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GET REAL: THE TENSION BETWEEN STARDOM AND
JUSTICE FOR REALITY TELEVISION PARTICIPANTS

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Reality television has become embedded in our cultural zeitgeist. These unscripted shows have entertained countless households since their inception—resulting in fandoms, memes, and fantasy leagues. However, behind the scenes, there have been accusations of workplace harassment, inadequate pay, and producer manipulation. Previously, reality television participants have been silent about their mistreatment, but recently, several reality stars have spoken out both publicly and via the legal system about their negative experiences on the shows that made them famous. Yet not all recent criticism has resulted in a legal win, and it is not clear whether other reality television participants will heed the call to express their grievances through legal action. This note points to both social and legal reasons why reality television participants have been—and still are—hesitant to bring legal claims against their shows’ production companies. This note also suggests new legal arguments and policy solutions that advocates may pursue to eventually improve the industry.

INTRODUCTION 422
I. THE MOST DRAMATIC SEASON EVER: A BRIEF HISTORY OF REALITY
TELEVISION 424
II. MENTION IT ALL: THE DARK SIDE OF REALITY TELEVISION 428

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III. WORTH PLAYING FOR?: WHY REALITY TELEVISION PARTICIPANTS AVOID LEGAL ACTION	433
A. <i>The Social Theory: Hunger for Fame</i>	433
B. <i>The Legal Theory: Losses and Settlements</i>	436
1. <i>The Lawsuits May Lack Legal Merit</i>	436
2. <i>There is a Tendency to Settle</i>	443
IV. QUITE THE SCANDAL, ACTUALLY: HOW REALITY TELEVISION PARTICIPANTS CAN FIGHT BACK	444
A. <i>Independent Contractors or Employees?: A Case Study of Love Is Blind Participants</i>	445
1. <i>California Labor Law</i>	446
2. <i>Federal Labor Law</i>	451
B. <i>Taking Matters Out of the Courtroom: Potential Legislative Initiatives</i>	455
CONCLUSION	456

INTRODUCTION

In Season 1 of *Love is Blind*,¹ the world watched as Lauren Speed and Cameron Hamilton fell in love before ever setting eyes on each other. The couple became a fan favorite and are still together five years later. Lauren Speed-Hamilton is now a “Creative,” “Entrepreneur,” “Author,” and “TV Personality.”² Cameron Hamilton kept his job as a scientist, but has co-written a book with Lauren and is represented by Creative Artists Agency (CAA).³ The couple walked away from the show married and with an ongoing public presence that allows them to post advertisements on their Instagram pages—with an average pay of \$1,800 per post—to their millions of followers.⁴

¹ Netflix describes *Love is Blind* as a “social experiment where single men and women look for love and get engaged, all before meeting in person.” *Love is Blind*, NETFLIX, <https://www.netflix.com/title/80996601> [<https://perma.cc/YLQ9-45JN>].

² Lauren Speed-Hamilton (@need4lspeed), INSTAGRAM, <https://www.instagram.com/need4lspeed/> [<https://perma.cc/2SB7-HGJJ>].

³ See Cameron Hamilton (@cameronreidhamilton), INSTAGRAM (July 11, 2022), https://www.instagram.com/p/Cf4VD_aOZ38/?utm_source=ig_embed&ig_rid=f5c57187-e362-45ef-8ccc-14bfc6e16f3e [<https://perma.cc/W42N-M5G8>].

⁴ Jennifer Dublino, *Social Media Stars: How Much Do They Really Make?*, BUSINESS.COM, <https://www.business.com/articles/social-media-stars-how-much-do-they-really-make/> [<https://perma.cc/EKT9-6F6H>].

In Season 2 of *Love is Blind*, Jeremy Hartwell stepped into the pods with the hope of finding love. His edit on the show lasted 30 seconds, and he walked away without a partner or the adoration of fans.⁵ On June 29, 2022, Hartwell filed a lawsuit in California state court, alleging that the production company—Kinetic Content—restricted food and drink options, did not provide adequate meal breaks, and paid the cast below California’s minimum wage, among other labor-related causes of action.⁶ Hartwell and other cast members of the second season claim that the producers kept them imprisoned, overworked, and malnourished.⁷

These types of accusations against reality television (TV) shows are not new,⁸ and *Love is Blind* is now on its sixth season, seemingly with the same structure as in previous seasons.⁹ This begs the question: if there have been public accusations of unsafe working conditions, mistreatment by producers, and other tortious claims, why don’t more former participants sue? If Jeremy Hartwell’s allegations are true, then Cameron Hamilton and Lauren Speed-Hamilton would have experienced the same treatment. So why don’t reality TV celebrities with seemingly nothing to lose sue the production companies?

This note argues that there are both legal and social reasons reality TV participants often do not seek public legal action against production companies. Part I discusses the history of reality TV. Part II outlines the accusations that

(“Macro-influencers have over 1 million followers and earn about \$1,804 per post.”) (last updated Apr. 10, 2024).

⁵ Sara Donnellan, *Who Is Jeremy Hartwell? 5 Things to Know About the ‘Love Is Blind’ Contestant Suing the Show*, US MAGAZINE (July 13, 2022), <https://www.usmagazine.com/entertainment/pictures/who-is-jeremy-hartwell-what-to-know-amid-love-is-blind-lawsuit/> [<https://perma.cc/NU46-7X2L>].

⁶ Compl. ¶¶ 23-57, *Hartwell v. Kinetic Content, LLC, et al.*, No. 22STCV21223 (Cal. Super. Ct. June 29, 2022).

⁷ Mariah Espada, *Why It’s So Hard For Reality Stars to Get Protection From Exploitation*, TIME (Sept. 18, 2023, 4:29 PM), <https://time.com/6314118/reality-tv-unions-protection/> [<https://perma.cc/KZ7P-9FEA>].

⁸ See *infra*, Part II.

⁹ Interestingly, following Hartwell’s lawsuit, subsequent seasons of *Love is Blind* conspicuously display large amounts of food being consumed and made by the participants. Most recently, during the Season 6 reunion, in what seemed like a coordinated rebuke of the lawsuit, co-host Vanessa Lachey asked former cast members what they missed about being on the show. One answered, “I miss the food,” which was followed by a comment from co-host Nick Lachey saying, “you cannot believe everything you read out there.” Immediately after that conversation, the cast of the season—for the first time ever—hovered around a full course meal on the reunion set (although the cast was not shown eating any of the food). See *Love is Blind*, Season 6, Episode 13, at 01:35:13-01:36:46, NETFLIX (Mar. 13, 2024), <https://www.netflix.com/watch/81741342?trackId=255824129> [archival link omitted] (last visited May 15, 2024).

have plagued the industry for years. Part III identifies the reasons there are so few lawsuits against production companies. Lastly, Part IV suggests potential legal and policy steps forward.

I THE MOST DRAMATIC SEASON EVER: A BRIEF HISTORY OF REALITY TELEVISION

Anyone can access reality TV, or any television show for that matter, at the tip of their Roku remote. *Love Island UK*—described as a “dating show that saw swimwear-clad twentysomethings spend several weeks in a luxury villa attempting to find their romantic match for a £50,000 (\$64,467) prize”¹⁰—is one example of how people can catapult into fame simply through their personality or looks. The *Love Island* franchise has expanded to multiple countries, raking in millions of viewers,¹¹ and similar shows have since been released.¹² But reality TV did not always exist or look anything like *Love Island*. The following describes a brief history of how the genre became so popular.

Academics note the different “generations” of reality TV. While some explain that “[r]ight from the earliest days of radio and television, ‘ordinary people’ have been an essential ingredient of broadcasting,”¹³ others point to a distinct pre-reality television generation of shows that broadcasted everyday life. Two shows epitomized this era: *Candid Camera*, which captured ordinary people with hidden cameras reacting to obscure situations; and *An American Family*, which followed the Loud family—a California upper-middle class family—in a fly-on-the-wall style format for seven months of their lives.¹⁴ Both shows were originally filmed with non-traditional, smaller cameras, and in a format distinct from the “traditional fiction film and the didactic narration of conventional documentaries.”¹⁵ They

¹⁰ Lucy Handley, *Hit TV show ‘Love Island’ is coming to America. CNBC explains why CBS wanted the reality series*, CNBC (Aug. 9, 2018, 10:56 AM), <https://www.cnbc.com/2018/08/09/what-is-love-island-cnbc-explains.html> [<https://perma.cc/84NF-EWA4>].

¹¹ *Id.* (“TV ratings have steadily increased since the first season aired in 2015. The final episode that year drew 800,000 viewers, increasing to 1.4 million in 2016 and 2.6 million in 2017.”).

¹² For example, in 2020, Netflix released *Too Hot to Handle*, where “gorgeous singles meet and mingle. But there’s a twist. To win an enticing grand prize, they’ll have to give up sex.” *Too Hot to Handle*, NETFLIX, <https://www.netflix.com/title/80241027> [archival link omitted] (last visited May 21, 2024).

¹³ DAVID GILES, *TWENTY-FIRST CENTURY CELEBRITY: FAME IN DIGITAL CULTURE* 60 (2018).

¹⁴ MISHA KAVKA, *REALITY TV* 13-45 (2012).

¹⁵ *Id.* at 14.

were the first shows to place “ordinary people under observation in a mediated situation,”¹⁶ and audiences craved this new form of entertainment. Although “[n]o one could quite figure out what they were watching, ... everyone tuned in to watch.”¹⁷

The peek into everyday behavior left viewers craving more, but it was not until the late 1980s and early 1990s that reality TV started to form into its own genre.¹⁸ The “camcorder” generation is considered the first distinct generation of reality TV.¹⁹ In the United States, this form of television exploded for two main reasons. First, deregulation during the Reagan administration “made it easier for competitors of network television to enter the broadcasting market.”²⁰ The number of viewers remained the same, but their views splintered among different networks, forcing executives to formulate new types of shows.²¹ Second, the 1988 Writers Guild of America (WGA) strike forced production companies to develop low-budget shows that did not involve union labor.²² “Casting regular people—not actors—wasn’t just the appeal of reality TV, it was key to the productions’ bottom lines.”²³

This combination, along with a rising law-and-order culture, allowed shows such as *Cops* and *America’s Most Wanted (AMW)* to prosper.²⁴ *AMW* premiered in 1988 and remains on air today.²⁵ It is a series that “uses dramatic reconstruction of crimes in combination with CCTV footage, interviews with police, victims

¹⁶ *Id.* at 43.

¹⁷ *Id.* at 31.

¹⁸ *Id.* at 46.

¹⁹ *See id.* at 46-74.

²⁰ *Id.* at 47.

²¹ *Id.*

²² Jonathan Mandell, *Recalling 1988 Strike*, CBS NEWS (Nov. 2, 2007, 5:38 PM), <https://www.cbsnews.com/news/recalling-1988-strike/> [<https://perma.cc/B6CZ-ENHJ>] (describing networks during the 1988 strike as wanting to “fill the hours with something other than repeats” and “look[ing] to what was then alternative programming,” such as “reality television”).

²³ Kathleen Walsh, *Reality TV Stars Aren’t Paid Like Employees, and That’s Practically Fraud*, INSTYLE (Mar. 10, 2020, 7:30 PM), <https://www.instyle.com/reviews-coverage/tv-shows/reality-tv-stars-paid-salary> [<https://perma.cc/9WDH-CHUP>].

²⁴ KAVKA, *supra* note 14, at 46-47.

²⁵ *See* Peter White, *‘America’s Most Wanted’ Revival Returns To Fox For Season 2; John Walsh & Son Callahan To Host – Update*, DEADLINE (Dec. 13, 2023, 9:00 AM), <https://deadline.com/2023/12/americas-most-wanted-revival-fox-season-2-1235633148/> [<https://perma.cc/8FL4-7QLC>] (noting the revival of *AMW* after a 10 year hiatus).

and families, and direct appeals to TV viewers for information and tip-offs.”²⁶ Similarly, *Cops*—which follows police officers during their patrol and other police duties in a “ride along” format²⁷—premiered in the spring of 1989 and is still produced today.²⁸ The success of *Cops* led to many spin-offs with similar formats.²⁹ “By the mid-1990s, ‘reality TV’ had become synonymous with reality crime programming, which in turn was understood on the model of *Cops*.”³⁰

The next generation, beginning at the turn of the 21st century, is the “surveillance and competition” generation.³¹ The rise of global discourse around the social dynamics and eliminations of each weekly episode distinguished this era.³² *Big Brother* and *Survivor* are the two shows that marked the “evolutionary leap that repositioned reality television as a high-rating component of prime time programming.”³³ Taking inspiration from *The Real World*, which aired from 1994 to 2007 and followed seven different strangers each season in a fly-on-the-wall format,³⁴ *Big Brother* and *Survivor* creators put a competitive twist into their shows.³⁵ *Big Brother* features contestants called “houseguests” who live together “in a house outfitted with 94 HD cameras and 113 microphones, recording their every move 24/7.”³⁶ Every week, one houseguest is “evicted” from the home through a vote.³⁷ *Survivor* involves a group of strangers congregated on an isolated island where they must provide food and shelter for themselves. Every week there is a “Tribal Council” where someone is voted off by the other islanders.³⁸

²⁶ KAVKA, *supra* note 14, at 53.

²⁷ *Id.* at 54.

²⁸ *See Cops*, IMDb, <https://www.imdb.com/title/tt0096563/> [<https://perma.cc/4MPU-CZLE>].

²⁹ KAVKA, *supra* note 14, at 54 (listing spin-offs).

³⁰ *Id.* at 54-55.

³¹ *Id.* at 75.

³² KAVKA, *supra* note 14, at 76.

³³ *Id.*

³⁴ *Id.* at 78-79.

³⁵ *See id.* at 78 (“In order to understand the legacies inherited by *Big Brother* and *Survivor* . . . we need to start by backing up – to *The Real World*, an MTV precursor that is often credited . . . with ‘usher[ing] in the age of reality television.’”).

³⁶ *Big Brother*, CBS, https://www.cbs.com/shows/big_brother/ [<https://perma.cc/9R8Z-FJAU>].

³⁷ Amanda Mitchell, *The Official Rules Behind Big Brother’s Legendary Competitions, Explained*, OPRAH DAILY (May 22, 2019, 1:40 PM), <https://www.oprahdaily.com/entertainment/tv-movies/a27545437/big-brother-competition-rules/> [<https://perma.cc/HW6E-VYLH>].

³⁸ *Tribal Council*, SURVIVOR WIKI, https://survivor.fandom.com/wiki/Tribal_Council [<https://perma.cc/27HW-ENUY>].

Unlike the first generation of *Cops* and *AMW*, *Big Brother* and *Survivor* embedded themselves into the public discourse with the introduction of surveilled competition and weekly “voting off” ceremonies.³⁹ Additionally, compared to the classic game-show formats of *Jeopardy* and *Who Wants to be a Millionaire?*, *Big Brother* and *Survivor* followed ordinary people *constantly*.⁴⁰ Contestants were no longer judged just on their trivia skills. Instead, they were judged under 24-7 surveillance by their fellow castmates—and the global audience—on who they were as whole, “real” people. The popularity of this competitive format of reality TV has led to a myriad of programs that revolve around winning a prize. *The Bachelor*, for example, is a dating show that ideally helps two people fall in love.⁴¹ However, viewers are drawn to the show because they want to find out who “wins” the heart of the bachelor of the season.⁴² Ultimately, *Survivor* and *Big Brother* led to a surge of reality shows and with that, reality subgenres. What connects all these shows is “a combination of four elements: *ordinary people in a contrived situation facing some kind of challenge surrounded by cameras*.”⁴³

The third generation is the “celebrity” generation, where “the primary goal of the show [becomes] the production of celebrity itself.”⁴⁴ This genre includes reality programs that attempt to reignite the celebrity of former famous people, such as *Keeping Up With The Kardashians* and *The Osbournes*.⁴⁵ As one academic explained, “[r]eality television has . . . become a site where the celebrity-making logics of representation, desire and commodification meld.”⁴⁶ This generation overlaps with the prior, competition-style one. Now, the fame that is acquired from

³⁹ KAVKA, *supra* note 14, at 76.

⁴⁰ *Id.*

⁴¹ Shivani Gonzalez, ‘*The Bachelor*’ Promises True Love. So Why Does It Rarely Work Out?, N.Y. TIMES (May 13, 2024), <https://www.nytimes.com/2024/05/13/arts/television/bachelor-bachelorette-breakups-reality-tv.html> [<https://perma.cc/253E-FCKL>] (“Unlike other popular reality dating shows, the [Bachelor] franchise markets itself as a genuine chance to find love without any other incentives like cash prizes.”).

⁴² Fans of *The Bachelor* and the spinoff *The Bachelorette* can take part in Fantasy Leagues while the seasons air. Madeline Berg, *Betting On Love: Inside Competitive ‘Bachelor’ Fantasy Leagues*, FORBES MEDIA (Jan. 16, 2017, 9:30 AM), <https://www.forbes.com/sites/maddieberg/2017/01/16/betting-on-love-inside-competitive-bachelor-fantasy-leagues/?sh=605850ab2c3e> [<https://perma.cc/P4NZ-UV57>].

⁴³ KAVKA, *supra* note 14, at 110.

⁴⁴ GILES, *supra* note 13, at 63-64.

⁴⁵ *Id.*

⁴⁶ KAVKA, *supra* note 14, at 147.

being “ordinary” on reality TV shows can lead to opportunities to join other shows. For example, Harry Jowsey—a reality TV celebrity who appeared on the first season of *Too Hot to Handle*⁴⁷—was on the most recent season of *Dancing with the Stars*. Despite the lackluster description of his fame being summarized as: “Harry Jowsey is a reality TV star. He appeared in Season One of Netflix’s ‘Too Hot to Handle’ and currently has over 4 million followers on Instagram,”⁴⁸ his casting on *Dancing with the Stars* signals that he has been elevated to the level of “star” to the general public.

Shows like *The Real Housewives* series, *Jersey Shore*, and *Selling Sunset* follow similar formats as *An American Family* and *The Real World*—with a fly-on-the-wall format, where viewers watch groups of people interact in their everyday (but admittedly heavily edited) environments. Purposefully or not, these shows propel its cast members into celebrity for qualities other than their merit. And their celebrity seems longer lasting than those from older reality TV shows, mainly because the celebrity economy has evolved to cater to this type of fame. Many reality TV stars are “[d]istributed carefully across various media, . . . with clothing and cosmetic ranges, apps, nightclubs, and modelling contracts.”⁴⁹

Like the 1988 WGA strike, the WGA strike in 2007-2008 drew producers and viewers to reality TV to fill the “gaps popular sitcoms and dramas left behind.”⁵⁰ Reality TV has drastically expanded and evolved since its early days of the 1980s, and it is here to stay.

II

MENTION IT ALL: THE DARK SIDE OF REALITY TELEVISION

There is no doubt that reality TV has become popular amongst generations of viewers. There is seemingly a genre for everyone to enjoy. And production costs are notoriously low, which, as mentioned earlier, helps explain the proliferation of

⁴⁷ See NETFLIX, *supra* note 12.

⁴⁸ Lindsay Lowe & Joyann Jeffrey, *Jamie Lynn Spears, Charity Lawson and Ariana Madix: ‘DWTS’ Season 32 Cast*, TODAY (Sept. 13, 2023, 10:18 AM), <https://www.today.com/popculture/tv/dancing-with-the-stars-season-32-cast-rcna104606> [<https://perma.cc/S228-PE25>].

⁴⁹ GILES, *supra* note 13, at 67.

⁵⁰ Ree Hines, *Reality TV To The Rescue? Amid Writers’ Strike, ABC And Fox Lean On Unscripted Shows*, FORBES MEDIA (May 17, 2023, 6:18 PM), <https://forbes.com/sites/reehines/2023/05/17/reality-tv-to-the-rescue-amid-writers-strike-abc-and-fox-lean-on-unscripted-shows/?sh=4c292f9e7916> [<https://perma.cc/VQK4-54EF>].

reality TV shows.⁵¹ What comes with cost-cutting, however, is a slew of complaints and allegations against producers and production companies. These complaints mainly focus on inadequate pay, unsafe work conditions, and sexual misconduct.

In 2022, *Variety* reported that the Kardashian family “split a massive 9-figure salary” for their move from E! to Hulu.⁵² Of course, this large a salary for an unscripted show is a rarity in the industry. Instead, for most reality TV shows, the participants “are not considered employees of either the shows on which they appear nor the production companies in charge of filming.”⁵³ Some are considered independent contractors and receive a stipend, which varies per cast member based on their popularity.⁵⁴ Other participants of reality TV shows receive no compensation at all.⁵⁵ While some expenses are covered during production, one producer admitted that “[n]inety-nine percent of the people on reality TV ... [receive] maybe a daily stipend of \$20 or \$30, but that’s it.”⁵⁶ On *Love is Blind*, participants are paid \$1,000 per week, but often work up to 20 hours per day, seven days a week. As Jeremy Hartwell alleged in his lawsuit against *Love is Blind*’s production company, the cast members were paid “effectively as little [as] \$7.14 per hour which is less than half of the applicable minimum wage rate of \$15.00 per hour ... pursuant to the applicable Los Angeles City and County minimum wage ordinances.”⁵⁷ The more popular or famous a reality star is determines the amount they are paid. But most of the participants are not famous to begin with. Thus, the majority are often underpaid and have little leverage because their lack of fame makes them easily replaceable.

Another frequent complaint among those both in front of and behind the camera is the unsafe working conditions on reality TV sets. This criticism

⁵¹ Jethro Nededog, *Here’s How Reality TV Shows Get Away With Paying People Nothing*, BUS. INSIDER (June 7, 2016, 2:10 PM), <https://www.businessinsider.com/reality-tv-shows-pay-nothing-2016-6> [<https://perma.cc/FUZ8-G4MQ>] (“Reality shows were designed from the beginning to be cheap television. They’re a break from the huge budgets that scripted TV needs, and they give networks more bang for their buck.”).

⁵² Emily Longertta, *Kardashian-Jenner Family Will Split a Massive 9-Figure Salary for New Hulu Reality Series*, VARIETY (Mar. 10, 2022, 7:30 PM), <https://variety.com/2022/tv/features/kardashians-jenners-salary-hulu-reality-show-1235201104/> [<https://perma.cc/E2AB-WTFR>].

⁵³ Walsh, *supra* note 23.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Nededog, *supra* note 51.

⁵⁷ Compl. ¶ 6, *Hartwell v. Kinetic Content, LLC, et al.*, No. 22STCV21223 (Cal. Super. Ct. June 29, 2022).

ranges from a lack of adequate nutrition to intentional infliction of emotional distress. One crew member who worked on a home renovation show said that “[t]here were no safety precautions taken and we were working in homes that were completely dilapidated. People went through the floor regularly, things were constantly falling and if you complained you were fired.”⁵⁸ Another noted that they had “worked on shoots in very dangerous situations (prison settings, massive crowds, mountaineering) with no security or emergency contingency plans or staff in place.”⁵⁹

Despite a proclaimed priority of creating a safe and respected work environment, production companies have faced an onslaught of complaints saying just the opposite. Some participants claim that producers control when they eat and sleep, but that alcohol is always available. Jeremy Hartwell, for example “could not access food and water, but alcohol was available—and even encouraged on an empty stomach.”⁶⁰ Braunwyn Windham-Burke from *The Real Housewives of Orange County* has echoed that producers place implicit pressure on cast members to drink. “Whenever you’re filming, they have alcohol there. They ask you before you go on a trip, what kind do you like? They get to know what your favorites are.”⁶¹ And while producers “‘don’t force you to drink,’ alcoholic beverages were ‘readily available’ and that sometimes during scenes, castmembers were discouraged from eating.”⁶²

Of course, some shows have components to them that are inherently stressful. *Fear Factor*, for example, is infamously known for its grueling challenges, which include eating tarantulas, jumping out of helicopters, and diving “into a

⁵⁸ Lowell Peterson, *Shooting Reality TV Shows is Unhealthy and Unsafe, and Most Networks Just Don’t Care*, WASH. POST (Sept. 10, 2014, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2014/09/10/shooting-reality-tv-shows-is-unhealthy-and-unsafe-and-most-networks-just-dont-care/> [<https://perma.cc/9RLN-4JQA>].

⁵⁹ *Id.*

⁶⁰ Marianne Garvey, ‘Love Is Blind’ Contestants Forced to Film Drunk, Hungry and Sleep-Deprived, Lawsuit Claims, CNN (July 16, 2022, 9:43 AM), <https://edition.cnn.com/2022/07/16/entertainment/love-is-blind-lawsuit/index.html> [<https://perma.cc/N8WH-QVM3>].

⁶¹ Marianne Garvey, *The Challenge of Becoming (and Staying) Sober On Reality TV*, CNN (Apr. 3, 2022, 10:54 PM), <https://www.cnn.com/2022/04/01/entertainment/reality-tv-sober-alcohol/index.html> [<https://perma.cc/3ENV-YJQL>].

⁶² *Id.*

blood aquarium and retriev[ing] cow hearts with their mouths.”⁶³ But even then, contestants who participate may not really know what they are signing up for. After watching *Fear Factor* for years, Anthony Bell participated in the show with his son and commented that he ““was totally caught off guard’ by the intensity of the challenges. . . . The hardest portion of the production, he said, was the meal: live scorpions. He had expected that he would have to eat something dead, not alive.”⁶⁴

Producers of challenge-based shows have admitted that they intentionally exploit contestants’ phobias to make better TV.⁶⁵ Even non-challenge-based program participants have experienced stress associated with their shows. While there are sometimes clinical psychologists on-set who help with mental-health screenings and prepare contestants for how they may be portrayed on TV, one psychologist said that when it “comes to twists or particular production issues that could affect a contestant’s mental health, he’s rarely consulted.”⁶⁶ Another clinical psychologist who works with contestants after their shows end explained that the assistance to participants is limited to three-follow up sessions.⁶⁷ After that, “contestants are on their own to seek help.”⁶⁸

There have also been reports of sexual misconduct on these programs. After allegedly goading participants with endless supplies of alcohol, producers have allowed interactions between participants to play out to the point of sexual assault. On the fourth season of *Bachelor in Paradise*—a spin-off of *The Bachelor*, where former contestants have a second chance at finding love—production temporarily stopped due to allegations of “misconduct.”⁶⁹ After two contestants drank heavily throughout the day, a sexual encounter between them was filmed and production

⁶³ Brian Stelter, *It’s Back, and Even More Disgusting*, N.Y. TIMES (Dec. 11, 2011), <https://www.nytimes.com/2011/12/12/arts/television/fear-factor-returns-to-nbc-on-monday-night.html> [https://perma.cc/7ZY9-EXYB].

⁶⁴ *Id.*

⁶⁵ Amber Dowling, *How Reality TV Handles Therapy Needs for Contestants*, VARIETY (June 13, 2019, 11:00 AM), <https://variety.com/2019/tv/features/reality-tv-challenge-big-brother-contestants-therapy-1203239481/> [https://perma.cc/5T55-KMV3].

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Tierney Bricker, *Bachelor in Paradise Shocking Scandal: Everything We Know*, E! NEWS (June 20, 2017, 1:12 PM), <https://www.eonline.com/news/860463/bachelor-in-paradise-shocking-scandal-everything-we-know> [https://perma.cc/W5Y7-K79K].

was then halted to investigate what had taken place.⁷⁰ Warner Bros. conducted an internal investigation and concluded that no wrongdoing had taken place.⁷¹ The fourth season subsequently continued production without the two contestants involved in the initial incident.⁷²

More recently, on *Below Deck Down Under*—a show that follows crew members of a super-yacht during a six-week charter season in Australia⁷³—two crew members were immediately fired from the season after one tried to get into bed naked with another crew member and the other made comments blaming the victim.⁷⁴ While the producers were praised for the swift intervention,⁷⁵ other members of production and the cast have claimed that when they experienced and witnessed sexual misconduct on set, their complaints had fallen on deaf ears. Samantha Suarez, a former makeup artist for *Below Deck Sailing Yacht*—another spin-off of the *Below Deck* franchise—accused a cast member, Gary King, of trying to force himself on her during production of the show’s fourth season.⁷⁶ King was also accused of touching other members of production and his fellow castmates without their consent.⁷⁷ Specifically, he was witnessed grabbing a “female cast

⁷⁰ Joyce Chen, ‘*Bachelor in Paradise*’ Scandal: What We Know and Why It Matters, ROLLING STONE (June 14, 2017), <https://www.rollingstone.com/tv-movies/tv-movie-news/bachelor-in-paradise-scandal-what-we-know-and-why-it-matters-203866/> [https://perma.cc/G8WD-KB98].

⁷¹ Bricker, *supra* note 69.

⁷² Jodi Guglielmi, *DeMario Jackson: Two Women Accuse Controversial ‘Bachelor in Paradise’ Star of Rape*, ROLLING STONE (Sept. 28, 2022, 11:37 AM), <https://www.rollingstone.com/tv-movies/tv-movie-news/bachelor-in-paradise-demario-jackson-rape-1234596955/> [https://perma.cc/C2WB-UBZP].

⁷³ “Captain Jason and Chief Stew Aesha reunite for an unforgettable, full-throttle charter season with a lively new crew and wild guests in the stunning waters of Cairns, Australia – the gateway to the Great Barrier Reef.” *Below Deck Down Under*, BRAVO <https://www.bravotv.com/below-deck-down-under> [https://perma.cc/5D4K-GEVD].

⁷⁴ Armando Tinoco, ‘*Below Deck Down Under*’ Crew Members Fired After Non-Consensual Sexual Advances Caught On Camera, DEADLINE (Aug. 12, 2023, 6:33 PM), <https://deadline.com/2023/08/below-deck-down-under-crew-members-fired-non-consensual-sexual-advances-1235461340/> [https://perma.cc/L8NJ-7AB7].

⁷⁵ Krystie Lee Yandoli, ‘*Below Deck*’s Captain Jason and Aesha Talk Handling Sexual Misconduct at BravoCon, ROLLING STONE (Nov. 4, 2023), <https://www.rollingstone.com/tv-movies/tv-movie-features/below-deck-down-under-captain-jason-chambers-aesha-scott-bravocon-sexual-misconduct-luke-jones-1234870569/> [https://perma.cc/Y3BV-KA5B].

⁷⁶ Krystie Lee Yandoli, ‘*Below Deck*’ Accused of Covering Up Gary King’s Sexual Misconduct, ROLLING STONE (Aug. 24, 2023, 9:30 AM), <https://www.rollingstone.com/tv-movies/tv-movie-features/below-deck-bravo-gary-king-sexual-misconduct-cover-up-1234811442/> [https://perma.cc/JC2N-7K2D].

⁷⁷ *Id.*

member's butt and continu[ing] to touch her inappropriately even though she said, 'No,' and told him to stop."⁷⁸ These incidents were reported to either HR or members of the production crew, yet King remained on the show and is still a public figure supported by the network.⁷⁹

III

WORTH PLAYING FOR?: WHY REALITY TELEVISION PARTICIPANTS AVOID LEGAL ACTION

The question then becomes, why don't legitimate complaints by reality show participants about low pay, dangerous working conditions, and sexual misconduct lead to more legal actions against the producers, the production company, or the TV network? The stars of these shows—while clearly not minding certain fame—seem to not want to be the whistleblowers to take down reality TV. This section offers two potential theories: social and legal.

A. *The Social Theory: Hunger for Fame*

Once someone has tasted their 15 minutes of fame, it is hard not to crave more. Psychologists have hypothesized that fame is addicting.⁸⁰ There are also many people who hope to attain the mass adoration of strangers even before they have experienced that dopamine rush.⁸¹ And reality TV has provided the opportunity to be famous without the requisite talent. Now, some celebrities today “are famous for being famous.”⁸²

⁷⁸ *Id.*

⁷⁹ *Id.* (“On Aug. 18, King announced in an Instagram post that he’d be attending BravoCon, Bravo’s annual convention for fans and stars of the network’s extensive slate of reality shows.”).

⁸⁰ See, e.g., Donna L. Roberts, *The Psychology of Fame: Unraveling the Mental Impact of Stardom*, MEDIUM (July 14, 2023), <https://medium.com/psych-pstuff/the-psychology-of-fame-unraveling-the-mental-impact-of-stardom-9a95a2e647b1#:~:text=Many%20famous%20individuals%20develop%20a,%20profound%20sense%20of%20loss> [<https://perma.cc/8UVG-36L4>] (“Many famous individuals develop a psychological dependence on fame. Like any addiction, they become reliant on the adoration and validation of the masses. If and when the fame fades, these individuals can experience withdrawal-like symptoms, which include depression, anxiety, and a profound sense of loss.”).

⁸¹ JAKE HALPERN, FAME JUNKIES: THE HIDDEN TRUTHS BEHIND AMERICA’S FAVORITE ADDICTION 3 (2008) (“Looking for aspiring celebrities in America is a little like looking for dehydrated nomads at a desert encampment—they are everywhere, and their thirst is so intense it’s almost palpable.”).

⁸² Chong Ju Choi & Ron Berger, *Ethics of Celebrities and Their Increasing Influence in 21st Century Society*, 91 J. BUS. ETHICS 313, 314 (2010); see also *supra* notes 44-49 and accompanying text (explaining the “celebrity” generation of reality TV).

Unlike older shows such as *The Real World*, where the association with the show often lasted only as long as the season aired,⁸³ the new generation of reality celebrities seem to find consistent fame through their participation on the show. Of course, sometimes reality TV participants want to distance themselves from their on-air reputations. For example, Nick Thompson from *Love is Blind* has mentioned that he cannot secure a job in his prior field (software) and is bordering on homelessness.⁸⁴

However, now more than ever, reality participants are hopeful that they will leave their shows with notoriety, positive or negative. It is commonly acknowledged and accepted that reality TV is a way to become a social media influencer, which is often accompanied by brand deals and a steady income.⁸⁵ Some previous participants have even made a career out of reality TV consulting by helping hopeful applicants put their best foot forward in the reality TV casting process.⁸⁶ Others have monetized their experience simply by speaking about their time on the show.⁸⁷

This desire for fame leads to the desire to not rock any boats. If reality stars have complaints about their shows—with either how they are treated during

⁸³ For example, Sean Duffy, a cast member on *The Real World: Boston*, which aired in 1997, was able to distance himself as a reality TV personality and served as a U.S. Congressman from 2011 to 2019. Similarly, the other seven cast members have all taken their careers off camera (although one of them—Jason Cornwell—works behind the scenes for reality TV networks). Pooja Sharma, *The Real World Season 6 (Boston): Where Are They Now?*, THECINEMAHOLIC (Sept. 23, 2023), <https://thecinmaholic.com/the-real-world-season-6-boston-where-are-they-now/> [<https://perma.cc/5XUQ-AXFU>].

⁸⁴ Morgan Hines, *'Love is Blind' Star Nick Thompson Says He Could Become 'Homeless,' Blames Netflix*, USA TODAY (Aug. 2, 2023), <https://www.usatoday.com/story/entertainment/celebrities/2023/08/02/netflix-love-is-blind-nick-thompson-homeless-danielle-ruhl/70511611007/> [<https://perma.cc/5PCH-UKZ8>].

⁸⁵ Walsh, *supra* note 23 (“That contestants today use *The Bachelor* to launch careers as social media influencers is more or less tacitly acknowledged by all, even though it contradicts the show’s central conceit [sic] — that everyone is there for the right reasons.”).

⁸⁶ Daryl Austin, *Reality TV Attracts More Applicants Than Ever. For Reality-TV Coaches, It's a Gold Rush*, WALL ST. J. (Feb. 24, 2023), <https://www.wsj.com/articles/reality-tv-casting-coaches-survivor-amazing-race-bbd52bd6> [<https://perma.cc/6FY9-PS8P>] (“Adam Klein, a former ‘Survivor’ contestant who won the show’s 33rd season, is now a full-time reality-television consultant.”).

⁸⁷ See, e.g., Emily Nussbaum, *Is “Love Is Blind” a Toxic Workplace?*, THE NEW YORKER (May 20, 2024), <https://www.newyorker.com/magazine/2024/05/27/is-love-is-blind-a-toxic-workplace> [<https://perma.cc/G8WD-KB98>] (identifying former *Love is Blind* contestants Deepti Vempati and Natalie Lee as taking this approach through Vempati’s memoir and the duo’s joint podcast “Out of the Pods”).

production, or how they are portrayed post-production—there is a hesitancy to speak out. Most people are not on these shows to make money as a cast member; they are on them for exposure. As one agent noted, “It’s about promoting your ancillary businesses, whether it’s endorsements or your own products.”⁸⁸ If they want to continue making content, create an image for themselves, and ultimately *be famous*, former participants may not want to ruin their chances by filing a lawsuit against the company that hired them.

While becoming a social media influencer arguably gives reality stars more autonomy and control over their brand, their image suffers when they have less exposure. Many reality TV shows across all genres have spin-offs that former cast members are invited back for, such as *Bachelor in Paradise*; *Below Deck Mediterranean*, *Sailing Yacht*, and *Down Under*; *The Challenge*; and *The Real Housewives Ultimate Girls Trip*. Even without direct spin-offs, reality TV stars can move across networks. For example, Tom Sandoval—a main cast member of *Vanderpump Rules*⁸⁹—has broadened his exposure by participating in talent- and challenge-based reality shows such as *The Masked Singer*⁹⁰ and *Special Forces: World’s Toughest Test*.⁹¹

But most reality TV participants—especially the more unknown and less popular ones—are replaceable. Unfortunately, “those at the margins; the unknowns . . . are most likely to get a bad deal.”⁹² They also have the most to lose. Compared to reality TV stars who already have a large following, others who call “attention to the mistreatment cast members often face means they will likely never return to reality TV.”⁹³ Former reality stars are hesitant to risk their financial

⁸⁸ Nededog, *supra* note 51.

⁸⁹ *Vanderpump Rules* is a show that follows the lives of current and former servers of SUR, a Los Angeles-based restaurant owned by former *Real Housewives of Beverly Hills* star Lisa Vanderpump. Talia Ergas, *What Is Vanderpump Rules? Everything to Know About the Bravo Series*, BRAVO (Dec. 12, 2023, 1:02 PM), <https://www.bravotv.com/the-daily-dish/what-is-vanderpump-rules-explainer> [<https://perma.cc/8ER3-ULVQ>].

⁹⁰ *The Masked Singer* “is a top-secret singing competition in which celebrities face off against one another while shrouded from head to toe in an elaborate costume, concealing his or her identity.” *The Masked Singer*, FOX, <https://www.fox.com/the-masked-singer/> [<https://perma.cc/CEZ7-3RM5>].

⁹¹ *Special Forces* is a show where “[c]elebrities from all genres take on – and try to survive – demanding training exercises led by directing staff agents, an elite team of ex-Special Forces operatives.” *Special Forces: World’s Toughest Test*, FOX, <https://www.fox.com/special-forces-worlds-toughest-test/> [<https://perma.cc/G848-KPKV>].

⁹² Walsh, *supra* note 23.

⁹³ Espada, *supra* note 7.

gains “by publicly coming forward in support of unionizing or talking about their poor treatment out of fear of not being asked back to potential future seasons or spinoffs.”⁹⁴ Therefore, one reason we do not see more legal cases play out in public is because the potential plaintiffs would rather stay quiet than risk their careers.

B. The Legal Theory: Losses and Settlements

While there is a social argument that reality TV participants do not sue because they will lose the opportunity to be famous, there are also two overarching legal reasons for the lack of lawsuits. First, the very nature of the contracts signed by reality TV participants often precludes them from pursuing their claims in court; and second, those who have valid claims typically settle out of court, thus preventing any precedent on this legal subject from emerging.

1. The Lawsuits May Lack Legal Merit

The difference in bargaining power between unknown talent and major TV networks is astronomical. Furthermore, the more people who sign unfair deals, and the longer those agreements are in place, the more difficult it is to challenge the contracts on a case-by-case basis. Kalpana Kotagal, Commissioner of the EEOC and co-creator of the inclusion rider in entertainment industry contracts, has stated that “Over time, if a contractual provision is put in place distinguishing a ‘participant’ from a ‘performer,’ for example, and that distinction is not challenged in court, or is held up in court, it becomes the norm on which other contracts are based.”⁹⁵

Many, if not all, contracts between production companies and talent contain a binding arbitration clause.⁹⁶ While arbitration could result in a victory for the individual plaintiff, talent attorneys have expressed concern that arbitrators are biased in favor of studios.⁹⁷ In fact, some talent-side attorneys “believe that the

⁹⁴ *Id.*

⁹⁵ Walsh, *supra* note 23 (“Contestants must agree to appearing as ‘participants’ in a contest, not ‘performers,’ which would be a class of employee that deserves, well, some rights and protections in the eyes of the law.”).

⁹⁶ See, e.g. Ronald J. Nessim & Scott Goldman, *Mandatory Arbitration Provisions Involving Talent and Studios and Proposed Areas for Improvement*, 22 UCLA ENT. L. REV. 233, passim (2015) (discussing the effects of an increase in arbitration clauses in contracts between major television studios and talent).

⁹⁷ *Id.* at 235 (“Transactional lawyers and litigators who represent talent have become increasingly concerned about repeat provider/player bias in talent versus major studio arbitrations.”).

choice of arbitrating versus litigating in a public courtroom is the single most important factor—perhaps even more important than the merits—in determining the outcome.”⁹⁸ This belief stems from the fact that arbitrators, unlike judges, are often selected by the parties to determine the case.⁹⁹ Although arbitrators are supposed to be neutral, there is a fear that even the most honest arbitrators are still “subconsciously . . . aware that if he or she rules against a major studio, particularly in a large dollar value case, he or she will not be picked by at least that major studio in the future.”¹⁰⁰

Thus, one possible reason there are so few lawsuits is because the mandatory arbitration clause in talent agreements precludes claims from being brought to court, and talent may not want to argue their claims in arbitration. To combat the binding arbitration clause within their signed contracts, participants have attempted to argue that the arbitration clauses are unconscionable. This section looks at why that legal argument has failed.

As noted in the seminal case *Williams v. Walker-Thomas Furniture*, “[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”¹⁰¹ In other words, to hold that a portion of a contract is unconscionable, courts must find that the contract is both procedurally and substantively unconscionable.¹⁰²

Procedural unconscionability relates to the fairness of the bargaining process. Courts consider whether there was an opportunity to understand the terms, whether there was a gross inequality of bargaining power, and whether there was a market alternative.¹⁰³ Substantive unconscionability “looks at whether the results ‘shock the conscience’ because they are ‘overly harsh’ or ‘one-sided.’”¹⁰⁴ Some state

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 350 F.2d 445, 449 (D.C. Cir. 1965).

¹⁰² Arthur Allen Leff, *Unconscionability and the Code-The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

¹⁰³ *Williams*, 350 F.2d at 449-50.

¹⁰⁴ *Kaufman v. Sony Pictures TV, Inc.*, No. 16-12027-LTS, 2017 U.S. Dist. LEXIS 112938, at *12 (D. Mass. July 19, 2017) (quoting *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 689 (Cal. 2000)).

courts, including California and New York, view unconscionability on a sliding scale: “the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required . . . and vice versa.”¹⁰⁵ Ultimately, “[i]n determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made.”¹⁰⁶

Admittedly not much legal doctrine has been established regarding the unconscionability of reality TV contracts, but one student note has argued that the contracts are not substantively unconscionable because the terms do not meet the “shock the conscience” standard.¹⁰⁷ When looking at the “terms of the contract considered in light of the circumstances existing when the contract was made,”¹⁰⁸ reality TV contracts are arguably not as manipulative as some may think. Specifically, “[i]n the entertainment industry, contracts tend to be over-inclusive and favor production companies because they are assuming the majority of the financial risk.”¹⁰⁹ Additionally, because there is an opportunity for contestants to make it big and contestants never *have* to participate in the show, their unfairness arguments about the contracts may be weak.

That said, it is undeniable that these participants, who are almost always unknown before the show, have little bargaining power. Kelly Scott, an employment attorney, explained that participants are “anxious to have this happen for them, and they’re willing to sign over a lot. As long as the contract isn’t egregious, [production companies] get away with it. Few people have been successful in

¹⁰⁵ *Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1013 (9th Cir. 2023) (quoting *Sanchez v. Valencia Holding Co.*, 353 P.3d 741, 748 (Cal. 2015)); *see also* *De Jesus v. Gregorys Coffee Mgmt., LLC*, No. 20-cv-6305, 2021 WL 5591026, at *7 (E.D.N.Y. Nov. 29, 2021) (“Courts consider procedural and substantive unconscionability on a ‘sliding scale,’ meaning that ‘the more questionable the meaningfulness of choice, the less imbalance in a contract’s terms should be tolerated and vice versa.’”) (quoting *Simar Holding Corp. v. GSC*, 87 A.D.3d 688, 928 N.Y.S.2d 592, 595 (2011)).

¹⁰⁶ *Williams*, 350 F.2d at 450.

¹⁰⁷ Catherine Riley, *Signing in Glitter or Blood?: Unconscionability and Reality Television Contracts*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 106, 108-09 (2014) (“While a lay reader may view the language of the agreements as extreme and unwarranted in isolation, when considered in the larger economic and industry framework of reality television, the terms are not unconscionable.”).

¹⁰⁸ *Williams*, 350 F.2d at 450.

¹⁰⁹ Riley, *supra* note 107, at 135.

breaking them.”¹¹⁰ Thus, participants who are willing to throw their hat into the legal ring may find their strongest argument under the procedural unconscionability prong. Specifically, they could argue that because their replaceability significantly weakens their bargaining power, and because there is no market alternative in the reality TV landscape, there is “no real negotiation and an absence of meaningful choice.”¹¹¹

Ultimately, however, it may be difficult to convince a court to set such a large precedent against these contracts because “[m]ost courts ‘have shown restraint in examining contracts or clauses for unconscionability’ to avoid encroaching on the parties’ freedom of contract.”¹¹² Additionally, as stated above, even using a sliding scale approach, a contract is unconscionable only if it is both procedurally and substantively unconscionable.¹¹³ Further, the few courts that have addressed whether portions of reality TV contracts are unconscionable have generally ruled in favor of the production companies.

For example, in *Ledwell v. Ravenel*, the Fourth Circuit rejected that the arbitration clause in a reality TV contract was unconscionable.¹¹⁴ There, during the production of *Southern Charm*,¹¹⁵ Dawn Ledwell was allegedly assaulted by one of the main cast members of the show.¹¹⁶ “Dissatisfied with the network’s response to the incident, Ledwell filed suit in state court” alleging defamation, negligence, and unfair trade practices.¹¹⁷ She argued that the contract she signed, which required the parties “to arbitrate any disputes arising out of the show’s production,” were invalid in part for unconscionability.¹¹⁸ The court, without much analysis, concluded that “even assuming that Ledwell could establish that she had

¹¹⁰ Breeanna Hare, *The ‘Real World’ of Reality Show Contracts*, CNN (Dec. 30, 2009), <https://www.cnn.com/2009/SHOWBIZ/TV/12/30/legal.reality.contracts/index.html> [<https://perma.cc/957Q-ZUHC>].

¹¹¹ *Bielski*, 87 F.4th at 1013 (quoting *Grand Prospect Partners v. Ross Dress for Less, Inc.*, 182 Cal. Rptr. 3d 235, 248 (Ct. App. 2015)).

¹¹² Riley, *supra* note 107, at 117 (quoting Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 461-62 (1999)).

¹¹³ See *supra* notes 101-106 and accompanying text.

¹¹⁴ 843 F. App’x 506, 507 (4th Cir. 2021) (per curiam).

¹¹⁵ “New relationships are forged alongside new resentments, but old habits die hard as these southern socialites grapple with shocking allegations that could fracture what were thought to be unbreakable bonds.” *Southern Charm*, BRAVO, <https://www.bravotv.com/southern-charm> [<https://perma.cc/23H5-K6GZ>].

¹¹⁶ *Ledwell*, 843 F. App’x at 507.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

no choice but to sign the releases, she identifies nothing in the agreements that rises to the level of substantive unconscionability.”¹¹⁹

Similarly, in *Abruzzo v. Bravo Media Productions LLC*, the Court of Appeals of South Carolina ruled that the arbitration agreement between the two parties was enforceable and therefore plaintiff’s claims could not be brought to court.¹²⁰ In that case, Joseph Abruzzo, a former boyfriend of one of the main cast members on *Southern Charm*, sued NBC Universal Media and its other entities, arguing that the producers went back on their promise that he would be portrayed in a positive light and that “he was under pressure to sign the agreement because he and [his then-girlfriend] had gone through hair and makeup and were sitting down for dinner, the film crew was ready to begin, and ‘bright lights’ were shining on him.”¹²¹ The court severed the analysis between the validity of the arbitration agreement and Abruzzo’s claim that the contract as a whole was invalid.¹²² The court then ruled that because Abruzzo did not explicitly argue that the arbitration clause was unenforceable, his other claims *must* go to arbitration.¹²³

Most recently, another *Love is Blind* cast member initiated litigation against the show’s production company, in part related to the enforceability of the arbitration clause in her contract. In 2023, Renee Poche, a Season 5 contestant of *Love is Blind*, publicly described her negative experience on the show. She claimed that producers forced her to spend large stretches of time alone with her “showmance” partner, Carter Wall, who was abusive both on and off camera.¹²⁴

¹¹⁹ *Id.* at 508.

¹²⁰ 892 S.E.2d 527 (S.C. Ct. App. 2023).

¹²¹ *Id.* at 529.

¹²² *Id.* at 531.

¹²³ *Id.* at 531-32 (“[Abruzzo’s] allegations do not specifically pertain to the arbitration clause; rather, they address how he felt about signing the entire agreement to both appear on the show and arbitrate any disputes. Therefore, Abruzzo has failed to specifically challenge the arbitration agreement independently from the rest of the agreement as required under *Prima Paint* and *Buckeye*. Accordingly, we . . . remand for an order compelling arbitration.”).

¹²⁴ Tatiana Siegel, *Drugs, Abuse, Imprisonment: A Secret ‘Love Is Blind’ Legal Battle Spills Out Into Public View*, VARIETY (Jan. 3, 2024), <https://variety.com/2024/tv/news/love-is-blind-lawsuit-renee-poche-1235860564/> [<https://perma.cc/V6U4-4MSW>] (“‘My experience on ‘Love is Blind’ was traumatic’ Poche tells *Variety*. ‘I felt like a prisoner and had no support when I let Delirium know that I didn’t feel safe.’”); see also Out of the Pods, 30. *The Lost Stories of Love is Blind: Season 5’s Renee Poche*, YOUTUBE (Oct. 19, 2023), <https://www.youtube.com/watch?v=rLIASIJh6Nc> [<https://perma.cc/8T6Z-EYXY>].

In response, one of the show's production companies (Delirium TV) initiated arbitration against Poche, seeking \$4 million for violating the non-disclosure provision within her talent agreement.¹²⁵ Poche and her attorneys then filed a lawsuit in California state court on January 2, 2024, alleging, among other things, that the arbitration clause in the agreement was unlawful and therefore unenforceable.¹²⁶ In other words, Poche sought to halt the arbitration filed by Delirium TV against her while the court determined whether the contract's non-disclosure agreement was enforceable in the first place. On March 22, 2024, following the briefing of Delirium TV's motion to compel arbitration,¹²⁷ Judge Bruce G. Iwasaki granted the motion in favor of the production company.¹²⁸ Although the judge acknowledged that he did not "like those kinds of clauses," he ruled the arbitration provision was not substantively unconscionable and that Poche's arguments related to the enforceability of the contract must be made to an arbitrator, not to the court.¹²⁹ Poche's attorneys stated they would appeal the court's ruling.¹³⁰

Departing from the norm, the Superior Court of California in *Higgins v. Superior Court (Higgins I)* found that the arbitration clause in a contract between the parties was unconscionable and therefore unenforceable.¹³¹ *Higgins I* involved five recently orphaned siblings who appeared on *Extreme Makeover: Home Edition*.¹³² The siblings had been taken in by the Leomiti Family, who were subsequently chosen to participate in the reality show for their kindness towards

¹²⁵ Compl. ¶ 30, *Poche v. Delirium TV, LLC*, No. 24STCV00088 (Cal. Super. Ct. Jan. 2, 2024) ("On November 1, 2023, Delirium initiated arbitration against Poche, alleging four violations of the nondisclosure provisions of the [talent agreement signed by both parties], each carrying liquidated penalties of \$1 million.").

¹²⁶ *Id.* ¶¶ 53, 83.

¹²⁷ See *Poche v. Delirium TV, LLC*, No. 24STCV00088: Defs. Mot. to Compel (Cal. Super. Ct. Feb. 5, 2024); Pls. Opp. to Mot. to Compel (Cal. Super. Ct. Mar. 11, 2024); Defs. Reply ISO Mot. to Compel (Cal. Super. Ct. Mar. 15, 2024).

¹²⁸ Maria Spoto, 'Love Is Blind' Contestant Contract Suit Sent to Arbitrator (1), BLOOMBERG LAW (Mar. 22, 2024, 1:18 PM) <https://news.bloomberglaw.com/litigation/love-is-blind-contestants-contract-claims-sent-to-arbitrator> [https://perma.cc/64JD-TCMM].

¹²⁹ *Id.* ("You can argue the release is vague, overbroad, doesn't apply, is against public policy," Iwasaki said, but those arguments, according to Poche's contract, should be made in front of an arbitrator.").

¹³⁰ *Id.* ("I think it went phenomenally," [Poche's attorney] said to reporters after the hearing. "I think the Court of Appeals will absolutely enjoy the argument here."").

¹³¹ 45 Cal. Rptr. 3d 293 (Cal. Ct. App. 2006).

¹³² *Id.* at 295-96.

the Higgins siblings.¹³³ The Leomitis received a new home, but only weeks after the camera crews left, the Leomitis evicted the Higgins siblings.¹³⁴ The siblings then sued the show's production company and related entities "alleging that they had been promised a home where they could live permanently and that they were never told that they had no ownership interest in the Leomitis' renovated home, or that the Leomitis retained the right to evict them."¹³⁵ The Higgins siblings argued that their claims should be decided by a court, not an arbitrator, because the arbitration clause that they had signed was unconscionable.¹³⁶ The court agreed, noting that the arbitration agreement was both procedurally and substantively unconscionable. Procedurally, the siblings—at the time aged 21, 19, 17, 16, and 14—were young, unsophisticated, and under pressure to review the arbitration provision.¹³⁷ Substantively, the terms of the arbitration provision were so one-sided that they shocked the conscience.¹³⁸

The Higgins siblings may have won the battle, but they did not win the war. When the merits of the case eventually went through the court system, the court ultimately found that the other provisions in the contract terms were not unconscionable. In an unpublished opinion, the Court of Appeals of California in *Higgins v. Disney/ABC Int'l Television, Inc. (Higgins II)*¹³⁹ assumed that the contract was procedurally unconscionable, but concluded that the provisions at issue—"those releasing respondents for tort liability for matters arising in connection with the show, including claims for invasion of privacy and appropriation of likeness"—were not substantively unconscionable.¹⁴⁰

¹³³ *Id.*

¹³⁴ *Id.* at 298

¹³⁵ *Higgins v. Disney/ABC International Television, Inc. (Higgins II)*, No. BC B200885, 2009 WL 692701, at *2 (Cal. Ct. App. Mar. 18, 2009).

¹³⁶ *Higgins I*, 45 Cal. Rptr. 3d at 295.

¹³⁷ *Id.* at 303-05.

¹³⁸ *Id.* at 299, 304-05.

¹³⁹ 2009 WL 692701.

¹⁴⁰ *Id.* at *12 (agreeing with the trial court that "allowing appellants to appear on the show and receive its benefits in exchange for giving up their publicity rights and limiting respondents' liability for torts occurring in connection with the show . . . were not surprising or unexpected and, when viewed in the context of the agreement's primary purpose, were not unconscionable").

Although there has been an occasional win for reality TV plaintiffs,¹⁴¹ it may ultimately be difficult to secure a victory on the merits when the standard for unconscionability is so stringent and the questionable terms of the contracts have become boilerplate and widespread.

2. *There is a Tendency to Settle*

The second legal explanation for the lack of lawsuits is that the claims that would result in the most damage to production companies—both monetarily and reputationally—settle out of court. For example, in 2012, MTV Network settled a lawsuit brought by Tonya Cooley, a former cast member of *The Real World* and *Road Rules Challenge*. Cooley claimed that she was sexually abused by fellow castmates throughout her time on the show and that the producers not only encouraged the behavior by supplying unlimited alcohol, but they also retaliated against her for complaining by sending her home early.¹⁴² Although Viacom Media Networks, MTV's parent company, answered Cooley's complaint by arguing that she failed to use the internal complaint procedures and that her own behavior on the show contributed to her circumstances, the two parties eventually settled for an undisclosed amount.¹⁴³

¹⁴¹ Recently, another Season 5 contestant of *Love is Blind*, Tran Dang, received a favorable ruling from a Texas state court judge regarding arbitration. Dang is suing two *Love is Blind* production companies (Delirium TV and Kinetic Content) related to an alleged sexual assault by her then-fiancé. Joelle Goldstein, *Love Is Blind Creator Speaks Out After Participant Sues for Sexual Assault, False Imprisonment*, PEOPLE (Oct. 6, 2023, 2:02 PM), <https://people.com/love-is-blind-creator-speaks-out-season-5-participant-tran-dang-sues-sexual-assault-lawsuit-exclusive-8348174> [<https://perma.cc/VCM4-J85V>]. After Delirium TV attempted to compel arbitration, Dang's attorney successfully argued that the Ending Forced Arbitration Act (EFAA) precluded arbitration. *See Delirium TV, LLC v. Dang*, No. 01-23-00383-CV, 2024 WL 1513878, at *4-7 (Tex. App. Apr. 9, 2024). The EFAA eliminates pre-dispute mandatory arbitration clauses "involving a nonconsensual sexual act or sexual contact," 9 U.S.C. §401(3), which Dang is basing her claims on. *See generally* Appellee Brief at 4, *Dang v. Delirium TV, LLC*, No. 01-23-00383-CV (Tex. App. Sept. 14, 2023). Subsequently, on May 9, 2024, a Texas appellate court ruled that Dang could not pursue her civil assault claim against Kinetic Content because the alleged assault took place in Mexico, meaning the trial court lacked specific jurisdiction over the company. *Kinetic Content, LLC v. Tran Dang*, No. 01-23-00444-CV, 2024 WL 2061593, at *8-10 (Tex. App. May 9, 2024). However, the court also held that Kinetic could not escape liability under Dang's false imprisonment and negligence claims. *Kinetic Content*, 2024 WL 2061593, at *10-12.

¹⁴² Eriq Gardner, *MTV Settles Lawsuit With 'Real World' Cast Member Who Alleged Rape*, THE HOLLYWOOD REPORTER (Oct. 24, 2012), <https://www.hollywoodreporter.com/business/business-news/real-world-rape-mtv-tanya-382809/> [<https://perma.cc/YQ7P-T95X>].

¹⁴³ *Id.*

Similarly, during the first season of *Survivor: All-Stars*, one cast member, Susan Hawk, claimed that another participant, Richard Hatch, “sexually violated” her while they completed a challenge.¹⁴⁴ Subsequently, Hawk quit the game and considered filing a lawsuit against CBS.¹⁴⁵ However, she later appeared with Hatch on *The Early*, stating she opted out of legal action because CBS had helped her “deal with the situation.”¹⁴⁶ Most recently, on May 8, 2024, Jeremy Hartwell’s attorneys filed a motion for preliminary approval of the class action settlement.¹⁴⁷ Based on the settlement, Kinetic Content has agreed to pay almost \$1.4 million, divided between approximately 144 class members.¹⁴⁸ A hearing on the settlement is scheduled for July 2024.¹⁴⁹ There are numerous other examples and articles about settlements between reality TV participants and production companies.¹⁵⁰

Settlements make sense for both parties involved in this type of dispute—both cut the costs of litigating, the production companies can avoid invasive discovery, and the plaintiff can avoid public attention and scrutiny. Unfortunately, potential future plaintiffs are harmed by these settlements because they do not have any precedent to rely on in future litigation. If few courts have had the chance to decide on these issues, then plaintiffs—likely with less resources than production companies—are left without a clear path forward on how to litigate their claims.

IV

QUITE THE SCANDAL, ACTUALLY: HOW REALITY TELEVISION PARTICIPANTS CAN FIGHT BACK

There have not been many legal victories for reality TV participants, and the strongest claims with the potential to bring negative publicity to production

¹⁴⁴ Rome Neal, *Hawk And Hatch: Getting Past It*, CBS NEWS (Mar. 4, 2004), <https://www.cbsnews.com/news/hawk-and-hatch-getting-past-it/> [https://perma.cc/99GV-B5Z4].

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See generally Mot. for Preliminary Approval of Class Action Settlement, Hartwell v. Kinetic Content, LLC, et al., No. 22STCV21223 (Cal. Super. Ct. May 8, 2024).

¹⁴⁸ *Id.* at 25.

¹⁴⁹ Hillel Aron, *‘Love Is Blind’ Cast Member Reaches \$1.4 Million Settlement With Netflix in Class Action Over Unpaid Wages*, COURTHOUSE NEWS SERVICE (May 10, 2024), <https://www.courthousenews.com/love-is-blind-cast-member-reaches-1-4-million-settlement-with-netflix-in-class-action-over-unpaid-wages/> [https://perma.cc/EH3M-DTJT].

¹⁵⁰ See, e.g., Espada, *supra* note 7 (A former contestant of *Big Brother* in France, Morgan Enselme, publicly criticized the production company for restricting her access to her prescribed antihistamines, which led to PTSD. “Enselme had sued the company and reached a legal settlement in 2016.”).

companies are settled out of court. As such, reality TV participants willing to risk their career may need to either make new legal arguments to have any hope of succeeding in courts or turn to political advocacy. The following addresses an innovative legal argument brought in Jeremy Hartwell's almost-settled lawsuit and policy suggestions.

A. *Independent Contractors or Employees?: A Case Study of Love Is Blind Participants*

One novel legal claim that has yet to be rejected by courts is whether reality TV participants are employees or independent contractors. This argument has been raised in Jeremy Hartwell's *Love is Blind* class action lawsuit against Kinetic Content (Kinetic), the show's production company. Hartwell alleged not only that he and the other cast members have been misclassified as independent contractors, but that as employees they were paid drastically below the California minimum wage standards.¹⁵¹ Generally, if someone is classified as an independent contractor, the employer is not required to comply with minimum wage and overtime laws.¹⁵² If an employer is found to have misclassified its employees as independent contractors, they face a plethora of legal consequences.¹⁵³

State and federal laws use different factors to determine whether someone is an employee or independent contractor. However, one commonality between these laws is that each employment relationship necessitates its own factual inquiry. How a company classifies a worker is irrelevant—what matters is each individual relationship between the worker and their hiring entity.¹⁵⁴ The following looks

¹⁵¹ Compl. ¶¶ 3-4, Hartwell v. Kinetic Content, LLC, et al., No. 22STCV21223 (Cal. Super. Ct. June 29, 2022).

¹⁵² Morgan E. Hedley & Michael A. Gamboli, *U.S. DOL Issues New Rule on Independent Contractor Classification, Returning to More Employee-Friendly Analysis*, PARTRIDGE SNOW & HAHN (Jan. 22, 2024), <https://www.psh.com/u-s-dept-labor-new-rule-on-independent-contractor-classification-under-flsa/> [<https://perma.cc/89TR-3JPX>].

¹⁵³ *Id.* (“As many employers know, a finding of misclassification can result in expensive penalties, such as unpaid overtime and minimum wage, liquidated damages and attorneys’ fees. If the IRS suspects an employer intentionally misclassified its employees, it can levy additional penalties for the misclassification, including criminal charges.”).

¹⁵⁴ *Myths About Misclassification: Myth #5*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/agencies/whd/flsa/misclassification/myths/detail#5> [<https://perma.cc/X54E-V9DZ>]; *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 962 (2018) (“It is well established, under all of the varied standards . . . that a business cannot unilaterally determine a worker’s status simply by assigning the worker the label

to Hartwell's *Love is Blind* lawsuit as a case study of how arguments about the employment status of reality TV participants may play out under both California law and federal law.¹⁵⁵

1. *California Labor Law*

Hartwell's lawsuit claims that under California law, *Love is Blind*'s production company, Kinetic, misclassified him and other class members as independent contractors.¹⁵⁶ Because of the recent settlement announcement,¹⁵⁷ the public may never know whether the California Superior Court (or an arbitrator¹⁵⁸) would have found merit to his claim; however, based on California's Assembly Bill 5 (AB5), Hartwell likely had a strong argument against Kinetic.

AB5, passed in 2019, codified a strict approach to employee classification, established in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (Cal. 2018).¹⁵⁹ In *Dynamex*, the California Supreme Court adopted the "ABC test" which presumes that workers are employees, unless the hiring entity can satisfy *all three* conditions:

- a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently

'independent contractor' or by requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor.'").

¹⁵⁵ The employment status of unscripted television participants could be its own note. As described above, the format and casting of reality TV shows vary greatly. *See generally supra* Part I. Each type of show and each type of participant deserves its own factual analysis. For the purposes of this note, the analysis is limited to potential arguments that participants from *Love is Blind* and their production company may use in litigation.

¹⁵⁶ Compl. ¶¶ 23-31, Hartwell v. Kinetic Content, LLC, et al., No. 22STCV21223 (Cal. Super. Ct. June 29, 2022).

¹⁵⁷ *See supra* notes 147-149 and accompanying text.

¹⁵⁸ Hartwell would likely have needed to survive a motion to compel arbitration in order to bring his wage and hour claim to court. *See* Joint Initial Status Conf. Statement at 3, Hartwell v. Kinetic Content, LLC, et al., No. 22STCV21223 (Cal. Super. Ct. Sept. 9, 2022). If the court ultimately compelled the parties to arbitrate, an arbitrator would have decided the issue of whether Hartwell and the class were misclassified as independent contractors.

¹⁵⁹ Cal. A.B. 5, ch. 296, Leg. Counsel's Digest (2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5 [<https://perma.cc/2V3V-DGCX>].

established trade, occupation, or business of the same nature as that involved in the work performed.¹⁶⁰

AB5 requires that California employers and courts apply the ABC test to determine “whether workers in California are employees or independent contractors for purposes of the Labor Code, the Unemployment Insurance Code, and the Industrial Welfare Commission (IWC) wage orders.”¹⁶¹ The law shifts the burden to the employer to prove that their worker is an independent contractor.¹⁶² In 2020, the California state legislature enacted two new statutes—Assembly Bills 170 and 2257 (AB 170 and AB 2257)—that established numerous exemptions to the application of the ABC test.¹⁶³ If a worker is exempted, the hiring entity-worker relationship is instead “governed by the multifactor test previously adopted in” *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (the *Borello* test).¹⁶⁴ The *Borello* test does not immediately absolve the hiring entity from liability, but it is less predictable than the ABC test because no one factor is determinative of the outcome.¹⁶⁵ Under the *Borello* test, employers and courts must consider “all potentially relevant factors on a case-by-case basis in light of the nature of the work, the overall arrangement between the parties and the purpose of the law.”¹⁶⁶ That said, neither AB 170 nor AB 2257 exempts reality TV

¹⁶⁰ *Dynamex*, 4 Cal. 5th at 955-56 (emphasis in original).

¹⁶¹ *Independent contractor versus employee*, STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, https://www.dir.ca.gov/dlse/faq_independentcontractor.htm [<https://perma.cc/2LSV-SM28>].

¹⁶² The previous law placed the burden on the worker to show that they were an employee of the hiring entity. See *S. G. Borello & Sons, Inc. v. Dep’t of Indust. Relations*, 48 Cal.3d 341 (Cal. 1989).

¹⁶³ See *Quinn v. LPL Fin. LLC*, 91 Cal. App. 5th 370, 375-76 (Cal. 2023) (referencing Assembly Bills 170 and 2257).

¹⁶⁴ Cal. A.B. 2257, ch. 38, Leg. Counsel’s Digest (2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257 [<https://perma.cc/8KQT-36M3>] (referencing *S. G. Borello & Sons*, 48 Cal.3d at 341). For detailed information about the *Borello* test, see STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, *supra* note 161 (Question 5: What is the Borello Test?).

¹⁶⁵ See Apalla U. Chopra, et al., *California Supreme Court Adopts ABC Employee Classification Test*, O’MELVENY & MYERS LLP (May 3, 2018), <https://www.omm.com/insights/alerts-publications/california-supreme-court-adopts-abc-employee-classification-test/> [<https://perma.cc/8FAX-SL9E>] (describing the ABC test set out in *Dynamex* as “more rigid and employee-friendly than the multifactor test developed in [*Borello*],” which had been “the common law method for determining employee status in California for nearly 30 years”).

¹⁶⁶ STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, *supra* note 161 (Question 6: How does the ABC test compare to the Borello test?). Some *Borello* factors include:

1. Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;

show participants from the ABC test.¹⁶⁷ AB 2257, for example, creates exemptions for certain entertainment industry occupations such as recording artists, vocalists, managers of recording artists, independent radio promoters, and others.¹⁶⁸ There is, however, no exemption for participants in reality TV.¹⁶⁹ Therefore, the relevant inquiry for analyzing whether reality TV cast members are independent contractors or employees is the more rigid ABC test. Under that test, *Love is Blind* participants would likely qualify as employees of the show's production company.

The first condition of the test is whether the worker is free from the control of the hiring entity.¹⁷⁰ Kinetic would argue that participants are free to leave the show whenever they please. *Love is Blind* is framed as a "social experiment," in which contestants find out whether love is, in fact, blind. Many participants choose to leave when they have not found a person to propose to.¹⁷¹ Even participants who find their match are free to leave the show and stop filming.¹⁷²

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2. Whether the work is a regular or integral part of the employer's business;
 3. Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;
 4. Whether the worker has invested in the business, such as in the equipment or materials required by their task;
 5. Whether the service provided requires a special skill.

Id. (Question 5: What is the Borello Test?).

¹⁶⁷ See Cal. A.B. 2257, ch. 38, Leg. Counsel's Digest (2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257 [<https://perma.cc/8KQT-36M3>] (codified at Cal. Lab. Code §2775 *et seq.*).

¹⁶⁸ See Cal. Lab. Code §2780(a)(1) (listing occupations exempted from the ABC test).

¹⁶⁹ See generally Cal. Lab. Code §2780. AB 2257 explicitly notes that "[f]ilm and television unit production crews . . . working on live or recorded performances for audiovisual works are *not* exempted from application of the ABC test." Cal. Lab. Code §2780(a)(2)(A).

¹⁷⁰ Cal. Lab. Code §2775(b)(1)(A).

¹⁷¹ Charlotte Walsh, *No, There Aren't Any Bathrooms in the Love Is Blind Pods*, TUDUM BY NETFLIX (Feb. 9, 2024), <https://www.netflix.com/tudum/articles/love-is-blind-pods> [<https://perma.cc/RZ2M-EBT2>] ("Producers will let singles know if someone's really interested in them, but it's ultimately up to the contestants if they'd like to pursue the relationship."); Goldstein, *supra* note 141 ("[The show's creator said] participants are always free to walk away from the show, like what has been done in the past with previous cast members.").

¹⁷² In season six, two out of the five couples decided to end their relationships and not finish filming the season. See Monica Mercuri, *Which Couples Got Married In 'Love Is Blind' Season 6? Here's Who's Still Together*, FORBES MEDIA (Mar. 6, 2024, 10:33 AM), <https://www.forbes.com/sites/monicamercuri/2024/03/06/which-couples-got-married-in-love-is-blind-season-6-heres-whos-still-together/?sh=156ece382f83> [<https://perma.cc/LU85-9KLC>].

However, this argument is unlikely to succeed because of the producers' high level of involvement with the contestants. For example, the producers allegedly shuffle participants between hotel rooms and the set of the show for the first portion of the season.¹⁷³ Throughout their time in the pods,¹⁷⁴ former participants have noted that producers take their passport, keys, wallet, and cellphone.¹⁷⁵ To continue filming the show and potentially find a love-interest, participants are not free from the control and direction of the production company. If anything, they are often pressured to stay and film with the threat of legal action.¹⁷⁶ Participants also do not have control over the prices they set for themselves because they do not negotiate with Kinetic and they are bound to the consideration within the contract they sign.¹⁷⁷ Additionally, even after filming ends, Kinetic requires contestants to follow certain conditions before the show airs. For example, if a couple ultimately marries on the show, they are not allowed to wear their wedding rings until the show finishes airing.¹⁷⁸ Or if a couple marries on the show but seeks to divorce, they must wait a specific time period before publicly filing any divorce documents.¹⁷⁹ The control Kinetic has over its participants lasts many months after filming.

Kinetic would also likely fail the second condition of the ABC test. The second condition requires that the worker perform work outside the usual course

¹⁷³ Sarah Hearon, *'Love Is Blind' Rules: How Dates Are Set Up in the Pods, Wedding Budgets and More*, *Us WEEKLY* (Apr. 14, 2023), <https://www.usmagazine.com/entertainment/pictures/love-is-blind-rules-of-the-pods-weddings-and-more/> [<https://perma.cc/5545-L2E2>].

¹⁷⁴ Pods are "fairly small rooms, each outfitted with a couch, a rug and a shimmering blue wall that's shared with another pod. Contestants can hear, but not see, one another as they fall in love." Walsh, *supra* note 23.

¹⁷⁵ Compl. ¶ 25, *Hartwell v. Kinetic Content, LLC, et al.*, No. 22STCV21223 (Cal. Super. Ct. June 29, 2022); Compl. ¶ 17, *Poche v. Delirium TV, LLC, et al.*, No. 24STCV00088 (Cal. Super. Ct. Jan. 2, 2024).

¹⁷⁶ *See Poche Aff.* ¶¶ 7, 9, *Poche v. Delirium TV, LLC, et al.*, No. 24STCV00088 (Cal. Super. Ct. Jan. 16, 2024) ("Delirium also made it clear that I would subject myself to legal action if I discontinued my participation in the Program or otherwise refused to move forward with the engagement.").

¹⁷⁷ *Id.* ¶ 5.

¹⁷⁸ *See Poche Compl. Ex. A (Talent Agreement)* ¶ 37(d), *Poche v. Delirium TV, LLC, et al.*, No. 24STCV00088 (Cal. Super. Ct. Jan. 2, 2024) ("[I]n the event that my Partner and I marry, then continuing through the initial broadcast of the last episode in which I appear, I will not wear my wedding ring on my wedding finger and shall maintain confidentiality regarding our relationship status, to stay married or to divorce.").

¹⁷⁹ *See id.* ("[I]f I and/or my fiancé/Partner marry and then elect to divorce, I agree that I will not file, initiate or otherwise start any divorce proceedings or any other legal proceedings against my Partner concerning the termination of or validity of, our marriage, until the initial broadcast of the last episode in which I appear, or eleven (11) months following the wedding date, whichever is later.").

of the hiring entity's business.¹⁸⁰ The goal of this condition is "to bring within the 'employee' category all individuals ... who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor."¹⁸¹ In *Dynamex*, the Court compared a retail store that "hires an outside plumber to repair a leak" on the premises to "a clothing manufacturing company [that] hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company."¹⁸² The former scenario involved an independent contractor—a plumber who has her own independent business that is separate from the retail store; the latter involved employees—seamstresses who were intimately entangled with the clothing business.¹⁸³ *Love is Blind* participants (and likely most, if not all, reality show participants) are *essential* to the production company's business. Kinetic's usual course of business is making and producing reality TV shows. Without participants there would be no show to produce. The participants' work is thus completely intertwined with the company's usual course of business. Their work as participants in determining whether love is truly blind is just as necessary and involved as a seamstress's work making dresses for a clothing company using the fabric provided by the company.

As to the third condition, the hiring entity has the burden to establish that the worker is customarily engaged in an independently established trade, occupation, or business.¹⁸⁴ Kinetic would have to demonstrate that being a reality TV participant is something that cast members do on their own, without the show. This argument, however, would likely fail. It would be nearly impossible for Kinetic to argue that first-time reality TV cast members, such as Jeremy Hartwell, are independently established reality TV stars. The premise of the show asks whether typical, single people can find love blindly. In fact, as part of the publicity for each season, participants are introduced with their occupations, which are clearly separate from their participation on the show.¹⁸⁵ Additionally, the show's co-

¹⁸⁰ Cal. Lab. Code §2775(b)(1)(B).

¹⁸¹ *Dynamex*, 4 Cal. 5th at 959.

¹⁸² *Id.* at 959-60.

¹⁸³ *Id.*

¹⁸⁴ Cal. Lab. Code §2775(b)(1)(C).

¹⁸⁵ Cole Delbyck, *The Love Is Blind Season 6 Cast: Meet Your New Pod Squad*, TUDUM BY NETFLIX (Mar. 6, 2024), <https://www.netflix.com/tudum/articles/love-is-blind-season-6-cast-instagram> [<https://perma.cc/U83W-ZVMH>].

hosts have condemned the idea that cast members should find fame through their participation.¹⁸⁶ In other words, *Love is Blind* does *not* want its participants to have independent careers rooted in reality TV.

All three conditions of the ABC test will likely pose difficult hurdles for Kinetic. And as explained, the hiring entity must satisfy all three conditions to successfully classify a worker as an independent contractor. Of course, the ABC test is a fact-specific inquiry and each reality TV show and cast member would require its own analysis. However, if Hartwell had successfully demonstrated that *Love is Blind* participants are employees, his class action lawsuit could have set the stage for a dramatic wave of legal actions. While some people do not want to risk their careers as influencers, if there is a legal theory that works, it is possible that other discontented participants will want a bite of that apple.

2. *Federal Labor Law*

In January 2024, the United States Department of Labor (DOL) published a final rule that defined an “independent contractor” under the Fair Labor Standards Act (FLSA).¹⁸⁷ The rule calls for the “economic realities test” to assess employment status.¹⁸⁸ The FLSA aims to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”¹⁸⁹ The Act requires that covered employers maintain certain records regarding employees and pay their nonexempt employees “at least the Federal minimum wage for all hours worked and at least one and one-half times the employee’s regular rate of pay for every hour worked over 40 in a workweek.”¹⁹⁰ However, similar to California law, not all workers are considered employees for purposes of the FLSA. Instead, “work must take place

¹⁸⁶ See *Love is Blind*, Season 6, Episode 13, 0:38:41-0:39:22, NETFLIX (Mar. 13, 2024) <https://www.netflix.com/watch/81741342?trackId=255824129> [archival link omitted] (last visited May 15, 2024). (Co-host Nick Lachey explaining: “We do not want people to come here motivated by fame. That’s not what this is about.”).

¹⁸⁷ Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1638 (Jan. 10, 2024) (codified at 29 C.F.R. pts. 780, 788, 795).

¹⁸⁸ *Id.*

¹⁸⁹ 29 U.S.C. §202(a).

¹⁹⁰ Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. at 1638.

within an employment relationship.”¹⁹¹ The FLSA does not define what constitutes an employment relationship. The DOL rule adopts a six-factor test to fill that gap:

[1] opportunity for profit or loss depending on managerial skill, [2] investments by the worker and the potential employer, [3] the degree of permanence of the work relationship, [4] the nature and degree of control, [5] the extent to which the work performed is an integral part of the potential employer’s business, and [6] skill and initiative. . . . [A]dditional factors may also be considered if they are relevant to the overall question of economic dependence.¹⁹²

The rule looks to the totality of the circumstances.¹⁹³ Factors two, three, four, and five, are most related to the reality TV employment dynamic, and depending on the show and participant, a court may weigh these factors differently. In connection with *Love is Blind*, while the inquiry is less certain than California’s ABC test because different factors favor each side, most factors still favor employee status for *Love is Blind* participants. Below is a high-level analysis of arguments that both Kinetic and Hartwell could make regarding the relevant factors.¹⁹⁴

Starting with factor two, Hartwell has the stronger argument that he is an employee. According to the DOL regulations, this factor considers whether “investments by a worker are capital or entrepreneurial in nature.”¹⁹⁵ Additionally, “the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently.”¹⁹⁶ Hartwell could argue that he never contributed capital or entrepreneurial investments in his endeavor to appear on the show. Kinetic, he could point out, naturally invests heavily in the recruitment and editing of the cast members. Kinetic provides the

¹⁹¹ Kimberlianne Podlas, *Does Exploiting a Child Amount to Employing a Child? The FLSA’s Child Labor Provisions and Children on Reality Television*, 17 UCLA L. REV. 39, 51 (2010) (citing *Goldberg v. Whitaker House Coop.*, 366 U.S. 33 (1961)).

¹⁹² Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. at 1640.

¹⁹³ *Id.*

¹⁹⁴ Although Hartwell did not allege that Kinetic violated the FLSA in his complaint, see generally Compl., *Hartwell v. Kinetic Content, LLC, et al.*, No. 22STCV21223 (Cal. Super. Ct. June 29, 2022), this note still provides an analysis of federal law regarding whether *Love is Blind* participants are considered employees.

¹⁹⁵ 29 C.F.R. §795.110(b)(2).

¹⁹⁶ *Id.*

initial set for the pods; the cameras used for shooting; and the “wrangler” who ensures that the contestants do not talk to others.¹⁹⁷ The only investment that contestants of *Love is Blind* are required to make relate to their travel expenses within their hometown.¹⁹⁸ Gas money is far from the type of capital investment the Rule calls for.¹⁹⁹

Factor three—the degree of permanence of the work relationship—likely weighs in favor of Kinetic and would be its strongest argument. The DOL rule explains that “general characteristics historically identified by courts and the Department . . . indicate employee status where there is a longer-term, continuous, or indefinite work relationship, and independent contractor status where the work is definite in duration, nonexclusive, project-based, or sporadic due to the worker being in business for themselves.”²⁰⁰

Kinetic would argue that the participants are independent contractors because their work is temporary in nature. The show rotates its cast every year and seeks new people for each season. The company hires participants for the one season that they are on, making the relationship temporary. The work is definite in duration because the contract makes clear the length of time participants are filmed is eight weeks.²⁰¹ Kinetic would also argue that the work is non-exclusive because filming *Love is Blind* does not preclude participants from working in their day job. On the show, once remaining engaged participants are out of the pod setting, they go back home to experience what life would be like with their partner.²⁰² During this time,

¹⁹⁷ See Poche Aff. ¶ 6, Poche v. Delirium TV, LLC, et al., No. 24STCV00088 (Cal. Super. Ct. Jan. 16, 2024).

¹⁹⁸ See *id.* ¶ 7.

¹⁹⁹ See Employee or Independent Contractor Classification Under the Fair Labor Standards Act, *supra* note 187, at 1681 (quoting *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1236 (10th Cir. 2018) (“[T]he relevant ‘investment’ is ‘the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself.’”)).

²⁰⁰ *Id.*

²⁰¹ See Poche Compl. Ex. A (Talent Agreement) ¶ 1(g), Poche v. Delirium TV, LLC, et al., No. 24STCV00088 (Cal. Super. Ct. Jan. 2, 2024) (“I will be available for the Program’s production dates, tentatively scheduled to last for a total of approximately eight (8) weeks at times to be determined at a later date by Producer in its sole discretion[.]”).

²⁰² Meredith Woerner, *How Netflix’s New Reality Series ‘Love Is Blind’ Works*, VARIETY (Feb. 14, 2020, 6:16 PM), <https://variety.com/2020/tv/news/netflix-love-is-blind-pods-rules-1203504741/> [<https://perma.cc/X6UK-U52F>].

they go about their typical day, which includes going to work.²⁰³ Additionally, Kinetic could argue that at the very least, the contestants who leave the show early due to a lack of connection are independent contractors because they are filming for an even briefer amount of time than the contestants who make it to the end of the show.²⁰⁴

Hartwell could counter that the Rule qualifies this permanence factor by stating that where the “operational characteristics . . . are unique or intrinsic” to the business, the factor does not necessarily weigh in favor of independent contractor status, “unless the worker is exercising their own independent business initiative.”²⁰⁵ In other words, the temporary nature of *Love is Blind* is intrinsic to Kinetic’s business, and therefore a court should look only to whether the participants are “exercising their own independent business initiative.”

Factor four touches on the nature and degree of control, which aligns with the first condition of California’s ABC test.²⁰⁶ As explained above, this factor likely favors Hartwell and other *Love is Blind* participants as being employees because of the immense control that production has over contestants’ time both during and after filming.²⁰⁷

Finally, factor five looks to whether the work performed “is critical, necessary, or central to the potential employer’s principal business.”²⁰⁸ This factor likely weighs in favor of employee status for Hartwell because the work performed by the contestants is essential to Kinetic’s goals as a business. Production companies

²⁰³ The *Love is Blind* participants often refer to working when they are home with their partner. *See, e.g., Love is Blind*, Season 6, Episode 8, at 00:17:47-00:17:59, NETFLIX (Feb. 21, 2024), <https://www.netflix.com/watch/81692465?trackId=200257859> [archival link omitted] (last visited May 24, 2024) (“My boss told me that I was irreplaceable today.”).

²⁰⁴ Hartwell, for example, filmed for four days. Emily Longeretta, ‘*Love Is Blind*’ Creator Confronts Cast Members’ Allegations, From Ignoring Mental Health to Lack of Food and Water on Set, VARIETY (Sept. 27, 2023, 11:45 AM), <https://variety.com/2023/tv/news/love-is-blind-lawsuit-allegations-danielle-ruhl-interview-1235734836/> [<https://perma.cc/8JPY-HG3B>].

²⁰⁵ 29 C.F.R. §795.110(b)(3).

²⁰⁶ *See Dynamex*, 4 Cal. 5th at 955 (“(a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact.”).

²⁰⁷ *See supra* notes 170-179 and accompanying text (outlining the arguments for the first factor of California’s ABC test).

²⁰⁸ 29 C.F.R. §795.110(b)(5).

are tasked with creating, filming, and airing shows that viewers want to watch. Without the reality TV participants, there is no show to film, to air, or to watch.

The DOL rule went into effect March 11, 2024.²⁰⁹ It is yet to be seen first, how reality TV employers respond to the new rule, if at all; and second, how courts will balance these factors. Hartwell’s lawsuit does not raise FLSA issues, and there are no other wage-related reality TV lawsuits currently in litigation. If courts ultimately interpret the rule more favorably towards hiring entities generally, reality TV cast members may be even less likely to bring a lawsuit given their hesitancy to initiate litigation in the first place. On the other hand, if courts interpret the rule favoring employee status, production companies may feel the need to reevaluate their payment structure.

B. Taking Matters Out of the Courtroom: Potential Legislative Initiatives

As of now, courts have not provided adequate redress for the unique issues that impact reality TV participants. Besides direct legal action, another solution is to advocate for policy changes at the state and federal levels. Activists—whether it be former reality TV participants, producers, or the average viewer—could push for laws that provide better protection for reality TV stars related to their pay and legal rights generally.

Regarding wages, at the federal level, activists could push for a federal version of California’s AB5. Although the current recognized test—the economic realities test—is more employee-friendly than the previous DOL rule,²¹⁰ a federal law that mimics AB5 could solidify that outcome. The FLSA is silent on the definition of employee.²¹¹ Congress could amend the FLSA to ensure that its definition of employees and employers is no longer circular. It could codify the ABC test, and place the burden on the hiring entity to prove that their workers are independent contractors. Activists could also push for labor laws like AB5 at the state and local

²⁰⁹ Employee or Independent Contractor Classification Under the Fair Labor Standards Act, *supra* note 187.

²¹⁰ See Hedley & Gamboli, *supra* note 152 (“In January 2021, under the Trump Administration, the DOL finalized a formal rule (the ‘2021 Rule’) for the first time. This rule consisted of a more employer-friendly five-factor test, focusing on two ‘core’ factors: the principal’s right to control and the worker’s opportunity for profit or loss.”).

²¹¹ See Fair Labor Standards Act of 1938 (29 U.S.C. §201 *et seq.*); Hedley & Gamboli, *supra* note 152 (“[T]he FLSA itself is silent on how to distinguish an employee from an independent contractor and, until 2021, the DOL had not defined ‘independent contractor’ by regulation.”).

level, so that participants have increased protection from production companies not based in California.

Another policy focus could center around changing the mandatory arbitration clauses within the contracts. Since 2011, members of Congress have introduced legislation that eliminates pre-dispute mandatory arbitration clauses in employment, consumer, and civil rights cases.²¹² The most recent attempt was in 2023, when Congressman Hank Johnson and Senator Richard Blumenthal introduced The Forced Arbitration Injustice Repeal Act, “the FAIR Act” in Congress.²¹³ The bill has yet to make it through committee.²¹⁴ Previous attempts have failed mainly because of lobbying efforts from a variety of big businesses.²¹⁵ It seems to be an uphill battle to eliminate pre-dispute arbitration, but reality TV participants can be another set of voices to rally behind the next iteration of the FAIR Act.

CONCLUSION

The legal and social landscape of reality TV leaves participants who have suffered from low pay, unsafe working conditions, or sexual harassment, without much legal recourse. It is difficult to point to one societal or legal reason that can explain why we do not see many court cases from reality TV participants, but the difference in power between the behemoth production companies and the semi-anonymous cast members seems to be the common denominator.

²¹² See Nessim & Goldman, *supra* note 96, at 252 (“Senator Al Franken introduced a bill in 2011 and 2013 that would prohibit all pre-dispute arbitration agreements ‘if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.’”) (quoting Arbitration Fairness Act of 2013, S.878, 113th Cong. (2013)). The most recent iteration of the proposed law includes independent contractors as falling under the “employment” category. See Forced Arbitration Injustice Repeal Act, S.1376, 118th Cong. §501(4)(A) (2023).

²¹³ See Forced Arbitration Injustice Repeal Act, S.1376, 118th Cong. §501(4)(A) (2023); Mark J. Levin & Alan S. Kaplinsky, *Arbitration “Fair Act” reintroduced in Congress*, BALLARD SPAHR LLP (May 11, 2023), <https://www.consumerfinancemonitor.com/2023/05/11/arbitration-fair-act-reintroduced-in-congress/> [<https://perma.cc/66TC-NMH2>].

²¹⁴ According to govtrack.us, the law has a 5% chance of being enacted. Govtrack.us, <https://www.govtrack.us/congress/bills/118/s1376> [<https://perma.cc/Y8TG-9MZP>].

²¹⁵ Nessim & Goldman, *supra* note 96, at 253 (“Business interests, such as the wireless trade group CTIA and the Financial Services Roundtable, an advocacy organization for the U.S. financial services industry, oppose the bill as ‘a misguided effort to overturn a well-reasoned U.S. Supreme Court decision.’”).

While individually it may be difficult to secure a legal win, there is strength in numbers. *Love is Blind* alums Jeremy Hartwell and Nick Thompson, who have both spoken critically of the show as discussed above, launched the Unscripted Cast Advocacy Network—an “organization that provides mental and legal support to past, present and future reality TV stars with the help of volunteer lawyers and psychologists.”²¹⁶ They have heard from at least fifty participants from a variety of reality shows interested in joining the network.²¹⁷ And in the wake of the WGA and SAG-AFTRA strikes in 2023, Bethenny Frankel—a major reality TV personality who got her start on *The Real Housewives of New York*—has become a vocal proponent for unionizing reality TV participants.²¹⁸ What Frankel has dubbed as the “reality reckoning”²¹⁹ has gained traction. Frankel’s attorneys, Bryan Freedman and Mark Geragos, sent a litigation hold letter to NBCUniversal in 2023 accusing the company of having a “pattern and practice of grotesque and depraved mistreatment of the reality stars and crewmembers.”²²⁰ Those same attorneys have gathered a reality TV cohort as their clients, representing participants from *Love is Blind*, *Vanderpump Rules*, and *The Real Housewives of Beverly Hills*.²²¹

²¹⁶ Espada, *supra* note 7.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ See Bethenny Frankel (@bethennyfrankel), INSTAGRAM (July 21, 2023), https://www.instagram.com/p/Cu-BiXZJO_w/ [archival link omitted] (last visited May 28, 2024).

²²⁰ Ashley Cullins, *NBCUniversal Accused of “Grotesque and Depraved Mistreatment” on Reality TV Series*, THE HOLLYWOOD REPORTER (Aug. 4, 2023 11:02AM), <https://www.hollywoodreporter.com/tv/tv-news/nbcuniversal-grotesque-depraved-mistreatment-reality-tv-lawyer-letter-1235551194/> [<https://perma.cc/94MS-L64V>].

²²¹ See Siegel, *supra* note 124 (“[*Love is Blind*’s Renee] Poche is fighting back with the help of Hollywood power lawyers Bryan Freedman and Mark Geragos and has filed an explosive suit against Netflix and Delirium.”); Dominic Patten, “*Cesspool*”: ‘*Vanderpump Rules*’ Vet Faith Stowers Sues NBCUniversal, Bravo & Producers For Racist Harassment & Retaliation, DEADLINE (Apr. 5, 2024 11:17AM), <https://deadline.com/2024/04/vanderpump-rules-faith-stowers-lawsuit-bravo-1235876900/> [<https://perma.cc/2AYC-CGFE>] (“[*Vanderpump Rules*’ Faith] Stowers’ legal action is being helmed by attorneys Bryan Freedman and Mark Geragos.”); Eileen Reslen, *Brandi Glanville’s Lawyers Blast Andy Cohen’s Claim that ‘Sexual Harassment’ Video Was a ‘Joke’*, PAGESIX (Feb. 23, 2024, 3:11PM), <https://pagesix.com/2024/02/23/entertainment/brandi-glanvilles-lawyer-blasts-andy-cohens-claim-that-sexual-harassment-video-was-a-joke/> [<https://perma.cc/UDQ3-WF6L>] (“[*The Real Housewives of Beverly Hills*’ Brandi] Glanville has not yet filed her own lawsuit against network executives, but her attorneys [Geragos and Freedman] mentioned ... that they are considering pursuing legal action” against NBCUniversal).

As more voices within the industry speak out, the more production companies may feel pressured to make changes. Frankel, Hartwell, and Thompson could be the white knights that reality TV participants have needed—but that is still to be seen.