film industries, or an actor who also works as a homosexual escort).
114. MEZA ET AL., supra note 113, at 8.
115. Id.
tested positive for HIV, and the remaining two contacts tested negative for HIV and STDs of any kind. The remaining contacts were unavailable for screening. The sexual encounters involving Burts implicated twelve different filming locations and ten different production companies. Burts confirmed that he did not use condoms during any of the vaginal or oral sex scenes but stated that he used them while filming anal sex scenes. The report, compiled by Dr. Francisco Meza, noted that limited cooperation from companies within the AFI hindered the investigation.

A moratorium on adult film production was instituted once more in August of 2011 after Diane Duke, the Executive Director of the FSC, received news of a performer’s HIV positive test result. Duke stated that the performer tested positive at an out-of-state facility, which was later confirmed to be located in Florida. The industry trade group halted production and urged all actors who had performed in scenes with the performer to get tested immediately. The moratorium was lifted a week later after the unidentified performer was retested and received HIV-negative test results. Although this incident (fortunately) proved to be a false alarm, it represents one more instance in a series of events that underscores the legitimate hazards performers are subjected to as byproduct of their profession.

In 2013 the AFI was riddled with a series of HIV outbreaks spanning from late August to early December. In addition to Cameron Bay, Rod Daily, and the third, unidentified performer, rumors surfaced that a fourth anonymous performer had come forward as HIV positive. News of the fourth positive test surfaced amidst the

116. See id.
117. See id. ("Nine [contacts] had unknown status.").
118. Id.
119. Id.
120. Id.
123. Knoll, supra note 122. The name, age, and gender of the performer were not released to the public. Id.
124. Id.
125. See Shire, supra note 28.
126. See Noah Rayman, Porn Film Industry Halted as Fourth HIV Case Emerges, time (Sept. 10, 2013), http://nation.time.com/2013/09/10/porn-film-industry-halted-as-fourth-hiv-case-
industry’s second ongoing moratorium, during the month of September. The rumor of a fourth infected performer increased tensions between the Free Speech Coalition and the AHF, parties already fiercely clashing over the topic of mandatory condom use in adult film. The FSC refuted the AHF’s reports of a fourth performer coming forward and claimed that the AHF was seeking information from the Coalition as a publicity stunt to further their agenda to advocate for mandatory condom use in adult film.

With tensions mounting between the FSC and the AHF and the issue of condoms in porn back in the media’s spotlight, a fifth performer, whose identity has also gone unreported, tested positive for the disease. The FSC announced the industry’s most recent moratorium on December 6, 2013. Free Speech Coalition CEO, Diane Duke, discussed the third moratorium and the fifth purported HIV positive performer stating:

We are taking every precaution while we do research to determine if there’s been any threat to the performer pool. . . . We take the health of our performers very seriously, and felt that it was better to err on the side of caution while we determine whether anyone else may have been exposed.

“Industry expert Mike South report[ed] the actor is a male, and is on the ‘straight side of the biz,’” although he did not reveal the performer’s identity.

News of the industry’s fifth infected performer in 2013 provoked a response from AHF President Michael Weinstein: “How many more
performs need to become infected for the industry to comply with existing regulations and laws requiring workplace safety?" 135 HIV acquisition and transmission represents the high-water mark of occupational hazard that adult film performers are exposed to each time they arrive on set and film sex scenes without the use of condoms, but it is not the only risk that threatens the health and safety of this class of workers. 136 Although the specter of HIV garners the lion’s share of the media’s attention in the debate over mandatory condoms in adult films, advocates for reform of the AFI are similarly concerned with performers’ needless and excessive exposure to a laundry list of sexually transmitted diseases and infections. 137

B. The STD Epidemic in the AFI

“Chlamydia and gonorrhea are the two most commonly reported communicable diseases in the United States with over 1.2 million and 300,000 cases respectively in 2009.” 138 The risks of disease transmission and acquisition during sex are well known and documented. 139 Despite inherent risks, the use of condoms on adult heterosexual film sets is reportedly very low—”approximately 17% for adult film performers.” 140 “In a [2011] systematic review of condom use among a randomly selected sample of adult films released between 2005 and 2006, penile-vaginal and penile-anal intercourses were projected in just 3% and 10% of heterosexual scenes, respectively.” 141

Due to the nature of an adult film performer’s occupation, they are exposed to an abnormally high number of sexual partners and engage in sexual acts much more frequently. “[T]he average American male has seven female sexual partners in a lifetime;” however it is quite possible

135. Id.
136. See Grudzen & Kendt, supra note 66, at 1; See also Klausner & Katz, supra note 88, at 649 (discussing the hazards adult film industry workers face of contracting chlamydia and gonorrhea); Chen, supra note 133 (discussing an syphilis outbreak in August of 2012).
137. See, e.g., Grudzen & Kendt, supra note 66, at 1-2; Klausner & Katz, supra note 88, at 649.
139. Id.
for a male performer to have seven sexual partners in a single day while producing adult films. 142 "The director of a clinic, which provides the majority of STD testing for performers, stated that 'an average popular male in the industry, through partner-to-partner-to-partner transmission, reaches approximately 198 people in three days.'" 143 The director also noted that while the overall population of performers working in the industry at any given time may appear small, generally averaging around 1200-1500 individuals, "[the performers] have a very large sexual network and serve as a bridge population for STD transmission to and from the general population." 144 The average size of the workforce in the AFI may seem insignificant at first glance; however the average career in the industry lasts a mere eighteen months, indicating that the total number of actors who have worked on adult film sets is much higher. 145

With such startling exposure rates and the exorbitant number of sexual partners inherent with work in the industry, the rampant lack of condom use within the adult film community makes for an especially perilous combination. "Between January 2003 and March 2005, approximately 976 performers were reported with 1,153 positive STD test results." 146 In 2011, the Los Angeles County Department of Public Health completed a study to gauge the pervasiveness and recurrence of chlamydia and gonorrhea infection among adult film performers. 147 The study revealed that the rate of chlamydia incidence among performers was eight and a half times higher than the rate of infection among Los Angeles County residents between the ages of 18-29 and thirty-four times higher than infection rates of the general population as a whole. 148 Rates of gonorrhea infection among performers compared to industry outsiders were even greater: incidence among performers was eighteen times higher than rates among 18 to 29-year-old age group and sixty-four-times higher than that of the general population. 149 The test also
revealed reinfection rates among adult film performers as high as 26.1% within a single year.\textsuperscript{150}

These alarming results dramatically underscore the threat facing performers within the industry and highlight the need of safety measures to prevent the transmission and spread of these diseases.\textsuperscript{151} Further, grim results indicated that 28\% of participants had at least one infection.\textsuperscript{152} The study also indicated that the use of condoms always for vaginal and anal intercourse on and off set was remarkably low: 3\% and 10\% respectively.\textsuperscript{153} Pre-existing infection with one or more STDs puts an individual at greater risk of HIV transmission.\textsuperscript{154}

In concluding the study, the Los Angeles County Department of Public Health advised the need for control strategies to protect workers within the industry and recommended the promotion of condom use on set to prevent workplace acquisition and transmission of STDs and HIV.\textsuperscript{155} The grave results of this study provide a direct and stark contradiction to the non-scientific claims by the FSC that STD infection rates among adult film performers are lower than in the general population.\textsuperscript{156} Former U.S. Surgeon General Joycelyn Elders opined on the lack of oversight in the AFI and the potential impact on the general welfare of the public: “These folks [adult film performers] are a reservoir. They don’t just have sex with one another. They have sex with regular people outside their business—doctors, lawyers, teachers, your next-door neighbor.”\textsuperscript{157} Such an observation highlights the threat posed to the mainstream public, in addition to the hazards that AFI workers are routinely and needlessly exposed to as a prerequisite to receiving a paycheck.

Similar to the series of HIV outbreaks within the AFI, bouts of STD
infections have impacted the industry and resulted in business-wide moratoriums. Most recently, an adult film actor tested positive for syphilis in August of 2012. News of the positive test resulted in a voluntary moratorium promulgated by the industry trade group, the Free Speech Coalition. Dr. Jonathan Fielding, Director of the Los Angeles County Department of Public Health, reported five initial cases of syphilis. This number jumped to nine less than a week later. Meanwhile, public health officials anticipated that the discovery of more cases was likely to follow. Joanne Cachapero, a spokeswoman for the FSC, stated that the industry would be shut down “until the risk to performers in the industry has been properly assessed and all performers have been tested.” The FSC called for more than 1000 performers to be tested and ordered that preventative shots of antibiotics be administered to all performers due to the difficulty in detecting the disease. According to Cachapero, the performers can return to set ten days after receipt of a shot of penicillin, the proscribed antidote for syphilis infection.

During the ten-day moratorium, as news of the syphilis outbreak spread among the tight-knit adult film community and permeated the national news conversation in major media outlets from New York to Los Angeles, the source of the syphilis outbreak came forward. Jesse Spencer, an eighteen-year industry veteran who uses the stage name

158. See generally Syphilis Scare Halts Porn Industry Filming in LA as Health Officials Investigate, CBS NEWS (Aug. 21, 2012, 1:35 PM), http://www.cbsnews.com/news/syphilis-scare-halts-porn-industry-filming-in-la-as-health-officials-investigate/ (“Syphilis is transmitted through contact with syphilis sores, which mainly occur on external genitals, vagina, anus, or inside the rectum. . . . The disease can be transmitted through a variety of sex acts. Genital sores caused by syphilis make it two to five times easier to transmit and acquire HIV . . . .(emphasis added)”); See also Syphilis- CDC Fact Sheet, CDC, http://www.cdc.gov/std/syphilis/stdfact-syphilis.htm

159. Syphilis Scare Halts Porn Industry Filming in LA as Health Officials Investigate, supra note 158.


161. Id.

162. Id.

163. Syphilis Scare Halts Porn Industry Filming in LA as Health Officials Investigate, supra note 158.

164. Id.

165. Id. “A single shot of penicillin can cure a person who has had syphilis for less than a year, but additional doses are necessary for people who have had the STD for a longer period.” Id.

“Mr. Marcus,” told *Adult Video News* (“AVN”), an industry trade journal, that he tested positive for syphilis on July 12, 2012, just one day after feeling ill and visiting his personal doctor. On July 13, Mr. Marcus received a shot of penicillin and was told to refrain from sexual intercourse for seven to ten days. During this interview with AVN, Mr. Marcus revealed that his personal doctor was apparently unaware of his occupation. Despite a follow-up test on July 24 that revealed syphilis was still in his system, Mr. Marcus confessed to shooting a sex scene that same day. According to the Los Angeles County City Attorney’s Office, Mr. Marcus also filmed a sex scene on July 26.

Mr. Marcus further admitted to concealing and later falsifying the positive syphilis test result. According to the performer, on set producers failed to reference his name in the Talent Testing Service (“TTS”) database and instead asked to see physical proof of his test results, upon which Mr. Marcus showed the producer a copy on his cellphone but purposely hid the area of the test showing he tested positive for syphilis. When prompted by a director on another set to confirm that he was HIV/STD-free, Mr. Marcus produced doctored test results. Not persuaded by the “suspicious” appearance of the test results, an investigation was launched concerning the status of Mr. Marcus’s health.

On June 4, 2013, Mr. Marcus was “convicted of knowingly exposing at least two co-stars to syphilis. . . .” Mr. Marcus was sentenced to thirty days in jail in addition to three years of probation and fifteen days of community service. Regarding Mr. Marcus’ conviction City Attorney Carmen Trutanich stated that “[t]he potential

168. Murray, supra note 166.
169. Id.
170. Id.
171. Lowrey, supra note 167.
172. Id.
173. Id.
174. Murray, supra note 166.
175. Id.
176. Id.
177. Lowrey, supra note 167. “Jesse Spencer, 42, pleaded no contest to exposing another to a communicable disease.” Id.
178. Id.
spread of syphilis and other communicable disease is a serious threat to our entire community . . . . My office will continue to hold accountable those who place the health and welfare of others in danger in such a reckless and thoughtless manner.\(^{179}\) The City Attorney further noted that neither actress contracted syphilis despite sexual contact with Mr. Marcus.\(^{180}\) The Associated Press confirmed that none of Mr. Marcus's partners tested positive for the disease.\(^{181}\)

In response to the 2012 syphilis outbreak, director of the Los Angeles County Department of Public Health, Dr. Jonathan Fielding commented on the pervasiveness of STDs within the AFI: "It's not surprising in the adult film industry that we would have transmission of all sexually transmitted diseases because they're having unprotected sex, often times with multiple actors . . . ."\(^{182}\) Dr. Fielding further commented: "I doubt that the rate of sexually transmitted disease[sic] is higher anywhere else."\(^{183}\) Comments by public health officials such as Dr. Fielding, and bold statements by the likes of City Attorney Carmen Trutanich beg the question: At what point will government officials intervene to regulate a labor force that is both vastly under-protected and tremendously vulnerable to potentially life-threatening, but ultimately preventable, risks?

While the case of Mr. Marcus and the 2012 syphilis outbreak reintroduced the issue of actor safety in the AFI back into the national discussion, the need for regulatory reform in the industry is even more dire in 2013. A frightening reality looms in the background of the syphilis outbreak of 2012: despite Mr. Marcus claiming to be the source of the STD,\(^{184}\) official reports and test results indicate that the true index patient remains unknown.\(^{185}\) How many more cases may have gone undetected across a labor force that consistently fails to implement adequate work place safety practices on a routine, or even infrequent, basis?

\(^{179}\) Id.
\(^{180}\) Id.
\(^{181}\) Murray, supra note 166.
\(^{182}\) Health Officials: 9 Syphilis Cases in LA Porn Industry Outbreak, More Expected, supra note 160.
\(^{183}\) Id.
\(^{184}\) See supra text accompanying notes 166-68. He was neither the cause of the nine reported cases of syphilis in the AFI nor did he transmit the disease to the two actresses he had sexual contact with while still infected. See generally Lowrey, supra note 167.
\(^{185}\) See Murray, supra note 166.
IV. A CAL/OSHA ANOMALY: THE AFI AS A SELF-REGULATING EMPLOYMENT SECTOR

Enacted in 1973, the California Occupational Health and Safety Act ("Cal/OSHA") was implemented to ensure that all men and women working in California are afforded "safe and healthful" workplace conditions. The scope of this Act grants Cal/OSHA the authority and jurisdiction to oversee and regulate nearly all private employers within the state of California. Despite this broad grant of statutory authority, Cal/OSHA has been historically reluctant to oversee and regulate the adult film industry. In the absence of regulatory oversight, the AFI has adopted a system of self-regulation that consists principally (and exclusively) of performer testing and screening for HIV and a limited number of STDs on a bi-weekly basis.

A. The P.A.S.S. System: The AFI's Sole Mechanism for Regulating Performers' Health & Safety

The current regime of testing within the AFI is an off-shoot of the Free Speech Coalition, and operates under the acronym "PASS" which stands for "Performer Availability Screening Services." PASS is a descendant of the now defunct Adult Industry Medical Service, and provides protocol and a database for screening of STDs within the adult film industry. Under this system, performers seeking to work in the

186. CAL. LAB. CODE § 6300 (West 2003).
187. See § 6307. The division has the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary adequately to enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring protection of the life, safety, and health of every employee in such employment or place of employment.
188. See Grudzen & Kerndt, supra note 66, at 3-4.
191. Id.
192. See About Us, FSC-PASS (Performer Availability Scheduling Services), http://www.fscpass.com/about_us (last visited Sept. 11, 2014).
industry must be cleared of HIV, syphilis, hepatitis B and C, chlamydia, gonorrhea and trichomoniasis within fourteen days of their shoot date.\textsuperscript{193} Testing information regarding the health status of each active performer is stored in the PASS database and made available to directors, producers, and agents.\textsuperscript{194} Any performer without a recent test record or who shows any irregularity is supposed to be barred from performance.\textsuperscript{195} In the event of a performer testing positive for HIV, the FSC is alerted and then will promptly call an industry-wide moratorium that immediately halts production.\textsuperscript{196} The FSC and PASS then work to determine all sexual contacts the infected performer may have had and then proceed with the testing and retesting of first generation partners to ensure that they have not been exposed to infection.\textsuperscript{197}

While testing protocols have improved markedly and the FSC has taken steps to ensure that the majority of production companies use the PASS system, there are still substantial flaws with the industry's handling of the spread of HIV and other communicable diseases among its work force.\textsuperscript{198} The primary shortcoming of the AFI's current system of disease prevention is its myopic approach. The FSC, executives, directors, producers, and performers alike, have relied solely on industry testing practices and have vehemently opposed the use of condoms or other barriers during the filming of penetrative sex acts.\textsuperscript{199} This anti-condom attitude has persisted despite the well-known efficacy of condoms against the spread of HIV and other diseases.\textsuperscript{200} Most notably, the World Health Organization ("WHO") declared the male latex condom to be "the single, most efficient, available technology to reduce the sexual transmission of HIV and other sexually transmitted infections."\textsuperscript{201}

Screening for HIV and other STDs is a largely reactive measure that is most effective as a tool to prevent new potential performers already infected with disease from entering the industry. Screening alone does less to prevent the spread of infection among the pool of

\begin{thebibliography}{99}
\bibitem{193} See An FAQ About STIs, Testing and Moratoriums, supra note 190.
\bibitem{194} See id.
\bibitem{195} Id.
\bibitem{196} See id.
\bibitem{197} See id.
\bibitem{198} de Cesare, supra note 30, at 685-86.
\bibitem{199} Id. at 683-84.
\end{thebibliography}
performers already established in the business. Salina Smith, a representative from the Centers for Disease Control ("CDC") indicated that a negative test result does not always mean that a person doesn't have HIV.

That's because of the window period—the period after you may have been exposed to HIV but before a test can detect it... There isn't any absolute evidence to indicate how long after infection a person becomes infectious. However, it's important to note that it's possible to transmit HIV to others during any stage of the infection.202

The CDC also reports that the immune system can take anywhere from two to eight weeks to create antibodies against HIV, which is what most tests screen for.203 Therefore, in the instance of an HIV positive performer whose status is temporarily undetected, the best practice for preventing the spread of infection is the use of a condom or other barrier during sexual contact with others.204 A performer could foreseeably test negative for HIV and STDs, be cleared to perform, contract a disease on set or in their personal life, and continue filming until the next round of testing, unknowingly transmitting the disease to sexual contacts in the workplace. Thus, the problem with testing is two-fold: (1) it is not 100% accurate and (2) testing is a reactionary method that is a better means for detecting disease rather than preventing its transmission and spread.

The five reported HIV infections among AFI performers and the three industry-wide moratoriums in 2013 illustrate that testing practices cannot be relied upon as the lone tool for regulation and oversight of adult film performers' health and safety in the workplace.205 Instead, the spread of disease within the AFI should be halted through the continued use of testing procedures coupled with the utilization of current federal and state regulations applicable to the industry206 and the adoption of proposed legislation, AB 1576, which would add a provision to California's Labor Code that expressly applies to the workplace

203. Id.
204. See U.N. Population Fund, supra note 201.
205. See supra notes 125-30, 10-13, 131 and accompanying text.
206. See infra Part III.B. discussing the applicability of California's bloodborne pathogen standard and the federal standard to the adult film industry. See, e.g., CAL. CODE REGS. tit. 8 § 5193 (2014); 29 C.F.R. § 1910.1030 (2013).
regulation of the adult film industry.\textsuperscript{207}

B. The Applicability of Cal/OSHA Regulations to the AFI

A chief reason for Cal/OSHA’s reluctance to regulate the adult film industry stems from the controversial question regarding jurisdiction: specifically, whether an adult film performer is classified as an employee or an independent contractor?\textsuperscript{208} In determining an individual’s status as an employee or an independent contractor, the Division of Labor Standards Enforcement (“DLSE”) applies the “economic realities test” which considers whether the employer has control or the right to control the work the worker is doing and the manner in which the work is performed.\textsuperscript{209} The DLSE also considers a multitude of other factors relating to each highly fact-specific employment scenario.\textsuperscript{210} The employment status of adult film performers has been hotly contested between proponents of government regulation of the AFI and members and supporters of the industry itself, whom would prefer that the AFI continue to operate under its regime of testing and self-regulation.\textsuperscript{211} This ambiguity surrounding the employment status of adult film performers is largely responsible for Cal/OSHA’s failure to enforce current federal and state workplace

\textsuperscript{207} See infra Part IV, discussing the proposal and viability of AB 1576 as a means of regulating performer health and safety in the adult film industry.

\textsuperscript{208} See de Cesare, supra note 30, at 692-96 (providing a thorough analysis of the issue and ultimately concluding that adult film performers should be classified as employees and thus should be afforded workplace health and safety protections).


\textsuperscript{210} Id. (“Additional factors that may be considered depending on the issue involved are: (1) Whether the person performing services is engaged in an occupation or business distinct from that of the principal; (2) Whether or not the work is part of the regular business of the principal or the alleged employer; (3) Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work; (4) The alleged employee’s investment in the equipment or materials required by his or her task or his or her employment of helpers; (5) Whether the service rendered requires a special skill; (6) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (7) The alleged employee’s opportunity for profit or loss depending on his or her managerial skill; (8) The length of time for which the services are to be performed; (9) The degree of permanence of the working relationship; (10) The method of payment, whether by time or by the job; and (11) Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but it is not determinative since this is a question of law based on objective tests.”)

\textsuperscript{211} See de Cesare, supra note 30, at 689-96 (discussing the unresolved issue of whether adult film performers are employees or independent contractors and outlining the arguments made by proponents and opponents alike, concerning government oversight of the AFI).
regulations that apply to the AFI.\textsuperscript{212}

1. The Bloodborne Pathogens Standard

Title 8 of the California Code of Regulations section 5193, known as the Bloodborne Pathogen ("BBP") standard, is currently one of the most applicable tools available to regulate performer health and safety conditions on adult film sets. This standard is modeled after the analogous federal standard and applies to all "occupational exposure to blood or other potentially infectious materials [("OPIM")]."\textsuperscript{213} The BBP standard was originally created in order to address the health and safety concerns facing healthcare professionals working in close contact with HIV/AIDS patients.\textsuperscript{214} Pursuant to Title 8 of the California Code of Regulations this standard applies to all industries, excluding the construction industry, which is expressly exempted.\textsuperscript{215} Cal/OSHA notes the variety of diseases and infections that can be transmitted through bodily fluids such as semen, vaginal fluid, fecal material, and mucous membrane contact.\textsuperscript{216} A critical group of diseases and the subject of § 5193 are those caused by bloodborne pathogens, which includes HIV, hepatitis B, and hepatitis C.\textsuperscript{217} In defining "other potentially infectious materials ["OPIM"],"\textsuperscript{218} the regulation expressly mentions both semen and vaginal secretions: two bodily fluids that adult film performers are

\textsuperscript{212} See Chase, supra note 112, at 218 (analyzing the Federal and California Bloodborne Pathogen Standards that pertain to the workplace protection of adult film performers).

\textsuperscript{213} CAL. CODE REGS. tit. 8 § 5193(a) (2014); See also 29 C.F.R. § 1910.1030(a) (2013) (defining the scope of the California and Federal BBP standards, respectively).


\textsuperscript{215} tit. 8 § 5193(a); See also Vital Information for Workers and Employers in the Adult Film Industry, supra note 187.

\textsuperscript{216} Vital Information for Workers and Employers in the Adult Film Industry, supra note 187.

\textsuperscript{217} Id.; tit. 8 § 5193(b)(3).

\textsuperscript{218} id. 8 § 5193(b). OPIM is defined as:

(1) The following human body fluids: semen, vaginal secretions, cerebrospinal fluid, synovial fluid, pleural fluid, pericardial fluid, amniotic fluid, saliva in dental procedures, any other bodily fluid that is visibly contaminated with blood such as saliva or vomitus, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids in situations such as emergency response; (2) Any unfixed tissue or organ (other than intact skin) from a human (living or dead); and (3) Any of the following, if known or reasonably likely to contain or be infected with HIV, HBV, or HCV: (A) cell, tissue, or organ cultures from humans or experimental animals; (B) Blood, organs, or other tissues from experimental animals; or (C) Culture medium or other solutions.

\textit{Id.}
routinely and inherently exposed to through the filming of a variety of unprotected sex acts.\footnote{219} Under § 5193, blood and semen are \textit{always} considered OPIM.\footnote{220}

As private employers under Cal/OSHA’s governance, adult film production companies must comply with the regulatory requirements dictated by the BBP standard.\footnote{221} To achieve its purpose of limiting occupational exposure to blood or other OPIM, the regulation requires the employer to implement “engineering” and “work practice controls” to limit the threat of exposure to such materials and to employ “universal precautions” to control potential incidents of infection to employees in the workplace.\footnote{222} As part of § 5193 employers are required to create an “exposure control plan” and to offer hepatitis B vaccinations to all workers who experience an occupational exposure.\footnote{223} The regulation further provides that implementing appropriate engineering and workplace controls requires the use of “barrier creation” and the use of other “personal protective equipment” to limit the exposure to and transmission of bloodborne pathogens.\footnote{224} The regulation defines “personal protective equipment” as “specialized clothing or equipment worn by an employee for protection against a hazard” and notes that general work clothes do not meet this standard.\footnote{225} In the context of adult film production, it has been obviously and heavily suggested that condoms constitute the “barrier creation” or “personal protective equipment” necessary to limit performers’ exposure to blood and OPIM while filming acts of sexual intercourse on set.\footnote{226}

While Cal/OSHA officials have argued that this current BBP standard requires condom use in the production of adult film, the

\footnote{219. \textit{Vital Information for Workers and Employers in the Adult Film Industry, supra note 187.} Additional STDs that are not classified as bloodborne pathogens under the standard can also be “transmitted through contact with mucous membranes, semen, vaginal fluid, or feces.” \textit{Id.}} \footnote{220. \textit{Id.}} \footnote{221. \textit{See id.}} \footnote{222. \textit{tit. 8 § 5193(b) (defining “Universal Precautions” to mean “an approach to infection control. . . [a]ll human blood and certain human body fluids are treated as if known to be infectious for HIV, HBV, HCV, and other bloodborne pathogens,” and defining “Work Practice Controls” to mean “controls that reduce the likelihood of exposure by defining the manner in which a task is performed”); See \textit{Vital Information for Workers and Employers in the Adult Film Industry, supra note 187.}} \footnote{223. \textit{tit. 8 § 5193(c)(1)(A).} Hepatitis B vaccinations must be offered at no additional cost to the employee. Employees exposed to blood or OPIM at the workplace must also be provided post-exposure medical treatment and follow ups. \textit{Chase, supra note 112, at 218.}} \footnote{224. \textit{See tit. 8 § 5193(b).}} \footnote{225. \textit{Id.}} \footnote{226. \textit{See Vital Information for Workers and Employers in the Adult Film Industry, supra note 187; \textit{See also Chase, supra note 112, at 218.}}}
industry has operated under the unfounded assertion that performers are independent contractors and thus production companies are not subject to the BBP standard dictated by Title 8.227 Industry executives and production companies have largely ignored the standard despite Aids Healthcare Foundation-backed initiatives by Cal/OSHA to enforce the standard.228 Lawsuits and fines initiated by Cal/OSHA going back as far as 2009 targeted AFI heavyweights, such as Vivid Entertainment and Hustler, which have had virtually no deterrent effect on the industry’s disregard of the state and federal BBP standard.229

2. The Treasure Island Media Decision: Adult Film Performers are Employees

As of January 6, 2014, adult film executives and production companies will no longer be able to shirk their duty to limit performers’ workplace exposure to blood and OPIM on adult film sets.230 In the first decision of its kind, Administrative Law Judge Mary Dryovage of the Occupational Health & Safety Appeals Board (“OSHAB”) upheld a slew of citations that were issued to a San Francisco-based gay adult film company, Treasure Island Media.231 In 2009, Cal/OSHA’s High Hazard Unit investigated Treasure Island Media after receiving a complaint alleging a variety of workplace health and safety violations.232 In addition to the multitude of “general” workplace violations ranging from lack of a fire alarm to failing to have a guardrail in place,233 Treasure Island was cited for two “serious” offenses under the California BBP standard: failure to establish an OPIM exposure control plan and failure to observe universal precautions during the production of films.234 The High Hazard Unit’s investigation revealed that Treasure Island Media, a production company known for its “specialty” in “bareback”, or

228. Chase, supra note 112, at 218.
229. Fitz-Gerald, supra note 33.
231. Id. at 36.
233. Treasure Island Media, Inc. at 1-2.
234. Judge Upholds Cal/OSHA Enforcement of Worker Protection Laws for Adult Film Performers, supra note 232.
condom-less gay adult film, failed to implement any OPIM exposure plans to limit contact with semen and other bodily fluids. The second “serious” citation concerned Treasure Island Media’s failure to exercise a system of universal precautions to limit such exposure, which in this instance would require the use of condoms or other prophylactic barrier protection.\footnote{See id.}

In this landmark decision, Judge Dryovage conclusively ruled that adult film performers are employees and thus should be afforded protection under Cal/OSHA’s workplace healthy and safety laws.\footnote{Treasure Island Media, Inc. at 36.} Language from the thirty-six-page decision specifically noted that the adult film industry is covered by the BBP standard outlined in Title 8, stating:

\begin{quote}
[Treasure Island Media] cites no evidence from the history of adoption of § 5193 that the Standards Board intended to exclude the production of adult films from its requirements.
\end{quote}

The terms of the California Occupational Safety and Health Act are to be given a liberal interpretation for the purpose of achieving a safe working environment (citation omitted). The bloodborne pathogen standard applies to all workplaces (except those in the construction industry) where employees are exposed to blood or other potentially infectious materials. The regulations by their terms apply “to all occupational exposure to blood or other potentially infectious materials”(citation omitted). Accordingly, the adult entertainment industry is covered by Section 5193.\footnote{Id.}

AIDS Healthcare Foundation President, Michael Weinstein described this ruling as a “milestone” in the quest to reform workplace regulation of the AFI and stated that this decision is critical in three substantial respects:

\begin{enumerate}
\item[(1)] The ruling unequivocally states that the adult film performers are employees, not independent contractors, as the industry regularly asserts, and as such are indeed covered under OSHA workplace safety statutes.
\item[(2)] It is the first time an adult film company cited (by Cal/OSHA) has gone to a full trial for appeal instead of settling, paying—or ignoring—
(3) It is the first time an adult film company has lost in this precedent-setting court ruling.\textsuperscript{238}

As a result of the ruling, Treasure Island Media must pay roughly $9,000 in Cal/OSHA citation fees.\textsuperscript{239} While this penalty may seem insubstantial in comparison to the revenues generated in the AFI, proponents of industry reform see this "as a step in the right direction."\textsuperscript{240}

The \textit{Treasure Island Media, Inc.} decision has set a precedent establishing adult film performers' rights to a healthy, safe, and regulated employment environment.\textsuperscript{241} This class of workers has been historically ignored and vastly under-protected, despite their exposure to some of the most long-term, life-altering, and potentially fatal occupational hazards across any labor force or employment sector.\textsuperscript{242} In recent years workers in the AFI have seen more than their fair share of controversy, tragedy, and scrutiny. While the \textit{Treasure Island Media} decision represents a victory for this vulnerable class of workers and progress for proponents of industry reform, further steps can be taken to reform the workplace for adult film performers.

V. WRAPPING IT UP: THE ROAD TO REGULATORY REFORM IN THE AFI THROUGH LEGISLATIVE MEANS

On January 30, 2014 California State Assembly member Isadore Hall III introduced AB 1576 to the California State Assembly.\textsuperscript{243} Assembly Bill 1576, also known as "FAIR" (For Adult Industry Responsibility) is the third in a series of legislative initiatives spearheaded by Assembly member Hall and supported vigorously by the AIDS Healthcare Foundation and several other state, federal, and international healthcare and medical associations.\textsuperscript{244} Like its predecessors, AB 332 and AB 640, FAIR aspires to "provide state-wide

\begin{thebibliography}{99}
\bibitem{238} Fitz-Gerald, \textit{supra} note 33.
\bibitem{239} Id.
\bibitem{240} See id.
\bibitem{241} See generally \textit{Treasure Island Media, Inc.}
\bibitem{242} See generally Grudzen \& Kerndt, \textit{supra} note 66.
\bibitem{244} \textit{See AB 1576} (Hall) \textit{Adult Film Worker Safety FACT SHEET, supra} note 2.
\end{thebibliography}
uniformity needed to ensure that the thousands of actors employed in this multi-billion dollar [adult film] industry are given reasonable workplace safety protections needed to reduce exposure to HIV and other communicable diseases. Substantively, the bill if passed will create § 6720, a new provision of the Labor Code relating to employment that explicitly applies to the adult film industry. A summary of the bill reads as follows:

This bill would require an employer engaged in the production of an adult film to adopt prescribed practices and procedures to protect employees from exposure to, and infection by, sexually transmitted diseases, including engineering and work practice controls, an exposure control plan, hepatitis B vaccinations, medical monitoring, and information and training on health and safety. The bill would define terms for those purposes. Because a violation of the act would be a crime under certain circumstances, the bill would impose a state-mandated local program by creating a new crime.

At its core this bill requires the use of condoms or similar barrier protection to be used by performers during the production of adult film throughout the entire State of California. In addition to the aforementioned requirements under proposed AB 1576, the statute would also require employers to cover performers' costs for medical monitoring, including, but not limited to, screening for HIV and other STDs. Under present industry procedure the majority of performers pay all costs associated with testing out-of-pocket.

As of February 14, 2014 the AB 1576 was referred to both the Assembly on Arts, Entertainment, Sports, Tourism and Internet Media and the Committee on Labor and Employment for further action. Pending approval by both committees, the bill will then be sent to the Assembly Appropriations Committee, where if approved will be voted on by the full assembly. In an interview with industry trade publication XBIZ, Assemblymember Hall addressed California's need for statewide legislation, noting "[t]he multiple HIV and STI outbreaks

245. Id.
247. Id.
248. Id. at (c)(2).
249. Id. at (g).
250. Morris, supra note 12.
252. Id.
within the adult film industry in 2013 along with the three self-imposed moratoriums only strengthened the need for mandatory statewide condom requirement in adult films..."253 In order to adequately protect performers in the AFI from the needless and substantial health risks inherent to their occupation it is imperative that the California State Assembly and Senate enact this legislation.

By passing AB 1576 and creating a new provision to the California State Labor Code one of the most under-protected classes of workers will now be afforded express and concrete protection under a set of laws tailored to the AFI.254 Enacting this legislation will end the longstanding and flagrant disregard of performers’ health and safety. Workers that have been historically denied protection will now be treated like all other working men and women, regardless of the social stigmas or cultural taboos surrounding their line of work. Endorsing 1576 as statewide law also reaffirms, strengthens, and legitimizes the very recent precedent set in Treasure Island Media establishing the status of adult film performers as employees rather than independent contractors.

Assembly Bill 1576 also addresses and eradicates many of the inadequacies of its motivating force, Measure B, the ballot initiative that passed via referendum in the 2012 Los Angeles County election.255 Measure B served as the first legislation to expressly require the use of a condom or other protective barrier during the production of adult film.256 Due to its limited jurisdictional scope and an unspecified enforcement scheme, Measure B was essentially crippled from inception. Measure B was enforceable in the majority of the eighty-eight cities that comprise Los Angeles County, but had no jurisdiction in unincorporated cities within the county or in cities operating their own municipal health departments, such as Pasadena, Long Beach and Vernon.257 Additionally, adult film executives and producers were able to circumvent the mandate by shifting production sites to neighboring counties.258 As a result, areas, such as Ventura County, San Diego, and San Francisco, experienced a rise in adult film production in those cities.259 Passing AB 1576 is the most effective and efficient solution to ensure that all adult film performers throughout the State of California

253. Id.
254. See Assemb. B. 1576.
255. See supra pp. 2-5.
256. See Rogers, supra note 16.
257. The Folly of Measure B, supra note 29; See also Bradley, supra note 39.
258. The Folly of Measure B, supra note 29.
259. See Kriegel, supra note 39.
are equally shielded under government mandated and enforced occupational health and safety regulations.

Passing AB 1576 has an additional, beneficial consequence that progresses towards uniformity and consistency of workplace regulation in the AFI. On March 3, 2014, the Ninth Circuit Court of Appeals heard oral arguments in the matter of Vivid Entertainment LLC v. Fielding.²⁶⁰ On appeal, Vivid contends that the Federal District Court for the Northern District of California erred in failing to grant an injunction enjoining application of the Measure B condom mandate in Los Angeles County.²⁶¹ Passage of AB 1576 will either reinforce the Ninth Circuit’s affirmance of the failure to grant the injunction, or will render a decision to reverse the Northern District’s failure to grant the injunction as moot.

The passage of AB 1576 will add a new section to the Labor Code that will supplant the AFI’s current system of autonomy and self-reliance. In order to transition from its current system, which relies solely on HIV and STD screening, to the system articulated under the comprehensive section 6720, the AFI should look to the legalized prostitution industry in Nevada. Parallels can easily be drawn between the AFI and brothel business of Nevada, which has been a legal business in that state since the mid-1980s.²⁶² Since this time, there have been zero cases of HIV among the state’s twenty-six legal brothels, which employ anywhere from 250 to 400 licensed prostitutes at any one time.²⁶³ Brothel industry specialists attribute the safe and HIV-free workplace to stringent enforcement of Nevada State Health Code.²⁶⁴ Patrons to these brothels are required by law to wear condoms.²⁶⁵ Failing to use condoms will result in a misdemeanor offense and if the patron is HIV-positive, they are charged with a felony.²⁶⁶ Brothel owners describe a two strike policy: the first time enforcement catches a
worker not using a condom, the establishment is fined. The brothel is shut down permanently if there is a repeat offense. Like the AFI, the brothels keep comprehensive health records and testing histories of each registered prostitute. The women are required to meet with a doctor on weekly basis for medical testing, however unlike the proposal in AB 1576, prostitutes bear the costs of some of these medical screenings. There is one stark contrast between these parallel industries: the business side of the brothel industry values the occupational health and safety of its workforce. One owner noted “[i]f we had the disease rate you see in the porn world, we’d be out of business tomorrow. . .”

Chris Motyl

---

267. Id. at 700.
268. Id.
269. Id. at 699-701.
271. Huffstutter, supra note 145.

* J.D. Candidate, 2015, Maurice A Deane School of Law at Hofstra University, B.S.B.A., 2012, West Virginia University. I would like to thank the staff of the Hofstra Labor & Employment Law Journal for their hard work throughout the publication process.