

Introducing Intimacy Coordinators in Mainstream and Adult Entertainment Film Industries: Towards Legally Ensuring Performer Safety On-Set

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In this paper I first address legal issues of consent (or lack thereof) during simulated sex scenes in the mainstream film industry. The primary question raised in this essay is: if a performer contractually agrees to do a simulated sex scene, does the performer have legal rights to continuous and ongoing consent throughout the scene? Actresses in particular often provide anecdotal evidence suggesting that they struggle to communicate boundaries with respect to nudity, physical contact, last-moment script changes, or improvisation requests from directors. Partially in response to these traumatic accounts, Canadian and American mainstream film unions recently began incorporating intimacy coordinators into the workforce, with the earliest accreditation occurring in 2018. An intimacy coordinator is the point of contact between the director and the performer during scenes involving nudity, intimacy, or simulated sex. They coach and choreograph movements to ensure that performers are aware of all boundaries while also prioritizing the director's artistic vision. Accompanying the rise of this new professional phenomenon are legal questions regarding how to regulate intimacy coordinators in the entertainment industry. This includes questions of imposing qualification law, modifying contract law, augmenting tort law, and seeking employment law options for non-union members. By investigating these legal disciplines, this paper demonstrates that more robust regulations or legislation are required for governing intimacy coordinators in the film production workforce. Until policy change is achieved, entertainment lawyers should ensure their clients contract an intimacy coordinator to be present whenever clients perform in simulated sex scenes.

This paper then shifts from the mainstream film industry's use of simulated sex scenes to the adult entertainment industry's use of un-simulated sex scenes. While the mainstream film industry takes steps to ensure performer protections, it appears pornography performers remain neglected. Undisputedly, adult film performers who engage in un-simulated sex scenes face greater on-set risks than performers in simulated sex scenes. By evaluating the adult entertainment industry's general structure for porn performers, I raise questions around obscenity laws and how these claims may allow for legislative change requiring intimacy coordinators. Past obscenity claims mainly focus on what is *on-screen*. I suggest that the focus should transition to evaluate the filmmaking *process*. Ultimately, I show that sex workers in the adult entertainment industry are often overlooked, necessitating an attitudinal shift that

humanizes porn performers and prioritizes their safety on-set. If none of the proposed avenues for legislative change are achieved, a public perception shift may be the last resort for facilitating positive change and ensuring on-set safety for performers in mainstream and adult film industries.

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I. Introduction: The Rise of Intimacy Coordinators in the Mainstream Film Industry

In the past, when movie production teams included a sex scene in their film, there were little to no protocols for how to proceed safely. In other words, there were significantly fewer legal considerations and safeguards for performers than there are today.

There are documented instances where performers consented to filming simulated sex scenes, but were not informed of all the details or were required to adapt to the director's improvisation instructions.¹ For example, in *Last Tango in Paris* (1972),² 19-year-old actress Maria Schneider consented to be the victim in a simulated sexual assault scene with 48-year-old Marlon Brando.³ However, the director and Brando had a secret agreement that butter would be used as a lubricant without Schneider's knowing.⁴ These events traumatized Schneider and she claimed she was humiliated and "felt a little raped."⁵ Schneider's anecdotal account also shows that performers often do not know their legal rights during simulated sex scenes. In an interview after the film's release, Schneider stated: "I should have called my agent or had my lawyer be present because you can't force someone to do something that's not in the script, but at the time I didn't know that."⁶

High-profile actresses in the mainstream film industry have recently disclosed the coercive tactics used by directors and production teams during simulated sex scenes. For example, Emilia Clarke, who is well-known for playing Daenerys Targaryen in HBO's *Game of Thrones* (2011-2019),⁷ spoke up about how she would cry in bathrooms because she felt she could not say 'no' to simulated sex scenes and appearing nude.⁸ Salma Hayek, as another example, described how she was threatened to lose her role in the film *Frida* (2002)⁹ unless she agreed to full-frontal nudity and appearing in a sex scene.¹⁰ Speaking up about these incidents is not easy for these actresses because it can have repercussions on their future employment opportunities. The fact that high-profile actresses are speaking up raises questions about how often non-famous performers remain silenced. The issue may be widespread.

These instances raise important issues regarding ongoing and continuous consent during sex scenes, and other questions on whether directors should be permitted to use on-the-spot improvisation when

¹ Bonnie Malkin, "Last Tango in Paris director suggests Maria Schneider 'butter rape' scene not consensual" *The Guardian* (4 December 2016), online: <<https://www.theguardian.com/film/2016/dec/04/last-tango-in-paris-director-says-maria-schneider-butter-scene-not-consensual>> [Malkin, "Last Tango in Paris"].

² *Last Tango in Paris*, Director Bernardo Bertolucci, Produzioni Europee Associati, 1972.

³ Malkin, "Last Tango in Paris," *supra* note 1.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Game of Thrones*, Created by David Benioff and D. B. Weiss, Home Box Office (HBO), 2011-2019

⁸ Madeline Fry Schultz, "Emilia Clarke Reveals Hollywood's Other #MeToo Problem" *Washington Examiner* (20 November 2019); online: <<https://www.washingtonexaminer.com/opinion/emilia-clarke-reveals-hollywoods-other-metoo-problem>>.

⁹ *Frida*, Director Julie Taymor, Miramax Films, 2002.

¹⁰ *Ibid.*

performers are not given notice.

In response to these issues, the mainstream film industry in Canada is adapting to the Me Too Movement that initiated in 2017, and this is providing a gateway for change.¹¹ The Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) provides a “Best Practices” document to guide performers in the mainstream entertainment industry when entering into agreements involving simulated sex scenes.¹² The document also recommends protocols from pre-production to post-production, including “auditions, wardrobe fittings, contracting, closed-set protocols and restricted access in post-production.”¹³ Most important to this paper, however, is its introduction of intimacy coordinators.¹⁴ An intimacy coordinator, if chosen to be hired, is a point of contact between the director and the performer. They prepare actors for scenes involving nudity, intimacy, or simulated sex. They coach and choreograph movements to ensure performers are aware of boundaries while also ensuring that the director achieves their artistic vision.¹⁵ The aim of hiring an intimacy coordinator is to provide safeguards for actors. As this profession is in its infancy, there are questions regarding how to regulate intimacy coordinators in the film production workforce to ensure performer safety on-set.

II. Intimacy Coordinators and the Lack of Robust Legal Requirements

Although Canadian unions such as ACTRA encourage producers to hire intimacy coordinators, it is not required. ACTRA encourages Canadian producers that are a part of their union to visit a website titled “Intimacy Coordinators Canada.”¹⁶ However, this website title may sound more official than it truly is. Intimacy Coordinators Canada is a corporation, not a government-regulated body. Therefore, the decision to have an intimacy coordinator present during a sex scene is ultimately up to the production company.

In 2019, the Screen Actors Guild - American Federation of Television and Radio Artists (SAG AFTRA) released guidelines for using intimacy coordinators in sex scenes.¹⁷ Films associated with the Guild are setting precedent by mandating specific protocols for filming simulated sex. However, these

¹¹ Trina Jones & Emma E Wade, “Me Too: Race, Gender, and Ending Workplace Sexual Harassment” (2020) 27:1 *Duke J Gender L & Pol’y* 203.

¹² Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), “ACTRA: Best Practices for Scenes Involving Nudity, Intimacy, Simulated Sex and Sexual Violence” (August 2020) online: <<https://www.actra.ca/wp-content/uploads/2020/09/Best-Practices-Web-Full.pdf>>.

¹³ *Ibid*, at page 19.

¹⁴ *Ibid*, at page 1.

¹⁵ Screen Actors Guild - American Federation of Television and Radio Artists (SAG AFTRA), “Standards and Protocols for the Use of Intimacy Coordinators” (January 2020) online: [sagaftra.org <https://www.sagaftra.org/files/Intimacy%20Coord%20S&P%20w%20Bios%20012920.pdf>](https://www.sagaftra.org/files/Intimacy%20Coord%20S&P%20w%20Bios%20012920.pdf).

¹⁶ Laura Beeston, “Intimacy Coordinators are Having Their Moment” (8 June 2021) *Canada Media Fund* online: [cmf-fmc.ca <https://cmf-fmc.ca/now-next/articles/intimacy-coordinators-are-having-their-moment/>](https://cmf-fmc.ca/now-next/articles/intimacy-coordinators-are-having-their-moment/).

¹⁷ Screen Actors Guild - American Federation of Television and Radio Artists (SAG AFTRA), “Standards and Protocols for the Use of Intimacy Coordinators” (January 2020) online: <<https://www.sagaftra.org/files/Intimacy%20Coord%20S&P%20w%20Bios%20012920.pdf>>.

protocols are only applicable if members of the production are part of the Guild. Therefore, non-union members often are not provided with these safety measures. Consequently, independent production teams are more likely to hire non-union performers because fewer requirements on the filmmaking process allow for cost-efficiency and expediency. Similarly, performers in the adult film industry, such as in porn, are usually non-union. Therefore, many independent film productions can bypass these requirements by selecting performers that are non-union. If these requirements went beyond mere guidelines and became required by statute, then it would create a safer environment by ensuring continuous consent on-set for all performers.

Both ACTRA and SAG AFTRA have released documents regarding the qualifications of intimacy coordinators.¹⁸ However, these documents are only to help guide or recommend individuals for the job. The introduction and development of the intimacy coordinator role appears to be simultaneous, suggesting that it is being created in an improvised manner. There are no legal requirements or qualifications to become an intimacy coordinator. Ultimately, it is up to the production team to decide what qualifications are valid to hire an individual for this role. The problem here is apparent. Underqualified individuals can slip through the cracks with improper training and have troubling impacts on the performers who rely on their expertise. As this is a novel field of work, I hope stronger policies are established immediately to provide a higher level of on-set safety for performers.

The lack of legal requirements for hiring intimacy coordinators can be detrimental for both performers and the film production team. Some have claimed that on the rare occasion of a negative experience with an intimacy coordinator, it is often because they are underqualified.¹⁹ Alicia Rodis, an intimacy coordinator currently working in the mainstream film industry, explains:

“The greatest threat to this new role [i.e. intimacy coordinators] is people who may have the best of intentions, but are attempting to break in without the proper training... People already can be skeptical of a new role that they might feel is threatening, and if you put someone in there who doesn’t have the right experience or temperament you have a recipe for even more issues.”²⁰

Since the demand for intimacy coordinators is rapidly rising, this quote describes the urgency of enforcing qualifications through robust regulations. In 2018, *The Deuce* (2017-2019),²¹ an HBO television show, listed an intimacy coordinator in its credits for the very first time in the mainstream Hollywood film industry.²² In the short time since this initial crediting, intimacy coordinators appear

¹⁸ See earlier notes ACTRA and SAG AFTRA.

¹⁹ Emily Hilton, “Let’s Talk About Simulated Sex: Intimacy Coordinators Two Years On” *The Hollywood Reporter* (10 December 2020) online: <<https://www.hollywoodreporter.com/tv/tv-news/lets-talk-about-simulated-sex-intimacy-coordinators-two-years-on-4101799/>> [Hilton, “Let’s Talk About Simulated Sex”].

²⁰ *Ibid.*

²¹ *The Deuce*, Created by David Simon and George Pelecanos, Home Box Office (HBO), 2017-2019.

²² Breena Kenner, “How HBO is Changing Sex Scenes Forever” *Rolling Stone* (24 October 2018), online: <<https://www.rollingstone.com/tv/tv-features/the-deuce-intimacy-coordinator-hbo-sex-scenes-739087/>>.

to be more common and essential to have on sets. HBO became the first network to commit to hiring intimacy coordinators for sex scenes.²³ Hulu, Starz and Amazon followed shortly after.²⁴ In 2019, Netflix released its first series crediting an intimacy coordinator: *Sex Education* (2019-present).²⁵ The next year, there were 23 Emmy-nominated programs that credited intimacy coordinators.²⁶ Therefore, as demand increases so does the possibility of hiring under qualified intimacy coordinators. Seeing as having intimacy coordinators on-set helps ensure consensual practices take place, the lack of safeguards and protocols during sex scenes raises legal questions of which rights performers can claim if production takes an unforeseen turn.

III. Nudity Riders, Intimacy Coordinators & Consent

Oftentimes a film or television contract will be accompanied by a “nudity rider” to outline the project’s sex scenes. Nudity riders are an agreement between performers and the production company. The document is separate from the main contract in order to highlight its importance and gravity. “Without this carefully drafted discussion of the sensitive scenes,” explains American entertainment lawyer Gordon Firemark, “the producer is vulnerable to claims that the actor didn’t fully understand what would be expected of her (or him), and the actor is vulnerable to bullying, intimidation and an extraordinarily uncomfortable work environment.”²⁷ It specifies details about the nude sex scenes involved, describes the attire to be worn, and provides any other relevant details to disclose what a performer can expect once the filmmaking process begins.²⁸ A robust nudity rider will typically provide detailed narrative excerpts from the script to avoid future disputes or misunderstandings.²⁹

Nudity riders can also require that as few people as necessary are invited on-set during intimate scenes. This raises questions about who is essential. Notably, if an intimacy coordinator is hired, then they will be considered necessary. However, the Time’s Up Movement (which is related to the Me Too Movement) has criticized unions for mandating nudity riders to include this clause without providing a definition of who is “essential” to be on-set.³⁰ This criticism complements my overall proposal for legal reform and sex scene regulations. Should there be reform in the future, “essential” should be defined.

²³ Hilton, “Let’s Talk About Simulated Sex, *supra* note 19.

²⁴ *Ibid.*

²⁵ *Sex Education*, Created by Laurie Nunn, Eleven Film, 2019-present.

²⁶ Hilton, “Let’s Talk About Simulated Sex, *supra* note 19.

²⁷ Gordon Firemark, “Nudity Riders - What They Are and Why You Need Them” *Firemark* (2 November 2015) online: <<https://firemark.com/2015/11/02/nudityrider/>>.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Jeremy Fuster, “Time’s Up Urges SAG AFTRA members to Vote Against Proposed Studio Contract” *The Wrap* (20 July 2020) online: <<https://www.thewrap.com/times-up-urges-sag-aftra-members-to-vote-against-proposed-studio-contract/>>.

It is necessary to present a nudity rider to the performer well in advance of the signing of the contract so that the performer has sufficient opportunity to consider the conditions. There is no legal requirement for non-union performers to have nudity riders but it seems to be accepted as 'best practice' and entertainment lawyers are encouraged to ensure all clients, whether unionized or otherwise, sign this document.

There appear to be inherent flaws with nudity riders, as they may not facilitate authentic consent. Simply put, consent can change. Someone might agree to have sexual intercourse with someone and then on their way to the bedroom change their mind. A simulated sex scene is undeniably different as there is no penetration involved, but it is plausible that pretending to film a sex scene is similar *enough* to warrant ongoing consent. As mentioned earlier, simulated sex scenes can be coerced, mentally stressful, or make performers feel as if they were sexually assaulted. If the harms of a simulated sex scene with a lack of consent are similar to the harms of a nonconsensual sexual act, then they may be similar enough to warrant the same protections.

Adult entertainment contracts differ significantly from mainstream entertainment contracts because sex is an unlawful form of consideration, and in order to create a valid contract both parties entering the contract must provide consideration.³¹ Both American and Canadian courts have made clear that there is strong public policy discouraging contracts for sexual intercourse.³² Therefore, pornography performers are legally unable to trade sexual services in exchange for contractual obligations. Perhaps simulated sex, because it can result in traumatizing outcomes for mainstream performers, should be treated similarly and not be validly contracted. If this becomes law, then performers can validly withdraw their consent from a simulated sex scene during the filmmaking process with no repercussions.

However, it is unclear in Canadian law whether production teams can claim freedom of contract in nudity riders. Freedom of contract is a process by which parties are "free" to create the deal they desire.³³ It is the duty of the court to give effect to the deal the parties have made.³⁴ Courts are generally not meant to interfere with the contract to make it more just or reasonable. Although freedom of contract stands in Canadian law, there are questions about the enforceability of simulated sex scenes in nudity riders. If a performer initially signs a nudity rider but prior to or during the sex scene they no longer consent, is this a breach of contract? Even if an intimacy coordinator is present during the scene, do they have the authority to allow a breach of the nudity rider?

³¹ Elizabeth Lin, "Adult Entertainment Film Contracts: To Enforce Or Not to Enforce" (2016) 22:2 Cardozo JL & Gender 367.

³² Andrew Gilden, "Sexual (Re)Consideration: Adult Entertainment Contracts and the Problem of Enforceability" (2007) 95 Geo LJ 541.

³³ Marco P. Falco, "Good Faith and Reasonableness: Two Limits on Canadian Freedom of Contract" (2016) 2016:4 Bus L Today 1.

³⁴ *Ibid.*

In the past, there have been legal repercussions if a performer breaches their nudity rider. In California, an actress in the series *Femme Fatales* (2011-2012)³⁵ was ordered to pay \$85,000 for violating the explicit terms of her agreement for refusing to do a sex scene.³⁶ Interestingly, this series was produced by HBO prior to when the production company began regulating intimacy coordinators. Production claimed that Anne Green, the performer, breached her contract which led to expenses above and beyond the amount budgeted for the episode.³⁷ As a result, a last-minute body double was hired to replace the performer.³⁸ This case provides American precedent that a breach of a nudity rider can lead to monetary repercussions for performers.

Since the *Femme Fatale* lawsuit took place, and since the implementation of intimacy coordinators, SAG AFTRA has updated its policies on nudity riders. SAG AFTRA says in its Quick Guide for Scenes Involving Nudity and Simulated Sex that:

“a performer may withdraw their written consent at any time prior to capturing footage. A performer may withdraw their consent verbally. If consent is withdrawn, the producer can double the performer (including by use of digital technology) per the terms of the original rider³⁹.”⁴⁰

Now, if a performer revokes a previous promise to go nude, the usual recourse for the production company is to find and hire a body double.⁴¹ Therefore, it is unlikely that Anne Green would have paid \$85,000 if the incident occurred today.

Perhaps nudity riders should not be offered freedom of contract in the first place, especially where the topic of a nudity rider centers on the acts of a simulated sex scene. One way to consider nudity riders is in comparison to non-disclosure agreements (NDAs). In 2018, California passed a law that prevents the use of settlement NDAs in sexual assault or harassment matters.⁴² Under California law, these NDAs will be void as a matter of public policy and any attorney who includes such a provision

³⁵ *Femme Fatales*, Created by Mark A. Altman and Steven Kriozere, CineTel Films, 2011-2012.

³⁶ Dominic Patten, “‘Femme Fatales’ Actress Loses Legal Move Against Cinemax Late Night Series Producer” *Deadline* (20 October 2014), online: <<https://deadline.com/2014/10/femme-fatales-lawsuit-actress-nudity-cinemax-producers-85570>>.

³⁷ *True Crime, LLC v. Superior Court*, 2016 Cal. App. Unpub. LEXIS 7152 (Cal. App. 2d Dist. September 30, 2016) at para 2.

³⁸ *Ibid.*

³⁹ Screen Actors Guild - American Federation of Television and Radio Artists (SAG AFTRA), “Quick Guide for Scenes Involving Nudity and Simulated Sex” (undated) online: <https://www.sagaftra.org/files/sa_documents/SAG-AFTRA_quickguide_intimscenes_F2.pdf> at page 3.

⁴⁰ Although outside the scope of this paper, future research could also discuss consent in the form of CGI sex scenes and whether performers can feel virtually raped even if their bodies are not physically involved. See: <<https://decider.com/2020/06/08/cgi-sex-scenes-coronavirus/>>.

⁴¹ Jill L Smith, “Perk Points: Publicity services, approval rights, exclusivity, and approvals are often key elements of a deal between actors and studios” (2015) 38:3 *Los Angeles L* pp 18-24.

⁴² *Senate Bill 820*, Settlement agreements: confidentiality (2017-2018).

in a settlement could be disciplined.⁴³ Perhaps nudity riders should be similarly re-evaluated.⁴⁴ Just as it is unacceptable to have a contract that allows sexual assault to be concealed, it should similarly be unacceptable to have a contract that obliges performers to participate in sex scenes without ongoing consent. SAG AFTRA and other unions have contracted the ability to withdraw consent at any time for its members, but this does not appear to be broad enough in scope. Indeed, not even ACTRA has mirrored these progressive efforts yet. Additionally, independent performers who are not unionized and other performers should have the right to withdraw consent. Overall, nudity riders are important documents because they clarify performer expectations during simulated sex scenes. However, the weight and potential breach of these documents should be reevaluated in order to ensure stronger performer safety on-set.

IV. Stunt Coordinators as an Analogy for Intimacy Coordinators & Tort Law

Intimacy coordinators can be thought of in similar terms as stunt coordinators. Stunt coordinators are present during dangerous action scenes to ensure the safety of performers. Stunt coordinators are not to be confused with stunt-doubles, who are trained professionals that stand-in for an actor in order to perform dangerous or physically demanding stunts. Unlike intimacy coordinators, however, stunt coordinators have been around for significantly longer. For example, “Excellence in Stunt Coordination” became an eligible Emmy winning category as early as 2002.⁴⁵

Stunt coordinators are comparable to intimacy coordinators in that both have no legal requirements for becoming qualified.⁴⁶ While stunt coordinators protect performers from various forms of physical harm that can arise during a dangerous scene, it is questionable why neither are required to receive a certain degree or complete a professional program to ensure that they are knowledgeable within their field. It is undeniable that stunt coordinators need professional expertise of health and safety codes when working on-set.

Stunt coordination is not always executed flawlessly, and occasionally there are fatal incidents. These incidents then lead to lawsuits which may inform future legal outcomes if there is an accident-related incident during a sex scene with an intimacy coordinator on-set. I predict a high likelihood that intimacy coordinator regulations will mirror stunt coordination. Stunt coordination appears to need

⁴³ Jennifer Nutter, “New California Law Further Restricts Confidentiality Provisions in Employment, Settlement and Separation Agreements” *The National Law Review* (19 November 2021) online: <<https://www.natlawreview.com/article/new-california-law-further-restricts-confidentiality-provisions-employment>>.

⁴⁴ Canada has not progressed to the same degree as California when it comes to NDAs being invalid when concerning sexual assault. There is no legislation or clarity in this area of law, and so far the law societies in Canada have not provided guidance. Roxanne Davis, a Canadian employment lawyer based in Calgary, has stated: “In this current environment, it would be useful to have a broader discussion in Canada about whether, from a policy perspective, it is appropriate to enforce NDAs in sexual harassment cases, so courts have some guidance in that area.” See: <<https://www.cbc.ca/news/world/harvey-weinstein-zelda-perkins-rowena-chiu-nda-1.5373433>>.

⁴⁵ See: <<https://www.emmys.com/bios/steve-griffin>>.

⁴⁶ See: <<https://www.nfi.edu/stunt-coordinator/>>.

legal reform in order to ensure the physical safety of performers and stunt doubles. It is possible that changing the regulation for one will influence the other. Therefore, changes in stunt coordination regulations could positively (or negatively) impact intimacy coordinator regulations.

Due to recent events where stunt coordination has led to serious bodily injury or death, it is plausible that greater stunt coordination regulation is on its way. One noteworthy example is the Alec Baldwin stunt coordination incident where the actor fired a gun (which was meant to be unloaded) and the bullet struck cinematographer Halyna Hutchins, killing her.⁴⁷ The incident follows many others where stunt coordination went extremely wrong and resulted in death. Another example includes *Dead Pool 2* (2018),⁴⁸ where Joi Harris fatally died in Vancouver, BC, during a motorcycle-related accident.⁴⁹ There was no civil trial, but rather an out-of-court settlement with the amount not being disclosed to the public.⁵⁰ Therefore, it is plausible that out-of-court settlements will be a strong option if there is tortious activity involving intimacy coordinators.

In contrast, John Bernecker died on the set of *The Walking Dead* (2010-2022)⁵¹ in 2017 from a 20-foot-fall stunt accident.⁵² This event led to court proceedings where the trial jury unanimously awarded Bernecker's estate over \$8 million in damages, finding the subsidiary film production companies to AMC negligent for the fatality.⁵³ Questionably, none of the companies were liable for punitive damages.⁵⁴ Critically, however, other parties found negligent included the stunt coordinator, Monty Simons.⁵⁵ It follows that an intimacy coordinator could be found negligent and vicariously liable if a sex scene goes wrong and a performer makes a legal claim. Additional insight from Bernecker's case is how the American Occupational Safety and Health Administration issued the maximum fine allowable—\$12,675, which might be considered inadequate in relation to the traumatic events—against the production company.⁵⁶ Perhaps another method to incentivize production companies to ensure on-set safety for performers is to raise the maximum fine amount.

⁴⁷ Simon Romero, Julia Jacobs & Glenn Thrush, "Alec Baldwin Was Told Gun in Fatal Shooting On Set Was Safe, Officials Say" *The New York Times* (10 November 2021) online: <<https://www.nytimes.com/2021/10/21/us/alec-baldwin-shooting-rust-movie.html>>.

⁴⁸ *Deadpool 2*, Directed by David Leitch, Twentieth Century Fox Film Corporation, 2018.

⁴⁹ Scott Johnson, "After Deadpool 2 Set Death, Fox Settles With Family of Stuntperson Joi Harris" *The Hollywood Reporter* (25 April 2019) online: <<https://www.hollywoodreporter.com/movies/movie-news/deadpool-2-set-death-fox-settles-family-stuntperson-sj-harris-1203254/>>.

⁵⁰ *Ibid.*

⁵¹ *The Walking Dead*, Created by Frank Darabont, AMC, 2010-2022.

⁵² Charles Trepany, "Walking Dead Stunman John Bernecker: Jury Awards \$8.6M to Estate in Damages" *USA Today* (19 December 2019) online: <<https://www.usatoday.com/story/entertainment/tv/2019/12/19/the-walking-dead-stunman-john-berneckers-estate-gets-8-6-million/2705451001/>>.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Occupational Safety and Health Administration, "US Department of Labour Imposes Maximum Fines on Motion Picture Company for Failing to Adequately Protect From Fall Hazards" (5 January 2018) online: <<https://www.osha.gov/news/newsreleases/region4/01052018>>.

However, the decision in Bernecker’s case was recently overturned in *Stalwart Films, LLC v Bernecker*.⁵⁷ The appeal court claims that Bernecker, as an employee, is barred by an exclusion remedy provision of the *Workers’ Compensation Act* within the corresponding American jurisdiction. Therefore, it appears that stunt doubles can request minor changes to the dangerous activity but overall the production company retains control of the “time, manner and method of work.”⁵⁸ This decision might raise questions of what the purpose of having a stunt coordinator is. It also relates directly to performer consent (and lack thereof) during the filmmaking process. Here, the comparison between intimacy coordinators and stunt coordinators is prevalent.

Based on the appeal court decision, are stunt performers able to change their mind about doing a dangerous stunt even if they previously agreed to do it? This is especially analogous to performers in sex scenes who may feel they have little to no control of the conduct. If stunt performers are only able to request minor changes to the dangerous activity, and are pressured to fulfill their contractual duties in order to be compensated for their time and efforts, there is arguably coercion for stunt persons to perform acts they may not deem safe. More research is needed on contractual obligations and pressures on stunt persons. Additionally, it may be beneficial to obtain further information about the role of stunt coordinators and how they communicate when a stunt seems unsafe. Lastly, I draw another comparison to sex scene safety (or lack thereof). These examples of stunt tragedies are high-profile. This raises similar questions as before about less-famous incidents. There is also the question of how many close-call incidents (where accidents almost occurred but fortunately did not) are documented or reported.

If stunt coordination accidents are governed through tort law, intimacy coordination might be similar. However, the flaws in stunt coordination lawsuits, as seen in the Bernecker case, show that tort law is not sufficiently regulating these roles in the mainstream entertainment industry. In other words, current tort law jurisprudence does not adequately facilitate and incentivize production companies to create safe spaces for performers to raise concerns. Tort law is clearly not enough to ensure justice for performers who engage in physically and mentally challenging scenes such as dangerous stunts or simulated sex. Therefore, if intimacy coordinator lawsuits become similar to stunt coordination lawsuits, then this is not robust enough and legislation around protocols remains the best avenue to ensure performer safety on-set.

⁵⁷ *Stalwart Films, LLC v. Bernecker*, 359 Ga. App. 236, 2021 Ga. App. LEXIS 178, 855 S.E.2d 120 (Ga. Ct. App. March 11, 2021).

⁵⁸ *Ibid*, at headnote.

V. Unionization for Pornography Performers

Adult film performers are drastically under-protected compared to their mainstream counterparts. However, regulating the health and safety of sex workers, such as porn performers, is possible and feasible. Maria de Cesare describes all the benefits for the mainstream film industry, none of which are enjoyed by their adult entertainment counterparts:

“Performers in mainstream motion pictures and television are protected by stringent union-enforced regulations concerning performers’ hours, wages, overtime, health insurance, retirement benefits, workers’ compensation and residual payments... Furthermore, mainstream performers have stunt workers and body doubles to stand in for them when they feel that the demands of their roles have become too risky.”⁵⁹

Now added to this list of benefits denied to adult performers is access to intimacy coordinators. In an industry where sex is simulated and thereby not real, it seems questionable that a coordinator would be present to monitor consent in mainstream scenes but not pornographic scenes, where sexual intercourse is authentic and consent is arguably more essential.

Although the mainstream and adult entertainment industries are different markets that attract different consumers, there are fundamental similarities between the performers’ work in each industry. In my opinion, the performers in both industries are critical elements of the products being sold. From this, I argue that both industries should offer similar health and safety protections to their performers by requiring intimacy coordinators.

Currently, not only mainstream industry actors, but cats, dogs, and even insects have more safety protections than most adult entertainment performers.⁶⁰ This is especially concerning given the occupational hazards adult performers put themselves at risk for each day on-set.⁶¹

SAG AFTRA codified a basic agreement in 1980 to ensure the well-being of organisms during the filmmaking process.⁶² One provision of the agreement requires producers to notify the American Humane Association (AHA) prior to the commencement of any work that involves animals.⁶³ For example, during the filmmaking of *Mimic* (1997),⁶⁴ AHA representatives oversaw the production in

⁵⁹ Maria de Cesare, "Rxxx: Resolving the Problem of Performer Health and Safety in the Adult Film Industry" (2006) 79:3 S Cal L Rev 667 at page 697-698 [Maria De Cesare, "Rxxx"].

⁶⁰ *Ibid*, at note 59.

⁶¹ For example, porn performers are exposed to risks of debilitating and sometimes fatal infections such as HIV. See *Ibid*.

⁶² See: <<https://www.americanhumane.org/app/uploads/2016/08/Guidelines2015-WEB-Revised-110315-1.pdf>> at page 4.

⁶³ *Ibid*, at page 9.

⁶⁴ *Mimic*, Guillermo del Toro, Miramax Films, 1997.

order to ensure cockroaches appearing in the film were not harmed.⁶⁵ Therefore, in a sense, cockroaches have more on-set rights than most porn performers. The AHA representative can be considered the intimacy coordinator equivalent for animals. Although animals cannot say ‘no’ in the way humans can, neither can mainstream nor adult performers in certain situations. Therefore, animal rights in the film industry appear stronger than human rights for adult entertainment performers. If it is feasible for animals to have a watchful guardian to ensure safety standards are met during production, then it should be possible in the porn industry, too.

Unfortunately, augmenting the rate of internal regulation and implementing policy change seems to be nearly impossible in the porn industry, namely because it cannot be executed in a unilateral manner. One of the biggest discrepancies between the mainstream and porn industries is the lack of unionization for porn performers. It is challenging for adult film performers to unionize because even when they know they are entitled to workers’ benefits, there is no easy way for performers to organize effectively.⁶⁶ There is high fragmentation in porn between production companies and performers, the constant threat by production for how easy it is to replace performers, and an upsettingly high turnover rate.⁶⁷ This is combined with a lack of organization between production companies and performers, and financial disincentives to provide workers’ compensation benefits or other safety protections. Overall, if intimacy coordinators are eventually regulated through statute, federal legislation in Canada may be necessary to ensure unity across the nation. This will also help keep the focus on performer safety, rather than shift it to which province is most regulatorily lenient for producing porn.

VI. Canadian Obscenity Law as a Potential Legal Claim to Require Intimacy Coordinators in Porn

It is undisputed that pornography has a bad reputation for coercion, abuse, and expropriation of vulnerable groups including women and minorities. For example, during a porn star panel discussion, multiple performers explained that there is nobody to call when consent is ignored on-set, that they generally feel they cannot speak to an agent or the police, and that it feels there is no safety net.⁶⁸ Here, I raise various questions. What happens when an un-simulated sex scene is not fully consensual? Does this mean it is inherently cruel or violent? If so, could this deem the footage “obscene” even though the source of cruelty or violence comes from the *process* of filmmaking and not necessarily from what is *portrayed* through the screen?

Historically, the enforcement of obscenity laws has primarily targeted the content displayed on screen rather than the production process itself. Nevertheless, it appears that the act of producing explicit, non-simulated sexual content could result in charges of obscenity. Surprisingly, in Canada there is no

⁶⁵ P.J. Huffstutter, “See No Evil” *LA Times* (12 January 2003) online: <<https://www.latimes.com/archives/la-xpm-2003-jan-12-tm-porn-story.html>>.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, at page 703.

⁶⁸ See: <<https://www.mindbrowse.com/2019/01/15/porn-production-consent/>>.

legislation governing how to legally, or safely, create adult entertainment or pornography. Instead, the industry is self-regulating. The only matter legislators have considered is the prohibition of distributing “obscene” materials through section 163 of the *Criminal Code*:

163 (1) Every person commits an offence who makes, prints, publishes, distributes, circulates or has in their possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or any other obscene thing.

[...]

163 (8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.⁶⁹

The problem with this provision, besides the lack of expansion through further legislation, is in the unclear definition and interpretation of “cruelty and violence.”

R v Butler, a 1992 case, helped clarify the test for determining whether materials are obscene or not.⁷⁰ Ultimately, the case created a community standard of tolerance test that focuses on harm to society.⁷¹ The Supreme Court of Canada further described “harm” as harm that the community recognizes as incompatible with its proper functioning, including the “physical or mental mistreatment of women by men or... the reverse.”⁷² It was determined that the overall parliamentary objective for section 163 of the *Criminal Code* is to prevent degrading, dehumanizing, or violent harm.⁷³ *R v Hawkins* further clarified the test, stating “not all material depicting adults engaged in sexually explicit acts which are degrading or dehumanizing will be found to be obscene. The material must also create a substantial risk of harm to society... it must be proved beyond a reasonable doubt and that proof must be found in the evidence adduced at trial.”⁷⁴ It is unclear what forms of evidence assist in proving harm. More research is needed for whether a porn performer can raise testimony about individual harm on-set that is not necessarily evident on-screen in order to prove that the filmmaking *process* was inherently obscene. It seems plausible that if such evidence was produced in court it might stand a chance of raising an obscenity charge.

Notably, post-*Butler*, there have been considerably few obscenity charges against pornography distribution.⁷⁵ Between 1997 and 2012, there were at least three claims of obscenity involving pornography alleged to be degrading, dehumanizing or violent towards women.⁷⁶ Legal scholar Janine

⁶⁹ *Criminal Code* (R.S.C., 1985, c. C-46) at section 163.

⁷⁰ *R v Butler*, [1992] 1 SCR 452 [*Butler*].

⁷¹ *Ibid*, at para 44-46.

⁷² *Ibid*, at para 59.

⁷³ *Ibid*, at para 84-86.

⁷⁴ *R v Hawkins*, 15 OR (3d) 549, [1993] OJ No 2572 at page 263.

⁷⁵ Janine Benedet, “The Paper Tigress: Canadian Obscenity Law 20 Years after *R v Butler*” (2015) 93:1 Can B Rev 1 at page 3.

⁷⁶ *Ibid*, at page 18.

Benedet argues the lack of obscenity charges suggests that sexualized violence against women has “gone mainstream” and lowered community standards.⁷⁷ She shows some of the earliest obscenity charges could include a strike to the buttocks that leaves behind markings or bruises.⁷⁸ Since then, however, the tolerance level has increased. For example, the BC Provincial Court found that the graphic pornography film contested in *R v Price*, which involved forcefully using a woman’s head to scrub a toilet with her tongue after a man urinated into her mouth, did not reach the community standard of obscenity.⁷⁹ The court also said that distribution of such materials did not exceed community standards even where an inference of harm from the content could be drawn.⁸⁰ Although this obscenity claim ultimately failed, no performers were present to describe the *process* of filmmaking.⁸¹ In a hypothetical situation where a porn performer provides testimony about the harm faced on-set, it seems plausible that the court would take this into consideration. If the purpose of the legislation is to prevent violent harm, then this evidence cannot be ignored when applying the community standards test. Anecdotal evidence shows that porn performers can engage in activities that lead to permanent scars, injuries incurring expensive hospital bills, and long-term mental health issues.⁸² More research is needed to understand how this testimony could be used in court for an obscenity charge.

⁷⁷ *Ibid*, at page 25.

⁷⁸ *Ibid*, at page 26.

⁷⁹ *R v Price*, 2004 BCPC 103, [2004] BCJ No 814 (QL) [*Price*] at para 79.

⁸⁰ *Ibid*.

⁸¹ To clarify, I am not suggesting that the process of filmmaking in this scenario was harmful. I am merely pointing to this case as a hypothetical example where testimony might call into question the production practices through performer testimony.

⁸² See: <https://www.collectiveshout.org/porn_stars_speak_out>.

VII. Conclusion: Public Perception and Attitudinal Shifts

Ultimately, both the mainstream film industry and adult entertainment industry require various forms of legal policy change. Intimacy coordinators should be required for all sexual film scenes, and stricter regulations regarding who is qualified to be an intimacy coordinator are needed. I have shown that freedom of contract should not apply for film scenes that require ongoing consent and that breach of nudity riders should not result in legal repercussions for performers. Through an analogy with stunt coordinators, I have illustrated that a different approach to tort law may be necessary as injured performers and stunt doubles appear to have little to no safeguards.

In terms of the adult entertainment industry, intimacy coordinators would help make the filmmaking process safer and help ensure continuous consent during un-simulated scenes. Regardless, if the porn industry is able to unionize (which does not seem likely in the near future), there should be stricter legislation and regulations outlining safe practices for production. It remains a possibility that obscenity charges could lead to policy change and legislative action that requires intimacy coordinators on-set. However, it seems that the reason adult entertainment remains unregulated relates to the social taboo surrounding the industry. There is a public attitude that adult film performers are ‘disposable’ and thereby public officials are not concerned with their protection.⁸³ Hopefully, it is not naive to hope that the cultural shift arising from the Me Too Movement in the mainstream industry will also affect adult entertainment, thus providing safer conditions for performers in both spaces.

⁸³ Maria de Cesare, “Rxxx,” *supra* note 59 at page 707.

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