

ADULT ENTERTAINMENT FILM CONTRACTS: TO ENFORCE OR NOT TO ENFORCE?

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TABLE OF CONTENTS

INTRODUCTION.....	367
I. BACKGROUND.....	370
A. “Consideration” Requirement.....	370
B. Public Policy Against Prostitution and Adult Entertainment.....	371
II. THE PERFORMANCE AS THE CONSIDERATION	372
III. THE WAIVER OF THE LEGAL RIGHT TO PRIVACY AS THE CONSIDERATION.....	373
IV. THE SEXUAL INTERCOURSE AS THE CONSIDERATION.....	375
A. Shifting Views	375
B. Legal Response.....	377
C. Growth of the Entertainment Industry	379
V. REASONS FOR ENFORCING ADULT ENTERTAINMENT FILM CONTRACTS	379
A. Adult Entertainment Film Contracts Protect the Performers from Abuse.....	379
B. Shifting Views Toward Openness to Sex and Recent Cases Legalizing the Creation of Adult Entertainment Films.....	380
C. Voiding Adult Entertainment Film Contracts Restrains a Women-Empowered Industry.....	383
D. Basic Principles of Contract Will Void Adult Entertainment Film Contracts Entered Into by the “Victimization of Women”	387
CONCLUSION.....	392

INTRODUCTION

The adult entertainment film industry is an industry that has seen significant growth in the recent years.¹ Typically, in the process of creating an adult entertainment film, the pornographer and each performer enter into an adult

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¹ See *infra* Part IV.C.

entertainment film contract, which is an agreement specifying the employment terms of the performer by the pornographer.² Generally, an adult entertainment film contract would be unenforceable because sexual consideration goes against public policy.³ However, in the recent years, courts have begun to legalize the creation of adult entertainment.⁴ The recent holdings beg the question of whether the contracts involved within this recently legalized industry are enforceable. In common law systems, consideration is a contract requirement.⁵

The enforceability of an adult entertainment film contract depends on how the consideration is defined. Although the consideration of an adult entertainment film contract has not been formally defined, it can be any of the following: the performance,⁶ the waiver of the legal right to privacy,⁷ or the sexual intercourse.⁸ If the consideration is the “performance”—the acting by the performer in the adult entertainment film, the contract is enforceable because it is the actor, not the subject, who is paid. In addition, if the consideration is the “waiver of the legal right to privacy,” the contract is enforceable. Even if the consideration is the “sexual intercourse,” the contract should be enforceable due to shifting views.

First, the consideration of an adult entertainment film contract can be the “performance” by the actor or actress.⁹ For instance, in such a case, no “lewd act” occurs under California law because there is no sexual contact between the paying customer—pornographer—and the performers engaging in sex.¹⁰ Under California law, a “lewd act” requires touching between the prostitute and the customer.¹¹ Thus, the consideration is, like Hollywood films, the acting by the performer—playing a character in the adult entertainment film—rather than the sexual intercourse. Therefore, similar to Hollywood contracts, an adult entertainment film contract is enforceable, as the consideration offered by the performer to the pornographer is legal.

Next, the consideration could be the “waiver of the legal right to privacy.”¹² Under New York law, there is a common law right to privacy.¹³ Sexual conduct

² Andrew Gildea, Note, *Sexual (Re)consideration: Adult Entertainment Film Contracts and the Problem of Enforceability*, 95 GEO. L.J. 541, 543 (2007).

³ Gildea, *supra* note 2, at 547.

⁴ *People v. Freeman*, 758 P.2d 1128 (Cal. 1988); Sherry F. Colb, *The Legal Line Between Porn and Prostitution*, CNN (Aug. 12, 2005, 2:20 PM), <http://www.cnn.com/2005/LAW/08/12/colb.pornography/index.html?iref=allsearch> (“Justice Budd G. Goodman recently issued a ruling . . . on the ground that pornography does not qualify as prostitution under the relevant New York statute.”).

⁵ *See infra* Part I.

⁶ *See infra* Part II.

⁷ *See infra* Part III.

⁸ *See infra* Part IV.

⁹ *See infra* Part II.

¹⁰ *Wooten v. Superior Court*, 113 Cal. Rptr. 2d 195, 202 (Cal. App. 4th Dist. 2001).

¹¹ *See id.*

¹² *See infra* Part III.

¹³ N.Y. CIV. RIGHTS LAW § 50 (McKinney 2014).

between consenting adults in a place not open to the public is completely lawful.¹⁴ In an adult entertainment film, a pornographer films performers engaging in sexual conduct—a lawful private act—in a private place. Without a waiver, the performers could sue the pornographer filming them for invasion of privacy. A waiver of the legal right to privacy is sufficient consideration for contract purposes.¹⁵ Therefore, if the consideration is the waiver of the legal right to privacy, then adult entertainment film contracts would be enforceable, as the consideration is legal.

However, it is controversial as to whether an adult entertainment film contract is enforceable when the consideration is the “sexual intercourse.”¹⁶ Historically, courts held contracts where sex is part of the consideration to be void because of the strong public policy against rewarding prostitution or quasi-prostitution.¹⁷ A marital contract is an example of a type of contract where sex is part of the consideration. Courts have been reluctant to intervene with marital contracts, as marriage was seen as a moral obligation.¹⁸ One court viewed it immoral for a woman to sell her virtue—her obligations as a wife.¹⁹ In addition, another court’s view was that the marriage contract should displace all other contracts;²⁰ additional contracts governing the marriage relationship would be demeaning to the higher obligation and spiritual purpose of marriage.²¹ However, premarital sex and cohabitation agreements are both becoming more acceptable in today’s society.²² Thus, legal standards should change to conform to these changes in social values; courts should not void contracts solely due to part of the consideration being sex.

In addition, there are many other reasons for enforcing adult entertainment film contracts.²³ First, the contract may be drafted to protect the performers, especially women, from both physical and psychological abuse by the pornographers.²⁴ In addition, the adult entertainment film industry is an industry empowered by women; women both dominate and earn a higher overall income than men in the industry.²⁵ Therefore, voiding adult entertainment film contracts would restrain one of the few women-empowered industries. Lastly, contract principles will void contracts entered into due to lack of capacity, duress, fraud, or

¹⁴ Gildea, *supra* note 2, at 550 (citing *People v. Freeman*, 758 P.2d 1128 (Cal. 1988)).

¹⁵ *Jemzura v. Jemzura*, 330 N.E.2d 414, 420 (N.Y. 1975) (citing *Ryerson & Son v. O’Donnell*, 279 N.Y. 109, 115 (1938)).

¹⁶ *See infra* Part IV.

¹⁷ Gildea, *supra* note 2, at 547.

¹⁸ *Balfour v. Balfour*, 2 KB 571 (C.A. Eng. 1919).

¹⁹ *Id.*

²⁰ *Miller v. Miller*, 134 F.2d 583 (10th Cir. 1943).

²¹ *Miller*, 134 F.2d at 583; *Bohanan v. Maxwell*, 181 N.W. 683 (Sup. Ct. Iowa 1921).

²² *See infra* Part IV.A-B.

²³ *See infra* Part IV.D.

²⁴ *See infra* Part IV.D.1.

²⁵ *See infra* Part IV.D.3.

mistake; there need not be a duplication of effort by the courts in determining whether it is fair to enforce a contract that is not void under contract principles.²⁶

This Note focuses specifically on the adult entertainment film industry and advocates for the enforceability of adult entertainment film contracts in light of the recent court decision that legalized the creation of adult entertainment films and shifts in social views in favor of premarital sex and cohabitation in the last few decades. However, this Note focuses only on the enforceability of adult entertainment film contracts. Part I of this Note will discuss the consideration requirement for contracts in general and the public policy against prostitution and adult entertainment. Part II will discuss the “performance,” or the acting by the performer, as the consideration and will argue that the consideration is legal; thus, the contract is enforceable. Part III will analyze the “waiver of the legal right to privacy” as the consideration, demonstrating that the contract is also enforceable. Lastly, Part IV will discuss the “sexual intercourse” as the consideration and continue to argue that, even if the consideration is the sexual intercourse, adult entertainment film contracts should be enforceable regardless because of the recent shift in views toward premarital sex and cohabitation agreements. In addition, this part will provide additional reasons for enforcing adult entertainment film contracts.

I. BACKGROUND

To create a valid contract, both parties entering the contract must provide lawful consideration.²⁷ Consequently, adult entertainment film contracts may be unenforceable for unlawful consideration because allowing sex as the consideration for a contract goes against public policy.²⁸

A. “Consideration” Requirement

Generally, for a contract to be enforceable, three elements need to be present: offer, acceptance, and consideration. Consideration consists of a “benefit to the promisor or a detriment to the promisee.”²⁹ General contract principles expand on what constitutes consideration:

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation.
- (4) The performance or

²⁶ See *infra* Part IV.D.4.

²⁷ CAL. CIV. CODE § 1608 (West 2015).

²⁸ Gildea, *supra* note 2, at 547.

²⁹ *Beitner v. Becker*, 824 N.Y.S. 2d 155, 156 (App. Div. 2006) (citing *Holt v. Feigenbaum*, 52 N.Y.2d 291, 299 (1981); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 464 (1982); *Village of Upper Nyack v. Christian & Missionary All.*, 155 A.D.2d 530 (1989)).

return promise may be given to the promisor or to some other person. It may be given by the promisee to some other person.³⁰

Some courts may hold a contract unenforceable because the consideration is “unlawful.”³¹ An example would be California courts following the California Civil Code. The California Civil Code voids the entire contract when any part of a consideration is unlawful.³² The Code defines “unlawful” as (1) contrary to an express provision of law, (2) contrary to the policy of express law, though not expressly prohibited, or (3) contrary to good morals.³³ This raises the issue of whether adult entertainment film contracts are enforceable: the consideration may be rendered unlawful either for being “contrary to the policy of express law” or “contrary to good morals.”

B. Public Policy Against Prostitution and Adult Entertainment

Historically, sex as the consideration for a contract runs counter towards the strong public policy against rewarding prostitution or quasi-prostitution;³⁴ as result, adult entertainment film contracts may be held unenforceable due to the “unlawful” sexual consideration. As early as in 1810, a Massachusetts court found the consideration for a contract for a prostitute’s wages to be immoral; thus, the court voided the contract.³⁵ Similarly, in 1818, a South Carolina court held that a woman may not sell her virtue; such contract is void from the beginning due to gross indecency and immorality in the foundation of the contract.³⁶ By the twentieth century, the Restatement (First) of Contracts stated that “a bargain in whole or part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal.”³⁷ The prohibition of sexual consideration also encompassed cohabitation agreements until *Marvin v. Marvin*,³⁸ which will be discussed below.³⁹

Although cohabitation agreements are becoming enforceable in some states, prostitution continues to be illegal in nearly every state. However, California carved out an exception for adult entertainment.⁴⁰ The definition of “adult entertainment” can be very broad.⁴¹ In *People v. Freeman*, the California Supreme

³⁰ RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981).

³¹ *Meyer v. Hawkinson*, 2001 ND 78 (N.D. 2001); *Teachout v. Bogy*, 175 Cal. 481 (Cal. 1917).

³² CAL. CIV. § 1608 (West 2015) (“If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void.”).

³³ CAL. CIV. CODE § 1667 (West 2015).

³⁴ *Gilden*, *supra* note 2, at 547.

³⁵ *Id.* at 557 (citing *Greenwood v. Curtis*, 6 Mass. (5 Tyng) 358, 379 (1810)).

³⁶ *Id.* at 557-58 (citing *Cusack v. White*, 9 S.C.L. (2 Mill) 279, 284 (1818)).

³⁷ *Id.* at 558 (citing RESTATEMENT (FIRST) OF CONTRACTS § 589 (1932)).

³⁸ *See id.* (citing *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976)).

³⁹ *See infra* Part IV.A.

⁴⁰ *Gilden*, *supra* note 2, at 542.

⁴¹ WASH. MUN. CODE § 5.56.000(A)(6) (2006) (“Any “adult motion picture theater”, which means a motion picture theater business or commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides or similar photographic reproductions characterized by the

Court legalized the creation of adult entertainment films.⁴² The *Freeman* court's decision "paved the way for today's multibillion-dollar industry by overturning contrary precedent and removing the perilous legal status in which pornography had been previously created."⁴³ As the creation of adult entertainment is becoming enforceable in some states, this begs the question as to whether the contracts in this industry are enforceable or unenforceable due to public policy.

II. THE PERFORMANCE AS THE CONSIDERATION

First, it is necessary to consider the performance by an actor or actress as the consideration. Many states that do not recognize sexual intercourse as valid consideration will enforce a contract when there is a valid, lawful consideration separate and apart from the sexual consideration. For instance, Florida law states:

Although a contract for or in consideration of illicit sexual intercourse or of a promise to engage in same is illegal, there is an exception that such intercourse between parties to a bargain previously or subsequently formed does not invalidate it.⁴⁴ . . . Hence, where it was clear there is a valid, lawful consideration separate and apart from any express or implied agreement regarding sexual relations, the contract does not violate public policy.⁴⁵

Thus, in a state like Florida, adult entertainment film contracts would be held enforceable if the consideration is the performance by the actor or actress. More specifically, the California Fourth District Court of Appeal held that "a lewd act, an element of prostitution, requires touching between the prostitute and the customer, even if the customer is simply an observer of sexual acts between two prostitutes."⁴⁶ In other words, there must be sexual contact between the prostitute and the customer. Many performances are admittedly remote: pornographic home videos, pornographic computer websites, pay for view television, peep show theaters, and movie houses.⁴⁷ Sex acts performed as a part of stage plays in front of live audiences differ from the other performances only in degree.⁴⁸ In the case of adult entertainment films, there is no "lewd act." The pornographer and the performers engaging in sexual intercourse do not make actual contact. Rather, the pornographer is simply an observer of the sexual act, similar to a live audience watching a sex scene in a play.

depiction or description of nudity or of specified sexual activities as described above at section (A)(2) are regularly shown.").

⁴² *Gilden*, *supra* note 2, at 543-44 (citing *People v. Freeman*, 758 P.2d 1128, 1128 (Cal. 1988)).

⁴³ *Id.*

⁴⁴ 11 FLA. JUR. 2D CONTRACTS § 129 (West Supp. 2014) (citing *Wilson v. Rooney*, 101 So. 2d 892 (Fla. Dist. Ct. App. 2d Dist. 1958)).

⁴⁵ *Id.* (citing *Poe v. Levy's Estate*, 411 So. 2d 253 (Fla. Dist. Ct. App. 4th Dist. 1982)).

⁴⁶ *Wooten v. Superior Court*, 113 Cal. Rptr. 2d 195, 202 (Cal. App. 4th Dist. 2001).

⁴⁷ *Id.* at 206.

⁴⁸ *Id.*

Adult entertainment film contracts should be held enforceable like Hollywood contracts. In both, the consideration is the “acting” rather than the sexual intercourse. “Acting” is “the art or practice of representing a character on a stage or before cameras.”⁴⁹ Additionally, adult entertainment films are similar to Hollywood films in many other ways as well. First of all, adult entertainment films are based on scripts,⁵⁰ supporting that the performers are playing a character rather than merely having sex. In addition, there are many genres in adult entertainment films, such as science fiction, mysteries, horror movies and romantic comedies;⁵¹ thus, adult entertainment films have storylines comparable to Hollywood films. The only difference is that the adult entertainment film has sexually explicit content.⁵²

Also, sexual content, although not quite as explicit, is commonly seen in today’s Hollywood movies due to shifting social values. The only real difference between a Hollywood movie and an adult entertainment film is that the performers are not actually having sex in a Hollywood movie, even though it is portrayed as if they are. However, the impact on the audience is the same.⁵³ To the audience, the performers are engaging in a sex scene, regardless of whether or not there is actually sexual intercourse.⁵⁴ In Hollywood films, it is implied that the actors are having sex; while in adult entertainment films, they actually are. Thus, similar to Hollywood films, the consideration for adult entertainment film contracts could be viewed as the performance based on a script rather than the sexual intercourse, making the contract enforceable.

III. THE WAIVER OF THE LEGAL RIGHT TO PRIVACY AS THE CONSIDERATION

Next, the consideration may be considered as the waiver of the legal right to privacy. If the consideration in an adult entertainment film contract is the waiver of a legal right, then the consideration is legal; thus, the contract is enforceable. In *People v. Freeman*, the court reasoned that

although [it] acknowledged that ‘acts which are independently prohibited by law cannot be consummated without sanction merely because they occur during [film production],’ in this case the acts ‘were not crimes

⁴⁹ “Acting,” MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/acting> (last visited Jan. 19, 2015).

⁵⁰ Clay Calvert & Robert D. Richards, *Porn in Their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture, and the Mainstreaming of Adult Content*, 9 VAND. J. ENT. & TECH. L. 255, 281 (2006).

⁵¹ *Id.* at 292.

⁵² *Id.*

⁵³ Colb, *supra* note 4 (“Though real sex occurred in the making of the pornographic film, this fact is only relevant insofar as it is known (or believed) by the viewer. If, for example, the entire film were created with highly realistic computer graphics, but the viewer believed that what he saw was real, then he would enjoy the material just as much.”).

⁵⁴ *See id.* (“[T]he impact of pornography occurs through the mediation of an audience witnessing a performance.”).

independent of and apart from the payment for the right to photograph the sexual performances.⁵⁵

If the filmmaker had hired actors to commit acts of murder, rape, or robbery, there would be an underlying crime, which makes the contract unlawful.⁵⁶ However, in *Freeman*, the sexual conduct was completely lawful because it was between consenting adults in a place not open to the public.⁵⁷ Assuming the sex is consensual and no minors are involved, the private acts engaged in between the two performers are completely lawful.⁵⁸ In general, one is free to have sex with whomever he or she wants. And, unlike a typical case of prostitution, where one person pays another person for sex, the pornographer is not paying for sex. He or she is paying to observe the two performers that just so happen to be having sex.

The consideration is not the sexual act itself; it is the waiver of the right to privacy. Generally, under common law, there is a cause of action against the invasion of privacy.⁵⁹ The general rule is that, when taking photos, a person is not allowed to make an intrusion into the private affairs of another.⁶⁰ This right may possibly be extended into semi-private areas as well.⁶¹ In the case of adult entertainment film, the performer is engaging in a private act in a private area, though it can be argued that the film studio is not really a private area. Even so, it is at least a semi-private area because it is not open to the general public, such as a public park, street, etc. In addition, there is no doubt that sexual conduct between two consenting adults is a private act.⁶² Without the performers' waiver of the right to privacy, those individuals engaging in sexual intercourse could sue for invasion of privacy.⁶³ Thus, the consideration is not the sexual intercourse; the consideration is the performer allowing the pornographer to intrude on his or her private affairs by photographing or video recording them.

In addition, the consideration is the waiver of the legal right to publicity. Common law grants a person whose name, portrait, or picture is used without consent a cause of action: the right to publicity.⁶⁴ Every individual has a right to

⁵⁵ Gilden, *supra* note 2, at 550 (citing *People v. Freeman*, 758 P.2d 1128 (Cal. 1988)).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ *Michaels v. Internet Entm't Grp., Inc.*, 1998 WL 882848, at *6 (C.D. Cal. Sept. 11, 1998) (quoting *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 768 (Ct. App. 1983) ("The elements of the tort of public disclosure of private facts are '(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.")).

⁶⁰ Benjamin J. Cooper, Note, *Naked Before the Law: Reality Porn and the Capacity to Contract*, 11 CARDOZO WOMEN'S L.J. 353, 369 (2005) (citing RESTATEMENT (SECOND) OF TORTS § 652B (1977)).

⁶¹ *Id.* at 369.

⁶² *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

⁶³ *Internet Entm't Grp., Inc.*, 1998 WL 882848, at *6 (finding that sex tapes depict private facts under the tort of public disclosure of private facts).

⁶⁴ The New York Civil Rights Law provides a cause of action for right of privacy: "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or

his or her own image.⁶⁵ In an adult entertainment film, the performer's name and photograph or video is used. In essence, the consideration for the contract is also the performer giving up the right to sue under a right to publicity claim. Thus, the contract is enforceable because the sexual intercourse is not the consideration, but the waiver of a legal right is. The waiver of a legal right on the part of the promisee is sufficient consideration to uphold a contract.⁶⁶

IV. THE SEXUAL INTERCOURSE AS THE CONSIDERATION

Assuming the consideration is not the performance or the waiver of the right to privacy, the contract should be enforceable even if the consideration is the "sexual intercourse" due to shifting views in favor of premarital sex and cohabitation agreements.⁶⁷ In addition, there are many other reasons to enforce adult entertainment film contracts, as voiding the contracts significantly disadvantages the performer.

A. *Shifting Views*

Prior to the 1960s, there was a strong view against premarital sex.⁶⁸ Generally, while a man risked contracting venereal disease if he had sex with a prostitute or a shotgun wedding if he impregnated a girl from a respectable family, a man suffered no reputational harm by engaging in premarital sex.⁶⁹ On the other hand, a young woman engaging in premarital sex not only risked pregnancy but also serious damage to her reputation.⁷⁰ In the 1960s, both technology and social changes altered these traditional norms.⁷¹ For instance, the introduction of the birth control pill offered a woman control over her own pregnancy.⁷² In addition, a movement to advance women's rights allowed women the possibility of engaging in premarital sex without reputational loss.⁷³ In recent years, as more and more young women have begun to engage in premarital sex, society has become much more accepting of premarital sex altogether.⁷⁴

As society became more open to premarital sex, more premarital cohabitation

picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor." N.Y. CIV. RIGHTS LAW § 50 (McKinney 2014).

⁶⁵ See *id.*

⁶⁶ *Jemzura v. Jemzura*, 330 N.E.2d 414, 420 (N.Y. 1975) (citing *Ryerson & Son v. O'Donnell*, 279 N.Y. 109, 115 (1938)).

⁶⁷ See *infra* Part IV.A.

⁶⁸ Marsha Garrison, *Golden Anniversary Issue, Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 312 (2008).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 313 (citing Arland Thorton, *Changing Attitudes Toward Family Issues in the United States*, 51 J. MARRIAGE & FAM. 873, 884 (1989)).

resulted. While the new norm began with the younger generation, by 1978, it spread to the older generation as well.⁷⁵ The number of U.S. “unmarried cohabitating households” increased significantly from 1970 to 2000: 523,000 to 4,880,000.⁷⁶ In addition, the number of individuals who have ever cohabited also increased significantly: “among women born between 1950 and 1954, women who came of age in the late 1960s and early 1970s, 24% cohabited before marriage; among women born between 1965 and 1969, 55% cohabited before marriage.”⁷⁷ In recent years, cohabitation has increased among older couples that have been divorced and chosen cohabitation over a new marital commitment.⁷⁸

In general, Christians tend to engage in less premarital sex than those who report their religion as “nothing” or “spiritual but not religious.”⁷⁹ Premarital sex among Christians tends to decrease with those that attend more church services per month.⁸⁰ Even among Christians, there has been a trend towards acceptance of premarital sex and cohabitation. For instance, a new study on Christian attitudes toward dating and marriage shows a shift towards acceptance of premarital sex and cohabitation and rejection of traditional gender roles.⁸¹ Experts believe that many Christians are following cultural trends more often than they follow the Bible when it comes to sex and marriage.⁸² A report published in 2014 by the religious dating websites Christian Mingle⁸³ and JDate,⁸⁴ noted that 61% of Christians said they would have sex before marriage, 56% said that it is appropriate to move in with someone after dating for a time between six months and two years, 59% said it

⁷⁵ *Id.* (citing Susan L. Brown, *Union Transitions Among Cohabitors: The Significance of Relationship Assessment and Expectations*, 62 J. MARRIAGE & FAM. 833, 838 (2000); Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913, 923 (1991); Patrick Heuveline & Jeffrey M. Timberlake, *The Role of Cohabitation in Family Formation: The United States in Comparative Perspective*, 66 J. MARRIAGE & FAM. 1214 (2004); Kathleen Kiernan, *The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe*, 15 J.L. POL’Y & FAM. 1 (2001); Sharon Sassier & James McNally, *Cohabiting Couple’s Economic Circumstances and Union Transitions: A Re-examination Using Multiple Imputation Techniques*, 32 SOC. SCI. RES. 553 (2004)).

⁷⁶ *Id.* (citing JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, P20-537, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: POPULATION CHARACTERISTICS (2001)).

⁷⁷ *Id.* (citing Kelly Raley, *Recent Trends and Differentials in Marriage and Cohabitation*, THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 126 (Linda J. Waite ed., 2000)).

⁷⁸ *See id.* (citing Susan L. Brown et al., *Cohabitation Among Older Adults: A National Portrait*, 61 J. GERONTOLOGY SERIES B. PSYCHOL. SCI. & SOC. SCI. S71 (2006)).

⁷⁹ *How Common Is Premarital Sex?*, AUSTIN INST. FOR THE STUDY OF FAMILY AND CULTURE (2014), <http://relationshipsinamerica.com/relationships-and-sex/how-common-is-premarital-sex>.

⁸⁰ *See id.*

⁸¹ Tyler O’Neil, *Christians Are Following Secular Trends in Premarital Sex, Cohabitation Outside of Marriage, Says Dating Site Survey*, CHRISTIAN POST (Jan. 27, 2014, 8:45 AM), <http://www.christianpost.com/news/christians-are-following-secular-trends-in-premarital-sex-cohabitation-outside-of-marriage-says-dating-site-survey-113373/> (citing CHRISTIANMINGLE.COM & JDATE.COM, STATE OF DATING IN AMERICA REPORT (2014), <http://www.stateofdatingreport.com/findings.htm>).

⁸² *See id.*

⁸³ ChristianMingle.com is an online dating community for Christian singles. CHRISTIANMINGLE.COM & JDATE.COM, *supra* note 81.

⁸⁴ JDate.com is an online Jewish dating community “responsible for more Jewish marriages than all other dating sites combined.” *Id.*

does not matter who the primary breadwinner in the family is, and 34% responded that, while it would be nice to marry someone of the same faith, it is not required.⁸⁵

The survey included data from more than 2,600 U.S. singles between the ages of eighteen and fifty-nine.⁸⁶ The report “covers topics of significance in today’s dating climate including habits and expectations from courtship to marriage, dating etiquette, social and familial influence on relationships, infidelity and more.”⁸⁷ For the survey, ChristianMingle and JDate partnered with licensed psychotherapist and relationship expert Rachel Sussman, LCSW, to evaluate the results from the survey and to put them in the context of larger national trends and clinical findings.⁸⁸ As the number of premarital cohabitants increase, society has become much more accepting of it, which leads to the issue of whether cohabitation agreements are enforceable.

B. Legal Response

Both cohabitation and adult entertainment film agreements can be seen as having similar consideration: sexual services. Traditionally, courts have held cohabitation agreements to be unenforceable due to the “immoral and illicit consideration of meretricious sexual services.”⁸⁹ With the shifting views regarding premarital cohabitation, in *Marvin v. Marvin*, the California Supreme Court held that cohabitation agreements are enforceable, whether they are implied or expressed.⁹⁰ The court decided to forego traditional legal standards because of the abandonment of alleged moral considerations.⁹¹ Today, *Marvin* is the dominant approach to cohabitation claims in the United States:⁹² appellate courts in at least twenty-six states and the District of Columbia now recognize some relational contract claims between cohabitants while only five states disapprove all forms of relief for claims by cohabitants.⁹³ Recently, in *Cochran v. Cochran*, the California Court of Appeal expanded *Marvin* to include part-time cohabitation.⁹⁴ In addition, some courts have even begun to recognize cohabitation agreements between same sex couples.⁹⁵ Although the majority of courts follow *Marvin*, some courts take a more cautious approach. For instance, New York only recognizes expressed

⁸⁵ O’Neil, *supra* note 81.

⁸⁶ CHRISTIANMINGLE.COM & JDATE.COM, *supra* note 81.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Marvin v. Marvin*, 557 P.2d 106, 121-22 (Cal. 1976).

⁹⁰ Garrison, *supra* note 68, at 315 (citing *Marvin*, 557 P.2d at 121-22).

⁹¹ *Id.* at 314.

⁹² *Id.* at 315.

⁹³ *Id.* at 315-16.

⁹⁴ *Id.* at 318 (citing *Cochran v. Cochran*, 106 Cal. Rptr. 2d 899 (Ct. App. 2001)).

⁹⁵ Ashley Frankel, Note, *The Right to Palimony: Why New York Should Change Its Law to Enforce Claims Between Unmarried Cohabitants*, 20 CARDOZO J.L. & GENDER 173, 187 (2013) (citing *Posik v. Layton*, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997)); see *Bergen v. Wood*, 18 Cal. Rptr. 2d 75 (Cal. App. 2d Dist. 1993).

cohabitation agreements.⁹⁶ Some states have gone as far as passing statutes addressing the matter. For example, Minnesota passed a statute that allows cohabitants, a man and woman living together out of wedlock, to create a contract that is enforceable as to terms concerning property and financial relations of the parties if the following conditions are met: (1) the contract must be written and signed by both parties, and (2) a party seeks to enforce the contract after the termination of the parties' relationship.⁹⁷

Although most courts have begun to recognize cohabitation agreements, contracts between married persons for domestic services, care and companionship, or support in exchange for compensation during marriage still remains unenforceable.⁹⁸ However, marriage are distinguished from cohabitation because, when one becomes married, it is implied that domestic services, care and companionship, and support are encompassed within the marriage; whereas, with cohabitation, the circumstances do not necessarily support such an inference.⁹⁹

In the case of cohabitation agreements, two individuals may be living together for non-romantic reasons, such as to save money on rent.¹⁰⁰ In such a case, it should not be assumed that the individuals intended on caring for one another. Similarly, adult entertainment film contracts typically do not involve romantic partners but two individuals entering into a contract for mutual financial benefit.¹⁰¹ In the case of two strangers or non-romantic individuals, it cannot be implied that the individuals contemplated on caring for one another. Thus, since domestic services, care and companionship, and support cannot be implied in cohabitation and adult entertainment film agreements, they are distinguished from

⁹⁶ Garrison, *supra* note 68, at 321 (citing *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980)).

⁹⁷ MINN. STAT. ANN. § 513.075 (West 2014) ("If sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock, or who are about to commence living together in this state out of wedlock, is enforceable as to terms concerning the property and financial relations of the parties only if: (1) the contract is written and signed by the parties, and (2) enforcement is sought after termination of their relationship.").

⁹⁸ *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Ct. App. 1993).

⁹⁹ *Marriage vs. Cohabitation*, FINDLAW (2013), <http://family.findlaw.com/living-together/marriage-vs-cohabitation.html>. In marriage, "[a] higher-wage-earning spouse may have the obligation to provide financial support for the other spouse upon separation or divorce; whereas, with cohabitation, "[c]ouples who live together and then split up usually do not incur the obligation to support each other after the breakup, unless they have entered into a contract providing otherwise." *Id.* In addition, in marriage, "if one spouse becomes ill or incompetent, the other spouse generally has the right to make decisions on the ill spouse's behalf, on issues including healthcare and finances"; whereas, with cohabitation, "[n]o matter how close the bond or how long the relationship existed, a cohabitant may need to defer to immediate family members when it comes to making decisions for an ill or incompetent unmarried partner, unless a general power of attorney or health care power of attorney give that authority to the cohabiting partner." *Id.*

¹⁰⁰ Wise Bread, *8 Simple Ways to Save Money When Renting*, U.S. NEWS (May 9, 2011, 1:55 PM), <http://money.usnews.com/money/blogs/my-money/2011/05/09/8-simple-ways-to-save-money-when-renting>.

¹⁰¹ *California v. Freeman*, 488 U.S. 1311, 1312 (U.S. 1989) (citing *People v. Freeman*, 46 Cal. 3d 419, 424 (Cal. 1988)) ("[T]he court characterized the payments made to the performers as 'acting fees' and held that 'there is no evidence that [Freeman] paid the acting fees for the purposes of sexual arousal or gratification, his own or the actors'.")

the unenforceable marriage contracts. Therefore, cohabitation and adult entertainment film agreements should be enforceable.

C. Growth of the Entertainment Industry

Following *People v. Freeman*,¹⁰² which legalized the creation of porn in California, the adult entertainment industry has experienced significant growth. In the mid-1970s, the estimated retail value of the adult entertainment industry in the United States was between \$5-10 million.¹⁰³ Currently, the estimated retail value has grown to \$4-12 billion.¹⁰⁴ The current spending on adult entertainment is “roughly equivalent to the amount spent on professional sporting events, music, or the mainstream box office.”¹⁰⁵ In addition, it is cheaper to make adult entertainment films today than it was in the 1970s. In 1975, the typical cost of producing an adult entertainment film was \$320,000 each in today’s dollars.¹⁰⁶ In 2001, the cost significantly decreased to as little as \$5,000 each.¹⁰⁷ The enormous growth of the adult entertainment industry raises the issue of whether the contracts within this multi-billion dollar industry are enforceable.

V. REASONS FOR ENFORCING ADULT ENTERTAINMENT FILM CONTRACTS

Although it may be argued that adult entertainment film contracts should be unenforceable because sexual consideration violates public policy, there are more reasons as to why the contracts should be enforceable.

A. Adult Entertainment Film Contracts Protect the Performers from Abuse

Regardless of whether the contracts are enforceable, the adult entertainment film industry is a growing multi-billion dollar industry,¹⁰⁸ and it is legal.¹⁰⁹ The agreements help protect the performers from abuse in the adult entertainment film industry, such as physical and psychological abuse.¹¹⁰ For instance, a contract may include a provision that specifies the maximum number of hours a performer may be required to work or the acts the performer may be required to perform.¹¹¹ Both

¹⁰² *People v. Freeman*, 758 P.2d 1128 (Cal. 1988).

¹⁰³ Gilden, *supra* note 2, at 543 (citing Eric Schlosser, *The Business of Pornography*, U.S. NEWS & WORLD REP. (1997)).

¹⁰⁴ *Id.* at 543 (citing FREE SPEECH COALITION, A REPORT ON THE ADULT ENTERTAINMENT INDUSTRY (2005), <http://www.freespeechcoalition.com/whitepaper05.htm> (\$4 billion estimate); Steve Kroft, *Porn in the U.S.A.*, CBS NEWS (Sept. 5, 2004), <http://www.cbsnews.com/stories/2003/11/21/60minutes/main585049.shtml> (\$10 billion); NICOLA SIMPSON, THE MONEY SHOT: THE BUSINESS OF PORN (2005)).

¹⁰⁵ Gilden, *supra* note 2, at 543 (citing Kroft, *supra* note 104).

¹⁰⁶ *Id.* (citing ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 168 (2003)).

¹⁰⁷ *Id.*

¹⁰⁸ *See supra* Part IV.C.

¹⁰⁹ *People v. Freeman*, 758 P.2d 1128 (Cal. 1988).

¹¹⁰ Gilden, *supra* note 2, at 545.

¹¹¹ *See id.*

of these provisions would be included to benefit the performer, not the pornographer. Additionally, the contract gives greater assurance that the performers will be adequately compensated.¹¹² Refusing to enforce adult entertainment film contracts due to public policy would disadvantage the often-vulnerable performers from being overworked and mistreated.

B. Shifting Views Toward Openness to Sex and Recent Cases Legalizing the Creation of Adult Entertainment Films

As discussed earlier, society has become much more accepting of premarital sex and cohabitation agreements in recent years.¹¹³ Changes in social views in favor of premarital sex parallel pop culture—Hollywood, TV, music, and written content.¹¹⁴ The Federal Communications Commission (“FCC”) restricts what may be broadcasted, prohibiting “obscene and indecent” material.¹¹⁵ Programming is considered obscene if “the average person, applying contemporary community standards, would find that the material appeals to the prurient interest; that the material describes or depicts sexual conduct in a patently offensive manner; or taken as whole, the material lacks serious literary, artistic, political or scientific value.”¹¹⁶

The meaning of “indecent” has changed over time.¹¹⁷ In the 1950s, TV programmers would not even show married couples sharing a bed.¹¹⁸ For instance, in the TV show *I Love Lucy*, a 1950s sitcom, Lucy and Ricky had separate beds.¹¹⁹ Even though the two were married, two beds were used instead of one because a single bed would imply the two were having sex.¹²⁰ Contrarily, in the more recent years, it is not unusual to have more than one sex scene in TV shows or movies, such as *Game of Thrones*¹²¹ and *Fifty Shades of Grey*.¹²²

Changes in social values mean that the law must be modified accordingly. Currently, the law against sexual consideration is based on moral and religious

¹¹² *See id.*

¹¹³ *See supra* Part IV.A.

¹¹⁴ Calvert & Richards, *supra* note 50, at 292.

¹¹⁵ Michael O’Malley, *Regulating Television*, EXPLORING U.S. HISTORY CTR. FOR HISTORY & NEW MEDIA (2004), <http://chnm.gmu.edu/exploring/20thcentury/regulatingtelevision/>.

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *See id.*

¹¹⁹ Yagana Shah, *How Separate Beds Are the Key to a Happy Relationship for Many Couples*, HUFFPOST 50 (Oct. 20, 2014, 8:17 AM), http://www.huffingtonpost.com/2014/10/20/couples-separate-beds-_n_5966132.html.

¹²⁰ *See id.*

¹²¹ Oliver Noble, *All the Sex and Nudity in Season 5 Of ‘Game of Thrones’ (NSFW)*, HUFFPOST TV (June 16, 2015, 6:00 PM), http://www.huffingtonpost.com/2015/06/16/game-of-thrones-sex-scene_n_7598014.html.

¹²² John Boone, *All the ‘Fifty Shades of Grey’ Sex Scenes by the Numbers*, ET ONLINE (Feb. 12, 2015, 8:50 AM), http://www.etonline.com/movies/159613_all_the_fifty_shades_of_grey_sex_scenes_by_the_numbers/.

values that are no longer shared. For example, in 1880, contracts made on Sunday (“Sunday statutes”)¹²³ were unenforceable in thirty states out of thirty-eight states¹²⁴ based on statute.¹²⁵ These Sunday statutes were based on the idea that Sunday was the “Lord’s day,” thus, not an appropriate day to conduct secular business.¹²⁶ Due to shifting views, this is not prevalent today as it was in the 1880s; today, not everyone follows the same religion.¹²⁷ Although some Sunday statutes still exist, such as those that restrict hunting on Sundays,¹²⁸ courts have generally begun to enforce contracts made on Sundays,¹²⁹ modifying the law in accordance with changes in social values. Gambling is another example of an area of law that has changed as a result of shifts in social values. While, in the past, courts held that gambling contracts were void due to public policy for being inconsistent with public welfare, they are less reluctant to enforce these contracts today.¹³⁰ Thus, laws have shifted in the past to align with changes in social values.

“Hookups,” or uncommitted sexual encounters, are becoming more engrained in pop culture,¹³¹ which also supports a shift towards acceptance of premarital sex. In fact, according to Justin R. Garcia,¹³² Chris Reiber,¹³³ Sean G. Massey,¹³⁴ and Ann M. Merriwether:¹³⁵

Popular media representations of sexuality demonstrate the pervasiveness of a sexual hookup culture among emerging adults. The themes of books, plots of movies and television shows, and lyrics of numerous songs all demonstrate a permissive sexuality among consumers. As an example, the

¹²³ Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall,”* 79 B.U. L. REV. 263, 317 (1999).

¹²⁴ *Id.* (citing ELISHA GREENHOOD, *THE DOCTRINE OF PUBLIC POLICY IN THE LAW OF CONTRACTS. REDUCED TO RULES* (Chicago, Callaghan & Co. 1886)).

¹²⁵ *Id.* (citing *Richmond v. Moore*, 107 Ill. 429, 432-33 (1883); *Ward v. Ward*, 77 N.W. 965, 966 (Minn. 1899); *Rodman v. Robinson*, 47 S.E. 19, 20 (N.C. 1904); RESTATEMENT OF CONTRACTS § 538; JOHN E. MURRAY, JR., *MURRAY ON CONTRACTS* 98(L) n.47 (3d ed. 1990); 14 SAMUEL WILLISTON & WALTER H.E. JAEGER, *A TREATISE ON THE LAW OF CONTRACTS* 1700 (3d ed. 1972)).

¹²⁶ *Id.* (citing Murray, *supra* note 125; WILLISTON & JAEGER, *supra* note 125).

¹²⁷ In a survey based on the interviews with more than 35,000 Americans over the age of 18, the U.S. Religious Landscape Survey found that “religious affiliation in the U.S. is both very diverse and extremely fluid.” *America’s Changing Religious Landscape*, PEW RESEARCH CTR. (May 12, 2015), <http://religions.pewforum.org/reports#>. Approximately 21.6% of Americans practice a religion other than Christianity. *Id.*

¹²⁸ *Sunday Hunting/Sunday Legislation*, NAT’L CONFERENCE OF STATE LEGISLATURE (Aug. 27, 2015), <http://www.ncsl.org/research/environment-and-natural-resources/state-sunday-hunting-ban-statutes.aspx>.

¹²⁹ Pettit, *supra* note 123, at 317-19.

¹³⁰ *Id.* at 319-25.

¹³¹ Justin R. Garcia et al., *Sexual Hookup Culture: A Review*, 16 REV. GEN. PSYCHOL. 161, 161 (2012), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3613286/>.

¹³² Justin R. Garcia, The Kinsey Institute for Research in Sex, Gender, and Reproduction, Indiana University, Bloomington.

¹³³ Chris Reiber, Graduate Program in Biomedical Anthropology, Department of Anthropology, Binghamton University.

¹³⁴ Sean G. Massey, Women’s Studies Program, Binghamton University.

¹³⁵ Ann M. Merriwether, Departments of Psychology and Human Development, Binghamton University.

lyrics above, from the chart-topping pop song *Last Friday Night (T.G.I.F.)* by singer-songwriter Katy Perry highlight someone's Friday night partying, presumably including casual sex, alcohol, and a piecemeal memory of the night's events.¹³⁶

Not only are "hookups" very prevalent in pop culture, but they are becoming the norm for younger generations. A study done by Chris Reiber and Justin R. Garcia shows that 81% of undergraduate students reported having engaged in some form of hookup behavior: 58% engaged in sexual touching above the waist, 53% engaged in sexual touching below the waist, 36% performed oral sex, 35% received oral sex, and 34% engaged in sexual intercourse.¹³⁷ In addition to "hookups," friends with benefits ("FWB") have also become very common in today's social culture. According to *Urban Dictionary*, FWBs can be described as two friends who have a sexual relationship without being emotionally involved and without a monogamous relationship or any kind of commitment.¹³⁸ The relationship mimics a real partnership but without any emotions, such as jealousy, that come with a serious relationship.¹³⁹ One study shows that "60% of 125 undergraduates reported having a FWB relationship at some point of their lives."¹⁴⁰ In the past, it may have been morally wrong to engage in sex before marriage. However, the surveys clearly show a shift away from this traditional view. Therefore, similar to the past changes, the current laws must adapt to the recent shifts in social values and the openness of sexuality, particularly within the context of adult entertainment film contracts.

In addition, voiding adult entertainment film contracts would be contradictory to the California Supreme Court's holding in *People v. Freeman*, which legalized the creation of porn.¹⁴¹ Not only that, but voiding adult entertainment film contracts would also be contradictory to the recent court holdings in favor of enforcing cohabitation agreements.¹⁴² For instance, California common law provides:

It is essential to the existence of a contract that there should be a sufficient consideration,¹⁴³ and the Civil Code provides specifically for consideration."¹⁴⁴ This does not necessarily mean, however, that both

¹³⁶ Garcia et al., *supra* note 131.

¹³⁷ *Id.* (citing Chris Reiber & Justin R. Garcia, *Hooking Up: Gender Differences, Evolution, and Pluralistic Ignorance*, 8 *EVOLUTION PSYCHOLOGY* 390 (2010)).

¹³⁸ *Id.* (citing *URBAN DICTIONARY* (2003), <http://www.urbandictionary.com/define.php?term=friends%20with%20benefits>).

¹³⁹ *Id.* (citing *URBAN DICTIONARY* (2005), <http://www.urbandictionary.com/define.php?term=friends%20with%20benefits>).

¹⁴⁰ *Id.* (citing Melissa A. Bisson & Timothy Levine, *Negotiating a Friends with Benefits Relationship*, 38 *ARCH. SEX BEHAVIOR* 66 (2009)).

¹⁴¹ *People v. Freeman*, 758 P.2d 1128, 1128 (Cal. 1988).

¹⁴² *See supra* Part IV.A.

¹⁴³ 32 CAL. JUR. 3D FAMILY LAW § 126 (West Supp. 2014) (citing CAL. CIV. CODE § 1550).

¹⁴⁴ *Id.* (citing CIV. CODE §§ 1605-1615).

parties in a nonmarital cohabitation situation must contribute money or property to the relationship—one or both can contribute household services as part or all of his or her consideration.¹⁴⁵ Agreements between unmarried cohabitants fail only to the extent that they rest on a consideration of meretricious sexual services.¹⁴⁶ However, even if sexual services are part of the contractual consideration, any severable portion of an agreement supported by independent consideration will still be enforced.¹⁴⁷

In California, sexual consideration does not necessarily void a cohabitation contract.¹⁴⁸ Even household services, not traditionally held as valid consideration, are becoming recognized as valid consideration that is independent of meretricious sexual services, making cohabitation contracts enforceable.¹⁴⁹

Why should adult entertainment film contracts be treated any differently than cohabitation contracts? In the past, courts have voided both cohabitation and adult entertainment film agreements for essentially the same reason: the sexual consideration.¹⁵⁰ Courts no longer void cohabitation agreements due to the sexual consideration; this rationale should apply to adult entertainment film contracts as well.¹⁵¹ The sexual acts in adult entertainment film are clearly not meretricious. If the sexual acts were meretricious, there would be no contract between the pornographer and the performers. Refusing to enforce adult entertainment film contracts would be contradictory to both the recent state courts' holdings that legalized the creation of adult entertainment films and made cohabitation agreements enforceable.

C. Voiding Adult Entertainment Film Contracts Restrains a Women-Empowered Industry

The adult entertainment film industry is a women-empowered industry in which women make two to three times the amount men do and are able to direct, produce, and write scripts for the films.¹⁵² Voiding adult entertainment film contracts would retrain this women-empowered industry. Generally, women on average make significantly less than the amount men make.¹⁵³ Data from 2012 shows that, on average, a woman makes seventy-seven cents for every dollar a man

¹⁴⁵ *Id.* (citing *Hill v. Westbrook's Estate*, 213 P.2d 727 (Cal. App. 2d Dist. 1950)).

¹⁴⁶ *Id.* (citing *Milian v. De Leon*, 226 Cal. Rptr. 831 (Cal. App. 4th Dist. 1986)).

¹⁴⁷ *Id.* (citing *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Cal. App. 4th Dist. 1988)).

¹⁴⁸ *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *Cochran v. Cochran*, 106 Cal. Rptr. 2d 899 (Ct. App. 2001).

¹⁴⁹ *Marvin*, 557 P.2d 106.

¹⁵⁰ *See supra* Part I.

¹⁵¹ *See supra* Part IV.A and Part IV.B.

¹⁵² Calvert & Richards, *supra* note 50, at 285.

¹⁵³ Laura Bassett, *Women Still Earned 77 Cents on Men's Dollar in 2012: Report*, HUFFINGTON POST (Sept. 17, 2013, 11:36 AM), http://www.huffingtonpost.com/2013/09/17/gender-wage-gap_n_3941180.html.

makes.¹⁵⁴ Also, in 2012, the median income for an American man working full-time was \$49,398, while the median income for an American woman working full-time was \$37,791.¹⁵⁵ “Women make up a majority of workers in the 10 most common jobs that pay less than \$10.10 an hour, and tend to be under-represented in high-earning fields.”¹⁵⁶ Nevertheless, this pay gap is not limited to only a few occupations. Women face a pay gap in nearly every occupation—from elementary and middle school teachers to computer programmers.¹⁵⁷ Even with experience, the pay gap does not lessen. This pay gap increases with age. Women under 35 typically earn about 90 percent of what men are paid, while women over 35 typically make 75-80 percent of what men are paid.¹⁵⁸ According to the American Association of University Women,¹⁵⁹ education does not necessarily resolve the issue either. At every educational level, women’s median earnings are less than men’s earnings; the pay gap is sometimes even larger at higher education levels.¹⁶⁰ The pay gap even exists among career driven women without children: the AAUW’s *Graduating to a Pay Gap* found that “among full-time workers one year after college graduation—nearly all of whom were childless—women were paid just 82% of what their male counterparts were paid.”¹⁶¹ Thus, it is not the differences in qualification that are contributing to the pay gap—but gender itself. The pay gap problem is getting worse with time. In some states, such as Colorado, gender wage gap has widened.¹⁶² In 2011, a typical Colorado female worker earned 79.6% of men’s typical pay.¹⁶³ The typical female worker’s pay decreased to 78.3% of men’s typical pay in 2012 and decreased again to 77.9% of men’s typical pay in 2013.¹⁶⁴

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ *Id.*

¹⁵⁷ Catherine Hill, *The Simple Truth About Gender Pay Gap*, AM. ASS’N OF UNIV. WOMEN (AAUW) (2014), <http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/> (citing BUREAU OF LABOR STATISTICS, *Household Data Annual Averages–39. Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex (2015)*, <http://www.bls.gov/cps/cpsaat39.pdf>).

¹⁵⁸ See *id.*

¹⁵⁹ “The American Association of University Women (AAUW) is the nation’s leading voice promoting equity and education for women and girls. Since [AAUW’s] founding in 1881, AAUW members have examined and taken positions on the fundamental issues of the day – educational, social, economic, and political.” *Who We Are*, AM. ASS’N OF UNIV. WOMEN, <http://www.aauw.org/who-we-are/> (last visited Feb. 15, 2016).

¹⁶⁰ Hill, *supra* note 157 (“While more education is an effective tool for increasing earnings, it is not an effective tool against the gender pay gap. At every level of academic achievement, women’s median earnings are less than men’s earnings, and in some cases, the gender pay gap is larger at higher levels of education.”).

¹⁶¹ *Id.* (citing Catherine Hill, *Graduating to a Pay Gap: The Earnings of Women and Men One Year After College Graduation*, AM. ASS’N OF UNIV. WOMEN (2012), <http://www.aauw.org/research/graduating-to-a-pay-gap/>).

¹⁶² DENV. BUS. J., *Colorado Gender Wage Gap Increases*, 9NEWS (Jan. 25, 2015, 12:46 PM), <http://www.9news.com/story/life/2015/01/24/colorado-gender-wage-gap-increases/22276137/>.

¹⁶³ See *id.*

¹⁶⁴ See *id.*

As of 2013, there are only a select few occupations in which women earn more than men, such as personal care and service work.¹⁶⁵ The adult entertainment film industry is one of these exceptions. Not only do women out-earn men in this industry, it is not uncommon for women to make two to three times more than men.¹⁶⁶ It is one of the few businesses where a woman can earn a high salary without an education.¹⁶⁷ A woman could make approximately \$100,000 a year for an average of nine films, two scenes per film, and promotional experiences,¹⁶⁸ more than most non-contract female performers.¹⁶⁹

In other entertainment industries, gender bias remains a persistent issue. For instance, in the theater industry, only ten of the seventy-eight shows produced on Broadway in the 2008-2009 season were written by women.¹⁷⁰ “Over the last twenty-five years, the proportion of female-written plays produced on Broadway¹⁷¹ has consistently been between 12-17%.”¹⁷² Research shows that directors and literary managers believe that plays written by women are of lower overall quality¹⁷³ and less profitable¹⁷⁴ as compared to plays written by men. Emily Glassberg Sands, a Princeton economics student who at the time was headed to Harvard for graduate work, showed this in a study:

Ms. Sands sent identical scripts to artistic directors and literary managers around the country. The only difference was that half named a man as the writer (for example, Michael Walker), while half named a woman (i.e., Mary Walker). It turned out that Mary’s scripts received significantly

¹⁶⁵ Bassett, *supra* note 153.

¹⁶⁶ Calvert & Richards, *supra* note 50, at 285.

¹⁶⁷ *See id.*

¹⁶⁸ Gilden, *supra* note 2, at 543 (citing SIMPSON, *supra* note 104, at 11).

¹⁶⁹ *See id.*

¹⁷⁰ Marisa Rothstein, Note, *Sharing the Stage: Using Title VII to End Discrimination Against Female Playwrights on Broadway*, 17 CARDOZO J.L. & GENDER 171, 171 (2010) (citing Theresa Rebeck & Laura Pels, Keynote Address, WOMEN & HOLLYWOOD (2010), <http://womenandhollywood.com/2010/03/16/text-of-theresa-rebeck-laura-pels-keynote-address/>; Emily Glassberg Sands, *Opening the Curtain on Playwright Gender: An Integrated Economic Analysis of Discrimination in American Theater* 1 (Apr. 15, 2009) (unpublished B.A. thesis, Princeton University), <http://www.off-stage-right.com/wp-content/uploads/2009/06/Opening-the-curtain-on-playwright-gender-Full-thesis1.pdf>; *see, e.g.*, Patricia Cohen, *Rethinking Gender Bias in Theater*, N.Y. TIMES, June 23, 2009, at C1; Jay Handelman, *Research Points to a Bias Against Female Playwrights*, Herald Tribune (Ft. Lauderdale), July 12, 2009; Kris Vire, *Gender Bias in Theater: The Women in Charge React*, TIME OUT CHICAGO BLOG, <http://www3.timeoutny.com/chicago/blog/out-and-about/2009/07/gender-bias-in-theater-the-women-in-charge-react/> (last visited Oct. 27, 2010)).

¹⁷¹ *Id.* (citing Zachary Pincus-Roth, *Ask Playbill.com: Broadway or Off-Broadway-Part I*, PLAYBILL (Feb. 7, 2008), <http://www.playbill.com/news/article/114923-ASK-PLAYBILLCOM-Broadway-or-Off-BroadwayPart-I>; Charles Wright, *Off-Off-Broadway, Way Back When*, THEATERMANIA (Oct. 4, 2004), http://www.theatermania.com/newyork/news/10-2004/offoffbroadway-way-back-when_5191.html).

¹⁷² *Id.* (citing Sands, *supra* note 170, at 102).

¹⁷³ *Id.* at 174 (citing TODD LONDON ET AL., *OUTRAGEOUS FORTUNE: THE LIFE AND TIMES OF THE NEW AMERICAN PLAY* 14 (Theatre Dev. Fund 2009)).

¹⁷⁴ *Id.* (citing Sands, *supra* note 170, at 92).

worse ratings in terms of quality, economic prospects and audience response than Michael's.¹⁷⁵

Surprisingly, in Ms. Sands' study, the unequal responses are from female artistic directors and literary managers rather than men; men rated male and female playwrights exactly the same.¹⁷⁶

In addition, there is a significant gender bias in Hollywood.¹⁷⁷ The Sony Pictures hack in December 2014 revealed that there are seventeen Sony executives with an annual income of over \$1 million per year.¹⁷⁸ Only one of these executives is a woman.¹⁷⁹ A study by the San Diego State University's Center for the Study of Women found significant discrepancies among females and males in the creative teams involved with the 250 top-grossing films in 2013.¹⁸⁰ In addition, the New York Film Academy compiled data from the top 500 movies of 2007-2011, and found that, "[t]he results are, unfortunately in line with the continued rumbling emerging from the industry as of late, in which Sweden has introduced the Bechdel test and a USC study found that 70 percent of the speaking roles in 2012's 100 highest-grossing movies belonged to men."¹⁸¹ The New York Film Academy also found that there is a 5:1 ratio of men working on films to women.¹⁸² The Forbes

¹⁷⁵ Cohen, *supra* note 170.

¹⁷⁶ *Id.*

¹⁷⁷ Moira Forbes, *Hollywood's Highest-Paid Actresses: Where Gender Bias Reigns Supreme*, FORBES (Aug. 6, 2013), <http://www.forbes.com/sites/moiraforbes/2013/08/06/hollywoods-highest-paid-actresses-where-gender-bias-reigns-supreme/>.

¹⁷⁸ Kevin L. Clark, *Hacked Document Reveals Hollywood's Startling Race and Gender Gap*, BLACK ENTERPRISE WEALTH FOR LIFE (Dec. 2, 2014), <http://www.blackenterprise.com/lifestyle/hacked-document-reveals-hollywoods-startling-race-and-gender-gap/>; Kevin Rose, *Hacked Documents Reveal a Hollywood Studio's Stunning Gender and Race Gap*, FUSION, <http://fusion.net/story/30789/hacked-documents-reveal-a-hollywood-studios-stunning-gender-and-race-gap/> (last visited Jan. 8, 2016); Libby Copeland, *Sony Pictures Hack Reveals Stark Gender Pay Gap*, SLATE (Dec. 5, 2014, 9:06 AM), http://www.slate.com/blogs/xx_factor/2014/12/05/sony_pictures_hack_reveals_gender_pay_gap_at_the_entertainment_company_and.html.

¹⁷⁹ Clark, *supra* note 178.

¹⁸⁰ Megan Gibson, *Matthew Weiner Is Wrong. The Gender Wage Gap Is Real, Even in Hollywood*, TIME (Aug. 21, 2014), <http://time.com/3153830/matthew-weiner-jenji-kohan-gender-wage-gap/> ("According to the San Diego State University's Center for the Study of Women in Television and Film's annual Celluloid Ceiling survey, women accounted for only 16 percent of all directors, executive producers, producers, writers, cinematographers and editors working on the 250 top-grossing films.").

¹⁸¹ *Gender Inequality in Film by the Numbers (INFOGRAPHIC)*, HUFFPOST ENTMT (Dec. 2, 2013), http://www.huffingtonpost.com/2013/11/29/gender-inequality-in-film_n_4360012.html. (citing Amanda Dobbins, *Swedish Movie Theaters Add a Bechdel Rating*, VULTURE (Nov. 6, 2013, 10:15 AM), http://www.vulture.com/2013/11/swedish-movie-theaters-add-a-bechdel-rating.html?utm_source=huffingtonpost.com&utm_medium=referral&utm_campaign=pubexchange_article ("[T] Swedish cinemas in quest have added gender-bias rating to all of their showings. In order to get an A, the film must pass the Bechdel test (in which two female characters talk about something other than a man)."); Sarah Bennett, *USC Study Confirms Gender Inequality in Film*, VULTURE (Nov. 22, 2011, 12:33 AM), http://www.vulture.com/2011/11/usc-study-confirms-gender-inequality-in-film.html?utm_source=huffingtonpost.com&utm_medium=referral&utm_campaign=pubexchange_article ("Examining the 100 top-grossing movies of 2009, the study finds that almost 70 percent of the 4,342 speaking roles were male (despite the fact that women buy more than 50 percent of the movie tickets in the U.S.).").

¹⁸² *Gender Inequality in Film by the Numbers*, *supra* note 181.

magazine 2013 list of the top ten highest paid actresses made a collective \$181 million versus \$465 million made by the top ten male actors.¹⁸³ Additionally, women tend to have more difficulty getting financing for their films than men in Hollywood.¹⁸⁴ When told about three films to invest in, one female investor stated, “I automatically passed on the movie with the woman producer team attached. I just feel like you can’t trust women you don’t know, but you can trust a man.”¹⁸⁵

This gender bias does not exist as much in the adult entertainment film industry. Rather, women are actually more empowered than men in the adult entertainment film industry both in pay and in involvement.¹⁸⁶ By voiding adult entertainment film contracts, the courts would be inhibiting one of the few women-empowered industries: voiding adult entertainment film contracts may decrease the number of films produced. The contracts are created to protect both the pornographers and the performers.¹⁸⁷ An enforceable contract insures that the pornographers receive quality performances from the performers, which in turn insures predictability. It also insures that the performers are not mistreated and are paid as agreed upon.¹⁸⁸ Without an enforceable contract, both pornographers and performers will be less likely to take risks. This restrains the women-empowered industry.

D. Basic Principles of Contract Will Void Adult Entertainment Film Contracts Entered Into by the “Victimization of Women”

An argument can be made that adult entertainment film contracts should not be enforced because they victimize women. “Women complain of being drugged, being coerced, and being offered money for sex by pornographers.”¹⁸⁹ In addition, many of the women who complain are minors, which automatically casts doubt on their culpability.¹⁹⁰ Sometimes, “the pornographers, who are pimps, take people who are already socially powerless—the poor, then young, the innocent, the used and used up, the desperate, the female—and deepen their invisibility and their silence.”¹⁹¹ Generally, because many performers were vulnerable at the time of signing the contract,¹⁹² an argument can be made those adult entertainment film

¹⁸³ *Id.*

¹⁸⁴ Lauren Sandler, *Why Women in Hollywood Can’t Get Film Financing*, BLOOMBERG BUSINESSWEEK (Feb. 21, 2013), <http://www.businessweek.com/articles/2013-02-21/why-women-in-hollywood-cant-get-film-financing>.

¹⁸⁵ *Id.*

¹⁸⁶ Calvert & Richards, *supra* note 50, at 285.

¹⁸⁷ *See supra* Part IV.D.1.

¹⁸⁸ *See id.*

¹⁸⁹ Cooper, *supra* note 60, at 356 (citing Ex. A to Notice of Removal, at 2, Capdeboscq v. Francis, No. Civ. A. 03-0556 (E.D. La. Feb. 21, 2003); Compl. and Demand for Jury Trial, at 7-9, Francis, No. 5:03CV260 (N.D. Fla.)).

¹⁹⁰ *Id.* (internal citations omitted).

¹⁹¹ CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 300 (2005).

¹⁹² Cooper, *supra* note 60, at 356 (citing Ex. A to Notice of Removal, at 2, Capdeboscq v. Francis, No. Civ. A. 03-0556; Compl. and Demand for Jury Trial, at 7-9, Francis, No. 5:03CV260).

contracts should be void. This could be because the performer lacked the capacity to enter into the contract at the time of signing the contract¹⁹³ or because the performer was tricked or forced into entering the contract.¹⁹⁴ Thus, the contract should be void because it would be unfair to enforce the contract.¹⁹⁵

This argument is flawed. In situations where the performer lacked capacity at the time of or was tricked or forced into entering the contract, other basic contract principles will govern to void the contract. Generally, every contract imposes a duty of good faith and fair dealing in its performance and its enforcement.¹⁹⁶ First of all, regarding capacity to contract, contract principles provide:

(1) No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances. (2) A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties unless he is (a) under guardianship, or (b) an infant, or (c) mentally ill or defective, or (d) intoxicated.¹⁹⁷

A person cannot be bound by a contract if he or she lacked capacity at the time of signing the contract. Sometimes a pornographer may take advantage of a performer with a mental illness or defect by inducing the individual into entering a contract. In such case, the contract is voidable by the performer with the mental illness or defect if the performer is unable to understand the nature and consequences of the transaction, or is unable to act in reasonable manner in relation to the transaction.¹⁹⁸ In addition, a pornographer may take advantage of a performer who is intoxicated by inducing them into entering a contract that the performer would not have entered into if not for the intoxication. Such a contract is voidable by the intoxicated performer when the performer is either unable to understand the nature and consequences of the transaction or is unable to act in a reasonable manner in relation to the transaction.¹⁹⁹ Thus, contract principles allow

¹⁹³ *See id.*

¹⁹⁴ *See id.*

¹⁹⁵ *Rodriguez v. Raymours Furniture Co.*, 436 N.J. Super. 305, 316 (App. Div. 2014) (quoting *Howard v. Diolosa*, 241 N.J. Super. 222, 230 (App. Div. 1990)) (“Generally, ‘[a] contract is unenforceable if its terms are manifestly unfair or oppressive and are dictated by a dominant party.’”).

¹⁹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981).

¹⁹⁷ *Id.* § 12.

¹⁹⁸ *See id.* § 15 (“(1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition. (2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under Subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such case a court may grant relief on such equitable terms as justice requires.”).

¹⁹⁹ *See id.* § 16 (“A person incurs only voidable contractual duties by entering into a transaction if the other party has reason to know that by reason of intoxication (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a

adult entertainment film contracts to be voided when the performer entering the contract is a minor, mentally ill, or intoxicated when entering the contract.

There are many other scenarios in which contract principles will void unfair contracts entered into by vulnerable performers, one being duress. In the case of duress, general contract principles dictate that a contract is voidable by a victim when the agreement was induced by improper threat by the other party, leaving the victim with no reasonable alternative.²⁰⁰ Contract law goes on to define what an improper threat is:

(1) A threat is improper if (a) what is threatened is a crime or tort, or the threat itself would be a crime or a tort if it resulted in obtaining property, (b) what is threatened is a criminal prosecution, (c) what is threatened is the use of civil process and the threat is made in bad faith, or (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient. (2) A threat is improper if the resulting exchange is not on fair terms, and (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat, (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or (c) what is threatened is otherwise a use of power for illegitimate ends.²⁰¹

One example of duress, or an improper threat, would be a gun being held to the performer's head or a threat of physical violence to the performer or the performer's family. The person who signs a contract under duress may void the contract.²⁰² In the example above, the contract is voidable by the performer. However, the choice is in the performer's hand: the performer has the option not to void the contract if he or she still wishes to be bound.

Additionally, in the case of fraud, contract principles dictate that, when the recipient justifiably relied on the fraudulent or material misrepresentation, the contract is voidable by the recipient.²⁰³ An example of fraud is the adult entertainment film contract being represented as solely an acting contract, without the sex, when the performer signed it. In addition, fraud would be committed if the pornographer misrepresented to the performer what sexual acts the contract

reasonable manner in relation to the transaction.”).

²⁰⁰ *See id.* § 175 (“(1) If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim. (2) If a party’s manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.”).

²⁰¹ *Id.* § 176.

²⁰² *See id.*

²⁰³ *See id.* § 164 (“(1) If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient. (2) If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.”).

encompasses. Here, similar to duress, the ultimate choice is in the performer's hand: he or she can choose to enforce the contract or void it.

Contract principles also address contracts entered into by mistake. A mistake is defined as "a belief that is not in accord with the facts."²⁰⁴ There are two scenarios of mistake that contract principles take in account. The first scenario is when both parties are mistaken as to the terms of the contract.²⁰⁵ In such a case, the contract is voidable by the adversely affected party unless he or she bears the risk of the mistake.²⁰⁶ An example of mistake by both parties is when both the pornographer and the performer had different assumptions as to the working conditions, and it is not expressly stated in the contract. The performer may be able to void the contract, as he or she is most likely the adversely affected party. When only one party is mistaken, the more likely case in adult entertainment, contract principles provide that the contract is voidable by the adversely affected party if he or she does not bear the risk of the mistake and (a) enforcement of the contract would be unconscionable or (b) the other party has reason to know of the mistake or caused the mistake.²⁰⁷ For instance, it is likely that the performer entered the contract by mistake, while pornographer had full knowledge of the mistake. This is true even when a performer signs a contract believing it is solely an acting contract, without any sex, and without any misrepresentation by the pornographer.²⁰⁸ With or without the pornographer's knowledge of or fault in causing the mistake, such contract may be voidable for being unconscionable.²⁰⁹ Similar to duress and fraud, the power is in the hands of the performer as to whether he or she wants to void the contract.²¹⁰ Again, even when a contract is voidable, the performer may still enforce the contract if he or she finds that the contract is acceptable.²¹¹

Contract principles also consider undue influence. Undue influence is defined as the unfair persuasion of one party who is under the domination of another party or the assumption that one party will not act consistent with his or her welfare based on the relationship between the two parties; in undue influence cases,

²⁰⁴ *Id.* § 151.

²⁰⁵ *See id.* § 152.

²⁰⁶ *See id.* ("Where a mistake of both parties at the time of contract was made as to the basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of mistake under the rule stated in § 154.").

²⁰⁷ *Id.* § 153 ("Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party has reason to know of the mistake or his fault caused the mistake.").

²⁰⁸ *See id.* § 153(a).

²⁰⁹ *See id.* § 153.

²¹⁰ *See id.*

²¹¹ *Hernandez v. Banks*, 65 A.3d 59, 67 (D.C. 2013) ("[A] voidable contract—unlike a void contract, which has no legal effect—binds both parties unless disaffirmed or avoided by the incapacitated party.").

the contract is voidable by the victim.²¹² An example of undue influence is a situation where the performer recently lost his or her job and is in a state of financial crisis. The pornographer, knowing of the performer's situation, comes and offers him or her an adult entertainment film contract. There are terms that the performer would not normally agree to, yet the performer consents to them because of the performer's desperate situation. The pornographer knows that the performer would not normally agree to the terms, but offers the contract anyway to exploit the performer's unfortunate situation. Such a contract would be voidable by the performer. However, similar to minority, duress, misrepresentation, mistake, and undue influence defenses, the performer is able to choose whether he or she wants to void the contract.²¹³

In regards to an unconscionable contract or term, contract principles provide the court may (1) refuse to enforce the contract, (2) enforce the remainder of the contract without the unconscionable term, or (3) limit the application of any unconscionable term to avoid an unconscionable result.²¹⁴ The courts take into account unconscionability because sometimes one of the persons entering the contract has significantly weaker bargaining power; here, that would be the performer. An example of an unconscionable term is a provision that waives all liability of the pornographer, even in the case of negligence.²¹⁵ Typically, terms that release all liability, even when the other party is negligent, are unconscionable and therefore unenforceable.

Minority, duress, misrepresentation, mistake, undue influence, and unconscionability are only a few examples of when a contract is deemed void or voidable. Clearly, basic contract principles have taken into account the vast majority of situations where enforcing a contract would be unfair. Thus, voiding adult entertainment film contracts due to "victimization of women" would just be a duplicate effort, which serves no purpose. Duplication of effort would be both a waste of time and judicial resources, leading to an inefficient economy.

In addition, when contract principles do not void a contract but the court voids it because of "victimization of women," it could lead to frivolous lawsuits.

²¹² *Id.* § 177 ("(1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare. (2) If the party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim. (3) If a party's manifestation of assent is induced by one who is not a part to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the undue influence either gives value or relies materially on the transaction.").

²¹³ *See id.*

²¹⁴ *Id.* § 208 ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.").

²¹⁵ Aimee Green, *Broad Liability Waivers Are 'Unconscionable,' Paralyzed Snowboarder Can Sue Mt. Bachelor, Supreme Court Rules*, OREGONIAN (Dec. 18, 2014), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/12/broad_liability_waivers_are_un.html.

“Victimization of women” typically is very fact-based, thus, needs to be decided by a jury. When it is recognized as a defense to a contract, performers may be likely to file a suit against the pornographer even when the case has no merit, in hopes of a settlement before trial. After evaluating the costs of going to trial and not going to trial, pornographers may give in to the settlement, even when there is no victimization, to save on court fees, attorney fees, and the uncertainty of trials.²¹⁶ This defense may encourage frivolous lawsuits and would waste limited judicial resources. When it is unfair to enforce an adult entertainment film contract where the performer who entered into the contract was in a vulnerable position, general contract principles will either void or allow the performer to void the contract. This should be sufficient to protect women who were trapped into entering the adult entertainment film contract and would also be the most efficient way in dealing with the matter.

When contract principles do not dictate otherwise, two consenting adults—specifically, a pornographer and a performer—should be able to create an enforceable contract. Parties should have freedom to contract. In fact, the freedom to contract is a constitutional right, found in Article I, section 10, clause 1 (also known as the Contract clause) of the United States Constitution: “No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts”²¹⁷ If the contract is not voided as the result of contract principles, courts should not void a contract just because it is a “bad deal,” such as the pornographer getting a better deal out of the bargain than the performer. Otherwise, parties would have very little incentive to enter into contracts in general when contracts are not enforceable every time one party ends up in a better position than the other party. What constitutes a “bad deal” is also very subjective, leading to inconsistent outcomes depending on each individual judge and jury and diminishing the predictability in the enforcement of contracts. Contracts would be of very limited purpose if they are rarely enforceable or are unpredictable.

CONCLUSION

After California legalized the creation of adult entertainment films,²¹⁸ an issue that had become prevalent was whether adult entertainment film contracts are enforceable. While courts have been reluctant to enforce contracts that involve sexual consideration due to public policy,²¹⁹ these contracts need to be viewed in a different light. Whether adult entertainment film contracts are enforceable depends on whether the consideration is the “performance,” “waiver of the legal right to privacy,” or “sexual intercourse.”

²¹⁶ See Jonathan D. Glater, *Study Finds Settling Is Better than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), <http://www.nytimes.com/2008/08/08/business/08law.html>.

²¹⁷ U.S. CONST. art. I, § 10, cl. 1.

²¹⁸ *People v. Freeman*, 758 P.2d 1128, 1128 (Cal. 1988).

²¹⁹ See *supra* Part I.

If the consideration is the “performance” or “waiver of the legal right to privacy,” then there is no doubt that the contract is enforceable.²²⁰ If the performance is the consideration, similar to Hollywood contracts, the contract would be enforceable, as acting is a sufficient, legal consideration: the pornographer is paying to watch the actor’s or actress’ performance rather than paying to engage in sexual activity with the actor or actress.²²¹ Similarly, if the consideration is the waiver of the legal right to privacy, the consideration would also be legal.²²² Sexual intercourse is a private act; when engaged in a private place, the two individuals have a common law right to privacy.²²³ Without a waiver, the pornographer would be violating the individuals’—the performers’—common law right to privacy.²²⁴ Thus, the waiver serves as the consideration for the adult entertainment film contract, making the contract enforceable.²²⁵

However, the main issue arises when the “sexual intercourse” is the consideration. Even when the sexual intercourse is the consideration, the contract should still be enforceable due to recent shift in views in favor of premarital sex and cohabitation agreements.²²⁶ In addition, voiding adult entertainment film contracts would increase abuse toward the performers, restrain one of the few women-empowered industries, and be contrary to recent court decisions, which legalized the creation of adult entertainment films and cohabitation agreements.²²⁷ Social views have shifted over the past few decades towards openness to sex, as shown by the increasing number of individuals engaging in premarital sex and cohabitation and the increasing prevalence of sex in today’s pop culture; the law should adapt and conform to these views.²²⁸ In the case of “victimization,” as illustrated in the defenses of incapacity, duress, misrepresentation, and mistake, general contract principles will void the contract; there need not be duplication of effort by the courts in determining whether to enforce a contract for being unfair when contract principles already address the issue.²²⁹ Duplication of effort would lead to negative behavior and waste limited judicial resources.²³⁰ Thus, courts should enforce adult entertainment film contracts regardless of whether the consideration is the “performance,” “waiver of the legal right to privacy,” or, “sexual intercourse.”²³¹

²²⁰ See *supra* Part II and Part III.

²²¹ See *id.*

²²² See *supra* Part III.

²²³ See *id.*

²²⁴ See *id.*

²²⁵ See *id.*

²²⁶ See *supra* Part IV.

²²⁷ See *id.*

²²⁸ See *id.*

²²⁹ See *id.*

²³⁰ See *id.*

²³¹ See *id.*

