REALITY PORN

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Prostitution is illegal while pornography is constitutionally protected. Modern technology, however, is complicating the relationship between prostitution and pornography. Recent technological advances make the creation and distribution of recorded material more accessible. Within our smart phones we carry agile distribution networks as well as the technical equipment required to produce low-budget films. Today, sex workers may be paid to engage in sexual activities as part of performances that are recorded and broadcast to a public audience. No longer confined to the pornography industry, this form of sexual performance can be created by anyone with a cell phone and access to the internet. In addition, modern popular culture recognizes the expressive value of reality and ordinary life. Technological advances will only continue to make broadcasting and sharing everyday life possible, raising the possibility that there will be a growing audience for, and communities organized around, sexually expressive materials online. This Article is the first to analyze this increasingly important and common phenomenon that it defines as reality porn. It argues that reality porn is pornographic paid sex work that should be accorded First Amendment recognition, notwithstanding the criminalization of the underlying act of prostitution. This Article redefines pornography and provides a framework for analyzing this sexual expression. As long as the conduct is consentable—both consented to in fact and consensual in nature—it should not be deprived of constitutional protection.

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Introduction

Imagine that a Silicon Valley technology company has developed a mobile application that allows customers to live broadcast sexual encounters to the internet.[1] While other companies have developed web cameras that broadcast sexual experiences to online audiences,[2] this application has the unique feature of allowing users to blur their faces and create graphic renderings that enhance the viewing experience for users. The facial adaptation feature is similar to the animal

[1] This is a hypothetical of the author's creation based on virtual reality games and virtual sex games that already exist. *See, e.g.*, Matt Richtel, *Intimacy on the Web, with a Crowd*, N.Y. Times (Sept. 21, 2013), https://www.nytimes.com/2013/09/22/technology/intimacy-on-the-web-with-a-crowd.html; Dana Dovey, *New, Creepy Porn App Lets You Paste Anyone's Face on the Star's Body*, Newsweek (Jan. 26, 2018), https://www.newsweek.com/deepfakes-fake-app-reddit-pornography-792053.

[2] Virtual reality hardware, such as the Oculus Rift, already allows users to interact with sexual content, including engagements with other live users as well as engagements with previously-recorded pornographic material with professional actors. *See* Wheeler Winston Dixon, *Slaves of Vision: The Virtual Reality World of Oculus Rift*, 33 Q. Rev. Film & Video 501 (2016); *see also* Edward Castronova, *Fertility and Virtual Reality*, 66 Wash. & Lee L. Rev. 1085, 1089 (2009) ("VR makes erotic pursuits ever more satisfying. . . . VR makes visual and auditory sensations better, in the sense of both realism and fantasy. . . . VR improves tactile sensations as well: Controllers vibrate and move in synch with visual and auditory sensations.").

and cartoon facial filters that occur when using the Snapchat mobile application, but instead renders faces completely unrecognizable.[3] This feature ensures that users of the application remain anonymous while engaging in consensual sexual acts that are broadcast to online viewers.

Let us now imagine that a significant portion of the application's consumers use the application to broadcast encounters between themselves and sex workers. They aim to avoid prosecution under prostitution statutes, anticipating that the broadcasting of these experiences will transform prostitution transactions into artistic expressions of sexual speech that are protectable under the First Amendment. These users, called gamers, pay a monthly subscription fee that allows for a set number of encounters each month. The "sex workers"[4] are treated as premium users and are awarded reward coins that are redeemable for cash after each transaction they complete. Should these transactions between gamers and premium users be treated as protectable expression, or as illegal acts of prostitution? Can prostitution become pornography?[5]

These questions are becoming increasingly relevant as the potential for interactive sexual experiences online expands. For example, OnlyFans is a subscription-based website that allows content creators to share sexually explicit materials with their fans, after engaging in direct messages and other interactions, for a fee. The popularity of the website has dramatically expanded during the COVID-19 pandemic.[6]

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[3] According to the mobile application description available on the iTunes applications website, "Snapchat is the most fun way to share the moment! . . . Change the way you look, dance with your 3D Bitmoji, and even play games with your face!" *iTunes Preview: Snapchat*, APPLE, https://itunes.apple.com/us/app/snapchat/id447188370?mt=8 (last visited May 18, 2021).

[4] The word "prostitution" carries social baggage that sex work advocates sought to offload through the adoption of the term "sex work." Carol Leigh coined the term "sex worker" in 1978 to "create an atmosphere of tolerance within and outside of the women's movement for women working in the sex industry." JILL MCCRACKEN, STREET SEX WORKERS' DISCOURSE: REALIZING MATERIAL CHANGE THROUGH AGENTIAL CHOICE 100 (2013). Similarly, I have adopted this term when referring to the labor activities of these individuals to reduce the stigmatization associated with this work when treated as an individual's identity. I use the word "prostitute" and "prostitution" to represent the criminal offense of prostitution and to clearly distinguish the criminal offense of prostitution from other forms of sex work.

[5] *See* Anders Kaye, *Why Pornography Is Not Prostitution: Folk Theories of Sexuality in the Law of Vice*, 60 ST. LOUIS U. L.J. 243, 247 (2016) (arguing that the distinction between pornography and prostitution is "rooted in a complex of cultural attitudes about sex, and especially in cultural anxieties about the imagined ways in which sex may taint or corrupt men").

[6] *See* Natalie Jarvey, *How OnlyFans Has Become Hollywood's Risque Pandemic Side Hustle*, HOLLYWOOD REP. (Dec. 11, 2020), https://www.hollywoodreporter.com/news/how-onlyfans-has-become-hollywoods-risque-pandemic-side-hustle ("OnlyFans has grown from

Several celebrities have joined the website and have been paid for sharing sexually explicit materials and online experiences with their audiences.[7] OnlyFans allows consumers to pay for live sexual interactions and sexually explicit materials, complicating how we define pornography and prostitution.

This Article defines this emerging category of sexually explicit content as reality porn. Reality porn refers to sexually explicit materials or experiences that are facilitated through online virtual platforms. These platforms are different from prior technologies because they facilitate the easy distribution of sexually explicit materials; create a space for interactive discussion and engagement with the materials; facilitate payment between the content creator and the consumer; and foster each creator's expressive voice while allowing for interactions between creators and consumers through online forums and discussions. Reality porn refers to sexual experiences that fit within the legal definition of prostitution in most states because they involve sexual conduct in exchange for a fee[8]—but that are expressive in nature. The sharing of material with an interactive, online audience distinguishes reality porn from these states' definitions of prostitution. Technology allows voyeurs to observe sexual conduct in ways that would otherwise be much less feasible. The presence of an audience is not merely a distinction without a difference; it is significant given the Supreme Court's First Amendment jurisprudence, which has noted that the presence of an audience demonstrates an intent to be expressive.[9] Reality porn is also distinct from pornography because the consumer of reality porn is paying for sexual gratification: they may provide direct payments to the content creator and make specific requests. Sexual gratification has been a key method for distinguishing pornography from prostitution.[10] Reality porn is a form of pornographic paid sex work that frustrates the distinction between prostitution and pornography.

The line between prostitution and pornography is important because prostitution is illegal, while pornography is constitutionally

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five creators when it launched in 2016 to more than 1 million today, over 100 of whom make at least $1 million annually on the platform. Since May [2020], its audience has jumped from 30 million users to 85 million users.").

[7] *See* Canela López & Kat Tenbarge, *Michael B. Jordan and 15 Other Celebrities Who Have Made OnlyFans Pages*, INSIDER (Nov. 26, 2020), https://www.insider.com/blac-chyna-and-celebrities-who-have-made-onlyfans-profiles-2020-5 (listing several celebrities who have joined the OnlyFans platform).

[8] *See infra* note 141 (collecting state prostitution statutes).

[9] *See infra* notes 77–78 (discussing the relevance of an actual or hypothetical audience to First Amendment doctrine).

[10] *See infra* Section I.D.

protected. The distinction between prostitution and pornography has always been fraught. Some feminists argue that pornography and prostitution are essentially the same thing—the commodification of sex—and that both should be criminalized.[11] By contrast, I have previously argued that all forms of sex work should be decriminalized,[12] an argument that I now extend to reality porn. While it may seem that these two acts are more similar than dissimilar, First Amendment doctrine protects one but not the other. Recent technological advances, which make the creation and distribution of recorded material more accessible, coupled with the current cultural environment, which recognizes the expressive potential of ordinary life—including sex—require that we reexamine how we draw the line between pornography and prostitution.

Cellular phones function as mobile film equipment and have the ability to transform the occurrences of everyday life into forms of expression.[13] Within our smart phones we carry agile distribution networks and audiences through various social media applications, as well as the technical equipment required to produce low-budget films.[14] Technological advances will only continue to make broadcasting and sharing everyday life, including sexual conduct, more accessible. No longer confined to the pornography industry, this form of sexual performance can be created by anyone with a cell phone and access to the internet. The regulation of technology, sexuality, and online communities will only continue to grow in importance as scholars grapple with how to regulate sex robots,[15] sex that occurs in

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[11] *See infra* note 351 and accompanying text.

[12] *See* I. India Thusi, *Radical Feminist Harms on Sex Workers*, 22 LEWIS & CLARK L. REV. 185 (2018) [hereinafter Thusi, *Radical Feminist Harms*].

[13] *Cf.* Max R.C. Schleser, *Collaborative Mobile Phone Filmmaking* (discussing the potential for filmmaking on cellular phones to enhance collaboration between the filmmaker and the audience), *in* HANDBOOK OF PARTICIPATORY VIDEO 339, 339, 344 (E-J Milne et al. eds., 2012). *But see, e.g.*, Mary Anne Franks, *The Desert of the Unreal: Inequality in Virtual and Augmented Reality*, 51 U.C. DAVIS L. REV. 499, 527 (2017) (outlining the risks and equality concerns presented by the spread of augmented reality applications).

[14] *See* WILSON DIZARD JR., MEGANET: HOW THE GLOBAL COMMUNICATIONS NETWORK WILL CONNECT EVERYONE ON EARTH 16 (Westview Press, Inc., 1997) (describing the potential of global communication networks to facilitate communication across the global communities). "Technology is largely responsible for defining a new generation: 'Generation Txt.' . . . [A]pproximately seventy-nine percent, or roughly seventeen million teens have mobile devices, and contribute one hundred billion dollars annually to the wireless consumer market." Amanda M. Hiffa, *Omg Txt Pix Plz: The Phenomenon of Sexting and the Constitutional Battle of Protecting Minors from Their Own Devices*, 61 SYRACUSE L. REV. 499, 503 (2011).

[15] *See* Jeannie Suk Gersen, *Sex Lex Machina: Intimacy and Artificial Intelligence*, 119 COLUM. L. REV. 1793, 1795 (2019) ("[T]he widespread use of sex robots would create

virtual worlds,[16] online communities,[17] and the right to sexual pleasure as a general matter.[18] This Article is the first to analyze the increasingly important and common ways that technology is blurring the line between prostitution and pornography.[19]

This Article argues that pornographic paid sex work is a form of protected expression that should be accorded First Amendment recognition, notwithstanding the criminalization of the underlying act of prostitution. The prostitution statutes in many states, which criminalize paying for "sexual conduct" for sexual gratification, are rendered both overbroad and vague because of evolving technology. Changes in technology facilitate inexpensive and convenient forums for community discussion and engagement, and they allow for new ways of engaging in sexual interactions. Content creators (sex workers) may receive direct requests from their audiences (consumers) to engage in sexual conduct by themselves or with others for the sexual gratification of the consumers and themselves. Sex workers who arrange virtual reality dates with clients are also engaged in sexual conduct for sexual gratification, although their activities are non-tactile. Presumably, these acts fall within the ambit of the broad language in most prostitution statutes. These scenarios amplify the fraught relationship between prostitution and pornography, which will only become more ambiguous as technology evolves. In light of this

concerns that cut across the realms of work and home, the public and the private, the commercial and the personal.").

[16] *See* Robin Fretwell Wilson, *Sex Play in Virtual Worlds*, 66 WASH. & LEE L. REV. 1127, 1134 (2009) (examining the challenges of regulating virtual sex that involves minors).

[17] *See* John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1103 (2013) ("Online groups mediate many of our daily life activities. They sustain relationships that would be difficult or impossible to form offline.").

[18] *See* Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 90 (2014) ("Sexual pleasure is a good thing. . . . Yet several areas of law central to how we experience sex and sexual pleasure assume just the opposite—that sexual pleasure in itself has negligible value and we sacrifice nothing of importance when our laws circumscribe it.").

[19] While this is the first Article to examine the role of technology in transforming prostitution into pornography, other articles have considered the legal problems that "virtual vice" may create. *See, e.g.*, D. James Nahikian, *Learning to Love "The Ultimate Peripheral" - Virtual Vices like "Cyberprostitution" Suggest A New Paradigm to Regulate Online Expression*, 14 J. COMPUTER & INFO. L. 779 (1996) (discussing the need for a normative framework for analysis of "virtual vices"); *id.* at 783 ("Cyberprostitution does not fit present case law or statutory conceptions of real, physically-based crimes like prostitution. Nor can cyberprostitution communications necessarily be categorized under a constitutional analysis as either obscene or indecent expression, due in part to the inherently private nature of the transaction between cyberprostitutes and their customers."). Professor Anders Kaye has examined the ways in which the line between pornography and prostitution has always been fraught. *See* Kaye, *supra* note 5, at 261. This Article is distinct in examining how technology exacerbates the already nebulous line between prostitution and pornography by facilitating new modes for communication, collaboration, and interactivity.

ambiguity, it is preferable to recognize and protect the sexual expression that is present in these interactions, rather than permit regulators to criminalize and prohibit them.[20] Instead, these forms of sexual expression should be entitled to constitutional protections with some limits. As long as the conduct is consentable[21]—both consented to in fact and consensual in nature—it should not be deprived of constitutional protection.

This finding is significant because the line between pornography and prostitution carries both legal and social significance. Labeling sexual acts as pornography rather than prostitution alters their legal status.[22] Pornography enjoys an important legal distinction from prostitution: it is often legally permissible, unlike prostitution in most places in the United States.[23] There is a substantial pornography industry in California that is able to operate as many other regulated industries do.[24] The Supreme Court has recognized that pornography is entitled to legal protection under the First Amendment as long as it is not obscene.[25] Accordingly, government actors must survive a stringent standard of review in order to pass content-based limitations on pornographic speech.[26] Current national community values toward pornography are permissive. Pornography websites receive more

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[20] *See* I. India Thusi, *Harm, Sex, and Consequences*, 2019 UTAH L. REV. 159, 167 [hereinafter Thusi, *Harm, Sex, and Consequences*] (arguing that the criminalization of sexual vices often is as harmful as the vice itself).

[21] *See generally* NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS (2019) (discussing consent as a socially constructed and situated concept and arguing that the social conditions of consent are relevant to whether or not consent is present in a situation); *see also infra* Section IV.C (applying the concept of consentability to the reality porn context).

[22] *See* Roth v. United States, 354 U.S. 476, 489 (1957) (finding that non-obscene pornography is entitled to constitutional protection); *see also* Clay Calvert, *Regulating Sexual Images on the Web: Last Call for* Miller *Time, But New Issues Remain Untapped*, 23 HASTINGS COMMC'NS & ENT. L.J. 507, 524 (2001) ("In 1998, revenues for online pornography were $1 billion, and are estimated by a Standard & Poor's accounting report to grow to $3 billion by 2003. Cyber-porn star Danni Ashe alone brings in $7 million annually with her 'growing empire of adult entertainment.'").

[23] *See Roth*, 354 U.S. at 489 (protecting non-obscene pornography).

[24] *See* CAL. CODE REGS. tit. 8, § 5193; *Health and Safety in the Adult Film Industry*, CAL. DEP'T INDUS. REGULS. (June 2020), https://www.dir.ca.gov/dosh/adultfilmindustry.html (providing health guidelines for adult film performers); Melia Robinson, *How LA's 'Porn Valley' Became the Adult Entertainment Capital of the World*, BUS. INSIDER (Oct. 2, 2017), https://www.businessinsider.com.au/history-of-porn-valley-hugh-hefner-2017-9 (describing the influence of California's San Fernando Valley as a major producer of pornography).

[25] *See* Miller v. California, 413 U.S. 15, 36–37 (1973); *Roth*, 354 U.S. at 489.

[26] *But see* Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After* Reed v. Town of Gilbert, 57 SANTA CLARA L. REV. 385, 386–87 (2017) (describing the secondary effects doctrine, which examines some forms of content-based restrictions on sexually explicit speech under an intermediate scrutiny analysis).

online traffic each month than Netflix, Amazon, and Twitter combined.[27] In 2018, there were 30.3 billion online searches for pornography on the pornography website Pornhub alone.[28] One study found that 73.1% of women and 98.1% of men reported viewing pornography *in the prior six months*.[29] "Porn for women" was the number one search on Pornhub.com in 2017.[30] Beyond the popularity of pornography, public opinion research appears to confirm that Americans tolerate pornographic materials. According to a recent General Social Survey report, over 66% of Americans believe that pornography should be legally available to adults.[31] These public opinion polls illustrate that the national community is willing to tolerate, and perhaps even embrace, the existence of some sexual materials permitted by the prevailing First Amendment jurisprudence on obscenity. During the COVID-19 pandemic, consumption of pornography increased by at least 22% at the largest online pornography website.[32] These evolving standards are relevant in assessing whether sexually expressive materials should receive First Amendment protections. As it stands, where sexually explicit material is not legally obscene, it is entitled to protection under the First Amendment. This jurisprudence tends to turn on

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[27] *See* Gerard V. Bradley, *Prolegomenon on Pornography*, 41 HARV. J.L. & PUB. POL'Y 447, 448 (2018) ("[U]p to one-quarter of all search engine requests relate to pornography; pornography sites attract more traffic monthly than Amazon, Netflix, and Twitter combined . . . .").

[28] *See* Curtis Silver, *Pornhub 2018 Year in Review Insights Report Will Satisfy Your Data Fetish*, FORBES (Dec. 11, 2018), https://www.forbes.com/sites/curtissilver/2018/12/11/pornhub-2018-year-in-review-insights-report.

[29] *See* Marie-Ève Daspe, Marie-Pier Vaillancourt-Morel, Yvan Lussier, Stéphane Sabourin & Anik Ferron, *When Pornography Use Feels Out of Control: The Moderation Effect of Relationship and Sexual Satisfaction*, 44 J. SEX & MARITAL THERAPY 343, 347 (2018).

[30] Pornhub Insights, *2017 Year in Review* (Jan. 9, 2018), https://www.pornhub.com/insights/2017-year-in-review.

[31] TOM W. SMITH & JAESOK SON, NORC AT THE UNIV. OF CHI., GENERAL SOCIAL SURVEY 2012 FINAL REPORT: TRENDS IN PUBLIC ATTITUDES ABOUT SEXUAL MORALITY 1 (Apr. 2013). By contrast, only 49% of Americans approve the legality of "prostitution between two consenting adults." Point Taken-Marist Poll, *Should Prostitution Be Legalized?* (May 31, 2016), http://maristpoll.marist.edu/wp-content/misc/usapolls/us160524/Point%20Taken/Prostitution/Exclusive%20Point%20Taken_Marist%20Poll_Complete%20Survey%20Findings_May%202016.pdf.

[32] *Pornography Is Booming During the Covid-19 Lockdowns*, ECONOMIST (May 10, 2020), https://www.economist.com/international/2020/05/10/pornography-is-booming-during-the-covid-19-lockdowns ("Last month traffic on Pornhub, a giant website, for instance, was up by 22% compared with March."); Justin J. Lehmiller, *How the Pandemic Is Changing Pornography*, PSYCH. TODAY (Mar. 23, 2020), https://www.psychologytoday.com/us/blog/the-myths-sex/202003/how-the-pandemic-is-changing-pornography ("People aren't just watching more porn right now—they're also watching more coronavirus-themed porn. In the last 30 days, more than 9 million coronavirus searches have appeared on Pornhub.").

the question of expression. Thus, the question of whether ordinary prostitution transactions may be transformed into expression is a serious one.

By contrast, prostitution is generally prohibited throughout the United States, and the Supreme Court has not yet recognized that it is entitled to special protections under the Constitution.[33] While the Court has recognized that substantive due process requires deference to individuals' personal decisions relating to sexual relationships in the context of laws that criminalize sodomy, the Court clearly noted that the case did not "involve public conduct or prostitution."[34] The addition of this dictum suggests that the Court was not prepared to support a right to engage in commercialized sex at the time the case was decided.[35] However, Justice Kennedy also wrote, "as the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom," implying that this standard may change.[36] Today, technology enables sex work transactions to move into more private spaces as sex workers are able to use technology to screen and secure clients and interact with them, eliminating much of the "public conduct" associated with sex work.

Several of the cases that have considered the question of how to distinguish pornography from prostitution have emphasized the use of third-party payers to rationalize their differences.[37] Courts have held that pornography is distinguishable from prostitution because a third party, the viewer, is paying for the sex work transaction in pornography whereas there is a direct payer in prostitution.[38] This distinction between third-party and direct payer turns entirely on sexual gratification: the direct payer has directly received sexual gratification from the transaction, whereas the third-party payer presumptively has not.[39] Yet both situations involve the commercialization of intimate

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[33] *But see* Joelle Freeman, *Legalization of Sex Work in the United States: An HIV Reduction Strategy*, 32 GEO. J. LEGAL ETHICS 597, 597 (2019) ("While sex work is seen as risky because of the workers' increased number of sexual encounters, the risks are more closely related to the policies, practices, and stigma that limit sexual and health-related decisions than they are to the act of sex itself. Therefore, legalization is imperative.").

[34] Lawrence v. Texas, 539 U.S. 558, 579 (2003) (holding that a state law criminalizing sodomy violated the petitioner's substantive due process rights).

[35] *See id.*

[36] *Id.*

[37] People v. Freeman, 758 P.2d 1128, 1131 (Cal. 1988) (holding that the defendant did not violate California's "pandering" statute by paying two actors to engage in sexually explicit acts as part of an adult film because there was no evidence that the defendant did so "for the purpose of sexual arousal or gratification").

[38] *Id.*

[39] *See* Marc J. Randazza, *The Freedom to Film Pornography*, 17 NEV. L.J. 97, 108 (2016).

relationships.[40] Both take conduct that would ordinarily be non-criminal sex and subject it to increased regulation.[41] Professor Anders Kaye has critiqued the fallacy of relying on sexual gratification as the basis for criminalizing prostitution and permitting pornography.[42] The focus on sexual gratification paradoxically allows for the commercialization of sex where sexual gratification is provided to the masses through pornography, while prohibiting the commercialization of sexual gratification for individual, private consumers through the criminalization of prostitution transactions.[43] The law thus provides little guidance on how to treat sexual transactions that technology may facilitate—through alternate payment arrangements or the facilitation of indirect payments through mobile applications—that can be structured to get around third-party and direct payer distinctions. Consequently, the current legal doctrine is too ambiguous and muddled to clearly address how to regulate the evolving sexual spaces that technology will continue to facilitate. No court has seriously considered this question.[44]

This Article addresses this novel issue and argues that when determining whether sexual expression is protectable under the First Amendment, courts should place special weight on the interactive and expressive nature of online audiences and communities. Pornography is generally different from prostitution because it involves an audience, which demonstrates a clear expressive intent.[45] When an indi-

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[40] *See* Kaye, *supra* note 5, at 249 (examining the anomaly that the "law treats pornographic acting as though it is not prostitution, despite employing a definition of prostitution that seems to straightforwardly encompass pornographic acting").

[41] *See* Michal Buchhandler-Raphael, *Drugs, Dignity and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 291, 302 (2013) ("[P]rostitution is still criminalized in all states (except several counties in Nevada where legalized brothels are closely regulated); . . . and while pornography is heavily regulated but legal, the law still criminalizes obscenity, based on its offensiveness to certain segments of society.").

[42] Kaye, *supra* note 5, at 261 ("[W]e normally characterize physical interactions . . . as 'sex' . . . without considering whether they are intended to cause arousal or gratification. . . . For another thing, if what pornographic actors do does not aim for arousal or gratification in the relevant sense, it is not clear that what prostitutes do does either.").

[43] *Id.*

[44] However, a few courts have considered the analogous question of whether broadcast commercialized sexual transactions should be treated as prostitution. *See, e.g.*, People v. Freeman, 758 P.2d 1128, 1131–32 (Cal. 1988) (holding that pornography cannot be criminalized as prostitution because it is protected by the First Amendment); Guinther v. Wilkinson, 679 F. Supp. 1066, 1070 (D. Utah 1988) (holding that the Utah statute for prostitution was overbroad because it applied to permissible conduct); State v. Theriault, 960 A.2d 687, 692 (N.H. 2008) (holding that the statute for prostitution was overbroad because it prohibited pornography).

[45] *See* Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 344 (2018) ("The case law suggests that First Amendment coverage rests on the cohesiveness of the

vidual commits an act with an audience in mind, they are illustrating their intent to express themselves and communicate with others. Technology facilitates a particularly important form of expression because it allows the audience to become a community and a forum for associating around various forms of speech.[46] Internet viewers are able to discuss content with each other and are not merely passive viewers as viewers in a movie theater might be.[47] Technology allows audiences around the world to connect with each other as fellow audience members and with content providers as part of their community and viewership, and it generates movements and mobilizations around different forms of content.[48] Sexual gratification may be a part of the process, but it does not have to be the only outcome. Courts should take seriously the expressive and associative interests that technology presents.[49] The stakes are significant for many sexual minorities, and courts should only restrict these acts of sexual expression in limited circumstances, such as child pornography,[50] nonconsensual pornography, revenge pornography,[51] or other circumstances in which there

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expected social meaning of, and reaction to, the activity in question—including how a speaker will affect the behavior of or harm a listener or audience."). An audience is not a necessary requirement for demonstrating that expression is protectable as speech, but it is a sufficient element for finding speech protectable. *See* John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 317 (2009) (noting that a group of "normative theories supporting the freedom of speech includes . . . those that aim to preserve the value of speech for audiences, and . . . society. These theories include the role of free speech in facilitating . . . truth and knowledge, in facilitating self-government, in checking abusive government, and in developing art and culture").

46 *See* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2005 (2011) ("Social media create social relationships; they 'bring[] people together.' Communicating via social media makes it easier for government actors to mobilize citizens from different walks of life and strata of society." (alteration in original)).

47 *Id.*

48 *See* Stacey B. Steinberg, *#Advocacy: Social Media Activism's Power to Transform Law*, 105 KY. L.J. 413, 433 (2016) (discussing the role of social media in mobilizing contemporary social movements).

49 *See* Adam Candeub, *Nakedness and Publicity*, 104 IOWA L. REV. 1747, 1765 (2019) (discussing the expressive quality of different types of technological sex work).

50 *See* New York v. Ferber, 458 U.S. 747, 759 (1982) (holding that there is no First Amendment protection for child pornography). *But see* Case Note, *Constitutional Law — First Amendment — Washington Supreme Court Affirms Child Pornography Conviction of Teenager. —* State v. Gray*, 402 P.3d 254 (Wash. 2017)*, 131 HARV. L. REV. 1505, 1506 (2018) (critiquing a Washington Supreme Court case that held that a 17-year-old was guilty of child pornography when he shared unsolicited, sexual photographs of himself with another); Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 IND. L.J. 1437, 1440 (2014) ("Unfortunately, the Court has not placed clear limits on what constitutes child pornography . . . .").

51 *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1944–45 (2019) (detailing the work of activists and scholars in drawing attention to the seriousness of revenge porn and "convinc[ing] lawmakers and the public why it [i]s not the fault of victims who trusted exes with their nude photos").

is no consent to engage in the conduct or to share the conduct with an audience.

The issue of how legally to treat reality porn is pressing because we are in the midst of a significant academic and political debate about mass incarceration and overcriminalization that critically examines the racialized harms of the criminal legal system.[52] This is an important debate, but few scholars center the ways that gender, sexual orientation, race, class, and poverty intersect to make marginalized groups more vulnerable to criminalization. Intersectionality, which considers the distinct forms of marginalization that certain groups experience from intersecting and overlapping systems of subordination (e.g., patriarchy and racism),[53] is often an afterthought in this debate. This oversight is clear in how sex work criminalization is rarely centered in discussions of overcriminalization. However, sex work is an area where the carceral state is at risk of expanding its reach and causing intersectional harms to marginalized groups that are already negatively impacted by the criminal legal system. The risks of overcriminalizing sexual conduct online loom large as Congress is currently considering bills like the EARN IT Act[54] and the Stop Internet Exploitation Act,[55] which both adopt broad language to impose criminal and civil liability on various forms of online sexual expression. The First Amendment provides an avenue for lessening the reach of criminalization to consentable online sexual expression.

As reality porn continues to grow in prevalence, there is already evidence that policymakers will err on the side of criminalization, which brings unanticipated consequences for sex workers. For instance, the effects of the recently passed Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA) indicate that the criminalization of online sex work platforms may inadvertently make

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52 This debate is not new, but it has seen a resurgence over the past several years. For a classic authority exploring these issues, see Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1291 (2004) ("Mass incarceration dramatically constrains the participation of African American communities in the mainstream political economy. This civic exclusion stems largely from the 'invisible punishments' that accompany a prison sentence.").

53 *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244–45 (1991) (noting that a "focus on the intersections of race and gender only highlights the need to account for multiple grounds of identity when considering how the social world is constructed"); Patricia Hill Collins, *Intersectionality's Definitional Dilemmas*, 41 ANN. REV. SOC. 1, 11–13 (2015) (explaining the deepening of intersectional theory by "expand[ing] the focus on race, class, and gender to incorporate sexuality, nation, ethnicity, age, and ability as similar categories of analysis" and "us[ing] intersectional frameworks to rethink violence and similar social problems").

54 EARN IT Act of 2020, S. 3398, 116th Cong. (2020).

55 Stop Internet Sexual Exploitation Act, S. 5054, 116th Cong. (2020).

all forms of sexual labor more dangerous.[56] FOSTA was intended to address the use of online forums to promote sex trafficking by holding internet service providers civilly and criminally liable when they have "the intent to promote or facilitate" materials that advertise sex trafficking or prostitution online.[57] Internet services providers like Craigslist and Reddit eliminated adult services forums in response to FOSTA.[58] However, sex workers have complained that they have been deprived of online forums where they safely advertised their services and shared information about clients and safety measures.[59] Black sex workers in particular have complained that they were early adopters of online sexual platforms but now are being pushed off of them.[60] While FOSTA targets sex trafficking, it already has had a chilling effect on protectable sexual expression, with OnlyFans now becoming less accessible to sex workers in order to proactively avoid the penalties outlined in FOSTA.[61]

While I have previously argued that all sex work should be decriminalized,[62] this Article is not about sex work decriminalization. Given the well-documented harms associated with criminalization—including abusive policing of marginalized communities, the inability to find housing and work due to criminal convictions, and the eco-

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[56] *See* Scott Cunningham, Gregory DeAngelo & John Tripp, Craigslist Reduced Violence Against Women 29 (Feb. 2019) (unpublished manuscript), https://economics.sites.stanford.edu/sites/g/files/sbiybj9386/f/craigslist_reduced_violence_against_women_scott_cunningham.pdf (finding that the introduction of online sex work forums "led to a 10-17 percent reduction in female homicides" because sex workers were able to advertise and screen clients online).

[57] 18 U.S.C. § 2421A. Many of the critiques of FOSTA also apply to the unenacted Stop Enabling Sex Traffickers Act of 2017 (SESTA), S. 1693, 115th Cong. (2017). Much of SESTA was eventually incorporated into FOSTA. Lura Chamberlain, Note, *FOSTA: A Hostile Law with a Human Cost*, 87 FORDHAM L. REV. 2171, 2173 n.6 (2019) (citing 164 CONG. REC. H1248 (daily ed. Feb. 26, 2018)).

[58] Merrit Kennedy, *Craigslist Shuts Down Personals Section After Congress Passes Bill on Trafficking*, NPR (Mar. 23, 2018), https://www.npr.org/sections/thetwo-way/2018/03/23/596460672/craigslist-shuts-down-personals-section-after-congress-passes-bill-on-traffickin (noting that Craigslist and Reddit eliminated their adult services forums following the passage of FOSTA).

[59] *See* Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018, 1:08 PM), https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom (discussing how internet service providers have responded to FOSTA and SESTA).

[60] *See* Noel Cymone Walker, *What Is the Future for Black Sex Workers on OnlyFans?*, OKAY PLAYER (Nov. 2020), https://www.okayplayer.com/originals/only-fans-rubi-rose-black-sex-workers.html (arguing that Black sex workers online are marginalized by "clients, workplaces, family, government assistance, care, and even social media").

[61] *Id.*

[62] *See generally* Thusi, *Radical Feminist Harms*, *supra* note 12 (arguing that radical feminist arguments in support of partial criminalization of sex work are harmful to sex workers).

nomic destabilization of families and entire communities—criminalization should be viewed as a last resort.[63] Nevertheless, this Article is primarily concerned with how technology frustrates the legal distinction between prostitution and pornography in a world where one is criminalized and the other is constitutionally protected.

Part I provides pertinent First Amendment background on expressive conduct and protectable pornography. It examines how courts have drawn the line between pornography and prostitution. Part II considers the ways that technology and cultural shifts create greater ambiguity about how we should draw this line. Part III of this Article argues that when faced with ambiguity about whether to treat conduct as pornography or prostitution, courts should err on the side of decriminalizing consensual sex work. Part IV argues that modern technology renders existing prostitution statutes impermissibly overbroad and vague, demonstrating the possibility of transforming the ordinary into protectable forms of expression.

I
Free Speech Protections

This Part outlines the First Amendment doctrines that are applicable to the government regulation of sexually expressive conduct. In evaluating whether sexual conduct is entitled to First Amendment protections, courts consider whether: (1) the acts in question are sexual expression or merely non-expressive conduct; (2) government regulation of the conduct withstands intermediate scrutiny; (3) the government regulations pertaining to the conduct are overbroad or vague; (4) the sexual expression is obscene; and (5) the conduct should be protected in light of the line between prostitution and pornography. The Supreme Court has recognized that non-obscene sexual expression is entitled to protection under the First Amendment.

A. Protecting Expressive Conduct

In general, content-based restrictions on speech are presumptively unconstitutional, and the government bears the burden of justi-

[63] *See* Thusi, *Harm, Sex, and Consequences*, *supra* note 20, at 167 (arguing that the criminalization of vice crimes should be avoided).

fying the regulation of content-based restrictions.[64] Courts evaluate content-based restrictions on speech under a strict scrutiny analysis.[65]

In assessing whether conduct is entitled to protection as speech, courts evaluate whether an act is expressive.[66] The *Spence-Johnson* test provides the relevant standard and examines (1) whether there is an intent to communicate a message and (2) whether the message is likely to be understood by those who view the conduct.[67] While the Supreme Court has "rejected 'the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea,' . . . [it has] acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'"[68]

To determine whether communicative conduct is protected under the First Amendment, courts must examine whether the actor is engaged in "the expression of an idea through activity."[69] As part of this inquiry, the actor must demonstrate that "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[70] In *Spence v. Washington*, Harold Spence displayed an upside down American flag with peace symbols on both sides.[71] Spence intended to protest the United States's invasion into Cambodia and the Kent State University killings by displaying the flag in this manner.[72] The Supreme Court held that this conduct was protected as speech under the First Amendment.[73] Likewise, in *Texas v. Johnson*, Gregory Lee Johnson burned an American flag outside of the Republican National Convention to protest the policies of the Reagan Administration.[74] Applying the *Spence* test, the

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64 *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.").

65 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."). Strict scrutiny requires that government regulation of speech be narrowly tailored to address a compelling government interest. *Id.* at 382–83.

66 Texas v. Johnson, 491 U.S. 397, 404 (1989).

67 *Id.*

68 *Id.* (first quoting United States v. O'Brien, 391 U.S. 367, 376 (1968); then quoting Spence v. Washington, 418 U.S. 405, 409 (1974) (per curiam)).

69 *Spence*, 418 U.S. at 411.

70 *Id.* at 410–11.

71 *Id.* at 406.

72 *Id.* at 408.

73 *Id.* at 410.

74 491 U.S. 397, 399 (1989).

Court held that the act of burning the flag was expressive conduct that intended to communicate a message about government policies.[75]

Nonpolitical conduct has also been recognized as expressive. In concurrence in *Barnes v. Glen Theatre, Inc.*, Justice Souter discussed the expressive value of erotic dancing.[76] He emphasized the special role of the audience in erotic dance performance:

> [D]ancing as aerobic exercise would . . . be outside the First Amendment's concern. But dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience. Such is the expressive content of the dances described in the record.[77]

The presence of the audience demonstrates an intent to be expressive.[78] However, not all forms of expression require an actual audience.[79] In *Lawrence v. Texas*, Justice Kennedy, writing for the majority, noted that "sexuality finds overt expression in intimate conduct with another person."[80] *Lawrence* was not a First Amendment case, but this sentence is a subtle nod to the expressive element of any form of sexual conduct.

Although the Court has recognized that expressive or symbolic conduct warrants First Amendment protection, such expression is subject to intermediate scrutiny rather than the strict scrutiny generally required for content-based restrictions on speech.[81] In *Barnes*, the plurality opinion stated that the Supreme Court had previously "rejected [the] contention that symbolic speech is entitled to full First Amendment protection."[82] While the *Barnes* Court recognized that nude dancing was a form of expressive conduct generally entitled to

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[75] *Id.* at 420.

[76] 501 U.S. 560, 581 (1991) (Souter, J., concurring).

[77] *Id.*

[78] *See id.* (reasoning that "performance dancing is inherently expressive" in part because it is "directed to an actual or hypothetical audience").

[79] *See* Marc Jonathan Blitz, *The Freedom of 3D Thought: The First Amendment in Virtual Reality*, 30 CARDOZO L. REV. 1141, 1149 (2008) ("Under the 'Spence test,' an act . . . may nonetheless count as First Amendment expression when the person undertaking that act is using it to convey a particularized message to an audience . . . ."); *see also* Sunset Amusement Co. v. Bd. of Police Comm'rs, 496 P.2d 840, 845–46 (Cal. 1972) ("[N]o case has ever held or suggested that simple physical activity falls within the ambit of the First Amendment. . . . The key element is, of course, [c]ommunication.").

[80] 539 U.S. 558, 567 (2003).

[81] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

[82] 501 U.S. at 567.

First Amendment protection, it upheld local regulations that required nude dancers to perform wearing pasties and G-strings despite incidental limitations on expressive activity,[83]

> [because] the governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose.[84]

Applying the intermediate scrutiny test from *United States v. O'Brien*, the plurality indicated that:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[85]

In upholding the local regulations, the plurality and Justice Scalia's concurrence relied in part upon the Court's decision in *Bowers v. Hardwick*,[86] which upheld a Georgia statute that criminalized sodomy.[87] While *Bowers* was not a First Amendment case, the *Barnes* Court used it as an example of local governments' ability to regulate morality and courts' upholding those morality-based laws.[88] However, the *Bowers* decision has since been overruled by *Lawrence v. Texas*, which held that criminalizing sodomy was unconstitutional because it violated the right to substantive due process.[89] Despite its status as a due process case, *Lawrence* demonstrates the limits of morality-based justifications for laws that infringe upon constitutional rights.[90]

In evaluating whether conduct is expressive, courts must also consider whether the conduct is merely a criminal act. In *United States v. Williams*, Michael Williams entered into a public internet chat room and offered sexually explicit materials of minors to an undercover law

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[83] *Id.* at 567, 571.

[84] *Id.* at 571–72.

[85] *Id.* at 567.

[86] *See id.* at 569, 575.

[87] Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[88] *See* 501 U.S. at 569.

[89] 539 U.S. at 578.

[90] *But see* City of Erie v. Pap's A.M., 529 U.S. 277, 292–95 (2000) (recognizing the expressive nature of nude dancing but nevertheless upholding a regulation barring all public nudity under the secondary effects doctrine).

enforcement officer.[91] After Secret Service agents obtained a search warrant and seized his hard drive, which contained images of children engaging in sexual conduct, Williams was charged with pandering and possessing child pornography.[92] The Court rejected Williams's argument that the statute criminalizing the pandering of child pornography is unconstitutionally overbroad.[93] Writing for the majority, Justice Scalia noted, "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection."[94] The rationale for this case may be interpreted in a deceptively simple manner: If conduct is criminalized, the First Amendment does not protect the speech that is connected to that conduct.[95] This reasoning makes sense when addressing whether a murder is protectable as speech because it is being filmed, but it is less clear when referring to prostitution and pornography. For instance, can a state government criminalize pornography, and then claim that pornography is no longer entitled to First Amendment protection because it is now criminalized? Is that conduct now not protected under the First Amendment pursuant to *Williams*'s finding that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection"?[96] This circular argument appears weak in light of the Court's extensive jurisprudence protecting non-obscene pornography against state regulation.[97] Even obscene pornography may be consumed in the privacy of one's home without state regulation.[98] The mere acknowledgment that prostitution is currently criminalized seems inadequate to fully assess whether there are forms of sexual expression involved in prostitution transactions that should nevertheless be entitled to First Amendment protection.

The Supreme Court's jurisprudence suggests as much. In *Bigelow v. Virginia*, a newspaper editor was convicted for engaging in criminal conduct.[99] At the time, a Virginia statute criminalized the circulation

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91 553 U.S. 285, 291 (2008).

92 *Id.* at 291–92.

93 *Id.* at 299.

94 *Id.* at 297.

95 *See id.* (noting that the "statute criminalizes only offers to provide or requests to obtain contraband—child obscenity and child pornography involving actual children").

96 *Id.*

97 *See* Roth v. United States, 354 U.S. 476, 488–89 (1957) ("It is . . . vital that the standards for judging obscenity safeguard the protection of freedom of speech . . . for material which does not treat sex in a manner appealing to prurient interest.").

98 *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Whatever . . . the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man . . . what books he may read or what films he may watch.").

99 421 U.S. 809, 811 (1975).

of materials that encouraged or prompted people to obtain an abortion, and the editor circulated an advertisement that provided details for abortion services.[100] The Court reversed the conviction and held that "Virginia could not apply [the statute to the] . . . publication of the advertisement in question without unconstitutionally infringing upon . . . First Amendment rights."[101] The fact that the legislature had criminalized the underlying conduct did not prevent the Court from nevertheless protecting the speech impacted by the criminalization.[102] Likewise, in *Brandenburg v. Ohio*, a Ku Klux Klan leader was convicted of criminal activity under the Ohio Criminal Syndicalism statute.[103] The Supreme Court nevertheless held that the conduct was entitled to First Amendment protection because a state is permitted to criminalize advocating for the use of force only if such advocacy tends to "incit[e] or produc[e] imminent lawless action."[104] Thus, the appellant's conviction was reversed.[105] These cases suggest that the mere fact that prostitution is criminal in most states does not automatically foreclose the potential to find sexual transactions that straddle the line between prostitution and pornography protectable under the First Amendment.

B. Overbreadth & Vagueness Doctrines

Government regulations that affect speech are also subject to limitations through the overbreadth and vagueness doctrines.

> [T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement."[106]

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[100] *Id.* at 811–12.

[101] *Id.* at 829.

[102] *See id.* at 834 (Rehnquist, J., dissenting) ("[T]he Court goes so far as to suggest that it is an open question whether a State may constitutionally prohibit an advertisement containing an invitation . . . to engage in activity which is criminal.").

[103] 395 U.S. 444, 444–45 (1969).

[104] *Id.* at 447.

[105] *Id.* at 449; *cf.* Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 IND. L.J. 963, 972 (2009) (noting the tension between eliminating racist speech while complying with First Amendment doctrine).

[106] Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

In *Kolender v. Lawson*, the Supreme Court held that a "criminal statute that requires persons who loiter or wander on the streets to provide a 'credible and reliable' identification" was unconstitutionally vague.[107] Similarly, in *Papachristou v. City of Jacksonville*, the Supreme Court invalidated on vagueness grounds a Florida statute that criminalized vagrancy: "A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law."[108]

The void for vagueness doctrine is not a First Amendment doctrine, but rather implicates Fifth Amendment substantive due process rights. However, it may be applied to First Amendment cases. As the Supreme Court held in *NAACP v. Button*, "[t]he objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice . . . but upon the danger of . . . a penal statute susceptible of sweeping and improper application."[109]

In addition, government regulations on expressive conduct cannot be overbroad.[110] Under the overbreadth doctrine, litigants may "challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[111] Overbroad legislation may have a chilling effect that suppresses speech that would otherwise be constitutionally protected. In *Reno v. ACLU*, the Supreme Court addressed the applicability of the overbreadth doctrine to a child pornography statute.[112] In 1996, Congress passed the Communications Decency Act, which attempted to protect minors from sexually explicit content on the internet.[113] The statute criminalized the transmission of "obscene or indecent" messages to minors.[114] It also criminalized knowingly sending any content "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[115] In 1997, the Supreme Court unanimously struck down

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107 *Id.* at 353.

108 405 U.S. 156, 171 (1972).

109 371 U.S. 415, 432–33 (1963).

110 *See id.* at 101 (describing that the First Amendment protects "certain forms of orderly group activity" beyond a "literal conception of freedom of speech").

111 Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

112 521 U.S. 844, 849 (1997).

113 Communications Decency Act, 47 U.S.C.A. § 230(c)(2).

114 *Reno*, 521 U.S. at 883.

115 *Id.* at 860.

the anti-decency provisions of the Communications Decency Act.[116] Writing for a majority of the Court, Justice Stevens stated:

> We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. . . . It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults.[117]

The Court noted that visitors to the internet must deliberately seek out content and are not exposed to unwanted content in the way that they are when watching television.[118] Accordingly, less effort is required to prevent undesired exposure to explicit material.[119]

In *United States v. Stevens*, the Supreme Court considered the constitutionality of a statute that criminalized the production of crush videos, which depict people crushing small animals for sexual pleasure.[120] Congress passed 18 U.S.C. § 48 to criminalize knowingly "creat[ing], sell[ing], or possess[ing] a depiction of animal cruelty" for commercial gain.[121] Stevens was successfully prosecuted under the statute for selling dog-fighting videos.[122] The Supreme Court held that the statute was unconstitutionally overbroad because it criminalized constitutionally protected conduct.[123] The underlying conduct at issue involved violent animal cruelty. Despite this underlying criminal activity, the Court held that the statute was overbroad because it also applied to permissible speech, such as depictions of animal harm that do not involve cruelty or ones that are humane to animals.[124] In *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down two provisions of the Child Pornography Prevention Act of 1996 as overbroad because they limited lawful speech.[125] Specifically, the provisions barred portrayals of teenagers engaged in any sexual conduct and had a chilling effect on legitimate forms of expression.[126] The

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116 *Id.* at 882.
117 *Id.* at 874–75.
118 *Id.* at 854 ("Though such material is widely available, users seldom encounter such content accidentally.").
119 *See id.*
120 559 U.S. 460, 464–66 (2010).
121 *Id.* at 464–65.
122 *Id.* at 466.
123 *Id.* at 474–76.
124 *Id.* at 474–75.
125 535 U.S. 234, 256, 258 (2002).
126 *Id.* at 246–47.

statute would have barred artistic speech that involved depictions of sexual conduct between children, including reenactments of *Romeo and Juliet* and many other portrayals of teenage love stories.[127]

In *State v. Washington-Davis*, the Minnesota Supreme Court considered whether Minnesota's prostitution statute was overbroad.[128] Antonio Dion Washington-Davis was convicted of soliciting and promoting prostitution and conspiracy to commit sex trafficking under the statute.[129] He and an accomplice solicited women into prostitution by initially becoming involved in romantic relationships with them.[130] After each relationship was formed, the men would usually promise each woman that she could make a good income by engaging in prostitution.[131] After bringing them into prostitution, Washington-Davis or his family member would photograph the women and post their photographs as advertisements online.[132] They then arranged for the women to engage in paid sex acts and drove the women to meet their customers, but kept the majority, if not all, of the money for themselves.[133] Washington-Davis argued that the Minnesota statute criminalizing the promotion and solicitation of prostitution was facially overbroad under the First Amendment.[134]

The Minnesota Supreme Court held that the trial court had sufficient evidence to support Washington-Davis's conviction under the statute, which "makes it a crime for a person, 'while acting other than as a prostitute or patron,' to intentionally 'solicit[] or induce[] an individual to practice prostitution' or 'promote[] the prostitution of an individual.'"[135] Washington-Davis argued that the statute was overbroad because it would affect filmmakers who hire, transport, and pay actors for the purpose of filming a pornographic or sexually explicit film.[136] However, the government argued that when "the State can prove a person solicited another to engage in sexual acts for the purpose of sexual gratification, such behavior is criminal regardless of whether a camera is involved."[137] The Minnesota court held that the statute was likely not overbroad because the "promotion and solicitation statute . . . criminalizes the solicitation and promotion of individ-

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127 *Id.* at 247.
128 881 N.W.2d 531, 534 (Minn. 2016).
129 *Id.* at 533.
130 *Id.* at 534.
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.* at 536 (quoting MINN. STAT. § 609.322, subd. 1a(1)–(2) (2014)).
136 *Id.* at 536–37.
137 *Id.* at 537.

uals to engage in sexual conduct *only if* the sexual conduct is done 'for the purpose of satisfying the actor's sexual impulses.'"[138] This focus on sexual gratification is interesting because the commercialization of sex is not the primary distinction between prostitution and pornography; it is the direct enjoyment of it that appears to be the critical factor.[139] While the Minnesota statute allows for criminalization "only if" there is sexual gratification,[140] many state prostitution statutes do not have this limitation and are much broader, encompassing any engagement in sexual conduct with another in exchange for a fee or other item of value.[141] The Minnesota court did not definitively conclude whether the statute was overbroad.[142] Instead, the court indicated that even if the statute is overbroad, it does not limit a substantial amount of constitutionally protected speech.[143] This concession suggests that, at best, this statute is marginal and that broader prostitution statutes that criminalize all sexual conduct for compensation are indeed overbroad.[144]

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[138] *Id.* at 539 (quoting MINN. STAT. § 609.321, subd. 10 (2014)).

[139] *See infra* Section I.D (discussing courts' reliance on the element of sexual gratification in distinguishing pornography from prostitution).

[140] *Washington-Davis*, 881 N.W.2d at 539 (emphasis omitted).

[141] *See* DEL. CODE ANN. tit. 11, § 1342(a)(1) (West 2019) ("A person, 18 years or older, is guilty of prostitution when the person engages or agrees or offers to engage in sexual conduct with another person in return for a fee."); GA. CODE ANN. § 16-6-9 (West 2019) ("A person . . . commits the offense of prostitution when he or she performs or offers or consents to perform a sexual act, including, but not limited to, sexual intercourse or sodomy, for money or other items of value."); MICH. COMP. LAWS ANN. § 750.449a(1) (West 2015) ("[A] person who engages or offers to engage the services of another person, not his or her spouse, for the purpose of prostitution, lewdness, or assignation, by the payment in money or other forms of consideration, is guilty of a misdemeanor."); N.J. STAT. ANN. § 2C:34-1 (West 2013) ("'Prostitution' is sexual activity with another person in exchange for something of economic value, or the offer or acceptance of an offer to engage in sexual activity in exchange for something of economic value."); N.Y. PENAL LAW § 230.00 (McKinney 2019) ("A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee."); 18 PA. STAT. AND CONS. STAT. § 5902(a) (West 2019) ("A person is guilty of prostitution if he or she: (1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or (2) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity."); WIS. STAT. ANN. § 944.30(1m) (West 2014) ("Any person who intentionally does any of the following is guilty of a Class A misdemeanor: (a) Has or offers to have or requests to have nonmarital sexual intercourse for anything of value. (b) Commits or offers to commit or requests to commit an act of sexual gratification . . . for anything of value.").

[142] *Washington-Davis*, 881 N.W.2d at 539.

[143] *Id.*

[144] *See supra* note 141 (listing statutes that have expansive language that covers conduct broader than the Minnesota statute).

C. *Protection for Non-Obscene Pornography*

The First Amendment protects sexually explicit materials as long as they are not obscene. In *Jacobellis v. Ohio*, Justice Stewart wrote that courts should not restrict sexual material unless it is "hard-core pornography" and that courts would "know" obscenity "when [they] see it,"[145] paving the way for a flexible standard for assessing whether sexual expression is obscene.[146] In 1973, the Supreme Court clarified the definition of obscenity in *Miller v. California*.[147] Miller was the operator of a mail-order pornographic business.[148] He mailed a brochure that contained sexual images to local businesses, including a Newport Beach restaurant.[149] The owner of the restaurant called the police concerning the mailed brochure.[150] As a result, Miller was arrested and charged with violating California Penal Code section 311.2(a), which stated:

> Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. . . .[151]

The test applied by the trial court in *Miller* was not entirely novel, but instead arose out of the Court's previous guidance on obscenity. Namely, the Court held in *Roth v. United States* that courts should ask "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[152] The jury at Miller's trial reviewed evidence of the community standards in California and found Miller guilty of violating these standards.[153] Miller appealed the conviction, arguing that only a national, not local, community standard should be used in assessing obscenity. The California appellate court rejected

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145 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

146 *But see* Elizabeth M. Glazer, *Seeing It, Knowing It*, 104 Nw. U. L. REV. COLLOQUY 217, 220 (2009) (noting the limitations of Justice Stewart's standard and subsequent Supreme Court doctrine and arguing that "leaving to intuition the determination of whether content strikes one as obscene because [for example] it contains gay sex seems particularly unrefined").

147 413 U.S. 15, 24 (1973).

148 *Id.* at 18.

149 *Id.*

150 *Id.*

151 *Id.* at 16–17 n.1 (internal citations omitted).

152 354 U.S. 476, 489 (1957).

153 *Miller*, 413 U.S. at 31 ("The jury, however, was explicitly instructed that . . . it was to apply 'contemporary community standards of the State of California.'").

this argument.[154] Miller appealed the conviction through the California courts and then to the U.S. Supreme Court.

The U.S. Supreme Court first considered whether the First Amendment protects obscene material.[155] The Court held that it does not, and then articulated the rule for analyzing states' ability to restrict the spread of obscene material.[156] The Court stated that restrictions to sexual material must be "carefully limited," articulating a three-pronged test: (1) whether the average person, applying "community standards" would believe the material as a whole appeals to the prurient interest; (2) whether the material describes or depicts in a patently offensive manner sexual or excretory functions; and (3) whether the material taken as a whole lacks serious literary, artistic, political, or scientific value.[157] The Court remanded the case to the California courts to apply this standard.[158] In *Pope v. Illinois*, the Supreme Court clarified that the first two prongs of the *Miller* test are to be evaluated according to local "community standards."[159] However, the third prong of the *Miller* test is to be evaluated according to the reasonable person standard, not limited to a particular community.[160]

In considering whether pornographic material is obscene under *Miller*, courts analyze whether the material lacks any serious literary, artistic, political, or scientific value.[161] The *Pope* Court indicated that the relevant standard requires an analysis of national values based on the reasonable person. Accordingly, changes in national values on sexuality and artistic expression impact what is considered obscene.

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154 *Id.* at 17, 31.

155 *See id.* at 23.

156 *Id.* at 23–24 ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

157 *Id.* at 24.

158 *Id.* at 37.

159 *See* 481 U.S. 497, 500 (1987).

160 *Id.* at 500–01 ("The proper inquiry is . . . whether a reasonable person would find such value in the material, taken as a whole."). Nevertheless, the Supreme Court has outlined special restrictions in the context of child pornography. In *New York v. Ferber*, the Supreme Court held that First Amendment protections do not extend to child pornography even when the material it depicts is not obscene. *See* 458 U.S. 747, 756–64 (1982) (establishing that child pornography is "unprotected by the First Amendment" even when the material does not meet the *Miller* standard for obscenity). New York's obscenity statute made it unlawful to "promote[] any performance which includes sexual conduct by a child less than sixteen years of age." *Id.* at 751. The Supreme Court upheld the statute, reasoning that states have a compelling interest in preventing child sexual abuse and that whether depictions of actual children engaging in sexual conduct have artistic value is irrelevant to a state's ability to proscribe such materials. *Id.* at 756–57.

161 *See Miller*, 413 U.S. at 27 (holding that non-obscene pornography is protected by the First Amendment).

Professor Elizabeth Glazer has argued that the Supreme Court's decision in *Lawrence v. Texas* striking down Texas's criminalization of sodomy has implications for obscenity doctrine[162]: It provides context for understanding evolving sexual norms, morality, and the limitation of regulating them.[163] While sodomy may have once been considered repugnant by American standards, community standards evolved, and the government's ability to regulate sodomy ended despite various morality-based justifications for criminalizing it.[164] Thus, although the *Miller* doctrine still permits states to restrict certain types of obscene material, the contours of the doctrine include important limitations on its own reach, and changing societal attitudes occasionally provide further limitations on the doctrine's scope.

D. The Line Between Pornography and Prostitution

While some courts have considered how to draw the nebulous line between pornography and prostitution, the legal doctrine remains unclear. The primary challenge is assessing whether potentially expressive prostitution transactions are merely criminal conduct pursuant to the Supreme Court's decision in *United States v. Williams*, or protectable, non-obscene sexual expression pursuant to the Court's obscenity cases. The distinction is complicated by the fact that the underlying conduct in *Williams* is both criminal and categorically unprotected under the First Amendment because it involved child pornography.[165] When evaluating prostitution, however, the underlying conduct is criminalized, but expressive versions of it—such as pornography[166] or nude dancing[167]—are not.

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[162] *See* Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 Nw. U. L. Rev. 1379, 1380 (2008) (arguing that the "First Amendment's obscenity doctrine has produced a discriminatory collateral effect against gays and lesbians" because of its reliance on community standards to judge the offensiveness of speech).

[163] *Id.* at 1423 ("*Lawrence*'s broad implications were not only moral, but also spatial, liberal, and cultural.").

[164] *See* Andrew R. Flores, The Williams Institute, National Trends in Public Opinion on LGBT Rights in the United States 5 (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-LGBT-US-Nov-2014.pdf (finding that while only one-third of Americans supported the decriminalization of sodomy in 1986, two-thirds supported its decriminalization in 2014).

[165] *See Ferber*, 458 U.S. at 758 (holding that child pornography is not entitled to First Amendment protection).

[166] *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184, 186–87 (1964) (holding that an obscenity conviction for exhibiting the film *The Lovers* violated the First Amendment).

[167] *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566–67 (1991) (recognizing the expressive value of nude dancing, but nevertheless upholding regulations restricting the nature in which nude dancing may occur).

The California Supreme Court considered how to draw this line in 1988 in *People v. Freeman*.[168] Harold Freeman hired actors and actresses to perform in an adult film, which involved various sexually explicit acts.[169] Freeman paid each actor and was later charged with five counts of pandering for each actress he hired to perform sexual acts in the film.[170] After a jury trial, Freeman was found guilty on all five counts and placed on five years of probation.[171] The law indicated that prostitution includes any lewd act between persons for money or other consideration paid for the purpose of sexual arousal or gratification.[172]

The California Supreme Court reversed the conviction and held that there was no evidence that Freeman paid the acting fees for the purpose of sexual arousal or gratification, his own or the actors'.[173] Freeman also did not participate in any sexual conduct.[174] The court stated that under the First Amendment, Freeman's conduct is protected because free expression allows the filming of non-obscene motion pictures.[175] To subject producers and directors of non-obscene motion pictures depicting sexual conduct to prosecution and punishment for pandering would place a substantial burden on the exercise of First Amendment rights.[176] The government argued that it had interests in: (1) the prevention of profiteering from prostitution, and (2) the prevention of the spread of STDs.[177] The court rejected these arguments.[178] Acts of alleged prostitution in this case were not crimes independent and apart from payment for the right to photograph or film the performance. The court noted that the sexual conduct was between consenting adults and occurred in a private place not open to the public.[179]

California is not the only state that has attempted to navigate the divide between pornography and prostitution. In 1987, Utah amended

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168 *See* 758 P.2d 1128, 1129 (Cal. 1988) (reversing a conviction for prostitution because the defendant was engaged in producing pornography).

169 *Id.*

170 *Id.* at 1129.

171 *Id.*

172 *See id.* at 1130.

173 *Id.* at 1131.

174 *Id.*

175 *Id.* ("[T]he application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values.").

176 *Id.* at 1132.

177 *Id.*

178 *See id.* at 1133 ("Both these suggested 'interests' not only directly involve the suppression of free expression but are, in the context of a pandering prosecution for the making of a nonobscene motion picture, not credible.").

179 *Id.* at 1134.

a prostitution statute that defined "sexual activity" as "acts of masturbation, sexual intercourse, or any touching of a person's clothed or unclothed genitals, pubic area, buttocks, anus, . . . in an act of apparent or actual sexual stimulation or gratification."[180] In *Guinther v. Wilkinson*, plaintiffs who were street performers, actors, and dancers sought an injunction asserting that the statute violated their First Amendment rights.[181] Although the court did not reach the plaintiffs' First Amendment claims, the court held that the amended statute violated their due process rights under the Fourteenth Amendment because it was void for vagueness.[182] The statute was vague because Utah defined prostitution as sexual activity with another person for a fee, but the statute's definition of "sexual activity" included even clothed touching of another person.[183] The court noted that in addition to nude dancing, the statute prohibited "ballet dancing by artists who dance for Ballet West, Disney on Parade, the San Francisco Opera and the San Francisco Ballet, in such productions as 'Paradise Lost,' 'Garden of Evil,' 'Samson and Delilah,' 'Ballet Chaos' and 'many others.'"[184] The statute was also vague because there was no standard in the statute concerning the meaning of the term "apparent or actual sexual stimulation or gratification."[185]

The New Hampshire Supreme Court also considered the pornography/prostitution divide in 2008. Robert Theriault was a court security officer, and on December 5, 2005, he approached a woman and her boyfriend asking if they needed employment.[186] Theriault told the couple he could not explain the job at the courthouse and when they later met in a parking lot behind a bank, Theriault asked if they wanted to participate in making a pornographic video.[187] Theriault explained that he would pay the couple fifty dollars an hour, rent them a hotel room, and provide temperature blankets and condoms all while Theriault videotaped the couple having sex.[188] Theriault was arrested and charged with multiple counts of prostitution after the couple reported the encounter to the boyfriend's mother, who

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180 Guinther v. Wilkinson, 679 F. Supp. 1066, 1068 (D. Utah 1988) (quoting 1987 Utah Laws 1115).

181 *Id.*

182 *Id.* at 1070 ("This court now holds that . . . the statute violates the due process clause of the Fourteenth Amendment . . . [in] that it is impermissively vague.").

183 *Id.* at 1069–70.

184 *Id.* at 1070.

185 *Id.* (quoting 1987 Utah Laws 1115).

186 State v. Theriault, 960 A.2d 687, 688 (N.H. 2008).

187 *Id.*

188 *Id.*

reported it to police.[189] Before trial, Theriault argued that New Hampshire's prostitution statute was overbroad and could be applied to theater productions.[190] The trial court ruled against Theriault, holding that "sexual contact for a purpose other than sexual gratification, like producing a movie or a theatrical production, would not be subject to sanction under the statute."[191] On appeal, Theriault argued that the prostitution statute was overbroad as applied to the constitutionally protected activity of making a sexually explicit video.[192]

The New Hampshire Supreme Court reversed in favor of Theriault.[193] The court held that there was no evidence or allegation that Theriault solicited this activity for the purpose of personal sexual arousal or gratification as opposed to merely making a video.[194] The girlfriend of the couple that was approached by Theriault testified that he only asked them to be in a video.[195] Additionally, the State did not charge Theriault under the "sexual contact" portion of the statute; if the State had charged Theriault under sexual contact, it would have been required to prove that he acted for the purpose of sexual arousal or gratification and his engaged conduct would not be constitutionally protected.[196] The only evidence as to Theriault's intent was that he intended to make pornography.[197]

The emphasis on third-party payers for pornography (when nonparticipants pay for the commission of sexual activity) versus direct payers for sex work transactions (when participants pay to personally engage in the sexual activity) is a neutral way of punishing sexual gratification.[198] If a third party pays, courts appear to suggest that there is no (direct) sexual gratification, but if a direct payer pays, there is. And thus conduct that results in direct sexual gratification is criminalizable. But there are many situations wherein sexual gratification alone cannot clarify the distinction between prostitution and pornog-

189 *Id.*

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.* at 693.

194 *Id.* at 690.

195 *Id.*

196 *See id.*

197 *Id.* at 692.

198 *Cf.* Tonya R. Noldon, Note, *Challenging First Amendment Protection of Adult Films with the Use of Prostitution Statutes*, 3 VA. SPORTS & ENT. L.J. 310, 318 (2004) ("The *Freeman* court left open the question of whether prostitution must always involve a customer and focused instead on the requirement that there be sexual arousal or gratification.").

raphy.[199] Is there sexual gratification when a pornography film producer experiences sexual arousal while filming and sharing his films? Is there sexual gratification in self-produced pornographic films? Is there sexual gratification when an elderly prostitution client spends their time cuddling and talking to a sex worker during a transaction? Is there sexual gratification when a client pays to receive the boyfriend experience from a sex worker? If sexual gratification were a suitable boundary, it would offer a meaningful distinction between pornography and prostitution under these circumstances, but it does not. Moreover, mobile applications easily facilitate transactions wherein sex workers receive payment through a third party.[200] A focus on whose hands have touched the money is a poor basis for distinguishing pornography from prostitution.

E. Freedom of Association

Unlike many forms of pornography, reality porn transactions implicate freedom of association protections in addition to the free speech interests already discussed in this Part. The Supreme Court has protected the right to associate with others around particular content and to advance various interests, including unpopular ones.[201] In *NAACP v. Alabama*, Alabama sought the membership lists of the NAACP in an attempt to limit its activities in the state.[202] The Supreme Court held that Alabama's actions violated the rights of the members of the NAACP to associate freely under the First Amendment.[203] The Court noted that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is

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199 The pertinence of sexual gratification is doctrinally inconsistent. For example, the absence of sexual gratification is not a defense to a prostitution charge in some contexts. *See* Sarah H. Garb, *Sex for Money Is Sex for Money: The Illegality of Pornographic Film as Prostitution*, 13 LAW & INEQ. 281, 299 (1995) (describing a proposed Minnesota statute wherein "the lack of sexual gratification or desire are not defenses, [and] issues of defining or measuring sexual gratification are avoided").

200 *See, e.g.*, Julia Mascetti, *Tipping 101*, ONLYFANS (July 8, 2020), https://blog.onlyfans.com/tipping-101 (describing the culture of "tipping" through the OnlyFans platform and noting that "[t]he psychology of tipping is complex, but fans generally tip content creators to show appreciation or gratitude").

201 NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (holding that requiring the NAACP to share its members' names and addresses would be a substantial infringement on members' First Amendment rights of free association).

202 *See id.* at 451 ("The question presented is whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal . . . the names and addresses of all its Alabama members and agents . . . .").

203 *Id.* at 462–63 ("[T]he . . . order . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association.").

undeniably enhanced by group association."[204] The Court further noted, "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[205] Accordingly, people have the right to freedom of association with regard to whom they associate in person and online; Professor John Inazu argues that we should protect virtual associations because "the right of association and its intimate and expressive components do not disappear in the virtual world."[206] The next Part details the ways that virtual communities facilitate new forms of association between people who would ordinarily be passive observers of content in person and explains how technology frustrates the relationship between pornography and prostitution.

II
Technology, Reality, and Expression

Recent technological and cultural shifts frustrate how courts distinguish pornography from prostitution in a digitally connected world. Technology allows sex workers and sex work clients to broadcast individual encounters, which facilitate the mass production of sexual gratification and the creation of online communities that organize around the shared content. This Part discusses how changes in digital filmmaking and a current social landscape that awards cultural capital to influencers who share authentic and everyday experiences online blur the line between pornography and prostitution. This Part highlights existing platforms that illustrate the tensions between these two categories. Technology allows sex workers and clients to: (1) share their conduct with readily available audiences in a manner that is affordable and accessible, democratizing the ability to both produce and interact with sexual content; (2) manipulate expressions of sexual conduct in creative ways; and (3) create a virtual space for discussion, critique, community-building, and organizing around sexual content.

A. Current Platforms

The Introduction of this Article provides an example of how fraught the relationship between pornography and prostitution is in

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[204] *Id.* at 460.

[205] *Id.* at 460–61.

[206] Inazu, *supra* note 17, at 1118 (examining the constitutional boundaries of online groups).

the internet age.[207] But that situation is not merely hypothetical—there are already several existing social media platforms that illustrate the growing ambiguity between prostitution and pornography.

1. Kink.com

Kink.com is an internet pornography website devoted to bondage, BDSM, and various fetishes.[208] Kink.com is a physical location and an online community. For several years, the company was based in the San Francisco Armory, a space that it used as a production studio.[209] Kink also converted rooms in the building into individual webcam rooms that webcam models could rent.[210]

Kink is also an informational resource for community members interested in the bondage lifestyle.[211] Kink's mission is to "demystify and celebrate alternative sexualities by providing the most ethical and authentic kinky adult entertainment."[212] It is a unique pornography company in that it is mission-oriented and devotes substantial resources to education.[213] For example, Kink actors conducted interviews after filming pornographic scenes to provide insights into the lifestyle, and Kink.com hosts community workshops to educate the public about the BDSM lifestyle.[214] Kink facilitated live interactions through its webcam studios while they were in operation, and it demonstrated the ways that audience members can be encouraged to organize around sexually explicit content.[215] Audiences were encouraged to learn about the BDSM lifestyle, and many supporters have stated that the company reflects the cultural and political heri-

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[207] *See supra* Introduction.

[208] *See* Jennifer Miller, *Kink Unbound(?): Pursuing Pleasure and Profit in Pornography*, SCHUYLKILL GRADUATE J., Spring 2012, at 20, 22, 31 (2012) (examining the prevalence of Kink.com and noting that pornography is "a site of identity and community building around sex acts" and that Kink.com built an "interconnected virtual community" that was "an affective community of strangers connected through the consumption of kink").

[209] *Id.* at 28. While Kink.com initially encountered community resistance to its purchase of the Armory, the purchase was eventually held to be compliant with various zoning regulations. In 2017, the site stopped producing content in the San Francisco area. *See* Kevin L. Jones, *Kink.com to Stop Filming in San Francisco Next Month*, KQED (Jan. 25, 2017), https://www.kqed.org/arts/12677964/kink-com-to-stop-filming-in-san-francisco-next-month.

[210] Richtel, *supra* note 1.

[211] *See, e.g.*, *Upcoming Workshops & Events*, KINK.COM, https://workshops.kink.com [hereinafter *Kink Workshops*] (last visited Feb. 2, 2021).

[212] Sam Levin, *'End of an Era': Porn Actors Lament the Loss of Legendary San Francisco Armory*, GUARDIAN (Jan. 25, 2017, 12:00 PM), https://www.theguardian.com/culture/2017/jan/25/porn-bdsm-kink-armory-closing-san-francisco.

[213] *Id.*

[214] *Id.*; *see also Kink Workshops*, *supra* note 211.

[215] Levin, *supra* note 212.

tage of San Francisco, which has been accommodating of alternative sexual cultures.[216] Kink.com illustrates the community-building potential of sexually explicit materials and exemplifies how education about sexually deviant lifestyles may be a form of political messaging.

2. *Monthly Subscription Services for Fans*

Many sex workers use monthly subscription-based websites and mobile applications to supplement their incomes. The OnlyFans website was started in 2016.[217] It allows content creators to monetize content that they provide to fans through monthly subscriptions.[218] OnlyFans allows content creators to share sexually explicit content.[219] And much of the success of OnlyFans was based on early adoption by sex workers.[220] Subscribers are able to have regular interactions with content producers, fostering an intimate connection.[221] Content creators interact with their fans through direct messages, and fans are able to request that content producers engage in various sexual acts through these messages.[222] When consumers are especially pleased by the content, they are able to provide tips to the content creator.[223] Many sex workers have built substantial followings on OnlyFans.[224] OnlyFans has expanded in prominence during the COVID-19 pandemic, increasing from 79 to 256 employees and obtaining a number of celebrities as content creators.[225] The website recently had a pop culture moment when Beyoncé rapped the following lyrics in her quarantine collaboration with Megan Thee Stallion: "Hips tik tok when I dance / On that Demon Time, she might start an OnlyFans."[226]

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216 *See id.* (discussing the social and political backdrop of San Francisco).

217 Jacob Bernstein, *How OnlyFans Changed Sex Work Forever*, N.Y. TIMES (Feb. 9, 2019), https://www.nytimes.com/2019/02/09/style/onlyfans-porn-stars.html.

218 *See id.* ("[H]undreds of men pay Dannii Harwood to enact their sexual fantasies . . . . If a guy is a regular customer, she likely knows his birthday, the names of his children and his pets—even when to call after a surgical procedure.").

219 *See id.*

220 *Id.*

221 *Id.*

222 *Id.*

223 *Id.*; *see also* Mascetti, *supra* note 200 (explaining the practice of tipping on OnlyFans).

224 *Id.*

225 *See* Danny Konstantinovic, *OnlyFans Is Exploding During COVID. But Are Its Users Safe?*, BUS. BUS. (Sept. 15, 2020, 2:02 PM), https://www.businessofbusiness.com/articles/onlyfans-growing-pandemic-covid-pornographic-adult-content.

226 Canela López, *What is Demon Time? Beyonce Raps About the New Trend of Masked Strippers Performing on Instagram Live for CashApp Tips*, INSIDER (May 13, 2020, 2:53 PM), https://www.insider.com/beyonce-raps-about-demon-time-strippers-on-instagram-live-2020-5 ("Beyoncé has been applauded for a new rap that pays tribute to—and raises the profile of—strippers and adult entertainers who have been put out of work by the lockdowns.").

OnlyFans complicates how we think about sex work. Many of the content creators who use the platform, including creators who provide sexually explicit content, do not necessarily think of themselves as sex workers.[227] For example, one popular content provider acknowledges that her fans pay for her content based on sexual motivations, but she still describes herself as a "fitness model" on the website.[228] Consumers may in fact be subscribing to the content for "sexual gratification" and paying for her to engage in sexual conduct, which is criminalized as prostitution under many existing statutes.[229] Content consumers also seek intimate connections with content creators.[230] Several creators on the website describe themselves as providing "The Girlfriend [or Boyfriend] Experience."[231] This experience refers to when "sex workers 'advertise themselves as "girlfriends [or boyfriends] for hire" and describe the ways in which they offer not merely eroticism but authentic intimate connection for sale in the marketplace.' "[232] The intimate connection is not solely concerned with sexual gratification. It is also about learning the daily activities of creators and forming personal bonds with them.

And OnlyFans is not the only online hub for sexually explicit content creators. Snapchat Premium also provides a forum for creators to monetize their content through monthly subscriptions.[233] Subscribers are able to communicate directly with content creators, provide public commentary on the content, and interact with other fans about the

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227 *See* Bernstein, *supra* note 217.

228 *Id.*

229 *See supra* note 141 (surveying state prostitution statutes); *cf.* People v. Freeman, 758 P.2d 1128, 1129 (Cal. 1988) (emphasizing the lack of sexual gratification in distinguishing pornography from prostitution).

230 *10 Things to Do When You Sign Up to OnlyFans*, ONLYFANS, https://blog.onlyfans.com/10-things-to-do-when-you-sign-up-to-onlyfans (last visited Feb. 13, 2021).

231 Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CALIF. L. REV. 1195, 1246 (2015); *see* Bernstein, *supra* note 217 (describing how OnlyFans provides its users with an experience akin to having an "online girlfriend"); Hallie Lieberman, *Meet the Male Sex Workers of OnlyFans. And the Women They Satisfy.*, BUZZFEED NEWS (Sept. 26, 2020, 10:31 AM), https://www.buzzfeednews.com/article/hallielieberman/onlyfans-male-sex-workers-dick-pics (profiling a male sex worker who provides "a texting boyfriend experience").

232 Davis, *supra* note 231, at 1246 (quoting ELIZABETH BERNSTEIN, TEMPORARILY YOURS: INTIMACY, AUTHENTICITY, AND THE COMMERCE OF SEX 7 (2007)).

233 Laurie Clarke, *The X-Rated World of Premium Snapchat Has Spawned an Illicit Underground Industry*, WIRED (Sept. 13, 2019), https://www.wired.co.uk/article/premium-snapchat-adult-models; *see also* Aisling Moloney, *What Are Premium Snapchat Accounts and Are They Just Porn?*, METROTIMES UK (Nov. 21, 2017, 8:38 AM), https://metro.co.uk/2017/11/21/what-are-premium-snapchat-accounts-7088201.

content.[234] Like OnlyFans subscribers, they are also able to request specific types of content from content creators.[235] Content creators may engage in challenges that include live interactions with audience members, production of sexually explicit content with other content creators, and private requests for explicit materials.[236] These platforms have become ubiquitous in popular culture.

3. Virtual Reality

Virtual reality pornography also complicates how we understand pornography and prostitution. Virtual reality pornography allows audience members to be immersed in sexually explicit augmented reality scenarios.[237] Pornography actors may prerecord scenes that aim to provide a comprehensive and multidimensional sexual experience.[238] The aim is to simulate real sex in a way that two-dimensional representations do not.[239] There is a sensorial component to the experiences.[240] The viewer is able to sense the experience through multiple senses, not just visually and audibly. Virtual reality allows content consumers to engage in prerecorded scenarios.[241] It also facilitates live action situations with other audience members and content creators.[242] Through augmented reality, sex work clients are able to have live interactions with sex workers without physical proximity.[243] For example, the Titan VR by KIIROO provides an immersive virtual sex experience that includes the "first interactive vibrating stroker" to incorporate a tactile experience.[244] The Titan allows a user to connect with "another person's device, [so they] can feel everything they do

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234 *See* Clarke, *supra* note 233.

235 *Id.*

236 For example, one creator describes a live challenge in which "men bid to watch her drive around town in her underwear and order a pizza to her home, whereupon she would answer the door naked." Bernstein, *supra* note 217.

237 *See generally* Alyson Krueger, *Virtual Reality Gets Naughty*, N.Y. TIMES (Oct. 28, 2017), https://www.nytimes.com/2017/10/28/style/virtual-reality-porn.html (describing virtual reality pornography and the experiences of virtual reality pornography actors).

238 Peter Rubin, *Coming Attractions: The Rise of VR Porn*, WIRED: BACKCHANNEL (Apr. 17, 2018, 6:00 AM), https://www.wired.com/story/coming-attractions-the-rise-of-vr-porn.

239 *Id.*

240 *Id.* (discussing how virtual reality companies advertise their partnerships with "sex toy companies to create vibrators or penis pumps that link to VR material").

241 *Id.*

242 Krueger, *supra* note 237 (describing how when one sex performer "does live X-rated performances, users can leave comments and chat to one another on the side of the screen").

243 *Id.*

244 *Titan VR Experience*, KIIROO, https://www.kiiroo.com/products/titan-experience (last visited Feb. 1, 2021).

through vibrations in [their] own device, while giving them total control over speed and intensity."[245] When connecting with sex workers and paying a service provider for prerecorded content, there is an exchange of money for sexual gratification, but the entire experience is virtual. If the scenario occurred in person, it would ordinarily be a prostitution transaction. Where there is no actual physical contact between the participants, should these situations be treated the same?

4. Other Possibilities

A sex work application that allows users to comment on sexual encounters, employing Snapchat-like features, might enable audience members and actors to participate in community building in similar ways that Snapchat does. Professors Dana Rotman and Jennifer Preece define an online community as "a group (or various subgroups) of people, brought together by a shared interest, using a virtual platform, to interact and create user-generated content that is accessible to all community members, while cultivating communal culture and adhering to specific norms."[246]

The audience members would be able to communicate with others who share similar sexual desires and communicate with actors about their content. The application would provide a forum for discussions about safe approaches to certain acts as well as conversations, critiques, and organizing. The establishment of this type of online space would itself be a political statement in socially conservative communities.[247] The relative societal value of this form of free association as compared to other online communities would not eliminate the importance of allowing these discussions. The marketplace of ideas that the First Amendment protects is not a marketplace for only ideas that are worthy of merit.[248] Justice Oliver Wendell Holmes conceived

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[245] *Realistic, Interactive VR Sex Is Finally Here, and It's Affordable: VR Sex Is No Longer Just a Hypothetical*, FUTURISM (June 19, 2020), https://futurism.com/vr-sex-kiiroo-titan-headset-vibrating-stroker.

[246] Dana Rotman & Jennifer Preece, *The 'WeTube' in YouTube–Creating an Online Community Through Video Sharing*, 6 INT'L J. WEB BASED COMM. 317, 320 (2010).

[247] *Cf.* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 11 (Robert Hurley trans., 1978). Michel Foucault describes the Victorian-era spaces for the deviant sexual behavior of the "other Victorians." *Id.* at 4. The "other Victorians" were those who expressed sexuality, outside the confines of the traditional Victorian standards limited to the marital relationship, by engaging in sexual discourses with psychiatrists or prostitutes. *Id.* at 4–5.

[248] *See* Ana Choi, McCullen v. Coakley*: How Should We Reconcile the First Amendment with Abortion Rights?*, 9 HARV. L. & POL'Y REV. ONLINE 11, 17 (2015) ("The essence of the 'marketplace of ideas' rationale is that *society as a whole* benefits when ideas are put into the marketplace. As society is exposed to more and more ideas, the likelihood of finding the truth increases, and it is counterproductive to try to regulate these ideas in advance."). Nevertheless, the marketplace of ideas conception of the First Amendment

of it as a free market with limited content restrictions and stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[249] In *Cohen v. California*, the Supreme Court noted:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . .[250]

The right to associate with others online, provide timely feedback, and interact with content providers is precisely what makes recent technological advances so significant. Technology provides for a new way to interact with content.

B. Changes in Production Technology

In addition to facilitating new forms of virtual engagement, technology has democratized the creation of quality content.[251] The ability to produce videos on handheld devices and the access to distribution networks speak to the potential of technology to democratize the distribution of ideas and the sharing of knowledge.[252] Technology has not only decreased the cost of producing content, it has made the production of content accessible.[253] It connects content producers to audiences in ways that analog production could not. It allows for content to flow to previously unavailable markets and reach wider audiences.[254] The ability to create content is no longer limited to an elite subsection of the population that has access to the resources to make videos and connect to viewers.[255]

In fact, filmmaking has been evolving into a more democratic endeavor for several decades. The cost of film equipment used to be a

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faces its fair share of critiques. *See* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 837 (2008) ("Scholars and courts continue to see the marketplace of ideas in neoclassical terms, debating its merits as if the only alternative would be to adopt a theory of the First Amendment based on the value of speech to democracy.").

249 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

250 403 U.S. 15, 24 (1971).

251 *See* Grant Blank, *Who Creates Content? Stratification and Content Creation on the Internet*, 16 INFO., COMMC'N & SOC'Y 590, 590 (2013) (arguing that the internet has made content creation and distribution "easier, faster, and cheaper").

252 *Id.* at 591.

253 *Id.*

254 *Id.*

255 *Id.*

barrier into entry into independent filmmaking.[256] The process of shooting on film and processing film meant that only filmmakers with substantial budgets and the ability to fundraise were able to produce films.[257] Filmmaking required specialized skills, costly camera equipment, and access to processing and editing laboratories.[258] The barriers into entering this field restricted filmmaking to true experts, who served as curators of the artistic content we consumed.[259]

However, the shift to digital filmmaking has substantially reduced the costs of filmmaking and opened the industry to people who had previously been excluded.[260] There are an increasing number of independent films because filmmakers are no longer dependent upon major film studios to finance their films.[261] They can film their projects on limited budgets[262] and share their films on the film festival circuit. The cost of a digital camera itself is substantially less than the cost of a film camera. For example, a Red camera EOL'd One MX, a digital cinema camera used in many Hollywood film productions that replicates the aesthetic of film cameras, once cost $25,000 and now only costs $4,000.[263] Meanwhile, many professional film camera prices start at over $100,000.[264]

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256 *See* Peter Flanigan, *The Environmental Cost of Filmmaking*, 10 UCLA ENT. L. REV. 69, 90 (2002) ("Digital filmmaking is quickly leading to an era where costs of production may be greatly minimized.").

257 *See id.* ("In 1995, the average cost of making a film (including marketing) was $34.4 million dollars.").

258 JOHN RICE & BRIAN MCKERNAN, CREATING DIGITAL CONTENT 37–46 (2002) (stating that the affordability of digital tools, the convergence of online and older media platforms, and the proliferation of consumer-centered content result in greater democratization within the production industry).

259 *See* Jon M. Garon, *Content, Control, and the Socially Networked Film*, 48 U. LOUISVILLE L. REV. 771, 773 (2010) (arguing that digital distribution of content has challenged the traditional networks for distributing content and altered the role of filmmakers in the process).

260 *See* Blank, *supra* note 251, at 591 (identifying the rise of "personal publishing" across creative content industries and noting that "a low-cost of production, relatively low technical skill requirements, minimal capital needs, and low-cost distribution [make] it . . . possible for ordinary people to reach large audiences").

261 *Id.*

262 *See generally* DAN RAHMEL, NUTS AND BOLTS FILMMAKING: PRACTICAL TECHNIQUES FOR THE GUERILLA FILMMAKER (2004).

263 Z. Honig, *Red Gets Epic Price Cut, Drops M, X and Scarlet Brains by up to 45 Percent*, ENGADGET (Nov. 2, 2012), https://www.engadget.com/2012-11-02-red-epic-price-cuts.html (describing price cuts of different digital cameras).

264 Johnathan Paul, *You Can't Afford This Expensive Hollywood Camera Gear*, PREMIUM BEAT (Jan. 13, 2016), https://www.premiumbeat.com/blog/you-cant-afford-this-expensive-hollywood-camera-gear.

The shift to digital film also increased access to film production.[265] Film production no longer requires physical studios devoted solely to developing, taping analog films to a reel, and taping and splicing film together to physically edit the film.[266] Film editing is possible through computers with editing software. Filmmakers are able to learn the skills to edit films on software such as Final Cut Pro and Premier from websites that provide detailed instructions and tutorials.[267] Many of the online tutorials are on free platforms like YouTube, where content providers are able to teach and share their expertise with audiences.[268] These changes are part of the technical and cultural landscape that make the distribution of sexually explicit materials more accessible.

In addition to the advances in digital filmmaking, advances in smart phone technology have extended our ability to make artistic content. Smart phone users can function as guerilla film crews.[269] Filmmaking is easier and more accessible to many novices and experts alike due to the high quality of video that smart phones capture. For example, Steven Soderbergh shot his film *Unsane* entirely on the iPhone.[270] Art critics have recognized the quality of smart phone videos and photos, and there are Instagram accounts devoted solely to artistic photos shot on iPhones.[271] Smart phones allow users to record

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265 *See* Michael Chanan, Who's for 'World Cinema'? 2 (May 14, 2011) (unpublished manuscript), http://www.mchanan.com/wp-content/uploads/2010/08/Reflections-on-World-Cinema.pdf ("Digital video has introduced new ways of shooting films, editing them, distributing and now exhibiting them which have unsettled the majors enormously as new players have entered a hugely extended market at all levels.").

266 *See Analog VS Digital Film Editing*, FOUNDS. OF EDITING (Mar. 4, 2015), https://foundationsofediting.blogspot.com/2015/03/analog-vs-digital-film-editing.html (describing the ease of editing digital as opposed to analog film).

267 *See, e.g.*, NO FILM SCHOOL, https://nofilmschool.com (last visited Mar. 30, 2021) (providing public education on film production and the technical skills to make quality films).

268 *Id.* (providing educational videos about film production that are available on YouTube).

269 Christi Carras, *12 Movies That Were Shot on an iPhone*, VARIETY (Mar. 22, 2018, 9:15 AM), https://variety.com/2018/film/news/unsane-tangerine-films-iphones-1202730676 ("As each new iPhone offers increasingly complex photography capabilities, filmmakers are beginning to recognize the Apple device as a legitimate medium.").

270 Eric Kohn, *Steven Soderbergh Says He's Done Directing Studio Movies and Wants to Only Shoot on iPhones — Sundance 2018*, INDIEWIRE (Jan. 26, 2018, 10:34 AM), https://www.indiewire.com/2018/01/steven-soderbergh-interview-sundance-iphone-unsane-1201921769. Soderbergh has indicated that he plans to continue to shoot his films on the iPhone. *See id.* Other filmmakers are also incorporating iPhone videos into their films, demonstrating the creative potential of the medium. *See* Carras, *supra* note 269 (discussing twelve films that were shot using an iPhone).

271 *See, e.g.*, RICHARD VICKERS, CONVERGENCE MEDIA, PARTICIPATION CULTURE AND THE DIGITAL VERNACULAR: TOWARDS THE DEMOCRATIZATION OF DOCUMENTARY ("The pervasive and ubiquitous nature of the camera phone and smart device signify the final

videos and edit video content through the many editing applications that are available to mobile phone filmmakers. Many documentaries incorporate cellular phone videos because they allow the filmmaker to record the subject of the film with the agility that prescheduled shoots with a full film crew often do not allow.[272]

Recent events illustrate the potential for smart phones to substitute as an on-the-ground news crew.[273] Racial justice protests in 2015 to 2017 were largely initiated after recordings of police acting violently were shared online.[274] In 2020, a global movement to address police brutality in response to the recorded police murders of George Floyd and Breonna Taylor was spurred by image and social media technology.[275] Community members recorded incidents of police misconduct on their smart phones and then distributed these videos through social media applications.[276] Activists used social media to comment on video recordings and organize protests. Smart phones have the potential to organize communities around shared issues.[277]

Smart phone applications also allow for the creative manipulation of visual content. For example, the mobile application Snapchat combines the ease of smart phone recordings and creative visualization to transform the everyday into the artistic.[278] Snapchat allows users to

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stage in the process of the democratization of photography that began over 100 years ago."), *in* INT'L CONF. ON COMMC'N, MEDIA, TECH. & DESIGN, CONFERENCE PROCEEDINGS 105 (May 2012).

[272] *Id.*

[273] *See* I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1248 (2017) ("There is a reason why 'black lives matter' has become part of the national conversation, and it has much to do with acts of police violence captured on video.").

[274] *See* Erika Robb Larkins, *Performances of Police Legitimacy in Rio's Hyper Favela*, 38 L. & SOC. INQUIRY 553, 571 (2013) (describing the use of Twitter and smart phone images to document police abuses in Brazilian favelas).

[275] *Protests Erupt in US After the Deaths of George Floyd and Breonna Taylor – In Pictures*, GUARDIAN (May 30, 2020), https://www.theguardian.com/us-news/gallery/2020/may/29/george-floyd-breonna-taylor-protests-photos. The video of Derek Chauvin killing George Floyd was captured through a bystander's cellular phone and shared on social media. Audra D.S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, N.Y. TIMES (May 26, 2020), https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html.

[276] *See* Lisa M. Olson, *Blue Lives Have Always Mattered: The Usurping of Hate Crime Laws for an Unintended and Unnecessary Purpose*, 20 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 13, 42 (2017) ("One side effect of a technology-savvy public is that these moments [of police-perpetrated assaults] are more likely to be captured on camera, a device, which most of us carry in our pockets on a daily basis and preserved indefinitely.").

[277] *See* Sarah Tran, *Cyber-Republicanism*, 55 WM. & MARY L. REV. 383, 431 (2013) ("[T]he leading social media platforms likely stimulate the growth of viewpoint diversity due to their inclusive design. This in turn enables richer dialogue and deliberation among citizens to occur.").

[278] *See* Ashley Barton, *Oh Snap!: Whether Snapchat Images Qualify As "Fighting Words" Under* Chaplinsky v. New Hampshire *and How to Address Americans' Evolving*

share short video clips with friends who are fellow users of the application. Users have the option to artistically manipulate their clips through various artistic inputs, drawings, writings, or images. For example, users may use a filter that transforms their face into that of a dog with its tongue sticking out, or add text to their images.[279] Snapchat videos often depict users engaging in ordinary activities like cleaning their homes,[280] eating meals, or spending time with their friends.[281] Many young adults rely on Snapchat as their primary mode of communicating with their peers, rarely turning to one-to-one text messages and phone calls.[282] Snapchat allows content to be broadcast to multiple individuals at once as creators engage in everyday life.[283] Accordingly, this form of communication allows for conversations that are broader than the two-person or three-person dialogues that typically occur through cellular phones. It facilitates the creation of online communities that can discuss multiple topics at once and who can organize their multiple conversations.[284] Followers are able to publish public commentaries that other followers are able to engage with as

Means of Communication, 52 WAKE FOREST L. REV. 1287, 1301–02 (2017) (discussing the applicability of the First Amendment to Snapchat images).

279 *See* Nathan C. Ranns, *Gone in a Snap?: The Effect of 17 U.S.C. § 102(a) Fixation Precedents on Ephemeral Messaging Platforms*, 45 AIPLA Q.J. 255, 265–66 (2017) (describing how Snapchat filters and lenses can alter a user's appearance and may be used to "give[] the user dog ears, a dog nose, and lick[] the screen when the user opens their mouth").

280 *See, e.g.*, Do It On A Dime, *Spring Clean with Me! ✨ Speed Deep Cleaning Tips & Motivation 2018*, YOUTUBE (Mar. 19, 2018), https://www.youtube.com/watch?v=7mU4QAUlT2Y (documenting an influential YouTube blogger cleaning her home); Unity Blott, *Move Over, Beauty Bloggers! The Glamorous Cleaning Gurus Taking Over Instagram with Their Hacks for Gleaming Tiles, Sparkling Surfaces and Perfect Pantries*, DAILY MAIL (Sept. 13, 2018, 3:30 PM), https://www.dailymail.co.uk/femail/article-6164147/Why-CLEANING-gurus-new-beauty-bloggers.html (discussing the growing influence of cleaning bloggers).

281 Mary Kate McGrath, *Kylie Jenner's Friends' Snapchat Names Will Help You Keep Up with Her Famous Crew*, BUSTLE (May 29, 2017), https://www.bustle.com/p/kylie-jenners-friends-snapchat-names-will-help-you-keep-up-with-her-famous-crew-60949.

282 Google, *Gen Z: A Look Inside Its Mobile-First Mindset*, THINK WITH GOOGLE, http://web.archive.org/web/20190104185635/https://www.thinkwithgoogle.com/interactive-report/gen-z-a-look-inside-its-mobile-first-mindset (last visited Apr. 19, 2021) (finding fifty-two percent of teens spend time on messaging applications, illustrating a shift away from text messaging); *see also* Nina Godlewski, *Teens Say They're Ditching Texting for Snapchat Because It's More Casual*, BUS. INSIDER (July 12, 2016, 2:54 PM), https://www.businessinsider.com/teens-message-in-snapchat-2016-7; Caleb Ledbetter, *The Language of Gen Z: Snapchat*, MILLENIAL MARKETING, https://www.millennialmarketing.com/2018/08/the-language-of-gen-z-snapchat (last visited Apr. 19, 2021).

283 Zelen Communications, *Storytelling for Your Business is a Snap with SnapChat*, https://zelencommunications.com/general-services/online-integrated-marketing/social-media/snapchat (last visited Feb. 13, 2021) ("People engage with stories on Snapchat and want to see the everyday life of their peers.").

284 *Id.*

the content provider is broadcasting their current activities.[285] Snapchat can be used to broadcast opinions about various topics, and content providers may gain followers that support their movement.[286] It provides a platform for community-building and the sharing of ideas, big and small.

C. *Reality Entertainment*

The current social environment provides further context for understanding recent technological advances and why they are important for online communities. We are in a moment in popular culture where the ordinary has the same artistic potential as the extraordinary displays of creativity that we traditionally view as art.[287] Take the case of YouTube family vloggers who record their daily lives to provide video content to YouTube viewers.[288] Vloggers, or video bloggers, adopt a film recording style that feels like a video diary, documenting the daily happenings of the vlog's subjects.[289] This style of shooting creates intimacy between the vloggers and the audience, and vloggers often refer to their audiences as part of their community.[290] For

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[285] Snapchat has emphasized its focus on community-building: "When we launched Snapchat more than seven years ago, it wasn't about capturing the traditional Kodak moment, or trying to look pretty or perfect. We wanted to create a way for our friends to express themselves and share however they felt in the moment." *Celebrating Our Real Friends*, SNAP INC. (July 29, 2019, 12:00 AM), https://www.snap.com/en-US/news; *see also* Elissa Tucci, #*nofilter: A Critical Look at Physicians Sharing Patient Information on Social Media*, 16 IND. HEALTH L. REV. 325, 330 (2019) ("Content generated by Snapchat users . . . focus[es] on mundane or everyday occurrences. Common themes include pets, food, weather, or sharing the viewpoint of the poster's current location.").

[286] *Cf.* Ashley E. Russo, *An Analysis of the First Amendment Through the Lens of Social Movements: How Apple's Latest iPhone Patent Can Change the Way We Rise*, 18 J. HIGH TECH. L. 331, 352 (2018) (discussing the role of social media during the Arab Spring and how "people throughout the world were able to follow everything that occurred . . . with the use of text messages, photographs, videos, and location services").

[287] *See* Adam P. Greenberg, *Reality's Kids: Are Children Who Participate on Reality Television Shows Covered Under the Fair Labor Standards Act?*, 82 S. CAL. L. REV. 595, 602 n.39 (2009) ("Although often considered second-rate entertainment, reality television has been legitimized by the Academy of Television Arts & Sciences through its creation of Emmy Awards for 'Outstanding Reality-Competition' and 'Outstanding Reality Program.'").

[288] *See, e.g.*, Belinda Luscombe, *The YouTube Parents Who Are Turning Family Moments into Big Bucks*, TIME (May 18, 2017, 6:00 AM), https://time.com/4783215/growing-up-in-public (discussing the growing genre of family vlogging).

[289] *See* Aymar Jean Christian, *Real Vlogs: The Rules and Meanings of Online Personal Videos*, FIRST MONDAY (Nov. 2, 2009), https://firstmonday.org/article/view/2699/2353 ("A vlog is many things, and different things to different people, but most broadly it is an expression of a self.").

[290] *See* TOBIAS RAUN, OUT ONLINE: TRANS SELF-REPRESENTATION AND COMMUNITY BUILDING ON YOUTUBE 2, 19 (2016) (outlining the ways that transgender vloggers have used their vlogs as platforms for building online communities); Michael Wesch, *YouTube and You: Experiences of Self-Awareness in the Context Collapse of the Recording Webcam*,

example, the *Daily Bumps* is a family vlog that follows the daily life of a family of four from San Diego, California.[291] The vlog channel has documented the family's fertility struggles, the births of the parents' two children, the children's birthday parties, and their mundane tasks like errands to the grocery store.[292] It is a window into their lives. Many vloggers record their videos on relatively low-cost cameras that are under $1,000 and are much cheaper than the cameras that are ordinarily used in major film production sets.[293] While this content is not of the same artistic quality as an Academy Award-winning film, it is nevertheless creative. Content providers must make choices about how to edit the content, the backgrounds against which they will shoot, and the types of activities they will share.[294] Additionally, they are expressing themselves through their content.

Reality television shows are another example of finding expressive potential in ordinary interactions.[295] Television shows like *Keeping Up with the Kardashians*, *Love & Hip Hop*, and *The Bachelorette* have transformed ordinary problems—family life in a large family, the struggle to make it in one's dream career, and the search for love, respectively—into interesting content for their large audiences.[296] Each of these television shows has been on the air for over a decade, and their audiences have grown attached to many of

8 EXPLS. MEDIA ECOLOGY 99, 99 (2009) (arguing that such online communities "create[] a context for sharing profound moments of self-reflection and for creating connections that are experienced as profoundly deep yet remain ephemeral and loose").

291 *See* Daily Bumps, *About*, YOUTUBE, https://www.youtube.com/c/dailyBUMPS/about (last visited Mar. 29, 2021) ("The Lanning family has been making videos on YouTube for over 8 years. Vlogging their family, travels, and fun along the way.").

292 *See id.*; *see also* Brittany Vanbibber, *How Bryan Lanning and His Wife Got Their Start on YouTube*, AOL (Mar. 4, 2017, 12:37 PM), https://www.aol.com/article/entertainment/2017/03/04/how-bryan-lanning-and-his-wife-got-their-start-on-youtube/21865945; Daily Bumps, *Daily Bumps Year 4 Montage*, YOUTUBE (Jan. 27, 2017), https://youtu.be/nR-z01FUSOc.

293 *See* Matthew Richards, *Best Camera for Vlogging 2019: 10 Perfect Choices Tested*, TECHRADAR (Jan. 1, 2019), https://www.techradar.com/news/best-vlogging-camera.

294 *See Build a Content Plan*, THINK WITH GOOGLE (Oct. 2015), https://www.thinkwithgoogle.com/marketing-resources/youtube/build-a-content-plan (describing creative choices that content creators should consider when developing a content plan); Rob Ciampa, Theresa Moore, John Carucci, Stan Muller & Adam Wescott, *Planning an Outstanding YouTube Channel*, DUMMIES, https://www.dummies.com/business/marketing/social-media-marketing/planning-an-outstanding-youtube-channel (last visited Jan. 20, 2021).

295 *See* Randall L. Rose & Stacy L. Wood, *Paradox and the Consumption of Authenticity Through Reality Television*, 32 J. CONSUMER RSCH. 284, 294–95 (2005) (describing consumer demand for hyper-authenticity and depictions of everyday life).

296 *See* Minna Aslama & Mervi Pantti, *Talking Alone: Reality TV, Emotions and Authenticity*, 9 EUR. J. CULTURAL STUD. 167, 172, 180 (2006) ("[M]ediated conversation dealing with the basic experiences of everyday life constructs imagined communities and . . . today, commercial television has taken a key role in their creation.").

the featured individuals.[297] Reality television shows are shot on shoestring budgets as compared to the major budgets of their sitcom predecessors. As compared to traditional forms of entertainment content on television, they are cheaper to shoot, require less scripting, and share less semblance with traditional art.[298] Reality television shows do not derive their artistic value from prior writing or scripting.[299] While there are varying levels of scripting for different shows, they do not involve the same level of clever writing as a fully scripted sitcom or dramatic television show.[300] They depict characters that are neither actors nor television performers. But reality shows are nevertheless a form of art and have substantial audiences that are committed to watching the reality stars perform their everyday lives.[301] There is a voyeuristic quality to these forms of programming that contributes to a cultural landscape that recognizes the expressive nature of the ordinary.[302]

YouTube vlogging and reality television shows are just two examples of the ways that expression may involve ordinary occurrences that would otherwise just be everyday life. They become forms of expression because they have been broadcast to the world through television networks and online platforms.[303] There have long been dis-

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297 *Cf.* Kelefa Sanneh, *The Reality Principle: The Rise and Rise of a Television Genre*, NEW YORKER (May 2, 2011), https://www.newyorker.com/magazine/2011/05/09/the-reality-principle (examining the cultural rise of reality television programming).

298 *See* Matthew Bunker, *Reality Bites: The Limits of Intellectual Property Protection for Reality Television Shows*, 26 UCLA ENT. L. REV. 1, 1–2 (2019) ("One huge advantage reality shows offer content providers over scripted comedies or dramas is that reality shows are much less expensive to produce. . . . [T]he average unscripted series costs about one-fourth as much as a high-end drama . . . ."); Barclay Palmer, *Why Networks Love Reality TV*, INVESTOPEDIA, https://www.investopedia.com/financial-edge/0410/why-networks-love-reality-tv.aspx (last updated Jan. 31, 2020).

299 *But see* Fan Cheng, *Behind the Low Originality of Chinese Reality TV Shows: Copyright Protection and Government Regulation for Localization*, 16 NW. J. TECH. & INTELL. PROP. 266, 270 (2019) ("The reality show production involves substantial effort . . . .").

300 *See* Jean K. Chalaby, *Drama Without Drama: The Late Rise of Scripted TV Formats*, 17 TELEVISION & NEW MEDIA 3, 14 (2016) (describing "[c]onstructed reality" television programs which "consist[] of shooting 'real' people in managed situations and structured scenarios"); *id.* ("Not all the genre's exponents use scripts. In the Anglo-American variant, producers construct settings but dialogues and storylines remain driven by 'real' characters.").

301 *See* Rose & Wood, *supra* note 295, at 284 (examining the expressive nature of reality television and the communicative power of perceived authenticity).

302 *See id.* (explaining the common scholarly depiction of reality television consumers as voyeurs).

303 *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581 (1991) (Souter, J., concurring) (discussing the importance of the audience to the expressive endeavor).

tinctions between low art and high art,[304] or high art that masquerades as low art.[305] There is a long tradition of depicting ordinary life through beautiful depictions and renderings.[306] However, the ability to follow people as they complete ordinary tasks and live everyday life for artistic content is relatively new. It stretches artistic possibilities and makes it possible to label even the mundane as artistic expression. Modern technology necessarily expands what we define as a form of art. The mere task of being becomes a form of expression once it is broadcast to an audience.

D. Online Audiences

Courts must contend with the changing nature of online audiences, which may demonstrate the intent to communicate, facilitate community-building, and foster interactivity. Technology now provides accessible online spaces for individuals to express their views and activities to large audiences. These audiences differ from traditional live audiences in their accessibility and sheer number. Ordinary people may be able to reach thousands and even millions of people with content that goes viral, or rapidly spreads through a community as content consumers share it with others.[307] The costs of sharing content are generally low and frequently free.[308] On many online platforms, such as OnlyFans, content creators are compensated by the

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304 *See* Anne Salzman Kurzweg, *Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression*, 34 HARV. C.R.-C.L. L. REV. 437, 463–67 (1999) (arguing that First Amendment protection should extend to various forms of performance); *id.* at 437 (describing an example of protectable performance in 1990 when "Annie Sprinkle, formerly a career actress in pornographic films, appeared onstage in New York to perform in a 'Smut Fest.' During the show, Sprinkle, legs spread, invited audience members onstage to view her cervix by means of a speculum. A number of men and women accepted her invitation.").

305 *See, e.g.*, Marc M. Harrold, *Stripping Away at the First Amendment: The Increasingly Paternal Voice of Our Living Constitution*, 32 U. MEM. L. REV. 403, 417 (2002) ("Mayor of New York, Rudolph Giuliani, decided to wage his own private war on the Brooklyn Museum over the planned exhibition of a show entitled '*Sensation*' that included a painting of a black Virgin Mary with clumps of elephant dung on her breasts."); Zahr K. Said, *Copyright's Illogical Exclusion of Conceptual Art*, 39 COLUM. J.L. & ARTS 335, 335 (2016) ("Many conceptual artists creating art in the contemporary era rebel against staid notions of what art can be . . . .").

306 *See, e.g.*, Benjamin A. Templin, *The Marriage Contract in Fine Art*, 30 N. ILL. U. L. REV. 45, 50 (2009) (discussing portrayals of the marriage contract in genre paintings, "which depict common events from the lives of ordinary people").

307 *See* Jonah Berger & Katherine L. Milkman, *What Makes Online Content Viral?*, 49 J. MKTG. RSCH. 192, 192 (2012) (examining the psychology of online content virality).

308 *See* Russell Belk, *You Are What You Can Access: Sharing and Collaborative Consumption Online*, 67 J. BUS. RSCH. 1595, 1596–97 (2014) (examining how online platforms facilitate the sharing and collaborative consumption of content).

platform.[309] Online audiences may interact with each other in ways that passive viewers in a traditional theater may not.

Moreover, the presence of an online audience may demonstrate that both the content creators and audience members intend to express themselves and share messages with each other and with the virtual community.[310] Online audiences are able to access the content and may be able to interact with it by providing public commentary to each other and direct feedback to the content creator.[311] The content contributes to the online marketplace of ideas.[312] From the perspective of the speaker, the individual demonstrates a clear intent to be expressive by making the content viewable to others, even if the content broadcast is a sexual encounter that could be considered prostitution. By uploading a video or other material for the consumption of others, the content provider is demonstrating the intent to share the material with others and express ideas.

Part of the demand for reality art is sparked by a curiosity in other people's ordinary lives, which has created a large audience for everyday life.[313] The presence of the audience can make an ordinary act expressive.[314] So, a performance art piece in which multiple actors walk down the street and start dancing in unison is expressive because the actors performed it with the understanding that bystanders would view the piece. Even if there was no audience present to view the actors on the street in the moment, their performance would still be expressive because the actors intended to communicate a message to an audience member. As discussed in Section I.A, Justice Souter

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309 *OnlyFans: Snapchat Alternative for Making Money*, SEXTING JOBS, https://sextingjobs.com/onlyfans-snapchat-alternative-making-money (last visited Jan. 20, 2021).

310 *See* Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam) (holding that conduct is expression entitled to First Amendment protection when "[a]n intent to convey a particularized message [i]s present, and in the surrounding circumstances the likelihood [i]s great that the message w[ill] be understood by those who view[] it").

311 *See* Inazu, *supra* note 17, at 1110–13 (noting the dynamic nature of online groups and observing that "[m]any of us use online connections to sustain relationships that begin offline").

312 *Cf. Spence*, 418 U.S. at 412 ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." (quoting Street v. New York, 394 U.S. 576, 592 (1969))).

313 Robin L. Nabi, Erica N. Biely, Sara J. Morgan & Carmen R. Stitt, *Reality-Based Television Programming and the Psychology of Its Appeal*, 5 MEDIA PSYCH. 303, 320–22 (2003) (finding that audiences watch reality television "primarily because they find it entertaining; they further enjoy getting a peek into others' lives and the self-awareness they acquire through viewing").

314 *See supra* text accompanying note 77 (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581 (1991) (Souter, J., concurring)). It is not necessary that there be an actual audience for the work, so long as there is an intended or "hypothetical" audience. *See id.*; *see also supra* note 78.

emphasized the importance of having an audience when distinguishing aerobic dancing from erotic dancing as an expressive form of conduct.[315] However, not all forms of expression require an actual audience.[316] Rather, the presence of an audience is sufficient to demonstrate that the actor intended to communicate a message through their actions.[317] The intent to communicate is at the heart of expression.[318]

The presence of an online audience also facilitates free association with others.[319] Technology allows the audience to actively engage with the content.[320] Sharing recorded material online frequently provides a space for video viewers to comment on the recordings and provide feedback and share unpopular views.[321] These interactions contribute to online communities that share a common interest in the actor and material that is being shared. In the context of reality porn,

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315 *See Barnes*, 501 U.S. at 581 (Souter, J., concurring).

316 *See* Blitz, *supra* note 79, at 1149 ("First Amendment speech protection [applies when] non-speech acts constitute 'symbolic' or 'expressive' conduct under the test set forth by the Supreme Court in the case of *Spence v. Washington*.").

317 The Supreme Court has not engaged with the *Spence* test where there is an audience, suggesting that acts are presumptively expressive in the presence of an audience. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (applying First Amendment protection to a musical performance without discussing the *Spence* test); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557–58 (1975) (holding that a municipality's denial of an application to use a public theater for a controversial rock musical violated the First Amendment without discussing the *Spence* test).

318 *See* Sunset Amusement Co. v. Bd. of Police Comm'rs, 496 P.2d 840, 845–46 (Cal. 1972) (finding that the key elements of a First Amendment claim are communication and the presence of an audience).

319 *See generally* NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 460 (1958) (holding that the First Amendment protects the right to free association); Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

320 *See* Amna Toor, Note, *"Our Identity Is Often What's Triggering Surveillance": How Government Surveillance of #BlackLivesMatter Violates the First Amendment Freedom of Association*, 44 RUTGERS COMPUT. & TECH. L.J. 286, 292–93 (2018) (arguing that the freedom of association extends to online activities and community-building); *id.* at 293 ("Modern-day movements, such as [Black Lives Matter], 'speak, associate, and organize through social media [and t]heir tweets, blogs, protests, marches, and die-ins are the trumpets by which they call for reform and social justice.'" (second alteration in original) (quoting Nusrat Choudhury, *The Government is Watching #BlackLivesMatter, and it's Not Okay*, ACLU (Aug. 4, 2015, 10:30 AM), https://www.aclu.org/blog/racial-justice/government-watching-blacklivesmatter-and-its-not-okay)). *But see* Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. REV. 1643, 1658–59 (2012) (outlining the challenges in recognizing a freedom to associate with online communities).

321 *See* Inazu, *supra* note 17, at 1110–11 ("[Online communities] foster and maintain resistance and dissent. These objectives are furthered . . . by the low cost of disseminating expression online. . . . The Internet may represent the democratization of cheap speech and the correlative benefits of . . . 'low-cost association building.'").

more people participate in a democratic endeavor to produce knowledge about sex. Many online commentators regularly follow and share feedback to content creators and become their loyal fans.[322] For example, on OnlyFans, fans may contact content producers directly and request specific types of videos. In response, the viewers may tip the content producer for fulfilling the content requests.[323] The viewer-creator relationship may move beyond the digital world and may involve live meet-ups and gatherings.[324] Accordingly, the presence of an intended audience not only demonstrates that the actor intends to communicate a message to another person, which is expressive;[325] it creates an opportunity for the actor to generate an online and live community around the content and actor, which is associative.[326] Technology fosters interactivity and dialogue between content consumers and content producers, which are features that are generally missing from most pornography. Content consumers are able to communicate with each other. Much like how the users of a Reddit forum consult each other for advice about different topics,[327] consumers of reality porn are able to speak with each other directly and provide feedback based on the content.

Technology also facilitates different types of relationships, including sexual relationships. Content creators and sex workers are able to build networks and connect without ever interacting in person. Technology fosters additional audiences for the consumption of sexual conduct. It also promotes interactivity and community, making the traditional line between prostitution and pornography even more arbitrary than usual. The line between pornography and prostitution never was black and white, but technology is greatly expanding the gray area.

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322 *See, e.g.*, The Chatwins, *About*, YouTube, https://www.youtube.com/channel/UC2TTY2iAEYVAWimBjU-NvHA/about (last visited Jan. 20, 2021) (describing family vloggers who refer to their YouTube audience as the "CHATFAM," illustrating the close and communal relationship between the content providers and the members of the online audience).

323 *See* Mascetti, *supra* note 200 (describing OnlyFans's tipping culture).

324 *See When YouTube Stars Go Offline and Meet Up 'Live*,*'* Phys.org (Feb. 13, 2015), https://phys.org/news/2015-02-youtube-stars-offline.html.

325 *See* Sunset Amusement Co. v. Bd. of Police Comm'rs, 496 P.2d 840, 845–46 (Cal. 1972) (discussing the importance of an audience in demonstrating communication in the First Amendment context).

326 *See* NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 460 (1958) (recognizing the right to free association).

327 *See* Anna P. Hemingway, *Keeping It Real: Using Facebook Posts to Teach Professional Responsibility and Professionalism*, 43 N.M. L. Rev. 43, 75 (2013) ("Reddit is a social news host allowing registered users to post information about most anything to the site that other users rank up or down. Posts are varied and cover news topics, humor pieces, politics, and . . . law-related issues.").

III
The Harms of Criminalizing Commercialized Sex

This Part provides a brief overview of why it is preferable to err on the side of recognizing the First Amendment rights in sexually expressive conduct when faced with ambiguity about where to draw the line between pornography and prostitution. Over the past several decades, policymakers, social justice advocates, and feminists have looked to the criminal law to address an assortment of social harms.[328] The hope was that the criminal system could protect victims. However, it is increasingly clear that while the criminal system condemns bad acts, it also marginalizes BIPOC communities and contributes to racially discriminatory practices that have led to mass incarceration, biased policing, and the economic destabilization of low-income communities.[329] The criminalization of commercialized sex imposes harms on marginalized communities while depriving them of a form of income. In this moment, it is exceptionally clear that criminalization can be as harmful as the harms it seeks to redress.[330] The harms of general criminalization provide a backdrop for examining the criminalization of commercialized sex.[331] The countless ways that the carceral apparatus has contributed to subordination along the axes of race, gender, disability,[332] sexual orientation, and class are beyond the scope of this Article. Nevertheless, the harms of criminalization of any conduct, including sex, are clear when adopting an intersectional lens toward social harms.[333] When the line is blurry, courts should favor protecting civil liberties rather than justifying state regulation.

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328 *See* Roberts, *supra* note 52, at 1277 (discussing the extensive social and economic costs of mass incarceration to Black communities); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 Geo. L.J. 1479, 1485–91 (2016) (describing the racialized police violence that Black communities experience); Erik Luna, *Criminal Justice and the Public Imagination*, 7 Ohio St. J. Crim. L. 71, 82 (2009) ("The social consequences of America's punitiveness are substantial . . . with some states spending more on prison than higher education . . . .").

329 *See* Roberts, *supra* note 52, at 1277 (describing the destabilization effects of mass incarceration).

330 *Id.* at 1304.

331 *See id.*

332 *See generally* Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 Denv. L. Rev. 973, 973 (2019) (examining ableism within the criminal legal system, which is defined as "a complex system of cultural, political, economic, and social practices that facilitate, construct, or reinforce the subordination of people with disabilities in a given society").

333 *See* Thusi, *Harm, Sex, and Consequences*, *supra* note 20, at 166–67 (examining the harms of a carceral approach to sex work).

A. The Sex Wars

There has already been considerable scholarly attention spent on debating the merits of whether sex work, namely prostitution and the production and consumption of pornography, should be criminalized. Much of the debate has occurred within feminist circles as discussion of how various forms of criminalization either help or harm sex workers.[334] This Article does not address this issue directly and therefore spends little time discussing the issue of whether prostitution should remain criminalized or whether all forms of pornography should be criminalized. However, in previous articles that I have contributed to this debate, I have argued that decriminalization is generally preferable.[335] I have argued that sex workers who face systemic marginalization because of their various identities are often, rightfully, suspicious of the criminal legal system.[336] This suspicion is justified given the differential treatment that Black, Indigenous, and other sex workers of color,[337] immigrant sex workers,[338] and transgender sex workers[339] encounter in their everyday lives at the hands of actors

334 For an overview of the various debates concerning the decriminalization of sex work, compare Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 304, 328–29 (1995) (examining dominance feminism, the critiques of it, and the "consequences [that] flow from characterizing women as pervasively constructed by male aggression"), and CAROLE S. VANCE, *More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference* (critiquing radical feminist approaches to sex work that view women as victims), *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (2d ed. 1992), *reprinted in* Carole S. Vance, *More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference*, 38 N.Y. L. SCH. L. REV. 289, 290 (1993), with KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 9 (1979), and ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 24–25 (1988) (treating sex work as inherently problematic and violent for women).

335 *See* Thusi, *Radical Feminist Harms*, *supra* note 12, at 189.

336 *Id.* at 187 (arguing that an intersectional examination of criminalization reveals that it is often more harmful than the harm it seeks to address).

337 *See* Kamala Kempadoo, *Women of Color and the Global Sex Trade: Transnational Feminist Perspectives*, 1 MERIDIANS 28, 40 (2001) ("[I]nsights, knowledges, and understandings of sex work have been largely obscured or dominated by white radical feminist, neo-Marxist, or Western socialist feminist inspired analyses that have been either incapable or unwilling to address the complexities of the lives of women of color.").

338 *See* Danielle Augustson & Alyssa George, *Prostitution and Sex Work*, 16 GEO. J. GENDER & L. 229, 231 (2015) ("Often police do not consistently enforce prostitution laws except against the most visible sex workers—street sex workers, women of color, transgender workers, and immigrants.").

339 *See* Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. 5, 13–14 (2017) ("More specifically, transgender women overwhelmingly report a very specific problem—they are pervasively profiled as sex workers by the police based on their gender expression, and then subjected to aggressive, often abusive, policing practices based upon law enforcement's perception that they are universally and perpetually engaged in sex work.").

within the criminal legal system. If feminists are concerned with the well-being of women and those in the sex trades, they must contend with the harms that the criminal legal system has inflicted upon women who face intersectional forms of subordination.[340] Many Black women do not view the criminal legal system as a source of protection.[341] Some feminist scholars have described the turn toward criminalization within the feminist movement.[342] Professor Aya Gruber has argued that adopting a carceral approach to feminism that views the criminal legal system as a sword for the vindication of rights only expands punishment and harms marginalized communities.[343]

Nevertheless, abolitionist, or radical, feminists argue that partial criminalization of prostitution is appropriate because all forms of sex work are harmful to women as a collective.[344] They argue that prostitution contributes to the objectification of women, and that pornography too should be prohibited as a harm against all women.[345] They persuasively tell stories about women's status as inherent victims in the sex trades and detail the various dangerous situations women in the trade encounter.[346] They argue that women should not be

340 *See* Cheryl Nelson Butler, *A Critical Race Feminist Perspective on Prostitution & Sex Trafficking in America*, 27 YALE J.L. & FEMINISM 95, 123 (2015) ("[T]he focus on criminalization by anti-trafficking advocates should be a concern for people of color. Indeed, the abolitionist and dominance feminist perspectives['] focus on criminalization could be problematic for critical race feminists concerned with the targeting of people of color for mass incarceration."); Simanti Dasgupta, *Sovereign Silence: Immoral Traffic (Prevention) Act and Legalizing Sex Work in Sonagachi*, 37 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 109, 122 (2014) (discussing the importance of recognizing "the agency of the subaltern," or the ability of a marginalized community to exercise agency, despite its contingent social position).

341 *See* Roberts, *supra* note 52, at 1277 (detailing the costs of the criminal system on Black communities).

342 *See* Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 158–59 (2016) ("The feminist investment in using criminal law as a lever to transform culture has evolved into a campaign to govern gender violence through crime. . . . Today, for a significant number of feminists, Crime Logic *is* feminist logic. Social determinants of behavior are rendered unimportant.").

343 *See* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 751 (2007) (warning that carceral feminism has led to "increasing amounts of paternalism and disdain, as more advocates and jurists buy into the belief that female victims are weak, damaged, and unable to recognize their own interests").

344 *See, e.g.*, Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must* Not Know *in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 111 (2006) ("When prostitution is conceptually morphed into sex work, brutal exploitation by pimps becomes an employer-employee relationship. When prostitution is defined as labor, the predatory, pedophiliac purchase of a human being by a john becomes a banal business transaction.").

345 *Id.* at 134; *see infra* note 351.

346 Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 448 (2016) (arguing that sex work is coercive while making several empirical claims about the nature of sex work, such as that "women are disproportionately bought and sold in

criminalized because of their work in the sex trades, but that society should not tolerate an industry that allows for their objectification.[347] They instead call for partial criminalization of sex work, which would criminalize the activities of the sex work client while decriminalizing the activities of the sex worker.[348] Proponents claim that this approach to sex work will eventually eliminate the demand for sex work by targeting sex work clients and promoters without inflicting any harms on sex workers.[349] Sweden, Norway, and several European countries have adopted this model to regulate sex work, and it has been lauded as a compromise that protects sex workers.[350] Radical feminists also argue that there is no difference between pornography and prostitution, and that both should be abolished from society.[351] However, there is a substantial body of research that demonstrates that any form of criminalization leaves all sex workers more vulnerable and exacerbates the harms within the industry.[352]

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prostitution by men as a cornerstone of combined economic, racial, age-based, and gendered inequality, in which money functions as a form of force in sex because the women are not permitted to survive any other way").

[347] *See* Thusi, *Radical Feminist Harms*, *supra* note 12, at 194 (arguing that the radical feminist approach to sex work is harmful to sex workers).

[348] *See* Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 23 WM. & MARY J. WOMEN & L. 47, 58 (2016) (describing the partial criminalization approach favored by abolitionists).

[349] *See generally* Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271 (2011) (arguing that sex buyers are the driving force behind the sex work industry and advocating for an approach that decriminalizes sex workers but criminalizes their clients).

[350] *Id.* at 275 ("[C]riminalizing the buyers—the demand— . . . while eliminating any criminal status for prostituted people—the sold—and providing them services and job training they say they want, is the approach being pioneered in Sweden, Iceland, and Norway, and recent changes in the U.K. that point in this direction.").

[351] *See, e.g.*, Allison J. Luzwick, *Human Trafficking and Pornography: Using the Trafficking Victims Protection Act to Prosecute Trafficking for the Production of Internet Pornography*, 112 NW. U. L. REV. ONLINE 355, 359 (2017) ("[P]ornography is indistinguishable from prostitution, but false distinctions, based on who is paying for the sex acts, have been used to create artificial legal lines between prostitution and pornography."); Eric Engle, *The Red Queen Meets the Cheshire Cat? MacKinnon, Marx and the Mirror Stage of Production*, CRIT, Spring 2009, at 1, 16 ("MacKinnon sees pornography and prostitution as essentially the same phenomenon: 'pornography is an arm of prostitution.'"); Kayla Louis, *Pornography and Gender Inequality—Using Copyright Law as a Step Forward*, 24 WM. & MARY J. WOMEN & L. 267, 274 (2018) (discussing a number of similar experiences that women in pornography and in prostitution have). *But see* Kaye, *supra* note 5, at 251–52 (noting that there is very little difference between prostitution and pornography without suggesting that both should be criminalized).

[352] Professor Ronald Weitzer has criticized the methodology of the radical feminist approach: "[T]he radical feminist literature on prostitution and other types of sex work is filled with 'sloppy definitions, unsupported assertions, and outlandish claims'; such writers select the 'worst available examples' of sex work . . . . Anecdotes are generalized and presented as conclusive evidence, sampling is selective, and counterevidence is routinely

Further complicating the discourse on prostitution is its current entanglement with sex trafficking narratives that evoke tales of dark, shadowy figures determined to steal young girls and sell them in underground sex trafficking rings.[353] Law enforcement officials have described incidents of ordinary prostitution as sex trafficking.[354] Sex trafficking stokes the fears of the public, and the goal of eradicating it is often used to justify criminalizing prostitution.[355] The conflation of sex work with sex trafficking is strategic because sex trafficking feeds societal fears about race, migration, and femininity. Sex trafficking campaigns often rely on familiar narratives about threatening men who capture innocent girls and force them into the sex industry.[356] The film *Taken* demonstrates this tale with its references to white femininity and patriarchy.[357] In the film, an innocent girl on vacation is kidnapped for sale into the underground sex industry.[358] The girl's father, portrayed by Liam Neeson, plays the hero who rescues her from sexual slavery.[359]

The desire to prevent sex trafficking is often used as a rationale for the continued criminalization of prostitution.[360] Professor Janie Chuang argues that the contemporary discourse on trafficking is driven by the ideological beliefs of radical feminists, who "recognize no distinction between 'forced' and 'voluntary' prostitution."[361] But the reliance on the ideal victim and the incorporation of racist overtones illustrates the problem with the conflation of sex work with sex trafficking.[362]

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ignored." Ronald Weitzer, *New Directions in Research on Prostitution*, 43 CRIME L. & SOC. CHANGE 211, 214 (2005) (citations omitted).

353 *See* TAKEN (EuropaCorp 2008) (depicting the paradigmatic sex trafficking case).

354 For example, after a sting operation in Florida, media outlets claimed that Robert Kraft was involved in a sex trafficking ring that prosecutors later admitted involved no actual sex trafficking, but rather sex work. Benjamin Goggin, *Prosecutor in Robert Kraft Massage Parlor Case Concedes 'No Human Trafficking' Found in Investigation Despite Previous Claims*, BUS. INSIDER (Apr. 13, 2019, 1:38 PM), https://www.businessinsider.com/robert-kraft-massage-parlor-prosecutor-no-human-trafficking-2019-4.

355 *See id.* (detailing how sex trafficking was used to sensationalize the prostitution charges against Robert Kraft).

356 *See* Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1694–1702 (2010) (examining the conflation of sex trafficking with sex work).

357 *Cf.* Jonathan Todres, *Movies and Myths About Human Trafficking*, CONVERSATION (Jan. 20, 2016, 5:51 AM), https://theconversation.com/movies-and-myths-about-human-trafficking-51300 (examining how the film *Taken* exploits myths about sex trafficking).

358 *Id.*

359 *Id.*

360 *See* Chuang, *supra* note 356, at 1669.

361 *Id.* at 1664.

362 *Id.* at 1666–68.

Fears about the capture of innocent girls have been effective at obscuring the differences between sex trafficking and sex work.[363] The legal definition of sex trafficking requires a threat of force or coercion.[364] The United Nations defines trafficking as forced prostitution by means "of the threat or use of force or other forms of coercion, of abduction, of fraud . . . ."[365] The conflation between sex trafficking and prostitution requires that sex work advocates carefully explain the distinction between prostitution and sex trafficking, a problem that is not as prevalent in the context of pornography. Accordingly, the line between pornography and prostitution is important because the label of prostitution may automatically connect the conduct to sex trafficking. If the conduct is prostitution, critics of prostitution may mislabel it as sex trafficking, even where no force or coercion is involved. If it is pornography, this mislabeling appears less likely to occur.[366]

B. The Harms of Criminalization

Critics might argue that if technology fosters greater ambiguity between pornography and prostitution, we should err on the side of criminalization. But there are several harms that come with the criminalization of sexual labor. Criminalization has been shown to contribute to sex workers' experience of violence.[367] It forces sex

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[363] While there have been extensive debates about the criminalization of sex work, Professor Adrienne Davis has noted that these questions have been inadequately theorized; her scholarship has gone beyond the question of whether sex work should be criminalized. *See generally* Davis, *supra* note 231. In a recent article, Professor Davis discusses the implications of decriminalizing sex work and highlights the theoretical tensions within the broader decriminalization movement. *Id.* at 1262. She examines how the regulatory framework might operate in a world where sex work is decriminalized, and the appropriate regulations and antidiscrimination laws that would be applicable in this universe of sex work decriminalization. *Id.*

[364] The United Nations defines trafficking as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability . . . for the purpose of exploitation." Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3, Nov. 15, 2000, T.I.A.S. No. 13,127, 2237 U.N.T.S. 319 [hereinafter United Nations Trafficking Protocol].

[365] *Id.*

[366] *See* Aziza Ahmed, *Trafficked? AIDS, Criminal Law and the Politics of Measurement*, 70 U. Miami L. Rev. 96, 107–08 (2015) ("Feminists identified pornography, and later prostitution, as two crucial sites of women's subordination."). While some feminists have attempted to paint both pornography and prostitution with the same brush, *see supra* note 351 and accompanying text, pornography does not appear to be as entangled with trafficking narratives as prostitution.

[367] In Sweden, the criminalization of client activities has resulted in a host of negative outcomes for sex workers, who have "reported increased risks and experiences of violence, in part because regular clients have avoided them for fear of police harassment and arrest, turning instead to the internet and indoor venues for sex." Sandra Ka Hon Chu & Rebecca

workers underground, where they are less likely to seek social services.[368] Sex workers in criminalized communities must deal with the possibility of arrest, which allows for less time to carefully vet clients: Instead of communicating with clients online, which would allow for extensive research prior to an engagement with a client, sex workers must screen clients during in-person meetings that require quick action because of the risk of arrest.[369] Criminalization forces sex workers to work with clients they may otherwise reject, to hesitate when considering whether to inform police officers about a violent encounter, or to refuse medical treatment for fear of judgment by medical professionals for engaging in illegal activities.[370] "The ability to operate legally, even with restrictions, means prostitution is less covert and less motivated to seek 'protection' through corrupt or illegal associations. Sex workers can seek redress against exploitation or poor work conditions without exposing themselves to criminal charges, or to criminal pay-back."[371] In addition, sex workers often face collateral consequences for criminal records associated with prostitution.[372] They are often cycled in and out of prison and are targeted through police profiling and broken windows policing strategies.[373] Sex workers from marginalized groups have been the subjects of mass

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Glass, *Sex Work Law Reform in Canada: Considering Problems with the Nordic Model*, 51 ALBERTA L. REV. 101, 106 (2013). They have also reported that remaining clients are "more likely to be drunk, violent, and to request unprotected sex." *Id.* Anti-client measures in jurisdictions beyond Sweden have also led to an increase in violence against sex workers. *Id.*

368 *Id.* at 107; *see also* Jay Levy & Pye Jakobsson, *Sweden's Abolitionist Discourse and Law: Effects on the Dynamics of Swedish Sex Work and on the Lives of Sweden's Sex Workers*, 14 CRIMINOLOGY & CRIM. JUST. 593, 598 (2014) ("Sweden's mainstreaming of radical feminism appears, therefore, to be used to justify a law that has resulted in the policing and moralizing of public space, ridding Sweden of the perceived aesthetic and social blight of prostitution by displacing visible prostitution . . . .").

369 *See* Regina A. Russo, *Online Sex Trafficking Hysteria: Flawed Policies, Ignored Human Rights, and Censorship*, 68 CLEV. ST. L. REV. 314, 316 (2020) ("[Previously, sex workers] were able to take advantage of the anonymity of the internet, creating a safeguard. They were able to work indoors instead of on the streets, to screen potential clients, to work together and share lists of dangerous clients . . . .").

370 *See* Levy & Jakobsson, *supra* note 368, at 598.

371 Christine Harcourt, Sandra Egger & Basil Donovan, *Sex Work and the Law*, 2 SEXUAL HEALTH 121, 126 (2005).

372 *See* Sienna Baskin, Aziza Ahmed & Anna Forbes, *Criminal Laws on Sex Work and HIV Transmission: Mapping the Laws, Considering the Consequences*, 93 DENV. L. REV. 355, 360 (2016) ("These consequences include limitations on employment options, discrimination by employers, loss of access to public benefits—including public housing—and loss of the right to sue the police if they are victims of police violence.").

373 *See* Chelsea Breakstone, *"I Don't Really Sleep": Street-Based Sex Work, Public Housing Rights, and Harm Reduction*, 18 CUNY L. REV. 337, 350 (2015) (discussing how sex workers are cycled in and out of prison and how incarceration exacerbates poverty).

incarceration and mass criminalization.[374] Black transgender women, for example, have been profiled as sex workers and subject to police coercion as a result.[375]

Jurisdictions that have opted to fully decriminalize sex work have had more success at protecting sex workers. In New Zealand, sex workers have experienced decreased levels of violence, improved health, and better relationships with the police following decriminalization.[376] Even only criminalizing the sex work client (and not the sex worker) has been shown to have a marginalizing effect on sex workers. "Abolitionist" feminists hoped criminalizing the actions of the sex work client while decriminalizing the actions of the sex worker would improve outcomes for the sex worker while signaling to society that sex work was not tolerated. However, in Sweden, sex workers reported experiencing increased social isolation, violence, and damaged relationships with the police after the government criminalized the conduct of their clients.[377] Despite the hopes of these feminists, once part of the sex work transaction is criminalized, the entire transaction is negatively impacted.

Despite the many reasons to decriminalize all sex work, some forms of sex work[378] are constitutionally protected in the United States, and some are not. This Article is grounded in the current reality in which prostitution is criminalized, and pornography is not.[379] My future work will more fully examine constitutional arguments for decriminalizing *all* sex work, but this Article is narrowly focused on the gray area between prostitution and pornography. While radical or abolitionist feminists argue that there is no functional difference

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374 *Id.* (describing how Black and Hispanic sex workers are "more likely to be arrested and prosecuted for prostitution-related offenses" in New York City).

375 *See* Andrea J. Ritchie, *Crimes Against Nature: Challenging Criminalization of Queerness and Black Women's Sexuality*, 14 LOY. J. PUB. INT. L. 355, 369 (2013) (detailing incidents of Black transgender people who are profiled as sex workers and arguing that "racialized policing of gender and sexuality is facilitated by the current dominant 'broken windows' policing paradigm").

376 *See, e.g.*, Christine Harcourt, Jody O'Connor, Sandra Egger, Christopher K. Fairley, Handan Wand, Marcus Y. Chen, Lewis Marshall, John M. Kaldor & Basil Donovan, *The Decriminalization of Prostitution Is Associated with Better Coverage of Health Promotion Programs for Sex Workers*, 34 AUSTRALIAN & N.Z. J. PUB. HEALTH 482, 484 (2010) (finding that the decriminalization of sex work was associated with better health programs for sex workers).

377 Chu & Glass, *supra* note 367, at 107.

378 In this sentence, I am adopting an expansive definition of sex work that includes all forms of work for sexual desire, including pornography.

379 *See* Kaye, *supra* note 5, at 251 (identifying and explaining the rationales for the divergent legal treatment of prostitution and pornography); *see also* Miller v. California, 413 U.S. 15, 24 (1973) (recognizing that non-obscene pornography can be protected by the First Amendment).

between prostitution and pornography,[380] the dominant legal understanding is that there is a difference. Courts have protected pornography and recognized that it implicates First Amendment interests.[381] Based on the harms associated with criminalization, courts should err toward recognizing constitutional rights in this area.

IV
Transforming Prostitution into Expression

In this social context of mass incarceration, a society that embraces the ordinary and reality as expressive, and various opportunities for sexual expression and connection online, courts must examine whether technology can transform prostitution transactions into acts of protectable sexual expression.

A. The Doctrinal Argument

The conduct that occurs in a sex-for-hire situation with an audience fits within the meaning of expressive conduct under the First Amendment. The Court has already implicitly acknowledged as much in its opinions on the constitutionality of regulating pornography.[382] The expressive nature of sex shared with an audience does not change because one of the actors has paid to experience sexual gratification during the act. The nature of the message is the same, and the activity involved is the same. In a culture that increasingly engages in voyeurism and observation of other people's ordinary lives, the act of sharing itself expresses a message about the content being shared. While the act of sex may often be intended to communicate a message of love or affection or eroticism, the act of sharing sex with an audience may also contain political messages about deviant sex, morality, and the breakdown of public and private spaces that is not a part of many acts of ordinary sex.[383] The Supreme Court has already recognized the expressive capabilities of the erotic message in nude dancing.[384] The message in these forms of sexual expression transcends the two participants in the act. The message can also be about

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380 *See supra* note 351.

381 *See supra* Section I.C.

382 *See* Roth v. United States, 354 U.S. 476, 487 (1957) (noting that non-obscene sexual expression is entitled to First Amendment protection); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (holding that banning non-obscene sexual expression violates the First Amendment); *Miller*, 413 U.S. at 24 (holding that non-obscene depictions of sex acts are constitutionally protected).

383 *See Kink Workshops*, *supra* note 211 (describing the importance of normalizing the BDSM lifestyle through Kink's public education and online platforms).

384 *See supra* notes 76–77 and accompanying text (discussing *Barnes v. Glen Theatre, Inc.*).

the emotion that it evokes in audience members. The Supreme Court has acknowledged that the "emotive function [of a message] may often be the more important element of the overall message sought to be communicated."[385] So, when Kink.com educates its audience members about bondage and the BDSM lifestyle, the portrayals of actors in this conduct—even if they are paid sex workers—are as much about sexual pleasure as they are sexual education, normalization of the BDSM lifestyle, and embracing sexual freedom.[386]

The next consideration is the extent to which courts will permit local governments to criminalize reality porn. Criminalization would need to survive intermediate scrutiny.[387] Accordingly, local governments would have to establish that there was an important government interest supporting criminalization and that criminalization is the appropriate means for addressing the governmental interest.[388] The first element would likely be satisfied because courts have allowed extensive regulation of sexually explicit material.[389] However, it is unclear that criminalization would ever be the most appropriate means for addressing governmental interests in this area. Criminalization brings with it the risks of forcing sex workers underground, increasing incarceration in an already bloated system, and exacerbating existing racial disparities in policing and incarceration.[390] So, while reality porn may likely be heavily regulated, it is doubtful that non-obscene sexual acts should be completely barred through criminalization.[391]

In addition, technology reveals that existing prostitution statutes and doctrines do not account for evolving trends in sex work. For the virtual reality consumer who pays for sex acts, many current statutes would bar her conduct as criminal.[392] Even requesting materials from a content creator through OnlyFans might be framed as prostitution if the consumer intends to use the material for sexual gratification. The element of sexual gratification is ill-fitted to the digital era. It also provides little guidance for sex work transactions in which consumers

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385 Cohen v. California, 403 U.S. 15, 26 (1971).

386 *See Kink Workshops*, *supra* note 211.

387 *Cf.* United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (applying intermediate scrutiny to content-neutral regulations that limit speech where both "'speech' and 'nonspeech' elements are combined in the same course of conduct").

388 *See* City of Erie v. Pap's A.M., 529 U.S. 277, 279 (2000) (upholding governmental regulation of nude dancing).

389 *See, e.g.*, *id.*

390 *See supra* Part III (outlining the costs of criminalizing sex work).

391 *See* Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (holding that non-obscene sexually explicit materials are protected by the First Amendment).

392 *See also infra* notes 394–406 and accompanying text.

seek the "girlfriend experience" and pay for intimacy rather than gratification. Participation in conduct legally labeled as prostitution lies on a continuum that includes sugar daddies, transactional sex, and hired intimacy.[393] However, the doctrine is ambiguous about these situations that will only become more easily facilitated through the use of technology that connects people to different communities, audiences, and content creators.

Furthermore, there is an emerging puzzle wherein prostitution laws that have appeared clear for decades are now rendered unconstitutional because of changes in technology.[394] Many prostitution statutes contain common elements and tend to criminalize (1) sexual conduct or sexual activity (2) engaged in for a fee.[395] Technology renders these statutes overbroad because it has expanded how people can engage in sexual conduct to include encounters that do not require direct tactile stimulation by the other participant but that are still engaged in for sexual gratification. These statutes are overbroad because they would criminalize constitutionally protected sexually expressive conduct: long-distance partners who pay each other for sexual content that they share through a shared internet drive; videos that OnlyFans content creators share with their partners for a fee; racy videos that a sugar baby shares with her sugar daddy on Snapchat in exchange for regular grants through a mobile application that facilitates cash transfers; sexual videos that a dominatrix shares with her online fans for a fee to advocate for the importance of recognizing the BDSM lifestyle.[396] Technology will only expand this growing gray area. There are many hypothetical situations that blur the line between prostitution and pornography and render these statutes overly broad. Given the harms of criminalization and the expressive and associative interests at stake, policymakers and courts should err toward the side of decriminalization in the face of growing ambiguity about whether conduct should be criminalized.[397]

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393 *See* Suzanne Leclerc-Madlala, *Transactional Sex and the Pursuit of Modernity* 12–13 (U. Cape Town, Ctr. for Soc. Sci. Rsch., Working Paper No. 68, 2004) (discussing the continuum of sex in exchange for material needs).

394 It is worth noting that statutes that criminalize prostitution are relatively modern inventions in response to concerns about the "white slavery" industry in the early twentieth century. Mara L. Keire, *The Vice Trust: A Reinterpretation of the White Slavery Scare in the United States, 1907-1917*, 35 J. SOC. HIST. 5, 6 (2001).

395 *See supra* Sections I.B, I.D (discussing challenges to state prostitution laws).

396 *See supra* Section II.A (discussing sexual exchanges that may and do occur on current technology platforms).

397 *See* Thusi, *Harm, Sex, and Consequences*, *supra* note 20, at 201–13 (describing the harms of the criminalization of sex work and offering a normative approach to decriminalization).

Recent federal legislation that was initially intended to address sex trafficking but eventually expanded to encompass sex work is an example of this overbreadth.[398] In 2017, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA) to address the use of online forums to promote sex trafficking.[399] FOSTA holds internet service providers (ISPs) civilly and criminally liable when they have "the intent to promote or facilitate" materials that advertise sex trafficking or prostitution online.[400] The statute was intended to ensure that victims of sex trafficking would be able to hold ISPs that provided forums for sex trafficking advertisements, including Craigslist and Backpage.com, accountable.[401] Many ISPs responded to the passage of FOSTA by eliminating forums for advertising sexual services to avoid the risk of litigation.[402] In *Woodhull Freedom Foundation v. United States*, the Electronic Frontier Foundation, Human Rights Watch, and other plaintiffs argued that FOSTA is unconstitutionally overbroad because it prohibits constitutionally protected speech.[403] The district court dismissed the lawsuit and held that the petitioners did not have standing to bring suit.[404] In January 2020, the U.S. Court of Appeals for the D.C. Circuit overruled the district court decision, noting that two of the plaintiffs had viable claims that the statute is unconstitutionally overbroad.[405] While FOSTA was well-intentioned, it was poorly-executed in its expansion to include consensual sex work.[406] This expansion not only extended to advertising for traditional sex work transactions, but it arguably would also criminalize a range of the reality porn scenarios that have been discussed in this Article.

Some detractors may argue that reality porn depicts unlawful conduct and therefore should be regarded as mere prostitution trans-

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398 Allow States and Victims to Fight Online Sex Trafficking Act, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230).

399 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230. Many of the critiques of FOSTA also apply to the unenacted Stop Enabling Sex Traffickers Act of 2017 (SESTA), S. 1693, 115th Cong. (2017). Much of SESTA was eventually incorporated into FOSTA. Chamberlain, *supra* note 57, at 2173 n.6 (citing 164 CONG. REC. H1248 (daily ed. Feb. 26, 2018)).

400 18 U.S.C. § 2421A.

401 *See* Romano, *supra* note 59 (discussing how internet service providers have responded to FOSTA and SESTA).

402 *Id.*

403 948 F.3d 363, 369 (D.C. Cir. 2020).

404 *Id.* at 364.

405 *Id.* at 367.

406 *See* Romano, *supra* note 59 (discussing how FOSTA and SESTA have already led to the elimination of online forums where sex workers shared safety information about clients and other matters, and thus may inadvertently make sex work less safe).

actions.[407] Another common critique of all forms of commercialized sex is to draw comparisons to selling babies, organs, and other forms of commercialization of "the person" that are currently criminalized.[408] The key difference between the sale of sex and these other forms of conduct is that other exchanges of "the person" are already highly regulated and subject to state intervention, thus the privacy interests are reduced as compared to state regulation of sex. Babies do not get legally adopted without state intervention.[409] Doctors cannot accept organ donations without complying with local and state regulations on the matter.[410] But consensual sex between adults can happen indiscriminately without state intervention. Sex is treated differently; sex that is commercialized in private transactions (prostitution) is criminalized while commercialized sex that is broadcast for the consumption of the masses (pornography) is permissible. Bans on selling babies do not provide helpful guidance on distinguishing between prostitution and pornography.

While the depiction of "crimes" ordinarily does not immunize the underlying crimes from prosecution,[411] reality porn is exceptional because the underlying conduct involved is otherwise lawful without direct payment between the parties. Consensual commercial sex is not a murder or robbery, which are *malum in se* crimes, or crimes that result in direct physical or economic injury to another person and that are generally never legally permissible.[412] The underlying act of por-

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407 *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (stating that First Amendment protection does not extend "its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute").

408 *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1928 (1987) (arguing that prostitution, baby-selling, and surrogacy are examples of conduct that should be market inalienable, or barred from commercialization).

409 *See, e.g.*, U.S. DEP'T OF HEALTH AND HUM. SERVS., CHILD.'S BUREAU, MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION (2019), https://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf (synopsizing the considerable amount of legislation that has impacted state child protection, adoption, and child welfare services); Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 297 (2015) (examining the extensive regulation of an Indigenous child under the Indian Child Welfare Act).

410 *See, e.g.*, Meredith M. Havekost, Note, *The Waiting Game: How States Can Solve the Organ-Donation Crisis*, 72 VAND. L. REV. 691, 694 (2019) (discussing organ procurement organizations and the various regulations doctors must comply with during the organ donation process).

411 *See* United States v. Williams, 553 U.S. 285, 288 (2008) (recognizing that child pornography is not protectable under the First Amendment).

412 *Cf.* Musa K. Farmand, Jr., *Who Watches This Stuff?: Videos Depicting Actual Murder and the Need for A Federal Criminal Murder-Video Statute*, 68 FLA. L. REV. 1915, 1934 (2016) (examining the rise of videos that portray murder and arguing that Congress should pass legislation that bars these depictions); Joseph J. Anclien, *Crush Videos and the Case*

nography is sex, and as an expressive act it is protectable under the First Amendment,[413] making it significantly different from depictions of murder. The primary question in distinguishing prostitution from constitutionally protected pornography is the flow of the monetary transaction.[414] "One court noted that prostitution statutes do not prevent individuals from engaging in consensual sexual relations with one another, but only prevent an exchange of sexual acts for compensation."[415] The California Supreme Court in *Freeman* noted:

> Murder, rape and robbery and aiding and abetting intercourse with a minor for that matter, are crimes independent of and totally apart from any payment for the right to photograph the conduct. By contrast, the acts of alleged "prostitution" in this case were not crimes independent of and apart from payment for the right to photograph the performance.[416]

The underlying criminality of prostitution does not provide a helpful analytical tool for examining whether to protect sexual conduct as pornography. An important difference between prostitution and pornography is whose hands touch the money.[417] However, websites are now facilitating payments, with some issuing tokens rather than money to content creators.[418] The doctrine is unable to clearly resolve the ambiguities that technology creates and exacerbates. In light of this ambiguity, courts should err toward protecting free speech.

B. The Cultural Argument

First Amendment doctrine requires analysis of community values and the evolving standards of what is considered worthy of serious artistic value.[419] The serious artistic value requirement is considered

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for Criminalizing Criminal Depictions, 40 U. MEM. L. REV. 1, 53 (2009) ("[R]estrictions on crush videos [that depict animals being physically crushed for pleasure] do *not* violate the First Amendment.").

413 *See* Roth v. United States, 354 U.S. 476, 489 (1957) (finding that the First Amendment applies to non-obscene pornography).

414 *See supra* Section I.D.

415 Natalia Benitez, Lorela Berisha, Alicia Delago & Rachel Lowitz, *Prostitution and Sex Work*, 19 GEO. J. GENDER & L. 331, 357 (2018) (citing Roe II v. Butterworth, 958 F. Supp. 1569, 1579–80 (S.D. Fla. 1997)).

416 People v. Freeman, 758 P.2d 1128, 1134 (Cal. 1988).

417 *See supra* Section I.D; *see also* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 764, 784 (2006) (discussing the regulation of illicit/licit sexual practices that suggests that marriage was historically used to cure illicit sexual conduct).

418 *See* Mascetti, *supra* note 200; Lieberman, *supra* note 231 (discussing webcam websites on which content consumers pay performers in tokens).

419 *See* Pope v. Illinois, 481 U.S. 497, 500–01 (1987) (holding that the first two prongs of the *Miller* test—the appeal to prurient interest and patent offensiveness of allegedly

by adopting a national standard based on a reasonable person.[420] Public opinion polling suggests that the national community is willing to tolerate pornographic material, and that almost half of Americans are open to the decriminalization of prostitution.[421] Dominant sexual values are increasingly more "sex positive" by embracing the value of sexual pleasure as a worthy pursuit.[422] The ubiquity of reality-based art forms indicates that there is also artistic merit in reality-based sexual transactions.[423] The broadcast of prostitution transactions fits within the growing genre of recognized reality-based forms of artistic expression. Mobile applications have the ability to transform the quality of ordinary videos by allowing for creative editing, correction of poor lighting, and improvement of both sound and video quality.[424] However, even the poorly-lit, low-budget sexual production may be entitled to protection when it intends to communicate. If a sex worker and their client interact with the purpose of sharing their transactions with others, the transaction is also a piece of communication. If the application that they use to share their experience with others allows them to creatively manipulate the video, then the video is arguably now art.[425]

Sexual content might also have political and associative value. Sex workers might use their platform to highlight why they need additional work protections or to allow clients to share their thoughts on the sex industry, much like Kink.com communities.[426] A broadcast becomes an opportunity for them to destigmatize their work through

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obscene materials—are to be evaluated based on local community standards, but that the third prong—the materials' literary, artistic, political, or scientific value—is to be evaluated under a national, reasonable person standard).

420 *Id.*; *see* Miller v. California, 413 U.S. 15, 34 (1973) ("The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.").

421 *See supra* note 31 and accompanying text (presenting recent data on American attitudes regarding the legality of pornography and prostitution).

422 *See* Kaplan, *supra* note 18, at 90 (arguing that constitutional doctrine should embrace a right to sexual pleasure).

423 *See Pope*, 481 U.S. at 500–01 (noting that the relevant inquiry is whether a reasonable person could find artistic value in the work).

424 Sean O'Kane, *How To Shoot Great Video with Your Smartphone*, VERGE (July 26, 2017, 1:00 PM), https://www.theverge.com/2017/7/26/16026238/smartphone-video-editing-apps-how-to-tips-iphone-android.

425 *See* Daniel Palmer, *iPhone Photography: Mediating Visions of Social Space* (discussing the ways that the iPhone can be manipulated to create "aesthetically appealing" and artistic images and videos), *in* STUDYING MOBILE MEDIA 88 (Larissa Hjorth, Jean Burgess & Ingrid Richardson eds., 2012).

426 *See* Toor, *supra* note 320, at 293 (examining how online platforms have facilitated organizing around controversial issues); *supra* Section II.A.1 (describing Kink.com).

creating an online community focused on "dissent."[427] They may be able to create viewer communities and audiences that are familiar with them. There is also an inherently expressive element involved in sexual performance that is absent from many other forms of conduct that have been outlawed. The physical act of sex may itself be a form of expression for some performers, akin to the nude dancing in *Barnes*, which the Supreme Court recognized as protectable sexual expression.[428] This communication and sharing of ideas is consistent with the purposes of the First Amendment.[429]

In light of the ambiguity, First Amendment protection should extend to sexually expressive acts that incorporate paid sex transactions, especially those that include an interactive audience.[430] The audience transforms the transaction into a performance.[431] The performative elements make it artistic. The possibility to add creative fonts and texts also adds to the artistic expressiveness.[432] The rise of "pop art" in the 1950s and 1960s, which adopted images from popular culture and advertising to challenge the elitism of traditional modes of art creation, is but one example of the ways that artistic values change.[433] The visual enhancements that virtual reality and technology bring to the ordinary, and the ability to communicate with audiences around the world, strengthen the artistic potential of these pieces.[434]

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427 *See* Inazu, *supra* note 17, at 1110–11 (discussing how online groups facilitate collaboration and association amongst group members).

428 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991).

429 *See* Inazu, *supra* note 17, at 1096 (arguing that First Amendment protections should be extended to online groups given the "intrinsic worth of some of these groups to core First Amendment values").

430 *See* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (considering the impact of noise regulations on the audience experience in upholding a First Amendment challenge to the regulations).

431 *See id.*

432 *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 826 (2001) ("[D]istinctions between 'high' and 'low' art have no place in First Amendment law.").

433 *See* Miller v. Civil City of South Bend, 904 F.2d 1081, 1089–1104 (7th Cir. 1990) (Posner, J., concurring) ("[M]uch of today's high culture began as popular entertainment . . . . The practical effect of letting judges play art critic and censor would be to enforce conventional notions of 'educated taste,' and thus to allow highly educated people to consume erotica but forbid hoi polloi to do the same."), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

434 *See* Sonia K. Katyal, *Technoheritage*, 105 CALIF. L. REV. 1111, 1116 (2017) (examining the legal implications of how technology and augmented reality allow cultural institutions to facilitate interactive cultural encounters).

The Supreme Court has adopted a marketplace of ideas interpretation of free speech.[435] These ideas need not be popular or morally consistent with the views of the majority of Americans.[436] This approach "is designed and intended to remove governmental restraints from the arena of public discussion."[437] The benefit of the marketplace of ideas conception of speech is the encouragement of a diversity of viewpoints, which in turn benefits the quality of ideas in a society.[438] Exposure to a variety of perspectives and viewpoints allows more robust dialogue and thoughtfulness in society.[439] The ideas in the marketplace do not have to be of equal value to be worthy of protection.[440] The value of speech may be in its ability to foster participatory democracy and the inclusion of various viewpoints.[441] An

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435 *See* Darren Bush, *The "Marketplace of Ideas:" Is Judge Posner Chasing Don Quixote's Windmills?*, 32 ARIZ. ST. L.J. 1107, 1126 (2000) (detailing the Supreme Court's embrace of the marketplace of ideas conception of the First Amendment).

436 *See* Dawn C. Nunziato, *First Amendment Values for the Internet*, 13 FIRST AMENDMENT L. REV. 282, 283 (2014) ("[O]ur preeminent First Amendment values: facilitating the uninhibited, robust, and wide-open marketplace of ideas; fostering the public debate and deliberation essential for the task of democratic self-government; and, in the process, protecting speech that is unpopular, disfavored, and less well-funded."); Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 105 (1996) (discussing jurisprudence "asserting that in the First Amendment 'marketplace of ideas,' offensive, unpopular, and even subversive viewpoints must be protected" (citing Am. Commc'n Ass'n v. Douds, 339 U.S. 382, 394–95 (1950))); Robert Firester & Kendall T. Jones, *Catchin' the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior*, 20 LOY. L.A. ENT. L. REV. 1, 4 (2000) ("[T]he First Amendment especially protects speech that expresses unpopular ideas and beliefs." (empahsis omitted)). In *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Supreme Court acknowledged the importance of protecting unpopular ideas: "[T]here are some purported interests—such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate [governmental regulation of speech]." *Id.* at 804.

437 Cohen v. California, 403 U.S. 15, 24 (1971) (holding that local governments could not prohibit an individual from wearing a jacket that stated "Fuck the Draft").

438 *But see* Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 828 (outlining critiques of the marketplace of ideas metaphor including those based on market failure and social psychology arguments).

439 *See* Nunziato, *supra* note 436, at 291 ("[I]n order for the people to have the opportunity of becoming an informed electorate, they need to be able to discuss and debate freely in a manner that is 'uninhibited, robust, and wide-open' on matters of public and societal importance and to access the speech of others on such subjects." (citing ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (1948) and quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

440 *See id.* (arguing for the implementation of strong net neutrality rules in order to protect citizens' First Amendment rights, including the protection of speech deemed less valuable).

441 *See* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 499 (2011) (arguing that participatory democracy is a descriptive and normative framework for understanding free speech doctrine).

artist may argue that her broadcast of commercialized sex transactions provides commentary on dominant sexual norms, the oppression of monogamy, or the hypocrisy of the distribution of wealth and the outlawing of prostitution.[442] The participants may view the transactions as a commentary on sexuality and evolving sexual standards.[443] Participants may intend to distribute their private sexual transactions to express the ordinariness of their commercialized sexual intimacy.

These transactions may also be a way for audience members and actors to engage in a shared sexual experience that they otherwise would not encounter, implicating their freedom of association rights. In this moment, similar experiences may occur on the internet through live broadcasts of sexual encounters that audience members may experience together. These forums may involve gratification but also expand the nature of the human experience and what it means to associate with others in the digital age. A recent episode from the television show *Black Mirror* depicts two heterosexual, male friends who have sexual encounters through a virtual reality game that allows one of them to be a female game player.[444] The friends had intense sexual experiences while engaging in the video game that surpassed their sexual experiences in the live world. They did not feel homosexual sexual desires toward each other in actual reality. But, their virtual experiences freed them to experience a new form of sexual desire that was unavailable to them in reality.[445] The episode explores how virtual sexual interactions free people to have experiences that they otherwise would not in reality and would prefer to leave in the digital world.[446] As the myriad online sexual experiences surveyed in Section

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442 *See, e.g.*, Jeremy M. Barker, *Can Un-Licensed Therapy Be Performance Art? Can Prostitution?*, CULTUREBOT (May 9, 2012), https://www.culturebot.org/2012/05/13501/can-un-licensed-therapy-be-performance-art-can-prostitution (discussing the reaction to performance artist Sarah White's naked therapy session performance art project within the art world).

443 *See, e.g.*, Jenni Berrett, *Myisha Battle: Sex Coach & Proponent of Masturbation as a Form of Resistance*, RAVISHLY (May 17, 2017), https://ravishly.com/people-we-love/myisha-battle-sex-coach-proponent-masturbation-form-resistance (discussing the work of sex coach and podcaster Myisha Battle, who focuses on safe sex in queer relationships and describes masturbation as a form of resistance in a puritanical society).

444 *See* Nicole Clark, *Black Mirror's 'Striking Vipers' Is a Skin-Deep Exploration of VR Sex*, VICE (June 10, 2019), https://www.vice.com/en_us/article/evyqpw/black-mirror-striking-vipers-netflix-vr-sex.

445 *Id.*

446 Inkoo Kang, *In the New Black Mirror Season's Standout Episode, Virtual Reality Lets Straight Men Have Gay Sex*, SLATE (June 5, 2019), https://slate.com/culture/2019/06/black-mirror-season-5-striking-vipers.html (examining how the *Black Mirror* episode explores the boundaries of sexuality).

II.A illustrate, experiences like that depicted in *Black Mirror* are not merely futuristic fantasies.[447]

Technology will only continue to advance, and courts need to be prepared to address the problems that will arise in a manner that does not simply penalize people for sexual gratification. Reality porn allows people who are otherwise not engaged in the encounter to share in the experience, provide live commentary, and engage in online community-building and online expression. Audience members become co-producers of the content and may engage in sexual encounters that deviate from sexual norms; sexual activity itself may be transformed into a commentary about the nebulous line between pornography and prostitution in a society that criminalizes one but not the other.

C. Risks & Limitations

Recognizing free speech interests in communicative paid sex transactions comes with certain risks. Over the past several decades, scholars have critiqued the Supreme Court's expansive protection of free speech.[448] As Dean Erwin Chemerinsky has observed, the Roberts Court has been reluctant to uphold speech restrictions, even restrictions that proscribe violent speech.[449] A number of scholars have described the Supreme Court's First Amendment jurisprudence as "First Amendment Lochnerism."[450] The critique arises because the

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447 *See supra* Section II.A (describing existing technology platforms that facilitate online sex interactions).

448 *See* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1922 (2016) ("Insistence on the novelty and political contingency of today's First Amendment Lochnerism allows progressive critics to cast themselves as the traditionalist defenders of a civil libertarian status quo . . . . [H]owever, . . . the creation of a truly non Lochnerian First Amendment would require a fundamental break with that status quo.").

449 *See* Erwin Chemerinsky, *The First Amendment in the Era of President Trump*, 94 DENV. L. REV. 553, 554 (2017) (summarizing the Roberts Court's approach to the First Amendment during Donald Trump's presidency).

450 *See, e.g.*, Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987) (arguing that *Lochner*'s legacy looms in First Amendment jurisprudence that emphasizes the "constitutional requirement of neutrality and understands the term to refer to preservation of the existing distribution of wealth and entitlements under the baseline of the common law"); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 386 ("[M]ore conservative forces soon will overtake and appropriate the libertarian approach to [F]irst [A]mendment law that progressives have used so effectively in the past."); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 133 ("Commercial interests are increasingly laying claim, often successfully, to First Amendment protections. Once the mainstay of political liberty, the First Amendment has emerged as a powerful deregulatory engine . . . ."); Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323 (2016) (arguing that current First Amendment jurisprudence has "potentially calamitous

First Amendment has been the basis for limiting economic regulation, often to the benefit of corporate entities and powerful interest groups.[451] Professors Robert Post and Amanda Shanor warn that the Court's free speech jurisprudence "threatens to revive the long-lost world of *Lochner*."[452] What scholars generally mean by this claim is that the Court has interfered with democratically-elected legislatures' ability to regulate economic activity by protecting commercial and economic speech.[453] Professor Cass Sunstein has argued that the "central commitment of the First Amendment, as currently interpreted, is to neutrality on the basis of content or viewpoint, and this commitment has a *Lochner*-like feature. Issues of substantive power and powerlessness do not enter into the constitutional inquiry."[454]

However, some scholars disagree with this characterization of the jurisprudence. Professor Genevieve Lakier argues that the Supreme Court's free speech jurisprudence is not *Lochner*-like because it is overprotective of free speech rights; rather, it is *Lochner*-like because it is a "body of law that, like *Lochner*-era substantive due process, insists that most legislative efforts to protect the expressive freedom of the less powerful by limiting the expressive freedom of the more powerful are constitutionally impermissible."[455] In this context, this Article is adopting an expansive interpretation of the First Amendment, but one that seeks to redress egalitarian concerns and protect forums for minority perspectives. To the extent that this framing of the First Amendment can be categorized as "maximalist," it is maximalist in a manner that is consistent with "the progressive

effects on workers" in its deregulation of the workplace); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 166 (2015) (arguing that modern First Amendment jurisprudence seeks to "*constitutionalize* the unregulated operation of the laissez-faire commercial marketplace"). *But see* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 384 (2011) (discussing how scholars use anticanonical cases, including *Lochner*, "as a rhetorical trump").

451 *See* Sunstein, *supra* note 450, at 875 (arguing that *Lochner*'s legacy lies in a series of decisions that immunize nongovernmental actors from constitutional constraints as evinced in First Amendment cases involving campaign finance laws).

452 Post & Shanor, *supra* note 450, at 182 (arguing that the embrace of the First Amendment to challenge economic regulations is a form of First Amendment Lochnerism).

453 *See* Shanor, *supra* note 450, at 133; Mila Sohoni, *The Trump Administration and the Law of the* Lochner *Era*, 107 GEO. L.J. 1323, 1383 (2019) (describing the "larger jurisprudential development, which has . . . used First Amendment religious, association, and speech claims to invalidate government regulation" around everyday economic transactions, reminiscent of the *Lochner* era).

454 Sunstein, *supra* note 450, at 914.

455 Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1245 (2020).

civil libertarianism of the early-to-mid-twentieth century."[456] As Professor Kathleen Sullivan has stated:

> [L]iberty itself has a redistributive aspect, at least when observed in practice rather than considered in the abstract. . . . Liberties of speech, after all, need only be asserted by the dissident or unpopular minorities whom the majority would suppress. And sometimes it may be easier to end subordination by appealing to abstract rights with which the powerful can identify, rather than by emphasizing what is special and victimized about one's group. Thus, . . . I think progressives jettison First Amendment conventions at their peril.[457]

That the Supreme Court has used the First Amendment to advance economic and corporate interests in one context should not be a reason to foreclose its potential to protect minority and dissent perspectives in another.[458]

There may also be legitimate concerns that reality porn would undermine privacy rights and expose unwilling participants to the harms of revenge pornography. Facial recognition technology and deep fakes may compromise individual privacy and dignity. These concerns are valid, but they may be mediated by limiting the First Amendment protection of reality porn to content that occurs within consentable transactions. Professor Nancy Kim describes the term consentable as conduct under which consent is both possible and legal given the social circumstances of the conduct.[459] The focus on consentability would allow for the protection of expressive conduct while protecting people from abusive aspects of online sexual exchanges. In general, courts should only protect broadcast sexual expression to the extent that it depicts acts that are consentable and consented to in fact and when the broadcast *itself* is consentable and consented to in fact.[460] Consentability is a limitation that allows for sexual expression to occur while limiting it where consent is absent or should not be recognized.

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456 Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 2008 (2018). *But see* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1635 (2015) ("[The] doctrinal tools developed for a smaller area of coverage will have to be modified, possibly with unfortunate consequences.").

457 Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 451 (1995).

458 *See id.*

459 *See* KIM, *supra* note 21, at 53, 137 (arguing that the social conditions of consent and autonomy, including power and age, should be considered when determining whether consent is present).

460 *See id.* at 2–4.

Some important restrictions include depictions of child pornography,[461] nonconsensual (or "revenge") pornography,[462] and sex trafficking.[463] The Supreme Court has already recognized that child pornography is not protectable because it involves the underlying harmful act of child sexual abuse, which the state has an acute interest in protecting.[464] Children cannot consent to engage in sexual acts. In the case of revenge porn, the actors in the sexual conduct may have both consented to the act itself,[465] however one actor may exploit the sexual content in order to inflict harm on the other actor.[466] Or, one of the actors may have not consented to the broadcast and distribution of the sexual content.[467] In these cases, courts should not treat these broadcast acts as protectable sexual expression. The broadcast of the sexual content may facilitate the creation of online communities to harass the person depicted in the act.[468] There is a direct harm to the person depicted that undermines the expressive interests at stake.

Likewise, in the case of sex trafficking, where the participant is only engaging in the act because they have been forced or coerced into doing so, courts should not treat acts as consentable.[469] There is a direct harm to the forced party in engaging in the sexual conduct and having that conduct broadcast against their will. When sexual acts are

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461 *See* New York v. Ferber, 458 U.S. 747, 759 (1982) (holding that child pornography is not entitled to First Amendment protection).

462 *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 349 (2014) (arguing that nonconsensual pornography should be criminalized).

463 United Nations Trafficking Protocol, *supra* note 364.

464 *Ferber*, 458 U.S. at 759.

465 *See* Citron & Franks, *supra* note 462, at 349 (describing the harms of nonconsensual pornography).

466 *See id.*

467 *See id.*

468 *See* Danielle Keats Citron, *Addressing Cyber Harassment: An Overview of Hate Crimes in Cyberspace*, 6 CASE W. RSRV. J.L. TECH. & INTERNET 1, 2 (2015) ("In 2012, Anita Sarkeesian, a well-known video game critic, announced that she was raising money on Kickstarter to fund a documentary series about sexism in video games. A week after Sarkeesian made her announcement, a cyber mob descended upon her. . . . [S]he received graphic rape and death threats."). The secondary effects doctrine is also a limitation. Under the secondary effects doctrine, courts may uphold limitations on pornographic speech that has secondary effects that are harmful to the community, "such as crime, blight, and public health dangers." Jacobs, *supra* note 26, at 386–87 (describing the secondary effects doctrine); City of Erie v. Pap's A.M., 529 U.S. 277, 292–95 (2000) (upholding a regulation barring all public nudity under the secondary effects doctrine, despite the regulation's limitations on expressive conduct such as nude dancing). While the doctrine has been widely criticized as an improper restriction on First Amendment rights, it may also provide a source for reasonable limits on sexual expression. *See* Fee, *supra* note 45, at 306–20, 324–27.

469 *See* United Nations Trafficking Protocol, *supra* note 364 (defining sex trafficking as requiring force or coercion).

not consentable, the participants do not have sufficient intent to express views or values or communicate with an audience. They are forced to engage in conduct that they otherwise would not engage in. Courts should not recognize such portrayals as protectable.

Conclusion

The ease with which we can now record ordinary activities through mobile devices presents an opportunity to reexamine the boundary between prostitution and pornography. Advances in technology create new forms of engagements and audiences for both viewers of and participants in ordinary activity, including sex. Technological advances have also transformed our ability to create content that is visually appealing. They have provided enhanced reality experiences that are equal parts performance and communication. And they connect content creators to audiences from around the world. Audiences can engage in online community building and organizing around sexual materials. Content creators may facilitate shared experiences with their audiences in ways that were previously unimaginable. Online forums allow audiences to become more than mere passive consumers of information. They allow audience members to share feedback on content, communicate with each other about the content, and associate with the content provider.

The community-building and expressive aspects of paid sexual encounters online implicate both expressive and associative interests under the First Amendment. Courts should take these rights seriously and should recognize that technology may transform what would ordinarily be prostitution into protectable pornography. Through the expansion of the possibilities for expressive and associative sexual activity, technology broadens the scope of conduct that can be deemed prostitution and renders existing prostitution-related statutes overbroad, as a great amount of constitutionally protected speech is now criminalized by these statutes. When confronted with a question of whether online sexual transactions should be treated as prostitution or pornography, courts should err on the side of treating the conduct as protectable pornography within the limits of consentability. When technology transforms ordinary prostitution transactions into pornography, courts should recognize these transactions as protectable speech rather than criminal acts.