NAKED BEFORE THE LAW: REALITY PORN AND THE CAPACITY TO CONTRACT

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I. INTRODUCTION

What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimised by other people?[1]

A. The Situation

The *Girls Gone Wild* series of videos is a multimillion-dollar business[2] that should need no further introduction.[3] However, for those who avoid late night television and racy news stories, the Louisiana Bar Association provides the following synopsis:

> Dorothy comes to Mardi Gras for spring break. This isn't Kansas, she quickly discovers. It is Bourbon Street, parade routes and a live-the-moment quest for beads, rather than ruby slippers. The deal is simple enough: sweatshirt up and beads down—down from floats and balconies, and all among the ubiquitous and foreseeable hum and glow of video cameras. Harmless enough, Dorothy thinks, until two months later, just in time for finals, Dorothy's mom, her sorority sisters and her soon-to-be-former boyfriend discover her heretofore hidden charms on pornographic Web sites or the cover of XXX-rated videos.[4]

Dorothy is now a star in "reality porn," the current craze in adult entertainment.[5] Reality pornography is pornography as if made by small independent film-makers:

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* J.D. Candidate 2005, Benjamin N. Cardozo School of Law. This note is, in many respects, the work of the Benjamin N. Cardozo School of Law as a whole; every student and professor who heard about this paper had something to comment or add. Special mention should be made of the late Rhett Rountree, whose assistance was invaluable in preparing the early drafts.

1 Allcard v. Skinner, 36 Ch. D. 145, 182 (Eng. C.A. 1887) (Lindley, L.J.).

2 Suzanne Smalley & Rebecca Sinderbrand, *This Guy's Gone Wild*, NEWSWEEK, Sept. 29, 2003, at 35, *available at* 2003 WL 8639919.

3 In fact, the problem of women caught on camera when they least expect is so well-known that it was a plot point in *Law and Order*. *See Law & Order Special Victims Unit: Brotherhood* (NBC television broadcast, Jan. 6, 2004).

4 William T. Abbott, *Show Us Your Torts*, 50 LA. B.J. 350, 350 (2003).

5 *See Fox News: Big Story Weekend with Rita Cosby* (Fox News Channel television broadcast, Aug. 2, 2003), *available at* 2003 WL 7459134.

the subjects are found on location, the camera is often handheld, and there is little embellishment.[6] The concept of catching young, attractive people behaving badly is so popular that it has spawned a series in which MTV invites a college-aged individual's parents, significant other or similar relation to secretly watch the individual act promiscuously at wild parties in an exotic location.[7]

Chief among the figures in the reality pornography business is Joseph Francis, head of the *Girls Gone Wild* enterprise.[8] By videotaping naked young women in public, Mr. Francis has gained for himself both a fortune and a multiple-count indictment in Florida.[9] As of this writing, the case against him is still pending.[10]

Many people are caught in reality pornography, and some suffer quite heavily for it. In 2001, twenty-two-year-old Brian Buck was approached by a group of pornographers known as *Shane's World* at his fraternity house at Arizona State University.[11] They offered him the opportunity to participate in their bacchanal.[12] Mr. Buck agreed and took part.[13] When the pornographers published his videotaped exploits, he was forced to resign from student government, expelled from his fraternity, barred from university housing and employment, and disowned by his parents.[14] When Mr. Buck asked for compensation from *Shane's World*, he received an offer of $500.[15]

At this point in time, seeking redress in the courts appears to be a complete gamble. The state of the law is such that three young women under the age of seventeen, claiming that they had been offered large quantities of alcohol and then pressured into undressing at the back of a private club, have had their claims

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[6] The most notable and consistent difference is that reality pornographers use video, not the 35mm film of adherents to the Dogme 95 structure of film-making. *See* Lars Von Trier & Thomas Vinterberg, *The Vow of Chastity*, *at* http://www.dogme95.dk/the_vow/vow.html (last visited Feb. 2, 2004).

[7] *See On Air–One Bad Trip*, MTV.COM, *available at* http://www.mtv.com/onair/one_bad_trip/ (last visited Dec. 21, 2003).

[8] *See* Smalley & Sinderbrand, *supra* note 2, at 35.

[9] *Id.* However, prosecutors dropped the charges against Mr. Francis for illegal dealing of hydrocodone, better known as Oxycontin or "hillbilly heroin," *see* Associated Press, *Most Serious Charge Dropped Against 'Girls Gone Wild' Producer,* THE ORLANDO SENTINEL, Nov. 6, 2003, at B4. More recently, a judge held that *Girls Gone Wild* is not child pornography, *see* Associated Press, *'Girls Gone Wild' Tape Not Child Porn, Judge Rules*, CHICAGO SUN-TIMES, Mar. 10, 2004, at 48, *available at* 2004 WL 63133237 (calling into question the multiple counts of "use of child in a sexual performance" and "conspiracy to use a child in a sexual performance" found in the indictment). The Panama City, Florida criminal case is docket number 03001036CFMA, *at* http://www.clerk.co.bay.fl.us/ovationweb/CourtCase.aspx?case=03001036CFMA (last visited Mar. 10, 2004).

[10] There is also a Federal Trade Commission action against Mr. Francis and Mantra Films for charging customers for products the customers did not want. *See* FED. TRADE COMM'N, SELLERS OF 'GIRLS GONE WILD' VIDEOS CHARGED WITH DECEPTIVE PRACTICES, *at* http://www.ftc.gov/opa/2003/12/girlsgonewild.htm (Dec. 17, 2003).

[11] *See* Ken Hegan, *The New Sex Ed*, ROLLING STONE, Sept. 18, 2003, at 66-67.

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See id.*

dismissed.[16] Another young woman, also under the age of eighteen, was driving down Bourbon Street when she exposed herself to a cameraman.[17] She too found herself in the *Girls Gone Wild* video series and commercials.[18] She sued in federal court in Florida, and her case was similarly dismissed.[19]

However, a Florida federal court deemed a twenty-three year old calendar model could "justifiably expect not to have [her] likeness . . . marketed in this manner in Florida without [her] consent, and that is so without regard to the law of Louisiana on this subject."[20] She settled in return for the *Girls Gone Wild* removing her from its videotapes and advertising.[21]

B. A Lack of Empathy

The law governing the rights of reality pornography participants is confused, and few women manage to recover some of their dignity through the legal process. Interestingly, the general public does not see the questionable willingness of some participants in reality pornography as a problem. Many feel that those who end up in these videos deserve their fate.[22] Others assume these women made a rational choice of the modern, sexually liberated era that they now regret.[23]

This is the same language society uses to dismiss acquaintance rape.[24] One is more likely to allocate blame to a victim of rape if the victim was attractive, drunk and in a circumstance where sex could be a logical outcome[25]—the same circumstances that draw a photographer with a fistful of beads to an individual at Mardi Gras. If an alleged rapist pays for the food or entertainment as *Shane's*

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[16] *See* James L. Rosica, *Girls Gone Wild Case Up for Trial; Judge Already Questioned Video Producers' Defense*, THE TALLAHASSEE DEMOCRAT, Sept. 14, 2002, at 1, *available at* 2002 WL 22442436.

[17] *See* Lane v. MRA Holdings, L.L.C., 242 F. Supp. 2d 1205, 1223 (M.D. Fla. 2002).

[18] *See id.*

[19] *See id.*

[20] *See* Gritzke v. MRA Holdings, L.L.C., No. 4:01cv495-RH, 2003 U.S. Dist. LEXIS 9307, at *8 (N.D. Fla. Mar. 16, 2003).

[21] *See Girl Not "Wild" About Video Settles Lawsuit Over Nudity*, THE BATON ROUGE ADVOCATE, Oct. 4, 2002, at 6B, *available at* 2002 WL 5046479.

[22] *See The Abrams Report* (MSNBC television broadcast, Dec. 4, 2002), *available at* 2002 WL 102685944 (reading a letter from a viewer who, after seeing a feature on *Girls Gone Wild*, wrote "I don't feel sorry for anybody who acts like that in the first place.").

[23] *See The Abrams Report* (MSNBC television broadcast, Dec. 3, 2002) (broadcasting a panel discussion where a panelist says, "they say that they can't give consent at 17 when they act like a stripper and then they're treated like one. Look, I don't like these videos, but when you are in the public and you lift your shirt, you are giving consent, and the fact is this girl acted like a stripper, she should be treated like one and get the shame she deserves.").

[24] The comparison between *Girls Gone Wild* and rape is not original to this note; a young woman interviewed by CBS complained that her appearance in the video series was "just as bad as rape . . . . He [the producer of *Girls Gone Wild*] just rapes me on video." *Girls Go Wild*, CBSNEWS.COM, Apr. 17, 2002, *available at* http://www.cbsnews.com/stories/2002/04/16/48hours/printable506281.shtml. Furthermore, the pleadings in at least one civil action refer to *Girls Gone Wild* as "the photographic equivalent of 'date rape' of intoxicated young women." Glaze v. M.R.A. Holding, L.L.C., No. 2:03CV221FTM29SPC, 2003 WL 21981978, at *2 (M.D. Fla. Jul. 11, 2003).

[25] Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3, 27 (2000).

World does for its partygoers, a jury is more likely to acquit.[26] One Louisiana judge deemed a young woman's mere presence at Mardi Gras constructive notice that she will be videotaped; if one were there, "[i]t seems to me there was consent."[27]

Americans generally believe that women are in control of their sexuality,[28] but this belief has not displaced the myth that sexually expressive women do not need to express consent.[29] If society can construe a woman's behavior as a rational choice, it does so; otherwise, it assumes her acts are reckless and she deserves the fate that befalls her.[30]

Not all women in reality pornography are reckless, even if one subscribes to the prevailing attitude. Women complain of being drugged, being coerced, and being offered money for sex by pornographers.[31] Many of the women who complain are not legally adults, which should give one pause in automatically assuming their culpability.[32] Furthermore, Mr. Francis, head of the *Girls Gone Wild* enterprise, admits that if not for the lawsuits, he would be more lax in determining whether someone consents to being filmed.[33] Sometimes, the young woman[34] needs to win.

C. Organization

This note will outline the various arguments an individual caught on video in reality pornography can enlist to seek relief in the court system. Part II of this note

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[26] *See* Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A.L. REV. 845, 866 (2002).

[27] Tr. of Mar. 8, 2002, at 29, Doe v. Mantra Films, Inc., No. 01-12450 (Civ. Dist. Orleans 2002).

[28] This may be a myth; one columnist notes, "[t]he collapse of the patriarchy was supposed to make women happy—we were supposed to get more sex, freer sex, better sex, more loving sex and better relations between men and women . . . . [b]ut instead men treat women worse than ever." Ann Marlowe, *No Intercourse, Please—We're Enlightened*, SALON, Oct. 1, 2003, *available at* http://www.salon.com/sex/feature/2003/10/01/marlowe/.

[29] *See* Cheryl Hanna, *Sometimes Sex Matters: Reflections of Biology, Sexual Aggression, and Its Implications on Law*, 39 JURISMETRICS J. 261, 264 (1999) ("Because of their new-found sexual freedom, however, girls may be putting themselves in situations where they are more, rather than less, vulnerable to male aggression.").

[30] Taslitz, *supra* note 25, at 15-16.

[31] In *Capdeboscq v. Francis*, the plaintiffs allege that Joseph Francis and the musician Snoop Doggy Dogg gave the plaintiffs alcohol, pressured them to pose naked for the cameras, and then reneged on plaintiffs' repeated requests not to appear in any videos. *See* Ex. A to Notice of Removal, at 2, Capdeboscq v. Francis, No. Civ. A. 03-0556 (E.D. La. Feb. 21, 2003). Another group of underage women allege that, after showing their breasts to the camera, they were lured to a hotel room and paid to engage in sex acts for the video. *See* Compl. and Demand for Jury Trial, at 7-9, *Francis*, No. 5:03CV260 (N.D. Fla.).

[32] Other than *Gritzke v. MRA Holdings*, the reported and unreported cases all involve minors. *See generally Capdeboscq*, 2003 U.S. Dist. LEXIS 8989; *Lane*, 242 F. Supp. 2d at 1223; *Doe*, No. 01-12450 (Civ. Dist. Orleans 2002).

[33] *See* CBSNEWS.COM, *supra* note 24 ("Francis admits to making mistakes in the past, and he's changed the way he does business. He says he shoots his own material, asks for IDs, and gets releases.").

[34] Due to the focus on *Girls Gone Wild* and the gender of all the plaintiffs in the lawsuits cited, this note will assume that it is a young woman bringing suit. However, it is possible that a young man could find himself in a similar situation, as in the case of Mr. Buck. *See* discussion *supra* Part I.A.

deals with the undertones of criminality in these transactions, and how such illegal acts nullify any purported contract in rare circumstances. Part III explains how one may end up selling much more of one's self than originally intended, and how one may argue that "[t]hat is not what I meant at all. That is not it, at all."[35] Part IV is an extended discussion of the disabilities individuals "going wild" may have in making contracts, either by being too young or by being too intoxicated.[36] Part V explains the consequences of being lucky enough to rescind the contract, and Part VI is the conclusion.

As of this writing, no one has yet sued *Shane's World*, although *Girls Gone Wild* is involved in a number of civil litigations.[37] Both are successful examples of how the reality pornography business operates, and both have been open to much media scrutiny, allowing for a thorough cataloguing of their methods. Although there are many similar outfits in operation, these two will be treated as exemplars for the remainder of the note. Furthermore, as many of the lawsuits deal with the excesses of Louisiana's Mardi Gras or Spring Break in Florida, the laws of those states will be referred to regularly, as will the law of Arizona, the shooting location for *Shane's World*.[38]

II. THE CRIMINAL CONTRACT

Before one falls into the paradigm offered by Mr. Francis and his ilk and assumes that one's naked form can under some circumstances be bargained away, one should examine whether such a bargain is enforceable. Even if a contract is not expressly void by statute, a court may infer a public policy prohibition against enforcement of that contract if the contracted-for act is prohibited by legislation or if prevention of the act is in the public interest.[39] The public interest is often inferred from the existence of a law.[40] However, the contract may be negated even if criminal activity is not established and the exchanges are customary.[41]

Crime is implicated in many of these cases. In *Doe v. Mantra Films*, three young women in New Orleans told a story of being served excessive amounts of alcohol before being coerced into disrobing in front of a camera, [42] a situation

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[35] T.S. Eliot, *The Love Song of J. Alfred Prufrock*, *at* http://www.bartleby.com/198/1.html (last visited Nov. 24, 2003).

[36] "The only really courteous excuse for misbehavior is 'I was drunk.'" P.J. O'ROURKE, MODERN MANNERS: AN ETIQUETTE BOOK FOR RUDE PEOPLE 56, *reprinted in* Atlantic Monthly Press (1990).

[37] As of October 10, 2003, PACER, the federal courts' electronic case tracking system, reported seventeen separate actions involving Mantra Films, Inc., the company that makes *Girls Gone Wild*. As many as fifteen of the actions involve women attempting to get out of the videos.

[38] The laws governing antics of spring break in Mexico are beyond the focus of this note.

[39] RESTATEMENT (SECOND) OF CONTRACTS § 179 (1981).

[40] *See* Blossom Farm Prod. Co. v. Kasson Cheese Co., 395 N.W.2d 619, 623 (Wis. Ct. App. 1986) (holding that a regulation against mislabeling "cheese food product" as real cheese created a public policy voiding a contract for the supply of cheese cultures).

[41] *See* Fed. Reserve Bank of Richmond v. Malloy, 264 U.S. 160, 170-171 (1924); Barnard v. Kellogg, 77 U.S. 383, 391 (1870) ("it is well settled that usage cannot be allowed to subvert the settled rules of law.").

[42] *See* Tr. of Mar. 8, 2002, at 12, 18, *Doe*, No. 01-12450 (Civ. Dist. Orleans 2002).

reminiscent of shanghaiing a sailor, which is still expressly prohibited by American law.[43] The judge in the aforementioned case gave some explanation as to the consideration exchanged to make the contract with Mantra Films valid,[44] but some see creating consideration in sexually themed situations as a semantic disguise to an illegal transaction.[45] One judge said Mantra Films' practice was arguably in violation of Florida's laws against deceptive trade practices.[46] As part of a *Shane's World* taping, a wandering group of pornographers seduced Mr. Buck into working with them;[47] their *modus operandi* apparently includes trespassing on college campuses without the school's permission.[48] Still, it is not obvious that criminal behavior is enough to make enforcement of a contract abhorrent to public policy.[49]

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[43] *See* 18 U.S.C. § 2194 (2003):

> Whoever, with intent that any person shall perform service or labor of any kind on board of any vessel . . . procures or induces, or attempts to procure or induce, another, by force or threats or by representations which he knows or believes to be untrue, or while the person so procured or induced is intoxicated or under the influence of any drug, to go on board of any such vessel, or to sign or in anywise enter into any agreement to go on board of any such vessel to perform service or labor thereon . . .

Other young women have reported that *Girls Gone Wild* has engaged in many of these acts in order to convince them to disrobe; *see* Mem. in Supp. of Mot. to Dismiss Pursuant to FED. R. CIV. P. 12(b)(6) at 2, *Capdeboscq*, 2003 U.S. Dist. LEXIS 8989 (allegations of intoxicants and pressure); Pl.'s Opp'n to Mot. to Dismiss With Mem. at 4, *Capdeboscq*, 2003 U.S. Dist. LEXIS 8989 (allegations of pressure and misrepresentation).

[44] According to Judge King:

> But it seems like these young ladies, like all of the young ladies, and probably even some men during Mardi Gras that go down in the French Quarters and expose themselves for beads are enriched. They are enriched because they don't get the average bead that one throws in a truck parade which might only be maybe 12 inches, they get the long bead.

Tr. of Mar. 8, 2002, at 28, *Doe*, No. 01-12450 (Civ. Dist. Orleans 2002).

[45] *See* O'ROURKE, *supra* note 35, at 100 (With regards to dating, "[e]ither sex, however, may bring a little gift, its value to be determined by the bizarreness of the sexual request to be made later in the relationship. Telling the difference between these gifts and performing an act of prostitution is not a problem, as there is no difference."); Sarah H. Garb, *Sex for Money is Sex for Money: the Illegality of Pornographic Film as Prostitution*, 13 LAW & INEQ. 281, 297 (1995) (suggesting that actors in pornographic films be arrested and tried as prostitutes). *Cf.* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 91 (1993) (noting that economic theory makes a number of "sex for services" transactions reasonable, and the only reason society prohibits them is to allow for the maintenance of human dignity in contract law).

[46] *See Gritzke*, 2003 U.S. Dist. LEXIS 9307, at *9-12.

[47] *See* Hegan, *supra* note 11, at 66-67.

[48] *See The O'Reilly Factor* (Fox News Channel television broadcast, Nov. 18, 2002), Tr. *available at* 2002 WL 5596036 (Indiana University claims it did not know about the filming of *Shane's World* and *Shane's World* publicist denies notifying the university).

[49] *See* RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. b (1981) ("The fact that the statute explicitly prohibits the making of a promise or the engaging in the promised conduct may be persuasive in showing a policy against enforcement of a promise but it is not necessarily conclusive."). The Restatement suggests a balancing test; *see* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.").

A. Nudity, Public and Otherwise

Contracts may potentially be voided for illegality if a young person is induced to disrobe in front of a camera. However, removing one's shirt alone, as in *Doe v. Francis*[50] or *Capdeboscq v. Francis,*[51] is legal in most states, although not wholly free from controversy.[52] Louisiana specifically prohibits exposure of one's genitals,[53] but is silent on breasts unless they are being handled in a lascivious manner.[54] Ohio has found that the mere wearing of a see-through brassiere does not violate the obscenity ordinance, as the statute only refers to "private parts," traditionally meaning the genitals alone, and not the breasts.[55] In at least one jurisdiction, one can be fully naked as long as one's nudity is not sexual in nature.[56] Even in places where going topless is prohibited, there are some exceptions for situations implicating equal protection[57] and free speech.[58]

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[50] *See* Tr. of Mar. 8, 2002, at 18-19, *Doe*, No. 01-12450 (Civ. Dist. Orleans 2002) (according to plaintiffs' counsel, "they never exposed their bottoms, that I'm aware of, at all.").

[51] Capdeboscq v. Francis, No. Civ. A. 03-0556, 2003 WL 21983221 at *2 (E.D. La. Aug. 18, 2003) ("Both the plaintiffs refer to the incident as a 'brief flashing.'").

[52] *See* Reena N. Glazer, *Women's Body Image and the Law*, 43 DUKE L.J. 113, 130 (1993) (New York has a statute against women going topless, but "forty-eight other states have not criminalized the mere exposure of a woman's breasts."). This figure is suspect; it does not include local laws. *See, e.g.* State v. Vogt, 775 A.2d 551 (N.J. Super. Ct. App. Div. 2001) (upholding local beach's statute against nude sunbathing); Tolbert v. Memphis, 568 F. Supp. 1285 (W.D. Tenn. 1983) (stating that a Memphis ordinance against uncovered female breasts passes constitutional muster although its application in the case was invalid because it was selectively enforced). *Cf.* DAYTONA BEACH, FLA. CODE OF ORDINANCES § 62-183 (2002) (prohibiting women from going topless). There are also cases where the allegedly volatile mix of topless women and alcohol was a permissible subject for regulation. *See, e.g.*, J&B Social Club, # 1 v. City of Mobile, 966 F. Supp. 1131 (S.D. Ala. 1996); Dydyn v. Dep't of Liquor Control, 531 A.2d 170 (Conn. Ct. App. 1987). The general trend towards accepting uncovered women's breasts does not apply to national parks in the Fourth Circuit, *see* U.S. v. Biocic, 928 F.2d 112, 115-16 (4th Cir. 1991) (holding that one cannot go topless in the Chincoteague National Wildlife Refuge), or on Cape Cod, *see Craft*, 683 F. Supp. 289. Furthermore, some enthusiastic police officers have used posts of nude pictures on the internet to issue warrants for violating public nudity ordinances when the background is visible. *See Nubile Nebraska Nudie Nabbed*, THE SMOKING GUN, Dec. 10, 2003, *available at* http://www.thesmokinggun.com/archive/nakedlincoln1.html.

[53] *See* LA. REV. STAT. ANN. § 14:106(A)(1) (2002).

[54] *See* LA. REV. STAT. ANN. § 14:106(A)(2)(b)(iv) (2002). One also may not have one's breasts exposed as a client of a masseuse. LA. ADMIN. CODE tit. 46, § XLIV.2501 (2002).

[55] State v. Parentreau, 564 N.E.2d 505, 506 (Ohio Mun. 1990). *Cf.* People v. David, 585 N.Y.S.2d 149, 151 (N.Y. Sup. Ct. 1991) ("The testimony of defense experts . . . included evidence that the change in community standards is such as to negate the notion that a woman's breast is a 'private or intimate part' of a person's body."). The perception of cultural change is not universal; *see Craft*, 683 F. Supp. at 301 ("Yet, nudity is a social concept, a changing social perception. At present, community standards have determined that women's breasts are an intimate part of the human body, and their exposure constitutes nudity."). At least one court denies that culture is relevant; *see* Eckl v. Davis, 124 Cal. Rptr. 685, 696 (Cal. Ct. App. 1975) ("Nature, not the legislative body, created the distinction between that portion of a woman's body and that of a man's torso. Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the covering of the breasts.").

[56] *See In re* Smith, 497 P.2d 807, 810 (Cal. 1972) (stating in regards to a sunbather that "a person does not expose his private parts 'lewdly' within the meaning of section 314 unless his conduct is sexually motivated.").

[57] *See David*, 585 N.Y.S.2d at 151 (holding the statute constitutional only when it "can therefore be construed to be gender neutral and implicitly include in its prohibitions the exposure of a male's breast as violative of the statute where it is satisfactorily demonstrated that it constitutes 'private or intimate parts' of a person"); *cf.* People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992).

The legality of pulling up one's shirt does not change even if the young women removing their clothing are under the age of eighteen, which would make "sexual performances" by them, or reproductions thereof, illegal under both state[59] and federal law.[60] Much hinges on the definition of "sexual performance," or its primary component, "sexual conduct."[61] As in obscenity law, a showing of the breast alone is not illegal. Under federal law, an exposed breast is only criminal if bared as part of simulated sexual intercourse, and it is described in gender-neutral terms.[62] In Florida, "sexual conduct" only occurs if a woman's breast is touched "with the intent to arouse or gratify the sexual desire of either party."[63] One Florida judge has already ruled that this does not apply to *Girls Gone Wild*.[64] Louisiana law does not refer to the breast at all,[65] and "sexual conduct" in Arizona is limited to penetrative intercourse or sodomy,[66] with a separate category of "exploitive exhibition" which makes criminal the exposure of the lower half of one's body with the purpose of sexually stimulating a viewer.[67] Even if one exposed one's genitals to the camera,[68] there is no guarantee that filming that act would be illegal. In a state where the child pornography law only punishes lewd exposure, focusing the camera on the genital area is not enough—lewd exposure must be inferred from conduct.[69]

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[58] *See* PAP's A.M. v. City of Erie, 812 A.2d 591, 603 (Pa. 2002) (holding that nude dancing is "expressive conduct" under the Pennsylvania constitution). *Contra* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (holding that an Indiana law requiring barroom dancers to wear a minimum of clothing did not violate the First Amendment); *Craft*, 683 F. Supp. at 292 ("Of course, plaintiffs contend that their protest against pornography and the exploitation of women will not be as powerful if presented clothed rather than naked. They may be correct that they will not receive nearly the same publicity if they demonstrate in clothing, but there is no constitutional right to deliver messages in the most effective manner possible."). Continuing with the example of Daytona Beach, *see* discussion *supra* note 52, DAYTONA BEACH, FLA. CODE OF ORDINANCES § 62-184(a)(2) (2003) excepts from the ordinance any act that "cannot constitutionally be prohibited by this section because it constitutes a part of a bona fide live communication, demonstration, or performance," citing *PAP'S AM* and *Barnes v. Glen Theatre* in the text of the statute. *Id.*

[59] *See, e.g.*, FL. STAT. ANN. § 827.071 (West 2003) (making it illegal to knowingly employ, authorize, or induce a child under the age of eighteen to engage in a sexual performance); LA. REV. STAT. ANN. § 14:81.1 (West 2003) (making illegal as child pornography any sexual performance of an individual under the age of seventeen).

[60] *See* 18 U.S.C. § 2256 (2003).

[61] A number of statutes define "sexual performance" almost circularly as a performance of "sexual conduct."

[62] *See* 18 U.S.C. § 2256(2)(B)(i) (2003) ("'sexually explicit conduct' means . . . lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited.").

[63] FL. STAT. ANN. § 827.071(1)(g) (West 2003).

[64] *See* Associated Press, *'Girls Gone Wild' Tape Not Child Porn, Judge Rules*, *supra* note 9.

[65] *See* LA. REV. STAT. ANN. § 14:81.1(B)(3) (defining as sexual conduct "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals."). However, Judge King asked in *Doe v. Francis* whether any "touching" was involved, even though only the breasts were bared. *See* Tr. of Mar. 8, 2002, at 26, *Doe*, No. 01-12450 (Civ. Dist. Orleans 2002).

[66] *See* ARIZ. REV. STAT. ANN. § 13-3551(9) (2003).

[67] *See* ARIZ. REV. STAT. ANN. § 13-3551(4) (2003).

[68] *See Lane*, 242 F. Supp. 2d at 1209-10.

[69] *Compare* State v. Gates, 897 P.2d 1345, 1348 (Ariz. Ct. App. 1994) (holding that, although the defendant surreptitiously filmed a girls' locker room and put together a video montage of publicly

B. Gatherings of Debauchery

A different case may be made when a number of people are gathered in a location for the express purpose of being filmed for various sex acts.[70] Such behavior is deemed a "nuisance" in Ohio.[71] A breast-baring contest, while seemingly otherwise legitimate under Ohio law,[72] could be illegitimate in the context of a greater nuisance.[73] This raises a question about the crowds that the *Girls Gone Wild* film crews generate in public places when they do their filming, sometimes in daylight.[74] Certainly, when the gathering involves minors, it is absolutely illegal.[75] The *Shane's World* series claims that it does not throw its own "parties" because the producers merely provide money to students who do.[76] However, a criminal conspiracy may be inferred from such a chain of events with a common purpose.[77]

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available pictures of naked children, "the statute requires that the minors, not the defendant, be the ones who are engaged in sexual conduct, in the lewd exhibition of their genitals, pubic, or rectal areas.") *with* State v. Schmitt, 590 So. 2d 404, 411 (Fla. 1991) (holding that where a man encouraged his young daughter to disrobe for the camera, "if Schmitt's true purpose was the intentional exploitation of his daughter for a sexual purpose, then his conduct was 'lewd' within the meaning of Florida law and is punishable as such.").

[70] The *Shane's World* series depends on a location where a party can be held. *See* Hegan, *supra* note 11, at 64. There are allegations that *Girls Gone Wild* is also taking this path. *See* Compl. and Demand for Jury Trial, at 5, *Francis*, No. 5:03CV260 (N.D. Fla.) (complaint filed Oct. 3, 2003 alleging that Mr. Francis et. al. rented a number of suites for use in videotaping individuals engaged in sexual acts).

[71] A "nuisance" of this sort is defined by OHIO REV. CODE ANN. § 3767.01(c)(2) (2003) as "any place in or upon which lewdness, assignation, or prostitution is conducted . . . or any place, in or upon which lewd, indecent, lascivious, or obscene films . . . are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown."

[72] *See Parentreau*, 564 N.E.2d 505 (holding that a "lingerie fashion show" at a club called "Scandals" could have models with see-through brassieres).

[73] *See* Montgomery v. Pakrats Motorcycle Club, Inc., 693 N.E.2d 310, 313 (Ohio Ct. App. 1997) ("While some contestants did dance on stage, expressive dancing was clearly not the primary focus of the contest. Furthermore, even if the 'titty contest' were protected by the First Amendment, many other public sexual acts engaged in by party attendees were not. The BCI agents testified that party attendees publicly engaged in oral sex and masturbation. Such displays can certainly be considered reprehensible and disgusting public sexual activity.").

[74] *See* Ariel Levy, *Spanking on the Beach,* DISPATCHES FROM GIRLS GONE WILD, SLATE (Mar. 24, 2004), *at* http://slate.msn.com/id/2097485/entry/0/ (giant crowd formed on a beach begging two women to remove their clothes).

[75] *See* State v. Snyder, 807 So. 2d 117, 119 (Fla. Dist. Ct. App. 2002) (noting that a videotaped "sex party" involving 12-16 year olds violates Florida law).

[76] *See Dateline NBC* (NBC television broadcast, Nov. 2, 2003) ("Shane's World insists it does not buy alcohol, nor officially sponsor parties, though that is common practice for other Web porn companies.").

[77] *See* U.S. v. Scott, 413 F.2d 932 (7th Cir. 1969). Even if one can allege a conspiracy, the personal, instead of commercial, nature of the injuries forecloses an action under RICO. *See Capdeboscq*, 2003 WL 21983221 at *3-4.

Having sex in front of a camera is not necessarily illegal.[78] If the production itself is not obscene, then the contract to perform, regardless of the performance's nature, is not per se illegal.[79] This line of reasoning would be more persuasive if the *Girls Gone Wild* producers consistently established movie-like situations for their films. In the quest for "authenticity" or "reality," the production companies film in public or semi-public locations where a number of non-participants are present and watching.[80] Having a public audience may violate "sex show" or pandering ordinances,[81] which are constitutional.[82] If the filming continues in one place for some time, it may violate zoning ordinances against "adult entertainment" establishments.[83]

C. Aiding and Abetting

Even if the photographing itself is legal, a contract to make that photograph may be unenforceable for public policy reasons. If the photographed individual furthered an illegal use of the photograph, or knew there would be an illegal use of the photograph resulting in significant social consequences, the Restatement says a court may refuse to enforce the contract.[84] Although it is difficult to say that *Girls Gone Wild* or *Shane's World* carries the social consequences required by the Restatement,[85] one may still argue that the production of the film in total or its promotion are illegal acts.

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[78] *See* People v. Freeman, 758 P.2d 1128, 1133 (Cal. 1988) ("The bald conclusion . . . that 'sexual intercourse for hire by models whose activity is photographed for [publication] . . . is prostitution' simply ignores First Amendment considerations that compel our contrary conclusion here.") (citing Van de Kamp v. Am. Art Enterprises, 142 Cal. Rptr. 338, 341 (Cal. Ct. App. 1977)); U.S. v. 35 mm. Motion Picture Film Entitled "Language of Love," 432 F.2d 705, 711 (2nd Cir. 1970) (holding a film that "portrays normal heterosexual relations albeit in rather graphic detail, one sequence of female masturbation, and close-ups of the examinations performed by the gynecologist" is not obscene in and of itself).

[79] *See Freeman*, 758 P.2d 1128 at 1134 (holding that, since paying actors is lawful and depicting non-obscene sex acts is lawful, paying actors to depict non-obscene sex acts is lawful).

[80] *See* Hegan, *supra* note 11, at 66 ("Fifteen students watch Dez [have sex with another porn star] . . . . Dez grins at the thirty students on the balcony outside. Their faces are mashed against the French windows, and behind them, forty more faces are straining to see over their shoulders.").

[81] *See, e.g.*, OR. REV. STAT. § 167.062 (2001) ("It is unlawful for any person to knowingly direct, manage, finance or present a live public show in which the participants engage in sadomasochistic abuse or sexual conduct.").

[82] *See* State v. Ciancanelli, 45 P.3d 451, 465 (Or. Ct. App. 2002) (holding that OR. REV. STAT. § 167.062 is constitutional). *Cf.* State v. Mutschler, 65 P. 3d 469, 474 (Ariz. 2003) ("defendants provide virtually no legal analysis in support of their position that to touch or fondle one's own breasts during a nude or erotic dance is constitutionally protected"); State v. Taylor, 808 P.2d 314 (Ariz. Ct. App. 1990) (finding that a sex show paid for by a third party violated pandering and prostitution statutes); People v. Maita, 203 Cal. Rptr. 685 (Cal. Ct. App. 1984) (holding that California could prosecute a theater where there were strippers who not only disrobed, but had sex with theater-goers).

[83] *See* City of Jackson v. Lakeland Lounge of Jackson, Inc., 688 So. 2d 742, 751 (Miss. 1996) (holding constitutional the regulation of female topless dancers by zoning). *Cf.* LA. REV. STAT. ANN. § 26:90 (Lexis 2003) (prohibiting exposed breasts amongst the staff of establishments with liquor licenses).

[84] RESTATEMENT (SECOND) OF CONTRACTS § 182 (1981).

[85] The example used by the Restatement is "as where it threatens human life." *Id.*, cmt. b. Some would say that *Girls Gone Wild, Shane's World* and their imitators do just that; *see generally* Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1

As previously mentioned, an illegal situation may arise if minors were present at the filming, even if the person currently fighting to avoid the distribution of her image is not a minor. Although the situation has not been litigated in the context of *Girls Gone Wild* or other "reality porn," the creation of a video where a minor engages in sex acts is illegal even if another minor set up the situation and was behind the camera.[86] The use of a minor's image in such a production would be a use involving grave social harm.[87] In the absence of minors, a promising avenue for victims to pursue is in the area of obscenity law.[88]

One may violate obscenity law not only by producing but also by distributing an obscene film.[89] In *Ginzburg v. United States*,[90] the Supreme Court found that a textbook that was not obscene when sold to medical professionals was obscene when the distributors "deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed."[91] This emphasis must be the exclusive thrust of the advertising;[92] the mere association of an otherwise non-obscene film with titillation is not enough.[93] The *Girls Gone Wild* franchise has a number of advertisements on cable television,[94] and both it and *Shane's World*

(1985) (arguing that pornography is a form of gender discrimination that leads to dehumanizing women and perpetrating violence against them). In Daytona Beach, the fine for public nudity is $253.00, equal to the fines for advertising by defacing public property or discharging a firearm. DAYTONA BEACH POLICE DEP'T, VOLUSIA CO. TRAFFIC FINES, *at* http://www.ci.daytona-beach.fl.us/police/fines_violations.htm (last modified Sept. 19, 2003).

86 *See* State v. A.R.S., 684 So. 2d 1383, 1387 (Fla. Dist. Ct. App. 1996) ("The statute is not limited to protecting children only from sexual exploitation by adults, nor is it intended to protect minors from engaging in sexual intercourse. The state's purpose in this statute is to protect minors from exploitation by anyone who induces them to appear in a sexual performance and shows that performance to other people.").

87 *See* David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981) (alleging that child pornography is more damaging to a child than that child being sexually abused or forced into prostitution).

88 Although state obscenity laws differ, 18 U.S.C. § 1461 (2003) prohibits transmission through the mail of "every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance." The only caveat is the relatively short hurdle that the distribution of the suspect video be in interstate commerce. However, "obscenity laws are technically not dead, but they might as well be." William F. Buckley, *Forlorn Search for Decency*, NAT'L REV. ONLINE, *available at* http://nationalreview.com/buckley/buckley200403121201.asp (Mar. 12, 2004). Proving that something is obscene may be difficult. *Id.*

89 *See* Splawn v. California, 431 U.S. 595, 598 (1977) ("There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene.").

90 Ginzburg v. U.S., 383 U.S. 463 (1966). Justice Stevens has waged a continuing battle against *Ginzburg*, accusing it of having been superceded. *See Splawn* v. California, 431 U.S. at 603 n.2 (Stevens, J., dissenting). Alternatively, he accuses *Ginzburg* of being "a legal fiction premised upon a logical bait-and-switch." U.S. v. Playboy Entm't Group, 529 U.S. 803, 828 (2000) (Stevens, J., concurring). However, the Supreme Court still finds *Ginzburg* valid, if distinguishable, to this day. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 257-58 (2002).

91 *Ginzburg*, 383 U.S. at 471-72.

92 *See id.* at 470 ("Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity.").

93 *See 35 mm. Motion Picture*, 432 F.2d at 714 (holding that a drawing of a voluptuous naked woman in an advertisement placed in a trade publication to film distributors is not conclusive of pandering).

94 *See* Compl. and Demand for Jury Trial at 5, *Francis*, No. 5:03CV260 (N.D. Fla.) at 6.

have websites.[95] Neither website is overly concerned with promoting any particular educational or social value in the work.[96] Furthermore, *Girls Gone Wild* tapes are at least occasionally packaged and sold with more explicit, potentially obscene materials.[97] Since anyone who is conscious enough to agree to have his or her image distributed[98] most likely knows what the image will be used for,[99] it could be argued that any agreement to be filmed and to release one's image for an obscene picture such as *Girls Gone Wild* is an illegal contract.

D. Girls Gone Violating Child Labor Laws

Let us assume, as in the unreported Louisiana case of *Doe v. Mantra Films*, the plaintiff is underage but has the capacity to contract.[100] In Louisiana, it is illegal to have a minor in a "theatrical exhibition"[101] unless the exhibition is part of a church function, a school-sponsored event or the work of a non-profit agency.[102] The minor must also have his or her parents' consent, or the Department of Labor must issue a permit for the minor to work in a commercial setting.[103] In Florida, an employer in the entertainment industry must have a permit from the state to employ minors.[104] In New York, any contract created by a minor without a work permit could be broken at any time as it would be unenforceable.[105] Not all contracts are

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[95] *See* http://www.girlsgonewild.com/ (last visited Nov. 19, 2003); http://www.shanesworld.com/ (last visited Nov. 19, 2003).

[96] *Compare* http://www.girlsgonewild.com/tour.php (last visited Nov. 19, 2003) ("Join now and you'll see all the Wild Girls baring it all for our cameras! G-strings, bare breasts, tight buns, and more! Uninhibited coed girls caught on tape doing all the things you've always dreamed of them doing. This is the HOTTEST Girls Gone Wild footage ever to be made available!"), *and* http://www.shanesworld.com/t1.html (last visited Nov. 19, 2003) (showing photos of sexual activity with the caption, "we travel from coast to coast to party with the wildest party-schools in the country! Real porn stars with real college students going wild!"), *with* Ginzburg, citing from the advertisement of one of the publications judged obscene through advertising:

> EROS is a new quarterly devoted to the subjects of Love and Sex. In the few short weeks since its birth, EROS has established itself as the rave of the American intellectual community—and the rage of prudes everywhere! And it's no wonder: EROS handles the subjects of Love and Sex with complete candor. The publication of this magazine—which is frankly and avowedly concerned with erotica—has been enabled by recent court decisions ruling that a literary piece or painting, though explicitly sexual in content, has a right to be published if it is a genuine work of art.

Ginzburg, 383 U.S. at 470. If there is any case to be made for censorship, it is that it forces consumers of pornography to be moderately literate and legally educated.

[97] *See Lane*, 242 F. Supp. 2d at 1210.

[98] If an individual is too intoxicated to contract, the contract is invalid regardless of its criminality. *See infra* Part IV.F.

[99] *See Lane*, 242 F. Supp. 2d at 1220 ("[T]his Court finds that even if the cameraman made such representations, no reasonable jury could conclude that Lane's consent limited the viewing of her image and likeness to only those persons present at the time of the filming.").

[100] The holdings of *Doe v. Mantra Films* and *Lane* are questionable. *See infra* Part IV.B.

[101] LA. REV. STAT. ANN. § 23:251(A)(3) (West 2003). § 23:251(A)(4) prevents "illegal, indecent, or immoral" exhibitions by minors, who are defined by §23:251(A) as being under the age of sixteen.

[102] LA. REV. STAT. ANN. § 23:253 (West 2003).

[103] *Id.*

[104] FLA. STAT. ANN. § 450.132(3) (West 2003).

[105] *See* Metro. Model Agency USA, Inc. v. Rayder, 643 N.Y.S.2d 923 (Sup. Ct. 1996).

unenforceable for the lack of a permit;[106] enforceability is made by a finding that "the interest in the enforcement of the promise is clearly outweighed by the public policy behind the requirement."[107] Some courts find the protection of children sufficient as a compelling policy to annul a contract.[108]

III. BARGAINS, FAUSTIAN AND OTHERWISE

In England at the end of the nineteenth century, Mrs. Pollard had her portrait taken at a firm called the Photographic Company.[109] She desired a limited number of copies, but her photo ended up for sale in the store window.[110] While suggesting that no contract would occur if the photograph were taken candidly,[111] the court held that Mrs. Pollard's contract with the studio implied a provision against unauthorized duplication.[112] To the contention that the defendant photographer owned the negatives, the court responded:

> It may be said that in the present case the property in the glass negative is in the Defendant, and that he is only using his own property for a lawful purpose. But it is not a lawful purpose to employ it either in breach of faith, or in breach of contract.[113]

Fourteen years later and across the Atlantic, a young New Yorker had her photograph taken.[114] Somehow, the picture ended up on around twenty-five thousand advertisements for flour.[115] Feeling "greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture," she sued.[116] The New York Court of Appeals ruled that the plaintiff had no interest in the dissemination of her own image.[117] The legislature then created N.Y. CIV. RIGHTS LAW § 50, which makes use of a person's image without her consent illegal.[118]

Both the concept of *Pollard's* breach of faith and the statutory sentiment of unfair exploitation came to rest in the Restatement, which states that "[o]ne who

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106 *See, e.g.*, McQueen v. Brown, 775 A.2d 748 (N.J. Super. App. Div. 2001) (holding that the failure by a landlord to get a building permit did not allow the landlord to breach the tenants' lease).

107 RESTATEMENT (SECOND) OF CONTRACTS § 181 (1981).

108 *See* Newman v. Rogers, 248 N.Y.S. 297, 297-98 (App. Term 1930) ("The contract of employment of defendant's twelve-year-old child is against public policy and illegal under section 485, subdivision 3, of the Penal Law, and cannot be enforced. It is not necessary for the statute in terms to provide that contracts made in violation of it are void. The statute makes such contracts against public policy, and the courts will declare them to be void.") (citations omitted); Scarpelli v. Travelers Indem. Co. of Hartford, 248 F. 2d 791, 794 (7th Cir. 1957) ("a contract of employment of a minor in violation of the Illinois Child Labor Law is a void contract and unenforceable by either party to it.").

109 *See* Pollard v. Photographic Co., 40 Ch. D. 345, 347-49 (Eng. 1888).

110 *See id.*

111 *See id.* at 346.

112 *See id.* at 349-50.

113 *Id.* at 352.

114 Roberson v. Rochester Folding Box Co., 64 N.E. 442, 442 (N.Y. 1902).

115 *See id.*

116 *See id.*

117 *Id.* at 445.

118 *See* Ann Margaret Eames, *Caught on Tape: Exposing the Unsettled and Unpredictable State of the Right of Publicity*, 3 J. HIGH TECH. L. 41, 45 (2004).

appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy."[119] If one agrees to publication, such publication can only be to the extent agreed.[120] By 1985, one could say that it is well established that consent to have a photograph taken does not equate with written consent to its use for advertising or trade purposes.[121]

A. What Counts as Agreement

When a court steps in to interpret an agreement, the conduct required to form an agreement is less stringent than common sense might dictate. One's pattern of conduct alone may result in a contract.[122] One commentator uses the example of sitting down to play bridge: one is now committed to playing through at least one rubber.[123] However, this pattern of acceptance must be fixed in its community[124] and known to the person accepting the contract.[125] An extreme example is a hasty agreement to marry made in an Australian bar; despite the bride's throwing the ring in the groom's face in front of the priest and the witnesses, a court held that it could not be "that every petty variation from the form in use in the relevant denomination should nullify the marriage."[126] Holding a ceremony in front of a clergyman was adequate; the marriage was valid.[127]

Furthermore, once a contract exists, courts are reluctant to deal with the relative unfairness of the contract. Whatever the agreed-to exchange is constitutes the contract.[128] If it's legal to barter one's image away for beads,[129] a court will not question the relative values transferred.[130]

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119 RESTATEMENT (SECOND) OF TORTS § 652C (1977).

120 RESTATEMENT (SECOND) OF TORTS § 652F, cmt. b (1977).

121 Barrows v. Rozansky, 489 N.Y.S. 2d 481 (App. Div. 1985) (referring to N.Y. CIV. RIGHTS LAW § 50).

122 This is for the individuals, such as Ms. Lane or Ms. Gritzke, who did not sign waivers and whose degree of consent must be determined by extrinsic evidence. In response to lawsuits, Mantra Films has changed its operating procedure to require waivers from all the women involved. *See Fox on the Record With Greta Van Susteren* (Fox News Channel television broadcast, Dec. 6, 2002).

123 E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 90 (1998). A rubber is the "best two of three games; the traditional unit of play in bridge." AMERICAN CONTRACT BRIDGE LEAGUE, THE BRIDGE WORLD: BRIDGE GLOSSARY, *at* http://www.bridgeworld.com/default.asp?d=bridge_glossary&f=glossr.html (last visited Mar. 31, 2005).

124 *See Malloy*, 264 U.S. 160 at 171.

125 *Id.* at 170.

126 *Recent Cases–Notes and Comments*, 27 AUSTL. L.J. 522, 525-26 (1953) (citing Quick v. Quick, V.L.R. 224 (1953)).

127 *Id.* at 526.

128 This is the general rule; courts have increasingly carved out exceptions since the 1930s. *See* Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1116 (1984) (illustrating the general rule and the modern exceptions). In England, "Courts of Equity have never set aside gifts on the ground of folly, imprudence, or want of foresight on the part of the donors." *Allcard*, 36 Ch. D. at 182-83.

129 Legality is discussed *supra* Part II.

130 *See* Faloona v. Hustler Magazine, Inc., 607 F. Supp. 1341, 1348 (N.D. Tex. 1985) (finding two releases for naked photography broad enough to let the photographers sell the photos to a pornographic magazine; the total value given for the releases was $100). Regarding reality pornography explicitly, *see* Tr. of Mar. 8, 2002, *Doe*, No. 01-12450 (Civ. Dist. Orleans 2002) at 28 (engaging in a discussion of

But if one lets the photographer take a picture, it is difficult to tell how much one agrees to.[131] In Indiana, where one notorious episode of *Shane's World* was shot,[132] if one can prove a separate oral agreement, such as a restriction on use of one's footage, even if it does not exist in the written contract, it is enforceable.[133] Courts enforce agreements when a reasonable person would believe a pact is made at the time of the agreement.[134] When a young woman exposes herself in order to get a "Girls Gone Wild" T-shirt from a photographer[135] or acts out in front of a similarly well-established camera crew, there cannot be much doubt that she expects to be in the show.[136] With a third-party photographer, whether or not a general permission to film was a release of one's rights for personal or commercial use is a question of fact.[137] If the release was for commercial use, the

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beads for pictures); *Lane*, 242 F. Supp. 2d at 1219-20 (holding that one can agree to a wholly uncompensated distribution of one's image). A court may consider consent lacking when the difference in value between the parties' performance is $22.3 million. *See* Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116, 129 (S.D.N.Y. 1999) (holding that a deal was "too good to be true" when the offer was to buy a combat jet for millions of soda labels or their cash equivalent).

131 Although the case hinged on New York's lack of a statutory right of privacy, *Messenger v. Gruner + Jahr Printing and Publishing Co.*, 727 N.E.2d 549 (N.Y. 2000) highlights the kind of difficulty one can get into even in situations where there is nothing particularly salacious about the picture itself. In *Messenger*, a young woman posed for a series of photographs to appear in *Young and Modern*. These photographs were used to illustrate a letter to an advice column from a young woman who became inebriated and had sex with three men in a single evening. The model had no legal recourse for this use. A comment in the NEW YORK LAW SCHOOL LAW REVIEW argues persuasively that *Messenger* came out wrongly, and that the court should have paid more attention to the damage the tangential use of the young woman's photo had on her future modeling career. *See* Alina Raines, Comment, *Messenger v. Gruner + Jahr Printing and Publ'g*, 46 N.Y.L. SCH. L. REV. 781 *passim* (2002).

132 *See* Hegan, *supra* note 11, at 66-67; *The O'Reilly Factor*, *supra* note 48.

133 *See* Grande v. Gen. Motors Corp., 444 F.2d 1022, 1026 (7th Cir. 1971).

134 *See* Barnes v. Treece, 549 P.2d 1152, 1155 (Wash. Ct. App. 1976) (holding that a "joke" is not a contract only if a reasonable person would understand it to be a joke). It is the responsibility of the party that made the offer in jest to convey that the offer was not serious. Lucy v. Zehmer, 84 S.E.2d 516, 521-22 (Va. 1954). The extreme example of a non-serious offer is when performance by either party would be difficult, if not impossible. *See Leonard*, 88 F. Supp. 2d at 129 (requiring the "purchaser" of a jet to drink 190 sodas a day for a century or provide cash equivalent in return for the company to sell the purchaser a jet usually only available to the United States Marine Corps).

135 *See Fox on the Record*, *supra* note 122 (statement by Joseph Francis: "Girls know what 'Girls Gone Wild' is, and they're either into it or they're not. But, generally, 'Would you like to be in 'Girls Gone Wild'?' And—yes or no question. And—'Well, what do I get?' 'Well, you get a 'Girls Gone Wild' T-shirt,' and they get like a 'Girls Gone Wild' tank top or baseball tee or something for participating in the series."). Some people expect there to be a transaction; in one instance, a woman demanded a hat after undressing for the camera. *See* Ariel Levy, *The View From the Sidelines of the "Sexy Positions Contest," in* Dispatches From Girls Gone Wild, SLATE, Mar. 23, 2004, *at* http://slate.msn.com/id/2097485/entry/2097653/.

136 *See* Neff v. Time, Inc., 406 F. Supp. 858, 859-60 (W.D. Pa. 1976) (holding that a drunken Steelers fan who tried to get the attention of a Sports Illustrated photographer cannot later sue when a picture of him with his pants zipper open appears in the magazine).

137 *See* Sangiovanni v. Stengle, 652 So. 2d 897, 898 (Fla. Ct. App. 1995) (holding that it was a question of fact as to whether a generally-worded settlement applied to all tortfeasors or just named parties); Gosse v. Swedish Hosp., 483 P.2d 147, 149 (Wash. Ct. App. 1971) (finding that there was a "question of intent" as to whether or not a negligence settlement covered a related medical malpractice claim).

photographer may further license that use to third parties unless there is an explicit restriction,[138] which is unlikely given the brief nature of the transaction.[139]

Situations where there is a third-party photographer also raise the issue of misrepresentation. If one party to the contract misleads the other, and the other party relies upon the falsehood, the contract is voidable at the misled party's discretion.[140] Although the principle that it is unnecessary to tell the other party what she should already know predates the founding of the United States,[141] misrepresentations may include omissions and half-truths that lead to false conclusions,[142] and "when the identity of the person is an important element in the sale . . . a mistake as to the person dealt with prevents the contract from coming into existence for want of assent."[143]

As putting one's self forth as the president of a company without mentioning the company's dissolution is grounds to avoid a contract,[144] a photographer who does not mention his affiliation or intent to resell his tape, especially in an atmosphere when many are taking photographs for personal use,[145] may allow the photographed individual to abrogate the contract.

B. Girls Standing Around

There may not need to be a contract if the photography occurs in a public place. It is not considered actionable to take photographs on a public highway,[146] even if the individual is drunk or otherwise in an embarrassing situation.[147] For example, if an individual is homeless, activities that might normally be privileged,

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[138] *See* O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1942) (holding that the publicity department of a football player's university had rights to his image, and those rights could be transferred). *Cf.* Faloona v. Hustler Magazine, Inc., 799 F.2d 1000, 1005 (5th Cir. 1986) (holding that a broad release executed by a mother for her children to pose naked for a book on sexual development allowed the owners of the photograph to sell it to *Hustler*).

[139] But in Florida, "the mere right to publish a photograph . . . would not necessarily immunize the publisher of the photograph from damages for invasion of privacy. If a generally authorized publication were made in such a manner that the publisher should reasonably have known would offend the sensibilities of a normal person, then as a preliminary legal matter the claim would state a cause of action." Facchina v. Mutual Benefits Corp., 735 So. 2d 499, 503 (Fla. Ct. App. 1999).

[140] RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981).

[141] *See* Carter v. Boehm, 97 E.R. 1162, 1165 (K.B. 1766).

[142] RESTATEMENT (SECOND) OF CONTRACTS § 159 cmt. b (1981).

[143] *See* Arthur Coal & Coke Co. v. Pittsburg Coal Co., 17 Ohio Cir. Ct. (N.S.) 491, 493 (1911).

[144] *See* Miller v. Celebration Mining Co., 29 P.3d 1231, 1235 (Utah 2001).

[145] *See Fox on the Record With Greta Van Susternen* (Fox News Channel television broadcast, Feb. 12, 2002) (statement by Mr. Francis's lawyer that "[i]f you look at these scenes, you'll see flashbulbs going off from still photographers.").

[146] RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977). Taking advantage of this principle, Bourbon Street in New Orleans's French Quarter is possibly the most photographed location in existence, with a number of sites filming the street constantly. *See, e.g.*, http://www.nola.com/bourbocam/classic/ (last visited Nov. 23, 2003); http://www.earthcam.com/usa/louisiana/neworleans/tricou/ (last visited Nov. 23, 2003); http://www.mikeandersons.com/cam.htm (last visited Nov. 23, 2003).

[147] RESTATEMENT (SECOND) OF TORTS § 652B cmt. c, illus. 6 (1977).

such as eating and sleeping, are not protected if done in public.[148] A voluntary choice to put one's self in public may surrender one's rights to one's image.[149]

Still, the general rule in taking photos is that one may not make an offensive intrusion into the private affairs of another,[150] including the state of one's underwear, or lack thereof.[151] Although some courts prohibit all photography without permission in absolutist terms,[152] this is not the general state of the law.[153] The homeless have rights in their property,[154] which some have argued should include their right to their own images.[155] An outspoken celebrity known for seeking the limelight still has the right to his own image in the times when he is not seeking publicity,[156] and a lack of fame does not preclude someone from suing for the value of his appropriated image.[157]

Even if standing in the street releases one's rights to one's image, one may still be able to assert a right to his or her image in a semi-private area. A fenced-off fairground that the public can attend for a fee is evidence that permission is necessary before filming.[158] For situations such as an invitation-only party,[159] a private club[160] or other private property[161] not established for the purpose of

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148 *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1575 (S.D. Fla. 1992).

149 *See* Laurel Kallen, *Invading the "Homes" of the Homeless: Is Existing Right-of-Privacy/Publicity Legislation Adequate?*, 14 CARDOZO ARTS & ENT. L.J. 405, 421 (2001) (referring to a surrender of rights by the homeless). *Cf.* Tr. of Mar. 8, 2002, at 29, *Doe*, No. 01-12450 (Civ. Dist. Orleans 2002) ("But an individual, minor or not, who goes down into the French Quarter—because this is well publicized. This is not the first year—I would think anyone, definitely local, but even away from the State of Louisiana is aware of what takes place down in the French Quarters. It seems to me that there was consent.").

150 RESTATEMENT (SECOND) OF TORTS § 652B (1977).

151 *Id.* cmt. c. This rule refers to when an individual uses some artifice to see the underwear, *see id.* cmt. c. illus. 7 where a jet of air at a funhouse lifts a woman's skirt. The Restatement does not speak to whether promoting or exploiting one's intoxication is also included.

152 *See* Peay v. Curtis Pub. Co., 78 F. Supp. 305, 309 (D.D.C. 1948) ("The law has recognized the right of privacy. The publication of a photograph of a private person without his sanction is a violation of this right.").

153 *See* Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790, 792 (Cal. Ct. App. 1993) ("Though both celebrities and non-celebrities have the right to be free from the unauthorized exploitation of their names and likenesses, every publication of someone's name or likeness does not give rise to an appropriate action.").

154 *See Pottinger*, 810 F. Supp. at 1559.

155 *See generally* Kallen, *supra* note 149.

156 *See* Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (considering a photograph of what was purportedly a nude Muhammed Ali).

157 *See Dora*, 18 Cal. Rptr. 2d at 792 n.2.

158 *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 563 (1977).

159 *See* Ken Hegan, *supra* note 11, at 64 ("[T]he party planner . . . carefully whittled the crowd down to 150 photogenic students, giving guests the closely guarded address only minutes before the party."). One could imply acceptance of use of one's image by going to a *Shane's World* party, *see supra* Part IIIA, unless one were incapable of giving such consent. *See infra* Part IV.

160 *See* Tr. of Mar. 8, 2002, at 15-18, *Doe*, No. 01-12450 (Civ. Dist. Orleans 2002) (allegations by the plaintiffs' lawyer that there is a difference between Bourbon Street and the inside of a bar on Bourbon Street).

161 *See, e.g.*, Cohen v. Herbal Concepts, Inc., 63 N.Y.2d 379 (1984) (bathing in a stream on private property).

filming individuals, there can be a question as to whether one expects to be photographed.[162]

C. Free Pictures If You Are a News Organization

Publication for money alone does not count as appropriation of one's likeness.[163] If someone's image or likeness is a "matter . . . in the public interest," then it is newsworthy and one need not be compensated for its publication.[164] This protection stems from the First Amendment,[165] a case that is made stronger by the subject's knowledge that photographs of him are being taken.[166]

The doctrine of public interest is an obstacle to any plaintiff attempting to sue a reality pornographer because many of them consider themselves documentary producers,[167] at least when it comes to the court papers.[168] Taking on the mantle of the documentary filmmaker can be a successful tactic. Documentaries are not included in commercial use,[169] and even a magazine's picture of a naked celebrity, albeit an obscure one, can be newsworthy even if the magazine is devoted entirely to pictures of naked celebrities.[170] Furthermore, depictions of actual events, even

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[162] This question may be so fact-specific as to require a trial by a fact-finder. *See* Capdeboscq v. Francis, No. Civ. A. 03-0556, 2004 WL 463316 at *2 (E.D. La. Mar. 10, 2004) ("However, the subject photograph was not taken on Bourbon Street, but at a 'party' on the second floor of a Bourbon Street bar, and the court finds that, while it is a close call, there is a genuine issue of material fact as to whether this party was 'public' rather than 'private.'").

[163] *See* Jaubert v. Crowley Post-Signal, Inc., 365 So. 2d 1386, 1391 (La. 1979).

[164] *See Dora*, 18 Cal. Rptr. 2d at 792. This only extends to the publication of the image as a "news item" or "documentary"; the plaintiff in *Gritzke*, 2003 U.S. Dist. LEXIS 9307, at *12-*13 also had her image in the commercials and on the videotape covers, making her an unwilling spokesperson for the product as opposed to the subject of news.

[165] *See* Davis v. High Society Magazine, Inc., 457 N.Y.S.2d 308, 313 (N.Y. App. Div. 1982). *See also* Delan v. CBS, Inc., 458 N.Y.S. 2d 608, 613 (N.Y. App. Div. 1983) ("While the very term 'purposes of trade' encompasses use for the purpose of making profit . . . a literal construction of the statutory provision would violate the constitutional protection of free speech and free press when such publication involves the public interest.") (citation omitted) *See also* Bosley v. WildWetT.com, No. 04-3428, 2004 U.S. App. LEXIS 11028 at *1 (6th Cir. Apr. 21, 2004) ([T]he Sixth Circuit stayed, on First Amendment grounds, a preliminary injunction against a website that broadcast video images of a naked woman allegedly filmed without her consent).

[166] *See Neff*, 406 F. Supp. at 862 (expressing concern that the photo chosen for a magazine has the subject's pants zipper open, but finding that he knew of the photography and that *Sports Illustrated* is protected by the First Amendment).

[167] *See Dateline*, *supra* note 76 (statement of spokesperson for *Shane's World* saying, "[w]e simply document what happens during the college experience.").

[168] *See* Memorandum in Support of Motion for Final Summary Judgment for Defendants MRA Holding, LLC and Ventura Distribution, Inc. at 8-10; *Lane*, 242 F. Supp. 2d 1205 (claiming that *Girls Gone Wild* is like *A Perfect Storm* in its use of real situations without appropriating likenesses); Answer, Defenses, & Affirmative Defenses of Ventura Distribution, Inc. at 6. *Lane*, 242 F. Supp. 2d 1205 ("The claim is barred by the First and Fourteenth Amendments of the United States Constitution as a truthful and accurate depiction of a public event of public concern.").

[169] *See* Benavidez v. Anheuser Busch Inc., 873 F. 2d 102, 104 (5th Cir. 1989) (holding that an "inoffensive" documentary about Hispanic war heroes, even if sponsored by a beer concern, was not commercial speech).

[170] *See Davis*, 457 N.Y.S.2d at 315 ("If, in fact, plaintiff, a well-known female boxer, posed nude in a boxing scene or actually posed in a semi clad fashion, we could not say that such is not a newsworthy event for a great many people."). *But see* Braun v. Flynt, 726 F.2d 245, 250 (5th Cir. 1984) (holding

if heavily stylized, are considered to be more news than commercial use,[171] and under certain circumstances, news photographers can take pictures on private property without regard to individuals' privacy rights.[172]

However, not everything is newsworthy. If it were, "commercial advertisers may seize upon such popularity to increase their sales of any lawful article without compensation of any kind for such commercial use of one's name and fame."[173] To avoid the classification as a newsworthy event, a particular use of a person's image must only be tangentially related to the matter of public interest, or substantially fictional.[174] A sale of a person's photograph to a news organization without the individual's prior permission implies a commercial use;[175] the same could apply to the third-party cameramen.

Even if the distributor was also directly responsible for the camera work, oddity—or in the present case, licentiousness—alone does not allow for unauthorized filming.[176] Newsworthiness also follows a balancing test: the greater the public's perceived "need to know," the more invasive an intrusion can be into someone's rights.[177] Given that nudity is newsworthy,[178] there can be no easy prediction as to how a court will rule.

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that a woman with a much publicized swimming pig act is not a public figure and therefore her image is not newsworthy).

171 *See, e.g.*, Molony v. Boy Comics Publishers, Inc., 98 N.Y.S.2d 119 (App. Div. 1950) (comic book treatment of a historical rescue).

172 Generally, a semi-private or private area requires permission from those photographed; *see* discussion *supra* Part III.B. However, Florida Publ'g Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976) held that a custom of news photographers entering burned-out houses with fire marshals created a presumption that they could do so unless the plaintiff provided additional information. *Florida Publ'g Co.*, 340 So. 2d at 916-18. If it is the custom that clubs or beer-soaked parties are "free fire" zones for candid photography, at least in Florida, permission by those photographed may be unnecessary. Furthermore, news organizations do occasionally set up in bars, and if there is a newsworthy event, no permission is necessary. *See* Stafford v. Hayes, 327 So. 2d 871 (Fla. Ct. App. 1976) (holding that legislative staffers working in a bar after a bomb threat evacuated the Capitol had no right to complain about the use of their images).

173 O'Brien v. Pabst Sales Co., 124 F. 2d 167, 171 (5th Cir. 1942) (Holmes, J., dissenting).

174 *See Davis*, 457 N.Y.S.2d at 314.

175 *See Barrows*, 489 N.Y.S.2d at 484 (dealing with the sale of photos of a socialite taken by an ex-boyfriend).

176 *See* Commonwealth v. Wiseman, 249 N.E.2d 610, 617 (Mass. 1969) (considering a film of a mental institution, the court remarked, "[t]he record does not indicate to us that any inmate shown in the film, by reason of past conduct, had any special news interest as an individual."). *Cf.* Delan v. CBS, Inc., 458 N.Y.S.2d 608, 613 (App. Div. 1983) ("there must have existed a legitimate connection between the use of plaintiff's name and picture and the matter of public interest sought to be portrayed.").

177 *See Dora*, 18 Cal. Rptr. 2d at 793.

178 *See Davis*, 457 N.Y.S.2d at 315.

D. Stealing the Show

Besides privacy, an individual with a modicum of fame[179] has a right of publicity, an asset not unlike corporate goodwill.[180] If, as many argue, women on Bourbon Street or in Cancun are exposing themselves at most opportunities,[181] and doing so is not illegal,[182] the women who trade the revealing of their bodies for beads can be considered paid entertainers. As such, a reproduction of their "performance" without specific authorization, even if by a news organization, would be like a violation of copyright and allow for suit.[183] This may not be true for the whole of Mardi Gras, as the filming of news events that include performances is not protected.[184] Still, one could, as a performer, make the argument that a particular show was for a particular place and time, and a photographer who did not clearly identify himself as attached to a larger agency could, like a man with a VCR, make only a personal copy for his own use.[185]

E. False Light

Veronica Lane, in her case against *Girls Gone Wild*, alleged that the company cast her in a false light.[186] Given a measure of common sense,[187] if someone does indeed expose himself in front of a camera, or engage in a sexual act in front of a camera, such a depiction cannot be said to be "false." There is no case for false light unless the offensive depiction assigns false characteristics to the person impugned[188]—the potential for someone to draw a false inference is not enough.[189]

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[179] *See, e.g.*, James L. Rosica, *Former FSU Student Settles Suit over Video: 'Girls Gone Wild' Makers Agree to Pull Tapes Featuring Woman Off the Market*, THE TALLAHASSEE DEMOCRAT, Oct. 4, 2002, *available at* 2002 WL 22443079 (noting that Ms. Gritzke was the model for September in a "Women of FSU" calendar).

[180] *See Ali*, 447 F. Supp. at 728. *Accord* O'Brien v. Pabst Sales Co., 124 F. 2d 167, 170 (5th Cir. 1942) (Holmes, J., dissenting) ("The right of privacy is distinct from the right to use one's name or picture for purposes of commercial advertisement. The latter is a property right that belongs to every one; it may have much or little, or only a nominal, value; but it is a personal right, which may not be violated with impunity.").

[181] *See* Tr. of Mar. 8, 2002, *Doe*, No. 01-12450 (Civ. Dist. Orleans 2002) at 8 (argument by defendant's attorney that plaintiffs were showing off their breasts on Bourbon Street starting at noon and continuing until the events of the case).

[182] *See supra* Part II.A. (noting that breast-baring is not in itself illegal in Louisiana).

[183] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977).

[184] *See* Gautier v. Pro-Football, Inc., 107 N.E.2d 485, 488 (N.Y. 1952) (finding that a halftime show could be broadcast with the rest of the football game).

[185] *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) ("Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.").

[186] *See Lane*, 242 F. Supp. 2d at 1221.

[187] Common sense is not altogether an alien thing to the law. At least one court has determined that "general principles must be applied in each instance with common sense and in the light of experience." Shofler v. Jordan, 284 S.W.2d 612, 615 (Mo. Ct. App. 1955).

[188] *See* RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (1977).

The false inference need not be hurtful, merely invasive;[190] some claim that the posting of unauthorized naked pictures is actually a career-enhancing opportunity in this day and age and therefore there is no harm.[191]

These false characteristics cannot be ascribed to a person merely by having his or her image shown in close succession with something else. The film of a Mardi Gras parade simulated for a charity, presumably without the infamous conduct that is the grist of this note, which by unfortunate happenstance became part of the establishing shots in a pornographic film, did not reflect poorly on the Mardi Gras simulators in an actionable way.[192] To have naked photos of one's self that were legitimately taken elsewhere for other purposes to be published in a pornographic magazine is not alone a false characterization.[193] It is an attribution of false characteristics to use a person's image to illustrate an undesirable concept without that person's permission,[194] but there is disagreement among courts as to whether "newsworthy" items[195] are immune from suit for juxtaposition.[196]

If an individual consents to being photographed, that individual may have no further control over the image unless he or she made any caveats explicit in consenting.[197] Although it is difficult to argue that consent to publish one's naked photos is not consent for unlimited publication, it is not an impossible case to make.[198] The question, then, becomes one of consent.

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189 *See* Jacova v. Southern Radio and Television Co., 83 So. 2d 34, 40 (Fla. 1955) (holding that a bystander filmed during the recording of a raid of an illegal gambling establishment by police had no cause of action against the news company that televised the raid).

190 RESTATEMENT (SECOND) OF TORTS § 652E cmt. b, illus. 5 (1977).

191 *See* Nick Gillespie, *Girls Gone Mild*, REASON ONLINE, Nov. 13, 2003, *available at* http://www.reason.com/links/links111303.shtml (implying that Vanessa Williams is the only Miss America to have a film career because she had a scandal with nude photos, and predicting that Paris Hilton will also benefit from the publication of her trysts). *Contra* Alina Raines, Comment, *supra* note 131, at 781 (describing a hypothetical situation where a young woman works hard to get a modeling job, and then her association with wantonness destroys her nascent career).

192 Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises, 530 So. 2d 643, 647, 648 (La. 1988).

193 *Faloona*, 799 F. 2d at 1006-7. The Fifth Circuit noted that the photographs in question were part of a book review, and therefore obviously not the regular photo spread. *Id.*

194 *See Peay*, 78 F. Supp. at 306. *Cf.* RESTATEMENT (SECOND) OF TORTS § 652E cmt. b, illus. 2, cmt. c, illus. 8.

195 Which may include videotapes of people disrobing for trinkets. *See* discussion *supra* Part IIIC.

196 *Compare Peay*, 78 F. Supp. 305 (holding that a cab driver whose picture accompanied an article disparaging certain kinds of cab drivers may sue) *with* Messenger v. Gruner + Jahr Printing and Publ'g, 727 N.E.2d 549 (N.Y. 2000) (finding that a model whose picture illustrated an advice column detailing the story of a young woman who engaged in promiscuous sexual activity might have a cause of action for being cast in a false light, but newsworthy magazines are immune).

197 *Compare Faloona*, 799 F.2d at 1005 (finding that the pictures shown in HUSTLER were under a general release) *with Braun*, 726 F. 2d at 247 (noting that the plaintiff signed a release stating, "all photographs are to be in good taste and without embarrassment to me and my family.").

198 *See* Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1137 (7th Cir. 1985) (holding that a model who posed nude eight times in PLAYBOY could still be cast in a false light by unauthorized nude photos in HUSTLER; there is a substantive difference between the two magazines that would allow one to draw different inferences from appearance in one and not the other).

IV. CAPACITY TO CONTRACT

A contract is a meeting of the minds.[199] If one of those minds is "so weak, unsound or diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to assent to the terms and conditions of the agreement" and there is no contract.[200] If a party knows of a disability such as youth or intoxication and exploits it, such exploitation is a species of fraud which allows the minor or the intoxicated person to rescind the contract or sue for damages.[201]

A. The Arbitrary Age

Unless a statute says otherwise, the age of majority is eighteen.[202] Historically, Roman law depended on the maturity of the youth to determine his capacity to contract, presuming this capacity once one reached the age of fourteen.[203] In the Middle Ages, the age of majority became a doctrinal rule because of fathers' greed[204]— a father collected the earnings of his minor son until age twenty-one, the age when young men were capable of wearing armor and riding into battle.[205] The age of majority for women remained at fourteen, leaving one to wonder "whether maturation was the real concern."[206]

Some courts assume that eighteen is a reasonable age to draw the boundary between childhood and adulthood,[207] but there is no solid evidence as to the particular quirks of minors' contracts.[208] Furthermore, the public perception of adulthood is now extending to the end of one's tertiary education.[209] This may be

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199 Minneapolis Cablesystems v. City of Minneapolis, 299 N.W.2d 121, 122 (Minn. 1980).

200 J.I. Case Threshing Machine Co. v. Myers, 111 N.W. 602, 603 (Neb. 1907).

201 *See* Hunt v. Golden, 532 P. 2d 26, 28 (Or. 1975).

202 RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

203 *See* Note, *Infant's Contractual Disabilities: Do Modern Sociological and Economic Trends Demand a Change in the Law?*, 41 IND. L.J. 140, 143 (1965).

204 *See* Robert G. Edge, *Voidability of Minor's Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 221 (1967).

205 *See id.* at 220-221.

206 *Id.* at 220. Paying attention to this disparity, one may wish to note that the age of consent to sexual activity has tracked the age of majority. David P. Shouvlin, a former advocate for runaway children, notes that "[p]ossibly, children are permitted to join in sexual activity at younger ages not through a recognition of any right they enjoy to do so, but because adults do not want to be punished for their sexual activity with them." Shouvlin, *supra* note 87, at 537 n.9.

207 *See* Mitchell v. Mitchell, 963 S.W.2d 222, 223 (Ky. Ct. App. 1998) ("The rule may seem antiquated in view of the arguable maturity of today's youth. It may seem ironic that a minor can drive a car yet not be bound by the contract to purchase that car . . . . The distinction to be made is that too frequently a contract involves negotiation and thought beyond the maturity of most people under the age of eighteen.").

208 *See* Walter D. Navin, Jr., *The Contracts of Minors Viewed From the Perspective of Fair Exchange*, 50 N.C.L. REV. 517, 517 (1972) ("In fact, how minors behave contractually is a matter of speculation."). *Cf.* Note, *supra* note 203, at 149-50 ("The selection of any age is arbitrary in that it leaves to chance the individual minor's need to contract, his need of protection, and his background, training, experience, maturity, and education.").

209 *See* The Associated Press, *Study Finds Americans Place Adulthood at 26*, THE PRESS-ENTERPRISE, May 18, 2003, at A13, *available at* 2003 WL 19924855. The age of twenty-six, as stated in the title, is based on the assumption of marriage and the beginning of a family.

true with regard to actual capacity to contract as well; despite a more extensive education than the adult of yesteryear, today's late teen is less mature and, being insulated from the workings of a farm or home industry, perhaps less contractually astute.[210] Despite the reduction in the age to contract from twenty-one to eighteen, a current poll of adults found that they considered an acceptable age for financial independence to be 20.9, almost the twenty-one of the past.[211] Regardless of these concerns, the bright line of minority precludes courts from the difficult task of determining comparative maturity.[212]

B. It's Not a Contract If You Don't Want It to Be

The reaching of majority, unlike many other boundaries, is like a rebirth contractually; it allows one to all but wipe clean one's contractual past.[213] The general principle is that "an infant can rescind all contracts, whether fair to him or not."[214] Unless a minor voids a contract, it exists.[215] A minor may deny a contract, even if both sides may have performed, at whim.[216] The minor's ability to make the contract void does not prevent her from enforcing it,[217] although an avoided contract is treated as if it never existed.[218] The other party does not have to have knowledge of the minor's youth for the contract to be avoided,[219] although intentional concealment of one's youth may prevent its exercise as a defense.[220]

Not all contracts are avoidable. Minors must be bound to some contracts in order for their sustenance and for justice to others.[221] It is in this gray zone that the

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210 *See* Note, *supra* note 203, at 144-45.

211 *See* The Associated Press, *Study Finds*, *supra* note 209.

212 *See* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT, *supra* note 45 at 150-51.

213 E. ALLAN FARNSWORTH, CHANGING YOUR MIND, *supra* note 123, at 27.

214 Creer v. Active Automobile Exchange, Inc., 121 A. 888, 891 (Conn. 1923). Even in Nevada, where gambling contracts are generally enforceable, there is no hope of collecting a gambling debt from a minor. *See* LIONEL SAWYER & COLLINS, NEVADA GAMING LAW 281 (3d ed. 2000).

215 *See* Holt v. Ward Clarencieux, 93 Eng. Rep. 954, 954 (K.B. 1732). An exception is that "a contract which is patently of no benefit to an infant must be ratified by him after he reaches majority to render him liable thereon." Cassella v. Tiberio, 80 N.E. 2d 426, 429-30 (Ohio 1948).

216 *See* Wooldridge v. Lavoie, 104 A. 346, 347 (N.H. 1918) ("Since Lavoie was a minor, he could rescind the contract he made with Wooldridge at any time before he became 21, or within a reasonable time thereafter, for any reason, or for no reason.").

217 *See* Holt v. Ward Clarencieux, 93 Eng. Rep. 954, 954 (K.B. 1732). The plaintiff in *Holt* was a fifteen-year-old girl who had been jilted and sued on a breach of contract to marry. The court found that, even though the plaintiff was a minor, "this contract is not void, but only voidable at the election of the infant: and as to the person of full age it absolutely binds."

218 *See* Ware v. Mobley, 9 S.E.2d 67, 69 (Ga. 1940) (holding that disaffirming a land contract reverses the chain of title).

219 *See* Iverson v. Scholl Inc., 483 N.E.2d 893, 897 (Ill. App. 1985) ("The ignorance of one party to the contract of the minority of the other party is, generally, of no consequence and does not operate as a bar to the right of the minor to disaffirm.").

220 Misrepresentation by minors is discussed *infra* Part IV.C.

221 *See* Zouch v. Parsons, 97 Eng. Rep. 1103, 1106-7 (K.B. 1765). Lord Mansfield's words here are some of the most-often quoted on the topic:

> [M]iserable must the condition of minors be; excluded from the society and commerce of the world; deprived of necessaries, education, employment, and many advantages; if they could do no binding acts. Great inconvenience must arise to others, if they were bound

judges in *Lane v. MRA Holdings*[222] and *Doe v. Mantra Films*[223] ruled. Both rulings are questionable.

The court in *Lane v. MRA Holdings* found that Florida excepted unpaid performances by minors from the general disability of minors.[224] This is an interesting reading of Florida law. It is in conflict with relatively recent Florida state court rulings,[225] and would render a purported contract void if the contract was under Louisiana law.[226]

Furthermore, the *Lane* court's ruling makes a waiver for purposes of photography stronger than any other kind of waiver by a minor. Across the United States, a minor cannot release someone from the obligation to pay an insurance claim.[227] A minor cannot be bound by an adhesion contract disclaiming liability for personal injury.[228] A minor may renege on tort claim settlements, either his own[229] or settlements on the minor's behalf made by his parents.[230] In fact, even a minor who has married and is emancipated from his parents may still disaffirm contracts for non-essential items.[231] California has a special statute preventing minors from disavowing their contracts with acting agencies.[232] Under the principle of *expressio unius est exclusio alterius*, the lack of specific language

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> by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts, for their own benefit; and, without prejudice to themselves, for the benefit of others.

Id. Some consider the making of binding contracts in minority key to developing a healthy economic sense. *See* Edge, *supra* note 204, at 232.

222 *See Lane*, 242 F. Supp. 2d 1205.

223 *See* Tr. of Mar. 8, 2002, *Doe*, No. 01-12450 (Civ. Dist. Orleans 2002).

224 *See Lane*, 242 F. Supp. 2d at 1218 ("Thus, while Lane is correct in her assertion that the use of a minor's image and likeness does not fall within the purview of any statute or common law doctrine removing the disability of nonage, it is apparent to this Court that the reason for this is because the disability of nonage does not exist under such circumstances.").

225 *See* Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 357 (Fla. Ct. App. 1997):

> The state of Florida has virtually the same policy: Except as to a very limited class of contracts considered binding, as for necessities, etc., the modern rule is that the contract of an infant is voidable rather than void. This rule applies to both executed and executory contracts, but with different application of the word voidable. To say that the executed contract of an infant is voidable means that it is binding until it is avoided by some act indicating that the party refuses longer to be bound by it.

Cf. Shea v. Global Travel Mktg., Inc., Case No. 4D02-910, 2003 Fla. App. LEXIS 12815 at *9 (Fla. Ct. App. 2003) ("Further, this court recognized, in *Dilallo v. Riding Safely, Inc.* that a minor is not bound by his or her own pre-injury contractual waiver.") (citation omitted).

226 The Supreme Court of Louisiana states, "[u]nemancipated minors do not have the capacity to contract." Deville v. Federal Savings Bank of Evangeline Parish, 635 So.2d 195, 197 (La. 1994).

227 *See Iverson v. Scholl*, 483 N.E.2d at 897-98.

228 *See* Celli v. Sports Car Club of America, Inc., 105 Cal. Rptr. 904, 908 (Cal. App. 1972). *Diallo v. Riding Safely* approves of this ruling. 687 So. 2d at 356-57.

229 See *Mitchell*, 963 S.W.2d at 223 ("Although the minor has the legal capacity to contract, he has the privilege of avoiding the contract.").

230 *See* Cooper v. Aspen Skiing Co., 48 P.3d 1229, 1234 (Colo. 2002).

231 *See* Kiefer v. Fred Howe Motors, Inc., 158 N.W.2d 288, 291 (Wis. 1968).

232 However, the contract must be approved by a California court in advance, *see* California Family Code § 6751 (West 2004), and, if the contract or waiver is signed without it, such contract or waiver may be void. *See supra* Part II.D.

referring to minority in Florida's statutes[233] seems to suggest that certainty in a tort claim settlement is of lesser importance to the *Lane* court than certainty in an uncompensated waiver to use of one's image in what could be described as soft-core pornography.

Based on early rulings on minors' contracts, the courts have had trouble with cases where a minor sues to dissolve a contract instead of using it as a defense.[234] But in relying on the knowledge of the minors as an implied consent,[235] the court in *Doe v. Mantra Films* ignored Louisiana's statutory disability of infancy.[236] Often in Louisiana, a minor who works illegally and is injured on the job may choose between disaffirming the contract and suing in tort, or assuming the contract and collecting worker's compensation.[237] If exposing one's self counts as work, there should be a right to reject the continuing effects of the employment. If viewed as a sale, a minor may reject the sale as well.[238]

C. Lying About Being Too Young

Disagreement exists as to whether a minor's intentional misstatement of age prevents her from avoiding a contract. Certainly, those who hand out waivers after filming a particularly racy incident would like to say that the legend thereon, something to the effect of "I assert that I am eighteen or older,"[239] holds any who puts his or her signature on the document to that statement. New Jersey puts forth the proposition that a relied-upon misrepresentation should defeat the defense of minority entirely.[240]

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233 *See Lane*, 242 F. Supp. 2d at 1219 (comparing Florida's image appropriation statute to that of California and New York).

234 *See Zouch*, 97 Eng. Rep. at 1107 ("A third rule deducible from the nature of the privilege, which is given as a shield, and not as a sword, is 'that it never shall be turned into an offensive weapon of fraud and injustice.").

235 *See* Tr. of Mar. 8, 2002, *Doe*, No. 01-12450 (Civ. Dist. Orleans 2002) at 33 ("It is a little mind boggling to think an individual over the age of, let's just say, 15, who goes on Bourbon Street and certainly sees this, prior to them participating in it, doesn't realize that this will be all over the country at some point . . . .").

236 LA. CIV. CODE ANN. art. 1918 (2003) ("All persons have capacity to contract, except unemancipated minors, interdicts, and persons deprived of reason at the time of contracting.").

237 *See, e.g.* Ewert v. Georgia Casualty & Surety Co., 548 So. 2d 358, 361-62 (La. Ct. App. 1989); Patterson v. Martin Forest Prods., Inc., 774 So. 2d 1148, 1152 (La. Ct. App. 2000). Both cases dealt with minors injured while working in the logging industry; both logging companies attempted to foreclose their remedies to worker's compensation alone, holding the minors to a contract to which they would not otherwise be bound. Young men crippled by logging are, in some ways, more sympathetic than young women thought to have gone wrong (*see* discussion *supra* Part I.B) but as minors have been able to disaffirm all sorts of otherwise binding contracts, the aspect of moral opprobrium should not have a bearing on these cases.

238 *See* Shipman v. Horton, 17 Conn. 481 (1846) ("[A] contract might be avoided by the infant, before he was of age.").

239 *See Fox On the Record With Greta Van Susteren, supra* note 122 ("We ask what her date of birth is, her age. Does she understand what 'Girls Gone Wild' [sic] and do we have her legal permission to use this in 'Girls Gone Wild.' And we do that on camera, and then we have her sign a written release.").

240 *See* La Rosa v. Nichols, 105 A. 201, 202 (N.J. 1918) ("[I]nfancy is no defense to a suit on the contract, the consideration of which was money advanced to the infant upon his falsely representing himself to be of age when the representation is relied on by the lender."); Public Finance Serv. v. Amato, 38 A.2d 857, 858-59 (N.J. Warren County Ct. 1944) (citing to a number of cases following *La Rosa v.*

In other jurisdictions, a young adult can sign a contract reading "I represent that I am 21 years of age or over and recognize that the dealer sells the above vehicle on this representation" and his ability to disavow contracts as a minor will remain.[241] It may not matter if the other party has no knowledge that he is or could be contracting with a minor.[242] The Connecticut Supreme Court found that a minor's intentional falsehood as to his age was just another indication that a minor was yet too immature to enter into a contract, and should therefore be no defense to an action to rescind a contract.[243]

D. Girls Denying Responsibility

One may disaffirm a contract by any act that indicates unwillingness to be bound by its terms.[244] Any unequivocal action incompatible with the contract is sufficient to disaffirm,[245] including filing or pleading a defense in a lawsuit.[246] One would assume that anyone filing a lawsuit against a reality pornographer intends to disaffirm any contract purportedly made.

The time to disaffirm often runs to the end of statute of limitations. In Florida, infancy does not toll the statute of limitations,[247] which is five years for contract actions.[248] For a cause of action arising in a foreign state, Florida will not extend the time to sue beyond the time allowed by that state.[249] For Louisiana, general contract actions have a ten-year statute of limitations with no exception for minors.[250] Both time periods are generous enough to give a minor time to realize that a problem exists and to disaffirm any contract.

Nichols; concluding that since there was no reliance and no benefit conferred on the minor, there is no reason to withdraw the defense of infancy).

241 *See* Kiefer v. Fred Howe Motors, Inc., 158 N.W.2d 288, 292-93 (Wis. 1968) ("We fail to see how the dealer could be justified in the mere reliance on the fact that plaintiff signed a contract containing a sentence that said he was twenty-one or over.").

242 *See* Iverson v. Scholl Inc., 483 N.E.2d 893, 897 (Ill. App. 1985) ("The ignorance of one party to the contract of the minority of the other party is, generally, of no consequence and does not operate as a bar to the right of the minor to disaffirm.") (citing Wieland v. Kobick, 110 Ill. 16, 18 (1884)).

243 *See Creer*, 121 A. at 890-91.

244 Robert G. Edge, *supra* note 204, at 207.

245 *See* Tracey v. Brown, 163 N.E. 885, 886 (Mass. 1928).

246 *See Wooldridge*, 104 A. at 347 (holding that a minor may rescind a contract any time before judgment in a trial disputing the issue).

247 FLA. STAT. ANN. § 95.051(1)(h) (Lexis 2003). There is an exception if there is no parent or guardian; in that case, the statute of limitations is seven years. *Id.*

248 FLA. STAT. ANN. § 95.11 (Lexis 2003).

249 *See* FLA. STAT. ANN. § 95.10 (Lexis 2003).

250 *See* LA. CIV. CODE Art. 3499 (West 2003). This is for "personal actions," a vague and amorphous category that is easily superseded by other laws or defeated by contractual language. *See, e.g.*, Farmers-Merchants Bank and Trust Co. v. Travelers Indemnity Co., 791 F.Supp. 150, 153 (1992) (holding that a statute specifically dealing with actions on letters of credit supercedes the general limitation of Art. 3499); Brier Lake, Inc. v. Jones, 710 So.2d 1054, 1063 (La. 1998) (holding that the phrasing in a homeowner's association agreement made the agreement a "building restriction" covered by a separate statute of limitations). Still, this does not defeat the general proposition that an action on the contract has a ten-year limitation. *See* Babkow v. Morris Bart, P.L.C., 726 So.2d 423, 429 (La. Ct. App. 1998).

E. Accepting Responsibility

Until a minor disaffirms, he or she may enforce the contract. Generally, the contract is real and enforceable if no action is taken;[251] although a minor continues to be able to disaffirm.[252] When minority ends, the minor may ratify, or make the contract good. The ability to ratify contracts has existed in law since at least Roman times.[253] If an item was exchanged as consideration for the release, and the minor keeps the item past the age of majority, retaining the item may act to permanently hold the minor to the contract.[254] As there is some competition in the Mardi Gras bead business, with manufacturers of beads suing each other over the designs,[255] at least for the year for which the beads are manufactured, they may have a specific and unique value,[256] and their retention may prevent the denial of a contract. The minor's having a regular course of business dealings beginning in minority and continuing into adulthood may make any further delay upon achieving majority fatal to one's right to make a contract void.[257]

If the contract is assumed to be for a service, such as participation in a party in return for allowing one to be filmed, one's acceptance and use of the service, even as a minor, may make it impossible to regain one's consideration,[258] as do use of the service once an adult ratifies a contract,[259] and continuing use of a

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[251] *See* Price v. Golden, No. 03-99-00769-CV, 2000 Tex. App. LEXIS 5906 at *16 (Tex. Ct. App. Aug. 31, 2000) (finding that a lawyer who worked for an incompetent was employed, and could collect his fees, up until the day when his contract was disaffirmed).

[252] *See Mitchell*, 963 S.W.2d at 223.

[253] *See* 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 9.18 n.2 (Joseph M. Perillo, ed., Revised ed. 1996) ("where a loan had been made to a slave or an infant, a new promise by the borrower after emancipation was valid, and it was not regarded as a donation.").

[254] *See Cassella*, 80 N.E.2d at 429.

[255] *See* William T. Abbott, *supra* note 4, at 352.

[256] Judge King of New Orleans supports the view that a unique style of bead may be particularly sought after; *see* discussion *supra* note 44.

[257] *See* Eastern Airlines, Inc. v. Stuhl, 318 N.Y.S. 2d 996, 998 (N.Y. Civ. Ct. 1970) (holding that an individual five months into majority cannot disavow the bad checks he issued over the last five years).

[258] *See, e.g.,* Vichnes v. Transcontinental Western Air, Inc., 18 N.Y.S.2d 603 (N.Y. App. Term 1940), where a minor bought himself an airplane ticket and flew round-trip to Los Angeles, consuming two in-flight meals, before asking to rescind the contract. The Appellate Term concluded, "there is no basis for recission here in view of the concession that the reasonable value of the transportation was the sum paid by the plaintiff." *Id.* at 603. However, as explained further in Part IV.A., *supra*, when minors buy physical items under contracts voidable by their minority, these items can often be lost, destroyed, or otherwise devalued without restitution. The differentiation between property and services may be seen in Vance v. Calhoun, 90 S.W. 619 (Ark. 1905), where a minor employs an attorney to collect a judgment, sells the judgment to the attorney, and then disaffirms the sale of the judgment. The court holds that the minor may get the judgment, now collected, from the attorney, but the attorney may retain the fees expended in collecting the judgment. *See Vance,* 90 S.W. at 619. Some courts make no dichotomy between goods and services, and hold that a minor can disaffirm all contracts, even if the service is used. *See, e.g.,* Doyle v. Giuliucci, 401 P.2d 1 (Cal. 1965) (holding that a minor may disaffirm a contract for medical services); Adamowski v. Curtiss-Wright Flying Service, Inc. 15 N.E.2d 467 (Mass. 1938) (holding that a minor may disaffirm a contract for flying lessons after learning how to fly).

[259] *See* Jones v. Dressel, 623 P.2d 370, 374 (Colo. 1981) (holding an individual to the limitation on liability in a contract for skydiving services when the individual entered into the contract as a minor, but was an adult when he actually stepped onto the plane).

service engaged in youth and not ceased upon becoming an adult.[260] Although a circumstance where one might continue to use the services of a reality pornographer while trying to disaffirm a contract with him seem farfetched,[261] it may just be that attendance at an expensive party, consuming beverages and enjoying the atmosphere[262] holds one to the license given in exchange.

This does not mean that, once one goes to the party or keeps a T-shirt six months after turning eighteen, one is left without recourse. A delay in exercising one's right to disaffirm a contract only becomes unreasonable once a minor knows of her right to do so.[263] Furthermore, if the beads or T-shirt are not worth very much, or nothing was exchanged in return for appearing in front of a camera, then the contract may be unenforceable unless specifically affirmed.[264] If the minor gains no benefit from the delay, and the other party suffers no harm,[265] an individual can wait a significant amount of time to disaffirm.[266]

F. The Beer Defense

One aspect, almost universal to cases involving reality porn, is the presence of alcohol.[267] English common law held that voluntary intoxication was not a defense to a contract action, and few modern courts have accepted it when pled.[268] When courts have allowed the drunk to void their contracts, "the drunkenness must have been such as to have drowned reason, memory, and judgment, and to have impaired the mental faculties to such an extent as to render the party *non compos*

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260 *See* Fletcher v. Marshall, 632 N.E.2d 1105, 1108 (Ill. App. 1994) (dealing with an apartment rental).

261 Although not impossible, considering the possibilities for publicity from nationwide recognition and regaining the rights to one's image, *accord* Gillespie, *supra* note 191.

262 As noted *supra* note 76, *Shane's World* attempts to distance itself from the parties it documents, perhaps to avoid criminal liability. It is also true, certainly with third-party photographers, that *Girls Gone Wild* is not establishing the party atmosphere that it profits from. In these circumstances, one cannot claim that the party was consideration for the rights to the images taken.

263 *See* G.E.B. v. S.R.W., 661 N.E.2d 646 (Mass. 1996).

264 This was the holding in *Cassella*, 80 N.E. 2d 426 (finding that "a contract which is patently of no benefit to an infant must be ratified by him after he reaches majority to render him liable thereon.").

265 The longer a video stays on the market, the more expensive it becomes both to recall it and to disgorge any profits received from it. This could be considered damage from delay.

266 "In the cases where, as in the present case, the quondam minor gained no benefit by delay and the party contracting with him suffered no harm, disaffirmance has been allowed after considerably greater delay than that of this case." Adamowski v. Curtiss-Wright Flying Service, Inc., 15 N.E. 2d 467, 469 (Mass. 1938) (considering a year's passage before disaffirming the contract).

267 *See* Memorandum in Support of Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6), Capdeboscq v. Francis, No. Civ. A. 03-0556 at 9-12 (E.D. La. May 2, 2003) (arguing that, even if Calvin Broadus supplied minors with drugs and alcohol, it does not lead to civil liability); Ken Hegan, *supra* note 11, at 64 (party held in a room with no furniture save a beer keg). Intoxication was not plead in *Lane,* 242 F. Supp. 2d 1205, but that may stem from Ms. Lane's picture being taken while she was driving a car, and such a position would amount to an admission of driving under the influence. *Lane,* 242 F. Supp. 2d at 1209.

268 *See* LIONEL SAWYER & COLLINS, NEVADA GAMING LAW, *supra* note 214, at 284.

mentis for the time being."[269] Even when one looks back at a videotape and wonders "what possessed me to do such a thing," the standard is hard to fulfill.[270]

When it is accepted as a defense, intoxication renders a contract voidable. The reasoning is not that there is some impropriety in contracting while intoxicated, but that one has no control over one's actions.[271] The intoxicated party must be more than just seriously affected by the alcohol; he must be unable to understand the transaction at the time of contracting.[272] If one is aware of what is going on when an agreement is made, then one is not sufficiently intoxicated to avoid the contract.[273] The stringent requirements of intoxication make it very difficult for a party who signs a release to get out of a contract. If one has enough cognitive ability to make the connection between signing the release, being captured by the camera, and in some cases receiving a T-shirt for one's trouble, one is not inebriated enough to void the contract.[274] However, in a faster, less formal exchange, this issue may be disputed.

Some courts require further that if one is not induced to intoxication by the party one contracts with, it must be obvious that one is inebriated.[275] Significant solicitation and harassment of one who is inebriated makes a contract voidable,[276] which is suggested by inadequate consideration.[277]

In theory, those who contract while seriously intoxicated may annul or ratify their contracts as minors can, but the law often puts more hurdles in their way. Any delay in disaffirming a contract entered into when inebriated may be enough to defeat the claim,[278] especially if the facts quickly come to light.[279] Additionally, any action that affirms the existence of the contract will make it valid.[280]

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269 Martin v. Harsh, 83 N.E. 164 (Ill. 1907).

270 To many, "'I was drunk' is a polite way of saying, 'I shed my inhibitions and did exactly what I wanted to do, and if you provoke me, I'll do it again.'" P.J. O'ROURKE, MODERN MANNERS, *supra* note 35, at 56. Requiring someone to be objectively incapacitated excludes him or her from exercising this excuse.

271 *See* Peter Bicks & Chin Nyuk Yin, *On the Nature of Undue Influence*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 86-87 (Jack Beatson and Daniel Friedman, eds. 1995) (considering the effect of various appetites, including addictions, on ability to contract).

272 *See* Curry v. Stewart, 368 P.2d 297, 299 (Kan. 1962).

273 *See id.* at 300.

274 In some cases, if one is lucid enough even to remember what one signed, that is enough to defeat a defense of intoxication. *See* Lucy v. Zehmer, 84 S.E.2d 516, 520 (Va. 1954).

275 *See* Hauge v. Bye, 201 N.W. 159, 161-62 (N.D. 1924).

276 In Thackrah v. Haas, 119 U.S. 499 (1886), the court found: "[D]efendants, at the time of transfer hereinafter mentioned, knew the plaintiff was and for two months had been in that condition [essentially blind drunk]; that while he was in that condition the bank through its officers pursued, harassed and goaded him . . . in order to extort from him a transfer." *Id.*. *Compare with* Exhibit A to Notice of Removal, *Capdeboscq*, No. Civ. A. 03-0556 (alleging that minors were offered intoxicants).

277 *Kendall v. Ewert*, 259 U.S. 139 (1922), suggests that a broad disparity in value is evidence that a contract should be voidable. *Id.* at 148. The intoxicated party in *Kendall v. Ewert* sold land for $700 that was quickly re-sold for $18,000. *Id.*

278 *See Case Threshing Machine*, 111 N.W. at 604 ("If the defendant was so intoxicated as not to understand what he was doing when the notes were signed, he should have disclaimed liability thereon within a reasonable time after recovering his senses.").

V. MAKING WHOLE BY GIVING AND RECEIVING

If a claimant successfully obtains a judgment that the contract is void, it is as if the contract never existed. To accomplish this end, the courts usually favor any exchange made to be reversed.[281] If the exchange is not reversed, the party who had an interest in the contract may sue.[282] In most reality pornography, a rescission is far less desirable to the pornographer than the photographed party. The individual's consideration, if any, consists of something small like beads or a T-shirt,[283] or something intangible like attendance at a party. The pornographer also has to return all rights to the image, damaging his future income.[284] If a court feels that an extended delay has financially harmed the non-rescinding party, the court may not allow for full restitution.[285] The court might also use its powers in equity to require no restitution on the part of a minor or intoxicated person if the court deems it just.[286]

There is no requirement that a pornographer, once he has returned the right to one's image to an individual, needs to disgorge his profits. Courts are willing to return property taken from a minor by fraud without making the deceiver pay interest.[287] However, to avoid a contract is to forgo a suit for damages resulting from the contract; to do so would be to affirm the contract.[288] A false light or misconstrued license argument is harder to support than an argument that the contract is void based on minority.[289] As many of these cases come forth once the

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279 In *Hauge v. Bye*, 201 N.W. 159 (N.D. 1924), "[t]he plaintiff discovered all the facts which he claims entitled him to disaffirm and avoid the settlement on the morning after it was made," *id.* at 162, but waited two years to do so. *Id.* at 160.

280 *See* Curry v. Stewart, 368 P.2d 297, 301 (Kan. 1962) (determining that an individual who followed the terms of a contract for three months after signing it ratified it by implication).

281 *See* Mitchell v. Baldwin, 45 So. 715, 717-18 (Ala. 1908).

282 Making the contract void "revests in either party the title to any property received by the infant under the contract." RESTATEMENT (SECOND) OF CONTRACTS § 14, cmt. c (1981).

283 The young women who allege Joseph Francis paid them to have sex say they were given $100 each, which may be considered more than nominal consideration. *See* Complaint and Demand for Jury Trial at 8, *Francis*, No. 5:03CV260 (N.D. Fla.).

284 Joseph Francis stated that he is willing to do so upon complaint; *see Fox on the Record*, *supra* note 122 (statement by Joseph Francis that his lawyer made an offer to Lane to remove her from the videos).

285 *See* Reggiori v. Forbes, 26 A.2d 145, 146-47 (N.J. 1942).

286 *E.g.*, Thackrah v. Haas, 119 U.S. 499, 502 (1886) ("[T]he plaintiff, without any fault of his, being unable to repay the consideration of the fraudulent transfer, equity will not require him to do so.").

287 *See, e.g.*, Waldrep v. Merkle, 38 F. Supp. 165, 173 (W.D. Okla. 1941) (regarding the theft of an estate from a family of child heirs).

288 *See* J.I. Hass Co. v. Jones-Teer, 755 F.2d 1264, 1267 (6th Cir. 1985). Furthermore, even in courts friendly to cases against *Girls Gone Wild*, unjust enrichment has been a failure as a legal theory. Capdeboscq v. Francis, No. Civ. A. 03-0556, 2004 WL 463316, at *2 (E.D. La. Mar. 10, 2004). It may therefore be difficult to get anything more than the "going rate" for such a performance; the Screen Actors' Guild states that a principal in a low-budget production outside of New York or Los Angeles gets four hundred and sixty-six dollars for a day's work. *See* SCREEN ACTORS' GUILD, LOW BUDGET RATE SHEET, *at* http://www.sag.org/sagWebApp/CMS/Documents/Tables/CheckRates-LowBud.htm (last accessed Mar. 17, 2004). In light of SAG guidelines, the five hundred dollars offered Brian Buck for his role in *Shane's World* seems more than reasonable. *See* discussion *supra* note 15.

289 False light is discussed *supra* Part III.E.

videos are in circulation,[290] this argument may be too late. It may behoove anyone who goes to Mardi Gras or Spring Break, and who can reasonably claim contractual inability due to infancy or intoxication, to file a declaratory judgment against the reality pornographers most likely to have been photographing to prevent dissemination of one's image.[291]

VI. CONCLUSION

In the average case, someone who appears in reality pornography has no recourse if, at some later point in time, he or she no longer wishes to have those acts memorialized. Usually, what is recorded by *Girls Gone Wild* is not illegal.[292] It is remarkably easy to sell all of one's rights to one's likeness for a pittance. Most people recorded by reality pornographers are of legal age to contract away those rights and not too drunk to be oblivious to their actions. Only minors, whom the law is known for giving second chances,[293] really have an opportunity to challenge their appearance in these films. So far, however, courts seem unsympathetic to their entreaties.

The sad state of affairs should not stop those who suspect they are in reality pornography from attempting to escape; any action is more effective sooner rather than later, even if one's action is not judicial in nature. The plaintiffs' case in *Capdeboscq v. Francis* survived a motion for summary judgment on March 10, 2004,[294] in no small part because one plaintiff was diligent in contacting Mr. Francis after Mardi Gras to request removal of her and her friend's footage from *Girls Gone Wild*.[295] As *Capdeboscq v. Francis* and *Gritzke v. MRA Holdings*[296] show, it is possible to prevail.

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290 Even more insidiously, they are also pirated on the internet. *Girls Gone Wild* is a common search on the Gnutella peer-to-peer network. For more information on Gnutella, *see* Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 517 (2003).

291 It is also desirable to file suit early as, regardless of the merits of the case, a preliminary injunction against releasing the video may be impossible. *See, e.g., Bosley*, 2004 U.S. App. LEXIS 11028 at *1 (holding, in an unpublished opinion, that First Amendment issues preclude the granting of a preliminary injunction).

292 It remains to be seen whether it or *Shane's World* violates live sex show and nuisance ordinances.

293 *E.g.*, WIS. STAT. ANN. § 938.355(4m) (West 2003) (allowing an individual over the age of seventeen to expunge his juvenile criminal record).

294 *See Capdeboscq*, 2004 WL 463316 (*passim*).

295 *Id.* at *1.

296 *See* discussion *supra* at note 20.