

SEX-POSITIVE LAW

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Sexual pleasure is a valuable source of happiness and personal fulfillment. Yet several areas of law assume just the opposite—that sexual pleasure in itself has negligible value, and we sacrifice nothing of importance when our laws circumscribe it. Many laws even rely on the assumption that sexual pleasure merits constraint because it is inherently negative. These assumptions are so entrenched in our law that they remain largely unquestioned by courts, legislatures, and legal scholarship.

This Article exposes and challenges the law’s unspoken assumption that sexual pleasure has negligible or negative value and examines how rejecting this assumption requires us to reconceptualize several areas of law. Until now, legal scholarship has lacked a robust analysis of how deeply this assumption runs through various areas of law and how fundamentally the law must change if we reject it. This Article fills that gap and provides a framework for “sex-positive” law that appropriately recognizes the intrinsic value of sexual pleasure. Such an approach transforms the debate surrounding several areas of law and requires lawmakers and legal scholars to undertake a more honest assessment of what we choose to regulate, what we fail to regulate, and our justifications for those choices.

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INTRODUCTION

Sexual pleasure is a good thing. It is a valuable source of happiness and personal fulfillment.¹ 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. Many laws even rely on the assumption that sexual pleasure merits constraint because it is

¹ See GARETH MOORE, THE BODY IN CONTEXT: SEX AND CATHOLICISM 64–69 (Continuum 2001) (arguing that it is in conformity with God’s design that sexual pleasure be recognized as valuable in itself); Gary Chartier, Comment, *Natural Law, Same-Sex Marriage, and the Politics of Virtue*, 48 UCLA L. REV. 1593, 1605–08 (2001) (discussing physical pleasure as valuable and the pursuit of such pleasure as rational); cf. DOUGLAS HUSAK & PETER DE MARNEFFE, THE LEGALIZATION OF DRUGS 86 (2005) (discussing the intrinsic value of pleasure in the context of drug use).

inherently negative. These assumptions are so entrenched in our law that they remain largely unquestioned by courts, legislatures, and legal scholarship.

This Article exposes and challenges the law's unspoken assumption that sexual pleasure has negligible or negative value and examines how rejecting this unfounded assumption requires us to reconceptualize several areas of law. Legal regulation generally sacrifices our freedom to engage in certain activities because the activities result in harm or regulation generates benefits.² The devaluation of sexual pleasure distorts this calculus. It has created First Amendment law founded on a dubious sexual-nonsexual dichotomy; criminal law that inconsistently respects consent and autonomy in a way that marginalizes sexual pleasure; and a constitutional jurisprudence that premises the protection of sexual activity solely on its contribution to other goals deemed more acceptable. A "sex-positive" approach that values sexual pleasure in itself requires lawmakers and legal scholars to undertake a more honest assessment of what we choose to regulate, what we fail to regulate, and our justifications for these choices.

The assumption that sexual pleasure in itself has negligible or negative value is largely unexamined and unchallenged in legal scholarship. While a few scholars have called for a fuller accounting of sexual pleasure in the law, most scholarship either implicitly or explicitly relies on this assumption or ignores it.³ Legal scholarship lacks a

² See *infra* Part I (arguing that the law should weigh the diminishment of sexual pleasure before restricting an activity just as it does when regulating other pleasures elsewhere in the law).

³ Authors exploring the way law treats sexual conduct or speech differently often rely upon or ignore the assumption that sexual pleasure is of negligible or negative value. See, e.g., Dennis J. Baker, *The Moral Limits of Consent as a Defense in the Criminal Law*, 12 NEW CRIM. L. REV. 93, 114, 117–20 (2009) (arguing that individuals should not be able to consent to certain forms of sadomasochistic sexual practices or to HIV infection for no purpose other than sexual intercourse); Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239 (2001) (arguing against decriminalization of sadomasochistic sexual activity); Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887 (1992) (arguing that pornography does not merit protection because it is not political speech); Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979) (arguing that obscenity merits less constitutional protection because it is a surrogate for sexual activity); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (arguing that pornography merits less constitutional protection as low-value speech).

Other authors have challenged the way courts or scholars describe sexual conduct or speech but do not consider this Article's thesis—that a fundamental problem with these laws is their frequent reliance on a faulty assumption that sexual pleasure itself has negligible or negative value. See, e.g., Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989) (challenging the argument that speech can be distinguished as being high-value, low-value, or no-value and the assumption that obscenity or pornography should be

robust analysis of how deeply this assumption runs through various areas of law and how fundamentally the law must change if we reject it. There is no framework for understanding what law that acknowledges the value of sexual pleasure might look like. This failure compromises several areas of law and legal discourse because the assumption that sexual pleasure is of negligible or negative value is, at best, highly questionable.

This Article challenges the sex-negative assumptions that distort legal discourse. It analyzes how the law must change significantly if we accept the common-sense assumption that sexual pleasure is intrinsically valuable. It examines what “sex-positive” law—law that accepts the value of sexual pleasure—would look like and the new questions it would raise. While this analysis has profound implications for several areas of law, this Article focuses on three specific areas: (1) obscenity law; (2) the criminalization of injury inflicted consensually for sexual pleasure; and (3) constitutional law pertaining to sexual freedom. Discounting sexual pleasure is particularly problematic in these areas because they regulate behaviors central to the experience of sexual pleasure. Accepting the premise that sexual pleasure has intrinsic value challenges the organizing principles of these areas of law and requires us to reexamine our approach to them.

Obscenity law relies on the presumption that offensive, sexually arousing materials are of so little value that the state may ban them unless they have serious literary, artistic, political, or scientific value.⁴

considered low-value speech); Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149 (2010) (arguing that equal protection law applies a lower standard of scrutiny when it perceives a gendered law as governing the consequences of illicit sex as opposed to limiting participation in public life); Paul Chevigny, *Pornography and Cognition: A Reply to Cass Sunstein*, 1989 DUKE L.J. 420 (challenging Cass Sunstein’s argument that pornography is noncognitive speech).

A few authors have noted legal scholarship’s negative or dismissive attitude about sexual pleasure or sex outside of intimate relationships but have not connected this approach to an underlying assumption that sexual pleasure in itself has negligible or negative value, or at least not to the breadth or depth of this Article. See, e.g., Susan Frelich Appleton, *Toward a “Culturally Cliterate” Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267, 285–90 (2008) (discussing how family law marginalizes female sexual pleasure); Katherine M. Franke, Essay, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (arguing that feminist legal scholarship marginalizes female sexual pleasure); Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadoomasochistic Sex*, 11 TEX. J. WOMEN & L. 51 (2001) (arguing that consensual sadoomasochistic sexual activities should not be criminalized); Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809 (2010) (arguing that courts and scholars ignore the value of non-intimate sex).

⁴ See *Miller v. California*, 413 U.S. 15, 23–26 (1973) (holding that the state may regulate obscene materials if they, “taken as a whole, appeal to the prurient interest in sex, . . . portray sexual conduct in a patently offensive way, and . . . do not have serious literary, artistic, political, or scientific value”).

This framework distinguishes sexually explicit material primarily intended to arouse as uniquely lacking in First Amendment protection.⁵ While First Amendment scholarship sometimes acknowledges obscenity law's implicit assumption that sexual arousal is of uniquely negligible value, this unfounded assumption has generally gone unchallenged.⁶ Rejecting this assumption encourages a more honest discussion of what the true goals of speech regulation should be and how to further those goals when we regulate sexual, offensive, violent, and other potentially objectionable speech.⁷

Similarly, the criminalization of injury inflicted in the context of consensual sadomasochistic sexual practices (BDSM)⁸ stands in stark contrast to criminal law's permissive stance toward risky or injurious activities such as sports. This Article analyzes the law of consent to injury in several contexts and concludes that BDSM is far more like permitted activities, such as sports and cosmetic surgery, than other prohibited activities, such as gang initiation or street fighting.⁹ It argues that the most convincing explanation for why BDSM receives no consent defense is that legislatures and courts fail to value its goal of sexual pleasure in the same way they value the pleasure derived from activities such as sports.¹⁰ This failure inappropriately distorts the costs and benefits of allowing consent to injury in the context of BDSM and other pleasurable pursuits. Valuing sexual pleasure improves the discourse on what injury the law should permit individuals to consent to for pleasure, sexual or otherwise.

The third legal realm this Article examines, constitutional law pertaining to sexual freedom, may seem like an odd choice given constitutional law's apparently strong legal protections for sex. A closer analysis of Supreme Court jurisprudence reveals that this case law values sexual pleasure only to the extent that it furthers goals such as marriage, procreation, and intimate relationships.¹¹ The value of sexual pleasure in itself is strangely absent from this jurisprudence. Even *Lawrence v. Texas* focuses on how intimate relationships

⁵ See *infra* Part II.A (describing how scholars and courts advance two rationales for obscenity law—that it prevents harmful conduct and that it prevents unwanted sexual thoughts outside of marriage—to remove First Amendment protection from sexually arousing speech when no other form of speech is subjected to so much regulation).

⁶ See *infra* Part II.A (exploring and refuting the few alternative explanations for sex exceptionalism in First Amendment law).

⁷ See *infra* Part III.B (proposing two potential paths for valuing sexual pleasure while regulating speech that appeals to prurient interests).

⁸ For a more detailed definition and discussion of BDSM, see *infra* notes 135–47 and accompanying text.

⁹ *Infra* Part II.B.

¹⁰ *Infra* Part II.B.

¹¹ See *infra* Part II.C.

transform mere sexual pleasure into something worthy of constitutional protection, leaving sexual activity that does not occur within these types of relationships vulnerable to regulation.¹² Valuing sexual pleasure for its own sake undermines the morality-based arguments for limiting sexual activity that persist after *Lawrence*. This Article explores the implications of this in the context of sex toy regulation, an issue that has prompted a circuit split in the wake of *Lawrence*.¹³

Part I of this Article provides a definitional framework and argues that sexual pleasure has intrinsic value just as other pleasures have intrinsic value. Part II argues that the law counterintuitively fails to value sexual pleasure for its own sake and instead often assumes that sexual pleasure has uniquely negligible or negative value. Rejecting this assumption undermines the foundation of several areas of law and requires that lawmakers, courts, and scholars rethink our approach to them. Part III begins this process by examining what sex-positive law would look like and the new questions it raises for these and other areas of law.

I

THE VALUE OF SEXUAL PLEASURE

A. *The Definitional Framework*

Sexual pleasure is not easy to define. Both pleasure and sexuality are inherently subjective, making sexual pleasure a fluid concept.¹⁴ This Article uses the term “sexual pleasure” to refer to physical and psychological enjoyment that is interpreted as sexual or erotic by the individual experiencing it.¹⁵ It does not limit the term to genital stimulation or even physical stimulation.¹⁶ This definition includes pleasure

¹² See *infra* Part II.C.

¹³ See *infra* Part III.D (discussing divergent cases in the Eleventh and Fifth Circuits, and arguing that bans on sex toys would not survive rational basis review if sexual pleasure were considered valuable in itself).

¹⁴ See PAUL R. ABRAMSON & STEVEN D. PINKERTON, WITH PLEASURE 8–10 (2002) (describing the varied and subjective nature of sexual pleasure); MOORE, *supra* note 1, at 44–45 (discussing how the concept of pleasure, including sexual pleasure, is varied and fluid).

¹⁵ See ABRAMSON & PINKERTON, *supra* note 14, at 8–9 (noting that what makes something sexually pleasurable is the brain’s interpretation of the signals as sexual and pleasurable); David F. Greenberg, *The Pleasures of Homosexuality*, in *SEXUAL NATURE, SEXUAL CULTURE* 223, 224–25 (Paul R. Abramson & Steven D. Pinkerton eds., 1995) (describing the link between psychological and physiological causes of sexual pleasure, particularly in the context of sexual orientation).

¹⁶ See MOORE, *supra* note 1, at 50–51 (describing a wide range of sources of sexual pleasure). *Contra* ABRAMSON & PINKERTON, *supra* note 14, at 8 (describing sexual pleasure in terms of physical stimulation). I choose to include sexual pleasure that is not derived from physical stimulation because this definition better represents the myriad

produced by visual or auditory stimuli that an individual interprets as pleasurable in a sexual way, as well as mere thoughts and fantasies without any external stimulation.¹⁷ For some, sexual pleasure may be intensified or only reached in the context of an emotional relationship;¹⁸ others may experience it with anonymous individuals or alone.¹⁹

There is also no one accepted definition for sex positivity; there are, however, several guiding principles. A sex-positive framework values sexual autonomy and all forms of consensual sexual activities as sources of pleasure and fulfillment.²⁰ It rejects a view that sex and sexual pleasure are shameful.²¹ It respects diverse ways of expressing and experiencing sexuality and sexual pleasure, and rejects a culture that privileges male or heterosexual desire and pleasure above female or queer desire and pleasure.²²

This Article focuses on one particular principle of sex positivity: that sexual pleasure has value because of the pleasure it provides and apart from its ability to serve other ends such as emotional bonding or

sources of sexual pleasure. Individuals may derive sexual pleasure from seeing, hearing, or smelling arousing stimuli. See TINA S. MIRACLE ET AL., *HUMAN SEXUALITY* 77–79 (2003) (describing how the five human senses all contribute to sexual arousal). Some individuals, for example, experience sexual pleasure from having others blackmail them or take control of their finances to use them for personal purchases, a form of financial domination, or “FinDom.” See EJ Dickson, “*Do It Again or I’m Gonna Call Your Wife*”: *Inside the World of Financial Domination*, SALON (June 29, 2013, 8:00 PM), http://www.salon.com/2013/06/30/do_it_again_or_i%E2%80%99m_gonna_call_your_wife%E2%80%9D_inside_the_world_of_financial_domination/ (describing and providing examples of financial domination).

¹⁷ See ABRAMSON & PINKERTON, *supra* note 14, at 9 (describing how the brain interprets signals to be sexually pleasurable).

¹⁸ See *id.* at 54 (describing how the importance of sexual pleasure extends beyond the individual to social behavior and relationships).

¹⁹ See Geoffrey P. Miller, *Law, Self-Pollution, and the Management of Social Anxiety*, 7 MICH. J. GENDER & L. 221 (2001) (discussing cultural and legal attitudes toward masturbation); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1348 n.228 (2011) (describing anonymous sex practices).

²⁰ See Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 214 (2011) (stating that a central theme of sex positivity is that sex is good as well as pleasure- and power-inducing); Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 282–83 (2008) (discussing how sex-positive feminists view sex as important for pleasure, fulfillment, and power); Lee Jacobs Riggs, *A Love Letter from an Anti-Rape Activist to Her Feminist Sex-Toy Store*, in YES MEANS YES!: VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE 107, 110, 112–13 (Jaclyn Friedman & Jessica Valenti eds., 2008) (describing a sex-positive culture as one that requires consent and encourages sexual pleasure and creativity).

²¹ See Riggs, *supra* note 20, at 110, 112–13 (describing how sex-positive culture rejects the idea that sexual desire is shameful or that sex is based on uncontrollable impulses).

²² See *id.* at 110 (describing sex-negative culture as possessing these characteristics).

procreation.²³ It does not endeavor to determine the precise value of sexual pleasure.²⁴ It makes only the common-sense assertion that sexual pleasure has value for its own sake.

B. *Sexual Pleasure Has Intrinsic Value*

Pleasure's inherent subjectivity complicates a discussion of its value. It is difficult to describe and demonstrate. Individuals derive pleasure from quite varied sources, and pleasurable experiences may be quite idiosyncratic. I think eggnog is delicious while others find it repellent. I cannot understand the appeal of Norwegian black metal music, while others invest great time, money, and effort in the pleasure they derive from listening to it.²⁵

But this subjectivity does not mean pleasure is not real or that we should not value it. On the contrary, several moral philosophers have accepted the intrinsic value of pleasure, with some arguing that pleasure may be the only thing that has intrinsic value.²⁶ The value of pleasure is also common sense. People value the pleasure they experience. Jets fanatics tailgate and brave freezing weather to feel the joy of victory or agony of defeat; comic book lovers descend on the stores and Internet message boards every time a new issue emerges; and a Prince

²³ This Article asserts that sexual pleasure is a good thing simply because it is pleasurable and even if it does not contribute to other potentially valuable pursuits such as intimacy, marriage, or procreation. The nature of such "intrinsic value," or value in general, is the subject of intense theoretical debate that is beyond the scope of this Article. *See, e.g.*, G.E. MOORE, *PRINCIPIA ETHICA* 187 (1965) (defining intrinsic value); JOSEPH RAZ, *THE PRACTICE OF VALUE* 15–16 (2003) (discussing instrumental, as opposed to intrinsic, value); T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 95 (1998) (sketching an abstract description of what it means to value something); John O'Neill, *The Varieties of Intrinsic Value*, 75 *MONIST* 119 (1992) (distinguishing different meanings of intrinsic value and applying the term to the natural world and the environmental context); Patrick S. Shin, *Diversity v. Colorblindness*, 2009 *BYU L. REV.* 1175, 1182–87 (defining instrumental and intrinsic value).

²⁴ *See* Franke, *supra* note 3, at 187 & n.24 (noting that the value of sex is important to recognize even if it is difficult to measure).

²⁵ *See, e.g.*, PETER BESTE, *TRUE NORWEGIAN BLACK METAL* (Johan Kugelberg ed., 2008) (depicting bold images of members of the black metal community in Norway—images the artist accumulated during thirteen separate trips to Norway); MICHAEL MOYNIHAN & DIDRIK SODERLIND, *LORDS OF CHAOS: THE BLOODY RISE OF THE SATANIC METAL UNDERGROUND* (2003) (describing the development of Norwegian black metal and exploring the violence and opposition to Christian philosophy within said genre).

²⁶ HUSAK & DE MARNEFFE, *supra* note 1, at 86; *see also* JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 11 (1996) (asserting that pain and pleasure is the natural dichotomy that governs mankind and determines utility in all things); Fred Feldman, *On the Intrinsic Value of Pleasures*, 107 *ETHICS* 448 (1997) (expounding on the hedonist claim that "pleasure is intrinsically good"); Fred Feldman, *The Good Life: A Defense of Attitudinal Hedonism*, 65 *PHIL. & PHENOMENOLOGICAL RES.* 604, 610 (2002) (defining "the value of a person's life" in terms of how much pleasure she experiences from the things that happen to her in her life).

fan will pay to download “Raspberry Beret.” Each of these individuals values the pleasure these activities provide even if none of them can empirically demonstrate that value.

Because we recognize the value of pleasure, lawmakers tend not to curtail pleasurable activities without good reason.²⁷ Many reasons for doing so exist, such as the fact that an activity harms or carries the risk of harm to another. For example, driving while intoxicated may be pleasurable to some, but we prohibit it because it risks harm to others.²⁸ Not any risk or any harm is sufficient to justify regulation, particularly criminal prohibition.²⁹ We could reduce the risk of automobile accidents by simply prohibiting all driving or all alcohol consumption. Instead, we accept certain risks as insubstantial or justifiable.³⁰ This calculation weighs the severity of the harm, the likelihood of the harm occurring, and the cost of prohibiting the activity.³¹ Pleasure factors into this calculation as part of the costs of regulating an activity pleasurable to some.³²

Sexual pleasure is no less valuable than pleasure derived from other types of activities.³³ Sexual pleasure is intrinsically valuable

²⁷ See HUSAK & DE MARNEFFE, *supra* note 1, at 84–88 (noting that lawmakers allow people to take enormous risks when they engage in recreational activities that do not involve drugs, but regulate recreational drug use in part because of the health risks involved).

²⁸ Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 BUFF. CRIM. L. REV. 599, 604–06 (1998) (noting that “drunk driving is proscribed because it increases the risk of a crash that causes personal injury and/or property damage”).

²⁹ See 1 JOEL FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* 188–91 (1984) (describing the philosophical foundations for prohibiting certain risk creation as assessment of the magnitude and probability of harms occurring); R.A. Duff, *Criminalizing Endangerment*, 65 LA. L. REV. 941, 952–54 (2005) (describing types of risk creation that merit criminalization); Husak, *supra* note 28, at 606 (arguing that the creation of an insubstantial risk should not be criminalized); Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, 4 THEORETICAL INQUIRIES L. 367, 372 (2003) (noting that criminal law only punishes the creation of risks that are substantial and unjustifiable).

³⁰ See *supra* note 29 (evaluating the justifications for prohibiting some risks and allowing others). The Model Penal Code implicitly reflects this judgment—an individual cannot be reckless or negligent unless he disregards a substantial risk, and the Code provides a defense for *de minimis* harm or risk. MODEL PENAL CODE §§ 2.02(2)(c)–(d), 2.12(2) (Official Draft and Explanatory Notes 1985).

³¹ FEINBERG, *supra* note 29, at 187–93; Robinson, *supra* note 29, at 372.

³² HUSAK & DE MARNEFFE, *supra* note 1, at 84–88 (asserting that “the strength of the reason we require [as a justification for criminalizing an activity] cannot be unrelated to the value of the activity for which punishment is imposed” and arguing for a weightier reason to criminalize more pleasurable activity).

³³ See MOORE, *supra* note 1, at 47 (arguing that engaging in pleasurable activities for pleasure’s sake is “an ordinary human good” and that sexual activity should be looked at the same way); Heather Corinna, *An Immodest Proposal*, in YES MEANS YES!, *supra* note 20, at 179, 185–87 (advocating an approach to sex that values female desire, experience, and experimentation, as we do with other types of potentially enriching and pleasurable

simply because it is pleasurable.³⁴ The value of this pleasure is evidenced by the ends to which people will go and the significant unwanted consequences they will risk or endure to achieve it.³⁵ If sexual pleasure has intrinsic value, then law and the discourse that surrounds it should reflect this. Laws that restrict sexual pleasure should weigh the diminishment of this pleasure just as we weigh the costs of restricting other pleasurable activities.

Part II argues that several areas of the law counterintuitively reflect the opposite assumption—that sexual pleasure for its own sake has negligible or negative value. It focuses on three areas of law: (1) obscenity law; (2) the criminalization of BDSM sexual activity; and (3) constitutional law pertaining to sexual freedom. Each of these legal realms is directly concerned with the regulation of sexual behavior or the experience of sexual pleasure. When examined together, they demonstrate how entrenched the devaluation of sexual pleasure is in our law and legal discourse.

experiences). Feminist scholars have voiced well-founded concerns about the validity of consent in relationships that reflect power imbalances and the societal ideation of submissive femininity. See Appleton, *supra* note 3, at 288–89, 300 (arguing that family privacy has permitted coercion-based consent to such an extent that women’s sexual pleasure is a false consciousness); Cheryl Hanna, *Rethinking Consent in a Big Love Way*, 17 MICH. J. GENDER & L. 111, 127–30 (2010) (“Love, as women in particular are taught to express it, can also constrain our choices and convince us to suppress our own autonomy as an act of love for another.”); Franke, *supra* note 3, at 198, 206 (“For MacKinnon, all gender is always already about sexuality, and all sexuality is always already about gender. And both gender and sexuality are entirely about women’s subordination to men.”); Catharine A. MacKinnon, *Desire and Power*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 46, 54 (1987) (“[S]exual desire in women, at least in this culture, is socially constructed as that by which we come to want our own self-annihilation.”); Matthew Weait, *Harm, Consent and the Limits of Privacy*, 13 FEMINIST LEGAL STUD. 97, 102–04 (2005) (discussing feminist objections to autonomy-based arguments for allowing harmful sexual acts). See generally Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (exploring critiques and defenses of dominance feminism, which portrays women as shaped by pervasive male sexual coercion). But we need not resolve whether every experience of pleasure is genuine to resolve that genuine pleasure is, in fact, a good thing.

³⁴ MOORE, *supra* note 1, at 67 (arguing that sex does not depend on procreative purposes to be valuable, but that it is valuable because it is pleasurable).

³⁵ See ABRAMSON & PINKERTON, *supra* note 14, at 66–67 (detailing descriptions from ancient texts of significant consideration, such as money, given in exchange for sexual pleasure).

II SEX-NEGATIVE LAW: LAW'S FAILURE TO RECOGNIZE THE VALUE OF SEXUAL PLEASURE

A. *Obscenity Law*

1. *Devaluing the Sexually Arousing*

Obscenity, unlike almost all other images and words, is presumptively denied First Amendment protection. The First Amendment requires content-based restrictions of speech to withstand strict scrutiny, a high bar.³⁶ Yet the distribution of obscenity may be regulated freely, and may even be banned, as restrictions on obscenity face only the low bar of rational basis review.³⁷ This is because the Supreme Court has designated obscenity as outside the ambit of the First Amendment.³⁸ For the purposes of First Amendment law, obscenity is not speech at all and thus merits no First Amendment protection.³⁹

While the words “obscenity” and “pornography” are often used interchangeably in common parlance, the two have very different

³⁶ See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (reaffirming that the First Amendment requires restrictions on speech to withstand strict scrutiny); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (emphasizing the high level of protection afforded speech under the purview of the First Amendment); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844 (2006) (identifying free speech law as the area of law in which strict scrutiny cases arise most frequently).

³⁷ See *United States v. Orito*, 413 U.S. 139, 141–44 (1973) (confirming the rejection of First Amendment protection for public obscenities, applying rational basis review, and allowing Congress to regulate interstate transport of obscene material); *Miller v. California*, 413 U.S. 15, 23 (1973) (“[O]bscene material is unprotected by the First Amendment.”). The Constitution protects only an individual’s right to possess obscenity within the confines of the home. *Stanley v. Georgia*, 394 U.S. 557, 559 (1969).

³⁸ See *Miller*, 413 U.S. at 20 (summarizing the holding of *Roth v. United States*, 354 U.S. 476 (1957), rejecting First Amendment protection for obscenity).

³⁹ See *id.* at 23, 34–35 (“[I]n our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment”); *Roth*, 354 U.S. at 485 (“We hold that obscenity is not within the area of constitutionally protected speech or press.”); see also Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1774–75 (2004) (tracing the Court’s continuing refusal to treat obscenity as protectable speech); Sunstein, *supra* note 3, at 594–95 (discussing the *Miller* Court’s opposition to obscenity). Several other types of speech have diminished constitutional protection. But such regulation exists only to protect against an identifiable harm or fraud. Obscenity requires no such harm or fraud. See Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 304–05, 308 (1995) (arguing that obscenity is at the bottom of the Supreme Court’s speech hierarchy). But see Mark Huppín & Neil Malamuth, *The Obscenity Conundrum, Contingent Harms, and Constitutional Consistency*, 23 STAN. L. & POL’Y REV. 31, 44–48, 54–56 (2012) (detailing both historical and contemporary identifiable harm-based justifications for obscenity laws).

legal meanings.⁴⁰ *Miller v. California* defines obscenity as materials (1) appealing to the prurient interests, (2) depicting sexual conduct in a patently offensive way, and (3) lacking in serious literary, artistic, political, or scientific (SLAPS) value.⁴¹ In contrast, the word “pornography” has no one legal definition.⁴² This Article uses “pornography” to refer to any depiction of bodies or erotic behavior that has the purpose of sexually arousing the viewer or reader.⁴³ Pornography is not necessarily obscene; pornographic material may be nonobscene if it is inoffensive in its depictions or has SLAPS value.⁴⁴ Obscenity, how-

⁴⁰ See Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 610–11 (1987) (discussing the different meanings of the terms, despite their interchangeable use); Nadine Strossen, *Current Challenges to the First Amendment*, 36 GONZ. L. REV. 279, 295–96 (2001) (noting that, although the public, the media, and politicians often use the words “obscenity” and “pornography” interchangeably, the two have different legal meanings).

⁴¹ *Miller*, 413 U.S. at 24–26; see also Dana Neaşu, *Tempest in a Teacup or the Mystique of Sexual Legal Discourse*, 38 GONZ. L. REV. 601, 630–35 (2003) (describing the evolution of obscenity law in the United States). Although *Miller’s* definition of obscenity does not exclude text, the Supreme Court has been more cautious in applying obscenity law to text than to images, and this caution is reflected in a contemporary prosecutorial tradition that focuses nearly exclusively on images. See *Kaplan v. California*, 413 U.S. 115, 116–19 (1973) (noting that, while words alone may constitute obscenity, the prosecution of text should be more restrained than the prosecution of images); Amy Adler, *The First Amendment and the Second Commandment*, 57 N.Y.L. SCH. L. REV. 41, 46–47 (2012) (describing the Court’s hesitation to designate text as obscene and its effect on subsequent prosecutions). This may reflect the assumption that images are more harmful or less conducive of ideas and reason than text; however, for reasons I discuss in Part II.A.2, there are good reasons to question these assumptions.

⁴² Cf. *Miller*, 413 U.S. at 18–19 n.2 (noting that the precise legal definition of obscene has more in common with the dictionary definition of pornography than with the dictionary definition of obscene).

⁴³ Others distinguish a narrower definition of pornography that includes only the subset of this material that depicts the abuse or objectification of women. See, e.g., INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY ch. 16, § 16–3(q) (1984) (limiting the definition of pornography to material subordinating women), reprinted in IN HARM’S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 438–44 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) [hereinafter IN HARM’S WAY], invalidated by *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985); Sunstein, *supra* note 3, at 591–92 (making the depiction of women enjoying or receiving abuse an essential part of the definition of pornography). Some discussions of pornography divorce the term entirely from the erotic and instead define it as the explicit or sensationalist depiction of something that elicits morbid fascination. See, e.g., Thomas Rogers, *The Meaning of Torture Porn*, SALON (June 7, 2010, 8:20 PM), http://www.salon.com/2010/06/08/philosophy_of_horror_movies/ (referring to graphic horror movies as torture porn).

⁴⁴ See ABRAMSON & PINKERTON, *supra* note 14, at 168 (“[A]nything that is unconventional or a bit unsavory, as judged by the prevailing morality, may be deemed pornographic.”); MARTHA C. NUSSBAUM, HIDING FROM HUMANITY 136 (2004) (criticizing the *Miller* Court’s treatment of pornography as merely a subclass of the disgusting); Ronald K.L. Collins & David M. Skover, *The Pornographic State*, 107 HARV. L. REV. 1374, 1392–93 (1994) (detailing the difficulty that arises when attempting to separate hardcore pornography from sexually charged artistic works); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 328

ever, falls within this Article's definition of pornography because it contains depictions of erotic behavior that have the purpose or effect of sexually arousing the viewer.⁴⁵ The state has much broader power to regulate obscenity than to regulate nonobscene pornography.⁴⁶

The definition of obscenity and its exceptional lack of constitutional protection reveal an underlying assumption that sexual pleasure in itself has negligible value.⁴⁷ Offensive material retains constitutional protection unless its purpose is to sexually gratify or arouse.⁴⁸ Offensive speech with the purpose of sexual arousal retains protection only if it contains some form of SLAPS value. Implicit in the *Miller* standard is the proposition that there is insufficient value in sexual pleasure alone to provide constitutional protection for sexually explicit materials that offend. To receive constitutional protection,

(1988) (arguing that pornography can contain "propositional, emotive, and artistic content").

⁴⁵ Cf. *Miller*, 413 U.S. at 24 (limiting the definition of obscenity to works that depict or describe sexual conduct and appeal to the prurient interest in sex).

⁴⁶ See *Schad v. Mount Ephraim*, 452 U.S. 61, 65, 76 (1981) (striking down a law prohibiting live nude dancing); *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 70 (1976) (upholding restrictions on pornography but stating the First Amendment would not allow a complete ban of the material); *Erznoznik v. Jacksonville*, 422 U.S. 205, 205 (1975) (striking down an ordinance prohibiting drive-in theaters from showing movies containing nudity); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975) (striking down a restriction on a regional theatrical production); see also *Shaman*, *supra* note 39, at 309–10 (discussing the majority of the Court's willingness to protect "non-obscene, sexually explicit expression"). Prosecutions for obscenity have become more difficult since the advent of the Internet muddled the question of how to apply the "community standards" factor. While the "community" in question was formerly assumed to be more local, the Internet calls this assumption into question. As a result, some jurisdictions began applying a standard that encompassed views outside their geographic area, which makes prosecution more difficult given the diversity of views across the country. See, e.g., *United States v. Kilbride*, 584 F.3d 1240, 1248–49 (9th Cir. 2009) (allowing a national community standards test). However, just because obscenity has become more difficult to prosecute does not mean that obscenity law is irrelevant. The government continues to prosecute obscenity and the Supreme Court continues to uphold the standard. See Shannon Creasy, Comment, *Defending Against a Charge of Obscenity in the Internet Age: How Google Searches Can Illuminate Miller's "Contemporary Community Standards,"* 26 GA. ST. U. L. REV. 1029, 1030–31 (2010) (describing how, despite controversy, obscenity laws are still prosecuted and upheld by the Supreme Court). Moreover, as described in *Lawrence v. Texas*, even laws that are enforced much less than they are violated are not trivial; such laws publicly condemn the activity, stigmatize the practice and the individuals engaging in it, and subject those individuals to public shame. 539 U.S. 558, 575 (2003).

⁴⁷ Cf. NUSSBAUM, *supra* note 44, at 137 (arguing that obscenity law reflects the view that there is something inherently disgusting about sex).

⁴⁸ See *Miller*, 413 U.S. at 24 (holding that patently offensive, prurient material which violates community standards is constitutionally protected only if it contains SLAPS value); see also NUSSBAUM, *supra* note 44, at 135 (reiterating the *Miller* Court's reasoning).

such material must have some *other* serious value: political, artistic, literary, or scientific.⁴⁹

The goals of obscenity law espoused by courts and scholars underscore obscenity law's devaluation of sexual pleasure. While obscenity law occasionally protects individuals from undesired exposure to obscenity, much of obscenity law regulates distribution to willing consumers.⁵⁰ This Article focuses on two justifications of obscenity law that scholars and courts advance. The first is that obscenity law prevents harmful conduct, such as rape.⁵¹ The second is that obscenity law prevents unwanted thoughts, beliefs, or emotions, such as misogyny or sexual arousal outside the context of marriage.⁵² Each of these potential aims demonstrates how obscenity law distinguishes sexually arousing speech as uniquely undeserving of First Amendment protection.

The harmful conduct argument posits that obscenity should be regulated because it promotes unwanted and even criminal behavior, such as rape or violence.⁵³ If obscenity promotes violence against

⁴⁹ *Miller*, 413 U.S. at 26; see also NUSSBAUM, *supra* note 44, at 142–43 (describing a case in which otherwise obscene speech was saved by its political message).

⁵⁰ In *Miller v. California*, for example, the material at issue was unsolicited, and the Court described the state interest in prohibiting dissemination of obscene material where the mode of dissemination carried a significant danger of offending the sensibilities of unwilling recipients or exposure to youth. 413 U.S. at 18–19. *But see id.* at 44 (Douglas, J., dissenting) (distinguishing obscenity cases from captive audience cases). Regardless, the statute in *Miller* targeted all such material, whether solicited or not, and much of obscenity law applies to willing viewers. See *id.* at 16–17 n.1, 27 (majority opinion) (discussing the statute at issue in *Miller* and noting that the Court's ruling applies to consenting adults); *id.* at 47 (Douglas, J., dissenting) (same); see also Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 393 (1963) ("Regulation frequently aims to prevent even the eager from obtaining the materials or from regarding them, however clandestinely . . .").

⁵¹ See Shaman, *supra* note 39, at 306–08 (discussing the Court's willingness to link obscenity to crime and other antisocial behavior); see also Henkin, *supra* note 50, at 392 (opposing this argument but noting that it is a common justification for banning obscenity); *c.f.* Post, *supra* note 44, at 325 (discussing this argument in the context of pornography); Sunstein, *supra* note 3, at 597–601 (same).

⁵² See Henkin, *supra* note 50, at 394–95 (noting that obscenity law punishes sexual obscenity as a crime against public decency and morals); Neacsu, *supra* note 41, at 609 (same); Sunstein, *supra* note 3, at 601 (making the argument in the context of pornography that objectifies women). Some arguments combine these two types of goals; for example, some scholars argue that obscenity promotes the objectification of women, which in turn promotes rape. See, e.g., Sunstein, *supra* note 3, at 597–601 (supporting this argument with evidence that men who have been exposed to pornography are desensitized to sexual violence against women and may be predisposed toward rape).

⁵³ See Henkin, *supra* note 50, at 392 (identifying said argument as one rationale for regulating obscenity); Shaman, *supra* note 39, at 306–08 (noting that the Supreme Court justified a prohibition on obscenity based on a contested link between obscenity and harmful behavior in *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973)); Sunstein, *supra* note 3, at 597–601, 612–15 (making this argument in the context of pornography, not

women, then obscenity law arguably does not devalue sexual pleasure per se. Rather, it prioritizes the prevention of unlawful violence over sexual pleasure. Cass Sunstein, for example, has argued for the regulation of certain sexually explicit materials on the grounds that the materials increase the occurrence of sexual violence against women.⁵⁴ His claims echo those of numerous feminist scholars, such as Catharine MacKinnon and Andrea Dworkin.⁵⁵

If true, the harmful conduct argument highlights how First Amendment law treats differently speech that is intended to sexually arouse. Obscenity is the sole exception to the rule that the state must demonstrate some type of fraud or harm in order to regulate speech.⁵⁶ In all other contexts, *Brandenburg v. Ohio* prohibits states from banning speech unless the state can demonstrate that harm is both imminent and extremely likely to occur as a result of the speech.⁵⁷ This high standard applies no matter how violent or distasteful the speech or how frivolous its purpose.⁵⁸

obscenity); see also Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1663–72 (2005) (noting that the harmful conduct argument's empirical basis is tenuous); Post, *supra* note 44, at 325 (describing and disagreeing with this argument). See generally IN HARM'S WAY, *supra* note 43 (transcribing women's testimony, given during hearings regarding antipornography ordinance, about how pornography harmed them). A related argument is that the creation of obscenity might in itself harm women because it involves or requires the exploitation, abuse, and rape of the women who participate in it. See IN HARM'S WAY, *supra* note 43, at 60–68, 359–60 (presenting testimony of or about women who performed in pornography due to threats, and whose rapes were documented as pornography). However, this argument faces many of the same problems as the argument that obscenity leads to violence against women, discussed *infra* notes 59–60 and accompanying text. Most notably, obscenity law is a poor fit for this problem, as it focuses on prurience and offense rather than violence and coercion; indeed, ordinances proposed to address this problem focus on the objectification of women rather than mere sexual prurience, offensiveness, and lack of redeeming SLAPS value. See, e.g., INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY ch. 16, § 16–3(q) (1984), reprinted in IN HARM'S WAY, *supra* note 43, at 438–44, *invalidated by* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

⁵⁴ Sunstein, *supra* note 3, at 597–601.

⁵⁵ See IN HARM'S WAY, *supra* note 43, at 4–6 (arguing that pornography harms women and advocating a legal remedy for its victims); see also Huppin & Malamuth, *supra* note 39, at 54–56 (describing arguments of feminist scholars in favor of harm-based pornography regulation). For a critique of MacKinnon's and Dworkin's views, see ABRAMSON & PINKERTON, *supra* note 14, at 181–91.

⁵⁶ See Huppin & Malamuth, *supra* note 39, at 48–49 (noting that all other categories of unprotected speech entail fraud or concrete harm to third parties).

⁵⁷ 395 U.S. 444, 447 (1969); see also Post, *supra* note 44, at 325–26 (reciting the *Brandenburg* standard); Sunstein, *supra* note 3, at 602 (same).

⁵⁸ See Shaman, *supra* note 39, at 289 (stating that under this high standard “regulations of speech are subject to searching judicial scrutiny, which allows speech to be restricted only when it is the cause of serious harm”). In contrast, in *Roth v. United States*, the Court did not feel it was necessary to prove that distribution of obscene materials posed a clear and present danger of antisocial conduct. 354 U.S. 476, 486–87 (1957); see also Stanley v.

As scholars such as Sunstein and Martha Nussbaum have noted, the *Miller* test is poorly suited to preventing violence against women.⁵⁹ The harmful conduct argument is concerned with certain types of material that promote violence against and subordination of women, while the current definition of obscenity focuses on offensiveness, appeal to prurience, and lack of SLAPS value. These categories may differ significantly. For example, pornography that features only males may fall within the definition of obscenity but fail to promote violence against women.⁶⁰ Even if obscenity law were limited to materials that promote violence against women, the evidence that those materials cause violent conduct is insufficient for the prohibition to pass the *Brandenburg* test.⁶¹

The argument that obscenity law prevents harmful behavior raises the question of why obscenity is treated so differently from other speech that purportedly causes unlawful conduct.⁶² If obscenity law truly exists to prevent sexual violence, then it is odd that the law presumes a sufficient causal link without the evidence it demands for the regulation of nonobscene materials. If the *Miller* test does not make this presumption, then it is odd that the Court distinguishes the category of obscenity law as needing no causal relationship between the materials it regulates and the harm it purports to prevent.

An alternative explanation for obscenity law is that it exists to prevent unwanted beliefs, thoughts, and emotions rather than

Georgia, 394 U.S. 557, 567 (1969) (restating the *Roth* Court's holding on this issue); Alexander, *supra* note 3, at 554 (describing the application of the test in *Brandenburg*).

⁵⁹ See NUSSBAUM, *supra* note 44, at 138–39 (noting that “the legal definition of obscenity actively colludes with misogyny” because it is based on male disgust and arousal, rather than on pornography’s subordination of women); Sunstein, *supra* note 3, at 594–95, 604 (noting that an approach directed at regulating obscenity differs from one directed at regulating harmful pornography in both its rationale and in the materials it covers); see also ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 9 (1989) (distinguishing obscenity from the pornography she advocates regulating); Post, *supra* note 44, at 298 (describing MacKinnon’s and Dworkin’s differentiation of obscenity and pornography); Shaman, *supra* note 39, at 320–21 (same).

⁶⁰ See WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 203 (2002) (describing the use of obscenity law to target gay pornography while permitting violently misogynistic straight pornography).

⁶¹ See Koppelman, *supra* note 53, at 1664–67 (outlining scientific studies on the effects of pornography); Sunstein, *supra* note 3, at 597–602 (arguing that pornography may promote violence against women, but recognizing that the evidence is too weak to pass the *Brandenburg* test). The Court acknowledged the lack of empirical evidence when it rejected a harmful conduct argument in the context of laws prohibiting the possession of obscenity. *Stanley*, 394 U.S. at 566–67; see also Alexander, *supra* note 3, at 554 (arguing that the connection between pornography and its resultant harm is the same type of connection that was deemed insufficient in *Brandenburg*).

⁶² See Huppín & Malamuth, *supra* note 39, at 48–49 (noting the uncommon treatment and qualities of obscenity among categories of unprotected speech).

unwanted conduct. Proponents of this view concede that such beliefs, thoughts, and emotions may not necessarily lead to unlawful conduct.⁶³ They argue that obscenity should nonetheless be regulated because of the way it affects individuals mentally, psychologically, or emotionally: what Andrew Koppelman calls “moral harm.”⁶⁴ There is significant disagreement over the content of obscenity’s moral harm. Some (most notably conservatives) argue that obscenity harms individuals by encouraging them to view others as sexual objects or by encouraging sexual pleasure outside of procreation, marriage, or a loving and monogamous relationship.⁶⁵ Others (most notably feminists) argue that obscenity conditions men to objectify and subordinate women.⁶⁶

Of these two explanations for obscenity law, the sexual morality argument seems more probable. Obscenity law is a poor fit to regulate materials that lead to the objectification of women, and indeed scholars such as Sunstein, Nussbaum, MacKinnon, and Dworkin acknowledge this.⁶⁷ The argument that speech that objectifies women should be regulated is more often used to advocate for legal reform

⁶³ See, e.g., Koppelman, *supra* note 53, at 1641–46, 1663–72 (describing how reading or viewing materials may inflict moral harm and acknowledging that such harm does not necessarily manifest itself in bad behavior).

⁶⁴ *Id.* at 1642; see also Matthew Benjamin, *Possessing Pollution*, 31 N.Y.U. REV. L. & SOC. CHANGE 733, 737 (2007) (noting that lawmakers have historically regulated obscenity for the purpose of protecting the public from moral harm).

⁶⁵ See, e.g., HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY 6–7 (1969) (expressing the view that pornography depersonalizes sexuality and objectifies people); HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW, AND PORNOGRAPHY 191–92 (1996) (same); see also Collins & Skover, *supra* note 44, at 1383–84 n.46 (describing conservative moralists’ rationales for regulating pornography); Koppelman, *supra* note 53, at 1647–49 (discussing the view that pornography is harmful because it objectifies people). See generally Benjamin, *supra* note 64, at 737 (tracing the history of the “moral pollution” argument).

⁶⁶ See Alexander, *supra* note 3, at 547–48, 554 (entertaining the idea that pornography, like a political pamphlet, can direct its audience to subjugate women, and noting that the rationale for regulating pornography is more likely preventing the dissemination of such messages than preventing harmful conduct); Collins & Skover, *supra* note 44, at 1386–87, 1397–98 (describing arguments by MacKinnon and other feminists that pornography dehumanizes and politically subjugates women, as well as counterarguments against these claims); Koppelman, *supra* note 53, at 1647–49 (discussing the view that pornography is harmful because it objectifies people); Post, *supra* note 44, at 324 (noting that MacKinnon and Dworkin want pornography regulated because it specifically demeans women); Sunstein, *supra* note 3, at 601 (arguing that pornography reflects and reinforces gender inequality); see also DWORKIN, *supra* note 59, at xxxvii–xxxix (making these arguments in the context of pornography); CATHARINE A. MACKINNON, ONLY WORDS 24–25 (1993) (same).

⁶⁷ See *supra* notes 53, 59–61 and accompanying text (discussing these scholars’ observations and critiques of the claim that obscenity law prevents objectification of or harmful conduct against women).

than to explain existing obscenity law.⁶⁸ The *Miller* test's focus on prurience and offensiveness is better suited to the task of regulating sexual pleasure that the state views as immoral.⁶⁹ Obscenity law is the regulation of sexually explicit materials that are both disgusting and sexually exciting—disgusting to the average person but nonetheless sexually exciting to some.⁷⁰ And, indeed, it is the very fact that some individuals find the materials sexually exciting that is a source of disgust to the community, just as the purported humor in racist jokes is in large part what makes them so abominable.⁷¹ This explanation of obscenity echoes the Court's language in both *Miller* and *Roth*, in which it described the selling of obscene materials as constitutionally punishable because it is “the commercial exploitation of the morbid and shameful craving for materials with prurient effect.”⁷² Obscenity law exists to limit the ways in which individuals can indulge their more shameful sexual interests.

Both moral harm justifications, however, underscore how obscenity law distinguishes sexually arousing speech as uniquely deserving of less protection. Outside the realm of obscenity, the Court is suspicious of speech regulations intended to limit unwanted thoughts and ideas. The Supreme Court's 2011 decision striking down the regulation of violent video games demonstrates the contrast between the Court's treatment of obscenity and other types of speech that are purported to produce moral harm.⁷³ In *Brown v. Entertainment Merchants Association*, the Court considered a California law that prohibited the sale or rental of violent video games

⁶⁸ See, e.g., NUSSBAUM, *supra* note 44, at 139–40 (asserting that obscenity law must be reformed in order to regulate materials that lead to the objectification and subordination of women).

⁶⁹ See NUSSBAUM, *supra* note 44, at 135–37 (problematizing the *Miller* Court's linkage of the definition of obscenity with disgust, pornography, and the concept of the female whore); Post, *supra* note 44, at 297 (situating the historical roots of obscenity law in U.S. religious traditions regarding the regulation of sex, decency, and morality). See generally *supra* note 50 and accompanying text (noting that obscenity law targets willing viewers as well as those for whom exposure to obscene material may be unsolicited).

⁷⁰ See NUSSBAUM, *supra* note 44, at 135–37 (discussing materials, such as films of bestiality, which courts have found obscene even though they would not sexually arouse the average person).

⁷¹ Cf. Koppelman, *supra* note 53, at 1646 (discussing the discomfort one feels with being fixed, at least momentarily, as a “member of a racist community” when one finds humor in a racist joke).

⁷² *Roth v. United States*, 354 U.S. 476, 496 (1957); see also *Miller v. California*, 413 U.S. 15, 35 n.15 (1973) (citing *Roth*).

⁷³ See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (holding that a California law regulating violent video games violates First Amendment protections because it is seriously overinclusive in some respects and seriously underinclusive in others).

to children.⁷⁴ As the Court observed, the statute mimicked the obscenity standard in some ways, by regulating games that allow the killing, maiming, or sexual assault of a human being and depict the act in a manner that “appeals to a deviant or morbid interest of minors,” is “patently offensive” to community standards, and “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.”⁷⁵ The Court, however, refused to grant the state the same leeway it would have to regulate obscenity because the speech at issue included depictions that were merely violent and not sexual.

Because the statute applied to nonsexual (and therefore nonobscene) speech, the Court subjected the law to strict scrutiny.⁷⁶ The state argued the law served the state interest of protecting minors from the psychological harm the video games posed.⁷⁷ In particular, the state cited studies claiming that violent video games may cause minors to become more aggressive.⁷⁸ However, the Court found that these studies were insufficient because they failed to demonstrate a sufficient causal relationship between violent games and aggressive behavior.⁷⁹ The Court also noted that the effects the state could demonstrate were also found when children were exposed to speech that was not prohibited, such as Bugs Bunny cartoons.⁸⁰ The underinclusiveness of the statute raised significant doubts about whether the state was pursuing the goal of preventing harm to children rather than merely disfavoring a particular type of speech.⁸¹

If obscenity law seeks to protect viewers from moral harm, *Brown* raises the question of why this goal receives special treatment in the context of obscenity. *Brown* demonstrated the Court’s willingness to protect speech even where the speech could promote violent or aggressive thoughts among minors, a population particularly vulnerable to manipulation. It is not clear that there is a stronger link

⁷⁴ CAL. CIV. CODE § 1746(d)(1)(A) (West 2009), *invalidated by Brown*, 131 S. Ct. 2729.

⁷⁵ *Brown*, 131 S. Ct. at 2732–34.

⁷⁶ *See id.* at 2738 (“Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.”).

⁷⁷ *See id.* at 2738–39 (addressing the state’s argument that the legislature can predict a link between violent video games and harm to minors).

⁷⁸ *See id.* at 2739 (discussing the state’s use of studies by research psychologists on the harmful effects of exposure to violent video games).

⁷⁹ *See id.* (critiquing the psychological studies presented by the state for only demonstrating correlation, not causation).

⁸⁰ *See id.* (noting that the reported effects in the relevant studies, even if taken as true, were indistinguishable from the effects of children’s exposure to violence on television).

⁸¹ *See id.* at 2740 (“Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”).

between obscenity and the objectification of women than between violent video games and aggressive attitudes. Nor is it beyond dispute that the moral harm at issue with obscenity is somehow worse than the moral harm at issue in *Brown*.⁸² Furthermore, if the moral harm of obscenity is that it promotes the objectification of women, obscenity law includes speech that does not pose this moral harm and excludes speech that does, raising the same concerns that were fatal in *Brown*.

Why is obscenity subject to less constitutional protection than speech that promotes violent fantasies, greedy dispositions, or racist attitudes? The most convincing explanation is that obscenity law presumes sexual pleasure is less valuable than other purposes of speech. Because sexual pleasure is deemed to be less valuable than the pleasure one gets from viewing violence or comedy, speech that exists solely to provide sexual pleasure is less worthy of constitutional protection. If such speech offends the standards of the majority—and, indeed, it is its defining quality of prurience that often makes it so offensive—it can be banned.⁸³ It is not merely that the purpose of obscenity, to provide or enhance sexual pleasure for individuals, is outweighed by other interests; it is that the purpose is at best uniquely without importance and at worst uniquely harmful. For this reason, no other form of speech is subject to so much regulation. Appeal to sexual pleasure is what makes obscenity exceptionally unworthy of constitutional protection.

The Court has made clear that what makes obscenity special is sex. On numerous occasions, the Court has refused to expand obscenity to include nonsexual offensive speech, most notably in cases involving depictions of violence.⁸⁴ Reviewing these decisions in *Brown*, the Court maintained “[o]ur cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of ‘sexual conduct.’”⁸⁵ The *Brown* Court further highlighted the importance of sex by distinguishing the case from *Ginsberg v. New York*. In *Ginsberg*, the Court

⁸² One might argue that the moral harm of immoral sexual desire is uniquely harmful. Yet this argument implicitly relies on the devaluation of sexual pleasure.

⁸³ See, e.g., *Roth v. United States*, 354 U.S. 476, 484 (1957) (stating that obscenity receives no First Amendment protection because it is “utterly without redeeming social importance”).

⁸⁴ See, e.g., *Brown*, 131 S. Ct. at 2734–35 (declining to expand obscenity law to include the regulation of violent video games in California); *United States v. Stevens*, 130 S. Ct. 1577, 1590–92 (2010) (holding a California statute to be unconstitutional in part because the state relies on an overbroad reading of the statute’s exceptions clause, which mimics the SLAPS exception in obscenity law).

⁸⁵ *Brown*, 131 S. Ct. at 2734 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

upheld a statute prohibiting the sale to minors of sexual material that would be obscene from the perspective of a child, allowing legislatures to “adjust[] the definition of obscenity ‘to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . .’ of such minors.”⁸⁶ The statute at issue in *Brown* applied only to the sale to minors of violent video games that would appeal “to a deviant or morbid interest of minors” that is “patently offensive to prevailing standards in the community as to what is suitable for minors.”⁸⁷ But the Court distinguished *Brown* from *Ginsberg* because the *Brown* statute was not limited to sexual material and therefore had to withstand a higher level of scrutiny than that applied to obscenity regulations.⁸⁸

The Court’s focus on the sexual nature of obscenity seems to blind it to how unique obscenity law is. Outside the context of obscenity, the Court has rejected a test that balances the value of speech against its potential harm. It explicitly refused to employ this balancing test in *Brown*, rejecting arguments that the entertainment value of the violent video games was outweighed by the social harm they caused.⁸⁹ It had rejected a similar test one year earlier in *United States v. Stevens*, in which the Court held unconstitutional a statute that banned depictions of animal cruelty.⁹⁰ In both cases, the Court reasoned that such a balancing test provided insufficient protection for the speech at issue, even though the statutes at issue in both cases explicitly exempted speech with SLAPS value.⁹¹ The Court made clear that, even where violent speech clearly lacks redeeming SLAPS

⁸⁶ *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (second alteration in original) (quoting *Mishkin v. New York*, 383 U.S. 502, 509 (1966)).

⁸⁷ CAL. CIV. CODE § 1746(d)(1)(A) (West 2009), *invalidated by Brown*, 131 S. Ct. 2729; *see also Brown*, 131 S. Ct. at 2732–33 (quoting the disputed California statute).

⁸⁸ *See Brown*, 131 S. Ct. at 2735–38 (finding that the strict scrutiny test applies in *Brown*, even though the disputed California statute bears some similarity to the New York statute regulating obscenity that was upheld in *Ginsberg*).

⁸⁹ *See id.* at 2733–38 (asserting that *Stevens* is controlling in *Brown* insofar as the state may not employ a simple balancing test to create new categories of content-based regulation of speech).

⁹⁰ *See Stevens*, 130 S. Ct. at 1585–86 (rejecting the state’s proposal that the disputed statute should be considered under a simple cost-benefit test that would allow the statute to stand if the speech the statute banned had greater social costs than value).

⁹¹ Compare 18 U.S.C. § 48 (2006) (current version at 18 U.S.C. § 48 (Supp. IV 2011)) (prohibiting depictions of animal cruelty, with a SLAPS exemption clause in paragraph (b)), and *Stevens*, 130 S. Ct. at 1585–86, 1590–91 (rejecting a simple balancing test as “dangerous” and “highly manipulable,” and finding the exceptions clause insufficient), with CAL. CIV. CODE §§ 1746, 1746.1 (West 2009) (prohibiting the sale of violent video games to minors, with a SLAPS exemption in 1746(d)(1)(A)), and *Brown*, 131 S. Ct. at 2734 (stating that *Stevens* is controlling and that the statute’s exceptions clause provides insufficient protection for the speech at issue).

value, restrictions must nonetheless survive strict scrutiny. In contrast, the *Miller* test presumes that sexually explicit offensive material that appeals to prurient interests and lacks SLAPS value merits *no* First Amendment protection.⁹² Explicitly violent offensive speech that appeals to blood thirst *may not* be subject to a balancing test; such content-based restrictions are presumed invalid unless they survive strict scrutiny. Yet sexually explicit offensive material that appeals to prurient interests *need not* be subject to a balancing test; such material simply lacks constitutional protection unless SLAPS value redeems it.

Obscenity law only makes sense if one assumes that sexual arousal is somehow uniquely valueless or harmful. It is the perceived moral harm inherent in sexual pleasure—and in particular deviant sexual pleasure—that is obscenity law’s concern. The argument also explains why the Court treats obscenity differently from other speech that might cause moral harm. Obscenity is speech that exists to appeal to *sexual* urges and satisfy *sexual* pleasure. Other types of offensive and potentially harmful speech—such as racist humor, violent entertainment, and exploitive reality television—all contain some value other than generating sexual pleasure, and thus all of them receive First Amendment protection. The special discounting of sexual pleasure also explains the Court’s steadfast insistence that the category of obscenity must be limited to speech with sexual content.

2. *Refuting Alternative Explanations*

Sex exceptionalism in First Amendment law is not a new concept, but scholars have heretofore failed to challenge First Amendment law’s underlying assumption that sexual pleasure itself is uniquely lacking in value. Instead, many prominent scholars have argued that pornography and obscenity are less valuable not because they appeal to sexual urges, but rather because of the *way* they appeal to these urges.⁹³ In particular, these arguments focus on obscenity and pornography’s appeal to emotion over reason or its appeal to the physical over the mental.

The first of these arguments posits that some forms of sexually explicit speech have low value because they communicate ideas and opinions through emotion rather than reason. Cass Sunstein, for example, distinguishes low-value speech based on various interrelated factors, which together provide a rough estimate of how important

⁹² See *supra* note 4 (describing the *Miller* test).

⁹³ See, e.g., Schauer, *supra* note 3, at 920–28 (arguing that hardcore pornography is devoid of cognitive content and only seeks to induce physical effects); Sunstein, *supra* note 3, at 602–08 (defending the regulation of pornography based on its “effect and intent” of “produc[ing] sexual arousal”).

that speech is to democratic society.⁹⁴ While Sunstein focuses on a particular definition of pornography, he notes that obscenity law illustrates this argument as well.⁹⁵ Speech that appeals to noncognitive functions is considered less valuable than other speech.⁹⁶ Sunstein argues that it is more permissible to regulate low-value speech based on viewpoint when the speech communicates through noncognitive functions.⁹⁷ He also argues that pornography that shows abuse of women is low-value speech because its intent is to produce sexual arousal and because it does so by appealing to noncognitive functions.⁹⁸ Sunstein concludes that pornography is uniquely suited to weaker constitutional protections because its noncognitive character makes it “more akin to a sexual aid than a communicative expression.”⁹⁹

Similarly, Frederick Schauer distinguishes obscenity as meriting less constitutional protection because it appeals to the physical as opposed to the mental.¹⁰⁰ Schauer argues that obscenity law seeks to exclude from First Amendment protection only materials without “cognitive content,” as such materials are not “speech” within the meaning of the First Amendment.¹⁰¹ Obscenity, Schauer argues, is less a communicative process than a sexual activity.¹⁰² While such sexual activity may have some social value, it lacks the “value as the process

⁹⁴ See Sunstein, *supra* note 3, at 602–05 (proposing four factors to be considered in assessing whether speech is low-value, including: its relation to the control of public affairs; its cognitive and noncognitive aspects; the purpose of the speaker; and the legitimacy of government regulation in certain areas).

⁹⁵ See *id.* at 604 (observing that obscenity law’s definitional focus on speech without SLAPS value is indicative of the factors that inform the low-value speech analysis).

⁹⁶ See *id.* at 605–06 (suggesting categorical distinctions between cognitive and noncognitive speech are rooted in “an effort to isolate what is uniquely important about speech in the first place”).

⁹⁷ See *id.* at 616 (“Regulation of harms that derive from types of persuasion appealing to cognitive faculties is presumptively disfavored Viewpoint-based regulation of high-value speech raises especially intense concerns about government motivation.”).

⁹⁸ See *id.* at 606–07, 616–17 (assessing the defensibility of antipornography legislation and regulation).

⁹⁹ *Id.* at 606.

¹⁰⁰ See Schauer, *supra* note 3, at 923 (asserting that pornography should be “viewed merely as a type of aid to sexual satisfaction” and therefore “may be treated conceptually as a purely physical rather than mental experience”). Schauer uses the word “pornography,” but clarifies that he is referring to the speech at issue in Supreme Court obscenity jurisprudence and that the Supreme Court erred in using the word “obscenity.” See *id.* at 920 nn.118–19.

¹⁰¹ See *id.* at 922 (interpreting the Court’s decision in *Roth* to exclude hardcore pornography from First Amendment protections as indicative of the Court’s unwillingness to extend such protections to communications which lack cognitive content).

¹⁰² See *id.* at 922–23 (presenting pornography as a “sexual surrogate” which serves as a sexual aid in “pictorial or linguistic form”).

and result of intellectual communication” that defines constitutionally protected speech.¹⁰³

John M. Finnis argues that, while obscenity law may have originated as a means to regulate depravity and corruption, modern obscenity law distinguishes a subset of speech that lacks constitutional protection because it pertains to the realm of passion and titillation rather than that of reason and intellect.¹⁰⁴ He posits that the First Amendment is intended to protect the free exchange of ideas and promote reasonable discourse and that it does not protect speech that appeals purely to emotion and passion.¹⁰⁵

Ronald K. L. Collins and David M. Skover use similar logic in their analysis of pornography’s dangers. Their article, *The Pornographic State*, defines pornography as that which trades in depictions of sexual acts, primarily through highly eroticized images, and which is publicly available through commercial distribution.¹⁰⁶ Collins and Skover warn of a “pornotopia” in which “James Madison’s reasoned discourse bends to pornotopia’s raw intercourse,” and “[d]eliberative discourse dies and is reincarnated as image-driven onanism.”¹⁰⁷ Collins and Skover contrast public reason with private passion, and argue that speech, particularly erotic speech, that serves only private self-gratification poses a threat to reasoned discourse.¹⁰⁸ The article questions whether pornography is communication at all and argues that, if it is communication, it is of a different order than the deliberative discourse at the core of the First Amendment.¹⁰⁹

One significant flaw of these arguments is that it is highly questionable that obscene materials appeal purely to emotions as opposed to reason (as Finnis, Collins, and Skover argue) or to physical as opposed to mental capacities (as Sunstein and Schauer argue).¹¹⁰

¹⁰³ *Id.* at 927.

¹⁰⁴ See John M. Finnis, “Reason and Passion”: *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 224–27 (1967) (identifying how modern obscenity law replaced the historical concepts of depravity and corruption with a more narrow definition of obscenity, distinguishing between reason and passion, in order to adhere to contemporary boundaries of First Amendment protections).

¹⁰⁵ See *id.* (arguing in favor of the obscenity standard in *Roth*, under which First Amendment protection did not extend to the expression of “passions, emotions and desires”). While Finnis uses this reasoning to explain the since-overruled *Roth* standard, his argument could apply equally to the *Miller* test, which focuses on speech that appeals to prurience and lacks SLAPS values that would implicate reason and intellectual content. See *id.*

¹⁰⁶ Collins & Skover, *supra* note 44, at 1378.

¹⁰⁷ *Id.* at 1375.

¹⁰⁸ *Id.* at 1375–82.

¹⁰⁹ *Id.* at 1375–80.

¹¹⁰ See Chevigny, *supra* note 3, at 422–27, 430–31 (arguing that a distinction between cognitive and noncognitive forms of communication is at best contradictory and unrelated

Indeed, it is doubtful that such stark dichotomies even exist.¹¹¹ The human mind relies heavily on a mix of intellect and emotions to interpret information.¹¹²

Obscenity by definition requires a cognitive interpretation because it must offend community standards while appealing to the prurient interest. The physical reaction of arousal occurs not because obscenity acts on a purely physical level, but because of the way the consumer interprets what he views or reads as arousing.¹¹³ This interpretation requires the consumer to go through complex cognitive processes of imagining the world in which the scenario occurs, relating to the characters, and finding erotic meanings in their actions.¹¹⁴ For this very reason, in many people, obscenity does not produce the physical reaction of arousal. Some find it ridiculous and humorous; others find it disgusting and abhorrent.

To say that obscenity merits less First Amendment protection because it is just a sexual aid ignores the fact that the physical reaction it produces requires a significant mental component. Physical comedy provides a useful analogy. In an episode of *The Simpsons*, “A Star Is Burns,” a film festival features the short film “Man Getting Hit by Football.”¹¹⁵ The film consists of one brief scene: A football strikes an elderly man in the groin, and the man falls to the ground in pain.¹¹⁶ Homer finds the film hilarious and erupts in laughter.¹¹⁷ To say that obscenity is a sexual aid and not speech is akin to saying that “Man Getting Hit by Football” is not speech because it merely generates in

to the way human cognition actually works in the world, and at worst entirely incoherent); Post, *supra* note 44, at 328–29 (“The notion that even a ‘hard-core’ pornographic film could be completely empty of content strikes me as fanciful, since at a minimum the film will be understood as attempting to communicate the author’s perception of what his audience will find sexually arousing.”).

¹¹¹ See Chevigny, *supra* note 3, at 422–27 (“All perception and thought aid in our comprehension of the world; the notion that some of these are ‘non-cognitive’ because they are not ‘intellectual’ is almost an incoherent distinction.”); Shaman, *supra* note 39, at 324 (“If pornography is as non-cognitive as Sunstein seems to think, so is much of the world’s great art, not to mention a good deal of the world’s popular culture.”). *But see* Finnis, *supra* note 104, at 228–30 (arguing that although dualistic theories of human nature may be “controverted,” they are also integral to U.S. constitutional history and political philosophy).

¹¹² See Chevigny, *supra* note 3, at 422–27 (reviewing studies in psychology that contradict the abstract philosophical distinction between “passion” and “reason”).

¹¹³ See *id.* at 426–27 (observing that pornography, like propaganda, conveys persuasive or ideological content by invoking pre-existing stereotypes).

¹¹⁴ See *id.* at 426–31 (“Expression always reaches us through some imaginative pattern or patterns that we already understand, rather than through some mythical path of direct stimulation. Our ability to picture or state a scenario for action enables us to make a decision and take action.”).

¹¹⁵ *The Simpsons: A Star Is Burns* (Fox television broadcast Mar. 5, 1995).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

Homer the physical reaction of laughter and is therefore the same as tickling him. This physical reaction requires a complex mix of cognitive capacities. The complexity is demonstrated by the varied reactions the film generates. Just as not everyone is aroused by obscenity, not everyone finds “Man Getting Hit by Football” funny.

Even if communication can be divided into cognitive-physical or reason-passion dichotomies, it is not clear why speech that appeals to emotion or to the visceral is inherently less valuable to society. Much of great art is great *because* of its appeal to emotion and passion or its ability to produce intense physical reactions.¹¹⁸ Society cherishes appeals to humor, anger, and fear in classic books, plays, and films.¹¹⁹

Proponents of the cognitive-physical or reason-passion arguments may counter that obscenity is distinctive in its singular means of communication or its particularly harmful effects. In other words, they may argue that appeals to the emotional or visceral are valuable when in service of or in combination with a complex message that appeals to reason.¹²⁰ They may also argue that obscenity should be regulated because it combines this limited means of communication with a particularly troubling message that is harmful to the viewer.¹²¹ But these arguments ignore the full spectrum of artistic expression. Similar arguments could be made about rock music, for example, or about club music that exists in large part to appeal to a physical desire to dance.¹²² Dance is at least as dominated by appeals to the physical and

¹¹⁸ See, e.g., Damien Hirst, *The Physical Impossibility of Death in the Mind of Someone Living*, DAMIEN HIRST (1991), <http://www.damienhirst.com/the-physical-impossibility-of> (displaying an art installation that consists of a tiger shark suspended in a tank of formaldehyde). A New York Times review of a 2007 installation of the piece remarked, “Mr. Hirst often aims to fry the mind (and misses more than he hits), but he does so by setting up direct, often visceral experiences, of which the shark remains the most outstanding.” Roberta Smith, *Just When You Thought It Was Safe*, N.Y. TIMES, Oct. 16, 2007, at E1.

¹¹⁹ See, e.g., Alexander, *supra* note 3, at 550 (“The distinction [between propositional and nonpropositional expression] not only places the Diego Rivera mural on the wrong side of the line, leaving it unprotected under the first amendment; the distinction also reads out of the first amendment everything that is nonpropositional: literature, art, movies, dance, and so on.”).

¹²⁰ See Sunstein, *supra* note 3, at 603–08 (“Speech that is not intended to communicate a substantive message or that is directed solely to noncognitive capacities may be wholly or largely without the properties that give speech its special status.”).

¹²¹ See *id.* at 607–08 (“These considerations [of the essentially non-ideological nature of pornography] suggest a . . . two-stage argument for the regulation of pornography. First, pornography is entitled to only a lower level of first amendment solicitude. . . . Second, the harms produced by pornographic materials are sufficient to justify regulation.”).

¹²² See Chevigny, *supra* note 3, at 428–29 (juxtaposing such a critique of rock music with Sunstein’s description of pornography and finding both “incoherent”); see also Suvi Saarikallio, *Music as Mood Regulation in Adolescence* (2007) (unpublished dissertation, University of Jyväskylä), available at <https://jyx.jyu.fi/dspace/bitstream/handle/123456789/13403/9789513927318.pdf> (exploring adolescent use of music to regulate moods).

emotional as obscenity, and dance has a history of provoking concern of moral harm.¹²³

In sum, theories defining obscenity or pornography as low-value speech, or not speech at all, based on their appeal to noncognitive or emotional functions do not provide a convincing explanation for why obscenity is treated exceptionally. Their underlying premise ignores the way obscenity really works and how we process it. Even if this underlying premise is correct, it fails to explain what makes obscenity special—if this argument is convincing for obscenity, it is also convincing for several types of protected speech.

Obscenity is treated differently not because of the supposed reason-passion or cognitive-physical dichotomies, but because of the passion-physical reaction to which it appeals: sexual pleasure.¹²⁴ Its exceptional place in First Amendment law is best explained by an underlying assumption in Supreme Court jurisprudence that sexual pleasure itself is far less important than other purposes of speech. Part III will challenge this assumption and discuss a sex-positive framework for obscenity law.

B. Criminalization of BDSM Practices

1. BDSM, Assault, and Consent

In July 2000, police raided a party held in a converted mill in Attleboro, Massachusetts.¹²⁵ They charged a thirty-eight-year-old New York woman with assault and battery for consensually spanking another woman with a wooden spatula.¹²⁶ The assault charge was dropped for lack of evidence when a judge held that the police conducted an improper search without a warrant.¹²⁷

While most practitioners of BDSM may never face criminal charges, the criminalization of BDSM activity has a significant effect

¹²³ Cf. Alexander, *supra* note 3, at 550 (discussing the noncognitive communicative power of the arts, including dance); Shadi Kardan, *The Government's New War on Drugs: Threatening the Right to Dance!*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 99, 99–103 (2003) (discussing the link between music, dance, and drugs in the rave scene).

¹²⁴ See Alexander, *supra* note 3, at 551 (pointing out that the “value” of a speech act is contextual, and arguing that therefore “‘pornography’ cannot be distinguished from ‘other speech’ except in terms of the ideas it conveys or the uses to which it is put”); Chevigny, *supra* note 3, at 428 (arguing against the position that “pornography is special because people ‘get off on it’”); see also Collins & Skover, *supra* note 44, at 1393–94 (claiming that pornography is different more because of where it takes us than *how* it takes us there).

¹²⁵ Cindy Rodriguez, *Group Creates Defense Fund to Support S&M Accused*, BOSTON GLOBE, July 27, 2000, at B6; Adrian Walker, *Drawing a Line in Suburbia*, BOSTON GLOBE, July 13, 2000, at B1.

¹²⁶ Rodriguez, *supra* note 125; Walker, *supra* note 125.

¹²⁷ Paul Edward Parker, *Attleboro Partygoer Rebuts Police Account of Paddling*, PROVIDENCE J., Oct. 14, 2001, at C5.

on the BDSM community and our larger culture.¹²⁸ It reflects and reinforces the perception that BDSM activities are the domain of the perverted and deviant.¹²⁹ The stigmatization of even unenforced criminal law is not trivial, as discussed in the *Lawrence v. Texas* decision striking down sodomy laws that were seldom enforced.¹³⁰ Even laws that are rarely enforced have legal consequences: BDSM practitioners who are outed as participating in illegal activities may lose their jobs or even custody of their children.¹³¹ These concerns have prompted the National Coalition for Sexual Freedom to publish guides for BDSM practitioners that address the possibility of arrest and prosecution,¹³² discrimination BDSM practitioners might face when reporting nonconsensual sexual violence,¹³³ and how courts and partners may raise their BDSM practices in divorce and child custody proceedings.¹³⁴ The legal status of BDSM therefore deeply affects the lives of BDSM practitioners as well as their families and communities.

A discussion of BDSM's legal status requires a reflection on BDSM's definition and guiding principles. BDSM encompasses a range of sexual activities between consenting adults that includes bondage, domination and submission, and sadomasochistic activity.¹³⁵

¹²⁸ For a more thorough definition of BDSM, see *infra* notes 135–47 and accompanying text.

¹²⁹ See Walker, *supra* note 125 (“This isn’t New York City, Las Vegas, or some other sin-drenched destination. This is Massachusetts, and Boston is not the only place where kinky is banned.”); Dave Wedge, *Fetishists Defend the Pursuit of Pain*, BOSTON HERALD, July 16, 2000, at 1 (profiling fetishists in response to a police raid of a “bondage bash”).

¹³⁰ *Lawrence v. Texas*, 539 U.S. 558, 572–73, 575 (2003).

¹³¹ See Lindsay M. Gladysz, Note, *Status Update: When Social Media Enters the Courtroom*, 7 I/S: J.L. & POL’Y FOR INFO. SOC’Y 691, 705 (2012) (describing how electronic evidence of personal and sexual behavior is commonly admitted in family law cases, in spite of possible privacy concerns); Jason Simms, *Bound and Flagged*, STRANGER, <http://www.thestranger.com/seattle/Content?oid=162102> (chronicling the difficulties faced by Seattle BDSM practitioners in custody disputes).

¹³² NAT’L COAL. FOR SEXUAL FREEDOM (NCSF), *WHEN THE LEVEE BREAKS: A GUIDE TO DEALING WITH AND AVOIDING ARREST AND PROSECUTION IN BDSM SCENES* (2012), https://ncsfreedom.org/images/stories/pdfs/Consent%20Counts/CC%20Doc/NCSF_Levee_21feb12_WEB.pdf [hereinafter NCSF, *WHEN THE LEVEE BREAKS*].

¹³³ NCSF, *PROTECT YOUR LEGAL RIGHTS: POLICE INTERACTIONS* (2011), https://ncsfreedom.org/images/stories/pdfs/EOP_Presentations/2011-prespoliceinteractionswhat-todo.pdf.

¹³⁴ NCSF, *GUIDELINES FOR CUSTODY DISPUTES* (2011), https://ncsfreedom.org/images/stories/pdfs/EOP_Presentations/2011-prescustodydisputes.pdf; NCSF, *GUIDELINES FOR INTERACTIONS WITH CHILD PROTECTIVE SERVICES* (2011), https://ncsfreedom.org/images/stories/pdfs/EOP_Presentations/2011-presjuvenilecpsocialservices.pdf.

¹³⁵ Stacey May Fowles, *The Fantasy of Acceptable “Non-Consent”: Why the Female Sexual Submissive Scares Us (and Why She Shouldn’t)*, in *YES MEANS YES!*, *supra* note 20, at 117, 117 (explaining that BDSM includes bondage, discipline, domination, submission, sadism, and masochism, and describing it as “safe, sane and consensual”); Riggs, *supra* note 20, at 112–13 (defining BDSM and emphasizing its consensual nature); NCSF, *WHEN*

These activities often involve the infliction of physical pain for mutual sexual pleasure.¹³⁶ They may also involve role-playing in which one partner assumes authority over the other partner and inflicts pain or other types of punishment on the submissive partner.¹³⁷ BDSM relationships are by definition erotic or sexual, as opposed to nonsexual role-playing; however, BDSM does not necessarily involve intercourse or even physical contact.¹³⁸

Guiding principles established by the BDSM community stress that BDSM must be safe, sane, and consensual.¹³⁹ The consent requirement is the “first law” of BDSM.¹⁴⁰ Consent must be unequivocal, voluntary, knowing, explicit, and limited to previously negotiated parameters.¹⁴¹ Consent also must be ongoing and can be withdrawn at any time.¹⁴² The BDSM community requires the use of a “safe word” that, if uttered by the submissive, requires the dominant to immediately cease his or her actions.¹⁴³

The principles of “safe” and “sane” provide additional rules and limitations on BDSM practice. The safety requirement attempts to ensure the dominant responsibly manages the risk of physical harm to the submissive.¹⁴⁴ The sanity requirement is based on the principle that BDSM is done for the pleasure of the participants and “should not cause emotional anguish,” “abuse the submissive’s vulnerability,” or “subject [the] . . . submissive to unreasonable risk.”¹⁴⁵ The use of

THE LEVEE BREAKS, *supra* note 132, at 8 (stating that BDSM “consists of intimate mutually pleasurable erotic activity within the scope of informed consent”).

¹³⁶ See Pa, *supra* note 3, at 58 (explaining that one major category of sadomasochism involves “infliction of physical pain”); see also NCSF, WHEN THE LEVEE BREAKS, *supra* note 132, at 8 (arguing that BDSM is “not assault, but rather is pleasurable, loving adult erotic activity”).

¹³⁷ See Pa, *supra* note 3, at 58–59 (listing five common features of BDSM, including “the appearance of control of one partner over the other” and “role-playing”).

¹³⁸ See *id.* at 58 (noting that BDSM sex includes a wide range of activities that use physical or psychological stimulation to create sexual arousal and satisfaction); Sari Cooper, *BDSM: Fifty Shades of Grey Unplugged*, PSYCHOL. TODAY (Mar. 6, 2012), <http://www.psychologytoday.com/blog/sex-esteem/201203/bdsm-fifty-shades-grey-unplugged> (“For many people the actual act of intercourse or touching one another is not part of the experience . . .”).

¹³⁹ Pa, *supra* note 3, at 61 (explaining that “safe, sane and consensual” is BDSM’s credo).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*; see Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 135–36 (2002) (“Safewords are signals that partners agree will supplant the meaning of the word *no.*”).

¹⁴⁴ Pa, *supra* note 3, at 61 (highlighting the goal of “acknowledging the potential risk of inflicting harm”).

¹⁴⁵ *Id.*

the word “sane” also reflects the BDSM community’s desire to dispel the idea that BDSM is practiced solely or primarily by those with psychological problems.¹⁴⁶ BDSM practice is not considered a psychological disorder unless it substantially interferes with the participant’s life or unless a dominant wants to cause pain without the submissive’s consent, neither of which is accepted by the BDSM community.¹⁴⁷

Despite these self-imposed regulations designed to ensure safety and consent, practitioners of BDSM are subject to criminal prosecution. Perhaps the most serious charges leveled against BDSM practitioners, however, are those of assault and battery.¹⁴⁸ In BDSM-related assault cases, courts must determine whether the full consent of the alleged victim may serve as a defense to assault or battery. The vast majority of courts have determined that consent is no defense in these circumstances.¹⁴⁹

¹⁴⁶ See *id.* at 61–64 (describing the medical community’s inability to affirmatively conclude that BDSM practitioners have a mental disorder).

¹⁴⁷ See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV-TR) 572–74 (2000) (diagnosing sexual masochism when the behavior distresses or impairs “important areas of functioning,” and sexual sadism when the person acts on urges “with a nonconsenting person”); Pa, *supra* note 3, at 63 (“The recent trend in the medical community is to depathologize S/M unless the practices or desires interfere with everyday life.”).

¹⁴⁸ Practitioners have faced such charges in many cases. See, e.g., *United States v. Arab*, 55 M.J. 508, 513–14 (A. Ct. Crim. App. 2001) (involving assault and battery charges arising from sexual practices including bondage, burning, and cutting); *People v. Samuels*, 58 Cal. Rptr. 439, 446, 449 (Cal. Ct. App. 1967) (affirming defendant’s conviction of aggravated assault based on film footage of sadomasochistic beating); *Govan v. State*, 913 N.E.2d 237, 238 (Ind. Ct. App. 2009) (affirming defendant’s convictions of felony and misdemeanor battery “for branding his long-term girlfriend with a hot knife and hitting her with a cord”); *State v. Collier*, 372 N.W.2d 303, 304 (Iowa Ct. App. 1985) (affirming defendant’s conviction of battery for sexual activity involving bondage and beating); *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1053 (Mass. 1980) (upholding defendant’s conviction of assault and battery with a dangerous weapon for beating his boyfriend with a riding crop); *State v. Van*, 688 N.W.2d 600, 608, 626 (Neb. 2004) (affirming conviction for assault and other charges arising out of BDSM activity); *People v. Jovanovic*, 700 N.Y.S. 2d 156, 159 (N.Y. App. Div. 1999) (involving assault charges arising out of a BDSM encounter following an email conversation indicating interest in such activity).

¹⁴⁹ See, e.g., *Arab*, 55 M.J. at 519 (concluding defendant’s actions were beyond any line where consent might negate unlawful harm); *Samuels*, 58 Cal. Rptr. at 447 (holding that consent was not an affirmative defense to the aggravated assault); *Govan*, 913 N.E.2d at 238 (holding that the jury could find the victim had not consented to battery); *Collier*, 372 N.W.2d at 307 (finding that BDSM is not within the statutory exception for social activity and thus consent is not a defense); *Appleby*, 402 N.E.2d at 1060–61 (finding no consent defense for battery with a dangerous weapon, regardless of sexual activity involvement); *Van*, 688 N.W.2d at 615 (holding that *Lawrence v. Texas* does not preclude assault charges for consensual sexual activity where injury occurs).

The question of whether consent should be a defense to assault has always been a rich source of debate.¹⁵⁰ Roman law adhered to the principle of *volenti fit non injuria*: To a willing person, no injury is done.¹⁵¹ Scholars from John Stuart Mill to Joel Feinberg adopted the principle but expanded on what the law should recognize as full and voluntary consent.¹⁵² Allowing the defense of consent also aligns with

¹⁵⁰ The definitions of and distinctions between assault and battery vary by jurisdiction. This Article uses the term “assault” to refer to an attempt to cause, or conduct that causes, bodily injury to another. See MODEL PENAL CODE § 211.1 (Official Draft and Explanatory Notes 1985) (defining the elements of simple assault). While the common law distinguishes assault from battery, I use the term to refer to both an attempt to injure and the infliction of injury. See 6A C.J.S. *Assault* §§ 1–2 (2004) (defining assault as either threatened or attempted force, and battery as actual contact). Some assault statutes also include offensive touching that is not physically harmful. Consent can be considered a defense to offensive touching, as it is lack of consent that makes the touching offensive. See *Commonwealth v. Burke*, 457 N.E.2d 622, 623 (Mass. 1983) (finding that lack of consent is required for nonharmful touching to qualify as battery), *superseded by statute*, MASS. GEN. LAWS ANN. ch. 265, § 13B (West 2008) (making children under fourteen legally incapable of consent to assault and battery); *State v. Weber*, 155 P.3d 947, 951 (Wash. Ct. App. 2007) (stating that consent was traditionally a defense against assault charges but determining it could not be invoked in the prison fight context because such violence is against public policy); see also Wayne R. LaFave, *Battery*, 2 SUBST. CRIM. L. § 16.2 (2003) (“Consent is a defense to what otherwise would be a minor sort of offensive touching, such as a kiss or caress . . .”). This Article focuses on harmful assaults, since this is the portion of the state statutes under which BDSM actions that consist of consensual but injurious contact may be prosecuted. See *Burke*, 457 N.E.2d at 624 (stating that contact that results in harm is battery, “and consent thereto is immaterial”). It excludes sexual assault or rape from this definition because the law’s approach to consent in the contexts of assault and sexual assault or rape differ dramatically; consent by an individual who has capacity to consent is always a defense to sexual assault or rape, but it may not be a defense to assault. See *Lyons v. State*, 437 So. 2d 711, 712 (Fla. Dist. Ct. App. 1983) (“The general view is that consent is not a defense to a criminal prosecution for assault and battery, except in cases of rape.”); *Burke*, 457 N.E.2d at 624 (stating that, for example, consent is not material when assault and battery involves use of a dangerous weapon); *State v. Brown*, 364 A.2d 27, 31 (N.J. Super. Ct. Law Div. 1976) (finding no consent defense for assault and battery because “the State makes it unlawful and is not a party to any such agreement between the victim and perpetrator”); see also W.E. Shipley, *Consent as Defense to Charge of Criminal Assault and Battery*, 58 A.L.R.3d 662, 664 (1974) (describing the view that “consent is no defense when the battery violates public policy”). But see *Govan*, 913 N.E.2d at 242 (interpreting the rule that consent is a defense where there are “sexual overtones” broadly to include BDSM cases, so long as a deadly weapon is not involved).

¹⁵¹ FEINBERG, *supra* note 29, at 115; Ryan G. Fischer et al., *Sex, Violence, and the Boundaries of the Defense of Consent*, 45 CRIM. L. BULL. 1137, 1145 (2009).

¹⁵² See FEINBERG, *supra* note 29, at 35–36, 115–17 (arguing that no harm can be done to a sane, fully informed adult who voluntarily consents—and that consent in and of itself cannot be proof of insanity); 3 JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 176–80 (1986) (arguing that when the consentor authorizes the consentee to go through with some act, this thereby “transfer[s] at least part of the responsibility for one person’s act to the shoulders of the consentor”); JOHN STUART MILL, ON LIBERTY 91–92 (1859) (arguing that people of “full age and the ordinary amount of understanding” should be allowed to consent to actions which may harm their interests and that the consentees should similarly not be punished); see also VERA BERGELSON, VICTIMS’

retributivist considerations about moral desert.¹⁵³ Moral desert requires a wrongful harm, and consent may negate the wrongfulness of a harm.¹⁵⁴ Yet courts have limited the degree to which consent may be a defense to assault. Some assaults once considered a violation of the victim's interests have come to be viewed as an affront to the public good.¹⁵⁵ The victim's consent cannot act as a defense in these circumstances because an individual's consent cannot justify harm to the public good.¹⁵⁶

RIGHTS AND VICTIMS' WRONGS: COMPARATIVE LIABILITY IN CRIMINAL LAW 62–67, 94–97 (2009) (“[C]onsensual physical harm . . . should be punishable only when an important welfare interest normally protected by criminal law is set back in a way that denies the victim his equal moral worth.”); Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 122 (1996) (“To give consent, a victim or plaintiff must intend what the defendant must be culpable with regard to (namely, the material elements of the *actus reus* of the offense he would commit in the absence of consent).”).

¹⁵³ See BERGELSON, *supra* note 152, at 36–38, 68–69, 71 (arguing that punishing an individual for inflicting harm on a consenting recipient wrongly promotes a conception of the social good over individual choice, and that if the inflictor's actions were conceived as benevolent then she is not morally deserving of punishment); FEINBERG, *supra* note 29, at 116–17 (arguing that acts which are voluntarily consented to are not wrongs and that their prohibition could therefore only be justified through paternalism); Hurd, *supra* note 152, at 123 (arguing that “consent can generate a permission that allows another to do a wrong act”).

¹⁵⁴ See *supra* notes 152–53 (citing authorities arguing that once consent is voluntarily given, a perpetrator's actions should no longer be seen as morally wrong).

¹⁵⁵ See *State v. Weber*, 155 P.3d 947, 951 (Wash. Ct. App. 2007) (“Traditionally, consent was considered a defense to assault. However, courts are now more hesitant to permit a defense of consent for some forms of assault because society has an interest in punishing assaults as breaches of the public peace and order” (citations omitted) (internal quotation marks omitted)); see also J.H. Beale, Jr., *Consent in the Criminal Law*, 8 HARV. L. REV. 317, 324–25 (1895) (“A personal injury inflicted by consent may harm the public if it tends to cause a breach of the peace, or severe bodily harm to the injured party.”); Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 192–93 (2007) (“[T]he defense of mutual combatants has been rejected because unregulated fights disturb public order.”); Keith M. Harrison, *Law, Order, and the Consent Defense*, 12 ST. LOUIS U. PUB. L. REV. 477, 478–79 (1993) (arguing that because the state is the legal victim of violations of the criminal law, individual consent to physical harm may be a defense in a private action for damages, but it is irrelevant within a criminal prosecution of the same defendant and act).

¹⁵⁶ See *Taylor v. State*, 133 A.2d 414, 415–16 (Md. 1957) (holding that the victim's consent was not a defense to the charge of sodomizing a minor due to the public policy of preventing juvenile delinquency); *State v. Brown*, 364 A.2d 27, 31–32 (N.J. Super. Ct. Law Div. 1976) (holding that a victim could not consent to an assault and battery because this would both reduce the overall security of society and lessen the moral weight of the principles underpinning the criminal law); *Weber*, 155 P.3d at 951 (holding that consent was not a defense to assault in the context of a prison fight because assaults are breaches of the public welfare, and an individual cannot consent to a wrong that is committed against the public); see also BERGELSON, *supra* note 152, at 16 (arguing that consent is not a valid defense to offenses like riot and escape because the victim is the general public, meaning that no individual exists whose consent could legitimate the offense); Beale, *supra* note 155, at 325 (arguing that consent cannot be a defense to engaging in a public fight because such an incident will likely be a breach of the peace); Fischer et al., *supra* note 151, at 1138

Most states adopt the Model Penal Code (MPC) approach to the consent defense.¹⁵⁷ Under the MPC, consent is a defense to an offense that causes or risks injury if the injury is “not serious” or if the conduct and the injury are “reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.”¹⁵⁸ In theory, the “not serious” requirement should allow a consent defense for many BDSM activities. The MPC and state penal codes define serious bodily injury in a way that tracks this logic, distinguishing it as injury that “creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”¹⁵⁹ BDSM organizations reject such activities, and much of BDSM involves spanking, paddling, and other activities that would not fall within the definition of “serious bodily injury.”¹⁶⁰

In practice, courts exaggerate or mischaracterize BDSM activities in order to force the resulting injuries into the category of “serious bodily injury.” Courts consistently reject the defense of consent for such minor BDSM-related assaults as spanking or light grazing with a crop.¹⁶¹ Courts have even interpreted pain itself as serious injury in the context of BDSM, a particularly odd result for an activity in which the pain brings pleasure to a consenting individual.¹⁶² This

(“[A]s a matter of public policy, a person cannot avoid criminal responsibility for an assault that causes injury or carries a risk of serious harm, even if the victim asked for or consented to the act.” (quoting *People v. Jovanovic*, 700 N.Y.S.2d 156, 168 n.5 (N.Y. App. Div. 1999))).

¹⁵⁷ See BERGELSON, *supra* note 152, at 18 & 172–73 n.61 (noting that the majority of states have adopted the MPC’s definition of consent, albeit with some slight modifications).

¹⁵⁸ MODEL PENAL CODE § 2.11 (Official Draft and Explanatory Notes 1985).

¹⁵⁹ *Id.* § 210.0.

¹⁶⁰ See Pa, *supra* note 3, at 58–59, 61 (listing common kinds of BDSM activity and arguing that the guiding principles of BDSM do not permit participants to undertake unreasonable risk or inflict permanent damage).

¹⁶¹ See, e.g., *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1061 (Mass. 1980) (holding that a “glancing blow” with a riding crop can constitute assault with a dangerous weapon to which consent is no defense); see also BERGELSON, *supra* note 152, at 19–20 (outlining cases); Fischer et al., *supra* note 151, at 1139 (“[T]he criminal law has consistently rejected consent as a defense to most assaults . . .”).

¹⁶² See *State v. Guinn*, Nos. 23886-1-II, 25856-1-II, 1030 2001 WL 310398, at *12 (Wash. Ct. App. March 30, 2001) (unpublished opinion) (holding that physical injury includes physical pain); see also BERGELSON, *supra* note 152, at 20 (“The MPC and some state penal codes include physical pain in the definition of ‘bodily harm.’”). It is true that something being sexual by nature may in some cases justify greater criminal liability. See Franke, *supra* note 3, at 199 (noting the special injury sexual violence inflicts on women). But what makes a physical injury worse in the context of sex is the breach of sexual autonomy it represents. See STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 99–105 (1998) (“[P]erhaps only our right to life itself . . . [is] as important as our right to decide whether and when we will become sexually

interpretation would bar consent as a defense in any sadomasochistic activity.¹⁶³

Courts' misinterpretation of the seriousness of the harm resulting from BDSM reveals an unstated value judgment about the underlying activity. Courts interpret injuries as more severe where they seek to denounce the underlying activity.¹⁶⁴ BDSM is the most startling example of this implicit value judgment. Vera Bergelson's research reviewing the concept of liability in criminal law demonstrates that courts have managed to find serious harm in virtually every case of an ostensible assault linked to BDSM, regardless of the injuries at issue.¹⁶⁵ Courts' willingness to stretch the meaning of serious injury in the context of BDSM reflects implicit judgments about the value of the activity that caused the purported harm.¹⁶⁶ Courts classify bruising and welts, a grazing blow with a riding crop, and even pain without resulting injury as "serious bodily injury" because they find negligible or negative value in the pursuit of sexual pleasure, particularly non-normative sexual pleasure.

Although BDSM is classified as "serious bodily injury," it may still merit a consent defense if "the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law"¹⁶⁷ The MPC commentary states that the rule is intended to allow a consent defense for sports and athletic contests, and activities "more appropriately characterized as exhibitions than as sports or athletic contests."¹⁶⁸ But the commentaries fail to state whether nonhostile consensual private encounters such as religious mortification or

intimate with another person."). BDSM, however, is consensual and therefore an exercise, rather than a denial, of sexual autonomy. See Fowles, *supra* note 135, at 119–21 (arguing that respectful BDSM relationships actually promote equality and personal autonomy); Pa, *supra* note 3, at 77–78 (noting that in BDSM, "[t]he submissive partner very much controls the situation, tells the dominant what is desired, and voluntarily places him or herself in the carefully delimited exchange").

¹⁶³ See BERGELSON, *supra* note 152, at 19–20 (noting that because BDSM almost by definition involves some level of pain, courts have refused to allow consent to be used as a defense in virtually every case involving charges relating to the activity).

¹⁶⁴ *Id.* at 19.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 20 ("As a general matter, courts habitually exaggerate the seriousness of injury or pain and the risk of death in order to condemn an unwanted activity."); Harrison, *supra* note 155, at 486 ("With individual and societal preferences out of step, those bodily invasions to which the individual consents will be allowed only if they happen to coincide with the type of invasions that society condones.").

¹⁶⁷ MODEL PENAL CODE § 2.11(2)(b) (Official Draft and Explanatory Notes 1985).

¹⁶⁸ *Id.* § 2.11 cmt. 2 n.10.

BDSM are included.¹⁶⁹ Courts determine on a case-by-case basis whether conduct falls into this category and the resulting injury was reasonably foreseeable.¹⁷⁰

As a result, courts have distinguished certain categories of serious injuries to which an individual may consent. Consent serves as a defense in the context of sports; most surgery, whether medically indicated or cosmetic; and certain cosmetic body modifications, such as piercings and tattoos.¹⁷¹ It is not clear whether consensual religious flagellation is prohibited, but at least one state expressly allows it and in general it has not been subject to criminal prosecution.¹⁷² Yet courts refuse to allow a consent defense to assault in the context of BDSM, grouping it with activities such as hazing, gang initiation, and street fighting.

As with courts' distinction between "serious" and "not serious" injuries, courts' determination that BDSM should not be afforded a consent defense to assault reflects underlying judgments about the value of the activity.¹⁷³ Courts consider surgery a socially useful activity and thus allow a consent defense.¹⁷⁴ Violent contact sports such as football, wrestling, boxing, and mixed martial arts are granted

¹⁶⁹ See BERGELSON, *supra* note 152, at 21 (noting that, under MPC § 2.11(2)(b), it is unclear "whether *nonhostile* consensual private encounters, such as religious mortification, sadomasochistic sex, or voluntary contracting of HIV, may be entitled to legal protection").

¹⁷⁰ See, e.g., *State v. Floyd*, 466 N.W.2d 919, 921–23 (Iowa Ct. App. 1990) (holding that a fight that broke out during a timeout in a basketball game, not during the course of regular play, was unforeseeable and therefore fell outside of the sports exception defense for assault and battery); *People v. Freer*, 381 N.Y.S.2d 976, 978–79 (N.Y. Dist. Ct. 1976) (holding a young man guilty of assault for a punch thrown subsequent to, and separate from, foreseeably hazardous physical contact resulting from being tackled during a football game); *State v. Shelley*, 929 P.2d 489, 492–94 (Wash. Ct. App. 1997) (holding that an intentional punch thrown during a pickup basketball game was assault and did not constitute a hazard foreseeable enough to warrant the athletic contest defense); see also Charles Harary, *Aggressive Play or Criminal Assault? An In Depth Look at Sports Violence and Criminal Liability*, 25 COLUM. J.L. & ARTS 197, 205–09 (2002) (noting that the implied consent doctrine for sports is limited to those hazards that are reasonably foreseeable); Jeffrey Standen, *The Manly Sports: The Problematic Use of Criminal Law to Regulate Sports Violence*, 99 J. CRIM. L. & CRIMINOLOGY 619, 626 (2009) ("[O]nly those acts of assault that were 'overly violent' lay outside of the [sports] consent defense.").

¹⁷¹ BERGELSON, *supra* note 152, at 21–23; Pa, *supra* note 3, at 64; Kelly Egan, Comment, *Morality-Based Legislation Is Alive and Well: Why the Law Permits Consent to Body Modification but Not Sadomasochistic Sex*, 70 ALB. L. REV. 1615, 1628–29 (2007).

¹⁷² 720 ILL. COMP. STAT. ANN. 5/12-32(a) (West 2002); BERGELSON, *supra* note 152, at 21–22.

¹⁷³ See Hanna, *supra* note 3, at 242–43 (arguing that most courts refuse to extend the consent defense allowed in sports to BDSM because the risk of harm is too substantial and the social utility of the activity is "not compelling"); Harrison, *supra* note 155, at 493–98 (arguing consent is a defense only when the dominant group believes that the activity has social utility).

¹⁷⁴ Pa, *supra* note 3, at 64–65.

a consent defense because their utility as sources of pleasure, entertainment, and income is well accepted.¹⁷⁵ Circumcision or religious flagellation is allowed because it furthers accepted religious norms and customs.¹⁷⁶ Even surgery, skin piercing, or tattooing that serves no purpose other than to provide an individual with an appearance she finds more pleasing is permitted if it is consensual.¹⁷⁷ In contrast, these same consensual actions constitute assault if their primary purpose is to provide the recipient with sexual pleasure.¹⁷⁸

This distinction demonstrates an underlying assumption that sexual pleasure is less valuable than other pleasures. More specifically, when compared to the pleasure individuals may derive from sports, spirituality, or having a pleasing appearance, sexual pleasure is deemed not only less valuable, but potentially even harmful to society. Although BDSM can serve a variety of prosocial purposes such as strengthening a marriage or fostering greater intimacy in a relationship, courts and legal scholars tend to view it only in terms of transgressive sexual pleasure in itself.¹⁷⁹ Because BDSM is considered

¹⁷⁵ BERGELSON, *supra* note 152, at 21–23; Bergelson, *supra* note 155, at 193–94 (explaining the rationale of “social utility,” which “validates or invalidates certain consensual behavior based on the resulting harms and benefits to the public”); Luis E. Chiesa, *Consent Is Not a Defense to Battery: A Reply to Professor Bergelson*, 9 OHIO ST. J. CRIM. L. 195, 203–04 (2011) (noting that the criminal law allows consent defenses to assaults during socially acceptable activities like boxing and mixed martial arts); Fischer et al., *supra* note 151, at 1139 (discussing the criminal law’s disallowance of the consent defense except for activities like sports, medical treatment, and body modification); Harrison, *supra* note 155, at 486–87, 497–98 (“[T]hose bodily invasions to which the individual consents will be allowed only if they happen to coincide with the type of invasions that society condones.”); Egan, *supra* note 171, at 1627 (asserting that “[a]llowing consent to injuries sustained during sports or surgery is usually justified based on . . . their perceived social utility”).

¹⁷⁶ BERGELSON, *supra* note 152, at 21–23 (discussing the allowance for the practice of religious flagellation); Harrison, *supra* note 155, at 499–501 (discussing the allowance for circumcision); *see also* Egan, *supra* note 171, at 1627–29 (showing that every state permits consent to body modification even though it could otherwise be defined as assault). *See generally* Sarah E. Waldeck, *Using Male Circumcision to Understand Social Norms as Multipliers*, 72 U. CIN. L. REV. 455 (2003) (discussing more generally the ways that social norms inform conceptions of legal acceptability in the context of male circumcision).

¹⁷⁷ Harrison, *supra* note 155, at 501–02 (discussing circumcision and tattooing); Alicia Ouellette, *Body Modification and Adolescent Decision Making: Proceed with Caution*, 15 J. HEALTH CARE L. & POL’Y 129, 135–36 (2012) (noting that states generally allow piercing and tattooing, with special rules for minors); Pa, *supra* note 3, at 53, 64–65 (discussing cosmetic surgery, tattooing, and piercing); Egan, *supra* note 171, at 1627 (describing body modifications and piercings).

¹⁷⁸ *See* Bergelson, *supra* note 155, at 194 (“Courts are much more tolerant, however, if they can find a reason, other than sexual pleasure, behind the injurious acts.”).

¹⁷⁹ *See* Annette Houlihan, *When “No” Means “Yes” and “Yes” Means Harm: HIV Risk, Consent and Sadosomachism Case Law*, 20 L. & SEXUALITY 31, 43 (2011) (“The s/m body was dangerous because it represented a diversion from social constructs of health and morality towards illness and hedonistic pleasures.”).

“deviant” sexual behavior,¹⁸⁰ courts view it as undermining rather than strengthening traditional sexual relationships and gender roles.¹⁸¹ Because sexual pleasure in itself is considered nonvaluable—or even subversive—BDSM is grouped with activities in which consent is no defense.

2. *Refuting Explanations for BDSM Criminalization*

There are several potential reasons courts and legislatures might refuse a consent defense to BDSM that are unrelated to the value of sexual pleasure. Legislatures and courts may value sexual pleasure but simply feel its value is outweighed by concerns BDSM raises that are not present in the context of, for example, sports or cosmetic surgery. But closer examination of these potential counterarguments reveals them to be unpersuasive.

a. *BDSM Raises Unique Concerns About Violence and Breach of the Peace*

Some courts have distinguished BDSM on the grounds that it constitutes a breach of the peace and therefore harms the public good.¹⁸² An individual’s consent is no defense to a harm to the public as a whole.¹⁸³ Courts have used this argument in the context of BDSM as well as assaults that occur in the contexts of hazing, street fights, gang initiation, and violence in sporting events that is distinct from the game itself.¹⁸⁴

¹⁸⁰ *Id.* at 38; Pa, *supra* note 3, at 52, 75–76; Egan, *supra* note 171, at 1638–39.

¹⁸¹ See Houlihan, *supra* note 179, at 43–44 (describing the belief that legal tolerance of sadomasochistic behavior could normalize such behavior to the detriment of society); Pa, *supra* note 3, at 90–91 (pointing out a lack of evidence that BDSM practitioners more commonly adopt traditional gender roles where women are subordinate to men).

¹⁸² See, e.g., *State v. Collier*, 372 N.W.2d 303, 306–07 (Iowa Ct. App. 1985) (concluding that sadomasochistic activity is an act committed against the public peace).

¹⁸³ See *Taylor v. State*, 133 A.2d 414, 415–16 (Md. 1957) (concluding that consent was no defense to assault that constitutes a crime against the public in general); *State v. Brown*, 364 A.2d 27, 28–32 (N.J. Super. Ct. Law Div. 1976) (holding that when an offense involves a breach of the public peace as well as an invasion of the victim’s physical security, the victim’s consent would not be recognized as a defense); *State v. Weber*, 155 P.3d 947, 951 (Wash. Ct. App. 2007) (asserting that an individual cannot consent to a wrong that is committed against the public peace).

¹⁸⁴ Courts have used this argument in various contexts. See, e.g., *State v. Floyd*, 466 N.W.2d 919, 921–23 (Iowa Ct. App. 1990) (rejecting consent as a defense to an assault that occurred on the sidelines of a basketball court); *Collier*, 372 N.W.2d at 307 (arguing, in the context of a sadomasochistic sex assault case, that sanctioning sadomasochism would lead to accepting barroom brawls, street fighting, and child molestation as acceptable social behavior); *Taylor*, 133 A.2d at 415 (rejecting consent as a defense to sodomy with a minor); *State v. Mackrill*, 191 P.3d 451, 458 (Mont. 2008) (rejecting consent as a defense to aggravated battery during a bar fight); *Brown*, 364 A.2d at 28–30 (rejecting consent as a defense

It is not entirely clear precisely what defines a breach of the peace, which makes it difficult to determine why BDSM constitutes a breach of the peace while a football game does not. Some courts have looked to the likelihood that the activity will disturb the public peace or lead to additional violence, reasoning often employed in the context of public fighting.¹⁸⁵ If this is the concern, it is difficult to understand how BDSM, which is overwhelmingly practiced in private, constitutes a breach of the peace, while public sporting events do not. Numerous examples of significant sporting injuries illustrate this point, as do fights and riots that, while not condoned by the rules of the sport, may result from the competitive nature and high emotional investment involved in sporting events.¹⁸⁶

A breach of the peace is not always limited to activities that are conducted in public. In *State v. Brown*, for example, the New Jersey Superior Court held that consent was no defense to a husband's assault on his wife in their home because the assault constituted a breach of the peace.¹⁸⁷ The court reasoned that breach of the peace reflects the public's interest in "the personal safety of its citizens" and the injury to the public "where the safety of any individual is threatened, whether by himself or another."¹⁸⁸

This argument fails to distinguish BDSM convincingly from injurious activities where consent acts as a defense. *Brown*, which discusses the argument at length, concludes that consent is a defense to injury sustained in lawful sports because lawful activities are not a breach of the peace.¹⁸⁹ This tautology explains nothing; it maintains

to assault in a beating that was a crime against the public in general); *Weber*, 155 P.3d at 951 (rejecting consent as a defense to assault in a fight between prisoners).

¹⁸⁵ *E.g.*, *Mackrill*, 191 P.3d at 458–60 (stating that street fights disturb the peace by putting at risk not only combatants, but also bystanders, police, and emergency personnel); *Weber*, 155 P.3d at 951 (refusing to accept consent as a defense to assault in a prison fight because, otherwise, violence might increase and the health and safety of the prison population as a whole would be threatened).

¹⁸⁶ C. Antoinette Clarke, *Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events*, 32 ARIZ. ST. L.J. 1149, 1153–54 (2000) (discussing the generally accepted nature of injuries and violence in contact sports and the demarcation between sports violence that is part of the game and that which is illegitimate); Harary, *supra* note 170, at 198–99, 204 (discussing numerous incidents of serious injury ensuing from sports events, as well as the effect violence in such sports has on the youth who watch and emulate professional athletes); *see also* Standen, *supra* note 170, at 625 (discussing the concern of some courts that sporting contests such as prize fights might incite viewers into acts of violence or other breaches of the peace).

¹⁸⁷ *Brown*, 364 A.2d at 28–29, 31.

¹⁸⁸ *Id.* at 28.

¹⁸⁹ *Id.* at 30 (asserting that the state cannot charge a participant with criminal assault upon another participant in sports such as football, boxing, or wrestling if the injury resulted from an activity within the scope of the sports activity, because these are not breaches of the peace).

that BDSM is unlawful because it constitutes a breach of the peace and that sports do not constitute a breach of the peace because they are lawful, but it provides no explanation for *why* sports and BDSM are treated differently.

A common justification given for this distinction is the role that harm plays in the activities.¹⁹⁰ Proponents of this view argue that BDSM should not be permitted because inflicting harm is its sole purpose.¹⁹¹ In contrast, harm is only incidental to permissible activities such as sports and cosmetic surgery.¹⁹² The law makes exceptions for activities in which injury is necessary to achieve a permissible and desirable purpose, such as improving the health of a patient or athletic achievement.¹⁹³ This distinction was at the heart of a decision by the United Kingdom's highest court to reject a consent defense in prosecutions that resulted from a raid of a BDSM club.¹⁹⁴

This argument misrepresents the nature of violence in BDSM and sports. The purpose of BDSM is not to inflict harm, but rather to cause sexual pleasure.¹⁹⁵ Violence is only employed as a means to an end. This is why participants agree to limits and safe words; violence is undesirable in BDSM unless it furthers sexual pleasure.¹⁹⁶ The argument also underestimates the importance of violence to many sports. Violence is as integral to the goal of entertainment and competition in football and boxing as it is to the goal of sexual pleasure in BDSM. While lasting injury may be incidental and unwanted (just as it is to BDSM), football cannot be played without the violence of tackles or

¹⁹⁰ See Weait, *supra* note 33, at 109 (summarizing the reasoning of the court in *R v. Brown*, which justified this distinction by distinguishing violence which is incidental from that which is inflicted for the indulgence of cruelty).

¹⁹¹ See *id.* (discussing the view that sadomasochistic activities are a manifestation of cruelty and cultish barbarism).

¹⁹² See *R v. Brown*, [1994] 1 A.C. 212 (H.L.) 265–66 (appeal taken from Eng.) (discussing surgery and contact sports as instances in which physical harm is acceptable); Weait, *supra* note 33, at 103 (same).

¹⁹³ Bergelson, *supra* note 155, at 193–94 (distinguishing sports in which a consent defense is allowed on the grounds that they build physical strength and skill and prepare participants for personal and public defense if needed); Harrison, *supra* note 155, at 494–95, 498 (discussing the purposes of traditional and cosmetic surgery that justify the allowance of a consent defense in those contexts and distinguishing boxing from sports that provide training for draft-age men, which has been used as a rationale to justify the physical harm participants suffer).

¹⁹⁴ See *Brown*, 1 A.C. at 236 (discussing the distinction between incidental and intentional violence); see also Weait, *supra* note 33, at 109 (same).

¹⁹⁵ See Pa, *supra* note 3, at 77–78 (asserting that the purpose of BDSM sex is mutual excitement and it should be classified as sex rather than violence); Egan, *supra* note 171, at 1616–17 (discussing the dynamics of BDSM sexual encounters).

¹⁹⁶ See Anderson, *supra* note 143, at 135–36 (discussing the boundaries participants set in sadomasochistic sex and their ways of ensuring that the activity does not become unpleasant to the submissive partner).

defensive and offensive lines, and boxing requires one individual to strike another, often until the other party is unable to stand unassisted.¹⁹⁷

If anything, the nature of violence in sports makes it more prone to abuse, escalation, and unanticipated injury than BDSM. This is in large part because the nature of violence in sports is competitive. Boxers and football players consent to the risk of being punched or touched but often seek to avoid the actual contact by dodging the punch or outrunning a tackle. Sports therefore allow, and even celebrate in some circumstances, aggressive contact with an individual who seeks to avoid the contact.¹⁹⁸ This celebration of competitive violence is exacerbated by coaches and managers, who often encourage aggressive behavior in which athletes seek to intimidate and even fight each other.¹⁹⁹ Combining the rough nature of sports with competition and aggression can also generate brawling, which creates unconsented-to violence and disturbs the peace.²⁰⁰ In contrast, violence in BDSM is cooperative, not competitive. BDSM is limited to inflicting violence only on those who desire it.²⁰¹ Violence is only celebrated to the extent that another individual derives pleasure from it.

¹⁹⁷ See *People v. Freer*, 381 N.Y.S.2d 976, 978–79 (N.Y. Dist. Ct. 1976) (describing the violence of tackling in football); Clarke, *supra* note 186, at 1152–54 (discussing injuries suffered during sports); Harary, *supra* note 170, at 199–200 (describing various severe injuries due to sports); Malcolm Gladwell, *Offensive Play*, *NEW YORKER*, Oct. 19, 2009, at 50 (describing the significant and lifelong injuries and neurological damage associated with professional football).

¹⁹⁸ See Clarke, *supra* note 186, at 1156–57 (discussing the psychological mindset of participants in competitive contact sports, which makes them show no regard for the human body while on the field).

¹⁹⁹ See *id.* at 1156–60, 1164–65 (describing how athletes are taught from an early age to intimidate their opponents and to seek, rather than avoid, physical altercations in competitive sports); Harary, *supra* note 170, at 197–98, 202 (discussing the endemic nature of violence in sports in the United States and the way coaches and team owners have encouraged said violence). Embracing violence against one who seeks to avoid it may also lead to the acceptance of violence off the playing field; males who participate in contact sports are significantly more willing to accept violent behavior as a way of solving problems. Standen, *supra* note 170, at 619–20 (arguing that the pre-conditioned violent behavior athletes learn on the field affects how they act off the field as well); see also Clarke, *supra* note 186, at 1157–58, 1164–65 (citing a study that shows a strong correlation between the reasoning athletes employ on the field and in everyday life).

²⁰⁰ See Harary, *supra* note 170, at 197–202 (discussing multiple instances of violence related to sports but outside game play, not only in professional sports, but also in recreational and youth games).

²⁰¹ See *supra* notes 135–47 and accompanying text (explaining that the BDSM community emphasizes the requirement of consent in order to promote a safe environment for the practice of BDSM).

b. BDSM Harms the Dignity of the Consenter

Some scholars have argued that consent should not be a defense to BDSM because, unlike participation in sports or surgery, BDSM harms the dignity of the consenter.²⁰² Dennis Baker, for example, argues that consent is a valid defense unless the harm consented to crosses the threshold of degrading the human dignity of the consenter to a serious degree.²⁰³ Baker argues that, even where the injury at issue is neither irreparable nor permanent, consent should not be a defense to harming another to cause them sexual pleasure because such action violates the dignity of the consenting individual.²⁰⁴ Baker distinguishes cosmetic surgery and contact sports because—except in rare cases such as surgery addiction—these activities are not undertaken for the purposes of causing harm and thus do not violate the dignity of the consenter.²⁰⁵

The previous subsection of this Article countered the argument that BDSM and sports can be distinguished based on the centrality of violence to their purpose; Baker's argument provides an opportunity to revisit this issue in the context of cosmetic surgery. For example, Baker argues that cosmetic surgery inflicts only temporary harm (or risk of more serious harm) in order to provide a long-term benefit. He argues that the surgeon “does not *aim* or have it as her purpose to leave her patient permanently disfigured or disabled.”²⁰⁶ He distinguishes a surgeon who amputates her patient's legs because the patient simply does not want them anymore—this type of cosmetic surgery, he argues, violates the patient's dignity.

Baker's assumptions about what types of surgery violate dignity and what types do not rest on several questionable assumptions about what is a whole and normal body as opposed to a disfigured or disabled one. Whether changing the structure of a nose is disfigurement or furthers an individual's dignity depends on how we feel about the appearance of the new nose. A determination that enlarging a

²⁰² See Baker, *supra* note 3, at 117–20 (arguing that while the goal of BDSM is to achieve satisfaction, it cannot be disentangled from the infliction of harm); Hanna, *supra* note 3, at 248 (arguing that “[t]he social goals of promoting human dignity are better served by limiting, not extending, the doctrine of violent consent”).

²⁰³ Baker, *supra* note 3, at 117–20.

²⁰⁴ *Id.* Baker focuses on the *R v. Brown* case, discussed *supra* note 192 and accompanying text and *infra* note 248. In the *Brown* case, the BDSM activities included nailing prepuces and scrota to a board, inserting hot wax into urethras, burning penises with candles, and making small incisions in the scrota with scalpels. *R v. Brown*, [1994] 1 A.C. 212 (H.L.) 246 (appeal taken from Eng.). No serious, irreparable, or permanent injuries resulted. Baker, *supra* note 3, at 117 (“The harm in *Brown* was distinguished from the type of harm that flows from mere assault, but it was not irreparable or permanent.”).

²⁰⁵ Baker, *supra* note 3, at 117–20.

²⁰⁶ *Id.* at 119.

woman's breasts provides a long-term benefit and maintains her dignity while amputating a woman's breasts disfigures her and violates her dignity rests on questionable notions of what is a whole, complete woman. Several scholars have rightly questioned the sexist, racist, and classist notions that underlie beliefs about what makes a body whole or normal.²⁰⁷

It is at best highly questionable that BDSM violates dignity more than other permitted activities. Dignity is a slippery concept; it is difficult to debate because it is nearly impossible to define.²⁰⁸ It might be easiest to define in reverse by determining what things are contrary to dignity.²⁰⁹ But enduring pain or injury because you enjoy it is no more harmful to your dignity than enduring pain or injury because it is part of a contact sport that you are paid to participate in and because the harmful contact is considered intrinsic to the enjoyment of the game and the entertainment of its spectators. Indeed, the latter seems more harmful to dignity than the former. This is particularly true in the context of professional sports, where competitors are encouraged to sacrifice their health and safety and to harm others for payment and to further the interests of the team and its owners.²¹⁰ It is likewise unconvincing that enduring pain for enjoyment is more harmful to dignity than surgery that changes the shape of your nose or the size of your breasts to appear more attractive to others.

²⁰⁷ See, e.g., Elizabeth Loeb, *Cutting It Off: Bodily Integrity, Identity Disorders, and the Sovereign Stakes of Corporeal Desire in U.S. Law*, 36 *WOMEN'S STUD. Q.* 44, 55 (2008) (claiming that our ideas of "whole" and "normal" cannot be separated from experiences of patriarchy, white supremacy, and capitalist exploitation).

²⁰⁸ See Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 *U. PA. L. REV.* 169, 172 (2011) (describing how the rising popularity of the term in Supreme Court jurisprudence does not mean that its meaning has been articulated or consistently interpreted and noting that contrasting views of its definition have emerged); R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 *SAN DIEGO L. REV.* 527, 532–59 (2006) (using case law to provide a "flavor" of the current uses of dignity by describing the ideas in tension with contemporary dignity).

²⁰⁹ See, e.g., R.A. Duff, *Punishment, Dignity and Degradation*, 25 *OXFORD J. LEGAL STUD.* 141, 149–51 (2005) (describing four modes of degradation: performative, consequential, expressive, and psychological); Wright, *supra* note 208, at 532–35 (finding brutality, cruelty, torture, humiliation, uncivilized or barbarous behavior, harsh treatment, and various sorts of intrusion and privacy invasion contrary to dignity).

²¹⁰ See Clarke, *supra* note 186, at 1155–56 (describing the moral transformation athletes must necessarily make to be violent in professional sports); Harary, *supra* note 170, at 202–04 (explaining the role of team owners and coaches in encouraging excessive violence in professional sports); Harrison, *supra* note 155, at 480 (stating that violent strikes and blows are common rather than unusual in competitive sports games).

c. BDSM Raises Unique Concerns About Valid Consent

The failure of courts and legislatures to recognize the defense of consent in BDSM might be explained by the concern that it is harder to determine whether consent is truly valid in the context of BDSM than in the context of permitted activities such as sports or surgery. Sexual attraction, love, and power imbalances in personal relationships may prompt individuals to consent to being a submissive when they do not truly desire it.²¹¹ These factors may also allow unscrupulous individuals to exploit the weaknesses of their partners and coerce them to submit to abuse disguised as BDSM.²¹²

This argument also fails to distinguish BDSM from activities in which consent is permitted. Several sports raise just as many, if not more, questions about the validity of participants' consent as BDSM does. Individuals who participate in sports accept that they will be harmed, but they do not *want* to be harmed. Ostensibly, many accept injury in return for the pleasure they take in competition. Given the prominent role sports play in our culture, there is certainly the risk that some individuals play contact sports even though they do not truly enjoy the game. This is particularly true in the context of professional, college, and high school sports, where individuals accept injury in exchange for the money they will earn or the promise of a future career or college education. Collegiate and professional sports are lucrative businesses and significant money depends on the players' ability to maximize the injuries of their competitors, minimize their own injuries, and continue to play at risk to their health or well-being.²¹³ The incentives and the power imbalances that underlie these decisions raise as much concern about the voluntary nature of consent as the personal relationships in which BDSM takes place.²¹⁴

Cosmetic surgery raises similar concerns about consent. Physicians financially profit from expensive surgeries that individuals, particularly women, may be coerced into to please partners. Some

²¹¹ See Hanna, *supra* note 33, at 127–30 (making similar arguments with regard to polygamy).

²¹² Indeed, Andrea Dworkin and Catharine MacKinnon have argued that consent to BDSM in a male-dominated society is illusory. ANDREA DWORKIN, *OUR BLOOD* 96–111 (1976); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 126–54 (1989); see also Hanna, *supra* note 3, at 282–83 (discussing Dworkin and MacKinnon); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 *WIS. WOMEN'S L.J.* 149, 186–87 (2000) (same).

²¹³ See Clarke, *supra* note 186, at 1154–57, 1168 (stating that “the available data indicate that aggressive and violent behavior during sporting contests is accepted and encouraged”).

²¹⁴ See Harary, *supra* note 170, at 202–03 (describing the role that team owners and coaches have in making athletes feel they are obliged to use violence).

feminists argue that consent to cosmetic surgery is illusory in a male-dominated society.²¹⁵ Consent may be further compromised by psychological disorders such as plastic surgery addiction or body dysmorphic disorder (BDD), an obsessive preoccupation with one's perceived physical defects.²¹⁶ While informed consent requirements in the law and professional guidelines should prevent a surgeon from operating on an ambivalent individual, an estimated sixteen percent of individuals receiving cosmetic surgery suffer from BDD, an affliction that affects only one percent of the population.²¹⁷ The individual must contend with the results of surgery every day unless she consents to additional surgery to revert.

d. BDSM Submissives Are Vulnerable to Dominants
Exceeding the Boundaries of Consent

Another concern is that, even if a submissive provides full and voluntary consent to BDSM activities, the dominant may perform actions beyond what was consented to. Perhaps permitted activities such as sports are less vulnerable to abuse by individuals who exceed the boundaries of consent because they have clear rules that set the parameters of acceptable contact.²¹⁸

Rules and safety are integral to the “safe, sane, and consensual” principle of BDSM, and there is no reason to think that individuals will ignore these rules in the context of BDSM any more than they are ignored in the context of sports. Aggression outside the boundaries of the rules is common in sports: Athletes develop norms outside the formal rule structure that dictate the extent to which violence that violates the formal rules is acceptable.²¹⁹ The competitive nature of the sport encourages aggression, as do coaches, fans, and incentives such as salaries or scholarships.²²⁰ Coaches train athletes to intimidate

²¹⁵ See *infra* note 227 (describing some of these feminist arguments).

²¹⁶ Brittany L. Newell, *Informed Consent for Plastic Surgery: Does It Cut Deeply Enough?*, 32 J. LEGAL MED. 315, 315, 317–20 (2011).

²¹⁷ *Id.* at 316.

²¹⁸ See Hanna, *supra* note 3, at 253 (describing a potential state interest in confining athletic violence to the rules of the game). *But see* Standen, *supra* note 170, at 630–34 (explaining that even if certain conduct is prohibited by the rules of the relevant sport, the consent defense does not necessarily fail).

²¹⁹ See Clarke, *supra* note 186, at 1163–65 (describing the differences between the formal rule structure and the normative or unwritten rules of a sport); Harary, *supra* note 170, at 198 (citing examples of violence in professional sports that is not condoned by the rules).

²²⁰ See Clarke, *supra* note 186, at 1152 (“Players, coaches, and spectators all accept—if not expect—a certain level of violent contact during the game.”); Harary, *supra* note 170, at 202–04 (portraying the growing desire of coaches and players to win at any cost, fueled by the increase in revenue that accompanies winning).

their opponents and to precipitate—rather than avoid—physical altercations, and players may find it difficult to curb their aggressive impulses in the moment.²²¹

It is also shortsighted to say that the rules of the sport clearly identify acceptable behavior.²²² The fact that it is an acceptable goal in sports to make contact with an individual who seeks to avoid contact further blurs the boundaries of consent. It is not always clear which injuries are “reasonably foreseeable” to a player when that player’s goals are to avoid being tackled, hit by a wild pitch, or fouled. Case law is replete with examples of how the violence involved in a tackle can result in serious harm such as a participant punching another in the throat, breaking another player’s jaw, or suffering a concussion.²²³ In contrast, the collaborative nature of BDSM poses less risk of this because partners must discuss the parameters of consent beforehand and employ a safe word.

e. BDSM Reinforces Disturbing Gender and Race Dynamics

Courts and legislatures may fear that the legalization of BDSM would glorify and encourage domestic violence, sexual assault, and sexual objectification.²²⁴ Feminist scholars in particular raise this concern when a woman is submissive to a dominant man.²²⁵ Cheryl Hanna suggests that BDSM and its focus on slave-master relationships, bondage, and domination may be rooted in America’s history of slavery and a collective cultural consciousness that assumes women and racial minorities should be subservient to white men.²²⁶

²²¹ Clarke, *supra* note 186, at 1158–59.

²²² *See id.* at 1153 (noting that violent collisions are often an accepted and foreseeable part of sports).

²²³ *See, e.g.,* *People v. Schacker*, 670 N.Y.S.2d 308, 309 (N.Y. Dist. Ct. 1998) (dismissing a charge of third-degree assault against a hockey player who, after the whistle was blown, struck another player on the back of his neck and caused him to have a concussion); *People v. Freer*, 381 N.Y.S.2d 976, 977–79 (N.Y. Dist. Ct. 1976) (finding the defendant guilty of third-degree assault for punching the plaintiff in the eye after being punched in the throat during a football tackle); *State v. Shelley*, 929 P.2d 489, 490, 492–93 (Wash. Ct. App. 1997) (rejecting the defendant’s consent defense in a second-degree assault charge for punching another player during a pickup basketball game and breaking his jaw); *see also* Clarke, *supra* note 186, at 1153–67 (describing the culture and encouragement of violence and aggression in sports); Gladwell, *supra* note 197, at 50–57 (describing the significant and lifelong injuries and neurological damage associated with professional football).

²²⁴ *See* Hanna, *supra* note 3, at 286–87 (“There are implications to opening up the Pandora’s Box of consensual violence, not the least of which is that it sends a symbolic message that some forms of sexual oppression are acceptable so long as the oppressed party says yes.”).

²²⁵ *See, e.g., id.* (explaining how BDSM could be used to bolster “oppressive cultural norms”).

²²⁶ *Id.*

This argument also fails to distinguish BDSM from activities to which consent is a defense. Cosmetic surgery is often undertaken in response to, and as a result reinforces, sexism and racism. Women reshape their bodies and faces to appear more pleasing to the male gaze.²²⁷ Ethnic and racial minorities pay others to surgically change their features or skin to have a more Anglo appearance.²²⁸ College and professional sports also raise troubling questions about the glorification of violence and subordination. Athletes are often disproportionately people of color and often suffer severe injuries and long-term health effects as a result of their participation in sports.²²⁹ In contrast, the coaches and team owners who benefit from their labor are predominantly White.²³⁰ At worst, this reality brings to mind the circumstances of enslaved gladiators; at best, it reflects and reinforces racist stereotypes about the athletic prowess of African Americans and the intellectual superiority of Whites.²³¹

²²⁷ See SHEILA JEFFREYS, *BEAUTY AND MISOGYNY: HARMFUL CULTURAL PRACTICES IN THE WEST* 28 (2005) (recounting the increasing popularity of labiaplasty, just one of many “other surgeries offered which cut up the female body to conform to male desires”); Dan O’Connor, *A Choice to Which Adolescents Should Not Be Exposed: Cosmetic Surgery as Satire*, 15 J. HEALTH CARE L. & POL’Y 157, 159–61 (2012) (explaining that the two dominant feminist interpretations of cosmetic surgery both accept that women choose the surgeries to meet sex-based standards of appearance); Rosemary Gillespie, *Women, the Body and Brand Extension in Medicine: Cosmetic Surgery and the Paradox of Choice*, 24 WOMEN & HEALTH 69, 72–74, 80 (1996) (describing the images of female beauty sought via cosmetic surgery as “racially, ethnically, and heterosexually inflicted”); Kathryn Pauly Morgan, *Women and the Knife: Cosmetic Surgery and the Colonization of Women’s Bodies*, 6 HYPATIA 25, 26, 28, 31–32 (1991) (describing women’s choices to undertake the most popular cosmetic surgical procedures as a way to purchase beauty and youth).

²²⁸ See Matt Lamkin, *Racist Appearance Standards and the Enhancements that Love Them: Norman Daniels and Skin-Lightening Cosmetics*, 25 BIOETHICS 185, 186 (2011) (describing these medical and cosmetic procedures minorities use to look more Anglo); Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1053 (2009) (describing the prevalence of cosmetic surgery in minority communities).

²²⁹ See Clarke, *supra* note 186, at 1154–56, 1168 (discussing injuries and violence in sports); Timothy Davis, *Race and Sports in America: An Historical Overview*, 7 VA. SPORTS & ENT. L.J. 291, 307–08 (2008) (discussing racial bias and discrimination in collegiate and professional sports that leads to a disproportionately large representation of people of color in entry-level and player positions and underrepresentation in managerial positions); Amy Christian McCormick & Robert A. McCormick, *Race and Interest Convergence in NCAA Sports*, 2 WAKE FOREST J.L. & POL’Y 17, 17, 23–25 (2012) (describing the disproportionately large number of African American athletes in college football and basketball); Erin Scanga, *Glass Ceiling Employment and Racial Discrimination in Hiring for the Head Coaching Position in the National Football League*, 14 SETON HALL J. SPORTS & ENT. L. 481, 485–87, 489 (2004) (describing racial distribution in the National Football League).

²³⁰ Davis, *supra* note 229, at 307–08; McCormick & McCormick, *supra* note 229, at 18, 23–25; Scanga, *supra* note 229, at 485–89.

²³¹ See Davis, *supra* note 229, at 307–08 (asserting that managerial opportunities for people of color in sports are limited because of implicit biases); Timothy Davis, *Racism in Athletics: Subtle Yet Persistent*, 21 U. ARK. LITTLE ROCK L. REV. 881, 883–85, 887–91

f. A Consent Defense for BDSM Would Make Domestic Violence and Sexual Assault More Difficult to Prove

One of the stronger arguments in favor of prohibiting consensual BDSM activity is that a consent defense might make domestic violence and sexual assault more difficult to prove.²³² The public nature of sports provides protections to participants to ensure rules are abided by and consent is valid. Spectators, umpires, referees, and other witnesses may deter unnecessary violence and allow those who exceed the boundaries of consent to be more easily brought to justice.²³³ BDSM, in contrast, occurs in private. Individuals who abuse their partners or sexually assault others may argue that the abuse was consented to as part of a BDSM relationship. Indeed, several individuals have made such claims where the facts indicated no BDSM relationship existed or the individual exceeded the consented-to level of activity.²³⁴ A rule prohibiting a consent defense in the context of BDSM will overdeter, but perhaps this is but one instance where an overinclusive rule is appropriate to prevent harm that the law cannot otherwise target effectively.²³⁵

While this may be the strongest argument for refusing the consent defense, it is not ultimately persuasive in distinguishing BDSM from accepted activities such as sports or surgery. If proof of abuse were a

(1999) (describing the harmful effects of racial stereotypes on minority advancement to sports management and on the educational opportunities of minority student athletes).

²³² See Hanna, *supra* note 3, at 268–70 (exploring the law’s difficulty in determining which situations are consensual, which the author believes makes it inadvisable to recognize a consent defense to assault in the context of BDSM).

²³³ See Standen, *supra* note 170, at 637 (describing the argument that internal regulation of player behavior in sports counsels less legal intervention).

²³⁴ See, e.g., *United States v. Arab*, 55 M.J. 508, 513, 515 (A. Ct. Crim. App. 2001) (defendant exceeded given consent); *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1053–54 (Mass. 1980) (defendant claimed there was a BDSM relationship but there was no other evidence of such a relationship); *State v. Van*, 688 N.W.2d 600, 613 (Neb. 2004) (defendant continued activity after consent was withdrawn entirely); *People v. Jovanovic*, 700 N.Y.S.2d 156, 159, 171 (N.Y. App. Div. 1999) (victim testified that the defendant continued activity after consent was withdrawn).

²³⁵ See Hanna, *supra* note 3, at 248, 268–71 (discussing the need for overinclusive rules in the context of BDSM). Many scholars have engaged in the discussion of how rules can deter undesirable behavior more effectively than standards. See LARRY ALEXANDER ET AL., *CRIME AND CULPABILITY* 296 (2009) (identifying coordination, expertise, and efficiency as benefits of rules over standards); Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1195 (1994) (discussing the rulemaker’s greater access to information as a benefit of rules); R.A. DUFF, *ANSWERING FOR CRIME* 169–70 (2007) (describing criminal laws that take the form of rules and have benefits that outweigh their overinclusiveness); Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 803–04 (2005) (noting the relative clarity of rules); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 971–72 (1995) (describing the benefits of rules).

significant concern, then we might expect to see courts and legislatures prohibiting the consent defense in the context of informal sports that lack oversight by referees or umpires. We might also see courts and legislatures encouraging BDSM clubs or parties with clear rules and multiple witnesses.²³⁶ Indeed, it seems somewhat counterintuitive for the private nature of BDSM to justify its prohibition. This is particularly true when the public nature of sports can increase the stakes of losing, incentivizing aggressive play and violent fights.²³⁷ This in turn can lead to aggression and violence by spectators.²³⁸

As a practical matter, there is no evidence that an overinclusive prohibition produces safer outcomes in the context of BDSM. On the contrary, it drives a wedge between the BDSM community and the police.²³⁹ It also deprives juries of a full and nuanced discussion of BDSM practices and what does and does not constitute consent in BDSM cases.²⁴⁰ A more practical approach would be to allow a BDSM defense based on evidence of what is considered safe and acceptable practice in the BDSM community. This would undermine a BDSM defense where the defendant ignored or did not elicit a safe word or where the practices were not adequately discussed beforehand. Parties could also provide testimony of the limitations they negotiated and how they agreed consent would be conveyed—for example, offering evidence about the existence of safe words.²⁴¹

g. BDSM Regulation Is About Deviant Sexual Activity

There is a valid argument that consensual BDSM is prohibited not because the law fails to value sexual pleasure *per se*, but rather because the law does not condone sex that is considered deviant. The law allows consensual vaginal intercourse, even though it can cause pain and injury.²⁴² For the last decade, the Supreme Court has required states to allow consensual anal and oral intercourse as

²³⁶ See Hanna, *supra* note 3, at 267–68 (noting that BDSM in the context of a club with clear rules can be a safer alternative that could resolve the problem of uncertain consent).

²³⁷ See *supra* notes 219–21 and accompanying text (discussing aggression and violence in sports).

²³⁸ See *supra* note 186 and accompanying text (discussing fights and riots at sporting events).

²³⁹ See Pa, *supra* note 3, at 56–58 (describing police harassment of the BDSM community).

²⁴⁰ See *id.* at 68–69 (discussing the importance of expert testimony to help juries and courts understand BDSM practices).

²⁴¹ See Anderson, *supra* note 143, at 58, 136 (proposing a rape shield law that allows evidence of negotiations regarding how consent will be conveyed).

²⁴² See Michelle Madden Dempsey & Jonathan Herring, *Why Sexual Penetration Requires Justification*, 27 OXFORD J. LEGAL STUD. 467, 477 (2007) (describing the potential for physical harm from consensual sex).

well.²⁴³ Perhaps the law does value sexual pleasure, but only certain types of sexual pleasure that it deems socially acceptable.²⁴⁴

But the law's distinction of BDSM as deviant is inextricably intertwined with its devaluing of sexual pleasure. The distinction between socially desirable sexual pleasure and deviant sexual pleasure is tied to the difference between valuing sexual pleasure as a means to other, more acceptable goals and valuing sexual pleasure as an end in itself.²⁴⁵ Vaginal sex is valued as a means to procreation and an important component of marital sex and emotional intimacy.²⁴⁶ *Lawrence v. Texas* valued sodomy as part of enduring personal relationships.²⁴⁷ In contrast, BDSM is not yet accepted as a sexual activity that strengthens other traditional bonds. The deviance of BDSM is in large part tied to the idea that it does not further other important interests such as emotional intimacy or marital relationships; as a result, courts considering BDSM believe that its only goal is to further sexual pleasure.²⁴⁸ The low value they assign to sexual pleasure in itself permits them to deny a consent defense while allowing the defense in other contexts.

BDSM may also be prohibited because it challenges accepted gender norms. As several scholars have noted, contact sports and many types of cosmetic surgery advance traditional gender roles.²⁴⁹

²⁴³ See *Lawrence v. Texas*, 539 U.S. 558, 563, 578 (2003) (holding unconstitutional a state statute criminalizing anal and oral sex between people of the same gender).

²⁴⁴ See Chiesa, *supra* note 175, at 203–04 (arguing that consent is a defense to battery only when the battery involves socially acceptable activities); Harrison, *supra* note 155, at 486–87 (same).

²⁴⁵ See Neașu, *supra* note 41, at 626 (noting that the state historically criminalized sexual acts that were deemed “hedonistic” because they did not serve an acceptable social purpose like procreation); cf. Chartier, *supra* note 1, at 1605–08 (describing and rejecting the view that sodomy and other nonprocreative sexual acts should be regulated or prohibited because individuals engage in them purely for the sake of pleasure).

²⁴⁶ See *infra* Part II.C.2 (discussing the focus on marriage in cases about sexual freedom); see also Chartier, *supra* note 1, at 1603–04 (describing the argument that all nonprocreative sex is wrong while procreative sex is valuable and good).

²⁴⁷ See *infra* Part II.C.3 (discussing *Lawrence*'s emphasis on the role of sex in intimate relationships).

²⁴⁸ For example, the British House of Lords rejected a consent defense for sadomasochistic sexual practices among a group of gay men who were not in committed relationships. *R v. Brown*, [1994] 1 A.C. 212 (H.L.) 235–37 (appeal taken from Eng.). Yet two years later the Court of Appeals argued that *Brown* was inapplicable to a case in which a man branded his wife with her consent. *R v. Wilson*, [1996] 2 Crim. App. 241 at 242–44; see Weait, *supra* note 33, at 111 (describing the *Wilson* court's view that *Brown* did not apply). The court distinguished *Brown* in large part because (1) the branding was done for adornment and not sexual pleasure and (2) the case involved the privacy of the matrimonial home. See Weait, *supra* note 33, at 111–12 (analyzing *Wilson*'s rejection of *Brown*).

²⁴⁹ See, e.g., Harrison, *supra* note 155, at 496 (“[W]omen are allowed to consent to surgical procedures that are otherwise legally unjustifiable, if in so consenting they are attempting to bring their bodies closer to the male (dominant group) dictated norm of

Hanna argues that sports are treated differently from BDSM because sports reaffirm masculinity in a controlled and regulated environment that mitigates risk of harm, whereas BDSM challenges these notions because the participants may be members of the same sex or the dominant may be female.²⁵⁰

This explanation likely plays a role in the law's rejection of the consent defense for BDSM, but it is a role that is interwoven with the law's approach to sexual pleasure. The law allows several activities that challenge gender norms. This is true even where the activity may result in serious injury. Women, for example, may play violent contact sports. Women and men may also modify their bodies in a way that challenges traditional gender norms and notions of female beauty, although this is admittedly limited.²⁵¹ This is in large part because the goals in these activities are valued; women benefit from athletics and there is a market for women's sports; body modification in the form of tattoos, piercings, or even gender reassignment may be permitted because courts and legislatures value an individual's ability to express herself and improve her psychological well-being as long as her desires conform to dominant society's ideals.²⁵² But where a violent activity challenges gender norms and does so merely for the purpose of sexual pleasure, the law is less forgiving. In this case, courts have determined that the benefits do not outweigh the harms.

physical appearance.”); Loeb, *supra* note 207, at 47, 51–52 (comparing the legal and cultural permission afforded to cosmetic surgeries that “map onto the landscape of normative and normativizing physical norms of race, sex, and gender” with those that do not); Weait, *supra* note 33, at 102–03 (citing the law's permissive attitude towards “non-essential cosmetic surgery and recognised violent contact sports (which, respectively, sustain gender stereotypes and celebrate the social value of certain kinds of dominance and submission”).

²⁵⁰ Hanna, *supra* note 3, at 245–46, 250, 255–56, 281–83; *accord* Loeb, *supra* note 207, at 46 (commenting on the legal distinction between a boxing match and asking to be whipped by a sexual partner: “Getting into a boxing ring makes me more of a man Asking to be whipped makes me a queer, less of a proper subject, a violated deviant in need of help.”); *cf.* Weait, *supra* note 33, at 108–13 (describing several cases involving “injuries sustained in the context of physical and/or sexual gratification,” and distinguishing those that occurred in the context of heterosexual marriage not for the purpose of sexual pleasure with those that occurred with that purpose and between those of the same sex).

²⁵¹ *See* Loeb, *supra* note 207, at 46–54 (describing the legal limitations placed upon those seeking cosmetic surgeries “who resist gender/sex-normative or work-normative ‘able bodied’ corporeality”).

²⁵² *See id.* (describing the ability of individuals to obtain gender reassignment surgery only after obtaining society's approval in the form of a psychiatric diagnosis of “gender identity disorder”); *cf.* Harrison, *supra* note 155, at 494–98 (arguing that a consent defense is allowed for cosmetic surgery (within the confines of Western standards of beauty) because society approves of those procedures and values the psychological well-being they provide).

3. *BDSM and Sexual Pleasure*

None of these arguments are persuasive because BDSM does not differ from permitted activities as a result of the way it is *bad*, but rather as a result of the way it is *good*. The law's failure to allow a consent defense in the context of BDSM is best explained by the law's failure to value sexual pleasure in the way that it values the goals of other permitted activities. Sports, surgery, and other activities are permitted in large part because they serve goals that legislators and courts value.²⁵³ BDSM serves the purpose of sexual pleasure. Courts have rejected a consent defense in the context of BDSM because they do not value sexual pleasure in itself as much as they value the goals served by sports, surgery, and other activities in which consent is a defense to assault.

Some courts have explicitly relied upon social value to distinguish which injurious activities merit a consent defense. In *State v. Floyd*, for example, the Iowa Court of Appeals argued that contact sports merit a consent defense because "many acts which our society considers to be quite acceptable, and even desirable, are technically assaults" ²⁵⁴ Courts have allowed sports to continue despite this because of a belief that the value of sports outweighs its tendency to disturb the peace.²⁵⁵ Legal scholarship has also noted the link between what the law allows an individual to consent to and what society considers valuable or acceptable.²⁵⁶ Keith Harrison, for example, argues that the law allows consent to cosmetic surgery because men, as a dominant social group, have a utility interest in the bodies of women, and cosmetic surgery that conforms to norms of what is attractive (rather than what is considered disfiguring) furthers this interest.²⁵⁷

²⁵³ See Bergelson, *supra* note 155, at 193–94 (describing the concept of "social utility" invoked in the legal "validat[ion] or invalidat[ion] [of] certain consensual behavior based on the resulting harms and benefits to the public"); Harrison, *supra* note 155, at 494–502 (explaining the availability of the consent defense as being determined by the "utility" or "paternal" interests of "socially dominant groups").

²⁵⁴ *State v. Floyd*, 466 N.W.2d 919, 922 (Iowa Ct. App. 1990).

²⁵⁵ See Standen, *supra* note 170, at 623–24 (describing the common law tradition of distinguishing sporting activities that were "calculated to give bodily strength, skill and activity and 'to fit people for defence . . . in time of need'" with those that "'serve[d] no useful purpose' and 'tend[ed] to [produce] breaches of the peace'" (alterations in original) (quoting *Commonwealth v. Collberg*, 119 Mass. 350, 353 (1876))); see also Harrison, *supra* note 155, at 497–98 (describing the phenomenon of "the dominant group exerting its utility interest" in the context of professional boxing and other organized athletic events).

²⁵⁶ See Chiesa, *supra* note 175, at 203–04 ("[T]he criminal law also cares about encouraging certain types of socially acceptable conduct and discouraging certain socially unacceptable acts."); Harrison, *supra* note 155, at 494–98 (examining instances of dominant groups' "utility interests" determining the availability of the consent defense).

²⁵⁷ Harrison, *supra* note 155, at 495–96.

Similarly, he argues, individuals may consent to many types of violent sports because of the common belief that they instill virtues in participants and because they are financially lucrative for organizers.²⁵⁸ Other scholars, such as Dennis Baker, use this calculus more implicitly. Baker argues that an individual should be able to consent to risk of HIV exposure for the purpose of procreation, but not merely for the purpose of sexual pleasure.²⁵⁹

Sexual pleasure has value equal to or greater than the goals of many permitted activities. Certainly there is a strong argument that life-preserving surgery serves a more important goal than BDSM.²⁶⁰ But the consent defense applies to surgeries that do not save lives or even benefit health. For example, the law permits a physician to perform a mastectomy on a woman who carries a breast cancer gene even where there is little proof that the surgery is superior to less extreme treatments.²⁶¹ In this circumstance, a patient chooses surgery primarily to relieve stress and anxiety about the likelihood of cancer occurring or recurring rather than because of an objective health benefit.²⁶² Cosmetic surgery may serve no health purpose and, in fact, may be detrimental to health.²⁶³ At best, these surgeries fulfill an emotional need; at worst, they prey upon the fear and insecurities of the patient. It is difficult to see how fulfilling these emotional needs is more valuable than sexual pleasure.

The value derived from contact sports is similarly questionable. Sports may further the goals of increasing athletic prowess and improving public health, but these goals can be served just as well without the contact that creates injury.²⁶⁴ The purpose of the contact in contact sports is that it makes the game more interesting, more physically challenging, and more enjoyable to some participants and spectators. These goals are similar to those pursued by BDSM enthusiasts, and it is not clear why the pleasure we take in sports has greater value than the sexual pleasure of consenting adults.

²⁵⁸ *Id.* at 498.

²⁵⁹ Baker, *supra* note 3, at 114.

²⁶⁰ See Harrison, *supra* note 155, at 494 (“[B]ecause the law values life and health so highly, it is willing to allow the individual to risk death to extend life or ease the burdens of illness.”).

²⁶¹ Bergelson, *supra* note 155, at 182.

²⁶² *Id.*

²⁶³ See Harrison, *supra* note 155, at 494–95 (describing the law’s desire to balance the possible harms of “reckless mutilation or endangering life” associated with plastic surgery with the results, which may be deemed beneficial).

²⁶⁴ *Cf.* Standen, *supra* note 170, at 623–24 (describing the common law’s subjection of sporting events to a utilitarian test measuring the development of a “socially useful” skill in participants, a test which sports like boxing failed).

BDSM can be more easily distinguished from prohibited activities such as fistfights or gang initiation. These activities seek to injure those who do not enjoy being injured and who only accept the injury as a means to an end. The ends these activities further are often socially undesirable, such as the formation of a criminal gang or simply to perpetuate violence against another person who does not wish to be harmed. These activities also often happen in public, disturbing the peace and increasing the likelihood that others will be pulled into the fray or join willingly. BDSM, in contrast, occurs in private and has strict rules with regard to its practice to protect consent and safety. Perhaps more importantly, we can and should value the desire to express sexuality and experience pleasure more than the desire to express anger violently and harm another who does not want to experience that harm.

This Article does not argue that all types of BDSM must be allowed.²⁶⁵ No potential assault for which consent is a defense is unregulated. The state extensively regulates surgery to protect public health, safety, and informed consent. But BDSM does not raise these concerns any more than activities in which consent is a defense. What makes BDSM different—and thus the most salient reason for its prohibition—is that it serves the goal of sexual pleasure.

C. *Sexual Freedom and Constitutional Law*

1. *Introduction*

The argument that the law is sex-negative or fails to value sexual pleasure appropriately at first seems absurd given the significant constitutional protection the Supreme Court has afforded sexual activities in the past fifty years. *Griswold v. Connecticut* protected married couples' right to access contraception;²⁶⁶ *Eisenstadt v. Baird* extended this protection to unmarried couples;²⁶⁷ *Carey v. Population Services International* extended it to minors.²⁶⁸ In 2003, *Lawrence v. Texas* overturned a Texas law prohibiting sodomy and in doing so recog-

²⁶⁵ See *infra* Part III.C (advocating for the ability of lawmakers, prosecutors, and courts to regulate the parameters of BDSM within a sex-positive legal framework).

²⁶⁶ See *Griswold v. Connecticut*, 381 U.S. 479, 481–86 (1965) (holding that a Connecticut statute forbidding use of contraceptives violated the right of marital privacy protected by “penumbras” emanating from the Bill of Rights).

²⁶⁷ See *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding a Massachusetts statute criminalizing distribution of contraceptives to unmarried persons unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

²⁶⁸ See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693–99 (1977) (striking down as unconstitutional a New York statute prohibiting the distribution of contraceptives to those under sixteen years of age).

nized the legitimacy of same-sex sexual relationships.²⁶⁹ These cases demonstrate the enormous progress the Court and society have made in recognizing the importance of sexual relationships. They also seem to provide sex with elevated status and far more constitutional protection than other activities individuals engage in for pleasure.

This progress, however, is limited in its approach (or lack thereof) to sexual pleasure itself. While these cases plainly recognize the importance of sexual decisionmaking and sexual relationships, sexual pleasure itself is noticeably absent from their considerations. Where sexual pleasure is implicitly recognized, its importance is discussed in a very limited way: It is valued only as a means to other, more legitimate and important ends such as marriage, procreation, and emotional intimacy. None of these decisions recognize or discuss the value of sexual pleasure for its own sake—indeed, many of them seem to go out of their way to avoid a positive discussion of sexual pleasure.

2. *Marriage and Procreation*

Early cases protecting activities related to sex focused on the sacred nature of marriage. In *Griswold v. Connecticut*, the Court held that a statute prohibiting the use of contraceptives unconstitutionally infringed on the right to marital privacy.²⁷⁰ *Griswold* protects the sexual activities of consenting adults even when that activity does not serve a procreative function. This might have implied a newfound recognition of the importance of sex for pleasure. But the *Griswold* Court carefully worded the decision in a way that limits, if not eliminates, any implicit recognition of the value of sexual pleasure. The Court made clear that the sexual activities at issue received constitutional protection only because they were part of a marital relationship, “an association for as noble a purpose as any involved in our prior decisions” that merited “a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”²⁷¹ *Griswold*’s focus is solely on the sacred nature of marriage and the statute’s burden on that relationship, and the decision carefully avoids a discussion of sex itself, much less sexual pleasure.²⁷² If

²⁶⁹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²⁷⁰ *Griswold*, 381 U.S. at 481–86.

²⁷¹ *Id.* at 486.

²⁷² *See id.* at 481–86 (framing the interests at stake as the “intimate relation of husband and wife and their physician’s role in one aspect of that relation” as existing within the “penumbral rights of ‘privacy and repose’” established by various precedents rather than as sex or sexual pleasure); *see also* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 226 (arguing that *Griswold* reflects the Supreme Court’s hesitation to acknowledge an affirmative interest in sexual expression); Mark Strasser, *Monogamy, Licentiousness, Desuetude and Mere Tolerance: The Multiple*

Griswold speaks to the value of sexual pleasure at all, it speaks solely to sexual pleasure's instrumental value in strengthening marital relationships.²⁷³

Griswold reflects the elevated status that legislatures and courts have historically given to sex within a marital relationship.²⁷⁴ The implication is that sex itself is bad, but marriage justifies its offense by directing it towards the socially acceptable purpose of strengthening the marital bond.²⁷⁵ This "marriage cure," as Ariela R. Dubler terms it, can be found in myriad contexts, including immigration law, sexual assault, and fornication.²⁷⁶ Indeed, several states continue to afford a marital exception for offenses such as prostitution and statutory rape.²⁷⁷

Although the Court subsequently expanded these privacy rights to nonmarital relationships, it was careful not to address the value of sexual pleasure itself. For example, in *Eisenstadt v. Baird*, it struck down a prohibition on distributing contraceptives to unmarried individuals.²⁷⁸ This case provided the Court with an exceptional opportunity to highlight the value of nonprocreative, nonmarital sex and to expand *Griswold* to all intimate relationships or even simply all non-

Misinterpretations of Lawrence v. Texas, 15 S. CAL. REV. L. & WOMEN'S STUD. 95, 99 (2005) (noting that *Griswold* focused on the marital relationship rather than the specific question of contraception use).

²⁷³ See *Griswold*, 381 U.S. at 485 (describing the law banning the use of contraceptives as having "a maximum destructive impact" upon the marital relationship); Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1182–83 (2006) (describing the *Griswold* Court's "tone of reverence for sexual intimacy—that is, specifically, marital sexual intimacy").

²⁷⁴ See Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 776–77 (2006) (noting the preferential legal status accorded to sex when it occurs within marriage).

²⁷⁵ See *id.* ("[S]ex—redefined as licit—was a fundamental part and an 'Essential Obligation[]' of the legal institution of marriage." (second alteration in original) (quoting *Graham v. Graham*, 33 F. Supp. 936, 938 (E.D. Mich. 1940))); see also ABRAMSON & PINKERTON, *supra* note 14, at 15–16 (describing the historical Christian view that all sexual intercourse is sinful unless undertaken within marriage for procreative purposes).

²⁷⁶ Dubler, *supra* note 274, at 764–65, 776–77. Dubler has also noted that, in terms of strategy, marriage has sometimes been the ultimate goal of litigants fighting for the recognition of rights to sex and relationships. See Dubler, *supra* note 273, at 1186 (placing civil rights cases about sexual freedom outside marriage in the context of a litigation strategy for securing the right to interracial marriage).

²⁷⁷ See, e.g., ALASKA STAT. § 11.41.445 (2012) (allowing a marital exception for a number of statutory rape crimes); IDAHO CODE ANN. § 18-5613 (2004) (allowing a marital exception for prostitution); MICH. COMP. LAWS ANN. § 750.449a (West 2004) (same); OR. REV. STAT. §§ 167.002, 167.007 (2011) (same); W. VA. CODE ANN. § 61-8B-5 (LexisNexis 2010) (allowing a marital exception for statutory rape); WIS. STAT. ANN. § 948.09 (West 2005) (same).

²⁷⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (striking down a Massachusetts statute barring the provision of contraceptives to unmarried people).

procreative sexually pleasurable activities.²⁷⁹ Yet the Court instead spoke only in terms of individual choices concerning parenthood and the equal protection of unmarried couples.²⁸⁰ The Court was given a similar opportunity in *Carey v. Population Services International*, when it protected minors' rights to access contraception.²⁸¹ But again the Court carefully avoided any mention of the interests minors might have in nonprocreative sex and spoke only in terms of procreative decisions.²⁸² Similarly, abortion cases have limited their discussion to the interests women have in deciding whether to become mothers or choosing a course of medical treatment.²⁸³ These privacy cases were "defined with close reference to reproduction and its control, not to sex itself," and certainly not to sexual pleasure.²⁸⁴ As a result, they are curiously silent about the reasons for which people might want to have nonprocreative sex in the first place.

²⁷⁹ See Dubler, *supra* note 273, at 1183 (suggesting that the *Eisenstadt* Court could have recognized a right to privacy even for unmarried couples). Similarly, in *McLaughlin v. Florida*, the Supreme Court struck down a law criminalizing interracial cohabitation, one of several provisions of Florida law that were intended to prevent extramarital sex. 379 U.S. 184, 185–87 (1964) (explaining the background of the law at issue and setting aside the conviction because the law violated equal protection). But the opinion focused on equality rather than sexual freedom, arguing that there was no need for a race-specific statute when laws prohibited interracial marriage and premarital sex in general. See *id.* at 196. The Court confirmed that it was constitutional to criminalize sex outside of marriage, as long as such laws were race neutral. See *id.* (noting that the law served a constitutionally valid state interest but holding it invalid because it singled out interracial couples); see also Dubler, *supra* note 273, at 1174–75 (observing that the *McLaughlin* Court avoided declaring that all extramarital sex was licit).

²⁸⁰ See *Eisenstadt*, 405 U.S. at 452–55 (finding that the ban violated equal protection because it applied only to unmarried people but declining to affirm the lower court's holding that a state could not ban contraception outright); see also Dubler, *supra* note 273, at 1183 (commenting on the *Eisenstadt* Court's decision not to explicitly condone unmarried couples' sexual relations).

²⁸¹ 431 U.S. 678, 691–99 (1977) (plurality opinion) (striking down a state law prohibiting the distribution of contraceptives to minors by anyone other than physicians); *id.* at 702 (White, J., concurring in the judgment on different grounds); *id.* at 707–08 (Powell, J., concurring) (same); *id.* at 712–13 (Stevens, J., concurring) (same).

²⁸² See *id.* at 684–86 (majority opinion) (explaining the Court's view of the right of privacy largely in terms of individuals' right to make childbearing decisions).

²⁸³ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852–53 (1992) (arguing that women have a liberty interest in being able to obtain abortions because otherwise the state could force them to endure the pain and suffering of pregnancy and childbirth and potentially to care for children for whom they are not prepared); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (justifying the inclusion of a right to abortion within the right to privacy for similar reasons, specifically citing the risk of psychological or physical harm to women); see also Law, *supra* note 272, at 226–27 (observing that the Supreme Court's decisions expanding access to contraception and abortion have cited the risks of childbirth instead of an affirmative right of sexual expression).

²⁸⁴ Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 61.

3. Lawrence v. Texas and Intimacy

*Lawrence v. Texas*²⁸⁵ perpetuated this silence. The *Lawrence* opinion was a watershed moment for sexual rights. The Court struck down the Texas sodomy law and expanded constitutional protection to nonmarital, same-sex sexual relations.²⁸⁶ But the opinion is oddly, almost obsessively, focused on the role of sex in reinforcing emotional bonds. In seeking to demonstrate that sex (and the right to engage in it) is not *always* about sexual pleasure, the *Lawrence* Court seemed to forget that it can *ever* be about sexual pleasure.²⁸⁷

The *Lawrence* decision has generated formidable debate about the precise meaning and implications of the Court's decision.²⁸⁸ Because the Texas statute prohibited sodomy only between members of the same sex, the Court could have resolved the issue on equal protection grounds, which would have allowed it to avoid overturning

²⁸⁵ 539 U.S. 558 (2003).

²⁸⁶ *Id.* at 578.

²⁸⁷ Ironically, there is no evidence that John Lawrence and Tyron Garner were in a longstanding romantic relationship. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1408 (2004) (pointing out the lack of such evidence); Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 36 (2010) (noting this irony). At the time of the arrest, Garner was romantically involved with another man, while Garner and Lawrence were likely at most occasional sex partners and not in a committed relationship. Douglas Martin, *Tyron Garner, 39, Plaintiff in Sodomy Case*, N.Y. TIMES, Sept. 14, 2006, at D8. The Court's focus on the couple's sex as an expression of love and intimacy reflects the dominant scholarship on intimate relationships and the value of sexual expression. See Rosenbury & Rothman, *supra* note 3, at 821–22 (surveying this scholarship).

²⁸⁸ See, e.g., Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 33–37 (interpreting *Lawrence* as rejecting the concept of tiered scrutiny for fundamental and nonfundamental rights and imposing a presumption against all government intrusions on liberty); Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1981–85 (2010) (describing arguments that *Lawrence* prohibits state bans on polygamy); Dubler, *supra* note 273, at 1181–82 (discussing the implications of *Lawrence* for same-sex marriage); Dubler, *supra* note 274, at 758–60, 809–10 (analyzing *Lawrence* in terms of the line it draws between licit and illicit sex and its rejection of the marriage cure); Franke, *supra* note 287, at 1401–04 (suggesting that the *Lawrence* Court recognized a newly privatized right to liberty instead of a right to privacy); Levit, *supra* note 287, at 29–30 (commenting that *Lawrence* reflected a shift in constitutional law towards inclusion of gays and lesbians); Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. C.R. L.J. 269, 299–311 (2006) (arguing that *Lawrence* may be read as the first case in which the Supreme Court affirmed a right to intimate association); David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453, 453–85 (discussing different readings of *Lawrence* and arguing that it should be interpreted as expanding the fundamental right of privacy by broadening the conception of family); Rosenbury & Rothman, *supra* note 3, at 823–25 (offering a relatively narrow reading of *Lawrence* as sex-negative); Sunstein, *supra* note 284, at 45–60 (describing different potential interpretations of *Lawrence* and interpreting the decision as a response to sodomy laws falling into desuetude).

Bowers v. Hardwick.²⁸⁹ Instead, it explicitly overruled *Bowers* and relied on substantive due process under the Fourteenth Amendment to invalidate the statute prohibiting sodomy.²⁹⁰ Exactly how and why it did so remains the source of significant debate for scholars and courts struggling to interpret the opinion's opaque reasoning.²⁹¹ One potential interpretation is that *Lawrence* recognizes a fundamental right to sexual autonomy, but many scholars and courts have rejected this interpretation.²⁹² Laurence Tribe, in contrast, interprets the deci-

²⁸⁹ See *Lawrence*, 539 U.S. at 574–75 (granting that the Court could resolve the case on equal protection grounds but explicitly opting to invoke a broader substantive due process right instead); *id.* at 579–85 (O'Connor, J., concurring) (arguing that the Court should have resolved the case on equal protection grounds); Sunstein, *supra* note 284, at 34–37 (observing that the Court could have decided *Lawrence* on equal protection grounds but that, though such a holding would have been narrower, the long-term consequences in other contexts may have been more extreme); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1908–16 (2004) (arguing that resolving the case on equal protection grounds would have been inadequate).

²⁹⁰ *Lawrence*, 539 U.S. at 577–78; see also Sunstein, *supra* note 284, at 39–42 (discussing the breadth of the substantive due process right the Court found in *Lawrence* and its explicit conflict with *Bowers*); Tribe, *supra* note 289, at 1908–16 (explaining the Court's decision to rely on a substantive due process right, forcing it to overrule *Bowers*, instead of equal protection).

²⁹¹ See, e.g., *Williams v. Morgan*, 478 F.3d 1316, 1320 & n.4 (11th Cir. 2007) (disagreeing with the lower court, which held that *Lawrence* employs an equal protection analysis and instead applying a due process analysis that subjects the challenged statute to rational basis review); *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006) (noting the difficulty of distilling a clear rule or standard of review from the *Lawrence* opinion). For additional sources on the topic, see *supra* note 288 (surveying scholarship interpreting *Lawrence*).

²⁹² Compare Strasser, *supra* note 272, at 100 (suggesting that *Lawrence* granted a "constitutionally protected right to engage in sexual relations"), with Meyer, *supra* note 288, at 466–77 (reading *Lawrence* as protecting and broadly redefining intimacy), Rosenbury & Rothman, *supra* note 3, at 824–29 (interpreting *Lawrence* as protecting sex only when promoting emotional intimacy and potential for long-term bonds), and Sunstein, *supra* note 284, at 49 ("[T]he Court's decision was less about sexual autonomy, as a freestanding idea, and closer to a kind of due process variation on the old common law idea of desuetude."). See generally Franke, *supra* note 287 (discussing the narrow, "geographized," and "domesticated" version of liberty used by the *Lawrence* majority). Several circuits have rejected the interpretation that *Lawrence* creates a fundamental right to sexual autonomy, privacy, or intimacy. See, e.g., *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 n.32 (5th Cir. 2008) ("*Lawrence* did not categorize the right to sexual privacy as a fundamental right . . ."); *Williams v. Morgan*, 478 F.3d 1316, 1320 (11th Cir. 2007) (finding rational-basis scrutiny of the challenged statute appropriate because *Lawrence* did not recognize a fundamental right to sexual privacy); *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006) ("[T]he [*Lawrence*] Court applied a rational-basis standard of review instead of a strict-scrutiny standard, inferring that the right to engage in homosexual sodomy is not a fundamental right."); *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) (finding that *Lawrence* applied retroactively but that the Court did not create "a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct"); see also Rosenbury & Rothman, *supra* note 3, at 829–35 (discussing the "sex-negative progeny" of *Lawrence*). Some courts cite *Lawrence* for recognizing a more narrowly defined liberty interest in certain consensual adult sexual conduct; for example, the First

sion as pulling away from the notion of tiered scrutiny and instead recognizing a more complex interaction of liberty and equality that is integral to human dignity.²⁹³ Several courts and scholars have debated the extent to which *Lawrence* undermines the use of morality as a rational basis for laws prohibiting sexual conduct.²⁹⁴ Justice Scalia's dissent warned that *Lawrence* calls into question the constitutionality of laws prohibiting incest, masturbation, prostitution, and bestiality.²⁹⁵ Cass Sunstein has argued that the opinion is best understood as rejecting only morality-based justifications that have fallen into desuetude.²⁹⁶

Despite its ambiguity, the *Lawrence* opinion represents a pivotal moment in the Court's approach to nonmarital sex. The *Lawrence* Court recognized sexual relations not as a disappointing reality but as an important component of "a personal bond that is more enduring."²⁹⁷ And, for the first time, it did this in the context of both

and Ninth Circuits declined to recognize a fundamental right in light of *Lawrence*'s murky language, but they settled on a scrutiny that fell between rational basis and strict scrutiny. See *Cook v. Gates*, 528 F.3d 42, 52 (1st Cir. 2008) (adopting a balance of constitutional interests instead of strict or rational-basis scrutiny); *Witt v. Dep't of Air Force*, 527 F.3d 806, 809, 821 (9th Cir. 2008) (applying heightened scrutiny to the "Don't Ask, Don't Tell" policy and remanding to the district court to further develop the record).

²⁹³ See Tribe, *supra* note 289, at 1898 ("*Lawrence*, more than any other decision in the Supreme Court's history, both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty."); see also Sunstein, *supra* note 284, at 48 ("Perhaps the Court was signaling its adoption of a kind of sliding scale, matching the strength of the interest to the demand for state justification, without formally requiring identification of a fundamental right.").

²⁹⁴ See *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (expressing concern that "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" are based on moral choice and that the majority offers no guidance as to the continued constitutionality of these laws). The Fifth and Eleventh Circuits disagreed about the extent to which public morality could justify a ban on the sale of sex toys in light of *Lawrence*. See *Reliable Consultants, Inc.*, 517 F.3d at 745 & n.32, 747 (holding that a statute prohibiting the sale of sex toys to protect public morality did not survive rational-basis review after *Lawrence*); *Williams*, 478 F.3d at 1321, 1323 (holding that, consistent with precedent, public morality provides a rational basis review for a ban on the sale of sex toys); see also Emily L. Stark, *Get a Room: Sexual Device Statutes and the Legal Closeting of Sexual Identity*, 20 GEO. MASON U. C.R. L.J. 315, 321–24 (2010) (identifying two sexual device statutes to illustrate laws that insulate society from "nonnormative" sexual identities); Laura M. Clark, Comment, *Should Texas's Former Ban on Obscene-Device Promotion Pass Constitutional Muster Under a Murky Lawrence?*, 41 ST. MARY'S L.J. 177, 195–206 (2009) (discussing whether a privacy right extends to sex toys).

²⁹⁵ *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

²⁹⁶ Cf. Meyer, *supra* note 288, at 454, 477–79 (explaining Sunstein's moral desuetude interpretation but ultimately rejecting it); Strasser, *supra* note 272, at 115 (summarizing Sunstein's desuetude position but noting its failure to account for *Lawrence*'s LGBT-affirming nature). See generally Sunstein, *supra* note 284.

²⁹⁷ *Lawrence*, 539 U.S. at 567; see also Levit, *supra* note 287, at 30 (noting *Lawrence*'s recognition of certain types of sexual relationships as "important and something the state should support").

nonmarital sexual relations and sexual relationships not conforming to traditional gender roles.²⁹⁸ The decision eloquently describes the importance of these relationships and the importance of being able to choose and experience them without state condemnation that “demeans the lives of homosexual persons.”²⁹⁹

But the *Lawrence* Court reserved its reverence for sex that takes place in the context of emotional relationships. Rather than discussing sexual conduct alone, the Court repeatedly limited its focus to “intimate sexual conduct,” and in particular to intimate sexual conduct that constitutes “but one element in a personal bond that is more enduring.”³⁰⁰ The decision either assumes that the sex at issue takes place in the context of an emotional relationship or, more likely, simply avoids discussing any other context for sodomy.³⁰¹ In doing so, the Court emphasizes that the Constitution does not protect sexual conduct as an end to itself, but rather because it is part of an enduring personal relationship.³⁰²

This becomes even clearer upon comparing the *Lawrence* majority with the *Bowers* decision it overturned and with Justice Scalia’s dissent in *Lawrence*. In *Bowers*, the Court limited its inquiry to whether the Constitution protects the sexual act of sodomy.³⁰³ It rejected any connection between the sexual act and the valuable and constitutionally protected interests of marriage, procreation, and

²⁹⁸ Dubler, *supra* note 273, at 1182 (“*Lawrence* marked the first time that the Supreme Court spoke of nonmarital relationships with a tone of respect and reverence.”); Meyer, *supra* note 288, at 481–84 (discussing *Lawrence*’s recognition of the value of certain same-sex relationships).

²⁹⁹ *Lawrence*, 539 U.S. at 575.

³⁰⁰ *Id.* at 566, 567.

³⁰¹ See Franke, *supra* note 287, at 1407–08, 1417 (asserting that the Court assumed that *Lawrence* and Garner were in a relationship and describing *Lawrence*’s holding as limited to intimate relationships while leaving other sexual behaviors subject to criminalization); Rosenbury & Rothman, *supra* note 3, at 823–29 (reading *Lawrence* to “protect[] sex only when it promotes emotional intimacy and the potential for a long-term bond”); see also Yakaré-Oulé Jansen, *The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 AKRON L. REV. 311, 316–17 (2007) (concluding that *Lawrence* leaves little room “for independent sexual rights outside the sphere of marriage or marriage-like relationships”); Bryan M. Tallevi, Comment, *Protected Conduct and Visual Pleasure: A Discursive Analysis of Lawrence and Barnes*, 7 U. PA. J. CONST. L. 1131, 1141–42 (2005) (interpreting *Lawrence*’s holding as spatially limited to the privacy of one’s home).

³⁰² See Meyer, *supra* note 288, at 481 (finding that *Lawrence* protects “durable, emotional, family-like intimacy”); Rosenbury & Rothman, *supra* note 3, at 823–29 (reading *Lawrence* to promote emotional intimacy and the potential for a long-term bond); see also Jansen, *supra* note 301 (concluding that *Lawrence* leaves little room “for independent sexual rights outside the sphere of marriage or marriage-like relationships”); Tallevi, *supra* note 301 (interpreting *Lawrence* as spatially limited to the privacy of one’s home).

³⁰³ *Bowers v. Hardwick*, 478 U.S. 186, 190, 195 (1986).

family.³⁰⁴ Justice Scalia's dissent in *Lawrence* echoes the *Bowers* Court's focus on the sexual act itself.³⁰⁵ The *Lawrence* majority, in contrast, makes clear that the decision is not about a right to engage in sexual acts. The Court, instead, focuses its rationale on the right to experience intimate emotional relationships with others:³⁰⁶

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. . . . The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.³⁰⁷

Lawrence therefore continues the Court's previous approach of recognizing the value of sex only insofar as it furthers interests, such as marital relations or procreative freedom.³⁰⁸ The Constitution, the Court suggested, protects sexual conduct not as an end in itself, but as a facet of a lasting intimate bond.³⁰⁹ While the Court had the opportunity to expand the right to privacy recognized in *Griswold* and its progeny to sexual acts, it chose instead to construe those acts within a

³⁰⁴ *Id.* at 190–91; see also Levit, *supra* note 287, at 29–30 (stating *Lawrence* focused on “love, affection, and relationships,” unlike *Bowers*, which focused on the particular sexual act itself); Meyer, *supra* note 288, at 461–62 (highlighting *Lawrence*'s focus on relationships and its condemnation of *Bowers*'s focus on the sexual conduct); Strasser, *supra* note 272, at 98 (discussing *Lawrence*'s focus on personal relationships instead of physical acts, as distinguished from *Bowers*).

³⁰⁵ See *Lawrence*, 539 U.S. at 594–96 (Scalia, J., dissenting) (focusing the inquiry on the act of sodomy itself and arguing that sodomy is not a right rooted in U.S. history); see also Levit, *supra* note 287, at 29–30 (describing the Court's shift from an emphasis on sex in *Bowers* to one of relationships in *Lawrence* and the dissent's focus on “forms of sexual activity”).

³⁰⁶ *Lawrence*, 539 U.S. at 567; see also Franke, *supra* note 287, at 1407–08 (stating that Justice Kennedy and the rest of the Court assumed that *Lawrence* and his sexual partner, Garner, were in an intimate relationship and used that presumed intimacy as a basis for rendering a decision in *Lawrence*); Levit, *supra* note 287, at 29–30 (writing that the Court's opinion emphasized “love, affection, and relationships”); Meyer, *supra* note 288, at 461–62, 481–82 (arguing that the *Lawrence* Court framed the legal question within the context of families and personal relationships); Strasser, *supra* note 272, at 98 (“By focusing on personal relationships rather than physical acts, the Court was able to locate same-sex sodomitical relations squarely within one of the strands of substantive due process jurisprudence.”).

³⁰⁷ *Lawrence*, 539 U.S. at 567.

³⁰⁸ See *supra* Part II.C.2 (describing how the Court's earlier opinions justified protecting sexual activity by focusing on the sanctity of marriage and the value of reproduction with no mention of the worth of sexual pleasure).

³⁰⁹ See *supra* notes 306–07 (detailing the *Lawrence* Court's focus on intimate relationships and scholarly assessments of this aspect of the *Lawrence* opinion).

framework it had already established—marriage and other “honorable . . . family-like relationship[s].”³¹⁰

Such an approach ignores the full reality of sex. Many people engage in sexual relations without any desire for an enduring personal bond with their partner. The full range of sexual experience includes those who value sex purely, mostly, or at least somewhat because of sexual pleasure. While defining the right at issue in *Lawrence* as simply one of sexual pleasure would have neglected other important concerns, the Court’s insistence on ignoring sexual pleasure is similarly myopic. As Katharine Franke has noted, *Bowers* overdetermined gay men and women in sexual terms, and *Lawrence* underdetermined their sexuality by limiting the issue to the emotional ties sex can strengthen.³¹¹ The result is an opinion that treats gay sex the same way the Court has treated heterosexual sex yet fails to advance the way the Court conceptualizes and treats sexual pleasure alone.³¹²

III

TOWARD SEX-POSITIVE LAW

A. *Making Law Sex-Positive*

Lawmakers, judges, and scholars should adopt a sex-positive framework that acknowledges the value of sexual pleasure to the individual and society. Sexual pleasure is not a de facto valueless or negative attribute that obtains positive value only in the context of marriage, procreation, or an intimate relationship. It is, in itself, an important and positive part of human existence.

Recognizing the value of sexual pleasure does not preclude regulating activities that provide sexual pleasure. We can acknowledge that sexual pleasure is valuable without placing it above all else. There are many important reasons that we might continue to regulate activities that yield sexual pleasure.³¹³ One person’s sexual pleasure may come at the expense of another person’s pleasure, autonomy, and physical

³¹⁰ Meyer, *supra* note 288, at 481–82; *see also* Levit, *supra* note 287, at 29–30 (discussing the Court’s focus on relationships in its decision).

³¹¹ Franke, *supra* note 287, at 1408–09.

³¹² *See* Franke, *supra* note 287, at 1414, 1417 (arguing that the *Lawrence* Court does not acknowledge nonnormative conceptions of sex and intimacy and that in the Court’s eyes, sex has no legal status in its own right); Jansen, *supra* note 301, at 316–17 (positing that *Lawrence* does not leave “much room for independent sexual rights outside the sphere of marriage or marriage-like relationships”); Rosenbury & Rothman, *supra* note 3, at 823–28 (“As such, Justice Kennedy’s opinion reinforces, rather than challenges, negative constructions of sex. In accordance with the traditional channeling function of family law, sex has value only when it creates, solidifies or deepens an emotional bond between two individuals.”).

³¹³ *E.g.*, ABRAMSON & PINKERTON, *supra* note 14, at 54–55.

or psychological well-being.³¹⁴ In the context of rape, for example, it would be abhorrent to value the sexual pleasure of the rapist over the victim's sexual autonomy.³¹⁵

In this way, sexual pleasure is no different from other types of pleasure. Although the pleasure we derive from sports is valuable, we prohibit gladiator fights; we value the pleasure we derive from art, but we prohibit individuals from stealing art simply because it would bring them happiness. The parameters of these limitations may be open to debate. But we need not ignore the pleasure many derive from these activities in order to regulate them reasonably.

Recognizing and appreciating the value of sexual pleasure enriches our ability to regulate activities that affect said pleasure because it requires legislatures and courts to be honest about the trade-offs associated with proposed regulation and interference. It yields a more complete assessment of the true harms and benefits of the activity we seek to regulate. The following subsections analyze how various areas of law must reconceptualize their goals and reassess their costs if we accept the premise that sexual pleasure has positive value.

B. *Obscenity Law*

Valuing sexual pleasure requires a more complete discussion about what kind of speech may be regulated and why. If we value sexual pleasure as much as we value the pleasure we receive from literature and art, then it makes no sense to designate offensive prurient material as worthy of less protection than, for example, offensive comedy or music. Instead, we must rethink the purpose and scope of the First Amendment in a sex-positive legal framework.

³¹⁴ See generally SCHULHOFER, *supra* note 162 (discussing legal frameworks of sex crimes and the role sexual autonomy plays in such frameworks while using anecdotal examples of the violation of sexual autonomy).

³¹⁵ See *id.* at 274–82 (critiquing rape and sexual harassment law's failure to protect an individual's freedom to deny a sexual advance and discussing areas where change is occurring and should occur to reflect values of sexual autonomy to partake in and refuse sex). As many feminist scholars have noted, the valuing of male sexual pleasure above female autonomy has a significant negative impact on society. The norm that women exist to be attractive for male sexual pleasure objectifies and marginalizes women, leading to entrenched gender inequalities and "rape culture." See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 635–36, 642–48 (1983) (drawing parallels between male domination over sexual acts and the state's control of these same acts); see also Catharine A. MacKinnon, *Sexuality, Pornography, and Method: "Pleasure Under Patriarchy,"* 99 ETHICS 314, 315–16, 340 (1989) (discussing how feminist theory contextualizes sexuality within a framework of gender inequality, specifically male dominance and rape culture).

Valuing sexual pleasure does not preclude the regulation of speech that appeals to prurient interests; it simply eliminates the false sexual-nonsexual dichotomy of the current obscenity law. This offers two possible paths: We can either treat formerly “obscene” speech like all other speech or, alternatively, we can acknowledge that sexual speech is not uniquely devoid of value and rethink our First Amendment protections for *all* forms of speech. The former path is simpler. It requires us only to excise the category of obscenity from First Amendment jurisprudence. Content-based restrictions of speech that would formerly fall within the *Miller* test would be subject to strict scrutiny. Arguments that the speech promotes harm such as violence against women would have to demonstrate clear and present danger of such harm.³¹⁶

The second path requires changing—and potentially weakening—the strong protections we currently afford speech. If we still want to designate certain content-based speech regulation as deserving less protection, we must rethink the parameters of this category. We can no longer presume that sexually arousing speech is inherently entitled to less protection than all other forms of speech simply because sexual arousal is an inherently less valuable goal. Instead, we must have a more honest discussion about whether the state should be able to curtail speech based on the effects of its content and, if so, how we determine which speech is subject to less constitutional protection.

This path may lead lawmakers and scholars to adopt a test for speech regulation that explicitly focuses on the value of the speech, the potential harm, and the nexus between the speech and the harm.³¹⁷ The regulation of speech deemed to have lower value may require a weaker nexus between the speech and its harm than a standard of clear and convincing danger. We may also broaden our conception of harm or change its parameters. Several scholars and lower courts have advocated this approach.³¹⁸ Martha Nussbaum, for

³¹⁶ See *supra* notes 56–61 (describing the *Brandenburg* test which applies to regulations on speech protected by the First Amendment and requires that such regulations refrain from banning speech unless the state can demonstrate that the speech poses an imminent and highly likely risk of harm).

³¹⁷ See Alexander, *supra* note 3, at 554 (analyzing governmental concerns implicated by regulation of low-value and high-value speech and the strength of the link between regulation and desired harm prevention).

³¹⁸ See INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY ch. 16, § 16–3(q) (1984), reprinted in *IN HARM’S WAY*, *supra* note 43, at 438–44 (defining pornography as sexually explicit subordination of females and detailing scenarios to elucidate that subordination), *invalidated by* Am. Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985); NUSSBAUM, *supra* note 44, at 140–41 (noting that MacKinnon and Dworkin have created a hypothetical ordinance to handle the harms felt by women affected by the por-

example, proposes an approach that regulates speech based on its harm to dignity and its subordination and objectification of others, an approach that mirrors one used in Germany.³¹⁹

An approach that focuses on speech value and potential harm would likely allow the regulation of sexually arousing speech but, unlike the current approach, it does not *presume* that sexually arousing speech is somehow less important than other types of speech. It would also require courts to appropriately weigh sexual pleasure as a valuable goal and recognize that speech that exists only to arouse has value just as courts currently recognize the value of speech that exists solely to amuse or enrage.³²⁰ This sex-positive approach would also undermine the purported harm of sexual arousal for its own sake; if sexual pleasure is a good thing, then the fact that speech provides or encourages sexual pleasure, even outside the confines of marriage or intimacy, is not in itself reason to regulate. The state must put forward some other harmful effect caused by the speech, such as a specific contribution to the subordination of women or sexual violence.³²¹

nography industry that allows them to sue for damages as well as injunctive relief if they can make a showing of harm); Sunstein, *supra* note 3, at 595–602 (arguing that anti-pornography legislation acts to counter three different harms: “harms to those who participate in the production of pornography, harms to the victims of sex crimes that would not have been committed in the absence of pornography, and harms to society through social conditioning that fosters discrimination and other unlawful activities”).

³¹⁹ NUSSBAUM, *supra* note 44, at 144–46. Catharine MacKinnon and Andrea Dworkin have advocated a model of civil liability for pornography that mirrors that of libel or slander, where the plaintiff must show that the speech caused some harm other than offense. See James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153, 1156–57 (1993) (noting that MacKinnon and Dworkin drafted a civil rights statute that was enacted in several places including Minneapolis and Indianapolis); see also Elizabeth Kirby Fuller, Note, *Holding Producers and Distributors Liable for the Harms of Sexually Violent Pornography Through Tort Law*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 125, 125–26 (1994) (discussing the civil liability statute drafted by MacKinnon and Dworkin). See generally IN HARM’S WAY, *supra* note 43 (describing the civil hearings and the ordinances put in place). But there is no reason that an approach focused on harm should be limited to sexually arousing material.

³²⁰ Divorcing the regulation of obscenity from the concept of sexual pleasure as devoid of social value may allow for regulation that enhances sexual autonomy for many. An obvious example of this is that it would likely prevent states from using obscenity laws to target gay and lesbian erotic material, which is vulnerable under the current state of affairs. See ESKRIDGE, *supra* note 60, at 203 (arguing that *Miller*’s formulation can encourage censorship of homosexual pornography or other homosexual actions and items due to the vaguely defined difference between “unprotected obscenity and protected indecency”).

³²¹ Shaman, for example, notes that there is evidence that degrading and violent sexual imagery has antisocial effects, but there is no evidence of such effects from nonviolent, nondegrading sexually explicit material. Shaman, *supra* note 39, at 307. Thus, regulation that focuses on harmful effects may need to divorce the concepts of prurience and dangerousness. Arguably, this is similar to the approach the Court currently takes with regard to the zoning of pornographic theaters and stores. Regulations that limit the zoning of pornographic theaters may be subject to intermediate scrutiny if they are justified by “secondary

An approach that appropriately values sexual pleasure generates a more complete conversation about speech regulation. Scholars and lawmakers alike will disagree on whether an approach such as the one proposed by Nussbaum is courageous or simply perilous. A test that balances the inherent value of speech against its potential costs may allow the state to silence unpopular views, and a test that allows the state to more freely regulate material that objectifies, exploits, or encourages violence against others may constitute unjust viewpoint discrimination.³²² But we cannot effectively debate these approaches without first recognizing and eliminating the unwarranted assumptions about sexual pleasure that support our current legal framework.

effects” of such speech, such as prostitution or illegal drug transactions. *See* Huppín & Malamuth, *supra* note 39, at 61 (noting that secondary effects cases are, at least on their face, regulations to curtail sex communication byproducts like illicit drug distribution). While regulations based on secondary effects are ostensibly not “content-based,” such secondary effects are inextricably tied to the content of the speech, and several justices have acknowledged this. *See id.* at 61–62 (noting that in the *Alameda Books* case, Justice Souter believed that there should be a correlation between content and effects and Justice Kennedy stated that the ordinances at hand were content-based). Valuing sexual pleasure could perhaps extend this approach to other types of secondary effects, such as increases in violence or the subjugation of women, as a substitute to the current obscenity regime. Mark Huppín and Neil Malamuth have suggested a similar approach to obscenity. *See id.* at 62–66, 69–74 (arguing that obscenity is similar to low-value sexual speech and commercial speech and should also receive the protection of intermediate scrutiny, such that obscenity could only be regulated when it “bent reality in a particularly harmful way”). A legal approach that values sexual pleasure, however, would differ from their proposal significantly. Huppín and Malamuth propose applying intermediate scrutiny only to speech that appeals to the prurient interest and has no redeeming SLAPS value. *See id.* at 76–77 (suggesting that intermediate scrutiny should be applied to pornography and obscene speech while admitting it is of low value). This framework continues to rely on the assumption that sexual pleasure is somehow less valuable than all other types of pleasure. While it no longer allows for a ban on obscenity unless it demonstrates a connection to harm, it still singles out sexually arousing speech as meriting less protection than other forms of speech on the basis of its sexually arousing nature. Valuing sexual pleasure requires us to reject this assumption. A more sex-positive approach would consider the value of *any* speech in relation to its nexus to certain harms.

³²² *See* *Hudnut*, 771 F.2d at 325, 327–28 (striking down an ordinance that regulated pornography by stating that it created unjust viewpoint discrimination because the government did not “leave to the people the evaluation of ideas” and created an order in which those “who espouse the approved view may use sexual images” while others could not); Collins & Skover, *supra* note 44, at 1387–88 (discussing Judge Easterbrook’s opinion that “there is no one correct view about the value of representations of sexual violence and subjugation”); Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 877–83 (1993) (probing into two different critiques of the Court’s use of the viewpoint neutrality principle against efforts to regulate pornography); Post, *supra* note 44, at 331–32, 334–35 (arguing that the permissibility of pornography regulation will be based in part on whether the First Amendment is cast as individualistic or paternalistic).

C. Criminalization of BDSM Activities

Sex-positive law requires us to rethink not only how we regulate BDSM, but also how we regulate numerous other pleasurable but potentially risky activities. A world that values sexual pleasure cannot explain why BDSM is treated as assault while potentially injurious activities such as contact sports are permitted. There is nothing inherently riskier, more difficult to regulate, more disturbing to the public peace, or more harmful to the dignity of the consentor about BDSM than there is about these permitted activities. BDSM is not distinguished because of its unique harm, but rather because of its unique benefits—it exists to provide sexual pleasure, and does so in a way that is not traditionally linked to marriage, procreation, or intimacy.

Placing BDSM in the category of permitted activities such as sports and cosmetic surgery not only appropriately recognizes the value of sexual pleasure, but also encourages a legal environment that is more respectful of sexual autonomy and more responsive to its breach. Legalizing BDSM may strengthen the cases of those who have been assaulted by partners who exceeded the boundaries of consent or never sought consent in the first place.³²³ Legalization can reduce the stigma of BDSM practice and therefore encourage BDSM practitioners who have been assaulted to come forward without fear of being shamed or rebuffed by police officers.³²⁴ It also requires lawmakers, prosecutors, and courts to understand the parameters of BDSM and therefore recognize when those parameters are violated or a partner ignored or was reckless as to another partner's consent.³²⁵ Indeed, BDSM practice can counter the "rape culture" that objectifies women and presumes access to their bodies unless sex is resisted unequivocally.³²⁶ It values the sexual pleasure of both partners and

³²³ See Pa, *supra* note 3, at 68–69 (discussing how the court in *Washington v. Guinn* excluded expert testimony that may have shed light on BDSM and its role in the case and arguing that such testimony could have given evidence about whether the victims "knew that these antics were fantasies and that no threat of actual harm existed").

³²⁴ See *id.* at 84–85 (noting several examples of the effects of this stigma on BDSM victims, including the difficulty New York police had in catching the "Dangerous Top" serial sexual assailant because of the reluctance of his victims to come forward).

³²⁵ See *id.* at 68–69 (emphasizing the significant positive impact that a court's understanding of consent in the context of BDSM could have had on a rape case).

³²⁶ See Fowles, *supra* note 135, at 120–25 (arguing that the "safe, sane, and consensual BDSM landscape" is one that can empower women with the ability to transcend rape culture with explicit consent and control, yet also noting the subversion of such an empowerment by mainstream porn and sex culture which promotes BDSM as a means to accelerated sexual pleasure without concern for the rules and boundaries of the culture); Riggs, *supra* note 20, at 112–13 (discussing how BDSM may be the "most responsible form of sex because you *have to* talk about it," that talking about sex and consent can lead to

requires communication about desires and boundaries.³²⁷ BDSM is problematic when it is co-opted by those who use its imagery without its principles of mutual, enthusiastic consent.³²⁸ A legal environment that values sexual pleasure is better able distinguish these types of practices.

To the extent that even fully consensual BDSM practices are deemed too dangerous to allow, a legal community that values sexual pleasure must, at least, be honest about the trade-offs being made and apply a similar calculus to other practices. Even sex-positive lawmakers may determine that sexual activities with a significant risk of physical trauma or death are not justified by the benefits of sexual pleasure, but such a determination requires us to turn a similarly critical eye to dangerous sports and elective surgery.

D. *Sexual Freedom and Constitutional Law*

Recognizing the value of sexual pleasure may have a range of implications for sexual freedom under constitutional law. It may strengthen arguments that the Supreme Court should recognize (or Congress should draft) a fundamental right to sexual pleasure or sexual autonomy. But it need not make such a profound impact in order to generate significant change. More likely, valuing sexual pleasure will strengthen challenges to state legislation that limits sexual freedom by undermining state justifications for these laws.

Prior to *Lawrence*, laws that limited sexual freedom were subject to strict scrutiny only if they implicated marital privacy or procreative rights.³²⁹ Otherwise, courts employed a rational basis standard.³³⁰ *Lawrence* implies that a heightened rational basis or intermediate level of scrutiny should be applied to limitations on consensual sexual activities involving adults, although some courts continue to use rational basis.³³¹ It also implies that morality-based arguments are

safer sex, and that it is a means to confront the “twisted, violent, inequality-ridden society that we live in”).

³²⁷ See *supra* note 326 (discussing how BDSM increases communication between sexual partners and can lead to female empowerment that dismantles rape culture).

³²⁸ See Fowles, *supra* note 135, at 120–25 (noting that portrayals of BDSM in mainstream pornography, and sex culture more broadly, may undermine its value as a consent-driven experience).

³²⁹ See *supra* Part II.C.2 (describing several cases embodying this framework). *But see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (using an undue burden standard for the regulation of abortion before viability).

³³⁰ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

³³¹ See, e.g., *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744–45 (5th Cir. 2008) (employing a rational basis standard); *Williams v. Morgan*, 478 F.3d 1316, 1320 (11th Cir. 2007) (same); *supra* note 292 and accompanying text (discussing possible interpretations of the level of scrutiny required by *Lawrence*).

insufficient in themselves to meet this standard.³³² But *Lawrence* fails to consider sexual pleasure in its analysis and, in fact, seems to earnestly avoid mentioning it.³³³

Valuing sexual pleasure can change this legal landscape in two ways: (1) Legislatures that view sexual pleasure in itself as a positive value will be less likely to pass legislation that infringes on sexual freedom; and (2) it will be more difficult for such regulations to pass even rational basis review because rational basis justifications will no longer be able to rely on the assumption that limiting individuals' indulgence in sexual pleasure alone strengthens public morality. If sexual pleasure is in itself valuable, the state cannot justify a law purely on the grounds that the public needs protection from it.

Constitutional challenges to laws prohibiting the sale of devices intended to stimulate the genitals (hereinafter "sex toys") provide an example of how valuing sexual pleasure could change courts' constitutional analysis of sexual freedom. Currently, at least three states have laws that explicitly ban the selling of sex toys.³³⁴ These laws exist to prohibit a means of experiencing sexual pleasure.³³⁵ States defending the laws against constitutional challenge cite the state interest in discouraging "prurient interests in autonomous sex,"³³⁶ "prurient interests in sexual gratification,"³³⁷ "the pursuit of sexual gratification unrelated to procreation,"³³⁸ and "masturbation . . . for its own sake."³³⁹ The regulation of sex toys is intricately tied to social anxiety about and legal disapproval of masturbation.³⁴⁰ Sex toy bans are an even more direct regulation of sexual pleasure than contraception

³³² See *supra* notes 294–96 and accompanying text (discussing the extent to which *Lawrence* suggests that morality-based arguments are constitutionally insufficient to survive rational basis review).

³³³ See *supra* Part II.C.3 (discussing the Court's focus on sex as part of intimate relationships, as opposed to purely for sexual pleasure).

³³⁴ D.C. CODE ANN. § 22-2201 (2010); ALA. CODE § 13A-12-200.2(a)(1) (2005); GA. CODE ANN. § 16-12-80 (2011); KAN. STAT. ANN. § 21-6401 (2012).

³³⁵ See Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1068 (2004) (examining possible rationales for laws banning devices that provide sexual pleasure).

³³⁶ Brief for Appellant at 13, *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001) (No. 99-10798).

³³⁷ Texas Attorney General Greg Abbott's Appellee Brief at 7, *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008) (Nos. 06-51067 & 06-51104).

³³⁸ *Id.* at 23.

³³⁹ Brief for Appellant, *supra* note 336, at 13.

³⁴⁰ See ABRAMSON & PINKERTON, *supra* note 14, at 25–27 (describing historical disapproval of masturbation by medical, religious, and legal authorities); Miller, *supra* note 19, at 262–70 (describing the history of laws that reflect social anxiety about masturbation).

bans because they prohibit devices specifically designed to increase sexual pleasure.³⁴¹

Prior to *Lawrence*, courts overwhelmingly held that sex toy bans did not violate the constitutional right to privacy.³⁴² Such cases distinguished access to sex toys from access to contraception because the latter implicates procreative decisionmaking and is therefore subject to heightened scrutiny.³⁴³ With no fundamental right at stake, these statutes only had to survive rational basis review and could easily be found to further the legitimate government interest of promoting public morals.³⁴⁴ Constitutional challenges were successful only to the extent that they ensured statutory exceptions for medical use.³⁴⁵

³⁴¹ See, e.g., Susan Ekberg Stiritz & Susan Frelich Appleton, *Sex Therapy in the Age of Viagra: "Money Can't Buy Me Love,"* 35 WASH. U. J.L. & POL'Y 363, 387 (2011) (noting that laws regulating sex toys prohibit devices that provide clitoral stimulation important for female sexual pleasure); Sunstein, *supra* note 335, at 1068 (noting that banning sex toys bans devices designed to increase sexual pleasure); see also Alana Chazan, Note, *Good Vibrations: Liberating Sexuality from the Commercial Regulation of Sexual Devices*, 18 TEX. J. WOMEN & L. 263, 265 (2009) ("Asserting a substantive due process right against the commercial regulation of sexual devices carries an inherent promise of liberation in that it asserts a right to individual sexual intimacy for the sake of sexual pleasure in itself.").

³⁴² See *State v. Brenan*, 772 So.2d 64, 72 (La. 2000) (declining to extend "constitutional protection in the way of privacy to the promotion of sexual devices"); *Regalado v. State*, 872 S.W.2d 7, 9 (Tex. Ct. App. 1994) (holding that the use or promotion of obscene devices is not protected by the right to privacy); see also *Sewell v. State*, 233 S.E.2d 187 (Ga. 1977) (holding that a sex toy ban was constitutional without even mentioning the right to privacy). A Mississippi case, *PHE, Inc. v. State*, 877 So.2d 1244 (Miss. 2004), was issued after *Lawrence* but does not discuss the decision, perhaps because it addresses only state constitutional law.

³⁴³ See *Brenan*, 772 So.2d at 70–71, 72 (listing contraception as one of many liberties protected by a fundamental right, while declining to extend any constitutional protection to sex toys); *PHE*, 877 So.2d at 1248 (finding that "society's interest in protecting the right to control conception is of greater magnitude than the interest in protecting the right to purchase sexual devices"); *Regalado*, 872 S.W.2d at 9 (contrasting the fact that "[t]he right to privacy protects activities relating to marriage, procreation, contraception, motherhood, family relationships, and child rearing and education," with its holding that "[t]here is no fundamental right to use obscene devices").

³⁴⁴ See, e.g., *Brenan*, 772 So.2d at 73.

³⁴⁵ See, e.g., *State v. Hughes*, 792 P.2d 1023, 1031–32 (Kan. 1990) (requiring such an exception); *Brenan*, 772 So.2d at 76 (same); see also Susan Reid, *Sex, Drugs, and American Jurisprudence: The Medicalization of Pleasure* 34–39 (April 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1810965&download=yes (discussing courts' focus on medicinal functions of sex toys to the exclusion of their sexual function). This medicalization argument only further underscores the low value placed on sexual pleasure; constitutional protection relied on evidence of a medical abnormality that can be cured, and pleasure is only valued as a means to that end. See Reid, *supra* at 34 ("In order to recast the behavior as therapeutic, the individual interest at stake must be 'elevated' from an interest in pleasure to an interest in medical treatment."); Chazan, *supra* note 341, at 293 (arguing that allowing statutes with medical exceptions to stand "continues the legacy of criminalizing and pathologizing all people who use sexual devices"). Under such laws, there is no healthy use of sex toys; individuals may only use

Lawrence created a new crossroads for sex toy cases by recognizing the value of nonmarital, nonprocreative sexual relationships.³⁴⁶ It subjected those relationships to a murky standard of review that seemed stronger than rational basis and implied that morality-based justifications would not meet this standard.³⁴⁷ However, *Lawrence*'s focus on intimate relationships rather than sex itself could allow courts to distinguish it as involving interests more important than mere sexual pleasure.³⁴⁸

As a result, there is a current split in the federal circuits as to *Lawrence*'s implications for sex toy laws. In *Williams v. Morgan*, the Eleventh Circuit upheld Alabama's ban on the sale of sex toys. It distinguished the case from *Lawrence* on the grounds that *Lawrence* concerned private sexual conduct as opposed to the more public nature of the sale of a sex toy.³⁴⁹ It found that the state's interest in protecting public morals provided a rational basis sufficient to withstand constitutional challenge.³⁵⁰ In contrast, the Fifth Circuit struck down Texas's ban on sex toy sales in *Reliable Consultants, Inc. v. Earle*. Citing *Lawrence*, the court held that the state's interests in morality could not justify the ban.³⁵¹

Valuing sexual pleasure would strengthen constitutional challenges to sex toy laws by further undermining the rational bases states use to justify them. Even where, as in *Williams*, courts distinguish sex toy laws from *Lawrence* based on the public nature of the sale of sex toys, the statutes must still survive rational basis review. States faced with challenges to sex toy laws rely on their interest in protecting public morality to provide a rational basis for the laws; this was the argument used in *Williams* and *Reliable Consultants*.³⁵² The argument assumes that sexual activity is immoral when it is engaged in purely for the sake of pleasure and without any other benefit such as marriage or procreation. If sexual pleasure is valuable in itself—if it is,

sex toys to the extent that they can demonstrate they are impaired and abnormal. See Reid, *supra* (discussing courts' steadfast insistence that only medical uses, not sexual uses, preserve any right to sex toys).

³⁴⁶ See *supra* Part II.C.3 (discussing an interpretation of *Lawrence* leading to this conclusion).

³⁴⁷ See *id.* (discussing various standards of review that commenters have seen in *Lawrence*).

³⁴⁸ See *id.* (discussing this possibility).

³⁴⁹ *Williams v. Morgan*, 478 F.3d 1316, 1322 (11th Cir. 2007).

³⁵⁰ *Id.* at 1322–23.

³⁵¹ *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744–45 (5th Cir. 2008). The court could not, however, resist discussing the importance of sex toys to married couples, those with therapeutic needs, and those who wish to refrain from premarital intercourse. *Id.* at 742 & n.16.

³⁵² See *supra* notes 336–39 and accompanying text.

indeed, a positive thing—then the need to prevent such sexual pleasure no longer provides a rational basis for a law. States must, instead, provide evidence that using sex toys to experience sexual pleasure is problematic in some other way, which is a difficult argument to make. In this area, as in many others, valuing sexual pleasure would lead to meaningful changes in state regulation.

CONCLUSION

A. *Implications for Other Areas of Law*

Valuing sexual pleasure yields a more complete assessment of the true harms and benefits of the activities we regulate. This Article focuses on three areas of law that are most directly related to sexual conduct and state regulation of sexual practices. But implications for sex-positive law extend beyond these areas.

1. *Family Law*

Family law involves many implicit assumptions about sex and sexual pleasure. To a certain extent, family law privileges sex. The family unit is defined through the (usually heterosexual) sexual relationship of the primary partners; this privileges sexual relationships over nonsexual relationships.³⁵³ But this privileging is limited in ways that reflect an underlying fear of and disgust with sexual pleasure.³⁵⁴ Sex is valued only insofar as it furthers marital or marital-like relationships.³⁵⁵ Such relationships transform the otherwise harmful or low-value sexual pleasure into something worthwhile—marriage and family relationships.³⁵⁶ A sex-positive approach may shake some of the core foundations of family law. If sexual pleasure need not be channeled into something else deemed to be positive—if it is regarded as positive in and of itself—then marriage may lose some of the justification for its status.

³⁵³ See Appleton, *supra* note 3, at 272–76 (discussing the importance of sexual intimacy, particularly of the heterosexual variety, to the family); Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 663–65 (1992) (outlining the centrality of sex (especially heterosexual sex) to family law's views of the family and how those views ostracize nonsexual families).

³⁵⁴ See Appleton, *supra* note 3, at 276–78 (arguing that family law channels sex toward marriage in order to “sanitize[]” sex).

³⁵⁵ *Id.* at 277.

³⁵⁶ *Id.* at 278; Franke, *supra* note 3, at 204–05 (arguing that such relationships tie hedonism to propriety).

2. *Sex Work and Prostitution*

A sex-positive framework may also challenge some of the justifications for criminalizing sex work. Sex exchanged for cash is stripped to a transaction of pleasure for pay. It does not contribute to the more traditional and acceptable goals of facilitating marital relationships or promoting emotional intimacy, thus it is denied constitutional protection.³⁵⁷ Legal scholarship has generated several arguments favoring sex work prohibition as well as counterarguments highlighting the potentially more harmful effects of prohibition.³⁵⁸ Some of the rationales for prohibition rely on a moral distaste for sexual pleasure stripped of intimacy and engaged in for its own sake.³⁵⁹ Attributing more value to sexual pleasure in itself undermines these arguments.

3. *Rape Law*

Valuing sexual pleasure provides no license to experience that pleasure at the expense of another's sexual autonomy, just as valuing the pleasure one derives from art does not require us to allow an individual to steal another's painting or assault an unwilling individual as part of a performance art piece. In fact, valuing sexual pleasure can strengthen rape law justifications. While traditional rape law considers, and arguably even values, the defendant's sexual pleasure in some ways, it often ignores the victim's sexual pleasure.³⁶⁰ Sexual violence and nonconsensual sex undermine an individual's choices about how to experience pleasure and, in consequence, her ability to experi-

³⁵⁷ See Sunstein, *supra* note 335, at 1066 (surmising that commercial sex is denied constitutional protection because, unlike noncommercial sex, it does not often involve intimacy).

³⁵⁸ See, e.g., ABRAMSON & PINKERTON, *supra* note 14, at 79–80 (noting the argument that society has an ethical obligation to legalize or decriminalize prostitution because people become prostitutes due to economic disadvantage that is not their fault); Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1220–29 (1999) (contending that prostitution supports inequality and promotes violence and proposing both criminal and civil sanctions for all parties involved except the person used in prostitution); Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1730–31 (2010) (arguing for the need to both end sex trafficking and prostitution—an “abolitionist” perspective—and acknowledging the perspective of the scholarship on the topic that sees the need to only do the former).

³⁵⁹ See, e.g., Sunstein, *supra* note 335, at 1066.

³⁶⁰ See Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 634–35 & n.33 (2005) (commenting on two scholars' consideration of pleasure in the context of rape and noting the demonstrably male-centric perspective of their analysis, including the failure to accurately consider the victim's position); Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 2 (1998) (noting that some elements of rape “promote the sexual agency of men at the expense of that of women”).

ence it at all.³⁶¹ Several feminist scholars have argued that laws allowing defendants to presume consent from lack of resistance or passive silence reinforce traditional gender roles, victimize women, and ignore the victim's sexual trauma and the subsequent harm it may do to her ability to have positive sexual experiences.³⁶² Such laws are grounded in and reinforce men as passionate and pleasure-seeking and women as mere gatekeepers to sexual pleasure who must affirmatively and clearly ward off unwanted sexual advances to have their sexual preferences respected.³⁶³ This ignores the importance of a woman's sexual pleasure and ability to determine when and how to experience that pleasure.³⁶⁴

Yet even the reforms pressed by feminist scholars risk continuing to marginalize female sexual pleasure. As Katherine Franke has argued, feminist legal scholarship tends to focus on male sexual pleasure while ignoring female sexual pleasure.³⁶⁵ Such scholarship consistently posits sex as a negative experience for women in which they submit to men's desires.³⁶⁶ This echoes traditional rape law's view that women are simply passive recipients of male sexual desire, without desire of their own.³⁶⁷ Feminist legal theory's failure to focus on

³⁶¹ See Riggs, *supra* note 20, at 109–15 (identifying interpersonal sexual violence as an impediment to positive sexuality); see also SCHULHOFER, *supra* note 162, at 99–105 (discussing the value of sexual autonomy as an important interest to be protected against damage done by unwanted sex); Franke, *supra* note 3, at 206 n.112 (noting the argument that women sacrifice pleasure due to fear of sexual violence from men); Anastasia Higginbotham, *Sex Worth Fighting For*, in YES MEANS YES!, *supra* note 20, at 241, 248 (arguing that rape “murder[s] a woman’s experience of sex, love, and pleasure”).

³⁶² Coughlin, *supra* note 360, at 2, 4–6 (noting the way in which current rape law perpetuates various pernicious phenomena); see also Anderson, *supra* note 143, at 103–04, 119–21, 127 (noting that the evidentiary inquiry into a woman's sexual history can subject her to trauma and impede the jury's ability to assess the truth and stating that acquaintance rape is especially injurious but evidence of prior conduct with the defendant is categorically admitted).

³⁶³ See ABRAMSON & PINKERTON, *supra* note 14, at 122–23 (discussing the myths surrounding the sexual proclivities of men and women that pervade culture and work to subjugate the sexual expression of women); Anderson, *supra* note 143, at 106, 119 (describing studies finding that jurors inappropriately acquit acquaintance rapists when victims are promiscuous on theories of “assumption of the risk and contributory negligence”); Corinna, *supra* note 33, at 182–83 (discussing the lengthy history of the distortion of female sexuality including misconceptions about pleasurable).

³⁶⁴ See Higginbotham, *supra* note 361, at 248 (arguing that rape is the denial of a victim's right to be a sexual being).

³⁶⁵ Franke, *supra* note 3, at 197–98 & n.77, 200, 206.

³⁶⁶ See *id.* (explaining the continuous linking of sex and oppression in second-wave feminism).

³⁶⁷ See Anderson, *supra* note 143, at 54, 74–77, 122–23, 152 (describing traditional conceptions of consent as woman's passive acquiescence to male sexual initiative and highlighting examples where consent was found despite a glaring lack of consideration for the female victim).

women's sexual pleasure—or to minimize it to simply an absence of male aggression—reinforces limiting stereotypes and marginalizes the actual experiences of women.³⁶⁸ A truly sex-positive view of rape must acknowledge the importance of sexual pleasure for many women. It must also address the way that rape law marginalizes women's sexual desires by limiting their ability to live as sexual beings who can freely decide how and when to experience sexual pleasure.³⁶⁹ It should acknowledge that defining rape is about defining what is good about sex, not merely what is bad.

Sex positivity would also affect rape law by enriching our understanding of consent. It posits that sex is to be enjoyed and not merely endured. As a result, sexual interactions should be characterized by enthusiastic consent rather than mere silence or acquiescence.³⁷⁰ Accepting sexual pleasure as a good thing enables us to better combat nonconsensual sex and violence, which are *never* acceptable.³⁷¹

Sex positivity may also highlight some of the limits of criminal law in preventing rape. This is because sex positivity requires a more honest conversation about how individuals think about and engage in sex and how assumptions about sex and sexuality contribute to the problem of rape. Such a conversation must include an analysis of the deeper social, cultural, and economic drivers of rape.³⁷² Currently, the criminal justice system, defined primarily by an overly simplistic punishment emphasis, does not take on such a broad and comprehensive approach.³⁷³ Such policy changes must also contend with the fact that rape exists on a wide spectrum of behavior that reflects and reinforces

³⁶⁸ See Franke, *supra* note 3, at 206–07 (noting the numerous shortcomings of marginalizing pleasure and desire in feminist legal theory).

³⁶⁹ See SCHULHOFER, *supra* note 162, at 99–105 (discussing the value of sexual autonomy as an important interest to be protected against damage done by unwanted sex); Higginbotham, *supra* note 361, at 248 (arguing that rape is the denial of a victim's right to be a sexual being).

³⁷⁰ See Corinna, *supra* note 33, at 182–83 (identifying the frequent lack of desire, pleasure, and satisfaction in what is ordinarily deemed consent); Cara Kulwicki, *Real Sex Education*, in YES MEANS YES!, *supra* note 20, at 305, 308–10 (promoting enthusiastic consent as a goal of sex education); Riggs, *supra* note 20, at 109–15 (clarifying that consent requires robust and enthusiastic affirmative confirmation, and arguing that consent improves sex for women as a class).

³⁷¹ Toni Amato, *Shame Is the First Betrayer*, in YES MEANS YES!, *supra* note 20, at 221, 223–26 (advocating that embracing one's true sexual self—including celebrating pleasure and desire—can combat unwanted sex among other societal ills).

³⁷² See Aya Gruber, *A “Neo-Feminist” Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 609–12 (2012) (underscoring the need to have a richer discussion that takes into account all the complex factors surrounding rape).

³⁷³ See *id.* (discussing the failure of the criminal justice system's current tough-on-crime approach to effectively manage socially undesirable behavior or protect its victims).

rape culture.³⁷⁴ While the definition of rape ought to be broadened to include many of these behaviors, criminalization may be inappropriate for others.³⁷⁵

A sex-positive view of rape could also inspire changes by other means to address the challenges surrounding rape. In particular, policies that use the public health system might be better suited to change entrenched views about sexuality and how we use our bodies to interact with the bodies of others.³⁷⁶

B. *Final Thoughts*

Recognizing and appreciating the value of sexual pleasure could undermine some of the fundamental assumptions that run through several areas of law. It alters the organizing principles that legislatures, courts, and scholars use to frame the debate on these topics. Sex positivity would not prohibit the regulation of activities that provide sexual pleasure. However, it would enrich our conversation about such regulations by requiring legislatures, courts, and legal scholars to honestly assess the costs and benefits of these laws. Such honesty can yield better laws and policies by requiring us to reexamine our justifications for what we regulate and how we regulate it.

³⁷⁴ See Julia Serano, *Why Nice Guys Finish Last*, in YES MEANS YES!, *supra* note 20, at 227, 227–40 (defining rape culture as an overly simplistic mindset in which men are always the aggressors and women always sexual objects and the myriad forms of unwanted sex and sexual violence go unrecognized; highlighting how this mindset contributes to the problems surrounding sexuality and rape law); Susan Ager, *The Incident*, DETROIT FREE PRESS MAG., Mar. 22, 1992, at 17, reprinted in JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 223, 223–24 (5th ed. 2009) (summarizing a situation that highlights the broad array of behavior that might be classified as rape).

³⁷⁵ It is debatable, for example, whether an individual who deceives another about his race, wealth, or identity should be prosecuted for rape. See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 70–76 (1998) (describing the varying treatments of “sexual scams”). Negligent rape, in which an individual is unaware but *should* be aware of the substantial and unjustifiable risk that his partner is not consenting, is also controversial. See Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J. L. & GENDER 381, 385–88 & n.34 (2005) (outlining debate over negligent rape); see also Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 FORDHAM L. REV. 263, 267 (2002) (concluding that it would be unwise to eliminate the mens rea of knowledge generally for sexual offenses and other crimes—as was done in the case of rape).

³⁷⁶ See, e.g., LAWRENCE O. GOSTIN & PETER D. JACOBSON, LAW AND THE HEALTH SYSTEM 12–18, 41–77 (2006) (describing the goals and methods of public health laws and policies); Arthur Kaufman et al., *Impact of a Community Health Approach to Rape*, 67 AM. J. PUB. HEALTH 365 (1977).