From the Green Room: Dance/USA's e-Journal

http://www.danceusa.org/ejournal/post.cfm?entry=calamity-or-comedy-critic-scholar-v-new-york-state-the-nite-moves-dance-tax-case

Calamity or Comedy: Critic/Scholar v. New York State The Nite Moves Dance Tax Case, Part 1

December 26, 2012 · 4 Comments

Editor's note: *This is the first part of a two-part article concerning government taxation of strip or gentleman's clubs. Some in the dance community believe that the rulings in this case could have larger ramifications for dancers and creative artists. Become part of the conversation. Let us know what you think. And check back in with us tomorrow to read part 2.*

By Judith Lynne Hanna

In the United States, should any government tax strip clubs where choreographed adult entertainment like exotic dancing is featured when it has a law providing a tax exemption for "live, dramatic, choreographic or musical performance," whether it is nonprofit or for profit?

In 2007, Stephen Dick, owner of Nite Moves, a gentleman's club in suburban Albany, N.Y., challenged New York State's "exotic dance tax," that, in his view, is "censorship by taxation" (discrimination on the basis of dance content). This court case went viral and generated about 600 news items, an Oct. 29. 2012, editorial in *The New York Times*, and a Nov. 8 segment on the Comedy Channel's "Colbert Report."

The question at stake is who decides whether exotic dance, or any other dance genre, is a "choreographic" performance. Choreography is the composition and arrangement of dances in terms of aesthetic principles, such as unity, variety, repetition, contrast, transition between movements, sequence, climax, proportion of magnitude, quality or degree, balance, harmony and even dissonance. Dick's accountants had told him he didn't have to pay a dance tax because by law "live, dramatic, choreographic or musical performance" is exempted. The New York state tax auditors disagreed. They neither observed stage or private dance nor considered the exemption.

This issue not only burdens strip clubs but also applies to the broader dance world, as do other cases nationwide in which legislatures and judges try to proscribe movements, costumes, nudity, theater design, lighting, dancer-spectator distance and interaction, hours of performance, etc. While the concert dance world may not wish to align itself with exotic dancers and strip clubs, this case demonstrates the reach that legal cases can have in the world of professional concert dance. Professor and New York attorney Nadine Strossen tells us why action is necessary (1995): "Once we cede to the government the power to violate one right for one person, or group, then no right is safe for any person or group. So when we defend sexual expression, we are really making a stand not only against a specific kind of censorship ... but human rights in general."

Dirty Dancing Bans

History is replete with government attempts to ban dance outright or through regulation. I give some examples in my new book, *Naked Truth: Strip Club, Democracy, and a Christian Right*, based on 15 years of research. I explain why the current adversaries of dance are more dangerous than previous ones and challenge many misperceptions about exotic dance. Among its adversaries are those who try to impose their scriptural values of modesty and patriarchy on everyone and eliminate the separation of church and state. Their inadvertent allies are some feminists who oppose women's bodies being the object of the male gaze and view this as a reason for the oppression of all women. There are also people who have been influenced by misleading media portrayals, including unfounded stories about exploited or trafficked dancers. Some people in the professional dance world want to distance themselves from what they view as lowbrow eroticism.

Stigma is the biggest problem exotic dancers face. I have encountered PTA moms who wear wigs and change their contact lens color to perform onstage, and college students who drive great distances from their campuses to conceal their identities.

Rooted in Middle Eastern belly dance and an American tradition of parody, namely American burlesque, striptease and exotic dance are a form of dance and theater art. While somewhat "risqué" or "naughty" with its adult play and fanciful sexualized teasing that transgresses social decorum and dress codes, exotic dance is, like all dance, communication and a learned skill with its own aesthetic. Characteristic is erotic fantasy and exposure of more skin and more provocative moves than are typically seen in public, along with the use of high heels (often eight-inch stiletto platform shoes) and the incorporation of jazz-like movements, such as hip thrusts and shoulder shimmies. So the question arises: how far removed is exotic dance from the world of artistic and concert dance?

During my research, I have found some performers were former cheerleaders, gymnasts, and professional dance company members. Toni Bentley, a former New York City Ballet dancer, tells us in her book, *Sisters of Salome*, that she wondered why George Balanchine watched "nude women strut their stuff." So she tried exotic dancing and experienced the power, freedom, creativity, and adulation that many exotic dancers find thrilling. Many women have learned to be exotic dancers by studying, observing, experimenting, and being coached by other exotic dancers. Given the diversity of dancers' backgrounds, it is no surprise that the quality of performance varies. Some clubs hire and promote talented, experienced dancers; others care less about their qualifications. Well-managed clubs provide security for dancers who must meet legal age limits and chose to dance of their own free will.

Like other dance genres that influence each other, exotic dance can be seen in ballet, Broadway, and contemporary dance. Balanchine featured a sexy burlesque striptease queen in his 1936 ballet "Slaughter on Tenth Avenue." Jerome Robbins directed and choreographed the popular Broadway musical *Gypsy*, based on the life of stripper Gypsy Rose Lee. Broadway star Bob Fosse's work in nightclubs and burlesque joints had a lasting influence on his distinctive choreography. In a *New York Times* article, Urban Bush Women founder Jawole Willa Jo Zollar has spoken of the influence on her dances of the strippers she saw in her childhood. Madonna and her backup singers perform stripper moves, including crotch grabbing and floorboard grinding. Working as a stripper while attending the San Francisco Art Institute influenced Karen Finley's performance art.

The Nite Moves Case

For the Nite Moves case, club owner Stephen Dick and his First Amendment attorney, Andrew McCullough, asked me to serve as an expert court witness. As an anthropologist specializing in dance as nonverbal communication, a dance critic and an author of seven scholarly books and hundreds of articles on dance, I had already served as an expert court witness in nearly 150 First, Fifth, and Fourteen Amendment cases across the nation related to exotic dance. (Some of those cases are spotlighted in *Naked Truth*.)

In the Nite Moves case, I used Labananalysis concepts to analyze a 22-minute videotape of two dancers performing as they usually do at the club. I described the sequential moves of each dancer. For example, one dancer had about 61 different moves in her routine of three songs, about 10 minutes. She used the pole and mirror. I noted the choreographic use of space, time, and effort, and the patterns of locomotion and gesture. The dancers' choreographies used a common theme and variation pattern with repetition. I also observed dances in the club and interviewed dancers. I concluded that the presentations at Nite Moves were, unequivocally, live dramatic choreographic performances in a theater.

Nite Moves, a juice bar (it serves only nonalcoholic drinks), is the only full nude club in the Albany, New York Capital District. The previous owner liked a song title and used it for the club's name. Dancers were club employees and paid no "house fee." In other club establishments dancers can perform as independent contractors and, therefore, they must pay clubs to dance, as would sculptors pay to rent a space in an art show, or independent choreographers who rent a space to show their work. The dancers kept tips and fees for "private" dances they performed near a patron's seat. They paid the club a percentage of the charges for lap dances in a private

area.

The dancers ranged in age from 18 to50 and were from diverse backgrounds—white, Asian, black, and Latina. There were 6 to 20 dancers per night, and 5 during the day. When recruiting a performer, Dick checked ID and background, invited questions from the applicant, and then auditioned her. Occasionally Nite Moves sponsored bikini contests open to anyone with $500 cash prizes.

Nite Moves' owner, now 37, came into the business by chance. While a biology major at St. Rose College, Dick worked in a convenience store around the corner from the club. A former Nite Moves owner came into the store and invited Dick to visit the club. One day a bartender didn't show up and a new owner asked Dick to sub, which grew into a full-time position. A 21-year-old in 1997, he made $700 a week and decided not to complete his senior year of college. In 2004 he became a co-owner.

On February 2, 2008, McCullough argued the Nite Moves case before Administrative Law Judge (ALJ) Katherine Bennett. I testified, submitted a report that included my qualifications and basis for my opinion, general findings (definitions of dance, choreography, theater, exotic dance, and art), and research at Nite Moves. Dick was a witness. A bartender and former dancer at Nite Moves testified that the stage dances involve creativity and that she had learned various moves and pole tricks from watching other dancers. New York state presented no evidence.

Judge Bennett ruled in the club's favor in April 2009. In the ALJ's view, all of the entertainment at Nite Moves was choreographed dancing and thus fell within the exemption. In addition, the ALJ reasoned that the charges were not taxable because the petitioner's sale of beverages was merely incidental to the petitioner's provision of entertainment.

Dissatisfied with the verdict, the state went to the New York Tax Appeals Tribunal in 2009, which reversed Bennett's ruling. Unlike other states, in New York the Appeals Tribunal is allowed overrule the ALJ on facts, law, and credibility determinations, including the weight to be accorded to an expert's testimony.

The two Tribunal Commissioners offered no evidence of expertise in dance, choreography and improvisation, creativity, or theater. Although the New York State legislation did not define these concepts, the commissioners exceeded their power by interpreting the law in a way it was not written. Moreover, they compared a peep show/juke box that had to pay taxes—without any evidence that it had choreographed performances—to what takes place at Nite Moves.

They discounted my testimony in its entirety, characterized my interpretation of a choreographed performance as "stunningly sweeping," to be "so broad as to include almost any planned movements [performed to] canned music." The Tribunal viewed my description of the private dances offered at Nite Moves as particularly suspect" because there were no lap dances the night I visited the club. But I have seen hundreds—one can describe a baseball game without having seen a specific one. In retrospect, an analysis of a videotape of a dancer on stage and also giving a lap dance would have been helpful.

The Tribunal challenged an expert court witness whose dance credentials and testimony were accepted by a judicial body in 45 court rooms nationwide. Would the Tribunal challenge experts in medicine or science and reject their opinions as to what constitutes disease or treatment? Nite Moves appealed, advancing to the third stage of litigation in 2012 and asked the New York Appellate Division Court to strike the Tribunal's holding. Alas, the Appellate Division Court said it was not reviewing the ALJ's but the Tribunal's decision—which it upheld because it was not "irrational."

Angered, Dick and McCullough took the case to a fourth court, the New York Court of Appeals, the state's highest court. Dick would like to leave a legacy of fighting the government for discriminating against a form of dance. Of course, he doesn't want an unfair tax burden either.

Judith Lynne Hanna *has written for many publications including* The New York Times, Washington Post, Stagebill, *and* Dance Magazine. *See* *www.judithhanna.com*.

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We accept submissions on topics relevant to the field: advocacy, artistic issues, arts policy, community building, development, employment, engagement, touring, and other topics that deal with the business of dance. We cannot publish criticism, single-company season announcements, and single-company or single artist profiles. If you have a topic that you would like to see addressed, please contact journal@danceusa.org.

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5 responses so far ↓

- 1**R. Bettmann** // Dec 27, 2012 at 12:33 PM

  Dr. Hanna is an exceptional advocate for her position, and a renowned scholar, but I can not agree with all of her arguments. She writes:

  "Rooted in Middle Eastern belly dance and an American tradition of parody, namely American burlesque, striptease and exotic dance are a form of dance and theater art."

  The truth is the dance performed in strip clubs could just as truthfully be reported as "growing from the oldest profession."

  Dr. Hanna attempts to cover "gray" territory with black and white arguments from other areas. Her analysis is over-zealous, or perhaps just over-reaching, and while from a Bill of Rights point of view I'm grateful to have her out there protecting freedom of expression, I find the concept that non-profit status should be applied to strip clubs demeaning to the value provided by the non-profit dance community.

- 2**C. Thomas** // Dec 27, 2012 at 12:58 PM

  I completely agree with Bettmann's comment. What is done and displayed in strip clubs is for other purposes completely outside of dance seen in theatres, festivals and performance venues. In many ways I find Dr. Hanna's arguments offensive to the dance community. It's a reach to align stripping and seducing with techniques taught and performed by studios and dance companies. It's quite scary actually.

- 3**Monica B.** // Dec 27, 2012 at 10:27 PM

  People who do sex work for money should have a safe work environment, a right to organize, and fair pay. Dancing for the sole purpose of sexual exciting or satisfying someone for money is sex work. In my opinion some of the connections made in this article are overly broad leaps that are not well supported. While I wonder if this article may just be a push for book sales, I can also see why this tax issue may possibly interest the larger performing arts community.

  All that said, I believe the author does a disservice to an often maligned culturally rooted dance form that is from in a place that is often 'othered' and 'exoticized' (not to mention bombed...) by saying that stripping is "rooted in Middle Eastern Belly Dance". I believe this shows a lack of understanding of Arabic music and dance as it appeared and developed in the 19th and 20th centuries in the US, and its complex relationship to diasporic experiences of a wide variety of Arabic and Mediterranean peoples. While the relationships and borrowing between various

"common" art forms that developed and were later sensationalized at the time, including vaudeville, are there and are quite interesting, I find myself distressed at what I--a performer, instructor, and researcher of Arabic and North African dance and music for over 20 years--perceive to be a blatant falsehood (ie, that modern stripping is rooted in Middle Eastern dance). I understand this topic is not the author's area of expertise, but in my opinion such a blatant falsehood serves to take away from her argument while adding (in published print) to tired and sometimes troublesome stereotypes other dancers have to deal with.

At risk of going too far off topic, should anyone care to explore this subject from a more researched perspective, I highly recommend Donna Carleton's book "Looking for Little Egypt" (1994 IDD Books).

- 4**C. Callon** // Dec 27, 2012 at 11:10 PM

  I agree with the previous two comments, that equating striptease with concert dance seems a stretch, but personal feelings aside, two major issues come to the forefront.

  First, from a philosophical standpoint, this is another case of attempting to define art and making a value judgment. According to accepted social conventions, certain live performances are "good" and are therefore deserving of certain protections (ie, tax exemptions) while other forms are "bad." I suppose this conversation will go on until the end of time.

  Building on these concepts, the case has political implications. In extending certain privileges to one art form but not another, a government entity has established (for those purposes at least) what is art and what is not, or which art is socially acceptable and which is not. Should they have this power?

  Some have concerns over government funding for the arts for this very reason, that government shouldn't be the one deciding what is art and making value judgments on it when tax dollars are at stake, either in the form of grants or tax exemptions. The law requires solid definitions, and since art cannot be clearly defined and the value of various art forms is highly subjective, should it be entangled in the law?

- 5**Judith Lynne Hanna** // Dec 30, 2012 at 11:32 AM

  Here is my response to the comments on my article for "From The Green Room":

  Is the article a push for book sales? asks Monica. Invited to share some knowledge by the "Green Room" editor, I wanted to alert readers to more research-based information (collected across the US since 1995) that would challenge many commonly held myths.

  Some commentators did not read carefully and/or made unfounded assertions. Some certainly

support my findings that many people look at stripping through Puritanical moral lens, media stereotypes, and fear of associations of dance with sexuality.

Contrary to what Bettmann says, I did not suggest that non-profit status be applied to strip clubs. These venues, like Broadway shows, are for profit. For- or non-profit is irrelevant to analysis revealing that Nite Moves dance performances were choreographed and according to written NY State law, choreographed performances are exempt from taxation. What is Bettmann's evidence that dance performed in U.S. strip clubs could just as truthfully be reported as 'growing from the oldest profession'?"

Where is Thomas's evidence for what is done and displayed in strip clubs that "is for other purposes completely outside of dance seen in theatres, festivals and performance venues?"

The exotic dance industry disavows performers being called sex workers as does Monica. The label is commonly identified with prostitutes. Most strippers and clubs use "dancer" or "entertainer." Yes, exotic dancers strive to "satisfy someone for money" as do all professional dancers, from ballet to gangnum. Her charge of "a blatant falsehood that modern stripping is rooted in Middle East dance" is challenged by historical documents that show a key influence of ME dance was the six "oriental" or "Egyptian" dancers who performed at the Chicago World's Fair in 1893.

Callon questions exotic dancing being equated with concert dance. Such "equation" is only in terms of the shared elements of being choreographed and a form of theater art. As Callon noted, the key issue raised in the article is indeed about the role of government in art.

http://www.danceusa.org/ejournal/post.cfm?entry=critic-scholar-v-new-york-state-the-nite-moves-case-reaches-the-highest-court-part-2

Critic/Scholar v. New York State -- The Nite Moves Case Reaches the Highest Court, Part 2

December 27, 2012

On September 5, 2012, the seven-member New York Court of Appeals heard Nite Moves' legal challenge to the Tribunal's decision that exotic dance was *not* a live choreographed performance and consequently exempt from taxation as stated in law. Read Judith Lynne Hanna's account of this intriguing case and the ramifications it could have on the dance community.

Editor's note: *This is the second part of a two-part article concerning government taxation of strip or gentleman's clubs. Some in the dance community believe that the rulings in this case could have larger ramifications for dancers and creative artists. Become part of the conversation. Let us know what you think. You can catch up with part 1 here.*

By Judith Lynne Hanna

On September 5, 2012, the seven-member New York Court of Appeals heard Nite Moves' legal challenge to the Tribunal's decision that exotic dance was ***not*** a live choreographed performance and consequently exempt from taxation as stated in law. McCullough addressed the judges. In addition, First Amendment attorney Brad Shafer submitted an *amicus curiae* brief for other clubs in New York in support of Nite Moves. He argued that the Tribunal's claim that "adult entertainment can never satisfy the Admission Charge Exception" violates the First Amendment, amounting to discrimination on the basis of content. Moreover, he elaborated how the Tribunal ignored New York State legislation and federal legislative history and case law.

At the hearing, Judge Eugene Pigott hostilely focused on the dancers paying the club a percentage of their dance fees (irrelevant to this case). He claimed the dancers lacked training and improvised, and that the club was not involved in the art business. Judge Robert Smith, however, rebutted, "I guess when I read the statute, it looks to me like 'choreographic' is just a synonym for dance" and "was never meant to exclude improvised dance."

Chief Judge Jonathan Lippman pithily asked the state counsel appearing for the Commissioner of Taxation and Finance, "Is it your view that they're making a judgment as to the worth of what's going on there rather than looking at the evidence? … that because of the nature of what's going on, they're making a … moral [judgment] or just you don't like what it is, what they do?" "You agree that the tribunal can't act arbitrarily, right?" Judge Smith also raised this point: "But you're really saying they weren't dancing, or you're just saying it wasn't very high class dancing?" The state counsel's argument was confused. He inappropriately introduced his own new argument and claimed that the sale of refreshments is more than merely incidental. But Judge Smith doubted that patrons came to Nite Moves for juice. McCullough summed up the hearing, "The point is that the State of New York doesn't get to be a dance critic."

Unfortunately, on October 23, 2012, New York's highest court handed down a 4-3 split decision against the club in *677 New Loudon v. State of NY Tax Appeals Tribunal*. The majority (Judges Ciparick, Graffeo, Pigott, and Jones) supported the taxation of admission to the stage dances and lap dance fees. "With the evident purpose of promoting cultural and artistic performances in local communities, the Legislature," the majority asserted, "created an exemption that excluded from taxation admission charges for a discrete form of entertainment." "The dancing at Nite Moves is not art but — like baseball games, stock-car races and ice shows — is a form of entertainment that falls within 'the broad sweep of the tax.'"

However, the dissent, written by Judge Smith (Chief Judge Lippman and Judge Read concurring) countered: "The issue is not what the legislature would have wanted to do, but what it did …" The ruling of the Tax Appeals Tribunal, which the majority upholds, "makes a distinction between highbrow dance and lowbrow dance that is not to be found in the governing statute and raises significant constitutional problems."

Furthermore, the dissent declaimed, "The people who paid these admission charges paid to see women dancing. It does not matter if the dance was artistic or crude, boring or erotic. Under New York's Tax Law, a dance is a dance."

The dissent challenged the Tribunal's decision that the dancers were not artists, but mere athletes, and it "seems to have missed the point that 'ranking' [in difficulty] of either of gymnasts or dancers, is not the function of a tax collector."

In addition, the dissent defended me: "[We] find the majority's and the Tribunal's discussions of the expert's testimony unfair — indeed, the Tribunal's discussion (which says the testimony came in through 'a continuous stream of leading questions' is simply inaccurate."

The New York Times editorial, "A Dance Is a Dance," came out in support of the dissent: "The state's position amounts to discrimination on the basis of content and raises a serious First Amendment issue" (October 30, 2012, p. A26).

Having climbed a four-court legal ladder without a favorable ending, Nite Moves petitioned the appeals court to revisit this issue on November 14. Nite Moves awaits an answer. If the court refuses to reconsider its 4-3 decision against Nite Moves, the club plans to ask the U.S. Supreme Court to review the case.

Should Dance/USA support Nite Moves against government playing dance critic and deciding what is dance, choreography, and art, in addition to evaluating dance genre quality and rank?
Should Dance/USA support Nite Moves against government playing dance critic and deciding what is dance, choreography, and art, in addition to evaluating dance genre quality and rank? In a democracy, dancers have the right to express any ideas, including sexual ones. Sexuality is in the mind of the beholder and can be read into any dance, especially given that the human body is the instrument of both dance and sex. Now exotic dance is under attack. What dance might be next?

Judith Lynne Hanna *has written for many publications including* The New York Times, Washington Post, Stagebill, *and* Dance Magazine. *See* www.judithhanna.com.

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- **Francine Paino** // Dec 31, 2012 at 5:49 AM

  No. Dance/USA should not defend Nite Moves. A simple test of whether or not it is an art form is to ask if it would be legal to bring children under the age of 18 to such an establishment. Nite Moves is providing sexual stimulation and satisfaction to its patrons . . . period! Let's stop this pc nonsense and call a thing by its name. Perhaps everyone would be better served if prostitution and its spin-off professions were legalized and fully taxed. That would be a major help to the national deficit!

- 2**Richard Rose** // Dec 31, 2012 at 9:58 AM

Isn't this also a threat to the world of dance in the musical theatre world as well? THE FULL MONTY comes to mind as does a host of musicals of the past. Can a conservative minded politician use this ruling to slap a tax on shows, dance or musical, that they would find offensive and want to see shut down?

February 7, 2013 Reargument was denied